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CHARLES B. ROBISON, Case Editor

EVIDENCE — IDENTIFICATION BY VOICE.—[Pennsylvania] One Stratigoes was robbed in his place of business by three men who immediately thereafter blinded him, apparently merely to prevent subsequent identification. Four months later defendants were arrested on suspicion of other crimes not connected with the one in question. A "show up" was conducted at the police station, and Stratigoes, after hearing the voices of a number of persons, identified those of defendants as belonging to the men who had injured him. Defendants were indicted for mayhem and robbery. The only evidence for the state was an account of the identification of defendants through their voices. There was no evidence that the voices in question had any peculiar characteristics. No examination was held in open court to test the accuracy of the identification. Defendants introduced considerable evidence tending to prove alibis. A conviction resulted, which was reversed by the appellate court. *Held:* Evidence of identification by voice alone is dangerous evidence. As developed by the prosecution it does not seem sufficiently substantial to support a conviction, particularly in view of the well substantiated alibis on the part of both defendants. *Commonwealth* v. *Derembeis,* 182 Atl. 85 (Pa. 1935).

Identification of an accused person as the guilty party is as essential as proof of the *corpus delicti* in every crime. *Booker* v. *State,* 76 Ala. 22 (1885); *People* v. *Nelson,* 85 Cal. 421, 24 Pac. 1006 (1890); *State* v. *Powers,* 72 Vt. 168, 47 Atl. 830 (1900). Generally speaking, the identification of the accused as the guilty party may be shown through any means by which the particular individuality can be differentiated from that of every other individuality. *McInerney* v. *United States,* 143 Fed. 729 (C. C. A. 1st, 1906). Witnesses have been allowed to base their conclusions on a number of considerations: appearance, *Brown* v. *Commonwealth,* 187 Ky. 829, 220 S. W. 1052 (1920); size, *Hogan* v. *Commonwealth,* 212 Ky. 813, 280 S. W. 104 (1926); voice, *Orr* v. *State,* 225 Ala. 642, 144 So. 867 (1932); *Pennington* v. *State,* 91 Fla. 446, 107 So. 331 (1926); *Ogden* v. *People,* 134 Ill. 599, 25 N. E. 755 (1890); *Deal* v. *State,* 140 Ind. 354, 39 N. E. 930 (1895); *Dorchester Trust Co.* v. *Casey,* 268 Mass. 494, 176 N. E. 178 (1929); *State* v. *Berezuk,* 331 Mo. 626, 55 S. W. (2d) 949 (1932); handwriting, *State* v. *Hauptman,* 180 Atl. 809 (N. J. 1935); *State* v. *Manley,* 211 Iowa 1043, 233 N. W.

110 (1930); palm prints, *State* v. *Dunn,* 161 La. 532, 109 So. 56 (1926); finger prints, *People* v. *Roach,* 215 N. Y. 592, 109 N. E. 618 (1915); *State* v. *Combs,* 200 N. C. 671, 158 S. E. 252 (1931); *State* v. *Witzell,* 175 Wash. 146, 26 Pac. (2d) 1049 (1933); footprints, *People* v. *Searcey,* 121 Cal. 1, 53 Pac. 359 (1898); *People* v. *Buckner,* 281 Ill. 340, 117 N. E. 1027 (1917). See 1 WIGMORE, EVIDENCE (2d. ed. 1923) 757, 758, 760.

In any case where the sufficiency of identification evidence is in question the court must consider four things: (1) The intrinsic reliability of the evidence in question, (2) the opportunity of the witness to make his observations, (3) the qualifications of the witness to observe and give his opinion on the particular type of evidence in question, (4) corroborating circumstances. Further than this it is difficult to generalize, and each case must be decided on its own facts.

Perhaps the most reliable and exact of all identification evidence is that relating to finger prints. Where identity has been the important issue at a trial, courts of review have taken judicial notice of the fact that no two finger prints are alike, and have not been reluctant to affirm convictions based on the testimony of finger print experts alone. *Castleton's Case,* 3 Crim. App. 74 (1909); *Parker* v. *The King,* 14 Comm. L. R. 681 (1912); *State* v. *Connors,* 87 N. J. L. 419, 94 Atl. 812 (1915); *Smith* v. *State,* 54 Okla. Cr. Rep. 236, 18 P. (2d) 282 (1933). Accord: *Braley* v. *State,* 54 Okla. Cr. Rep. 219, 18 P. (2d) 281 (1932); *State* v. *Johnson,* 37 N. M. 280, 21 P. (2d) 813 (1933); *State* v. *Witzell, supra.* The same attitude is taken toward palmprints. *State* v. *Dunn, supra; State* v. *Kuhl,* 42 Nev. 185, 175 Pac. 190 (1918); *State* v. *Lapan,* 101 Vt. 124, 141 Atl. 686 (1928). See *People* v. *Les,* 267 Mich. 648, 656, 255 N. W. 407, 410 (1934), where the court says: "We are satisfied that finger prints and palm prints are a more certain and exact method of identification than a comparison of hair and eyes, height, weight and even physical defects. Their use affords more protection to the innocent man than do the more usual modes of identification."

Some courts have shown a tendency to distrust handwriting evidence even when given by experts, and cautionary instructions to the jury in this regard have been held proper. *State* v. *Manley, supra; State* v. *Van Tassel,* 103 Iowa 6, 72 N. W. 497 (1897). But see *State* v. *Hauptman, supra,* where the conviction was affirmed despite the fact that the trial judge had refused to instruct the jury that the opinion of handwriting experts is proof of "low degree."

Types of evidence other than those already referred to shade off into varying degrees of unreliability. Evidence as to appearance, size and various physical peculiarities is less substantial and reliable and entitled to less weight, primarily because it is so often based on mere opinion formed from very casual observations. *Brown* v. *Commonwealth, Hogan* v. *Commonwealth, supra.* On the very same facts, persons equally honest and equally intelligent may often draw contrary conclusions and mere positiveness of opinion does not change the actual fact. While evidence of trailing by blood-

hounds is admissible (*State* v. *Evans,* 115 Kan. 538, 224 Pac. 492 (1924)), it is generally held that this class of evidence is merely cumulative or corroborative, and not sufficient of itself to support a conviction. *Copley* v. *State,* 153 Tenn. 189, 281 S. W. 460 (1926).

When it comes to the question of identification by voice, courts are faced with the most hazardous and unreliable type of identity evidence. The court in *State* v. *Karas,* 43 Utah 506, 136 Pac. 788 (1913), indicates that most courts will require that testimony of recognition of the voice of a person should be reasonably positive and certain, and based upon some peculiarity of the person's voice, or upon sufficient previous knowledge by the witness of such person's voice. Accord: *Patton* v. *State,* 117 Ga. 230, 43 S. E. 523 (1903); *Givens* v. *State,* 35 Tex. Cr. Rep. 562, 34 S. W. 626 (1896); *Andrews* v. *Commonwealth,* 100 Va. 801, 40 S. E. 935 (1902). Courts have said that a witness may testify that statements made over the telephone were statements of the accused, where the witness is able to recognize the voice. *State* v. *Usher,* 136 Iowa 606, 111 N. W. 811 (1907); *People* v. *Strollo,* 191 N. Y. 42, 83 N. E. 473 (1908). A witness who has overheard a conversation between the accused and the deceased may describe the tone of voice used as angry or pleasant *Campos* v. *State,* 50 Tex. Cr. Rep. 289, 97 S. W. 100 (1906). However, in both of these situations he is subject to the qualifications set forth above.

It is possible to criticize the court in the instant case in view of the fact that the complaining witness several times positively identified the voices of defendants from a large group of persons at the police "show up." See *People* v. *Martin,* 304 Ill. 494, 136 N. E. 711 (1922); *People* v. *DeSuno,* 354 Ill. 387, 188 N. E. 466 (1933). On the other hand, it should be remembered that human senses and memory are faulty at best. See Brown, *An Experience in Identification Testimony* (1934) 25 J. Crim. L. 621. In this case the court was dealing with identification by voice, the flimsiest and least reliable of all identification evidence. It was not even shown that the voices of defendants were in any way peculiar or unusual. The identifying witness had not heard the defendants' voices before the time of the crime or afterwards until the police "show up." It should be further noted that voice and voice alone was relied upon. The witness, being blind, was unable to identify defendants by their appearance. There were no corroborating circumstances, but on the contrary, defendants presented well substantiated alibis. Such evidence should be received with care. Viewing the case as a whole, it is difficult to say that the court's decision was unwarranted.

LYLE E. PIERCE.

FORMER JEOPARDY — WAIVER BY HABEAS CORPUS — SUNDAY JUDGMENT.—[New York] The relator's trial for disorderly conduct commenced Saturday before a police magistrate and a jury, but he was not found guilty and sentenced until Sunday. Asserting that the sentence was void because entered on Sunday he obtained a discharge on a writ of *habeas corpus.* Upon again being charged with

the same offense on the same information he alleged that he had already been placed in jeopardy because of the first trial, and upon this ground he obtained a discharge on a second writ of *habeas corpus*. The Appellate Division reversed the order of the Special Term sustaining this second discharge. 281 N. Y. S. 86 (1935). On appeal, reversed and the order sustaining the discharge affirmed. *Held:* The former trial placed the relator in jeopardy and he could not be retried for the same offense, notwithstanding the fact that the court had no jurisdiction to sentence him on Sunday. One judge dissented, asserting that the relator had waived his jeopardy by having the conviction set aside through his own initiative. *People ex rel. Meyer* v. *Warden of Nassau County Jail,* 269 N. Y 426, 199 N. E. 647 (1936).

At common law courts were forbidden to function on Sunday. *Swann* v. *Broome,* 3 Burr. 1595, 97 Eng. Rep. 999 (1764). In several states this rule still obtains, and it has been held that judgments entered on Sunday are void. *Higgenbotham* v. *State,* 88 Fla. 26, 101 So. 233 (1924); *Devault* v. *Sampson,* 114 Kan. 913, 221 Pac. 284 (1923) (judgment entered on plea of guilty); *Ex Parte Thompson* v. *Sanders,* 334 Mo. 1100, 70 S. W. (2d) 1051 (1934); *Moss* v. *State,* 131 Tenn. 94, 173 S. W. 859 (1915). This rule has long been confirmed in New York. N. Y. CONSOL. LAWS (Cahill, 1930) c. 31, §5; *People* v. *Luhrs,* 29 N. Y. S. 789 (1894); *People ex. rel. Martineau* v. *Brunnell,* 236 N. Y. S. 586 (1929), noted (1930) 15 Corn. L. Q. 288. But judgments may be entered on Sunday on a plea of guilty. N. Y. Laws (1930) c. 602; *People* v. *Wells,* 276 N. Y. S. 543 (1934).

In the present case, the former judgment being void and jeopardy having attached when the relator was arraigned and the jury sworn (*People ex. rel. Pulko* v. *Murphy,* 280 N. Y. S. 405 (1935)), *habeas corpus* was a proper remedy to raise the question of double jeopardy when he was charged with the same offense the second time. *Bens* v. *United States,* 266 Fed. 152 (C. C. A. 2d, 1920), *cert. denied,* 254 U. S. 634 (1920); *People ex rel Cohen* v. *Collins,* 265 N. Y. S. 475 (1933). But the fact that jeopardy has once attached does not necessarily preclude a new trial in every case. A new trial is not barred when the jury is discharged in cases of manifest necessity. 1 WHARTON, CRIMINAL LAW (9th ed. 1923) §§998 (3), 1035. Similarly, where the verdict of the first trial is a nullity, a second trial may be had. *Houston* v. *United States,* 5 F. (2d) 497 (C. C. A. 5th, 1925); *Allen* v. *State,* 13 Okla. Cr. Rep. 533, 165 Pac. 745 (1917). Where the court has no jurisdiction over the subject-matter of the trial, a defendant cannot plead double jeopardy. *Peterson* v. *State,* 79 Neb. 132, 112 N. W. 306 (1907); *Rudd* v. *Hazzard,* 259 N. Y. S. 18 (1932). The present case, as the dissent points out, is similar to those in which a court has lost jurisdiction because the term ended before the verdict was rendered. *In re Scrafford,* 21 Kan. 527 (1879); *State* v. *Jeffers,* 64 Mo. 376 (1877). A new trial was granted in these cases. In the instant case the trial was proper and valid up to the time the court lost jurisdiction by holding over into Sunday, and it would not seem unreasonable to

conclude that a new trial could be had.

But the dissent is not strictly accurate in saying that the relator waived his plea of double jeopardy by instituting proceedings on his own initiative to challenge the legality of his conviction, because the waiver doctrine is generally applied to cases where an appeal or writ of error is used to set aside the conviction. The doctrine rests upon the principle that a defendant who by his own act brings about a retrial in place of his conviction, cannot be heard to say he is then placed in double jeopardy, and thus go unpunished. See dissenting opinion, 199 N. E. at 650. To petition for *habeas corpus* in such a case is not to ask for a retrial, but is to deny the court's jurisdiction to hear the case at all. However, this reasoning has been applied even when *habeas corpus* has been used, and the technical distinctions between *habeas corpus* and appeal or writ of error have been disregarded. *Bryant* v. *United States,* 214 Fed. 51 (C. C. A. 8th, 1914); *Marshall* v. *State,* 73 Tex. Cr. Rep. 531, 534, 166 S. W. 722, 724, 1915A L. R. A. 526. Under the circumstances of the present case a practical solution would have been to allow a new trial to determine the guilt or innocence of the accused, instead of releasing him to go free.

RUSSELL PACKARD.

FOURTEENTH AMENDMENT — DUE PROCESS — CONVICTION BASED ON INVOLUNTARY CONFESSION.—[Federal] Defendants, three negroes, were coerced by torture of the most brutal nature, in which several deputy sheriffs participated, to confess to the commission of a homicide. They were indicted for murder. Counsel were hurriedly appointed. After a preliminary examination, the trial court admitted the confessions in evidence, and a conviction followed. The Supreme Court of Mississippi affirmed, holding that defendants should have requested the exclusion of the confessions and that the withdrawal of the privilege against self-incrimination is not a denial of due process. *Brown* v. *State,* 173 Miss. 542, 158 So. 339, 161 So. 465 (1935). On *certiorari* to the United States Supreme Court, reversed. *Held:* Convictions which rest solely upon confessions shown to have been brutally extorted by state officers are inconsistent with the due process of law required by the Fourteenth Amendment. *Brown* v. *Mississippi,* 56 S. Ct. 461 (1936).

A state criminal proceeding, perhaps more than any other, is a matter of purely local as distinguished from national concern. Nevertheless, it is well established that the due process clause of the Fourteenth Amendment is a definite limitation on state powers in this regard. *Cf. Twining* v. *New Jersey,* 211 U. S. 78 (1908) (the privileges and immunities clause of the Fourteenth Amendment does not restrict the state in its conduct of a criminal trial). Recently the Supreme Court has shown a tendency toward more frequent intervention in these matters. See Nutting, *The Supreme Court, The Fourteenth Amendment and State Criminal Trials* (1936) 3 Chi. L. Rev. 244. The instant case following as it does closely upon the famous *Scottsboro* decisions (*Powell* v. *Alabama,* 287 U. S. 45 (1932);

Norris v. *Alabama,* 294 U. S. 587 (1935); *Patterson* v. *Alabama,* 294 U. S. 600 (1935)), confirms this tendency and serves once more to focus interest on the supervisory power of the United States Supreme Court over state criminal proceedings.

A review of the state proceeding may be obtained, as in the instant case, by writ of *certiorari* from the Supreme Court to the state court of last resort. *Powell* v. *Alabama, supra.* A second method of obtaining review by the federal courts is by petition for *habeas corpus,* either in the federal district court (*Downes* v. *Dunaway,* 53 F. (2d) 586 (C. C. A. 5th, 1931)), or originally in the Supreme Court. See *Mooney* v. *Holohan,* 294 U. S. 340 (1935). Before this writ will be granted, however, it must appear that all remedies in the state courts have been exhausted. *Hale* v. *Crawford,* 65 F. (2d) 739 (C. C. A. 1st, 1933); *Mooney* v. *Holohan, supra* (petitioner must not only have appealed to the highest state court but he must have petitioned for *habeas corpus* in a state court); Comment (1935) 35 Col. L. Rev. 404. The accused may also remove from the state to the federal district court if he is denied the federal right by a state statutory or constitutional provision. This procedure has been strictly limited (*Virginia* v. *Rives,* 100 U. S. 313 (1879)) and has been little used in recent years.

The Supreme Court has shown extreme reluctance, except in cases where the violation of federal rights is apparent, to exercise its supervisory power over state criminal procedure. The Court's attitude is well expressed by Justice Holmes in *Ashe* v. *Valotta,* 270 U. S. 424, 426 (1926): "In so delicate a matter as interrupting the regular administration of the criminal law of the State—too much discretion cannot be used, and it must be realized that it can be done only upon definitely and narrowly limited grounds." The details of state procedure will not be interfered with. As was said in *Frank* v. *Magnum,* 237 U. S. 309, 340 (1915), "Repeated decisions of this court have put it beyond the range of further debate that the 'due process' clause of the Fourteenth Amendment has not the effect of imposing on the states any particular form or mode of procedure, so long as the essential rights of notice and a hearing, or the opportunity to be heard, before a competent tribunal are not interfered with." Thus it was held in *Hurtado* v. *California,* 110 U. S. 516 (1884), that to proceed by information rather than by a grand jury's indictment was not to deny due process. In *Maxwell* v. *Dow,* 176 U. S. 581 (1900), it was indicated that a state might constitutionally do away with trial by jury. *Twining* v. *New Jersey, supra,* established that the Fourteenth Amendment does not secure to an accused the privilege against self-incrimination or limit the states in the same manner that the first eight Amendments to the Constitution limit the federal government. Although the right to be present at the trial seems to be an element of due process (see *Hoyt* v. *Utah,* 110 U. S. 574 (1883)), defendant must show that his absence worked a substantial injury to his cause. *Snyder* v. *Massachusetts,* 291 U. S. 97 (1933) (defendant was not present at view), noted (1934 24 J.

Crim. L. 1102. Presence when the jury returns its verdict is not essential if the defendant waived the right. *Frank* v. *Magnum, supra.*

It is difficult to say, except in the most general terms, what constitutes a denial of due process by the state court. The Supreme Court will look at the whole case and will not interfere unless it appears that the state trial has been grossly unfair and the accused has been deprived of some fundamental right. See *Rogers* v. *Peck,* 199 U. S. 425, 434 (1905); *Herbert* v. *Louisiana,* 272 U. S. 312, 316 (1926). Systematic exclusion of negroes from jury service has been held a denial of due process. *Neal* v. *Delaware,* 103 U. S. 370 (1880); *Norris* v. *Alabama, supra;* Note (1935) 35 Col. L. Rev. 776. See Comment (1934) 29 Ill. L. Rev. 498. A judge cannot constitutionally have a direct pecuniary interest in a conviction. *Tumey* v. *Ohio,* 273 U. S. 510 (1927). Following a suggestion made in *Frank* v. *Magnum, supra,* the Court has held that mob domination of a state trial renders that trial a nullity and contravenes the Fourteenth Amendment. *Moore* v. *Dempsey,* 261 U. S. 86 (1923). Similarly, a conviction based on perjured testimony intentionally used by the prosecuting attorney cannot stand. *Mooney* v. *Holohan, supra,* noted (1935) 35 Col. L. Rev. 282, (1935) 25 J. Crim. L. 943. Where ignorant negroes were rushed through a trial to a conviction without the benefit of counsel they were held to have been denied due process. *Powell* v. *Alabama, supra;* Note (1933) 23 J. Crim. L. 841; Comment (1932) 31 Mich. L. Rev. 245. A state statute permitting conviction for syndicalism without supporting evidence has met with the Court's displeasure (*Fisk* v. *Kansas,* 274 U. S. 510 (1927)), as has an arbitrary presumption against the accused raised by a statute making criminal the leasing of lands to aliens. *Morrison* v. *California,* 291 U. S. 82 (1933); Comment (1934) 48 Harv. L. Rev. 102. See generally Nutting, *supra.*

The Supreme Court of Mississippi dismissed the constitutional objections in the instant case on the technical ground that, even if the admission of the forced confessions constituted a withdrawal of the privilege against self-incrimation, the Fourteenth Amendment was not contravened. But the United States Supreme Court properly refused to consider the case on any such narrow issue. "That complaint," it said, at 465, "is not of the commission of mere error, but of a wrong so fundamental that it made the whole proceeding a mere pretense of a trial and rendered the conviction and sentence wholly void." Again it said, "The rack and the torture chamber may not be substituted for the witness stand. . . . It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions so obtained was a clear denial of due process." The stock objections to Supreme Court action in these cases, *viz.,* that it infringes on state sovereignty, that it is a means of delay, and that it will cast an undue burden on the Supreme Court by a multiplicity of suits seem insignificant as one reads this decision. Admitting that such inconveniences exist, they would seem to be more than

justified by such a salutory result as was reached in this case. As long as such conditions as are described in this decision can exist in the administration of justice by the states, a supervisory power in the Supreme Court is both desirable and necessary.

C. IVES WALDO, JR.

CONSPIRACY—EVIDENCE NECESSARY TO SUSTAIN CONVICTION.—[Federal] One Nash, who had escaped from the federal prison at Leavenworth was apprehended by federal agents and was being returned to prison when three gangsters, armed with machine guns, attempted to effect his escape. In the ensuing fray three police officers, the prisoner, and one federal agent were killed. Defendants, although they did not participate in the attack were charged with conspiracy to violate a federal law providing that: "It shall be unlawful for any person to procure the escape of any prisoner properly committed to the custody of the Attorney General or to advise, connive at, aid, or assist in such escape, or to conceal any such prisoner after such escape." 46 STAT. 327 (1930), 18 U. S. C. A. §753 (i) (1935). The evidence tended to show that all of the defendants, some of whom were women, had been closely associated with the outlaws who committed the actual murders, and that they had rendered assistance to Nash during the time he was at large. It was shown that all of the defendants were of bad character. Evidence was introduced to show that defendants made telephone calls to the place of the murders shortly before they occurred. Defendants were convicted. On appeal, affirmed. *Held:* Conspiracy may be proved by circumstantial evidence. The evidence is sufficient to sustain the conviction. *Galatas* v. *United States,* 80 F. (2d) 15 (C. C. A. 8th, 1935). [*Certiorari denied,* 56 S. Ct. 574 (1936).]

The term "conspirators" apparently originated in the ordinance of 33 EDW. I (1274) which was directed against "confederacy and alliance for the false and malicious promotion of indictments and pleas, *etc.*" Blackstone defined it as the "crime where two or more conspire to indict an innocent man of felony falsely and maliciously, who is accordingly indicted and acquitted." Digby, *Law of Criminal Conspiracy in England and Ireland* (1890) 6 L. Q. Rev. 129, 130. But, in the *Poulterer's* case, 9 Co. Rep. 55 (1611), the Star Chamber held that an *agreement* for a conspiracy was itself indictable, whether the conspiracy was actually carried out or not. This concept of conspiracy was expanded and frequently used by the later English courts. WRIGHT, LAW OF CRIMINAL CONSPIRACIES AND AGREEMENTS (1873) 8. In fact, combinations designed to effect any ends which were generally considered unjust or pernicious were at first regarded as criminal conspiracies. Digby, *supra* at 134. The reason conspiracies were made criminal was generally due to the danger to the public, or to individuals, because of the increased power which resulted from the combination. *State* v. *Dalton,* 134 Mo. App. 517, 114 S. W. 1132 (1908); 2 BISHOP, CRIMINAL LAW (9th ed. 1923) 180; Holdsworth, *Conspiracy and Abuse of Legal Process* (1921) 37 L. Q. Rev. 467. It is now the well-established

common law rule that the crime is committed when there is an agreement to do an "unlawful act, or to do a lawful act by unlawful means." Lord Denman in *Jones* case, 110 Eng. Rep. 485, 487 (1832). This doctrine continued in use notwithstanding the fact that Denman had apparently repudiated it. See *Regina* v. *Peck*, 112 Eng. Rep. 1372, 1374 (1839). Many American states follow the common law rule that the unlawful agreement in itself completes the offense and that an overt act is not necessary. *People* v. *Cohen*, 358 Ill. 326, 198 N. E. 150 (1934); *Garland* v. *State*, 112 Md. 83, 75 Atl. 631 (1910); *Commonwealth* v. *Richardson*, 229 Pa. 609, 79 Atl. 222 (1911); *Smith* v. *State*, 8 Ala. App. 187, 62 So. 575 (1913); *State* v. *Dalton*, *supra*. Some state statutes, however, require an overt act. *People* v. *Miles*, 108 N. Y. S. 510 (1908); *People* v. *Johnson*, 22 Cal. App. 362, 134 Pac. 339 (1913).

In the federal courts the prosecution must show an overt act to complete the federal offense of conspiracy. 35 STAT. 1096 (1909), 18 U. S. C. A. 88 (1927); *United States* v. *Hirsch*, 100 U. S. 33 (1879); *Hyde* v. *Shine*, 199 U. S. 62, 76 (1905); *Hyde* v. *United States*, 225 U. S. 347, 359 (1912). Further, it has been held that to constitute a conspiracy against the United States the object of the unlawful agreement must be the commission of some offense against the United States in the sense only that it must be some act made an offense by the laws of the United States. *United States* v. *Lyman*, 190 Fed. 414 (D. C. Ore., 1911); *Heike* v. *United States*, 227 U. S. 131 (1913). The only case, other than the instant one, that has arisen under 18 U. S. C. A. §753 (i) (1930) is *Hale* v. *United States*, 65 F. (2d) 673 (1933). There, defendant was convicted of conspiracy to aid a prisoner to escape from a federal penitentiary by "smuggling in" to him some saws which he used to effect his escape. The evidence of the government was largely circumstantial, but the conviction was sustained on the ground that it was for the jury to decide the weight to be given to the evidence and witnesses. In the instant case the court said, "conspiracy is rarely susceptible of direct and positive proof, but may be proved by circumstantial evidence." Similar statements appear in *Smith* v. *United States*, 157 Fed. 721, 728 (C. C. A. 8th, 1907) (conspiracy to deprive certain citizens of their rights); *Feigenbutz* v. *United States*, 65 F. (2d) 122, 124 (C. C. A. 8th, 1933) (conspiracy to violate National Prohibition Act); *People* v. *Cohn*, *supra* (conspiracy to obtain money by false pretenses). There is even authority for convicting a person who has been only indirectly connected with the conspiracy. In *Tomplain* v. *United States*, 42 F. (2d) 202 (C. C. A. 5th, 1930), the court said: "Where a conspiracy is established but slight evidence connecting a defendant therewith may still be substantial, and if so, sufficient."

Conspiracy has become a sort of "catch-all" to punish all kinds of combinations considered socially dangerous. Chief among its uses in early times in this country was against labor disturbers. *Fischer* v. *State*, 101 Wis. 23, 70 N. W. 594 (1898) (threats of violence); *Loewe* v. *Calif. State Fed. of Labor*, 139 F. 71 (1905) (boycott); *Franklin Union* v. *People*, 220 Ill. 355,

77 N. E. 176 (1906). Since the determination of what is a conspiracy is largely a question of fact, we find that "the law of conspiracy certainly is in a very unsettled state. The decisions have gone on no distinctive principle nor are they always consistent." Justice Gibson in *Mifflin* v. *Commonwealth,* 5 Watts S. 461 (Pa. 1845).

Most of the evidence in this case was circumstantial; much of it tended but indirectly to implicate the defendants. But taken as a whole it seems clearly to establish that defendants actively participated in the conspiracy to aid in the escape and concealment of the prisoner, Nash. The instant case is thus an excellent example of the use to which a prosecutor may put conspiracy statutes. All members of a gang of criminals who contributed in any way to the perpetration of crime may be brought to justice, without the necessity of proving that each was present at the time the conspiracy culminated in murder, robbery or other specific offense. See also Note (1935) 26 J. Crim. L. 278.

RUSSELL BUNDESEN.

INSTRUCTIONS TO JURY—REASONABLE DOUBT—"BUSINESS TEST."—[Federal] In a prosecution for attempt to evade the income tax, after the case had been submitted to the jury, there was a request for further instruction on reasonable doubt. The court thereupon instructed the jury that if they were convinced of defendant's guilt to that degree of certainty upon which they would act in their own important affairs, then they were convinced beyond a reasonable doubt. The court then attempted to illustrate this standard by comparing reasonable doubt to the doubt which a juror might have as to whether a price offered for his property was as much as he could hope to obtain. The jury returned a verdict of guilty and judgment was entered accordingly. The above instruction was assigned as error. On appeal, reversed. *Held:* Such an instruction is erroneous as practically eliminating the doctrine of reasonable doubt. *Paddock* v. *United States,* 79 F. (2d) 872 (C. C. A. 9th, 1935).

Under Anglo-American law in criminal cases every man is presumed to be innocent until he is proved to be guilty. It is the duty of the court to instruct the jurors that to convict, they must be satisfied of the defendant's guilt beyond a reasonable doubt. An instruction on reasonable doubt that has received frequent sanction and has been quoted many times is found in *Commonwealth* v. *Webster,* 59 Mass. 320 (1850). Reasonable doubt, the court said, is "that state of the case, which, after the entire comparison and consideration of the evidence, leaves the minds of the jurors in that condition that they cannot say that they feel an abiding conviction, to a moral certainty, of the truth of the charge. . . . The evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgment. . . . This we take to be proof beyond a reasonable doubt."

An instruction sometimes approved is "there is a reasonable doubt when the evidence fails to satisfy the jury with such certainty that a prudent man would feel

safe in acting upon it in his own important affairs." This definition, designated the "business test," has been accepted to some degree in a number of jurisdictions. Some states permit reasonable doubt to be compared to the doubt which arises in the "important" or "graver" transactions of life. *People* v. *Lenhardt,* 340 Ill. 538, 173 N. E. 155 (1930); *Martin* v. *State,* 67 Neb. 36, 93 N. W. 161 (1903); *Commonwealth* v. *Green,* 292 Pa. 579, 141 Atl. 624 (1928); *State* v. *Harras,* 25 Wash. 416, 65 Pac. 774 (1901); *State* v. *Watson,* 103 W. Va. 482, 138 S. E. 117 (1927) (instruction unnecessary but not reversible error). Other jurisdictions consider such a standard too low a degree of care and require that this test be applied only to the "*most* important" affairs or to matters of the "*highest* importance." *Averheart* v. *State,* 158 Ark. 639, 238 S. W. 620 (1922); *Beneks* v. *State,* 196 N. E. 73 (Ind. 1935); *State* v. *Crockett,* 59 Ore. 76, 65 Pac. 447 (1901) (instruction undesirable but not so misleading as to constitute reversible error); *Nelson* v. *Commonwealth,* 153 Va. 909, 150 S. E. 407 (1929); see *People* v. *Albers,* 137 Mich. 678, 691, 100 N. W. 908, 913 (1904). Most courts that uphold the use of the business test feel that it elucidates the expression of reasonable doubt and aids the ordinary juror to a proper comprehension of what is implied by the term. See *Commonwealth* v. *Andrews,* 234 Pa. 597, 608, 83 Atl. 412, 415 (1912).

However, other jurisdictions wholly reject the business test. *Burchfield* v. *State,* 123 So. 281 (Ala. App. 1929); *Nelms* v. *State,* 123 Ga. 575, 51 S. E. 588 (1905); *Jane* v. *Commonwealth,* 59 Ky. 30 (1859); *People* v. *Montlake,* 172 N. Y. S. 102 (1918); *State* v. *Morris,* 41 Wyo. 128, 283 Pac. 406 (1929). The refusal to apply the test is based on two grounds. The first is that the judgment of reasonable men in the affairs of life, however important, is influenced and controlled merely by a preponderance of the evidence. In criminal cases something more is required, and consequently, use of the business test is likely to lead jurors to believe wrongly that they may convict on a preponderance of the evidence. See *State* v. *Morris, supra.* The other ground for rejection is that the phrase "reasonable doubt" is self-explanatory and any definition tends only to confuse the jury and render uncertain an expression which, standing alone, is intelligible and certain. See *Nelms* v. *State, supra.* The federal rule, as set forth in the leading case of *Hopt* v. *Utah,* 120 U. S. 430 (1886), approves an instruction using the business test when it is part of the more elaborate charge that "if you can reconcile the evidence with any reasonable hypothesis consistent with the defendant's innocence you should do so and in that case find him not guilty." Accord: *Shepherd* v. *United States,* 236 Fed. 73 (C. C. A. 9th, 1916).

For the jury to determine guilt by the business test is undesirable. It should not be reversible error when confined to important issues and when qualified by instruction. When it is the kind of judgment used in trivial commercial transactions it undermines reasonable doubt and should be cause for reversal. "Reasonable doubt" is clear and attempts to define it may lead to confusion. See 5 WIGMORE, EVIDENCE (2d ed. 1923) §2497.

GERTRUDE SIEBER.

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