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PRACTICE AND PROCEDURE-TRIAL PRACTICE-JUROR AFFIDAVITS

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PRACTICE AND PROCEDURE—TRIAL PRACTICE—JUROR AFFIDAVITS—The jury, in an action for trespass, returned a verdict in favor of the plaintiff and thereafter separated after being dismissed by the court. Subsequently, a juror reported to the court that the verdict as returned did not express the actual agreement of the jury. Five days after dismissal the jury was recalled and, upon being polled, unanimously agreed that the verdict as returned did not represent the actual agreement of the jury due to an error in computation.[1] The jury was sent back to the jury room under instructions to refigure the verdict only upon evidence already presented in the prior trial. A $500 verdict in favor of the plaintiff was thereafter returned. *Held,* reversed. The trial court acted properly in receiving the statements of the juror that the verdict as returned did not express the actual agreement of the jury, but the verdict should have been set aside and a new trial granted. *Kennedy v. Stocker,* (Vt. 1950) 70 A. (2d) 587.

Under the so-called non-impeachment rule, it is generally recognized that courts will not receive a juror's affidavit or statement evidencing misconduct or the use of improper methods by the jury in reaching a verdict.[2] However, this rule is usually held to be inapplicable when the juror's affidavit or statement is offered to show that the verdict as reported to the court does not express the jury's actual agreement.[3] Consequently, it has been considered allowable to show such matters as clerical errors,[4] mistake as to forms,[5] and errors in computation[6]

[1] It is not entirely clear from the opinion of the court that the jurors themselves stated that an error in computation caused the verdict to be incorrectly reported, but the Supreme Court, in the course of its opinion, accepted this as the reason.

[2] 8 WIGMORE, EVIDENCE, 3d ed., §§2349, 2354 (1940).

[3] Pelzer Mfg. Co. v. Hamburg-Bremen Fire Ins. Co., (C.C. S.C. 1896) 71 F. 826; Young v. United States, (10th Cir. 1947) 163 F. (2d) 187, cert. den. 332 U.S. 770, 68 S.Ct. 83 (1947); Setzer v. Latimer, 40 Ga. App. 247, 149 S.E. 281 (1929); Drainage District No. 2 v. Extension Ditch Co., 32 Idaho 314, 182 P. 847 (1919); *contra,* McKinley v. First National Bank of Crawfordsville, 118 Ind. 375, 21 N.E. 36 (1888). Some states have statutes which have been interpreted to exclude affidavits or statements. See Phipps v. Patterson, (Cal. App. 1938) 81 P. (2d) 437.

[4] Wirt v. Reid, 138 N.Y. App. 760, 123 N.Y.S. 706 (1910); Caylat v. Houston E & W Texas Ry. Co., 113 Tex. 131, 252 S.W. 478 (1923).

[5] Carlson v. Adix, 144 Iowa 653, 123 N.W. 321 (1909); Setzer v. Latimer, 40 Ga. App. 247, 149 S.E. 281 (1929).

[6] McCabe Lumber Co. v. Beaufort County Lumber Co., 187 N.C. 417, 121 S.E. 755 (1924).

by affidavit or statement. The theory of the courts in admitting such evidence is that such practice is not an attempt to overthrow or upset the verdict, but it is rather a means of reporting the true verdict and correcting an erroneous record.[7] This approach appears sound, as the parties to a suit heard by a jury are entitled to the considered judgment of the jurors, and an incorrectly reported verdict would hardly secure that right.[8] After such affidavit or statement has been received, however, there is a sharp conflict as to the further disposition of the case. Some courts, as in the principal case,[9] hold that the case should be set aside and a new trial ordered.[10] The reason given for such a holding is that separation of the jurors presents too great an opportunity for them to be influenced by evidence which was not introduced in the trial and that this might be reflected in a subsequent verdict. Other courts take the position that the original verdict should be corrected.[11] The theory of this holding is that it is unfair to subject a party to the expense and delay of a new trial when the only thing required is a reapplication of an agreed damage formula to facts also once agreed upon. A primary question that always faces a court is, "How will justice to all the parties be most fully achieved?" Such a question may be answered only by inspecting the nature and circumstances of the particular case in controversy. It is submitted that the best solution to the problem is to allow the discretion of the trial judge to control the manner of disposing of the case rather than adhere to an arbitrary rule one way or another. The trial judge surely has more knowledge of all the relevant and intimate factors involved in the rendition of a particular erroneous verdict than an appellate court, and surely he could best weigh such factors in making the determination.[12]

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[7] Wolfgram v. Town of Schoepke, 123 Wis. 19, 100 N.W. 1054 (1904).

[8] "That which decides the rights of the parties litigant is the unanimous agreement of the jurors. Each party is entitled to such judgment as results from that agreement. Any other is presumptively unjust, and any rule that necessitates it is unreasonable. . . ." Wolfgram v. Town of Schoepke, supra note 7, at 26.

[9] Principal case at 590.

[10] Weston v. Gilmore, 63 Me. 493 (1874); Boyer v. Maloney, (Ohio App. 1927) 160 N.E. 740; Youtsey v. Darlington, 233 Ky. 112, 25 S.W. (2d) 44 (1930).

[11] Hodgkins v. Mead, 119 N.Y. 166, 23 N.E. 559 (1890); Capen v. Stoughton, 82 Mass. 364 (1860); Glennon v. Fisher, 51 Idaho 732, 10 P. (2d) 294 (1932); Moulton v. Stoats, 83 Utah 197, 27 P. (2d) 455 (1933); Prussels v. Knowles, 5 Miss. 90 (1839). The Massachusetts decision must be considered in the light of a recent decision which appears considerably to narrow the scope of the allowable correction in that state. Shears v. Metropolitan Transit Authority, 324 Mass. 358, 86 N.E. (2d) 437 (1949).

[12] There is indication in some of the decisions that such an approach to the problem might be successful. These courts have drawn a distinction between cases where the trial jurors unanimously agreed that an error had been made in reporting the verdict and those cases where the error was reported by only a few. See Lattner Mfg. Co. v. Higgins, 196 Iowa 920, 195 N.W. 746 (1923); Peters v. Fogarty, 55 N.J.L. 386, 26 A. 855 (1893).