LARILLIAN AS AD. *vs.* LANE & CO.

Where the record states that "a jury of twelve good and lawful men came," &c., but contains the names of eleven only, this court will presume that the name of one juror was omitted by mistake; as where the record is contradictory the legal presumption is that that portion is true, which answers the requirements of the law, unless the contrary be made to appear by exceptions.

Writ of Error to the Circuit Court of Union county,

This case was determined in the Circuit Court of Union county, at the May term, 1844; and was removed into this court by writ of

error. The facts relied upon for a reversal of the judgment, appear in the opinion of the court.

RINGO & TRAPNALL, for the plaintiff. The record and assignment of errors present in this case a single point; that is, whether, in the absence of any express consent of the parties thereto, a jury can consist of 11 persons only. The record in this case contains the names of the persons empannelled as a jury, and thereby proves affirmatively that the jury consisted of 11 persons, and no more. The plaintiff insists that a jury at common law in such case consisted of 12 men; that this number is not diminished by any statutory provision; but the right of trial by jury, as at common law, is in such case prescribed by both the constitutions of the United States and this State; that the relinquishment of such right, that is, the right to have a jury of 12 men, when a jury is called or empannelled, is never to be presumed; nor a trial had by a different number without the express consent of all the parties to be affected by the verdict, which consent must appear of record. 3 *Black. Com.* 352. *Const. U. S. amendments art.* VII. *Const. Ark. Dec. of Rights, sec.* 6. *McDonald* v. *McDonald,* 5 *Yerger's Rep.* 307.

FOWLER, on same side. The record shows that the cause was tried by eleven men, without any showing whatever that the parties agreed to such a mode of trial, or waived their right to a jury, or submitted the issues to the court. The trial was neither by the court, by a jury, or by arbitrators, "on the agreement of the parties," as prescribed, &c. *Rev. Stat. p.* 633, *sec.* 98. Consequently the trial was illegal, and the judgment rendered thereon was erroneous.

The very substance and technical meaning of the term *jury,* is twelve good and lawful men. 3 *Bl. Com.* 349, 365. The *venire facias* issues for twelve good and lawful men. 3 *Bl. Com.* 352. 2 *Tidd's Pr.* 714, 715. Twelve persons shall be sworn upon the jury. 3 *Bl. Com.* 358, 365.

To make a jury out of the ordinary mode valid, both parties must consent. 1 *Hammond's Ohio Rep.* 533 *to* 535, *Mills* v. *Noles.* A judgment rendered on a verdict found by eleven persons is erroneous. 5 *Yerg. Rep.* 308, *McDonald* v. *McDonald.*

PIKE & BALDWIN, contra. The record in this case states that a jury of twelve men tried the case, but gives the names of eleven only. It was not necessary to name the jurors at all. It was sufficient if it was stated that there were twelve. See *Coke's & Lilly's Entries, passim.* 2 *Paine & Duer's Prac.* 734.

Even if necessary, it was a clear mistake. The court is so bound to consider it in the ordinary presumptions which it is bound to make in favor of the court below. The court will intend a mistake in making up the record, rather than suppose that the court sat on a day on which they could not legally sit. *Moore* v. *Tracy,* 7 *Wend.* 233. They will not reverse for clerical errors, or matters of form; as where the wrong term is stated, or costs awarded when the court judicially knows there could be none, *ib.*

By our own statute, a judgment cannot be reversed for mistake in the name of an officer or juror; an informality in entering judgment or making up the record, any default or negligence of clerk or attorney. *Rev. Stat.* 636.

Where there is obviously a mere clerical error or omission, the court will disregard it without making a formal amendment. *Moore* v. *Tracy, ub. sup.* Obvious mistakes are disregarded. *Reed* v. *Hind,* 7 *Wend.* 412.

JOHNSON, C. J. The only cause assigned for error is, that the verdict upon which the judgment is based, was not found by a jury of twelve men. The record states that twelve good and lawful men returned the verdict, but, upon inspection, it appears there were but eleven names recorded. The record is contradictory in this respect, and, whenever that is the case, the presumption is that that portion of it is true and sustained by the facts of the case which is in accordance with and answers the requirements of the law, unless the contrary shall be clearly made to appear by exceptions taken at the time, or in some mode by which the matter may be brought before this court. The trial by jury is a great constitutional right, and when the convention incorporated the provision into the constitution of the country, they most unquestionably had reference to the jury trial as known and recognized by the common law. It is a well ascertained fact,

that the common law jury consisted of twelve men, and as a necessary consequence, since the constitution is silent upon the subject, the conclusion is irresistible that the framers of that instrument intended to require the same number. If the jury really did not consist of twelve men, and the defendant in the court below did not intend to waive his constitutional rights, he should have reserved the point in the mode pointed out by law, and then it would have been entitled to the consideration of this court.

The record having stated that there were twelve men upon the jury, the legal presumption is that such statement is true, and that the clerk omitted to place their names upon it, and the statute is explicit that no such omission shall cause a reversal of the judgment.

Judgment affirmed.