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SOME OBSERVATIONS ON THE LAW OF EVIDENCE FAMILY RELATIONS

By Robert M. Hutchins* and Donald Slesinger†

Except in cases of necessity[1] the wife was incompetent to testify for or against her husband at common law.[2] Coke suggests[3] that the reason for the rule lay in the fact that husband and wife were one, and naturally could not be divided for the purposes of testimony. Although the courts soon got beyond this doctrine, they insisted on the value of the rule. They argued that spouses, though perhaps not physically identical, were identical in interest. When disqualification by interest was removed, the judges had to take other ground, and did so in *Stapleton v. Crofts*.[4] There they decided that the true basis for the rule was the necessity of marital harmony and confidence.

But even this philosophy has been unable to sustain the notion that one spouse cannot appear for or against the other. The disqualification has gradually been reduced to a disqualification in criminal cases alone.[5] The dissenting opinion of Mr. Justice Erle[6] in *Stapleton v. Crofts* states the arguments that have prevailed against broader disqualification. He points out that the idea of promoting domestic peace is incapable of consistent application in these cases. It is not applied to witnesses not parties to the action. Mr. W may testify for the plaintiff, Mrs. W against him. Their stories may lead to endless ructions in the W household. Erle, J., doubts, too, whether husbands suborn their wives to perjury. He is reasonably sure that the exclusion of the evidence is a definite loss, whereas the gain, if any, is remote and speculative.

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[1]Anonymous, (1710) 11 Mod. 224; I Wigmore, Evidence 2d ed., sec. 612.

[2]Mary Griggs' Case, (1660) T. Raym. 1, 1 Wigmore, Evidence, 2d ed., sec 601 sets forth the various reasons that have been advanced for the rule.

[3]Commentary on Littleton 66; see also 2 Hale, Pleas of the Crown 279.

[4](1852) 18 Adol. & El. N. S. 367

[5]This incompetency has been abolished in England by (1898) St. 61 and 62 Vict. chap. 36, sec. 1. The American statutes are assembled by Wigmore, Evidence, 2d ed., sec. 488.

[6](1852) 18 Adol. & El. N. S. 367, 371.

Although this line of reasoning has led to the abolition of the general disqualification of husband and wife, it has not led to its total elimination. The same objections which obtain to the old rule hold against the modern one. In addition we are confronted with questions of statutory interpretation which have been solved in somewhat extraordinary ways. In *Story v State*,[7] a short time before the killing the witness heard the defendant's wife say, "Yes, he thinks more of deceased's wife than he does of me and the children." This was held "clearly violative of the rule forbidding the use of the wife's testimony against her husband and should not have been admitted." An even more preposterous result was reached in *People v Holtz*.[8] There Mrs. Whisman and Mrs. Holtz were on trial for the murder of Whisman and the attempted murder of Holtz. Holtz was called for Mrs. Whisman. His testimony would have exonerated her completely But he was not permitted to give it, because the husband of one codefendant may not testify for the other

Great difficulties have arisen too, in determining the limits of the principal exception to the modern rule, that for crimes against the wife. In these cases, though domestic peace may have long since vanished, the wife is usually not permitted to testify unless the husband is on trial for personal violence to her Where the husband shot at the wife and killed the child in her arms and was tried for the murder of the child, the wife could not take the stand because the crime was not against her[9] Yet the rather complete absence of matrimonial harmony might suggest another result. The same is true of the incest cases,[10] where the wife is frequently held incompetent although the home has been pretty well shattered.

If the husband and wife are now not ordinarily disqualified in civil cases, one class of litigation does involve the total prohibition of testimony by them to certain facts, and is important as revealing the attitude of the courts toward the institution of the family Where the legitimacy of offspring is in question the declarations of husband or wife may not be admitted to prove illegitimacy Here appears again the idea of the unity of the family, and its importance to the courts. The Lord Chancellor

[7](Tex. Crim. App. 1927) 296 S. W 516.
[8](1920) 294 Ill. 143, 128 N. E. 341 15 Ill. L. Rev 453· 35 Harv L. Rev. 673, 691, 29 Harv. L. Rev. 332
[9]19 Harv. L. Rev. 545.
[10]25 Col. L. Rev. 103· 14 Col. L. Rev. 537

in *Russell v. Russell*,[11] decided only five years ago, stated that these declarations are inadmissible under any and all circumstances. To hold otherwise would invade the sanctity of the home. This in spite of Lord Sumner's suggestion,[12] that the sanctity of married intercourse passed into the limbo of lost causes and impossible loyalties in 1857, with the divorce acts of that date.

This conception of the home as a unit, with all the members dwelling in sacrosanct confidence and harmony was never, apparently, extended beyond the husband and wife. A son might testify against his father, and a brother might cast grave doubts on his sister's paternity Even in days when some remote financial interest in the result of the action would disqualify, the most intimate blood relationship would not.[13] Children might quarrel, they might attack their parents on the stand, their parents might appear for or against them in the most bitterly contested litigation, the domestic peace remained undisturbed.

In contrast with the legal conception of the family as indicated by the rules described above, let us examine the actual situation of the family at the present time. Before the industrial revolution a family unit was a function of several forces all working in the same direction. Individual members of families were tied by sexual and affectional bonds. If these bonds were frequently ambivalent, disharmony was prevented by economic necessity and social pressure. It was important to keep the family together because it was a producing unit, and economic disaster might very well follow a breakup.[14] These sexual and economic forces found formal expression in the law, but one may seriously doubt that the law of evidence had any formative effect on family life in general. Too few people get into court, and the adjective law is little known outside of it. Family unity there was, beyond reasonable doubt. But evidence was merely parallel to it.

The industrial revolution wrought profound changes in family life. It gradually altered family economy, by emphasizing the family as a consuming, not a producing unit. Means of support grew up outside the home, freeing the children and the

[11][1924] A. C. 687; 37 Harv. L. Rev. 916; 19 Ill. L. Rev. 280; 73 U. of Pa. L. Rev. 71

[12][1924] A. C. 687, 746.

[13]Brown v. State, (1904) 142 Ala. 287, 38 So. 268.

[14]The sexual factor may be assumed to be more or less constant in family relationships. For an account of the family see Goodsell, Problems of the Family chap. V VI, VII.

women from economic family domination. It increased mobility and destroyed the physical unity of the home. In many cases it forced disunity on unwilling families by introducing competition between parents and children, husbands and wives, or by creating widely separated labor markets that had to be tapped if individuals were to live. That male heads of families were able to find satisfactory employment in coal mines, for instance, was no guarantee that the same locality would also absorb the energies of wife and children. Economically it was no longer necessary, or even desirable, for the family to remain a unit, indeed, in the early days of child labor the dormitory system made such unity impossible.[15]

As a result of the removal of economic pressure negative attitudes more easily find expression in family disorganization. Figures substantiate this hypothesis. Since 1870, while the population of the United States has only tripled, divorce has increased seventeen fold.[16] The increase is much more marked in urban than in rural environments,[17] perhaps because the industrial revolution has been more completely achieved in our city than in our country communities. As a further indication that the removal of economic pressure promotes disorganization, we find a correlation between divorce curves and business cycles.[18] In periods of prosperity the divorce rate is high, while during depression it shows a marked decrease. Again we find that gainfully employed females, a definitely increasing group tend to marry later than their more dependent sisters.[19] This may be in part caused by selection, or later marriage may force women into various forms of employment. But it seems safe to assume that when these working women finally marry (as most of them do) their independence will make them merge less readily into the old style family

This indicates a different, not necessarily a worse family situation. People may be hesitant about the agrarian family but not about marriage and family life in general. If the divorce rate has increased since 1870, so has the marriage rate.[20] Even

[15]Supra note 14. An interesting commentary on the effects of this change, and a comparison of it with contemporary primitive societies will be found in Mead, Margaret, 128 Nation 253.

[16]Groves and Ogburn, American Marriage and Family Relationships 346.

[17]Id., 355.

[18]Id. 355.

[19]Id., 278.

[20]Id., 151.

among the divorced, dissatisfaction with a single spouse does not induce one to abstain permanently from marriage. Well over half of the divorced remarry,[21] and in one state from which figures are available, most of those who remarry do so in less than four years.[22] Again, although divorce has shown a marked increase, the length of marriage before divorce has also increased.[23] What we are witnessing, then, seems to be a period of social flux in which the family is changing correlatively with industrial change. There is still a strong desire for marital harmony, in fact the divorce rate may indicate that real harmony has become the paramount issue, now that economic pressure has been removed. Another possible item of evidence for the stress on marital harmony may be the slight correlation between low birth-rate and high marriage rate.[24] At the outset even children seem to be sacrificed to the spousal relationship.

If economic life is disorganizing to the family, so are many other modern developments. The breakdown of religion, the diversified recreation made possible by the automobile and the movie, have destroyed the religious and recreational unity of the family, and laid emphasis on dispersion.[25] It is literally true in many modern families that the right hand knows not what the left hand doeth. All the social and economic forces of society then are acting centrifugally, tending to break up the old family relationship. The only remaining binding ties are sexual and affectional. This realignment of forces makes a new family adjustment inevitable.

In the face of all this we find the law of evidence making a rather ineffectual effort in a restricted field to stem the tide. No wonder the disqualifying rule has been swept away in civil cases. In this period of readjustment, we can see no reason for sacrificing individual justice (as it has demonstrably been sacrificed in several cases) to a mythical family unity

It may be argued that even though the disqualification is

[21]Groves and Ogburn, American Marriage and Family Relationships 365.

[22]Id., 365.

[23]Id., 353.

[24]Id., 272. The correlation is not high enough to indicate more than a slight tendency.

[25]Lynd, R. & H., Middletown, (1928). One of the important things brought to light by this study was the devotion to automobiles, radios, etc., even at the expense of food and modern plumbing. Whether the radio will unify where other recreational devices disorganize is a problem upon which the next few years may throw some light.

removed the rule protecting confidential communications should be retained, that with everything breaking up the home, and only affection and intimacy holding it together, these qualities should be fostered as much as possible. At the present time the chief protection of the homes of those who succeed in keeping out of the criminal courts is this privilege. The theory of the privilege is clear it is intended to promote confidence between husband and wife by assuring them that their confidences will never be revealed without their consent. Hence death, divorce, and annulment do not remove the bar.[26] Although in the particular case the home has gone to pieces, other people whose homes are still intact must be assured that their confidences will remain secret should their homes ever go to pieces, too.

The problem of administering these statutes has been one of great difficulty and has produced much complexity What is a confidential communication? Apparently profane language addressed to the wife and ill-treatment of her are not, even though one would not ordinarily swear at or beat one's wife in public.[27] Letters passing between the parties when living in a state of hostility are not confidential, though the writer would not care to have them printed in the papers.[28] Although the courts find ways of holding that criminal acts of the husband in the wife's presence are not confidential,[29] the rule as to other acts is not so clear In the same year the courts of two states took exactly opposite views of almost the same facts. In *State v Dixson,*[30] the wife, whose marriage had been annulled, testified against her husband, on trial for burglary, and told of gifts of stolen property to her during marriage. The court held that this was proper, since the statute forbade communications only, and gifts are not communications. On the other hand, when, in Michigan,[31] a divorced wife testified to the presence of stolen property in the house during coverture, the admission of the testimony was reversible error under a statute forbidding the husband or wife to be a witness against the other and during or after marriage to be a witness

[26]Dexter v. Booth, 2 (1861) Allen (Mass.) 559· 7 Col. L. Rev 137

[27]Stillman v. Stillman, (1921) 115 Misc. Rep. 106, 187 N. Y S. 383; Cf. Sherry v. Moore, (Mass. 1928) 163 N. E. 906 where the husband's statement to the wife that he wished she were dead was held privileged.

[28]Symington v. Symington, (1926) 215 App. Div. 553, 214 N. Y S. 307

[29](1926) 26 Col. L. Rev. 897 (1902) 15 Harv. L. Rev. 674.

[30]State v. Dixson, (1927) 80 Mont. 181, 260 Pac. 138.

[31]People v. Geisinger, (1927) 238 Mich. 625, 214 N. W 184.

to any confidential communication during marriage. Bewildering distinctions appear in the interpretation of these statutes in the same court, and even in the same case. Thus in *Howard v. State*[32] the fact that the wife saw blood on her husband's shirt is admissible, testimony that she burned the shirt is inadmissible.

On one point the courts seem to be agreed, the presence of third parties means that the communication is not confidential.[33] The presence of a third party not visible to husband or wife will prevent either of them from testifying against the objection of the other, but will not prevent the eavesdropper from appearing.[34] The privilege operates only to protect the spouses against each other. But here again the problem of interpretation is difficult. In *McKie v. State*[35] the prosecution offered letters from wife to husband which had been obtained from third parties. The Supreme Court of Georgia held the evidence inadmissible regardless of the channel through which it reached the court. In this case the wife was on trial for murdering her husband.

The question of waiver presents the same difficulties in administration. It would be supposed that with a privilege which has called forth so much adverse criticism, the courts would be astute enough to work out a waiver wherever it could be done. In actions for divorce, it would seem that the party complaining, at least, might be held to waive the privilege.[36] Actions for alienation of affections, and similar suits, would seem to involve necessarily such an investigation of the relations between the spouses that the privilege would have to give away. Yet in Nebraska a statute was required to bring this about, and in *Larsen v. Larsen*[37] the court limited its decision to a situation where the wife had already sworn to conversations with her husband, and he was attempting to reply.[38]

As in the rules affecting competency we find much confusion both in interpretation and administration. Sometimes we reach a logical absurdity in trying to justify the admission of evidence. If evidentiary rulings had social effects one would never write letters, and would live in perpetual fear of some intruder hiding

[32](Tex. Crim. App. 1926) 280 S. W 586.
[33]See Appeal of Robb, (1881) 98 Pa. 501.
[34]Commonwealth v. Griffin, (1872) 110 Mass. 181 Ray v. State, (Ga. 1928) 143 S. E. 603.
[35](Ga. 1927) 140 S. E. 625, noted in 37 Yale L. J. 669.
[36]But see Lewis v. Lewis, (1928) 224 Ky. 18, 4 S. W (2d) 1106.
[37](1927) 115 Neb. 601, 213 N. W 971.
[38]See also Kiesgen v. Harness, (1928) 242 Mich. 422, 218 N. W 667 Gjesdahl v. Harmon, (1928) 175 Minn. 414, 221 N. W 639.

under the bed or in the closet. As was pointed out previously, very few people ever get into court,[39] and practically no one outside the legal profession knows anything about the rules regarding privileged communications between spouses. As far as the writers are aware (though research might lead to another conclusion) marital harmony among lawyers who know about privileged communications is not vastly superior to that of other professional groups.

Against this emphasis on secrecy we can point to a growing tendency toward revelation of intimacies where the end in view seems to justify it. People in personal difficulties are tending more and more to disclose secrets of their personal lives to psychiatrists.[40] Where scientific truth is desired innumerable people, many with no personal problems, are not unwilling to betray marital confidences. A number of recent studies substantiate this view,[41] and the subjects of them have not become demonstrably unhappy as a result. Individual justice is as important as social science or personal difficulties and has clearly as much to gain by compulsory waiver of privilege where, in the discretion of the trial judge, important evidence might be obtained in that way, and no other. Spouses have a perfect right to protection from publicity (all social science studies guarantee that absolutely), but this protection can be obtained in other ways than that of silence.

It seems clear, then, that family relationships should not disqualify witnesses, nor render important evidence inadmissible through privilege. If the evidence is admitted, then, should not the relationship be offered in order to aid the tribunal in evaluating it? Should not one be able to impeach a witness by pointing to relationship and deducing therefrom bias which would discredit the testimony offered?

Unlike the rules on competency and privilege, the rules on impeachment by showing bias extend to other relationships than

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[39]Research in Connecticut, New York and Massachusetts reveals that almost two-thirds of the cases put on the court calendar are withdrawn or discontinued before reaching judgment. (Unpublished tables from the files of the Yale study of court administration, under the chairmanship of Prof. Charles E. Clark.)

[40]This is evidenced by the growth of psychiatric practice in cities like New York, Boston and Chicago, and by the enormous amount of popular literature on the subject that has appeared in the last decade.

[41]Katherine B. Davis' study (by mailed questionnaire) of 1,000 married and 1,000 single women; J. O. Chassell's, Personality Variables and G. V Hamilton's, A Research in Marriage, to name only a few.

that of husband and wife. A communication between parent and child or sister and brother is never privileged because of relationship. But any relationship may be used to show the possibility that the witness is lying because of it. The rule extends to illicit love affairs,[42] which are protected by no privilege,[43] and to all family situations. It is supposed that the jury should have an opportunity to appraise the testimony in the light of the witnesses' relations to the parties by blood, marriage, affection, or interest.

There is no doubt that living together, frequent visiting or intimate relationships produce emotional reactions in all parties concerned. The courts assume that bias is always in the same direction. In the light of recent research that does not seem to be the case. Myth and literature contain many suggestions of ambivalent attitudes toward those whom one is supposed to love. Generations of Greek gods thrived on patricide. Oedipus murdered his father for love of his mother, Hamlet's attitude toward his mother and uncle-father could never come to rest because of the battle of antagonistic emotions going on within him. In "The Brothers Karamazov," Ivan, on trial for his life, cries, "They all desire the death of their fathers." The testimony of these characters would scarcely have been predictably biased in favor of their relatives.

Recent psychological investigation has shown that these are not literary exceptions, but may prove to be the general rule. It is insisted by psycho-analysts that the great interest in the Oedipus myth, for example, results from the fact that it objectifies an experience common to mankind. Because of that Freud designated the situation where a child prefers the parent of the opposite sex and is jealous of (hostile to) the parent of his own, the Oedipus complex where the child is a boy, and the Electra where it is a girl.[44] Although investigators differ somewhat as to the age at which this incest wish undergoes repression,[45] the preference and rivalry are admitted as matters of common observation. This infantile attitude, unless properly handled, frequently continues into adult life, sometimes resulting in a psychoneurosis. Where it does not become definitely pathological, there is still a strong native antagonism, overlaid by the mores, which keep it in

[42]State v. Abbott, (1902) 65 Kan. 139, 69 Pac. 160, (1902).
[43]Rex v. Bramley, (1795) 6 Durn. & East 330.
[44]Freud, Introductory Lectures on Psychoanalysis 175; Flügel. Psychoanalytical Study of the Family 12.
[45]G. V Hamilton, for example, in Research in Marriage 546.

place most of the time. Obviously a situation of this sort, while productive of bias, without doubt, does not prduce predictable bias. In order to estimate a statement made on the stand we must abandon a general rule, and turn to the psychology of the individual in question.

The Oedipus complex has a corollary in the attitude of parents toward children of the same sex. It is a matter of more or less common knowledge that family favoritism runs to sexual opposites. How this situation will affect any given testimony can not be foreseen without a wide margin of error And general ignorance of these emotions is such that it is not safe merely to present the relationship to the jury, and trust to its evaluating ability

The reason it is unsafe to trust to the introspection of twelve men in deciding whether bias is likely to be for or against is that the attitudes described are frequently unconscious. The father, child, husband or wife is usually only conscious of his socially acceptable attitudes. We have seen[46] that people declare that they are emotionally aroused by words which are supposed to arouse emotion although objective tests indicate that their self observation is false. As an example take the over solicitous husband, shielding his wife from drafts, bothering her a dozen times a day trying to make her comfortable, whose later behavior showed that he was concealing his true feelings, even from himself,[47] or the woman recently married who, while still professing great love for her husband, failed to recognize him across the street,[48] and whose divorce revealed the trend of her emotion. These unconscious factors can only be brought to light by a special technique.

If parents and children are just as likely to be prejudiced against as for each other, can we expect something different in the husband-wife or fraternal relationships? There is abundant clinical evidence that the same situation obtains in the latter that we find in the former Fraternal antagonism may be due to a number of factors. Flügel in his Psycho-analytic Study of the Family[49] states that a most common one is the jealousy of children for new born infants who necessarily take up a great deal of

[46]Syz, Observations on the Unrealiability of Subjective Reports of Emotional Reactions, 17 Brit. Jour. Psych. Gen. Sect. 119-126.
[47]Freud, Psychopathology of Everyday Life.
[48]Freud, Psychopathology of Everyday Life.
[49]Flügel, Psychoanalytical Study of the Family 19.
[50]Freud, S., General Introduction to Psychoanalysis 280, 172.

parental time and attention that formerly went to the older child.[50] The infant's day is over when he comes into direct competition with his older sib and finds himself inadequate in many fields. Rivalry and competition last into adult life for a variety of reasons, one child may be more attractive or able than another, parents may favor one against the other; there may be fear of the ultimate disposal of the parental estate. Legal observers can point to enough instances which cast doubt upon the positive feeling sibs are supposed to have for one another, to make further elaboration superfluous.

Spousal antagonism may be observed through increasing divorce[51] or such studies of marital behavior as that recently undertaken by G. V Hamilton. He found as possible sources of antagonism, sexual relationships, economic affairs, and previous attitudes of spouses toward their parents, to name but a few.[52] Only forty-four of two hundred men and women studied answered unqualifiedly "Nothing" to the question "What things in your married life annoy and dissatisfy you most."[53] One hundred and fifty-four in describing the traits of their spouses referred to undesirable ones.[54] One hundred and seventeen of them began to be seriously dissatisfied with some lack or shortcoming in their spouses at some stage in their married lives.[55] This group may not have been representative, but clearly many members of it would scarcely be expected to rush unequivocally to the defense of their spouses. Here, as previously, though bias may be assumed, its amount or direction will only be revealed as a result of careful individual study How detailed this study will be, depends, of course, on how crucial is the testimony offered by the supposedly biased person. Again the reader should be reminded that these spousal attitudes are, for the most part, unconscious. They are infrequently expressed in overt behavior, and might conceivably result not in deliberate lying on the stand, but an unconscious distortion of testimony that might unduly prejudice a jury

We find, on the whole, then, that there is a decided lag in the judicial attitude towards the family, at least as far as the

[51]In Clark, Fact Research in Law Administration, Conn. Bar Jour. (July 1928) p. 8 we find that over one-fourth of the cases heard in the trial courts are family disorganization cases.

[52]G. V Hamilton, Research in Marriage.

[53]Id., p. 7

[54]Id., p. 70.

[55]Id., p. 68.

rules of evidence are concerned. The courts are trying to maintain a family organization that is being superseded by a new one. There seems to be no special reason for maintaining a moribund family concept, for the modern one is demonstrably better suited to our economic structure, and according to any observers, is better for the independent development of children. Furthermore, even if it were desirable to emphasize the mediaeval family, it seems that the law of evidence is a peculiarly ineffectual branch of jurisprudence to foster it, because it is the most technical, and least known field as far as the general public is concerned. Thus the courts, in some cases at least, are sacrificing justice to a questionable and, by this means, unenforceable ideal. Therefore it would not be unsafe to extend the attitude in civil cases to cover the whole family field. Disqualification thus would be removed. Privilege might well be restricted, with the understanding that it is automatically waived wherever crucial evidence can be obtained in no other way When family bias is shown in order to impeach a witness, it should be rebuttable by detailed individual histories, whenever the evidence offered is important enough to have great weight with the tribunal.