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PRIVILEGED COMMUNICATIONS BETWEEN HUSBAND AND WIFE IN THE DISTRICT OF COLUMBIA

At a comparatively early period in the history of the common law, neither spouse was competent to testify for or against the other. The rule that neither spouse could testify for the other was predicated upon the general rule that a witness was disqualified from testifying because of interest. To preserve the unity and harmony of the marital relationship, it was early decided by Lord Coke that neither spouse could testify against the other. These were the two basic principles which the common law had developed affecting testimony by spouses. Certain exceptions to these rules, based on necessity, have always been recognized. The exceptions included civil actions arising out of the marital status and those criminal actions where the wife was the complainant.

The common law disqualification of one spouse's testifying against the other was recognized centuries before the advent of the rule excluding the testimonial disclosure of confidential communications between husband and wife which had taken place during their relationship as such. Also, at this earlier period, the common law recognized a disqualification for interest, which, as applied to married persons, had the effect of disqualifying the testimony of one in behalf of the other. These disqualifications preserved their grip on the exclusionary rules applicable to testimonial evidence until the latter part of the nineteenth century. At this time through legislation, these rules advanced from the category of incompetency to that of privilege. The legislatures became aware of the gross injustices resulting from the application of the common law rules which rendered certain persons incompetent, particularly in those instances in which the wife was the sole witness who could have testified for her husband in a criminal action. To protect the universally recognized necessity of freedom of thought and expression between spouses, there arose through legislative action the general principle which excluded the disclosure of confidential communications.

This principle has been set forth by the legislatures in varying legal rules: Some disqualify, others merely make privileged; some include all communications, others include only confidential ones. Again, the exceptions by reason of necessity are applied.

The foregoing common law rules and their statutory modifications as heretofore discussed constitute the general pattern of development which has been closely followed in the District of Columbia. An early case held that the Act of Congress of 1864, chapter 222 (13 stat. 374) made a wife a competent witness to testify in civil actions against her husband.¹ This

1. *Traction Co. v. Lusby*, 12 App. D.C. 295 (1898).

Act of Congress was incorporated into sections 876 and 877 of the Revised Statutes of the District of Columbia. In 1901, the Code was modified to provide that while the husband and wife are competent witnesses to testify either for or against each other, neither could be forced to so testify.¹ This section of the Code has been held to be procedural only, and not substantive, so that in an action which accrued and which was commenced prior to the passage of that section of the Code, but which came on for trial after its passage, a wife was nonetheless competent to testify for her husband.²

The privilege has consistently been applied only to those communications which took place while the parties to the communication were actually married.³ Hence, when the parties are living in separation, or unlawful cohabitation, the rule does not apply. There is likewise no basis in policy to protect those communications which were made before marriage or after cessation of the marital status. Although very few cases have been found in the District directly upholding these concepts, there is little reason to believe that the District would follow any of the scant minority holdings contrary to the rules as set forth.

A problem comes up in determining just what constitutes a confidential communication. The statute which was incorporated into the D.C. Code includes only those communications which are made in confidence.⁴ A wife has been allowed to testify that her husband did not exhibit during their association, which of course included the period of their marriage, indications of insanity.⁵ Thus, a spouse's actions are deemed not to come within the privilege. The privilege does not include those communications which by their very nature require communication to a third person.⁶ Nor does it apply to letters written by a husband to his wife, subsequently deceased, where the letters came into the hands of third persons who were conducting a legal search among her effects.⁷ In Hopkins v. Grimshaw,⁸ a young daughter present at the time of the conversation, but taking no part in it or appearing to appreciate its content, did not affect the application of the privilege. The rule obtaining in those jurisdictions which have been confronted with the problem as to the admissibility of the testimony of third persons who overheard the conversation between husband and wife is to the effect that such testimony is admissible. This point has never been decided in the District of Columbia, though one case would lead one to believe that this rule would be applied if and when the problem arises.⁹

It would be absurd to require one spouse to preface all of his remarks to the other with the warning that they were or were not confidential.

1. D.C. Code, T. 14-306 (Act of March 3, 1901, 31 Stat. 1358, ch. 854, Section 1068).

2. Mallery v. Frye, 21 App. D.C. 105 (1919).

3. Halback et al. v. Hill, 49 App. D.C. 127, 261 F. 1007 (1919) (letters).

4. D.C. Code, T. 14-307.

5. United States v. Guiteau, 10 F. 161, 1 Mackey (12 D.C.) 498, 47 Am. Rep 247 (1882).

6. Dobbins v. United States, 81 App. D. C. 218, 157 F. 2d. 257, certiorari denied, 329 U.S. 734 (1946).

7. Dickerson v. United States, 62 App. D.C. 191, 65 F. 2d. 824, certiorari denied, 290 U.S. 665 (1933).

8. 165 U.S. 342 (1895).

9. Dickerson v. United States, supra.

Logic dictates that all private conversations between husband and wife are impliedly within the rule, excepting those wherein a contrary intention is indicated.

Even after the common law rule disqualifying witnesses generally for interest had been abrogated, a wife was still disqualified from testifying for her husband. This is shown in Foertsch v. Germuiller,¹ where an action was brought against a married woman in an attempt to recover for services rendered in preparing plans for the erection of a block of houses on land which she possessed as her separate property, the contract for the erection of such houses having been made by her husband alone. The court refused to allow the husband to testify for his wife although there was then in effect in the District of Columbia a statute which abrogated the common law rule disqualifying witnesses from testifying on account of interest. The judge refused to accept the appellant's argument that the aforesaid abrogation was broader than the statute which codified the common law rule disqualifying a spouse's testimony for or against the other. The judge said that the disqualification of husband and wife rested "not upon interest but upon public policy".

A problem arises as to whom the privilege inures. The rule applied elsewhere is that the privilege belongs to the communicating party. This is so because the object of the privilege is to secure the proper frame of mind which freely discloses to the other spouse the ideas of the communicating spouse. Assent and adoption by silence make the communication that of the one adopting, and thus the privilege inures to that person. The privilege may be waived by the person possessing it.

In the District, the Code explicitly makes either spouse incompetent to testify as to any confidential communications made by one to the other during marriage.² Thus, there is no privilege, properly so-called, because no waiver may make competent, one who is incompetent to become a witness. This rule applies in civil as well as in criminal proceedings, without regard as to whether or not a spouse is a party.

Another provision in the Code³ states that the rule prohibiting disclosure of confidential communications does not apply in criminal cases for non-support, criminal assault, or for wilful neglect or refusal to support wife or minor child. The basis of the rule is to provide against inhibitions which would prohibit such full disclosure essential to the marital relation. Logically, this would mean that the cessation of the civil aspects and consequences of the marital bond would not mean, as to those communications made during marriage, that the privilege would cease. On the contrary, it has been consistently held that the death of the communicating spouse does not terminate the privilege.⁴ In those jurisdictions wherein the problem has arisen, it has been held that the privilege does not terminate even upon divorce. Obviously, no privilege would protect later communications between the divorced spouses. Exceptions to the disclosure of privileged communications, where the marital relations had ceased, have been

1. 9 App. D.C. 351 (1896).

2. D.C. Code, T. 14-307.

3. D.C. Code, T. 22-903.

4. Brooks v. Francis, 10 D.C. 109 (1879).

allowed, based upon the necessity of the situation and a realization of the hardship which would be consequent upon a strict literal application of the rule. ¹

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1. *Smith v. Cook*, 10 D.C. App. 488, 492 (1891); *Posey v. Hanson*, 10 D.C. App. 497, 509 (1891).