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Evidence—Wife's Observance of Husband with Accomplices Not a Confidential Communication

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Division, the Court stated its agreement with Appellate Term that title to the checks passed to decedent and from him to his estate.[80]

Before his death, Sylvester Connolly was an employee of the City of New York. He retired on March 3, 1955 and, as a member of the New York City Employees' Retirement System, chose to receive his retirement benefits under "Option 1."[81] Under this option Connolly would receive an annual retirement allowance payable in equal monthly installments. Connolly died on August 28, 1955, after having received checks, none of which he cashed, for $1,985.05. "Option 1" provided that any balance in the decedent's account was to go to his beneficiaries. Decedent's original account with the Retirement System totalled $47,815.35 and this amount was paid to the three beneficiaries under decedent's will, the uncashed checks having been returned to the Retirement System and the amount thereof recredited to his account. James T. Connolly, plaintiff, executor and beneficiary under the will, took the position that the $1,985.05 represented by the uncashed checks belonged to the estate; so, he paid his share thereof to himself as executor and brought this suit against the other two beneficiaries and against the Retirement System for the other two thirds of the total amount of the checks.

The heart of this controversy is the meaning and purpose of the arrangement made by decedent and the Retirement System under "Option 1." The Court of Appeals interpreted "Option 1" to mean that the beneficiaries were to get an amount equal only to the original account less the monthly allowances accrued to the member of the System during his retirement. In reaching its conclusion the Court termed inapplicable the general law as to whether or not a check imports payment. The relationship between Connolly and the Retirement System was that of debtor and creditor, but the Court did not view this as helpful in answering the question before it. Although the application of general legal principles by analogy is often helpful, it also increases the risk of strained reasoning. Notably, the Court here limited itself to a common-sense interpretation of language fairly clear on its face.

Bd.

EVIDENCE

WIFE'S OBSERVANCE OF HUSBAND WITH ACCOMPLICES NOT A CONFIDENTIAL COMMUNICATION

In *People v. Melski*,[1] the Court of Appeals affirmed a conviction of second degree grand larceny against appellant, who had been charged with illegally appropriating some guns from a shop in Batavia with a few of his friends.

80. 8 A.D.2d 729, 187 N.Y.S.2d 18 (2d Dep't 1959).
81. See Administrative Code of City of New York § B3-46.0.

1. 10 N.Y.2d 78, 217 N.Y.S.2d 65 (1961).

Appellant's sole argument was that the trial court had committed reversible error in permitting his wife to testify as to the presence of his accomplices in their home after the crime had allegedly been committed. The wife testified, over objection, that she arose at 6:00 A.M. on the morning in question to get some milk for the baby, and that as she entered the kitchen, she saw her husband and the accomplices. "When she stated that she was not sure if there were any guns, she was reminded that she told the Grand Jury that she had seen the guns."[2]

Appellant's contention was that his wife's observance on the morning in question was a disclosive act which he had communicated in confidence to her and that it was, therefore, a privileged communication within the meaning of Section 2445 of the Penal Law.[3] The Court of Appeals, however, in a 4-3 decision, held that the disclosive act was neither observed in confidence nor induced by the marital relationship, and hence, appellant cannot claim the privilege afforded by Section 2445.

The Court appears to have based their decision on a combination of factors: a) That the alleged communication was voluntarily repeated by appellant to the police prior to the trial; b) That the disclosive act was observed by the wife under circumstances which indicate that the appellant and his accomplices did not intend to be observed. In the Court's opinion, appellant and the others were surprised by the wife's untimely entrance. c) Probably the most determinative factor was the Court's reliance upon the presumption, which they felt had not been rebutted by appellant, that communications originally made in the presence of third parties are not confidential.

It appears to be clear under New York law that an *act*, performed by one spouse in the presence of the other, is a confidential communication if it is induced by the confidence existing between them by reason of the marital relationship. For this Court so held, in the leading case of *People v. Daghita*, that: "An act may communicate knowledge to the known observer and repose a confidence in him as clearly and unmistakably as if accompanying descriptive words were uttered."[4] Both the majority and the dissent in the present case agree with this proposition. They differ, however, as to whether the disclosive act *under the circumstances of this case* can be properly classified as a confidential communication.

The dissent felt that the question presented was to be determined on the authority of the *Daghita* case, where the Court of Appeals reversed a judgment

2. Id. at 79, 217 N.Y.S.2d at 66.

3. N.Y. Penal Law § 2445:

The husband or wife of a person indicted or accused of a crime is in all cases a competent witness, . . . but neither husband nor wife can be compelled to disclose a confidential communication made by one to the other during their marriage.

This privilege belongs to the spouse against whom the testimony is offered. If timely objection is made, not only can the witness spouse not be compelled to testify, she cannot even voluntarily testify. People v. Wood, 126 N.Y. 249, 27 N.E. 362 (1891).

4. 299 N.Y. 194, 86 N.E.2d 172 (1949).

against defendant because the latter's wife had been permitted to testify, over objection, that she had observed her husband bringing stolen goods into their home. The dissent, in the present case, emphasizes the fact that the defendant's wife in the *Daghita* case had also testified that she had observed her husband and an *accomplice* carrying stolen goods out of the store. Although the wife may well have testified at the trial as to the latter fact, it is not even mentioned in the opinion of the Court of Appeals. Therefore, even if the issue as to the trial court's propriety in admitting this latter observance had been properly raised before the Court of Appeals, and the latter so held it to be confidential, as the dissent contends, it could amount to no more than an alternative holding, since the trial court's admission of either observance by the wife would have compelled a reversal of the defendant's conviction. In any case, it does not appear as clear as the dissent contends, that the *Daghita* case can be read as authority for the proposition that a disclosive act, communicated in the presence of a third party, is a confidential communication. It appears that the Court, in the *Daghita* case, confined its actual holding to the wife's observance of her husband bringing the stolen goods into their home and did not consciously consider the propriety of the trial court's admission of the wife's observance of her husband and his accomplice at the store.

It appears that the New York courts, relying heavily upon the presumption that communications originally made in the presence of third parties are not confidential, have never extended the privilege of Section 2445 to communications made in the presence of third parties.[5] In fact, it appears that the presumption, as applied in this case, was the deciding factor in the Court's decision. "If there were no other facts [referring to the fact that defendant had told the police prior to trial, and the circumstances existing in the home at the time of the disclosure] evidencing an absence of confidence, *and* if we could sever the 'disclosive act' from the presence of the third parties, we might be inclined to agree that the communication was confidential."[6]

The Court then proceeds to say that if the appellant, while alone, had gone into his wife's bedroom and told her of his recent escapade and of the presence of his friends in their home, the wife would not have been permitted to testify.[7]

This writer submits that the latter hypothetical raised by the Court, which was obviously unnecessary for purposes of their decision, raises some doubt as to the soundness of their reliance upon the presumption in the present case.

The only factual distinction between the hypothetical and the present case is that, in the hypothetical, the accomplices do not know that the wife is aware of their presence in her home. Is the basic fact upon which the presumption is based to be that third parties are aware that the husband has communicated

5. People v. McCormick, 278 App. Div. 191, 104 N.Y.S.2d 139 (1st Dep't 1951), aff'd, 303 N.Y. 782, 103 N.E.2d 895 (1952); People v. Lewis, 62 Hun 622, 16 N.Y. Supp. 881 (1891), aff'd, 136 N.Y. 633, 32 N.E. 1014 (1892); McCormick, Evidence 171 (1954).

6. People v. Melski, supra note 1 at 83, 217 N.Y.S.2d at 69.

7. Ibid.

something in confidence to his wife, or that a third person has also been permitted to learn the content of the communication? The latter would seem to be the sounder view, and some weight is given to the belief that the Court also recognizes the latter as the basic fact by their adoption of certain language from the case of *Wolfle v. United States*.[8]

> "The uniform ruling that communications between husband and wife, voluntarily made in the presence of their children, old enough to comprehend them, or other members of the family within the intimacy of the family circle, are not privileged . . . is persuasive that communications like the present, *even though made in confidence*, are not to be protected." (Citations omitted.)[9]

If the basic fact of the presumption is that third parties only be aware that the wife has been told something, why did the Court in the *Wolfle* case feel that it was necessary that the children be *old enough to comprehend the communication*? The reason, it is submitted, is that the courts have generally recognized that the basic fact upon which the presumption is based is that a third party has not only become aware that the wife has been told something by the husband but that she has also been permitted to hear and comprehend the meaning of the communication. Is it not true that the accomplices, in both the hypothetical case and the present case, know the content of the communication, *i.e.*, their own presence, with the guns, in the wife's home?

The Court further found that the circumstances indicated a lack of intent by appellant that the wife observe the disclosive act. However, it appears to be just as reasonable to infer that appellant, knowing his wife to be in the house at the time, would recognize the probability of her "discovering" them.

Although weaknesses may be found in each of the separate factors relied upon by the majority in reaching their conclusion as to the nonconfidential nature of the disclosive act in the present case, it appears that their ultimate decision was rightly based upon the cumulative effect of these factors. It further appears that the admission of the alleged confidential communication in the present case would not frustrate the underlying policy of the statute, *i.e.*, to promote the family unity.

J. D.

PRIOR INCONSISTENT STATEMENTS TO REFRESH RECOLLECTION AND IMPEACH CREDIBILITY

In *People v. Freeman*,[10] the defendant was convicted of manslaughter in the first degree. The Court of Appeals reversed the conviction on the grounds that the prosecutor misused a witness' prior inconsistent statements and that the trial court's charge as to these statements was erroneous.

During the presentation of the State's case, the prosecutor called a witness,

8. 291 U.S. 7, 17 (1934).
9. People v. Melski, supra note 1 at 82, 217 N.Y.S.2d at 69.
10. 9 N.Y.2d 600, 217 N.Y.S.2d 5 (1961).