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Juries -- Challenge for Racial Prejudice

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Although most jurisdictions still follow the rule in the principal case it has been severely criticized.\(^5\) Justice Brogden recognizes the injustice of the rule as is manifest by his apologetic reason for the decision.\(^6\) It would seem that there should be no hesitancy in overruling an arbitrary rule of law, based on erroneous reasoning, created as a historical accident, and so unjust as to be termed barbarous by so great a writer as Mr. Wigmore and roundly assailed by so eminent a jurist as Judge Holmes.

DALLACE McLENNAN.

Juries—Challenge for Racial Prejudice.

A negro was tried and convicted of the murder of a white man. Upon the \textit{voir dire} examination of prospective jurors, the trial judge overruled the defendant's request that a question relative to racial prejudice be propounded to each and every juror. \textit{Held}, the ruling of the trial court was erroneous and the judgment of conviction must be reversed.\(^1\)

The propriety of such an inquiry to determine a disqualifying state of a juror's mind has been generally recognized with reference to the negro race,\(^2\) other races,\(^3\) and the defendant's nationality.\(^4\)

\(^1\) WIGMORE, \textit{Evidence} (2d ed. 1923) §§1476, 1477; Donelly v. United States, \textit{supra} note 4, Judge Holmes' dissenting opinion.

\(^2\) "The writer of this opinion speaking for himself strings with the minority but it is the duty of the trial judge to apply the law as it is written." If this is true can this rule ever be changed by judicial decision?


The question usually assumes the form of a specific interrogatory with the purpose of determining the existence of a prejudice which will influence the juror's verdict, as contrasted with a mere preference for one's own race or nationality to that of the defendant's.\(^5\) The question is, therefore, consistent with other questions propounded to jurors; such as, whether they are members of an organization or association which is interested in the prosecution of the particular defendant;\(^6\) or whether the juror is a stockholder in a corporation which is a party to the suit;\(^7\) or whether the juror is an employee of the defendant;\(^8\) or whether the juror's opinion of the death penalty will influence his verdict in a prosecution for a capital crime.\(^9\) It is generally held that affirmative answers to such questions constitute sufficient grounds for challenges for cause.\(^10\)

Where the juror admits the existence of a prejudice against the defendant's race, but states that he can render a fair verdict upon the law and evidence, he is usually held competent for jury service.\(^11\) Such rulings may be questioned on the ground that the juror is merely expressing a belief in his own ability to render an impartial verdict regardless of his prejudice.\(^12\)

A person, under the constitution and laws of the United States, is entitled to a fair and impartial trial. If a prospective juror possesses a racial prejudice that would prevent his giving a fair and impartial verdict, he is unfit to sit in the jury box. How, then, is it


\(^6\) State v. Sultan, 142 N. C. 569, 54 S. E. 1002 9 *Ann. Cas.* 310, n. 312 (1906); Bethel v. State, 162 Ark. 257 S. W. 740, 31 A. L. R. 402, n. 411 (1924). But mere membership in an organization or association whose policies are adverse to the defendant, but which is not actively interested in the prosecution of the defendant, does not in itself constitute disqualification.

\(^7\) Murchison National Bank v. Dunn Oil Mills Co., 150 N. C. 683, 64 S. E. 883 (1909); Walters v. Lumber Co., 165 N. C. 388, 81 S. E. 453 (1914); Note (1912) 40 L. R. A. (N. S.) 978; Note (1917) 16 R. C. L. 274.


\(^10\) See note 3-10, *supra*.


\(^12\) State v. Brooks, 57 Mont. 480, 188 Pac. 942 (1920).
possible to ascertain whether he is prejudiced or not, unless such questions are propounded to him? It would seem that the court in the instant case has made satisfactory answer to this question.

JAMES O. MOORE.

Libel and Slander—Liability of Estate for Libel in Will.

The will of testatrix contained an implication that her grandson was illegitimate. The grandson sued the estate for libel and recovery was allowed. The appellate court, in conscious disregard of common law principles, based its decision on the theory that everyone is presumed to intend the natural consequences of his act, and that since testatrix deliberately inserted the defamatory statement in her will, knowing it would be published, her estate should be held liable. No attempt was made to place liability on the executor, as the legal requirement that the will be probated makes the act privileged.

Libel and slander are personal actions, and are abated by the death of the tortfeasor. The Georgia court, however, evades this difficulty by holding that as the cause of action did not accrue until the probate of the will, which was after the death of the testatrix, it was not abated by her death.

Only two other decisions have been found involving the same question and both these cases allowed recovery on the theory that the executor was the agent of the testator and therefore the estate was liable. This theory has been severely criticized. There can be no agency where no principal exists. If an agency is created before death, death will ordinarily revoke the agency, and it has been held that death cannot create an agency. The Georgia court men-

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3 People v. Reyes, supra note 5.
1 Hendricks v. Citizens' & Southern Nat. Bank, 158 S. E. 915 (Ga. 1931).

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8 Actio personalis moritur cum persona.
11 1 MECHEN, THE LAW OF AGENCY (2nd ed. 1914) §26, n. 2.
12 Hunt v. Roussmanier's Adm'rs., 8 Wheaton 174 (1823); 1 MECHEN, THE LAW OF AGENCY (2nd ed. 1914) §§651, 652, 655. The two exceptions to this rule—where the agency is coupled with an interest in the subject matter, and when the revocation would involve the agent in liability to third parties—obviously do not apply.