The Jury at Work

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By Jack Leavitt

"... [W]e gather twelve ignorami together and, after pumping law into them they cannot comprehend, and surfeiting them with testimony which they are incompetent to analyze or unable to remember, we allow a dozen or so shyster lawyers to befog them with their sophistry, to drive out what little of the law and evidence may have found lodgment in their befuddled brains, then lock them up until the most obstinate jackass in the crowd coerces the others into submission or drives them to open revolt."

"We didn’t believe the witnesses on either side, so we made up our minds to disregard all the evidence and decide the case on its merits."

The functions, duties, and rights of jurymen have changed considerably since the Assize of Clarendon in 1166 required twelve of the most lawful men from each hundred (i.e., from each territorial district) to state under oath whether their community harbored any man accused or publicly suspected of being or receiving a robber, murderer, or thief. During the turmoils of their early history, jurors could be convicted of perjury and punished heavily for a wilfully wrong verdict; they could be empaneled by the King’s connivance for the specific purpose of acquitting a defendant on whom judgment was to be passed; they could be kept without meat, drink, fire, or candle in their deliberations and, if they failed to agree on a verdict before the judges left the town, could be carried around the judicial circuit in a cart.

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2 Statement of an unidentified juror in Wellman, Gentlemen of the Jury 263 (1937).
3 Thayer, A Preliminary Treatise on Evidence at the Common Law 137-68 (1898).
4 Letter from Denbenham, Tymperley, and White to Paston, 2 May 1451, in Kendall, Source Book of English History 117 (1900).
5 III Blackstone, Commentaries 375-76.
With the passage of time, the men who transmuted jurisprudence into dollars and cents were able to perform their duties in a more comfortable, less terrifying atmosphere. By the 1840's, jurors in California who were addicted to cutting up desks and mutilating other courtroom furniture were not punished but, instead, were provided with wooden boards and reminded, "Whittle the boards; spare the desks." Still later, the jury's right to meals, lodging, and transportation at the county's expense was established over the county's protest that it had no legal authority to pay those bills. Ideal jury facilities, under the modern view, were described as including a well-ventilated jury room, upholstered arm chairs, and free parking space. To insure that jury integrity would be protected from the curiosity of university professors, among others, the federal government and the state of California enacted penal legislation against eavesdropping on jury deliberations or voting.

Despite these improvements in the jury's decisional environment, the conduct of its members often aggrieved the litigants against whom they returned unfavorable verdicts. Charges of jury misconduct continued to be laid before the courts on a variety of grounds, from taking unauthorized papers into the jury room, to bantering with an attorney at a water fountain, to experimenting during deliberations, to arriving
at chance verdicts, to drinking intoxicating liquors during the trial, and to various other transgressions. This article seeks to describe and analyze these breaches of duty so that an attorney who discovers similar misconduct has a convenient picture of how it bears on a motion for new trial or an appeal. For the sake of completeness, the article also considers the judge's direct relations with the jury, except for omitting his role in jury selection and in giving his initial instructions.

Most of the following discussion has as its implicit reference point the state constitutional provision decreeing that no judgment will be set aside or new trial granted for procedural errors unless the court believes that a miscarriage of justice has resulted. Since perfect justice does not necessarily depend on the symmetrical application of fixed rules, the attorney should be prepared to discover the court routinely brushing aside clear violations of established legal procedures. Is this leniency to be encouraged? For those who believe in law as ritual, as eternally fixed commands and taboos rather than as a means to social justice, these deviations are vile: "The taboo, by its nature, does not admit of experimental verification. The native does not dare, by ignoring it, to make the test; or if by chance, involuntarily, he does, still he is more likely to support the theory by promptly dying of fright than to live to note the nonappearance of the consequences." To those others who believe that no system is more virtuous than its results, the courts' willingness to overlook error is most often a mark of inspired good sense.

**Jury Intoxication**

Two examples of alleged jury intoxication provide a pleasant aperitif for a discussion of jury misconduct. Because of its belief that "The purity and correctness of the verdict should be guarded in every way, that the administration of justice should not be subjected to scandal and distrust," the California Supreme Court once reversed a murder conviction in which there was strong reason to suspect a juror of having drunk so much as to unfit him for the proper discharge of his duty. This strong reason, which prompted some concurring justices to condemn the entire jury, was based on a disclosure that during the course of trial the jury drank at least seventeen and one-half gallons of beer, a two gallon demijohn of wine, three bottles of claret, and an undetermined amount of whiskey. By preventing a fair and due con-

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10 Cal. Const. art. VI, §43½.
12 People v. Gray, 61 Cal. 164, 186 (1882).
Consideration of the case, this conduct warrants the granting of a new trial.\textsuperscript{13}

Nine years later the same tribunal apparently discovered that courtroom air cures drunkenness.\textsuperscript{14} A juror had admittedly drunk intoxicating liquors out of court and was under their influence during recess, but his sobriety in the courtroom was the subject of conflicting evidence. In determining whether this "outside" intoxication was sufficient as a matter of law to infect the verdict, the supreme court held:\textsuperscript{15}

If, while in his capacity of juror, he was sober, heard the evidence, understood and appreciated it and the instructions of court and argument of counsel, and was then able intelligently to understand, deliberate, and determine what should be the verdict, with his fellow-jurors, we are unable to perceive that the verdict was arrived at accompanied by misconduct on the part of the juror while performing his duty. He was guilty of drinking more than he ought, when out of court, but does not seem ever to have been under its influence while sitting or deliberating as a juror. \textit{At those times his mind was clear}, and no misconduct is shown to have occurred. (Emphasis added.)

Perhaps, however, in spite of this erratic temperance philosophy, the decision really turned on the proverbial \textit{in vino veritas}.

\textbf{Authorized and Unauthorized Separations}

To reduce the chance of outside influence or distraction, the members of the jury are kept together (whenever feasible) during their tenure as purifiers of disputed fact. If permitted to separate, they are warned not to speak or listen to any other person about the subject of the trial, and not to form or express an opinion until the case is finally submitted to them.\textsuperscript{16} This enforced comradeship is most stringently observed when, under charge of an officer, the jury retires to some convenient place to deliberate on a verdict.\textsuperscript{17}

Jurors being what they are (\textit{e.g.}, "one of the chief props and bulwarks of civil liberty")\textsuperscript{18}, this limitation on free assemblage is sometimes ignored. (Sometimes, too, authority for a separation may be sought by an attorney seeking to curry favor with the jury,\textsuperscript{19} while at

\textsuperscript{13} \textit{Id.} at 186. It was noted that if it is "necessary" for a juror to drink intoxicating liquors, he should apply for the court's leave to do so.

\textsuperscript{14} People v. Deegan, 88 Cal. 602, 26 Pac. 500 (1891). See also People v. Romero, 12 Cal. App. 466, 107 Pac. 709 (1910).

\textsuperscript{15} 88 Cal. at 606-07, 26 Pac. at 501-02.

\textsuperscript{16} \textit{CAL. CODE CIV. PROC. §} 611; \textit{CAL. PEN. CODE §§} 1121-22.

\textsuperscript{17} \textit{CAL. CODE CIV. PROC. §} 613; \textit{CAL. PEN. CODE §} 1128.

\textsuperscript{18} May, \textit{Trial By Jury, Modern Jury Trials} 169 (Donovan ed. 1908).

\textsuperscript{19} See Atchison, T. & S.F. Ry. v. Southern Pac., 13 Cal. App. 2d 505, 57 P.2d 575 (1936), where the jury's being permitted to separate for a single evening was held not to have jeopardized the interests of the complaining party.
other times a charge of unlawful separation may be based on a claim that while the jurors were going to or coming from the courtroom, all in full view of the officer in charge, one juror lagged behind his associates.20)

When raising these alleged irregularities on appeal, the complaining party should be prepared to establish three facts:21

1. A separation actually occurred.
2. The separation was unauthorized and contrary to the court's instructions.
3. Improper influence might have been brought to bear on one or more jurors during this interval.

The party seeking to sustain the verdict must then negative the presumption of improper influence and show that no such attempt was made. If he does so, the irregularity is disregarded.22

Authorized separations also create difficulties, chief among them being a question of whether the court has power to authorize the practice in the first place. By a four to three decision,23 the California Supreme Court has held that the Code of Civil Procedure, properly read, vests this power in the trial court. Although the lower court justified his action in this case "because of the possibility of black-outs, air raid, and that sort of thing,"24 the supreme court, leaving aside such wartime flexibility, based its approval on the supposed implications of sections 611 and 613.

Section 611, which begins, "If the jury are permitted to separate . . . " contains the foreseeable implication that the trial court has authority to separate the jury either before or after the case is submitted to them. Who else, if not the judge, could give the necessary permission? Section 613, which says that if the jury retire for deliberations,

20 People v. Walther, 27 Cal. App. 2d 583, 81 P.2d 452 (1938). This claim failed, but the judgment of conviction was reversed on other grounds.
22 Id. In Saltzman, the alleged misconduct occurred when one juror, in the presence of a deputy sheriff but away from the other jurors, telephoned his father-in-law with a request for that relative to take care of the juror's horse. Since the telephone company was the defendant, the losing plaintiff complained that improper communications could have been made during this unauthorized separation. Judgment, however, was affirmed. While the juror's conduct was a gross impropriety, the court said, the brevity of the communication, the presence of the deputy, and the juror's own affidavit denying misconduct are sufficient to rebut the presumption of injury. See also People v. Cord, 157 Cal. 562, 108 Pac. 511 (1910), a criminal case stating that a new trial should be granted if the jury were permitted to separate during their deliberations under such circumstances that they might have been tampered with, unless there is affirmative proof explaining the separation and showing that the defendant was not prejudiced. In Cord, a slight separation, due to the confusion arising from a nearby fire, was held non-prejudicial.
24 Id. at 697, 160 P.2d at 798.
"they must be kept together," means, according to this reasoning, that:

The jury is not to separate on their own volition or by permission of the officer in charge. It does not mean that the court may not order a separation. It provides that the jury must be kept together. That duty falls on the officer in charge. Hence, it is concerned with his duties rather than the power of the court to direct a separation.

Sharply critical of this theory, the dissenting opinion declared:

The conclusion that, in a civil action, a trial judge may, without the consent of the parties, allow the jurors to separate during their deliberations and before they have reached a verdict, in my opinion, not only rests upon a strained and unwarranted construction of the applicable statute but also sets aside procedure which has been established in this state for more than fifty years.

From the present author's point of view, the majority in McDowd v. Pig'n Whistle Corp. achieved a proper result despite their tailoring legislative intent with the same skill employed by the legendary emperor's clothing merchants. Using justice as the pattern, but legislative silence as the cloth, the court here recognized that separation alone need not lead to corruption. With that premise the court should have rested.

Taking Materials into the Deliberation Room

When the jurors retire to consider a verdict, they are permitted in both civil and criminal cases to take the following memory aids with them: all papers that have been received in evidence (except for depositions and for papers that should remain with the person having them in his possession), and their own notes of the testimony or other proceedings at the trial. Beyond this mutually acceptable point, Code of Civil Procedure section 612 and Penal Code section 1137 vary in their provisions. Under section 612, jurors are permitted to utilize any "exhibits" (presumably consisting of non-documentary real evidence) which the court deems proper, a privilege not mentioned in section 1137 but granted by court decision. Through a different approach

25 Id. at 699, 160 P.2d at 798. See also Marinucci v. Bryant, 151 Cal. App. 2d 298, 311 P.2d 622 (1957), citing McDowd to support the proposition that mere separation does not require reversal.

26 26 Cal. 2d at 701, 160 P.2d at 799 (dissent).

27 CAL. CODE CIV. PROC. § 612; CAL. PEN. CODE § 1137.

28 For the taking of exhibits other than papers into the jury room in criminal trials, see People v. Lyons, 50 Cal. 2d 245, 324 P.2d 556 (1958) (articles of allegedly stolen property); People v. Walker, 150 Cal. App. 2d 594, 310 P.2d 110 (1957) (tape recording and recording machine); People v. Barrett, 22 Cal. App. 780, 136 Pac. 520 (1913) (overcoat, revolver, piece of bloody flooring).
to statutory silence, courts consider it irregular for jurors in civil cases to take instructions into the jury room since the Code of Civil Procedure does not authorize the practice. No equivalent problem arises in criminal trials because section 1137 specifically permits written instructions to be taken to the deliberation room.

The wisdom of these statutory incongruities has been questioned elsewhere and need be considered here only as a passing aspect of the more general problem: When does prejudice result from the taking of an unauthorized paper into the jury room? According to the cases, "rarely."

A cultural deficiency in early English life explains why jurors were initially restricted in their use of writings, and makes more understandable a modern court's reluctance to overturn a verdict because of an irregularity in this procedure. Jurors in those days were generally illiterate. Since a writing conveyed nothing to them, unsealed instruments were customarily excluded from the deliberation room except with the consent of the parties. Sealed instruments, although just as incomprehensible from a literary standpoint, were allowed in the jury's custody because the jurors, drawn from the immediate vicinity, were familiar with the seals, which were derived from neighborhood armorial bearings. Being recognizable, a seal spoke for the genuineness of a document. To abate these restrictions when conditions no longer warranted such practices, Code of Civil Procedure section 612 was enacted, not as a limitation on the court's power, but to modify and extend the common law rules in regard to the use of writings.

Influenced by this permissive philosophy, courts have sustained verdicts in the face of claims that prejudice had occurred because the jurors improperly took the following materials to the jury room: Depositions (specifically prohibited by statute); written instructions;
notes of counsels’ arguments; statements marked for identification but never introduced in evidence; a map not received in evidence; a paper on which plaintiff’s attorney had entered his computation of damages; unidentified documents and papers; pleadings; a partial transcript of testimony; a flashlight alleged to have caused an explosion; and samples of Communist literature.

The rationale behind these decisions is a sensible one, that justice was done in spite of it all and that the merits of each verdict outweigh existed on the question of contributory negligence, the court, without objection, reread its previous instruction on contributory negligence. The jury then retired and within a few minutes sent word that it wanted the written instruction that had just been read to them. Over objection by plaintiff’s counsel that it would be improper to send a written instruction to the jury room because this act would focus attention on just the one instruction, the court complied with the jury’s request. Ten minutes later the jury returned with a verdict for the defendant. On appeal, it was held that the error was collateral and without probable substantial relation to the disposition of the cause. “Any singling out of that subject was done by the jury (not by the judge) in the course of their deliberation. Sending the instruction in to them, to be read in the jury room, would not seem to give this subject any greater emphasis than to have called them into the courtroom (which would have been proper) for the judge again to read it to them there.” 167 Cal. App. 2d at 509, 334 P.2d at 617.

Ferner v. Casalegno, 141 Cal. App. 2d 467, 297 P.2d 91 (1956). These notes were held “obviously” to be papers authorized by CAL. CODE Crv. Paoc. § 612.

Newton v. Thomas, 137 Cal. App. 2d 748, 769, 291 P.2d 503, 515 (1955). In examining the statements, the appellate court noted “[we] fail to find anything that was not testified to at the trial.”


Balasco v. Chick, 84 Cal. App. 2d 802, 192 P.2d 76 (1948). Cf. Carty v. Boeseke-Dawe Co., 2 Cal. App. 646, 84 Pac. 267 (1906), holding that the court may properly refuse to let the jury take a map with them, and People v. Cochran, 61 Cal. 548 (1882), reaching the same result when counsel unsuccessfully requested that a diagram be sent to the jury room.


People v. Walther, 27 Cal. App. 2d 583, 81 P.2d 452 (1938). Although the judgment of conviction was reversed on other grounds, the appellate court was unimpressed by an affidavit in defendant’s behalf that “certain documents and papers unknown to this affiant” were delivered to the jury outside of court. In the absence of evidence to the contrary, the court “must assume” that the jurors and the officer in charge of them were obedient to the court’s admonitions and that the jury rendered the verdict solely on the evidence adduced in open court. “In support of that presumption we may assume the documents which were handed to the jurors had no application to the case on trial, or that they consisted of pleadings or exhibits which had been formally received in evidence during the progress of the trial. If that is not the fact it would have been easy to introduce evidence of the nature of the documents.” 27 Cal. App. 2d at 593, 81 P.2d at 457. The court does not explain why it would be “easy” to do so.

Powley v. Swensen, 146 Cal. 471, 80 Pac. 722 (1905). The practice, however, is of doubtful propriety.

Bleumel v. Kroizy, 113 Cal. App. 585, 298 Pac. 825 (1931). No timely objection had been raised to the taking of the transcript.


its imperfect origin. Conceding agreement with this approach, we should nevertheless quarrel with several pronouncements:

In a breach of contract action dealing with the purchase of a custom-built home 45 much of the evidence recounted the luxury features the buyers had demanded and were reluctant to pay for. As newspapers will, the local press described these frills in sarcastic terms. And as jurymen often do, some jurors read these accounts during the course of trial. Against a claim that this behaviour was prejudicial misconduct, the court noted, “If the evidence on these issues was admissible, and it obviously was, it is difficult to see how a newspaper summary of such evidence could be prejudicially inflammatory.” 46 Surely this statement, standing alone, is nonsense. Journalistic wit has no place in the jury room. Even if we assume that newspaper accounts will summarize actual evidence, we need only compare the ways competing newspapers describe the same events to realize that nothing in the fourth estate is as flexible as a fact. Litigants should be spared this risk 47.

In a fraud action concerned with sales of real property, 48 the plaintiff’s attorney posted a large sheet of paper with his computations of damages on a courtroom blackboard. The figures consisted of the sums in money and property paid by the plaintiff to the defendant, the value of the property plaintiff received in exchange, interest totals, and 5,000 dollars claimed as exemplary damages. On retiring, a juror took this paper to the deliberation room. No objection was made until after a verdict had been returned in the exact amount of these computations. The appellate court noted that the juror’s action was improper but was done “in full view” of the court, the defendant, the defendant’s counsel, and the plaintiff’s counsel. This being so, “It is to be presumed that the trial court on motion for new trial was of the opinion that the incident was observed by appellant’s counsel and that he had an opportunity to make a timely objection.” 49

Such a presumption, however, wanders beyond the facts and unreasonably enlarges the doctrine of waiver. To prevent a party from sitting back in silence when he knows of a procedural irregularity and is gambling on a favorable verdict while ready to complain of a hos-

46 Id. at 273, 270 P.2d at 112.
47 See United States v. Reid, 53 U.S. (12 How.) 361 (1851) and People v. Murray, 94 Cal. 212, 29 Pac. 494 (1892) on the harmless effect of jurors reading newspaper articles. See Mattox v. United States, 146 U.S. 140 (1892) and People v. Chin Non, 146 Cal. 561, 80 Pac. 681 (1905) on the prejudicial effect of this conduct. See also People v. McCoy, 71 Cal. 395, 12 Pac. 272 (1886).
49 Id. at 42, 158 P.2d at 423.
tile one, courts expect an attorney to object as soon as he discovers\(^5\) or suspects\(^6\) that the jury has improperly taken certain papers with them. The present decision, however, seemingly requires an attorney to monitor the actions of the jury as carefully as he listens to the testimony of witnesses so that he can promptly object to irregularities. He is impliedly charged with constructive knowledge of whatever the jury does in open court and is penalized for faulty observation. (The fact that his client might have observed an impropriety hardly lessens the attorney’s burden. Few clients know what constitutes proper jury procedure and must either call every bit of jury activity to the attorney’s attention or gamble on ignoring a prejudicial act.) The one neutralizing feature that eases this court-imposed vigilance is the statistical likelihood that opportunities for its application are rare.\(^5\)

In a prosecution for criminal syndicalism,\(^5\) the jury was mistakenly permitted to take with it literature that discussed the religious and social ideas of Communists as well as the Communists’ alleged lack of ideals. The defendants were convicted. On appeal, it was claimed that the literature might have shocked the sensibilities of the jurors and that the defendants, not being able to confront the “witnesses” against them, were deprived of liberty without due process of law. Rejecting this argument, the appellate court held that since the defendants made no affirmative showing they were injured by this mistake, no prejudice would be presumed. The court’s bland naivete in a political-criminal trial might best be judged through a poet’s eyes:

“Your innocence is on at such a rakish angle
It gives you quite an air of iniquity.”\(^6\)

Occasionally, courts find that an irregularity in the taking of papers to the jury room has prejudiced the losing party. Such a result occurred when, in a sharply contested trial, the jury obtained a depo-

\(^5\) But see Kershaw v. Tilbury, 214 Cal. 679, 8 P.2d 109 (1932), in which the court said that if a juror falls asleep during the trial and a party notices this fact, it is his duty to notify his attorney who should call the court’s attention to this conduct. A party’s failure to do so is a waiver of the objection. “It does not behoove a litigant to observe an error being committed and sit idly by and not mention it to his attorney or the court.” 214 Cal. at 691, 8 P.2d at 114. See also Newman v. Los Angeles Transit Lines, 120 Cal. App. 2d 685, 262 P.2d 95 (1953), which states that before an appellant may urge a juror’s dereliction (here, the alleged sleeping of two jurors through most of the trial) as a ground for reversal or new trial, he must affirmatively show that neither he nor his counsel had knowledge of this fact before the case was submitted.
tion that was extremely damaging to the defendant.\textsuperscript{55} The appellate court declared:\textsuperscript{56}

Permitting the jury to have this isolated portion of the evidence, contrary to the provisions of the statute (Code of Civil Procedure section 612), centered its attention on the Steffan testimony, stressing the importance of this one item and exalting it above all other evidence given at the trial. The obvious result of such procedure could well be that the verdict for plaintiff was based upon this deposition rather than upon a proper consideration of all evidence placed before the jury.

What minimizes this result, however, is the fact that the trial court had granted a new trial when the misconduct was called to his attention. In rendering its decision, the appellate court had only to affirm that the trial court did not thereby abuse his discretion. Later cases based on the same irregularity show that "although the taking of a deposition into the jury room is erroneous, the question of whether it constitutes ground for a new trial or a reversal is one addressed to the sound discretion of the court."\textsuperscript{57} This language, though strong, is somewhat misleading. Appellate courts recognize that a document's contents can be independently examined at each judicial level with equal facility. Unlike situations in which the demeanor of a witness carries great impact, situations involving written material give the trial court no analytic advantage over his more elevated brethren. Accordingly, the higher court appears to base its decision on a study of the improperly-used documents, taking into account the contents and the relationship of the document to the major issues at trial. For depositions alleged as the basis of prejudicial misconduct, courts are likely to preserve the verdict if the deposition is substantially identical to the testimony of the witness as given on the stand.\textsuperscript{58} No more felicitous technique suggests itself.

\textbf{Evidence, Experience, and Experiments}

Jurors are expected to reach a verdict based on the evidence admitted at trial and interpreted by their own common knowledge. The
common knowledge must not supply testimony, as would occur if a jury acted on its private information about a particular fact, but must be used only to aid them in understanding what competent evidence signifies.

Indeed, no evidence in any case would be intelligible if neither the judge nor jury could see and understand it in the light of common experience... Of course, the common knowledge of one jury might be very different from that of another; but no definite rule as to what is common knowledge can be made. The more intelligent the juror the better he will apply common knowledge in the understanding of testimony and in making proper deductions and inferences therefrom.59

Regulating these boundless possibilities of ignorance, information, and delusion, which shift with each turn of the jury selection wheel, is a task that links law with epistemology, trial procedure with the theory of the method and grounds of knowledge. Two early California cases simplify one aspect of the problem by focusing attention on a jury's traveling away from the courtroom to view premises referred to in testimony.

According to Wright v. Carpenter,60 an instruction is erroneous if it authorizes the jury to take into consideration the results of their own examination of the premises. Code of Civil Procedure section 610, which permits these views, did not intend to convert the jurors into "silent witnesses" who could base their verdict on their own inspection tour regardless of an overwhelming weight of evidence to the contrary. There would be no way to ascertain the value or accuracy of an opinion based on such personal observations. The purpose of section 610, said the court, was to enable the jury to more clearly "understand and apply" the evidence. Under such a decision, juries serve as receptacles for evidence rather than as repositories of knowledge.

Though Wright was decided three years after section 610 was passed, and might therefore be credited with some perception of legislative insight, the California Supreme Court, in People v. Milner,61 soon noted that this interpretation had already been "set aside" before 1898. Why? Because a view is similar to an evaluation of real evidence that is physically present in court. A door with a hole in it could be

59 Kawamura v. Honek, 127 Cal. App. 509, 511, 512, 16 P.2d 150, 151 (1932), holding that in a determination of plaintiff's life expectancy, when plaintiff neither introduced testimony as to his age, health, or family history, nor introduced "life tables," the jury could take the testimony given them, including its own view of the plaintiff and his demeanor, and with the aid of common knowledge approximate his age and life expectancy.

60 49 Cal. 607 (1875).

61 122 Cal. 171, 54 Pac. 833 (1898), a criminal trial, with the view authorized under Cal. Pen. Code § 1181(2).
received in evidence and submitted to the jury to determine whether the hole was caused by a bullet. If, instead of bringing the door to the jury, the jury was brought to the door, would it be any less the reception of evidence because obtained in this way? Jurors, \textit{al fresco} or not, were permitted to add some increment of their own wisdom to the facts adduced at trial.

Nowadays the knowledge that a jury acquires by an authorized view is considered independent evidence in the case, properly used in arriving at a verdict.\footnote{Neel v. Mannings, Inc., 19 Cal. 2d 647, 122 P.2d 576 (1942); Gates v. McKinnon, 18 Cal. 2d 179, 114 P.2d 576 (1941), in which the trier of fact was a judge sitting without a jury; Downey v. Santa Fe Transp. Co., 134 Cal. App. 2d 730, 286 P.2d 40 (1955), reversing a judgment notwithstanding the verdict because the trial court erred in determining there was no evidence giving substantial support to the jury verdict for plaintiff. The evidence at trial, together with the jury's view of the premises, can furnish substantial evidence to support an implied finding of defendant's negligence.} Because "the practice is a dangerous one, as is well known to the profession,"\footnote{Brown v. Lemon Cove Ditch Co., 36 Cal. App. 94, 100, 171 Pac. 705, 708 (1918).} the trial judge has discretion in determining whether the jury should be permitted to view the premises.\footnote{CAL. CODE CIV. PROC. § 610; Trust v. Arden Farms Co., 50 Cal. 2d 217, 324 P.2d 583 (1958); Henley v. Atchison, T. & S.F. Ry., 166 Cal. App. 2d 554, 333 P.2d 388 (1958), holding that no abuse of discretion is shown when the court properly instructs the jury that changes made since the accident are to be disregarded; Laguna Salada Elementary School Dist. v. Pacific Dev. Co., 119 Cal. App. 2d 470, 259 P.2d 498 (1953); Freibury v. Israel, 45 Cal. App. 138, 187 Pac. 130 (1919), holding that there is no error in permitting the jury to view a damaged buggy about one year after the accident when witnesses, who are subject to cross-examination, testify the buggy is in substantially the same condition at the time the jury viewed it as it was immediately after the accident. See also Judd v. Letts, 158 Cal. 359, 111 Pac. 12 (1910), holding that a juror's expression of a desire to view the premises is not prejudicial misconduct.} The court's discretion extends to a determination, explicit or implicit, on whether the jury's misconduct during an authorized view is prejudicial. Even though the judge forewarns the jury, "I think it is better for you not to discuss it (the situation at the scene of the accident) among yourselves," and counsel makes a timely objection that the jurors were "scattered and separate," talking to each other, and pointing out various physical objects, an appellate court will not disturb the trial court's implied finding, in denying a motion for new trial, that these events were harmless.\footnote{MacPherson v. West Coast Transit Co., 94 Cal. App. 463, 271 Pac. 509 (1928). Counsel's affidavits in this case did not disclose the actual conversations the jurors carried on with each other.} Violations of the trial court's instructions are measured according to the magnitude of the violation. Assuming that some jurors have improperly received evidence out of court by examining street car brakes during a view of the crossing where an accident occurred, "was it important enough to warrant a
reversal?6 If no one has claimed anything was wrong with the brakes or the brake mechanism, nor alleged that the accident was due to any defect in the brakes, the improperly received evidence is immaterial to any real issue in the case. No prejudice arises from such misconduct.67

Leading from this situation is a side road concerned with the role of the judge during an authorized view. Two irreconcilable precedents, one criminal and one civil, may be called on to answer the question, “Must the trial judge accompany the jury on these excursions?” In a late 19th century criminal prosecution,68 the judge’s failure to join the jury at the scene of a homicide was held reversible error. More recently, a civil case69 acknowledged the existence of this holding, but refused to apply the earlier result. “The failure of a judge to perform his duty and accompany the jury when it views the premises, should not be encouraged.... We expressly hold it to be improper, but we cannot say under the circumstances of this case that defendant was prejudiced by such failure.”70

Unless the complaining party can affirmatively show substantial irregularity in the jury’s conduct, the judge’s absence, as such, appears to be small cause for reversal. More sophisticated and more troublesome, however, is the effect of this absence on the judge’s qualifications to pass on later motions directed to the sufficiency of the evidence. If the jury, but not the judge, visit the scene of the accident and watch a driving demonstration from an office where a witness allegedly observed the accident, is the judge properly acting within his discretion when he grants a new trial on defendant’s motion that the evidence was insufficient to support the verdict? Yes, he is, declares a 1947 decision of the district court of appeals.71 Having heard all the testimony, observed the witnesses, and seen the maps and photographs received in evidence, the judge is in a position to weigh and consider the possibility and probability that defendant’s vehicle was driven in the manner alleged by plaintiff. Although he should have been with the

67 Ibid. When the jury approached the scene of the accident in this case, one juror said, “That is the way Kimic was injured; if the tracks were wet he could not have stopped his car before said crossing.” This statement, according to the court, does not show a “prejudiced mind.” As a statement made on the spur of the moment and based on an irrelevant fact, it could not ultimately have affected the minds of intelligent jurors, even though it violated the court’s admonition that the jury should not discuss the case.
68 People v. Yut Ling, 74 Cal. 569, 16 Pac. 489 (1888). The judge’s absence was the sole ground for reversal.
70 Id. at 555, 245 P.2d at 17, 18.
jury, his failure in this regard does not prevent him from exercising his discretion in passing on the motion.

A decision of this nature renders worthless the jury's evaluation of the physical environment in which the disputed event took place, nullifies what might be called the "demeanor of the landscape." If the trial judge had believed that, at best, plaintiff did not—and could not—sustain the burden of proof to establish defendant's fault, he should have granted the defendant judgment notwithstanding the verdict. In such a case, we could reasonably assume that the judge allotted the jury's view its greatest possible weight and still found the plaintiff wanting. But by granting the motion for new trial, the judge implies that plaintiff can successfully prove his case before another judge and jury, and can do so with the same evidence marshalled at the first trial. Given this possibility of plaintiff's future success, the judge should recognize that through his own fault he put the jury in a better position that himself to evaluate the facts. He should not, when passing on the motion for new trial, act as a "thirteenth juror" if his credentials are so impaired. In reviewing the judge's action, the appellate court should insist that the judge's discretion be no broader than his qualifications to judge. The granting of a new trial in these circumstances would then be considered an abuse of discretion.\textsuperscript{72}

Irregularities present in authorized views have also been found in unauthorized views, when one or more members of the jury decide to see for themselves what all the testimony is about. Such "officious conduct" is readily condemned,\textsuperscript{73} but is judged within the perspective of the whole trial. If the misconduct is of so trifling a nature that it could not have been prejudicial to the losing party, then the improper view does not justify a new trial.\textsuperscript{74} The philosophy of applying the

\textsuperscript{73} Maffeo v. Holmes, 47 Cal. App. 2d 292, 117 P.2d 948 (1941). Because of a rule excluding certain affidavits made by jurors to impeach their verdict, the improper action of two jurors was not here available as a ground for reversing the judgment.
\textsuperscript{74} Siemsen v. Oakland, S.L. & H. Elec. Ry., 134 Cal. 494, 66 Pac. 672 (1901), reversing the trial court's granting of defendant's motion for new trial. Where a dispute exists over the location of an accident, or the scene's exact condition has an essential bearing on the controversy, it may well be that a verdict should be set aside on proof that a juror improperly acquired knowledge by visiting the scene. But if the place of the accident and the fact that a street car ran off its track are not disputed, and there is no allegation that the car left the track because of defective rails or road bed, there is an insufficient showing to justify a new trial on the basis of an affidavit that a juror was observed between the tracks "seemingly" examining them. See Kollert v. Cundiff, 50 Cal. 2d 768, 774, 329 P.2d 897, 1900 (1958), rejecting jurors' affidavits but noting, "With respect to the foreman's visit to the scene of the accident and his report to the jury it is difficult to see how, in the light of the evidence relating to the collision, the duration of the traffic signals could have had a significant bearing on the outcome of the case." Higgins v. Los Angeles Gas & Elec. Co., 159 Cal. 651, 115 Pac. 313 (1911), holding that no error resulted from
same standards to a jury's conduct, whether originally authorized or not, appears perfectly compatible with the sound administration of justice. No reason exists to punish a litigant for the jury's wrongs unless the litigant benefited from the misconduct.

An example of prejudicial misconduct is a case where two jurors during a court recess inspected the motorcycle on which plaintiff was riding at the time of the disputed accident. The motorcycle was not then in evidence but, examining it all the same, one juror said to the other that plaintiff's wife could not have seen the speedometer from where she was sitting on the rear seat when the accident occurred. After judgment for defendant, the plaintiff, moving for a new trial, presented affidavits that the speedometer was not in the same position during the unauthorized examination as it was at the time of the accident, and that no evidence was introduced to show the speedometer's position before the accident. The lower court's action in granting the motion was affirmed on appeal. Not only were the jurors taking evidence out of court without the parties' knowledge, but the improperly received evidence was along new lines which the plaintiff had no opportunity to explain or refute. Misconduct of this nature affects substantial rights and is the proper basis for a new trial.

Closely allied to the view as sources of information are experiments, which are often proper, and private research, which is always criticized. Private research takes several forms, from measuring a map during a court recess (irregular but not prejudicial), to checking on the value of electroencephalograms and on the reputation, background, and qualifications of the medical witnesses (irregular but not prejudicial), to telephoning a private physician about whether 190 is a dangerous blood pressure (irregular and prejudicial). As usual, the relationship of the improperly received information to the total case determines the appellate result. When a juror, by soliciting an outside source, receives information directly bearing on a principal issue over

the sheriff's having conducted the jury to lunch past the building in which a disputed explosion had occurred. The jury's casual visit to the scene of the event, as when taking exercise under an officer's custody, is no ground for setting aside a verdict.

75 Tunmore v. MacLeish, 45 Cal. App. 266, 187 Pac. 443 (1919).
76 Wilson v. California Cab Co., 125 Cal. App. 383, 13 P.2d 758 (1932). The map in question had been admitted in evidence, but the jurors' action violated the court's instruction not to discuss the case until final submission.
77 Schouten v. Crawford, 118 Cal. App. 2d 59, 65, 257 P.2d 88, 92 (1953). "While the juror undoubtedly violated the court's admonition, it is clear that his conduct was not prejudicial since it dealt with matters touching the character and extent of plaintiff's injuries and the reliability of witnesses testifying on such matters. Such testimony, however, never became crucial since the jury came to the conclusion that plaintiff was not entitled to recover." A question of waiver was also resolved against the plaintiff.
which qualified expert witnesses had differed, this "reprehensible conduct" justifies a reversal of the judgment. Reliance on the expert opinion of a man whom the juror trusted, as opposed to the testimony of strangers under oath, cannot meet the required standards of fairness in the rendition of a just verdict uninfluenced by outside considerations.\(^7\)

Experiments, when properly conducted, occupy a legitimate place in jury deliberations. On a rudimentary and rather obvious level, a jury may subject a memorandum book, previously introduced in evidence, to inspection under a mechanical device—a magnifying glass—for the purpose of investigating and comparing samples of handwriting.\(^8\) But since the jury must not investigate the case outside the courtroom, it is prejudicially improper for some jurors to borrow a rifle like the one which killed the deceased and, by firing it, try to determine the range at which powder marks would be carried.\(^9\) A working principle to guide such jury curiosity has been established by the California Supreme Court in reversing the grant of a new trial for alleged jury misconduct:\(^10\)

The court may permit the jury to take with them and use in their deliberations any exhibit where the circumstances call for it, observing the proper precaution of instructing the jury in the nature of the use which they shall make of the exhibit. . . . They may use the exhibit according to its nature to aid them in weighing the evidence which has been given and in reaching a conclusion upon a controverted matter. They may carry out experiments within the lines of offered evidence, but if their experiments shall invade new fields and they shall be influenced in their verdict by discoveries from such experiments which will not fall fairly within the scope and purview of the evidence, then, manifestly, the jury has been taking evidence without the knowledge of either party, evidence which it is not possible for the party injured to meet, answer, or explain.

Could this sensible rule have been made available in Marinucci v. Bryant,\(^11\) the lower court's judgment would undoubtedly have been reversed because of prejudicial jury experiments. Marinucci, which

\(^7\) Id. 
\(^8\) In re Thomas' Estate, 155 Cal. 488, 101 Pac. 798 (1909), a will forgery case. See CAL. CODE CIV. PROC. §1944.

\(^9\) People v. Conkling, 111 Cal. 616, 44 Pac. 314 (1896). The jurors here were considered honest and desirous of getting at the truth, but too zealous in their work.


turned on the use of incompetent affidavits to impeach a verdict, nevertheless demands some attention from legal scholars anxious to grasp the foundation of a jury’s knowledge. Three litigants participated in this case: the plaintiff, who was also the cross-defendant; the defendant husband; and the cross-complainant wife. To initiate the controversy, plaintiff had approached the wife in a bar and “pinched her where she sat, which caused her to jump, but not to arise.” Husband thereupon struck plaintiff, who, loser in combat, took to the law and emerged victorious against the husband and, on her cross-complaint, against the wife. The wife appealed with affidavits showing that on the first day of their deliberations, some women jurors had pinched other women jurors or had pinched themselves (but no male jurors had a hand in these proceedings). On the next day, the jurors searched for black and blue marks in the abused area. Finding none, they decided against the wife’s claim.

Though refusing to reverse the judgment, the appellate court agreed with the wife that these experiments were highly improper and incompetent because “no comparison can be drawn between a puny pinch administered by one woman juror to another and the surreptitious squeeze of a stimulated steelworker in a bar room. . . .”

**Improper Communications**

Jurors often indulge in conversations with each other, with counsel for one of the parties, with court officers, with the judge, or with strangers. These conversations, however innocent in tone or remote from the controversy at issue, nevertheless intrude an element of possible unfairness in the jury’s verdict. According to an older decision of the United States Supreme Court, “Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear.” This language, though probably still valid as a bold statement of principle, has been diluted by a liberal interpretation of what conduct is harmless. So, for example, no misconduct is registered when a witness, employed by defendant, meets two jurors at a drinking fountain, smiles, shrugs his shoulders, and comments, “Now you see what we have to cope

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84 See text at notes 143-65.
85 151 Cal. App. 2d at 300, 311 P.2d at 623.
86 Id. at 306, 311 P.2d at 627.
87 Mattox v. United States, 146 U.S. 140, 150 (1892), reversing a murder conviction. In this case, the bailiff told the jury during their deliberations that, among other things, the present victim was the “third fellow” the defendant had killed.
with;\(^8\) nor when one of several jurors standing in the hallway, as a prelude to a few "bantering" remarks, tells the plaintiff’s attorney that he resembles a motion picture actor;\(^9\) nor when a juror, speaking out from the jury box as counsel is about to offer a bumper in evidence, remarks, "he can sell that for a fee."\(^10\)

The statement last quoted may have been made by one juror for his colleagues, and not deliberately addressed to outsiders. Regardless of this possibility, the conduct is still improper since jurors must not talk with each other about a case before it is finally submitted,\(^91\) nor form or express an opinion on the controversy until that time.\(^92\) As the attorney should expect from an acquaintanceship with other courtroom irregularities, this occurrence is harmless when the statement could not have improperly influenced the verdict.\(^93\)

In charging misconduct based on intra-jury conversations, the complaining party takes on a difficult enterprise. With juror affidavits unavailable to impeach the verdict,\(^94\) his best means of determining what Juror A said to Juror B before submission is the evidence of an outsider who observed the dialogue. An affidavit similar to the following one, made by a private investigator who was seated about ten feet from the jury, appears to contain as much information as could be expected under ordinary conditions, and yet was disregarded. The


\(^10\) Sepulveda v. Ishimaru, 149 Cal. App. 2d 543, 308 P.2d 809 (1957). This decision may have been based on the attorney’s waiver of his right to complain. On a related point, the court held that no prejudice resulted from the fact that a daughter of one of the jurors talked to the defendant in the ladies’ restroom, wished her good luck, and later sat next to her in the courtroom where, presumably, the juror observed this proximity. It is “not clear how this fact can have influenced the mother unless the daughter then and there spoke to the defendant or in other ways showed that she was associating with the defendant or sympathized with her. The affidavit does not state anything of the kind, nor does it indicate how long the daughter sat next to the defendant. The fact alone that a person for some undefined length of time sits next to a party in a law suit does not necessarily have any meaning with respect to the relations or sentiments existing between them. The probable effect on the juror of the in itself inconclusive happening was again a question of fact primarily for the trial court whose implied decision that it did not affect the mother we shall not disturb.” 149 Cal. App. 2d at 547-48, 308 P.2d at 812.

\(^91\) See Monaghan v. Pacific Rolling Mill Co., 81 Cal. 190, 22 Pac. 590 (1889).

\(^92\) See Cal. Code Civ. Proc. § 611. The statute specifically refers to the jurors’ conduct during a separation but should reasonably apply with equal force when the jury is kept together.


\(^94\) See text at notes 143-65.
investigator stated in part that he observed two jurors conversing while testimony was being given: 95

I could plainly see from their actions and manner of conversing that they were very unfavorable to the defense in this action; that whenever any objections was [sic] overruled by the court that had been introduced by the defense they appeared to be satisfied, smiled and said something to each other; that I could plainly tell from their manner that they were talking together about this case and that their actions indicated clearly that they were unfavorable to the defense.

. . . That I could plainly tell by the actions of the two jurors mentioned that they appeared to be more opposed to the defense of this action, indicating to me that they had formed an opinion before the case was submitted to them.

Since this affidavit lacked statements revealing the language used by the jurors or describing the nature of their objectionable actions, the court concluded that it must be disregarded “as merely a recital of the conclusions arising in the mind of the affiant.” 96 Granted that the affidavit contains more conclusions than “brute facts,” how much detail may a court legitimately expect when the affiant, by definition, is a stranger to the conversation? According to hornbook law, 97 the opinions of lay witnesses are admissible on the following matters, among others: the apparent state of feelings or the nature of relations apparently existing between persons, and an individual’s appearance, actions, and apparent physical, mental, or emotional conditions and characteristics. Admissibility of these opinions 98

. . . is a matter of necessity or expediency, for it frequently happens that it is impossible for a witness to detail all the pertinent facts in such a manner as to enable the jury to form a conclusion without a statement of the witness’s opinion. Indeed, the witness may not be able to separate the facts which form the basis of his conclusion from the conclusion itself.

If the courts wish to enforce the prohibitions against intra-jury conversations about the trial, allowances should be made for the problems in obtaining this information. An affidavit with “opinion-facts” should

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95 Smith v. Brown, 102 Cal. App. 477, 482-83, 283 Pac. 132, 134 (1929). A question of waiver was also considered here, seemingly as a judicial afterthought.
96 Id. at 483, 283 Pac. at 134. The court’s use of “merely” brings into focus an incident from Vierick & Eldridge, My First Two Thousand Years 248 (Crest ed. 1956). The book’s fictional hero has just astounded the court of Frederick the Great with his universal knowledge.

“Voltaire grumbled. ‘Mere memory, Your Majesty.’

“Frederick laughed. ‘Do not mind Monsieur de Voltaire, Prince. He scorns every art in which he is not proficient. He says “mere king” with equal glibness.’”

97 2 Jones, Evidence § 405 (5th ed. 1958).
98 Id. § 404.
be accepted as prima facie evidence which the other party can (and should) meet by counter-affidavits from the accused jurors or by other appropriate means.

For conversations between jurors and third persons, problems of proof are easier. Yet even when the unauthorized conversation takes place between a juror and a party's attorney, with a direct bearing on the case (e.g., the juror asking about a map that had been introduced in evidence, and the attorney answering that certain testimony covered the subject), the event may be harmless. Recognizing that counsel "should at all times be solicitous to preserve not only the substance of justice, but every appearance of propriety, and should keep away from jurors during recesses and should have no conversation with them beyond the usual salutations," the court still appreciates the attorney's desire to be courteous. If the juror precipitates the conversation and the attorney tries to answer without being discourteous and without supplying new information, no prejudice results to the other party.

Bailiffs, as the intermediaries between the jury and the court, frequently become entangled in controversies over whether a particular message is an improper communication. In the often-cited and often-differentiated case of Nelson v. Southern Pac., the appellate court stated it was an "improper irregularity" for the trial court, in the absence of counsel, to communicate with the jury after their retirement by sending them a message through the bailiff. Discussing this and other irregularities, but never describing the improperly sent message, the appellate court finally held that the "sum" of the errors justified a reversal. Later cases withstood the claim that Nelson required a new trial whenever this type of irregularity was established. "It is true," said one court, "that any communication sent to the jury in the absence of counsel or without their express stipulation is irregular and the practice is one to be avoided."

California Code of Civil Proce-

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89 Jurors' affidavits are admissible to disprove or explain the alleged misconduct. See Kimic v. San Jose-Los Gatos Ry., 159 Cal. 379, 104 Pac. 312 (1909). Cf. Kritzer v. Citron, 101 Cal. App. 2d 33, 224 P.2d 808 (1950); and see text at note 156.


101 50 Cal. App. 2d at 826, 123 P.2d at 857. Accord, Dimnick, v. Alvarez, 196 Cal. App. 2d 215, 16 Cal. Rptr. 308 (1961), holding that a few words spoken between an attorney and a juror does not in itself amount to prejudicial misconduct. See also Ingersen v. Truebody, 40 Cal. 603 (1871), holding that the "mere" fact that a juror prematurely disclosed the verdict to the winning party does not invalidate the verdict, unless damage or fraudulent conduct is shown.


103 Here, the jury sent a message through the bailiff asking whether a verdict could be returned in favor of only one plaintiff. The judge replied by sending the following allegedly-prejudicial writing to the jury: "Yes, they may decide in favor of one plaintiff and not in favor of the other." See also Kritzer v. Citron, 101 Cal. App. 2d 33, 224 P.2d 808 (1950).
Section 614, on returning the jury to the courtroom for additional information, should have been observed. But if the court's communication does not prejudice the complaining party, nor contain statements calculated to mislead the jury in any respect, the error does not require a new trial.104

Under California Constitution article VI section 4 1/2, which says that a judgment should not be reversed unless a miscarriage of justice has been caused, the complaining party has the burden of making an affirmative showing that prejudice resulted, unless the prejudice is revealed on the face of the record. The irregular communication, to be prejudicial, must have a "probable substantial relation to the disposition of the cause." Where error is relied on to invoke the court's power to reverse a judgment, it has been stated that:105

It is not sufficient for appellant to point out the error and rest there. Since the appellate court must affirmatively find prejudice such finding must be based either upon the facts found in the record or upon the reasonable inferences to be drawn therefrom. In the face of the constitutional limitation there is no room for the presumption that prejudice results from the fact of error alone. The fact of prejudice is just as essential as the fact of error.

The Role of the Judge in Jury Deliberations

As a guide to what a judge expects of a jury, and therefore as an insight into his conduct when the jurors have difficulty in arriving at a verdict, a classic instruction by Judge Robert C. Pitman of Massachusetts should be examined. Addressing a jury on their general duties, Judge Pitman said:106

104 Tice v. Pacific Elec. Ry., supra note 103. The majority in Tice cited Soukoian v. Cadillac Taxi Co., 68 Cal. App. 604, 229 Pac. 1015 (1924) as supporting the same position—which it does, though it is a district court of appeal decision rendered before the supreme court decided Nelson. A dissenting judge in Tice argued that the lower court's procedure was improper and that the requirement for proper procedure is not a "so-called technical rule." 36 Cal. App. 2d at 76, 96 P.2d at 1026.


106 WILLLARD, HALF A CENTURY WITH JUDGES AND LAWYERS 123 (1895). See also Allen v. United States, 164 U.S. 492 (1896), a criminal case in which it was held proper for the court to give an instruction after they interrupted their deliberations to return to court. "While, undoubtedly, the verdict of the jury should represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conference in the juryroom. The very object of the jury system is to secure unanimity by a comparison of views and by arguments among the jurors themselves. It certainly cannot be the law that each juror should not listen with deference to the arguments and with a distrust of his own judgment, if he finds a large majority of the jury taking a different view of the case from what he does himself. It cannot be that each juror should go to the juryroom with a blind determination that the verdict shall represent his opinion of the case at the moment; or that he should close his ears to the arguments of men who are equally honest and intelligent as himself." 164 U.S. at 501-02.
Gentlemen, there may be large cases, and there may be small; some five dollars, and some five thousand dollars, and the law does not presume that, however difficult a case may be, a jury is not to agree, and keep the parties in misery, and support an army of lawyers during their natural lives; but you come here to agree and settle the case in which the parties are in dispute.

This philosophy, coupled with the jury's right to further enlightenment under California Code of Civil Procedure section 614 and Penal Code section 1138, often stimulates a judge to aid, coax, or allegedly coerce a divided twelve into making a decision. When he takes action in this regard, complaints about his conduct usually arise in three major categories, dealing with the rereading of evidence, the regiving of previously given instructions or the giving of new instructions, and the use of "pressure" to induce agreement.107

So far as the rereading of evidence is concerned, no prejudicial error occurs if the court permits only a partial reading of certain testimony under facts which show that the jury returned to court, asked to hear the testimony, and announced their desires were satisfied before the testimony was completed. If a party thinks the selection is an inadequate response to the jury's request, he should ask for the reading of other relevant and material testimony at that time.108 In other situations, when the court refuses a proper request for a rereading of testimony, his action is erroneous and probably—but not necessarily—prejudicial. One district court of appeal decision110 has observed that a trial judge, who knew from the jury's messages they were confused

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107 See, e.g., Pisani v. Martini, 132 Cal. App. 269, 22 P.2d 804 (1933), holding there is no misconduct when, after the jury announces they cannot agree on a verdict, the trial court suggests they retire for further deliberations. Without indicating how the case should be decided and without intimidation or coercion, the judge stated that the case had been well tried and was one in which an agreement should be reached. The judge then asked if the jury could not agree "by talking the matter over." A juror replied, "We might try." Try they did, and reached the verdict sustained on appeal.

108 For examples outside those categories, see Marinucci v. Bryant, 151 Cal. App. 2d 298, 311 P.2d 622 (1957), holding a judge may properly make the litigants rise when the jury returns to court so that a confused juror could identify the "cross-complainants" and "cross-defendant"; and Soukoian v. Cadillac Taxi Co., 68 Cal. App. 604, 229 Pac. 1015 (1924), holding no prejudicial error arises when the judge, on reading the verdict handed to him, tells the foreman that the verdict must not include costs and attorneys' fees, and sends the jury back for further deliberations.

109 Duncan v. J. H. Corder & Son, 18 Cal. App. 2d 77, 62 P.2d 1387 (1938). See Hughes v. Wheeler, 76 Cal. 230, 18 Pac. 386 (1888), holding that if the record does not show what testimony was reread to the jury, it is impossible to ascertain that the testimony had any prejudicial effect on the jury. "Error must be affirmatively shown by the record."

110 James v. Key System Transit Lines, 125 Cal. App. 2d 278, 270 P.2d 116 (1954). Here the jury did not specifically request a reading of the transcript, but its action could reasonably have been interpreted only as such a request.
about a deposition, should have brought them into the courtroom and ascertained what they wanted from the document. The appellate court declared:\textsuperscript{111}

If on returning to the courtroom the jury asked for more than it was entitled to have read, the judge could, of course, limit it to that to which it was entitled. \textit{But to refuse to inform it of its rights in this respect, when the judge was, in effect, informed that the jury was in difficulty in some way about the deposition, clearly prevented a fair trial. . . .} (Emphasis added.)

The omission marks, like the italics, belong to the author and not to the appellate court. Had the court stopped here, its reasoning would have led it to reverse the judgment (which was based on a ten to two verdict) and order a new trial. Unfortunately, the italicized quotation actually ends in this manner: "clearly prevented a fair trial, unless the matters in the deposition were inconsequential." Because the deposition did not substantially contradict the plaintiff's testimony and did not affect his credibility, and because the \textit{court} found nothing "which in any reasonable probability would have caused any of the jurors to vote differently than they did,"\textsuperscript{112} the judgment was affirmed. A more respectful approach to the jury system was registered the following year, after a trial judge had notified the jury that their request for a rereading of testimony could not be granted because the court reporter was ill.\textsuperscript{113} On appeal, the court reversed the resulting judgment: "Whether the outcome or the verdict would have been any different is beside the issue. The verdict was 9 to 3. In the circumstances, the action of the trial judge must be held, as a matter of law, to have been prejudicial."\textsuperscript{114}

A jury conscientious enough to seek aid through proper channels should be given wholehearted assistance from the trial judge. If he refuses this help—and the appellate court excuses the dereliction—how can jurors then be expected to obey the niceties of legal conduct?

The problem of reinstructions is another area giving the parties cause for alarm. When the jury returns to court specifically asking to hear a particular instruction, the party whom the instruction may injure is likely to claim that a rereading of instructions on one subject diverts the jury's attention from the real issue in the case and prejudicially affects the party's rights. Despite this claim, the trial court, on proper request, has power to reread any portion of the charge already given, or may go further and give additional instructions to clarify

\textsuperscript{111} Id. at 283, 270 P.2d at 119.
\textsuperscript{112} Id. at 285, 270 P.2d at 120.
\textsuperscript{114} Id. at 790, 283 P.2d at 43.
those previously read. The court's failure to answer a juror's question on a matter that had not been covered by an instruction is prejudicial error.

What must always be guarded against is the misdirecting of the jury during the reinstruction period. So, for example, the court commits prejudicial error when it is requested to reread all the instructions on negligence and assumption of risk and, after inadvertently omitting three instructions, tells the jury that all the instructions have been reread, and is also at fault when it goes beyond the specific question asked by the jury and gives an erroneous instruction. But no such prejudice occurs if the jury return for more instructions on damages (after being told to consider legal responsibility first and then, if plaintiff was entitled to a verdict, to consider damages), and in so instructing them the court uses the words "if any" to qualify phrases like "the injuries proved to have been sustained," "anxiety and suffering," "expenses incurred," "time lost," and "amount of such damages." Criticism of the phrase "if any" is "hypertechnical."

When charges of judicial coercion are raised to explain why a jury reached the "wrong" verdict after an initial deadlock, the trial judge's

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115 See Muskin v. Gerun, 46 Cal. App. 2d 404, 116 P.2d 105 (1941). The lower court's judgment, however, was reversed for defects in the general charge. Accord, Lincoln v. Williams, 119 Cal. App. 498, 6 P.2d 563 (1932). See also Olson v. Standard Marine Ins. Co., 109 Cal. App. 2d 130, 240 P.2d 379 (1952), holding that a party is not entitled as a matter of right to have instructions read which the jury have not called for, nor have instructions on a particular subject read when the jury are satisfied with those that were already presented.

116 Brooks v. City of Monterey, 106 Cal. App. 649, 290 Pac. 540 (1930). See also Bryant v. Market St. Ry., 71 Cal. App. 2d 508, 163 P.2d 33 (1945), holding that it was proper for the court to reread a particular instruction and suggesting it might have been error for the court to refuse. A dissent in Bryant argued that, considering the state of the evidence, it was prejudicial error to give the disputed instruction in an unqualified form, especially when the jury had "run away" with the case. For the difficulty in proving that the court had refused to reinstruct the jury, see McAvoy v. Helms Bakeries, 43 Cal. App. 2d 587, 111 P.2d 431 (1941).


118 See Scott v. Renz, 67 Cal. App. 2d 428, 154 P.2d 738 (1945). The trial court here had granted a new trial because he realized his error. On appeal his use of discretionary power was affirmed.

119 Gray v. Rheem Mfg. Co., 143 Cal. App. 2d 537, 299 P.2d 900 (1956). Some confusion resulted because the foreman originally stated that the jury had agreed on liability, but later amended this statement to say that no formal agreement had been reached. For other cases in which the court's response to the jury's inquiry was held proper, see Graham v. Griffin, 66 Cal. App. 2d 116, 151 P.2d 879 (1944); Ridge v. Boulder Creek Union J.-S. High School Dist., 60 Cal. App. 2d 453, 140 P.2d 990 (1943); Long v. Chronicle Pub. Co., 68 Cal. App. 171, 228 Pac. 873 (1924).
authority must be examined. Among his powers, he has wide discretion in determining the length of time a jury can deliberate before he must discharge them; 120 and can have the jury returned to court to ask them about the probability of an agreement and about the way they stand numerically (without revealing for whom they stand). 121 He has the right to advise them about the importance of reaching a verdict and about each juror’s duty to hear and consider the others’ arguments with open minds, rather than obstinate adherence to first impressions. Yet “the judge may not tell them that they must agree nor may he harry their deliberations by coercive threats or disparaging remarks.” 122

In a criminal case, he must not make comments to the jurors which might reasonably be interpreted as indicating his belief in the guilt of the accused. This prohibition extends to insistence on agreement when the court knows that the jurors favoring acquittal constitute a small minority, and to the giving of an impression that there is no basis in the evidence for a reasonable difference of opinion about the defendant’s guilt: 123

120 Hughes v. Schwartz, 51 Cal. App. 2d 362, 124 P.2d 886 (1942). Although the court, counsel, and the jurors “engaged in some jocularity which appellant now seeks to distort into impatience, imporantry and coercion on the part of the court” no abuse of discretion was shown. See also Bertolozzi v. Progressive Concrete Co., 95 Cal. App. 2d 332, 212 P.2d 910 (1949), holding that a party waives its right to complain if it gambles on a verdict in its favor by remaining quiet when the jury, after an early deadlock, is required to continue their deliberations.


122 Cook v. Los Angeles Ry. Corp., 13 Cal. 2d 591, 594, 91 P.2d 118, 120 (1939). In reversing the judgment, the appellate court noted that the trial judge’s colloquy with the jury foreman carried the plain implication that the plaintiff was not entitled to recover and that the judge should take ten minutes to bring in the appropriate verdict. Also considered as bearing on the judge’s strong personal opinion about the case is the statement he made following the verdict: “Thank you, ladies and gentlemen of the jury. I do not see how you could have arrived at any other verdict. Had you given any other verdict, it would have been set aside.” 13 Cal. 2d at 595, 91 P.2d at 120. For a case annulling an order of contempt against a defendant’s attorney for protesting a trial judge’s “well nigh unheard of” conduct in recalling the jury after three weeks of deliberation to state his opinion that the defendants testified falsely and the prosecution witnesses told the truth, see Cooper v. Superior Court, 55 Cal. 2d 291, 10 Cal. Rptr. 824, 359 P.2d 274 (1961). See also Shippy v. Peninsula Rapid Transit Co., 197 Cal. 290, 240 Pac. 785 (1925), holding that a trial judge commits prejudicial error by asking a jury if they are prepared to pass on the issues without final arguments or instructions; and Mahoney v. San Francisco & S.M. Ry., 110 Cal. 471, 42 Pac. 968, 43 Pac. 518 (1895), holding that prejudicial error arises when the trial judge states that the trial was an expensive one, that the plaintiff was not well off, and that he (the judge) would help those jurors “who cannot agree.”

123 People v. Crowley, 101 Cal. App. 2d 71, 76, 224 P.2d 748, 751 (1950). This case is an important precedent to be used in supporting claims that a trial judge committed prejudicial misconduct. But see Alvarez v. Los Angeles County, 132 Cal. App. 2d 525, 282 P.2d 531 (1955), a civil case distinguishing Crowley because the judge in Crowley indicated his belief in the defendant’s guilt and gave the jury half an hour to
Reasonably intelligent jurors would know that the court would not permit a defendant to be convicted upon legally insufficient evidence and would have understood that the court in the present case was not impressed by the weakness of the evidence of the People. Since they were not advised to acquit the defendant they could reasonably have inferred that the court expected them to convict him. Any question as to the interpretation that was placed upon the court’s remarks finds an answer in the verdict of guilty which was rendered some 30 minutes later.

These limitations on the trial judge’s powers have the disadvantage of preventing the one knowledgeable neutral in the case from insisting (apart from his instructions) that the controversy be decided on what his experience tells him are valid grounds. But, more importantly, the limitations help in leaving justice to the “amateurs,” the ordinary citizens on whose ultimate wisdom all legality must rely.

**Chance Verdicts**

Chance verdicts are condemned as an abdication of the jury’s function to hear and determine a case on its merits.\(^{124}\) So objectionable is the resort to chance that Code of Civil Procedure section 657(2) provides the only statutory exception to the rule against jurors’ affidavits impeaching their own verdict, and permits “the affidavit of any one of the jurors” to prove this misconduct.

What, then, constitutes a chance verdict? Examples of “pure” chance (such as basing a verdict on the next out-of-state license plate to be seen in the street) have not been encountered, nor in all probability would such rampant mischief ever occur. The ordinary situation involves an agreement by each of the jurors to secretly write down the sum he would like to award. These amounts are then added together and the result divided by twelve to produce a quotient that represents the “average” or “arithmetic mean.” At least one early case\(^{125}\) approvingly held that where the jurors had bound themselves to accept this quotient without further consultation or discussion, neither the individual sums nor the arithmetical computations were the result of chance “but, on the contrary, the result of the most accu-

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rate of the sciences.” This “scientific” process was soon rejected because the character of the verdict is “entirely unknown to the jurors as though the whole matter were decided by the casting of a die, or the tossing of a coin.” Under a system of this nature, “one unscrupulous and cunning juror always has the power to defeat justice by increasing or decreasing the amount of the verdict in proportion as he places his estimate at an unconscionably high or low figure.”

The present concept of a chance verdict largely depends on the point of time in which the jurors agree to be bound by a quotient verdict. If the agreement to accept an “average” total is made before the result is known, the verdict is improperly based on chance. If, however, the jurors simply average the sums each has in mind, learn the resulting amount, and then individually decide to adopt this amount as the verdict, the procedure is acceptable. “Thus, if a jury adopts a quotient verdict by independent action after the amount is made know to them, such approval subsequent to averaging the sums constitutes a valid verdict.”

Proof of this decisive chronology is usually based on statements made in jurors’ affidavits and counter-affidavits, procured by the parties to justify their respective demands at the hearing on a motion for new trial. An affidavit by a party is properly disregarded because it could not be assumed, in the absence of proof, that he was present in the jury room or had any personal knowledge of what took place there while the jurymen were considering their verdict. Similarly, a trial judge is justified in accepting the sworn statements of identified jurymen against the affidavit of an attorney, on information and belief, that the verdict was based on chance, when the sources of the attorney’s information “were unwilling to either state the facts under oath or to allow their identity to be disclosed.” If the affidavits are conflicting,
the trial judge has discretion to weigh this evidence and his findings are ordinarily not disturbed on appeal. The discretionary scope includes a finding, unless erroneous as a matter of law, on whether any real conflict exists between the supposedly-contradictory affidavits.

Lest we be too pleased with the court's condemnation of chance verdicts, we might ask why a jury forbidden from committing itself to an "average" verdict is allowed to make such more illusive calculations as the amount of future damages for loss of business profits when the means of fixing these damages are uncertain; the reduced earning power of a minor who had not earned anything before or after the accident; and the proper money award that will compensate for pain and suffering. In cases of this kind, the most "scientific" measurements will undoubtedly be as wide of (or as near) the mark as any good-faith average.

Compromise Verdicts

Through a wise, simple, and apparently effective technique, courts can remedy one type of impropriety in the deliberation room while still protecting the secrecy of the jury's deliberations. The mischief in question is a compromise verdict, usually the result of a vigorously fought trial which leads some jurors to surrender their views on the defendant's non-liability in exchange for other jurors agreeing to a trifling amount of damages. What makes the verdict objectionable is the "inevitable" conclusion that nine jurors could not agree on the question of defendant's negligence or of its having proximately caused plaintiff's injuries.

The issue, in most cases, is initially created when a disappointed winning party moves for a new trial on the ground that the inadequate damages reflect an insufficiency of the evidence to justify the verdict. The court stated that a 'resort to the determination of chance' as would be good ground for a new trial." 120 Cal. at 478, 52 Pac. at 126.

132 Buhl v. Wood Trucking Lines, 62 Cal. App. 2d 542, 144 P.2d 847 (1944). Here, the lower court had granted a new trial on defendant's motion. In affirming this result, the appellate court noted that, on the same facts, it would have also affirmed an order denying a new trial.

137 See Wallace v. Miller, supra note 136.
If this were the sole dispute, the controversy could be routinely handled just like any other motion for new trial. At this point, however, the parties usually begin to squabble about whether the verdict was the result of an improper compromise. Having had the question of liability decided in his favor, the plaintiff is likely to assert that no such compromise was made and that the new trial should be granted on the issue of damages alone. The defendant ordinarily replies that the motion should be denied because the evidence justifies the verdict or, failing in this contention, that a new trial should be granted on all the issues, liability as well as damages, because the jury had improperly resolved the question of liability against him. In ruling on the motion, the trial court has discretion to determine whether or not the verdict stemmed from the allegedly improper compromise. If he finds that it did, any new trial that he grants should be granted on all the issues.

To evaluate the verdict, neither the trial court nor the appellate court seeks to discover the actual transactions that were conducted in the jury room. Logic, rather than a descriptive narrative of events, supports the eventual conclusion. If, for example, the award is "so grossly absurd" that it furnishes convincing proof the verdict resulted from unwarranted concessions made by each of two opposing factions, one conscientiously believing defendant should prevail and the other equally conscientious in believing plaintiff should recover full damages, or if the award "barely, if at all" repays plaintiff's special damages, these facts are sufficient to establish that the verdict was based on an improper compromise. But even where the evidence amply supports a conclusion that the damages were too low, an inference that the jurors must have stultified themselves by bargaining inadequate damages for unjustified liability is a non sequitur. Such a conclusion, especially where the trial court reached a contrary result, would be more speculative than inferential.

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138 See CAL. CODE CIV. PROC. § 657(6). The moving party, of course, really means that the damages are insufficient in light of the "over-sufficiency" of the evidence. But, conforming to statutory language, he claims the evidence is insufficient. By contrast, if a losing party wishes to complain of excessive damages, CAL. CODE CIV. PROC. § 657(5) permits him to do so without these linguistic gymnastics.


140 Donnatin v. Union Hardware & Metal Co., supra note 139.


By employing this clearly limited technique, the courts have armed
themselves with a useful small-caliber weapon to combat otherwise
unassailable jury verdicts. Until Code of Civil Procedure section 657
is amended to permit “inadequate damages” as a ground for new trial,
this method of subduing a faulty verdict without intruding on jury
solitude is commendable.

Use of Juror's Affidavits

Beginning with the first volume of its supreme court reports,143
California courts have adopted the generally unshaken position that
statements of a juror cannot be admitted to impeach a verdict in which
he took part. "Generally unshaken," an admittedly vague term, in-
cludes one statutory exception, one case law exception, and at least
one decision (subsequently disapproved) that suggested other possible
exceptions.

The statutory exception is California Code of Civil Procedure sec-
tion 657(2), which permits jurors' affidavits to be used in showing
that a verdict was the result of chance determination.144 The case law
exception applies in situations where proceedings in the deliberation
room reveal that one or more jurors gave false answers on voir dire
to conceal their bias.145 The tentatively advanced and soon rejected
third category of exceptions was predicated on the theory that, under
California Code of Civil Procedure section 657(1), jurors' affidavits
might be available to show an irregularity in jury proceedings by
which a party was prevented from having a fair trial.146

At a time when the only exception to the general rule was that
dealing with chance verdicts, one court frowned:147

Why the legislature should sanction different modes of proving dif-
f erent kinds of misconduct is not readily perceived. If the affidavits
of jurors are to be received for the purpose of establishing certain
kinds of misconduct, there seems to be no good reason why they
should not be received as to all kinds without distinction.

143 See People v. Baker, 1 Cal. 403 (1851).
144 See text at notes 124-35.
145 Williams v. Bridges, 140 Cal. App. 537, 35 P.2d 407 (1934), apparently the first
California case in which this exception is expressly treated, though it cites Clark v. United
States, 289 U.S. 1 (1933) and People v. Galloway, 202 Cal. 81, 259 Pac. 332 (1927) in
support of the same proposition. Galloway was based on CAL. PEN. CODE §§ 1179-82,
which are narrower in scope than CAL. CODE CIV. PROC. § 657.
146 Articulated in Shipley v. Permanente Hospital, 127 Cal. App. 2d 417, 274 P.2d
53 (1954); disapproved in Kollert v. Cundiff, 50 Cal. 2d 768, 329 P.2d 897 (1958). See
Note, 10 HASTINGS L.J. 319 (1959).
147 S. S. Turner v. Tuolumne County Water Co., 25 Cal. 397, 400 (1864). The
statute in question was the old PRACTICE ACT § 193.
Yet except for a reference to legislative authority as constituting "public policy," courts have not explained the rationale behind this bifurcated attitude. In justifying the exclusionary rule as applied to other misconduct, however, courts have made their doctrine clear:

There are many reasons to support the rule that an affidavit of a juror is incompetent to impeach the verdict. The reason most frequently given for the rule is that the verdict having been reached by the solemn deliberations of the jury, after hearing the evidence and instructions, should not be lightly set aside because of the subsequent doubts or change of attitude by one of the jurors. Such rule would permit a juror to stultify his own solemn pronouncement and decision. Another reason is that jurors should be protected in the exercise of their function and their duties, and should not thereafter be subject to examination or pressure by litigants.

Consistent with this view, courts have refused to consider jurors' affidavits which stated that some members of the jury had visited the scene of an accident and reported on their personal observations, that the foreman "manipulated the (affiant's) ignorance and confusion," that the jurors misunderstood the effect of defendant's counterclaim on the amount admittedly due to plaintiff; that a juror said as far as she was concerned the type of accident in question happened every day and any one of the jurors might have done the same thing;

148 Davenport v. Waite, 175 Cal. App. 2d 623, 627, 346 P.2d 501, 503 (1959). See also Saltzman v. Sunset Tel. & Tel. Co., 125 Cal. 501, 504-05, 58 Pac. 169, 170 (1899): "The independence of the jury and the value of their discussions would be lessened if the reasons given by any juror for his opinions or for his verdict could be reported to the court and criticized, and his motives impugned for remarks made in the jury-room. And such reports would be more likely to be made by dissenting jurors who had been heated by earnest debate and defeated by the final vote. But the independence of the jury would be gone if a perfectly correct report could be made and the verdict attacked by showing that some jurors mistook the evidence or the law, or were actuated by other considerations. There would be no freedom of discussion in the jury-room if they were subject to a possible censorship of this character. And the stability of judicial determinations would be as much imperiled by liability to attack by dissenting jurors as by the others." But cf. Clark v. United States, 289 U.S. 1 (1933), affirming a juror's conviction for contempt of court, in which Cardozo, J. wrote: "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. The force of these considerations is not to be gainsaid. But the recognition of a privilege does not mean that it is without conditions or exceptions. The social policy that will prevail in many situations may run foul in others of a different social policy, competing for supremacy. . . . The chance that now and then there may be found some timid soul who will take counsel of his fears and give way to their repressive power is too remote and shadowy to shape the course of justice. It must yield to the overmastering need, so vital in our polity, of preserving trial by jury in its purity against the inroads of corruption." 289 U.S. at 13, 16.


150 People v. Kloss, 115 Cal. 567, 47 Pac. 459 (1897).

151 Polhemus v. Heiman, 50 Cal. 438 (1875).

that the foreman told the jurors they would have to abide by the verdicts he completed or they would never again be allowed to act as jurors;\textsuperscript{153} and that the foreman mentioned high insurance premiums as being caused by high judgments.\textsuperscript{154}

Not only are the jurors prohibited from impeaching their verdict (exceptions aside), but third persons are also incompetent to impeach the verdict on the basis of hearsay evidence derived from a juror. "If a member of the jury may not impeach the verdict by his personal affidavit or oral testimony, certainly he may not circumvent the rule by informing an attorney of the appellants by means of a telephone of his alleged misconduct as a juror and thus render his statement competent by the hearsay affidavit of some other affiant."\textsuperscript{155}

The rule against admissibility is relaxed when jurors attempt to sustain their verdict, but is quickly tightened up when this attempt is based on the subjective attitude of the majority jurors. Jurors' affidavits are therefore admissible to disprove or explain the alleged misconduct but, once the misconduct is admitted, are ineffectual to show that the verdict was not influenced by those events.\textsuperscript{156}

Formidable as these rules might be, the courts have themselves announced an exception to their own rule against using jurors' affidavits to impeach a verdict. Although a litigant was unsuccessful at the turn of the century in arguing that a valid distinction exists between a juror's misconduct before retirement and his misconduct after retirement,\textsuperscript{157} chronology later became a paramount consideration. The earlier case, in refusing to accept an affidavit which alleged that during the trial a juror had improperly visited the scene of an accident, pointed out that judicial decisions should not struggle to multiply exceptions to a plain and simple rule. When, however, an affidavit was offered in another case to show that a juror had witnessed the disputed accident, had formed an opinion about liability, and had falsely denied

\textsuperscript{153} Kollert v. Cundiff, 50 Cal. 2d 768, 329 P.2d 897 (1958).
\textsuperscript{156} Kimic v. San Jose-Los Gatos Ry., 156 Cal. 379, 104 Pac. 986 (1909); Saltzman v. Sunset Tel. & Tel. Co., 125 Cal. 501, 58 Pac. 169 (1899); Kritzer v. Citron, 101 Cal. App. 2d 33, 224 P.2d 808 (1950); Walter v. Ayvazian, 134 Cal. App. 360, 25 P.2d 526 (1933). But cf. People v. Murray, 94 Cal. 212, 29 Pac. 494 (1892), in which it was held proper for jurors to aver that they fully denied the defendant's charges of misconduct, that no admonition of the court had been disobeyed, and that no newspaper articles or anything else, save the evidence and the charge, influenced them in finding their verdict.
on her *voir dire* examination that she had any knowledge of the event, the court held that this affidavit should have been received.\textsuperscript{158} Why? Because, said the court, the bar applies to words or acts that are inherent in the verdict and had their origin after the impanelment and before the discharge of the jury. The bar does not apply to an affidavit which shows a juror’s positive misconduct in concealing actual bias on the *voir dire* examination. Stated another way, an affidavit is admissible to show that occurrences during the deliberations tend to disclose a bias on the part of the juror which, if known on the *voir dire* examination, would have led to a challenge for cause.\textsuperscript{159}

The “chance” and “prejudice concealed on *voir dire*” exceptions now mark the only situations in which jurors’ affidavits are competent to impeach a verdict, although “whether or not additional exceptions may be justified under some circumstances” is theoretically still an open question.\textsuperscript{160}

Before suggesting the proper guide for California courts to adopt in this area, we should examine a fact that has apparently been overlooked in the arguments for a limited (i.e., virtually nonexistent) use of these affidavits. As previously indicated, one reason to prohibit jurors from impeaching their own verdict is that this practice could expose their opponents in the deliberation room to public criticism. The possible harm is real, but the alleged cure is so inadequate that it should not be used to sustain a verdict based on jury misconduct. As long as a juror can “expose” his former colleagues outside of court and suffer no penalty, the permanent secrecy of jury deliberations depends only on the degree of public interest in the trial. When the case is notorious, both the press and the television media are likely to pressure the jurors for information that can become headlines like: HISS JURORS TELL OF LONG HOURS OF WRANGLING;\textsuperscript{161} or televi-


\textsuperscript{160} See Kollert v. Cundiff, 50 Cal. 2d 768, 329 P.2d 897 (1958). See also United States v. Reid, 53 U.S. (12 How.) 361, 364 (1851), in which Chief Justice Taney said: “It would perhaps hardly be safe to lay down any general rule upon this subject. Unquestionably such evidence ought always to be received with great caution. But cases might arise in which it would be impossible to refuse them without violating the plainest principles of justice.”

\textsuperscript{161} See Spotlight on the Jury, in Liebling, THE PRESS 144-62 (1961). From a newspaper article, the author (at 147) quotes a pro-conviction juror stating that the four pro-acquittal jurors in the first Alger Hiss case were “so stubborn you could have knocked their heads against the wall and it would have made no difference. The foreman was emotional, two were blockheads, and one was a dope. Eight of us pounded the hell out of the four since Thursday night, but we couldn’t get anywhere.” The same newspaper, The New York Journal-American, later reported that: “All jurors in the trial reported
You will sit with the men of a federal jury as they deliberate the fate of a defendant accused of kidnapping and murder. You will see and hear what actually goes on behind the guarded doors of the jury room as these men turn over in their minds each bit of evidence to determine whether another human being shall be set free or spend the rest of his life in a federal penitentiary, whether another human being shall live or die.

Unless the jurors can be restrained from discussing these matters outside the deliberation room (a possibility which should be rejected on first amendment grounds), no valid reason exists to protect jury privacy from legitimate complaints before a court which has power to remedy the misconduct. Accepting this fact (as the author does), we are left with only one major consideration against making jurors' affidavits competent to impeach a verdict: the fear that a juror might have subsequent doubts about his vote and seek to upset the verdict by his present statements. To prevent that possibility while permitting a verdict developed through misconduct to be attacked, our courts should adopt a principle enunciated by the Kansas Supreme Court and approved by the United States Supreme Court, though apparently rejected by the California Supreme Court. The principle states:

Public policy forbids that a matter resting in the personal consciousness of one juror should be received to overthrow the verdict, because being personal it is not accessible to other testimony; it gives to the secret thought of one the power to disturb the expressed conclusions of twelve; its tendency is to produce bad faith on the part of a minority, to induce an apparent acquiescence with the purpose of subsequent dissent; to induce tampering with individual jurors subsequent to the verdict. But as to overt acts, they are accessible to the knowledge of all the jurors; if one affirms misconduct, the remaining eleven receiving telephone calls and mail commenting on their stand. Those who voted for conviction received expressions of approval while those who stood for acquittal reported 'threats.' Perhaps as a public service, the Journal-American then printed the names and addresses of two pro-acquittal jurors.

102 See United States v. Rees, 193 F. Supp. 849, 861, 864, 866 (D.C. Md. 1961). The three Rees opinions include first (at 849) the main case of kidnapping and murder; second (at 861), the disposition of defendant's motion for new trial or mistrial because of a television program, featuring nine jury members, that was presented the evening before the judge was to have sentenced the defendant; third (at 864), the court's acceptance of the fact that it has no power to punish for contempt the persons who were responsible for the television program or appeared on the show.

103 Mattox v. United States, 146 U.S. 140 (1892), quoting an earlier case written by Mr. Justice Brewer when he was speaking for the Kansas Supreme Court.

104 See Kollert v. Cundiff, 50 Cal. 2d 768, 329 P.2d 897 (1958), which says that a few jurisdictions permit a wider use of jurors' affidavits than does California, and cites Mattox as one example.

105 Mattox v. United States, 146 U.S. 140, 148 (1892).
can deny; one cannot disturb the action of the twelve; it is useless to 
tamper with one, for the eleven may be heard.

The thought always to be borne in mind is that the jury system is 
designed to benefit litigants, not jurors.