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Criminal Law--Presence of Accused at Trial

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mortgage was not dependent upon the existence of an actual creditor. Had this more liberal interpretation been followed in the principal case, the conditional sale contract would have been void as to the trustee. Since the transfer had not been perfected under Washington law prior to the date of bankruptcy, a creditor of the bankrupt whose claim arose on that date could have obtained a lien on the property, and the trustee has the rights of such a creditor, whether or not such a creditor actually exists.

The interpretation of 70(c) given in the principal case fails to strike a proper balance between the interests of the secured and unsecured creditors of the bankrupt. If the principal case is followed, 70(c) would serve little useful purpose, since most transfers avoidable under 70(c) would be avoidable under 70(e), and where no actual subsequent creditors are in existence, secret liens or invalid transfers would be permitted to deplete the assets of the estate to the detriment of the general creditors. The proper balance would be struck, however, if the existence of an actual creditor were required only under Section 70(e). 70(e) could be used to avoid any lien or transfer voidable by an actual creditor of the bankrupt regardless of when the transaction was perfected. 70(c) could then be used to avoid any lien or transfer not perfected as of the date of bankruptcy whether or not an actual creditor exists who could have obtained a lien.

Harold Dale Brewster, Jr.

Criminal Law—Presence of Accused at Trial

D was convicted of statutory rape. At the trial, while instructions were being discussed, *D* voluntarily left the judge's chambers. His absence was discovered within four or five minutes. The judge suspended the proceedings and upon *D*'s return, the discussion of instructions resumed. On appeal, *D* maintained that his absence constituted reversible error. *Held*, reversed, new trial awarded. W. VA. CODE ch. 62, art. 3, § 2 (Michie 1961), requires that "a person indicted for felony shall be personally present during the trial therefor. . . ." The statute is mandatory and the right of the accused is inalienable. *State v. Vance*, 124 S.E.2d 252 (W. Va. 1962).

The concern regarding presence at trial reached its climax in West Virginia in the instant case. The court reluctantly reversed

the conviction and did so on purely technical grounds. It was said that any liberalization of the statute must come from the Legislature and not from the courts. Until an amendment, it must be presumed that the court's strict interpretation gives effect to the legislative intent at the time of the enactment of the statute. A fervid dissent in the principal case took the position that the West Virginia court is needlessly being consistent with a rule that no longer has a basis.

The "personally present" rule has its origin in common law. In English history, a prisoner in a felony trial had no right to the advice and assistance of counsel. The accused was required to defend himself and it was held that he must be present in court when any step was taken in his case, regardless of how insignificant it was. The old English cases were very strictly followed in the early decisions in America. In adhering to this rule the legislatures and courts lost sight of the reason upon which it was founded. Lehman, *A Critical Survey of Certain Phases of Trial Procedure In Criminal Cases*, 63 U. PA. L. REV. 609, 619 (1915).

The first Virginia case to take cognizance of the rule was *Sperry v. Commonwealth*, 9 Leigh 623 (1838). The court said that the rules applicable in England to trials for felonies were, in general, equally applicable in Virginia. A person accused of felony must be arraigned and must plead in person. It was required that the accused personally appear in all the subsequent proceedings. The rule became a statute in 1849. *Lawrence v. Commonwealth*, 30 Gratt. 845, 850 (1878), held that the statute was declaratory of common law.

West Virginia, from the first years of statehood, has applied the rule with the strictness of the old English courts and the early Virginia cases. See 45 W. VA. L.Q. 82 (1938), for a compilation of West Virginia cases.

The court had two possible alternatives in the instant case. It could have narrowed the interpretation of the word "trial" or considered *D's* voluntary absence as a waiver of his right to be present at that particular stage of the trial. If the court had taken the first course, it would have been necessary to repudiate *State v. Howerton*, 100 W. Va. 501, 130 S.E. 655 (1925). In the *Howerton* case, instructions were argued and acted upon by the trial court in the absence of the accused. The West Virginia Supreme Court of Appeals held reversible error.

In *Brown v. Maryland*, 225 Md. 349, 170 A.2d 300 (1961), *D* was not present at the argument of instructions. After instructions were read to the jury, counsel, in the presence of *D*, was asked if there were any exceptions. None were given. On appeal, *D* relied on *State v. Howerton, supra*, because article 5 of Maryland's Declaration of Rights has been construed as giving the accused the right to be present at every stage of his trial. Held, conviction affirmed. The Maryland court pointed out that the West Virginia court in the *Howerton* case cited *State v. Grove*, 74 W. Va. 702, 703, 82 S.E. 1019 (1914) as holding "The statute stands as it stood in the Virginias for years. . . ." Yet, Virginia arrived at an opposite conclusion less than three weeks before the *Howerton* case was decided. *Palmer v. Commonwealth*, 143 Va. 592, 130 S.E. 398 (1925).

The *Palmer* and the *Howerton* cases are factually similar. In the former, the court had adjourned for the day. Counsel, without *D*'s presence, argued instructions before the judge. The following day, the judge made his decision on the instructions, and in the presence of *D*, gave them to the jury. The Virginia court held that the argument of instructions was suspension of the trial and the court was not in session. It was said that the accused must be present at every stage of the trial proper, emphasis being placed on presence when anything is done which can affect the interest of the accused. The West Virginia court has refused to apply the statute when it considered the acts as not part of the trial. *State v. McHaffa*, 110 W. Va. 266, 157 S.E. 595 (1931). However, when given two factually similar cases, the West Virginia and Virginia courts took contrary positions. The statutes are derived from a common source, yet West Virginia's is applied with more severity.

The second alternative would be a waiver of *D*'s rights. In *State v. Sutter*, 71 W. Va. 371, 76 S.E. 811 (1912), the court reversed a conviction because the accused was not present when his counsel argued a motion to exclude state's evidence. The prisoner was sent for, and his counsel was requested by the Judge to repeat his argument in the prisoner's presence but counsel declined to do so. The dissent in the *Sutter* case set forth an interesting problem. In many instances, counsel are called to the bench and neither the accused nor the jury can hear what is transpiring. In those instances the prisoner is present, technically speaking, but he is just as much ignorant of what is going on as someone in the

next room. It was the dissent's opinion that no court would be so technical so as to reverse a decision in such a case.

There is no constitutional question involved in waiver. In *Synder v. Massachusetts*, 291 U.S. 97 (1933), *D* was convicted of murder. He was not present when the jury viewed the scene. Mr. Justice Cardozo, speaking for the majority, said that there is no ruling of the United States Supreme Court which assures the privilege of presence when presence would be useless. The Court said confusion of thought results when there is a failure to distinguish between requirements of presence that have their source at common law and requirements that have their presence in the federal constitution. The privilege of presence is not to be confused with the privilege of confrontation of witnesses in a trial.

The West Virginia Supreme Court of Appeals, in the principal case, has made it clear that if any liberalization is to come in this area, it will have to come from the Legislature. The following methods of procedure are possibilities. The Federal Rules of Criminal Procedure provide that the presence of the defendant is required at arraignment and at every stage of the trial, except as otherwise provided by the rules. If the offense is not punishable by death, the defendant's voluntary absence after trial has begun in his presence shall not prevent continuing the trial. FED. R. CRIM. P. 43. The American Law Institute Code of Criminal Procedure offers another basis for legislation. If the defendant voluntarily absents himself, except at his arraignment and when a plea of guilty is made, the proceedings may be had in his absence if the court so orders. ALI CODE CRIM. P. § 287 (1931).

Until some change is made, the state's criminal procedure is unduly impeded. No conflict of thought exists regarding the problems that this extreme technical point presents. The conflict exists only as to the method of correction. Without the desired legislation, the West Virginia courts will continue to reverse convictions on a rule, with its present interpretation, that no longer has a basis and which the court may have created.

Thomas Edward McHugh