

February 1957

## Irregularities in the Selection of Grand Juries

W. A. K.

*West Virginia University College of Law*

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Courts Commons](#)

---

### Recommended Citation

W. A. K., *Irregularities in the Selection of Grand Juries*, 59 W. Va. L. Rev. (1957).

Available at: <https://researchrepository.wvu.edu/wvlr/vol59/iss2/6>

This Student Note is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact [ian.harmon@mail.wvu.edu](mailto:ian.harmon@mail.wvu.edu).

situation might be distinguished because there is no comparable state law here, but it would be a very close question.

Apparently, the third and fourth circuits, while ostensibly applying the economic interest test, have actually evolved a test of "production" unconnected with investment. It matters not that the contract is terminable for any reason<sup>56</sup> or that the owner has full control of the amount of coal to be mined<sup>57</sup> or that the contractor is not dependent on market price for the amount of his compensation.<sup>58</sup> In these two circuits, an owner who does not actually produce the mineral may as well resign himself to the fact that no depletion will be allowed on payments made to a stripper, regardless of the contractual arrangement between the parties. The Tax Court has been consistent in basing its results on just these factors.<sup>59</sup> However, since the lower courts have not enforced the requirement of investment, is that element no longer necessary? Perhaps not. But in any event, until the Supreme Court accepts a strip mining case for review, the borderline between "economic interest" and "economic advantage" in this field will remain clouded.

C. M. C.

---

#### IRREGULARITIES IN THE SELECTION OF GRAND JURIES\*

The procedure for selection of grand juries is specifically set forth in various statutes. Any slight deviation from this procedure is quickly pounced upon by the defense as a means to obtain reversal of criminal convictions. Whether such irregularities require a reversal depends upon the language in the statute. If it is mandatory, the irregularity is fatal; if directory, substantial compliance is suffi-

---

<sup>56</sup> *Supra* note 47.

<sup>57</sup> *Supra* notes 42, 46.

<sup>58</sup> Weirton Ice and Coal Supply Co., *supra* note 41.

<sup>59</sup> Economic interest was absent in *Morrisdale Coal Mining Co.*, 19 T.C. 208 (1952) (*inter alia*, owner controlled amount mined); *C. A. Hughes & Co.*, 14 CCH TAX CT. MEM. 172 (1955) (contract terminable on 60 days' notice); *Hamill Coal Corp.*, 14 CCH TAX CT. MEM. 218 (1955) (payment to contractor not dependent on market price). Economic interest was found in *James Ruston*, 19 T.C. 284 (1952) (contract not terminable at will, and it gave contractor exclusive right to mine all the coal); *Lincoln D. Godshall*, 13 T.C. 681 (1949) (contractor to be paid only from proceeds); *H. W. Findley*, 10 CCH TAX CT. MEM. 363 (1951) (contractor obligated to develop mineral and was dependent on market price for compensation).

---

\* In order to facilitate the consideration of this subject, citations for materials used in the statutory discussion are embodied in the text rather than in footnotes.

## STUDENT NOTES

191

cient.<sup>1</sup> Where an irregularity is fatal, the grand jury is not legally constituted and indictments returned by it are void.<sup>2</sup>

Various tests have been stated for determining what language is mandatory and what is directory. Lord Mansfield said, "There is a known distinction between circumstances which are of the essence of a thing required to be done by an act of Parliament, and clauses merely directory."<sup>3</sup> In other words, whether a statute is mandatory or not depends upon whether the thing directed to be done is of the essence of that required. This test has been cited with approval in many West Virginia decisions.<sup>4</sup> Yet its insufficiency is apparent by the fact that the court has continued to propound numerous ways to determine the type of language. The use of affirmative or negative words, the intention of the legislature to make compliance essential to the validity of the act, and the intention to impose a penalty for noncompliance are some of the approved tests.<sup>5</sup> The court has also formulated a few general principles. Ordinarily, a statute providing simply a mode of procedure will be held to be directory, and if the thing intended is done in some other way than that provided by the statute it will be valid, unless the statute in express terms provides that it shall be invalid unless performed in the manner pointed out.<sup>6</sup> Generally, the use of the word "shall" in constitutions and statutes leaves no way open for the substitution of discretion.<sup>7</sup> If the general purpose of statutes is to expedite rather than to hamper the administration of justice, the language is directory rather than mandatory.<sup>8</sup>

Applying the many principles and tests set forth, the court has concluded that "the general purpose of the statutes relating to the drawing of grand juries is to expedite and not to hamper the administration of justice—hence they are directory rather than mandatory. . . . A technical departure from the mode of procedure

---

<sup>1</sup> State v. Carduff, 93 S.E.2d 502, 513 (1956).

<sup>2</sup> State v. Wetzel, 75 W. Va. 7, 83 S.E. 85 (1914).

<sup>3</sup> Rex v. Loxdale, 1 Burrow 445, 447, 97 Eng. Rep. 394, 395 (1758).

<sup>4</sup> State ex. rel. Thompson v. Fry, 137 W. Va. 321, 71 S.E.2d 449 (1952).

<sup>5</sup> State v. Simmons, 135 W. Va. 196, 64 S.E.2d 503 (1951).

<sup>6</sup> State v. Price, 92 W. Va. 542, 115 S.E. 393 (1922).

<sup>7</sup> Baer v. Gore, 79 W. Va. 50, 90 S.E. 530 (1917).

<sup>8</sup> State v. Price, *supra* note 6. Query, are statutes ever enacted for the purpose of *hampering* the administration of justice? Are not all procedural statutes enacted for the purpose of *expediting* the administration of justice? If so, then this test is absolutely worthless. Yet it is used as the basis for a generalization that statutes relating to the drawing of grand juries are directory rather than mandatory!

by the court . . . where the prisoner has not been shown to have been prejudiced thereby, will not constitute reversible error.”<sup>9</sup> Despite this generalization, the only reliable way to determine the type of language is by looking to the precedents. W. VA. CODE c. 52, art. 2 (Michie 1955), contains the procedure for selecting grand juries. This note will be limited to the pertinent provisions of sections two, three, and four, beginning with the preparation of the jury lists and ending with the summoning of additional jurors when the grand jury convenes. Fortunately, precedents are available for nearly all the provisions of these sections.

1. W. VA. CODE c. 52, art. 2, § 2 (Michie 1955): “The jury commissioners appointed under . . . article one . . . shall select and draw persons for grand juries.”

Article one, section three of chapter fifty-two provides that the jury commissioners shall take an oath before entering upon their duties. This has been held directory. The commissioner is a de facto officer; thus his acts are valid even though he has not taken the prescribed oath. *State v. Medley*, 66 W. Va. 216, 66 S.E. 358 (1909). The same section specifies that the commissioner’s term of office is four years. Yet the fact that his term has expired prior to his participation in the drawing of a jury is immaterial since he is a de facto officer. *State v. Huff*, 80 W. Va. 468, 92 S.E. 681 (1917). The jury commissioner must be appointed by the court or judge in vacation, not the clerk of the circuit court. This provision is mandatory. *State v. Howard*, 137 W. Va. 519, 73 S.E. 2d 18 (1952).

2. “Such commissioners shall, at the levy term of the county court each year . . . prepare a list of not less than one hundred nor more than two hundred qualified persons of their county for grand jury service, chosen from the respective magisterial districts thereof as nearly as may be in proportion to the population of the districts.”

The levy term of the county court begins on the first Tuesday in August, and adjourns until the third Tuesday at which time the levy is completed. W. VA. CODE c. 11, art. 8, §§ 9 and 10 (Michie 1955). The provisions requiring the commissioners to prepare the list at this time are directory. If they are unable to complete their work by the time the court adjourns, they may continue until they do finish it. *State v. Medley, supra*. The list is valid although it is

---

<sup>9</sup> *State v. Muncey*, 102 W. Va. 462, 466, 135 S.E. 594, 595 (1926).

prepared seventy-eight days after the levy term. *State v. Carduff*, 93 S.E. 2d 502 (1956). However, the provisions of the statute requiring the list to be prepared and that it be prepared by the jury commissioners are mandatory. *State v. Carduff, supra*. The number of jurors to be selected is directory. The fact that two hundred nineteen names were listed was immaterial. *State v. Carduff, supra*.

3. "The lists so prepared shall be submitted to the clerk . . . or the judge . . . and the name of any person who is not qualified shall be stricken from the list by the clerk or judge. The persons so listed shall be *men* of good moral character, who have never been convicted of a felony or of any scandalous offense and shall have been bona fide citizens of the State and county for at least one year immediately preceding the preparation of the list, and shall not be office holders under the laws of the United States or of this State."<sup>10</sup>

These are the only qualifications necessary for grand jury service. *State v. Austin*, 93 W. Va. 704, 117 S.E. 607 (1923). However, inclusion on the list does not conclude the issue as to competency. *State v. Austin, supra*. The court may properly question the jurors to see if they are qualified once they appear. *Eastham v. Holt*, 43 W. Va. 599, 27 S.E. 883 (1897). If the court then erroneously excludes one juror who in fact is qualified, the error is not reversible. The grand jury finally selected would still be composed of competent jurors. *Eastham v. Holt, supra*. W. VA. CODE c. 52, art. 2, § 12 (Michie 1955), provides that no indictment shall be void because one or more of the grand jurors is incompetent. The legislature certainly did not intend this to be true; otherwise an indictment would be valid even though found by a completely incompetent grand jury. Nevertheless, the statute does serve to resolve situations where one juror is incompetent but the defendant was in no way prejudiced thereby. Where one juror was not a resident of the county, *State v. Burdette*, 135 W. Va. 312, 63 S.E. 2d 69 (1951); a jury commissioner was foreman of the jury, *State v. Martin*, 38 W. Va. 568, 18 S.E. 748 (1893); and the president of the Berkeley Springs board was a juror, *State v. Driver*, 88 W. Va. 479, 107 S.E.

---

<sup>10</sup> The following constitutional amendment was ratified in 1956 and becomes section twenty-one of article three: "Regardless of sex, all persons who are otherwise qualified shall be eligible to serve as petit jurors, in both civil and criminal cases, as grand jurors and as coroner's jurors." Article fourteen, section two, of the constitution provides that an amendment shall be in force from the time of ratification.

189 (1921); the indictments were upheld as valid. Where all Negroes are excluded from the jury list because of race or color, equal protection of the laws is denied. *State v. Young*, 82 W. Va. 714, 97 S.E. 134 (1918).

4. "At the time such jury list is made up, the jury commissioners shall cause all the names thereon to be written, each on a separate ballot, and shall fold, roll or prepare the same so as to resemble each other as nearly as may be, and so that the name written thereon shall not be visible on the outside, and shall inclose the ballots for each magisterial district with the name of the . . . district and the number of ballots inclosed and shall deposit all the ballots, with the list, in a secure box. . . ."

This whole section probably is mandatory. Where the trial court found that the ballots had not been folded so as to conceal the names and that the clerk (under earlier statutory provisions) who drew the names from the box was in sympathy with the accused and no indictment was returned, it directed that a new jury list be prepared. The appellate court did not reverse. *Eastham v. Holt*, *supra*. This case is not a direct holding that the language is mandatory, but it indicates that these provisions were enacted to ensure the selection of an unbiased grand jury. Since this is a fundamental concept of the jury system, the courts are more likely to be strict in requiring compliance.

The new list and new ballots replace and supplant the old list and ballots. If ballots from the preceding year remain undrawn, they are to be destroyed and discarded. The old and new ballots are not to be mingled for use during the ensuing year. *State v. Welch*, 36 W. Va. 690, 15 S.E. 419 (1892).

5. ". . . which shall be delivered to and safely kept by the clerk of the circuit court . . . and shall be opened only by the jury commissioners or by order of the judge. . . ."

The requirement of delivery to and preservation by the clerk of both the list and the box is mandatory. *State v. Wetzel*, 75 W. Va. 7, 83 S.E. 85 (1914). This is to prevent someone from fraudulently changing names on the list or on the ballots. The list is to be kept in the box so that the ballots can be checked for fraudulent entries.

6. W. VA. CODE c. 52, art. 2, § 3 (Michie 1955): "The clerk . . . shall, at least thirty days before the term of court, summon the jury commissioners to attend at his office at a day speci-

fied, which shall not be less than twenty days before such term and select men for the grand jury. . . .”

Although no cases relating to this thirty-day provision have been decided, the provision would probably be held directory. Under earlier statutes, the clerk was required to issue a writ for the grand jurors thirty days before the term and at the same time to summon the officials to do the drawing. Such provisions were held directory. *State v. Hoke*, 76 W. Va. 36, 84 S.E. 1054 (1915). The twenty-day provision, however, would probably be mandatory because negative words are employed.<sup>11</sup> If the commissioners attend and perform their functions, the fact that they were not properly summoned or were not summoned at all is immaterial. *State v. Price*, 92 W. Va. 542, 115 S.E. 393 (1922). This case involved commissioners summoned to select petit jurors where the summons was not signed by the clerk, but the reasoning is applicable to all jury commissioners. The purpose of a summons is to obtain attendance, and if the persons attend, the summons is unnecessary. The commissioners are to meet in the clerk's office to perform their duties, but this would probably be held directory; the drawing could be as fraudulent inside as well as outside the office.

7. “On the day appointed, the jury commissioners shall . . . draw the names of sixteen persons from the . . . box.”

Although this provision seems clearly to be mandatory, it has been held otherwise. Where the court issued an order for the clerk to draw the names, and the clerk did so in the presence of the judge, the error was not reversible because no prejudice was shown. *State v. Muncey*, *supra*. This decision cites *State v. Wetzel*, *supra*, for the proposition that statutes relating to the drawing of grand juries are directory, but overlooks the holding in that case which is exactly *contra*. There the court held that the requirement that the county clerk be summoned to draw the names of the jurors was directory *provided* that he actually attend the drawing. The court then discussed the requirement of attendance and concluded that the statute is mandatory in requiring that persons designated to draw jurors actually attend the drawing. *State v. Muncey* does not expressly overrule this decision. Apparently the point was overlooked.

---

<sup>11</sup> The statute reads “which shall not be less than twenty days . . .” The use of negative words, as discussed in the introduction to this note, is one of the tests for determining that language is mandatory.

8. "If a person drawn is dead or otherwise unable to serve, his ballot is destroyed and another is drawn. They shall enter the names . . . so drawn in a book . . . and deliver the list to the clerk who shall issue a summons for the persons drawn, directed to the sheriff . . . requiring him to summon them to appear on the day required. . . ."

It has been held with regard to petit juries that a delay in delivery of the list of jurors drawn to the clerk is immaterial. *State v. Huff, supra*. There the jury commissioners failed to keep a record of their proceedings. The clerk was told the names selected and he issued a summons for them. Later the commissioners made up a list which was filed. This list should not be confused with the jury list made up at the levy term. The provisions requiring that list to be delivered to and preserved by the clerk are mandatory. *State v. Wetzel, supra*.

This section sets forth one substantial difference from the procedure prescribed for drawing and summoning petit juries. At common law a writ of venire facias was issued to the sheriff whenever a jury was needed, directing him to select and summon persons to serve as jurors. *State v. Medley, supra* at 222. W. VA. CODE c. 52, art. 1, § 8 (Michie 1955), requires the clerk to issue the writ of venire facias at least thirty days before the term of court. However, the grand jury provision above requires the clerk to issue the writ after the jury commissioners have been summoned and have made their selections. This may be as late as twenty days before the term of court, since the commissioners are to be summoned thirty days before the term, to appear at the clerk's office at least twenty days before the term.

The sheriff has a duty to summon the jurors in a lawful manner. Notice by postcard is not a legal summons. However, if the jurors actually attend, the manner of summoning is immaterial. *State v. Austin, supra*. The case of *Eastham v. Holt, supra*, leaves undecided whether a service of summons by an unauthorized person is valid, but the preceding case would indicate that attendance of the juror determines the issue.

9. "The provisions of article one . . . relating to the drawing and summoning of petit jurors . . . so far as applicable and not inconsistent with the provisions of this article, shall be observed and govern the selection of a grand jury. . . ."

W. VA. CODE c. 52, art. 2, § 4 (Michie 1955): "Any fifteen or more of the grand jurors attending shall be a competent



grand jury. If a sufficient number or qualified jurors do not attend, the court shall appoint two bona fide citizens of the county, of opposite politics, having all the qualifications of jury commissioners, who after taking the oath required of jury commissioners, shall select the number of qualified persons necessary to complete the grand jury. . . ."

A regular jury commissioner may be appointed as a special jury commissioner. *State v. Risk*, 139 W. Va. 380, 80 S.E. 2d 226 (1954). The taking of the oath would probably not be essential under this section either. See *State v. Medley, supra*.

The commissioners may select any qualified persons as additional jurors even though their names are not included on the jury lists. Inclusion on the jury lists is not a necessary qualification. *State v. Austin, supra*.

The procedure analyzed here is best illustrated by the procedure used by the clerk of the circuit court of Monongalia County, Mrs. Frances J. Quinn.<sup>12</sup> Thirty days before the term, the jury commissioners are reminded, usually by a telephone call, that they are to make the selections within ten days. They appear at the earliest time convenient and make the selections. Then a summons containing all the names drawn is issued to the sheriff, directing him to summon the jurors named therein. (This is the *venire facias*.) At the same time an individual summons directed to each juror is given to the sheriff for service on each juror. The adoption of section three of article two embodying this procedure removed a discrepancy which existed in the grand jury statutes prior to its adoption in 1919 and which still exists in the petit jury statutes.

Originally, the writ of *venire facias* was an order directing the sheriff to *select* and summon the jurors. *State v. Medley, supra*. The writ did not name the jurors. This writ was essential because it was the sheriff's authorization to summon the jurors. Thereafter the legislature decided to regulate the selection of jurors in order to ensure an unprejudiced jury. Statutes were enacted requiring the writ of *venire facias* to be issued thirty days before the term of court and specifying that certain officials were to make the selections rather than the sheriff. Under this procedure, the writ of *venire facias* becomes relatively unimportant because the clerk can draw up individual summonses for each juror. These are sufficient to show the sheriff's authority without the writ of *venire facias*. Thus "the present *venire facias* bears little resemblance to the

---

<sup>12</sup> Acknowledgment is made to Mrs. Quinn for this information.

original writ . . . and issuance of it seems now to be almost, if not altogether, a useless requirement." *State v. Medley, supra* at 222. Its only present purpose can be to notify the sheriff that he is to summon the jurors selected by the jury commissioners.

The discrepancy arises because the writ of *venire facias* is required to be issued thirty days before the term; yet the jury commissioners are allowed until twenty days before the term to make the selections. This makes the issuance of the writ even more useless since the sheriff must wait possibly ten more days before carrying out his duty. As would be expected, the clerks either do not issue the writ at all, or issue it at the same time as the individual summonses are drawn up. And the court, in *State v. Hoke, supra*, has held that the writ is not objectionable if issued less than thirty days before the term. *State v. Wetzel, supra*, held that the writ need not issue at all as long as the sheriff summoned the jurors. Thus the requirement is completely ignored. The discrepancy could readily be eliminated by an amendment incorporating the grand jury procedure into article one of chapter fifty-two for petit juries, bringing the statutory provisions into conformity with the practice in West Virginia.

W. A. K.