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## Husband-Wife Privileged Communications, Summarized

Donald L. Guarnieri\*

COURTS AND LEGISLATURES of the United States generally view communications between husband and wife as privileged against court-room disclosure. The protection which the courts, legislatures and text writers<sup>1</sup> have favored seems to stem from the basic premise "that the privilege against court-room disclosure is needed for the encouragement of marital confidences, which confidences in turn promote harmony between husband and wife."<sup>2</sup> Affection and understanding between husband and wife seem far more important for marital harmony than confidence based on a legal rule of evidence.<sup>3</sup>

### The Common Law

Conflicts of views about the evolution of this privilege appear in the conclusions in many American cases.<sup>4</sup> However, the English Court of Appeals<sup>5</sup> denied that any such privilege existed at common law. Whatever the historical fact may be, the privilege certainly is part of the Anglo-American law of evidence today.

The writings of Greenleaf and Best influenced the adoption of the English *Evidence Amendments Act* of 1853, which provided that:

No husband shall be compellable to disclose any communications made to him by his wife during the mar-

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<sup>1</sup> 8 Wigmore, *Evidence*, § § 2332-2341 (3rd. ed. 1940); McCormick, *Evidence*, § 82 (1st. ed. 1954); 5 Jones, *Evidence*, § § 2128-2153 (2nd. ed. 1926). Also see 97 C. J. S., *Witnesses*, § § 75-104, and 58 Am. Jur., *Witnesses*, § § 375-400.

<sup>2</sup> McCormick, *op. cit. supra*, n. 1, at 179.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Arizona Title Guarantee and Trust Co. v. Wagner*, 75 Ariz. 82, 251 P. 2d 897 (1952).

<sup>5</sup> *Shenton v. Tyler*, L. R. 1939 Ch. D. 620. In this decision Sir Wilfrid Greene, M. R., wrote: "The authorities and textbooks which I have examined in the course of this judgment are all earlier in date than the Act of 1853. I must confess to feeling some surprise at the result of that examination; since the existence of the alleged rule of common law has, I think, in modern times been assumed by many lawyers. It is not without significance that the only English text-book earlier in date than the Act of 1853 in which the existence of the alleged rule is asserted is the First Edition of Best on Evidence, . . . , where the only authority cited is the American work of Professor Greenleaf."

riage, and no wife shall be compellable to disclose any communications made to her by her husband during the marriage.<sup>6</sup>

Following this, the legislatures of various states of the United States began to enact statutes of their own, patterned on this English statute. Today most of the states have such statutes. Although they vary greatly in verbiage, the basic idea is well illustrated by the Pennsylvania Statute:

Nor shall either husband or wife be competent or permitted to testify to confidential communications made by one to the other unless this privilege be waived upon trial.<sup>7</sup>

### Communications and Acts

Perhaps the chief uncertainty in the statutory law lies in whether a "communication" includes both oral and written communications *and also* acts, facts, conditions, and transactions which ordinarily are not thought of as "communications." Some text writers<sup>8</sup> argue that such doubtful acts or omissions should not be included. "It seems . . . that logic and policy should cause the courts to halt with communications as the furthest boundary of the privilege."<sup>9</sup> This view was adopted in a prosecution for transporting a wife in interstate commerce for the purpose of prostitution, the act of the husband in taking money from his wife for these "services" being held not to be privileged.<sup>10</sup>

However, most of the cases in the United States hold that "communications" means more than mere words (oral, written or in sign language) and also includes acts, facts, conditions and

<sup>6</sup> Evidence Amendment Act, 1853, St. 16 & 17 Vict. c. 83, § 3; also known as "Lord Brougham's Act."

<sup>7</sup> Purdon's Penna. Statutes, title 28, § 316. Also see Burns' Indiana Statutes, 1946 Repl., § 2-1714 which reads, "The following persons shall not be competent witnesses: . . . Sixth. Husband and Wife, as to communications made to each other." Cf. New York, Civil Practice Act, § 349, "a husband or wife shall not be compelled, or without the consent of the other if living, allowed to disclose a confidential communication made by one to the other during marriage. In action for criminal conversation, the plaintiff's wife is not a competent witness for the plaintiff, but she is a competent witness for the defendant, as to any matter in controversy; except that she cannot, without the plaintiff's consent, disclose any confidential communication had or made between herself and the plaintiff."

<sup>8</sup> McCormick, *op. cit. supra*, n. 1, at § 83.

<sup>9</sup> *Id.*, at 170.

<sup>10</sup> United States v. Mitchell, 137 F. 2d 1006 (4th Cir. 1943).

transactions done in coverture.<sup>11</sup> A recent Virginia case<sup>12</sup> viewed as privileged the acts of a husband in leaving home for a robbery, his later return, the placing of a pistol on the mantel, and the wife's subsequent drive with her husband near where a stolen safe had been hidden.

### Time of Making Communication

If the courts' purpose is to protect the marital relationship, it is only natural for them to limit the use of the privilege to people actually joined in wedlock.<sup>13</sup> Accordingly, where a man and woman agree to become husband and wife by common law marriage, that agreement is not a confidential communication as between a husband and wife.<sup>14</sup>

Divorced couples who disclose information to one another, after divorce, cannot take advantage of the privilege.<sup>15</sup> Likewise, a husband's letter to his wife while they are living apart, on being informed that she was about to sue for divorce, stating that he would do his utmost to "beat her out of every dollar" should she begin the litigation, is not a confidential communication.<sup>16</sup>

### Confidential

One of the important elements of the privilege is that the communication be of a confidential nature. If the communication was not so intended, the privilege is lost.<sup>17</sup> A husband's note left for his wife at their home, written on a large piece of cardboard, was not intended to be confidential.<sup>18</sup> In a case where a husband, under the observing eye of his wife, pushed a wheelbarrow with a trunk on it and dumped something out of the trunk into an outhouse vault, the decision allowed admission of the wife's testimony over objection, because these acts were not intended to be confidential.<sup>19</sup>

Business transactions constitute an exception to the rule of confidential communications. The reasoning of the courts in denying business use of the privilege is that, even though the

<sup>11</sup> *Smith v. State*, 198 Ind. 156, 152 N.E. 803 (1926).

<sup>12</sup> *Menefee v. Comm.*, 189 Va. 900, 55 S.E. 2d 9 (1949).

<sup>13</sup> 58 Am. Jur. § 378; 70 C. J. Witnesses, § 510.

<sup>14</sup> *Forshay v. Johnston*, 144 Neb. 525, 13 N.W. 2d 873 (1944).

<sup>15</sup> *Cain v. Enyon*, 331 Mich. 81, 49 N. W. 2d 72 (1951).

<sup>16</sup> *McNamara v. McNamara*, 99 Neb. 9, 154 N.W. 858 (1915).

<sup>17</sup> *People v. Palumbo*, 5 Ill. 2d 409, 125 N.E. 2d 518 (1955).

<sup>18</sup> *Yoder v. United States*, 80 F. 2d 665 (4th Cir. 1935).

<sup>19</sup> *Smith v. State*, *supra* n. 11.

communication occurs in the confidence afforded by the marital relationship, actually they intend that sooner or later their conversations (decisions) shall become known to the public.<sup>20</sup>

The privilege is also barred by the presence of third persons during the "confidential" disclosure.<sup>21</sup> Thus, a letter dictated to a stenographer by a prisoner, which letter is later received by the prisoner's wife, is not privileged.<sup>22</sup>

Children present another problem. The child may be enough of an intruder in the element of confidence to bar it.<sup>23</sup> However, this is not always true. The essential question in such a situation is not the mere presence of a child, but the degree of understanding the child has, or the age of the child, which may or may not indicate its mental capacity.<sup>24</sup>

### Eavesdropper Rule

The privilege does not prevent disclosure by a third person, who either by accident or design overheard the conversation, even though the privilege would exist between the husband and wife.<sup>25</sup>

An enterprising father and son team developed one of the most unique schemes found in the American cases in an attempt to qualify under this exception. The son, with the permission of the father but with no knowledge on the part of the mother, set up a tape-recording device with a microphone attached to his parents' bed. Upon their retiring a tape recording was made of the "confidential" communications which took place between the husband and wife. The court, disturbed by such a practice, would not allow the tape recording to be introduced into evidence. Betrayal of the marital confidence, whether in court or by such sly devices out of court, will not be tolerated.<sup>26</sup>

<sup>20</sup> *Brooks v. Brooks*, 357 Mo. 343, 208 S.W. 2d 279 (1948).

<sup>21</sup> *Tabbah v. United States*, 217 F. 2d 528 (5th Cir. 1954).

<sup>22</sup> *Wolfe v. United States*, 291 U. S. 7, 78 L. Ed. 617 (1934). Justice Stone in his opinion wrote: "the privilege suppresses relevant testimony, and should be allowed only when it is plain that marital confidence cannot otherwise reasonably be preserved."

<sup>23</sup> *Fuller v. Fuller*, 100 W. Va. 309, 130 S. E. 270 (1925).

<sup>24</sup> *Ibid.*

<sup>25</sup> *Thompson v. Steinkamp*, 120 Mont. 475, 187 P. 2d 1018 (1947). Also see *Nash v. Fidelity Phenix Fire Ins. Co.*, 106 W. Va. 672, 146 S. E. 726 (1929). Justice Lively wrote: "for, even though a conversation between husband and wife was intended to be confidential, a third person who overheard it, whether his presence was known or not, may testify as to what was said."

<sup>26</sup> *Hunter v. Hunter*, 169 Pa. Super. 498, 83 A. 2d 401 (1951).

### Family Wrongs

Courts usually hold that actions by one spouse against the other constitute an exception to the privilege, and allow communications to be admitted.<sup>27</sup> For instance, in a divorce case the husband's statements about his own infidelity were admitted.

No consideration of domestic peace and harmony or of the sanctity of the marital relation forbid their disclosure to redress the wrongs of the injured party. They did not arise from the confidence existing between the parties, but from the want of it.<sup>28</sup>

The most commonly recognized exceptions to the rule of privilege are:

- (a) In an action by one spouse against the other;
- (b) In an action for damages for the alienation of affections;
- (c) In a criminal action in which one spouse is accused of crimes against the other or against the children.<sup>29</sup>

### Death and Divorce

At common law husband and wife were incompetent to testify for or against one another, and they were also incompetent to testify either during the marriage relation or after its termination by death. . .<sup>30</sup>

As is suggested by this quotation, the law protects the privileged communications not only during the lifetime of either party, but also after death. Likewise, divorce will not permit the disclosure of the communication.<sup>31</sup>

### Who is the Holder of the Privilege?

The problem of who holds the privilege to disclose or to require disclosure of a confidential communication has long troubled the courts.<sup>32</sup> The problem is not the same as that in the

<sup>27</sup> As to statutes which so hold see, 2 Wigmore, Evidence, § 488 (3rd ed. 1940).

<sup>28</sup> *Seitz v. Seitz*, 170 Pa. 71, 32 A. 578 (1895).

<sup>29</sup> Uniform Rules of Evidence, R. 28 (2).

<sup>30</sup> *Ohio Oil Co. v. Industrial Commission*, 293 Ill. 461, 127 N. E. 743 (1920).

<sup>31</sup> 8 Wigmore, Evidence, § 2341 *op. cit. supra*, n. 27. Also, *Cain v. Enyon*, *supra*, n. 15.

<sup>32</sup> Wigmore, *op. cit. supra*, n. 27, at § 2340.

attorney-client privilege<sup>33</sup> or the doctor-patient privilege.<sup>34</sup> In both of these latter privileges, it is universally agreed that the client and the patient, respectively, are the holders of the privilege, and that they may waive it at their own discretion if they wish.<sup>35</sup> However, as to the husband-wife privilege, the courts, in some situations, are in hopeless conflict over which one may qualify as a holder of the right.<sup>36</sup>

Wigmore suggests that the holder should be *the communicating spouse* and that in the case of a unilateral oral statement the maker of the statement would be the only party capable of requiring its publication. But if the case involves the receiving parties unspoken adoption of the statement, then both sender and receiver would be entitled to claim the privilege.<sup>37</sup>

McCormick points out that the problem actually stems from the assumption that the words "competency" and "privilege" are synonymous,<sup>38</sup> which of course is not true. Most statutes have been construed to mean that the parties are merely "competent" to testify to confidential marital communication,<sup>39</sup> and now allow either party to the action to claim the benefit of the rule.<sup>40</sup> Correctly speaking, this is purely a "privilege," and not a problem of competency. Viewed as "privilege," only the holder of the privilege can claim it.<sup>41</sup> Yet a waiver may be effected by failure of either party to the communication to object.<sup>42</sup>

### The Ohio Statute

Ohio Revised Code § 2317.02<sup>43</sup> provides for the husband and wife privilege in Ohio. Its unique aspect, found in the statutes

<sup>33</sup> *Id.*, at § 2327-2329.

<sup>34</sup> *Id.*, at § 2386. Also see, *Metropolitan Life Ins. Co. v. Kaufman*, 104 Colo. 13, 87 P. 2d 758 (1939). In this case the physician was required to testify where the privilege had been waived by the patient.

<sup>35</sup> *Ibid.*

<sup>36</sup> McCormick, *op. cit. supra*, n. 1, at § 87.

<sup>37</sup> Wigmore, *op. cit. supra*, n. 27, at 2340.

See *Fraser v. United States*, 145 F. 2d 139 (6th Cir., 1944).

<sup>38</sup> McCormick, *op. cit. supra*, n. 36.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

<sup>42</sup> *Patterson v. Skoglund*, 181 Ore. 167, 180 P. 2d 108 (1947). Only the husband and wife are the holders of the privilege, not the defendant; and the defendant cannot invoke the privilege.

<sup>43</sup> Formerly G. C. § 11494.

of few other states,<sup>44</sup> is that both a "communication made by one to the other, or an act done by either in the presence of the other. . ." <sup>45</sup> is privileged. This differs from statutes of most other states, which usually only include "communication" as subject to the privilege,<sup>46</sup> leaving to the courts the determination of whether or not physical acts should be viewed as communications.<sup>47</sup>

### Conclusion

The history of the development of the husband-wife privilege is of little importance, now that the privilege is so well recognized. The primary concern of courts and lawyers now is the application of the various privilege statutes. Conflicting views regarding "communications" or "acts," the time of the making of the communication, the aspect of "confidence," the eavesdropper rule, and waiver, are making a legal puzzle out of what was once considered to be a fundamental and simple concept of jurisprudence.

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<sup>44</sup> See Sub-title, Communications and Acts, in this article.

<sup>45</sup> O. R. C. § 2317.02.

<sup>46</sup> Pennsylvania Statute, *supra*, n. 7.

<sup>47</sup> McCormick, *op. cit. supra*, n. 1, at § 83. The complete Ohio Statute pertaining to husband and wife privilege, O. R. C. § 2317.02 (G. C. 11494) reads: "The following persons shall not testify in certain respects . . . (c) Husband or Wife, concerning any communication made by one to the other, or an act done by either in the presence of the other, during coverture, unless the communication was made, or act done, in the known presence or hearing of a third person competent to be a witness; and such rule is the same if the marital relation has ceased to exist; . . ." Also see, Page's Ohio Digest, Witnesses, § 106, and Ohio Jur., Witnesses, § 238.