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The Extent to Which Affidavits of Jurors Will Be Considered for the Purpose of Setting Aside Their Own Verdict

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NOTES AND COMMENT

THE EXTENT TO WHICH AFFIDAVITS OF JURORS WILL BE CONSIDERED FOR THE PURPOSE OF SETTING ASIDE THEIR OWN VERDICT. The question as to what extent and under what circumstances the affidavits of jurors will be considered on a motion for a new trial, arises in instances where the losing party feels that the jury has failed to properly exercise its function of deciding the case in an impartial and unprejudiced manner according to the law and evidence submitted in the case. In an early case the arbitrary rule was laid down that under no circumstances would an affidavit of a juror be considered for the purpose of setting aside the juror's sworn act incorporated in the verdict.[1] The rule thus laid down, that a "juror will not be permitted to impeach his own verdict," was followed by the courts in many jurisdictions and, in the absence of statutory provision, a majority of the jurisdictions in the United States will not, under any circumstances, consider the affidavits of jurors for the purpose of setting aside their verdict. The reasons for this inflexible rule are based on obvious considerations of public policy

[1] *Vaise v. Delaval*, T. R. 11 (1785).

However, some courts have not seen fit to thus arbitrarily exclude such affidavits, but have under certain circumstances and conditions admitted them where it is obvious from the facts recited therein that the parties' rights have been trifled with and that public policy will best be served by reviewing the matter.

The first case to attempt to lay down any rule as to when such affidavits are, and when they are not, admissible, is the case of *Wright v. Ill. & Miss. Telephone and Telegraph Co.*,[2] wherein the court said.

> " * * * 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 adhere in the verdict itself, as that a juror was improperly approached by a party, his agent, or attorney, that witnesses or others conversed as to facts or merits of the cause, out of court and in the presence of jurors, that the verdict was determined by aggregation and average or by lot, or game of chance or other artifice or improper manner; but that such 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 witnesses or the pleadings in the case, that he was unduly influenced by the statements or otherwise of his fellow jurors, or mistaken in his calculations or judgment, or other matter resting alone in the juror's breast."

The Supreme Court of Washington saw fit to follow the more liberal rule thus pronounced and in the case of *State v. Parker*[3] the court quoted with approval decisions in the states of Kansas, Tennessee, Iowa and Texas. In that case and in the case of *Marvin v. Yates*,[4] decided shortly thereafter, the court laid down the rule that affidavits of misconduct will not be received as to matters which inhere in the verdict but that affidavits *will* be received as to matters which do not inhere in the verdict. Since the decision in the case of *State v. Parker, supra,* with the exception of those instances coming within a statutory exception to be mentioned later, the admissibility of the affidavits has been determined on whether or not the matters recited in the affidavit inhere in the verdict.[5] This test of inherency in the verdict is not altogether satisfactory,

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[2] 20 Iowa 195 (1866).

[3] 25 Wash. 405, 65 Pac. 776 (1901)

[4] 26 Wash. 50, 66 Pac. 131 (1901).

[5] *Wagoner v. Warn*, 88 Wash. 688, 153 Pac. 1072 (1915) *Hosher v. Olympia Shingle Co.*, 128 Wash. 152, 222 Pac. 466 (1924) *State v. Gunns*, 136 Wash. 495, 240 Pac. 678 (1925) *State v. McMullen*, 142 Wash. 7, 252 Pac. 108 (1927).

it leaves something to be desired in the way of an accurate test. The word itself means nothing. It is not descriptive of any class of facts or circumstances. The Supreme Court of Washington, in a recent case, has recognized the difficulty of determining the question by this test,[6] and the courts of other jurisdictions have criticized it as illogical.[7] It would be useless to attempt to harmonize the decisions in the various jurisdictions. It is not the purpose of this article to criticize the rule, but rather the purpose is to elaborate on the expression and attempt to show what is meant by the rule as laid down in the decisions of this state and of other states where the rule prevails.

The case in Washington in which the court has gone the farthest in specifically defining the word is *State v. Lorenzy*,[8] wherein the court says, "It would seem, then, that the natural way to express the definition of the word as here applied would be to say that it means lost in, or covered by the verdict. Verdicts are rendered upon evidence received in open court, and the true test would be whether the misconduct complained of fell within, or pertained to, the legitimate issues of the case, so that the verdict might have been influenced by it." In *State v. Parker*[9] it was said, "In considering the affidavits filed, we entirely discard those portions which may tend to impeach the verdict of the jurors, and consider only those facts stated in relation to misconduct of the juror, and which in no way inhere in the verdict itself." The definition attempted by the Iowa court is laid down in *Wright v. Ill. & Miss. Tel. Co.*[10] Courts in other jurisdictions have used various explanatory expressions. The Nebraska court in *Harris v. State*[11] said, "affidavits of jurors will not be received for the purpose of impeaching or avoiding their verdict in respect to a matter which essentially inheres in the verdict itself, as that the juror was mistaken in a computation, or misunderstood a witness, or did not comprehend the instructions of the court. The reason for the rule is that the matters referred to being alone within the breast of each juror, it would be impossible to rebut any statements which might be made by the juror." The Oklahoma court in defining what does not inhere in the verdict uses the expression, "An overt act, open to the knowledge of all the jury and not alone within the personal consciousness of one."[12] From these and similar expressions can be seen the difficulty of laying down any precise definition embodying an accurate classification. And generally courts recognizing the difficulty, have avoided an attempt to lay down general principles. Rather they have adopted the policy wherein each juris-

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[6] *Lyberg v. Holtz*, 145 Wash. 316, 259 Pac. 1087 (1927).

[7] *Hinkel v. Oregon Chair Co.*, 80 Ore. 404, 156 Pac. 438, 157 Pac. 789 (1916).

[8] 59 Wash. 308, 109 Pac. 1064 (1910).

[9] See note 3, *supra*.

[10] See note 2, *supra*.

[11] 24 Neb. 803, 40 N. W 317 (1888).

[12] *Carter State Bank v. Ross*, (Okla.) 152 Pac. 1113 (1915).

diction has developed a body of precedents of its own depending on the existence of an analogous state of facts.

Although the question has frequently been presented to the supreme court of this state on appeal, in only a few instances has the court held the affidavits admissible. A careful examination of the Washington cases indicates that the court has been reluctant to extend the class of affidavits admissible. The most common situation which arises and one which would include practically all the Washington cases permitting the affidavits of jurors is where evidence or statements, other than those properly received in evidence, concerning material issues of the case have come to the attention of the jury Cases of this type include instances where some juror has made statements of his own knowledge as to facts which, upon reasonable deduction, have a bearing on the material issues of the case.[13] In such instances affidavits of jurors as to the making and content of the statements have been admitted. However, that part which attempts to state the effect of the statement on the juror has not been considered.[14] Another familiar instance coming within the above class of cases wherein the affidavits of jurors have been considered is where the juror has visited the scene of the accident or transaction without leave of court.[15] Again where the jury by means of microscope discovered what they considered additional evidence, the affidavits of jurors were admitted to prove this fact.[16] They are matters open to the knowledge of the jurors. They relate to overt acts which are capable of being corroborated or disproved by other jurors. They do not attempt to show something within the juror's own mind. They are not facts which impeach or belie the sworn act and word of the juror, but are facts showing what transpired in the presence of the jury In *Marvin v. Yates*,[17] the court, in discussing the admissibility of affidavits, says: "Only facts which relate to the acts of jurors or to influences brought to bear upon them outside of the evidence can be considered in this conection." Such are matters which do not inhere in the verdict. It is for the court then to determine whether the facts recited materially affected a proper determination of the case.

It may be well at this time to mention a class of cases covered by the statute. Rem. Comp. Stat. sec. 399 (2) provides that, "whenever any one or more of the jurors shall have been induced to assent to any general or special verdict to a finding on any question or questions submitted to the jury by the court, other and

[13] *State v. Parker*, note 3, *supra*, *State v. Lorenzy*, 59 Wash. 308, 109 Pac. 1064 (1910).

[14] *Marvin v. Yates*, note 4, *supra*, *State v. Aker*, 54 Wash. 342, 103 Pac. 420 (1909).

[15] *Maryland Casualty Co. v. Seattle Electric Co.*, 75 Wash. 430, 134 Pac. 1097 (1913).

[16] *State v. Burke*, 124 Wash. 632, 215 Pac. 31 (1923).

[17] See note 4, *supra*.

different conclusions, and arrived at by a resort to the determination of chance or lot, such misconduct may be proved by the affidavits of one or more of the jurors." About the only question which has been litigated in connection with this statute is whether or not a quotient verdict, that is, a verdict arrived at by adding together the various amounts recommended by each of the jurors and then dividing by the number of jurors, is a verdict arrived at by lot or chance. In deciding this question the court has laid down a rule that a quotient verdict will not be set aside as arrived at by lot or chance, unless it is shown that the jurors agreed in advance to return the result as their verdict and that they in fact did so.[18]

Outside of these two classes of cases. first, where evidence or statements, other than those properly received in evidence, concerning material issues of the case have come to the attention of the jury, second, where the jury has arrived at its verdict by a resort to lot or chance, the court has generally refused to permit the affidavits of jurors to be considered on the ground that the matters recited therein inhere in the verdict.

Thus it has been held that the matter inheres in the verdict and the affidavits are not admissible where the affidavit states that jurors misunderstood the instructions of the court,[19] or that they misunderstood the testimony of a witness,[20] or that they gave their verdict on issues other than those upon which they were directed to by the court.[21] Nor will they be considered where the affidavits state that the affiant consented thereto because of arguments of fellow jurors,[22] or under the belief that the defendant would be just as well off under a verdict of guilty with recommendation of mercy,[23] or where he misunderstood the penalty,[24] or where he consented to the verdict because he was ill and wished to be relieved from duty [25]

From these cases where the affidavits have been rejected on the ground that the matter inheres in the verdict a general conclusion may be drawn to the effect that, if the matter related to facts dealing with the juror's thoughts, beliefs, understanding, or processes of reasoning, they are matters which inhere in the verdict, that is, the juror cannot now say what it was that induced him to agree to the verdict, or that he had a belief contrary to his sworn statement incorporated in the verdict, nor can he show what facts he considered or processes of reasoning he indulged in, in arriving at the verdict. These are facts within the consciousness

[18] *Conover v. Neher-Ross Co.*, 38 Wash. 172, 80 Pac. 281 (195) *Wiles v. Northern Pacific Railway Co.*, 66 Wash. 337, 119 Pac. 810 (1911).

[19] *State v. Whipple*, 124 Wash. 578, 215 Pac. 14 (1923).

[20] *Henslin v. Pratt*, 119 Wash. 443, 205 Pac. 867 (1922).

[21] *Ralton v. Sherwood Logging Co.*, 54 Wash. 254, 103 Pac. 28 (1909).

[22] *State v. Aker* 54 Wash. 342, 103 Pac. 420 (1909).

[23] *State v. Gay*, 82 Wash. 423, 144 Pac. 711 (1914)

[24] *State v. Holmes*, 12 Wash. 169, 40 Pac. 735, 41 Pac. 887 (1895).

[25] *Lindquist v. Pac. Coast Coal Co.*, 86 Wash. 408, 150 Pac. 619 (1915). *State v. Cook*, 126 Wash. 81, 217 Pac. 42 (1923).

of the juror's own mind, and, if they purport to state something different or contrary to the belief or judgment expressed in his verdict, they will not be considered. The juror by submitting such an affidavit is impeaching himself. He says that he violated his sworn duty and word in arriving at and giving forth the verdict he pronounced. Such is the true meaning of the expression "that a juror shall not be permitted to impeach his own verdict."

ALBERT OLSEN.

INCOMPATIBILITY OF PARTIES AS GROUND FOR DIVORCE—This brief note is concerned with two recent decisions in the State of Washington touching the law of divorce, *Shaw v. Shaw*,[1] decided August 22, 1928, by Department One, and *Haller v. Haller*,[2] decided October 8, 1928, by Department Two.

The facts of both cases turn upon incompatibility or the inability of the parties to live together. In the *Shaw* case the court holds that since the enactment of the Session Laws of 1921, p. 331,[3] this is no longer ground for divorce in this state. In the *Haller* case the other department of the court apparently holds that it is a ground for divorce. The *Shaw* case points out that the present law of divorce is predicated upon the element of fault of the delinquent spouse and that the divorce is granted upon the application of the "injured" party

Upon principle it is difficult to distinguish between the basic facts of these two cases. They were both cases of an unfortunate alliance. In both cases there was no "fault" of either party, sufficient as the court intimates to constitute any one of the statutory grounds for divorce. In the *Shaw* case the wife became insane, which was not a fault. In the *Haller* case the husband drifted into the more subdued years, so that, as the court says, the very great divergence of their ages prevented this man and woman from deriving an appreciable amount of happiness from their marriage, and for a long period of time they had not lived together as husband and wife, although occupying the same home. And the court further referred to the "difficulty of attempting to mate 'January' and 'May,' " and substantially bases its decision upon the following paragraph of the opinion.

> "An examination of the record discloses that it is not only impossible for these parties to live together as husband and wife, but that it is to their interest and the interest of society that they be divorced."

If the rule stated in the *Shaw* case is correct, requiring fault of one or both of the parties in some one or more of the causes stated

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[1] 148 Wash. 622, 269 Pac. 804 (1928).
[2] 49 Wash. Dec. 153, 270 Pac. 822 (1928).
[3] Rem. Comp. Stat., sec. 982.