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NOTES

VALIDITY OF THE UNANIMOUS VERDICT REQUIREMENT

By

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While the jury system is generally regarded as an "Anglo-Saxon" product, it is the opinion of many historians on the subject, as Judge Jerome Frank points out in his *Courts on Trial*, that the germ of the American jury system is to be found rather in ninth century France, where it began as an administrative device, perhaps borrowed from the fifth century Roman procedure. Judge Frank's chapter on "The Jury System" is an incisive analysis of this "bulwark" which raises great question of its efficacy in promoting the cause of justice. However, this short paper is not concerned with the overall subject but rather with the validity of the requirement of unanimous verdicts.

It happens often that an element in a thing which was originated for one purpose becomes a "tradition" in it, and notwithstanding that the thing assumes an entirely different characteristic and is perpetuated for an entirely different purpose, there is carried with it the peculiar element or "tradition" not at all an indispensable part of it to serve the changed purpose. Such, it seems to me, is the element of unanimity required by tradition in jury verdicts. This requirement found its origin in the jury of the ninth century, during the Middle Ages in France. When certain of the King's rights were in question, twelve men of the neighborhood were called in to state the facts on their oaths. The jury then were, in effect, the witnesses. It was that type of jury that was brought into England by William the Conqueror. Quite obviously, if the witnesses to the event could not agree, they, called together as a "jury", could not very well render a verdict as to what happened. It seems to me that it was in those circumstances that the requirement of a unanimous verdict was implicit. It was not until the end of the fifteenth century, as pointed out by the same author, that the jury in England had grown into substantially what it is today—no longer a body of witnesses but a body which heard the witnesses. While, however, the purpose and function of the jury had thus gradually evolved into something quite different from what it was originally, there remained tacked on to it the archaic requirement of unanimity of verdict which had no logical relation to its new function, much as it was a logical requirement for the performance of its original function in the ninth century. Entirely overlooking this difference of functions, the injunction that "trial by jury, as heretofore, shall be inviolate" became imbedded in our concept of trial by jury, carrying with it the unanimous verdict requirement. It seems to me the situation calls for the application of the principle found in the maxim *cessante ratione legis, cessat ipsa lex*.

The requirement of unanimous jury verdicts is at variance with the practice in all other human affairs which are determined by any organized body or group

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of people. In most cases the questions are determined by a majority, in others by a two-thirds or three-fourths of the group, whether laymen or judges. Impeachment of the highest public officers, not excluding the President of the United States, may be effected by a two-thirds vote of the body having jurisdiction in the matter. Such impeachment may be more serious to the individual concerned than a verdict against him in some civil matter, or in connection with conviction of some crime, an adverse verdict in either of which case would require the unanimous agreement of the jury.

In this State a defendant cannot plead guilty to murder in the first degree. He can, however, plead guilty to murder generally. If the district attorney certifies the case to rise no higher than second degree murder, the trial judge can alone dispose of the matter. In the absence of such certification three judges hear the matter to determine the degree of the defendant's guilt and, if the court so constituted decides it is first degree murder, they must fix the penalty of either life imprisonment or death. In the absence of such a guilty plea it is the jury's function to fix the degree of guilt and, in case it fixes it at first degree murder, it is the jury that must fix the punishment as either life imprisonment or the death penalty. Now the incongruity of the situation lies in this: If the jury has the case, it can not fix the degree of guilt or impose the penalty unless by unanimous verdict, but when the three judges have the matter before them on a guilty plea, they can determine both questions (mixed questions of fact and law) by a majority of two to one, that is to say, a two-thirds vote, which often occurs.

What is the situation on appeal? A unanimous verdict is required in a civil case involving the most serious consequences to one side or the other, and such a verdict is also required in a criminal case, but on appeal the verdict may be sustained, even in a case involving the execution of a defendant, by a mere majority of the court, and this is true not only on questions of law, strictly speaking, but on the sufficiency of the evidence. The failure of justice on the one hand, and actual injustice on the other, can undoubtedly be traced in many cases to the rigidity of the requirement of unanimous verdicts. It would be well, in the light of the foregoing, to examine the matter in Pennsylvania to the end that we fall in line with the trend of advanced thinking on the subject. In the December 1949 issue of the *Journal of the American Judicature Society*, vol. 33, there appears on page 111, under the caption, "Use of majority verdicts in the United States", a table showing the modification of the unanimous verdict requirement in various degrees in 29 jurisdictions, showing that in varying situations verdicts may be rendered by a mere majority up to ten-twelfths of the jury, in both civil and criminal cases, excepting first degree murder. For instance, in civil cases in Minnesota a verdict approved by five-sixths of the jury may be rendered if the jury has been out 12 hours; the same in Nebraska after the jury has been out six hours. In other jurisdictions in civil cases and in criminal cases less than a felony, majority verdicts of two-thirds, three-fourths and ten-twelfths are permitted, without any qualifi-

cation as to deliberating time of the jury. The changes have been effected by constitutional amendment and statute.

Without indicating the precise formula that should be adopted in Pennsylvania, it seems to me that the advanced principle should in some way be applied in every kind of case with the exception perhaps of first degree murder, and in such case if after the jury has been out for a long time (to be fixed by the statute making the overall changes), and cannot agree on the major charge but can agree on a lesser degree of guilt by a vote of three-fourths or ten-twelfths of the jury, it ought to be allowed to render such a verdict.

Of course there is room for a great deal of difference of opinion as to the limitations of the suggested modification, but it would be well, I think, for the bench and bar of the state and the legislature to study the matter to the end that Pennsylvania fall in line with the other forward looking jurisdictions on the subject.