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THE VIRGINIA CONSTITUTIONAL CONVENTION

YESTERDAY'S PROCEEDINGS.

The session of the Constitutional Convention yesterday was devoted almost entirely to further consideration of the report of the Committee on the Bill of Rights. But before the convention went into Committee of the Whole there was an interesting incident. Mr. Cameron, arising to a question of personal privilege, made an indignant speech in reply to the charge made by Mr. Summers (Republican) in a speech made some days ago that he (Mr. Cameron) had voted to turn a one-legged Confederate soldier out of the office of Doorkeeper of the House of Delegates, and had aided in putting a black negro into the position. Mr. Cameron said he was not a member of the Legislature when Mr. Sullivan, who is the doorkeeper of the convention, was turned out of his place by the Readjusters. He had read at the clerk's desk a letter from Mr. Sullivan, setting forth the facts.

Mr. Summers acknowledged his mistake, and the incident was closed.

After going into Committee of the Whole, the body took up the amendment to section 8 of the bill, allowing the Commonwealth the right of appeal in revenue cases, and it was adopted.

The amendment offered by Mr. Braxton, providing that juries in civil cases shall consist of seven men, and that five of any such jury may render a verdict upon failure of the jury to agree unanimously after six hours' deliberation.

Mr. Braxton spoke at length in support of his amendment. As soon as he had taken his seat, Mr. Pettit, the patriarch of the convention, arose and made an earnest argument against the change in the jury system. He said in the course of an able speech that an experience of fifty years as a lawyer convinced him the change proposed was not in the least desirable.

Mr. Quarles spoke in opposition to the proposition of his colleague from Augusta, after which the committee arose, and the convention adjourned at 2:45 o'clock.

OFFICIAL REPORT.

Friday, September 13, 1901.

The Convention met at 12 o'clock M.

Prayer by Rev. W. B. Beauchamp.

The PRESIDENT: The Secretary will call the roll of members.

The Secretary called the roll and the following delegates answered to their names:

Present: Messrs. George K. Anderson, Barbour, Barham, Thomas H. Barnes, Blair, Boaz, Bolen, Bouldin, Braxton, Bristow, Brooke, Brown, Cameron, Clarence J. Campbell, P. W. Campbell, Carter, Chapman, Cobb, Crismond, Daniel, Dunaway, Earman, Eggleston, Epes, Fairfax, Fletcher, Flood, Garnett, Gillespie, B. T. Gordon, James W. Gordon, R. L. Gordon, Green, Gregory, Gwyn, Hamilton, Hancock, Hardy, Harrison, Hatton, Hooker, Hubard, Hunton, Ingram, Claggett B. Jones, G. W. Jones, Keezell, Kendall, Lawson, Lincoln, Lindsay, Marshall, McIlwaine, Meredith, Miller, Moncure, R. Walton Moore, Mundy, Newton, O'Flaherty, Orr, Parks, Pedigo, Pettit, Philips, Pollard, Portlock, Quarles, Richmond, Rives, Robertson, Smith, Stebbins, Stuart, Summers, Thom, Thornton, Turnbull, Waddill, Walker, Walter, Watson, Wescott, Willis, Wise, Withers, Woodhouse, Yancey, and the President—89.

The PRESIDENT: The call of the roll shows that members are in attendance, more than a quorum. The Secretary will read the Journal of yesterday's proceedings.

The Journal of yesterday's proceedings was read and approved.

PERSONAL EXPLANATION.

Mr. CAMERON: Mr. President, I rise to a question of personal privilege.

Some days since a member of this body without provocation on my part, in breach of all the restraints of decorum and justice which usually obtain in such assemblages as this, saw fit to make my personal and political record the target for his attack.

His opinions and utterances as to my attitude on public questions in the past or in the present are a matter of utter indifference to me. I am satisfied to know that whatever measure of respect, great or small, the people of Virginia accord to me cannot be affected by any comment or criticism proceeding from that source.

But in the course of his remarks that delegate used language containing a misstatement of fact which I cannot allow to remain a matter of record without offering to it my indignant challenge and emphatic denial. Whether it was dictated by ignorance or by malice is immaterial. He said that the delegate from Petersburg, I, had kicked out of his position as doorkeeper of the House of Delegates, a one-legged Confederate, and had put in his place the meanest negro in Eastern Virginia.

I was, Mr. President, at that time mayor of the city of Petersburg. I was not then and I have never been a member of either branch of the Legislature of Virginia. I was elected Governor of Virginia and took part in the administration of State affairs for the first time more than two years after Mr. Sullivan was defeated for doorkeeper of the House. I had no more to do with it than a babe unborn, and I knew nothing about it until after it was done.

In this connection, and without further remark, I send to the desk a letter from Mr. Sullivan which I desire to have read by the Secretary and placed upon record in the Journal.

The PRESIDENT: The Secretary will read as requested.

The Secretary read as follows:

Richmond, Va., September 10, 1901.

Hon. William E. Cameron, Richmond, Va.:

My dear Governor,—In answer to your inquiry, will say that I was defeated for re-election as doorkeeper of the House of Delegates on December 3, 1879. You were not a member of the House of Delegates and, therefore, had no opportunity to vote for or against me, and I never heard that you were instrumental in any way in encompassing my defeat. You did not enter upon the duties of Governor of the Commonwealth until January 1, 1882, more than two years subsequent to my defeat for the office of doorkeeper.

I am satisfied, and have so stated, heretofore, that you had no connection whatever with the matter.

Very truly yours,

A. O. SULLIVAN.

Mr. SUMMERS: Mr. President, I suppose the delegate from Petersburg refers to me. I claim to be a brave man, and whenever I have done a gentleman a wrong I am brave enough to apologize for it.

In the heat of argument I probably made a mistake. If I did, sir (to Mr. Comeron), I will take your word for it. My argument was based upon what I believed to be facts. If they were not, sir, of course I acknowledge my error with the greatest pleasure. It has always been my pride to do what is right. This is my statement, sir.

LEAVES OF ABSENCE.

Mr. R. WALTON MOORE asked and obtained leave of absence until Monday for Mr. Glass.

Mr. GREEN asked and obtained leave of absence for five days, beginning Monday next, for Mr. George W. Jones.

Mr. RIVES asked and obtained leave of absence for two days, beginning Monday next, for Mr. Epes.

Mr. GARNETT asked and obtained leave of absence for two days, beginning to-morrow, for Mr. Bristow.

Mr. FLOOD asked and obtained leave of absence for two days, beginning to-morrow, for Mr. Pettit.

Mr. EGGLESTON: I wish to ask leave of absence for the members of the Committee on Public Institutions and Prisons for one day, to-morrow.

The PRESIDENT: The gentleman from Charlotte moves that leave of absence be granted to the Committee on Public Institutions and Prisons for one day.

The motion was agreed to.

PETITIONS AND MEMORIALS.

Mr. CHAPMAN presented petitions of voters of Shenandoah county approving the resolution submitted by Mr. Quarles, relating to the granting of liquor licenses; which were referred to the Committee on Preamble and Bill of Rights.

Mr. HUNTON presented a memorial of the Potomac Baptist Association remonstrating against the appropriation of public funds to any institution wholly or partly under sectarian control; which was referred to the Committee on the Legislative Department.

SCHOOL STATISTICS.

The PRESIDENT laid before the Convention the following communication, which was read, and, on motion of Mr. O'Flaherty, ordered to be printed and referred to the Committee on Education and Public Instruction.

Commonwealth of Virginia.
Department of Public Instruction,
Superintendent's Office.
Richmond, Va., September 12, 1901.

To the Hon John Goode, President Constitutional Convention, Richmond, Va.:

Dear Sir,—In compliance with a resolution adopted by the Constitutional Convention requesting the Department of Public Instruction to furnish that body with the total cost of the white and the colored public schools for the school year ending July 31, 1901, I have the honor to report I have received carefully compiled reports from all the counties and cities of the Commonwealth, except the city of Petersburg and the counties of Alexandria and Warwick. From the figures furnished by the counties and cities that have sent in reports, I am able to submit to your honorable body the following statement:

Total cost of white schools for the year ending July 31, 1901, excluding Alexandria county, Petersburg and Warwick	$1,365,680.15
Estimated for Alexandria county, Petersburg and Warwick	23,000.00
Total cost of white schools	$1,388,680.15
Total cost of colored schools thus far reported	$419,549.56
Estimated for Alexandria county, Petersburg and Warwick	11,000.00
Total cost of colored schools	$430,549.56
Total cost of white and colored public schools	$1,819,230.71

The foregoing estimate does not include the salaries of the county and city superintendents nor the expenses of the Department of Public Instruction.

I am, with great respect,
Joseph W. Southall,
Superintendent Public Instruction.

RESTRICTIONS ON CREATION OF NEW OFFICES.

Mr. GREEN: I am authorized by the Committee on Preamble and Bill of Rights to call attention to the fact that resolution No. 250, patron Mr. Barham relating to restrictions upon the legislative power to create new offices, has been referred to the Committee on Preamble and Bill of Rights. The Committee, on consideration, think it properly belongs to the Committee on the Legislative Department, as it proposes a restriction on the legislative power. We ask that the Committee on Preamble and Bill of Rights be discharged from its further consideration and that it be referred to the Committee on the Legislative Department.

The PRESIDENT: That order will be made in the absence of objection.

PENSION APPROPRIATIONS.

Mr. R. WALTON MOORE: A memorial of the McCready Camp of Confederate Veterans as to the pension appropriations was referred to the Committee on the Legislative Department. It would seem that the proper reference would be to the Committee on Taxation and Finance.

The PRESIDENT: That refernce will be made in the absence of objection.

METHOD OF APPROPRIATING MONEY.

Mr. R. WALTON MOORE: Resolution No. 255, relative to the method of appropriating money and paying it out of the treasury, was referred to the Committee on the Legislative Department. It would seem that it should go to the Committee on Taxation and Finance.

The PRESIDENT: That reference will be made.

APPROPRIATIONS FOR THE EXECUTIVE DEPARTMENT.

Mr. R. WALTON MOORE: There was referred to the Committee on the Legislative Department a resolution relating to the method of appropriating money for the support of the Executive Department of the Government. It would seem that it should go to the Committee on the Executive Department.

The PRESIDENT: It will be referred to the Committee on the Executive Department, if there be no objection.

CALL OF COMMITTEES.

The PRESIDENT: The Secretary will call the list of standing committees.

The Secretary called the list.

AMENDMENT OF THE RULES.

The PRESIDENT: The unfinished business is the motion of the gentleman from Rockingham (Mr. Keezell) to reconsider the vote of the Convention adopting the resolution offered by the gentleman from Fairfax (Mr. Moore) proposing a change of Rule 6. What is the pleasure of the Convention?

Mr. C. J. CAMPBELL: I move that it be passed by.

The motion was agreed to.

BILL OF RIGHTS.

Mr. GREEN: I move that the Convention go into Committee of the Whole for further consideration of the report of the Committee on Preamble and Bill of Rights.

The motion was agreed to, and the Convention resolved itself into Committee of the Whole upon the report of the Committee on Preamble and Bill of Rights, Mr. Turnbull in the chair.

The CHAIRMAN: The question before the committee is the adoption of section 8 of the Bill of Rights. The imediate question for consideration is the amendment of the gentleman from Fauquier (Mr. Hunton.) The Secretary will state the amendment.

The SECRETARY: It is proposed to insert after the word "offense," in line 7, the following:

"Except that an appeal may be allowed to the Commonwealth in all cases for the violation ofa law relating to the State revenue."

So that if amended the clause would read:

"Nor shall any person be put twice in jeopardy for the same offense, except that an appeal may be allowed to the Commonwealth in all cases for the violation of a law relating to the State revenue."

The amendment was agreed to.

The CHAIRMAN: The question is on the adoption of section 8 of the Bill of Rights as amended. The Secretary will read the section as amended.

The Secretary read as follows:

8. That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of his vicinage without whose unanimous consent he cannot be found guilty; nor shall any person be twice put in jeopardy for the same offense; except that an appeal may be allowed to the Commonwealth in all cases for the violation of a law relating to the State revenue; nor can he be compelled to give evidence against himself; that no man be deprived of his life or liberty, except by the law of the land, or the judgment of his peers.

But in any criminal case, upon a plea of guilty, tendered in person by the accused and with the consent of the attorney for the Commonwealth entered of record, the court shall, and, in prosecutions for a misdemeanor, upon a plea of not guilty, with the consent of the accused and the attorney for the Commonwealth entered of record, the court may, in its discretion, hear and determine the case without the intervention of a jury; and the General Assembly may by law provide for the trial by a justice of the peace, without a jury, of persons accused of criminal offences not punishable by death or confinement in the penitentiary, but in all such cases the General Assembly shall preserve the right of the accused to an appeal and trial by jury in the appellate court.

The General Assembly may provide by law for juries consisting of less than twelve men for the trial of persons accused of criminal offences not punishable by death or confinement in the penitentiary, and may classify such cases and prescribe the number of jurors for each class of cases. Provided, that no such jury shall consist of less than five men.

The CHAIRMAN: The question is on agreeing to the section as amended.

The section as amended was agreed to.

The CHAIRMAN: The question is on the adoption of section 11, which the Secretary will read.

The Secretary read as follows:

11. That in controversies respecting property, and in suits between man and man, a trial by jury is preferable to any other, and ought to be held sacred; but the General Assembly may, by law, prescribe any number less than twelve, but not less than seven, to constitute a jury.

Mr. GREEN: Mr. Chairman, before amendments are offered, I ask leave to say for the committee that after the word "law," in the fourth line of the eleventh section, it is desirable to insert " in such cases," so that it will read, "But the General Assembly may, by law, in such cases prescribe," &c. I will state that that is done for the purpose of yielding to the hypercriticism of some gentlemen of the Convention. I do not myself think it at all necessary, and I do not think any member of the committee thinks it necessary, but there are several hypercritical gentlemen in the Convention. It does not alter the sense or change the sentence in any way, and I am perfectly willing that it shall go in. The sentence will then read:

"But the General Assembly may, by law, in such cases prescribe any number less than twelve."

The CHAIRMAN: Notice has been given on previous days of amendments that would be offered.

Mr. BRAXTON: I desire to offer an amendment to section .11 It is somewhat different from the form in which it was originally proposed to offer it. I move to strike out the words:

"But the General Assembly may, by law, in such cases prescribe any number less than twelve, but not less than seven, to constitute a jury."

And in lieu thereof to insert the following:

"Juries in civil cases shall consist of seven men. A majority of not less than two-thirds of any such jury may render a verdict upon the failure of the jury to agree unanimously after six hours of deliberation."

The CHAIRMAN: Will the gentleman from Augusta send his amendment to the desk so that it may be stated by the Secretary?

Mr. BRAXTON: Certainly.

The CHAIRMAN: The amendment proposed by the gentleman from Augusta will be stated.

The SECRETARY: The gentleman from Augusta proposes to strike out in section 11, line 3, all after the word "sacred," as follows:

"But the General Assembly may, by law, in such cases prescribe any number less than twelve, but not less than seven, to constitute a jury."

And to insert in lieu thereof:

"Juries in civil cases shall consist of seven men. A majority of not less than two-thirds of any such jury may render a verdict upon the failure of the jury to agree unanimously after six hours of deliberation."

So as to make the section read:

"That in controversies respecting property, and in suits between man and man, a trial by jury is preferable to any other, and ought to be held sacred. Juries in civil cases shall consist of seven men. A majority of not less than two-thirds of any such jury may render a verdict upon the failure of the jury to agree unanimously after six hours of deliberation."

Mr. HANCOCK: I should like to have the amendment again read.

The Secretary again read the amendment.

Mr. GREEN: Can the gentleman give me the number of the amendment?

Mr. BRAXTON: It has no number. It is simply an amendment which has been offered.

Mr. HANCOCK: I should like to inquire of the gentleman from Augusta what is two-thirds of seven?

Mr. BRAXTON: I say not less than two-thirds. It would be five, I suppose.

The CHAIRMAN: The question is on agreeing to the amendment proposed by the gentleman from Augusta.

Mr. BRAXTON: Mr. Chairman, in the interest of public economy, in the interest of the efficient administration of justice, and in the interest of preserving and perpetuating the jury system in this country, I propose that we abolish the rule requiring unanimity in verdicts.

A deep reverence is entertained by some for this unreasonable and anomalous rule, because of its antiquity, which is generally supposed to be much greater than it really is. Since the researches of the German scholar, Dr. Brunner, it has been generally conceded that the English civil jury, which, by the way, is several centuries older than the criminal jury, came not from the forests of Germany, as Montesquieu says, but originated in England, as the outgrowth of an "inquisition of witnesses", created by the Carlovingian kings of France to establish the facts in controversies concerning the royal estates, and was not derived, but was essentially different, from the ancient "folk-courts."

These early "folk-courts" were not bound by the unanimity rule, nor were any of the older tribunals. The judicium parium of Magna Charta was not unanimous. In all tribunals known to man, those of ancient Egypt, the Grecian dicasts, the Roman judices, and the courts of the ancient Germans and Anglo-Saxons, the Britons and the Normans the majority rules. How, then, did this anomaly of jury unanimity arise? The answer is, that it had its origin when the jury was not a tribunal at all, but merely a body of witnesses, summoned, not to decide upon evidence, but to prove facts.

The policy of the law in requiring more than one witness to establish a fact is as old as law itself. In the ancient laws of the Hebrews it was essential that "in the mouth of two or three witnesses shall every word be established," and even now we have the requirement of two witnesses to prove a will or upset the force of a sworn answer in chancery. So it was at the inception of the jury system that twelve witnesses were required to establish a disputed fact.

Why twelve was fixed upon is not known. Some think it was by analogy to the twelve apostles; but it is known to have been a mystic number in the superstition of many ancient people, unfamiliar with the Christian Bible, notably the ancient Scandinavians. Whatever the true reason be, it was evidently based upon pure superstition, for every man will now admit that there is no more virtue in twelve than in six, or any other number. The law, however, required twelve witnesses to agree upon a disputed fact, in order to establish it; and so, when the first twelve jurors or witnesses that were summoned failed to agree, they were "afforced" by summoning additional witnesses, till twelve were found that did agree. This grew to be inconvenient, and the rule requiring twelve witnesses to concur was relaxed, and the concurring evidence of a majority of the twelve was taken.

Then in the reign of Edward III., in the latter part of the 14th century the Court, in its characteristic English zeal for upholding the forms of antiquity, restored the rule of twelve witnesses; but being unwilling to resort to the inconvenient and expensive "afforcement" process to effect it, took the short cut of saying the Court would compel the original twelve to agree, by holding them "sine cibo et potu" till they did agree. The very reasoning upon which this remarkable rule was based showed the Court's recognition of the majority rule; for it was said that the minority were inexcusable in holding out against the majority; that, as they were all mere witnesses to the same fact, if the majority agreed upon what that fact was, nothing but stupid obstinacy, "impious stubbornness" or corruption could account for the minority taking a different view about a matter of plain fact and not involving opinion or judgment at all.

Thus the unanimity rule was established; and it is to an origin based upon such essentially different conditions, and such absurd and illogical reasoning, in an age of intellectual night, that the modern advocates of unanimity cling with superstitious veneration. Gradually, and by slow degrees, the jury was transformed from a body of witnesses to prove, to a judicial tribunal to determine, facts; but, with characteristic tenacity for old things, the law held on to the unanimity rule, long after any reason, even imaginary, had continued to exist.

It must not be thought, though, that our very practical ancestors had any idea of putting up with the inconvenience of hung juries, for such things were practically unknown to the common law. First, because the facts submitted were of the simplest character, and second, because the unanimity desired was compelled by forcing the minority to yield to the majority, or otherwise.

Lord Chief Justice Cockburn in the case of Winsor vs. the Queen, reported in 118 Common Law Reports, page 170, referring to this subject, says:

"Our ancestors insisted on unanimity as of the essence of the verdict, but were unscrupulous how that unanimity was obtained. Whether the minority gave way to the majority, or the reverse, appeared to them a matter of indifference: it was a contest between the strong and the weak, the able-bodied and the infirm, as to who best could bear hunger and thirst, and all the discomfort incident to confinement. It has also been said that it was competent to, or was the duty of the judge, to take a jury who could not agree on their verdict in carts to the confines, or even beyond the confines of the country. That notion is founded upon loose dicta in the book of Assizes, servilely copied by text-writers on criminal jurisprudence. I doubt whether it was ever done; and there is nothing extant on record to show that such was ever the practice. In our day we look upon trial by jury and the principle upon which juries ought to find their verdicts in a different way."

So you will see that the judges who first restored the unanimity rule did so under circumstances which absolutely precluded the idea of there being any such thing as a hung jury.

That this absurd practice should have existed and continued for years seems past belief. At last reason and humanity partly asserted themselves, and the compulsion feature was dropped, though the unanimity rule was retained, with the result that a large portion of our modern jury trials are failures.

The utter folly of adhering to the unanimity rule (which not only had its origin in an age of darkness, but was based upon essentially different conditions, and no longer has to support it even the semblance of reason upon which it was originally based), has been again and again pointed out by lawyers, judges, statesmen and philosophers. The celebrated John Locke condemned it and favored the majority rule. Hallam, in his "History of the Middle Ages," calls it: "A preposterous relic of barbarism."

Prof. Christian, in his edition of Blackstone, says it "is repugnant to all rules of human conduct, passions, and understanding," an opinion which was afterwards concurred in by Judge Cooley, who adds that the rule "could hardly in any age have been introduced into practice by the deliberate act of a Legislature."

Jeremy Bentham and Lord Brougham, in their report to Parliament on the rule in 1830, denounced it as "no less absurd than barbarous."

The celebrated South Carolina professor, Dr. Leiber, in commenting upon the rule of unanimity—and I will say in passing that this country has never produced a sounder or more profound thinker upon such subjects than Doctor Leiber—says:

"It is my firm conviction, after long observation and study, that the unanimity principle ought to be given up."

Nearly every bar association in America which has acted on the subject has condemned the rule. The learned editor of the Virginia Law Register, Prof. Lile, of the University of Virginia, has repeatedly urged reform in this matter.

When the Harvard Law School was admitted as a member and constituent of the university, it celebrated the occasion by a thesis 'Against the unanimity rule (in verdicts of juries) in civil cases."

Forsyth, in his well-known work on jury trials, greatly condemns the unanimity rule, saying:

"The time is fast approaching, if it has not already come, when trials by jury, like every other part of our legal fabric, will become the subject of public criticism; and I feel persuaded that it will be found impossible to justify or retain a rule which is opposed to both justice and expediency."

The late Justice Miller, of the United States Supreme Court, who was believed by many men to have been the equal in ability of any judge who has ever sat upon that bench, in an article on the subject published in the American Law Register for December, 1887, said:

"It has always appeared to me"——

This is the opinion of one of the ablest judges of the highest court in the land——

"It has always appeared to me, and it does now, a very great hardship that a plaintiff asserting a right in a court of law could only enforce that right by securing an unanimous verdict of twelve men in his favor; that, however, clear it may appear to eleven of those men that he has established a case for the recovery of a judgment, the resistance of a single man can deprive him of it. When we consider how many motives may influence men to inconsiderate action, or how many prejudices enter the jury box, or how much stupidity may prevail over clear sense and sound judgment, all of which elements are as likely to be found among jurors, as anywhere else, it is, to say the least, a very serious drawback in the system of trial by jury that one man, influenced by any such motives, may render nugatory the labors of a long trial, the evidence of innumerable witnesses, the clear instructions of the court, while all the other members are ready to recognize the right established by the plaintiff.

"The same principle applies to a defendant, who having struggled through the course of a trial, finds perhaps that ten or eleven of the jurors are ready to say by their verdict that there is no cause of action established against him, and yet, because of one or two undisciplined minds not being able to agree with the majority, the whole trial is rendered useless and must be gone through with again.

"As I have already called attention to the results of my experience in the case of the judges, it is not usual in human nature for as many as twelve men to take the same view of all the circumstances of fact controverted in a judicial trial, unless the case be so plain as almost to remove all doubt upon the subject. And yet, in civil actions the verdict in a jury trial, according to law, goes upon the preponderance of evidence, upon a balancing of the weight of the testimony, giving the result to the side which has the strongest evidence, comparing the testimony of different witnesses to contradict each other, and weighing their character for observation and sagacity. To establish as a proposition that these trials shall all be nullities, and that a man's rights shall not be enforced judicially unless all the twelve agree, is to me almost an absurdity."

Mr. Chairman, I cannot cite to the committee any higher authority than that.

In an article read before the Missouri Bar Association in 1899 by the distinguished Judge, Henry C. Caldwell, of the United States Circuit Court, he said:

"The unanimity rule had its origin in the dark ages, and is one of the common law relics of barbarism and superstition * * * * * Several States of the Union have abolished it with the happiest results, and in almost all countries where jury trial has been introduced in modern times, the practice is unknown * * * * All reason and analogy is against the practice. In all political and social matters, and in all other judicial proceedings, the majority rule obtains. A majority of one will elect every officer in the republic, from President to road supervisor, and enact any law, State or national. The rule never did govern judges. In a court composed of three or more judges, the majority dictates the decision. In the last advance sheets of the decisions of the United States Supreme Court is a case decided by a vote of five to four"——

Which I may mention in passing were the income tax cases——

"And many cases in that court of the very greatest importance are decided by the same close majority. A contest for President of the United States was decided by a vote of 8 to 7, by the tribunal constituted to try it. Many cases occur about which men can no more think alike than they can look alike. The diversity of opinion is not due to perversity or want of understanding, but to the honest difference of human opinion, without which the body-politic would become torpid and the State perish with the dry rot. If the unanimity were tantamount to infallibility, there would be some reason for the rule; but there is no more infallibility in twelve men than in seven or nine. Its baneful effects on the jury and on the administration of justice are very great. The superstition should be abolished by law."

Many of the most experienced judges, and, I believe, a large majority of the bar, of this State, condemn the unanimity rule.

Mr. Justice Brewer, of the United States Supreme Court, denounces the unanimity rule in civil juries as an absurd and unreasonable thing and a great obstruction to the proper administration of justice.

Mr. O'FLAHERTY: Will the gentleman permit me to ask him a question?

Mr. BRAXTON: Certainly.

Mr. O'FLAHERTY: Would not the provision in your amendment requiring a six-hours limit put it absolutely in the hands of any one of the jurors to reach a two-thirds vote? Would he not only have to say, "I will just hold out until the limit, and then I will compel them to reach a two-thirds vote?"

Mr. BRAXTON: Yes, sir; possibly that is true if he will hold out to the limit. I will comment on that point before I get through.

Mr. O'FLAHERTY: Why not eliminate it entirely? It would be absolutely nugatory.

Mr. BRAXTON: The discussion of that point is a little out of the order of my remarks. I will come to it, I will say to the gentleman, before I complete my remarks.

I am reading these quotations to the committee to show that this is no new idea of mine, that this is no new thing, that the unanimity rule has been condemned almost universally by men who have been in the best position to judge of it. I have read to you the authority of historians, of philosophers, of law professors, of judges.

I will now mention the fact that former Governor Koerner of Ilinois, in one of his annual messages, referred to the unanimity rule as "that illogical unanimity rule, which has been a great source of injustice, and consequently a denial of justice." Governor Carpenter, of Iowa, in one of his annual messages, termed it "that antique absurdity which has too long fettered the administration of justice."

Mr. GEORGE K. ANDERSON: Will the gentleman allow me to interrupt him?

Mr. BRAXTON: Yes, sir.

Mr. GEORGE K. ANDERSON: It would be a gratification to some of us if you would tell us something about who these judges are. I am not familiar with all of them.

Mr. BRAXTON: Judge Samuel Miller was a very distinguished Justice of the United States Supreme Court.

Mr. GEORGE K. ANDERSON: I know of him.

Mr. BRAXTON: Justice Brewer is a present member of that court. Judge Caldwell is one of the most distinguished Federal Circuit Court judges in the United States. I think they are the only judges I have quoted.

Mr. GEORGE K. ANDERSON: In what State is Judge Caldwell; where is his circuit?

Mr. BRAXTON: I think it includes Arkansas. Little Rock, I think, is his home.

Mr. GEORGE K. ANDERSON: I merely wanted to know, if the gentleman will excuse me, who these gentlemen are.

Mr. BRAXTON: Unfortunately for me, I have no acquaintance with Judge Caldwell, but our distinguished President tells me that he is regarded as one of the very ablest of all the Federal Circuit Court judges in the United States.

Mr. GEORGE K. ANDERSON: I desired to know where the gentlemen come from, who they are, and what courts they represent.

Mr. BRAXTON: I suppose it is hardly necessary for me to tell who Judge Cooley was.

Mr. GEORGE K. ANDERSON: I know of him. Who was the last judge you mentioned, Judge Koerner?

Mr. BRAXTON: He was a Governor of the State of Illinois.

Mr. GEORGE K. ANDERSON: What is he now?

Mr. BRAXTON: I do not know. He may be an angel, sir. (Laughter.)

Mr. GEORGE K. ANDERSON: What was he when he made the report you refer to?

Mr. BRAXTON: I cannot hear the gentleman.

Mr. GEORGE K. ANDERSON: I wish to know what position he occupied when he made the report you have referred to.

Mr. BRAXTON: He did not make a report. It was in his annual message to the Legislature.

Mr. GEORGE K. ANDERSON: Ah, he was a Governor.

Mr. BRAXTON: And so with Governor Carpenter, of Iowa. I want to read the committee the opinions of all sorts and conditions of men, so that they can see that this is a general opinion, and not restricted to men of only one walk in life; that it is shared in by men of all sorts and shades of opinion and all sorts of experience.

Mr. Chairman, I have so far been quoting the opinions of these men as to what ought to be done. I will now call the attention of the committee to the cases in which this reform has actually been tried, not a matter of opinion, but a matter of experience.

In the code of civil procedure of British India in 1882, it is provided that the majority rule shall obtain in all civil cases, and in a number of the most flourishing English colonies the same rule has been adopted. By act of Parliament of 1854 the majority rule in civil cases as applied to Scotland was adopted.

Mr. HANCOCK: Will the gentleman allow me to ask him a question?

Mr. BRAXTON: Yes, sir.

Mr. HANCOCK: What is the number of the jury in those cases?

Mr. BRAXTON: I cannot tell you, sir. As to the number of the jury and the question of unanimity, I think they are separate subjects, and I shall ask that they be voted on separately when we come to vote upon them.

Mr. QUARLES: The jury in Scotland is sixteen.

Mr. BRAXTON: It is fifteen, I think.

Mr. QUARLES: It is sixteen.

Mr. BRAXTON: The gentleman knows. But that applies only to Scotland, I think.

Mr. Chairman, I learn from sources which I deem reliable that the unanimity rule in verdicts has been abandoned in Louisiana, California, Nevada, Iowa, Texas, Missouri, Washington, Colorado, Florida, Idaho, South Dakota, North Dakota, Michigan, Montana, Wyoming, Kentucky, Nebraska, New Jersey and Connecticut; and it has been urged by the Legislatures of New Hampshire and Wisconsin. So far as I have been able to learn, the result has been one of entire satisfaction to all parties, and in no case where the step has once been taken has it ever yet been abandoned.

From these observations it will be seen not only that the unanimity rule is an anachronistic absurdity, but that its abolition has been persistently urged by the almost unanimous concurrence of modern thought and experience, and that wherever it has been abolished the experiment has proved msot successful, without a single solitary exception, so far as I know.

Mr. Chairman, in the matter of economy, the abolition of the unanimity rule will save many thousands of dollars to the public treasury and to the litigants in the courts. Professor Lesser, in his work on the present aspect of the jury system, vehemently denounces the unanimity rule, and declares that in consequence of its enforcement "the number of mistrials is enormous."

An able writer in a recent issue of the Legal Advertiser states that "not less than twenty per cent. of important jury cases are abortive by reason of disagreement;" and in a recent discussion of the question in the Alabama Constitutional Convention, it was stated on the floor of the Convention that at least twenty-five per cent. of the cases submitted to juries in that State resulted in mistrial, because of the inability to reach a unanimous verdict. Of course, every retrial of a case is a double expense, not only to the Commonwealth, but to each of the litigants.

We all know that in the trial of these civil cases immense, and I may say almost incalculable, expense is incurred and paid by the litigants, to say nothing of the cost of the jury paid by the community; and every time that thing occurs it is a repetition of all that expense. Whatever that expense may be, be it great or small, according to these figures from one-fourth to one-fifth of the entire expense will be saved by this provison, which will prevent the recurrence of hung juries.

In the interest of justice, the advantage would be still greater. It is absurd to presume that verdicts are the result of the actual concurrence of opinion of the twelve jurors. It is known that in every walk of life it is practically impossible to find twelve men who will agree unanimously upon any given state of facts involving an appreciable complexity; and the so-called unanimous verdicts are, in nine cases out of ten, the result of an abandonment of their real views by the various members of the jury. Professor Lesser, in his work on the jury system just quoted, says that "A curious investigator of such matters has calculated that the probability of a unanimous verdict being honest and without compromise or concessions, is one in five hundred thousand."

The great inconvenience and expense of the unanimity rule could only be justified on the theory that the concurrent verdict of the entire jury is infallible; and yet the law permits the single judge to set aside a verdict as contrary to the evidence, notwithstanding that this infallible tribunal has passed upon it unanimously, thus attributing to this one man more wisdom than to the twelve members of the jury, notwithstanding their unanimity.

In all branches of our government, and, so far as I know, in those of any other government upon earth, there is no analogy for this unanimity rule for juries. One man's vote can elect our President, and can practically declare for peace or war. One man's vote upon the Supreme Court decides the questions which a jury can only pass on by unanimous vote.

By far the larger part of property values are litigated in courts of chancery, and are either passed upon by a single man or, when taken into the Court of Appeals, are determined by a bare majority. The Court of Claims, which annually passes on millions of dollars in controversy, decides all questions of law and fact by a bare majority; and so in Admiralty Courts. This very Convention, by a majority of one vote, may decide upon the fundamental laws controlling the lives, the liberties and the property of every citizen in the Commonwealth.

By the unanimity rule opportunity is given to every stupid, corrupt or prejudiced man who may accidentally get upon a jury to effectually stop the wheels of justice. What better field of operations can the jury fixer desire than one in which it is only essential for him to tamper with one man out of twelve? And the danger of this is no mere theoretical surmise. In 1899, an investigation into the jury system of Chicago revealed the fact that seven bailiffs of the court were implicated, several of them being in the "regular hire" of certain corporations. Twenty jurors, in their scramble to turn State's evidence, testified to having either actually received money or that they were offered it, to hang juries. How often does it occur, in the experience of every pratitioner, that it is the universal consensus of opinion when certain men are seen upon juries, that, regardless of the evidence and the law, those juries will inevitably hang.

How disastrous is it to the rights, especially of the poor litigant, when he has expended his last farthing and utmost effort to bring his case to trial, to have the whole thing end in a miserable fiasco without any verdict at all, because forsooth, he was unable to do that which no litigant before any other tribunal on earth is required to do, to-wit: convince every single one of his judges of the merits of his controversy. And how often is this power to wear out and exhaust a litigant availed of by rich corporations, to avoid the consequences of righteous verdicts against them which they cannot escape by any other means.

The whole theory of civil trials is that the facts need only be proved by a preponderance of the evidence. The utter exclusion of any reasonable doubt does not apply to civil trials. The reasons which prevail to sustain the rule requiring unanimity in criminal cases does not apply to civil cases. In the criminal cases the fact must be proved beyond a reasonable doubt, and as long as one man out of twelve has such doubt or does not agree at least with the others, that shows the existence of a reasonable doubt.

But when you come to a civil trial it is merely a question of the preponderance of evidence, and when in such a case as that you require absolute unanimity in the jury, you are simply requiring of the jury as a whole a consensus of reasoning not required of the faculties of any member of the jury as an individual.

I also urge this change in the interest of the preservation and perpetuation of our jury system. The unreasonableness of the rule, the inconvenience, the expense, the unastisfactoriness of its operation, all concur, as much as anything that can be devised, to make the jury sytem unpopular and unsatisfactory. Many thoughtful writers are to-day demanding that the entire jury system shall be abolished as utterly unsuited to modern times. In many States statutory regulations have been introduced, as in Masachusetts and Michigan, discouraging jury trials and accustoming the people to do without them; and many writers on the subject have pointed out the great danger to the preservation of the system resulting from the adherence to this absurd rule of unanimity.

Dr. Leiber, whom I have quoted before, as far abck as 1868 said, in speaking of this danger:

"It is by no means certain that, without some change in this matter of unanimity, the jury system can stand."

Mr. R. WALTON MOORE: How far back?

Mr. BRAXTON: In 1868. And again Dr. Leiber said:

"It is by on means certain that without some change, like that of the abolition of unanimity, the right fo trial by jury, one of the abutments on which are arch of civil liberty rests, can be prevented from giving way in the course of time."

Many other writers of distinction, including some of the Justices of the Supreme Court of the United States, have pointed out this great danger to the entire jury system.

In 1890, Hon. William J. Bryan, which in this country was once a name to conjure with, introduced into Congress a bill abolishing the unanimity rule in the United States courts, which he denounced as one of the evils that threatened the jury system.

The large corporations have generally been the ones from whom the principal objections to this change have come. Their argument assumes that they cannot get justice before any jury, and that when they go before such a tribunal they can only rely upon the one righteous man in Sodom to save them.

The whole opposition to the majority rule on a jury proceeds on the mistaken hypothesis that virtue and intelligence are always in the minority on a jury. This I deny. It is true that in some cases the minority will be found to be right; but I submit that in juries, as in every other instance, the rule will be that the majority, especially if a substantial majority, are right, and the minority are wrong.

Gentlemen who oppose the view that I take of this matter will cite you to cases where by one man holding out and hanging the jury an injustice was prevented. But where that occurs once, sir, the one man who hangs the jury against the opinion of the great majority ninety-nine times out of one hundred is wrong, unless it is that virtue and intelligence are always in the minority on the juries of our land.

Mr. Chairman, it is to the interest of the Commonwealth that there be an end to litigation, instead of cases being kept on the docket, and tried and retried and tried again, keeping alive the feeling of animosity in the community, exhausting the litigants with expense, and draining the treasury of the State, it is better that some few cases should be decided wrong. Wherever the error is gross, it can be set aside by the judge and corrected, just as it is done now; and the lawyers, instead of satisfying themselves with playing upon the prejudices of one or more individuals with a view to hanging the jury, will have to address themselves to the more serious task of convincing the majority of the jury so as to get a verdict.

Mr. Chairman, one of the arguments which has been urged by the opponents to the view I take is that by the unanimity rule the jury are compelled to stay together and discuss the case, and that they are thereby prevented from arriving at hasty and ill-considered verdicts. In order to meet that, I propose to provide that the verdict can not be brought in in less than six hours, unless it is unanimous. So, in case the jury is not unanimous they must stay there and discuss it at least six hours. But it is fair to assume that if in six hours you can not convince the other man, you can not convince him at all; and the question then comes whether you shall have a miscarriage of justice, an abortive attempt to get what the litigants are entitled to, or whether you will say to them, as you say to almost every tribunal on earth, that a majority shall determine, certainly a majority of two-thirds, which in the cases I mention will amount to five-sevenths; and if you can convince them you have convinced just as big a proportion of your judges as men are required to do before any other tribunal on the face of the earth.

The findings of a jury are not absolutely accurate. Nothing short of the omniscience of the mighty God can be that. You only wish to get at facts as near as it is practicable to get at them. You only wish to introduce enough evidence to satisfy the jury by a preponderance of the evidence, and a preponderance of two-thirds of the members of the jury is certainly a sufficient preponderance.

I think, sir, that you accomplish everything that can be desired to prevent hasty and ill-considered verdicts when you have the provision which is included in my amendment, that they shall not find a verdict by two-thirds until they have been in consultation at least six hours. If they come to a unanimous decision they can render it at any time, but if after six hours they cannot agree unanimously, then two-thirds of them may render the verdict.

Mr. Chairman, when this reform, which I regard as a most important and desirable one, is accomplished, the burden the jury is now to the public, to the men from whom the juries are drawn, will be infinitely relieved. You will get better men to serve upon your juries, because the service is not so burdensome to them. At present you have men joining all sorts of associations, fire companies and associations of every kind, and bills coming up in the Legislature to exempt this kind of a man and that kind of a man from jury service, and all sorts of excuses, until frequently in cities it is only the indifferent class of men whom as a general rule you can get to serve on juries, because the man knows he may be held there indefinitely, and, after all, his work may go for nothing.

Mr. MEREDITH rose.

Mr. BRAXTON: A man can sacrifice his time when he accomplishes something, but no man wants to sit there week in and week out and spend two or three days in consultation and then the whole thing go out in smoke. I think one result, amongst others, of this reform will be to get a better class of men to serve upon the juries. I will hear the gentleman from Richmond.

Mr. MEREDITH: I simply wish to ask whether you do not think that your argument against the unanimity of the jury ought to depend very much on the size of the jury. If you reduce the jury from twelve to seven, do you not know that all these remarks which have been made by text-writers and judges and philosophers would be inapplicable, more or less?

Mr. BRAXTON: No, sir.

Mr. MEREDITH: Do you think that when sevn is the number, the same argument ought to apply?

Mr. BRAXTON: I think so.

Mr. MEREDITH: Taking into consideration what is generally the character of jurors?

Mr. BRAXTON: I think so. I think by reducing the number to seven you will get a better class of men on the jury. I think the right and reason in requiring the litigant before the court to assume the burden of proving his case to the satisfaction of every single solitary man of the judges, whether they be jurors or not, is just as great, and that the argument which has been adduced on this subject is just as applicable to a jury of seven as it is to a jury of twelve. There may be some difference of degree. Of course the more men there are on the jury, the easier it is for the jury to hang, and the fewer, the less easy. But it is a mere matter of degree, and I insist that the rule and the reason prevail with just as much force where the number is seven as where it is twelve.

Mr. HANCOCK: May I ask the gentleman a question?

Mr. BRAXTON: Yes, sir.

Mr. HANCOCK: You cite the case of the Supreme Court of the United States where five judges may control, which is a majority of only one. Is there not an essential difference between the decision of a question of law and a question of fact?

Mr. BRAXTON: There is some difference between the trial of a question of law and a question of fact, but sometimes questions of fact come before the Supreme Court; and in all chancery cases they are decided by the single chancellor. There are just as many questions of fact before the court, and if anything more, than there are before a jury.

Now, Mr. Chairman, as to the reduction of the jury to seven, I have very little to say. It seems to me that if this committee has seen fit to reduce juries to seven, as we have done, in misdemeanor cases, and if seven men can be trusted to try a criminal case, although a misdemeanor case, they certainly can be trusted to try a civil case, and by doing that we cut down the expense of the jury five-twelfths, whatever that expense may be.

In my own county, sir, for many years the jury system has been practically a jury of seven. I do not recall, except in cases of damage suits against big corporations, where we have ever had anything but a jury of seven. I do not mean to say that it never occurred; but I do not recall any case occurring; which makes me satisfied that if it occurs at all it is exceedingly rare. These juries have given absolute and entire satisfaction to our people. We have found that we can get a verdict just as well from seven men as we can from twelve.

A writer in the London Times in 1872 or 1873 mentions the fact that for a long time in England juries of seven, by consent of the parties, had been tried and found entirely satisfactory; that in nearly every case where it was permitted by consent of the parties they did consent to it, and that it was found to give entire satisfaction. It is very much less burdensome upon the people. You take off only seven men from their ordinary avocations instead of twelve.

I say, finally, Mr. Chairman, when you have relieved the jury system from the unreasonable and burdensome provisions and restrictions which now load it down you will have done more than you can by any other act possible to render the system popular and to perpetuate it. You will have made it less burdensome to the people. You will have taken out of the mouths of the people who would like to see the jury system abolished and are always decrying it, the strongest argument they can bring to tempt the people to abandon this ancient protection to their rights.

I think, sir, from every view you may take of it, the opinion of theorists, the recommendation of practical men, the absolute and unbroken experience of innumerable communities, the fact that all reason is in favor of it, when you have made that change you will not be treading on untried ground; you will be going by paths that have been tried and experimented in by others and that have been found safe and satisfactory; and you will have relieved the people of this Commonwealth of a great and some times almost unbearable burden in the administration of civil justice.

I thank you, Mr. Chairman.

Mr. PETTIT: Mr. Chairman, there is scarcely one thing connected with the governmental history of Virginia which has given more prominence in that history, legislative, constitutional and juridical, than the principle and the policy and the determination to preserve intact the ancient trial by jury. If my friend had lived in the days of Mason and Jefferson, would he have been then found there contending that those great men were the serious, the determind, th earnst advocates of something that is absurd? Why did he not propose as one of his amendments to the Bill of Rights that the word "sacred" should be stricken from it? So earnestly were they convinced and of the

(CONCLUDED ON PAGE 3.)