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RECENT CRIMINAL CASES

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E. WAYNE SCHROEDER, Case Editor

EVIDENCE—ADMISSIBILITY OF DYING DECLARATIONS.—[Oklahoma] In a recent prosecution following a bank robbery the defendant attempted to introduce into evidence the dying declaration of a third party, made before the sheriff of another jurisdiction, confessing the crime for which the defendant was on trial. *Held:* The dying declaration was not made by the party whose death was the subject of the trial and the declaration was inadmissible as hearsay. *Newton* v. *State*, 71 P. (2d) 122 (Okla. 1937). The ruling of the court in this case is in accord with the majority rule in this country. WIGMORE, EVIDENCE (2d ed. 1933) §1430.

The hearsay evidence rule is applied in the instance where there is a statement made out of court testified to or produced in court to show the truth or falsity of the out of court statement: i. e., if in court *A* testifies that *B* reported or states that a certain event *X* occurred, *A's* testimony that *B* said certain things is good, but if this testimony is used to prove event *X* there is error, since this is hearsay evidence. WIGMORE, EVIDENCE §1361. There are at least three reasons usually recited in support of this rule: (1) The report of *B* was not given under oath; (2) There was no opportunity for cross-examination for the purpose of substantiating or qualifying the statements of *B;* (3) There has been no confrontation, a right guaranteed by most constitutions.

There are several exceptions to the general rule. Among these is the rule which admits a dying declaration in a homicide case when the death of the declarant is the reason for the trial. WIGMORE, EVIDENCE §1432. Clearly the principal case does not fall within this exception. Is there any reason why the exception should be thus limited in its application? The rationalization of the exception is usually presented under two main arguments: (1) The dying declarant is so near death as to be constrained to tell the truth; (2) it is clearly public necessity to admit the last words of the victim of a secret murder in order to convict the murderer who would otherwise be protected by the lack of eyewitnesses. Under the first argument the courts are generally very strict concerning the nearness of death and the knowledge on the part of the declarant that death is imminent. *Starkey* v. *People*, 17 Ill. 17 (1855); *Digby* v. *People*, 113 Ill. 123 (1885). In the case of the second argument, that of necessity, it is interesting to note in cases where there has been adequate

evidence of another nature, nevertheless the dying declaration of the victim was admitted in the case against the defendant. *Commonwealth* v. *Roddy,* 184 Pa. 274, 39 Atl. 211 (1898). In that case necessity was defined as being not the exigency of a particular case but the general necessity to preserve the public peace and prevent secret murders.

There has been another exception drawn by statute in certain states to allow the admission of a dying declaration where the declarant is the victim of a criminal abortion. OHIO CODE ANN. (Throckmorton, 1936) §12412-1. At common law if there was an indictment for criminal abortion and the introduction of the dying victim's declaration was necessary to procure a conviction the defendant would go free. *Railing* v. *Commonwealth,* 110 Pa. 100, 1 Atl. 314 (1885). If on the other hand there was an indictment for manslaughter on the same fact situation the dying declaration of the victim was then competent evidence to procure a conviction. It was the recognition of the ridiculousness of the technicality on the part of the legislatures which gave rise to statutes like the one cited above.

In the principal case the accused would have been acquitted if he could have shown that some person other than himself had committed the crime for which he was on trial. However, when he attempted to use the confession of a third party made on his deathbed; evidence which tended to prove that some person other than the defendant committed the robbery, he was met by this restrictive rule of evidence and precluded from thus proving his innocence. The reasons usually given for allowing dying declarations only when the declarant's death is the subject of the trial are these: (1) No oath. (2) No opportunity for cross-examination. (3) Such declarations are given on the point of death under the consequent physical and mental stress, when the memory may not be clear and the declarant's mind may be warped in its conclusions and opinions. (4) No opportunity for confrontation of the witness by the accused. (5) There is a clear opportunity for fraud. In the face of these objections most courts allow a dying declaration to be introduced into evidence in a homicide case where the declarant's death is the reason for the trial.

There must be some reason why these objections are strong enough to rule out evidence of this nature in a robbery case when they are not sufficient to prevent the use of the same sort of evidence in the homicide exception where a man's life may hang in the balance. Either the objections apply with greater force in one case than in the other or else the factor of necessity is stronger in one case than in the other. That there should be any difference in the force with which the objections apply seems highly illogical. Can there be any greater necessity for allowing such a declaration in a homicide case? In one breath the courts say that dying declarations make very objectionable evidence, and in the next they confine the use of such evidence to a case where a man's life is in issue. The courts apparently fear fraud in the ordinary criminal cases. There would be scarcely any greater chance for fraud in a robbery case than in a homicide case and it would seem to be more in keeping with justice to run the

risk of occasionally acquitting a guilty man rather than always to convict a man when, as in the principal case, the defendant's case was based to a large extent upon the dying declaration. There is some authority for the position opposite from the principal case. *Donnelly* v. *United States,* 228 U. S. 243, 277 (1912) (Holmes' dissent); *Hines* v. *Commonwealth,* 136 Va. 728, 117 S. E. 843 (1923): WIGMORE, EVIDENCE §1432 ff. It should be noted that these authorities require that there be some substantiating evidence which tends to support the truth of the dying declaration. In the principal case there was evidence which seemed to corroborate the confession of the third party; e. g., the confessor's wife testified that she had seen bank notes from the robbed bank in her husband's possession and certain implements such as an acetylene torch and hammer were found in the location described by the declarant.

In an old North Carolina case in which a father was suing for loss of services of his daughter by seduction the court admitted the girl's dying declaration to identify the defendant. When the defendant took an appeal on the basis of the strict rule confining the exception to criminal cases of homicide where the death of the declarant was in issue, the supreme court of the state was not bothered by the fact that the case was not even a criminal trial and admitted the evidence. The words of the court were these: "Can the practice of receiving it (dying declaration) to destroy life, and rejecting it where a compensation is sought for a civil injury, derive any sanction from reason, justice or analogy?" *M'Farland* v. *Shaw,* 4 N. C. 187, 190 (1815). It would seem that age has not weakened the force of this argument nor time removed its appropriateness. This rule has been followed in other cases in North Carolina as well as in Kansas. *Tatham* v. *Andrews Mfg. Co.,* 180 N. C. 627, 105 S. E. 423 (1920); *Williams* v. *Randolph and Cumberland Ry. Co.,* 182 N. C. 267, 108 S. E. 915 (1921); *Thruston* v. *Fritz,* 91 Kan. 468, 138 Pac. 625 (1914). See N. C. CODE ANN. (Michie, 1935) §160.

There is another exception to the general hearsay rule which might be used in such a case as the present one. It is the admission in evidence in a civil suit of the declaration of a third party made against his own pecuniary interest. It has been pointed out that the reason why the rule no longer applies to declarations against penal interest is because of an historical accident. WIGMORE, EVIDENCE §1476. Of course in the case where a declaration against penal interest is also a dying declaration, the argument that it is true because against the interest of the declarant is not so strong, unless he is a religious man. because the penal threat is removed. On the other hand there is no particular reason why a third party would confess a crime which he did not commit simply to free an accused man. Although the weight of authority is with the court in the principal case, it would seem that the weight of reason supports a conclusion opposite from the one arrived at in this case and many others like it.

EDWIN O. WACK.

FEDERAL CRIMINAL STATUTES — VALIDITY.—[Federal] The expansion of the Federal government into the field of crime has gone comparatively unnoticed by legal com-

mentators, in their focusing on the problems raised by government control in the fields of agriculture and industry. Recent Supreme Court and Federal court decisions have involved the validity and constitutionality of six major criminal statutes enacted by Congress in recent years.

(1) The Lindbergh Act (1934) 48 Stat. 781, 782, punishing the transporting of a kidnapped person in interstate commerce by the death penalty if the jury does not recommend mercy, and creating a presumption that state lines have been crossed where the victim has not been returned in seven days, was the basis of convictions in *Gooch* v. *United States,* 297 U. S. 124 (1936); *Bailey* v. *United States,* 74 F. (2d) 451 (C. C. A. 10th, 1934); *Kelly* v. *United States,* 76 F. (2d) 847 (C. C. A. 10th, 1935) The statute was also upheld in *United States* v. *Parker,* 19 F. Supp. 450 (D. C. N. D. N. J., 1937). The *Bailey* case considered and rejected the arguments that the statute was invalid because the sentence of life imprisonment imposed was "cruel and unusual" punishment within the prohibition of the Eighth Amendment and that the interstate commerce power does not embrace the statute.

The Fugitive Felon Act (1934) 48 Stat. 782, a part of the Lindbergh Act, punishes a person fleeing in interstate commerce from prosecution or to avoid testifying in felony cases. In *United States* v. *Miller,* 17 F. Supp. 65 (D. C. W. D. Ky., 1936) this was upheld as within the plenary power of Congress as to interstate commerce.

(2) The Anti-Racketeering statute (1934) 48 Stat. 979, was sustained by the District Court, Northern District Illinois, in *United States* v. *Gramlich,* 19 F. Supp. 422 (1937). This act makes it a felony punishable by one to ten years imprisonment or by fine of $10,000 or both, to obtain the payment of money or other valuable consideration by the use of threats or force, violence, or coercion when such conduct is in connection to any act in any degree affecting interstate or foreign commerce.

(3) Similarly, the Extortion Act (1932) 47 Stat. 649, which punishes the sending of threatening communications through the mails, was sustained in *Sutton* v. *United States,* 79 F. (2d) 863, (C. C. A. 9th, 1935).

(4) The National Firearms Act (1934) 48 Stat. 1236-1240, requires registration of machine guns, rifles and sawed-off shotguns and taxes dealers on the sale and the persons transferring such objects. *Sonzinsky* v. *United States,* 86 F. (2d) 486 (C. C. A. 7th, 1936) and *United States* v. *Adams,* 11 F. Supp. 216 (D. C. S. D. Fla., 1935) are convictions under the act.

(5) The constitutionality of the National Bank Robbery Act (1934) 48 Stat. 783, punishing the robbery of national banks and providing the death penalty where a person has been killed in such a robbery, has never been attacked, but a conviction thereunder was affirmed in *White* v. *United States,* 85 F. (2d) 268 (Ct. App. D. if C., 1936).

(6) The National Stolen Property Act (1934) 48 Stat. 794, in *United States* v. *Miller,* 17 F. Supp. 65 (D. C. W. D. Ky., 1936), punishes anyone who transports or causes to be transported in interstate or foreign commerce, stolen goods, securities or money to the value of $5,000 or more, knowing the same to be stolen. Also punished are those who receive or dis-

pose of such property, knowing the same to be stolen.

The power of Congress to pass such legislation is predicated upon the power to levy taxes and to control interstate and foreign commerce. The taxing power has not been so widely used as a basis of criminal statutes: the main examples, prior to the National Firearms Act, are the Anti-Narcotic Drug Acts. The Act of 1914, 38 Stat. 785, which made sales unlawful except to persons giving orders on forms issued by the Commissioner of Internal Revenue, was held to be a valid revenue measure, as its prohibitions bore a reasonable relation to the enforcement of the tax. *United States* v. *Doremus,* 249 U. S. 86 (1919). The Act, as amended in 1918 to levy, in addition to the occupation tax upon dealers and importers, a stamp tax upon the drug packages, was challenged in *Nigro* v. *United States,* 276 U. S. 332 (1928). But the Supreme Court definitely cleared the way for subsequent regulatory enactments based upon the taxing power by declaring that the right of a resident of a state to buy narcotics is subject to the power of Congress to lay an excise tax on its sale—and the legislation's constitutionality is not affected by the fact that it may incidentally discourage the use of the thing taxed.

More widely used as the source of criminal enactments by Congress has been the power over interstate and foreign commerce conferred in Art. I, §8(2), of the Constitution. The leading case under the commerce clause is *Gibbons* v. *Ogden,* 22 U. S. 1 (1824), which defined the broad character of that power in the words, at p. 188, " 'Commerce' describes the commercial intercourse between nations and parts of nations, in all its branches and is regulated by prescribing rules for carrying on that intercourse." Under the aegis of such a mandate Congress has seen fit to enact a multitude of criminal statutes based upon the commerce power.

Outstanding cases involving these examples, prior to those of the last decade, are: *United States* v. *Popper,* 98 Fed. 423 (D. C. N. D. Calif., 1899) upholding the prohibition against sending contraceptives in interstate commerce; The *Lottery* Case, 188 U. S. 321 (1903) by which the Congressional Act for the Suppression of Lotteries was validated; *Hipolite Egg Co.* v. *United States,* 220 U. S. 45 (1911) sanctioning the Pure Food and Drug Act of 1906; *Hoke* v. *United States,* 227 U. S. 308 (1913) and *Caminetti* v. *United States,* 242 U. S. 470 (1916) wherein the White Slave Traffic Act of 1910 was held to be within the commerce power; *Weber* v. *Freed,* 239 U. S. 325 (1915) in which the Congressional ban upon prize-fight films was upheld, and *Brooks* v. *United States,* 276 U. S. 432 (1925) which found the National Motor Vehicle Theft Act Constitutional. This current of decision leaves no modern support for such supposed barriers to Congressional regulation as was announced in *Anderson* v. *United States,* 171 U. S. 604 (1898), to the effect that interstate commerce must be *directly* affected before Congress may legislate to control.

The only real obstacle to the extension of the commerce power as has been done since 1932 would seem to be *Hammer* v. *Dagenhart,* 247 U. S. 251 (1918), which held that the act prohibiting transportation in interstate commerce of goods produced in factories em-

ploying child labor was invalid as encroaching upon the powers reserved to the states by the Constitution. There the causal connecnection between child labor and interstate shipment was held too indirect to justify Congressional interference. The evil, child labor, was complete before the goods were in interstate commerce and, therefore could not be a causal element. In all of the criminal statutes under consideration, the illegality of the criminal act for which punishment is sought is accomplished before transportation is accomplished, and under the ruling in *Hammer* v. *Dagenhart* (*supra*), had the Supreme Court seen fit to so limit the power of Congress, it might have done so.

The Supreme Court might have justified expansion of Federal power into the field of criminal law, hitherto a state matter, by holding that the individual violator himself was the evil which passed in interstate commerce. However, the Court was influenced by considerations of public policy as regards the individual state's inadequacy to cope with organized national crime. In line with the enlightened attitude of the Federal government toward our social and economic ills, it is reasonable to expect a further expansion of Congressional regulations over those matters touching the field of criminal law.

JEAN RODGERS.

JUDGMENT AND SENTENCE—DELAY IN EXECUTION—HABEAS CORPUS.—[Federal] The question of a prisoner's right to appeal from alleged improper detention arises once again. Petitioner was sentenced to six years in the Federal penitentiary and committed to the marshal for delivery, "forthwith." After being placed in the county jail, the petitioner was relinquished to the state officials who tried and sentenced him to the state penitentiary. Upon his parole over six years later, the United States marshal again took custody and incarcerated the prisoner in the Federal penitentiary under the original commitment, from which detention petitioner seeks a writ of habeas corpus. Denied in the district court. On appeal, reversed. *Smith* v. *Swope*, 91 F. (2d) 260 (C. C. A. 9th, 1937).

The Federal statute of June 29, 1932, provides that all prison sentences shall begin on the date of delivery of the prisoner to the designated penitentiary, except when prisoner is committed to a jail, "to await transportation." (1932) 47 Stat. 381.

It has long been held that a Federal marshal has no authority to act other than that given him by the order of the court. *In re Jennings*, 118 Fed. 479 (C. C. E. D. Mo., 1902), and certainly, the commitment in the present case gave the marshal no authority to postpone sentence or deliver the prisoner to state authorities. The question thus arises whether sentence can be satisfied by any other means than Federal imprisonment.

Whether the imprisonment is to be in a jail or a penitentiary goes to the nature and extent of the punishment and is of the essence of the sentence, for a penitentiary sentence is infamous. So there are pronouncements that a sentence to imprisonment in a penitentiary cannot properly be executed in a jail. *Ex parte Wilson*, 114 U. S. 417, 428 (1885); *In re Mills*, 135 U. S. 263, 267 (1890); *Gorovitz* v. *Sartain*, 1 F. (2d) 602 (D. C. N.

D. Ga., 1924). However, the marshal is under a duty to convey the prisoner within a reasonable time to the penitentiary. Prior to the statute, the Federal rule on sentences delayed in execution through no fault of the prisoner was that such delay would not work to the prisoner's detriment. *In re Jennings,* 118 Fed. 479 (E. D. Mo., 1902); *Ex parte Sichofsky,* 273 Fed. 694 (D. C. S. D. Cal., 1921) See *White* v. *Pearlman,* 42 F. (2d) 788 (C. C. A. 10th, 1930) (sentence of prisoner mistakenly discharged before expiration of his sentence continues to run while he is at liberty); *Gorovitz* v. *Sartain,* 1 F. (2d) 602 (D. C. N. D. Ga., 1924). The reasoning is that the prisoner had started service of his sentence and the improper action of the marshal could not cause its abatement. The ordinary practice for setting the commencement of sentence was that sentence should begin to run with delivery to the designated penitentiary. *Hynes* v. *United States,* 35 F. (2d) 734 (C. C. A. 7th, 1929); *Eori* v. *Aderhold,* 53 F. (2d) 840 (C. C. A. 5th, 1931); *Yutz* v. *Pearman,* 33 F. (2d) 906 (D. C. E. D. S. C., 1929). See (1902) 32 Stat. 397. There was sufficient variance, nevertheless, to provide the courts with a flexible rule. *United States* v. *Sautter,* 17 F. Supp. 326 (D. C. M. D. Pa., 1936) (credit given defendant for time spent in jail awaiting trial, defendant having been tried and sentenced prior to the 1932 Act); *United States* v. *Marrin,* 227 Fed. 314 (D. C. E. D. Pa., 1915); *In re Morse,* 117 Fed. 763 (D. C. Mo., 1902) (suspended sentence: term of beginning sentence is to be computed from time of actual incarceration, not from time unnecessarily fixed in the judgment). See *Bernstein* v. *United States,* 254 Fed. 967 (C. C. A. 4th, 1918) (court can subsequently change time fixed for commencement of sentence if for any reason execution has been delayed); *Miller* v. *Snook,* 15 F. (2d) 68 (D. C. N. D. Ga., 1926). Holdings that sentence started to run upon pronouncement, or at least commitment, were prevalent enough to allow courts to make use of them if the occasion demanded. *Dimmick* v. *Tompkins,* 194 U. S. 540 (1904) (sentence to hard labor in a state prison does not commence to run until arrival at prison and if prisoner secures a *supersedeas* pending appeal his detention meanwhile cannot be counted as part of his time); *Miller* v. *Snook,* 15 F. (2d) 68 (D. C. N. D. Ga., 1926) (prisoner sentenced to penitentiary, sentence to run from date of sentence).

Under the statute, however, a new obstacle obstructs similar holdings. A strict interpretation of it might well be made to read to the instant prisoner's detriment. The courts have, however, taken judicial notice of the fact that marshals are accustomed to make only periodic trips to the penitentiary with prisoners and, hence, of necessity, the prisoners are jailed, "to await transportation." *Trant* v. *United States,* 90 F. (2d) 718 (C. C. A. 7th, 1937). Since a sentence once started is continuous (assuming no fault on the part of the prisoner), *White* v. *Pearlman,* 42 F. (2d) 788 (C. C. A. 10th, 1930), the federal statute seems to leave the law unchanged in this situation. In the light of the probable intent on the part of the legislature not to affect these anomolous cases, the decision in this instant case can hardly be condemned.

State courts seem to hold more

rigidly to the idea that punishment is the essence of a prison sentence and the only means of satisfaction, regardless of delay not the fault of the prisoner. *Ex parte Vance,* 90 Cal. 208, 27 Pac. 209 (1891); *State* v. *Piper,* 103 Kan. 794, 176 Pac. 626 (1918); *State* v. *Birbiglia,* 155 La. 597, 99 So. 462 (1924); *Ex parte Holden,* 31 Okla. Cr. 133, 237 Pac. 622 (1925). However where the defendant has never been imprisoned after being sentenced, his subsequent arrest and commitment are valid. *Middleton* v. *State,* 60 Ark. 108, 254 S. W. 342 (1923) (unsatisfied sentence against one permitted to remain at large on bail may be enforced by subsequent arrest and commitment); *Mann* v. *People,* 16 Colo. App. 475, 66 Pac. 452 (1901) (defendant cannot escape punishment because of magistrate's failure to commit defendant to jail pending appeal); *Egbert* v. *Tauer,* 191 Ind. 54, 134 N. E. 199 (1921) (delay of judge in issuing commitment did not satisfy defendant's sentence); *Miller* v. *Evans,* 115 Iowa 101, 80 N. W. 198 (1901) (expiration of time of sentence from day fixed in judgment not a satisfaction thereof, when sheriff failed to issue mittimus); *Ex parte Underwood,* 94 Tex. Cr. 157, 248 S. W. 551 (1923) (defendant at large on appeal bond cannot claim his term began upon affirmance of sentence by appellate court). Both of these groups of cases are usually based on the rule that time for starting punishment is no part of the sentence, and thus can be varied after sentence is passed. *State* v. *Cockerham,* 24 N. C. 167 (1842). See WHARTON'S CRIMINAL PROCEDURE (10th ed., 1918) §1864; (1919) 3 A. L. R. 1572. There is a small minority, however, holding that delay of the state cannot impair the prisoner's "rights" and that the day on which the prisoner is sentenced will be reckoned as a part of his imprisonment. *Kirby* v. *State,* 62 Ala. 51 (1878); *Corporate Authorities of Scottsboro* v. *Johnson,* 121 Ala. 397, 25 So. 809 (1899) (time of sentence expired while defendant was at liberty by court order, pending payment of fine). See *State* v. *Snyder,* 98 Mo. 555, 12 S. W. 369 (1889) (defendant who submitted to erroneous sentence freed; jury had previously fixed term at six months, which time had expired); *Ex parte Myers,* 44 Mo. 279 (1869); *In re Webb,* 89 Wis. 354, 62 N. W. 177 (1895) (order of commitment made more than six months after the sentence, wherein defendant was sentenced to six months imprisonment or payment of a fine; held, order without authority, even though defendant failed to pay the fine).

The basis of many of the rigid state holdings is *Dolan's* Case, 101 Mass. 219 (1869) and *Hollon* v. *Hopkins,* 21 Kan. 459 (1879). Both involved attempts of escaped convicts to reduce their sentence for time spent at large. From such facts it is extremely doubtful whether these holdings were ever meant to extend beyond these unique facts. See *Hollon* v. *Hopkins,* 21 Kan. 459 (1879). A realistic, if unlegalistic opinion is *Ex-parte Bugg,* 145 S. W. 831 (Mo. App., 1912), in which the judge would decide each case upon its own peculiar facts, following such course as will best promote the ends of justice. While attractive, such lack of standard can hardly be condoned in the light of general policy.

Although the result of the present case seems acceptable, a better remedy is sugggested in *Gorovitz*

v. *Sartain*, 1 F. (2d) 602 (D. C. N. D. Ga., 1924), which would require the prisoner to seek habeas corpus and move to have his sentence carried out immediately upon unreasonable delay in execution, rather than wait until toward the end of his sentence to raise the objection. Such a rule seems commendable in that it would not be a burden upon the good faith petitioner, while it would serve to discourage bad faith applications.

JACK SIMONS.

TRIAL AND APPELLATE PRACTICE—REVERSIBLE ERROR.—[Federal] It has been said of appellate courts in this country that they "tower above the trials of criminal cases as impregnable citadels of technicality." *Kavanaugh, Improvement of Administration of Criminal Justice by Exercise of Judicial Power* (1925) 11 A. B. A. J. 217, 222. As an instance in support of this generality we offer a recent case in the Ninth Circuit Court of Appeals involving an appeal from a conviction under the Narcotics laws. *Ah Fook Chang* v. *U. S.*, 91 F. (2d) 805 (C. C. A. 9th, 1937).

The situation presented was as follows: the jury having been in deliberation for some five hours, the foreman came to the judge in his chambers and in the presence of attorneys for the defense and prosecution, informed the judge that the jury wished to be advised whether the confession of one of the defendants in the case could be considered as evidence against the other. (The latter was present and not in custody when the confession was given.) The judge, over defense attorney's objection, gave the same instruction on the matter that he had previously given in the course of the trial in open court, viz., that the confession of the one could be used as evidence against the other defendant. The foreman retired and a few minutes later the jury returned to the court room with a verdict against both defendants. The Circuit Court of Appeals felt that this incident required the granting of a new trial. Error was found in the fact that the transaction occurred in chambers without defendants personally present, whereas a trial is supposed to take place in a courtroom with defendants in attendance, providing they wish to be. The court was content with merely pointing out this error. Apparently it was not enough to require reversal in itself—probably just something, impliedly, to add to the other and more basic error, viz., the instruction to the jury in the absence of counsel. Counsel were absent, it was said, for the foreman relaying the instruction did so in the jury room where counsel were necessarily excluded. "On that theory reversal is required," the court stated.

The court had pointed out that not all error is reversible error. The next step, logically, would have been to have applied some test to determine if their second or basic error was reversible error. Had they proceeded in this manner they might well have asked, as a sensible test, "Has the error probably affected the verdict?" Applying that test here, the conclusion must be that the error does not call for reversal. The instruction as a matter of substance was not error; the error lay in giving it to the foreman alone to carry back to the jury, so that counsel could not be present when it was given the jury. Would the absence of this error have changed the ver-

dict? All counsel could have seen to was that the foreman tell the jury the evidence could be used. The jury's prompt verdict indicates they were told the evidence could be used, for they did use it without doubt. Thus presence of counsel, which would have prevented error, could not have affected the verdict; and under this test there was no reversible error.

Doubtless the court considered this line of reasoning, because the dissenting judge accepted and enunciated it. But still the majority felt that "the error may have been prejudicial." Without articulating any reason for that feeling, the court stated prejudice would be presumed. A case from the neighboring Tenth Circuit Court of Appeals, *Little* v. *U. S.*, 73 F. (2d) 861 (C. C. A. 10th, 1934) was cited as standing for a rule of presumption in such a situation. But a careful search through that case discloses no announcement of a rule of presumption. The incident involved in the *Little* case consisted of the judge's sending the court stenographer into the jury room to read the instructions from her notes. Probably this case is stronger on the facts as supporting reversal for error than the present case, for the reasons that the sanctity of the jury room properly must remain inviolate, and that it was altogether possible the stenographer had misread or wrongly emphasized portions of the instructions. But even if it is a fair factual precedent as showing a situation another court found to require reversal, no rule of presumption is used to get the result. The rule or phrase that is employed in the *Little* case as a guide is that where error occurs which within the range of a "reasonable possibility" may have affected the verdict, reversal is in order. This phrase was imported from the opinion of Mr. Justice Cardozo in *Snyder* v. *Massachusetts*, 291 U. S. 97, 113 (1933). No burden of proof was by this rule placed on the appellee as is true under the rule of presumption applied in the present case. Under the rule in the *Little* case the court must find a "reasonable possibility" of injury from error and may not "presume" it even though appellee has not shown absence of injury.

No mention was made in the present case of the Federal statute applicable, (1919) 40 Stat. 1181. The pertinent portion of this statute reads as follows: "On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." Divergent views have been expressed in various Circuit Courts of Appeal as to the effect of this amendment. *United States* v. *River Rouge Co.*, 269 U. S. 411, 421 (1925). A full consideration is given the two views in the *Little* case, *supra*. It is pointed out that some of the circuits, including the Ninth, have taken the view, since the amendment, that an appellant must establish affirmatively, substantial error and resulting prejudice. These Ninth Circuit cases, of which no mention was made by that court in the present case are *Marron* v. *United States*, 18 F. (2d) 218 (C. C. A. 9th, 1926); and *Miller* v. *United States*, 47 F. (2d) 120 (C. C. A. 9th, 1931). In the former case the following language is used

at p. 219: "It is argued primarily that every error is deemed to be prejudicial. Such a presumption does not arise." In the latter case the court says, at p. 121, "In the absence of a showing that substantial rights were prejudiced . . . appellant has no ground for complaint." Clearly these expressions show no rule of presumption had existed in the Ninth Circuit previous to the present case.

The other view, the one professedly adopted in the *Little* case, is to the effect that the amendment did not change the ancient doctrine of "harmless error" that had long pertained in the Federal courts. This idea appears in a sense fallacious. Under the doctrine of "harmless error" the whole record was examined, and if it was shown that no injury to substantial rights had resulted from the error it would be ignored. If there was no proof either of injury or of lack of injury from the error reversal would be in order, predicated upon a reasonable possibility of injury or upon a presumption of injury. The latter aspect of the doctrine of harmless error, presumed injury, had been the subject of much adverse criticism. First announced in England about 1835 in the highly technical Court of Exchequer, it was later adopted by other English courts and by most of the American courts. It was abolished in England by the Judicature Acts; but it continued to flourish in this country and was the gravamen of the "considerable agitation" which finally brought on the 1919 amendment to §269 of the Judicial Code. 1 Wigmore, *Evidence,* (2d. ed. 1923) §21; Sunderland, *The Problem of Appellate Review* (1927) 5 Texas L. Rev. 126, 147; Orfield, *Criminal Appeals* (1937) 27 J. Crim. L. 668, 675, 679. There can can be little doubt that the presumed injury aspect of the doctrine of harmless error was intended to be abolished by the amendment. Sunderland, *supra* p. 147. The Supreme Court of the United States has so declared. *Berger* v. *United States,* 295 U. S. 78, 82 (1935).

With an understanding of this background of the 1919 amendment it seems the court might well find in it a direction to them to reverse only in case a reasonable possibility of injury from error appeared. Probably no burden of proof of injury was intended to be placed on the appellant. Cf. *Haywood* v. *United States,* 268 Fed. 195 (C. C. A. 7th, 1920). But despite the ambiguous wording the least that can be said of the statute is that it indicates a public disapproval of technical reversals such as would often result if injury must be presumed.

It is true that the same result may be obtained whether the judge purports to follow the reasonable possibility of injury formula or whether he merely presumes injury. But under the former rule it is incumbent upon a judge, in good conscience, to show where lay the dangers of injury; he is called upon to articulate his "vague unrest." If it were made clear to the courts that this much is expected of them under the statute, and if they would accept the responsibility, it seems that a great step would be taken to lessen frivolous reversals. But, unfortunately, under our constitutional system of division of powers, nothing can be done about it if the courts refuse to enunciate clearly their reasons. No statute can en-

join upon them this duty; nor, indeed, can any statute eradicate technical reversals. Sunderland, *supra* p. 147; Orfield, *supra* p. 680.

It is common knowledge that not infrequently the real reasons do not appear in the opinion. This can hardly be called intellectual dishonesty; oftentimes the force moving the decision never arises above an emotional state, "an intuition more subtle than any articulate major premise," Justice Holmes was wont to say. This moving force is with difficulty put in words, if, indeed, it is commonly recognized. Sometimes it is recognized and expressed, but for fear of appearing to decide on "extra-legal" grounds, the decision, purportedly, is based on technical legal dogma. See Baker, *Reversible Error in Homicide Cases*, (1932) 23 J. Crim. L. 28.

The present case may be examined in the light of some of these extra-legal considerations. We are loath to believe that when the court said it would presume injury from an error that under no reasonable possibility could have injured the defendants, it had no laudable motive for employing such dialectics. But when an attempt is made to indicate what may have been the unexpressed forces moving the decision, forces that, perchance, the judge himself did not consciously consider, the ground becomes unsteady. However, a few suppositions will be indulged in of what might have been factors motivating the result. First, the defendants were members of the Chinese race, a mother and her son. Foreigners are often treated kindly by appellate courts. Baker, *supra* p. 33. Second, the officers searched the son's room without a warrant, finding opium on a table. "There is a dispute in the evidence as to whether or not the entry made by the officers was permissive." The court could not find evidence clearly showing the entry not to be permissive; but they might well have been skeptical that it was permissive, picturing the scene of a startled Chinaman suddenly confronted by police officers demanding entrance into his room, he well knowing damaging evidence of law violation was in full view on a table. But it was the Chinaman against the officers and the lower court had believed the officers; the appellate court had to accept, on paper, the finding that defendant had waived his constitutional right against unreasonable searches and seizures by permitting the entrance. Third, the signed statements of the defendants were obtained after a questioning lasting intermittently from 3 o'clock in the afternoon until midnight. Again it was mother and son against the officers on the issue of volition in the giving of the statements. Again the trial court had believed the officers and "the trial court's judgment thereon must be sustained." A possibility of oppressive before-trial treatment may elicit leniency in the appellate court. Baker, *supra* p. 43.

If it were known what the judges understood to be the condition of criminal investigation and administration in Hawaii, a better opinion could be given as to whether or not any of the above considerations influenced the decision. In the absence of any information on the subject of conditions there, it would seem to be a better guess that none of these factors was important in motivating the decision. Indeed, the nationality of the de-

fendants considered with the nature of the crime, and the apparent reasonableness of the police operations, would seem to militate for affirming the conviction.

At any rate the court indicated that the objection on which reversal was predicated, viz., the out-of-court incident, constituted a more serious question. In considering the unexpressed reason for reversing on this harmless error, the conclusion must be that here is another instance of the age-old conflict between formalism and teleology; between a system of administration calculated to guard against injustice generally, and justice in the particular case. (This conflict is peculiarly acute in criminal law where loss in the particular case may prevent the defendant from profiting later by a good precedent set at his expense, as he might do, for example, in the field of property law.) The court in the present case simply looked to form, and ignored effect in the particular case. Usually it cannot be said that a court is wrong in choosing one or the other of these approaches; it is a matter of fundamental differences. But there are instances where the result in the particular case is so absurd, and there is such slight possibility that the error will occur again to disturb the even course of administration, that one feels constrained to criticize.

Such an instance is the present case. However, not all the fault may be placed on the appellate court. There is little excuse for the lethargy of the trial judge in conducting part of the trial in his chambers; there is little excuse for the failure of counsel, both for prosecution and accused to object to the out-of-court procedure. (In fact counsel for defendants objected merely to the substance of the instruction, and by requesting that a different instruction be given in the chambers really invited the error.) But the upper court proved itself to be an "impregnable citadel of technicality" in failing to get a plausible result despite the errors of those below. Furthermore, its technique, first, of finding its decisive doctrine in a case which contained no such doctrine, second, of overlooking its own recent decisions holding that the doctrine did not exist in the Ninth Circuit, and third, of ignoring a statute which authorities had said outlawed such a doctrine in the Federal courts, can hardly be justified.

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