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Evidence—Wire Recordings of Confidential Communications Between Husband and Wife Held Inadmissable

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Supreme Court in the past has allowed the equal division rule in *collision* cases despite a statute limiting the liability of one of the negligent parties. See *The Chattahoochee, supra; The Harter Act,* 27 Stat. 445, 446 U. S. C. Sec. 190-195. As the Court said in *The Tampico, supra* "in reason and principle collision cases point the way." Justice Holmes, confronted with a similar argument that an expansion in admiralty law should be left to the Congress replied: "It would be a mere historical anomaly if admiralty courts were not free to work out their own systems and to finish the adjustment of maritime rights and liabilities." *Erie Ry. Co. v. Erie Transportation Co.,* 204 U. S. 220, 225 (1907).

Daniel T. Roach

EVIDENCE—WIRE RECORDINGS OF CONFIDENTIAL COMMUNICATIONS BETWEEN HUSBAND AND WIFE HELD INADMISSABLE

The plaintiff had induced his son to make a wire recording of an argument between plaintiff and his wife while they were alone in their common bedroom. Held: Admission of the recording in divorce proceedings brought by plaintiff against his wife was error because the status of the parties and the confidential nature of the communication made it privileged, *Hunter v. Hunter* 169 Pa. Super. 498, 83 A (2d) 401 (1951).

Although the absolute common law prohibition, *Davis v Dinwoody* 4T. R. 678, 100 Eng. Rep. 1241 (1792), against the use of testimony of one spouse in the cause of the other, whether it be hostile or helpful, has been to a large extent abrogated in this country by statute, *New York Civil Practice Act* §346, 28 *Purdon's Pa. Stats.* §317, and by decisional law, *Funk v. U. S.* 290 U. S. 371 (1933), the privilege attached to confidential communications between husband and wife still persists, *Wolfle v. U. S.* 291 U. S. 7 (1934), *New York Civil Practice Act* §349, *New York Penal Law* §2449, 28 *Purdon's Pa. Stats.* §316.

The privilege relates to either the written or spoken word but is applicable only where the communication is confidential due to its nature, *Seitz v. Seitz* 170 Pa. 71, 32 Atl. 578 (1887), *Parkhurst v. Berdell* 110 N. Y. 386, 18 N. E. 123 (1888) and is made in the absence of third persons, *People v. Lewis* 62 Hun 622, 16 N. Y. Supp (Sup. Ct. 1st Dept. 1891).

The reason for the privilege is the preservation of conjugal unity. Therefore, the privilege acts as a bar available only to one spouse against testimony by the other, and does not prevent the admission into evidence of conversations overheard, *Commonwealth v. Wakelin* 230 Mass. 567, 120 N. E. 209 (1918), but cf. *Nash v. Fidelity Phoenix Fire Ins. Co.* 106 W. Va. 672, 146 S. E. 726 (1929), or letters intercepted by third parties, Cf. *People v. Hayes,* 140 N. Y. 484, 35 N.

E. 951 (1894). Nevertheless, it has been maintained that due to the personal nature of the privilege the spouse confided in should not be allowed to circumvent the rule by acting in connivance with a third person so as to bring the conversations within the ambit of the "eavesdropper" exception to the privilege, 8 *Wigmore On Evidence* §2339 (3rd Ed. 1940), *Richardson On Evidence* §515 (7th Ed. 1948). Despite the apparent validity of the arguments propounded by text-writers, many jurisdictions which have passed upon the question have held such evidence admissable, *McNeill v. State* 117 Ark. 8, 173 S. W. 826 (1915), *State v. Buffington* 20 Kan. 599, 27 Am. Rep. 193 (1878). The reasoning of the court in the principal case, to the effect that the plaintiff ought not to be allowed to procure indirectly and through his agent an advantage not otherwise available to him, would appear to be the preferred approach towards a rule of law which has as its ultimate objective the strengthening of the marriage relationship by investing it with a bond of mutual trust and confidence between the spouses.

Gerard J. O'Brien

EQUITY—SPECIFIC PERFORMANCE BY PARTIAL SUB-PURCHASER AGAINST ORIGINAL VENDOR

The New York, New Haven & Hartford Ry. Co. leased a parcel of real property to Bronx-Whitestone Terminals, Inc. The lease contained an option to purchase. Bronx contracted to convey a part of the leasehold to Geo. V. Clark Co., and thereafter gave notice to the Railroad of its exercise of the option. Clark tendered performance to Bronx, but Bronx refused to deliver a deed, on the grounds that (1) it could not get title from the Railroad, and (2) that the title was unmarketable. Clark sued for specific performance, joining Bronx and the Railroad. A motion to dismiss, on the grounds that the complaint failed to state a cause of action, was granted in favor of the defendant Railroad in the Supreme Court, County of Bronx, where it was declared that a suit could not be brought on a contract by a plaintiff who is neither a party nor privy to it. On appeal, the order was reversed, Callahan J. stating that (1) . . . "although there is no privity of contract between Clark and the Railroad, privity of estate exists, and equities have arisen in favor of Clark entitling him to specific performance of the Bronx-Railroad contract, and his own contract of sub purchase . . ."; (2) "in any event the complaint states a cause of action for specific performance against Bronx, . . . and the Railroad is a necessary party to such suit to avoid circuity of action . . . ." Van Voorhis, J., dissented. *Geo. V. Clark Co., Inc.* et. al. v. *New York, New Haven & Hartford Ry. Co.* et. al., ———App. Div.———, 107 N. Y. S. 2nd 721 (1st Dept. 1951).

Equity will entertain a cause of action for specific performance of an ex-