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RELATIONSHIP OF A JUROR TO A PERSON INJURED BY THE COMMISSION OF A CRIME AS GROUNDS FOR CHALLENGE

The sixth amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an *impartial jury*. . . ." (Emphasis added.) The fairness of trial by jury depends upon the impartiality of the jurors selected. It is the foremost object of the law to secure as jurors men whose minds are wholly free from bias—actual or implied.¹ Implied bias is that which is imputed in law to the prospective juror regardless of any actual partiality.²

It is the purpose of this article to examine one ground of implied bias for which a juror is subject to challenge in a criminal case, *i.e.* the relationship, either by affinity or consanguinity, to the prosecuting witness, the person injured by the crime, or the deceased.

COMMON LAW

Before proceeding, it is advisable that brief attention be paid to the matter of implied bias as a ground for challenge at common law. Many of the rules pertaining to the competency of jurors had been derived from the canon law scheme of "exceptions to witnesses."³ An interest in the litigation was one of several general grounds of incompetency.⁴

Blackstone mentions two types of challenges: principal cause and to the favor.⁵ The former was used where the facts imported actual bias, for example consanguinity or affinity of a juror to either party within the ninth degree.⁶ These challenges are discussed by Blackstone in his section on civil trials. However, at a later point he states that challenges in criminal

1. *State v. Hatfield*, 48 W. Va. 561, 37 S.E. 626 (1900); *State v. Dushman*, 79 W. Va. 747, 91 S.E. 809 (1917).

2. *United States v. Wood*, 299 U.S. 123 (1936). Implied bias is "such bias as, when the existence of the facts is ascertained, does in judgment of law disqualify the juror." N.Y. CRIM. CODE § 376 (1945).

3. See 2 POLLACK & MAITLAND, *HISTORY OF ENGLISH LAW* 621 (2d ed. 1923); PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* ch. 4 (2d ed. 1936) for a discussion of the history of the jury system.

4. 9 HOLDSWORTH, *HISTORY OF ENGLISH LAW* 193 (5th ed. 1944). Nowhere are specific grounds mentioned, and this field is too general to draw any concrete conclusions as to specific grounds of incompetency.

5. 3 BLACKSTONE, *COMMENTARIES* *363. Challenges to the favor exist where the party has no principal challenge, but objects only to some probable circumstances of suspicion, such as acquaintance; the validity of this challenge must be left to the judge. This challenge is not within the scope of this comment.

6. *Ibid.*

7. 4 BLACKSTONE, *COMMENTARIES* *352.

8. 3 BLACKSTONE, *op. cit. supra* note 5, at 363.

cases may be made for the same reasons as in civil cases.⁷ Blackstone makes no mention of a juror's relationship to the injured party as a ground for challenge,⁸ and if such a rule existed, it is not clear why he omitted it.⁹

THE LAW TODAY

A) *Non-Statutory*

Subject to constitutional limitations¹⁰ it is within the power of the legislature to prescribe the qualifications of jurors and grounds for challenging them.¹¹ Half of the states¹² are presently without statutes which declare relationship to the prosecuting witness, to the party injured by the offense, or to the deceased as a ground for challenging a juror. When the problem arises in these states, the courts are faced with the question of what precedent is applicable.¹³ Several courts have relied on the common law, basing their decisions on the rule that a juror related within the ninth degree to a party is subject to challenge.¹⁴ These courts have held that for the purposes of a criminal trial, the person injured by the offense must be considered a party.¹⁵ Courts basing their decisions on common law precedents have failed to explain the complete absence of a specific rule of challenge on this point.

9. From an examination of the above cited authorities, the author feels it is safe to conclude that there existed at common law no specific ground for the challenge of jurors because of relationship to the prosecuting witness, person injured by the offense, or the deceased. *Accord*, *State v. Hilton*, 87 S.C. 434, 69 S.E. 1077 (1911).

10. U.S. CONST. amend. XIV, § 1, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." *Strauder v. West Virginia*, 100 U.S. 303 (1879) (a statute of West Virginia disqualifying negroes from acting as jurors because of their race was held unconstitutional as violative of the fourteenth amendment); see also *Brown v. Allen*, 344 U.S. 443 (1952); *Cassell v. Texas*, 339 U.S. 282, 286-287 (1950); *State v. Peoples*, 131 N.C. 784, 42 S.E. 814 (1902).

11. *Ex parte Mana*, 178 Cal. 213, 172 Pac. 986 (1918) (legislature had the right to provide that women serve as jurors); *Walter v. State*, 208 Ind. 231, 195 N.E. 268 (1935) (the qualifications of jurors is a matter of legislative control); *Palmer v. State*, 197 Ind. 625, 150 N.E. 917 (1926); *People v. Barttz*, 212 Mich. 580, 180 N.W. 423 (1920).

12. These states are: Arizona, Colorado, Connecticut, Delaware, Illinois, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, New Hampshire, New Jersey, New Mexico, North Carolina, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, West Virginia, Wisconsin. Neither the United States Code, Statutes at Large or the Federal Rules of Criminal Procedure have any such statute.

13. The courts are faced with this problem because of the confusion concerning the existence of a common law rule in point. See 3 BLACKSTONE, COMMENTARIES *363; 4 BLACKSTONE, COMMENTARIES *352; 9 HOLDSWORTH, HISTORY OF ENGLISH LAW 193 (5th ed. 1955); PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW ch. 4 (2d. ed. 1936); 2 POLLACK & MATTLAND, HISTORY OF ENGLISH LAW 621 (2d ed. 1923).

14. 3 BLACKSTONE, COMMENTARIES *363.

15. *State v. Williams*, 9 Houst. 508, 18 Atl. 949 (Del. 1890); *Smith v. State*, 3 Ga. 574, 59 S.E. 311 (1907); *State v. Thomas*, 351 Mo. 804, 174 S.W.2d 337 (1943); *State v. Miller*, 331 Mo. 675, 56 S.W.2d 92 (1932). The influence of Blackstone's statement that challenges in criminal cases may be made for the same reasons as in civil cases is apparent. 4 BLACKSTONE, COMMENTARIES *352.

Courts in other states have held that due to the absence of a common law rule regarding this ground of challenge,¹⁶ a juror will not be subject to challenge because of a relationship to the injured party.¹⁷

Both of the foregoing court-created theories have lost sight of the fundamental idea underlying the existence of the right to challenge jurors—to guarantee the accused a fair and impartial trial by a jury of his peers.¹⁸ Decisions based upon these theories are completely arbitrary.

A more reasonable approach has been expressed in cases holding that it is within the discretion of the trial judge to determine whether the particular juror is subject to challenge.¹⁹ The judge's decision should rest on the *probability* of bias arising from the particular relationship and the surrounding circumstances.²⁰ In *United States v. Banmiller*²¹ the juror was the sister-in-law of the injured complainant. They were acquainted, but never met socially nor were they connected in any business way; they had never discussed the case with each other. The trial judge, after a hearing,²² concluded that the relationship did not affect the juror's consideration of the case and there was no ground for challenge.

Discretion vested in the trial judge has resulted in the attainment of

16. *State v. Hilton*, 87 S.C. 434, 69 S.E. 1077 (1911).

17. *Duke v. State*, 257 Ala. 339, 58 So.2d 764 (1952); *Anderson v. State*, 30 Ala. App. 124, 2 So.2d 461 (1941); *State v. Oliver*, 193 La. 1084, 192 So. 725 (1939) (relationship of step-brothers existing between prosecuting witness and juror not a ground for challenge. The author feels this is an excellent example of the arbitrary decisions reached by these courts); *State v. Chandler*, 178 La. 7, 150 So. 386 (1933); *State v. Phillips*, 164 La. 597, 114 So. 171 (1927).

18. This idea is expressed in *State v. Hatfield*, 48 W. Va. 561, 37 S.E. 626 (1900); *State v. Dushman*, 79 W. Va. 747, 91 S.E. 809 (1917).

19. *State v. Haney*, 186 La. 465, 172 So. 528 (1937); *State v. Carricut*, 157 La. 140, 102 So. 98 (1924); *State v. Scarborough*, 152 La. 669, 94 So. 204 (1922); *State v. Lewis*, 323 Mo. 1070, 20 S.W.2d 529 (1929); *State v. Gregory*, 172 S.C. 329, 174 S.E. 10 (1934).

20. *State v. Haney*, 186 La. 465, 172 So. 528 (1937) (juror's wife was second cousin of prosecutrix, but because of his substantial standing in the community and reputation for honesty, the juror was not disqualified); *State v. Scarborough*, 152 La. 669, 94 So. 204 (1922).

21. 248 F.2d 303 (3d cir. 1957).

22. Upon the accused's motion for a new trial on ground that he was denied an impartial trial, the court held a hearing to determine if such was the case. The following testimony was given by the juror at the hearing:

Q. Mrs. Degler, the fact that you were related to the man who was victimized in this robbery, did that prejudice your vote in any way in this case?

A. No, it did not.

Q. Did you bring back your verdict of guilty on the evidence as presented in the court; is that how you based your verdict, I mean, on what you heard in court?

A. On what I heard, yes, that is the way.

Q. And the fact that your brother-in-law was the one who was robbed had nothing to do with it?

A. It did not.

Based on the hearing, and upon the fact that the juror was a housewife serving as a juror for the first time, the trial judge felt there was no fraud on her part and was convinced of her impartiality. His decision was upheld on appeal. *United States v. Banmiller*, 248 F.2d 303, 306 (3d cir. 1957).

the basic objective of this theory—to impanel a fair and impartial jury, free from arbitrary exclusions not sanctioned by statute.²³

B) Statutory

There are twenty-four states with statutes holding certain relationships to the injured party or to the prosecuting witness to be ground for challenge because of implied bias.²⁴ A single basic pattern is formed by these statutes, differing only in the degree of relationship required. The span of relationship ranges from that of third degree²⁵ to “any kin.”²⁶

The apparent basis of the “degree designation” is found in the common law rule of relationship to a party within the ninth degree.²⁷ This has been increased or decreased in proportion to the legislature’s fear of bias stemming from the relationship. It is nevertheless difficult to justify the extension of this rule to include “any kin,” regardless of how great the fear of bias may be.

Since the forms of these statutes do not vary materially, it is sufficient to look at a single example. The New York statute²⁸ provides:

Grounds of challenge for implied bias.

A challenge for implied bias may be taken for all or any of the following causes, and for no other: 1. Consanguinity or affinity within the ninth degree, to the person alleged to be injured by the crime charged, or on whose complaint the prosecution was instituted, or to the defendant; . . .

23. The author bases his opinion on the results reached in the following cases: *United States v. Bammler*, 248 F.2d 303 (3d cir. 1957); *State v. Scarborough*, 152 La. 669, 94 So. 204 (1922).

24. Ala.: ALA. CODE ANN. tit. 30 § 55 (1940); Ark.: ARK. STAT. § 43—1920 (1947); Cal.: CAL. PENAL CODE § 1074 (1953); Fla.: FLA. STAT. ANN. § 913.03 (1943); Ga.: GA. CODE ANN. § 59-716 (1935); Idaho: IDAHO CODE ANN. § 2020 (1947); Ind.: IND. ANN. STAT. § 9—1504 (1956); Iowa: IOWA CODE ANN. § 779.5 (1950); Kan.: KAN. GEN. STAT. ANN. ch. 62 art. 1406 (1949); Ky.: KY. ACTS OF GEN. ASSEMBLY ch. 87 § 1 (1956); Minn.: MINN. STAT. ANN. § 631.31 (1945); Mo.: MO. ANN. STAT. § 546.120 (Vernon 1949); Mont.: MONT. REV. CODES ANN. § 94—7120 (1947); Neb.: NEB. REV. STAT. § 29—2006 (1956); Nev.: NEV. COMP. LAWS § 10946 (1929); N.Y.: N.Y. CRIM. CODE § 377 (1945); N.D.: N.D. REV. CODE § 1736 (1943); Ohio: OHIO REV. CODE ANN. § 2945.25 (Baldwin 1953); Okla.: OKLA. STAT. ANN. § 660 (1937); Ore.: ORE. REV. STAT. § 136.220 (1953); Tex.: TEX. CODE CRIM. PROC. ch. 3 art. 616 (Vernon 1941); Utah: UTAH CODE ANN. § 77—30-19 (1953); Wash.: WASH. REV. CODE § 4.44.180 (1951); Wyo.: WYO. COMP. STAT. ANN. § 10.1104 (1945).

25. Florida and Texas use third degree as their basis.

Degree of relationship required	No. of states
3	2
4	6
5	4
6	1
9	4
any kin	7

26. Arkansas, Kansas, Kentucky, Missouri, Montana, and Washington place no limit upon the degree of relationship.

27. 3 BLACKSTONE, COMMENTARIES *363

28. N.Y. CRIM. CODE § 377 (1945).

(1) *Computation of Degree of Relationship*

The civil law method of calculation is used to determine the degree of relationship.²⁹ By this method "reckoning" is taken from the person in question upward to the common ancestor and then down again to the other related party.³⁰ The matter of determining a juror's degree of relationship has not been difficult.³¹

(2) *Consanguinity and Affinity*

Consanguinity implies blood relation through a common ancestor and may be lincal or collateral.³² The courts have had more difficulty in determining the existence of a relationship by affinity which concerns a tie between the blood relations of one spouse and the other spouse.³³ Each spouse is related by affinity to the blood relations of the other spouse in the same degree as the latter, but (and this is the point of confusion) the *blood* relations of one spouse are not, by virtue of the marriage, related by affinity to the *blood* relations of the other spouse.³⁴

Put more simply:

The bride and groom come within the circle of the others kin.
But kin and kin are no more related than they were before.³⁵

Thus, where a juror's son had married a member of the same family in which members of the prosecuting witness's family had married, it was held that no relationship by affinity had been created and the juror was not subject to challenge on that ground.³⁶

(3) *Problems*

These enactments have failed to solve several existing problems;³⁷ the first and most troublesome of which concerns a juror who is unaware that he is within the prohibited degree of relationship until after the verdict.

The second problem is whether a juror related by affinity within the prohibited degree is subject to challenge when the relationship has been dissolved before the trial.

29. *Duke v. State*, 257 Ala. 339, 58 So.2d 764 (1952); *Smith v. State*, 62 Ga. App. 494, 8 S.E. 2d 663 (1940); *Watkins v. State*, 125 Ga. 143, 53 S.E. 1024 (1906); *State v. Thomas*, 351 Mo. 804, 174 S.W.2d 337 (1943).

30. *Watkins v. State*, 125 Ga. 143, 53 S.E. 1024 (1906); 2 BLACKSTONE, COMMENTARIES *207.

31. Clear and extensive charts tracing the degrees of relationship are presented in 2 BLACKSTONE, COMMENTARIES *207 and ATKINSON, WILLS 46 (2d ed. 1953).

32. 26 AM. JUR., *Husband & Wife* § 2 (1938).

33. *Ibid.*

34. *State v. Wall*, 41 Fla. 26 So. 1020 (1899); 26 AM. JUR., *Husband & Wife* § 2 (1938).

35. *Owens v. State*, 177 Miss. 488, 171 So. 345 (1936).

36. *Thornberry v. State*, 192 Ark. 435, 92 S.W.2d 203 (1936); See *Duke v. State*, 257 Ala. 334, 58 So.2d 764 (1952); *Carrett v. State*, 203 Ga. 756, 48 S.E.2d 377 (1948); *Owens v. State*, 177 Miss. 488, 171 So. 345 (1936); *State v. Thomas*, 351 Mo. 804, 174 S.W.2d 337 (1943).

37. It should be noted that these problems also exist in the absence of statute.

DISQUALIFYING RELATIONSHIP UNKNOWN TO JUROR

The court decisions are in conflict where a juror is ignorant of his relationship within the prohibited degree to the person injured. This conflict exists in states having statutes setting forth grounds for challenge based on implied bias³⁸ and in states without such statutes.³⁹

Courts holding that a juror is subject to challenge who is within the prohibited degree, but ignorant of the relationship base their decisions on the possible dangers involved in setting a precedent allowing such jurors to serve.⁴⁰

The court in *Crawley v. State*⁴¹ argued;

It would be too dangerous a precedent to allow the juror to assert that he was ignorant of the relationship till after trial. The principal on which the law rejects him is that he is not impartial; the same objection lies to his assertion that he was ignorant of the relationship at the time of trial, after he had assisted in the conviction.

Courts also refuse to recognize that the juror is unaware of the relationship; the law is deaf to his explanations.⁴²

The majority of courts adhere to the belief that the juror who is ignorant of the relationship until after the verdict is not subject to challenge. Underlying these decisions is the theory stated by the court in *State v. Miller*⁴³ wherein the juror was related within the fourth degree to the deceased, and by such relationship was disqualified by statute.⁴⁴ However, the juror was unaware of the relationship until after the verdict of conviction had been rendered. In holding that the juror was not subject to challenge because of the relationship, the court said that while the fact of relationship subjects a juror to challenge it is really the knowledge of such fact by the juror which may be expected to result in bias. The court could not understand how the relationship could have resulted in bias where such relationship was unknown until after the verdict. In *Miracle v. Commonwealth*⁴⁵ the court stated that where a juror did not know of his relationship to the deceased he stood in the same position as a complete

38. See statutes cited note 24 *supra*.

39. See note 26 *supra*.

40. *State v. Williams*, 9 *Houst.* 508, 18 *Atl.* 949 (Del. 1890); *Crawley v. State*, 151 *Ca.* 818, 108 *S.E.* 238 (1921); *Merritt v. State*, 152 *Ca.* 405, 110 *S.E.* 160 (1921); *Smith v. State*, 151 *Ca.* 818, 108 *S.E.* 238 (1921); *Ledford v. State*, 75 *Ca.* 856 (1885); *Garner v. State*, 76 *Miss.* 515, 25 *So.* 363 (1889); *Page v. State*, 22 *Tex. App.* 551, 3 *S.W.* 745 (1886).

41. 151 *Ca.* 818, 825, 108 *S.E.* 238, 241 (1921).

42. *Smith v. State*, 3 *Ca.* 574, 59 *S.E.* 311 (1907).

43. 331 *Mo.* 675, 56 *S.W.2d* 92 (1932).

44. *MO. REV. STAT.* § 3668 (1929).

45. 148 *Ky.* 453, 146 *S.W.* 1136 (1912); the court further stated that it is the knowledge of the relationship and the resultant feeling that causes the disqualification and where the knowledge is absent, the disqualification disappears.

stranger the judgment of the juror could not have been affected by a circumstance of which he had not the slightest knowledge.

If consideration is given to the fundamental theory underlying the right to challenge jurors,⁴⁶ the logic of *State v. Miller*⁴⁷ and cases supporting this theory⁴⁸ is compelling. The author is hard pressed to understand how a man's decision could be biased by a relationship of which he is not aware.

The dangers arising from the application of this theory, as expressed by its opponents,⁴⁹ would be greatly lessened if the judge would conduct an extensive hearing and careful examination of the facts. A court determination that lack of knowledge of the relationship existed would appear to compel a holding that the juror is not subject to challenge.

RELATIONSHIP BY AFFINITY AS AFFECTED BY DISSOLUTION OF THE MARRIAGE

A) *Dissolution by Death*

It is the general rule that where the disqualifying relationship of a juror is based upon marriage the death of the other spouse removes such disqualification.⁵⁰ The reason for this rule is that the entire structure of relationship by affinity is based on a subsisting marriage, not a dissolved one.⁵¹ However the court in *Spear v. Robinson*⁵² held that relationship by affinity is not lost on the dissolution of the marriage any more than blood relationship is lost by the death of those from whom it is derived.

Where issue survives, the relationship by affinity continues regardless of the death of a spouse.⁵³ Consequently a juror subject to challenge because of affinity remains so even after the marriage is dissolved as long as there is surviving issue.⁵⁴

46. See cases cited note 18 *supra*; this idea is to enable the accused to be tried by a wholly impartial jury composed of men whose minds are free from bias.

47. 331 Mo. 675, 56 S.W.2d 92 (1932).

48. *State v. Fox*, 52 Idaho 474, 16 P.2d 663 (1932); *Reed v. Comm.*, 273 Ky. 607, 117 S.W.2d 589 (1938); *Miller v. Comm.*, 203 Ky. 437, 262 S.W. 579 (1924); *Miracle v. Comm.*, 148 Ky. 453, 146 S.W. 1136 (1912); *Blumfield v. State*, 102 Miss. 610, 59 So. 849 (1912); *State v. Miller*, 331 Mo. 675, 56 S.W.2d 92 (1932); *State v. Steward*, 296 Mo. 12, 246 S.W. 936 (1922); *Traviss v. Comm.*, 106 Pa. 597 (1884); *State v. Congdon*, 14 R.I. 458 (1884); *Hamilton v. State*, 101 Tenn. 417, 47 S.W. 695 (1898); *Rogers v. State*, 109 Tex. Crim. 88, 3 S.W.2d 455 (1927).

49. See cases cited Note 40 *supra*.

50. *Harnage v. State*, 7 Ga. App. 573, 67 S.E. 694 (1910); *Garner v. State*, 6 Ga. App. 788, 65 S.E. 842 (1909); *Gillespie v. State*, 168 Ind. 298, 80 N.E. 829 (1907). There was no mention of the effect of surviving issue of such marriage in these cases.

51. *Diebold v. Diebold*, 235 Mo. App. 83, 141 S.W.2d 119 (1940).

52. 29 Me. 531 (1849).

53. *Shamburger v. State*, 221 Ala. 538, 130 So. 70 (1930).

54. *Shamburger v. State*, 221 Ala. 538, 130 So. 70 (1930); *Walsingham v. State*, 61 Fla. 67, 56 So. 195 (1911); *Miller v. State*, 97 Ga. 653, 25 S.E. 366 (1895); *State v. Shaw*, 25 N.C. 532 (1843); *Stringfellow v. State*, 42 Tex. Crim. 588, 61 S.W. 719 (1901)

B) *Dissolution of Marriage Other Than by Death*

The author has been unable to find any case wherein a court decided the effect upon the disqualifying relationship by affinity of a juror where the marriage was not dissolved by death.⁵⁵

Dicta in *Crosby v. State*⁵⁶ appears to indicate that the result would be the same had the marriage been dissolved by divorce. The court stated:

If the marriage on account of which such relationship exists, be dissolved by death *or otherwise*, the relationship in contemplation of law ceases to exist, unless issue of such marriage survives. (Emphasis added.)

The court further indicated that the burden of proof was on the party challenging the juror to show that the spouse was still living, *and the marriage was otherwise undissolved*. No definite statement can be made in the absence of an actual decision on the point.

CONCLUSION

Courts which have relied solely upon common law precedents to establish grounds for challenging jurors have reached arbitrary results. There is no sound basis for the automatic disqualification of a juror because of a remote relationship to the party injured. Nor is there a sound basis for refusal to exclude a juror who is very probably biased merely because grounds for his exclusion did not exist at common law. It is this strict adherence to an inflexible standard which has resulted in arbitrary decisions. Where discretion has been left with the trial judge to determine a juror's bias the results have been more reasonable. The judge is not bound by rigid standards. The particular relationship and the surrounding circumstances guide the judge's discretion in each individual case. It is the author's belief that this method should be adopted by all states lacking statutes concerning implied bias as a ground for challenge.

The existing legislation leaves much to be desired. Extension of the prohibitory relationship to "any kin" is unrealistic. It is submitted that relationship within the fourth degree should be set up as an absolute basis of exclusion. Discretion should be left to the trial judge in cases involving jurors related within the fifth to ninth degrees. This would reduce arbitrary exclusions.

The legislatures have left untouched the varied problems which have arisen, such as that of a juror within the prohibited degree of relationship but unaware of this fact until after the verdict, and the problem of a

55. Annot., 117 A.L.R. 805 (1938).

56. 90 Fla. 381, 106 So. 741 (1925).

juror related by affinity within the prohibited degree when the marriage has been dissolved before the trial.

Legislatures attempting to solve these problems must always keep in mind the fundamental theory underlying the right to challenge jurors—the guarantee to the accused of a fair and impartial trial by a jury of his peers.

MURRAY GOLDMAN