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Evidence-Privileged Communications-Husband and Wife

Evidence—Privileged Communications—Husband and Wife. This case came to the Supreme Court on a writ of certiorari to review a ruling of the District Court of Western Washington in a criminal trial, admitting in evidence against the accused, the petitioner here, a statement contained in a letter written by him to his wife, but proved by the testimony of a stenographer, reading from her notes, to whom petitioner had dictated the letter and who had transcribed it. The statement to which the witness was permitted to testify in the present case was a relevant admission by petitioner, probative of his guilty intent or purpose to commit the crime charged. It was therefore rightly received in evidence unless it should have been excluded because made in a communication to petitioner's wife. The government argues that the privilege does not exclude proof of communications between them, however confidential, by a witness who is neither the husband nor the wife. Held, that the testimony was admissible because of the voluntary disclosure of the communication by petitioner to a third person, his stenographer.[1]

The law of privileged communications, particularly as between husband and wife, has been and still is in some confusion. The general rule is usually stated to be that a husband or wife is an incompetent witness as to communications made between them.[2] This rule has been modified and interpreted to mean confidential communications,[3] and in some instances to include third persons who acquire knowledge of the communication.[4] The term communication has been held to include written as well as oral communications.[5] It is usually stated that the reason for the privilege is a public policy in protecting the mutual trust and confidence which gives rise to the communication.[6] Against this, however, must be balanced the advantage that a disclosure will result in a benefit to the judicial investigation of the truth.[7] This comparison of the advantages and disadvantages of making such communications inadmissible has its result in the rule that a third party who acquires knowledge of the communication in any manner is a competent witness to testify.[8] There are exceptions to this rule in the case of attorney and client,[9] and physician and patient.[10] In the former a clerk may not testify as to communications between his employer and client, when he gained such knowledge of the communication by virtue of his employment. In the latter the same is true as to the testimony of a nurse. It is upon these exceptions that petitioner bases his argument; that the testimony of the stenographer should be inadmissible.

Upon an examination of the cases, one of them being directly in point,[11] the inevitable conclusion is that a distinction must be drawn, and that the

1 Wolfle v. United States (1934), 291 U. S. 7.

2 Mercer v. Patterson (1872), 41 Ind. 440; Williams v. Riley (1882), 88 Ind. 290; Higham v. Vanosdal (1884), 101 Ind. 160; Orr v. Miller (1884), 98 Ind. 436; Burns Annotated Stat. of Ind. (1926), Sec. 550, No. 6.

3 5 Wigmore Evid. (2d ed. 1923), Sec. 2336.

4 Selden v. State (1889), 74 Wis. 271, 42 N. W. 218; Wilkerson v. State (1893), 91 Ga. 729, 17 S. E. 990; Bowman v. Patrick (1887), 32 Fed. 368.

5 Mitchell v. Mitchell (1891), 80 Tex. 101, 15 S. W. 705; Mercer v. State (1898), 40 Fla. 216, 24 So. 154; Stillman v. Stillman (1921), 187 N. Y. Supl. 383, 115 Misc. Rep. 106.

6 Gifford v. Gifford (1914), 58 Ind. App. 665, 107 N. E. 308; Scott v. Commonwealth (1893), 94 Ky. 511, 23 S. W. 219.

7 (1930) 19 Cal. L. Rev. 402.

8 State v. Wallace (1913), 162 N. C. 622, 78 S. E. 1; Commonwealth v. Sapp (1890), 90 Ky. 580, 29 A. S. R. 412; Commonwealth v. Griffin (1872), 110 Mass. 181; Taylor v. Winsted (1920), 74 Ind. App. 511, 129 N. E. 259; McCormick v. State (1916), 135 Tenn. 218, 186 S. W. 95.

9 Cocroft v. Cocroft (1924), 158 Ga. 714, 124 S. E. 346.

10 Culver v. Union Pac. R. Co. (1924), 112 Mo. 441, 199 N. W. 794.

11 State v. Young (1922), 97 N. J. L. 501, 117 A. 713; Drew v. Drew (1924), 250 Mass. 41, 144 N. E. 763.

petitioner's contention is untenable. Since the communication to be privileged must originate in the confidence of the marital relation, a voluntary disclosure of the communication to a third person would seem to negative the confidential nature of the communication.[12] There is no public policy which protects a communication that has its origin not in confidence, but in disclosure. A person's private stenographer cannot be said to bear the same relation to a husband and wife as a nurse bears to a physician and patient, or as a clerk does to an attorney and client. The stenographer is not an essential element to the carrying on of the relation of husband and wife, except perhaps as to business matters, and it has generally been held that communications as to business matters between husband and wife are not privileged and do not require the protection afforded by the privilege.[13] The privilege of an attorney or physician to hold their confidences immune from disclosure cannot be reasonably enjoyed without including the clerk and the nurse, respectively, in such privilege. No such reason applies to the relation of husband and wife. The Supreme Court states in the decision rendered in this case, "A husband and wife may conveniently communicate without the aid of a private stenographer."

The cases concerning written communications are in great confusion. Some jurisdictions hold that writings from husband to wife are inadmissible under any conditions;[14] other jurisdictions hold that such writings are inadmissible because of a particular statute,[15] and still others hold that such writings are admissible no matter the manner in which a third party acquires such writings or knowledge of them.[16] There is also a conflict as to when the communication is put into the hands of a third party by the connivance of one of the spouses.[17]

There is a tendency in the more modern cases toward a relaxation of the privilege and one is convinced that this is basically sound. There is no reason, in law or in fact, why the privilege should be in the nature of a blanket, covering every possible situation and affording protection in a great number of cases where the communication is not based on the purpose served by the privilege. The marital relation is not so unstable that it will be shaken by requiring a husband or wife, who wishes to keep a communication secret, actually to base his or her action on the privilege and thus make the communication confidential in fact. The tendency of the privilege is to prevent the full disclosure of the truth. It must be a strong policy indeed that will overcome one of the primary purposes of the law, that of the full disclosure of the truth, by allowing a person, in many instances a wrongdoer, to avoid the consequences of his own neglect by extending to him the protection of a privilege designed to protect the natural confidences of the marital relation; particularly when such person has, in making such communication, divulged it to a third person who is not a necessary element to the proper transmission of such communications.

It seems, therefore, that the Supreme Court has made a decision which is entirely in accord with the policy of the law in discovering the full truth and at the same time has not unduly jeopardized the trust and confidence of the marital relation. J. O. M.

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12 Gebhart v. Burkett (1877), 57 Ind. 378; Allison v. Barrow (1866), 43 Tenn. 414.
13 Gifford v. Gifford (1914), 58 Ind. App. 665, 107 N. E. 308.
14 Knapp v. Knapp (1916), 183 S. W. 576 (Mo.).
15 Campbell v. Chace (1879), 12 R. I. 333; Gross v. State (1911), 61 Tex. Cr. R. 176, 135 S. W. 373.
16 Commonwealth v. Sapp (1890), 90 Ky. 580, 29 A. S. R. 412.
17 People v. Hayes (1894), 140 N. Y. 484, 35 N. E. 951; Walker v. State (1911), 64 Tex. Cr. R. 70, 141 S. W. 243.