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Requirement of Consent of Three-Fourths of Jury to Verdicts in Civil Action, Abolishing Law of Unanimous Consent

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REQUIREMENT OF CONSENT OF THREE-FOURTHS OF JURY TO VERDICTS IN CIVIL ACTIONS, ABOLISHING LAW OF UNANIMOUS CONSENT*

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I believe it may be safely asserted that the overwhelming majority of nisi prius judges of limited or extensive experience gives sanction to the sentiment expressed by the late Chief Justice Lamm of Missouri: "The invention of a jury to weigh and determine the credit due to human testimony, and settle facts in doubt or dispute in a trial at law, is to be rightly taken as one of the splendid achievements of civilized man. While not ideally perfect, trial by jury has stood the test of use and justifies itself as indispensable. A jury trial is the most cherished, if not the most valuable, institution we have derived from our Saxon ancestors."

I believe, too, that the same body of practical, hard-working administrators of the law will accord approval to Blackstone's pronouncement, "Trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law. . . . A competent number of sensible and upright jurymen, chosen by lot from among those of the middle rank, will be found the best investigators of truth, and the surest guardians of public justice. It is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbors and equals."

Time, and, in fact, experience in many jurisdictions other than ours, have proven the need of some modification of the last clause, "that the subject cannot be affected in his *property* but by the *unanimous* consent of twelve of his neighbors." Blackstone states that, "The necessity of a total unanimity seems to be peculiar to our own Constitution." His annotator, Chitty, observes, "The unanimity of twelve men, so repugnant to all experience of human conduct, passions and understandings, could hardly in any age have been introduced into practice by a deliberate act of the Legis-

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lature. But that the life, and *perhaps* the liberty and property of a subject, should not be affected by the concurring judgment of a less number than twelve, where more were present, was a law founded in reason and caution; and seems to be transmitted to us by the common law, or from immemorial antiquity." It is stated, however, by Professor Thayer, quoted in Bouvier, "Unanimity in giving verdict was not universal in the early days of the common law; at times eleven sufficed; in some cases a majority. Probably it was only in the second half of the fourteenth century that unanimity became an established principle." And the same author quotes Pollock, *Expansion of Common Law*: "The rule of unanimity of the jury was not fixed before the 14th century and it was probably never laid down in terms that juries must be unanimous. What was actually decided was that the verdict of fewer than twelve men would not suffice, and it became a fixed custom to have that number of the petit jury."

So, it seems the reasons for the selection of twelve as the original trial jury and whether this number should return their "unanimous consent" are much beclouded in the mists of "immemorial antiquity."

Article III, Section 13 of our own Constitution preserves the right of trial by jury in suits at common law, but is silent as to the number who shall comprise the jury. Construing this section, the Supreme Court of Appeals said, in *Lovings v. Norfolk & W. Ry.*,[1] "It means and can only mean the common law jury of twelve good and lawful men. . . . 'In case of trial by the petit jury it can be by no more nor less than twelve, and *all* assenting to the verdict.' "

Section 14 of our Bill of Rights provides expressly for a jury of twelve in the trial of crimes and misdemeanors.

A. P. Herbert, the English author, in his entertaining volume of satire and sound common sense, *Uncommon Law,* refreshingly melodramatizes the requirement of unanimous verdicts:

> "THE JUDGE: Sir Ethelred, will there be any charge for your lecture on the jury system?
>
> "SIR ETHELRED: No, milord. Milord, I was just coming to the present case. Look at it! It's lasted a fortnight. The most complicated dispute in my experience. The documents were a mile high when we began; and they now measure three, for the reports of the proceedings in this Court amount to two. . . .

[1] 47 W. Va. 582, 35 S. E. 962 (1900).

"All about debentures and mergers and mortgages and subsidiary companies — twenty-five subsidiary companies on one side alone! Not to mention the expert evidence about the scientific stuff — all that fandango about the magnesium alkaloid and the patent vapour-feed. The chemists on the two sides flatly contradicted each other, and so did the accountants. I don't believe there's an accountant on either side who really knows what some of the figures mean; I don't believe there's a single person in this Court —

"THE JUDGE: There is one person in this court, Sir Ethelred, who has a firm grasp of the whole case.

"SIR ETHELRED: I beg your Lordship's pardon. Certainly, milord. But, milord, with great respect, that rather bears out — ah — what I was saying — ah — for that one person, milord, as this is a jury case, will not have to answer the important questions in the case. You, milord, have had the advantage at every stage of this protracted bicker of seeing the shorthand reports of the previous day's proceedings, with copies of the material documents, diagrams, maps, schedules, balance-sheets, accounts, and so forth. So milord, have me learned friend and myself, each of whom is attended by a small cloud of solicitors and junior counsel. We are all three possessed of exceptional intelligence and are equipped by long training and practice for the rapid understanding of complex figures and affairs; and if at any moment we are in doubt we can request each other or our advisers for information and assistance. Yet you will recall, milord, how often we have found ourselves—sometimes all three of us—in an incontestable fog about some vital point, exactly what a witness said or a correspondent wrote, the date of an interview, the amount of a cheque or bribe, the wording of a formula, the position of a building; and how many minutes we have spent each day upon excavating the forgotten facts from the desert of documents with which we are surrounded. . . .

"How, I say, can you (the jury) be expected to get a grip of this colossal conundrum *without the assistance of any documents at all?* No shorthand notes, no maps, no accounts, except now and then when his Lordship decides it is time you were given a bone to play with, and we let you have a hasty glance at a diagram that doesn't matter. The whole thing's fantastic! There you sit on your hard seats, with scarcely room to wriggle, wondering what it is all about. Decent fellows, I dare say, some of you, but with no particular intelligence or financial training, and wildly divergent in character and opinion. And presently his Lordship will ask you to answer — and answer *unanimously* — about seventeen extremely unanswerable questions: 'Did the defendant knowing-

> ly make a false assertion?' and so forth. How the deuce do you know? You don't even know when you've made a false assertion yourselves. And *unanimous*! I look at you, twelve good men and true — or rather, ten good men and true and two women — and I try to think of any simple subject about which the twelve of you would be likely to agree unanimously if you were assembled together by chance in any place outside this Court; at a dinner-party, on a committee. The simplest questions of fact, morals, ethics, history, arithmetic — and you'd be all over the shop. And yet when we shut you up in a cold room with nothing to eat you can arrive at unanimous decisions about questions that baffle the wisest brains of the Bench and Bar."

What trial judge sometime in his experience has not fretted at the requirement of a unanimous verdict in the trial of civil actions? Frequently hung juries by reason of the self-opinionated, if not downright stubbornness of one or two jurors unwilling and refusing to consider the views of fellow jurors; or because of the social, fraternal or business ties to and relations with parties litigant or counsel; animosity or extreme friendliness towards material witnesses, and many other improper and illogical reasons. Moreover, a cause of fret to the court is found in juries often consuming unnecessary and unreasonable time in agreeing upon a verdict; and frequently returning inadequate and sometimes nominal verdicts. All of these undesirable features and factors could be obviated by abolishing the unanimity rule. I am quite certain every trial judge could cite instances of the results referred to, and that his impatience therewith would not brand him as skeptical of the beneficence of the jury system. During the preparation of the manuscript of this address, there came to me from the West Publishing Company, as no doubt was sent to most members of the bar, the picture of The Hung Jury, so typical of the point here made, revealing one old bewhiskered apotheosis of adamantine obstinacy. This picture I have had framed and placed upon the wall of the jury room of my court. Permit me to instance one case recently heard before me:

An action against a small loan company and two of its agents or "adjusters" for the alleged suicide of a customer of the loan company while in a deranged mental state, occasioned by assault upon him by the two adjusters while on a visit to his home to collect a delinquency or to reclaim pledged personal property. The deceased had worked steadily for a period of twenty years for a glass company and had been promoted to a position of some re-

sponsibility, but, like so many of his class, chronically in debt, and in the toils of the particular loan company fourteen years. There survived him a widow and eight children ranging in age from nine months to twenty-one years.

Upon instructions to the jury, as I conceived the law, it returned a verdict for $2,500.00. Information was unsolicitedly given me that ten of the jury were in favor of returning a verdict in amounts varying from $5,000.00 to $10,000.00, but that two were not so liberal, not desiring to give anything, and that one of the two and his wife were close friends and bridge-playing companions of one of the individual defendants, and, of course, one of those whose alleged wrongful acts involved the loan company. Had the unanimity rule not been in force, there would in all likelihood have been a verdict of from $7,500.00 to $10,000.00 in this case, which assuredly would not have been excessive. While the time for application for a writ of error to the judgment rendered here has not expired, I feel free to comment thereon as I have been reliably informed that the judgment has been paid.

After nearly five years service as presiding judge of a court whose doors are required to be open fifty-two weeks of the year to receive a constant flow of matters of original jurisdiction and no inconsiderable volume of appellate matters, as well as some previous service as special judge of the same and of a court of concurrent jurisdiction, I am firmly of the opinion that justice will be more expeditiously, more inexpensively, more fairly administered in the trial of civil cases by requiring the consent of only three-fourths of a jury of twelve to a verdict. This, of course, can be brought about only by a constitutional amendment.

Twenty-seven states still require unanimous verdicts in civil cases; fourteen require three-fourths verdicts; six require five-sixths, and one state two-thirds. New York was first of the original states to depart from the unanimity rule, it requiring five-sixths. Reform in practice in this respect, and I hold such to be reform, has been brought about largely in the western states. In the great majority changes were effected by constitutional provisions.

The constitutions of New Mexico and Texas permit verdicts in civil cases by less than a unanimous vote, but the Legislatures

are given authority to require unanimous verdicts, and statutes in each of these states require such.

Minnesota has the unique and peculiar provision for a unanimous verdict but, after twelve hours of deliberation, the agreement of five-sixths of the jury shall be sufficient to return a verdict.

A small majority of the states, it will be noted, retain the requirement of the unanimous verdict.[2]

[2] JURY VERDICT IN CIVIL CASES

STATE	UNANIMOUS VERDICT REQUIRED	UNANIMOUS VERDICT NOT REQUIRED	
Alabama	X		
Arizona *		Code 1928, § 3823	3/4
Arkansas	X		
California		Const., art. I, § 7	3/4
Colorado	X		
Connecticut	Unless Waived	Gen. Stat. 1930, § 5656	3/4
Delaware	X		
Florida	X		
Georgia	X		
Idaho		Const., art. I, § 7	5/6
Illinois	X		
Indiana	X		
Iowa	Unless Waived	Code 1935, § 11483	Bare Majority
Kansas	X		
Kentucky		Carr. Stat. 1936, § 2268	3/4
Louisiana		Code of Prac. 1932, § 522	3/4
Maine	X		
Maryland	X		
Massachusetts	X		
Michigan	X		
Minnesota **	Within 12 Hours	Minn. Stat. 1927, § 9301	5/6
Mississippi		Miss. Code 1930, § 2067	3/4
Missouri		Const., art. II, § 32	3/4
Montana		Const., art. III, § 23	2/3
Nebraska		Comp. Stat. 1929, § 20-1125	5/6
Nevada *		Const., art. I, § 3	3/4
New Hampshire	X		
New Jersey	X		
New Mexico ***	X		
New York		Const., art. I, § 2 Civ. Prac. 1937, § 463-a	5/6
North Carolina	X		
North Dakota	X		
Ohio		Gen. Code 1938, § 11420-9	3/4
Oklahoma *		Const., art. II, § 19	3/4
Oregon		Const., art. VII, § 18	3/4
Pennsylvania	X		
Rhode Island	X		
South Carolina	X		
South Dakota *		Comp. Laws of 1929: § 2515 — Circuit Courts § 2516 — Justice Courts	5/6 3/4
Tennessee	X		
Texas ***	X		
Utah *		Const., art. I, § 10	3/4
Vermont	X		

STATE	UNANIMOUS VERDICT REQUIRED	UNANIMOUS VERDICT NOT REQUIRED	
Virginia	X		
Washington		Rem. Code 1932, § 358	3/4
West Virginia	X		
Wisconsin		Wis. Stat. 1937, § 270.25	5/6
Wyoming	X		
TOTALS	27 3 Qualified	18 3 Qualified	

* These six states apparently never required unanimous verdicts in civil cases.
** In Minnesota, if verdict returned within 12 hours' deliberation, it must be unanimous; after 12 hours' deliberation, it may be by a 5/6 vote.
*** The Constitutions of New Mexico and Texas permit verdicts in civil cases by less than a unanimous vote of the jury, but the Legislatures are given authority by the Constitutions to require unanimous verdicts, and by statutes in both states unanimous verdicts are required.