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litical propaganda in the United States is increasing. The Foreign Relations Committee staff, which recently prepared a study on the nondiplomatic activities of representatives of foreign governments,⁸⁵ concluded that the labeling provisions, meant to counter the effect of foreign political propaganda, "have been all but erased from the lawbooks through nonapplication."⁸⁶

DAVID L. SIMIELE

Husband-Wife Testimony in Ohio

Husband-wife testimony in Ohio is regulated by statute in both civil and criminal cases.¹ The Ohio civil statute has incorporated the common-law rule concerning confidential communications. The Ohio criminal statute has incorporated, to some extent, the common-law rules concerning the incapacity of one spouse to testify on behalf of the other and the spouses' privilege of not having to testify against each other. Much confusion exists, however, as to the interpretation and application of these statutory provisions.

COMMON-LAW FOUNDATIONS

At the common-law neither party to a marriage was competent to testify as to any confidential communication made between them, nor could either be a witness in favor of or against the other.² The rationale for these rules was originally based upon the legal fiction that the husband and wife were one. Since a party to an action was disqualified from testifying because of interest, the spouse was likewise held to be barred.³ However, the interest disqualification was soon abolished and the courts presented other reasons for perpetuating the rules.⁴

Confidential Communications

The common-law rule regarding confidential communications between husband and wife concerned the competency of the witness and was not a rule based upon substantive evidence or privilege.⁵ The reason for this was that it was originally a mere extension of the rule that neither spouse could be permitted to testify for or against the other.⁶ However, it soon became a separate rule justified on its own grounds. The most commonly cited of these grounds is the necessity to protect the marriage institution.⁷ This reasoning has been criticized on the basis that

85. *Ibid.*

86. *Ibid.*

few people, if any, know and rely on the protection of this rule in making communications to their spouse,⁸ and that the rule is an "indefensible obstruction to truth in practice."⁹

The common-law rule that made spouses *incompetent to testify as to confidential communications* by one to the other should not be confused with either the separate and distinct *privilege of not having to testify against one's spouse* or the *rule disqualifying one spouse from testifying on behalf of the other*.¹⁰ The latter two rules rest upon grounds completely independent of those supporting the exclusion of testimony by the spouses concerning confidential communications made by one to the other during coverture.

Testifying on Behalf of One's Spouse

Although the disqualification from testifying for one's spouse came into being about the same time as the privilege of not having to testify against the other spouse, the two concepts have no necessary connection in principle or purpose.¹¹ The disqualification of the spouses to come forward voluntarily in favor of each other seems to rest, first, on the ground that there is a natural bias of affection. Secondly, if such testimony were permitted, the spouse would be subject to cross examination which might divulge information unfavorable to the accused spouse. Therefore, the very purpose for which the privilege was intended would be defeated.¹² The latter reasoning has been criticized on the basis that

1. OHIO REV. CODE §§ 2317.02, 2945.42.

2. *People v. Hayes*, 140 N.Y. 484, 35 N.E. 951 (1894); *Lock v. State*, 33 Ohio App. 445, 169 N.E. 833 (1929); Annot., 4 A.L.R.2d 835 (1949); Annot., 63 A.L.R. 107 (1929).

3. Quick, *Privilege Under Uniform Rules of Evidence*, 26 U. CINC. L. REV. 537, 550 (1957); Note, *Evidence*, 6 OHIO ST. L.J. 78 (1939).

4. *Damn v. Lodge*, 158 Ohio St. 107, 107 N.E.2d 337 (1952); *Sessions v. Trevitt*, 39 Ohio St. 259 (1883); Quick, *supra* note 3, at 550. See also *Bird v. Hueston*, 10 Ohio St. 418 (1859), where the court stated in its syllabus: "2. The rule that husband and wife are incompetent to testify for or against each other, is not changed by the removal of incompetency on the ground of interest. Whether the husband or wife be a party to the action, or only interested in the event, the policy of the rule applies."

5. Annot., 4 A.L.R.2d 835, 836 (1949).

6. *Ibid.*

7. *Marsh v. Preferred Acc. Ins. Co.*, 89 F.2d 932, 934 (6th Cir. 1937); *Sessions v. Trevitt*, 39 Ohio St. 259, 267 (1883); *Cook v. Grange*, 18 Ohio 526 (1849); Annot., 10 A.L.R.2d 1389, 1391 (1950); Annot., 63 A.L.R. 107 (1929). See also *Dick v. Hyer*, 94 Ohio St. 351, 360, 114 N.E. 251, 253 (1916); Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 100, 113 (1956).

8. Hutchins & Slesinger, *Some Observations on the Law of Evidence; Family Relations*, 13 MINN. L. REV. 675 (1929).

9. 8 WIGMORE, EVIDENCE § 2228, at 221 (McNaughton rev. 1961).

10. Annot., 4 A.L.R.2d 835, 836 (1949); Annot., 63 A.L.R. 107 (1929). Cf. Quick, *supra* note 3, at 552. The UNIFORM RULES OF EVIDENCE abolish the *for* and *against* rules.

11. 8 WIGMORE, EVIDENCE § 2227, at 211 (McNaughton rev. 1961).

12. 2 WIGMORE, EVIDENCE § 601, at 732-33 (2d ed. 1940).

it will be the accused spouse himself who will call the other spouse to testify in his favor.¹³ The law should not deny to the accused spouse the right to the testimony of the other spouse because of a risk which he himself is willing to accept.¹⁴

Testifying Against One's Spouse

The privilege of not having to testify against one's spouse rests upon grounds completely different from those supporting the disqualification from voluntarily testifying in the other's behalf.¹⁵ The basis for the authorities supporting this rule seems to be that there is a natural repugnance to compel a husband or wife to be the possible means of the other's downfall.¹⁶ Even this reasoning has been criticized on the basis that it is a mere legal anachronism and an obstruction to truth.¹⁷

Exceptions to the Privilege

Certain exceptions to the privilege of not having to testify against one's spouse were recognized at the common law on the basis of necessity, that is, a necessity to avoid the extreme injustices which might inure upon a strict enforcement of the rule.¹⁸ In Ohio, as in other states, these common-law exceptions have taken statutory form.¹⁹ Ohio Revised Code section 2945.42 permits one spouse to testify against the other in all actions and proceedings regarding personal injury of either by the other, bigamy, failure to provide for, neglect of, or cruelty to their children under sixteen years of age,²⁰ and in proceedings under the Ohio Revised Code sections 3113.01 or 3113.03 for neglect or abandonment of the wife.²¹

Further exceptions seem to exist in Ohio, although not by statute, where the privilege is being used to perpetrate a fraud,²² where the spouse is acting as the agent for the other spouse,²³ and where the spouse is testi-

13. *Haberty v. State*, 8 Ohio C.C.R. 262 (Cir. Ct. App. 1894).

14. 2 WIGMORE, EVIDENCE, *op. cit. supra* note 12, at 732-33.

15. 8 WIGMORE, EVIDENCE § 2228, at 216 (McNaughton rev. 1961).

16. *Id.* at 217; Note, *Evidence*, 6 OHIO ST. L.J. 78, 81 (1939).

17. 8 WIGMORE, EVIDENCE, *op. cit. supra* note 15, at 221.

18. *Whipp v. State*, 34 Ohio St. 87, 88 (1877); 8 WIGMORE, EVIDENCE § 2239, at 242 (McNaughton rev. 1961); Quick, *supra* note 3, at 551.

19. OHIO REV. CODE §§ 2945.42, 3105.11.

20. *State v. Ward*, 92 Ohio App. 179, 109 N.E.2d 488 (1952).

21. Chapter 3115 of the Ohio Revised Code provides a means for enforcing the right of a wife, or any other person entitled to support, to be supported by her husband when he has left the jurisdiction. See 28 OHIO JUR. 2d *Husband and Wife* § 47, at 162 (1958).

22. OHIO JUR. *Witnesses* § 253, at 256 (1936); 28 R.C.L. § 115, at 526.

23. 2 WIGMORE, EVIDENCE § 616, at 749 (3d ed. 1940); 42 OHIO JUR., *op. cit. supra* note 22, at 256; 28 R.C.L. § 116, at 527. If this were not the case a spouse would be able to insulate himself from liability by always making his spouse his agent for business purposes.

fyng in an action against his spouse and a co-defendant and his testimony is directed toward the co-defendant.²⁴

*Common-Law Distinctions as Incorporated
in Ohio Statutory Law*

Many elements of the common-law rules regarding husband-wife testimony have been incorporated in the statutes of various jurisdictions. This is true in Ohio where the applicable statute in civil cases is Ohio Revised Code section 2317.02²⁵ and the applicable statute in criminal cases is Ohio Revised Code section 2945.42.²⁶

The Ohio civil statute preserves the common-law incompetency of the spouses to testify as to confidential communications made by one to the other. The Ohio criminal statute, however, while partially preserving the common-law privilege of a spouse not having to testify against the other spouse, completely changes the common-law rule disqualifying one spouse from testifying on behalf of the other spouse. Thus, contrary to the common-law rule prohibiting one spouse from testifying on behalf of the other spouse, the Ohio criminal statute permits a spouse to testify on behalf of the other spouse in "all criminal prosecutions."

TESTIMONY IN CIVIL CASES — OHIO REVISED CODE § 2317.02

In Ohio the rule as to husband-wife testimony in civil cases relates to the *competency* of the spouses to testify in regard to confidential com-

24. *Edwards v. Edwards*, 24 Ohio St. 402 (1873) (separate judgments only).

25. OHIO REV. CODE § 2317.02 provides as follows:

"The following persons shall not testify in certain respects:

....

(C) Husband or wife, concerning any communication made by one to the other, or an act done by either in the presence of the other, during coverture, unless the communication was made, or act done, in the known presence or hearing of a third person competent to be a witness; and such rule is the same if the marital relation has ceased to exist."

26. OHIO REV. CODE § 2945.42 provides as follows:

"No person is disqualified as a witness in a criminal prosecution by reason of his interest in the event thereof as a party or otherwise, or by reason of his conviction of crime. Husband and wife are competent witnesses to testify *in behalf* of each other in all criminal prosecutions, and to testify *against* each other in all actions, prosecutions, and proceedings for personal injury of either by the other, bigamy, or failure to provide for, neglect of, or cruelty to their children under 16 years of age. A wife may testify against her husband in a prosecution under section 3113.01 or 3113.03 of the Revised Code for neglect or abandonment of such wife. Such interest, conviction, or relationship may be shown for the purpose of affecting the creditability of such witness. Husband or wife shall not testify concerning a communication made by one to the other, or act done by either in the presence of the other, during coverture, unless the communication was made or act done in the known presence or hearing of a third person competent to be a witness, or in case of personal injury by either the husband or wife to the other, or bigamy, or failure to provide for, or neglect or cruelty of either to their children under 16 years of age, or neglect or abandonment of such wife under such sections. The presence or whereabouts of the husband or wife is not an act under this section. The rule is the same if the marital relation has ceased to exist." (Emphasis added.) See also OHIO REV. CODE §§ 2905.22, 2917.44.

munications made or acts done by the husband or wife to the other during coverture,²⁷ and does not affect their competency to testify as to other matters.

Necessity of the Marriage Relationship

The Ohio rule regarding husband-wife testimony in civil cases applies only to those individuals who maintain, in relation to one another, the legal relation of husband and wife.²⁸ Ohio courts have held that the burden of proving this relationship rests upon the party opposing the competency of the testimony.²⁹

Since, under the Ohio statute, the rule attaches only to communications made or acts done by one spouse to the other during the marriage relationship, it follows that the rule cannot be recognized in regard to second bigamous or plural spouses,³⁰ or those who have procured their marriages through fraud.³¹ Moreover, acts or communications made between husband and wife before marriage are not subject to the rule, as they were not made during coverture.³²

The Ohio civil statute, by itself and as incorporated in the criminal statute,³³ remains in effect after the marital relation has ceased to exist. Therefore, communications made by one spouse to the other cannot be testified to by a spouse after the marriage has been dissolved by divorce³⁴ or death.³⁵

Since the underlying reason for retaining the rule in respect to confidential communications is to protect the marriage institution, the basis for it would seem to fall upon the dissolution of the marriage. This has been taken into consideration in the drafting of the Uniform Rules of Evidence, which provide that the rule is deemed to be at an end upon divorce or the death of either spouse.³⁶

Effect of Presence of Third Person

Where a communication is made or act done by one spouse to the other in the known presence or hearing of a third person, the communi-

27. OHIO REV. CODE § 2317.02.

28. *Stober v. McCarter*, 4 Ohio St. 513 (1855); *Lynch v. State*, 5 Ohio App. 16 (1915); 42 OHIO JUR. *Witnesses* § 241, at 245 (1936).

29. *Lynch v. State*, *supra* note 28, at 26.

30. *Ibid*; 8 WIGMORE, EVIDENCE § 2231, at 224 (3d ed. 1961); 42 OHIO JUR., *op. cit. supra* note 28, at 245.

31. 42 OHIO JUR., *op. cit. supra* note 26, at 245; 28 R.C.L. § 114, at 526.

32. *Bolen v. Humes*, 94 Ohio App. 1, 114 N.E.2d 281 (1951).

33. OHIO REV. CODE §§ 2317.02, 2945.42.

34. *Cook v. Grange*, 18 Ohio 526 (1849); *Community Traction Co. v. Neorr*, 52 Ohio App. 190, 3 N.E.2d 638 (1936); *Holmes v. Pere Marquette Rd. Co.*, 28 Ohio App. 297, 162 N.E. 675 (1927); *Losh v. Brunk*, 18 Ohio App. 412 (1924); *Dischner v. Dischner*, 116 Ohio App. 86 (1921).

35. *Stober v. McCarter*, 4 Ohio St. 513 (1855).

36. *Quick*, *supra* note 3, at 553.

cation is no longer held to be confidential in nature and, therefore, is no longer entitled to the protection of the rule.³⁷

Known Presence of Third Person

Some trouble has been encountered in various jurisdictions as to the effect of a third person's presence if it was not known to the spouse making the communication. Logically it would seem that before a communication or act can be deemed to be non-confidential in nature, the presence of the third person should have been known to the communicating spouse. However, the majority of jurisdictions seem only to require that the communication be made within the hearing of a third person, whether known or not, in order to be rendered admissible.³⁸

Fortunately the above problem does not exist in Ohio for the applicable statute, Ohio Revised Code section 2317.02, specifically provides that before a communication or act is deemed to be non-confidential in nature it must be made in the *known* presence or hearing of a third person.³⁹ One should note that when a confidential communication is overheard, whether accidentally or by design, by some person who is neither a member of the husband-wife relation nor a necessary intermediary, such third person may testify as to the communication, being absolutely unaffected by the rule.⁴⁰

Competency of Third Person

Even though the act was done or communication made in the *known* presence or hearing of a third person, the act or communication is still deemed inadmissible if such third person, at the time the act was done or communication made, was incompetent to be a witness.⁴¹ Thus, the rule can still be claimed if the third person present at the time the act was done or communication made was of unsound mind, a child under ten years of age who was incapable of receiving just impressions of facts and transactions and relating them truly,⁴² or an attorney or physician of the spouses during an interview or consultation.⁴³ Further-

37. *Sessions v. Trevitt*, 39 Ohio St. 259, 267-68 (1883); *Bean v. Green*, 33 Ohio St. 444, 447 (1878); Annot., 63 A.L.R. 107, 108 (1929).

38. *Linnell v. Linnell*, 249 Mass. 51, 143 N.E. 813 (1924); Annot., 63 A.L.R. 107, 114-15 (1929).

39. OHIO REV. CODE §§ 2317.02, 2945.42.

40. 42 OHIO JUR. *Witnesses* § 237, at 241 (1936); 28 R.C.L. § 110, at 521.

41. OHIO REV. CODE §§ 2317.02, 2945.42; 42 OHIO JUR. *Witnesses* § 248, at 252 (1936).

42. OHIO REV. CODE § 2317.01.

43. *Sieving v. Seidelmeyer*, 7 Ohio Dec. Reprint 609 (Super. Ct. 1879); 42 OHIO JUR., *supra* note 41, at 252. See also *Alliance First Nat'l Bank v. Maus*, 100 Ohio App. 433, 137 N.E.2d 305 (1955), where the court stated in its syllabus:

"1. Under the provisions of Sections 2317.02 and 2317.03, Revised Code, an attorney who represents both a husband and wife in a transaction may testify concerning such transac-

more, testimony concerning husband-wife communications would be admissible even if the third person, known to be present and competent at the time the communication was made or act done, is not living at the time of trial⁴⁴ or is otherwise incompetent at the time of trial.

Determination of Presence or Competency

Upon objection to the introduction of alleged confidential communications, the examining party will have the burden of proving that a third person competent to be a witness was present at the time the communication was made or act done and that the third person's presence was *known* to the spouse.⁴⁵

The determination of whether a third person, competent to be a witness, was present at the time the communication was made or act done is for the court to decide and not for the jury.⁴⁶ Further, a husband or wife called to testify in regard to such communication or act is competent to testify as to the known presence, hearing, or knowledge of such third person.⁴⁷

Acts and Communications Under the Ohio Civil Statute

For an act or communication made between the spouses to be governed by the civil statute, it must have been confidential in nature and must have arisen from the marital relation. Also, the civil statute regarding husband-wife confidential communications prohibits only testimony as to the substance of the matter communicated and not the fact that a communication was made by one spouse to the other without relating what was communicated.⁴⁸

Knowledge Gained Through General Observation

Although a spouse is incompetent to testify to any matter the knowledge of which was acquired in conjugal confidence, he or she may testify to any other matter concerning his or her spouse, insofar as such knowl-

tions, where, after the decease of one of the parties thereto, the surviving spouse gives his consent."

44. *Sessions v. Trevitt*, 39 Ohio St. 259 (1883); *Sieving v. Seidelmeyer*, 7 Ohio Dec. Reprint 609 (Super. Ct. 1879); *Morgan v. Bartlette*, 3 Ohio C.C.R. 431 (Cir. Ct. 1888); *Citizens Bank v. Andrews*, 24 Ohio N.P. (n.s.) 361, 381 (C.P. 1923).

45. *Losh v. Brunk*, 18 Ohio App. 412, 418 (1924).

46. *Finnegan v. Metropolitan Life Ins. Co.*, 162 N.E.2d 216 (Ohio Ct. App. 1958); *Commercial Gazette Co. v. Grooms*, 10 Ohio Dec. Reprint 489 (Super. Ct. 1889).

47. *McCague v. Miller*, 36 Ohio St. 595 (1891).

48. Annot., 10 A.L.R.2d 1389, 1396 (1950).

edge is gained from general observation not springing from the marital relation.⁴⁹

In *Stober v. McCarter*⁵⁰ the Ohio Supreme Court permitted a decedent's widow to testify as to work and labor performed by the plaintiff for her husband before his death. In admitting this testimony over the objections of the deceased spouse's administrator, the court held that this was an "independent fact" learned during coverture. Since this was an "independent fact," open to the observation of everyone, the disclosure of it by the deceased's spouse would violate no conjugal confidence.⁵¹

Along these same lines Ohio courts have held that a wife could testify as to the whereabouts of her husband a few days before his death,⁵² and that a wife could testify as to her observation of the accident scene and conversation with her husband as he lay dying as the result of a household accident.⁵³

The latter case involved an action based upon an accident and life insurance policy for accidental death. The defendant insurance company objected to the introduction of testimony by the decedent's widow as to what her husband had related to her concerning the cause of his injury and as to her observation of the accident scene. In holding the widow's testimony admissible, the court stated that the Ohio legislature could not have intended the exclusion of all transactions and communications made between husband and wife, however unsecretive or unconfidential in nature.⁵⁴

Conversely, in *Community Traction Co. v. Neorr*⁵⁵ the Ohio Supreme Court held that a divorced woman was incompetent to testify as to the odor of beer upon her former husband's breath immediately after an automobile accident that had occurred while they were still married. In *Commercial Gazette Co. v. Grooms*⁵⁶ the court went so far as to prohibit a husband from testifying as to unconscious acts done and words spoken by his wife while she was in a somnambulistic state.

In view of the policy reasons for retaining the husband-wife rule con-

49. *Marsh v. Preferred Life Ins. Co.*, 89 F.2d 932, 934 (6th Cir. 1937); *Stober v. McCarter*, 4 Ohio St. 513, 523-24 (1855); *Finnegan v. Metropolitan Life Ins. Co.*, 162 N.E.2d 216 (Ohio Ct. App. 1958); 42 OHIO JUR. *Witnesses* §§ 246, 251, at 249, 254 (1936); Annot., 10 A.L.R.2d 1389, 1391 (1950).

50. 4 Ohio St. 513 (1855).

51. *Holtz v. Dick*, 42 Ohio St. 23, 26 (1884); *Stober v. McCarter*, 4 Ohio St. 513, 523-24 (1855); Annot., 10 A.L.R.2d 1389, 1418 (1950).

52. *Finnegan v. Metropolitan Life Ins. Co.*, 162 N.E.2d 216 (Ohio Ct. App. 1958).

53. *Marsh v. Preferred Acc. Ins. Co.*, 89 F.2d 932 (6th Cir. 1937).

54. *Id.* at 934.

55. 52 Ohio St. 190, 3 N.E.2d 638 (1936). See also *Stevenson v. Morris*, 37 Ohio St. 10 (1881), where the court prohibited a wife's testimony regarding instructions given to her by her husband on how she should protect herself in case she was assaulted.

56. 10 Ohio Dec. Reprint 489 (Super. Ct. 1889).

cerning confidential communications, the decisions of the courts in the *Neorr* and *Grooms* cases seem indefensible. The communications made and acts done were not based upon any marital confidence and, thus, the application of the rule merely aided in the obstruction of truth and justice.

Written Communications

Generally, the rules pertaining to written communications are no different than those relating to oral communications;⁵⁷ that is, a communication made between the spouses should not be admissible unless it appears that the communication was made under such circumstances so that it cannot be considered confidential.⁵⁸ Accordingly, in many jurisdictions, including Ohio, the courts have held that where a written communication comes into the possession of a third person, such communication is admissible against the spouse when produced at trial.⁵⁹ In Ohio this rule seems to be the same regardless of the fact that the third person accidentally or wrongfully came into possession of the communication.⁶⁰

Statutory Effect on Competency of Spouses to Testify as to Confidential Communications

The general rule in most jurisdictions is that the exclusion of testimony pertaining to confidential communications is not an absolute prohibition.⁶¹ In Ohio many courts have treated the words of the statute, "*shall not testify in certain respects,*" as being mandatory words of disqualification and have, therefore, held that the spouses are absolutely prohibited from testifying as to confidential communications except as specifically provided for by the statute.⁶² However, in 1924, the Ohio Supreme Court in *Ruch v. State*⁶³ permitted a spouse to testify in regard to a confidential communication due to the fact that counsel made no objection. The court in its opinion rejected the theory that a spouse is wholly prohibited from testifying as to confidential communications.

57. Annot., 63 A.L.R. 107, 120 (1929).

58. *Marsh v. Preferred Acc. Ins. Co.*, 89 F.2d 932, 934 (6th Cir. 1937); *Finnegan v. Metropolitan Life Ins. Co.*, 162 N.E.2d 216 (Ohio Ct. App. 1958); 42 OHIO JUR. *Witnesses* §§ 246, 249, at 249, 254 (1936); Annot., 10 A.L.R.2d 1389, 1391 (1950).

59. *Whalen v. State*, 12 Ohio C.C.R. 584 (Cir. Ct. 1896); *Lowther v. State*, 4 Ohio C.C.R. 522 (Cir. Ct. 1890); Annot., 63 A.L.R. 107, 120 (1929).

60. *Whalen v. State*, *supra* note 59; 42 OHIO JUR. *Witnesses* §§ 240, 250 at 244, 253 (1936); Annot., 63 A.L.R. 107, 120 (1929).

61. Note, *Privileged Communications — Who May Assert and Who May Waive the Privilege Under the Ohio Statute*, 20 U. CINC. L. REV. 75 (1951); Note, *Evidence*, 6 OHIO ST. L.J. 78, 81 (1939).

62. Note, 20 U. CINC. L. REV. 75, *supra* note 61, at 78.

63. 111 Ohio St. 580, 146 N.E. 67 (1924). See also *Locke v. State*, 33 Ohio App. 445, 169 N.E. 833 (1929).

The right to object to the introduction of testimony concerning confidential communications made by one spouse to the other may be waived by the person entitled to assert the rule.⁶⁴ Further, if the rule is once waived it cannot again be asserted in the same trial. Some authorities do state, however, that the waiver of the rule at one trial will not preclude the assertion of it at a subsequent trial.⁶⁵

Persons Who May Claim the Benefits of the Rule

Generally, the rule in most jurisdictions is that the husband-wife rule concerning confidential communications may be claimed only by the communicating spouse.⁶⁶ Nevertheless, Ohio courts are in hopeless conflict as to who qualifies under the statute as the one entitled to its benefits.⁶⁷

In *Dick v. Hyer*⁶⁸ an action on a promissory note was instituted against the defendant, a co-maker with her former husband. The defendant, in attempting to establish that the date on the note was altered after she had signed it, testified that she had signed the note at her husband's request and in his presence only. The *plaintiff* objected to the introduction of this testimony on the ground that it was protected by the Ohio statute as a confidential communication. The court sustained the plaintiff's objection to the wife's testimony and, thus, allowed one not a party to the marital relation to claim the benefit of the statute.

On the basis of the Ohio Supreme Court's decision in the *Dick* case and other Ohio court decisions in this same area, the trend of judicial authority apparently permits the benefit of the rule concerning confidential communications to be claimed not only by the parties to the marriage but even by other parties involved in the action.⁶⁹ The inequities that can and do result when a stranger to the rule is permitted to claim its protection are immediately apparent as evidenced by the *Dick* case. A clarification of this point is long overdue, if not from the courts themselves, then through legislative action.

64. *Ruch v. State*, 111 Ohio St. 580, 146 N.E. 67 (1924); *Pendleton v. Pendleton*, 103 Ohio App. 345, 145 N.E.2d 485 (1957); *Piqua v. Collett*, 151 N.E.2d 770 (Ohio Ct. App. 1956); 42 OHIO JUR. *Witnesses* § 237, at 240, 241 (1936).

65. *Pendleton v. Pendleton*, *supra* note 64; 42 OHIO JUR., *supra* note 64, at 240-41; 28 R.C.L. § 110, at 521.

66. Note, *Privileged Communications — Who May Assert and Who May Waive the Privilege Under the Ohio Statute*, 20 U. CINC. L. REV. 75, 80 (1951).

67. Note, *Husband-Wife Privileged Communications Summarized*, 8 CLEV. MAR. L. REV. 531 (1959).

68. 94 Ohio St. 351, 114 N.E. 251 (1916).

69. *Dick v. Hyer*, 94 Ohio St. 351, 114 N.E. 251 (1916); *Community Traction Co. v. Neorr*, 52 Ohio App. 190, 3 N.E.2d 638 (1936); *Worland v. McGill*, 26 Ohio App. 442 (1927); Note, 20 U. CINC. L. REV. 75, *supra* note 66, at 77.

Objection to Admission of Confidential Communications

Objection to the admissibility of confidential communications must be made at the time the testimony is sought to be introduced and not for the first time on appeal.⁷⁰ However, where the objection is properly made at the trial level, there is a presumption, on appeal, in favor of the admissibility of the testimony.⁷¹ It will not be considered error for the lower court to have admitted such testimony unless this presumption can be rebutted by the record.

Actions in Which Testimony Concerning Confidential Communications May Be Admitted

There are certain actions at law in which no objection can be made to the introduction of testimony concerning confidential communications. Although these actions are not listed in the Ohio civil statute⁷² they are enumerated in the Ohio criminal statute⁷³ and in an Ohio divorce statute.⁷⁴

Criminal Actions

Under the Ohio criminal statute objection may not be made to the introduction of testimony concerning confidential communications in cases of:

[P]ersonal injury by either the husband or wife to the other, or bigamy, or failure to provide for, or neglect or cruelty of either to their children under 16 years of age, or neglect or abandonment of such wife under such sections.⁷⁵

Divorce and Alimony Actions

The protection of the husband-wife confidential communication rule cannot be claimed in divorce and alimony actions. The applicable statute, Ohio Revised Code section 3105.11, provides:

The parties notwithstanding their marital relation, shall be competent to testify in actions and proceedings under section 3105.01 to 3105.21 inclusive, of the Revised Code, to the same extent that any other witness might.⁷⁶

70. *Gaydas v. Fusselman*, 11 Ohio L. Abs. 652 (Ct. App. 1931).

71. *Westerman v. Westerman*, 25 Ohio St. 500 (1874); *F. A. Requarth Co. v. Holland*, 78 Ohio App. 493, 66 N.E.2d 329 (1946); cases cited note 46 *supra*.

72. OHIO REV. CODE § 2317.02.

73. OHIO REV. CODE § 2945.42.

74. OHIO REV. CODE § 3105.11.

75. OHIO REV. CODE § 2945.42.

76. OHIO REV. CODE § 3105.11. See also *Weikert v. Weikert*, 143 N.E.2d 863 (Ohio Ct. App. 1956).

In *McEntire v. McEntire*⁷⁷ a husband and wife entered into an oral agreement of separation and property settlement and then parted. The wife attempted to exclude the husband's testimony concerning the oral separation agreement on the ground that it was a confidential communication made during coverture. The court, in holding the husband's testimony admissible, pointed out that under Ohio statutory law a spouse is permitted to testify against his mate in divorce and alimony proceedings "to the same extent that any other witness might."⁷⁸

Grand Jury Hearings

The exclusion of a spouse's testimony concerning confidential communications does not apply in hearings before the grand jury. In *Wickliffe v. Alvis*⁷⁹ a wife appeared before the grand jury and testified against her husband in regard to confidential communications made between them. The husband claimed that the indictment returned against him and all subsequent proceedings based upon this indictment were void because of the inadmissibility of his wife's testimony. The court, in holding the grand jury's indictment valid, did not feel that the grand jury should be bound by technical rules of evidence and further stated:

1. The grand jury, in inquiring into crimes and offenses and returning indictments, does not exercise a judicial function.
2. An indictment and subsequent proceedings based thereon are not rendered invalid on the ground that illegal and incompetent testimony was heard by the grand jury which voted such indictment.⁸⁰

Alienation of Affection Suits

The Ohio courts seem to be in agreement that in actions involving alienation of affection a confidential communication made between husband and wife is not subject to exclusion under the statute if the purpose of introducing such testimony is to show the state of feeling that existed between the spouses prior to the alleged alienation of affection.⁸¹ This rule is the same whether the confidential communication was made prior or subsequent to the marriage relationship.⁸²

77. 107 Ohio St. 510, 140 N.E. 328 (1923); 42 OHIO JUR. *Witnesses* § 242, at 246 (1936).

78. *McEntire v. McEntire*, 107 Ohio St. 510, 521, 140 N.E. 328, 331 (1923).

79. 103 Ohio App. 1, 144 N.E.2d 207 (1957).

80. *Ibid.*

81. *Holtz v. Dick*, 42 Ohio St. 23 (1884); *Whalen v. State*, 12 Ohio C.C.R. 584 (Cir. Ct. 1893); 28 OHIO JUR. 2d *Husband and Wife* § 156, at 280 (1958); 21 OHIO JUR. *Husband and Wife* § 286, at 570 (1932); Annot., 36 A.L.R. 1068 (1925). In *Brodbeck v. Ottgen*, 17 Ohio Supp. 129 (C.P. 1945), the court held that admissions in a husband's answer and cross-petition filed in his wife's divorce action were admissible as evidence to show the status of conjugal relations at the time of the divorce suit.

82. *Preston v. Bowers*, 13 Ohio St. 1 (1861).

RULES IN CRIMINAL CASES —
OHIO REVISED CODE § 2945.42

In Ohio the common-law rules relating to the testimony of a husband or wife in a criminal case have been somewhat changed by Ohio Revised Code section 2945.42.

Confidential Communications

The Ohio criminal statute regulating husband-wife testimony incorporates the common-law rule as adopted by the Ohio civil statute that:

[H]usband or wife, [shall not testify] concerning any communication made by one to the other, or an act done by either in the presence of the other, during coverture, unless the communication was made, or act done, in the known presence or hearing of a third person competent to be a witness⁸³

The rule pertaining to confidential communications in criminal cases, as in civil cases, applies only to those individuals who maintain the legal relation of husband and wife, and the rule remains in effect even after the marital relation has ceased to exist.

Acts and Communications Under the Criminal Statute

The terms "act" and "communication" as employed in the criminal statute are construed in the same manner as in connection with the civil statute. One exception does exist, however, in that the criminal statute specifically provides that a spouse may testify as to the *presence or whereabouts* of the other spouse even though no third person was present at the time.⁸⁴

Spouse's Waiver of the Rule

The trend of authority in recent Ohio cases has been to construe the criminal rule as to husband-wife confidential communications in the same manner as the civil statute and to make the spouses competent to waive the rule.⁸⁵ In *Ruch v. State*⁸⁶ the Ohio Supreme Court stated:

Where in a prosecution for crime, the wife of the defendant is called by the state to testify, and gives testimony material to the indictment, which testimony consists in part of a communication made by the husband to the wife during coverture, not in the known presence or

83. OHIO REV. CODE § 2945.42.

84. *Ibid.*; 42 OHIO JUR. *Witnesses* § 256, at 259 (1936). "The presence or whereabouts of the husband or wife is not an act under this section." OHIO REV. CODE § 2945.42.

85. *Ruch v. State*, 111 Ohio St. 580, 146 N.E. 67 (1924); *Piqua v. Collett*, 151 N.E.2d 770 (Ohio Ct. App. 1956).

86. 111 Ohio St. 580, 146 N.E. 67 (1924).

hearing of a third person competent to be a witness, and no objection is made by the defendant or his counsel thereto, and no motion to exclude the testimony, and no request to instruct the jury not to consider such testimony, and the attention of the trial court is not called thereto at any time during the trial, *the defendant will be held to have waived the provisions of section 13659 General Code* [Ohio Rev. Code § 2945.42], in his behalf, and such circumstances will not constitute reversible error. (Emphasis added.)⁸⁷

Testifying on Behalf of One's Spouse

Under the provisions of the Ohio criminal statute the common-law disqualification of a spouse to testify on behalf of the other spouse has been completely abrogated. A spouse is now competent to testify on behalf of the other spouse in "all criminal prosecutions."⁸⁸

Testifying Against One's Spouse

The common-law privilege of not having to testify against one's spouse has been partially abrogated by the criminal statute.⁸⁹ Under the provisions of Ohio Revised Code section 2945.42 one spouse is now competent to testify against the other in:

all actions, prosecutions, and proceedings for personal injury of either by the other, bigamy, or failure to provide for, neglect of, or cruelty to their children under 16 years of age. A wife may testify against her husband in a prosecution under section 3113.01. or 3113.03 of the Revised Code for neglect or abandonment of such wife.⁹⁰

Waiver of the Privilege

Prior to the first statutory enactment in Ohio in regard to husband-wife testimony in criminal cases the courts followed the rule of the general incompetency of the spouse to testify,⁹¹ an incompetency that could not be waived.⁹² However, recent Ohio cases have construed the criminal statute so as to render the spouse partially competent to testify and, therefore, able to waive the incompetency of a spouse called to the stand by the state.⁹³

87. *Id.* at 580, 146 N.E. at 67.

88. OHIO REV. CODE § 2945.42. See 2 WIGMORE, EVIDENCE § 601, at 731 (3d ed. 1940); Annot., 4 A.L.R.2d 835, 836 (1949). Under the UNIFORM RULES OF EVIDENCE the *for* and *against* rules have been abolished.

89. *State v. Rodriguez*, 110 Ohio App. 307, 169 N.E.2d 444 (1959).

90. OHIO REV. CODE § 2945.42.

91. *Steen v. State*, 20 Ohio St. 333 (1870); *State v. Rodriguez*, 110 Ohio App. 307, 169 N.E.2d 444 (1959); *Locke v. State*, 33 Ohio App. 445, 448, 169 N.E. 833, 835 (1929); Note, *Evidence*, 6 OHIO ST. L.J. 78, 81 (1939).

92. *Schultz v. State*, 32 Ohio St. 276 (1877); *Steen v. State*, *supra* note 91; *Locke v. State*, *supra* note 91; Note, *supra* note 91, at 82.

93. *Ruch v. State*, 111 Ohio St. 580, 146 N.E. 67 (1924); *Piqua v. Collett*, 151 N.E.2d 770 (Ohio Ct. App. 1956).

In *Locke v. State*⁹⁴ the Ohio Supreme Court sustained the accused's objection to the testimony of his spouse after she was called to the stand by the state and examined by the prosecution at length. Although the court, in this case, did not hold that the accused spouse waived the privilege of the statute, it did state:

The spouse is no longer absolutely incompetent. Husband or wife may testify for each other, and *this partial competency makes it possible for the accused to waive the competency of such witness when called by the state.* (Emphasis added.)⁹⁵

From the viewpoint of policy, every consideration supports the theory that the privilege not to testify against one's spouse may be waived.⁹⁶ Owing to the scarcity of modern case law on the subject, it would be unwise to state categorically that Ohio courts will, in all cases, construe the partial incompetency of a spouse to testify against the other spouse as a privilege subject to waiver. The trend of judicial authority, however, seems to be in that direction.

Persons Who May Claim the Benefits of the Privilege

Ohio law is not clear as to who has the right to claim the privilege to not testify against one's spouse as conferred by Ohio Revised Code section 2945.42. In view of the grounds upon which the privilege rests, it seems clear that the right to invoke the rule should belong to both the accused and his spouse.⁹⁷ To hold otherwise would be to put the accused's spouse in the possible position of either going to jail for contempt for failure to answer a question posed by the prosecution or becoming the cause of his spouse's possible conviction.

State's Right to Comment on Invocation of Privilege

Generally, courts will not permit comment on the invocation of the husband-wife privilege in criminal cases.⁹⁸ But in Ohio, contrary to the great weight of authority, the courts hold that the invocation of the privilege and the failure of the spouse to call his spouse to the stand in his behalf are the proper subject of comment by the prosecution.⁹⁹

94. 33 Ohio App. 445, 169 N.E. 833 (1929).

95. *Locke v. State*, 33 Ohio App. 445, 448, 169 N.E. 833, 835 (1929).

96. Note, *supra* note 91, at 81.

97. *Ibid.*

98. *Graves v. United States*, 150 U.S. 118 (1893); *Zumwalt v. State*, 16 Ariz. 82, 141 Pac. 710 (1914); *People v. Klor*, 32 Cal. 2d 658, 197 P.2d 705 (1948); *State v. Spears*, 76 Wyo. 82, 300 P.2d 551 (1956). The UNIFORM RULES OF EVIDENCE § 23(4) prohibit any comment by court or counsel. On the other hand, the MODEL CODE OF EVIDENCE § 201(3) allows comment by court or counsel if the privilege is claimed and allowed.

99. *State v. Herman*, 179 N.E.2d 89 (Ohio Ct. App. 1957).

State v. Herman,¹⁰⁰ the principal Ohio case supporting the right of the state to comment on the accused's invocation of the privilege, relies upon an analogy between the invocation of the privilege and the failure of the accused to take the stand in his own defense.¹⁰¹ Since the Ohio Constitution specifically provides that the state may comment on the accused's failure to take the stand in his own defense,¹⁰² the court held that the same principle applied in respect to the invocation of the privilege.

CONCLUSION

The three common-law rules concerning husband-wife testimony journeyed long through history before being incorporated into the statutory law of Ohio. Ohio courts would do well to consider these common-law foundations when construing the husband-wife statutes in future cases.

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100. *Ibid.*

101. *Id.* at 90.

102. The analogy seems incomplete. OHIO CONST. art. 1, § 10 provides that "No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and the jury and may be the subject of comment by counsel." But OHIO REV. CODE § 2945.42 provides that "Husband and wife shall not testify. . . ." This section does not provide for comment upon the invocation of the privilege.