

## Peremptory Challenges

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1—The courts may hold that a partner engaged in manual labor is an employee and, therefore, entitled to compensation. The courts of Oklahoma in the case of *Ohio Drilling Co. v. State Industrial Commission*<sup>57</sup> adopted this method. In that case, all work was done by the members of the partnership, who, because it was a hazardous enterprise, insured themselves. The suit was brought by an injured partner when the carrier refused compensation on the ground that he was not an employee, but one of the employers. The court held that a partner could be an employee, and compensation was awarded.

2—A statute may be passed making a workman who receives wages an employee. Such a statute has been passed in California in 1937. It provides "A working member of a partnership receiving wages irrespective of profits from such partnership is an employee under this division."<sup>58</sup> The next section reads—"Workmen associating themselves under a partnership agreement, the principal purpose of which is the performance of the labor on a particular piece of work are employees of the person having the work executed. In respect to injuries which occur while such workmen maintain in force insurance in an insurer, insuring to themselves and all persons employed by them benefits identical with those conferred by this division the person for whom such work is to be done is not liable as an employer under this division."<sup>59</sup>

3—A statute may extend the benefits of the Workmen's Compensation Act to the working members of a partnership without calling them employees.

But under the law as it stands in New York today if the partnership is such as to comply with Section 10 of the Partnership Law it will be upheld even though the avowed motive for its formation is to evade the Workmen's Compensation Act.<sup>60</sup>

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#### PEREMPTORY CHALLENGES.

One of the most cherished attributes of our democratic society is the right of trial by jury. No less important are the incidents thereto, as for example, the selection and qualifications of the jurymen. Long regulated by constitutional and statutory provisions, these rights have become a bulwark of our system of government.

The following discussion is concerned with one of the elements of trial practice which has assumed increasing importance, namely, the

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<sup>57</sup> 86 Okla. 139, 207 Pac. 314 (1922).

<sup>58</sup> CAL. LABOR CODE § 3359.

<sup>59</sup> *Id.* § 3360.

<sup>60</sup> *People v. Kaplan*, 160 Misc. 179, 288 N. Y. Supp. 474 (1936).

right to disqualify jurors for purely capricious objections; the right of peremptory challenge.

A challenge is an objection to a juror. Objections may be made to the whole panel of jurors, which is called a challenge to the array, or a challenge may be made as to the individual juror, which is a challenge to the polls. A challenge to the individual juror may be for cause, or may be a peremptory challenge. A challenge for cause is either a challenge for principal cause, in which case the juror is disqualified as a matter of law, or a challenge to the favor, which raises a question of fact.<sup>2</sup>

A peremptory challenge is an objection to a juror based upon the whim or fancy of the challenger.<sup>3</sup> He may object to the color of the juror's hair or the cut of his suit and so disqualify him from serving. This right, today, is purely statutory. It is evident that it is a substantial right, for once the legislature has decreed a definite number of challenges no arbitrary rule of court can reduce that number.<sup>4</sup>

### *Peremptory Challenges in Civil Cases.*

The right of peremptory challenge in New York has been granted in both civil and criminal cases.<sup>5</sup> At common law no right of peremptory challenge in civil cases existed.<sup>6</sup> The New York Civil Practice Act now provides:<sup>7</sup> "Upon the trial of an issue of fact, joined in a civil action in a court of record, each party may peremptorily challenge not more than six and in a court not of record each party may peremptorily challenge not more than three of the persons drawn as jurors." Thus the statute gives each party in a civil case at most six peremptory challenges and not less than three.

The New York Civil Practice Act has also provided for alternate jurors when the trial is likely to be protracted.<sup>8</sup> The court, in its discretion, may direct the calling of one or two additional jurors.

<sup>1</sup> See generally N. Y. CIV. PRAC. ACT §§ 449a-453; N. Y. CODE CRIM. PROC. §§ 359-357; FED. RULES OF CIV. PROC. (1938) Rule 47; JUD. CODE § 287, 36 STAT. 1166 (1911), 28 U. S. C. § 424 (1934).

<sup>2</sup> *Butler v. Glenn Falls R. R.*, 121 N. Y. 112, 24 N. E. 187 (1890).

<sup>3</sup> N. Y. CODE CRIM. PROC. § 372; *People v. McGonegal*, 136 N. Y. 62, 32 N. E. 616 (1892); *People v. Hughes*, 137 N. Y. 29, 32 N. E. 1105 (1893); *People v. McQuade*, 110 N. Y. 284, 18 N. E. 156 (1888); *People v. Bodine*, 1 Denio 281 (N. Y. 1845); *People v. Elliott*, 66 App. Div. 179, 73 N. Y. Supp. 282 (3d Dept. 1901).

<sup>4</sup> *People v. McQuade*, 110 N. Y. 284, 18 N. E. 156 (1888); *Betts v. United States*, 132 Fed. 228 (C. C. A. 1st, 1904); *Lewis v. United States*, 146 U. S. 370, 13 Sup. Ct. 136 (1892); *Sorter v. Austen*, 221 Ala. 481, 129 So. 51 (1930); *Schnitzler v. Atchinson R. R.*, 104 Cal. App. 138, 285 Pac. 918 (1930); *Gordon v. Chicago*, 201 Ill. 623, 66 N. E. 823 (1903); *Foreman v. State*, 203 Ind. 324, 180 N. E. 291 (1932); see *Walter v. People*, 32 N. Y. 147 (1865); *Stokes v. People*, 53 N. Y. 164 (1873).

<sup>5</sup> N. Y. CIV. PRAC. ACT § 451; N. Y. CODE CRIM. PROC. §§ 359, 372, 385, 386.

<sup>6</sup> *Sackett v. Ruder*, 152 Mass. 397, 25 N. E. 736 (1890).

<sup>7</sup> N. Y. CIV. PRAC. ACT § 451.

<sup>8</sup> *Id.* § 499a.

These jurors are to be " \* \* \* drawn from the same source, and in the same manner, and have the same qualifications as the jurors already sworn and be subjected to the same examinations *and challenges*." (Italics ours.) If before the termination of a case a juror dies or becomes ill, the court may, in its discretion, substitute the alternate juror. But even though two additional jurors may thus be chosen, the Civil Practice Act has failed to provide for an increase in the number of peremptory challenges.

There seems to be no logical reason for this omission. It has been said that peremptory challenges are one of the most effective means of ridding the jury box of unfit men.<sup>9</sup> And both the New York Code of Criminal Procedure<sup>10</sup> and the new Federal Rules of Civil Procedure<sup>11</sup> have made specific provisions for additional peremptory challenges for alternate jurors. It is submitted that the present provision of the Civil Practice Act should be amended to include such a provision.

According to the wording of the statute, "each party" may peremptorily challenge. This has raised the frequently litigated question as to the meaning of "each party" where there is more than one plaintiff or defendant.

In *Downey v. Finucane*,<sup>12</sup> a leading New York case, plaintiff instituted an action of fraud and deceit against five defendants, claiming they were liable for a false prospectus issued to promote the sale of securities. The five defendants claimed that each of them was entitled to six peremptory challenges. But the Court of Appeals only allowed six peremptory challenges in all. The defendants were treated collectively as one "party" because they had a common interest, their answers were substantially identical, and their defenses were conducted in the common interest of all. The word "each party" was held not to mean each individual litigant, but, rather, each side to the controversy. If there is no community of interest among the contestants and their claims are conflicting, each plaintiff and each defendant will be entitled to his share of peremptory challenges. This situation is also present where cases are consolidated in the interest of economy and justice.<sup>13</sup>

<sup>9</sup> *Hayes v. Missouri*, 120 U. S. 68, 7 Sup. Ct. 350 (1886).

<sup>10</sup> N. Y. CODE CRIM. PROC. § 373.

<sup>11</sup> FED. RULES CIV. PROC. (1938) Rule 47.

<sup>12</sup> 205 N. Y. 251, 98 N. E. 391 (1912); *Lane v. Fenn*, 146 App. Div. 205, 130 N. Y. Supp. 995 (4th Dept. 1911).

<sup>13</sup> For an interesting selection of cases on the question of whether the litigants in an action are considered a "party" see note 12, *supra*; *Eilola v. Oliver Min. Co.*, 201 Minn. 77, 275 N. W. 408 (1937); *Roberts v. Saunders*, 118 N. J. L. 584, 194 Atl. 1 (1937); *Edwards v. West Texas Hospital*, 107 S. W. (2d) 729 (Tex. Civ. App. 1937); *Glazier v. Roberts*, 108 S. W. (2d) 829 (Tex. Civ. App. 1937); *Kincaid v. Chi. R. R.*, 119 S. W. (2d) 1084 (Tex. Civ. App. 1938). In *Maddox v. Pattison*, 186 So. 894 (La. 1939), a death action resulting from injuries sustained in a collision was consolidated for trial with another action by another party injured in the same collision. The consolidation of the actions was for the purpose of economy and justice, since the same

An interesting angle is presented in the case where the defendants are joined because " \* \* \* the plaintiff is in doubt as to the person from whom he is entitled to redress \* \* \*" and he seeks to question them to see to what extent any of the defendants are liable.<sup>14</sup> In such a case, each defendant should be allowed his statutory number of peremptory challenges. In *Schultz v. Gilbert*,<sup>15</sup> a negligence action by eight plaintiffs against one defendant, the court pointed out the possibility that plaintiff may join with himself other parties as plaintiff solely for the purpose of increasing the number of peremptory challenges, and hastened to add that this would be a fraud on the court. In view of the New York decisions on the meaning of "each party" this danger is less serious here.

Although the number of peremptory challenges are definite, they may be increased or decreased by the legislature so long as the right is not taken away.<sup>16</sup> And the time, manner and order of exercising these challenges are also regulated by the legislature, though the court has a certain amount of discretion where the particular facts demand action by the court.<sup>17</sup> It is to be noted that the court has no right of peremptory challenge.

#### *Peremptory Challenges in Criminal Cases.*

At common law, the crown long abused its right of peremptory challenges in criminal cases. Its right of unlimited objections to any number of jurors proved so distressing that in the reign of Edward I, a statute was passed abolishing the crown's right of peremptory challenge.<sup>18</sup>

Since the questions of challenges are in the control of the legislature, we look to the New York Code of Criminal Procedure.<sup>19</sup> It

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evidence was involved in both actions. The court held each plaintiff was entitled to the statutory number of peremptory challenges. See *Levyin v. Kopin*, 183 Mich. 232, 149 N. W. 993 (1914); *International R. R. v. Bingham*, 40 Tex. Civ. App. 469, 89 S. W. 1113 (1905); notes 30, 33, *infra*.

<sup>14</sup> N. Y. CIV. PROC. ACT § 213: "Where the plaintiff is in doubt as to the person from whom he is entitled to redress, he may join two or more defendants, to the intent that the question as to which, if any, of the defendants, is liable and to what extent, may be determined between the parties."

<sup>15</sup> 20 N. E. (2d) 884 (Ill. 1939).

<sup>16</sup> *Walter v. People*, 32 N. Y. 147 (1865); *Stokes v. People*, 53 N. Y. 164 (1873).

<sup>17</sup> See note 23, *infra*. The N. Y. CODE CRIM. PROC. § 371 provides: "A challenge must be taken when the juror appears, and before he is sworn; but the court may, in its discretion, for good cause, set aside a juror at any time before evidence is given in the action."

<sup>18</sup> 33 Ed. I. c. 4. At common law the right of peremptory challenge existed only in capital cases, cases punishable by death. See *United States v. Carrigo*, 25 Fed. Cas. No. 14,735 (1802); *People v. Keating*, 61 Hun 260, 16 N. Y. Supp. 748 (5th Dept. 1891). Peremptory challenges were allowed only on the plea of not guilty, and never on the trial of collateral issues. *People v. Reese*, 258 N. Y. 89, 179 N. E. 305 (1932); *Freeman v. People*, 4 Denio 9 (N. Y. 1847); *People v. Aichman*, 7 How. Pr. 241 (N. Y. 1852).

<sup>19</sup> N. Y. CODE CRIM. PROC. §§ 359-387; particularly § 373; see note 16, *supra*.

provides: "If the crime charged be punishable with death, thirty [peremptory challenges are allowed] for the regular jury; and three for each alternate juror; if punishable with imprisonment for life, or for a term of ten years or more, twenty [peremptory challenges are allowed] for the regular jury; and two for each alternate juror." In all other cases, five challenges are allowed and one additional for each alternate. The peremptory challenges for the alternate jurors are computed separately and are in addition to the number of peremptory challenges actually taken.<sup>20</sup>

The Code of Criminal Procedure differs from the Civil Practice Act with respect to peremptory challenges in two ways. The number of peremptory challenges varies with the seriousness of the crime, and provision is made for additional peremptory challenges for alternate jurors.

An interesting case is *People v. Reese*.<sup>21</sup> Defendant was convicted of forgery, but before sentence was imposed, the District Attorney accused him of having been convicted of three crimes which would have been felonies had they been committed in New York. Arraigned in response to this information, the defendant stood mute. A jury was impanelled to determine his identity and they found him to be the same person who was previously convicted. Defendant was then sentenced to imprisonment as a fourth offender. He claimed that the refusal to allow him his peremptory challenges in this action was error. The Court of Appeals held that " \* \* \* for centuries the privilege of such a challenge has been denied whenever the proceedings, though triable by a jury, has been collateral to the general issue of the defendant's guilt or innocence."<sup>22</sup> The present inquiry, in which the defendant was found to be a fourth offender, was deemed collateral within the old rule, and the defendant was not entitled to any peremptory challenges.

We have seen that the legislature has the right of determining the time and manner of choosing the jurors. Therefore, a requirement that peremptory challenges be made before the juror is sworn is constitutional.<sup>23</sup> The courts, nevertheless, retain discretion to set aside a juror any time before evidence is given.<sup>24</sup>

<sup>20</sup> *Id.* § 373.

<sup>21</sup> 258 N. Y. 89, 179 N. E. 305 (1932).

<sup>22</sup> 258 N. Y. 89, 103, 179 N. E. 305, 309 (1932).

<sup>23</sup> *People v. Elliott*, 66 App. Div. 179, 73 N. Y. Supp. 279 (3d Dept. 1901), *aff'd*, 172 N. Y. 146, 64 N. E. 837 (1902); *People v. Thayer*, 61 Misc. 573, 115 N. Y. Supp. 855 (1908), *aff'd*, 132 App. Div. 593, 116 N. Y. Supp. 821 (3d Dept. 1909). For cases in which the court allowed peremptory challenges after the jurors were sworn, see *People v. Carpenter*, 102 N. Y. 238, 6 N. E. 584 (1885); *People v. Hughes*, 137 N. Y. 29, 32 N. E. 1105 (1893). On the constitutionality of N. Y. CODE CRIM. PROC. §§ 369, 370, 371, see *People v. Mack*, 35 App. Div. 114, 54 N. Y. Supp. 698 (3d Dept. 1898).

<sup>24</sup> See note 22, *supra*; *People v. Goodwin*, 72 P. (2d) 551 (Cal. 1937); *State v. Ezell*, 189 La. 151, 179 So. 64 (1938). It has been said that swearing is begun as soon as the juror is directed to be sworn and has placed his hand upon the book. *State v. Deliso*, 75 N. J. L. 808, 69 Atl. 218 (1908).

The legislature has made a distinct provision for the order in which challenges are to be taken in criminal cases.<sup>25</sup> One interesting provision is that challenges to the individual juror must be taken first by the people and then by the defendant.<sup>26</sup> This section is mandatory and any attempt by the court to vary the order is violative of the defendant's constitutional rights.<sup>27</sup> The order in which peremptory challenges is exercised is more important than it seems. Let us assume that one particular juror is so offensive that both the people and the defendant would unhesitatingly peremptorily challenge him. If the people must challenge first, the defendant has saved himself a challenge and actually has received an additional one. Repeat this instance with a number of jurors and we see that the order in which peremptory challenges must be exercised has its advantages and disadvantages.

If several defendants are tried together, a statutory provision prevents them from severing their challenges.<sup>28</sup> So, where five persons were tried together for murder in the first degree, they received thirty peremptory challenges as if there were but one defendant.<sup>29</sup> This follows the reasoning of the courts in civil cases holding that "each party" means each side to the controversy.<sup>30</sup> Where, however, two separate actions have been consolidated to speed up the wheels of economy and justice, each defendant would be allowed the statutory number of peremptory challenges.<sup>31</sup>

<sup>25</sup> N. Y. CODE CRIM. PROC. §386. Order of Challenges:

"Challenges of either party must be taken:

1. To the panel.
2. To an individual juror, for a general disqualification.
3. To an individual juror, for implied bias.
4. To an individual juror, for actual bias.
5. Peremptory."

<sup>26</sup> N. Y. CODE CRIM. PROC. § 385: "Challenges to an individual juror must be taken first by the people and then by the defendant."

<sup>27</sup> *People v. McQuade*, 110 N. Y. 284, 18 N. E. 156 (1888); *People v. McGonegal*, 62 Hun 622, 17 N. Y. Supp. 147 (1st Dept. 1891), *aff'd*, 136 N. Y. 62, 32 N. E. 616 (1892). In *People v. Grieco*, 266 N. Y. 48, 193 N. E. 634 (1934), the court permitted the people to peremptorily excuse a juror who had previously been examined and accepted not only by the people but by counsel for the defendant. Upon appeal the court held this was error. In *State v. Ferguson*, 187 La. 869, 175 So. 603 (1937), it was held that if the court makes the defendant exercise his peremptory challenge first, it violates his constitutional right.

<sup>28</sup> N. Y. CODE CRIM. PROC. § 360: "When several defendants are tried together they cannot sever their challenges, but must join therein."

<sup>29</sup> *People v. Doran*, 246 N. Y. 409, 159 N. E. 379 (1927).

<sup>30</sup> See notes 12, 13, 14, 15, *supra*.

<sup>31</sup> *People v. Kassis*, 145 Misc. 483, 259 N. Y. Supp. 339 (1931); *People v. Schemnitzer*, 142 Misc. 16, 254 N. Y. Supp. 480 (1932); *People v. Vario*, 165 Misc. 842, 2 N. Y. S. (2d) 611 (1938); see *People v. Casey*, 96 N. Y. 115 (1884), note 13, *supra*, note 33, *infra*.

*Peremptory Challenges and Federal Practice.*

Under Federal Practice,<sup>32</sup> the rules respecting peremptory challenges follow, in general, the pattern of the state courts. Twenty peremptory challenges are allowed to defendants upon an indictment for treason or a capital offense, while the United States is allowed six. In all other cases, whether civil or criminal, each party gets three peremptory challenges. There is an express statutory provision that in cases of several defendants or plaintiffs the parties on each side shall be deemed a single party for the purpose of peremptory challenges.<sup>33</sup> It is probable that if the interests of the joint parties were adverse and in conflict, each litigant would be allowed the legal number of challenges. There are no federal cases on this point but the attitude of the federal courts where two actions have been consolidated lends some support to this supposition.<sup>34</sup>

Two points about Federal Practice that should be noted are the provisions for peremptory challenges where alternate jurors are chosen,<sup>35</sup> and the fact that where a prisoner in a federal court is indicted for murder he has no right to have the government exhaust its peremptory challenges before him.<sup>36</sup>

In all questions on time for challenging, and order of challenging,

<sup>32</sup> FED. RULES CIV. PROC. (1938) Rule 47; JUD. CODE § 287, 36 STAT. 1166 (1911), 28 U. S. C. § 424 (1934); *United States v. Hall*, 44 Fed. 883 (W. D. Ga. 1890).

<sup>33</sup> JUD. CODE § 287, 36 STAT. 1166 (1911), 28 U. S. C. 424 (1934): "When the offense charged is treason or a capital offense, the defendant shall be entitled to twenty and the United States to six peremptory challenges. On the trial of any other felony, the defendant shall be entitled to ten and the United States to six peremptory challenges; and in all other cases, civil and criminal, each party shall be entitled to three peremptory challenges; and in all cases where there are several defendants or several plaintiffs, the parties on each side shall be deemed a single party for the purposes of all challenges under this section.\*\*\*"

<sup>34</sup> *Davis v. Jessup*, 2 F. (2d) 433 (C. C. A. 6th, 1924); *Zedd v. United States*, 11 F. (2d) 96 (C. C. A. 4th, 1926); *United Verde Copper Co. v. Jordan*, 14 F. (2d) 299 (C. C. A. 9th, 1926); MOORES, FEDERAL PRACTICE (1938) 3093. In *Beckett v. United States*, 84 F. (2d) 731 (C. C. A. 6th, 1936), where for the purpose of trial, an indictment charging the defendant used the United States mails to defraud, was consolidated with an indictment for conspiracy, which grew out of the same transaction, the court held the defendant was not entitled to have the number of challenges allowed a defendant in a criminal case, for each indictment on which the defendant was charged in the consolidated action. See *Avila v. United States*, 76 F. (2d) 39 (C. C. A. 9th, 1935); *Butler v. Evening Post Pub. Co.*, 148 Fed. 821 (C. C. A. 4th, 1906), *cert. denied*, 204 U. S. 670, 27 Sup. Ct. 785 (1907); *People v. Schanda*, 352 Ill. 36, 185 N. E. 183 (1933); *Garton v. Powers*, 252 Mich. 442, 233 N. W. 373 (1930); *State v. Park*, 322 Mo. 69, 16 S. W. (2d) 30 (1929).

<sup>35</sup> FED. RULES CIV. PROC. (1938) Rule 47: If one or two alternate jurors are called, each party is entitled to one peremptory challenge in addition to those otherwise allowed by law. This additional peremptory challenge may be used only against alternate jurors and other peremptory challenges allowed by law shall not be used as alternates.

<sup>36</sup> *Pointer v. United States*, 151 U. S. 396, 14 Sup. Ct. 410 (1894); see note 26, *supra*.



the court retains the right to use its discretion to effectuate justice where the facts warrant it.<sup>37</sup> There is no penalty if the number of peremptory challenges is exceeded by either of the parties, although, at common law, this right was considered so important that if the number of challenges was exceeded by the defendant the penalty was death.<sup>38</sup>

*Peremptory Challenges and Voir Dire Examinations.*

Though the right of peremptory challenge may be exercised without assigning any reason, and the challenger may base his objection on pure intuition, it is frequently desirable to examine the juror. By a *voir dire* examination one is able to see the juror, hear his answers, and note his mannerisms under examination. Whether such an examination is a right or purely discretionary is debatable. There is no doubt that it is desirable for it enables the challenger to use his right of peremptory challenges more intelligently.<sup>39</sup> Most courts allow examinations of jurors even though it is merely to get information on which to base their peremptory challenges.<sup>40</sup> New York allows such examinations.<sup>41</sup>

In the few jurisdictions which refuse to allow examinations solely for the purpose of enabling a more intelligent use of the peremptory challenge,<sup>42</sup> resort is frequently had to personal investigations of the jurors outside the court room. In *Sinclair v. United States*,<sup>43</sup> detectives were employed for the sole purpose of shadowing jurors and then reporting on their activities. The Supreme Court condemned this practice, rebuked the offenders, and held such practice in contempt of court.

Under the new Federal Rules of Civil Procedure,<sup>44</sup> the court may permit the parties or their attorneys to conduct the examination of prospective jurors, or the court may itself conduct the examination. If the court conducts the examination, the rules provide that the court shall permit the parties or their attorneys to supplement the examina-

<sup>37</sup> *Radford v. United States*, 129 Fed. 49 (C. C. A. 2d, 1904); *Pointer v. United States*, 151 U. S. 396, 14 Sup. Ct. 410 (1894); (1936) 10 So. CALIF. L. REV. 89.

<sup>38</sup> 35 C. J. (1924) p. 411, § 470, nn.36, 37.

<sup>39</sup> *Foreman v. State*, 203 Ind. 324, 180 N. E. 291 (1932); *State v. Toff's Estate*, 13 N. E. (2d) 883 (Ind. 1938); *State v. Lauth*, 46 Ore. 342, 80 Pac. 660 (1905); (1933) 17 MINN. L. REV. 299.

<sup>40</sup> *Raines v. Wilson*, 213 Iowa 1251, 239 N. W. 36 (1932); *Church v. Stoldt*, 215 Mich. 469, 184 N. W. 469 (1921); *Wilkinson v. State*, 120 Tex. Cr. Rep. 284, 47 S. W. (2d) 819 (1932).

<sup>41</sup> *Dresch v. Elliott*, 137 App. Div. 252, 122 N. Y. Supp. 14 (1st Dept. 1910).

<sup>42</sup> *People v. Edwards*, 163 Cal. 752, 127 Pac. 58 (1912); *People v. Eudy*, 12 Cal. (2d) 359 (1938); *State v. Welsh*, 160 Md. 542, 154 Atl. 51 (1931).

<sup>43</sup> 279 U. S. 749, 49 Sup. Ct. 471 (1929); see also *Comm. v. Sherman*, 264 Mass. 264, 162 N. E. 349 (1928).

<sup>44</sup> FED. RULES CIV. PROC. (1938) Rule 47.

tion by such further inquiry as it deems proper. The parties may submit questions to the court, which the court in its discretion may submit to the jurors. In many states the practice is to allow the counsel to conduct the examination directly, always subject, however, to the discretion of the court. No valid objection can be made to the court's supervision in this matter, as the court is equally competent and, at times, more experienced in understanding the type of questions that are prejudicial and the type of questions most likely to produce the desirable results. Jurors who answer questions falsely are subject to penalty. In *People v. Rendigs*,<sup>45</sup> the juror was under oath and wilfully gave a false answer. He was held liable for perjury. If the juror is not under oath, the penalty would be at least contempt of court.

To tell accurately what type of question would be allowed upon a *voir dire* examination is difficult. At best one can list the general type of questions that have been acceptable.

In negligence cases, the question frequently asked of jurors is their interest in insurance companies. This question is proper in New York by statute.<sup>46</sup> Where, however, plaintiff's counsel asked jurors if they were interested in an insurance company which is "defending this case" the court held it was an improper statement.<sup>47</sup> Questions as to the jurors' views on the subject of capital punishment;<sup>48</sup> his prejudices against certain defenses;<sup>49</sup> his prejudices against certain classes of people or political or economic groups, have been allowed.<sup>50</sup> In *Aldrich v. United States*,<sup>51</sup> a negro who killed a white man was held entitled to have jurors asked on their *voir dire* if they had any racial prejudices which might prevent an impartial verdict. In New York, where this question was answered in the affirmative, it was held not error to reject the juror.<sup>52</sup> And so ques-

<sup>45</sup> 123 Misc. 32, 205 N. Y. Supp. 133 (1924).

<sup>46</sup> N. Y. CIV. PRAC. ACT § 452; *Wood v. N. Y. State Electric and Gas Corp.*, 257 App. Div. 172 (3d Dept. 1939); *Gelbo v. Findlay*, 257 App. Div. 66 (4th Dept. 1939); *Blair v. McCormack Constr. Co.*, 123 App. Div. 30, 107 N. Y. Supp. 750 (2d Dept. 1906), *aff'd*, 195 N. Y. 521 (1909). For an excellent discussion of this problem see N. Y. L. J., July 6, 1939, p. 38, col. 1; N. Y. L. J., July 5, 1939, p. 28, col. 1; (1933) 17 MINN. L. REV. 299.

<sup>47</sup> *Kolacki v. Am. Sugar Refining Co.*, 164 App. Div. 417, 150 N. Y. Supp. 93 (2d Dept. 1914); *Gallotti v. Deansboro Supply Co.*, 248 App. Div. 20, 289 N. Y. Supp. 535 (3d Dept. 1936).

<sup>48</sup> *State v. Foster*, 91 Iowa 164, 59 N. W. 8 (1894).

<sup>49</sup> *Towl v. Bradley*, 108 Mich. 409, 66 N. W. 347 (1896).

<sup>50</sup> See Notes (1936) 105 A. L. R. 1527; (1935) 95 A. L. R. 388; (1931) 73 A. L. R. 1208 on racial, religious, social or political prejudice of proposed juror as proper subject of inquiry or ground of challenge on *voir dire* in criminal cases.

<sup>51</sup> 283 U. S. 308, 51 Sup. Ct. 470 (1931).

<sup>52</sup> *People v. Decker*, 157 N. Y. 186, 51 N. E. 1018 (1898); *Balbo v. People*, 80 N. Y. 484 (1880); *cf.* *People v. Christie*, 2 Park. Cr. Rep. (N. Y.) 579, 2 Abb. Pr. 256 (1855).

tions as to the juror's membership in the Ku Klux Klan;<sup>53</sup> or in an organization for the prosecution of offenses such as that which the defendant was charged, have also been held admissible.<sup>54</sup>

In all these cases it must be remembered that the nature of the examination and the type of question is carefully scrutinized by the court.<sup>55</sup> In the interest of justice, and the more intelligent use of the right of challenging, the courts should allow great freedom in these examinations, and should hesitate to rule out a question unless it is asked maliciously, without having any possible bearing on the problem, and would be a clear violation of some right of the juror.

ROBERT A. KLEIN.

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<sup>53</sup> Fileppelli v. United States, 6 F. (2d) 121 (C. C. A. 9th, 1925); Reich v. State, 94 Tex. Cr. Rep. 449, 251 S. W. 1072 (1923); Benson v. State, 95 Tex. Cr. Rep. 311, 254 S. W. 793 (1923).

<sup>54</sup> Lavin v. People, 69 Ill. 303 (1873); State v. Mulroy, 152 Minn. 423, 189 N. W. 441 (1922).

<sup>55</sup> Bass v. Dehner, 103 F. (2d) 28 (C. C. A. 10th, 1939); Roby v. State, 17 N. E. (2d) 800 (Ind. 1938); Kiesau v. Varigen, 285 N. W. 181 (Ind. 1939); Hawkins y. Burton, 281 N. W. 342 (Iowa 1939); Petition of City of Detroit to Condemn Lands, 280 Mich. 708, 274 N. W. 375 (1937). In prosecution under a statute in New Jersey, for filing a Democratic Party nominating petition which the defendant knew was falsely made, questions relating to membership in the Democratic Party, and the juror's participation in the Democratic primary of that year were properly excluded in a *voir dire* examination. The court said that because one was a member of the Democratic Party, or because he participated in a primary, would not be evidence of bias or prejudice. State v. Longo, 121 N. J. L. 427, 3 Atl. (2d) 127 (1939). Whether the court would have denied these questions if the examination was for the purpose of exercising peremptory challenges is questionable.