

EXEMPTIONS FROM JURY SERVICE AND CHALLENGES FOR CAUSE IN MISSOURI*

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3. *Qualifications in Criminal Cases*

The qualifications of jurors in criminal cases are regulated primarily by statutes. Many of them, while significant in their substance, are plain in their meaning and so obvious in their nature as to give rise to only a minimum of judicial construction. These statutes, therefore, may be dealt with in a summary fashion.

a. Grand Jurors

A law of 1835 provided that "No person who was a member of the grand jury or inquest by which any indictment or presentment was found in any cause shall serve as a petit juror on the trial of such cause."¹²⁵ This statute continues in effect.¹²⁶

b. Witnesses

Prior to 1835, the law pertaining to witnesses in criminal cases was the same as the law in civil cases, already referred to.¹²⁷ The law of 1835 which is also the present law follows: "No witness in any criminal case shall be sworn as a juror therein if challenged for that cause before he is sworn; and if any juror shall know anything relative to the matter in issue, he shall disclose the same in open court."¹²⁸ In construing the statute, it has been held that a person who is subpoenaed upon an application for a change in venue is a competent juror, not a witness within the terms of the statute.¹²⁹

* Continued from the April number, 15 ST. LOUIS L. REV. 266.

¹²⁵ R. S. Mo. (1835) p. 490, sec. 6.

¹²⁶ R. S. Mo. (1845) p. 879, sec. 7; R. S. Mo. (1855) p. 1190, sec. 9; G. S. Mo. (1865) p. 849, sec. 9; R. S. Mo. (1879) sec. 1893; R. S. Mo. (1889) sec. 4193; R. S. Mo. (1899) sec. 2612; R. S. Mo. (1909) sec. 5216; R. S. Mo. (1919) sec. 4010.

¹²⁷ See p. 255, *supra*.

¹²⁸ R. S. Mo. (1835) p. 490, sec. 10; R. S. Mo. (1845) p. 879, sec. 11; R. S. Mo. (1855) p. 1191, sec. 13; G. S. Mo. (1865) p. 849, sec. 12; R. S. Mo. (1879) sec. 1896; R. S. Mo. (1889) sec. 4196; R. S. Mo. (1899) sec. 2615; R. S. Mo. (1909) sec. 5219; R. S. Mo. (1919) sec. 4013.

¹²⁹ *State v. Wisdom* (1884) 84 Mo. 177; *State v. Marshall* (Mo. A. 1917) 198 S. W. 451.

c. Disqualification of Prosecuting Witnesses, Prosecutors,
Defendants and Their Relatives

Another law which was first enacted in 1835 and which continues in effect today substantially as of the date of its original passage, provided, "When any indictment alleges an offense against the person or property of another, neither the injured party nor any person of kin to him shall be a competent juror on the trial of such indictment, nor shall any person of kin to the prosecutor or defendant in any case serve as a juror on the trial thereof."¹³⁰

In a case decided in 1881, the Supreme Court held that where a juror testified on his examination that "his father was a second cousin of the defendant's mother," he was incompetent under the statute.¹³¹ A finer construction of the law is set forth in a case of 1922 in which the court held that "The clear purpose of the statute is to secure fair and unprejudiced jurors, and it is in reality knowledge of any relationship that makes the juror biased and prejudiced. Where the juror on his *voir dire* examination swore that he was not related to deceased, and after a verdict of guilty it developed that he had never heard before that he was kin to deceased, the juror was not by reason of that relationship, assuming that it was proved, incompetent under the statute."¹³² Only favorable criticism can be offered of the reasonable position assumed by the court in this case.

In the very recent case of *State v. Lewis*, in which the defendant was accused of receiving a check for deposit as president of a bank which was then in a failing condition, the counsel for the defendant undertook to secure the discharge of jurors who were alleged to be related to bank depositors.¹³³ Authority for the challenges was the case of *Price v. Protection Co.*¹³⁴ Concerning it, Judge Walker of the Supreme Court said, "There is one

¹³⁰ R. S. Mo. (1835) p. 490, sec. 8; R. S. Mo. (1845) p. 879, sec. 9; R. S. Mo. (1855) p. 1190, sec. 11; G. S. Mo. (1865) p. 849, sec. 10; R. S. Mo. (1879) sec. 1894; R. S. Mo. (1889) sec. 4194; R. S. Mo. (1899) sec. 2613; R. S. Mo. (1909) sec. 5217; R. S. Mo. (1919) sec. 4011.

¹³¹ *State v. Walton* (1881) 74 Mo. 271, 285.

¹³² *State v. Stewart* (1922) 296 Mo. 12, 246 S. W. 939.

¹³³ The contention was that the jurors were incompetent under R. S. Mo. (1919) sec. 4011, and R. S. Mo. (1919) sec. 6632, the latter statute being applicable, if at all, under R. S. Mo. (1919) sec. 4023. See p. 244, *supra*.

¹³⁴ See p. 257, *supra*.

case in this State . . . which is a suit against an insurance company to recover losses in which jurors were held disqualified who were related within the fourth degree of consanguinity or affinity to persons insured in the corporation, the laws of which made those insured, members of the corporation, and subjected them to the payment of assessments to cover losses. The distinctive difference between the facts in that case and the one at bar becomes apparent upon a statement of the same. In the former the disqualifying relationship of the jurors was with persons who were an essential part of the corporation itself. By them the corporation was created, and through their continued activities its existence was perpetuated; in the latter the depositors, being mere creditors, were in no sense such a part of the corporation as would tend to influence the minds of the jurors in rendering their verdict."^{134a}

In the *Price* case the jurors were declared incompetent only because of a liberal construction of the statute and a piercing of the corporate entity. While the court in the *Lewis* case pointed out several reasons for declaring the jurors qualified under the particular facts involved, the distinction drawn between corporate shareholders and bank depositors in determining the competency of jurors does not seem tenable. The opinions of the jurors might have been the same in either case. In the *Price* case the court was held to have acted under statutory authorization; in the *Lewis* case the judge might have discharged the jurors in his discretion even though no statute declared bank depositors incompetent, under the circumstances.¹³⁵

d. Opposition to Death Penalty and Related Matters

Another act of the legislature of 1835 provided: "Persons whose opinions are such as to preclude them from finding any defendant guilty of an offense punishable with death, shall not be allowed or compelled to serve as jurors on the trial of an indictment for any offense punishable with death."¹³⁶ The law continued in effect until 1925,¹³⁷ when it was modified to provide

^{134a} State v. Lewis (Mo. 1929) 20 S. W. (2d) 529, 534.

¹³⁵ See p. 257, *supra*.

¹³⁶ R. S. Mo. (1835) p. 490, sec. 9.

¹³⁷ R. S. Mo. (1845) p. 879, sec. 10; R. S. Mo. (1855) p. 1190, sec. 12; G. S. Mo. (1865) p. 849, sec. 11; R. S. Mo. (1879) sec. 1895; R. S. Mo.

that the representative of the state could waive such disqualification.¹³⁸

The Supreme Court has cited the statute in a number of cases to the effect that whenever the maximum penalty for the crime of which the defendant is charged is death, the juror is properly challenged or excused by the court under the statute.¹³⁹ Before the amendment of 1925, one decision held that it was proper for the state to challenge some jurors who had conscientious scruples and not others, such a procedure being calculated only to benefit the accused.¹⁴⁰ Yet the decision seems to be squarely in opposition to the strict wording of the statute. However, when a similar case arose in 1928, the court said, "A juror . . . stated that he had conscientious scruples against the infliction of the death penalty. This disqualification was waived by counsel for the state, and the juror accepted. Authority for this waiver is found" under the statute as amended.¹⁴¹ In view of the decision of 1921 it seems that the Supreme Court had arrived at the same position at that date which the legislature reached by the enactment of 1925. To avoid any possibility of a reversal by the courts, the legislature acted wisely in amending the statute.

A question closely allied to the subject matter of the statute is the right of challenge where the juror states that he has conscientious scruples which would prevent him from inflicting the death penalty on circumstantial evidence alone. In one case this question was brought within the purview of the statute. Judge Burgess of the Supreme Court said, "By the statute persons whose opinions are such as to preclude them from finding any defendant guilty of an offense punishable with death, are incompetent to sit as jurors in any such case, and it matters not whether the evidence of guilt be positive or circumstantial. This

(1889) sec. 4195; R. S. Mo. (1899) sec. 2164; R. S. Mo. (1909) sec. 5218; R. S. Mo. (1919) sec. 4012.

¹³⁸ Mo. Laws 1925, p. 196, sec. 4012.

¹³⁹ *State v. David* (1895) 131 Mo. 380, 33 S. W. 28; *State v. Gilbert* (Mo. 1916) 186 S. W. 1003; *State v. Wooley* (1908) 215 Mo. 620, 115 S. W. 417; *State v. Tevis* (1910) 234 Mo. 276, 136 S. W. 339; *State v. Sherman* (1914) 264 Mo. 274, 175 S. W. 73; *State v. Murphy* (1921) 292 Mo. 275, 237 S. W. 529; *State v. Cooper* (Mo. 1924) 259 S. W. 434; *State v. Hayes* (Mo. 1924) 262 S. W. 1034.

¹⁴⁰ *State v. Gore* (1921) 292 Mo. 173, 237 S. W. 993.

¹⁴¹ *State v. Hicks* (Mo. 1928) 3 S. W. (2d) 230, 233.

juror clearly came within the inhibition of the statute, and was properly excused by the Court."¹⁴²

The above opinion, rendered in 1895, stands alone in its citation of the statute as authority, for prior and subsequent decisions arrive at the same result without mention of the statute. In the leading case of *State v. West*, a juror was excused by the court because he said he had scruples against convicting the accused of murder on circumstantial evidence alone.¹⁴³ Strangely enough the court held the juror properly excused on the authority of *Chouteau v. Pierre*, a civil case which in no way related to a conviction of murder on circumstantial evidence.¹⁴⁴ But the court in the *West* case went further by stating that the decision was based on a rule of fairness; even though no statute disqualified a juror because of malice to the defendant, no court in this state would permit such a person to serve; by a parallel line of reasoning, the court was justified in discharging the juror in this case, in order to preserve impartiality in jury trial. The general rule is that jurors who admit their inability to impose the death penalty on circumstantial evidence alone, are properly excluded.¹⁴⁵

A kindred subject is found in those cases pertaining to prejudice or expression of opinion against crime. It was held that a member of a society liable to assessment for funds to prosecute violations of liquor laws is not a competent juror to try a defendant charged with the illegal sale of liquor even though the juror is of the opinion that he can try the case fairly.¹⁴⁶ On the other hand, it was not a ground for challenge of a juror that he was a member of a commercial club which had passed a resolution in favor of law enforcement and urging officials to do their duty in the prosecution of violations of the local option law, the juror being otherwise qualified.¹⁴⁷ The cases are distinguishable. The general rule is that the expression, or the existence of bias, or prejudice against crime constitutes no cause for challenge.¹⁴⁸

¹⁴² *State v. Punshon* (1895) 133 Mo. 44, 34 S. W. 25.

¹⁴³ *State v. West* (1879) 69 Mo. 401. ¹⁴⁴ See p. 263, *supra*.

¹⁴⁵ *State v. Leabo* (1886) 89 Mo. 247, 1 S. W. 288; *State v. Young* (1893) 119 Mo. 495, 24 S. W. 1038; *State v. David* (1895) 131 Mo. 380, 33 S. W. 28; *State v. Bauerle* (1898) 145 Mo. 1, 46 S. W. 609; *State v. Miller* (1900) 156 Mo. 76, 56 S. W. 907. ¹⁴⁶ *State v. Fullerton* (1901) 90 Mo. A. 411.

¹⁴⁷ *State v. Stephens* (1916) 195 Mo. A. 34, 189 S. W. 630.

¹⁴⁸ *State v. Burns* (1884) 85 Mo. 47; *State v. Mace* (1914) 262 Mo. 143,

e. Opinions

By far the largest number of decisions relating to the qualification of jurors in criminal cases has arisen under R. S. Mo. (1919) sec. 4014. That section had its beginning in an act of 1816, providing that jurors who had formed or expressed opinions were disqualified. The provision was repeated in an act of 1825, both laws being referred to above, for they relate to civil as well as criminal cases.¹⁴⁹

In 1826, the law was radically modified. "In all criminal cases, when the impartiality of a juror is to be tried by the court, it shall not be a disqualification to a juror that he has formed or delivered an opinion, unless such formation or delivery of opinion will, in the judgment of the court, bias the juror in making up his verdict."¹⁵⁰ Whereas the former law declared incompetent, jurors who merely possessed opinions of the case, this law made such jurors competent unless the opinions would bias the jurors in rendering their verdicts.

The law was amended and revised in 1835. "It shall be a good cause of challenge to a juror that he has formed or delivered an opinion on an issue, or any material fact to be tried, but if it appears that such opinion is founded only on rumor and not such as to prejudice or bias the mind of the juror, he may be sworn."¹⁵¹ The law has remained practically unchanged, except for an important amendment in 1879 by which the words "and newspaper reports" were inserted in the statute after the word "rumor."¹⁵² This is by far the most important statute pertaining to the qualifications of jurors in criminal cases.

Before considering the many cases which have arisen under the statute, several preliminary facts should be mentioned. The practice in civil cases in respect to the impaneling of jurors is applicable in criminal trials except in cases otherwise pro-

170 S. W. 1105; *State v. Daniels and Hamilton* (Mo. 1923) 274 S. W. 26; *State v. Lowry* (Mo. 1929) 12 S. W. (2d) 469.

¹⁴⁹ See p. 255, *supra*.

¹⁵⁰ 2 Ter. Laws 96, sec. 4.

¹⁵¹ R. S. Mo. (1835) p. 490, sec. 11.

¹⁵² R. S. Mo. (1845) p. 880, sec. 12; R. S. Mo. (1855) p. 1191, sec. 14; G. S. Mo. (1865) p. 849, sec. 13; R. S. Mo. (1879) sec. 1897; R. S. Mo. (1889) sec. 4197; R. S. Mo. (1899) sec. 2616; R. S. Mo. (1909) sec. 5220; R. S. Mo. (1919) sec. 4014.

vided.¹⁵³ The statute regulating the qualifications of jurors in civil cases¹⁵⁴ and the criminal statute which has been outlined, have not been inclusive of all the grounds for challenge for cause which counsel have undertaken to submit from time to time.¹⁵⁵ Referring to the civil statute,¹⁵⁶ the Supreme Court has held at least on three occasions that the reasons for challenging the juror invoked by counsel, had no legal existence.¹⁵⁷

Returning to a consideration of the statute¹⁵⁸ and the cases decided under the statute, it will be found that numerous decisions running through from the early history of the state down to the present date have turned on the construction of this statute. The rulings of the court are many and varied.

In the case of *Lisle v. State*, decided in 1840, Judge Napton took occasion to discuss the statute, for the first time, by way of dictum. "It is suggested in argument, that the section . . . is an evasion of the constitutional requisition which declares that every offender shall have a fair and impartial jury. It is supposed that a juror who has formed an opinion, no matter from what source of information, is not such an *impartial* juror as the constitution contemplates. It may be said however in relation to this, that it might be a nice point in metaphysics to determine how far the mind was compelled to assent or to dissent from the truth of a supposed state of facts, when presented to its contemplation, and that for the ordinary purposes of life, we are well assured, that an opinion or rather inclination of the judgment, founded on a supposed state of facts, when it is unaccompanied with any prejudice or ill will to the parties concerned, will very readily be removed and changed, by the presentation of a different state of facts, and the person whose judgment is invoked is as capable of doing justice as though he had never heard any incorrect or imperfect statement in relation to the matter."¹⁵⁹

¹⁵³ See p. 244, *supra*.

¹⁵⁴ See pp. 255-256, *supra*.

¹⁵⁵ See *State v. Lewis* (Mo. 1929) 20 S. W. (2d) 529.

¹⁵⁶ R. S. Mo. (1919) sec. 6632.

¹⁵⁷ *State v. Meininger* (Mo. 1926) 290 S. W. 1007; *State v. Griffith* (1925) 311 Mo. 630, 279 S. W. 136; *State v. Koch* (Mo. 1929) 16 S. W. (2d) 205.

¹⁵⁸ R. S. Mo. (1919) sec. 4014.

¹⁵⁹ *Lisle v. State* (1840) 6 Mo. 426, 430.

A construction of the statute was necessary to the opinion handed down by Judge McBride of the Supreme Court in the case of *Baldwin v. State*, decided in 1848. That part of the opinion relating to the statute is quoted *in extenso* because of its unusual historical importance, and because subsequent cases have referred to the *Baldwin* case as the first and leading decision in the construction of the statute:

The juror, having been sworn to answer questions, stated that he saw statements in regard to the transactions in the New Orleans public papers; that from these he formed an opinion, and believes that if the statements were true, he has an opinion as to the defendant's guilt or innocence; but he had then no prejudice or bias, nor has he now any against the defendant. That opinion is now unchanged if the facts are as stated; he should be governed solely by the evidence; he has not conversed with any of the witnesses; his opinion depends solely upon what he saw in the New Orleans papers; he has conversed on the subject with persons since his return to St. Louis, but does not know whether or not they are witnesses.

Before the enactment of the provision hereafter referred to, great difficulty existed in obtaining a jury to try a criminal cause, which by reason of the circumstances attending the commission of the act charged, gave it notoriety. Inquisitiveness is a component part of every rational thinking mind; when, therefore, an offense of a high grade, or one of unusual occurrence, or one attended with aggravating circumstances, takes place, it is but natural that it should become a subject of conversation and inquiry with the community in which it occurred. This produces impressions rather than opinions of the guilt or innocence of the party accused, and hence the difficulty, in some cases, of obtaining a jury, from the vicinage, free from impressions, amounted almost to an indemnity for crime. Having witnessed this state of things, and doubtless being desirous to obviate the difficulty as far as practicable, the general assembly of this state passed the following act:
(Then follows the statute.)¹⁶⁰

The information upon which the juror predicated his opinion, was derived from newspaper statements, which, of all other sources of intelligence, are the most uncertain and unreliable; gleaned, as such matters are, from the streets and alleys, beer houses and oyster cellars of a large

¹⁶⁰ See p. 366, *supra*.

commercial city, and without any special pains being taken to ascertain the particulars of the affair. The juror further stated that he had no prejudice or bias on his mind. If, therefore, the question of the competency is referable to the juror himself, then he was competent; but it was not his province to pass upon that question; he could only state facts, and it was the duty of the court to decide whether, according to the facts, he was competent. In deciding this question, the presiding judge at the trial, having the juror before him, witnessing the manner of his examination, possessing a knowledge of his character, is infinitely better qualified than we are to decide whether under all the circumstances, his mind and feelings are in a condition which will enable him to discharge honestly and impartially his duty as a juror. Where the juror qualifies himself under the statute, and the presiding judge accepts him, this court cannot say that an error has been committed.¹⁶¹

Subsequent opinions have treated the *Baldwin* case as fundamentally sound. The last paragraph of that part of the decision which has been quoted is peculiarly significant, for although the court refers to newspaper statements as the source of the juror's opinion, the statute did not affirmatively qualify a juror whose opinion was founded on newspaper reports, until the amendment of 1879.¹⁶² As will appear hereafter, these facts have been critically reviewed in the construction of the statute.

Following closely the decision in the *Baldwin* case, the Supreme Court sustained the trial judge who discharged a juror when challenged by the state. The juror had admitted an opinion formed as a result of reading a newspaper. He was asked whether, notwithstanding the opinion, he could give the accused a fair trial. He answered, "That is very doubtful." While the Supreme Court upheld the judge in discharging this juror, it also ruled that there was no error in refusing to sustain the challenge of the defendant to two other jurors who stated that, although they had formed opinions from reports, which it would require evidence to remove, they could try the case fairly and impartially on the law and the evidence.¹⁶³

¹⁶¹ *Baldwin v. State* (1848) 12 Mo. 223, 225.

¹⁶² See p. 366, *supra*.

¹⁶³ *State v. Brooks* (1887) 92 Mo. 542, 575, 5 S. W. 257. Likewise where a juror has an opinion favorable to the defendant, resulting from newspaper reports and hearsay, the juror properly is discharged. *State v. Punshon* (1895) 133 Mo. 44, 34 S. W. 25.

The Supreme Court has held that a juror who had an opinion as to the guilt or innocence of the defendant formed wholly on public talk was not incompetent when he stated that he could give an impartial verdict and would not permit the opinion he had formed on rumor to bias him.¹⁶⁴

Where the defendant and one, Butler, had been accused of committing a robbery jointly, several of the jurors summoned on the panel in the trial of the defendant, had also qualified but were not selected to hear the *Butler* case which was tried the day before. The jurors knew the two men were charged jointly; they had heard questions asked by counsel in qualifying a panel in the previous trial; they had heard the results of the Butler trial. However, the jurors stated that they had no opinion in the present case and that they could try the case on the evidence and under the instructions of the court without regard to anything they had learned concerning the Butler trial. The Supreme Court held, "A juror, qualified as one of the panel before the challenges are made and who is then excused before the trial is begun, is not disqualified from being used again, simply because of such prior use as tentative juror, if he is otherwise qualified. The mere fact of having been summoned and examined as to his qualifications and then excused from the trial panel does not disqualify a juror from subsequent service in a case based upon the same or similar facts. The trial judge was careful to inquire if the challenged juror had formed any opinion as to the merits of the case."¹⁶⁵ It follows from the Supreme Court holding that under the statute there was no reason for excusing the jurors.

The rule uniformly followed and set forth in a very large number of cases is that if a juror has an opinion formed of rumor, public talk, and newspaper reports, he is not therefore disqualified, even though it will require evidence to change the opinion of the juror, provided it is clear that he can hear the

¹⁶⁴ *State v. Van Wye* (1896) 136 Mo. 227, 243, 37 S. W. 938; *State v. Ashbrook* (Mo. 1928) 11 S. W. (2d) 1037. Accord, where the juror had discussed the arrest of the defendant with the prosecuting witness. *State v. Dudley* (1912) 245 Mo. 177, 149 S. W. 449.

¹⁶⁵ *State v. Ingram* (1926) 316 Mo. 268, 271, 289 S. W. 637.

case with an open mind and render a verdict exclusively on the evidence under the instructions of the trial court.¹⁶⁶

f. Evidence at Former Trials, Preliminary Hearings,
Confessions

In cases in which the juror has read or heard evidence at a former trial or a preliminary hearing, the courts have wavered in determining the competency of the juror.

In the leading case of *State v. Walton*, decided in 1881, Judge Norton of the Supreme Court said, "Where the venireman has formed an opinion, either from his own knowledge or from conversing with witnesses to the transaction, or from having heard their testimony on the trial of the cause, he is subject to be challenged for cause."¹⁶⁷

And in the case of *State v. Culler*, in which the opinion was delivered by Judge Sherwood in 1884, the court held that one who has read the evidence taken before the coroner, either as

¹⁶⁶ *State v. Davis* (1860) 29 Mo. 391; *State v. Rose* (1862) 32 Mo. 346; *State v. Core* (1879) 70 Mo. 491; *State v. Barton* (1879) 71 Mo. 288; *State v. Brown* (1880) 71 Mo. 454; *State v. Greenwade* (1880) 72 Mo. 298; *State v. Burgess* (1883) 78 Mo. 234; *State v. Stein* (1883) 79 Mo. 330; *State v. Hopkirk* (1884) 84 Mo. 278; *State v. Wilson* (1884) 85 Mo. 134; *State v. Reed* (1886) 89 Mo. 168; 1 S. W. 225; *State v. Cunningham* (1889) 100 Mo. 382, 12 S. W. 376; *State v. Elkins* (1890) 101 Mo. 344, 14 S. W. 116; *State v. Williamson* (1891) 106 Mo. 162, 17 S. W. 172; *State v. Duffy* (1894) 124 Mo. 1, 27 S. W. 358; *State v. Schmidt* (1896) 136 Mo. 644, 38 S. W. 719; *State v. Dyer* (1897) 139 Mo. 199, 40 S. W. 768; *State v. Hunt* (1897) 141 Mo. 626, 43 S. W. 389; *State v. Bronstine* (1898) 147 Mo. 520, 49 S. W. 512; *State v. Brennan* (1901) 164 Mo. 487, 65 S. W. 325; *State v. Gartrell* (1902) 171 Mo. 489, 71 S. W. 1045; *State v. Collins* (1903) 181 Mo. 235, 79 S. W. 671; *State v. Snyder* (1904) 182 Mo. 462, 82 S. W. 12; *State v. Forsha* (1905) 190 Mo. 296, 88 S. W. 746; *State v. Sykes* (1905) 191 Mo. 62, 89 S. W. 851; *State v. McCarver* (1905) 194 Mo. 717, 92 S. W. 684; *State v. Miles* (1906) 199 Mo. 530, 98 S. W. 25; *State v. Vickers* (1907) 209 Mo. 12, 106 S. W. 999; *State v. Rasco* (1911) 239 Mo. 535, 144 S. W. 449; *State v. Schmulbach* (1912) 243 Mo. 533, 147 S. W. 966; *State v. Walton* (1913) 255 Mo. 232, 164 S. W., 211; *State v. Herring and Baldwin* (1916) 268 Mo. 514, 188 S. W. 169; *State v. Garrett* (1920) 285 Mo. 279, 226 S. W. 4; *State v. Poor* (1921) 286 Mo. 644, 228 S. W. 810; *State v. Smith* (Mo. 1921) 228 S. W. 1057; *State v. Sherman* (1914) 264 Mo. 274, 175 S. W. 73; *State v. Samis* (1922) 296 Mo. 471, 246 S. W. 956; *State v. Connor* (Mo. 1923) 253 S. W. 713; *State v. Baker* (Mo. 1926) 285 S. W. 416; *State v. Woodard* (1925) 309 Mo. 19, 273 S. W. 1047; *State v. Hicks* (Mo. 1928) 3 S. W. (2d) 230; *State v. Davis* (Mo. 1928) 7 S. W. (2d) 264; *State v. Yeager* (Mo. 1928) 12 S. W. (2d) 30.

¹⁶⁷ *State v. Walton* (1881) 74 Mo. 271, 284.

originally written or as printed in a newspaper, and formed an opinion therefrom, in either case, is, as a matter of law, disqualified from serving as a juror.¹⁶⁸ Against this decision Judge Norton protested vigorously.

The decision in the *Culler* case was overruled in the case of *State v. Bryant* handed down by the Supreme Court in 1887, the majority opinion being by Judge Norton. The question arose as to the qualification of a juror who had formed an opinion based upon the report of the testimony of the former trial as published in certain newspapers, and substantially as contained in the court records. Judge Norton said:

The fact cannot be ignored that in the march of civilization there are one or more newspapers in every town and county of the state, and that as a rule, they are read with avidity by all the citizens who can read, and when a homicide or other crime is committed the enterprising journalist publishes the fact with all the attending circumstances. Such accounts are usually sought after and read with eagerness, and it is just as impossible for the reader not to be impressed by it, and not have some opinion concerning it as it is to throw black ink on a white wall without coloring it. One of these results is produced by a law of the mind and the other by a law of matter. The legislature, giving recognition to this law of the mind, expressly provided that opinions formed from newspaper reports and rumors should not disqualify a person from being a juror, unless it should further appear that such opinion would bias his judgment and prevent him from trying the case impartially, and according to the evidence adduced on the trial. If all such persons and readers of newspapers are to be excluded as incompetent jurors, the result would be that the citizen charged with a crime would, of necessity, either be compelled to have his cause submitted and tried by a jury of the most ignorant class in the community, if the state should exercise its right of peremptory challenge, or to a jury composed of that class of persons who seek to be professional jurors. Believing the rule so uniformly followed in this state to be in accord with sound principle and the weight of authority, and productive of the best results, both for the accused and the state, no reason is perceived for departing from, and we adhere to it in all its integrity.¹⁶⁹

¹⁶⁸ *State v. Culler* (1884) 82 Mo. 623.

¹⁶⁹ *State v. Bryant* (1887) 93 Mo. 273, 306, 6 S. W. 102.

The well written dissenting opinion of Judge Sherwood refers first to the case of *Baldwin v. State*, which has already been considered.¹⁷⁰ The Judge said:

It is manifest from this ruling that "rumor" and "newspaper reports" were regarded as legal equivalents, so far as affecting the competency of a juror is concerned. And when the legislature, by the revision of 1879,¹⁷¹ added the words, "newspaper reports," to the existing statute, thus coupling that phrase with the word "rumor," it will be intended that they did so as manifesting the design of accepting that phrase with the judicial meaning thereto attached; and by coupling the words mentioned together, in the same sentence, they meant in this instance to give legislative sanction and application to two familiar maxims, "*noscitur a sociis*," and "*copulatio verborum indicat acceptionem in eodem sensu*." If this view is to prevail, the publications in question cannot be treated as "newspaper reports," but must needs occupy a higher plane of authenticity, since the newspaper publications referred to were a substantial report of the testimony, as given at the first trial, and as embodied in the present record. Having eliminated from this discussion all question as to the nature of the publications on which the opinion of the jurors were founded, and having determined that they were not "newspaper reports" in either the judicial or legislative sense of the term, it is in order now to inquire if those who were declared by the court competent as jurors, were indeed competent. In entering on this inquiry, it must be confessed that there is often a real, but more frequently an apparent conflict of authority to be met with in the adjudged cases. Often some statutory regulation causes the apparent conflict, and in most states, such regulations are now adopted. Anterior, however, to the adoption of such regulations, it was well settled that the forming and expression of an opinion as to the guilt of an accused, disqualified a juror. . . . I do not think that our statute should receive any forced or strained, but only a reasonable construction. I do not think that mere evanescent opinions, or more properly, impressions, "not such as to bias or prejudice the minds of the jurors," opinions, or more properly, impressions, having no better bases than rumor, or its cogener, newspaper reports, as already defined, should disqualify him. But I do think that our own statute is to be

¹⁷⁰ See pp. 368-9, *supra*.

¹⁷¹ See p. 366, *supra*.

our guide, its limitations our limitations, in passing on questions of this sort. . . . The opinion of those called as jurors, not having been formed on "rumor and newspaper reports," they did not fall within the terms of the proviso and were not competent.¹⁷²

But in two subsequent decisions handed down by the Supreme Court in 1891 and 1893, the holding in the *Bryant* case was overruled, the court virtually adopting for its opinions, the line of reasoning used by Judge Sherwood¹⁷³ in his dissent in that case.¹⁷⁴

In the case of *State v. Taylor*, decided in 1896, with Judge Sherwood speaking for the majority, the court took the following position. "It has been held that the hearing and reading of fragmentary portions of the evidence of the former trial, and the forming an opinion thereon, will not of themselves disqualify a juror; and that in order to his disqualifications, he must have heard or read *all* the evidence at the former trial."¹⁷⁵ This statement of law has found support in several cases.¹⁷⁶

The general rule is stated by Judge Gantt in the case of *State v. Foley*, decided in 1898. "If a person has formed or expressed an opinion upon his own knowledge of the facts in the case, or from conversing with the witnesses in the case, or read the sworn evidence taken before the coroner on preliminary examination, or if his opinion has been engendered by hearing the witnesses testify under oath in a former trial of the same case, the uniform practice has been to reject such a person as incompetent to serve as a juror. . . . An opinion thus formed does not fall within the exception to the statute as one based merely upon rumor or newspaper reports, but is strictly within the rule of exclusion prescribed by the statute which declares it a good cause of challenge if he has formed or expressed an opinion on the issue or

¹⁷² *State v. Bryant* (1887) 93 Mo. 273, 283, 6 S. W. 102.

¹⁷³ Judge Sherwood's line of reasoning seems to be derived from the dissenting opinions of Judge Henry in *State v. Barton* (1879) 71 Mo. 288, 290, and *State v. Brown* (1880) 71 Mo. 454, 456.

¹⁷⁴ *State v. Hulz* (1891) 106 Mo. 41, 53, 16 S. W. 940; *State v. Robinson* (1893) 117 Mo. 649, 23 S. W. 1066.

¹⁷⁵ *State v. Taylor* (1896) 134 Mo. 109, 141, 35 S. W. 92.

¹⁷⁶ *State v. Duestrow* (1896) 137 Mo. 44, 38 S. W. 554, 39 S. W. 266; *State v. Riddle* (1903) 179 Mo. 287, 78 S. W. 606; *State v. Sechrist* (1909) 226 Mo. 274, 126 S. W. 400; *State v. Shackelford* (1899) 148 Mo. 493, 50 S. W. 105.

any material facts to be tried.”¹⁷⁷ The Supreme Court has held that the reading of an unsworn confession,¹⁷⁸ or the alleged confession of a person not on trial, but who is a witness in the case,¹⁷⁹ or the reading of extracts of a confession,¹⁸⁰ do not disqualify jurors who are otherwise competent. A word of warning to counsel to prove affirmatively that the opinion of the juror is formed under conditions which disqualify him is set forth in a recent case.¹⁸¹

A most extraordinary view of the question under discussion is presented by Judge Burgess of the Supreme Court in *State v. Church*, decided in 1906. The Judge says, “The confession as published in the papers was part of those publications and the jurors having read them including that confession and formed opinions therefrom with respect to the guilt of the defendant, the case is clearly brought within the provisions of” the statute.¹⁸² If the test here used by Judge Burgess had been applied in each of the cases cited, all jurors who had read sworn confessions, testimony before the coroner, or at a former trial, would have been held competent. The test applied by Judge Burgess entirely disregards the rules of law laid down in prior cases, and in itself, begs the question. If there is to be any line of demarcation between competent and incompetent jurors who have read newspaper reports, that line must be based on the source of the report. The application of the Burgess test makes a differentiation between jurors based on the *source* of the report quite impossible.

The contest between Judge Sherwood and Judge Norton as to the construction of the statute was won by Judge Sherwood after a struggle of seven years’ duration. In a sense, the only question involved was whether or not the Supreme Court should construe the statute strictly or liberally. The strict constructionist won; the competency of a juror was made to depend on a historical setting. This was grounded on Judge Sherwood’s dissent in the *Bryant* case, and the basis of that dissent rests on the

¹⁷⁷ *State v. Foley* (1898) 144 Mo. 600, 611, 46 S. W. 733.

¹⁷⁸ *State v. Myers* (1906) 198 Mo. 225, 94 S. W. 242.

¹⁷⁹ *State v. Bobbitt* (1908) 215 Mo. 10, 114 S. W. 511.

¹⁸⁰ *State v. Wooley* (1908) 215 Mo. 620, 115 S. W. 417.

¹⁸¹ *State v. Darling* (1906) 199 Mo. 168, 97 S. W. 592.

¹⁸² *State v. Church* (1906) 199 Mo. 605, 631, 98 S. W. 16.

opinion in the *Baldwin* case. Judge Sherwood's fine distinctions appear strictly logical, although it is doubtful that the legislature in 1879 when it amended the statute, had before it the *Baldwin* case, decided in 1848; if it did, it is even more doubtful that the legislature anticipated Judge Sherwood's argument. Judge McBride's reference in the *Baldwin* case to newspaper statements was not binding upon the legislature. By parallel reasoning, it might be argued that the legislature acted unnecessarily in 1925 when the statute providing that persons opposed to the death penalty in capital cases were incompetent as jurors, was amended in such a way as to permit this disqualification to be waived. Already in 1921, the same result had been reached by judicial decision; but when a case arose in 1928, to which the same principle was applicable, the court referred authoritatively to the amended statute and not to its earlier decisions.¹⁸³ Here the legislature completely disregarded the court's decision of 1921; each acted independently of the other. This might have been the policy of the courts as easily under the *Baldwin* case, the amendment of 1879, and subsequent decisions.

However, under the statute opinions on the issue or any material fact do disqualify a juror unless such opinions are founded only on rumor and newspaper reports. Depending upon the source from which the juror derives his opinion, the court must hold him competent or incompetent. The line of demarcation which has been drawn seems more acceptable than any other line, for opinions obtained as a result of reading or hearing evidence at a former trial or a preliminary hearing are more calculated to prejudice or bias the mind of the juror than opinions obtained from other sources. The differentiation is artificial; but apparently unavoidable under the statute. The conclusions arrived at by the Supreme Court are quite satisfactory. But it must be observed that there is a tendency to demand a high degree of proof of the facts which render a juror incompetent. As a result, the number of jurors who are declared incompetent is reduced. No objection is provoked by this trend in the cases; neither the defendant nor the state is prejudiced; and a panel of competent jurors can be secured more readily.

¹⁸³ See p. 57, *supra*.

g. Prejudice

Under the statute a juror may be challenged because of his prejudice in the case. Judge Walker of the Supreme Court once said, "The test as to the qualification of a juror is his freedom from prejudice and his consequent ability to give an accused a fair and impartial trial."¹⁸⁴ Prejudice in criminal cases may be treated under the same headings as in civil cases, first, prejudice based on a knowledge of the facts in the case, second, prejudice arising out of acquaintance with a party to the action, and finally, prejudice resulting from personal bias.

There appear to be only two cases of any importance relating to prejudice based on a knowledge of the facts in the case. In an early case in which the defendant was indicted for stealing cattle, one of the jurors stated upon his *voir dire* examination that he knew the cattle which were stolen. The court held that since the facts concerning which the juror was informed were not controverted, the juror was competent. The court observed that in doubtful cases it was a practice of the circuit court to excuse jurors, and commented favorably on this policy.¹⁸⁵

In the second case, the defendant was prosecuted for an offense committed after a discharge from the penitentiary. The juror who was challenged had been a member of the panel which formerly convicted the defendant. The court held that the juror was competent since the offenses were entirely different, the former conviction was shown upon the record, and the identity of the defendant was not denied. In this case the juror stated that he could give the defendant a fair and impartial trial, and the court did not become aware of the fact that the juror had served in the former trial until after the trial had begun and some evidence had been introduced.¹⁸⁶ Under the circumstances of the case, the objections made to this juror appear to be without substantial foundation.

Two cases have arisen concerning prejudice resulting from acquaintance with a party to the action. In the first case a juror testified that his friendship and association with the brother of the defendant would influence him in reaching a verdict. The

¹⁸⁴ State v. Miller (1914) 264 Mo. 441, 175 S. W. 191.

¹⁸⁵ State v. Martin (1859) 28 Mo. 530, 533.

¹⁸⁶ State v. Maloney (1893) 118 Mo. 112, 23 S. W. 1084.

court held the juror properly excused when challenged on the theory that the State as well as the defendant is entitled to an impartial jury.¹⁸⁷

In the second case, the court held that the fact that one of the jurors was well acquainted with the prosecuting attorney and his assistants, and had been a witness for the state in another case, did not constitute grounds for a challenge for cause. The juror on his *voir dire* examination stated that regardless of his acquaintance, he would try the case fairly according to the law and the evidence.¹⁸⁸ Technically the juror may have been qualified, but it is unlikely that any injustice would have resulted had this juror been excused from the panel.

Instances of prejudice resulting from personal bias are set forth in a number of cases. In two cases, after the jury had been empaneled a juror used such language in speaking of the defendant as to indicate clearly his bias. In both cases the juror was held to be utterly unfit to pass upon the guilt or innocence of the party.¹⁸⁹ On the other hand a juror's statement that if the defendant was guilty he ought to be "sent up" for a year or so was held not to be an expression of the defendant's guilt and, standing alone, not to be a ground of challenge for cause.¹⁹⁰

In a case in which a juror indicated his prejudice against the Habitual Criminal Act and was challenged by the State for that reason, the court ruled that the trial judge properly excused the juror.¹⁹¹ In this case it was quite apparent that the juror was so prejudiced that he was unfit to sit in a cause in which the Habitual Criminal Act might be invoked. The Supreme Court has held competent jurors who said they were opposed to the defense of insanity but who stated that they could nevertheless give the defendant a fair trial.¹⁹² The same ruling was applied in another case in which it appeared that some jurors, otherwise qualified, had been dismissed because in a similar case decided

¹⁸⁷ State v. Faulkner (1904) 185 Mo. 673, 84 S. W. 967.

¹⁸⁸ State v. Shoemaker (Mo. 1916) 183 S. W. 322.

¹⁸⁹ State v. Wheeler (1891) 108 Mo. 658, 18 S. W. 924; State v. Nardini (Mo. A. 1916) 186 S. W. 557.

¹⁹⁰ State v. Hayes (1883) 78 Mo. 307; *accord*, State v. Burns (1885) 16 Mo. A. 556.

¹⁹¹ State v. Taylor (Mo. 1929) 18 S. W. (2d) 474, 478.

¹⁹² State v. Baker (1912) 246 Mo. 357, 152 S. W. 46.

somewhat earlier they had been successfully challenged on account of their opposition to the pleading of insanity as a defense.¹⁹³ In a case in which two of the jurors were Klansmen who had attended an indignation meeting of the Klan called following the killing of the woman for whose death the defendant was on trial, the jurors were declared competent, since they had stated that they could give the accused a fair trial, and since no evidence had been introduced to show the type of meeting that the Klan had held.¹⁹⁴

Statutes relating to the selecting and summoning of jurors have been construed as directory only; therefore, when a jury happens to be selected in a manner not strictly in accord with the statutory provisions, a challenge to the array will be overruled, unless prejudice can be shown.¹⁹⁵ However, the courts have held that where the prosecuting attorney has suggested names of persons to be placed in the jury wheel,¹⁹⁶ or where he has submitted a complete list of names some of which thereafter have been drawn from the wheel,¹⁹⁷ the defendant's challenge to the array was properly sustained. It is quite apparent that the greatest opportunity exists for obtaining prejudiced jurors in those instances in which a representative of the State actually assists in the selection of the jury for the trial of a case in which he is to participate. Consequently the rule established in these cases is an excellent safeguard.

Several cases have arisen involving prejudice against negroes. In one of these it appeared that a juror, summoned to serve in the trial of a negro, had at one time had a personal disagreement with another negro arising from his refusal to take a drink in a saloon at the same counter as that at which the negro was drinking. The court ruled that the conduct of the juror did not show such prejudice against the negro race as to disqualify him from

¹⁹³ *State v. Fairlamb* (1893) 121 Mo. 137, 25 S. W. 895.

¹⁹⁴ *State v. Garland* (1924) 304 Mo. 87, 263 S. W. 165.

¹⁹⁵ *State v. Pitts* (1875) 58 Mo. 556; *State v. Knight* (1875) 61 Mo. 373; *State v. Albright* (1898) 144 Mo. 638; 46 S. W. 620; *State v. Jackson* (1901) 167 Mo. 291, 66 S. W. 938; *State v. Riddle* (1903) 179 Mo. 287, 78 S. W. 606; *State v. Woodard* (1925) 309 Mo. 19, 273 S. W. 1047; *State v. Jackson* (Mo. A. 1921) 227 S. W. 647.

¹⁹⁶ *State v. Austin* (1904) 183 Mo. 478, 82 S. W. 5.

¹⁹⁷ *State v. Haney* (1910) 151 Mo. A. 251, 132 S. W. 56.

serving in the trial of a negro accused of murder.¹⁹⁸ In a case in which the juror stated that he was not prejudiced against the defendant, a negro, but against the negro race in general, the juror was held competent. However, the Supreme Court suggested that when the case was retried, errors having been committed, it would be wiser for the trial court in harmony with absolute impartiality to select a panel of jurors who had no unkindly feeling toward the class to which the defendant belonged.¹⁹⁹

An unusual situation arose in the case of *State v. Thomas*, decided by the Supreme Court in 1913. In that case, the defendant, a negro, challenged the array on the ground that the jury commissioners in passing upon the qualifications of persons for jury service in Jackson County discriminated against colored persons of African descent. All the judges of the criminal and circuit courts of Jackson County, except the judge trying the case, were called as witnesses. They testified that they had not discriminated against the African race in selecting names of persons from whom the jurors would be drawn to try the case. All of the judges but one testified that they had approved some negroes for jury service, although, they did not remember the precise number. Their evidence indicated that a larger per cent of white persons than of negroes (according to the population of each) was approved for jury service because a great many negroes were found not to possess sufficient educational qualifications for jury service, and that of the negroes found qualified from an educational standpoint a large percentage were ministers, school teachers or physicians, and therefore exempt from jury service.

The defendant offered to prove that nine hundred negroes in Jackson County were qualified for jury service, but had never been summoned to serve. The court held, "This evidence was rejected, and we think properly so, for the reason that while it would have tended to prove that the negro race had been discriminated against in the past, it did not tend to prove discrimination in the particular panel of jurors then in the wheel from which a jury was drawn to try defendant."²⁰⁰ Undoubtedly the

¹⁹⁸ *State v. Green* (1910) 229 Mo. 642, 129 S. W. 700.

¹⁹⁹ *State v. Brown* (1905) 188 Mo. 451, 87 S. W. 519.

²⁰⁰ *State v. Thomas* (1913) 250 Mo. 189, 202, 175 S. W. 330.

decision of the court is correct. No prejudice was shown in the selection of the particular panel; whether in fact prejudice does exist in the gathering of names for the jury wheel is another question altogether, and one which cannot be answered positively, or even beyond any reasonable doubt, unless a detailed study of the problem is undertaken.

In conclusion, it may be stated, that no dogmatic rule of law can be laid down for the determination of the qualifications of a juror in the abstract. Whether or not a juror should be held incompetent because of his prejudice must be decided on the merits of each case as it arises. The cases referred to above are at best guide posts which may assist in solving problems brought to the attention of the courts.

D. QUALIFICATIONS IN PARTICULAR CLASSES OF COUNTIES AND CITIES

In the consideration of exemptions of jurors in particular classes of counties and cities, it was pointed out that one of the peculiarities of the jury system in this state has resulted from the policy of the legislature in enacting laws of a general nature and also laws of a more limited applicability.²⁰¹ This same peculiarity is found in the system of challenges for cause in Missouri. Quite frequently, identical, although separately enacted, laws are in force in two different classes of counties or cities. In considering these laws, each one will be set forth as of the date of its first enactment; subsequent laws which are identical, but applicable to counties or cities of different classes, will be dealt with largely in the footnotes. Whenever such a law has been construed for one class of counties or cities, the same construction logically applies to the law when in force in another class of counties or cities.

1. Counties

The policy of the legislature, to which reference has just been made, was adopted for the first time in 1891 with the enactment of a series of laws relating to counties. A statute applicable to counties containing cities from 50,000 to 300,000 inhabitants provided that "None of the following persons shall be permitted

²⁰¹ See p. 236, *supra*.

to serve as jurors: First, any member of the national guard or other organized militia, or fire company; second, any person under the age of 21 years or over the age of 65 years; third, any person who is not sufficiently acquainted with the English language to read and write the same, and to understand thoroughly the proceedings ordinarily had in courts of justice; fourth, any person actually exercising the functions of clergyman, practitioner of medicine, druggist, or apothecary, attorney-at-law, or any professor or other teacher of any school or institution of learning; fifth, any person of bad reputation or without visible means of support; sixth, any person who has served on a regular panel as a juror in any court of record in the county within one year last past; seventh, any person who has been convicted of felony; eighth, any person not drawn or selected according to the provisions of this article."²⁰² The law continues in effect today although the population basis for its applicability has been changed.²⁰³ In 1903 a similar law was enacted applicable to counties containing from 100,000 to 175,000 inhabitants.²⁰⁴ This law also remains unchanged, except in the provisions defining its applicability.²⁰⁵

The courts have seldom had occasion to construe the statute. It has been held that the finding of the trial court as to whether jurors are disqualified under the statutes will not be reversed unless manifest error appears.²⁰⁶ In a case in which a juror signed the verdict by making his mark, the court ruled that no absolute proof appeared that the juror could not write as required by the provisions of the statute.²⁰⁷

In passing, reference should be made to another section which

²⁰² Mo. Laws 1891, p. 173, sec. 8.

²⁰³ R. S. Mo. (1899) sec. 3799; R. S. Mo. (1909) sec. 7312; Repealed, Mo. Laws 1911, p. 309; Enacted, Mo. Laws 1905, p. 176, sec. 10, as applied to counties containing cities having a population from 150,000 to 400,000; made applicable to counties containing cities having a population from 100,000 to 400,000 inhabitants, Mo. Laws 1907, p. 323, sec. 1; R. S. Mo. (1909) sec. 7327; made applicable to counties having a population from 200,000 to 400,000, Mo. Laws 1911, p. 309; R. S. Mo. (1919) sec. 6665.

²⁰⁴ Mo. Laws 1903, p. 210, sec. 7.

²⁰⁵ R. S. Mo. (1909) sec. 7296; made applicable to counties having a population from 60,000 to 200,000, Mo. Laws 1911, p. 307, sec. 10; R. S. Mo. (1919) sec. 6648.

²⁰⁶ *State v. Jackson* (Mo. 1901) 66 S. W. 938.

²⁰⁷ *Parman v. Kansas City* (1904) 105 Mo. A. 691, 78 S. W. 1046.

invariably has followed the law which has just been outlined. "Any person may challenge any juror for cause, for any reason mentioned in the last section, and also, for any causes authorized by the laws of the state."²⁰⁸ This statute is self-explanatory.

A law adopted in 1905 and at that time made applicable to counties containing cities having a population from 150,000 to 400,000, provided that "No petit juror shall be permitted to serve on such jury for more than one week consecutively during any term of court; Provided, that in no case shall this section cause the discharge of any juror during the actual pendency of the trial of any cause."²⁰⁹ The law continues in effect today although its applicability has been modified.²¹⁰ The same provision, applicable to counties having a population from 60,000 to 200,000 was adopted by the legislature in 1911, and continues in operation.²¹¹

In the words of Judge Walker of the Supreme Court, "The purpose of this statute is to free trials from the presence of professional jurors and to equalize jury service so that no juror in the counties designated shall be required, subject to the proviso contained in the section, to serve more than one week during any term of court."²¹² Accordingly, the court held that jurors who had served two days in the previous week and were subsequently excused until the week in which this case was heard, were not incompetent, since the court construed the statute to limit the right to challenge to the time of actual service of the juror and not to the period of his attendance upon the court under the venire.

In 1911 the legislature enacted the following statute, applicable to juries in counties having a population from 60,000 to 200,000. "If upon the *voir dire* it appears that any juror is in the

²⁰⁸ Mo. Laws 1891, p. 174, sec. 9; R. S. Mo. (1899) sec. 3800; R. S. Mo. (1909) sec. 7313; Mo. Laws 1905, p. 176, sec. 11; R. S. Mo. (1909) sec. 7328; R. S. Mo. (1919) sec. 6666; Mo. Laws 1903, p. 211, sec. 8; R. S. Mo. (1909) sec. 7297; R. S. Mo. (1919) sec. 6649.

²⁰⁹ Mo. Laws 1905, p. 177.

²¹⁰ Made applicable to counties containing cities having a population from 100,000 to 400,000, Mo. Laws 1907, p. 323; R. S. Mo. (1909) sec. 7330; made applicable to counties having a population from 200,000 to 400,000; Mo. Laws 1911, p. 309; R. S. Mo. (1919) sec. 6668.

²¹¹ Mo. Laws 1911, p. 307, sec. 13; R. S. Mo. (1919) sec. 6651.

²¹² State v. Rose (1917) 271 Mo. 17, 23, 195 S. W. 1013.

employ of any person, firm, or corporation who has within the six months last past employed, or who within such time has had in his or its employ, any attorney on either side of the case being tried, the opposing party shall have the right to challenge such juror for cause."²¹³ The law, unmodified, continues in effect today.²¹⁴ It has been declared constitutional.²¹⁵

2. Cities

Only two statutes have been enacted relating to the challenging of jurors in cities. Both are procedural rather than substantive, and contain provisions relating to the qualifications of jurors, most of which are also applicable under the general law.²¹⁶

E. CONCLUSION

The innumerable problems which have confronted the legislature and the courts in matters related to the challenging of jurors for cause are primarily questions of substantive law, not of procedure. Only when the legislature has divorced the history and tradition pertaining to the development of the jury system from the enactment of new and scientific legislation will the qualifications of jurors throughout the entire state in criminal and civil cases be standardized. And standardization is imperative to a smoothly operated jury system.

It must be observed that the jury of today is not the jury which was known to Blackstone and Chief Justice Marshall. Increase in population, large cities, new facilities for travel brought with them jury commissions, jury lists, jury wheels and many psychological changes. The courts have not been unobserving of new developments. Thus Judge Allen said in 1913, "However, under conditions existing today, we might frequently find some practical difficulties in the way of applying Lord Mansfield's ideal rule that 'a juror should be as white as paper.'"²¹⁷

²¹³ Mo. Laws 1911, p. 308, sec. 18.

²¹⁴ R. S. Mo. (1919) sec. 6655.

²¹⁵ Hicks v. Simonsen (1924) 307 Mo. 307, 270 S. W. 318; Privitt v. Railroad (Mo. 1927) 300 S. W. 726.

²¹⁶ See R. S. Mo. (1919) sec. 6679; R. S. Mo. (1919) sec. 6696; Mo. Laws 1919, p. 430, sec. 25.

²¹⁷ McManama v. Railroad (1913) 175 Mo. A. 43, 49, 158 S. W. 442.

In the leading case of *Theobald v. Transit Co.*, the court remarked that "The administration of justice has not yet fallen so low, nor the character of our people become so imbued with prejudice, that it is impossible to secure a jury that will enter upon the discharge of its duties with minds perfectly free to see and declare the right as the facts of the case now show it to be, untinctured and untainted by the personal whims, bias or prejudice of the jurors."²¹⁸

Yet in a case of 1892, one of the courts declared, "It is a matter of common experience that in many classes of cases the securing of a wholly unbiased jury is next to impossible."²¹⁹ On the other hand, Judge Faris feels that "with the world absolutely filled with unprejudiced jurors," there is no need to fear.²²⁰

These expressions of opinion show that the firm belief and confidence in the jury in a measure have been shaken. The many complex statutory ramifications which have sprung up in this state necessitate a reorganization of the jury system. The thought expressed by Chief Justice Marshall furnishes a very excellent guide, "I have always conceived, and still conceive, an impartial jury as required by the common law, and as secured by the Constitution, must be composed of men who will fairly hear the testimony which may be offered to them, and bring in their verdict according to that testimony, and according to the law arising on it."²²¹

Bearing in mind the statement made by the Chief Justice, one may well doubt the existence of any rational basis for declaring incompetent as jurors in all counties having between 60,000 and 400,000 inhabitants, persons who are clergymen, practitioners of medicine, druggists, apothecaries, professors, teachers, members of organized militia, and firemen.²²² That such individuals should be exempt from jury service is altogether reasonable, but that they should be disqualified along with persons convicted of felonies and without visible means of support, is a patent absurdity. If such individuals are willing and able to serve, they should be welcomed on the jury panel, for the classes here dis-

²¹⁸ *Theobald v. Transit Co.* (1905) 191 Mo. 395, 428, 90 S. W. 354.

²¹⁹ *Coppersmith v. Railroad* (1892) 51 Mo. A. 357, 366.

²²⁰ *State v. Mace* (1914) 262 Mo. 143, 154, 170 S. W. 1105.

²²¹ *Chouteau v. Pierre* (1845) 9 Mo. 3.

²²² See pp. 381-3, *supra*.

qualified are composed of those who are highly desirable to raise the standing of the jury in this state.

Another peculiarity which the presence of this law on the statute books emphasizes is that in counties having populations of less than 60,000 inhabitants, the law is inapplicable. In such counties, the classes of persons just enumerated as desirable for jury service, are merely exempt, and not disqualified. There is no logical basis for such a differentiation. The persons disqualified in the larger counties, are no more and no less incompetent than the same classes of persons in smaller counties, under Chief Justice Marshall's conception of competency. Nothing but good could come from the eradication of this illogicality in the law.

For purposes of illustration, the most extreme example has been selected to emphasize the evils which have resulted from the legislative dissection of the jury system. So far as the qualifications of jurors are concerned, it is difficult to understand why a person who is competent in Jackson County, should not be just as competent in St. Charles County, Greene County, Ozark County, or any other county in this State. What benefit is to be derived from determining the qualifications of a juror according to the population of the county or city in which he resides? Is a juror less competent because in the six months last past he has been in the employ of a person who within such time had in his employ an attorney in the case where the population of the county is 70,000 than he would be if the population of the county were only 50,000?²²³ Is a juror less competent to serve on a jury for more than one week consecutively during any term of court in a county of 80,000 inhabitants than he would be in a county of 55,000 inhabitants?²²⁴

In the light of judicial decisions and the numerous statutes which have been enacted concerning qualifications of jurors and the right of challenge in civil and criminal cases, it is obvious that the statutes now in force need to be revised and codified for the purpose of clarifying the law and of providing by further legislative enactments relating to the disqualifications of jurors which at the present time can be discovered only through a search of the cases. A series of laws, the constitutionality of which would be unquestioned, and which would be broad enough

²²³ See pp. 383-4, *supra*.

²²⁴ See p. 383, *supra*.

in their scope to cover adequately challenges for cause, could be drawn up only with considerable difficulty. With an effort to preserve the sound features of challenges for cause, already prescribed by law, it might be suggested that the following statutes would in substance approach the model:

Every juror shall be a citizen of the state, resident in the county, sober and intelligent, of good reputation, over 21 years of age, and physically fit for jury service. No witness or person summoned as a witness, no person who has formed or expressed an opinion concerning the matter in controversy which may influence his judgment, no person having such a prejudice in the cause as to influence his judgment, no person kin to either party or counsel to a cause within the fourth degree of consanguinity or affinity, no person unable to speak and write English intelligently, no person who has had prior service on a regular panel in any court in the county within one year last past, no person who is or who has been within the six months last past in the employ of any person, firm, or corporation who within such time had in his or its employ any attorney in the cause, shall be permitted to serve as a juror. Any juror may be challenged for cause for any reason herein set forth.

This statute would be applicable in both civil and criminal actions.²²⁵ It would permit women to serve on juries. This is in conformity with a suggestion made by Judge Grimm, but as the Judge pointed out, a constitutional amendment would be necessary to make such a provision effective.²²⁶

The eligibility of women would double the number available for jury service, and therefore permit the courts to be more exacting in choosing the panel. The result should logically be that the standard of juries in this state would be materially improved.

It is recognized that the existence of good jury laws does not in itself create an efficient jury system in practical operation. The statute, itself, seems to prescribe a high standard of qualifications for jury service, but that is also true of the statutes now in force. Upon the discretion exercised by the trial court must largely depend the ultimate competency of the jury. Up to the

²²⁵ See p. 244, *supra*.

²²⁶ Grimm, *Judicial Administration*, MISSOURI CRIME SURVEY (1926) p. 178, 180.

present time it is extremely doubtful that trial courts have made even a reasonable effort in this matter.

While it has been recognized that a constitutional amendment would be necessary to qualify women for jury service, for the courts to select male jurors more critically would not be unconstitutional. In the leading case of *Vaughn v. Scade*,²²⁷ decided in 1860, Judge Scott said, "The term 'trial by jury' was well known and understood at the common law, and in that sense it was adopted in our bill of rights. Of course the non-essentials of that institution, such as concern the qualifications of jurors, the mode of summoning them, and many other such matters, were left to the regulation of law. The Constitution is preserved in retaining the substance of that form of trial as it was known and practiced among those from whom we derived it. This subject has undergone examination in other tribunals, and we find them concurring in those views."

The views so well expressed by Judge Scott have received the hearty support of the Supreme Court in two subsequent cases, in one of which the court remarked, "It never could have, in our opinion, been intended to tie up the hands of the people themselves through their chosen representatives so that no beneficial changes and regulations of the trial by jury could be made as subsequent experience might dictate, as long as the essentials are preserved."²²⁸

An additional model statute pertaining to challenges in criminal cases would be necessary:

No person who was a member of the grand jury or inquest by which any indictment or presentment was found in any cause in which he is summoned to serve as a petit juror, no person whose person or property was alleged in the indictment to have been injured, nor any person kin to him within the fourth degree of consanguinity or affinity, no person who has read or heard the sworn confession of the accused, or full reports of the testimony at a former trial, or a preliminary hearing shall be permitted to serve as a juror. These disqualifications shall furnish valid bases for challenges for cause. The representative of the state

²²⁷ *Vaughn v. Scade* (1860) 30 Mo. 600.

²²⁸ *State v. Hamey* (1901) 168 Mo. 167, 192, 67 S. W. 620. See *State ex rel. Railroad v. Slover* (1896) 134 Mo. 607, 36 S. W. 50.

may challenge for cause, in cases in which the death penalty may be inflicted jurors whose opinions preclude them from finding any defendant guilty of an offense punishable with death, and, in any case, jurors opposed to convicting a defendant on circumstantial evidence alone where the prosecution is based on circumstantial evidence and jurors opposed to convicting the defendant of a violation of the Habitual Criminal Act where the case involves the application of that act.

It is not urged that the grounds for challenge set forth in these two model statutes are complete and full in themselves. While they may prove inadequate in some particulars, it must be remembered that the courts of this state consistently have held that because certain grounds for challenge are enumerated in statutes, it does not follow that the trial judge is precluded from sustaining challenges to jurors for reasons not mentioned therein.²²⁹ Thus any statutory deficiencies may be cured by court decisions.

The statute which has been in force for many years declaring residents of counties or cities which are parties to actions competent to serve as jurors is entirely satisfactory and an excellent modification of the old common law rule.²³⁰

The proposed reforms which have been outlined can, of course, not be viewed as panaceas for the evils of the jury system in this state, but it may reasonably be expected that a reorganization of the type suggested²³¹ will raise the standard of jurors, so that the public will have its confidence renewed in trial by jury and in the competency of the twelve men who sit as triers of facts in the cause—a jury of our peers.

²²⁹ See p. 258, *supra*.

²³⁰ See pp. 253-255, *supra*.

²³¹ A series of model statutes with references to jury laws in many states is set forth in *American Law Institute, Code of Criminal Procedure*, Tentative Draft No. 2 (March, 1929) pp. 30-34, and pp. 254-318.