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Evidence

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The father left before trial and a default judgment was entered against him for $7,579. The mother then brought suit on the judgment in Washington. A defense was entered on the ground that the judgment was obtained by fraud and a cross complaint was filed for one-half the amount the father had expended in the support of the four other children.

The action was dismissed by the court on the basis of RCW 26.20.010 which provides for joint and several liability of both the husband and wife for the expenses of the family and the education of the children. The court said the statute provides that the obligation of a mother and father for the support of the children is expressly prescribed as joint and several, not as primary and secondary as under the common law. There is nothing in the statute which indicates that the legislature intended that the mother should be entitled to contribution from the father while the children were in her custody but that there would be no reciprocal right in the father while the children were in his custody. The court went on to state that while in a divorce action there exists a wide discretion to adjust the property rights of the parties, in a subsequent action the court is bound by the statute. In commenting on the evidence supporting the mother's contention that the father had abandoned her and was consequently barred from claiming contribution, the court said that the evidence was not only inconclusive but that on the basis of *Schoennauer v. Schoennauer*, 77 Wash. 132, 137 Pac. 325 (1913), the fact of abandonment was immaterial.

The court disposed of the mother's argument to the effect that the father's claim should have been interposed in the New York suit by holding that nothing had been pleaded as a basis for such a decision and that consequently under RCW 4.32.090 the father's counterclaim was proper as an independent cause of action.

A dissenting opinion pointed out that RCW 26.20.010 had never before been applied to facts such as these. The dissenting judge felt that the correct rule should be that a spouse's right to contribution is suspended during such time as the one from whom contribution is sought is wrongfully deprived of the custody of the child or children in question, or during any period that the children's whereabouts are wrongfully concealed.

EVIDENCE

Sound Recordings—Foundation for Admission in Evidence.[1] The foundation which must be laid before a sound recorded confession may be received in evidence has been prescribed by the Washington Supreme Court in *State v. Williams*.[2] The *Williams* case was a rape prosecution in which the state offered in evidence a tape recording of a conversation from which a written statement purportedly signed by the defendant was taken. The trial court admitted the tape recording and the written statement. On appeal defendant assigned as error admission of the statement and the recording. The supreme court ruled only on admission of the recording since it alone was argued in defendant's brief in support of the assignment of error. The supreme court held that admission of the recording was prejudicial error because a proper foundation had not been laid. A new trial was granted.

[1] Annot., 168 A.L.R. 927 (1947) (a discussion of admissibility of sound recordings as evidence).

[2] 149 Wash. Dec. 347, 301 P.2d 769 (1956).

The witness who recorded defendant's statement testified on direct examination that he had a tape recorder in operation while he was taking the defendant's statement; that he had prepared the recorder mechanism so it would function properly; that the conversation which was recorded was the conversation from which the written statement was taken; and that the tape recording offered in evidence was a recording of that conversation.

After referring to opinions from other jurisdictions concerning the foundation required for recordings, the Washington Court approved the requirements for admission of a dictaphone recording laid down by the Georgia Court in *Solomon, Jr., Inc. v. Edgar.*[3] In the *Solomon* decision the Georgia Court said a proper foundation for the use of mechanical transcription devices must be laid as follows:

> (1) It must be shown that the mechanical transcription device was capable of taking testimony. (2) It must be shown that the operator of the device was competent to operate the device. (3) The authenticity and correctness of the recording must be established. (4) It must be shown that changes, additions, or deletions have not been made. (5) The manner of preservation of the record must be shown. (6) Speakers must be identified. (7) It must be shown that the testimony elicited was freely and voluntarily made, without any kind of duress.[4]

The Washington Court in the *Williams* decision held that the testimony elicited during the direct and cross examinations of the state's witness failed to provide a proper foundation under the *Solomon* decision, but did not specify which requirements had not been satisfied. Clearly, the foundation laid in the *Williams* case did not satisfy requirements (2), (3). (4), (5), and (7) as set forth above.

As identified by the Washington Court, the problem presented was one of striking a balance between the application of sufficient safeguards to assure true reproduction and the imposition of requirements so stringent that they would tend to discourage the use of this valuable evidentiary medium. Other aspects of the problem of admissibility of recordings have been dealt with by the Washington Court,[5] but the *Williams* decision is one of first impression on the adequacy of foundation and on the admission of a recorded confession.

Analysis of the requirements set forth in the *Williams* decision re-

[3] 92 Ga. App. 207, 88 S.E.2d 167 (1955).
[4] Id. at 212, 88 S.E.2d at 171.
[5] State v. Lyskoski, 47 Wn.2d 102, 287 P.2d 114 (1955), 31 WASH. L. REV. 145 (1956); State v. Slater, 36 Wn.2d 357, 218 P.2d 329 (1950); State v. Salle, 34 Wn.2d 183, 208 P.2d 872 (1949).

veals that a party offering a sound recorded conversation in evidence must be prepared to present, at the minimum, the testimony of: (1) the person who operated the recording device; (2) one who was present when the conversation was recorded; (3) the custodian of the recording from the time of making until the time of trial; (4) a person who is familiar with the voices of the speakers. In the typical case the testimony of one witness will satisfy several if not all of these requirements.

The statement of the court that "it must be shown the mechanical transcription device was capable of taking testimony" is unclear. If the court means that it must be shown that a device of the type used was capable of taking testimony, the requirement would appear to be satisfied by the testimony of any witness who had recorded conversation on a device of that type. But if the court means that it must be shown that the particular device used was, at the time used, capable of taking testimony, it would appear the requirement would be satisfied only by the testimony of a witness who had tested that device and had found it to be in working order immediately prior to the recording of the conversation in issue.

In view of the push-button simplicity with which modern sound recording devices operate it is apparent that the requirement of capability of the operator can be easily satisfied.

The stated requirement of a showing that changes, additions or deletions have not been made would seem to be satisfied simultaneously with the showing of custodianship if the recording offered is the original one made.. If the recording offered purports to be a copy of the original then the showing of lack of changes, additions or deletions would have to be made by the testimony of a witness familiar personally with the contents of the original recording or of the conversation itself. It should be noted that the Washington Court has held that a copy of a recording is not inadmissible under the best evidence rule.[6]

It is possible for an expert to dub or to delete material from a wire or tape recording on its face. Dubbing or deleting requires splicing the tape or wire. A splice on a tape can be detected by the eye. Major additions or deletions which would interrupt the conversational tone of the speaker could also be detected by the ear. But should the altered tape or wire then be rerecorded, major alterations might still be audible, but no alterations would then be visible.

The expressed reason that the court in the *Williams* case adopted

[6] State v. Lyskoski, note 5, *supra.*

such an extensive foundation is that too little restriction could result in ingenious fraud and tampering. An interesting comparison here is that of the foundation necessary for admission in evidence of a photograph, which also is capable of being altered. Proof of accuracy of a photograph may be given by anyone who has knowledge of the thing represented thereby, and need not be verified by the photographer who took it.[7]

Whether the first six *Williams* requirements must be satisfied before a sound recording of a conversation may be received in evidence for purposes other than a confession is a question at present unanswered. Until that answer is supplied the practitioner must be prepared to meet these requirements when he offers such a recording in evidence in a Washington court.

Privilege Against Self Incrimination—Effects of Claiming. In *Annest v. Annest*[1] plaintiff husband appealed from that portion of a divorce decree awarding custody of the children and child support to defendant wife. The trial court found that defendant wife had committed adultery and that plaintiff had threatened her and her paramour with criminal prosecution. During cross-examination defendant, her paramour and his wife declined to answer questions relating to adultery on the ground their answers would tend to incriminate them. On appeal plaintiff assigned as error the trial court's refusal of his motion to strike the entire testimony of these witnesses. In affirming the decree the Washington Supreme Court held that since the action was not brought or maintained by defendant, the most the trial court could have done was to have stricken the testimony, but failure to strike was not prejudicial error because, even disregarding this testimony, the record supported the decree.

In the *Annest* opinion the court quoted the provisions of Rule of Practice, Pleading and Procedure 42 as in effect at the time of the trial[2] and then stated:

[7] Kelleher v. Porter, 29 Wn.2d 650, 189 P.2d 223 (1948).

[1] 149 Wash. Dec. 68, 298 P.2d 483 (1956).

[2] 34A Wn.2d 106. "Testimony of Adverse Party. A party to an action or proceeding shall not be precluded from examining the adverse party as a witness at the trial. The testimony of a party at the trial may be rebutted by adverse testimony. If a party refuse to attend and testify at the trial, his complaint, answer or reply may be stricken out, and judgment taken against him, and he may also, in the discretion of the court, be proceeded against as in other cases of contempt; provided this rule shall not be construed so as to compel any person to answer any question where such answer may tend to incriminate himself." Rule 42 has since been abrogated and there has been substituted therefor the provisions appearing in Rule of Pleading, Practice and Proced-

> A witness who declines to answer a proper question on the ground that it would tend to incriminate him, has not told the whole truth, which his oath as a witness requires. He will not be permitted to testify to part of the truth only. When a party claims the privilege of not answering a proper question, the court may dismiss his action or strike his testimony.[3]

Two prior Washington decisions deal with the effect of a party's refusal to answer questions on cross examination. In *Thomas v. Dower*[4] it was held proper to strike the entire testimony of a plaintiff who refused to answer on the ground of self incrimination. In *Rutger v. Walken*[5] it was held proper under the provisions of Rem. Rev. Stat. 1230[6] to strike the entire testimony of a plaintiff who refused to answer responsively during cross examination. Although neither the statute nor Rule 42 mentions the striking of testimony, the similarity of their provisions and the *Rutger* decision indicate that a court may proceed under this Rule to strike the testimony of a party who refuses to answer.

Rule 42 as in effect at the time of the *Annest* trial lends itself to two possible constructions. The usual function of a proviso is to limit operation of preceding matter. If this rule of construction be followed the result would be to exempt from operation of the Rule those cases where refusal to answer is based on the ground of self incrimination. For purposes of brevity this construction of Rule 42 will hereafter be referred to in this note as "the exemption construction." A proviso, however, is sometimes employed to guard against a possible construction that was not intended. Giving recognition to this use of a proviso, the Rule may be construed to mean that the privilege against self incrimination is recognized to the extent that the party may not be required to relate incriminating matter, but if he chooses to invoke the privilege he may be penalized as provided in the Rule. This construction will be hereafter referred to as "the penalizing construction."

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ure 42, 45 Wn.2d xxx. The change in the Rule is not material to the discussion in this note.

[3] 149 Wash. Dec. at 69, 298 P.2d at 484.

[4] 162 Wash. 54, 297 Pac. 1094 (1931).

[5] 19 Wn.2d 681, 143 P.2d 866 (1943).

[6] RCW 5.04.060 (later abrogated and superceded by Rules of Pleading, Practice and Procedure 44 and 26-37 incl.) "If a party refuse to attend and testify at the trial, or to give his deposition, or to answer any interrogatories filed, his complaint, answer or reply may be stricken out, and judgment taken against him, and he may also, in the discretion of the court, be proceeded against as in other cases for a contempt: Provided, that this chapter shall not be construed to compel any person to answer any question where such answer may tend to incriminate himself."

The propriety of the court's action in striking the defendant's testimony in the *Annest* case under the provisions of Rule 42 must therefore be assessed in light of both constructions of the Rule. Striking that testimony under the provisions of the Rule is in accord with "the penalizing construction," but is contrary to "the exemption construction."

There remains to be examined the statement in the *Annest* decision: "... When a party claims the privilege of not answering a proper question, the court may dismiss his action or strike his testimony."

The *Annest* opinion raises some question as to which construction the Supreme Court has placed on Rule 42. The statement quoted above is itself ambiguous. One interpretation is that a trial court is vested with a considerable amount of discretion in dismissing an action for refusal to testify, and may take into account the propriety of the claim of privilege and the importance of the subject matter as to which the privilege was invoked. This interpretation of the court's language would indicate that the court has placed "the exemption construction" on Rule 42. But taken in the context of the *Annest* opinion where the claim of privilege was properly made and where the matter to which the claim was asserted was important, this interpretation does not seem too plausible.

A second interpretation of the court's statement is that the trial court may dismiss the action of a plaintiff who claims the privilege, while it may only strike the testimony of a defendant who claims the privilege. This interpretation indicates that the Supreme Court has placed "the penalizing construction" on the Rule as far as a plaintiff is concerned. Rule 42 would thus operate to confront a plaintiff with the choice of either incriminating himself or having his complaint stricken and judgment entered against him. Confronting a plaintiff with these alternatives does not seem to work too great a hardship on him, for he has a choice as to whether he will bring his action and thus subject himself to being called to testify. Arguably, a plaintiff should be prepared to freely divulge to the court the matters on which his action rests. In view of the actual holding in the *Annest* case, and the rule of construction favoring that construction which is constitutional, it may well be said that the Washington court intends to confront only a plaintiff with this choice.

A third interpretation of the statement is that whenever either the

plaintiff or the defendant claims the privilege against self incrimination the court may properly strike his complaint or answer and enter judgment against him. This interpretation indicates that the court has placed "the penalizing construction" on the Rule. Under this construction the Rule could operate to compel a defendant who has no choice in bringing the action or in taking the stand to either incriminate himself or to have judgment entered against him. Were Rule 42 actually to be applied so as to confront a defendant with this choice the question of the constitutionality of the Rule as applied could then arise.

It is doubtful whether applying Rule 42 so as to compel a defendant to make this choice in a state court would present a constitutional question under the fifth and fourteenth amendments of the U.S. Constitution.[7] However, the Rule so construed and applied could raise a substantial constitutional question under the prohibition against compulsory self incrimination contained in the Washington State Constitution.[8]

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INSURANCE

Accident—Determination of Number of Accidents in One Mishap. The concept of proximate cause was used by the Washington Supreme Court in *Truck Insurance Exchange v. Rohde*[1] to determine the number of "accidents" arising from a collision of four vehicles, in an action brought by the Exchange to determine its liability under a policy in which Rohde was the named insured.

Rohde, while driving under circumstances conceded to be negligent, collided with three motorcycles. Rohde's car crossed the center line and struck the first motorcycle, spun around and then collided with two other motorcycles traveling in echelon formation seventy-five feet apart. Rohde did not regain control of his car between the first and last impacts.

[7] The United States Supreme Court has held that the exemption from self incrimination is not a privilege or immunity of national citizenship guaranteed against abridgement by the states by the privileges and immunities clause of the fourteenth amendment, nor is it inherent in due process of law which the States are prohibited by the due process clause of the fourteenth amendment. Twining v. New Jersey, 211 U.S. 78 (1908).

[8] Art. I, § 9.

[1] 149 Wash. Dec. 451, 303 P.2d 659 (1956) *petition for rehearing denied* 149 Wash. Dec. 865 (1957).