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Evidence -- Witnesses -- Competency of Husband and Wife in Criminal Conversation Action

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Evidence—Witnesses—Competency of Husband and Wife in Criminal Conversation Action

In a recent North Carolina case[1] a wife brought an action against a feme defendant to recover damages for criminal conversation by defendant with plaintiff's husband. Over objection, testimony by plaintiff relative to statements made to her by her husband tending to show his illicit relationship with defendant was admitted. *Held:* Under modern Married Woman's Statutes[2] a wife can bring the action of criminal conversation. Under the North Carolina statute[3] governing competency of husband and wife in civil actions, the admission of the testimony relating to the husband's statements was error.

The case is one of first impression in North Carolina on the direct question of the right of a wife to sue for criminal conversation. The North Carolina Supreme Court had previously recognized this right in a well-reasoned dictum in the case of *Hinnant v. Tidewater Power Company.*[4] The court in allowing the action in the instant case followed what is a definite majority holding on this question.[5]

This decision, being on a question of first impression, suggests an examination of the evidence statute here involved with some degree of care.[6] Passed in 1866, the statute abolished the common-law rule that for centuries had made husband and wife incompetent as witnesses for and against each other.[7] But the abolition was not complete, for two areas of incompetency were retained, one of them being ". . . any action or proceeding for or on account of criminal conversation." Within this area of incompetency, however, there is embodied an exception, *viz.*, ". . . that in actions of criminal conversation brought by the husband in which the character of the wife is assailed she shall be a competent witness to testify in refutation of such charges." It is this portion of the statute, appearing as an amendment in 1919, with which this note is primarily concerned.[8]

[1] Knighten v. McLain, 227 N. C. 682, 44 S. E. 2d 79 (1947).
[2] N. C. GEN. STAT. (1943) §§52-1, 52-6, 52-10.
[3] N. C. GEN. STAT. (Supp. 1945) §8-56.
[4] 189 N. C. 120, 122, 126 S. E. 307, 309 (1925).
[5] See cases collected in 27 AM. JURIS., HUSBAND AND WIFE, §535 (1944).
[6] N. C. GEN. STAT. (Supp. 1945) §8-56: "In any trial . . . the husband or wife of any party thereto, or of any person in whose behalf any such suit . . . is brought, . . . shall, except as herein stated, be competent and compellable to give evidence, as any other witness on behalf of any party to such suit, action or proceeding. Nothing herein shall render any husband or wife competent or compellable to give evidence for or against the other in any action for or in consequence of adultery, or in any action or proceeding for divorce on account of adultery; or in any action or proceeding for or on account of criminal conversation, except that in actions of criminal conversation brought by the husband in which the character of the wife is assailed she shall be a competent witness to testify in refutation of such charges: Provided however, that in all such actions or proceedings, the husband or wife shall be competent to prove and may be required to prove, the fact of marriage."
[7] Grant v. Mitchell, 156 N. C. 15, 71 S. E. 1087 (1911).
[8] Public Laws 1919, c. 18.

Application of the statute in this area of incompetency has led to certain incongruities. The declaration of incompetency has been applied to make inadmissible indirect, as well as direct, testimony of the wife, including declarations and admissions relating to the offense itself.[9] It *has not* applied to testimony of the plaintiff husband relating to the misconduct of his wife, since she is not a party and he is not deemed to be testifying "for or against" her.[10] The provision making the wife competent to testify in refutation of charges against her character has been applied in only one North Carolina case.[11] "The net result is that the wife's testimony and declarations cannot be used to establish her improper relations with the defendant, but that in all other respects the husband and wife are as competent in an action of criminal conversation as in any other case."[12]

The advent of the action by the wife in the principal case focuses attention on a new incongruity in the statute itself. Is there not injustice in failure to provide that the husband can testify in refutation of charges brought by the wife against his character? Will the courts remedy this injustice by interpretation? There appears in the statute governing competency of husband and wife in criminal cases a similar discrepancy in the rights of the husband and wife to testify[13] which the courts have disposed of. In an exception to incompetency *against* one's spouse, the statute provides only for the right of the *wife* to testify for the state in criminal prosecutions of the husband for assault and battery upon her, but since this was only declaratory of the common-law (which included a right in both the husband and the wife in such a case)[14] the court was able to permit a *husband* to testify in behalf of the state in a criminal prosecution of his wife for assault and battery upon him.[15] But the reasoning by which this right was so extended without express statutory expression[16] is not applicable in the provision as to criminal

[9] McCall v. Galloway, 162 N. C. 353, 78 N. E. 429 (1913); Gardner v. Klutts, 53 N. C. 375, 376 (1861) (considering common-law prohibition generally the court said, "It follows that [spouses'] declarations cannot be evidence for or against [the other], otherwise, more weight is given to what she says when not on oath than to what she would say on oath; which is absurd.").

[10] Powell v. Strickland, 163 N. C. 393, 397, 79 S. E. 872, 874 (1913) (". . . she is not a party to the record and has no legal interest in the action or its event, that is, no interest that can by the rules of law be affected thereby.").

[11] Chestnutt v. Sutton, 204 N. C. 476, 168 S. E. 680 (1933).

[12] STANSBURY, NORTH CAROLINA EVIDENCE §58 (1946).

[13] N. C. GEN. STAT. (1943) §8-57: ". . . Nothing herein shall render any husband or wife competent or compellable to give evidence against each other in any criminal action or proceeding, . . . except that in all criminal prosecutions of a husband for an assault and battery upon his wife, . . . it shall be lawful to examine the wife in behalf of the state against her husband."

[14] State v. Hussey, 44 N. C. 123 (1852).

[15] State v. French, 203 N. C. 632, 166 S. E. 747 (1932); State v. Alderman, 182 N. C. 917, 110 S. E. 59 (1921); State v. Davidson, 77 N. C. 522 (1877).

[16] STANSBURY, NORTH CAROLINA EVIDENCE §59 n. 62 (1946) ("The competency of husband or wife in this type of action was recognized at common law, and therefore is properly recognized under the statute which was intended to enlarge and not restrict the common-law.").

conversation which we are now examining. The common-law rule of incompetency extended to actions of criminal conversation too,[17] thus making the provision under consideration in derogation of the common-law. Statutes in derogation of the common-law will be construed strictly and not be extended beyond the scope of the legislative expression.[18]

Since it is assumed that it will be left up to the legislature to remedy this injustice, this should be accomplished with little difficulty unless there is some compelling reason for the omission. The cases are devoid of any language indicating any reason for it. Did the legislature contemplate the present action when it passed the amendment? Most of the jurisdictions that had passed on the question of the wife's right in this action had recognized it.[19] The North Carolina court had indicated its attitude toward a wife's right to bring an action for invasion of her marital rights in the husband.[20] The outmoded idea that the male is the aggressor, thus negativing his right to refute charges against his character arising from his own action, was surely not in the minds of the legislators.

The clue probably appears in a case where a husband was suing for crimnal conversation, in which the court deplored the fact that the statute denied the right of the *wife* to take the stand when *her* character was so seriously assailed.[21] There the court refused to follow the holding in divorce cases,[22] which permitted the wife to testify in refutation of charges brought by her husband in an action for divorce on grounds of adultery, despite the omission of such a right in the statute. It is most probable that the court's statements in that case provided the impetus for the amendment to the statute and that the legislature, following the language used there, never contemplated an action by the wife.

Examination of the statutes of other states casts little light on this problem as they are so variant in their terms and phraseology that interpretations of them give no real basis of comparison. But it is interesting to note that of the ten states in the United States that have criminal conversation as an exception (some as exception to competency,

[17] Grant v. Mitchell, 156 N. C. 15, 71 S. E. 1087 (1911).

[18] CRAWFORD, STATUTORY CONSTRUCTION §248 (1940); *see* Price v. Edwards, 178 N. C. 493, 101 S. E. 33 (1919); Rice v. Keith, 63 N. C. 319 (1868).

[19] *See* Note, 4 A. L. R. 569 (1919).

[20] Brown v. Brown, 121 N. C. 8, 27 S. E. 998 (1897) (alienation of affections).

[21] Grant v. Mitchell, 156 N. C. 15, 17, 71 S. E. 1087, 1089 (1911) ("The rule denying the right to the wife to be heard when her character is so seriously assailed seems cruel, but we cannot permit this consideration to induce us to refuse to give effect to the legislative act. She was offered as a witness against her husband in an action on account of criminal conversation and this the statute says cannot be done.").

[22] Broom v. Broom, 130 N. C. 562, 565, 41 S. E. 673, 674 (1902) ("Her evidence was in defense of herself, and not 'for or against' the other party, and the statute disqualifies neither as a witness in his or her own behalf, except only when it is for or against the other.").

others as exception to incompetency strangely enough) in the statutes governing competency of the husband and wife as witnesses in civil cases,[23] only three[24] make any distinction between testimony of the wife and husband. In these three jurisdictions, only two cases have been found which consider the possible reason for the distinction between wife and husband. In Pennsylvania the court said, "Doubtless the legislature considered there were good reasons for permitting the wife to defend her character and conduct, but no sufficient reason for changing the common-law rule as to the husband."[25] One New York court made an interesting observation on their provision making the *wife* competent for the defendant but not for the plaintiff, in actions for criminal conversation, "The purpose of exclusion of wife as witness for plaintiff, in actions for criminal conversation is to prevent collusion between husband and wife. If this is the purpose why should not the husband also be disqualified if such an action will lie in behalf of the wife? Is not this section in fact a legislative declaration that such an action will not lie in behalf of the wife?"[26] The New York Court of Appeals repudiated this reasoning in a later decision[27] in which the wife was allowed to sue for criminal conversation. It is also interesting to note that of these ten states, three have abolished the action of criminal

[23] **Criminal conversation as exception to competency generally:** IND. ANN. STAT. (Burns, 1933) §1720 (husband competent, wife not competent in suit for seduction of wife); N. J. STAT. ANN. (1939) §2:97-9 (husband and wife not compellable in this action); N. Y. CIV. PRAC. ACT (1947) §439 (wife competent for defendant but not for plaintiff in this action).

Criminal conversation as exception to incompetency for or against: PA. STAT. ANN. (Purdon, 1930) tit. 28, §319 (wife can testify in refutation of charges against her character).

Criminal conversation as exception to incompetency for or against without consent of other: ARIZ. CODE (1939) c. 23, §103; CAL. CODE CIV. PROC. (Deering, 1946) §1881; N. D. REV. CODE (1943) §31-0102; S. D. CODE (1939) §36-0101.

Criminal conversation as exception to incompetency against the other: NEB. REV. STAT. (1943) §25-1203 (either may be witness against the other in this action); WYO. COMP. STAT. (Bobbs-Merrill, 1945) §3-2605 (wife competent against husband in this action).

[24] New York: In any action for criminal conversation plaintiff's wife is not a competent witness for plaintiff, but she is competent for defendant as to any matter in controversy.

Pennsylvania: In all civil actions brought by husband, the wife shall be a competent witness in rebuttal when her character or conduct is attacked upon the trial thereof.

Wyoming: Husband and wife can be a witness for each other in all cases, but not against. The wife can be a witness against the husband in an action for criminal conversation.

[25] Ehrhart v. Bear, 51 Pa. Super. 39, 45 (1912).

[26] Strock v. Russell, —— Misc. ——, 132 N. Y. Supp. 968, 970 (1911); Oppenheim v. Kridel, —— Misc. ——, 198 N. Y. Supp. 157 (1923).

[27] Oppenheim v. Kridel, 236 N. Y. 156, 160, 140 N. E. 227, 231 (1923) ("Section 349 of the Civil Practice Act [giving only the wife the right to testify for defendant in a criminal conversation action] does not express any legislative intent regarding this question [right of wife to bring criminal conversation action]. That provision simply declares a rule of evidence.").

conversation by statute.[28] As in North Carolina, the statutes of the three states which contain a discrepancy similar to the one under consideration were passed prior to recognition of a wife's right to bring the action.[29]

Since the problem is one for the legislature, it is submitted that the incompetency of husband and wife in criminal conversation cases ought to be completely abolished. Fifteen states have expressly abolished by statute the incompetency rule in its entirety.[30] The jurisdictions that allow husband and wife to testify *for* the other in all actions (whether or not they have extended the right to testify against) have found no upsetting situation in allowing the testimony in criminal conversation cases.[31] The stage is set in North Carolina for another step toward a complete abolition of incompetency. Maintaining this exception to complete competency has created a greater anomaly in the law than the old incompetency rule. Where the husband has joined with an action for criminal conversation one for alienation of affections (as is usually the case), burdensome problems present themselves as to admission of evidence. The court has been compelled to instruct the jury that testimony of the wife tending to show her relationship with defendant is allowed, but can only be considered with reference to the latter charge.[32] Plaintiff is permitted to present indirect testimony (declarations) of the spouse tending to show the state of mind and feeling between himself and his wife and the effect of the conduct of the defendant on them.[33] Thus the jury, after listening to all this testimony, is burdened with the task of making complicated distinctions that human nature practically precludes.

[28] N. J. STAT. ANN. (1939) §2:39A-1; N. Y. CIV. PRAC. ACT (1947) §§61(a) and (i); WYO. COMP. STAT. (Bobbs-Merrill, 1945) §§3-512 and 3-513.

[29] New York: L. 1877, c. 416, §184 (first recognized wife's right in criminal conversation action in Oppenheim v. Kridel, *supra*, 1923).

Pennsylvania: 1907, May 8, P. L. 184, §1 (no case on wife's right in criminal conversation action).

Wyoming: Laws 1899, c. 81, §1 (no case on wife's right in criminal conversation action).

[30] DEL. REV. CODE (1935) §4691; FLA. STAT. ANN. (1943) §90.04; ILL. ANN. STAT. (Smith Hurd, 1941) c. 51, §5; ME. REV. STAT. (1944) c. 100, §115; MD. ANN. CODE GEN. LAWS (Flack, 1939) art. 35, §1; MO. REV. STAT. ANN. (1942) §1892; N. H. REV. LAWS (1942) c. 392, §29; OHIO GEN. CODE ANN. (Page, 1939) §11493; S. C. CODE (1942) §3692; TENN. ANN. CODE (Williams, 1934) §9777; TEX. ANN. REV. CIV. STAT. (Vernon, 1925) art. 3715; VT. PUBLIC LAWS (1933) §1697; VA. CODE (Michie *et al.*, 1942) §6210; W. VA. CODE (Michie *et al.*, 1943) §5727; WIS. STAT. (Brossard, 1943) §325.18.

[31] Smith v. Meyers, 54 Neb. 1, 74 N. W. 277 (1898); Phelps v. Utley, 92 Vt. 40, 101 Atl. 1011 (1917).

[32] Hyatt v. McCoy, 194 N. C. 760, 140 S. E. 807 (1927).

[33] Cottle v. Johnson, 179 N. C. 426, 102 S. E. 769 (1920) (an action for criminal conversation and alienation of affections—plaintiff's wife's declarations as to why she was not going back to plaintiff was held to be part of the *res gestae*. The court said at p. 432, "We recognize the danger of evidence of this kind and the opportunity it affords for collusion and for this reason it should be kept within bounds with instructions [to the jury] as to how it should be considered. . . .").

Unless there is some compelling need for this area of incompetency supported by stronger reasons than those given for the common-law rule,[34] it should be eliminated from the statute books. A reason presented by the court is to avoid "fraud and collusion."[35] This was one of the reasons noted for the common-law rule which has been discarded for all other cases except this and divorce proceedings, and there is no more danger of collusion here than in other cases. Actually there is less danger considering the delicacy of the testimony, which no one is prone to divulge even if true, ". . . and the interest of the state in the marriage relation, which may justify extreme measures to prevent collusion in divorce litigation is no excuse for a rule of incompetency in criminal conversation actions."[36] In fact one jurisdiction, in a case of criminal conversation presented at a time when the wife was generally incompetent as a witness for or against her husband, has held that a wife should be allowed to testify *for* the husband in this action on grounds of public policy.[37] At a time when speedy and accurate administration of justice has become the watchword, this change is in order.

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Federal Jurisdiction—State Statutes Enlarging Federal Equity Jurisdiction—The Doctrine of Equitable Remedial Rights

Solely on a basis of diversity of citizenship a simple contract creditor entered a federal court in Wisconsin and asked for a receiver. By principles of old English Chancery as applied by the federal courts the plaintiff would not have been entitled to such relief until it had exhausted its remedies at law. On the other hand, under the Wisconsin "Uniform Fraudulent Conveyance Act" the plaintiff was entitled to the relief.[1] *Held:* Defendant's motion to dismiss denied.[2]

Under a similar set of facts in *Pusey & Jones v. Hanssen*[3] the United States Supreme Court reversed an order appointing a receiver

[34] Powell v. Strickland, 163 N. C. 393, 400, 79 S. E. 872, 875 (1913) (". . . whether it was upon the ground of interest alone, when the testimony is in favor of the spouse, or marital bias, or public policy when it is against, or whether it was because they were considered as two souls in a single body. . . .").

[35] *See* note 31 *supra.*

[36] STANSBURY, NORTH CAROLINA EVIDENCE §58 n. 42 (1946).

[37] Coy v. Humphries, 142 Mo. App. 92, ——, 125 S. W. 877, 879 (1910) ("All power should be given to society to punish those moral ulcers on the body politic which corrupt its vitals and demoralize its members; and unless society shall apply sufficient remedies to repress the erotic mania displayed in this case [defendant enticed a wife into adultery] its most cherished and priceless institutions—home and the family—will be destroyed. The admission of testimony of the wife for the plaintiff was not error.").

[1] WIS. STAT. (Brossard, 1943) §242.10.

[2] Houseware Sales Corp. v. Quaker Stretcher Co., 70 F. Supp. 747 (E. D. Wis. 1947).

[3] 261 U. S. 491 (1923). See Comment, 33 YALE L. J. 193 (1923).