North Dakota Law Review

Volume 38 | Number 1 Article 16

1962

Witnesses - Competency - Acts of Husband and Wife as Privileged Communications

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not declared taxable.[15] Further, a transfer of property made in order to be relieved of responsibilities,[16] afford others experience in bearing them,[17] or to have children independently established[18] are transfers associated with life and are not taxable.[19]

The contemplation of death statute in North Dakota[20] is similar to the federal statute with the only exception a stipulation of two years prior to death rather than the federal three year requirement.

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WITNESSES—COMPETENCY—ACTS OF HUSBAND AND WIFE AS PRIVILEGED COMMUNICATIONS—The defendant was convicted of grand larceny in the second degree. He and three accomplices had stolen a number of guns, thereafter returning to the kitchen of the defendant's home. The defendant's wife unexpectedly entered the kitchen and saw the defendant and his companions with the stolen guns. The trial court allowed her to testify concerning this observation. On appeal the Court of Appeals *held,* three justices dissenting, that although an act may constitute a privileged communication under New York statute,[1] such act must be induced by absolute confidence in the marital relationship, and the communication must be intended to be confidential. The dissent argued that all knowledge derived by reason of the marital relationship was privileged. *People v. Melski,* 176 N.E. 2d. 81 (N. Y. 1961).

Because the public interest demands that courts have access to all pertinent facts in deciding the truth of a litigated issue, the policy of unrestricted inquiry is seldom curtailed.[2]

15. United States v. Wells, 283 U.S. 102 (1931) (Decedent gave his children substantial sums of money during his lifetime so that he could advise them as to its proper use).
16. Estate of Anna Scott Farnum, 14 T.C. 884 (1950) (Decedent wanted to protect her property from loss by speculation and consequently had a trust indenture drawn up so the principal would be beyond her reach).
17. United States v. Wells, 283 U.S. 102, 118 (1931).
18. Commissioner of Internal Rev. v. Colorado Nat. Bank, 95 F.2d 160, 163 (10th Cir. 1938) (Decedent desired to make the transfer so that his daughter and her children would be provided for whatever might happen to his own financial affairs).
19. Mossberg v. McLaughlin, 125 Conn. 680, 7 A.2d 910 (1939).
20. N.D. Cent. Code §57-37-04 (1961).
1. N.Y. Penal Law § 2445, **Husband or wife as witness.**—The husband or wife of a person indicted or accused of a crime is in all cases a competent witness, on the examination or trial of such person; but neither husband nor wife can be compelled to disclose a confidential communication, made by one to the other during their marriage."
2. See McMann v. Securities Exchange Comm., 87 F.2d 377 (2d Cir. 1937); Mooney v. New York County, 269 N.Y. 291, 199 N.E. 145 (1936).

At common law,[3] as construed by American courts,[4] a husband or wife was barred from testifying against the other spouse as to any knowledge obtained by reason of the marital relationship.[5] This privilege was granted to promote marital harmony by relieving fear that such a confidence might be divulged in court.[6] In many states this privilege has been codified, and a spouse is not required to testify as to "communications",[7] "private communications",[8] "any communications"[9] or words to this effect.[10]

Although a number of courts have held that only oral or written statements constitute "communications"[11] within the testimonial privilege, the weight of authority has interpreted the statutes as also extending to knowledge derived by one spouse from observing the acts of the other.[12] Under a broad interpretation of the privilege, all acts done in reliance on the marital relationship are considered privileged,[13] and it would appear that no intent to communicate is necessary.[14] The narrower view applies a test of intent; an act is not considered within the privilege unless there is an active intent on the part of one spouse to communicate by act.[15]

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3. See Lady Ivy's Trial, 10 How. St. Tr. 555, 628 (1684) cited in 8 WIGMORE EVIDENCE § 2333 (3d ed. 1940), which first recognized the principle of testimonial privilege between spouses.

4. See, **e. g.,** Sexton v. Sexton, 129 Iowa 487, 105 N.W. 314 (1905); Whitehead v. Kirk, 104 Miss. 776, 61 So. 737 (1913).

5. Schreffler v. Chase, 245 Ill. 395, 92 N.E. 272 (1910); People v. Daghita, 299 N.Y. 194, 86 N.E.2d 172 (1949); Lanham v. Lanham, 105 Tex. 91, 145 S.W. 336 (1912); see 8 WIGMORE, EVIDENCE § 2337 (3d ed. 1940).

6. See Mercer v. State, 40 Fla. 216, 24 So. 154 (1898); Sexton v. Sexton, 129 Iowa 487, 105 N.W. 314 (1905); 8 WIGMORE, **op. cit. supra,** § 2227.

7. **E.g.,** Ga. Code Ann, § 38-418 (1954).

8. **E.g.,** Mass. Gen. Laws ch. 233, § 20 (1921).

9. **E.g.,** Idaho Code § 16-203 (1932); Minn. Gen Stat. § 9814 (1923), see 2 WIGMORE, EVIDENCE § 488 (3d ed. 1940) for a complete listing of statutes.

10. 2 WIGMORE, **op. cit. supra** note 9, § 488.

11. United States v. Mitchell, 137 F.2d 1006 (2d Cir. 1943); Posner v. New York Life Ins. Co., 56 Ariz. 202, 106 P.2d 488 (1940), ". . . they may testify as to what was done by either spouse, but not as to what was said. . . ."; **In re** Van Alstine's Estate, 26 Utah 193, 72 Pac. 942 (1903).

12. Prudential Ins. Co. of America v. Pierce's Adam'x, 270 Ky. 216, 109 S.W.2d 616 (1937); Todd v. Barbee, 271 Ky. 381, 111 S.W.2d 1041 (1937); People v. Gessinger, 238 Mich. 625, 214 N.W. 184 (1927); People v. Daghita, 299 N.Y. 194, 86 N.E.2d 172 (1949); Menefee v. Commonwealth, 189 Va. 900, 55 S.E.2d 9 (1949). But see McCORMICK, EVIDENCE § 83 (1st ed. 1954), which points out that the privilege is often invoked to protect acts in furtherance of a crime.

13. People v. Daghita, 299 N.Y. 194, 86 N.E.2d 172 (1949); State v. Robbins, 35 Wash. 2d 389, 213 P.2d 310 (1950).

14. See Menefee v. Comm., 189 Va. 900, 55 S.E.2d 9 (1949), in which the observations of a wife without the husband's knowledge were not held to be privileged. **But see** Smith v. State, 198 Ind. 156, 152 N.E. 803 (1926).

15. Thompson v. Steinkamp, 120 Mont. 475, 187 P.2d 1018 (1947); Hafer v. Lemon, 182 Okla. 578, 79 P.2d 216 (1938); State v. Snyder, 84 Wash. 485, 147 Pac. 38 (1915); 8 WIGMORE, **op. cit. supra** note 5, § 2337, "There must be something in the way of an invitation of the wife's presence or attention with the object of bringing the act directly to her knowledge. Except in such cases, the privilege cannot cover anything but an utterance of words, spoken or written."

Since courts will seldom recognize the privilege unless the disclosive act is done in confidence,[16] the presence of a third party will naturally destroy the confidential nature of the knowledge communicated.[17]

North Dakota's privileged communication statute[18] refers to "any communication".[19] Although there are no reported cases in North Dakota construing the meaning and implication of these words, states with similar statutes[20] have interpreted "any communication" to include acts, but only those confidential in nature.[21] Our courts would no doubt reach a similar conclusion.

Due to the multiplicity of opinions[22] on the socio-legal question involved in granting the privilege of nondisclosure of evidence in an effort to aid the marital relationship, no completely satisfactory conclusion can be reached. It does appear that granting the privilege to all acts done, even in the absence of intent to communicate, would unjustifiably hinder the courts in obtaining all pertinent facts. Such a broad construction of the statutes is placing too much importance upon an old rule of questionable value in our society.

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16. People v. Rosa, 268 Mich. 462, 256 N.W. 483 (1934); Dickinson v. Abernathy Furniture Co., 231 Mo. App. 303, 96 S.W.2d 1086 (1936); Parkhurst v. Berdell, 110 N.Y. 386, 18 N.E. 123 (1888).

17. Tanzola v. De Rita, 45 Cal. 2d 1, 285 P.2d 897 (1955) (dictum); Shepard v. Pacific Mut. Life Ins. Co., 230 Iowa 1304, 300 N.W. 556 (1941); Hazlett v. Bryant, 192 Tenn. 251, 241 S.W.2d 121 (1951); **contra** Mahlstedt v. Ideal Lighting Co., 271 Ill. 154, 110 N.E. 795 (1915).

18. N.D. Cent. Code § 31-01-02 (1961), **"Competency of husband or wife as witness—Communications made during marriage—Exceptions.** — a husband cannot be examined as a witness 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 afterwards, without the consent of the other, be examined as to any communication made by one to the other during the marriage. . . ."

19. **Ibid.**

20. **E.g.,** Ohio Rev. Code § 2317.02 (c) (1953), provides in part that husband or wife cannot testify "concerning any communication made by one to the other."

21. Shepard v. Pacific Mut. Life Ins. Co., 230 Iowa 1304, 300 N.W. 556 (1941); Thayer v. Thayer, 188 Mich. 261, 154 N.W. 32 (1915); Finnegan v. Metropolitan Life Ins. Co., 162 N.E.2d 216 (Ohio App. 1958).

22. See generally 58 Am. Jur. § 375, 380, 385, 386; McCORMICK, **op. cit. supra** note 12, § 83; 8 WIGMORE, **op. cit. supra** note 5, § 2332, 2337; 8 WIGMORE, EVIDENCE § 2332, 2333, 2336, 2337 (McNaughton rev. 1961).

"It is a sound precept not to take the law from the rules, but to make the rule from existing law. For the proof is not to be sought from the words of the law. The rule, like the magnetic needle points at the law, but does not settle it."

SIR FRANCIS BACON—De Augmentis Scientiarum