Montana Law Review

Volume 28
Issue 1 *Fall 1966*

Article 9

7-1-1966

New Trial: Use of Affidavits from Jurors To Impeach the Verdict (Goff v. Kinzle, Mont. 1966)

Brent Reed Cromley
University of Montana School of Law

Follow this and additional works at: https://scholarworks.umt.edu/mlr

Part of the Law Commons
Let us know how access to this document benefits you.

Recommended Citation
Brent Reed Cromley, *New Trial: Use of Affidavits from Jurors To Impeach the Verdict (Goff v. Kinzle, Mont. 1966)*, 28 Mont. L. Rev. (1966).
Available at: https://scholarworks.umt.edu/mlr/vol28/iss1/9

This Legal Shorts is brought to you for free and open access by ScholarWorks at University of Montana. It has been accepted for inclusion in Montana Law Review by an authorized editor of ScholarWorks at University of Montana. For more information, please contact scholarworks@mso.umt.edu.

A determination of the fairness of any distribution is likely to be influenced by the needs of the stepchildren. For instance, they may have been dependent on the stepparent because of age or physical disability. Thus, it might seem unfair to evict a minor stepchild from decedent's family home in favor of a distant relative who has no need for it himself. Also, the death of the stepparent may place heavy burdens on a stepchild who is left with a moral obligation to wind up the decedent's affairs.

Another consideration would be the nature of the property to be distributed. If decedent's property was largely obtained from the stepchild's natural parent, it would seem manifestly unfair to exclude the stepchild. The same would be true of property developed or acquired through a joint family effort in which the stepchild participated. However, giving stepchildren a share in the family heirlooms or other sentimental property might lead to additional difficulties in an area already a frequent source of family argument.

The instant case was clearly erroneous in its legal analysis. Further, if the case is understood to stand for the proposition that stepchildren inherit as natural children, it is unacceptable as a general rule of law. However, if the decision had been based on a rule taking into consideration the special circumstances of each case, the result would be quite acceptable, since the decedent had no natural children and he raised the stepdaughter as if she were his own.

JOSEPH T. SWINDLEHURST.

NEW TRIAL: USE OF AFFIDAVITS FROM JURORS TO IMPEACH THE VERDICT.—After a verdict for defendant in an auto negligence case, counsel for plaintiff submitted affidavits from jurors showing that the foreman had made an independent investigation of the accident scene. *Held:* Affidavits of jurors that bring to the court's attention facts of irregularity and misconduct are competent to sustain a motion for a new trial. *Goff v. Kinzle,* 417 P.2d 105 (Mont. 1966).

An English jury sitting in 1785 tossed a coin to determine a verdict. Chief Justice Lord Mansfield used the occasion to expand the doctrine of *nemo turpitudinem suam allegans audietur*[1] by declaring that the verdict could not be disturbed solely on the basis of affidavits from jurors. Instead, to show jury misconduct "the Court must derive their knowledge from some person having seen the [misconduct] through a window, or by some such means."[2]

The Mansfield Rule was carried over to the United States and ap-

[1]No man alleging his own infamy will be heard. Also expressed as *allegans suam turpitudinum non est audiendus;* one who alleges his own infamy is not to be heard.

[2]Vaise v. Delaval, 1 Term Rep. 11, 99 Eng. Rep. 944 (K.B. 1785).

Published by ScholarWorks at University of Montana, 1966

plied to a wide variety of jury misconduct.[3] In 1866 Justice Cole modified the restriction against jurors' affidavits by stating what is now called the Iowa Rule:

> [A]ffidavits 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 inhere 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 the 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 instruction 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.[4]

The common law Mansfield Rule is still the majority rule in the United States,[5] although criticized by legal theoreticians.[6] Several states have modified the Mansfield Rule by statute.[7]

Decades of litigation have yielded many arguments supporting and attacking the Mansfield Rule. Common arguments for exclusion of jurors'

[3]For example, courts have said that they would exclude affidavits of jurors tending to show that a juror was intoxicated, Snyder v. Town of Chinook, 48 Mont. 484, 138 Pac. 1090 (1914); that the verdict was a quotient verdict, McDonald v. Pless, 238 U.S. 264 (1915); that a juror had taken an unauthorized view of the scene of the accident in question, Maffeo v. Holmes, 47 Cal.App.2d 292, 117 P.2d 948 (1941); that the jury had made a mistake in its calculation of damages, Bateman v. Donovan, 131 F.2d 759 (9th Cir. 1943); that a juror had concealed prior prejudice during the *voir dire* examination, Kollert v. Cundiff, 50 Cal.2d 768, 329 P.2d 897 (1958); that jurors read a newspaper article prejudicial to a party, Schaff v. Shaules, 137 Mont. 357, 352 P.2d 265 (1960); that the jury had misunderstood the instructions of the court, Dawson v. Eldredge, 84 Idaho 331, 372 P.2d 414 (1962).

[4]Wright v. Illinois & Mississippi Telegraph Co., 20 Iowa 195, 210 (1866).

[5]66 C.J.S. *New Trial* §169(b) (1950).

[6]McCormick, Evidence 148 (1954); 8 Wigmore, Evidence §2354 (McNaughton rev. ed. 1961). The American Law Institute has proposed a rule similar in substance to the Iowa Rule:

> Whenever any act, event or condition known to a member of a petit or grand jury is a subject of lawful inquiry, any witness, including every member of the jury, may testify to any material matter, including any statement or conduct or condition of any member of the jury, whether the matter occurred or existed in the jury room or elsewhere, and whether during the deliberations of the jury, or in reaching or reporting its verdict or finding, or in any other circumstances, except that upon an issue as to the validity of a verdict or indictment no evidence shall be received concerning the effect which anything had upon the mind of a juror as tending to cause him to assent to or dissent from the verdict or indictment or concerning the mental processes by which it was reached. Model Code of Evidence rule 301 (1942).

[7]For example, Cal. Civ. Proc. Code §657(2) provides:

> [W]henever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors.

Identical statutes have been adopted by Idaho (Idaho Code Ann. §10-602 (1948)); Montana (Revised Codes of Montana, 1947, §93-5603(2)); North Dakota (N.D.R.Civ.P. 59(b)); South Dakota (S.D.Code §33.1605 (Supp. 1960)); Utah (Utah R.Civ.P. 59(a)2); and Washington (Wash. Rev. Code Ann. §4.76.020 (1962)). Kansas has adopted the Uniform Law of Evidence which embodies the same concept as the Iowa Rule and which is discussed later in this article. Kan. Gen. Stat. Ann. §§ 60-441, 60-443, 60-444 (1964).

affidavits are that public policy demands stability in verdicts,[8] that jurors' deliberations must be private or frankness and freedom of discussion are prevented,[9] that prolonged litigation should be avoided,[10] and that the verdict being the sum of the conclusions and beliefs of the jurors, they should not later be heard to deny it.[11]

Other arguments for exclusion are based upon the vulnerability of verdicts which would result. Thus courts argue that if affidavits of jurors were allowed, doors would be opened to inquiry and harassment of jurors to determine whether misconduct occurred;[12] parties would attempt to bribe or otherwise induce jurors to submit affidavits showing misconduct which did not actually occur;[13] and a juror himself could later destroy a verdict with which he disagreed.[14] Courts often state that even when misconduct has occurred, a juror is not capable of knowing whether the misconduct influenced his verdict or not.[15]

Jurists advocating admission of affidavits from jurors as a basis for a new trial claim that only history—not logic or reason—supports the Mansfield Rule.[16] They argue that the jury must base its findings on evidence presented in the courtroom or authorized by the court;[17] that public policy demands jury misconduct the discouraged;[18] and that the best evidence is excluded because the jury is most likely to know the facts regarding the misconduct.[19] To rebut arguments on the vulnerability of verdicts, opponents of the Mansfield Rule point out that admission of jurors' affidavits doesn't necessarily mean a new trial will be granted: the evidence must still sustain a burden of proof within the discretion of the trial judge.[20] Tampering with a juror is not a problem because overt acts of misconduct are accessible to the knowledge of all the jurors—'it is useless to tamper with one, for the eleven may be heard."[21] The Iowa Rule is urged as a replacement for the Mansfield Rule on the ground that even if not competent for proving matters which inhere in the verdict, jurors' affidavits are as dependable as any other evidence for showing independent facts.[22]

[8]Sopp v. Smith, 59 Cal.2d 12, 377 P.2d 649, 653 (1963); Sutton v. Lowry, 39 Mont. 462, 104 Pac. 545, 548 (1909).

[9]*McDonald v. Pless*, *supra* note 3, at 267-68; *Maffeo v. Holmes*, *supra* note 3, at 950.

[10]*Sopp v. Smith*, *supra* note 8, at 653.

[11]*Bateman v. Donovan*, *supra* note 3, at 765; *Kollert v. Cundiff*, *supra* note 3, at 901.

[12]*McDonald v. Pless*, *supra* note 3, at 268; *Kollert v. Cundiff*, *supra* note 3, at 900.

[13]State v. Beesskove, 34 Mont. 41, 85 Pac. 376, 378 (1906); State v. Kociolek, 20 N.J. 92, 118 A.2d 812, 815, 58 A.L.R.2d 545, 551 (1955).

[14]Sanitary Dist. of Chicago v. Cullerton, 147 Ill. 385, 35 N.E. 723, 724 (1893); *Sopp v. Smith*, *supra* note 8, at 653.

[15]*Maffeo v. Holmes*, *supra* note 3, at 951.

[16]*Sopp v. Smith*, *supra* note 8, at 652-53.

[17]Peppercorn v. City of Black River Falls, 89 Wis. 38, 61 N.W. 79, 80 (1894).

[18]Kincaid v. Wade, 196 Kan. 174, 410 P.2d 333, 337 (1966).

[19]*Sopp v. Smith*, *supra* note 8, at 653.

[20]*Ibid.*

[21]Mattox v. United States, 146 U.S. 140, 148-49 (1892).

[22]*Ibid.*; *Wright v. Illinois & Mississippi Telegraph Co.*, *supra* note 4, at 211-12.

In Montana, the granting of a new trial is a statutory remedy.[23] The REVISED CODES OF MONTANA, 1947, Section 93-5603(2), provides for a new trial on the ground of jury misconduct. It specifically states that when the verdict was reached by a resort to a determination of chance, the misconduct may be proved by the affidavit of any one of the jurors.[24] Until 1966 the Montana Supreme Court had consistently interpreted the statute as excluding juror affidavits except when the motion for a new trial was based upon a chance verdict.[25]

But in the instant case, the Supreme Court said that the exclusionary rule is not applicable to affidavits which bring to the court's attention facts of irregularity and misconduct.[26] The Court relied upon an earlier 1966 Montana case, *Putro v. Baker,*[27] and a 1966 Kansas case, *Kincaid v. Wade.*[28] During the trial of *Putro v. Baker* a local newspaper published an article mentioning that the defendant had pleaded guilty to a manslaughter charge arising out of the same auto collision. The trial court took defendant's motion for a mistrial under advisement until the verdict was rendered for the plaintiff. After polling the jury on the effect of the article upon the verdict, the trial court decided that it had not been prejudicial. The Supreme Court reversed and remanded the cause for a new trial, saying that a mistrial should have been granted because the article was bound to have prejudicial effect.[29] Evidence from jurors impeaching the verdict was not a question.

The jury misconduct in the Kansas case, *Kincaid v. Wade,* was similar to that of the instant case. However, Kansas is the only state to have adopted the Uniform Law of Evidence.[30] The Uniform Law does not allow evidence showing the effect of any conduct or event upon the mental processes of a juror but specifically provides that a juror is not excluded from showing "conditions or occurrences either within or outside of the jury room having a material bearing on the validity of the verdict."[31]

California and Washington, with identical statutes,[32] have interpreted them differently. In fact situations essentially identical to that of *Goff v. Kinzle,* California will not allow jurors' affidavits as grounds

[23]State *ex rel.* Smith v. District Court, 55 Mont. 602, 179 Pac. 831, 832-33 (1919); Komposh v. Powers, 75 Mont. 493, 244 Pac. 298, 305 (1926).

[24]The identical California statute is quoted *supra* note 7. (REVISED CODES OF MONTANA are hereinafter referred to as R.C.M.).

[25]*State v. Beesskove, supra* note 13; State v. Lewis, 52 Mont. 495, 159 Pac. 415 (1916); Hough v. Shishkowsky, 99 Mont. 28, 43 P.2d 247 (1935); State Highway Comm'n v. Manry, 143 Mont. 382, 390 P.2d 97 (1964).

[26]Instant case at 108.

[27]147 Mont. 139, 410 P.2d 717 (1966).

[28]196 Kan. 174, 410 P.2d 333 (1966).

[29]*Putro v. Baker, supra* note 27, at 723.

[30]9A UNIF. LAWS ANN. 589 (1965). The Kansas statute is cited *supra* note 7.

[31]UNIFORM RULES OF EVIDENCE 41, 44.

[32]These states' respective statutes are cited *supra* note 7.

Cromley: New Trial

for a new trial.[33] This is true even when it is apparent that a private investigation of an auto accident scene has provided information prejudicial to one party. In *Maffeo v. Holmes,*[34] jurors' affidavits disclosed that a private investigation had helped them to "understand how Mrs. Holmes (the successful defendant) could have driven where she drove without seeing deceased."[35] California does have a judicial exception to the statute allowing affidavits from jurors where they establish bias or prejudice of a juror concealed during *voir dire.*[36] In *Williams v. Bridges,*[37] the court recognized this exclusionary rule and the California statute. However, it justified admission of jurors' affidavits to show concealed jury bias on the ground that there were no California cases holding otherwise on that specific instance of misconduct.[38] In *Maffeo v. Holmes* the court distinguished this exception, explaining that bias concealed during *voir dire* necessarily affects the verdict, whereas other forms of misconduct occurring after the jury has been impaneled require a showing that the misconduct improperly influenced the verdict.[39]

Washington courts have accepted the Iowa Rule.[40] *Gardner v. Malone*[41] was another auto negligence suit in which a juror made a private investigation of the accident scene. The Washington Supreme Court there explained that only when the facts alleged inhere in the verdict do they impeach the verdict; if the facts do not inhere in the verdict, "it then becomes a matter of law for the trial court to decide the effect the proved misconduct could have had upon the jury."[42]

It is submitted that the instant case is not supported by the law of Montana. Prior interpretations of Revised Codes of Montana, 1947, Section 93-5603(2) have strictly construed the statute and allowed prior affidavits only when the verdict was arrived at by chance. The Court failed to justify its decision in any meaningful way, and left open the question as to how the statute would be construed in future cases.

If the exception to the exclusionary rule is not to be limited to verdicts arrived at by chance, the reference thereto is meaningless and can lead only to confusion.[43] This confusion was amplified in the latest

[33]*Kollert v. Cundiff, supra* note 3. In 1962, California did grant a new trial solely on the basis of affidavits from jurors showing that they had made a private investigation of the auto accident scene in litigation. Sopp v. Smith, 22 Cal.Rptr. 436 (1962). This decision was reversed on appeal, one justice dissenting. *Sopp v. Smith, supra* note 8.

[34]*Supra* note 3.

[35]*Id.* at 950.

[36]Williams v. Bridges, 140 Cal.App. 537, 35 P.2d 407 (1934); *Maffeo v. Holmes, supra* note 3; *Kollert v. Cundiff, supra* note 3; State Dep't of Water Resources v. Natomas Co., 49 Cal.Rptr. 64 (1966).

[37]*Supra* note 36.

[38]*Williams v. Bridges, supra* note 36, at 409.

[39]*Maffeo v. Holmes, supra* note 3, at 951.

[40]Dibley v. Peters, 200 Wash. 100, 93 P.2d 720 (1939); Gardner v. Malone, 60 Wash.2d 836, 376 P.2d 651 (1962).

[41]*Supra* note 40.

[42]*Gardner v. Malone, supra* note 40, at 654.

[43]Besides the various interpretations by California, Montana and Washington discussed

Published by ScholarWorks at University of Montana, 1966

reported case on the point, *Schmoyer v. Bourdeau*.[44] The Court there held that jurors' affidavits *could* be used to impeach a verdict on other grounds than that specified in 93-5603(2). However, the Court did *not* say on what conditions this would be allowed. The Court further stated that they were not overruling their previous holdings.

In view of the confusion necessarily arising from the two latest cases, it is desirable that the law be clarified. It is submitted that the relevant sections of the Uniform Law of Evidence be considered. These sections provide as follows:

> *Rule 41. Evidence to Test a Verdict or Indictment.*—Upon an inquiry as to the validity of a verdict or an indictment no evidence shall be received to show the effect of any statement, conduct, event or condition upon the mind of a juror as influencing him to assent to or dissent from the verdict or indictment or concerning the mental processes by which it was determined.
>
> *Rule 43. Testimony by a Juror.*—A member of a jury sworn and empanelled in the trial of an action, may not testify in that trial as a witness.
>
> *Rule 44. Testimony of Jurors Not Limited Except by These Rules.*—These rules shall not be construed to (a) exempt a juror from testifying as a witness, if the law of the state permits, to conditions or occurrences either within or outside of the jury room having a material bearing on the validity of the verdict or the indictment, except as expressly limited by Rule 41; * * *

These rules do not require, and in fact do not allow, an impeaching juror to recognize and relate the effect of any misconduct upon his decision in the case. The jury then becomes merely an additional source —albeit a very important one—from which evidence of misconduct during a trial can be obtained. Able to consider *all* the evidence, the court can make a more enlightened and just ruling on a motion for a new trial.

BRENT REED CROMLEY.

---

in the article, consider the interpretations of the four other states with the identical statute (statutes cited *supra* note 7):

Idaho has excluded jurors' affidavits except when the verdict was the result of chance. *Dawson v. Eldredge, supra* note 3; Robinson v. White, 414 P.2d 666 (Idaho 1966). North Dakota, without citing its statute, accepted the Iowa Rule in James Turner & Sons v. Great Northern Ry. Co., 67 N.D. 347, 272 N.W. 489 (1937), but discussion in a later case is unclear and implies a more exclusionary position. Grenz v. Werre, 129 N.W.2d 681, 691-93 (N.D. 1964).

South Dakota has consistently excluded affidavits from jurors except when the verdict was reached by chance. Brown v. Draeger, 51 S.D. 190, 212 N.W. 869 (1927). But compare the dictum in Elfert v. Witt, 73 S.D. 4, 38 N.W.2d 445, 448 (1949). Utah strictly interprets its statute. Hepworth v. Covey Bros. Amusement Co., 97 Utah 205, 91 P.2d 507 (1939); Smith v. Barnett, 17 Utah 2d. 240, 408 P.2d 709 (1965).

[44] 23 State Rep. 781 (Mont. 1966).