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Trial by Jury

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TRIAL BY JURY

Reference is made at this point to West's S. C. Digest, Vol 12, Jury, beginning at page 415.

In Equity:

There was no right of trial by jury in equity at common law, and neither does Art. 1, Section 25 nor Art. 5, Section 22 of the South Carolina Constitution apply to equity cases. And if a statute attempted to establish such a right the Supreme Court would undoubtedly declare such statute unconstitutional as making "a radical change in the machinery of the Court of Equity as it has existed from time immemorial." It was that court of many centuries that the constitution made a part of the state's judicial system. As said in *Johnstone v. Matthews* (1937), 183 S. C. 360, 191 S. E. 223, at page 366, when quoting from an older case wherein the court was asked to construe Sections 10-1057 and 10-1457 (then the Act of 1890) as working such a radical change:

> " . . . We cannot view this Act of 1890 as intended for such a purpose, or as working out such a result. If we did, we would not hesitate to declare it unconstitutional, as subversive of the provisions of the constitution relating to Courts of Common Pleas and this Court in equitable actions."

In equity cases Rule 28 of the circuit court must be followed as the annotations clearly indicate. Also Section 10-1057 must be construed along with Section 10-1457. This latter Section has given rise to much discussion among members of the Bar. There are those who consider it unconstitutional as working one of those radical changes already mentioned. However, it is thought by some that it may be squeezed under the exception clause of Section 4, Art. 5 of the Constitution, though the question does not appear to have been directly and finally decided as yet.

In *Momeier v. McAlister, Inc.* (1939), 190 S. C. 529, 3 S. E. 2d 606, at page 538, one finds the following:

> In the case of *Johnstone v. Matthews,* 183 S. C. 360, 191 S. E., 223, 225, Judge Stoll, framed issues under Section 593 to be tried at a subsequent term, and when the case was reached for trial Judge Rice was presiding. The defendants made a motion during the course of the

trial that the Judge should withdraw the case from the jury, which he declined to do, but stated in effect that he would submit the case to the jury for the information of the Court although he would not be bound by the verdict. This Court in the carefully prepared opinion of Chief Justice Stabler affirmed the order of Judge Rice, holding that in his discretion he could have withdrawn the case from the jury and that he also had the right to require them to make findings upon the issues before them merely for the enlightenment of his conscience. We quote the following from this opinion: "But we are of opinion, and so hold, that the provision of Section 593 of the Code as to the force of the verdict, here relied on by the appellants, can only mean, under the plain language used, that when issues of fact in equity cases are framed under that section, to be tried by a jury, and such issues are submitted to them and findings thereon are made by them under the statute, such findings, if there is any evidence to support them, are conclusive of the issues submitted; and the presiding Judge, in such case, can only affirm the verdict or set it aside and order a new trial. In his discretion, however, he may, during the course of the trial, and before such findings are made, withdraw the case from the jury and decide the issues for himself; or, instead of withdrawing them, he may have the jury, should he so desire, to make findings upon the issues as framed for his aid and enlightement in determining the judgment to be rendered."

This case also deals with the matter of submitting issues to the jury for the aid and enlightenment of the Chancellor in equity cases, and we quote from the opinion the following accurate statement of the law: "Before the enactment of the statute referred to, the chancellor in equity cases had full authority, in his discretion, to submit issues to the jury for his aid and enlightenment, and he was not bound to accept their verdict in making up his decision as to the judgment to be rendered. [S. C. cases cited.] And the same rule has prevailed since the passage of the Act. This Court has held that independently of what is now Section 593 of the Code, the presiding Judge has the right and power, in a chancery case, to refer issues to the jury for the enlightenment of his

conscience [S. C. cases cited]; and that in such cases neither party is entitled to a jury trial as a matter of law, the question of framing issues being left entirely to the sound discretion of the Circuit Judge [S. C. cases cited].***"

One gathers from the foregoing cases that under Section 10-1457 for a verdict to be conclusive in an equity case the verdict must have been published, namely, announced in open court as the verdict of the jury, otherwise the judge, as chancellor, can make his own findings of fact and disregard what may be the unannounced factual conclusion arrived at by the jury.

No Jury Right when Long, Complicated Account:

In construing Code Sections 10-1402 it was declared, at page 250, in *Jefferies v. Harvey* (1945), 206 S. C. 245, 33 S. E. 2d 513, as follows:

> It is elementary that equity has jurisdiction of actions in which long and complicated accounts are involved, on the ground that the remedy at law in such cases is not adequate. Some of the reasons are, that the circumstances ordinarily incident to jury trials make it impracticable for the jury to properly examine such accounts and make the computations and adjustments necessary to ascertain the truth and do justice between the parties. The rule, therefore, is that to deprive a party of the right of jury trial, the account involved must not only be long, but so complicated that it would not be practicable for an ordinary jury to comprehend and adjust the issues correctly. [cases cited] The test seems to be whether the account is so long that the jury cannot keep the items and calculations clearly in their minds and give each item its proper weight and application. *Moody v. Dudley Lumber Co.*, 136 S. C., 327, 134 S. E., 369.

In Law:

"The right of trial by jury shall be preserved inviolate." Art. 1, Section 25 of the Constitution. One goes to the common law at the time of the adoption of the Constitution to ascertain the extent of such right. For example, a right to a jury trial never has been accorded either party in a *quo warranto* proceeding. *State v. Gibbes* (1918), 109 S. C. 135, 95 S. E. 346.

Art. 5, Section 22 should be read in connection with Code Section 10-1056.

A trial attorney should familiarize himself with the following provisions in the Code, with their numerous annotations: Sections 10-1453 to 10-1456; Chapter 12, beginning on page 790, and Title 38, beginning on page 447.

Best v. Barnwell County (1920), 114 S. C. 123, 103 S. E. 479 declares at page 127 that this jury right "applies to civil as well as criminal cases." That was an instance where, pursuant to a statute, Barnwell County was sued for damages for lynching Walter Best. The opinion is worthy of a careful study, as it covers not only the right to a jury but also judicial jurisdiction as compared with the lack of such power in a county board of commissioners. See *State v. Weldon* (1912), 91 S. C. 29, 74 S. E. 43, 39 LRA, NS, 667.

As will be seen later South Carolina has provisions for special verdicts, but there is no provision for special juries in this state, except as provided for in Section 38-7; but that section doesn't pertain to the special jury as known in England and some of the states.

At this point it may be well to note that the safest course is always to bring any code section or later legislative enactment as nearly up-to-date as possible. As an example of later changes in rather quick succession reference is made to Sections 38-61 and 38-68 relative to drawing of juries in circuit courts. Those Sections provided for the drawing of 36 petit jurors. By the Act of 1955 (Acts of 1955, p. 45) the number was raised to 40 in Richland and several other counties. By an Act approved Feb. 8, 1957 the number was again raised for Richland County to 48. As to county courts, the respective code sections, relating to the several counties having such courts must always be checked and likewise brought up-to-date. The above Acts must be taken as amending Code Section 38-68.

Alternate Jurors:

Sections 38-768, 38-304 and 38-212 should be read together, as all three have to do with alternate jurors. These sections do not apparently apply to County Courts, but an Act. No. 259, approved May 11, 1955, provides for such jurors in municipal courts in cities having a population of over 5000.

Venire, Panel, Array, List — What is Each?:

As to what is venire, array or panel of jurors depends upon what jurisdiction one is in. In South Carolina there is no doubt but that the *venire* is only inclusive of those jurors summoned to attend a session of Court but there is confusion as to what a *panel* is in South Carolina. In some jurisdictions, as Iowa and Wisconsin, the panel is the venire or array. In South Carolina it is not, but is inclusive only of the names drawn by the clerk in the court room and put on a list, copy of which is handed to each side's attorney for striking or exercising peremptory challenges. What is that list called? In *Brown v. S. H. Kress & Co.* (1933), 170 S. C. 178, 170 S. E. 142, it is called "panel." However, Sections 38-205 and 38-206 say "list". It is often referred to in court as the "striking list". So, a young attorney had better follow the trial judge and/or leading members of his local Bar.

Only Male Jurors Serve:

Art. 5, Section 22 of the S. C. Constitution provides for male jurors only in Circuit Courts. Former Sec. 608, now Sec. 38-52, didn't then provide that only names of male electors should be put in the jury box, so, as judge of the Richland County Court, when a woman's name happened to get in the jury box and was drawn on that court's venire, the writer ruled she could serve, but didn't have to serve, as she had the "personal privilege" to refuse to serve under Sec. 629, now Sec. 38-104.

Now that Sec. 38-52 (old Sec. 608) allows only male electors' names to go in the jury box, no woman can serve in any of the county courts. That leaves an utter inconsistency in Sec. 38-104, as long as the word "women" is kept therein, since there is no reason to give one by way of exemption a personal privilege to refuse to do what one can't legally do at all. The word "women" should for the present be stricken out of that section.

Drawing of Jury:

In connection with the drawing of the regular or the special venire, the "Tales box" (Section 38-60) has in it from 100 to 800 names of qualified male electors who live within 5 miles of the court house. This box is used when judge orders extra jurors to be drawn in case enough don't answer

on the regular venire, and it doesn't take long for them to report for duty. This box was done away with in Richland, Aiken & Marlboro counties in 1957. See Acts of 1957, pg. 12, Act No. 16, amending Section 38-60.

Under Sec. 38-102 the jury commissioners have very broad powers; hence it is wise, when one has a case to be tried at that term, to be present when a venire is being drawn. *Humphrey v. Palmer,* 89 S. C. 401. See Secs. 38-51 to 38-76.

Striking and Challenging Jurors:

One should familiarize oneself with Chapter 4, page 465 *et seq* of the 1952 Code. See also West's S. C. Digest, Jury, page 414 *et seq.*

Civil Cases:

When the jury list is handed out for a civil case by the clerk to the respective attorneys, the plaintiff strikes first. One should always be sure and not refer to a juror's name when striking, that is when exercising the right to peremptory challenges, but should always refer to the number to the left of the juror's name. Human nature being what it is, if a juror knows he had been stricken he may hold it against that attorney or his client in the future if he should be placed later by either on a trial jury.

When a juror is placed on *voir dire,* either by the judge, or a party, Sec. 38-202 says the judge "shall" examine such juror, but *Brown v. Kress, ante,* gives the judge discretion to permit the attorney to do the questioning. Attention is called to the fact that an attorney must be very careful in exercising that privilege or else the judge, for the sake of the attorney's client, will not be able to permit him to question the juror. The writer has seen an attorney antagonize a juror, whom the judge finally ruled was not biased, and then either have to permit him to sit on the jury or else have to use a strike to keep him off, when that strike was needed to keep another juror off. Such a choice can seriously hurt a client's cause; also, thereafter that same judge will never again give that attorney the privilege of questioning a juror on *voir dire.*

In the *Brown* case, *supra,* it was held:

> In spite of the statement two or three times by the juror to the effect that he could give a fair and impartial trial to the parties, we think his examination clearly dis-

closed that his state of mind was not such as to make him the "impartial" juror required under the law. The qualification of a juror is not to be determined alone by the fact that he declares his fairness and impartiality. In *State v. Prater*, 26 S. C., 198, 2 S. E., 108, 109, Mr. Justice McIver, for this Court, said: "It is quite clear that the mere fact that a given juror swears that he is not sensible of any bias would not be sufficient to qualify him to sit as a juror in a particular case; for, if that were the rule, then a close friend, or even a near relative of the accused, might, by simply swearing that he was not sensible of any bias, force himself upon the jury."

In *Fender v. N. Y. Life Insurance Co.*, 158 S. C., 331, 155 S. E., 577, 578, we reaffirmed the principle announced in *State v. Sharpe*, 138 S. C., 58, 135 S. E., 635, that: "Our Circuit Judges should be very careful to keep off juries persons who are related to the parties, or who, in any manner, have an interest in the result of the cause."

The foregoing word of caution would also apply to county judges. See also *State v. King* (1930), 158 S. C. 251, 155 S. E. 409, in which it was said "the better practice is for the Judge himself to make the examination." In connection with one's right to challenge it should be remembered that it is "a right to *reject*, and not a right to select . . . . " *State v. Campbell* (1891), 35 S. E. 28, 31, 14 S. E. 292.

There is no fixed rule for disqualifying relationship. Section 38-202 leaves it to the judge's discretion as to when a juror is disqualified by reason of relationship or kinship. In *Smith v. Quattlebaum* (1953), 223 S. C. 384, 76 S. E. 2d 154 one finds on pages 388-9 that a trial judge has no definite yardstick for asertaining what is a disqualification except the circumstances of each particular situation viewed in the light of a guiding rule to which the court called attention when it said:

In *State v. Brock*, 61 S. C. 141, 39 S. E. 359, 361, which construes the foregoing section, is the following: " * * * While the circuit judge committed error in stating that jurors related by blood or connected by marriage within the sixth degree to either of the parties were disqualified from sitting as such, that both consanguinity and affinity

within the sixth degree were grounds for legal exceptions *under the statutes,* still he stated a very salutary rule. Certainly the legislature has interdicted judges from sitting in cases of such relationship, and it is a good guide to the exercise of a sound discretion by a circuit judge to observe the same degree of relationship. * * * "

We also quote from *State v. Merriman,* 34 S. C. 16, 34, 12 S. E. 619, 625, cited and followed in *Sims v. Jones,* 43 S. C. 91, 20 S. E. 905:

"We are not aware of any statute fixing the degrees, either of consanguinity or affinity, within which a juror is disqualified; and it must therefore be left to the circuit judge to determine whether the fact that the juror's father and the grandfather of the accused were brothers was such a relationship as would be likely to render the juror not indifferent in this case."

It is not by reason of consanguinity or affinity that a juror becomes disqualified, but in the exercise of the discretion of the trial Judge he is subject to disqualification because of possible interest in the cause. Those related within the sixth degree are generally excused, without being questioned, in compliance with the salutary rule.

See *State v. Cook* (1944), 204 S. C. 295, 28 S. E. 2d 842, where it was declared that relationship of a juror to one of sheriff's force would not be a disqualification.

When objections to juror must be made: Under Section 38-203 it is provided that all objections to jurors in any court must be made "before the juror is empaneled for or charged with the trial . . . . " or else there will be waiver. The Section applies to petit jurors and not to grand jurors. However, the Supreme Court construed this Section liberally to meet the requirements of the Constitution and allowed an objection to come after verdict. In *Garrett v. Weinberg* (1899), 54 S. C. 127, 34 S. E. 70, one finds the following at page 145:

The only remaining inquiry is whether the disqualification of Ardis to serve as a juror entitled the defendants to have their motion for a new trial granted. In view of the express provisions of the Constitution above quoted, which are declared mandatory, it is difficult to see how this question can be answered otherwise than in the affirmative. This being a question of title to real estate,

> it is not necessary to cite authority to show that the parties were entitled to a trial by jury. What that jury should consist of is expresly [sic] declared, in mandatory terms, by the Constitution. It must be a body of twelve men, each of whom must be a qualified elector, and "all of them must agree to a verdict in order to render the same." These are the express mandates of the Constitution, and it must be obeyed. But here we have a body of twelve men, one of whom is *not* a qualified elector, who has undertaken to render a verdict, which, under the terms of the Constitution, they have no power to do, and hence the same should be disregarded and set aside, and a new trial ordered. It is contended, however, that this objection comes too late, and cannot now be considered. A number of cases have been cited to sustain the position that objection to a juror comes too late after verdict, as that which is a cause of challenge to a juror canot [sic] be urged as a ground for a new trial; though there is one case, which has not been cited, *Kennedy v. Williams,* 2 N. & McC., 79, in which it was held that, where the objection was not known to the parties until after the jury had brought in their verdict, it was a good ground for a new trial . . . . We are not aware of any case which has been decided since the enactment of this statute, which holds that a party would be precluded from making an objection to a juror after the trial, when such objection did not come to his knowledge in time to make it before or during the trial. . . .

And later the Court reaffirmed this ruling in *State v. Gregory et al.* (1933), 171 S. C. 535, 172 S. E. 692, by saying at page 541:

> . . . Clearly, under numerous decisions of this Court, so very many that it is useless to cite them (see annotation under Section 639 of the Code), a party, in his trial, who fails to exercise due diligence in discovering the disqualification of a juror, before the empaneling of the jury, cannot, after the rendition of a verdict adverse to him, rightly ask the Court to disturb that verdict. This Court, time after time, has disapproved the quiet sitting of a party, with information already obtained, or which could be easily obtained, as to the disqualification of a juror, taking his chances, ready to acquiesce in a favorable ver-

> dict, and more ready to move the setting aside of an unfavorable one. The provisions of Section 639 of the Code say that objections to jurors, not taken before the jury is empaneled, "shall be deemed waived; and if made thereafter shall be of none effect." The Court has construed the language of the section to mean such objections of which the party had knowledge, or which by the exercise of due diligence he could have known.

And in *State v. Rayfield* (1958), ___ S. C. ___, 101 S. E. 2d 505, the Court said at page 509:

> In the recent case of State v. Harreld, 228 S. C. 311, 89 S. E. 2d 879, 880, Mr. Justice Taylor, speaking for this Court, said:
>
> "From the Order of the hearing Judge, it is apparent that no objection as to the qualifications of any of the jurors was interposed prior to the jurors being empaneled as required by Section 38-203 of the Code of Laws of South Carolina 1952; neither was there any objection made before the returning of the verdict nor any showing made that appellant was in anywise injured thereby as required by Section 38-214 of the Code. Appellant will not be permitted to take his chances upon a favorable verdict, and in case of disappointment, have the verdict set aside upon a technicality. State v. Johnson, 66 S. C. 23, 44 S. E. 58."

When is jury empaneled or charged with the trial? One must know the answer to this question, otherwise one may waive a client's right. In *State v. Harding* (1905), 70 S. C. 395, 50 S. E. 11, the answer appears by inference to be: before the jury is sworn.

When to challenge: It is not wise in a civil action to challenge and ask that a juror be sworn on his *voir dire* while he is on the venire and before his name is drawn by the clerk and placed on the "striking list". It can be a waste of time, since there is always the chance that his name wouldn't have been drawn anyway. So, it is best to wait until the "striking list" is handed out by the clerk to the respective attorneys. If a challenge should be made, do it then. If the judge rules that the juror is not qualified to serve and excuses him, the clerk, pursuant to Section 38-206 will then take his name off the "list" and draw another name to take its place. It will

be noted that the foregoing Section requires that challenging or "objection for cause" *must* be made before one exercises one's right of striking. To that extent the Section tends to bear out what has been said above, namely, that one should await the "list" before challenging or objecting for cause.

Criminal cases: Some of the cases heretofore cited under the topic *Civil cases* will apply here as to certain phases of conducting a criminal trial. This will be noted from their titles, as, for example, *State v. King* and *State v. Campbell, ante.*

Who strikes first? As heretofore noted the plaintiff strikes first in a civil case. Section 38-205. In exercising the right of peremptory challenge in a criminal case under Section 38-211 one doesn't usually use the word "strike" since no "striking list" is handed each side by the clerk. On the other hand, under Circuit Rule 25 and Sections 38-65 and 38-209 a child under ten years draws out one name at a time from the venire container and the clerk calls the name of the juror so drawn. Such juror then comes to the front. Then is the time to challenge him either for cause, or peremptorily under Section 38-211. The practice in this state is for the solicitor to have the first choice of exercising the right. There is no rule of law or statute in this regard, but the suggestion of the court in *State v. Harding* (1905), 70 S. C. 395, 50 S. E. 11, has been consistently followed. The opinion of Justice Woods is short but explicit. He said:

> . . . While the jury was being empaneled, the juryman, R. C. Webster, was examined on his *voir dire*. The presiding Judge being satisfied by the examination, ordered that he be presented, and the clerk presented him with the usual words: "Juror, look on prisoner; prisoner, look on juror; what say you?" The counsel for the defendants, said, "Swear him," and the solicitor said, "I challenge him," at the same time. The Court ruled as follows: "The Court ordered this juror to be presented, and while his hand was upon the book, the defendant's counsel said, 'Swear him,' and the State challenged him, all at the same time. I hold that under the law, either side can challenge any juror as he comes to the book to be sworn and before he is sworn; and in this case no effort was made at all to swear him before the State challenged him. He was

accepted and challenged at the same time by the defendants' and the State's counsel."

The appeal is from this ruling. The rule that the solicitor should exercise the State's right of challenge before the juror is accepted by the defendant, has no statutory sanction, but is based entirely on the practice of the Court. *State v. Haines*, 36 S. C., 504, 15 S. E., 555. The defendant's right of challenge is a right of rejection not of selection. *State v. Kelley*, 46 S. C., 55, 24 S. E., 60. It is, therefore, manifest that a verdict should not be set aside for a mere technical violation of the rule, which has not impaired the defendant's right of challenge or any other substantive right. Despite the utmost care on the part of the Court and counsel, misunderstanding and confusion will sometimes occur in the course of a trial, and the discretion of the Circuit Judge in adjusting such matters will not be disturbed unless abuse of discretion clearly appears. In this case, there is nothing to suggest intentional delay on the part of the solicitor in challenging the juror, but it seems clear that either the defendants' counsel inadvertently spoke too quickly or the solicitor inadvertently spoke too slowly. In these circumstances, it would have been an abuse of discretion to deny the State its right of challenge, when to allow it in no way abridged the defendants' rights.

We venture to think it would diminish the chances of misunderstanding if the defendant would not exercise the right of challenge until the solicitor had affirmatively accepted or challenged the juror.

Disqualifying conduct: After one has been drawn on a venire to serve as a juror at a certain term of court, and especially after one has been placed on the panel or trial jury for any given case, both an attorney and his client must be extremely careful in association with such juror as will be seen from the *Hubbard* case, post.

Of course what a juror has said or done that could indicate prejudice, whether done before or after having been drawn, must always be taken into consideration. *Hubbard v. Rowe* (1939), 192 S. C. 12, 5 S. E. 2d 187, clearly points the way at page 30:

While it appears that the situation was an unusual one, counsel citing no decided case in point, it was a serious

matter, vitally affecting the issue of whether or not the defendant company would or could receive, in the circumstances, a fair and impartial trial. It has been held that the misconduct of a juror, although amounting to no more than the juror's accepting entertainment from the litigants or their counsel, is a proper ground for a mistrial. While the situation here was somewhat different, it was a matter that required a full investigation on the part of the presiding Judge. The juror in question was charged in the affidavits with having stated positively that he thought the plaintiff should have a verdict for $150,000.00, giving as his reason that if Hubbard were awarded the money he could get somebody to take care of him. We do not think it is material whether Swett expressed such an opinion before or after he was drawn on the trial jury. The question is whether he made such a statement; and, if so, could he offer a satisfactory excuse for doing so? However, he was not questioned or given an opportunity to deny the grave charge made against him, or to offer any explanation thereabout. It was not ascertained whether the statement, if made, was made inadvertently, or whether it was intended to be a jocular remark or the deliberate and fixed opinion of the juror. Presumably, on the face of the affidavits, Swett was prejudiced against the defendant company and was, therefore, not a competent juror. In these circumstances, it is clear that the appellant was entitled to the protection of the Court to the extent of its ascertaining the true facts of the matter; for only in that way could the trial Judge properly determine, in the exercise of a wise discretion, whether the juror was a competent one or whether a mistrial should be ordered. As the Court failed to take the action indicated, we are constrained to hold that there was reversible error as complained of.

Grand Jury: A comprehensive case as to the necessary qualifications of members of a Grand Jury, and as to the extent of an accused's constitutional right to be indicted by that functionary, is *State v. Rector* (1930), 158 S. C. 212, 155 S. E. 385. Any good practitioner on the criminal side of the court should know that case thoroughly. Also, it should be care-

fully shepardized, as there are already over two dozen later cases citing one or more of its rulings.

Residence or taxpayer no disqualification: Besides the necessary qualifications stated in the Constitution and the Code, it should be noted that *Ward v. City of Florence* (1928), 144 S. C. 76, 142 S. E. 48, held:

> We have no statute which forbids residents of a municipality from serving as jurors in cases in which the municipality of their residence is a party to the action on the sole ground of residence, or because the juror may be a taxpayer of such municipality. In the absence of such statute, we cannot hold that a juror so situated is disqualified. We think it would be a dangerous precedent to lay down such a rule. If we did so, it might necessarily follow that a resident of a county could not sit in a case where the county was sued, for the same pecuniary interest which would apply to the resident of a municipality. Even in criminal cases where the fines imposed on convicted defendants go to the county, or their sentences compel them to do manual labor for the county, the rule asked for would require the exclusion from the jury residents of the county, and in every such criminal case would make it necessary, upon demand of the defendant, for a change of venue to be granted. And, to follow the suggested holding to its ultimate conclusion, it would practically forbid a trial of a criminal case anywhere in the state, because the citizen of the state might have a pecuniary interest in the result of the trial. Certainly, if the suggested principle were held good, we do not see where a civil case, in which the state was a party, could be tried, unless the trial should be had in some state other than our own, which, of course, would be impossible.