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## CONSTITUTIONAL LAW - CRIMINAL LAW AND PROCEDURE - PRESENCE OF ACCUSED DURING ARGUMENTS OF LAW

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CONSTITUTIONAL LAW — CRIMINAL LAW AND PROCEDURE — PRESENCE OF ACCUSED DURING ARGUMENTS OF LAW — The defendant was indicted for a felony on charges of wilfully attempting to "evade or defeat" federal income taxes based on his failure to report money allegedly received by him from "backers" of numbers games in exchange for political protection.<sup>1</sup> On cross-examination he was questioned about certain payments made in the year following the ones on which the indictment was based. His attorney objected on the ground that the question was going to be the subject of another indictment against the defendant, and asked that the jury be dismissed while an argument was had upon the point of law raised. The trial judge excused the jury, but at the same time he granted the prosecuting attorney's request that the defendant be excused from the courtroom. The defendant left the courtroom without argument or objection. In his appeal, however, he claimed that the court's action deprived him of due process of law guaranteed by the Fifth Amendment. In an opinion based on the principles established in *Snyder v. Massachusetts*,<sup>2</sup> the court held that the defendant "took no harm from his exclusion from the courtroom during the argument" and, consequently, was not deprived of his rights under the Fifth Amendment. *United States v. Johnson*, (C. C. A. 3d, 1942) 129 F. (2d) 954, *affd.* *Johnson v. United States*, (U. S. 1943) 63 S. Ct. 549.

<sup>19</sup> *McCann v. Hoffman*, 9 Cal. (2d) 279 at 285, 70 P. (2d) 909 (1937), holding that the sharing of expenses "does not transform into a passenger one who without such exchange would be a guest. . . . It is obvious that if a different result obtained under any construction of the [guest] statute its purposes would be defeated and its effect annulled"; *Chaplowe v. Powsner*, 119 Conn. 188 at 192, 175 A. 470 (1934) ("Although the operation of the statute in denying a right of recovery should not be extended, by construction, beyond the correction of the evils and the attainment of the social objects sought by it . . . equally, the scope of the term 'guest' should not be so restricted as to defeat or impair those purposes, as would be the case if one riding as a mere recipient of hospitality [passenger supplying theatre tickets, driver supplying transportation] be excluded by the status of a guest"); *Olefsky v. Ludwig*, 242 App. Div. 637, 272 N. Y. S. 158 (1934) (holding that contribution for gas and oil does not constitute payment for transportation removing person from class of "guest").

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<sup>1</sup> The defendant was indicted under § 145(b) of the Revenue Act of 1936, 49 Stat. L. 1703, 26 U.S.C. (1940), § 145(b), which provides "any person . . . who wilfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall . . . be guilty of a felony. . . ."

<sup>2</sup> 291 U. S. 97, 54 S. Ct. 330 (1933). Since the phrase "due process of law" used in the Fifth Amendment means substantially the same as that phrase of the Fourteenth Amendment, the court in the principal case considered *Snyder v. Massachusetts* as the controlling authority in the case at bar. *Hurtado v. People of California*, 110 U. S. 516, 4 S. Ct. 111, 292 (1884); *Twining v. New Jersey*, 211 U. S. 78, 29 S. Ct. 14 (1908); *Powell v. Alabama*, 287 U. S. 45, 53 S. Ct. 55 (1932).

The right of the accused to be present at his own trial in a federal court is guaranteed by both the Fifth and Sixth Amendments of the Constitution.<sup>3</sup> Since it is clear, however, that due process of law has regard to substance of right, and not to mere form or procedure,<sup>4</sup> the question whether his presence is necessary at any particular stage of the trial depends on whether it bears "a relation, reasonably substantial, to his opportunity to defend" so that "a fair and just hearing would be thwarted by his absence."<sup>5</sup> The right is guaranteed for the sole purpose of giving the defendant a full and real opportunity to defend himself and not for the purpose of preserving "the archaic, cumbersome and ineffective system of criminal procedure that now obtains in a majority of our states."<sup>6</sup> Due process of law is no longer denied by an occasional absence of the defendant from the trial,<sup>7</sup> from the hearing of a motion,<sup>8</sup> from a view,<sup>9</sup> while the clerk of the court is performing ministerial acts connected with the jury,<sup>10</sup> or, as in the principal case, while counsel argue points of law after the jury has been excused.<sup>11</sup> Under such circumstances the defendant's presence is usually superfluous. Nevertheless, if he can show that his opportunity to defend has been substantially impaired by his absence, then his rights under the Constitution have also been impaired and a new trial must be decreed.<sup>12</sup> It is manifest from the general nature of this test that, in order to determine in any particular situation whether the defendant has been deprived of due process, we must consider the facts of each case. There exists, however, one exception to this statement in that the personal presence of the accused is required at all times when the jury is in the box and the trial is in progress, regardless of

<sup>3</sup> "The Fifth Amendment to the Constitution provides that no person shall be deprived of liberty without due process of law and the Sixth Amendment guarantees a speedy and public trial with the right of confrontation to every defendant." Principal case, 129 F. (2d) 954 at 957; *Diaz v. United States*, 223 U. S. 442, 32 S. Ct. 250 (1911); *Snyder v. Massachusetts*, 291 U. S. 97, 54 S. Ct. 330 (1933); *Gaines v. Washington*, 277 U. S. 81, 48 S. Ct. 468 (1928).

<sup>4</sup> *Frank v. Mangum*, 237 U. S. 309, 35 S. Ct. 582 (1915). The essence of due process of law was stated by Justice Cardozo as follows, in *Snyder v. Massachusetts*, 291 U. S. 97 at 105, 54 S. Ct. 330 (1933): "What may not be taken away is notice of the charge and an adequate opportunity to be heard in defense of it."

<sup>5</sup> *Snyder v. Massachusetts*, 291 U. S. 97 at 106, 108, 54 S. Ct. 330 (1933); *Diaz v. United States*, 223 U. S. 442, 32 S. Ct. 250 (1911).

<sup>6</sup> "Outline of Code of Criminal Procedure," 12 A. B. A. J. 690 at 691-692 (1926). See also *Valdez v. United States*, 244 U. S. 432, 37 S. Ct. 725 (1917); *Howard v. Kentucky*, 200 U. S. 164, 26 S. Ct. 189 (1900). Cf. *Schwab v. Berggren*, 143 U. S. 442, 12 S. Ct. 525 (1892).

<sup>7</sup> *Frank v. Mangum*, 237 U. S. 309, 35 S. Ct. 582 (1915), where the defendant was absent when the verdict was rendered.

<sup>8</sup> *Commonwealth v. Millen*, 289 Mass. 441, 194 N. E. 463 (1934).

<sup>9</sup> *Snyder v. Massachusetts*, 291 U. S. 97, 54 S. Ct. 330 (1933).

<sup>10</sup> *People v. Johnston*, 140 Cal. App. 729, 35 P. (2d) 1074 (1934).

<sup>11</sup> There are no other federal cases in point. Nearest state decisions are *Adams v. State*, 28 Fla. 511, 10 So. 106 (1891); *Tiller v. State*, 96 Ga. 430, 23 S. E. 825 (1895).

<sup>12</sup> *Snyder v. Massachusetts*, 291 U. S. 97, 54 S. Ct. 330 (1933).

whether injury to his defense would result from his absence.<sup>13</sup> "The defendant must be deemed to have the absolute right to hear everything which the jury hears if he is to protect himself."<sup>14</sup> The principal case is significant in that it indicates how far the courts are willing to depart from the strict formalities of jury trial when no useful purpose would be served by perpetuating the older rules.<sup>15</sup>

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<sup>13</sup> *Id.*, 291 U. S. at 114: "A defendant in a criminal case must be present . . . for the opportunity must be his to advise with his counsel . . . and cross-examine his accusers." See also *Powell v. Alabama*, 287 U. S. 45, 53 S. Ct. 55 (1932); *Commonwealth v. Slavski*, 245 Mass. 405, 140 N. E. 465 (1923).

<sup>14</sup> *Snyder v. Massachusetts*, 291 U. S. 97, 54 S. Ct. 330 (1933). See note 13 *supra*.

<sup>15</sup> *THE AMERICAN LAW INSTITUTE CODE OF CRIMINAL PROCEDURE* (official draft 1930), § 289. "When presence of defendant not necessary. In a prosecution for felony or misdemeanor the defendant need not be present during the making, hearing of, or ruling upon any motion or application addressed to the court, nor when judgment is rendered." See also, 9 HUGHES, *FEDERAL PRACTICE, JURISDICTION AND PROCEDURE*, § 7067 (1931).