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Criminal Law—Right to Counsel—Burden of Proof of Deprivation

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COURT OF APPEALS, 1957 TERM

further provided that violators could be prosecuted as disorderly persons. *Held*: the defendant charged with violation was validly convicted. The fact that end of speed zone signs were not up was not material since fair notice was given as to what the limit was within the village. Whether or not the "disorderly persons" portion of the ordinance was valid, defendant was not prosecuted thereunder and this provision was severable; hence, defendant could not complain.¹¹²

Personal Summation By Defendant Not Allowed When Represented By Attorney

In *People v. Richardson*,¹¹³ the defendant sought a reversal of a first degree murder conviction upon the ground that although represented by counsel, he had an absolute right to personally sum up to the jury. The Court held that no such right existed. The Court equated the constitutional right that an accused "shall be allowed to appear and defend in person and with counsel as in civil actions"¹¹⁴ to that right given a party in a civil suit. In a civil suit, a party has a right to appear personally but if the party has an attorney his participation will be allowed only at the discretion of the court.¹¹⁵ The Court, in the *Richardson* case found no abuse of the trial court's discretion in disallowing the defendant's participation and accordingly affirmed the judgment for conviction. To take a defendant's privilege to interfere out of the trial court's discretion would be disruptive of orderly court procedure and the proper administration of justice.¹¹⁶

Right to Counsel — Burden of Proof of Deprivation

In *People v. Prior*,¹¹⁷ the defendant was convicted and fined in a Police Justice Court upon a plea of guilty to driving while intoxicated.¹¹⁸ On appeal to County Court, the defendant stated in his affidavit of errors that "he did not have the benefit of counsel" and alleged generally that "he was not fully advised of his rights in the situation."

The Court of Appeals held that the defendant's allegation of "not having benefit of counsel" did not constitute matter to which the Police Justice need respond in his return.¹¹⁹ An allegation of "not having opportunity to secure counsel," however, would suggest that benefit of counsel was not waived¹²⁰ but deprived, thus requiring a specific response in the return of the police justice.

112. *People v. Lathrop*, 3 N.Y.2d 551, 170 N.Y.S.2d 326 (1958).

113. 4 N.Y.2d 224, 173 N.Y.S.2d 587 (1958).

114. N. Y. CONST., Art. I, §6.

115. N. Y. CIV. PRAC. ACT §236.

116. *Compare Webb v. Dill*, 18 Abb. Prac. 264 (1865).

117. 4 N.Y.2d 70, 172 N.Y.S.2d 155 (1958).

118. N. Y. VEHICLE AND TRAFFIC LAW §70(5).

119. N. Y. CODE CRIM. PROC. §756. Also see *People v. Marincic*, 2 N.Y.2d 181, 158 N.Y.S.2d 569 (1957); 7 BUFFALO L. REV. 122 (1957).

120. N. Y. CODE CRIM. PROC. §§335(2), 699(4).

Here, where the return of the police justice indicated that the defendant was informed of all his rights, including the right to counsel, the return was conclusive to all controverted matter within the police justice's knowledge in the absence of defendant's motion to correct alleged defects therein.¹²¹

DECEDENTS ESTATES AND TRUSTS

Recovery by Executor for Services of His Accounting Firm

The compensation which an executor or administrator is to receive for his services to an estate is set by section 285 of the Surrogates Court Act at a percentage of the total value of the property which the executor or administrator must handle in the course of his duties. This section makes provision for additional compensation for executors and administrators in two instances. First, when the executor or administrator is an attorney, he is allowed, in addition to his statutory compensation, reasonable fees for necessary legal services which he has rendered to the estate.¹ Secondly, when an executor or administrator is called upon to collect rents or manage property of the estate, he is allowed a fixed percentage of the rents or income so derived.² If the services for which an executor requests additional compensation do not fall within the provisions set forth above, the additional compensation is generally denied.³ However, this is not an inflexible rule, and if special circumstances justify compensation, a reasonable amount will be given.⁴

In *In re Tuttle's Estate*,⁵ Thomy, an accountant-executor was decedent's accountant for twelve years prior to decedent's death, and at the time of death was rendering services pertaining to an income tax deficiency suit in which decedent was involved. Thomy did not request or receive permission of the court to continue the accounting services for the estate, but with the consent of the two other executors and with no objection by decedent's widow (the principal beneficiary of the estate) he completed his services in the income tax matter and made an audit for the estate. After he had received payment for services rendered to decedent prior to his death and partial payment for the post death services, decedent's widow began proceedings to oust Thomy as executor claiming that his charges were excessive and constituted self-dealing. The surrogate found Thomy's charges for the accounting services to be reasonable and allowed them.

121. N. Y. CODE CRIM. PROC. §§757, 758.

1. N. Y. SURROGATE'S COURT ACT §285(b)(7), N. Y. CIV. PRAC. ACT §1548(a).

2. N. Y. SURROGATE'S COURT ACT §285(b)(1).

3. *Collier v. Munn*, 41 N.Y. 143 (1869); *In re Popp*, 123 App.Div. 2, 107 N.Y. Supp. 277 (2d Dep't 1907).

4. *Lent v. Howard*, 89 N.Y. 169 (1882).

5. 4 N.Y.2d 159, 173 N.Y.S.2d 279 (1958).