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Evidence—Establishing Identity and Agency of Antiphonal Speaker.

The witness dialed the telephone number of an insurance office. A man answered. Upon the witness stating that he wanted to substitute one car for another in an insurance policy he was asked to wait a minute. A conversation ensued with a woman unknown to the witness. *Held*: Conversation admissible in evidence.¹

The mere fact that a conversation is conducted through a telephonic system does not render it inadmissible in either civil² or criminal³ cases. The problem, in the main, is to identify the person with whom the conversation was held and thus establish a foundation for relevancy. Evidence authenticating the antiphonal speaker by recognition of his or her voice is generally held to be sufficient proof of identity,⁴ despite the possibility of error created by the mechanical transmission. And it is sufficient identity if such recognition dawns upon the witness at any time before the evidence is offered.⁵ Such witness is not required to swear to definite and certain recognition. Where he states that he is satisfied in his own mind as to the identity of the voice, but could not swear to it, the evidence is competent. Completeness of identification goes to the weight of the evidence and not to the admissibility.⁶

Evidence other than voice recognition may establish sufficient identity,⁷ though it subjects the court to multifarious situations with uncertain limits. Of course, where the witness answers a telephone call and there is no evidence to authenticate the antiphonal speaker, except that he states his name, the evidence is inadmissible as hearsay.⁸

¹ Zurich General Accident and Liability Ins. Co. v. Baum, 165 S. E. 518 (Va. 1932).

² Gates v. Mader, 316 Ill. 313, 147 N. E. 241 (1925).

³ State v. Nixon, 111 Kan. 601, 207 Pac. 854 (1922).

⁴ Merritt v. United States, 264 Fed. 870 (C. C. A. 9th, 1920) (reversed on confession of error, in 255 U. S. 579, 41 Sup. Ct. 375, 65 L. ed. 795 (1921)); Griffin Mfg. Co. v. Bray, 193 N. C. 350, 137 S. E. 151 (1927).

⁵ People v. Strolla, 191 N. Y. 42, 83 N. E. 573 (1908); People v. McDonald, 177 App. Div. 806, 165 N. Y. Supp. 41, 44 (1917): "When a witness gives his opinion of the identity of a voice heard over the telephone...., it matters not whether the knowledge which enables him to form such opinion was obtained before or after the voice over the wire was heard." People v. Dunbar Contracting Co., 215 N. Y. 416, 109 N. E. 554.

⁶ State v. Nixon, *supra* note 3.

⁷ Robilio v. United States, 291 Fed. 975 (C. C. A. 6th, 1923) (certiorari denied in 263 U. S. 716, 44 Sup. Ct. 137, 68 L. ed. 522 (1923)).

⁸ State *ex rel.* Strohfeld v. Cox, 325 Mo. 901, 30 S. W. (2d) 462 (1930); Griffin Mfg. Co. v. Bray, *supra* note 4; People v. Thompson, 231 Mich. 256, 203 N. W. 863 (1925).

But it has been held that where the caller states his name and in addition agrees to meet the witness at a certain place, and does so, the transaction as a whole establishes sufficient identity.⁹ And many courts have held that if the caller expresses an acquaintance with some transaction known to the witness a *prima facie* case of identity may be established.¹⁰ Where a letter has been mailed to or received from the caller who expresses familiarity with the substance of the letter, identification is sufficient.¹¹ Evidence obtained from the record at the central telephone office, tending to show that the call came from the telephone of the one purported to have called, renders the conversation admissible, even though the evidence is not conclusive.¹² Where the witness, unable to speak to the person for whom he calls, leaves a message for the party to call him and later someone purporting to be that party calls the witness the facts and circumstances render the conversation admissible.¹³

The courts make a meritorious distinction between those cases in which the witness is called and the party calling is not recognized but represents himself to be a certain individual and a case wherein the witness calls a telephone number and receives a reply purporting to be from the party called.¹⁴ In the latter case there is not the chance of premeditated fraud as where the witness is called. And such facts and circumstances are sufficient to make a *prima facie* case of identity.¹⁵ These *prima facie* cases include not only the calling of a private number but also the calling for some particular person in a business office.¹⁶

The courts are liberal as to the identification necessary where a party calls a place of business maintaining a telephone and is answered by a stranger purporting to have authority to deal with the caller. The conversation is admissible under two presumptions.

⁹ State v. Daffy, 179 Minn. 439, 229 N. W. 558 (1930).

¹⁰ E. g. Chubb v. Sodler, 284 Fed. 910 (C. C. A. 9th, 1922).

¹¹ See Van Piper v. United States, 13 F. (2d) 961, 968 (C. C. A. 2d, 1926)

¹² Am. & British Mfg. Corp. v. New Idria Mining Co., 293 Fed. 509 (C. C. A. 1st, 1923).

¹³ International Harvester Co. v. Caldwell, 198 N. C. 751, 153 S. E. 325 (1930).

¹⁴ See Meyer Milling Co. v. Strohfied, 224 Mo. 508, 20 S. W. (2d) 963 (1929).

¹⁵ Epperson v. Rostatter, 90 Ind. 8, 168 N. E. 126 (1929). Cf. State v. Burleson, 198 N. C. 61, 150 S. E. 628 (1929) (where the person answering said she was not the person called but would call the desired party and later another person answered purporting to be the desired party, held, sufficient evidence of identity); *In re Estate of Wood v. Tyler*, 256 Ill. App. 401 (1930)

¹⁶ Rice v. Fidelity & Casualty Co., 250 Mich. 398, 230 N. W. 181 (1930)

The first one, based on the accuracy of the telephonic system, is that the person is in the business office called; the other is that such person was authorized to transact the particular business over the telephone. This latter presumption is based on the fact that when the business unit maintains a telephone in its office it impliedly invites the public to deal with it by such means and that during office hours some person with authority to transact the particular business will answer the telephone.¹⁷ The burden is thus on the party called to show that the person replying had no authority.¹⁸ These presumptions are unnecessary when pursuant to the conversation action is taken which only an authorized agent could take.¹⁹ In some particular businesses the presumption may be that the person answering the telephone is not authorized to deal with the subject in litigation.²⁰ Some judicial authorities do not recognize this presumptive agency rule at all.²¹ Thus to prove agency without the aid of this presumption will necessitate identifying (in person) the telephonic speaker.

¹⁷ *Potomac Ins. Co. v. Armstrong*, 206 Ky. 434, 267 S. W. 188, 189 (1924): "The law is not only a practical, but a progressive, science, and takes cognizance of the modern methods of communication and the means used therefor. When an individual or corporation engaged in a particular line of business installs in its office a telephone, whereby it may be connected through the telephone system with a large number of people, presumably it invites them to do business with it through that means of communication, and presumably it thereby advertises to the business world that it at all times has in its office some person to communicate with others as to its particular line of business, and deal with them through that method of communication. It would in many instances hamper the transaction of its business, and cast suspicion upon the validity of the agreements made from its office over the telephone if it was incumbent upon the other party to establish the identity of the person to whom he talked, and his authority to represent the corporation or individual. On the contrary, the fair presumption is that such individual or corporation has always at its office somebody authorized to speak for it in the transaction of its particular line of business. . . . Out of this modern method of doing business has grown a modification, to the extent indicated, of the general rule that one dealing with one professing to be the agent of another does so at his peril, and must not only establish the agency before holding the principal liable, but must establish the extent of such agency. . . ."

¹⁸ *Western Union Teleg. Co. v. Campbell*, 212 S. W. 720 (Tex. Civ. App. 1919) (the presumption becomes conclusive in the absence of proof to the contrary).

¹⁹ *Commercial Casualty Ins. Co. v. Lawhead*, 62 F. (2d) 927 (C. C. A. 4th, 1933) (where the call to an insurance agency requested a change in a policy and the one calling received by mail a policy containing the change promised in the conversation).

²⁰ *Robinson v. Lancaster Foundry Co.*, 152 Md. 81, 136 Atl. 58, 50 A. L. R. 1196 (1927) (where the general rule was recognized but limited under the facts of the case as there was nothing on which to base the presumption but rather presumption of no authority to pay maturing negotiable paper).

²¹ *Lacoma & E. Lumber Co. v. A. B. Field & Co.*, 100 Wash. 79, 170 Pac. 360 (1918).

A complex problem arises where a person in a telephone conversation recognizes the voice of the antiphonal speaker and turns the telephone over to the witness who does not identify the speaker. It has been held that the witness may testify to the subsequent conversation, as it is hardly probable that another succeeded the speaker at the other end of the line.²² Identification was sufficiently established in a case in which the defendant, conversing with a third party, asked to speak to the witness and later admitted to the third party that he had done so.²³

A different case arises where a bystander attempts to give testimony tending to show the identity of the speaker at the other end of the line. In the absence of personal knowledge as to the identity such evidence may be hearsay.²⁴ But "a telephone conversation between the parties, and upon this subject matter in litigation, having been testified to by one of the parties, may also be testified to by a bystander, so far as he heard it."²⁵

The decision in the instant case seems to be in line with the general trend of judicial opinion. A presumption of agency is substantiated by the fact that the party first answering the telephone called another to take the particular message. For the court not to consider the practical use of the telephone in the commercial world and to require further identity of the antiphonal speaker than a presumptive showing of his agency would be to restrict business to the rules established before the coming of the telephone.

W. E. ANGLIN.

Evidence—Jury's Deliberations as Privileged.

The defendant, a juror indicted for contempt, was charged with concealing or misstating facts bearing upon ineligibility during her *voir dire* examination. Testimony of other jurors as to what defendant said during the deliberations in the jury room was admitted as evidence that her answers were false and evasive and that she was biased and prejudiced at the time of the examination. *Held:*

²² *Marton v. United States*, 60 Fed. (2d) 696 (C. C. A. 7th, 1832).

²³ *People v. Albritton*, 110 Cal. 188, 294 Pac. 76 (1930).

²⁴ *Pitt Lumber Co. v. Askew*, 185 N. C. 87, 116 S. E. 93 (1923) (where a bystander was allowed to testify as to what he actually heard but could not give substantive testimony as to the identity of the one at the other end of the line).

²⁵ *Kent v. Cobb*, 133 Pac. 424 (Colo. 1913). Cf. *Sanders v. Griffin*, 191 N. C. 447, 132 S. E. 157 (1926) (where the bystander gave testimony as to what he heard as original evidence).