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# Evidence--Husband and Wife as Witnesses For or Against Each Other in Kentucky

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EVIDENCE—HUSBAND AND WIFE AS WITNESSES FOR OR AGAINST  
EACH OTHER IN KENTUCKY

Kentucky, in common with every other state in this country, has attempted to govern by statute the giving or prohibiting of testimony by one spouse either for or against the other. The latest revision by the legislature in 1940 leaves the present provision reading as follows:<sup>1</sup>

“In all actions between husband and wife, or between either or both of them and another, either or both of them may testify as other witnesses, except as to confidential communications between them during marriage, provided, however, that in an action for absolute divorce or divorce from bed and board, either or both of them may testify concerning any matter involved in the action, including questions of property, and *provided further, that neither may be compelled to testify for or against the other.*”<sup>2</sup> (Italics writer's).

In order to analyze and evaluate this code section and appreciate its various ramifications, something more than its bare words should prove helpful. First, an investigation of the historical background of the present enactment reveals that the legislature has repeatedly evidenced its dissatisfaction with the law on this subject by numerous changes. As the statute appeared in the original code in 1851,<sup>3</sup> it was first an explicit disqualification of either spouse to testify either for or against the other during the marriage. It also made both spouses incompetent or disqualified<sup>4</sup> them from testifying during the marriage or afterwards concerning any confidential communication made by one to the other during the marriage. Although this blanket disqualification of either spouse to testify for or against the other during marriage in any instance was a manifestation of the general wave of sentiment throughout the country at that time, it has now been repudiated in whole or in part in Kentucky and all but perhaps one state of the union.<sup>5</sup> Another undesirable element was apparent in the 1851 statute. The incorporation of these two principles: (1) the general disqualification of either spouse to testify for or against the other, during marriage, and (2) the disqualification of either to testify during or after dissolution of the marriage as to any confidential communication made by one to the other during the marriage, not only in one provision, but in one sentence has generously contributed to the confusion and uncertainty in our present law on this subject. The first clause related to the *competency of the proffered witness*; the second was concerned not with the competency of the wit-

<sup>1</sup> KY. CODES, CIV. PRAC. sec. 606 (1) (1948).

<sup>2</sup> *Ibid.*

<sup>3</sup> Sec. 670 (4) of the 1851 Edition of the Kentucky Code read as follows: “The following persons shall be incompetent to testify: 4. Husband and wife, for or against each other, or concerning any communication made by one to the other, during the marriage, whether called as a witness while that relation subsisted or afterwards.” This section was quoted verbatim in CODE OF PRAC., CIV. AND CRIM. CASES, STATE OF KY., sec. 670 (4) (1867).

<sup>4</sup> The words *incompetent* and *disqualified* as used here are synonymous and may be interchanged.

<sup>5</sup> The state referred to is Arkansas. ARK. STAT. ANN. sec. 28-601 (1947) is as follows. “All persons except those enumerated herein shall be competent to testify in a civil action. The following persons shall be incompetent to testify: Third. Husband and wife, for or against each other, or concerning any communication made by one to the other during the marriage, whether called as a witness while that relation subsist or afterwards, but either shall be allowed to testify for the other in regard to any business transacted by the one for the other in the capacity of agent.”

ness, but with the *competency of the testimony or evidence* which a qualified witness might offer or refuse to give. These are separate principles, governing separate aspects of this problem, and should for the sake of clarity and distinction be stated separately.

This first codification existed in its original form until 1876, when it was slightly revised.<sup>6</sup> It divided the former blanket disqualification into two phases: (1) disqualification of one spouse to testify for the other, and (2) disqualification of one spouse to testify *against* the other. It retained one-half of the original disqualification in that it disabled either spouse to testify to any facts adverse to the other. A few minor exceptions were made to the disqualification of either to testify for the other. And, of course, in the first sentence it simply restated the former disqualification of either to testify while the marriage existed or afterwards concerning any confidential communications made by one to the other during the marriage.

No further alteration was made until 1898, when another relatively minor exception was made in the rule governing the competency of one spouse to testify for the other.<sup>7</sup> As it clearly declared, in situations where one spouse was acting as agent for the other, the statute allowed either to testify as to any matter connected with such an agency.

In 1912 another minor change was made.<sup>8</sup> The change, in addition to the exceptions theretofore made, permitted either of the spouses to testify against the other in an action for divorce where the grounds relied on were as specified in the statute. These gradual minor relaxations may have indicated a trend, but this served little at that time to comfort an attorney who was forced to forego the use of valuable evidence by this groundless gag rule.

One writer, a practicing attorney in Kentucky at that time, made these colorful and profound observations on the code provision as it stood in 1917:<sup>9</sup>

“ The trend of modern thought is toward changing that section [606] so that it will read: ‘Every person is competent to testify for himself or another, who is capable of understanding the facts concerning which his testimony is offered. The exceptions and

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<sup>6</sup> CODES OF PRAC., KY. sec. 606 (1) (1876) was as follows: “Neither a husband nor his wife shall testify, even after the cessation of the marriage, concerning any communication between them during marriage. Nor shall either of them testify against the other. Nor shall either of them testify for the other, except in an action for lost baggage or its value against a common carrier, an innkeeper, or a wrongdoer, and in such action either or both of them may testify; and, except in actions which might have been brought by or against the wife, if she had been unmarried, and in such actions either, but not both, of them may testify.”

<sup>7</sup> CODES OF PRAC., Ky., sec. 606 (1) (1906). Although the code provision of 1876 was rescinded in 1898, it was re-enacted in the exact words as shown in note 6, *supra*. with the following clause added: “And except that when a husband or wife is acting as agent for his or her consort, either of them may testify as to any matter connected with such an agency.”

<sup>8</sup> CARROLL'S CODES OF PRAC., CIV. AND CRIM., KY. sec. 606 (1) (1919). The following provision was added to the Code as it stood revised in 1898: “And except in an action for divorce where the grounds relied upon are those provided by section 2117 of Carroll's Kentucky Statutes, paragraphs 2 and 3, as follows: ‘Habitually behaving towards her by the husband, for not less than six months, in such cruel and inhuman manner as to indicate a settled aversion to her, or to destroy permanently her peace or happiness. Such cruel beating or injury of the wife by the husband, as indicates an outrageous temper in him, or probable danger to her life, or great bodily injury from her remaining with him;’ that either or both of them may in such suit testify.”

<sup>9</sup> Note, 6 Ky. L. J. 45 (1917).

modifications contained in section 606 are unsound in reason and based on false logic, and not only work hardship, but frequently cause the miscarriage of justice. The truth can be found only by the presentation of the facts and all the facts. The whole procedure of our courts is predicated upon the theory that witnesses under oath detail the facts truthfully. Otherwise, our whole system of jurisprudence is a hoax. Then why should we make the exceptions contained in section 606?"<sup>10</sup>

" It is only within the memory of persons now living that parties to issues have been permitted by the law to face a jury and detail the facts at issue. If it is a sound policy to permit the party to testify, and thus no one now denies, why, may I ask, is it improper that the husband or wife of the party should testify? That interest that does not disqualify the party himself from testifying can by no juggling of logic disqualify the husband or wife of such party, whose interest is manifestly less personal. Nor can we agree with the idea that the spouse should be denied the privilege of testifying for the reason that it would be strongly calculated to create distrust and destroy that harmony and conjugal affection so important, not only to the happiness of themselves and family, but to the interests of society. "<sup>11</sup>

"Those words suggest the days of chivalry and must have been written when Kentucky gentlemen all read Sir Walter Scott, kept their wives secluded in the home, and took over their property on marriage as a matter of right under the beneficent provisions of the common law. They may have worked well in the days of *coverture*. But the wife is now an entity, a human being, a citizen. All the ways of the earth are open to her. She pursues all business avocations and fills all professions. In a few years she will be admitted to man's last stronghold and exercise the right of suffrage. I submit that no law ought to protect those guilty of wrong by sealing the mouth of the spouse who knows the facts and is willing to testify. What sort of a public policy is that? Is justice and right between the parties litigant less sacred than the relation of husband and wife? Again, submit that no husband nor wife should distrust the spouse or feel less affection because that spouse has told the truth that justice might be done. We cannot build our sacred institutions, we cannot sanctify the home, we cannot inspire or perpetuate affection between husband and wife by a lie or by the suppression of the truth. And logic might suggest that permitting the husband or wife to testify against the other might be a great restraint against wrongdoing."<sup>12</sup>

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<sup>10</sup> *Id.* at 47.

<sup>11</sup> *Id.* at 48.

<sup>12</sup> *Id.* at 48 and 49.

In 1926, the legislature made the greatest change to that date in the provision.<sup>13</sup> But, these changes came in the form of more exceptions to the general disqualification. An insignificant change occurred in the code provision because of a relatively minor change in the divorce statute. The most important change permitted either or both spouses to testify in a criminal prosecution of one of the spouses for bigamy or abandonment. Probably much of the beneficial effect of the exceptions was lost in the confusion resulting from the voluminous proportions of the statute.

Between 1926 and 1932 more minor changes were made in section 2117 of Carroll's Kentucky Statutes. Since this statute was quoted in the code provision, these minor changes were reflected in the code in 1932.<sup>14</sup>

Then came the revolutionary change of 1940, which is the present code provision as quoted at the beginning of this note.<sup>15</sup> A brief resume of its evolution should prove worthwhile at this point. As hereinbefore stated, it was at its inception (1) a blanket disqualification of either spouse to testify for or against the other during marriage, and (2) a disqualification of either spouse to disclose either during or after dissolution of the marriage any confidential communication made by the other during marriage. In 1876 the first principle was divided into (1) whether one might testify *against* the other, and (2) whether one might testify *for* the other. The rule governing confidential communications remained unchanged.

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<sup>13</sup> CARROLL'S CODES OF PRAC., CIV. AND CRIM., KY., sec. 606 (1) (7th ed. 1927) reads as follows: "Neither a husband nor his wife shall testify while the marriage exists or afterwards concerning any communication between them during marriage. Nor shall either of them testify against the other. Nor shall either of them testify for the other, except in an action for lost baggage or its value against a common carrier, an innkeeper or a wrong-doer, and in such action either or both of them may testify; and, except in actions which might have been brought by or against the wife, if she had been unmarried, and in such actions either, but not both, of them may testify. [And except that when a husband or a wife is acting as agent for his or her consort, either of them may testify as to any other matter connected with such an agency.] [And except in an action for divorce where the grounds relied upon are those provided by section 2117 of Carroll's Kentucky Statutes, paragraphs 2, 3 and 4 as follows: 'Habitually behaving towards her by the husband, for not less than six months, in such cruel and inhuman manner as to indicate a settled aversion to her or to destroy permanently her peace and happiness; such cruel beating or injury of the wife by the husband, as indicates an outrageous temper in him, or probable danger to her life, or great bodily injury from her remaining with him or concealment from the other party of any loathsome disease existing at the time of the marriage, or contracting such afterwards; that either or both of them may in such suit testify. And except where the husband or wife is charged with commission of crime under chapter 19, page 70 of the Acts of 1922 (Kentucky Statutes, section 33 li) as follows: 'The parents of any child or children residing in this Commonwealth who shall leave, desert or abandon said child or children under the age of sixteen years, leaving said child or children in destitute or indigent circumstances and without making proper provisions for the board, clothing, education and proper care of said child or children in a manner suitable to the condition and station in life of said parent and said child or children, or any married man who shall leave, desert, or abandon his wife while pregnant by him, leaving said wife in destitute or indigent circumstances and without making proper provisions for the board, clothing and proper care of said wife in a manner suitable to the condition and station in life of said married man and wife shall be guilty of a felony and upon conviction thereof shall be punished by confinement in the penitentiary for not less than one year or more than five years in the discretion of the court or jury trying the case; that either or both of them in such prosecution may testify. And except that in prosecutions for the crime of bigamy either the husband or wife may testify against the other.']"

<sup>14</sup> KY. CODES ANN. sec. 606 (1) (1938). The change was so slight that the writer deems it does not warrant repetition of the lengthy statute.

<sup>15</sup> See note 1, *supra*.

Between 1876 and 1940 several exceptions were made to the rules regarding the competency of one spouse to testify either for or against the other. However, the two principles, slightly weakened by exceptions, remained with the law governing confidential communications until the change of 1940. It is hoped that this excursion into the past will aid in understanding the provisions of our present act.

In order to begin an analysis of the present Kentucky Code provision, it may be helpful to enumerate and clarify the categories into which a proposed witness may fall. They are as follows:

1. *Incompetent or disqualified.* A witness in this category cannot testify regardless of his or anyone else's desire.

2. *Privileged.* Here a witness is competent but not compellable and whether or not he testifies is contingent on whether the holder of the privilege exercises it or waives it.

3. *Unprivileged.* A witness in this category is both competent and compellable and a refusal to give the requested evidence amounts to contempt.

Competent authority<sup>16</sup> states that an incompetency or disqualification<sup>17</sup> cannot be waived; a privilege may be waived.

The Kentucky Court in interpreting the code provision on this subject has departed from the orthodox view. It may be questioned whether a true disqualification as expounded by Wigmore ever existed in Kentucky. As stated above, Wigmore says that a disqualification cannot be waived. Is an *incompetent* witness a *disqualified* witness? In the opinion of the writer, these words may be used interchangeably without altering the meaning. Before and since the 1940 amendment, the Kentucky Court has said that the failure to object to the competency of a witness was a waiver of the incompetency of the witness to testify.<sup>18</sup> This is not the preferred view.<sup>19</sup> The incompetency or disqualification of a witness cannot be waived. As a procedural matter, the writer feels that if an appellate court finds (1) that the testimony of an incompetent witness has been received by the trial court, and (2) that the reception of the evidence was prejudicial, it should reverse the judgment of the lower court even if there was no objection to the competency of the incompetent witness. There is a duty on the court to guard against the testimony of disqualified witnesses in the absence of objections; otherwise, there would be no distinction between a privilege and a disqualification.

Now, we are confronted with a paradox. If a disqualification exists in Kentucky on this subject today, it is as to the competency of the spouses to testify as to confidential communications made between them during marriage. By the great weight of modern authority, these confidential communications are privileged only. Amazing as it may seem, it is submitted that in the end here, Kentucky is again in accord with the majority. Though the court says the spouses are incompetent to testify to confidential communications,<sup>20</sup> it is submitted that incompetent, as used here, means the same thing to the court as when it was dealing with the disqualification. The *incompetency* of a witness there was waivable. The net result there was that a disqualification erroneously became a privilege. Applying the same reasoning, the *incompetency* here should also be waivable. The result here then is that a privilege is erroneously called a disqualification yet cor-

<sup>16</sup> 2 WIGMORE, EVIDENCE sec. 604 (3rd Ed., 1940).

<sup>17</sup> See note 4, *supra*

<sup>18</sup> *Hembree v. Commonwealth*, 210 Ky. 333, 275 S. W. 812 (1925). Also see *Jefferson County v. Bischoff*, 238 Ky. 176, 178, 37 S. W. 2d 24, 25 (1931); *Mullins v. Commonwealth*, 293 Ky. 572, 574, 169 S. W. 2d 611, 612 (1943).

<sup>19</sup> See note 16, *supra*.

<sup>20</sup> See *Taylor v. Commonwealth*, 240 Ky. 450, 549 42 S. W. 2d 689, 693 (1931). *Mullins v. Commonwealth* 293 Ky. 572, 574, 169 S. W. 2d 611, 612 (1943).

rectly treated as a privilege. Figuratively speaking, the court has called a spade a heart, yet treated it as a spade. A brief summary might solve the dilemma of the reader at this point. In practical application, the present statute contains no disqualification of either spouse as a witness either for or against the other. In practice a privilege exists as to confidential communications made by one spouse to the other during the marriage. These results are orthodox and generally accepted. The manner in which they are reached is not recommended.

These views should be examined to determine if they merit retention or to see if some change is warranted. First, attention should be directed to the privilege created concerning confidential communications. As a general rule, every person is under a duty to give testimony upon all the facts inquired of in a court of justice. An exception to the general rule is established where a privilege against disclosure of certain information is recognized. Wigmore states that four fundamental conditions are necessary to the establishment of a privilege against the disclosure of communications between persons standing in a given relation.<sup>21</sup> They are:

"(1) The communications must originate in a *confidence* that they will not be disclosed:

(2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties;

(3) The *relation* must be one which in the opinion of the community ought to be sedulously *forested*; and

(4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation."<sup>22</sup>

Wigmore further states that in the privilege for communications between husband and wife, all four conditions are present.<sup>23</sup> Greenleaf states that this principle of privacy of confidential communication is one which no one is likely ever to propose to abolish.<sup>24</sup> With all respect due these distinguished legal writers, their views still should be reconsidered. All four prerequisites are fulfilled in civil actions and the privilege should be retained with a few minor exceptions. But in a prosecution of one of the spouses for a grave criminal offense, all four conditions are not satisfied, in the opinion of the writer. Of course, the reasons for retaining the privilege are those conditions necessary to its establishment. Assume that the husband murders his mother-in-law. The wife learns of his guilt by a confidential communication. In a prosecution for murder, the husband has his privilege against self-incrimination. The wife knows that he is the murderer, but she learned of it by reason of the marital relationship, so the husband can refuse to allow her to testify as to the confidential communications. If there are no other witnesses to the crime and circumstantial evidence is insufficient to gain a conviction, the wife, alone, holds, without the ability to transmit, the evidence necessary to convict him. Is the injury that would inure to the relationship in general by the disclosure of the communications greater than the benefit that would result from the correct disposal of the litigation? In prosecutions for all odious and heinous crimes there should be no privilege retained for confidential communications. The injury that will inure to society by intervention into the marital confidence to ferret out the truth is less than the injury that will follow from permitting parties who commit grave offenses to go unmolested because of this evidential gag. Opponents of this view may say that by such a step you would move no nearer to the solution of the crime because if the criminal knows beforehand that even though a communication is given in an air of confidence to his spouse, it

<sup>21</sup> 8 WIGMORE, EVIDENCE sec. 2285 (3rd Ed., 1940).

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

<sup>24</sup> GREENLEAF, EVIDENCE sec. 333c (16th Ed., 1899).

will not be privileged, he will never give it. Or they may say that regardless of whether there is a privilege or not, the witness spouse will perjure himself rather than incriminate the defendant spouse. The answer to both of these arguments is rather simple. If the criminal has not confided in his spouse, then no confidential communication will be divulged, and even though the domain has been invaded, the injury to the relationship will be negligible. As to the second proposition, a jury will be allowed to determine whether or not the witness spouse is truthful.

The law does not favor conspiracy. Why foster a marriage which may be used to protect felons at the expense of society? In criminal cases, this proposed exception would not be extended to misdemeanors. The maintenance of the air of confidence between spouses is probably more beneficial to society in general than would be its benefit from seeing that misdemeanants are punished at the expense of puncturing the privilege as to confidential communications. Here, the writer has attempted to state only the general boundaries of this proposed intervention into the marital confidence with reasons therefor. In a model statute appearing at the conclusion of this note will be found the concise limits of this proposed intervention.

Another phase of the present Kentucky Statute should be considered. The statute provides that "In all actions between husband and wife, or between either or both of them and another, *either or both of them may testify as other witnesses* provided further, that neither may be compelled to testify for or against the other."<sup>25</sup> (Italics writer's). The crux of this whole idea is to encourage and perpetuate a more healthy marital relationship which is deemed so essential to our system of society. However, the language of the last clause in the statute expressly creates a privilege in the witness-spouse to decide whether he or she will or will not be a witness. This statute has the effect of placing in the hands of the witness-spouse a metaphorical axe which he or she may use to extort exorbitant favors from the other spouse by either threatening to testify against or refusing to testify for the other spouse. Since the enactment of the Married Women's Acts, the interests of husband and wife are not so identical that either might hesitate to do so in some instances. The writer doubts that this is conducive to harmony in the marital relationship.

One solution to this problem might be to simply eliminate the last clause of the Kentucky Code Provision,<sup>26</sup> as was done in a model statute proposed by the American Law Institute.<sup>27</sup> This would take the privilege away from either spouse and both could be made to testify as any other witness except as to confidential communications. Another solution, perhaps less stringent and more widely practiced, is to place the privilege in the hands of the party-spouse. This eliminates the possibility of blackmail, for then the party-spouse has the option of whether the witness-spouse may testify or not. This will appear more clearly in the model statute to be formulated later.

It should be noted that, although no mention is made of such application, in the code section, the judiciary has decided, with an admitted lack of legislative authority, that the statute applies equally to criminal as well as to civil actions.<sup>28</sup> Legislators generally detest judicial legislation, but have invited it by omitting the simple insertion of a clause to the effect that the code section applies also to criminal cases.

Finally, the last defect of our present code provision is that it lumps into one rather brief provision our whole law governing testimony of husband and wife.

<sup>25</sup> KY. CODES, CIV. PRAC. sec. 606 (1) (1948).

<sup>26</sup> The words suggested to be eliminated are: "that neither may be compelled to testify for or against the other."

<sup>27</sup> MODEL CODE OF EVIDENCE, Rules 214-218, 227 (1942).

<sup>28</sup> See *Mullins v. Commonwealth*, 293 Ky. 572, 574, 169 S. W. 2d 611, 612 (1943).

Brevity is commendable in certain instances, but here, confusion results from the failure to state separately and more clearly the law governing the entirely separate and distinct aspects regarding testimony of husband and wife for or against each other.

In order to better formulate a model state and to exhibit the need for improvement of the law on this subject, a brief survey of the statutes of our sister states should be included.

A survey of the various state statutes reveals that there is little uniformity to be found in this country on this subject. Not a single provision approaches the clarity and progressiveness of a model statute proposed by the American Law Institute.<sup>29</sup> True, this statute is rather long, but it is not ambiguous and it leaves little to conjecture.

The statute governing testimony by the spouses in criminal cases in Alabama<sup>30</sup> is almost an exact replica of that in Kentucky. In Arkansas,<sup>31</sup> as shown before, there is an absolute disqualification of either to testify for or against the other including confidential communications. This is the Common Law view which began in the 19th century. Arizona has one of the better statutes existing in this country today on this subject.<sup>32</sup> Ten other states have statutes similar to that of Arizona.<sup>33</sup> At least thirty-seven states have provisions concerning confidential communications which make them either privileged or disqualify the spouses to testify concerning them.<sup>34</sup> In application, these states differ as to who shall be the holder of this

<sup>29</sup> See note 27, *supra*.

<sup>30</sup> ALA. CODE ANN. tit. 15, sec. 311 (1940) reads: "The husband and wife may testify for or against each other in criminal cases, but shall not be compelled to do so."

<sup>31</sup> See note 5, *supra*.

<sup>32</sup> ARIZ. CODE ANN. sec. 23-103 (3) (1939) reads: "A husband can not 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 afterwards, be, without the consent of the other, examined as to any communications made by one to the other during the marriage; except in an action for divorce or a civil action by one against the other, or in a criminal action or proceeding as provided in the Penal Code or in an action brought by husband or wife against another person for the alienation of the affections of either husband or wife, or in an action for damages against another person for adultery committed by either husband or wife."

<sup>33</sup> See CAL. CODE CIV. PROC. ANN. sec. 1881 (1946); CAL. PEN. CODE sec. 1322 (1941); COLO. STAT. ANN. c. 177, sec. 9 (1935); IDAHO CODE ANN. sec. 16-203 (1932); MINN. STAT. sec. 595.02 (Henderson 1945); MONT. REV. CODES ANN. sec. 10536 (1935); NEV. COMP. LAWS ANN. sec. 8971 (1929); N. D. REV. CODE sec. 31-0102 (1943); ORI. COMP. LAWS ANN. sec. 3-104 (1940); UTAH CODE ANN. tit. 104, sec. 49-3 (1943); WASH. REV. STAT. ANN. sec. 1214 (1931).

<sup>34</sup> ARK. STAT. ANN. sec. 28-601 (1947); ARIZ. CODE ANN. sec. 23-103 (1939); CAL. CODE CIV. PROC. ANN. sec. 1881 (1946); COLO. STAT. ANN. c. 177, sec. 9 (1935); GA. CODE ANN. sec. 5785 (1914); IDAHO CODE ANN. sec. 16-203 (1932); ILL. REV. STAT. c. 51, sec. 5 (1947); IND. STAT. ANN. sec. 2-1714 (Burns 1933); IOWA CODE sec. 622.9 (1946); KAN. GEN. STAT. ANN. sec. 60-2805 (1935); KY. CODES CIV. PROC. sec. 606 (1) (1948); LA. GEN. STAT. ANN. sec. 1991 (1939); MD. ANN. CODE GEN. LAWS art. 35, sec. 4 (1939); MASS. GEN. LAWS c. 233, sec. 20 (1932); MINN. STAT. sec. 595.02 (Henderson 1945); MO. REV. STAT. ANN. sec. 4081 (1939); MONT. REV. CODES ANN. sec. 10536 (1935); NEB. REV. STAT. sec. 25-1201 (1943); NEV. COMP. LAWS ANN. sec. 8971 (1929); N. H. REV. LAWS c. 392, sec. 29 (1942); N. J. REV. STAT. sec. 2:97-9 (1937); N. M. STAT. ANN. sec. 20-112 (1941); N. Y. CIV. PROC. ACT sec. 349; N. C. GEN. STAT. ANN. sec. 8-56 (1943); N. D. REV. CODE sec. 31-0102 (1943); OHIO GEN. CODE ANN. sec. 11494 (1946); OKLA. STAT. tit. 12, sec. 385 (1941); ORE. COMP. LAWS ANN. sec. 3-104 (1940); PA. STAT. tit. 28, sec. 316 (1936); R. I. GEN. LAWS c. 537, sec. 15 (1938); S. C. CODE ANN. sec. 692 (1942); TENN. CODE ANN. sec. 9777 (Williams 1934); TEX. CODE CRIM. PROC. ANN. art. 714 (1936); UTAH CODE ANN. tit. 104, sec. 49-3 (1943); VA. CODE ANN. sec. 6212 (1942); WASH. REV. STAT. ANN. sec. 1214 (1931); WIS. STAT. sec. 325.18 (1947).

privilege. One state feels so strongly that one spouse should have a privilege not to testify against the other in a criminal prosecution that it has inserted a clause in its constitution to that effect.<sup>35</sup> Only Illinois<sup>36</sup> has a statute which closely resembles that of Kentucky for civil cases. Pennsylvania<sup>37</sup> and North Carolina<sup>38</sup> have attempted to exhaust all possibilities on the topic. Other than the agreements and oddities mentioned, no other state statute is considered worthy of individual notice. This brief analysis should demonstrate the need for a general remodeling of the state statutes on this problem. It is for that reason that a model statute has been formulated by the writer and is now offered for consideration and criticism. Considerable portions of the statute proposed in the American Law Institute Code of Evidence<sup>39</sup> have been adopted.

#### MODEL STATUTE—CODE OF CIVIL PROCEDURE

*Section 1. Civil Actions; General; Husband and Wife; Witnesses for or Against Each Other; Disqualification Abolished.* No spouse shall be incompetent or disqualified by reason of his or her marital relationship to testify either for or against the other spouse in a civil action regardless of the parties thereto, notwithstanding any present statutes to the contrary.

*Section 2. Civil Actions; Husband and Wife as Witnesses for or Against Each Other.* Subject to Section 3, below, a spouse cannot refuse to appear and testify because of the marital relationship when called as a witness either for or against the other spouse in any civil action.

*Section 3. Confidential Communications; Husband and Wife; Privileged.* In a civil action, a spouse, whether or not a party thereto, who communicates a confidential communication to the other spouse during marriage has a privilege to refuse to disclose and to prevent the other spouse to whom the communication was made from disclosing such communication either during or after dissolution of the marriage, except in civil cases:

- a. For a divorce, separation, or alimony from the other; or
- b. For damages for injuries done by one of them to the person or property of the other, including an action for the wrongful death of the other.

*Section 4. Confidential Communications; Privileges; Waiver of.* Neither the offer of the other spouse as a witness for nor the consent to the offering of the other spouse as a witness against one shall, alone, constitute a waiver of the privilege granted in Section 3, above. However, the holder of the privilege granted to the communicator in Section 3 waives such privilege if he either:

- a. Contracts with anyone not to claim the privilege, or
- b. Without coercion and with knowledge of his privilege makes disclosures of any part of the matter or consents to such a disclosure made by anyone, either in our out of court.

*Comment. Section 1. Civil Actions.* At the outset it should be stated that these proposed rules of evidence are designed for application in civil cases only. In actual practice today, no disqualification of one spouse as a witness for or against the other exists in Kentucky or in most states of the union, but a restatement of this principle in uncontroversial form serves to remove all doubt. Hence if this portion of the statute alone were adopted it would effect only a slight change in the law but would inform all of its existence. Thus, this portion of the statute, although it may appear superfluous, has a purpose in clarification.

<sup>35</sup> UTAH CONST. ART. I, sec. 12 (1895).

<sup>36</sup> ILL. REV. STAT. c. 51, sec. 5, and c. 38, sec. 734 (1947).

<sup>37</sup> PA. STAT. tit. 19, sec. 683, 684, tit. 28, sec. 316-320 (1936).

<sup>38</sup> N. C. GEN. STAT. ANN. sec. 8-56, 8-57 (1943).

<sup>39</sup> See note 27, *supra*.

Under this proposed rule, marriage is no longer a cause for disqualifying any witness in any civil action, regardless of its nature or the parties. Privileges (See Section 3, below) if exercised may limit the testimony a witness may give, but regardless of the marital relationship of the proffered witness to any party or witness in the civil action, he or she is never disqualified by reason of such marriage. If the marital status of the witness be such as might tend to elicit perjury or biased testimony, the testimony should nevertheless be admitted and submitted to the jury to weigh along with the other evidence.

Comment. *Section 2. Civil Actions.* Under this rule, subject to Section 3, below, spouses would be treated as if no such relationship existed when called either as a witness for or against each other. A spouse when subpoenaed could not refuse to appear as a witness either for or against the other. However, the spouse might at anytime while testifying, invoke the privilege granted in Section 3, below. In effect, this proposed statute abolishes the privilege of the witness-spouse to testify or to refuse to testify at his or her election either for or against the party spouse. The party spouse could call or refuse to call his spouse as a witness just as if no such relationship existed. Most states recognize one of these principles at present. Therefore, this section represents a departure from the existing law in most if not all states. The writer feels, however, that reasoning warrants this departure. This whole problem resolves itself into a conflict between a desire to preserve the marital relationship and the struggle to determine the truth in courts of law through gathering and presenting all pertinent evidence. The abolition of the privilege to appear or to refuse to appear does not permit interference with marital confidence. Section 3 still retains the privilege to refuse to disclose confidential communications. The marital status would be jeopardized only slightly if at all by such. The value to courts in ascertaining the truth would be quite helpful in some cases.

Comment. *Section 3. Civil Actions. a. General.* This section establishes a privilege not to disclose confidential communications. (For an apt statement of the conditions necessary for the establishment of a privilege for confidential communications, see footnote 21, *supra*). When these conditions are satisfied, a privilege arises. This privilege is granted to the communicator-spouse only. No one else can claim or waive it. This privilege survives the marriage, and in some states the communicator's personal representative may exercise it after the death of the communicator. This privilege is retained for a very cogent reason. To permit the invasion of this field of confidence would be to virtually destroy the confidential harmony of a marriage. Its retention inviolate is more valuable to society than the invasion thereof by courts in search of the truth in civil actions.

b. *Exceptions.* The proposed exceptions to this rule arise largely from necessity. Two reasons may be assigned for their retention. First, if they could not testify as to confidential communications in the instances excepted, it would be difficult if not impossible to maintain these actions. Next, in most of the above actions excepted, the marriage is either being dissolved or else it is in such a state that it is not worthy of the protection of this privilege. State statutes that do provide for his privilege vary widely in the exceptions established. The writer considers the above exceptions merit retention.

Comment. *Section 4. Civil Actions.* Certainly, all privileges may be waived. The American Law Institute Code of Evidence states that there is some objection to the enforcement of a promise to waive a privilege on the grounds that such is against public policy. However, the very nature of a privilege implies the possibility of waiver thereof, otherwise it is not a privilege.

Next, if one with knowledge of the existence of a privilege, voluntarily divulges a portion of a communication, he should not be permitted to stop at his election.

## MODEL STATUTE—CODE OF CRIMINAL PROCEDURE

Section 1. *Criminal Prosecutions; General; Husband and Wife; Witnesses for or Against Each Other; Disqualification Abolished.* No spouse shall be incompetent or disqualified by reason of his or her marital relationship to testify either for or against the other spouse in a criminal prosecution regardless of the parties thereto, notwithstanding any present statutes to the contrary.

Section 2. *Criminal Prosecutions; Husband and Wife as Witnesses for or Against each Other.* Subject to Section 3, below, a spouse cannot refuse to appear and testify when called as a witness either for or against the other spouse in a criminal action.

Section 3. *Confidential Communications; Privileged.* In a criminal prosecution of either the husband or wife, a spouse, whether or not the accused, who communicates a confidential communication to the other spouse during marriage has a privilege to refuse to disclose and to prevent the other spouse to whom the communication was made from disclosing such communication either during or after dissolution of the marriage, except where the crime charged is:

- a. A crime against the person or property of the other or of a child of either, or
- b. A crime against the person or property of a third person committed in the course of committing a crime against the other, or
- c. Bigamy or adultery, or
- d. Desertion of the other or of a child of either, or
- e. A felony either by statute or at the common law.

Section 4. *Confidential Communications; Privilege; Waiver of.* Neither the offer of the other spouse as a witness for nor the consent to the offering of the other spouse as a witness against shall, alone, constitute a waiver of the privilege granted in Section 3, above. However, the holder of the privilege granted in Section 3 waives such privilege if he either:

- a. Contracts with anyone not to claim the privilege, or
- b. Without coercion and with knowledge of his privilege makes disclosure of any part of the matter or consents to such a disclosure made by anyone, either in or out of the court.

Comment. *Section 1. Criminal Actions.* First, it should be pointed out that this set of rules is designed for criminal cases only. The above rule is inserted chiefly for clarification purposes. Few states recognize a disqualification of one spouse to testify for or against the other today. Hence, its adoption would result in little change in the law throughout the country. Under this rule, a witness is never incompetent to testify because of his marital relationship. Whether his or her testimony is competent may be governed in part by Section 3, below.

Comment. *Section 2. Criminal Actions.* As on the civil side this section goes much further than the present law on this subject. A spouse could be forced to appear as a witness against the other regardless of objections by the accused. Generally, today, the proposed witness-spouse has a privilege to testify for or against the accused as desired or else the accused spouse has a privilege to refuse to permit the other spouse to testify against him. None of these privileges would exist under the proposed statute. They would be treated for this purpose as if no marriage existed. Such privileges often shield persons deserving punishment and the abolition of such a privilege jeopardizes the marriage very little.

Comment. *Section 3. Criminal Actions.* a. *General.* This section establishes a privilege not to disclose confidential communications. The privilege is once again placed in the hands of the communicator-spouse. The party who makes

confidential statements to his or her spouse should be given the privilege of determining whether or not either can divulge such statements. The retention of this privilege is considered essential to the maintenance of a healthy confidential air between the spouses.

b. *Exceptions.* The privilege does not exist in case of the exceptions enumerated. Several states provide for the exceptions enumerated in a and d but those crimes in b and c are rarely listed. The exception made in e, above, exists nowhere today, so far as this writer can determine. The question of whether society will benefit more from the preservation of the marriage inviolate, in general, rather than in risking placing it in jeopardy through removal of the privilege as to confidential communications arises again. Society will benefit considerably from the removal therefrom of those who commit the more heinous crimes. It is also true that the marriage is jeopardized by invading the air of confidence surrounding it. The writer believes that society will lose less if these criminals are convicted. If one of the spouses is an arch criminal, society benefits none from the marriage. However, in so stating, the writer is not unaware that it is not that particular relationship, but marriage in general that society is interested in fostering. Furthermore, much difficulty is encountered in determining where to draw the line as to when the privilege does not exist. As stated in the body of the note the privilege would not be abolished in case of misdemeanors. Perhaps to state that there will be no privilege in all cases where the crime charged is a felony is too broad, but it has a certain advantage in that it is definite.

Comment. *Section 4. Criminal Actions:* All privileges should be and are waivable, otherwise no privilege exists in a true sense. The reasons for including the rule on waiver of the privilege in criminal cases are no different from those assigned in Section 4, Civil Cases.

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