

1959

## Evidence: The Status of the Rule in the Federal Courts Concerning the Competency of One Spouse's Testimony Against the Other in Criminal Prosecutions

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### Repository Citation

Eugene A. Ranney, *Evidence: The Status of the Rule in the Federal Courts Concerning the Competency of One Spouse's Testimony Against the Other in Criminal Prosecutions*, 43 Marq. L. Rev. 131 (1959).

Available at: <https://scholarship.law.marquette.edu/mulr/vol43/iss1/12>

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**Evidence: The Status of the Rule in the Federal Courts Concerning the Competency of One Spouse's Testimony Against the Other in Criminal Prosecutions.** The defendant was charged, in the Federal District Court of Oklahoma, with violating the Mann Act,<sup>1</sup> in that he was alleged to have transported a girl from Arkansas to Oklahoma for immoral purposes. At the trial, a question of fact arose as to whether the defendant knew of the purpose of the prosecutrix in making the trip. The defendant maintained that, although he took the girl to Oklahoma in his car, he was unaware of her purpose in going there and merely accommodated her incidentally to a business trip which he was making. At this point of the trial, the United States Attorney called the defendant's estranged wife to the stand and, over the objection of the defendant, she testified that she was the defendant's wife, that she was a prostitute at the time of the trip in question and that she was a prostitute prior to her marriage to the defendant. The jury found the defendant guilty of the charge and he was convicted and sentenced to serve five years imprisonment. On the appeal by the defendant to the Circuit Court, the conviction was affirmed.<sup>2</sup> The United States Supreme Court granted certiorari. *Held:* Judgment of the trial court reversed. The appearance of the defendant's wife on the stand in the presence of the jury, and her testimony, given over the objection of the defendant, was error. At common law, either spouse was incompetent to testify for or against the other in any case, and, although this rule has been subject to various modifications, the present rule has been subject to various modifications, the present rule to be applied in criminal cases arising in federal courts is that a wife cannot testify against her husband without his consent, if the crime with which he is charged involves no personal violence or moral wrong to the person of his wife. Here, the court found from the record that the mere presence of the defendant's wife on the stand as a witness against her husband would most likely impress jurors adversely and strongly suggest that the defendant might be inclined to commit such a crime as charged. In the concurring opinion, Justice Stewart states that the true test of the rule is to whom the privilege belongs, the accused-spouse or the witness-spouse? He concludes by saying that this is not the case to decide this question, inasmuch as the record indicates that the testimony of the defendant's wife was anything but voluntary, *Hawkins v. United States*, \_\_\_\_\_ U.S. \_\_\_\_\_, 79 S. Ct. 136, 3 L. Ed. 2d 125 (1958).

This decision completely ignores the reasoning of an earlier Federal

<sup>1</sup> 18 U.S.C. §2421, 18 U.S.C.A. §2421, which provides: "Whoever knowingly transports in interstate or foreign commerce . . . any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose . . . shall be fined not more than \$5000 or imprisoned not more than five years, or both."

<sup>2</sup> 249 F. 2d 735 (10th Cir. 1958), wherein the court relied on the reasoning of *Yoder v. United States*, 80 F. 2d 665 (10th Cir. 1935).

Court of Appeals case<sup>3</sup> which had been set out by writers as a possible break with traditional ties.<sup>4</sup> The early common law rule, based on the strict reasoning of England's Lord Coke<sup>5</sup> that a husband and wife were, in law, one person, barred any testimony of one spouse on behalf of the other and, as later modified, required consent of both spouses where adverse testimony was sought in certain types of cases. This evidentiary problem was further categorized into areas where general testimony was barred simply because of the marital status of the parties, and where actual communications between the parties during this status were labeled as privileged. In this discussion of the *Hawkins* case, consideration will be limited to the former, more general area of the status of the parties as affecting the competency of testimony.

State law, as compared with the Federal rule<sup>6</sup> which governs the admission of evidence in Federal criminal actions, differs more in language than in actual effect. Although every state has supposedly legislated away the original common law prohibition, the majority of the states,<sup>7</sup> in effect, retain, either by subsequent statutory modifications or by judicial interpretation, the modified common law "privilege" concept that where the spouses do not consent to adverse testimony is not admissible.<sup>8</sup>

Federal Rule 26<sup>9</sup> is not the only federal legislation relative to this issue. On two previous occasions, Congress enacted statutes<sup>10</sup> to permit

<sup>3</sup> *Yoder v. United States*, *supra* note 2.

<sup>4</sup> Note, 38 VA. L. REV. 359 (1952).

<sup>5</sup> 1 COKE, COMMENTARY UPON LITTLETON 6b (19th Ed. 1832).

<sup>6</sup> FED. RULE CRIM. PROC. 26: ". . . The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

<sup>7</sup> Alabama, Alaska, California, Colorado, Connecticut, Idaho, Illinois, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, Oregon, Rhode Island, South Dakota, Utah, Virginia, Washington, West Virginia.

<sup>8</sup> Even at common law, the rule of incompetency was modified so as to permit testimony by one spouse, aggrieved by an act of personal violence by the other. 8 WIGMORE, EVIDENCE §2239 (1940). A minority of approximately 13 states which retain, in statutory form, the common law concept of incompetency also provide for an exception where a "necessity" such as polygamy, bigamy or personal violence against the witness-spouse would permit testimony. On the other hand, 10 states such as Wisconsin, WIS. STAT. §325.18 (1957), have completely abolished the common law view, by making either spouse competent to testify for or against the other in any civil or criminal action, and might even compel a spouse, as any other witness, to so testify in some criminal cases. Note, 38 VA. L. REV. 359 (1952). Therefore, as mentioned above, the majority of states which declare such testimony competent but privileged, and the 13 states which adhere to the original "incompetency" view, are an indication that state statutes have certainly not dimmed the rationale of the common law and present Federal Rule.

<sup>9</sup> *Supra* note 6.

<sup>10</sup> 24 STAT. 635 (1887), 28 U.S.C. 633 (1946) permitted testimony by one spouse against the other, where the spouse was being prosecuted in federal courts for bigamy, unlawful cohabitation or polygamy. 39 STAT. 878 (1917), 8 U.S.C. 138 (1946) further modified the common law by allowing testimony of one

testimony of spouses in particular criminal prosecutions. But these statutes are to be interpreted presently in light of the Federal Rule. This rule is the codification of a Supreme Court decision which is most significant for its holding that the federal courts are not bound by state laws of evidence and the admissibility of evidence and competency and privileges of witnesses should be governed by the principles of common law as they are interpreted by the courts of the United States in the light of reason and experience.<sup>11</sup> This decision is also noted for its holding that a spouse is now competent to testify *for* the other spouse in any action, civil or criminal. As the instant case indicates, the Mann Act raises a problem in the federal courts, inasmuch as the common law rule of necessity of justice, which permits a wife to testify against her husband in situations where the husband is charged with committing either an act of personal violence or of moral injury against his wife, cannot be technically applied where a wife was not the transported woman.

Originally, violations of the Mann Act were not considered the type of case to permit the application of the "necessity" exception to the common law rule of incompetency.<sup>12</sup> But federal courts were not entirely in agreement<sup>13</sup> and shortly, they began to find that the Mann Act involved a crime of such moral consequence that an application of the exception was permitted.<sup>14</sup> However, this line of decisions was only applicable to situations where the wife had been aggrieved by the husband's act of transporting and they did nothing to resolve the problem presented by cases such as the principal one. The only decision which has permitted testimony by a wife under such circumstances<sup>15</sup> seems to find its sole justification in what the court referred to as "an enlightenment of the times which requires modification of common law principles." Further language in this decision would have the federal courts fall into line with the states in abolishing the common law prohibition entirely, but such a suggestion is not altogether sound if one is to analyze the effect of the majority of the state statutes.<sup>16</sup>

Therefore, a consideration of the instant decision in light of cases<sup>17</sup>

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spouse where the other was charged with importing aliens for immoral purposes.

<sup>11</sup> *Funk v. United States*, 290 U.S. 371 (1933).

<sup>12</sup> *Johnson v. United States*, 221 Fed. 250 (8th Cir. 1915).

<sup>13</sup> *Cohen v. United States*, 214 Fed. 23 (9th Cir. 1914).

<sup>14</sup> *United States v. Mitchell*, 137 F. 2d 1006 (2nd Cir. 1943); *aff'd on rehearing*, 138 F. 2d 831 (2nd Cir. 1943); *Denning v. United States*, 247 Fed. 463 (5th Cir. 1918); *Shores v. United States*, 174 F. 2d 838 (8th Cir. 1949) overruling *Johnson v. United States*, *supra* note 12; 3 *WHARTON'S CRIMINAL EVIDENCE* §783 (1955).

<sup>15</sup> *Yoder v. United States*, *supra* note 2.

<sup>16</sup> *Supra* note 8, where it is noted that complete abolishment of the common law rule of incompetency has not been effected in a majority of the states which merely reduce the "incompetency" to a "privilege."

<sup>17</sup> *Brunner v. United States*, 168 F. 2d 281 (6th Cir. 1948) and *United States v. Walker*, 176 F. 2d 564 (2d Cir. 1949), *cert. denied*, 338 U.S. 891 (1949).

subsequent to *Yoder v. United States* shows that the Supreme Court, in deciding a criminal case where no personal violence or moral injury is involved, is sound in its reasoning, if not modern in its result.<sup>18</sup> The court, in ignoring the *Yoder* exception, has decided that the policy surrounding the common law rule with its subsequent modifications is still necessary to foster family peace and to benefit the Public, in the preservation of the marital state. The concurring opinion is actually a dissent to the common law and cannot be construed to be a concurrence in reasoning. To adopt Justice Stewart's view would be to approach the result reached in *Yoder*. It is unrealistic to think that an accused spouse would ever consent to the introduction of damaging evidence, but on the other hand, to give the privilege to a spouse called as a witness would open the door to evidence which the majority opinion feels must still be kept closed as a matter of policy.

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<sup>18</sup> As far back as 1938, the American Bar Association's Committee on Improvements in the Law of Evidence recommended that the privilege of a spouse not to be compelled to testify against the other be abolished in both civil and criminal cases. 63 AMER. BAR ASSN. REP. 595 (1938).