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ADMISSIBILITY IN TENNESSEE OF SPOUSES' TESTIMONY CONCERNING THEIR PRIVATE AFFAIRS

In Tennessee neither husband nor wife may testify to matters occurring between them by reason of the marital relation.¹ The purpose of this rule is to insure "a free exchange of confidences" between husband and wife upon the theory that mutual confidence is a necessary element of successful marriage.² The other states agree in principle; every state places some restriction upon the testimony of husband and wife.³ Although this Note is primarily concerned with Tennessee law, there are differences in the restrictions imposed by various states which make some comparison desirable. The common law is the starting point.

I. THE COMMON LAW RULES OF MARITAL DISQUALIFICATION

A. *Incompetence of One Spouse to Testify for the Other*⁴

At common law when one spouse was a party the other could not be a witness for him.⁵ The party was incompetent; it was thought that his testimony was untrustworthy because of his interest in the outcome. Husband and wife were one in the eyes of the law; their interests were ordinarily the same; they were biased by the affection between them. Therefore, when one was a party, both were incompetent, because they were considered untrustworthy witnesses.⁶

B. *Incompetence of One Spouse to Testify Against the Other*⁷

Also when one spouse was a party the other could not be a witness against him.⁸ The incompetence of the witness was required by a public policy embracing three separate considerations: (1) Marital discord would attend the appearance of one spouse against the other. Parties were adversaries; so were witnesses to some extent. To preserve the "peace of families,"

1. TENN. CODE ANN. § 9777 (Williams, 1934) (civil cases); *McCormick v. State*, 135 Tenn. 218, 186 S. W. 95 (1916) (criminal cases).

2. *Harp v. State*, 158 Tenn. 510, 513, 14 S. W. 2d 720 (1928).

3. 3 VERNIER, AMERICAN FAMILY LAWS § 226 (1935).

4. On this general topic, see 2 WIGMORE, EVIDENCE §§ 600-20 (3d ed. 1940); 5 JONES, COMMENTARIES ON EVIDENCE §§ 2128-42 (2d ed. 1926); 1 BL. COMM. *443.

5. *Owen v. State*, 89 Tenn. 698, 16 S. W. 114 (1891); *Goodwin v. Nicklin*, 53 Tenn. 256 (1871); *Kelly v. Proctor*, 41 N. H. 139 (1860); *Johnston v. Slater*, 11 Gratt. 321 (Va. 1854); *Stapleton v. Crofts*, 18 Q. B. 367, 118 Eng. Rep. 137 (1852).

6. "The unity of interest of the husband and wife would necessarily exclude both, when either is incompetent." *Patton v. Wilson*, 70 Tenn. 101, 113 (1878).

7. On this general topic, see 8 WIGMORE, EVIDENCE §§ 2227-45 (3d ed. 1940); 5 JONES, COMMENTARIES ON EVIDENCE §§ 2128-42 (2d ed. 1926); 1 BL. COMM. *443.

8. *Kimbrough v. Mitchell*, 38 Tenn. 539 (1858); *Brewer v. Ferguson*, 30 Tenn. 564 (1851); *Knowles v. People*, 15 Mich. 408 (1867); *Pringle v. Pringle*, 59 Pa. 281 (1868).

the witness would not be heard.⁹ (2) Marital confidence would be violated by the disclosure of private affairs of husband and wife. As a result secretive behavior would replace the frankness desirable between them.¹⁰ (3) Incrimination of one spouse by the other would be repugnant as akin to self-incrimination.¹¹

II. STATUTES PROTECTING MARITAL COMMUNICATIONS¹²

In most states the rules of the common law have been abrogated or modified and husband and wife are competent witnesses for or against each other.¹³ However the common law policy of protecting marital confidence has continued to have an important effect upon the testimony of married persons. Some forty states have by statute adopted testimonial restrictions which in certain situations prevent disclosure by husband or wife of private communications between them;¹⁴ and a similar result is reached by the courts in the absence of statute.¹⁵

A. The Nature of the Testimonial Restrictions

The marital communications statutes are of two general types: one makes the testimony inadmissible; the other creates a privilege against its admission. The important difference is that the privilege may be waived¹⁶ and the

9. "[T]o admit such evidence would occasion domestic dissensions and discord." *Goodwin v. Nicklin*, 53 Tenn. 256, 258 (1871).

10. "[T]he consciousness that this might be done, would be productive of reserve, distrust, and anxiety." *Brewer v. Ferguson*, 30 Tenn. 564, 567 (1851).

11. "No public policy is sound which . . . by means of the evidence of one, consigns the other to the gallows, the penitentiary, or the jail." *Norman v. State*, 127 Tenn. 340, 355, 155 S. W. 135, 139 (1912).

12. On this general topic, see 8 WIGMORE, EVIDENCE §§ 2332-41 (3d ed. 1940); Hines, *Privileged Testimony of Husband and Wife in California*, 19 CALIF. L. REV. 390 (1931); Hutchins and Slesinger, *Some Observations on the Law of Evidence: Family Relations*, 13 MINN. L. REV. 675 (1929); Note, 30 ILL. L. REV. 783 (1936).

13. The rules of evidence which restrict the evidence of married witnesses have been codified in almost every state. The table below is based upon 3 VERNIER, AMERICAN FAMILY LAWS § 226 (1935). Only statutes which are clearly restrictive are tabulated.

Husband or Wife as Witness for the Other	<i>Civil Cases</i> <i>Criminal Cases</i>	
Incompetent	4 states	4 states
Witness—spouse must consent	1 state	12 states
Husband or Wife as Witness Against the Other		
Incompetent	9 states	16 states
Party-spouse must consent	14 states	8 states
Witness-spouse must consent	1 state	9 states
Both spouses must consent	no states	8 states
Communications between Husband and Wife		
Inadmissible	16 states	
Witness-spouse must consent	7 states	
"Other-spouse" must consent	16 states	
Both spouses must consent	1 state	

14. See table, note 13, *supra*.

15. *E.g.*, *McCormick v. State*, 135 Tenn. 218, 186 S. W. 95 (1916). See Note, 27 L. R. A. (N.S.) 273 (1910).

16. On waiver, see 8 WIGMORE, EVIDENCE § 2340 (3d ed. 1940).

testimony thereby made admissible. Among statutes creating a privilege there is a further difference: some place the privilege in the communicating spouse; some, in the witness spouse.

Dean Wigmore argues convincingly that the purpose of protecting marital confidence is adequately served by a privilege in the communicating spouse.¹⁷ It is his conduct which is intended to be influenced. If he is apprehensive of public disclosure, he might hesitate to confide in his spouse. The rule is aimed at dispelling any such apprehension on his part, and this can most effectively be done by enabling him to prevent disclosure, rather than by giving this ability to the other spouse or to the party against whom the testimony is offered. His peace of mind is well secured when the admission of the testimony is conditioned upon his consent; and, therefore, when he does consent, there is no harm in permitting disclosure. Evidence is unnecessarily lost when someone else is able to prevent disclosure.¹⁸

B. *The Nature of the Conduct Protected*

Whatever the nature of the testimonial restriction which the statutes create, it is almost always imposed upon the disclosure of "communications" or "confidential communications" between husband and wife.¹⁹ Despite the similarity of phrasing, the courts have not agreed upon the nature of the conduct which comes within the immunity. Some courts protect only conduct which is intended to transmit information from husband to wife.²⁰ Other courts extend protection to conduct which is not intended to transmit information, but from which information is acquired.²¹ However, the position a court takes on this question does not define the scope of the immunity. Disclosure of conduct which is not confidential in nature is ordinarily allowed,²² and conduct which is not intended to transmit information is apt to be treated as non-confidential.²³ Ultimately, the application of a particular statute is controlled by what the courts of that state believe necessary for the protection of marital confidence.

17. *Ibid.*

18. Professor Vernier argues that the various rules do not have any effect upon the conduct of husband and wife, and that they do have an obstructive effect upon the ascertainment of truth. He would do away with all the rules. 3 VERNIER, AMERICAN FAMILY LAWS § 226, p. 589 (1935).

19. 3 VERNIER, AMERICAN FAMILY LAWS § 226 (1935).

20. *Posner v. New York Life Ins. Co.*, 56 Ariz. 202, 106 P. 2d 488 (1940); *In re Pusey's Estate*, 180 Cal. 368, 181 Pac. 648 (1919); *State v. Dixson*, 80 Mont. 181, 260 Pac. 138, 146 (1927); *Howard v. State*, 103 Tex. Cr. Rep. 205, 280 S. W. 586 (1926).

21. *Mercer v. State*, 40 Fla. 216, 24 So. 154 (1898); *Todd v. Barbee*, 271 Ky. 381, 111 S. W. 2d 1041 (1937); *People v. Gessinger*, 238 Mich. 625, 214 N. W. 184 (1927); *Whitehead v. Kirk*, 104 Miss. 776, 61 So. 737 (1913); *Mcnefee v. Commonwealth*, 55 S. E. 2d 9 (Va. 1949).

22. *Wolfe v. United States*, 291 U. S. 7, 54 Sup. Ct. 279, 78 L. Ed. 617 (1934); *Lowry v. Lowry*, 170 Ga. 349, 153 S. E. 11 (1930); *Toole v. Toole*, 112 N. C. 152, 16 S. E. 912 (1893).

23. *Smith v. State*, 198 Ind. 156, 152 N. E. 803 (1926); *Sexton v. Sexton*, 129 Iowa 487, 105 N. W. 314 (1905).

III. DEVELOPMENT OF THE PRESENT TENNESSEE RULE

In Tennessee as in most other states husband and wife are now competent witnesses for or against each other, but their testimony is restricted to prevent disclosure of private matters. It is not clear that the same restriction is applicable to both civil and criminal cases. In this connection the history of the development of the present rule is relevant.

A. In Civil Cases

The first step away from the common law rules of disqualification was the passage in 1868 of a statute making parties and other interested persons competent witnesses in civil cases.²⁴ The party spouse was thus enabled to testify. However, it was soon held that he might not disclose information acquired by reason of the marital relation, in the case of *Hale v. Kearley*.²⁵

In 1878 the incompetence of the witness spouse was removed by the decision in *Patton v. Wilson*,²⁶ and a similar restriction was imposed upon his testimony. In 1879 the present statute, now section 9777, was passed providing that in civil cases "neither husband nor wife shall testify as to any matter that occurred between them by virtue of or in consequence of the marital relation."²⁷

B. In Criminal Cases

Meanwhile, in criminal cases the common law remained unchanged. After the criminal defendant was made competent by statute,²⁸ the courts, following the reasoning of *Patton v. Wilson*, might have held his

24. Tenn. Acts 1868, c. 75, now incorporated in TENN. CODE ANN. § 9777 (Williams, 1934).

25. 67 Tenn. 49 (1874). Where husband and wife were joint or adverse parties, both were incompetent, since their testimony would then be for or against each other. *Self v. Haun*, 2 Tenn. Cas. 123 (1876); *Guion v. Tuggle* (Tenn. Sup. Ct. 1873) [set out in *Patton v. Wilson*, 70 Tenn. 101, 108-10 (1878)]; cf. *Hyden v. Hyden*, 65 Tenn. 406 (1873). But cf. *Foster v. McVann* (Tenn. Sup. Ct. 1878) (also set out in *Patton v. Wilson*, *supra* at 111-12).

26. 70 Tenn. 101 (1878). The court held that interest was no longer a ground for the incompetence of the witness-spouse. A prior case had held otherwise, reasoning that the interest referred to by the statute was a pecuniary interest. *Goodwin v. Nicklin*, 53 Tenn. 256 (1871). A later case held that a wife is not a competent subscribing witness to her husband's deed because of interest, since the statute did not apply to subscribing witnesses. *Bank v. O'Brien*, 94 Tenn. 38, 28 S. W. 293 (1894). The policy of avoiding discord had no weight because the marriage had terminated. Nevertheless, the holding was affirmed in subsequent cases in which the marriage had not terminated. *Orr v. Cox*, 71 Tenn. 617 (1879); *Lowery v. Petree*, 76 Tenn. 674 (1881); *Washington v. Bedford*, 78 Tenn. 243 (1882).

27. TENN. CODE ANN. § 9777 (Williams, 1934). "In all civil actions, no person shall be incompetent to testify because he is a party to, or interested in, the issue tried, or because of the disabilities of coverture, but all persons, including husband and wife, shall be competent witnesses, though neither husband nor wife shall testify as to any matter that occurred between them by virtue of or in consequence of the marital relation."

28. Tenn. Acts 1887, c. 79, § 1, now TENN. CODE ANN. § 9782 (Williams, 1934).

spouse competent also; but this was not done.²⁹ The courts would not countenance the possibility of one spouse incriminating the other.³⁰ In 1915 the legislature by statute made husband and wife competent witnesses for and against each other in criminal cases.³¹ This statute placed no express restriction upon their testimony; but *McCormick v. State*,³² held that it "did not abrogate the rule as to . . . confidential communications."³³ The court thereby adopted a restriction substantially like that established by section 9777 for civil cases.

IV. THE NATURE OF THE TESTIMONIAL RESTRICTION IN TENNESSEE

A. Comparison with the Common Law Rules

The present rule is more than a modification of the common law. The common law rules were applicable to one spouse only, and made him incompetent in suits to which the other spouse was a party. The present rule, at least in civil cases, is applicable to both spouses, preventing certain testimony by them, even in suits to which neither is a party. The common law rules prohibited testimony concerning matters occurring before marriage;³⁴ the present rule applies only to matters occurring during the marriage.³⁵ Upon the termination of the marriage by death or divorce, the common law rules ceased to be applicable in many states, although not in Tennessee;³⁶ the present rule continues to be applicable.³⁷

B. Comparison with the Marital Communications Statutes

(1) In Civil Cases

Although the language of section 9777 is somewhat unique, it may be classed with those statutes which make testimony concerning marital communications inadmissible.³⁸ While a recent federal case determined that the statute created a privilege and admitted testimony upon a waiver thereof,³⁹ the Tennessee courts have several times excluded testimony under section 9777 which both husband and wife were anxious to have admitted.⁴⁰

29. *Owen v. State*, 89 Tenn. 698, 16 S. W. 114 (1891).

30. *Norman v. State*, 127 Tenn. 340, 155 S. W. 135 (1912).

31. TENN. CODE ANN. § 9778 (Williams, 1934). "In all criminal cases, the husband or the wife shall be a competent witness to testify for or against each other."

32. 135 Tenn. 218, 186 S. W. 95 (1916).

33. *Id.* at 228, 188 S. W. at 97.

34. *Norman v. State*, 127 Tenn. 340, 155 S. W. 135 (1912).

35. *Harp v. State*, 158 Tenn. 510, 14 S. W. 2d 720 (1928).

36. *State for the Use of Barker v. McAuley*, 51 Tenn. 424 (1871); *Kimbrough v. Mitchell*, 38 Tenn. 539 (1858); *Brewer v. Ferguson*, 30 Tenn. 564 (1851).

37. *Patton v. Wilson*, 70 Tenn. 101 (1878); *Williams v. Frazer*, 6 Tenn. App. 211 (M. S. 1927); *New York Life Ins. Co. v. Ross*, 30 F. 2d 80 (6th Cir. 1928).

38. *Insurance Co. v. Shoemaker*, 95 Tenn. 72, 31 S. W. 270 (1895).

39. *Fraser v. United States*, 145 F. 2d 139 (6th Cir. 1944).

40. *Crane and Co. v. Hall*, 141 Tenn. 556, 213 S. W. 414 (1919); *Insurance Co. v.*

(2) In Criminal Cases

In criminal cases the testimony excluded is characterized sometimes as "privileged," sometimes as "incompetent." The terms are apparently used interchangeably. In the few cases decided the result could have been reached upon either theory.⁴¹ Since the rule in criminal cases rests upon common law principles, the cases applying section 9777 would probably not be controlling. However, the earlier rule of *Patton v. Wilson*, which also rested upon common law principles, apparently made the testimony inadmissible⁴² and might be considered controlling authority.

V. THE NATURE OF THE TESTIMONY EXCLUDED IN TENNESSEE

A. In Civil Cases

In other states the statute usually speaks of "communications" or "confidential communications" between husband and wife. The protection given by section 9777 is not so limited; it extends "to any matter that occurred between them by virtue of . . . the marital relation." In the leading case of *Insurance Co. v. Shoemaker*⁴³ this language was interpreted as including "all transactions and conversations had between the husband and wife in relation to their own affairs, not in the presence of some third person."⁴⁴

Most of the cases involve transactions between husband and wife. When no other person was present at the time of the transaction, neither may testify to a loan,⁴⁵ or to a gift,⁴⁶ or to the delivery of a deed.⁴⁷ Neither may testify to facts which would establish a resulting trust.⁴⁸ But either may testify to a transaction between one spouse and a third person,⁴⁹ and apparently when one spouse is acting as the agent of a third person he may testify to a transaction with the other spouse.⁵⁰ Testimony concerning ownership or possession of

Shoemaker, 95 Tenn. 72, 31 S. W. 270 (1895); *State v. Caldwell*, 21 Tenn. App. 396, 111 S. W. 2d 377 (M. S. 1937); *Robertson v. Wade*, 17 Tenn. App. 457, 68 S. W. 2d 487 (M. S. 1933); *Hornsby v. City National Bank*, 60 S. W. 160 (Tenn. Ch. App. 1900); *Young v. Hurst*, 48 S. W. 355 (Tenn. Ch. App. 1898).

41. *Cavert v. State*, 158 Tenn. 531, 14 S. W. 2d 735 (1928); *Harp v. State*, 158 Tenn. 510, 14 S. W. 2d 720 (1928); *McCormick v. State*, 135 Tenn. 218, 186 S. W. 95 (1916).

42. *Washington v. Bedford*, 78 Tenn. 243 (1882); *Hale v. Kearley*, 67 Tenn. 49 (1874).

43. 95 Tenn. 72, 31 S. W. 270 (1895).

44. *Id.* at 82, 31 S. W. at 272.

45. *Crane and Co. v. Hall*, 141 Tenn. 556, 213 S. W. 414 (1919); *McDonald v. Baldwin*, 24 Tenn. App. 670, 148 S. W. 2d 385 (M. S. 1940); *Robertson v. Wade*, 17 Tenn. App. 457, 68 S. W. 2d 487 (M. S. 1933); *Farmers Bank of Lynchburg v. Farrar*, 4 Tenn. App. 186 (M. S. 1926).

46. *State v. Caldwell*, 21 Tenn. App. 396, 111 S. W. 2d 377 (M. S. 1937); *Young v. Hurst*, 48 S. W. 355 (Tenn. Ch. App. 1898).

47. *Insurance Co. v. Shoemaker*, 95 Tenn. 72, 31 S. W. 270 (1895).

48. *Insurance Co. v. Shoemaker*, 95 Tenn. 72, 31 S. W. 270 (1895); *Hornsby v. City National Bank*, 60 S. W. 160 (Tenn. Ch. App. 1900).

49. *Renshaw v. First Nat. Bank*, 63 S. W. 194 (Tenn. Ch. App. 1900); *Hill v. Fly*, 52 S. W. 731 (Tenn. Ch. App. 1899).

50. *Pilcher v. Rylee*, 2 Tenn. App. 348 (W. S. 1925).

property is also admissible,⁵¹ so that a wife may testify that she owns a horse, but not that her husband gave it to her.⁵²

Private conversations between husband and wife are excluded as a matter of course.⁵³ Letters from one to the other are likewise excluded.⁵⁴

B. In Criminal Cases

In criminal cases the rule does not necessarily prohibit the same testimony which is excluded under section 9777. The typical civil case involves a contest over property between the wife and the husband's creditors. The wife's claim is based on a legal transaction with the husband. Both husband and wife are anxious to testify to the transaction, but their testimony is excluded.⁵⁵ This result is in accord with the established construction of section 9777, but it cannot be justified as necessary to the protection of marital confidence. In the first place the disclosure would be entirely voluntary. In the second place the holding would hardly encourage legal transactions between husband and wife. Finally, there is no apparent reason why the law should encourage such transactions. Since the rule in criminal cases rests directly upon a policy of protecting marital confidence,⁵⁶ and no statute forecloses the question, a different result might well be reached upon similar facts.

The Tennessee Supreme Court has formulated three different statements of the scope of the rule in criminal cases: (1) It has been said to be coextensive with the rule in civil cases as stated in *Insurance Co. v. Shoemaker*.⁵⁷ (2) It has been said to prohibit disclosure of confidential communications.⁵⁸ As thus stated the rule would apparently not include legal transactions. (3) It has been said to prohibit disclosure of all information acquired by reason of

51. *Insurance Co. v. Shoemaker*, 95 Tenn. 72, 31 S. W. 270 (1895); *State v. Caldwell*, 21 Tenn. App. 396, 111 S. W. 2d 377 (M. S. 1937); *Young v. Hurst*, 48 S. W. 355 (Tenn. Ch. App. 1898).

52. The strict application of the rule to legal transactions between husband and wife may be influenced by a desire to protect creditors from fraud. Even when the testimony of husband and wife is admitted without objection, it is not sufficient without corroboration to establish a legal transaction to the prejudice of a third person. *Crane and Co. v. Hall*, 141 Tenn. 556, 213 S. W. 414 (1919) (contract); *Insurance Co. v. Shoemaker*, 95 Tenn. 72, 31 S. W. 270 (1895) (resulting trust); *State v. Caldwell*, 21 Tenn. App. 396, 111 S. W. 2d 377 (M. S. 1937) (gift); *Sanford v. Allen*, 42 S. W. 183 (Tenn. Ch. App. 1897) (debt).

53. *Insurance Co. v. Shoemaker*, 95 Tenn. 72, 31 S. W. 270 (1895); *Petway v. Hoover*, 12 Tenn. App. 618 (M. S. 1931); *Young v. Hurst*, 48 S. W. 355 (Tenn. Ch. App. 1898).

54. *McCormick v. State*, 135 Tenn. 218, 186 S. W. 95 (1916); *New York Life Ins. Co. v. Ross*, 30 F. 2d 80 (6th Cir. 1928). *But cf.* *E. W. M. v. J. C. M.*, 2 Tenn. Ch. App. 463 (1897).

55. Among cases which fit this description are those cited in note 40 *supra*.

56. *Harp v. State*, 158 Tenn. 510, 14 S. W. 2d 720 (1928).

57. *Cavert v. State*, 158 Tenn. 531, 14 S. W. 2d 735 (1928). After quoting the rule of the *Shoemaker* case, the court adds: "This rule is applied, perhaps, with more strictness in criminal cases." *Id.* at 542, 14 S. W. 2d at 739.

58. *Harp v. State*, 158 Tenn. 510, 513, 14 S. W. 2d 720 (1928); *McCormick v. State*, 135 Tenn. 218, 228, 186 S. W. 95, 97 (1916).

the marital relation.⁵⁹ As thus stated the rule would logically apply only to the testimony of the spouse acquiring the information. So few cases have considered the problem that it cannot be said which statement of the rule is likely to be sanctioned.

C. Testimony by a Third Person

It is well settled in Tennessee that a third person may testify to matters which occur between husband and wife in his presence.⁶⁰ But if the matter occurs privately he may not disclose information given him by husband or wife concerning the matter.⁶¹ However, if this information leads to the discovery of other facts, he may testify to the facts discovered.⁶²

VI. EXCEPTIONS

The Tennessee courts strongly favor the policy of protecting marital confidence. They apply the rule although "detached situations . . . might seem to require its destruction."⁶³ As a result there are few exceptions to the rule. One well-established exception is that matters occurring in the presence of other persons are not within the rule.⁶⁴ This exception does not extend to letters which come into the hands of other persons.⁶⁵

Many of the marital communications statutes are expressly inapplicable when husband and wife are adverse parties.⁶⁶ The Tennessee courts have declined to imply such an exception in the absence of statute.⁶⁷ However, by recent amendment, section 9777 does not apply to divorce cases.⁶⁸ The courts may be willing to recognize a like exception in other cases involving the welfare of children.⁶⁹

At common law the wife might testify to physical mistreatment by the

59. *Cavert v. State*, 158 Tenn. 531, 544, 14 S. W. 2d 735, 739 (1928); *Harp v. State*, 158 Tenn. 510, 513, 14 S. W. 2d 720 (1928); *McCormick v. State*, 135 Tenn. 218, 228, 186 S. W. 95, 97 (1916).

60. *Allison v. Barrow*, 43 Tenn. 414 (1866); *Queener v. Morrow*, 41 Tenn. 73 (1860); 6 TENN. L. REV. 285 (1928).

61. *English v. Ricks*, 117 Tenn. 73, 95 S. W. 189 (1906); *Pearson v. McCallum*, 26 Tenn. App. 413, 173 S. W. 2d 150 (W. S. 1941).

62. *Clark v. State*, 159 Tenn. 507, 19 S. W. 2d 228 (1929).

63. *Harp v. State*, 158 Tenn. 510, 513, 14 S. W. 2d 720 (1928).

64. *Insurance Co. v. Shoemaker*, 95 Tenn. 72, 31 S. W. 270 (1895).

65. *McCormick v. State*, 135 Tenn. 218, 186 S. W. 95 (1916).

66. 3 VERNIER, AMERICAN FAMILY LAWS § 226 (1935).

67. *Jackson v. Jackson*, 186 Tenn. 337, 210 S. W. 2d 332 (1947), 2 VAND. L. REV. 130 (1948). The question had been reserved in *Hunt v. Hunt*, 169 Tenn. 1, 80 S. W. 2d 666 (1934).

68. Tenn. Pub. Acts 1949, c. 55, § 1. The same result had been reached in *Gardner v. Gardner*, 104 Tenn. 410, 58 S. W. 342 (1900) and in *E. W. M. v. J. C. M.*, 2 Tenn. Ch. App. 463 (1897); but these cases were overruled by *Jackson v. Jackson*, 186 Tenn. 337, 210 S. W. 2d 332 (1947), 2 VAND. L. REV. 130 (1948).

69. *Gower v. State*, 155 Tenn. 138, 290 S. W. 978 (1926). Husband or wife may testify to intercourse during the pendency of a divorce suit. The thorough opinion of Chief Justice Green does not suggest that the rule announced in *McCormick v. State*, 135 Tenn. 218, 186 S. W. 95 (1916), would, if raised, prohibit the testimony.

husband upon the theory that this was necessary for her protection.⁷⁰ The courts would probably sanction a similar exception to the present rule.⁷¹

A recent federal case concluded that the rule was not applicable to acts or communications in furtherance of a fraud.⁷² But in an analogous Tennessee case the rule was held to apply to acts and communications which tended to establish a conspiracy between husband and wife.⁷³

VII. CONCLUSION

That section 9777 encourages a free exchange of confidences between husband and wife cannot easily be established or disproved. Any effect that the statute might have upon their private conduct would necessarily be subtle. However, good reasons may be advanced for certain modifications of the statute.

Section 9777 might be amended so that the acting or communicating spouse would have the option to allow or to prevent disclosure of his conduct. Any apprehension of disclosure which he might have would be effectively removed by giving him the ability to prevent it. On the other hand there is no reason why he should not be able to disclose his own conduct voluntarily or to allow his spouse to do so.

This section might further be improved by the exception of matters which are clearly not of a confidential nature. This exception would in no wise impair the policy of protecting marital confidence. It would allow the courts some discretion in administering that policy.

It would perhaps be more desirable for the legislature to enact a new statute applicable to criminal as well as civil cases. Any doubt concerning the rule in criminal cases would thereby be removed; and reconsideration of the subject in entirety might well prove profitable.

The following provision is recommended for consideration:

"No person shall be incompetent as a witness in any case because of marital condition or relationship; but confidential communications between husband and wife shall not be disclosed without the consent of the spouse making the communication, except that in divorce actions either husband or wife may testify as to communications between them, whether confidential or not."

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70. See *Norman v. State*, 127 Tenn. 340, 349, 155 S. W. 135, 137 (1912).

71. However, it has been held that testimony concerning acts of cruelty is not admissible in a suit for divorce. *Jackson v. Jackson*, 186 Tenn. 337, 210 S. W. 2d 332 (1947), 2 VAND. L. REV. 130 (1948).

72. *Fraser v. United States*, 145 F. 2d 139 (6th Cir. 1944).

73. *Cavert v. State*, 158 Tenn. 531, 14 S. W. 2d 735 (1928).