

10-1-1957

Evidence—Husband-Wife Privilege

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Recommended Citation

George M. Gibson, *Evidence—Husband-Wife Privilege*, 7 Buff. L. Rev. 149 (1957).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol7/iss1/75>

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of the plaintiff, the majority did not feel that there was an infringement on his rights. Nor were the legislative hearings being held for the purpose of investigating the plaintiff. Its purpose was to examine and to investigate state agencies so as to recommend legislation to improve the effectiveness and the economy of such agencies and when the legislature is fulfilling its constitutional function, the judiciary should not interfere.⁶

The three dissenting judges wrote separate opinions. Judge Desmond did not believe that any public official or body was free from the power of the court.⁷ He also viewed this situation as a threatened violation of a fundamental constitutional right and not merely an evidenciary question. It was pointed out that there are many instances where the accused can only consult with his attorney in the jail⁸ and if the majority view prevailed, he would never have an opportunity for private consultation.

Judge Dye and Judge Fuld concurred with Judge Desmond in finding that the plaintiff was denied one of his very basic rights. However all three judges spoke in terms of what great harm can result from the failure to restrain the use of such evidence; but they did not specify any disastrous result. As the majority pointed out, the plaintiff was not being prosecuted on the basis of this evidence and they definitely stated that if such was the case, their decision would have been *contra*.

Husband-Wife Privilege

At common law, as a general rule, a husband or wife were forbidden to be witnesses for or against each other.⁹ Although exceptions gradually came to be recognized at common law,¹⁰ it remained for the legislatures of the various jurisdictions to determine what inroads should be made upon the privilege to facilitate the judicial quest for truth.

In *Poppe v. Poppe*,¹¹ the Court of Appeals was called on to interpret section 349 of the Civil Practice Act, which provides, in so far as is pertinent here, ". . . A husband or wife shall not be compelled, or without the consent of the other if living, allowed to disclose a confidential communication made by one to the other during marriage." As can be seen, the *sine qua non* of the privilege is the existence of a "confidential communication." It has been held that for a communication to be "confidential" it must be one emanating by reason of the implicit relationship

7. *Youngstown Sheets & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

8. N.Y. CODE CRIM. PRAC. §552; N.Y. CORRECTION LAW §§216-218.

9. *Davis v. Dinwoody*, 100 Eng. Rep. 1241 (1792).

10. See *e.g.*, 8 WIGMORE, EVIDENCE §2239 (3d ed. 1940).

11. 3 N.Y.2d 312, 165 N.Y.S.2d 99 (1957).

of confidence existing between husband and wife.¹² The information must be such that it would not have been imparted had not such a relationship existed.¹³

In the instant case, the wife sued for a separation alleging abandonment. The husband acknowledged the abandonment but claimed that such conduct was justified because of the wife's "cruel and inhuman treatment." On this question of cruelty, the husband testified, over objection, that the wife had told him that she had had illicit relations with another and intended to elope with him. The Court, in affirming the dismissal of the complaint, held that such testimony was admissible on the issue of cruelty.¹⁴ The opinion of Judge Fuld was that such a communication should not receive the sanction of confidentiality since by its terms it was destructive of the relationship sought to be protected by the privilege. Likening the communication to that of an unfounded charge of infidelity, which has been held admissible on the issue of cruelty,¹⁵ the opinion reasoned that to apply the doctrine of privilege here would result in protecting a spouse who had injured the other.

The concurring opinion of Judge Froessel agreed that the testimony was admissible but stated that such result should be reached whether the communication is regarded as confidential or not. In other words, if the communication is not "confidential" it is not within section 349; if it is considered confidential, it is within the exception recognized at common law that to exclude the testimony would work injustice since the privilege was never designed to give immunity to injuries perpetrated by one spouse upon the other.¹⁶

The dissent felt that the communication necessarily was one arising out of the marital relationship and thus was confidential within the meaning of section 349. The opinion relied in part on *Warner v. Press Publishing Co.*¹⁷ where an admission by a wife of illicit relations was held inadmissible. There the Court reasoned that such statement was clearly not intended for publication to others and by its very nature was one induced by the marital relation. It is submitted that while the dissent clearly answers the position of Judge Fuld that the communication here was not confidential, it would seem that the dissent did not meet the problem posed by that opinion and the concurring opinion that exclusion of such testimony would work manifest injustice by shielding one spouse who had injured the other. Section 349 should not be interpreted so as to countenance such a result.

12. *People v. Daghita*, 299 N.Y. 194, 86 N.E.2d 172 (1949).

13. *People v. McCormack*, 278 App. Div. 191, 104 N.Y.S.2d 139 (1st Dep't 1951).

14. *Woodrick v. Woodrick*, 141 N.Y. 457, 36 N.E. 395 (1894); *Lanyon's Detective Agency v. Cochrane*, 240 N.Y. 274, 148 N.E. 520 (1925).

15. *De Meli v. De Meli*, 120 N.Y. 485, 24 N.E. 996 (1890).

16. 8 WIGMORE, EVIDENCE §2339 (3d ed. 1940).

17. 132 N.Y. 181, 185-186, 30 N.E. 123, 126 (1892).