



1935

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*Kentucky Court of Appeals*

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### Recommended Citation

Drury, W. T. (1935) "Constitutionality of the Kentucky Statute Refusing a New Trial Because of the Smallness of Damages," *Kentucky Law Journal*: Vol. 23: Iss. 3, Article 3.

Available at: <https://uknowledge.uky.edu/klj/vol23/iss3/3>

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CONSTITUTIONALITY OF THE KENTUCKY STATUTE  
REFUSING A NEW TRIAL BECAUSE OF THE  
SMALLNESS OF DAMAGES

By W. T. DRURY\*

"A new trial shall not be granted on account of the smallness of damages in an action for injury to the person or reputation, or in any other action in which the damages equal the actual pecuniary injury sustained."<sup>1</sup>

While this article is prepared for the lawyers composing the Bench and Bar of Kentucky, it will not be without interest to the lawyers of Arkansas, Indiana and Oklahoma, for this same statute is now on the books of those states.<sup>2</sup>

The toleration of this statute is the result of the failure of men to think of the wrongs that can be and have been wrought under it, and it is in the hope of inducing thought on the part of lawyers that this article is written. A great lawyer once said:

"Whenever it looks like some monstrous wrong is about to be wrought by the operation of a statute it is time to look at the constitution for our constitutions contain the crystalized wisdom of the ages while our statutes are often the experiments of the hour."

It conflicts with 14th Amendment to the U. S. Constitution. In this amendment it is provided among other things:

"Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Section 340 of Ky. Civil Code expressly gives to the trial judge the power to set aside the verdict of the jury if in his opinion the damages awarded are excessive, yet by Section 341 of the same code, this statute in question attempts to deny to the trial judge the right to set aside the verdict of the jury when he regards the damages awarded inadequate. That can not be equal protection of the law.

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\* Commissioner of the Court of Appeals of Kentucky.

<sup>1</sup> Sec. 341 Ky. Code of 1876, Sec. 370 Code of 1854 and Sec. 382 Code of 1851.

<sup>2</sup> Sec. 1312 Ark. Stats., formerly Sec. 372 Ark. Code of 1868. Sec. 611 Ind. Stats., formerly Sec. 353, Ind. Code. Sec. 399 Okla. Stats. of 1931, Sec. 573 Okla. Stats., 1921, Sec. 5034 Okla. Stats. 1910.

What would you think of a judge who should greet two opposing litigants in this manner :

"Be seated gentlemen. I shall endeavor to see that you get an impartial jury and a fair trial, and to you Mr. Defendant, I will say that if the jury goes wild and returns against you what I deem an excessive verdict I will set it aside, but Mr. Plaintiff if the jury goes wild and awards you an inadequate verdict, I will do nothing for you no matter how inadequate I may deem it to be."

Would you want to try your case before a judge, who would take such an attitude? Of course not. Yet that attitude is forced on every trial judge in Kentucky, Indiana, Arkansas and Oklahoma by the statute in question.

Courts are set up and laws are written for the establishment of justice. The moment inequality appears justice has gone, and injustice is at hand. If a statute applies unequally justice can not result from its operation. Can it be constitutional for the legislature to invest a trial judge with plenary power to protect a defendant from brain-storms in the jury box and deny to that judge all power to protect a plaintiff from a like peril? There can be but one answer that the average reasonable man would give, and that is "No," for it does not look to him like this law affords equal protection; neither does it look so to the text writers and to the courts.

"A statute is void which prescribes a rule of procedure that operates as a discrimination between persons who are similarly situated, as, for example, an act which allows an appeal in civil cases to one party without allowing it on equal terms to the other party."<sup>3</sup>

In 1907 the legislature of Illinois passed an act<sup>4</sup> regulating practice in its appellate courts, and in such act provided, that in actions at law, appellate courts should make findings of facts, and that if the appellate court affirmed the judgment such finding of facts should be conclusive but if the appellate court reversed the judgment, and the case were taken by writ of error or appeal to the Supreme Court that it should there stand for review both on the law and the facts. It was held this statute conferred a special privilege upon the original

<sup>3</sup> 12 C. J., p. 1185, Sec. 948.

<sup>4</sup> Acts of Illinois 1907, p. 443.

plaintiff in error, that it denied the equal protection of the law, and hence was unconstitutional and void.<sup>5</sup>

The above statement of the supposed greeting of the presiding judge to the two opposing litigants arouses a feeling of revulsion in the breast of the average reasonable man. To him it is absolutely unthinkable that in any civilized community such a judge should be allowed to preside over a court and he would never believe it possible that there could be any civilized state where such a statute would be tolerated for a moment if he did not see it in black and white on the printed page. A statute is void which does not grant the same rights to all persons similarly situated.<sup>6</sup> This statute permits a judge to protect a defendant from a jury's passion and prejudice, and because it attempts to deny him the right to afford similar protection to a plaintiff it is void. Due process and equal protection are denied by a statute that discriminates between the parties litigant,<sup>7</sup> and a statute is void for constitutional conflict which grants to some a remedy denied to others similarly situated or forbids to one litigant protection afforded to another.<sup>8</sup>

#### CONFLICT WITH CONSTITUTION OF KENTUCKY.

##### *Its Denials of Justice.*

In Magna Carta, it is written: "To no one will we sell, to no one will we deny or delay, right or justice."<sup>9</sup> Magna Carta was not something new but was almost entirely a Latin translation of old Anglo Saxon charters and traditions.<sup>10</sup> The ideas contained in it were already old when King John was born

<sup>5</sup> *Jones v. Chicago, R. I. & P. Ry. Co.*, 83 N. E. 215 (1907); *Hecker v. I. C. R. Co.*, 83 N. E. 456 (1908); *Green v. Red Cross Med. Soc.*, 83 N. E. 1081 (1908).

<sup>6</sup> 12 C. J., p. 1210, Sec. 983, note 85.

<sup>7</sup> 12 C. J., p. 1232, Sec. 1015, note 80.

<sup>8</sup> 12 C. J., p. 1183, Sec. 942, notes 39 and 40.

<sup>9</sup> Magna Carta, Ch. 40. "*Nulli vendemus, nulli negabimus, aut differemus, rectum aut justiciam.*"

<sup>10</sup> See Article by Stevenson, Eng. History, Rev. XXIII, 1-8. See Article by Dr. Poole, Eng. History, Rev. XXVIII, 444.

and would have come down to us if he had never lived and sinned in England. Englishmen and all those who have derived their systems of jurisprudence from England have cherished this promise made in Magna Carta; they have clung to the idea, though changes have been made in the verbiage. Thus Kentucky writes this in her constitution, and similar provisions may be found in others.

"All courts shall be open and every person, for an injury done him in his land, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay."<sup>11</sup>

*Surely these provisions are not mere idle boasts.* The makers of these constitutions meant what they were so solemnly writing there. They meant that right and justice should be had without it being necessary to purchase it from anyone and that nobody could deny it or delay it. That the legislature can not delay right or justice was settled early in the history of this nation.<sup>12</sup> Recently it was decided in Kentucky that the legislature could not directly deny right and justice<sup>13</sup> and we are now considering the constitutionality of a statute that attempts to enable a jury to do so.

These constitutional provisions do not mean that every man who fancies his neighbor has injured him can sue his neighbor and recover. The neighbor may be in the right and the plaintiff in the wrong, but they do mean that when the neighbor is sued and the jury finds for the plaintiff upon every issue and only awards him a nominal recovery, that right and justice has been denied to the plaintiff, and this statute in question when it attempts to deny to the trial judge his common law power<sup>14</sup> to right that wrong by granting a new trial is in conflict with these constitutional provisions.

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<sup>11</sup> Sec. 14 Ky. Const., Sec. 64 Ind. Const., Sec. 13, Art. II Ark. Const., Sec. 13, Art. II, Okla. Const.

<sup>12</sup> *Blair v. Williams*, 14 Ky. 34 (1823), and *Lapsley v. Brashears*, 14 Ky. 46 (1823).

<sup>13</sup> *Ludwig v. Johnson*, 242 Ky. 543, 49 S. W. (2d) 347 (1932).

<sup>14</sup> *Blackstone's Commentaries*, Vol. 3, side page 387. Lord Mansfield in *Bright v. Eynon*, 1 Burrow 390 (1757), *Lopez v. De Tastet*, 8 Taunt. 712 (1819), *Capital Traction Co. v. Hof.*, 174 U. S. 1, 19 Sup. Ct. 58, 43 L. ed. 873 (1898). Note p. 12, Ann. Cas. 1914A. Note Ann. Cas. 1912D, p. 539.

"Where the verdict of a jury and the judgment entered thereon are so grossly inadequate as to shock one's sense of justice, after it has found a recovery should be had, it is the bounden duty of a reviewing court to set aside the verdict and award a new trial."<sup>15</sup>

Jurors sometimes allow their passions and their prejudices to be reflected in their verdicts; for example, a verdict of \$1.00 was returned for the negligent killing of a man 22 years of age, a like sum for the negligent killing of a 17-year-old boy,<sup>16</sup> \$300.00 for the negligent killing of a 20-year old miner,<sup>17</sup> \$1.00 for serious personal injuries and the loss of two horses and a buggy,<sup>18</sup> 1 cent for the loss of an arm,<sup>19</sup> 1 cent for the loss of a hand<sup>20</sup> and \$1.00 for negligent killing of a boy 20 years of age.<sup>21</sup> If space allowed, these instances of freak verdicts could be multiplied a hundred fold. When such verdicts as these are returned and allowed to stand justice is denied just as effectually as if the judge had ordered the cases stricken when first he saw them on the docket, or the clerks had refused to file them when they were presented to them.

The statute in question conflicts with a right that English jurisprudence has cherished since it was written into Magna Carta. We speak of Magna Carta with a feeling of veneration yet its greatness lies not so much in what it meant to its framers in 1215 as in what it has come to mean to the political leaders, the judges, the lawyers and the great mass of men over whom the English system of jurisprudence has since 1215 been extended. To have produced it, to have preserved it, and to have matured it, give to England an immortal claim upon the respect and esteem of mankind.

In his "Middle Ages," Vol. 11, 451, Hallam says: "A law which enacts that justice shall neither be sold, denied nor delayed, stamps with infamy the government under which such a law had become necessary." What would Hallam say if he should return to earth, visit this fair land of ours, hear some of our boasts of freedom, justice, progress and enlightenment

<sup>15</sup> *Greer v. Board of Commissioners*, 169 N. E. 709 (1927).

<sup>16</sup> *Thompson v. Town of Fort Branch*, 178 N. E. 440, 82 A. L. R. 1413 (1931).

<sup>17</sup> *Kinser v. Soap Creek Coal Co.*, 85 Iowa, 26, 51 N. W. 1151 (1892).

<sup>18</sup> *Carpenter v. City of Red Cloud*, 64 Neb. 126, 89 N. W. 637 (1892).

<sup>19</sup> *Baries v. Louisville Electric Light Co.*, 118 Ky. 830, 80 S. W. 814 (1904).

<sup>20</sup> *Ray v. Jeffries*, 75 Ky. 465 (1876).

<sup>21</sup> *Chicago R. I. & P. Ry. Co. v. Dean*, 15 Pac. (2d) 595 (1932).

and then learn that in four of our states not only are denials of justice of every day occurrence but that we actually have statutes on our books to aid and abet these denials, by attempting to deny the trial judge his common law power to correct them by granting new trials?

*It is a Legislative Attempt to Exercise a Judicial Function.*

Constitutional government in this nation is distinguished by the care with which the executive, legislative and judicial functions are separated and committed to separate departments, which are each forbidden to encroach upon the field of activities belonging to another.<sup>22</sup>

That the making of and rigid adherence to such a partition of power is absolutely necessary to the preservation of civil liberty is the solemn statement of all great writers, for example, Baron Montesquieu,<sup>23</sup> DePaley,<sup>24</sup> Sir William Blackstone,<sup>25</sup> President Madison,<sup>26</sup> Alexander Hamilton,<sup>27</sup> Justice Taney,<sup>28</sup> Justice Cooley,<sup>29</sup> Justice Brewer<sup>30</sup> Justice Kent,<sup>31</sup> and others.

The judicial power of this Commonwealth is vested in the courts.<sup>32</sup> The power and discretion to receive or reject the verdict of a jury, and to refuse or direct a new trial is strictly judicial (It is a part of trial by jury, as shall be pointed out later). It exists in the courts by constitutional grant and no one can show a statute upon which it is dependent or from which it is derived. In view of this tripartite separation of the powers of government, when those of one department attempt to exercise any of the powers belonging to another department that act is void and unconstitutional. If our Court of Appeals or the Supreme court of any other state should undertake to grant

<sup>22</sup> Sec. 27 and 28 of Ky. Const. Art. III, Sec. 1, Ind. Const., and Sec. 103, Ind. Stats. Art. IV, Sec. 1 and Sec. 2, Ark. Const. Art. IV, Sec. 1, Okla. Const.

<sup>23</sup> *Spirit of Laws*, Bk. II, Ch. 6.

<sup>24</sup> *Moral Philosophy*, Bk. 6, Ch. 8.

<sup>25</sup> *Commentaries*, Bk. 2, ch. 6.

<sup>26</sup> 46th and 47th numbers of the *Federalist*.

<sup>27</sup> The *Federalist*, No. 47.

<sup>28</sup> *U. S. v. Ferreira*, 13 Howard 40, 14 L. ed. 42 (1851).

<sup>29</sup> *Cont. Lim.* 413.

<sup>30</sup> *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. ed. 819 (1897).

<sup>31</sup> *Dash v. Van Kleeck*, 7 Johns 477 (1811).

<sup>32</sup> Sec. 109 Ky. Const.

a pardon to a convicted man, no one would pay any attention to it; for the act would be void. If the Governor of Kentucky or the Governor of any other state should in most solemn fashion enter upon the executive journals a judgment that John Doe should recover of Richard Roe, five hundred dollars with interest no one would pay the slightest attention to it and the judgment would be absolutely void, or if either or all of these governors should in most solemn fashion and under the great seal of the state write to the most humble justice of the peace in the most remote district of the state and direct him to enter a judgment for \$50.00 in favor of *Samuel Swift v. Stephen Slow*, that act would be void and the judgment would not be entered.

Just so, when the legislature by this statute in question attempts to tell a judge what order he shall enter in disposing of a motion for a new trial, no attention should be paid to it for the act is unconstitutional and void. The legislature can make reasonable regulations concerning new trials. It can require the motion to be made within a certain reasonable time after judgment, that it be in writing and can require the judge to pass upon that motion within a certain reasonable time, but it can not tell the judge what his order shall be. That is a matter of judicial discretion and when the legislature attempts to say how the judge shall rule upon a motion for a new trial or attempts to make any regulation that would unreasonably hamper the judiciary in the free exercise of its discretion or attempts to tell the judiciary what its decision shall be, then the legislature has gone beyond its proper sphere and its act is unconstitutional and void.

Here are some things of interest said by courts of last resort:

"In determining whether a statute is invalid as a legislative assumption of judicial power, it is of importance to note whether under the proceeding authorized by such statute all questions of a judicial nature are left to the judgment of the courts."<sup>23</sup>

"The right to review, or to try anew, facts which have been determined by a verdict or decree, depends on fixed and well-settled principles, which it is the duty of the court to apply in the exercise of a sound judgment and discretion."<sup>24</sup>

"The power to order new trials is judicial; but the power of the legislature is not judicial. It is limited to the making of laws; not to

<sup>23</sup> 6 R. C. L., p. 161, Sec. 160. *Florentine v. Barton*, 2 Wall. 210, 17 L. ed. 783 (1865).

<sup>24</sup> *Denny v. Matton*, 2 Allen (Mass.) 361, 79 Am. Dec. 784.

the exposition or execution of them. The functions of the several parts of the government are thoroughly separated, and distinctly assigned to the principal branches of it, the legislative, the executive, and the judiciary, which, within their respective departments are equal and co-ordinate. Each derives its authority, mediately or immediately, from the people, and each is responsible, mediately or immediately, to the people for the exercise of it. When either shall have usurped the power of one or both of its fellows, then will have been effected a revolution, not in the form of the government, but in its action. Then will there be a concentration of the powers of the government in a single branch of it, which, whatever may be the form of the constitution, will be despotism—a government of unlimited, irresponsible and arbitrary rule.

"It is idle to say the authority of each branch is defined and limited in the constitution, if there be not an independent power able and willing to enforce the limitations. . . .

"It has become the duty of the court to temporize no longer, but to resist, temperately, though firmly, any invasion of its province, whether great or small."<sup>35</sup>

"Those in authority in the other departments can not even so much as cross the line dividing the domain of the judicial from the other departments to make a suggestion as to how the judicial department shall perform its functions or what kind of judgments or decrees it ought to render."<sup>36</sup>

It is not easy to draw the line between things judicial and things legislative. It has been said that matters judicial relate to things that have passed and that legislative matters are directed in futuro,<sup>37</sup> yet that is not always true, else courts could not issue injunctions which are always directed in futuro. Chief Justice Shaw said,<sup>38</sup> "Extreme cases are allowable to test a legal principle." Suppose the legislature should enact: That hereafter no judgment shall be deemed excessive; that an accused shall not be allowed to plead self defense; that 80% of all cases appealed shall be affirmed; that in the verdict the jury shall name the witnesses they believe; that 80% of all men accused of crime shall be convicted; that a court shall never give a peremptory instruction; that a court shall never grant a continuance; etc. No one would pay the slightest attention to such statutes although directed in futuro.

Not everything a legislature tries to do is legislative merely because directed in futuro. For example, in 1862 the Kentucky legislature passed an act declaring a man expatriated himself by thereafter joining the Confederate army, and that whenever a

<sup>35</sup>*De Chastellux v. Fairchild*, 15 Penn. St. 18, 53 Am. Dec. 570 (1850).

<sup>36</sup>*Board of Comrs. v. Gwin*, 136 Ind. 562, 36 N. E. 237, 22 L. R. A. 402 (1894).

<sup>37</sup>12 C. J., p. 807, Sec. 239.

<sup>38</sup>In *Com. v. Essex Co.*, 12 Gray, 239, 253 (1859).

person undertook to vote, hold office, serve on a jury, etc., he could be required to swear he had done none of the things denounced by the act. (This was what old Confederate soldiers termed "Taking the oath.") This act was directed in futuro, yet the Court of Appeals<sup>39</sup> held it void as an attempt to exercise a judicial function, and in doing so said:

"To decitizenize a freeman is a tremendous blow. It deprives him of his chosen country and home, and sunders his most endearing relations, social and civil. Is not this severely punitive; and who can be lawfully so punished without conviction; and how can there be lawful conviction without trial and proof; and what other department than the judiciary can try and decide on the evidence?"

"This is necessarily a judicial question, which can be constitutionally decided by the judiciary on a full and fair trial on an indictment or a presentment."

There are many matters that are judicial in their very essence, and because thereof any attempt on the part of the legislature to direct what the court shall do (in the future mind you) is unconstitutional, for example: Acts requiring appellate courts to write opinions,<sup>40</sup> acts providing that certain corporations shall be accepted by courts as sole surety, where security is required,<sup>41</sup> acts making the finding of a referee conclusive,<sup>42</sup> acts providing that no injunction shall issue against certain commissioners,<sup>43</sup> and acts declaring certain evidence shall be conclusive.<sup>44</sup>

Whether a verdict is adequate or inadequate is a question that can be answered only after a consideration of the law and the evidence, and its determination is a judicial act. "*Judicial power exists only in the courts. It can not live elsewhere.*"<sup>45</sup> *When it finds lodgment elsewhere tyranny is in the offing.*

When by a motion for a new trial, the correctness of a verdict awarding inadequate damages, is challenged there is raised the question whether that verdict is consonant with the law and the evidence, a question that in its very essence is judicial, and when by the statute in question the legislature has bluntly or-

<sup>39</sup> *Burkett v. McCarty*, 73 Ky. (10 Bush.) 758 (1874).

<sup>40</sup> *Vaughn v. Harp*, 49 Ark. 160, 4 S. W. 751 (1887); *Houston v. Williams*, 13 Calif. 24, 73 Am. Dec. 565 (1859); *Speight v. People*, 87 Ill. 595 (1877).

<sup>41</sup> *Matter of American Banking Co.*, 4 Pa. Dist. 757 (1895).

<sup>42</sup> *In re Booth*, 3 Wis. 1 (1854).

<sup>43</sup> *Guy v. Hermance*, 5 Calif. 73, 63 Am. Dec. 85 (1855).

<sup>44</sup> *U. S. v. Klein*, 20 L. ed. 519 (1871); *White v. Flinn*, 23 Ind. 46 (1864); *Wantlan v. White*, 19 Ind. 471 (1862).

<sup>45</sup> *Edwards v. Dykeman*, 95 Ind. 509 (1884).

dered the court to refuse it, the legislature has invaded the field constitutionally allotted to the judiciary and the act is void.

Of course all the departments of government, executive, legislative and judicial can be vested in one man, as under Attila and under Genghis Kahn, or in one body as in France during the Reign of Terror. We are bound to admit the acts of those governments, though not entirely admirable, were nevertheless entirely legal, but our governments are not so constituted, and considering the statute that we have, under our constitutions as they are, and under the lights that are at hand, there can be but one conclusion:

*The statute in question is absolutely void.*

The judge who presided at the trial is better fitted to decide whether a new trial should be granted under the circumstances than the legislature which knows nothing of the facts. It is a judicial question, it should be left to the judiciary, yet the legislature in all its ignorance of the circumstances attempts by the statute in question to determine the matter and bluntly say the motion shall be denied.

The statute in question is not an attempt to regulate the procedure for obtaining a new trial, but is a blunt order to the trial judge that under certain circumstances he must deny the motion. It would be difficult to conceive of a more glaringly unconstitutional act than our statute in question.

*Does it Conflict with the Constitutional Provision Declaring the Ancient Mode of Trial by Jury Shall Remain Inviolable?*

A great lawyer to whom this question was put, replied:

"Of course not, for when this statute is applied 'trial by jury' is over."

That answer was made because that great lawyer had not thought of what trial by jury consists.

Kentucky has thus defined it:<sup>46</sup>

"Trial by jury' in the primary and usual sense of the term at the common law and in the American constitutions, is not merely a trial by a jury of twelve men before an officer vested with authority to cause them to be summoned and impaneled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of twelve men,

<sup>46</sup> *Wendling v. Com.*, 143 Ky. 587, 137 S. W. 205 (1911).

in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence. This proposition has been so generally admitted, and so seldom contested, that there has been little occasion for its distinct assertion."

This definition of "Trial by Jury" was copied by Kentucky from a definition given by the United States Supreme Court<sup>47</sup> and is one that has been accepted and followed generally.<sup>48</sup>

When we separate this definition into its elements and look at it in detail we see that:

- (a) A jury of 12 men must be legally selected.
- (b) A duly commissioned judge must be presiding.
- (c) He must superintend the jury, that is, direct the trial.
- (d) He must instruct them in the law.
- (e) He must advise them on the facts, that is, determine what evidence the jury shall hear.
- (f) Except on acquittal of a criminal charge, he must set aside their verdict if in his opinion it is against the law or the evidence.

Thus we see there are six essential elements of trial by jury, one no more sacred than another. The powers and functions of the judge are just as much a part of trial by jury and are just as much preserved from violation as those of the jury. The constitutional provisions cited forbid the invasion of either.

The statute in question strikes down one of those elements (element f) when it denies to the judge the right he had at common law to award a new trial. It is a wise provision that gives such power to a judge for juries sometimes go wild and return verdicts that do rank injustice, for example, where a verdict of \$1.00 was returned for the negligent killing of a healthy man,

<sup>47</sup> *Capital Traction Co. v. Hof.*, 174 U. S. 1, 43, L. ed. 873, 19 S. Ct. 580 (1898).

<sup>48</sup> *Davis v. Cent. States Fire Ins. Co.*, 121 Kan. 69, 245 Pac. 1062 (1926). *Demnee v. McCoy*, 4 Ind. Ter. 233, 69 S. W. 858 (1902). *State v. McMahon*, 17 Nev. 365, 30 Pac. 1000 (1883). In re Opinion of Justices, 41 N. H. 550 (1860). *Hallett v. Boyer*, 114 N. Y. S. 559 (1909). *Grisson v. State*, 16 Okl. Cr. 569, 185 Pac. 452 (1919). *Smith v. Atlantic & C. R. Co.*, 25 Ohio St. 91 (1874). *White v. White*, 108 Tex 570, 196 S. W. 508, L. R. A. 1918A, 339 (1917). *Peo. v. Hopt*, 3 Utah, 396 4 Pac. 250 (1884). 35 C. J., p. 143, Sec. 9.

22 years of age.<sup>49</sup> Other verdicts of similar nature could be cited.

Out of the numerous cases in which this statute has been involved the question of its constitutionality has been mentioned but three times. In the Franke cases<sup>50</sup> the court cites as persuasive if not convincing evidence that the bar and the courts concede the validity of the statute. The fact that men have not thought on the question of this statute's conflict with the constitution is no evidence of the absence of conflict. One might just as well argue there is no such thing as the law of gravitation because no one thought of it before Newton announced it in 1687.

The first court to consider the constitutionality of this statute was the United States Circuit Court.<sup>51</sup> It discussed the question and said the statute was unconstitutional. Liberal quotations from the opinion are unnecessary.

The next time its constitutionality was mentioned it was barely referred to and without any discussion of the question at all the court refused to reverse an inadequate judgment<sup>52</sup> and said: "In so holding we violate no constitutional right, state or federal, of appellant."

In a later case<sup>53</sup> the Kentucky Court of Appeals seriously and carefully considered the question, but failed to note the distinction between the right of the trial court on timely motion to grant a new trial and the right of a litigant to prosecute an appeal from its judgment. The right of appeal is purely statutory and may be partially or entirely withheld but the right to move for and for proper cause to obtain a new trial is a part of the ancient common law "Trial by Jury" which may not be constitutionally denied. As a result of its failure to note this distinction the court held this statute constitutional and rested its decision upon this citation:

"It is entirely within the province of the legislature to restrict or to abridge the right to a new trial to any extent it may see fit, even

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<sup>49</sup> *Greer v. Board of Commissioners*, 169 N. E. 169 (1929).

<sup>50</sup> *Drury v. Franke*, 247 Ky. 758, 57 S. W. (2d) 969, 88 A. L. R. 917 (1900).

<sup>51</sup> *Hughey v. Sullivan*, 80 Fed. 72 (1897).

<sup>52</sup> *Galliaer v. Southern Harlan Coal Co.*, 247 Ky. 752, 57 S. W. (2d) 645 (1933).

<sup>53</sup> 46 C. J., p. 59, Sec. 2.

to the extent of denying to a litigant the privilege of moving for a new trial."

Corpus Juris uses that very language in its text and cites in support thereof but one case, *State v. Cascade Co. Etc.*, 64 Mont. 181, 208 Pac. 952.

Montana has a statute which provides that a motion for a new trial that is not passed upon within 15 days after submission shall be treated as denied. Such a motion had been submitted on April 22, 1922, and on May 13th. or 21 days after submission the judge entered an order granting a new trial and *State v. Cascade Co., Etc.*, was an original action before the Montana Supreme Court to quash that order granting a new trial, and the only question before the Court was whether the provision, that a motion for a new trial, not passed on in 15 days after submission, should be treated as denied, was a reasonable regulation which the legislature had the power to make and when the court said it was, it was through deciding the case and what it said thereafter about the power of the legislature to abridge the right to move for a new trial to any extent it saw fit and even to deny it altogether is not only dictum but is not the law.

In the Franke cases the Kentucky Court of Appeals trod upon the quicksand of a judicial dictum found in Corpus Juris, the erroneousness of which will perhaps more clearly appear when it is contrasted with another excerpt from the same work, remembering always that the right of the trial court to set aside a jury's verdict and to grant a new trial is a part of the "ancient mode of trial by jury," which our constitution declares shall remain inviolate:

It is entirely within the province of the legislature to restrict or to abridge the right to a new trial to any extent it may see fit even to the extent of denying to a litigant the privilege of moving for a new trial. 46 C. J., p. 59, Sec. 2.

The legislature may make any reasonable regulations as to the practice and procedure in civil cases as long as the right to a jury trial is not materially impaired. 35 C. J., p. 226, Sec. 146.

These two excerpts are in direct conflict, the latter is correct, the former is erroneous.

Corpus Juris should amend its text so as to read:

"So long as it does not impinge upon some constitutional provision, it is entirely within the province of the legislature to make reasonable regulations regarding the granting of new trials."

The rule is correctly stated in 16 R. C. L., p. 196 et seq., Sec. 15:

"The constitutional provision that the 'right of trial by jury shall remain inviolate' means that it shall not be destroyed or annulled by legislation nor so hampered or restricted as to make the provision a nullity . . . The legislature . . . may impose restrictions or regulations upon the exercise of the right as long as its substance and its vital purposes are conserved . . . Always, however, in view of the provisions of the constitution that the cherished right of trial by jury shall remain inviolate, . . . the inclination of the court should be to protect and enforce the right."

Sometimes we can test the soundness of a ruling by looking at the mischief that may be wrought under it, or as Justice Shaw said:<sup>54</sup> "Extreme cases are allowable to test a legal principle." Suppose the Kentucky legislature should enact a statute like this:

"A new trial shall not be granted for failure of the court to properly instruct the jury."

Would not the court if it adhered to the ruling in the Franke cases be compelled to hold such a statute constitutional? The same would be true of a statute like this:

"A new trial shall not be granted for any error of the court in admitting or rejecting evidence."

Also of this one:

"A new trial shall not be granted because the jury may have received evidence outside of court."

And this one:

"A new trial shall not be granted for any misconduct of the jury, the court, the successful party or his counsel."

Or suppose the legislature in an outburst of economy should so repeal and modify the statutes as to provide:

"All petit juries in civil cases shall be composed of three men only, a majority of whom by signing it may make a verdict."

And should further provide:

"A new trial shall not be granted because the jury was composed of less than 12 men."

Each of these supposed statutes would have to be held con-

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<sup>54</sup>In *Com. v. Essex Co.*, 13 Gray, 239, 253 (1859).

stitutional if the ruling in the Franke cases is to be adhered to, and thus the legislature could if it saw fit by such statutes entirely destroy "trial by jury" as the makers of our constitutions understood it.

*The history of this Statute.*

The first state to adopt a code of practice was New York in 1848, then followed Missouri in 1849, California in 1850, Kentucky and Minnesota in 1851, etc.

This statute first appeared in the Kentucky Code of Practice in civil cases.<sup>55</sup> No such provision was contained in the codes of New York, Missouri or California, nor is such to be found in any of the five volumes of suggested material prepared for and used by the New York legislature in the preparation of the code adopted by that state.

The act adopting the Kentucky Code (Ch. 616, Acts 1851) was approved March 22, 1851, the act adopting the code of Minnesota was approved March 31, 1851. Aside from Sec. 381 and Sec. 382 the Minnesota Code then adopted is almost exactly like the Kentucky Code then adopted. This striking similarity suggests that the same source book was used in both Kentucky and Minnesota, and the appearance of this statute in Kentucky suggests it was inserted by some crafty hand but whose it was or why or how exerted can not now be learned.

In 1852 Indiana adopted a code very largely copied from Kentucky and this statute became a part of it;<sup>56</sup> the same is true of the Ohio Code adopted in 1853,<sup>57</sup> of the Nebraska Code adopted in 1855,<sup>58</sup> of the Kansas Code adopted in 1859,<sup>59</sup> of the Iowa Code of 1860,<sup>60</sup> of the Arkansas Code copied from Kentucky in 1868,<sup>61</sup> and of the Oklahoma Code copied from Kansas in 1890.<sup>62</sup>

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<sup>55</sup> Sec. 382 Code of 1851, Sec. 370 Code of 1854 and Sec. 341 Code of 1876.

<sup>56</sup> Sec. 353 Code of Ind., now Sec. 611 Ind. Stats.

<sup>57</sup> Sec. 298 Code of Ohio, later Sec. 5306 Ohio Stats.

<sup>58</sup> Sec. 315 Nebraska Code.

<sup>59</sup> Sec. 307 Kansas Code, later Sec. 4755 Gen. Stats. of Kansas.

<sup>60</sup> Sec. 3113 Iowa Stats. of 1860, Sec. 2339 Iowa Stats. of 1873.

<sup>61</sup> Sec. 372 Ark. Code 1868, now Sec. 1312 Ark. Stats.

<sup>62</sup> Sec. 5034 Okla. laws 1910, Sec. 573 Okla. laws 1921 and now Sec. 399 Okla. laws 1931.

The statute was repealed by Iowa in 1897,<sup>63</sup> by Ohio in 1898,<sup>64</sup> by Kansas in 1905,<sup>65</sup> and by Nebraska in 1911.<sup>66</sup>

The Court of Arkansas has never mentioned this statute although it has been on the books in that state for more than 65 years. Cases decided under it are collected in a note published in 88 A. L. R., p. 943 et seq., so there is no need for listing them here. It was passed at a time when (as the Nebraska Court suggested)<sup>67</sup> greater regard was shown for property rights than human rights but the question now is this:

What shall be done about it?

First, of all things the question must be studied. The Judicial Council without a dissenting vote asked the legislature to repeal it and a bill for that purpose was introduced but an active lobby working for the railroads succeeded this year in stopping it in the hands of the committee.

The statute is unconstitutional and thinking lawyers will soon discover ways to so convince the courts. Once it is held unconstitutional its repeal will follow. An attack on its constitutionality is not answered by calling attention to its age. Constitutionality does not grow on a statute as moss grows on a roof.

"Where the constitutionality of a statute is directly called in question, the decision will not be controlled by the fact that such statute has been assumed to be constitutional, in several decisions, where the question was not raised."<sup>68</sup>

"The Court will not adhere to a doctrine which, although established by previous decisions, they are convinced is erroneous."<sup>69</sup>

"The doctrine (Stare decisis) has never been given the force of depriving courts of the right to correct an erroneous holding."<sup>70</sup>

"An adherence to it (Stare decisis) is necessary to preserve the uniformity of the law, . . . but the rule is not so strictly observed where the questioned decision is of recent utterance, nor is the maxim itself always imperative or necessarily binding."<sup>71</sup>

<sup>63</sup> When new code was adopted.

<sup>64</sup> See 93 Ohio laws, p. 217.

<sup>65</sup> See Chap. 332 Laws of Kansas for 1905.

<sup>66</sup> See Chap. 169 Laws of Nebraska for 1911.

<sup>67</sup> *O'Reilly v. Hoover*, 70 Neb. 357, 97 N. W. 70 (1903).

<sup>68</sup> 15 C. J., p. 977, Sec. 341, note 40.

<sup>69</sup> 15 C. J., p. 957, Sec. 357, note 20.

<sup>70</sup> *L. & N. R. Co. v. Hutton*, 220 Ky. 277, 295 S. W. 175 (1927).

<sup>71</sup> *Kentland Coal & Coke Co. v. Keen*, 168 Ky. 836, 183 S. W. 247, L. R. A. 1916D, 924 (1916).

"A person not a party or a privy to the action, can not acquire a vested right in an erroneous decision made therein."<sup>72</sup>

The rule will not be applied to perpetuate error.<sup>73</sup> It does not apply in tort cases. A litigant can not invoke the doctrine unless he has relied upon and acted under the former decision. It is the duty of the court to overrule an erroneous decision where no rule of property is involved.

"When a question involving important public or private rights, extending through all coming time, has been passed upon a single occasion, and which decision can in no just sense be said to have been acquiesced in, it is not only the right, but the duty, of the court, when properly called upon, to re-examine the questions involved, and again subject them to judicial scrutiny. We are by no means unmindful of the lessons furnished by our own consciousness, as well as by judicial history, of the liability to error and the advantages of review."<sup>74</sup>

The question should be re-examined. The Franke cases are unsound, and should be overruled. The statute is void for its denial of trial by jury, of equal protection of the law, its denial of justice and its assumption of judicial power.

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<sup>72</sup> *Origler v. Shepler*, 79 Kan. 334, 101 Pac. 619, 23 L. R. A. N. S. 500 (1909).

<sup>73</sup> 15 C. J., p. 956, Sec. 357.

<sup>74</sup> *Montgomery Co. Fiscal Court v. Trimble*, 104 Ky. 629, 47 S. W. 773 (1898). 42 L. R. A. 738.