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FIVE-SIXTH VERDICTS IN CIVIL JURY TRIALS

H. WILLIAM IHRIG

BEFORE the amendment of the Wisconsin constitution in 1922, Article I, section 5 thereof, read:

The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy; but a jury trial may be waived by the parties in all cases in the manner prescribed by law.

By an amendment to the constitution, in November, 1922, there was added to the above section the provision:

Provided, however, that the legislature may, from time to time, by statute provide that a valid verdict, in civil cases, may be based on the votes of a specified number of the jury, not less than five-sixths thereof.

The right of a trial by a jury of six men in a civil action in a justice's court is provided for by section 302.04 of the Wisconsin statutes.

After the amendment of the constitution, the legislature by Chapter 46 of the Laws of 1923 added the following sentences to section 302.18 providing for the return of the verdict of the jury in the justice court:

A verdict agreed to by five jurors shall be the verdict of the jury.

At the same session, the legislature, by Chapter 65 of the Laws of 1923 amended the present section 270.25 which previously read:

A general verdict is one by which the jury pronounce generally upon all or any of the issues either in favor of the plaintiff or defendant. A special verdict is that by which the jury finds the facts only, leaving the judgment to the court. Where, upon the trial, the case presents only questions of law the court may, in its discretion, direct the jury to render a verdict subject to the opinion of the court.

by adding the following sentence:

A verdict, finding or answer agreed to by five-sixths of the jurors shall be the verdict, finding or answer of the jury.

In analyzing the origin of the preceding sentence, the Legislative Reference Library, by Edwin E. Witte, Chief, advised:

We must report that our records do not indicate that the precise language of the present section, 270.25, was taken from the laws of any other state. Only the last sentence in this section relates to the five-sixths jury verdicts; and this section was added by chapter 65, laws of 1923. This chapter originally was bill No. 78-A, which passed through three stages. This sentence in the original bill was almost

identical in language with the constitutional amendment for the five-sixths jury trial adopted by the people in 1922 (being "a valid verdict in civil cases may be based on the votes of five-sixths of twelve men empaneled in the jury"). The assembly committee on the judiciary, however, modified this sentence to read, "a verdict agreed to by ten jurors shall be the verdict of the jury." The senate judiciary committee later substituted for this sentence the present language: "A verdict, finding or answer, agreed to by five-sixths of the jurors shall be the verdict, finding or answer of the jury." This language came from the senate judiciary committee, and we do not know from what source it was taken. The senate judiciary committee at the time was composed of Honorable Howard Teasdale of Sparta, chairman; Honorable Max W. Heck, Racine; Honorable Theodore Benfey, Sheboygan; Honorable William F. Quick, Milwaukee, and Honorable A. E. Gary, secretary of the Civil Service Commission; and of Senators Burke and Mahon since deceased. . . . We assume, however, that this language was not taken from any other law, but represents merely what the judiciary committee thought was needed to cover all situations presented to juries in civil cases.

Thus we have the constitutional provision:

The legislature may . . . by statute provide that a *valid verdict* in civil cases, may be based on the *votes* of a *specified number* of the jury, not less than five-sixths thereof.

with the statutory enactment:

A *verdict, finding or answer* agreed to by five-sixths of the jurors shall be the *verdict, finding, or answer of the jury*.

There are present at the outset, two questions:

1. Did the legislature, in part, exceed the constitutional authorization?
2. What is the effect of the change accomplished by the Legislature, if constitutional?

The constitutionality of the statutory enactment has been discussed three times. In the first case decided under the new law it was held that:

Ten members of the jury must agree before a question can be answered; but the same ten must agree to each question before it can be answered. . . . Of course, a verdict may be arrived at if the same ten or eleven jurors agree in their answers to all of the questions.¹

In the latest case on the point, *Will v. Chicago, Milwaukee and St. Paul Railway Company*,² the rule laid down is as follows:

If now ten jurors, as in former days twelve jurors, are agreed upon the essential questions asserted as to a cause of action or to sustain a defense, though each such ten may not be the same as are in accord

¹ *Dick v. Heisler*, 184 Wis. 77, 86.

² 210 N. W. 717 (decided Nov. 9, 1926).

on other questions of the special verdict, their accord on such essential questions is sufficient to make the verdict proper to be now received under the present law.

This position caused the court to withdraw from the first stated conclusion, although, in the earlier case, it was held that the view taken therein was necessary in the light of the previously established law, to hold the statute constitutional.

The reasoning in the first case, *Dick v. Heisler*,³ is as follows, at page 84:

Prior to the enactment of sec. 2857, it was necessary for the entire jury to agree upon a verdict, finding or answer. . . . The last sentence in the constitutional provision constitutes the amendment adopted in 1922, and we must therefore construe the statute with reference to such constitutional provision. It will be noted that the constitutional provision does not refer in express terms to a special verdict, or to the questions and answers of a special verdict, or to a finding or findings of the jury. The expression "a valid verdict in civil cases," etc., is used. The practice of submitting a special verdict has long been in vogue in this state and in many of the other states of the Union. "The right of a jury to find a special verdict is a common-law right going back at least as far as 13 Edward I." 27 Ruling Case Law, 865; *Underwood v. People*, 32 Mich. 1; and note in 24 L. R. A. N. S. L. In this state the right to a special verdict is made absolute if requested in time. *Gatzow v. Buening*, 106 Wis. 1, 81 N. W. 1003.

In answering questions of a special verdict the jury is required to find certain facts, and the questions of a special verdict are framed in such a manner as to present the ultimate controverted facts which when determined by the jury constitute its verdict, upon which, as a matter of law, the court bases its order for judgment.

Where two or more questions of a special verdict are submitted to a jury, the determination of one of such questions, or of a number less than the whole number submitted, does not constitute the verdict of the jury. The identical ultimate facts included in a special verdict are also involved in a general verdict, and the ultimate result in either event should be the same. By way of illustration, let us assume the ordinary suit for damages on account of an automobile collision, where the court submits a special verdict, which includes, first, the negligence of the defendant; second, the proximate cause of the injury; and third, the contributory negligence of the plaintiff. Under the instruction of the court as given in the instant case, ten jurors could agree and answer the first question in the affirmative, while two of the jurors voted in the negative. In answer to the third question, the two jurors voting in the negative on the first question could agree with eight of the jurors voting with the majority on the first question in a negative answer, and, if the second question were answered in the affirmative, such answers would constitute the verdict of the jury upon the subject of liability, and the plaintiff would be entitled to recover.

³ 184 Wis. 77.

Let us now assume that, instead of submitting a special verdict as above indicated, the court had submitted a general verdict. All of the ultimate facts involved in the special verdict are also included in the general verdict. The court in instructing the jury would necessarily require a verdict of five-sixths or more of the jurors. In such a case, if the jury resolved the ultimate facts involved in the general verdict, in the same manner as was done by the jury under the special verdict, the verdict would result in a disagreement. We have therefore concretely illustrated the error committed by the trial court in its instructions.

A situation may arise where a special verdict of twelve questions involving ultimate facts is submitted. Eleven members of the jury may agree upon each question, leaving each member of the jury disagreeing as to one question. Under the instructions given by the court the answers of the jury would constitute its verdict and would control the ultimate result. We must construe the statute as constitutional if reasonably possible. The term "verdict" as used in the statute implies not only a general verdict but a special verdict, and as so applied to a special verdict it includes all of the questions and answers of such special verdict; and we must hold that when the statute refers to the finding or answer it refers to a situation where but one finding or question is submitted.

It is only by giving the statute such construction that the same can be held constitutional. [Italics are ours.]

As we construe the statute, ten members of the jury must agree before a question can be answered; but the same ten must agree to each question before it can be answered. Where eleven agree to an answer of the question, one voting with the majority may disagree on another question, so as to permit the remaining eleven to answer such question; however, in answering the remaining questions, the ten jurors who voted with the majority in both questions must unite in their answers to all of the other questions. Of course, a verdict may be arrived at if the same ten or eleven jurors agree in their answers to all of the questions.

. . . . We realize that the construction herein placed upon the statute greatly enhances the difficulties of courts and juries in the performance of their duties in the trial of jury cases where special verdicts are submitted. The situation presented was evidently not in the minds of the framers of this constitutional provision; but whatever may be our view upon this subject, we must construe the statute in accordance with the fundamental law as it exists.

The next case discussing the constitutionality of the Act is *Hobbs v. Nelson*,⁴ wherein the intervening cases are cited, the court stating at page 114:

This subject of the constitutional amendment changing the requirement of the unanimous verdict of the common-law jury in civil cases of twelve men to one whereby a five-sixths vote of such jury may determine the issues, was presented and fully considered and discussed

⁴ 188 Wis. 108.

in *Dick v. Heisler*, 184 Wis. 77, 84 *et seq.*, 198 N. W. 734, and in *Stevens v. Montfort State Bank*, 183 Wis. 621, 625, 198 N. W. 600. What was said in those cases was repeated in *Kosak v. Boyce*, 185 Wis. 513, 523, 201 N. W. 757, and again in *Bentson v. Brown*, 186 Wis. 629, 637, 203 N. W. 380, and all are to the effect that it is necessary for the same ten jurors to agree upon their answers to each and every question of a special verdict.

Under the law prior to the constitutional amendment the failure of all of the twelve jurors to agree as a unit on a general verdict, or on all questions of a special verdict, resulted in an imperfect, defective verdict or disagreement. The amendment and the statute have changed that rule so that now, instead of a unit of twelve jurors, it is necessary that there shall be a unit of only ten jurors. But it must be the same ten individual jurors in order to constitute the new unit required under the amendment. *To permit one set of ten to answer one essential question in a verdict, and another set of ten another, and so on, would make a much more substantial encroachment upon the common-law jury of twelve than can be held to be effected by the amendment and the statute, as we have heretofore repeatedly stated.* [Italics are ours.]

The late case of *Wills v. Chicago, Milwaukee and St. Paul Railway Company*,⁵ holds the effect that the statute to be such as would make it unconstitutional under the decision of *Dick v. Heisler* (supra), although in the *Wills* case the question of constitutionality is never expressly mentioned and the new application is upheld. In the *Wills* case the law on this very practically vital point is held to be as follows:

When in cases of this kind a special verdict is submitted to the jury, it generally contains one or more sets of questions which may determine, independently of all the others, the essential elements of such a case; that is, lawsuits generally present matter or issues which belong to what, for want of a better term, may be described as plaintiff's attack, failure in sufficient proof of which his lawsuit fails. There may also be that which constitutes defendant's defense, immaterial, of course, unless plaintiff succeeds in his attack (disregarding here the matter of counterclaims where the defendant, in effect, is plaintiff).

If now ten jurors, as in former days twelve jurors, are agreed upon the essential questions asserted as to a cause of action or to sustain a defense, though each such ten may not be the same as are in accord on other questions of the special verdict, their accord on such essential questions is sufficient to make the verdict proper to be now received under the present law. In other words, if ten jurors are agreed that a defendant was negligent as to some particular duty, and also that such negligence was a proximate cause of the injury and as to the amount of plaintiff's damages, that is sufficient to make a good verdict or finding against the defendant in that regard, although such ten jurors may not be the same ten that are in accord on other questions. If, however, one set of ten should agree that the defendant did fail in the exercise of the degree of care required of him, but a different set of

⁵ 210 N. W. 717, 720.

ten agree that such found negligence was a proximate cause of injury, the combination of such two answers would not be a sufficient verdict upon which the ultimate responsibility of the defendant could be based. But when ten jurors are agreed, as it appears in this case, that the defendant did not have actual knowledge of a suggested danger, and also are agreed that such defendant ought not, in the exercise of the care required, to have known of such danger, and such two questions cover the entire subject of the possible liability of defendant, the return of such verdict requires a judgment for defendant, because it is a complete verdict, in that it finds a want of the essential element for the plaintiff to maintain in such class of cases; namely, negligence or a breach of duty.

The same situation undoubtedly would arise with reference to the question of contributory negligence. One set of ten jurors might find defendant negligent and that such negligence was the proximate cause of the injury; another set of ten might, however, find that there was negligence by plaintiff proximately contributing to the same injury. That defendant was thus found negligent and proximately contributing to the injury would then become immaterial, so far as plaintiff's ultimate right to recover was concerned, because, ten jurors having found that plaintiff himself was negligent, then it follows, as a matter of law, that the plaintiff cannot recover.

Under this view, and regretting the former language of this court above recited, which must now be deemed withdrawn, it becomes our duty to hold that upon the verdict as here rendered the motion of the defendant for judgment upon such verdict should have been granted.

A further testing of the constitutionality of this construction is likely in view of the previous construction of the law to make it apply equally to both general verdicts and special verdicts, as stated in *Dick v. Heisler*, and the innovation here made and denied so many times previously, in view of the development of the law before the constitutional and statutory change.

The question of unanimity in arriving at the verdict which was stressed in the *Dick v. Heisler*, and *Hobbs v. Nelson* cases, is firmly established in the law.

In *American Publishing Company v. Fisher*,⁶ states the law as follows:

Now unanimity was one of the peculiar and essential features of trial by jury at common-law. No authorities are needed to sustain this proposition. Whatever may be true as to legislation which changes any mere details of a jury trial, it is clear that a statute which destroys this substantial and essential feature thereof is one abridging the right. It follows, therefore, that the court erred in receiving a verdict returned by only nine jurors, the others not concurring.

In order to guard against any misapprehension it may be proper to say that the power of a state to change the rule in respect to unanimity

⁶ 166 U. S. 464.

of juries is not before us for consideration. *Walker v. Souvint*, 92 U. S. 90; *Heirtad v. California*, 110 U. S. 516.

In the leading case of *City of Denver v. Hyatt*,⁷ a constitutional provision allowed the legislature to provide for trial by a jury of less than twelve. The statute enacted that three-fourths of the jurors sitting could return a verdict for the jury. The question was of the necessity for unanimity of the jurors sitting and the court held that in the absence of a constitutional change respecting unanimity in agreement, a mere change by the constitution in the number constituting a jury, did not affect any aspect of a jury trial but only the detail of number, and that the necessity for unanimity was continued in its full force. The court held:

It is urged that the provision of the act permitting a verdict by a less number than the whole is a wise one, and coincides with the views of eminent jurists and others on this subject, and that in this advanced age we should no longer cling to what is termed by some that relic of barbarism and superstition which requires that a verdict must be unanimous. Whether the innovation is wise or not can in no manner aid in the solution of the question presented. The sole inquiry is, does the act conflict with the constitution of the state?

. . . . The legislature was granted authority to pass a law which might provide for a jury in civil cases consisting of less than the common-law number. If it was intended to vest the legislature with supreme control over the subject of juries in civil actions, why grant authority to provide for the number only, instead of employing language which would remove all restrictions whatsoever? To hold that such grant of authority removes all restrictions would be a construction which renders the language employed superfluous, in fact, would leave it without any effect whatever; whereas, if the intention was to preserve the right in all respects, except as to number, every word employed is given full force, meaning, and effect. So that, reading the section, and applying to the language employed its usual significance, and bearing in mind the doctrine of implication, the conclusion is irresistible that a fair construction of the section is that thereby the right of trial by jury in civil cases, as provided by the common law, is preserved in all its essentials, except the one of number.

The legal aspects of a "trial by jury" are tersely stated in *First National Bank of Rock Springs v. Foster*⁸ as follows:

. . . . It is also so well settled as to require no reference to authorities that when the Constitution secures to litigants the right of trial by jury the legislature has no power to deny or impair such right. The courts have uniformly held, also, that the word "jury," as used in our Constitutions, when not otherwise modified, means a common-law jury

⁷ 63 Pac. 403 (Colo.)

⁸ 61 Pac. 466, 63 Pac. 1056. 54 L. R. A. 549.

composed of twelve men, whose verdict shall be unanimous. As stated by the supreme court of Minnesota: "The expression 'trial by jury' is as old as Magna Charta, and has obtained a definite historical meaning, which is well understood by all English-speaking peoples; and for that reason no American Constitution has ever assumed to define it. We are therefore relegated to the history of the common law to ascertain its meaning. The essential and substantive attributes or elements of jury trial are, and always have been, number, impartiality, and unanimity. The jury must consist of twelve. They must be impartial and indifferent between the parties; and their verdict must be unanimous. *Lommen v. Minneapolis Gaslight Co.*, 65 Minn. 196, 33 L. R. A. 437, 68 N. W. 53. An extended list of the cases is given in the note to *State v. Bates*, (Utah) 43 L. R. A. 48."

Also, see the note in L.R.A. 1917, A, page 91; 35 *Corpus Juris*, Juries, sec. 124, and cases cited; *Norval v. Rice*, (Wis.).⁹

The cases under this new law discussing its effect upon the charges to the jury as to burden of proof and affirmative and negative answers are:

Stevens v. Montfort State Bank,¹⁰ which was reversed in part in *Stokdyk v. Schmidt*.¹¹ This latter case also overruled in part *Papke v. Haerle*.¹² In *Stokdyk v. Schmidt* the present rule was laid down as follows:

. . . . In *Papke v. Haerle* the rule was announced as to the right of the defendant to have a question answered "No" where the burden of proof was upon the plaintiff to establish an affirmative answer, namely, when ten or more of the jurors were not satisfied by a preponderance of the evidence and to a reasonable certainty that it should be answered "Yes."

It is true the court said they should answer it "No" or disagree. The words "or disagree," should not have been added, because if ten or more were not convinced that it should be answered "Yes," then such ten or more constituted a jury reaching the conclusion that plaintiff had not established the fact that an affirmative answer should be given to the question. A sufficient number of jurors to constitute a jury were agreed that plaintiff had not established a case, and an answer of "No" was the only permissible answer in such a case.

. . . . Under our statute ten or more now constitute a jury qualified to return a verdict, so the expression "ten or more," becomes equivalent to "the jury." Courts since the origin of the jury system have instructed that if the jury are not satisfied that the plaintiff has established the material allegation of the complaint or the existence of the facts necessary to his recovery they must find for the defendant. The same holds true as to questions in a special verdict. If the burden is upon one

⁹ 2 Wis. 22.

¹⁰ 183 Wis. 621.

¹¹ 190 Wis. ———, 208 N. W. 241.

¹² 189 Wis. 156, 207 N. W. 261.

party to establish an affirmative answer, and ten or more jurors are not convinced that the burden has been met, then they must return a negative answer, because ten or more, i. e., the jury, agree that the question should not be answered in the affirmative.

. . . . If they stand ten to two, eleven to one, or are unanimous, they can return a valid verdict. We are not now concerned with the rule that the same ten must agree as to all material answers. If we were there would be many more combinations in which a nugatory verdict or a disagreement could occur.

Of course, the late case of *Will v. Chicago, Milwaukee and St. Paul Railway Company*,¹³ must also be kept in mind in this connection.

Lastly, as to the effect of a failure to indicate on the verdict which jurors disagreed so as to come within the requirement of a verdict by five-sixths, the law is forcefully stated in *Kosak v. Boyce*.¹⁴

The appellant further complains that in view of the fact that three questions of the special verdict are answered by less than a unanimous vote of the jury, it cannot be ascertained from an inspection of such answers whether the same ten jurors agreed on all of them. This is urged as reversal. This matter was considered in *Dick v. Heisler*, 184 Wis. 77, 198 N. W. 734, and it was there held that it was necessary for the same ten jurors to agree upon answers to every question of the special verdict. It was there suggested that this might be made to appear by requiring the dissenting members of the jury to be indicated wherever the answers were not unanimous. We have before us a verdict where it is possible that five members of the jury disagreed with some feature thereof, and we have no way of telling whether ten agreed on the answer to every question. We take this occasion to say, however, that appellant is in no position to urge this as reversible error. He had it within his power to make this uncertain verdict definite and certain by polling the jury. We will not tolerate a practice which will permit a party to remain silent upon the coming in of the jury's verdict and thereafter urge the uncertainty of that verdict as ground for a new trial or a reversal, when he had it within his power then and there, by demanding a poll of the jury, to establish whether the verdict was lawful. He who fails to challenge the regularity of a verdict in this respect when it is returned into court will be held to have waived such irregularity and will not thereafter be permitted to take advantage of it.

Every change of fundamentals in the law brings to mind the complexity of the simple. Undoubtedly many cases will arise for decision by the supreme court on the questions here involved. Whether the change in the number of jurors agreeing on a verdict will be the sole change wrought by the new law, or whether the present law as expressed in the *Will* case will be followed is yet to be decided. The complexities arising under the latter possibility augur many vexing questions and decisions.

¹³ 210 N. W. 717 (Wis.)

¹⁴ 185 Wis. 513, 523.