Trial Jury--The Possible Prejudicial Effect of Newspaper Articles on Juries in Criminal Cases

Linza B. Inabnit
University of Kentucky

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way Department or its independent contractors, the road is made to
incroach upon the land of B. The State is liable since the case is one
which qualifies in any jurisdiction as an ACTUAL taking or occupation
of the land.

Conclusion

Reverse eminent domain, in its present ambiguous form, is a trap
for unwary litigants. Litigants may forego their rights under the Ken-
tucky Claims Act in order to secure the advantages which lie in
the doctrine of reverse eminent domain. Under that doctrine, the
award is limited only by the damages suffered while, under the
Claims Act, recovery is limited to $10,000. Also, under reverse eminent
domain, the liability of the government is absolute while the claimant
must show negligence if he proceeds under the Claims Act. However,
in choosing reverse eminent domain as the remedy to pursue, the liti-
gant is buying a “pig in a poke”. A clarification of the doctrine is
essential and the following summary is a re-definition which it is
hoped states the true nature of the doctrine under the cases.

1. There is no distinction between a “taking” under section 13
and an “injury” under section 242. Consideration of the cases makes
this conclusion inevitable.

2. The real consideration is, and should be, what is “property”
under the two sections. Property is, and should be, any right which the
owner holds in relation to his land limited only by the fact that the
damage to the “property” might be of a consequential nature, due to
the fact of estoppel by prior conveyance.

3. The next consideration should be whether or not the property
was appropriated to a “public use.” In this respect, the inquiry should
be whether or not the damage to the property is the natural con-
sequence of the execution of the plans under which the work was car-
ried on. Such a test would justify the decision in V.T.C. Lines and
would make it extremely difficult to ever recover under reverse eminent
domain for damages to movable personalty. Its recognition would
necessitate the overruling of the so-called “negligence” cases in which
the injury results solely from the tortious acts of the agents of the
Commonwealth.

Charles E. Goss

TRIAL JURY—THE POSSIBLE PREJUDICIAL EFFECT OF
NEWSPAPER ARTICLES ON JURIES IN CRIMINAL CASES

The Sixth Amendment to the Constitution of the United States
guarantees trial by an impartial jury to an accused in a federal criminal
trial, and state constitutions generally contain similar provisions as to state prosecutions. Although the United States Constitution does not even demand trial by jury in state prosecutions, a state court's power regarding the right of an accused to trial by an impartial jury is not unlimited in view of the Fourteenth Amendment.

However, the right of an accused to a trial by an impartial jury constitutes an increasingly more difficult problem in this day of media of mass communication. Due to the modern methods of mass dissemination of information it is becoming increasingly more difficult to impanel a jury which has not been apprised of the "facts" of an alleged crime and formed an opinion as to the guilt or innocence of the accused therefrom. As the title indicates, this note deals with the prejudicial effect on juries in criminal trials of one such medium of mass communication—the newspaper.

Summary

The general rule is that an opinion as to the guilt or innocence of an accused, based on newspaper accounts of the crime with which he is charged, will not disqualify a person from serving as a juror or entitle the accused to a new trial, provided it appears to the reasonable satisfaction of the court that such person can and will, notwithstanding such opinion, fairly and impartially try the case on the evidence presented at trial and on the law as given by the court. Under the general

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1 The Sixth Amendment confers upon the accused in federal prosecutions the "right to a speedy and public trial, by an impartial jury. . . ." U.S. Const. amend. VI.

2 For example, the Constitution of Kentucky states: "[T]he shall have a speedy public trial by an impartial jury of the vicinage. . . ." Ky. Const. Sec. 11.

3 See infra, page 239.

4 As early as 1878, Chief Justice Waite of the United States Supreme Court stated that:

   In these days of newspaper enterprise and universal education, every case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits.

   Reynolds v. United States, 98 U.S. 145, 155-56 (1878). On appeal of a homicide conviction, the Kentucky Court of Appeals in Gadd v. Commonwealth, 305 Ky. 318, 323, 204 S.W. 2d 215, 217 (1947) stated:

   We really consider that it should be a matter of pride to the jurisprudence of any county that its jurors read the daily newspapers, for it has been truthfully said that newspapers are the world's mirrors. We wonder whether Madison County [the county in which the trial was held] . . . could ever impanel any group of jurors without newspaper readers scintillating among them like Pleiades on a clear night.

5 Thus here we have two major freedoms of our American way of life meeting and colliding head-on—an accused right to a fair and impartial jury versus the right of the press to be free and the right of the people to be informed by a free press.
rule, to warrant the granting of a new trial on the ground of prejudice of the jury resulting from newspaper articles, it must be shown that:

(1) some or all of the jurors have actually read the article,
(2) the nature of the article is such that it is capable of being prejudicial, and
(3) the article has in fact exerted a prejudicial influence on some or all of the jurors depriving the defendant of an impartial trial.\(^6\)

Thus, for example, the reading of an article by jurors which reports false damaging facts,\(^7\) or which reports facts inadmissible as evidence in courts,\(^8\) or which comments on the defendant’s failure to testify,\(^9\) has in certain jurisdictions been held to be reversible error. But it must be noted that the ultimate decision in a given case as to whether a juror’s reading of a newspaper account of a crime, or of the trial in a criminal action, is grounds for a new trial rests in the sound discretion of the trial court. The trial court’s decision will not be reversed unless there is a clear showing of gross abuse of that discretion.

Moreover, there are several remedies available to the defendant which may vitiate the prejudicial effect of the article:

(1) peremptory challenges and challenges for cause on voir dire
(2) change of venue
(3) continuance
(4) charge to the jury from the court not to read such newspaper articles, or, if having read them, to disregard them
(5) waiver of the right to trial by jury
(6) contempt power of the court
(7) due process clause of the Fourteenth Amendment.

However, in a given case all of the available remedies may be ineffective to guarantee him an impartial trial. On the other hand, his failure to utilize any one of these remedies may prove fatal to his cause. Also other circumstances may be such as to prevent a reversal.

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\(^6\) The nature of the article may be such as to raise a presumption of prejudice. Delaney v. United States, 199 F. 2d 107 (1st Cir. 1952); State v. Claypool, 185 Wash. 295, 237 Pac. 730 (1925).

\(^7\) Griffin v. United States, 295 Fed. 437 (3d Cir. 1924); State v. Tilden, 21 Idaho 262, 147 Pac. 1056 (1915).


Thus, where the evidence of the defendant’s guilt is overwhelming, a reversal is not warranted. The defendant may also be denied relief where he is at least partly responsible for the newspaper article reaching the juror or where he fails to make a timely assertion of his rights.

The Reading Requirement

The general rule, by the great preponderance of authority, is that to warrant a reversal of a conviction on the ground of prejudice of the jury due to inflammatory newspaper articles, it must be shown that at least some of the jury actually read the articles. Thus, it has been held that if it does not appear that the jurors have read the newspaper, a verdict will not be set aside merely because articles which were likely to influence the jury were published and freely circulated among the public during or before trial. As the United States Supreme Court has said, “If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day.”

Although according to some courts it is to be presumed where jurors have been in possession of a newspaper containing objectionable matter that they have read the prejudicial article, the general rule is contra. State v. Carta, 90 Conn. 79, 96 Atl. 411 (1916). Kentucky follows the general rule. Richardson v. Commonwealth, 312 S.W. 2d 470 (Ky. 1958), held that a motion to discharge a jury was properly overruled where, although some of the jury had seen the newspaper article dealing with the case, none of the jurors had read the objectionable part.

A mistrial will not be declared because of publications in the press which the jury has not seen. Shushan v. United States, 117 F. 2d 110 (5th Cir. 1941), cert. denied 313 U.S. 574 (1941); Richardson v. Commonwealth, 312 S.W. 2d 470 (Ky. 1958). Holt v. United States, 218 U.S. 245, 251 (1910). A new trial is not required in a homicide case because of a headline in a newspaper advertising on the defendant’s guilt if there is nothing to show that it was seen by any members of the jury although the jurors had an opportunity to see it. McHenry v. United States, 276 Fed. 761 (D.C. Cir. 1921). Although jurors may not in order to reverse or support a verdict already rendered testify as to the influence or lack of it a newspaper report had on their verdict, nevertheless the general rule is that testimony and affidavits of jurors are admissible on the subject as to whether they had in fact read the objectionable matter. Mattox v. United States, 146 U.S. 140 (1892). See also United States v. Ogden, 105 F. 371 (E.D. Pa. 1900); People v. Stokes, 103 Cal. 193, 37 Pac. 207 (1894); State v. Lilja, 193 Minn. 251, 195 N.W. 178 (1923); Annot., 93 A.L.R. 1449, 1454-55 (1934).

It should also be noted that coupled with clear admonitions not to read newspaper articles pertaining to the alleged crime or the trial, the granting or denial of a request after commencement of the trial to interrogate or poll jurors as to whether they have read such articles during the trial rests in the sound discretion of the trial court and, in the absence of a clear showing by the defendant by other methods of a reading, seldom will a denial of the right to interrogate be reversed by an appellate court. Richardson v. Commonwealth, 312 S.W. 2d 470 (Ky. 1958); State v. DeZeler, 230 Minn. 39, 41 N.W. 2d 318 (1950). See also Annot., 15 A.L.R. 2d 1152 (1951).
The Nature of the Article

The nature of the article must be such that it is capable of being prejudicial. If a newspaper account read by jurors is of such a character as to prejudice an accused's rights in the mind of the jurors and to render impossible his receiving a fair and impartial trial, then a verdict influenced by such articles will be set aside and a new trial granted. However, whether in the particular case the accounts read by the jury are to be deemed of such nature as to influence the jury depends, of course, upon the character and nature of the accounts.

Therefore, a juror's reading of a newspaper account of the facts of the crime, or of the trial, will not be grounds for a new trial where the account contains nothing prejudicial to the accused. The reading of accounts and reports of a fair resumé of the facts, of the progress of the trial and of abstracts of the evidence introduced into court are not grounds for a new trial. The best example of a non-prejudicial article is one which merely repeats what has taken place in the court room in the presence of the jury with no attempt by the article to color, change, interpret or interpolate on evidence which has been properly admitted. In Miller v. Kentucky, the court affirmed a voluntary manslaughter conviction where the article was "nothing more than an unbiased and . . . rather accurately complete account of the trial the day before."

But where a newspaper report has departed from a fair and honest statement of the evidence and has interpolated parts derogatory to the defendant and likely to excite passion and prejudice on the part of the jury, the courts will grant a new trial. Consequently, if a newspaper report read by jurors contains facts which would be inadmissible as evidence in court, or contains matter actually rejected as inadmissible by the trial court and the admission into evidence of such matter would constitute reversible error, then a reversal may be

13 Kentucky cases are illustrative of this general rule. Gadd v. Commonwealth, 305 Ky. 318, 204 S.W. 2d 215 (1947), held that in a homicide prosecution the overruling of the defendant's motion to discharge prospective jurors who had read a newspaper account relating to the homicide was not error where the newspaper contained nothing inflammatory or otherwise objectionable. To the same effect is Clemens v. Commonwealth, 222 Ky. 393, 6 S.W. 2d 483 (1928).
15 Tinkoff v. United States, 86 F. 2d 898 (7th Cir. 1937); State v. Soltau, 212 Minn. 20, 2 N.W. 2d 155 (1942); 4 Kan. L. Rev. 180 (1955).
16 40 F. 2d 820, 822-23 (6th Cir. 1930). For a list of cases and annotations of cases involving newspaper accounts which courts have decided as being incapable of being of a prejudicial nature see Annot., 31 A.L.R. 2d 417, 422-25 (1953). This article, from which the author has drawn freely, is the best and most complete work available on the question of when the reading of a newspaper article by jurors requires the reversal of a conviction.
17 Babb v. State, 18 Ariz. 505, 163 Pac. 259 (1917).
Thus, it is not difficult to see how a confession referred to in a newspaper article might be grounds for a new trial when such confession was not admissible into evidence. For like reasons, the reading of accounts referring to other criminal offenses allegedly committed by the accused has been held to be a ground for a new trial in states which do not admit such matter in evidence. Therefore, in *Babb v. State* a reversal was warranted where the newspaper story recited that the defendant had been guilty of another felony. Similarly, in *People v. Murawski* an abortion conviction was reversed on the basis of a newspaper article which stated that the defendant had been convicted of abortion before. Other intimations on the defendant's guilt, which are inadmissible as evidence, but are brought to the attention of jurors by newspaper accounts—such as reports that the defendant had made full plans for a jail break if found guilty, and inferences of attempts to bribe the jury—have been held to demand reversals.

It is clear that the reading of damaging false material "facts" by jurors from newspaper articles will demand a reversal if thereafter it appears that it is impossible for the jurors to act impartially. A conviction was reversed in *State v. Tilden* where the article contained a dying declaration, naming the defendant as the murderer, which so far as the record was concerned was never made. Prejudicial error has also been found where newspapers contained confessions of defendants which had never in fact been made.

A newspaper report which deviates from an objective statement of the evidence presented at trial, interprets the evidence adversely to the defendant, and intimates to the jury the weight to be accorded the evidence in such a manner as to prevent an impartial trial is a ground for a new trial. In a prosecution for homicide in which the jurors had read newspaper articles which summarized the testimony of the witnesses for the prosecution, described their manner upon the

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20 18 Ariz. 505, 163 Pac. 259 (1917).
21 394 Ill. 230, 68 N.E. 2d 272 (1946).
22 Perry v. People, 63 Colo. 60, 163 Pac. 844 (1917).
23 People v. Stokes, 103 Cal. 193, 37 Pac. 207 (1894).
25 27 Idaho 262, 147 Pac. 1056 (1915).
26 Griffin v. United States, 295 Fed. 487 (3rd Cir. 1924). Although the case was reversed on other grounds, as a denial of equal protection of the law, in *Shepherd v. Florida*, 341 U.S. 50 (1951), newspaper articles containing false allegations that the Negro defendants had confessed to rape were deemed by the concurring opinion to constitute a denial of due process of law.
stand, stated that their testimony was not shaken by cross-examination and was corroborated by the testimony of each other, and which further stated that unless the testimony of the defendant's own children was refuted it would send the defendant to the electric chair, the article was held to be so prejudicial that a conviction should be reversed.28 Similarly, a comment to the effect that the evidence is sufficient to convict, that there is little conflict in the evidence, that persons in a position to know have claimed the evidence against the defendant to be very strong, and that defendant's friends have given up hope of the defendant's acquittal has been held to be of a prejudicial nature.29

In a state which does not permit comment on the defendant's failure to testify, the reading of newspaper articles referring to the fact that the defendant did not take the witness stand in his own behalf is ground for a new trial.30

Likewise, in a state which does not permit comment on the evidence by a trial judge, an article purporting to convey the opinion of the trial judge as to the facts in the case is of a prejudicial nature.31

In a number of cases, newspaper articles to the effect that the defendant's witnesses are corrupt and unreliable have been found to be of a prejudicial nature. A new trial was ordered in State v. Peirce32 in which a newspaper report commented upon the fact that one of the accused's witnesses was corrupt, saying that public officials were charging the witness with perjury.

An inflammatory newspaper article which expresses a drift of public sentiment against a defendant, or which is calculated to convey to the minds of the jurors the idea that it represents public sentiment, has been held in some jurisdictions to be prejudicial. In Capps v. State,33 newspaper articles which were seen by jurors and reported that public sentiment had crystalized into the belief that the defendant was guilty were deemed to be prejudicial to his substantial rights.

Inflammatory newspaper accounts which do not come within any of the above classifications but which are so calculated as to excite such heat and passion in the minds of the public from which the jury must be drawn, as to interfere with the fair administration of justice, have been held to be of a prejudicial nature.34

29 Mattox v. United States, 146 U.S. 140 (1892).
32 178 Iowa 417, 159 N.W. 1050 (1916).
33 109 Ark. 193, 159 S.W. 193 (1913).
34 Although decided on other grounds, see Shepherd v. Florida, 341 U.S. 50 (1951), in which a newspaper cartoon picturing electric chairs for the defendants was headed: "No Compromise—Supreme Penalty".
Influence on the Jury

In order to warrant a new trial on the basis of prejudicial newspaper accounts, it must be shown not only that the article is of a character capable of being prejudicial, but that it in fact influenced the jury. A juror’s opinion will render him incompetent only where it will influence his verdict and prevent him from trying the case impartially and rendering a verdict according to the evidence and the law. The character of the article may be such as to raise a presumption of a prejudicial influence. Such a presumption is especially strong where a verdict has been returned before it becomes known to the defense that the jury read the prejudicial accounts. Such is also the case where the defense learns that the jury, during the course of the trial, has read a prejudicial article and the trial judge refuses interrogation of the jurors as to the effect of the article on them. In these two cases the presumption of prejudice resulting from the nature of the article is the only method left to the defense to show

For other accounts which have been held to be of a prejudicial nature see Annot., 31 A.L.R. 2d 417, 429-430 (1953) and 4 Kan. L. Rev. 180, 181-183 (1955).

"It should be borne in mind that although the reading of a prejudicial article by the jurors is often a ground for a new trial, this ground can be overcome by several means, such as by showing that the jury was not in part influenced by the report irrespective of its contents." Annot., 31 A.L.R. 2d 417, 460 (1953). Thus the fact that a juror does not remember the contents of the prejudicial article that he has read, if proved to the reasonable satisfaction of the court, will prevent the granting of a new trial where one otherwise would be in order.


For a very rare instance in which the mere possibility that the articles read by the jurors might have been prejudicial has been held to be sufficient cause for setting a verdict aside see Commonwealth v. Johnson, 5 Pa. County Ct. 236 (Pa. 1898). Also see State v. Barille, 111 W. Va. 567, 163 S.E. 49 (1933), cited by some secondary authorities as standing for the same proposition but rationalized on other grounds by other such authorities.

The clearest example of such prejudicial effect on the juror is where the juror testifies that he has formed an opinion which will interfere with his rendering an impartial verdict and the court believes him—in such case he will be properly held disqualified. Griffin v. United States, 299 Fed. 437 (3rd Cir. 1924); Capps v. State, 109 Ark. 193, 159 S.W. 193 (1913); People v. Stokes, 103 Cal. 193, 37 Pac. 207 (1894); State v. Carta, 90 Conn. 79, 96 Atl. 411 (1916).

United States v. Ogden, 105 Fed. 871 (1900); People v. Stokes, 103 Cal. 193, 37 Pac. 207 (1894).

There is lack of direct authority as to whether or not a defendant by showing that a juror has actually read an article, that is in fact capable of being prejudicial, would have an absolute right for an interrogation as to the effect of such a reading on the juror. The few cases involving a trial court refusal to interrogate the jurors after empanelment as to whether they have read a newspaper article have upheld such a refusal. However, these cases are generally based on the ground that the defendant has failed to prove that the article was of a prejudicial nature, People v. Fernandez, 3 Cal. App. 689, 86 Pac. 899 (1906); State v. De Zeler, 230 Minn. 39, 41 N.W. 2d 313 (1950), or that the jurors had in fact read such an article, People v. Phillips, 120 Cal. App. 644, 8 P. 2d 228 (1932); People v. Harrison, 317 Ill. App. 460, 46 N.E. 2d 103, affd. 384 Ill. 201, 51 N.E. 2d 172 (1948); State v. De Zeler, 230 Minn. 39, 41 N.W. 2d 313 (1950).
prejudice. However, where the prejudicial articles were read by the prospective jurors prior to trial and the defense had an opportunity to question the jurors on voir dire as to the prejudicial effect of the articles, the presumption of prejudice, with certain exceptions, is easily overcome by circumstances such as a juror's assertions that his verdict will not be influenced. This is true also where upon discovery prior to a verdict of a reading by the jurors during trial and the judge interrogates or allows interrogation of the jurors.

Also, it should be noted that even an opinion formed from newspaper accounts may not of itself disqualify a juror, for not every opinion which a juror may entertain is of such a character as to prevent his rendering an impartial decision. Chief Justice Marshall in *Burr's Trial* early stated the rule to be that:

[L]ight impressions, which may fairly be presumed to yield to the testimony, that may be offered, which may leave the mind open to a fair consideration of the testimony constitute no sufficient objection to a juror; but . . . those strong and deep impressions which close the mind against the testimony that may be offered in opposition to them, which will combat that testimony and resist its forces, do constitute a sufficient objection to him.

40 Affidavits of jurors submitted after a verdict that they were or were not influenced in their verdict by prejudicial articles are inadmissible. *People v. Stokes*, 103 Cal. 193, 37 Pac. 207 (1894). See *United States v. Ogden*, 105 Fed. 371 (1900), which held that such affidavits are inadmissible and that in such cases whether the article influenced the jury is an inference to be drawn by the court from the nature of the article.

41 "Unless he [the challenger] shows the actual existence of such an opinion in the mind of the juror as will raise the presumption of impartiality, the juror need not necessarily be set aside, and it will not be error in the court to refuse to do so." *Reynolds v. United States*, 98 U.S. 143, 157 (1878).


44 However, as noted by some courts, the distinction between mere opinion of the juror and prejudice or bias on his part may be semantic jousting for as stated in 10 Miami L.Q. 606, 607 (1955-56) quoting an early case: "[T]he human mind is so constituted that it is almost impossible on hearing a report freely circulated . . . to prevent it from coming to some conclusion on the subject; and such will always be the case while the mind continues susceptible to the impressions . . . ." As Justice Frankfurter remarked in his dissent in *Stroble v. California*, 345 U.S. 181, 201 (1952), "Jurors are of course human beings and even with the best of intentions in the world they are, in the well known phrase of Holmes and Hughes, J.J., 'extremely likely to be impregnated by the environing atmosphere.' *Frank v. Mangum*, 237 U.S. 303, 349 (1915). Thus the major premises of such courts is that it is not always possible for an individual to prevent his preconceptions from influencing his determinations.

On the other hand the majority of courts take the view that the general public does not put a great deal of faith in newspaper reports, for where the juror has formed an impression from a newspaper report generally his mere declaration of impartiality will render him qualified. If he has formed such impression from talking to witnesses no such declaration will render him competent. *State v. Dickens*, 68 Idaho 173, 191 P. 2d 384 (1948).

Thus, in courts adhering to the latter of the two conflicting premises just set out, it is held that the fact that a person knows and has confidence in the author
Under such a view, a juror is competent although he may have formed an opinion from reading prejudicial newspaper articles if he states that he is without prejudice and can try the case impartially according to the evidence and the court in the exercise of reasonable discretion is satisfied that he can and will do so.\textsuperscript{46} Illustrative of this well settled view is \textit{State v. Gantt}\textsuperscript{46} which held that it was not error for the trial judge to refuse to dismiss jurors for cause. There the jurors stated, and there was no showing to the contrary, that they had formed and expressed an opinion as to the guilt or innocence of the defendants, that it would require some evidence to remove such opinion, but that they could give defendants a fair and impartial trial notwithstanding their opinions.

The above is a statement of the general rule, and this rule has been incorporated into the statutes of many states. Illustrative of such statutes is that of Kentucky which is identical to a statute of Illinois upheld as constitutional by the Supreme Court of the United States in \textit{Spies v. Illinois}:

\begin{quote}
It shall not be a cause of challenge that a juror has read in the newspapers an account of the commission of the crime with which the prisoner is charged, if such juror shall state on oath that he believes he can render an impartial verdict according to the law and the evidence; and provided further, that in the trial of any criminal cause the fact that a person called as a juror has formed an opinion or impression, based upon rumor or upon newspaper statements (about the truth of which he has expressed no opinion), shall not disqualify him to serve as a juror in such case, if he shall, upon oath, state that he believes he can fairly and impartially render a verdict therein in accordance with the law and the evidence, and the court shall be satisfied of the truth of such statement.\textsuperscript{48}
\end{quote}

Such a statute cannot be regarded as changing in any degree the essential qualifications which jurors must possess.\textsuperscript{49} As a logical con-
sequence, it has been held that such a statute does not make the
decision of the trial court as to the competency of a juror absolutely
certain. The juror's declaration of impartiality is evidence to be
received and given the weight properly to be accorded it. Moreover
there are a few cases in states which have incorporated the above
statute, or which have by common law adopted a similar rule, where
the reading of a newspaper account of the crime or of the resulting
trial was sufficient ground for vitiating the verdict even though the
jurors stated that they were not influenced by what they had read.50
Thus even in states having statutes identical to that of Kentucky, the
declaration of the juror that he is impartial is not conclusive, for

where it is once clearly shown that there exists in the mind of a
juror, at the time he is called to the jury box a fixed and positive
opinion as to the merits of the case, or as to the guilt or innocence
of the defendant he is called to try, his statement that, notwithstanding
such opinion, he can render a fair and impartial verdict, according

part, such a statute would violate due process of law. Spies v. Illinois, 123 U.S.
131 (1887). The state of Tennessee has declared such a statute unconstitutional
which contained no such clause. Eason v. State, 65 Tenn. 466 (1873).

50 State v. Claypool, 135 Wash. 295, 237 Pac. 730 (1925). Courts generally
base their decision on the ground that despite the juror's assertion of impartiality
his actions, statements and his answers on voir dire examination indicate actual
prejudice. Thus where jurors show by their answers that they have fixed and
settled opinions as to the guilt of a defendant and as to most of the facts and cir-
cumstances necessarily to be relied upon for a conviction, they are not competent
jurors even though they swear that they can render a fair and impartial verdict.
See Coughlin v. People, 144 Ill. 140, 33 N.E. 1 (1893), which was also sustained
on other grounds.

Some courts, in adopting the premises mentioned earlier—that it is not always
possible for an individual to prevent his preconceptions from inflaming his
determinations—in conjunction with the premises that unconscious presumptions
derived from newspaper accounts may be as damaging as conscious ones, have
held that mere declarations of impartiality are not enough to vitiate the possibility
Caine, 194 Iowa 147, 111 N.W. 445 (1907) a new trial was ordered on the
ground that the jurors had read newspaper accounts and comments upon the trial,
the court holding that affidavits of jurors to the effect that they had not been
influenced by the reports were insufficient to overcome the objectionable miscon-
duct of having read the reports, it being pointed out that the unconscious influence
of such accounts would be far more likely to affect the result than an influence of
which they were conscious, which they might have easily resisted. But such reason-
ing is contrary to the preponderance of modern authority. However, see Delaney
v. United States, 119 F. 2d 107, 113 (1st Cir. 1952), in which the crux of the
court's assumption in granting a new trial was, directly contrary to that implicit in
antecedent authority, that the average juror is often probably not capable of
excluding the "unconscious influence of his preconceptions as to probable guilt" 53
Cal. L. Rev. 69 (1953).

Here as in Juelich v. United States, 214 F. 2d 950 (5th Cir. 1954), the
accused's right to an impartial jury was held to demand more than a jury whose
members were willing to state that they could lay aside their preconceived
opinions when they tried the case. In the Juelich case it was held that the mere
fact that all the members of the jury had formed opinions deprived the defendant
of his right to an impartial jury trial despite the fact that each juror testified that
he could disregard his opinion and there was no contrary showing. 8 Okla. L. Rev.
to the law and the evidence has little, if any, tendency to establish his impartiality.\textsuperscript{51}

However, under a “to the satisfaction of the court” clause of a statute, or in the absence of any statute comparable to that of Kentucky, the question as to the juror’s partiality, and the question of whether or not the jurors read the articles, are questions of fact to be determined by the trial judge in the exercise of sound discretion.\textsuperscript{52} Therefore the first and probably most important hurdle which the defendant must cross in securing a reversal is the showing of gross abuse of discretion by the trial judge—a fete which, as the cases will bear out, is in the normal situation extremely difficult.\textsuperscript{53} But this is as it ought to be, for the trial judge is in a far better position to evaluate the effect of the publicity on the jurors than is an appellate court with only the cold record of the voir dire examination and other comparable records before it.

Nevertheless, in the rare case where the abuse of discretion on the trial judge’s part is gross, appellate courts will reverse convictions resulting from such prejudicial influence.\textsuperscript{54}

\textbf{Remedies Available to a Defendant}

There are several remedies available to an accused to combat the effect of newspaper articles.\textsuperscript{55} Yet the courts are limited in their power to insulate jurors from the prejudicial effect of newspaper articles, and while the remedies afford no absolute guarantee of an impartial trial,

\textsuperscript{51} Coughlin v. People, 144 Ill. 140, 33 N.E. 1, 14 (1893).
\textsuperscript{52} Holt v. United States, 218 U.S. 245 (1910); Reynolds v. United States, 98 U.S. 145 (1878); State v. DeZeler, 230 Minn. 39, 41 N.W. 2d 313 (1950); State v. Ganee, 223 S.C. 431, 76 S.E. 2d 674 (1953); cert. denied, 347 U.S. 906 (1954).
\textsuperscript{53} Thus when a juror’s mind has been subjected to the contents of a prejudicial newspaper article and he has formed some opinion therefrom which he declares will not influence his verdict, the trial court will be called upon to decide whether the juror is qualified. The court must “determine whether the nature and strength of the opinion formed are such as in law necessarily to raise the presumption of partiality. The question thus presented is one of mixed law and fact, and to be tried, as far as the facts are concerned, like any other issue of that character, upon the evidence. The finding of the trial court upon that issue ought not to be set aside by a reviewing court, unless the error is manifest.” Reynolds v. United States, 98 U.S. 145, 156 (1878).
\textsuperscript{54} Thus a conviction for income-tax influence peddling, in a case involving national publicity, was reversed, the appellate judge stating in regard to abuse of the trial judge’s discretion, “[U]nder the circumstances it is difficult to see how anyone could fail to perceive the risk of prejudice.” Delaney v. United States, 199 F. 2d 107, 115 (1st Cir. 1952).
\textsuperscript{55} It must be noted that much of the broad, sweeping language to the effect that the prejudicial effect of a newspaper article is overcome by such circumstances as jurors’ statements that they will not be influenced comes from cases where it was not proved that the jury had read the article or, if the jury had read the article, it was not proved that the article was in fact of a prejudicial nature.
\textsuperscript{56} For articles elucidating upon each of these remedies see note, 3 Syracuse L. Rev. 150 (1951); note, 53 Colum. L. Rev. 651 (1953), and note, 63 Harv. L. Rev. 840 (1950).
a defendant's failure to take advantage of any one of them may be fatal to his cause. Illustrative of these remedies are the following:

(1) An accused's right to a voir dire examination of the jury and to challenge the jury

An accused through voir dire examination may discover the prejudice of jurors and through utilization of his peremptory challenges and challenges for cause eliminate prejudiced jurors from the jury panel. Until his statutory allotment of peremptory challenges is exhausted he can exclude such persons from the jury panel as he deems might be prejudicial to his case. He can then challenge for cause. However a challenge for cause does not dismiss a juror unless the trial judge in the exercise of sound discretion sustains it. Generally trial judges refuse to bar prospective jurors who, although they have read newspaper accounts of the crime and have formed an opinion therefrom, state they can nevertheless give the accused an impartial trial. Also, as noted earlier, appellate courts will not reverse such a decision of the trial judge in the absence of a clear showing of abuse of his discretion. Thus this remedy does not guarantee an absolutely impartial trial. On the other hand, failure of a defendant to utilize the voir dire examination to discover prejudice and failure to use his challenges to exclude prejudicial jurors generally bars the defendant from later complaining on the ground that a juror was prejudiced at the time of impanelment.

(2) The defendant's right to move for a change of venue or for a continuance

An accused can move for a change of venue or for a continuance on the ground that so great a prejudice exists at a given place or time that he cannot obtain a fair and impartial trial. Where prejudice is confined to a small area, change of venue may be enough to assure an

56 In Kentucky a defendant is entitled to fifteen peremptory challenges in prosecutions for felony and to three in prosecutions for misdemeanors. Ky. Crim. Code, sec. 203 (1953).

57 In Kentucky either the defendant or the Commonwealth may challenge for cause for implied or actual bias. Ky. Crim. Code, secs. 205, 208 (1958). Depending on the particular jurisdiction, failure of a defendant to exhaust his peremptory challenges at the time the jury is being selected may, State v. Gantt, 223 S.C. 43, 76 S.E. 2d 674 (1953), cert. denied 347 U.S. 906 (1954), or may not, Delaney v. United States, 199 F. 2d 107 (1st Cir. 1952), bar his later complaining of the court's failure to dismiss a juror for cause.

58 Note, 53 Colum. L. Rev. 651 (1953).

59 An appellate court will not set aside a conviction because of objectionable newspaper articles where published prior to trial which may have influenced the jurymen, where there is no showing that an impartial panel could not be obtained or that the defendant was denied his privilege of examining the jurymen on voir dire and of thus showing their prejudice and protecting his rights. Thus the defendant's failure to utilize his voir dire privilege waived his rights. State v. Gordon, 32 N.D. 31, 155 N.W. 59 (1915).
impartial trial, but change of venue alone may not insure impartiality as the wide circulation of modern newspapers can carry inflammatory stories throughout an entire judicial district, state, or nation. By postponement the defendant may obtain an impartial jury after the publicity has subsided and its impact has been dulled by the passage of time. Nevertheless, a continuance may merely delay a trial without any compensating benefits if the case is such that, no matter when in the reasonably proximate future it will be tried, it will stimulate like publicity.

Rulings on motions for a change of venue or for a continuance lie in the discretion of the trial judge. Appellate courts seldom reverse refusals to grant them if the jurors are not clearly biased under the definition of impartiality established in the challenge cases, i.e. if they are able to state that they can judge the accused on the evidence although of the opinion that he is guilty there is generally no abuse of discretion.

(8) The accused's right to an appropriate charge to the jury to disregard prejudicial articles

A defendant facing the possibility of the prejudicial influence of newspaper articles may secure a charge to the jury from the court not to read such newspaper articles or, if having read them, to disregard them. Although the effectiveness of such a charge is speculative, most courts consider the harm which may have been done by a juror's reading a newspaper account of the crime or of the trial no ground for a new trial if the trial judge has adequately instructed the jury to disregard any impression formed therefrom and to render their verdict entirely on the basis of the evidence offered in court. However courts recognize that in the case where the article is of a flagrantly prejudicial character a charge to the jury will not adequately protect the accused.

(4) The right to waive a jury trial

Another way a defendant can avoid being tried by jurors influenced by newspaper accounts of the crime is to waive his right to trial by jury and allow the judge to decide the facts. However, elimination of the jury is no foolproof method of securing an impartial trial. Despite

60 See note, 53 Colum. L. Rev. 651, 659 (1953).
61 Ibid.
63 United States v. Wolf, 102 F. Supp. 824 (W.D. Pa. 1952). Failure to request such a charge may constitute waiver on a defendant's part. On the other hand failure of the trial judge to so charge the jury may be a ground for reversal. People v. Murawski, 394 Ill. 236, 68 N.E. 2d 272 (1946).
64 Coughlin v. People, 144 Ill. 140, 33 N.E. 1 (1893); State v. Claypool, 135 Wash. 295, 237 Pac. 730 (1925).
the judge’s superior training, the defendant has no assurance that the
date will not be influenced by his socio-economic conditioning or by
the same factors which will influence a juror. Also a defendant is
rightfully entitled to a trial by jury and in waiving a trial by jury he
loses much or all of the emotional appeal his case may have to which
he is justly entitled.

(5) The defendant’s right to utilize the contempt power
of the court for his benefit

A defendant may also appeal to the contempt power of the court
to aid his case against prejudiced newspaper articles. However except
for the general deterring effect such power may have over newspaper publishers the power may be of little benefit to a particular defendant because (a) this power is generally exercisable only after the harm has been done to the defendant’s cause, and (b) the newspaper may be acting within its constitutional rights and still adversely effect the defendant’s cause.

(6) The right to appeal under the due process clause
of the United States Constitution

A defendant convicted in a state court may appeal to the federal courts for a reversal on the grounds that the conviction violated the due process clause of the Fourteenth Amendment. Although the Sixth Amendment guarantee of trial by an impartial jury is not imposed upon the states (for the Supreme Court has consistently held that the Federal Constitution does not even demand jury trials in state courts), the state’s power, once it has resorted to trial by jury, because of the Fourteenth Amendment is not unlimited. If the state resorts to trial

65 The Supreme Court of the United States has held that the press is immune from prior restraints and censorship. Near v. Minnesota, 283 U.S. 697 (1931).
66 It is generally considered that utilization of the contempt power by courts is limited to where the acts complained of constitute a “clear and present danger” to the administration of justice, Bridges v. California, 314 U.S. 252 (1941), and, as Mr. Justice Jackson said in Shepherd v. Florida, 341 U.S. 50, 52 (1951), “This Court has recently gone a long way to disable a trial judge from dealing with press interference with the trial process.” Thus when the two conflicting interests are balanced—the defendant’s interest in an impartial trial and the newspaper’s right to freedom of press—the defendant’s rights are usually lessened in the resulting compromise.
68 The Supreme Court has declared state jury trial convictions to violate due process of law in which the judge is prejudicial by having an economic interest in the outcome, Tumey v. Ohio, 273 U.S. 510 (1927), in which the jury trial is dominated by a mob so that there is actual interference with the course of justice, Moore v. Dempsey, 261 U.S. 86 (1923), and in which the conviction is secured through use of an involuntary confession, Ashcraft v. Tennessee, 322 U.S. 143 (1944). The equal protection of the law clause is also violated by state convictions
by jury, the Fourteenth Amendment guarantees the defendant trial by an "impartial" jury. However, in regard to prejudice on the juror's part due to newspaper publicity this guarantee, except for its general deterring effect, has meant little to defendants who have appealed to the federal courts because (a) the rules of evidence of the various states constitutionally differ within broad confines, and (b) federal courts have been particularly reluctant to look beyond the finding of state appellate courts to find gross abuse of a state trial judge's discretion.

In which persons belonging to a social or other group to which the accused belongs are systematically and arbitrarily excluded from the jury. Shepherd v. Florida, 341 U.S. 50 (1951); Strauder v. West Virginia, 100 U.S. 303 (1879).

The Supreme Court allows the state's broad discretion in adopting rules of evidence and will not declare a state rule of evidence to be unconstitutional unless it falls below the minimum due process requirements. Thus one state may constitutionally admit in state prosecutions evidence illegally seized while another may constitutionally prohibit its admission. Wolf v. Colorado, 338 U.S. 25 (1949). Consequently, one state may make newspaper comment on such evidence ground for a new trial when brought to the attention of the jury while the other state may not. But the main point is: whichever way either state decides in regard to such newspaper comment will not violate due process of law allowing the defendant to appeal to the federal courts for a new trial. For a discussion of federal restrictions on evidence in state criminal cases see Scott, "Federal Restrictions on Evidence in State Criminal Cases," 34 Minn. L. Rev. 489 (1950) and Scott, supra note 67.

In fact, despite frequent appeals for certiorari, the Supreme Court of the United States has never reversed a state conviction on the sole ground of prejudice of the jury resulting from newspaper comments. As exemplary of federal judges' reluctance to look beyond the findings of state appellate courts as to conditions surrounding a trial, see Frank v. Mangum, 237 U.S. 309 (1915) in which a majority accepted as conclusive a finding of the Supreme Court of Georgia that there had been no violence in the court room—despite strong evidence to the contrary. Note, 3 Syracuse L. Rev. 150 (1951). In a recent federal habeas corpus proceeding it was held that where prospective jurors on voir dire examination in an Indiana state prosecution stated that they had formed or expressed an opinion that the accused was guilty based solely on newspaper articles and other similar reports and that, notwithstanding such opinion, they could render an impartial verdict based solely on the law and evidence, permitting them to serve on the jury was not a denial of due process, where from all the evidence presented on voir dire there was no clear showing of prejudice. Irvin v. Dowd, 531 F. Supp. 539 (N.D. Ind. 1957). However, see Shepherd v. Florida, 341 U.S. 50, 52-53 (1951) in which it was contended, among other things, that publication of certain inflammatory prejudicial articles in newspapers made a fair and impartial trial of the Negro defendant for rape impossible. Although the majority granted a new trial on the ground of discrimination against Negroes in jury selection, in a concurring opinion Mr. Justice Jackson, with whom Mr. Justice Frankfurter joined, in commenting on the trial court's denial of the defendant's motion for a change of venue, observed that the newspaper reports were so highly prejudicial that the defendants were adjudged guilty before trial and thereby denied a fair trial and due process of law under the Fourteenth Amendment: "[I]f freedoms of press are so abused as to make fair trial in the locality impossible, the judicial process must be protected by removing the trial to a forum beyond its probable influence. Newspapers, in the enjoyment of their constitutional rights, may not deprive accused persons of their right to a fair trial. These convictions, accompanied by such events, do not meet any civilized conception of due process of law." See note, 5 Fla. L. Rev. 452 (1952). Also see Ex parte Wallace, 24 Cal. 2d 933, 152 P. 2d 1 (1944), holding that the presence on the jury of a prejudicial juror violated the due process clause of the Fourteenth Amendment of the United States Constitution.
Undoubtedly in a case of clear evidence that a state jury has been rendered prejudiced in constitutional terms by newspaper accounts and there is a clear showing of gross abuse of discretion by the trial judge, the Supreme Court has the power to and will reverse such a state conviction. However as a practical matter under the present philosophy and procedure of the court, the exercise of such power would indeed be a rarity.

Even though these various remedies are available and even though it appears that prejudicial newspaper articles have been read by a jury, a defendant's failure to make a timely assertion of his rights may constitute a waiver. It has already been noted how a defendant's failure to utilize his voir dire privilege and challenges may waive his objection to pre-trial publicity. Similarly, if the reading of the accounts by the jury during the trial is made known to a party and he makes no objection at the time or expressly states that he does not object thereto, any right on his part to a new trial on that ground will be deemed waived. It would be unjust to allow him to sit idly by in anticipation of a favorable verdict and reserve his objection to the verdict until, and if, it turns out to be unfavorable.

Although the above remedies available to a defendant do not absolutely guarantee trial by an impartial jury, the courts must do what they can to insulate a defendant from prejudice due to newspaper accounts. Skillful utilization of a combination of the remedies will, except in the rare instance, provide reasonable safeguards to the defendant's rights.

Other Circumstances

In addition to a defendant's failure to utilize the possible available remedies there are various other circumstances which may be such as to prevent a reversal of a conviction on the ground of prejudicial influence on jurors due to newspaper articles. If the evidence of the defendant's guilt is overwhelming a reversal may not be warranted. When the evidence in support of the jury's verdict is such that the jury could not have honestly or intelligently returned any other verdict than the one it did return, the courts have held that there should not be a new trial on the ground that jurors have read prejudicial newspaper accounts of the crime or of the trial. But an appellate court

71 Exemplary of this view is Miller v. Kentucky, 40 F. 2d 820 (6th Cir. 1930), in which the court said that even if the article had been prejudicial, the defendant's failure, upon learning of the juror's reading of the article, to move for a new trial or to request an instruction upon the subject was fatal to his belated request. Accord, State v. Soltau, 212 Minn. 20, 2 N.W. 2d 155 (1942); Spreckels v. Brown, 212 U.S. 208 (1909) (civil case).

must not assume the functions of a jury since the possibility of prejudice to the cause of the accused may be so highly probable that a court is not justified in regarding them as inconsequential.\textsuperscript{73}

Courts have held it grounds for denial of relief where the defendant was responsible for at least some of the objectionable material reaching the jury.\textsuperscript{74}

\textit{Conclusion}

Due to the modern media of mass communication it is becoming increasingly more difficult to secure a truly impartial jury trial in which the members of the jury have not read or heard of the case from sources outside the court room presentation of evidence. However, in balancing the interests of a defendant in securing an impartial trial against the necessity of having trials where it is practically impossible to obtain jurors with minds of the \textit{tabula rasa} quality certain principles have been laid down by the courts.

As stated earlier, the general rule laid down by the courts is that an opinion of a juror as to the guilt or innocence of an accused based on newspaper or other accounts of the crime with which he is charged will not disqualify him from serving as a juror provided it appears to the reasonable satisfaction of the court that such person can and will, notwithstanding such opinion, fairly and impartially try the case on the evidence presented at trial. To warrant a new trial the defense must show that the members of the jury actually read the article and that the article, in addition to being of a prejudicial nature, did in fact exert a prejudicial influence on the jury in reaching their verdict. Although in the individual case these remedies may not effectively protect a defendant, there are several remedies which can be availed of by a defendant in an attempt to protect himself from the effect of prejudicial newspaper articles. These remedies include his right to voir dire examination of the jurors and to challenge them, to a change of venue, to a continuance, to a charge to the jury to disregard the article, to waive a jury trial, to utilization of the protection of the contempt power of the courts, and to seek the protection of the due process clause of the Fourteenth Amendment to the Constitution of the United States. However, in addition to other circumstances which may bar

\textsuperscript{73} Berger v. United States, 295 U.S. 78 (1935).

\textsuperscript{74} McKibben v. Philadelphia & R. Ry., 251 Fed. 577 (3rd Cir. 1918); Meyer v. Cadwalader, 49 Fed. 32 (E.D. Pa. 1891) and Quinn v. State, 54 Okla. Crim. 179, 16 P. 591 (1932), are civil cases in which such action defeated a party's cause. See note, 4 Kan. L. Rev. 130 (1955).

Conversely, where prejudicial publicity results from unwarranted action taken by the prosecution the courts are particularly likely to reverse a conviction. Henslee v. United States, 246 F. 2d 190 (5th Cir. 1957), Griffin v. United States, 295 Fed. 437 (3d Cir. 1924).
relief, failure of a defendant to utilize these remedies may be fatal to his cause.

Due to the ever increasing nature of this danger to the cause of defendants and to the integrity of our judicial system itself, courts must be ever vigilant to utilize all the resources at their command to protect a defendant against the prejudicial influence of newspapers and the other modern media of mass communication.

Linza B. Inabnit

A WIDOW'S DOWER RIGHTS—KENTUCKY DOWER RIGHTS; ON INTESTACY OR UPON RENUNCIATION OF HER HUSBAND'S WILL

Introduction

In 1956, the Kentucky General Assembly enacted several amendments1 to the Kentucky “dower statute.”2 These related, inter alia, to the nature and amount of the surviving widow’s interest upon her husband’s death intestate, as well as her interest upon renunciation of the husband’s will. Some of the effects of these amendments were construed for the first time in the recent case of Hedden v. Hedden, 312 S.W. 2d 891 (Ky. 1958). Dicta in this case, together with the wording of the amendments, have created uncertainties which this note discusses and evaluates.

Hedden v. Hedden

In this action, appellant brought suit for a declaratory judgment to determine her dower rights under Kentucky Revised Statutes Section3 392.0204 as amended. The appellant’s husband had died testate, but had made no provision for her in his will. She contended

3 Hereinafter referred to in the text as KRS.
4 Ky. Rev. Stat., sec. 392.020, as amended in 1956, provides that:

After the death of the husband or wife intestate, the survivor shall have an estate in fee of one-half of the surplus real estate of which the other spouse or anyone for the use of the other spouse, was seized of an estate in fee simple at the time of death, and shall have an estate for his or her life in one-third of any real estate of which the other spouse or anyone for the use of the other spouse, was seized of an estate in fee simple during the coverture but not at the time of death, unless the survivor’s right to such interest has been barred, forfeited or relinquished. The survivor shall also have an absolute estate in one-half of the surplus personalty left by the decedent. Unless the context otherwise requires, any reference in the statutes of this state to “dower” or “curtesy” shall be deemed to refer to the surviving spouse’s interest created by this section. (emphasis added)