

been revised in pursuance of the suggestions made in my Opinion No. 2859, rendered to you January 24, 1931, and I am of the opinion that the revised proposed articles now submitted conform in all respects to the Constitutions and laws of the State of Ohio and of the United States.

I am advised that articles of incorporation of an association of the same name were previously filed with you. It will, therefore, be necessary for the corporation previously organized to be dissolved or for the proper officers of said corporation to sign the formal waiver and consent to the use of the name and for said waiver and consent to be filed with you before the proposed articles of incorporation now submitted can be legally filed in your office.

I return herewith the said proposed articles of incorporation of The Growers Mutual Insurance Association.

Respectfully,

GILBERT BETTMAN,  
*Attorney General.*

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3134.

GRAND JURORS—CHALLENGE BY PROSECUTING ATTORNEY ON STATUTORY GROUNDS APPLICABLE TO PETIT JURORS, ILLEGAL—WHEN SUCH JURORS MAY BE EXCUSED FROM SERVICE.

*SYLLABUS:*

*Prosecuting attorneys may not challenge persons summoned for grand jury service on the grounds enumerated in the statutes governing the challenging of petit jurors, but they may challenge persons summoned for such service if on appearance it is manifest they have physical infirmities by reason of which they are incapable of rendering jury service.*

COLUMBUS, OHIO, April 9, 1931.

HON. C. G. L. YEARICK, *Prosecuting Attorney, Newark, Ohio.*

DEAR SIR:—This will acknowledge the receipt of your recent communication, in which you ask my opinion as to whether persons summoned to serve on a grand jury may be legally interrogated, challenged and excused by the court for the same causes that petit jurors may be challenged and excused.

Section 13436-2, General Code, to which you refer, as enacted in the new Code of Criminal Procedure, reads:

“A grand jury shall consist of fifteen persons resident electors of the county, having the qualifications of jurors.”

Section 13436-17 of the General Code is indirectly pertinent, and reads:

“At least twelve of the grand jurors must concur in the finding of an indictment, and when so found the foreman shall endorse on such indictment the words ‘A true bill’ and subscribe his name as foreman.”

In reference to the summoning of persons to serve as grand jurors, section 11426, General Code, among other things provides:

“When by order of a court of record in any county, except a police court, or of a judge thereof in vacation, the clerk of the common pleas court is directed

to cause the summoning of persons to serve as grand or petit jurors in such courts, in the presence of the sheriff, he at once shall turn the jury wheel-until the pieces of paper therein are thoroughly mixed, then draw from it the number of names specified in the order, \* \* \* and unless otherwise therein directed, forthwith shall issue a venire facias to the sheriff commanding him to summon the persons whose names were so secured, to attend as jurors at the time and place in the order stated. \* \* \* ”

Pertinent statutes of Ohio now make provision for a jury wheel for use in the selection of jurors. Section 11423 of the General Code, as far as pertinent, reads:

“On the fourth Monday in May, the jury commissioners shall meet at the court house at 10 o'clock in the forenoon and shall there select such number of judicious and discreet persons, having the qualifications of electors of such county, as the court may direct, to be selected as nearly as may be from the several wards and townships in proportion to their respective population. No person shall be so selected who shall not, in the judgment of such commissioners, be competent in every respect to serve as juror. \* \* \* ”

It will be noted that provision is made in the section quoted for the jury commissioners to select such number of judicious and discreet persons having the qualifications of electors of such county. The section also provides that no person shall be so selected who shall not, in the judgment of such commissioners, be competent in every respect to serve as jurors.

Section 1 of Article V of the Constitution of Ohio provides:

“Every citizen of the United States, of the age of twenty-one years, who shall have been a resident of the state one year next preceding the election, and of the county, township, or ward, in which he resides, such time as may be provided by law, shall have the qualifications of an elector, and be entitled to vote at all elections.”

The right to challenge prospective grand jurors and petit jurors is statutory. Sections 11431 and 11436, General Code, read:

Sec. 11431. “When, by reason of challenge or other cause, enough jurors summoned as aforesaid to make up the panel, either of the grand or petit jury, are not present, or if the array be set aside, the sheriff shall summon talesmen until the deficiency is made up. Or, if the number for a grand jury is insufficient, the court may issue a special venire to the sheriff, commanding him to summon the persons named therein to attend forthwith, as grand jurors.”

Sec. 11436. “A challenge to the array may be made and the whole array set aside by the court, when the jury, grand or petit, was not selected, drawn or summoned, or did not proceed as prescribed by law. But no challenge to the array shall be made or the whole array set aside by the court, by reason of the misnomer of a juror or jurors; but on challenge, a juror or jurors may be set aside by reason of a misnomer in his or their names; but such challenge shall only be made before the jury is impaneled and sworn, and no indictment shall be quashed or verdict set aside for any such irregularity or misnomer if the jurors who formed the same possessed the requisite qualifications to act as jurors.”

In legal parlance the word “array” means the whole body of persons summoned

to serve as a grand jury before they have been impaneled as such. From its origin, a grand jury has been a commission to inquire into charges preferred against persons bound over by magistrates or other persons, and matters disclosed and brought before it during its investigation. Its province was and still is to examine the evidence offered and determine whether there is sufficient evidence to put accused persons on trial before a petit jury. It is not a trier of the guilt or innocence of an accused. As observed by Blackstone, Volume 4, page 303:

“They are only to hear evidence on behalf of the prosecution; for the finding of an indictment is only in the nature of an inquiry or inquisition which is afterward to be tried and determined; and the grand jurors are only to inquire upon their oaths whether there be sufficient cause to call upon the party to answer it.”

The functions of the grand jury being only inquisitorial, and the statutes under which names are placed in the jury wheel and drawn therefrom having provided that only judicious and discreet persons having the qualifications of electors shall be selected, and also having provided that no person shall be selected by the jury commission who shall not, in the judgment of such commission, be competent in every respect to serve as a juror, it would seem to logically follow that the qualifications of jurors are passed upon by the jury commission.

Section 13443-8, General Code, provides for the challenging of persons called as jurors on an indictment and specifies nine different grounds for challenging. In addition to those nine specific grounds, the statute also authorizes like challenges as are allowed in civil cases. The statutes in civil cases are sections 11437 and 11438, General Code, in which sections provision is made for eleven more grounds. However, it is manifest that the provisions in reference to challenge are only applicable when an accused person is brought to trial before a petit jury on an indictment.

It is a well established rule that the language of a legislative body expressed in a statute cannot be extended beyond its proper and natural meaning in order to meet particular circumstances that may have arisen. That part of section 11423, General Code, should be kept in mind, in which it is provided that the persons whose names are placed in the jury wheel by the jury commission must be judicious and discreet persons having the qualifications of electors and competent to serve as jurors. It should also be noted that pertinent provisions of section 11436, supra, specifically limit the grounds and the time for exercising a challenge to the array, in that no challenge to the array shall be made or the array set aside by the court by reason of the misnomer of a juror or jurors. Likewise, on challenge a juror or jurors may be set aside by reason of misnomer in his or their names, but such a challenge shall be made before the jury is impaneled or sworn. In addition to that, the statutes specifically forbid any indictment to be quashed or a verdict of a jury thereon set aside for any such irregularity or misnomer, if the jurors forming the grand jury possess the qualifications requisite to act as jurors. The provisions in the statutes on the subject, I think, clearly imply a restriction as to the right to challenge the persons called for grand jury service and any interpretation of the statutes which will permit the challenging of these persons, the same as is authorized in criminal cases, for petit jurors, would be reading into the statutes on the subject a right the legislature has not provided.

In reaching this conclusion, I am not unmindful of the general expression on the subject found in the cases of *Huling vs. State*, 17 O. S., 583, and *State vs. Esther*, 30 O. S., 540. In these cases, however, it will be noted that the facts are different in that they did not involve the question you ask. On the contrary, it appears they are cases in which objections were raised by indicted persons at the time they were placed on trial before petit jurors.

It has long been the established rule in reference to reported cases that the law announced thereby must be in accordance with the facts which the courts are called upon to decide.

In the case of *Cohens vs. Virginia*, 6 Wheat., at page 399, Chief Justice Marshall, among other things, says:

"It is a maxim not to be disregarded that general expressions, in their opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected but ought not to control the judgment in a subsequent suit when the very point is presented for decision."

The same general rule has been announced by the Supreme Court of Ohio in the case of *White vs. Lockwood*, 39 O. S., p. 145, as follows:

"An examination of the Ohio cases shows an apparent conflict in the syllabi or head-notes. Although in this state such head-notes are prepared by the judges, and in all cases receive the assent of a majority—a practice with which we are well satisfied—they are always to be read in connection with the facts appearing in the report, and so read, the cases are not in conflict, nor are they in conflict with the principles asserted in this case."

Notwithstanding the statutory limitations, however, with reference to the challenging of grand jurors, I am of the opinion that should it appear to the court that a person or persons summoned for grand jury service, on appearance, are exempt or manifestly unsuitable, on account of defective hearing or eyesight, or other impediment, or that persons are called who are exempt from service within the provisions of sections 11443 and 11444, General Code, the court may lawfully excuse such person or persons from service and command the sheriff to summon additional jurors until the deficiency is made up, as provided in section 11431, General Code.

In specific answer to your inquiry, I am of the opinion that the prosecuting attorney may not challenge grand jurors on the grounds provided in the statute applicable to petit jurors.

Respectfully,  
GILBERT BETTMAN,  
*Attorney General.*

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3135.

APPROVAL, CONTRACT FOR ROAD IMPROVEMENTS IN PORTAGE COUNTY.

COLUMBUS, OHIO, April 9, 1931.

HON. O. W. MERRELL, *Director of Highways, Columbus, Ohio.*

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3136.

APPROVAL, AGREEMENT FOR ELIMINATION OF GRADE CROSSING NEAR WORTHINGTON, FRANKLIN COUNTY, OHIO.

COLUMBUS, OHIO, April 10, 1931.

HON. O. W. MERRELL, *Director of Highways, Columbus, Ohio.*