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Evidence - Privileged Communication between Attorney and Client - Attorney Practicing in State Other Than One Where Licensed

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wrongfully convicted.[11] At least two states have expressly provided by statute that previous conviction will not be considered if pardon was granted for reasons of innocence.[12]

It is unjust to give a pardon granted for innocence the same limited application as is now generally given to pardons granted for other reasons. There is no logical reason why pardons granted for innocence should not conclusively prevent consideration of the pardoned conviction in an attempt to apply an habitual offender statute. Recognizing that the executive and judicial power of a state should be separated as much as possible, exercise of the pardoning power for reasons of innocence may be criticizable as an executive review of a judicial decision.[13] The principle of separation of powers could be better adhered to by instituting an extraordinary judicial remedy which would only lie whenever such evidence is discovered as would presently result in a pardon for innocence. If such a remedy were available and made exclusive, all subsequently granted pardons would be granted for reasons other than innocence. Where that is true, there appears to be no valid reason why pardoned convictions should be considered in applying habitual offender statutes. It is submitted, that if the pardon in the instant case was granted solely on the basis of innocence, the decision of the court is correct.

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EVIDENCE—PRIVILEGED COMMUNICATION BETWEEN ATTORNEY AND CLIENT—ATTORNEY PRACTING IN STATE OTHER THAN ONE WHERE LICENSED.—In a discovery proceeding,[1] plaintiff moved under Rule 34, Federal Rules of Civil Procedure[2] for an order requiring the defendant to produce various documents relating to prior patent litigation. The defendant excepted, contending that certain of the documents were privileged as communications with its attorney. The plaintiff contested the privileged status of the documents on the grounds that defendant's counsel was not licensed to practice in New York where the communications and litigation took place. It was conceded that counsel was a member of the District of Columbia and Pennsylvania Bars. The court *held* that a lawyer regularly employed by a corporation as legal counsel who actively participates in litigation qualifies as an "attorney" within the rule of privileged communication between attorney and client, though he is not licensed to practice in the state. *Georgia-Pacific Plywood Co. v. U.S. Plywood Corp.*, 18 F.R.D. 463 (S.D. N.Y. 1956).

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11. 28 Harv. L. Rev. 647, 659 (1915).
12. Iowa Code § 747 (1950); N. Y. Code of Crim. Proc. § 697 (1953).
13. The Federalist No. 47 at 373 (Hamilton ed. 1885) (Madison).

1. See Sunderland, *Discovery Before Trial Under the New Federal Rules*. 15 Tenn. L. Rev. 737 (1939).

2. Fed. R. Civ. P. 34, "Discovery And Production of Documents And Things For Inspection, Copying, or Photographing. Upon motion of any party showing good cause therefore and upon notice to all other parties, and subject to the provisions of Rule 30 (b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, book accounts, letters, photographs, objects or tangible things, *not privileged*, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26 (b) and which are in his possession, Custody, or control; . . . The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just." (Italics added)

The extent of the exemption from discovery of privileged documents is not defined by the Federal Rules of Civil Procedure,[3] but must be determined by the applicable rules of evidence.[4] Federal decisions are followed and not the law of the state where the cause of action arose,[5] There is a dearth of judicial authority on whether an attorney licensed in one jurisdiction is an "attorney" in the meaning of the privilege while practicing in other areas. One Canadian case, which involved a member of the Ontario Bar who gave legal advice to a United States citizen in New York concerning American law, resulted in divided court holding that the communication was not privileged.[6] This case is not a precedent binding American courts and differs in several respects from the instant case.[7] A United States District Court sitting in Massachusetts has held that attorneys licensed in other states and employed in a corporate patent department were not within the privilege because their work was primarily non-legal, but by way of dictum the court indicated that the privilege might otherwise apply to out of state counsel.[8] Another opinion which supports this view states that, "bar membership should properly be of the court for the area wherein the services are rendered, but this is not a sine qua non. ... "[9]

The Model Code of Evidence promulgated by the American Law Institute would extend the privilege even further than the principle case.[10] Rule 209 (b) defines "lawyer" as "a person authorized or reasonably believed by the client to be authorized, to practice law in any state or nation the law of which recognizes a privilege against disclosure of confidential communications between client and lawyer;"[11] Modern text writers are in agreement with the American Law Institute and the principle case.[12]

The holding in the principle case is strongly supported by practical considerations and social policy. Full time legal counsel employed by corporations should not be required to take bar examinations and be licensed to practice in the many states where they may communicate with their client.[13]

3. 28 U.S.C. following § 723c.

4. Wild v. Payson, 7 F.R.D. 495 (S.D. N.Y. 1946) Humphries v. Penn. R.R. Co., 14 F.R.D. 177 (N.D. Ohio 1935).

6. Scourtes v. Fred W. Albrecht Grocery Co., 15 F.R.D. 55 (N.D. Ohio (1953); Panella v. Baltimore & O. R. Co., 14 F.R.D. 196 (N.D. Ohio 1953). N.D. Rev. Code § 31-0106 (1943), gives privileged status to communications between attorney and client, without distinguishing between North Dakota attorneys and other lawyers. N.D. Rev. Code §27-1127 (Supp. 1953) recognizes is foreign attorneys and allows them to practice before state courts at the discretion of the individual court. In view of the above statutes in a North Dakota case, the privilege would probably extend to communications with an attorney not admitted to practice in North Dakota.

6. Re U.S.A. v. Mommoth Oil Co., 56 Ont. L. Rep. 635, 2 D.L.R. 966 (1925). Cf. Lawrence v. Campbell, 4 Drew. 485, 62 Eng.Rep. 186 (V.C. 1859), holding that a duly licensed attorney, while acting for a client belonging to his jurisdiction is within the privilege regardless of where the communication takes place.

7. See Re U.S.A. v. Mammoth Oil Co., 56 Ont.L.Rep. 635, 2 D.L.R. 966 (1925). holding that the mere identity of the client was not privileged. Secondly, it was a United States Court which was requiring the examination of the attorney.

8. U.S. v. United Shoe Mach. Corp., 89 F. Supp. 357, 360 (D.C. Mass. 1950)(dictum).

9. Zenith Radio Corp. v. Radio Corp. of America, 121 F. Supp. 792, 794 (D.C. Del. 1954).

10. *Model Code of Evidence* Rule 209(b) (1942).

11. *Ibid.* See also, *Uniform Rules of Evidence,* National Conference of Commissioners on Uniform State Laws, Rule 26.

12. See 1 Morgan, *Basic Problems of Evidence* 99 (1954). 5 Jones, Evidence § 2166 (2d. ed., 1926) "It must also appear that the alleged attorney is a licensed attorney in the particular jurisdiction." This statement of the author is only an apparent exception. An examination of the cases footnoted reveals that they refer without exception to persons not admitted to practice anywhere.

13. 18 F.D.R. at 465-466.

The court apparently overlooked an additional reason for holding the communications in question privileged. The defendant's counsel was admitted to practice before the United States District Court of New York to represent his employer in litigation; and the documents in question were directly connected with that action. It is submitted that admission to litigate a case before any recognized and established court of law should be sufficient to qualify counsel as attorney within the scope of the attorney-client privilege for communications directly connected with that action.[14]

JOHN MICHAEL NILLES

INSURANCE—EXTENT OF LIABILITY—RECOVERY IN ABSENCE OF PECUNIARY LOSS.—Plaintiff, insured, sued defendant, insurer, to recover for a loss sustained under a fire insurance policy issued by defendant. The plaintiff occupied the insured premises as lessee, the terms of the lease providing that the lessor would repair any damage to the premises resulting from fire. The contract of insurance between plaintiff and defendant provided that for the purposes of that agreement, the plaintiff was to be considered the sole and unconditional owner. Shortly after the loss suffered under the policy, the lessor repaired the damaged premises pursuant to the terms of the lease. It was *held* that the defendant's liability attached on the happening of the loss and that subsequent restoration without cost to the plaintiff did not relieve the defendant of its accrued liability. *Citizens Insurance Company v. Foxbilt, Inc.*, 226 F.2d 641 (8th Cir. 1955).

The question of whether an insured may recover when he has suffered no pecuniary loss is one of controversy. Fire insurance is generally considered to be a personal contract.[1] The weight of authority requires that there be an insurable interest,[2] and that actual pecuniary loss be sustained,[3] before there can be recovery. Generally, a tenant is said to have an insurable interest in the leasehold.[4] It has frequently been stated by the courts that one may not make a profit on fire insurance.[5] The rule in England is that the insured is considered to have suffered no loss when a person under a contract duty to repair has made good the damage.[6] It is argued in support of the above position that public policy demands such a result to prevent "wagering contracts" and the intentional destruction of property.[7]

14. See Radin *The Privilege of Confidential Communication Between Lawyer and Client* 16 Calif. L. Rev. 487 for a scholarly discussion of the history and present status of the attorney-client privilege.

1. *E.g.*, Traders' Ins. Co. v. Newman, 120 Ind. 554, 22 N.E. 428 (1889); Mack v. Liverpool & London & Globe Ins. Co., 329 Ill. 158, 160 N.E. 222 (1928).

2. 4 Appleman, Insurance Law & Practice § 2121 (1941).

3. *E.g.*, Draper v. Delaware State Grange Mutual Fire Ins. Co., 5 Boyce 143, 91 Atl. 206 (Del. 1914); Beman v. Springfield Fire & Marine Ins. Co., 303 Ill. App. 554, 25 N.E. 2d 603 (1940); Abbottsford Building & Loan Assoc. v. Wm. Penn Fire Ins. Co., 133 Pa. Super. 422, 197 Atl. 504 (1938); Ramsdell v. Ins. Co. of North America, 197 Wis. 136, 221 N.W. 654 (1928).

4. 4 Appleman, Insurance Law & Practice §2193 (1941).

5. *Accord*, St. Paul Fire & Marine Ins. Co. v. Scheuer, 298 Fed. 257 (5th Cir. 1924); Tabbut v. American Ins. Co., 185 Mass. 419, 70 N.E. 430 (1904); Liverpool & London & Globe Ins. Co. v. Bolling, 176 Va. 182, 10 S.E.2d 518 (1940).

6. Darrell v. Tibbitts, 5 Q.B.D. 560 (1880).

7. Liverpool & London & Globe Ins. Co. v. Bolling, 176 Va. 182, 10 S.E.2d 518 (1940); It should be noted that the lower court held that Iowa public policy was not involved in the case, but rather the insured's contract right to recover on the insurance policy. The lower court further stated that if Iowa public policy were believed to be involved, the case would have been remanded to the Iowa state courts courts for decision. 128 F.Supp. 594 (S.D. Iowa 1955).