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Constitutional Law—Due Process—Conviction of Crime Upon Involuntary Confession; Contracts—Release of One Joint and Several Obligor as a Complete Discharge of All the Co-Obligors; Municipal Corporations—Debt Limitations—Bond Issues; Rules of Court—Dismissal for Want of Prosecution

S. J. K.

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RECENT CASES

CONSTITUTIONAL LAW—DUE PROCESS—CONVICTION OF CRIME UPON INVOLUNTARY CONFESSION. The four defendants and other negroes were arrested on suspicion of robbery and murder. At the end of an all night session following five days of fruitless questioning, where the defendants were separately interrogated in a room, surrounded by four to ten white men, they confessed to the crimes. The issues of fear of personal violence and duress were submitted to the jury. They found that the confessions were voluntarily made. The conviction was affirmed by the Supreme Court of Florida. The defendants were granted a review by the Supreme Court of the United States which *held:* ". . . the drag net methods of arrest on suspicion without warrant, and the protracted questioning . . . of these ignorant young colored tenant farmers, . . . where as prisoners they were without friends, advisers, or counselors, and under circumstances calculated to break the strongest nerves and the stoutest resistance," made their confessions "involuntary" and their conviction by the use of such confessions was a denial of "due process" in violation of the Fourteenth Amendment of the Federal Constitution. *Chambers v. Florida,* 60 Sup. Ct. 472 (1940).

In Washington the admissibility of confessions is governed by statute. REM. REV. STAT. § 2151: "The confession of a defendant made under inducement, with all the circumstances, may be given as evidence against him, except when made under the influence of fear produced by threats; but a confession made under inducement is not sufficient to warrant a conviction without corroborating testimony." Washington, Hawaii, and Indiana appear to be the only jurisdictions which have made such a radical departure from the common law rule which excludes any confession made under any circumstances that might influence the confessor to falsify it. Wigmore believes that this is a desirable reform. 3 WIGMORE, EVIDENCE (3rd ed. 1940) § 867.

The Washington cases indicate that *only* threats of physical harm are operative to exclude the confession; that the threats must be such as would be likely to induce a false confession, *State v. Coella,* 3 Wash. 99, 28 Pac. 28 (1891); that the threats can be communicated by conduct as well as by words, *State v. Coella,* 8 Wash. 512, 36 Pac. 474 (1894); a confession obtained by placing the defendant in the "dark hole" is "involuntary," *State v. McCullum,* 18 Wash. 394, 51 Pac. 1044 (1897).

On facts approaching those of the *Chambers* case our court has held: That the confession is admissible even though made under promises and inducements when there is no showing that it was made under the influence of fear produced by threats, *State v. Coss,* 12 Wash. 673, 42 Pac. 127 (1895); the necessity of testifying to an act in a civil trial to protect the defendant's interest is not sufficient to make the confession "involuntary," *State v. Hopkins,* 13 Wash. 5, 42 Pac. 627 (1895); an ignorant Indian, uninformed as to his right to counsel, "voluntarily" answered questions on preliminary examination, *State v. Washing,* 36 Wash. 485, 78 Pac. 1019 (1904); a statement was admissible even though the defendant was not reminded that she was under arrest, that she was not obliged to reply, and that her answers would be used against her, *State v. Brownlow,* 89 Wash. 582, 154 Pac. 1099 (1916); questioning before the mayor, deputy sheriff, prosecuting attorney and others did not exclude the confession. *State v. Seablom,* 103 Wash. 53, 173 Pac. 721 (1918).

Yet one group of cases indicates that something other than physical coercion may be sufficient to make the confession inadmissible. Threats of cumulative sentences appear sufficient to exclude the confession. *State v. Miller*, 61 Wash. 125, 111 Pac. 1053 (1910); *State v. Miller*, 68 Wash. 239, 122 Pac. 1066 (1912); *State v. Harvey*, 145 Wash. 161, 259 Pac. 21 (1927).

In light of all the Washington cases it would appear that "continuous interrogation" without more would not be sufficient to exclude a confession obtained thereby. Under the ruling of the *Chambers* case such an interpretation of the statute will no doubt require modification.

Another problem, although not important to the decision, should be noticed. Whenever there is a controversy as to whether there was coercion in obtaining the confession, Washington, like Florida, submits the question to the jury. *State v. Elwood*, 193 Wash. 514, 76 P. (2d) 986 (1938) and cases cited therein. These cases do not seem to square with REM. REV. STAT. § 342: "All questions of law, including the admissibility of testimony, the facts preliminary to such admission, and the construction of statutes and other writings, and other rules of evidence, are to be decided by the court, and all discussions of law addressed to it." And independently of statute, general applicable principles indicate that the question of admissibility, even where the evidence of voluntariness is in dispute, should be for the court. 3 WIGMORE, EVIDENCE (3rd ed. 1940) § 861.

The rule of the local cases leads to the anomalous situation of permitting the jury to determine whether they should hear and consider a confession which in advance of such determination has been put before them. Moreover, the jury cannot be familiar enough with the confession rules to apply them accurately. 3 WIGMORE, EVIDENCE (3rd ed. 1940) § 861.

S. J. K.

CONTRACTS—RELEASE OF ONE JOINT AND SEVERAL OBLIGOR AS A COMPLETE DISCHARGE OF ALL THE CO-OBLIGORS. Plaintiff had recovered a joint and several judgment upon a promissory note against *A*, *B*, *C* and *D*. A release was given to two of the debtors, entitled "Release of Judgment as to Particular Defendants," declaring the judgment satisfied as against the defendants *A* and *B*. *C* and *D* moved that the judgment against them be satisfied pleading the release as a complete discharge of their liability. *Held*: A release with a reservation of rights does not operate to discharge the other non-contracting joint and several obligors. The reservation was found by implication of fact. *Johnson v. Stewart*, 1 Wn. (2d) 439, 96 P. (2d) 473 (1939).

At common law the general rule is that a release of one joint contract obligor operates as a release of all. *Clark v. Mallory*, 185 Ill. 227, 56 N. E. 1099 (1900); *Tancred v. First Nat. Bank of Ft. Smith*, 124 Ark. 154, 187 S. W. 160 (1916); *Dixie Cotton v. Jackson*, 25 Ga. App. 149, 102 S. E. 841 (1920); *Lewis v. Browning*, 223 Ky. 771, 4 S. W. (2d) 734 (1928); *Farmers' State Bank of Pawnee City v. Baker*, 117 Neb. 29, 219 N. W. 580 (1928). However, a covenant not to sue may be given to one such obligor leaving unimpaired the rights against the others. *Bozeman v. State Bank*, 7 Ark. 328, 46 Am. Dec. 291 (1847); *Security State Bank of Strasburg v. Groen*, 59 N. D. 431, 230 N. W. 298 (1930); *Snyder v. Miller*, —— Ind. ——, 22 N. E. (2d) 985 (1939). And the courts have recognized that a release with a reservation of rights is tantamount to a covenant not to sue. *Bradford v. Prescott*, 85 Me. 482, 27 Atl. 461 (1893); *Roseville Trust Co. v. Mott*, 85 N. J. Eq. 297, 96 Atl. 402 (1915); *Long v. Gwin*, 202 Ala. 358, 80 So. 440 (1918); *Simmons*

v. Sikes, 56 S. W. (2d) 193 (Tex. Civ. App., 1932); *Baldwin v. Ely*, 127 Pa. Super. 110, 193 Atl. 299 (1937).

Where the obligation is joint and several as in the instant case, arguably the common law rules as to unqualified releases should not be applied to the several obligations. A majority of the courts have held, however, that it does apply. 2 WILLISTON, CONTRACTS (2d. ed. 1936) § 334. The rationale suggested by these courts is that the debt is entire despite the joint and several form of the obligation. Having once received payment and granted a release the creditor should be barred from any further claim upon any of the obligors. *Middlebrooks v. Phillips*, 39 Ga. App. 263, 146 S. E. 653 (1929); Note (1928) 53 A. L. R. 1420, 1430. Actually, however, the debt is not entire but is made up, first, of the joint promises to pay, and second, of the promise of each obligor to be individually liable for the debt. In other circumstances, the courts recognize the several obligations imposed by joint and several contracts and allow suit against each debtor separately, holding that a judgment against him is not a bar to suit against the obligors unless satisfaction is had. If, however, the debt were entire, it would be necessary to join them in one action. The fallacy of regarding a release as satisfaction of the debt is apparent when one realizes that the consideration given for a release is only a part of the obligation. Further, the amount paid for this agreement reduces the original obligation as against all parties thus preventing a double recovery by the obligor in any event. Therefore the only justification for the rule—that the obligee should have but one satisfaction—is not properly applicable in this case.

Williston has suggested that a release given to one jointly and severally liable should release only the joint liability of his co-obligors. 2 WILLISTON, CONTRACTS § 334. There is case authority for this view: *Krbel v. Krbel*, 84 Neb. 160, 120 N. W. 935 (1909); *Tinkam v. Wright*, 163 S. W. 615 (Tex. Civ. App., 1914); *Gillespie v. Smith*, 229 Fed. 760 (1916); and it was adopted by the RESTATEMENT, CONTRACTS (1932) § 123. The Uniform Joint Obligations Act (adopted by New York, Nevada, Utah, Wisconsin) in effect so provides in §§ 4 and 5. And in a number of states, statutes have been adopted providing that a release of one joint obligor will not operate to discharge all of them. 2 WILLISTON, CONTRACTS, § 336. Under such statutes *a fortiori*, release of a joint and several obligor would not discharge the several obligations of the co-obligors.

The Washington court in *North Pacific Mortgage Co. v. Krewson*, 129 Wash. 239, 224 Pac. 566 (1924), followed the majority rule and held that the release operated as a complete discharge of the other joint and several obligors. In *North Pacific Public Service Co. v. Clark*, 185 Wash. 132, 52 P. (2d) 1255 (1936), it was held that a release with an express reservation of rights did not operate to discharge the other co-obligors. The court, in the instant case, apparently approved *North Pacific Mortgage Co. v. Krewson, supra*, but feeling that the rule there announced should not be extended, found a reservation of rights as against the other judgment debtors through a construction of the intention of the parties as expressed in the instrument.

It may be that in the light of the rule suggested by the modern authorities a revaluation of the merits of the different doctrines would be advisable, especially since, as recognized by our court in this case, the present rule is extremely harsh and the suggested modification would allow the

court more easily to effectuate the intentions of the parties. In the instant case, the court might better have expressly overruled the prior cases and adopted the modern rule rather than to attempt to reach the same result by finding a reservation of rights.

N. B. F.

MUNICIPAL CORPORATIONS—DEBT LIMITATIONS—BOND ISSUES. To retire bonds issued during 1929, Thurston County sought to issue refunding bonds providing that all the proceeds from the sale of the refunding bonds be used for payment of the outstanding issue and that the new bonds have the same right to annual levy of taxes to pay the same as the outstanding bonds. This action was brought to restrain the issuance of the new bonds, the complainant contending: First, that the county's indebtedness would be increased; second, that the new bonds would require a levy in excess of of the ten mills allotted a county under the Forty Mill Tax Levy Limitation (REM. REV. STAT., § 11238-1c). *Held:* Injunction denied. The bonds could be issued without violating either the constitutional debt limitation or the Forty Mill Limitation. *Eaton v. Thurston County*, 1 Wn. (2d) 178, 95 P. (2d) 1024 (1939).

The decision on the first point in effect overrules prior cases in this jurisdiction, *State ex rel. Jones v. McGraw*, 12 Wash. 541, 41 Pac. 893 (1895); *State ex rel Atkinson v. Ross*, 43 Wash. 290, 86 Pac. 575 (1906), which followed the minority view of *District Township of Doon v. Cummins*, 142 U. S. 366 (1892). Washington is now in accord with the great weight of authority in holding that refunding bonds do not increase a municipality's indebtedness. Note (1935) 97 A. L. R. 442.

As to the second point the court determined that the debt, and not the evidence of that debt, should govern; and therefore the refunding bonds should have the same right to levy beyond the county's ten mill authorization as had the old bonds. This decision is sound. A municipality can now effect savings to the taxpayers by securing better interest rates, as was true in the instant case; and bond issues that might otherwise be defaulted can be met. Although not considered in the opinion, the inference is that the refunding bonds could not carry a higher rate of interest than the old bonds. Hence there could be no greater burden on the taxpayers. Notes (1935) 97 A. L. R. 442, 458, (1936) 102 A. L. R. 672.

H. A. B.

RULES OF COURT—DISMISSAL FOR WANT OF PROSECUTION. Over one year after the defendant had filed his demurrer, the case still had not been noted for hearing. The defendant's motion to dismiss for want of prosecution was denied on the ground that under Rule III of the Rules of Pleading, Procedure and Practice, 193 Wash. 40-a, REM. REV. STAT. (Supp.) 308-3, the trial court could exercise its discretion in the matter. The defendant sought a writ of mandate to compel the Superior Court to grant the motion to dismiss the action. *Held:* Rule III, *supra*, is mandatory and the court is without discretion in the matter, and *must* dismiss the action. *State ex rel. Lyle v. Superior Court*, 104 Wash. Dec. 5, 102 P. (2d) 246 (1940).

The power of a trial court to dismiss an action for want of diligence in prosecution is generally recognized, even in the absence of statute or court rule granting this power. BOWERS, JUDICIAL DISCRETION OF TRIAL COURTS, (1931) 109, and cases cited therein. The Washington court, without any

discussion of the question, early accepted this doctrine. *Langford v Murphy*, 30 Wash. 499, 70 Pac. 1112 (1902). The common basis for the power is the duty of a plaintiff to expedite a final determination of his case. *Arthur v Washington Water Power Co.*, 42 Wash. 431, 85 Pac. 28 (1906); *Raggio v Southern Pac. Co. et al*, 181 Cal. 472, 185 Pac. 171 (1919). But the Washington court has also given abandonment as the reason for the rule. *First Nat. Bank v. Hunt*, 40 Wash. 190, 82 Pac. 285 (1905); *Peterson v. Parker*, 151 Wash. 392, 275 Pac. 729 (1929).

In the absence of statute or court rule, the power to dismiss for failure to prosecute an action was universally recognized as a *discretionary* one. BOWERS, *loc. cit. supra*. And Washington, prior to the adoption of Rule III, *supra*, took this view. *Loving v. Maltbie*, 64 Wash. 336, 116 Pac. 1086 (1911); *National Surety Co. v. Amer. Sav. Bank and Trust Co.*, 101 Wash. 213, 172 Pac. 264 (1918). Rule III, *supra*, which is now the law, provides that: "Any civil action shall be dismissed, without prejudice, for want of prosecution whenever the plaintiff or cross-complainant shall neglect to note the action for trial or hearing within one year after any issue of law or fact has been joined, unless the failure to bring the same on for trial or hearing was caused by the party who makes the motion to dismiss. Such motion to dismiss shall come on for hearing only after notice to the adverse party." Similar rules or statutes have been adopted in a number of jurisdictions. Note (1938) 112 A. L. R. 1158. Some have been held to be mandatory, *Christin et al v. Superior Court In and For Los Angeles County*, 9 Cal. (2d) 526, 71 P. (2d) 205, 112 A. L. R. 1153 (1937), and others merely directory, *Lambert v. Brown*, 22 N. D. 107, 132 N. W. 781 (1911); *Wisconsin Lumber and Supply Co. v. Dahl*, 214 Wis. 137, 252 N. W. 714 (1934), depending largely upon the wording of the particular rule or statute. The instant case is a clear, definitive holding that the Washington rule is mandatory, and the factual situation is a strong one, since the statutory period upon limitations of actions had run and the plaintiff was barred from bringing another suit. But the plaintiff could have made an even *stronger plea* had he offered some legitimate excuse for his laxity to justify the trial court's discretionary action. *See* 112 A. L. R. 1169.

A. T. B.

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Legal Institute and Bar Convention Meet Concurrently

The State Bar Convention and the Legal Institute, conducted under the joint auspices of the State Bar Association and the University of Washington Law School, will be held concurrently at Olympia, Wednesday, August 7, to Friday, August 9, 1940, inclusive. The consolidated program is announced elsewhere in this issue. Arrangements and entertainment are being provided by the Thurston-Mason County Bar Association under the leadership of J. T. Trullinger, President.

For a description of the hotel accommodations and reasonable rates, see announcement opposite title page.