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Evidence -- Privileged Communications Between Husband and Wife

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out unreservedly engrafting upon the Code such concepts as will make of it a mutation and destroy its purpose.[40]

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Evidence—Privileged Communications Between Husband and Wife

The North Carolina Supreme Court recently reconsidered its position regarding privileged confidential communications between husband and wife.[1] In *Hicks v. Hicks*,[2] the wife had instituted a suit under the provisions of N.C. GEN. STAT. § 50-16 (Supp. 1967),[3] for the custody of their eight-year-old daughter, for maintenance and support for her and the child, and for counsel fees. The trial record reveals that the husband had installed a tape recorder in the basement of the home. There was no evidence that the wife knew of the tape recorder. On three different occasions, in the presence of their eight-year-old child, conversations between the husband and wife were recorded. The opinion does not disclose what was said on

[40] *See* Corbin, *Offer and Acceptance, and Some of the Resulting Legal Relations*, 26 YALE L.J. 169, 206 (1917):

> The legal relations consequent upon offer and acceptance are not wholly dependent, even upon the reasonable meaning of the words and acts of the parties. The law determines these relations in the light of subsequent circumstances, these often being totally unforeseen by the parties. In such cases it is sometimes said that the law will create that relation which the parties would have intended had they foreseen. The fact is, however, that the decision will depend upon the notions of the court as to policy, welfare, justice, right and wrong, such notions being inarticulate and subconscious.

[1] Common law developed four distinct rules regarding testimony between husband and wife. These rules have not always been kept separate in legal writings. These four categories are: (1) one spouse could not testify in the other's behalf (2) one spouse could not testify against the other (3) one spouse could not testify about confidential communications with the other (4) neither spouse could testify to nonaccess so as to basterdize a child conceived or born during the marriage. *See generally* J. MAGUIRE, EVIDENCE, COMMON SENSE AND COMMON LAW 78-101 (1947); D. STANSBURY, NORTH CAROLINA EVIDENCE §§ 53-61 (2d ed. 1963) [hereinafter cited as STANSBURY]; 8 J. WIGMORE, EVIDENCE §§ 2285-87, 2332-41 (McNaughton rev. 1961) [hereinafter cited as WIGMORE]; Comment, *Evidentiary Privileges and Incompetencies of Husband and Wife*, 4 ARK. L. REV. 426 (1950).

[2] 271 N.C. 204, 155 S.E.2d 799 (1967).

[3] N.C. GEN. STAT. § 50-16 (Supp. 1967) provides for alimony without divorce and for custody of any children of the marriage. This section concerns support and not divorce. Shore v. Shore, 220 N.C. 802, 18 S.E.2d 353 (1942).

these occasions, but did indicate that the wife "used vile and profane language in respect to her husband."[4] The trial judge remarked to the jury " 'there was a pretty ugly conversation in the presence of that little girl.' "[5] On appeal the North Carolina Supreme Court was asked to determine whether the recordings were admissible in evidence. The court held the recordings inadmissible due to the privileged communications rule and ordered a new trial.

The court was faced initially with the admissibility of the sound recording itself.[6] The great weight of authority,[7] which the court followed,[8] holds that evidence offered in the form of a sound recording is not inadmissible because of that form, if properly authenticated[9] and if not excluded by some positive rule of law because of the subject matter. As early as 1936, a Pennsylvania court perceived that the phonograph, the dictaphone, the talking motion picture, and other recording devices were in such common use that the verity of their recording and reproduction of sounds was well established. Thus, the court could permit their use as a means of presenting evidentiary facts to the jury.[10]

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[4] 271 N.C. 204, 206, 155 S.E.2d 799, 801 (1967).

[5] *Id.* at 207, 155 S.E.2d at 802.

[6] *See generally* Annot., 58 A.L.R.2d 1024 (1958).

[7] *Id.* at 1029-30.

[8] 271 N.C. 204, 205, 155 S.E.2d 799, 800 (1967).

[9] Sound recordings have almost universal approval as an acceptable form of evidence; this is premised upon a proper foundation initially established for their admission. Annot., 58 A.L.R.2d 1024, 1032-36 (1958). *See, e.g.*, Williams v. State, 226 P.2d 989 (Okla. Crim. App. 1951), which lays down seven requirements for a proper foundation.

[10] Commonwealth v. Clark. 123 Pa. Super. 277, 187 A. 237 (1936). As to the use of recordings containing privileged communications between spouses, *see* Hunter v. Hunter, 169 Pa. Super. 498, 83 A.2d 401 (1951) (in a divorce proceeding it was error to admit into evidence a wire recording of conversations between spouses since confidential communications between spouses cannot be divulged by either spouse without the consent of the other). *Accord,* People v. Buckowski, 37 Cal. 2d 629, 233 P.2d 912 (1951); Braun v. Braun, 31 Wash. 2d 468, 197 P.2d 442 (1948). *But see* State v. Slater, 36 Wash. 2d 357, 218 P.2d 329 (1950) (a criminal case where the admission in evidence of a wire recording of a confidential communication between spouses, simultaneously overheard by a third person, a police officer, was apparently upheld on the ground that an eavesdropper is unaffected by the rule of privilege. In earlier North Carolina cases tape recordings and television recordings were allowed in evidence). State v. Walker, 251 N.C. 465, 112 S.E.2d 61 (1959), *cert. denied,* 364 U.S. 832 (1960) (a criminal conspiracy case in which a tape recording was offered in evidence in corroboration of the witness who had testified regarding those matters on the tape); State v. Knight, 261 N.C. 17, 134 S.E.2d 101 (1964) (recognizing admissibility of a television recording for impeachment purposes). For information on the

The court then concerned itself with N.C. GEN. STAT. § 8-56 (Supp. 1967), which expressly provides: "No husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage."[11] This statute presents various problems when it is applied to the present fact situation. Essentially the court must decide three issues: (1) who has the privilege and who may waive it; (2) whether the presence of a third person destroys the privilege even though the third person is a child and member of the family; and (3) whether the presence of the third person destroys the privilege in toto so that either spouse may testify or destroys it only to the extent that the third person alone may testify.

The marital privilege of confidential communications is to be distinguished from rules disqualifying witnesses as unreliable and from rules, *e.g.*, the hearsay rule, excluding evidence because of lack of trustworthiness or because of its prejudicial effect. The rule of privilege shuts out probative evidence as a matter of policy in recognition of the desirability of protecting certain human relationships, even at the expense of the judicial investigation of truth.[12] The social gain to be fostered is absolute confidence between spouses.

use of motion pictures, *see* Annot., 129 A.L.R. 361 (1940); Annot., 83 A.L.R. 1351 (1933).

[11] A partial bibliography of materials treating privileged communications between husband and wife follows: STANSBURY § 60; R. WEINBERG, CONFIDENTIAL AND OTHER PRIVILEGED COMMUNICATIONS 26-30 (1967); WIGMORE §§ 2332-41; Hurley, *Privileged Communications in Oregon*, 36 ORE. L. REV. 132 (1957); Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101 (1956); McCormick, *The Scope of Privilege in the Law of Evidence*, 16 TEX. L. REV. 447 (1938); Platz, *A Code of Evidence for Wisconsin? Various Privileges*, 1945 WIS. L. REV. 239; Quick, *Privileges Under the Uniform Rules of Evidence*, 26 U. CIN. L. REV. 537, 550 (1957); *Symposium on the Oklahoma Law of Evidence—Confidential Communications Between Spouses*, 5 OKLA. L. REV. 291, 311 (1952); Comment, *Evidentiary Privileges and Incompetencies of Husband and Wife*, 4 ARK. L. REV. 426, 429-32 (1950); Note, *Spousal Testimony*, 28 BROOKLYN L. REV. 259, 279-84 (1962); Note, *Privileged Communications Between Husband and Wife in the District of Columbia*, 1 CATH. U.L. REV. 9 (1950); Note, *Testimonial Privilege and Competency in Indiana*, 27 IND. L.J. 256 (1952); Note, *Marital Evidentiary Privilege in Minnesota*, 36 MINN. L. REV. 251 (1952); Note, *Evidence—Privileged Communications Between Husband and Wife*, 15 N.C.L. REV. 282 (1937); Note, *Privileged Communications—Some Recent Developments*, 5 VAND. L. REV. 590, 593 (1952); Annot., 63 A.L.R. 107 (1929). This most modern and widely recognized marital privilege has the sanction of statute in more than forty jurisdictions. The statutes have been collected in 2 J. WIGMORE, EVIDENCE § 488 (3d ed. 1940).

[12] WIGMORE § 2285.

The policy of the privilege[13] was expressed in *State v. Brittain*[14] thusly:

> The relation of husband and wife is confidential, from unity of interest and sometimes unity of person, as in a case of joint estate to them. The law requires and exhorts this confidence, and it will protect it. Communications between them cannot be exposed to public view. The interest of the home, the parties, the children and especially the peace and order of society forbid it.[15]

The privilege embraces oral and written communications[16] but not ordinarily acts.[17] It is applicable to a marital status only, i.e., communications "during marriage."[18] Therefore, the privilege does not apply to a communication between spouses living in separation,[19] or between persons living in unlawful cohabitation,[20] since the relation is not one in which the law wishes to foster confidence. The privilege does not protect communications between man and woman before their marriage,[21] but once the privilege has arisen, it remains after termination of the marital relation by death[22] or divorce[23] as to communications during marriage.

There is a split of authority among the states regarding which spouse has the privilege and who may waive it.[24] Some courts feel

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[13] WIGMORE § 2332; Hutchins and Slesinger, *Some Observations on the Law of Evidence: Family Relations*, 13 MINN. L. REV. 675, 680-82 (1929).

[14] 117 N.C. 783, 23 S.E. 433 (1895).

[15] *Id.* at 795, 23 S.E. at 433.

[16] Mercer v. State, 40 Fla. 216, 24 So. 154 (1898); Mitchell v. Mitchell, 80 Tex. 101, 15 S.W. 705 (1891).

[17] WIGMORE § 2337 (acts may be communicative in nature so some acts may be covered by the privilege).

[18] Whitford v. North State Life Ins. Co., 163 N.C. 233, 79 S.E. 501 (1913) held that a letter written by husband and received by wife after his death not privileged, since communication was not made during marriage.

[19] Holyoke v. Holyoke's Estate, 110 Me. 469, 87 A. 40 (1913); *Contra*, People v. Oyola, 6 N.Y.2d 259, 160 N.E.2d 494, 189 N.Y.S.2d 203 (1959). *Oyola* held privilege applicable where separation was short and communication was in nature of an attempted reconciliation.

[20] People v. Keller, 165 Cal. App. 2d 419, 332 P.2d 174 (1958) (privilege does not apply where marriage is bigamous).

[21] United States v. Mitchell, 137 F.2d 1006 (2d Cir. 1943); Halbock v. Hill, 261 F. 1007 (D.C. Cir. 1919); Forshay v. Johnston, 144 Neb. 525, 13 N.W.2d 873 (1944); Harp v. State, 158 Tenn. 510, 14 S.W.2d 720 (1929).

[22] *See* WIGMORE § 2341 n.1 for numerous cases on this point.

[23] Cooper v. United States, 282 F.2d 527 (9th Cir. 1960); Pereira v. U.S., 202 F.2d 830, 834 (5th Cir. 1953); Annot., 38 A.L.R.2d 570, 579 (1954); *But see*, Coles v. Harsch, 129 Ore. 11, 276 P. 248 (1929).

[24] WIGMORE § 2340.

that since the privilege is intended to secure freedom from apprehension in the mind of the communicator, he has the privilege, and the addressee cannot object, unless the latter's silence is viewed as an assent and adoption of the statement as his own.[25] Under this reasoning the communicating spouse alone has the privilege and he alone may waive it.[26] However, the general rule which existed at common law is that communications made by one spouse to the other in confidence of the marital relation are so protected that neither spouse can disclose or can be required to disclose unless the other spouse consents thereto and waives the privilege.[27] Thus *both* spouses have the privilege but *neither* can waive it without the consent of the other.

The court in *Hicks* in considering the scope and meaning of this privilege discovered what must be viewed as an aberration in North Carolina law regarding who may claim the privilege and who may waive it. In *Hagedorn v. Hagedorn*,[28] the court permitted the wife to testify to confidential conversations with her husband, over the husband's objection.[29] "Thus," one commentator has summarized, "under this decision [the *Hagedorn* case] where one spouse confides in the other, apparently *both* spouses are given a privilege not to disclose the confidence, but *either* can waive it for both."[30] Until the present case the North Carolina Supreme Court had no opportunity to reconsider this position, with the exception of an *obiter dictum* in accord with the decision of the *Hagedorn* case.[31] The common law rule, i.e., that both spouses have the privilege and neither can waive it without the consent of the other, is a direct contradiction of the rule in *Hagedorn*. North Carolina recognized the common law formulation of the privilege before it was written into

[25] WIGMORE §§ 2338 par. (4), 2340. *E.g.*, Hagedorn v. Hagedorn, 211 N.C. 175, 189 S.E. 507 (1937); *Contra*, Hunter v. Hunter, 169 Pa. Super. 498, 503, 83 A.2d 401, 403 (1951), note 10 *supra*.

[26] State v. Branch, 193 N.C. 621, 137 S.E. 801 (1927).

[27] Note 24 *supra*; State v. Freeman, 197 N.C. 376, 148 S.E. 450 (1929); State v. McKinney, 175 N.C. 784, 95 S.E. 162 (1918); State v. Randall, 170 N.C. 757, 87 S.E. 227 (1915); State v. Wallace, 162 N.C. 623, 78 S.E. 1 (1913); Toole v. Toole, 109 N.C. 615, 14 S.E. 57 (1891).

[28] 211 N.C. 175, 189 S.E. 507 (1937).

[29] STANSBURY § 60.

[30] 15 N.C.L. REV. 382, 285 (1937). This excellent note criticizes the *Hagedorn* case stating that "In arriving at this result, the Court relied solely upon one North Carolina case, [Nelson v. Nelson, 197 N.C. 465, 149 S.E. 585 (1929)] which is not in point, and a dictum of the Supreme Court of the United States [Stickney v. Stickney, 131 U.S. 227, 236 (1899)]."

[31] Biggs v. Biggs, 253 N.C. 10, 16, 116 S.E.2d 178, 183 (1960).

the present statute.[32] In *McCoy v. Justice*,[33] for example, a letter written by the husband to the wife was held inadmissible without the husband's consent even though the wife betrayed the confidence by giving the letter to a third person. Note that the privilege did not terminate when the third person received the letter.

If the court in *Hicks* had followed the *Hagedorn* decision, the husband could have waived the privilege. The court did not expressly overrule *Hagedorn* or the *obiter dictum* in accord, but simply held if they were applicable to the facts then the court was inclined not to follow them.[34] The court apparently adopted the common law rule in interpreting the statute but it is distressing that the court did not expressly overrule the *Hagedorn* case which is a clear departure from the statute.

The final issue in the case, i.e., whether the presence of a third person, a child, during the conversations removed the veil of confidence, had to be determined by the court. The essence of the privilege is to protect confidential communications only.[35] The better view appears to be that all marital communications are presumed confidential, but it is a rebuttable presumption.[36] According to the reasoning of most courts, this confidentiality is destroyed when the communication is made in the known presence of a third person.[37] Also, since the privilege insures the communicating spouse only that his confidences will not be disclosed without his consent in court by

[32] In State v. Jolly, 20 N.C. 108 (1838) the court said: "whatever is known by reason of that intimacy [marriage] should be regarded as knowledge confidentially acquired, and that neither [husband nor wife] should be allowed to divulge it to the danger and disgrace of the other." *Id.* at 112.

[33] 199 N.C. 602, 155 S.E. 452 (1930). *See also*, State v. Banks, 204 N.C. 233, 167 S.E. 851 (1933) where the court refused to allow cross-examination of witness as to contents of letter written by him to his wife and delivered by her to counsel to show bias. The contrary implication in State v. Branch, 193 N.C. 621, 137 S.E. 801 (1927) would appear to be an inadvertance.

[34] 271 N.C. 204, 207, 155 S.E.2d 799, 802 (1967).

[35] Wigmore suggests that all marital communications should be presumed confidential until the contrary is shown. WIGMORE § 2336. *See also*, Sexton v. Sexton, 129 Iowa 487, 105 N.W. 314 (1905); Comment, 4 ARK. L. REV. 426, 430 (1950).

[36] *Id. Accord*, R. WEINBERG, CONFIDENTIAL AND OTHER PRIVILEGED COMMUNICATIONS 28 (1967).

[37] WIGMORE § 2339. *See also*, Toole v. Toole, 109 N.C. 615, 14 S.E. 57 (1891). Some cases have held that communications between spouses, although made in the presence of a third person, are privileged. *E.g.*, Mahlstedt v. Ideal Lighting Co., 271 Ill. 154, 110 N.E. 795 (1915). Some states follow this rule on the ground that the disqualifying statute makes no exception with respect to the presence of a third person. *See* Annot., 63 A.L.R. 107, 118 (1929).

the addressee,[38] an eavesdropper, unknown to the spouses, who overhears them, is not prohibited from making a disclosure.[39] Consequently, according to the great weight of authority, a communication, conversation, or transaction between husband and wife in the *presence of* or *overheard by* a third person is not within the protection of the privileged communications rule.[40] The majority of courts allow the third person to testify, but courts disagree whether the addressee may also testify. The logical rule would appear to be that a communication made by one spouse to the other in the known presence of a third person would not be considered confidential and could be the subject of testimony by the spouse to whom the communication is made; but that a communication made by one spouse to the other in supposed privacy, which is overheard by an eavesdropper would still be a confidential communication and the addresse could not testify as to the communication. Yet the majority of jurisdictions do not seem to require that the presence of a third person be known to the communicator in order to render the testimony of a spouse regarding the communication admissible.[41] "But," it has been noted, "the facts of the majority of

[38] Dalton v. People, 68 Colo. 44, 189 P. 37 (1920); Commonwealth v. Wakelin, 230 Mass. 567, 120 N.E. 209 (1918).

[39] State v. Slater, 36 Wash. 2d 357, 218 P.2d 329 (1950), *supra* note 10; Commonwealth v. Wakelin, 230 Mass. 567, 120 N.E. 209 (1918) (homicide; conversation between husband and wife in jail, overheard by dictograph, admitted); Commonwealth v. Everson, 123 Ky. 330, 96 S.W. 460 (1906); State v. Center, 35 Vt. 378 (1862) (conversation overheard by witness who was in the next room).

[40] WIGMORE § 2339. *E.g.*, Wolfe v. United States, 291 U.S. 7 (1934); Whitehead v. Kirk, 104 Miss. 776, 61 So. 737 (1913); Cowser v. State, 157 S.W. 758 (Tex. 1913). North Carolina has several cases speaking to this point. State v. Freeman, 197 N.C. 376, 148 S.E. 450 (1929) is an arson prosecution in which a third person was permitted to testify what he heard husband tell wife at time of arrest. In State v. McKinney, 175 N.C. 784, 95 S.E. 162 (1918) a constable was allowed to testify that at the time of arrest the wife told the defendant husband she had warned him against selling whiskey and that he would get caught. State v. Randall, 170 N.C. 757, 87 S.E. 227 (1915) was a liquor offense in which conversations overheard by a police officer were admitted. In State v. Wallace, 162 N.C. 622, 78 S.E. 1 (1913) eavesdropper unknown to spouses was allowed to testify to the conversation. In Toole v. Toole, 109 N.C. 615, 14 S.E. 57 (1891) a third person was allowed to testify about what the husband said to the wife to show adulterous intercourse as well as contradicting a previous witness. *C.f.* State v. Brittain, 117 N.C. 783, 23 S.E. 433 (1895) where the wife was forced by her husband to confess to him about incest, then forced by him to confess to her mother; since the first confession was inadmissible, the second confession was also excluded as stemming or proceeding from the first.

[41] Annot., 63 A.L.R. 107, 116 (1929).

these cases show that the reasonable conclusion to be drawn from them is that the presence of a third person was known to the husband and wife."[42]

Members of one's family occupy the same position as strangers in that their knowledge of a communication between spouses affects the privilege of that communication.[43] Thus, if a communication is made in the known presence of a member of the family,[44] or is overheard by a member of the family,[45] the veil of confidence has been removed and the communication is not privileged.

In *Hicks,* a third person was present during the conversations, but that person was a child. Does the presence of a child remove the veil of confidence so that the husband could submit the recordings in evidence? The answer to this question logically should involve two additional problems: (1) evaluation of the competency of the child to determine whether she may or may not be considered a third person within the rule, and (2) if the child is determined competent, whether the privilege is completely destroyed so that one of the spouses may submit evidence concerning the conversations or is destroyed only to the extent that the child could testify. Unfortunately the court did not face either of these problems; it simply gave its conclusions without any reasons. The court stated that it construed the statute broadly and held that the husband and wife *intended* their utterances to be privileged and that the "presence of the eight-year-old daughter did not destroy the veil of confidence thrown over these confidential conversations. . . ."[46] Thus the court held the tape recordings inadmissible and ordered a new trial.

Three problems faced the court and no satisfactory answer was given to any of them. First, the court should have made its position regarding the *Hagedorn* case explicit rather than saying it does not apply to these facts. But the court did indicate that the other de-

[42] *Id.*

[43] *Id.* at 118.

[44] In Taylor v. Winsted, 74 Ind. App. 511, 129 N.E. 259 (1920) a wife was held competent to testify to statements made by her to her husband in the presence of their sixteen-year-old daughter. Cowser v. State, 157 S.W. 758 (Tex. 1913) held that a wife may testify as to a conversation between herself and her husband in the presence of her daughter.

[45] Linnell v. Linnell, 249 Mass. 51, 143 N.E. 813 (1924) held that when a daughter was in a room 10 or 12 feet from room where wife made angry statements to husband, the husband should be allowed to testify.

[46] 271 N.C. 204, 207, 155 S.E.2d 799, 802 (1967).

cisions since 1838[47] are uniform and that it would follow them. The logical conclusion is that the rule in North Carolina is that both spouses have the privilege but neither can waive it without the consent of the other. Secondly, the court should have concerned itself with the competency of the child. In North Carolina there is no fixed limit below which a witness is incompetent to testify, but the witness must understand the obligation of the oath and have sufficient intelligence to give evidence.[48] North Carolina is liberal in allowing children to testify; several cases have found children under seven years old competent to testify.[49] Previously courts have made the following inquiries: Was the child of sufficient intelligence to pay attention to, and to understand, what was being said?[50] Was the child interested in what was being said?[51] Did the child pay attention to or take any part in the conversation?[52] In the principal case the court failed to make any such inquiries; however, the court stated at one point in its discussion that the child was " 'singing or playing in the area' "[53] during one of the conversations, thus possibly implying that the child was not paying attention to or was not interested in what was being said. The court made no further observations about the child in respect to the other two conversations and nowhere referred to the child's competancy. If the child was determined competent as a third person, how could the spouses *intend* their conversations to be confidential when making vile and profane statements in

[47] State v. Jolly, 20 N.C. 108 (1838).

[48] STANSBURY § 55.

[49] McCurdy v. Ashley, 259 N.C. 619, 131 S.E.2d 321 (1963) (six-year-old boy allowed to testify to events occurring nearly two years earlier); State v. Gibson, 221 N.C. 252, 20 S.E. 51 (1942) (admitting testimony of five-year-old, rejecting that of six-year-old, not abuse of discretion); *See also,* State v. Harrington, 260 N.C. 663, 133 S.E.2d 452 (1963); Artesani v. Gritton, 252 N.C. 463, 113 S.E.2d 895 (1960); State v. Edwards, 79 N.C. 648 (1878).

[50] Fuller v. Fuller, 100 W. Va. 309, 130 S.E. 270 (1925) (thirteen-year-old daughter held capable of comprehending what was said); Freeman v. Freeman, 238 Mass. 150, 130 N.E. 220 (1921) (nine-year-old child held not of sufficient intelligence to comprehend conversation); Schierstein v. Schierstein, 68 Mo. App. 205 (1896) (infant child held incapable of comprehending).

[51] Lyon v. Prouty, 154 Mass. 488, 28 N.E. 908 (1891) held that a fourteen-year-old daughter would be interested when conversations concerned seduction.

[52] Hopkins v. Grimshaw, 165 U.S. 342 (1897) held that the wife could not testify as to a private conversation where the thirteen-year-old-daughter took no part in the conversation.

[53] 271 N.C. 204, 207, 155 S.E.2d 799, 802 (1967).

the presence of the third person? Thirdly, if the court had determined the child competent as a third person, the problem of whether both the child and husband could testify would arise. The better view appears to be that the privilege is completely destroyed as to a conversation made in the known presence of a third person and therefore the husband should be allowed to testify via the tape recordings. North Carolina follows the rule that the third person either known or unknown to the spouses may testify, but whether the spouse may in turn testify once the actual presence of a third person has been established has not been decided.[54]

A court should be zealous in protecting the privilege of confidential communications which is intended to secure the perfect confidence and trust which should characterize the relation of husband and wife. However, the privilege protects *only* the institution of marriage. It seems that the court in *Hicks* viewed the privilege as covering the familial unit. The fact that the spouses intend their conversations to be private and confidential seems immaterial when spoken in the known presence of a third person, even if that third person is a child. The court possibly considered the child such an integral part of the marriage that she should not be considered a third person. The real problem with the case is the failure of the court to articulate the reasons for its decision, resulting in considerable ambiguity as to its actual holding.

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Federal Jurisdiction—Realignment—Antagonism Test Extended

Multiple-party actions in the federal courts are susceptible to dismissal for want of jurisdiction because of the rule of complete diversity requiring that no plaintiff be a citizen of a state of which a defendant is a citizen.[1] The jurisdiction of the federal courts over suits "between citizens of different states"[2] seemingly contradicts the basic tenets of federalism, for these suits involve rights grounded

[54] Note 40 *supra.*

[1] Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806).
[2] 28 U.S.C. § 1332(a)(1) (1964).