

U. S. Rep.]

McDANIELS, EXECUTOR, &c. v. McDANIELS.

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in such cases seems to be simply appellate. See *In re Clegghorn*, 2 U. C. L. J., N. S., 133; *Re Stevenson*, 1 U. C. L. J., N. S., 52.

The payments to Sovereign, Langs and Lyons are admitted. These payments must, in my opinion, be applied in reduction of the schedule debts, and being applied in that way will reduce the amount of the debts of the discharging creditors to a sum less than the amount required to effect the insolvent's discharge.

Taking this view of the case, it is unnecessary for me to enter into the question of the insolvent's conduct in retaining and dealing with the estate as disclosed in his examination, nor how far the same may have tended to bring him within the provisions of sub-sec. 6 of sec. 9.

Confirmation refused.

UNITED STATES REPORTS.

SUPREME COURT OF VERMONT.

McDANIELS, EXECUTOR, &c. v. McDANIELS.

Conversations had with jurors about the case on trial by the friends of the prevailing party, intended and calculated to influence the verdict, constitute a sufficient cause to warrant the court in granting a new trial, even though not shown to have influenced the verdict in point of fact, and though they were had without the procurement or knowledge of the prevailing party, and listened to by the jurors without understanding that they were guilty of misconduct in so doing.

A motion for a new trial, upon the ground of misconduct by jurors during the trial, need not contain an averment that the misconduct was unknown to the moving party before the jury retired. It would seem to be otherwise when the objection to the juror is some matter which existed before the trial commenced, and which might have been a cause for challenge.

The fact that the moving party neglected to inform the court, before the jury retired, of misconduct on the part of jurors during the trial which came to his knowledge, would not, if proved, necessarily, as a matter of law, defeat the motion for a new trial, but would be one circumstance to be considered with others by the court in determining whether, in their discretion, to set aside the verdict.

Appeal from the probate of an instrument purporting to be the last will and testament of James McDaniels, deceased. The case was tried by jury, at the September Term of the Rutland County Court, A. D. 1866, upon the issue joined upon the plea, that the instrument is not the last will and testament of the deceased, and a verdict was rendered for the proponent. After verdict, and before judgment, a motion was filed by the defendant to set aside the verdict for several causes, among which was the following: "For that some of the panel of jurors, after they were impanelled, and during the progress of the trial, and out of court, were talked to and with, upon the subject of said cause, and favorably to the proponent, by the agents, emissaries, and friends of Isaac McDaniels, and by them were urged and solicited, and influenced by improper conversations with said jurors, or in their presence, to render a verdict in favor of the proponent." This motion was supported by accompanying affidavits. Further testimony was taken and filed by both parties, and at an adjourned session of the County Court, Peck, J., presiding, the verdict was set aside for the cause above assigned,—to which decision the proponent excepted. The exceptions were allowed, subject

to the opinion of the Supreme Court whether exceptions will lie in such a case. The exceptions set forth that the court found that the conversations detailed in the affidavits were had with, and in the presence of the jurors who tried the cause, during the trial, and that several of the persons holding such conversations, were the friends of the proponent, and that they held such conversations for the purpose of influencing the verdict of the jury in his favor; that this was done without the procurement of either the proponent or the defendant, and without the knowledge of the proponent. And the court did not find that it was done with the knowledge of the defendant. It was also found that the conversations were of a character directly calculated to influence the verdict in favor of the proponent.

The court did not find any corruption, or intentional misconduct in any of the jurors, but did find that some of the jurors were guilty of impropriety in suffering conversations to be held with them, and in their presence and hearing.

The counsel for the proponent contended that the court could not legally set aside the verdict; and particularly because it was not set forth in the motion, nor in the affidavits sustaining the same, that the defendant had no knowledge of the conversations when they occurred, and before the jury retired to consider the verdict. But the court held this not to be in law essential.

E. Edgerton and Daniel Roberts, for the plaintiff.—1. As a general proposition, it may be said, that the setting aside of a verdict, and the granting of a new trial, rests in the discretion of the County Court, to which no exception lies. But this discretion is not unrestrained license. It is limited by legal principles and legal rules. It depends, both as to its exercise at all, and, in a degree, as to the mode of its exercise, upon the facts found. So far as the decision below can be resolved into a legal conclusion from the facts found and stated upon the record, it is subject to revision: *Joyal v. Barney*, 20 Vt. 159-160; *Briggs v. Georgia*, 15 Id. 61; *French v. Smith et al.*, 4 Id. 363.

2. The court reports, that the conversations referred to "were of a character directly calculated to influence the verdict in favor of the plaintiff," but does not find that the verdict was thus influenced; that there was no "corruption nor intentional misconduct in any of the jurors;" and that those conversations were had "without the procurement of the plaintiff, and without his knowledge." Courts will not visit the consequences of an irregularity upon an unoffending party, unless it appear that it has wrought some injury to the other party: *Dennison v. Powers*, 35 Vt. 39; *Downer v. Baxter*, 30 Id. 467; *Blaine v. Chambers*, 1 S. & R. 169; 2 Grah. & Wat. N. T. 309, 310, 312, 317; *Shed v. Lawrence*, 1 Allen 167.

3. This was not a proper case for the exercise of any discretionary action of the court, inasmuch as it must be assumed that the defendant knew of the matters complained of, at the time of their occurrence, and did not bring them to the knowledge of the court before the verdict, but lay quiet, speculating upon the chance of a verdict in his favor.

On this point the case states the non-finding of the court. "The court did not find that it