Indiana Law Journal

Volume 11 | Issue 4 Article 12

4-1936

Jury-Intentional Exclusion of Women

JURY—INTENTIONAL EXCLUSION OF WOMEN.—Appellant was convicted of embezzlement. At the trial, the male defendant challenged the array upon the ground that the jury commissioners had purposely and intentionally excluded the names of women from those selected for jury service Testimony of the commissioners supported this charge. Held, error to overrule such challenge.[1]

Is a jury selected from a jury box from which the names of women have been intentionally excluded by the jury commissioners a legally drawn jury, and if not, what are the consequences of such actions? Substantially, this was the question which was recently presented to the Indiana Supreme Court. The situation which provoked it is typical. The Lagrange county court house did not facilitate a convenient separation of male and female jurors, should a mixed jury ever be drawn. As a result, the Lagrange Circuit judge and his jury commissioners had reached a tacit understanding that the names of women be omitted from the jury box from which the panel was drawn to avoid complications.

Although there is some conflict,[2] it is now generally settled that women are competent and qualified jurors.[3] Consequently, when the defendant in this proceeding in the Lagrange circuit was to be tried by a jury from which women were excluded, he challenged the array on the above ground. The challenge was overuled, but on appeal the court refused any variance from what it considered the hard and fast lines of statutory instructions to jury

---

27 (1935), 12 Fed. Supp. 30. Although the statute makes provision for a reasonable rental charge, there is to be no payment until the end of the first year of the moratorium. The court declares this to be an unsecured promise "that deprives the mortgagee of an otherwise positive right to income for that period."

In the case, In re Slaughter (1935), 12 Fed. Supp. 206, the court apparently interprets the statute to authorize a judicial sale at the insistence of the creditor before the end of the "three years probationary period."

1 Walter v. State (1935), 195 N. E. 268 (Ind.).

2 18 Georgetown L. J. 393, 394, 16 A. L. R. 1154.

3 Palmer v. State (1926), 197 Ind. 625, 150 N. E. 917, Moore v. State (1926), 197 Ind. 640, 151 N. E. 689; Wilkinson v. State (1926), 197 Ind. 642, 151 N. E. 690; Jalbert v. State (1928), 200 Ind. 380, 165 N. E. 522; Commonwealth v. Maxwell (1921), 271 Pa. 378, 114 Atl. 825, People v. Baltz (1920), 212 Mich. 580, 180 N. W 423, 4 A. L. R. 140.

commissioners as to the mode of impanelling. The court announced further that there was no obligation upon the defendant to show that "his substantial rights were impaired, or that the jurors were biased or prejudiced against him, or that he did not have a fair trial" so long as the jury was not selected according to the letter of the statute.[4] The theory is that the defendant has a right to a trial by a jury which has been legally selected and an arbitrary exclusion of a class by the commissioners makes an illegally drawn jury.

In determining when a jury is legally drawn, the particular court exercises considerable discretion. The line of demarcation is so vague[5] that one cannot critically approach a separate decision. Yet the tests used in the cases and texts seem to be simple and easy of application. In the first place, it is generally presumed of jury commissioners, as of other public officers, that they have acted regularly and in accordance with their officially designated powers and duties.[6] Even if this presumption is successfully rebutted, errors and irregularities in failing to comply strictly with the statutory provision for making up a jury list do not always serve as a ground for challenging the array or serve to invalidate the list. The next principle for application is that such provisions are usually held to be directory only and not mandatory.[7] Does an examination of the particular section of the statute that might govern offer a clue as to whether it is a mandatory or directory provision? Section 4-3304, Burns' Ann. St. 1933, provides for the selection of jurors "from the names of legal voters and citizens of the United States on the tax duplicates of the county for the current year."[8] If the jury commissioners had arbitrarily included any persons other than legal voters and citizens on the tax duplicates, it would not even be suggested that it was properly drawn and that such provision was directory only and not mandatory.[9] To that extent this part of the statute may very reasonably be deemed a mandatory one. Positing this, then, the court does not seem to be taking a step much farther when it says that this provision must be interpreted as meaning that "the names shall be selected from the names of 'all' the qualified voters on the tax duplicates." It follows then, that when the commissioners arbitrarily excluded a class who would be qualified under the terms of the statute, they had not complied with a mandatory provision and the array was imperfect and invalid.[10]

The question before the court, as simply stated above, is almost as simply answered, but there is some objection to reaching a result through reasoning that provokes the layman's observation that justice is submerged in technicalities. Here, a trial that was fair and orderly was set aside because of the omission of the names of women from the jury box. Was there not still a trial by a jury of the defendant's peers, competent, qualified, and impartial?

---

[4] Walter v. State (1935), 195 N. E. 268, 270 (Ind.).

[5] 92 A. L. R. 1110.

[6] Jones, Law of Evidence (1924), 3rd ed., sec. 30; McKelvey, Law of Evidence, (1924, 3rd ed.) p. 134; Karnes v. Commonwealth (1919), 125 Va. 758, 99 S. E. 562; 4 A. L. R. 1509.

[7] Brown v. State (1918), 14 Okla. Cr. 609, 174 Pac. 1102; Commonwealth v. Zillafrow (1903), 207 Pa. 274, 56 Atl. 539; 92 A. L. R. 1110.

[8] Acts 1881, (Indiana) Spec. Sess., ch. 69, sec. 2, 557.

[9] State v. Jenkins (1884), 32 Kan. 477, 4 Pac. 809 (challenge to array), People v. Thacker (1896), 108 Mich. 652, 66 N. W 562 (challenge for cause).

[10] Mitchell v. Likens (1833), 3 Blackf. 258, Mitchell v. Denbo (1833), 3 Blackf. 259.

Has the defendant been prejudiced? Has he been deprived of any of his constitutional guarantees, equal protection of the laws, due process? To these questions one seeks an affirmative answer before a jury panel may be reasonably vitiated. To uphold a challenge to an array without showing some such harm is to merit the badge of technicality.

Thus we find other jurisdictions seeking to find an encroachment upon some right when similar situations arise. The cases generally hold that an irregularity in the mechanical process of drawing names for a jury panel will not substantiate any complaint by the defendant, unless he can show it to be prejudicial to him.[11] They indicate that the same requirement applies when there is an exclusion of an eligible class from the jury list, since the general rule is that only a person affected by discrimination in making up jury lists may complain.[12] Thus a party may object to a trial before a jury from which the class to which he belongs has been excluded.[13] But the exclusion of women from a jury impanelled to try a man for a crime, even if wrongful, does not deprive him of any rights or privileges and he cannot be heard to complain.[14] Some injury is required.[15] Neither could a feminine defendant protest because the summoning officer selected only women for jurors and excluded all men.[16] Such holdings would seem to be contra to the principal case in that they sought to find a present injury.[17]

The Indiana court, however, finds a general presumption of prejudice against the defendant whenever the jury commissioners agree to, or upon suggestion do, exclude any class within the qualifications set out by the legislature. The presumption is aided by setting out specifically the prejudicial forms of discrimination that might be exercised by the commissioners.[18] It is possible that actually harmful discriminations could be called to the attention of the court when, and if, they are committed, without the aid

---

[11] 92 A. L. R. 1110.

[12] 52 A. L. R. 920; Green v. State (1882), 73 Ala. 26.

[13] One of the latest and most famous cases involving such exclusion of the class to which the defendant belonged was Norris v. Alabama (1935), 55 S. Ct. 579. There the Supreme Court found prima facie evidence that the defendant had been denied the equal protection of the laws. 3 Geo. Wash. L. R. 388, 35 Col. L. R. 776. Yet the defendant has no right to have any portion of the jury which tries him to be of his own race. Virginia v. Rives (1880), 100 U. S. 313. Nor is he, himself being denied the privilege of being a juror in this instance. However the decisions deal strongly with the possibility of prejudicial partiality against the defendant, and the rule is generally followed that it is a reversible irregularity to exclude arbitrarily the members of the same race, color or religion of the defendant. Montgomery v. State (1908), 55 Fla. 97, 45 So. 879; Smith v. State (1910), 4 Okla. Cr. 328, 111 Pac. 960; Farrow v. State (1908), 91 Miss. 509, 45 So. 619; Jaurez v. State (1925), 102 Tex. Cr. 297, 277 S. W 1091.

[14] McKinney v. State (1892), 3 Wyo. 719, 30 Pac. 293, 16 L. R. A. 710; 52 A. L. R. 922.

[15] State v. James (1921), 96 N. J. L. 132, 114 Atl. 553, 16 A. L. R. 1141, State v. Carlino (1922), 98 N. J. L. 48, 118 Atl. 784.

[16] People v. Manuel (1919), 41 Cal. App. 153, 182 Pac. 306.

[17] Further evidence of the conflict between the principal Indiana case and those in other jurisdictions is the fact that the situation which provoked the challenge in two of those cases is the same as that in Walter v. State, namely, inadequate facilities. People v. Manuel (1919), 41 Cal. App. 153, 182 Pac. 306, State v. James (1921), 96 N. J. L. 132; 11 Atl. 553.

[18] Walter v. State (1935), 195 N. E. 268, 270 (Ind.).

of this presumption. But the court, in some degree, does meet the objection of "mere technicality" with this practically conclusive presumption of prejudice.

How then, can we formulate a practical answer to our original question on the basis of the indistinct pattern of the cases? The difficulty lies in the fact that we must work with two general principles, that are applied, which do not contradict each other and yet are entirely divorced. On the one hand are the cases holding that the statute must be substantially complied with and a disregard of material provisions will support a challenge to the array, i. e., material provisions are mandatory ones and violations thereof invalidate the panel.[19] But these decisions do not require injury in virtue of the irregularity complained of. On the other hand are the cases which do not permit an array to be questioned because of an irregularity in the impanelling, unless some prejudicial injury is shown.[20] Separating the two principles is the fact that this latter group of cases generally do not concern themselves with whether it was a mandatory or directory provision of the statute which had been violated. Clearly, the latest Indiana decision falls within the first group. In this respect it is consistent with earlier Indiana cases where challenges were invoked against an irregularity in the impanelling.[21]

Our court's method of deciding the validity of such complaints may not be entirely discredited. The statutes on the manner of selecting a jury are designed by the legislature to the end of providing a fair, impartial, and orderly trial, and only by the threat of reversal can compliance with such statutes be secured. It may readily be seen how impractical it may be for the complainant to show wherein he has been directly injured by a divergence from the procedure set out. The fact remains, however, that the cases dealing with the specific problem of the exclusion of a certain class from the jury lists do not accord with *Walter v. State*.[22] Those that do invalidate the panel upon such exclusion, do so where it is obvious that harm is not improbable.[23] The Indiana courts disregard this specific problem, but as suggested, not without cause. By deciding only whether there has been a material departure from the statute, they presumably decide whether there has been actual harm, since the legislature has already decided how the jury should be selected to obtain the fairest and most impartial panel.[24]

Because of the two divergent propositions already pointed out, it is submitted that the problem involving the trial of a man by a jury from which women have been excluded, might have been decided in either way and still not be subject to technical criticism. (1) A challenge to such array might

---

[19] Jones v. State (1832), 3 Blackf. 37, Mitchell v. Likens (1833), 3 Blackf. 258, People v. Boston (1923), 309 Ill. 77, 139 N. E. 880; Donnegan v. State (1920), 89 Tex. Cr. 193, 230 S. W 166, State v. Walker (1921), 192 Ia. 823, 185 N. W 619; Wright v. Stuart (1839), 5 Blackf. 120; Green v. State (1882), 59 Md. 123, 43 Am. Rep. 542; 16 R. C. L. 234.

[20] State v. Barnes (1909), 54 Wash. 493, 103 Pac. 792, 23 L. R. A. (N. S.) 932; McKinney v. State (1892), 3 Wyo. 719, 30 Pac. 293, 16 L. R. A. 710; State v. James (1921), 96 N. J. L. 132, 114 Atl. 553, People v. Manuel (1919), 41 Cal. App. 153, 182 Pac. 306, State v. Morse, 35 S. D. 18, 150 N. W 293.

[21] Wright v. Stuart (1839), 5 Blackf. 120; Jones v. State (1832), 3 Blackf. 37, Mitchell v. Denbo (1833), 3 Blackf. 258.

[22] (1935) 195 N. E. 268 (Ind.).

[23] 52 A. L. R. 920, 922, 923.

[24] Burns' 1933, sec. 4-3304.

be sustained because of failure to comply with a mandatory provision of the statutes as to selection. (2) Or it might be overruled without violating any legal principles, unless actual harm had been inflicted by the irregularity. Possibly the law would seem less peremptory if actual harm was the primary consideration. But for convenience of application and as a more stringent guardian of the right to a trial fair in all respects, the practice of invalidating panels drawn with a disregard of material provisions of the statute (upon timely plea), even though it does not affirmatively appear that any harm has ensued, is to be commended. However, it is further submitted, that if the case has been decided on its merits by a jury composed of individually competent persons—persons not subject to challenge for cause, the ruling in the principal case should not be the basis of reversible error. To so consider this ruling on the challange to the array, is to modify the generally accepted rules of Indiana Practice that reversible error be harmful error.[25] H. A. A.

CONSTITUTIONAL LAW—PRIVILEGES AND IMMUNITIES CLAUSE OF THE FOURTEENTH AMENDMENT.—The Vermont Income and Franchise Tax Act of 1931 imposed an individual income tax of 4 per cent. on income received on account of ownership or use of, or interest in, any interest bearing security, denominated class B income. Excluded from this tax, however, were: (a) corporate dividends earned within the state; (b) interest received on account of money loaned within the state at a rate of interest not exceeding 5 per cent. per annum. Held, that exempting from the tax income from dividends earned within the state did not deny equal protection of the laws, but, that exempting from the tax income from money loaned within the state at not more than 5 per cent. interest, apart from the equality clause, violated the privileges and immunities clause of the Fourteenth Amendment of the Federal Constitution, since the classification was based on a difference having no substantial relation to the revenue objective of the act.[1]

There would seem to be no legitimate objection on reason or authority to the court upholding the first exemption, referred to above, as not being in violation of the equality clause of the Fourteenth Amendment.[2] However,

---

[25] Morris v. State (1883), 94 Ind. 565, Hicks v. State (1927), 199 Ind. 401, 156 N. E. 548 (voir dire in court's discretion unless harm shown), Terre Haute Electric Co. v. Watson (1904), 33 Ind. App. 124, 70 N.E. 993 (Overruling of challenge for cause not reversible error unless peremptory challenges exhausted so as to constitute harm).

[1] Colgate v. Harvey (1935), 56 S. Ct. 252.

[2] Another Vermont tax act imposed a tax of 2 per cent. upon the net income of every corporation for the privilege of exercising its franchise in the state and of doing business therein. In addition to the 2 per cent. franchise tax, all tangible corporate property lying within the state is subject to a property tax. As the court points out, the 2 per cent. franchise tax, especially with the property tax added, has the effect of indirectly imposing a tax burden upon domestic business measurably equivalent to the 4 per cent. tax burden imposed upon dividends realized from out-of-state business. Furthermore, since the 4 per cent. tax is imposed only upon such part of the corporate net income as passes to the shareholders in the form of dividends, and the 2 per cent. tax is measured by the entire net income of the corporation, it may well be that the one tax burden would approximate the other. It seems clear, therefore, that the classification relative to dividends is not arbitrary. It has always been the doctrine of the Supreme Court that, though