kinship, etc., "in answer to questions by the court," qualified himself so far as inquired of, was pronounced a good and lawful juror by the court, accepted by both sides, and ordered into the box, but, before taking his seat, told the clerk he was not 21 years old. The court, on being informed of this, after further examination ordered him to stand aside. In reply to the argument that the time had passed for pronouncing a judgment on the juror's qualifications, the supreme court says:

"We think that, until the jury shall be sworn in the case, the court may, for any good cause, discharge a juror that has been selected, and select another in his place."

In the case of *Bloodworth* v. *State*, 6 Baxt. 614, one of the errors raised by the bill of exceptions was that two of the grand jurors had served in the court within 12 months, which was held to be no error, the court, in its opinion, saying, *inter alia:*

"As to a petit jury, it is the right of either party to the case to get clear of the incompetent juror by challenge, and, if he fails from proper cause to exercise this right at the proper time, it would be a conclusive waiver of it and the verdict of the jury be valid."

The late case of *Draper* v. *State*, 4 Baxt. 253, (1874,) shows that the motion for a new trial was made because a juror was neither a freeholder nor householder, and that the defendant was ignorant of this at the trial. It does not appear from the record what answers the juror made on his preliminary examination, but the court, in disallowing a new trial, assume that the juror, supposing himself competent, answered accordingly.

The cases of *Howerton* v. *State*, Meigs, 262; *Troxdale* v. *State*, 9 Humph. 411; and *Brakefield* v. *State*, 1 Sneed, 215, relied upon by the defendants here, were all cases where the objections to the juror were made because of bias or partiality or prejudice, evidenced by the formation and expression of opinion by the juror. Such objections, which give a party the right to challenge *propter affectum*, go to the purity of the verdict, and its fairness and correctness, and are governed by a different principle than those presented in this case.

The rule thus shown to be the law of Tennessee is, unquestionably, the well-settled English doctrine, and the result of more than two centuries' growth. A few of the earlier common-law cases will be referred to, illustrating the principle: *Aylett* v. *Stellam*, Style, 100, was decided in 24 Car. I., as follows:

"Twisden, upon a rule to show cause why there should not be a new trial, said that two things were alleged on the other side that there ought to be a new trial: (1) That two of the jurors were kin to the plaintiff. * * * To the first of which he answered that the jurors were not of kin, and produced an affidavit for proof. ROLLA, J., interrupted him, and said: 'It is not now material whether they be of kin or no, for the defendant would have taken advantage of that upon his challenge at the trial.' "

So, also, in *Loveday's Case*, Id. 129:

"The court was moved upon an affidavit that one of the jurors that gave the verdict against the plaintiff had a suit in law depending at that time with the plaintiff, and therefore that the trial was not indifferent; and therefore it was prayed there might be a new trial. But the court said it could not be, and asked the party why he did not challenge the juror for this cause at the trial, for want of which he had now lost that advantage."

In an old case decided in 1681, (*Cotton* v. *Daintry*, Vent. 29,) the issue tried by the jury was whether Sir A. B. was a bankrupt. The motion for a new trial was based on two grounds,—one being that the foreman of the jury was brother-in-law to one of the creditors of Sir A. B., but "Moreton and Rainesford held neither of these reasons sufficient; for the first, it was their own laches that they did not challenge upon it. * * * Twisden, for the *last reason*, held a new trial was to be granted. * * * Kellynge held both reasons sufficient for a new trial, which could not be, in regard the court was divided; whereupon, judgment was entered for the plaintiff, and execution taken out."

Upon an exhaustive review of all the authorities, the authors of a late work on juries conclude that "the rule is very well settled that, after a verdict, these formalities will not be permitted to affect the result, although they did not sooner come to the knowledge of the party complaining, unless positive injury can be shown to have accrued therefrom." Thomp. & M. Jur. § 295, and cases cited *in nota*.

But even if the juror Gray, who sat in the trial of this suit, was not, in fact, summoned by the marshal, nor drawn from the box, but appeared instead of his father, who was so drawn and summoned, and this fact had been sufficiently proved upon the motion for a new trial by the defendants, it is doubtful if the motion should, for that reason, prevail, and the court suspects, from what passed between counsel at the hearing of this motion, though it is not in the record, that such was the fact, and so accounts for this juror's presence in the panel; for it is a common practice in the state courts for jurors summoned to send substitutes whom the court accepts. The English cases present a curious line of decisions peculiarly applicable to such a state of facts.

In *Hill* v. *Yates*, 12 East, 229, (1810,) the motion for new trial was made "because the son of one of the jurymen returned upon the panel had answered to his father's name when called, and had served upon the jury," as appeared by affidavits. "The court, however, considering the extreme mischief which might result to the public from setting aside, upon a motion for a new trial on such ground, inasmuch as the same objection might happen to lie against every verdict on the civil and criminal sides at the assizes, and recollecting that the same objection had been taken and overruled since the case in Willes, refused to entertain the motion." Afterwards, upon consulting all the judges, Lord ELLENBOROUGH said they would not interfere in this mode; "that if they were to listen to such an objection they

might set aside half the verdicts given at every assizes where the same thing might happen from accident and inadvertence, and, possibly, sometimes from design, especially in criminal cases."

In 1816, in the case of *Dovey* v. *Hobson*, 6 Taunt. 460, *Hill* v. *Yates* was in terms expressly affirmed, but a new trial was granted under these facts: A summons had been left at the house for B., who had recently moved out; M. at the time occupying it. M. appeared, answered to the name of B., was sworn and impaneled in the cause. After the case had been gone through, but before verdict, the fact was discovered.

But in the case of *Rex* v. *Tremaine*, 16 E. C. L. 318, the facts, perhaps, bear a closer resemblance to the case at bar than any other to be found. It was a motion for a new trial on a conviction for perjury. The name of John Williams appeared in the tales panel, and, when called, a person appeared, answered thereto, went into the box, and joined in the verdict. After verdict it was discovered that the one who served was Richard Henry Williams, a son of John, and who was but 20 years and 6 months old, had no freehold or copyhold estate, and had not been summoned. It appeared from the young man's affidavit that his father had been served, but, being ill, had requested the boy to attend in his place, and that affiant knew no harm in so doing. All collusion was denied. In granting a new trial, ABBOTT, C. J., said the mischiefs enumerated in *Hill* v. *Yates* ought not to control in support of "a verdict pronounced by a jury on which a person incompetent, both by reason of nonage and want of qualification, has served, * * * particularly in a case so highly penal."

In *Regina* v. *Mellor*, cited in Thomp. & M. Jur. 334, there was in 1858 a conviction and sentence to death for murder. The panel contained the names of Thorn and Thornilly, both of whom were summoned and qualified. When Thorn's name was called, Thornilly by mistake answered and was sworn, without challenge or objection, and the mistake was not discovered until after verdict. Of the 14 English judges who sat in review upon this case 6 were of the opinion that a new trial should be granted, 6 that it should not, and 2 gave no opinion. And in *Wells* v. *Cooper*, Id. 335, the name of Fox being called as a juror, one Cox answered and served by mistake. A new trial was refused because "the court will not in its discretion grant a new trial in a case where a person not of the panel served upon the jury, unless substantial injustice has been done by a wrong juror having served." *Norman* v. *Beamon*, Willes, 484; *Parker* v. *Thornton*, 2 Ld. Raym. 1410.

But one of the earliest and perhaps the leading American case on the subject of new trials for want of proper qualifications for a juror is *Hollingsworth* v. *Duane*, Wall. C. C. 147, (1801,) the opinion by Judge GRIFFITH being an able review of all the early English authorities, and an exhaustive exposition of the whole subject. The suit was an action for damages for libel contained in a newspaper

publication, and is reported no less than six times on different questions in the same volume of reports. The question arose on a rule for the plaintiff to show cause why his verdict should not be set aside on the ground that the foreman of the jury who rendered the verdict was an alien, and that defendant was ignorant of it when the jury was impaneled. The court refused to disturb the verdict, saying:

"I admit that it is a good cause of challenge that a juror is an alien. * * * But it is one thing to set aside a juror on a challenge made to him and substantiated by proof before he is sworn, at the proper time and place, and by the proper mode of trial, and another to allow the juror to be sworn without objection, and then set aside the verdict of the whole jury for a defect of qualification which, had it been suggested in time, would have been attended with no consequence but that of calling on the next juror named in the panel. It is easy to see to what injurious consequences this practice would lead, or allowing a challenge after verdict. The causes of challenge are infinite, and perhaps not one jury in ten are sworn that, if the situations, connections, interests, and qualifications of each juror were critically inquired into after verdict, some one or more would not be found, in some capacity, the subject of challenge. * * * But as to the ordinary and legal disqualifications of jurors, such as citizen, freeholder, relation, servant, and every relation of a general nature, and capable of ascertainment by ordinary care and inquiry, these cannot be permitted upon the plea of ignorance after verdict. * * * If simply swearing to ignorance of a fact were to put a party on the same ground in regard to challenge after as before verdict, it is easy to see that the rule of invoking challenges at the trial would be good for nothing; the whole law would be changed; the mode of trying the challenges, the time, the opportunity for the juror and the party to be heard, and verdicts would many times be overset after a fair trial merely on the plea of a culpable ignorance. No; if a party comes to set aside a verdict on the ground of a disqualified juror, he must make a very special case indeed. He must show from the nature of it that ordinary diligence could not have effected the discovery; that he was surprised; or that, after due inquiry and pains, he had missed or been misled as to the fact."

In *Orme* v. *Pratt*, 4 Cranch, C. C. 124, (1830,) the motion for a new trial, because one of the jurors was brother-in-law of the plaintiff, a fact not known to defendant nor his counsel, was overruled. In the criminal case of *U. S.* v. *Baker*, 3 Ben. 68, Judge BLATCHFORD denied the motion for a new trial because one of the jurors was deaf and did not and could not hear the evidence, although the defendant was ignorant of this when the jury was sworn and impaneled. The court in this case held that "the non-possession of any natural faculty stands, in respect to a juror duly summoned, in the same category with alienage or infancy or sex." But see the case of *Turnpike Co.* v. *Railroad Co.* 13 Ind. 90, where a contrary doctrine was held as to a juror who could not read or write English.

The early case of *Gilbert* v. *Ryder*, Kirby, (Conn.) 180, (1786,) presented a motion in arrest of judgment because one of the jurors had not taken the statutory oath of fidelity to the state, which fact was unknown to the defendant at the time of trial. The motion was denied by the whole court. "The exception does not go to the partiality of the juror, nor affect the obligation he was under to find a verdict

according to truth; and it is not stronger than the want of a freehold, which, though a ground of challenge, hath been repeatedly adjudged insufficient after verdict." *People* v. *Jewett*, 6 Wend. 387.

In *James* v. *State*, 53 Ala. 380, (1875,) a new trial was refused under these circumstances: The State Code, § 4063, prescribed certain qualifications for jurors, and a subsequent act made it the duty of the court, "before administering the oath prescribed by law" to any juror, to ascertain that he possessed the qualifications prescribed by the Code, "and the duty required by the court by this act shall be considered imperative." In selecting the panel, the court caused eight questions to be put to each person. None of these questions inquired of the jurors in respect of their qualifications under said section, nor did the defendant ask nor request the court to ask any such questions, neither objecting nor accepting.

The cases of *Orcutt* v. *Carpenter*, 1 Tyler, (Vt.) 250, (1801;) *Guykowski* v. *People*, 1 Scam. (Ill.) 476; and *Watts* v. *Ruth*, 30 Ohio St. 32, (1876,) are cited and relied upon by the defendants here. In the Vermont case a juror was a freeholder when his name was put into the box, but not when he was drawn, summoned, and served as a juror in the case. The new trial was refused *on this ground*, because "the juror being legally qualified when put into the box, his subsequent disqualification by divesting himself of his freehold, and thus not being a freeholder when drawn, summoned, and sworn, should have been taken advantage of in challenge, and cannot prevail after verdict." The Illinois case is a direct authority for granting a new trial, because one of the jurors was an alien when sworn, of which fact the defendant was ignorant at the time; but in *Greenup* v. *Stoker*, 3 Gilman, (Ill.) 202, the decision is by the same court, criticised *and confined strictly to capital cases*, while in *Chase* v. *People*, 40 Ill. 356, the doctrine is wholly repudiated and overruled.

In the Ohio case, read in the argument, the juror was cited as a talesman, and was not 21 years old, but was accepted without inquiry as to his competency, though personally known to the party and his counsel. No objection was made nor question asked of him, because he was thought to be 21 years of age. In denying the motion for a new trial on this ground the court says:

"If a person, not having this qualification, is retained upon the panel without the knowledge of the party or his counsel, after due diligence and inquiry has been made to ascertain the juror's qualification at the time of impaneling the jury, a new trial should be granted. If, however, no inquiry was made of the juror, and thereby arose a want of reasonable diligence in ascertaining the qualification of the juror at the time of impaneling the jury, the party will be held to have waived all objection to the juror. This rule extends to each and every element that goes to constitute a qualified juror, save such as *the statute* requires the court *sua sponte* to ascertain. * * * It is not a sufficient showing, on a motion for a new trial, that the party, at the time the jury was impaneled, was ignorant of the fact of the incompetency of such person for a juror, and that he believed him to be competent. He must, at the proper time, have examined the juror touching his qualifications. Noth-