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# VOIR DIRE I—EXAMINATION OF JURORS\*

NEWTON C. BRILL\*\*

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\*This article immediately precedes Voir Dire II—discussing voir dire problems relating to insurance. Mr. Thomas Vetter, author of Voir Dire II, also contributed in part to this article.

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The right of trial by jury guaranteed by our Constitution, if it is to be worth anything, must mean . . . the right to a fair and impartial jury.<sup>1</sup>

## I. PURPOSE OF EXAMINATION

Voir dire literally means "to speak the truth"<sup>2</sup> and describes the preliminary examination given prospective jurors to determine their qualifications to serve. Naturally both parties desire a jury favorable to their cause, and this produces a conflict which by its very nature achieves a just result. For as each party weeds out jurors unfavorable to his individual side, a state of neutrality is accomplished, assuring a fair and impartial jury. [This illustrates the importance of this phase of the trial. A slipshod

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1. *Lee v. Baltimore Hotel Co.*, 345 Mo. 458, 463, 136 S.W.2d 695, 698 (1939); *Piehler v. Kansas City Pub. Serv. Comm.*, 357 Mo. 866, 873, 211 S.W.2d 459, 463 (1948).

2. BLACK, *LAW DICTIONARY* 1746 (4th ed. 1951).

voir dire by one attorney could produce a jury favorable to his opponent and actually do injustice to his client.]

Although "the world [is] absolutely filled with competent, unbiased, and unprejudiced jurors,"<sup>3</sup> they must be sought out. The panel presented to counsel may have veniremen who do not possess the basic statutory qualifications,<sup>4</sup> who have formed opinions and already decided the case,<sup>5</sup> who are biased against one party or his case because of identity of interest with the other party through kinship or similarity of experience,<sup>6</sup> or who have strong religious or moral scruples for or against some aspect of the case.<sup>7</sup> Therefore, the purpose of conducting this preliminary examination is to obtain a fair and impartial jury who will decide the case under the evidence presented and the instructions of the court.

## II. CONDUCT OF EXAMINATION

### A. Procedural Aspects

While the drawing, selecting and summoning of the jurors by the proper authorities is governed by statute,<sup>8</sup> the conduct of the voir dire examination may vary from county to county. However, there are certain guidelines which have been established as minimum rights of litigants during such procedure. It is these rights (and their limitations) that will be examined here.

In Missouri, the number of jurors to be examined at one time is properly left to local custom, and the final decision will lie in the discretion of the trial court.<sup>9</sup> No right exists to have any certain number enter the jury box at one time.<sup>10</sup> Normally, a panel of eighteen will be examined with a replacement called for each member excused. This will leave eighteen fully qualified veniremen from which counsel can strike six peremptorily, leaving the final panel of twelve.<sup>11</sup>

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3. State v. Mace, 262 Mo. 143, 155, 170 S.W. 1105, 1109 (1914).

4. Discussed on pages 267-70 *infra*.

5. Discussed on page 286 *infra*.

6. Discussed on pages 284-85 *infra*.

7. Discussed on pages 276-77 *infra*.

8. This area is beyond the scope of this paper. For the proper procedure see Chapters 494, 495, 496, 497 and 498 RSMo 1959 and 1963 Supp. Any challenge to these procedures (a challenge to the array) must be made in *writing* prior to any challenge to the polls on voir dire. State v. Clark, 121 Mo. 513, 26 S.W. 562 (1894); State v. Taylor, 134 Mo. 109, 35 S.W. 92 (1896).

9. State v. Munch, 57 Mo. App. 207 (St. L. Ct. App. 1894).

10. *Supra* note 9. Counsel asked to examine four jurors at a time, but the trial court denied the request and had the entire panel examined.

11. In civil cases plaintiff and defendant each has three peremptory challenges. § 494.200, RSMo 1959. In criminal cases the number will vary according

The first step in qualifying the panel is to swear the veniremen or "put them upon their voir dire."<sup>12</sup> The oath will normally be administered by the judge. Then both counsel begin their systematic inquiry into the qualifications of the panel. Plaintiff, or the State, questions first and is followed in turn by defendant. Each counsel has the opportunity to remark on the nature of the case prior to his questioning.<sup>13</sup> These prefatory remarks set the stage for questions peculiar to the particular action.

As mentioned, the voir dire examination is normally conducted by counsel in Missouri state courts. This is not a *right*, however, for the trial court itself may conduct all or part of the examination.<sup>14</sup> "Such examinations are made for the information of the court to enable it to pass upon the competency of persons selected as jurors, and whether the proper questions are asked by the court, the prosecuting attorney [or counsel for plaintiff] or counsel for defendant is of no consequence."<sup>15</sup> If the trial court does choose to put general questions to the *panel*, counsel has no right thereafter to address the *same* question to each juror *individually*.<sup>16</sup> But if the trial court denies counsel the privilege to ask a pertinent question, and also refuses to do so itself, this would be an abuse of discretion and possibly reversible error.<sup>17</sup> Where the parties are conducting the examination, the court may require that general questions be addressed to the panel collectively instead of individually, in order to save time,<sup>18</sup> or to prevent undue emphasis of the subject matter.<sup>19</sup>

Even if the parties do conduct the examination the court may, of its own motion, discharge a juror from the panel who it feels is incompetent or disqualified to serve even though the juror is not challenged by either

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to the offense. See § 546.180. Peremptory challenges will not be examined in this paper.

12. The oath may vary. An example used and furnished by Judge Carl Wheaton, Municipal Judge of Columbia, Missouri, is: "Do you solemnly swear honestly and truly to answer the questions put to you concerning your qualifications to act as jurors, so help you God?"

13. *E.g.*, "This is a personal injury case in which plaintiff claims that she was struck down in a cross walk by defendant's automobile," or, "This is a trial for first degree murder in which the State will ask the death penalty."

14. *State v. Munch*, *supra* note 9. *Accord*, *State v. Taylor*, 134 Mo. 109, 35 S.W. 92 (1896); *State v. Wooley*, 215 Mo. 620, 115 S.W. 417 (1908); *State v. Ludwig*, 70 Mo. 412, 415 (1879); *overruled for different reasons* in *State v. Fitzgerald*, 150 Mo. 407, 32 S.W. 1113 (1895).

15. *State v. Ludwig*, *supra* note 14, at 415.

16. *State v. Munch*, *supra* note 9.

17. *Id. Accord*, *Loeffler v. Keokuk Packet Co.*, 7 Mo. App. 185 (St. L. Ct. App. 1879).

18. *State v. Wolfe*, 343 S.W.2d 10 (Mo. En Banc 1961).

19. *Bunch v. Crader*, 369 S.W.2d 768 (Spr. Mo. App. 1963).

party.<sup>20</sup> Even if the juror appears qualified from his voir dire examination, it is not error for the trial court to excuse the juror, for neither party has a right to have any particular person on the panel.<sup>21</sup> For the same reasons the court has the discretion to discharge a juror who, though not legally disqualified, is so situated that his presence on the panel might reasonably give either party an "apprehension" of unfairness.<sup>22</sup>

### B. Hypothetical Questions, Questions of Law, Contingencies

Certain questions are improper, not because of their content, but because of the way they are framed. Such inquiry is an attempt to commit or pledge the jurors to a particular fact or view before they have heard any evidence, instructions of the court, or argument of counsel. The appellate courts have consistently disapproved such inquiry and counsel runs the risk of incurring reversible error when such a question is asked. This section will examine examples of such impropriety showing the areas where it frequently arises, and setting out the proper way of phrasing the questions.

#### 1. Evenly Balanced Evidence

An alternate topic might be "Widow v. Corporation," as such a situation is ideal for counsel to manufacture a challenge for cause. Counsel for either party asks "if the evidence in the case should be evenly balanced between plaintiff, an individual, and defendant, a corporation, which way would you incline to find?"<sup>23</sup> If the juror is inclined for the opponent, counsel then challenges for cause, since the juror's answer indicated bias and prejudice for the opponent.

This is not, however, a good challenge, and should be overruled. It is not for the juror to decide how he would find if the evidence should be

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20. *State v. Naylor*, 328 Mo. 335, 40 S.W.2d 1079 (1931). See also *State v. Taylor*, *supra* note 14. That there is no duty for the trial court to make the challenge when a ground for challenge appears and counsel fails to object, see *McCollum v. Schubert*, 185 S.W.2d 48 (K.C. Mo. App. 1944); cf. *Glasgow v. Metropolitan St. Ry. Co.*, 191 Mo. 347, 89 S.W. 915 (1905).

21. *State v. Naylor*, *supra* note 20. This question is considered in more detail in the discussion on appellate review beginning on page 300 *infra*.

22. *Glasgow v. Metropolitan St. Ry. Co.*, *supra* note 20. The discharged juror was a clerk for a corporation whose president was also the president of defendant corporation. Plaintiff had challenged the clerk for cause, which the court denied, but then the court discharged the juror of its own motion.

23. *Hudson v. St. Louis, K. C. & N. Ry.*, 53 Mo. 525, 537 (1873); *Montgomery v. Wabash, St. L. & P. Ry.*, 90 Mo. 446, 2 S.W. 409 (1886); *Keegan v. Kavanaugh*, 62 Mo. 230 (1876); *Albert v. St. Louis Elec. Terminal Ry.*, 192 Mo. App. 665, 179 S.W. 955 (St. L. Ct. App. 1915).

evenly balanced.<sup>24</sup> It is for the court to instruct how to find in such a situation.<sup>25</sup> Further, the only thing which shows prejudice is the juror's statement that he would find against the opponent if the evidence was evenly balanced. If on subsequent questioning the juror states that he has no prejudice against the opponent in particular and that he would determine the case according to the law and the evidence, he is qualified.<sup>26</sup> "The effort to show that the juror was prejudiced against railroads in general is rather *in the form* of the examination than in his answers."<sup>27</sup> (Emphasis added.) Further, if such questions were allowed to disqualify jurors, it would be virtually impossible to impanel a jury. For "in ninety-nine cases out of a hundred"<sup>28</sup> the answers to such questions would probably be the same. It is therefore not error for the trial court to retain such a juror on the panel if he is otherwise qualified. If counsel objects to such a question being asked the objection should be sustained.

## 2. Jury Room Discussions

In a criminal case defendant's counsel may ask the jury, "Suppose 11 of the jury think the defendant is guilty, and be satisfied with his guilt beyond a reasonable doubt, and you had doubt whether he was guilty, what would you do then?"<sup>29</sup> "[W]ould you make your own decision . . . as to whether the man is innocent or guilty or let somebody else on the jury make it for you?"<sup>30</sup> This line of inquiry is improper and it is not error for the trial court to sustain an objection to the questions,<sup>31</sup> or to deny challenges based upon them.

It is the general rule that counsel may not ask a juror to speculate upon what he might do in certain contingencies, or how his verdict might be influenced by certain contingencies.<sup>32</sup> For this reason alone the question is improper. Furthermore it is not improper for a juror to be influenced

24. *Montgomery v. Wabash, St. L. & P. Ry.*, *supra* note 23.

25. *Ibid.*

26. *Ibid.* See also, *Hudson v. St. Louis, K. C. & N. Ry.*, *supra* note 23.

27. *Montgomery v. Wabash, St. L. & P. Ry.*, *supra* note 23, at 451, 2 S.W. at 410.

28. *Keegan v. Kavanaugh*, *supra* note 23, at 232.

29. *State v. Talley*, 22 S.W.2d 787, 788 (Mo. 1929).

30. *State v. Wall*, 339 Mo. 111, 116, 96 S.W.2d 36, 39 (1936).

31. *State v. Talley*, *supra* note 29; *State v. Wall*, *supra* note 30.

32. *State v. Katz Drug Co.*, 352 S.W.2d 678 (Mo. En Banc 1961); *State v. Hawkins*, 362 Mo. 152, 240 S.W.2d 688 (1951); *State v. Huckert*, 217 S.W.2d 561 (Mo. 1949); *State v. Ramsey*, 355 Mo. 720, 197 S.W.2d 949 (En Banc 1946); *State v. McKeever*, 339 Mo. 1066, 101 S.W.2d 22 (1936); *State v. Pinkston*, 336 Mo. 614, 79 S.W.2d 1046 (1935); *State v. Talley*, *supra* note 29; *State v. Gifford*, 186 S.W. 1058 (Mo. 1916).

by his associates on the panel.<sup>33</sup> In fact, one of the purposes of keeping jurors together in the jury room is that through discussion of the evidence they might reach agreement.<sup>34</sup>

### 3. Specific Point of Evidence

It is likewise improper for counsel to ask the jury to speculate upon their reaction to evidence yet to be introduced.<sup>35</sup> Therefore it would not be error for the trial court to disallow a question such as: "[W]ould [you] accept the testimony of [an accomplice] the same as that of a disinterested and uncontradicted witness if it developed on the trial of the case that he [had repudiated an earlier confession]? . . ." <sup>36</sup> Such a question is improper, for it constitutes an attempt to pledge the jury beforehand into giving defendant's testimony the same weight and credence given other witnesses. Weight and credibility are for the jury to determine after hearing all of the evidence.<sup>37</sup> It is the duty of the trial court to instruct the jury as to the law of the case, and the jury's duty to follow such instructions. It is presumed that both will carry out these duties.<sup>38</sup>

In addition to attempts to pledge the jury on the credibility of certain witnesses, it is also improper for counsel to ask the jury to speculate upon what they might do if certain evidence is introduced. A case involving the Sunday Blue Laws was reversed solely on the ground of such a hypothetical.<sup>39</sup> The prosecutor, over defendant's objection, was allowed to ask, "Now, if I prove to your satisfaction and beyond a reasonable doubt that February 22, 1959, was a Sunday, and that the Katz Drug Company . . . sold goods, wares and merchandise which were not medicines or drugs and not items of immediate necessity, and if the court instructs you that that is a violation of the law, *will you convict?*"<sup>40</sup> (Emphasis added.) The prosecutor was asking for an unequivocal pledge of conviction on the contingency that certain facts were proved. It was an improper attempt to commit the jurors before they had heard the evidence, instructions of the court, or counsel's argument. If such an inquiry is

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33. State v. Talley, *supra* note 29; State v. Wall, *supra* note 30.

34. State v. Wall, *supra* note 30.

35. *Supra* note 32.

36. State v. McKeever, *supra* note 32, at 1077, 101 S.W.2d at 27.

37. State v. Gifford, *supra* note 32; State v. Thusky, 245 S.W.2d 859 (Mo. 1952).

38. State v. Gifford, *supra* note 32.

39. State v. Katz Drug Co., *supra* note 32.

40. *Id.* at 684.



pursued and allowed by the trial court, it is an abuse of discretion and reversible error.<sup>41</sup>

However, merely *asking* such a question may not be reversible error.<sup>42</sup> If the trial court sustains an objection to the question before it is answered, and instructs the jury against being influenced by such improper remarks, it is very likely that the panel will not feel pledged to any position.<sup>43</sup> It is permitting the question *and* requiring it to be answered that constitutes reversible error.<sup>44</sup>

A related area, involving the same rules, is the criminal trial of a capital case where counsel seeks to eliminate those jurors with conscientious scruples against the death penalty.<sup>45</sup> Although it is proper for counsel to ascertain whether the jurors have any scruples against the death penalty,<sup>46</sup> inadvertently, or purposely, the questions may be formed in such a way as to be an attempt to pledge the jurors to the death penalty. In *State v. Pinkston*<sup>47</sup> the prosecutor asked: ". . . if you believe and found from the evidence beyond a reasonable doubt that the defendant was guilty, if you believe from the evidence that the death penalty was proper penalty to follow a finding of guilty, *would* you vote for it?"<sup>48</sup> (Emphasis added.) The trial court allowed this line of inquiry and was reversed. The way the question was framed ("*would* you vote for it") amounted to an attempt to pledge the jury to the death penalty if they found defendant guilty. "*Counsel may, not in advance, ask (a juror) to speculate upon what he might do, and how his verdict might be influenced by certain contingencies that may arise later.*"<sup>49</sup>

A somewhat different problem arises when counsel attempts to explain the law to the panel, or tells them what the court's instruction will be on a certain point. The trial judge does not unduly restrict counsel's inquiry when he refuses to allow this on voir dire.<sup>50</sup> It is the trial court's duty and privilege to instruct the jury on the law, and if counsel wishes to explain the instructions he must wait until his closing argument.

41. *Id.*; *State v. Huckert*, *supra* note 32.

42. *State v. Huckert*, *supra* note 32.

43. *State v. Huckert*, *supra* note 32; *State v. Katz Drug Co.*, *supra* note 32.

44. *State v. Katz Drug Co.*, *supra* note 32.

45. See § 546.130, RSMo 1959, discussed on pages 294-96 *infra*.

46. *Ibid.*

47. *Supra* note 32.

48. *Id.* at 618, 79 S.W.2d at 1049.

49. *Ibid.*; *State v. Talley*, *supra* note 29. For the proper way to phrase these questions, see pages 294-96 *infra*.

50. *State v. Bolle*, 201 S.W.2d 158 (Mo. 1947); *State v. Mosier*, 102 S.W.2d 620 (Mo. 1937); *State v. Linders*, 224 S.W.2d 386 (Mo. 1949).

Neither is it proper for counsel to inquire of the panel whether they think a law is good or bad.<sup>51</sup> If it is desirable to ascertain whether or not a juror's opinion of a law would prevent him from bringing in a verdict counsel may so inquire. "The correct procedure is for counsel to ask the members of the panel whether, if the court instructs them in a specified manner, they would have any opinion or conscientious scruples such as would prevent them from returning a verdict accordingly. . . ."<sup>52</sup> A juror's opinion of the law is immaterial unless it is so strong that it would prevent him from following the court's instructions.

Similarly it is not proper for counsel to implant in the jury's mind the idea that they should independently draw legal distinctions.<sup>53</sup> Therefore it is improper to ask the jury to distinguish between two crimes of different elements and ask them to give defendant the benefit of the doubt,<sup>54</sup> or to ask whether they would require the state to prove every element of the charge beyond a reasonable doubt, and if there was such a doubt would they then give defendant the benefit of the doubt?<sup>55</sup> The latter is also an attempt to state the law and is improper on that ground. In both situations counsel could properly ask if the jury would follow the court's instructions and not convict unless they found defendant guilty beyond a reasonable doubt.<sup>56</sup> But the jury cannot be presumed to know, or led to believe that they can distinguish between the elements of a crime.<sup>57</sup>

### III. CHALLENGE FOR CAUSE—GROUNDS

#### A. *General Statutory Qualifications*

There are certain basic qualifications required of a juror which have nothing to do with his attitude toward the cause of the parties on trial, but which are grounds for challenge for cause.

#### 1. Citizenship and Residence

Section 494.010. Every juror, grand or petit, shall be a citizen of the state, a resident of the county or of a city not within a county for which the jury may be impaneled. . . . To satisfy this statute a juror must reside within the county (or city) for which the jury is impaneled. It appears

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51. *State v. Mosier*, *supra* note 50.

52. *State v. Mosier*, *supra* note 50, at 624.

53. *State v. Ford*, 346 Mo. 882, 143 S.W.2d 289 (1940). *Accord*, *State v. Hoffman*, 344 Mo. 94, 125 S.W.2d 55 (1939).

54. *State v. Ford*, *supra* note 53.

55. *Ibid.*

56. *Ibid.*

57. *State v. Ford*, *supra* note 53; *State v. Hoffman*, *supra* note 53.

that the dominant consideration is the juror's intent to make the county, and state, his permanent abode rather than any fixed length of time. Thus where jurors had lived in the county for thirty days,<sup>58</sup> two months,<sup>59</sup> or five months,<sup>60</sup> settling there with the intention of making their permanent homes in the county and state, they were qualified under the statute.<sup>61</sup> Conversely, it would not be error to excuse a juror who had been absent from the state with intent to change his domicile and had only returned recently *without* the intent to make Missouri his permanent abode.<sup>62</sup>

Occasionally voting is used as an indicia of citizenship. If a juror is a qualified voter of the county and state he satisfies the citizenship requirement.<sup>63</sup> It should be remembered, however, that "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."<sup>64</sup> That is, a juror may be qualified to serve under this statute without being qualified to vote.

## 2. Sobriety and Intelligence

Section 494.010 . . . Every juror, grand or petit, shall be . . . sober and intelligent. . . .<sup>65</sup>

## 3. Good Reputation

Section 494.010 . . . Every juror, grand or petit, shall be . . . of good reputation. . . .<sup>66</sup>

## 4. Age

Section 494.010 . . . Every juror, grand or petit, shall be . . . over twenty-one years of age. . . .<sup>67</sup>

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

59. *State v. France*, 76 Mo. 681 (1882).

60. *Ibid.*

61. *Supra* notes 58-60. See also, *State v. Hicks*, 319 Mo. 28, 3 S.W.2d 230 (1928).

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

63. *State v. Pagels*, 92 Mo. 300, 4 S.W. 93 (1887); *State v. Fairlamb*, *supra* note 58; *State v. Burns*, 148 Mo. 167, 49 S.W. 1005 (1899).

64. *State v. Fairlamb*, *supra* note 58, at 150, 25 S.W. at 899.

65. No case definition.

66. No case definition.

67. *State v. Brooks*, 92 Mo. 542, 5 S.W. 257 (1887). It should be noted that while a good challenge can be made to a juror under twenty-one, there is no longer a set maximum age. § 495.130, which set a maximum age of 65 was repealed in 1959. It is possible that a juror of advanced age could be challenged for associated reasons, such as senility or other infirmity of old age. See § 494.020(6), RSMo 1959.

### 5. Otherwise Qualified

Besides the requirements listed above, section 494.010 requires a juror to be "otherwise qualified." This has been interpreted to mean "impartial" or "judicious."<sup>68</sup>

In addition to the basic qualifications of section 494.010, certain persons are ineligible to serve as jurors under section 494.020,<sup>69</sup> and this would also serve as a basis for challenge.

### 6. Conviction of Felony or Misdemeanor Involving Moral Turpitude

Any person convicted of such an offense, by the state of Missouri or in a federal court,<sup>70</sup> is ineligible to serve as a juror under section 494.020(1). If a person so convicted has been restored his civil rights, this ineligibility is removed.

### 7. Ability to Read, Write, Speak and Understand the English Language

Under section 494.020(2) a person must be able to read, write, speak, and understand the English language. One early reason given for this requirement<sup>71</sup> was the fact that court records are kept in English, and the court's instructions are given in English. These same reasons apply today. Many times in the conduct of the proceedings a juror might be called upon to read both printed and handwritten evidence, as well as the court's

68. *Lee v. Baltimore Hotel Co.*, 345 Mo. 458, 463, 136 S.W.2d 695, 698 (1939), (juror deliberately dishonest as to his identity). See also, *Kendall v. Prudential Life Ins. Co.*, 319 S.W.2d 1, 5 (K.C. Mo. App. 1958); *State v. Hermann*, 283 S.W.2d 617, 619 (Mo. 1955) ("sober and intelligent, of good reputation . . . and otherwise qualified" could certainly include a conviction for felony in a federal court).

69. § 494.010 and .020 now apply to *all* counties of Missouri. See §§ 495.131, 496.101, 497.201, RSMo 1959, and § 498.120(1), RSMo 1961. In addition these qualifications are made the basis for a challenge for cause in §§ 445.140, 496.110, RSMo 1961. See § 546.060 for criminal trials.

70. There is no case expressly stating that the conviction must be in Missouri but that was the contention in *State v. Hermann*, *supra* note 68. The state contended that conviction of a felony in a federal court was *not* a disqualification. The Supreme Court referred to *State ex rel. Barrett v. Sartorius*, 351 Mo. 1237, 175 S.W.2d 787 (En Banc 1943), where it held "such broad language without any stated limitation disqualified from voting one who had been convicted of a felony in a federal court," and considered the same reasoning applicable under this statute. Furthermore, even if § 494.020(1) did not apply, conviction in a federal court of a felony would disqualify a person under § 494.010. See note 68.

71. *State v. Wilson*, 117 Mo. 570, 21 S.W. 443 (1893).

instructions. No doubt there is a hesitancy to ask the panel if they can read or write, and as a result most of the cases in this area are decided on the basis of waiver<sup>72</sup> if there is no challenge made before the jury is sworn.<sup>73</sup>

It is also essential for a juror to understand the meaning of the English language to comprehend the proceedings. But this does not mean that a juror must be able to give the meanings of certain words chosen by counsel.<sup>74</sup> A general understanding sufficient to enable him to carry out his duties is all that is required.<sup>75</sup>

8. Member of Armed Forces or State Militia on Active Duty<sup>76</sup>
9. Licensed Attorney at Law<sup>77</sup>
10. Judge of Court of Record<sup>78</sup>
11. Persons Mentally or Physically Ill or Infirm<sup>79</sup>
12. Persons Not Properly Drawn or Selected Under Chapters 494, 495, 497, and 498.<sup>80</sup>

## B. *Witnesses*

### 1. Civil Trials—Section 494.190

No witness or person summoned as a witness in any civil cause . . . shall be sworn as a juror in the same cause.

It is proper to challenge any juror who is a witness to any material issue, whether summoned or not. Under the limited authority available<sup>81</sup> the challenge is made good by showing the record of the subpoena.<sup>82</sup> The trial court is then able to sustain the challenge, relying on the good

72. § 494.050 provides for waiver of all the qualifications discussed in this section, with some exceptions. For a full explanation, see pages 301-04 *infra*, and cases discussed there.

73. § 494.050, RSMo 1959.

74. *State v. Duestraw*, 137 Mo. 44, 38 S.W. 554 (1897).

76. § 494.020(3).

77. § 494.020(4).

75. *Ibid.*

78. § 494.020(5).

79. § 494.020(6). See *Eastman Kodak Stores v. Summers*, 377 S.W.2d 476 (K.C. Mo. App. 1964) (after the jury is sworn it is too late to object to a juror who had previously been adjudicated a person of unsound mind).

80. § 494.020(7).

81. *Boyce v. Aubuchon*, 34 Mo. App. 315 (St. L. Ct. App. 1888).

82. *Ibid.*

faith of counsel in subpoenaing the juror.<sup>83</sup> If it should thereafter appear in the course of the trial that counsel subpoenaed a juror as a witness only to gain additional preemptory challenges, the trial court would be under a duty to vacate any verdict in favor of such party upon motion of his opponent.<sup>84</sup> Bad faith in subpoenaing jurors to gain an unfair advantage has been deemed gross misconduct on the part of an attorney.<sup>85</sup> Whether or not such an advantage is actually gained is not important.<sup>86</sup>

The proper procedure to weed out "witnesses" who have *not* been summoned has not been decided under this statute. The language, "no witness," would indicate the propriety of inquiring on this point and challenging on the basis of the juror's first hand knowledge of the facts.<sup>87</sup> If he was a "witness" to any fact in issue the challenge should be sustained.<sup>88</sup>

Although the language of section 494.190 seems mandatory—"shall [not] be sworn"—it would appear that this qualification, too, would be waived if not timely made before the jury is sworn.<sup>89</sup> If counsel should later discover that a witness needed by him is on the qualified panel he must revert to section 494.090 and follow the procedure therein.<sup>90</sup>

## 2. Criminal Trials—Section 546.140

No witness in any criminal case shall be sworn as a juror therein if challenged for that cause before he is sworn; and if any juror shall know anything relative to the matter in issue, he shall disclose the same in open court.

As in civil trials, any witness, whether summoned or not, should be disqualified under this section<sup>91</sup> if counsel makes a timely challenge. "Wit-

83. *Ibid.*

84. *Ibid.*

85. *Ibid.*

86. *Ibid.*

87. Distinguish this challenge for cause when the juror is a witness—i.e., he can give relevant testimony—from the challenge for *opinion*, discussed on pages 286-300 *infra*. Here mere knowledge of the facts may be the basis of challenge.

88. *State v. Marshall*, 198 S.W. 451 (Spr. Mo. App. 1917). No civil case authority could be found on this point.

89. Waiver is discussed on page 301 *infra*.

90. To summon a juror from the qualified panel to use as a witness in the cause, counsel must "first show, to the satisfaction of the court, that such juror or jurors so to be summoned are material witnesses, whose evidence he should have in the trial of the cause. . . ." This statute refers to a member of the regular panel who has qualified for the trial of the particular cause. *Robinson Lumber Co. v. Cottonseed Delinting Corp.*, 207 S.W.2d 63 (Spr. Mo. App. 1947).

91. The only cases decided under this section deal with jurors who have been

ness" refers to jurors who are witnesses in fact and who know anything relevant to the issue being tried.<sup>92</sup> It does not include a juror who testifies in an application for a change of venue, at least where the testimony (and knowledge) is limited to the question of prejudice against defendant.<sup>93</sup>

The proper procedure, as the statute indicates, is to inquire if "any juror [knows] anything relevant to the matter in issue."<sup>94</sup> An affirmative answer should determine the validity of a challenge for cause. It would also show counsel's prior good faith if the challenged juror has also been subpoenaed.<sup>95</sup>

### C. Bias or Prejudice

Trial by jury means a trial by an impartial jury.<sup>96</sup> Thus a basic disqualification of a juror is any bias or prejudice that might destroy his ability to give the parties a fair and impartial trial. Although disqualification for bias or prejudice is not specifically designated by statute, the fact that the statute enumerates certain grounds of disqualification does not exclude other grounds of incompetency.<sup>97</sup> Further, the Missouri Supreme Court has held<sup>98</sup> that the words "otherwise qualified" mean both "impartial" as stated in Article I, Section 18(a) of the Missouri Constitution<sup>99</sup> and "judicious" as stated in section 494.070 of the Revised Statutes.<sup>100</sup>

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subpoenaed but the language is broad enough to include both categories. See *State v. Wisdom*, 84 Mo. 177 (1884); *State v. Marshall*, *supra* note 88.

92. *State v. Marshall*, *supra* note 88.

93. *State v. Wisdom*, *supra* note 91. *Accord*, *State v. Marshall*, *supra* note 88.

94. *State v. Marshall*, *supra* note 88.

95. *Ibid.* The same problem could arise under this statute as under the civil provision; i.e., an attempt by a party to gain additional peremptory challenges through the bad faith use of subpoenas. *State v. Marshall* indicated that a mere showing that subpoenas had been issued would *not* be sufficient to sustain a challenge. This would seem to be a better rule than that laid down in *Boyce v. Aubuchon*, *supra* note 81.

96. *Lee v. Baltimore Hotel Co.*, 345 Mo. 458, 136 S.W.2d 695 (1939); *Privitt v. St. Louis-S.F. R.R.*, 300 S.W. 726 (Mo. 1927).

97. *State v. Miller*, 156 Mo. 76, 56 S.W. 907 (1900).

98. *Lee v. Baltimore Hotel Co.*, *supra* note 96.

99. Rights of accused in criminal prosecutions.—That in criminal prosecutions the accused shall have the right to appear and defend, in person and by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf; and a speedy public trial by an *impartial* jury of the county. (Emphasis added.)

100. Oath of sheriff and his deputies.—The clerk of the court shall, in open court, and before any jury shall be impaneled, administer to the sheriff and all his deputies the following oath:

You, and each of you, do solemnly swear, or affirm (as the case may be), that in summoning jurors to be returned to this court, and in executing

Bias or prejudice may arise from a variety of causes. It may be directed toward a party as an individual or as a member of a class. Or it may be toward the cause that he represents.

"Prejudice need not be proved [by direct evidence] but may be inferred from established facts and circumstances. . . ."101 Voir dire enables counsel to determine the presence or the absence of those facts and circumstances which bear on the juror's ability to render a decision that will be free from bias or prejudice.

In impaneling a jury, counsel should not be permitted to inquire into extrinsic or collateral matters which could have no bearing on a juror's qualifications or his bias,<sup>102</sup> but he is entitled to put such questions in good faith as will enable him to exclude persons who for any reason may not be fair or impartial.<sup>103</sup> As the extent to which parties should be allowed to go in examining jurors cannot well be governed by any fixed rules, what questions may or may not be answered must necessarily be left to the discretion of the trial court.<sup>104</sup>

Furthermore, the sweep of the trial court's discretion in this area is not confined to the extent of the examination. The removal of jurors for bias or prejudice is largely vested in the trial courts, and the appellate courts have almost uniformly approved the trial courts' removal of a doubtful juror and have likewise upheld the overruling of challenges for cause when no actual bias or prejudice was shown.<sup>105</sup> An examination of areas of bias or prejudice indicates what questions are considered to be pertinent and what facts and circumstances are sufficient to constitute grounds for disqualification.

### 1. Parties and Counsel

The extent of the juror's acquaintance with the parties is a basic fact determined on voir dire. And where the juror acknowledges the existence of such close personal ties with one of the parties as to feel reluctant to sit on the jury he will be properly excused.<sup>106</sup> This principle has been

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every writ and precept which has or shall come to your hands for the return of jurors, you, and each of you, have used and will use the utmost diligence to summon and return, as jurors, sober and *judicious* persons. . . .  
(Emphasis added.)

101. *Girratono v. Kansas City Pub. Serv. Co.*, 272 S.W.2d 278, 281 (Mo. 1954).

102. *Faught v. St. Louis-S.F. R.R.*, 325 S.W.2d 776 (Mo. 1959).

103. *Ibid.*

104. *State v. Hoffman*, 344 Mo. 94, 125 S.W.2d 55 (1939).

105. *Leavitt v. St. Louis Pub. Serv. Co.*, 340 S.W.2d 131 (St. L. Mo. App. 1960).

106. *Winters v. Hassenbusch*, 89 S.W.2d 546 (K.C. Mo. App. 1936); *Robbins v. Olson-Schmidt Const. Co.*, 215 S.W. 779 (K.C. Mo. App. 1919).



extended to include the juror's friendship and association with relatives of a party<sup>107</sup> and to relationships based on business.<sup>108</sup>

A juror's acquaintance with counsel, whether social or business, is not in itself grounds for disqualification.<sup>109</sup> This is also true of jurors acquainted with the prosecutor and his assistants in a criminal case.<sup>110</sup> And it has even been held error to dismiss a juror for cause merely because he was acquainted with counsel.<sup>111</sup> But where the juror's relationship with counsel is such that the juror feels that it would embarrass him to try the case he will be properly dismissed.<sup>112</sup>

## 2. Relations of Consanguinity or Affinity to Either Party

In civil cases a juror who is of kin to either party within the fourth degree of consanguinity or affinity may be properly challenged for cause<sup>113</sup> and in criminal cases the kin of the injured party, of the prosecutor and of the defendant are not competent to serve as jurors.<sup>114</sup> These exclusions are based on a presumption of prejudice in such cases. "A juror within the prohibited relationship should be excluded on the grounds of presumptive prejudice which is the basis of the prohibitory statute."<sup>115</sup> The Missouri Supreme Court has held that the degree of relationships in civil cases should be computed under the civil law rule.<sup>116</sup> And even where the relationship is beyond the prohibited degree the juror's expression that it would influence his verdict will be sufficient grounds for challenge for cause.<sup>117</sup>

Under the criminal statute no degree of relationship is mentioned and the real question is whether there is actual prejudice resulting from that relationship. The fact of kinship is not the ground for challenge but the effect of it is.<sup>118</sup>

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

108. *Oakley v. Richards*, 275 Mo. 266, 204 S.W. 505 (1918), *error dismissed* 248 U.S. 541 (1918).

109. *Murphy v. Fidelity Nat'l Bank & Trust Co.*, 226 Mo. App. 1181, 49 S.W.2d 668 (K.C. Ct. App. 1932); *Vojta v. Pelikan*, 15 Mo. App. 471 (St. L. Ct. App. 1884); *Pioneer Const. Co. v. Schmidt*, 192 S.W.2d 859 (Mo. 1946).

110. *State v. Shoemaker*, 183 S.W. 322 (Mo. 1916).

111. *Gardner v. Metropolitan St. Ry. Co.*, 177 S.W. 737 (K.C. Mo. App. 1915).

112. *Bright v. Sammons*, 214 S.W. 425 (K.C. Mo. App. 1919).

113. § 494.190, RSMo 1959.

114. § 546.120, RSMo 1959.

115. *State v. Chandler*, 314 S.W.2d 897, 900 (Mo. 1958).

116. *State v. Thomas*, 351 Mo. 804, 174 S.W.2d 337 (1943).

117. *Mahaney v. St. Louis & H. Ry. Co.*, 108 Mo. 191, 18 S.W. 895 (1892).

118. *State v. Miller*, 331 Mo. 675, 56 S.W.2d 92 (1932); *State v. Thomas*, *supra* note 116.

The juror related to a party within the prohibited degree is subject to challenge by the adverse party and not by the party to whom he is related. The presumptive prejudice which is the basis for the statute runs in favor of the related party and not against him and thus cannot be invoked by one who is presumptively helped, not hurt, by the relationship.<sup>119</sup>

Inasmuch as the juror's knowledge of the fact of his relationship to a party is the real basis that may be expected to make the juror biased or prejudiced, the juror cannot be said to be prejudiced by a fact unknown to him.<sup>120</sup> So where a juror is completely unaware of the existence of any relationship between himself and a party, there is no cause for a new trial merely because the relationship is subsequently shown.<sup>121</sup> Of course, if the relationship is brought out on voir dire, then the juror will be properly challenged for cause.<sup>122</sup> His awareness of the relationship raises the presumption of prejudice.

Kinship by affinity exists only between each spouse and the blood relatives of the other spouse.<sup>123</sup> Thus where the juror's sister was the wife of a brother of the prosecutrix's husband, there was no kinship so as to disqualify the witness.<sup>124</sup> Neither did disqualifying kinship exist where the juror's wife's cousin was married to a brother of the defendant.<sup>125</sup> The juror's relationship with a witness, other than the prosecuting witness, is not grounds for removal.<sup>126</sup>

In an early case against an insurance company three jurors whose fathers were insured with defendant and a fourth whose brother was also so injured were held incompetent under the statute. The court reasoned that one who was insured with defendant was a member thereof and that "a corporation can not be said to have any kindred yet as such bodies are composed of natural persons who may have such kindred . . . if a juror be of kin to any that is of such a body he is incompetent. . . ."<sup>127</sup>

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119. *State v. Thomas*, *supra* note 116; *State v. Chandler*, *supra* note 115.

120. *State v. Miller*, *supra* note 118.

121. *State v. Stewart*, 296 Mo. 12, 246 S.W. 936 (1922); *State v. Miller*, *supra* note 118; *State v. Carter*, 345 Mo. 74, 131 S.W.2d 546 (1939); *State v. Chandler*, *supra* note 115.

122. *State v. Stewart*, *supra* note 121.

123. *State v. Thomas*, *supra* note 116.

124. *Ibid.*

125. *State v. Carter*, *supra* note 121; *But see State v. Jones*, 64 Mo. 391 (1877) (father-in-law of prosecutor held competent).

126. *State v. Bounds*, 216 Mo. App. 236, 262 S.W. 411 (Spr. Ct. App. 1924).

127. *Price v. Patron's & Farmer's Home Protection Co.*, 77 Mo. App. 236 (K.C. Ct. App. 1898).

This reasoning seems rather tortuous. Basically it disregards the corporation as a separate legal entity. As the particular insurance company may have been the type where assessments were levied on all members after each payment for loss the result might have been more properly founded on the juror's potential, though remote, financial interest.

### 3. Sex and Race

The sex and race of the individual litigants will be physically before the jurors throughout the trial. As both factors are a matter of observation to the jurors, questions concerning their bias or prejudice in this regard may be freely asked by counsel.

The jurors may be properly asked if the fact that one of the parties was a woman would influence their decision; and this is true even in a criminal action, despite the contention of a female defendant that such a question when asked by the prosecutor was prejudicial in that it reduced the effectiveness of her plea of self-defense.<sup>128</sup>

The jurors may be properly asked if the fact that a party is a Negro would influence their verdict.<sup>129</sup> In an early case the court held that a juror's statement that he had some prejudice against the Negro race did not technically disqualify him in view of the juror's qualifying statement that his prejudice was not such as would prevent him from impartially trying the case.<sup>130</sup> The case was reversed on another point and the court commented that "it would be more in harmony with absolute impartiality to select a panel of jurors who have no unkindly feeling toward the class to which defendant belongs. . . ."<sup>131</sup> It is fairly certain that any indication of racial prejudice in a Missouri court today would merit disqualification of the juror despite any qualifying statements that he might make.

### 4. Religion and Politics

While the sex or race of the parties is obvious to the jurors, the religious and political affiliations of the parties are not self-evident. Questions concerning political or religious beliefs may actually inject a prejudicial element into the case unless, of course, the litigants' affiliations are a matter of common knowledge. Therefore, questions as to these

128. *State v. Dill*, 282 S.W.2d 456 (Mo. 1955).

129. *Hawkins v. Missouri Pac. R.R. Co.*, 182 Mo. App. 323, 170 S.W. 459 (K.C. Ct. App. 1914).

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

131. *Id.* at 460, 87 S.W. at 522.

points only become pertinent under special circumstances and, "unless the nature of the case itself discloses the facts rendering the question pertinent,"<sup>132</sup> counsel should state his reasons for desiring to ask such questions so as to acquaint the trial court with the facts as to why the questions are pertinent. Ordinarily a question as to whether a juror is a Catholic or a Protestant is not pertinent, for religious affiliation is not a qualification for jury service.<sup>133</sup> So too, as to affiliations with political parties.<sup>134</sup>

An example of where questions relating to such facts may be considered pertinent is seen in *State v. Miller*.<sup>135</sup> One of the key witnesses for the prosecution was a priest who was the pastor of the church attended by the victim and who had talked with the victim in his native tongue as to the identity of his assailants. When defense counsel inquired of a juror what particular church he attended the prosecutor's objection was sustained by the trial court. The supreme court reversed. Under the circumstances it was permissible for defendant to ascertain whether any juror attended that particular church.

#### 5. The "Size" of the Parties

The relative financial positions of the parties may well be a matter that is clearly before the jury. Where such is the case counsel may inquire as to whether the jurors would be prejudiced for or against a party because of his economic position. And where a juror did admit that the outcome of a past personal injury claim might possibly prejudice him "against the big fellow"<sup>136</sup> (the corporate defendant), it was held error to permit the juror to remain on the panel despite his qualification that he "couldn't be anything but fair."<sup>137</sup>

#### 6. Financial Interest

At common law, financial interest in litigation, even as remote as that of a taxpayer who would contribute to any judgment obtained against a county or municipality, was sufficient to disqualify a citizen thereof as

132. *Rose v. Sheedy*, 345 Mo. 610, 611-12, 134 S.W.2d 18, 19 (1939).

133. *Ibid.*

134. *State v. McGee*, 336 Mo. 1082, 83 S.W.2d 98 (1935); See also *State v. Campbell*, 210 Mo. 202, 109 S.W. 706 (1908) (no requirement to select equal numbers from the two political parties).

135. 207 S.W. 797 (Mo. 1918).

136. *Moore v. Midwest Freightways, Inc.*, 266 S.W.2d 578 (Mo. 1954).

137. *Id.* at 585. See also *Koepfel v. Koepfel*, 208 S.W.2d 929 (St. L. Mo. App. 1948) (holding as analogous a question as to whether the juror's verdict would be influenced by the fact that the suit was brought for an execution debt for the support of a child).

a juror.<sup>138</sup> In Missouri this has been changed by statute so as to cure the juror's previous disability.<sup>139</sup> But otherwise the juror's pecuniary interest in the case will still render him incompetent and counsel is free to determine if such an interest exists. Thus where a paternal benefit society was sued on a life insurance policy issued by the society, jurors who were members of the society and whose assessments could have been affected by the result were successfully challenged for cause.<sup>140</sup>

In *Barb v. Farmer's Ins. Exchange*<sup>141</sup> four jurors who were policyholders with defendant, a reciprocal insurance company, were considered by the trial court to be "subscribers and stockholders . . . [with] pecuniary interests in the case,"<sup>142</sup> and plaintiff's challenge for cause was sustained. On appeal the supreme court affirmed but at the same time observed that "it was not made unequivocally manifest that Exchange is a mutual company, nor was it clear that the challenged veniremen had any interest in the case as to disqualify them as a matter of law. Now we do not say it would have been error to overrule plaintiff's challenge for cause. . . . We hold the trial court did not err or abuse its discretion in sustaining plaintiff's challenge."<sup>143</sup>

In *Kendall v. Prudential Ins. Co. of America*,<sup>144</sup> the court amplified the *Barb* decision. Four jurors who were policyholders of defendant company were challenged for cause. The challenge was denied and on appeal the supreme court, en banc, affirmed, holding that "a challenge for cause is not required to be sustained as to every kind of policyholder under all circumstances. In view of modern widespread use of all kinds of insurance, such a rule would be unreasonable at least as to those with nonassessable policies or those who do not participate in policy dividends."<sup>145</sup> The court concluded that the plaintiff had failed to make a sufficient showing of the juror's financial interest to warrant a holding that the trial court had erred in refusing to sustain the challenge for cause.

There has been no Missouri case on whether a shareholder is competent to serve when the corporation is a party. Dictum has indicated that he would not be competent. Membership in a cooperative organization has

138. *Kendall v. Prudential Life Ins. Co.*, 327 S.W.2d 174 (Mo. En Banc 1959).

139. § 494.040, RSMo 1959.

140. *Edmonds v. Modern Woodmen of America*, 125 Mo. App. 214, 102 S.W. 601 (K.C. Ct. App. 1907).

141. 281 S.W.2d 297 (Mo. 1955).

142. *Id.* at 301.

143. *Ibid.*

144. *Supra* note 138.

145. *Id.* at 177-78.

been held to constitute sufficient financial interest such that failure to excuse for cause is reversible error.<sup>146</sup>

Merely because a juror is a depositor in a bank does not disqualify him from trying a tort case where the bank was defendant. But a juror who was in debt to the bank and was beneficiary of a trust fund for which the bank was trustee was properly excused.<sup>147</sup>

As in other areas, questions regarding financial interest may be held improper because they are not pertinent or may be prejudicial. In *Eickmann v. St. Louis Public Service Co.*<sup>148</sup> plaintiff was denied permission to inquire as to the juror's interest in a corporation which owned a substantial interest in defendant corporation. The court said "the proper qualifications of jurors is not served by unlimited inquiries into the stock ownership of affiliated or holding companies."<sup>149</sup>

### 7. Organizations and Clubs

As with religious or political affiliations the juror's membership in any society, order, or fraternal organization is not grounds for challenge unless such a group is shown to be unlawful in its object and purpose.<sup>150</sup> Even membership in the Ku Klux Klan has been held not necessarily to render a juror incompetent.<sup>151</sup> But whereas only the nature of the case, or circumstances revealed by counsel, will make pertinent questions concerning religion or politics, it has been held that "counsel have the right to interrogate jurors . . . as to their membership in, or affiliations with, any organization. . . ." <sup>152</sup>

The reasoning does not seem sound. The prejudicial effects that arise from questions concerning religion or politics are also apparent with regard to organizations. So in *State v. Koch*<sup>153</sup> when the prosecutor was allowed to ask each juror individually as to their membership in the Klan, defendant contended that the jurors inferred from this inquiry that he was or had been a member of the Klan and that they were thereby prejudiced against him. The court found "no showing of improper motives on the part of counsel"<sup>154</sup> and that there was "nothing in the record to

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146. *Ozark Border Elec. Coop. v. Stacy*, 348 S.W.2d 586 (Mo. 1961).

147. *Murphy v. Fidelity Nat'l Bank & Trust Co.*, *supra* note 109.

148. 323 S.W.2d 802 (Mo. 1959).

149. *Id.* at 807.

150. *State v. Griffith*, 311 Mo. 630, 279 S.W. 135 (1925).

151. *Ibid.*

152. *State v. Koch*, 322 Mo. 106, 117, 16 S.W.2d 205, 209-10 (1929).

153. *Ibid.*

154. *Id.* 322 Mo. at 117, 16 S.W.2d at 210.

support the contention that the jury were prejudiced against the defendant by this incident."<sup>155</sup> Defendant had been charged with arson and from the facts reported it cannot be said that the nature of the case required voir dire questioning concerning the Klan. If circumstances existed which made such questioning pertinent it would have been a simple matter for the prosecutor to state what they were. It would have been far easier to require the prosecutor to prove the propriety of his motives than for defendant, in effect, to have to show their impropriety.

However this view has not been accepted. In *State v. Hoelscher*<sup>156</sup> the trial court refused to allow defendant to examine the jurors as to their membership in or affiliation with the Klan and defendant excepted. On appeal the prosecutor argued that the question of membership in the Klan had no real bearing on the case. The court examined the holdings in other jurisdictions on this point and concluded that "in each and every instance it was held that where there were any facts or circumstances in any way connected with the case, and which would in any way indicate that such membership might in any way influence the juror in passing upon the guilt or innocence of the accused, such information was proper. . . ."<sup>157</sup> After noting that an affirmative answer as to membership in the Klan would not necessarily have afforded any grounds for challenge for cause, the court reversed the action of the trial judge, concluding that the information sought was within the reasonable limits of voir dire. Needless to say the result reached is inconsistent with the reasoning employed.

In those cases where the questioning is clearly pertinent mere membership in the organization concerned is insufficient to disqualify the juror. In *State v. Gartland*<sup>158</sup> two jurors admitted membership in the Klan which had held a public indignation meeting to protest the shooting of the victim by defendant police officer. Both jurors denied taking part in the proceedings of the meeting or joining a funeral procession attended by the Klan in a body. Neither juror was held to be incompetent. In *State v. Stephens*,<sup>159</sup> a juror was a member of the West Plains Commercial Club whose clubhouse was the scene of the crime (violation of a liquor law). The juror had been present at a subsequent meeting of the Club

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155. *Id.* 322 Mo. at 117, 16 S.W.2d at 209.

156. 217 Mo. App. 156, 273 S.W. 1098 (St. L. Ct. App. 1925).

157. *Id.* 217 Mo. App. at 160, 273 S.W. at 1099.

158. 304 Mo. 87, 263 S.W. 165 (1924).

159. 195 Mo. App. 34, 189 S.W. 630 (Spr. Ct. App. 1916).

when a resolution was passed decrying violations of the local option laws and resolving to "render all the assistance we can to the prosecuting attorney and court in the prosecuting of these cases."<sup>160</sup> There was no evidence of any positive action along the lines of the resolution. The court said, "The most that can be said of this resolution is that it and those voting in favor thereof declared for law enforcement."<sup>161</sup> The existence of bias or prejudice against crime constitutes no cause of challenge.<sup>162</sup>

But in *State v. Fullerton*,<sup>163</sup> also involving a liquor law violation, a juror admitted membership in the Home Protection Alliance, an organization whose *object* was to prosecute liquor law violators. This energetic group had even employed the individuals who made the purchase charged in the information and who thus were the main witnesses for the state. The juror stated that he had not contributed to carrying out the purposes of the Alliance but indicated that he would if he were assessed. The juror was held to be incompetent. The court did not clearly indicate whether the juror's disqualification was based on his membership in the organization or the fact of his potential financial interest. Certainly it cannot be said that the organization was unlawful in its object and purposes. However, in view of the undesirability of having this type of case tried by a member of such an organization, the court should be justified in finding that the payment of dues or assessments gives a sufficient, albeit insignificant, financial interest to disqualify such a juror.

### 8. Co-indictees

When two or more individuals have been charged on the same indictment it would seem reasonable that when one indictee is tried the prosecutor has a valid motive to inquire as to the juror's acquaintance with the others. However, such questions may be phrased in a manner that renders them clearly prejudicial. In *State v. Meysenberg*<sup>164</sup> it was held error to allow the prosecutor to ask the jurors if they were acquainted with "certain noted bribe-givers and takers"<sup>165</sup> all of whom happened to be under the same indictment (for bribery) as defendant. The court found that this was done "to intimate to the jurors that defendant was a bird of the same feather, and thus in advance prejudice the panel against

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160. *Id.* 195 Mo. App. at 35, 189 S.W. at 631.

161. *Id.* 195 Mo. App. at 36, 189 S.W. at 631.

162. *State v. Burns*, 85 Mo. 47 (1884).

163. 90 Mo. App. 411 (K.C. Ct. App. 1901); *State v. Stephens*, *supra* note 159.

164. 171 Mo. 1, 71 S.W. 229 (1902).

165. *Id.* 171 Mo. at 66, 71 S.W. at 239.



him."<sup>166</sup> *State v. Mangercino*<sup>167</sup> states the rule that the prosecutor may inquire as to the juror's acquaintances with individuals who were charged jointly with defendant. That inquiry only concerned whether the jurors were acquainted with the men named and the *Meysenberg* case was distinguished on the basis that the inquiry in the latter instance was purposefully prejudicial. The fact that the prosecutor prefaces his question by the statement that defendant has been granted a severance is not reversible error.<sup>168</sup>

### 9. Employment

The past or present employment of a juror may constitute evidence of bias or prejudice when that employment is intimately related either to the case or to the parties. Thus the nature of the juror's employment is a valid area of inquiry.<sup>169</sup> If the juror's knowledge and experience based on his employment has resulted in his having "his own ideas about such matters" he may be discharged for cause.<sup>170</sup>

A juror who is an employee of one of the parties would seem to be presumptively prejudiced so as to warrant disqualification.<sup>171</sup> This principle has been extended to include jurors who are employees of a firm which is connected with a party.<sup>172</sup>

In criminal cases it has been held error to allow a deputy sheriff to remain on the panel<sup>173</sup> even where he was not active.<sup>174</sup> These cases have reasoned in terms of "exemption" rather than "disqualification." This is basically unsound. Jurors who are classified as "exempt" are simply empowered to be excused from jury service upon timely application to the

166. *Ibid.*

167. 325 Mo. 794, 30 S.W.2d 763 (1930).

168. *State v. Scott*, 299 S.W.2d 529 (Mo. 1957).

169. The fact that a juror's prior employer did the same type of business as one of the parties is not sufficient grounds for challenge for cause. *Paige v. Missouri Pac. R.R.* 323 S.W.2d 753 (Mo. 1959). Neither is the fact that his occupation is identical to that of one of the parties. *Ballentine v. Mercer*, 130 Mo. App. 605, 109 S.W. 1037 (K.C. Ct. App. 1908).

170. *McFall v. St. Louis-S.F. R.R.*, 185 S.W. 1157 (K.C. Mo. App. 1916).

171. In Class II counties a juror who is an employee of any person, firm or corporation who has, within the previous six months employed any attorney on either side, may be challenged for cause by the opposing party. § 495.150, RSMo 1959. That this statute does not violate either the United States or Missouri Constitutions, see *Privitt v. St. Louis-S.F. R.R.*, 300 S.W. 726 (Mo. 1927); *Hicks v. Simonsen*, 307 Mo. 307, 270 S.W. 318 (1925).

172. *Quirk v. Metropolitan St. Ry. Co.*, 200 Mo. App. 585, 210 S.W. 103 (K.C. Ct. App. 1919).

173. *State v. Golubski*, 45 S.W.2d 873 (Spr. Mo. App. 1932).

174. *State v. Langley*, 342 Mo. 447, 116 S.W.2d 38 (1938).

court. Assuming compliance with the statute<sup>175</sup> the juror exempts himself. The court does not *exempt* him. *State v. Butts*,<sup>176</sup> holding that it was error not to sustain a challenge for cause directed to a juror who was a police officer, correctly points out that the true basis is that of *disqualification* which is within the power of the court under section 494.010 of the Revised Statutes and not *exemption* which is within the rights of the juror under section 494.031. The court noted: "It seems incompatible with justice that a defendant who has been apprehended by the police, and against whom police officers are going to testify, should be tried by a jury made up of police officers."<sup>177</sup>

The fact that a juror was a *former* police officer or a *former* deputy sheriff is not sufficient to merit a determination that he is biased as a "convictor."<sup>178</sup>

#### 10. Previous Accidents Involving the Juror

In personal injury cases counsel is usually alert to determine the extent of the juror's personal experience in accidents involving himself or his family so that he may ascertain if the outcome of such an experience has left any deep impression that might result in prejudicing the juror's judgment. The fact that the juror had once filed a claim for injuries to his family or to himself that was satisfactorily settled is not sufficient to disqualify the juror.<sup>179</sup> Nor is personal involvement with accidents, even those occurring with the same type of motor vehicle involved in the present case, sufficient for disqualification.<sup>180</sup> But where the previous accident was with the present defendant and the juror's experience was such that his description of that experience indicates bias or prejudice he will be properly challenged for cause.<sup>181</sup>

#### D. Implied Bias

Generally, bias or prejudice is revealed by the juror's answers on voir dire but the juror's failure to give a full and accurate response may indicate an attempt to conceal information which would suggest bias or

175. § 494.031, RSMo 1959.

176. 349 Mo. 213, 159 S.W.2d 790 (1942).

177. *Id.* 349 Mo. at 220, 159 S.W.2d at 794.

178. *State v. Hamilton*, 340 Mo. 768, 102 S.W.2d 642 (1936).

179. *Smith v. Kansas City Pub. Serv. Co.*, 328 Mo. 979, 43 S.W.2d 548 (En Banc 1931).

180. *Ibid.*

181. *Billmeyer v. St. Louis Transit Co.*, 108 Mo. App. 6, 82 S.W. 536 (St. L. Ct. App. 1904).

prejudice. Of course, if the juror denies any prejudice towards a party and the fact of his prejudice is subsequently shown, a new trial will be granted on the basis of the juror's disqualification.<sup>182</sup> But what if while firmly denying prejudice the juror either negligently or intentionally fails to disclose facts in response to counsel's voir dire questioning? In such an event, the intentional failure to disclose a material fact is considered such an implication of bias or prejudice that it will constitute grounds for disqualification. Implied bias requires (a) an intentional non-disclosure of (b) a material fact. The courts consider these two parts to be inseparable. That is to say, that failure to disclose a material fact is regarded as intentional while the omission of immaterial fact is generally considered to be unintentional.

When the undisclosed facts are considered by the court to be material, the juror's claim that he has forgotten them is "not a sufficient excuse for his dereliction,"<sup>183</sup> and the juror's claim that he misunderstood the question will call for a consideration of the circumstances in which it was asked. While the courts acknowledge the possibility that a juror might mistake a question when asked if the panel collectively or of the juror individually, if the same question has previously been asked several times of other jurors, the court will not listen to a claim of misunderstanding.<sup>184</sup>

An answer that is incomplete in that it omits material facts is not a sufficient answer even when the juror claims that he would have disclosed everything if counsel had asked. "It is the duty of jurors on voir dire examination to answer questions fully and frankly and it should not be necessary for attorneys to resort to cross-examination or to ask leading questions to ascertain the facts. Honest men do not hesitate to divulge information concerning their qualifications as jurors."<sup>185</sup>

### 1. Acquaintance with Parties, Counsel or Witnesses

As indicated previously, the juror's mere acquaintance with the parties, counsel, or the witnesses is not, in and of itself, sufficient basis for a challenge for cause.<sup>186</sup> But where the juror fails to respond to a question designed to reveal these relationships, the court may find an implication of

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182. *Reissman v. Wells*, 258 S.W. 43 (St. L. Mo. App. 1924).

183. *Woodworth v. Kansas City Pub. Serv. Co.*, 274 S.W.2d 264 (Mo. 1955); *Girratono v. Kansas City Pub. Serv. Co.*, 272 S.W.2d 278 (Mo. 1954).

184. *Triplett v. St. Louis Pub. Serv. Co.*, 343 S.W.2d 670 (St. L. Mo. App. 1961).

185. *Bass v. Durand*, 345 Mo. 870, 874, 136 S.W.2d 988, 990 (1940).

186. See text and accompanying notes on pages 273-74 *supra*.

bias in the juror's failure to answer when it is subsequently shown that he was in fact closely connected with these individuals.<sup>187</sup>

## 2. Litigation

If a juror has previously filed a claim against one of the parties and does not disclose this information when questioned in this regard, an inference of bias may be drawn from such non-disclosure.<sup>188</sup> But the fact that the juror fails to disclose that a relative had once filed a claim against a party to the present suit, even when counsel's question directly inquired as to this point, will not be sufficient in itself to constitute evidence of bias.<sup>189</sup> The distinction seems sound. A juror should be expected to remember previous claims that he has filed against one of the parties but he should not be held accountable to either know of or remember the claims filed by his various relatives.

The juror's personal experiences in prior litigation may be valuable in the selection of the panel but just as the fact of his previous involvement is not sufficient for a successful challenge for cause<sup>190</sup> so too his failure to disclose the existence of a prior claim will not necessarily lead to a finding of implied prejudice.<sup>191</sup> Therefore, the fact that a juror fails to disclose that a relative had filed a claim, even though it is pending, is not a material non-disclosure as to disqualify the juror.<sup>192</sup>

But both counsel are entitled to know of prior litigation in order to effectively make their pre-emptory challenges. This entire problem comes under the general rule that where a juror intentionally conceals information sought on the voir dire examination, a new trial may be granted.<sup>193</sup>

It is very important when inquiring on this subject that the jurors understand precisely the question that is asked of them. They must know what is meant by a "claim" or "lawsuit." If the question asked by the

187. *State v. White*, 326 Mo. 1000, 34 S.W.2d 79 (1930) (party); *Gibney v. St. Louis Transit Co.*, 204 Mo. 704, 103 S.W. 43 (1907) (party); *Bass v. Durand*, *supra* note 185 (witness); *Schierloh v. Brashear Freight Lines*, 148 S.W.2d 747 (Mo. 1941) (counsel).

188. *Woodworth v. Kansas City Pub. Serv. Co.*, *supra* note 183; *Piehler v. Kansas City Pub. Serv. Co.*, 357 Mo. 866, 211 S.W.2d 459 (1948).

189. *Zimmerman v. Kansas City Pub. Serv. Co.*, 226 Mo. App. 369, 41 S.W.2d 579 (K.C. Ct. App. 1939).

190. See text and accompanying notes on page 283 *supra*.

191. *Lineker v. Missouri-Kan.-Tex. R.R.*, 142 S.W.2d 356 (K.C. Mo. App. 1940).

192. *Plater v. Kansas City*, 334 Mo. 842, 68 S.W.2d 800 (1933).

193. *Piehler v. Kansas City Pub. Serv. Co.*, 357 Mo. 866, 211 S.W.2d 459 (1948); *Mantz v. Southwest Freight Lines*, 377 S.W.2d 414 (Mo. 1964); *Maddox v. Vieth*, 368 S.W.2d 725 (K.C. Mo. App. 1963).

attorney is capable of misinterpretation or misunderstanding, then a negative answer, or silence, may not appear to be a case of intentional concealment.<sup>194</sup> "It is enough to ask such a question as would indicate to the mind of a fair and reasonable man what information the examining counsel sought to elicit."<sup>195</sup>

If the question was not capable of being misunderstood, then the facts and circumstances of each individual case would seem to be the determining factor.<sup>196</sup>

If the prior claim or lawsuit occurred several years earlier and it would be reasonable for a juror to forget, then it possibly would not be a case of intentional concealment.<sup>197</sup>

But the mere excuse that a juror does not recall very much about the prior suit, or remember the details, will not suffice. Silence or a negative answer would then amount to intentional concealment and strong evidence of bias or prejudice.<sup>198</sup>

Where the failure to disclose the prior litigation is coupled with questionable conduct on the part of the juror, the combination will disqualify him.<sup>199</sup>

### E. *Opinion*

#### 1. Based on Prior Knowledge of Facts

There are two statutory grounds for challenging a juror who has formed or expressed an opinion concerning the case being tried. The first is found in section 494.190 and pertains to civil trials and jury trials in general, and the second is in section 546.150 pertaining to criminal trials. Section 494.190 actually covers both civil and criminal trials and the purpose of section 546.150 is to place some limitations on the general provisions in criminal trials, as will be pointed out in the following subsections.

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194. *Duffendack v. St. Louis Pub. Serv. Co.*, 365 S.W.2d 52 (St. L. Mo. App. 1963); *Barb v. Farmer's Ins. Exch.*, 281 S.W.2d 297 (Mo. 1955); *Mantz v. Southwest Freight Lines*, *supra* note 193.

195. *Brady v. Black & White Cab Co.*, 357 S.W.2d 720, 725 (K.C. Mo. App. 1962).

196. *Triplett v. St. Louis Pub. Serv. Co.*, 343 S.W.2d 670 (St. L. Mo. App. 1961).

197. *Duffendack v. St. Louis Pub. Serv. Co.*, *supra* note 194. In this case the prior litigation transpired 9½ years before the interrogation and involved a workman's compensation payment for which no claim had to be made.

198. *Brady v. Black & White Cab Co.*, 357 S.W.2d 720 (K.C. Mo. App. 1962).

199. *Reich v. Thompson*, 346 Mo. 577, 142 S.W.2d 486 (1940).

For convenience civil and criminal trials will be discussed separately although there is much overlap. As will be seen, most of the controversy has been in the criminal area.

a. Civil Trials: Section 494.190

Section 494.190 reads in part as follows:

. . . [N]o person who has formed or expressed an opinion concerning the matter, or any material fact in controversy in any such cause, which may influence the judgment of such person . . . shall be sworn as a juror in the same cause.

For a juror to be disqualified under this section he must have (a) formed or expressed an opinion, (b) which concerns the outcome of the litigation or a material fact in the controversy, and (c) the opinion must be of such strength as to influence the judgment of the juror.<sup>200</sup> Each of these factors must be present in order to challenge the juror for cause, otherwise, the challenge will be denied.

When it is stated that the juror must have *formed* or *expressed* an opinion this means that mere knowledge of the facts, from whatever source, does not make the juror incompetent.<sup>201</sup> This section disqualifies the juror, who, with knowledge of the facts, forms or expresses an opinion based thereon.

The opinion so formed must concern the outcome of the litigation or a material fact thereof. This is self explanatory.<sup>202</sup>

The most difficult requirement to establish is the third: The opinion must be such as to influence the judgment of the juror. Assuming that the juror has formed or expressed an opinion on the outcome or a material fact of the litigation, how does the court determine whether the opinion will influence the judgment of the juror? The court looks to the *source* of the facts upon which the opinion was first based. The facts giving rise to the prior knowledge and opinion formed thereon must be of such a nature and quality that the opinion based thereon will be presumed to

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200. See cases cited in text at pages 291-93 *infra*.

201. Walker v. Hassler, 240 S.W. 257 (St. L. Mo. App. 1922). This statement is true, however only in civil cases. See § 546.110, RSMo 1959 which provides that no one may serve as a juror in a criminal trial who served on either the grand jury or the coroner's jury.

202. See State v. Yeager, 12 S.W.2d 30 (Mo. 1928).

have the strength to endure the evidence presented and the instructions of the court, and thus bias the verdict rendered.<sup>203</sup>

There are not enough cases dealing strictly with civil litigation to formulate any definite rules but there is some indication of what fact sources are of such a nature and quality. If a juror sat as a juror in an earlier case involving the same fact situation<sup>204</sup> or had been a fellow worker with plaintiff on a farm and talked with plaintiff's husband about the case,<sup>205</sup> or had listened to all the testimony presented in a prior trial by a different plaintiff against the same defendant which involved the same issues as the present case,<sup>206</sup> the court *presumes* that the opinion based on such prior knowledge will cause the juror to prejudge the case. As will be seen in the next subdivision on criminal cases, these cases indicate that it is the *reliability* of the source, and substantiality of information which gives a disqualifying strength to the opinion so formed. In this area the trial court is vested with much discretion.<sup>207</sup>

Even when a juror responds that he had formed or expressed an opinion on the outcome or a material fact in the controversy, if in answer to additional questions he further states that he can render a verdict based on the evidence presented and under the instructions of the court, and the source of the opinion does not fall within the reliable category discussed above, he is competent.<sup>208</sup> This is true even though he states it will take some evidence to remove the opinion.<sup>209</sup> However, this rule does not apply when the court determines that due to the source of the opinion its strength will cause the juror to prejudge the case. Then it does not matter what the juror thinks as to his ability to disregard the opinion and render a fair and impartial verdict. He is then incompetent to serve.<sup>210</sup>

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203. This theory is explained fully by Chief Justice Marshall in *United States v. Burr*, 25 Fed. Cas. 51 (No. 14, 692g) (C.C. D.Va. 1807). In accord: *McCarthy v. Cass Avenue & F. Ry.*, 92 Mo. 536, 4 S.W. 516 (1887); *Spangler v. Kite*, 47 Mo. App. 230 (St. L. Ct. App. 1891).

204. *Hunt v. City of Columbia*, 122 Mo. App. 31, 97 S.W. 955 (K.C. Ct. App. 1906).

205. *Rooker v. Deering S.W. Ry.*, 215 Mo. App. 481, 247 S.W. 1016 (Spr. Ct. App. 1923).

206. *Barnett v. St. Francis Levee Dist.*, 125 Mo. App. 61, 102 S.W. 583 (St. L. Ct. App. 1907).

207. *United States v. Burr*, *supra* note 203; *McCarthy v. Cass Avenue & F. Ry.*, *supra* note 203; *Spangler v. Kite*, *supra* note 203.

208. *Spangler v. Kite*, *supra* note 203; *McCarthy v. Cass Avenue & F. Ry.*, *supra* note 203.

209. *McCarthy v. Cass Avenue & F. Ry.*, *supra* note 203.

210. *Rooker v. Deering S.W. Ry. Co.*, *supra* note 205; *Barnett v. St. Francis Levee Dist.*, *supra* note 206.

## b. Criminal Trials: Section 546.150

Section 546.150 states that a juror may be challenged for cause in a criminal trial if:

. . . he has formed or delivered an opinion on the issue, or any material fact to be tried, but if it appears that such opinion is founded only on rumor and newspaper reports, and not such as to prejudice or bias the mind of the juror, he may be sworn.

Under this section it is proper for counsel to inquire if any member of the panel has expressed or formed any opinion as to the guilt or innocence of the defendant<sup>211</sup> or any other material fact in issue.<sup>212</sup> As in civil proceedings three requirements must be met for a valid challenge: (a) the juror must have formed or expressed an opinion, (b) which concerns either the guilt or innocence of the accused or a material issue of the trial, and (c) the opinion must be of such strength as to influence the judgment of the juror.

The language of this section indicates that the crucial inquiry is the *source* of the opinion. As the next two subdivisions indicate, the dividing line between sources which will not remove the juror's competence and those rendering him incompetent is the reliability of the source with the added factors of accuracy and substantiality. This is the same criterion as for civil proceedings, but here there is more emphasis and thus better guidelines. The same question is presented to the trial court: Does an opinion based on this source of knowledge have such strength as to cause the juror to render a biased verdict?

## (1) Opinions Based on Rumor or Newspaper Reports

Section 546.150 expressly states that an opinion based on rumor does not of itself disqualify the juror.<sup>213</sup> It does not matter whether such opinion will be disregarded by the juror completely, or will require evidence to remove, if the juror satisfies the court that he can render a fair and impartial verdict based on the evidence and the court's instructions.<sup>214</sup> The rationale behind this exception appears to be a presumption

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211. See cases cited in text at pages 291-93 *infra*.

212. *State v. Lonon*, 56 S.W.2d 382 (Mo. 1932). Juror's opinion of the defendant's reputation for being a law abiding citizen and for truth and veracity is not such a material fact because such does not go to the merits of the case.

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

214. *State v. Fimmel*, 280 S.W.2d 110 (Mo. 1955); *State v. Burns*, 351 Mo. 163, 172 S.W.2d 259 (1945); *State v. Wampler*, 58 S.W.2d 266 (Mo. 1933); *State*



that such opinion would not have the strength to survive exposure to sworn testimony from reliable witnesses, and the instructions given by the court.

The court has the final determination as to the juror's competency, based on the juror's answers about his opinion and the court's assessment of the fixed nature of such opinion.<sup>215</sup> An opinion based entirely on rumor might thus be disqualifying if the juror states without qualification that it would influence his verdict, or if the trial court determines that the opinion was of such a strength or fixed nature as to affect the juror's verdict, regardless of the juror's opinion of his objectivity. Exercise of the trial court's discretion in this matter will almost always be final.

Section 546.150 also states that opinions based on newspaper reports are not automatically disqualifying. The decisional history of this phrase renders it ambiguous. Therefore a brief look at the history of this provision may be helpful.

The first case dealing with newspaper reports was *Baldwin v. State*<sup>216</sup> decided in 1848. (This was before the "news-report" exception had been added to the statute.) In *Baldwin* the court was faced with the qualification of a juror who had formed an opinion based on a newspaper article.

The information upon which the juror predicated his opinion, was derived from newspaper statements, which, of all other sources of intelligence are the most uncertain and unreliable; gleaned, as such matters are, from the streets and alleys, beer houses and oyster cellars of a large commercial city, and without any special pains being taken to ascertain the particulars of the affair.<sup>217</sup>

After the legislature amended section 546.150 in 1879 to add "and newspaper reports" to "rumor," Judge Sherwood explained<sup>218</sup> the legislative intent in the light of the judicial definition of "newspaper reports" made by the court in *Baldwin*. It was his belief that the legislature expressed an intent to make "rumor" and "newspaper reports" legal equivalents.

This construction may create different categories of newspaper reports, some equal to "rumor" which will not make the juror incompetent—and

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v. Hicks, 319 Mo. 28, 3 S.W.2d 230 (1928); *State v. Woodward*, 309 Mo. 19, 273 S.W. 1043 (1925); *State v. Smith*, 228 S.W. 1057 (Mo. 1921); *State v. Miles*, 199 Mo. 530, 98 S.W. 25 (1906).

215. *Ibid.*

216. 12 Mo. 223 (1848).

217. *Id.* at 225.

218. Dissenting in *State v. Bryant*, 93 Mo. 273, 6 S.W. 102 (1887).

some that rise above the status of "rumor" to "reliability" and thereby make the juror incompetent. This is the way the cases have developed, although some decisions have failed to make the distinction clear.<sup>219</sup> The basic inquiry remains: Which newspaper reports will give an opinion the strength to make a juror incompetent as a matter of law? This is covered in subdivision b., *infra*. Rather than attempt to set out which newspaper reports are the legal equivalent of rumor (and not disqualifying if the trial court determines that the juror can render a fair and impartial verdict), it will be of more help to decide which reports *are* disqualifying as a matter of law if a juror bases an opinion thereon, and say that the remainder fit into the rumor category.

## (2) Opinion Formed from Prior Knowledge Based on Reliable Sources

A juror is incompetent to serve if he had formed or expressed an opinion from: (a) hearing a substantial amount of testimony in the preliminary hearing,<sup>220</sup> the coroner's inquest,<sup>221</sup> a prior trial of the same cause,<sup>222</sup> or (b) talking with witnesses in the case, whether summoned or not,<sup>223</sup> or (c) facts of which he has personal knowledge;<sup>224</sup> or (d) reading newspaper accounts which are an accurate and substantial report of the proceedings in the preliminary hearing, coroner's inquest or prior trial of the same cause,<sup>225</sup> or an accurate, substantial portion of a confession of the accused or an accomplice.<sup>226</sup>

The distinguishing characteristic of this rule is the reliability of the source of the opinion. If a juror bases his opinion on such source, theoretic-

219. *State v. McCarver*, 194 Mo. 717, 92 S.W. 684 (1906).

220. *State v. Hultz*, 106 Mo. 41, 16 S.W. 940 (1891).

221. *State v. Biswell*, 352 Mo. 707, 179 S.W.2d 61 (1944).

222. *State v. Garrett*, 285 Mo. 288, 226 S.W. 4 (1920).

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

224. *Eckert v. St. Louis Transfer Co.*, 2 Mo. App. 36 (St. L. Ct. App. 1876). A newspaper reporter was held incompetent who had examined the facts and written an article on the case. *But see Walker v. Hassler*, 240 S.W. 257 (St. L. Mo. App. 1922) and *Genova v. Kansas City*, 254 S.W.2d 38 (K.C. Mo. App. 1953), which, although civil cases, point out that mere knowledge of the facts, without forming an opinion therefrom, will not disqualify.

225. *State v. Reed*, 137 Mo. 125, 38 S.W. 574 (1896) partial reports are *not* sufficient; *accord*, *State v. Bobbit*, 215 Mo. 10, 114 S.W. 511 (1908); *State v. Forsha*, 190 Mo. 296, 88 S.W. 746 (1905). Neither are *general* newspaper accounts. *State v. McGinnis*, 158 Mo. 105, 59 S.W. 82 (1900). Must be accurate and same as given at inquest, *State v. Biswell*, 352 Mo. 707, 179 S.W.2d 61 (1944). General newspaper report not sufficient, *State v. Tiedt*, 229 S.W.2d 582 (Mo. En Banc 1950).

226. *State v. Robinson*, 117 Mo. 649, 23 S.W. 1066 (1893).

cally such an opinion is much more difficult to remove and tends to smack of bias or prejudice. At least that is the judicial result. The mere formation or expression of such opinion makes the juror incompetent to serve, notwithstanding his belief that he can render a fair and impartial verdict based on the evidence presented and under the instructions of the court.

The rule was early developed and well expressed in *State v. Foley*,<sup>227</sup> where certain veniremen had heard part of the testimony at a prior trial, discussed the case with witnesses, and had read reports of the evidence presented on the first trial in a newspaper:

If a person has formed or expressed an opinion upon his own knowledge of the facts in the case, or from conversing with the witnesses, or read the sworn evidence taken before the coroner on preliminary examination in the case, or if his opinion has been engendered by hearing the witnesses testify under oath in a former trial of the same case, the uniform practice has been to reject such a person as incompetent to serve as a juror.<sup>228</sup>

To disqualify the juror in these different situations certain facts must be established, sometimes beyond the answers of the juror.<sup>229</sup> A venireman who attended a prior trial, preliminary hearing or inquest pertaining to the case on trial must have heard a *substantial* part of the evidence so presented before being disqualified. A fragmentary hearing is not adequate to make him incompetent.<sup>230</sup> This fact can be established by the answer of the venireman himself and no outside proof should be necessary. This is also true with respect to a juror who has talked with witnesses or who himself has personal knowledge of the facts of the case.<sup>231</sup>

A different situation exists with respect to newspaper sources. Before the juror will be disqualified the challenging party must prove that the paper did contain a substantial and accurate account of the evidence presented at the former trial, preliminary hearing or coroner's inquest.<sup>232</sup>

227. *Supra* note 223.

228. *Supra* note 223 at 611, 46 S.W. at 736.

229. It would be necessary to introduce the newspaper article in order to show that it contained an accurate and substantial account of the evidence. *State v. Darling*, 199 Mo. 168, 97 S.W. 592 (1906); *State v. Myers*, 198 Mo. 225, 94 S.W. 242 (1906).

230. *State v. Garrett*, 285 Mo. 288, 226 S.W. 4 (1920), jurors who had heard fragments of testimony at prior trial held not incompetent; *State v. Riddle*, 179 Mo. 287, 78 S.W. 606 (1904), juror had heard part of one witness' testimony at prior habeas corpus proceeding held not incompetent; *Accord*, *State v. Taylor*, 134 Mo. 109, 35 S.W. 92 (1896).

231. *Supra* note 223.

232. *State v. Darling*, *supra* note 224, sets out a very good guide of proof needed to show a juror incompetent. See also *State v. Robinson*, *supra* note 226.

If the newspaper report purports to be a confession of the accused or an accomplice, it may have to be sworn to make it admissible into evidence.<sup>233</sup> With this limitation on newspaper reports it is very probable that most opinions based on them will be in the “rumor” category.

## 2. Expression of Opinion Before Jury Panel

The foregoing sections examined the result of a venireman admitting he had formed or expressed an opinion privately, at least outside of the courtroom. When the juror expresses his opinion before the rest of the panel while undergoing voir dire, an additional problem is raised. It does not fit into “challenge for cause” form, but it is closely connected. The basic inquiry is this: Does an outburst of opinion have such a prejudicial effect that it warrants discharge of the entire panel?

In *State v. Taylor*<sup>234</sup> the defendant was charged with assault with intent to kill with malice. Counsel had given a brief statement concerning the general nature of the case, and after hearing this one juror stated she was ready to give the defendant “the maximum.” This statement was not in response to any question. Out of the presence of the panel defendant moved for a mistrial which was denied. The court did excuse the juror and instructed the panel to disregard the outburst. On appeal it was held that such an expression of opinion was not a sufficient ground for challenging the entire panel.<sup>235</sup> The supreme court emphasized that the trial court was in a better position to determine the effect of such behavior, and on these facts there was no abuse of discretion.

Jurors have often been anxious to express their views during the voire dire. In *State v. Weidlich*<sup>236</sup> a juror maintained that he didn't think he could give a “thief” a fair trial. A venireman in *State v. Scott*<sup>237</sup> was sure the defendant was guilty and furthermore he thought the defendant should have to serve on a “rock pile” the rest of his life! On appeal both

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233. *State v. Bobbit*, 215 Mo. 10, 114 S.W. 511 (1908), opinion based on unsworn statement of which fragmentary portion he had read in paper, held competent; *State v. Myers*, 198 Mo. 225, 94 S.W. 242 (1906) unsworn statement of accomplice, court noted that there was no effort to show that the newspaper reports were correct reports of the evidence taken at the trial and reports themselves were not offered when the juror was challenged; *State v. Wooley*, 215 Mo. 620, 115 S.W. 417 (1908) opinions formed on published *extracts* of confession made by defendant were not disqualifying.

234. 324 S.W.2d 643 (Mo. 1959).

235. *Ibid.*

236. 269 S.W.2d 69 (Mo. 1954).

237. 359 Mo. 631, 223 S.W.2d 453 (En Banc 1949).

trial courts were sustained in their refusal to discharge the panel and declare a mistrial.<sup>238</sup>

These examples demonstrate that the trial court has much discretion in ruling on the prejudicial effect of such outbursts.<sup>239</sup> Before the trial court will be reversed the outburst must be so evidently inflammatory and prejudicial that the appellant's right to a fair trial was prejudiced thereby.<sup>240</sup>

### 3. Personal Opinions and Conscientious Scruples

This subdivision is intended to encompass opinions formed for which there is no concrete basis or source. More than likely they are the product of some inner feeling of what is right or wrong, moral or immoral, just or unjust, formed from religious training and social upbringing.

#### a. Death Penalty

Section 546.130 states:

Persons whose opinions are such as to preclude them from finding any defendant guilty of an offense punishable with death, shall be ineligible to serve as jurors on the trial of an indictment or information charging any such offense, unless such disqualification is waived by the representative of the state when selecting the jury in any such case.

Under this statute a juror is incompetent to serve if his opinion would preclude him from assessing the death penalty in a capital case.<sup>241</sup> It makes no difference on what the juror bases his opinion. "It may be based on religious or conscientious scruples or the fact that the juror was a friend of the defendant or his family or that he had some animosity toward the deceased or the prosecuting attorney."<sup>242</sup>

238. *Supra* notes 236 and 237.

239. It appears their decision will be final in almost all instances. *Smith v. Aldridge*, 356 S.W.2d 532 (St. L. Mo. App. 1962); *State v. Sanders*, 313 S.W.2d 658 (Mo. 1958); *State v. Hawkins*, 362 Mo. 152, 240 S.W.2d 688 (1951); *State v. Walters*, 29 S.W.2d 89 (Mo. 1930).

240. *Supra* note 236.

241. *State v. Swinburne*, 324 S.W.2d 746 (Mo. En Banc 1959); *State v. Heckert*, 217 S.W.2d 561 (Mo. 1949); *State v. Boyer*, 342 Mo. 64, 112 S.W.2d 575 (1937); *State v. Pinkston*, 336 Mo. 614, 79 S.W.2d 1046 (1935); *State v. Williams*, 309 Mo. 155, 274 S.W. 427 (1925); *State v. Cooper*, 259 S.W. 434 (Mo. 1924); *State v. Gore*, 292 Mo. 173, 237 S.W. 993 (1922); *State v. Murphy*, 292 Mo. 275, 237 S.W. 529 (1922); *State v. Gilbert*, 186 S.W. 1003 (Mo. 1916); *State v. Sherman*, 264 Mo. 374, 175 S.W. 73 (1915); *State v. Tevis*, 234 Mo. 276, 136 S.W. 339 (1911); *State v. Wooley*, 215 Mo. 620, 115 S.W. 417 (1909); *State v. Bauerle*, 145 Mo. 15, 46 S.W. 609 (1898); *State v. David*, 131 Mo. 380, 33 S.W. 28 (1895).

242. *State v. Pinkston*, *supra* note 241, at 619, 79 S.W.2d at 1049.

## EXAMINATION OF JURORS

The major problem is not the propriety of asking about such an opinion, but the proper phrasing of the question itself. This difficulty lies in forming the question in such a way that it can be interpreted as an attempt to *pledge* the jurors to the death penalty, hypothesizing it upon certain contingencies of proof. The proper way to phrase the question is this: "Do any of you have such opinions or conscientious scruples as *would* preclude you from returning a verdict with the death penalty?"<sup>243</sup>

Although the State can properly challenge for cause any juror giving an affirmative answer to the above question, section 546.130 also permits the prosecutor to waive this disqualification. This is only proper as the statute is for the benefit of the State.<sup>244</sup>

It is not error therefore, if the State fails to ask such question at all in a capital case,<sup>245</sup> or if after asking it does not challenge a juror who states such an opinion,<sup>246</sup> or upon asking it challenges some of the jurors and waives the disqualification as to others.<sup>247</sup> There is a danger however that the State could abuse this optional right by exercising it in such a way as to prejudice defendant's right to a fair trial. This situation could occur where the State, while not intending to ask for the death penalty in a capital case, proceeds to ask the juror's opinion anyway. As defendant argued in *State v. Swindell*,<sup>248</sup> this procedure might impress the jury more with the seriousness of the offense than if the question was not asked.

The prosecutor could also unfairly use this optional challenge as a makeshift peremptory challenge by using it, where possible, to challenge for cause a juror otherwise qualified. The prosecutor would simply ask the question of some jurors and not of others while not intending to ask for the death penalty. This procedure might be reversible error.<sup>249</sup> To

243. *State v. Swinburne*, 324 S.W.2d 746, 751 (Mo. En Banc 1959); *State v. Mosier*, 102 S.W.2d 620 (Mo. 1937) (life imprisonment); *State v. Pinkston*, 336 Mo. 614, 619, 79 S.W.2d 1046, 1049 (1935).

244. *State v. Gore*, 292 Mo. 173, 237 S.W. 993 (1922).

245. *State v. Thompson*, 289 S.W. 788 (Mo. 1926).

246. *State v. Hicks*, 319 Mo. 28, 3 S.W.2d 230 (1928).

247. *State v. Gore*, 292 Mo. 173, 237 S.W. 993 (1922). The defendant later challenged for the same cause those jurors for whom the state waived the disqualification. The court stated at 182, 237 S.W. at 995, that: "If the state sees fit to waive this disqualification . . . the defendant cannot complain. It has always been considered that it is to the interest of the defendant to have such jurors left on the panel when being tried for first degree murder."

248. 271 S.W.2d 533 (Mo. 1954). Defendant tried for forcible rape.

249. See *State v. Ussery*, 178 La. 593, 152 So. 302 (1934), cited by the court in *State v. Swindell*, *supra* note 248: "In a prosecution for a capital offense, if the [prosecutor] does not intend to plead for an infliction of the death penalty, he ought to waive the right to exclude from the jury those who have conscientious or

avert implication of these improper practices the prosecutor would best inform defendant, the panel and the court, at the beginning of his inquiry, of his intention regarding the death penalty.

### b. Circumstantial Evidence

Jurors with conscientious scruples against convicting on circumstantial evidence pose a related problem. It most often arises in capital cases where the court has consistently held that a juror with such scruples is not competent to serve.<sup>250</sup> It is not error therefore to exclude jurors who state that they would not convict one accused of a capital offense on circumstantial evidence alone.<sup>251</sup> It is conceivable that the State might have to indicate in some manner that its case will be based almost entirely on circumstantial evidence before such a challenge would be sustained.

In this situation although the juror would not convict on circumstantial evidence alone, he does not necessarily have conscientious scruples against bringing in the death penalty otherwise. Section 546.130 discussed *supra* does not apply.<sup>252</sup> While there is no authority pertaining to this challenge in other than capital cases, the same reasoning should apply for

religious scruples against the infliction of the penalty of death." The court concluded that it would be improper in such a case for the prosecutor to inquire about capital punishment.

250. *State v. West*, 69 Mo. 401, 403 (1879). This is the first statement of this rule, and it appears to be the strongest. Here the court indicated that a juror would be incompetent if his opinion of circumstantial evidence *precluded* a conviction for murder or if although he might convict he would have conscientious scruples in doing so. See also, *State v. Leabo*, 89 Mo. 247, 1 S.W. 288 (1886), not error to exclude jurors from panel who state that they would not convict on circumstantial evidence alone. To leave them on the panel would be "trifling with justice" and error. *Accord*, *State v. Miller*, 156 Mo. 76, 56 S.W. 907 (1900); *State v. Bauerle*, 145 Mo. 1, 46 S.W. 609 (1898); *State v. Punston*, 133 Mo. 44, 34 S.W. 25 (1896); *State v. David*, 131 Mo. 380, 33 S.W. 28 (1895); *State v. Young*, 119 Mo. 495, 24 S.W. 1038 (1894).

251. *Ibid.*

252. In *State v. West*, *supra* note 250, the court agreed that there was no statutory basis for such a challenge, although a statute similar to § 546.130 was then in existence: 2 Wag. Mo. St. § 11, p. 1103 (1872). The court used as direct authority the decision in *Chouteau v. Pierre*, 9 Mo. 3 (1845), which set forth the general principle of securing an impartial jury whose minds would be receptive to the testimony and law presented them, unhindered by any preconceived notions. No statute was mentioned in *State v. Leabo*, *State v. Young*, *State v. David*, or *State v. Bauerle*, *supra* note 250. *State v. Miller*, *supra* note 250, while sustaining the challenge, noted there was no statutory basis for it. *Cf. State v. Pinkston*, *supra* note 241, where the court did uphold the challenge on the basis of the same statute that was in existence when *State v. West* was decided. The reasoning in this case appears to be wrong, since the juror stated that he had no opinion which would preclude him from bringing in the death penalty, but he would not convict on circumstantial evidence.

any case. The State is also entitled to a fair and impartial jury, and if there is a juror sitting who will not convict on circumstantial evidence the State has lost without putting on any testimony.

The same caveat as given in the death penalty cases should be noted here. The prosecutor should not abuse this challenge by making it in bad faith when his case is not based substantially on circumstantial evidence. Such might prejudice defendant by allowing the State more "peremptory" challenges than allowed by statute.

### c. Insanity as a Defense

A plea of insanity as a defense to homicide often may arouse an emotional response in some jurors.<sup>253</sup> The juror's aversion may arise because he considers this a "bogus" plea<sup>254</sup> or because he fears that if such a defense wins acquittal defendant will be turned loose in society to kill again,<sup>255</sup> or simply because he earnestly believes a "crazy man" should hang the same as a sane one.<sup>256</sup> In such instances the juror is not necessarily incompetent to serve if he satisfies the trial court that he will render a fair and impartial verdict under the law and the evidence.<sup>257</sup> If, however, such personal opinion is strong enough to prejudice the juror's verdict, he should be disqualified. There is much discretion in the trial court to make this determination.<sup>258</sup>

The same opinion may occur in civil cases where sanity and suicide are issues in an action on an accident policy. In such a situation it is not error to discharge a juror who has a firm conviction that a man who committed suicide *was* insane, where such an opinion would influence the juror's judgment and require evidence to remove.<sup>259</sup> In either civil or criminal cases the opinion is not of itself disqualifying, unless the court

253. *State v. Baker*, 246 Mo. 357, 152 S.W. 46 (1912), "a bogus defense which allows killers to run loose."

254. *Ibid.*

255. *Ibid.*

256. *State v. Baker*, 74 Mo. 292 (1881). Juror would hang a "crazy man."

257. *State v. Baker*, 246 Mo. 357, 152 S.W. 46 (1912); *State v. Welson*, 117 Mo. 570, 21 S.W. 443 (1893); *State v. Pogels*, 92 Mo. 300, 4 S.W. 931 (1887); *State v. Baker*, 74 Mo. 292 (1881).

258. *State v. Welson*, *supra* note 257.

259. *Edwards v. Business Men's Assur. Co.*, 350 Mo. 666, 168 S.W.2d 82 (1942). The court distinguished *McCowas v. Covenant Mut. Life Ins. Co.*, 56 Mo. 573, 575 (1874), where the trial court was upheld in sustaining an objection to the question, "whether the jury has any opinion upon the question whether a man is necessarily insane who commits suicide." As the question was only improper in not including the proposition *whether such opinion would influence the judgment of the juror*.



determines it is firm enough to influence the juror's verdict despite the law and the evidence presented.<sup>260</sup>

#### d. "Self-Defense" and Other Defenses

A juror with personal opinion or religious or conscientious scruples against any defense should be incompetent if the conviction or opinion would prejudice the verdict.<sup>261</sup>

#### e. Juror's Attitude Toward Amount of Damages Asked

When plaintiff's case merits an unusually large amount of damages, he may properly be concerned about prospective jurors having fixed opinions against large verdicts which might not yield to proper evidence. For this reason counsel may desire to ascertain the jurors' attitude toward the amount of damages asked. There are relatively few cases involving direct inquiry in this area and the examples found are not always conclusive. When considering this problem the wide discretion of the trial judge to control the scope of inquiry must always be kept in mind. As the following examples illustrate, the danger is that the inquiry may be interpreted as an attempt to pledge the jurors to a certain amount.

In an early personal injury action plaintiff's counsel asked the panel, "Whether they had in mind any fixed amount beyond which they would not render a verdict. . . ." Defendant's counsel did not object when the panel was thus generally interrogated but the supreme court said that such inquiry was still not to be approved.<sup>262</sup> This question would appear to be innocuous since it does not mention or attempt to pledge the jury to any specific amount of damages. However, it is poorly worded to accomplish the purpose desired.

In a later wrongful death action plaintiff's counsel stated: "This is a suit for wrongful death in the amount of \$25,000. That is the amount fixed by statute." He further inquired whether any member of the panel had any conscientious scruples against awarding such an amount, ". . . if under the evidence and instructions of the court you felt they were entitled to that amount?"<sup>263</sup> Defendant objected that such inquiry was

260. See text at pages 287-89 *supra*, where the same rule applies under the statutory provisions on opinion.

261. See *State v. Barsieur*, 242 S.W. 900 (Mo. 1922), where the court indicated approval of such inquiry about "self-defense."

262. *Pence v. Kansas City Laundry Serv. Co.*, 332 Mo. 930, 59 S.W.2d 633, 638 (1933).

263. *Shepard v. Harris*, 329 S.W.2d 1, 12 (1959).

made to incite and arouse the sympathy of the jury and was prejudicial by further attempting to pledge the jury to a certain verdict before hearing the evidence. The supreme court found nothing in this line of inquiry to suggest bad faith or to unduly influence or prejudice the jury, and held that for the trial court to allow such was not reversible error. Counsel should, therefore, be allowed to test the scruples of the jurors against bringing in a large verdict.

A different situation exists where the question is so phrased as to amount to an attempt to pledge the juror to a particular award.

In a personal injury action against a corporate defendant, plaintiff's counsel informed the panel that the amount of damages asked for was \$300,000. He then inquired ". . . that if the plaintiff's evidence shows you that [plaintiff] has been ruined for life, and that he has been damaged at least \$300,000, and under the court's instruction as to the law you feel he is entitled to recover . . ." would any juror hesitate to bring in a verdict for \$300,000? Defendant objected that this was an attempt to commit the panel to a willingness to return a verdict for \$300,000. The supreme court did not directly determine the propriety of the inquiry, for, even assuming it was error, it was not prejudicial as the jury did not bring in a verdict for \$300,000, but for \$200,000.<sup>264</sup> The panel therefore had not considered themselves committed to any amount. This may mean that if the jury had returned a verdict in the amount prayed for the question might have been reversible error, as the verdict would be an indication that the jury felt themselves bound.

The supreme court avoided the same problem in a later case because defendant's counsel failed to object. Plaintiff's counsel had asked several members of the panel such questions as: "Is there anything that would force you . . . not to fully compensate this woman because it would mean returning verdict in a very large sum of money?" and "Would you feel that we can't compensate this lady fully because if we do we will come out with a great big verdict?" No objection was made to any of several like questions until one panel member was removed by the court after she indicated there would be a limit on the amount to which she would agree even if she felt that plaintiff was entitled to it. The supreme court commented that these questions and other very similar ones, were improper on voir dire because they were argumentative, implying an

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264. *Moore v. Ready Mixed Concrete Co.*, 329 S.W.2d 14, 21 (Mo. En Banc 1959).

obligation to return a large verdict for plaintiff before any evidence had been heard.<sup>265</sup> In the light of the decision in *Shepard v. Harris*,<sup>266</sup> however, it would appear that it was counsel's poor choice of words that the court objected to, for counsel appeared to be ridiculing any thought of bringing in a verdict for less than that asked.<sup>267</sup>

#### IV. FORM OF CHALLENGE

A challenge for cause is an objection to the competency of a juror, and like an objection to any evidence, it must be specifically stated by setting out the cause for complaint.<sup>268</sup> This is important at two stages of the proceedings. The objection must be in the proper form when made during voir dire or it will be denied, and if not corrected counsel might be compelled to waste a peremptory challenge to strike the objectionable juror. On appellate review the fact that the trial court denied the challenge—and left any objectionable juror on the panel—will not be reversible error as the general objection does not preserve the point for review.<sup>269</sup>

Counsel should, therefore, state his objections by setting forth the facts constituting his cause for complaint.<sup>270</sup> A challenge to a juror as "disqualified and not qualified to sit as a competent juror,"<sup>271</sup> "for cause,"<sup>272</sup> or a request that a juror "be excused and discharged from the panel"<sup>273</sup> is a general challenge and amounts to no more than the statement of a legal conclusion.<sup>274</sup> Similarly, an "omnibus objection" to

265. *Goldstein v. Fendelman*, 336 S.W.2d 661, 665 (1960).

266. *Supra* note 263.

267. In general see Annotation, Propriety of inquiry on voir dire as to juror's attitude toward amount of damages asked, 82 A.L.R.2d 1420 (1962).

268. *State v. Brown*, 267 S.W.2d 682 (Mo. 1954); *State v. Diple*, 242 Mo. 461, 147 S.W. 111 (1912); *State v. Fields*, 234 Mo. 622, 138 S.W. 518 (1911); *State v. Bobbit*, 215 Mo. 10, 114 S.W. 511 (1908); *State v. Wooley*, 215 Mo. 620, 115 S.W. 417 (1908); *State v. McCarver*, 194 Mo. 717, 92 S.W. 684 (1906); *State v. Miles*, 199 Mo. 545, 98 S.W. 25 (1906); *State v. Myers*, 198 Mo. 225, 94 S.W. 242 (1906); *State v. Forsha*, 190 Mo. 323, 88 S.W. 746 (1905); *State v. Evans*, 161 Mo. 95, 61 S.W. 590 (1901); *State v. McGinnis*, 158 Mo. 118, 59 S.W. 83 (1900); *State v. Albright*, 144 Mo. 638, 46 S.W. 620 (1898); *State v. Reed*, 137 Mo. 125, 38 S.W. 574 (1897); *State v. Taylor*, 134 Mo. 109, 35 S.W. 92 (1896).

269. *State v. Diple*, *supra* note 268; *State v. Fields*, *supra* note 268; *State v. Wooley*, *supra* note 268; *State v. Miles*, *supra* note 268; *State v. Myers*, *supra* note 268; *State v. Forsha*, *supra* note 268; *State v. Evans*, *supra* note 268; *State v. McGinnis*, *supra* note 268; *State v. Taylor*, *supra* note 268.

270. *State v. Taylor*, *supra* note 268.

271. *Ibid.*

272. *State v. Miles*, *supra* note 268.

273. *State v. Diple*, *supra* note 268.

274. *State v. Taylor*, *supra* note 268.

the entire panel "because they were not qualified"<sup>275</sup> is too indefinite to preserve for review an objection to one particular juror.<sup>276</sup>

There is one qualification to these rules which might possibly save a general objection for review. The reason for requiring a specific challenge setting forth the grounds of complaint is to inform the trial court, adverse counsel, and the appellate court of the disqualification being objected to.<sup>277</sup> Therefore, if the ground of complaint is obvious, and could be for no other reason than that contended, it might be sufficient.<sup>278</sup> The application of this exception will depend upon the facts in any particular case, and if the objection is to be preserved for appeal the disqualification must be so clear as to rule out any other grounds.<sup>279</sup>

#### V. TIME FOR CHALLENGE—WAIVER

Not only must counsel make his objection specific, but he must make it timely or the objection may be waived.<sup>280</sup> Section 494.050 states:

No exception to a juror on account of his citizenship, non-residence, state or age or other legal disability shall be allowed after the jury is sworn.<sup>281</sup>

This statute reflects the "policy of our law . . . that the qualifications of a juror should be determined before the trial begins."<sup>282</sup> Applying to both civil and criminal trials,<sup>283</sup> this statute has been consistently con-

275. *Kansas City v. Smart*, 128 Mo. 272, 283, 30 S.W. 773, 777 (1895).

276. *Ibid.*

277. *State v. Taylor*, *supra* note 268.

278. *Carroll v. United Rys.*, 157 Mo. App. 247, 137 S.W. 303 (St. L. Ct. App. 1911); *Cf. State v. Myers*, *supra* note 268.

279. *Carroll v. United Rys.*, *supra* note 278.

280. *State v. Hermann*, 283 S.W.2d 617 (Mo. 1955); *Robbins v. Brown-Strauss Corp.*, 363 Mo. 1157, 257 S.W.2d 643 (1953); *Schierloh v. Brashear Freight Lines*, 148 S.W.2d 747 (Mo. 1941); *Massman v. Kansas City Pub. Serv. Co.*, 119 S.W.2d 833 (Mo. 1938); *Allen v. Chicago, R.I. & P. Ry.*, 327 Mo. 526, 37 S.W.2d 607 (1931); *State v. Murray*, 316 Mo. 31, 292 S.W. 434 (1926); *State v. Wilson*, 230 Mo. 647, 132 S.W. 238 (1910); *City of Tarkio v. Cook*, 120 Mo. 1, 25 S.W. 202 (1894); *State v. Ross*, 29 Mo. 32 (1859); *Lisle v. State*, 6 Mo. 426 (1840); *Orr v. Bradley*, 126 Mo. App. 146, 103 S.W. 1149 (K.C. Ct. App. 1907); *Pitt v. Bishop*, 53 Mo. App. 600 (K.C. Ct. App. 1893).

281. Section 498.260, RSMo 1959, pertaining to juries for cities of more than 500,000 inhabitants, in particular, St. Louis City, is identical except it goes further to say: ". . . nor shall any violation of the provisions of this chapter by an officer be any ground of objection to any juror, unless made before such juror is sworn, nor shall it in any manner affect the verdict rendered by him, or of the jury of which he is a member." As will be seen, this added material is an expression of the common law and is the law with regard to all petit juries.

282. *State v. Hermann*, 283 S.W.2d 617, 619 (Mo. 1955).

283. *State v. Wilson*, *supra* note 280.

strued as prohibiting objections to a juror after the jury is sworn,<sup>284</sup> for the grounds stated, and these are very broad. Besides including waiver of citizenship, nonresidence, state or age required by section 494.010, "other legal disability" has been interpreted to mean any other ground of challenge.<sup>285</sup>

This states only the general rule, however, and whether waiver of a disqualification is final will depend upon the circumstances of each case. The following subtopics examine those circumstances.

#### *A. Where There Is No Inquiry Bearing on the Disqualification*

The parties themselves must develop any grounds for challenge and make the challenges before the jury is sworn for the trial.<sup>286</sup> Therefore when a juror is accepted by a party without being asked any questions at all, or not being asked questions bearing on the area of disqualification later objected to, there is most certainly waiver of any disqualification.<sup>287</sup> It is to no avail to raise the objection for the first time in a

284. *State v. Wilson*, *supra* note 280; *State v. Ross*, *supra* note 280; *Pitt v. Bishop*, 53 Mo. App. 600 (K.C. Ct. App. 1893); this section also applies in juries covered by Chapters 495, 496 and 497. See also *Orr v. Bradley*, 126 Mo. App. 146, 103 S.W. 1149 (K.C. Ct. App. 1907); *Allen v. Chicago, R.I. & P. Ry.*, *supra* note 280.

285. This assertion follows from the reasoning in *Pitt v. Bishop*, *supra* note 280, where "other legal disability" was interpreted to include grounds for challenge mentioned in the statute. *Accord*, *State v. Wilson*, *supra* note 280. For actual disqualifications held to be waived see note 287 *infra*.

286. *State v. Hermann*, *supra* note 282.

287. *Hart Realty Co. v. Ryan*, 288 Mo. 188, 232 S.W. 126 (1921). The record showed no examination of the jury at all. Therefore, the fact the juror was related to a party within prohibited degree was waived.

*Reading and writing*: Where no questions asked about juror ability to read or write, such disqualification is waived. *Allen v. Chicago, R.I. & P. Ry.*, 327 Mo. 526, 37 S.W.2d 607 (1931); *Koontz v. Wabash Ry.*, 253 S.W. 413 (K.C. Mo. App. 1923); *Vogts v. Kansas City Rys.*, 228 S.W. 526 (K.C. Mo. App. 1921); *Knight v. Kansas City*, 138 Mo. App. 153, 119 S.W. 990 (K.C. Ct. App. 1909); *Orr v. Bradley*, 126 Mo. App. 146, 103 S.W. 1149 (K.C. Ct. App. 1907); *Parmen v. Kansas City*, 105 Mo. App. 691, 78 S.W. 1046 (K.C. Ct. App. 1894).

*Citizenship*: *State v. Murray*, *supra* note 280.

*Age*: *State v. Burns*, 351 Mo. 163, 172 S.W.2d 259 (1943).

*Bias and prejudice*: Juror belonged to "Law and Order League," which was brought out on voir dire, but no challenge made. *Held*, waived. *City of Tarkio v. Cook*, *supra* note 280. *Accord*, *Massman v. Kansas Pub. Serv. Co.*, *supra* note 280.

*Relationship*: Objection that juror was within prohibited relationship of § 494.190, RSMo 1959, was waived when counsel failed to conduct voir dire. *Hart Realty Co. v. Rejan*, 288 Mo. 188, 232 S.W. 126 (1921).

*Felon*: Counsel waived fact juror was a convicted felon and disqualified under present § 494.020(1), RSMo 1959. *State v. Wilson*, *supra* note 280.

*Opinion*: Expression of opinion as to outcome prohibited by § 494.190, RSMo 1959, can be waived. *State v. Phillips*, 117 Mo. 389, 22 S.W. 1079 (1893).

motion for a new trial,<sup>288</sup> regardless of how the motion is supported.<sup>289</sup> The motion should be denied when the record shows counsel failed to ask the necessary questions and thus failed to make any challenges,<sup>290</sup> as there is nothing preserved for appellate review.<sup>291</sup> "Any other rule would offer a premium on ignorance of the disqualification of a juror. A party would prefer to remain in ignorance so that if he obtains a verdict, well enough, but if he loses, he may then become active in search of knowledge that he should and could have ascertained before the trial."<sup>292</sup>

### B. Juror Conceals Disqualification

When questions are asked on voir dire that cover the area of prejudice or disqualification objected to, that should fairly elicit an answer from the juror, and the juror conceals his incompetency by remaining silent or giving a false answer or otherwise deceives counsel, the rule is different.<sup>293</sup> Thereafter when the ground for challenge is discovered, from the time the jury is sworn or after verdict, counsel can make his objection in a motion for a new trial.<sup>294</sup> This is similar to the situation when a new trial is sought for newly discovered evidence.<sup>295</sup>

Such a motion for a new trial, to succeed, must be supported by oral testimony taken at the hearing, or by affidavits. This testimony or evidence must show (1) that neither the party nor his counsel were at fault with respect to not obtaining the information previously;<sup>296</sup> and (2) that the

288. *Hart Realty v. Ryan*, *supra* note 287; *Allen v. Chicago, R.I. & P. Ry.*, 327 Mo. 526, 37 S.W.2d 607 (1931).

289. *Ibid.* Here counsel was allowed to present evidence upon the juries incompetence at the hearing on his motion for a new trial. The court indicated affidavits would have served him no better.

290. *Hart Realty Co. v. Ryan*, *supra* note 287.

291. See cases cited *supra* note 280.

292. *Orr v. Bradley*, *supra* note 280, at 151, 103 S.W. 1151. For cases where a disqualification was actually brought out on voir dire but counsel made no objection, see *State v. Burns*, 351 Mo. 163, 172 S.W.2d 259 (1943) (age); *City of Tarkio v. Cook*, 120 Mo. 1, 25 S.W. 202 (1894) (bias).

293. *State v. Ross* *supra* note 280; *Gibney v. St. Louis Transit Co.*, 204 Mo. 704, 103 S.W. 43 (1917); *State v. Hermann*, *supra* note 280; *Robbins v. Brown-Strauss Corp.*, *supra* note 280; *State v. White*, 362 Mo. 1000, 34 S.W.2d 79 (1930); *Massman v. Kansas City Pub. Serv. Co.*, *supra* note 280. *Cf. O'Brien v. Vandalia Bus Lines*, 351 Mo. 500, 173 S.W.2d 76 (1943), where concealment was unintentional and did not amount to deception.

294. It must be shown that neither the party nor his counsel had knowledge of the disqualification. *Pitt v. Bishop*, 53 Mo. App. 600 (K.C. Ct. App. 1893).

295. *Robbins v. Brown-Strauss Corp.*, *supra* note 280, at 1165, 257 S.W.2d 647.

296. See *State v. Phillips*, 117 Mo. 389, 22 S.W. 1079 (1893), where a motion for a new trial was properly derived because there was nothing in the record to show but what counsel and his client knew of the disqualification at trial. *Accord*, *State v. Burns*, 85 Mo. 47 (1884). See also, *State v. Childers*, 268 S.W.2d 858 (Mo. 1954) where objection was not made sufficient by an unverified motion for new

party was prejudiced by not being able to determine the information and make the challenge.<sup>297</sup> Again, it must be remembered that "a trial court's consideration of such a question on motion for a new trial is in the exercise of a discretionary power."<sup>298</sup> Assuming that the motion is properly supported by showing the disqualification and counsel's reasonable lack of knowledge thereof, it is for the trial court to determine whether under all the circumstances prejudice resulted.<sup>299</sup>

## VI. CONCLUSION

It is hoped that this general survey of the law regarding the voir dire examination of jurors will be of some help to the practitioner when preparing to undertake this vital phase of the trial process. It is difficult enough to secure a verdict without jeopardizing it by conducting an improper voir dire. Many of the cited cases illustrate this fact.

It would be impossible in an article of this length to refer to every case that touches upon the subject matter, but it is hoped that enough cases have been cited to enable the reader to resolve particular problems.

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trial; Schierloh v. Brashear Freight Lines, *supra* note 280, where counsel's lack of knowledge so stated in motion supported by affidavit that motion was true to best of counsel's knowledge, was sufficient on that point.

297. State v. White, *supra* note 293.

298. Robbins v. Brown-Strauss Corp., *supra* note 280, at 1165, 257 S.W.2d 647.

299. Robbins v. Brown-Strauss Corp., *supra* note 280, Schierloh v. Brashear Freight Lines, *supra* note 280; O'Brien v. Vandalia Bus Lines, 351 Mo. 500, 173 S.W.2d 76 (1943); Gibney v. St. Louis Transit Co., *supra* note 293.