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CRIMINAL LAW AND PROCEDURE - RIGHT OF ACCUSED TO BE PRESENT AT TRIAL

CRIMINAL LAW AND PROCEDURE — RIGHT OF ACCUSED TO BE PRESENT AT TRIAL — In a prosecution for bank robbery, testimony of a witness which did not connect the accused with the crime and merely served to qualify the witness was received during the unnoticed and involuntary absence of the accused. No objection was made by the counsel for the accused who was present at the time. When the accused's absence was discovered, the motion of counsel

that the cause be withdrawn from the jury was overruled and the court admonished the jury not to consider the testimony. Appellant contended that he had been denied a right and that therefore injury must be presumed. *Held*, that since the irregularity did not result in injury it would not render the verdict invalid. *Ray v. State*, (Ind. 1934) 192 N. E. 751.

The accused has a right to be present during the whole of his trial.[1] There is no specific guarantee of this right in the federal Constitution applicable to state proceedings except as absence negatives due process, but the right arises from state constitutions and statutes.[2] The problem is essentially whether the presence of the accused is jurisdictional or merely a personal right of the accused. It is generally held that the accused may waive this right,[3] but some courts deny that there is a right of waiver in trial for felony,[4] and others in trial for crimes punishable by death.[5] The problem becomes more acute when the accused is involuntarily absent. Involuntary absence during unimportant parts of the trial has been held not to be jurisdictional.[6] Whether involuntary absence of the accused during the presentation of evidence should be held to be jurisdictional seems to be answered by a consideration of the purpose of the confrontation rule. "The main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination.*" [7] "Nor has the privilege of confrontation at any time been without recognized exceptions, as for instance dying declarations or documentary evidence." [8] "The exceptions are not even static, but may be enlarged from time to time if there is no material departure from the reason of the general

[1] People v. Kohler, 5 Cal. 72 (1855); Long v. State, 52 Miss. 23 (1876); Gladden v. State, 12 Fla. 562 (1869).

[2] West v. Louisiana, 194 U. S. 258, 24 Sup. Ct. 650 (1904).

[3] Waiver by voluntary absence and by attorney: State v. Bragle, 88 N. Y. 585 (1882); Scruggs v. State, 131 Ark. 320, 198 S. W. 694 (1917); Diaz v. United States, 223 U. S. 442, 32 Sup. Ct. 250 (1912); United States v. Noble, (D. C. Mont. 1923) 294 Fed. 689, aff. (C. C. A. 9th, 1924) 300 Fed. 689. Waiver after error: Winston v. State, 127 Miss. 477, 90 So. 177 (1922).

[4] Noell v. Commonwealth, 135 Va. 600, 115 S. E. 679 (1923).

[5] Kokas v. Commonwealth, 194 Ky. 44, 237 S. W. 1090 (1921); State v. Greer, 22 W. Va. 800 (1883) (widely cited on this point); Stanley v. State, 97 Miss. 860, 35 So. 497 (1910); Cason v. State, 52 Tex. Cr. 220, 106 S. W. 337 (1907), [but see in connection with this case, Doss v. State, 104 Miss. 598, 61 So. 690 (1913)]; State v. Reed, 65 Mont. 51, 210 Pac. 756 (1922).

[6] While counsel was preparing to address the jury—People v. Bush, 68 Cal. 623, 10 Pac. 169 (1886). While jury considered their verdict—State v. McGraw, 35 S. C. 283, 14 S. E. 630 (1891). Calling the names of the jury after recess—McNish v. State, 47 Fla. 66, 36 So. 175 (1904). Jury sent to consider their verdict without comment—Jones v. Commonwealth, 79 Va. 213 (1884). Adjournment because of earthquake—People v. Morrell, 28 Cal. App. 729, 153 Pac. 977 (1915). Jury requested additional time—State v. Suire, 142 La. 101, 76 So. 254 (1917). Verdict recorded—State v. Davis, 149 La. 620, 89 So. 867 (1921).

[7] 3 WIGMORE, EVIDENCE, sec. 1395 at p. 94 (1923).

[8] Snyder v. Massachusetts, 291 U. S. 97 at 107, 54 Sup. Ct. 330, 90 A. L. R. 575 (1934), citing Robertson v. Baldwin, 165 U. S. 275 at 282, 17 Sup. Ct. 326 (1897); Motes v. United States, 178 U. S. 458, 20 Sup. Ct. 993 (1900).

rule." [9] Although it may well be argued that the presence of the accused is indispensable to a full advantage, the fact that the accused is represented by counsel for most purposes assures him the opportunity of cross-examination even in his absence.[10] Some cases hold that the presentation of any evidence at all during the involuntary absence of the accused is jurisdictional and reversible error.[11] But other cases have refused to follow the rigid and technical rule in particularly hard cases, as, for instance, where an unanswered question was put to a witness,[12] or where testimony was re-read to the jury,[13] or where one question was answered by the witness,[14] all in the presence of the accused's counsel. Once it is granted that the presence of the accused is not jurisdictional, the next question is whether the presentation of evidence during the absence of the accused in the particular case is so prejudicial to the accused's rights that it should be considered grounds for reversal. It is difficult to see how the testimony in the principal case could possibly have prejudiced the accused.[15]

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[9] Snyder v. Massachusetts, 291 U. S. 97 at 107, 54 Sup. Ct. 330, 90 A. L. R. 575 (1934), citing Commonwealth v. Slavski, 245 Mass. 405 at 415, 140 N. E. 465, 29 A. L. R. 281 (1923).

[10] State v. Outs, 30 La. Ann. 1155 (1878). But see in this connection, De Bardeleben v. State, 16 Ala. App. 367, 77 So. 979 (1918), where both accused and counsel were absent.

[11] State v. Greer, 22 W. Va. 800 (1883); State v. Moran, 46 Kan. 318, 26 Pac. 754 (1891); State v. Sheppard, 49 W. Va. 582, 39 S. E. 676 (1901); Doss v. State, 104 Miss. 598, 61 So. 690 (1913).

[12] State v. Spotted Hawk, 22 Mont. 33, 55 Pac. 1026 (1899) (the report is not clear).

[13] People v. Carey, 125 Mich. 535, 84 N. W. 1087 (1901). But see in this connection, Burton v. State, 46 Tex. Cr. 493, 81 S. W. 742 (1904).

[14] Boyd v. State, 153 Ala. 41, 45 So. 591 (1908).

[15] See in this connection, Booker v. State, 81 Miss. 391, 33 So. 221 (1902), with facts very similar to the principal case but in which the testimony concerned the homicide and in which an opposite result was reached. See also, in regard to Indiana, Simpson v. State, 31 Ind. 90 (1869); Roberts v. State, 111 Ind. 340, 12 N. E. 500 (1887).