

Michigan Law Review

Volume 35 | Issue 1

1936

CRIMINAL LAW AND PROCEDURE - NON-UNANIMOUS VERDICTS - CONSTITUTIONALITY

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Recommended Citation

CRIMINAL LAW AND PROCEDURE - NON-UNANIMOUS VERDICTS - CONSTITUTIONALITY, 35 MICH. L. REV. 146 (1936).

Available at: <https://repository.law.umich.edu/mlr/vol35/iss1/17>

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CRIMINAL LAW AND PROCEDURE — NON-UNANIMOUS VERDICTS — CONSTITUTIONALITY — An amendment to section 11, article 1 of the constitution of the state of Oregon permitted the concurrence of ten of the twelve jurors to control in criminal trials except in cases of murder in the first degree. It was claimed that this amendment discriminated against persons charged with second degree murder and in favor of those on trial for first degree murder, since in the latter case the jury could recommend life imprisonment which was the punishment prescribed in the former. The court *held* that there was no violation of the Fourteenth Amendment of the Federal Constitution. *State v. Osbourne*, (Ore. 1936) 57 P. (2d) 1083.

Trial by jury has been held to mean trial by jury as it existed at the common law at the time of the separation of the American colonies from England; that is, trial by a jury of twelve requiring a unanimous verdict.¹ But the Sixth and Seventh Amendments to the Federal Constitution govern only the federal courts and do not apply to jury trials within the states;² and trial by jury may be abolished by the states consistently with the Fourteenth Amendment.³ As to equal protection, it has been held that heavier penalties for second offenders are valid;⁴ that giving the right to trial without a jury in non-capital criminal cases, and requiring a jury in capital cases,⁵ or requiring a jury made up of less than twelve persons in cases not capital,⁶ is not contrary to the equal protection clause of the Federal Constitution. In civil cases more than a third of the states permit non-unanimous verdicts,⁷ but to render a man infamous a unanimous verdict might be more desirable.⁸ Yet all reason and analogy is against the practice of requiring unanimous verdicts, for it is difficult for twelve men to agree on any question, and in all political and social matters the majority rule obtains.⁹ The decision in the principal case seems justifiable.

J. J. DeL.

¹ *Dimick v. Schiedt*, 293 U. S. 474, 55 S. Ct. 296 (1935); *Weinstein*, "Trial by Jury and Unanimous Verdicts," 69 U. S. L. REV. 513 (1935). Under a state constitution guaranteeing jury trial, this definition would control unless the state constitution should define it otherwise. *Minnequa Cooperage Co. v. Hendricks*, 130 Ark. 264, 197 S. W. 280, L. R. A. 1918D 477, Ann. Cas. 1918D 687 (1917); *State v. Jutila*, 34 Idaho 595, 202 P. 566 (1921). 1 HOLDSWORTH, HISTORY OF ENGLISH LAW, 3rd ed., 318 (1922).

² *People v. Kelly*, 347 Ill. 221, 179 N. E. 898 (1931); *State v. Hadad*, 142 La. 69, 76 So. 243 (1917); *State v. Harvey*, 159 La. 674, 106 So. 28 (1925); *State v. Walker*, 192 Iowa 823, 185 N. W. 619 (1921); 39 AM. L. REV. 108 (1905).

³ *Snyder v. Massachusetts*, 291 U. S. 97, 54 S. Ct. 330 (1934).

⁴ *Graham v. West Virginia*, 224 U. S. 616, 32 S. Ct. 583 (1911); *Carlesi v. New York*, 233 U. S. 51, 34 S. Ct. 576 (1913); 6 R. C. L. 431 (1915).

⁵ *Commonwealth v. Millen*, (Mass. 1935) 194 N. E. 463, certiorari denied 295 U. S. 765, 55 S. Ct. 924 (1935).

⁶ *Maxwell v. Dow*, 176 U. S. 581, 20 S. Ct. 448 (1900).

⁷ *Weinstein*, "Trial by Jury and Unanimous Verdicts," 69 U. S. L. REV. 513 at 519 (1935); see *Caldwell*, "The American Jury System," 22 AM. L. REV. 853 (1888).

⁸ *Miller*, "The System of Trial by Jury," 21 AM. L. REV. 859 at 865-866 (1887).

⁹ 39 AM. L. REV. 108 (1905).