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there was nothing to establish that the driver's conviction in Massachusetts amounted to a violation of the New York statute.¹⁵ Other opinions indicate a similar judicial caution in revoking licenses for out-of-state offenses.¹⁶

It would seem probable that the section of the Wyoming statute will have little effect unless supplemented by procedures for the regular exchange of information between the enforcement agencies of the various states concerning convictions for traffic offenses.

ANGELYN AVERY

Waiver of Constitutional Right of Confrontation

The recent case of *People v. Valdez*¹ presents an interesting question regarding a waiver of the constitutional requirement that the accused be confronted with witnesses who testify against him. The defendants Valdez and Noriega were convicted of hi-jacking a truck load of walnuts and kidnaping the driver for the purpose of robbery while armed with a deadly weapon.

Both defendants confessed, and the confessions were introduced at the preliminary hearing. A police officer testified at the preliminary hearing that the confessions were made freely and voluntarily. He was not examined on this point either on voir dire or on cross-examination, and no objection was made to his testifying. Transcripts of the confessions were placed in evidence at the preliminary hearing without objection, and at the trial by stipulation.

On appeal to the District Court of Appeal of California, defendants claimed that the rule of confrontation was infringed at the trial by the insertion of evidence (confessions, and testimony of police officer) received at the preliminary hearing. The court held that the constitutional privilege of confrontation consists of the guaranty of an opportunity to cross-examine the witnesses, and does not include the observation of the witnesses' demeanor by the trier of the facts. Hence when the defendant in a criminal case gives his consent that secondary evidence of the testimony of a witness may be used against him at the trial he thereby waives the constitutional right of confrontation by such witnesses. If the opportunity for cross-examination has once been given, the right of confrontation has been satisfied.

Thus the question is presented, how and to what extent can the accused

¹⁵ The Appellate Division cited *Commonwealth v. Lyseth*, 250 Mass. 555, 558, 146 N. E. 18 (1925), in which the Supreme Court of Judicature of Massachusetts held that in a prosecution for operating a motor vehicle "while under the influence of intoxicating liquor," the commonwealth need not prove that the defendant was drunk. "Whatever difficulties there may be in framing with a precision a definition of the extent of inebriety which falls short of and which constitutes drunkenness, there is a distinction between that crime on the one hand and merely being under the influence of liquor on the other hand, which is recognized in common speech, in ordinary experience, and, in judicial decisions."

¹⁶ *Harrigan v. Fletcher*, 69 N. Y. S. (2d) 158 (1947) (motorist was convicted in Vermont for driving while under the influence of intoxicating liquor; revocation of the motorist's New York license annulled on the grounds that the Vermont magistrate had failed to warn him of the consequences of conviction; such warning was held necessary under New York law, even where the conviction occurred out-of-state); cf. *In re Wright*, 228 N. C. 301, 45 S. E. (2d) 370 (1947).

¹ *People v. Valdez*, .. Cal. ..., 187 P. (2d) 74 (1947).

waive his right to be confronted at his trial by those witnesses who testify adversely to him?

The authorities are in complete agreement that the right of the accused to be confronted by witnesses against him is a personal privilege which he may assert or waive as he sees fit.² The waiver may be made by express consent; for example, the accused might permit the reading of testimony taken at a preliminary hearing or at a former trial.³ Occasionally in order to secure an adjournment of trial or to secure a delay for additional time to prepare his defense, a defendant may consent to the examination of the complaining witnesses before the trial commences and waive his right to be confronted by them at the trial. Agreements of this nature between the attorney of the accused and the prosecuting attorney have been held to be binding, and to preclude the accused from invoking the confrontation rule on appeal.⁴

There seems to be an inherent danger in this type of agreement. Grasping at any straw for delay, an accused may agree to the taking of testimony by deposition without realizing that the deposition might assume great importance and even be sufficient to convict. It would seem that such agreements should be closely scrutinized by the courts not only when they are made to gain additional time but also when intended to speed up a trial and avoid a continuance.⁵ The cases have gone exceedingly far, even in one case to the extent of permitting a waiver by a person accused of murder when he asked that he be tried before the same jury and on the same facts as his co-defendant who had been previously tried and convicted. Such a request was held to be a waiver by the accused of his right to be confronted by the state's witnesses.⁶ A person accused of murder would certainly seem to be entitled to greater care in the determination of his guilt or innocence than merely taking the testimony of a witness in regard to another individual at another trial, and having it applied per se to the accused.

A waiver may be made by the accused when he fails to assert his right of confrontation in apt time. In one case the accused, who did not

² 5 Wigmore, Evidence (3d ed. 1940) §1398.

³ *Diaz v. United States*, 223 U. S. 442 (1912), leading case on waiver. The accused, who was charged with homicide, during the trial offered in evidence records of proceedings of a preliminary hearing and the proceedings before a justice of the peace. The testimony was offered by the accused because parts of it were favorable to him. But when the government introduced other parts of it to obtain a conviction the defendant attempted to invoke the confrontation rule. Held, that the right of confrontation is in the nature of a privilege extended to the accused rather than a restriction on him, and that he is free to waive it or assert as it may seem advantageous to him. Having once waived the privilege in order to allow the introduction of favorable testimony, he could not prevent introduction of the entire record. *Accord*, that the waiver is a personal privilege, *Bonar v. Commonwealth*, 180 Ky. 338, 202 S. W. 676 (1918); *People v. Brown*, 83 Cal. App. 236, 256 Pac. 569 (1927); *People v. Harris*, 302 Ill. 590, 135 N. E. 75 (1922); *People v. Czajkowski*, 342 Ill. 144, 173 N. E. 817 (1930); *People v. Malin*, 372 Ill. 422, 24 N. E. (2d) 349 (1939) [where defendants were represented by competent counsel, and all the evidence for the People was established by stipulation, without accused being warned of their constitutional right to meet adverse witnesses face to face, held not reversible error].

⁴ *People v. Sugarman*, 248 N. Y. 255, 162 N. E. 24 (1928).

⁵ *State v. Wagner*, 78 Mo. 644, 47 Am. R. 131 (1883); *State v. Mortenson*, 26 Utah 312, 73 Pac. 562 (1903).

⁶ *Bonar v. Commonwealth*, 180 Ky. 338, 202 S. W. 676 (1918). Apparently the reason for the request was the light prison sentence handed down by the jury at the close of the other trial.

speak the English language, sat mute along with his attorney through the entire trial, and neither of them informed the court that the defendant could not understand until all the evidence was presented. At this point in the trial a request was made that the accused be furnished with an interpreter; the court held that this delay in asking for an interpreter was a failure to assert the right in apt time and that the accused's right of confrontation was not infringed.⁷ It is admitted that court calendars are crowded and that time is precious, but it is probable that a conviction based on testimony which the defendant was unable to understand and evaluate would today be considered a denial of due process.⁸

The waiver may also be made if the defendant conducts himself in a way that does not seem to insist on the right of confrontation. Thus a defendant by voluntarily absenting himself from the court room during the progress of the trial would show a purpose not to insist on the right. Since the accused was afforded but failed to take advantage of an opportunity to meet the witnesses who testified against him, he had waived his constitutional privilege.⁹ This classification of waiver seems to be the most reasonable of the three; if the accused by indifference or neglect fails to take advantage of his opportunity to hear and meet those who testify against him it would seem that such a waiver was not prejudicial to his rights or interests.

Most courts draw no distinction as to whether the waiver, express or implied, was made by the accused or his attorney; or if made by the attorney, whether the accused or the court appointed him.¹⁰ The theory of waiver by counsel has been accepted by every state except Texas and Maryland. While upholding the right of a defendant in a criminal case to waive his constitutional right of confrontation by adverse witnesses, the courts of these two states have consistently refused to allow the waiver to be made by stipulation or by the admission of counsel.¹¹ Maryland and Texas courts consider the right of confrontation too important to be waived by implication, counsel, or by anything short of express waiver by the prisoner in open court; and have expressed considerable doubt whether the waiver should be permitted at all in a great many cases.¹²

The rule allowing a waiver of the right of confrontation seems to be well founded both in reason and precedent, but it is submitted that there

⁷ *Zunago v. State*, 63 Tex. Cr. 158, 138 S. W. 713 (1911). Held on appeal that it was altogether improbable in view of the testimony of the witnesses that the appellant could have in any way assisted his attorneys. Query? An interpreter would have been granted if the request had been made at any point prior to this time.

⁸ *Cf. Marino v. Ragen*, . . . U. S. . . 68 S. Ct. 240 (1947). Accused was arraigned in open court and advised through interpreters of the meaning and effect of the plea of guilty; the accused also signed a statement waiving a jury trial, and pleading guilty (so common law record recited). Accused was sentenced to life imprisonment. On review of a denial of habeas corpus it appeared that no attorney was appointed to represent him; that the waiver was not in fact signed by him, and that no plea of guilty had been entered at the trial. The accused was only 18 years old at the time of the trial, and had been in this country only two years. He did not understand the English language and it is doubtful whether he understood American trial court procedure. The arresting officer served as interpreter for the accused at the original trial. In view of the state's confession of error the Court held that due process under the Fourteenth Amendment had been denied.

⁹ *Yates v. Commonwealth*, 215 Ky. 725, 268 S. W. 676 (1918).

¹⁰ *People v. Murray*, 52 Mich. 288, 17 N. W. 843 (1883).

¹¹ *Bell v. State*, 2 Tex. App. 215, 28 AM. R. 429 (1877); *Allen v. State*, 16 Tex. App. 237 (1884).

¹² *Dutton v. State*, 123 Md. 373, 91 Atl. 417 (1914).