

SELECTING THE JURY.

The right of challenge to a jury is as old as the jury system itself. It was in use among the Romans in criminal cases from very ancient times. The *Lex Servilla*, in the second century before the Christian era, enacting that the accuser and the accused should each name one hundred *judices*, from which each might reject fifty, so that one hundred remained to try the case. Blackstone shows the great similarity of our jury customs, as to their being summoned, impanelled, challenged and sworn, to the practice in the Roman republic, before she lost her liberty. Quoting from Tully and other early writers, and in comparing them with usages of the common law, he says, "Indeed these *selecti judices* bore in many respects a remarkable resemblance to our juries: for they were first returned by the prætor; *de decuria Senatoria conscribunter*: Then their names were drawn by lot, till a certain number was completed: *in urnam sortito mittunter, ut de pluribus necessarius numerus confici posset*: Then the parties were allowed their challenges; *post urnam permittitur accusatori, ac reo, ut ex illo numero rejiciant quos putaverint sibi, aut inimicos, aut ex aliqua re incommodus fore*: Next they struck what we call a *tales*; *rejectione celebrata, in eorum locum qui rejecti fuerunt subsortiebatur prætor alios, quibus ille judicum legitimus numerus compleretur*: Lastly, the judges, like our jury, were sworn; *his perfectis, jurabant in leges judices, ut obstricti religione judicarent*.¹

In England the right of challenge has existed from the earliest period. In Granville's time the tenant was permitted to object, for good cause, to any of the recognitions of the assize, and Bracton tells us² that a person put upon his trial, if he had just cause to suspect any of the jurors to be influenced by improper feelings toward him, might object to their being on the inquest and cause them to be removed. And so far was this rule adopted that, corresponding with the *resuscatio judicis* of Justinian's code, it was the ancient law of England, that, for good cause, the judge himself might be removed.³ In line with the words of Fortescue, of more than five hundred years ago: "The jurors selected to try a cause

¹ Sharswood's Blackstone's Commentaries, Bk. III. 366.

² Bracton III. c. 22.

³ *Ib.*, V. c. 15. Fleta, VI. c. 37.

should not be strangers nor people of uncertain character, whose circumstances are unknown." It was once the law of England that it was ground for challenge to the array that the jurors were not returned from the hundred in which the venue was laid, and therefore, where the cause of action was supposed to have arisen.

The object of this article is to review the qualifications of jurors and the grounds of challenge, rather than a discussion of the manner of selecting the panel and the practice in summoning and returning juries, so variously regulated by the statutes of the States; but some general remarks upon those subjects are not inappropriate, by way of introduction to the questions it is proposed to consider, as being of greater interest to the profession.

At common law, in a civil case after issue joined, the court awarded a writ of *venire facias* upon the record, commanding the sheriff to summon to appear on a certain day, "twelve free and lawful men, *liberales et legales homines*, of the body of the county," not of kin to the parties, to try that particular cause. If the sheriff was not an indifferent person, the venire issued to the coroner, and, failing his qualifications, to two clerks of the court, or to two persons named by the court, called *elisors*, duly sworn for that purpose.⁴ By the statute of 3 Geo. II. c. 25, a jury of twelve for each case is no longer returned, but one panel, containing not less than forty-eight nor more than seventy-two jurors, is summoned for every cause to be tried at the same assizes; and their names being written on tickets, are put into a box or glass, and when each cause is called twelve of these persons, whose names shall be first drawn out of the box, are sworn upon the jury, unless absent, challenged or excused. In this country the practice is entirely regulated by the statutes of the several States. In some of them the lists of qualified persons for jury service is made up by special boards; in others, by an officer of the court, such as the sheriff, in conjunction with other county officers; and, in the New England States, by the town authorities, to whom the venire is issued for that purpose. In the Federal Courts, the practice is regulated by the Act of Congress of June 30th, 1879, requiring the juries to be drawn from a box containing the names of three hundred persons, placed therein by the clerk of the court, and a commissioner appointed by a judge; the clerk and the commissioner being of opposite political parties.

⁴ Sharswood's Blackstone's Com., Book III. 352, 355. Assimilated to this is the practice in the Supreme Court of Pennsylvania, where, when a defective verdict has been rendered, found upon error appearing on the record, the judgment is reversed and a *venire facias de novo* is awarded.

The qualifications of a juror are regulated by statute; in some of the States those qualifications are prescribed by their Constitutions, in others they are directed by legislative enactments. There are three requisites, now almost universally prescribed: (a) The juror must be a citizen of the county. At common law, a jury *de medietate linguæ*, consisting half of aliens and half of inhabitants, was a privilege accorded where either party was an alien born. This has now been abolished in England and in all of the States except Kentucky, where such a jury may still be returned if so directed by the court.⁵ (b) The juror must be a male and above the age of twenty-one years. While at common law, a jury of women may be empanelled in certain cases upon a writ *de ventre inspiciendo*, a privilege which, no doubt, still remains, but the writer is not aware of any statute permitting females to sit as jurors in an ordinary civil cause, or criminal trial; although it may be granted them in those States, *e. g.*, Wyoming and Colorado, where the right of suffrage has been extended to women. (c) Generally, it is requisite that a juror shall possess the elective franchise and be entitled to vote in the county wherein the cause is to be tried. A diligent search has failed to discover any case where the contrary has been held; it may, therefore, be assumed, in the absence of a statute to the contrary, that every juror must be an elector.⁶

At common law the qualifications of a juror, in addition to residence and citizenship, as named by Coke, under the head of *propter defectum*, required that he should be a freeman and possessed of an estate of a certain value. This property qualification has been the subject of legislative enactment in the United States, having been abolished in some and expressly required in others.⁷

⁵ In England, Act 33 Vict. ch. 14; In Kentucky, G. L. 1879, p. 571.

⁶ In Arkansas it is held that a resident in the county, and a citizen of the State, is competent to serve as a juror, although his residence has not been of sufficient length to confer upon him political privileges. *Anderson v. State*, 5 Ark. 444. See also *State v. Francis*, 76 Mo. 681. In *United States v. Nardello*, 4 Mackey (D. C.) 503, it was held that a juror was qualified as a resident of Washington to sit in the trial of a case in the District of Columbia, because he lived in that city, although he spent his vacations and voted in Virginia. *Quare*, Would he be a qualified juror in that State? It was held in Nevada that a qualified voter who had not paid his poll tax or had been registered, although the time had not expired within which to perfect his registry, was not rendered incompetent to sit as a juror. *State v. Salge*, 1 Nev. 455.

⁷ New York, Virginia, North Carolina and New Mexico require the juror to be possessed of property. In Texas, Mississippi and Alabama, he must be a householder. In Indiana he must be both a freeholder and a householder.

Certain persons are generally exempt from jury service; those exemptions relating to age, occupation, previous service, and mental or physical infirmity. Thus, jurors under twenty-one or over sixty or seventy years of age are exempt. So also, by virtue of their occupation, are attorneys-at-law, while in practice; clergymen; physicians; public officers and court officials; justices of the peace and constables; professors and teachers in colleges and schools, and their students and pupils; members of the militia and of fire companies; railroad, steamboat and incorporated bank officers and employees; and mail agents, public stage drivers and telegraph officers.

But all these exemptions are a personal privilege which may be waived by those to whom they apply, and do not operate as such disqualifications which may be claimed by the parties to the action as grounds of challenge.

Challenges are of two kinds: to the array, or panel, and to the polls. At common law, the former was confined to the partiality or some default in the sheriff who arrayed the panel; but, with the enlargement of the processes of selecting, drawing and returning the jury tests, the grounds for challenging the array have been enlarged until it may be stated, as a general rule, that any want of statutory form, properly presented, would be cause for quashing the panel; many of the States having statutory enactments as to the grounds for the challenge.

Challenges to the polls, the particular subject of this article, are of two classes, peremptory, and for cause. At common law it seems that the right to challenge peremptorily was not permitted in civil cases, Blackstone making no mention of challenges in those causes; but in criminal trials for felonies punishable with death, the prisoner could exercise this right to the number of thirty-five; that is, one under the number of three full juries, reduced, by the statute of 22 Henry VIII. c. 14, to twenty. Blackstone says that this is "a provision full of that tenderness and humanity to prisoners for which our English laws are justly famous;" and adds that it is grounded on two reasons: "1. As every one must be sensible what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another, and how necessary it is that a prisoner (when put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him, the law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike. 2. Because, upon challenges for

cause shown, if the reasons assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment, to prevent all ill consequences from which the prisoner is still at liberty, if he pleases, peremptorily to set him aside."⁸

Prior to the statute of 33 Edw. I., ch. 4, the Crown could exercise the right of peremptory challenge to an unlimited extent without alleging any other reason than *quod non boni sunt prorege*. This statute, while it took away that unlimited right, was construed by the courts to allow the prosecution a qualified right of peremptory challenge, which was exercised by allowing the crown the privilege of setting aside jurors when called, without assigning cause, until the panel was exhausted, when, if the full number was obtained, such jurors were not called, but if not, their names were afterwards called on the general list.⁹ Such is still the practice in the Federal Courts, and in such of the States as have not in this respect superseded the common law by statutes.¹⁰

In Brandreth's case the question arose whether the prisoner should be required to exercise the right of peremptory challenge before the right of challenge was exercised by the Crown, and, after full argument, it was decided that, according to the uniform practice, the right must first be exercised by the prisoner.¹¹

While in England peremptory challenges are still forbidden, except in cases of felony and treason,¹² it can be stated that in most of our jurisdictions, if not in all, this privilege is now accorded in all criminal trials, as well as in civil causes, the number of challenges being regulated by statutes of the several States. Under the revised statutes, section 819, in treason and capital offences, the defendant is entitled to twenty, the United States to five peremptory challenges; in other felonies the prisoner has ten, the government three; in all other cases, civil or criminal, each party has three. In the State courts the number of such challenges approximate to the practice in the Federal Courts in

⁸ Sharswood's Black. Com., IV. 353.

⁹ Mansel *v.* The Queen, 8 El. & Bl. 54, 70.

¹⁰ M. S. *v.* Shackelford, 18 How. 588; Com. *v.* Joliffe, 7 Watts (Pa.) 585; Jewell *v.* Com., 22 Pa. St. Rep. 94; Wormeley *v.* Com., 10 Gratt. (Va.) 658; State *v.* Stalmaker, 2 Brev. (S. C.) 1; State *v.* Arthur, 2 Dev. L. (N. C.) 217; State *v.* Craton, 6 Iredell (N. C.) 164.

¹¹ 32 State Trials, 771. To the same point are State *v.* Bone, 7 Jones (N. C.) 121; Jones *v.* State, 2 Blackf. (Ind.) 475; State *v.* Hays, 23 Mo. 287

¹² Creed *v.* Fisher, 9 Exch. Rep. 472.

criminal trials, and range from two to one-fifth of the jurors summoned in civil cases.¹³ The right of each defendant in criminal trials, where two or more are indicted and tried together, to the full number of peremptory challenges, in the absence of a statutory provision, has been variously adjudicated; but it seems to be the better authority that where the statute gives such challenges to "every person," it can be exercised by every defendant; but where the right is extended to "each party," or to "either party," that only the full number can be allowed to all the defendants.¹⁴ In civil cases it seems to be settled that when there are several defendants, making a common and joint defense, they have collectively only the same number of peremptory challenges to which one defendant would be entitled.¹⁵ But where the defendants plead separately, are represented by different counsel, and different verdicts may be rendered against the several defendants, each one is entitled to the statutory number of such challenges;¹⁶ so, also where several actions by the same plaintiff have been commenced, and afterwards consolidated under a common defense, each defendant is entitled to the full number of challenges.¹⁷

The ancient division of challenges for cause into principal challenges, and those to the favor, no longer exists. The distinction lay in the mode of trying such challenges; the former being decided by the courts, and the latter by triors; but now they are universally tried by the court, triors having been abolished by statute.¹⁸

The various grounds of challenge for cause apply equally in civil and criminal cases. As we have seen, it is of right and co-

¹³ These statutes are collated in 12 Am. and Eng. Enc. of Law, 347. Title, "Jury and Jury Trial."

¹⁴ Thompson & Merriam on Juries, Sec. 162; *United States v. Hall*, 44 Fed. Rep. 883; *Moschell v. State*, 22 Atl. Rep. 50; *State v. Stoughton*, 51 Vt. 362. *Contra*, See *Savage v. State*, 18 Fla. 909; *Wiggins v. State*, 1 Lea (Tenn.) 738.

¹⁵ *Stone v. Segur*, 93 Mass. 568; *Snodgrass v. Hunt*, 15 Md. 274; *Bibb v. Reid*, 3 Ala. 88; *Schmidt v. Chicago & R. R. Co.*, 83 Ill. 405.

¹⁶ *Strote v. Hinchman*, 37 Mich. 490.

¹⁷ *Mutual Life Ins. Co. v. Hillmon*, 145 U. S. 285.

¹⁸ "The triors, in case the first man called be challenged, are two indifferent persons named by the court; and if they try one man and find him indifferent, he shall be sworn; and then he and the two triors shall try the next; and when another is found indifferent and sworn, the two triors shall be superseded, and the two first sworn on the jury shall try the rest." Sharswood's *Blackstone's Com.* III. 363.

existent with the jury system itself. The constitutional right of trial by jury implies that the trial shall be by an impartial jury, and upon that question the courts have spoken in no uncertain language. In *Diven v. City of Elmira*, 51 N. Y. 506, it was said: "The object of the law is to procure impartial, unbiased persons for jurors. They must be *omni exceptione majores*." The Supreme Court of Georgia, in *Melson v. Dickson*, 63 Ga. 682, said: "An impartial jury is the corner-stone of the fairness of trial by jury;" and in *Ensign v. Harvey*, 15 Neb. 330, it was well said: "Unless fair-minded, and unbiased jurors can be selected, a trial becomes a mere farce, dependent, not upon the merits of the case, but upon extraneous circumstances, such as the bias, prejudice, or interest of the jury." Doctor Warren, in advising the young practitioner, sums up the matter thus: "Look sharply after your jury panel, otherwise you may have, as one of your judges, one whom no evidence, no arguments, would persuade to give your client a verdict; one who may be his personal enemy, or the friend, or relation of your opponent; or may belong to some trade, profession or calling, which would be injuriously affected by your success; or enjoy rights in respect of property situated similarly with that which you seek to affect with liability."¹⁹

The grounds of challenge for cause include the following:

I. Lack of statutory qualifications. These we have discussed *supra*, but to them it can be added that a juror who does not understand the English language is disqualified from sitting in the case, although his rejection on that ground is largely within the discretion of the court.²⁰

II. Interest in the result of the action disqualifies, but not an interest merely in the legal questions involved without an interest in the result of the cause.²¹ The various grounds of interest are

¹⁹ Warren's "Duties of Attorneys," 192.

²⁰ *Sutton v. Fox*, 55 Wis. 531; *Fisher v. Philadelphia*, 4 Brewster (Pa.) 395; *McCampbell v. State*, 9 Tex. App. 124; *Lyle v. State*, 41 Tex. 172; *Plankroad Co. v. Railroad Co.*, 13 Ind. 99. The writer had the novel experience of trying a case for a week where, after verdict, it was discovered that three of the jurors, although born in the county, did not understand a word of English, and had been ignorant of all that had transpired at the trial. It had been held in the same court that this was not ground for a new trial. The losing side had the satisfaction of learning that these jurors had voted for them until the last ballot; possibly a reason to satisfy the defendants that the verdict was not improper.

²¹ *Wood v. Stoddard*, 2 Johns (N. Y.) 194; *Williams v. Smith*, 6 Com. (N. Y.) 166.

these: (a) Pecuniary in the result of the suit.²² But not for mere liability for attorney's fees, without interest in the cause.²³ (b) Similar case pending.²⁴ In *Davis v. Allen*, 11 Pick. 466, it appeared that a juror had an interest and claim, the success of which would depend upon the same state of facts controverted at the trial, and it was held that it would have constituted a good ground for challenge, had the exception been seasonably taken. (c) That the juror has wagered upon the result of the suit.²⁵ (d) Citizenship and taxpayer in a town or city party to the action. In many of the States, statutes expressly remove this disqualification; but, in the absence of such a statute, it seems to be settled that the juror is not competent if the action is against a municipality for damages, or for the direct recovery of money on any other ground, so that the judgment might result in the imposition of an additional tax on him or his property.²⁶ And the taxpayer is equally disqualified whether the result of the trial may be to increase or diminish his taxes.²⁷ But not upon the trial of one accused of violating a city ordinance; or for murdering a policeman, although the city has employed counsel to aid the prosecution; or for stealing property of the county; or for burning the county jail.²⁸ (e) Membership in a private corporation party to the action. Universally, this disqualifies the juror, be his interest in the corporation great or small, provided the corporation is directly interested in the result of the trial.²⁹ But the juror is not necessarily disqualified, from the fact that he is a member of a corpora-

²² *Small v. Jones*, 6 Watts & Serg. (Pa.) 122; *Meeker v. Potter*, 5 N. J. Law, 586; *Omaha v. Kane*, 15 Neb. 657.

²³ *Doyal v. State*, 70 Ga. 134; *B. & O. R.R. Co. v. P. W. & B. R.R. Co.*, 17 W. Va. 812.

²⁴ *Gardner v. Lanning*, 3 N. J. Law, 231; *Lord v. Brown*, 5 Denio (N. Y. 345; *Talmadge v. Northrup*, 1 Root (Conn.) 455.

²⁵ *Essex v. McPherson*, 64 Ill. 349; *Cheverius v. Com.*, 81 Va. 787; *Seaton v. Swem*, 58 Iowa 41.

²⁶ *Diven v. City Elmira*, 51 N. Y. 506; *Goshen v. England*, 119 Ind. 368; *Gibson v. Wyandotte*, 20 Kan. 156; *Bailey v. Trumbull*, 31 Conn. 581; *Fulweiler v. St. Louis*, 61 Mo. 479; *Kendall v. City Albia*, 73 Iowa 243; *Mayor Columbus v. Goetchius*, 7 Ga. 139.

²⁷ *Hawes v. Gustin*, 2 Allen (Mass.) 404; *Wood v. Stoddard*, 2 Johns (N. Y.) 194; *State v. Williams*, 30 Me. 484.

²⁸ *Middletown v. Ames*, 7 Vt. 166; *State v. Wells*, 46 Iowa 662; *Doyal v. State*, 70 Ga. 134; *People v. Bennett*, 37 N. Y. 177; *Phillips v. State*, 29 Ga. 105.

²⁹ *Respublica v. Richards*, 1 Yeates, 480; *Peninsula R. R. Co. v. Howard*, 20 Mich. 18; *Page v. Contoocook Valley R. R. Co.*, 21 N. H. 438; *Fleeson v. Savage Mining Co.*, 3 Nev. 157.

tion of which one of the parties is also a member; or is a member of a similar corporation; unless, indeed, a prejudice can be shown arising from that connection.³⁰ (f) Membership in an association party to the action, where the juror must contribute to the expenses of the suit.³¹ And so if the action relate to the property of a church of which he is a member, he is incompetent;³² but not simply because the action is against another church member, or against a church of the same denomination, but of which he is not a member.³³ In *Miles v. United States*, 13 Otto 304, Mr. Justice Woods said: "It is evident from the examination of the jurors on their *voir dire*, that they believed that polygamy was ordained of God, and that the practice of polygamy was obedience to the will of God. At common law, this would have been ground for principal challenge of jurors of the same faith." But from what follows, it is clear that the court put the incompetency on the ground of actual bias, rather than on religious belief. "It needs no argument to show that a jury composed of men entertaining such a belief could not have been free from bias or prejudice, on the trial for bigamy, of a person who entertained the same belief, and whose offense consisted in the act of living in polygamy. * * * Whether or not that bias was founded on the religious belief of the juror, is entirely immaterial, if the bias existed." It has been held, with little variation, that the fact that a juror is a member of the same benevolent or social organization, or of the same secret society, with one of the parties to the action, does not render him incompetent, in the absence of special prejudice proven against him. The question was discussed at length, and with much ability, in the leading case of *Purple v. Horton*, 13 Wend. (N. Y.) 9, where it was held that it is no cause of challenge to a juror that he is a freemason, where one of the parties to the suit is a member of that society, and the other is not; and that the oath taken by a master mason, or a royal arch mason, on his admission to the society, does not disqualify him in such an action. There is not entire unanimity of opinion on the question as to whether a juror is disqualified by reason of his membership in an association formed to suppress a particular kind of crime, upon the

³⁰ *Miller v. Wild Cat Gravel R. R. Co.*, 52 Ind. 51; *Williams v. Smith*, 6 Cow. (N. Y.) 166; *Brittain v. Allen*, 2 Dev. L. (N. C.) 120.

³¹ *Com. v. Moore*, 143 Mass. 136.

³² *Cleague v. Hyden*, 6 Heisk. (Tenn.) 73.

³³ *Barton v. Erickson*, 14 Neb. 164.

prosecution of a person accused of a crime of that class; but the weight of authority is in favor of his competency;³⁴ unless the objects of the association, or the circumstances disclosed, indicate a hostility to the person on trial as an individual, or to all persons of his class.³⁵

III. Relationship to the parties to the action. At common law, this was cause of principal challenge, which may be to the blood or kindred of either party within the ninth degree; and so it has been held in some of the States.³⁶ By statutes of other States, persons are permitted to act as jurors, though more closely related to the parties than would have been permitted at the common law.³⁷ Relationship by affinity disqualified the juror at common law, and under the statutes of most of the States, is also cause for challenge.³⁸ The disqualification exists either from the relation of the juror to the wife of a party, or from the relation of his wife to the party; the test, in the latter case, being to ascertain if the juror's wife, were her sexual disqualification removed, could be competent to try the cause, and, in the former, if the juror would be competent if his relative were a party to the action.³⁹ But relationship by affinity terminates on the death of the person by whose marriage it was created, unless the marriage has resulted in issue who are still living.⁴⁰ Relationship to a party beneficially inter-

³⁴ *United States v. Borger*, 7 Fed. Rep. 193; *Boyle v. People*, 4 Colo. 176; *State v. Hoxie*, 15 R. Is. 1; *Musick v. People*, 40 Ill. 272.

³⁵ *Com. v. Moore*, 143 Mass. 136; *People v. Reyes*, 5 Cal. 347.

³⁶ *Sharswood's Black. Com.* III. 363; *Wireback v. First Nat. Bank*, 97 Pa. St. Rep. 552; *Jacques v. Com.*, 10 Gratt. (Va.) 690; *Morrison v. McKinnon*, 12 Fla. 552; *State v. Perry*, Busb. (N. Car.) 330. And Coke says: "How far remote soever he is of kindred, yet the challenge is good." *Coke Litt.* 157.

³⁷ In Alabama, within the fifth degree; *Code Ala. Sec.* 4186. In New York, Maine and Indiana, sixth degree; *N. Y. Code Civ. Pro. Sec.* 1166; *Hardy v. Sproule*, 32 Me. 310; *High v. Big Creek Assn.*, 44 Ind. 356. In Vermont, California and Nebraska, fourth degree; *Churchill v. Churchill*, 12 Vt. 661; *Cal. Pen. Code, Sec.* 1074; *Cal. Civil Code, Sec.* 602; *Marion v. State*, 29 Neb. 233.

³⁸ *O'Conner v. State*, 9 Fla. 215; *Jacques v. Com.*, 10 Gratt. (Va.) 690; *Wireback v. First Nat. Bank*, 97 Pa. St. Rep. 552; *Dailey v. Gaines*, 1 Dana (Ky.) 529; *Paddock v. Wells*, 2 Barb. Ch. (N. Y.) 331.

³⁹ *Dearmond v. Dearmond*, 10 Ind. 191; *Hartford Bank v. Hart*, 3 Day (Conn.) 491; *Woodbridge v. Raymond, Kirby* (Conn.) 280; *Den v. Clark*, 1 N. J. L. 446; *Trallinger v. Webb*, 3 Ind. 198; *Dailey v. Gaines*, *Hardy v. Sproule*, *supra*.

⁴⁰ *Cain v. Ingham*, 7 Cow. (N. Y.) 478 and note; *State v. Shaw*, 3 Tred. (N. C.) 532; *Monnson v. West*, 1 Leonard, King's Bench, 88. *Chase v. Jennings*, 38 Me. 44; *Foot v. Morgan*, 1 Hill (N. Y.) 654; *Carman v. Newall*, 1 Denio (N. Y.) 25; *Vannoy v. Gives*, 23 N. J. L. 201; *Bigelow v. Spragne*, 140 Mass. 425; *Dearmond v. Dearmond*, *Jacques v. Com.* *supra*.

ested also disqualifies; and so held where the juror is related to a stockholder in a corporation plaintiff or defendant; or related to a taxpayer of a plaintiff town; or to one who may be called upon to pay the judgment recovered; or to one interested in the principle involved in the cause; or to an administrator suing in his representative capacity; or to an attorney or counsel in the case, whose fees depend upon recovery, but not, otherwise, by reason of his relation to counsel.⁴¹

IV. Dependence on a party to an action disqualifies a juror; the test in this class of cases being whether the juror is subject to the control of the party. The converse of the proposition, viz: that the party is within the control of the juror, depends upon the question of whether there is bias as matter of fact. The various grounds of dependence disqualifying the juror have been held to be:⁴² (a) That he is an employee or servant of one of the parties. (b) Or his partner in business. (c) Or his tenant; this was so at common law, and has so been held in modern cases, but not uniformly. (d) Or surety for a party on an obligation, as indicating a strong bias; and, if relating to the claim in suit, on the additional ground of interest in the litigation. (e) Or if he receives favors from a party, and still expects them, in a business way. (f) Or is a witness in the same case.

But the juror is not disqualified because he is a debtor of the party, unless actual bias is shown; or is the client of an attorney party to the suit; or has an office in the same room with one of the counsel in the case; or was an intimate friend of the party, in the

⁴¹ In the order named for these causes; (a) *Georgia R. R. Co. v. Hart*, 60 Ga. 550; *Bank v. Leavens*, 20 Conn. 87; (b) *Carew v. Howard*, 1 Root (Conn.) 324; *Bailey v. Trumbull*, 31 Conn. 581, 583 (*dicta*); *Day v. Savage*, Hobart, King's Bench, 85; (c) *Woodbridge v. Raymond, Kirby* (Conn.) 280; (d) *Hartford Bank v. Hart*, 3 Day (Conn.) 491; (e) *Balsbaugh v. Fraser*, 19 Pa. St. Rep. 95; (f) *Melson v. Deckson*, 63 Ga. 682; (g) *Funk v. Ely*, 45 Pa. St. Rep. 444; *Pipher v. Lodge*, 16 Serg. & Rawle (Pa.) 214; *Wood v. Wood*, 52 N. H. 422; *State v. Jones*, 64 Mo. 391.

⁴² In the order given: (a) *Hubbard v. Rutledge*, 57 Miss. 7; *Central R. R. Co. v. Mitchell*, 63 Ga. 173; *Louisville R. R. Co. v. Mack*, 64 Miss. 738; *Hill v. Cochran*, 15 Colo. 270; *Gunter v. Graniteville Co.*, 18 S. C. 263; *State v. Coella*, 3 Wash. 199; *Block v. State*, 100 Ind. 357; (b) *Stumm v. Hummel*, 39 Iowa 478; (c) *Hathaway v. Helmer*, 25 Barb. (N. Y.) 29; *Harrisburg Bank v. Foster*, 8 Watts (Pa.) 304; *Pipher v. Lodge*, 16 Serg. & Rawle (Pa.) 110; *contra*, *Brown v. Wheeler*, 18 Conn. 199; *Marsh v. Coppock*, 9 Car. & P. 480; (d) *Brazleton v. State*, 66 Ala. 96; *Anderson v. State*, 63 Ga. 675; *Bradshaw v. Hubbard*, 1 Gilm. (Va.) 390; *Ferriday v. Selser*, 4 How. (Miss.) 506; (e) *Omaha R. R. Co. v. Cook* (Neb.), 55 N. W. Rep. 943; (f) *Com. v. Joliffe*, 7 Watts (Pa.) 585.

absence of actual bias; or is the guest of an innkeeper, but pays for his accommodations and is under no special obligations to his landlord.⁴³

V. Disqualification of juror because of personal hostility, or actual bias. As has already been said, the right to unprejudiced jurors is an inseparable and inalienable part of the right of trial by jury. If a constitution guarantees the right to a jury trial, it necessarily includes the guaranty that the trial shall be had before an impartial jury. According to the expressions in some cases, the juror should stand indifferent between the parties; in others, it is said that his mind should be as white paper. By reason of the dissemination of public information through the press, whereby knowledge of the facts in the more important causes is very generally made known, it is practically impossible to obtain jurors, worthy to sit in the trial of such cases, who are without some knowledge of the facts, and so it is, in these modern days, that the rule must be confined to the exclusion from the jury box of those whose bias, or preconceived opinion, is sufficient to sway their judgment, or influence their verdict, against the evidence in the cause; or, as was said in Burr's trial, "Those strong and deep impressions which close the mind against the testimony which may be offered in opposition to them—which will combat that testimony, and resist its force." While the courts have universally declared that bias or prejudice exclude the juror, there is no authority defining the degree of bias necessary to found a challenge upon that ground; although in *People v. Reyes*, 5 Cal. 349, the Court said: "Prejudice is a state of mind which, in the eye of the law, has no degrees. If the juror is prejudiced in any manner, he is not a fit or proper person to sit in this box." But that statement has not been followed in any other case, and must even there be regarded as a *dictum*. In a general way, the proper rule has been well stated in an able note to *Commonwealth v. Brown*, 9 Am. State Rep. 746: "Whenever a juror shows upon his examination that he himself fears that his deliberations cannot be impartial, or where he expresses a state of feeling from which it appears that his mind is in an improper condition, he will generally be excluded." It is impossible, within the limits of this article, to dwell at any further length upon this subject, but the reader is referred to the remarks of the learned justices, both of Supreme Court of Illinois and of the United States, in the famous Chicago anarchists cases:

⁴³ *Thompson v. Douglass*, 35 W. Va. 337; *Regina v. Geach*, 9 Car. & P. 499; *State v. Taylor*, 5 Ind. App. 29; *Moore v. Cass*, 10 Kan. 288; *Cummings v. Gann*, 52 Pa. St. Rep. 484.

Spies *v.* People, 122 Ill. 1 (S. C. 3 Am. State Rep. 320, 466-471) and *in re* Spies *et al.*, 123 U. S. 131—for an able discussion of this question.

Above, we have referred to the grounds for challenge based upon the implied bias of the juror, by reason of his interest in the result of the action, relationship to the parties, and of his dependence upon them. It is proposed now to summarize some of the leading authorities holding specific grounds for the exclusion of the juror by reason of his actual bias and preconceived opinion. (a) Personal hostility towards one of the parties, or against some one beneficially interested in the action, even though it be general and without special reference to the matter in controversy, will render the juror incompetent; and the juror is equally disqualified if he is shown to have a bias in favor of one of the parties; but prejudice against a third party, or against one of the attorneys in the case will not, as a rule, render the juror incompetent.⁴⁴ (b) Litigation pending between the juror and one of the parties was cause for challenge at common law, and would still be ground for exclusion, if it appeared that there was the absence of that impartiality and freedom from prejudice requisite to qualify the juror for service.⁴⁵ (c) Prejudice or bias against the business in which a party is engaged, or against his nationality or creed, will disqualify the juror, unless it appear that he can lay aside his prejudice and render an impartial verdict, according to the law and the evidence.⁴⁶ It was held in *United States v. Eagan*, 30 Fed. Rep. 608, in an indictment for fraudulent registration, that the fact that a man was a member of a political party, and a strong partisan, did not affect his qualifications as a juror. (d) Prejudice against the class of cases or defenses which the juror is called to try, if it

⁴⁴ *Freeman v. People*, 4 Denio (N. Y.) 9; *Brittain v. Allen*, 2 Dev. (S. C.) 120; *Mima Queen v. Hepburn*, 7 Cranch. 290; *Chess v. Chess*, 1 Pen. & Watts (Pa.) 32; *Denver & R. R. Co. v. Driscoll*, 12 Colo. 520; *Township v. Kirston*, 72 Mich. 1; *Mason v. State*, 15 Tex. App. 534; *Monaghan v. Ag'l. Inst.*, 53 Mich. 238; *Jones v. State*, 55 Md. 350; *Pike Co. v. Griffin*, 15 Ga. 39; *Omaha v. Kane*, 15 Neb. 657; *Hutchinson v. State*, 10 Neb. 262; *Strawn v. Cogswell*, 28 Ill. 457; *Catasagua Mfg. Co. v. Hopkins*, 141 Pa. St. Rep. 30.

⁴⁵ *Coke on Litt.* 157; 1 *Chitty Crim. Law* 541; *People v. Bodine*, 1 Denio (N. Y.) 281, 305; *Davis v. Allen*, 11 Pick. (Mass.) 466.

⁴⁶ Business or occupation: *Lawlor v. Linforth*, 72 Cal. 205; *Winnesheik Ins. Co. v. Scheuller*, 60 Ill. 472; *United States v. Noelke*, 1 Fed. Rep. 426; *Meretzek v. Caldwell*, 2 Abb. Pr. N. S. 407; *Shields v. State*, 95 Ind. 299; *Albrecht v. Walker*, 73 Ill. 69; *State v. Nelson*, 58 Iowa 208; *Williams v. State*, 3 Ga. 453. Nationality: *Balbo v. People*, 80 N. Y. 484. Creed: *People v. Christy*, 2 Abb. Pr. 256; *People v. Reyes*, 5 Cal. 349.

amounts to actual bias, will exclude the juror; certainly so if he appears to distrust his own ability to impartially try the case. But it must appear that the prejudice of the juror will influence his verdict, and, in a criminal case, if the bias is only such as a law abiding citizen ought to have, it cannot exclude him.⁴⁷ (e) Prejudice against crime generally does not render the juror incompetent, in the absence of personal bias against the prisoner.⁴⁸ (f) Conscientious scruples against capital punishment, or against conviction on circumstantial evidence, disqualifies the juror, unless he shows that he can act fairly and impartially, and render a verdict irrespective of his scruples or convictions.⁴⁹ (g) That an opinion formed or expressed by a juror concerning the merits of the cause, or the guilt of the accused, will disqualify him has been well settled, but there is much conflict in the authorities as to the degree of fixity of opinion, touching the facts at issue, which will render him incompetent. In a general way, the rules governing the question may be thus stated:

1. If the opinion is based merely upon rumor or newspaper statements, and the juror testifies that he can give an impartial verdict from the evidence, he is generally admitted to the box.

2. But if the opinion has been formed through reports of the testimony, or from conversation with witnesses, it is held that the juror is disqualified.

3. The weight of authority—as well as statutes of many of the States—is now to the effect that if the juror testifies to the satisfaction of the court, that he believes his previously formed opinion will have no effect, but will yield to the evidence, and that he can render an impartial verdict according to the law and evidence, he will be allowed to serve.⁵⁰

⁴⁷ *People v. Carpenter*, 102 N. Y. 238; *Anson v. Dwight*, 18 Iowa 241; *Butler v. State*, 97 Ind. 378; *McCarthy v. Cass Ave.*, 92 Mo. 536; *Spies v. People*, 122 Ill. 1 (S. C. 123, U. S. 131); *Winneshiek Ins. Co. v. Scheuller*, *supra*; *People v. McGonegal*, 136 N. Y. 62; *Com. v. Poisson*, 157 Mass. 510.

⁴⁸ *Davis v. Hunter*, 7 Ala. 135; *State v. Burns*, 85 Mo. 47; *Kroer v. People*, 78 Ill. 294; *U. S. v. Borger*, 7 Fed. Rep. 193; *Williams v. State*, 3 Ga. 453; *Spies v. People*, *supra*.

⁴⁹ *Logan v. United States*, 144 U. S. 263; *O'Brien v. People*, 36 N. Y. 276; *People v. Fanshaw*, 137 N. Y. 68; *Fahnestock v. State*, 23 Ind. 231; *State v. Ward*, 39 Vt. 225; *Williams v. State*, 32 Miss. 389; *State v. Shields*, 33 La. Ann. 991. For a collection of the cases and a full discussion of the authorities see 3 Wharton Crim. Law, Sec. 3116-3121.

⁵⁰ See Statutes and authorities collated in 12 Am. and Eng. Enc. Law, 354, 355, and notes; 3 Wharton Criminal Law, Sec. 3064-3110; 2 Elliott's General Practice, Sec. 524 and notes.

But an opinion upon collateral, or merely incidental questions involved, does not disqualify, unless shown to be such as likely to influence the verdict;⁵¹ although an opinion that the defendant has already been sufficiently punished in a criminal prosecution will disqualify the juror on a civil action to recover damages for the same wrong.⁵²

VI. Prior service of the juror, as such, upon a former trial of the same case is cause for challenge;⁵³ or if he has served as a juror upon the trial of a co-defendant;⁵⁴ or was one of the grand jury who found the indictment against the prisoner.⁵⁵ But, in the absence of a statute, it is not a ground for challenge that the juror on a prior case had found a verdict against the prisoner for another offense, or had been a juror in a civil case involving the same general questions.⁵⁶

As has already been said, all challenges for cause are now tried by the court; the ancient practice of submitting the determination of challenges to the favor to triors having become obsolete, or been abolished by statute; and in many cases the trial court is entitled to a wide discretion, particularly in the control of the challenges, the manner of examination of the juror, and in excusing jurors.⁵⁷ Generally, the decision of the court, particularly in challenges to the favor, like the findings of the triors, is conclusive as to the facts.⁵⁸

⁵¹ *Weston v. Com.*, 111 Pa. St. Rep. 251; *Hughes v. Cairo*, 92 Ill. 339; *Patterson v. State*, 48 N. J. L. 381; *Lowenberg v. People*, 27 N. Y. 336; *Elbin v. Wilson*, 33 Md. 135; *Dew v. McDevitt*, 31 Ohio St., 139.

⁵² *Asbury Life Ins. Co. v. Warren*, 66 Me. 523.

⁵³ *Dunn v. State*, 7 Tex. App. 600; *Jacobs v. State*, 9 Ib. 278; *State v. Sheeley*, 15 Iowa; *Argent v. Darrell*, 2 Salk. K. B. 648.

⁵⁴ *Morton v. State*, 1 Kan. 468; *Arnold v. State*, 9 Tex. App. 435; 1 Inst. 157.

⁵⁵ *Greenwood v. State*, 34 Tex. 334; *Rex v. Cook*, 13 St. Tr. 334; *Rice v. State*, 16 Ind. 298; *State v. McDonald*, 9 W. Va. 456; *Bearson v. State*, 34 Miss. 602; *State v. Gillick*, 7 Iowa 287; *Stewart v. State*, 15 Ohio St. 155.

⁵⁶ *U. S. v. Schackelford*, 3 Cranch. C. C. 178; *Com. v. Hill*, 4 Allen (Mass.) 591; *Plow Co. v. Deutsch*, 16 Neb. 384; *Patterson v. State*, 48 N. J. L. 381.

⁵⁷ *State v. Linde*, 54 Iowa 139; *Rowell v. Boston & Maine R. R. Co.*, 58 N. H. 514; *Thompson on Trials*, Sec. 88; 3 *Wharton Crim. Law*, Secs. 3140-3151; 12 *Am. and Eng. Enc. Law* 359-361.

⁵⁸ *Stout v. People*, 4 Park Cr. (N. Y.) 132; *People v. Bodine*, 1 Denio (N. Y.) 281, 309; *U. S. v. McHenry*, 6 Blatchf. 503; *Patterson v. State*, 48 N. J. L. 381; *State v. Ihrig*, 106 Mo. 267; *State v. Green*, 95 N. Car. 611; *Pickens v. Hobb*, 42 Ind. 270; *Lockhart v. State*, 92 Ind. 452.

To determine the competency of the juror he is examined upon his *voir dire*. Much latitude is permitted in this examination, leading questions being permitted, within the discretion of the court, and, in some cases, hypothetical questions have been permitted to ascertain how the juror would decide under a supposed state of the evidence. But the later decisions deny this right, particularly the recent case of *Chicago & R. R. Co. v. Fisher*, 141 Ill. 614. The questions asked the juror, however, should be pertinent, fair and honest, and not such as tend to disgrace or degrade him.⁵⁹ While the usual mode of determining the competency of the juror is by his examination, yet other evidence may be given to prove the ground of challenge.⁶⁰

In *Regina v. Frost*, 9 Cart. P. 92, Lord Tindal said: "The rule is that challenges must be made as the jurors come to the book, and before they are sworn. The moment the oath is begun it is too late, and the oath is begun by the juror taking the book, having been directed by the officer to do so." Now, however, it is universally held that the challenges can be made at any time before the jury is sworn, and, in some courts, after the oath has been administered, but before anything else is done; and in some cases both the peremptory challenge and those for cause have been subsequently permitted, but that request is addressed only to the discretion of the Court.

Where, after the exercise of due diligence, an incompetent juror has been admitted, the party has a right to complain, as soon as he discovers the disqualification, which may be before or after verdict: in the former case a juror should be withdrawn and the case continued; in the latter, it is ground for a new trial; both somewhat within the discretion of the court.⁶¹

Objections to jurors have been held to be waived in the following cases: (a) When the juror is accepted without examination as to his qualifications it is a waiver of all objections that might have been thereby discovered, unless the disqualification were unknown to the party and his counsel at the time of trial; this exception, however, is not universally recognized.⁶² (b) Knowl-

⁵⁹ *Burt v. Panjand*, 99 U. S. 180.

⁶⁰ *Burt v. Panjand*, *supra*; *People v. Mather*, 4 Wend. (N. Y.) 229.

⁶¹ *Toast's Case*, 11 Leigh (Va.) 714; *State v. Davis*, 80 N. Car. 412; *Henry v. State*, 77 Ala. 75; *Rhodes v. State*, 128 Ind. 189; *Sellen v. People*, 4 Ill. 412; 1 *Thompson on Trials*, Sec. 116.

⁶² *Yanez v. State*, 6 Tex. App. 429; *Faville v. Shehan*, 68 Iowa 241; *Daniels v. City Lowell*, 139 Mass. 56; *Rollins v. Ames*, 2 N. H. 349 (S. C. 7 Am., Dec. 79, and note) where the cases are collected on both sides of the question.

edge, at the time of trial, of the incompetency of an accepted juror is a waiver of objections, and knowledge of counsel binds his client.⁶³ (c) Challenges to the polls generally is a waiver of challenge to the array; but an overruled challenge to the array, with an exception taken thereon, is not waived by afterwards challenging individual jurors.⁶⁴ (d) In an overruled challenge for cause an exception thereon is waived if the juror is afterwards challenged peremptorily, unless thereby the peremptory challenges are exhausted.⁶⁵ (e) An exception to an erroneous overruling of an objection or challenge is unavailing if the party does not exhaust his peremptory challenges.⁶⁶ (f) When a party waives a cause of challenge, existing only as against himself, the other party cannot challenge upon the same ground.⁶⁷

In order to make the proper record for appeal, the grounds of the challenge should be specifically stated; the request, refusal and exception should appear, and, generally, the examination of the juror in full. When the action of the court is placed on record, and there is a regular issue and joinder, and judgment on this issue, then error lies to this at common law.⁶⁸

C. La Rue Munson.

WILLIAMSPORT, PA., April 26th, 1895.

⁶³ *State v. Tuller*, 34 Conn. 280; *Russell v. Quinn*, 114 Mass. 103; *Carmon v. Bullock*, 26 Ga. 431; *State v. Bowden*, 71 Me. 89; *Scott v. Moore*, 41 Vt. 205.

⁶⁴ *Clinton v. Englebrecht*, 13 Wall. 434; *Watkins v. Weaver*, 10 Johns. (N. Y.) 107; *Mueller v. Rebham*, 94 Ill. 142; *Co. Litt.* 158 a.

⁶⁵ *Burt v. Panjand*, 99 U. S. 180; *Schoeffler v. State*, 3 Wis. 823; *People v. Aplin*, 86 Mich. 393; *State v. Brady*, 107 N. Car. 822; *Wilson v. People*, 94 Ill. 299; *State v. Hoyt*, 47 Conn. 518; *Mimms v. State*, 16 Ohio 221; *Robinson v. Randall*, 82 Ill. 521; *contra*, *Brown v. State*, 70 Ind. 576; *People v. Bodine*, 1 Denio (N. Y.) 281.

⁶⁶ *Robinson v. Randell*, *supra*; *Sulings v. Shakespeare*, 46 Mich. 408; *State v. Elliott*, 45 Iowa 486; *St. Louis R. R. Co. v. Lux*, 63 Ill. 523; *State v. Jones*, 97 N. Car. 469; *White v. State*, 30 Tex. app. 652.

⁶⁷ *State v. Ketchey*, 70 N. Car. 621; *Murphy v. State*, 37 Ala. 142.

⁶⁸ 3 Wh. Crim. Law, Sec. 3152; *R. v. Edmonds*, 4 B. & Ald. 471.