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Evidence—Affidavit Concerning Jurors’ Unauthorized View Inadmissible as Ground for New Trial

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The present decision is significant when looked at for its narrow precedential value. There can be little doubt that the Court, as presently constituted, will continue to apply the same presumption and strict reading of the statute. The history of litigation concerning the status of adopted children in bequests and devises to a class has exhibited persistent concern for these children. One court, in excluding an adopted child from participation because of an absence of intention of the testator to favor the child, seemed wholly dissatisfied with the presumption applied in the greater number of cases when it stated that "any consideration of the problem by search for an intention to benefit the adopted child does not give section 115 [of the Domestic Relations Law] real effect."⁴⁵ Thus it would seem that the decision in the instant case has, for the immediate future, settled a frequent and troublesome source of litigation in the law of estates as applied to wills and trust instruments of persons dying before the 1963 legislative amendments.⁴⁶ Whether the ends achieved by the Court justify the means used however, is highly doubtful. The Court has, in its task of creating certainty in the law and promulgating the public policy regarding adopted children, left behind it scarred and battered remnants of principles of the law of wills.

RONALD J. THOMAS

EVIDENCE—AFFIDAVIT CONCERNING JURORS' UNAUTHORIZED VIEW INADMISSIBLE AS GROUND FOR NEW TRIAL

One defendant was convicted of burglary in the third degree and possession of burglary instruments as a felony, the other defendant was convicted of the same burglary count and possession of burglary instruments as a misdemeanor. Defendants moved to set aside the verdict and for a new trial based on an affidavit of defendants' trial counsel alleging that certain of the jurors told him shortly after the verdict was rendered that during the trial, without direction of the court, they had visited the premises where the crimes were allegedly committed. On a joint appeal from an affirmance of the trial court's order denying the motions, *held*, affirmed, three judges dissenting. Jurors may not impeach their own duly rendered verdict by statements averring their own misconduct outside the jury room presented in the form of hearsay affidavits, and although an unauthorized view of such premises is improper, it is not, without more, such an impropriety as to require granting of a new trial. *People v. DeLucia*, 15 N.Y.2d 294, 206 N.E.2d 324, 258 N.Y.S.2d 377 (1965), *cert. denied*, 34 U.S.L. Week 3106 (U.S. Oct. 12, 1965).

45. In the Matter of the Estate of Taintor, 32 Misc. 2d 160, 163, 222 N.Y.S.2d 882, 885 (Surr. Ct. 1961).

46. The presumption to be applied is now the same for all cases. In controversies where the testator or settlor has died prior to the 1964 effective date of the amendments, the presumption will be applied by "virtue" of the present case. Where the testator or settlor has died after the effective date, the presumption by virtue of Section 49 of the Decedent's Estate Law will control. For text of statute see note 15 *supra*.

A vast majority of American jurisdictions¹ still adhere to the rule early adopted from Lord Mansfield² that a juror may not impeach his own verdict. Before the early 1780's affidavits and testimony of jurors were freely received to impeach their verdict.³ This prohibition against self-impeachment was first based on the policy that a juror will not be heard to allege his own turpitude.⁴ In later discussions, particularly in American courts, the rule was also based on: (1) the parol evidence rule,⁵ (2) a privilege against disclosure of juror's communications during deliberations,⁶ (3) policies to avoid encouraging jury tampering,⁷ (4) juror perjury,⁸ (5) destroying the secrecy of jury room and thereby inhibiting a juror's frankness and freedom of discussion during deliberations,⁹ (6) a fear of prolonged litigation¹⁰ and (7) uncertainty in the finality of verdicts.¹¹ The injustice flowing from the inflexible application of the rule has led to its modification.¹² A few jurisdictions have adopted the Iowa rule and permit a juror's affidavit to show "any matter occurring during the trial or in the jury room, which does not essentially inhere in the verdict itself. . . ."¹³ Although there are different interpretations of "inhere,"¹⁴ generally overt factors which may have influenced his decision, which can be verified by others, including fellow jurors, are considered by the court, but evidence concerning a juror's mental processes or the effect of events or conditions in influencing his vote is excluded.¹⁵ Other jurisdictions have distinguished between

1. See 8 Wigmore, Evidence § 2354 (McNaughton rev. 1961) (Excellent and exhaustive survey of state cases and their holdings).
2. *Vaise v. Delaval*, 1 T.R. 11, 99 Eng. Rep. 944 (1785).
3. 8 Wigmore, *op. cit. supra* note 1, § 2352.
4. *Id.* § 2352. *But see* *Smith v. Cheetham*, 3 Cai. R. (N.Y.) 57 (Sup. Ct. 1805) (Livingston, J., dissenting). "Are not criminals in England every day convicted, and even executed, on their own confession?" *Id.* at 59.
5. 8 Wigmore, Evidence § 2348 (McNaughton rev. 1961).
6. *Clark v. United States*, 289 U.S. 1 (1933) (Cardozo, J.); see *In re Nunns*, 188 App. Div. 424, 176 N.Y. Supp. 858, 38 N.Y. Crim. 7 (2d Dep't 1919); 8 Wigmore, Evidence § 2346 (McNaughton rev. 1961).
7. *Perry v. Bailey*, 12 Kan. 539 (1874); *State v. Kociolek*, 20 N.J. 92, 118 A.2d 812, 58 A.L.R.2d 545 (1955), 56 Colum. L. Rev. 952 (1956), 54 Mich. L. Rev. 1003 (1956); *Payne v. Burke*, 236 App. Div. 527, 260 N.Y. Supp. 259 (4th Dep't 1932).
8. *Northern Pacific Ry. v. Mely*, 219 F.2d 199 (9th Cir. 1954); *Caldwell v. F. E. Spears & Sons*, 186 Ky. 64, 216 S.W. 83 (1919); *State v. Adams*, 141 Ohio St. 423, 48 N.E.2d 861, 25 Ohio Op. 570, 146 A.L.R. 509 (1943).
9. *Clark v. United States*, 289 U.S. 1 (1933) (Cardozo, J.). "Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world." *Id.* at 13; *McDonald v. Pless*, 238 U.S. 264 (1915); *In re Nunns*, 188 App. Div. 424, 176 N.Y. Supp. 858, 38 N.Y. Crim. 7 (2d Dep't 1919).
10. *Stromblad v. Hanover Fire Ins. Co.*, 121 Misc. 322, 201 N.Y. Supp. 67 (Sup. Ct. 1923); *State v. Gardner*, 230 Or. 569, 371 P.2d 558 (1962); *Hudson v. State*, 9 Yerg. (Tenn.) 408 (1836).
11. *Kollert v. Cundiff*, 50 Cal. 2d 768, 329 P.2d 897 (1958); *Wright v. Illinois & Miss. Tel. Co.*, 20 Iowa 195 (1866); *Robbins v. Windover*, 2 Tyl. (Vt.) 11 (1800).
12. *Fisch*, *New York Evidence* § 305 (1959).
13. *Wright v. Illinois & Miss. Tel. Co.*, 20 Iowa 195, 210 (1866).
14. *Compare* *State v. Lorenzy*, 59 Wash. 308, 109 Pac. 1064 (1910) ("inheres" means "lost in" or "covered by" the verdict), *with* *Perry v. Bailey*, 12 Kan. 539 (1874) (within the personal consciousness of a juror).
15. *Southern Pacific Ry. v. Klinge*, 65 F.2d 85 (10th Cir.) *cert. denied*, 290 U.S. 657

events occurring outside the jury room and events within the jury room.¹⁶ The exclusionary rule is applied only to the deliberations of the jury and a juror's affidavit alleging his own misconduct or misconduct of a fellow juror, outside the jury room, is accepted as competent evidence.¹⁷ Texas abolished Lord Mansfield's rule by statute, but the evidence must be restricted to overt acts.¹⁸ Where the verdict was reached by chance, many states have statutes providing for an exception to the prohibition against a juror's self-impeachment.¹⁹

The early New York decisions²⁰ followed the rule in *Vaise v. Delaval*²¹ and refused to consider a juror's affidavit tending to impeach his previously rendered verdict. In *Dabrymple v. Williams*²² the New York Court of Appeals said that this rule excludes affidavits "to show mistake or error of the jurors in respect to the merits, or irregularity or misconduct, or that they mistook the effect of their verdict and intended something different."²³ The Court reasserted this exclusionary rule in *People v. Sprague*²⁴ stating that "jurors cannot by their affidavits, even if those affidavits aver misconduct outside the jury room, attack or discredit the verdict which they have in fact recorded or rendered."²⁵ However, this strict rule has been modified. Jurors' affidavits have been accepted to deny their alleged misconduct, since the affidavits are not being used to impeach their

(1933); *Martinez v. Ashton*, 124 Colo. 23, 233 P.2d 871 (1951) (dictum); *City of Miami v. Bopp*, 117 Fla. 532, 158 So. 89, 97 A.L.R. 1035 (1934); *Perry v. Bailey*, 12 Kan. 539 (1874); *Sprinkle v. State*, 137 Miss. 731, 102 So. 844 (1925); *Harris v. State*, 24 Neb. 803, 40 N.W. 317 (1888); *State v. Kociolek*, 20 N.J. 92, 118 A.2d 812, 58 A.L.R.2d 545 (1955); *Turner & Sons v. Great Northern Ry.*, 67 N.D. 347, 272 N.W. 489 (1937); *State v. Gardner*, 230 Or. 569, 371 P.2d 558 (1962); *Crawford v. State*, 2 Yerg. (Tenn.) 60 (1821); *State v. Lorenzy*, 59 Wash. 308, 109 Pac. 1064 (1910).

16. Maguire, Weinstein, Chadbourne, and Mansfield, *Cases and Materials on Evidence* 887 (5th ed. 1965).

17. *Driscoll v. Gatcomb*, 112 Me. 289, 92 Atl. 39 (1914) (unauthorized visit to plaintiff's home); *Collins v. Splane*, 230 Mass. 281, 120 N.E. 66 (1918) (unauthorized view); *Pierce v. Brennan*, 83 Minn. 422, 86 N.W. 417 (1901) (unauthorized view); *Welshire v. Bruaw*, 331 Pa. 392, 200 Atl. 67 (1938) (dictum) (misconduct of officer in charge of jury); *Peppercorn v. City of Black River Falls*, 89 Wisc. 38, 61 N.W. 79 (1894) (unauthorized view).

18. Texas Code Crim. Proc. Ann. art. 753(8) (1950). "New trials . . . shall be granted . . . where, from the misconduct of the jury, the court is of the opinion that the defendant has not received a fair and impartial trial. It shall be competent to prove such misconduct by the voluntary affidavit of a juror. . ."; Tex. R. Civ. P. 327 (1954). "Where the ground of the motion [for new trial] is misconduct of the jury . . . or because of any communication made to the jury or that they received other testimony . . . the court shall hear evidence thereof from the jury or others in open court, and may grant a new trial if such misconduct proved, or the testimony received, of [sic] the communication made . . . be material, and if it reasonably appears from the evidence both on the hearing of the motion and the trial of the case and from the record as a whole that injury probably resulted to the complaining party." See generally Pope, *The Mental Operations of Jurors*, 40 Texas L. Rev. 849 (1962); Comment, 15 Texas L. Rev. 101 (1936).

19. E.g., Cal. Code Civ. Proc. Ann. § 657 (1872); N.Y. Code Crim. Proc. § 465(4).

20. *Dana v. Tucker*, 4 Johns. R. (N.Y.) 487 (Sup. Ct. 1809); *Clum v. Smith*, 5 Hill (N.Y.) 560 (Sup. Ct. 1843). *Contra*, *Smith v. Cheetham*, 3 Cai. R. (N.Y.) 57 (Sup. Ct. 1805).

21. 1 T.R. 11, 99 Eng. Rep. 944 (1785).

22. 63 N.Y. 361 (1875).

23. *Id.* at 363.

24. 217 N.Y. 373, 111 N.E. 1077 (1916); *accord*, *Williams v. Montgomery*, 60 N.Y. 648 (1875).

25. *People v. Sprague*, 217 N.Y. 373, 381, 111 N.E. 1077, 1080 (1916).

verdict but to sustain it.²⁶ Similarly, a juror's affidavit has been accepted where a mistake has occurred in announcing or recording the verdict, the reason being that it is an attempt to establish, rather than reverse, the action of the jury.²⁷ Jurors' affidavits have been considered as evidence of other persons' misconduct in their dealings with the jurors, the exclusionary rule being interpreted as applying only to misconduct of jurors.²⁸ Jurors' affidavits have also been accepted, in support of a motion for new trial, to disclose a juror's concealed prejudice on *voir dire*, on the ground that due to his partiality he was never eligible to become a member of the jury; hence his vote was a nullity and there was no verdict to be impeached.²⁹ Although non-jurors' affidavits concerning juror misconduct are not excluded by Lord Mansfield's rule,³⁰ affidavits containing statements made to the affiant by a juror are not admissible and are excluded as hearsay.³¹

Competent evidence of juror misconduct will not be a ground for a new trial unless it be shown that the verdict was affected thereby.³² In New York criminal cases a new trial will be granted only where the substantial rights of the defendant have been prejudiced.³³ Such a motion is generally addressed to the

26. Haight v. City of Elmira, 42 App. Div. 391, 59 N.Y. Supp. 193 (3d Dep't 1899); Dana v. Tucker, 4 Johns. R. (N.Y.) 487 (Sup. Ct. 1809); Moore v. N.Y. Elevated R.R. Co., 24 Abb. N. Cas. 77, 8 N.Y. Supp. 329, 18 Civ. Proc. R. 146, 15 Daly 506 (C.P. 1890), *aff'd*, 24 Abb. N. Cas. 74, 8 N.Y. Supp. 769, 15 Daly 510 (C.P. 1890), *rev'd on other grounds*, 130 N.Y. 523, 29 N.E. 997 (1892). See generally Annot., 93 A.L.R. 1449 (1934).

27. Dalrymple v. Williams, 63 N.Y. 361 (1875) (Foreman mistakenly announced verdict for plaintiff); Wirt v. Reid, 138 App. Div. 760, 123 N.Y. Supp. 706 (1st Dep't 1910) (mistake of clerk in entering verdict).

28. Schrader v. Joseph H. Gertner, Jr., Inc., 282 App. Div. 1064, 126 N.Y.S.2d 521 (2d Dep't 1953); Thomas v. Chapman, 45 Barb. (N.Y.) 98 (Sup. Ct. 1865); Wilkins v. Abbey, 168 Misc. 416, 5 N.Y.S.2d 826 (Sup. Ct. 1938).

29. People v. Leonti, 262 N.Y. 256, 186 N.E. 693 (1933); McHugh v. Jones, 258 App. Div. 111, 16 N.Y.S.2d 332 (2d Dep't 1939), *aff'd mem.*, 283 N.Y. 534, 29 N.E.2d 76, 17 N.Y.S.2d 396 (1940); People v. Whitmore, 45 Misc. 2d 506, 257 N.Y.S.2d 787 (Sup. Ct. 1965). "The action of the juror taints the trial in its origin. It destroys the very foundation of our democratic processes and makes the trial a farce." *Id.* at 509, 257 N.Y.S.2d at 794. *Contra*, Payne v. Burke, 236 App. Div. 527, 260 N.Y. Supp. 259 (4th Dep't 1932). See generally Annot., 48 A.L.R.2d 971 (1956).

30. Johnson v. Riter-Conley Mfg. Co., 149 App. Div. 543, 133 N.Y. Supp. 1004 (1st Dep't 1912); Morehead v. Graham, 193 Misc. 388, 83 N.Y.S.2d 866 (Sup. Ct. 1948), *aff'd mem.*, 276 App. Div. 1057, 96 N.Y.S.2d 475 (4th Dep't 1950) (jurors' affidavits regarding their discussion with defendant's wife not accepted, affidavit of defendant's wife accepted); Vaise v. Delaval, 1 T.R. 11, 99 Eng. Rep. 944 (1785) (dictum). "The court must derive their knowledge from some other source, such as from some person having seen the transaction through a window. . . ." *Id.* Cf. People *ex rel.* Choate v. Barnett, 24 Abb. N. Cas. 430, 18 Civ. Proc. R. 230, 9 N.Y. Supp. 321, 56 Hun 351, 8 N.Y. Crim. 13 (Sup. Ct.), *aff'd mem.*, 121 N.Y. 678, 24 N.E. 1095 (1890) (intentional eavesdropping as contempt of court).

31. People v. Sprague, 217 N.Y. 373, 111 N.E. 1077 (1916); Gregory v. Bijou Theater Co., 138 App. Div. 590, 122 N.Y. Supp. 1085 (3d Dep't 1910); Bennett v. Nazzaro, 144 Misc. 450, 258 N.Y. Supp. 828 (Sup. Ct.), *aff'd mem.*, 237 App. Div. 866, 261 N.Y. Supp. 1018 (3d Dep't 1932).

32. Roberts v. United States, 60 F.2d 871 (4th Cir. 1932); People v. Johnson, 110 N.Y. 134, 17 N.E. 684 (1888); Moore v. N.Y. Elevated R.R. Co., 24 Abb. N. Cas. 77, 8 N.Y. Supp. 329, 18 Civ. Proc. R. 146, 15 Daly 506 (C.P. 1890), *aff'd*, 24 Abb. N. Cas. 74, 8 N.Y. Supp. 769, 15 Daly 510 (C.P. 1890), *rev'd on other grounds*, 130 N.Y. 523, 29 N.E. 997 (1892).

33. People v. Johnson, *supra* note 32; People v. Jones, 115 N.Y. Supp. 800 (Sup. Ct.), *aff'd*, 194 N.Y. 83, 86 N.E. 810 (1909); People v. Kraus, 147 Misc. 906, 265 N.Y. Supp. 294 (Ct. Gen. Sess. 1933); N.Y. Code Crim. Proc. § 465.

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discretion of the trial court and the court's action is ordinarily not reviewable.³⁴ An unauthorized view³⁵ is invariably improper, the only issue being whether the extent of the impropriety requires a new trial.³⁶ A view not under the direction of the court is improper because of the danger that the jurors may view the wrong objects and because of the subsequent difficulty of determining whether they have viewed the right objects.³⁷ If the court considers a view as constituting independent evidence, the court has no control over the introduction of this evidence and there is no opportunity for it to be rebutted.³⁸ There are also the dangers that the conditions of the premises have changed since the occurrence in issue³⁹ and that the jurors will receive information from unsworn witnesses in violation of the hearsay rule.⁴⁰ In New York a mere visit and inspection of the premises by the jurors, in the absence of the defendant, is not in itself violative of the defendant's rights, and is not the taking of evidence within section 465 Code of Criminal Procedure⁴¹ and the New York State Constitution.⁴²

The majority decision in the instant case is a traditional analysis of the problem.⁴³ The Court first refuses to accept the affidavit as competent evidence but then continues to consider its contents to determine to what extent the defendant's rights would be prejudiced by the existence of the alleged facts. Chief Judge Desmond, writing for the minority, dissents on the ground that Lord Mansfield's rule is being used to validate "a transgression of fundamental

34. *People v. Johnson*, *supra* note 32; *People v. Durling*, 303 N.Y. 382, 103 N.E.2d 336 (1952) (counsel should have been given opportunity to supply affidavits); *Buffalo Structural Steel Co. v. Dickinson*, 98 App. Div. 355, 90 N.Y. Supp. 268 (4th Dep't 1904).

35. A view is an inspection by the jury of a place where the event in issue occurred. *Commonwealth v. Dascalakis*, 246 Mass. 12, 140 N.E. 470 (1923).

36. *Gambon v. City of New York*, 153 Misc. 401, 274 N.Y. Supp. 653 (Sup. Ct. 1934); 4 *Wigmore*, *Evidence* § 1166 (3rd ed. 1940). *Contra*, *Curry v. Quait*, 100 Misc. 604, 166 N.Y. Supp. 367 (Sup. Ct. 1917) (unauthorized view invariably prejudicial so as to require a new trial).

37. 4 *Wigmore supra* note 36.

38. *Aldrich v. City of Minneapolis*, 52 Minn. 164, 53 N.W. 1072 (1893).

39. *Briggs v. Chicago Great Western Ry.*, 243 Minn. 566, 68 N.W.2d 870 (1955).

40. *People v. Gallo*, 149 N.Y. 106, 43 N.E. 529 (1896).

41. N.Y. Code Crim. Proc. § 465 provides, in part:

The court . . . has power to grant a new trial, when a verdict has been rendered against the defendant, by which his substantial rights have been prejudiced, upon his application, in the following cases:

....

2. When the jury has received any evidence out of court, other than that resulting from a view, as provided in section four hundred and eleven;

3. When the jury have separated without leave of the court, after retiring to deliberate upon their verdict, or have been guilty of any misconduct by which a fair and due consideration of the case has been prevented; . . .

42. *People v. Thorn*, 156 N.Y. 286, 50 N.E. 947, 42 L.R.A. 368 (1898); *Haight v. City of Elmira*, 42 App. Div. 391, 59 N.Y. Supp. 193 (3d Dep't 1899); *People v. Kraus*, 147 Misc. 906, 265 N.Y. Supp. 294 (Ct. Gen. Sess. 1933).

43. *E.g.*, *United States v. Reid*, 53 U.S. (12 How.) 361 (1851); *In re Cochran*, 237 N.Y. 336, 143 N.E. 212 (1924) (criminal contempt); *McHugh v. Jones*, 258 App. Div. 111, 16 N.Y.S.2d 332 (2d Dep't 1939), *aff'd mem.*, 283 N.Y. 534, 29 N.E.2d 76, 17 N.Y.S.2d 396 (1940); *Davis v. Lorenzos*, 258 App. Div. 933, 16 N.Y.S.2d 624 (4th Dep't 1939); *Sindle v. 761 Ninth Ave. Corp.*, 127 N.Y.S.2d 258 (Sup. Ct. 1953), *aff'd*, 283 App. Div. 939, 130 N.Y.S.2d 880 (1st Dep't 1954); *Smith v. Cheetham*, 3 Cai. R. (N.Y.) 57 (Sup. Ct. 1805).

fair trial rules."⁴⁴ The juror's unauthorized view is interpreted by the dissent as independent evidence gathering for the purpose of checking the credibility of courtroom testimony whereas the majority considers the juror's view as taken in order to more easily understand the evidence. The dissent states that Lord Mansfield's rule and its purposes apply only to jury room deliberations and methods of arriving at verdicts. Jurors' affidavits of unauthorized views should be considered on a motion for new trial, but it is not for the appellate court to evaluate the prejudicial effect of the misconduct, since this is a matter within the sound discretion of the trial judge. The minority would remand to the trial court for a hearing on the motion.⁴⁵

The instant case represents the first time the New York Court of Appeals has directly confronted the problem of a juror's self-impeachment in conjunction with an unauthorized view. Instead of utilizing the opportunity to re-evaluate Lord Mansfield's rule with respect to juror misconduct outside the jury room, the Court dogmatically reaffirms the long established rule that a juror will not be heard to impeach his own verdict. However, the 4-3 decision indicates an undercurrent of dissatisfaction within the Court with the application of this rule to juror misconduct outside the jury room. Policy considerations have weighed heavily in the shaping of this exclusionary rule. The Court must choose between the protection of individual rights and the preservation of the public administration of justice.⁴⁶ However, where the misconduct occurs outside of the jury room, the policy considerations favoring the application of the rule are diminished, particularly in light of the possibility of a great injustice done an injured party for which he has no remedy. In admitting testimony of outside events there will be no disclosure of deliberations or of the manner in reaching the verdict. Hence, the jurors' frankness and freedom of discussion during deliberations will not be inhibited. It is urged that the danger of jury tampering in reality is no greater if the evidence is admitted.⁴⁷ Generally jurors are the only persons who know of the misconduct and the rule excludes the best available evidence.⁴⁸ The fear of prolonged litigation and increasing uncertainty of jury verdicts by admitting jurors' affidavits can be dispelled by the court's adoption of more restrictive substantive grounds for impeachment.⁴⁹ Under the Model Code of Evidence⁵⁰ and

44. Instant case at 296, 206 N.E.2d at 325, 258 N.Y.S.2d at 379.

45. See *People v. Shilitano*, 215 N.Y. 715, 109 N.E. 500 (1915) (Cardozo, J.); *People v. Arata*, 254 N.Y. 565, 173 N.E. 868 (1930); *People v. Durling*, 303 N.Y. 382, 103 N.E.2d 336 (1952).

46. *McDonald v. Pless*, 238 U.S. 264 (1915).

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

48. *Wright v. Illinois & Miss. Tel. Co.*, 20 Iowa 195 (1866); *State v. Kociolek*, 20 N.J. 92, 118 A.2d 812, 58 A.L.R.2d 545 (1955); *Smith v. Cheetham*, 3 Cai. R. (N.Y.) 57 (Sup. Ct. 1805) (Livingston, J., dissenting).

49. Comment, *Impeachment of Jury Verdicts*, 25 U. Chi. L. Rev. 360 (1958) (e.g., these should not be grounds for impeachment: Majority verdicts in criminal cases; consideration of specialized knowledge not in evidence; consideration of common knowledge such as liability insurance, attorney's fees, or accused failure to testify).

50. Rule 301 (1942). "[E]very member of the jury, may testify as to any material matter . . . except that . . . 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 ver-

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the Uniform Rules of Evidence,⁵¹ these affidavits would be received. The Court in the instant case avoids considering whether the trial court should receive evidence of the influence of the misconduct upon the juror's mind in reaching his verdict. Unless the method of evaluating the effect of the misconduct on the verdict is objective, the court is probing into the juror's mental processes during his deliberations. The patent injustice inflicted upon a losing defendant requires a re-evaluation of the policy grounds underlying the adoption of Lord Mansfield's rule to juror misconduct outside the jury room, instead of repeating the dogma that a juror may not impeach his own verdict.

ARTHUR A. RUSS, JR.

FUTURE INTERESTS—APPLICATION OF STATUTE TO BAR ENFORCEMENT OF MATURED REVERTER HELD UNCONSTITUTIONAL

On May 11, 1854, John Townsend and wife deeded land and a building to the Trustees of Walton Academy. The deed, duly recorded, contained a reverter clause providing that the deed was to be valid only so long as the premises were used for an Academy and for nothing else. On failure of this condition the premises were to revert to Townsend and his heirs.¹ They were used for educational purposes by Walton Academy until April 1, 1962, when such use was discontinued. Plaintiff Board of Education succeeded to the Academy's rights. Under section 345(3) of the New York Real Property Law (the statute at issue) defendant was required to file a Declaration of Intention to Preserve Restrictions on the Use of Land, by Sept. 1, 1961. This Declaration was filed on April 13, 1962, seven months after the deadline. Plaintiff Board of Education sued for title on stipulated facts, under the same statute (discussed *infra*), which was designed to eliminate certain restrictions on the use of land, and won a unanimous judgment in the Appellate Division.² On defendants' appeal, *held*, reversed. The recording provisions of section 345 of the New York Real Property Law are unconstitutional in that they impair the obligation of contracts and deprive defendants of property without due process of law, when applied so as to bar enforcement of a reverter which matured after the date the statute set for filing notice of intent to preserve the reverter. Chief Judge

dict . . . or concerning the mental processes by which it was reached." Comment, 47 Mich. L. Rev. 261 (1948).

51. Rule 41 "Upon an inquiry as to the validity of a verdict . . . 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 concerning the mental processes by which it was determined."

1. The clause read: "Provided nevertheless that the said lot and the building thereon shall be used for the purposes of an Academy and no other then this deed shall remain in full force and effect otherwise it shall become Void and the premises herein conveyed shall revert to the said John Townsend party of the first part and to his heirs." Instant case at 364, 207 N.E.2d at 183, 259 N.Y.S.2d at 131 (1965).

2. Board of Educ. v. Miles, 18 A.D.2d 87, 238 N.Y.S.2d 766 (3d Dep't 1963).