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Trial-Instructions-Unanimity of the Jury Verdict

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tendency of the Federal courts away from the "hard doctrine" of the *Britt* case is questionable.¹

—WILLIAM F. WUNSCHEL.

TRIAL — INSTRUCTIONS — UNANIMITY OF THE JURY VERDICT.
— Action was brought for personal injuries. In reviewing the jury verdict in favor of the plaintiff, the Supreme Court held that the defendant's requested instruction on unanimity of the jury verdict was incomplete, in that too little emphasis was placed on the duty to agree, if possible; that the refusal, therefore, could not be deemed error. *Robertson v. Hobson*.²

Prior to 1367, the jury verdict was controlled by the majority.³ After this date, the rule became that the litigants, in cases either civil or criminal, were entitled to an instruction that the verdict must be unanimous, if the instructions be not couched in terms inviting obduracy or disagreement.³ The courts are apparently more exacting in criminal⁴ than in civil⁵ trials. The tendency to depart from the strict rule in civil actions seems not to extend to criminal cases, where the social interest in expediting trials is

¹ It is submitted that the principal decision neither expressly nor by implication overrules *United Zinc Co. v. Britt*, but if an extension, is applicable only to the doctrine of the *Stout* case, being itself likewise amenable to the modifying influence of the *Britt* case.

² 171 S. E. 745 (1933).

³ Y. B. 41 EDW. III, Mich. pl. 36 (1367); HOLDSWORTH, HISTORY OF ENG. LAW (3rd ed. 1922) vol. 1, 318.

³ BLACKSTONE'S COMMENTARIES, Book 4 (1769), Ch. 27, 343; C. and N. W. Ry. Co. v. Dunleavy, 129 Ill. 132, 22 N. E. 15 (1889); *Emory v. Monongahela West Penn Pub. Service Co.*, 111 W. Va. 699, 163 S. E. 620 (1932); *Birmingham Ry. Light and Power Co. v. Goldstone*, 181 Ala. 517, 61 So. 218 (1913). Unanimity of the jury is essential; but while the charge may be said to assert this proposition, yet if in the particular case it possesses misleading tendencies, it is properly refused.

⁴ *Supra* n. 2, at 319; *Clem v. State*, 42 Ind. 420 (1873) (an instruction that stated that no number of minds could agree upon a multitude of facts, and there must be some yielding, within limits and without sacrifice of conscience, was not sanctioned). *State v. Edgell*, 94 W. Va. 198, 118 S. E. 144 (1923). (Instruction on unanimity should have been given. It was not covered by any other instruction.) *State v. Wiseman*, 94 W. Va. 224, 118 S. E. 139 (1923). (The presumption that defendant was prejudiced was applied where lower court refused an instruction on unanimity). See, also, *State v. Noble*, 96 W. Va. 432, 123 S. E. 237 (1924). (Here, instruction said nothing about consulting fellow jurors; but the court held that defendant was entitled to an instruction on the unanimity of the jury verdict.)

⁵ *Chicago and Alton Ry. Co. v. Kirkland*, 120 Ill. App. 272 (1905). (Much discretion is allowed the trial court and not error to refuse an instruction on the unanimity of the verdict.) *Shaller v. Detroit United Ry.*, 139 Mich. 171, 102 N. W. 632 (1905). (It is presumed that a juror knows

over-balanced by the tender regard in which the law holds the accused.⁶

The approved law as laid down in *Commonwealth v. Tuey* is the extreme boundary line in the direction of compromise and coercion,⁷ and it is doubtful whether it would be applied to a criminal case in West Virginia. It would appear, however, that such an instruction containing the element of balance as suggested by Maxwell, J., in *Emory v. West Penn, etc.*,⁸ and meeting the requirements of *State v. McCausland*,⁹ could not mislead the jury to the hurt of either litigant.

—RICHARD F. CURRENCE.

he should not find a verdict not based on his own convictions, and the refusal of defendant's charge is not such *manifest* error as to reverse the judgment.) *Smith v. Stanley*, 114 Va. 117, 75 S. E. 742 (1912). (Here, there had been two mistrials. — A charge telling the jury to make reasonable concessions, if they could possibly do so without violating their oath, was upheld.) See, also, *Brogan v. Union Traction Co.*, 76 W. Va. 698, 707, 86 S. E. 735 (1915). (It is a general rule that jurors understand their verdict must be unanimous and that plaintiff must make out his case by a preponderance of the evidence. "How then could the defendant have been prejudiced by the rejection of this instruction") But, see, *Emory v. Traction Co.*, *supra* n. 3, at 710: "The dictum in the Brogan case, if construed to hold that an instruction on the burden of proof renders unnecessary an instruction on the duty and right of each juror in agreeing upon a verdict, is disapproved." Cf. *Robertson v. Hobson*, *supra* n. 1, approving the Brogan case without mentioning the Emory case; *C. and N. W. Ry. Co. v. Dunleavy*, *supra* n. 3, held that a party cannot have the instruction on unanimity applied to each element of the case.

⁶ Compare the degrees of proof in criminal and civil actions. See, especially, text and cases collected, under Evidence, 10 R. C. L. §§ 204 to 207, page 101 *et seq.*, and Criminal Law, 8 R. C. L. §§ 215 and 216, page 218 *et seq.*

⁷ *Commonwealth v. Tuey*, 8 Cush. (Mass.) 1 (1851). The case involved, among others, the following elements in the instruction given and in the upper court's approval thereof: (a) absolute certainty is impossible; (b) jurors must view the opinions of the others with candor and deference; (c) case must eventually be decided sooner or later, and cannot find a more able jury; (d) jurors should listen to each others' opinions with a disposition to be convinced; (e) minority should re-examine and scrutinize more carefully the facts in the cause; (f) there is a duty to yield, when it can be done without sacrifice of conscientious convictions; (g) the jury-room is no place for pride of opinion, or for maintaining, in the spirit of controversy, either side of a cause.

⁸ *Emory v. Monongahela West Penn Public Service Co.*, *supra* n. 3, page 712, *per* Maxwell, J.: "Of course, there must be unanimity. . . . The said two instructions over-emphasize the thought of individual and independent action on the part of jurors . . . without at the same time giving even passing mention to the juror's equally important duty of using his efforts towards a harmonizing of the divergent views of the jurors . . . [It] is lopsided . . . and a bid for a 'hung' jury."

⁹ *State v. McCausland*, 82 W. Va. 525, 96 S. E. 938 (1918). (An instruction was bad that would compel a verdict of not guilty, when eleven of the jurors were thoroughly satisfied of defendant's guilt, and one had a reasonable doubt thereof. Such condition would result in a mistrial instead of a verdict of acquittal.) See, also, *State v. Rodgers*, 56 Kan. 362, 43 Pac. 256 (1896).