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CRIMINAL LAW CASE NOTES AND COMMENTS

Prepared by students of Northwestern University School of Law, under the direction of student members of the Law School's Legal Publication Board

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PRIVILEGED COMMUNICATIONS BETWEEN HUSBAND AND WIFE: EXTENSION OF THE PRIVILEGE TO ACTS IN CRIMINAL CASES

Policy and History of the Privilege

The privilege for confidential communications between husband and wife provides that neither spouse can be examined during a trial as to any private communication made by one to the other during the marriage.¹ The privilege may be invoked only at the instance of the spouse in whose favor it lies and it may be waived only by him. An important limitation on the privilege, however, lies in the general rule that while the fact and substance of a communication may be privileged, testimony by the other spouse as to what he did in reliance thereon is not privi-

¹ The privilege was recognized by the English common law as early as 1684 in *Lady Ivy's Trial*, 10 How. St. Tr. 555, 628 [cited in 8 WIGMORE, EVIDENCE § 2333 (3d. ed. 1940)] although an explicit statement of the rule was not made in that country until the second half of the Nineteenth Century.

A distinction must be drawn between two parallel but essentially different rules relating to the marital relation. The *marital disqualification* rendered one spouse incompetent to testify, as an interested party, at the trial of the other. The *privilege* itself, on the other hand, when invoked by the party in whose favor it exists, renders the testifying spouse incompetent only as to the privileged matter, *i.e.*, confidential communications made during the marriage, even though the spouses are divorced or separated at the time of trial. The *marital disqualification* has for the most part been abolished, its legislative abrogation being frequently contained in the statutory statement of the privilege itself. See note 8 *infra*.

leged.² Although it has been strongly advocated that this privilege be limited in scope,³ the privilege normally extends not only to verbal statements but to acts as well.

The policies upon which the privilege is based lie in several fundamental socio-legal considerations: (1) the communication must originate in confidence; (2) the confidence is necessary to the preservation of the relationship involved; (3) the relationship is a proper subject of encouragement by the law; (4) the injury that would inure to the relationship by the disclosure is probably greater than the benefit that would result from the judicial investigation of the truth.⁴ Where the marital relationship has been established, the last three of the foregoing considerations have been satisfied.⁵ The variable, however, is

² *Sampson v. Sampson*, 233 Mass. 451, 112 N.E. 84 (1916). Although this is an indirect method of proving the substance of the confidential communication, it seems logical to allow the trier of fact to draw all reasonable inferences as to the substance of the communication from what was said or done afterward.

³ Dean Wigmore argued against the inclusion of acts under the privilege except under special circumstances. 8 WIGMORE, EVIDENCE § 2337 (3d. ed. 1940). Professor McCormick points out that the privilege is frequently invoked to protect acts in furtherance of a crime or fraud, which should not be protected. MCCORMICK, EVIDENCE § 83, at 171, 172 (1st ed. 1954).

⁴ WIGMORE, EVIDENCE at 637 (3d ed. 1940).

⁵ The fourth consideration is subject to the limitation which excludes acts of abuse committed by one

the requirement that the act must originate in *confidence* because only confidential communications are privileged.

A *communication* signifies any act of a spouse which is seen or perceived by the other spouse. This broad definition of a *communication* is similar to that adopted by the Restatement of Torts⁶ and is consistent with other contemporary authorities, including the Uniform Rules of Evidence and The Model Code of Evidence.⁷ An *act* denotes any overt physical manifestation other than verbal utterances. Whether or not a given act comes within the privilege depends upon the application of certain criteria which may be formulated from the cases and statutes. As the privilege is governed by statutes in most jurisdictions,⁸ the language of the applicable statute⁹ or the common law rule in force (as the spouse against the other from the protection of the privilege. See text at notes 28 and 29 *infra*.

⁶ "The word 'communication' is used to denote the fact that one person has brought an idea to the perception of another . . ." 3 RESTATEMENT, TORTS § 559, comment (a) (1938).

⁷ The Uniform Rules of Evidence include as a "statement" in addition to oral and written expression, non-verbal conduct by a person intended by him as a substitute in expressing the matter stated. UNIFORM RULES OF EVIDENCE, Rule 62 (1) (1953). Presumably this broad definition would include acts, as well. Likewise, the Model Code of Evidence includes as a "statement," both conduct intended by the person making the assertion to be such, as well as conduct of which evidence is offered for a purpose requiring an assumption that it was so intended. MODEL CODE OF EVIDENCE, Rule 501 (1) (1942). The Code recognizes that one may use conduct other than words as a means of making an assertion. Thus, whatever one's intent, one's conduct may be interpreted by others as if intended to be an assertion. *Id.* at page 225.

⁸ *E.g.*, TENN. CODE ANN. § 9777 (1932): "... husband and wife shall be competent witnesses, though neither husband nor wife shall testify to any matter that occurred between them by virtue of or in consequence of the marital relation." All of the statutes are collected in 2 WIGMORE, *op. cit. supra* § 488.

⁹ The various criminal and civil statutes differ as to the term employed to describe a "communication." *E.g.*, CAL. CODE CIV. PROC. ANN. § 1881 (1) (1955): "any communication;" ILL. REV. STAT. c.

case may be)¹⁰ should serve as a preliminary focal point. However, it is necessary to bear in mind that such statutes or general common law rules are not of themselves definitive, but are subject to the implications and limitations read into them on the basis of other factors.

In conferring the privilege upon acts, many courts have regarded the presence or absence of a communicative intent on the part of the actor as one of the controlling factors. It is to be noted that the phrase *communicative intent* is susceptible of two different interpretations. The first meaning is indicated by the natural purport of the words; it refers to a *specific* intent on the part of the actor that the communication shall be received by the other spouse. The second meaning, which is much broader, exists wherever the actor intends to do a given act which may be perceived by the other spouse. It is frequently difficult to determine in which sense a court is using the term. For purposes of analysis, the cases which the courts encounter in applying the privilege can be divided into three types: (1) where communicative intent on

51 § 5 (1953): "admission or conversation;" IND. STAT. ANN. § 2-1714 (550) (1946): "Sixth—communications made to each other;" KY. REV. STAT. § 421.210 (C.C.606) (9153): "any communication between them during marriage;" MASS. GEN. LAWS c. 175, § 20 (1955); "private conversations;" MO. ANN. STAT. § 491.020 (1952): "admission or confidential communications;" N.H. REV. LAWS c. 392, § 29 (1942): "statement, conversation, letter, or other communication;" N.Y. PENAL CODE c. 676, § 715 (1881): "confidential communications;" OHIO CODE ANN. § 2945.42 (1955): "communication or act;" TEXAS CODE CRIM. PROC. Art. 714 (1925): "communication . . . while married;" TENN. CODE ANN. § 9777 (1932): "matter;" UTAH CODE ANN. § 78-24-8 (1953): "any communication made . . . during marriage;" VA. CODE § 8-289 (1950): "communication privately made;" VT. REV. STAT. § 1738 (1947): "statement, conversation, letter . . . communication . . . (or) matter;" WASH. REV. CODE § 5.60.060 (1955): "communication made . . . during the marriage." See 2 WIGMORE, EVIDENCE § 488 (3d. ed 1940).

¹⁰ In some states, it is provided by statute that the common law rules of evidence shall apply in criminal prosecutions, *e.g.*, Illinois. See note 29 *infra*.

the part of the actor can readily be found; (2) where the intent is not readily discernable; and (3) where there exists, either inferentially or actually, an intent *not* to communicate.

The Presence of a Communicative Intent

The first type of case, in its simplest form, consists of a communication much like a verbal act. For example, a wife asks her spouse whether he has procured travel tickets, to which he does not answer verbally, but produces the tickets themselves. Here the communicative act replaces and is tantamount to a verbal answer. Such an act would be privileged, as a clear intention to assert an idea is manifest from the nature of the act itself.

Cases where the Communicative Intent Is Not Present

In the second type of case, the courts have not hesitated to apply the privilege by inferring an intent. These cases squarely present the problem of whether an intent to communicate must necessarily exist where the act is done in the presence of the other spouse. An adoption of the broad definition of *communicative intent* assumes the answer to be in the affirmative. While this result is not necessarily to be criticized, this is a question-begging manner of analysis. On the other hand, the position has been taken that an observation by the wife is not necessarily synonymous with an assertion by the husband.¹¹ The reasoning from this more narrow definition of *communicative intent* would result in greatly restricting the use of the privilege. Such an approach is open to two strong objections: first, it is more likely than not that an act done in the other spouse's presence *will* be observed; and second, that a broader view would dictate that the major consideration should relate to the act being done in reliance upon the marital confidence, rather than whether or not an intent existed on the actor's part. While the following cases illustrate that *intent* is regarded as a material factor in the decisions, the conclusion is inescapable that this criterion is at best a vague and perplexing one.

¹¹ See Note, 35 VA. L. REV. 1111, 1112 (1949). See also Note, 3 VAND. L. REV. 656-659 (1949-50).

Decisions using it in conferring the privilege must, more often than not, be supported on broader theories, because *communicative intent*, in its narrow sense, is rarely found to exist.

In one case¹² the accused returned home late on the night of a burglary bringing nothing with him. This was observed by his wife who later saw him with money, helped him to count it, and subsequently saw him purchase merchandise therewith. These acts were privileged under the broad theory.¹³ In a similar case¹⁴ the accused's wife observed him coming home late on the night of a burglary in an unusually nervous condition. He placed a pistol on the mantel, later scraped paint from his car, and eventually had his wife drive him through the neighborhood where the safe was later found. The Court held that the wife's observations of these acts were privileged.¹⁵ In another case where a piece of material found at the scene of the crime matched that of an overcoat owned by the accused, the privilege was held to exclude from evidence the wife's observation that the accused had left that morning wearing the

¹² Owen v. State, 78 Ala. 425, 56 Am. Rep. 40 (1885).

¹³ The acts of counting the money and (presumably) of purchasing merchandise would also be privileged under the narrow meaning of *communicative intent*. There was apparently a specific intent on the part of the husband that his wife should receive the communication, she having taken part in the acts in question.

¹⁴ Menefee v. Commonwealth, 189 Va. 900, 55 S.E.2d 9 (1949), applying CODE OF VA. § 6212 (1942) (now VA. CODE § 8-289, 1950): "Neither husband nor wife shall, without the consent of the other, be examined in any case as to any communication privately made by one to the other while married, nor shall either be permitted, without such consent, to reveal in testimony after the marriage relation ceases any such communication made while the marriage subsisted."

¹⁵ The act of having his wife drive him through the neighborhood where the stolen safe was hidden would be privileged under the narrow interpretation of *communicative intent* for the reasons set forth in note 13 *supra*. See also Delk v. Commonwealth, 285 S.W.2d 169 (Ky. 1955), 286 S.W.2d 531 (Ky. 1956).

overcoat in question and had returned home unusually late wearing another coat.¹⁶

While the courts held these acts privileged by reasoning that they invited the wife's attention (*i.e.*, an intent to communicate) the holdings rest as well on the broader premise that the policy of the privilege dictates protection of all knowledge gained by virtue of the marital relationship, subject to certain qualifications. This theory was broadly applied in the recent case of *People v. Daghita*,¹⁷ where the Court reasoned that the accused would not have brought home stolen merchandise (making no apparent effort to conceal it from his wife) *except in reliance* upon the assumption of confidence then existing between the spouses. Implicit in the ruling is an assumption that the accused intended that the communication would be perceived as well as held inviolate by his spouse.¹⁸

¹⁶ *People v. Woltering*, 275 N.Y. 51, 61, 9 N.E.2d 774, 778 (1937) applying N.Y. PENAL CODE c. 676, § 715 (1881): "The spouse of a defendant in a criminal case is a competent witness . . . but neither . . . can be compelled to disclose a confidential communication, made by one to the other during their marriage." Because the accused was the witness' common law husband, an issue existed as to whether the privilege was applicable at all. The Court also held as privileged the wife's testimony that (1) she had been home during the day and the accused had not returned home to change coats, and (2) that he had asked her, upon his return home, to tell anyone who might inquire that he had returned home at an earlier hour. 275 N.Y. at 57, 9 N.E.2d at 776.

¹⁷ 299 N.Y. 194, 86 N.E.2d 172 (1949) applying the New York statute, *supra* note 16.

¹⁸ "The term communication means more than mere oral communications of conversations between husband and wife. It includes knowledge derived from the observance of disclosive acts done in the presence or view of one spouse by the other because of the confidence existing between them by reason of the marital relation and which would not have been performed except for the confidence so existing." 299 N.Y. at 199, 86 N.E.2d at 174. *Accord*, *People v. Gessinger*, 238 Mich. 625, 214 N.W. 184 (1927) applying the Michigan statute. MICH. STAT. ANN. § 27.916. The Court extended the privilege to cover a wife's observation of stolen property in the house, even though she had not seen her husband bring it home.

As a limitation upon the broad *Daghita* theory the privilege is not applied to acts observed by a spouse which are also done within the easy observance of third persons. The theory of the limitation, which applies in all areas of the privilege, is that such act is not done in reliance upon the marital confidence and should not be regarded as a confidential communication which the privilege seeks to protect. Thus in *Howard v. State*,¹⁹ a wife's observation that her husband returned home late at night with stains on his shirt resembling blood was not privileged, apparently because it could be easily observed by others. Yet, in *State v. Robbins*,²⁰ the Court held as privileged a wife's testimony that her husband sat in a stolen automobile parked in front of the local City-County Building in full view of the public.

These seemingly contrary results may be reconciled by the fact that in the *Howard* case, third persons observing the defendant could reasonably suspect, from his appearance (*i.e.*, his bloody shirt) that he had been involved in some trouble. In the *Robbins* case, however, the observing public would not reasonably surmise from the accused's act of sitting in a parked car that he had stolen it and that his wife was at that moment obtaining license plates therefor.²¹

¹⁹ 103 Tex. Crim. 205, 280 S.W. 586 (1926), applying TEX. CODE CRIM. PROC. Art. 714: "Neither husband nor wife shall . . . testify as to communications made by one to the other while married; nor shall they, after the marriage relation ceases, be made witnesses as to any such communication . . . they shall in no case testify against each other except in a criminal prosecution for an offense committed by one against the other."

²⁰ 35 Wash. 2d 389, 213 P.2d 310 (1950) applying WASH. REV. STAT. § 1214, P. 1: "A husband cannot be examined for or against his wife without her consent; nor a wife for or against her husband, without his consent; nor can either, during the marriage or afterward, be, without the consent of the other, examined as to any communication made by one to the other during the marriage."

²¹ The Court stated, "It might at first be supposed that appellant's act of waiting in an automobile in sight of all on a public thoroughfare, was not an act done in reliance upon the confidence established by the marital relation. He was apparently willing to be seen by the public, including acquaintances

This interpretation is, in effect, a refinement of the original limitation upon the *Daghita* theory: that even though the act is done within the public's view, it will nevertheless be privileged if the wife alone knows the implications of the act in question and if it was primarily done in reliance upon the marital confidence.

A further seeming inconsistency between these two cases is furnished by the Court's ruling in the *Robbins* case that the accused's wife could testify that she applied at the City-County Building for license plates for the stolen vehicle in her husband's name, she signing as agent. This was correctly admitted for it was an act done by *her alone*, the trier of fact being free to infer that she acted pursuant to her husband's instruction (the substance of which instruction would be privileged).²² The *Howard* case, on the other hand, held as privileged the wife's testimony that she afterward burned her husband's blood-stained shirt, presumably at his behest.²³ While this would seem to violate the rule which admits acts done in reliance upon a privileged communication, a possible explanation of this result may lie in the degree of prejudice contained in the evidence of the *Howard* case. Although the testimony was highly relevant in both cases, courts have not hesitated to exclude relevant evidence where its

who might be passing by. The reason that he was not afraid of being seen by the general public, however, was that it was unlikely that this would result in connecting appellant with the transaction then taking place inside the building. But his wife knew why he was waiting there, and was accordingly in a position to disclose appellant's connection with the transaction then in progress. *It is obvious that he would not have waited in the automobile had he not relied upon the confidence between them by reason of the marital relation.*" (Italics supplied). 35 Wash. 2d at 393, 213 P.2d. at 314.

²² *Sampson v. Sampson*, 233 Mass. 451, 112 N.E. 84 (1916). See note 2 *supra*.

²³ The Court stated, "If she burned (the shirt) without the knowledge or connivance of appellant, he would not be bound thereby; and if she burned it at his request, or as a result of a private conversation . . ." it would be privileged. 280 S.W. 586, 588 (Tex. Crim.). The holding obviously assumes the latter alternative, since the act is privileged.

prejudicial effects would outweigh its probative value.²⁴

Thus in cases where a communicative intent is not apparent, courts have inferred the intent from the circumstances surrounding the act itself. The better reasoned opinions, however, apply the privilege upon the broad theory that the act would not have been done except upon an assumption by the actor that the communication would be held inviolate because of the marital confidence then existing between the spouses. Thus the emphasis is not upon whether the actor intended to convey an idea to his spouse, but rather on whether he would have done the act at all if he did not believe that it would remain confidential between the spouses. As a limitation upon the broad theory, acts observable by third persons have not been privileged except where the implications of the act would not be readily apparent to outside observers. Lastly, the admission or exclusion of testimony by a spouse will be subjected to the orthodox tests of relevancy and prejudice.

Cases where an Intent Not to Communicate Is Present

In the third type of case, courts have uniformly refused to extend the privilege to protect the acts in question. Such refusal rests upon two theories: (1) that from the very nature of the act a strong presumption arises that the actor does not desire to call his spouse's attention to his act, and hence makes no assertion which will be perceived; and (2) that the act is not done in reliance upon the marital confidence, and that the marital harmony, which it is the purpose of the privilege to protect is more likely to be upset than furthered. While both of these theories may come into play in the same case,

²⁴ MODEL CODE OF EVIDENCE, Rule 303 (1942): "(1) The judge may in his discretion exclude evidence if he finds that its probative value is outweighed by the risk that its admission will . . . create substantial danger of undue prejudice . . .". See also *Stewart v. People*, 23 Mich. 63, 75 (1871), "The proper test for the admissibility of evidence ought to be . . . whether it has a tendency to affect belief in the mind of a reasonably cautious person, who should receive and weigh it with judicial fairness."

the first theory is particularly illustrated in a case where the accused's wife observed him in the act of burying an object in their yard, erecting a structure thereon to make the point of burial inaccessible. The object buried was the body of the accused's mother-in-law whom he had murdered.²⁵ The operation of both theories, but particularly the second, operated to prevent the privilege from applying where the accused's wife observed him in the act of sexual intercourse with his step-daughter,²⁶ and where a wife saw her husband sprinkle a substance on her food which was subsequently shown to be poison.²⁷

Cases Involving Acts of Abuse

Since the policy of the privilege seeks the preservation of the relationship involved, the reason for applying the privilege ceases to exist where the act sought to be protected from disclosure is destructive of the marital harmony by being injurious to one of the spouses or in contravention of law. By inquiry as to whether the application of the privilege will preserve the relation, or, on the other hand, further the harm already done to it, the courts have recognized as an exception to the privilege acts of abuse committed by one spouse against the welfare of the other. To a large extent, this exception overlaps the prior class of cases. The exception is recognized in both civil actions²⁸ and in criminal prosecutions.²⁹

²⁵ *Smith v. State*, 198 Ind. 156, 152 N.E. 803 (1926).

²⁶ *State v. Snyder*, 84 Wash. 485, 147 Pac. 38 (1915) applying the Washington statute, note 20 *supra*.

²⁷ *Commonwealth v. Sapp*, 90 Ky. 580, 14 S.W. 834 (1890).

²⁸ There is a conflict of authority as to this exception in civil actions. *Reynolds v. Reynolds*, 297 Mo. 447, 249 S.W. 407 (1923) applying a statute which privileged "admissions or conversations" (but which has since been amended to extend to "admission or confidential communications", note 9 *supra*) allowed such testimony in a divorce proceeding on the general grounds that the granting of a divorce would be unduly complicated if such evidence could not be introduced into the record. Another, more formal ground for not applying the

Thus where a husband carried a revolver on his person and made continued threats against his wife, the act was not privileged.³⁰ Likewise, the privilege did not apply where the accused had seized his wife bodily, abusing her, and forced her to forge a document.³¹ While the weight of authority indicates that this exception applies *only* in a criminal prosecution for an offense committed by one spouse against the other or in a civil action where the spouses are

privilege in divorce cases is that since the grounds for divorce may involve acts of abuse by one spouse against the other, the recognized exception for acts of abuse comes into play.

However, the Illinois courts have excluded testimony by a spouse concerning acts of abuse by the other spouse. See *Griffeth v. Griffeth*, 162 Ill. 368, 44 N.E. 820 (1896)—divorce action where the defendant's previously divorced wife could not testify as to his acts of abuse toward her; and *Fox v. Fuchs*, 241 Ill. App. 242 (1926)—alienation of affections suit. The Illinois statute, note 29 *infra* has been interpreted so as to exclude testimony of any "fact or transaction" of the marriage. See *People v. Rogers*, 348 Ill. 322, 180 N.E. 856 (1932) (perjury action), *In re Ford's Estate*, 70 Utah 456, 261 Pac. 15 (1927); *Whitehead v. Kirk*, 104 Miss. 776, 61 So. 737 (1913).

²⁹ While this exception was applied at common law, it has been embodied in most modern statutes. *E.g.*, ILL. REV. STAT. c. 51, § 5 (1953): "Nothing in this section shall be construed to authorize or permit any such husband or wife to testify to any admissions or conversations of the other, whether made by him to her or her to him . . . except in suits or causes between such husband and wife." However, the Illinois Supreme Court held in *Miner v. People*, 58 Ill. 59 (1871) that the above section did not modify the common law rule, and only applies in civil cases. Criminal prosecutions are governed by ILL. REV. STAT. c. 38 § 736 (1953): ". . . all trials for criminal offenses shall be conducted according to the course of the common law . . . and the rules of evidence of the common law shall also be binding upon all courts and juries in criminal cases . . .".

³⁰ *Hafer v. Lemon*, 182 Okla. 578, 79 P.2d 216 (1938). See also *Hall v. Commonwealth*, 309 Ky. 74, 215 S.W.2d 840 (1948).

³¹ *Beyerline v. State*, 147 Ind. 125, 45 N.E. 772 (1897).