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Witnesses—Husband and Wife—Extent of Confidential Communications

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a plaintiff can recover where he is injured in an attempt to retrieve a customer's hat.⁹ Kansas is in line with Missouri applying the stricter rule.¹⁰ No cases have been found on this point in Oklahoma or Kentucky.¹¹

The liberal view seems to be the majority view throughout the country.¹²

O. J. G.

WITNESSES—HUSBAND AND WIFE—EXTENT OF CONFIDENTIAL COMMUNICATIONS—[Missouri].—In an action to recover damages for personal injuries alleged to have been received by the plaintiff from being hit by a truck belonging to defendant, the trial court excluded testimony of the plaintiff's husband offered by defendant, in contradiction of plaintiff on the trial, and tending to show that she was contemplating making her case by perjured testimony. *Held*; That any spouse, while the relation of marriage exists, or subsequently, shall not be permitted to testify as to any admissions or statements, or confidential communications of the other spouse made to him or her; although our statutes, from time to time, have largely abolished the common law and reconstructed the rule relating to similar evidence upon modern lines. *Dickinson v. Abernathy Furniture Co.*¹

It would seem that under the particular facts of the case the same decision would have been reached by all jurisdictions. The case is important, however, because it upholds the comprehensive Missouri rule: *That any communications between husband and wife made in the absence of third persons are incompetent and must be excluded.* In the body of the opinion the court states, "There are no restrictions imposed upon the conversation in the relationship of husband and wife, and no exceptions spring therefrom."² This is the Missouri rule, both under the statutory provision³ and under case holdings.⁴

From time to time, however, Missouri courts have been forced to admit such evidence in a particular case. The original rule has always been sus-

N. E. 285 (1892); *Contra*, Missouri case on exact same factual set up, *Logan v. Wabash R. R. Co.*, 96 Mo. App. 461, 70 S. W. 734 (1902); *St. Louis I. M. & S. Ry. Co. v. Morgan*, 115 Ark. 529, 171 S. W. 1187 (1914); *Idem*, 115 Ark. 602, 174 S. W. 546 (1915).

9. *Lamparter v. Wallbaum*, 45 Ill. 444, 92 Am. Dec. 225 (1867).

10. *Condif v. Kansas City Ft. S. & G. R. Co.*, 45 Kan. 256, 25 Pac. 562 (1891).

11. Dictum in the case of *Mohan Jellico Coal Co. v. Bird*, 167 Ky. 697, 1 c. 702, 181 S. W. 339 (1916) indicates that the strict rule would be applied if such a case arose.

12. *McKay v. Atlantic Coast Line R. R. Co.*, 160 N. C. 260, 75 S. E. 1081 (1912); *Davis v. Savannah Lumber Co.*, 11 Ga. App. 610, 75 S. E. 986 (1912); *Finnigan v. Biehl*, 61 N. Y. Supp. 1116 (1899); *Thompson v. Seaboard Air Liner Ry.*, 81 S. C. 333, 62 S. E. 396, 20 L. R. A. (N. S.) 426 (1908); *Temple Electric Light Co. v. Halliburton*, 136 S. W. 584 (Tex. 1911); 45 C. J. 968; 3 *Cooley, On Torts* (1932) sec. 487.

1. 96 S. W. (2d) 1086 (Mo. App., 1936).

2. 96 S. W. (2d) 1086, 1094.

3. R. S. Mo. 1929, sec. 1728.

4. *Moore v. Moore*, 51 Mo. 118 (1872); *Berlin v. Berlin*, 52 Mo. 151 (1873); *Miller v. Miller*, 14 Mo. App. 418 (1883); *Ayers v. Ayers*, 28 Mo. App. 97 (1887).

tained, but a distinction drawn in each case: for instance, *ex necessitate rei*,⁵ fraud,⁶ verbal assault,⁷ abuse,⁸ or peculiarly within the knowledge of the spouse.⁹ The question arises, did not these cases recognize exceptions to the general rule? But the bulk of the decisions and the language of the statute affirm the statement that conversations between husband and wife are unrestricted and that there are no exceptions to the rule excluding such testimony.

The same general position is taken by Arkansas,¹⁰ Kansas,¹¹ Oklahoma¹² and Kentucky,¹³ under statutes and case holdings. Illinois, however, has enacted a statutory exception to the general rule, allowing testimony as to admissions and conversations to be admitted in suits between the husband and wife.¹⁴

Considering the policy of the rule, *viz.*, preservation of the inviolability of domestic confidence,¹⁵ it is apparent that the policy is best served by a broad and unrestricted rule excluding all such testimony. But Professor Wigmore, citing several jurisdictions, would limit the meaning of confidence to matters involving the "fundamental element of confidence."¹⁶ Also he maintains that the rule should not be allowed where the disadvantages to the general public outweigh the benefit obtained from the exercise of the privilege; and therefore the same exceptions to this rule should be recognized as were discoverable at common law under the privilege of husband and wife testifying against each other.¹⁷

The adoption of these qualifications upon the rule of confidential communications between husband and wife would do much to clear up the confusion existing in the Missouri decisions on this point.¹⁸ J. R. G.

5. Henry v. Sneed, 99 Mo. 407, 12 S. W. 663 (1889).

6. Mockel v. Heim, 134 Mo. 576, 36 S. W. 226 (1896); Henry v. Sneed, *supra*; Rice v. Waddill, 168 Mo. 99, 67 S. W. 605 (1902).

7. Meyer v. Meyer, 158 Mo. App. 299, 138 S. W. 70 (1911).

8. Maget v. Maget, 85 Mo. App. 6 (1900); Schweikert v. Schweikert, 108 Mo. App. 477, 83 S. W. 1095 (1904).

9. Sauter and Adams v. Scrutchfield, 28 Mo. App. 150 (1887); Schweikert v. Schweikert, *supra*, note 8.

10. Ark., C. & M. Digest of the Statutes of Ark. (1921) sec. 4146; Berlin v. Cantrell, 33 Ark. 611 (1878); Nolen v. Harden, 43 Ark. 307 (1884).

11. R. S. Kansas (1923) chap. 60, sec. 2805; Van Zandt v. Shuyler, 2 Kan. App. 118 (1895); Wingrove v. Williams, 6 Kan. App. 262 (1897); Jacquith v. Davidson, 21 Kans. 341 (1878).

12. Okla., Harlow Okla. Statutes (1931) chap. 2, art. 10, sec. 272; Adkins v. Wright, 37 Okla. 771, 131 Pac. 686 (1913); Potter v. Womack, 63 Okla. 107, 162 Pac. 801 (1917).

13. Ky. Civil Code Prac. sec. 606 (1); Willey v. Howell, 168 Ky. 466, 182 S. W. 619 (1916); Leucht v. Leucht, 129 Ky. 700, 112 S. W. 845 (1908).

14. Ill., Smith-Hurd R. S. (1935) chap. 51, sec. 5.

15. 5 Wigmore, *Evidence* (2nd ed. 1923) sec. 2332.

16. 5 Wigmore, *Evidence* (2nd ed. 1923) sec. 2336.

17. 5 Wigmore, *Evidence* (2nd ed. 1923) sec. 2338. These exceptions were assault and battery, corporal violence, desertion, custody of children, adultery, deprivation or injury of property, and others of a similar nature. These are discussed in 4 Wigmore, *Evidence* (2nd ed. 1923) sec. 2239.

18. See notes 5, 6, 7, 8 and 9 above; and question propounded in the body of the comment.