Marital Privileges

Charles W. Jakopich

Follow this and additional works at: https://scholarship.kentlaw.iit.edu/cklawreview

Recommended Citation
Available at: https://scholarship.kentlaw.iit.edu/cklawreview/vol46/iss1/7

This Notes is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact jwenger@kentlaw.iit.edu, ebarney@kentlaw.iit.edu.
MARITAL PRIVILEGES

Three separate rules of evidence regarding the marital relationship developed during the early 1660's. The three rules were: (1) the incompetency of a spouse to testify in a civil or criminal action whether on behalf of or against the other spouse; (2) the privilege of preventing one spouse from testifying against the other (called by Wigmore the privilege for anti-marital facts); and (3) the privilege of excluding from testimony those communications between the spouses that are confidential.

COMMON LAW RULE OF INCOMPETENCY

The common law rule of incompetency was based on the idea that interested parties were not competent witnesses in their own cause and the metaphysical belief that husband and wife were one. In England such free thinkers as Jeremy Bentham waged a campaign against the rule, which found England abolishing it during the 19th Century. Presently only twelve jurisdictions in the United States have statutes that render spouses incompetent to testify on behalf of or against each other. These statutes are not like the true common law incompetency. They are more similar to the privilege against a spouse testifying against the other spouse.

THE PRIVILEGE FOR ANTI-MARITAL FACTS

The result achieved under the privilege that prevents a spouse from testifying against the other is the opposite of the common law incompetency rule. The common law incompetency rule prevented the spouse from testifying at all. Under the anti-marital facts privilege, a spouse may call the other to the witness stand and elicit testimony, thus waiving the privilege. But if one spouse does not desire the other to testify against him, he may claim the privilege and prevent her from testifying, on the ground that this adverse testimony would tend to disrupt marital harmony. The object being protected is the marriage itself rather than the parties to the marriage. The privilege exists in twenty-five states, but most of the juris-

1 See, e.g., I Blackstone Commentaries 443 (1765) "... (I)f they were admitted to be witnesses for each other, they would contradict one maxim of law, nemo in proprio causa testis esse debet ..." (No one ought to be a witness in his own cause).
2 See Coke, Commentary Upon Littleton 6b (Hargrave 16th ed. 1809).
3 See Bentham, Rationale of Judicial Evidence 481 (Bowring ed. 1843).
5 Professor McCormick's comment on the existence of the marital privilege: "The privilege has sometimes been defended after the manner in which we find reasons for inherited customs generally, as protecting family harmony. But family harmony is nearly always past saving when the spouse is willing to aid the prosecution. The privilege, in truth, is an archaic survival of a mystical religious dogma and a way of thinking about the marital relation, which is today outmoded." McCormick, Evidence § 66 (Hornbook Series 1954) (hereinafter cited as McCormick).
dictions have added a number of exceptions so that while the statute provides the privilege, it is rarely available, and when available, of little use.6

**THE PRIVILEGE FOR CONFIDENTIAL COMMUNICATIONS7**

The third and soundest evidentiary rule concerning the marital relationship is the privilege for confidential communications. It is also the most widely accepted of the evidentiary rules; forty-two American jurisdictions have enacted statutes dealing with it.8 Due to the use of the common law rule of incompetency and the privilege against anti-marital facts, this privilege, even though in existence since 1684,9 did not start being asserted until 1853.10

McCormick mentions four principles that are the basis of the privilege for confidential communications:

1) It is founded on a social policy of protecting the marital relationship by preventing disclosure of confidences exchanged by persons occupying such status.

2) The privilege covers communications during marriage.

3) This privilege is not affected by statutes rendering spouses incompetent.

4) The privilege is limited to confidential communications.11

The privilege against anti-marital facts and the privilege for confidential communications are separate and distinct, as the four principles enumerated by Professor McCormick demonstrate. The anti-marital facts privilege refers to communications between the spouses; the communications privilege only refers to confidential communications. Under the anti-marital facts privilege even information that one of the spouses gained outside of the marital relationship is privileged, whereas under the communications privilege, the spouse is restricted to knowledge obtained on account of the marital relationship.12 Furthermore, the communications

---

6 Wigmore, Evidence § 2245 (McNaughton rev. 1961) (hereinafter cited as Wigmore).
9 Lady Ivy's Trial, 10 How. St. Tr. 555 (1684).
10 The first official recognition of the marital confidential privilege came in the Evidence Amendment Act of 1853 which stated: "... (N)o husband shall be compellable to disclose any communication made to him by his wife during marriage and no wife shall be compellable to disclose any communication made to her by her husband during the marriage." 16 and 17 Vict. Ch. 83, § 3.
11 McCormick § 82.
12 8 Wigmore § 2334.
NOTES AND COMMENTS

privilege still exists after death or divorce, but the anti-marital facts privilege does not.

The underlying policy basis of the privilege for confidential communications is the importance society places upon the institution of marriage, the basis of the family unit. Consequently, the courts frown upon anything that tends to disrupt a marriage. The privilege enables the spouses to develop the necessary confidence in each other, which is the foundation of a stable marriage. A free exchange of ideas between the spouses is the goal of such a privilege. Also, the very thought of a husband or wife being compelled to testify against the other is repulsive to our notions of fair play.

HOLDER OF THE PRIVILEGE

That the privilege is available only to the marriage partner and not to third parties is without doubt. But is the privilege available only to the communicator, or is it available to both the communicator and the communiquee? The privilege is usually granted solely to the communicator of the confidential communication, but on occasion it has been accorded to both. Granting the privilege to both is not a sound policy since the communicating spouse is the one interested in whether the message is kept confidential. The recipient has no control over what flows from the communicator's lips; if the communicator later desires to make public his utterances, the communicatee has no valid basis on which to object. Looking at the intent of the privilege, which is to secure freedom from apprehension in the mind of the one who communicates, we can clearly see that the holder of the privilege should be the communicator and not both the communicator and the communicatee.

STATUTORY MODIFICATIONS

The Illinois Legislature in 1935 amended Section 5 of the Evidence Act and in 1937 it amended Section 6 of Division 13 of the Criminal

13 McCormick points out that the vast majority of marriage partners never know of this privilege and would not act differently if they did know of it. McCormick § 90.
14 Martin v. State, 203 Miss. 187, 33 So. 2d 825 (1943) (in a murder prosecution the court held that a third person could not claim the privilege that applies to confidential communications between the spouses).
15 Wigmore § 2340 (1).
16 United States v. Mitchell, 137 F.2d 1006 (1943) aff'd., 138 F.2d 881 (1943), cert. denied, 321 U.S. 794 (1944), rehearing denied, 322 U.S. 768 (1944) (the case involved a prosecution for an alleged violation of the Mann Act. The court held that the privilege for confidential communications applies to both spouses, but the testimony was admissible if one spouse waived the privilege).
17 Supra, note 15.
18 The amended statute, Ill. Rev. Stat. Ch. 51, § 5 (1966), reads as follows: "In all civil actions, husband and wife may testify as to any communication or admission made by either of them to the other or as to any conversation between them during coverture,
Code;\textsuperscript{19} as amended, these two statutes are substantially the same. The statutes removed the complete spousal incompetency of early common law and retained only the common law privilege relating to communications between the spouses. Unfortunately, the proviso which disqualified the husband and wife in matters relating to "any communication or admission . . . or any conversation . . . during coverture", left much to be desired.\textsuperscript{20} Such language has in some jurisdictions been construed to confine the privilege to any communication between the spouses\textsuperscript{21} while the other jurisdictions have construed the same language to be applicable only to confidential communications.\textsuperscript{22}

Until 1955, the Illinois courts construed the language of the proviso to mean incompetency to testify rather than as a privilege, and also applied the incompetency to any communication between the spouses, not simply confidential communications.\textsuperscript{23}

In \textit{Zaremba v. Skurdialis},\textsuperscript{24} the Illinois Supreme Court took a step forward by reversing a decision holding that an ex-wife could not testify on behalf of the defendant ex-husband in a suit for alienation of affections and criminal conversation as to matters not touching on the confidential relationship between husband and wife. Thus, impliedly, the Court recog-

\textsuperscript{19} The part of the amended statute pertaining to husband and wife communications, Ill. Rev. Stat. Ch. 38, § 155 (1966) reads as follows: "In all criminal cases, husband and wife may testify for or against each other; provided, that neither may testify as to any communication or admission made by either of them to the other or as to any conversation between them during coverture, except in cases where either is charged with an offense against the person or property of the other, or in case of wife abandonment, or where the interests of their child or children are directly involved, or as to matters in which either has acted as agent for the other."


\textsuperscript{21} These following states hold all communications between the spouses to be privileged: Kansas, Minnesota, Oregon, South Carolina, Tennessee, Virginia, and Wyoming.

\textsuperscript{22} The words "any communication" appear in the vast majority of state statutes, and they are construed, as Illinois construed them, to mean only confidential communications. See Broomer, \textit{Spousal Testimony} 28 Brooklyn L. Rev. 259, 292-296 (1962) (the article contains an excellent table that lists and explains the statutes and rules of each jurisdiction as to the various phases of spousal competency and privileged communications).

\textsuperscript{23} Reeves v. Herr, 59 Ill. 81 (1871) (the court held that the privilege is not confined to subjects which are confidential in their nature, but includes any matter which comes to the knowledge of one of the spouses in consequence of the marital relation); Dunn v. Heasley, 375 Ill. 43, 30 N.E.2d 628 (1940) (a grantee can object to testimony of the wife as to conversations with her deceased husband regarding the deed, this case construed the statute as a rule of limited incompetency); Heineman v. Herman, 385 Ill. 191, 52 N.E.2d 263 (1943) (this case holds that all knowledge gained through the marital relationship is privileged).

\textsuperscript{24} 395 Ill. 437, 70 N.E.2d 617 (1947).
nized that only confidential communications between the spouses during coverture are privileged communications.

Finally, in *The People v. Palumbo,* in which Section 155 of Ch. 38 was construed, the Illinois Supreme Court held that "any communication" means only a confidential communication. The section of the statute that was examined by the Court provides in substance that in all criminal cases, husband and wife may testify for or against each other; provided that neither may testify to any communication or admission made by either of them to the other or as to any conversation between them during coverture. Construing this proviso, the court reached the conclusion that it was the intention of the Legislature to eliminate the general common law disqualification of husband and wife and to retain only the common law privilege as it related to confidential communications, a privilege based upon a desire to preserve the matrimonial relationship by drawing a web of protection around marital confidences. Reading this case against the historical background of privileged communications and in light of the modern policy on the subject of competency of witnesses (the trend is to allow as much as possible to be admitted into evidence), it can be said that the result obtained was a sound one.

Whereas confidentiality is a requisite to the privilege, all marital communications are presumed confidential and the burden of rebutting this presumption is on the party who seeks to admit such testimony. The party asserting that the privilege is not applicable in a specific instance must satisfy the court that under the circumstances grounds for exclusion of the testimony do not exist. If the court determines that the requisite confiden-

25 5 Ill. 2d 409, 125 N.E.2d 518 (1955) (The wife was allowed to testify that her husband told her in the presence of a third person to get a package of narcotics from their bedroom; the court held that the presence of a known third party negated that confidentiality which the common law considered as a prerequisite to a privileged communication). See Note, 33 Chi.-Kent L. Rev. 282 (1955).


27 8 Wigmore § 2336.

28 8 Wigmore § 2332. Dean Wigmore gives the following four principles as the basis of the privilege of confidential communications between spouses:

1) The communications must originate in confidence.
2) This confidence is essential to the marital relationship.
3) The relation (marital relation) is the proper object of encouragement by the law.
4) The injury that could inure to the relationship by disclosure of the confidential communication is probably greater than the benefit that would result in the judicial investigation of the truth.

29 Married people seldom preface their conversations with express injunctions of secrecy, so that it would seem proper to presume all marital communications by implication are confidential and that the contrary intention must be shown by the circumstances of a given instance. 8 Wigmore § 2336, See also Blau v. United States, 340 U.S. 332 (1951) (petitioner, a witness before a grand jury, refused to tell where his wife was hiding; the Court held that the petitioner did not have the burden of showing that the communication from his wife was conveyed to him in confidence, that is a rebuttable presumption that the government failed to rebut; therefore, the petitioner was privileged not to tell where his wife was hiding),
tiality does not exist, the privilege is wholly inapplicable and both spouses and any third party may testify as to the contents of the communication.

**Statements Made in Presence of a Known Third Party**

The privilege of confidential communications cannot be claimed in court for statements made in the presence of a known third person, for in such a case, the very presence of a known third person negates confidentiality. If the court makes the determination that the requisite confidentiality is not present, both the communicatee and the known third party may testify as to the communication. This rule is applied almost without exception when the known third party is not an immediate member of the communicator's family; when the known third party is a child of the communicator, the courts will generally look to the age and comprehension of the child, permitting the privilege to be exercised when the child is thought to be incapable of comprehending what was said between the spouses, or is incompetent as a witness. The reason for this is to place the responsibility of maintaining the confidence where it properly belongs, on the spouses. The effect of the rule is not to inhibit communications between

30 People v. Palumbo, 5 Ill. 2d 409, 125 N.E.2d 518 (1955) (the husband in the presence of a known third party asked his wife to get a package of narcotics from their bedroom; the third party, who was a police informer, was allowed to testify since the husband, by asking his wife to get the package of narcotics in the presence of the known third party, waived the requisite confidentiality); People v. McNanna, 94 Ill. App. 2d 314, 236 N.E.2d 769 (1968) (statement made by the defendant to his wife in a tavern regarding his intention to burn everything she loved was not confidential and was admissible in an arson prosecution of the defendant; the conversation took place in a public establishment at a table where the wife was seated between the defendant and his sister, thus showing that the conversation was not intended to be confidential).


31 8 Wigmore § 2352-2341; Pereira v. United States, 347 U.S. 1 (1954).

mail fraud and his conviction was reversed on account of his wife being permitted to testify against him. Under a federal statute allowing recovery, he brought an action for damages, which required a certificate of innocence in order for him to succeed. The court denied the certificate of innocence. The communication to which his wife testified was admissible and unprivileged because he spoke to his wife in the presence of a known third party, a mailman, and therefore the communication was not confidential. This rule also applies to documents, see State v. Fiddler, 57 Wash. 2d 815, 360 P.2d 155 (1961) (the court held that the husband-defendant's letter to his wife, who was unable to read, was intended to be read by others and therefore was not a confidential communication).

33 Master v. Master, 223 Md. 618, 166 A.2d 251 (1960) (statements made by husband to wife in the presence of children old enough (age not given) to understand fully what was being said, were not confidential).

34 Freeman v. Freeman, 238 Mass. 150, 130 N.E. 220 (1921) (the admission of a conversation between the spouses in the presence of their daughter, the eldest being nine years old, was not improper, it being necessary for the trial court to determine whether the eldest daughter was of sufficient intelligence at the time of the conversation to pay attention and understanding what was being said). But cf. Jacobs v. Hester, 113 Mass. 157 (1873) (neither husband nor wife was permitted to testify regarding their private conversations held in the presence of their five children, the eldest being eleven years of age).
the spouses, but only to guard against the carelessness of the spouses in allowing others to hear what is purported to be confidential. 85

THIRD PARTY NOT KNOWN TO BE PRESENT

The case law holds that the privilege of confidential communications is not available to withhold testimony of an unknown third person who has overheard, either accidentally or by eavesdropping, an oral communication between a husband and wife 86 or who has intercepted a letter from one spouse intended for the other spouse. 87 However, the privilege of confidential communications will not be considered lost if the eavesdropper, as to the oral communication, 88 or the interceptor of the letter 89 was facilitated in his task by the betrayal or connivance of the spouse to whom the communication was directed. 40 The betraying spouse would, of course, not be allowed to testify against the wishes of the communicator, since the privilege is retained by the communicator. In addition, the court will prevent the unknown third party from testifying in order that the betraying spouse not be able to accomplish by indirection that which he cannot do directly. 41

An eavesdropper or interceptor, provided that he was not aided by the

85 People v. Lewis, 136 N.Y. 633, 32 N.E. 1014 (1892), State v. Wilkins, 72 Ore. 77, 142 P. 589 (1914).
86 State v. Slater, 36 Wash. 2d 357, 218 P.2d 329 (1950) (in prosecution for buying, receiving or aiding in concealing certain personality, court affirmed and held that admission of police officer's testimony regarding conversation overheard by him in adjoining hotel room between defendant and wife was proper). Nash v. Fidelity-Phenix Fire Ins. Co., 106 W. Va. 672, 146 S.E. 726 (1929) (testimony of unknown third party over hearing a conversation between husband and wife that was intended to be confidential held admissible over the objection of the communicating spouse).
87 Batchelor v. State, 217 Ark. 340, 230 S.W.2d 23 (1950) (letter to wife by defendant-husband, intercepted by prison guard); People v. Dunnigan, 163 Mich. 349, 128 N.W. 180 (1910) (a person entered the prisoner's cell to cut his hair and then promised to take a letter to the prisoner's wife, but delivered it instead to the Sheriff); Connella v. Teu., 16 Okla. 365, 86 P. 72 (1906) (letter from defendant to wife sent by messenger but intercepted by Sheriff).
88 Hunter v. Hunter, 169 Pa. Super. 498, 83 A.2d 401 (1951) (husband suing wife for divorce offered into evidence recordings of their private conversations in bed; the tape recorder was operated by the plaintiff's son on orders from the plaintiff, without the wife's knowledge; held privileged communication).
89 McCoy v. Justice, 199 N.C. 637, 155 S.E. 452 (1930) (husband's letters were given to a third person by the wife); Scott v. Commonwealth, 94 Ky. 511, 23 S.W. 219 (1889) (letter by husband to wife voluntarily surrendered by wife to a third party); Wilkerson v. State, 916 A. 729 17 S.E. 990 (1893) (letter from husband to wife given by the wife to her lover; held inadmissible against the husband). But cf. People v. Jwaile, 12 Cal. App. 192, 107 P. 134 (1909) (jailer requested husband to send a letter to his wife, and the wife at the jailer's request gave it to him; held admissible); State v. Sepinger, 25 S.D. 110, 125 N.W. 879 (1910) (husband wrote a letter to wife while in jail and she, in turn, delivered it to the State's Attorney, held admissible). Uniform Rules of Evidence 28(1) is in agreement.
40 McCormick § 86.
41 Ibid.
communicator, may testify as to the content of the confidential message because the holder of the privilege (the communicator) does not have a privilege to suppress testimony of third persons, though the privilege between the spouses still survives. Some courts allow the unaided third party to testify on the basis of a lack of confidentiality; but whatever be the rationale, the eavesdropper or interceptor cannot testify when he has been assisted by the spouse receiving the confidential message.

Since the communicating spouse can take precautions against oral communications being overheard or written communications being intercepted, the communicator should bear the risk of failure to use the appropriate precautions.

**Disclosure by One Spouse to Another Person**

If the communicatee of a confidential communication reveals the contents of the communication inadvertently to a third person, the rules that apply to an unknown third party are applicable and the third person may testify as to what was told him by mistake. The mistake by the communicatee does not negate the confidentiality of the communication between the spouses; therefore, the communicatee (the spouse who revealed the confidential communication) will not be allowed to testify.

On the other hand, if the disclosure by the spouse was made purposefully, this malicious disclosure is thought of as an attempt to circumvent the privilege, and the third person will not be permitted to testify since the disclosing spouse should not be allowed to do indirectly what she cannot do directly.

**Acts as Confidential Communications**

One of the most perplexing problems is whether the privilege of confidential communications includes acts as well as words. The cases are divided on this point; a substantial number say that only communicative acts, acts that communicate a message to the other spouse, are privileged. The

---

43 Ibid.
44 Commonwealth v. Everson, 123 Ky. 330, 96 S.W. 460, 461 (1906) (comparison of the husband-wife privilege to the attorney-client privilege as to which "... (t) has been said that if persons wish the communications they have with their attorneys to be kept secret, they should be careful not to make them in the hearing of others a... "); 8 Wigmore, §§ 2336, 2339 (1). Professor McCormick would allow the privilege if the husband and wife have taken all the reasonable precautions to insure that they are not being overheard. McCormick (86), Uniform Rules of Evidence 28 (1) is similar.
46 8 Wigmore § 2339 (2).
48 An example of an act clearly intended to be a confidential communication is: a
rationale for this is that the confidence the spouses desire from each other and the freedom from apprehension which the privilege is designed to serve should apply equally to communicative conduct as well as verbal communications.49 An equal or greater number of courts have construed their respective statutes50 to extend the privilege to acts, facts, and conditions which, strictly speaking, are not communications (neither utterances nor communicative acts), but which have come to the knowledge of one of the spouses only because of the confidence of the marital relationship.51 This is the better view, since it does more to foster confidence in the marital relationship. Yet this view has been severely criticized by several noted writers in the field.52

The privilege will not be extended to encompass a spouse who performs an act without knowing that he was being observed by the other spouse and consequently at the time of performance had no intention to convey knowledge of the act to anyone, especially the unknown observant.53 On the other hand, all acts which are clearly intended to be confidential are privileged. For example, if the actor-spouse is aware that the other spouse is watching and still makes no attempt to conceal the performance

husband brings home a package and calling his wife's attention, says, "Note where I place this package," as he places it in the top drawer of his desk. He communicates to her not only the words, but also the act of placing the package in the top drawer of his desk.8 Wigmore § 2337.

49 8 Wigmore § 2337.

50 In Illinois the two statutes are Ill. Rev. Stat. Ch. 38, § 155 (1966) and Ill. Rev. Stat. Ch. 51, § 5 (1966). These statutes do not mention acts as privileged communications; they only state that admissions, communications, and conversations are privileged.

51 Griffith v. Griffith, 162 Ill. 368, 44 N.E. 820 (1896) (suit for divorce upon grounds of impotency; the husband's former wife held incompetent to testify as to acts of self-abuse by husband, learned as a result of her observations); Monaghan v. Green, 265 Ill. 233, 106 N.E. 792 (1914) (in a will contest the court held that the widow of the testator was not a competent witness to testify that the testator was often intoxicated and had made two wills because her testimony would concern conversations, facts and circumstances that occurred during the marital relationship and the knowledge of which she obtained only by means of such a relationship). But cf. United States v. Mitchell, 137 F.2d 1006 (1943) (prosecution for violation of the Mann Act; held wife's testimony as to husband's act of taking money from her not privileged); Pool v. United States, 260 F.2d 57 (1958) (the court stated that the privilege of communications between a husband and wife generally extends only to utterances and not to acts); Posner v. New York Life Ins. Co., 56 Ariz. 202, 106 P.2d 488 (1940) (ex-husband's testimony that he purchased drugs for the plaintiff and saw her make tests of her urine, not privileged).

52 McCormick states that all extensions beyond communications seem to be unjustified, McCormick § 83. Dean Wigmore would prefer restricting the privilege to cover only communicative acts, not all acts performed in the presence of a known spouse which the majority of jurisdictions hold to be privileged. 8 Wigmore § 2337.

53 Smith v. Smith, 198 Ind. 156, 152 N.E. 803 (1926) (murder prosecution; the husband dropped a trunk into an outdoor toilet; the trunk contained the body of his mother-in-law. At the time, the defendant-husband was unaware that his wife saw him perform the act; the court held that the act was not a confidential communication because there was no intent to perform the act in reliance upon the confidential nature of the marriage relationship).
of the act, it is implied that the actor-spouse intended that the knowledge of the act be confidential, and the privilege will attach.\textsuperscript{54}

A similar problem arises with respect to one spouse's knowledge of the other's physical state or condition. Here the result is dependent on whether the disclosure is voluntary, and thereby within the marital relationship, or the disclosure is involuntary to the extent that any attempt to conceal it would fail and thereby it is not privileged.\textsuperscript{55}

Any attempt to formulate a precise test to apply to specific acts in order to determine whether they are confidential communications would be impractical and would unduly burden the court. It can be noted that the salient feature to look for in an act is the intention of the actor, i.e. whether the actor placed any reliance or trust upon the observing spouse, since confidentiality in acts, as well as communications, is a prerequisite to the privilege attaching.\textsuperscript{56}

**Operative Span of the Privilege**

The privilege is created to encourage marital confidence and trust; therefore, in order for the communication to be privileged, the communication must have been made during the existence of a valid marital relation.\textsuperscript{57} Validly contracted common law marriages are treated the same as ceremonial marriages; confidential communications made while the common law marriage exists are privileged.\textsuperscript{58} There is no privilege as to transactions

\textsuperscript{54} People v. Daghlita, 299 N.Y. 194, 86 N.E.2d 172 (1949) (the husband, a policeman, was charged with theft. The wife's testimony as to her husband's acts in her presence of bringing home the loot and secreting it all over the house held to be a privileged communication); Menefee v. Commonwealth, 189 Va. 90, 55 S.E.2d 9 (1949) (wife was not permitted to testify that she saw her husband leave home before the robbery, return with a revolver, and later drive with her to where he hid the stolen safe).

\textsuperscript{55} United States v. Giuteau, 12 D.C. (1 Markey) 498, 547-48 (1882) which states the rule: "A physical state or condition that is involuntary is not privileged communication, e.g., blindness, insanity, height, weight or loss of limb." In this case, testimony as to insanity was held not privileged, since the actions which tended to show the person insane are not a matter of choice or volition; In Re Estate of Van Alstine, 26 Utah 193, 72 P. 942 (1903) (husband's intoxication in presence of wife held not to be a confidential communication). But cf. Schreffler v. Chase, 245 Ill. 395, 92 N.E. 272 (1910) (probate of the wife's will; husband's testimony for the contestant as to wife's insane conduct held to be privileged); Donnan v. Donnan, 256 Ill. 244, 99 N.E. 931 (1912) (will contest, widow's testimony as to the testator's physical condition not admissible).

\textsuperscript{56} State v. Robbins, 35 Wash. 2d 389, 213 P.2d 310 (1950) (the husband waited in a public place in a stolen auto while his wife went inside to procure license plates; the court held that the wife could not testify as to the stolen car, even though many people saw the husband waiting in the car, since he did so only because he trusted that his wife would not disclose that the car was stolen. It is obvious that he would not have waited in the car had he not relied upon the confidence engendered between them by reason of the marital relation).

\textsuperscript{57} United States v. Mitchell, 137 F.2d 1006, adhered to 138 F.2d 831, certiorari denied; Mitchell v. United States, 321 U.S. 794, rehearing denied, 322 U.S. 768.

\textsuperscript{58} See Brown v. State, 208 Ga. 304, 66 S.E.2d 745 (1951); People v. Woltering, 275 N.Y. 51, 9 N.E.2d 744 (1937).
or conversations which occurred before the marriage of the parties involved, nor is the claim of privilege available where the marriage is void because one of the parties had been previously married to another person who is still living and not divorced.

A communication made during a purported marriage later annulled for fraud has been held to be privileged as to the victim of the fraud.

What of a husband and wife who are living apart? Most courts hold that the privilege should not apply where the parties are living separately under decree of the court because the spouse making the communication is purported to be hostile to the other spouse. Where the separation has not been ordered by a court decree and the confidential communication was made to the spouse in hope of reconciliation, it will probably be held to be a privileged communication.

Both under the common law and under the statutes, the incompetency of a spouse to testify concerning confidential communications made during coverture is not terminated with the dissolution of the marriage relation either by death or divorce. Nevertheless, it would sometimes be unjust

59 Knights v. Knights, 300 Ill. 618, 133 N.E. 377 (1921) (in a suit by a widow for dower in property transferred by the husband prior to marriage. where defendants were defending as grantees under a deed from the husband's trustee, the widow was competent to testify as to transactions and conversations occurring prior to the marriage). Accord, Otis v. Spencer, 102 Ill. 622, 40 Am. R. 617 (1882).

60 Cole v. Cole, 153 Ill. 585, 38 N.E. 703 (1894) (court held that where there is positive proof by other witnesses that a man's former wife was living when he contracted a second marriage, the second wife is competent to prove admissions made by him to her during their cohabitation to the effect that he had never been divorced from his first wife). Other jurisdictions sometimes uphold the privilege where the result is to penalize the active, knowing bigamist. Thomas v. Thomas Estate, 64 Neb. 581, 90 N.W. 630 (1902) (where the opposite means are necessary to punish the intentional bigamist, the privilege has been disallowed); People v. Keller, 165 Cal. App. 2d 419, 332 P.2d 174 (1958).

61 People v. Godines, 17 Cal. App. 2d 721, 62 P.2d 787 (1936) (perjury against the wife; testimony of the husband found to be properly excluded, as to a letter written him by the accused during the purported marriage, even though the marriage was annulled prior to trial).

62 McEntire v. McEntire, 107 Ohio St. 510, 140 N.E. 328 (1923) (communications between separated husband and wife as to a property settlement held admissible and not privileged). Symington v. Symington, 215 App. Div. 553, 214 N.Y.S. 307 (1st Dept. 1926), (letters from the husband to the wife during period of separation prior to filing of divorce action were held not privileged).

63 People v. Oyola, 6 N.Y. 2d 259, 160 N.E.2d 499 (1959) (wife had husband charged with sexual assault on his own child; he was arrested and moved out of the family home; later he confessed over the phone to his wife; this alleged confession was found to be a confidential communication because part of an attempted reconciliation).


65 Geer v. Goudy, 174 Ill. 514, 51 N.E. 623 (1898) (wife attempted to take an oral contract out of the Statute of Frauds; court held a wife cannot testify as to declarations by or conversations with her husband during coverture, although the marriage relation was severed by the death of her husband). Accord, First National Bank of Princeton v. Kurtz 22 Ill. App. 213 (2d Dist. 1886).

66 Heineman v. Heineman, 385 Ill. 191, 52 N.E.2d 263 (1944) (divorced wife of party to action prosecuted by heir was incompetent to testify to alleged agreement between
not to recognize exceptions to this rule. Even though the spouse entitled to the privilege is deceased, the surviving spouse should be allowed to waive the privilege in two instances: (1) in the interest of the deceased spouse; or (2) for the exoneration of the surviving spouse.\textsuperscript{67} If this flexibility is allowed, many occasions of hardship can be avoided.

**Waiver**

A statute embodying a rule as to confidential communications between husband and wife does not create an absolute incompetency, but only a privilege.\textsuperscript{68} An absolute incompetency cannot be waived,\textsuperscript{69} whereas a privilege may be waived by the holder of it.\textsuperscript{70} The ability to waive the privilege as to confidential communications belongs to the communicating spouse;\textsuperscript{71} the addressee of the communication is not entitled to object.\textsuperscript{72} This is the majority rule and appears to be the best rule, since the privilege is designed to secure freedom from apprehension in the mind of the spouse making the communication, it is only natural that the communicator be the holder of the privilege.\textsuperscript{73}

The communicating spouse (the holder of the privilege) may waive the privilege by directly stating so or by implication. The courts are extremely prone to conclude that the holder of the privilege has impliedly waived it;\textsuperscript{74}

deceased and husband occurring before divorce and which wife knew by virtue of the marriage relation). In accord, People v. Rodgers, 348 Ill. 322, 180 N.E. 856 (1932), Ohio Ice Co. vs. Industrial Commission, 293 Ill. 461, 127 N.E. 743 (1920); Monaghan v. Green, 265 Ill. 233, 106 N.E. 792 (1914).

67 8 Wigmore § 2341.


69 2 Wigmore § 604.

70 Ibid.

71 8 Wigmore § 2340 (1); the Illinois statute fails to designate the person by whom the privilege may be asserted; but Cleary, in construing the statute, follows Dean Wigmore in stating that since the privilege is to encourage communications without apprehension, it is only sound reasoning that the privilege belongs to the communicator. Cleary, Handbook of Illinois Evidence § 10:12 (2d ed. 1963). Also in accord are the Uniform Rules of Evidence 28 (1) and the Model Code of Evidence Rule 214 (c) (1942).

72 Fraser v. U.S., 145 F.2d 139 (1944), cert. denied, Fraser v. Barton, 324 U.S. 849 (1945); 8 Wigmore § 2340.

73 People v. McCormick, 278 App. Div. 191, 194, 104 N.Y.S.2d 139, 143 (1951), ("... (T)he conjugal privilege belongs not to the witness, but to the spouse against whom the testimony is offered.").

74 Proffitt v. U.S., 264 F. 299 (1920) (a narcotics case, where the witness failed to make a timely objection and was impeached by his wife's testimony, which revealed an otherwise confidential communication); People v. Jones, 217 Mich. 641, 187 N.W. 386 (1922) (when the defendant called his wife to testify in his behalf, the court held that he waived his privilege as to confidential communications brought out on cross-examination); Barber v. People, 203 Ill. 543, 68 N.E. 93 (1903) (if no objection is made at trial, error in the admission of confidential communication between husband and wife cannot be successfully urged in the appeal); People v. Kroyer, 37 Cal. Rptr. 593, 390 P.2d 369 (1964) (court
when the holder himself ceases to treat a matter as confidential, it should, as a matter of course, lose its confidential character.\textsuperscript{75}

The old Illinois statutes\textsuperscript{76} apparently did not allow waiver by the communicating spouse,\textsuperscript{77} for the old proviso stated “... that nothing in this section shall be construed to authorize or permit any such husband or wife to testify to any admissions ...” The change in this proviso in the new statutes\textsuperscript{78} allows the court to permit the communicating spouse to waive the privilege.

Once the privilege as to confidential communications is waived, the waiver extends to the entire transaction\textsuperscript{79} and it cannot be limited to a particular part of the transaction or to a particular person involved.\textsuperscript{80} But a waiver of the privilege may be recalled at any time before it is acted upon.\textsuperscript{81}

\textbf{COMMENT ON THE EXERCISE OF THE PRIVILEGE}

When the privilege of confidential communications has been invoked by the holder, the issue of whether comment about the exercise of the privilege is proper arises. The majority of decisions holds that no-comment regarding the privilege can be made.\textsuperscript{82} But the person desiring the addressee of the privileged communication to testify can place him or her on the witness stand and call for testimony, thereby forcing the communicator (the holder of the privilege) to exercise the privilege in the courtroom and within the jury’s hearing. This causes an adverse inference to be drawn held that if a spouse’s privilege against disclosure by the other spouse of a confidential communication is to be relied upon, it must be raised at trial; otherwise, the spouse who holds the privilege has impliedly waived it).

\textsuperscript{75} Tribado v. Brees, 212 So. 2d 61 (1968) (court held that where husband voluntarily and without objection testified on deposition as to privileged communications with his wife, the communications lost their confidential character and the privilege was waived). 76 Ill. Rev. Stat. ch. 51, § 5 (1933) pertained to civil cases and Ill. Rev. Stat. ch. 38, § 734 (1933) dealt with criminal cases. 77 Marks v. Madsen, 261 Ill. 51, 103 N.E. 625 (1913); 8 Wigmore § 2340. 78 Ill. Rev. Stat. ch. 38 § 155 (1966) and Ill. Rev. Stat. ch. 51, § 5 (1966); both state that husband or wife may testify for or against each other except as to confidential communications, admissions and conversations made during coverture except in enumerated cases where they may testify. Nowhere in the two statutes does it state that waiver is not allowed nor can any implications be drawn against waiver. See 30 Ill. L. Rev. 783 (1936).

\textsuperscript{79} Chamberlain v. Chamberlain, 230 S.W.2d 184 (1950). 80 Metropolitan Life Insurance Co. v. Kaufman, 104 Colo. 13, 87 P.2d 758 (1939). 81 Donovan v. Donovan, 231 Iowa 14, 300 N.W. 656 (1941). 82 Mash v. People, 220 Ill. 86, 77 N.E. 92 (1906) (in a prosecution for keeping a house of prostitution, prosecuting attorney drew an inference from the defendant’s wife not testifying, held to be an improper comment, but excused by the defendant attorney’s prior similar impropriety); People v. Kloe, 32 Cal. 2d 658, 197 P.2d 705 (1948) (comment held to be improper, but not prejudicial); Knowles v. People, 15 Mich. 408 (1867) (the privilege would be entirely destroyed if comment were allowed, therefore, court reversed a larceny conviction); Uniform Rule of Evidence 39 prohibits comment if the communications privilege has been claimed.
by the jury against the holder of the privilege. Looking at this from a broad perspective, it only seems fair that if the holder of the privilege desires the communicatee of the confidential communication not to testify, he must exercise his privilege to accomplish its intended purpose.\(^8\)

Although some courts hold unauthorized comment to be ground for reversible error, the more enlightened courts weigh the seriousness of the error in light of all circumstances. Since one party may have established a clear case apart from any benefit derived from the inference raised by the unauthorized comment, he would be unduly prejudiced by a reversal.\(^4\)

**Exceptions to the Privilege**

Like other privileges, the privilege of confidential communications has its exceptions. The Illinois civil statute\(^5\) pertaining to confidential communications between husband and wife lists three exceptions, and the similar criminal statute\(^6\) lists four. The statutory exceptions evolved from the common law doctrine of necessity, which was devised to avoid extreme injustice to one of the spouses if his or her testimony were excluded.\(^7\) The common law scholars wanted to prevent the husband from obtaining a

\(^{83}\) People v. Matthews, 359 Ill. 171, 194 N.E. 220 (1935) (the state's attorney objected to a statement by defendant's counsel that defendant's wife could not testify either for or against him; the reviewing court held that it was not error for the trial judge to remark in sustaining the objection that the proper method would have been for the defendant to have offered his wife as his witness and that if the state objected, the court would have instructed the jury that the wife was not a competent witness). People v. Chand, 116 Cal. App. 2d 242, 253 P.2d 499 (1953) (calling defendant's wife to the stand not improper); State v. McMullan, 223 La. 629, 66 So. 2d 574 (1955) (upheld requiring defendant's wife to appear in court and claim her privilege). But cf. Caldwell v. State, 162 Tex. Crim. 486, 287 S.W.2d 176 (1959) (error for state to call defendant's wife to witness stand on rebuttal, thereby forcing defendant to object to her testimony and claim his privilege); State v. Tanner, 54 Wash. 2d 535, 541 P.2d 869 (1959) (improper for the state to call wife, forcing the appellant husband to elect whether to object to her testimony before a jury); People v. Ward, 50 Cal. 2d 702, 328 P.2d 777 (1958) (misconduct for the prosecuting attorney to offer defendant's wife as a witness thus forcing defendant to object before the jury in order to assert his privilege). See Note, 6 U.C.L.A. L. Rev. 455 (1959).

\(^{84}\) Mash v. People, 220 Ill. 86, 77 N.E. 92 (1906).

\(^{85}\) Ill. Rev. Stat. ch. 51, § 5 (1966) lists three exceptions to the privilege of confidential communications between the spouses:

1) actions between themselves.
2) actions where the custody or support of their children is directly in issue.
3) matters in which either spouse has acted as the agent for the other.

\(^{86}\) Ill. Rev. Stat. ch. 38, § 155 (1966) lists four exceptions to the privilege of confidential communications between the spouses:

1) when either spouse is charged with an offense against the person or property of the other.
2) action for wife abandonment.
3) actions where the interest of the couple's child or children are directly involved.
4) matters in which either spouse has acted as the agent for the other.

\(^{87}\) Bentley v. Cooke, 3 Doug. 422, 424; 99 Eng. Rep. 729 (K.B. 1784) (Mansfield, L.C.J.): "... (T)hat necessity is not a general necessity, as where no other witness can be had, but a particular necessity, as where, for instance, the wife would otherwise be exposed without remedy to personal injury." See 8 Wigmore § 2239.
license enabling him to injure his wife with complete immunity. He would have had this immunity if his wife were not allowed to testify, by the doctrine of necessity, as to injuries inflicted on her by him. The modern statutes have expanded the common law doctrine of necessity to include not only actions by one spouse against the other, but for example also actions where the welfare of the children is at stake and when the wife has acted as an agent for her husband. The majority of exceptions fall into the following categories.88

a) Prosecution for crimes committed by one spouse against the other or against the children of either.89

b) Actions by one of the spouses against a third party for an intentional injury to the marital relation.90

c) Actions by one spouse against the other.91

d) Matters where either has acted as an agent for the other.92

If the confidential communication falls into one of the enumerated exceptions, the communication is by statute no longer confidential and either the communicator or the communicatee may testify as to that communication.93

**CONCLUSION**

The most substantial argument advanced in support of the privilege of confidential communications is that the privilege encourages marital harmony.94 But the fear of courtroom disclosure is almost never in the mind of the communicator when he or she speaks to the other spouse.95 What encourages them to fullest frankness is not the assurance of the privilege, but the trust they place in the loyalty and discretion of each other.96 Most people never make an appearance in court as a party or witness and the

---

88 McCormick § 88.
89 People v. McCormack, 278 App. Div. 191, 104 N.Y.S.2d 189 (1951) (in a murder prosecution, wife's testimony as to assault upon her by defendant-husband before he left the apartment and committed homicide, admissible).
90 3 Wigmore § 2239 and 6 Wigmore § 1730 (2).
91 People v. Schlette, 139 Cal. App. 2d 165, 293 P.2d 79 (1956) (arson case, wife eligible to testify against husband since she was joint owner of the property).
92 Robertson v. Brost, 83 Ill. 116 (1876) (if a wife makes a contract for her husband as his agent, she may testify to the contract; otherwise, all the husband would have to do is to have his wife make all his contracts as his agent).
93 People v. Pittullo, 116 Cal. App. 2d 373, 253 P.2d 705 (1953) (assault by husband upon wife, held competent to testify); In Re Kellog, 41 Cal. App. 2d 833, 107 P.2d 964 (1940) (theft of husband's funds from a joint account, testimony of the husband admitted), People v. Malach, 119 Mich. 112, 77 N.W. 638 (1898) (failure to support wife, her testimony allowed).
94 McCormick § 90.
96 Supra, note 94.
anticipation of making one is not one of those factors which materially influence the communicator of the confidential communication. Therefore, the benefits of the privilege are at best doubtful and marginal, while the danger of injustice from suppression of relevant proof is clear and certain.

The rationale for the privilege of confidential communications is not the encouragement of marital harmony, but a strong respect for the privacy of man and wife. This is a most noteworthy and decent reason, yet when balanced against the need for disclosure of all relevant proof in court where a man's life, liberty, or property may be in issue, the need for full disclosure weighs more heavily. This reasoning has swayed the courts to limit the privilege in cases where injustice would result and has resulted in the formulation of this principle: the scope of the privilege in doubtful cases should be strictly limited.

The privilege should be thought of as not an absolute one but as a qualified one, which will yield if the trial judge finds the evidence of the communication is required to arrive at a just result. The paramount consideration must be justice for all parties involved, not the blind application of a privilege, which by the time the spouses are in court will not further marital harmony since spouses at that stage have very little, if any, marital affection.

Charles W. Jakopich

97 Supra, note 95.
98 Supra, note 94.
100 Supra, note 94.