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SELECTION AND EXAMINATION OF JURORS

MAX E. WILDMAN

WE LAWYERS have often wondered why some cases result in substantial verdicts for the plaintiffs and why others, on seemingly similar facts, fall under the axe of "not guilty" verdicts. In attempting to reach one result or the other, we frequently extend ourselves in providing demonstrative evidence, culling up obscure facts, and devoting great attention to final argument. As important as all of these facets of a trial may be, nevertheless, the end result often is greatly determined by the manner of selection of the veniremen. For this purpose, let us consider the selection of a jury after the panel of twelve is called into the jury box. Consequently, we will omit those preliminary steps in the selection of the jury panel itself.

METHOD OF EXAMINATION

After the jury has been impanelled, it becomes

... the duty of the court, upon request of either party to the suit, or upon its own motion, to order its full number of twelve jurors into the jury box, before either party shall be required to examine any of the said jurors touching their qualifications to try any such causes.¹

After these twelve jurors are in the box, the examination proceeds. The court may first examine the jurors itself before allowing the counsel to do so. This right is generally recognized² and has been specifically set forth by court rule in certain courts.³ The prospective jurors are then examined by counsel. The court cannot refuse counsel this right even though it has examined the jurors itself.⁴ However, it should

¹ Ill. Rev. Stat. (1955) c. 78, § 21.

² *Donovan v. People*, 139 Ill. 412, 28 N.E. 964 (1891).

³ Circuit Court of Cook County, Rule 49; County Court of Cook County, Rule 36.

⁴ *Donovan v. People*, 139 Ill. 412, 28 N.E. 964 (1891); *American Bridgeworks v. Pereira*, 79 Ill. App. 90 (1898).

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be noted in this connection that some judges limit to a great extent counsel's *voir dire* examination. While it is true that no abuse of the privilege of examination of a juror by counsel should be allowed, it is equally true that a serious limitation on the part of the litigants' counsel actually amounts to a deprivation of our time-honored "right to jury trial."

The time which counsel may use to examine jurors is largely left to the discretion of the court⁵ although in some courts the judge is given the right by rule "to reasonably limit" the time.⁶ Lawyers who spend much of their time actually trying cases have noticed that a prolonged examination usually works to their detriment and to the detriment of their client's interests. This seems to be particularly true when the trial lawyer insists upon asking each juror the same stock questions which have been put to each preceding venireman. On some occasions attorneys have been known to spend as much as several hours on a single panel, and in civil cases it is highly questionable whether or not any advantage results to the lawyer who prolongs his examination. Moreover, it is extremely doubtful whether or not he has a better measure of such juror's qualifications. After such a prolonged examination by one attorney, his adversary might well consider pointing up such an onerous examination by merely asking a few short questions to the group as a whole and then either accepting the panel or excusing one or more as the case may be. In that way, the contrast is vividly demonstrated to the entire jury panel.

The examination by the parties begins with the plaintiff. It is set forth in the statute "that the jury shall be passed upon and accepted in panels of four by the parties, commencing with the plaintiff."⁷ The plaintiff may challenge jurors from the first panel of four and additional jurors will be added to the panel to replace those challenged. He will continue to examine additional jurors until he has found four who are acceptable to him. These four are then accepted and tendered to the defendant.⁸

The defendant then examines the four jurors tendered by the plaintiff. If he challenges any, he must continue to examine additional jurors

⁵ Nealon v. People, 39 Ill. App. 481 (1890).

⁶ Circuit Court of Cook County, Rule 49; County Court of Cook County, Rule 36.

⁷ Ill. Rev. Stat. (1955) c. 78, § 21.

⁸ The tender of a panel of four implies acceptance of it. Maher v. New York C. & St. L. R. Co., 280 Ill. App. 222 (1935).

until he has found four who are acceptable to him. These additional jurors tendered by the defendant are then examined by the plaintiff. After the first panel of four has been accepted by both sides, counsel will proceed to examine a second panel.⁹

It should be noted here that if the defendant breaks a panel which plaintiff has tendered and substitutes another juror for the one who is excused, plaintiff can then excuse any of those jurors whom he has previously accepted.¹⁰ Until a panel has been accepted by both sides, either side may challenge a juror previously accepted by it.¹¹

This rule frequently leads into some very interesting by-play between experienced trial counsel, particularly when few peremptory challenges remain to one side or both. For example, let us assume that the third panel is being examined and each side has one remaining challenge. Perhaps plaintiff's counsel finds three jurors with whom he is quite content, one of whom, however, he is sure defendant's counsel will excuse. The fourth juror may be questionable from plaintiff's standpoint but he is reluctant to use his last challenge, not knowing who will be substituted for the juror who the defendant will excuse. In this situation, plaintiff can well afford to tender the entire panel to the defendant. After defendant has exercised his last challenge and tendered the panel with the new juror back to plaintiff, the latter can then decide whether he would prefer to have the new juror or the one which previously seemed questionable. Even the "strategy of chess" enters into a jury trial!

The practice in the United States District Courts differs from the Illinois practice in regard to a right of counsel to examine prospective jurors. The federal rules of civil procedure provide as follows:

The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper.¹²

It can thus be seen that unlike the Illinois practice, counsel in the Federal Court have absolutely no right to examine the jurors. It is in the discretion of the court whether to examine them itself, whether to

⁹ Ill. Rev. Stat. (1955) c. 78, § 21.

¹⁰ *People v. Gray*, 251 Ill. 431, 96 N.E. 268 (1911).

¹¹ *Ibid.*

¹² Fed. Rules Civ. Proc. 47(a).

permit examination by counsel, or whether to examine upon questions submitted by counsel. This practice of strongly limiting counsel's right to complete *voir dire* examination is more prevalent in the Federal District Court than in the state courts of Illinois. While the federal rules are more confining, it should be noted that the Federal judges in the Northern District of Illinois, in practice, actually allow trial counsel sufficient leeway to afford satisfaction with the jury. Quite obviously, the court has the problem of permitting counsel to exercise what appears to be a "right" and at the same time prevent any abuse.

SCOPE OF EXAMINATION

The purpose of the examination of jurors is to gain information with which a party may intelligently exercise its challenges.¹³ There are two kinds of challenges and the jurors may be examined for the purpose of exercising either.¹⁴ These are challenges for cause and peremptory challenges. There is no limit to the number of challenges for cause a party may make, but these, of course, must be ruled upon by the court and can be granted only by the court. Generally, the grounds for challenge for cause in Illinois are as follows:

A juror may be challenged who lacks the statutory qualifications for jury service. These are generally set forth in the statute.¹⁵ A person may be challenged who has served as a juror during the year previous to the trial. This challenge, however, applies only to persons who are not members of the regular panel and therefore seems of little practical consequence. Likewise, a person who is a party to any suit pending for trial in the particular court may be challenged.¹⁶ The qualifications in the Federal Court are also set forth by statute.¹⁷

¹³ *People v. Robinson*, 299 Ill. 617, 132 N.E. 803 (1921).

¹⁴ *Moore v. Edmonds*, 384 Ill. 535, 52 N.E. 2d 216 (1943).

¹⁵ Ill. Rev. Stat. (1955) c. 78, § 2 provides: "... Jurors in all counties in Illinois must have the legal qualifications herein prescribed, and shall be chosen a proportionate number from the residents of each town or precinct, and such persons only as are: *First*—Inhabitants of the town or precinct, not exempt from serving on juries. *Second*—Of the age of twenty-one (21) years or upwards. *Third*—In the possession of their natural faculties and not infirm or decrepit. *Fourth*—Free from all legal exceptions, of fair character, of approved integrity, of sound judgment, well informed, and who understand the English language."

¹⁶ Ill. Rev. Stat. (1955) c. 78, § 14.

¹⁷ 62 Stat. 951 (1948), 28 U.S.C.A. § 1861 (1950) provides as follows:

"Any citizen of the United States who has attained the age of 21 years and resides within the judicial district, is competent to serve as a grand or petit juror unless: (1) He has been convicted in a state or federal court of record of a crime punishable by imprisonment for more than one year and his civil rights have not been restored

Generally speaking, bias against a party is grounds for challenge for cause:

It is a fundamental principle, that every litigant has the right to be tried by an impartial and disinterested tribunal. Bias or prejudice has always been regarded as rendering jurymen incompetent. And when a juror avows that one litigant should have any other than the advantage which the law and evidence give him, he declares his incompetency to decide the case. . . .¹⁸

In order to disqualify, the bias may be such as will require proof to remove it. "A party should never be compelled to produce proof to change a pre-conceived opinion or prejudice which may control the action of the juror."¹⁹

A pre-conceived opinion as to the merits of the case may be grounds for challenge for cause. In a very early case, the rule was laid down . . . that if a juror has made up a decided opinion on the merits of the case, either from a personal knowledge of the facts, from statements of witnesses, from the relations of the parties, or either of them, or from rumor, and that opinion is positive, and not hypothetical, and such as will probably prevent him from giving an impartial verdict, the challenge should be allowed.²⁰

The mere fact that a juror has formed an opinion "based upon newspaper accounts, as to the truth of which he had no knowledge"²¹ would not disqualify him. The question of the nature of the juror's opinion and whether or not it is sufficient to disqualify is left to the discretion of the trial court and will not be set aside unless "error is manifest."²²

As distinguished from a challenge for cause, a peremptory challenge is one which is made without assigning a reason therefore and which the court must allow. The Civil Practice Act covers the number of challenges to which a party is entitled and provides as follows:

Each side shall be entitled to 5 peremptory challenges. If there is more than one party on any side, the court may allow each side additional peremptory

by pardon or amnesty. (2) He is unable to read, write, speak, and understand the English Language. (3) He is incapable, by reason of mental or physical infirmities to render efficient jury service. (4) He is incompetent to serve as a grand or petit juror by the law of the State in which the district court is held."

62 Stat. 953 (1948), 28 U.S.C.A. § 1869 (1950) provides as follows: "In any district court, a petit juror may be challenged on the ground that he has been summoned and attended such court as a petit juror at any term held within one year prior to the challenge."

¹⁸ *Chicago & Alton v. Adler*, 56 Ill. 344, 346 (1870).

¹⁹ *Winnesheik Ins. Co. v. Schueller*, 60 Ill. 465, 472 (1871).

²⁰ *Smith v. Eames*, 4 Ill. 76, 80 (1841).

²¹ *Williams v. Supreme Court of Honor*, 221 Ill. 152, 159, 77 N.E. 542, 544 (1906).

²² *Ibid.*, at 158 and 543.

challenges, not to exceed 3, on account of each additional party on the side having the greatest number of parties. Each side shall be allowed an equal number of peremptory challenges. If the parties on a side are unable to agree upon the allocation of peremptory challenges among themselves, the allocation shall be determined by the court.²³

In the Federal Courts, parties are entitled to only three peremptory challenges although if there is more than one defendant the court may allow additional such challenges.²⁴ In actual practice counsel should address the court and request leave to excuse a specific juror either for cause or peremptorily. However, the formality of this practice is not generally observed and usually counsel merely addresses the juror and advises the prospective juror that he or she is excused.

Generally speaking, the scope of examination is limited to inquiry such "as is reasonably necessary to determine whether or not they [the jurors] have any bias or prejudice against either side." This is the specific rule of several courts²⁵ and has been confirmed in the cases.²⁶ The scope of examination is generally left to the discretion of the court and hence there are few decided cases in point.

The scope of examination has caused inexperienced trial lawyers some embarrassment in the past. Frequently authors of trial technique treatises and books will advise a young trial lawyer to "warm up" to the jury during the course of his *voir dire* examination. From such discussions, fledgeling trial lawyers frequently get the impression that they might even engage the prospective juror in conversational topics. In a few cases, trial lawyers have attempted to discuss the number of children in the juror's family, the neighborhood in which he resides, aspects of his employment which have no bearing on the case and other unrelated subjects. The story is told of a young lawyer who attempted to discuss his problems regarding a television antenna with a television repairman during the course of his *voir dire* examination. Quite obviously, these subjects are inappropriate and it would not appear that any answers given in response to such questions would indicate the lack of qualifications or competency to try the particular case.

All experienced trial lawyers have their own individual manner of ferreting out delicate information tactfully from a prospective juror.

²³ Ill. Rev. Stat. (1955) c. 110, § 190 (1) (Civ. Prac. Act § 66).

²⁴ 62 Stat. 953 (1948), 28 U.S.C.A. § 1870 (1950).

²⁵ Circuit Court of Cook County, Rule 49; County Court of Cook County, Rule 36.

²⁶ *Moore v. Edmonds*, 384 Ill. 535, 52 N.E. 2d 216 (1943).

Such things as a woman's age, marital status in some instances, medical histories, and other personal subjects must be covered with finesse. In a medical malpractice suit, for example, the case at bar may involve alleged negligence in the performance of a hysterectomy. Obviously, the experiences of a middle-aged woman in particular might be very important in determining the individual juror's qualifications to serve, and yet such a juror may be very reluctant to discuss her own personal experiences. An improperly directed question under such circumstances might well determine at that very point how that particular juror will vote when the first ballot is cast at the conclusion of the case. The phrasing of such questions under those circumstances becomes vitally important, particularly if one has few remaining peremptory challenges.

One subject which has come up from time to time is the right of counsel to interrogate as to a prospective juror's interest in an insurance company which is defending the suit. This subject has been the cause of considerable litigation and today remains unsettled. The latest expression of the Illinois courts is *Wheeler v. Rudek*.²⁷ The court here reviews the older decisions and says generally that:

... a principle of law that runs through all the cases is that, in an action of this kind where defendant carried public liability insurance, the plaintiff has the right, within certain limitations, to interrogate prospective jurors on their *voir dire* as to their interest and relationship to insurance companies that carry such insurance.²⁸

The cases generally require a showing of good faith by plaintiff before such an examination can be made but shed little light on the manner and sufficiency of this showing.²⁹

It would be extremely difficult, and at the same time fruitless, to attempt to list those subjects of inquiry which, in all probability, should be covered in a given case on the *voir dire* examination. No two cases are the same, and even seemingly similar automobile accident cases involve different considerations in selecting a jury. Certainly trial counsel would want to consider the age, race and background, employment and appearance of the two litigants. Other factors, such

²⁷ 397 Ill. 438, 74 N.E. 2d 601 (1947).

²⁸ *Ibid.*, at 441 and 602.

²⁹ *Moore v. Edmonds*, 384 Ill. 535, 52 N.E. 2d 216 (1943); *Kavanaugh v. Parret*, 379 Ill. 273, 40 N.E. 2d 500 (1942); *Edwards v. Hill-Thomas Lime Co.*, 378 Ill. 180, 37 N.E. 2d 801 (1941); *Smithers v. Henriques*, 368 Ill. 588, 15 N.E. 2d 499 (1938). See comment, *Disclosures of Insurer's Interest in voir dire Examination of Jurors in Illinois*, 43 Ill. L. Rev. 650 (1948).

as the witnesses expected to testify on either side, location of the occurrence and nature of the injuries, should receive consideration. From all of this, the trial lawyer should eventually find himself faced with the question, "Will this juror be inclined to sympathize with my client's plight, or will he most likely favor my opponent's case?"

Common prejudices and biases play a greater or lesser roll in the jury's determination of any factual question, but it would seem that the main object of any trial counsel in selecting a jury should be to select those veniremen who can lay aside whatever "every day" prejudices and feelings they may have and decide the case strictly on the merits. Somehow or other, whether divinely guided or not, juries generally reach sound, fair decisions; and from the moment the trial lawyer speaks to the jury during the course of the *voir dire* examination until the end of the final argument, jurors sense whatever feelings trial counsel may have and oftentimes even the feelings of their clients. If this be so, there can be no question but that courts and trial judges in general, while striving to avoid any abuse of our jury system, should interpret all rules and precedents broadly enough to ensure the feeling on the part of both lawyer and litigant that he had sufficient opportunity to select "The Peerless Twelve."