ing short of such an investigation will furnish a showing of reasonable diligence."

Here we have no statute requiring *the court* to ascertain the qualifications of its jurors.

But the defendants here in argument insist that, conceding the doctrine to be as announced in this opinion, they do not fall within it because Gray, being "duly sworn, elected, and impaneled as a juror" on the first day of the term when the *venire* was returned, they had a right to rely upon this without anything further, and that, therefore, they have waived nothing; or, in other words, have been guilty of no laches or negligence, or want of proper diligence. But the answer to this argument, in the light of the foregoing cases, is obvious; and the solution of the question depends upon *the time when* the right of challenge accrues to a party, and what is meant by the impaneling of a jury and an examination of a juror upon his *voir dire*. Nothing is better settled than that a party cannot, either with knowledge of a juror's disqualification or from supineness and culpable negligence in ascertaining whether he is qualified or not, speculate upon the result of a trial, holding in reserve whatever he may know or can afterwards ascertain to vitiate the verdict, if against him. Our statute requires the names of jurors to be "publicly drawn from a box," and under our and the Tennessee practice the *venire facias* must issue a certain number of days before the commencement of the term. The evident object and purpose of these and various other somewhat similar provisions is to *publish* to litigants and others interested the jurors selected by law to try the issues presented for determination in the court, thereby giving ample opportunity for investigation and inquiry as to their qualifications, characters, connections, relations, etc., "that so they may be challenged upon just cause." 3 Bl. Comm. 355.

Besides, the proper time for challenge is after issue joined in a cause, especially in a civil suit, and when the cause is called for trial. Thomp. & M. Jur. § 286, and cases cited. Mr. Chitty, in his work on Criminal Law, on this precise subject says:

"*The time for the trial having arrived*, the clerk calls the petit jury on their panel by saying: 'You good men that are impaneled to try the issue between our sovereign lord, the king, and the prisoner at the bar answer to your names upon pain and peril that shall fall thereon.' When this is done, and a full jury appears, the clerk of the arraigns calls the prisoner at bar and says to him: 'These good men and true, that you shall now hear called, are those which are to pass between our sovereign lord, the king, and you; if, therefore, you, or any of you, will challenge them, or any of them, you must challenge them as they come to the book to be sworn, before they are sworn, and you shall be heard.' * * * From the words of the clerk's address to the prisoner, it is evident that this is the proper time to exercise the right of challenge." 1 Chit. Crim. Law, 532, 533.

And an examination of all the cases cited in this opinion shows that the objections were always taken "on the trial," or "when the

jury was impaneled," or "before the jury was sworn," or "when the juror was sworn on his *voir dire*," and the like. The statutes, too, are full of expressions regarding the procedure in jury trials, plainly indicating that the proper time for challenge is between the calling of the juror and his taking the oath in the case. For example, peremptory challenges are allowed "*on the trial of*" felony cases; when a prisoner exhausts his challenges "*in the trial of a capital case;*" after any excess is disallowed, "*the cause shall proceed for trial,*" and in treason, "*a list of the jury*" shall be delivered to the defendant "*before he is tried.*" Rev. St. U. S. §§ 819, 1031, 1033. So the challenge for cause in the state courts is given in case of "any person *presented* as a petit juror," and peremptory challenges are prescribed for "*a civil action tried in the courts of this state,*" as well as "*in the trial of criminal prosecutions.*" Tenn. Code, 4009, 4012–4014.

Originally, at common law, all questions arising by challenge were tried by triers, composed of two indifferent persons appointed by the court, until one juror was obtained, when he took the place of one of the triers, and, when another was accepted, these two jurors so first obtained were the triers before whom witnesses were sworn, and whose decision was final. Challenges in the federal courts are now tried by the court without the aid of triers. Rev. St. 819. So, strictly speaking, and at common law, a jury is impaneled only when they have been elected and are ready to be sworn, though the more modern use of the term often indicates the jury as sworn in a particular case. Thomp. & M. Jur. § 257; 2 Bac. Abr. 742, tit. "Juries," B, 8; Co. Litt. 158*b*; *State* v. *Potter*, 18 Conn. 169, 175; 1 Abb. Law Dict. 200, "Challenge;" 2 Bouv. Law Dict. 271, "Panel."

The writ of *venire facias* at common law was merely the sheriff's "warrant to warn the jury," and the names were in fact selected by him, and he returned them in a panel—"a little pane or oblong piece of parchment"—attached to the writ. But these jurors were not in fact summoned by the sheriff under the writ of *venire*, but a subsequent compulsory process of *distringas* or *habeas corpora juratorum*, as the case might be, issued to bring them in; and until the English statute of Geo. II. *c.* 25, these writs issued as, of course, in every separate cause; hence the old form of granting a new trial was the award of a *venire de novo*. This act of Geo. II. "appoints that the sheriff or officer shall not return a separate panel for each separate cause, as formerly, but one and the same panel for every cause to be tried at the same assizes, containing not less than 48 nor more than 72 names, and that their names being written on tickets shall be put into a box or glass, and *when each cause is called* 12 of these persons whose names shall be first drawn out of the box shall be sworn upon the jury, unless absent, challenged, or excused." 3 Bl. Comm. 357, 358.

It is the practice of the judge presiding in the courts of this district, as the return of the *venire* is called by the marshal in open

court at the commencement of each term, to cause each of the jurors present to be sworn and examined as to his citizenship, property qualification, and previous service in the court. Excuses offered by individual jurors are then passed upon, proceedings ordered in case any summoned are absent through default or contumacy, and new names for an *alias venire* drawn from the box in case the number then present are reduced below the jurors probably demanded by the business of the court. Indeed, the practice originated in a desire to expedite and facilitate the trial of cases by supplementing the duties of the clerk and jury commissioner in their endeavor to present to parties only such jurors as are qualified under the law. It is in no sense whatever an examination of the juror on his *voir dire*; it is in law no trial of a juror for the purposes for which originally triers were appointed, nor would the circumstance give a party in court the right to challenge a juror at that time, nor has a challenge ever in this court been made on such a call.

Nor do I think any advantage whatever can result or accrue to a party having a case in court from this customary action of the judge. The *venire* is issued out of the court to a public officer for service, and contains names for jurors publicly drawn from a box by the crier in open court. The venire is returned into the court, and is called by the marshal in open court, when and where the jurors appear and answer. Why any one of these various steps to secure a lawful jury can be relied upon by a party, more than another, as an excuse for want of diligence in ascertaining a particular juror's statutory qualications, is neither obvious to me, nor suggested by the argument nor in the briefs of the defendants. As well might it be insisted that the action of the clerk and jury commissioner in our practice, or of the county court, the *nisi prius* court, or sheriff, as the case may be, in our state practice, would excuse a party from challenging a juror for any statutory cause on the theory that no juror other than those qualified would ever by these means be presented to a party. It is true, every juror is *prima facie* competent and qualified. The duty of ascertaining to the contrary devolves on him who would take advantage of a want of qualification.

There has been much discussion in the books whether, in denying a new trial for such cause, the action of the court should be based on the party's waiver, as in this state is the rule, or on his want of diligence, as the supreme court of Michigan holds. Of course, it makes practically but little difference, since the result, in a case like this, would be the same on either ground, and would result in a new trial being denied.

But even if ignorance were an excuse to a party, in all cases, for not challenging a juror for a cause *propter delictum* or *propter affectum*, which is by no means clear in Tennessee, there must be shown, in addition, that the party has been injured by reason of that particular juror taking part in the verdict. That he was not qualified is not

enough; it must be further shown that the verdict was vitiated by reason of the juror's want of proper legal qualification. *Hill* v. *Yates*, 12 East, 229; *Wells* v. *Cooper*, *supra*; *Brakefield* v. *State*, 1 Sneed, 215; *Howerton* v. *State*, Meigs, 262; *Hollingsworth* v. *Duane*, Wall. C. C. 160, 162, 163; Thomp. & M. Jur. § 295 *et nota*.

Here, therefore, had the juror been examined in court upon his *voir dire* strictly, on the impaneling of the jury in this cause, and had qualified himself as to age and property, when in fact this was untrue, that alone would not, under the facts set out in the affidavits filed in support of this motion, warrant the court in granting it, in the absence of any showing whatever of any injustice thereby accruing to the defendants, and of improper motives on the part of the juror.

The next ground of the motion is based on the action of the court in allowing the plaintiff to amend his declaration, as to which the court is satisfied that it committed an error for which a new trial should be granted. The application was allowed with great reluctance, and solely to prevent, if possible, an abortive trial. Technically, if the amendment had been disallowed the result would have been barely nominal damages to a plaintiff entitled, perhaps, to substantial recompense for an injury to his property at a critical time in his affairs, if the jury should find the issues in his favor; and since the defendants had examined numbers of witnesses and were before the jury with abundant testimony, it seemed important that the plaintiff should be allowed to put his defective declaration in shape to support whatever case he had made by his proof. The amount of the verdict was larger than the court had supposed it would be, and affords no hope that the parties, notwithstanding this error, might adjust this litigation. The well-known practice of the court not to disturb verdicts fairly rendered makes it incumbent on the court to scrutinize its own conduct with care on these motions for a new trial, particularly where there is no review by writ of error open to the parties, and, whatever the verdict may be, to set it aside if there be substantial error.

The plaintiff chose to go to trial on the declaration as he had made it, after its defects had been called to his attention, and when, under the inconvenience of a continuance, it might have been amended as he wished. When, after the case was nearly ended, the conclusion was reached that it was fatally defective, it was the defendants' right to hold him to the pleadings, unless he should take a nonsuit, suffer costs, and begin again; and it was putting the defendants to a disadvantage to deprive them of this benefit of the situation by allowing the amendment.

Besides, the affidavits show that there is other proof they might have had, if they could have had another trial by forcing the plaintiff to a nonsuit, though they show no reason for not having presented that proof on this trial. They argue that they need show no other

reason than that, on the declaration as it stood, they needed no proof at all, as nothing but nominal damages were recoverable against them. This is perhaps a full answer; but, whether it is or not, the allowance of the amendment at that stage of the proceedings was erroneous unless it had been accompanied by a continuance of the case for another trial, or, at least, a reopening of it for an opportunity to the defendants to introduce further proof after the declaration had been amended. *Fowlks* v. *Long*, 4 Humph. 511; *Morrow* v. *Hatfield*, 6 Humph. 108; *Smith* v. *Large*, 1 Heisk. 6.

Motion granted.

OREGONIAN RY. CO. (Limited) *v.* OREGON RY. & NAV. CO.

(*Circuit Court, D. Oregon.* December 1, 1884.)

1. PLEADING—DENIAL OF KNOWLEDGE OR INFORMATION.
   A defendant is not bound to inform himself concerning the truth of an allegation, of which he never had any knowledge, before answering the same; and a denial of any knowledge or information thereof is a sufficient denial, and will not be stricken out as sham unless it plainly appears that the same is false.
2. SAME—FRIVOLOUS PLEADING.
   A frivolous answer or defense is one which contains nothing that affects the plaintiff's case, and may be stricken out on motion; but a motion to strike out for frivolousness is not well taken if the matter included in it is material, if true.
3. SAME—PLEA IN BAR OR ABATEMENT.
   In an action by a corporation on a contract, a denial of its corporate existence goes not only to the disability of the plaintiff but to the cause of action also, and is therefore a plea or defense in bar of the action, and will be so considered, unless expressly pleaded in abatement.
4. SAME—ESTOPPEL BY CONTRACT.
   A party who contracts with a corporation, as such, is thereby estopped, in an action on such contract, to deny its corporate existence or power to make such contract; but in case such want of existence or power is pleaded as a defense to such action, the corporation must claim the benefit of the estoppel on the record, or the same will be considered waived.
5. SAME—PLEADING AN ESTOPPEL.
   When the matter constituting the estoppel—the compact—does not appear in the previous pleadings, it must be set up by replication; but where the same does so appear, the estoppel must be raised by demurrer.

Action to Recover Rent.

John W. Whalley and *William Gilbert*, for plaintiff.

Charles B. Bellinger, for defendant.

DEADY, J. This action is brought by the Oregonian Railway Company, (Limited,) a foreign corporation alleged to have been formed in Great Britain under "The Companies' Act of 1862," against the Oregon Railway & Navigation Company, a domestic corporation formed under the general incorporation act of Oregon of 1862, to recover the sum of $68,131, alleged to be due the plaintiff for the use of its

railway in Oregon, commonly called the "narrow gauge" road, for the half year beginning May 15, 1884.

It is alleged in the amended complaint, filed August 15, 1884, that the plaintiff became a corporation on April 30, 1880, by certain persons making and delivering for registry under the British act aforesaid a "memorandum of association" and "articles of association," as therein set forth; that the defendant became a corporation under the Oregon act aforesaid on June 13, 1879, by certain persons making and filing articles of incorporation to that effect, as therein set forth; that on August 1, 1881, the plaintiff was the owner of a certain railway in Oregon, and then demised the same by a written instrument to the defendant for the term of 96 years, for and upon a yearly rental of 28,000 pounds sterling, to be paid in half-yearly installments in advance, and that the defendant, by its proper officers, duly executed said instrument, they being first thereunto fully authorized by a vote of its directors; and that the defendant thereupon entered into possession of the railway and operated the same, but has failed to pay the installment of rent falling due on May 15, 1884.

By the second amended answer to this amended complaint, filed October 18, 1884, the defendant expressly admits that it is a corporation formed under the laws of Oregon, and that its president and assistant secretary signed the written instrument aforesaid, and that in pursuance thereof it entered into the possession of said railway and operated the same until May 15, 1884, when it offered to return the same to the plaintiff, which offer was declined, and that it has since retained the possession thereof, only under a special agreement with the plaintiff, not material to the present inquiry, and denies (1) that the plaintiff is or ever was a corporation under the companies act of 1862, or otherwise, or at all; (2) that the law of Great Britain confers on the plaintiff the power to lease said railway; (3) knowledge or information sufficient to form a belief as to whether a memorandum or articles of association were made and delivered for registry, as alleged in the complaint, or at all; (4) that plaintiff is or ever was authorized to construct, own, operate, lease, or sell a railway in Oregon, or that it has ever complied with the laws of Oregon on the subject of foreign corporations doing business therein; (5) that either the plaintiff or defendant ever had authority to execute said written instrument, or any indenture for the leasing of said railway, or that the plaintiff ever demised the same to the defendant; and (6) that any sum of money is due the plaintiff from the defendant; and avers that it has fully paid the rental provided for in said pretended lease for the period during which it was in possession of said railway, to-wit, for the period ending May 15, 1884.

The plaintiff moves to strike out his answer as being "frivolous and immaterial," and for judgment. In the brief submitted by counsel in support of this motion, it is maintained that the denials of

knowledge or information concerning the alleged execution and delivery of the memorandum and articles of association are insufficient, because they relate to matters which are of record, and of which the defendant can inform itself, or to such things as are presumptively already within its knowledge, and therefore it is not at liberty to controvert the allegation otherwise than by a positive denial; citing, *Heatherly* v. *Hadley*, 2 Or. 275; *State* v. *McGarry*, 21 Wis. 500; *Hance* v. *Rumming*, 2 E. D. Smith, 48; *Curtis* v. *Richards*, 9 Cal. 38; *Nelson* v. *Murray*, 23 Cal. 338; Pom. Rem. § 641; Moak's Van Santv. Pl. § 517. But none of these authorities go so far as to hold that because the subject of an allegation in a pleading is of record, that therefore the party answering or replying thereto must take the trouble to inform himself so as to be able to deny the allegation positively, if at all. A party may, by the force of a statute, have constructive notice or knowledge of the existence and contents of a private writing duly admitted to record in a public registry, but there is no presumption that he has any actual knowledge or information on the subject, unless it also appears that he had some connection with the transaction contained in the record or relation to the proceeding out of which it grew. The rule was long ago stated by Mr. Justice FIELD in *Curtis* v. *Richards*, *supra*, as follows:

"If the facts alleged are presumptively within the knowledge of the defendant, he must deny positively, and a denial of information or belief will be treated as an evasion. Thus, for example, in reference to instruments in writing alleged to have been executed by the defendant, a positive answer will alone satisfy the requirements of the statute. If the defendant has forgotten the execution of the instruments, or doubts the correctness of their description, or of the copies in the complaint, he should, before answering, take the requisite steps to obtain an inspection of the originals. If the facts alleged are not such as *must* be within the personal knowledge of the defendant, he may answer according to his information and belief."

—Or, rather, he may deny knowledge or information thereof sufficient to form a belief. See, also, on this point, Pom. Rem. § 641, wherein it is said in effect that a party may controvert an allegation by a denial of any knowledge or information thereof whenever such denial would not, in the light of the circumstances, appear to be palpably false.

Now, upon the facts stated in this case, there can be no presumption that the defendant has any personal knowledge concerning the existence or contents of the documents made and registered in Great Britain, by means of which the plaintiff claims to have become a corporation. How can such presumption arise? The defendant was an utter stranger to the proceeding, and there is no evidence that it, or those who represent it, and through whom its knowledge must come, ever saw or examined the documents for any purpose. Neither is a party under any obligation to inform himself concerning any matter of fact, so that he may answer an allegation relating to it, positively, unless it be to recall and verify that knowledge or information