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Evidence - Privileged Communication between Attorney and Client - Publication of Illegally Obtained Confidential Communication

Gordon O. Hoberg

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EVIDENCE — PRIVILEGED COMMUNICTION BETWEEN ATTORNEY AND CLIENT — PUBLICATION OF ILLEGALLY OBTAINED CONFIDENTIAL COMMUNICATION. — An attorney and his client sought to restrain a New York joint legislative committee from making public a tape recording of a private consultation between the attorney and client in the county jail. The Court of Appeals of New York, three judges dissenting, *held* that the attorney-client privilege extends only to testimonial compulsion, and publication of a confidential communication by a state Legislative committee cannot be restrained. *Lanza v. New York State Joint Legislative Committee*, 3 N.Y.2d 92, 143 N.E.2d 772 (1957).

The privilege of confidential communication between attorney and client originated to protect the oath and honor of the attorney,[1] but since the 1700's it has belonged exclusively to the client[2] to provide him freedom from apprehension in consulting a legal advisor.[3] The privilege is based on the fact that any person ought to able, fully and freely, to disclose all the facts to his lawyer knowing that what he tells his lawyer cannot, over his objection, be extorted in court from the lawyer's lips.[4] Many states have enacted laws which protect a confidential communication between an attorney and his client.[5]

If the communication between attorney and client is subject to being made public,[6] or used in evidence against the client,[7] it will greatly jeopardize the administration of justice. In the recent case of *Hurt v. Oklahoma*,[8] Judge Nix stated that a great injustice was done by allowing an attorney to testify against a previous client as to privileged material. In the *Ex parte Snyder*[9] case the court held that failure to allow a defendant confined in jail to have private consultation with his counsel violates his constitutional rights.

The court's decision in the instant case is based upon a New York statute[10] which does seal the lips of the attorney and affords a privilege against testimonial compulsion, unless waived by the client.[11] The purpose of making the recording public was for future legislation and not for testimonial evidence, therefore the court held that the statute did not apply.

If an attorney and his client are deprived of absolute privacy while in jail or prison it will greatly hinder public justice.[12] It is submitted that public

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1. See Taylor v. Blacklow, 3 Bing N.C. 236, 249, 132 Eng. Rep. 401 (C.P. 1836).
2. See Duchess of Kingston's case, 20 How. St. Tr. 586 (1776).
3. Ammesley v. Earl of Anglesea, 17 How. St. Tr. 1139 at 1224-5 (1743). For a good discussion of the history of attorney-client privilege see, Radin, *The Privilege of Confidential Communication between Lawyer and Client*, 16 Calif. L. Rev. 487 (1928).
4. 8 Wigmore, Evidence § 2295 (3d ed. 1940).
5. *Id.* § 2292.
6. See Foster v. Buchele, 213 S.W.2d 738 (Tex. 1948).
7. See Carlisle v. Bennett, 268 N.Y. 212, 197 N.E. 220 (1935).
8. 312 P.2d 169, 184 (Okla. 1957) (concurring opinion).
9. 62 Cal. App. 697, 217 Pac. 777 (1923).
10. Civil Practice Act, §§ 353, 354; Section 353 provides that an attorney (and his employees) "shall not be allowed to disclose a communication, made by his client to him, or his advice thereon, in the course of his professional employment." Section 354 states: "The last three sections apply to any examination of a person as a witness . . ."
11. State v. Toscano, 13 N.J. 418, 100 A.2d 170 (1953).
12. See *Ex parte* Rider, 50 Cal. App. 797, 195 Pac. 965 (1920). "The right of an accused, confined in jail or other place of detention pending a trial of the charge against him, to have an opportunity to consult freely with his counsel without any third person, whose presence is objectionable to the accused, being present to hear what passes between the accused and his counsel, is one of the fundamental rights guaranteed by the American criminal law—a right that no legislature or court can ignore or violate."

policy and the preservation of attorney-client privilege, indicate that the judgment in the instant case should have been reversed.

GORDON O. HOBERG

HUSBAND AND WIFE — TORTS — HUSBAND'S RIGHT OF ACTION AGAINST WIFE. — In an action by a husband against his wife for injuries sustained due to her negligent operation of a motor vehicle, the Supreme Court of Arkansas *held*, that a statute providing that every married woman shall have the right to sue and be sued as though a femme sole[1] gives the husband a right of action against his wife. *Leach v. Leach*, 300 S.W.2d 15 (Ark. 1957).

At common law, because of the fiction that husband and wife were one, it was held that neither spouse could maintain an action against the other sounding in tort.[2] Married Women's Acts have been passed in all American jurisdictions, primarily to secure to a married woman a separate legal identity and a separate legal estate in her own property.[3] The decisions of the appellate courts of the nation are in hopeless conflict in the results they have reached as to the effect of these acts, even when the statutory language before them has been identical or substantially so.[4]

The majority of American courts hold that the Married Women's Acts have left unchanged the common law rule that neither spouse could maintain an action in tort against the other.[5] The reasons usually given for denying the action are that statutes in derogation of the common law should be strictly construed,[6], public policy is against disturbing domestic tranquility,[7]

1. Ark. Stat. § 55-401 (1947): "Every married woman and every woman who may in the future become married, shall have all the rights to contract and be contracted with, to sue and be sued, and in law and equity shall enjoy all rights and be subjected to all the laws of this State, as though she were a femme sole; provided, it is expressly declared to be the intention of this act (section) to remove all statutory disabilities of married women as well as common law disabilities, such as the disability to act as executrix as provided by Sect. 6 of Kirby's Digest (Sect. 62-205), and all other statutory disabilities."

2. Thompson v. Thompson, 218 U.S. 611 (1910); Austin v. Austin, 136 Miss. 61, 100 So. 591 (1924); Leonardi v. Leonardi, 21 Ohio App. 110, 153 N.E. 93 (1925); Fitzmaurice v. Fitzmaurice, 62 N.D. 191, 242 N.W. 526, 527 (1932) (dictum).

3. *E.g.*, Johnson v. Johnson, 201 Ala. 41, 77 So. 335 (1917).

4. McKinney v. McKinney, 59 Wyo. 204, 135 P.2d 940, 943 (1943) (dictum).

5. Thompson v. Thompson, 218 U.S. 611 (1910); Comment, 22 Yale L.J. 250 (1913); Spector v. Weisman, 40 F.2d 792 (D.C. Cir. 1930); Peters v. Peters, 156 Cal. 32, 103 Pac. 219 (1909); Ferguson v. Davis, 48 Del. 299, 102 A.2d 707 (1954); Webster v. Snyder, 103 Fla. 1131, 138 So. 755 (1932); Eddleman v. Eddleman, 183 Ga. 766, 189 S.E. 833, 836 (1937) (dictum); Hindman v. Holmes, 4 Ill.App.2d 779, 124 N.E.2d 344 (1955); *In re* Dolmage's Estate, 203 Iowa 231, 212 N.W. 553 (1927); Sink v. Sink, 172 Kan. 217, 239 P.2d 933 (1952); Edwards v. Royal Indemnity Co., 182 La. 171, 161 So. 191, 193 (1935) (dictum); Abbott v. Abbott, 67 Me. 304, 24 Am. Rep. 27 (1877); Furstenburg v. Furstenburg, 152 Md. 247, 136 Atl. 534 (1927); Lubowitz v. Taines, 293 Mass. 39, 198 N.E. 320 (1936); Bandfield v. Bandfield, 117 Mich. 80, 75 N.W. 287 (1898); Strom v. Strom, 98 Minn. 427, 107 N.W. 1047 (1906); Austin v. Austin, 136 Miss. 61, 100 So. 591 (1924); Rogers v. Rogers, 265 Mo. 200, 177 S.W. 382 (1915); Conley v. Conley, 92 Mont. 425, 15 P.2d 922 (1932); Emerson v. Western Seed & Irrigation Co., 116 Neb. 180, 216 N.W. 297 (1927); Von Laszewski v. Von Laszewski, 99 N.J. Eq. 25, 133 Atl. 179 (1926); Romero v. Romero, 58 N.M. 201, 269 P.2d 748 (1954); Kaczorowski v. Kalkosinski, 321 Pa. 438, 184 Atl. 633, 665 (1936) (dictum); Oken v. Oken, 44 R.I. 291, 117 Atl. 357 (1922); Lillienkamp v. Rippetoe, 133 Tenn. 57, 179 S.W. 628 (1915); Nickerson v. Nickerson, 65 Tex. 281 (1886); Comstock v. Comstock, 106 Vt. 50, 169 Atl. 903 (1934); Keister v. Keister, 123 Va. 157, 96 S.E. 315 (1918); Schultz v. Christopher, 65 Wash. 496, 118 Pac. 629 (1911); Poling v. Poling, 116 W.Va. 187, 179 S.E. 604 (1935); McKinney v. McKinney, 59 Wyo. 204, 135 P.2d 940 (1943).

6. See, *e.g.*, McKinney v. McKinney, *supra* note 5.

7. Drake v. Drake, 145 Minn. 388, 177 N.W. 624 (1920); Longendyke v. Longendyke, 44 Barb. 367 (N.Y. 1863); Prosser, Torts, § 99, 903 (1955).