EXEMPTIONS FROM JURY SERVICE AND CHALLENGES FOR CAUSE IN MISSOURI*

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I. INTRODUCTION

The common law of England is the fundamental law of American jurisprudence. It is the foundation of the law of Missouri. Of peculiar significance is the fact that in two identical congressional acts of 1804 and 1805, trial by jury was established in the territory out of which the State of Missouri later was carved.[1] And it was not until 1812 that Congress enacted a law providing that the people of Missouri Territory should always be entitled to judicial proceedings according to the common law.[2] The General Assembly of the Territory of Missouri adopted the common law of England in 1816.[3] While trial by jury is a very vital feature of that law, it is remarkable that Congress provided for jury trial even before establishing the common law.

The laws concerning exemptions from jury service and challenges for cause seem to have become firmly established and well crystallized. Objectively viewed, the jury in this state presents a most disorganized and disheveled appearance. When it is recalled that the legislature has enacted five laws, one of which exempts clergymen from jury duty throughout the state,[4] another which exempts them in cities having a population over 100,000,[5] a third which exempts them in cities having a population over 500,000,[6] a fourth which disqualifies them in counties having a population from 60,000 to 200,000,[7] and a fifth which disqualifies them in counties having a population from 200,000 to 400,000,[8] there is clear proof of a lack of scientific method in jury legislation. When it is found that a juror who within the period of six months preceding a trial has been in the employ of a corporation with which during the same period an attorney in

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[1] 1 Ter. Laws p. 5, sec. 12; 1 Ter. Laws p. 7, sec. 3.
[2] 1 Ter. Laws p. 12, sec. 14.
[3] 1 Ter. Laws p. 436.
[4] See R. S. Mo. (1919) sec. 6609.
[5] See R. S. Mo. (1919) sec. 6680.
[6] See R. S. Mo. (1919) sec. 6713.
[7] See R. S. Mo. (1919) sec. 6665.
[8] See R. S. Mo. (1919) sec. 6648.

the case was connected, may be challenged for cause in counties having a population from 60,000 to 200,000, but not in counties of greater or lesser population,[9] the inconsistency is flagrant. Nothing short of a Justinian or Napoleonic codification of laws relating to the jury in Missouri can serve to bring order out of this chaos.

In this day when the equality of the sexes is being recognized in politics and business, when women have had conferred upon them the same legal rights as men, there is no reason why they should not bear equally with men the duty of jury service. To double the number of eligible jurors in this state might aid considerably in the solution of the jury problem.

The law of Missouri has been changed and greatly modified since 1820. A code of civil procedure has been enacted; only recently did the legislature provide a Workmen's Compensation Law; many other laws have supplemented or abrogated the common law. If that fact-finding mechanism of the common law, the jury, is to function efficiently today, it can do so only if those parts of the machine adapted to modern needs are preserved and the outworn and useless appendages are replaced by parts calculated to operate effectively at the present time. The jury in this state has developed piecemeal; it has grown like Topsy. Conditions today demand a complete reorganization along scientific lines. As juries in other states are studied, a fuller understanding and helpful suggestions will result. Only through substantial modifications and revisions can confidence in trial by jury in this state be reestablished.

II. Exemptions From Jury Service

A. INTRODUCTION

The laws of Missouri have provided for the permanent exemption of certain classes of persons from jury service and for the temporary exemption of others. The tendency of the legislation relating to jury service has resulted in the enactment of many laws pertaining to exemptions, and conversely to only a limited number of judicial decisions.

B. EXEMPTIONS UNDER THE GENERAL LAW

1. Permanent Exemptions

Judge Grace of the Supreme Court has said, "The subject of

[9] See R. S. Mo. (1919) sec. 6655.

the . . . exemptions of certain citizens from jury service has always, in this state, been purely a subject of statutory regulation. . . . Exemption from jury service is not a personal favor or disfavor, but for the public comfort and convenience."[10] These statements aptly describe the method by which a person is made exempt and the basis for allowing the exemptions. That public policy should determine whether or not certain classes of persons should be required to serve is in accord with both common law and common sense. Judge Lamm has expressed anew the age-old reason for exempting clergymen. "Clergymen are exempt from jury service this (doubtless) agreeably to the common-law maxim: No man warring for God should be troubled with secular business. (*Nemo militans Deo implicatur secularibus negotiis.*)"[11]

Only one case is on record concerning permanent exemptions from jury service under the general law. In the case of *State ex rel. Flickinger v. Fisher,* decided in 1893, the question arose as to a dentist's right to claim exemption because he was a doctor. The case was heard before Division Number One of the Supreme Court, and by a divided court it was held that a dentist was a practitioner of medicine within the meaning of the statute.[12] Thereafter the case was certified to the Supreme Court *en banc,* and by a four-to-three decision, the holding in Division Number One was reversed and it was held that a dentist was not a practitioner of medicine within the meaning of the statute.[13] As a result of this decision, the legislature in 1895 amended the law exempting practitioners of medicine from jury service, so that dentists were included within the term.[14]

The history of permanent exemptions from jury duty under the general law is set forth completely in Chart I. The chart illustrates the exemption of twenty-four classes of persons from jury service at the present time. It demonstrates the ever increasing number of exemptions prescribed by statutes from 1808 to date.

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[10] State ex rel. Flickinger v. Fisher (Mo. 1893) 21 S. W. 446, 447.
[11] State v. Railroad (1911) 239 Mo. 196, 319, 143 S. W. 785.
[12] State ex rel. Flickinger v. Fisher (Mo. 1893) 21 S. W. 446.
[13] State ex rel. Flickinger v. Fisher (1893) 119 Mo. 334, 24 S. W. 167.
[14] See chart, number 5, and explanatory note (f).

CHART I

PERSONS EXEMPT FROM JURY SERVICE UNDER THE GENERAL LAW—YEAR OF ENACTMENT OR REVISION

Classification	1808	1810	1825	1835	1845	1855	1865	1870	1879	1885	1887	1889	1895	1899	1909	1911	1917	1919
1 Clergymen; 2 Attorneys; 3 Constables; 4 Ferry Keepers; 5 Practitioners of (1) Physic (a), of Medicine (b)	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	....	X
6 Sheriffs (1) (c)	X	X	X	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....
7 Deputy Sheriffs (1) (c)	X	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....
8 Clerks of courts (1) (c)	....	X	X	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....
9 Clerks or other officers of courts (1) (c)	....	....	....	X	X	X	X	X	X	X	X	X	X	X	X	X	....	X
10 Judges of courts of record (1)	....	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	....	X
11 Overseers of roads (1)	....	....	X	X	X	X	X	X	X	X	X	X	X	X	X	X	....	X
12 Persons over 65 years of age (1)	....	....	X	X	X	X	X	X	X	X	X	X	X	X	X	X	....	X
13 Coroners (1) (2) (d)	....	....	....	....	X	X	X	X	X	X	X	X	X	X	X.	X	....	X
14 Grand Jurors during same term (3)	....	....	....	....	X	X	X	....	X	....	....	X	....	X	X	....	....	X
15 Postmasters (1)	....	....	....	....	....	X	X	X	X	X	X	X	X	X	X	X	....	X
16 Millers (1)	....	....	....	....	....	....	X	X	X	X	X	X	X	X	X	X	....	X
17 Professors or teachers in schools of learning (1)	....	....	....	....	....	....	X	X	X	X	X	X	X	X	X	X	....	X
18 Volunteer firemen ready for active service. 19 Paid firemen (1)	....	....	....	....	....	....	....	X	X	X	X	X	X	X	X	X	....	X
20 Officers and guards of Penitentiary (4)	....	....	....	....	....	....	....	....	X	....	....	X	....	X	X	....	....	X
21 Presidents, cashiers of National Banks or Banking Cos., Inc., in Mo. (1) (e)	....	....	....	....	....	....	....	....	....	X	X	....	....	....	....	....	....	....
22 Superintendents of County Poor Houses (1)	....	....	....	....	....	....	....	....	....	....	X	X	X	X	X	X	....	X
23 Persons employed in state eleemosynary institutions (1)	....	....	....	....	....	....	....	....	....	....	....	X	X	X	X	X	....	X
24 Druggists (1)	....	....	....	....	....	....	....	....	....	....	....	X	X	X	X	X	....	X
25 Pharmacists or assistant pharmacists in active service (5)	....	....	....	....	....	....	....	....	....	....	....	....	....	....	X	....	....	X
26 Licensed embalmers (1)	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	X	....	X
27 Licensed dentists (6) (f)	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	X	X
28 Members of state military forces (7)	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	....	X

EXPLANATORY NOTE

Classification indicates persons exempt from jury service. X. indicates the year when the exemption was first allowed, and subsequent revisions.

(a) The term was changed to "Practitioners of medicine" in 1865.

(b) In 1895 the term was made to include "all persons lawfully practicing as aurists, oculists, dentists and other specialists."

(c) 9, in fact, is a continuation of 6, 7 and 8.

(d) Two statutes have always exempted coroners from jury service.

(e) No record appears of the repeal of the statute as to these persons, yet they are not included in any revisions from 1889 to 1919.

(f) See (b). Dentists were already exempt.

(1) 1808, 1 Ter. Laws p. 199, sec. 2; 1810; 1 Ter. Laws p. 238, sec. 2; R. S. Mo. (1825) p. 468, sec. 7; R. S. Mo. (1835) p. 343, sec. 9; R. S. Mo. (1845) p. 627, sec. 9; R. S. Mo. (1855) p. 910, sec. 10; G. S. Mo. (1865) p. 597, sec. 4; Mo. Laws 1870, p. 53; R. S. Mo. (1879) sec. 2779; Mo. Laws 1885, p. 185; Mo. Laws 1887, p. 205; R. S. Mo. (1889) sec. 6062; Mo. Laws 1895, p. 201; R. S. Mo. (1899) sec. 3764; R. S. Mo. (1909) sec. 7261; Mo. Laws of 1911, p. 303; R. S. Mo. (1919) sec. 6609.

(2) R. S. Mo. (1845) p. 230, sec. 8; R. S. Mo. (1855) p. 368, sec. 8; G. S. Mo. (1865) p. 391, sec. 1; R. S. Mo. (1879) sec. 5132; R. S. Mo. (1889) sec. 2438; R. S. Mo. (1899) sec. 6629; R. S. Mo. (1909) sec. 2921; R. S. Mo. (1919) sec. 5916.

(3) R. S. Mo. (1845) p. 628, sec. 10; R. S. Mo. (1855) p. 911, sec. 11; G. S. Mo. (1865) p. 598, sec. 12; R. S. Mo. (1879) sec. 2789; R. S. Mo. (1889) sec. 6075; R. S. Mo. (1899) sec. 3777; R. S. Mo. (1909) sec. 7274; R. S. Mo. (1919) sec. 6623.

(4) R. S. Mo. (1879) sec. 6529; R. S. Mo. (1889) sec. 7259; R. S. Mo. (1899) sec. 8915; R. S. Mo. (1909) sec. 1652; Mo. Laws 1917, p. 183, sec. 12; R. S. Mo. (1919) sec. 12512.

(5) Mo. Laws 1909, p. 478, sec. 16; R. S. Mo. (1919) sec. 4727.

(6) Mo. Laws 1917, p. 267, sec. 5495t; R. S. Mo. (1919) sec. 12658.

(7) Mo. Laws 1919, p. 512, sec. 29; R. S. Mo. (1919) sec. 7384.

2. Temporary Exemptions

The following chart sets forth the provisions for the temporary exemption of persons after service on juries. There are six divisions arranged in chronological order, each of which shows the conditions under which jurors have been exempted.

CHART II

TEMPORARY EXEMPTIONS FROM JURY SERVICE UNDER THE GENERAL LAW

YEAR OF ENACTMENT AND REPEAL

1808-10	1825-73	1826-35
For two years after (1) serving as juror	Jury service to be equalized (2)	Six days in any term unless case was not completed (3)
1839-45	**1873-1901**	**1901 to date**
A maximum service of six juries in one year (4)	Service at one term of court a year (5)	Service as a standing juror once a year (6)

(1) 1 Ter. Laws, p. 200, sec. 6; 1 Ter. Laws, p. 238, sec. 4.
(2) R. S. Mo. (1825) p. 468, sec. 8; R. S. Mo. (1835) p. 343, sec. 10; R. S. Mo. (1845) p. 628, sec. 11; R. S. Mo. (1855) p. 912, sec. 19; G. S. Mo. (1865) p. 599, sec. 27; Mo. Laws 1873, p. 46.
(3) 2 Ter. Laws, p. 96, sec. 2; R. S. Mo. (1835) p. 384, sec. 33.
(4) Mo. Laws 1839, p. 76, sec. 3. Impliedly repealed in 1845 on the authority of Hogel v. Lindell (1847) 10 Mo. 483.
(5) Mo. Laws 1873, p. 47, sec. 5; Mo. Laws 1874, p. 98, sec. 5; R. S. Mo. (1879) sec. 2785; R. S. Mo. (1889) sec. 6068; R. S. Mo. (1899) sec. 3770.
(6) Mo. Laws 1901, p. 191, sec. 3770; R. S. Mo. (1909) sec. 7268; R. S. Mo. (1919) sec. 6616. Intended as a benefit for the party summoned as a juror. Schneider v. Chew (1911) 157 Mo. A. 354, 138 S. W. 357.

C. EXCUSES

Judge Lewis of the Saint Louis Court of Appeals once said, "The court may in its discretion, before the jury are empanelled, excuse a juror from service, for any cause that may be deemed sufficient."[15] The same principle was stressed by former Circuit Judge J. Hugo Grimm who wrote in the Missouri Crime Survey that "the court has a right to excuse those who have been summoned and theoretically this is only done where they have good excuses to offer."[16]

[15] O'Brien v. Vulcan Iron Works (1879) 7 Mo. A. 257.
[16] J. H. Grimm, *Judicial Administration*, MISSOURI CRIME SURVEY (1926) pp. 178, 179.

The legislature has provided in counties where the circuit court is composed of more than one division, and but a single panel is to be drawn for all the divisions, that one judge designated by the judges of the court shall hear and determine all excuses.[17] And for cities having populations of more than 100,000,[18] as well as for cities having populations of more than 500,000,[19] laws have been enacted stipulating that "whenever any person summoned as a juror under this article shall be excused by the court from service, the court shall decide whether he shall be excused for the year ending on the last day of September next ensuing, or only temporarily."

Thus it may be observed from the statements of judges and the enactments of the legislature, that the power of the trial court to excuse jurors before the jury is empanelled is conclusively established in Missouri.

The significant facts concerning the exercise of this power are fully set forth by Judge Grimm.

> Unfortunately, judges are nominated through the influence of political organizations which also assist in their election, and the members of these organizations and some public officials do not hesitate to use their influence to have competent and well-qualified citizens who have been summoned to serve as jurors excused from that service. It is fair to assume that those who seek to be excused are men of affairs and large interests on the one hand, or working men who cannot afford to serve. . . The former, of course, are more influential, and acquainted with those having

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[17] Applied to counties containing cities having a population from 150,000 to 400,000; Mo. Laws 1905, p. 175, sec. 6; 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. 7323; made applicable to counties having a population from 200,000 to 400,000, Mo. Laws 1911, p. 309; R. S. Mo. (1919) sec. 6661; enacted and applied to counties having a population from 60,000 to 200,000, Mo. Laws 1911, p. 306, sec. 6; R. S. Mo. (1919) sec. 6644, Mo. Laws 1929, p. 241, sec. 6644.

[18] Mo. Laws 1879, p. 34, sec. 19; R. S. Mo. (1889) p. 2166, sec. 19; R. S. Mo. (1899) sec. 6557; R. S. Mo. (1909) sec. 7352; R. S. Mo. (1919) sec. 6690.

[19] Mo. Laws 1919, p. 428, sec. 19. The law further provides, "It shall be the duty of the said board of jury supervisors to make and promulgate rules and regulations for the excusing of jurors from jury service, and it shall be the duty of each of the judges of any such court to comply with rules and regulations."

political influence so that the majority of those who are excused, as a matter of favor, belong to the former class.

This has a tendency, at least, to lower the standard of the jury. From time to time campaigns are started to induce business men not to attempt to evade jury service. Something may be accomplished in this manner, but it would seem that a more direct method would be to impress upon the judges their responsibility in the matter, and their duty to refuse to excuse capable and representative citizens from jury duty except where they are able to present valid excuses.

There is also the danger of deputy sheriffs making false returns of "not found" in cases where they have in reality found and served jurors, and this has occurred usually in cases where the jurors were to be summoned to serve for judges known to be strict in requiring good excuses before relieving the juror from duty.[20]

In this statement, the judge has pointed out the evils resulting from the present practices of trial courts in excusing jurors. If the standard of the jury is to be raised, these evils must be eradicated.

D. EXEMPTIONS IN PARTICULAR CLASSES OF COUNTIES AND CITIES

Prior to the adoption of the Constitution of 1875, particularly under the Constitution of 1820, and to a lesser extent under the Constitution of 1865, the legislature was empowered to enact both general and local laws. The general legislation concerned measures applicable to the entire state, while the local legislation often related to particular counties or cities designated by name. Exemptions from jury service were both local and general. Exemptions under the general laws have already been outlined. The exemptions under local laws were essentially the same as under the general laws.[21] These local laws are of comparatively little importance in the history of the development of exemptions in Missouri. They have been impliedly repealed by legislation enacted subsequent to the adoption of the Constitution of 1875.

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[20] J. H. Grimm, *Judicial Administration*, MISSOURI CRIME SURVEY (1926) pp. 178, 179.

[21] Mo. Laws 1843, p. 245, sec. 3; Mo. Laws 1845, p. 115, sec. 4; Mo. Laws 1847, p. 70, sec. 1; Mo. Laws 1849, p. 489, sec. 20; Mo. Laws 1851, p. 481; Mo. Laws 1853, p. 106, sec. 1; Mo. Laws. 1872, p. 254; Mo. Laws 1877, p. 280; In re Powell (1878) 5 Mo. A. 220.

One of the peculiarities of the jury system in this state has resulted from the policy of the legislature since 1879 to enact laws of a general nature, and also laws applicable only to certain classes of counties and cities. Quite frequently, identical, although separately enacted, laws are in force in two different classes of counties or cities. These laws, consequently appear twice in the revised statutes. It was not the policy of the legislature to adopt these identical laws simultaneously, but after the laws had been in force in one class of counties or cities for a number of years, they were enacted anew for another class of counties or cities. Another peculiarity of this system is that while the laws generally have remained unchanged since their adoption, their applicability has been modified from time to time. The complexity of the system, and the difficulty of analysis at once become apparent.

1. Counties

Two statutes only have been enacted concerning exemptions of jurors in particular classes of counties. In 1889, the legislature provided that "Hereafter in all counties having a population of fifty thousand inhabitants or over, no petit juror shall be required to serve on such jury more than two consecutive weeks 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."[22] The law continues in effect.[23]

In 1903, the following exemption provision was enacted for juries in counties having populations from 100,000 to 175,000: "The jurors so summoned may be required to serve for the space of three weeks, at the end of which time they shall be discharged from further service as jurors; unless they are sitting in the trial of a cause, in which event they shall be finally discharged as jurors at the termination of such trial."[24] This law continued in effect until 1911 when it was repealed.[25]

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[22] R. S. Mo. (1889) sec. 6070.
[23] R. S. Mo. (1899) sec. 3772; R. S. Mo. (1909) sec. 7389; R. S. Mo. (1919) sec. 6638.
[24] Mo. Laws 1903, p. 211, sec. 12.
[25] R. S. Mo. (1909) sec. 7301; Mo. Laws 1911, p. 305, sec. 1.

2. Cities

A law applicable in cities having populations of more than 100,000[26] and in cities having populations over 500,000[27] provides that the courts may determine how long the jurors summoned shall serve. The law has been construed by the courts to mean that jurors shall serve for such time as the courts direct.[28] To these same classes of cities another provision applies[29] stipulating that no person shall be required to serve as a juror more than once in any year. The statute is directory.[30] It confers a personal privilege to claim exemption upon a person summoned for service a second time within a year.[31]

Chart III indicates the exemption of twenty-one classes of persons under laws applicable only to certain classes of cities. It should be observed that persons who are exempt in one class of cities are not necessarily exempt in other classes of cities.

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[26] Mo. Laws 1879, p. 34, sec. 20; R. S. Mo. (1889) p. 2166, sec. 20; R. S. Mo. (1899) sec. 6558; R. S. Mo. (1909) sec. 7353; R. S. Mo. (1919) sec. 6691.

[27] Mo. Laws 1919, p. 428, sec. 20.

[28] Blyston-Spencer v. Railroad (1910) 152 Mo. A. 118, 132 S. W. 1175; Turney v. Railroad (1911) 155 Mo. A. 513, 135 S. W. 93.

[29] Mo. Laws 1885, p. 75, sec. 31; R. S. Mo. (1889) p. 2169, sec. 30; R. S. Mo. (1899) sec. 6567; R. S. Mo. (1909) sec. 7361; R. S. Mo. (1919) sec. 6699. See Mo. Laws 1919, p. 431, sec. 27.

[30] State v. Jennings (1889) 98 Mo. 493, 11 S. W. 980.

[31] Williamson v. Transit Co. (1907) 202 Mo. 345, 100 S. W. 1072; Blyston-Spencer v. Railroad (1910) 152 Mo. A. 118, 132 S. W. 1175.

CHART III

PERSONS EXEMPT FROM JURY SERVICE IN CERTAIN CLASSES OF CITIES*

YEAR OF ENACTMENT OR REVISION

Classification	1879	1889	1895	1897	1899	1903	1909	1919
Militia; Firemen; Persons unable to read, write, and understand court proceedings; Clergymen; Practitioners of Medicine; Druggists; Apothecaries; Attorneys; Ferry-keepers; Millers; Professors and Teachers; Persons over 65 years; Persons navigating the Mississippi River and Tributaries; Railroad Employees; Employees of the U. S. and the State of Mo.; Municipal Employees; Persons of ill fame, etc. (1) (2)	X	X	....	....	X	....	X	X
Persons serving on jury in preceding twelve months (1) (2) (3)	X	X	....	....	X	....	X	X
Judges of elections and their clerks (4) (5)	....	....	X	....	X	....	X	X
Members of boards of education (6)	....	....	....	X	X	....	X	X
Judges and clerks of election for 2 years after expiration of term; persons filling their vacancies for six months after expiration of term (7)	....	....	....	....	....	X	X	X

EXPLANATORY NOTE

Classification indicates persons exempt from jury service. X indicates the year when the exemption was first allowed, and subsequent revisions.

(1) Applied to cities having populations in excess of 100,000. Mo. Laws 1879, p. 30, sec. 9; R. S. Mo. (1889) p. 2162, sec. 9; R. S. Mo. (1899) sec. 6547; R. S. Mo. (1909) sec. 7342; R. S. Mo. (1919) sec. 6680. Cited in State v. Jackson (1912) 242 Mo. 410, 146 S. W. 116; Anderson v. Pryor (Mo. A. 1919) 209 S. W. 122; State v. Welsor (1893) 117 Mo. 570, 21 S. W. 443.

(2) Applied in cities having populations in excess of 500,000. Mo. Laws 1919, p. 423, sec. 10.

(3) The courts have held that this is a ground for challenge under the wording of the statute, not merely an exemption. See Williamson v. Transit Co. (Mo. 1907) 202 Mo. 345, 100 S. W. 1072; Blyston-Spencer v. Railroad (1910) 152 Mo. A. 118, 132 S. W. 1175; Asmus v. Railroad (1911) 152 Mo. A. 521, 134 S. W. 92; O'Donnell v. Railroad (1911) 152 Mo. A. 606, 133 S. W. 1166; Kaiser v. Railroad (1911) 155 Mo. A. 428, 135 S. W. 90; Turney v. Railroad (1911) 155 Mo. A. 513, 135 S. W. 93.

(4) Applied to cities having populations in excess of 100,000. The exemptions were secured by two laws (a) Mo. Laws 1895, p. 8, sec. 8; R. S. Mo. (1899) sec. 7277; R. S. Mo. (1909) sec. 6097; R. S. Mo. (1919) sec. 5122; (b) Mo. Laws, Extra Session 1895, p. 43, sec. 98; R. S. Mo. (1899) sec. 7367; R. S. Mo. (1909) sec. 6187; R. S. Mo. (1919) sec. 5213.

(5) The laws were repealed and a similar provision enacted in 1921. Mo. Laws 1921, p. 377, sec. 96.
(6) Applied to cities having populations in excess of 300,000 until 1909 when the law became applicable only to cities having populations in excess 500,000. Mo. Laws 1897, p. 222, sec. 4; Mo. Laws 1909, p. 846, sec. 1; R. S. Mo. (1909) sec. 11032; R. S. Mo. (1919) sec. 11458.
(7) Applied to cities having populations in excess of 300,000 until 1921 when (5) superseded the law. Mo. Laws 1903, p. 191, sec. 42; R. S. Mo. (1909) sec. 6230; R. S. Mo. (1919) sec. 5257.

* Since 1879 the legislature has enacted a number of laws relating to the procedure of claiming exemptions. See R. S. Mo. (1919) sec. 6683; R. S. Mo. (1919) sec. 6716 and sec. 6717; R. S. Mo. (1919) sec. 6685; R. S. Mo. (1919) sec. 6705.

E. CONCLUSION

The establishment of a scientific system of jury exemptions in Missouri will require a complete revision of the exemption laws which are in force at the present time. Seven statutes provide for permanent jury exemptions under the general law,[32] and four pertain to exemptions in cities,[33] of certain classes. Jury exemptions are determined by public policy. No effort has been made to evaluate the wisdom of the exemptions which the legislature has allowed. It seems logical and consistent, however, that persons exempt in one community should be exempt in others as well. Why railroad employees should be exempt in all cities having populations of more than 100,000, but not in smaller cities cannot easily be explained.[34] It might be argued that such persons are needed for jury service in the smaller communities. There are two replies to this argument. In the first place, where the population is less, fewer criminal and civil actions will be heard, whether the ratio varies according to population or not. In the second place, if the persons exempt in the large cities are needed in the small cities because of the scarcity of jurors, then the margin of eligible jurors is so small as to make the satisfactory working of the jury system a matter of grave doubt.

In the light of the facts brought out in the consideration of exemptions from jury service it seems clear that all the purposes which the legislature and the courts have had in mind could be fully satisfied by two simple statutes of uniform application providing that:

[32] See Chart I. [33] See Chart III. [34] *Ibid.*

> The following persons shall be exempt from jury service in this state: clergymen, attorneys-at-law, practitioners of medicine (all persons lawfully practicing as aurists, oculists, dentists or other specialists), persons over sixty-five years of age, coroners, grand jurors during their term of service, judges and clerks of election during their term of service, millers, professors and teachers in schools of learning, volunteer firemen, paid firemen, druggists, pharmacists and assistant pharmacists in active service, licensed embalmers, persons actually and regularly employed in the navigation of the Mississippi River or its tributaries, railroad employees, employees of the United States, employees of the State of Missouri, and employees of counties and municipalities of the State of Missouri.
>
> A temporary exemption for one year shall be granted to any persons who has rendered jury service in a case (or in several successive cases not occupying over a week of time, provided that no person shall be discharged before the termination of a case) during any term of court.

Without doubt the many classes of persons exempt from jury service tend to reduce the standard of the jury, but under conditions existing today, it is almost imperative that these exemptions be allowed. A more serious problem arises, however, in connection with the large number who are excused by the judges before the impanelling of the juries. As Judge Grimm has pointed out,[35] such persons are usually more intelligent and more capable than many who are required to serve. A single exemption here and an occasional excuse there are not material in affecting the standard of the mass of jurors, but it is the sum total of persons exempt and excused whose absence has such a profound effect on the quality of juries. It has been observed that there is a sound basis, public policy, for exempting jurors; except in rare instances, there probably is no such cause for excusing jurors. In order to improve the standard of the average juror, it is imperative that the number of persons excused from jury duty be materially reduced.

Willis B. Perkins has remarked that adequate provision should be made for the comfort and accommodation of the jurors while engaged in the performance of their duty, and that when they have good quarters in which to sleep, when they are furnished better food, and rest rooms, jurors will not be so inclined

[35] See Insert pp. 234, 235, *supra*.

to invent or seek excuses to avoid service.[36] Some persons have suggested that in these particulars the situation in Missouri is not the best. However, no statement to this effect can be made without an extensive study of juries throughout the state.

Judge Grimm's suggestions that citizens should be impressed with their duty to serve on juries, and that judges should be impressed with their responsibilities in jury trials are obviously basic, but little can be achieved in those directions until the community is aroused to a fuller respect for jury service. As long as jury service is in disrepute, as long as capable citizens endeavor to avoid their duty, only rarely will competent juries sit in court. If the people could realize the very important functions which the courts perform in society today, they would more willingly serve on juries, for they would realize how closely such service is bound up with their own welfare. Possibly, a series of statutes, calculated to penalize persons and judges who connive to excuse without cause qualified jurors would reduce the number of persons seeking to avoid jury duty.

III. CHALLENGES FOR CAUSE

A. INTRODUCTION

The right to a fair and impartial trial by jury at common law was secured, in part, through the use of the privilege of challenging for cause. Such a challenge was made either to the array or to the polls, depending upon whether the competence of the entire panel or individual jurors was summoned into question. The court's failure to discharge the panel or the individual juror, when properly challenged, constituted error. As an essential feature of jury trial, challenges for cause are preserved in Missouri under the common law and by statute. This paper will deal with the historical development of challenges for cause in this state.

B. PROCEDURE

1. Time of Stating Exceptions

In order that appellate courts may review the action of a lower court in accepting or rejecting a juror upon the trial of a

[36] Perkins, *Some Needed Reforms in the Methods of Selecting Juries* (1915) 13 MICH. L. REV. 391, 399.

cause, it is essential that the juror be challenged at the proper time. The matter has been regulated by statute. In 1825, the legislature provided that "no exception against any such juror on account of his citizenship, non-residence, estate, or age, or other legal disability shall be allowed after he is sworn or affirmed."[37] The law was amended in 1835, but is substantially the same today as it was at that time.[38]

The reason for the rule is set forth by Judge Napton in an early case in which the competence of a juror was summoned into question for the first time in a motion for a new trial. "If the juror was incompetent, and that incompetency was known to the defendant before the trial, he cannot now seek to reverse the judgment on that ground. . . If . . . either party may receive incompetent jurors, and after taking the chances of the opinion of the juror being in his favor, make it a ground for reversing the verdict, when it is discovered to be otherwise, there could be no end to litigation."[39]

The Missouri courts have held generally that the competency of a juror will not be reviewed for the first time upon a motion for a new trial.[40] The best statement of the rule is found in the recent case of *State v. Ferris*, in which it was held that an objection based on the claim that one of the jurors had prejudged the case was made too late, in the absence of a showing of definite facts concerning the exact time when counsel received knowledge of the juror's incompetence, since in case it was known or was discoverable by the exercise of ordinary diligence, it should have been brought to the attention of the trial court at the proper time.[41] If, however, counsel has made reasonable

[37] R. S. Mo. (1825) p. 467, sec. 6.

[38] "No exception against any juror, on account of his citizenship, non-residence, state or age, or other legal disability shall be allowed after the jury are sworn." R. S. Mo. (1835) p. 343, sec. 8; R. S. Mo. (1845) p. 627, sec. 8; R. S. Mo. (1855) p. 910, sec. 9; G. S. Mo. (1865) p. 597, sec. 3; R. S. Mo. (1879) sec. 2778; R. S. Mo. (1889) sec. 6061; R. S. Mo. (1899) sec. 3763; R. S. Mo. (1909) sec. 7260; R. S. Mo. (1919) sec. 6608.

[39] Lisle v. State (1840) 6 Mo. 426, 430, 432.

[40] State v. Jackson (1888) 96 Mo. 200, 9 S. W. 642; Frank Hart Realty Co. v. Ryan (1921) 288 Mo. 188, 232 S. W. 126; Vierling v. Stifel Brewing Co. (1884) 15 Mo. A. 125; Boleter v. Roy (1890) 40 Mo. A. 234; Pitt v. Bishop (1893) 53 Mo. A. 600.

[41] State v. Ferris (Mo. 1926) 16 S. W. (2d) 96; accord, Pitt v. Bishop (1893) 53 Mo. A. 600.

effort to ascertain the juror's competency in due course of trial, and thereafter the juror is found to have prejudged the case, the objection will be considered in a motion for new trial. Such was the intent of the legislature.[42]

It has been held that the statute concerning the time when challenges may be made takes precedence over other statutes providing that persons possessing certain enumerated legal disabilities shall not serve as jurors.[43] Objections to the competency of jurors, after the jury are sworn, are made too late.[44]

Stated somewhat differently, the law is that ordinarily the competency of a juror will not be reviewed on appeal unless he was challenged in accordance with the statute.[45]

In criminal cases, the legislature early adopted a supplementary statute, designed to provide a method for securing at the discretion of the judge the discharge of an incompetent juror after the jury was sworn. The appellate courts seem never to have taken occasion to refer to this statute. First enacted in 1835, the law is essentially the same today as it was at the time of its original passage. "All challenges for cause may be tried by the court, on the oath of the person challenged, or by triers[46] on other evidence, and such challenges shall be made before the juror is sworn; but if the cause of challenge be discovered after a juror is sworn, and before any part of the evidence is de-

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[42] State v. Ross (1859) 29 Mo. 32; accord, State v. Barr (Mo. A. 1929) 20 S. W. (2d) 599. See State v. Baker (Mo. 1930) 24 S. W. (2d) 1039.

[43] R. S. Mo. (1919) sec. 6608.

[44] State v. France (1882) 76 Mo. 681; State v. Waller (1885) 88 Mo. 402; State v. Myers (1906) 198 Mo. 225, 94 S. W. 242; State v. Sartino (1908) 216 Mo. 408, 115 S. W. 1015; State v. Wilson (1910) 230 Mo. 647, 132 S. W. 238; State v. Davis (1911) 237 Mo. 237, 140 S. W. 902; State v. Parsons (Mo. 1926) 285 S. W. 412; State v. Murray (1926) 316 Mo. 31, 292 S. W. 434; State v. Hicks (Mo. 1928) 3 S. W. (2d) 230; Orr v. Bradley (1907) 126 Mo. A. 146, 103 S. W. 1149; Knight v. Kansas City (1909) 138 Mo. A. 153, 119 S. W. 990; Pemiscott Land & Cooperage Co. v. Davis (1910) 147 Mo. A. 194, 126 S. W. 218; Voghts v. Kansas City Rys. Co. (Mo. A. 1920) 228 S. W. 526; Koontz v. Wabash Ry. Co. (Mo. A. 1923) 253 S. W. 413; State v. Barr (Mo. A. 1929) 20 S. W. (2d) 599.

[45] City of Tarkio v. Cook (1893) 120 Mo. 1, 25 S. W. 202; State v. Shoemaker (Mo. 1916) 183 S. W. 322; State v. Dooms (1919) 280 Mo. 84, 217 S. W. 43; State v. Ivy (Mo. 1917) 192 S. W. 737; State v. Garrett (1920) 285 Mo. 279, 226 S. W. 4; Frank Hart Realty Co. v. Ryan (1921) 288 Mo. 188, 232 S. W. 126; Loeffler v. Keokuk (1879) 7 Mo. A. 185.

[46] The words, "by triers," have been omitted from the statute since 1879.

livered, he may be discharged, or not, in the discretion of the court."[47]

Of vital importance in connection with procedure in criminal cases, relating both to challenges for cause and exemptions from jury service is a statute which was enacted in 1835 and which continues in effect today. "The proceedings prescribed by law in civil cases, in respect to the impaneling of jurors, the keeping them together, and the manner of rendering their verdict shall be had upon trials on indictments and prosecutions for criminal offenses, except in cases otherwise provided by statute."[48]

2. Challenges to the Array and to the Polls

A challenge to the array is a challenge to the entire panel of jurors. Such a challenge, at common law and under Missouri practice, must precede the challenge to the polls, which is a challenge to individual jurors.[49] After an exception is taken to a single juror, a challenge to the entire panel is invalid unless such a challenge has already been made.[50] Moreover, the common law practice, unabrogated in this state, is that a challenge to the array must be in writing.[51] This does not apply to a challenge to the polls.[52]

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[47] R. S. Mo. (1835) p. 490, sec. 12; R. S. Mo. (1845) p. 880, sec. 13; R. S. Mo. (1855) p. 1191, sec. 15; G. S. Mo. (1865) p. 849, sec. 14; R. S. Mo. (1879) sec. 1898; R. S. Mo. (1889) sec. 4198; R. S. Mo. (1899) sec. 2617; R. S. Mo. (1909) sec. 5221; R. S. Mo. (1919) sec. 4015.

[48] R. S. Mo. (1835) p. 490, sec. 14; R. S. Mo. (1845) p. 880, sec. 15; R. S. Mo. (1855) p. 1191, sec. 17; G. S. Mo. (1865) p. 850, sec. 16; R. S. Mo. (1879) sec. 1906; R. S. Mo. (1889) sec. 4306; R. S. Mo. (1899) sec. 2625; R. S. Mo. (1909) sec. 5229; R. S. Mo. (1919) sec. 4023; cited in State v. Lewis (Mo. 1929) 20 S. W. (2d) 529.

[49] Thompson, TRIALS (2d ed.) sec. 91; State v. Weeden (1895) 133 Mo. 70, 34 S. W. 473; State v. Powers (1896) 136 Mo. 194, 37 S. W. 936.

[50] Thompson, TRIALS (2d ed.) sec. 91; State v. Clark (1894) 121 Mo. 500, 26 S. W. 562; State v. Weeden (1895) 133 Mo. 70, 34 S. W. 473; State v. Taylor (1896) 134 Mo. 109, 35 S. W. 92.

[51] Samuels v. State (1831) 3 Mo. 68; State v. Clark (1894) 121 Mo. 500, 26 S. W. 562; State v. Taylor (1896) 134 Mo. 109, 35 S. W. 92; State v. Brennan (1901) 164 Mo. 487, 65 S. W. 325; State v. Hottman (1906) 196 Mo. 110, 94 S. W. 237; State v. Church (1906) 199 Mo. 605, 98 S. W. 16; State v. Ivy (Mo. 1917) 192 S. W. 737; State v. Garrett (1920) 285 Mo. 279, 226 S. W. 4; State v. Ray (Mo. 1920) 225 S. W. 969.

[52] State v. Clark (1894) 121 Mo. 500, 26 S. W. 562.

The rule consistently followed[53] that challenges for cause must be specifically recited, is expounded by Judge Sherwood in a leading case. "In making . . . challenges for cause, this formula was observed at the close of the examination of each veniremen: 'Counsel for defendant objected to this juror as disqualified and not qualified to sit as a competent juror in this cause, and challenged said juror for cause. Objection and challenge overruled, to which ruling defendants excepted.' Now nothing is better settled than that challenges for cause must be *specifically* stated. . . Fairness to the court and to adverse counsel alike demand the grounds of the challenge for cause be particularly set forth."[54]

However, there is a gloss on the general rule which was stated by Judge Sherwood. Judge Reynolds of the Saint Louis Court of Appeals in a well written opinion said, "There is no room for the contention over the correctness of this (that challenges must be specifically stated) as a general rule, but its application, as in all rules, must depend on the facts in any particular case. The reason for the definiteness in objection as well as in challenge is that the trial court as well as this court may know exactly what is required to be ruled upon. . . In the case at bar, it is obvious that the challenge was grounded upon prejudice, confessed by the juror to have been entertained by him. No other disqualification is suggested and the challenge could have been aimed at no other ground."[55]

The decision in the Court of Appeals' case appears to be sound. When the court and counsel are familiar with the causes for the objection to a juror, formalities of procedure should not inter-

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[53] State v. Albright (1898) 144 Mo. 638, 46 S. W. 620; State v. Soper (1898) 148 Mo. 217, 49 S. W. 1007; State v. McGinnis (1900) 158 Mo. 105, 59 S. W. 83; State v. Evans (1900) 161 Mo. 95, 61 S. W. 590; State v. Miles (1906) 199 Mo. 530, 98 S. W. 25; State v. Forsha (1905) 190 Mo. 296, 88 S. W. 746; State v. McCarver (1905) 194 Mo. 717, 92 S. W. 684; State v. Myers (1906) 198 Mo. 225, 94 S. W. 242; State v. Bobbitt (1908) 215 Mo. 10, 114 S. W. 511; State v. Wooley (1908) 215 Mo. 620, 115 S. W. 417; State v. Tucker (1910) 232 Mo. 1, 133 S. W. 27; State v. Fields (1911) 234 Mo. 615, 138 S. W. 518; State v. Mace (1914) 262 Mo. 143, 170 S. W. 1105; State v. Ray (Mo. 1920) 225 S. W. 969; State v. Poor (1921) 286 Mo. 644, 228 S. W. 810; State v. Craft (1923) 299 Mo. 332, 253 S. W. 224.

[54] State v. Taylor (1896) 134 Mo. 109, 142, 143, 35 S. W. 92.

[55] Carroll v. United Rys. Co. (1911) 157 Mo. A. 247, 262, 137 S. W. 303.

fere with fundamental principles of justice. On the other hand, as the courts have pointed out, it is a wise policy to enforce the rule that challenges should be specifically stated in order that the parties may apprehend the reason for the objection.

3. Discretion of Trial Court in Discharging Jurors; Appellate Review

The rule generally approved is that the trial court possesses a large discretion in the selection and impaneling of the jury.[56]

In the leading case of *State ex rel. Goldsoll v. Bank,* decided in 1883, which, however, states a broader rule than that later followed, the court held, "The decision of the court accepting or rejecting a juror, is the decision of a question of fact under the law, and it should be regarded in appellate courts like the decision of any other question of fact which it becomes the duty of the court to decide. If, when it comes up for review, it is supported by evidence, it ought not to be disturbed, although the seeming weight of evidence may be against it. The trial court is better able to pass on such a question than an appellate court."[57]

In a case decided in 1892 the court said, "But while the disqualification of a juror under the statute[58] is a pure question of law and is to be reviewed as such, the disqualification of a juror for other causes is a question of fact, and the finding of the trial court thereon is conclusive on appeal, unless it is clearly and manifestly against the weight of the evidence."[59] While the courts have often held that the decision of a trial court in the selection of jurors will not be reversed unless it is clearly and

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[56] Stoner v. State (1836) 4 Mo. 368; State v. Brooks (1887) 92 Mo. 542, 5 S. W. 257; State v. Brown (1905) 188 Mo. 451, 87 S. W. 519; Joyce v. Railroad (1909) 219 Mo. 344, 118 S. W. 21; State v. Taylor (1896) 134 Mo. 109, 35 S. W. 92; Quirk v. Railroad (1919) 200 Mo. A. 585, 210 S. W. 103; Bright v. Sammons (Mo. A. 1919) 214 S. W. 425; Robbins v. Olson-Schmidt Const. Co. (Mo. A. 1919) 215 S. W. 779; State v. Poor (1921) 286 Mo. 644, 228 S. W. 810; Dorton v. Railroad (1920) 204 Mo. A. 262, 224 S. W. 30; Kelley v. Sinn (Mo. A. 1925) 277 S. W. 361; State v. Ingram (1926) 316 Mo. 268, 289 S. W. 637; State v. Tally (Mo. 1929) 22 S. W. (2d) 787.

[57] (1883) 80 Mo. 626, 632.

[58] Now R. S. Mo. (1919) sec. 6632; See p. 255, *infra.*

[59] Coppersmith v. Railroad (1892) 51 Mo. A. 357, 365.

manifestly against the weight of the evidence,[60] the distinction drawn by the court in this case between statutory and other grounds of exclusion is difficult to support.

A reasonable rule appears in the case of *Glascow v. Railroad,* decided in 1905. "The court was right in overruling the challenge because the facts stated did not disqualify the juror. But the authority of the court in such case is not limited to a decision of the strict legal question of the qualifications of a juror; it has a discretion to be exercised in the administration of justice in which it may excuse a juror who although not legally disqualified yet whose sitting is reasonably liable to fill either party with an apprehension of unfairness. A court in the exercise of that discretion will not attempt to allay an unreasonable suspicion, but when it can remove a cause of reasonable apprehension on the one side without injuring in any degree the rights of the other or giving the other cause for a similar reasonable apprehension, it is the right and duty of the court to do so, and when in that respect the court exercises a sound judicial discretion its ruling will not be disturbed. The trial court stands closer to the source of justice than any other tribunal, because much of the administration of justice depends on the wise exercise of a discretion that the law has reposed in him alone. We are satisfied that the court exercised its discretion wisely in excusing this juror."[61]

In the leading case of *Theobald v. Transit Co.,* also decided in 1905, the Supreme Court in handing down a logical and well written opinion, attacking squarely and directly the holding in the *Bank* case, said, "The question of the qualification of a juror is a question to be decided by the court and not one to be decided by the juror himself. It is the prerogative and duty of

[60] McCarthy v. Railroad (1887) 92 Mo. 536, 4 S. W. 516; Ruschenberg v. Railroad (1901) 161 Mo. 70, 61 S. W. 626; McManama v. Railroad (1913) 175 Mo. A. 43, 158 S. W. 442; Shore v. Dunham (Mo. A. 1915) 178 S. W. 900; Richardson v. Railroad (1921) 288 Mo. 258, 231 S. W. 938; Johnson v. Electric Light Co. (Mo. A. 1921) 232 S. W. 1095; Ternetz v. Lime & Cement Co. (Mo. 1923) 252 S. W. 65; Parlon v. Wells (Mo. 1929) 17 S. W. (2d) 528; State v. Taylor (1896) 134 Mo. 109, 35 S. W. 92; State v. Baker (Mo. 1926) 285 S. W. 416; State v. Walton (1881) 74 Mo. 271; State v. Brooks (1887) 92 Mo. 542, 5 S. W. 257; State v. Bauerle (1898) 145 Mo. 1, 46 S. W. 609; State v. Poor (1921) 286 Mo. 644, 228 S. W. 810.

[61] Glascow v. Railroad (1905) 191 Mo. 347, 356, 89 S. W. 915.

the trial court to exercise a wise, judicial discretion in this regard, and the conclusion of the court should rest upon the facts stated by the juror with reference to his state of mind, and should not be allowed to depend upon the conclusions of the juror as to whether or not he could or would divest himself of a prejudice he admitted existed in his mind. . . It is proper to examine a juror as to the nature, character, and cause of his prejudice or bias, but it is not proper to permit the juror, who admits the existence in his mind of such prejudice or bias, to determine whether or not he can or cannot, under his oath, render an impartial verdict. Such a course permits the juror to be the judge of his qualifications, instead of requiring the court to pass upon them as questions of fact."

"It is altogether a mistaken idea that the ruling of the trial court on such questions is conclusive and not subject to review. In some cases it has been loosely said that the ruling of the court on such questions is like the ruling of the trial court in law cases, and that where there is any evidence to support the ruling an appellate court will not review the same. . . It is the discretion exercised by the trial judge which is the subject of review. In approaching the decision of that question an appellate court is guided by the same rule that obtains with reference to the review of discretionary judicial acts of inferior tribunals. Great deference is to be paid to the finding of a trial judge, but that finding is not conclusive, and where the facts are, as here practically undisputed, such ruling is subject to review on appeal. Otherwise the whole power and authority as to the selection of jurors would be vested in the trial court, and it is against the policy of our law to permit any ruling in a *nisi prius* court to be beyond review and correction by an appellate court. Accorded such power, all else would be a foregone conclusion, and a litigant would be entirely at the mercy of the trial judge, and the usefulness and propriety of appellate courts, would, to a large extent be diminished."[62]

The apparent purpose of the *Theobald* opinion was to lay down a clear rule of law which the courts in this state could follow thereafter. The Supreme Court in a case decided in 1913 reached its conclusion by citing the *Bank* case as authority; at

[62] (1905) 191 Mo. 395, 417, 418, 90 S. W. 354.

the same time it referred approvingly to the *Theobald* case, but seems not to have noticed that the latter case directly overruled the holding in the former.[63] In a case decided in 1920, reference was made to the *Theobald* case and part of the decision was quoted with approval.[64]

In the light of the conflicting views expressed by the courts of appeals and the Supreme Court from time to time, it would seem advisable to analyze the question anew and reach a final decision which would end all doubts and uncertainties which now confront practicing attorneys in the trial of a cause. As a starting point for a judicious re-analysis no case presents a better view and a more reasonable approach than *Theobald v. Transit Co.*

Trial courts would profit by the advice offered by Judge Faris of the Supreme Court. "In passing we take the opportunity to say that the small trouble of telling an incompetent juror to stand aside and of calling . . . a competent one to take his place, ought so lightly to weigh against the hazard of the case of refusing to take this step, and against the ofttimes outrageous unfairness to a defendant on trial, mayhap for his life, that ordinarily neither the court *nisi* nor the State's counsel, out of the abundance of caution and impartiality, should ever take so momentous a chance. But for most unaccountable reasons, we have long observed that in a great majority of cases the moment the defense undertakes to disqualify a juror the State (aided more often than necessary by the trial court) rushes to the juror's relief as if the particular juror were Atlas and the world rested on him. It is no reflection on the trial court or on the State's attorney to have counsel for defendant disqualify a proposed juror; it is more often a reflection on both judge and counsel when they refuse to permit it. With the world absolutely filled with unprejudiced jurors, error in this behalf is usually gratuitous and unnecessary, a few notorious *causes celebres* excepted.[65]

4. Retrials Resulting From Errors in Rejecting Challenges

Courts of this state all agree that a man is entitled to an un-

[63] McManama v. Railroad (1913) 175 Mo. A. 43, 158 S. W. 442.
[64] Vessels v. Light & Power Co. (Mo. 1920) 219 S. W. 80.
[65] State v. Mace (1914) 262 Mo. 143, 154, 170 S. W. 1105.

prejudiced jury of his peers. The problem presenting itself is whether, if a man has received such a trial but only through the use of one or more of his peremptory challenges, he is or is not entitled to a new trial, provided that the juror peremptorily challenged is admittedly incompetent. On this question the appellate courts have handed down contradictory opinions.

In a case in 1876 before the Saint Louis Court of Appeals, where a challenge for cause had been overruled by the trial court and, thereafter, the juror was challenged peremptorily, the court held that it manifestly appeared that defendant was in no way prejudiced by the action of the trial court in accepting this juror, except on the erroneous theory that peremptory challenge means the right to select, and not the mere right to exclude.[66]

And in a case before the Supreme Court in 1929, it was held that the refusal of the trial court to sustain plaintiff's challenge of a venireman for cause, if error, was harmless, since the venireman was later challenged peremptorily. The court pointed out that the verdict in this case was unanimous, while under the Constitution, a verdict of three-fourths of the jurors would have sufficed.[67]

In a case in 1905, the Supreme Court expressed a totally different opinion. "Under our statute each party is absolutely entitled to three peremptory challenges. The statute also gives parties litigant the right to challenge a juror for cause. If error appears in the ruling of the court on a challenge for cause that question should be decided wholly independent of any consideration of whether the party litigant had or had not exhausted his peremptory challenges. In other words, the statute provides for two classes of challenges, one for cause and the other peremptorily without assigning any cause. And in the determination of the question of the propriety of the ruling upon a challenge for cause, it is improper to mix with it a consideration of the question as to whether or not the complaining party had exhausted his peremptory challenges."[68]

The Saint Louis Court of Appeals in 1911 reversed the position it had taken in 1876. The court held, "The result of overruling the challenge for cause was that counsel for defendant

[66] Eckert v. Transfer Co. (1876) 2 Mo. A. 36, 43.
[67] Parlon v. Wells (Mo. 1929) 17 S. W. (2d) 528.
[68] Theobald v. Transit Co. (1905) 191 Mo. 395, 424, 90 S. W. 354.

was compelled to use one of his three peremptory challenges to which he was entitled by law, to get rid of this disqualified juror, whom he had duly challenged. Counsel for respondent urges that the verdict of the jury was unanimous and that defendant had accepted the jury and was not hurt. That argument will not do as it assumes the whole point in issue."

"The right to a fair and unprejudiced jury is at the very foundation of the right of trial by jury. If there are any doubts as to the qualifications of a venireman, they should be solved against the one challenged. A party submitting his case to the arbitrament of a jury is entitled to a jury, every member of which is a qualified juror—above all doubt or question. The law requires a panel of eighteen qualified men—in a civil case—from which the jury is to be struck. Even when the eighteen qualified men are selected, the law gives each party to the action the right to strike off three names without requiring cause for the act. Each party is entitled to exercise this peremptory challenge of three men out of a panel of competent, qualified jurors."[69] The judgment was reversed.

The theory referred to as erroneous in the case of 1876 that peremptory challenge means the right to select, and not the mere right to exclude, has been somewhat more broadly stated. "No party has a right to have a particular juror or set of jurors. The privilege of challenge is a right to reject, and not a right to select."[70] Now the true argument which the court overlooked in 1876 is the argument forcibly presented in 1911, namely, that the law requires a panel of eighteen qualified men—in a civil case—from which the jury is to be struck. On any other theory, the statute providing for peremptory challenges is reduced to a nullity. Such a line of reasoning, followed to its logical conclusion, would provide in a civil case that even though three jurors should have been excused when challenged for cause, since those jurors were challenged peremptorily, the challenging party would have no grounds of complaint. Pursuing this line of reasoning even a further step, it may be assumed that six incompetent jurors are permitted to remain on the panel after being duly challenged for cause and thereafter three are

[69] Carroll v. United Rys. Co. (1911) 157 Mo. A. 247, 264, 137 S. W. 303.

[70] O'Brien v. Vulcan Iron-Works (1879) 7 Mo. A. 257; See State ex rel. Railroad v. Slover (1896) 134 Mo. 607, 36 S. W. 50.

challenged peremptorily. It might be argued that since a verdict by nine of a jury of twelve is valid in a civil case, the presence of the three incompetent jurors does not affect the verdict. Truly, as the court pointed out in 1911, such reasoning assumes the whole point. Moreover, while the selection-rejection argument is generally accepted and is valid when properly used, it is not sound when applied to peremptory challenges, for the purpose of such challenges is to permit each party to reject a certain number of jurors on the panel who are qualified; the peremptory challenge has never been considered as a secondary form of challenge for cause.

The failure to challenge a juror peremptorily after a challenge for cause has been overruled constitutes a waiver of the challenge for cause on appeal.[71] This rule of law, doubtless, is responsible for the policy of counsel in challenging peremptorily after the challenge for cause has been overruled. Decisions by some courts that the party has no just ground for complaint after the juror objected to has been removed produce anomalous situations. The procedure must be followed for the appeal to be perfected, and thereafter the complaining party is informed that he has no ground for objection because the juror is not on the panel. To use a homely illustration, the courts treat the problem in the same way as does the mother who gives her child candy, and after the sweet has been consumed, punishes the infant for eating it. In order to avoid the evil results naturally ensuing from the line of decisions to which reference has just been made, the courts would have to declare that an incompetent juror retained on the panel after challenge for cause, and duly challenged peremptorily, should necessitate a reversal of the trial court under the present theory of jury trial.

C. QUALIFICATIONS OF JURORS UNDER THE GENERAL LAW

1. General Provisions

In 1825 the legislature provided that "every petit juror shall be a free white male citizen of this state, and resident within

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[71] Thompson, TRIALS (2d ed.) sec. 120; Carroll v. United Rys. Co. (1911) 157 Mo. A. 247, 137 S. W. 303; Pratt Grain Co. v. Schreiber (1923) 213 Mo. A. 268, 249 S. W. 449; Williamson v. Transit Co. (1907) 102 Mo. 345, 100 S. W. 1072.

the county, above the age of twenty-one years."[72] The law remained substantively the same until 1865[73] when it was modified to read as follows: "Every juror, grand and petit, shall be a white male citizen of the state, resident in the county, sober and intelligent, of good reputation, over twenty-one years of age, and otherwise qualified."[74] In 1879, the word "white" was omitted from the statute, thus making negroes and other colored peoples eligible for service on the same footing as whites. The law, as amended in 1879, continues in effect today.[75]

The statute has been invoked but seldom, and then primarily on the ground that jurors on the panel were not citizens of the state and residents of the county where the trial was being held. The Supreme Court has ruled that residence in the state and county for a period of time varying from thirty days to five months is sufficient to qualify the juror to serve under the statute, provided that the juror has shown his intention of remaining permanently in the county.[76] A person duly qualified to vote is a citizen within the meaning of the statute.[77] However, "while the right to exercise the elective franchise is the highest evidence of citizenship, a man may be a citizen of the county in which he permanently resides without possessing the necessary qualifications of a voter," and such a person is a competent juror.[78]

2. Qualifications in Civil Cases

a. Eligibility of Residents of City or County When City or County Is a Party

"At common law, inhabitants and taxpaying citizens of a municipality were held to be incompetent to sit as jurors in a cause wherein the municipality was a party because of their in-

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[72] R. S. Mo. (1825) p. 467, sec. 6.

[73] R. S. Mo. (1835) p. 343, sec. 6; R. S. Mo. (1845) p. 627, sec. 6; R. S. Mo. (1855) p. 910, sec. 3.

[74] G. S. Mo. (1865) p. 597, sec. 2.

[75] R. S. Mo. (1879) sec. 2777; R. S. Mo. (1889) sec. 6060; R. S. Mo. (1899) sec. 3762; R. S. Mo. (1909) sec. 7259; R. S. Mo. (1919) sec. 6607.

[76] State v. France (1882) 76 Mo. 681; State v. Fairlamb (1893) 121 Mo. 137, 25 S. W. 895.

[77] State v. Pagels (1887) 92 Mo. 300, 4 S. W. 931; State v. Burns (1898) 148 Mo. 167, 49 S. W. 1005.

[78] State v. Fairlamb (1893) 121 Mo. 137, 150, 25 S. W. 895.

terest, though remote, by being compelled to contribute their mite to the payment of any judgment obtained against the municipality."[79] The same rule has been held to apply where a county is a party to an action.[80]

In 1825, the legislature abandoned the common law rule concerning counties. The statute then enacted provided that, "in all actions brought by or against any county, the inhabitants of the county so suing, or being sued, may be jurors, . . . if otherwise competent and qualified.[81] The law remained virtually unchanged until 1889, when it was amended so as to include cities in the same category with counties.[82] With this change the law is still in force.[83]

The statute has been invoked on a number of occasions. In a case decided in 1848, Judge Scott said, "The objection to the jurors was a valid one. It is a clear principle that jurors must be *omni exceptione majores*, free from every objection and wholly disinterested. . . Although the legislature has made the inhabitants of a county competent jurors in suits in which the county is a party, it has not relaxed the law as to corporations. A regard to convenience dictated this change in the law. The books are full that challenges are allowed when the issue concerns a corporation or city and they are to make the panel."[84] All early cases are in accord with this ruling.[85]

However, since the amendment of 1889, the courts have held jurors who are residents of a city which is a party to an action competent. As the court said in a recent case, "While we believe that trial courts should use great caution in the selection

[79] City of Cape Girardeau v. Hunze (1926) 314 Mo. 438, 456, 284 S. W. 471.

[80] Eberle v. Board of President and Directors of St. Louis Pub. Schools (1848) 11 Mo. 247.

[81] R. S. Mo. (1825) p. 244, sec. 5.

[82] R. S. Mo. (1835) p. 143, sec. 9; R. S. Mo. (1845) p. 290, sec. 9; R. S. Mo. (1855) p. 503, sec. 9; G. S. Mo. (1865) p. 225, sec. 7; R. S. Mo. (1879) sec. 2801; R. S. Mo. (1889) sec. 6088.

[83] R. S. Mo. (1899) sec. 3790; R. S. Mo. (1909) sec. 7288; R. S. Mo. (1919) sec. 6637.

[84] Eberle v. Board of President and Directors of St. Louis Pub. Schools (1848) 11 Mo. 247, 261.

[85] Fine v. St. Louis Pub. Schools (1860) 30 Mo. 166; Rose v. City of St. Charles (1872) 49 Mo. 509; Fulweiler v. City of St. Louis (1876) 61 Mo. 479; O'Brien v. Vulcan-Iron-Works (1879) 7 Mo. A. 257.

of impartial jurors in the trial of causes, and that, upon the slightest showing of partiality or bias, a juror should be excused by the trial court, we cannot say in the instant case, in view of the existing statute, that the trial court committed reversible error in refusing to excuse as jurors property owners in the sewer district."[86]

The action of the legislature in reversing the common law rule has greatly simplified the task of selecting jurors in cases where counties and municipalities are parties to actions. Resident jurors are probably as well qualified as those brought from outside the county or city, for the loss to each juror in the event of a judgment against the county or municipality is so infinitesimally small as to be of no practical importance.

b. Disqualification of Witnesses, Persons Who Possess Opinions, and Relatives of Parties to Causes

A single statutory provision pertaining to the competency of persons for jury service in civil cases, if such persons are witnesses, have expressed opinions, or are related to parties to the action, is found in the body of the law relating to juries. Historically, the statute first appeared in 1816.[87]

The legislature in 1835 provided that "No witness, or person summoned as a witness, in any civil cause, and no person who has formed or expressed an opinion concerning the matter in controversy, in any such cause, which may influence the judgment[88] of such person, shall be sworn as a juror in the same cause."[89] The significant feature of the statute of 1835 is that it enables individuals to serve as jurors even though they have opinions on the merits of the case, as long as the opinions held do not influence the jurors in reaching their verdict under proper instructions from the court. The statute provides indirectly for the impanelling of more intelligent jurors by removing one of the old common law disqualifications.

In 1845 the statute was amended by a further provision that

[86] City of Cape Girardeau v. Hunze (1926) 314 Mo. 438, 457, 284 S. W. 471; accord, Priddy v. Mackenzie (1907) 205 Mo. 181, 103 S. W. 968, although the case is lacking in historical accuracy.

[87] Ter. Laws p. 447; sec. 7; R. S. Mo. (1825) p. 630, sec. 36.

[88] Under the former law, persons who had formed opinions were disqualified. See R. S. Mo. (1825) p. 630, sec. 36.

[89] R. S. Mo. (1835) p. 463, sec. 16.

persons who were "kin to either party to any such cause, within the fourth degree of consanguinity or affinity" were incompetent.[90] The law is substantively the same today.[91]

The clear wording and meaning of the statute may be the causes for the relatively few cases which have arisen under it. There appears to be but one case in which the statute has been invoked to bring about the discharge of a person summoned as a witness. In that case the court ruled that where members of the panel had been subpoenaed as witnesses for the plaintiff, they were properly discharged by the court under the statute.[92]

The courts have referred to the statute occasionally in ruling on the competency of persons who possess opinions on the case. A juror, summoned in a cause, who was a newspaper reporter, who had heard of the injury resulting in the lawsuit, and who in fact had written up the story for his paper, was held competent when he stated that what he might know of the facts from hearsay would not influence his opinion. The court recognized that hearing the case might recall the facts to the juror's mind, but because of his statement that he could judge the case fairly, he was nevertheless held competent.[93]

However, where jurors have sat or heard testimony in cases involving substantially the same facts, and where as a result they possess opinions as to the merits of the case on which they have been summoned, they are held incompetent even though they assert that they will undertake to render a fair verdict. The courts refer to the statute[94] in concluding that such jurors possess opinions on material facts which are at issue.[95]

Even when a juror has heard the result of the case in a former trial or when from other sources he has gotten a definite impression, he has been held competent if it is clear that his impression will not close his mind to the evidence.[96] "The opinion which

[90] R. S. Mo. (1845) p. 628, sec. 12.

[91] R. S. Mo. (1855) p. 912, sec. 20; G. S. Mo. (1865) p. 599, sec. 22; R. S. Mo. (1879) sec. 2796; R. S. Mo. (1889) sec. 6083; R. S. Mo. (1899) sec. 3785; R. S. Mo. (1909) sec. 7283; R. S. Mo. (1919) sec. 6632.

[92] Boyce v. Aubuchon (1888) 34 Mo. A. 315.

[93] Eckert v. St. Lois Transfer Co. (1876) 2 Mo. A. 36.

[94] R. S. Mo. (1919) sec. 6632.

[95] Hunt v. City of Columbia (1906) 122 Mo. A. 31, 97 S. W. 955; Barnett v. Levee District (1907) 125 Mo. A. 61, 102 S. W. 583.

[96] In re Bowman (1879) 7 Mo. A. 569; Spangler v. Kite (1891) 47 Mo. A. 230.

renders a juror incompetent must be such as would influence his judgment."[97]

Another prohibition of the statute affects persons related to either party to an action within the fourth degree of consanguinity or affinity. Here, again, the statute is very clear, but nevertheless, it has been cited authoritatively in two outstanding cases.

In *Mahaney v. Railroad,* a juror on his *voir dire* examination stated that the plaintiff was a second or third cousin of his wife. He was then asked by counsel for the defendant if that relationship would influence him in reaching a conclusion. He answered in the affirmative and was challenged for cause. Then plaintiff's counsel asked if the juror believed he could try the case impartially under oath. The juror replied that he could so try even his own brother. Defendant's counsel then inquired if he would not be inclined to listen more favorably to plaintiff's evidence. The juror answered that he might. Thereafter the court overruled defendant's challenge for cause. Judge Gantt, in handing down the decision of the Supreme Court, said, "The finding of a trial court as to the qualification of a juror ought not to be disturbed unless it is clearly against the evidence. The trial judge has exceptional advantages to see and know the jurors. Often the manner and tone of voice may indicate prejudice or bias, or the want of either. It would seem, however, that a court ought to have no difficulty in obtaining jurors of good repute who are in no way related to either party. While we would hesitate long before reversing this case for this action alone, we think it is a precedent not to be followed. This juror could hardly be said to have that impartiality which the law guarantees every suitor."[98]

The opinion is well written. It unquestionably manifests the legislative intent, and accords with common sense. The decision assists in the preservation of impartiality in jury trial.

In *Price v. Protection Co.* the plaintiff objected to four jurors on the ground that they were related to certain parties who were insured with the defendant. The court sustained the objection

[97] Spangler v. Kite (1891) 47 Mo. A. 230, 233; McCarthy v. Railroad (1887) 92 Mo. 536, 4 S. W. 516; McManama v. Railroad (1913) 175 Mo. A. 43, 158 S. W. 442.

[98] Mahaney v. Railroad (1891) 108 Mo. 191, 199, 18 S. W. 895.

and excused each of the persons challenged. The question was whether or not error had been committed by the court in excusing these jurors under the statute.[99]

The Kansas City Court of Appeals held, "While a corporation cannot be said to have any kindred, yet as such bodies are composed of natural persons who may have such kindred, it would seem from all the authorities that if a juror be of kindred to any that is of such a body he is incompetent in a cause where such body is a party to the record. The four jurors were within the fourth degree of consanguinity to certain persons who were insured with the defendant and therefore incompetent under the statute. It may be proper to here say that it was conceded that any one who was insured with defendant was, under the law of its organization, a member thereof, subject to the payment of assessments for all losses sustained by it."[100]

The least that can be said of this case is that the defendant was in no way prejudiced by the discharge of the four jurors from the panel. On the other hand, the trial judge, in excusing them under the statute, was performing a duty. In order to preserve impartiality in jury trial, statutes such as the one here referred to may well be liberally construed.

c. Prejudice

While the statute[101] provides for the discharge of jurors who are declared incompetent for certain enumerated causes, there are other grounds for which the court has the right to discharge jurors when challenged for cause. "It is essential that all causes as far as practicable should be tried by wholly impartial triers, and hence, the special designation by statute of certain disqualification creates no limitation against others not so designated."[102] "The statute does not speak of the bias or prejudice of a juror affecting his qualifications, because it is fundamental in our system of jurisprudence that a juror shall be free from bias or prejudice, and that the burden shall not be cast upon the parties litigant to first remove the bias or prejudice of the juror before, or in addition to, proving the facts in the case. The

[99] R. S. Mo. (1919) sec. 6632.
[100] Price v. Protection Co. (1898) 77 Mo. A. 236, 239.
[101] R. S. Mo. (1919) sec. 6632.
[102] Coppersmith v. Railway (1892) 51 Mo. A. 357, 365.

principle of the rule underlying the statute, and affording the ground for challenge for cause, is the same as underlies the doctrine in reference to bias or prejudice of the juror."[103]

For purposes of analysis, challenges to jurors because of prejudice may be considered under three principal headings, first, prejudice based on a knowledge of facts in the case, second, prejudice arising out of acquaintance with a party to the action or a witness, and finally, prejudice resulting from personal bias. These will be approached in the order in which they have been outlined, particular stress being laid on prejudice resulting from personal bias, which has been by far the greatest concern of the courts. In a discussion of this entire problem, it must be observed, to say the least, that the rejection of a juror for prejudice is within the sound discretion of the trial court.[104]

The cases relating to prejudice based on a knowledge of facts in the case are few in number. In a case in which the plaintiff was in the real estate business and two of the jurors were found to be real estate agents, not in business with the plaintiff or interested in the case in any manner, the court held the defendant's challenge for cause properly overruled. The court said, "A merchant, farmer or servant is not disqualified to be a juror in an action to which another merchant, farmer or servant is a party, though the subject-matter may be of peculiar interest to his calling. Very likely every member of the jury selected had an interest of his own in the subject of compensation of agents and brokers, since nearly every person who owns property or engages in business is compelled at some time to employ agents to buy, sell or act for him. An interest of that character 'carries no mark of suspicion either of malice or favor' and, therefore, is not a disqualification. The objection must be ruled against defendant."[105]

In a suit for negligent delay in the shipment of cattle, a juror who was a local freight agent of a road other than the defendant, and who had to deal in handling cattle shipments with the very

[103] Theobald v. Transit Co. (1905) 191 Mo. 395, 422, 90 S. W. 354; accord, Glascow v. Railroad (1905) 191 Mo. 347, 89 S. W. 915; State v. Chatham National Bank (1881) 10 Mo. A. 482.

[104] See pp. 246-249, *supra*.

[105] Ballentine & Boone v. Mercer (1908) 130 Mo. A. 605, 608, 109 S. W. 1037; accord, Walker v. Hassler (Mo. A. 1922) 240 S. W. 257.

same issues which were at issue in this case, was held properly excused upon objection, even though he stated that he could try the case impartially and without relying upon his own knowledge.[106] The court reached the opposite conclusion in a somewhat similar case, however. Where the facts involved a knowledge of the custom of the grain exchange and the juror knew of these facts, but said he could be guided by the law contained in the instructions to the jury, he was held competent.[107] The only conclusion which may be drawn from these two cases is that accepting or rejecting a juror depends on the peculiar circumstances of the case and upon the conduct of the juror while being examined.

Whether or not a juror will be discharged because of his acquaintance with a party to the action or a witness, depends primarily upon the facts of each particular case. The general rule, however, is that when the juror says that his association or friendship with one of the parties to a cause or his counsel will embarrass the juror and for that reason he prefers not to sit in the case, no error is committed in excusing the juror when challenged for cause.[108]

But the mere fact that the juror is acquainted with an attorney in the case raises no suspicion of prejudice. "Some of the older practitioners at the bar could scarcely appear before a panel of jurors without meeting acquaintances among them and it would be a novel idea that the fact of such acquaintanceship should be held up as a ground for challenge for cause."[109] In fact, in a case in which a number of jurors were excused when challenged because they knew defendant's counsel, as neighbors, as members of the same church, or in a business way, but still stated that they could try the case fairly and without impartiality, the court held that the action of the trial judge was reversible error. The court suggested that the mere acquaintance of counsel and jurors is not proof of prejudice.[110] The

[106] McFall v. Railroad (Mo. A. 1916) 185 S. W. 1157.

[107] Pratt Grain Co. v. Schreiber (1923) 213 Mo. A. 268, 249 S. W. 449.

[108] Oakley v. Richards (1918) 275 Mo. 266, 204 S. W. 505; Vessels v. Light & Power Co. (Mo. 1920) 219 S. W. 80; Robbins v. Construction Co. (Mo. A. 1919) 215 S. W. 779; Bright v. Sammons (Mo. A. 1919) 214 S. W. 425.

[109] Vojtka v. Pelikan (1884) 15 Mo. A. 471, 478.

[110] Gardner v. Railroad (Mo. A. 1915) 177 S. W. 737.

position taken by the courts in these cases appears entirely logical.

It has been held that counsel may inquire of jurors whether or not they have had any dealings with insurance companies, where counsel have reason to believe that defendant is insured against liability. Failure to allow counsel to ask questions as to such a relationship is reversible error.[111]

The Supreme Court has held that a juror who stated on his *voir dire* that he had known the president of the defendant company for thirty-five years and that their relations were very friendly, but that such friendship would not influence his verdict, and that he would be guided by the evidence and the instructions of the court, was not incompetent.[112] While the trial court had the opportunity of observing the juror and determining his qualifications partly by his demeanor, the case seems extreme. The discharge of such a juror probably would not have constituted error, and it would have eliminated even the bare possibility of a biased juror on the panel.

A somewhat similar factual situation is found in a recent case. The juror whose competency was questioned had lived on the same farm with the plaintiff and before the trial had discussed the case with a man, who after the trial became the plaintiff's husband. The juror stated that he had formed an impression on the merits of the case, but added that he could try it and render a verdict free from any opinion he had formed. The appellate court arrived at the judicious conclusion that "Common knowledge and experience make it almost impossible for two fellow workers, on the same farm, friendly with one another, to impartially try any issue wherein a fellow worker is suing a railroad company for personal injuries."[113]

In a case in which a juror testified that owing to his business relations he wished to keep in the good graces of the defendant,

[111] Smith v. Cab Co. et al. (Mo. 1929) 19 S. W. (2d) 467; accord, Wilson v. Spuhler et al. (Mo. A. 1929) 20 S. W. (2) 556; Davis v. Quermann (Mo. A. 1929) 22 S. W. (2d) 58. Galber v. Grossberg et al. (Mo. 1930) 255 S. W. (2d) 96. When it appears that defendant is insured against losses, it is immaterial whether counsel acts in good or bad faith in questioning veniremen concerning any relations they may have had with defendant's insurer. Wendell v. City Ice Co. (Mo. A. 1929) 22 S. W. (2d) 215.

[112] Tawney v. Railroad (1914) 262 Mo. 602, 172 S. W. 8.

[113] Rooker v. Railroad (1922) 215 Mo. A. 481, 485, 247 S. W. 1016.

but that he could still render a fair and impartial verdict, the juror was held competent.[114]

Prejudice resulting from personal bias covers a wide range of cases including the juror's sympathy for one of the parties, prejudice for or against certain classes of cases, and prejudice resulting from personal and family experience in dealing with a party to the action. Decisions vary materially depending on the facts of each case.

There is only one case in which the question of sympathy played an important part in the decision. A plaintiff brought suit to recover damages for the death of his child, and the juror admitted his sympathies in such a cause but said he could try the case fairly. The juror was challenged, and the objection was overruled. The court said, "Obviously the sympathies which one entertains for the loss of a child in such circumstances do not constitute a strong, and deep impression which will close the mind against the testimony so as to resist its force and combat its effect. On the contrary, such sympathies are to be regarded as in the category of light impressions which may fairly be supposed to yield to testimony in a case. The examination of the juror here discloses that his mind was open so as to enable him to return a proper verdict under the instructions of the court notwithstanding his natural sympathy."[115]

The rule referred to in this decision concerning light impressions is an important one, and is frequently used by the courts in determining the qualification of jurors. That rule will be referred to hereafter as it is invoked in particular cases.

The general rule concerning prejudice against certain classes of cases is that if a juror has such a bias, or prejudice, against the class of cases to which the one on trial belongs that his judgment will be warped, he should not be accepted as a juror; but it ought to appear clearly that his bias is such as to influence his judgment.[116]

In a case in which a juror said that he did not think the "city got a square deal" in the transaction some years previously in

[114] Joyce v. Railroad (1909) 219 Mo. 344, 118 S. W. 21.

[115] Albert v. Railway Co. (1915) 192 Mo. A. 665, 675, 179 S. W. 955.

[116] McCarthy v. Railroad (1887) 92 Mo. 536, 4 S. W. 516; Parlon v. Wells (Mo. 1929) 17 S. W. (2d) 528; McManama v. Railroad (1913) 175 Mo. A. 43, 158 S. W. 442; Vessels v. Light & Power Co. (Mo. 1920) 219 S. W. 80; Johnson v. Electric Light Co. (Mo. A. 1921) 232 S. W. 1095.

which the defendant company had obtained a franchise from the city, it was decided that the opinion held by the juror did not disqualify him from serving in a personal injury case.[117]

An extraordinary case arose in 1845 when the plaintiff, a slave, brought an action to obtain his freedom from the defendant. The request of the defendant was denied to inquire of the jurors if any of them felt bound in conscience to find a verdict in favor of the freedom of the plaintiff, notwithstanding the law might hold him in slavery. The court handed down this significant opinion: "We cannot well conceive how a juror could be considered as indifferent between the parties, who labored under the bias supposed by the question. Nor do we see what objection can be urged against its propriety. An affirmative answer does not tend to the disgrace or infamy of the juror. We know that there are many of our sister states who do entertain such opinions; they may find their way amongst us, and so long as slavery is tolerated in this State, our courts should be clothed with the power of preventing our laws from being openly set at defiance, and under the pretence of administering justice, to permit jurors to trample in the dust the rights of property of our citizens. No loyal or faithful citizen will object to answering the question. He will fully appreciate the motives which prompt it, and while he laments the cause which renders such an inquiry necessary, he yields a ready obedience to the law which prescribes such a test, in order to ascertain his fitness as a juror in cases involving the right to property of the species claimed by the defendant in error."[118]

The opinion is well written, but jurors are more reticent to admit their prejudices than the court believed. The preliminary examination of jurors shows this trait. Whatever the practical difficulties may be in discovering the prejudice, the cases are in accord on the conclusion that prejudice which influences the judgment of a juror against a class of cases disqualifies him.

The general rule pertaining to cases in which the juror shows a prejudice resulting from personal or family experience in dealing with a party to the action is thus summarized by the Supreme Court: "A juror may also be biased by what he deems

[117] Richardson v. Railroad (1921) 288 Mo. 258, 231 S. W. 938.
[118] Chouteau v. Pierre (1845) 9 Mo. 3, 6.

to be his personal interest. In such cases it makes no difference whether that interest is real or imaginary. It is the state of his mind which is the subject of the inquiry and in either case the apprehension of loss or the hope of gain by the result of his action as a juror is an influence with which the litigant ought not unnecessarily be burdened."[119]

In a case in which it appeared that the juror's daughter had at one time been injured by the defendant, the juror stated that the "company didn't do just right in not paying that doctor's bill," but further testified that this would not influence him in arriving at a verdict, nor in any way prejudice or bias his opinion or judgment." The court said, "In the administration of justice it is vital that those who sit in judgment, whether jurors or judges, be free from any prejudice or bias that would in any manner influence them in a decision either upon the facts or the law." But the juror was held competent, the court declaring, "It would seem that his prejudice ought not to disqualify him as a juror, where it does not appear to be a deep seated feeling or impression sufficient to influence him in passing judgment upon the facts under the evidence in the case."[120]

In the case of *Theobald v. Transit Co.* in which the defendant was a street car company, it developed upon *voir dire* examination that eight or nine years before the trial the juror had been thrown off a car. He stated that that fact would influence him, but also that he would be governed by the testimony and instructions of the court and believed he could render an impartial verdict. He added that he had nothing against this defendant, but that since his accident he had had a prejudice against street car companies, which had been removed only during the last five minutes of his *voir dire* examination. The Supreme Court very properly held the juror was incompetent and in doing so declared, "The streams of justice should be kept pure and free from prejudice. In the administration of justice, the courts and all judges, as well as the jurors, should as far as human precaution can avail, be kept free from bias or prejudice."[121]

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[119] Vessels v. Light & Power Co. (Mo. 1920) 219 S. W. 80, 85.

[120] McManama v. Railroad (1913) 175 Mo. A. 43, 49, 51, 158 S. W. 442.

[121] (1905) 191 Mo. 395, 427, 90 S. W. 354; accord, Carroll v. Railroad (1911) 157 Mo. A. 247, 137 S. W. 303.

The decision in the leading case of *Billmeyer v. Transit Co.* is worth noting in great detail, for this and the *Theobald* case are, perhaps, the two most outstanding cases concerning the qualification of jurors in civil cases in Missouri.

In the *Billmeyer* case a juror, who was accepted for service, testified on his examination that he had a prejudice against the defendant company because it came near killing two members of his family; that they were injured by its criminal carelessness and the fact had caused him to entertain a hard feeling against the defendant which he could not get over in the jury box. He testified further as follows:

> Q. You would go in the jury box having the same feeling, the hard feeling you think you have the right to have against the Transit Company? A. I could not get over that.
> Q. And it would require the defendant to make a stronger defense than if the defendant were some other company where you had not been injured at all by an act of the other company? A. Yes, sir.
> Q. In other words, it would require more evidence for you to render a verdict for the Transit Company than some other defendant? A. Yes, sir.

Judge Goode, speaking for the Saint Louis Court of Appeals, said, "That testimony discloses a very strong bias in the mind of the venireman; not exactly a prejudice in the strict sense of that word; for he had not prejudged the case, nor formed an opinion about it. Yet it is plain that he cherished a bitter and resentful feeling against the defendant which would be apt to prevent a dispassionate consideration of the case. It is true the juror swore he did not think his feelings would affect his judgment and that he could give the defendant a fair trial. But his entire testimony produces that conviction that his conception of a trial which would be fair to the defendant, embraced the notion that it would be incumbent on the defendant to clear itself of blame for the accident by stronger evidence than other defendants in similar actions ought to adduce. Such an opinion indicated a spirit of positive hostility that rendered the venireman unfit to perform the duties of a juror. The defendant certainly could not expect, nor likely receive, a fair trial by a man who would refuse to exonerate it from liability unless it made good its defense by an extraordinary weight of evidence—by more

evidence than would be needed to induce him to excuse some other defendant. . . The juror challenged in the court below was not in a mood that left his mind open to a fair consideration of the defendant's testimony and hence disqualified."[122]

The cases to which reference has been made set forth fully and completely the rules concerning prejudice resulting from personal and family experience in dealing with a party to the action. Depending on the facts in each particular case, jurors have or have not been declared incompetent by the courts as the facts tended to bring the case within one classification or another.[123]

It is an established principle of law that when a juror says in answer to a question that he will decide for one party or the other if the evidence is evenly balanced, he is nevertheless competent, if the rest of the examination discloses his ability to try the cause fairly and without bias; but, if instead it appears that the juror also is prejudiced, then he is incompetent.[124]

(To be continued.)

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[122] (1904) 108 Mo. A. 6, 9, 82 S. W. 536.

[123] Gilchrist v. Railroad (Mo. 1923) 245 S. W. 161; Heidbring v. Railroad (1908) 133 Mo. A. 40, 113 S. W. 223; Shore v. Dunham (Mo. A. 1915) 178 S. W. 900; Kennelly v. Railroad (Mo. A. 1919) 214 S. W. 237; Jepson v. Transfer Co. (1922) 211 Mo. A. 366, 243 S. W. 370.

[124] Hudson v. Railroad (1873) 53 Mo. 525; Montgomery v. Railroad (1886) 90 Mo. 446, 2 S. W. 409; Richey v. Railroad (1879) 7 Mo. A. 581; Heidbrink v. Railroad (1908) 133 Mo. A. 40, 113 S. W. 223; Albert v. Railroad (1915) 192 Mo. A. 665, 179 S. W. 955.