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COMPETENCY OF WITNESSES IN FEDERAL CRIMINAL CASES

Lester B. Orfield

MENTAL INCAPACITY

In a civil action in tort in which the court cited criminal cases the Supreme Court held that a witness, to have sufficient mental capacity to be judged competent, must have the capacity to observe, the capacity to remember, and the capacity to communicate. The witness must have sufficient mental capacity to apprehend the obligation of an oath. The trial court passes on the issue upon examination of the witness and any competent witness who can speak as to the nature and extent of his insanity. Mental capacity is a preliminary question for the judge upon due challenge. A witness may testify although he had once been adjudicated insane.

Where the defendant was tried for rape without any question of mental competency raised, but two weeks later on appearance for sentencing he was found insane and sent to a mental institution, on release three years later he was entitled to a hearing as to his mental capacity at the time of trial and conviction. A trial judge did not err in refusing to appoint a psychiatrist to examine the defendant at his request where the defendant, as his own counsel, ably conducted his defense.

* Professor of Law, Indiana University; Member United States Supreme Court Advisory Committee on Rules of Criminal Procedure, 1941-1946; Consultant, American Law Institute Model Code of Evidence, 1939-1942; author of Criminal Procedure From Arrest to Appeal (1947) and Criminal Appeals in America (1939).


‡ Young v. United States, 107 F. 2d 490, 492 (5th Cir. 1939).


® Shelton v. United States, 205 F. 2d 806, 815 (5th Cir. 1953), cert. denied, 346 U.S. 892 (1953).
Where no formal objection was raised to a witness' mental qualification, and the record revealed that the witness had responded to cross-examination and to questions put to him by the trial judge, failure of the trial judge to explore his mental capacity was not error. The form of the examination for competency is in the discretion of the trial court, but it is good practice for the court to question the witness or be present at examination by counsel.

Lack of mental capacity is a basis for impeachment of the witness. A court has stated: "The existence of insanity or mental derangement is admissible for the purpose of discrediting a witness."

Where a Government witness admitted on examination by the judge (the jury being absent) that up to the time of his arrest he had taken opium and heroin hypodermically but stated that he had not taken them since, the trial judge could determine that the witness was entirely clear and rational, and need not require the witness to bare his arm. If the defendant, because of the influence of intoxicants or narcotics, is not able to comprehend the proceedings and conduct his defense, a conviction will be reversed.

**Mental Immaturity**

Whether an infant is competent is largely in the discretion of the trial judge. An infant five and one-half years old was permitted to testify as to the murder of the deceased, his parent, it first being shown on examination of the infant that he was intelligent, understood the difference between truth and falsehood, and the consequences of falsehood, and what was required by the oath. A boy thirteen years old was permitted to testify for the Government in a narcotics prosecution. The witness need not be able to define the meaning of the word "oath." A six year old child was competent to testify to an indecent assault on her when on cross-examination she testified that she believed that per-
sons who did not tell the truth would be punished. Where the victim of an indecent assault was three years and eight months old, the trial court found her incompetent to testify after talking with the child. A girl thirteen years old, the victim of statutory rape, may testify as to her age. On prosecutions for taking indecent liberties with children, the alleged girl victims (aged six and eight) were allowed to testify. But a girl aged five was not allowed to testify after the trial court examined her as to competency. A recent case considered knowledge of the nature of an oath, but held that the child need not be able to answer abstract questions on matters of general knowledge. A ten year old girl was permitted to testify as to commission of an indecent act on a minor. In a prosecution for indecent assault, a child was allowed to testify although he stated that he did not know the difference between right and wrong. In a prosecution for indecent assault, the testimony of the victim of about four years and ten months was admitted.

**Seamen**

In an early case Circuit Justice Story instructed the jury: "Seamen, like other persons, if not interested or infamous, are competent witnesses in the trial of criminal as well as civil cases."

**Enemy Army Officer**

An enemy army officer is competent to testify. He may testify in a treason trial. When a witness takes the stand he is assumed to be competent, and incompetency must be shown by the party objecting to him. He may testify in his full uniform and give the Nazi salute. Any objection goes to the credibility of the testimony, and not to competency.

**Negroes**

As early as 1806 it was held that a slave was a competent witness for

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15 Antelope v. United States, 185 F. 2d 175 (10th Cir. 1950).
16 Henton v. United States, 196 F. 2d 605 (D.C. Cir. 1952). A child 7½ years old was held competent in Williams v. United States, 3 D.C. App. 335, 339 (1894) in a larceny prosecution.
17 Jones v. United States, 231 F. 2d 244 (D.C. Cir. 1956).
22 Stephan v. United States, 133 F. 2d 87, 95 (6th Cir. 1943), cert. denied 318 U.S. 781 (1943). See also Gillars v. United States, 182 F. 2d 962, 970 (D.C. Cir. 1950).
a free Negro. A mulatto born of a white woman, and not in a state of servitude by law, is a competent witness for a white man.

In early cases arising in the District of Columbia it was held that a slave is not a competent witness against a free Negro person in a capital case, the offense being arson. But under the Maryland act of 1817 free Negroes or mulattoes, unless they are in a state of servitude by law, are competent witnesses against free Negroes. Free born Negroes and mulattoes not subject to any term of servitude by law, are competent in all cases, including cases where the defendant is white. In 1837 it was held that a slave was a competent witness against Negroes or mulattoes in a prosecution in the District of Columbia, the court applying a Virginia statute of 1792. In 1827 it was held that a mulatto is not a competent witness against a colored man jointly indicted with a white man as the testimony against one defendant would operate against the other. The court relied on a Virginia statute of 1792.

In 1840 the Circuit Court for the District of Maryland held that a Negro could testify against a defendant who was not a Christian white person under a Maryland statute of 1808. But if the defendant was a Christian white person then Negroes and mulattoes, free or slave could not testify. Negroes could testify for and against each other. In 1864 Congress provided by statute against exclusion of Negro witnesses because of race. The statute provided: "That, in the courts of the United States there shall be no exclusion of any witness on account of color." Writers on Abraham Lincoln have pointed out that he advocated such statutes.

**Religious Belief**

At common law want of religious belief resulted in incompetency.

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The testimony of an atheist was held not admissible in Anonymous, 1 Fed. Cas. 999 (No. 446) (D.Mo. 1839).

On religious belief see 2 Wigmore, Evidence §§518, 6 Wigmore, Evidence §§1816-1829 (3rd ed. 1940); McCormick, Evidence 141 (1954); Morgan, Basic Problems of Evidence 79-80 (1954); 3 Wharton, Criminal Evidence.
Where the defendant objected to a witness for the government on the ground of his lack of religious belief the court refused the request of the defendant to examine the witness on the voir dire. Another person was sworn as a witness and testified that in a conversation with the proposed witness a few weeks ago, in answer to a question, the proposed witness stated that he did not believe in the existence of a God or a future state of rewards and punishments. The proposed witness was then permitted, at his own request, to explain his belief. He stated that he believed Nature to be God, and God to be Nature. He stated that swearing on the Bible was no more significant than swearing on any other book. He did not believe in existence after death. The court rejected the witness.  

Where the defendant objected to a witness for the government on the ground that he did not believe in the existence of a God and a future state of rewards and punishments, the Court permitted the witness to state what his opinions were. The witness then stated that he had always believed in the existence of a Supreme being, and that such being would punish him in this world or the next for his evil deeds; that he now believes in a future state of existence; and that he regularly sent his children to Sunday school, and his wife and children to church. A police officer testified that prior to the trial the witness had made a similar statement. A witness for the defendant testified that she had heard the witness express himself otherwise some years ago. The witness was held competent.  

In a civil action by the Government for trespass on public lands it was held that a witness who believes merely that punishments are inflicted in this life is a competent witness, although his credibility is affected. The modern practice is not to interrogate a witness as to his religious belief. Instead his belief is proved by witnesses who may have learned his belief from his own declarations. Under the former practice the witness was examined on this point either before or after he was sworn.  

In a case decided in 1918, a court of appeals held that a witness was competent despite lack of religious belief because this was the law of the state when it was admitted to the Union. The court made no reference to a federal trial court decision in a case tried in the same state two years.
earlier holding to the opposite effect. The trial court based its decision on the common law, but not the common law of any particular state.

Where the witness stated that she did not believe in the God of the Bible, nor in rewards or punishment after death, but recognized a duty to speak the truth, she was allowed to testify upon affirmation. The phraseology as to interpretations in the light of reason and experience in Rule 26 of the Federal Rules of Criminal Procedure was held to warrant this conclusion.

**Conviction of Crime**

A witness is incompetent who has been convicted of a conspiracy to defraud the creditors of an insolvent debtor, as this is an infamous crime. It partakes of the *crimen falsi*. But a person convicted of assault and battery with intent to murder in a court of a state in which the federal court sat and sentenced to fine and imprisonment is competent, as the offense is not infamous. The court stressed the nature of the offense, but added that even if the punishment was the test, the punishment here inflicted was not infamous. To disqualify, conviction must have been for treason, felony or *crimen falsi*.

In about 1880 a court held that while at common law a person convicted of an infamous crime was incompetent as a witness, in England and in most states this disqualification has been removed and the conviction may be shown only to affect credibility. If such a person may not testify, the conviction must be shown by the record. The record of a judgment of conviction in a state court of another state is not admissible unless attested in accordance with the federal statute, and duly certified. In 1884 the Supreme Court held that as to a case tried in Utah Territory, one convicted of murder could testify under a Utah statute.

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37 United States v. Miller, 236 Fed. 798, 799 (W.D. Wash. 1916). A person believing that "all his punishment is in this world, while he is here; I don't think it comes from God," was held incompetent.


41 Kellie v. United States, 193 Fed. 8, 23 (1st Cir. 1912).

42 See Benson v. United States, 146 U.S. 325, 326 (1892).

43 United States v. Biebusch, 1 Fed. 213, 214 (C.C.E.D. Mo. 1880). As the decision refers to a statute of 1878 the decision must have been rendered after that date. See also United States v. Wood, 28 Fed. Cas. 762, 763 (No. 16,760) (C.C.D.C. 1834); Bise v. United States, 144 Fed. 374, 375 (8th Cir. 1906) citing 2 Wigmore, Evidence §1270 (3rd ed. 1940).


45 Hopt v. Utah, 110 U.S. 574, 587 (1884).
In 1892, the Supreme Court held that a conviction of an offense made the person incompetent only in the jurisdiction of conviction at common law.\(^4\)

In 1907 a court held that a convicted person may testify "unless settled principles or precedents absolutely force such a construction."\(^4\) The rules of the common law were applicable, and not state statutes. One who had been convicted of embezzlement was guilty only of a misdemeanor, and therefore could testify. Embezzlement was not treason, felony, or *crimen falsi*; hence the common law did not bar.\(^4\) In 1913 a court applied the common law of the state so as to exclude one convicted of a felony and sentenced to 15 months in the penitentiary.\(^4\) The *crimen falsi* covered not only a charge of falsehood, but also injuriously affecting the administration of justice. If any change is to be made in the law, Congress should make it.\(^5\) In 1918 a court held a witness convicted in another state was competent, as the early law of the state made only local convicts incompetent.\(^5\)

A mere plea of guilty does not render a witness incompetent.\(^5\) A judgment of conviction is necessary to produce that result.

A witness who has been pardoned may testify.\(^5\) However, if the pardon is invalid or does not cover all convictions the witness is incompetent.\(^5\)

An early case held that the statute making defendants competent to testify did not render competent a defendant who, by a previous conviction of an infamous crime, had lost the privilege of testifying.\(^\) In 1916 a court held that a conviction of an infamous offense in the same state did not make the convict incompetent; only a federal convict would be incompetent.\(^\) Finally in 1918 the Supreme Court determined that the "dead hand of the common law rule of 1789 should no longer

\(^4\) Logan v. United States, 144 U.S. 263, 303 (1892).
\(^4\) United States v. Sims, 161 Fed. 1008, 1012 (C.C.N.D. Ala. 1907). In Keliher v. United States, 193 Fed. 8, 23 (1st Cir. 1912) conviction of a misdemeanor was held not to disqualify although the penalty could be more than one year.
\(^5\) Maxey v. United States, 207 Fed. 327, 329 (8th Cir. 1913) fraudulent use of mails.
\(^5\) See also the dissenting opinion in Rosen v. United States, 237 Fed. 810, 811 (2d Cir. 1916).
\(^\) McCoy v. United States, 247 Fed. 861, 863 (5th Cir. 1918).
\(^\) United States v. Wilson, 60 Fed. 890, 899 (D. Ore. 1894); Bise v. United States, 144 Fed. 374, 376 (8th Cir. 1906); Fetter v. United States, 258 Fed. 567, 576 (2d Cir. 1919).
\(^\) Stetler's Case, 22 Fed. Cas. 1314, 1315 (No. 13,380) (C.C.E.D. Pa. 1832); In re Greathouse, 10 Fed. Cas. 1057, 1059 (No. 5,741) (C.C.N.D. Calif. 1864).
be applied” to the question of incompetency because of conviction of crime.\(^5\) The court stated that it disposed of the question “in the light of general authority and sound reason.” Congress had removed disability because of perjury. The states had adopted a rule of competency of persons convicted of crime. Under Rule 26 a witness convicted of a crime could testify.\(^6\)

In the absence of a request for an instruction, there is no duty to charge as to the credibility of a witness who had been convicted of a felony.\(^6\) In fact, it has been held that even on request there need be no such instruction.\(^6\) But another court has suggested that instructions are desirable whether requested or not.\(^6\)

**Accomplice**

An accomplice is a competent witness.\(^6\) In 1824 Circuit Justice Washington held that an accomplice, separately indicted, is a competent witness in favor of or against a person indicted for the offense.\(^6\) In the particular case he was allowed to testify for the defendant. In 1841 it was held that an accomplice may testify against the defendant. “The law made him a competent witness, though by his own statement he was an accomplice.”\(^6\) However, his testimony should be received with great caution and where uncorroborated should have little weight. An accomplice who has already pleaded guilty is competent.\(^6\) In 1947 a court stated: “A co-conspirator, although an accomplice whose testimony is uncorroborated, is a competent witness against his co-conspirator,

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57 Rosen v. United States, 245 U.S. 467, 471 (two justices dissenting) (1918); Notes, 16 Mich. L. Rev. 387 (1918); Notes, 27 Yale L. J. 572 (1918); Comment, 27 Yale L. J. 668 (1918). The court below had held likewise in a two to one decision in Rosen v. United States, 237 Fed. 810 (2d Cir. 1916), and in a unanimous decision in Pakas v. United States, 240 Fed. 330, 334 (2d Cir. 1917). The case was followed in Ammerman v. United States, 257 Fed. 136, 143 (8th Cir. 1920), cert. denied, 254 U.S. 650 (1920); Peace v. United States 278 Fed. 180 (7th Cir. 1921); Hurwitz v. United States, 299 Fed. 449, 453 (8th Cir. 1924); United States v. Segelman, 83 F. Supp. 890, 892 (W.D. Pa. 1949).

58 Sharp v. United States, 195 F. 2d 997, 998 (6th Cir. 1952) (conviction of felony in state court).

59 Weaver v. United States, 111 F. 2d 603, 606 (8th Cir. 1940).

60 Ruvel v. United States, 12 F. 2d 264 (7th Cir. 1926).

61 Weaver v. United States, 111 F. 2d 603, 606 (8th Cir. 1940).


64 United States v. Lancaster, 26 Fed. Cas. 854, 859 (No. 15,556) (C.C.D. Ill. 1841). The defendant was separately indicted. It appeared that the accomplice had been arrested, but the facts do not show that he was indicted. See also United States v. Troax, 26 Fed. Cas. 216 (No. 16,540) (C.C.D. Ohio 1843); United States v. Lancaster, 44 Fed. 896, 921 (C.C.W.D. Ga. 1891); Crawford v. United States, 212 U.S. 183, 204 (1909).

65 McCormick v. United States, 9 F. 2d 237, 239 (8th Cir. 1925); Stoneking v. United States, 232 F. 2d 385, 392 (8th Cir. 1956), cert. denied, 352 U.S. 835 (1956).
not only as to the existence of the conspiracy, but as to the participation of his co-conspirator therein."

**Perjurers**

Congress passed a statute providing that any person convicted of perjury, or subornation of perjury, under the law of the United States, shall be incompetent to testify in the federal courts until the judgment is reversed. But in 1909 this statute was repealed. Clearly an alien convicted of false swearing in a naturalization proceeding under a special statute and not under the perjury statute, may testify in a prosecution for aiding aliens not entitled to naturalization.

One convicted of perjury is now competent to testify. Rule 26 clearly indicates a policy favoring admissibility of such testimony. One not convicted of perjury may testify even though he concedes that he previously was guilty of perjury.

While a convicted perjurer may testify, the trial judge must instruct that the testimony of such a witness must be scrutinized with care. But a court of appeals later held that where a witness admitted on direct examination that she had been convicted of perjury before a grand jury, no clear error was committed in failing to instruct that the testimony of a perjurer must be viewed with extreme caution.

**The Accused**

A court has stated: "The requirement that an accused present himself for trial is one of the earliest established in the criminal law. The modern rule is that he must also identify himself, if so required."

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66 Colt v. United States, 160 F. 2d 650, 651 (5th Cir. 1947).
68 See Logan v. United States, 144 U.S. 263, 302 (1892). The witness must have been convicted. O'Leary v. United States, 158 Fed. 796, 798 (1st Cir. 1907); Casten v. United States, 298 Fed. 453, 455 (3rd Cir. 1924).
69 See Rosen v. United States, 245 U.S. 467, 471 (1918); Casten v. United States, 298 Fed. 453, 455 (3rd Cir. 1924).
70 Latzis v. United States, 97 F. 2d 588, 590 (4th Cir. 1938).
71 United States v. Margolis, 138 F. 2d 1002, 1004 (3rd Cir. 1943); United States v. Segelman, 83 F. Supp. 890, 892 (W.D. Pa. 1949); Lucles v. United States, 100 F. 2d 908 (5th Cir. 1939); Latigius v. United States, 97 F. 2d 588 (4th Cir. 1938).
75 Mims v. United States, 254 F. 2d 654, 658 (9th Cir. 1958).
76 Kivette v. United States, 230 F. 2d 749, 755 (5th Cir. 1956), cert. denied, 353 U.S. 935 (1958). See also Swingle v. United States, 151 F. 2d 512 (10th Cir. 1945).
77 On the accused see 2 Wigmore, Evidence §§579, 581 (3rd ed. 1940); McCormick, Evidence 257-259 (1954); Morgan, Basic Problems of Evidence
Rule 43 of the Federal Rules of Criminal Procedure provides in part: "The defendant shall be present . . . at every stage of the trial." Admission of testimony on an essential element of the offense in the absence of the defendant is a direct violation of his right to confront the witness against him.\textsuperscript{77}

The defendant may in some circumstances be handcuffed at the trial.\textsuperscript{78} In the absence of uncontrovertible evidence of hurt, the trial court is permitted to use such means to safeguard the court, counsel, jury, and spectators and to assure the continued attendance of the defendant at the trial, as the nature of the case, known criminal record, character, associates in crime, and reputation of the defendant call for. Even more clearly the handcuffing of a co-defendant is not prejudicial error.\textsuperscript{79} In a prosecution for bank robbery it is not reversible error that the defendant was brought into court handcuffed, especially when he was then freed from restraint and the court questioned the jurors and they stated they would not be influenced.\textsuperscript{80} In a recent trial in New York City in which the defendant hurled a witness chair at the Assistant United States Attorney, he was put in leg irons and handcuffed.\textsuperscript{81}

In 1867 a district court held that a relator in habeas corpus is a competent witness, as a civil action is involved.\textsuperscript{82} The act of Congress of 1864\textsuperscript{83} provided that "there shall be no exclusion of any witness on account of color, nor in civil actions because he is a party thereto or interested in the issue to be tried."

A court of appeals has pointed out that "in criminal cases a defendant at common law could not be a witness for himself. He was permitted in capital cases, and according to some authorities, in cases not capital, to make an unsworn statement to the jury, but not as a witness, and he was not subject to cross-examination."\textsuperscript{84} Circuit Judge Dillon pointed out in 1876: "The defendant, by the policy of our law, can neither be compelled nor permitted to testify."\textsuperscript{85} The acts of 1862\textsuperscript{86} and 1864\textsuperscript{87} did

\textsuperscript{77} United States v. Hamrick, 293 F. 2d 468, 469 (4th Cir. 1961).
\textsuperscript{78} Lias v. United States, 51 F. 2d 215, 217 (4th Cir. 1931); McDonald v. United States, 89 F. 2d 128, 136 (8th Cir. 1937).
\textsuperscript{79} McDonald v. United States, 89 F. 2d 128, 136 (8th Cir. 1937).
\textsuperscript{80} Bayless v. United States, 200 F. 2d 113, 114 (9th Cir. 1952), \textit{cert. denied}, 345 U.S. 929 (1953). See also Cwach v. United States, 212 F. 2d 520, 527 (8th Cir. 1954).
\textsuperscript{81} N.Y. Times, June 5, 1962, p. 34.
\textsuperscript{82} In re Reynolds, 20 Fed. Cas. 592, 612 (No. 11,721) (N.D.N.Y. 1867).
\textsuperscript{83} 13 Stat. 351 (1864).
\textsuperscript{84} Wolfson v. United States, 101 Fed. 430, 435 (5th Cir. 1900).
\textsuperscript{86} 12 Stat. 588 (1862).
not permit the defendant to testify. The act of 1874 did not remove the disability. Repeated attempts to induce Congress to pass a law providing for competency had failed.

A statute of 1878 permitted a criminal defendant to testify. The Supreme Court referred to this statute in 1892. The statute provided that "in the trial of all indictments, information, complaint, offenses, and misdemeanors, in the United States courts, territorial courts, and courts-martial, and courts of inquiry, in any state or territory, including the District of Columbia, the person so charged shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him." While it has been argued that the statute violates the privilege against self-incrimination because it brings high pressure on the defendant to testify, the Supreme Court has never so held, nor has any lower federal court.

It has been asserted that if the government calls the defendant to the stand and thus forces him before the jury to claim his privilege not to testify, this might be held an implied comment on the failure of the defendant to testify. A court of appeals has held that "it is obvious that the practice of calling individual defendants to the stand in a criminal case is a dangerous one which should be employed only with scrupulous regard for their constitutional rights," but no prejudicial error was found on the facts. In the first place, individual defendants as corporation officers may be required to produce and identify corporate records even though the records may tend to incriminate them. In the second place, the evidence elicited was stricken so far as it related to them. It was held that the defendants were not entitled to directed verdicts. Moreover trial was by the court without a jury. The problem is most likely to arise where several individual defendants are tried and a corporation is also a defendant.

In a subsequent case it was held that calling the defendant to the stand even at the request of a co-defendant, violated the privilege against self-incrimination under the Fifth Amendment. The error is not cured

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89 18 Stat. 180 (1874).
91 20 Stat. 30 (1878).
93 See the dissenting opinion of Frank, J. in United States v. Grunewold, 233 F. 2d 556, 571, 578-587 (3rd Cir. 1956).
95 Carolene Products Co. v. United States, 140 F. 2d 61, 67 (4th Cir. 1944), (aff'd without consideration of the point), 323 U.S. 18 (1944). See also United States v. Fenwick, 177 F. 2d 488, 492 (7th Cir. 1949); Mulloney v. United States, 79 F. 2d 566, 579 (1st Cir. 1935).
96 United States v. Housing Foundation of America, 176 F. 2d 665 (3rd Cir. 1949).
by striking the testimony and directing the jury to disregard it. The defendant is unlike an ordinary witness. An ordinary witness could be placed on the stand though he claimed the privilege against self-incrimination.

On a motion to dismiss an information count, the court should not call the defendant to the stand and ask him incriminating questions. But there is no reversible error when the case is later tried to the court and guilt is established by uncontradicted evidence.\footnote{97}

The defendant may testify as to his own intent where material.\footnote{98} In a recent case the court stated that "in a criminal proceeding where the intent of the defendant is in issue the defendant may testify as to what his intent was."\footnote{99} The rule against self-serving declarations should not prevent a defendant from testifying as to his intent.\footnote{100} A trial judge in his discretion may deny a defendant who testifies the right to testify as to his mental and physical condition.\footnote{101}

**Co-Indictees and Co-Defendants**

Where several defendants were jointly tried, a defendant could not call on a co-defendant as a witness in his favor.\footnote{102} His counsel would therefore seek to secure, if possible, a separate trial. But in 1834, Circuit Justice Story held that separate trials need not be granted.\footnote{103} It made no difference that such testimony could not be used in a joint trial. A trial court could not, by an act of its own, make a witness competent. The rights of the Government must be protected. Separate trial had never been previously granted on such a ground. To grant a separate trial would be an abuse of sound discretion. Furthermore, a new trial

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\footnote{97}{Buenaventara v. United States, 290 F. 2d 86 (9th Cir. 1961).}
\footnote{99}{Krogmann v. United States, 225 F. 2d 220, 229 (6th Cir. 1955).}
\footnote{100}{United States v. Michener, 157 F. 2d 616, 620 (8th Cir. 1946).

\footnote{101}{Piquett v. United States, 81 F. 2d 75, 81 (7th Cir. 1936), cert. denied, 298 U.S. 664 (1936).}
\footnote{102}{Justice Story has stated: "It is clear by law that confederates in the same piracy . . . are not competent witnesses for each other. . . . In a joint trial the Government has a right to exclude all the prisoners from being witnesses." United States v. Gilbert, 25 Fed. Cas. 1287, 1303 (No. 15,204) (C.C.D. Mass. 1834). See also the view of Grier, J. in United States v. Harding, 26 Fed. Cas. 131, 135 (No. 15,301) (C.C.E.D. Pa. 1846). See 2 Wigmore, Evidence §580 at 707 (2nd ed. 1921).

On co-defendants see 2 Wigmore, Evidence §580 (3rd ed. 1940); 3 Wharton, Criminal Evidence 125-128 (12th ed. 1955); 3 Jones, Evidence 1522-1523 (5th ed. 1958); Morgan, Basic Problems of Evidence 82-83 (1954); Underhill, Criminal Evidence 243-251 (4th ed. 1935).

\footnote{103}{United States v. Gibert, 25 Fed. Cas. 1287, 1315 (No. 15,204) (C.C.D. Mass. 1834).}
would not be granted on the ground of newly discovered evidence of persons acquitted at such trial.\textsuperscript{104} In another case, in which two co-defendants were indicted for assault and battery, counsel for the defendants asked for separate trials, as he wished to examine each as a witness for the other.\textsuperscript{105} The court stated that it was a matter of discretion to allow separate trials. Neither can be examined as a witness for the other unless it should appear that there is no evidence against one, in which case the jury may acquit him, and he may then be examined for the other. The co-defendant was acquitted and then testified favorably for the defendant who was also acquitted. In another case the court, on motion of a defendant jointly indicted for larceny on the high seas, permitted the co-defendant to be separately tried so that he could be used as a witness for the defendant in the event of an acquittal.\textsuperscript{106} One case thought it unlikely that the government would join innocent persons so that they might be excluded as witnesses.\textsuperscript{107} Finally, in 1851, the Supreme Court held that even where two persons were jointly indicted but separately tried, the defendant first tried could not call the other as a witness in his behalf.\textsuperscript{108} But the Court did not hold that the defendant tried after the first defendant could not call the first defendant if he had been acquitted. Consequently grant of a separate trial, while of no advantage to the defendant tried first, would be of advantage to the defendant thereafter tried.

An early case held that an accomplice separately indicted was a competent witness for the defendant.\textsuperscript{109} Another early case held that if several defendants, jointly concerned in an assault and battery, were separately indicted, but all tried by the same jury at the same time, one of the defendants could give evidence for the other defendants.\textsuperscript{110} The jury need not first pass on the case against the defendant who was a witness. The witness could be sworn in all cases but his own, as the defendants were not jointly indicted. The jury was to be regarded as if it were four separate juries.

\textsuperscript{107} United States v. Harding, 26 Fed. Cas. 131, 135 (No. 15,301) (C.C.E.D. Pa. 1846).
The Supreme Court has pointed out that at common law where two persons are jointly indicted and tried together neither is a competent witness; but if one is tried separately, the other is a competent witness against him. Thus the Government is better off in the second situation than is the defendant, apparently on the theory that each will try to swear the other out of the charge when called by the defendant. An accomplice separately indicted can testify for the Government.

Following the statute of 1878 permitting the defendant to testify, the Supreme Court suggested in a dictum that a co-defendant could, at his own request, testify for the other defendant. "Under that statute, if there had been no severance and the two defendants had been tried jointly, either would have been a competent witness for the defendants, and though the testimony of the one bore against the other, it would be none the less competent." It would seem to follow that in the event of a severance, co-defendants might testify for the defendant; and if each defendant was separately indicted, each could testify for the other.

Following the 1878 statute allowing the defendant to testify, it was held that when two persons are jointly indicted and a severance is ordered, one of the defendants whose case is undisposed of may be called and examined as a witness on behalf of the government against the co-defendant. If the defendants were separately indicted, another defendant could testify for the Government. Even where there is a joint trial of defendants jointly indicted, a defendant may, at his own request, be examined as a witness by the Government even though the other defendant objects. But the Government could not call him in the absence of a request on his part. Where the Government has promised immunity to co-defendants it should state such fact and might ask for a severance, and there could be a reversal if harm results.

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111 Benson v. United States, 146 U.S. 325, 334 (1892).
112 United States v. Henry, 26 Fed. Cas. 276 (No. 15,351) (C.C.D. Pa. 1824). The holding was weak as the witness testified for the defendant.
113 20 Stat. 30 (1878); See 2 WIGMORE, EVIDENCE §880 at 710-714 (3rd ed. 1940); UNDERHILL, CRIMINAL EVIDENCE 243-246 (4th ed. 1935).
117 Wolfson v. United States, 101 Fed. 430, 434 (5th Cir. 1909); Heitler v. United States, 244 Fed. 140, 141 (7th Cir. 1917); United States v. Noble, 294 Fed. 689, 691 (D. Mont. 1923), affirmed, Noble v. United States, 300 Fed. 689 (9th Cir. 1924); Brown v. United States, 253 F. 2d 587 (5th Cir. 1958); Channel v. United States, 285 F. 2d 217, 222 (9th Cir. 1960).
118 Heitler v. United States, 244 Fed. 140, 142 (7th Cir. 1917); Rowan v. United States, 281 Fed. 137, 139 (1st Cir. 1922), cert. denied, 260 U.S. 721 (1922) (witness testified after pleading guilty).
In 1952 a court held that a co-defendant may testify against the defendant both under the 1878 statute and under Rule 26.119

Where several defendants are tried together, each has the right to testify at the trial.120 He need not obtain the consent of the co-defendant, and may testify against him. This is the effect of the statute121 first passed in 1878 providing that a defendant shall, at his own request, but not otherwise, be a competent witness.

Where several defendants are tried for conspiracy and one defendant in effect becomes a witness against the others, they may cross-examine him.122

Where a defendant takes the stand and testifies, he is not entitled to an instruction that he could not call his co-defendants to the stand where they elected not to take the stand, as this could amount to a comment on the failure of the co-defendants to testify.123

It is reversible error to instruct the jury that a witness not called would be unfavorable to the defendant where such witness had pleaded guilty and was awaiting sentence as to the conspiracy charge involving several defendants.124 Such witness was equally available to both the Government and to the defendant, hence no unfavorable inference can be drawn not calling such witness.

The jury may be properly informed during the trial that one or more defendants have pleaded guilty, or the plea may be entered in the jury's presence, if proper cautionary instructions are given.125 But if the defendant in pleading guilty, directly indicates that the other defendants are guilty also, that is reversible error.126 The same is true if the trial judge emphasizes the plea of guilty by a co-defendant.127

The trial judge may deny a motion of the defendant made before trial for a mental examination of a co-defendant who testified against the defendant where such motion was based on an affidavit of a psychiatrist who had never seen the co-defendant.128

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119 Sharp v. United States, 195 F. 2d 997, 998 (6th Cir. 1952).
122 Stanley v. United States, 245 F. 2d 427, 433 (6th Cir. 1957).
123 Bailey v. United States, 282 F. 2d 421, 426 (9th Cir. 1960).
124 Meyer v. United States, 78 F. 2d 624, 630 (9th Cir. 1935); Clayton v. United States, 152 F. 2d 402, 404 (9th Cir. 1945).
125 Casados v. United States, 300 F. 2d 845, 848 (5th Cir. 1962); Fahning v. United States, 299 F. 2d 579, 580 (5th Cir. 1962); United States v. Crosby, 294 F. 2d 928, 948 (2d Cir. 1961); Wood v. United States, 279 F. 2d 359, 363 (8th Cir. 1960); Davenport v. United States, 260 F. 2d 591, 596 (9th Cir. 1958); Richards v. United States, 193 F. 2d 554, 556 (10th Cir. 1951); Schiefer v. United States, 288 Fed. 368, 369 (3rd Cir. 1923).
126 Gaynor v. United States, 247 F. 2d 583 (D.C. Cir. 1957).
127 Payton v. United States, 222 F. 2d 794, 797 (D.C. Cir. 1955); United States v. Toner, 173 F. 2d 140, 142 (3rd Cir. 1949).
OTHER INTERESTED PERSONS
In some very early cases it was held that the owner of stolen goods is a competent witness after releasing to the United States his share of any fine the court may impose on the defendant.\(^1\)

The victim of fraud is a competent witness.\(^1\) The person intended to be injured by a forgery and the person whose name is forged to a certificate are competent witnesses to prove the forgery.\(^2\) But if the witness has paid money upon the forged paper, he is not competent to prove the forgery, although one judge doubted this. The owner of stolen goods may be a witness in a larceny prosecution.\(^3\)

In 1842 the Supreme Court held that the owner of property alleged to have been stolen on board an American vessel on the high seas is a competent witness.\(^3\) It made no difference that conceivably the victim might recover a part of the penalty or forfeiture, and that the statute making the act a crime did not expressly provide that the victim might be a witness. In America, as distinguished from England, the victim of a forgery is a competent witness. In America the owner of stolen goods is a competent witness. "The general rule, undoubtedly is, in criminal cases as well as in civil cases, that a person interested in the event of the suit or prosecution is not a competent witness. But there are many exceptions which are as old as the rule itself."\(^4\) The exceptions are necessary to enforcement of the criminal law. The victim of a robbery may testify. One who is to receive a reward on conviction may testify. Informers may testify although they are to receive a part of the penalty or forfeiture. But while a victim may testify, "[t]he credibility of his testimony is a matter for the consideration of the jury, under all the weight of circumstances connected with the case, and his interest in the result."\(^5\)

In an early case it was held on a prosecution for selling liquor, that the prosecutor whose name is indorsed on the indictment is not a compe-


\(^{132}\) United States v. Tolton, 28 Fed. Cas. 15 (No. 16,433) (C.C.D.C. 1830). The court declined to apply Maryland law. A Statute of 1715 of Maryland excluded such a witness, but only in the county courts and not the provincial. The jurisdiction of the Federal court did not depend on Maryland law, but on an act of Congress.

\(^{133}\) United States v. Murphy, 14 U.S. (16 Pet.) 252 (1842).

\(^{134}\) Id., 14 U.S. (16 Pet.) 254.

\(^{135}\) Id., 14 U.S. (16 Pet.) 258. The case was referred to favorably in Benson v. United States, 146 U.S. 325, 335 (1892).
tent witness for the government. The witness was interested, as according to a Virginia statute of 1792, he was liable to pay the costs.

It is no objection to the competency of a witness that he may be entitled to a reward on conviction. Public safety requires that rewards should be offered. On grounds of public policy, such an objection goes only to the credit of a witness.

**Marital Relationship**

At common law neither spouse was competent to testify for the other. Wigmore contended that at common law a spouse was not incompetent to testify against the other spouse, but that each had a privilege not to testify against the other and not to be the subject of testimony against him by the other. McCormick likewise concludes that the former should be dealt with as competency and the latter as privilege. Morgan disagrees that the common law was as represented by Wigmore. The English Court of Appeal rejected Wigmore's theory.

Several modern federal cases seem to follow Wigmore's classification as to testimony against a spouse. Several decisions of the Supreme Court spoke in terms of privilege. But others still spoke in terms of competency. The author of this article, following Wigmore's view, has dealt with the subject of testimony by a spouse against a spouse in a separate article entitled "The Husband-Wife Privileges in Federal Criminal Procedure."

It was as late as the year 1933 before the Supreme Court held that a spouse may testify in favor of the other spouse. The early cases seemed to rely on public policy alone. A district court stated: "There can be no doubt that at common law a wife is not a competent witness for or against her husband. And this is not on account of interest, but on the

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138 On testimony by the husband or wife of the defendant see 2 WIGMORE, §§2227-2245 (McNaughton Rev. 1961); MCCORMICK 144-145 (1954); MORGAN, BASIC PROBLEMS OF EVIDENCE 85-90 (1954); 3 WHARTON, CRIMINAL EVIDENCE 100-124 (12th ed. 1955); 3 JONES, EVIDENCE 1493-1511 (5th ed. 1958); UNDERHILL, CRIMINAL EVIDENCE 668-686 (4th ed. 935); Note, 56 Nw. U. L. REV. 208 (1961).
139 2 WIGMORE, EVIDENCE §604 (3rd ed. 1940); 8 WIGMORE, EVIDENCE §2242 (McNaughton Rev. 1961).
140 MCCORMICK, EVIDENCE 144 (1954).
141 MORGAN, BASIC PROBLEMS OF EVIDENCE 86-87 (1954).
143 United States v. Mitchell, 137 F. 2d 1006, 1008 (2d Cir. 1943) cert. denied, 321 U.S. 794 (1944). Shores v. United States, 174 F. 2d 838, 839, 844 (8th Cir. 1949); Olender v. United States, 210 F. 2d 795, 800 (9th Cir. 1954).
ground of public policy.... There exists no statute of the United States removing this disability.”¹¹⁷ Subsequently it was held by a lower court that a wife could not testify for her husband because of the “presumed identity of interest.”¹¹⁸ The Supreme Court followed this view in 1920.¹¹⁹ The theory of interest does not adequately explain the law.¹²⁰ By now almost all courts have repudiated the reasons offered for disqualification by interest. And with respect to public policy, it seems fantastic to say that where the wife was the only witness who could show the innocence of her husband, nevertheless she may not testify.¹²¹

The rule was never changed by legislation enacted by Congress. The statute¹²² adopting existing state law in determining the competency of witnesses applied only to federal civil actions, while the state law of 1789 or date of admission to the Union applied in federal criminal cases.¹²³ The Supreme Court so held in 1920 in a case involving testimony by a wife for her husband.¹²⁴ The Supreme Court held that the Act of Congress of July 2, 1864,¹²⁵ providing that there shall be no exclusion of a witness in civil actions because he is a party to or interested in the issues tried, does not give competency to a wife to testify for her husband. The Court stated: “That it is a rule of the common law, a wife cannot be received as a witness for or against her husband, except in a suit between them, or in criminal cases where he is prosecuted for a wrong done to her is not controverted.”¹²⁶ The statute of 1878¹²⁷ permitting a criminal defendant to testify did not permit a spouse to testify. “In the absence of a statute expressly allowing the wife to testify for her husband in a criminal action, she is not a competent witness for him. Neither the removal of the disability of interest nor the allowing of a defendant to testify in his own behalf in a criminal action makes the wife a competent witness.”¹²⁸

In 1893 the Supreme Court stated in a murder prosecution that a wife “was not a competent witness either in behalf of, or against her

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¹¹⁸ Knoell v. United States, 239 Fed. 16, 23 (3rd Cir. 1917), error dismissed, 246 U.S. 648 (1917).
¹²¹ Tinsley v. United States, 43 F. 2d 890, 896 (8th Cir. 1930).
¹²³ Logan v. United States, 144 U.S. 263, 299 (1891). The 1906 amendment was similarly interpreted in Maxey v. United States, 207 Fed. 327, 329 (8th Cir. 1913).
¹²⁵ 12 Stat. at Large 588 (1862); Rev. Stat. §858; Repealed 1948 Ch. 646.
¹²⁷ 20 U.S. Stat. at Large 30 (1878).
¹²⁸ United States v. Crow, 3 Dak. 106, 14 N.W. 437, 438 (1882). See 2 WIGMORE, EVIDENCE §608, 619 (3rd ed. 1940). See also United States v. Liddy, 2 F. 2d 60 (E.D. Pa. 1924); Talbott v. United States, 208 Fed. 144 (5th Cir. 1913) as to co-defendants.
husband." She cannot be placed upon the stand. One justice dissenting concluded that she should be present so that clearer identification of her husband could be made. This view was followed in several decisions of lower courts. In 1911 the Supreme Court reaffirmed its view that a wife could not testify in favor of her husband even in a murder case. The Court offered no reasoning and cited a decision not involving spouses, holding that early state law applies to the admission of testimony. The rule was made even harsher in some cases in which lower courts excluded a wife's testimony in favor of her husband even though state law at the time of admission to the Union seemed to permit her to testify. Occasionally a court seemingly looked at the common law rule of exclusion without reference to the law of any particular state. Sometimes the court excluded it by looking at current decisions of the state in which it sat.

A lower court pointed out in 1919 that the Supreme Court had recently concluded that the "dead hand of the common law rule of 1789 should no longer be applied" to exclude the testimony of convicted felons. "It may therefore be said with equal reason that the same 'dead hand' should no longer disqualify husband and wife except as respects confidential communications." If the trial judge had admitted the testimony of the wife, the Court of Appeals would not readily have reversed. But the next year the Supreme Court held that the defendant's wife is not competent to testify for her husband generally or even to contradict testimony that certain matters occurred in her presence.

The Court of Appeals of the Ninth Circuit held in 1927 that a wife could testify in favor of her husband in a narcotics prosecution. The

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159 Graves v. United States, 150 U.S. 118, 121 (1893).
160 Id. at 122.
161 United States v. Sims, 161 Fed. 1008, 1010 (C.C.N.D. Ala. 1907); Wesoky v. United States, 175 Fed. 333, 335 (3rd Cir. 1910).
162 Hendrix v. United States, 219 U.S. 79, 91 (1911).
163 Logan v. United States, 144 U.S. 263 (1891).
164 Adams v. United States, 259 Fed. 214 (8th Cir. 1919); Liberato v. United States, 13 F. 2d 564, 566 (9th Cir. 1926), corrected in Rendleman v. United States, 18 F. 2d 27, 29 (9th Cir. 1927). See Leach, State Law of Evidence in the Federal Courts, 43 Harv. L. Rev. 554, 565-566 (1930).
165 Adams v. United States, 259 Fed. 214 (8th Cir. 1919). The state was Oklahoma.
166 Slick v. United States, 1 F. 2d 897, 899 (7th Cir. 1924). The state was Illinois.
167 Fitter v. United States, 258 Fed. 557, 577 (2d Cir. 1919).
168 Jin Fuey Moy v. United States, 254 U.S. 189, 195 (1920). The case is criticized in Leach, State Law of Evidence in the Federal Courts, 43 Harv. L. Rev. 554, 563-564 (1930). The case was followed in Fisher v. United States, 32 F. 2d 602, 604 (4th Cir. 1929); Barton v. United States, 25 F. 2d 967 (4th Cir. 1928); United States v. Swierzbenski, 18 F. 2d 685 (W.S. N.Y. 1927); Liberato v. United States, 13 F. 2d 564, 566 (9th Cir. 1926); Fasulo v. United States, 7 F. 2d 961 (9th Cir. 1925); Allen v. United States, 4 F. 2d 688, 695 (7th Cir. 1925); Slick v. United States, 1 F. 2d 897, 899 (7th Cir. 1924); Krashowitz v. United States, 282 Fed. 599, 601 (4th Cir. 1922); Lowe v. United States 282 Fed. 597, 599 (9th Cir. 1922).
169 Rendleman v. United States, 18 F. 2d 27 (9th Cir. 1927) discussed by Dood, Jr., Evidence—Rules Governing Competency of Witnesses In Criminal Trials In the Federal Courts, 22 Ill. L. Rev. 545 (1928); Bronough, Competency of
COMPETENCY OF WITNESSES

The court pointed out that convicted felons could testify, and that the modern trend is to remove disability of witnesses. The same court held the same way in a liquor prosecution, but no reversible error was found in excluding the wife's testimony. The same court upheld a trial judge in refusing to allow the wife to testify when the defendant failed to make an offer of proof as to what she would testify. The Eighth Circuit in 1930 sharply criticized the rule preventing the wife from testifying for her husband as "an absurdity and a relic of legal barbarism which should no longer be recognized." The court referred to an article of Professor Barton Leach of the Harvard Law School which concluded that in some states, statutes existed at the date of admission to the Union qualifying the wife as a witness, and that certainly in such states the wife should be able to testify for her husband in a federal prosecution. The Fourth Circuit adhered to the rule of incompetency in 1931.

The harshness of the rule was to a slight extent mitigated by various devices. In some cases the defendant's wife testified for him without objection by the Government. On request of the defendant, the jury should be instructed that the wife cannot testify for her husband where the facts are such that otherwise the jury might draw unfavorable inferences from her failure to testify.

Where several defendants are jointly indicted and jointly tried, an early case held that the spouse of one defendant could not testify in favor of another defendant. The husband could not be a witness. It followed that the wife could not be. Even after the statute of 1878 permitted a criminal defendant to testify, several cases held that the wife was not a competent witness for or against a co-defendant at a joint trial. She could not even be a witness in favor of a co-defendant.

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Husband or Wife in Criminal Cases in Federal Court, 31 Law Notes 108 (1927).

170 Green v. United States, 19 F. 2d 850, 853 (9th Cir. 1927), affd, 277 U.S. 438 (1928).

171 Romeo v. United States, 23 F. 2d 551, 552 (9th Cir. 1928), rehearing, 24 F. 2d 527; Hass v. United States, 31 F. 2d 13, 14 (9th Cir. 1929).


175 Lusco v. United States, 287 Fed. 69 (2d Cir. 1923) (drug prosecution); United States v. Lindsly, 7 F. 2d 247, 255 (E.D.La. 1925), reversed on other grounds, 12 F. 2d 771 (5th Cir. 1926).

176 Fisher v. United States, 32 F. 2d 602, 604 (4th Cir. 1929).


179 Talbott v. United States, 208 Fed. 144 (5th Cir. 1913); United States v. Liddy, 2 F. 2d 60 (E.D.Pa. 1924).

180 Dowdy v. United States, 46 F. 2d 417, 420 (4th Cir. 1931), Notes, U. Pa. L. Rev. 1146 (1931) (where wife's testimony would inure to the benefit of her husband); Israel v. United States, 3 F. 2d 743, 745 (6th Cir. 1925) (where
However, several cases held that she could be a witness for a co-defendant. Several cases left the question open where the wife's testimony could not affect her husband.

Where several defendants are jointly indicted but separately tried, several cases left open the question whether the wife of one defendant could testify for a co-defendant at his separate trial. Other cases allowed her to testify.

Finally in 1933 the Supreme Court held that a wife is competent to testify in favor of her husband. State legislation had moved in that direction. The reasons given by the common law were not persuasive. Its reason as to interest was not convincing because since 1878 even the defendant could testify, and his interest is even greater. Public policy favoring the maintenance of harmonious marital relations is fanciful in the light of modern social conditions. The court in express language left open the question of the competency of one spouse to testify against the other.

The Funk case has settled that a wife may testify for her husband where she is willing to do so. Suppose, however, that she is unwilling. The problem has seldom arisen. In one case husband and wife had both been convicted of larceny, and the husband moved for a new trial. When called by her husband to testify in support of the motion, she stated that she did not want to testify "against my husband or for him" and assigned as her ground, "on the wife's privilege." The wife had not yet been sentenced, and the period allowed for appeal had not expired. It

wife's testimony would affect the husband's defense); Haddock v. United States, 294 Fed. 536 (6th Cir. 1923); Fitter v. United States, 258 Fed. 567, 576 (2d Cir. 1919); United States v. Liddy, 2 F. 2d 60 (E.D.Pa. 1924); United States v. Davidson, 285 Fed. 661, 662 (E.D.Pa. 1922).

Tinsley v. United States, 43 F. 2d 890, 895 (8th Cir. 1930); Romeo v. United States, 23 F. 2d 551, 552 (9th Cir. 1928); Green v. United States, 19 F. 2d 850, 852 (9th Cir. 1927) (not reversible error to exclude however). See Wigmore, Evidence—Husband Incompetent to Testify for Wife In a Criminal Case, 15 Ill. L. Rev. 453 (1921).

Israel v. United States, 3 F. 2d 743, 745 (6th Cir. 1925).


Funk v. United States, 290 U.S. 371 (1933); Notes, 14 B.U.L. Rev. 175 (1934); Note, 19 Cornell L. Q. 480 (1934); Note, 22 Geo. L.J. 626 (1934); Note, 19 Iowa L. Rev. 488 (1934); Note, 23 Ky. L.J. 190 (1934); Note, 33 Mich. L. Rev. 306 (1934); Note, 13 Ore. L. Rev. 259 (1934); Note, 19 St. Louis L. Rev. 157 (1934); Note, 8 St. John's L. Rev. 375 (1934); Note, 82 U. Pa. L. Rev. 406 (1934).

At the present time only twelve states have statutes purporting to make spouses incompetent to testify for one another. But even in such states the rule is much less rigid than at common law. Note, 56 Nw. U. L. Rev. 208, 209 (1961).
was held that the wife need not testify, chiefly on the ground of self-incrimination.\textsuperscript{187}

\textbf{Judge}

In a case decided in 1798, the presiding judge was asked and answered questions on issues of fact by the defendant who called no other witnesses.\textsuperscript{188} Apparently this was regarded as not improper procedure and the defendant was convicted and sentenced for seditious libel. In a case decided in 1799 on a prosecution for treason, one of the bench of judges was sworn and testified to matters connected with the sedition charged, and he was also cross-examined.\textsuperscript{189} In 1916 a judge stated in a concurring opinion: "Indeed, a judge presiding at a trial is not a competent witness, for the duties of a judge and a witness are incompatible. If he testified he would have to pass upon the competency of his own testimony; and as a witness he might be regarded as partisan, and would be subject to embarrassing conflicts with counsel. The danger to the dignity of the bench, of subjecting its impartiality to doubt and of placing the defendant at an unfair disadvantage by admitting the presiding judge as a witness is very obvious."\textsuperscript{190} Interrogation by a judge should not be such as in effect to amount to testimony by the judge. Where the judge, under the form of asking questions of the defendant as to an interview sought with the judge by the defendant, in effect testified to that interview, there was reversible error.\textsuperscript{191} At the interview the defendant had intimated his guilt. The Supreme Court stated in 1942 by Justice Murphy: "After the testimony of Abosketes, the court read into the record the fact that Abosketes was indicted in Wisconsin in 1936 and 1938, and that he pleaded guilty to one indictment and the other was dismissed. It is of course, improper for a judge to assume the role of a witness, but we cannot assume that prejudicial error resulted. Abos-\textsuperscript{187} Mills v. United States, 281 F. 2d 736, 739 (4th Cir. 1960). In accord Bisno v. United States, 299 F. 2d 711, 721 (9th Cir. 1961).

\textsuperscript{188} Lyon's case, 15 Fed. Cas. 1183, 1184 (No. 8,646) (C.C.D. Vt. 1798). The questions were asked of Circuit Justice Patterson. The defendant had no counsel, and apparently the court did not wish to curtail his defense. The case was heard before two judges.


\textsuperscript{189} Case of Fries, 9 Fed. Cas. 826, 872, 874 (No. 5,126) (C.C.D. Pa. 1799). District Judge Peters testified. Circuit Justice Iredell was one of the bench of judges trying the case.

\textsuperscript{190} Lepper v. United States, 233 Fed. 227, 230 (4th Cir. 1916). This was quoted in Terrell v. United States, 6 F. 2d 498, 499 (4th Cir. 1925).

\textsuperscript{191} Terrell v. United States, 6 F. 2d 498, 499 (4th Cir. 1925).
ketes had briefly referred to his troubles in Wisconsin in his testimony.\footnote{192}

A federal statute\footnote{192} provides: “Any justice or judge of the United States shall disqualify himself in any case in which . . . he is or has been a material witness.” Rule 41 of the Uniform Rules of Evidence provides: “Against the objection of a party, the judge presiding at the trial may not testify in that trial as a witness.” Rule 302 of the Model Code of Evidence provides: “If the judge testifies concerning a disputed material matter, he shall not continue as a judge in the action against . . . objection. . . .” This appears to be Wigmore’s position.\footnote{194}

If the trial judge knows of relevant facts outside the area of judicial notice, he cannot use them except as a witness or by consent of the parties. The Supreme Court stated by Chief Justice Hughes: “In the instant case, the trial judge did not analyze the evidence; he added to it, and he based his instruction upon his own addition.”\footnote{195}

A judge is a competent witness in cases in which he is not presiding.\footnote{196} Such a judge may be subpoenaed.\footnote{197}

\subsection*{Juror}

Where the defendant consents that a juror shall act as interpreter for a witness speaking a foreign language, no prejudicial error is committed.\footnote{198}

The federal cases on jurors as witnesses seem invariably to involve impeachment of the verdict. No cases have been found of juror testimony at earlier stages of the trial.

In general, a juror is incompetent in civil cases to testify in impeachment of his verdict.\footnote{199} Some courts would permit jurors to testify to

\footnote{192 Glasser v. United States, 315 U.S. 60, 82-83 (1942). In Dillon v. United States, 307 Fed. 2d 445 (9th Cir. 1962), a defendant called the sentencing on a motion to vacate. The judge did not answer the single question asked.}


\footnote{194 6 Wigmore, Evidence §1909 (3rd ed. 1940).}

\footnote{195 Quercia v. United States, 289 U.S. 466, 471 (1933). See McCormick, Evidence 690 (1954); Morgan, Basic Problems of Evidence 75-76 (1954).}


\footnote{197 In United States v. Caldwell, 25 Fed. Cas. 238 (No. 14,708) (C.C.D. Pa. 1795) state judges were subpoenaed. See Orfield, Subpoena in Federal Criminal Procedure, 13 Ala. L. Rev. 1, 52 (1960).}

\footnote{198 Thiede v. Utah Territory, 159 U.S. 510, 519 (1895). On competency of jurors see 2 Wigmore, Evidence §1910 (3rd ed. 1940); McCormick, Evidence 147-149 (1954); Morgan, Basic Problems of Evidence 76-77 (1954); 3 Washburn, Criminal Evidence 74 (12th ed. 1955); 3 Jones, Evidence 1514-1522 (5th ed. 1958); Torkelson, Testimony of a Judge or Juror, 1945 Wis. L. Rev. 248; Hart, Testimony by a Judge or Juror, 44 Marq. L. Rev. 183, 188 (1960).}

\footnote{199 McDonald v. Pless, 238 U.S. 264, 266 (1915). See McCormick, Evidence §68}
misconduct and irregularity which are grounds for new trial. Excluded, however, is evidence as to the impressions and arguments of the jurors in their deliberations and evidence as to their own motives, beliefs, and mistakes in arriving at their verdict. The testimony of some jurors, on motion for new trial, that the failure of the defendant to take the stand was discussed as indicating guilt, and that this was given weight, is excluded. Attempts from without to influence the jury may involve an exception to the rule. Jurors may testify in some cases that newspaper comments on the pending case have been read by the jury. Drunkenness, bribery, receiving incompetent documents, or privately interviewing a party might justify juror testimony. But jurors may not give affidavits or testify that the jury considered documents giving the criminal history of the defendant made available as part of the record exhibits.

In 1953 the Supreme Court stated: "Nor have the courts favored any public or private post-trial inquisition of jurors as to how they reasoned, lest it operate to intimidate, beset, and harass them. This Court will not accept their own disclosure of forbidden quotient verdicts in damage cases. McDonald v. Pless, 238 U.S. 464. Nor of compromise in a criminal case whereby some jurors exchanged their convictions on one issue for concession by other jurors on another issue. Hyde v. United States, 225 U.S. 437."

The affidavits of jurors that the defendants were found guilty of counts in the indictment other than those shown in the verdict as returned in the court were held inadmissible on a motion for new trial.
But they would be admissible to correct the verdict. Affidavits of jurors that they were influenced by an unauthorized statement of the bailiff that a verdict must be reached are inadmissible to impeach a verdict of guilty.209 Jurors may not be called to testify on motion for new trial as to the effect of improper argument by the Government on the jury.210

In one case the illness of a juror was brought to the attention of the trial judge during the deliberation of the jury and when the verdict was returned. The trial judge questioned the juror. It was held on appeal that the verdict was not unanimous and should not have been received.211 The trial court was reversed.

A court has stated: "If any jurors had received communications from the trial court or the Federal Bureau of Investigation of a nature which would tend to prejudice them against appellant, or had been subjected to other extraneous inferences, such fact could have been appropriately presented by submitting affidavits of the jurors themselves."212 Members of a jury may be asked whether an experiment was conducted during their deliberations.213 Jurors may testify that a newspaper clipping about the defendant was shown by a juror to the other jurors just before a vote on the verdict was taken.214 On a motion for new trial because a juror was upset because of an injury to her husband, the juror could testify that she was not upset since the injury was slight.215

Rule 302 of the Model Code of Evidence provided that "a petit juror in an action may be a witness therein." Furthermore, "he shall continue as a juror ... unless the judge finds that to allow him to do so is likely to prevent a fair consideration by the jury of an issue in action." This seems to be the prevailing law, and is favored by Wigmore.216 Rule 42 of the Uniform Rules of Evidence provides that "a member of the jury sworn and impanelled in the trial of an action may not testify in that trial as a witness. But if a party or his counsel has been advised or otherwise has knowledge that a prospective juror may be called as a witness, the failure of such party to challenge the juror on that ground shall be deemed a waiver on his part of his right to object to the juror as a witness."


211 United States v. Pleva, 66 F. 2d 529, 531 (2d Cir. 1933); Note, 47 Harv. L. Rev. 717 (1934); Note, 40 W. Va. L.Q. 198 (1934).

212 Remsner v. United States, 205 F. 2d 277, 291 (9th Cir. 1953).


214 United States v. Kum Seng Seo, 300 F. 2d 623 (3rd Cir. 1962).


216 6 Wigmore, Evidence §1910 (3rd ed. 1940).
Wigmore has supported the doctrine that to be distinguished from rules of incompetency and exclusion is a rule that each juror has a privilege against the disclosure in court of his communications to the jurors during their retirement.\(^\text{217}\) On an appeal from a conviction of a juror for contempt in giving false answers on voir dire examination, Justice Cardozo, speaking for the Supreme Court stated: “The books suggest a doctrine that the arguments and votes of jurors, the \textit{media concludendi}, are secrets protected from disclosure unless the privilege is waived. . . . Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world. The force of these considerations is not to be gainsaid. . . . Assuming that there is a privilege which protects from impertinent disclosure the arguments and ballots of a juror while considering his verdict, we think the privilege does not apply where the relation giving birth to it has been fraudulently begun or fraudulently continued.”\(^\text{218}\) But the privilege was held inapplicable because of such fraudulent conduct. It has been asserted that the latter conclusion was without precedent.\(^\text{219}\) The lower federal court in the instant case had also held against any privilege on the facts of the present case.\(^\text{220}\)

**ATTORNEY**

The Supreme Court stated in a civil case by Justice Matthews: “There is nothing in the policy of the law, as there is no positive enactment, which hinders the attorney of a party prosecuting or defending in a civil action from testifying at the call of his client.”\(^\text{221}\) The Court reversed a judgment for the defendant because counsel for the plaintiff was not allowed to testify. A court held that where an assistant United States Attorney testified against the defendant in rebuttal as to an essential matter, such procedure was not to be approved, and held it reversible error when combined with other error, though not in itself reversible error.\(^\text{222}\) There were other government counsel available, and the attorney might have withdrawn when it was discovered that he was a necessary witness.

\(^{217}\) S \textit{Wigmore, Evidence} §§2346 (McNaughton Rev. 1961).

\(^{218}\) Clark v. United States, 289 U.S. 1, 12-14 (1933).

\(^{219}\) Comment, \textit{Marq. L. Rev.} 300, 301 (1933). A single New York decision is cited in Note, 17 Minn. L. Rev. 654, 656 (1933). But that decision seems to be the only one so holding. Note, 11 N.C.L. Rev. 347, 348 (1933). See also the dissenting opinion in Clark v. United States, 61 F. 2d 695, 709, 717 (8th Cir. 1932).

\(^{220}\) United States v. Clark, 1 F. Supp. 747, 752 (D. Minn. 1931) ; Clark v. United States 61 F. 2d 695, 705 (8th Cir. 1932). The holding is thought to be sound in principle: Note, 17 Minn. L. Rev. 654, 656 (1933) ; 347, 349 (1933). Note, 11 N.C.L. Rev. 347 (1933).


\(^{222}\) Robinson v. United States, 32 F. 2d 505, 510 (8th Cir. 1929).
Where the stenographer of the defendant had testified against him as to a criminal direction given to her, it was held reversible error not to let the defendant's office associate, at times engaged by the defendant as his attorney, contradict her. But after he testified the court could exclude such attorney from further participation in the trial. Judge Learned Hand has stated: "Lastly, Pietraniello complains that he was not permitted to call to the stand the attorney for the prosecution without disclosing how his testimony would be relevant. We do not suggest that an attorney who is trying a case can never be called as a witness, although the judge appears to have been of the opinion; but merely it should be a condition that the defense give some reasons for such an unusual move." Judge Waterman has stated: "It has been widely recognized that lawyers representing litigants should not be called as witnesses in trials involving those litigants if such testimony can be avoided consonant with the end of obtaining justice." The Court cited Canon 19 of the American Bar Association Canons of Professional Ethics, providing: "When a lawyer is a witness for his client, except as to merely formal matters as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except where essential to the ends of justice, a lawyer should avoid testifying in court in behalf of his client." The same rule should be applied to the United States Government and its attorneys. Hence in a prosecution for perjury, testimony as to what transpired before the grand jury should not come from the United States Attorney, but from the grand jury stenographer or from a member of the grand jury. In a later case the court reversed because of testimony by the Assistant United States Attorney.

In 1960 a court stated: "Although an attorney is competent to testify in his client's behalf, the court is then justified in excluding him from further participation in the case."

It is not common practice for the Government to call defendant's counsel as a witness. But it was held not reversible error in the particular facts of a case.

In a federal habeas corpus case involving a state court defendant it was held that the practice of an attorney, here the prosecuting attorney testifying in a case and also participating in the trial, is not to be commended, but it is not a denial of due process in a collateral attack on the

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223 Christensen v. United States, 90 F. 2d 152, 154 (7th Cir. 1937).
224 United States v. Chiarella, 184 F. 2d 903, 911 (2d Cir. 1950).
225 United States v. Alu, 246 F. 2d 29, 33 (2d Cir. 1957).
227 United States v. Clancy, 276 F. 2d 617, 636 (7th Cir. 1960). See also Christensen v. United States, 90 F. 2d 152, 155 (7th Cir. 1937); Jackson v. United States, 297 F. 2d 195, 198 (D.C. Cir. 1961).
228 Irwin v. Dowd, 153 F. Supp. 531, 539 (N.D. Ind. 1957), aff'd, 251 F. 2d 548
conviction. On appeal a concurring judge stated: "Such conduct was in violation of Canon 19 of the Canons of Professional Ethics. Such conduct was offensive to the right of a defendant to a fair and impartial trial."

In a federal habeas corpus proceeding involving federal criminal defendants it was held that two assistant United States Attorneys who prosecuted the criminal case were not disqualified in the habeas corpus proceeding. The testimony of such attorneys that the petitioners had waived trial by jury, taken by deposition, was admissible.

THE PROCEDURE OF DISQUALIFICATION

When a witness takes the stand he is assumed to be competent. Incompetency must be shown by the party objecting to him.

The form of the examination for mental incapacity, is in the discretion of the trial judge, but it is good practice for the judge to interrogate the witness or to be present at his examination by counsel. The judge may talk with a child to determine whether the child is sufficiently mature to testify.

An objection to the competency of testimony after the witness has left the stand, and after several other witnesses have been subsequently examined comes too late. It is proper to overrule a motion to strike out. At common law an objection to the competency of a witness on the ground of interest had to be made before his examination in chief; or, if interest was then unknown, as soon as it was discovered.

A party may waive his objections to the competency of a witness. There is a waiver where there is no objection when the witness was sworn, nor at any time during the trial.

The question of competency of a witness is a preliminary question to be passed on by the judge. It has been so held in cases involving

229 Irwin v. Dowd, 153 F. Supp. 531, 539 (N.D. Ind. 1957), aff'd, 251 F. 2d 548 (7th Cir. 1958).
231 Keller v. Zerbst, 97 F. 2d 257, 258 (5th Cir. 1938), cert. denied, 303 U.S. 637 (1938).
232 Stephen v. United States, 133 F. 2d 87, 95 (5th Cir. 1943), cert. denied, 318 U.S. 781 (1943). An enemy officer was allowed to testify in a treason trial. On the procedure of disqualification see 2 WIGMORE, EVIDENCE §§483-487, 583-587 (3rd ed. 1940); MCCORMICK, EVIDENCE 149-150 (1954); 3 WHARTON, CRIMINAL EVIDENCE 67-70 (12th ed. 1955); 3 JONES, EVIDENCE 1527-1529 (5th ed. 1958).
234 Brown v. United States, 152 F. 2d 138 (D.C. Cir. 1945); Jones v. United States, 231 F. 2d 244 (D.C. Cir. 1956).
235 Benson v. United States, 146 U.S. 325, 332 (1892). Here the wife of the defendant testified for the Government. See also United States v. One Case of Hair Pencils, 27 Fed. Cas. 244, 245 (No. 15,924) (C.C. N.D. N.Y. 1825). This was a forfeiture proceeding involving a deposition.
236 Bise v. United States, 144 Fed. 374, 376 (8th Cir. 1906). A co-defendant was allowed to testify for the Government.
competency of a wife to testify against her husband\textsuperscript{237} and mental incapacity.\textsuperscript{238}

\textsuperscript{237} Matz v. United States, 158 F. 2d 190 (D.C.Cir. 1946); Miles v. United States, 103 U.S. 304, 313 (1880).

\textsuperscript{238} Young v. United States, 107 F. 2d 490, 492 (5th Cir. 1939).