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NEW TRIAL — USE OF TESTIMONY OF JURORS TO SET ASIDE VERDICT—Whether or not testimony of a juror is admissible for the purpose of setting aside a verdict is a question upon which the cases are in conflict. Much of the contrariety of opinion is due to a failure of courts to distinguish between the two basic factual situations which present the problem. The juror's testimony may be sought to be introduced to show either: (1) that, due to some misunderstanding, his own thought processes were misdirected in arriving at his final vote; or, (2) that he observed the open misconduct of a fellow juror. At the outset it should be noted that the majority rule is to exclude all testimony of jurors whether it goes to prove misunderstanding or misconduct. However, the American Law Institute in its Model Code of Evidence adopted a rule[1] correctly recognizing the distinction pointed out and squarely opposing the majority rule as to misconduct. It stated that "every member of the jury may testify to any material matter, including any statement or conduct... of any member of the jury... whether during deliberations of the jury, or in reaching or reporting its verdict. . . ." Because of the number of eminent authorities who aided in this draft it is appropriate to reconsider the policies lying behind the majority rule.

I

Testimony by a juror relating to his own thought processes in reach-

[1] American Law Institute, Model Code of Evidence, Rule 301.

ing a verdict has been excluded by the courts with near unanimity.[2] In *Wright v. I. & M. Telegraph Co.*[3] it is stated that an "affidavit to avoid the verdict may not be received to show any matter which does essentially inhere in the verdict itself, as that the juror did not assent to the verdict; that he misunderstood the instructions of the court, the statements of the witness, or the pleadings in the case; that he was unduly influenced by the statements or otherwise of his fellow jurors, or mistaken in his calculation or judgment, or other matter resting alone in the juror's breast."[4] It is noteworthy that such a rule in no way excludes testimony as to *activity* but only the *effect* of such activity upon the juror's mind.

Of course, if the juror's claim is true, this rule of exclusion will work extreme hardship upon the losing litigant, for his opponent has recovered a judgment in spite of failing to satisfy the entire jury. However, courts realize that truth cannot be assured by admission of such testimony because the falsity of the testimony and affidavits by the juror could seldom be established. A dishonest juror, or one who has forgotten bits of evidence which were clear to him in the jury room, could assert that he misunderstood certain instructions. How can this asserted state of mind be disproved?

Turning to extrinsic considerations of policy, courts have refused the testimony on three grounds: (a) that there would be no certainty in a verdict,[5] for the unscrupulous or forgetful juror could overthrow the deliberations of the twelve; (b) that there would be no end to trials;[6] and (c) that it would violate the parol evidence rule. The latter argument is advanced by Professor Wigmore[7] and by a few cases[8] contending that a written verdict is the final culmination and integration of the prior thoughts of the jury and cannot be disturbed by advancing those prior thoughts.

It is submitted that the rule excluding juror's testimony relating to matters "which inhere in the verdict itself" is sound and is necessary to assure a stable legal system. A verdict and judgment must mean more than a temporary victory which may be snatched away at the caprice of a recalcitrant juror, or parties engaged in a dispute will turn to self-help

[2] Due to a misapplication of Wright v. I. & M. Telegraph Co., 20 Iowa 195 (1866), discussed, infra, the Iowa Supreme Court has allowed affidavits to show that the jurors gave weight to certain inadmissible evidence. Douglass v. Agne, 125 Iowa 67, 99 N.W. 550 (1904), and Brown Land Co. v. Lehman, 134 Iowa 712, 112 N.W. 185 (1907).

[3] 20 Iowa 195 (1866).

[4] Id. at 210.

[5] Robbins v. Windover, 2 Tyl. (Vt.) 11 at 13 (1802).

[6] Hudson v. State, 9 Yerg. (17 Tenn.) 407 at 410 (1836).

[7] 8 WIGMORE, EVIDENCE, 3d ed., § 2348 (1940).

[8] For example, see: Duke of Buccleuch v. Metropolitan Board, 5 H.L. 418 (1872); Murdoch v. Sumner, 22 Pick. (39 Mass.) 156 (1839).

and to breaches of the peace rather than seeking the aid of a judicial tribunal.

II

There remains the more controversial subject of admissibility of testimony by a juror concerning misconduct which he has witnessed. It is necessary that certain formalities be observed during retirement of the jury. It is true that formalities are only indicia of the existence of good reasoning, but they are insisted upon in the case of jury deliberations because of the impossibility of introducing the actual motives of the jurors which were the bases of the verdict. This discussion assumes the existence of an irregularity which will avoid the verdict under local law; the inquiry is instead: Can the irregularity be shown by testimony of the jurors themselves? The majority of courts have decided it cannot be.

If this misconduct consists of an expression of one of the jurors and the testimony is offered by another juror, then it must first be determined if the juror who expressed his views can claim the communication to be privileged. In the case of a general communication by a juror to his fellow jurors, it has been conceded that his statements cannot be disclosed without his consent,[9] for all of Wigmore's elements of privilege are present: it originates in confidence; the confidence is necessary to maintain a semblance of independent jury trial; more injury would result in denying the privilege, for no juror should be afraid to speak his mind during deliberations; and, that fair jury trials should be fostered cannot be questioned in light of the express words of the constitutions.[10] However, when the words spoken involve misconduct, the privilege is not allowed to protect the speaker and indirectly to injure the litigant, for then the confidence is not necessary to maintain a fair trial and the injury is greater if the testimony is excluded.[11] Otherwise testimony of threats, promises, and illegal agreements in the jury room would be inadmissible because of the doctrine of privilege.

Is there any other basis on which to exclude testimony of a juror regarding misconduct which he claims to have witnessed? This problem was presented in *Vaise v. Delaval*[12] in which the jurors' affidavits averred that the decision was based upon chance. Prior to this case (1785) there was little doubt but that the affidavits were admissible.[13] Lord Mansfield

[9] 8 WIGMORE, EVIDENCE, 3d ed., § 2346 (1940); State v. Morrow, 158 Ore. 412, 75 P. (2d) 737 (1938).

[10] 8 WIGMORE, EVIDENCE, 3d ed., § 2285 (1940).

[11] 8 WIGMORE, EVIDENCE, 3d ed., § 2346 (1940); Miami v. Bopp, 117 Fla. 532, 158 S. 89 (1934); 97 A.L.R. 1038 (1935). Clark v. United States, 289 U.S. 1, 53 S.Ct. 465 (1933), recognizes that privilege does not apply to misconduct.

[12] 1 T.R. 11, 99 Eng. Rep. 944 (1785).

[13] Phillips v. Fowler, Barnes 441, 94 Eng. Rep. 994 (1735); Aylett v. Jewel, 2 Black. W. 1299, 96 Eng. Rep. 761 (1779).

ignored precedents, however, and excluded such testimony because "such conduct is a very high misdemeanor," and stated further that "in every such case the court must derive their knowledge from some other source such as some person having seen the transaction through a window or by some such means." It seemed that this decision was doomed to be short-lived because it was squarely contrary to earlier cases and was far from well-reasoned, but because the prestige of Mansfield was ascribed to the case it became the settled law of England and was accepted without question in a majority of states in this country.

What reason can be advanced for a rule which excludes testimony of a juror as to acts of misconduct? Lord Mansfield's statement, that the acts were a "very high misdemeanor," rested on an old Latin phrase: *nemo turpitudinem suam allegans audietur*—no man shall be heard to allege his own turpitude. This principle flourished in the 1700's and was a favorite of Mansfield.[14] However, it died a quick death in the 1800's when judicial attacks similar to those of Judge Livingston were levelled at it: "Are not criminals in England every day convicted and even executed on their own confessions? And is not our own State prison filled in the same way?"[15] The doctrine has now been discredited both in United States and in England.

Retention of the rule excluding jurors' testimony, after the doctrine upon which it rested had been abandoned, required the courts to seek a new basis for that rule.

The uncertainty of verdicts and indeterminacy of trials, the foundations for excluding a juror's testimony relating to his mental processes, fail to uphold exclusion of testimony of misconduct. Here we have an overt act by one juror which can impress the senses of eleven others in the room. Those eleven can deny the alleged misconduct if it did not occur.

Owen v. Warburton[16] advanced a further argument that a juror who believed the result would be against his views might propose that the verdict be determined by lot, and then when returned against his opinion could have it set aside by his own affidavit. This may be true, but the same juror could simply refuse to vote with the eleven and in the same way secure a new trial. Wigmore dismisses *Owen v. Warburton* as a "fantastic imagination" and points out that on the same logic we should

[14] In Walton v. Shelly, 1 T.R. 296, 99 Eng. Rep. 1104 (1786), Mansfield refused to allow an indorser of a note to plead usury, saying at p. 300, "no party who has signed a paper or a deed shall ever be permitted to give testimony to invalidate that instrument. . . ." Again in Goodright v. Moss, 2 Cowp. 591, 98 Eng. Rep. 1257 (1777), he applied the same doctrine to prevent one spouse from testifying to the nonaccess of the other and thereby bastardized the child.

[15] Smith v. Cheetham, 3 Caines (N.Y.) 57 at 59 (1805).

[16] 1 B. & P. N.R. 326, 127 Eng. Rep. 489 (1805).

abolish all appeals "because a wicked judge might give a wrong reason against a party whom he favored, so that there may be a new trial."[17]

Still other judges exclude the testimony of misconduct because the defeated party may harass and beset jurors for testimony of irregularities,[18] or on the grounds that it amounts to entrapping jurors into confessing criminal liability.[19] But why should the court protect one who has committed a crime, at the expense of an innocent litigant? When a thief or embezzler confesses, the court does not close its ears because the confession was obtained from the one by whom the money was stolen. As for the harassing, it would seem that this disadvantage is more than offset by the truth it may evoke.

Vaise v. Delaval, mentioned above, distinguished sharply between the testimony of a juror and that of an outsider. A bailiff who invades the secrecy of the jury room is guilty of reprehensible conduct; yet some courts allow him to testify as to irregularities occurring therein.[20] An interloper outside the window could testify in these courts concerning discovered misconduct. It is singular that the courts then refuse to admit the best evidence of that irregularity—testimony of the jurors, themselves. There is no reason to require formalities and then refuse to listen to evidence of their breach. Courts find comfort in repeating their shibboleth—"a juror cannot impeach his verdict"[21]—and believe that justice has been done, not looking to see what type of case they have before them.

The obscurity which surrounds this subject is a direct result of *Vaise v. Delaval*, a case which was not only poorly reasoned, but one for which even that poor reason no longer exists. Despite this, many legislatures have enacted statutes which affirm this view, failing to draw any distinction as to subject matter of the testimony.[22] It is submitted that courts—with the aid of the legislature if necessary—should distinguish acts of misconduct from matters lying in the juror's breast and admit testimony regarding misconduct.

A handful of states has drawn such a distinction, steering clear of the

[17] 8 WIGMORE, EVIDENCE, 3d ed., § 2353 at p. 686 (1940).

[18] McDonald v. Pless, 238 U.S. 264 at 267, 35 S.Ct. 783 (1915).

[19] Cluggage v. Swan, 4 Binn (Pa.) 150 (1811).

[20] Wright v. Abbot, 160 Mass. 395, 36 N.E. 62 (1894), and Reich v. Thompson, 346 Mo. 577, 142 S.W. (2d) 486 (1940), allow the testimony of a person other than a jury-man to impeach a verdict. Contra: Central of Ga. R. Co. v. Holmes, 223 Ala. 188, 134 S. 875 (1931); Lambert v. Caronna, 206 N.C. 616, 175 S.E. 303 (1934); Bourre v. Texas Co., 51 R.I. 254, 154 A. 82 (1931). See 129 A.L.R. 803 (1940).

[21] There is such blind allegiance to the shibboleth that some courts allow affidavits to *support* a verdict even if it finds that support only within the juror's breast. See Fulton County v. Phillips, 91 Ga. 65, 16 S.E. 260 (1892), and cases cited in 93 A.L.R. 1449 (1934). As to the right to poll a jury on these matters, see 86 A.L.R. 203 (1933).

[22] See for example, Mich. Comp. Laws (1929) § 14292.

entrapment created by Lord Mansfield. New York early discredited *Vaise v. Delaval*, Judge Livingston saying, "Why the judges are so very tender of the jury; or why they, as well as others, may not be punished by their own confession, which is the highest evidence, we are not told.... The case of *Vaise v. Delaval*, happened since the revolution, and therefore forms no precedent."[23] Later New York cases overlooked these strong words, however, and fell in line with the majority.[24]

Tennessee was next to adopt a rule admitting testimony of misconduct,[25] and it has not deviated from this view.[26] Perhaps the minority rule should therefore be called the Tennessee rule, but the first decision to be widely noted was the Iowa decision of *Wright v. I. & M. Telegraph Co.*,[27] ably written by Judge Cole. It is from this jurisdiction that the minority rule derived its name. The case holds that testimony is inadmissible as to those matters inhering in the verdict, but that "affidavits of jurors may be received for the purpose of avoiding a verdict, to show any matter occurring during the trial or in the jury room, which does not essentially inhere in the verdict itself. . . ."[28] This same distinction has been recognized in seven state courts[29] and may soon be the rule in the federal courts.[30]

III

It is submitted that the Iowa rule is more consistent with principles of justice. Courts are founded for the purpose of preventing or rectifying injuries resulting from unlawful acts. Because the wrongdoer happens to be a juror and the one injured a party litigant does not change that function. Granting that sound policy dictates that a verdict by a

[23] Smith v. Cheetham, 3 Caines (N.Y.) 57 at 60 (1805).

[24] Dana v. Tucker, 4 John. (N.Y.) 487 (1809); Atikian v. Chang Wen Tai, 153 Misc. 881, 276 N.Y.S. 228 (1934).

[25] Crawford v. State, 2 Yerg. (10 Tenn.) 60 (1821).

[26] The affidavits admitted in Crawford v. State, supra, actually went to the beliefs of the jurors. On this point it was repudiated 15 years later in Hudson v. State, 9 Yerg. (17 Tenn.) 407 (1836). For the law in Tennessee today, see: Texas Co. v. Ingram, 16 Tenn. App. 267, 64 S.W. (2d) 208 (1933).

[27] 20 Iowa 195 (1866).

[28] Id. at 210.

[29] Miami v. Bopp, 117 Fla. 532, 158 S. 89 (1934); Wright v. I. & M. Telegraph Co., 20 Iowa 195 (1866); Perry v. Bailey, 12 Kan. 539 (1874); De Porte v. State Furniture Co., 129 Neb. 282, 261 N.W. 419 (1935); James Turner & Sons v. Great Northern Ry. Co., 67 N.D. 347, 272 N.W. 489 (1937); Texas Co. v. Ingram, 16 Tenn. App. 267, 64 S.W. (2d) 208 (1933); Stallworth v. State, 148 Tex. Cr. Rep. 255, 186 S.W. (2d) 252 (1945).

[30] See Mattox v. United States, 146 U.S. 140, 13 S.Ct. 50 (1892), following the rule of Perry v. Bailey, 12 Kan. 539 (1874), admitting the testimony. In McDonald v. Pless, 238 U.S. 264, 35 S.Ct. 783 (1915), however, the Court excluded testimony of a juror that the verdict was a quotient verdict. Note the opinion of Judge Hand in Jorgensen v. York Ice Machinery Corp., (C.C.A. 2d, 1947) 160 F. (2d) 432 at 435.

jury which has followed the procedural requirements should remain untouched by matters lying within the juror's breast, there is no reason to protect it when that juror overtly breaches his duty in returning the verdict. The consecrated rubric of the majority is no better explained away than by Judge Brewer: "Public policy forbids that a matter resting in the personal consciousness of one juror should be received to overthrow the verdict, because being personal it is not accessible to other testimony.... But as to overt acts, they are accessible to the knowledge of all the jurors; if one affirms misconduct the remaining eleven can deny; one cannot disturb the action of the twelve; it is useless to tamper with one for the eleven may be heard."[81]

Since the provision of Model Code of Evidence dealing with this situation is nothing more than a statement of this minority rule it is inescapable that it has stated a proposition much sounder than that which the majority of courts follow today. Perhaps the eminence of the authority supporting the Model Code will hasten the acceptance of its principles by statutes and judicial decisions.

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[81] Perry v. Bailey, 12 Kan. 539 at 545 (1874).