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CRIMINAL LAW-NEW TRIAL-ABSENCE OF ACCUSED FROM TRIAL BECAUSE OF ATTORNEY'S NEGLIGENCE

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CRIMINAL LAW—NEW TRIAL—ABSENCE OF ACCUSED FROM TRIAL BECAUSE OF ATTORNEY'S NEGLIGENCE—Defendant, represented by an attorney, was ordered, under an appearance bond, to appear at the November term of the court of general sessions to answer to an indictment for assault and battery with intent to kill. The indictment was not prepared during the November term, and at the end of the term the court ordered all those whose cases were not called to appear at the next term of court. At the February term defendant's case came up, but his attorney had apparently failed to read the court calendar, as neither the

defendant nor the attorney knew that the trial was at hand. Defendant was convicted by a jury in his absence. His attorney filed a motion for a new trial, alleging that the court and prosecuting attorney had not protected defendant's rights as carefully as they would have if counsel for the defendant had been present.[1] The trial court denied the motion for new trial, and defendant appealed. *Held*, affirmed. Defendant had statutory notice of the terms of court and had the duty to be present.[2] *State v. Johnson*, (S.C. 1948) 49 S.E. (2d) 6.

Under the common law a defendant could not be tried for a felony in absentia, and this rule is still in force, either by constitutional provision or statute, in every jurisdiction. However, when a defendant is voluntarily absent from the trial, some courts hold that he has waived his right to be present, on the theory that the right is personal and subject to waiver.[3] Following this view, the court held in the principal case that the defendant's absence, coupled with statutory notice, was sufficient to constitute a waiver of his constitutional rights.[4] In reality, the defendant waived nothing in this case. The blame for his absence must fall upon his attorney. The issue then is, to what extent is the client responsible for his attorney's conduct? As a matter of policy, the courts have treated the attorney and client as one, and the negligence of the attorney is not considered as a ground for a new trial.[5] Since the attorney's negligence is a question of fact in most cases, the result is justified, in that endless complications would result from allowing the accused, on appeal, to review his attorney's conduct of the case. However, when the result would be unfair the decisions are not unanimous. Many courts continue to hold that the defendant is bound by acquiescence, if he witnessed his attorney's conduct and failed to object seasonably.[6] Others allow a new trial on

[1] Defendant alleged as error on appeal that the prosecuting attorney had not sufficiently identified the defendant as the man who wielded the knife; that the court failed to charge the jury on the law of self-defense, and that the defendant's absence was not to be construed as an admission of guilt; and that the court assumed in its instructions that the defendant was the man who did the slashing.

[2] "If a defendant who is recognized to appear at the next ensuing term of court was under no duty to appear after the first term, if fortuitously his case was not reached at such first term, a chaotic condition in the enforcement of criminal law would forthwith result as respects a great number of cases." Principal case at p. 7.

[3] State v. James, 116 S.C. 243, 107 S.E. 907 (1920); United States v. Noble, (D.C. Mont. 1923) 294 F. 689, affirmed, (C.C.A. 9th, 1924) 300 F. 689; Lee v. State, 244 Ala. 401, 13 S. (2d) 590 (1943), limiting the rule to cases involving less than capital offenses; contra: Noell v. Commonwealth, 135 Va. 600, 115 S.E. 679 (1923); State v. Reed, 65 Mont. 51, 210 P. 756 (1922); State v. McCausland, 82 W. Va. 525, 96 S.E. 938 (1918), holding that the defendant's presence is jurisdictional, and cannot be waived.

[4] S.C. Const. (1895) Art. 1, § 18, requires that a defendant be allowed to face his accusers.

[5] Rice v. Commonwealth, 278 Ky. 43, 128 S.W. (2d) 219 (1939); Woolsey v. People, 98 Colo. 62, 53 P. (2d) 596 (1935); State v. Henderson, 226 Wis. 154, 274 N.W. 266 (1937).

[6] Hale v. Thompson, 56 N.D. 716, 219 N.W. 218 (1928); O'Brien v. Commonwealth, 115 Ky. 608, 74 S.W. 666 (1903); Territory v. Clark, 13 N.M. 59, 79 P. 708 (1905).

the ground that the defendant has been prevented from fairly presenting his defense.[7] It seems that the court has unduly extended the client's responsibility for his attorney's conduct in the principal case, for he had no opportunity to oversee his attorney's actions and was prevented from arguing the merits of his case.

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[7] People v. Schulman, 299 Ill. 125, 132 N.E. 530 (1921); People v. Gardiner, 303 Ill. 204, 135 N.E. 422 (1922); See also 24 A.L.R. 1025 (1923), 64 A.L.R. 436 (1929).