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Jurors: Right to Peremptory Challenge

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JURORS: RIGHT TO PEREMPTORY CHALLENGE.—A trial court's denial of the plaintiff's statutory right[1] to exercise a peremptory challenge was declared to be error by the California Supreme Court, but not reversible error.

In the case of *Buckley v. Chadwick*,[2] a wrongful death action, the trial judge informed counsel for both parties that once a peremptory challenge is passed as to any juror in the box, that challenge is waived, in so far as those jurors are concerned. A peremptory challenge could thereafter only be exercised to a juror called into the box after the waiver.

The error in question occurred after the jury box was filled. Plaintiffs exercised four peremptory challenges and then passed a peremptory challenge to the jurors then in the box. The defendant challenged a juror, and a new venireman entered the box. Plaintiffs then sought to peremptorily challenge a juror who had been in the box at the time plaintiffs passed their fifth peremptory. This was disallowed by the trial court on the ground that the juror had been in the box at the time plaintiffs had passed a peremptory, and under the pretrial instructions this amounted to a waiver to all except new veniremen entering to replace those challenged by the defendant.

The majority of the California Supreme Court conceded that the plaintiffs were entitled to exercise this peremptory challenge, and that the pretrial instruction was contrary to section 601 of the Code of Civil Procedure, as it read at the time of the trial:

> . . . Each side is entitled to six peremptory challenges. If no peremptory challenges are taken until the panel is full, they must be taken by the sides alternately, commencing with the plaintiff. . . . Each side shall be entitled to have the panel full before exercising any peremptory challenge. . . .

In addition this abridgement was declared to be beyond the broad power of a judge to control the proceedings before him, and in so stating the court cited an early California Supreme Court case, which heretofore had never been overruled. *Silcox v. Lang*, based on similar facts, stated:

> "The right to challenge a certain number of jurors peremptorily is absolute under the statute; and the fact that a party had once passed the jury, including the juror afterward sought to be challenged, does not cut off this right. The right may be exercised at any time before the juror is sworn."[3]

However, despite the *Silcox* case and the recent passage of an amendment to section 601, which seems to reaffirm the decision, the court decided that the failure to make an affirmative showing of bias or prejudice on the part of the jurors, or that the plaintiffs did not have a fair and impartial trial, amounted to a mere technical error in procedure which could be cured by an application of article VI, section 4½, of the California Constitution, which reads:

> No judgment shall be set aside, or new trial granted, in any case . . . for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.

To term this denial a matter of procedure appears to be in conflict with the *Silcox* case and other California decisions in which the right to a peremptory challenge was said to be: a substantial right;[4] one that is absolute;[5] an inseparable and

[1] CALIF. CODE OF CIVIL PROCEDURE § 601.
[2] Buckley v. Chadwick, 45 Cal.2d ——, 288 P.2d 12 (1955).
[3] Silcox v. Lang, 78 Cal. 118, 123, 20 Pac. 297, 300 (1889).
[4] People v. Diaz, 105 Cal.App.2d 690, 696, 234 P.2d 300, 304 (1951).
[5] People v. Helm, 152 Cal. 532, 535, 93 Pac. 99, 101 (1907); Silcox v. Lang, 78 Cal. 118, 123, 20 Pac. 297, 300 (1889).

inalienable part of the constitutional right to a trial by jury.[6] The denial of this right, in *People v. Diaz*,[7] was said to be not a mere matter of procedure, but an absolute and substantial right which renders article VI, section 4½, inapplicable.

In view of the above decisions the application here of article VI, section 4½, does not appear to be within the intended purpose of the enactment as reflected in *People v. O'Bryan*, the first Supreme Court case to consider the constitutional section. There the court said:

> "We do not understand that the amendment in question was designed to repeal or abrogate the guaranties accorded . . . by other parts of the same constitution or to overthrow all statutory rules of procedure. . . .
>
> "It is an essential part of justice that questions of guilt or innocence shall be determined by an orderly legal procedure, in which the substantial rights belonging to defendants shall be respected."[8]

The court also said that not every invasion of even a constitutional right necessarily required a reversal, but the court must decide if the error is reflected in the jury's verdict.

The paramount evil sought to be corrected, in the minds of the court, was the situation requiring reversal for technical errors or omissions, even though, if the court had been able to look at the evidence, they would have been able to ascertain that a fair trial had been granted. The court went on to state that the important change in the new section was to alter the rule that prejudice was to be presumed from error.

It does not appear that the broad provisions of the article were ever meant to cure deviations from accepted rules of pleading and procedure which are essential to a fair trial, for example: the trial court's biased comments on the evidence to the jury,[9] limiting the right to examine jurors,[10] and abridgement of a defendant's right to a jury trial.[11]

That the right to peremptory challenge is included within this list of deviations from accepted rules of procedure is evidenced by the case of *People v. O'Connor*.[12] The defendant was denied the right to exercise the authorized number of peremptory challenges, and it was contended that article VI, section 4½, applied. The court said it could not reasonably be held that this section is so broad as to permit the trial court to disregard the usual form of jury trial and adopt a new and entirely different manner from that recognized by law.

The right to a peremptory challenge is treated with equal strength whether in a civil or criminal case; in both it is termed an absolute right.[13] There seems therefore to be no logical basis for applying one line of reasoning in criminal cases, as illustrated in the *O'Connor* opinion, and an entirely different form of reasoning in a civil matter, as the case under discussion implies.

Hence, by the rule applied in *People v. O'Connor*, the constitutional section, although it relates to procedure, should have no application where there has been an abridgement of a statutory right that has been termed absolute.

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[6] People v. Wismer, 58 Cal.App. 679, 685, 209 Pac. 259, 263 (1922); People v. O'Connor, 81 Cal.App. 506, 521, 254 Pac. 630, 636 (1927).

[7] 105 Cal.App.2d 690, 234 P.2d 300 (1951).

[8] People v. O'Bryan, 165 Cal. 57, 130 Pac. 1032 (1913).

[9] People v. Hooper, 92 Cal.App.2d 524, 530, 207 P.2d 117, 122 (1949).

[10] People v. Carmichael, 198 Cal. 534, 547, 246 Pac. 62, 67 (1926).

[11] People v. Hall, 199 Cal. 451, 458, 249 Pac. 859, 861 (1926).

[12] 81 Cal.App. 506, 254 Pac. 630 (1927).

[13] See note 5 *supra*.