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Criminal Procedure -- Evidence -- Privilege of Juror on Cross Examination

sufficient prospect of liquidation to bring the interests of the directors into conflict with those of the corporation and its creditors. Directors, then, occupying a position which puts it within their power to conceal the evidence of the facts and to defy detection, should be given the burden of showing that, at the time of their purchase, there was a well founded expectation of the debtor's composition and solvency.

CRIMINAL PROCEDURE—EVIDENCE—PRIVILEGE OF JUROR ON CROSS EXAMINATION

Defendant was indicted for entering into a conspiracy or agreement that he would vote falsely while doing jury duty.[1] On direct examination of another juror, testimony was admitted as to how defendant-juror had voted in the jury room. Cross examination as to how other jurors had voted was declared improper because of the juror privilege. On appeal, *held,* that there was no error in restricting the cross examination. *Burton v. United States,* 175 F.2d 960, *rehearing denied,* 176 F.2d 865 (9th Cir. 1949).

It is a general rule that communications among jurors are privileged against disclosure on the witness stand without their consent.[2] The privilege is based on the public policy that by assurance of secrecy in the jury room there will be promoted freedom of discussion and deliberation so essential for a proper determination by the jurors.[3] However, there are exceptions to this privilege. It does not apply where the relation in which it arose has been fraudulently commenced or continued,[4] nor where a juror has been guilty of misconduct with respect to some collateral matter.[5]

Sometimes the rule is confused with the competency of the witness to testify in the impeachment of a verdict.[6] Where the situation involves the impeachment of a verdict, the courts generally have kept the juror's privilege inviolate.[7] On the other hand, where the suit in which the juror had served ended in a mistrial, the privilege as to impeachment of a verdict was held inappropriate and testimony by other jurors as to the defendant-juror's statements was admitted.[8] This represents a sharp divergence from privileges for confidential communications where testimony is excluded, except when waived or offered voluntarily by the person asserting the privilege.[9] An *extension* allowed

1. 35 STAT. 1096 (1909), 18 U.S.C. § 88 (1946).
2. 8 WIGMORE, EVIDENCE § 2346 (3d ed. 1940).
3. M'Kain v. Love, 2 Hill 506 (S.C. 1834).
4. Clark v. United States, 289 U.S. 1 (1932), 81 U. OF PA. L. REV. 1000 (1933).
5. *In re* Cochran, 237 N.Y. 336, 143 N.E. 212 (1924) (An attempt to corrupt vote).
6. See Clark v. United States, *supra* at 12, 13.
7. Hyde v. United States, 225 U.S. 347 (1911); Kelly v. State, 39 Fla. 122, 22 So. 303 (1897). *See* McDonald v. Pless, 238 U.S. 268, 269 (1914). See 8 WIGMORE, EVIDENCE § 2354 n.1 (3d ed. 1940) (at least one exception to this in a dozen code states).
8. Clark v. United States, *supra.*
9. 8 WIGMORE, EVIDENCE § 2354 (3d ed. 1940).

an accused juror, charged with perjury on a *voir dire* examination, to show by cross examination of the other jurors how the panel voted.[10] This is limited to instances in which a mistrial occurred and the inqury concerned a crime committed prior to the jurors' retirement.[11]

Inasmuch as the principal case is not one in which a member of the jury claims the privilege of being protected against disclosure, the point is whether or not the privilege of the other jurors should cease when supervened by the defendant-juror's right to reasonable latitude of cross-examination. Here the juror had participated in a case which ended in a mistrial; furthermore, he was charged with a crime committed before retiring to the jury room. According to the above reasoning where these factors are present, the privilege should end and cross-examination as to the other jurors' voting should be permitted. The privilege has not proved invulnerable when it has come in conflict with a paramount policy, such as the protection of the integrity of the jury. It should not be upheld where it restricts the right to cross-examine; a fundamental right of a defendant accused of a crime.[12]

FEDERAL COURTS—JURISDICTION—EXTENSION OF THE DOCTRINE OF FORUM NON CONVENIENS

An action was brought in federal district court against the directors of a New York corporation by shareholders therein, alleging misuse of corporate funds. At the time suit was instituted, an action based upon the same claims brought against substantially the same defendants, but by different shareholders, was pending in the state court. The federal court stayed further proceedings pending the determination of the suit in the state court. An appeal by petitioner to review the order staying proceedings was dismissed by the Court of Appeals on the ground that such an order was not a "final order" from which plaintiff could appeal.[1] Petitioner then requested a writ of mandamus directing the district court judge to proceed with the trial of the action. *Held*, petition denied; the right of access to a federal court is not absolute and an action commenced in such court based upon diversity of citizenship may, in the discretion of the trial court, be stayed, or not even heard, under the doctrine of *forum non conveniens*. *Mottolese v. Kaufman*, 176 F.2d 301 (2d Cir. 1949) (Frank, J. dissenting.)

Originally a citizen was allowed an absolute privilege of access to a federal court, even though its exercise resulted in inconvenience, delay and

10. Serpas v. State, 188 La. 1074, 179 So. 1 (1938).
11. See note 9 *supra*.
12. Alford v. United States, 282 U.S. 687 (1931).

1. Mottolese v. Preston, 172 F.2d 308 (2d Cir. 1949).