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CRIMINAL LAW AND PROCEDURE - RIGHT OF DEFENDANT TO ACCOMPANY JURY ON VIEW-DUE PROCESS

CRIMINAL LAW AND PROCEDURE — RIGHT OF DEFENDANT TO ACCOMPANY JURY ON VIEW — DUE PROCESS — During the trial of appellant in the Massachusetts courts for murder the jury was sent to view the scene of the crime. The accused asked that he be allowed to accompany them, invoking the protection of the Fourteenth Amendment. Permission was refused. At the view, judge and counsel being present, a stipulation was entered into as to changes which had occurred since the crime. Upon conviction, appellant appealed to the United States Supreme Court asserting that there had been a denial of due process. *Held*, four justices dissenting, that there had been no denial of due process since no substantial harm had been done appellant by his absence during the view. *Snyder v. Massachusetts*, 291 U. S. 97, 54 Sup. Ct. 330 (1934).[1]

In the state courts where the question of the right of the accused to be present at a view has arisen, the decisions are in hopeless conflict.[2] The problem has usually arisen under constitutional or statutory provisions securing the rights of a defendant in a criminal case to be confronted with the witnesses against him and to be present at his trial.[3] While a majority of the courts seem to hold

[1] Affirming Commonwealth v. Snyder, 282 Mass. 401, 185 N. E. 376 (1933).

[2] See 3 WHARTON, TREATISE ON CRIMINAL PROCEDURE, 10th ed., sec. 1642 (1918); 2 WIGMORE, EVIDENCE, sec. 1168 (1923); 3 *ibid.*, secs. 1802, 1803; 1 COOLEY, CONSTITUTIONAL LIMITATIONS, 8th ed., p. 667 (1927) for copious citations on the point.

[3] The better views would seem to be (a) that the view is evidence, autoptic evidence, which the jury for psychological reasons cannot disregard, but is not testimony and the confrontation clauses are not violated by defendant's absence from the view [People v. Thorn, 156 N. Y. 286, 50 N. E. 947, 42 L. R. A. 368 (1898); Starr v. State, 5 Okla. Cr. Rep. 440, 115 Pac. 356 (1911). See 15 VA. L. REV. 489 (1929); but see Benton v. State, 30 Ark. 328 (1875); and Noell v. Commonwealth, 135 Va. 600, 115 S. E. 679, 30 A. L. R. 1345 (1923), cases holding that the confrontation clause is violated by defendant's absence]; (b) that the view is not part of the trial, since a trial must be held at the court house in the presence of the judge [State v. Mortensen, 26 Utah 312, 345, 73 Pac. 562, 633 (1903); State v. Slorah, 118 Maine 203, 106 Atl. 768, 4 A. L. R. 1256 (1919); People v. Thorn, supra. *Contra*, that it is part of the trial: Chance v. State, 156 Ga. 428, 119 S. E. 303 (1923); State v. McGinnis, 12 Idaho 336, 85 Pac. 1089 (1906); Foster v. State, 70 Miss. 755, 12 So. 822 (1893)].

that the defendant can waive his right to be present at the view,[4] there is an almost unanimous dictum that he should be allowed to go along if he expressly requests it. The Massachusetts rule seems to be that it is in the discretion of the trial judge to refuse the defendant permission to accompany the jury, even if he desires to do so.[5] In the principal case, however, the United States Supreme Court had before it only the question whether the enforced absence of the defendant from the view worked a substantial injustice upon him and made his trial unfair, so as to operate as a denial of due process. It was a case requiring the Court to interfere with state procedure not based upon statute, a field upon which it has been reluctant to enter.[6] While the minority opinion seems to hold that under the due process clause the defendant has an absolute right to be present at a view, the true approach would seem to be that of the majority of the Court that he has no such right, except as it exists as a part of the larger right to have an adequate opportunity to present his defense.[7] The Court had previously held that the purpose of the rule requiring defendant's presence at the trial was to enable him to prepare his defense and to assist his counsel in cross-examination, and if his presence could have served no useful purpose there was no basis for reversal under the Fourteenth Amendment.[8] In the principal case the majority adopts a common sense attitude and comes to the conclusion that the defendant's presence at the view in question could have served no useful

[4] Shular v. State, 105 Ind. 289, 4 N. E. 870, 55 Am. Rep. 211 (1885); Haynes v. State, 71 Fla. 585, 72 So. 180 (1916); Carney v. Commonwealth, 181 Ky. 443, 205 S. W. 408 (1918); People v. Auerbach, 176 Mich. 23, 141 N. W. 869, Ann. Cas. 1915B 557 (1913); and especially the recent case of State v. Cates, (Mont. 1934) 33 Pac. (2nd) 578). *Contra*, that defendant cannot waive his right: Noell v. Commonwealth, 135 Va. 600, 115 S. E. 679, 30 A. L. R. 1345 (1923); Foster v. State, 70 Miss. 755, 12 So. 822 (1893); State v. McCausland, 82 W. Va. 525, 96 S. E. 938 (1918). The latter view is adopted in 2 COOLEY, CONSTITUTIONAL LIMITATIONS, 8th ed., p. 667 (1927); THE AMERICAN LAW INSTITUTE CODE OF CRIMINAL PROCEDURE (proposed final draft, 1930), sec. 297, p. 98, provides that, "In a prosecution for a felony the defendant shall be present . . . (f) at a view by the jury."

[5] Commonwealth v. Belenski, 276 Mass. 35, 176 N. E. 501 (1931); Commonwealth v. Snyder, 282 Mass. 401, 185 N. E. 376 (1933).

[6] The extent to which the court will go in these matters is poorly defined. See Ireton, "Due Process in Criminal Trials," 67 U. S. L. REV. 83 (1933). In Moore v. Dempsey, 261 U. S. 86, 43 Sup. Ct. 265 (1923), it was held that mob domination of a state trial was ground for interference by the federal courts; but *cf.* Frank v. Mangum, 237 U. S. 309, 35 Sup. Ct. 582 (1914). It is generally considered that Powell v. Alabama, 287 U. S. 45, 53 Sup. Ct. 55 (1932) (the Scottsboro case) showed a tendency on the part of the court to expand its surveillance over state criminal procedure, the right to free access to counsel in capital cases being held a part of due process. See the note on this case in 32 COL. L. REV. 1430 (1932).

[7] See the dictum in Hopt v. Utah, 110 U. S. 574, 4 Sup. Ct. 202 (1884); as to the right of the defendant in federal courts to be present while purely formal documents are marked in evidence, see Lewis v. United States, 146 U. S. 370, 13 Sup. Ct. 136 (1892).

[8] The defendant may be momentarily absent while part of the jury is being impaneled: Howard v. Kentucky, 200 U. S. 164, 26 Sup. Ct. 189 (1906); and testimony of witnesses at a former trial may be read to the jury at the second trial: West v. Louisiana, 194 U. S. 650, 24 Sup. Ct. 650 (1904).

purpose. He could not have spoken to the jury at this time, nor could he have assisted in the cross-examination of anybody. His counsel was present to observe any misconduct on the part of the court, jury, or showers; and while a stipulation regarding changes in the locus was entered into during his absence, nothing at the trial showed that this stipulation affected the case in any way or that the jury had been misled to his detriment. It is submitted, however, that the rule laid down by this case is not that the defendant never has the right under the due process clause to accompany the jury, but rather that the denial of this privilege is not reversible error under the due process clause unless it appears that seeing the locus as the jury sees it would aid him in the preparation of his defense.[9] It is interesting to note how the Court here brushed aside the technicalities of the criminal law and got down to the fundamental question of whether substantial harm had been done the accused.

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[9] See the possibilities suggested in Foster v. State, 70 Miss. 755, 12 So. 822 (1893), as to when it would be important for the accused to be at the view.