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May a Juror Take Notes in Illinois

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MAY A JUROR TAKE NOTES IN ILLINOIS?

The cases throughout the country seem to be in hopeless and irreconcilable conflict as to whether jurors should be permitted to take notes concerning the evidence presented for their consideration. Most courts outside Illinois which have considered the issue view the practice as generally proper;[1] some view it as substantially improper;[2] and others leave the question to the total discretion of the trial court.[3] In at least nine states there are statutes which specifically grant the right to jurors.[4]

Illinois Decisions

In Illinois, there have been only three cases which have considered the issue and no clear rule may be drawn from the decisions except that it is improper for counsel to direct a request to the jurors that they take notes.

In *Ind. & St. Louis R.R. Co. v. Miller*,[5] the earliest of the Illinois decisions, counsel for the plaintiff requested the jury to take notes of his calculations of damages and the trial court allowed the jury to do so. On appeal, the Supreme Court said that the practice of permitting an attorney, who is arguing a case, to persuade jurors to take paper and pencil and record his calculations of damages, and permitting such memoranda to be taken to the jury room to be used in reaching a verdict, should not be countenanced by trial courts. "It may be," the court continued, "that a juror, if he desire it, may make, on his own motion,

[1] *See, e.g.*, Denson v. Stanley, 17 Ala. App. 198, 84 So. 770 (1919), *rev'd on other grounds*, Ex Parte Stanley, 203 Ala. 408, 84 So. 773 (1919); Vaughn v. State, 17 Ga. App. 268, 86 S.E. 461 (1951); State v. Joseph, 45 La. Ann. 903, 12 So. 934 (1893); Martin v. Atherton, 151 Me. 108, 116 A.2d 629 (1955); Cahill v. Baltimore, 129 Md. 17, 98 A. 235 (1916); State v. Robinson, 117 Mo. 649, 23 S.W. 1066 (1893); Swift & Co. v. Bleise, 63 Neb. 739, 89 N.W. 310 (1902); State v. Shedd, 274 N.C. 95, 161 S.E.2d 477 (1968); State v. Cottrell, 19 R.I. 724, 37 A. 947 (1896); State v. Trent, 234 S.C. 26, 106 S.E.2d 527 (1959); Watkins v. State, 216 Tenn. 545, 393 S.W.2d 141 (1965); Commercial Music Co. v. Klag, 288 S.W.2d 168 (Tex. Civ. App. 1955); Koontz v. Mylius, 77 W. Va. 499, 87 S.E. 851 (1916).

[2] *See, e.g.*, Cheek v. State, 35 Ind. 492 (1871); Maclin v. Horner, 357 S.W.2d 325 (Ky. 1962); Re Thirty West Broad Corp., 425 Pa. 36, 227 A.2d 827 (1967); Fischer v. Fischer, 31 Wis. 2d 293, 142 N.W.2d 857 (1966).

[3] *See, e.g.*, Toles v. U.S., 308 F.2d 590 (9th Cir. 1962), *cert. denied*, 375 U.S. 836 (1962), *reh. denied*, 375 U.S. 949 (1962); Alaska State Housing Authority v. Contento, 432 P.2d 117 (Alaska 1967); Andrews v. Cardosa, 97 So. 2d 43 (Fla. App. 1967); State v. Jackson, 201 Kan. 795, 443 P.2d 279 (1968), *cert denied*, 394 U.S. 908 (1969); Commonwealth v. Tucker, 189 Mass. 457, 76 N.E. 127 (1905); *In re* Appropriation of Easements for Highway Pur., 16 Ohio Op. 2d 465, 87 Ohio L. Abs. 295, 176 N.E.2d 881 (1961).

[4] Cal. Penal Code Sec. 1137 (1949), Cal. Code Civ. Proc. Sec. 612 (West 1939); Ida. Code ch. 19, Sec. 2203 (1947); Ia. Code Sec. 784.1 (1954); Minn. Stat. Sec. 631.10 (1949); Mont. Rev. Code ch. 94, Sec. 7303 (1947); Nev. Comp. Laws Sec. 11004 (1929); N.D. Rev. Code ch. 29, Sec. 2204 (1943); N.Y. Consol. Laws, Code Cr. Proc. Sec. 426 McKinney (1950); Utah Code ch. 77, Sec. 32-2 (1953). Similar provisions in Arizona (Ariz. Rev. Code Sec. 5077 (1928)) and Oregon (Ore. Code Sec. 2-312 (1930)) statutes were deleted in 1939 revisions. Such a provision is also adopted by the Restatement of Criminal Procedure Sec. 330 (1931).

[5] 71 Ill. 463 (1874).

memoranda of evidence, or even of the points of argument of counsel, but it should be done only on the motion of a juror, and not by counsel."[6]

In *Ettelsohn v. Kirkwood*,[7] counsel for the appellant asked a juror to take notes of the appellant's claims so the jury might remember them. Counsel for the appellee objected and the trial judge refused to allow the note taking. On appeal, the appellant argued that the trial court erred by not allowing the juror to take notes.[8] The court, affirming the judgment below, held that counsel had no right to ask the jury to take notes.

In *Kelley v. Call*,[9] the most recent Illinois decision, written memoranda which indicated the specific amounts of certain alleged damages (physicians' charges, costs of medical treatment, etc.) were found in the jury room. The appellant alleged reversible error, arguing that the jury had taken notes during the trial and had relied upon these notes during its deliberations. The court, however, found no evidence that appellee's counsel had requested the jury to take notes or that the notes were, in fact, made in the jury box. Thus, the court affirmed the lower decision, saying in *obiter dictum*: ". . . nor do we hold that memoranda made in the jury box for use in the jury room at the request or suggestion of counsel *and not of their own volition* is [*sic*] proper."[10] (Emphasis added.)

It appears, therefore, from the language in the *Miller* and *Kelley* cases, that note taking by jurors is not *per se* improper. Both cases suggest that it may, in fact, be proper for jurors to take notes of their own volition or on their own motion. However, no specific guidelines or standards are set out in the opinions and the issue, therefore, remains unresolved in this state.

The View that Note Taking is Improper

In earlier times, the tendency was to view with suspicion the taking of notes by jurors. While the exact origin of the suspicion and the reasons for it are unknown, it has been suggested that the suspicion originated in the time when illiteracy was common and literacy was uncommon.[11] It was feared that the one or two jurors who were literate would, by virtue of their written recollection, be capable of exerting undue influence upon the other jurors. To guard against

[6] *Id.* at 472.

[7] 33 Ill. App. 103 (1st Dist. 1889).

[8] See United States v. Chiarella, 184 F.2d 903 (2d Cir. 1950), wherein the court observes that in most cases of jury note taking the question is whether the judge must forbid the practice and not whether he must permit it. A review of the approximately seventy-five decisions on the note-taking issue indicates the validity of the observation, since no more than six cases appear to address themselves to the latter question. Generally, whether the trial judge must permit note taking is left to his discretion and this view was upheld even where a statute directed a judge to inform the jury that they might take notes and he failed to do so. *See* Skinner v. State, 432 P.2d 675 (Nev. 1967).

[9] 324 Ill. App. 143, 57 N.E.2d 501 (3d Dist. 1944).

[10] *Id.* at 148, 57 N.E.2d at 503.

[11] United States v. Campbell, 138 F. Supp. 344, 348 (N.D. Iowa 1956). *See also* Woodcock, *Note Taking by Jurors*, 55 Dick. L. Rev. 335 (1951).

such an evil and to insure a fair and impartial trial by jury, the early common law judge simply forbade note taking. The modern version of this reasoning, which has been applied in a few decisions,[12] is that all jurors do not possess the same note-taking abilities and the skilled note taker, therefore, will have a marked advantage in influencing other jurors.

Other common reasons often advanced today as a basis for forbidding note taking by jurors are: (1) that the process of writing notes may divert the jury's attention from important evidence; (2) that during deliberations, the jury would be apt to rely strongly on the notes, which may be imperfect, whereas properly the jurors should rely on their memories; (3) that conflicts of memory between jurors would be settled by the notes, which might be inaccurate, meager, careless, loosely deficient, partially or altogether incomplete; (4) that a juror hurriedly scribbling notes is apt to divert the attention of the other jurors; (5) that an inept note taker might place undue emphasis during his deliberation upon unimportant evidence; (6) and that a juror may start a trial by making copious notes, but as the novelty wears off and the job becomes tedious he will stop, thereby affording a disadvantage to subsequent testimony and evidence.[13]

The View that Note Taking is Proper

The view that note taking by jurors is proper has substantial support in a large number of cases and is based upon several important factors: (1) it seems inconsistent to permit a trial judge, trained in the art of hearing and weighing evidence, to take notes of the evidence and to deny jurors with little or no experience the right to this aid; (2) a person's memory is faulty, particularly over a long period of time, and to allow notes to be made as a memory-refresher will better enable a jury to reach a proper result; (3) an experienced and skilled note taker may influence the jury, but even in the absence of notes the juror with the sharpest memory may also influence the jury; (4) the purpose of the notes is not to replace the memory but to aid it; (5) in lengthy trials, such as prosecutions under the anti-trust acts, stock frauds, tax and bank cases—trials that may extend six months or longer—there may be many defendants and witnesses, and it is impossible for a juror to remember accurately the testimony of each; (6) and allowing the juror to make notes will to some extent alleviate the guessing that must occur in deliberations over complex issues of damages or technical data.[14]

[12] *See, e.g.*, United States v. Davis, 103 F. 457 (C.C.W.D. Tenn. 1900), *aff'd*, 107 F. 753 (6th Cir. 1901) (which has not been followed); Thornton v. Weaber, 380 Pa. 590, 112 A.2d 344 (1955); Fischer v. Fischer, 31 Wis. 2d 293, 142 N.W.2d 857 (1966).

[13] *See, e.g.*, United States v. Standard Oil Co., 316 F.2d 316 (7th Cir. 1963); United States v. Davis, 103 F. 457 (C.C.W.D. Tenn. 1900); Cheek v. State, 35 Ind. 492 (1874); Thornton v. Weaber, 380 Pa. 590, 112 A.2d 344 (1955); Fischer v. Fischer, 31 Wis. 2d 293, 142 N.W.2d 857 (1966); Buzard, *Jury Note Taking in Criminal Trials*, 42 J. Crim. L.C. & P.S. 490 (1951); Comment, 43 Mich. L. Rev. 803 (1945); 32 J. Am. Jud. Soc'y 57 (1948). *Contra*, United States v. Chiarella, 184 F.2d 903, 907 (2d Cir. 1950), wherein Circuit Judge Learned Hand said that objections to jurors taking notes are "far-fetched" and "imaginary."

[14] *See, e.g.*, Toles v. United States, 308 F.2d 590 (9th Cir. 1962); United States v.

Generally, however, though note taking is viewed as proper, the allowing or forbidding of the practice in the absence of a statute is left to the discretion of the trial court[15] and this exercise of discretion may be effectively challenged only where the appellant can demonstrate that he has been prejudiced or injured.[16] Consent, too, may make the taking of notes non-erroneous[17] and failure to object to the taking of notes by jurors during the trial may constitute a waiver,[18] unless counsel can prove that, despite diligence, he was unaware of it.[19]

Statutory Considerations

As indicated earlier, the legislatures of some nine states have enacted statutes which may be regarded as giving jurors the unqualified right to take notes during a trial.[20] The Iowa statute, which is typical of those enacted by the several states, reads as follows:

> The jury may also take with them notes of the testimony or other proceedings on the trial taken by themselves or any of them, but none taken by any other person.[21]

Thus, under the provisions of these statutes, it is clear that jurors may take notes on their own initiative and, though the statutes sometimes specify that the note taking right is limited to civil cases, or limited to criminal cases, there does not appear to be any significant justification for the limitations.[22]

Chiarella, 184 F.2d 903 (2d Cir. 1950); United States v. Campbell, 138 F. Supp. 344 (N.D. Iowa 1956); United States v. Carlisi, 32 F. Supp. 479 (E.D.N.Y. 1940); Cahill v. Baltimore, 129 Md. 17, 98 A. 235 (1916); Omaha F. Ins. Co. v. Crighton, 50 Neb. 314, 69 N.W. 766 (1897); *In re* Appropriation of Easements for Highway Pur., 16 Ohio Op. 2d 465, 87 Ohio L. Abs. 295, 176 N.E.2d 881 (1961); Watkins v. State, 216 Tenn. 545, 393 S.W.2d 141 (1965); Buzard, *supra* note 13; 32 J. Am. Jud. Soc'y 57 (1948).

[15] *See, e.g.*, Harris v. United States, 261 F.2d 792 (9th Cir. 1958); Goodloe v. United States, 88 App. D.C. 102, 188 F.2d 621 (1950); United States v. Chiarella, 184 F.2d 903 (2d Cir. 1950); United States v. Campbell, 138 F. Supp. 344 (N.D. Iowa 1956); Chicago & N.W.R. Co. v. Kelly, 84 F.2d 569 (8th Cir. 1956); Alaska State Housing Authority v. Contento, 432 P.2d 117 (Alaska 1967); Andrews v. Cardosa, 97 So. 2d 43 (Fla. App. 1957); State v. Jackson, 201 Kan. 795, 443 P.2d 279 (1968); Watkins v. State, 216 Tenn. 545, 393 S.W.2d 141 (1965).

[16] *See, e.g.*, Van Sickle v. Kokomo Water Works Co., 239 Ind. 612, 158 N.E.2d 460 (1959); Boegel v. Morse, 251 Iowa 1253, 104 N.W.2d 826 (1960); People v. McIntosh, 6 Mich. App. 62, 148 N.W.2d 220 (1967).

[17] State v. Cottrell, 19 R.I. 724, 37 A. 947 (1896).

[18] *See, e.g.*, United States v. Smith, 393 F.2d 687 (6th Cir 1968), *cert. denied*, 393 U.S. 885 (1968); People v. Cline, 222 Cal. App. 2d 597, 35 Cal. Rptr. 420 (1963); State v. Shedd, 274 N.C. 95, 161 S.E.2d 477 (1968); State v. Trent, 234 S.C. 26, 106 S.E.2d 527(1959).

[19] *See, e.g.*, Commonwealth v. Tucker, 189 Mass. 457, 76 N.E. 727 (1905); Davis v. Kansas City Public Service Co., 361 Mo. 168, 223 S.W.2d 669 (1950).

[20] California appears to be the only state which has decisions applying the statute as an authorization for the jury, as a matter of right, to take notes if they desire. *See* People v. Cline, 222 Cal. App. 2d 597, 35 Cal. Rptr. 420 (1963); Ferner v. Casalegno, 141 Cal. App. 2d 467, 297 P.2d 91 (1956). However, in none of the other states are there cases forbidding the practice, or leaving it to the judge as a discretionary matter (except, perhaps, in Nevada. See note 8, *supra*). The clear language of the statutes indicates that their purpose is to give jurors the right to make notes.

[21] Iowa Code Sec. 784.1 (1954).

[22] In Iowa, the Supreme Court has indicated in another connection that the rules of

In Illinois, there is no statute which expressly grants the note-taking right to jurors, but there is a statute which seems to imply that a juror has the right. That statute, entitled "Secrecy of Proceedings of Petit Jury," reads in part as follows:

> Nothing contained in this section shall be construed to prohibit the taking of notes by a petit juror in any court of the State of Illinois in connection with and solely for the purpose of assisting him in the performance of his duties as such juror.[23]

Upon close examination, however, it becomes evident that the statute is based on and is virtually identical with a federal statute enacted in 1956,[24] and has as its sole purpose the protection and assurance of privacy of juries during their deliberations and votings.[25] The statute imposes a penalty upon anyone who by any means records the proceedings of a jury during its deliberation and voting, and the note-taking provision is intended merely to allow the jurors to "record" data during their own deliberations. Without this note-taking exception in the statute, jurors would not be permitted to use pencil and paper during their deliberations and voting. There is absolutely no indication that the legislature intended this statute to stand for the proposition that jurors may, as a matter of right, take notes of testimony and evidence while it is being presented at the trial itself.[26]

Conclusion

Unless and until the Illinois legislature acts to grant jurors the right to take notes at a trial, the issue should rest in the sound discretion of the trial court. Note taking might be commendable in some instances but undesirable in others, and the trial judge, because of his familiarity with the pleadings and issues of the particular case, will be best able to make the determination. The trial judge should be permitted, whenever he believes that the ends of justice will be better served, to encourage the jurors to take notes by carefully instructing them as to the privilege. Should a juror take notes of his own volition, the matter should be brought to the immediate attention of the trial judge for a ruling as soon as the practice is discovered. And, should a request for leave to take notes be made by the foreman on behalf of the jury, the request should be viewed as an objective showing that the jury feels it would be better able to follow and recollect the evidence by taking notes. Under this latter circumstance, it would seem that the request should be denied only in an exceptional situation.

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evidence and procedure should be the same in both civil and criminal trials. *See* State v. West, 197 Iowa 789, 198 N.W. 103 (1924).

[23] Ill. Rev. Stat. ch. 78, Sec. 36 (1969).

[24] Public Law 919, 84th Cong., 2d Sess. (1956), 18 U.S.C.A. Sec. 1508. The only difference in substance is that the federal statute applies to grand juries as well as petit juries.

[25] *See* Sen. Rep. No. 1691 and H. Rep. No. 2807, 84th Cong., 2d Sess. (1956), reprinted in Vol. 3 *U.S. Code Congressional and Administrative News*, 84th Cong., 2d Sess. 1956, p. 4149.

[26] *See* S.H.A. ch. 78, Sec. 36, at 604 (1969).

It is further submitted that note taking by jurors should constitute reversible error only where there is a definite showing that a timely objection was registered, and that the party alleging error was substantially prejudiced by the trial judge's abuse of discretion.

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