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Forum Juridicum

JURY TRIALS UNDER THE FEDERAL RULES AND THE LOUISIANA PRACTICE

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The instant treatise is not intended as a complete comparative study of federal and Louisiana civil jury practice. It contemplates merely a brief consideration of those provisions of the Federal Rules of Civil Procedure which have their counterparts (and perhaps their genesis) in Louisiana law. This delimitation is necessitated by the need for brevity, coupled with the fact that the Louisiana Code of Practice treats with minute detail many subjects which the Federal Rules of Civil Procedure were never intended to cover.

In 1823 the famous Livingston Committee submitted to the legislature of Louisiana a code of practice whose provisions with reference to trial by jury were the first in any American jurisdiction to require the party desiring the jury to make demand¹ for this dubious privilege. These became a part of the Code of Practice of 1825.²

Louisiana has no constitutional guarantee of a right to trial by jury in civil actions.³ Other states have gradually reduced the importance of jury trials by requiring an affirmative claim for such a trial;⁴ and still others have accomplished a similar result by requiring the pre-payment of jury fees.⁵

The Louisiana Code of Practice of 1870, in effect today, requires the plaintiff⁶ or defendant⁷ as the case may be, wishing trial by jury, to enter his demand therefor before the suit is set

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1. *Projet, La. Code of Practice of 1825*; (1937) 2 *La. Legal Archives* 83, § 2.

2. Art. 494, *La. Code of Practice of 1825*.

3. Colorado is apparently the only other state in this position. *Colo. Const., Art. 2, § 23*.

4. See James, *Trial by Jury and the New Federal Rules of Civil Procedure* (1936) 45 *Yale L. J.* 1022.

5. Cases discussing the validity of such a requirement are collected in 32 *A.L.R.* 865 (1923).

6. Art. 494, *La. Code of Practice of 1870*.

7. Art. 495, *La. Code of Practice of 1870*.

for trial, save when the defendant has excepted to the jurisdiction before pleading to the merits.

The Federal Rules, while preserving the right of trial by jury⁸ as required by the seventh amendment to the Constitution or as granted by any statute of the United States, parallel the Louisiana provisions in that they place on the party seeking the jury trial the burden of making written demand therefor upon the opposing party.

While the Federal Rules permit this demand to be made any time after "commencement of the action," it must not be "later than ten days after the service of the last pleading directed to such issue."⁹ This requirement would seem to serve the same purpose as the Louisiana provisions which require the demand to be made after issue is joined, but before the case is set for trial.¹⁰

In Louisiana there are many cases in which a trial by jury is not allowed. The right does not exist in suits on bills of exchange or other unconditional promises to pay specific sums of money, unless there is a defense of fraud, error, forgery, or want or failure of consideration;¹¹ and there is no right to trial by jury of suits for partition,¹² interdiction and probate matters,¹³ and summary cases.¹⁴ The Federal Rules, quite naturally, are not so explicit in this regard, but accomplish a similar result by granting to the court the power either after motion by one of the parties, or *sua sponte*, to deny the demand for a jury trial in cases in which the court is satisfied that no such right exists under the Federal Constitution or statutes.¹⁵

Under the Federal Rules prospective jurors may be examined by the court, by counsel, or by the parties.¹⁶ If the court conducts the examination, the parties or their attorneys may conduct a supplementary inquiry. In Louisiana the examination of prospective jurors is conducted primarily by counsel¹⁷ rather than by the court.

8. Rule 38(a).

9. Rule 38(b).

10. Arts. 494, 495, La. Code of Practice of 1870.

11. Art. 494, La. Code of Practice of 1870.

12. *Bickham v. Pitts*, 185 La. 930, 171 So. 80 (1936).

13. Arts. 924(10), 1036, La. Code of Practice of 1870.

14. Arts. 756, 757, La. Code of Practice of 1870.

15. Rule 39(a).

16. Rule 47(a).

17. Arts. 507, 509, La. Code of Practice of 1870.

The Federal Rules allow one or two alternate jurors to sit during a case.¹⁸ This allows one additional peremptory challenge.

In the Louisiana courts the number of jurors in civil cases is twelve, but only nine need agree.¹⁹ In some criminal cases there are juries of five, but all must agree.²⁰ The Federal Rules have advanced somewhat further in this regard, for parties may now stipulate²¹ that a jury may contain a number less than twelve, and that the "finding of a stated majority" will be the verdict.

The Federal Rules changed the old federal practice as to motions for a directed verdict. It is now unnecessary to reserve the right to produce evidence if a motion for a directed verdict is overruled at the conclusion of the opposing party's evidence and before the mover has presented his case; and it is no longer considered a waiver of the right to a jury trial if all parties move for a directed verdict.²² No codal provisions or practice similar to the motion for a directed verdict exist in Louisiana.²³

It should be noted that the Federal Rules circumvent the rule established in the well-known case, *Slocum v. New York Life Insurance Company*,²⁴ which prohibited federal courts from granting a judgment *non obstante veredicto*, for such a judgment may now be granted whenever a motion for a directed verdict has been refused for any reason.²⁵

While the phraseology of the articles of the Louisiana Code of Practice differs from the provisions of the Federal Rules with regard to instructions to the jury and objections thereto, the resulting practices are quite similar. Under both systems, parties may file written charges, although the provision in the Louisiana code²⁶ apparently limits this right to cases "appealable to the Supreme Court." In the federal tribunals the court must rule upon the request²⁷ and inform counsel of the ruling before their closing arguments to the jury. The attorney must then object to the giving of, or failure to give, certain instructions to the jury prior to the time the jury retires.

18. Rule 47(b). La. Act 6 of 1940 makes a similar provision for alternate jurors in criminal trials only.

19. Arts. 512, 527, La. Code of Practice of 1870.

20. Art. 339, La. Code of Crim. Proc. of 1928.

21. Rule 48.

22. Rule 50(a).

23. See *Dougherty v. Yazoo & M. V. R.R.*, 9 La. App. 295, 296, 119 So. 543, 545 (1928).

24. 228 U.S. 364, 33 S.Ct. 523, 57 L.Ed. 879 (1913).

25. Rule 50(b).

26. Art. 515, La. Code of Practice of 1870.

27. Rule 51.

In the Louisiana courts the judge may charge only on the law applicable to the case, and is prohibited "from saying anything about the facts, or even recapitulating them so as to exercise any influence on their decision in this respect."²⁸ This is in contrast to the power which the federal court has exercised and continues to exercise.²⁹ If the Louisiana tribunal errs in its charge, as to the legal principles or as to their applicability to the facts, counsel may require the judge to hand down written reasons³⁰ and may note an exception if the court refuses.

There is a great difference in the two practices as to the right to determine the type of verdict which a jury may render. Under the federal system³¹ a party may specify the issues to be treated by the jury, and the opposing party may add additional issues to be decided in the same manner; but failure to specify the issues will be considered as a submission of all the facts to the jury. When only a portion of the issues is submitted, those not so included are to be tried by the judge. However, the parties, even after requesting a jury, may, by stipulation, written or oral, consent to a trial without a jury.³²

The federal court is given a wide discretion, for it may upon motion order a jury trial on some or all of the issues, even when the parties have previously failed to make the demand. Further, the federal court may require a special verdict³³ as to any issue or may have the jury render a general verdict accompanied by answers to special interrogatories.³⁴ If these answers or some of them are inconsistent with the general verdict, the court may order a new trial, grant a judgment based on the answers, or send the jury back to reconsider the inconsistent answers. A special verdict could not be had as a matter of right in federal courts prior to the new rules.³⁵

In Louisiana, while both general and special verdicts are allowed,³⁶ the jury is the judge of both the law and the facts and

28. Art. 516, La. Code of Practice of 1870.

29. See the forcible argument in favor of granting judges power to comment fully on the evidence in a Comment (1932) 30 Mich. L. Rev. 1303.

30. Art. 517, La. Code of Practice of 1870.

31. Rule 38(c).

32. Rule 39(a).

33. Rule 49(a).

34. Rule 49(b).

35. "Under the former federal practice, which was governed by the common law and not by state statutes or decision, the special verdict was not available to the litigants as a matter of right." See Note (1939) 34 Ill. L. Rev. 96, 98.

36. Art. 519, La. Code of Practice of 1870.

it is at the discretion of the jury whether it will render a special or a general verdict.³⁷

Louisiana courts, in contradistinction to the federal courts and those in common law states, have never been confronted with the procedural differences of actions at law or suits in equity. There are no separate law courts, and no special sessions in which the court hears only one type of case.³⁸ Hence it is not surprising that in Louisiana appeals in civil causes lie both as to the law and facts.³⁹

The Federal Rules make no provision concerning the scope of review by the appellate court of a case originally tried before a jury.⁴⁰ Formerly, federal appellate courts, in actions at law confined themselves almost entirely to a review of the legal questions. Although they made inquiry as to whether the facts were supported by substantial evidence, they would not consider whether the verdict was contrary to the weight of the evidence. On the other hand, federal equity courts exercising appellate jurisdiction reviewed even the weight of the evidence. It seems now to be assumed that Rule 52 will establish the equitable review, but this is by no means settled.⁴¹

The fact that appellate courts in Louisiana may review both the law and the facts has no doubt been a deterrent to the use of jury trials in civil actions. And the paucity of jury trials serves partially to explain why more speedy and inexpensive trials are the rule rather than the exception in the courts of Louisiana.

37. Arts. 520, 521, La. Code of Practice of 1870.

38. "In all civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages, where positive law is silent." Art. 21, La. Civil Code of 1870.

39. La. Const. of 1921, Art. VII, §§ 10, 29.

40. However, Rule 59(a) provides that a party seeking a new trial after the cause has been heard before a jury, may obtain it only for the reasons for which new trials were formerly "granted in actions at law in the courts of the United States"; whereas, if the case was originally tried without a jury, a new trial may be granted "for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States." Accordingly, some of the procedural distinctions between law and equity may still prevail under the Federal Rules.

41. See Clark, *Review of Facts Under Proposed Federal Rules* (1936) 20 *J. Am. Jud. Soc.* 129; Clark and Stone, *Review of Findings of Fact* (1937) 4 *U. of Chi. L. Rev.* 190.