

COMMENTS

IMPEACHMENT OF JURY VERDICTS

The dogma that "a juror may not impeach his own verdict"¹ has been subjected to several judicial and legislative inroads. Nevertheless, it remains in most cases the major obstacle to impeachment. If, as recommended by many commentators,² these inroads grow, courts will have to deal more frequently with the problem of what kinds of jury misconduct, when proven, constitute grounds for impeachment. This problem has yet to receive systematic consideration in light of the functions of the jury³ and the policies favoring stability of verdicts and fairness to individual litigants. However, since exclusion of jurors' testimony severely limits the opportunities of a court to consider the substantive issue, it is necessary first to review the admissibility question: the approaches which have been taken to the exclusionary rule, and the persuasiveness of their underlying rationales.

As originally laid down by Lord Mansfield,⁴ the exclusionary rule was a flat prohibition of jurors' testimony of any kind of jury misconduct. Under this approach, courts have even excluded jurors' testimony of a bribe offered outside the juryroom.⁵ Although the original justification of the rule was the maxim that no one should be a witness to his own misconduct,⁶ courts have generally excluded the testimony of jurors who were not involved in the misconduct alleged.⁷ The rule has also been applied to jurors' testimony concerning violations of jury privacy,⁸ although these cases often do not involve misconduct by any juror. Moreover, Lord Mansfield and several courts would admit eaves-

¹ 8 Wigmore, Evidence § 2345 (3d ed., 1940).

² E.g., 8 Wigmore, Evidence §§ 2345, 2352, 2353 (3d ed., 1940); Chance and Quotient Verdicts, 37 Va. L. Rev. 849 (1951); Model Code of Evidence, Rule 301. But see Uniform Rules of Evidence, Rule 44.

³ See note 61 infra.

⁴ Vaise v. Delaval, 1 T.R. 11, 99 Eng. Rep. 944 (K.B., 1785).

⁵ McKinney v. Darby, 58 Ga.App. 725, 199 S.E. 649 (1938).

⁶ For an analysis of Mansfield's misappropriation of this doctrine, see 8 Wigmore, Evidence § 2352 (3d ed., 1940). See also Smith v. Cheetham, 3 Caines (N.Y.) 57, 59 (1805) ("Are not criminals in England every day convicted, and even executed, on their own confession?").

⁷ Ramsey v. United States, 27 F.2d 502 (C.A.6th, 1928) (juror's testimony that fellow juror, in prohibition case, said he had heard that anyone could buy whiskey at defendant's house).

⁸ See, e.g., People v. Gidney, 10 Cal.2d 138, 73 P.2d 1186 (1937) (jury told by bailiff that they would be locked up all weekend unless they soon agreed, and that accused had a bad reputation with police).

droppers' testimony,⁹ even though such such testimony necessarily revealed the witness's own misconduct. Thus the rationale for the strict rule is more accurately reflected in the common phrase, "a juror cannot impeach his own verdict";¹⁰ the idea seems to be that it is reprehensible for a juror to attack a verdict which he and his fellows swore to give upon the evidence and to which they all assented.¹¹ However, other considerations are necessary to explain why this reprehensibility should be visited upon the losing party.

A second approach has been to exclude all jurors' testimony except when it reveals an "extraneous influence" resulting from breach of the formal restrictions by which courts seek to cut off jurors from any extra-judicial communications concerning the case.¹² Under this exception there are two types of cases. Sometimes the juror's testimony concerns events occurring outside the juryroom, such as his drinking with an employee of a party during recess.¹³ Here, admission of the testimony in no way inhibits deliberations by infringing on their secrecy.¹⁴ In other cases the juror's testimony reveals the intrusion of an improper communication into the juryroom, such as an inflammatory newspaper account of the trial,¹⁵ or a bailiff's discussion of the case with the jury.¹⁶ In such a case admission of the testimony might infringe on the secrecy of deliberations. In cases involving the presence of an outsider in the juryroom,¹⁷ it might be argued that the deliberations in question were not uninhibited and secret and so should not be protected from disclosure. But this argument cannot be made for all cases of extraneous influence, and in any event, admission

⁹ *Vaise v. Delaval*, 1 T.R. 11, 99 Eng.Rep. 944 (K.B., 1785) ("[Testimony would be admissible] from some other source, such as some person having seen the transaction through a window or by some such means."); *Reich v. Thompson*, 346 Mo. 577, 142 S.W.2d 486 (1940); *Wright v. Abbott*, 160 Mass. 395, 36 N.E. 62 (1894). Contra: *Central of Georgia Ry. Co. v. Holmes*, 223 Ala. 188, 134 So. 875 (1931); *State v. Kress*, 204 Iowa 828, 216 N.W. 31 (1927).

¹⁰ *McDonald v. Pless*, 238 U.S. 264, 267 (1915). The Mansfield rule does not exclude juror testimony to support a verdict under a charge by outsiders of misconduct, *Kritzer v. Citron*, 101 Cal.App.2d 33, 224 P.2d 808 (1950); *Kelley v. Call*, 324 Ill.App. 143, 57 N.E.2d 501 (1944); or to correct a verdict mistakenly reported in open court, *Fried v. McGrath*, 135 F.2d 833 (App.D.C., 1943); *Elliot v. Gilmore*, 145 Fed. 964 (E.D.Pa., 1906); or erroneously recorded by the clerk of court, *Wirt v. Reid*, 138 App. Div. 760, 123 N.Y.Supp. 706 (1910); or erroneously computed by the jury, *Kennedy v. Stocker*, 116 Vt. 98, 70 A.2d 587 (1950); *McCabe Lumber Co. v. Beaufort County Lumber Co.*, 187 N.C. 417, 121 S.E. 755 (1924).

¹¹ *Cluggage v. Swan*, 4 Binn. (Pa.) 150, 158 (1811).

¹² See cases cited in 8 Wigmore, Evidence § 2354 n.2 (3d ed., 1940). These restrictions are important, in Wigmore's view, because "the impossibility . . . of regarding jurors' actual motives and reasonings makes it the more necessary to depend on the conventional canons of behavior for confidence in the verdict." *Id.*, at § 2352.

¹³ *Callahan v. Chicago, M. & St. P. Ry. Co.*, 158 Fed. 988 (N.D. Iowa, 1908).

¹⁴ *Morgan, Maguire & Weinstein*, Cases and Materials on Evidence 806 (4th ed., 1957).

¹⁵ *Mattox v. United States*, 146 U.S. 140 (1892).

¹⁶ *Wheaton v. United States*, 133 F.2d 522 (C.A.8th, 1943).

¹⁷ *Ibid.*; *People v. Knapp*, 42 Mich. 267, 3 N.W. 927 (1879) (court official present, though silent, during entire deliberation).

of testimony concerning any occurrences inside the juryroom involves a danger of encouraging lawyers to inquire into deliberations in other cases and thus perhaps of inhibiting the free discussion of future juries. Nevertheless, despite the differing policy considerations bearing on testimony of occurrences outside and inside the juryroom, many courts have ignored the distinction: of the several cases in which a juror made an unauthorized visit to the premises or discussed the case with outsiders and later reported the event to his fellow jurors,¹⁸ only one has been found in which testimony of the report is treated differently from testimony of the event reported.¹⁹

A third treatment of the problem is the so-called "Iowa rule," which excludes all jurors' testimony of matters "which inhere in the verdict,"²⁰ or matters "resting in the personal consciousness of one juror,"²¹ and which admits jurors' testimony of "overt acts . . . accessible to the knowledge of all the jurors."²² In practice, this formulation has been given two meanings. According to a leading Kansas case, the rule admits any juror's testimony open to corroboration by the other jurors.²³ Under such a rule, a juror could testify that he or another juror expressed bias or misunderstanding of instructions during retirement.²⁴ However, the Iowa rule as more commonly applied excludes testimony of any discussion during deliberations²⁵ unless the discussion shows that some juror had personal knowledge of the case.²⁶ In the leading case, two reasons were given for this distinction: first, that to impeach for an improper discussion would "unsettle verdicts" and encourage lawyers to investigate the conduct of deliberations;²⁷ and secondly, that testimony regarding improper discussion would involve a speculative inquiry into the motives for decision—a matter "resting alone in the juror's breast."²⁸ The first reason, however, does not apply only to cases of improper discussion. And the second reason would seem

¹⁸ See, e.g., *Cappozzi v. Butterwei*, 2 N.J.Super. 593, 65 A.2d 144 (1949) (visit to premises); *City of Amarillo v. Emery*, 69 F.2d 626 (CA.5th, 1934) (discussion with outsiders).

¹⁹ *Pierce v. Brennan*, 83 Minn. 422, 86 N.W. 417 (1901).

²⁰ *Wright v. The Illinois & Mississippi Telegraph Co.*, 20 Iowa 195, 210 (1866).

²¹ *Perry v. Bailey*, 12 Kan. 539, 545 (1874).

²² *Ibid.*

²³ *Ibid.*

²⁴ 8 Wigmore, *Evidence* § 2354, at 699 (3d ed., 1940). This appears to be the rule in Texas, where a juror may testify to a discussion tending to show that he or some other juror had improper reasons for assenting. See cases cited in *Trousdale v. Texas & N. O. R. Co.*, 264 S.W.2d 489, 493-5 (Tex.Civ.App., 1953).

²⁵ *Clark v. Van Vleck*, 135 Iowa 194, 112 N.W. 648 (1907) (award of expenses not claimed in petition).

²⁶ *Douglass v. Agne*, 125 Iowa 67, 99 N.W. 550 (1904) (juror with knowledge that plaintiff had made an out-of-court statement contradicting her present position).

²⁷ *Wright v. The Illinois & Mississippi Telegraph Co.*, 20 Iowa 195, 211 (1866).

²⁸ *Id.*, at 210.

to involve a confusion between testimony of the fact of misconduct and testimony of the effect of misconduct on the verdict.

Whenever a court admits jurors' testimony of the fact of misconduct, a further problem arises, concerning proof on the issue of prejudice. It has been stated, as a general rule, that "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 to dissent from the verdict."²⁹ This formulation involves difficulties. In many cases, an act or statement of a juror can be regarded both as misconduct and as a circumstance tending to show the effect of an event on his mind. Thus the case of *Jorgensen v. York Ice Machinery Corp.*³⁰ has been regarded as a case of a majority verdict³¹ and as a case concerning the effect which news of the death of a juror's son had in inducing the jury to terminate deliberations with a majority vote.³² A common treatment of the problem has been to admit testimony of overt acts or statements tending to show the prejudicial effect of misconduct,³³ but to exclude direct testimony of the effect of misconduct on a juror's mind.³⁴ Thus a juror cannot testify that he was not influenced by a report that defendant, charged with murder in the second degree, had offered to plead guilty of manslaughter, but his testimony is admissible to the fact that the jury did not reach a conclusion, though they had deliberated more than twenty hours, until after hearing the report.³⁵ Some courts, however, have excluded testimony of overt acts tending to show the effects of misconduct on the verdict.³⁶ This proposition might be justified on the ground that the process of deliberation can be so complex as to render wholly speculative any determination of the motives behind the final decision, or that any accurate determination of prejudice would require the court to reconstruct virtually the entire course of deliberations, and perhaps also to delve into the personal make-

²⁹ Uniform Rules of Evidence, Rule 41. See also Model Code of Evidence, Rule 301.

³⁰ 160 F.2d 432 (C.A.2d, 1947).

³¹ Affidavits of Jurors as Basis for New Trial, 47 Col. L. Rev. 1373 (1947).

³² Morgan, Maguire & Weinstein, Cases and Materials on Evidence 805 (4th ed., 1957). See also *United States v. Dressler*, 112 F.2d 972 (C.A.7th, 1940) (jury not permitted to testify whether or not they had read the notation of accused's criminal record, which was on the back of fingerprint cards properly before them).

³³ *Sprinkle v. State*, 137 Miss. 731, 102 So. 844 (1925) (testimony admitted that juror changed vote to guilty after reading, in the juryroom, newspaper article on accused's criminal background).

³⁴ *Mattox v. United States*, 146 U.S. 140 (1892) (jurors read newspaper article); *Welshire v. Bruaw*, 331 Pa. 392, 200 Atl. 67 (1938) (tipstaff made coercive remarks in juryroom); *State v. McChesney*, 114 Wash. 113, 194 Pac. 551 (1921) (juror reported personal knowledge of accused). Contra: *Marshall v. North Branch Transfer Co.*, 166 Tenn. 96, 59 S.W.2d 520 (1933); cf. *United States v. Reid*, 12 How. (U.S.) 361 (1851).

³⁵ *Whitehead v. State*, 115 Neb. 143, 212 N.W. 35 (1927).

³⁶ See *State v. Kociolek*, 20 N.J. 92, 118 A.2d 812 (1955) (dictum excluding testimony that change of vote on issue of whether to let accused suffer death penalty occurred soon after a juror stated that accused had earlier been indicted for assault and battery).

up of some of the jurors. However, courts which exclude all jurors' testimony of the effect of misconduct do decide the issue of prejudice, on the basis of the probable effect of the misconduct on a typical jury.³⁷ It would seem that such an inquiry would be made somewhat less speculative by utilization of jurors' testimony; trial court discretion to limit the scope of inquiry might prevent it from becoming unmanageably broad.

The variety of approaches taken by courts to admission of jurors' testimony for impeachment purposes would seem to indicate considerable disagreement as to the strength of the competing interests involved. It has been argued that this testimony is likely to be perjured³⁸ or inaccurate.³⁹ However, there seems to be no reason to believe that jurors have more motive to lie than other witnesses. And while a juror's testimony concerning his own motives for decision may well be inaccurate, although honest, this objection would not apply to testimony concerning acts and statements in the juryroom.

In *McDonald v. Pless*,⁴⁰ the United States Supreme Court said that admission of jurors' testimony of a quotient verdict would make what was intended to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference.⁴¹

Although implementation of this policy might be argued to require only that each juror have a privilege regarding his acts and statements in the juryroom,⁴² it is plain that the privilege approach would protect jurors only from disclosure

³⁷ Prejudice would result where irregularities "were of a nature as to make it probable that they entered into the consideration of any juror when his vote was cast." *Southern Pac. Co. v. Klinge*, 65 F.2d 85 (C.A.10th, 1933). "The test is capacity of the irregular matter to influence, not whether influence in fact resulted." *Palestroni v. Jacobs*, 10 N.J.Super. 266, 272, 77 A.2d 183, 186 (1950). Each case must, of course, be decided upon its own facts. Compare *Charlton v. Kelly*, 156 Fed. 433, 438 (C.A.9th, 1907) (no prejudice found where marshall said: "What is the matter with you that you can't agree in this case? You had better call up the judge and get some more instructions."), with *State v. Adams*, 141 Ohio St. 423, 424, 48 N.E.2d 861, 862 (1943) (prejudice found and new trial granted where bailiff said: "You must reach a decision if you have to stay here for three months.").

³⁸ *Northern Pac. Ry. Co. v. Mely*, 219 F.2d 199, 202 (C.A.9th, 1954) ("All trial lawyers know that jurors, after the event, are always ready to be on the side of whoever asks them. These affidavits are as standardized as the fittings of a Pullman."); *Cluggage v. Swan*, 4 Binn. (Pa.) 150, 158 (1811). But see *Crawford v. State*, 2 Yerg. (Tenn.) 60, 67 (1821) ("[j]urors in general are above attacks of this kind.").

³⁹ *McKenzie*, *What Is Truth? A Defense of the Jury System*, 44 A.B.A.J. 51 (1958). "[W]hen a juror is suddenly called upon to select and describe those things that incline his sense of justice toward one result or the other, he . . . may come up with some trivia that may justify criticism of his vocabulary or facility of expression but does not necessarily justify criticism of his conclusions as a juror." *Id.*, at 76.

⁴⁰ 238 U.S. 264 (1915).

⁴¹ *Id.*, at 267-68. See *National Labor Relations Bd. v. Botany Worsted Mills*, 106 F.2d 263 (C.A.3d, 1939).

⁴² 8 Wigmore, *Evidence* § 2346 (3d ed., 1940); cf. *Clark v. United States*, 289 U.S. 1 (1933) (Cardozo, J.).

in court of their juryroom behavior; the jurors' "freedom and frankness of discussion" might be inhibited simply by the knowledge that they would later be subjected to the harassment of lawyers seeking to obtain waivers of the privilege in order to overturn the verdict. Thus many cases have excluded testimony offered by the allegedly culpable juror.⁴³ But it may be doubted whether the inhibiting effect of post-verdict harassment would be significant; since most verdicts must be unanimous, the individual juror's vote will generally be made public in any event. Although it may be true that a juror would be embarrassed more by disclosure of his role in the discussion than disclosure of his final vote, it is also true that the other jurors are all free to report to outsiders what was said and done during deliberations. Moreover, there are frequently outsiders interested in eliciting such reports—newsmen in dramatic cases,⁴⁴ and lawyers wishing to assess the effect of their arguments on the jury; while the propriety of such post-verdict interviews has been the subject of some question,⁴⁵ there is no doubt that the practice is widespread. Unless the present possibilities for disclosure have impaired the independence of deliberations, it seems doubtful that harassment by lawyers seeking impeachment would even accomplish this effect. Moreover, most jurors may well be unaware of the possibilities for disclosure, or at least may give the matter no thought; in such a case, the law of jurors' testimony would hardly affect the independence of deliberations. Thus the policy of "frankness and freedom of discussion and conference" may require only that the jury deliberate in private.

The general practice of defeating most attempts at impeachment by exclusion of jurors' testimony might be justified as a way of discouraging these attempts. It may be argued that any standard defining the grounds for impeachment is bound to be vague, so that without a barrier to admission of the only testimony usually available, there would be frequent litigation on the substantive question. This objection would be valid even though the substantive standard were formulated to require impeachment of only a few verdicts; the vagueness of the standard would encourage attempts to impeach in a much larger number of cases. However, the objection fails in several situations where fairly precise definition of the grounds of impeachment is possible.

⁴³ E.g., *Morehead v. Graham*, 83 Misc. 388, 83 N.Y.S.2d 866 (Sup. Ct., 1948) (excluding testimony of two jurors that they made an unauthorized visit to the premises and there talked with defendant's wife).

⁴⁴ See the interview of the sole juror who stood out for acquittal in the recent James R. Hoffa wiretap conspiracy trial reported in the *New York Times* § 1, p. 10, col. 6 (Dec. 21, 1957). This juror was, contrary to practice, identified in open court as the lone dissenter.

⁴⁵ The Professional Ethics Committee of the American Bar Association has said that post-verdict interviewing of jurors by trial counsel, for the purpose "of informing himself as to any mistakes he may have made in the presentation of evidence or of testing his judgment in selecting members of the panel," is improper. Opinion 109, March 10, 1934, *Opinions of the Committee on Professional Ethics and Grievances* 230 (1947). Accord: *Primm v. Continental Casualty Company*, 143 F.Supp. 123, 126-27 (W.D. La., 1956). Contra: Opinion 107, Jan. 14, 1952, *Committee on Professional Ethics, Association of the Bar of the City of New York*.

Courts have generally given an extremely broad definition to the grounds for impeachment; virtually any prejudicial deviation from the ideal of jury regularity—impartial consideration of the evidence in accordance with the instructions, with every juror freely assenting to the verdict—is considered grounds for impeachment, if it can be proved by competent evidence.⁴⁶ The fact that most attempts at impeachment have been defeated by exclusion of jurors' testimony may indicate that the exclusionary rule can be explained as a substitute for a more restrictive rule concerning the grounds for impeachment. By preventing proof of misconduct in most cases, the exclusionary rule enables courts to avoid wholesale upsetting of verdicts, while permitting occasional lip service to the ideal of regularity in the few cases where admissible testimony is available. It would seem, however, that clarity of analysis requires direct consideration of the substantive question.

Consideration of the problem of the type of misconduct which should constitute grounds for impeachment is rendered difficult by the lack of detailed empirical data concerning jury deliberations. However, until such data are made generally available,⁴⁷ it is possible to obtain some rough idea of the types of misconduct and their frequency from a reading of the hundreds of reported cases on the subject. The Texas cases are particularly helpful in this respect. A liberal attitude to admission of jurors' testimony, coupled with a broad definition of the grounds for impeachment,⁴⁸ has brought the impeachment problem before Texas appellate courts in literally hundreds of cases. While the Texas experience could thus be argued to show that relaxation of the exclusionary rule involves an excessive amount of litigation, a more restrictive definition of the grounds of impeachment might lead to a different result. Such a definition can be based on four categories of misconduct, into which most of the cases can be placed: 1) consideration of personal knowledge not introduced into evidence and gained prior to trial; 2) improper consideration of common knowledge; 3) breaches of the formal restrictions by which courts seek to hold jurors incommunicado from "extraneous influences"; and 4) use of an improper method of decision, such as quotient, majority vote, or chance.

Jurors may have two types of personal knowledge: knowledge of the facts in issue, and specialized knowledge facilitating evaluation of the evidence. It would seem that impeachment should be allowed for consideration of a juror's knowledge of the facts in issue, where the juror in question did not testify, since to allow such consideration would deprive the parties of their right to cross-

⁴⁶ See notes 49, 53, 56-8, 62-3, 66, 71 and 76 *infra*.

⁴⁷ The questions considered in this comment may well be illuminated by the results of the research into the workings of the jury system currently being conducted at the University of Chicago Law School under a grant from the Ford Foundation. Except where otherwise indicated, this research has not been used in the writing of this comment.

⁴⁸ See Texas Code of Crim. Proc. Ann. (Vernon, 1950) Art. 753 and Texas Rules of Civ. Proc. Ann. (Gammel, 1948) Rule 327.

examine and rebut.⁴⁹ It seems unlikely that impeachment on this ground will upset many verdicts. If the case is tried in a community where the parties are not well-known, jurors are not likely to have personal knowledge of the case. Moreover, jurors with such knowledge might be detected on the voir dire, although detection may be limited by a lawyer's reluctance to pursue a line of questioning intimating the existence of facts incriminating his client. If the parties have become well-known in the community, the voir dire could be used more effectively to eliminate jurors whose personal knowledge of the case might prejudice their deliberation: a lawyer with a notorious client would be taking less risk of revealing prejudicial matter when questioning veniremen on their attitude toward the case.⁵⁰

Since there is some conflict in the cases on the question of whether a jury may be instructed to consider the case in the light of specialized knowledge not in evidence,⁵¹ it seems doubtful that verdicts should be impeached on this ground. Where a juror has not testified to his specialized knowledge, its consideration by the jury could be said to deprive the parties of their rights to cross-examine and rebut. The situation could be argued to differ from common-knowledge cases, since a lawyer may have no idea of what specialized knowledge, if any, his jury happens to have, and the use of specialized knowledge might not be felt to comport with the jury's role as a body representing the community. However, if it is true that "[s]ome jurors on almost every panel are at least apt to have some knowledge that is not common to all, and which may be a valuable aid in weighing testimony,"⁵² it seems doubtful that a jury with such knowledge is "unrepresentative," and it would of course be foolish to require the jury not to consider the knowledge it has. Moreover, by asking questions on the voir dire about the jurors' occupations and avocational interests, a lawyer could probably detect most members of the panel having specialized knowledge relating to the case,⁵³ without running the danger of asking questions that would

⁴⁹ *State v. Kociolek*, 20 N.J. 92, 118 A.2d 812 (1955) (verdict impeached where two jurors who earlier sat on grand jury reported that accused had been indicted for a lesser felony); *State v. Salmer*, 181 Iowa 280, 164 N.W. 620 (1917) (verdict impeached where juror said that accused had been a drunkard since childhood). See Iowa Code Ann. (1950) § 780.17 ("[I]f during the retirement of the jury, a juror declares any fact which could be evidence in the cause, as of his own knowledge . . . in support of a motion to set aside a verdict, proof of such declaration may be made by any juror.").

⁵⁰ The best example is the trial which has received wide newspaper publicity. See, e.g., *New York Times* § 2, p. 29, col. 2 (Nov. 26, 1957), in which is recounted the difficulty experienced in obtaining impartial jurors for the trial of James R. Hoffa.

⁵¹ See *Solberg v. Robbins Lumber Co.*, 147 Wis. 259, 133 N.W. 28 (1911) (not error to instruct jurors to use their "expert knowledge" to weigh the evidence). *Contra: Downing v. Farmer's Mut. Fire Ins. Co.*, 158 Iowa 1, 133 N.W. 917 (1912). See also *McCormick*, *Evidence* 691 n.11 (1954).

⁵² *Solberg v. Robbins Lumber Co.*, 147 Wis. 259, 268, 133 N.W. 28, 31 (1911).

⁵³ If a juror's remarks during deliberations indicate that he has given false answers or has concealed relevant information on the voir dire, it is settled that the verdict may be im-

prejudice his client. In any event, it would seem that any distinction between "specialized knowledge" and the kind of knowledge which jurors, as members of the community, are supposed to bring to bear on the case, would be so vague⁵⁴ that its use as a basis for impeachment would foster a large amount of litigation. Thus, to allow impeachment in these cases would entail considerable expense without any clear resulting advantage.

Improper consideration of common knowledge probably occurs in a large number of cases: in Texas, where a liberal attitude toward admission of jurors' testimony has resulted in frequent impeachment,⁵⁵ a large proportion of the cases involve the jurors' discussion of such matters as liability insurance,⁵⁶ attorney's fees,⁵⁷ or the accused's failure to testify.⁵⁸ These cases might be characterized as cases involving inferences which the jury might be commonly expected to draw, and which could not be suggested to it at trial, either by witnesses or counsel.⁵⁹ In such cases, it might be argued that impeachment should not be allowed, because it would threaten the finality of a large number of verdicts.⁶⁰ However, if jury misconduct is felt to prejudice the parties' rights, its frequent occurrence might be said to suggest a basic defect in the system itself, rather than to constitute a reason for denying impeachment. But impeachment seems to be a doubtful method of curing basic defects. Moreover, the very frequency with which a matter such as liability insurance is considered might be argued to demonstrate that here the jury is performing its function of

peached. *Hyman v. Eames*, 41 Fed. 676 (D.Colo., 1890); *Mesner's Estate*, 77 Cal.App.2d 667, 176 P.2d 70 (1947); *People v. Leonti*, 262 N.Y. 256, 186 N.E. 693 (1933); *Adams v. State*, 92 Tex.Crim.Rep. 264, 243 S.W. 474 (1922). Accord: *State v. Parker*, 25 Wash. 405, 65 Pac. 776 (1901); cf. *Clark v. United States*, 289 U.S. 1 (1933) (contempt proceedings brought under this rule). Contra: *State v. Shields*, 296 Mo. 389, 246 S.W. 932 (1922).

⁵⁴ See, e.g., *Solberg v. Robbins Lumber Co.*, 147 Wis. 259, 133 N.W. 28 (1911), where "several" jurors were familiar with the type of machinery used in defendant's lumber mill, and *Tennessee Gas Transmission Co. v. Hall*, 277 S.W.2d 733, 736 (Tex.Civ.App., 1955), where the court found that "the process of chiseling or subsoiling land is a matter of common knowledge in and around Hidalgo County."

⁵⁵ See note 78 *infra*.

⁵⁶ *Barrington v. Duncan*, 140 Tex. 510, 169 S.W.2d 462 (1943).

⁵⁷ *Texas & P. Ry. Co. v. Mix*, 193 S.W.2d 542 (Tex.Civ.App., 1946). Accord: *Union Bus Lines v. Moulder*, 180 S.W.2d 509 (Tex.Civ.App., 1944) (jurors considered the amount by which taxation would reduce an award of damages, in ignorance that such income was non-taxable).

⁵⁸ *Harrell v. State*, 42 S.W.2d 438 (Tex.Crim.App., 1931).

⁵⁹ For a discussion of the relation between the rules of evidence and the limits of forensic argument, see *The Nature and Consequences of Forensic Misconduct in the Prosecution of a Criminal Case*, 54 Col. L. Rev. 946, 950-56 (1954).

⁶⁰ A survey reported in *Discussion of Failure of Accused To Testify*, 45 Harv. L. Rev. 746 (1932), shows that Texas appellate courts granted new trials in at least thirty criminal cases within a twenty-one year period because of jurors' discussion of accused's failure to testify.

disregarding legal standards in order to apply community notions of justice.⁶¹ Where these notions involve such matters as racial prejudice, there may result a conflict with ideas of fairness held by the broader community to which appellate courts are responsive.⁶² Such ideas led one court to refer to constitutional rights of due process and jury trial in granting impeachment.⁶³ However, the constitutional arguments cut both ways. Whenever impeachment requires jurors' testimony, the verdict could be supported by an argument that Lord Mansfield's rule, laid down in 1785, is a basic feature of the system, constituting a major block to judicial supervision of deliberations, and that it therefore was incorporated in constitutional provisions preserving the jury trial.⁶⁴ Moreover, the vagueness of any distinction between "fair" and "unfair" use of common knowledge would tend to foster a large amount of litigation; to abolish the distinction by impeaching for any improper consideration of common knowledge would create another vague distinction between "proper" and "improper" inferences. Since the arguments for impeachment do not clearly preponderate, it would seem that impeachment in common knowledge cases would not be warranted by the expense involved to the system.⁶⁵

A strong case for impeachment is presented when a verdict is affected by a breach of the restrictions designed to seal off the jury from influences arising outside the courtroom.⁶⁶ It might be argued that impeachment is unnecessary

⁶¹ See Curtis, *It's Your Law* 91-104 (1954); Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 *Harv. L. Rev.* 1281, 1285-86 (1952). For a critique of this view see Broeder, *The Functions of the Jury: Facts or Fictions?*, 21 *U. of Chi. L. Rev.*, 386, 388, 395, 402-4, 411-12 (1954).

⁶² See *Evans v. Galbraith-Foxworth Lumber Co.*, 31 S.W.2d 496 (Tex.Civ.App., 1929) (verdict impeached where juror displayed anti-Semitism in juryroom); cf. *People v. Leonti*, 262 N.Y. 256, 186 N.E. 693 (1933) (verdict impeached where prejudice against Italians concealed on voir dire). Other cases, however, have excluded testimony of manifestations of prejudice. See *Williams v. State*, 204 Md. 55, 102 A.2d 714 (1954) (prejudice against Negro defendants); cf. *Johnson v. Hunter*, 144 F.2d 565 (C.A.10th, 1944) (prejudice against sole Negro juror). See also *Valdez v. State*, 248 S.W.2d 744 (Tex.Crim.App., 1952) (prejudice against Mexicans characterized as common knowledge); Broeder, *The Functions of the Jury: Facts or Fictions?*, 21 *U. of Chi. L. Rev.* 386, 411-13 (1954), using racial prejudice cases in an effective criticism of the notion of the jury as "law dispenser."

⁶³ See *Wharton v. People*, 104 Colo. 260, 90 P.2d 615 (1939), permitting impeachment for rank coercion of the single dissenting juror. See also *United States v. Reid*, 12 How. (U.S.) 361, 366 (1851), where Taney, C.J., said, "cases might arise in which it would be impossible to refuse [jurors' testimony] without violating the plainest principles of justice."

⁶⁴ *Dimick v. Schiedt*, 293 U.S. 474 (1935); *Farrell v. City of Ontario*, 39 Cal.App. 351, 178 Pac. 740 (1919); *Moot v. Moot*, 214 N.Y. 204, 108 N.E. 424 (1915).

⁶⁵ The considerations relevant to common knowledge cases would seem to apply also to cases where jurors misunderstood or misapplied instructions. See, e.g., *Bateman v. Donovan*, 131 F.2d 759 (C.A.9th, 1942).

⁶⁶ See, e.g., *Southern Pac. Co. v. Klinge*, 65 F.2d 85 (C.A.10th, 1933) (verdict impeached where juror told others that during an overnight adjournment he had investigated and verified the fact that defendant had offered to settle the case for \$20,000); *Heller v. People*, 22 Colo. 11, 43 Pac. 124 (1895) (verdict impeached where bailiff called jury's attention to defect in defense's argument); *Sprinkle v. State*, 137 Miss. 731, 102 So. 844 (1925) (verdict impeached where jury read newspaper in juryroom relating accused's criminal background).

to protect juries from these influences, since the court's physical and moral control of the jury should be sufficient for this purpose. But this control could easily fail to prevent jurors from discussing the case with friends and reading newspaper stories, and to the extent that judicial control is effective, the problem of unsettling a large number of verdicts is minimized. Moreover, to uphold verdicts affected by extraneous influences would impugn the integrity of the jury system and deprive the losing party of the protection afforded by knowledge of what information is before the jury.

It has been said that "in a good verdict . . . every intelligence on the jury, being first appraised of the action of every other, has, by its own individual, conscious action, ratified and arrived at the same conclusion with every other."⁶⁷ Majority votes, quotients of the individual jurors' awards, and chance methods such as a coin toss, all deviate from this ideal, if their results are accepted without subsequent deliberation. In many cases, a majority vote might be considered as harmless error; investigation suggests that, for most juries, the result of a ballot taken at any time during deliberations will coincide, at least on the issue of liability or guilt, with the final unanimous verdict.⁶⁸ However, a majority vote may often be the result of a situation in which no unanimity was possible. On the other hand, a majority vote might be taken to foreclose lengthy deliberations needed to produce unanimity, or to resolve a situation in which the jurors erroneously believed final unanimity to be impossible. Moreover, even if more lengthy deliberations would not have produced unanimous concurrence in the result of the majority vote, willingness to accept a majority verdict may indicate that the minority sees considerable merit in the majority view, or has even accepted that view without wishing to admit it. Thus most majority verdicts may well be of the kind which should be upheld,⁶⁹ and since it would be impossible in practice to identify the verdicts which should be impeached, a flat rule upholding all majority verdicts seems to be justified.⁷⁰

⁶⁷ *Goodman v. Cody*, 1 Wash. T. 329, 336 (1871).

⁶⁸ See Kalven, Report on the Jury Project of the University of Chicago Law School 10-11 (speech given on Nov. 5, 1955, to a Conference on Legal Research at the University of Michigan Law School, on file at the University of Chicago Law School Library), stating that post-verdict interviews of actual jurors in criminal cases showed a high degree of correlation between results of majority votes on first ballots and the final unanimous verdicts.

⁶⁹ Only one case has been found in which the court considered a majority vote an insufficient irregularity to overthrow the verdict: *Jorgensen v. York Ice Machinery Corp.*, 160 F.2d 432 (C.A.2d, 1947). *Contra: Casstevens v. Texas & P. Ry.*, 119 Tex. 456, 32 S.W.2d 637 (1930); *Houk v. Allen*, 126 Ind. 568, 25 N.E. 897 (1890).

⁷⁰ The same considerations would seem to apply to cases in which a minority juror has been coerced into agreement, although in cases of extreme coercion it is more difficult to argue that the minority juror ever assented to the verdict, even in the sense that a minority juror "assents" to a majority vote. Compare *Wharton v. People*, 104 Colo. 260, 90 P.2d 615 (1939) (verdict impeached where minority juror was subjected to abuse, including threats of physical combat, throughout a deliberation lasting twenty-seven hours), with *State v. Hook*, 176 Minn. 604, 224 N.W. 144 (1929) (verdict upheld where minority juror, a woman, claimed her assent was forced by the inconvenience of there being no separate sleeping quarters for women jurors).

The quotient⁷¹ might be viewed as a more serious irregularity than a majority vote, on the ground that a quotient verdict might not represent the individual opinion of any one juror, let alone of all the jurors.⁷² On the other hand, it has been said that the taking of a quotient is a rough approximation of the deliberative process,⁷³ since discussion tends to neutralize extreme views and produce an average of the individual jurors' initial opinions. Moreover, the cases suggest that quotients are often used not as a complete substitute for deliberation, but as a last resort after protracted deliberation has failed to produce agreement.⁷⁴ Furthermore, a quotient is less likely than a majority vote to be prejudicial in the sense of producing a verdict where regular deliberation would have resulted in a hung jury;⁷⁵ the issue of damages or length of sentence, to which the quotient method is applied, would appear less likely irrevocably to divide a jury than the issues of liability or guilt, to which a majority vote is usually directed. Thus if majority verdicts are to escape impeachment, quotient verdicts should also survive.

Chance methods, on the other hand, would seem to constitute sufficient grounds for impeachment.⁷⁶ Chance verdicts might result from the fact that most

⁷¹ A quotient verdict represents the average of the individual jurors' assessments. Impeachment is permitted only if the jury agreed in advance of the calculation to accept its result. *New Morgan County Building & Loan Ass'n v. Plemmons*, 210 Ala. 286, 98 So. 12 (1923). *Thompson v. State*, 197 Tenn. 112, 270 S.W.2d 379 (1954). Some courts permit impeachment of quotient verdicts on the authority of statutes (see note 76 *infra*) permitting jurors to impeach "chance" or "lot" verdicts. *Long v. Collins*, 12 S.D. 621, 82 N.W. 95 (1900).

⁷² *Long v. Collins*, 12 S.D. 621, 82 N.W. 95 (1900).

⁷³ See *Compromise Verdicts*, *Solicitors' Journal*, reprinted in 1 So. L. Rev. (n.s.) 393 (1875).

⁷⁴ *American Security & T. Co. v. Kaveney*, 39 App. D.C. 223 (1912); *Sheker v. Jensen*, 241 Iowa 583, 41 N.W.2d 679 (1950); *Newell v. City Ice Co.*, 140 Kan. 110, 34 P.2d 558 (1934); *Thompson v. State*, 197 Tenn. 112, 270 S.W.2d 379 (1954). But see *McDonald v. Pless*, 238 U.S. 264 (1915).

⁷⁵ See text at p. 370 *supra*.

⁷⁶ See, e.g., *Levy v. Brannan*, 39 Cal. 485 (1870) (drawing of lots—verdict impeached); *Beakley v. Optomist Printing Co.*, 28 Idaho 67, 152 Pac. 212 (1915) (coin toss—verdict impeached). Many states have statutes authorizing a new trial in criminal cases where the verdict was reached "by lot" and in civil cases where the verdict was reached "by a resort to the determination of chance." The criminal statutes are: *Ariz. Rev. Stat. Ann.* (1956) *Rules of Crim. Proc.*, Rule 310; *Ark. Stat. Ann.* (1948) § 43-2203; *Cal. Pen. Code* (Deering, 1949) § 1181; *Fla. Stat. Ann.* (1944) § 920.04; *Idaho Code* (1948) § 19-2406; *Iowa Code Ann.* (1950) § 787.3; *Ky. Crim. Code* (Russell, 1953) § 271; *Mont. Rev. Codes Ann.* (1949) § 94-7603; *Nev. Rev. Stat.* (1957) 175.535; *N.Y. Consol. Laws Ann.* (McKinney, 1945) *Code of Crim. Proc.* § 465; *N.D. Rev. Code* (1944) § 29-2402; *Okla. Stat. Ann.* (1937) tit. 22, § 952; *S.D. Code* (1939) § 34.4002; *Tex. Code of Crim. Proc. Ann.* (Vernon, 1950) Arts. 753, 754; and *Utah Code Ann.* (1953) § 77-38-3. Three of these states give jurors express statutory permission to prove the verdict by lot. *Ky. Crim. Code* (Russell, 1953) § 272; *Mont. Rev. Codes Ann.* (1949) § 94-7603; *S.D. Code* (1939) § 34.4005. The civil statutes, all of which expressly authorize jurors to prove the misconduct involved, are: *Cal. Code Civ. Proc.* (Deering, 1953) § 657; *Idaho Code* (1948) § 10-602; *Mont. Rev. Codes Ann.* (1949) § 93-5603; *N.D. Rev. Code* (1943) § 28-1902; *S.D. Code* (1939) § 33-1605; *Utah Code Ann.* (1953) Rule 59; and *Wash. Rev. Code* (1951) § 4.76.020 (lot and chance). These statutes have sometimes been taken as a statement of policy to prohibit impeachment of verdicts for any other kind of misconduct. *People v. Cahan*, 141 Cal.App.2d 891, 297 P.2d 715 (1956); *Mirabito v. San Francisco Dairy Co.*, 88 Cal. Dec. 180, 35 P.2d 513 (1934); *State v. Cacavas*, 55 Idaho 538, 44 P.2d 1110 (1935).

of the jurors, after some deliberation, have no strong preference for either party. Or they might result from a sharp and close division of opinion. In either event, it seems doubtful that a chance verdict is more likely than not to coincide with what would be the result of a lengthier, more regular deliberation by the same jury. And the toss of a coin in no sense approximates the deliberative process. Impeachment of chance verdicts would probably not put a heavy burden of added litigation on the courts,⁷⁷ and in any case, judicial economy is a weak justification for a completely arbitrary disposition of parties' rights.

It is submitted that courts should impeach verdicts affected by chance methods, a juror's personal knowledge of the case not introduced in evidence, or extraneous influences. The Texas cases suggest that such a rule would probably not upset a large number of verdicts.⁷⁸ And the problem of defining these grounds, with preciseness sufficient to discourage frequent attempts at impeachment, would not seem insurmountable. In any event, the problem of impeachment of verdicts seems important enough to warrant treatment in terms of the proper function of the jury, the parties' interest in a fair trial, and the public interest in a stable judicial system, rather than in terms of a questionable rule of evidence excluding in most cases the only available testimony.⁷⁹

⁷⁷ See note 78 *infra*.

⁷⁸ A survey of civil cases reaching Texas appellate courts in the period 1946-1956 shows 78 cases involving attempts to impeach verdicts for jury misconduct. New trials were granted in 16 of these cases. Under the analysis offered by this comment, only 9 of these 78 cases would have been in impeachable categories: 7 cases of a juror's personal knowledge of facts in the case and 2 cases of extraneous influences. A new trial was granted in only 1 of these 9 cases; in the other 8 the misconduct was found to be non-prejudicial.

⁷⁹ See *Jorgensen v. York Ice Machinery Corp.*, 160 F.2d 432, 435 (C.A.2d, 1947) (L. Hand, J.).

ESTATE TAX INCLUDIBILITY OF STOCK DIVIDENDS ON SHARES TRANSFERRED IN CONTEMPLATION OF DEATH

Section 2035(a) of the 1954 Internal Revenue Code,¹ like Section 811(c)(1)(A) of the 1939 Code,² provides that when a decedent transfers property in contemplation of death,³ the value of such property is included in the decedent's gross estate. Until the recent case of *Estate of Delia Crawford McGehee*,⁴ it had not been decided whether stock dividends declared between the time of trans-

¹ Int. Rev. Code § 2035(a), 26 U.S.C.A. § 2035(a)(1954), hereinafter cited as Int. Rev. Code.

² Int. Rev. Code § 811(c)(1)(A) (1939).

³ "A transfer in contemplation of death is a disposition of property prompted by the thought of death (though it need not be solely so prompted). A transfer is prompted by thought of death if it is made with the purpose of avoiding [estate taxes], or as a substitution for a testamentary disposition of the property, or for any other motive associated with death." Treas. Reg. 105, § 81.16, U. S. Code Congressional and Administrative News (1956).

⁴ 2 CCH Tax Ct. Rep. 22,385, 28 T.C. No. 44 (1957).