Marquette Law Review

Volume 33
Issue 3 *Winter 1949-1950*

Article 7

1950

Evidence: Scope of Cross-Examination of Juror Witness to Events in Jury Room

Vincent A. Vassallo

gage because rates for transportation may be directly affected by the degree of the carrier's responsibility for safe carriage and delivery of baggage. Under this reasoning posted tariff regulations which in any way directly limited the amount of money which the carrier could be called upon to pay out would seem to be matter notice of which the passenger would properly be held to have. Regulations pertaining to obligatory routing of passengers or manner of baggage disposition might conceivably be included in this category. Situations are various and many. A regulation, however, limiting the time in which an action might be commenced appears too remote in its effect on the carrier's rates and charges to reasonably charge a passenger of notice thereof in the manner undertaken in the instant case. Nor can it be said to be a matter contemplated or required by the Interstate Commerce Act to be filed under tariff regulations. The law as pronounced in the present case would seem to allow the carrier to attach unusual limitations and conditions, both subsequent and precedent, to the unsuspecting passengers' contract of carriage by merely including them on the posted list of tariff regulations. This hardly seems desirable.

The case of *Pacific SS Co. v. Cackett*[5] presented a fact situation similar to the one here discussed. The Court there held specifically that because giving of notice of claims for damages from negligence had no perceptible relation to rates and charges for transportation, the plaintiff did not lose her right of action by failure to comply with carrier's regulation pertaining thereto. This case was not cited in the opinion of the present case.

PATRICIA MAHONEY

Evidence — Scope of Cross-Examination of Juror Witness to Events in Jury Room — One Burton was on trial for income tax evasion. LaBranche was called as a juror, examined, accepted, heard the evidence and thereafter was sent to the jury room where he deliberated with his fellow jurors as to the verdict. The result was a disagreement and the jury was discharged. This was followed by a criminal action charging LaBranche and others with conspiracy in that for a sum of money LaBranche promised to vote for the acquittal of Burton. The prosecution called Adams who had served as a petit juror with LaBranche, and asked how LaBranche had voted. Adams answered LaBranche had voted for acquittal throughout the entire proceedings in the jury room. On cross-examination counsel for LaBranche asked Adams how the other jurors had voted. The government objected on grounds of immateriality and irrelevancy, and was sus-

[5] *Supra,* Note 3.

tained by the Court. On appeal defendant contended the limitation on his right of cross-examination was prejudicial, because if Adams had been permitted to answer the question, it would have been shown that not only had LaBranche voted for acquittal, but seven other jurors also voted the same way. *Held:* In the prosecution of a juror for conspiracy to impede the administration of justice, where it is testified that the juror voted not guilty throughout the proceedings of the jury, that on cross-examination because of juror's privilege it would be improper to ask how the other particular jurors voted. Conviction was sustained. *Burton v. United States, 175 F. (2d) 960 (C.C.A. 5th 1949).*

It is settled with apparent unanimity that the activities and deliberations transpiring in the jury room are cloaked with a definite sanctity and privilege.[1] Except in those countries where a tryannical form of government exists, the courts will not permit a prying into the jury room to ascertain how the jurors voted in arriving at the verdict. For reasons of public policy the utmost freedom of debate and protection from impertinent exposure of the arguments and ballots of the jurors must be upheld.[2]

Admitted such sanctity and inviolability does exist, yet it is conceded the privilege takes as its postulate a genuine relation, honestly created and honestly maintained.[3] In other words, although a juror is protected from a disclosure of his activities in the jury room, this immunity may be obliterated when prima facie evidence is produced showing he acted corruptly.[4] Thus if it be shown the juror rendered untrue statements on his examination as to his qualifications as a juror, or that he accepted a bribe, or that he propositioned other jurors to acquit the defendant, the courts will then permit the jury room door to be opened for the purpose of gathering corrobative evidence.[5]

In holding that the testimony of Adams as to how the other jurors voted was irrelevant and immaterial, the reasoning behind the Court's ruling ostensibly was based on the idea that jurors should be afforded sanctity. This doctrine has its roots in an old English case where at the seige of Minorca in 1755. The British public was profoundly jarred at the death sentence imposed on the Admiral, and immediately set up a vociferous clamor for an investigation of those who had rendered the verdict. In refusing to investigate the doings of the triers, the House of Lords concluded that for the sake of administering criminal justice satisfactorily, a disclosure of the reasoning of those who pronounced the verdict could not be made public.[6]

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[1] Columbus Oil Co. v. Moore, 202 N.C. 708, 163 S.E. 879 (1932).
[2] Carpenter v. Carpenter, 48 R.I. 56, Atl. 322 (1926).
[3] Clark v. United States, 289 U.S. 1, 535 S.Ct. 465, 77 L.Ed. 933 (1933).
[4] *Ibid.*
[5] Matter of Cochran, 237 N.Y. 336, 143 N.E. 212 (1924).
[6] Campbell, Lives of the Lord Chancellors, Vol. V. Chapter 136, p. 141.

This principle as stated cannot be controverted. Query whether there should be strict adherence to such a policy once the door to the jury room has been unlatched? More precisely, should one party be allowed to invade the sanctity of the jury room, obtain the evidence it desires, and then close the door and exclude the opposition from securing evidence from the same source which may be favorable to him?

By analogy it is found that the law abounds with privileges, immunities, and privacies accorded in particular relationships existing between parties. Thus there is a privilege protecting communications between attorney and client.[7] There is a privilege extended the doctor-patient relationship.[8] As between husband and wife both are precluded from testifying against the other in matters classed as private and confidential communications.[9] A defendant or any witness may refuse to answer questions which are of a self-incriminating nature.[10] For each and every privilege there is a distinct reason, which usually may be summed up by stating that as between the parties there exists a natural confidence, and there must be no apprehension that such confidence will be violated. Yet, in each and every case, this privilege may be waived and thrown to the winds by the parties themselves either by breaking the seal of secrecy by their own testimony,[11] by failing to properly object when the privilege is invaded,[12] or by probing the party beyond the limits of the privilege.[13] In short, the veil is draped shrouding the events and words from disclosure for reasons of confidence, respect, and harmony, providing the protected parties do not open the door. Once the lid has been lifted, the privilege drops out of the picture, and there is publicity.

From all this it seems apparent that the standards of American justice and due process of law will not tolerate one party trespassing in and out of the so-called private zone, and at the same time not allow a similar opportunity to the other litigant. Whether the protected class be a jury, the attorney-client, doctor-patient, should make no difference. If on direct examination, the privilege is ignored and one party is permitted to extricate evidence from a source in the protected category, the fundamental right of the opposition insists that cross-examination pursuing the same avenue must be accorded that party.[14] When such cross-examination is abbreviated and cut short, it is obvious the rulings

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[7] Matters v. State, 120 Neb. 404, 232 N.W. 781 (1930); Orton v. McCord, 32 Wis. 205 (1873).
[8] Maine v. Maryland Casualty Co., 172 Wis. 350, 178 N.W. 749, 15 A.L.R. 1536 (1920).
[9] Sexton v. Sexton, 129 Iowa 487, 105 N.W. 314 (1905); 2 LRA NS 708.
[10] United States v. Benjamin, 120 F. (2d) 521 (C.C.A. 2d 1941).
[11] People v. Gosch, 82 Mich. 22, 46 N.W. 101 (1890).
[12] Burke v. Chicago & N.W. Ry. Co., 131 Minn. 209, 154 N.W. 960 (1915).
[13] In Re Coleman's Will, 111 N.Y. 220, 19 N.E. 71 (1888).
[14] Alford v. United States, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624 (1931).

of the court may be partial, one-sided, and give an advantage to the sustaining party. To say jurors must be insured freedom of action, and at the same time open the door for one side and not for the other, seems too high a price to pay for the assurance to jurors of serenity of mind.

VINCENT A. VASSALLO

Torts — Remedy of Personal Representative for the Wrongful Death of an Unborn Child — Beatrice Verkennes, mother of the deceased child and wife of the plaintiff, engaged defendant physician to take care of her during pregnancy and the delivery of her child. While at the hospital defendant allegedly was negligent in properly aiding, treating, and caring for her during her confinement, and that by reason thereof the foetus died undelivered. *Held:* under a wrongful death statute, the personal representative of an unborn child alleged to be viable and capable of separate and independent existence, whose death was caused by the negligence of the physician in charge of the mother, may maintain an action therefor on behalf of the next of kin of such deceased child. *Verkennes v. Corniea et al., 38 N.W. (2d) 838, (Minn., 1949).*

There is a conflict of authority on the issue whether the special administrator for the unborn child has a cause of action on behalf of the unborn child. The majority of jurisdictions follow the early case of *Dietrich v. Inhabitants of Northampton.*[1] Justice Holmes there maintained that a child *en ventre sa mere* has no juridical existence, and is so intimately united with its mother as to be a "part" of her and as a consequence is not to be regarded as a separate, distinct, and individual entity. The reasoning thus expressed follows the common law.[2] In an Illinois case plaintiff's mother, ten days before being confined, negligently was injured in defendant's elevator. Plaintiff, who was born four days later, was also negligently injured. The State has an unlawful death statute, but in denying recovery to the child the opinion read:

> "That a child before its birth is in fact, a part of the mother, and is only severed from her at birth, cannot, we think, be successfully disputed. The doctrine of the civil law and the ecclesiastical and admiralty courts, therefore, that an unborn child may be regarded as in esse for some purposes, when for its benefit, is a mere legal fiction, which, so far as we have been able to discover, has not been indulged in by courts of common law to the extent of allowing an action by an infant for injuries occasioned before its birth. If the action can be maintained, it necessarily follows that an infant may maintain an action against its own mother for injuries occasioned by the negligence of the mother while pregnant with it. We are of the opinion that the action will not lie."[3]

[1] 138 Mass. 14, 52 Am. Rep. 242 (1884).
[2] 52 Am. Jur. 440, sec. 98.
[3] Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N.E. 638 (1900).