



## Kentucky Law Journal

Volume 18 | Issue 3

Article 6

1930

# Jury Selection in Kentucky

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### Recommended Citation

Buckley, Leer (1930) "Jury Selection in Kentucky," *Kentucky Law Journal*: Vol. 18 : Iss. 3 , Article 6.  
Available at: <https://uknowledge.uky.edu/klj/vol18/iss3/6>

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## JURY SELECTION IN KENTUCKY

### DRAWING THE JURY

In the organization of the jury the first step is the selection of the jury commissioners. Annually, usually at the last regular term of the court for the year, the circuit judge in each county appoints "three intelligent and discreet housekeepers" of the county over twenty-one years of age, resident in the different portions of the county, and having no action in court requiring intervention of a jury, as jury commissioners to serve one year. This process varies throughout the state only in the number of commissioners appointed, three being the usual number. In counties having two divisions of the circuit court, four commissioners are appointed. In counties where the circuit court is divided into more than two divisions, one commissioner is appointed for each branch requiring the service of a jury. In Jefferson County, containing Louisville, the court is divided into seven branches, five of which require the service of a jury. Jefferson County has five commissioners.<sup>1</sup>

If any person appointed as a commissioner cannot serve, or having commenced, cannot complete his labors, the circuit judge may appoint another person of like qualifications in his place. A commissioner may serve only one year.<sup>2</sup>

Shortly after their appointment the commissioners meet, take an oath to perform their duties faithfully; and from the last returned assessor's book select from the intelligent, sober, discreet and impartial citizens resident housekeepers in the different portions of the county over "twenty-one years of age" the names of those who are to be the prospective jurors for the succeeding year. The number selected is based on the population of the county, the population being the gauge of court business. In the smallest counties (smallest in population) the number selected may not be less than one hundred twenty-five nor more than one hundred and fifty. In the largest county, Jefferson, the number selected is ten thousand, two thousand for each of the five branches of the circuit court requiring the services of a jury.<sup>3</sup>

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<sup>1</sup> Section 2241 of the Kentucky Statutes.

<sup>2</sup> Section 2242 of the Kentucky Statutes.

<sup>3</sup> Section 2241 of the Kentucky Statutes.

The name of each prospective juror is written on a slip of paper, each slip being as near the same size and appearance as possible. Individual slips are then enclosed in small cases or envelopes and deposited unsealed in the jury wheel or drum, care being taken to see that the same is empty. The drum is then locked and revolved, and after the slips are thoroughly mixed, the commissioners draw the names of those who are to be summoned to serve on the regular panels of grand and petit juries during the next term of court.

If, at any time, it becomes apparent to the judge that the names in the jury drum will be exhausted before the next annual selection of commissioners, it is his duty, by an order entered in the record, to reconvene the commissioners. They will then select and place in the drum the number qualified, grand and petit jurors, ordered by the judge. After placing the slips bearing the names of the prospective jurors in the drum and mixing them, the commissioners draw therefrom the names of twenty-four persons qualified to serve as grand jurors. The names of these twenty-four are written on a list, which is enclosed in an envelope, sealed and signed. The slips from which the names are taken are destroyed. The drum is locked and revolved and the names of from thirty to thirty-six persons are drawn for service on the petit jury. The number is specified by the circuit judge. The lists and the locked drum are then turned over to the circuit clerk, who with his deputies must take an oath not to open the envelopes containing the jury lists until the proper time—twenty days before the next term of court. The key to the drum is delivered to the judge, he being obligated to keep it in his sole possession.<sup>4</sup>

Where the key is left in the custody of the clerk, even in a sealed envelope, it is ground for discharging of the jury. *Smith v. Commonwealth*, 108 Ky. 53 (1900).

For services during other terms of the year and for services during special terms, the drawings are made by the judge in open court in the same manner as drawings by the commissioners, and he may require the presence of one of the commissioners if he thinks best. As in the case of commissioners the lists and drum are turned over to the circuit clerk to hold until the

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<sup>4</sup>Ky. Stats., 2243.

proper time to be opened. The method in courts having continuous session is the same except the drawings are made more frequently; every two weeks for petit jurors, and every month for grand jurors.

Where a special term is to be held, the lists provided for the next regular term are used and a new list drawn at the special term becomes the lists for the next regular term.<sup>5</sup>

#### SUMMONING JURORS

Within twenty days of the date to which the grand and petit jurors are to be summoned, the clerk opens the envelopes containing the lists, and makes copies of them for the sheriff, to whom they are delivered. At least three days before the term date the sheriff summons the persons named on the lists, the grand jurors to appear on the first day and the petit jurors on the second day of the term,<sup>6</sup> except in cases of courts having continuous session where the jurors are summoned to appear on the first Monday in the month for which they are drawn.<sup>7</sup>

Personal notice must be given to each prospective juror found. If the sheriff is unable to find a prospective juror, notice in writing must be left with some member of his or her family over sixteen years of age. The lists are returnable on the first day of the term with a certificate thereon of the date and manner in which each juror was summoned.<sup>8</sup>

#### REGULAR PANELS

The regular panel consists of twelve persons. From the list of twenty-four summoned, twelve are selected in the order in which their names appear. If the list is exhausted without securing the twelve required (this may be due to failure on the part of jurors to appear, or their being excused by the judge, or both) the judge draws from the wheel the names of a sufficient number to complete the list and the sheriff summons them forthwith. This process is continued until a regular panel is acquired. If the vacancies to be supplied do not exceed three,

<sup>5</sup> Ky. Stats., 2244.

<sup>6</sup> It is not error to summon petit jurors for the first day of the term. *Harshfield v. Commonwealth*, 212 Ky. 87, 278 S. W. 623 (1925).

<sup>7</sup> Ky. Stats., 2246.

<sup>8</sup> Ky. Stats., 2246.

the judge may direct and he usually does direct the sheriff to summons bystanders to fill the vacancies.<sup>9</sup>

A jury containing one bystander after six bystanders had been summoned to complete the panel, and each party had stricken three names, was not properly impanelled. *Martin v. Stumbo Elkhorn Coal Co.*, 216 Ky. 147, 287 S. W. 539 (1926).

1. Grand Jury. A grand juror must be a citizen and a housekeeper of the county over twenty-one years of age. No civil officer, tavern keeper or unpardoned felon is competent to serve on a grand jury. But the fact that a person not qualified or competent, serves on a grand jury is not cause for setting aside indictments found by the grand jury.<sup>10</sup> Each grand jury is presided over by a foreman, appointed by the court.<sup>11</sup>

2. Petit jury. The regular petit jury panel consists of twenty-four persons. From the list of thirty to thirty-six summoned the twenty-four are selected in the order in which their names appear. If the list is exhausted without securing the twenty-four required, the judge draws double the number of names to supply the places of those excused or absent and these are summoned forthwith. This process is repeated until the regular panel is acquired. If the number of vacancies does not exceed three, the judge may direct the sheriff to fill the panel from the bystanders. If it becomes necessary to fill more than three vacancies, these vacancies must be drawn from the wheel.<sup>12</sup> The purpose of the method of selecting juries is to do away with professional jurors and a verdict by a jury summoned in substantial disregard of the statutory method will be set aside.<sup>13</sup>

A citizen housekeeper, twenty-one years of age, sober, temperate, discreet and of good demeanor is qualified to serve on the petit jury. A civil officer, transient, physician, surgeon, practicing attorney, minister, cashier, or teller of a bank, asylum attendant, retail druggist or pharmacist, undertaker, depot agent of a railroad, or telegraph operator in employment, or any person over sixty years of age may not be compelled to

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<sup>9</sup> Ky. Stats., 2247.

<sup>10</sup> The fact that a county coroner was a member of the grand jury which returned an indictment is not sufficient for quashing same. *Ford v. Commonwealth*, 223 Ky. 677 (1928).

<sup>11</sup> Ky. Stats., 2248.

<sup>12</sup> *L. & N. R. R. v. King*, 161 Ky. 324 (1914).

<sup>13</sup> *L. & N. R. R. v. Owen*, 164 Ky. 557 (1915).

serve on a petit jury. The fact that a juror is not competent to serve is not cause for setting aside a verdict. Nor may an exception be taken to any juror for incompetency after the jury has been sworn.<sup>14</sup>

After the first week the regular panel of the petit jury may be discharged and another jury impaneled. The second jury may not be discharged after a week's service.<sup>15</sup>

#### TRIAL JURY

In the circuit court, twelve persons constitute a trial jury with the privilege in the parties to any action or prosecution, save a prosecution for felony to agree to a trial by a less number.<sup>16</sup> In courts inferior to the circuit court, six persons constitute a jury. In inferior courts the jury is usually waived. In the circuit court the parties seldom agree to a smaller number than twelve.

Selecting the Jury in Civil Cases.—The regular panel of twenty-four persons having been made up, the clerk writes the names of the jurors on separate slips of paper of as near the same size and appearance as possible and deposits them in a box for that purpose. After mixing them, he draws eighteen names from the box. These eighteen names are written on two slips of paper, one of which is delivered to each party. The plaintiff and defendant each strike three names and return the list to the clerk who calls the first twelve not erased. Before any names are struck, those on the list may be challenged for cause. Jurors' names that are challenged, struck, or not used, are returned to the box. If after challenging and striking there are not enough remaining, other names are drawn from the box until the panel is exhausted. If the panel becomes exhausted and additional jurors are needed, the court may order a sufficient number drawn

<sup>14</sup>Ky. Stats., 2253. *L. & N. R. R. v. King*, note 12 supra. The same is true where a juror is under twenty-one years of age. *Combs v. Commonwealth*, 97 Ky. 24 (1895); *Netter v. Louisville R. R. Co.*, 134 Ky. 673 (1909).

<sup>15</sup>Ky. Stats., 2261. *Imperial Jellico Coal Co. v. Fox*, 167 Ky. 1 (1915); *L. & N. R. R. v. Messer*, 165 Ky. 506 (1906), where a circuit court discharged the first regular jury after a week's service, and discharged each succeeding panel after a week's service. An objection to the fifth panel was overruled. This was ground for a reversal.

<sup>16</sup>Power to waive the requisite number of jurors in a prosecution for felony denied on the ground of public interest in the accused. *Branham v. Commonwealth*, 209 Ky. 734, 273 S. W. (1925). See 37 Yale L. J. 521. Ky. Stats., 2252.

from the drum or summoned from bystanders as already described<sup>17</sup>

Selecting the Jury in Criminal Cases.—From the box containing the names of the regular panel of twenty-four the clerk draws from the box as many more as are required and as often as required until a jury is obtained or the panel is exhausted. If the panel is exhausted, the judge may order the sheriff to make up the deficiency from the bystanders or he may draw names from the drum and have them summoned at once.<sup>18</sup>

If the judge be satisfied after making a fair effort that it will be impracticable to obtain a jury free from bias in the county where the prosecution is pending, he may order the sheriff to summon a sufficient number of qualified jurors from some adjoining county in which he, the judge, believes there is the greatest probability of obtaining impartial jurors. The judge's action in so doing is not subject to review.<sup>19</sup> The sheriff summons these jurors according to the common law method.<sup>20</sup> Jurors summoned from adjoining counties may be forced to attend as if they were citizens of the same county. They are paid mileage and the same pay as other jurors, that is, three dollars a day. Any person legally summoned and failing to attend as grand or petit juror without a reasonable cause, is subject to a fine of ten dollars.<sup>21</sup>

#### CHALLENGING THE JURY

A challenge to the array may be made only for a substantial irregularity in selecting or summoning the jury or in drawing the trial panel by the clerk. If the challenge is sustained on the ground of irregularity in selecting or summoning, all the standing jurors are excluded and a new trial jury is summoned by the sheriff. If sustained because of an irregularity of the clerk in drawing the trial panel, a new panel is drawn.<sup>22</sup>

A challenge to an individual juror must be taken before he is sworn in chief, unless the court for good cause permits it

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<sup>17</sup> Ky. Stats., 2267.

<sup>18</sup> Ky. Stats., 2266.

<sup>19</sup> *Winstead v. Commonwealth*, 195 Ky. 484 (1922), Criminal Code 281.

<sup>20</sup> *Deaton v. Commonwealth*, 157 Ky. 308 (1914).

<sup>21</sup> Ky. Stats., 2269.

<sup>22</sup> Criminal Code, Section 200.

to be made at any time before the jury is completed.<sup>23</sup> An exception to a juror must be taken in time.<sup>24</sup>

In civil cases each party is allowed three preemptory challenges. In a prosecution for misdemeanor the Commonwealth and the defendant are each allowed three preemptory challenges.<sup>25</sup> In prosecutions for felonies the Commonwealth is allowed five preemptory challenges; the defendant is allowed fifteen challenges.<sup>26</sup>

Challenges for cause are spoken of as general challenges or particular challenges. A general challenge is one based upon juror's lack of qualification as prescribed by statute,<sup>27</sup> conviction for felony, or defective mentality. A particular challenge is one based on actual bias or implied bias. None of these need be discussed, save possibly implied bias.

The Criminal Code, section 210, sets out the following as being evidence of implied bias:

1. Consanguinity, guardian and ward, attorney and client, landlord and tenant, employer and employed on wages, member of defendant's family or of the person's alleged to have been injured by the offense charged or on whose complaint the prosecution was instituted.
2. Adverse to defendant in a civil suit, or having complained against or been accused by him in a criminal prosecution.
3. Served on the grand jury in a criminal prosecution bringing the indictment, or on the coroner's jury which inquired into the death of the person whose death is the subject of the indictment.<sup>28</sup>
4. One of the former jury to try the same indictment and whose verdict was set aside, or were discharged without a verdict.
5. Served on the trial jury, which has tried another person for the offense charged in the indictment.
6. Served as juror in a civil action brought against the defendant for the act charged in the indictment.
7. Conscientious objections to capital punishment, where the defendant is being tried for a capital offense.

In a civil action most of the above relationships would be sufficient to raise a challenge for implied bias. Having served as a juror on a former trial of the same case would be ground

<sup>23</sup> Criminal Code, Section 202.

<sup>24</sup> *L. & N. R. R. v. King*, note 12 supra; *Combs v. Commonwealth*, 91 Ky. 24 (1895); *Netter v. L. & N. R. R.*, 134 Ky. 121 (1909).

<sup>25</sup> Ky. Stats., 2258.

<sup>26</sup> Criminal Code, Section 203.

<sup>27</sup> Ky. Stats., 2253.

<sup>28</sup> Fact that juror is a member of the grand jury returning indictment raises the question of implied bias. *Riley v. Commonwealth*, 190 Ky. 204, 227 S. W. 146 (1921).



for challenge.<sup>29</sup> Affinity by marriage is ground for challenge.<sup>30</sup> Kinship to stockholders in a defendant corporation is not sufficient.<sup>31</sup> Intimate and confidential relationship to either party would be sufficient.

Opinion formed from rumor does not disqualify in either civil or criminal cases.<sup>32</sup> The same is true where opinion is based upon a newspaper statement if the juror can render an impartial verdict.

Decisions of the court upon challenges to the array and upon challenges for cause in criminal cases are not subject to exception and review however prejudicial they are to the accused.<sup>33</sup> Decision of the court as to peremptory challenges in criminal cases is subject to review.<sup>34</sup>

In criminal cases challenges to the jury are first made by the Commonwealth, then by the defendant. The order of the challenges are as follows:<sup>35</sup>

1. Array.
2. To juror for general disqualifications.
3. To juror for implied bias.
4. To juror for actual bias.
5. Peremptory.

The trial jury having been selected, the clerk of the court (the judge if he sees fit) administers the oath to them as a body. The court appoints a foreman and the real trial starts.

#### THE USE OF THE JURY

The circuit court is the great trial court in Kentucky. A jury composed of six persons may be had in courts inferior to the circuit court, but as a matter of fact they are rarely had, the jury being waived. In the circuit court a jury of twelve is usual in both civil and criminal cases.<sup>36</sup> In equitable proceedings the trial is to the court with the usual code provision that a jury may be called to pass upon the facts. The court, how-

<sup>29</sup> *Herndon v. Bradshaw*, 4 Bibb 45 (1815); *McKee v. Cincinnati F. & S. E. R. R. Co.*, 161 Ky. 713, 171 S. W. 425 (1914).

<sup>30</sup> *Daily v. Gaines*, 1 Dana 529 (1833).

<sup>31</sup> *Stone v. Monticello Construction Co.*, 135 Ky. 659 (1909); *Walter v. Louisville R. R. Co.*, 150 Ky. 652 (1912).

<sup>32</sup> *Smith v. Commonwealth*, 100 Ky. 135 (1896).

<sup>33</sup> *Mann v. Commonwealth*, 215 Ky. 731 (1926).

<sup>34</sup> *Smith v. Commonwealth*, 50 S. W. 241, note (32) supra.

<sup>35</sup> Criminal Code, Section 216.

<sup>36</sup> Ky. Stats., 2252.

ever, generally passes upon both the law and facts in such cases. There is no rule that the defendant has a constitutional right to have a jury pass in an equitable action upon the facts.

In criminal cases the verdict must be unanimous of all the jurors. In civil cases a verdict of three-fourths of the jurors is sufficient. But where a verdict is rendered by a less number than the whole jury, it is necessary that the verdict be signed by all of the jurors who agree to it.<sup>37</sup> Special verdicts are prohibited in civil cases,<sup>38</sup> but are allowed under the criminal code.<sup>39</sup>

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<sup>37</sup> Ky. Stats., 2268.

<sup>38</sup> Civil Code, Section 317 and notes.

<sup>39</sup> Criminal Code, Sections 259, 260, and 261.