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## Evidence—Admissibility of Telephone Conversations—Identification of Calling Party

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tion to a case where the remedy at law is adequate; and if the remedy is inadequate, there is a sufficient basis for equity jurisdiction without reference to the mutuality doctrine.<sup>16</sup>

V. M.

EVIDENCE—ADMISSIBILITY OF TELEPHONE CONVERSATIONS—IDENTIFICATION OF CALLING PARTY—[Missouri].—In a suit to recover accrued rent, plaintiff introduced evidence concerning a dunning letter which plaintiff's lawyer had written to one of the defendants. In order to show defendants' knowledge of the letter, plaintiff sought to introduce his lawyer's testimony concerning a telephone conversation that took place when the lawyer was called by a party who identified himself as one of the defendants, saying he had received the letter and wanted to talk to plaintiff's lawyer about it. From the court's refusal to admit this testimony plaintiff appealed. *Held*, that the testimony was admissible. *Morriss v. Finkelstein*.<sup>1</sup>

Generally, evidence of telephone conversations is admissible when the witness can identify the other speaker.<sup>2</sup> Therefore, the circumstances under which identification is sufficiently certain give rise to the only real problem. It has long been held in most jurisdictions that a conversation is admissible when it is related by the person who called the listed number of an office or person, and received an answer. There is a presumption that the person answering the telephone was the person listed, or one authorized by him to answer.<sup>3</sup> Identification of the voice of the person answering in such cases has not been held to be a requisite of identification.<sup>4</sup>

16. The affirmative mutuality doctrine was rejected because of adequacy of the legal remedy in *G. W. Baker Mach. Co. v. U. S. Fire Apparatus Co.* (1916) 11 Del. Ch. 386, 97 Atl. 613, and in *Eckstein v. Downing* (1887) 64 N. H. 248, 9 Atl. 626, 10 Am. St. Rep. 404. On the other hand, in the early case of *Yulee v. Canova* (1864) 11 Fla. 9, specific performance at the suit of a vendor of sugar was decreed on the basis of mutuality of remedy, even though the relief sought was merely in the nature of compensation in damages or value. In *Morgan v. Eaton* (1910) 59 Fla. 562, 52 So. 305, 138 Am. St. Rep. 167, and in *Migatz v. Stieglitz* (1906) 166 Ind. 361, 77 N. E. 400, there are *dicta* to the effect that specific performance would be decreed even though there was a remedy at law.

1. (Mo. App. 1940) 145 S. W. (2d) 439.

2. *Hammond Lumber Co. v. Weeks* (1930) 105 Cal. App. 315, 287 Pac. 573; *Meyer Milling Co. v. Strohfeld* (1929) 224 Mo. App. 508, 20 S. W. (2d) 963, cert. quashed in *State ex rel. Strohfeld v. Cox* (1930) 325 Mo. 901, 30 S. W. (2d) 462; *Williamson-Halsell-Frasier Co. v. London* (1932) 154 Okla. 24, 6 P. (2d) 671.

3. *Wolfe v. Missouri Pac. Ry.* (1888) 97 Mo. 473, 11 S. W. 49, 3 L. R. A. 539, 10 Am. St. Rep. 331; *Guest v. Hannibal & St. Joseph Ry.* (1898) 77 Mo. App. 258; *Meeke v. Union Electric Light and Power Co.* (1919) 279 Mo. 574, 216 S. W. 923; *Ozark Fruit Growers Ass'n v. St. Louis-San Francisco Ry.* (1932) 226 Mo. App. 222, 46 S. W. (2d) 895; *Shelton v. Wolfe Cheese Co.* (Mo. 1936) 93 S. W. (2d) 947. See 7 Wigmore, *Evidence* (3d ed. 1940) 616, sec. 2155; McKelvey, *Evidence* (4th ed. 1932) 206, 207, sec. 131.

4. *Theisen v. Detroit Taxicab and Transfer Co.* (1918) 200 Mich. 136, 166 N. W. 901, L. R. A. 1918D 715; *Barrett v. Magner* (1908) 105 Minn. 118, 117 N. W. 245, 127 Am. St. Rep. 531; *Globe Printing Co. v. Stahl*

The problem of identifying the speaker is more difficult under the circumstances of the instant case. No presumption of identity can be held to arise when the witness is the one who was called, and in such cases the courts have been more strict in their demands for identification.<sup>5</sup> The mere statement by the person calling that he is a certain person has, when testimony was given by the person called, generally been held to be pure hearsay, if there were no other means of identification.<sup>6</sup> However, when the witness testified that he recognized the voice of his caller, the courts have generally admitted the conversation as evidence.<sup>7</sup> There is no definite rule as to admissibility when there was no recognition of the voice, and the courts must take into consideration the accompanying circumstances in each case. In many jurisdictions testimony by the person called concerning telephone conversations has been held inadmissible even where the subject of the conversation was a transaction to which the witness and the person who called were parties.<sup>8</sup> On the other hand, more liberal jurisdictions have admitted testimony of telephone conversations by the person called when the court felt there was such circumstantial evidence as would identify the caller, or when the party calling related facts tending to disclose his identity.<sup>9</sup> A federal decision very nearly in point held admissible evidence of a conversation which referred to two letters, one from the witness to the person calling, and the second from the person calling to the witness.<sup>10</sup>

Missouri, in a 1907 decision, was one of the first states to give the liberal interpretation to the rule of identification of the party calling the witness.<sup>11</sup> However, a much referred to decision handed down later seems to have

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(1886) 23 Mo. App. 451; *Miller v. Phenix Fire Ins. Co.* (Mo. App. 1928) 9 S. W. (2d) 672.

5. *Miller v. Kelly* (1921) 215 Mich. 254, 183 N. W. 717; *Meyer Milling Co. v. Strohfeld* (1929) 224 Mo. App. 508, 20 S. W. (2d) 968, cert. quashed in State ex rel. *Strohfeld v. Cox* (1930) 325 Mo. 901, 30 S. W. (2d) 462; See 7 Wigmore, *Evidence* (3d ed. 1940) 617, sec. 2155.

6. *A. T. Stearns Lumber Co. v. Howlett* (1927) 260 Mass. 45, 157 N. E. 82, 52 A. L. R. 1125; *American Trust Co. v. Moore* (Mo. App. 1923) 248 S. W. 983.

7. *Dorchester Trust Co. v. Casey* (1929) 268 Mass. 494, 176 N. E. 178; *Friedman v. Schlossberg* (S. Ct. 1921) 186 N. Y. S. 78; *Schwartz v. Mercantile Trust Co.* (Mo. App. 1925) 279 S. W. 253; *Meyer Milling Co. v. Strohfeld* (1929) 224 Mo. App. 508, 20 S. W. (2d) 963, cert. quashed in State ex rel. *Strohfeld v. Cox* (1930) 325 Mo. 901, 30 S. W. (2d) 462; *State v. Berezuk* (1932) 331 Mo. 626, 55 S. W. (2d) 949. But see *General Cheese Co. v. Moore Bros. Co.* (S. Ct. 1920) 180 N. Y. S. 481.

8. *Larner v. Massachusetts Bonding Co.* (1921) 238 Mass. 80, 130 N. E. 92; *Miller v. Kelly* (1921) 215 Mich. 254, 183 N. W. 717; *A. T. Griffin Mfg. Co. v. Bray* (1927) 193 N. C. 350, 137 S. E. 151.

9. *Merchant's Nat'l Bank v. State Bank* (1927) 172 Minn. 24, 214 N. W. 750; *Thomasson v. Davis* (Tex. Civ. App. 1934) 74 S. W. (2d) 557.

10. *American & British Mfg. Corp. v. New Idria Quicksilver Mining Co.* (C. C. A. 1, 1923) 293 Fed. 509.

11. *Kansas City Star Co. v. Standard Warehouse Co.* (1907) 123 Mo. App. 13, 99 S. W. 765. The caller referred to a newspaper advertisement as the one "we are putting in". Although the caller's voice was not recognized by the witness, the conversation was held to be admissible as evidence.

disregarded this holding.<sup>12</sup> It was not until the instant case that the Missouri courts extended the doctrine of the earlier case. In this case the fact that the call testified to was received shortly after the letter was mailed by the witness seems practically irrefutable circumstantial evidence of the identity of the caller, since he stated that he wished to talk about the letter and did not deny the conversation when opportunity offered. Thus, the principal case seems to be an advance along the same lines as the other liberal decisions on the matter, rather than a departure from the general rule requiring identification.

H. G.

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EVIDENCE—PRIVILEGE AGAINST SELF-INCRIMINATION—ADMISSIBILITY OF RESULTS OF INTOXICATION TESTS—[Texas].—Defendant was prosecuted for "murder without malice" for striking a pedestrian while driving an automobile. The prosecution attempted to introduce as evidence the results of certain tests performed on defendant while under arrest to prove that defendant was intoxicated at the time of the accident. These tests required defendant to answer questions, walk, make sudden turns, touch his nose, and submit a urine specimen for analysis. Defendant objected that the results were inadmissible as violative of the provision of the Texas constitution against self-incrimination.<sup>1</sup> *Held*, that the evidence was inadmissible. *Apodaca v. State*.<sup>2</sup>

The common law privilege against compulsory self-incrimination included two aspects: (a) testimonial utterances (b) obtained under compulsion. Originally the privilege was designed to prevent law enforcement agencies from relying on forced testimony, which would quite possibly be false.<sup>3</sup> All but two American jurisdictions have adopted this privilege in their constitutions.<sup>4</sup> But the American courts began at an early time to emphasize the compulsion factor of the rule to the exclusion of the requirement that the evidence be testimonial. Under this extension of the rule, the courts in effect prohibited examinations of the body of the accused and enforced conduct.<sup>5</sup>

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12. *Meyer Milling Co. v. Strohfled* (1929) 224 Mo. App. 508, 20 S. W. (2d) 963, cert. quashed in *State ex rel. Strohfled v. Cox* (1930) 325 Mo. 901, 30 S. W. (2d) 462.

1. Tex. Const. art. 1, sec. 10. "In all criminal prosecutions the accused \* \* \* shall not be compelled to give evidence against himself."

2. (Tex. Cr. 1940) 146 S. W. (2d) 381.

3. 8 Wigmore, *Evidence* (3d ed. 1940) 276, 362, secs. 2250, 2263. See *Ex parte Frenkel* (1920) 17 Ala. 563, 85 So. 878, a homicide case, where it was held that questioning the accused concerning the number of intoxicating drinks consumed violated the rule.

4. Iowa and New Jersey have adopted the privilege by statute. The wording of the privilege varies among the jurisdictions. The usual phrasing is either that in criminal cases no person shall be compelled to be a witness against himself or that no person shall be compelled to give evidence against himself. "This variety of phrasing \* \* \* neither enlarges nor narrows the scope of the privilege as already accepted, understood, and judicially developed in the common law." 8 Wigmore, *op. cit. supra*, note 3, at 321, sec. 2252.

5. *Cooper v. State* (1889) 86 Ala. 610, 6 So. 110; *Blackwell v. State*