

U. S. Rep.]

MCDANIELS, EXECUTOR, &C. V. MCDANIELS.

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was done with the knowledge of the defendant"—thus distinguishing between this and the positive finding in respect to the plaintiff's knowledge.

Clearly the tendency of the testimony was to prove this knowledge on the part of the defendant.

But to warrant setting aside the verdict, it should be both stated in the motion and be proved affirmatively, that the defendant did not know of the matter complained of before the rendition of the verdict: *Brunhill v. Giles*, 9 Bing. 13; *Herbert v. Shaw*, 11 Mod. 118; *State v. Camp*, 23 Vt. 551; *Jameson v. Androscoggin Railroad*, 52 Me. 412; *Pettibone v. Phelps, et al.*, 13 Conn. 445; *Selleck v. Sugar Hollow T. Co.*, Id. 452; *Woodruff v. Richardson*, 20 Id. 237; 2 Grah. & Wat. N. Trials 303, 575.

Charles C. Dewey and *A. Potter*, for the defendant.—I. Exceptions will not lie, and the case should be remanded.

a. The court found the fact that the persons guilty of tampering were the friends of the proponent.

b. That the conversations were of a character directly calculated to influence the verdict of the jury in favor of the proponent.

c. That they were held for the purpose of influencing the verdict of the jury in his favor.

d. That the jurors were guilty of impropriety in suffering such conversations with them, and in their presence and hearing.

e. And that the conversations were in violation of law.

II. As a motion for a new trial, for causes dehors the record, is and must be addressed to the discretion of the court, the decision cannot be revised on exceptions, unless, indeed, it be for the improper admission or rejection of evidence, or when it is apparent the decision is based upon a false legal assumption: *Sheldon v. Perkins*, 37 Vt. 557; *Shea v. Lawrence*, 1 Allen 169; *White v. Wood*, 8 Cush. 415; 2 Grah. & Wat. 47, n. 4.

It has never been held, or even claimed, that jurors' depositions may not be received to prove the misconduct of the parties or of persons acting in their behalf: *Ritchie v. Halbrooke*, 7 S. & R. 458

III. 1. It is not essential that the tampering be done by the party himself, nor by his procurement. It is sufficient if it be done by his friends and in his behalf: *Deacon v. Shreve*, 2 Zab. 176; *Coster v. Merest*, 3 Brod. & Bing. 272; *Knight v. Freeport*, 13 Mass. 218; *Shea v. Lawrence*, 1 Allen 169; *Brunson v. Graham*, 2 Yeates 166; Pleas of the Crown, vol. 2, p. 308; Grah. & Wat. vol. 2, p. 238, *et seq.*

2. And even if the attempt to bias the jury be made by strangers, the verdict will be set aside if there is fair ground for belief that it has been influenced thereby: Grah. & Wat. vol. 2, p. 309.

3. So, in the class of very numerous cases, where papers have been delivered to the jury by mere mistake, the verdicts have been set aside, whenever the papers had any tendency to bias them: *Whitney v. Whitman*, 5 Mass. 405; Vin. Abr., Trial, pl. 18; *Hix v. Drury*, 5 Pick. 296; *Sargent v. Roberts*, 1 Id. 337.

4. The same rule obtains, and verdicts will be set aside: 1. Where jurors are allowed to separate before a verdict is agreed upon, if the separation is attended with the slightest suspicion

of abuse: *Oliver v. Trustees of Pres. Church*, 5 Cow. 283; *Horton v. Horton*, 2 Id. 589. 2. Where a juror gives private information to his fellows, material to the issue, which may have influenced them: *Sam v. The State*, 1 Tenn. 61. 3. Where jurors re-examine witnesses who have already testified: *Metcalf v. Dean*, 2 Bay 94; *Perine v. Van Note*, 1 South. 146; *Bedington v. Southall*, 4 Price 232.

It thus appears from the authorities above cited, and many others to be found in the books, that the ground upon which courts set aside verdicts for improper attempts to influence the jury, is not merely and only the misconduct of the party, but the possibility that the unlawful attempt, by whomsoever made, or with whatever motive, may have inoculated the verdict with vice or error.

IV. 1. It is a corollary of the preceding proposition, already incidentally discussed, that it need not affirmatively appear that the verdict was injuriously affected by the tampering. If the purity of the verdict might have been affected, it will be set aside. And this rule has been adhered to with great rigor and tenacity: *Whitney v. Whitman*, 5 Mass. 405; *Cohen v. Robert*, 1 Strab. 410; *Perkins v. Knight*, 4 N. H. 474; *Hare v. The State*, 8 How. (Miss.) 187; *Com. v. Roby*, 12 Pick. 496; *Com. v. Wormley*, 8 Grat. 712; *Custer v. Merest*, 3 Brod. & Bing. 272; *Knight v. Freeport*, 13 Mass. 218; Grah. & Wat. vol. 2, p. 300; *Hix v. Drury*, 5 Pick. 286.

The opinion of the court was delivered by

STEELE, J.—The motion for a new trial was properly granted. It was not incumbent upon the moving party to show that the verdict was, in point of fact, influenced by the unlawful conversations. It is quite enough that, in a doubtful case, conversations with the jurors have been had during the progress of the trial for the purpose of influencing and directly calculated to influence them to render just the verdict they did. There is no practicable method to so analyze the mental operations of the jurors as to determine whether, in point of fact, the verdict would have been the same if the trial had been conducted, as both parties had a right to expect, according to law and upon the evidence in court. If the court, in their instructions to the jury, err, with respect to some proposition of law, it is well understood that the right of the defeated party, on exceptions to a new trial, does not depend on his showing that the error actually influenced the verdict. It is enough, if its natural tendency is to influence the jury to render their verdict against him, and such may reasonably have been its result. The right to a correct charge from the court is no more sacred or important than the right which, in this case, was violated. The analogy might be carried farther. It is not essential to the right to a new trial, on exceptions, that the error of the court should have been intentional, or by the fault of the prevailing party. So, in this case, the defendant was not any the less likely to be injured because the jurors did not appreciate the impropriety of tamely listening to conversations intended to influence them, or because the plaintiff was unaware of the officious efforts of his friends on his behalf. The friends of the plain-