CHAPTER 11

Competency of Witnesses

**SECTION 19‑11‑20.** “Dead man’s” statute.

 Notwithstanding the provisions of Section 19‑11‑10, no party to an action or proceeding, no person who has a legal or equitable interest which may be affected by the event of the action or proceeding, no person who, previous to such examination, has had such an interest, however the same may have been transferred or come to the party to the action or proceeding, and no assignor of anything in controversy in the action shall be examined in regard to any transaction or communication between such witness and a person at the time of such examination deceased, insane or lunatic as a witness against a party then prosecuting or defending the action as executor, administrator, heir‑at‑law, next of kin, assignee, legatee, devisee or survivor of such deceased person or as assignee or committee of such insane person or lunatic, when such examination or any judgment or determination in such action or proceeding can in any manner affect the interest of such witness or the interest previously owned or represented by him. But when such executor, administrator, heir‑at‑law, next of kin, assignee, legatee, devisee, survivor or committee shall be examined on his own behalf in regard to such transaction or communication or when testimony of such deceased or insane person or lunatic in regard to such transaction or communication, however the same may have been perpetuated or made competent, shall be given in evidence on the trial or hearing in behalf of such executor, administrator, heir‑at‑law, next of kin, assignee, legatee, devisee, survivor or committee, then all other persons not otherwise rendered incompetent shall be made competent witnesses in relation to such transaction or communication on said trial or hearing.

HISTORY: 1962 Code Section 26‑402; 1952 Code Section 26‑402; 1942 Code Section 692; 1932 Code Section 692; Civ. P. ‘22 Section 708; Civ. P. ‘12 Section 438; Civ. P. ‘02 Section 400; 1870 (14) Section 415.

Library References

Witnesses 125 to 183.5.

Westlaw Topic No. 410.

C.J.S. Witnesses Sections 146, 208 to 293.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Appeal and Error Section 79, Evidence at Trial.

S.C. Jur. Witnesses Section 14, Persons Whose Testimony is Excluded.

S.C. Jur. Witnesses Section 16, Testimony Excluded.

S.C. Jur. Witnesses Section 18, Exceptions.

Treatises and Practice Aids

Restatement (2d) of Property, Don. Trans. Section 10.2 TD 1, Permissible Evidence for Determining Donor’s Intention.

Restatement (3d) Property (Wills & Don. Trans.) Section 10.2, Permissible Evidence for Determining Donor’s Intention.

LAW REVIEW AND JOURNAL COMMENTARIES

Evidence: Competency ‑ The Dead Man’s Statute. 22 S.C. L. Rev. 558.

Scope of dead man’s statute enlarged. 39 S.C. L. Rev. 96, Autumn 1987.

The Dead Man’s Statute. 25 S.C. L. Rev. 389.

The New Federal Rules of Evidence and South Carolina Evidentiary Law: Comparison and Critical Analysis. 28 S.C. L. Rev. 481.

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1. In general

Cited in Campbell v Linder (1897) 50 SC 169, 27 SE 648. Farmers Bank & Trust Co. v Fudge (1919) 113 SC 25, 100 SE 628. Hydrick v Hydrick (1927) 142 SC 531, 141 SE 156. Lynch v Jordan (1928) 145 SC 525, 143 SE 264. Maxwell v Epton (1935) 177 SC 184, 181 SE 16. Young v Levy (1945) 206 SC 1, 32 SE2d 889. Samuel v Young (1949) 214 SC 91, 51 SE2d 367. Wallace v Wallace (1971) 256 SC 294, 182 SE2d 60. Murphy v Murphy (1972) 259 SC 147, 190 SE2d 735. Duncan v Brookview House, Inc. (1974) 262 SC 449, 205 SE2d 707.

The rule embodied in this section [Code 1962 Section 26‑402] aims to prevent testimony “as to communications and transactions with persons deceased” in the cases therein enumerated, on the ground that it is against public policy to allow witnesses to testify as to matters, when, if such testimony is untrue, it cannot be contradicted. Trimmier v Thomson (1894) 41 SC 125, 19 SE 291. Harris v Berry (1957) 231 SC 201, 98 SE2d 251.

Applied in Stuckey v Truett (1923) 124 SC 122, 117 SE 192. Guery v Kinsler (1872) 3 SC 423. Blohme v Lynch (1887) 26 SC 300, 2 SE 136. Martin v Adams (1888) 29 SC 597, 6 SE 860. Harris v Bratton (1891) 34 SC 259, 13 SE 447. Orr v Orr (1891) 34 SC 275, 13 SE 467. McCutchen v McCutchen (1907) 77 SC 129, 57 SE 678. Merck v Merck (1913) 95 SC 328, 78 SE 1027. McAuley v Orr (1914) 97 SC 214, 81 SE 489. Thomson v Ehrlich (1928) 148 SC 330, 146 SE 149.

This section [Code 1962 Section 26‑402] applies to criminal as well as to civil actions. State v Reynolds (1897) 48 SC 384, 26 SE 679. State v Kennedy (1910) 85 SC 146, 67 SE 152.

It was held also that this view was not in conflict with the cases of State v Belcher (1880) 13 SC 459, and State v Dodson (1882) 16 SC 453. State v Reynolds (1897) 48 SC 384, 26 SE 679. State v Kennedy (1910) 85 SC 146, 67 SE 152.

Dead man’s statute essentially prohibits any interested person from testifying concerning conversations or transactions with decedent if testimony could affect his or her interest. Hanahan v. Simpson (S.C. 1997) 326 S.C. 140, 485 S.E.2d 903, rehearing denied. Witnesses 125

Dead man’s statute is founded on principle that it is against public policy to allow interested witness to testify when testimony, if untrue, cannot be contradicted. Hanahan v. Simpson (S.C. 1997) 326 S.C. 140, 485 S.E.2d 903, rehearing denied. Witnesses 125

Under dead man’s statute, witness may testify to transaction between deceased and third party. Hanahan v. Simpson (S.C. 1997) 326 S.C. 140, 485 S.E.2d 903, rehearing denied. Witnesses 160(1)

The Dead Man’s Statute is directed not to the admissibility of evidence but to the competency of witnesses. Estate of Mason v. Mason (S.C.App. 1986) 289 S.C. 273, 346 S.E.2d 28.

The General Assembly, by using the words “testimony . . . however the same may have been perpetuated or made competent, . . . shall be made competent witnesses” by clear inference recognized that camouflaged testimony might be, in reality, fraudulent testimony of a transaction with a deceased person. Estate of Mason v. Mason (S.C.App. 1986) 289 S.C. 273, 346 S.E.2d 28.

This section [Code 1962 Section 26‑402] is commonly known as the dead man’s statute. Havird v. Schissell (S.C. 1969) 252 S.C. 404, 166 S.E.2d 801.

This section [Code 1962 Section 26‑402] is simply a perpetuation within a limited scope of the discarded common‑law rule which disqualified a witness because of interest from testifying. Long v. Conroy (S.C. 1965) 246 S.C. 225, 143 S.E.2d 459.

The ban of this section [Code 1962 Section 26‑402] is directed against the witness, not the “transaction or communication.” Harris v. Berry (S.C. 1957) 231 S.C. 201, 98 S.E.2d 251.

This statute is intended to protect estates of deceased, insane, and lunatic persons from alleged communications and transactions with such persons when alive or when suffering under the disability mentioned. Johnson v. Broome (S.C. 1935) 175 S.C. 385, 179 S.E. 315. Witnesses 125

It is error to exclude testimony concerning statements made by a person since deceased, unless the testimony is objectionable on some of the grounds and for reasons stated in this section [Code 1962 Section 26‑402]. Van Ness v. Schachte (S.C. 1928) 143 S.C. 429, 141 S.E. 721.

2. Construction and application

This section [Code 1962 Section 26‑402] is in restriction of the general rule in Code 1962 Section 26‑404 that one’s interest in the event of the action does not disqualify him as a witness therein, and is therefore to be strictly construed, and its restriction is not to be extended beyond its clearly expressed purpose. Harris v Berry (1957) 231 SC 201, 98 SE2d 251. Hicks v Battey (1972) 259 SC 426, 192 SE2d 477.

Only persons included in the particular relations herein referred to can be considered as embraced in the proviso or exceptions; others not named, though within the mischief intended to be prevented, cannot be included. Colvin v Phillips (1886) 25 SC 228. Jones v Quattlebaum (1889) 31 SC 606, 9 SE 982. Jackson v Lewis (1890) 32 SC 593, 10 SE 1074. Archer v Long (1893) 38 SC 272, 16 SE 998. Hobbs v Beard (1895) 43 SC 370, 21 SE 305. Harrell v Parrott (1896) 45 SC 611, 23 SE 946. Harrell v Parrott (1897) 50 SC 16, 27 SE 521. Butler v Butler (1901) 62 SC 165, 40 SE 138. Glenn v Gerald (1902) 64 SC 236, 42 SE 155. Lenhardt v Ponder (1902) 64 SC 354, 42 SE 169. Mims v Hairs (1908) 80 SC 460, 61 SE 968. McAulay v McAulay (1913) 96 SC 86, 79 SE 785. Pressley v Pressley (1915) 102 SC 174, 86 SE 377. Mims v Jones (1917) 107 SC 81, 91 SE 987. Huntley v Sullivan (1933) 170 SC 391, 170 SE 664. Copeland v Craig (1940) 193 SC 484, 8 SE2d 858. Zinnerman v Williams (1947) 211 SC 382, 45 SE2d 597. Singleton v Mullins Lumber Co. (1959) 234 SC 330, 108 SE2d 414. Shelley v Shelley (1964) 244 SC 598, 137 SE2d 851. Shelley v Shelley (1969) 253 SC 238, 169 SE2d 764.

When ‑ (a) In regard to any transaction or communication between the witness and a person deceased, insane, or lunatic. (b) Against a party prosecuting or defending the action as executor, administrator, heir‑at‑law, next of kin, assignee, legatee, devisee, or survivor of such deceased person, or as assignee or committee of such insane person or lunatic. (c) When the present or previous interest of the witness may in any manner be affected by the testimony or by the event of the trial. Norris v Clinkscales (1896) 47 SC 488, 25 SE 797; Long v Conroy (1965) 246 SC 225, 143 SE2d 459. It will thus be seen that, to justify the exclusion of testimony under this section [Code 1962 Section 26‑402], it should be shown to the satisfaction of the trial judge ‑ First, that the witness belongs to one or more, or to all, of the four classes of persons whose testimony may under certain circumstances be excluded; and, secondly, that his testimony partakes of, not merely one or two of the disqualifying characteristics classified under (a), (b), and (c), but that it possesses all three of those characteristics. Norris v Clinkscales (1896) 47 SC 488, 25 SE 797. Long v Conroy (1965) 246 SC 225, 143 SE2d 459.

This section [Code 1962 Section 26‑402] is to be strictly construed rather than extended by construction. Lisenby v Newsom (1959) 234 SC 237, 107 SE2d 449. Respass & Respass, C.P.A. v King Pontiac (1960) 236 SC 363, 114 SE2d 486.

Since dead man’s statute is exception to general rule of witness competency, it requires restrictive reading on which party requesting its muzzling effect bears burden. Hanahan v. Simpson (S.C. 1997) 326 S.C. 140, 485 S.E.2d 903, rehearing denied. Witnesses 126; Witnesses 182

The dead man’s statute, Section 19‑11‑20, requires a restrictive reading because it is an exception to the general rule of witness competency; the party requesting the statute’s muzzling effect bears the burden of proof. U.S. Fire Ins. Co. v. Macloskie (S.C.App. 1995) 320 S.C. 459, 465 S.E.2d 759, rehearing denied. Witnesses 125; Witnesses 182

This section [Code 1962 Section 26‑402] is to be strictly construed and its restriction is not to be extended beyond its clearly expressed purpose. Havird v. Schissell (S.C. 1969) 252 S.C. 404, 166 S.E.2d 801. Witnesses 126

This section [Code 1962 Section 26‑402] acts to disqualify a person who falls within either or all of the designated classes only when his testimony partakes of all of the stated disqualifying characteristics. Long v. Conroy (S.C. 1965) 246 S.C. 225, 143 S.E.2d 459.

This section [Code 1962 Section 26‑402] does not bar a party to the action from testifying unless his testimony possesses all of the disqualifying characteristics. Long v. Conroy (S.C. 1965) 246 S.C. 225, 143 S.E.2d 459.

In every case wherein this section [Code 1962 Section 26‑402] has been construed, it has been held to be in restriction of the general right to testify, and at the same time this court has recognized its inability to extend it beyond the classes expressly denied the right to testify. Rapley v. Klugh (S.C. 1893) 40 S.C. 134, 18 S.E. 680.

This section [Code 1962 Section 26‑402] is in restriction of the general right conferred by Code 1962 Section 26‑404 and cannot be extended by construction beyond its clearly expressed design. Guery v Kinsler (1872) 3 SC 423. Jones v. Plunckett (S.C. 1878) 9 S.C. 392.

This section [Code 1962 Section 26‑402] must be construed by the intent appearing on its face, and whether the proviso should be applied must be determined by the issue raised through the pleadings and not by the form of the action. Boykin v. Watts (S.C. 1875) 6 S.C. 76.

3. Documentary evidence

Since dead man’s statute is directed against competency of witness, rather than transaction or communication itself, it does not prohibit introduction of documentary evidence. Hanahan v. Simpson (S.C. 1997) 326 S.C. 140, 485 S.E.2d 903, rehearing denied. Witnesses 164(1)

Where will is contested on ground of undue influence, this section [Code 1962 Section 26‑402] does not preclude introduction by proponent of letters written by testator to beneficiaries under will, since letters speak for themselves and testimony by interested witness is not needed. Harris v. Berry (S.C. 1957) 231 S.C. 201, 98 S.E.2d 251.

But had any of such letters been lost, witness could not have testified, over objection, to its contents. Harris v. Berry (S.C. 1957) 231 S.C. 201, 98 S.E.2d 251.

In action by administratrix for possession of an automobile in defendant’s possession, the admission of a check and bank book as documentary evidence that defendant had delivered the check to deceased held not subject to objection under this section [Code 1962 Section 26‑402], since it could not be considered a transaction or communication between witness and deceased. Bense v. O’Neill (S.C. 1930) 154 S.C. 126, 151 S.E. 228. Witnesses 164(1)

4. Interested person—In general

Under this section [Code 1962 Section 26‑402], to disqualify a witness, the examination must not only be in regard to a transaction with deceased, and his testimony or the event of the trial affect the interest of the witness, but the action or proceeding must be one against or by one of the designated classes of persons. Lewie v. Hollman (S.C. 1898) 53 S.C. 18, 30 S.E. 601.

5. —— Parties, interested person

Statute does not apply where the witness is not a party to the action, has no interest in the event of it, and cannot be affected by it. Bollmann v Bollmann (1874) 6 SC 29. Twitty v Houser (1876) 7 SC 153. Blakely & Copeland v Frazier (1878) 11 SC 122. Shaw v Cunningham (1881) 16 SC 631.

Testimony fell within dead man’s statute and was properly refused where person seeking to testify was party to action and testimony he sought to introduce: (1) dealt with transaction or communication between witness and deceased; (2) was against party prosecuting or defending action as executor, heir‑at‑law, legatee, devisee, or survivor of such deceased person; and, (3) affected present interest of witness. Kelly v. Peeples (S.C. 1987) 294 S.C. 63, 362 S.E.2d 636.

In action by creditor to set aside conveyance of real property by debtor to his mother, testimony of mother concerning agreement with son to purchase house from him and assume purchase money mortgage did not violate Dead Man’s Statute where son died after transferring property to mother but prior to commencement of action by creditor, as mother’s testimony was not offered against party prosecuting or defending action as executor, administrator, heir at law, next of kin, assignee, legatee, devisee or survivor of debtor. First State Sav. and Loan Ass’n v. Nodine (S.C.App. 1987) 291 S.C. 445, 354 S.E.2d 51. Witnesses 135

It is at least doubtful whether this section [Code 1962 Section 26‑402] applies where parties prosecute and defend as grantees or alienees of deceased person rather than as executor, administrator, heir at law, etc. Branton v. Martin (S.C. 1963) 243 S.C. 90, 132 S.E.2d 285.

In an action by a surviving partner against the son of the deceased partner for damages caused to his interest in the business, the court held this section [Code 1962 Section 26‑402] not applicable as to the testimony of the surviving partner, and he was rightfully permitted to show that he owned a one‑half interest in the partnership, since son was not sued in representative capacity. Shuler v. Heitley (S.C. 1946) 209 S.C. 198, 39 S.E.2d 360.

In an action on a life insurance policy, where the defense was suicide, plaintiff can testify to conversations with insured before his death, since defendant is not defending as representative of the deceased, so that this section [Code 1962 Section 26‑402] is not applicable. Lanter v. Southern States Life Ins. Co. of Alabama (S.C. 1920) 114 S.C. 536, 104 S.E. 193. Witnesses 148

In an action to which a married woman is a party, her husband is not a “party” within the meaning of this section [Code 1962 Section 26‑402], and has no “interest” therein that will prohibit him from testifying as to a transaction between his wife and a person since deceased. Scott v. Wiggins (S.C. 1919) 113 S.C. 88, 101 S.E. 113.

One who petitioned for letters of administration could testify that he paid a doctor’s bill for the deceased, notwithstanding this section [Code 1962 Section 26‑402], since the testimony was not given in an action against any of the parties named in the section. Burkhim v. Pinkhussohn (S.C. 1900) 58 S.C. 469, 36 S.E. 908. Witnesses 132

A plaintiff may state the fact and date of a conversation with defendant’s testator. Trimmier v. Thomson (S.C. 1894) 41 S.C. 125, 19 S.E. 291. Witnesses 159(2)

In order for the section to apply, the action must be prosecuted or defended by a person, in the capacity of one of the relations mentioned in the section. The mere existence of the relation does not make the section applicable unless the action is prosecuted in that capacity. Brown v. Moore (S.C. 1887) 26 S.C. 160, 2 S.E. 9.

In an action by creditors of a partnership to subject the lands of a deceased partner to the firm debts, where the defendant claims an equitable mortgage upon said lands, said defendant is not prohibited by this section [Code 1962 Section 26‑402] from testifying as to communications and transactions between himself and the deceased as to the land in question, the testimony not being against anyone belonging to the classes mentioned in said section, but against creditors. Hutzler v. Phillips (S.C. 1887) 26 S.C. 136, 1 S.E. 502, 4 Am.St.Rep. 687. Witnesses 150(5)

For a case where the court held that the testimony offered came within every provision of this statute, with one exception, namely, that the testimony offered and admitted in evidence, while being against a party then prosecuting the action, the party so prosecuting the action was not doing so either as executor, administrator, heir‑at‑law, next of kin, assignee, legatee, devisee, or survivor of the deceased person, see Godfrey v. Godfrey (S.C. 1936) 182 S.C. 117, 188 S.E. 653.

A trustee is not the representative of his deceased predecessor, and the obligor of bond, given to the latter, can prove payment to him in the action thereon by the former. Guery v. Kinsler (S.C. 1872) 3 S.C. 423.

6. —— Executors, interested person

In an action by executrixes for the purpose of foreclosing on two notes secured by mortgages, defendant mortgagor’s testimony concerning the deceased mortgagee’s intentions regarding the notes was barred under the Dead Man’s Statute, Section 19‑11‑20, where she was a party to the action, which concerned a transaction between her and the decedent, and her testimony would definitely have affected her interest in the mortgaged property. Suttles v. Wood (S.C.App. 1984) 280 S.C. 272, 312 S.E.2d 574.

In an action to recover proceeds of a life insurance policy as remaindermen of their father’s estate, plaintiffs’ testimony relating to transactions between themselves and the deceased life tenant, whose defendant estate was represented by the executors under her will, was properly excluded by the application of this section [Code 1962 Section 26‑402] when it was invoked by her executors. Walters v. Kirkwood (S.C. 1947) 209 S.C. 470, 40 S.E.2d 795.

For case holding executor to have no interest and therefore being capable to testify under this section [Code 1962 Section 26‑402], see Ex parte Newton (S.C. 1937) 183 S.C. 379, 191 S.E. 59.

This section [Code 1962 Section 26‑402] does not render one of two executors, who is a defendant, but who has no interest except in his representative capacity, incompetent as a witness for the plaintiff. Devereux v. McCrady (S.C. 1896) 46 S.C. 133, 24 S.E. 77.

A surviving executor, in an action against the administrator of his late coexecutor, cannot testify as to what assets he did or did not receive from the deceased, or what passed between them relative to preparing the inventory of the estate. Williams v. Mower (S.C. 1888) 29 S.C. 332, 7 S.E. 505.

If the defendant, though not named as executor, defends for the benefit of the estate of his testator, whose declarations the plaintiff has offered to prove, he is protected against such testimony. Boykin v. Watts (S.C. 1875) 6 S.C. 76.

7. —— Administrators, interested person

In an action by the administrator of a deceased wife against her husband for money of her estate in his hands, the husband is, under this section [Code 1962 Section 26‑402], incompetent to testify that the wife gave him the property as his own. McElveen v. King (S.C. 1910) 88 S.C. 346, 70 S.E. 801. Witnesses 139(11)

8. —— Legatees, interested person

In an action by legatees to recover a legacy from executors, the father of contingent legatees does not have such an interest as will preclude him from testifying concerning a communication by the deceased executor. Gibert v. Glenn (S.C. 1930) 159 S.C. 135, 156 S.E. 325. Witnesses 140(4)

In an action by a tenant against the executors of his former landlord for the unlawful seizure of crops for rent alleged to be due, it is competent for a legatee, who also claims to own the land by gift from the deceased, and to whom the tenant has attorned, to testify as a witness to the arrangement between himself and the deceased landlord, whereby he became entitled to the rents, he not being a “party” to the action, and having no interest therein, within the meaning of this section [Code 1962 Section 26‑402]. Huff v. Latimer (S.C. 1890) 33 S.C. 255, 11 S.E. 758. Witnesses 140(6)

A legatee under lost will, in attempting to set up same, cannot testify to communications or transactions with testator. Bauskett v. Keitt (S.C. 1885) 22 S.C. 187.

9. —— Heir‑at‑law, interested person

Plaintiff heir’s deed of his portion of the subject real estate to his daughter fail to extinguish his interest in the property so as to qualify him to testify, under a court‑created exception to Section 19‑11‑20, concerning a trust relationship with defendant heir’s ancestor and, thus, permit a constructive trust to be impressed upon the real property, since the plaintiff heir’s interest was still in being, even though it was now being held by his daughter, the plaintiff heir could potentially be a statutory or testamentary heir of his daughter, should she predecease him, or his daughter could reconvey the property to him when the case concluded, and without the plaintiff heir’s testimony the property deeded to the daughter would have no value. Davie v. Atkinson (S.C.App. 1987) 291 S.C. 188, 352 S.E.2d 517.

Under this section [Code 1962 Section 26‑402] the testimony of a defendant in partition as to an agreement between himself and his deceased father is competent, where the plaintiffs claim as heirs of defendant’s deceased brother, because it is not against a party prosecuting or defending in any character mentioned in this section [Code 1962 Section 26‑402]. Harmon v. Harmon (S.C. 1911) 96 S.C. 393, 71 S.E. 815.

Under this section [Code 1962 Section 26‑402] one who is sued as an heir may testify to the contents of a letter received by her ancestor from plaintiff, and to conversations between her and the ancestor, because such testimony is not against a party prosecuting or defending the action as executor, administrator, etc., of such deceased person. Martin v. Jennings (S.C. 1898) 52 S.C. 371, 29 S.E. 807.

The fact that the plaintiff is an alienee of the rights of the other heirs‑at‑law, as well as an heir‑at‑law, cannot prevent her from invoking the provision of this section [Code 1962 Section 26‑402]. Vaun v. Howle (S.C. 1895) 44 S.C. 546, 22 S.E. 735.

Testimony by an heir, party to the proceeding, as to a communication had between his ancestor and the ancestor, since deceased, of a co‑defendant adverse in interest, is competent under this section [Code 1962 Section 26‑402]. Moore v. Trimmier (S.C. 1890) 32 S.C. 511, 11 S.E. 548, rehearing denied 32 S.C. 511, 11 S.E. 552, opinion reinstated 35 S.C. 606, 15 S.E. 800.

The plaintiff may be the heir‑at‑law of the deceased person with whom the communication was had and about which testimony is being offered, yet if the plaintiff is not prosecuting the action in the capacity of heir‑at‑law, this section [Code 1962 Section 26‑402] does not apply. Brown v. Moore (S.C. 1887) 26 S.C. 160, 2 S.E. 9.

10. —— Employees, interested person

Witnesses were not precluded from testifying by the dead man’s statute as having certain or vested legal interests simply by virtue of the fact that they were employed by the defendant. U.S. Fire Ins. Co. v. Macloskie (S.C.App. 1995) 320 S.C. 459, 465 S.E.2d 759, rehearing denied.

Admitting testimony of insurer’s employee in action on policy held not violative of this section [Code 1962 Section 26‑402]. Caldwell v. Volunteer State Life Ins. Co. (S.C. 1933) 170 S.C. 294, 170 S.E. 349. Witnesses 140(4)

11. —— Agents, interested person

In action for dower, testimony of plaintiff’s son as to his acts as agent for plaintiff was not objectionable as being testimony of party in interest. Hazelwood v. Mayes (S.C. 1918) 111 S.C. 23, 96 S.E. 672. Witnesses 140(4)

Statements by agent since deceased are admissible. Berry v. Virginia State Ins. Co. (S.C. 1909) 83 S.C. 13, 64 S.E. 859.

In an action against the company on an insurance policy, where the agent had authority to accept a note for premiums, the agent was asked on examination what agreement there was between him and deceased at the time he took deceased’s note for the premiums, the agreement sought to be shown being that, if a note was not paid at maturity, deceased should return the policy. The trial court properly excluded the testimony on the ground that it contravened this section [Code 1962 Section 26‑402] excluding the transactions of a deceased person with a witness who was a party in interest. Clark v. Home Fund Life Ins. Co. (S.C. 1908) 79 S.C. 494, 61 S.E. 80. Witnesses 164(1)

This section [Code 1962 Section 26‑402] does not prohibit testimony as to conversations between plaintiff’s agent and defendant’s testator. Kean v. Landrum (S.C. 1905) 72 S.C. 556, 52 S.E. 421. Witnesses 141

12. —— Assignees, interested person

An alienee, by executor’s sale of land of a deceased person, is not deceased’s “assignee” within the protection of this section [Code 1962 Section 26‑402]. Rapley v Klugh (1893) 40 SC 134, 18 SE 680. Jones v Plunckett (1878) 9 SC 392. Cantey v Whitaker (1882) 17 SC 527.

A “grantee” of decedent is an “assignee” within the meaning of that term as used in this section [Code 1962 Section 26‑402]. In short, anyone who is excluded from testifying to communications or transactions with an “assignee” of the deceased is likewise debarred from testifying to communications or transactions with the “grantee” of one deceased. Palachucola Club v. Withington (S.C. 1931) 159 S.C. 446, 157 S.E. 621.

The fact that the defendant was the alienee of the deceased person would not necessarily make the defendant an “assignee” so as to render it incompetent for the plaintiff to testify to a transaction with the deceased. Brice v. Miller (S.C. 1892) 35 S.C. 537, 15 S.E. 272.

In an action against a bank to recover a policy of insurance upon the life of A., deceased, payable to plaintiffs and one J., deceased, which policy, as defendant alleged, had been assigned by A. to it as collateral, held, that plaintiffs did not sue in any of the representative capacities referred to in this section [Code 1962 Section 26‑402], and that the testimony of defendant’s president and cashier, as to transactions and communications with A. concerning the policy, was admissible. Macauley v. Central Nat. Bank (S.C. 1887) 27 S.C. 215, 3 S.E. 193. Witnesses 129

13. —— Attorneys, interested person

Testimony of attorney preparing will is generally admissible, despite dead man’s statute, on ground that attorney is not “interested person.” Hanahan v. Simpson (S.C. 1997) 326 S.C. 140, 485 S.E.2d 903, rehearing denied. Witnesses 141

Attorney who drafted will was not “interested person,” for purposes of dead man’s statute; accordingly, his testimony was admissible in will contest. Hanahan v. Simpson (S.C. 1997) 326 S.C. 140, 485 S.E.2d 903, rehearing denied. Witnesses 140(16)

An attorney is not deemed to have a disqualifying interest in the action by reason of his right to ordinary and usual fees which he will derive from the proceeding, or by reason of a lien for his fee. Havird v. Schissell (S.C. 1969) 252 S.C. 404, 166 S.E.2d 801.

In action by executor, an attorney can testify to communications between himself as attorney for the testator and the administrator, now deceased, of an estate under which defendants claim. Reynolds v. Rees (S.C. 1885) 23 S.C. 438. Witnesses 138

14. —— Third parties, interested person

Section does not apply to conversations between deceased and third person. Ivester v Fowler (1917) 109 SC 424, 96 SE 154. Kennemore v Kennemore (1887) 26 SC 251, 1 SE 881. Sloan v Hunter (1900) 56 SC 385, 34 SE 658, reh dismd 56 SC 392, 34 SE 879. Singleton v Singleton (1901) 60 SC 216, 38 SE 462.

A witness in interest is not incompetent to testify to communications and transactions had between a person deceased and some third person. Roe v Harrison (1878) 9 SC 279. Hughey v Eichelberger (1878) 11 SC 36. Shaw v Cunningham (1881) 16 SC 631. McLaurin v Wilson (1882) 16 SC 402. Robinson v Robinson (1884) 20 SC 567.

The testimony of a party to an action testifying as to a communication between the deceased and another person is admissible under this section [Code 1962 Section 26‑402]. Oswald v. Lawton (S.C. 1938) 187 S.C. 42, 196 S.E. 535.

In Brickle v Leach (1899) 55 SC 510, 33 SE 720, it is held that this section [Code 1962 Section 26‑402], providing that, in action by or against the representative of a decedent, the opposing party may not testify as to conversations between himself and the decedent, does not prohibit other witnesses from testifying to such conversations. Brickle v. Leach (S.C. 1899) 55 S.C. 510, 33 S.E. 720. Witnesses 160(1)

15. Legal or equitable interest affected

Witness is prohibited from testifying under dead man’s statute only if his or her present or previous interest will be affected by event of trial; as such, person is only disqualified if he or she has certain or vested legal or equitable interest which may be affected by direct, legal operation of judgment. Hanahan v. Simpson (S.C. 1997) 326 S.C. 140, 485 S.E.2d 903, rehearing denied. Witnesses 140(1); Witnesses 140(2)

Testator’s son‑in‑law, who was not beneficiary under contested will and therefore had no present, vested interest in outcome of will contest, was not sufficiently “interested person” for dead man’s statute to bar his testimony. Hanahan v. Simpson (S.C. 1997) 326 S.C. 140, 485 S.E.2d 903, rehearing denied. Witnesses 140(4)

Since testator’s granddaughter had only contingent interest under contested will, rather than vested legal interest that could be affected by direct, legal operation of judgment in will contest, dead man’s statute did not render her testimony inadmissible. Hanahan v. Simpson (S.C. 1997) 326 S.C. 140, 485 S.E.2d 903, rehearing denied. Witnesses 140(7)

In determining the applicability of the dead man’s statute precluding testimony by, inter alia, “a person having an interest which may be affected by the event of the trial,” the test is whether the witness has a certain or vested legal interest, and the interest may possibly be affected by the direct, legal operation of the judgment. U.S. Fire Ins. Co. v. Macloskie (S.C.App. 1995) 320 S.C. 459, 465 S.E.2d 759, rehearing denied. Witnesses 140(2)

In declaratory judgment action to construe will, testimony of life tenant as to testator’s intent that life tenant’s adopted son inherit under the will was admissible in evidence under the dead man’s statute where testamentary language, although not specifically naming adopted grandson, left remainder to children living at time of death. Estes v. Ruff (S.C. 1976) 267 S.C. 396, 228 S.E.2d 671.

A witness is disqualified only when he has a legal or equitable interest and there is a possibility that such interest may be affected by the direct, legal operation and effect of the judgment. Havird v. Schissell (S.C. 1969) 252 S.C. 404, 166 S.E.2d 801. Witnesses 140(1)

The test of the interest of a witness in the event which disqualifies him, under this section [Code 1962 Section 26‑402], from testifying in his own behalf against the personal representative of a deceased person, is that he will either gain or lose by the direct legal operation and effect of the judgment. Long v. Conroy (S.C. 1965) 246 S.C. 225, 143 S.E.2d 459.

The general common‑law rule, established by all the cases, is, that in order to render a witness incompetent, his interest in the event of the suit, should be present, certain, and vested interest, and not uncertain and contingent. Long v. Conroy (S.C. 1965) 246 S.C. 225, 143 S.E.2d 459.

This section [Code 1962 Section 26‑402] does not disqualify a witness from testifying as to transactions or communications with a deceased person when the present or previous interest of the witness will not be affected by the testimony or the event of the trial. Long v. Conroy (S.C. 1965) 246 S.C. 225, 143 S.E.2d 459. Witnesses 171

A witness is disqualified only when there is a possibility that his interest may be affected by the direct legal operation and effect of the judgment. McLauchlin v. Gressette (S.C. 1953) 224 S.C. 296, 79 S.E.2d 149.

Participation in the transaction or communication will disqualify a witness if he has a legal or equitable interest which may be affected by the result of the case. The test of the interest of a witness in the event which disqualifies him, under this section [Code 1962 Section 26‑402], from testifying in his own behalf against the personal representative of a deceased person, is that he will either gain or lose by the direct legal operation and effect of the judgment. Riddle v. George (S.C. 1936) 181 S.C. 360, 187 S.E. 524.

The “interest” must be held by the witness in his individual capacity, and does not apply to interest held solely in a representative capacity. Devereux v. McCrady (S.C. 1896) 46 S.C. 133, 24 S.E. 77.

In an action of ejectment, where both parties claim title under a common grantor, the widow of the grantor, who purchased at a sale under an execution against her husband, may, under this section [Code 1962 Section 26‑402], competently testify whether, when she purchased at the execution, it was understood between her and her husband that she was to take subject to a mortgage by her husband, she having no interest in the result of the action. Blohme v. Lynch (S.C. 1887) 26 S.C. 300, 2 S.E. 136. Witnesses 140(10)

In a contest between two claimants under the obligee, in a bond for title, the obligor can testify to communications between himself and the deceased obligee, as such a witness, though a party to the cause, has no interest in the action. Wood v. Wood (S.C. 1886) 25 S.C. 600. Witnesses 139(5)

A party as witness is incompetent to testify as to communication with deceased person against his administrator where the judgment would affect his interest. Earle v. Harrison (S.C. 1882) 18 S.C. 329.

It is the possibility that “any person who has a legal or equitable interest which may be affected by the event of the action” that will exclude him as a witness. Roe v. Harrison (S.C. 1878) 9 S.C. 279.

16. Against interest testimony

Even where the interest is held as an individual right, yet the testimony of the witness is competent if it is against such interest. Devereux v McCrady (1896) 46 SC 133, 24 SE 77. Shell v Boyd (1890) 32 SC 359, 11 SE 205.

Under dead man’s statute, party may testify against his or her interest. Hanahan v. Simpson (S.C. 1997) 326 S.C. 140, 485 S.E.2d 903, rehearing denied. Witnesses 171

Since testator’s surviving wife stood to gain more under intestacy than under contested will, her testimony as to will’s validity in will contest was against her pecuniary interest, and was not prohibited by dead man’s statute. Hanahan v. Simpson (S.C. 1997) 326 S.C. 140, 485 S.E.2d 903, rehearing denied. Witnesses 171

Since testator’s son‑in‑law stood to gain more under prior wills, he was effectually testifying against his pecuniary interest when he testified as to final will’s validity in will contest, so as to be competent witness under dead man’s statute. Hanahan v. Simpson (S.C. 1997) 326 S.C. 140, 485 S.E.2d 903, rehearing denied. Witnesses 171

This section [Code 1962 Section 26‑402] was enacted to protect an estate under certain circumstances after death has closed the mouth of the decedent, but it was never intended to prevent an adverse claimant from telling the truth in favor of decedent’s representative. Ex parte Cleveland (S.C. 1935) 177 S.C. 514, 181 S.E. 890. Witnesses 164(7)

This section [Code 1962 Section 26‑402] was never intended to take from one named as a party the locus penitentiae, and to compel him to remain silent, when he is willing to tell the truth against his own interest, even if his testimony should affect the rights of others. Shell v. Boyd (S.C. 1890) 32 S.C. 359, 11 S.E. 205.

Purpose of dead man’s statute is to prevent fraud; thus, testimony which would diminish one’s share under will would not be disqualifying under this statute. In re Estate of Fabian (S.C.App. 1997) 326 S.C. 349, 483 S.E.2d 474. Witnesses 125; Witnesses 171

The interest affected means the interest promoted; parties are competent to testify against their interest. Moffatt v. Hardin (S.C. 1884) 22 S.C. 9.

17. Transactions—In general

The term transaction, as used in this section [Code 1962 Section 26‑402] means the carrying on or through of any matter or affair, and implies mutuality ‑ something done by both in concert, in which both take some part. Burns v Caughman (1970) 255 SC 199, 178 SE2d 157. Hicks v Battey (1972) 259 SC 426, 192 SE2d 477.

The necessity that there be mutuality or concert of action to constitute a transaction eliminates a fortuitous, involuntary act, such as where the plaintiff simply relates from his observation the physical situation and how an accident happened. Hicks v. Battey (S.C. 1972) 259 S.C. 426, 192 S.E.2d 477.

While the term transaction is said to have a comprehensive meaning, its application is limited to those situations within the evil which this section [Code 1962 Section 26‑402] was designed to prevent; that is, the protection of estates of deceased, insane, and lunatic persons from fraudulent claims. Burns v. Caughman (S.C. 1970) 255 S.C. 199, 178 S.E.2d 151. Witnesses 125

This section [Code 1962 Section 26‑402] does not prohibit evidence concerning transactions or communications with a decedent, but renders certain witnesses incompetent to give such evidence. Riddle v. George (S.C. 1936) 181 S.C. 360, 187 S.E. 524.

This section [Code 1962 Section 26‑402] does not prevent a husband from testifying as to a transaction between his wife and a person since deceased. Scott v. Wiggins (S.C. 1919) 113 S.C. 88, 101 S.E. 113. Witnesses 146

The term “transaction” is a very comprehensive term, meaning the carrying on or through of any matter or affair. Merck v. Merck (S.C. 1911) 89 S.C. 347, 71 S.E. 969, Am.Ann.Cas. 1913A,937.

The crucial test in determining the competency of testimony under this section [Code 1962 Section 26‑402] is: Was the transaction or communication between a person now deceased and the witness? If it was, he is not competent to testify as to such transaction or communication. If it was not, he is competent. Brock v. O’Dell (S.C. 1895) 44 S.C. 22, 21 S.E. 976.

A witness may testify as to a conversation between his wife and decedent, in which he took no part, such conversation not being a transaction or communication between the witness and decedent. Sullivan v. Latimer (S.C. 1893) 38 S.C. 158, 17 S.E. 701.

“Transaction” implies mutuality ‑ something done by both the witness and decedent, in concert, in which both take some part. Sullivan v. Latimer (S.C. 1893) 38 S.C. 158, 17 S.E. 701.

A decree in an action by an executor against the estate of his coexecutor in relation to their testator’s estate will not be set aside, under this section [Code 1962 Section 26‑402], because of testimony that plaintiff had had repeated conversations with deceased, where the details of the conversations were not given. Williams v. Mower (S.C. 1892) 35 S.C. 206, 14 S.E. 483. Witnesses 159(2)

Witness is disqualified under dead man’s statute only if testimony concerns transaction or communication between witness and deceased. In re Estate of Fabian (S.C.App. 1997) 326 S.C. 349, 483 S.E.2d 474. Witnesses 159(1)

18. —— Contracts, generally, transactions

Letter written by decedent indicating belief that she had changed beneficiary of annuity did not fall under Dead Man’s Statute, and was admissible to show decedent’s intent to remove her husband as beneficiary. Rushton v. Lott (S.C.App. 1998) 330 S.C. 418, 499 S.E.2d 222, rehearing denied. Witnesses 164(4)

Under this section [Code 1962 Section 26‑402], the testimony of a party, setting up a counterclaim for goods sold and delivered to a person since deceased, that items in his books of original entry were made by him, is not incompetent, since it relates only to his own acts. Jeffords v. Muldrow (S.C. 1916) 104 S.C. 388, 89 S.E. 357, 6 A.L.R. 755. Witnesses 165

In an action by the owner of a store building against a former tenant and a purchaser from such tenant of a half interest in the business carried on in such store, for damages for the removal of alleged fixtures, evidence as to whether, when the purchasing defendant bought the interest in the business, the tenant’s manager, since deceased, represented the fixtures as being a part of the business, was not admissible under this section [Code 1962 Section 26‑402]. Hurst v. J.D. Craig Furniture Co. (S.C. 1913) 95 S.C. 221, 78 S.E. 960. Witnesses 159(2)

If the witness had simply testified that he placed a certain sum in the hands of his wife, the testimony would have been admissible; but, when he further testified that the sum of money was in payment of a certain interest, then this involved the act of the wife in so receiving it, and rendered the testimony incompetent. Corbett v. Fogle (S.C. 1905) 72 S.C. 312, 51 S.E. 884.

In an action by an administrator who is surviving partner of deceased, he is incompetent to testify that the deceased partner was responsible for goods sold by the firm to his tenants, so that his estate should be charged therewith. Gee v. Humphries (S.C. 1897) 49 S.C. 253, 27 S.E. 101. Witnesses 139(16)

A ward, in action for account brought by him after majority against the executor of his deceased guardian, cannot testify to communications made to him by the deceased upon the matter of compromise formerly made between them, as to the value of the estate, although the returns of the guardian have been introduced in evidence by the executor. Owens v. Watts (S.C. 1886) 24 S.C. 76.

In an action to recover a share of a crop made by plaintiff on defendant’s farm, revived after defendant’s death against his executors, the plaintiff could testify as to his own acts in connection with the subject matter, which he in no way attempted to connect with the deceased. Rookhart v. Dean (S.C. 1884) 21 S.C. 597.

Plaintiff in action against a town can testify as to the transactions between himself and former intendant of the town, acting for the corporation, but at the time of trial deceased. Coleman v. Chester (S.C. 1880) 14 S.C. 286. Witnesses 153

A factor in his action against executor of owners of cotton for reclamation cannot testify to conversation had with them. Blakely & Copeland v. Frazier (S.C. 1878) 11 S.C. 122.

19. —— Checks, transactions

In an action against a daughter to account for money she withdrew from her father’s checking account prior to his death, the daughter’s testimony that the money was “a gift” from her father violated the Dead Man’s Statute, Section 19‑11‑20, even though such testimony was in answer to, and explanation of, a direct question by opposing counsel. Pinkerton v. Jones (S.C.App. 1992) 310 S.C. 295, 423 S.E.2d 151. Witnesses 159(7)

Testimony relating to the issuance of a check payable to the deceased and that it was left with an attorney for delivery to him was not evidence of a transaction between the witness and the deceased. Lisenby v. Newsom (S.C. 1959) 234 S.C. 237, 107 S.E.2d 449. Witnesses 159(13)

If the testimony of the plaintiff is to the effect that she gave a check to deceased for the purpose of buying a car for her, it would be clearly inadmissible. Bense v. O’Neill (S.C. 1930) 154 S.C. 126, 151 S.E. 228.

20. —— Wills, transactions

Self‑serving testimony about the destruction of a will, whether the testimony is negative or positive as to the presence and direction of the testator, is proscribed by the Dead Man’s Statute. Estate of Mason v. Mason (S.C.App. 1986) 289 S.C. 273, 346 S.E.2d 28. Witnesses 164(2)

Testimony of will proponent as to her destruction of the will pertained to a transaction or communication with the deceased, was also self‑serving, and therefore proscribed by the Dead Man’s Statute. Estate of Mason v. Mason (S.C.App. 1986) 289 S.C. 273, 346 S.E.2d 28. Witnesses 164(2)

Under this section [Code 1962 Section 26‑402], in an action by one of the parties to an alleged agreement to execute mutual, irrevocable wills, against the executor, legatees, and devisees of the other party to enforce such agreement, plaintiff’s testimony as to transactions and communications with the deceased should have been excluded. Dicks v. Cassels (S.C. 1915) 100 S.C. 341, 84 S.E. 878. Witnesses 159(2)

21. —— Loans, transactions

In a suit to recover money alleged to have been loaned to the deceased in his lifetime, the admission of testimony of the lender as to the fact of depositing the money in a bank to the credit of the deceased was held not error, since the mere deposit of money in a bank could have been without the knowledge or consent of the deceased and would, therefore, lack that element of mutuality which is necessary to a transaction with the deceased within inhibition of the statute. Johnson v. Broome (S.C. 1935) 175 S.C. 385, 179 S.E. 315. Witnesses 159(3)

In a suit to recover money alleged to have been loaned to the deceased in his lifetime, the admission of testimony of the lender as to the fact of her giving money to the deceased was held error, since the testimony involved a transaction between the lender and the deceased consisting of an act of the lender in putting the money in the deceased’s hands, and act of the deceased in receiving money. Johnson v. Broome (S.C. 1935) 175 S.C. 385, 179 S.E. 315. Witnesses 159(3)

22. —— Notes, transactions

A person is not excluded as a witness whose liability on a note will in no way be increased or diminished by the event of the suit. Sanders v Bagwell (1892) 37 SC 145, 15 SE 714, reh dismd 37 SC 160, 16 SE 770. Twitty v Houser (1876) 7 SC 153.

Testimony of widow and executrix of payee of note as to alleged agreement to credit laundry charges of maker on the note in action by executrix to collect note was not prohibited by this section [Code 1962 Section 26‑402]. Wolfe v. Brannon (S.C. 1947) 211 S.C. 282, 44 S.E.2d 833.

In proceeding against estate for allowance of claims, competency of claimant’s testimony showing failure of consideration for note executed by testatrix held not to render admissible testimony with reference to gift of lot, which was separate, distinct, and unrelated transaction which occurred several years after execution of note. Ex parte Cleveland (S.C. 1935) 177 S.C. 514, 181 S.E. 890. Witnesses 175(1)

In administrators’ action on note given by defendant to intestate, defendant could not testify that note was merely an accommodation note for which no consideration had been given, such testimony relating to a “transaction” with deceased. Witsell v. Nettles (S.C. 1925) 131 S.C. 140, 126 S.E. 429.

Under this section [Code 1962 Section 26‑402] the plaintiff, in an action on a note, was incompetent to testify that an endorser, since deceased, made payments and promises to him, and of what the last payment consisted. Patrick v. English (S.C. 1916) 106 S.C. 267, 91 S.E. 295. Witnesses 144(5)

In an action upon a note endorsed by defendant’s intestate, it was competent for plaintiff to testify that, when he got possession of the note, it had the intestate’s name on the back of it, and that intestate did not put his name on the back after plaintiff got it. Patrick v. English (S.C. 1916) 106 S.C. 267, 91 S.E. 295. Witnesses 164(8)

Where suit is brought upon the notes of a married woman, alleged to have been given with reference to certain property received from a deceased relative upon condition that she pay a certain debt of the husband, it is not incompetent under this section [Code 1962 Section 26‑402] as a transaction with a decedent, for plaintiff, speaking of a change in the possession of the property, to say that the decedent “had fixed the property so they could pay the debt.” Brice v. Miller (S.C. 1892) 35 S.C. 537, 15 S.E. 272. Witnesses 160(2)

This section [Code 1962 Section 26‑402] does not render incompetent testimony by the son’s administrator that he had had frequent conversations with the father in relation to the settlement of the son’s estate, and that the father, though knowing that he was administrator, never made any demand upon him for the note, where he does not undertake to testify to what the conversations were. Richards v. Munro (S.C. 1889) 30 S.C. 284, 9 S.E. 108. Witnesses 159(2)

In proceeding to revive execution by administrator of the assignee the defendant cannot testify that he had placed two notes in hands of the deceased assignee to collect. Monts v. Koon (S.C. 1884) 21 S.C. 110. Witnesses 159(3)

Where assignee of sealed note sues, the defendant may prove the loss of the receipt given him by assignor, since deceased, but he cannot testify to contents of it. Standridge v. Powell (S.C. 1879) 11 S.C. 549. Witnesses 164(6)

23. —— Personal injury, transactions

One‑car accident is “transaction” as something done in concert in which both parties take mutual parts and sole survivor may testify concerning independent act of deceased in operating vehicle by simply relating what he saw as to issue of identity of driver. Starnes v. Miller (S.C. 1980) 275 S.C. 16, 266 S.E.2d 790.

Testimony of widow as to complaints of pain by the deceased were clearly admissible, and other testimony of widow as to statements made by the deceased with reference to how the accident occurred, if technically inadmissible, afford no reasonable ground upon which to reverse the award, because her testimony in this regard was purely cumulative to other testimony establishing the injury. Wright v. Graniteville Co. Vaucluse Division (S.C. 1976) 266 S.C. 88, 221 S.E.2d 777.

In an action for injuries to a passenger, declarations of the conductor (made while taking up the tickets immediately before the wreck) who was killed in the wreck, are a part of the res gestae, and are not excluded by this section [Code 1962 Section 26‑402]. Cain v. Atlantic Coast Line R. Co. (S.C. 1906) 74 S.C. 89, 54 S.E. 244. Witnesses 163

24. —— Real property, generally, transactions

In an action to enjoin obstruction of a road, defendant was not precluded by this section [Code 1962 Section 26‑402] from testifying as to an agreement with a deceased former owner of plaintiff’s land, where such former owner was not plaintiff’s immediate grantor, but merely one of his predecessors in title. Taylor v. Cox (S.C. 1951) 218 S.C. 488, 63 S.E.2d 470.

Where plaintiff sued to recover an undivided one half of deceased’s property, alleging oral contract on his part to will her such property, her testimony was incompetent to prove the contract under this section [Code 1962 Section 26‑402]. Brown v. Golightly (S.C. 1917) 106 S.C. 519, 91 S.E. 869, Am.Ann.Cas. 1918A,1185. Witnesses 159(8)

In a boundary suit, testimony of a former owner as to a conversation of a third person with his father, then the owner of the land, is not obnoxious to this section [Code 1962 Section 26‑402] as it is not a transaction between the witness and the deceased, and it is not against a defendant who sustained any of the relations to the deceased mentioned in the statute. Holden v. Cantrell (S.C. 1915) 100 S.C. 265, 84 S.E. 826. Witnesses 160(1)

That decedent was in possession of certain land when he conveyed the same to the witness is not a transaction between the witness and the decedent as to which the witness was incompetent to testify. Langston v. Cothran (S.C. 1907) 78 S.C. 23, 58 S.E. 956. Witnesses 159(4)

The examination of plaintiff as to whether he knew how defendant came into possession of certain property, received from a deceased relative, was not improper, under this section [Code 1962 Section 26‑402], as the transaction referred to was not between the witness and the deceased person, but between the defendant and a deceased person. Brice v. Miller (S.C. 1892) 35 S.C. 537, 15 S.E. 272.

The survivor of a firm, in an action against devisee of deceased partner to recover his share of certain lands held in deceased partner’s name, but being really partnership property, is incompetent to prove any communications or transactions between the deceased and himself. Jones v. Smith (S.C. 1889) 31 S.C. 527, 10 S.E. 340.

Mere consent to occupancy of land by another is not a “transaction,” within the meaning of this section [Code 1962 Section 26‑402]. Brown v. Moore (S.C. 1887) 26 S.C. 160, 2 S.E. 9.

Where, in an action to recover an interest in land, a party defendant offers to testify as to declarations and transactions between the deceased owner of the land and the father of the plaintiffs, also deceased, the evidence is admissible. Kennemore v. Kennemore (S.C. 1887) 26 S.C. 251, 1 S.E. 881. Witnesses 160(1)

In an action to recover land, brought against one who claimed as purchaser under A, who had purchased from C, deceased, A was a competent witness to prove C’s declarations as to the title to the land. Jones v. Plunckett (S.C. 1878) 9 S.C. 392. Witnesses 143(2)

25. —— Deeds, transactions

Grantee’s testimony as to his conversations with grantor about effect of deed transferring 250 acres of real property to him for $1 had no relation to grantor’s mental competency, and thus, such testimony should have been excluded under Dead Man’s Statute in action against grantee by grantor’s children after her death, challenging deed’s validity. Brooks v. Kay (S.C. 2000) 339 S.C. 479, 530 S.E.2d 120, rehearing denied. Witnesses 159(14)

A witness could not, in view of this section [Code 1962 Section 26‑402], testify regarding disposition a deceased ancestor made of his land and as to what arrangements, with respect to whether the ancestor had agreed to sign a deed to witness, had been made. Floyd v. Montgomery Lumber Co. (S.C. 1919) 111 S.C. 382, 98 S.E. 139. Witnesses 159(8)

The witnessing of a deed executed by a decedent, thus giving validity to the instrument, is a “transaction,” between the witness and the deceased person which prohibits such person from testifying to the execution of the deed. Merck v. Merck (S.C. 1911) 89 S.C. 347, 71 S.E. 969, Am.Ann.Cas. 1913A,937.

A son, after introduction in evidence of a deed to him by his father, since deceased, may testify that he bought the land of the father and paid for it, such testimony being not inadmissible under this section [Code 1962 Section 26‑402]. Langston v. Cothran (S.C. 1907) 78 S.C. 23, 58 S.E. 956. Witnesses 159(2)

The son of a grantor in a deed may testify as to remarks made by the grantor at the time of executing the deed, which was to another son of the grantor, and as to directions by the grantor to the person drawing the deed, without infringing this section [Code 1962 Section 26‑402]. Brock v. O’Dell (S.C. 1895) 44 S.C. 22, 21 S.E. 976. Witnesses 160(1)

This section [Code 1962 Section 26‑402] does not prevent the son and grantee of a deceased debtor from testifying for complainant in a suit by a judgment creditor of his father to set the deed aside as fraudulent. Shell v. Boyd (S.C. 1890) 32 S.C. 359, 11 S.E. 205.

26. —— Partition actions, transactions

In an action brought against a deceased attorney’s estate for damages resulting from the attorney’s alleged negligent representation of plaintiff in a partition action and negotiations for the purchase of real property, testimony given by the plaintiff concerning a communication with the deceased was inadmissible, under Section 19‑11‑20, since the plaintiff was directly affected by the outcome of the trial; however, the plaintiff’s wife, who was not a party to the action, was not disqualified by the statute merely because of her relationship to plaintiff and, even though her testimony may have been disqualified by the statute due to her former dower interest in the property which was the subject of the attorney‑client relationship, the defendant, as administratrix of the estate, failed to object on this ground at trial. McBeth v. Bishop (S.C. 1982) 278 S.C. 443, 298 S.E.2d 441.

In a suit to partition the estate of an intestate, the plaintiff may testify that he paid the purchase money; that he paid half of the taxes; that he took and held possession of half the land, and the date and extent of his occupancy, the improvements made by him, the insurance of his house, and the collection and retention of the amount of the policy, with the knowledge and acquiescence of his deceased mother; that he paid no rent; that a line between the part occupied by him and that occupied by her was run by a surveyor a short while before she died ‑ for these were independent substantive acts and facts which involved no transaction or communication with the deceased. Walker v. Henderson (S.C. 1918) 109 S.C. 160, 95 S.E. 337.

In an action for partition of real estate of an intestate, plaintiff’s testimony as to statements of the deceased regarding sale of lands to him is incompetent under this section [Code 1962 Section 26‑402]. Walker v. Henderson (S.C. 1918) 109 S.C. 160, 95 S.E. 337. Witnesses 159(8)

In partition against a husband of lands claimed by him through his deceased wife, he is incompetent to testify as to payment to the wife of certain sum for her interest, under this section [Code 1962 Section 26‑402], because it relates to a transaction with a decedent. Corbett v. Fogle (S.C. 1905) 72 S.C. 312, 51 S.E. 884. Witnesses 159(13)

A defendant to an action for partition is not incompetent to testify to communications between himself and a former trustee of the property, now deceased, under whom plaintiff claimed, the plaintiff not holding any of the relations to the deceased specified in this section [Code 1962 Section 26‑402]. Minton v. Pickens (S.C. 1886) 24 S.C. 592.

27. —— Mortgages, transactions

Under this section [Code 1962 Section 26‑402] the testimony of defendant that the deceased, in asking him to execute a mortgage, assured him that the mortgage was only intended to evidence the purchase price of a lot, and that he would soon have a settlement with the defendant, and would then deliver up the mortgage for a cancellation and satisfaction, was excluded as relating to a transaction with deceased. Woodrow v. Frederick (S.C. 1926) 133 S.C. 431, 131 S.E. 598.

Under this section [Code 1962 Section 26‑402], the testimony of a widow and administratrix, defending a suit by heirs for an accounting, that the decedent had used certain of her land, as to the rental value thereof, as to mortgages and debts collected for her, and as to money which he had borrowed from her, in view of other evidence showing that he had handled her mortgages and collected upon them, and that she had never received the amount, was competent. Smith v. Smith (S.C. 1916) 105 S.C. 393, 89 S.E. 1032.

Under this section [Code 1962 Section 26‑402], a plaintiff was held incompetent to testify, on an issue of the execution of a mortgage, that he saw the deceased mortgagor execute the mortgage. Stelts v. Martin (S.C. 1911) 90 S.C. 14, 72 S.E. 550. Witnesses 159(2)

28. —— Services rendered, transactions

Where the services are of a personal kind which by their very nature had to be performed in the presence or with the knowledge or consent of the decedent, so that the testimony would tend to show the existence of an implied contract by the decedent to pay for the services, the witness is prohibited to testify as to the services rendered. Burns v. Caughman (S.C. 1970) 255 S.C. 199, 178 S.E.2d 151. Witnesses 159(9)

In an action to recover compensation for an audit, the testimony of a witness, who shared plaintiff’s profits, as to the content of a telephone conversation between him and the deceased concerning deceased’s personal liability for auditing services performed by the plaintiff, was inadmissible. Respass & Respass v. King Pontiac (S.C. 1960) 236 S.C. 363, 114 S.E.2d 486.

Where a niece sued the estate of her deceased aunt for compensation for services she had rendered, it was held that testimony of the niece as to the agreement for the services should not have been allowed, and testimony of disinterested persons as to conversations they had with the deceased should have been admitted. In re Limehouse’s Estate (S.C. 1941) 198 S.C. 15, 16 S.E.2d 1.

The testimony of the plaintiff, in a suit for services rendered to a person since deceased, that she rendered services for a specified time, and on cross‑examination as to what she received from the deceased, was not incompetent, under this section [Code 1962 Section 26‑402]. Marshall v. Mitchell (S.C. 1901) 59 S.C. 523, 38 S.E. 158. Witnesses 159(9)

In an action for services rendered on a building for deceased, plaintiff’s testimony as to work done by him on deceased’s premises when the latter was at home, and could not have been ignorant of such work, is not a “transaction” within the meaning of this section [Code 1962 Section 26‑402]. Foggeth v. Gaffney (S.C. 1890) 33 S.C. 303, 12 S.E. 260. Witnesses 159(9)

In an action against an administrator for services to defendant’s decedent, it is inadmissible for plaintiff to testify that the account sued on was correct. Boyd v. Cauthen (S.C. 1888) 28 S.C. 72, 5 S.E. 170. Witnesses 159(9)

29. Exceptions

Benefit of dead man’s statute may be waived where party asserting statute “opens the door,” by offering testimony otherwise excludible. Hanahan v. Simpson (S.C. 1997) 326 S.C. 140, 485 S.E.2d 903, rehearing denied. Witnesses 175(1)

Testimony relating to interested witnesses’ observations of testator, which formed basis of their opinions of his capacity, was properly admitted in will contest under mental capacity exception to dead man’s statute. Hanahan v. Simpson (S.C. 1997) 326 S.C. 140, 485 S.E.2d 903, rehearing denied. Witnesses 159(14)

Notwithstanding that testimony of interested witness may generally fall within inhibition of dead man’s statute as to evidence of transactions or communications with decedent, witness may testify to acts, demeanor or conduct of decedent where testimony is offered merely for its bearing on issue of mental competency. Hanahan v. Simpson (S.C. 1997) 326 S.C. 140, 485 S.E.2d 903, rehearing denied. Witnesses 159(14)

In action brought by decedent’s estate to recover life insurance proceeds from decedent’s second wife, who was named beneficiary of life insurance policy, wife was competent to testify regarding such policy, under exception to dead man’s statute, once personal representative had testified on same subject. Estate of Revis by Revis v. Revis (S.C.App. 1997) 326 S.C. 470, 484 S.E.2d 112. Witnesses 176(1)

A plaintiff’s deposition testimony which was prohibited by the first sentence of Section 19‑11‑20 and did not fall within either of the 2 exceptions provided by the second sentence of the statute, was not rendered admissible on the ground that the defendant’s counsel “opened the door for the admission of the oral agreement and relationship between the plaintiff and the decedent” when he took the plaintiff’s deposition and examined her regarding an alleged oral agreement with the decedent and her relationship with the decedent. Thomas v. Taylor (S.C.App. 1989) 300 S.C. 127, 386 S.E.2d 630.

Notwithstanding the testimony of an interested witness may generally fall within the inhibition of the statute as to evidence of transactions or communications with a decedent, he may testify to the acts, demeanor, or conduct of the decedent where the testimony is offered merely for its bearing on an issue of mental competency. Havird v. Schissell (S.C. 1969) 252 S.C. 404, 166 S.E.2d 801.

In a suit to recover money alleged to have been loaned to deceased, the testimony of the sole beneficiary under the will of the deceased as to her knowledge of the facts involved in the suit did not render competent the otherwise incompetent testimony of the lender as to fact of the lender’s giving money to the deceased, since the sole beneficiary was not a party to the action within the statute which excludes testimony only when one of the designated parties is a party to the action. Johnson v. Broome (S.C. 1935) 175 S.C. 385, 179 S.E. 315. Witnesses 176(1)

In action in claim and delivery for possession of automobile in defendant’s possession, plaintiff’s testimony on cross‑examination that deceased had come to her house in car and had stated that car was his did not open the door for admission of defendant’s testimony purporting to give details of transaction between herself and deceased under this section [Code 1962 Section 26‑402]. Bense v. O’Neill (S.C. 1930) 154 S.C. 126, 151 S.E. 228. Witnesses 178(3)

And in an action to recover land, evidence on the part of the plaintiff that she left the deed to the land with the grantor, who had a life interest, for safekeeping, and he was dead, was not inadmissible under this section [Code 1962 Section 26‑402], where the defendant had already testified that he did not claim the land as heir‑at‑law, devisee or assignee of the deceased. Brucke v. Hubbard (S.C. 1906) 74 S.C. 144, 54 S.E. 249. Witnesses 164(9)

Under this section [Code 1962 Section 26‑402], testimony of plaintiff as to transactions with a deceased person is admissible where the testimony of such person taken de bene esse was used by the defendant in reference to the same transaction. Ellis v. Cribb (S.C. 1899) 55 S.C. 328, 33 S.E. 484. Witnesses 175(2)

It has always been the proper construction of this section [Code 1962 Section 26‑402] to allow a plaintiff to testify fully as to communications and transactions with a person deceased, if and whenever the personal representative of such deceased persons opens the door by giving testimony himself to such a communication or transaction. Trimmier v. Thomson (S.C. 1894) 41 S.C. 125, 19 S.E. 291.

The observations of a physician do not amount to a transaction within this section [Code 1962 Section 26‑402], so as to prohibit such physician from testifying as to decedent’s physical condition, and the amount of time required to look after his health. Sullivan v. Latimer (S.C. 1893) 38 S.C. 158, 17 S.E. 701. Witnesses 159(9)

The introduction of testimony other than that of the representative of the deceased, as to certain transactions or communications of the deceased, does not render a party in interest competent to testify as to the same matter. Brice v Hamilton (1879) 12 SC 32. A remote alienee of one deceased is within the mischief intended to be remedied by the exception, but she is not within its express terms, and can testify as to communications and transactions between herself and the deceased as to the land she seeks to recover in the action. Cantey v. Whitaker (S.C. 1882) 17 S.C. 527.

30. Removal of disqualification

At common law, where a witness was disqualified from testifying because of interest, the disqualification could be removed by a valid release or extinguishment of such interest, provided it was made in good faith. Long v. Conroy (S.C. 1965) 246 S.C. 225, 143 S.E.2d 459.

The common‑law rule, permitting a witness to remove the disqualification of interest by executing in good faith a release or extinguishment thereof, is equally applicable under this section [Code 1962 Section 26‑402]. Long v. Conroy (S.C. 1965) 246 S.C. 225, 143 S.E.2d 459.

31. Pleading and practice

Even if testimony by personal representative of decedent’s estate that decedent attempted to remove decedent’s husband as beneficiary of annuity, and, believed that she had done so, was inadmissible under Dead Man’s Statute, it was not prejudicial to husband in his action to recover proceeds from decedent’s annuity, where personal representative’s testimony was cumulative to evidence in admissible letter from decedent. Rushton v. Lott (S.C.App. 1998) 330 S.C. 418, 499 S.E.2d 222, rehearing denied. Appeal And Error 1051.1(2)

To extent that any of testator’s surviving wife’s testimony may have been objectionable under dead man’s statute, it was merely cumulative to other testimony which was properly admitted. Hanahan v. Simpson (S.C. 1997) 326 S.C. 140, 485 S.E.2d 903, rehearing denied. Wills 400

Trial judge did not err in allowing testimony of 2 witnesses in violation of “Dead man’s” statute where record did not reflect any objection to testimony on this ground, nor did exception to ruling of trial judge assert error on this basis; moreover, testimony was merely cumulative to other evidence which appeared in record. Harris v. Campbell (S.C.App. 1987) 293 S.C. 85, 358 S.E.2d 719. Appeal And Error 203.3; Appeal And Error 1051.1(2)

In Sherwood v McLaurin (1916)103 SC 370, 88 SE 363, it was agreed among counsel that all the testimony should be taken down and that any objections that either party desired to make could be made at the argument of the case. At the argument no special objections were made, and each side merely said that they objected to any testimony that was objectionable under this section [Code 1962 Section 26‑402] if it had not been waived. The court held the objection to be too general, and further that since both sides had introduced testimony conflicting with the rule of this section [Code 1962Section 26‑402], the protection of the statute had been waived. Sherwood v. McLaurin (S.C. 1916) 103 S.C. 370, 88 S.E. 363.

When testimony is offered which is deemed objectionable under this section [Code 1962 Section 26‑402], it is the duty of the objector to state to the trial court the grounds of objection. Terry v Husbands (1898) 53 SC 69, 30 SE 826. Gaston v. Gaston (S.C. 1908) 80 S.C. 157, 61 S.E. 393.

Testimony taken on one reference is not rendered competent on a second reference against persons not parties to the first by a provision in the order of reference that the testimony taken on the first reference might be used. Gee v. Humphries (S.C. 1897) 49 S.C. 253, 27 S.E. 101. Reference 104

Objection cannot be taken to testimony which has already been admitted without objection in another part of the examination. Brice v. Miller (S.C. 1892) 35 S.C. 537, 15 S.E. 272. Trial 75

It was error for probate judge to strike out on motion testimony as incompetent under this section [Code 1962 Section 26‑402], where such testimony had been previously given without objection. Stark v. Hopson (S.C. 1884) 22 S.C. 42. Trial 91

A party examined on his own behalf may, like other witnesses, refresh his memory by book entries and other memoranda. Bull v. Lambson (S.C. 1874) 5 S.C. 284. Witnesses 255(7)

32. Presumptions and burden of proof

Dead man’s statute is exception to general rule of witness competency; it is to be read restrictively, and party requesting its use bears burden of establishing its applicability. Estate of Revis by Revis v. Revis (S.C.App. 1997) 326 S.C. 470, 484 S.E.2d 112. Witnesses 125; Witnesses 182

33. Review

Testimony incompetent under this section [Code 1962 Section 26‑402] is admissible if not objected to. Tompkins v Tompkins (1882) 18 SC 1. Burris v Whitner (1872) 3 SC 510. Bollmann v Bollmann (1874) 6 SC 29. McGougan v Hall (1884) 21 SC 600. Martin v Jennings (1898) 52 SC 371, 29 SE 807.

Otherwise the Supreme Court will not consider the objections on appeal. Terry v Husbands (1898) 53 SC 69, 30 SE 826. Wingo v Caldwell (1891) 35 SC 609, 14 SE 827.

If the testimony of some of the witnesses appears to be obnoxious to this section [Code 1962 Section 26‑402], the court on appeal will exclude it and then proceed to consider whether the remaining evidence is strong enough to support the plaintiff’s case. Gaston v Gaston (1908) 80 SC 157, 61 SE 393. Marshall v Marshall (1894) 42 SC 436, 20 SE 298. Scoggins v Smith (1889) 31 SC 605, 9 SE 971. Bennett v Cook (1888) 28 SC 353, 6 SE 28. Young v Young (1887) 27 SC 201, 3 SE 202.

In reviewing summary judgment that was entered in favor of company that provided temporary workers in company’s action alleging that customer failed to pay for workers, prohibition on giving advisory opinions precluded Court of Appeals from addressing company’s issue concerning Dead Man’s Statute. S.C. Labor Ltd., LLC v. Eastern Tree Service, Inc. (S.C.App. 2005) 362 S.C. 654, 609 S.E.2d 305. Constitutional Law 2608

Trial court did not abuse its discretion in admitting evidence of will contestant’s prior acts in will contest, despite contestant’s assertions that evidence was inadmissible under dead man’s statute and that testator’s affidavit was too remote. Hanahan v. Simpson (S.C. 1997) 326 S.C. 140, 485 S.E.2d 903, rehearing denied. Evidence 145; Witnesses 158

Appellants were precluded from asserting that the trial court erred in allowing the appellee to testify in violation of the Dead Man’s Statute where the appellants did not make such objection at the trial court level. Geddings v. Geddings (S.C. 1995) 319 S.C. 213, 460 S.E.2d 376.

An objection to testimony which violated the Dead Man’s Statute, Section 19‑11‑20, on the ground that it “was not responsive to the question asked” did not preserve the objection for appellate review; moreover, the objection on the correct ground to similar evidence introduced later in the proceeding did not cure the earlier failure to object on the proper ground. Pinkerton v. Jones (S.C.App. 1992) 310 S.C. 295, 423 S.E.2d 151.

A defendant did not waive any objection under the “dead man’s” statute to deposition testimony by failing to note an objection during a taking of the deposition since the rule governing the use of depositions specifically provides that objections to the competency of a witness are not waived by the failure to make them during the taking of the deposition. Thomas v. Taylor (S.C.App. 1989) 300 S.C. 127, 386 S.E.2d 630. Witnesses 181

The established general rule requiring reservation of objections in cross‑examination is particularly applicable with reference to this section [Code 1962 Section 26‑402], for the testimony thereby excluded would otherwise be competent, and therefore, one relying on this section [Code 1962 Section 26‑402] must make sufficient and timely objections. Brevard v. Fortune (S.C. 1952) 221 S.C. 117, 69 S.E.2d 355. Witnesses 180

In Trimmier v Liles (1900) 58 SC 284, 36 SE 652, it appeared that the circuit judge, on the return of a master’s report, ordered one of the issues submitted to a jury. On appeal from the order refusing to confirm the master’s report, exception was made that evidence had been received which violated this section [Code 1962Section 26‑402]. The Supreme Court held that the testimony, if improper, related to the issue which was to be tried by the jury. The court said: “We cannot say now whether (this section [Code 1962 Section 26‑402]) will exclude such testimony or not. It depends upon circumstances.” Trimmier v. Liles (S.C. 1900) 58 S.C. 284, 36 S.E. 652.

After excluding the incompetent testimony the case must stand or fall by the evidence that is left. Dash v. Inabniet (S.C. 1898) 53 S.C. 382, 31 S.E. 297.

Nor will the Supreme Court consider grounds of objection to testimony not properly within the exceptions assigned. Terry v. Husbands (S.C. 1898) 53 S.C. 69, 30 S.E. 826.

The ruling of the trial court as to the relevancy of evidence will not be reversed unless the party complaining has been injured by an abuse of discretion. Martin v. Jennings (S.C. 1898) 52 S.C. 371, 29 S.E. 807.

**SECTION 19‑11‑30.** Competency of husband or wife of party as witness.

 In any trial or inquiry in any suit, action, or proceeding in any court or before any person having, by law or consent of the parties, authority to examine witnesses or hear evidence, no husband or wife may be required to disclose any confidential or, in a criminal proceeding, any communication made by one to the other during their marriage.

 Notwithstanding the above provisions, a husband or wife is required to disclose any communication, confidential or otherwise, made by one to the other during their marriage where the suit, action, or proceeding concerns or is based on child abuse or neglect, the death of a child, or criminal sexual conduct involving a minor.

HISTORY: 1962 Code Section 26‑403; 1952 Code Section 26‑403; 1942 Code Sections 692, 1012; 1932 Code Sections 692, 1012; Civ. P. ‘22 Section 708; Cr. P. ‘22 Section 98; Civ. P. ‘12 Section 438; Cr. C. ‘12 Section 91; Civ. P. ‘02 Section 400; Cr. C. ‘02 Section 65; G. S. 2644; R. S. 65; 1866 (13) 378; 1870 (14) Section 415; 1986 Act No. 439, eff May 26, 1986; 1992 Act No. 412, Section 3, eff June 2, 1992; 1995 Act No. 104, Section 3, eff September 3, 1995; 2012 Act No. 255, Section 4, eff June 18, 2012.

CROSS REFERENCES

Priest‑penitent privilege, see Section 19‑11‑90.

Library References

Privileged Communications and Confidentiality 60 to 94.

Westlaw Topic No. 311H.

C.J.S. Witnesses Sections 301 to 329.

RESEARCH REFERENCES

ALR Library

23 ALR 6th 1 , “Communications” Within Testimonial Privilege of Confidential Communications Between Husband and Wife as Including Knowledge Derived from Observation by One Spouse of Acts of Other Spouse.

Encyclopedias

S.C. Jur. Witnesses Section 21, Marital Privilege; Exception.

LAW REVIEW AND JOURNAL COMMENTARIES

Annual Survey of South Carolina Law: Evidence: Privileged Spousal Communication. 28 S.C.L.Rev 345.

Digital pillow talk?: Waiving marital privilege at work in United States v. Hamilton. Jennifer Butler Routh, 64 S.C. L. Rev. 1147 (Summer 2013).

Twenty‑first century pillow‑talk: Applicability of the marital communications privilege to electronic mail. 58 S.C.L.Rev 275 (Winter 2006).

Attorney General’s Opinions

It was improper, in cross‑examining a murder defendant, to refer to his wife and ask whether she would testify, but this brief reference, in context, created no negative inference and did not result in prejudice to the defendant. State v South (1985) 285 SC 529, 331 SE2d 775, cert den (US) 88 L Ed 2d 178, 106 S Ct 209.

NOTES OF DECISIONS

In general 1

1. In general

The natural, personal interest that a witness may have in his wife’s welfare does not clothe him with that legal or equitable interest which the law contemplates. Certainly the mere fact and existence of the marital relation did not operate to disqualify him as a witness. Riddle v George (1936) 181 SC 360, 187 SE 524. Scott v Wiggins (1919) 113 SC 88, 101 SE 113.

Cited in Williams v. State of S. C. (D.C.S.C. 1965) 237 F.Supp. 360, vacated 356 F.2d 432.

The exemption against disclosure by any spouse against another is a privilege of a particular witness, unaffected by any objection of the other spouse. State v. Motes (S.C. 1975) 264 S.C. 317, 215 S.E.2d 190.

This section [Code 1962 Section 26‑403] is not broad enough to support a criminal defendant’s contention that his wife’s conduct in giving an insurance policy to the police was a breach of this State’s alleged public policy against permitting the wife of an accused to give evidence against her husband in criminal proceedings. Williams v. Leeke (S.C. 1971) 257 S.C. 104, 184 S.E.2d 441. Criminal Law 392.24; Criminal Law 1169.3

A wife may testify against her husband in criminal prosecutions, except as to confidential communications made during marriage. State v. Reynolds (S.C. 1897) 48 S.C. 384, 26 S.E. 679.

So wife of one not on trial is a competent witness against his accomplices. State v. Drawdy (S.C. 1866) 14 Rich. 87.

Wife or father is competent to testify on separate trial against the son indicted with him. State v. Anthony (S.C. 1821).

**SECTION 19‑11‑50.** Testimony of defendant in criminal cases.

 The testimony of a defendant in a criminal case shall not be afterwards used against the defendant in any other criminal case, except upon an indictment for perjury founded on that testimony.

HISTORY: 1962 Code Section 26‑405; 1952 Code Section 26‑405; 1942 Code Sections 1011, 1012; 1932 Code Sections 1011, 1012; Cr. P. ‘22 Sections 97, 98; Cr. C. ‘12 Sections 90, 91; Cr. C. ‘02 Sections 64, 65; G. S. 2642, 2644; R. S. 63, 65; 1866 (13) 378; 1995 Act No. 104, Section 4, eff September 3, 1995.

CROSS REFERENCES

Privilege against self incrimination, see SC Const, Art I, Section 12, Section 19‑11‑80.

Right of defendant in criminal case to produce witnesses in his favor, see Section 17‑23‑60.

Library References

Criminal Law 539(2).

Westlaw Topic No. 110.

C.J.S. Criminal Law Section 1477.

NOTES OF DECISIONS

In general 1

Arguments of counsel 4

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Cross‑examination 5

Hearsay 6

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Other cases 3

1. In general

Quoted in State v Cox (1951) 221 SC 1, 68 SE2d 624, dis op of Baker, C.J. State v Britt (1959) 235 SC 395, 111 SE2d 669.

This section [Code 1962 Section 26‑405] not apposite when accused allegedly confessed before committed or warrant issued, as he was not on trial in the sense intended by this section [Code 1962 Section 26‑405]. State v. Miller (S.C. 1947) 211 S.C. 306, 45 S.E.2d 23.

Cited in State v. Gowan (S.C. 1935) 178 S.C. 78, 182 S.E. 159.

While there may have been an indication in the opinion of the Supreme Court in the case of State v Franks (1898) 51 SC 259, 28 SE 908, that a defendant, in the trial of a criminal case, could not testify in behalf of a codefendant, jointly tried with him, it is entirely clear in the later case of State v Kennedy (1910) 85 SC 146, 67 SE 152, that such is not now the law in this State. State v. Holmes (S.C. 1933) 171 S.C. 8, 171 S.E. 440.

One indicted as principal with one as accessory may testify against the accessory, tried separately, before his own trial and without having been dismissed from the record. State v. Kennedy (S.C. 1910) 85 S.C. 146, 67 S.E. 152.

Every witness is privileged from answering any question tending to criminate himself. State v. Williamson (S.C. 1903) 65 S.C. 242, 43 S.E. 671.

A defendant cannot be made to testify against himself and be convicted on his own testimony. Town Council of Crosshill v. Owens (S.C. 1901) 61 S.C. 22, 39 S.E. 184.

Accomplice by becoming witness does not waive protection accorded to his communication to his attorney. State v. James (S.C. 1891) 34 S.C. 49, 12 S.E. 657, rehearing denied 34 S.C. 579, 13 S.E. 325.

Even if this section [Code 1962 Section 26‑405] providing that in criminal cases the defendant may, if he chooses, testify as to the facts of the case, makes a defendant who is infamous competent in his own behalf, it does not make him competent as against a codefendant. State v. Peterson (S.C. 1892) 35 S.C. 279, 14 S.E. 617. Criminal Law 508(3); Witnesses 117

2. Constitutional issues

This section [Code 1962 Section 26‑405] and its companion constitutional provision, SC Const, Art 1, Section 17 (now Art 1, Section 12), look to an absolute freedom of defendants in all criminal cases as to testifying; thus it follows that nothing shall result to a defendant’s prejudice from his failure to testify. State v Robinson (1961) 238 SC 140, 119 SE2d 671. State v Howard (1892) 35 SC 197, 14 SE 481.

In the absence of the sort of affirmative assurance concerning a suspect’s silence embodied in the Miranda warnings, a state does not violate the due process of law guaranteed by the Fourteenth Amendment by permitting cross‑examination of a criminal defendant as to post‑arrest silence when the defendant choses to take the stand; a state is entitled in such situations to leave to the judge and jury, under its own rules of evidence, the resolution of the extent to which post‑arrest silence may be deemed to impeach a criminal defendant’s own testimony. Fletcher v. Weir, 1982, 102 S.Ct. 1309, 455 U.S. 603, 71 L.Ed.2d 490. Constitutional Law 4687; Witnesses 347

Due process was not denied by trial court permitting testimony by unsentenced co‑defendants where appellant alleged, but failed to demonstrate, that co‑defendants had perjured themselves in order to curry favor with state. State v. Wright (S.C. 1977) 269 S.C. 414, 237 S.E.2d 764.

This section [Code 1962 Section 26‑405] and SC Const, Art 1, Section 17 (now Art 1, Section 12), look to an absolute freedom of defendants, in criminal cases, as to testifying. The latter indicates that such a one shall not be forced to testify while the former is purely permissive, provided he chooses to do so. This being the case, it almost of necessity follows that nothing shall result to his prejudice from a failure to testify. State v. White (S.C. 1963) 243 S.C. 238, 133 S.E.2d 320.

3. Other cases

Admission of capital murder defendant’s testimony from his prior trial into evidence in resentencing proceeding did not violate statute which provides that testimony of defendant in criminal case shall not be afterwards used against defendant in “any other” criminal case; testimony was offered in resentencing proceeding in same criminal case and, in any event, testimony was merely cumulative to his statements that had already been admitted in guilt phase. State v. Tucker (S.C. 1999) 334 S.C. 1, 512 S.E.2d 99, certiorari denied 119 S.Ct. 2407, 527 U.S. 1042, 144 L.Ed.2d 805. Sentencing And Punishment 2298(1)

4. Arguments of counsel

It is improper for the solicitor, or any attorney for the State, to comment on or to make any reference in his argument to the fact that the accused failed to testify as a witness in his own behalf. State v Robinson (1961) 238 SC 140, 119 SE2d 671. State v Howard (1892) 35 SC 197, 14 SE 481. State v Pendarvis (1911) 88 SC 548, 71 SE 45. State v King (1930) 158 SC 251, 155 SE 409. State v Chasteen (1955) 228 SC 88, 88 SE2d 880. State v Allen (1957) 231 SC 391, 98 SE2d 826.

Where solicitor, in his argument, commented that the evidence was not disputed or denied, this could have had no reference to the failure of the appellant to testify in his own behalf, and there was no error on the part of the trial judge in refusing to grant a new trial on the ground that the solicitor had commented on the failure of the appellant to testify. State v. Robinson (S.C. 1961) 238 S.C. 140, 119 S.E.2d 671.

The conduct of the prosecuting attorney in commenting unfavorably in his argument upon the fact that the defendant had not gone upon the stand, as permitted by this section [Code 1962 Section 26‑405], although improper, will not cause a reversal where the court checks any evil consequences by charging that no inference can be drawn therefrom. State v Howard (1892) 35 SC 197, 14 SE 481. State v. Robinson (S.C. 1961) 238 S.C. 140, 119 S.E.2d 671.

5. Cross‑examination

Where the defendant testifies in his own behalf his character for truth and veracity is thereby uncovered, but not his general moral character. His character for truth and veracity may be impeached, and his testimony may be commented on by counsel as the testimony of other witnesses. State v Robertson (1887) 26 SC 117, 1 SE 443. State v Chasteen (1957) 231 SC 141, 97 SE2d 517.

When the accused voluntarily elects to be a witness in his own behalf, he thereby assumes the position of any ordinary witness. And he may be cross‑examined as any other witness. State v Robertson (1887) 26 SC 117, 1 SE 443. State v Wise (1891) 33 SC 582, 12 SE 556. State v Merriman (1891) 34 SC 16, 12 SE 619, adhered to (SC) 13 SE 328. State v Rowell (1906) 75 SC 494, 56 SE 23. State v Boyleston (1910) 84 SC 574, 66 SE 1047. State v Kennedy (1910) 85 SC 146, 67 SE 152. State v Kenny (1907) 77 SC 236, 57 SE 859. State v Mills (1908) 79 SC 187, 60 SE 664. State v Barwick (1911) 89 SC 153, 71 SE 838. State v Holmes (1933) 171 SC 8, 171 SE 440.

While it may be true that a defendant, by taking the stand as a witness, does not thereby permit his general moral character to be impeached, he does thereby put in issue his character for truth and veracity, and is subject to the rules which govern the cross‑examination of ordinary witnesses in testing credibility. State v Mitchell (1900) 56 SC 524, 35 SE 210. State v Williamson (1903) 65 SC 242, 43 SE 671.

The trial court erred in charging the jury in a criminal action on the limiting effect of evidence which was admissible only for impeachment purposes where the defendant denied both (1) a prior conviction for writing fraudulent checks, for which no evidence was subsequently offered in proof, and (2) an alleged assault, upon which he could not be contradicted since he had not been convicted of the charge; absent any evidence of impeachment, the charge improperly impugned the defendant’s credibility. State v. Outlaw (S.C. 1992) 307 S.C. 177, 414 S.E.2d 147.

It was proper for solicitor to introduce co‑defendant’s guilty plea where defendant, charged with housebreaking, elected to take stand and asserted his lack of knowledge of co‑defendant’s motive for entering school building. State v. Murphy (S.C. 1978) 270 S.C. 642, 244 S.E.2d 36. Criminal Law 422(2)

When a defendant accepts the privilege of testifying he puts his character in issue so far as truthfulness is concerned. State v. Chasteen (S.C. 1957) 231 S.C. 141, 97 S.E.2d 517.

There can be laid down no fixed rule as to what is admissible on cross‑examination with respect to the past conduct of a defendant who takes the stand as a witness. That is admissible which fairly tends to affect his credibility as a witness; that which does not is incompetent and may be prejudicial. State v. Chasteen (S.C. 1957) 231 S.C. 141, 97 S.E.2d 517.

Prior conviction of assault with intent to ravish is admissible to impeach testimony of defendant in criminal case. State v. Chasteen (S.C. 1957) 231 S.C. 141, 97 S.E.2d 517.

But a mere indictment or warrant should not be admitted as affecting the credibility of a witness, simply because it is not proof of commission of the crime charged. State v. Chasteen (S.C. 1957) 231 S.C. 141, 97 S.E.2d 517. Witnesses 345(1)

Where accused is a witness for himself, he may be examined as to whether he had not been indicted for perjury, without production of the record. State v. Williamson (S.C. 1903) 65 S.C. 242, 43 S.E. 671. Witnesses 359

And he may be examined as to his religious belief. State v. Turner (S.C. 1892) 36 S.C. 534, 15 S.E. 602, rehearing denied 36 S.C. 608, 16 S.E. 687.

6. Hearsay

Testimony of law clerk in appellant’s attorney’s office that defendant had told him certain personal facts about prosecutrix in rape case, offered for purpose of showing appellant obtained information about prosecutrix from her and thereby bolster defense of consent, related directly to appellant’s defense, was testimonial in nature, and, as such, was hearsay, self‑serving, and inadmissible under rule that defendant cannot introduce in his defense his own statements made to others. State v. Sweet (S.C. 1978) 270 S.C. 97, 240 S.E.2d 648.

7. Instructions

Unless such an instruction is requested, the court need not charge the jury with respect to the failure of accused to testify. State v. White (S.C. 1963) 243 S.C. 238, 133 S.E.2d 320. Criminal Law 824(13)

An accused person has the right to have the trial court instruct the jury that his failure to take the witness stand and testify in his own behalf does not create any presumption against him, and upon his request the court must give that instruction. State v. White (S.C. 1963) 243 S.C. 238, 133 S.E.2d 320. Criminal Law 787(1)

**SECTION 19‑11‑80.** Privilege against self‑incrimination.

 No person shall be required to answer any question tending to incriminate himself.

HISTORY: 1962 Code Section 26‑408; 1952 Code Section 26‑408; 1942 Code Section 1012; 1932 Code Section 1012; Cr. P. ‘22 Section 98; Cr. C. ‘12 Section 91; Cr. C. ‘02 Section 65; G. S. 2644; R. S. 65; 1866 (13) 378.

CROSS REFERENCES

Exoneration of gambling witness for becoming State’s evidence, see Section 16‑19‑110.

Immunity of witnesses testifying in dueling trial, see Sections 16‑3‑440 to 16‑3‑460.

Privilege against self incrimination, see SC Const, Art I, Section 12.

Use of defendant’s testimony in criminal case, see Section 19‑11‑50.

Library References

Criminal Law 393(1).

Witnesses 297.

Westlaw Topic Nos. 110, 410.

C.J.S. Criminal Law Sections 902 to 904, 906 to 908, 911 to 913.

C.J.S. Prisons and Rights of Prisoners Section 39.

C.J.S. Witnesses Sections 585 to 587, 590 to 595, 597, 600 to 602, 609, 614.

LAW REVIEW AND JOURNAL COMMENTARIES

The Current Role of the Presumption of Innocence in the Criminal Justice System, 31 S.C. L. Rev. 357.

United States Supreme Court Annotations

Miranda warnings, right to counsel during interrogation, see Florida v. Powell, U.S.Fla.2010, 130 S.Ct. 1195, 559 U.S. 50, 175 L.Ed.2d 1009, on remand 66 So.3d 905.

Self‑incrimination, Miranda warnings, right to counsel during interrogation, application of presumption, custody, Terry stops, see Maryland v. Shatzer, 2010, 130 S.Ct. 1213, 559 U.S. 98, 175 L.Ed.2d 1045, on remand 413 Md. 605, 994 A.2d 411.

Supreme Court’s views as to what comments by prosecuting attorney violate accused’s privilege against self‑incrimination under Federal Constitution’s Fifth Amendment. 99 L Ed 2d 926.

NOTES OF DECISIONS

In general 1

Arguments of counsel 4

Voluntary admissions 3

Waiver 2

1. In general

Admission into evidence of video tape of drunk driving suspect’s booking did not violate Miranda rule, with the exception of his response to a question as to the date of his sixth birthday, which was testimonial and should have been suppressed. Pennsylvania v. Muniz, U.S.Pa.1990, 110 S.Ct. 2638, 496 U.S. 582, 110 L.Ed.2d 528.

The trial court properly allowed the investigating officer to testify concerning a post‑arrest oral statement made by the defendant 2 days after the crime with which he was charged, even though the defendant had refused to sign a written statement at the time, where the defendant testified during the in camera hearing that he was advised of and understood his Miranda rights, and that he was not threatened or coerced when he made the statement. State v. Wells (S.C.App. 1992) 336 S.C. 223, 426 S.E.2d 814. Criminal Law 413.54

The protection afforded by the rule against self incrimination may not be injected to invalidate a subpoena or the court’s order to appear, and an order or subpoena is not invalid merely because of the possibility that the witness sought to be questioned may possibly be asked some question, the answer to which might tend to incriminate him. Greenwood Lumber Co. v. Cromer (S.C. 1954) 225 S.C. 375, 82 S.E.2d 527. Witnesses 8

2. Waiver

The trial court’s determination that a mildly retarded defendant was competent to waive his Miranda rights was sufficiently supported by evidence that (1) both county police officers and South Carolina Law Enforcement Division personnel read him standard Miranda warnings, and he responded affirmatively when asked if he understood each warning, and (2) a forensic psychiatrist, who tested and observed him, testified that his comprehension was adequate to enable him to knowingly and intelligently waive his rights. State v. Davis (S.C. 1992) 309 S.C. 326, 422 S.E.2d 133, rehearing denied, certiorari denied 113 S.Ct. 2355, 508 U.S. 915, 124 L.Ed.2d 263.

A defendant’s statements were properly admitted in evidence where he was arrested on Thursday night, was given his Miranda warnings, waived his rights to counsel, then made a number of contradictory statements to officers before being taken in front of a magistrate on the following Monday; the defendant was not prejudiced by an alleged violation of the requirement of Supreme Court Rule 51(a) that those arrested shall be taken as soon as practicable before a designated official for the purpose of securing the right to counsel. State v. Bell (S.C. 1991) 305 S.C. 11, 406 S.E.2d 165, certiorari denied 112 S.Ct. 888, 502 U.S. 1038, 116 L.Ed.2d 791.

A defendant was entitled to a new trial for assault to commit criminal sexual conduct where he was advised of his Miranda rights at the jail after his arrest and did not make a statement to the police at that time, then in an attempt to impeach his testimony on cross‑examination at trial the solicitor for the state first asked if he had told his story to the police, and when he responded that he had not, he was asked “you want these ladies and gentlemen of the jury to believe you are telling the truth?”; although defense counsel objected only the first time this question was asked, he did not thereby waive this error. State v. Gray (S.C.App. 1991) 304 S.C. 482, 405 S.E.2d 420.

The statement of a defendant was properly admitted in evidence in a murder trial where the defendant refused to discuss the case with officers, was read his rights and refused to waive them, asked the departing officers what would happen to him and was told that he was wanted in California for the murder of a delivery boy, and then he blurted out “I had to kill that boy” and “I didn’t want him to identify me”; the defendant clearly initiated the further conversation after waiving his rights. State v. Sims (S.C. 1991) 304 S.C. 409, 405 S.E.2d 377, certiorari denied 112 S.Ct. 1193, 502 U.S. 1103, 117 L.Ed.2d 434.

3. Voluntary admissions

State undercover law enforcement officer posing as fellow inmate was not required to give Miranda warnings to suspect, as such warnings are not required when suspect is unaware that he is speaking to law enforcement officer and gives voluntary statement; interests protected by Miranda are not implicated in such circumstances in which there is no interaction between custody and official interrogation. Illinois v. Perkins, U.S.Ill.1990, 110 S.Ct. 2394, 496 U.S. 292, 110 L.Ed.2d 243.

Defendant’s statement to police sergeant while being transported to detention center, that the “chase” was “fun while it lasted,” was voluntarily given and thus admissible at trial for armed robbery and other offenses; defendant had first waived his Miranda rights approximately four hours beforehand and had not told police since that time that he wanted to remain silent, and the relatively short lapse of time between the initial Miranda warnings and his subsequent incriminatory statement was not too attenuated to require sergeant to reread defendant’s rights to him. State v. Simmons (S.C.App. 2009) 384 S.C. 145, 682 S.E.2d 19. Criminal Law 411.9

A statement given by the defendant from his hospital bed, in which he had been placed in restraints by hospital personnel due to his belligerence, was voluntarily made where the officer to whom the statement was made testified that the defendant seemed alert, spoke coherently, and cooperated with him, and that he was not in custody at the time. State v. White (S.C.App. 1993) 311 S.C. 289, 428 S.E.2d 740, rehearing denied.

A statement given by the defendant from his hospital bed, in which he had been placed in restraints by hospital personnel due to his belligerence, was voluntarily made, despite the fact that he had been given sodium pentothal 4 hours earlier in order to calm him down, where (1) the defendant gave concise answers to the officers’ questions, (2) he was questioned only after the officers had been given permission by the charge nurse and they had given him the Miranda warnings, and (3) he appeared to understand what was said. State v. White (S.C.App. 1993) 311 S.C. 289, 428 S.E.2d 740, rehearing denied.

The defendant’s oral statements in regard to possession of the controlled substance which formed the basis for his conviction were involuntarily made where the officers to whom the statements were made had told him that they could take out a warrant for his wife’s arrest and have his children taken by the Department of Social Services, and thus they coerced his confession by means of veiled threats against his family. State v. Corns (S.C.App. 1992) 310 S.C. 546, 426 S.E.2d 324.

Prior case law holding that the question of the voluntariness of a defendant’s confession is for the jury to ultimately decide would be limited to mandating that the jury make a separate finding as to whether the defendant received and understood his Miranda rights, and would not require that the jury make a separate finding on whether law enforcement’s actions conformed to the requirements of Miranda. State v. Davis (S.C. 1992) 309 S.C. 326, 422 S.E.2d 133, rehearing denied, certiorari denied 113 S.Ct. 2355, 508 U.S. 915, 124 L.Ed.2d 263.

The jury must be charged at the close of the penalty phase that it must find that the defendant’s confessions were voluntarily given and accompanied by a waiver of his constitutional rights, where a capital defendant’s disputed statement was introduced initially in the penalty phase; no confession may be considered by the jury unless it has been found beyond a reasonable doubt to have been given freely and voluntarily. State v. Torrence (S.C. 1991) 305 S.C. 45, 406 S.E.2d 315.

The trial judge did not abuse his discretion in determining that the statement of a defendant was voluntary where, when questioned, the defendant indicated that he wished to remain silent and to see an attorney, the officers ceased interrogation and informed him that he would have to initiate any future contact between them, the next day an officer asked if he would like to sign a form waiving extradition to which he responded that he did not, but that he wanted to speak with the previous officers, and then he proceeded to waive his rights and go on the record. State v. Sims (S.C. 1991) 304 S.C. 409, 405 S.E.2d 377, certiorari denied 112 S.Ct. 1193, 502 U.S. 1103, 117 L.Ed.2d 434.

Statements made following alleged request for attorney were properly admissible at trial, even though testimony was contradictory as to whether defendant had requested attorney during initial interrogation, since voluntariness of subsequent incriminating statements was established by defendant’s written statement expressly waiving right to attorney, by self‑serving nature of statements, and by defendant’s subsequent incriminating statements, each preceded by Miranda warning. State v. Pendergrass (S.C. 1977) 270 S.C. 1, 239 S.E.2d 750.

Voluntary confession allegedly made before accused was committed or a warrant issued for his arrest was not prohibited by this section [Code 1962 Section 26‑408] from being introduced as evidence. State v. Miller (S.C. 1947) 211 S.C. 306, 45 S.E.2d 23.

4. Arguments of counsel

A solicitor’s comment, during the sentencing phase of a capital murder trial, regarding letters written by the defendant in which the defendant stated that he was glad that the victim had died, and that the solicitor didn’t know whether the defendant had changed his mind, did not constitute an impermissible indirect comment on the defendant’s right to remain silent. State v. Matthews (S.C. 1988) 296 S.C. 379, 373 S.E.2d 587, certiorari denied 109 S.Ct. 1559, 489 U.S. 1091, 103 L.Ed.2d 861, denial of habeas corpus affirmed 105 F.3d 907, certiorari denied 118 S.Ct. 102, 139 L.Ed.2d 57. Sentencing And Punishment 1780(2)

An attorney’s invitation to the jury to “imagine what kind of mood that young man was in the night the victim was killed, as he sits here today as quiet as can be” was a constitutionally impermissible reference to the defendant’s silence at trial. State v. Cockerham (S.C. 1988) 294 S.C. 380, 365 S.E.2d 22. Criminal Law 2132(2)

**SECTION 19‑11‑90.** Priest‑penitent privilege.

 In any legal or quasi‑legal trial, hearing or proceeding before any court, commission or committee no regular or duly ordained minister, priest or rabbi shall be required, in giving testimony, to disclose any confidential communication properly entrusted to him in his professional capacity and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline of his church or religious body. This prohibition shall not apply to cases where the party in whose favor it is made waives the rights conferred.

HISTORY: 1962 Code Section 26‑409; 1959 (51) 344.

CROSS REFERENCES

Communications between husband and wife, see Section 19‑11‑30.

Communications by person applying for or receiving vocational rehabilitation being privileged, see Section 43‑31‑150.

Confidentiality of communications of person seeking counselling, treatment or therapy for a drug problem, see Section 44‑53‑140.

Confidentiality of information obtained in course of defense by Attorney General of actions against public officers and employees, see Section 1‑7‑70.

Facts learned by doctors during physical examination under Workmen’s Compensation Law not being privileged, see Section 42‑15‑80.

Information received by probation officers being privileged, see Section 24‑21‑290.

Library References

Privileged Communications and Confidentiality 403.

Westlaw Topic No. 311H.

C.J.S. Witnesses Sections 419 to 420.

RESEARCH REFERENCES

ALR Library

93 ALR 5th 327 , Subject Matter and Waiver of Privilege Covering Communications to Clergy Member or Spiritual Adviser.

Encyclopedias

S.C. Jur. Constitutional Law Section 49, Special Applications‑Priest‑Penitent Evidentiary Privilege.

S.C. Jur. Witnesses Section 22, Priest‑Penitent Privilege.

LAW REVIEW AND JOURNAL COMMENTARIES

Annual survey of South Carolina law, evidence 40 S.C. L. Rev. 129 (Autumn 1988).

The Priest‑Penitent Privilege in South Carolina—Background and Development. 12 SC LQ 440.

Attorney General’s Opinions

Both the clergyman and the penitent alike may invoke the priest‑penitent privilege. S.C. Op.Atty.Gen. (April 6, 2010) 2010 WL 1808723.

Section 19‑11‑90 extends to members of the clergy generally. S.C. Op.Atty.Gen. (April 6, 2010) 2010 WL 1808723.

This privilege applies generally to all clergy. S.C. Op.Atty.Gen. (Feb. 9, 2004) 2004 WL 323942.

NOTES OF DECISIONS

In general 1

1. In general

Burden of showing facts required to establish clergyman ‑ penitent privilege rests on party objecting to disclosure of communication, and there must be confidential communication, confidential communication disclosed to regular or duly ordained minister, priest, or rabbi, confidential communication entrusted to clergyman in his professional capacity, and confidential communication must be one that is necessary and proper to enable clergymen to discharge functions of his office according to usual course of practice or discipline of his church or religious body; marriage counseling services provided by ordained minister under auspices of church are protected by priests ‑ penitent privilege. Rivers v. Rivers (S.C.App. 1987) 292 S.C. 21, 354 S.E.2d 784. Privileged Communications And Confidentiality 403

In prosecution for murder of priest, decedent’s records were protected from discovery by defendant under the priest‑penitent privilege where information sought related to a collateral matter which could not have thrown any light on the killing. State v. Franklin (S.C. 1976) 267 S.C. 240, 226 S.E.2d 896. Privileged Communications And Confidentiality 403

**SECTION 19‑11‑95.** Confidences of patients of mental illness or emotional conditions.

 (A) For purposes of this section:

 (1) “Provider” means a person licensed under the provisions of any of the following and who enters into a relationship with a patient to provide diagnosis, counseling, or treatment of a mental illness or emotional condition:

 (a) Chapter 55, Title 40;

 (b) Chapter 75, Title 40;

 (c) Section 40‑63‑70 as a licensed master social worker or a licensed independent social worker;

 (d) Section 40‑33‑10 as a registered nurse who meets the requirements of a clinical nurse specialist and who works in the field of mental health.

 (2) “Patient” means a person who consults or is interviewed by a provider to diagnose, counsel, or treat a mental illness or emotional condition as authorized in subsection (A)(1).

 (3) “Confidence” is a private communication between a patient and a provider or information given to a provider in the patient‑provider relationship.

 (4) “Written authorization after disclosure”, or a similar phrase, includes an authorization in the application or claims procedure of an insurer or a person providing a plan of benefits.

 (5) “Mental illness or emotional condition” is defined consistent with accepted diagnostic practices.

 (B) Except when permitted or required by statutory or other law, a provider knowingly may not:

 (1) reveal a confidence of his patient;

 (2) use a confidence of his patient to the disadvantage of the patient;

 (3) use a confidence of his patient for the advantage of himself or of a third person, unless the patient gives written authorization after disclosure to him of what confidence is to be used and how it is to be used.

 (C) A provider may reveal:

 (1) confidences with the written authorization of the patient or patients affected, but only after disclosure to them of what confidences are to be revealed and to whom they will be revealed;

 (2) confidences when allowed by statute or other law;

 (3) the intention of the patient to commit a crime or harm himself and the information necessary to prevent the crime or harm;

 (4) confidences reasonably necessary to establish or collect his fee or to defend himself or his employees against an accusation of wrongful conduct;

 (5) in the course of diagnosis, counseling, or treatment, confidences necessary to promote care within the generally recognized and accepted standards, practices, and procedures of the provider’s profession;

 (6) confidences in proceedings conducted in accord with Sections 40‑71‑10 and 40‑71‑20;

 (7) confidences with the written authorization of the patient or patients affected for processing their health insurance claims, but only after disclosure to them of what confidences are to be revealed and to whom they will be revealed.

 (D) A provider shall reveal:

 (1) confidences when required by statutory law or by court order for good cause shown to the extent that the patient’s care and treatment or the nature and extent of his mental illness or emotional condition are reasonably at issue in a proceeding; provided, however, confidences revealed shall not be used as evidence of grounds for divorce;

 (2) confidences pursuant to a lawfully issued subpoena by a duly constituted professional licensing or disciplinary board or panel;

 (3) confidences when an investigation, trial, hearing, or other proceeding by a professional licensing or disciplinary board or panel involves the question of granting a professional license or the possible revocation, suspension, or other limitation of a professional license.

 (E) A disclosure pursuant to subsection (C) or (D) is limited to the information and the recipients necessary to accomplish the purpose of the subsection permitting the disclosure.

 (F) A person to whom a disclosure is made pursuant to subsections (C)(1), (5), and (7), an employee to whom a disclosure is made pursuant to subsection (G), and any other person to whom a confidence, written or oral, is disclosed by a provider are bound by the same duty of confidentiality as the provider from whom he received the information.

 (G) A provider shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences of a patient, except that a provider may reveal the information allowed by subsections (C) and (D) through an employee.

 (H) A provider releasing a confidence under the written authorization of the patient or under the provisions of this section is not liable to the patient or other person for release of the confidence to the person authorized to receive it; provided, however, a patient has a cause of action for damages against a provider, associate, agent, employee, or any other person who intentionally, wilfully, or with gross negligence violates the provisions of this section.

 (I) Nothing in this section alters the existing requirements of nonproviders to preserve confidences or the requirements of providers subject to Sections 44‑23‑1090 and 44‑52‑190.

HISTORY: 1989 Act No. 163, Section 1, eff six months after approval by the Governor (approved June 8, 1989).

CROSS REFERENCES

Law Enforcement and Public Safety, confidential communications, see Section 23‑3‑85.

Library References

Privileged Communications and Confidentiality 300 to 332.

Westlaw Topic No. 311H.

C.J.S. Criminal Law Sections 587 to 591, 673, 680 to 681, 731 to 732.

C.J.S. Mental Health Sections 17 to 21.

C.J.S. Records Sections 89 to 111, 117.

C.J.S. Witnesses Sections 374, 390, 392, 411.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Constitutional Law Section 49, Special Applications‑Priest‑Penitent Evidentiary Privilege.

S.C. Jur. Witnesses Section 24, Psychotherapist‑Patient Privilege.

NOTES OF DECISIONS

In general 1

1. In general

Records pertaining to defendant’s hospitalization for anger management and substance abuse were relevant to jury’s assessment of defendant’s character in penalty phase of capital murder trial and, thus, were discoverable. State v. Terry (S.C. 2000) 339 S.C. 352, 529 S.E.2d 274, rehearing denied, certiorari denied 121 S.Ct. 197, 531 U.S. 882, 148 L.Ed.2d 137. Privileged Communications And Confidentiality 319; Privileged Communications And Confidentiality 320

**SECTION 19‑11‑100.** Qualified privilege against disclosure for news media; waiver.

 (A) A person, company, or entity engaged in or that has been engaged in the gathering and dissemination of news for the public through a newspaper, book, magazine, radio, television, news or wire service, or other medium has a qualified privilege against disclosure of any information, document, or item obtained or prepared in the gathering or dissemination of news in any judicial, legislative, or administrative proceeding in which the compelled disclosure is sought and where the one asserting the privilege is not a party in interest to the proceeding.

 (B) The person, company, or other entity may not be compelled to disclose any information or document or produce any item obtained or prepared in the gathering or dissemination of news unless the party seeking to compel the production or testimony establishes by clear and convincing evidence that this privilege has been knowingly waived or that the testimony or production sought:

 (1) is material and relevant to the controversy for which the testimony or production is sought;

 (2) cannot be reasonably obtained by alternative means; and

 (3) is necessary to the proper preparation or presentation of the case of a party seeking the information, document, or item.

 (C) Publication of any information, document, or item obtained in the gathering and dissemination of news does not constitute a waiver of the qualified privilege against compelled disclosure provided for in this section.

HISTORY: 1993 Act No. 138, Section 1, eff June 14, 1993.

Library References

Privileged Communications and Confidentiality 404.

Westlaw Topic No. 311H.

C.J.S. Witnesses Sections 415 to 418.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Witnesses Section 25, Qualified Privilege Against Disclosure for News Media (“Reporter’s Shield Law”); Waiver.

NOTES OF DECISIONS

In general 1

1. In general

In the appeal of an order finding a news reporter in civil contempt for failing to reveal the identity of a source, the reporter’s shield law, Section 19‑11‑100, was inapplicable where the entity seeking the disclosure of the information was the trial court rather than a “party” to the underlying action. Matter of Decker (S.C. 1995) 322 S.C. 215, 471 S.E.2d 462. Privileged Communications And Confidentiality 404

The Supreme Court of South Carolina would issue a writ of supersedeas staying a news reporter’s incarceration during the pendency of her appeal where the trial court had issued an order for civil contempt against the reporter for refusing to divulge the name of a source and the Supreme Court had not previously had an opportunity to interpret the qualified privilege given news media under Section 19‑11‑100 nor had the Court had an opportunity to consider whether such a qualified privilege for exists under the First Amendment to the United States Constitution. Matter of Decker (S.C. 1995) 322 S.C. 212, 471 S.E.2d 459. Contempt 66(5)