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WITNESSES--COMPETENCE OF DEFENDANT'S SPOUSE AS WITNESS FOR THE PROSECUTION

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WITNESSES—COMPETENCE OF DEFENDANT'S SPOUSE AS WITNESS FOR THE PROSECUTION—Defendant, on trial for the offense of transporting across state lines a sum of money exceeding $5,000 feloniously obtained by fraud, was con-

victed largely through the testimony of his victim. The fraud charged consisted of a lightning courtship and hasty marriage, closely followed by the disappearance of the new husband along with the entire estate of the too-gullible bride. Over the objection of the defendant, his wife was permitted to testify to the swindle practiced upon her. After conviction, he filed a motion for a new trial, contending that it was error to permit a wife to testify against her husband in a criminal prosecution where the essence of the offense charged was the felonious taking of her property. *Held,* the testimony was admissible in evidence, the common law rule being now outmoded in the light of reason and experience. *United States v. Graham,* (D.C. Mich. 1949) 87 F. Supp. 237.

Under the common law, this ruling would undoubtedly have been held erroneous, as that law regarded neither spouse as a competent witness in criminal proceedings against the other, except where the offense charged involved actual violence to the person of the would-be witness.[1] The reasons behind this rule are usually considered to be the common law doctrine of unity of husband and wife, a fear that permitting the wife to be the instrument of her husband's detection and punishment would stir up strife between them with resultant destruction of the sacred marital relationship, and a mistaken view of litigation as a kind of game requiring a sportsmanlike attitude on the part of the law.[2] The exception arises out of necessity, as absolute enforcement of the rule would leave the weaker spouse entirely at the mercy of the stronger. This disqualification persists in most states in the form of a statute precluding testimony except in prosecutions "for a crime committed by the one against the other." Such statutes have been variously interpreted, most courts holding them to be merely declaratory of the common law.[3] However, the result of disqualifying what would often be the most important witness in a prosecution after all hope of marital harmony had been destroyed has led some courts to a more liberal construction. Probably the most widely adopted expansion is that permitting the spouse to testify in cases of sexual offenses committed with a third person.[4] Some cases indicate that the test is

[1] 8 WIGMORE, EVIDENCE, 3d ed., §2239 (1940). See also Lord Audley's Case, 123 Eng. Rep. 1140 (1631); Meade v. Commonwealth, 186 Va. 775, 43 S.E. (2d) 858 (1947).

[2] 8 WIGMORE, EVIDENCE, 3d ed., §2228 (1940), criticizing the rule as outmoded and illogical; 5 BENTHAM, RATIONALE OF JUDICIAL EVIDENCE, Bk. IX, c. V, §IV (1827), describing the rule a century ago as one sprung from feudal barbarism which seeks to convert every man's house into a den of thieves and a nursery of unpunishable crimes; Cargill v. State, 25 Okla. Cr. 314, 220 P. 64 (1923); Jenkins v. State, 191 Ark. 625, 87 S.W. (2d) 78 (1935).

[3] Meade v. Commonwealth, supra, note 1; Grier v. State, 158 Ga. 321, 123 S.E. 210 (1924). Many states provide specific statutory exceptions to the common law rule; others provide similarly that the spouse is competent but not compellable. See 2 WIGMORE, EVIDENCE, 3d ed., §488 (1940) for a general survey of statutory provisions relating to qualifications of witnesses.

[4] Lord v. State, 17 Neb. 526, 23 N.W. 507 (1885) (adultery); Wilkinson v. People, 86 Colo. 406, 282 P. 257 (1929) (rape); State v. Chambers, 87 Iowa 1, 53 N.W. 1090 (1893) (incest); Schell v. People, 65 Colo. 116, 173 P. 1141 (1918) (bigamy). *Contra:* State v. Lasher, 131 Minn. 97, 154 N.W. 735 (1915) (adultery); State v. Goff, 64 S.D. 80, 274 N.W. 665 (1936) (rape); Toth v. State, 141 Neb. 448, 3 N.W. (2d) 899 (1942) (incest). The strength of this minority probably comes from the feeling expressed in United States v. Bassett, 5 Utah 131 at 136, 13 P. 237 (1887): "A man in the bed of a strange woman

whether the marital relationship constitutes an element of the crime charged.[5] Other courts have extended the statutory exception to those cases in which the would-be witness is injured directly as an individual, rather than only as a member of society in general.[6] The most notable contribution of the federal courts in this field to date has been the ruling that "a woman is as much entitled to protection against complete degradation as against a simple assault," followed in a long line of Mann Act cases.[7] But the basis for the holding in the instant case is to be found in the memorable opinion of Justice Sutherland in *Funk v. United States,* in which the Court, declaring that "the public policy of one generation may not, under changed conditions, be the public policy of another," laid down the rule that the competence of witnesses in the federal courts was to be governed by common law principles as interpreted and applied in the light of reason and experience.[8] This holding is now embodied in Rule 26 of the Federal Rules of Criminal Procedure.[9] In view of the changed economic and social conditions since the birth of the common law rule,[10] the recognized difficulties imposed on the law enforcement agencies, and the doubtful effect of the law of evidence on marital concord, it would seem that the "light of reason and experience" should disclose the propriety of extending protection at least to the wife's property, even if not to third parties.[11] The decision in the principal case seems all the more proper under the recent declaration of the Supreme Court that "rules of evidence for criminal trials in the federal courts are made a part of living law and not treated as a mere collection of wooden rules in a game."[12]

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is in a very unfavorable situation to insist upon preserving inviolate the sacred concord of marriage, and harmony and confidence on the part of his wife." Unfortunately, this did not persuade the United States Supreme Court, which reversed the decision. Bassett v. United States, 137 U.S. 496, 11 S.Ct. 165 (1890).

[5] State v. Burt, 17 S.D. 7, 94 N.W. 409 (1903); State v. Chambers, supra, note 4; Toth v. State, supra, note 4.

[6] Emerick v. People, 110 Colo. 572, 136 P. (2d) 668 (1943); State v. Woodrow, 58 W.Va. 527, 52 S.E. 545 (1905); Dill v. People, 19 Colo. 469 (1894).

[7] Denning v. United States, (C.C.A. 5th, 1918) 247 F. 463 at 466; United States v. Mitchell, (C.C.A. 2d, 1943) 137 F. (2d) 1006, adhered to 138 F. (2d) 831 (1943), cert. den. 321 U.S. 794, 64 S.Ct. 785 (1944), rehearing den. 322 U.S. 768, 64 S.Ct. 1052 (1944); Shores v. United States, (8th Cir. 1949) 174 F. (2d) 838.

[8] 290 U.S. 371 at 381, 54 S.Ct. 371 (1933).

[9] 18 U.S.C.A., fol. §687 (1927 to date).

[10] See Hutchins and Slesinger, "Some Observations on the Law of Evidence: Family Relations," 13 MINN. L. REV. 675 (1929).

[11] One federal court has held that the wife's testimony may be received against her husband in a criminal case of any nature. Yoder v. United States, (C.C.A. 10th, 1935) 80 F. (2d) 665. *Contra*: Brunner v. United States, (C.C.A. 6th, 1948) 168 F. (2d) 281; United States v. Walker, (2d Cir. 1949) 176 F. (2d) 564 (appeal pending). Among state courts, only Colorado has held that its general exception includes injuries to property. Emerick v. People, supra, note 6.

[12] United States v. Mitchell, 322 U.S. 65 at 66, 64 S.Ct. 896 (1944).