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June 1, 1956  
Opinion No. 56-107

REQUESTED BY: Honorable ~~W. L.~~ Flood, Justice of the Peace

OPINION BY: ROBERT MORRISON, The Attorney General  
Newman W. White, Special Assistant  
Attorney General

QUESTION: May trial juries in misdemeanor cases in the  
justice court consist of less than twelve jurors?

CONCLUSION: Yes, by consent of both parties expressed in  
open court.

Article 2, Section 23, of the Constitution of Arizona, reads as follows:

"§ 23. (Trial by jury.) -- The right of trial by jury shall remain inviolate, but provision may be made by law for a jury of a number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of a jury in civil cases where the consent of the parties interested is given thereto."

Section 44-1807, A. C. A., 1939, reads, in part, as follows:

"44-1807. Issues of fact--By whom tried--Jury formation. ---...  
Issues of fact must be tried by jury, unless a trial by jury be waived in actions not amounting to felony, by the consent of both parties, expressed in open court and entered in its minutes. In misdemeanors the jury may consist of twelve (12), or any number less than twelve (12), upon which the parties may agree in open court. Trial juries for criminal actions are formed in the same manner as trial juries in civil actions."

Section 37-101, A. C. A., 1939, reads as follows:

"37-101. Kinds of juries--Number composing. --There shall be grand juries, trial juries and juries of inquest. A grand jury shall be composed of not less than sixteen (16) nor more than twenty-one (21) men. A trial jury in courts of record shall be composed of twelve (12) men, but in civil actions the parties may consent to try with a less number, not under three (3); such consent to be entered in the minutes of the

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trial. A jury in courts of justices of the peace shall, in criminal actions, be composed of twelve (12) men, in civil actions of six (6) men; but in civil actions the parties may consent to a less number, not under three (3). A jury of inquest shall be composed of not less than six (6) nor more than twelve (12) men."  
(Emphasis supplied)

The 1945 amendment to Section 37-101, A. C. A., 1939, as found in the 1952 Supplement, made no substantial change in this section as contained in the 1939 Code. The 1945 amendment added the designations (a), (b), (c), and (d); deleted sentence providing that "There shall be grand juries, trial juries and juries of inquest"; and substituted the word "persons" for "men".

It is the general rule of statutory construction that, where there is in a general statute a specific clause and also a general one which in its most comprehensive form would include the former, the general clause is deemed to affect only such cases within its general language as are not within the provisions of the specific clause.

The Arizona Supreme Court has held in the case of Valley Bank v. Malcolm, 23 Ariz. 395, 405, 204 Pac. 207, that the language of a statute, however mandatory in form, may be deemed directory whenever the purpose of the Legislature, in view of the good to be accomplished, can best be carried out by such construction.

Based on the above rules of statutory construction, it has been considered that the word "shall" appearing in paragraph 3 of Section 37-101, A. C. A., 1939, includes the provision contained in Section 44-1807, A. C. A., 1939, to the effect that in misdemeanors the jury may consist of twelve or any number less than twelve upon which both parties may agree in open court, and that trial juries for criminal actions are formed in the same manner as trial juries for civil actions. Accordingly, misdemeanors have been tried before a jury of less than twelve when the parties agreed in open court.

A. R. S. § 13-1593 reads as follows:

"§ 13-1593. Waiver of jury by consent of parties

A trial by jury may be waived in criminal actions not amounting to felony by the consent of both parties expressed in open court and entered on its minutes."

A. R. S. § 22-320 reads as follows:

"22-320. Trial by jury; forming jury

A. A trial by jury shall be had if demanded by either the state or defendant. Unless the demand is made before commencement of the trial, a trial by jury shall be deemed waived.

B. Upon demand being made for a jury trial, the justice of the peace or presiding officer of a police court shall issue an order directed to the sheriff of the county, or to any constable, marshal or policeman therein, commanding such officer to summon the number of qualified persons specified in the order to appear at the time and place therein fixed to serve as jurors in the action. If the required number of jurors do not appear, an additional order or orders may be issued." (Emphasis supplied)

The Arizona Supreme Court has held in numerous cases that the court will presume that the legal effect of consolidation and restatement of the law is the same as that of the old statute, unless context of the new Code is such as to make such interpretation unreasonable, and that where two or more meanings can be given the court must assume that meaning leaving the law as it was originally intended and not the meaning which changes the legal effect of the statute as well as its phraseology. In re Estate of Sullivan, 38 Ariz. 387, 300 Pac. 193; Castenada v. National Cash Register Co., 43 Ariz. 119, 29 P. 2d 730; Mutual Benefit H. & A. Assn. v. Neale, 43 Ariz. 532, 549, 33 P. 2d 604; In re Forsstrom, 44 Ariz. 472, 38 P. 2d 878.

The provision as to the number of jurors required in courts of justices of the peace, in criminal actions as contained in A. R. S. § 21-103, are identical with those contained in section 37-101, A. C. A., 1939. A reading of the statutes pertaining to the kinds of juries and the number of jurors required to try misdemeanors in courts not of record, in connection with Art. 2, section 23, of the Arizona Constitution, above quoted, leads to the conclusion that the Legislature did not intend any substantial change in the law subsequent to the statute which originally provided that in misdemeanors the jury may consist of twelve or any number less than twelve on which the parties may agree in open court, notwithstanding the fact that this provision, contained in section 44-1807, A. C. A. 1939, was omitted from the Arizona Revised Statutes.

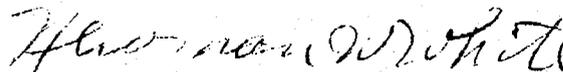
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Further, in view of the fact that a trial by jury may be waived in criminal actions not amounting to a felony with the consent of both parties expressed in open court, it is the opinion of this office that the Legislature did not intend any substantive change in the law with reference to jury trials in justice courts; otherwise, there would be no point in authorizing a justice of the peace to specify the number of jurors required, as provided in A. R. S. § 22-320, supra.

It is, therefore the opinion of this office that the law as set forth in Arizona Revised Statutes authorizes the trial of misdemeanors in justice courts by a jury consisting of less than twelve jurors when both parties agree to same in open court.

ROBERT MORRISON  
The Attorney General



NEWMAN W. WHITE  
Special Assistant  
Attorney General

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