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## Civil Procedure -- Less Than Unanimous Jury Verdicts

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The stricter attitude toward licensing of ordinary occupations reached its culmination when, in a well reasoned opinion,<sup>48</sup> the North Carolina Supreme Court flatly reversed the decision in *State v. Lawrence* and declared that the statute setting up the State Board of Photographic Examiners violates Article I, Sections 1, 17, and 31 of the Constitution of the State of North Carolina.<sup>49</sup> This decision removes the inconsistency in our law brought about by the departure in *State v. Harris*<sup>50</sup> from the attitude taken in the *Lawrence* case, and makes it plain that engaging in ordinary occupations having no special connection with the objectives of the police power may not be restricted by the enactment of licensing statutes. The earlier haphazard enactment of licensing statutes and uncritical judicial approval of them appears during the eleven years since the *Lawrence* case to have given way to a legislative attitude requiring that these enactments be justified by a bona fide public purpose, and to a judicial policy of close scrutiny of such enactments to ascertain whether they genuinely protect the public health, safety, morals, or general welfare and thus bear an actual relationship rather than a theoretical one to these objectives of the police power.

ROBERT LEE HINES.

### Civil Procedure—Less Than Unanimous Jury Verdicts

A recent discussion<sup>1</sup> in a Senate Committee of the 1949 state legislature concerned the feasibility of introducing a bill to provide for less than unanimous verdicts in civil cases. Although no action was taken in the matter, it would seem timely to consider briefly herein the arguments for and against a modification of our current requirement of unanimity.

At common law a jury verdict meant a unanimous verdict.<sup>2</sup> There-

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Committee report); H. R. Bill No. 713 (1949) (would repeal Art. 2 of Chapter 87 of the General Statutes which set up the State Board of Examiners for Plumbing and Heating Contractors—unfavorable House committee report); H. R. Bill No. 906 (1949) (would remove persons furnishing or erecting industrial equipment, power plant equipment, or radial brick chimneys from the general contractors licensing act—enacted); H. R. Bill No. 1233 (1949) (would authorize issuance of "limited licenses" for practice of law in certain districts—unfavorable House committee report).

<sup>48</sup> *State v. Ballance*, 229 N. C. 764, 51 S. E. 2d 731 (1949).

<sup>49</sup> See note 6 *supra*.

<sup>50</sup> *State v. Harris*, 216 N. C. 746, 6 S. E. 2d 854 (1939).

<sup>1</sup> *News and Observer*, Jan. 20, 1949, p. 16, col. 7.

<sup>2</sup> 3 BL. COMM. \*379 ("The trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law. . . . it is the most transcendent privilege which any subject can enjoy . . . 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."); 1 COOLEY'S CONST. LIM. 677 (8th ed., Carrington, 1927); SEDGWICK, CONSTRUCTION OF STATUTORY AND CONST. LAW 493 n. (2nd ed. 1874).

fore, when the American states used the expression, "trial by jury," in their constitutions, it has been uniformly held that this meant a verdict to which all of the jurors assented<sup>3</sup> and that any legislation providing for majority verdicts where jury trial is a matter of right would be unconstitutional in the absence of an express constitutional provision authorizing such a change.<sup>4</sup>

The Seventh Amendment to the United States Constitution requires that trials by jury shall be according to the course of the common law, but it has been established that this requirement is not applicable to the states,<sup>5</sup> for the provisions of the Seventh Amendment apply only to the federal government.<sup>6</sup> And the great weight of authority is to the effect that the due process requirement of the Fourteenth Amendment to the United States Constitution does not even require a jury trial in a state court.<sup>7</sup> Hence it is not a violation of the federal constitution for a state to authorize a verdict by less than the full number of jurors.<sup>8</sup>

Our North Carolina Constitution guarantees the right of trial by jury in civil cases<sup>9</sup> saying that ". . . the ancient mode of trial by jury is one of the best securities of the rights of the people and ought to remain sacred and inviolable." That this means a unanimous verdict is well established.<sup>10</sup> This would indicate beyond doubt that any attempt to change the law of North Carolina would have to be by a constitutional amendment.

There are two types of constitutional provisions that have been

<sup>3</sup> *Patton v. United States*, 281 U. S. 276 (1929); *Mutual Life Ins. Co. v. Green*, 37 F. Supp. 949 (W. D. Ky. 1941); *Minnequa Cooperage Co. v. Hendricks*, 130 Ark. 264, 197 S. W. 280 (1917); (dissent said that the phrase "the right of trial by jury shall remain inviolate" in the constitution does not specify how a verdict shall be rendered, and the silence of the constitution means that the legislature is to control the matter; that the constitution is a declaration of principles and not details; and that other states merely follow each other blindly on this question.).

<sup>4</sup> *Coca Cola Bottling Works v. Harvey*, 209 Ind. 262, 198 N. E. 782 (1935); *Franklin v. St. Louis & M. R. R.*, 188 Mo. 533, 87 S. W. 930 (1905); *In re Opinon of Justices*, 41 N. H. 550 (1860).

<sup>5</sup> *St. Louis & S. F. R. R. v. Brown*, 241 U. S. 223 (1915).

Even in an action in state courts under the Federal Employers' Liability Act, the provisions of the Seventh Amendment are not applicable and state courts can give effect to a local practice permitting a less than unanimous verdict: *Minneapolis & S. L. R. R. v. Bombolis*, 241 U. S. 211 (1915); *Chesapeake & O. Ry. v. Shaw*, 168 Ky. 537, 182 S. W. 653 (1916); *aff'd*, 243 U. S. 626 (1916).

<sup>6</sup> *Southern Ry. v. Durham*, 266 U. S. 178 (1924); *Chicago, R. I. & P. Ry. v. Cole*, 251 U. S. 54 (1919).

<sup>7</sup> *Fay v. N. Y.*, 332 U. S. 261, 288 (1946); *Palko v. Connecticut*, 302 U. S. 319, 324 (1937); *Synder v. Massachusetts*, 291 U. S. 97 (1933); *Tumey v. Ohio*, 273 U. S. 510, 534 (1926); *Hawkins v. Bleakly*, 243 U. S. 210 (1916).

<sup>8</sup> *Maxwell v. Dow*, 176 U. S. 581 (1900); *Weaver v. Cuff*, 52 S. D. 51, 216 N. W. 600 (1927).

<sup>9</sup> N. C. CONST. Art. I, §19; *Hershey Corp. v. Atlantic C. L. R. R.*, 207 N. C. 122, 176 S. E. 265 (1934).

<sup>10</sup> *In re Sugg's Will*, 194 N. C. 638, 140 S. E. 604 (1927); 2 N. C. L. REV. 45 (1924).

used to authorize majority verdicts—self-executing<sup>11</sup> and non-self executing.<sup>12</sup> In the former there is no need for further legislative action while in the latter the provisions for less than unanimous verdicts are effectuated only by legislative enactments.

In discussing the jury system, some writers have urged a limited use only of civil juries<sup>13</sup> while others have advocated abolishing the jury in civil cases.<sup>14</sup> Still others feel that the civil jury is not likely to be done away with; hence the jury system should be reformed by permitting the use of majority verdicts.<sup>15</sup>

The arguments advanced are that the unanimous verdict is kept only because of traditional reluctance to change from the status quo;<sup>16</sup> that many lawyers are opposed for purely selfish reasons;<sup>17</sup> that the present unanimity is apparent and not real;<sup>18</sup> that with the unanimity requirement, strong jurors coerce weak jurors;<sup>19</sup> that unanimity gives one recalcitrant or dishonest juror the power to hold up the whole judicial process;<sup>20</sup> that the use of majority verdicts is now widespread;<sup>21</sup> that our democratic form of government is based on the rule of the majority;<sup>22</sup> that jurors come from varied backgrounds and expecting twelve

<sup>11</sup> *E.g.*, CALIF. CONST. ART. I, §7.

<sup>12</sup> *E.g.*, WASH. CONST. ART. I, §21; WASH. REV. STAT. ANN. §358 (1932).

<sup>13</sup> Clark & Shulman, *Jury Trial in Civil Cases—A Study in Judicial Administration*, 43 YALE L. Q. 867, 885 (1934).

<sup>14</sup> Peterson, *Reform in Civil Jury Procedure*, 5 N. C. L. REV. 89 (1927); Duane, *Civil Jury Should Be Abolished*, 12 J. AM. JUD. SOC'Y 137 (1929); McLemore, *An Argument Against Jury Trial in Civil Cases*, 20 VA. L. REV. 708 (1934).

<sup>15</sup> Winters, *Majority Verdicts in the United States*, 26 J. AM. JUD. SOC'Y 87 (1942); Weinstein, *Trial by Jury and Unanimous Verdicts*, 69 U. S. L. REV. 513 (1935).

<sup>16</sup> Linn, *Changes in Trial by Jury*, 3 TEMP. L. Q. 3, 13 (1928).

<sup>17</sup> Lindsey, *The Unanimity of Jury Verdicts*, 5 VA. L. REG. 133 (1899) ("defendant" lawyers, men who are corporation or business counsel, are likely to be opposed for the hope of success for a particular case may often depend upon convincing a minority rather than the majority).

<sup>18</sup> LESSER, *HISTORY OF THE JURY SYSTEM* 187 (1894); 10 ST. JOHN'S L. REV. 373 (1936) ("Where the verdict is clearly against the weight of the evidence, the trial judge is given the discretion to set aside and grant a new trial, which brings about the same results as if the jury had been unable to come to an agreement. However, where the case is not quite so clear, these forced compromises are not set aside, but are allowed to decide the matter.").

<sup>19</sup> Miner, *The Jury Problem*, 4 ILL. L. REV. 183 (1946) ("Coercion is not a symbol of justice."); Barnett, *The Jury's Agreement—Ideal and Real*, 20 ORE. L. REV. 189 (1941); Bailey, *Improvement of Trial by Jury*, 17 MASS. L. Q. 11 (1932) (in olden days various methods were used to bring about agreement of all jurors—food, drink and heat withheld; if court was on circuit, judge might have jury put in carts and taken along to the next place where court was to be held.).

<sup>20</sup> Marantz, *Shall We End the Unanimity Rule for Verdicts in Civil Cases?*, 70 N. J. L. J. 269 (1947).

<sup>21</sup> Winters, *supra* note 15, at 89.

<sup>22</sup> Marantz, *supra* note 20 (United States Supreme Court and state appellate courts render decisions by majority rule); Wilkin, *The Jury: Reformation, Not Abolition*, 13 J. AM. JUD. SOC'Y 154 (1930); Linn, *supra* note 16, at 11; Winters, *supra* note 15, at 88; Weinstein, *supra* note 15, at 523; Lindsey, *supra* note 17, at 142 (United States Senate may impeach the President by majority of one vote, Court of Claims determines property rights involving millions with judges trying fact and finding law).

such people to agree, especially on complicated factual situations, is ridiculous;<sup>23</sup> that there are too many hung juries;<sup>24</sup> that the change would deal a serious blow to the practice of tampering with and fixing a jury;<sup>25</sup> that court calendars would be cleared up because of fewer retrials;<sup>26</sup> that the nominal verdicts so often rendered by unanimous juries are most often unjust;<sup>27</sup> that if there is a real danger from hasty majority verdicts, the state could specify a time within which the verdict must be unanimous;<sup>28</sup> and that the reluctance of people to sit on juries under the present system because of the time consumed in trying to get a unanimous verdict would no longer be present.<sup>29</sup>

Advocates of the requirement of unanimity reply that the unanimous verdict should be retained as it is an old and cherished feature of the American plan for the administration of justice;<sup>30</sup> that litigants have more confidence in it;<sup>31</sup> that the hung jury is typically American in that it dignifies the rights of the minority;<sup>32</sup> that a change would result in the bringing of a greater number of doubtful suits and would result in unduly large assessments of damages by a majority in a hurry to render a verdict;<sup>33</sup> that rash decisions by a weak majority would follow;<sup>34</sup> that alleged prejudicial jurors which cause hung juries are eliminated by the prior examination of jurors by competent counsel;<sup>35</sup> that unanimity is required to offset the advantages which the plaintiff receives from the order of procedure;<sup>36</sup> that after all, hung juries are relatively few and retrial often proves that the views of dissenting jurors were right;<sup>37</sup> that the change to a majority verdict would bring on confusion from more motions for retrial for misconduct of jurors, more new trials being granted, and more appeals based on adverse rul-

<sup>23</sup> Marantz, *supra* note 20.

<sup>24</sup> Marantz, *supra* note 20; Wilkin, *supra* note 22, at 155; Note, 34 ILL. L. REV. 240 (1940); Winters, *supra* note 15.

<sup>25</sup> Note, 22 CORNELL L. Q. 415 (1937); Linn, *supra* note 16; Barnett, *supra* note 19, at 205.

<sup>26</sup> Marantz, *supra* note 20; Linn, *supra* note 16.

<sup>27</sup> Bouchelle, *Requirement of Consent of Three-fourths of Jury to Verdicts in Civil Actions, Abolishing Law of Unanimous Consent*, 48 W. VA. L. Q. 149 (1942); Note, 22 CORNELL L. Q. 415 (1937); Winters, *supra* note 15, at 88 (too often one juror holds out and you get a verdict in accordance with his views; especial danger that where liability is established, minority opinion will control amount of damages.).

<sup>28</sup> Weinstein, *supra* note 15, at 523.

<sup>29</sup> Linn, *supra* note 16, at 14.

<sup>30</sup> 1 HOLDSWORTH, HISTORY OF ENGLISH LAW 318 (3rd ed. 1922).

<sup>31</sup> 37 COL. L. REV. 1235 (1937).

<sup>32</sup> *Majority Verdicts Debated in Texas*, 26 J. AM. JUD. Soc'y 184 (1943).

<sup>33</sup> Weinstein, *supra* note 15, at 523.

<sup>34</sup> Note, 34 ILL. L. REV. 236 (1939).

<sup>35</sup> Weinstein, *supra* note 15, at 523.

<sup>36</sup> *Ibid.* (Plaintiff in most cases has advantage of opening and closing the arguments, and in most negligence cases, plaintiff has the further advantage of sympathy as against a rich defendant or insurance company.).

<sup>37</sup> Boone & Potts, *Majority Verdicts for Texas*, 6 TEX B. J. 118 (1943).

ings on the motions for retrial,<sup>38</sup> and that the end result of it all would be more expense in labor and delay than caused now by the unanimity requirement.<sup>39</sup>

An extra consideration to be noted is the problem presented in any state using special verdicts<sup>40</sup> and permitting majority verdicts as to whether or not the same majority of the jurors should agree on all the issues of the case. The Wisconsin courts have held that since the intent of the less than unanimous provisions are merely to reduce the required number of jurors that need assent to a valid verdict, the agreement of the same jurors is necessary on all the essential questions.<sup>41</sup> Washington reaches the opposite result.<sup>42</sup> It has been argued that the Wisconsin result is the more logical since the questions of the special verdict express the steps that would be necessary to find a general verdict and disagreement in the answering of any one of these questions should have the same effect as such a disagreement would have in the finding on that fact if the jury was to return a general verdict.<sup>43</sup> The Washington position has been supported as the better one<sup>44</sup> on the ground that "the change from unanimous verdicts recognizes that juries are engaged not in finding the 'truth' but are venturing opinions which as such establish probabilities of fact sufficient in the judgment of the legislature to warrant a verdict. Consequently an agreement of the stipulated majority on any question presented is an adequate indication of probability to conform to the legislative requirement and therefore should be sufficient." In connection with this problem, it should be noted that many states which have permitted less than unanimous verdicts require all the jurors assenting to the verdict to sign it<sup>45</sup> so as to prevent litigation on the question of which of the jurors assented to particular issues and also whether the required number acquiesced.

The widespread use today of majority verdicts is shown by the fact that fourteen states permit a verdict by three-fourths of the jurors,<sup>46</sup>

<sup>38</sup> *Majority Verdicts Debated in Texas*, 26 J. AM. JUD. SOC'Y 184 (1943); Boone & Potts, *supra* note 37, at 137.

<sup>39</sup> Boone & Potts, *supra* note 37, at 138.

<sup>40</sup> North Carolina does: N. C. GEN. STAT. §§1-201, 202 (1943).

<sup>41</sup> *Christensen v. Petersen*, 198 Wis. 222, 223 N. W. 839 (1929); *Larson v. Koller*, 198 Wis. 160, 223 N. W. 426 (1929); 25 MICH. L. REV. 563 (1927); 40 HARV. L. REV. 916 (1927).

<sup>42</sup> *Bullock v. Yakima Valley Transp. Co.*, 118 Wash. 413, 184 Pac. 641 (1919).

<sup>43</sup> 7 WIS. L. REV. 111 (1932). <sup>44</sup> 37 COL. L. REV. 1235 (1937).

<sup>45</sup> *E.g.*, Kentucky, New Mexico, Oklahoma.

<sup>46</sup> ARIZ. CONST. ART. II, §23; ARIZ. CODE ANN. §21-1003 (1939); ARK. CONST. AMEND. XVI; CALIF. CONST. ART. I, §7; CONN. CONST. ART. I, §21; CONN. GEN. STAT. §7971 (1949); IDAHO CONST. ART. I, §7; IDAHO LAWS ANN. §2-104 (1943); KY. CONST. §248; KY. REV. STAT. §§29.330, 29.340 (1946); LA. GEN. STAT. ANN. §1958 (1939); LA. CODE PRAC. ANN. art. 527 (1942); MISS. CONST. ART. III, §31; MISS. CODE ANN. §1801 (1942); MO. CONST. ART. II, §28; MO. REV. STAT. ANN. §719 (1939); NEV. CONST. ART. I, §3; OHIO CONST. ART. I, §5; OHIO GEN. CODE ANN. §11420-9 (1938); OKLA. CONST. ART. II, §19; ORE. CONST. ART. VII, §18; UTAH CONST. ART. I, §10.

six states permit a verdict by five-sixths of the jurors;<sup>47</sup> Nebraska allows a five-sixths verdict after six hours deliberation;<sup>48</sup> Minnesota allows a five-sixths verdict after twelve hours deliberation;<sup>49</sup> Montana and Virginia allow a two-thirds verdict;<sup>50</sup> Iowa permits a valid verdict by a bare majority if the parties stipulate it;<sup>51</sup> Colorado permits the parties to stipulate any majority;<sup>52</sup> and the Texas Constitution would permit a less than unanimous verdict,<sup>53</sup> but by statute<sup>54</sup> the constitutional provision for three-fourths verdicts is limited to situations where one or more jurors is disabled from sitting. The Federal Rules of Civil Procedure<sup>55</sup> provide that the parties may stipulate that a verdict or finding of a stated majority of the jurors would be valid as the verdict or finding of the jury.

It is submitted that the people of North Carolina should give consideration to the question of whether or not the requirement of unanimity is outmoded and should be abolished. If it should be decided to abolish it, attention should be given in the drafting of the necessary constitutional amendment and the ensuing legislation, if any is required, to the advisability of making definite provision therein for the agreement to be required in connection with the separate issues submitted to the jury and for a signing of the verdict.

JOHN M. SIMMS.

### Constitutional Law—Denial of Due Process—Insufficient Time to Prepare Defense

A person accused of crime is guaranteed the right to be represented by counsel.<sup>1</sup> This right to representation necessarily includes an oppor-

<sup>47</sup> N. J. CONST. Art. I, §9 (new 1947 constitution permits legislature to provide for five-sixths verdicts); N. M. CONST. Art. II, §12; N. M. STAT. ANN. §§19-101, (48) (b) (1941); N. Y. CONST. Art. I, §2; N. Y. CIV. PRAC. ACT §463-a; S. D. CONST. Art. VI, §6; S. D. CODE §33.1333 (1939) (circuit courts), (justice courts: three-fourths, S. D. CODE §33.1334 (1939)); WASH. CONST. Art. I, §21; WASH. REV. STAT. ANN. §358 (1932); WIS. CONST. Art. I, §5; WIS. STAT. §270.25 (1947).

<sup>48</sup> NEB. CONST. Art. I, §6; NEB. REV. STAT. §25-1125 (1943).

<sup>49</sup> MINN. CONST. Art. I, §4; MINN. STAT. §546.17 (Henderson 1945).

<sup>50</sup> MONT. CONST. Art. III, §23; MONT. REV. CODES ANN. §9358 (1935); VA. CONST. Art. I, §11; VA. CODE ANN. §6012 (1942).

<sup>51</sup> IOWA CONST. Art. I, §9; IOWA RULES CIV. PROC. §203(a) (supersedes IOWA CODE §11483 (1939)).

<sup>52</sup> COLO. CONST. Art. II, §23; COLO. STAT. ANN. rule 48 (1935).

<sup>53</sup> TEX. CONST. Art. V, §13.

<sup>54</sup> TEX. REV. CIV. STAT. ANN. art. 2204 (1941).

<sup>55</sup> FED. R. CIV. P., 48.

<sup>1</sup> U. S. CONST. AMEND. XIV; *Williams v. Kaiser*, 323 U. S. 485 (1944); *Tomkins v. Missouri*, 323 U. S. 471 (1944); *Avery v. Alabama*, 308 U. S. 444 (1939); *Powell v. Alabama*, 287 U. S. 44 (1932); *Kelly v. Oregon*, 273 U. S. 589 (1926); *Frank v. Mangum*; 237 U. S. 309 (1914); *Felts v. Murphy*, 201 U. S. 123 (1905). N. C. CONST. Art. I, §11 (the original constitution of North Carolina (1776) did