

is that the defendant was authorized to appoint the plaintiff an agent of the Motor Company for the sale of automobiles at Franklin, upon his purchasing or making a sale of a machine; that both parties understood the contract was being made by the defendant as agent of the Motor Company; and that in making the contract the defendant was acting within the scope of his authority. As there was no competent evidence from which it could be found that the contract was made with the defendant personally, and as the Motor Company is not a party to the action, it is unnecessary to consider whether the evidence would warrant the inference that the plaintiff succeeded in making a sale.

*Exception overruled.*

All concurred.

Sullivan, }  
May 1, 1906. }

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GOODWIN & a. v. BLANCHARD & a.

Where counter-affidavits of jurors are submitted in support of a verdict which is assailed on the ground of their misconduct, it is within the discretion of the trial court to permit the moving party to cross-examine them with respect to the statements made therein.

ASSUMPSIT, for breach of a written agreement. Trial by jury and verdict for the plaintiffs for one cent damages. In support of their motion to set aside the verdict and for a new trial, on the ground of alleged misconduct of jurors in making up the verdict, the plaintiffs submitted the affidavit of the sheriff who had charge of the jury during their deliberations. The defendants submitted counter-affidavits of some of the jurors. The plaintiffs then moved for leave to bring the jurors into court and examine them "in explanation or contradiction" of their affidavits. The motion was denied solely as a matter of law, and the plaintiffs excepted. The motion to set aside the verdict was also denied. Transferred from the May term, 1905, of the superior court by *Pike, J.*

*Burt Chellis and Allen Hollis*, for the plaintiffs.

*Ira Colby & Son and Hosea W. Parker*, for the defendants.

BINGHAM, J. The plaintiffs did not have the legal right to bring the jurors who had given affidavits in opposition to their motion before the trial judge and have them orally examined, even

if their testimony would have been competent. The conduct of hearings on motions is largely within the judicial discretion of the trial judge. He may require a motion involving an issue of fact to be heard upon affidavits only, and his ruling will not be set aside unless it is clear that in the particular case he abused his discretion. *Strom v. Railway*, 81 Minn. 346, 348, 349; *State v. King*, 88 Minn. 175, 184; *Gano v. Wells*, 36 Kan. 688; *Schoolfield v. Brunton*, 20 Col. 139; *People v. Tucker*, 117 Cal. 229. He may require the moving party to present his whole case at once, and decline to receive affidavits or other proof in rebuttal of counter-affidavits. *Ames v. Howard*, 1 Sumn. 482, 491. He may cause persons who have made *ex parte* affidavits in support of a motion to be brought before him and examined orally with respect to statements made in their affidavits and how they came to give them, for the purpose of testing their knowledge and credibility. *Glidewell v. State*, 15 Lea 133; *Moore v. State*, 96 Tenn. 209; *People v. Lee Chuck*, 78 Cal. 317, 339; *United States v. Lloyd*, 4 Cranch C. C. 472. But it is not within his power to require persons who have made *ex parte* affidavits, either in support of or in opposition to a motion, to give additional affidavits. *Forshee v. Abrams*, 2 Ia. 571; *Grady v. State*, 4 Ia. 461.

In this state it is provided by a rule of court that no motion grounded upon facts that do not appear in the record or papers on file in the case, or that are not agreed to in writing, will be heard by the court, either in support of or in opposition to the motion, unless the facts are verified by affidavit. Rule of Court, No. 48, 56 N. H. 589; Rule of Court, No. 43, 71 N. H. 682. This rule is the same as one adopted by the superior court of Massachusetts. *Spaulding v. Knight*, 118 Mass. 528. While the trial court, on the hearing of a motion involving an issue of fact, may receive the oral testimony of witnesses, it would seem that the practice commonly recognized or fixed by rule of court, of only receiving affidavits, should not be departed from unless it be in exceptional cases and to avoid a miscarriage of justice. *Gardner v. Webber*, 16 Pick. 251; *Fowler v. Colton*, 1 Pin. 331, 338; *Carr v. Bank*, 18 Wis. 268; *Strom v. Railway*, *supra*; *State v. Stackhouse*, 24 Kan. 445, 454; *Tyler v. Safford*, 24 Kan. 580, 582; 1 Enc. Pl. & Pr. 333; 14 *Ib.* 147, 148, 149; 1 Wig. Ev., s. 4.

In this case the affidavits of the sheriff and the jurors were put in evidence without objection. We are therefore not called upon to decide whether they were competent to be considered on the question raised by the motion. Conceding that they were competent, it was within the discretion of the trial judge to grant the plaintiffs' request to cross-examine the jurors with respect to the statements there made, and how they came to give the affidavits.

When the examination is thus limited no legal objection is apparent. The trial judge, however, without exercising his discretion, ruled as a matter of law that the plaintiffs were not entitled to so examine the jurors. This was error.

*Case discharged.*

All concurred.

Coos, }  
May 1, 1906. }

YOUNG v. MILAN.

Evidence that notice of a highway hearing was served upon the husband of an interested landowner in her presence, and that she examined the paper, fully understood its meaning, expressed satisfaction with the object of the proceeding, and remained silent until the road was laid out over her premises, is competent to show a waiver of her right to a formal notice.

PETITION, for a writ of *certiorari*. Writ denied. Transferred from the September term, 1905, of the superior court by *Pike, J.*

In 1904, the selectmen of the defendant town, upon petition, laid out a highway across the plaintiff's land. The plaintiff was not present at the hearing before the selectmen. No written notice of the hearing addressed to her was served upon her, but such a notice addressed to her husband, with whom she lived upon the premises, was served upon him. Subject to the plaintiff's exception, the defendants offered evidence showing that at the request of the husband the land in question had been taxed to him by the selectmen, who supposed he was the owner; that the petition and the notice of the highway hearing was served upon him in the presence of the plaintiff, to whom it was immediately handed, and that she unfolded and read it; that in the petition it appeared that the proposed highway was to pass over her land; and that she said to the person serving the notice that she wanted the road laid out and also her damages therefor. Subsequently the road was laid out and damages were awarded to the landowners, including the plaintiff's husband, but none to her. Some weeks later this petition was filed. From the plaintiff's failure to disclose her ownership of the land, together with her remarks and conduct, the court found that she waived her right to a more formal notice than she received.

*Goss & Tardivel*, for the plaintiff.

*Rich & Marble*, for the defendants.