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Proffitt v. State, 315 So. 2d 461 (Fla. 1975)

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CASE COMMENTS

Evidence—HUSBAND-WIFE PRIVILEGE—TESTIMONY OF THIRD PARTY EAVESDROPPER CONCERNING PRIVILEGED COMMUNICATION ADMISSIBLE WHERE PRIVILEGED PARTY KNOWS OR HAS REASON TO KNOW OF EAVESDROPPER'S PRESENCE.—*Proffitt v. State*, 315 So. 2d 461 (Fla. 1975).

On the morning of July 10, 1973, Joel Medgebow was stabbed to death as he and his wife slept. Patricia Medgebow, awakened by her husband's moans, was struck several times in the face by a man who then fled through a sliding glass door.¹

Charles William Proffitt was subsequently charged with and tried for the murder of Joel Medgebow.² At the trial it was established that fingerprints found on the door through which the assailant fled did not match Proffitt's. Mrs. Medgebow was unable to identify Proffitt as the man who struck her, and her description of the assailant's clothing was only a close approximation to that worn by Proffitt on the night of the murder.³ A droplet and a smear of blood too small to identify as to type were found on Proffitt's shirt; the murder weapon, smeared with blood of the same type as that of the victim, yielded no fingerprints.⁴ During the trial, Mary Helen Bassett, who rented a room in Proffitt's mobile home, testified that she was awakened early on the morning of July 10 and overheard Proffitt telling his wife that he had stabbed and killed a man in an attempted robbery and that he had beaten a woman.⁵ Based on this evidence, Proffitt was convicted of first degree murder and sentenced to death.⁶ The case reached the Florida Supreme Court on direct appeal from the imposition of the death sentence; the judgment of the lower court was affirmed.⁷

1. *Proffitt v. State*, 315 So. 2d 461 (Fla. 1975).

2. *Id.* at 463.

3. Mrs. Medgebow described the intruder as wearing a white pin-striped shirt and either grey or brown trousers. However, another witness, who had seen Proffitt an hour before the homicide, described him as wearing a white shirt with a blue emblem and grey trousers. *Id.* Mrs. Proffitt confirmed this description of Proffitt's apparel but stated that on his return home—at about 5:15 a.m.—he was barefoot. *Id.*

4. *Id.*

5. Mrs. Bassett admitted that she had not seen Proffitt during this conversation; she did, however, state that she knew his voice well enough to recognize the speaker as Proffitt. *Id.*

Proffitt's attorney objected to the admission of this testimony at trial, and on appeal, he again raised the issue of admissibility, both as to violation of the husband-wife privilege and the hearsay rule. The court on appeal found no error in the admission of Mrs. Bassett's testimony; it first held that there had been no violation of the marital privilege and that the evidence came within the *res gestae* exception to the hearsay rule. *Id.* at 463-65.

6. *Id.* at 464.

7. *Id.* at 467. FLA. CONST. art. V, § 3(b)(1) provides that the supreme court "[s]hall hear appeals from final judgments of trial courts imposing the death penalty"

Mrs. Bassett's testimony concerning the conversation between Proffitt and his wife was among the most damaging evidence that the state introduced in its case against Proffitt.⁸ Although the Florida Supreme Court gave considerable attention to Proffitt's assertion that this communication was protected by the husband-wife privilege, it decided that Mrs. Bassett's testimony was admissible.⁹

The husband-wife privilege is not a modern concept; it was enforced at common law although it did not exist in the form that we know it today.¹⁰ Until the 19th century, the husband-wife privilege was incorporated in the common law rule of incompetency,¹¹ but in 1853, the privilege to refrain from testifying about confidential communications arising through the intimacy of the marital relationship was recognized as a separate rule of evidence.¹²

8. The other evidence that was introduced—the fingerprints, the knife, the shirt, the other descriptions of Proffitt's clothing—indicated nothing which unequivocally linked Proffitt to the murder. 315 So. 2d at 463.

9. *Id.* at 465.

10. 8 J. WIGMORE, EVIDENCE § 2333 (McNaughton ed. 1961). For a discussion by the Florida Supreme Court of the common law development of the privilege consult *Ex parte Beville*, 50 So. 685 (Fla. 1909).

11. See 8 J. WIGMORE, EVIDENCE § 2333 (McNaughton ed. 1961). Apparently the privilege not to testify against one's spouse existed before the rule of disqualification of husband and wife to testify on one another's behalf. Eventually these two rules merged into one, once more to be divided in the 1800's. *Id.* at § 2227.

12. Evidence Amendment Act, 1853, 16 & 17 Vict., c. 83:

Whereas the Law touching Evidence requires further Amendment: Be it therefore declared and enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

I. On the Trial of any Issue joined, or of any Matter or Question, or on any Inquiry arising in any Suit, Action, or other Proceeding in any Court of Justice, or before any Person having by Law or by Consent of Parties Authority to hear, receive, and examine Evidence, the Husbands and Wives of the Parties thereto, and of the Persons in whose Behalf any such Suit, Action, or other Proceeding may be brought or instituted, or opposed or defended, shall, except as herein-after excepted, be competent and compellable to give Evidence, either *vivâ voce* or by Deposition according to the Practice of the Court, on behalf of either or any of the Parties to the said Suit, Action, or other Proceeding.

II. Nothing herein shall render any Husband competent or compellable to give Evidence for or against his Wife, or any Wife competent or compellable to give Evidence for or against her Husband, in any Criminal Proceeding, or in any Proceeding instituted in consequence of Adultery.

III. No Husband shall be compellable to disclose any Communication made to him by his Wife during the Marriage, and no Wife shall be compellable to disclose any Communication made to her by her Husband during the Marriage.

13. Act of Nov. 6, 1829, ACTS OF THE LEGISLATIVE COUNCIL OF THE TERRITORY OF FLORIDA 8-9 (1829). The modern version, FLA. STAT. § 2.01 (1975) provides: "The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the 4th day of July, 1776, are declared to be of force in this state; provided, the said statutes and common law be not inconsistent

In 1823, the common law of England as it existed in 1776 was adopted by statute in Florida.¹³ Thus Florida indirectly became heir to the husband-wife privilege, for in 1776 the husband-wife privilege was still incorporated in the general rule of spousal incompetency.¹⁴ In 1892, the Florida Legislature declared both spouses competent to testify as witnesses for or against each other in both civil and criminal matters;¹⁵ at that time, the general rule that every individual has a duty to testify had already been established.¹⁶ But an exception to this

with the constitution and laws of the United States and the acts of the legislature of this state."

14. See text accompanying note 11 *supra*.

15. In 1879 the common law was altered by providing that a wife could testify in civil actions to which her husband was a party and was competent to testify:

AN ACT to Allow Married Women to Testify in all Civil Cases where their Husbands are Parties and Not Disqualified.

The People of the State of Florida, represented in Senate and Assembly, do enact as follows: SECTION 1. In the trial of civil actions in this State, married women shall not be excluded as witnesses in cases wherein their husbands are parties and allowed to testify.

Fla. Laws 1879, ch. 3124.

But, in *Schnabel v. Betts*, 1 So. 692 (Fla. 1887), the court held that this statute did not abrogate the incompetency of a husband to testify in a case in which his wife was a party. The Florida Legislature responded by amending the 1879 statute to remove the incompetency of both spouses to testify in civil cases:

AN ACT to Amend Chapter 3124 of the Laws of Florida so as to Authorize both Husband and Wife to Testify in Civil Actions in which Either may be Interested.

Be it enacted by the Legislature of the State of Florida: SECTION 1. That an act entitled An Act to Allow Married Women to Testify in all Civil Cases where their Husbands are Parties and not Disqualified, the same being Chapter 3124 of the Laws of Florida, approved March 7, 1879, be amended so as to read as follows:

"SECTION 1. That in the trial of civil actions in this State, neither the husband nor the wife shall be excluded as witnesses, where either the said husband or wife is an interested party to the suit pending."

Fla. Laws 1891, ch. 4029.

Shortly thereafter, the provisions of law relating to competency of witnesses to testify in civil cases was extended to criminal cases as well. See FLA. REV. STAT. § 2863 (1892); *Everett v. State*, 15 So. 543 (Fla. 1894).

Today spouses are competent to testify in actions against each other. FLA. STAT. § 90.04 (1975) provides: "Witnesses; competency of wife or husband.—In the trial of civil actions in this state, neither the husband nor the wife shall be excluded as witnesses, where either the said husband or wife is an interested party to the suit pending."

FLA. STAT. § 914.07 (1975) provides: "Competency of evidence.—Except as otherwise provided, the law regarding competency of evidence and witnesses in civil cases shall apply in criminal cases."

16. FLA. STAT. § 90.05 (1975) provides: "90.05 Witnesses; as affected by interest.—No person, in any court, or before any officer acting judicially, shall be excluded from testifying as a witness by reason of his interest in the event of the action or proceeding, or because he is a party thereto . . ." The predecessor of this statute was enacted in 1892. See Fla. Laws 1892, ch. 1094; Fla. Laws 1892, ch. 4029.

rule for spouses was early recognized because "[t]he law appreciated the fact that even truth itself might be pursued too keenly, and might cost too much. The general evil of infusing reserve and dissimulation between [husband and wife] . . . would be too great a price to pay for the chance of obtaining and establishing the truth in regard to some matter under legal investigation."¹⁷

The abrogation of the disability to testify for or against one's spouse did not in any way affect the rule against disclosure of confidential marital communications.¹⁸ The courts of Florida have long recognized that the confidences of marriage are so inherently private and invasions thereof so destructive to the solidarity of marriage that even after divorce or death,¹⁹ a spouse cannot be compelled to testify concerning confidential communications made during the marriage.²⁰ Generally the privilege may not be waived by one spouse without the consent of the other,²¹ but a voluntary disclosure of the communication by the spouse to whom its disclosure is directly detrimental serves to nullify the privilege.²²

In spite of Florida's strong interest in fostering and maintaining the institution of marriage, its courts have not been liberal in their extension of this privilege. Florida courts have refused to extend the privilege to encompass more than written and oral communications; in cases where the husband-wife privilege was claimed to exclude testimony about a spouse's actions, the courts have found the privilege inapplicable.²³ Since the privilege itself is a departure from the general

17. *People v. Hayes*, 35 N.E. 951, 954 (N.Y. App. 1894); *see also McGill v. McGill*, 19 Fla. 341, 345-46 (1882).

18. *Ex parte Beville*, 50 So. 685, 688 (Fla. 1909) ("The change of the common-law rule by making one spouse a competent witness against the other does not affect the rule against disclosure of marital communication."); *Cox v. State*, 192 So. 2d 11 (Fla. 3d Dist. Ct. App. 1966).

19. *Brown v. May*, 76 So. 2d 652 (Fla. 1954); *Mercer v. State*, 24 So. 154, 157 (Fla. 1898); *Henderson v. Chaires*, 6 So. 164, 166 (Fla. 1889).

20. *Id.* There is one statutory exception to the husband-wife privilege in Florida's Uniform Reciprocal Enforcement of Support Law, requiring spouses to testify to matters relevant to support proceedings whether based on confidential communications or not. FLA. STAT. § 88.261 (1975) provides: "Evidence of husband and wife.—Laws attaching a privilege against the disclosure of communications between husband and wife are inapplicable to proceedings under this chapter. Husband and wife are competent witnesses and may be compelled to testify to any relevant matter, including marriage and parentage."

21. *Brown v. May*, 76 So. 2d 652 (Fla. 1954) (one spouse may not disclose communications made by the other without consent).

22. In *Savino v. Luciano*, 92 So. 2d 817 (Fla. 1957) (a case involving attorney-client privilege), the court stated that "[w]hen a party himself ceases to treat a matter as confidential, it loses its confidential character." *Id.* at 819. *See Tibado v. Brees*, 212 So. 2d 61, 63 (Fla. 2d Dist. Ct. App. 1968).

23. In *Mercer v. State*, 24 So. 154 (Fla. 1898), the court stated that "[the privilege]

duty to testify,²⁴ it is understandable that there has been no widespread extension of the privilege to prohibit spousal testimony concerning matters other than those involving confidential communications.

The general rule has been that a third party overhearing an otherwise privileged conversation between spouses may testify to that conversation.²⁵ The rule extends not only to the testimony of third

should not be confined to mere statements by one [spouse] to the other, but embraces all knowledge upon the part of either obtained by reason of the marriage relation, and which, but for the confidence growing out of it, would not have been known." *Id.* at 157. This pronouncement, however, that the privilege attaches to more than statements, appears to have found limited, if any, application in Florida. In *Gates v. State*, 201 So. 2d 786 (Fla. 3d Dist. Ct. App. 1967), the court permitted a wife to testify to acts of violence by her husband, for such testimony was to an event rather than a communication, and thus the marital privilege was inapplicable. In *Ross v. State*, 202 So. 2d 582 (Fla. 1st Dist. Ct. App. 1967), it was argued that a wife should not be permitted to testify about her husband's act of delivering a stolen sweater to her on the grounds that such an event was analogous to telling her that the sweater was stolen, and testimony to such a communication would be inadmissible because of the privilege. The court, noting that this was a case of first impression in Florida, refused to extend the privilege. The court reasoned that the husband-wife privilege is not so broad as to exclude evidence of acts by a spouse. *See also* *Porter v. State*, 160 So. 2d 104 (Fla. 1963). *But see* *Kerlin v. State*, No. 75-1765 (Fla. 4th Dist. Ct. App., filed July 23, 1976).

24. *See* note 16 *supra*. The United States Supreme Court has stated: "The power of government to compel persons to testify in court or before grand juries and other governmental agencies is firmly established in Anglo-American jurisprudence." *Kastigar v. United States*, 406 U.S. 441, 443 (1972) (footnote omitted). This duty to testify is recognized "in the Sixth Amendment requirements that an accused be confronted with the witnesses against him, and have compulsory process for obtaining witnesses in his favor." *Id.* at 443-44. As early as 1562 the power to compel persons to appear and testify was apparent:

XII. Provided also, and be it further enacted by the authority aforesaid, That if any person or persons, upon whom any process out of any of the courts of record within this realm or *Wales* shall be served to testify or depose concerning any cause or matter depending in any of the same courts, (2) and having tendred unto him or them, according to his or their countenance or calling, such reasonable sums of money for his or their costs and charges, as having regard to the distance of the places is necessary to be allowed in that behalf, (3) do not appear according to the tenor of the said process, having not a lawful and reasonable let or impediment to the contrary; (4) that then the party making default, to lose and forfeit for every such offence ten pounds, and to yield such further recompence to the party grieved, as by the discretion of the judge of the court, out of the which the said process, shall be awarded, according to the loss and hindrance that the party which procured the said process shall sustain, by reason of the non-appearance of the said witness or witnesses; (5) the said several sums to be recovered by the party so grieved against the offender or offenders by action of debt, bill, plaint or information, in any of the Queen's majesty's courts of record, in which no wager of law, essoin or protection to be allowed.

Statute of Elizabeth, 5 Eliz. 1, c. 9, § XII (1562); *see also* Proceedings against Mary, Countess of Shrewsbury, 2 How. St. Tr. 769-70 (1612).

25. "A third person overhearing a confidential communication may testify to it . . ." 8 J. WIGMORE, EVIDENCE § 2339 (McNaughton ed. 1961). *E.g.*, *Wolfe v. United States*, 291

parties whose presence is known to the spouses, but also to the testimony of eavesdroppers whose presence is unknown to the spouses.²⁶ The *Proffitt* court recognized this rule as it applies to third parties whose presence is known,²⁷ but by implication it refused to extend the rule to eavesdroppers.²⁸ Although the court maintained that its decision merely followed long respected precedent,²⁹ its decision in reality marks a change in attitude regarding the admissibility of an eavesdropper's testimony.

The general rule that an eavesdropper is competent to testify concerning communications between spouses has never been explicitly embraced by the Florida courts, and there is a marked dearth of reported cases on this point. Indeed, in this century only one Florida case other than *Proffitt* has dealt with the question of whether the husband-wife privilege extends to exclude the testimony of an eavesdropper. In *Horn v. State*³⁰ a confidential conversation between a husband and wife was overheard by an eavesdropper on an extension phone. Although testimony of the eavesdropper concerning that conversation was ultimately deemed inadmissible under the Florida wire-

U.S. 7 (1934) (communications by spouses made through use of a stenographer not privileged); *State v. Narten*, 407 P.2d 81 (Ariz. 1965); *State v. Barnhart*, 442 P.2d 959 (Wash. 1968); *State v. Sidoti*, 341 A.2d 670 (N.J. App. 1975).

26. "One who overhears the communication, *whether with or without* the client's knowledge, is not within the protection of the privilege." 8 J. WIGMORE, EVIDENCE § 2326 (McNaughton ed. 1961) (footnotes omitted, emphasis added) (references are freely made between attorney-client and husband-wife privileges since general rules apply to both in most instances). *E.g.*, *State v. Schifsky*, 69 N.W.2d 89 (Minn. 1955); *Hunter v. Hunter*, 83 A.2d 401 (Pa. 1951); *State v. Barnhart*, 442 P.2d 959 (Wash. 1968); *State v. Thorne*, 260 P.2d 331 (Wash. 1953); *Nash v. Fidelity-Phenix Fire Ins. Co.*, 146 S.E. 726 (W. Va. 1929).

27. The court, citing Wigmore, stated that "[t]he general rule, and clearly the weight of authority is to the effect that testimony of a third party who overhears a confidential communication is admissible." 315 So. 2d at 464.

28. Had the rule extended to eavesdroppers, there would have been no need to discuss whether Proffitt knew or should have known of Mrs. Bassett's presence. Under the general rule her testimony would have been admissible regardless of Proffitt's knowledge of her presence. The court's discussion of Proffitt's knowledge of an eavesdropper's presence implies that without such knowledge the communication would remain privileged and Mrs. Bassett could not testify concerning it.

29. 315 So. 2d at 464. It is significant that the only authority cited for this proposition was *Mercer v. State*, 24 So. 154 (Fla. 1898). *Mercer* only peripherally pertains to spoken communications between husband and wife. In *Mercer*, the court declared "*certain classes of communications to be privileged from the inherent character of the communication . . .*" *Id.* at 158 (emphasis added). The essence of the holding in *Mercer* is that letters between husband and wife are inherently privileged and are thus inadmissible even when produced from the custody of third parties. Although dictum indicates that oral communications between husband and wife should be accorded the same privilege as that extended to letters, *Mercer* does not specifically apply the husband-wife privilege to oral communications overheard by eavesdroppers.

30. 298 So. 2d 194 (Fla. 1st Dist. Ct. App. 1974).

tap statute,³¹ the court stated that the testimony of a third person—in this case an eavesdropper—who overhears a confidential conversation is generally admissible.³² Thus, *Horn* contemplates adherence to the general rule that an eavesdropper whose presence is unknown to the privileged parties is competent to testify about otherwise privileged communications.³³

The supreme court's decision in *Proffitt*, which came 1 year after *Horn*, apparently invalidates both *Horn* as it relates to privileged communications and the general rule as to the admissibility of an eavesdropper's testimony where overheard privileged communications are involved. Although the court noted that the general rule and weight of authority supports a conclusion that the privilege does not extend to exclude the testimony of a third party who overhears the conversation,³⁴ it implied that where the presence of the third party, or eavesdropper, is unknown, the testimony would be inadmissible.³⁵ This implication is supported by the court's statement that "it has long

31. *Id.* at 198–99. Chapter 934 of the Florida Statutes was enacted in 1969. Fla. Laws 1969, ch. 69–17. FLA. STAT. § 934.03(1) (1975) provides in part: "[A]ny person who: (a) Willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept any wire or oral communication . . . shall be guilty of a felony of the third degree . . ." This act also contains specific provisions relating to the admissibility of evidence obtained in violation of the act. FLA. STAT. § 934.06 (1975) provides:

Prohibition of use as evidence of intercepted wire or oral communications.—Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the state, or a political subdivision thereof, if the disclosure of that information would be in violation of this chapter.

FLA. STAT. § 934.09(8) (1975) provides:

The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding unless each party, not less than 10 days before the trial, hearing, or proceeding, has been furnished with a copy of the court order and accompanying application under which the interception was authorized or approved. This 10-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information 10 days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

32. 298 So. 2d at 196.

33. See note 25 *supra*. The court in *Horn* also mentioned the possibility of the right to privacy being pertinent where eavesdroppers were involved. 298 So. 2d at 199. An earlier case, *Markham v. Markham*, 272 So. 2d 813 (Fla. 1973), although not concerned with the husband-wife privilege, held that eavesdropping by a husband upon telephone calls by his wife to her lover violated both the Florida wiretap statute and the constitutional right of privacy.

34. 315 So. 2d at 464.

35. See note 28 *supra*.

been held in this State that privilege of non-disclosure between husband and wife . . . attaches to the conversation or the communication itself, and protects it from exposure in evidence, wheresoever or in whosoever hands it may be."³⁶ This statement indicates that the communication itself is privileged and inadmissible regardless of the source. Yet the court recognized that basic to this concept of privilege is the notion of confidentiality.³⁷ It realized that a communication normally privileged loses its privileged character when not made in confidence. In its discussion of privilege and confidentiality, the court relied on *Schetter v. Schetter*,³⁸ a case involving the attorney-client privilege. In *Schetter*, the court noted that fundamental to the attorney-client privilege is the requirement of the expectation of confidentiality by the parties.³⁹ The *Proffitt* court focused on this point and utilized it as the touchstone of its decision. Contrasting *Proffitt* with *Schetter*, the court stated that "it is clear that [in *Proffitt*] there was no attempt to make the communication in confidence. . . . Therefore the privilege character of the communication was lost"⁴⁰ Thus, although the privilege may actually attach to the conversation itself, it may be forfeited by the parties who make the communication if they do not insure that they are not overheard.

In *Proffitt* the defendant's conversation with his wife lay outside the protective cover of the husband-wife privilege, for the court found that he and his wife knew or should have known that their privileged communication was being overheard.⁴¹ Yet *Proffitt* implies that the husband-wife privilege may be extended to exclude the testimony of all eavesdroppers who overhear confidential interspousal communications. To determine when an eavesdropper's testimony will be excluded, the court focused upon what constitutes a "confidential" conversation and made clear that it was not simply a private conversation between the parties. The court placed a heavy burden of proof upon the shoulders of the one claiming the privilege to prove that the conversation was indeed confidential.⁴² Apparently *Proffitt* demands that

36. 315 So. 2d at 464.

37. *Id.* at 464-65.

38. 239 So. 2d 51 (Fla. 4th Dist. Ct. App. 1970). In *Schetter* an attorney secretly taped a telephone conversation with his client and gave it to a psychiatrist who testified on the issue of the client's mental competency. This was deemed inadmissible because it was violative of the attorney-client privilege.

39. 239 So. 2d at 52.

40. 315 So. 2d at 465.

41. *Id.*

42. *Id.* "[I]t is clear that there was no attempt to make the communication in confidence. . . . There is absolutely no testimony indicating that either [Proffitt] or his wife made any attempt . . . to keep the conversation from being overheard." *Id.*

a party claiming privilege prove that he and his spouse did not speak in such a manner and place that there was a reasonable chance of being overheard, and that they did not know of any possibility of being overheard at that time.⁴³ *Proffitt*, however, indicates that if this burden is met, then further protection will be afforded the marital relationship by excluding from testimony interspousal communications which previously had been admissible. As a general rule the testimony of the eavesdropper is no longer admissible in Florida; the admissibility of such testimony now hinges on the protected spouses' knowledge or reason to know of the eavesdropper's presence.

ELAINE KAY FREEMYER

Admiralty—SALVAGE—THE UNITED STATES HAS NOT ASSERTED SOVEREIGN PREROGATIVE OVER ABANDONED PROPERTY ON OUTER CONTINENTAL SHELF.—*Treasure Salvors, Inc. v. Abandoned Sailing Vessel Believed To Be the Nuestra Señora De Atocha*, 408 F. Supp. 907 (S.D. Fla. 1976).

In July of 1975, after years of frustrating and expensive work, Treasure Salvors, Incorporated, and Armada Research Corporation succeeded in bringing to the surface of the ocean two bronze cannon from a sunken ship. The wreck was located approximately 45 miles west of Key West, Florida, on the continental shelf, but outside of the territorial waters¹ of the United States (on the so-called "outer shelf"). The wreck was thought to be that of the *Nuestra Señora de Atocha*, a Spanish galleon which sank with tons of silver in 1622.²

The two corporations brought an action in the United States District Court for the Southern District of Florida for possession and confirmation of title of the wreck. The plaintiffs claimed that general

43. *Id.*

1. The United States places a 3-mile limit on its territorial waters. For a discussion of efforts to settle upon an internationally known limit on territorial waters and reasons for the United States preference for the 3-mile limit, see Dean, *The Geneva Conference on the Law of the Sea: What Was Accomplished*, 52 AM. J. INT'L. L. 607, 610-13 (1958).

2. The Miami Herald, Feb. 5, 1976, § B, at 2, col. 5 (street ed.). While the silver treasure allegedly carried by the *Atocha* has not been found, nine bronze cannon have been raised by plaintiffs, some valued at \$40,000 each. *Id.*