DEPARTMENT OF PRACTICE.

EDITOR-IN-CHIEF,
HON. GEORGE M. DALLAS
Assisted by
ARDEMUS STEWART, HENRY N. SMALTZ, JOHN A. MCCARTHY.

VAUGHAN *v.* STATE.[1] SUPREME COURT OF ARKANSAS.

Murder—Misconduct of Jury.

The fact that after the cause was submitted to the jury some of the jurors were allowed to stand on the courthouse porch, where they could hear citizens discussing the merits of the case, and insisting on the defendant's guilt, is ground for setting aside a verdict of guilty and granting a new trial.

FACTS OF THE CASE.

When the attorney-general concluded his argument, it was followed by loud, general and continuous applause for some moments by the citizens of Washington and Madison Counties, who filled the courthouse to its full capacity.

Upon affidavit that the cause was submitted to the jury on Saturday and that on Sunday they were given the liberty of the courtroom, the doors and windows of which stood open; that some of the jurors left the courtroom and remained for some time upon the porches of the courthouse; that divers citizens of the above-named counties were in the courthouse yard within fifteen feet of the jurors, excitedly discussing the case, insisting upon the guilt of the defendant, and so continued for hours, C. J. COCKRILL said:

"The unimpeached affidavit made a *prima facie* case that some or all of the jurors had been exposed to improper influence, and it cast upon the prosecution the burden of showing that the jury had not been so exposed, or that the exposure was of a character that could not or did not influence them. . . . When the means of contradic-

[1] 20 S. W. Rep., 588 (1892).

tion were so easily to be obtained, we must infer that the statements of the affidavit are true, else the proof to the contrary would be forthcoming." Judgment reversed. New trial ordered.

MISCONDUCT OF JURY.

The process of trial by jury is to-day regarded, substantially, as a birthright by American citizens, and the deliberations of this august body are watched with jealous care.

But the early restrictive principles have been modified in most of the United States, and even in England, and the purity of jury trials is made to depend not on form, but on substance.

A fair and unbiased expression of opinion is the aim, and while certain acts of jurors may be deemed irregular and even reprehensible, they may not be sufficiently culpable to disturb their verdict.

Use of Liquors by Jurors.—As to indulgence in liquors some old cases require total abstinence. The modern rule is more liberal. The mere fact that a juror in a *civil* cause drank intoxicating liquors during an adjournment of Court, is not a sufficient legal reason for granting a new trial, unless there be suspicion of its influence upon the verdict: R. R. *v.* Porter, 32 O., 327; or unless it was supplied from an improper source: State *v.* Upton, 20 Mo., 397. See Wilson *v.* Abrahams, 1 Hill (N. Y.), 207, a leading case.

A verdict will not be set aside for such misconduct of jurors in a *criminal* or even in a capital proceeding, unless it be such as might affect their impartiality or disqualify them from the proper exercise of their legal functions: Pratt *v.* State, 56 Ind., 179; State *v.* Livingstone, 64 Io., 560; State *v.* Cucuel, 2 Vroom (N. J., 249; State *v.* Tatlow, 34 Kan., 80.

With State *v.* Tatlow contrast People *v.* Gray, 61 Cal., 164, where, during the trial, large quantities of liquors were procured and consumed by the jury immediately preceding their deliberation, and there was strong reason to believe that one juror was drunk and unable to properly discharge his duty. The verdict was set aside.

The misconduct of a juror, essential to justify a new trial, must be gross and must have resulted in probable injury to the complaining party; or, as the Court said in State *v.* Washburn, 91 Mo., 571, "to affect the verdict (guilty of felonious assault), the circumstances must, at least, be such as to create a reasonable suspicion that the drinking may have improperly influenced it."

A different conclusion was reached in certain criminal cases where a juror, *after retiring* to consider upon the verdict, left the jury room in charge of the officer, went to a grocery store, procured and drank a glass of beer, after which he returned to the jury room and participated in finding the verdict: Iowa *v.* Baldy, 17 Io., 39; Ryan *v.* Harrow, 27 Io., 494; Weiss *v.* State, 22 Oh., 486. In the latter case the Court said: "If jurors were permitted at their

pleasure to leave their retirement during their deliberations for the purpose of visiting drinking saloons, the purity of the system would be vitiated."

Where, however, the jury used intoxicating liquors *in their retirement*, the Missouri Courts refused to disturb a conviction of murder, unless the liquor be supplied from an improper source or affected the verdict. The Court said: "No Court would be warranted in receiving a verdict against a prisoner from a jury, any member of which was in the least under the influence of intoxicating liquor. But to hold that a verdict should be set aside for the use of ardent spirits by a jury, not carried to excess, when such spirits are not supplied from a source interested or calculated to bias the minds of jurors, would be establishing a rule which would result in no practical good and prove very burdensome to the parties:" State *v.* Barber, 74 Mo., 292.

On the other hand, in Leighton *v.* Sargent, 31 N. H., 118, the use of brandy as a beverage by jurors, in the jury room, while deliberating upon their verdict, was held to furnish a sufficient cause for granting a new trial, although the quantity drunk be small and no indications are shown and no suspicions are entertained by the other jurors that the jurors who partook of it are under the influence of spirituous liquors, and the liquor is furnished by the attending officer, at the request of the jurors, the excuse being illness.

This same State holds, however, that a verdict will not be disturbed because a juror has privately taken in an ante-room, apart from and without the knowledge of his fellows, as a medicine previously prescribed by his physician, for the relief of a disease under which he was manifestly laboring, a small quantity of spirituous liquor during the deliberations of the jury: Gilmanton *v.* Ham, 38 N. H., 108. In this case his decision had been finally made before taking.

Same result in Nichols *v.* Nichols, 136 Mass., 256. See also U. S. *v.* Gilbert, 21 Sum. (U. S.), 19; Roman *v.* State, 41 Wis., 312; O'Neill *v.* R. R. Co., 45 Io., 546.

Influence and Effect of Favors, etc.—As a general rule, refreshments procured without the consent of the Court subject the jurors to punishment, but do not vitiate their verdict. But where the sheriff interested in a reward treated the jurors: People *v.* Myers, 70 Cal., 582; and where the successful defendant paid the expenses of a jury of viewers, they knowing the fact: Dond *v.* Guthrie, 13 Ill. App., 653; and where an attorney arranged a surprise party for a juror: Stafford *v.* Oskaloosa, 11 N. W. Rep., 668; and where the prevailing party at the request of two jurors loaned them his horse and buggy to convey them home: Ensign *v.* Harney, 15 Neb., 330; *aliter* Hudgins *v.* State, 61 Ga., 182; Bonnett *v.* Glattfeldt, 120 Ill., 166—the several verdicts were set aside, because of the flagrant breach of duty on the part of the jurors and parties, although they may have acted without thought of misconduct.

Johnson *v.* Greim, 17 Neb., 447, does not conflict with Ensign *v.* Harney, *supra*. The jury dined with the defendant only because it was the only convenient place, the bailiff paying for the meal and the defendant having no conversation with the jury. Upon this subject

see exhaustive opinion by C. J. SHAW, Com. *v.* Roby, 12 Pick. (Mass.), 496.

The stringent rule that favors of an interested party will nullify a verdict, has not always been enforced. In Patton *v.* Mfg. Co., 11 R. I., 188, where plaintiff and his sons entertained a jury of viewers, but there was no apparent intention to predispose the jury or influence them in favor of them or against the defendant, the Court refused to disturb the verdict, saying "there must be strong preponderance of evidence against it," and it was not so shown: *Similiter* Carlisle *v.* Sheldon, 38 Vt., 440. Where the inhabitants of a town, a party to the suit, furnished food and drink to a jury, but acted within the limits of ordinary hospitality, without any improper design or improper influence on the verdict, the verdict was upheld: Carlisle *v.* Sheldon, 38 Vt. See Eakin *v.* Morris Co., 24 N. J. L., 538.

Sleeping of Jurors.—The fact that a juror was asleep while a witness was testifying or an attorney was making his argument, it not appearing that the Court's attention was called to it, will not justify a new trial. C. J. MAXWELL said the attorney "should have called the attention of the Court to the juror's condition; having failed to do so he cannot afterward complain:" Scott *v.* Waldeck, 12 Neb., 5, McClary *v.* State, 75 Ind., 260.

Reading of Newspapers by Jurors.—Such acts will not affect their verdict, unless they contain influential or prejudicial reports or comments upon the case. The fact that two jurors in a homicide trial read a newspaper report of the preceding evidence in no sense calculated to influence their decision: U. S. *v.* Reid, 12 How., 361; or that affiant is informed and believes that newspapers were left in the jury room and read by the jury who convicted him of murder: People *v.* Williams, 24 Cal., 31; State *v.* Cucuel, 2 Vroom, 249; or that the jury used a newspaper containing a portion of the judge's charge, if the evidence of that fact depends on the affidavit of a juror: Com. *v.* Haines, 15 Phila., 363; will not vitiate the verdict, the Court saying "solemn and deliberate verdicts must not be set aside without substantial reasons."

In People *v.* McCoy, 71 Cal., 395; Carter *v.* State, 9 Lea (Tenn.), 440; Walker *v.* State, 37 Tex., 366, the rule was more strictly enforced. C. J. DEADERICK, in the Tennessee case, said "the comments here were calculated to prejudice the defendant, and it is well settled that if facts are illegally before the jury, which may have prejudiced the prisoner, he is entitled to a new trial."

Communications with Strangers.—The casual and involuntary hearing by jurors of reprehensible remarks of others, provided the jurors do not show approval and are not influenced by them, will not taint a verdict: Brake *v.* State, 4 Baxt., Tenn., 361; Pettibone *v.* Phelps, 13 Conn., 445. See especially Clement *v.* Spear, 56 Vt., 401; and this rule holds whether the cause be civil or criminal, a capital felony or otherwise: People *v.* Boggs, 20 Cal., 432; Com. *v.* Roby, 12 Pick., 496. A substantial reason for the rule is assigned by J. HOGEBOOM in Hager *v.* Hager, 38 Barb. (N. Y.), 92: "From the very mode of administering justice in our courts, jurors are in almost every case necessarily, more

or less, brought into contact with bystanders or strangers to the controversy, and we must be careful not to countenance merely fanciful or imaginary notions of prejudice to the parties resulting therefrom."

Communications with Witnesses.—When the jury communicate with witnesses in the suit, the rule is invoked in all its rigidity. See Odle *v.* State, 6 Baxt. (Tenn.), 159; State *v.* Hascall, 6 N. H., 352.

A new trial will result where the jury re-examined in the jury room a witness without the consent of the court or parties: Luttrell *v.* R. R. Co., 18 Mon. (Ky.), 291; and, although he may repeat verbatim his former testimony: Meil *v.* Abel, 24 Wend. (N. Y.), 185, or where, without the knowledge and consent of the Court and parties the jury visit with the witness the place in dispute, for the purpose of information: Deacon *v.* Shreve, 22 N. J. L., 176; Tyrrell *v.* Bristow, E. C. L. R., 433. It is nothing less than *ex parte* examination of evidence, and the extent of the influence is unknown.

Examination of Books of Law.—Where the jury after retiring for deliberation obtained from the bailiff, for consultation, a copy of Revised Statutes, without the knowledge and consent of Court or counsel, the criminal conviction was nullified: State *v.* Smith, 6 R. I., 33. Jurors are the sole ultimate judges of fact, but must receive the law applicable to the case solely from the publicly-given instructions of the Court. In this way the Court and jury are made responsible for errors, each in its own appropriate sphere. In Burrows *v.* Unwin, 3 C. & P., 310, Lord TENDERDEN said, "The regular way is for the jury to come into court and state their questions and receive the law from the Court."

But the mere presence of law books in the jury room will not vitiate the verdict unless the jury were influenced by them: State *v.* Hopper, 71 Mo., 425. See Williams *v.* People, 24 Cal., 31.

Communications with Judges.—Where a justice merely entered the jury room in the absence of the parties and counsel, and while the jurors were deliberating: State *v.* Harrington, 27 Kan., 414, or where the judge wrote an answer to a written question from the jury without the knowledge of either party: Cook *v.* Lovell, 11 Io., 80; Sargent *v.* Roberts, 1 Pick., 341; State *v.* Alexander, 66 Mo., 148; State *v.* Patterson, 45 Vt., 308; Plunkett *v.* Appleton, 51 How. Pr. (N. Y.), 469; or where an associate judge, without the knowledge of counsel, entered the jury room at the jurors' request, to explain the charge of the Court, during a temporary adjournment: Kirke *v.* State, 14 Ohio Rep., 511. In each instance the judgment was reversed.

A judge has no more right to communicate with the jury or invade their sanctity after they have retired than any other person, and his entrance can be regarded only in the same light as the entry of any third person. See, *aliter*, Allen, Cummings & Co. *v.* Aldrich, 29 N. H., 63; Goldsmith *v.* Solomons, 2 Stohl (S. C.), 296; People *v.* Kelley, 94 N. Y., 526.

Communications with Parties or Their Friends.—Where a juror, after a conversation with a third person prejudicial to the interest of the unsuccessful party, received from the prevailing party a pamphlet

confirming the truth of the conversation: Hamilton *v.* Pease, 38 Conn., 115; or where a juror having interviewed the attorney of a party expressed dissatisfaction with the sealed verdict when opened in court, and a larger verdict was finally returned: Martin *v.* Morelock, 32 Ill., 485; or where a juror during a recess asked the defendant for a printed copy of the evidence adduced at a former trial, and his conclusion was guided thereby: Heffron *v.* Gallupe, 55 Me., 563; or where a juror received information voluntarily given by a friend of the successful party, but such improper influence was not exerted at the request or knowledge of such party, —the verdicts were set aside. New York, in Nesmith *v.* Ins. Co., 8 Abb. Pr., 141, follows the Maine rule, that the appearance of evil should be avoided as much as the evil itself. Where, however, the communications between jurors and successful parties can be explained, and are free from prejudicial influence, the verdict will not be disturbed; as where a witness stated that he saw two jurors converse with the plaintiff; but the juror swore that the interview had no reference to the suit: Borland *v.* Barrett, 76 Va., 128; or where defendant merely rode with the jury and counsel, on both sides, with tacit consent of plaintiff: Hahn *v.* Miller, 60 Io., 96: Bonnett *v.* Glattfeldt, 120 Ill., 166, *aliter*, Ensign *v.* Harney, 15 Neb., 330; or where a juror makes a jocose remark to the successful party: Catterlin *v.* Frankfort City, 87 Ind., 45; or where a juror was addressed by the successful party, who did not know that he was a juror, and on being informed immediately desisted: Wise *v.* Bosley, 32 Io., 34.

Separation of Jury.—Although in modern times the ancient restriction has yielded to a more enlightened reason, yet no rule tending to insure the impartial administration of justice and the purity of jurors has in the slightest degree been abandoned or impaired. Before deliberation separation of jurors is a matter of judicial discretion in civil causes and upon indictments for misdemeanors, but only under cautious instructions as to decorum during the interim. But even though the jury disobey such instructions, such misconduct will not provoke a new trial, provided the rights of the parties are not injured: Morrow *v.* Co. of Saline, 21 Kan., 484; Downer *v.* Baxter, 30 Vt., 467; Stancell *v.* Kenan, 33 Ga., 56.

This rule is extended in certain States to include even felonies, capital and otherwise. In Pennsylvania (burglary), and in Indiana, South Carolina, Georgia, Kansas, Minnesota, New York, Ohio, Connecticut, Illinois and Iowa (indictments for murder), the jury may separate with the permission of the Court or defendant without *per se* vitiating the verdict.

The better rule, however, as to felonies is that the jury may not separate after being sworn and before bringing in their verdict. See Wesley *v.* State, 11 Hump. (Tenn.), 502. In Wiley *v.* State, 1 Swan, 256, it was held that the consent of the prisoner should not be asked or taken in any case of felony, capital or otherwise; and in Peiffer *v.* Com., 15 Pa., 468, C. J. GIBSON says: "Who dare refuse to consent when the accommodations of those in whose hands are the issues of his life or death are involved in question?"

Separation in felonies is ground for a new trial according to the following cases unless it appears positively that such separation was not attended by improper conduct of the jurors, or by any circumstance calculated to exert an improper influence on the verdict: State *v.* Dolling, 37 Wis., 396; Riley *v.* State, 95 Ind., 446; State *v.* Kendricks, 32 Kan., 559; Cartwright *v.* State, 12 Lea (Tenn.), 620. See opinion of C. J. COLE, in Crocket *v.* State, 52 Wis., 211.

As a general rule separation is not allowed in any case after the jury retire to find their verdict until it is found and delivered in open court. However, in Armheler *v.* Lieberman, 33 O. St., 77, where the jury separated after retirement, induced by a sudden alarm of fire in the near vicinity of the jury room; and in State *v.* Conway, 23 Minn., 291, where a juror left the jury room, walked through a long hall into a crowded court room and asked the judge a question, these acts were not deemed sufficient to vitiate the verdict made after reassembling.

Separation of jurors after sealing their verdict is discretionary with the Court in civil cases, and in some jurisdictions in criminal prosecutions, and should the jury separate after verdict sealed, without permission of the Court, it will not be disturbed where it appears that there was no intentional wrong or cause to suspect some abuse: Leas *v.* Cool, 68 Ind., 166; Welch *v.* Welch, 9 Rich. (S. C.) L., 133; Evans *v.* Foss, 49 N. H., 490; Brown *v.* McConnell, 1 Bibb (Ky.), 265; State *v.* Engle, 13 O., 490; Com. *v.* Carrington, 116 Mass., 39; Jarrell *v.* State, 58 Ind., 293. See also Silvey *v.* State, 71 Ga., 552; Clayton *v.* State, 100 Ind., 201.

May a Jury Seal a Verdict on Sunday?—It is so held in True *v.* Plumley, 36 Me., 466, and the weight of authority is that the jury may deliberate, write out, seal up, or deliver to the Court their verdict on Sunday: Hoghtaling *v.* Osborn, 15 Johns., 119; Huidekoper *v.* Collins, 3 Watts, 56; State *v.* Fenlason, 78 Me., 495; Webber *v.* Merrill, 34 N. H., 202; State *v.* Rickets, 74 N. C., 187.

Receiving Evidence Out of Court.—Such misconduct, if prejudicial to the parties, will vitiate the verdict. Where the jury experimented to test the transmission of sound, or the size of shoe tracks in running: Jim *v.* State, 4 Hump., 289; or took into the jury room a pistol not proved to have been the weapon used, to experiment: Yates *v.* People, 38 Ill., 536; or put on worn-out shoes to determine the character of tracks made in sawdust, though done at the suggestion of appellant: State *v.* Sanders, 68 Mo., 202; or where the jury, without the permission of the Court, visited the *locus in quo:* Ortman *v.* R. R. Co., 32 Kan., 419; Winslow *v.* Morrill, 68 Me., 362. See also State *v.* Brown, 64 Mo., 367. Indianapolis *v.* Scott, 72 Ind., 196; or where jurors make evidential statements to their fellows, based on personal knowledge as that a juror knew a female witness was unchaste or unworthy of belief; Auschecks *v.* State, 6 Tex. Ap., 524; or that the plaintiff had convinced him of the justice of his case: Ritchie *v.* Holbrook, 7 S. & R., 458; or that the defendant had once stolen a hog: Booley *v.* State, 4 Yerg. Tenn., 111 — in all these cases the verdicts were set aside.

Jurors are sworn to well and truly try the matters submitted to them

in the case and a true verdict give in accordance with the law and evidence, that is, the sworn evidence in open court, under the safeguards of the law and open to cross-examination and liable to be met with countervailing proof by the party affected by it.

Use of Papers and Books in the Jury Room.—It is useless to cite authorities to show that the pleadings in the case, judicial instructions, itemized accounts of claims and the like, referred to but not offered in evidence, and all papers received in evidence, may be examined by the jury while deliberating.

As to depositions, the general rule excludes them; for as C. J. TILGHMAN, in Alexander *v.* Jameson, 5 Binney, 238, says, it would be "unequal that while the jury were not permitted to call before them the witnesses who had been examined in court, they should take with them the depositions of other witnesses not examined in court." But see Iowa Revis. Code, 1887; Haregrove *v.* Millington, 8 Kan., 321. Where papers not in evidence, as a bill of exceptions to a former trial, are taken into the jury room: Munde *v.* Lambie, 125 Mass., 367; or a letter attached to a deposition: Toohy *v.* Sarvis, 78 Ind., 474; or judges' minutes or notes of the trial: Meil *v.* Abel, 24 Wend., N. Y., 185; or an atlas without permission of the Court: State *v.* Lautz, 23 Kan., 728; State *v.* Hartman, 46 Wis., 248; or scientific works: State *v.* Gillick, 10 Ia., 98, the verdicts were set aside.

Improper Procedure in determining upon a Verdict.—Verdicts obtained by chance or drawing of lots: Mitchell *v.* Ehle, 10 Wend., 596; Livy *v.* Brannan, 39 Cal., 485; Codes of Ark. and Tex., or quotient verdicts from marking, aggregation and division: Johnston *v.* Husband, 22 Kan., 277, will always be set aside, if there was a *previous* agreement to abide by the result whatever it may be. This is the test.

C. J. PARK in Haight *v.* Hoyt, 50 Conn., 584, says: "This mode of arriving at a verdict is reprehensible, to say the least, for it is hardly possible that an honest result could be thus obtained. Some jurors would mark a much larger sum than their candid judgment would dictate in order to make up the expected deficiency of others, and so the honest jurors would be deceived and a dishonest verdict obtained."

See also Crabtree *v.* State, 3 Sneed (Tenn.), 302.

If merely the mode is used, but the result is freely assented to *afterward* by each juror, the verdict will not be impeached: Tinkle *v.* Dunivant, 16 Lea (Tenn.), 503; Roy *v.* Coings, 112 Ill., 656; Miller *v.* St. Louis, 5 Mo. Ap., 471.

If the jury suffer their verdict to be coerced or restrained by the judge or any person it cannot stand, for it is not the result of unrestrained freedom, deliberation and judgment: Slater *v.* Mead, 53 How. Pr. (N. Y.), 57; People *v.* Williams, 24 Cal., 31.

Effect of Misconduct—Waiver.—A party possessing information or knowledge of a juror's misconduct, or participating in it, cannot speculate upon the result and complain when the verdict brings disaster to his interests. But where counsel had his attention called to the fact that a juror was reading a newspaper, Bullinger *v.* People, 95 Ill., 394; or where defendant was informed that a juror asked defend-