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Note Taking By Jurors

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NOTE TAKING BY JURORS

By

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Anyone attending court will notice that the presiding judge, interested counsel, and the newspaper men are asiduously making notes of important or interesting statements of the witnessess testifying in the case. The Judge will use his notes as a basis for his charge; the counsel theirs for the purpose of cross examination or in summing up and expounding their theory at the conclusion of the trial; and the newspaper men will use theirs to give the public, through the press, an adequate and complete picture of what develops in the court room. In the meanwhile, an official stenographer will be noticed meticuously recording every spoken word and carefully identifying all papers, records and photographs offered in evidence. At the same time the butcher, the baker, and the candlestick maker are segregated from the spectators in a special section of the court room known as the Jury Box, and they are not too comfortably accommodated. These, twelve in number, will be sitting there staring at a space, sometimes showing interest in the progress of the trial, sometimes day dreaming and frequently evidencing a bored expression. It will likewise be noted that of all the persons engaged, directly or indirectly, in the trial of a case, these in the Jury Box are the only ones not making notes, because should any of them attempt to do so, the presiding judge either on his own motion or because requested by counsel will inform the jurors that they are not allowed to take any notes but must rely entirely on their memories when they later meet in a closed session to determine upon a verdict.

Just when, where, and why this principle of law came into use seems to be difficult, if not impossible, to determine. In the standard texts on jury trial such as HISTORY OF TRIAL BY JURY by William Forsyth, HYATT ON TRIALS by William Harvey Hyatt, TREATISE ON TRIAL BY JURY by John Proffat and TRIAL BY JURY by Robert von Moschzisker late Chief Justice of Pennsylvania, nothing can be found as to the origin or reason for this rule.

There are but two reported cases in Pennsylvania where the question of the jurors taking notes during the trial of a case receives any judicial mention. In the case of *Gasparovio* v. *Reed*, 5 D. & C., 531 (Pa. 1922), there had been a motion filed for a new trial and one of the reasons assigned was that during the trial one of the jurors took notes and these notes were used in the Jury Room when the case was being discussed among the jurors. Judge Miles I. Potter in discussing the reason thus assigned says, "This is the first time we have ever heard exactly this point being raised in our modern practice." He then lashes out at the fact that someone must have disclosed the proceedings among the jurors after they

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had retired, a thing which he said was contrary to American jurisprudence for if someone had not tattled there was no way that this particular fact could have been disclosed. It appears in the opinion that all the juror did was to make a note of the monetary value of the damages suffered by the defendant, and Judge Potter says, "We fail to see any harm whatever in any juror taking the figures as given by the witnesses." A new trial was not granted, and no appeal taken from Judge Potter's opinion.

The other Pennsylvania case was that of *Commonwealth* v. *Wilson*, 19 Dist. Rep., 48 (Pa. 1910). This report gives but a minute of the proceedings in which the judge directed any juryman who had taken notes to deliver them to the sheriff before retiring, stating that they would be sealed in an envelope and returned to the juror after the verdict had been rendered. There was no exception taken to this charge.

In the case of the *United States* v. *Davis*, 103 F. Rep. 457, (1900). *aff.* 107 Fed. 753 (C. C. A. 6th 1901), the court refused to permit note taking by jurors and gave as its reason the following:

"It gives a juror taking notes an undue influence in discussing when he appeals to his notes to settle conflicts of memory. Without corrupt purpose, his notes may be inaccurate, or meager, or careless, or loosely deficient, partial and all together incomplete. With a corrupt purpose, they may be false in fact, entered for the purpose of misleading or deceiving his fellows when he comes to appeal to them. There is no protection against such dangers except to forbid the practice."

There are several criminal cases in the State of Indiana where this rule has been rather definitely expressed. It is there stated, "The juror is to register the evidence, as it is given, on the tablets of his memory, and not otherwise. Then the faculty of the memory is made, so far as the jury is concerned, the sole depository of all the evidence that may be given, unless a different course be consented to by the parties or the court: Burrill, CIR. Ev. (2nd ed.), 108, and note (a). The jury should not be allowed to take the evidence with them to their room, except in their memory. It can make no difference whether the notes are written by a juror or by someone else. Jurors would be too apt to rely on what might be imperfectly written, and thus make the case turn on a part only of the facts:"

There seems to be no definite rule established by Pennsylvania decisions as to whether or not jury men can take notes during the course of a trial, carry them into the Jury Room and use them in discussion; it may be stated however, that both bench and bar seem to recognize as a common law rule the principle that jury men should not take notes, and this seems to be established in all the common law states because the only place where the practice appears to be otherwise is where a statute has been passed recognizing the right of the jurors to take

notes during the trial except in the State of Georgia where by decision the right has been recognized, with the priviso that the court should not allow the jury to spend too much time taking notes so as to let that phase of the trial take their mind away from their real duty.

There can be no doubt that when the first jurors were called upon to determine an issue of fact few, if any, of them were able to read little less to write. When the law was dealing with men who were illiterate it can readily be seen that the taking of notes at a trial could have been the privilege of the one or two in the average jury and their written recollection might have had undue weight with their fellows in determining the truth of facts presented to them. While human memories have not improved the literacy of juries has. Were the jury to be permitted to make notes of testimony this privilege would be enjoyed by one and all and in all probability a verdict in that case would be rendered by facts and not by impressions. This leaves me still waivering by the horns of a dilemma as to whether cold judgment bespeaks justice better than emotion or pathos.