

1-1935

Courts-Number of Jurors Required

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Recommended Citation

(1935) "Courts-Number of Jurors Required," *Indiana Law Journal*: Vol. 10: Iss. 4, Article 9.
Available at: <http://www.repository.law.indiana.edu/ilj/vol10/iss4/9>

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Courts—Number of Jurors Required.—Appellee filed its claim in the City Court of East Chicago asking for damages in the sum of \$600. The only errors presented involved the jurisdiction of the court and the overruling of appellant's motion for a new trial. Appellant asserts that the City Court of East Chicago had no jurisdiction over the subject-matter of the action, and that, therefore, the Lake Circuit Court, upon appeal, did

¹¹ Blackwell Lumber Co. v. Empire Mill Co. (1916), 28 Idaho 556, 155 P. 680.

¹² Mull v. Indianapolis, etc., Traction Co. (1907), 169 Ind. 214, 81 N. E. 657; Burley v. United States (1910), 179 F. 1; Hairston v. Danville and Western Ry. Co. (1908), 208 U. S. 598, 52 L. ed. 637; City of Santa Ana v. Harlin (1893), 99 Cal. 538, 34 P. 224; Chicago, B. and O. Railroad Co. v. City of Naperville (1897), 169 Ill. 25, 48 N. E. 335.

¹³ Sexauer v. Star Milling Co. (1909), 173 Ind. 342, 90 N. E. 474; Mull v. Indianapolis, etc., Traction Co. (1907), 169 Ind. 214, 81 N. E. 657; Bedford Quarries Company v. Chicago, Indianapolis and Louisville Ry. Co. (1910), 175 Ind. 353, 94 N. E. 326; Westport Stone Co. v. Thomas (1910), 175 Ind. 319, 94 N. E. 406.

¹⁴ (1910), 175 Ind. 319, 94 N. E. 406.

¹⁵ Burns' Ann. St. 1926, Sec. 13218.

¹⁶ (1904), 27 Utah 158, 75 P. 371, affirmed (1905), 198 U. S. 361, 49 L. ed. 1085.

¹⁷ (1905), 198 U. S. 361, 49 L. ed. 1085.

not obtain jurisdiction. Its position is based upon the theory that the Act of the General Assembly of 1921, conferring special jurisdiction upon certain city courts, including the City Court of East Chicago, is void and unconstitutional since it deprives a party litigant of the constitutional right to a trial by a jury of twelve men. The act provides that the city courts of any second-class city, not having a circuit or superior court, shall have jurisdiction over all civil cases for the enforcement of demands not exceeding \$2,000, where the parties or the subject-matter are in the township in which the city is located. The act also provides that "such city courts shall be governed so far as may be by the laws and rules governing the circuit courts, excepting as provided in this act and other laws governing city courts." Burns 1926, paragraph 11041 provides that: "All issues of fact, in civil actions, pending in said city courts shall be triable by the judge, unless either party shall demand a jury trial, which jury shall consist of six qualified voters of the city, to be summoned by the bailiff by venire issued by the judge." Thus, the appellant contended that the Act of 1921 must be construed in connection with the act last quoted providing for a jury of six; and, consequently, is unconstitutional because our constitution entitles litigants to common law jury of twelve. Section 20, Article I of the Constitution of Indiana provides that: "In all civil cases, the right of trial by jury shall remain inviolate." Held, the Act was unconstitutional.¹

The review of the cases upon the point in question clearly shows that the Indiana Supreme Court followed the overwhelming weight of authority. At common law a jury was understood to mean a body of twelve men,² and it has been universally held that the provisions of the constitutions of the several states which guarantee a trial by jury must be interpreted in the light of the common law.³ A brief resume of the provisions in the various state constitutions show that they are somewhat differently worded. Roughly, however, they can be divided into three classes as follows: In some it is merely provided that the right of a trial by jury shall be inviolate;⁴ in others that the right shall remain inviolate;⁵ and in others that as heretofore used or enjoyed the right shall remain inviolate.⁶ However worded, these provisions have been uniformly held to mean a jury trial composed of twelve men.⁷ It would seem then that if repeated decisions for approximately a century are to be received as the best exposition of the law, a trial by a jury of less than twelve is erroneous unless such lesser number was authorized by a constitutional provision,⁸ or a jury of twelve had been waived by the parties.⁹

¹ *Millers National Insurance Company v. American State Bank of East Chicago*, May 24, 1934, Supreme Court of Indiana.

² *Marwell v. Dow* (1899), 176 U. S. 581; *Brown v. State* (1861), 16 Ind. 496; *Poe v. Luby* (1885), 56 Mich. 551, 23 N. W. 218.

³ *Eshelman v. Chicago, etc., R. Co.* (1885), 25 N. W. 251, 67 Iowa 296; *McManus v. McDonough* (1883), 107 Ill. 95; *Lamb v. Lane* (1854), 4 Ohio St. 167; *Smith v. Times Pub. Co.* (1897), 178 Pa. 481, 36 Atl. 296.

⁴ *Tatlaw v. Bacon* (1917), 165 Pac. 835, 101 Kan. 26; *Times v. State* (1855), 26 Ala. 165; *Swart v. Kimball* (1880), 5 N. W. 635, 43 Mich. 443; *Gordon v. Munn* (1910), 111 Pac. 177, 83 Kan. 242.

⁵ *Blanchard v. Raines* (1884), 20 Fla. 467; *Wallon v. Bancroft* (1860), 4 Minn. 109.

⁶ *Flaherty v. Murphy* (1920), 126 N. E. 553, 291 Ill. 595; *Byers v. Commonwealth* (1862), 42 Pa. 89.

⁷ *U. S. Capital Tract Co. v. Hoff* (1898), 174 U. S. 1; *Florida Fertilizer Co. v. Boswell* (1903), 34 So. 241, 45 Fla. 301; *McManus v. McDonough* (1883), 107 Ill. 95; *McRae v. Grand Rapids* (1892), 53 N. W. 561, 93 Mich. 399; *Smith v. Atlantic, etc., R. Co.* (1874), 25 Ohio St. 91.

⁸ *Poe v. Lane* (1900), 82 N. W. 896, 125 Mich. 271; *White v. White* (1916), 183 S. W. 369.

All of the disadvantages pertaining to a twelve man jury certainly are not remedied by reducing the number of jurors to six, but the advantages of such a reduction are not few. A tribunal of twelve men has the possibility of presenting twelve opportunities for corruption. It also presents, under Indiana law, twelve distinct opportunities for a hung jury. The instructions by the court must necessarily at times become complicated, and it is no fault of the average juror that he failed to comprehend their meaning. It is the misfortune rather than the fault of the average layman that he has neither the ability or the acquired experience and skill to deal with complicated issues of fact. The layman as an average person has confined himself within the limits of his home, occupation, church or the contents of his favorite newspaper. Contra to popular belief, he does not have the ability to detect exaggerations which at times characterize the testimony of witnesses. As a result, the shrewd but unscrupulous counsel who is prone to be a good court room actor often sways the jury toward unreasonable results. The law, however, does recognize to some extent the ignorance of the jury; and because it does, artificial rules have developed excluding whole classes of evidence and information upon which the intelligent man relies in the management of his private affairs.

It is only too well known that jury service is repugnant to the majority of business and professional men. The long drawn affairs of the American trial, the meager pay for jury services, and the pecuniary loss in their own business due to the loss of time are the major factors which prove to be realities for the would-be jurymen. The expression of an illusory prejudice is the only thing required to disqualify one from sitting in the jury box. Just how often the desirable prospective juror uses this exit is not capable of calculation, but from all indications, it is used to no small extent. If the jury pay were increased and their number decreased to six, it must be conceded without argument that it would be much easier to impanel six qualified jurors than twelve. And too, would not justice more likely be rendered by a jury of six qualified men who could understand the problem at hand rather than twelve who were inexperienced?

Article I of the Constitution reads that the trial by jury shall remain inviolate, and says nothing to the effect that the jury shall be composed of twelve men. Hence, the jury of twelve requirement is the creation of the courts. The Supreme Court, if it had seen fit, could have decided the problem at hand conversely from the way it did and yet not have violated all legal principles. The doctrine of *stare decisis* is certainly the foundation of the common law, and it is not to be violated by the erratic whims of any court. But the moment the line of authority becomes in conflict with economic and social progress, the courts should not hesitate to alter the rule and make it a benefit and not a burden upon society. The breaking away from a precedent is not totally foreign to the Indiana Supreme Court. The case of *State v. Shuman*¹⁰ is in direct conflict with the well known United States Supreme Court case of *Ex Parte Grossman*.¹¹ In deciding the *Shuman* case, the Indiana court found it desirable to break away from a well settled precedent.

From the time of William the Conqueror, the jury system constantly changed and evolved throughout English history. Why should we not allow it to continue to evolve? Is there any plausible reason why its development should be crystalized at the time of the American Revolution? Since in the

⁹ *Woodruff Burr* (1915), 180 S. W. 976, 121 Ark. 266; *Kreuchi v. Dehler* (1869), 50 Ill. 176; *Roach v. Blakey* (1893), 17 S. E. 228, 89 Va. 767.

¹⁰ *State of Indiana v. Shuman* (1928), 200 Ind. 716, 164 N. E. 408.

¹¹ *Ex parte Grossman* (1924), 276 U. S. 86.

principal case the old common law rule was applied, it must necessarily follow that a unanimous verdict will be required. Whether the purpose of the constitutional provision is to guarantee a jury of twelve and a unanimous verdict or to guarantee a jury of some sort but such a jury as changing social conditions may demand, is not a closed question. However, with the presumption in favor of the present case, people who want to try a different kind of jury should not be denied the privilege by something not in the written constitution but something read into it by the court.

It is one of the dogmas of the political scientist that the constitution for any government must be flexible within certain bounds. Strict construction is the exception and not the general rule. This is only too well demonstrated in the development of the due process and the impairment of the obligation of contract clauses. If then, the court has been liberal in the interpretation of these clauses along with several others, for what reason was it necessary to apply strict construction on the jury clause. It must be kept in mind that a trial by a jury a common law pending in the state courts is not a privilege or immunity of national citizenship which the states are forbidden to abridge under the Federal Constitution.¹² Though the state cannot deprive a person of his property without due process of law, this does not imply that the trial must be by jury. The states have the exclusive privilege of defining due process within their boundaries.

There is need today for more business methods in the courts, for speedier rendition of justice, and the elimination of haphazard methods by which verdicts are reached. But unless the Indiana Supreme Court can see its way clear to grant these needs, Indiana is doomed to be burdened with these pre-revolutionary left-overs for some years to come. The possibility of a constitutional amendment is negligible.

L. E. B.

Insurance—Accidental Means Distinguished from Accidental Result—Sunstroke.—Plaintiff's husband was insured under two accident policies providing for indemnity for death resulting directly and independently of all other causes from bodily injury effected solely through external, violent, and accidental means. While playing golf, according to his custom in the afternoon of the summer months, he suffered a sunstroke and died within two hours. In the action below there was a judgment for the defendant. The plaintiff secured a writ of certiorari to the United States Supreme Court. Plaintiff alleged that her husband was in his usual good health and was doing as others were then doing, playing golf, at the time he was stricken. The plaintiff further alleged that at the time of her husband's injury and unknown to him there was a temporary condition in his body which rendered him susceptible to sunstroke, and that this temporary and unknown condition intervened between his intentional act of playing golf, which he intended to perform safely as others did at the time, and his injury. Held, under an insurance policy providing indemnity for death caused solely by accidental means, death resulting from sunstroke suffered while intentionally playing golf under the existing weather conditions, although it is an accidental death, is not death by accidental means.¹

¹² Walker v. Sauvinet (1875), 92 U. S. 90, 23 L. ed. 678; Pearson v. Yewdall (1877), 95 U. S. 294, 24 L. ed. 436; Edwards v. Elliott (1874), 21 Wall. 532, 22 L. ed. 489.

¹ Landress v. Phoenix Mut. Life Ins. Co. (1934), 291 U. S. S. C. 491, 78 L. ed. 619 (Tenn.).