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Criminal Law - New Trial - Misconduct of Jury

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of support imposable on defendant under that state's law,[14] an amendment was recommended in 1958 which permitted the responding state to treat a duly registered judgment as if locally issued.[15] This amendment failed to accomplish its purpose, however, because it is apparent that the effectiveness of the Uniform Support Act is dependant upon the interpretation of the court in the responding state.[16] Even the criminal extradition provisions of the Act, unsatisfactory as they may be for providing support, are subject to judicial interpretation.[17]

If North Dakota's neighbors who do not impose the obligation to support illegitimate children[18] accept the reasoning of the Texas court, it is evident that a father of an illegitimate child, although obligated under North Dakota law to provide support,[19] need not be too inconvenienced to escape his obligation.

Considering that the common law rule has been abrogated in other states by judicial construction[20] and that full faith and credit has been extended to cover ambulatory judgments in other states[21] and even in Texas in some cases,[22] the Texas court would have made no radical variation from accepted practice. Leaving for legislative enactment what has been accomplished elsewhere by judicial construction is a dereliction of precedent. Judicial cognizance of the social problem and public burden for which a remedy is sought should be combined with the plenary powers of judicial interpretation and construction to give effect to this Uniform Support Act and preclude Texas and others[23] from becoming havens for those who wish to sow the seeds but avoid the tedium of nurturing the crop.

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CRIMINAL LAW—NEW TRIAL—MISCONDUCT OF JURY—The defendant was convicted of petit larceny for obtaining money by an unpaid check. He appealed for a new trial claiming misconduct on the part of the jury. The affidavits of two jurors stated that during their deliberation the jury foreman made many statements to the jury in respect to his view that the defendant was guilty. He stated that he had a stack of bad checks in his office and that

14. Duncan v. Duncan, 85 Ohio L. Abs. 522, 172 N.E.2d 478 (1961); *contra*, Wilson v. Chumney, 214 Ga. 120, 103 S.E.2d 552 (1958) (responding state held proceedings of initiating state res judicata).
15. 9C U.L.A. §§ 33-38 (Supp. 1964).
16. Clarke v. Blackburn, 151 So. 2d 325 (Fla. 1963); Hardy v. Betz, 105 N.H. 169, 195 A.2d 582 (1963). The responding state refused extradition on grounds that defendant had not been adjudged guilty of a crime under law of responding state.
17. *Ibid.*
18. *E.g.*, Idaho, Michigan, Missouri and Montana.
19. N.D. CENT. CODE § 32-36-01 (1960).
20. *Supra* notes 9, 10 and 11.
21. *Supra* note 4.
22. *Supra* note 6.
23. *Op. cit. supra* note 18.

a stop must be put to such a practice. Later during the deliberation the same juror explained that the defendant had previously been in court. The Supreme Court of Tennessee *held* that the Constitutional right to meet the witnesses face to face was not denied the defendant and it was not shown that there was misconduct on the part of the jury. *Troglen v. State,* 392 S.W.2d 925 (Tenn. 1965)

The majority of jurisdictions hold to the orthodox view that the members of a jury may not give testimony so as to impeach their verdict.[1] The reasons given for such a decision as well as the criticism[2] of such decisions are varied and voluminous.[3] Several states have modified the archaic rule to admit a juror's impeachment of his verdict.[4] North Dakota has modified the rule only to civil verdicts arrived at by chance.[5]

These jurisdictions which receive the testimony of a jury member for the purpose of avoiding the verdict do so in a limited fashion under the Iowa rule which limits this testimony to those items that do not essentially inhere in the verdict itself.[6] Under this rule the motives, methods and mental processes by which the jury reaches its decision inhere in the verdict,[7] while the existence of conditions of the occurrence of events bearing on the verdict are proof of facts which will be admitted into evidence.[8]

After the alleged misconduct on the part of the jury has been admitted, the granting of a new trial is at the discretion of the trial judge.[9] Some courts categorically grant a new trial if there is misconduct on the part of the jury,[10] while others hold that there must be actual prejudice toward the defendant before a new trial is granted.[11] Generally a new trial will not be granted unless the fact alleged is based upon an observation, experience or idea unique to that juror by virtue of his business, profession or social circumstance,[12] or is not part of the evidence admitted during the trial.[13] The court's reasoning in the principal case falls within this generalization.

The right of the defendant to be confronted with the witness against him in a judicial proceeding is a basic Constitutional right

1. *E.g.,* Ramsey v. United States, 27 F.2d 502 (6th Cir. 1928); Brackin v. State, 31 Ala. App. 228, 14 So. 2d 383 (1943); State v. Graber, 77 N.D. 645, 44 N.W.2d 798 (1950).
2. McDonald & U.S. Fidelity & Guaranty Co. v. Pless, 238 U.S. 264 (1915).
3. *E.g.,* Taylor v. State, 18 Ala. 466, 93 So. 78 (1922); State v. Kociolek, 20 N.J. 92, 118 A.2d 812 (1955); Sandoval v. State, 209 S.W.2d 188 (Tex. 1948).
4. *E.g.,* State v. James, 198 Iowa 976, 200 N.W. 577 (1924); Galvin v. State, 46 Tenn. 283 (1869); TEX. CODE CRIM. PROC. art. 753 (1950).
5. N.D. R. Civ. P. 59 (b) (2) (1957); Grenz v. Werre, 129 N.W.2d 681 (N.D. 1964); State v. Graber, *supra* note 1.
6. Butler v. United States, 317 F.2d 249 (8th Cir. 1963); Wright v. Illinois & Miss. Tel. Co., 20 Iowa 195 (1866); MODEL CODE OF EVIDENCE rule 301 (1942).
7. State v. Lorenzy, 59 Wash. 308, 109 Pac. 1064 (1910).
8. State v. Kociolek, *supra* note 3.
9. State v. Jones, 357 P.2d 760 (Kan. 1960); State v. Cray, 31 N.D. 67, 153 N.W. 425 (1915).
10. State v. Kociolek, *supra* note 3; TEX. CODE CRIM. PROC., *supra* note 4.
11. State v. Olds, 106 Iowa 110, 76 N.W. 644 (1898); State v. Robidou, 20 N.D. 518, 128 N.W. 1124 (1910); Kirkendoll v. State, 198 Tenn. 497, 281 S.W.2d 243 (1955).
12. See, *e.g.,* Russ v. State, 95 So. 2d 594 (Fla. 1957); Rawlings v. State, 303 S.W.2d 799 (Tex. 1957).

which has been extended to the states by the fourteenth amendment.[15] The court in the principal case bypassed this Constitutional issue by merely saying that the juror was not a witness. A contrary opinion can be reached by viewing the juror's statement in the light of his fellow jurymen. The statement that he had a stack of bad checks in his office implied that at least one of these checks was passed by the defendant. The later part of his testimony that a stop must be put to this practice could have inferred that a stop should be put to this particular defendant. A few well chosen questions by defendant's counsel on cross-examination could have brought out the truth that the juror was not speaking of the defendant but of his customers in general.

An analogous situation arose in *United States v. Douglas*[16] where two affidavits were attached to the information sent to the jury. Each contained persuasive proof in support of the alleged charges. The affidavits, however, had not been admitted into evidence during the trial. The circuit court held that the submission to the jury of the affidavits was a palpable infringement on the defendant's Constitutional right to be confronted with the witness against him. If the jury's deliberation under these circumstances is a violation of the defendant's Constitutional rights, there is no logical reason why a juror's adverse testimony should not come within the purview of the Constitution. This is especially true in light of the United States Supreme Court's recent decisions expanding the application of an accused's Constitutional rights.[17] The only remedy for such misconduct is a new trial.

Allowing the defendant the right to confrontation in this situation may burden the courts for at least a short period until judges become accustomed to instructing juries on such matters. The difficulty resulting from such confrontation, however, should not be an excuse for refusing to improve the means of justice.

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13. State v. Wegener, 180 Iowa 102, 162 N.W. 1040 (1917); State v. Burton, 65 Kan. 704, 70 Pac. 640 (1902); Briggs v. State, 207 Tenn. 253, 338 S.W.2d 625 (1960).
14. U.S. CONST. art. 6.
15. Pointer v. Texas, 85 Sup. Ct. 1065 (1965).
16. 155 F.2d 894 (7th Cir. 1946).
17. *E.g.*, Escobedo v. Ill., 84 Sup. Ct. 758 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963); Mapp v. Ohio, 367 U.S. 643 (1961)