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Rule 558 — What The Jury May Take To The Jury Room

*Bell v. State*¹

The defendant, Bell, was convicted in a trial by jury of having lottery tickets in his possession. On appeal, the defendant contended that the trial court committed error in that over his objection it wrongfully allowed exhibits to be taken to the jury room at the conclusion of the trial. The Court of Appeals, in affirming the conviction, *held*, that the matter of what papers or objects the jury could take with them upon retiring rested in the sound discretion of the trial court and was not reviewable except where there has been a clear abuse of such discretion.

While this case is in accord with earlier decisions handed down by the Court of Appeals, it is of current interest in that it draws attention to the newly adopted Rule 558, of the Maryland Rules of Procedure effective January 1, 1957.²

Prior to the adoption of Rule 558, the case law in Maryland left to the trial court's discretion the question of what the jury was permitted to take with them upon retiring for their deliberation.³ Rule 558 provides:

“a. *In Court's Discretion.*

Upon retiring for deliberation, the jury may take with them into the jury room such of the pleadings,

¹ 200 Md. 223, 88 A. 2d 567 (1952).

² Maryland Rules of Procedure (Michie Co., 1956).

³ *Negro Jerry v. Townshend*, 9 Md. 145 (1856), jury not permitted to take depositions. *Ingalls v. Crouch*, 35 Md. 296 (1872), jury entitled to take the pleadings (*obiter dictum*), but not an account attached thereto. *Hitchins v. Frostburg*, 68 Md. 100, 11 A. 828 (1887), up to trial court's discretion whether jury may take pleadings. *Moore v. McDonald*, 68 Md. 321, 12 A. 117 (1888); by consent of both parties, court may allow any instrument of writing admitted in evidence to be taken by the jury to their room, but parties as a matter of right cannot demand that documentary evidence be sent to jury room. *Cahill v. M. & C. C. of Balto.*, 129 Md. 17, 98 A. 235 (1916), in absence of statute jury may not take, as a matter of right, notes made by themselves at the dictation of counsel during trial, but matter is within discretion of trial court. *Fleischmann v. Clark*, 137 Md. 171, 111 A. 851 (1920), no error in trial court's refusal to allow jury to take with them a special plea filed by defendant. *Nichols v. Meyer*, 139 Md. 450, 115 A. 786 (1921), what evidence may go is in trial court's discretion. *Astrin v. Sinai Hospital*, Superior Court of Baltimore City, *Daily Record*, May 1, 1953, declaration may be kept from jury. *Schaumsky v. Shell Oil Co.*, Court of Common Pleas, Baltimore, *Daily Record*, March 31, 1955, whether declaration and bill of particulars may be taken is within sound discretion of trial court. See also 2 POE, PRACTICE (5th ed., 1925), Sec. 328, 328A. The practice in Maryland is that the jury may take with them pleadings and court's instructions but no other papers whatever, except by consent of counsel, although the trial court may exercise a discretion in matter should special circumstances arise.

granted prayers or written instructions, and exhibits which have been received in evidence, as the court may deem necessary for a proper consideration of the case.

b. *As of Right — Notes.*

The jury may also take with them notes of the testimony or other proceedings taken by themselves but none taken by any other person.

c. *Return to Clerk.*

All such papers or exhibits except the notes mentioned in section b hereof, shall be returned to the clerk before the jury is discharged.

d. *Exception.*

A deposition may not be taken into the jury room except by agreement of all 'parties'⁴ and with consent of the court."

The new Rule substantially follows the doctrine enunciated in the *Bell* case that it is within the sound discretion of the trial court what objects and papers may be taken by the jury into the jury room.

At the present time approximately twenty-six other states have statutes or rules dealing with this question.⁵ The great majority of these statutes or rules, as in the case of the Maryland rule, merely restate the case law in leaving the matter up to the trial court's discretion, with one or two exceptions thrown in. The wording of many of the

⁴ Rule 3a of the Maryland Rules, *supra*, n. 2, provides:

"Where in these Rules it is provided that a party may act, such act may be performed by his attorney except as otherwise provided. Where any notice is to be given, by or to a party, such notice may be given by or to the attorney of such party."

⁵ Statutes: ALA. CODE, tit. 7 §275 (1940); ARIZ. CODE, 344-1906 (1939); ARK. STAT., §43-2138 (1947); DEERING'S CAL. CODE OF CIV. PROC., §612 (1953); DEL. CODE, tit. 10 §4529 (1953); IDAHO CODE, 10-211 (1948); ILL. REV. STAT., Ch. 110 §191 (1953); IOWA CODE, Vol. II (1946); KAN. STAT., Ch. 71 §5 (1949); MINN. STAT., §546.15, §631.10 (1947); MISS. CODE, tit. 10, Ch. 3 §1528 (1942); MONT. CODE, tit. 93, §5104 (1947); NEV. COMP. LAWS, §11004 (1929); N. J. STAT. ANN., tit. 2, Ch. 27 §232 (1937); N. M. STAT. ANN., Ch. 19 §823 (1953); MCKINNEY'S CONSOL. LAWS OF N. Y., Book 66 §425; N. C. STAT., §2945.35 (1951); OKLA. STAT. ANN., tit. 28 §843 (1951); ORE. COMP. LAWS ANN., Col. 5 Ch. 312 (1955); S. D. CODE, tit. 36 §3654 (1939); VA. CODE, §8-221 (1950); W. VA. CODE, §5657 (1949); REMINGTON'S REV. STAT. OF WASH., tit. 3, Ch. 2 §351 (1932).

Rules: IOWA RULES OF CIV. PROC., Div. IX §193 (1946); MD. RULES OF PROC., Rule 558 (1956); TEX. RULES OF CIV. PROC., Rule 281 (1948); TEX. RULES OF CRIM. PROC., Rule 671 (1948); UTAH RULES OF PROC., Rule 47 (1956).

statutes or rules is similar and often provides that the jury may take all papers and exhibits received in evidence, except depositions,⁶ and all notes of testimony or other proceedings made by themselves but none taken by any other person.⁷

Enactment of these statutes or rules created several problems in that while the legislature or rule-making body may have codified or formalized the law,⁸ the application and interpretation still remained with the courts. The courts often had to decide whether the language of the statute or rule was to be treated as mandatory or merely discretionary and whether the statute or rule was to be given a liberal rather than literal construction. This problem is considerably related to the perennial problem of ascertaining the significance of the word "may" or "shall" when used in a statute.⁹ That is, if the word "shall" was used did this mean the jury as of right could take the objects thereafter set out? The Maryland rule has for the most part eliminated this problem by sub-dividing the rule into several parts; *i.e.*, "a. In Court's Discretion; b. As of Right", etc.

A second problem that confronted the courts in interpreting such a statute or rule concerned the meaning or scope of the word "papers". If the papers involved were those that had been admitted in evidence, then the question is simply whether the statute or rule is mandatory or discretionary. However, when such things as the pleadings, the court's instructions, or depositions were sought to be taken to the jury room, a second look at the statute or rule

⁶ Why depositions have been singled out for exclusion is not completely clear. However, American Jurisprudence says:

"The obvious reason for such exclusion is that depositions may and do contain matters not admissible in evidence which have been eliminated from the consideration of the jury. Moreover, it would be unequal, while forbidding jurors to call before them witnesses examined in court, to permit them to take depositions of witnesses unexamined in court."

53 Am. Jur. 664, TRIAL, Sec. 931.

⁷ For statutes containing similar wording see those of Arizona, California, Idaho, Minnesota, Montana, Nevada, New Mexico, all *supra*, n. 5.

⁸ While statutes are enacted by the legislature and rules are adopted by the executive or judicial branch of the government, the words themselves, *i.e.*, statutes or rules may often be used interchangeably. This occurs, for example, when the highest court within the jurisdiction adopts a system of Rules of Civil or Criminal Procedure. Such rules, for the most part, have the same effect as if they had been enacted by the legislature. In many instances these rules are later included by the legislatures within the statutory compilations or codes.

⁹ *Texas Employers' Ins. Assn. v. Applegate*, 205 S. W. 2d 412 (Ct. of Civ. App. Tex., 1947). *Alabama City G. & A. R. Co. v. Heald*, 178 Ala. 636, 59 So. 461 (1912); 82 C. J. S. 877, Statutes, Sec. 380

was necessary. If the statute or rule expressly admitted such papers, once again there was no problem, but in the absence of such express language the courts were left to rely upon their own judgment and discretion. This being the case, it was only natural that the courts might reach different results.

In those states following the common law,¹⁰ or in those states whose statutes or rules follow the common law, there may appear at first glance to be some inconsistency and confusion. The materials considered by the cases extend from pleadings and depositions to crow bars and beer bottles while the court's treatment varies from liberality¹¹ to complete exclusion.¹² To illustrate this seeming disharmony, some courts have allowed the jury to take such things as a dictionary,¹³ an affidavit,¹⁴ clothing of deceased,¹⁵ two bottles of beer,¹⁶ and pleadings,¹⁷ whereas other courts have felt it necessary to exclude such things as a dictionary,¹⁸ crow bar,¹⁹ dying declaration,²⁰ and pleadings.²¹ This apparent inconsistency, however, is a necessary price of leaving to the courts the task of balancing the equities between the jury's need in having the issues and evidence clearly before it when making their deliberation and the right of the parties to have the jury reach a verdict free of the effect of incompetent and prejudice-arousing evidence. The result of this balancing process might call for a different result as to the same object or type of paper in different trials or proceedings. To eliminate judicial discretion from the application of the rule, might in many cases fail to satisfy the need of the jury or prejudice the right of the parties. This is too high a price to pay for uniformity.

The new Rule will, as a practical matter, have little effect upon the law as it stands at present in Maryland. The only

¹⁰ At common law, the jurors were allowed to take with them to jury room only instruments that were under seal. If they wished to take papers which were not under seal, the consent of the parties was necessary. For a good discussion of the common law rule, see *Higgins v. Los Angeles Gas and Electric Co.*, 159 Cal. 651, 115 P. 313 (1911).

¹¹ *Chitwood v. Philadelphia & R. Ry. Co.*, 266 Pa. 435, 109 A. 645 (1920).

¹² 89 C. J. S. 103, Trial, Sec. 466, n. 94.

¹³ *State v. Donald*, 90 Utah 533, 63 P. 2d 246 (1936), at least finding it was not prejudicial, although improper.

¹⁴ *Lee v. State*, 213 Ind. 352, 12 N. E. 2d 949 (1938).

¹⁵ *Golden v. Commonwealth*, 275 Ky. 208, 121 S. W. 2d 21 (1938).

¹⁶ *Crossett v. State*, 252 P. 2d 150 (Crim. Ct. of App., Okla. 1952).

¹⁷ 89 A. L. R. 1260, 1263.

¹⁸ *Daniels v. Barker*, 89 N. H. 416, 200 A. 410 (1938).

¹⁹ *Karn v. United States*, 158 F. 2d 568 (9th Cir. 1946).

²⁰ *People v. Cheney*, 368 Ill. 131, 13 N. E. 2d 171 (1938).

²¹ 89 A. L. R. 1260, 1270.

two modifications made by the Rule are (1) to require consent of counsel and court before depositions may be taken by the jury and (2) that the jury may as a matter of right take to the jury room notes taken by themselves but no others. As before, the appellate court's function will primarily be the determination of whether the trial court has abused its discretion.

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