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Criminal Procedure - Presence of the Accused During Trial

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adjustment of a particular constitutional problem to embrace all the logical implications of its decision.[25]

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CRIMINAL PROCEDURE—PRESENCE OF THE ACCUSED DURING TRIAL —During a trial for manslaughter the jury was removed from the courtroom to the jail to receive a demonstration of evidence. The record stated generally that the accused was present during the trial, but failed to show whether he was present or absent at the time the evidence complained of was taken. Defense counsel did not object and reserve a bill of exception to the alleged absence of accused during the demonstration of evidence. *Held,* that since the error was not patent on the face of the record, and since no objection was made and exception reserved, the error complained of was waived and could not be urged as a ground for a new trial. *State v. Augusta,* 7 So. (2d) 177 (La. 1942).

The jurisprudence of the state of Louisiana is in accord with the general common law rule[1] to the effect that one who is on trial for a felony must be present in court during every important stage of the trial from the moment of his arraignment to his sentence.[2] Not only must he be present, but the records of the court must affirmatively show his presence or state facts from which his presence may be inferred.[3] The failure of the record to show the presence of the accused during important proceedings does not ipso facto constitute reversible error, and the case may be tempo-

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25. The fact that the Federal government has in the past few months enacted statutes authorizing price regulation for all commodities is another matter. Such statutes are enacted for emergency purposes and can be grounded on the war power.

1. Bishop, New Criminal Procedure (2 ed. 1913) 240, § 273; Clark, Handbook of Criminal Procedure (2 ed. 1918) 492, § 148. Lee v. State, 56 Ark. 4, 19 S.W. 16 (1892); Lowman v. State, 80 Fla. 18, 85 So. 166 (1920); McLendon v. State, 96 Miss. 25, 50 So. 864 (1910); State v. Bramlett, 114 S.C. 389, 103 S.E. 755 (1920). Canadian cases: Rex v. McDougall, 8 O.L.R. 30, 24 C.L.T. 324 (1904); Rex v. Paris, 69 D.L.R. 373, 38 Can. Crim. Cas. 126 (1922).

2. State v. Christian, 30 La. Ann. 367 (1878); State v. Ford, 30 La. Ann. 311 (1878); State v. Smith, 31 La. Ann. 406 (1879); State v. Davenport, 33 La. Ann. 231 (1881); State v. Thomas, 128 La. 813, 55 So. 415 (1911); State v. Futrell, 159 La. 1093, 106 So. 651 (1925); State v. Layton, 180 La. 1029, 158 So. 375 (1934).

3. When evidence is admitted during the trial, the Constitution requires that the accused be present. La. Const. of 1921, Art. I, § 9; Art. 365, La. Code of Crim. Proc. of 1928. State v. Christian, 30 La. Ann. 367 (1878); State v. Revells, 31 La. Ann. 387 (1879); State v. Smith, 31 La. Ann. 406 (1879); State v. Thomas, 128 La. 813, 55 So. 415 (1911); State v. White, 156 La. 770, 101 So. 136 (1924); State v. Futrell, 159 La. 1093, 106 So. 651 (1925); State v. Layton, 180 La. 1029, 158 So. 375 (1934).

rarily remanded for the purpose of amending an incorrect record to show his presence.[4] This, however, must be done contradictorily with the accused.[5] In case of a short trial, it has been held that where the record shows that the accused was present at the beginning of the trial, a presumption arises that he was present during the remainder.[6]

The instant decision presents a rather significant procedural departure from the established rule of jurisprudence. Prior decisions have rather consistently held that the record must affirmatively state that the defendant was *present* during all important phases of the trial or must state facts from which his presence could be inferred.[7] In the case at bar, however, the record did not affirmatively state that the accused was present during the reception of this evidence and the court announces the departing rule that the record must state that the accused was *absent* during an important part of the trial, otherwise he cannot raise the fact of his absence by motion for a new trial or an appeal unless he objected and filed an exception during the trial.

In prior cases where the records did not show the presence of the accused at some important phase of the trial the case was either temporarily remanded for correction[8] or was reversed and remanded for a new trial. This placed the burden on the state to show that the accused was present at all important stages of the trial. Apparently the court in the *Augusta* case did not consider remanding the case temporarily to determine whether or not the accused was actually present when the evidence in question was received by the jury; but as a result of his failure to object and file an exception, the accused was precluded from proving that he was not in fact present during an important phase of the trial[9]—

4. State v. Revells, 31 La. Ann. 387 (1879); State v. Smith, 31 La. Ann. 406 (1879); State v. White, 156 La. 770, 101 So. 136 (1924); State v. Futrell, 159 La. 1093, 106 So. 651 (1925); State v. Johnson, 171 La. 592, 131 So. 721 (1930); State v. Layton, 180 La. 1029, 158 So. 375 (1934); State v. Pepper, 189 La. 795, 180 So. 640 (1938). When there is a conflict between the judge's per curiam and the records as to whether the accused was present, the record must govern.

5. State v. Layton, 180 La. 1029, 158 So. 375 (1935). It is error for the trial judge to amend the record in chambers without notice to the accused. State v. Revells, 31 La. Ann. 387 (1879); State v. Smith, 31 La. Ann. 406 (1879).

6. State v. Collins, 33 La. Ann. 152 (1881); State v. Price, 37 La. Ann. 215 (1885); State v. Clements, 42 La. Ann. 583 (1890); State v. Starr, 52 La. Ann. 610, 26 So. 998 (1899); Bond v. State, 63 Ark. 504, 39 S.W. 554 (1897); State v. Brock, 186 Mo. 457, 85 S.W. 595 (1905); Folden v. State, 13 Neb. 328, 14 N.W. 412 (1882). Note (1941) 20 Neb. L. Rev. 49.

7. Supra note 3.

8. Supra note 4.

9. "And his failure to make timely objection to reserve a bill. . . will be considered as a waiver in cases where the minutes of the Court do not show

a right which this court had previously stated could not be waived. The rule deduced from this decision is that the burden is shifted from the state to the accused to preserve a record of irregularity. He must either object to any important phase of proceeding being held in his absence and file a bill of exception to an adverse ruling or take affirmative steps to see that the record shows his *absence*. Otherwise he cannot raise the error later on appeal or on a motion for a new trial.

The question of what is an important stage of the proceeding, necessitating the presence of the accused, has been the basis of numerous decisions. The right of the accused to be present is limited to the trial of the issues of fact raised by his plea; which the Louisiana courts have held included the arraignment proceedings,[10] selection and swearing in of the jury,[11] reception of any evidence,[12] the judge's charge to the jury,[13] rendition[14] and recordation[15] of the verdict, and the imposition of the sentence.[16] It has been held, however, that this right does not extend to formal proceedings which are not part of the actual trial of the guilt or innocence of the accused.[17] Thus the presence of the accused is not sacramental when the case is assigned for trial,[18] a motion for a continuance is filed,[19] a motion to quash the indict-

that the accused was absent during any important stage of the proceeding." State v. Augusta, 7 So. (2d) 177, 182 (La. 1942).

10. La. Act 31 of 1926, § 1 [Dart's Crim. Stats. (1932) § 635]; State v. Davis, 149 La. 620, 622, 89 So. 867, 868 (1921): "The accused shall be present at arraignment (in felony cases) to plead; at the trial to enjoy the constitutional right of confronting the witnesses who testify against him; during the charge to hear the court's giving of the law affecting the case; at the verdict to receive the jury's decision; and at the sentence to hear the court's judgment pronounced against him." State v. Futrell, 159 La. 1093, 106 So. 651 (1925).

11. State v. Thomas, 128 La. 813, 55 So. 415 (1911); State v. Layton, 180 La. 1029, 158 So. 375 (1934); La. Const. of 1921, Art. 1, § 9; Art. 365, La. Code of Crim. Proc. of 1928.

12. It is reversible error to admit evidence during the trial which was taken by prosecution before the trial when the accused was absent. State v. Bertin, 24 La. Ann. 46 (1872); State v. Hutchinson, 163 La. 146, 111 So. 656 (1927); State v. Gustopolis, 169 La. 707, 125 So. 862 (1930); State v. Layton, 180 La. 1029, 158 So. 375 (1935); State v. O'Day, 188 La. 169, 175 So. 838 (1937); State v. Pepper, 189 La. 795, 180 So. 640 (1938).

13. State v. Harville, 170 La. 991, 129 So. 612 (1930).

14. Art. 399, La. Code of Crim. Proc. of 1928. State v. Ford, 30 La. Ann. 311 (1878).

15. Art. 399, La. Code of Crim. Proc. of 1928. State v. Perkins, 40 La. Ann. 210, 3 So. 647 (1888) (voluntary absence amounts to a waiver).

16. Art. 523, La. Code of Crim. Proc. of 1928.

17. State v. Fahey, 35 La. Ann. 9 (1883); State v. Dominique, 39 La. Ann. 323, 1 So. 665 (1887).

18. State v. Clark, 32 La. Ann. 558 (1880); State v. LeBlanc, 116 La. 822, 41 So. 105 (1906).

19. State v. Fahey, 35 La. Ann. 9 (1883).

ment is made,[20] a motion to quash the venire is made,[21] an indictment or information is amended,[22] a motion for an appeal is made,[23] attachments are ordered for witnesses,[24] evidence is taken as to the existence or non-existence of a witness,[25] a witness appears in answer to an attachment and gives evidence as to the necessity of the attachment,[26] the jury is called in from deliberating merely to be informed that the court is about to adjourn,[27] or where the judge is passing on the admissibility of evidence.[28]

There is a marked conflict between the decisions of the various jurisdictions as to whether the accused may waive his right to be present at an important phase of a felony trial.[29] The majority of courts sustain the position that the accused has a right to be present, but that such a right is a personal privilege which can be expressly or impliedly waived in cases not capital.[30] Misconduct by the accused necessitating his removal from the trial has also been held to be a ground for continuing the trial in his absence.[31] In capital cases it is generally held that the accused must be present during all important phases of a trial and cannot waive this right.[32]

No definite rule or consistent pattern of decision can be deduced from the Louisiana cases. Some decisions have expressed the rule that the accused must be present at every important stage of a felony trial and that he cannot consent to the deprivation of this right,[33] nor does his failure to except prevent him

20. State v. Pierre, 39 La. Ann. 915, 3 So. 60 (1887).
21. State v. Fahey, 35 La. Ann. 9 (1883).
22. State v. Dominique, 39 La. Ann. 323, 1 So. 665 (1887); State v. Pierre, 39 La. Ann. 915, 3 So. 60 (1887).
23. State v. Wyatt, 50 La. Ann. 1301, 24 So. 335 (1898).
24. State v. Clark, 32 La. Ann. 558 (1880).
25. State v. Simien, 36 La. Ann. 923 (1884).
26. State v. Kiernan, 116 La. 739, 41 So. 55 (1906).
27. State v. Suire, 142 La. 101, 76 So. 254 (1917).
28. State v. Barret, 151 La. 52, 91 So. 543 (1922).
29. Clark, Handbook of Criminal Procedure (Mikell 2 ed. 1918) 494, § 148.
30. Diaz v. United States, 223 U.S. 442, 32 S.Ct. 250, 56 L.Ed. 500 (1912); State v. Rubaka, 82 Conn. 59, 72 Atl. 566 (1909); State v. Smith, 183 Wash. 136, 48 P.(2d) 581 (1935); Rex v. Meharg, 51 O.L.R. 229 (1921).
31. Rex v. McDougall, 8 O.L.R. 30, 24 C.L.T. 324 (1904).
32. Clark, loc. cit. supra note 29. Lee v. State, 56 Ark. 4, 19 S.W. 16 (1892); Gladden v. State, 12 Fla. 562 (1868); McLendon v. State, 96 Miss. 25, 50 So. 864 (1910); State v. Greer, 22 W.Va. 800 (1883). Contra: Lowman v. State, 80 Fla. 18, 85 So. 166 (1920). In some states, statutes authorize the defendant to waive his right to be present, at least after the arraignment and plea, even in a trial for a capital offense. Miss. Code of 1906, § 1495; Thomas v. State, 117 Miss. 532, 78 So. 147 (1918).
33. State v. Thomas, 128 La. 813, 55 So. 415 (1911); State v. Pepper, 189 La. 795, 180 So. 640 (1938). Accord: Hopt v. People of Utah, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884).

from asserting the error later.[34] In other cases it has been held that the voluntary temporary absence of the accused from an important phase of the trial is not ground for a reversal[35] unless he can show that he was injured as a result of his absence,[36] but that the accused may expressly waive this right himself, or through his counsel when he, the accused, is present.[37] The Louisiana Code of Criminal Procedure provides that an accused waives his right to arraignment by voluntarily entering trial without arraignment[38] and that he also waives the right to be present when the verdict is rendered, received, and recorded by voluntarily absenting himself.[39]

The various jurisdictions are in conflict as to the necessity or even the right of the accused to be present at the viewing of the scene of the alleged crime by the jury.[40] In jurisdictions which consider the view by the jury as the taking of evidence and an important phase of the trial, the constitutional right of confrontation is violated if the accused is *denied* the right to be present.[41] In other jurisdictions the view by the jury is considered merely as a means of enabling the jury to understand the evidence more thoroughly, but not as evidence in itself;[42] therefore the accused is

34. "That which the law makes essential in the deprivation of life and liberty, cannot be dispensed with, or affected by, the consent of the accused; much less by his mere failure, when on trial and in custody, to object to unauthorized methods." State v. Thomas, 128 La. 813, 817, 55 So. 415, 416 (1911). In the late case of State v. Pepper, 189 La. 795, 801, 180 So. 640, 642 (1938), the court stated: "The minutes must show that the accused was present at every important stage of the trial for a felony. . . . The failure of the defendant to except at the time does not affect the question. . . ."

35. State v. Barret, 151 La. 52, 91 So. 543 (1922) (temporary absence during a murder trial was not reversible error); State v. Ricks, 32 La. Ann. 1098 (1880); State v. Perkins, 40 La. Ann. 210, 3 So. 647 (1888).

36. State v. Ricks, 32 La. Ann. 1098 (1880); State v. Henderson, 168 La. 487, 122 So. 591 (1929); State v. Gustopolis, 169 La. 707, 125 So. 862 (1930).

37. In State v. Hutchinson, 163 La. 146, 149, 111 So. 656, 657 (1927), the court stated: "The right of an accused to be confronted by witnesses against him is a constitutional guarantee; and whilst it is true that such right may be waived by the accused himself or by his counsel in his presence, it is . . . equally true that such waiver cannot be made by counsel alone and out of the presence of the accused."

State v. Futrell, 159 La. 1093, 106 So. 651 (1925); State v. Obey, 193 La. 1075, 192 So. 722 (1939) (by not objecting to being arraigned without counsel, there is no error in proceeding with the trial).

38. Art. 256, La. Code of Crim. Proc. of 1928.

39. Art, 399, La. Code of Crim. Proc. of 1928.

40. 30 A.L.R. 1357 (1924).

41. People v. White, 20 Cal. App. 156, 128 Pac. 417 (1912); Foster v. State, 70 Miss. 755, 12 So. 822 (1893); Carter v. Parsons, 136 Neb. 515, 286 N.W. 696 (1939); Colletti v. State, 12 Ohio App. 104 (1919). The word "denied" implies that a request was refused.

42. Owen v. State, 86 Ark. 317, 111 S.W. 466 (1908); State v. Slorah, 118 Me. 203, 106 Atl. 768 (1919); People v. Auerbach, 176 Mich. 23, 141 N.W. 869 (1913).

not entitled "of right" to attend this phase of the proceeding. It is generally held, however, that the right to be present may be expressly or impliedly waived.[43] A few states have stressed the idea that the viewing of the scene of the crime is a form of taking evidence, and have concluded that the constitutional right of confrontation even prohibits the accused from waiving his right to be present.[44]

In Louisiana, viewing the scene of the alleged crime is uniformly considered as taking evidence;[45] therefore the accused has a constitutional right to attend, and it is an error to *deny* him this right.[46] Failure to file a timely objection has been held not to prevent the accused from raising the error on appeal.[47] However, where the accused was present at the viewing and voluntarily remained out of the sight of the jury without objecting to this irregularity and could show no injury or prejudice, he could not later raise the error.[48] In *State v. Moore*,[49] the Louisiana court held that even if the accused had made a timely objection to the irregularity of allowing him to remain outside the building while the jury was on the inside viewing the scene of the alleged crime, such an irregularity would not have been sufficient grounds for a reversal.[50] Such a holding is justified on the ground that the action of the accused in voluntarily remaining outside operated as an implied waiver of the constitutional right to be present with the jury when they viewed the scene.

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43. Whitley v. State, 114 Ark. 243, 169 S.W. 952 (1914); People v. White, 20 Cal. App. 156, 128 Pac. 417 (1912); Casney v. Commonwealth, 181 Ky. 443, 205 S.W. 408 (1918); Colletti v. State, 12 Ohio App. 104 (1919); People v. Thorn, 156 N.Y. 286, 50 N.E. 947 (1898).

44. Pierce v. Commonwealth, 135 Va. 635, 115 S.E. 686 (1923); State v. McCausland, 82 W.Va. 525, 96 S.E. 938 (1918). The Federal Constitution, however, does not guarantee to an accused the right to be present at a view by the jury in a trial conducted in a state court. Snyder v. Commonwealth of Mass., 291 U. S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1933). Note (1934) 34 Col. L. Rev. 767.

45. State v. Bertin, 24 La. Ann. 46 (1872); State v. O'Day, 188 La. 169, 177, 175 So. 838, 841 (1937): "It is only reasonable that viewing the scene, the physical facts and circumstances surrounding the scene . . . is as much the taking of evidence as taking the testimony of witnesses."

46. State v. Bertin, 24 La. Ann. 46 (1872).

47. State v. Pepper, 189 La. 795, 180 So. 640 (1938).

48. In State v. Gustopolis, 169 La. 707, 125 So. 862 (1930). Accused stayed with the sheriff about 80 feet from the jury out of their sight. The court stated: "No objection was made by the defendant at the time as to the remote position occupied by the jury. . . . Besides, defendant has shown no prejudice or injury . . . from the manner in which the inspection was made by the jury." (169 La. at 711, 125 So. at 863.)

49. 119 La. 564, 44 So. 299 (1907).

50. 119 La. at 568, 44 So. at 300: "Not every incident of a trial can be seized upon to predicate thereof a successful defense. There must be error,

The present case is in line with the trend of Louisiana jurisprudence toward a very liberal rule in regard to the presence of the accused at a felony trial. The cases indicate that the accused still has the right to be present at important stages of the trial, but that he may waive this right.[51] Such waiver has been found where the accused voluntarily absented himself from the trial;[52] also a failure to urge promptly his right to file an exception to a part of the proceeding being held in his absence may operate as a waiver unless he can show that he had suffered injury by the proceeding continued in his absence.[53] This is a fair and equitable manner of disposing of such situations. The accused has not been denied any substantial right to which he is entitled, and the court has removed another technical device frequently seized upon by convicted criminals in an effort to delay punishment.

In an effort to alleviate conflicts in the criminal procedure of the various states, so that practicing attorneys will know definitely when the presence of the accused is essential and when it is generally required but may be waived, the American Law Institute has devoted a section of their model code of criminal procedure to the problem.[54] The adoption of such a provision might do much to clarify this unsettled area of criminal procedure in Louisiana. *R.O.R.*

PEREMPTION — PRESCRIPTION — WORKMEN'S COMPENSATION — INTERRUPTION OF WORKMEN'S COMPENSATION LIMITATIVE PERIOD BY FILING SUIT—Plaintiff was injured while employed in Louisiana

something showing that the law has been overlooked or neglected, or treated with indifference."

51. Supra note 37.

52. Supra note 35.

53. Supra note 36.

54. American Law Institute, Code of Criminal Procedure (1930) c. 14, § 287:

"In a prosecution for a felony the defendant shall be present:

"(a) at arraignment

"(b) when a plea of guilty is made

"(c) at the calling, examination, challenging, impanelling, and swearing of the jury

"(d) at all proceedings before the court when the jury is present

"(e) when evidence is addressed to the court out of the presence of the jury for the purpose of laying the foundation for the introduction of evidence before the jury.

"(f) at a view by the jury

"(g) at the rendition of the verdict.

"If the defendant is voluntarily absent, the proceedings mentioned above, except those in clauses (a) and (b) may be had in his absence if the court so orders."