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Evidence

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EVIDENCE

I. RELEVANCY: MALICE

The South Carolina Supreme Court in *State v. Alford*[1] confronted the issue of the admissibility of evidence of a prior difficulty between the accused and a third person. The trial judge had permitted the State, over the defendant's objection, to introduce evidence of threats made by the accused against the brother of the deceased and against another third party made one week prior to the homicide.[2] Additionally, the testimony of two witnesses was allowed, over the defendant's objection, which quoted the accused just two hours prior to the fatal shooting as saying that he was going to get Lester Cox, the brother of the deceased, with either a knife or a pistol and that "that young man would die tonight."[3] The prosecution's intent in seeking admission of this evidence was to show that the defendant had possessed the necessary malice aforethought in the resulting homicide.[4]

The admission of this evidence was raised on appeal, and the supreme court found that "[w]hile it is true that threats against a third party are normally not admitted to show malice against the deceased, the rule is not an inflexible one."[5] The court quoted the discussion in *Corpus Juris Secundum* as authority, noting that:

> [e]vidence is inadmissible to show a difficulty between the accused and a third person in no way connected with the victim or offense. . . . However, where there [*sic*] connection with the

1. 264 S.C. 26, 212 S.E.2d 252 (1975).

2. One week prior to the homicide, appellant, and Lester, the brother of the deceased, along with one David McDowell were riding together in Lester's truck. When the appellant persisted in driving recklessly over the protests of Lester, the latter cut off the ignition and, taking the keys, demanded that appellant move from behind the wheel. When appellant refused, Lester struck him, at which point the appellant warned Lester that he would "get him." Subsequently, inside a nearby coffee shop, the appellant pulled a knife on Lester in the presence of the owner. As the appellant was leaving the shop, he called out to Lester to "take me to Gene Ray's [the owner of the pistol used by the appellant in the fatal shooting] and it will be all over with tonight." *Id.* at 32, 212 S.E.2d at 254.

3. Record at 36 & 43. These comments by the accused appear not to have been communicated directly to Lester Cox, but apparently had been communicated to Albert prior to the fatal shooting. *Id.* at 39-40.

4. Brief for Respondent at 6. Notwithstanding the admission of the disputed evidence at trial, the jury was unwilling to convict on the charge of murder, returning instead the verdict of manslaughter. Record at 2.

5. 264 S.C. at 32, 212 S.E.2d at 254.

> offense sufficiently appears, evidence of prior difficulties between the accused and a third person is admissible to show malice, premeditation, or general state of mind, as is evidence of accused's ill will toward a member of the family of deceased, or that accused had a grudge against the companion of the victim at the time of the assault. . . . 40 C.J.S. Homicide § 209.[6]

Without elaborating, the court added that "the series of events recited . . . sufficiently connects the threats with the offense so as to evidence malice. . ." and concluded that "both the threats of the previous week and the threats of the same night were admissible in evidence."[7] Although unarticulated, the court's conclusion must have necessarily centered upon three salient determinations: (1) the relationship between the third person and the victim or the affinity of the third person to the offense; (2) the proximity of the antecedent threats or conduct to the offense; and (3) the degree of malice established by virtue of the antecedent conduct.[8] The failure of the court to articulate the guiding standards to be employed will undoubtedly result in future confusion as to the admissibility of particular testimony. More importantly, the conspicuous absence of the proper analysis may create the belief that the rule of admitting third party

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6. *Id. See* C. McCORMICK, EVIDENCE § 190 & n.45 (2d ed. 1954) [hereinafter cited as McCORMICK]; 1 F. WHARTON, CRIMINAL EVIDENCE § 163 (13th ed. 1972) [hereinafer cited as WHARTON]; 1 & 2 J. WIGMORE, EVIDENCE §§ 105, 363, 364 (3d ed. 1940) [hereinafter cited as WIGMORE].

7. 264 S.C. at 33, 212 S.E.2d at 254. Since the conclusion of the court on this issue rests largely upon the particular facts involved, a capsule of the events is necessary. At about midnight on the evening in question, the appellant and his now acquitted co-defendant, Glen Lane, and the deceased Albert Cox were drinking. An argument ensued, culminating in a fist fight betwzen Lane and Albert, in which the former dominated. Later that evening the two again met. This time Albert had returned with his brother Lester, and Lane and the appellant had procured a pistol from the appellant's brother, Gene Ray. Although the evidence relative to what then took place is in conflict, essentially Lane engaged Lester (the deceased's brother) in a fist fight. The appellant, however, fired the pistol, shooting Albert Cox and fatally wounding him. *Id.* at 30-31, 212 S.E.2d at 253.

8. Even as early as 1901, the United States Supreme Court had noted the need for the latter two determinations:1

> But even if it be conceded that prior conduct of the accused may be put in evidence in order to show that he had feelings of enmity towards the deceased, we are clear that the testimony was wrongfully admitted in the present case, because the time of the incident testified to, more than a month before the homicide, was too remote, and because the incident itself did not tend to prove any feeling of enmity on the part of [the defendant] to the deceased.

Bird v. United States, 180 U.S. 356, 360 (1901). The additional requirement of the connection between the third party and the offense is logically a product of the variation encountered when the defendant threatens not the deceased but some other person.

threats is so firmly established in this jurisdiction that its application warrants only nominal consideration.

Concededly, the theoretical niceties of the law of evidence that loom large in academic minds are less significant to the attorney attempting to secure the admission of evidence into court. This is amply demonstrated in the instant case, where an argument equal to the one made for the admissibility of the week-old threat could be made for its exclusion. The exclusion argument would contend that since malice could have been demonstrated sufficiently[9] by the threat two hours prior to the shooting, the use of the week-old threat would be cumulative. Recognizing the "prejudicial" nature of this latter evidence, due to its remoteness and uncertain probative value, exclusion seems only proper.[10] Thus for all practical purposes, where the result of either exclusion or admission could be reached, the understandable response of a trial judge would be to admit the disputed evidence conditionally,[11] knowing that even if its introduction was subsequently held to be error, the prejudice which resulted from its admission would in many instances be found not so substantial in nature as to warrant a reversal.

Also illustrative of this latter point is the lack of treatment the supreme court gave to the trial court's apparent error in permitting the introduction of evidence of the accused's threats against David McDowell as evincing the difficulty between the accused and Lester Cox occurring the week prior to the homicide.[12] Dissenting, Justice Bussey astutely observed that:

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9. *But see* note 4, *supra.*

10. The conclusions of one commentator support such an approach:

> It is suggested that such evidence be ruled inadmissible unless it can be shown by the prosecution that it is essential to the proof of an element of the crime allegedly committed by the accused and, indeed, that its use in this sense not be merely cumulative. This rule of necessity has been adopted or hinted at before in the authorities. It admittedly involves some degree of judicial discretion. . . .

Payne, *The Law Whose Life Is Not Logic: Evidence of Other Crimes in Criminal Cases,* 3 U. RICH. L. REV. 62, 86-87 (1968). *Accord, e.g.,* State v. Goebel, 36 Wash. 2d 367, 379, 218 P.2d 300, 306 (1950) ("this class of evidence, where not essential to the establishment of the state's case should not be admitted, even though falling within the generally recognized exceptions to the rule of exclusion, when the trial court is convinced that its effect would be to generate heat instead of diffusing light, or . . . where the minute peg of relevancy will be entirely obscured by the dirty linen hung on it.") *See also* MCCORMICK § 157; 2 J. WEINSTEIN'S EVIDENCE ¶404[10] (1975).

11. Record at 33, 37, 39-40, 101-03.

12. *See* note 2 *supra.*

> As McDowell was not involved in or connected with the altercation or confrontation which resulted in the homicide, evidence as to threats allegedly made by appellant against McDowell was totally irrelevant to any issue in the case, highly prejudicial and, of course, the admission thereof was erroneous.[13]

Nevertheless, the majority's silence on this issue should probably be viewed as amounting to a holding that the error was in fact not prejudicial.[14]

In deciding that it was permissible to show the prior difficulty between the accused and the brother of the deceased, the supreme court declared that the rule set forth in *State v. Clinkscales,*[15] prohibiting testimony as to the general *details* of a previous difficulty, had not been violated.[16] Although the rule had been enunciated as "well settled" in a number of prior cases,[17] none of those cases offered much guidance as to its proper application. The rule has therefore been literally applied in some instances to deny the admission of any details of the prior dispute.[18] In other cases, its application was tempered to exclude only those prejudicial and irrelevant details.[19] Additionally, the

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13. 264 S.C. 26, 36, 212 S.E.2d 252, 256 (Bussey, J., dissenting).

It was probably the state's contention that the threats made against McDowell were also sufficiently connected to show malice on the part of defendant. Brief for Respondents at 10. *But see* discussion at note 14 *infra.*

14. The only other interpretation would be that the court regarded the threats against McDowell as "sufficiently connected". Yet a careful reading of the language seems not to be so encompassing. Indeed if such were the case, the quote from C.J.S. (*see* text accompanying note 6 *infra*) appears woefully inadequate.

15. 231 S.C. 650, 99 S.E.2d 663 (1957).

16. 264 S.C. at 33, 212 S.E.2d at 254.

17. *See, e.g.,* State v. Bush, 211 S.C. 455, 45 S.E.2d 847 (1947); State v. Smith, 200 S.C. 188, 20 S.E.2d 726 (1941); State v. Kennedy, 143 S.C. 318, 141 S.E. 559 (1927); State v. Abercrombie, 130 S.C. 358, 126 S.E. 142 (1924); State v. Evans, 112 S.C. 43, 99 S.E. 751 (1919); State v. Adams, 68 S.C. 431, 47 S.E. 676 (1903).

18. *E.g.,* State v. Kennedy, 143 S.C. 318, 141 S.E. 559 (1927); State v. Evans, 112 S.C. 43, 99 S.E. 751 (1919); State v. Adams, 68 S.C. 421, 47 S.E. 676 (1903).

19. The court in State v. Abercrombie, 130 S.C. 358, 126 S.E. 142 (1924), held that evidence as to the defendant's prior threat upon the deceased's life was admissible, but that evidence of the defendant's ransacking the deceased's house and verbally abusing the deceased's wife during this encounter was prejudicial and irrelevant to the issue of guilt and thus inadmissible. *Id.* at 363-64, 126 S.E. at 143. Similarly in State v. Bush, 211 S.C. 455, 45 S.E.2d 847 (1947), the court admitted testimony of the defendant's numerous threats against his wife in defendant's trial for the homicide of his brother-in-law who at the time of the threats was protecting her. However, the court disallowed the introduction of the details of episodes of physical violence by the defendant against his wife as being irrelevant and highly prejudicial to the issue of guilt in his brother-in-law's murder. *Id.* at 460-61, 45 S.E.2d at 849.

rule has been held applicable in varying degrees to testimony offered by the defendant.[20]

The correct application of the rule prohibiting details of previous difficulties should easily follow from proper recognition of its supporting considerations—that it is improper to go into the details of a previous difficulty to an extent which will confuse the issues and prejudice the defendant by trying the merits of the prior incident. Thus while evidence of ill feelings, malice, and threats is properly admissible for the purpose of explaining what occurred and for the purpose of aiding the jury in its determination of the ultimate issue, it is not properly admissible for the purpose of obscuring the issue or substituting a false one.[21] Necessarily then, rules which proscribe the admissibility of evidence of a defendant's threat against a third party, or which limit the admissible details of such prior conduct, must be kept flexible by judicial discretion where it appears that the trial court's ultimate fact-finding will be sufficiently advanced.[22]

In this light, it may be said that the South Carolina Supreme Court correctly concluded in *Alford* that there was no error in the trial judge's ruling.

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20. *See, e.g.*, State v. Smith, 200 S.C. 188, 200, 20 S.E.2d 726 (1941). The application of the rule to defendants has been less than uniform. In the earlier case of State v. Kennedy, 143 S.C. 318, 141 S.E. 559 (1927), the defendant alleged error in the admission of certain details by the state of a prior difficulty. The court disagreed, commenting that it was the defendant who first elicited testimony as to the details in an attempt to imply that he was not the wrongdoer. In such a situation, it was the court's opinion that the State was properly permitted to combat the defendant's theory by eliciting testimony along the same lines. *Id.* at 322, 141 S.E. at 560. But, in the more recent case of State v. Peterson, 255 S.C. 579, 180 S.E.2d 341 (1971) it was the defendant who attempted to introduce the details of a previous difficulty. However, the trial judge excluded most of the details. The court found no error, noting that,

> [t]he trial judge liberally applied the evidentiary rule here in question, thereby granting the appellant [defendant] more latitude in the introduction of evidence regarding the matter of previous difficulties between himself and the details thereof . . ., than he was entitled to under the rule.

Id. at 583, 180 S.E.2d 343.

21. The following from State v. Adams, 68 S.C. 421, 47 S.E. 676 (1904) reflects this view:

> The evidence as to previous difficulty was competent only to show the animus of the parties, and thus aid the jury in reaching a conclusion as to who was probably the aggressor, and what demeanor each party had reason to expect from the other when they met and the fatal difficulty occurred. The general details of the previous trouble were properly excluded.

Id. at 425, 47 S.E. at 677.

22. *See* note 10 *supra*.

II. IMPEACHMENT: PRIOR INCONSISTENT STATEMENT

A. *Foundation and Notice*

The South Carolina Supreme Court in *State v. Galloway*[23] considered two issues which are noteworthy. The first involves the requisite notice of "laying the foundation" before contradicting a witness on a prior inconsistent statement. In addition to the familiar "when, where, and to whom" rule,[24] the appellants asserted that a witness must be warned of the cross-examiner's intention to impeach in the event the statement is denied.[25] Characterizing this rule as a rather "prevalent trial superstition,"[26] the court found it not be be the law. Indeed, the appellant's contention had been raised before and expressly repudiated by the 1881 decision of *State v. White.*[27] The *Galloway* court could find no more substantial basis for the myth other than a statement in *State v. Brock*[28] noting that the solicitor in that case had cross-examined the defendant as to a prior inconsistent statement "after notifying the witness that he proposed to contradict him. . . ."[29] The decision in *Galloway* should now make it un-

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23. 263 S.C. 585, 211 S.E.2d 885 (1975).

24. Professor Dreher lucidly explained "laying the foundation":

> Before a prior inconsistent statement may be proved against a witness, he must be asked about it on cross-examination and informed 'when, where, and to whom' he was supposed to have made the statement.

DREHER, A GUIDE TO EVIDENCE LAW IN SOUTH CAROLINA 13-14 (2d ed. 1971) [hereinafter cited as DREHER].

That the formula need not be blindly followed is well settled in South Carolina. It is sufficient if the witness is fairly apprised of the circumstances under which it is claimed he made the earlier statement. *See,* Elliott v. Black River Electric Co-op, 233 S.C. 233, 104 S.E.2d 357 (1958). The purpose of the requirement is to avoid unfair surprise to the adversary and to save time, since an admission by the witness may make extrinsic proof unnecessary. Indeed, by the majority view, such an admission will preclude receipt of the prior statement into evidence. *See generally* DREHER 14; MCCORMICK § 159; *accord,* McMillan v. Ridges, 229 S.C. 76, 91 S.E.2d 883 (1956). *Contra,* WIGMORE § 1037, n.4. (Chadbourn Rev. 1976).

25. Brief for the Appellants at 16.

26. 263 S.C. at 591, 211 S.E.2d at 888.

27. 15 S.C. 281, 390 (1881). The court answered the contention thusly:

> But we are not aware of any rule which requires that the witness should be warned before he answers of the intention to contradict him, in case he denies having made the statement which it is proposed to prove, in any other way than the character of the preliminary questions as to the time when, the place where and person to whom such contrary statement is alleged to have been made, would be likely to do.

Id. at 382-93.

28. 130 S.C. 252, 126 S.E. 28 (1925).

29. *Id.* at 253, 126 S.E. at 28.

equivocably clear that "[T]he requirement of notice is met when the cross-examiner advises the witness of the substance of the prior statement and the time when, the place where and the person to whom it was made."[30]

B. Collateral Matters

The second issue presented to the *Galloway* court spawned a clarification of the test of "collateralness" and a subsequent enlargement of the scope of suitable subject matter on which a witness may be impeached. The rule that a cross-examiner is concluded by the answer of a witness to a collateral question, while elementary to the law of evidence,[31] remains, nevertheless, difficult in its application. The difficulty, of course, lies with determining what is collateral under the rule. As Dean Wigmore observed,

> [w]hen we seek to learn what 'collateral' means, we are obligated either to define further—in which case it is a mere epithet, not a legal test—or to illustrate by specific instances—in which case we are left to the idiosyncrasies of individual opinion.[32]

The test for collateralness in South Carolina until now had been articulated in the now familiar terms enunciated in *State v. Brock*[33] as being whether

> the cross-examining party [would] be entitled to prove the fact as a part of and as tending to establish, his case [.] If he would be allowed to do so, the matter is not collateral; but if he would not be allowed to do so, it is collateral.[34]

The court in *Galloway,* however, found, as some commentators had, that this formulation was just too narrow to suffice for all cases.[35]

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30. 263 S.C. at 591, 211 S.E.2d at 888.

31. State v. Brock, 130 S.C. 252, 126 S.E. 28 (1925) and cases cited therein. Also see, State v. Miller, 262 S.C. 369, 204 S.E.2d 738 (1974); State v. Smith, 263 S.C. 150, 208 S.E.2d 533 (1974); State v. Williams, 263 S.C. 290, 210 S.E.2d 298 (1974), which are surveyed in 27 S.C.L. REV. 467, 470 (1975). *See* generally, DREHER 14-15; MCCORMICK § 36; 3A WIGMORE §§ 1020-1023 (Chadbourn Rev. 1976).

32. 3A WIGMORE § 1020 (Chadbourn Rev. 1976).

33. 130 S.C. 252, 126 S.E. 28.

34. *Id.* at 254, 126 S.E. at 29.

35. 263 S.C. at 592, 211 S.E.2d at 888. Professor Dreher's astute criticism of this formulation was that a strict application would relegate the right to impeach to that of admitting evidence inadvertently left out of the adversary's case in chief. He further noted that

In this case, defendant's witness, a Mrs. Church, had testified[36] that from her place of employment she had observed 300 yards away, a tall gray-haired man strike a tall young man with what appeared to be a 2 x 4, and in addition that she had seen the younger man respond by striking his assailant with his fists. Although Mrs. Church did not recognize either man at the time, she further testified that upon hearing a news broadcast of the death of a Mr. Brissey she had then realized that the older man she had seen was he. Only from a later newscast relating to the arrest of the defendant did she learn that the younger man was her sister's son, the defendant Galloway.

On cross-examination, the solicitor elicited from Mrs. Church that prior to learning the identity of either of the antagonists, she had felt that the blow struck by the older man "was a pretty bad thing to do." He then inquired of her whether or not upon learning of Brissey's death, but before knowing of the involvement of her nephew, she had exclaimed to three named coworkers: "Why did they do away with capital punishment? He was a good man."[37]

The judge, permitting the question over the defense's objection, ruled that Mrs. Church's co-workers could be called to contradict her denial of having made the statement.[38] During their testimony, the co-workers also testified to facts which, if believed, made it most unlikely that Mrs. Church had made the observations to which she testified.

To the supreme court it was apparent, upon examining the record on appeal, that the "testimony [of Mrs. Church] sought to be impugned [was] material, while the impugning testimony, except for that purpose, [was] not."[39] Since testimony of such a nature could not have been offered in proof of the case-in-chief against the defendant, it would concededly be collateral under the *Brock* formula.[40] However, the supreme court found that the decision, which Dean Wigmore felt was responsible for the *Brock*-

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[t]he trial judge should have the . . . discretion, to relax this rule when it appears that the fact testified to, no matter how minor, was one which the witness could not have been mistaken about if his story was true.

DREHER 15.

36. 263 S.C. at 590, 211 S.E.2d at 887.

37. *Id.*

38. Record at 657, 671, 691.

39. 263 S.C. at 593, 211 S.E.2d at 889.

40. Although the state did not concede this point, the court made the decision for them. 263 S.C. at 592, 211 S.E.2d at 888.

type test, had enunciated a much broader standard. That decision, *Attorney-General v. Hitchcock,*[41] had advanced the rule that for a prior inconsistency to be deemed relevant and properly the subject of impeachment

> "[i]t must be connected with the issue as a matter capable of being distinctly given in evidence, *or* it must be so far connected with it as to be a matter which, if answered in a particular way, would contradict a part of, the witness' testimony. . ."[42]

Notably, the court's opinion does not overrule the *Brock* formula for determining collateralness.[43] Rather, it only intimates an agreement with Dean Wigmore's view that such expressions of the test, although "accurate enough as far as they go," nevertheless fail to provide for "an important class of . . . admissible [evidence], namely facts relating to the bias, corruption, or other specific deficiencies of the witness."[44]

In order to find a statement of the rule from our own jurisdiction, which, in the court's words, is "broad enough to sustain the allowance of the contradiction,"[45] this passage from *Smith v. Henry,*[46] a case predating even *Hitchcock* was resurrected:

> "The general rule is, that the answer of a witness, to an immaterial question, cannot be contradicted to impeach his credit; but if the question is in any wise material to the issue, his answer can be contradicted."[47]

That this language is not employed as the new test for collateralness is very apparent. Indeed, the phrase "in any wise material to the issue" is no less a legal epithet than is "collateral."

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41. 1 Exch. 99 (1847).

42. 263 S.C. at 592, 211 S.E.2d at 888, *quoting* Attorney-General v. Hitchcock, 1 Exch. 99 (1847) (emphasis added by court). *See also* 3A WIGMORE § 1020 (Chadbourn Rev. 1976).

43. The court only went so far as to recognize that the rule "would not suffice for all cases." 263 S.C. at 592, 211 S.E.2d at 888.

44. 3A WIGMORE § 1020 (Chadbourn Rev. 1976). For an excellent treatment of this view, see Ewing v. United States, 135 F.2d 633, 640-42 (1942), *cert. denied,* 318 U.S. 803 (1943).

45. 263 S.C. at 593, 211 S.E.2d at 888.

46. 18 S.C.L. (2 Bail.) 118 (1831).

47. 263 S.C. at 593, 211 S.E.2d at 888, *quoting* Smith v. Henry, 18 S.C.L. (2 Bail.) 118, 127 (1831). Although this case has often been cited as authority for the proposition that one may not impeach on collateral matters, *e.g.,* State v. Wyse, 33 S.C. 582, 592, 12 S.E. 556, 558 (1890); State v. Sullivan, 43 S.C. 205, 210, 21 S.E. 4, 7 (1895); Miller, Adm'r v. A.C.L.R. Co., 140 S.C. 123, 213, 138 S.E. 675, 705 (1926) (dissenting opinion), this passage has never before been quoted as the statement of the rule in this jurisdiction.

In searching for a new legal standard by which to measure the relevancy of this latter class of evidence, the court quoted the following from a Kentucky decision:[48]

> "if a prior statement bears upon the story of a witness with such force and directness as to give it appreciable value in determining whether or not that story is true, such statement may be itroduced against him."[49]

Perhaps one further comment regarding the viability of the *Brock* test is appropriate. As previously noted, the *Galloway* opinion does not overrule the test, but, rather, makes it clear that the *Brock* test is no longer, if it ever was, the exclusive test for governing the admissibility of impeaching evidence. Consequently, the rule stated in *Brock,* can no longer be used to exclude testimony as irrelevant and collateral, but is instead available only to point out one clear area of impeaching testimony which is admissible.

III. STATUTORY LIMITATION BY FAILING TO DELIVER WRITTEN STATEMENT

The decision in *State v. Motes*[50] is destined to be troublesome for a number of reasons, one of which is the court's literal construction of South Carolina Code sections 1-65, 26-7.1, and 26-7.2.[51] The supreme court construed these provisions so as to pre-

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48. Commonwealth v. Jackson, 281 S.W.2d 891 (Ky. 1955).

49. 263 S.C. at 593, 211 S.E.2d at 888 *quoting* Commonwealth v. Jackson, 281 S.W.2d 891, 894-95 (Ky. 1953). Of course, a number of variations of this test exist. *See, e.g.,* Ewing v. United States, 135 F.2d 633 (D.C. Cir. 1942):

> But when it goes to challenge directly the truth of what the witness has said in matters crucial or material to the issues on trial, by no process of reason can it be held collateral.

Id. at 641; *accord,* DREHER 15, note 35 supra. Although the language quoted by the *Galloway* court refers only to self-contradicting evidence, apparently the test would be applicable to contradiction by extrinsic evidence as well, since the South Carolina Supreme Court has, thus far, never distinquished the two. *See* 3A WIGMORE §§ 1019, 1020, 1021 n.1 (Chadbourn Rev. 1976).

50. 264 S.C. 317, 215 S.E.2d 190 (1975).

51. S.C. CODE ANN. § 1-65 (1962) provides:

> *Public employee taking statement in investigation to give copy.*—Whenever any person employed by the State, or any county, city or municipality thereof, or any part of any such governing body, shall take a written statement in any investigation of any kind or nature from any person, the person receiving or taking the written statement shall give to the person making the statement a copy thereof and shall obtain from the person making the statement a signed receipt of the copy so delivered.

clude the defense from introducing a prior written statement for impeachment purposes because the State had originally failed to furnish a copy of the statement to the witness when it was made, as statutorily required.[52]

The issue was raised at the murder trial of James Motes, where the State offered as a witness the wife of the accused.[53] Mrs.

S.C. CODE ANN. § 26-7.1 (1962) provides:

Examination of witness in criminal proceeding concerning written statement made to public employee.—No witness in any preliminary hearing or in any criminal judicial proceeding of any kind or nature shall be examined or cross-examined by any examiner, solicitor, lawyer or prosecuting officer concerning a written statement formerly made and given to any person employed by this State, or any county, city, or municipality thereof, or any part of any such governing body, unless it first be shown that at the time of the making of the statement the witness was given an exact copy of the statement, and that before his examination or cross-examination the witness was given a copy of the statement and allowed a reasonable time in which to read it.

S.C.CODE ANN. § 267.2 *(1962) provides:*

Admissibility of such statement in evidence.—Unless the provisions of §§ 1-65 and 26-7.1 have been complied with, no statement such as is referred to in those sections shall be admissible in evidence in any case, nor shall any reference be made to it in the trial of any case.

52. In the few cases the supreme court has been called upon to construe these sections, it has typically responded in a manner which would not exclude valuable evidence.

In State v. Anderson, 224 S.C. 419, 79 S.E.2d 455 (1954), the court emphasized the statute's language which imposed the duty on the investigating officers with respect to statements which they "shall take". Thus the court found the statute did not apply to statements taken before its enactment. *Id.* at 421-22, 79 S.E.2d at 457.

Again avoiding the exclusion of evidence but in this instance by de-emphasizing the statute's language, the court in State v. Jones, 228 S.C. 484, 91 S.E.2d 1 (1956) found that:

> [r]easonably construed, the provision in Section 2 of the Act that the witness be given a copy of the written statement at the time of the making of the statement does not mean that such a copy must be given *eo instante.* The requirement of the statute is satisfied if a copy of the statement be given within a reasonable time after its making. . .

Id. at 493, 91 S.E.2d at 6.

The only other decision which brings some light to the subject is State v. Mikell, 257 S.C. 315, 185 S.E.2d 814 (1971) in which the court held that the statute was not applicable to exclude tape recordings of an alleged conspiracy. Importantly, the court went on to note that:

> [o]ne of the purposes of this statute is to permit a witness or a defendant to refresh his memory relative to statements made prior to the trial. Inasmuch as the tapes were played to and for these defendants prior to the trial, it cannot be forcefully argued that the spirit and purpose of the rule has been circumvented.

Id. at 326, 185 S.E.2d at 819.

53. Prior to being sworn as a witness, the defense interposed objection to Mrs. Motes' competency as a witness and to the proposed subject matter of her testimony. *Record* at 21. The defense contended that under § 26-403 of the South Carolina Code, any communication, verbal or nonverbal, made during coverture is protected from disclosure in a

Motes admitted in her testimony that she had made two prior statements concerning the crime, one written and a subsequent oral one, both made to the investigating officers. She testified, out of the jury's presence, that her first statement was false[54] but that the oral one, consistent with her in-court testimony, was true.[55] The trial judge *sua sponte* refused to permit examination or cross examination from the prior written statement when it became apparent that she had not been given a copy.[56]

The colloquy among the attorney for the State, attorney for the defense, and the trial judge concerning the use of the prior written statement revealed the judge's concern:

> *The COURT:* You can ask her about any oral statement she made but you can't face her with [the] written statement and that's spelled out in the Code. And I've been through it. I saved a man from the chair from that one time by using the rule.
>
> . . . .
>
> *The COURT:* Unless the provisions of 1-65 . . . and the provisions of 26-7.1 have been complied with no statement such as referred to in those sections shall be admissible in evidence in any case nor shall any reference be made to it at the trial of the case. How can it be any plainer, gentlemen . . . I've been through this thing [before].
>
> . . . .
>
> *The COURT:* It's a two edge sword. It was for the benefit of the defendant in my case but it cuts both ways.[57]

Nevertheless, the judge stated that he would be willing to relax the rule somewhat and allow Mrs. Motes to be cross-examined as to her testimony that one statement was true and the other false.[58]

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criminal case by one spouse against the other. That the trial judge overruled the objection and the supreme court affirmed his decision, ruling that the privilege, as defined by the statute, lies with the witnessing spouse and not the communicating spouse, is of course another troubling aspect of this case. *Record* at 22-23; 264 S.C. at 323, 215 S.E.2d at 192-93. This part of the decision is treated separately under the section dealing with Privileges. *See* notes 77-91 and accompanying text *infra*.

54. *Record* at 29.

55. The oral statement was made to the Solicitor on the morning prior to trial. *Id.* at 86, 90.

56. *Record* at 56.

57. *Id.* at 57-62.

58. *Id.* at 64. The defense did pursue this opening, but with little success.

> (DEFENSE): What other inconsistencies in your statements other than those two we have already pointed out about the shiny object and the man pulling the gun out in the grill did you make . . . [b]etween that and what you've testified to from this witness stand under oath?

This permission for limited cross-examination was viewed as significant by the supreme court. Though they too construed the applicable statutes to preclude the admission of the written statement,[59] the court speaking through Justice Lewis went on to hold that:

> [T]here [was] no showing that the inconsistencies between the trial testimony and the prior statement were not limited to those stated by the witness on cross-examination. Since the witness admitted that she had made false and inconsistent statements about the matter and the defendant was permitted to examine her concerning these inconsistencies, the defendant was not prejudiced by the refusal of the trial court to allow the prior statement to be further used in the trial.[60]

The supreme court appears to have been unbothered by its own inconsistency. That a trial judge may vacillate between a strict and unwaivering interpretation of the code that "cuts both ways" and an equitable and compromising position is excusable by the exigencies of trial. The same cannot be said for a court of review.

This ambivalent nature of the court's opinion is probably best explained as a reflection of the concerns expressed in the strong dissent of Justice Bussey. While agreeing with the majority that in this particular case, no showing of prejudice was demonstrated, Justice Bussey seriously questioned the court's construction of the three code sections:

> I cannot conceive of the legislature having intended to deprive an individual of the benefit of such evidence because of the failure of the State to comply with the law. Such would, I think be completely illogical and outside the obvious purpose of the statutory scheme.[61]

More importantly, the dissenting justice noted that had the

MRS. MOTES: Is that I didn't know that my husband had the gun when he left to go back over there.

(DEFENSE): That's the only other thing?

MRS. MOTES: That's the only other thing.

Record at 87.

59. 264 S.C. at 325, 215 S.E.2d at 193.

60. *Id.*, 215 S.E.2d at 193.

61. *Id.* at 327, 215 S.E.2d at 194. On this point the defendant asserted that such a construction would be "an invitation to law enforcement agencies to defeat conclusively any impeachment of their witnesses by the simple expedient of not receipting for witness statements prior to trial." Brief for Appellant at 19.

constitutional question been raised, the case of *Chambers v. Mississippi*[62] would clearly preclude such a construction.

In *Chambers,* the United States Supreme Court held that the Due Process clause barred a state from making evidentiary rulings which would render the trial fundamentally unfair.[63] After *Chambers* it is clear that the right of cross-examination is not merely "a desirable rule of trial procedure,"[64] but rather it is a right of constitutional proportions. Because it helps to assure the accuracy of the truth determining process, a state may not rigidly apply evidentiary rules to defeat its proper assertion.[65]

Although *Chambers* has been applied,[66] in various ways by

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62. 410 U.S. 286 (1973).

63. Leon Chambers, charged with the murder of a police officer, asserted as one defense, the repeated confessions of one McDonald. Although McDonald was turned over to the local authorities, he was ultimately released after repudiating a sworn confession at his preliminary hearing. At trial, McDonald was put on the stand by Chambers' attorney after the State failed to call him, but was only partially successful in presenting the desired testimony to the jury. One obstacle was Mississippi's "voucher rule," which presumes that a party calling a witness vouches for his credibility and is thereby bound by anything the witness might say. The other was the fact that Mississippi did not recognize declarations against penal interests and thus the testimony of three witnesses to whom McDonald had confessed prior to his sworn confession were inadmissible under the hearsay rule.

> In sum, then, this was Chambers' predicament. As a consequence of the combination of Mississippi's "party witness" or "voucher" rule and its hearsay rule, he was unable either to cross-examine McDonald or to present witnesses in his own behalf who would have discredited McDonald's repudiation and demonstrated his complicity. Chambers had, however, chipped away at the fringes of McDonald's story by introducing admissible testimony from other sources. . . [but] Chambers' defense was far less persuasive than it might have been had he been given an opportunity to subject McDonald's statements to cross-examination or had the other confessions been admitted.

410 U.S. at 294.

64. *Id.* at 295.

65. Although the Supreme Court grounded its reversal on the denial of cross-examination and the exclusion of McDonald's admissions, it appears that some lower courts have concluded that either violation alone justifies reversal. See the discussion and cases cited in Note, *Constitutional Restraints on the Exclusion of Evidence in the Defendant's Favor: The Implication of Davis v. Alaska,* 73 MICH. L. REV. 1465, 1485-86 n. 95 (1975).

66. Some lower courts have regarded *Chambers* as not intending to establish any new broad principle of constitutional law regarding a state's "voucher" or other evidentiary rules and have thus limited the case somewhat to its particular facts and circumstances. *E.g.,* United States v. Hughes, 529 F.2d 838 (5th Cir. 1976); Herrin v. State, 230 Ga. 476, 197 S.E.2d 734 (1973). Other courts however have found it to be authority to circumvent strict application of state evidentiary rules where the evidence bears assurances of trustworthiness and appears critical to the outcome. *E.g.,* Johnson v. Brewer, 521 F.2d 556 (8th Cir. 1975); Salem v. State of North Carolina, 374 F. Supp. 1281 (1974); Kreisher v. State, 303 A.2d 651 (Del. Sup. Ct. 1974); State v. Jamison, 64 N.J. 363, 316 A.2d 439 (1974); State v. Carrillo, 88 N.M. 236, 539 P.2d 626 (1975).

different courts it would seem to be persuasive authority for attacking a strict, mechanical application of section 26-7.2, at least where the proffered testimony bears assurances of trustworthiness and appears critical to the outcome.[67] The application of that section would prohibit without exception an impeachment cross-examination which centers upon a non-receipted written statement, regardless of the resulting prejudice to the defendant's right of confrontation. Such a construction simply could not pass constitutional muster after *Chambers*.[68]

It is possible then that the *Motes* court, by concluding that there was no prejudice caused by the exclusion of the prior written statement, was not completely oblivious to its contradictory ruling which construed the statute strictly. Rather it was conceivably attempting to frame its opinion so as not to foreclose any avenue it might want to take when actually faced with the constitutional issue. Unfortunately when given this opportunity in the recent case of *State v. Bolten*,[69] the court merely affirmed, without discussion, the decision in *Motes*.[70] Although the court could have moved in several directions which would have obviated the constitutional issue or at least clarified the grounds of the *Motes* decision, the court failed to do either, thus perpetuating the confusion concerning the proper construction to be given the statute.

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67. 410 U.S. at 302. With regard to the requirement that the excluded testimony be critical, one commentator observed:

> Certainly, the [*Chambers* decision] is not based on the fact that the evidentiary rulings "interfered with" the defendant's case, or rendered it "far less persuasive than it might have been." For this is the inevitable effect of any evidentiary ruling on the party against whom the rule is invoked. It is more likely that the key factor is the nature of the testimony at issue. Undoubtably, it was critical to Chambers' defense.

Recent Decisions, 62 ILL. B.J. 158, 159 (1973)(footnotes omitted).

68. *See also* Davis v. Alaska, 415 U.S. 308 (1974) where the Supreme Court found that a statute prohibiting the admission of juvenile records which operated to prevent an effective cross-examination of a crucial governmental witness for possible bias, violated the defendant's right of confrontation.

> One commentator astutely observed of the decision's reach that,
>
> [w]hile it is not the first case holding that the right of confrontation guarantees more than a trial procedure allowing physical confrontation and some cross-examination, it is the first to base a determination that the right of confrontation was violated on an explicit examination of the *effectiveness* of a line of cross-examination.

Note, *Constitutional Restraints on the Exclusion of Evidence in the Defendant's Favor: The Implications of Davis v. Alaska*, 73 MICH. L. REV. 1465, 1465-66 (1975) (emphasis in original; footnotes omitted); *see* 415 U.S. at 318.

69. 266 S.C. 444, 223 S.E.2d 863 (1976).

70. *Id.* at 449, 223 S.E.2d at 865.

The most direct course the court could have taken would have been to construe sections 1-65, 26-7.1 and 26-7.2 as applicable only to proscribe the use of unreceipted written statements by the state. Conceding that the import of the language employed conveys just the opposite legislative intent,[71] prior judicial interpretations of those sections have indicated that they should be read not literally, but in a manner which best effectuates the legislative purpose.[72] It is clear that this part of the Code was merely intended to remedy the common law disability of a defendant to discover his own written statement.[73] The broad language was therefore provided to ensure that all those possibly involved in securing a written statement, especially a written confession, would be included under the statute's scope. The pertinent sections, then, should not be construed to deprive the defendant of the benefit of any evidence contained in the unreceipted statements because of the failure of the state to comply with the law since the intent was to protect not hinder the defendant.

An alternative construction the supreme court might have advanced would have been to deny the statute's applicability in criminal cases where it is apparent that prejudice or a serious injustice would result to the defendant. Notably, since the *Motes* opinion is already partially couched in language dealing with prejudice, it would have been a simple matter for the court to formally adopt the standards enunciated in *Chambers*.[74]

The effect of the South Carolina Supreme Court's affirmance in *Motes* and its failure to explore the constitutional problems raised by *Chambers* is to foreclose such alternatives to the federal courts. Since the Federal District Court must defer to the state court on questions of state statutory interpretation,[75] that court will be required to rule all of the provisions of sections 26-7.1, and 26-7.2 unconstitutional as applied if *Chambers* is later found controlling.

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71. *See* note 51 *supra.*

72. *See* note 52 *supra.*

73. This common law disability is examined in its present context in Fletcher, *Pretrial Discovery in State Criminal Cases,* 12 STAN. L. REV. 293 (1960); Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure,* 69 YALE L.J. 1149, 1180-85 (1960); Kaufman, *Criminal Discovery and Inspection of Defendant's Own Statements in the Federal Courts,* 57 COLUM. L. REV. 1113 (1957). *See generally* 6 WIGMORE §§ 1850, 1859(g) (Chadbourn rev. 1976).

74. *See* notes 62-65 and accompanying text *supra.*

75. For an excellent examination of this point, see Tushnet, *Constitutional Limitation of Substantive Criminal Law: An Examination of the Meaning of Mullaney v. Wilbur,* 55 BOSTON U.L. REV. 775, 786 n. 78 (1975).

It might be noted however that *Chambers* may possibly apply only where the statements precluded under the statute are critical to the defense.[76] Thus it is arguable that in most instances the preclusion of a written statement under the rule would have such a negligible effect on the outcome of the case, that an issue of any significant constitutional dimension would not be raised except in "rare" circumstances. Even so, the South Carolina Supreme Court could have immunized the statute by specifically adopting the prejudice standard enunciated in *Chambers*. Its failure to do so leaves the statute vulnerable to constitutional invalidation and subject to considerable conjecture as to the statute's proper function.

IV. Privileged Spousal Communication

Another aspect of the decision in *State v. Motes*[77] requires careful attention. The supreme court, over the strong dissent of Justice Bussey, held that the effect of section 26-403 of the 1962 Code of Laws is to grant solely to the witnessing spouse the right to exercise the privilege against disclosing marital communications.[78] In this particular case, the State was permitted to call the wife of the defendant, over his objection, as a voluntary witness against him.

Although South Carolina originally recognized the common law rule that neither spouse was competent to testify for or against the other in a lawsuit, the competency of a husband or wife as a witness is now determined in this state under the following provisions of section 26-403 of the 1962 Code of Laws:

> In any trial or inquiry in any suit, action or proceeding in any court . . . the husband or wife of any party thereto or of any person in whose behalf any suit, action or proceeding is brought, prosecuted, opposed or defended shall, except as hereinafter stated, be competent and compellable to give evidence, the same as any other witness, on behalf of any party to such suit, action or proceeding. But no husband or wife shall be required to disclose any confidential or, in a criminal proceeding, any communication made by one to the other during their marriage.[79]

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76. *See* note 67 *supra.*

77. 264 S.C. 317, 215 S.E.2d 190 (1975).

78. *Id.* at 324, 215 S.E.2d at 193.

79. The statutory origins of the present day grant of competency may be traced from

The language of the statute removes the common law disability which formerly attended spousal testimony. It further purports to make such testimony compellable, whether favorable or adverse to the author-spouse. The statute then deals disjunctively with the separate questions of interspousal testimony[80] by protecting confidential communications from disclosure in civil cases, and all communications made by one spouse to the other during their marriage in criminal proceedings.[81]

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a provision enacted in 1866, making the husband and wife competent and compellable to testify for or against each other in *civil* cases. The history of this provision, as it emerged in various forms throughout numerous codifications, is succinctly described in Comment, *Witnesses—Competency of Spouses to Testify Against Each Other in Criminal Trial—Compelling the Spouse to Testify*, 16 S.C.L. REV. 615, 620-23 (1964).

For treatment of the early common law rule of spousal incompetency, see MCCORMICK § 66; 2 WIGMORE §§ 600-20A; Hutchins and Slesinger, *Some Observations on the Law of Evidence: Family Relations*, 13 MINN. L. REV. 675 (1929); Note, *A Critical Examination of Some Evidentiary Privileges: A Symposium*, 56 NW. U.L. REV. 206 (1961); Note, *Competency of One Spouse to Testify Against the Other in Criminal Cases Where the Testimony Does Not Relate to Confidential Communications: Modern Trend*, 38 VA. L. REV. 359 (1952).

80. The distinction between rules of incompetency and rules of privilege should be kept in view. Rules of incompetency are designed to aid in the search for truth, disqualifying certain witnesses as unreliable for various reasons, while a privilege operates to shut out evidence, thus obstructing the search for truth. A privilege is accorded to protect a person or interest for reasons of public policy. Care must therefore be taken to make this distinction, since courts have used the term "incompetency" to refer indiscriminately to both rules of exclusion. *E.g.*, Hawkins v. United States, 358 U.S. 74, 75 (1958). Perhaps in reaction to this misuse of the terms, the authorities have set out a great deal of detail to distinguish the two types of rules. *See* MCCORMICK § 78; 8 WIGMORE §§ 2332-34 (McNaughton rev. 1962).

Succinctly stated, the privilege of marital communication at common law prohibits testimony by a spouse concerning intra-spousal confidential communications made during marriage. The privilege obtains even though the parties were at the time estranged and, moreover, survives the death of a spouse or their divorce. The essence of the privilege is to protect confidences intended to be private and, thus, all communications or disclosive acts made in private are presumed to be confidential. Nevertheless, a third party who overhears a marital confidence may disclose it, unless his eavesdropping was made possible by the connivance of the other spouse. Lastly, it should be noted that the privilege is generally regarded as inapplicable (1) when one spouse is being prosecuted for a crime against the other, (2) when a third party is being sued for an injury to the marriage status, or (3) when one spouse sues for divorce and the quoted matter is a threat of harm or a confession of marital transgression. *See generally* DREHER 26-27; MCCORMICK §§ 78-86; 8 WIGMORE §§ 2332-41 (McNaughton rev. 1961); Hutchins and Slesinger, *Some Observations on the Law of Evidence: Family Relations*, 13 MINN. L. REV. 675, 680-82 (1929); Note, *Spousal Testimony*, 28 BROOKLYN L. REV. 259, 268-92 (1962); Note, *A Critical Examination of Some Evidentiary Privileges: A Symposium*, 56 NW. U.L. REV. 206, 216-30 (1961); Note, *Competency of One Spouse to Testify Against the Other in Criminal Cases Where the Testimony Does Not Relate to Confidential Communications: Modern Trends*, 38 VA. L. REV. 359 (1952).

81. This statutory distinction between disclosures in criminal cases and those in civil

The statute, until the *Motes* decision, had always been regarded as preserving, by necessary inference, the author-spouse's right to claim the privilege against the disclosure of marital communications.[82] The court, however, viewed the statute as "defin[ing] the limits of the remaining privilege against being compelled to so testify."[83] As such, the court gave it the following literal reading:

> In view of the prior removal of the disqualification of the husband and wife as witnesses against each other and the injunction that they may be "compellable" to give evidence as any other witness, the subsequent limitation that "no husband or wife" could be required to disclose marital communications means that the privilege against disclosing such evidence must be claimed or asserted, otherwise the disclosure could be required. There is no statutory language to indicate a legislative intent that a witness spouse could not so testify unless the other spouse agreed. It is the particular witness (husband or wife, as the case may be) who cannot be compelled to disclose; and, in the absence of a contrary statutory direction, the right to exercise the privilege against disclosing marital communications is solely that of the witness spouse from whom the privileged information is being sought.[84]

It should be observed that the majority's position is singular in finding the holder of the privilege to be the witnessing spouse.[85]

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cases was thought by Professor Dreher ". . . to add little to the common law rule . . . because all communications made in private betwzen a husband and wife are presumed to be confidential unless the subject matter or the circumstances show to the contrary." DREHER 26 (footnote omitted).

82. DREHER 26-27; Whaley, *Handbook on South Carolina Evidence*, 9 S.C.L.Q. (4A) 31 (1957).

83. 264 S.C. at 323, 215 S.E.2d at 192.

84. *Id.* at 323-24, 215 S.E.2d at 192-93.

85. The prevailing view as characterized by Professor Wigmore:

> The privilege is intended to secure freedom from apprehension in the mind of the one desiring to communicate; it thus belongs to the *communicating* one. The other one—the addressee of the communication—is therefore not entitled to object unless . . . the latter's silence is treated as an assent and an adoption of the statement, which thus makes it doubly a communication and doubly privileged.

8 WIGMORE § 2340 (McNaughton rev. 1961), (footnotes omitted; emphasis in original). For collected cases see *id.* at nn. 1 & 2; *accord*, DREHER 27; MCCORMICK § 83; *cf.*, People v. Wood, 126 N.Y. 249, 271, 27 N.E. 362, 368 (1891); Whaley, *Handbook on South Carolina Evidence*, 9 S.C.L.Q. (4A) 31 (1957) (that a waiver must be by both spouses since it is the privilege of both).

In a discussion of the privilege of confidential communication, one commentator noted that

That is not to say the opinion is erroneous for that reason. Indeed, the court fashioned its literal reading on the premise that since the effect of the statute was in derogation of the common law privilege, the court should look solely to the statute, not to the weight of common law authority, to determine the conditions under which the privilege might be asserted.[86] It is precisely this premise, that the statute acts in derogation of the common law privilege, which Justice Bussey persuasively argues to be erroneous. In his dissenting opinion, Justice Bussey thoroughly traces the legislative history and the subsequent judicial constructions of prior statutory enactments of the privilege and ultimately concludes,

> that it was the intent of the legislature to preserve the privilege of communications between husband and wife, which privilege was preserved primarily for the benefit of the communicating spouse, but also for either spouse who chose to claim it and not

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> the privilege is sometimes accorded to both, and sometimes to the communicator. . . . [T]o accord the privilege to the communicatee only would have the effect of leaving the communicator, the party most likely to be prejudiced by the testimony, without the protection of the privilege and such an approach clearly contravenes the policies of the privilege. (footnotes omitted)

Note, *A Critical Examination of Some Evidentiary Privileges: A Symposium,* 56 Nw. U.L. REV. 206, 220 (1961).

The North Carolina Supreme Court defined the ownership of the privilege under a statute similar to that of South Carolina. N.C. GEN. STAT. § 8-56 (1969) provides: "No husband or wife shall be compellable to disclose any confidential communication made by the one to the other during their marriage." Prior to Hagedorn v. Hagedorn, 211 N.C. 175, 189 S.E. 507 (1937), it was assumed, in accordance with the prevailing rule, that in North Carolina both spouses were protected, not only from being compelled to disclose a communication made in confidence between them, but also, from disclosure by or through the connivance of the other. D. STANSBURY, NORTH CAROLINA EVIDENCE § 60 (2d ed. 1963). In the *Hagedorn* case, however, it was held with little discussion and without citation of supporting authority that the privilege was that of the witness only; that if one spouse chose to testify to a confidential communication, the other could not successfully object. The decision was criticized in Note, *Evidence—Privileged Communications Between Husband and Wife,* 15 N.C.L. REV. 282 (1937): "Thus, under this decision, where one spouse confides in the other, apparently *both* spouses are given a privilege not to disclose the confidences, but *either* can waive it for both." *Id.* at 285 (emphasis in original). Subsequently, the North Carolina Supreme Court was given the opportunity to reconsider this ruling in the case of Hicks v. Hicks, 271 N.C. 204, 155 S.E.2d 799 (1967). The court, however, declined to expressly overrule *Hagedorn* and held instead that "[i]f *Hagedorn* is applicable here under the factual situation, we are not inclined to follow it. . ." 271 N.C. at 207, 155 S.E.2d at 802. The logical conclusion to be drawn from the case, according to one writer, is that "the rule in North Carolina is that both spouses have the privilege but neither can waive it without the consent of the other." Note, *Evidence—Privileged Communications Between Husband and Wife,* 46 N.C.L. REV. 643, 651 (1968).

86. 264 S.C. at 323, 215 S.E.2d at 192.

merely for a spouse who perchance chose to be or not to be a witness thereabout.[87]

If an explanation of the majority's opinion exists, it would appear to be that the court was not made aware of the pervasive consequences of deciding the case on such unsturdy grounds. In the first place, neither of the parties before the court addressed the issue as to the holder of the privilege but focused, instead, on questions relating to the requisite confidentiality and the scope of the communications.[88] Perhaps the court was merely attempting to escape the almost metaphysical maze such a discussion would be likely to entail. Nevertheless, in deciding the case as it did, the court has effectively read out of existence a large part of the rule of privileged spousal communication in South Carolina. Under the *Motes* decision, the communicating spouse can only be assured that his spouse will not be *compelled* to disclose such confidences in open court.[89]

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87. *Id.* at 330, 215 S.E.2d at 195; *see* note 6 *supra.*

88. In states with similar statutes, rather than substantially abolishing the privilege altogether, courts tend to limit the statutes' destructive nature by finding such communications are not strictly confidential. *See, e.g.*, People v. Melski, 10 N.Y.2d 78, 176 N.E.2d 81, 217 N.Y.S.2d 65 (1961). In that case the defendant and accomplices stole a number of guns. The group, upon being discovered by the defendant's wife in their home, subsequently related to her the nature of the crime. The majority held that the communication in question was neither induced by the marital relation nor made in confidence, as evidenced by the presence of third parties. *See* Note, *Evidence—Husband and Wife—Confidential Communication*, 11 AM. U.L. REV. 106 (1962); Note, *Witnesses—Competency—Acts of Husband and Wife as Privileged Communications*, 38 N.D.L. REV. 133 (1962).

However, careful attention to the distinctive language employed in the South Carolina statute raises the question of whether such a tactic is available to the court in this jurisdiction. In contrast to most other state statutes, the South Carolina Code distinguishes between disclosures in civil cases and those in criminal prosecutions. It apparently creates a privilege for *any* communication between spouses in a criminal proceeding, as opposed to *confidential* communications which are privileged in either type of proceeding at common law. Notwithstanding Professor Dreher's observation that such a distinction "would seem to add little to the common law rule," the scope of the privilege as extended by § 26-403 for criminal proceedings literally deletes any requirement of confidentiality whatsoever, thereby eliminating the avenue employed by other jurisdictions to save the heart of the privilege.

Another approach often taken to limit the evidentiary obstruction of the privilege is for the court to narrowly define "communications." *See* MCCORMICK § 79 and cases collected at 164 n. 19. But it should be noted that an equal number of courts have construed their statutes to extend the privilege to acts, facts, conditions and transactions not amounting to expressive communications at all. Cases collected in MCCORMICK § 79, at 164 n. 20.

89. It is debatable whether limiting the privilege as such, is "good" or "bad." For a view that a limited rule is to be preferred, see Note, *Competency of One Spouse to Testify*

If the privilege is intended, as the authorities contend,[90] to secure freedom from apprehension in the mind of one desiring to communicate, then it cannot be gainsaid that the benefit of the privilege is substantially lost after the *Motes* decision. Moreover, this particular resolution concerning the exercise of the marital privilege suggests one further flaw compounding the others — *i.e.*, determining whether the in-court disclosure by the witnessing spouse is actually voluntarily made. The essence of the argument to be advanced is that there are often ways "to compel such testimony more subtle than the simple issuance of a subpoena, but just as cogent."[91] This line of argument would be most persuasive in those instances where the testifying spouse had played more than a passive part in the offense, or where the decision to testify closely followed an investigation by the authorities. In this light one more expected problem attending the *Motes* decision will remain in defining exactly what is *voluntary* spousal testimony.

Whether the witness privilege rule will prove beneficial in

Against the Other in Criminal Cases Where the Testimony Does Not Relate to Confidential Communications: Modern Trend, 38 VA. L. REV. 359, 374 (1952). For the view recognizing the merits of the broader exclusion see Note, *A Critical Examination of Some Evidentiary Privileges: A Symposium,* 56 NW. U.L. REV. 206, 218 (1961).

The most basic policy justification supporting the retention of the privilege has been to help preserve marital harmony. Critics of the privilege are quick to point out that the rule is applied regardless of whether a particular marriage is preservable. Indeed, family harmony is nearly always past preserving when one spouse is willing to aid in the prosecution of the other. MCCORMICK § 66. Secondly, the privilege is widely accepted due to society's natural repugnance to requiring one spouse to testify against the other by disclosing marital communications. Note, *A Critical Examination of Some Evidentiary Privileges: A Symposium,* 56 NW. U.L. REV. 206, 218 (1961). But even the limited privilege left by *Motes* does not *require* one spouse to testify against the other.

90. *See* note 85 *supra.*

91. The language is that of Justice Stewart, concurring in Hawkins v. United States, 358 U.S. 74, 83 (1958). The defendant in that case was convicted of violating the Mann Act by transporting a girl across state lines for immoral purposes. His wife was permitted to testify against him over his objection. The court, under its rule-making authority, held that although the wife did not object to testifying, admission of her testimony over the defendant's objection was error.

The government had argued, analogous to the *Motes* holding, that the privilege should be that of the witness and, though she could not be compelled to testify, neither could she be prevented from doing so by the defendant-spouse. Justice Stewart, however, observed that the circumstances of the case were hardly consistent with the theory that her testimony was indeed voluntary. It appears that before the wife testified, she had been incarcerated as a material witness, her bonded release being conditioned upon her appearance in court as a witness for the government. *Id.* at 83. Justice Stewart went on to note that in general "such a [witness privilege] rule would be difficult to administer and easy to abuse." *Id.*

terms of facilitating the truth-finding function of a trial, or whether any such benefits will be viewed as insignificant in comparison with the loss of the traditional notions of interspousal privilege, can be ascertained only with the passage of time. But certainly it is to be observed that a judicial change of any privilege accorded to protect a person or interest for reasons of public policy, is characteristically made with more caution and generally upon a more explicit legislative intent than the bolder interpretation of the old privilege found necessary by the South Carolina Supreme Court in *Motes*.

David Rosenblum