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Constitutional Law - Rules of Evidence - Effect of Refusal for Request for Counsel on Admissibility of Evidence

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claim, then many cases would hold the claim to be extinguished.[8] But if, in fact, the settlement is only a release then the following results obtain: (1) if the cause of action is against concurrent wrongdoers, acting in concert, most courts would enforce the common law rule that a release to one is a complete surrender of any cause of action against the other;[9] (2) if the release is given to one not legally liable such release, per se, will not operate as a discharge to others who are responsible.[10] In the writer's opinion another result could also be reached: if the release is given to one not legally liable, such one in return, making a payment in full satisfaction of the releasee's claim, it would appear that no concern should be had with the legal efficacy of the release itself, but rather consider the release as merged in the satisfaction. Thus, essentially, the transaction would be only one of full satisfaction.

In view of the above observations, the following questions become pertinent when considering the facts and decision of the instant case: (1) did plaintiff intend the settlement to be a full satisfaction for the injuries sustained in the accident? (2) did plaintiff intend only that the settlement should operate as a release as to the parties making payment thereunder? (3) was the settlement intended to be a release plus a full satisfaction? The intent mentioned above should, it would seem, be determined in the light of the language of the settlement agreement, the amount paid, and the attending circumstances.

It is submitted that the above inquiries present questions of fact for jury determination.[11] Noteworthy also, the settlement could be taken as a prima facie acknowledgment of satisfaction and the burden placed upon plaintiff to prove that it was not.[12] In the instant case, however, the court on its own accord construed the settlement to be a release. In so doing, besides passing upon what were perhaps jury questions, the court obviated the defense that might be made upon subsequent trial as to the operation of the settlement as a full satisfaction of plaintiff's cause of action—*i.e.*, it had already been judicially determined that a release only was involved.

It would seem that the determining factor in any such case as that presented should be whether or not, in fact, plaintiff has been fully compensated. He should never be compelled to surrender his cause of action against any wrongdoer unless he has intentionally done so, or unless he has received full compensation therefor.

JAMES M. CORUM.

CONSTITUTIONAL LAW — RULES OF EVIDENCE — EFFECT OF REFUSAL FOR REQUEST FOR COUNSEL ON ADMISSIBILITY OF EVIDENCE.—Defendant, a 31-year-old college graduate with law school training, was arrested for murder and interrogated by police. His request for counsel was refused despite a statute making such refusal a misdemeanor. Shortly thereafter he signed a confession. The United State Supreme Court *held,* four justices dissenting, that a conviction

8. See note 6 *supra.*

9. Bee v. Cooper, 217 Cal. 96, 17 P.2d 740 (1932); Lisoski v. Anderson, 112 Mont. 112, 112 P.2d 1055 (1941); Aljian v. Ben Schlossberg Inc., 8 N. J. Super. 461, 73 A.2d 290 (1950).

10. Randall v. Gerrick, 93 Wash. 522, 161 Pac. 357 (1916).

11. See McKenna v. Austin, 134 F.2d 659 (D.C. Cir. 1943).

12. See Dwy. v. Connecticut Co., 89 Conn. 74, 92 Atl. 883 (1915) (Irrebuttable presumption).

based upon such a confession did not violate the due process clause of the Fourteenth Amendment to the Constitution where it was not shown that the refusal of counsel had a coercive or prejudicial effect on the defendant. *Crooker v. California,* 357 U.S. 433 (1958).

It is firmly settled that the right to counsel cannot be denied at trial without abridging the due process clause.[1] But the principal case leaves open the vexatious question of how far into the proceedings antecedent to the trial the right to counsel extends. The holding of the majority causes the right to vary in its nature, depending on such elements as the age, intelligence, and experience of the accused.[2] The question of whether a denial of counsel constitutes a deprivation of due process thus becomes one of fact to be determined on the basis of circumstances shown in each individual case.[3] The dissenting judges contend that denial of the right to counsel during interrogation by police should be deemed a denial of due process regardless of its effect on the accused. This rule has, at least on the surface, the greater virtue of certainty, and is prompted by the asserted gross injustices resulting from the use of third degree methods to extract confessions from innocent parties.[4] Yet, tempting as it is, it is subject to the cogent objection raised by the majority, that assuming such a rule were laid down, a single denial of the right to counsel would be a complete and permanent bar to conviction, since the error could not be corrected by the grant of a new trial.[5] The advisability of imposing such a sweeping penalty upon the state in cases where no actual prejudice can be shown to have resulted from the denial may well be doubted.

The law of North Dakota provides that the accused shall have the right to obtain an attorney at his request after being arrested.[6] However, since the vast majority of cases hold that a confession acquired by police officers who violate this law will support a conviction,[7] if the accused is to avail himself of the benefits granted to him by this statute he must bring a writ of mandamus,[8] or in some cases, a habeas corpus proceeding.[9] This presents an interesting paradox because without the aid of counsel the accused will, in most cases, be lacking in the necessary ability to utilize these remedies to obtain his rights as the legislature intended. Other deficiencies of the North Dakota statute are manifest when it is observed that it does not restrict the right of the accused to visit with his attorney at all *reasonable* hours;[10] does not contain a provision restricting this right in time of imminent danger of

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1. Chandler v. Fretag, 348 U.S. 3 (1954); see Beany, The Right to Counsel in American Courts, 89 (1955). This right is incorporated into all 48 state constitutions.
2. *Accord,* Gibbs v. Burke, 337 U.S. 773 (1949); State v. Magrum, 76 N.D. 527, 38 N.W.2d 358 (1949).
3. Cicenia v. LaGay, 357 U.S. 504 (1958).
4. See McNabb v. United States, 318 U.S. 332 (1942); Lisenba v. California, 314 U.S. 219 (1941).
5. Crooker v. California, 357 U.S. 433, 78 Sup. Ct. 1287, 1292 (1958) (dictum).
6. N. D. Rev. Code § 29-0502 (1943), see also §§ 29-0606, 29-0704.
7. Haley v. Ohio, 332 U.S. 596 (1948); McCleary v. State, 122 Md. 394, 89 Atl. 1100, 1103 (1914) and cases cited; State v. Neubarer, 145 Iowa 337, 124 N.W. 312 (1910).
8. People *ex rel,* Burgess v. Risley, 13 Abb. N. C. 186, 66 How. Pr. 67, 1 N. Y. Crim. Rep. 492 (1883); *cf.* State v. Board of State Prison Comm'rs, 44 Cal.2d 1, 273 Pac. 1044 (1929).
9. *Cf.* Application of Chessman, 44 Cal.2d 1, 279 P.2d 24 (1955); *Ex parte* Qualls, 58 Cal. App.2d 330, 136 P.2d 341 (1943); *Ex parte* Snyder, 62 Cal. App. 697, 217 Pac. 777 (1923); *Ex parte* Rider, 50 Cal. App. 797, 195 Pac. 965 (1920).
10. For statutes that so provide see Mo. Rev. Stat. § 544:170 (1949).

escape;[11] fails to provide for absolute privacy between the accused and his attorney;[12] and fails to put "teeth" into the law by rendering the officer who willfully refuses to allow the accused this right either civilly liable to the accused[13] or subject to criminal punishment.[14]

LYLE R. CARLSON

FRAUD — CRIMINAL RESPONSIBILITY — OFFENSES UNDER STATUTES PROHIBITING UNTRUE, DECEPTIVE, AND MISLEADING ADVERTISEMENTS. — Defendant corporation, a toy store, advertised merchandise as "20% to 40% off" by the display of signs in its store windows. Upon proof of sale of three articles at prices in excess of the prevailing price in the community, defendant was convicted under a penal law pertaining to deceptive and misleading advertising.[1] On appeal the New York Court of Appeals *held,* three justices dissenting, that defendant had the right to price merchandise and then discount it as was deemed appropriate, but could not, by the use of deceptive advertising, create the impression that its prices were lower than the prevailing price in the community. *People v. Minjac Corp.,* 4 N.Y.2d 320, 151 N.E.2d 180 (1958).

New York, as did most states,[2] enacted a variation of the *Printers Ink Model Statute,* which makes false advertising a criminal offense, after it became evident that losses from fraudulent advertising were enormous and that common law remedies did not furnish effectual reparation.[3] These statutes are directed against the advertiser;[4] the organ of dissemination is not subject to its terms.[5]

The policy behind these statutes is directed to the rectification of two evils: protect the public from entering into purchases and contracts to purchase based upon representations in deceptive advertising,[6] and protect advertisers from unfair competition occasioned by the use of such advertisements.[7] Since the purpose of the statutes is to prevent[8] deceptive advertising it is immaterial

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11. See Minn. Stat. § 481:10 (1949).
12. See Kansas Gen. Stat. Ann. § 62-1304a (1949).
13. See Idaho Code § 19:4115 (1947)
14. See Ohio Rev. Code § 2935:16 (Baldwins 1955).

1. N. Y. Penal Law § 421; North Dakota has substantially the same statute, N. D. Rev. Code § 51-1201 (1943). The constitutionality of these statutes was challenged on the basis of indefiniteness, but they were upheld. Commonwealth v. Reilly, 248 Mass. 1, 142 N.E. 915 (1924); Jasnowski v. Connolly, 192 Mich. 139, 158 N.W. 229 (1916).

2. *The Regulation of Advertising,* 56 Colum. L. Rev. 1018, 1058, 1098 (1956) (Forty-three states have adopted a version of the model statute); 36 Yale L. J. 1155, 1157 (1927) (North Dakota was one of the first adopting the statute in 1913).

3. See State v. Bacon Publishing Co., 141 Kan. 734, 42 P.2d 960 (1935).

4. People v. Wahl, 39 Cal. App.2d 771, 100 P.2d 550 (1940) (fact that others wrote ad and defendant acted on orders in causing it to be published is no excuse). N. D. Rev. Code § 51-1202 (1943) (punishment for one aiding another in violation of § 51-1201).

5. See State v. Bacon Publishing Co., 141 Kan. 734, 42 P.2d 960 (1935); Amalgamated Furniture Factories v. Rochester Times Union, 128 Mics. 673, 219 N. Y. Supp. 705 (Sup. Ct. 1927) (Newspaper which had sold advertising space may refuse to perform contract if advertisement is of prohibited character because it need not cooperate knowingly in the commission of a crime); Goldsmith v. Jewish Press Publishing Co., 118 Mics. 789, 195 N. Y. Supp. 37 (Sup. Ct. 1922) (organ of dissemination not required to censor advertisements, but intimation that publication after notice of unlawful nature of ad is an improper act for which there might be prosecution).

6. See State v. Andrew Schoch Grocery Co., 193 Minn. 91, 257 N.W. 810 (1934).

7. See People v. Glubo, 5 App. Div.2d 527, 174 N. Y. S.2d 159 (2d Dep't 1958).

8. *Ibid.*