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JURORS - DISQUALIFICATION FOR RELATIONSHIP TO PARTIES - WHO ARE PARTIES

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JURORS — DISQUALIFICATION FOR RELATIONSHIP TO PARTIES — WHO ARE PARTIES — Defendant was convicted of grand larceny. His motion for a new trial on the ground that one of the jurors was disqualified for implied bias because she was the mother of a deputy prosecuting attorney of the county[1] was denied. Defendant appealed. *Held*, there was no error in denying the motion, for the juror was not disqualified. *State v. Peterson*, 190 Wash. 668, 70 P. (2d) 306 (1937).

A Washington statute provides: "A challenge for implied bias may be taken for any or all of the following causes and not otherwise:—1. Consanguinity or affinity within the fourth degree to either party." [2] This was the section upon which defendant relied. So the question was presented who are parties within the meaning of the statute. Consanguinity or affinity of a juror to either party is a ground of principal challenge at common law.[3] In the ordinary civil case the record parties are clearly pecuniarily interested in the outcome. So relatives of such parties are subject to challenge for implied bias because of that relationship. But record parties often are not the only persons pecuniarily interested in the result of the suit. There is no less reason, then, to subject relatives of these other interested persons to challenge for implied bias on the same

[1] It does not appear from the opinion in the instant case that the deputy prosecutor actually tried the case, but the court treats the questions presented as if he had, or as if such fact made no difference.

[2] Wash. Comp. Stat. (Remington, 1922), § 330. This section sets out the grounds of challenge for implied bias in civil cases. Section 2141 provides that in criminal cases "challenges for cause shall be allowed for such cause as the court may, in its discretion, deem sufficient, having reference to the causes of challenge prescribed in civil cases, as far as they may be applicable, and to the substantial rights of the defendant."

[3] 3 BLACKSTONE, COMMENTARIES, Jones' ed., 363 (1916).

ground. The obvious purpose of the rule in the first instance is to insure impartiality in the jurors, and to effectuate that purpose the rule is applied within broad limits. Therefore these other interested persons are treated as parties for the purpose of challenging jurors.[4] In those states where the common-law grounds of challenge still prevail, there is the same wide application of the rule, and persons with a pecuniary interest in the result are within its scope.[5] This is likewise true in those other jurisdictions where the rule is statutory,[6] as in the

[4] Mellor v. Spateman, 1 Wms. Saund. 343 at 345, 85 Eng. Rep. 495 (1670), where the judge points out "that the natural persons members of a corporation . . . are not strangers to the corporation, but are the parties interested in all the revenues and privileges of the corporation of which they are members. And therefore, if a corporation bring an action for anything which they claim in their corporate capacity, it is a ground for principal challenge to a juror that he is of affinity to any member of the corporation, though the corporation itself cannot have any kindred," and cites COKE, LITTLETON, 14th ed., 157a (1791). This language was relied on in Quinebaug Bank v. Leavens, 20 Conn. 87 (1849). Likewise, see Woodbridge v. Raymond, Kirby (Conn.) 279 (1787), where a juror related to a surety on defendant's bond for costs was challenged under this rule.

[5] Atlantic Coach Co. v. Cobb, 178 Ga. 544 at 550, 174 S. E. 131 (1934), where the court felt that it was "beside the mark to argue that the inquiry as to jurors' relationship to shareholders and employees of an indemnity company should be refused merely because the company was not an actual party." And see Stokes v. McNeal, 48 Ga. App. 816, 173 S. E. 879 (1934) (error to allow a juror who was related to plaintiff's grantor to sit in a suit for recovery of possession of land where defendant set up an adverse claim under the same grantor); Young v. Banking Co., 166 Ga. 877, 144 S. E. 652 (1928) (attachment proceeding by the bank, jurors related to shareholders were subject to challenge for implied bias). In Melson v. Dickson, 63 Ga. 682, 36 Am. Rep. 128 (1879), and Crockett v. McLendon, 73 Ga. 85 (1884), jurors related to counsel who were retained on a contingent fee basis were disqualified for implied bias, though it is not entirely clear the court regarded counsel as parties within the rule. The same court in a subsequent case took the position that a person was not a party for this purpose unless he was beneficially interested, and in Pool v. Warren County, 123 Ga. 205, 51 S. E. 328 (1905), refused to allow a challenge to a juror related to a record party, where the record party was the county commissioner, defending the suit only in his official capacity, with no interest other than that of a taxpayer. But see Rivenburgh v. Henness, 4 Lans. (N. Y. Sup. Ct.) 208 (1871), and Baldwin v. McArthur, 17 Barb. (N. Y. Sup. Ct.) 414 (1854). In Davis v. Southern Ry., 18 Ga. App. 134, 88 S. E. 919 (1916), and in Fait v. Truxton, 1 Penn. (17 Del.) 24, 39 A. 457 (1897), relationship to attorneys who were not retained on contingent fees was not regarded as a relationship within the rule.

[6] In Mono County v. Flanigan, 130 Cal. 105, 62 P. 293 (1900), one who was a county officer and entitled to ten per cent of the recovery by the county, the only record party in this suit instituted by the officer, was held to be a party under a statute similar to that in the instant case. And in Texas & P. Ry. v. Elliott, 22 Tex. Civ. App. 31, 54 S. W. 410 (1899), the wife of plaintiff was held to be a party within the language of the statute, again similar to that of the instant case, because any recovery by her husband became community property, and because an adverse judgment for costs would be paid from community property. But in Roark Trans. Co. v. West, 188 Ark. 941, 68 S. W. (2d) 1000 (1934), it was held that the statute disqualifying jurors related to parties did not disqualify a juror related to a person killed in the same

instant case. In criminal cases, persons other than the record parties are held to be within its bounds. And so a juror may be subject to challenge for implied bias as a relative of a party if he is related to the prosecuting witness,[7] or to the person injured by the offense,[8] or to the deceased in a homicide case.[9] Here, the extreme likelihood of bias, which is the basis for the challenge, arises ordinarily not from relationship to a person pecuniarily interested in the result, but from relationship to a person who is probably instrumental in starting the prosecution and is probably unusually interested in exacting punishment. Or if the juror is related to deceased, he himself probably has such interest. The policy which leads to disqualification of a juror who is related to a party has found expression in an analogous rule—that which disqualifies a judge related to a party.[10] It seems clear that in testing the qualifications of those persons, whether

accident, in the suit by the administrator of the other decedent for the wrongful death. Likewise, in Kelso v. Kuehl, 116 Wis. 495, 93 N. W. 455 (1903), and in Louisiana Ry. v. Morere, 116 La. 997, 41 So. 236 (1906), the rule relating to parties did not disqualify a juror related to counsel. There was nothing to indicate a contingent fee. In general, see the annotation in 86 A. L. R. 118 (1933) on disqualification of a juror for relationship to one who would be subject to challenge for implied bias.

[7] Hamilton v. State, 101 Tenn. 417, 47 S. W. 695 (1898); and see the suggestion in the instant case that section 330(1) might disqualify a relative of the prosecuting witness. Contra: State v. Hilton, 87 S. C. 434, 69 S. E. 1077 (1911). In general, see the annotation in 18 A. L. R. 375 (1922).

[8] Jacques v. Commonwealth, 10 Gratt. (51 Va.) 690 (1853) (juror related to the person whose barn defendant was charged with burning). In State v. Miller, 331 Mo. 675, 56 S. W. (2d) 92 (1932), it was said *obiter* that "in a criminal case the party injured must be considered as a party in interest for the purpose of testing the qualifications of jurors." In general, see the annotation in 63 A. L. R. 183 (1929) on relationship to one financially affected by the offense charged as a disqualification of a juror.

[9] State v. Williams, 9 Houst. (14 Del.) 508, 18 A. 949 (1890); Garner v. State, 76 Miss. 515, 25 So. 363 (1898); State v. Gregory, 172 S. C. 329, 174 S. E. 10 (1934).

[10] This rule is unknown to the common law, but it is generally found in state constitutions and statutes. It, too, is liberally construed. In civil cases, the courts uniformly treat any person with an immediate pecuniary interest in the subject matter of the suit as a party for this purpose, even though such person is not a record party. Thus where an attorney is entitled to a contingent fee or a portion of the recovery, it is said he has an immediate interest in the suit and the judge related to such attorney is disqualified for relationship to a party. Howell v. Budd, 91 Cal. 342, 27 P. 747 (1891); Johnson v. State, 87 Ark. 45, 112 S. W. 143 (1908); Yazoo Ry. v. Kirk, 102 Miss. 41, 58 So. 710 (1912). Contra, Missouri, K. & T. Ry. v. Mitcham, 57 Tex. Civ. App. 134, 121 S. W. 871 (1909). In Young v. Harris, 146 Ga. 333, 91 S. E. 37 (1916), and Norwich Union Fire Ins. Co. v. Drug Co., 121 Miss. 510, 83 So. 676 (1920), where counsel were to get a sum certain in any event and a larger sum if the case were won, it was said that was not a direct interest in the subject matter for counsel were not sharing in the recovery, and so such counsel were not regarded as parties. The distinction seems dubious. In Casmento v. Barlow Bros., 83 Conn. 180, 76 A. 361 (1910), it was held an attorney was not a party for the purpose of disqualifying the judge, though it was assumed the attorney had a financial interest of some kind. In Roberts v. Roberts, 115 Ga. 259, 41 S. E. 616 (1902), where the attorney's

judges or jurors, whose impartiality is essential to a fair trial, the rules disqualifying them for relationship to parties should be given wide application. Strictness of interpretation defeats the purpose of the rule. Admittedly, the

application for fees had to be approved by the court, the attorney was said to be a party for the purpose of testing the judge's qualifications.

In Dobbins v. City of Marietta, 148 Ga. 467, 97 S. E. 439 (1918), a judge related to property owners subject to special assessments which were being questioned was disqualified, though not related to the record parties. Yet in Railway v. Anderson County, (Tex. Civ. App. 1915) 174 S. W. 305 at 327, in a suit by the county and certain taxpayers on behalf of all other taxpayers similarly situated to restrain the railroad from violating its charter, it was said the judge was not disqualified though related to taxpayers not parties of record but among those similarly situated. It was thought inconvenient to disqualify a judge for relationship to any interested person where a public interest is represented by a few on behalf of many.

In Duncan v. Herder, 57 Tex. Civ. App. 542, 122 S. W. 904 (1909), a judge related to one of the next of kin of a decedent whose administrator was contesting a claim was held to be a party. In Stephenson v. Kirkham, (Tex. Civ. App. 1927) 297 S. W. 265, a judge was disqualified because his father-in-law was a shareholder in a business trust whose trustees were record parties. The case was distinguished from that of shareholder in a corporation. In Hodde v. Susan, 58 Tex. 389 (1883), and in Crook v. Newborg, 124 Ala. 479, 27 So. 432 (1910), the court did not hesitate to disqualify a judge related to a surety even though the surety was not a record party.

Some courts show a willingness to apply the rule to persons with an indirect interest in the outcome, regarding a shareholder in a corporation, for instance, as a party for this purpose when the corporation is a record party. Parks v. Citizens Bank, 40 Ga. App. 523, 150 S. E. 438 (1929). But Lewis v. Rolling Mill, (Tex. Civ. App. (1893) 23 S. W. 338, and Turnpike Co. v. Cutler, 6 Vt. 315 (1834), are contra. The latter case explains the reason why the rule is different in the case of the juror —as a matter of convenience a new juror is more easily found than a new judge. See Mellor v. Spateman, 1 Wms. Saund. 343, 85 Eng. Rep. 495 (1670). In State Mutual Life Ins. Co. v. Walton, 142 Ga. 765, 83 S. E. 656 (1914), a judge related to a policy-holder of the insurance company which was a record party was disqualified as a relative of a party.

In certain instances, the rule is relied upon to justify recusation of a judge related to a person with no pecuniary interest in the result but who is instrumental in the commencement of and controls the proceedings, as in certain quasi-criminal actions and statutory proceedings. Thus in Rivenburgh v. Henness, 4 Lans. (N. Y. Sup. Ct.) 208 (1871), the overseer of the poor was held to be a party to a bastardy proceeding because he was authorized by statute to institute and control such action. In event of an adverse judgment, he was liable for costs. In Baldwin v. McArthur, 17 Barb. (N. Y. Sup. Ct.) 414 (1854), the members of the board of supervisors of the poor, a public corporation, were held to be parties to a suit conducted by them pursuant to statute in the name of the corporation to secure an order of support. The individual members had only the same interest as other taxpayers and were not liable for costs. In Reeves v. State ex rel. Mason, 114 Tex. 296, 267 S. W. 666 (1924), the private relator in an action to oust the sheriff was a party so as to disqualify a judge related to him. The relator was liable for costs in the event of an adverse judgment. But in People ex rel. Cooper v. Sheriff of Washington County, 208 App. Div. 823, 204 N. Y. S. 38 (1924), the private relator was said not to be a party. In Hengst v. Burnett, 40

holding in the instant case is supported by precedent,[11] but the principles underlying the rule warrant a holding that the juror is disqualified for relationship to a party when related to the prosecuting attorney in a criminal case. It is obviously impossible to treat the state as a party for this purpose.[12] The prosecuting attorney is the one authorized to control the litigation.[13] He may institute it or discontinue it. In some instances he is authorized to appeal. True, he has no immediate financial interest in the outcome, but he strives for a good record of convictions to keep the position or to pave the way to something higher in the political field.[14] In the instant case, the language of the statute regarding challenges for cause,[15] coupled with the fact that in another section of the code [16] the prosecuting attorney is referred to as a party for the purpose of changing venue, afforded the court an opportunity to disqualify a juror whom the man in the street would probably have regarded as biased. It is as important to avoid the suspicion of prejudice, in selecting a jury, as actual prejudice. Otherwise, faith in the jury as an institution safeguarding the individual's rights is destroyed.[17]

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Okla. 42, 135 P. 1062 (1913), where a guardian took advantage of a statute allowing him to seek a court order authorizing an investment, the guardian was treated as a party.

In Gill v. State, 61 Ala. 169 (1878), a prosecution for murder, the judge was disqualified as a relative of a party because he was related to the deceased.

[11] Frost v. State, 225 Ala. 232, 142 So. 427 (1932); Long v. State, 163 Miss. 535, 141 So. 591 (1932); Mathis v. State, 97 Tex. Crim. 222, 260 S. W. 603 (1924); State v. Cadotte, 17 Mont. 315, 42 P. 857 (1895), all uniformly hold that the prosecuting attorney is not a party within the meaning of the rule disqualifying jurors related to parties. And there are dicta to the same effect in People v. Waller, 70 Mich. 237, 38 N. W. 261 (1888), and State v. Jones, 64 Mo. 391 (1877).

[12] Like the corporation, the state has no kindred. See Mellor v. Spateman, 1 Wms. Saund. 343, 85 Eng. Rep. 495 (1670). And the draftsman of section 2141, supra note 2, may have had something of this sort in mind.

[13] In Hodde v. Susan, 58 Tex. 389 (1883); Crook v. Newborg, 124 Ala. 479, 27 So. 432 (1910); Rivenburgh v. Henness, 4 Lans. (N. Y. Sup. Ct.) 414 (1854), and Hengst v. Burnett, 40 Okla. 42, 135 P. 1062 (1913), the element of control of litigation was thought of significance in determining whether a person was a party.

[14] A prosecutor seems likely to be less disinterested than the overseer or supervisor of the poor in Rivenburgh v. Henness, 4 Lans. (N. Y. Sup. Ct.) 414 (1854); and Baldwin v. McArthur, 17 Barb. (N. Y. Sup. Ct.) 414 (1854).

[15] Wash. Comp. Stat. (Remington, 1922), § 2141, quoted supra, note 2.

[16] Ibid., § 2020.

[17] It does not appear from the opinion that the question of disqualification was raised on trial, but the court treats the problem as if it had been. Otherwise, there would be the further question whether the failure to raise the point below had amounted to a waiver. In general, see the annotations in 18 A. L. R. 473 (1893) and 39 L. R. A. (N. S.) 967 (1912), on disqualification of a juror as ground for new trial.