Journal of Criminal Law and Criminology

Volume 30
Issue 3 *September-October*

Article 11

Fall 1939

Recent Criminal Cases

RECENT CRIMINAL CASES

Edited by the
LEGAL PUBLICATIONS BOARD
NORTHWESTERN UNIVERSITY SCHOOL OF LAW

EDMUND G. PABST, Case Editor
LEONARD SHAPIRO, JOSEPH NELLIS } Ass't Editors

NONEXPERT WITNESSES IN INSANITY CASES.—[Tex.] The Texas Court of Criminal Appeals in *Winn* v. *State,* 126 S. W. (2d) 481 (1939) held that laymen, with no special knowledge of mental disorders, may still give their opinion as to an accused persons sanity or insanity. Although a five minute observation and conversation with defendant, it was observed, was not sufficient to express a nonexpert opinion, a person unskilled in the study of the mind could, after having a reasonable opportunity for observation, express his opinion as to the mental condition of the accused. While some jurisdictions limit nonexpert opinion to conclusions drawn from specific facts disclosed by observation or conversation *People* v. *Witte,* 350 Ill. 558, 183 N. E. 622 (1933); or require the witness to have reasonable time to observe the accused *Bass* v. *State,* 219 Ala. 282, 122 So. 45 (1929); *Langhorn* v. *State,* 105 Tex. Cr. R. 470, 289 S. W. 57 (1926); or be an "intimate acquaintance" of the accused *People* v. *Carskaddon,* 123 Cal. App. 177, 11 Pa. (2d) 38 (1932); or require the witness to have observed the accused at the time of the crime or for a reasonable period preceding it *State* v. *Aeschbach,* 107 N. J. Law 433, 153 Atl. 505 (1931), all jurisdictions allow non-professional observers to state their conclusions as to the mental condition of a person charged with crime.

It will be readily admitted that the most desirable procedure in insanity cases is one that will facilitate the judgment of the jury. Desiring reliable judgments then, are we to allow a lay-observer to give his own opinion as to whether the accused is or is not capable of having the mental element necessary to commit a crime? Generally nonexperts may not express their opinion on subjects about which they know little or nothing but lay-opinion in insanity cases has been an exception to this rule, for it was believed that a man's mental condition is a matter of common knowledge; that anyone who comes into contact with an insane person can tell in a reasonable time that such person lacks his mental faculties. *United States Smelting Co.* v. *Parry,* 166 F. 407, 412; 1 Wigmore, Evidence (2d ed. 1923) §568.

But how far are the unskilled and inexperienced witnesses able

to reach a reliable decision? There are forms of insanity of which the outward signs can be recognized only by those who are familiar and skilled in the field of mental disorders. Williams, *The Insanity Plea,* p. 26. All insane people do not live up to the concept of the raving mad which movies and novels develop. Likewise, insanity may be feigned and a layman, realizing the actor is not behaving normally, can easily be led to believe him insane. But where a layman may be fooled, an expert can detect a malingerer. John C. Goodwin, *Insanity and the Criminal,* pp. 88, 97.

Conversely, a true paranoid, for example, often has a defense pattern which is so subtle that a lay observer may be led to believe that the defendant is perfectly sane. The writer has had the experience of watching the majority of a university class in elementary psychology beguiled into believing, after conversation with a paranoid patient, that the latter was unjustly incarcerated in a State institution.

We allow an individual to testify that a person was apparently ill but we never allow a layman to say that one has some particular disease. If we believe that he is incompetent to give his opinion, based on his observations, as to the nature of a physical ill, he certainly should not be heard to speak on mental ills which in many cases are more difficult of comprehension. The classification and symptomatology of mental diseases can be approached with scientific perspective only by an expert.

The facts upon which an unskilled witness bases his conclusions may not be symptoms of insanity at all but may be merely due to the fact that a person is overwrought by an emotion or due to a weighty burden or a slight physical malady which makes the actions of the accused veer from the line of normality and hence leads the average man to suspect insanity; whereas the expert would not confuse the outward signs of a troubled or emotional mind with those of a diseased mind.

Nonexpert witnesses in insanity cases have also been an exception to the opinion rule—which disallows lay conclusions in matters of scientific specialty—because it was supposed that the facts upon which the opinion is based are of such a nature that they cannot be adequately presented to the jury; that the nonexpert cannot fully portray the outward manifestations of the deranged mind so that the jury can fully appreciate the queer antics upon which the observer has based his opinion. 4 Wigmore, Evidence (2d ed. 1923) §1934. Perhaps this may be a valid reason for allowing nonexperts to testify in insanity cases and give their opinion if experts were not available, but men trained and experienced in the study of mental disorders can now be procured, and their opinion, based on sufficient observation of the defendant coupled with the exactitude of a scientist eliminates the necessity of accepting the opinion of one who is not equipped to render a reliable decision. The courts, when they allow nonexpert opinions on the ground that a witness cannot explain why he believes one to be insane, admit that the witness has no objective tests of insanity and that his opinion of necessity must be visceral in nature.

The courts, realizing that there must be some point or limitation where culpability is erased by lack of responsibility, sought to devise legal tests to determine that point. In the earlier law the "wild beast" rule was in vogue. If a person was so deprived of his understanding and memory that he knew no more what he was doing than an infant, a brute or a wild beast, then he was not responsible for his social transgressions. *Rex* v. *Arnold,* 16 How. St. Tr. 695, 764 (1724). But as the law developed so did the rules of responsibility until today the law reports are replete with tests of various kinds. The most common is that the accused must be so deranged that he cannot distinguish between right and wrong (*People* v. *Marquis,* 344 Ill. 261, 176 N. E. 314, 74 A. L. R. 751 (1931)) or that the mental disease so destroys his power to choose that it alone causes the crime. *Boyle* v. *State,* 229 Ala. 212, 154 So. 575 (1934). All of the States are in agreement that mere mental weakness or slight subnormality does not immunize against responsibility for crime. *Daniels* v. *State,* 186 Ark. 255, 53 S. W. (2d) 231 (1932). Now what layman, even with a reasonable opportunity for observation, can safely give as his opinion that a person is on one side or the other of the point where culpability starts? Sanity is a norm, the deviations from which occur by imperceivable gradations, the measurements of which are subtle and at times uncertain. Maudsley, *Responsibility in Mental Disease,* p. 38 *et seq.* The courts do not always deal with the obvious cases but those on the borderline appear most frequently and offer the greatest difficulty. And yet it is with the latter that the unskilled, untutored, and inexperienced are permitted to give their opinion which at most could be but a belief unfounded in science or skill, a suspicion or mere guess.

Realizing that procedural reform is needed in criminal insanity cases, the Committee of the American Institute of Criminal Law and Criminology, appointed by Dean Wigmore, submitted an expert testimony bill for adoption. 30 Harvard Law Rev. 537 *et seq.* (1917); Bill approved by Dr. S. Sheldon Glueck in *Mental Disorder and the Criminal Law,* p. 487; Dr. Wm. A. White, *Insanity and the Criminal Law,* p. 143. This bill provides for expert witnesses called by the court, with fees paid by the county, to examine the defendant and render a written report on their findings. It gives ample time for investigation and would enable the experts to have at their disposal the fullest possible information about the individual to be examined. The enactment of this measure would assure unbiased, expert testimony and would provide the courts with a procedure which would be more likely to result in just decisions than the present practice. *Cf.* Expert Testimony Statute of the Committee on Medico-Legal Problems, 25 J. Crim. L. 467 (1934).

In civil cases the courts are quick to demand that a witness qualify himself as an expert before he is allowed to testify in a specialized field. *Piehl* v. *Albany R. Co.,* 162 N. Y. 617, 57 N. E. 1122 (1900); *Schwantes* v. *State,* 127 Wis. 160, 106 N. W. 237 (1906). But in criminal insanity cases, where the life of the accused may be at stake, or

an outrage against society may go unpunished, any man, with or without any special knowledge or skill is still allowed to express an opinion on a highly specialized and scientific matter. Thus it appears that courts deal more appropriately with property interests than with life or liberty.

E. R. REYNOLDS, JR.

ACCESSORY AFTER THE FACT—TRIAL AFTER THE ACQUITTAL OF PRINCIPAL.—[Colo.] Although at common law a conviction of the principal was necessary before there could be a trial of the accessory after the fact, by statute in most states the modern crime of accessory after the fact has been broadened into a substantive offense, apart from the principal crime. It is essential for the conviction of the accessory that the principal crime be proved beyond reasonable doubt, but conviction of the accused principal is not a prerequisite to trial of the accessory. *Hatchett* v. *Commonwealth,* 75 Va. 925 (1882); *Howard* v. *People,* 97 Colo. 550, 51 P. (2d) 594 (1935).

In the recent case of *Robert* v. *People,* 103 Colo. 250, 87 P. (2d) 251 (1939), one Roberts and one Wier were separately charged with murder and each accused the other of committing the offense. Roberts was tried and acquitted of the murder charge, but was then charged, under C. S. A. 1935, sec. 14, c. 48, as an accessory after the fact and Wier was named as principal felon. Upon the acquittal of Wier the information was amended, and the crime was alleged to have been committed by unknown persons. However, in spite of the amendment, the state offered evidence, which tended only to prove that the principal crime had been committed by Wier. Roberts was convicted of being an accessory and the conviction was upheld by a divided court, which observed that it was not prejudicial to charge that the principal crime had been committed by unknown persons and then to offer proof that it had been committed by Wier. The decision rested on the question of whether or not Roberts could be convicted as accessory after Wier had been acquitted of the principal offense; and this the court resolved affirmatively.

The issue raised is, what effect, if any, should conviction or acquittal of the alleged principal have in the trial of the accused accessory. The opinions of the courts differ widely and the decisions may be divided into three groups: first, that the verdict given in the principal's trial (especially if for acquittal) is conclusive evidence of the principal's guilt or innocence in the trial of the accessory; second, that it is *prima facie* evidence of the principal's guilt or innocence, but may be rebutted by the other evidence offered; and third, that the verdict in the principal's trial is not admissible into evidence in the trial of the accessory, and that the guilt of the principal must be established *de novo* at the subsequent trial.

Most of the early cases held that the final decision in the trial of the principal felon conclusively determined his guilt or innocence; and in the trial of the accessory, that matter was considered *res judicata.* Because it was a separate substantive crime, the accessory could be tried and convicted before the principal, but if the principal were subsequently acquitted it was gen-

erally held that the accessory must necessarily be released and all charges against him dropped. A number of the more recent decisions, including the dissent in the present case, and *Heyen* v. *State,* 114 Neb. 783, 210 N. W. 165 (1926), have followed this view arguing that it would be anomalous to allow the redecision of the guilt or innocence of the principal by means of this collateral method or for the law at once to hold the principal both innocent and guilty of the same offense.

Because of the presumption of innocence, and the general policy in criminal law of giving the accused every reasonable opportunity to prove his innocence, many courts have abandoned this first view and have allowed the accused to offer additional evidence to rebut the presumption of the principal's guilt created by the record of his previous conviction. *Terry* v. *State,* 149 Ark. 463, 233 S. W. 673 (1921); *Anderson* v. *State,* 63 Ga. 675 (1878). They allow this by reasoning that conviction and guilt are not necessarily synonymous, that if through some miscarriage of justice, a principal is wrongfully convicted, there should not be a second unpreventable wrongful conviction merely because of the first; consequently the accused accessory should be allowed to offer evidence to set aside this *prima facie* evidence of the principal's guilt. While this argument was originally offered for the benefit of the accused, it is capable of being inverted and used by the state against him. For just as conviction does not always prove guilt, acquittal does not invariably establish innocence. *Woody* v. *State,* 10 Okla. Cr. 322, 136 P. 430 (1913). The view taken today seems to be that a judgment for conviction and judgment for acquittal should be given equal value. *People* v. *Beintner,* 168 N. Y. Supp. 945, 36 Cr. R. 336 (1918). If on the trial of the accessory a judgment of conviction of the principal does not bind the defendant when offered by the state then a judgment of acquittal should not bind the state when offered defensively by the defendant. But if the acquittal is entered as *prima facie* evidence the state has the added burden of overcoming this presumption as well as the general burden of proving the case. Justice Buller in *An Introduction to the Law Relative to Nisi Prius* (6th ed. 1793) suggested that the presumption created by an acquittal be open to a collateral attack even when the presumption created by a conviction is not, and reasoned that a conviction is the result of the establishment of the proof of guilt but that an acquittal is not the result of a proof of innocence but only that for some reason the suit before the court has not been established beyond a reasonable doubt by the evidence.

However, the instant case goes further and eliminates all such presumptions of guilt or innocence by holding that the record of the acquittal should not even be entered into evidence in the trial of the accessory but that the principal crime must be proved entirely from evidence of witnesses who confront the accused at his trial. The Colorado court bases its decision on *People* v. *Beintner, supra,* which is based on *Kirby* v. *United States,* 174 U. S. 47 (1899). The Kirby case holds that under the Sixth Amendment to the Constitution, providing that "In all criminal

prosecutions the accused shall . . . be confronted with the witnesses against him . . ." a conviction in a larceny case could not be entered even as prima facie evidence against a person charged with the separate offense of receiving stolen goods since the accused was in no way connected with the other trial and evidence was not given in his presence. The Beintner case transfers this reasoning to the case of an accessory after the fact where the principal had been previously acquitted; and it seems open to question whether the reasoning can be logically so transposed that a constitutional provision, intended to give added protection to an accaccused, can be used against him to prevent him from admitting evidence in connection with which he has not been confronted with the witnesses for and against him. It would seem that the accused might waive the benefit of the provision, that it would be analogous to a judgment after a plea of guilty; it could hardly be contended that the provision should be extended so as to be a benefit to the state. The court justifies the transition by using the general argument (*supra*), that a judgment for conviction and a judgment for acquittal are of equal significance and that the accused cannot prevent the one from being entered into evidence and yet offer the other as evidence. While this might generally be the rule and while logically an acquittal might usually be more open to a collateral attack than a judgment for conviction, it could hardly be argued that there could be no expressed exception to this rule and it would appear that the provision in the Constitutional Bills of Rights would provide such expressed exceptions.

Another ground for upholding the decision that the principal's former acquittal should not be admitted into evidence is furnished in the case of *People* v. *Buckland*, 13 Wendell (N. Y.) 593 (1835); in that case the principal had been acquitted and the alleged accessory was being tried for withholding evidence of the offense from the authorities. The trial court refused to admit the acquittal into evidence and the Supreme Court of Judicature upheld the trial court by reasoning that since the judgment for acquittal was or may have been produced by the accused's own criminal act of withholding evidence from the authorities, he was estopped from pleading it. In the instant case it would seem logical to estop the defendant from pleading the acquittal of Wier since, by withholding evidence from the authorities and by assisting in the concealing of the crime, he aided in the procurement of that acquittal.

While the group of cases is comparatively small where an alleged accessory after the fact is tried after the one alleged as principal has been acquitted, there seems to be substantial and growing authority for holding that the record of the former acquittal should not be offered into evidence against the accessory. *People* v. *Buckland, supra; People* v. *Beintner, supra; Commonwealth* v. *Long*, 246 Ky. 809, 56 S. W. (2d) 524 (1933); and the instant case; although the cases are still decidedly split the three ways. Since the parties must establish the proof of the principal crime without the aid of former court record where the principal

has not been apprehended or tried, it would not, it seems, work a hardship on the parties to prove, and defend against proof, of the principal's guilt without the aid of court record after the principal trial. Since juries often acquit for other reasons than that they think the one tried is innocent, to allow the admission of an acquittal or conviction would give the evidence an unfair weighting, and one in whose favor it was admitted an undeserved advantage.

DONALD G. BAIRD.

EVIDENCE—ADMISSIBILITY OF EVIDENCE OF CONSPIRACY WHERE NO CONSPIRACY IS CHARGED IN THE INDICTMENT.—[Ill.] Defendant was indicted for malicious mischief, in that he injured and defaced a building and its contents. At the trial evidence was admitted which showed that the defendant had conspired with others to injure not only the building in question but others as well. Upon writ of error it was held that evidence of conspiracy is admissible even though no conspiracy is charged in the indictment. It was further held that the fact that such evidence may disclose other offenses does not alter the rule. *People* v. *Novotny,* 20 N. E. (2d) 34 (Ill. 1939).

The cases are legion in which the defendants have objected, because no conspiracy was charged in the indictment, both to the admission of evidence of a conspiracy to commit the crime charged and to the propriety of submitting the case to the jury on a conspiracy instruction. Uniformly the courts have overruled all such objections, have allowed the evidence, and have approved of instructions based thereon. *Ray* v. *Commonwealth,* 230 Ky. 656, 20 S. W. (2d) 484 (1929); *cf. Commonwealth* v. *Darry,* 221 Mass. 45, 108 N. E. 890 (1915); the decisions are collected in an extensive annotation to this case in 66 A. L. R. 1311. The rule is thus stated in Wharton, *Criminal Evidence* (11th ed., 1935) §725: "Neither is it necessary that the conspiracy be alleged in the indictment when that is not the charge being prosecuted and its existence is sought to be established merely as an incidental or evidentiary matter in that it is a foundation for the admission of acts and declarations of co-conspirators which depend on such conspiracy; it is sufficient for this purpose that the conspiracy is shown to exist in fact." The acts and declarations of the co-conspirators thus made admissible may be used as "substantive evidence against any co-conspirator on trial. When once the conspiracy is established the act or declaration of one conspirator or accomplice in the prosecution of the enterprise is considered the act or declaration of all and therefore imputable to all." Wharton, *Criminal Evidence* (11th ed., 1935) §700: For cases illustrating this theory see *Van Riper* v. *U. S.,* 13 F. (2d) 961 (C. C. A. 2d, 1926); *State* v. *Ritter,* 197 N. C. 113, 147 S. E. 733 (1929).

The rule of evidence where a conspiracy is shown is said to be the same as where a conspiracy is charged. *Robinson* v. *U. S.,* 33 F. (2d) 238 (C. C. A. 9th, 1929); *Gill* v. *State,* 59 Ark. 422, 27 S. W. 598 (1894). But since the evidence of conspiracy in no event can be admissible except to prove the crime charged, it seems sensible that the evidence should be explained to the jury where no conspiracy is

charged. And so the practice has been to instruct the jury as to the effect of the evidence. See 66 A. L. R. 1311, 1314. If no conspiracy is established the judge should admonish the jury to disregard the acts and declarations of co-conspirators. If a *prima facie* case of conspiracy is made out the evidence may go to the jury but in any event the court should instruct the jury that its competency will depend on a finding that the conspiracy exists in fact. *Burns* v. *Stage,* 155 Ark. 1, 243 S. W. 963 (1922); *Cook* v. *Commonwealth,* 240 Ky. 766, 43 S. W. (2d) 1 (1931); *People* v. *Baxter,* 245 Mich. 229, 222 N. W. 149 (1928); *Ormsby* v. *People,* 53 N. Y. 472 (1873).

While it may seem that failure to instruct the jury as to the purpose of admitting conspiracy evidence where no conspiracy is charged would be prejudicial to the defendant, precisely the opposite has been held. In *Powers* v. *Commonwealth,* 197 Ky. 154, 46 S. W. 436 (1922) the court said that failure to submit the case under a conspiracy instruction where there is evidence thereof, while not a good practice, is beneficial, not prejudicial, to the defendant because it merely meant that there was one less theory upon which the defendant could be convicted. This may be true in cases where a conspiracy instruction is used for the purpose of establishing some particular element of the crime, to make out one theory of the state's case. *Cook* v. *State,* 169 Ind. 430, 82 N. E. 1047 (1907). Cases of this type, where a conspiracy instruction is used to establish some particular element of the crime, are not infrequent. Thus in *Dorsey* v. *Commonwealth,* 13 Ky. 223, 17 S. W. 183 (1891) the court said: "It will be observed that the defendants were neither indicted nor tried for entering into a conspiracy. They were only charged with murder the language of which was in due form and the essential element of it is malice aforethought. The proof of conspiracy, if any, would be conclusive proof of such premeditation." And so in *People* v. *Looney,* 324 Ill. 375, 155 N. E. 363 (1927) the court instructed the jury that if they found a conspiracy it would establish a motive for the crime. Obviously, failure to make this type of instruction which is merely a judicial expression of the effect of certain evidence might be beneficial rather than prejudicial to the defendant. But on the other hand instructions on conspiracy evidence where no conspiracy is charged do not only serve the purpose of establishing essential elements in the state's case. They should also be used to warn the jury of the limitation upon the use of the conspiracy evidence, namely, that it is to be considered only in so far as it establishes the commission of the crime charged and that the acts and declarations of co-conspirators are not to be considered unless the conspiracy has been established in fact. Failure to precaution the jury as to such matters might more than offset the benefits to the defendant of the court's failure to set out the state's theory of the case.

The rule of the instant case, everywhere followed, is approved by the courts so mechanically and dogmatically that one might expect it to be above reproach. There are, however, two dangers in allowing evidence of conspiracy where none is charged. The first and

most serious objection to this practice which may and has been raised, is that the basic purpose of the indictment, namely, to inform the defendant of the crime with which he is being charged, is being disregarded. That the accused has a right to be informed about the nature and cause of the accusation against him, is fundamental. *Hurtado* v. *California,* 110 U. S. 516 (1884); and has been embodied in many state constitutions and statutes. The need for this obviously is to give the defendant opportunity to prepare his defense.

The problem involved in these cases, then, is whether or not the defendant may reasonably expect evidence of conspiracy. In this regard it seems highly important whether he was jointly indicted or is the only one charged with the crime. If the defendant was jointly indicted, though no conspiracy was charged, it does not seem unreasonable that the joint indictment would be sufficient notice of itself that there might be evidence showing a conspiracy. *Cook* v. *State,* 169 Ind. 430, 82 N. E. 1047 (1907). The court remarked that " . . . the allegations in the indictment showing that this crime was committed jointly by the parties named therein were sufficient to authorize the state to introduce any competent evidence to prove or sustain the conspiracy in controversy . . ." But where the defendant alone is indicted for the crime charged it is less obvious that he should expect and be prepared to defend against evidence of a conspiracy to commit the crime in question. This was recognized in *State* v. *Kennedy,* 177 Mo. 98, 75 S. W. 979 (1903), where the court observed that "the better practice is to make all the conspirators parties defendant to the indictment, or to aver therein the existence of such conspiracy, the parties thereto, if known, and their purpose, for then the defendant, on trial, will have reason to anticipate what evidence will or may be offered against him and prepare to meet the same, otherwise he will not." A perusal of the cases reveals that almost all of them involve joint indictments. Those few where the defendant is singly indicted, however, seem to lay down the same rule without recognizing that any different considerations are involved.

Secondarily, there is danger that the jury will be misled by the evidence and convict the defendant of a crime with which he is not charged, namely, conspiracy. This danger may, of course, be minimized by adequate instructions.

That both of these dangers may become serious where the rule is blindly followed is well illustrated in the case of *Ray* v. *Commonwealth,* 230 Ky. 650, 20 S. W. (2d) 484 (1929). The defendant Ray was indicted for robbery. The indictment stated "that the Defendant Ray was then and there present and near enough to and did unlawfully, feloniously, and fraudulently aid, abet, and assist his *co-defendants* to commit the robbery aforesaid." The defendant gave as his alibi that he was in Louisville some forty miles away from the scene of the robbery at the time of its commission. The court instructed the jury "that it might find Ray guilty if it should believe he entered into a conspiracy with George Gagnon to rob Vittitoe of his whisky and Gagnon did rob him as a result of such conspiracy, and

in pursuance thereof and while the same existed." The verdict as rendered by the jury read as follows: "We the jury find the defendant guilty of conspiracy and sentence him to six years in the penitentiary!" The trial judge in the presence of the jury altered it so as to read, "we the jury find the defendant Ray guilty as charged in the indictment and fix his punishment at confinement in the penitentiary for six years." The verdict as altered was then read to the jury and they were asked if that was what they meant and they answered in the affirmative. As the dissent points out under the instruction given "the defendant would have been convicted, although the jury may have believed his alibi, for the verdict which the court changed was that the jury found the defendant guilty not of robbery nor of aiding and abetting, but of conspiracy." The injustice is obvious for no one would believe that the defendant would have to be prepared to defend himself, beyond showing that he was not present at the scene of the crime nor so nearly so—aiding, assisting and abetting—as in fact to make him a joint principal with Gagnon.

The instant case represents one of that smaller group wherein the defendant was singly indicted and yet evidence of conspiracy was admitted though not charged. The court does not even discuss the question of whether or not the defendant was adequately informed to defend himself, or whether the jury may have been misled by the evidence of conspiracy. This may have been because there was sufficient direct evidence of the commission of the crime by the defendant; or it may have been because the court was beset by a corollary problem, namely, could the evidence of conspiracy admissible under the general rule, include evidence of other offenses? The majority held that it clearly could include evidence of other crimes. Three justices in a concurring opinion objected to allowing evidence of other similar offenses merely because the crime was committed pursuant to a conspiracy. They maintained that proof of other offenses must be justified as showing proof of a common design, or intent, or to negative a theory of accident; but in any case on considerations independent of whether or not the crime involved a conspiracy. But the minority seem to be engaging in legalistic hair-splitting; for if the other offenses revealed are part of the conspiracy, as they must be under any rule, they will necessarily show a common design.

CHARLES MARTIN.

COMMENT BY DISTRICT ATTORNEY ON FAILURE OF ACCUSED TO TESTIFY. —[Va.] The ruling in *Elliott* v. *Commonwealth*, 1 S. E. (2d) 273 (Va. 1939), that a comment by the district attorney on the failure of the accused to testify must be presumed to do irreparable harm to the defendant, and renders the case reversible *ipso facto*, aligns Virginia with the minority which clings tenaciously to what seems to be an erroneous rule of law. *Hunt* v. *State*, 28 Tex. App. 149, 12 S. W. 737, 19 Am. St. Rep. 815 (1889); *Angelo* v. *People*, 96 Ill. 209, 36 Am. Rep. 132 (1880); for collected cases, see 3 Am. Jur. 616, 84 A. L. R. 799.

The weight of authority holds

that such comments, though highly improper, may, when the evidence of defendant's guilt is clearly established, work no injury, where the trial judge promptly intervenes, excluding the comments and admonishing the jury to disregard them. In other words, comments of that kind stand on very much the same footing as other improper arguments, and whether they call for a reversal or not depends on whether, after a full consideration of all the circumstances, including the action of the trial judge at the time they were made, the appellate court is of the opinion that no prejudice resulted. *People* v. *Hoch,* 150 N. Y. 291, 44 N. E. 976 (1896); *Commonwealth* v. *Richmond,* 207 Mass 240, 93 N. E. 816, 20 Ann. Cas. 1269 (1911); for collected cases, see 3 Am. Jur. 616, 84 A. L. R. 795.

The rule, that comments on the accused's failure to testify are not allowed, is auxiliary to the privilege against self-incrimination, which came into the common law at a time when the defendant was not guaranteed the right to counsel, to confront the witness against him, speedy and public trial, nor any of the other safeguards which are now his. Masser, *Right of Prosecuting Attorney to Comment on the Defendant's Failure to Take the Stand,* 22 Cornell L. Q. 392 (1937). The privilege was incorporated into our State and federal constitutions, but there was no need for the rule in question because the defendant was not a competent witness until more than sixty years after our country was founded. 1 Wigmore, Evidence (2d ed. 1923) §579. This disqualification was universal until 1864, when Maine passed the first competency statute, granting the defendant the privilege of testifying if he so desired, and forbidding comments if he chose not to. Me. Stat. 1865, c. 280. Now by statute, constitutional provision, or decision the prosecuting attorney—and usually the court— is denied the right to comment on defendant's failure to take the stand in practically every state in the union. 4 Wigmore, Evidence (2d ed. 1923) §2272; for lists of the statutes, see Restatement, Administration of the Criminal Law (Tent. Draft No. 1, 1931) pp. 35 ff.

The statutes themselves, with the exceptions of those of Iowa and Oklahoma which embody the minority rule, do not mention the effect of a violation. Therefore, it appears that the legislative intent was that a breach of this trial rule should be treated as any other. And the general rule in all trials is that where an improper argument is addressed to the jury, the attention of the judge shall be called to it at once and he will permit it to proceed or end it, but in an event will adequately rule on it in the charge to correct any erroneous effect. *Commonwealth* v. *Richmond,* 207 Mass. 240, 93 N. E. 976, 20 Ann. Cas. 1269 (1911). No sound reason appears why this rule of practice should not apply to unwarranted arguments by the district attorney. At most this will be merely giving judicial sanction to realities, it being generally recognized that the jury considers the defendant's failure to testify. 4 Wigmore, Evidence (2d ed. 1923) §2272.

The argument so often advanced that such a comment renders the trial unlawful and hence reversible *ipso facto* begs the question. It is

merely an application of the theory that all statutes changing the common law must be interpreted strictly. This theory is one of inertia and maintenance of *status quo,* and should not, without further support, prevail over the legislative intent. This view is supported by the fact that nearly all of the states now have statutes providing for liberal interpretation. In the instant case, as pointed out by the dissent, there is an example of these statutes, which provides in part that, "No judgment . . . shall be arrested or reversed . . . for any error committed on the trial where it plainly appears from the record and the evidence . . . that the parties have had a fair trial on the merits and substantial justice has been reached . . .". Va. Code 1919, §6331.

The minority ruling seems to be a hold-over of the former Exchequer Rule, which made the law of evidence an end in itself—an end so independent of justice, and so superior thereto that it had to be maintained even at the cost of justice. *Crease* v. *Barrett,* 1 C. M. & R. 919, 932. The Exchequer Rule is based on fallacious theories, and its practical workings are lamentable, causing delay, expense, injustice, and popular distrust of justice. I Wigmore, Evidence (2d ed. 1923) §21. And yet the instant case is a glaring example of its tenacity.

Here, every requisite of the well established majority rule was fulfilled. It was conceded that the evidence presented by the Commonwealth was sufficient to sustain the verdict of the jury. The trial judge immediately intervened, adequately instructing the jury on defendant's privilege, excluding the comment and admonishing them to disregard it. The only basis for such a decision is the fact that an unjustifiable rule of law still survives.

W. McFARLAND.