1929

Privileged Communications

Joseph O’Meara

Notre Dame Law School

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Recommended Citation

Joseph O’Meara, Privileged Communications, 3 U. Cin. L. Rev. 229 (1929).

Available at: https://scholarship.law.nd.edu/law_faculty_scholarship/980

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in its "Re-statement of the Law of Contracts". 8 Section 219-(1) provides as follows:

"1. For the determination of the question whether a contract to vary a prior contract is within the statute, the second contract is regarded as creating a new single contract consisting of so many of the terms of the prior contract as the parties have not agreed to change, and in addition the new terms on which they have agreed."

An application of the Institute's rule to the facts of the principal case, and those in Clark v. Guest, 9 would, it seems, result in the same judgments as reached by the court in those cases. Similarly, if on the facts of Negley v. Jeffers, 10 the terms of the prior contract in reference to the conveyance be deemed no longer in the modified contract, because of the actual conveyance prior to the modification, the Institute's rule would again give the result reached by the court.

No generalization can decide a concrete case. Actually it can only describe the cases that have been decided previously and serve as a hypothesis for those arising in the future. The Institute's formulation, however, has the merit of simplicity in a field where confusion has reigned, and where definiteness itself is a policy to be served, and it will be interesting to note its effect on the future approach of our courts to the problem of the oral modification of a contract within the statute of frauds.

JAMES L. MAGRISH.

PRIVILEGED COMMUNICATIONS

In Wills v. National Life & Accident Insurance Co. 1 there is important dicta concerning the privilege which is accorded to confidential communications between physician and patient. The action was on a life insurance policy conditioned upon sound health on the part of the insured on the date and at the time of delivery

8The section referred to seems to apply to the Statute of Frauds generally. The Re-Statement does not refer to a "Statute of Frauds", such as was involved in the principal case. It is stated that the drafts of the law of contracts, including this section, have been approved and are no longer confidential.

9Supra, note 4.

10Supra, note 5.

128 Ohio App. 497 (1928).
of the policy. The defense was that the insured was not then in sound health. The trial court entered judgment on a verdict for the company. The court of appeals, after finding that the judgment was sustained by sufficient evidence of unquestioned admissability, stated that in its view the testimony of certain physicians, further sustaining the judgment, had been properly received by the trial court, saying:

"A proper interpretation of the clause of the policy which provides that the applicant must be in sound health is, we think, by operation of law, a waiver of the right to claim privileged communication under the statute, and an estoppel against objection to the evidence in the trial of a cause where the insured seeks to recover, because to hold otherwise would be to become a partner to the constructive fraud and the instrumentality of its perpetration."

In *Baird v. Detrick,* it was said that "the privilege conferred by sec. 11494, General Code, is solely for the benefit of the client, and may be waived by the client." If that be true as to attorney and client, it must also obtain in the case of physician and patient, and it has been so held. In the recent case of *New York Life Insurance Company v. Snyder,* the supreme court decided that an express waiver of the this privilege incorporated in an application for a policy of life insurance is valid and may be enforced by the company in a suit on such policy against all parties having or claiming any interest therein. That is the general rule.

That the waiver may be implied is vigorously maintained by Dean Wigmore. It was held otherwise in *Ausdenmoore v. Holzback.* Subsequently, however, in the case of attorney and client,
the supreme court has recognized that there may be an implied waiver by holding that an attorney for a testator, who, at the latter's request, witnesses his will, may testify to any fact affecting the validity of that instrument.\(^9\) The court indeed said that by such request the testator "expressly consents that the attorney may testify".\(^10\) That he consents, in effect, at least, is clear enough, but that there is an *express* consent in any customary sense is obviously not the fact. The consent must be implied for it does not appear except by inference from his conduct. That this is the real basis of the court's holding is clear from the context.

According to Dean Wigmore,\(^11\) "A waiver is to be predicated, not only when the conduct indicates a plain intention to abandon the privilege, but also when the conduct (though not evincing that intention) places the claimant in such a position, with reference to the evidence, that it would be unfair and inconsistent to permit the retention of the privilege."

The *dicta* quoted above from *Wills v. National Life & Accident Co.* is further supported by that eminent authority who holds,\(^12\) specifically, that "a contract of life or accident insurance ought to be deemed an implied waiver by both parties, because otherwise it leaves the prospects of proof for both parties a mere gamble."\(^13\)

Disclosures to a physician in his professional capacity were not privileged at common law. The privilege is of statutory origin, the first enactment being adopted in New York, 1828.\(^14\) Statutes creating a privilege for communications to a physician are now in force in about one-half of the states. The assumptions underlying these statutes have been vehemently assailed by Dean Wigmore,\(^15\) who characterizes the privilege as "a clever legerdemain loaned by the law to the parties to suppress the truth".\(^16\)

At all events there is certainly no reason to make a fetish of the statute and exempt it from the operation of the rule that

9Knepper v. Knepper, 103 Ohio St. 529, 135 N. E. 476 (1921).
10Ibid., p. 536.
115 WIGMORE, op. cit., supra, note 7, at p. 220.
12Ibid., supra, note 7, at p. 220.
13*Contra:* Maine v. Maryland Casualty Co., 172 Wis. 350, 178 N. E. 749 (1920), (two judges dissenting).
145 WIGMORE, op. cit., supra, note 7, sec. 2380.
15Ibid. In this connection it may be observed that the privilege may be invoked as well as by the defendant as by the plaintiff. Maine v. Maryland Casualty Co., *supra*, note 13, will serve as an example.
16Ibid., supra, note 7, sec. 2389.
statutes in derogation of the common law should be strictly construed. While the wisdom of that canon of interpretation may, in general, be open to some question, there is assuredly no ground, so long as it is adhered to, for ignoring it in connection with the statute under discussion.

The attitude taken by the court in Wills v. National Life & Accident Insurance Company is both reasonable and fair, and, while not supported by the cases, is consistent with settled rules of construction and, it is submitted, should be followed.

JOSEPH O'MEARA, JR.

RULINGS OF PUBLIC UTILITIES COMMISSION BASED UPON EVIDENCE NOT DISCLOSED TO THE PARTIES.

Grubb v. Public Utilities Commission of Ohio, involved the review of an order of the Utilities Commission on an application for a certificate to operate an interstate motor bus line between Columbus, Ohio, and Huntington, West Virginia, and a so-called "side-loop" from Portsmouth, Ohio, to South Portsmouth, Kentucky. Other carriers objected to the granting of the certificate contending, among other things, that the application was not made in good faith, and was a scheme to compel these operators to purchase peace against the competition that would be offered if the application were granted. These objections were directed particularly against the granting of a certificate for the "side-loop".

At the close of the commission's hearing the commissioners announced orally that the application would be granted as prayed for. Thereafter a written memorandum, confirming the announcement was signed by the commissioners who heard the case and was filed. Before the certificate was actually issued, the commissioners further considered the matter and decided to deny the application as to the "side-loop".

17 Kleybolte v. Buffon, 89 Ohio St. 61, 105 N. E. 192 (1913). Cf., Hill v. Micham, 116 Ohio St. 549, 553 (1927). "It has also been held that it is the duty of courts, in the interpretation of statutes, unless restrained by the letter, to adopt that view which will avoid absurd consequences, injustice, or great inconvenience, as none of these can be presumed to have been within the legislative intent. Moore v. Given, 39 Ohio St., 661."

18 Cf., Myers v. State of Indiana, 137 N. E. 547, 192 Ind. 592 (1922); Howe v. Regensburg, 132 N. Y. S. 837, 75 Misc. 132 (1911).