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EVIDENCE -ADMISSIBILITY OF STATEMENTS OF FACT MADE DURING NEGOTIATION FOR COMPROMISE

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EVIDENCE — ADMISSIBILITY OF STATEMENTS OF FACT MADE DURING NEGOTIATION FOR COMPROMISE — At present, the various jurisdictions hold with comparative uniformity that while offers to settle a dispute are not admissible in evidence, statements of independent fact made during such compromise negotiation are admissible.[1] The routes of logic by which the courts arrive at this similarity in result are marked by some fundamental differences, as will be shown later, but the result is the same under any theory. The question therefore presents itself, whether the distinction made by the courts between the admissibility of offers to compromise and statements of fact made during compromise negotiations can be justified under a system of jurisprudence whose essential aim is justice between litigants.

Since any discussion of these rules raises basic questions of policy, the statement of an extreme case may serve to illustrate the issues involved. In the early and often cited case of *Sanborn v. Neilson*,[2] a husband sued the defendant for damages for criminal conversation. By arrangement, the defendant came to the husband's house, with the understanding on the part of both that they would endeavor to adjust their differences. At the compromise session, the defendant admitted

[1] 80 A. L. R. 919 (1932); 22 C. J. 308, 314 (1920); 1 R. C. L. 471 (1914); 2 WIGMORE, EVIDENCE, 2d ed., §§ 1061, 1062 (1923); 3 JONES, EVIDENCE, 2d ed., §§ 1052, 1055 (1926); 1 GREENLEAF, EVIDENCE, 16th ed., 321 (1899).

[2] 4 N. H. 501 (1828).

intimacies with the wife and offered to take one of the wife's children as his own. These admissions, overheard by witnesses secreted in the room by the husband, were permitted by the court to be used in evidence against the defendant.

Obviously this was an instance in which the good faith of one party was matched by the patently treacherous design of the other. The defendant's desire for settlement without notoriety well may have prompted a frank admission of doubtful and disputed facts—facts difficult of proof by other means. If the use of information so procured is shocking to the layman, it is because his sense of natural justice has been offended. While it is a mistake to regard the trial of a cause of action as a contest in which the taking of undue advantage is unsportsmanly, yet if there had been no preconceived treachery in the *Sanborn* case the result still would have been undesirable. Extra-judicial settlement of disputes is seriously hampered by the fear that an unguarded statement may prove the basis of recovery by an opponent.[3]

With a general notion in mind of the consequences which are apt to follow a frustrated negotiation for compromise, an examination may well be made into the reasoning by which the courts reject evidence of offers of compromise but accept admissions of fact. A study of the decisions shows that the courts and the text writers are not even in agreement as to the theory under which offers of compromise are rejected. There appear to be three different theories asserted as a justification for this rule.

One theory is that of privilege; that compromise negotiations have a privileged status similar to that extended to confidential communications between lawyer and client and priest and penitent, the basis of the privilege being that of public policy, the desirability of having men who are in disagreement settle their disputes by mutual concessions without the uncertainties and expense of litigation.[4] Logically, the privilege rule should extend to all communications during such negotiations,

[3] Patrick v. Crowe, 15 Colo. 543 at 554, 25 P. 985 (1890). In relation to offers, the court said, "If parties can be compelled against their will, as in this case, to detail offers made for the purpose of settling matters in dispute to avoid litigation, certainly no prudent person would feel safe in offering any concessions for the purpose of bringing about compromise." In Bartels v. Schwake, 153 Minn. 251 at 252, 190 N. W. 178 (1922), it was said: "The law favors the settlement of disputed claims without litigation, and to encourage such settlements will not permit either party to use offers of settlement made by the other as evidence of an admission of liability." See also Inzerillo v. Chicago, B. & Q. R. Co., 225 Mo. App. 1213, 35 S. W. (2d) 44 (1931).

[4] No definite alignment of the courts can be made because the privilege and relevancy theories are not mutually exclusive. A court may consider an offer both privileged and irrelevant. Examples of early cases containing the language of privilege are Dickinson v. Dickinson, 9 Metc. (50 Mass.) 471 (1845); Daniels v. Town of Woonsocket, 11 R. I. 4 (1874); Doon v. Ravey, 49 Vt. 293 (1877).

offers and facts alike, but in such jurisdictions as seem to follow this theory an arbitrary limitation unfortunately restricts its application to offers, excepting independent facts so disclosed.[5]

A second theory mentioned by some of the text writers is that of contract. This theory doubtless had its origin in the policy of English business men and lawyers inserting in letters written by them the words "without prejudice," the effect of which expression, as construed by the courts, was to make the contents of such letter inadmissible in evidence against the writer.[6] Highly artificial, this theory, in the absence of the saving words, presumes a tacit agreement between the negotiating parties to keep the communication confidential. At most, such may be their expectation. Having indulged in the presumption, such a court could rely on the line of authority which protects compromise statements so expressly stipulated to be confidential.[7] Suffice it to say that the contract view in the ordinary case is not realistic and has little recognition.

The third and most widely accepted theory upon which offers are excluded but statements of independent fact are admitted is that offers are irrelevant, but facts, relevant. An offer is an individual's appraisal of the worth to him of having a dispute settled rather than an admission of the measure of liability. Settlement is referred to as "buying peace." The premise conceded, the line of relevancy logically falls between offers and independent facts. Lord Mansfield's illustration, quoted by Greenleaf, was that a defendant being sued for £100 and offering £20 to be rid of the action neither admitted nor ascertained any debt.[8] Ob-

[5] Dickinson v. Dickinson, 9 Metc. (50 Mass.) 471 at 474 (1845). Proceeding upon a theory of privileged communications, the court said: "To some extent this rule was attempted to be introduced, excluding all admission of the parties, even admission of particular facts, where it appeared that they were stated at the time 'to be made without prejudice.' But the exception was soon introduced, that the evidence was competent where it was the admission of a collateral fact." See also 42 HARV. L. REV. 697 (1929).

[6] Cory v. Bretton, 4 Car. & P. 462, 172 Eng. Rep. 783 (1830), stressing confidence as a condition to acceptance of a letter labeled "without prejudice"; semble, Hoghton v. Hoghton, 15 Beav. 278, 51 Eng. Rep. 545 (1852); Kurtz & Co. v. Spence & Sons, 57 L. J. Ch. 238, 58 L. T. 438 (1887), containing a lucid interpretation of the phrase.

[7] 22 C. J. 316 (1920); Somerville Water Co. v. Borough of Somerville, 78 N. J. Eq. 199, 78 A. 793 (1911), saying: "it is perfectly well settled that an offer made by one litigating party to the other is incompetent as evidence, if stated to be made without prejudice . . ."; Garber v. Levine, 250 Mass. 485, 146 N. E. 21 (1925). A statement made under express stipulation for privilege is inadmissible. White v. Old Dominion S. S. Co., 102 N. Y. 660 at 662, 6 N. E. 289 (1886), approving a statement by the lower court that "the admission of a distinct fact which in itself tends to establish a cause of action or defense, is not rendered inadmissible from the circumstance that it was made during discussion relating to a compromise, unless it is expressly stated to be made without prejudice. . . ."

[8] 1 GREENLEAF, EVIDENCE, 16th ed., 321 (1899).

viously irrelevancy cannot be made the basis for excluding statements of fact made during the compromise negotiation.

As has been pointed out, the net result under any of the three theories named is the exclusion of offers and the admission of independent statements of fact. That would seem to be a logically correct result under either the contract or relevancy theory. Whether such distinction is sound under the privilege theory is more of a question, as will later be discussed. However, the distinction between offers and statements of fact creates difficulties which become apparent in the application of any one of the three theories. For example, under the rule that unqualified admissions of liability are admissible in evidence [9] the court, in *Armour v. Gaffey*,[10] held that an expression of willingness on the part of the defendant to pay an alleged shortage in his accounts was an admission of the fact of his liability. Unless the subjective intentions of the compromising party were laid bare, some doubt might be raised as to whether (especially in the case of a small shortage) a clerk might not prefer to pay the sum asked rather than to suffer the embarrassment of suit. Moreover, when it is remembered that desire for settlement prompts the disclosure of offers and facts alike, the line between the two becomes hazy indeed.

One may speculate upon how the compromise rule came to be crystallized in its present form. In two eighteenth century English cases,[11] both cases of offers, the court excluded the evidence as irrelevant. Another line of cases dealing with communications expressly stipulated to be "without prejudice" [12] accord a privilege to such statements, in recognition of the contract between the parties. How, then, in the ordinary case of compromise, where no express stipulations are made, is it that offers are excluded and facts admitted? The answer follows only by way of conjecture. The court which first excluded offers may have considered them privileged but disposed of the case on the ground of relevancy. At any rate, a decision based on relevancy would leave the question of privilege open. When the question of the admissibility of a statement of fact subsequently arose, it was faulty logic to reason that since irrelevant statements of compromise were inadmissible, relevant

[9] 80 A. L. R. 929 (1932). Erickson v. Webber, 58 S. D. 446, 237 N. W. 558, 80 A. L. R. 914 (1931), defendant's admission that worm medicine caused death held admissible; Tosti v. Rossetti, 277 Mass. 553, 179 N. E. 212 (1931), acknowledgment of indebtedness admissible.

[10] 30 App. Div. 121, 51 N. Y. S. 846 (1898), affd. 165 N. Y. 630 (1901).

[11] Turton v. Benson, 1 P. Wms. 496, 24 Eng. Rep. 488 (1718), wherein the court said: "Mr. Turton's offers made and not accepted signified nothing"; Slack v. Buchanan, Peake 7, 170 Eng. Rep. 59 (1790); commented on by 2 WIGMORE, EVIDENCE, 2d ed., 527, note 1 (1923).

[12] Ante, note 7.

statements would be admissible. Such a conclusion assumes a premise which ignores any doctrine of privilege, viz., that compromise statements, unless irrelevant, are admissible.[13]

Among the text writers, Jones takes the view that public policy in encouraging compromise is the basis for the present rule;[14] while Chamberlayne scouts the idea of privilege and argues for the admission of all compromise statements.[15] Greenleaf says that the reason that offers are excluded and statements of fact are admitted is that the former are irrelevant and cannot be attributed with the real quality of an admission, in contrast to the latter.[16] Wigmore reviews the several theories and adopts the views of Greenleaf.[17]

Several instances of injustice under the present rule of admitting statements of fact will demonstrate its unfairness.

In *Akers v. Kirk*,[18] the defendant and her father were sitting in the court room preceding the trial. When the father withdrew, the plaintiff approached the defendant with an invitation to compromise, and secured from her a virtual acknowledgment of agency for creation of the debt in question, which fact was in issue. The court permitted the admission to be used against the defendant, the compromise having failed.

In *Kalus v. Bass*,[19] an action for damages for injuries received by falling through the stairway to defendant's building, the defendant went to a third person to enlist his services toward compromise, admitting to such person that the stairways were old and he supposed they were rotten. The admission was later permitted to be used as a part of the basis of recovery against the defendant.

In *Ingraham v. Associated Oil Co.*,[20] the plaintiff and defendant inspected the plaintiff's orchard with a view to compromise. The de-

[13] In Waldridge v. Kennison, 1 Esp. 143, 170 Eng. Rep. 306 (1794), an admission of handwriting was permitted to be used against one of the parties though made in a negotiation for compromise. Without allusion to precedent, Lord Kenyon was reported to have ruled "that certainly any admission or confession made by the party respecting the subject-matter of the action, obtained while a treaty was depending, under faith of it, and into which the party might have been led by the confidence of a compromise taking place, could not be admitted to be given in evidence to his prejudice, but he added, that the fact of a hand-writing being a person's or not stood on a different foundation; it was matter no way connected with the merits of the cause, and which was capable of being easily proved by other means." An early case in the line of Massachusetts authority, Marsh v. Gold, 19 Mass. 285 (1824), relies on Lord Kenyon's decision to exclude statements of fact made during compromise.

[14] 3 JONES, EVIDENCE, 2d ed., 1937 (1926).

[15] 2 CHAMBERLAYNE, EVIDENCE, § 1469 (1911).

[16] 1 GREENLEAF, EVIDENCE, 16th ed., 321 (1899).

[17] 2 WIGMORE, EVIDENCE, 2d ed., §§ 1061, 1062 (1923).

[18] 91 Ga. 590, 18 S. E. 366 (1893).

[19] 122 Md. 467, 89 A. 731 (1914).

[20] 166 Wash. 305, 6 P. (2d) 645 (1932).

fendant's admission of injury to the trees caused by his spray was admitted in evidence as an independent fact.

Papke v. Haerle [21] was an action for damages alleged to have been caused by the negligence of the defendant's daughter while driving the family car. The court admitted evidence that the daughter stated in compromise session that she was engaged in an errand for her father when she had the accident.

Another indictment of the present rule regarding compromise statements is the undue advantage which a knowledge of the subtleties of the law gives an informed party. The initiated, by stating facts in hypothetical or conditional form, can protect themselves and even use their show of frankness to elicit information from an adversary.

If one were to inquire of any layman or lawyer, not familiar with the precedents on this point, whether offers of compromise should be admitted in evidence, his answer would certainly be in the negative. When asked for his reasons for so answering, would not his reply be about as follows?

"Because the best interests of society demand the settlement of disputes by mutual understanding and concession rather than by resort to the expense and uncertainties of litigation. Full and frank disclosure by each party to the controversy of the position taken by him and the facts on which he relies to sustain his position or to justify a recession therefrom must be expected if the end desired is to be achieved. It should be assumed that the law has written over the door of every such conference room the words 'without prejudice.' The best hope of a satisfactory compromise lies in the confidence of the participants in the conference that they can speak freely."

On this common sense reasoning, is it not apparent that the real basis of the rule which bars offers of compromise is that of privilege, a privileged status similar to that extended to conferences between attorney and client and to conferences between the court and counsel "off the record"?

If the proper basis of the rule is privilege, is there any logical theory under which the court can, by methods akin to chemistry, analyze a compromise conversation so as to precipitate one element of it as an offer of settlement and the other as an independent statement of fact? Would not the layman entering into a compromise negotiation be shocked if he were informed that certain sentences of his conversation could be used against him and other sentences could not? In the opinion of the writers, courts will never do full justice between litigants so long as, through mere adherence to precedent, they adopt and preserve dis-

[21] 189 Wis. 156, 207 N. W. 261 (1926).

tinctions so shadowy in character and so subversive of the end desired, that of encouraging frankness in compromise negotiations.

However, the question may be asked: Conceding the soundness of the theory of privilege, nevertheless, are we not, by depriving a party of the ability to use in litigation information obtained in this manner, robbing him of a valuable right which, if not observed by the courts, may lead to a denial of justice?

The answer to this question would appear to be fairly obvious. What is this valuable right? How did the party come to possess it? It was not anything which he had before the compromise negotiations began. It was information acquired during and solely because of such negotiations. To deny a party the right to use admissions so obtained is nothing more than the denial of an opportunity for "unjustified enrichment." [22]

Since the time when the compromise rule was originally adopted by the courts, great changes have occurred in the conditions surrounding the trial of a law suit. Parties no longer have to depend upon admissions by an opponent as the only evidence of a claimed fact. The testimony of a party to the cause is no longer inadmissible. In fact in most modern jurisdictions the opposing party can be called as a witness and cross-examined on any part of the case without the party calling him being bound by his answers.[23] The party who is denied the right to use admissions made in compromise negotiations is therefore not without resource to prove the same fact in a perfectly fair and proper way.

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[22] Cf. Perry v. United States, 294 U. S. 330 at 358, 55 S. Ct. 432 (1935).
[23] E.g., Ohio Code (1930), § 11497; Mich. Comp. Laws (1929), § 14220.
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