thought that communication with morning readers was separate and distinct from communication with evening readers. The alleged "tying" product (communication with morning readers) was not separated from the "tied" product (communication with evening readers); the two together formed a single product (communication with readers). The market for communication, therefore, was not separted, but was only one market. It was this undivided market that the defendant did not control. The Court held that, because the principal case did not factually fit the "tying" pattern, the restraint which resulted from the use of the unit contracts was not unreasonable *per se*. The Court further found that there was no proof in the record of the specific intent necessary for an unreasonable restraint of trade under section 1 or an attempt to monopolize under section 2.

The trial court attempted to straddle the issue of whether there was a violation *per se*, and reached a decision that could not be upheld on any ground because the court had not required proof of a specific intent. The decision of the Supreme Court is sound because it requires definite proof of individuation of products in "tying" cases.

CONSTITUTIONAL LAW—CRIMINAL PROCEDURE—WAIVER OF UNANIMOUS VERDICT

Hibdon v. United States 204 F.2d 834 (6th Cir. 1953)

Appellant was tried in a federal court for commission of a felony. After twenty-seven minutes of deliberation the jury reported that they were unable to agree on a verdict. Both parties then agreed, at the suggestion of the judge, to accept a majority verdict. A poll of the jury disclosed a majority in favor of conviction, and the trial court entered a verdict of guilty. The appellate court reversed the lower court's judgment, remanded the case for a new trial, and held that a defendant on trial in a federal court for commission of a felony cannot waive his right to a unanimous verdict by the jury.[1]

The Federal Rules of Criminal Procedure require a unanimous verdict.[2] The court in the principal case points out that there is no provision in the present Rules for a waiver of this requirement by the accused, despite the fact that such a provision was found in the First Preliminary Draft of the Rules.[3]

Many of the rights guaranteed to an accused by the Constitution

1. Hibdon v. United States. 204 F.2d 834 (6th Cir. 1953).
2. FED. R. CR. P. 31(a): "The verdict shall be unanimous."
3. FED. R. CR. P. 29(a) (First Prelim. Draft, 1943). The reason for the elimination of this provision was the adverse criticism of both the judiciary and the bar. Hibdon v. United States, 204 F.2d 834, 836 (6th Cir. 1953).

may be waived. The right to a speedy trial,[4] the right to a trial by jury,[5] the right to a twelve man jury,[6] the right to a trial in the state and district where the alleged crime was committed,[7] the right to confront witnesses,[8] and the right to have assistance of counsel[9] may all be waived by an accused in a criminal proceeding. The basis of these decisions is that the rights are privileges accorded to the accused to protect his interests, and that if he decides freely that his interests will be better served by waiving the privileges, he should be allowed to waive them.[10]

In *Patton v. United States*[11] a jury of twelve was duly impaneled, but seven days after the trial began one of the jurors became seriously ill and could no longer serve. Both parties agreed to finish the case with the eleven remaining jurors. The question of the constitutionality of the eleven man jury was certified to the Supreme Court of the United States. The Court stated that the elements of jury trial guaranteed by the Constitution are (1) that the jury shall consist of twelve persons, (2) that the jury be advised and instructed by a judge, and (3) that the verdict be unanimous.[12] The Court held that the defendant had the power to waive his right to the first element because it was a "privilege" and not an "imperative requirement."[13] The Court also reasoned that, because the accused could waive his right to all three elements as a unit and be tried by the court, he could make a partial waiver and waive the numerical requirement.[14]

The question presented by the principal case was one of first impression, and could not have been unequivocally answered by logical deduction from the *Patton* case. A holding that one element of a jury trial may be waived does not require a holding that a different element may be waived. The requirement of a twelve men jury could be a

4. Moreland v. United States, 193 F.2d 297 (10th Cir. 1951); Sheperd v. United States, 163 F.2d 974 (8th Cir. 1947); Worthington v. United States, 1 F.2d 154 (7th Cir. 1924), *cert. denied*, 266 U.S. 626 (1924).

5. Adams v. United States, 317 U.S. 269 (1942); Simons v. United States, 119 F.2d 539 (9th Cir. 1941). *See* Wright v. United States, 165 F.2d 405, 408 (8th Cir. 1947); Jabezynshi v. United States, 53 F.2d 1014 (7th Cir. 1931), *cert. denied*, 285 U.S. 546 (1931).

6. Patton v. United States, 281 U.S. 276 (1930); Fowler v. Hunter, 164 F.2d 668 (10th Cir. 1947). *See* Coater v. Lawrence, 46 F. Supp. 414, 423 (S.D. Ga. 1942).

7. United States v. Jones, 162 F.2d 72 (2d Cir. 1947); Mahaffey v. Hudspeth, 128 F.2d 940 (10th Cir. 1942); Hagner v. United States, 54 F.2d 446 (D.C. Cir. 1931).

8. Diaz v. United States, 223 U.S. 442 (1911); Burgess v. King, 130 F.2d 761 (8th Cir. 1942); Grove v. United States, 3 F.2d 965 (4th Cir. 1925).

9. Adams v. United States, 317 U.S. 269 (1942); Johnson v. Zerbst, 304 U.S. 458 (1938); Butzman v. United States, 205 F.2d 343 (6th Cir. 1953).

10. See, *e.g.*, United States v. Sorrentino, 175 F.2d 721 (3d Cir. 1949). See notes 4-9 *supra*.

11. 281 U.S. 276 (1930).

12. *Id.* at 288.

13. *Id.* at 298.

14. *Id.* at 290.

privilege, and at the same time the requirement of unanimity could be considered as an imperative requirement.

The issue of the relinquishment of the unanimity requirement should be resolved by reference to the underlying social policies. It could be argued that most defendants cannot properly evaluate the protection afforded by the unanimity requirement and consequently could not make an intelligent waiver. It could also be argued that the unanimity requirement is closely allied with the requirement of proof of guilt beyond a reasonable doubt, and that if waiver were allowed an accused could be convicted even though some of the triers of fact were not convinced of his guilt. It could also be said that to allow an accused to wager his freedom on his guess as to which way the jury was split would introduce into criminal trials a singularly inappropriate element of chance.

The result reached by the court in the principal case is supported by the fact that a provision for waiver of unanimity was considered but not included in the Federal Rules of Criminal Procedure. It may be, however, that the history of the unanimity provision does not resolve the issue; the failure to include a provision for waiver does not necessarily require an implication of an intent to prohibit waiver.

The rights guaranteed by the Constitution are intended for the protection of the accused. If the accused in a prosecution intelligently decides that his interests will be advanced by discarding some of his Constitutional protections, he should be allowed to do so. He is in a much better position to weigh the various factors of his particular case than is a legislator formulating abstract rules to cover all cases. It is submitted that the result reached by the court in the principal case is incorrect, and that the requirement of unanimity, like the other Constitutional protections, should be subject to waiver.

EVIDENCE—EXPERT OPINION ON ULTIMATE FACTS

Hooper v. General Motors Corp., 260 P.2d 549 (Utah 1953)

The plaintiff brought an action against the defendant to recover damages for injuries sustained when her truck overturned due to a separation of the rear wheel. An expert witness for the defendant was asked what caused the separation. The plaintiff's objection to the question on the ground that it called for opinion testimony on the ultimate fact in issue was overruled. The Utah Supreme Court, affirming the ruling of the trial court, said that an expert witness may express an opinion as to the cause of any particular condition or occurrence, and may do so with any degree of positiveness he deems necessary.[1]

1. Hooper v. General Motors Corp., 260 P.2d 549 (Utah 1953). (Reversed on other grounds.)