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TRIAL—DUE PROCESS—PRESENCE OF DEFENDANT AT A JURY VIEW.—[Federal] Defendant Snyder and two others were indicted for the murder of a filling station operator during a robbery. At the trial the Commonwealth moved for a view of the scene of the offense, which motion was granted. The court appointed counsel for the defendants to represent them at the view. Counsel for Snyder moved that his client be permitted to view the premises with the jury. The motion was denied, in accordance with the Massachusetts practice, which gave the judge discretion in allowing the defendant to accompany the jury when making the view. Snyder was found guilty. The judgment was affirmed in the Supreme Court of Massachusetts, and the defendant brought *certiorari* to the United State Supreme Court, basing his application upon the claim that his rights under the Fourteenth Amendment had been violated by the denial of his motion to view the premises with the jury, since the Fourteenth Amendment guaranteed the defendant the right to be present throughout every stage of his trial. *Held:* affirmed. The Fourteenth Amendment does not assure one charged with a felony the privilege to be present at a mere view of the scene of offense by the jury: *Snyder* v. *Commonwealth of Massachusetts* (1934) 54 S. Ct. 330.

The provision of Massachusetts practice giving the judge the right to deny the defendant the privilege of accompanying the jury on its view is peculiar to that state, but its singularity furnishes no foundation for its destruction unless it violates the Constitution. State courts and legislatures are accorded great latitude in providing alterations and innovations in their procedure. Indeed, their policies, however unique, will not be disturbed unless they run afoul of some fundamental principle of justice deep-rooted in the Constitution: *Hurtado* v. *California* (1883) 110 U. S. 516, 4 S. Ct. 111; *N. Y. Central R. Co.* v. *White* (1916) 243 U. S. 188, 27 S. Ct. 247.

The Fourteenth Amendment contains no literal guarantee of presence throughout all stages of a trial. Its due process guarantee embraces all the elements of a fair hearing, leaving to be decided whether any individual deprivation of supposed right falls within that rubric. Nor is there any uniform line of decisions in the state or federal courts which may be resorted to for the determination of the indispensable elements of due process in criminal cases. In general language, by way of *dictum*, it was stated in *Hopt* v. *Utah* (1883) 110 U. S. 574, 4 S.

Ct. 202, that the right of the accused to be present throughout the trial was of the essence of due process. But trial in this sense does not embrace the preliminary steps antecedent to the hearing on the merits, or the stages of the litigation after the rendition of the verdict: *Schwab* v. *Berggren* (1891) 143 U. S. 442, 12 S. Ct. 525; *Dowdell* v. *United States* (1910) 221 U. S. 325, 31 S. Ct. 590. Numerous cases throughout the states have held that the privilege of continued presence appears to be founded not only upon the safeguard of confrontation of adverse witnesses, but is intended also to secure to the defendant the right of hearing, seeing, and knowing all that passes before the jury and has a bearing upon his fate. Indeed, many cases have held specifically that the defendant has the right to accompany the jury upon its view: see note, 32 A. L. R. 1345. But these decisions are not without their limitations and counterparts. The defendant may lose his right by his own conduct or by waiver: *Diaz* v. *United States* (1911) 223 U. S. 442, 32 S. Ct. 250, or by a failure to show that his absence at some point in the trial worked substantial injury to his cause: *Whittaker* v. *State* (1927) 173 Ark. 1172, 294 S. W. 397; *Lowman* v. *State* (1920) 80 Fla. 18, 85 So. 166; *Commonwealth* v. *Kelly* (1928) 292 Pa. 418, 141 Atl. 246.

The majority in the instant case relied heavily upon the last element mentioned in the preceding paragraph. It reasoned that the privilege of presence must bear some substantial relation to the opportunity to defend, and if presence would be useless, or if no material benefits would be derived therefrom, the protection of the Fourteenth Amendment could not be invoked. *Cf. Howard* v. *Kentucky* (1905) 200 U. S. 164, 26 S. Ct. 189. *Valdez* v. *United States* (1916) 244 U. S. 432, 37 S. Ct. 725, amplified the doctrine still further. It was there held that the deprivation of rights ordinarily extended to a defendant must result in substantial detriment to his cause in order to support reliance upon the protection of the Fourteenth Amendment. Applying this flexible doctrine to the instant case, it is evident, that the mere view of the premises by the jury, with the physical factors pointed out mechanically without comment, evidence, or argument, could not affect the defendant's case substantially: *People* v. *Bonney* (1862) 19 Cal. 426. Nothing could be seen on the view that could not be explained or amplified on trial, in the presence of the defendant. He could do no more at the view than his counsel, and the risk of injustice is slight. It follows from this train of reasoning, considered with the absence of a literal guarantee of continued presence in the Fourteenth Amendment, that the facts of the instant case did not justify the extension of the protection of due process. The majority would throw such cases into the crepuscular zone of due process, where each case stands upon its own facts.

The dissent based its argument upon the *dictum of* the *Hopt* case buttressed by similar *dictum* from *Lewis* v. *United States* (1892) 146 U. S. 370, 13 S. Ct. 136. The dissentients felt that the view was a material part of the trial, since it was as material as testimony on the stand in striking the balance between the defendant and the state. If the defendant could not be barred from the trial during the examination of witnesses, he should not be

barred during the introduction of equally weighty evidence in the form of a jury view of the scene of the offense, and such bar to his presence constituted a deprival of due process. Granting that the defendant sustained no substantial injury by his absence at the view, still the element of presence was essential to compliance with due process, and the question of prejudice should not be allowed to confuse decision on the question whether a right guaranteed by the Constitution was denied. The former is determinable by a relative standard, while the latter should be measured by an absolute.

The case presents a highly satisfactory means of resolving the long-standing conflict between two theories of criminal jurisprudence: that which requires strict adherence to procedural technicalities, and that which seeks non-technical substantial justice, and allows flexibility and discretion in procedure. The informal rule of due process utilized by the court. which seeks to ascertain only if injury was done to the defendant's cause by the technical omission, is admirably adapted to the long-sought end of a fair trial unfettered by the manacles of archaic procedure.

ROBERT L. GROVER.

HABEAS CORPUS—FORCEABLE ABDUCTION FROM ASYLUM STATE TO INDICTING STATE.—[Federal] Petitioner was under indictment in Indiana for bank robbery. The sheriff of Marshall County, Indiana, accompanied by an Indiana officer and two Chicago police officers, arrested petitioner at his Chicago residence and took him to Indiana where next day a warrant was read to him. Petitioner's application for *habeas corpus* in Marshall County having been refused, he sought a writ in the United States District Court. *Held:* a person charged with a crime in one state and apprehended and abducted from another state is not entitled to discharge on *habeas corpus* in the federal courts. His remedy is in the state courts: *Leahy* v. *Kunkel, Warden* (D. C. Ind. 1933) 4 F. Supp. 894.

It is admitted that it is highly desirable to make the arrest and conviction of criminals easy. In this light, extradition dependent upon demand by one governor on another and governed by laws adopted when travel was slow and escape difficult, seems somewhat archaic. Nevertheless in order that some semblance of order may be kept, it is necessary that the constitutional provisions and the statutory law governing arrest and extradition be observed. The Federal Constitution accords the right of extradition in an orderly manner by Art. IV, sec. 2, the right to security against unreasonable searches and seizures by the Fourth Amendment, and the right to equal protection of laws by Amendment XIV.

Yet despite these constitutional provisions which would seem to indicate, at least, that an individual is protected against the "legal kidnapping" resorted to in the instant case, the courts have almost uniformly held to the contrary. A person held in actual custody by a state for trial in one of its courts under an indictment for a crime against its laws will not be released on *habeas corpus* by a federal court merely because the methods by which his personal presence in a state was secured may have violated the provisions of Art. IV, sec. 2: *Pettibone* v. *Nichols* (1906) 203 U. S. 192, 27 S. Ct. 111. Nor is

there anything in the Constitution, treaties or laws of the United States which exempts an offender brought before the courts of a state for an offense against its laws from trial and punishment, even though brought from another state by unlawful violence or by abuse of legal process: *Lascelles* v. *Georgia* (1893) 148 U. S. 543, 13 S. Ct. 687; *Ex parte Johnson* (1897) 167 U. S. 120, 17 S. Ct. 735. One abducted from the asylum state to the indicting state and there served with process was not entitled to *habeas corpus: Mahon* v. *Justice* (1887) 127 U. S. 700, 8 S. Ct. 1204. Courts of criminal jurisdiction need not inquire how the prisoner came within reach of its mandates: *Chapman* v. *Scott* (D. C. Conn. 1926) 10 F. (2d) 156. The same result is reached where, instead of being illegally abducted from one state to another the accused is kidnapped in a foreign country and removed to this one, *Ex parte Campbell* (D. C. Tex. 1932) 1 F. Supp. 899, or carried from one federal district to another: *United States ex rel. Voight* v. *Toombs* (C. C. A. 5th, 1933) 67 F. (2d) 744. But see *Ex parte Brown* (D. C. N. Y. 1886) 28 Fed. 635, where the district court, recognizing unlawful arrest as a possible ground for issuing *habeas corpus*, suggested that a writ would issue if the stratagem used to get a fugitive within the jurisdiction where he could be lawfully arrested was itself an infraction of the law.

Where *habeas corpus* is refused by the federal courts the petitioner has two remedies: he can seek a writ in the state courts, or he can sue the arresting officers for false imprisonment. But the remedies are more illusory than real. As to *habeas corpus* in the state court, it was refused in the instant case before petitioner sought it in the federal court. While there is a presumption that the state courts will enforce the accused's rights under the Federal Constitution and laws, as stated in the instant case, nevertheless state courts are not inclined to issue *habeas corpus* in this type of case. As to the recovery for a civil suit for false imprisonment, it would be small comfort for him once he is convicted.

There is no way of knowing how many times this means of getting fugitives into the jurisdiction in which they are under indictment has been used. In many cases the criminal, realizing that he will be tried eventually on the charge, may agree to waive extradition in return for possible leniency from the state's attorney. The court in the instant case recognized the wrong by the officers, stating that they were without the pale of judicial approval and should not be condoned or encouraged, but that it is not within its power to do anything. Whether the desire for ease of removal of fugitives should override conformity with the lawful means of extradition is a problem of timely interest due to the present intensive drive on crime. Police officers should be allowed considerable leeway in the capture of criminals, but abduction may well be considered too extreme.

DENISON GROVES.

EXTRADITION — CRIMINALITY IN STATE OF ASYLUM.—[Federal] On complaint of British Consul, United States Commissioner for the Northern District of Illinois issued a warrant to hold petitioner, John Factor, in custody for extradition to England, on a charge of receiving certain sums of money, know-

ing the same to have been fraudulently obtained. On a petition for a writ of *habeas corpus*, the district court ordered petitioner released on the ground that the act charged was not an offense under the law of Illinois, the place of asylum. The Circuit Court of Appeals reversed the judgment. *Held:* on *certiorari*, affirmed. Under the applicable treaties, extradition may be had, although the offense charged is not criminal by the laws of the asylum state: *Factor* v. *Laubenheimer* (1933) 54 S. Ct. 191.

The question was whether the offense charged is extraditable even if the offense does not constitute a crime under the laws of Illinois, the asylum state, or by act of Congress. It is a generally recognized principle of international law that, in the absence of treaty, the offense for which extradition is sought must be criminal in the jurisdiction where the accused is found: *Wright* v. *Henkel* (1903) 190 U. S. 40, 23 S. Ct. 781. Application for extradition in this case was brought under Article X of the Webster-Ashburton Treaty of 1842: 1 *Malloy*, "Treaties" (1910) 650-655, supplemented by the Blaine-Pauncefote Convention of 1889: *ibid.* 740. A question then arose as to the interpretation of these treaties in the light of this general principle; whether it is incorporated into the treaty *sub silentio* by necessary implication so as to be read into its terms if not inconsistent therewith, or whether it must be specifically embodied in the treaty to preserve it. The majority opinion in this case adopts the latter interpretation, as being more conducive to the purposes of the treaty.

Article X of the 1842 treaty provides in substance that each country shall deliver up to justice all persons who, being charged with any of seven named crimes, committed within the jurisdiction of either, shall seek asylum or be found within the territory of the other, "provided that this shall only be done on such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial if the crime or offense had there been committed . . . ." The supplemental convention of 1889 provides that an additional list of crimes should be embraced in Article X of the treaty of 1842. It lists ten numbered classes of offenses, of which two classes, §§4 and 10, specifically provide that the act charged must be punishable by the laws of both countries. The crime here charged was brought under one of the other classes, §3, where no such specific limitation is mentioned.

The majority were of the opinion that a liberal construction of the treaty, as is the accepted policy in the construction of international agreements (*Jordan* v. *Tashiro* (1928) 278 U. S. 123, 49 S. Ct. 47; *Asakura* v. *Seattle* (1924) 265 U. S. 332, 44 S. Ct. 515) required that it be interpreted so as not to require criminality in the asylum state. Thus it asserted that, inasmuch as criminality is expressly required in some of the classes, there is no such requirement intended in the others. And further that the provision in Article X of the 1842 treaty, which provides that "this shall only be done on such evidence of criminality as according to the laws of the place where the fugitive shall be found would justify his apprehension and commitment for trial if the offense had there been committed," should not be interpreted

to require criminality in the asylum state but merely refers to the procedure to be followed and to the *quantum* of the proof required. And moreover, the proviso in its whole scope deals with procedure and a different interpretation is inconsistent with the specific enumeration of classes where criminality is required, since if the proviso meant that criminality was required then the express enumeration would be unnecessary. This argument is weakened by a circumspection of the classes where this criminality is explicitly required. In all instances the offenses are such that the specific requirement is necessary so as to limit them to criminal charges to the exclusion of merely civil ones, such as fraud and offenses against the bankruptcy laws. With this explanation, the proviso relating to the *quantum* of the evidence might better be said to "significantly coincide" with the principle that criminality is required in the asylum state, and that it supports that principle: dissenting opinion at p. 203.

It was stated that to ascertain the meaning of a treaty the court may look beyond its express words to the negotiations and diplomatic correspondence of the contracting parties, and that while the construction placed on a treaty by the political department of government is not conclusive, it is nevertheless of weight: *Nielsen* v. *Johnson* (1929) 279 U. S. 47, 49 S. Ct. 223; *Charlton* v. *Kelly* (1913) 229 U. S. 447, 33 S. Ct. 945. A perusal of the diplomatic correspondence hardly fortifies the conclusion reached by the court. The only correspondence relied on by the court was a letter of instructions from Secretary of State Calhoun to Edward Everett, Minister to Great Britain, which was an *ex parte* argument on behalf of slavery and not germane to the issues then involved: Instructions, Calhoun to Everett, Aug. 7, 1844, No. 99; Instructions, Calhoun to Everett, Jan. 28, 1845, No. 120. (All the diplomatic correspondence referred to in this note is collected in the "Appendix to Brief of Petitioner on Reargument.") But even if the correspondence be considered as an official ruling, the construction thus placed on the treaty was never accepted by the British Government, Dispatch No. 55, Upshur to Everett, Aug. 8, 1843; Note from Thornton to Fish, Dec. 15, 1870, and is directly contrary to the construction placed thereon by this government both preceding and following the correspondence relied on by the court: Dispatch No. 55, *supra;* Note from Thornton to Fish, Apr. 3, 1872.

The only case cited by the majority to substantiate the proposition that criminality in the asylum state is not required, is the district court case of *In re Metzger* (1847) 17 Fed. Cas. 232, Case No. 9511, in which under a treaty with France, it was decided that criminality in the asylum state of New York was not required. The fact was also pointed out that extradition has never been denied by the Supreme Court because the offense was not criminal in the place of asylum and that the precise question has never been before the court, *Kelly* v. *Griffin* (1915) 241 U. S. 6, 36 S. Ct. 487, and *Benson* v. *McMahon* (1888) 127 U. S. 457, 8 S. Ct. 1240, being cited. But in each case before the court the crime charged has been judged to be criminal in the asylum state, the court having assumed in each instance that such criminality was prerequisite, and sometimes having taken great pains to find the necessary local crimin-

ality. It should be noted that the entire weight of judicial authority, save for the one case cited by the court, has been to the effect that the crime must be one against the laws of both countries: *Wright* v. *Henkle, supra; Collins* v. *Loisel* (1922) 259 U. S. 309, 42 S. Ct. 469.

In the words of the court in the instant case: "It is of some significance also that the construction which petitioner urges would restrict the reciprocal operation of the treaty. Under that construction the right to extradition may vary with the state or territory where the fugitive is found, although extradition may be had from Great Britain with respect to all offenses named in the treaty." It is not clear how the reciprocal operation of the treaty can be furthered by the construction adopted by the court. To the contrary, the effect of the decision is to prevent reciprocity and equality of operation by requiring the United States to deliver up fugitives for acts not criminal in the place of asylum, although Britain is not similarly bound: *In re John Anderson* (1861) 11 Upper Canada Common Pleas Report 2; *In re Windsor* (1865) 6 Best & Smith Rep. (Eng.) 522.

Perhaps the most cogent reason for the majority construction of the treaty was one of policy to further the mutual friendly relationships of the two countries by granting extradition when possible. Where the act is generally recognized as criminal, and is so acknowledged as criminal as to be included in the treaty, extradition should not fail merely because the fugitive may succeed in finding, in the country of refuge, some state, territory, or district, in which the offense charged is not punishable. But on the other hand there are compelling reasons why criminality in the state of refuge should be required. To be extraditable, the acts should be crimes which it is to the common interest of all to suppress; these are such as are known and dealt with by the law of all civilized nations. It is not the purpose of extradition to repress crimes created by the laws of a particular people. That the offense is in the treaty alone is not sufficient. A *prima facie* case must be made out before the commissioner who cannot be expected to know or interpret the foreign law, but must decide, according to Article X of the treaty, whether there is "such evidence of criminality, as according to the laws of the place where the person so charged shall be found, would justify his apprehension and commitment for trial if the offense had there been committed." If local criminality is not required, what should be the basis of the test as to whether there is sufficient evidence of criminality? It would seem that local criminality is a necessary implication in the proviso: Report of the Royal Commissioners on Extradition, 1878.

It is true that the construction of an extradition treaty is for the courts, and they are not bound by the construction placed thereon by the executive or diplomatic branches of government, or by that placed thereon by the foreign country with whom the treaty is made: *Ex parte Charlton* (C. C. N. J. 1911) 185 Fed. 880, aff'd *Charlton* v. *Kelly, supra.* But the desirability of so interpreting a treaty contrary to the accepted view of the courts, contrary to the view taken by the other high contracting party, and contrary to the intent and interpretation made manifest by the preponderance of the diplomatic correspondence, is questionable. The

granting of extradition in this particular case was unimportant. It is a situation which has never before faced the court and may never face it again. The important consideration is the potential consequences which may result. The decision, equally applicable to the Dawes-Simon Treaty of 1932, which is to supersede all the prior extradition treaties between the two governments, tends to burden the new treaty with inconsistency, in that under its terms (Art. 5) the statute of limitations will only run in the asylum state if the offense is there criminal, so that if not there criminal, the fugitive can receive no protection under it, thus favoring the fugitive in the state where the act is criminal. And possible consequences are not limited to Britain, since the same construction would apply to like treaties with other nations, and in the same manner hinder their operation.

ALEXANDER S. MALTMAN.

ENTRAPMENT—NARCOTIC SALE IN VIOLATION OF HARRISON NARCOTIC ACT.—[Federal] A federal narcotic agent and a woman employed as an informer, paid by the government, sought out the defendant to purchase narcotics. The woman was an addict and a former mistress of the defendant. The defendant testified that after several unsuccessful attempts had been made to meet him, the woman accidentally met him on the street and complained of pains and cramps in the stomach for want of narcotics. Thereupon, because of his sympathy for her, the defendant declares that he went to her room and gave her an address with a note to some other persons from whom she could obtain morphine. On the other hand, the testimony of the government agent and the woman informer indicated that the defendant was motivated in the sale of the morphine by a desire for pecuniary profit. The defendant was convicted on a charge of conspiring to sell and distribute morphine in violation of the Harrison Narcotic and Tariff Act, 26 U. S. C. A. §§211, 691-707. Defendant then assigned as error that the trial judge withdrew from the jury the defense of entrapment on his plea of not guilty. *Held:* on appeal, reversed. Where the evidence is conflicting the question of entrapment under a plea of not guilty should be given to the jury: *Wall* v. *United States* (C. C. A. 5th, 1933) 65 F. (2d) 993.

The defense of entrapment existed at common law and was generally used where property was taken by the accused with the owner's consent or by reason of his inducement, with the result that it was not taken "against the owner's will": *Bishop,* "Criminal Law" (9th ed. 1923) §926. This special defense was later extended to cover all situations wherein the defendant was "encouraged" to commit a crime at the suggestion of government officials or their agents. The theory upon which the defense rests is that "sound policy estops the government from asserting that an act, which involves no criminal intent, was voluntarily done, when it originated in and was caused by the government agent's deception": *Voves* v. *United States* (C. C. A. 7th, 1918) 249 Fed. 191; *Bishop, op. cit. supra,* §926. Also see *Butts* v. *United States* (C. C. A. 8th, 1921) 273 Fed. 35, 18 A. L. R. 143 at p. 146; *Robinson* v. *United States* (C. C. A. 8th, 1928) 32 F. (2d) 505. Thus the gist of entrapment is that the law enforcing officer, by trick-

ery, incites the accused to commit an offense which he might not otherwise have committed: *Swallum* v. *United States* (C. C. A. 8th, 1930) 39 F. (2d) 390. However, if the intent and purpose on the part of the accused to violate the law were present, the mere fact that government officers furnished the opportunity for commission of the offense is no defense: *Reyff* v. *United States* (C. C. A. 9th, 1924) 2 F. (2d) 39; *Ritter* v. *United States* (C. C. A. 9th, 1923) 283 Fed. 187.

Doubtless due to the creation of many new crimes by statutes and the resultant establishment of special agencies for their enforcement, the doctrine of entrapment has been used as a defense with increasing frequency. That it is regarded rather favorably by the courts is apparent, for it has been stated that the violation of the principles of justice by the entrapment of the unwary into crime should be dealt with no matter by whom or at what stage of the proceedings the facts are brought to the attention of the courts: *Gambino* v. *United States* (1927) 275 U. S. 310, 317, 48 S. Ct. 137. Thus the court may discharge the accused upon a writ of *habeas corpus*: *United States ex rel. Hassell* v. *Matthews* (D. C. Pa. 1927) 22 F. (2d) 979; or quash an indictment, or entertain a plea *in bar*: *United States* v. *Pappogoda* (D. C. Conn. 1923) 288 Fed. 214; *Spring Drug Co.* v. *United States* (C. C. A. 8th, 1926) 12 F. (2d) 852. Proof of entrapment at any stage of the proceedings requires the court to stop the prosecution, direct the indictment to be quashed, and the accused to be set at liberty.

Until the recent case of *Sorrells* v. *United States* (1932) 287 U. S. 435, 53 S. Ct. 210, 23 J. Crm. L. 482, there was some doubt whether or not the duty to act on the question of entrapment remained with the court even though it could be submitted to the jury. *Cf.*, opinion of Roberts, J., in the *Sorrells* case. However, it is settled by that case that where the evidence is conflicting, an issue of fact is presented which is within the province of the jury to decide after proper instructions: *Jarl* v. *United States* (C. C. A. 8th, 1927) 19 F. (2d) 891, *Butts* v. *United States, supra.* Some of the considerations involved in determining whether entrapment is present, are whether or not the officer misrepresented himself, whether he originated or initiated a plan which ultimately led to the commission of the offense, or whether he suggested the act or lured, aided, abetted or encouraged the accused in crime: *Lucadanio* v. *United States* (C. C. A. 2d, 1922) 280 Fed. 653; *Rosso* v. *United States* (C. C. A. 3d, 1924) 1 F. (2d) 717; *Rothman* v. *United States* (C. C. A. 2d, 1920) 270 Fed. 31; *Aulbman* v. *United States* (C. C. A. 5th, 1923) 289 Fed. 251; *O'Brien* v. *United States* (C. C. A. 7th, 1931) 51 F. (2d) 674.

Undoubtedly there is some element of entrapment in many cases where criminals are apprehended, and it is difficult to draw a dividing line between legitimate devices of crime detection and illegal entrapment. As was said by Mr. Justice Roberts in the *Sorrells* case *supra*, "Society is at war with the criminal classes, and courts have uniformly held that in waging warfare, the forces of prevention and detection may use traps, decoys, and deception to obtain evidence of the commission of crime." But where, in addition to the element of artifice or deception, there is a substantial showing of the planning of an offense by an officer and his procure-

ment of its commission the issue should be submitted to the jury. In the principal case use of a former mistress to play on the sympathies of the accused might well have been regarded as a questionable device in detecting violations, and in view of conflicting testimony as to the motives, the question properly should have been left with the jury.

FRED J. GINSBURG.

EVIDENCE—ADMISSIBILITY OF UNRELATED OFFENSES. — [Arkansas] The deceased and a Mrs. May were seated on the ground in a woods not far from the pavement when the defendant, carrying a shot-gun, approached them. According to Mrs. May's testimony, he forced them to stand, by shooting the gun between them—some of the shot entering their legs. He led them far into the woods and ordered the deceased to take off all his clothes and at once shot and killed him. The defendant then demanded Mrs. May to accompany him a short distance and there lie on the ground which she refused to do. The defendant then stabbed her with his pocket-knife and forced her to have sexual intercourse with him. The trial court permitted Mrs. May to testify to this attack. The defendant was convicted of murder and sentenced to death. It was insisted on behalf of the defendant that he was not being tried for rape but for murder, and that the admission of evidence of another crime, having no relation to the crime charged, was prejudicial and reversible error. *Held:* on appeal, affirmed. Evidence may be introduced to prove the motive of the crime for which the accused is on trial, even though it may point him out as guilty of an independent and dissimilar offense: *Banks* v. *State* (Ark. 1933) 63 S. W. (2d) 518.

That evidence of other unrelated crimes is not admissible, as a general rule, is too well recognized for elaboration: 1 *Wigmore,* "Evidence" (2d ed., 1923) §300; *Underhill,* "Criminal Evidence," (3d ed., 1923) §150. To this rule however, several distinct exceptions have been permitted from absolute necessity to aid in the detection and punishment of crime: *Underhill, op. cit. supra,* §151; *McHenry* v. *United States* (App. D. C. 1921) 276 Fed. 761. Where two or more crimes are a part of one transaction, *Miller* v. *State* (1917) 13 Okla. Cr. 176, 163 Pac. 131, or where it is necessary to complete the *res gestae, Gibson* v. *State* (1916) 14 Ala. App. 111, 72 So. 210; *Holland* v. *State* (1908) 55 Tex. Cr. 27, 115 S. W. 48, or where guilty knowledge and purpose must be proved, *Choate* v. *Comm.* (1917) 176 Ky. 427, 195 S. W. 1080, or where motive need be shown, *State* v. *Greco* (1918) 7 Del. 140, 104 Atl. 637; *State* v. *Buster* (1915) 28 Idaho 110, 152 Pac. 196; *Underhill* v. *State* (1916) 185 Ind. 587, 114 N. E. 88; *Appleby* v. *State* (1915) 11 Okla. Cr. 284, 146 Pac. 228, or where the identity of the accused is in question, *Romes* v. *Comm.* (1915) 164 Ky. 334, 175 S. W. 669; 1 *Wharton,* "Criminal Evidence" (10th ed., 1912) p. 145, such testimony has been admitted. But there has always been the limitation that a logical connection between the collateral offense and the crime in issue must exist; otherwise there is a danger of prejudice: *Chaffee,* "The Progress of the Law" (1919) 35 Harv. L. Rev. 433. The court in the instant case admitted the testimony of the unconnected act under the exceptions that the two crimes were a part of one transaction and common motive. In order

to do this however, it was necessary to assume that the objective of the defendant was to attack Mrs. May and that the logical means to that end was the removal of the deceased. Without this assumption there are no facts on the record to show why the deceased was killed.

Two objections may be made to such a treatment of the case. First, the court *assumed* that the purpose of the defendant was to commit a rape. It is common learning that there are no assumptions or presumptions against the accused in a criminal case. Conceding this, however, evidence of collateral offenses are seldom admitted unless they have been completely proved, *State* v. *Hyde* (1911) 234 Mo. 200, 136 S. W. 316; *Gart* v. *United States* (C. C. A. 8th, 1919) 294 Fed. 66, and there is no evidence that this was done in the principal case. Secondly, it was unnecessary for the appellate court to justify the trial court's admission of this testimony in order to sustain the conviction. There appeared to be sufficient eye-witness testimony upon which to obtain a verdict against the defendant. To add another pillar to an already completed edifice by parading other unrelated offenses committed by the accused points to a disposition which is inconsistent with unbiased criminal jurisprudence. Furthermore, such activities lead to dangers of unjust administration of the law. For instance, if A, in heat of argument fights with B, a detective, knocking him unconscious and B dies, this may be justifiable or excusable homicide and at most would be manslaughter: *People* v. *Crenshaw* (1921) 298 Ill. 412, 131 N. E. 576. Assuming similar facts, if A, after the fight, passes a neighborhood store, robs it and is apprehended and tried for the homicide, shall it be assumed that the motive of the homicide was the robbery? If the rule of the principal case becomes precedent the court may so hold: *William* v. *State* (1931) 183 Ark. 870, 39 S. W. (2d) 295.

Though ordinarily, when the lower court inflicts the highest punishment, the appellate court is loath to affirm unless the trial was practically free from error, *Baker*, "Reversible Error in Homicide Cases" (1932) 23 J. Crim. L. 28, if the defendant, from the evidence presented, clearly appears to be guilty, the courts usually affirm a case containing errors, which under other circumstances might have been considered sufficient to reverse the case: *Harrison* v. *State* (1924) 97 Tex. Cr. Rep. 468, 262 S. W. 472; *People* v. *Watkins* (1923) 309 Ill. 318, 141 N. E. 204. That the defendant deserved the most severe treatment is clear from the evidence, but the zeal of the court for reaching a guilty verdict established a ruling that should seldom be applied, if at all, and one which was certainly unnecessary in order to reach a conviction in the principal case: *Underhill, op. cit. supra,* §151; *People* v. *Townsend* (1921) 214 Mich. 267, 183 N. W. 177. The case could have been affirmed and the danger avoided by a ruling that the testimony was irrelevant and too remote to the specific offense to be prejudicial and though it was improperly admitted, yet could not have been reversible error: *State* v. *Bean* (N. C. 1922) 115 S. E. 176. Admissibility of such testimony is left very much to the discretion of the trial court, and since it may be abused by an over-zealous and righteously angry judge, the appellate court ought to review his rulings.

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Pages 1113 - 1139 containing Current Notes and Book Reviews have been deleted from this reprinted edition.