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Evidence--Attorney-Client Privilege--Necessity of Proceeding Against Client

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cies argue that a policeman, acting with the most commendable motives and abstaining from any techniques of physical or psychological coercion, may merely detain the prisoner for a sufficient time to interrogate him concerning the crime, only to discover that to question an accused person before an alibi can be devised and at the time when the individual is most favorably disposed toward confession and repentance, is to violate the requirements of criminal procedure. From this point of view, society is compelled to suffer doubly when the voluntary confession of an accused is vitiated by the wrongdoing of a policeman.

The Court, however, imbued with the spirit of civil libertarianism, has adopted the more enlightened view and ruled that the possible sacrifice of social safety is of no consequence when weighed against the prospect of delayed arraignment, the temptation of intensive interrogation, and the ultimate use of the "third degree," before an individual is acquainted with his rights by being brought before a commissioner. Not only must the individual be informed of his privileges, but of equal importance is the fact that, without prompt arraignment and a determination of whether the arrest was founded on "probable cause" or mere suspicion, the law enforcement agencies would be free to arrest upon mere suspicion, hold the suspect incommunicado, subject him to the "third degree" and to obtain convictions with confessions obtained by such reprehensible methods.

To suggest that innocent persons have nothing to fear from the hazards of these abuses, that only the criminal element will be affected, is to approve the indefensible methods of a former period which our more sophisticated society may desire to avoid.

R. G. P.

EVIDENCE—ATTORNEY-CLIENT PRIVILEGE—NECESSITY OF PROCEEDING AGAINST CLIENT.—A legislative committee, in pursuance of investigating a parole violation, announced that it would hold a public hearing in which a tape recording of conversations between an attorney and his client would be disclosed. The attorney and client sought an injunction to restrain the committee from using the recording in such manner, alleging that the conversations were recorded, illegally and without consent, in the consulting room of the county jail. The decision of the Supreme Court at Special Term granting the injunction was reversed by the Appellate Division.

Held, affirming the Appellate Division, that the use and disclosure of the communication, unconnected with any proceeding directed against the client, as distinguished from the act of recording, was not a basis for injunction action. *Lanza v. New York State Joint Legislative Committee*, 3 N.Y.2d 92, 143 N.E.2d 772 (1957) (4-3 decision).

The attorney-client privilege was the first of the privileged communications to be recognized by the common law. See *Dennis v. Codrington*, Cary 143, 21 Eng. Rep. 53 (1580); *Berd v. Lovelace*, Cary 88, 21 Eng. Rep. 33 (1577). It is now firmly imbedded in Anglo-American jurisprudence. 8 WIGMORE, EVIDENCE § 2292 (3d ed. 1940). Originally the privilege was based upon a concern for the oath and honor of the attorney without regard for the client, but by the 19th century it was recognized as being necessary to permit full consultation between the attorney and client without fear of public disclosure. 8 WIGMORE, EVIDENCE § 2292. Thus, since the privilege is now regarded as designed for the client's protection, only he may waive it, and the attorney is required to assert the privilege, where applicable, unless it has been so waived by the client. See Canon 37 of the Canons of Professional Ethics.

Under the present law the privilege is said to exist: where legal advice of any kind is sought from a professional legal adviser in his capacity as such, provided the communications relate to that purpose and are made in confidence by the client, they are at his instance permanently protected from disclosure by himself or by the legal adviser, except that the protection may be waived. 8 WIGMORE, EVIDENCE § 2292. These elements, with little variation, are incorporated in the common law or in the state statutes enacted on the subject. The statutes are listed and compared in 8 WIGMORE, EVIDENCE § 2292. In West Virginia the common law principle is rigidly adhered to in courts of record and by statute it applies to justice of the peace courts. *Donahoe v. Collett*, 87 W. Va. 383, 105 S.E. 265 (1920); W. VA. CODE c. 50, art. 6, § 10 (Michie 1955).

The majority of the court in the principal case, without denying the existence of the privilege, refused to protect it because the divulgence of the communication was unconnected with a proceeding against the client; such view finds no support in reason or authority. The reason for the existence of the privilege is to encourage the client to disclose everything to his lawyer without apprehension of

such information being used against him. Legal advice is as often needed for avoiding litigation as for carrying it on, and it is the avowed purpose of the legal profession to diminish litigation by so ordering the affairs of clients that it won't be necessary. Much litigation is due to the failure of clients to seek legal advice until it is too late. Thus, the attorney-client privilege is of equal importance for matters still in the nonlitigious state; and the protection of the relation at that stage tends to prevent its necessity in the further and less desirable stage. 8 WIGMORE, EVIDENCE § 2294. This rule that privilege may be asserted irrespective of pending litigation is more commonly applied to prevent an attorney from testifying when summoned to the witness stand about his relations with a former client. *State v. Fisher*, 126 W. Va. 117, 27 S.E.2d 581 (1943); *cf. Hoffman v. Hogan*, 345 Mo. 903, 137 S.W.2d 444 (1940); *Graver v. Schenley Products*, 26 F. Supp. 768 (S.D.N.Y. 1938).

In the principal case the majority of the court, without qualification, applied the principle that the privilege does not inhibit disclosures by third persons who overhear the conversation. Admittedly, it is a general rule that the method by which evidence is obtained doesn't affect its validity. *Commonwealth v. Chaitt*, 380 Pa. 532, 112 A.2d 379 (1955). Further, it is conceded that in the case of persons overhearing the communication without the knowledge of the parties, the information so obtained is admissible, although the more reasonable view would seem otherwise. *Van Horn v. Commonwealth*, 239 Ky. 833, 40 S.W.2d 372 (1931); *cf. McCORMICK, EVIDENCE § 95* (1954). It is submitted that the secret recording here involved is not governed by the principle applied by the court. The theory underlying the principle that third persons are allowed to speak is that the parties presumably didn't intend the conversation to be confidential or they would have taken greater precaution. See *Erlich v. Erlich*, 278 App. Div. 244, 104 N.Y.S.2d 531 (1st Dep't. 1951); *In re Quick's Estate*, 161 Wash. 537, 297 Pac. 198 (1931); McCORMICK, EVIDENCE § 79. However, in the instant case, not only did the attorney and client intend the conversation to be confidential, but also they had every right to believe that was the case. There are numerous decisions sustaining the sanctity of consulting rooms provided in penal institutions. *Ex parte Qualls*, 58 Cal. App. 2d 330, 136 P.2d 341 (1943); *cf. In re Synder*, 62 Cal. App. 697, 217 Pac. 777 (1923). This view finds further support in

UNIFORM RULES OF EVIDENCE § 26, which maintains that the privilege should be protected if the communication is overheard in a manner not reasonably to be anticipated by the client.

The argument presented thus far would seem to place the attorney-client communication beyond the reach of the law; however, this is not the case. Aside from the client's waiver of the privilege it may be destroyed on other grounds. For an excellent theoretical discussion see Mr. Justice Cardozo's opinion in *Clark v. United States*, 289 U.S. 1, 13 (1933). The privilege may be destroyed where there is a substantial showing that legal aid was sought for the perpetration of future crime or fraud. See *In re Selser*, 15 N.J. Super. 393, 105 A.2d 395 (1954); cf. *State v. Childers*, 196 La. 554, 199 So. 640 (1940). Thus, in the principal case the legislative committee was not without a means of exposing the communication, had they been able to establish a right to abrogate the privilege under this principle.

It is submitted that the court in the principal case permitted the legislative committee to impinge on the civil liberties of an individual by disposing of an essential privilege through the application of finely drawn distinctions which have no justification in reason or principle. Although the attorney-client privilege has no express guarantee in the Constitution, and is basically an expression of policy, it is indispensable to the administration of justice and should not be dealt with in a capricious manner.

J. O. F.

TAXATION—DEFERRED COMPENSATION PLAN FOR CONTROLLING STOCKHOLDER.—A corporation, engaged in the manufacture of clothing, entered into a deferred compensation agreement with its president and majority stockholder (98 of 100 shares), the taxpayer. To fund the agreement the corporation purchased a combined life and annuity contract insuring his life, whereby taxpayer was to receive a monthly payment for life as a pension, and the corporation was declared owner and beneficiary of the policy. The Tax Court, in affirming the Commissioner's determination, held the annual premiums paid by the corporation to be a taxable dividend to taxpayer, the transaction lacking bona fides and being merely an attempt to use corporate funds without taxation. *Held*, that