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Evidence -- Assembly of Jurors' Affidavits to Impeach Jury Verdict

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Evidence

ADMISSIBILITY OF JURORS' AFFIDAVITS TO IMPEACH JURY VERDICT

Introduction

"A juror cannot impeach his own verdict" has become a sacrosanct phrase of the law. It is applied to deny the admission of jurors' evidence as to misconduct of the jury itself and of third parties' misconduct which affects the verdict. While the rule is well settled, the application of it to various fact situations varies considerably. Further, confusion is added to the area by the various reasons offered for applying the rule. Many courts apply it automatically, the only reason being the afore-mentioned canon, *viz.* it is well settled that a juror cannot impeach his own verdict, a seemingly blind adherence to form alone.

History of the Rule

The birth of the rule that evidence of a juror shall not be received to impeach his own verdict occurred in England in 1785 in the case of *Vaise v. Delaval.*[1] In this historic case an affidavit of a juror that the jury, having been divided, "tossed up," and the plaintiff won, was rejected. Lord Mansfield's entire opinion, the cornerstone of all the conflict today, stated:

> The Court cannot receive such an affidavit from any of the jurymen themselves, in all of whom such conduct is a very high misdemeanor: but in every such case the Court must derive their knowledge from some other source: such as from some person having seen the transaction through a window, or by some such other means.[2]

The decision was grounded on the doctrine that a "witness shall not be heard to allege his own turpitude"; *nemo turpitudiem suam alligans audietur.* After the force of this maxim was generally repudiated in other fields, the rule continued to be applied due to the eminence of Lord Mansfield's name. Later other reasons were furnished to uphold the use of this exclusionary rule.

What makes this case the true beginning of the rule and not merely a culmination of its evolution is the fact that, prior to the decision in *Vaise v. Delaval,* the practice had been to receive a juror's testimony in cases of this nature.[3]

In a comparatively short time, as we measure the growth of

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1 1 T.R. 11, 99 Eng. Rep. 944 (K.B. 1785).
2 *Ibid.*

law, the pendulum had swung to the other extreme. In 1839 an English court agreed with counsel's argument that such an affidavit "is clearly inadmissable."[4] The court advanced as its reasons for this ruling that:

> When the jury have openly concurred in a verdict in open court . . . it woud be most dangerous, and lead to the greatest fraud and abuse, to set it aside on such statements as that which is made in this case.[5]

Fundamentally this is the rule and the basic rationale that was accepted by American juristic thought and continues to the present day.

The Rule in the United States

That the vast majority of United States' jurisdictions accept and apply the principle that a "juror's testimony is not receivable to impeach his own verdict" is a fact acknowledged by leading authorities.[6] However, such a statement without a view of the reasons for the rule and the varying factual situations which control the application or non-application of the rule is meaningless.

The public policy argument against the juror's affidavit seems to encompass a multitude of arguments. In *McDonald v. Pless*,[7] the Supreme Court stated that the recognized rule is based on a controlling consideration of public policy, which chooses the lesser of two evils in choosing between redressing injury to the litigant and injuring the public by permitting jurors to testify as to what happened in the jury room. Without this rule of exclusion there would exist ". . . a door so wide and [it would] present temptations so strong, for fraud, corruption, and perjury, as greatly to impair the value of, if not eventually to destroy, this inestimable form of trial by jury."[8] More particularly the public policy rule is designed to protect the secrecy of the deliberations,[9] to promote "free discussion and interchange of opinion

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[3] Dent v. Hertford, 2 Salk. 645, 91 Eng. Rep. 546 (K.B. 1696); Norman v. Beamont, Willes 484, 125 Eng. Rep. 1281, 1282 (C.P. 1744): "[W]e always admitted of affidavits; as in respect to a misbehaviour of any of the jury. . . ."

[4] Straker v. Graham, 4 M. & W. 721, 150 Eng. Rep. 1612 (Ex. 1839).

[5] *Id.* at 1614.

[6] McCORMICK, EVIDENCE, § 68 (1954); 8 WIGMORE, EVIDENCE, §§ 2345-2364 (3d ed. 1940).

[7] 238 U.S. 264 (1915).

[8] Johnson v. Davenport, 3 J.J. Marshall 390, 26 Ky. 261, 264 (1830); followed in Caldwell v. E. F. Spears & Sons, 186 Ky. 64, 216 S.W. 83, 85 (1919).

[9] Sineri v. J. Smilkstein & Sons, Inc., 205 Misc. 745, 132 N.Y.S.2d 475 (1954); Emmert v. State, 127 Ohio St. 235, 187 N.E. 862 (1933); The King v. Kahalewai, 3 Hawaii 465 (1873).

among jurors,"[10] and to lessen temptation to tamper with the jury after the verdict.[11] In short, it has been suggested that abandonment of the rule would result in protracted litigation and weakened public regard for the "ancient and well-tried method of trial by jury."[12] However, a shadow is cast over the validity of these reasons in the states that follow the general rule but allow affidavits to be received to support the verdict.[13] It is submitted the evil of tampering with the jury after the verdict does not change its basic nature because the end desired is varied.

Public policy is not the only reason advanced for the exclusionary rule here discussed. Courts have also made use of the more standard rules of evidence, the hearsay rule, the parol evidence rule and privileged communication. The parol evidence rule is said to be the basic underlying principle of the exclusion of jurors' affidavits as the verdict is the final legal act. It is the outward utterance which is the act and not the prior and private intentions. Hence, "the verdict, in which they all concur, must be the best evidence of their belief . . . and therefore must be taken to be conclusive."[14] But affidavits are admissible to correct the written verdict, as to errors in recording the verdict or in mathematical computation of damages, for example, because this is not the verdict itself.[15] The courts, however, caution that "a distinct line must at all times be drawn between an impeachment of the *written record* . . . and an attempted impeachment of the verdict itself."[16] From the general principles of the parol evidence rule can be deduced all the rules that control setting aside or correcting the jury's verdict. However, this rationale does not seem to find great use among the decisions. Most courts rely on public policy alone as grounds for denying admissibility of the affidavits.

Also infrequently used as a rationale by the courts is the hearsay rule. When the affidavits are based on the discussions of the jurors this rule can be used to bar the admission of such evidence.[17] Both the hearsay and public policy rules exclude

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10 Sandoval v. State, 151 Tex. Crim. 430, 209 S.W.2d 188, 190 (1948).

11 Haight v. Turner, 21 Conn. 593 (1852); People v. Pizzino, 313 Mich. 97, 20 N.W.2d 824 (1945).

12 State v. Best, 111 N.C. 638, 15 S.E. 930, 933 (1892).

13 People v. Duzan, 272 Ill. 478, 112 N.E. 315 (1916) (dictum); Iverson v. Prudential Ins. Co., 126 N.J.L. 280, 19 A.2d 214 (1941). The cases do not discuss the exclusion rule in relation to their ruling.

14 Murdock v. Sumner, 39 Mass. (22 Pick.) 156, 157 (1839).

15 Kennedy v. Stocker, 116 Vt. 98, 70 A.2d 587 (1950); Wolfgram v. Town of Schoephe, 123 Wis. 19, 100 N.W. 1054 (1904).

16 Bauer v. Kummer, 70 N.W.2d 273, 276 (Minn. 1955).

17 Utt v. Herold, 127 W. Va. 719, 34 S.E.2d 357 (1945).

the affidavits because ". . . experience has shown that they are more likely to prevent than to promote the discovery of the truth."[18] Whether a court today would find it necessary to use the hearsay rule to exclude affidavits of jurors' discussions is doubtful. Its advisability is problematical.

The doctrine to the effect that each juror has a privilege against disclosure in court of his communications to the other jurors during retirement has the support of Wigmore[19] and is noticed in at least one Supreme Court case.[20]

Briefly then, while other reasons sometimes support the exclusion of jurors' affidavits, the rule itself exists as a rule because of a desire of the courts to protect the jury system from what it deems an evil which will destroy its purpose and value.

A survey of the fact situations in which the rule is applied or rejected shows that the line of delimitation lies between (1) evidence that attempts to show mistakes, etc., in the thought processes of the jurors and (2) open misconduct not inherent in the verdict itself. The various fact patterns and corresponding rules can be broken down into four basic situations.

(1) *Mistake and Misconduct of Jurors.* The deliberations of the jury should be conducted with the necessary formalities. If there is misconduct or mistake there is no better witness of it than one of the jurors himself. However, ever since the decision of Lord Mansfield this evidence has been excluded.[21] Hence, attempts to show misinterpretation of law [22] and misunderstanding of instructions[23] will be thwarted unless they come under exceptions noted below. Attempts to show misconduct are not allowed;[24] therefore, evidence to show that jurors spoke of in-

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[18] Blodgett v. Park, 76 N.H. 435, 84 Atl. 42, 44 (1912): ". . . it is customary to enforce the rule which excludes such affidavits . . . for the same reason that the hearsay rule is enforced."

[19] 8 WIGMORE, EVIDENCE, § 2346 (3d ed. 1940) and cases there cited. The requirements for a privileged communication are satisfied if these factors exist: (1) The communication originates in a "confidence of secrecy"; (2) confidence is essential to attainment of the purpose; (3) the relationship is entitled to protection; (4) injury from disclosure overbalances the benefits gained. The fourth requirement seems indistinguishable from the public policy rule in substance.

[20] Clark v. United States, 289 U.S. 1, 12 (1933). The case discussed the theory but then said that assuming there were a privilege it did not apply in the event of fraudulent conduct.

[21] Vaise v. Delaval, 1 T.R. 11, 99 Eng. Rep. 944 (K.B. 1785).

[22] State v. Veillon, 160 La. 193, 106 So. 780 (1926); State v. Knapp, 194 Wash. 286, 77 P.2d 985 (1938).

[23] Collings v. Northwestern Hospital, 202 Minn. 139, 277 N.W. 910 (1938); Olson v. Williams, 270 Wis. 57, 70 N.W.2d 10 (1955).

[24] York v. North Central Gas Co., 69 Wyo. 98, 237 P.2d 845, 852 (1951),

surance,[25] or to show what the jury allowed and disallowed in computing damages,[26] or that they had an unauthorized view of the scene of the accident,[27] or that a verdict was coerced by deceit of fellow jurors,[28] or was compromised by freeing one defendant while convicting another,[29] could not be admitted due to the general rule excluding the jurors' affidavit.

(2) *Misconduct of Third Parties.* Where the misconduct that the juror seeks to show involves the improper acts of a third person there is a conflict between the states that apply the general rule. Those that admit the evidence distinguish between the acts of jurymen and influences of third parties which are extraneous to the deliberations.[30] The "extraneous facts" argument coupled with the public policy that an officer of the court (bailiff, judge, etc.) should not be shielded by a rule designed to meet another situation has led to exceptions in some instances.[31] Most jurisdictions, however, refuse to relax the general rule that jurors shall not be heard to impeach their own verdict.[32]

(3) *Testimony of One Who Overheard Jury.* This situation is analogous to the problem of permitting a juror to impeach his own verdict, as Lord Mansfield suggested in *Vaise v. Delaval.*[33] Some courts allow evidence from a non-juror of what the jury has said and done during deliberations to impeach the verdict.[34] Apparently, these decisions turn on the fact that this evidence is independ-

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[24] *continued*
where the rule was too firmly settled to be upset by judicial decision (dictum); State v. Forrester, 14 N.D. 335, 103 N.W. 625, 626 (1905): "Although injustice may at times result from thus holding. . . we deem it the better rule. . . ."

[25] Newell v. City Ice Co., 140 Kan. 110, 34 P.2d 558 (1934).

[26] Schumacher v. Lang, 160 Neb. 43, 68 N.W.2d 892 (1955).

[27] Wilson v. Oklahoma Ry. Co., 207 Okla. 204, 248 P.2d 1014 (1952).

[28] State v. Lewis, 59 Nev. 262, 91 P.2d 820 (1939).

[29] State v. Corner, 58 S.D. 579, 237 N.W. 912 (1931).

[30] Mattox v. United States, 146 U.S. 140 (1892). If protection of secrecy is the object of the rule there is no good reason why jurors cannot testify as to outside influence. See the discussion of the "Iowa Rule," text at note 51 *infra.*

[31] Wilkins v. Abbey, 168 Misc. 416, 5 N.Y.S.2d 826 (1938).

[32] Ruiter v. Knudson, 318 Ill. App. 211, 47 N.E.2d 534 (1943); and see Annot., 146 A.L.R. 514 (1943) for a discussion and collection of other cases on this point.

[33] 1 T.R. 11, 99 Eng. Rep. 944 (K.B. 1785). Evidence of misconduct cannot come from the jurors but is admissible from ". . . some person having seen the transaction through a window, or by some such other means." *Ibid.*

[34] Wright v. Abbott, 160 Mass. 395, 36 N.E. 62 (1894); Reich v. Thompson, 346 Mo. 577, 142 S.W.2d 486 (1940).

ent of the deliberations and does not fall under the sanction of the rule. Perhaps more important is the fact that this is the only means by which such misconduct may be established.

The courts that refuse to allow evidence of eavesdroppers, etc., to impeach the verdict, accept as a rationale that to do so would violate the general rule by allowing indirectly what is denied directly, *i.e.*, invading the secrecy of the jury room.[35]

(4) *Quotient and Lot Verdicts.* Quotient verdicts in which the jury reaches its decision by adding the individual estimates of the damage and dividing the total by twelve is misconduct sufficient for a new trial as a determination by chance.[36] However, such misconduct cannot be shown by jurors' affidavits in keeping with the general rule.[37] Several states have remedied this situation by statute to allow affidavits to prove arrival at verdict by chance or lot.[38]

Another variation of the general rule is the *aliunde* rule of Ohio. To the general rule that the verdict of a juror may not be impeached by the testimony of a juror concerning the jury's misconduct, is added the qualification "in the absence of evidence *aliunde*." Thus, where evidence of misconduct is available from a non-juror, the jurors' evidence of misconduct may come in.[39]

Judicial Criticism of the General Rule

Due to the hardship in individual cases the general rule that a juror cannot impeach his own verdict has been criticised, not only by the commentators[40] but also by the courts. In 1821 in the case of *Crawford v. State*,[41] the court severely condemned the rule. The opinion pointed out that there seemed to be a struggle even in the minds of the judges who made the rule and that the "... coincidence of opinion which has formed the majority has not been founded on the unity of their reasons."[42] Then the court pointed

35 Central of Georgia Ry. v. Holmes, 223 Ala. 188, 134 So. 875 (1931).

36 Benjamin v. Helena Light & Ry., 79 Mont. 144, 255 Pac. 20 (1927).

37 Southern Ry. of Indiana v. Ingle, 57 N.E.2d 948, (Ind. 1944), *rev'd on other grounds*, 223 Ind. 271, 60 N.E.2d 135 (1945).

38 CAL. CODE CIV. PROC. § 657(2) (Deering 1953); IDAHO CODE ANNO. § 10-602(2) (1948); MONT. REV. CODES ANN. § 93-5603(2) (1947); N.D. REV. CODE § 28-1902(2) (1943); S.D. CODE § 33.1605(2) (1939); UTAH CODE ANN. § 77-38-3(4) (1953) (statute does not expressly provide for receiving juror's affidavits, but in State v. Priestley, 97 Utah 158, 91 P.2d 447, 449 (1939), the court indicated that affidavits were proper. (dictum)).

39 Wicker v. City of Cleveland, 150 Ohio St. 434, 83 N.E.2d 56 (1948).

40 8 WIGMORE, EVIDENCE § 2345 (3d ed. 1940); Jorgensen v. York Ice Mach. Co., 160 F.2d 432, 435 (2d Cir.) (dictum), *cert. denied*, 332 U.S. 764 (1947).

41 10 Tenn. (2 Yerg.) 54 (1821).

42 *Id.* at 58.

out that the change in the common law was made after the Revolution and only those rules prior to it should be part of our common law, hence "affidavits of jurors are legally receivable here."[43]

The court also bulwarked its argument with the points that, first, to exclude the evidence cuts off the best evidence, if not the only evidence, of misconduct. At best the exclusion puts the juror below the level of an eavesdropper whose evidence is admitted.[44] Second, the Tennessee court rejected the worry about tampering with the jury because "the danger is imaginary; jurors in general are above attacks of this kind."[45]

The second major attack on the general rule was made in 1866 in *Wright v. Illinois and Mississippi Telegraph Company.*[46] This case is the basis of the so-called "Iowa Rule" which is discussed below. The opinion gave an exhaustive review of all prior leading cases and after pointing out inconsistencies, concluded that each of the cases was not decided" . . . on any recognized or fixed principle, but upon its own supposed merits, according to individual views of the judge. . . ."[47]

In 1947 Judge Learned Hand spoke out against the rule,[48] saying "the whole subject has been obscured, apparently beyond hope of clarification, by Lord Mansfield's often quoted language in Vaise v. Delaval. . . ."[49] He further believes it is:

> . . . not improbable that when the question arises in the future, the testimony of the jurors may be held competent, and that we shall no longer hear that they may not "impeach their verdict," when it is "impeachable" if what they say is true. Maybe not; judges again and again repeat the consecrated rubric which has so confused the subject; it offers an easy escape from embarrassing chores.[50]

However, the rule is so firmly imbedded this seems unlikely to come about without legislative action. The criticism above has brought about modifications of the rule, the most important being the so-called "Iowa Rule."

The "Iowa Rule"

In the *Wright* case,[51] *supra,* after expressing the criticism of the

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43 *Id.* at 59.
44 *Id.* at 60.
45 *Id.* at 60.
46 20 Iowa 195 (1866).
47 *Id.* at 209.
48 Jorgensen v. York Ice Mach. Co., 160 F.2d 432 (2d Cir.), *cert. denied,* 332 U.S. 764 (1947).
49 *Id.* at 435.
50 *Ibid.*
51 Wright v. Illinois and Mississippi Tel. Co., 20 Iowa 195 (1866).

general rule set out above, the court stated what it believed to be the true rule.

> That affidavits of jurors may be received for the purpose of avoiding a verdict, to show any matter occuring during the trial or in the jury room, which does not essentially inhere in the verdict itself. . . .[52]

This rule has been applied in some federal cases[53] and accepted by state courts in a number of instances.[54]

The American Law Institute in its *Model Code of Evidence* adopts the "Iowa Rule." Rule 301 provides:

> [A]ny witness, including every member of the jury, may testify to any material matter . . . whether the matter occurred or existed in the jury room or elsewhere, and whether during the deliberations of the jury . . . except . . . no evidence shall be received concerning the effect which anything had upon the mind of a juror . . . or concerning the mental processes by which it [the verdict] was reached.[55]

The comments observe that this allows the juror to testify to every relevant matter except his mental processes and the effect on his mental operations in coming to a verdict.[56] Thus the sanctity and secrecy of the jury deliberations are protected; at the same time, the percentage of cases where apparent injustice results to the individual, because of application of the rule, could be substantially lessened.

Conclusion

There is no doubt that the finality of the jury's verdict and their freedom of discussion must be protected by the courts. However, in reading the numerous reported cases on the subject one is appalled by the many instances where injustice is done to an innocent litigant due to the inadmissibility of the only evidence of misconduct available. Admittedly all attempts to draw lines between two conflicting rules strew hard cases on either side of the line. How-

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52 *Id.* at 210.

53 Mattox v. United States, 146 U.S. 140 (1892); *Jorgensen v York Ice Mach. Co., supra* note 48.

54 Miami v. Bopp, 117 Fla. 532, 158 So. 89 (1934); Perry v. Bailey, 12 Kan. (Dassler) 415 (1874); Jensen v. Dikel, 69 N.W.2d 108, 114 (Minn. 1955) (dictum); McInnis v. State, 213 Miss. 491, 57 So. 2d 137, 140 (dictum) (1952): ". . . may testify as to misconduct of others. . . ."; James Turner & Sons v. Great No. Ry., 67 N.D. 347, 272 N.W. 489 (1937); Dallas Ry. & Terminal Co. v. Bishop, 203 S.W.2d 651 (Texas, 1947).

55 MODEL CODE OF EVIDENCE, Rule 301 (1942).

56 *Id.*, comment a.

ever, it is submitted that in drawing the line between redressing injury to the litigant and protecting the public through the protection of the traditional jury process the line has been drawn with too clumsy a hand. The "Iowa Rule," which admits evidence of facts not inherent in the verdict, appears to be the better instrument for justice. The present position of the rule in the United States makes this a matter for the legislatures of the various jurisdictions. It is to be hoped that the *Model Code of Evidence* soon finds favor with these bodies.

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