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TRIAL-EVIDENCE-WHAT MAY JURY TAKE TO JURY ROOM TO AID IN DELIBERATION

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TRIAL—EVIDENCE—WHAT MAY JURY TAKE TO JURY ROOM TO AID IN DELIBERATION—Upon the trial of a case under the Texas Workmen's Compensation Act,[1] X-ray photographs, properly authenticated, were introduced in evidence by both parties to the suit. After retiring to deliberate, the jury requested that the X-ray pictures be sent to the jury room for their examination and consideration. This request was granted. Appellant objected on the ground that the pictures were technical and could not be understood by the jury without interpretation. On appeal, *held*, affirmed. X-ray photographs are "written evidence" and come within the provisions of the Texas Rules of Civil Procedure[2] which provide that the jury may take with it in its retirement "any written evidence" with the exception of depositions. *Texas Employers' Insurance Association v. Crow*, (Texas, 1949) 221 S.W. (2d) 235.

[1] 22 Tex. Civ. Ann. (Vernon, 1925) art. 8306 et seq.
[2] 6 Tex. Civ. Ann. (Vernon, 1925) art. 2193.

The early common law rule was to the effect that the jury could take to the jury room only documents under seal.[3] Today either by statutes or by court decisions these matters are left to the sound discretion of the trial court.[4] Generally the statutes, as in the principal case, provide that all written evidence with the exception of depositions may be taken to the jury room.[5] Depositions are excluded for the excellent reason that they are a substitute for oral testimony, and since the jury must rely on its memory as to oral testimony the same rule should apply to depositions.[6] The language of these statutes has given rise to certain problems of construction, especially when the question of real evidence arises. Since the statutes generally employ the phrase, "written evidence," the tendency is to consider them as merely doing away with the harsh common law rule requiring a seal. In order to justify taking real evidence to the jury room a few courts have done violence to such statutory language by including certain kinds of real exhibits within the meaning of "written evidence."[7] Others, however, hold that the common law rule applies only to writings and that the question of taking real evidence to the jury room has always been in the discretion of the trial court.[8] This latter construction reaches the same result, while eliminating the necessity for linguistic gymnastics. As a result of these views documentary evidence, real evidence,[9] pleadings and instructions[10] may all be taken to the jury room at the discretion of the trial court. The rule, however, is not designed to permit the jury to receive new or additional evidence out of court. Indeed, evidence to be taken to the jury room must have been properly admitted at the trial.[11] The

[3] 6 WIGMORE, EVIDENCE, 3d ed., §1913 (1940).

[4] State v. Damon, 350 Mo. 949, 169 S.W. (2d) 382 (1943); Durdella v. Trent-Philadelphia Coach Co., 349 Pa. 482, 37 A. (2d) 481 (1944); Henry v. Crook, 202 App. Div. 19, 195 N.Y.S. 642 (1922); 53 AM. JUR., Trial §921 et seq. Even where there is statutory permission to take evidence to the jury room the court may exercise its discretion in the matter, see White v. Walker, 212 Iowa 1100, 237 N.W. 499 (1931) and Edgerton v. Lynch, 255 Mich. 456, 238 N.W. 322 (1931).

[5] 64 C.J., Trial §§816-826.

[6] Depositions are also excluded in the absence of a statute. Rawson v. Curtis, 19 Ill. 455 (1858). In State v. Solomon, 96 Utah 500, 87 P. (2d) 807 (1939) the court refused to permit the jury to take the written record of testimony in a former trial to the jury room on the ground that it was similar to a deposition.

[7] In Dr. Jack, an Indian v. Territory, 2 Wash. T. 101, 3 P. 832 (1882) the statutory word "papers" was construed to encompass exhibits constituting real evidence.

[8] The statute involved in Higgins v. Los Angeles Gas & Electric Co., 159 Cal. 651, 115 P. 313 (1911) permitted the jury to take "papers" to the jury room. The court held that this merely relaxed the common law rule and that it did not prevent the court from exercising its discretion with respect to other kinds of evidence. In Alexander v. Jameson, 5 Binney (Pa.) 237 (1812) the court refused to adopt the common law rule because it felt that the rule would lead to confusion and injustice.

[9] See note 4, supra.

[10] With respect to pleadings and instructions there is some division of authority but in general the matter is left to the discretion of the court. See the annotation on pleadings in 89 A.L.R. 1260 (1934) and one on instructions in 96 A.L.R. 899 (1935).

[11] Kavale v. Morton Salt Co., 329 Ill. 445, 160 N.E. 752 (1928). The jury is permitted to experiment with the exhibits but only along the lines for which the exhibit was offered in evidence. If it went further it would be taking evidence on its own. Higgins v. Los Angeles Gas & Electric Co., supra, note 8, at 657, states the test as follows: "[The jury] may

modern liberal attitude of courts and legislatures in permitting the jury to re-examine evidence while deliberating is grounded in sound reason. The complexity and length of many trials make it necessary that the jury be able to refer to exhibits and written evidence in order to remember and evaluate properly testimonial evidence. Further, juries are no longer chosen because of their familiarity with the action but for their ignorance of it, and this necessitates that the members of the jury be given an opportunity to study the evidence as carefully as possible. So long as the trial judge exercises his discretion in a wise fashion, the results of the modern rule ought to be that sort of fair and informed verdict desired by all.

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carry out experiments within the lines of offered evidence, but if their experiments shall invade new fields, and they shall be influenced in their verdict by discoveries from such experiments which will not fall fairly within the scope and purview of the evidence, then, manifestly, the jury has been itself taking evidence without the knowledge of either party, evidence which it is not possible for the party injured to meet, answer or explain."