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EVIDENCE—PRIVILEGE—CONFIDENTIAL COMMUNICATIONS BETWEEN HUSBAND AND WIFE—Husband sued for divorce alleging that wife drank excessively and humiliated him in public by her conduct, and that she continually made false and profane accusations designed to make his life unbearable. As proof of the latter charge, plaintiff was allowed to introduce in evidence a wire recording of conversations between plaintiff and defendant in their bedroom. Plaintiff's son by a previous marriage had, by prearrangement with plaintiff, installed in their bedroom a microphone connected to a wire-recorder in the son's adjoining bedroom, with which recordings were made of four separate conversations between plaintiff and defendant. The recordings substantiated plaintiff's theory, but revealed that plaintiff had goaded his wife into making her remarks and

had asked her to speak louder at several points, claiming he could not hear her. *Held,* decree for husband reversed. The recordings were not admissible because the conversations are privileged as confidential communications by the wife to her husband.[1] *Hunter v. Hunter,* 169 Pa. Super. 498, 83 A. (2d) 401 (1951).

At common law, a spouse was disqualified from testifying either for or against the other spouse.[2] Today, one may testify for his spouse almost everywhere,[3] and the trend is toward also allowing a witness to give testimony against his spouse.[4] Another common law rule was that confidential communications between spouses were privileged and could not be divulged by either spouse without the consent of the other.[5] The privilege as to confidential communications between spouses is distinct from the common law disqualification[6] and remains almost intact today.[7] The theory of the privilege is that confidences

[1] 28 Pa. Stat. Ann. (Purdon, 1930) Evidence, §316. "Nor shall either husband or wife be competent or permitted to testify to confidential communiciatons made by one to the other, unless this privilege be waived upon the trial."

[2] Heineman v. Hermann, 385 Ill. 191, 52 N.E. (2d) 263 (1943); Davis v. Dinwoody, 4 T.R. 678, 100 Eng. Rep. 1241 (1792).

[3] Funk v. United States, 290 U.S. 371, 54 S.Ct. 212 (1933), 93 A.L.R. 1136 at 1144 (1934); 8 WIGMORE, EVIDENCE, 3d ed., §2245 (1940). For a complete digest of the statutes, see 3 VERNIER, AMERICAN FAMILY LAWS §226 (1935).

[4] 8 WIGMORE, EVIDENCE, 3d ed., §2245 (1940). For statutory analysis, see 3 VERNIER, AMERICAN FAMILY LAWS §226 (1935). In the federal courts, a witness is still disqualified to testify against his spouse. United States v. Walker, (2d Cir. 1949) 176 F. (2d) 564, cert. den. 338 U.S. 891, 70 S.Ct. 239 (1949).

[5] Principal case at 503; Heineman v. Hermann, supra note 2; Phoenix Fire & Marine Ins. Co. v. Shoemaker, 95 Tenn. 72, 31 S.W. 270 (1895).

[6] Yoder v. United States, (10th Cir. 1935) 80 F. (2d) 665; McCormick v. State, 135 Tenn. 218, 186 S.W. 95 (1916), 95 L.R.A. 1916F 382 at 389; 4 ARK. L. REV. 426 (1950). Some courts, however, fail to keep the two concepts separate. People v. Zabijak, 285 Mich. 164, 280 N.W. 149 (1938). The disqualification ends at divorce, while the privilege survives divorce and death. Owen v. State, 78 Ala. 425 (1885); State v. Musser, 110 Utah 534, 175 P. (2d) 724 (1946), revd. on other grounds 333 U.S. 95, 68 S.Ct. 397 (1948); Salamon v. Indemnity Ins. Co., (D.C. N.Y. 1950) 10 F.R.D. 232. Moreover, the privilege can be waived while the disqualification cannot be waived. Fraser v. United States, (6th Cir. 1944) 145 F. (2d) 139, cert. den. 324 U.S. 849, 65 S.Ct. 684 (1945); Hampton v. State, 7 Okla. Crim. Rep. 291, 123 P. 571 (1912), 40 L.R.A. (n.s.) 43 at 43 (1912). A few courts have held that the privilege could not be waived, probably failing to see the distinction. Whitehead v. Kirk, 104 Miss. 776, 61 S. 737 (1913). See 58 AM. JUR., Witnesses §379 (1948). On the questions of who can claim the privilege, and who can waive it, see 8 WIGMORE, EVIDENCE, 3d ed., §2340 (1940); Fraser v. United States, supra this note; Martin v. State, 203 Miss. 187, 33 S. (2d) 825 (1948), 2 A.L.R. (2d) 640 at 645 (1948); People v. McCormack, 278 App. Div. 191, 104 N.Y.S. (2d) 139 (1951).

[7] 8 WIGMORE, EVIDENCE, 3d ed., §2332 (1940); Sexton v. Sexton, 129 Iowa 487, 105 N.W. 314 (1905), 2 L.R.A. (n.s.) 708 at 708 (1906); AMERICAN LAW INSTITUTE, MODEL CODE OF EVIDENCE §215 (1942). For the statutory pattern, see 3 VERNIER, AMERICAN FAMILY LAWS §226 (1935). Note that some of the statutes use the words "any" or "all" in referring to the communications covered by the privilege, while others require "confidential" communications. Wigmore contends that in view of the underlying policy of the privilege, all statutes should be construed so as to protect only confidential statements. 8 WIGMORE, EVIDENCE §2336. The majority of the decisions favor Wigmore's position. New York Life Ins. Co. v. Mason, (9th Cir. 1921) 272 F. 28; Sackman v. Thomas, 24 Wash. 660, 64 P. 819 (1901); In re Ford's Estate, 70 Utah 456, 261 P. 15 (1927). *Contra:* Leppla v. Minnesota Tribune Co., 35 Minn. 310, 29 N.W. 127 (1886). Likewise, Wigmore

between husband and wife are essential to the marriage relationship and must be encouraged; that policy is considered of sufficient importance to justify the exclusion of otherwise admissible evidence.[8] Although some older decisions extended the cloak of the privilege to all communications between spouses,[9] the view today is that the privilege obtains only when the statement was of a confidential nature.[10] All communications between husband and wife are presumed to be confidential,[11] but if it appears from the circumstances that the speaker did not intend them as such, there will be no privilege.[12] For example, if the communicating spouse anticipates that the matter will be related to a third person, his statements are not privileged.[13] Likewise, there is no privilege if the statement is knowingly made in the presence of some third person.[14] If the communication is overheard by a third person whose presence is unknown to the communicant, it is clear that the eavesdropper is free to

contends that the theory of the privilege only extends to oral communications, and would not protect acts done by one spouse in the other's presence. 8 WIGMORE, EVIDENCE, §2337. *Accord:* United States v. Mitchell, (2d Cir. 1943) 137 F. (2d) 1006, cert. den. 321 U.S. 794, 64 S.Ct. 785 (1944), rehear. den. 322 U.S. 768, 64 S.Ct. 1052 (1944). *Contra:* People v. Daghita, 299 N.Y. 194, 86 N.E. (2d) 172 (1949), 10 A.L.R. (2d) 1385 at 1389 (1950), noted in 35 CORN. L.Q. 187 (1949); Menefee v. Commonwealth, 189 Va. 900, 55 S.E. (2d) 9 (1949), noted in 34 MINN. L. REV. 257 (1950).

[8] Wolfle v. United States, 291 U.S. 7 at 14, 54 S.Ct. 279 (1934), noted in 10 IND. L.J. 182 (1934); Mercer v. State, 40 Fla. 216, 24 S. 154 (1898); Stillman v. Stillman, 187 N.Y.S. 383 at 385, 115 Misc. 106 (1921); A.L.I., MODEL CODE, §215, comment (a). To the effect that the theory is not justified because few people know and rely on this protection in making communications to their spouses, see Hutchins and Slesinger, "Some Observations on the Law of Evidence: Family Relations," 13 MINN. L. REV. 675 (1929); 3 VERNIER, AMERICAN FAMILY LAWS 589 (1935). Written confidential communications between spouses are included within the privilege. McCormick v. State, supra note 6; Stillman v. Stillman, supra this note. However, there are exceptions to the privilege, such as when the communication is used to prove a crime by one spouse against the other, or to show a fraud perpetrated on one spouse by the other. United States v. Mitchell, supra note 7; Hach v. Rollins, 158 Mo. 182, 59 S.W. 232 (1900). On the exceptions to the privilege, see A.L.I., MODEL CODE, §216; 8 WIGMORE, EVIDENCE §2338.

[9] Robin v. King, 2 Leigh (29 Va.) 153 (1830); Campbell v. Chace, 12 R.I. 333 (1879); Long v. Martin, 152 Mo. 668 at 674, 54 S.W. 473 (1899).

[10] Wolfle v. United States, supra note 8; Thompson v. Steinkamp, 120 Mont. 475, 187 P. (2d) 1018 (1947); Thompson v. First National Bank of Danville, 166 Va. 497, 186 S.E. 77 (1936); Brooks v. Brooks, 357 Mo. 343, 208 S.W. (2d) 279 (1948).

[11] Principal case at 503; Blau v. United States, 340 U.S. 332, 71 S.Ct. 301 (1951); State v. Pizzoloto, 209 La. 644, 25 S. (2d) 292 (1946); Owen v. State, supra note 6, at 427.

[12] Principal case at 503; Wolfle v. United States, supra note 8; Thompson v. Steinkamp, supra note 10; Parkhurt v. Berdell, 110 N.Y. 386, 18 N.E. 123 (1888); 8 WIGMORE, EVIDENCE, §2336. See note 18 infra.

[13] Thompson v. Steinkamp, supra note 10; State v. Musser, supra note 6.

[14] People v. McCormack, supra note 6; Shepherd v. Pacific Mutual Life Ins. Co., 230 Iowa 1304, 300 N.W. 556 (1941); Cocroft v. Cocroft, 158 Ga. 714, 124 S.E. 346 (1924); Sessions v. Trevitt, 39 Ohio 259 (1883). *Contra:* Robin v. King, supra note 9; Campbell v. Chace, supra note 9. When the third person is a minor member of the family, the question is whether or not the child was old enough to understand what was said. Linnell v. Linnell, 249 Mass. 51, 143 N.E. 813 (1924), noted in 4 BOST. UNIV. L. REV. 267 (1924).

testify as to what he heard, for the evidence is not incompetent in nature.[15] But the mere fact of being overheard by an eavesdropper does not prevent the speaker from asserting the privilege as against the spouse,[16] for the policy of the privilege applies in the situation where the speaker erroneously believes that he and his spouse are alone as strongly as in the situation where they are in fact alone. Therefore, since the plaintiff in the principal case could not divulge directly the contents of his wife's statements, the court correctly refuses to allow him to do so indirectly, by means of a mechanical reproduction of the conversation, and thereby subvert the basic policy of the privilege.[17] Another question raised in the principal case is whether the wife's abusive and profane accusations were in fact "confidential" communications. It is difficult to say that the defendant intended statements of this nature as confidential communications to her husband.[18] The court, however, without discussion, holds that the presumption that all communications between husband and wife are confidential applies here, especially since the conversations took place in the privacy of the bedroom.[19] The holding seems simply to evidence a strong feeling that this plaintiff, having set a trap for his wife and having goaded her into making such statements, is in no position to rely on the character of defendant's language to rebut the presumption.[20]

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[15] Commonwealth v. Wakelin, 230 Mass. 567, 120 N.E. 209 (1918); People v. Peak, 66 Cal. App. (2d) 894, 153 P. (2d) 464 (1944); 8 WIGMORE, EVIDENCE §2339. The writer in 4 VA. L. REV. 306 (1917) argues that the policy of the privilege is so strong that it should bar even an eavesdropper from testifying as to what he overheard.

[16] Nash v. Fidelity-Phenix Fire Ins. Co., 106 W.Va. 672, 146 S.E. 726 (1929), 63 A.L.R. 101 at 107 (1929); principal case at 504.

[17] Principal case at 504.

[18] Held, not privileged: Thayer v. Thayer, 188 Mich. 261, 154 N.W. 32 (1915) (*H*'s accusations to *W* that she was unchaste); People v. Zabijak, supra note 6, (threats by *H* to *W*); Clark v. Commonwealth, 269 Ky. 587, 108 S.W. (2d) 532 (1937) (*H*'s statement to *W* on a public dance floor that he was going to beat her); Millspaugh v. Potter, 62 App. Div. 521, 71 N.Y.S. 134 (1901) (profane and abusive language and accusations); People v. McCormack, supra note 6, (loud profane language by *H* to *W*, and threats that he was going to kill someone). Held, privileged: Sherry v. Moore, 265 Mass. 189, 163 N.E. 906 (1928) (*H*'s statement to *W* that he wished she were dead).

[19] Principal case at 503.

[20] See language of principal case at 501. To the effect that the statutory privilege will not be strictly construed if to do so will subvert the basic policy of the privilege, see Stocker v. Stocker, 112 Neb. 565, 199 N.W. 849 (1924), 36 A.L.R. 1063 at 1068 (1925).