MAINE STATE LEGISLATURE

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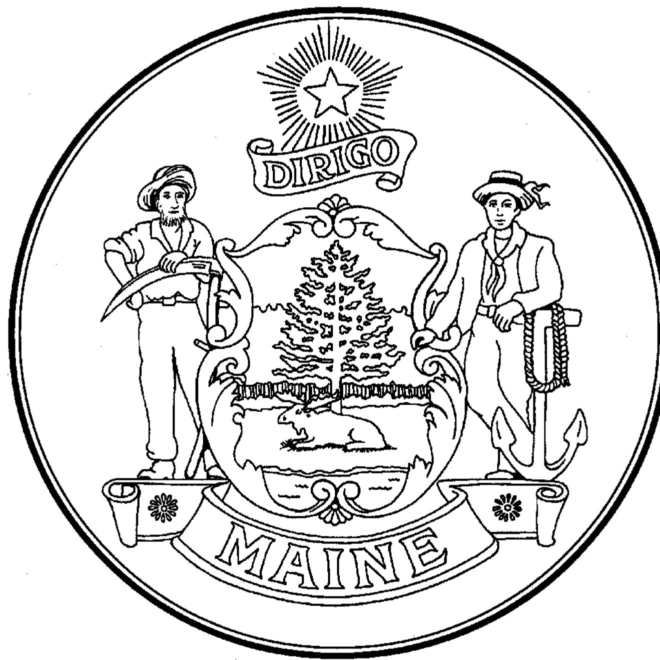

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DOCUMENTS

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THE LEGISLATURE

OF THE

STATE OF MAINE.

1862.

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1862.

FORTY-FIRST LEGISLATURE.

HOUSE. No. 9.

MINORITY REPORT.

Upon the Order instructing the Committee on the Judiciary to inquire into the expediency of taking the appropriate measures for an amendment of the Constitution in relation to juries, that Committee, by a majority, has reported "legislation inexpedient." The undersigned, members of that Committee, not having concurred with the rest, beg leave to present a minority report.

The chief sovereignty of the State is vested in the Legislature. It underlies and supports the other departments. The matters given it in charge are without number, or weight, or measure. Of this vast deposit, it is merely trustee for the people. Its mission is to secure and advance the well-being of the State. "Safe, yet progressive," is the broad seal of its action. It is under the constant and efficient control of the people. The ballot-box each year furnishes all needed corrections. And what interest may not be safely confided to its care? To establish a sound jurisprudence is its highest duty. It establishes courts, distributes their powers, and prescribes the mode of their proceeding. All must work in harmony. There is to be the closest contact, but no friction. Jurisdictions are not to clash. Throughout the entire working, there must be no jar,—if any such be found, it must be corrected. If the fault be in the enactments of the Legislature, they are to be changed. If the programme contained in the higher law (the Constitution) be imperfect, the people will amend it. It is with gladness that they

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furnish the remedy. The benefits are not for the Legislature, but for themselves. And they have even made it the duty of the Legislature to apprize them whenever such a need occurs. Permit us to say that such an occasion is now before us, in relation to the jury system.

To perfect a system of jurisprudence, implies the control of every part of it. To require its perfection, and yet to withhold the power of arranging its details, is a solecism. The Constitution demands from the intelligence of the Legislature a completed economy of jurisprudence, but denies them the right of deciding upon the means. It precludes them from judging what powers it would be best to confer upon juries, and even what would be their best number. It is a prohibition entirely out of place. It destroys the symmetry of the Legislative duties—duties which require the fullest control of details. To read the article, sounds well enough; to apply it, jars the system, and tears the machinery. It is this incongruity that calls for amendment. Why the article was inserted, we are not called upon to say. Probably it was in reference to a sentiment, then prevailing, handed down from earlier days. But to what is its original to be ascribed? Perhaps to the Delphic oracle; perhaps to the occult science of the stars. At any rate, it is a clog upon the administration of justice. It is at variance from all our other institutions and all our habitudes. In every part of the world, except of British origin, it is a nondescript. If right in its principle, it dislodges the Legislature, the bench and the ballot-box, for *they* all work by majorities. How inconsistent that the Constitution should spike into our jurisprudence the dogma of an "undivided twelve," while, at the same time, it casts upon the Legislature the far more important prerogative of selecting the jurors, involving the whole question of their intellectual, social and moral qualification! But Inspiration informs us that "great men are not always wise." Still the dogma is a venerable one. Universal adhesion is claimed for it. No case can be too small for its dictatorial and costly interposition. There seems a living energy in the word "twelve" when adorned with its algebraic "unanimity." Men talk as if the very phrase "undivided twelve" infuses into the soul some hallowed or some magical inspiration, controlling the intellect and the conscience, too sacred for doubt, too mystical for exploration. They

look on with approval while it drags from family and employment twelve of our select citizens, with three or four supernumerary or contingent substitutes, ten, twenty or thirty miles, at the county expense, to decide matters not of dollars but of shillings. Can it be wise ?

If any person thinks there may be cases in which it may not be safe to dispense with the accustomed panel, with such person we have no controversy. The proposed amendment would not preclude that course, though we think a smaller panel would as fully secure all rights. Doubtless in criminal cases, the now required number and unanimity would enlarge the chance of escape. It would give the accused more encouragement to defy the law, and to defeat the claims of justice. And now, at this very spot, we wish to impress the remark that every undue protection given *one* party, in any case, civil or criminal, infringes, to an equal extent, the safety and the rights of the *other*. It is believed that some specific benefits would flow from the proposed alteration. Thus, in the formation of jury lists by the cities and towns, as a smaller number would be needed, a better selection could be made; and the Legislature could prescribe panels, varying in the number of their jurors, according to the magnitude or importance of the classes of cases.

The authority in two-thirds or three-fourths of a jury to render a valid verdict would be of high advantage.

1. It would almost take away the chances of final disagreement, and insure a verdict at the first trial.

Verdicts at the first trial are more likely to be founded in truth, because, prior to a second trial, the witnesses may fail in memory, or may die or remove beyond the jurisdiction.

2. It would go far to take away the inducement to tamper with individual jurors.

3. A verdict would not be defeated by sudden death or sickness of a juror, after the hearing had been fully or partially completed.

It is not only the parties, but also the *public*, that have an interest in the speedy termination of lawsuits by securing verdicts at the first trial.

These positions are well illustrated by several years' experience in New Brunswick. There the jury (at least in civil suits,) is composed of seven persons only, five of them having the power to render

an effective verdict. And the experiment is said to have proved highly satisfactory.

There is also a further consideration entitled, in these days of pressure, to very great weight. It is that *certainly* the proposed amendment would operate a large retrenchment of expenditure in our Jurisprudence.

An estimate has been made, upon the supposition that the panel should consist of eight, with power in six to render a verdict. It has aimed carefully to avoid exaggeration, and shows that, of the money paid from the county treasuries for jurors fees, the saving would be over thirteen thousand dollars each year. There would also be a saving *to somebody*, amounting to thousands from the avoidance of new trials; and some thousands more from the earnings of men, permitted to attend to their own occupations, instead of being called to act as jurors.

The proposed amendment contains some reference to the grand jury. With many persons, that is no favorite. They think it a needless appendage, and that in some future year it will be spoken of as a by-gone mistake. Their belief is, that some shorter and less costly mode of instituting prosecutions will be substituted. But that is no part of the present plan. True, many a smile may spring up on remembering the pompous ceremonials of the grand jury; with what dread array, ushered by the tip staff, in Indian file and almost endless succession, they came with majestic tread and unbroken silence, to lay before the clerk, on oath and in recorded form, the startling fact that A. B. stole some potatoes, and that C. D. retailed some whiskey. But such forecastings are to have no influence here. We refer to them only the more effectually to exclude them from consideration.

It *does*, however, belong to the case to say, that our proposed amendment would lead to a large saving of public expense in the grand jury system, if the alteration in the Constitution should extend to that department.

But the foregoing views have been overruled by objections in the Committee room. To these objections we ask a few moments attention.

1. It was suggested that the proposed alteration is disallowed by the Constitution of the United States. This difficulty was dissipated by an examination of the authorities.

2. It was intimated that there were too many other matters, of higher importance before the Legislature, to allow action on this subject. Our reply is, that it is not among matters of secondary importance. It contemplates a needed reform in the jurisprudence of the State. Such a work is always serviceable. Time, bestowed upon it, cannot be ill directed.

3. It was suggested that the State has prospered under the ordinance, and therefore it is wise to let it stand. We only need to say, in reply, that the prosperity has been achieved, not by aid of the ordinance, but in spite of it.

4. Another ground of resistance is that the present practice is of high antiquity, embodying the wisdom of ages, and claiming the strong prestige of conservatism, while every desire of improvement must therefore be radical. You will pardon us for declining to discuss the proposition, that whatever is ancient admits of no improvement. Under such a testament as that, we desire no inheritance. But the claim to antiquity calls for notice. A little research may change the claimants.

It was only within the present millennium, that the common law originated. Except among people of British origin, confined to a small nook of the world, that law has never found acceptance. All nations, in every age, in all their varied governmental institutions, including the patriarchal dynasty before the flood, have steadfastly united in *excluding* the common law, with its much boasted ingraft of jury trial.

Here then are two parties, each leaning upon its antiquity. To which belongs the high prestige of long-discarded, time-honored wisdom? Which has the best title to conservatism? It is but the radical, who upholds the *modern invention* of trial by jury. But, more seriously, we decline to write our creed with that, which sighs over the desolations of intelligent progress.

All wisdom is not confined to the cells of antiquity. How very few years is it since our Legislature, with trembling and alarm, invaded the consecrated precinct and tore from the time-stained parchment the decree that no interested person should be a witness before the jury; and also inserted the long forbidden doctrine that a party even may testify in his own case? Yet no jurist is now to be found who does not approve of the new practice.

To the requirement of unanimity in the panel, something more of analysis may appear to be due. Twelve "good men and true" are embodied, each having his own proclivities and processes of mental action, capable to apprehend, to reason and decide. They are sworn to render a true verdict; that is to say, each one is sworn to render a verdict in exact accordance with his convictions of truth. If this obligation be adhered to, how small must be the chance of unanimity in all the departments of a case on trial? This "almost-impossibility" is of startling import. If verdicts fail, the jurisprudence of the State is terminated. This danger is always imminent. To overcome the difficulty, strong appliances are needed. And it would hardly do to be over scrupulors in the use of them. For that purpose, some out-of-the-way attempts have been vigorously made. Shackles to bind and grooves to guide the minds of jurors have been provided. The narrow gauge was in use before the days of railroading. Bench-made rules were early fulminated, artificial and untruthful, belittleing and bewildering. Their aim was, not to advance justice, but to secure verdicts. They dictated the ovus probandi and that other dogma, of double bewilderment, that "the proofs must remove all reasonable doubts."

Was it for the court, or rather, was it not for each juror to say what proof should bring conviction to his mind? That such rules repudiate the simplicity and the just weight of truth, and disturb the balance of mental conviction, is not to be doubted. And such must be considered their design. But they were necessary, not for justice sake, but to preclude disagreements in the jury room. They are the first and the last mandate in the judge's charge, urged with vehement emphasis and plentiful repetition How often, when juries have returned into court without having agreed, has the judge with almost resistless importunity, though in other phraseology, urged a surrender of their convictions, that a verdict of some sort, (no matter what,) might be rendered. Such the appliances, found necessary, that verdicts should be procured, otherwise all the business of the court must stop. And why so difficult to secure verdicts? Just because of that self-contradictory ordinance of an undivided panel.

But these interpositions were not enough. Another dogma must be foisted in. Its essence is that, in civil suits that degree of proof is sufficient which produces "reasonable satisfaction" to the mind,

while, in criminal cases, it must go further and "remove all reasonable doubts." Here is food for confusion to feed upon. The distinction has controlled the verdicts in ten thousand cases; and yet it is but distinction without a difference. There can be no "reasonable satisfaction" while there remains a "reasonable doubt." The removal of all "reasonable doubt" must bring "reasonable satisfaction." Equally true is it that "reasonable satisfaction" excludes all "reasonable doubt."

But the sophism has its use. It brings obscurity to the jury seats. The thicker the blinders, the more pliable the team.

What can atone for the artifices practiced upon jurors in such systematic efforts to defeat the independence of their mental action? What can compensate for the wear and tear of brains and of conscience to uphold an erroneous dogma?

How unstatesmanlike to adhere to a doctrine that requires so much finesse. How pitiful to enforce upon the judges a duty so repulsive.

After all, the proposition is merely to remove an impediment in the way of judicial action; only to enable the Legislature to perfect its own work. Does this Legislature doubt that its successors will use the power without unfaithfulness? Will there be any inducements to perversion, in the ordaining of a jury system, more than in the exercise of any other of its countless and unmeasured powers?

Actuated by these considerations, the undersigned ask leave to submit the following Resolves.

BION BRADBURY,
WM. P. FRYE.

STATE OF MAINE.

RESOLVES for amending the constitution relative to trial-juries.

Resolved, two-thirds of both houses of the Legislature
2 concurring, That the constitution be so amended as to
3 refer it to the legislature to prescribe what number of
4 persons may compose a jury for the trial of disputed
5 matters, and what number of the jury may render an
6 effective verdict.

Resolved, That the aldermen of the cities and the
2 selectmen of the towns and the assessors of the planta-
3 tions are directed to notify the inhabitants of their
4 respective cities, towns and plantations, in the manner
5 prescribed by law, at the annual meeting in September
6 next, to give in their votes upon the amendment pro-
7 posed in the foregoing resolve. And the question
8 shall be, "shall the constitution be amended, as pro-
9 posed by a resolve of the legislature for amending the
10 constitution relative to trial-juries." And said inhab-
11 itants shall vote by ballot, those in favor of the amend-

12 ment expressing it by the word "yes," and those
13 opposed to it by the word "no" upon their ballots.
14 And the ballots shall be received, counted, and de-
15 clared in open ward, town and plantation meetings.
16 And lists of the votes shall be made by the aldermen,
17 selectmen and assessors and clerks of the several cities,
18 towns and plantations, and returned to the office of
19 the secretary of state, in the same manner as votes for
20 senators; and the governor and council shall count the
21 same, and make return thereof to the next legislature;
22 and if the majority of the votes are in favor of the
23 amendment, the constitution shall be amended accord-
24 ingly.

Resolved, That the secretary of state shall furnish to
2 the several cities, towns and plantations, blank returns
3 in conformity to the foregoing resolve, accompanied
4 with a copy thereof.

STATE OF MAINE.

IN HOUSE OF REPRESENTATIVES,
March 10, 1862.

Presented by Mr. BRADBURY, from the Committee on Judiciary, and on his motion laid on the table, and 350 copies ordered to be printed for the use of the Legislature.

CHARLES A. MILLER, *Clerk.*