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# EVIDENCE - WITNESSES - PRIVILEGE OF REPORTER NOT TO TESTIFY CONCERNING CONFIDENTIAL COMMUNICATIONS

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EVIDENCE — WITNESSES — PRIVILEGE OF REPORTER NOT TO TESTIFY CONCERNING CONFIDENTIAL COMMUNICATIONS — Defendant, a newspaper reporter, refused to reveal to a grand jury which was investigating gambling and the lottery racket the names and addresses of persons and places mentioned in certain newspaper articles he had written on that subject, on the ground that the information was given to him confidentially and its source was therefore privileged. He was committed for contempt, and sued out a writ of habeas corpus. *Held*, writ dismissed. *Mooney v. Sheriff*, 269 N. Y. 291, 199 N. E. 415 (1936).

To further justice, the law has taken the position, in the famous words of Lord Hardwicke, that the "public has a right to every man's evidence"; and the mere fact that a witness has been given information in confidence affords him no immunity from being compelled to testify concerning it in court.[1] The exceptional privilege which has been attached, either by judicial law or by statute, to confidential communications received by persons occupying certain relationships to those who have disclosed the information [2] is based upon the fact that greater harm to society would result from admitting the testimony and thereby injuring the relationship than by keeping it out. This privilege has never been extended by the common law to statements made in confidence to

[1] 4 WIGMORE, EVIDENCE, § 2192 (1923); 5 ibid., § 2286; Ex parte Taylor, 110 Tex. 331, 220 S. W. 74 (1920); 70 C. J. 376 (1935).

[2] Confidential communications which are generally privileged include those made in lawyer-client, husband-wife, physician-patient, and priest-penitent relationships, state secrets, trade secrets, statements made by jurors in the jury room or to judges, and information given to prosecuting attorneys (according to some decisions). See 5 WIGMORE, EVIDENCE, § 2285 et seq. (1923); 70 C. J. 376-456 (1935); 28 R. C. L. 517-531 (1921).

newspapermen in their professional capacity,[3] although persistent agitation on their part has resulted in statutes in four states protecting them from being compelled to disclose the source of information.[4] It is considered a breach of journalistic ethics for a newspaperman to reveal such source,[5] and it is argued that because of the great public interest today in the dissemination of news and the difficulty of acquiring it when the informant is not protected, public policy demands that the privilege be extended to include secrets of the editorial room.[6]

[3] Joslyn v. People, 67 Colo. 297, 184 P. 375 (1919); In the Matter of Wayne, 4 Hawaii (D. C.) 475 (1914); In re Grunow, 84 N. J. L. 235, 85 A. 1011 (1913); Plunkett v. Hamilton, 136 Ga. 72, 70 S. E. 781, 35 L. R. A. (N. S.) 583, Ann. Cas. 1912B, 1259 (1911); Pledger v. Georgia, 77 Ga. 242, 3 S. E. 320 (1886); People v. Fancher, 2 Hun (9 N. Y. S. Ct.) 226 (1874); Ex parte Lawrence, 116 Cal. 298, 48 P. 124 (1897); People v. Durrant, 116 Cal. 179, 48 P. 75 (1897).

There have been insufficient decisions to map out the precise limits of the rule. Thus, the question of whether the privilege will be recognized in a civil case has not yet been decided. As to the bodies which can compel a reporter to testify, it has been held that a legislative body (Ex parte Lawrence, supra) and a police commission trying charges against a policeman (Plunkett case, supra) are included, as well as a court of record.

The principal case did not discuss the effect of the New York statute [N. Y. Civil Practice Act (Cahill, 1931), § 1254; Code, § 2034] which prohibits a court from inquiring into the "legality or justice" of any decree upon habeas corpus proceedings. A similar provision was made the basis of a holding in People v. Fancher, 2 Hun (9 N. Y. S. Ct.) 226 (1874) (cited in principal case), that the court cannot grant the writ, even if privilege exists, so long as the committing court had jurisdiction over parties and subject matter. If this is the true rule at common law, the authority of the cases on reportorial privilege is weakened, since most of them arise on habeas corpus proceedings. In absence of statute, however, it has been held that habeas corpus, though a collateral attack on the order, is properly granted where a witness has been committed for contempt in refusing to testify concerning privileged matters. Counselman v. Hitchcock, 142 U. S. 547, 12 S. Ct. 195 (1892); Bradley v. Veazie, 47 Me. 85 (1860); People v. Kelley, 24 N. Y. 74 (1861). The New York statute would seem to be merely declaratory of the common law rule that habeas corpus tests power and not mere error. Ferris, EXTRAORDINARY REMEDIES, § 18 (1926); 29 C. J. 25-32 (1922). It would seem that the existence of a reportorial privilege could be made the basis of habeas corpus, since the writ will ordinarily reach a commitment where the court has exceeded a positive legal prohibition on its acting, as well as where it had no jurisdiction over person or subject matter at all. Ferris, EXTRAORDINARY LEGAL REMEDIES, § 65 (1926); Ex parte Earman, 85 Fla. 297, 95 So. 755 (1923).

[4] *Maryland:* 1 Md. Ann. Code (Bagby 1924), art. 35, § 2; *New Jersey:* N. J. Laws, 1933, c. 167; *California:* Cal. Stat., 1935, c. 532, § 6; *Alabama:* 68 ED. AND PUB., No. 21, p. 26 (Oct. 5, 1935). Prof. Wigmore, who called the Maryland statute "detestable in substance" incorrectly predicted that it would remain unique. 5 WIGMORE, EVIDENCE, § 2286, note 7 (1923). Attempts to enact such legislation in New York and in Congress have been unsuccessful.

[5] See report on Mooney case decision in N. Y. TIMES, p. 6: 1 (Jan. 8, 1936); also, In the Matter of Wayne, 4 Hawaii (D. C.) 475 (1914).

[6] It has also been contended that the newspaper occupies a position like that of the prosecuting attorney, prosecuting wrongful conduct in the court of public opinion, and that a privilege similar to that extended by some courts to protect the prosecutor from disclosing the names of informers should be recognized. HAGEMAN, PRIVILEGED

However, the decision of the court would seem to be the sound one. We should be wary of fettering the administration of justice by reducing the mass of evidence accessible to the court; and the publication of news which cannot be secured without the recognition of the privilege is not an object of such overwhelming public interest as to override the counter interest in securing evidence, which at best is hard enough to obtain and which may be necessary to secure the conviction of criminals. Where journalistic ethics conflict with the administration of justice, the former must yield. Moreover, the extension of immunity might result in a tendency to aid the expansion of "muckraking" and sensational journalism, since the source alone would be privileged and publication not prevented.

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COMMUNICATIONS, § 234 (1889). The analogy, however, seems imperfect: the relation of the newspaper to the administration of justice is much more remote than that of the prosecutor.