

RESTRICTIONS ON THE RIGHT OF TRIAL BY JURY

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According to a recent report of the Ohio Bar, February 1, 1937, at page 624, the Cleveland Bar Association will sponsor a bill which proposes to require a written demand to be made by a litigant before a trial by jury may be had in a civil case in common pleas courts. The bill further provides that if the demand is not made within a specified time the jury will have been deemed to have been waived and, if the jury is demanded, it shall consist of eight persons unless the litigant specifies twelve. A law of this type is not an innovation in Ohio; statutes similar in intent and purpose have been passed by the legislature reducing the number of jurors as well as requiring prepayment of jury fees before the right may be exercised. The underlying purpose of such statutes is to reduce the number of jury trials so that both the expense of hiring juries and the sluggishness of judicial procedure may be lessened. Upon this basis such statutes are thought to be justified. However, these statutes involve more than pure public policy, they present a constitutional issue and it is certain that without constitutional sanction they are invalid. At the threshold, therefore, it is pertinent to consider them in the light of Art. I, Sec. 5, Ohio Constitution "The right of trial by jury shall remain inviolate, except that, in civil cases, law may be passed to authorize the rendering of a verdict by a concurrence of not less than three-fourths of the jury".

In testing the proposed statute under this provision, three fact situations are suggested. Although they are not all presented by the proposed statute, nevertheless, they are closely related and anticipate the same problems. These fact patterns placed in question form may be stated as follows: (1) Is it constitutional in view of Art. I, Sec. 5 for the legislature to reduce the size of the jury in a civil case to eight persons? (It is apparent that the framers of the proposed statute sought to evade this question by placing the burden on the litigant to choose a jury of eight or twelve.) (2) Is it constitutional in view of Art. I, Sec. 5 for the legislature to require a written

demand for a jury or in event of litigants failing to make the demand to deem a trial by jury waived? (3) Is it constitutional under Art. I, Sec. 5 for the legislature to require a deposit of jury fees as a prerequisite to a trial by jury or in event of litigants failing to pay the deposit to deem a trial by jury waived? (Each question contemplates common pleas courts.)

The right of trial by jury as used in the constitution is predicated according to Ohio authority (for trial by jury is neither defined nor described in the constitution) upon the right of trial by jury as it existed at common law at the time of the adoption of the constitution. It was said in an early Ohio case, *Willyard v. Hamilton*, 7 Ohio (pt. 2.) 111 (1836), "The constitution declares that the right of trial by jury shall be inviolate; and the only way that we can ascertain the true meaning of this clause, is by making inquiry, whether before the constitution was framed if jury trials were known in such cases in the territory of Ohio." Applying this test, the court approved a charter provision permitting the assessment of land for canal purposes by a commission rather than a jury. The court found that prior to the adoption of the constitution trial by jury was not had in such cases. The same test has been followed in subsequent Ohio cases and it is now well established that the trial by jury contemplated by the constitution is the jury at common law existing at the time of the adoption of the constitution. *Work v. State*, 2 Ohio St. 297 (1853); *Hagany v. Cohnen*, 29 Ohio St. 82 (1876); *Inwood v. State*, 42 Ohio St. 186 (1884); *Belding v. State, ex. rel. Heifner*, 121 Ohio St. 393, 169 N.E. 301, 8 Ohio L. Abs. 28 (1929).

Following this line of reasoning, numerous Ohio cases have held that a trial by jury is a trial by twelve persons. This was suggested in Ohio, as early as the *Willyard* case, *supra*, and was definitely settled in *Lamb v. Lane*, 4 Ohio St. 167 (1854). In the latter case Justice Thurman states, "That the term 'jury,' without addition or prefix, imports a body of twelve men in a court of justice, is as well settled as any legal proposition can be." *Accord, Work v. State, supra; Sovereign v. State*, 4 Ohio St. 489 (1855). Other cases which have suggested that a trial by jury is a trial by twelve persons are *Norton v. McLeary*, 8 Ohio St. 205 (1858); *Warner v. B. & O. R. R. Co.*, 31 Ohio St. 265 (1877); *Miller, Recr. v. Eagle*, 96 Ohio St. 106, 117 N.E. 23 (1917); *State, ex. rel. Warner v. Baer*, 103 Ohio St.

585, 134 N.E. 786 (1921). In the last case Chief Justice Marshall, citing *Work v. State* and *Lamb v. Lane* said, "It has been accepted as settled law throughout the United States that a jury is composed of twelve men, and the early cases in Ohio are in perfect harmony with this principle."

Since it is accepted that a trial by jury is a trial by twelve persons, our next inquiry (which is our first question above), is, can the legislature reduce that number? It has been held that it can not. *Work v. State, supra*; *Sovereign v. State, supra*; *Fleishman Transportation Co. v. Bishop*, 12 Ohio App. 293 (1919). The latter case declared unconstitutional the statute, Ohio G.C. 1558-15, establishing a jury of six in the municipal court of Cincinnati. Citing the *Lamb* case, *Miller* case, *Norton* case, and *Warner* case, *supra*, the court decided that the right of trial by jury meant a right to a jury of twelve and to reduce that number was unconstitutional. In view of this decision, this statute was changed to read "Provided however, that any party may demand a jury of twelve by specifying that number in the written demand." In the light of these precedents, it may be deduced that, if it is unconstitutional to reduce the number of jurors in Ohio to a less number than twelve in courts inferior to common pleas courts, it would likewise be unconstitutional to reduce the number of jurors in the common pleas courts, since the common pleas courts are certainly common law courts contemplated by the constitution.

In numerous cases in other states courts have held in accord with the Ohio decisions, that the common law jury is a jury of twelve men, *McRae v. Grand Rapids L. & D. R. Co.*, 93 Mich. 399, 53 N.W. 561 (1892); *Povlich v. Goldich*, 311 Ill. 149, 142 N.E. 466 (1924); *State v. Walker*, 192 Iowa 823, 185 N.W. 619 (1921); 16 R.C.L. 221. Blackstone writes, 3 Black. 352, "A common law jury consisted of 12 free and lawful men, *liberos et legales homines*." Other cases have held where a jurymen is ill and a verdict is rendered by a jury of less than twelve to which number the litigants did not acquiesce there is no verdict. *McRae v. Grand Rapids L. & D. R. Co.*, *supra*; *Povlich v. Goldich, supra*. Statutes passed by legislatures lowering the number of jurors below twelve have been held as a general rule unconstitutional. In *Re Eshelman v. Chicago B. & O. R. Co.*, 67 Iowa 296, 25 N.W. 251 (1885); *Millers Nat. Ins. Co. v. American State Bank of East Chicago*,

206 Ind. 511, 190 N.E. 433 (1934). The only circumstances under which such reductions have been held within the constitution are those in which the statute has affected only inferior courts which had no jury trial at common law or where the constitution permits a less number, *Lindsey v. Lindsey*, 257 Ill. 328, 100 N.E. 892 (1913); *Groves v. Ware*, 109 S.E. 568; 182 N. Car. 553 (1921); Texas Const. Art 5, Sec. 13 permits 9 jurors in civil cases. *Dictum in Baader v. State*, 201 Ala. 76, 77 So. 370 (1917) approves the rule that the legislature can not reduce the number of the jury below twelve. The overwhelming weight of authority appears to support this view. See also 16 R.C.L. 224.

As noted before the framers of the proposed statute have sought to evade the possibility of unconstitutionality by leaving to the discretion of the litigants whether they want a jury of eight or twelve. Can a litigant agree to be tried by a court with a jury of less than twelve persons? Chief Justice Marshal answers this question affirmatively in the Baer case, *supra*. In that case the defendant was charged with manslaughter. During the trial one of the jurors became sick and the defendant agreed to be bound by the verdict of the eleven remaining. The defendant then claimed no verdict. The court held "that the purpose of the framers of the bill of rights was to prevent the legislature from enacting any statute which would deprive persons accused of the right of trial by jury", but it was not mandatory on the accused to exercise the right. If he desired he could be tried without a jury, therefore he could be tried, if he desired, with a less number than the constitutional jury. Although apparently no civil case involves the same point, since the right of trial by jury is thought to be more sacred and the burden of proof is greater in a criminal proceeding, it may be deduced that, if a jury of less than twelve is permitted in a criminal action with consent of the parties, it would be permitted in a civil action. Cases in accord with the Baer case, *supra*, are *Miller v. State*, 218 N.W. 743 (1928) Neb.; *Patton v. United States*, 281 U.S. 276, 50 S. Ct. 253 (1930).

The second and third questions *supra*, "Is the requirement of a written demand constitutional?" and "Is a requirement of a demand for prepayment of jury fees constitutional?", may be considered together since in both instances, if they are to be answered in the negative, they must be justified on the same

principle. The first is raised in the proposed statute; the second has been raised in several Ohio cases but has never been adjudicated as to common pleas courts. As indicated above, the trial by jury as contemplated by the constitution is the trial by jury that was in existence at the time of the adoption of the constitution. There is authority to the effect that this right is absolute and unconditional. In the *Work* case, *supra*, Justice Ranney said, "If it had been deemed safe to leave it to the discretion of the general assembly, no constitutional provision was needed", and in *Gunsaulius, Admr. v. Pettit, Admr.*, 46 Ohio St. 27, 17 N.E. 231 (1888) Judge Minshall stated, "The right may be extended but not abridged". Approaching the problem in the light of these premises, it obviously follows that an infringement upon the unqualified right of trial by jury, such as, requiring a written demand or requiring prepayment of jury fees, would be unconstitutional, since at the time of the adoption of the constitution neither of these things was required, *dictum*, *Silderman v. Hay, infra*.

But upon the examination of other Ohio cases we find that the right of trial by jury is not as absolute and unconditional as the above cases would lead us to suspect. Although there are no cases which deal directly with our problem as to common pleas courts, there are cases which can be deemed to have resulted in the encroachment on the unconditional right of trial by jury which may have been contemplated in the constitution. Four Ohio cases appropinquate our problem. These are not the only cases on the subject, but since each reviews the decisions before it, we are enabled to make a comprehensive study of the whole field by employing these cases as a point of departure.

The first case to be considered is *Miller, Recr. v. Eagle, supra*. Here the plaintiff sued in the municipal court of Dayton for labor performed and materials furnished. Defendant demanded a jury but refused to pay the fees before trial as was required by Ohio G.C. 1579-61, contending that the act was unconstitutional as a deprivation of the right of trial by jury as guaranteed by the constitution. The Supreme Court sustained the act.

The court cited *Reckner v. Warner*, 22 Ohio St. 275 (1872). In that case assessment by three disinterested freeholders was made for damages in taking land for public road purposes. The statute involved permitted appeal from this

assessment to the probate court where a jury trial could be procured if the appellee placed bond for the costs. The court sustained the act and declared it not an encroachment on the right of trial by jury citing *Norton v. McLeary*, *supra*. In the Norton case the constitutionality of a statute extending the jurisdiction of the justice of peace from \$100 to \$300 was attacked for the first time. Counsel for the defendant contended in substance that the jurisdiction of the justices of peace as well as the trial by jury mentioned in the constitution were the same as were in existence at the time of the adoption of the constitution, and at that time in cases involving more than \$100 a jury trial was allowed; therefore, now to take away a jury in cases involving more than \$100 would be an impairment of the constitutional right of trial by jury as it existed at the time of the adoption of the constitution. The court permitted the extension of the jurisdiction of justices courts basing its conclusion upon Art. 3, Sec. 9 (Const. of 1851) "and their powers and duties shall be regulated by law." As to the contention of the defendant the court said in substance that the defendant had a right of trial by jury upon appeal and even though an appeal bond is demanded of the defendant, nevertheless the right remained "perfect" and "unimpaired". The court further stated, "But on this subject a discretion is given to the legislature which must be so far abused, as to be clearly violative of the substantial right before the court can interfere to nullify legislative action".

Of the Reckner case, *supra*, Judge Newman wrote in the Miller case, *supra*, p. 110, ". . . This contention [that an appeal bond was a burden] was not sustained by the court, the court being of the opinion that the requirement of an appeal bond . . . was a moderate and reasonable restriction upon the enjoyment of the right of trial by jury and was not an impairment of the right itself . . ." Here then we find the absolute and unconditional right as it may have existed at common law restricted by the rule of reasonableness.

The Miller case further cites *Silberman v. Hay*, 59 Ohio St. 582 (1899), a case in which the court declared unconstitutional The Cuyahoga County Jury Law, 91 Ohio Laws 795, which required five days notice and five dollars deposit or a waiver of the jury. The court held the act unconstitutional upon the basis that the right of trial by jury was a subject mat-

ter of general legislation, and laws affecting it must be uniform in operation throughout the state, Art. 2, Sec. 26, but nevertheless the court used these significant words, "At the adoption of the constitution of Ohio every litigant in a suit, such as that between the parties below, *had a right to demand a jury trial without depositing any sum of money, or making the demand at any particular period, before the case was called for trial.*" (Italics writers) From this language it is patent that this judge would have declared the statute unconstitutional even had it not been restricted to a county; it was the same Judge Minshall who said in the Gunsaulus case, *supra*, "The right may be extended, but not abridged." But note how Judge Newman interpreted this case, "In deciding that the Cuyahoga County jury law affected the right of trial by jury, the court could not have meant to hold that this right was affected in the sense that it was impaired and the law thereby rendered invalid, for the inference to be drawn from the second paragraph of the syllabus is that had the law not been limited in its operation to Cuyahoga County, it would have been preserved from constitutional infirmity." This language is strong and there is little doubt how this judge would have regarded the statute suggested by the Cleveland Bar Association had it been before him. This seems even more evident when in speaking for the court he held constitutional Ohio G.C. 1579-61, *supra*, on the grounds of a "moderate and reasonable restriction of the right of trial by jury and not an impairment of the right." The language is especially strong since he does not distinguish in his reasoning between municipal courts and common pleas courts. By his interpretation he has narrowed the concepts of the right of a trial by jury by subjecting it to reasonable restraints.

However, it might be argued that the municipal court is an inferior court, *Hess v. Devon*, 112 Ohio St. 1, 146 N.E. 311 (1925) from whose decisions litigants have a right to appeal to a trial before a common pleas court with a jury of twelve. See Ohio G.C. 11215. Therefore, it would seem that these cases concerning municipal courts are not authority for saying that the right of trial by jury may be restricted, first, because litigants in these inferior courts never had a right of a trial by jury, *Work v. State*, *supra*, and second, because if they do have such right it is perfected upon appeal to the common pleas court, *Norton v. McLeary*, *supra*. It has been held in an unreported

case, *Doll v. Williams*, Franklin County, Feb. 4, 1930, that Ohio G.C. 11215 which defines the appellate jurisdiction of the common pleas courts and provides for the appeal from inferior courts to the common pleas court, is a law of general nature and the method of appeal provided in the statute can not be varied in any one municipal court. If this decision is followed, it will mean that an appeal to a court with a jury of twelve can be enjoyed from all municipal courts.

However, the Indiana court has taken a different view of this problem, in *Millers Nat. Ins. Co. v. American State Bank of East Chicago*, *supra*. In discussing a statute reducing a jury in a municipal court to six, the court declared, "We must conclude that the tribunal is a court, presided over by a judicial officer, with the same powers as to the supervision of trials, instruction of the jury as to the law, granting new trials and arresting judgment, that are vested in the circuit courts and the judges thereof" and therefore a jury must be provided satisfying the common law requirements. It is significant to note that by Burns Ind. Stat., 4-2603, this specific court might be appealed from in the same manner as justice of peace courts, and by *Stewart v. J. E. Ertel & Co.*, 69 Ind. App. 29, 121 N.E. 661 (1919) it was held reversible error to try an appeal from a justice court with six jurors instead of twelve. This is comparable to the appeal from municipal courts under Ohio, G.C. 11215. Applying the Indiana doctrine to the Ohio decisions that both municipal courts and common pleas courts must have juries as existed at common law, we may conclude that the apparent restriction on the right of trial by jury such as the requirement of a prepayment of jury fees in the municipal court, would be likewise permissible in the common pleas courts.

The next case with which we are concerned, is that of *Harry Goldberg Co. v. Emerman*, 125 Ohio St. 239, 181 N.E. 19 (1932). In this case the court upheld the constitutionality of a statute, Ohio G.C. 1579-24, requiring written demand before a jury trial could be enjoyed in the municipal court of Cleveland. This requirement raises a different question from the previous one discussed in that here if the litigant is deprived of his right, it is because he has neglected to do an act which it is within his power to do, whereas, in the case of requiring prepayment of jury fees, if the litigant is deprived of his right, it may be because the performance of the act is not within his power. Courts

have not distinguished these situations upon this ground. Ohio courts have held without differentiating between inferior and superior courts that it is constitutional to require a party to make a written demand before he is permitted a jury trial.

In the Goldberg case, *supra*, the court said, "It merely regulates the method of making the demand in the interests of economy and orderly procedure." The court cited with approval 35 Corpus Juris 212, Sec. 128 holding that where a jury is not demanded it is waived. No distinction is made here between inferior and superior courts. Other Ohio cases on this point are *Billigheimer v. State*, 32 Ohio St. 435 (1877) which held "unless the record shows that the defendant demanded a jury, he will be deemed to have waived it," and *Dailey v. State*, 4 Ohio St. 57 (1854) which held to be constitutional a statute providing that if jury trial was not demanded in the probate court it would be waived. The charge was against selling intoxicating liquors. Judge Kennon very succinctly summed up the argument in favor of constitutionality in these words: "That right still exists; all he has to do is demand a jury trial and the law awards it to him . . . But who deprived him of that right? Surely not the court or the statute." Another case in point and an interesting case because of the vehement dissent of Judge Donahue is *Hoffman v. State*, 98 Ohio St. 137, 120 N.E. 234 (1918). This court held constitutional the same statute which was upheld in the Goldberg case, *supra*. Although the majority recognized the fact that the accused was entitled to the jury known at common law, nevertheless, in this criminal proceeding the court held this statute "not a restriction, limitation, or violation of such a right". The court cited the two prior cases. Although the specific problem involved in the Hoffman case is apparently settled, the dissent of Judge Donahue is important in that a court might follow his line of reasoning and declare the proposed statute unconstitutional. His major proposition was as follows, "The right of an accused to a trial by jury is not based upon provisions of any statute of the state but is the right guaranteed by the constitution . . . The right conferred is an *absolute* and *unconditional* one." [Italics writers]. The same thing indubitably could be said of civil cases, since the constitution guarantees the right of trial by jury in those cases in the same section. Further he stated, "The people of the state write its constitution. It is for them to say when their needs

demand a change of provisions." The judge cited to sustain his contention *Slocum v. Lessee of Swan* 4 Ohio St. 162 (1854). This case was a civil action for ejectment and the court was of the opinion that the cause could not be tried by the court until there was a specific waiver of trial by jury by the parties. Likewise he cited *Gibbs v. Village of Girard*, 88 Ohio St. 34 (1913) in which it was stated in the syllabus "The right of trial by jury being guaranteed to all our citizens by the constitution, can not be invaded by either legislative action, judicial order or decree." He cited the *Work* case quoting "it is beyond the power of the general assembly to impair the right (of trial by jury) or materially change its character." To conclude this line of reasoning the judge used language which is indeed anticipatory of the statutes requiring prepayment of jury fees, "Is it possible in this progressive age 'the dollar is to be placed above the man', or that the protection of liberty of the individual is of less concern to the state than the protection of property."

In *The Cleveland Ry. Co. v. Halliday, adm'rs.*, 127 Ohio St. 278, 188 N.E. 1 (1933) the common pleas court of Cuyahoga County tried a civil case with a jury of six rather than a jury of twelve. In accordance with a rule made by the common pleas judge, "In civil jury cases . . . parties will be deemed to have waived a jury of twelve and to have consented to try such cases to a jury of six, unless a demand for a greater number than six in writing shall be filed . . .". The supreme court declared that the common pleas court had no power to make such a rule. This case is important on the question of the proposed statute, in that it contains two *dicta*. In the first *dictum* the court stated that a long line of authorities have "established a distinction between trials of persons accused of minor crimes or prosecuting civil actions in inferior courts and criminal trials in a court of record." The court then cited *Daily v. State, supra*, *Billigheimer v. State, supra* and *Hoffman v. State* 98 Ohio St. 137, 120 N.E. 234 (1918). Although all the cases are for minor crimes, in none of them do the courts distinguish upon that basis. In the other *dictum* the court said, "In every one of these cases the legislature had by express statute, established, either the right of the court to make the rule dealing with the waiver of jury, or had itself set forth the circumstances which would constitute such a waiver." From this language it might appear that the judge was thinking that if the legislature had made the rule

rather than the court, it would have been declared valid. However, this is *contra* to the prior *dictum* which seeks to draw a line between inferior and superior courts in regard to right of trial by jury.

These are the supreme court cases and from them one can readily see that either the constitutionality or unconstitutionality of the proposed statute could be plausibly argued. To these cases however, should be added a recent Court of Appeals case *Walker v. Parkway Cabs, Inc.*, 50 Ohio Appeals 250, 19 Ohio L. Abs. 539, 3 Ohio Op. 563, 197 N.E. 921 (1935). In examining this case it may be assumed that the judge was familiar with the above decisions. In that light, his interpretation is particularly important. The court held constitutional G.C. 1558-16 in which \$25.00 was required as a jury deposit in the Cincinnati municipal court. Proof was present that the plaintiff was unable to pay. "We find no dissent from the rule that a state may require prepayment of or security for the costs as a condition precedent to obtaining a jury," wrote the judge and cited for authority 32 A.L.R. 865 where it is stated "Statutes providing that a person who demands jury trial must pay a jury fee before the trial begins are generally held constitutional." It is apparent from the language of this court as well as from the citation that this court was not distinguishing common pleas courts from municipal courts, but was considering the bald proposition that prepayment of jury fees was a reasonable condition upon the right of trial by jury and was therefore constitutional. Using the same reasoning, we may conclude that likewise in common pleas courts reasonable restraints of the same type would be permitted. The language of the court is especially interesting in that it introduces a novel point of view. It was asserted that the reason for permitting the legislature to pass such laws was "so that the tribunal guaranteed by the constitution may be created and rendered available." In other words, to preserve the right, this court said you must have the adequate means to make possible the jury, that is, money to pay the jury. This court probably recognized as did the common pleas court in Cuyahoga county in adopting the above mentioned rule that at times, there are not sufficient funds in the treasury to make possible the assurance of the right of a speedy trial by jury. Those opposing this point of view would assert that by requiring payment, you are taking away the right from

a great number of litigants, rather than preserving it to all. They would say it is better to have a postponed jury trial than no jury trial. This case is a graver imposition upon the right of trial by jury than any previous case because this court did not think the fact that the defendant was financially incapable of paying for the right had any bearing on the constitutional issue of the deprivation of the right. One can imagine Judge Donañue's impatience with any such suggestion.

Many decisions of other states have declared constitutional the requirements of a written demand and a prepayment of jury fees as pre-requisite to a jury trial.

As early as 1878 a Texas court declared valid a statute (Session laws, Acts of 1876, p. 71) making a pre-requisite for jury trial a demand and a deposit of jury fees, *Cushman & Wife v. Flanagan*, 50 Texas 389 (1878). *Accord; Hardin v. Blakeshear*, 60 Tex. 132 (1883); *Cole v. Terrell*, 71 Tex. 549 (1888); *Cambell v. Hamilton Brown Shoe Co.*, 81 Tex. 104 (1891); *Estacado Oil Co. v. Parker*, 36 S.W. (2d) 1095 (Tex. App. 1930); *Public Indemnity Co. v. Pearce*, 56 S.W. (2d) 906, (Tex. App. 1933). For the present Texas statute see Art. 2124, Texas Statutes 1928; which is applicable to both district and county courts.

In California the collection of jury fees before trial has been permitted as a reasonable rule of the court, *Conneau v. Geis*, 73 Cal. 176, 14 Pac. 580 (1887); *Adams v. Crawford*, 116 Cal. 48 Pac. 488 (1897); *Naphtaly v. Rovegno*, 130 Cal. 639, 63 Pac. 66, (1900); *Norland v. Gould*, 200 Cal. 706, 254 Pac. 560 (1927). On the authority of the Norland case it was held in *Gray v. Craig*, 127 Cal. App. 374, 15 Pac. (2d) 762 (1932) that a statute requiring a deposit of jury fees was constitutional. The same conclusion was reached in *Davis v. Conant*, 51 Pac. (2d) 151 (1935); *Bennett v. Hillman*, 37 Cal. App. 586, 174 Pac. 362 (1918); *City of Los Angeles v. Zeller*, 176 Cal. 166, 167 Pac. 849 (1917); *Deberry v. Cavalier*, 297 Pac. 611 (Cal. app.) (1931). The attitude of the California court may be summed up in these words from *Conneau v. Geis*, *supra*, "A rule requiring the fee to be paid in advance is a reasonable precaution to prevent the jurors from being defrauded by unscrupulous parties, and to prevent the demand of a jury being used as a pretext to obtain continuance and stifle justice."

The leading case in Minnesota and one cited by many

authorities is *Adams v. Corrison*, 7 Minn. 456 (Gil. 365) (1862). This was a civil suit in a district court in which the defendant did not deposit jury fees required by statute. The case was tried by the court. The court declared that the constitution did not guarantee a citizen a right to litigate without expense "but simply protects him from imposition of such terms as unreasonably and injuriously interfere with his right to a remedy . . ." The same result was reached in *Rollins v. Nolting*, 53 Minn. 232, 54 N.W. 1118 (1893) and *McGeagh v. Nordberg*, 53 Minn. 235 (1893). In the latter case it was said that the power of the legislature to require a prepayment of jury fees is "undoubted."

The court in *Williams v. Gottshalk*, 231 Ill. 175, 83 N.E. 141 (1907) cited with approval *Adams v. Corrison*, *supra*, quoting therefrom that if the constitution means that we shall litigate without price there is an end to all fees from the issuing of the summons to the entry of satisfaction of judgment. The implication is that the framers of the constitution did not intend that parties should be free to litigate without cost. In accord with this case is *Morrison Hotel Co. & Restaurant Co. v. Kirsner*, 245 Ill. 431, 92 N.E. 285 (1910) and *Simon v. Reilly*, 321 Ill. 431, 151 N.E. 884 (1926). In the former case the court said, "It is not a right to command the services of a jury without cost, but is of the same nature as the right to have official services performed by public officers, and the requirement of a payment of a reasonable amount for jury fees, such as will necessarily be required in every jury trial, is not a denial or encroachment upon the right." Illinois has the same constitutional provision as Ohio.

In *Adae v. Zangs*, 41 Iowa 536 (1875) the court in interpreting the bill of rights Sec. 9, "the trial by jury shall remain inviolate," said, "It does not either directly or by implication provide that this right shall be enjoyed without expense . . . the party enjoys the right inviolate if he is willing to incur the expense." This case was followed by *Steel v. R. R. Co.*, 43 Iowa 109 (1876) and *Conners v. Burlington R. R. Co.*, 74 Iowa 383, 37 N.W. 966 (1888). The later case held constitutional a statute providing for trial by jury of six unless fees were provided for twelve, in a city superior court. The Steel case recognized that the jury contemplated was the jury as it existed at common law.

Beers v. Beers, 4 Conn. 535 (1823) is a case frequently cited. In that case the court was considering the constitutionality of a statute enlarging the jurisdiction of the justice of peace courts. Chief Justice Hosmer said, "An instrument remains inviolate, if it is not infringed and by a violation of the trial by jury, I understand taking it away, prohibiting it, or subjecting it to *unreasonable and burdensome regulations* (Italics writers), which, if they do not amount to literal prohibitions, are, at least, virtually of that character. It could never be the intention of the constitution to tie up the hands of the legislature, so that no change of jurisdiction could be made and no regulation even of the right of trial by jury, could be had . . ."

In *Randall v. Kehlor*, 60 Me. 37 (1872) the court followed the reasonable restriction doctrine and held a statute which required prepayment of jury fees constitutional. In *Nichols v. Cherry*, 22 Utah 5, 60 Pac. 1103 (1900) and *Ward Lemon v. McCabe* 73 Pac. 443 (Ariz. 1890) similar statutes affecting district courts were held constitutional without much discussion.

In *Venine v. Archibald*, 3 Colo. 163 (1877) approving *Randall v. Kehlor*, *supra*, and *Adams v. Corrison*, *supra*, the court held constitutional a deposit of twenty dollars required as a jury fee in the probate court, stating, "This is a matter resting in the discretion of the legislature, and the courts will not interfere unless the fixed fee should amount to a practical prohibition of the right."

In Rhode Island with the same constitutional provisions as Ohio a reasonable restraint upon the right of trial by jury is permitted. In *Mandeville, Brooks and Chaffee v. Fritz*, 50 R.I. 513, 149 Atl. 859 (1930) a statute requiring a written demand was declared a reasonable restraint. In Alabama a written demand or waiver is considered permissible. *McClellen v. State*, 118 Ala. 122, 23 So. 732 (1898); *Red v. State*, 169 Ala. 9, 53 So. 908 (1910); *Ireland v. State*, 11 Ala. App. 155, 65 So. 443 (1914); *Daley v. State*, 74 So. 843, 16 Ala. App. 7 (1917).

It was intimated in the Ohio case of *Walker v. Parkway Cabs Inc.* that there is no doubt as to the proposition that a legislature can demand prepayment of jury fees. However, in *Le Bowe v. Balthozer*, 180 Wis. 419, 193 N.W. 244, 32 A.L.R. 862 (1923) the court declared a statute unconstitutional which required a two dollar advance fee for each juror in a municipal

court. It did not overrule a former Wisconsin case *Reliance Auto Repair Co. v. Nugent*, 159 Wis. 488, 149 N. W. 377 (1917) which held valid a statute requiring prepayment of twelve dollars as jury fees. However, had that case been before this court, this court from its insistence on the right of trial by jury unimpaired would have apparently declared the statute unconstitutional. Under the circumstance the court declared that a difference between twelve dollars and twenty-four dollars was enough to make the second provision unreasonable even if the first was reasonable. This is the language of the judge with which Judge Donahue would probably agree "Manifestly the municipal court will deal with the poorer classes of litigants, but these litigants are entitled to the same rights and privileges under the constitution as those of larger possessions."

In conclusion, to answer the questions raised in the first part of this discussion in summary form, we find:

1. Ohio courts as well as other state courts have declared unconstitutional legislation reducing the number of jurors below the common law number, twelve, but have upheld a reduction if it is acquiesced in by the parties.

2. Ohio courts as well as other courts have held constitutional legislation requiring a written demand to be made as a prerequisite of trial by jury, without differentiating between inferior and superior courts.

3. Ohio courts as well as other state courts have upheld the constitutionality of legislation requiring the prepayment of jury fees as a prerequisite of trial by jury without differentiating between inferior and superior courts.

Propositions (2) and (3) may be challenged in their application to common pleas courts in that

(a) No Ohio decisions have established a precedent for the constitutionality of legislation affecting the right of trial by jury in the above cases in the common pleas courts since all the decisions have concerned inferior courts.

(b) Some Ohio decisions have held the right of trial by jury to be absolute and unconditional, with which the legislature cannot interfere. Upon this basis as a major premise, a court could hold that the contemplated legislation would infringe upon that right in common pleas courts. It might reconcile such a conclusion with the apparent restrictions upon the right in municipal courts by reasoning that these restrictions are

not in reality infringements on the right because no right exists in these courts inasmuch as from each, a litigant can have an appeal to a court with a jury of twelve.

It is submitted that there is an apparent trend in the Ohio decisions away from the idea that the right of trial by jury is an absolute and unconditional right and a trend toward a more narrow and limited interpretation of the right.