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Evidence--Privileged Communications--Police Records in a Civil Case

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may be joined and damages on each cause of action separately assessed by special verdict.[18]

In many jurisdictions the defendant may by proper motion require the plaintiff to consolidate his causes of action.[19] The purpose underlying this procedure is to avoid a multiplicity of suits and have the rights of all parties fully determined in one action. It would seem that the same reasons should be applied so as to give the plaintiff the right to join the causes of action in one suit.

ROBERT J. KALAFUT

EVIDENCE — PRIVILEGED COMMUNICATIONS — POLICE RECORDS IN A CIVIL CASE

A chief of police was served with a subpoena duces tecum in connection with the taking of a deposition in a civil action for a wrongful death, claimed to have been caused by two police officers of the City of Cleveland. The subpoena described certain records of the police department made by the officers at the time of the death. The chief of police had possession of these records. Notwithstanding an order of the notary, he refused to produce them on the ground that they were privileged from disclosure. He was held in contempt of court and placed under technical arrest. On appeal, the Ohio Supreme Court held that the petitioner was not entitled to a writ of habeaus corpus.[1]

The majority of the court stated that it was within the province of the legislature to provide for instances of a privilege of non-disclosure and that the courts should " only in extreme cases recognize such instances where they have not been provided by statutory or constitutional provisions."[2] The dissent reasoned that the circumstances were sufficiently compelling to extend the privilege since the disclosure of these records would destroy their usefulness as aids in prosecution and therefore would be against public policy.[3]

In a deposition proceeding in Ohio a witness who is not a party to the action may refuse to answer questions or produce evidence only if that testimony or evidence is privileged.[4] A privilege exempting a witness from testifying or producing evidence must rest on some statutory or constitutional provision.[5] The statutory privileges have been enumerated by Ohio

[1] *In re* Story, 159 Ohio St. 144, 111 N.E.2d 385 (1953).

[2] *Id.* at 151, 111 N.E.2d at 388.

[3] *Ibid.* Chief Justice Weygandt and Judge Matthias dissented.

[4] *In re* Martin Jr., 141 Ohio St. 87, 47 N.E.2d 388 (1943).

[5] *In re* Frye, 155 Ohio St. 345, 98 N.E.2d 788 (1951); Torrance v. Torrance, 147 Ohio St. 169, 70 N.E.2d 365 (1946); Weis v. Weis, 147 Ohio St. 416, 72 N.E.2d 365 (1946); Goehring v. Dilliard, 145 Ohio St. 41, 60 N.E.2d 704 (1945); Bene-

Revised Code Section 2317.02 (Ohio General Code Section 11494) [6] However, the Supreme Court of Ohio has extended the privilege beyond statutory or constitutional authority.[7] An example of this extension is found in cases invoking the attorney-client privilege. By a literal construction of the privilege statute[8] an attorney cannot testify concerning communications made to him by a client, but there is no privilege regarding the production of records or testimony concerning them afforded the party or his employees. Yet, under the attorney-client privilege, the court has often held that reports and records gathered by transportation companies in preparation for litigation, in the possession of the company or its employees, are privileged communications and their production cannot be enforced in the taking of depositions.[9] The court, although broadening the privilege in this instance, has refused to extend the privilege to the confidential com-

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dict v. State, 44 Ohio St. 679, 11 N.E. 125 (1887); Roberts v. Briscoe, 44 Ohio St. 596, 10 N.E. 61 (1886); *In re* Raab s Estate, 16 Ohio St. 273 (1865); Bomberger v. Turner, 13 Ohio St. 263 (1862).

[6] "The following persons shall not testify in certain respects:

(1) An attorney, concerning a communication made to him by his client in that relation, or his advice to his client , or a physician concerning communications made to him by a patient.

(2) A clergyman or priest, concerning a confession.

(3) A husband or wife, concerning any communication made by one to the other unless made in the known presence of a third person.

(4) A person who assigns his claim or interest concerning any matter in respect to which he would not if a party be permitted to testify.

(5) A person, who, if a party would be restricted in his evidence under the next following section. ["Dead Man's Statute"].

[7] "It is apparent, therefore, that this court has extended the privilege against testifying or producing evidence to an instance beyond those supported by statutory or constitutional provisions." *In re* Story, 159 Ohio St. 144, 148, 111 N.E.2d 385, 387 (1953).

[8] See note 6 *supra.*

[9] *In re* Shoup, 154 Ohio St. 221, 94 N.E.2d 625 (1950); *In re* Hyde, 149 Ohio St. 407, 79 N.E.2d 224 (1948); *In re* Klemann, 132 Ohio St. 187, 5 N.E.2d 492 (1936); *Ex parte* Schoepf, 74 Ohio St. 1, 77 N.E. 276 (1906).

The court has, however, distinguished between information obtained in preparation for litigation and information obtained in the regular course of business. Although both may be in the hands of the company attorney, only the former is privileged. *In re* Keough, 151 Ohio St. 307, 85 N.E.2d 550 (1949); *In re* Hyde, 149 Ohio St. 407, 79 N.E.2d 224 (1948); Furman v. Central Park Plaza, 102 N.E.2d 622 (Cuyahoga Com. Pl. 1951). See 4 WEST. RES. L. REV. 86 (1952).

[10] *In re* Frye, 155 Ohio St. 345, 98 N.E.2d 788 (1951)

[11] Weis v. Weis, 147 Ohio St. 416, 72 N.E.2d 245 (1946).

[12] See note 9 *Supra.*

[13] The federal courts take a liberal view of the deposition discovery proceeding and restrict privileges to their narrowest permissible limits. Hickman v. Taylor, 329 U.S. 495, 67 Sup. Ct. 385 (1946); Reynolds v. U.S., 192 F.2d 987 (3d Cir. 1951); Brookshire v. Penn. R.R., (N.D. Ohio 1953)