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Verdict--Juror's Assent--What Constitutes

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that the sounder principles lay in those authorities which hold that the transaction is not usurious. After all, the borrower is obliged merely to furnish additional security; it is scarcely likely that local usury laws have been intended to forbid such a relatively harmless practice.[15] It is true that a requirement to take out insurance with the lender may be a clever scheme for selling insurance, still that consideration should bear no weight as an argument based on usury. Perhaps there is another factor in this line of cases, namely, a judicial belief that fair collateral advantages should be upheld. Clearly, one now discerns a growing tendency to approve and enforce collateral stipulations[16] that were once held to be "clogs on the equity of redemption" in mortgages.[17] Though the insurance policy may properly be held to typify a contract of adhesion,[18] and, therefore, one to be construed most narrowly against the insurance company lender, there is no such strong social interest in usury as to invalidate the present security transaction.

—R. E. HAGBERG.

VERDICT — JUROR'S ASSENT — WHAT CONSTITUTES. — In the trial of a recent criminal case, juror no. 12 told the court that he feared for his health and life if he had to continue in jury service. Medical examination disclosed that he was suffering only physical discomfort which would not affect his capacity as a juror. He continued in jury service, and a verdict of guilty was rendered. On the poll, all of the jurors agreed to the verdict. In answer to further questions asked him by the court concerning his physical condition, juror no. 12 said that he agreed in order to escape further confinement and suffering, although he did not believe that the defendants were guilty. The verdict was then recorded over the defendants' objection, and a new trial was re-

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the law to be reasoned from analogy the same as any other rule of law . . . .)"

[15] The excess profit to the lender is hardly an evil of such magnitude as to outweigh advantages of free capital investment in West Virginia.

[16] John Hancock Mut. Life Ins. Co. v. Nichols, *supra* n. 3 (The theory of the court is that the business of the company is to insure lives. Since its surplus funds must be invested it is not unreasonable to confine its loans to policy-holders; in other words, the company may validly insist upon fair reciprocity).

[17] See Williams, *Clogging the Equity of Redemption* (1933) 40 W. VA. L. Q. 31, 50.

[18] See Vance, *supra* n. 6, pp. 201, 215.

fused. *Held*: It was a reversible error to record the verdict. There was no unanimous verdict, since the necessary assent of the mind was not given by juror no. 12. *United States v. Pleva.*[1]

A juror may change his verdict,[2] or a poll of the jury may be taken,[3] at any time before the verdict is recorded or the jury discharged. For these reasons, the statements of improper motives made by a juror who is being polled, before either of these events take place, must be taken into consideration by the court in determining whether there exists the unanimous assent[4] of the mind[5] necessary to a valid verdict. The validity of the verdict is a question of fact for the trial court to determine in its sound discretion.[6] Thus the court may in a proper case refuse to inquire into the motives of a juror,[7] since the only purpose of the poll is to determine what is the verdict.[8] But such an inquiry is proper when the motive of the juror may determine the validity of his verdict.

There is a fairly well defined limit within which the juror's answer or statements when he is polled are held to be sufficient agreement to make the verdict unanimous. There is no doubt that an assent given by a juror contrary to his conscience is insufficient.[9] On the other hand, it is not necessary that his mind be clearly free from doubt.[10] The obvious reason for this latter rule is that

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[1] 66 F. (2d) 529 (C. C. A. 2d, 1933).

[2] Lawrence v. Stearns, 11 Pick. 501 (Mass. 1831); Weeks v. Hart, 24 Hun. 181 (N. Y. 1881); Owens v. Southern R. Co., 123 N. C. 183, 31 S. E. 383 (1898); Scott v. Scott, 110 Pa. 387, 2 Atl. 531 (1885); B. & O. R. R. Co. v. P. W. Co., 14 Gratt. 447 (Va. 1858); Yonker v. Grimm, 101 W. Va. 711, 113 S. E. 695 (1926).

[3] State v. Waymire, 52 Ore. 281, 97 Pac. 46 (1908).

[4] Lawrence v. Stearns, *supra* n. 2; Weeks v. Hart, *supra* n. 2; Brogan v. Union Traction Co., 76 W. Va. 698, 86 S. E. 753 (1915) (Unanimity in result alone is sufficient); see Note (1899) 43 L. R. A. 33.

[5] People v. Faber, 199 N. Y. 256, 92 N. E. 674, 20 Ann. Cas. 879 (1910); Rothbauer v. State, 22 Wis. 468 (1868).

[6] *In re* Buchanan, 158 U. S. 31, 15 S. Ct. 723 (1895); Martin v. State, 124 So. 392 (Ala. 1929); Hill v. State, 64 Ga. 453 (1880); Bunn v. Hoyt, 3 Johns. 255 (N. Y. 1808) (It is proper to send the jury back to deliberate further, in case of an insufficient verdict).

[7] Moss v. State, 152 Ala. 30, 44 So. 598 (1907) (In polling the jury, the court has a sound discretion in deciding whether it will inquire into the motives of a juror); State v. Tomlinson, 7 N. D. 294, 74 N. W. 995 (1898).

[8] State v. Boger, 202 N. C. 702, 163 S. E. 877 (1932).

[9] Bunn v. Hoyt, *supra* n. 6 [a civil case, cited with approval in Douglass v. Tousey, 2 Wend. 352 (N. Y. 1829)]; State v. Austin, 6 Wis. 205 (1858) (A juror indicated grave doubt, but answered in the affirmative after the court insisted that he answer "yes" or "no". The verdict was declared insufficient); Farrell v. Hennesy, 21 Wis. 639 (1867) (a civil case, in which the error was waived by failure to object before the verdict was recorded).

[10] Parker v. State, 81 Ga. 332, 6 S. E. 600 (1888); Ponder v. State, 11 Ga. App. 60, 74 S. E. 715 (1912); State v. Asher, 63 Mont. 302, 206 Pac. 1091

a requirement of wholehearted agreement would render it extremely difficult to obtain a verdict in most cases. Between these two extremes there is the middle ground, in which the juror's statements disclose varying degrees of doubt or agreement. A mere indication by a juror that his verdict is influenced by the opinion of other jurors,[11] or by a desire to avoid a "hung" jury,[12] will not alone invalidate his verdict, if the juror maintains that it is his verdict. But if there is added to either of these reasons the statement of the juror that he does not regard the verdict as correct,[13] the essential assent of the mind is lacking. Into this class of cases the principal case falls, and the juror's fear for his own health overcomes his desire to acquit the defendants. But an affirmative answer to the poll question is not overcome by such indefinite statements as "I reckon so",[14] and "I suppose so",[15] made immediately before the affirmative answer. The court must not use coercion in obtaining such an affirmative answer.[16] In civil cases, the assent to the verdict need not be so strong as in criminal cases.[17]

In the principal case, the fact that the juror was mistaken as to the danger he was in does not remove his incapacity as a juror, for the coercion still existed. Since they see only the printed record, the appellate courts properly show a reluctance to upset trial court rulings on whether the juror's affirmative answer represents his true convictions. In such a clear instance as the principal case, however, there is little or no doubt that a reversal is proper.

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(1922) (Juror answered that it was his verdict, on condition that sentence be suspended, and then when the question was repeated, answered "yes". There was sufficient agreement); *cf.* State v. Austin, *supra* n. 9.

[11] Henderson v. State, 12 Tex. 525, 533 (1854).

[12] State v. Millroy, 103 Wash. 193, 174 Pac. 10 (1918).

[13] Rothbauer v. State, *supra* n. 5.

[14] Martin v. State, *supra* n. 6.

[15] Hill v. State, *supra* n. 6.

[16] State v. Austin, *supra* n. 9 (the insistence by the court that the juror answer "yes" or "no" amounted to coercion).

[17] Macon Ry. & Light Co. v. Barnes, 121 Ga. 443, 49 S. E. 282 (1904) (the court purposely avoided an authoritative decision, but said that in the light of former decisions, an unwilling compromise on the amount of recovery would not invalidate the verdict); Black v. Thornton, 31 Ga. 641 (1860) (the juror's answer that he found for the defendant, but was not satisfied with the verdict was held to be sufficient assent). These civil cases cite criminal cases for general propositions, and vice versa, but the results of the cases cited *supra* nn. 9-16 inclusive, when compared, show that the courts require more perfect assent in criminal cases.