may avoid a voidable marriage. It appears, with the possible single exception of insanity, that a void marriage may be collaterally attacked. A direct proceeding is required in the case of a voidable marriage, and it must be brought by the party defrauded or underage. In the instance of a void marriage, jurisdiction over the person follows the common law, but proceedings applicable to a divorce must be followed in voidable marriages. The cases illustrate that voidable marriages may be ratified. On the other hand, there can be no ratification of void marriages. In the past the courts have often prevented unfortunate and needless complications by implying a valid common-law marriage. Questions concerning property settlements of ostensible marriages have been answered by characterizing the marriages as "quasi-partnerships." The children of such marriages are by statute declared legitimate. However the legislature has not granted the courts power to grant custody of children in annulment proceedings. Finally, the case discloses that there will be no award of alimony in annulment proceedings, but support pendente lite and money for adequate defense will be granted in certain instances of a voidable marriage.

THE AVAILABILITY OF WRITTEN INSTRUCTIONS TO THE JURY IN INDIANA

Many American jurisdictions either permit or require the sending of written instructions into the jury room in a civil trial.[1] Although there is evidence that the majority of Indiana trial courts refuse to allow this practice,[2] there is neither a statutory provision nor a Supreme Court Rule

1. Tabular summary of law of other jurisdictions, Appendix I.

2. The *Indiana Law Journal* has conducted a survey of Indiana Circuit and Superior Courts in an attempt to gather data concerning the practice of sending written instructions to the jury room. Fifty returns were received of a total of ninety-four questionnaires, equalling a fifty three per cent return. Below is a facsimile of the questionnaire with the final results indicated:

In answering the following questions please assume (a) a civil jury trial (b) that counsel has requested that the court instruct the jury in writing.

I. When may a copy of the written instructions be sent in with the jury as they retire to the jury room? (Please check one.)

76%	Never	2%	Upon request of the jury
16%	With consent of both parties	4%	A matter of judicial discretion
0%	Upon request of either party	2%	Always

II. With what frequency do the following occur? (Assume 5 jury trials as a basis, *i.e.*, how many out of five.)

or judicial decision expressly governing this phase of civil procedure. This absence of a definitive procedural rule in regard to the jury's having the written instructions during its deliberation and the conflicting policy considerations involved invite an investgation of the legal foundation of the present Indiana procedure.

Historically, the propriety of permitting the written instructions in the jury room presented no problem as the judge normally gave the charge orally.[3] But even if instructions had been reduced to writing, the well settled rule of evidence prohibiting writings not under seal or not a part of the record from being submitted to the jury would have barred the instructions from the jury room.[4] This common law restriction on the availability of written materials in the jury room was abolished in Indiana by statute in 1843, and discretion was given to trial courts to

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(1) The jury requests that they be given a copy of the instructions.
   (a) As they retire: never—*98%*, one out of five times—*2%*
   (b) After they have retired: never—*84%*, one out of five times—*12%*, two out of five—*4%*
(2) Counsel requests that the jury be given a copy of the instructions as the jury retires.
   (a) Counsel for plaintiff: never—*98%*, one out of five times—*2%*
   (b) Counsel for defendant: never—*98%*, one out of five times—*2%*
(3) The jury requests that they be brought into court to have the instructions or part of the instructions explained or clarified.
   (a) When the jury has not had the written instructions in the juryroom: never—*23%*, less than one out of five times—*27%*, one out of five times—*23%*, two out of five—*21%*, three out of five—*6%*
   (b) When the jury has had the written instructions in the jury room. (Not enough replies received to warrant any conclusions.)

The names of individual judges who supplied answers and comments appearing in this note will remain confidential. The returns are on file in the business office of the *Indiana Law Journal*. Reference to the survey will be made by the appropriate section of the questionnaire, *e.g.* Survey, II (1)(a).

3. The practice of requiring the judge to reduce the charge, or portions of the charge to writing, is a relatively modern development in trial procedure. An Indiana statute enacted in 1843 required the court to reduce to writing any instruction to which an objection had been entered. REV. STAT. 1843, ch. 40, § 326, p. 733. A later statute required that special instructions submitted by the parties and the general instructions of the court be reduced to writing if requested by either party. 2 REV. STAT. 1852, ch. 1, § 324, p. 110. The present practice concerning the reduction of instructions to writing is governed by IND. ANN. STAT. §§ 2-2008, 2-2010 (Burns 1946) and IND. SUP. CT. RULE 1-7a.

Rising-Sun Turnpike Co. v. Conway, 7 Ind. 149, 150 (1855), indicates that the emphasis on written instructions probably had its historical roots in the difficulty seventy-five or one hundred years ago of insuring a court record for the purpose of appellate review of the instructions. In the background of the transition from oral to written instructions was the desire of lawyers to restrict the power of the judge to influence the jury by his summarization of the evidence or comments on the evidence. See DEVLIN, TRIAL BY JURY 116 (1956) (common law power of judge to summarize and comment on the evidence).

4. The historical development and modern decline of this common law rule is discussed in THAYER, PRELIMINARY TREATISE ON EVIDENCE 107 (1898); 2 THOMPSON, TRIALS § 2574 (2d ed. 1912); and, Note, *Right of Jury to Take Written Exhibits to Jury Room*, 73 U.S.L. REV. 121 (1939).

determine which papers were available to the jury during its deliberation.[5] However, this 1843 provision was not specifically reenacted with the promulgation of the Indiana Civil Code in 1852. Instead, the Code apparently contained no procedural guide to aid the trial court in determining which written materials the jury might have during the course of its deliberation.[6] Two apparent alternatives were available to the courts in interpreting this lack of legislation: Either the legislature intended the 1843 statute to remain in effect with the result that the trial court retained discretion in determining the availability of particular written materials to the jury;[7] or, it contemplated that the statutory void would be filled by a system of judicial rules and precedents formulated to deal with each category of written material. This latter alternative has been almost uniformly accepted by Indiana appellate courts, with the result that by judicial decision definitive rules have developed which serve as procedural guides for trial courts in determining the availability of particular writings to the jury, such as documentary evidence, pleadings, and statutory materials.[8] However, no such guide apparently exists with

5. "The court, in all trials shall have a right to determine what papers shall be taken from the bar by the jury to their room, any former usage or law to the contrary notwithstanding." REV. STAT. 1843, ch. 40, § 332, p. 734. As early as 1817, papers read in evidence were made available to the jury during its deliberation. IND. LAWS 1817-18, ch. 3, § 57.

6. This absence of a statutory guide may be attributable to an oversight of the draftsmen of the original Indiana Civil Code. The Field Code of Procedure, which appeared in 1848, is generally recognized as the pattern of the Indiana Civil Code of 1852; however, the Field Code provision permitting the jury to receive all documentary evidence except depositions was not enacted in the Indiana Civil Code.

7. See note 5 *supra* and accompanying text.

8. *E.g.*, it is generally held that documentary evidence should not be permitted in the jury room over the objections of a party. See *e.g.*, Summers v. Greathouse, 87 Ind. 205 (1882); Toohy v. Sarvis, 78 Ind. 474 (1881) (letter attached to deposition); Nichols v. State, 65 Ind. 512 (1879) (several folios of charges and credits); Lotz v. Briggs, 50 Ind. 346 (1875) (record of former action between same parties); Eden v. Lingenfelter, 39 Ind. 19 (1872) (account books); Alexander v. Dunn, 5 Ind. 122 (1854) (estimate of amount due plaintiff).

Contrary to the practice in many other states, Indiana juries may consult the pleadings during their deliberation. See *e.g.*, Continental Nat. Bank v. State Bank, 199 Ind. 290, 157 N.E. 433 (1927) (jury was warned that pleadings were not evidence); Shulse v. McWilliams, 104 Ind. 512, 3 N.E. 243 (1885); Summers v. Greathouse, 87 Ind. 205 (1882); Snyder v. Braden, 58 Ind. 143 (1877); Continental Optic Co. v. Reed, 119 Ind. App. 643, 88 N.E.2d 55 (1949).

There is authority seemingly indicating that a document which is properly attached to the complaint, or which could have been so attached, is available to the jury. See *e.g.*, McKaig v. Jordan, 172 Ind. 84, 87 N.E. 974 (1908) (viewer's reports in action to stay approval of proposed highway); Guthrie v. Carpenter, 162 Ind. 417, 70 N.E. 486 (1903) (plans of building in action on building contract); Snyder v. Braden, 58 Ind. 143 (1877) (note sued upon); Collins v. Frost, 54 Ind. 242 (1876) (note sued upon); Haas v. Cone Mfg. Co., 25 Ind. App. 469, 58 N.E. 499 (1900) (memo of interest due attached to bill of particulars); Smith v. Thurston, 8 Ind. App. 105, 35 N.E. 520 (1893) (note sued upon attached to complaint as an exhibit).

Minutes of the evidence may not be taken to the jury room. See *e.g.*, Cheek v. State, 35 Ind. 492 (1871) (notes taken by juror); Ball v. Carley, 3 Ind. 577 (1852)

respect to written instructions. This conclusion is supported by the results of a survey of Indiana trial courts which indicates at least five different practices throughout the state.[9]

An apt illustration of the judicial approach commonly utilized in developing these rules governing the availability of specific categories of written materials is afforded by *Eden v. Lingenfelter*,[10] a case involving books of account which had been introduced as evidence. The Indiana Supreme Court expressed the opinion that such materials were not available to the jury during its deliberation because the prevailing practice did not permit it, and because the 1843 statute,[11] giving the trial court discretion to send in documentary evidence, was not embodied in the Civil Code. The reasons behind the Court's opinion were not fully developed and lacked logical appeal. No attempt was made to evaluate competing rules. Moreover, the Court ignored the construction provision of the Civil Code which continued in force all laws which were not inconsistent with the Civil Code and which would supply any omitted case.[12] This would have saved the provision of the 1843 statute and would have made the submission of documentary evidence discretionary with the trial court. Instead, the Supreme Court formulated the inflexible rule that docu-

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(minutes of evidence taken by counsel); Berne Hardware Co., 64 Ind. App. 473, 116 N.E. 54 (1917) (not reversible error where defendant's attorney had notice that juror was taking notes but did not object until verdict had been returned).

Likewise, it is error to submit to the jury a record of a former action between the parties without permission of the court and consent of appellant. See *e.g.*, Jones v. State, 89 Ind. 82 (1883) (copy of *Indiana Reports* containing prior appeal); Ohio & Mississippi Ry. v. Hill, 7 Ind. App. 255, 34 N.E. 646 (1893).

There is also some indication that it may be error for the jury to request and receive a dictionary. See *e.g.*, Indianapolis Power and Light Co. v. Moore, 103 Ind. App. 53, 5 N.E.2d 118 (1937).

The following rules which have been developed in criminal actions may be useful in determining the availability of analogous written material in civil trials.

Prior decisions have sustained the taking of statutory materials into the jury room. See *e.g.*, Posey v. State, 234 Ind. 696, 131 N.E.2d 145 (1955); McClanahan v. State, 233 Ind. 365, 118 N.E.2d 434 (1954); Mulreed v. State, 107 Ind. 62, 7 N.E. 884 (1886).

Likewise, it is proper in a criminal trial to permit the jury to take with them the affidavit or indictment; provided, however, that there is nothing of a prejudicial character attached thereto or endorsed thereon. See *e.g.*, Lee v. State, 213 Ind. 352, 12 N.E.2d 949 (1937); Middaugh v. State, 191 Ind. 373, 132 N.E. 678 (1921); Masterson v. State, 144 Ind. 240, 43 N.E. 138 (1895) (jury was instructed that the information was not evidence against the defendant); Stout v. State, 90 Ind. 1 (1883) (indictment and all papers attached thereto were taken to the jury room).

On the other hand it has been held to constitute misconduct of the jury where a legal textbook was present in the jury room during the deliberation. Newkirk v. State, 27 Ind. 1 (1866) (one volume of Bishop's *Criminal Law*).

9. See Survey, part I.

10. 39 Ind. 19 (1872).

11. See note 5 *supra*.

12. "The laws and usages of this State relative to pleadings and practice in civil actions and proceedings, not inconsistent herewith, and as far as the same may operate in aid hereof, or to supply any omitted case, are hereby continued in force." 2 REV. STAT. 1852, ch. 1, § 802, p. 224.

mentary evidence must be withheld from the jury room unless both parties consent. The Court reasoned, "This may be inferred, probably, from the section of the code of practice . . . which provides that the jury shall be brought into court if they disagree as to any part of the testimony, ..."[13]

In subsequent cases involving documentary evidence the inference made in the *Eden* case was elevated to the status of ruling precedent by a superficial declaration that the law was "settled" and that the court "approved of this view of the law, as likely to attend, in its practical administration, with less evil than would attend the opposite rule of law on the subject."[14] No further attempts were made to explain why the section of the Civil Code which prescribed the procedure to be followed in the event the jury requests additional information[15] should be construed as determinative of what written materials the jury could properly have during its deliberation. The oblique technique employed by the Court in the *Eden* case, and in subsequent cases dealing with other types of written materials, was made necessary by the Supreme Court's refusal to allow the trial courts to exercise their discretion in placing written materials in the hands of the jury, and by an apparent compulsion to fit the resulting piecemeal rules into some convenient niche of the existing statutory scheme.

Although the Civil Code provision invoked in the *Eden* case[16] has not been judicially construed as authority prohibiting written instructions in the jury room, the strength of the analogy between documentary evidence and written instructions may be a contributing factor behind the predominant practice in Indiana trial courts of excluding written instructions from the jury room. However, it is more probable that the case of *Smith v. McMillen*[17] most directly influences the present Indiana practice. Indeed, the *Smith* case has been cited as authority for the broad proposition that it is error to permit the jury to have written instructions during its deliberation, without consent of the parties.[18] In the *Smith* case, the

13. The section of the code cited by the Court provides: "After the jury have retired for deliberation, if there is a disagreement between them as to any part of the testimony, or if they desire to be informed as to any point of law arising in the case, they may request the officer to conduct them into court, where the information required shall be given in the presence of, or atfer notice to, the parties or their attorneys." IND. ANN. STAT. § 2-2017 (Burns 1946).

14. Lotz v. Briggs, 50 Ind. 346 (1875); *cf.* Nichols v. State, 65 Ind. 512, 521 (1879).

15. See note 13 *supra* and accompanying text.

16. *Ibid.*

17. 19 Ind. 391 (1862).

18. Gavit cites *Smith v. McMillen* for the following proposition: "It is misconduct for a juror to . . . receive and use the written instructions during the deliberation. . . ." 2 GAVIT, INDIANA PLEADING AND PRACTICE, § 457 n. 4 (1942). See also 89 C.J.S., *Trials* § 468 n. 50 (1955).

trial court permitted the jury, during the absence of one party from the courtroom, to have the written instructions after the jury had been deliberating "for a long time." The Indiana Supreme Court held this to be reversible error and remanded the cause for new trial. In the per curiam opinion there is neither a record of who made the request, nor any description of the form of the instructions except that they were in writing.

In reversing, the Supreme Court relied on a policy argument which was based on the premise that not all jurors can read but all jurors can hear. Thus, all jurors will be equal if they are forced to rely on their memory after hearing the instructions read in the courtroom. The Court reasoned that this was safer than allowing the literate juror to examine and interpret instructions for the illiterate juror; thereby the possibility that the "sharp ones" would become "interpreters for the Court and mislead their less skillful fellow jurors" would be avoided.

On this basis the Indiana Supreme Court concluded broadly: "We think instructions should not be sent to the jury room, without consent of both parties."[19] This statement, if taken at face value, appears to be authority absolutely prohibiting the jury from having the instructions without the consent of the parties. Indeed, this statement may account for the position taken by many Indiana trial courts that written insructions are not available to the jury during its deliberation even though both parties consent.[20] However, it is submitted that the proper holding in the *Smith* case is more limited.

The precise question presented by the facts in the *Smith* case was whether the lower court had committed reversible error in permitting the jury to receive the written instructions *after* its deliberation had commenced. The answer was apparent, for the procedure in question was a clear violation of the Civil Code provision that the jury, *after* it retires shall be brought into the courtroom to receive further instruction or to have the instructions repeated, and that notice shall be given to the parties.[21] However, no mention of this express statutory mandate was made in the opinion. The Court apparently arrived at its independent conclusion through the indirect "sharp juror" argument. Although the conclusion reached was correct, that is, error had been committed below, the Court failed to define the precise question before it. Instead, the

19. Six years prior to the *Smith* decision, the Indiana Supreme Court, while not deciding whether in a criminal trial it was error for the jury to have the instructions, condemned the practice as, "perhaps not very judicious." Hall v. State, 8 Ind. 439, 443 (1856).

20. See Survey, part I.

21. See note 13 *supra*.

Court considered the broader issue of whether it is reversible error to submit the instructions to the jury *at any time,* and did not limit its decision to that time after the jury had retired, the time existing in the fact situation before it. Indeed, this failure to distinguish between sending instructions to the jury room *as* the jury retires and *after* the jury has retired may perhaps account for the Court's failure to apply the controlling Civil Code provision.[22]

The time element is only significant because it provides a technical means of avoiding the blanket prohibition against instructions in the jury room which *Smith v. McMillen* is thought to have established. Once it is recognized that the time element factually limits the scope of the *Smith* case to that time *after* the jury has retired, the holding of that case simply represents a proper, however fortutitious, application of an existing statute.[23]

But even though the holding in the *Smith* case, when limited to its facts, does not prohibit the jury's taking written instructions *as* it retires, the "sharp juror" policy argument employed by the Court cannot be similarly limited by the time factor. However, the considerable decrease in illiteracy in Indiana since *Smith v. McMillen* was decided in 1862, has substantially destroyed the vitality of the argument that the literate juror may interpret the instructions erroneously and thereby mislead his illiterate fellow juror.[24] Thus, the *Smith* case on its facts cannot be considered as express authority prohibiting the jury from taking the instructions to the jury room *as* it retires; and, the "sharp juror" policy argument cannot be said to lend logical support to this prohibition.

But even if the *Smith* case can be limited in its stare decisis effect upon Indiana trial courts in their ruling on the propriety of allowing the jury to take in the written instructions *as* it retires, it would be improper to contend that Indiana trial courts have absolute discretion to allow

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22. *Ibid.*

23. In subsequent cases the statute which should have been invoked in the *Smith* decision has been properly applied to prevent further communication by way of instruction between the court and jury except in open court and after notice has been given to the parties. See *e.g.,* Low v. Freeman, 117 Ind. 341, 20 N.E. 242 (1888); Blacketer v. House, 67 Ind. 414, 418 (1879); Searfoss v. Grissom, 85 Ind. App. 691, 693, 155 N.E. 613, 615 (1926).

The *Smith* case has been cited for its proper holding that the jury may not receive further instructions *after* it retires except in open court and after notice to the parties. See *e.g.,* Blacketer v. House, *supra* at 418; ABBOTT, CIVIL JURY TRIALS § 385 n. 3 (5th ed. 1935); 2 THOMPSON, TRIALS § 2583 n. 84 (2nd ed. 1912).

24. In Indiana the illiteracy rate among persons twenty years old or over decreased from 11.1% in 1860 to 2.1% in 1930. See U.S. DEPT. OF COMMERCE ABSTRACT OF THE 15TH CENSUS 290 (1933); U.S. DEPT. OF COMMERCE, STATISTICS OF THE POPULATION OF THE UNITED STATES, 9TH CENSUS (1870).

25. IND. ANN. STAT. § 2-2401 (Burns 1946).

juries to take written instructions *as* they retire without considering other possible legal prohibitions of this practice.

The statutory causes for new trial found under the heading of "misconduct of the jury"[25] or "error of law occurring at the trial"[26] have been successfully invoked to bar certain written materials from the jury room.[27] However, it cannot be contended that the jury is guilty of misconduct if the court *permits* the instructions to be taken *as* the jury retires. Generally it is when the jury inadvertently, or by design, removes a paper from the courtroom without the authority of the court and it is shown that consideration of the written material influenced the jury to the detriment of one of the parties, that there would be such material "misconduct" to sustain a motion for new trial.[28] Likewise, an "error of law" would not be committed by sending instructions in with the jury *as* it retires, unless it first be shown that there is a rule of procedure which prohibits this practice. As shown previously, there is no provision in the Civil Code which has this effect; and disregarding the dictum found in *Smith v. McMillen,* there apparently is no judicial decision which could be characterized as a prohibition of this practice.

Since it is reasonably arguable that there is no legal foundation for the predominant practice in Indiana trial courts prohibiting the jury from taking the written instructions *as* it retires, support for this practice is found mainly on the level of policy considerations. If flexibility is recognized in regard to the availability of instructions *as* the jury retires, the logical approach in selecting the better practice would be to evaluate competing policy considerations in light of an accurate record indicating a jury's actual treatment of written instructions. But it must be recognized that the sanctity of the jury room renders the obtaining of such a record impracticable,[29] and thereby makes it difficult to reach an ir-

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26. *Ibid.*

27. See *e.g.,* Jones v. State, 89 Ind. 82 (1883) (*Indiana Reports* containing a former appeal); Toohy v. Sarvis, 78 Ind. 474 (1881) (letter attached to a deposition); Lotz v. Briggs, 50 Ind. 346 (1875) (record of former action between same parties); Cheek v. State, 35 Ind. 492 (1871) (notes taken by juror); Newkirk v. State, 27 Ind. 1 (1866) (Bishop's *Criminal Law*).

28. See *e.g.,* McClanahan v. State, 233 Ind. 365, 118 N.E.2d 434 (1954); Bersch v. State, 13 Ind. 434 (1859); Ball v. Carley, 3 Ind. 577 (1852); Indianapolis Power and Light Co. v. Moore, 103 Ind. App. 53, 5 N.E.2d 118 (1937); Ohio & Mississippi Ry. v. Hill, 7 Ind. App. 255, 34 N.E. 646 (1893).

29. The sanctity of the jury's deliberation has been criticized as a factor which insures irresponsibility of the jury in a civil trial. See Kingdon, *True Verdicts?,* 23 J. Am. Jud. Soc'y 190 (1940). In order that a more accurate evaluation of the jury system may be accomplished, it has been suggested that jury deliberations be recorded, transcribed and filed with the verdict. See Glaston, *Civil Jury Trials and Tribulations,* 29 A.B.A.J. 195 (1943). Currently, the University of Chicago Law School is conducting a series of studies of experimental juries to determine how instructions can be made more intelligible to the jury. Letter from Harry Kalven Jr., Director of Jury Project at Univ. of Chicago Law School to *Indiana Law Journal,* April 3, 1957.

refutable conclusion either for or against the practice of sending written instructions to the jury room.

As stated previously, the "sharp juror" policy argument employed in the *Smith* case has lost most of its persuasiveness in view of the substantial decrease in illiteracy.[30] This argument was based on the fallacious premise that if all jurors could read they would possess equal ability to properly understand and utilize the written instructions. This fallacy does suggest a modification of the original *Smith v. McMillen* reasoning, which may provide new vigor for the Court's "sharp juror" policy argument; for, even if all jurors could read there would remain a disparity in their ability to understand typical instructions which involve a special vocabulary and complex sentence structure.[31] Thus, if written instructions are available to the jury, the resulting modern counterpart of the "sharp juror," condemned in *Smith v. McMillen,* might be found in the juror possessing a superior vocabulary and capacity to analyze difficult legal sentences. However, this modification of the "sharp juror" argument loses much of its logical appeal because it is just as possible that a "sharp juror" may mislead his fellow jurors even though the instructions are given only in the courtroom.

Less tenuous than the "sharp juror" policy consideration is the position that if the jury is permitted to have written instructions, it may single out a particular instruction, thereby placing undue emphasis either on a narrow aspect of the case, or on instructions which present only one side of an important proposition.[32] However, again, this abuse of instructions cannot be altogether avoided even though the instructions are withheld from the jury room.[33] Particular instructions would seem to become more prominent in the individual juror's mind because of emphasis, real or imagined, given the instruction by the judge, or because the juror was particularly interested in the phase of the case covered by an instruction, or because certain instructions reinforce the juror's pre-

30. See note 24 *supra* and accompanying text.

31. See Littler, *Reader Rights in Legal Writing,* 25 CAL. B.J. 51 (1950); Hulen, *"Twelve Good Men and True": The Forgotten Men of the Courtroom,* 38 A.B.A.J. 813, 814 (1952) (comments of jurors on the difficulty of understanding instructions).

32. This policy argument seems to be the controlling factor in several Indiana trial courts which never permit the jury to receive written instructions. The following statements of two Indiana trial courts reflect this policy argument: "We do not permit written instructions to go to the jury room for the reason that laymen might misinterpret or place too much emphasis on a single instruction." "It has never been my practice to permit the jury to take written instructions with them for the reason that it is my feeling that a juror may become attached to one specific instruction and rely heavily upon that in defference [*sic*] to the other instructions, ..." Letters in reply to a survey of Indiana trial courts to the Board of Editors of the *Indiana Law Journal,* May, 1957.

33. See *e.g.,* Searfoss v. Grissom, 85 Ind. App. 691, 693, 155 N.E. 613, 615 (1926).

conceived view of the correct verdict in the case.

Although neither the choice of reading the instructions to the jury in court nor sending the instructions to the jury room guarantees that the juror will give equal consideration to each instruction, it is arguable that the better course is to withhold written instructions from the jury during its deliberation. If the jury were permitted to consult the written instructions, and should a disagreement arise over a particular instruction, it would be difficult to direct attention away from the center of the controversy to other instructions which may easily settle the dispute or point out other indispensible issues which have been completely overlooked. The trial court's cautionary instruction that all instructions are to be given equal weight is probably not an adequate safeguard once the jury has fixed its attention upon one or two written paragraphs or sentences.[34] On the other hand, the alternative procedure of bringing the jury into the courtroom and rereading the instructions, should the jury disagree, would seem to provide at least some assurance that the jury will consider all the instructions, because under this procedure the court will normally refuse a request to reread only the disputed instruction, but will reread the instructions in their entirety.[35] Moreover, this procedure provides an additional exposure to the entire charge which may broaden the jury's consideration to include instructions theretofore iguored or hastily discarded in the heat of the deliberation.

Another policy objection to the jury's having written instructions is that the jury may shift its attention from its principal job of determining issues of fact to that of disputing the meaning of particular words of phrases in the instructions.[36] However, it is difficult to visualize instructions drafted with absolute clarity of expression and lacking ambiguity.[37] In order that a jury composed of twelve individual minds may arrive at a collective understanding of legal concepts involved in instructions, it is

34. See *e.g.*, Gholston v. Gholston, 31 Ga. 625 (1860).

35. See *e.g.*, Searfoss v. Grissom, 85 Ind. App. 691, 693, 155 N.E. 613, 615 (1926); 2 GAVIT, INDIANA PLEADING AND PRACTICE, § 338 (1942). There is evidence that many trial courts are willing to reread a particular disputed instruction; but, counsel for the parties will seldom agree to anything less than a rereading of all instructions. Letters in reply to a survey of Indiana trial courts to the Board of Editors of the *Indiana Law Journal*, May, 1957.

36. See CAL. LAW REVISION COMM'N, Recommendations and Study Relating to Taking Instructions to the Jury Room, at C-12 (1956).

37. The difficulty the jury may encounter in understanding instructions is perhaps overstated by one conscientious trial judge, "Still, after half a century, we find ourselves in the embarrassing position in regard to instructions to the jury in plain, automobile accident cases in which lawyers do not know how to write instructions, the trial judges do not know whether or not they are correct, and only God understands them." Hulen, *"Twelve Good Men and True": The Forgotten Men of the Courtroom*, 38 A.B.A.J. 813, 814 (1952).

perhaps desirable that the meaning of specific language be vigorously debated. Moreover, the possibility that such debate would result in interminable confusion in the jury room would seem to be greatly reduced by existing statutory procedure which permits the jury to request that it be brought back into the courtroom if it desires to be informed as to any point of law arising in the case.[38]

In jurisdictions which require or permit written instructions to be taken into the jury room as the jury retires, the primary reason advanced for such a practice is the desire to provide a practical method of avoiding errors of memory and to give the jury a better opportunity to understand the precise terms of the instructions.[39] The logical appeal of this practice is apparent. Instructions must be designed to serve an omnibus purpose; and, even a cursory examination of the scope and content of the court's charge indicates the enormity of the burden placed upon the juror's capacity to remember. One analyst has suggested that twenty-one matters are normally covered.[40] In many cases the sheer volume of instructions makes it inconceivable that jurors can remember more than isolated fragments of the whole.[41] Moreover, the juror's memory is perhaps even less trustworthy when statements of amounts and figures are included in the instructions.[42]

However, it is arguable that in Indiana courts the necessity of sending the instructions with the jury is questionable in view of the Civil Code provision that the jury may have the instructions reread in the

38. See note 13 *supra.*

39. Dissatisfaction with overreliance upon the juror's memory of instructions is apparent in each of the following decisions approving the practice of sending of written instructions to the jury room: "We see no good reason why the members of a jury should always be required to debate and rely upon their several recollections of what the judge said when proof of what he said is readily available." Copeland v. U.S., 80 U.S. App. D.C. 308, 152 F.2d 769, 770 (1945). "[W]e think it was not only permissible but commendable for the court to . . . [permit the jury to have the written instructions]. The purpose of instructions is to advise the jury as to the law, and at all times in considering its verdict a jury should keep them in mind. We can think of no better method of enabling it to do this than to have the written instructions of the court always before it." Valley Nat. Bank v. Witter, 58 Ariz. 491, 504, 121 P.2d 414, 420 (1942). "But why should the jurors be deprived, when they retire to make up their verdict, of the very papers and documents upon which their verdict must to a great extent depend? We are unable to discover any substantial reason." State v. Tompkins, 71 Mo. 613, 617 (1880). "And the only result of allowing them [the jury] to examine it [the court's charge] for themselves would seem to be, that they would know more thoroughly its precise terms than they could if compelled to trust entirely to recollection after hearing it read once." Wood v. Aldrich, 25 Wis. 695, 696 (1870).

40. See Diamond, *Instructions to Juries,* PRACTISING LAW INSTITUTE (1946-51).

41. See *.eg.,* Emry v. Beaver, 192 Ind. 471, 137 N.E. 55 (1922) (45 instructions covering 27 pages of printed brief); Clear Creek Stone Co. v. Carmichael, 37 Ind. App. 413, 73 N.E. 935 (1905) (37 instructions); 1 THORNTON, INDIANA INSTRUCTIONS TO JURIES, § 14 (1914).

42. See *e.g.,* Chattahoochee Brick Co. v. Sullivan, 86 Ga. 50, 60, 12 S.E. 216, 221 (1890).

courtroom to refresh its memory.[43] On the other hand, this practice may be unrealistic in assuming that by listening to the judge intone the instructions the jury can gain a working knowledge of the law embodied in the instructions. Furthermore, it is met by the argument that if the jury is to be effectively guided and controlled by instructions, it should be afforded a realistic opportunity to know the content of the instructions, and should be permitted to exercise fully its intelligence in arriving at a reasonable construction of the language therein.[44] The fact that the legal concepts and terminology involved often confuse experienced lawyers who draft the instructions and the learned judge who must rule on their validity would seem to strengthen this argument.

Economy of time has been suggested as another advantage to furnishing the jury a copy of the instructions as it retires. Since counsel will usually demand that the instructions be reduced to writing,[45] no additional time would be consumed in placing a copy of the instructions among the papers available to the jury as it retires.[46] It is suggested that this practice would at all times afford the jury an accurate record of the instructions, thereby eliminating the necessity of conducting the jury back to the courtroom should a dispute arise concerning the form or content of the judge's charge.

A practice which would accelerate jury trials and thereby alleviate congested dockets is attractive; but, it would seem that the ultimate criterion for evaluating a proposed improvement of the instruction procedure is not one of economy of time, but rather one of certainty in the understanding of the instructions. But even if an evaluation of the alternative practices was based solely upon economy of time, it is doubtful if there is such a disparity of time so as to overwhelmingly favor placing the instructions in the hands of the jury as it retires. Although a comparison of the mechanics of the alternative procedures indicates a possible disparity in time consumed, whether in actual practice the time spent in conducting the jury into the courtroom is significant remains uncertain. Indiana juries return to the courtroom to have the instructions

43. See note 13 *supra.*

44. See note 39 *supra.*

45. There is evidence that Indiana trial courts generally reduce the instructions to writing upon their own motion, although counsel for neither party makes the request under IND. ANN. STAT. §§ 2-2008, 2-2010 (Burns 1946). Letters in reply to a survey of Indiana trial courts to the Board of Editors of the *Indiana Law Journal,* May, 1957.

46. The United States District Court, Northern District of Indiana has adopted the practice of making a tape recording of the instructions available to the jury in most civil cases. Conditions are stipulated for the jury's use of the tape recording. These conditions are: (1) that the recording be sent to the jury room only in the event the jury wants to hear the instructions again; (2) that the instructions be played back in their entirety; and (3) that unless permission is given by the court, the recording may be heard no more than two times.

reread on the average of one case in six.[47] The ratio of the time consumed in conducting a single jury into the courtroom and rereading a single set of instructions to the total time consumed by six complete jury trials would seem to be negligible.

Those who favor giving instructions to the jury as it retires point out that the whole doctrine of qualification of one instruction by another is without value unless the jury can read and compare the instructions to determine whether one instruction in a series of instructions modifies or qualifies another in the same series.[48] It is questionable, however, whether the average jury, untrained in law, can intelligently make such a determination, for its treatment of the instructions in arriving at a general verdict is probably not sensitive enough to appreciate the legal complexities involved in the doctrine.

The policy considerations outlined above represent the basic arguments for and against adopting a liberal procedure permitting the jury to have the written instructions during its deliberation. In summary, the arguments against this procedure seem to be based essentially upon the negative theory that the jury cannot handle instructions effectively unless it is denied direct contact with the written words of the instructions and is, in effect, forced to rely upon a vague understanding of the general import of the instructions. And, on the other hand, proponents of this procedure anticipate a jury which would be greatly benefited by an opportunity to carefully analyze the instructions.

The contrasting policy arguments which account for the diametrically opposed procedures found in Indiana and other jurisdictions also raise the broader issue of whether the jury is capable of an intelligent application of instructions regardless of the procedure adopted.[49] Those who are affronted by an attack on the jury's ability suggest that judges and lawyers who draft instructions are primarily responsible for the difficulties juries encounter in dealing with instructions.[50] Undoubtedly,

47. See Survey, part II (3)(a).

48. See Chicago Union Traction Co. v. Hanthorn, 211 Ill. 367, 373, 71 N.E. 1022, 1024 (1904).

49. Jerome Frank bases his "realistic" theory of the function of the jury upon "[W]hat everyone can discover by questioning the average person who has served as a juror—namely that often the jury are neither able to, nor do they attempt to, apply the instructions of the court." FRANK, COURTS ON TRIAL 111 (1949). Other observers of the modern jury system seriously question the jury's ability to properly utilize the court's instructions. See Kingdon, *True Verdicts?*, 23 J. AM. JUD. SOC'Y 190, 191 (1940); Osborn, *The Mind of the Juror* 8 (1937).

50. One Indiana judge is of the opinion that instructions are used by lawyers to test the trial courts' knowledge of the law and that, beyond certain simple "horse sense" instructions, they are "nothing more than a vehicle by which lawers are in a position to try and trick or trap the trial court into creating a reversible error." Letter in reply to a survey of Indiana trial courts to the Board of Editors of the *Indiana Law Journal*, May, 1957.

the deficiencies of both the jury and the instructions contribute to the problems attending the instructional phase of jury trials. Unless the suggestion that jury trials be abandoned altogether in civil cases is the ultimate solution, the proper approach to the dilemma requires a coordinated effort by the Legislature, the courts, and the bar to improve both the quality of the jury and the content and form of the instructions. No less important to the proper functioning of instructions is the adoption of a procedure which will insure that instructions afford intelligible legal guidance to the jury, give the parties adequate opportunity to submit legal theories, and provide the court the necessary supervision of the jury's deliberation and verdict.

APPENDIX

Practice in Other States

State	*Required*	*Permitted*	*No Authority*	*Authority*
Alabama	x			Ala. Code Ann. tit. 7, § 273 (1940); Miller v. Hampton, 37 Ala. *342 (1861); Polly v. McCall 37 Ala. 20 (1860).
Arizona		x		Valley Nat'l Bank v. Witter, 58 Ariz. 491, 121 P.2d 414 (1942).
Arkansas		x		Missouri Pac. R.R. v. Watt, 186 Ark. 86, 52 S.W.2d 634 (1932) (by implication).
California		x		Fererira v. Silvey, 38 Cal. App. 346, 176 Pac. 371 (1918) (by implication).
Colorado	x			Colo. Rev. Stat. Ann. rule 51 (1953).
Connecticut			x	
Delaware			x	
Florida			x	
Georgia		x		Chattahoochee Brick Co. v. Sullivan, 86 Ga. 50, 12 S.E. 213 (did not follow Gholston v. Gholston, 31 Ga. 625 (1860) prohibiting instructions in the jury room).
Idaho	x			Idaho Code Ann. § 10-206 (1948) (unless party objects); Hilbert v. Spokane R.R., 20 Idaho 54, 116 Pac. 1116 (1911).
Illinois	x			Ill. Ann. Stat. c. 110, § 67 (Smith-Hurd 1956).
Iowa		x		Head v. Lansworthy, 15 Iowa 235 (1863).
Kansas		x		Moyer v. Dolese Bros. Co., 162 Kan. 484, 489, 178 P.2d 270, 279 (1947) (by implication).
Kentucky			x	
Louisiana			x	
Maine			x	
Maryland			x	
Massachusetts			x	
Michigan		x		Behrendt v. Wilcox, 277 Mich. 232, 269 N.W. 155 (1936) (on request of jury).

Minnesota			x	
Mississippi		x		MISS. CODE ANN. § 1530 (1942).
Missouri	x			MO. REV. STAT. § 29.2016 (1949); Security Sav. Bank v. Green, 281 S.W. 137 (1926).
Montana		x		Hammond v. Foster, 4 Mont. 421, 433, 1 Pac. 757, 759 (1882) (if any are given all must be given).
Nebraska		x		Langworthy v. Connelly 14 Neb. 340, 15 N.W. 737 (1883) (by implication).
Nevada			x	
New Hampshire			x	
New Jersey			x	
New Mexico	x			N.M. STAT. ANN. § 22-1-1, rule 51(c) (1953) (upon request of either party).
New York			x	
North Carolina	x			N.C. GEN. STAT. § 1-182 (1951) (if instructions are in writing and if requested by either party).
North Dakota	x			N.D. REV. CODE vol. 3, § 28.1411 (1943) (if in writing); Ley v. Gulke, 58 N.D. 727, 227 N.W. 222 (1929).
Ohio	x			OHIO REV. CODE ANN. § 2315.01 (Page 1955) (written instructions).
Oklahoma		x		Lowenstein v. Holmes, 40 Okla. 33, 37, 135 Pac. 727, 729 (1913).
Oregon	x			ORE. REV. STAT. § 17.255 (1955) (if requested by party).
Pennsylvania			x	
Rhode Island			x	
South Carolina			x	
South Dakota	x			S.D. CODE § 33.1317 (1939).
Tennessee			x	
Texas		x		TEX. STAT., Rule Civ. Proc. 281 (Vernon, 1948).
Utah		x		UTAH CODE ANN., Rule Civ. Proc. 47(m) (1953).
Vermont			x	
Virginia			x	
Washington	x			Wash. RULES PLEAD., PROC. & PRAC., RULE 8, 34A Wash.2d 74 (1951).
West Virginia		x		Wiseman v. Ryan, 116 W. Va. 525, 182 S.E. 670 (1935).
Wisconsin		x		Wood v. Aldrich, 25 Wis. 695 (1870).
Wyoming			x	