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Evidence--Privileged Communications--State Secrets

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stance the provisions of the Federal Constitution,[12] guarantees in trials of crimes and misdemeanors that "The accused shall be fully and plainly informed of the character and cause of the accusation . . ."[13] The reason generally given for this provision is that the accused is entitled to know with certainty what offense is charged so that he may prepare an adequate defense and not be taken by surprise by evidence offered at the trial.[14] The theory of the short-form indictment is to eliminate the necessity of pleading ultimate facts since such facts may be demanded by a defendant by a bill of particulars.[15] In states using the statutory indictments a bill of particulars is compulsory[16] and not a matter in the discretion of the court as in West Virginia.[17] However, an argument against the use of a statutory short-form indictment is that it may be possible for the prosecuting attorney to bring in facts for the prosecution that the grand jury never considered.[18] Since 1931 there has been a tendency on the part of the West Virginia court to declare the statutory indictments void unless every essential element of the offense is charged.[19]

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EVIDENCE — PRIVILEGED COMMUNICATIONS — STATE SECRETS. —*P*, who was also the plaintiff in a civil action for wrongful death, sought mandamus to compel the circuit court to permit examination by her attorney of a copy of the report of the officers who investigated the death. *Held,* that if the discretion of the trial court in refusing the use by counsel of such communications is not arbitrary, the court's ruling will not be disturbed. *State v. Bouchelle, Judge.*[1]

It is usually recognized in West Virginia that there are at

[12] U. S. CONST. Amend. VI.
[13] W. VA. CONST. art. III, § 14.
[14] Berger v. United States, 295 U. S. 78, 55 S. Ct. 629, 79 L. Ed. 1314 (1935); United States v. Cruikshank, 92 U. S. 542, 2 L. Ed. 588 (1875); Clifford v. State, 29 Wis. 327 (1871).
[15] Husty v. United States, 282 U. S. 694, 51 S. Ct. 240, 75 L. Ed. 629 (1931).
[16] People v. Bogdanoff, 254 N. Y. 16, 23, 171 N. E. 890 (1930).
[17] Dale v. Atwell, 103 W. Va. 590, 592, 138 S. E. 201 (1927); State v. Counts, 90 W. Va. 338, 110 S. E. 812 (1922).
[18] Comment (1937) 35 MICH. L. REV. 456, 463.
[19] Scott v. Harshbarger, 116 W. Va. 30, 180 S. E. 187 (1935); State v. McGinnis, 116 W. Va. 473, 181 S. E. 820 (1935).

[1] 11 S. E. (2d) 119 (W. Va. 1940).

present three kinds of privileged communications:[2] (1) attorney—client,[3] (2) husband—wife,[4] and (3) state secrets.[5] The present case is an application of the latter. It is apparently the first time that the West Virginia court has made a direct holding on this particular type of privileged communication, although there have been some dicta to support it.[6] The authorities have generally recognized state secrets to be privileged,[7] but apparently the privilege only exists when the name of the informant is not known to the petitioner.[8] It should be noted, however, that the rule in West Virginia has not as yet been so limited.

Though the privilege of state secrets is well recognized, its importance will undoubtedly increase with the rise to power of administrative agencies. This privilege is based upon the recognition that in carrying on governmental work it is necessary that the government, its agencies, and subdivisions, be free to gather vital information.[9] One hindrance to the acquisition of valuable information is the fear of the individual that his participation may lead to embarrassing disclosures.

It should be noted that the instant case differs somewhat from the usual case in which this privilege is claimed or questioned in that the information was gathered by the department of public safety and *P* is asking for it in order that it may be used in a private suit for the wrongful death.[10] In case of a prosecution by the state, the accused might have some right to learn about the information and its source, but there would seem to be no basis

[2] By W. VA. CODE (Michie, 1937) c. 50, art. 6, § 10, a minister, clergyman or priest is excused from disclosing communications received by him in that capacity, and a doctor is similarly privileged as to communications with a patient, but this section apparently has reference only to justices of the peace. See Curd, *Privileged Communications between the Doctor and His Patient—An Anomaly of the Law* (1938) 44 W. VA. L. Q. 165. W. VA. CODE (Michie, 1937) c. 31, art. 5, § 14, provides immunity from disclosure of the source of information of a surety company, which information was the motivating force for refusal of the company to become responsible for employees of common carriers.

[3] Woodrum v. Price, 104 W. Va. 382, 140 S. E. 346 (1927).

[4] Zane v. Fink, 18 W. Va. 693 (1881); White v. Perry, 14 W. Va. 66 (1878).

[5] Sullivan v. Hill, 73 W. Va. 49, 79 S. E. 670 (1913); State v. Paun, 109 W. Va. 606, 155 S. E. 656 (1930).

[6] *Ibid.*

[7] 8 WIGMORE, EVIDENCE (3d ed. 1940) §§ 2374-2378.

[8] *Id.* at § 2374, p. 755.

[9] Worthington v. Scribner, 109 Mass. 487 (1872); Peden v. Peden's Adm'r, 121 Va. 147, 92 S. E. 984 (1917).

[10] The usual case is one in which at the trial itself the defendant seeks to discover, from an official of the state who is a witness, the source of his information.

for *P's* claim that she has the right to use the information collected by the state for her own personal advantage.

The privilege of state secrets is not so governed by fixed rules as the attorney-client or husband-wife privilege,[11] since it is one which at the discretion of the judge may be disregarded. It appears to be based chiefly on the need for governmental efficiency and freedom of action, but if there are other aspects of public interest in favor of disclosing the information which outweigh the policy of secrecy, the judge may order that the records be opened to the petitioner.

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EVIDENCE — "RES GESTAE" — SPONTANEOUS EXCLAMATIONS. — One morning after parking his car four blocks from his place of business at 7:20, the decedent, a vigorous man in good health, entered his office about 7:30, moaning and groaning, apparently much upset and in pain, stating that he had slipped on the icy pavement and fallen. Similar statements were made about an hour later at a near-by store where he had been taken. His wife sued on an insurance policy, seeking double indemnity, which depended upon death resulting from bodily injury caused exclusively by accidental means. The trial court admitted testimony relative to the decedent's statements in both instances. *Held*, that testimony as to the first statement made in his office is admissible as part of the *"res gestae,"* but the admission of the statement made an hour later is erroneous. *Collins v. Equitable Life Ins. Co.*[1]

The term *"res gestae"* is used by courts generally as an evidentiary device to admit various types of evidence, some coming within the hearsay rule, others not.[2] The early West Virginia

[11] Thomas v. First National Bank, 166 Va. 497, 186 S. E. 77 (1936); Sullivan v. Hill, 73 W. Va. 49, 79 S. E. 670 (1913); 8 WIGMORE, EVIDENCE §§ 2332-2341, 2290-2329.

[1] 8 S. E. (2d) 825 (W. Va. 1940). The basis for admitting the first statement was that it had been spontaneously uttered while the decedent was still subject to the nervous excitement of the event which caused his suffering, giving to his utterance sufficient guaranty of trustworthiness. Admission of the second statement made an hour later was held to be erroneous because of the interval of time which had elapsed and the circumstances under which the statement had been made. However, since it was the same as that made at the office and merely cumulative, the court did not consider its admission as prejudicial.

[2] 6 WIGMORE, EVIDENCE (3d ed. 1940) §§ 1768, 1769, lists five such types of cases, and two instances in substantive law, where *"res gestae"* is used