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Juries—Challenging Jury Panel for Bias—*State v. Eggers* (Neb. 1963)

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JURIES — CHALLENGING JURY PANEL FOR BIAS — *State v. Eggers* (Neb. 1963).

Appellant was tried before a jury on March 5th and 6th of 1962 for issuing an insufficient fund check and was found not guilty. On March 6, 1962, another information was filed charging him with having issued a different insufficient fund check.[1] His attorney, realizing that Eggers would be tried for the second offense by jurors drawn from the same jury panel from which the jury at his first trial had been drawn, filed a motion to quash the complaint and information and to abate the prosecution. Later, appellant obtained new counsel who filed a motion for a continuance premised upon three grounds, one of which was that the jury panel before which the case would be heard would be biased because of their knowledge of the previous case. The motion to quash and abate was overruled, as was the motion for a continuance, and a jury was selected from the same group of jurors who seven weeks before had constituted the jury panel for appelant's prior trial.[2]

On appeal Eggers assigned as error: (1) that the trial court had compelled him to be tried before a jury selected from the same panel which had previously tried him upon a similar charge; and (2) that three of the jurors who sat at the second trial had, in fact, also served upon the jury that tried him on the previous charge.[3]

A question of first impression in Nebraska—whether it is prejudicial error to compel an accused to be tried by a jury selected from a panel from which an earlier jury had been selected and had heard a similar charge against the same accused—was squarely before the Nebraska Supreme Court. The Nebraska court, however,

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[1] State v. Eggers, 175 Neb. 79, 120 N.W.2d 541 (1963). As nearly as can be determined from the report, the two offenses charged arose out of entirely separate transactions and were completely unrelated.

[2] Specifically, three of the jurors who sat at the second trial of defendant had served on the jury at defendant's first trial. From the questions and answers at the voir dire examination of the jury panel, it appears that all but two members of the panel knew that the accused at the former trial was also the defendant in the present case, and several, although not selected to sit upon the jury at the first trial, had remained in the courtroom after the impanelling was completed and heard at least a part of the state's case.

[3] Brief for Plaintiff in Error, p. 4, State v. Eggers, 175 Neb. 79, 120 N.W.2d 541 (1963).

did not decide the issue. The case was decided on the narrow procedural point that the challenge had not been properly raised. After demonstrating that the motion to quash and abate was inappropriate to challenge the jury panel, and concerning itself with the motion for a continuance, the court stated:[4]

> In *Seaton v. State* . . . we held: 'The question of the competency of a venireman to sit in the trial of a criminal case cannot be raised by a motion for a continuance.'
>
> In the instant case, the defendant was represented by counsel who knew the proper method of raising the question of disqualifications of jurors. For his own reasons he elected not to do so and passed the jurors selected for cause. By passing the jurors for cause, the defendant waived any objection to their selection as jurors.

The court had come close to facing this problem of jurors' knowledge of prior proceedings in two earlier cases involving defendants who were tried separately for criminal acts arising out of the same transaction. Some of the same jurors sat at the trials of both defendants,[5] and it was held that the "double duty" jurors were not qualified to sit at both trials.

I.

THE PROBLEM

Eggers presents a serious problem to Nebraska defense attorneys faced with a jury panel, a large part of which may well be biased against the defendant. The case denies an attorney any method of challenging the jury panel as a whole and forces him to challenge each prospective juror individually for cause—a process which may deny the accused his right to a fair and impartial jury.[6]

The proper method of raising the question of whether the jury panel was biased, the court stated, was to challenge each of the prospective jurors for cause when the jury was impaneled. This method, however, would have placed counsel for Eggers in a dif-

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[4] State v. Eggers, 175 Neb. 79, 85, 120 N.W.2d 541, 546 (1963). See Seaton v. State, 106 Neb. 833, 184 N.W.890 (1956).

[5] Bufford v. State, 148 Neb. 38, 26 N.W.2d 383 (1947) and Seaton v. State, 106 Neb. 833, 184 N.W. 890 (1921).

[6] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committeed . . . ." U.S. CONST. amend. VI. "In all criminal prosecutions the accused shall have . . . a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed." NEB. CONST. art. I, § 11 (1875).

ficult position. In order to challenge the three jurors who had served at the previous trial, it might have been sufficient to assert that they had so served. On the other hand, bearing in mind the prior rulings of the trial judge on the jury issue, there is the distinct possibility that more extensive questioning might have been required. It might have proven necessary to question the jurors at length about the prior trial and the effect the earlier trial had upon their ability to hear the case impartially in order to establish a firm basis for a challenge for cause. Certainly questions involving the former trial would have been necessary in connection with the challenges to the other jurors on the panel who had not sat at the former trial but who knew about it in varying degrees. As Eggers' counsel agrued on appeal,[7] any discussion of the prior trial along with the fact that the defendant had formerly been accused of a similar offense would have been highly prejudicial to defendant.

The Nebraska Supreme Court has said:[8] " 'The general rule is that evidence that accused has committed another crime independent of, and unconnected with, the one on trial is inadmissible; it is not competent to prove one crime by proving another.' "[9] This rule is generally adhered to throughout the United States. In *People v. Formato*,[10] defendant was charged with gambling and conspiracy to keep a gambling establishment. Evidence was introduced to show that defendant had been convicted earlier on two different charges of gambling. This evidence was held to have been improperly admitted. Citing Wigmore the court reasoned:[11]

> The natural and inevitable tendency of the tribunal — whether judge or jury — is to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge.

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[7] Brief for Plaintiff in Error, p. 26, State v. Eggers, 175 Neb. 79, 120 N.W.2d 541 (1963): "To have challenged each juror for cause as they were called to the jury box at the time of impanelling the jury, would have mitigated against the defendant in his attempt to defend himself on other issues raised by this brief."

[8] Turpit v. State, 154 Neb. 385, 390, 48 N.W.2d 83, 87 (1951), quoting 22A C.J.S. *Criminal Law* § 682 (1961).

[9] See Brown v. State, 224 Miss. 498, 80 So. 2d 761 (1955), to the effect that in an insufficient fund check case the fact that the defendant had previously been convicted on a similar charge was inadmissible in the second case.

[10] 286 App. Div. 357, 143 N.Y.S.2d 205 (1955).

[11] *Id.* at 364, 143 N.Y.S.2d at 212.

If evidence of prior convictions can not properly be introduced at subsequent trials of a defendant because it improperly tends to cast doubt upon his character, it logically follows that evidence of an acquittal should also be excluded for the same reason. The prosecution would rarely attempt to introduce such evidence. Under the holding of *Eggers,* however, what could not be done directly could happen indirectly. The jury would be aware of the previous offense, either because many of the prospective jurors knew of the first trial, or because the proceedings of the first trial would have to be covered extensively by defense counsel in his attempt to establish cause for challenges.

It is no answer to the problem to say that the challenges for cause would have been sustained by the trial court, and that Eggers would have obtained a new jury panel after all, since nearly all of the members of the old panel would have been excused, leaving too few to form a jury. Defense counsel had reason to believe that this possibility was very remote since the trial judge had shown little sympathy for appellant's contentions when he ruled unfavorably on them in two pretrial motions. Should defense counsel be forced to gamble with defendant's liberty by having to rely upon the uncertain results of the challenges for cause?

In addition to the above problem, the challenges for cause of each and every member of the jury panel would be time consuming and repetitive. As Judge Yeager said in *Bufford v. State:*[12] "We no longer adhere to the rule requiring repeated objection to evidence of the same kind. Should we be more technical when lives and liberties are involved than in the determination of personal or property rights? I don't think so."

These consequences, flowing from the holding in *Eggers,* demonstrate the need for some method for challenging a jury panel as a whole where there is evidence that the entire panel may be biased.

II.

ALTERNATIVES OPEN TO COUNSEL

The original counsel in *Eggers* tried to answer the problem by filing a motion to quash and abate.[13] This motion was not proper

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[12] 148 Neb. 38, 46, 26 N.W.2d 383, 388 (1947) (dissenting opinion).

[13] "A plea in abatement may be made when there is a defect in the record which is shown by facts extrinsic thereto." NEB. REV. STAT. § 29-1809 (Reissue 1956). See Whitner v. State, 46 Neb. 144, 64 N.W. 704 (1895).

to raise the challenge to the jury. As the *Eggers* opinion stated:[14]

> A motion to quash may be made in all cases where there is a defect apparent upon the face of the record, including defects in the form of the indictment or in the manner in which an offense is charged. Defendant's motion does not involve any defect apparent upon the face of the record. Furthermore, the motion does not ask that the jury panel be discharged and another summoned, but asks that the information be quashed and the prosecution against him abated.

When the original attorney was forced to leave the pending second case, Eggers second attorney attempted to raise the jury issue, by filing a motion for a continuance. The court held this motion to be improper, citing *Seaton v. State*,[15] where the court devoted very little space to the question of whether objections to jurors could be made by a motion for a continuance. The court concluded that they could not, citing only one case, *Humphries v. State*[16]. This might lead one to believe that the question is settled in favor of the position taken by the Nebraska court. Such is not the case. A great number of cases do say that one cannot question the qualifications of jurors by a motion for a continuance.[17] There are, however, a number of cases supporting the position of appellant in *Eggers*.

For example, in *Brown v. City of Tuscaloosa*[18] the defendant had been tried by a jury for a violation of a liquor-prohibition ordinance of the City of Tuscaloosa and had been granted a directed verdict after presentation of all of the evidence. The jury which tried the case resulting in the appeal was drawn from the same jury panel which had heard the evidence in the earlier case. The challenge to the jury panel, raised by asking for a continuance, was held to have been properly made. The court said, however, that it is within the discretion of the trial court to grant or deny the motion, and such discretion was not subject to review upon appeal unless shown to have been grossly abused.

In *Young v. Commonwealth*,[19] a case analogous to *Eggers*, de-

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[14] State v. Eggers, 175 Neb. 79, 85, 120 N.W.2d 541, 546 (1963), quoting NEB. REV. STAT. § 29-1808 (Reissue 1956).

[15] Seaton v. State, 106 Neb. 833, 184 N.W.890 (1921).

[16] 100 Ga. 260, 28 S.E. 25 (1897).

[17] See Commonwealth v. Niemi, 365 Pa. 105, 73 A.2d 713 (1950); Wagner v. Commonwealth, 179 Va. 387, 18 S.E.2d 888 (1942); Sanders v. State, 22 Ala. App. 358, 116 So. 329 (1928).

[18] 12 Ala. App. 617, 67 So. 780 (1914).

[19] 286 S.W.2d 893 (Ky. App. 1955).

fendant was convicted at a jury trial. Six days later he was tried for a crime totally unrelated to that charged at the first trial. The jury for the second trial was drawn from the same panel from which the jurors had been drawn for the first trial, and six of the jurors sat at both trials. The court said, "We are of the opinion that on a motion for a continuance this objection to the jury may be considered by the trial court, but whether or not a continuance shall be granted on this ground lies within the court's discretion."[20]

Thus, there is authority supporting the conclusion that a motion for a continuance is the proper motion to raise the question of the qualification of the panel, and the Nebraska Supreme Court would have been justified in so holding. Such a ruling would have solved the dilemma faced by Eggers' counsel and would have afforded Eggers a trial by a jury from a new panel which would have been above suspicion of bias.

There are several other methods for challenging jury panels[21]

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[20] See also Dorsey v. State, 36 Ala. App. 376, 56 So. 2d 390 (1952); State v. Wyckoff, 27 N.J. Super. 322, 99 A.2d 365 (App. Div. 1953); Commonwealth v. Krolak, 164 Pa. Super. 288, 64 A.2d 522 (1949).

[21] Other methods which might have been used were:
(1) *Challenge to the Array*—There is a method for challenging the entire jury panel, known as a challenge to the array, which was not used by either counsel in *Eggers*. In Gardiner v. State, 55 N.J.L. 17, 18, 26 Atl. 30, 31 (Sup. Ct. 1892), the challenge to the array is explained in this manner: "A challenge to the array is an exception to the whole body of jurors upon the panel summoned and returned for service at the term, and is grounded upon some default of the sheriff or other officer making the return in drawing or returning the jurors, or for partiality or misconduct in performing the duties." A challenge to the array would have been inappropriate in *Eggers* since there was no irregularity in summoning the jury panel. The bias of the panel resulted not from the way in which they were summoned but rather from their service at appallant's first trial after the summoning of the panel was completed. (2) *Change of Venue*—Nor did the attorneys in *Eggers* seek a change of venue. The Nebraska statute governing change of venue in criminal cases is NEB. REV. STAT. § 29-1301 (Reissue 1956) which states: "All criminal cases shall be tried in the county where the offense was committed unless it shall apear to the court by affidavits that a fair and impartial trial cannot be had therein; in which case the court may direct the person accused to be tried in some adjoining county." The wording of the statute is probably broad enough to cover the *Eggers* problem. The cases applying the statute, however, have construed it narrowly. A change of venue has been granted only when there is a showing of general bias throughout the whole community. In light of these cases, the change of venue alternative does not appear too promising.

which neither counsel in *Eggers* chose to employ. However, they probably would have been inappropriate in the *Eggers* case.

Allowing the question of the possible bias of a panel to be raised by a motion for a continuance seems to be the most suitable solution. This procedure is not entirely satisfactory, however, because the granting or denying of this motion lies within the discretion of the trial court, and leaves the trial court's ruling not subject to review upon appeal unless it can be shown that the trial court grossly abused its discretion.

Appellate courts generally tend to uphold the determination of the trial court unless evidence of abuse of discretion is very persuasive.

The ideal solution seems to involve legislative action rather than an extension of existing concepts by the courts. The legislature could enact a statute allowing a challenge of the entire panel to be made by a new type of motion similar to the challenge to the array.[22] A presumption of bias should be included in the legislation to cover the situation which developed in *Eggers*.[23]

III.

WERE THE JURORS BIASED?

In the past, most courts have said the fact that a juror sat at a previous trial of a defendant involving a totally unrelated offense does not prejudice him to the extent that he should not be permitted to sit at the second trial. One of the earliest cases discussing this problem was *Commonwealth v. Hill*.[24] Hill was placed on trial for keeping and maintaining a nuisance. Over his objection, he was tried before a jury which had earlier convicted him for keeping and maintaining the same building as a nuisance. The court, refusing to reverse his conviction, said:[25]

> It cannot . . . be assumed that the jurors who had served during the first trial of the defendant, had in any degree prejudiced the present case, or were under any bias or want of impartiality which would prevent them from giving a fair hearing to the new case which they were called on to try and determine. It would certainly be going very far to say that mere knowledge by a juror that a

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[22] See note 21 *supra*.

[23] See discussion at note 30 *infra*. Note the use of the term "implied bias" in the Kentucky statute.

[24] 86 Mass. 591 (1862).

[25] *Id.* at 592.

> person had been found guilty of a previous crime, coupled with a knowledge of the facts on which such conviction was founded, would of itself operate to disqualify such juror from an impartial and unprejudiced judgment of a new and distinct charge against the same person. . . . It is doubtless true that the defendant might suffer in some degree from the moral effect produced on the minds of jurors by the knowledge he had been previously found guilty of a similar offense. But in this respect he would stand in a similar position with one charged with an offence [*sic*], whose character in the vicinage from which the jury was drawn, for honesty or correct deportment, was generally known to be bad. Exact and absolute impartiality is not to be had. The utmost that can be obtained is, that jurors should be as impartial as the lot of humanity will permit.

This reasoning seems to assume the ability of members of society to judge one whom they know has already committed one crime with complete impartiality. The judge in *Hill* conceded that some prejudice to the defendant resulted, but he concluded that it was impossible to eliminate. Admittedly, absolute impartiality is difficult, if not impossible, to obtain, yet it would seem the important goal of avoiding substantial bias would be better served by excluding those jurors known to possess prejudicial knowledge.

Contrast the approach of the judge writing the *Hill* opinion in 1862 with the more recent analysis of Judge Carter of the California Supreme Court, writing in 1949 in *People v. Zatzke*.[26] Defendant was charged with murdering Dyer who allegedly made improper sexual advances toward him. Evidence was introduced over objection as to defendant's prior homosexual practices. On appeal, the majority upheld the introduction of this evidence, on the grounds that it fell within an exception to the general rule that evidence of prior criminal acts may not be introduced at the trial of one accused of an unrelated crime. Judge Carter, dissenting, stated:[27] stated:[27]

> The large majority of persons of average intelligence are untrained in logical methods of thinking, and are therefore prone to draw illogical and incorrect inferences, and conclusions without adequate foundation. From such persons jurors are selected. They will very naturally believe that a person is guilty of a crime with which he is charged if it is proved to their satisfaction that he has committed a similar offense, or any offense . . . .

The line of cases following the decision in *Hill* seem to have embraced the principle laid down therein without re-examining the

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[26] 33 Cal. 2d 480, 486, 202 P.2d 1009, 1012 (1949).

[27] People v. Zatzke, 33 Cal. 2d 480, 487, 202 P.2d 1009, 1012-13 (1949).

assumptions advanced to support it.[28] A careful re-examination ought to be made of the *Hill* case to see whether it is in accord with the concept of the fair and impartial jury so important to our judicial system.[29]

Various courts have questioned the wisdom of the rule. One court had this to say about the problem, "While we do not think that the practice of using the same jury to try an accused for different offenses is to be commended, we cannot say that it is error."[30]

In *Bowling v. Commonwealth*,[31] the problem was discussed at length. The defendant was convicted of grand larceny for the theft of wheels and tires. Two days later he was brought to trial under another indictment of grand larceny for the theft of other tires and wheels. Seven members of the jury at the second trial had also served on the first jury. On appeal of the second conviction the majority held that since the Kentucky statute providing for the challenge of jurors for implied bias did not include a provision concerning jurors trying the same person at two trials on different sets of facts, the conviction could not be set aside on this ground. Three judges dissented on the constitutional ground that appellant

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[28] See, *e.g.*, Stephens v. State, 137 Tex. Crim. 551, 132 S.W.2d 878 (1939) (very same jury at both trials, no reasoning given, rule simply stated); Sandlin v. State, 19 Ala. App. 583, 99 So. 784, 785 (1924) (where the court simply stated, "There was no merit in this objection."); Sanders v. State, 22 Ala. App. 358, 116 So. 329 (1928) (no reasons given, rule simply stated).

[29] The right to a trial by a fair and impartial jury has traditionally been regarded as one of the keystones in our judicial system. In Booth v. State, 67 Okla. Crim. 413, 94 P.2d 846 (1939), appellant was charged with illegal possession of alcohol with the unlawful intent to sell the same. After challenges by the state and by defense counsel had been made, there were not enough jurors left to constitute a jury of twelve. The court sent a deputy sheriff out to find some more prospective jurors. Defense counsel objected to this since the deputy sheriff sent was scheduled to testify against defendant at the trial. The court in reversing the conviction, stated: "To deprive him [defendant] of the legal right to an unbiased and impartial finding on the evidence, which may be in his favor, is to inflict upon him an injustice of the rankest kind. . . . The framers of our Constitution, in which this right is so sedulously guarded, well knew that a trial by jury afforded the best protection for innocence and the surest mode of punishing guilt ever devised or conceived by the mind of man."

[30] Burford v. Commonwealth, 132 Va. 512, 516, 110 S.E. 428, 429 (1922).

[31] 286 S.W.2d 889 (Ky. 1955).

had not been given a trial by a fair and impartial jury. Judge Cammack, speaking for the dissenters, said:[32]

> One of the basic rules of evidence applied in our criminal proceedings is that evidence of prior convictions cannot be introduced as evidence against the defendant in a case of this character, but only for the purposes of impeachment if the defendant takes the stand. The relevance of that rule to the instant case is not the underlying theory that such evidence is irrelevant, but rather the fact that, if such evidence is admitted, a reversal is necessary because the evidence is said to be substantially prejudicial to the defendant. The rule is based upon the premise that knowledge of the facts surrounding the previous crimes throws doubt upon the impartiality required of our jurors. Yet, the opinion of the majority would evade the effect of the rule by permitting the same jurors to serve repeatedly in trials of the same defendant for separate crimes.

Judge Cammack went on to say that the time element was very important. The closer the two trials were to each other the greater the implication of bais would be.

Shortly after the decision in *Bowling,* the Kentucky statute was specifically amended to include the provision that, if a juror had previously sat at the trial of the defendant for a prior separate offense such fact would give rise to a challenge for implied bias.[33]

Several other cases have held that jurors will not be allowed to serve in this manner, especially where, as in *Eggers,* the two

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[32] *Id.* at 892.

[33] KY. CRIM. CODE § 210 (1962) provides: "A challenge for implied bias may be made: (1) If a juror be related by consanguinity, or affinity, or stand in the relation of guardian and ward, attorney and client, master and servant, landlord and tenant, employer and employed on wages, or be a member of the family of the defendant, or of a person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted. (2) If he be adverse to the defendant in a civil suit, or have complained against or been accused by him in a criminal prosecution. (3) If he have served on the grand jury which found the indictment, or a coroner's jury which inquired into the death of the party, whose death is the subject of the indictment. (4) If he have served on a trial jury, which has tried another person for the offense charged in the indictment. (5) If he have been one of a former jury sworn to try the same indictment, and whose verdict was set aside, or who were discharged without a verdict. (6) If he have served as a juror in a civil action brought against the defendant for the act charged in the indictment. (7) When the offense is punishable with death, if he entertain such conscientious opinions as would preclude him from finding the defendant guilty. (8) *If he have served on a trial by jury which has tried the defendant for another crime.*" (Emphasis added). Section 8 was added just after the decision in the *Bowling* case by KY. ACTS c. 87 (1956).

offenses charged are similar and the two trials follow each other in rapid succession.[34]

IV

CONCLUSION

Although the courts have not yet discarded the old rule concerning the effect of prior jury service, it is hoped that the courts will soon recognize an exception to the rule to cover fact situations similar to *Eggers*. If the courts fail, perhaps a statute similar to the Kentucky act should be enacted in Nebraska to solve the problem.[35]

As the court said in *Eggers*:[36]

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[34] In Weber v. State, 44 Okla. Crim. 447, 281 Pac. 987 (1929), a juror who had served on a jury which had convicted defendant of possessing intoxicating liquor was allowed to serve on the jury which tried defendant for a separate offense of possessing intoxicating liquor. Counsel had exhausted his three peremptory challenges to exclude three other prospective jurors who had also sat at the earlier trial, and his challenge for cause directed toward the juror in question was not allowed. The two trials were only about a week apart and were heard during the same jury term. The court held that the failure of the trial court to sustain the challenge to the juror was reversible error. In Jean v. State, 49 Okla. Crim. 412, 295 Pac. 233 (1931), there were four jurors who had sat at the first trial and the two trials were only one day apart. Once again the court held that failure to exclude the jurors was error. Eleven jurors had served at the prior trial in Moffit v. State, 45 Okla. Crim. 440, 283 Pac. 1027 (1930). The first and second trials were held on the same day. Again it was held error to fail to allow challenges for cause directed against five of these jurors after the first six had been excused by peremptory challenges.

It should be noted that, in Weber, Jean, and Moffit, the two offenses were closely related, involved some of the same questions of fact, and required the testimony of some of the same witnesses. The courts have said that jurors will not be allowed to serve at two successive trials of a defendant where these factors are present, and this rule probably influenced the appellate court in the above three cases to sustain the challenges. But in these three cases the court also recognized the basic problem of bias on the part of the jurors, irrespective of these three factors, when two trials for similar offenses follow each other in rapid succession and the jurors serve at both trials. These cases are quite similar to the situation in *Eggers*, and the trend of these decisions should not be ignored.

It should be noted that in these cases the impartiality of only a few jurors, not the whole panel, was questioned. Therefore, utilization of challenges for cause was adequate here but proved inadequate in *Eggers* for the reasons previously mentioned.

[35] See note 30 *supra*.

[36] State v. Eggers, 175 Neb. 79, 86, 120 N.W.2d 541, 546 (1963) (Emphasis added).

> It is the duty of a trial court to see that defendants in criminal cases are tried by a jury such that *not even the suspicion of bias (leaning) or prejudice (prejudgement) can attach to any member thereof.* Unless the jury be *absolutely impartial,* the jury system becomes an 'awkward instrument of justice', and the constitutional guaranty that 'every person charged with an offense against the laws of this state . . . shall have a public and speedy trial by an impartial jury' is worthless.

Unfortunately, the results flowing from the holding in *Eggers* do not measure up to the high standards the Nebraska Supreme Court enunciated in the very same opinion.

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