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Evidence -- Jury's Deliberations as Privileged

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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.

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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).

the testimony was properly admitted as corroborative evidence, supplementing and confirming the case that would exist without it.[1]

The admissibility of the testimony of a juror relating to happenings in the jury room is generally raised on motion to set aside the verdict and is generally disallowed.[2] The writer has found only one case other than the instant one where such evidence was proposed to show the juror guilty of contempt for false answers on his *voir dire* examination. In the case of *In re Nunns*[3] the contemnor was a juror in a trial upon an indictment for keeping a disorderly house. On the *voir dire* examination he said that he did not know the defendants and knew nothing of their place. Evidence of jurors was admitted to prove that he stated in the jury room that he did know the defendants and that their place was correct and proper.

The commentators who have considered this problem are apparently opposed to the result reached by these two cases. They seem to conclude, without citing any cases directly to that effect, that statements made to a fellow-juror are privileged and cannot be disclosed against the juror's consent.[4]

[1] Clark v. United States, 53 Sup. Ct. 465, 77 L. ed. (Advance Opinions) 515 (1933).

[2] McDonald and U. S. Fidelity & Guaranty Co. v. Pless, 238 U. S. 264, 35 Sup. Ct. 783, 59 L. ed. 1300 (1915); Hicks v. U. S. Shipping Board Emergency Fleet Corp., 14 F. (2d) 316 (S. D. N. Y. 1926); Central of Georgia Ry. Co. v. Holmes, 223 Ala. 188, 134 So. 875 (1931); Valentine v. Pollak, 95 Conn. 556, 111 Atl. 869 (1920); Ballance v. Dunnington, 246 Mich. 36, 224 N. W. 434 (1929); Miller v. Gerard, 200 App. Div. 870, 192 N. Y. Supp. 884 (1922); Campbell v. High Point, T. & D. R. Co., 201 N. C. 102, 159 S. E. 327 (1931); Teeters v. Frost, 145 Okla. 273, 292 Pac. 356 (1930); Eyak River Packing Co. v. Huglen, 143 Wash. 229, 255 Pac. 123 (1927); Vaise v. Delaval, 1 T. R. 11, K. B. (1785); 5 WIGMORE, EVIDENCE (2d ed. 1923) §2354, n. 1 (rule prevails except in possibly six jurisdictions); note (1928) 6 N. C. L. REV. 315. *Contra:* Composh v. Powers, 75 Mont. 493, 244 Pac. 298 (1926) (statute permits where the verdict was reached by resort to determination by chance); Jones v. Wichita Valley Ry. Co., 195 S. W. 890 (Tex. Civ. App. 1917) (statute allows testimony but not affidavits); Owen v. Warburton, 1 Bos. & P. N. R. 326 (1807); *cf.* Hyman v. Eames, 41 Fed. 676 (C. C. D. Colo. 1890).

[3] 188 App. Div. 424, 176 N. Y. Supp. 858 (1919); *cf. In re* Cochran, 237 N. Y. 336, 143 N. E. 212, 32 A. L. R. 433 (1924) (where juror stated additional facts, proposed acquittal if bond were given for defendant's good behavior, and, though he believed the defendant guilty, refused to convict, the court refused to punish him for contempt on the ground that the conduct was privileged).

[4] 5 WIGMORE, EVIDENCE (2d ed. 1923) §2346 ("Under the Parol Evidence rule, the juror's testimony is excluded only when it is offered to prove facts nullifying the verdict, on a motion for a new trial. But under the Privileged Communications rule, the juror's testimony would be excluded for any purpose whatever, . . . for example, where upon another trial he was a witness and his bias was offered to be shown by his expressions during retirement with the former jury.") HUGHES, EVIDENCE (1907) 302; 5 JONES, EVIDENCE (2d ed. 1926) §2212; UNDERHILL, CRIMINAL EVIDENCE (3d ed. 1923) §311.

While public policy should protect the freedom of debate and expression of opinion on the merits of the case in order that the evidence may be thoroughly considered,[5] such policy does not require the protection of a juror who gives additional evidence as in the case of *In re Nunns*.[6] Although Mr. Wigmore contends that no such limitation should be placed upon privileged communications,[7] it would seem to be the better rule that statements of personal knowledge, which should be given by the juror as a witness in open court under oath and upon cross-examination, should not be privileged. Therefore, it is believed that it would be more desirable to adopt a middle view, namely, that only certain communications should be privileged.

In the principal case the Circuit Court of Appeals,[8] though admitting that there was authority *contra,* was content to say that such communications should not be privileged. The Supreme Court did not deny that such a privilege existed or that the communications were those that should be protected, but held that since the defendant had fraudulently entered into the relation giving rise to the privilege she was not entitled to the protection of that privilege. It was thought that the policy of protecting jurors from disclosure of the course of their deliberations was outweighed by the necessity of preserving the jury from corrupting influences, and this view is believed to be sound.

JULE MCMICHAEL.

Negligence—Duty of Guest in Automobile.

Plaintiff was the guest of the defendant in the rear seat of the latter's automobile. Although the plaintiff was aware that the night was foggy and the road narrow and winding, she did not protest the defendant's maintenance of a dangerous rate of speed. Defendant lost control of the car, which went over an embankment, and the plaintiff was injured. *Held:* No recovery; an automobile guest, failing to protest the driver's action in encountering possible danger, reasonably apparent to both, is guilty of contributory negligence.[1]

[5] In the case of *In re* Cochran, *supra* note 3, 143 N. E. at 213, the court said: "It is not alone as to the final result—the verdict—that they are protected. Public policy requires that they be given the uttermost freedom of debate as it requires in the case of the Legislature."

[6] *Supra* note 3.

[7] WIGMORE, EVIDENCE §2354 (b); *cf. In re* Cochran, *supra* note 3.

[8] 61 F. (2d) 695 (C. C. A. 8th, 1932).

[1] Adams v. Hutchinson, 167 S. E. 135 (W. Va. 1932).