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WHAT IS BECOMING OF THE JURIES?

*By Jacob J. Lieberman of the Los Angeles Bar**

FOR some time past the Jury system has been hanging in the balance. A considerable opinion is crystalizing in this country that the jury system should be put into the discard, and that this important institution of Magna Charta should be considered as superfluous in our modern jurisprudence. The age-old debate is being renewed as to the efficacy, as well as the advisability of the jury system.

California still guarantees, by its Constitution, the right of trial by jury. In fact, the language of this Constitution is—"The right of trial by jury shall be secured to all, and remain inviolate." How inviolate it is, and how all receive the benefit of it, is a matter for individual conjecture, when one learns that before a litigant in a civil action can obtain a jury trial he must first deposit the fees of the jury, to-wit: the sum of $24.00, to cover the $2.00 for the first day which each juror is to serve, and more recently the Presiding Judge of Los Angeles County announced that the law requires mileage in addition to the fee; therefore a deposit is now required of $40.00 before the case will be set for trial to a jury. This deposit must accompany the demand for the trial by jury which must be included in the so-called setting card, or notice of application for the setting of the cause for trial. If a jury is not asked for at this time it is determined to have been waived, and the parties litigant are not entitled to a trial by jury. No express waiver is required.

When the case finally comes on for trial the deposit is used for the first day's jury fees. On the morning of the second day of the trial the party who has demanded the jury must deposit an additional $24.00 before the trial can proceed and this money is paid out in cash to the jurors by the Clerk at the rate of $2.00 each for that day, and in like manner on the morning of each day's renewal of the trial another $24.00 must be forthcoming before proceedings can be commenced for the day. What chance does a poor litigant, who does not come within the pauper class, stand in enforcing his constitutional right, "secured to all," for a trial by jury? One can

* (This is another of the series of articles calling attention to interesting differences and comparisons between the laws of Colorado and California, written especially for Dicta by Mr. Lieberman, formerly of the Denver Bar.)

readily see that the result of a system of implied waivers of jury trials by failure to demand a jury at the time of the notice of setting, and an expensive process such as has just been outlined, is that the number of jury trials in California is being considerably reduced.

Trial by jury, in other words, is being discouraged in California. Is this a sign of the tendency of the times?

A former Colorado practitioner cannot help but make a comparison. Remembering that in Justice Courts in Colorado trial are had to a jury of three, and a jury of six is the maximum, the extra three being called only upon demand of the party paying the extra fees, and that in the Courts of record, a jury of six is called upon the mere demand for a jury, whereas a special demand for the jury of twelve must be made, together with a payment of the additional fee entitling the party to the extra six jurors, one naturally contrasts this convenient system with the fixed rule in California, for juries of twelve in all Courts. In California the litigants practically pay the jurors direct, inasmuch as the Clerk takes the cash out of the monies deposited by one of the litigants and directly pays each juror in Court in the case in which he serves. In Colorado the juror receives his pay from the County and the jury fund is embellished by the litigant only out of the fixed fees paid for this purpose, instead of the actual amount paid to the jurors for the particular day's attendance. In California the County funds pay only for the criminal juries and for general attendance of jurors not sitting on a particular case. One of the vagaries of the system is the fact that a juror sitting in a criminal case receives $3.00 per diem, while the juror sitting in a civil case in the same building receives $2.00 per diem. Sometimes a civil jury is drafted to sit in a department to which has been assigned for trial a criminal case, in order to relieve the congestion in the regular civil departments. The Civil jurors in such case who are drafted to sit in the criminal trial become thus suddenly, and most fortunately, elevated from the $2.00 class to the $3.00 class.

On the other hand, speaking of numbers of jurors, all twelve are not required to agree in order to return a verdict in civil cases in California. The agreement of nine jurors is sufficient for a verdict. In criminal cases a unanimous verdict of all twelve is still required.

In the selection of a jury, twelve jurors are called into the box. The statement of the case is made and the examination of the jurors as to their qualifications proceeds, and after challenges for cause are completed the peremptory challenges are exercised. This is not done by taking the list of jurors and handing it back and forth from one Attorney to the other, and silently and secretly striking the undesirable jurors peremptorily challenged, but each counsel has to announce aloud the name of the juror whom he challenges without announcing his rhyme or reason therefor. Imagine the feelings of the average woman juror who is thus excused from the jury box, without being informed as to the motives or reasons therefor! Imagine the popularity of a District Attorney who tries one case after another before the same panel and who, perchance, may have excused the same juror on more than one occasion!

In criminal cases twenty peremptory challenges are allowed to each side in cases where the offense is punishable with death or imprisonment for life. In trials for lesser offenses ten peremptory challenges are allowed to each side. (Until the Legislative Session of 1927, the State was entitled to half the number of challenges which were allowed to the defense). In civil cases each side is entitled to four peremptory challenges, except in the Justice Courts where they are entitled to three. In civil cases where there are several defendants joined together, who are denied separate trials, they must join in their challenges, thus all being entitled, collectively, to but four peremptory challenges.

Grand juries are called once a year and serve a whole year. How business men who usually are drafted to grand juries are able to do this is a mystery. Until recently, even petit juries used to serve for several months. More recently a new system has been adopted which brings about a better rotation and calls for approximately two weeks service, as under the Denver system inaugurated some time ago.

As has been indicated above, and as has by this time been heralded throughout the world in the reports of the many sensational trials which have been held out here, the California law provides for women, as well as men, to sit on juries. The only male jury which one sees now in California is either accidental or in the Federal Court.

Arguments of counsel to the jury in summing up the case are made prior to the giving of the instructions; in fact almost invariably prior to the time when the Court has finally settled the instructions, the Court for the most part completing the writing and compilation of the instructions while sitting on the bench during the arguments of the lawyers to the jury. This has led to such a loose system that very rarely does one attorney show opposing counsel the courtesy of furnishing him with a copy of the instructions which he proposes, and seldom, if ever, does the Court submit his proposed instructions to the attorneys in the trial, to afford them an opportunity to call the Court's attention to errors, and perhaps persuade the court to avoid such errors.

As to the place of the argument, coming before the instructions are read to the jury for settlement, five years of practice in the California courts have not convinced this writer that the Colorado system of having the arguments follow reading of the instructions to the jury, is not superior. In fact, the writer cannot help feeling, after years of experience with many juries, that the California system makes confusion worse confounded. The average juror entering the jury box has certain notions of his own as to what the law is or ought to be. The attorneys for the plaintiff or the prosecution tell the jury that the law is something else or that they expect that the Court will so instruct them. Then come the attorneys for the defense and tell the jury that the law is something else again, or that they expect the Court will so instruct them. Then comes the Court and advises the jurors that the law is perhaps something far different from what any of them have said. By that time a bewildered jury is ready to forget all about law and yield only to instincts; and some times it may happen, as occurred in one of the Los Angeles courts when a lawyer emphatically announced to the jury in his argument that he was confident that the Court would instruct them that the law was thus and so, and an irascible Judge sitting on the bench, unable to repress his nervous temperament, leaned forward and, interrupting the argument, very forcefully stated—"The Court will do no such thing!"

Yes, for various reasons, juries are most uncertain quantities!