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New Trial--The Admissibility of Jurors in Support of a Motion for a New Trial in Kentucky

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STUDENT NOTES

NEW TRIAL—THE ADMISSIBILITY OF TESTIMONY OF JURORS IN SUPPORT OF A MOTION FOR A NEW TRIAL IN KENTUCKY

At early common law evidence given by jurors which impeached their verdict could be received in support of a motion and grounds for a new trial.[1] In 1785 Lord Mansfield in *Vaise* v. *Delanel,* abrogated this doctrine and laid down the modern rule, followed in a majority of jurisdictions in this country,[2] that the affidavit of a juror as to his misconduct or the misconduct of his fellow jurors, which impeaches their verdict, is not admissible in support of a motion for a new trial.

In discussing the law in Kentucky on this subject one section of the *Kentucky Civil Code*[4] and two sections of the *Kentucky Criminal Code*[5] must be considered. Subsection (2) of section 340 of the Civil Code provides that "Misconduct of jury, of the prevailing party, or of his attorney" is a ground for a new trial, but there is no provision in the Civil Code relative to the competency of jurors to testify, or to the admissibility of evidence to establish the misconduct of the jury as a ground for a new trial. Subsection (3) of section 271 of the Criminal Code provides that, "If the verdict have been decided by lot, or in any other manner than by a fair expression of opinion by the jurors" such shall be a ground for a new trial. Section 272 of the *Kentucky Criminal Code* provides that "A juror can not be examined to establish a ground for a new trial, except it be to establish that the verdict was made by lot." This is the only section of either code dealing directly with the subject and it appears to be rather limited in scope. Thus we must turn to the cases decided by the Court of Appeals to discover its interpretation and the application of these sections. The cases will be considered in two general groups, first those cases dealing with the admissibility of testimony of jurors impeaching their verdict for misconduct or mistake of themselves or their fellow jurors and second, those cases dealing with verdicts determined by lot.

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[1] Phillips v. Fowler, Barnes 441, 94 Eng. Rep. R. 994 (1734), Watts v. Brains, Cro. Eliz. 778, 78 Eng. Rep. R. 1009 (1599)
1 T. R. 11, 99 Eng. Rep. R. 944 (1785)

[3] 8 WIGMORE, EVIDENCE (3d ed. 1940) sec. 2354.

[4] KENTUCKY CIVIL CODE (Carroll, 1938) sec. 340.

KENTUCKY CRIMINAL CODE (Carroll, 1938) secs. 271, 272.

CASES OF MISCONDUCT OR MISTAKE

The first case in Kentucky holding that jurors cannot impeach their verdict by affidavits in support of a motion and grounds for a new trial was *Taylor* v. *Giger*[6] decided in 1808. In that case the affidavits of five jurors were to the effect that they erroneously understood that a recovery for the plaintiff would be a bar to any future action for the continuing trespass caused by the damming of a stream, and therefore assessed the damages abnormally high. In reinstating the verdict after a new trial had been granted by the trial court, the Court of Appeals stated,

> " it has been determined, and we think properly that affidavits of the jurors ought not to be received to prove misbehavior in themselves and their fellow-jurors, but that wherever misbehavior of a jury is relied on as a ground for a new trial, it ought to be made out by other evidence.
>
> We can not discover any case where the jurors have *consented* to the verdict, and where they have been permitted afterward, by their affidavits, for the purpose of impeaching, or setting aside their verdict, to explain the train of reasoning, or the grounds either of law or fact assumed by them, inducing that consent. Such a practice, if tolerated, would be extremely dangerous "

The court, however, did point out that the affidavits of jurors might be received to show there was in fact no verdict or that the jurors or part of them did not agree to the verdict rendered.

Since this case it has been firmly established that affidavits of jurors that they did not understand the instructions;[7] were mistaken as to the effect of their verdict;[8] or were mistaken as to the amount that could be or should have been awarded[9] may not be received by the court to impeach their verdict when considering a motion and grounds for a new trial. The fact that the jurors received and considered evidence improperly, from their own investigation,[10] from rumors,[11] from newspapers,[12] or from other

[6] Ky. (Hardin) 595 (1808)

Mills v Commonwealth, 223 Ky 165, 3 S. W 2d 183 (1928), Caldwell v Spears & Son, 186 Ky. 64, 216 S. W 83 (1919) Tabler v Jones & Brown, 12 Ky L. Rep. 189 (1890), Russell v Gollady, 2 Ky. Opin. 236 (1868)

[8] Cadle v McHargue, 249 Ky. 385, 60 S.W 2d 973 (1933).

[9] Hood v Spitzlberger, 242 Ky 291, 46 S.W 2d 102 (1932) Waitman v Marksberry, 200 Ky 1, 254 S. W 432 (1923) Eversole v. White, 112 Ky. 193, 65 S. W 442, 23 Ky L. Rep. 1435 (1901)

[10] City of Covington v. Parsons, 258 Ky. 22, 79 S.W 2d 353 (1935) Pollack v Southern Ry Co. 220 Ky. 302, 295 S. W 150 (1927) Sizemore v Commonwealth, 189 Ky. 46, 224 S. W 637 (1920), Rager v. L. & N. R. Co., 137 Ky. 811, 127 S. W 155 (1910) Jones Adm'r. v L. & N. R. Co., 108 S. W 865 (Ky 1908) Steele's Heirs v Logan, 10 Ky. (3 A. K. Marsh.) 394 (1821).

[11] Ralston v. Dossey, 289 Ky. 40, 157 S. W 2d 739 (1941)

[12] Irvine v. Greenway, 220 Ky 388, 295 S. W 445 (1927)

improper sources,[13] or that they considered or discussed improperly admitted evidence,[14] or discussed improper remarks of counsel,[15] even though such may be a ground for a new trial, cannot be established by affidavits or other evidence given by jurors. Where the verdict rendered is so ambiguous that its true meaning can not be ascertained, the jurors rendering it may not be recalled to explain the meaning intended,[16] but the court and counsel may rely on the record.[17] Persons not members of the jury may not give evidence of the misconduct of jurors gained from the members of the jury as a ground for a new trial, for such evidence not only violates the rule that jurors may not impeach their own verdict, but also violates the hearsay rule.[18] But persons not members of the jury may give evidence of the misconduct of the jurors, if the information was gained direct from competent sources and not from the jurors themselves.[19] There is some dictum in the Kentucky cases which would indicate that affidavits of jurors might be received to establish the fact that a juror on *voir dire* falsely answered or failed to answer a question, which if truly answered would have rendered him incompetent to serve as a juror, and thereby impeach the verdict.[20] Even though affidavits of jurors may not be used to impeach the verdict rendered by them, such affidavits may be used in the prosecution of persons who have attempted to tamper with the jury.[21] Affidavits of jurors as to their good conduct or to their lack of misconduct may always be received to sustain their verdict.[22] The rule against the admissibility of evidence by jurors impeaching their

[13] Holladay v. Holladay, 294 Ky 540, 172 S. W 2d 36 (1943) Allen v. Commonwealth, 234 Ky 302, 28 S. W 2d 19 (1935), Borderland Coal Co. v. Kerns, 171 Ky. 626, 188 S. W 783 (1916).

[14] McDowell v Commonwealth, 207 Ky. 680, 269 S. W 1019 (1925).

[15] Byers' Adm'r. v. Hines, 194 Ky. 488, 239 S. W 783 (1922)

[16] Cadle v McHargue, 249 Ky. 385, 60 S.W 2d 973 (1933), Romans v. McGinnis, 156 Ky. 205, 160 S. W 928 (1913) Alexander v. Humber, 86 Ky 565, 6 S. W 453 (1888)

[17] Pittsburgh C. C. & St. L. Ry Co. v. Darlington's Adm'x. 129 Ky 266, 111 S. W 360 (1908).

[18] Dunbar v. Commonwealth, 192 Ky. 263, 232 S. W 655 (1921) Morgan v. Commonwealth, 188 Ky 458, 222 S. W 940 (1920).

[19] Lexington & E. Ry. Co. v. Crawford, 155 Ky. 723, 160 S. W 267 (1913), Gleason v Commonwealth, 145 Ky 128, 140 S. W 63 (1911).

[20] Drury v. Franke, 247 Ky. 758, 795-798, 57 S. W 2d 969, 984 (1933), Wolfe v. Commonwealth, 214 Ky. 544, 549-551, 283 S. W 385, 388-389 (1926) Borderland Coal Co. v. Kerns, 171 Ky 626, 631, 188 S. W 783, 785 (1916).

[21] Doran v. Shaw, 19 Ky. (3 T. B. Mon.) 411 (1826)

[22] Tate v Shaver, 287 Ky. 29, 152 S. W 2d 259 (1941) Smith's Adm'x. v Middlesboro Electric Co., 164 Ky. 46, 174 S.W 773 (1915), Gleason v. Commonwealth, 145 Ky. 128, 140 S. W 63 (1911) Howard v. Commonwealth, 69 S. W 721 (Ky. 1902).

conduct in the jury room applies to grand juries as well as petit juries.[23]

As was suggested in *Taylor v. Giger* [24] there is one class of cases wherein affidavits of jurors in support of a motion and grounds for a new trial may be received, that is, when there was in fact no verdict, or the verdict rendered was not the verdict reached by the jurors. There have been many attempts to bring cases within this exception,[25] but a dilligent search reveals but one case wherein the exception was applied. In *Youtsey Bros. v. Darlington*,[26] eleven jurors agreed to a verdict for the plaintiff, but the dissenting juror drew up the verdict and mistakenly or otherwise drew it in favor of the defendant and the eleven jurors signed it without noticing that it was not the true verdict reached. The verdict for the defendent was rendered in open court and was not questioned at the time. Upon discovering the error, the counsel for the plaintiff secured the affidavits of the eleven jurors that the verdict rendered was in fact not the verdict agreed on and based his motion for a new trial on the grounds set out in the affidavits. The trial court received the affidavits in evidence and granted a new trial. In approving the action of the trial court in granting a new trial the Court of Appeals stated,

> "But affidavits of jurors are admissible to show that the verdict as received and entered of record by reason of mistake does not embody the true finding of the jury. While the rule is that a new trial should not be granted on this ground, unless on clear evidence, the facts were sufficient here to grant the new trial. Otherwise there would be no way to correct a mistake of this kind."

VERDICT BY LOT

Verdicts by lot may be divided into two general classes, first, those arrived at by pure chance, such as tossing a coin or drawing a number from a hat, and second, those arrived at by adding together the number of years sentence, in a criminal case, or the amount to be recovered, in a civil action, which each juror believes should be the verdict and dividing the total by twelve; this is commonly known as a "quotient" verdict. Verdicts arrived at by lot are intimately connected with the admissibility of evidence of jurors to impeach their verdict because it would be practically impossible to establish the method by which the verdict was reached except by affidavits or other testimony of the jurors.

The invalidity of the first type of verdicts, those arrived at by pure chance, can easily be established in Kentucky because

[23] Commonwealth v Skeggs, 66 Ky (3 Bush) 19 (1867).
[24] 3 Ky. (Hardin) 595 (1808).
[25] Alexander v Humber, 86 Ky 565, 6 S. W 453 (1888) Johnson v Davenport, 26 Ky. (3 J. J. Marsh.) 390 (1830).
[26] 233 Ky. 112, 25 S. W 2d 44 (1930).

section 272 of the *Kentucky Criminal Code* provides that jurors may be examined to establish that fact. This section has been held applicable to civil actions as well as criminal cases.[27] A search of the books failed to reveal a case of this type that has reached the Court of Appeals in Kentucky, although they have arisen in other jurisdictions.[28]

To establish the character of the second type of verdict, that is, that verdict rendered is a quotient verdict, presents a more difficult problem. The admissibility of the testimony of jurors to the effect that the verdict rendered was arrived at by the quotient method depends on whether or not the method used for the conduct of the jurors was such as would make the verdict one arrived at by lot and thus come under section 272 of the Criminal Code. If the jurors agree that each will put down the amount which he believes the plaintiff should recover or the number of years the accused should be confined, that the twelve numbers will be added together and divided by twelve and agree *in advance* that the result will be their verdict and that they will be bound thereby, then it is deemed that the verdict has been arrived at by lot and affidavits of jurors may be introduced to establish that fact.[29] The fact that all the jurors agreed that the accused was guilty or that the plaintiff should recover and the quotient method was used merely to ascertain the amount of the verdict does not affect the operation of this rule.[30] If, however, each juror agrees to put down the amount of recovery he thinks the plaintiff should have or the number of years confinement to which the accused should be sentenced, to add them together and divide the total by twelve, but does not agree to be bound by the result, and each juror adopts the quotient as his verdict as a result of independent and subsequent consideration, then it is deemed that the verdict was not arrived at by lot and the affidavits of the jurors may not be received in support of a motion for a new trial on the ground that the verdict was arrived at by lot.[31] As in the case of misconduct, the testimony of jurors may be received to *support* the verdict by

[27] L. & N. R. Co. v. Marshall's Adm'x., 289 Ky 129, 158 S. W 2d 137 (1942).

[28] Vogt v Curtis, 200 Wash. 692, 94 P 2d 761 (1939), Donner v. Palmer, 23 Cal. 40 (1863).

[29] L. & N. R. Co. v. Marshall's Adm'x., 289 Ky. 129, 158 S. W 2d 137 (1942), Paducah and Elizabethtown R. R. Co. v Commonwealth, 80 Ky. 147 (1882) *But see* Redmon v. Commonwealth, 82 Ky. 333 (1884).

[30] Walton v. Commonwealth, 223 Ky 393, 3 S. W 2d 764 (1928) Bennett v. Commonwealth, 175 Ky 540, 194 S. W 797 (1917)

[31] Choate v. Commonwealth, 176 Ky 133, 195 S. W 1080 (1917), Heath v. Conway, 4 Ky. (1 Bibb) 398 (1809) *see* Cox v. Commonwealth, 255 Ky. 391, 74 S. W 2d 346 (1934) Walton v Commonwealth, 223 Ky. 393, 3 S. W 2d 764 (1928)

showing that it was not arrived at by lot.[32] Quotient verdicts generally have been criticized by the Court of Appeals[33] and it has been held to be an error to instruct the jury that they may arrive at a verdict by the quotient method if they cannot otherwise agree.[34]

CONCLUSION

The rule that the testimony of jurors may not be received to impeach their verdict is manifestly the only safe rule by which the jury system can be preserved. The rule of *Youtsey Bros.* v. *Darlington*,[35] that affidavits of jurors may be introduced to show there was in fact no verdict, or that the verdict rendered was not the verdict agreed on, should not be followed even though it is now recognized as a valid exception to the general rule. The reasons for protecting a verdict from attack by the jurors rendering it have been well stated by the court in *Borderland Coal Co.* v. *Kerns*.[36]

> "The rule not permitting verdicts to be impeached by the testimony of a member of the jury as to what occurred while the verdict was being considered with the exception stated (verdict by lot) is one designed to protect the sacredness of the jury system, as well as the stability of verdicts, and to give some assurance of a final determination of litigation. It belongs to that class of subjects to which the door should be closed against all inquiries, upon the theory that an adherence to it would serve the cause of justice better than would a different rule allowing the deliberations of the jury to be investigated."

The temptation to the losing party to tamper with the jurors after the verdict has been rendered is so great that a contrary rule would lead to dangerous results which would eventually destroy the jury system. The possibility of injustice resulting from powerful and wealthy but unscrupulous litigants, upsetting adverse verdicts under a contrary rule far outweighs the possibility of injustice under a conclusive rule that jurors may not impeach their own verdict except that it was made by lot.

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[32] Walton v Commonwealth, 223 Ky. 393, 3 S. W 2d 764 (1928), Clark v Commonwealth, 201 Ky. 620, 257 S.W 1035 (1924), Bennett v Commonwealth, 175 Ky. 540, 194 S. W 797 (1917).

[33] Cox v Commonwealth, 255 Ky 391, 74 S. W 2d 346 (1934), Walton v. Commonwealth, 223 Ky 393, 3 S. W 2d 764 (1928).

[34] Allard v. Smith, 59 Ky (2 Met.) 297 (1859)

[35] 233 Ky 112, 25 S. W 2d 44 (1930).

[36] 171 Ky. 626, 631-632, 188 S. W 783, 785-786 (1916).