Wyoming Law Journal

Volume 19 | Number 1 Article 4

December 2019

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SPOUSE'S TESTIMONY IN CRIMINAL CASES

The rules regarding testimony by the spouse of one charged with a crime are in a rather confused state; this is not particularly surprising, in view of the many contradictions and inconsistencies that have been a part of the development of these rules. An appraisal of the present status—with some natural emphasis on Wyoming—requires an inquiry into the origin of the several rules, an examination of the relationship of each to the others, and a summary of the development in the area.

As now understood, the common law "rule" that neither party to a marriage could be a witness in favor of or against the other, in any suit to which either was a party, or in which either had an immediate or direct interest, excepting only those few cases where the testimony was to be admitted on the grounds of necessity[1] was originally two rules, one of disqualification and one of privilege. The Eighth Circuit has approvingly cited Wigmore's statement that the disqualification was an absolute bar against testifying *for* the other, while the privilege was not to testify *against* the other, which privilege could be asserted by either spouse and to which the court was required to give effect unless waived by both.[2] The distinction becomes clearer when it is observed that the disqualification has to do with the capacity of the witness, while the privilege refers to the admissibility of the evidence. The word "competent" is used in both senses: a ten year-old boy is *prima facie* competent (qualified) to testify; the testimony is not competent (admissible) because it violates some rule of evidence. The distinction between disqualification and privilege must be kept firmly in mind.

There is an impression of substantial proportions that these two rules arose at the same time from the marital relationship and for the same reasons, *i.e.*, the concept that man and wife were one in the law and the ancient rule that a party to a suite could not testify. Some evidence exists that the two rules were not even contemporary in origin.[3] At any rate, in 1628 Coke treated them as parts of the same rule, using the phrase "for or against" and referring to the above reasons,[4] and his version gained wide acceptance thereafter. As might be expected, this union of disqualification and privilege brought forth some strange progeny. In 1851, an English statute provided that neither husband nor wife was to be "competent or compellable to give evidence for or against" the other in a criminal proceeding.[5] Then the Evidence Amendment Act of 1853 formally abolished the disqualification of the spouse of the defendant.[6] Subsequently, the English Criminal Evidence Act of 1898 recited that one spouse should be *competent* to testify for the other at every stage of a

1. 58 Am. Jur. Contracts § 175 (1948).
2. Shores v. United States, 174 F.2d 838, 839 (8th Cir., 1949).
3. Bent v. Allot, Cary 135, 21 Eng. Rep. 50 (1580).
4. 8 WIGMORE, EVIDENCE, § 2227 (3rd Ed., 1940).
5. St. 14 & 15 Vict., c. 99 (1851).
6. St. 16 & 17 Vict., c. 83 (1853).

criminal proceeding, but only if both agreed.[7] If these three statutes could be considered as isolated and complete in themselves, there would be no particular problem; the second modified the first, and the third could be in the nature of a restatement. Unfortunately, because of the common law background, this parochial viewpoint cannot be justified. And if the distinction between disqualification and privilege is to be retained, then obviously, the removal of the one has nothing at all to do with the waiver of the other. But this fuzzy language has become so deeply implanted in the law that it is still being used in modern legislation.

Bentham advocated the complete abolition of both disqualification and privilege on the grounds that such action would make more certain the punishment of wrong-doers.[8] The same theory could be cited to support the abolition of all disqualification and all privileges, and, while this is acceptable as a statement of legal philosophy, there is surely no justification for sequestering these particular rules from the mass. The Bentham argument is typical of the "heat without light" that has been generated in this area.

There was one major exception to the basic common law privilege. As early as 1631, a wife was permitted to testify against her husband in a criminal case over his objections when "she was the party wronged."[9] She could not testify in a civil case, since she was a party to the suit; in a criminal case, the parties were the crown and the defendant, and she was the victim. It would be a fair assumption that this exception was formulated on the basis of necessity; in any event, it was firmly imbedded in the law at an early date. At cursory glance, this might appear to be a precise and well-defined exception, but such is not the case. In the first place, she apparently could not be compelled to testify; but if she chose to do so under the exception, her husband could not rebut her testimony himself, since he was a party. In the second place, interpretation of the word "wrong" has caused considerable difficulty.

With this one major exception, the rule which forbade the admission of one spouse's testimony without the consent of both was rigidly adhered to.[10] It applied only during the marriage, albeit completely then.[11] A prospective defendant could marry the witness and keep her from testifying at his trial.[12] The privilege vanished with the termination of the marriage.[13] It applied only to husband and wife, and did not attach to parent-child or sibling relationships.[14] The suggestion that the privilege arose because a hen-pecked man had enough troubles without letting his wife run to the courts, like the tale that it was allowable at common law to beat your wife if you used a

7. St. 61 & 62 Vict., c. 36 (1898).
8. 5 BENTHAM, RATIONALS OF JUDICIAL EVIDENCE 337.
9. Lord Audley's Trial, 3 How. St. Tr. 401, 402, 414 (1631).
10. 8 WIGMORE, EVIDENCE § 2332 (3rd Ed., 1940).
11. *Id.*, § 2237.
12. *Id.*, § 2230.
13. *Supra* note 11.
14. *Supra* note 4.

stick no thicker than your thumb, "until some darn fool invented the welding rod," is apocryphal; but certainly the effect of the rule was to restrict outside interference in domestic affairs.

One other early development—the confidential communications rule—is of significance to the present issue. So long as divorce and annulment were rare and so long as the disqualification was in force, the fact that the privilege was co-extensive with the marriage was of little import. Eventually, however, public policy demanded some additional protection that would last beyond the termination of the marital relationship. So a separate rule came into being: a confidential communication made between the parties during the marriage retained its confidential character after the termination of the marriage. There is a difference of opinion as to the origin of this latter rule, some saying that, in policy at least, it was part of the earlier rule and was not recognized as distinct until need for such recognition arose,[15] while there is some authority that it was statutory in origin.[16] In either case, after 1853 it was an element of the privilege.[17] In essence, then, there are three rules: disqualification (inability to testify for the spouse), general privilege (right of either spouse to bar admission of the testimony by the other) and special privilege (confidential communications ban).

Before the disqualification was abrogated in England, it had been transmitted to the U. S., and so was included in the early law here. The bar to testimony by the accused was removed in the federal jurisdiction by statute in 1878.[18] Until this law was enacted, a person charged with a crime in the federal court was incompetent to testify in his own behalf.[19] As late as 1926, the federal rule was that the spouse was *competent* to testify in cases of bigamy, polygamy, and unlawful co-habitation, but could not be *compelled* to testify without the consent of the other, and could not testify as to confidential communications during the marriage.[20] (Note the similarity to the language of the earlier English Acts.) It was not until 1933 that the U. S. Supreme Court overruled prior decisions and held that the wife was competent to testify for the husband when he was a defendant in any criminal action.[21] The Court said that the defendant had not been allowed to testify at common law because he was not a trustworthy witness, that this effect had been much diluted by the modern tests of cross-examination, the increased intelligence of jurors, etc., that the exclusion of the spouse was based on the same premise, and that anyway, there was a statute permitting the defendant to testify and it would be incongruous to deny the same right to his spouse. So the disqualification

15. *Op. cit. supra* note 10 at § 2333.
16. Shenton v. Tyler, L. R. 1939, Ch. Div., 620, 635.
17. *Supra* note 6.
18. 28 U.S.C. § 632.
19. Maxey v. United States, 207 F. 327, 330 (8th Cir., 1913).
20. 29 U.S.C. § 633.
21. Funk v. United States, 290 U.S. 371, 377 (1933).

has been completely abrogated in the federal system. The general privilege and the special privilege remain.

One federal area in which there has been much discussion of the privilege is in trials for violation of the Mann Act. In an early case, the court held that the ex-wife of the defendant would be allowed to testify against him, even though she was not the woman he was accused of transporting.[22] The court declined to base the decision on the divorce, but said merely that she would be allowed to testify unless a confidential communication was involved. Subsequent developments indicate that, in a similar case today, the divorce would be the significant factor. This early ruling was extended in another Mann Act case, the court holding that the present wife of the defendant, again not the woman involved, would be allowed to testify against him.[23] But the conviction was reversed by the Supreme Court on the grounds that it was serious error to allow the wife to testify against her husband over his objections;[24] in the Supreme Court, the prosecution did not ask that she be compelled to testify, but only that she be allowed to do so if she desired. The Court refused to hold that the privilege belonged only to the witness.

In another case, the wife, who was the woman involved, stated that she did not want to testify against her husband; she did, in fact, testify when called. The appellate court said that this was a personal injury to her, and that a victim can be compelled to testify, regardless of the marital status.[25] The Supreme Court affirmed, holding that the testimony would be admissible over the objections of both, since a primary purpose of the Mann Act was to "protect women who are weak from men who are bad."[26] The chivalrous tone may seem fanciful in this era of emancipation, but the decision is sound enough; obviously, a man who could persuade a woman to become a prostitute could persuade her not to testify. It is now settled that, in this specific federal area, the victim may be compelled to testify against the defendant when they were unmarried at the time of the offense but married at the time of the trial,[27] or even if they were married at the time of the offense.[28] These two Supreme Court holdings can be reconciled by noting that the victim can be compelled to testify, even if she is the wife of the defendant; but a wife who is not the victim may not testify over the husband's objections. The federal rule is clearly in line with the common law precept that the status of the victim takes precedence over the status of spouse.

The problem, however, is not the theory of the rule, but the application: what is a wrong against the wife, and when is it serious enough to

22. Yoder v. United States, 80 F.2d 665 (10th Cir., 1935).
23. Hawkins v. United States, 249 F.2d 735 (10th Cir., 1957).
24. Hawkins v. United States, 358 U.S. 74 (1958)
25. *Supra* note 2.
26. Wyatt v. United States, 362 U.S. 525, 530 (1960).
27. *Id.* at 525.
28. United States v. Nelms, 190 F. Supp 677 (W.D. Va., 1960), *aff'd.* 291 F.2d 390 (4th Cir., 1961).

make her testimony admissible? One writer states, "An almost unbroken line of federal authority has held that a serious moral wrong to the wife is as much a crime against her person as is corporal violence."[29] The Wyatt case[30] clearly includes Mann Act violations within this class of serious moral wrong, but does not indicate any criteria to be observed in other cases.

Usually, of course, it is the defendant who asserts the privilege and objects to the admission of the spouse's testimony. But it should be remembered that both must waive the privilege in order to get the testimony in. In one recent case,[31] husband and wife had both been convicted of bank robbery, and, at the hearing on his motion for a new trial, he called her as a witness. She refused to testify "against him or for him," citing the "wife's privilege." The court sustained her in her refusal, suggesting that she might be invoking the privilege against self-incrimination, since the period of time during which she might perfect an appeal had not expired; this line of reasoning was adopted even though the only privilege to which she referred at all was the marital one. So the federal rule might be more completely stated thus: the spouse of the accused is *competent* to testify at the trial, but the accused retains the *privilege* to refuse to allow testimony by the spouse, and the spouse also has the privilege not to testify;[32] the rule of privilege does not apply in the husband's favor where the wife is the victim of the offense;[33] and neither may testify as to a confidential communication without the consent of the other.[34]

Because all of the states have statutes in this area[35] and because there is a wide diversity in the interpretation of "wrong against the wife," it should be futile to attempt to include even a general classification of the application of the general privilege in the several jurisdictions. It is consistently held that an attempt on the life of the spouse is sufficient to permit her to testify,[36] and that bigamy is not sufficient,[37] but between these poles there is no pattern. For example, it has been held that the murder of a child in the mother's arms, the mother being incidentally wounded by the same bullet, is not enough of a wrong against her to allow her to testify against her husband at his trial for the murder;[38] on the other hand, abandonment of a child has been held to be a sufficient wrong to the mother.[39] The former case was decided on the basis of strict interpretation of the common law and the latter on the basis of a

29. Annot., 11 A.L.R. 2d 651 (1950).
30. *Supra* note 26.
31. Mills v. United States, 281 F.2d 736 (4th Cir., 1960).
32. Bisno v. United States, 299 F.2d 711 (9th Cir., 1961), *cert. den.* 370 U.S. 952, 82 S. Ct. 1602 (1962), *reh. den.* 371 U.S. 855, 83 S. Ct. 51 (1962).
33. *Supra* note 28.
34. 28 U.S.C. § 633. 7
35. 3 WIGMORE, EVIDENCE, § 488 (3rd Ed. 1940) and 1957 Supp.
36. Annot., 11 A.L.R. 2d 652 (1950).
37. *Id.*, at 654.
38. State v. Woodrow, 58 W. Va. 527, 52 S.E. 545 (1905).
39. O'Donley v. State, 91 Okla. Crim. 352, 219 P. 2d 259 (1950).

specific statute, so the comparison may not be entirely fair, but it nonetheless illustrates the wide disparity among the states.

The same variety many be found in the application of the special privilege (confidential communication rule.) It has been generally held that the privilege of exclusion applies only to the contents of the communication, and not to whether a communication was made,[40] or not made.[41] It has been held that the act of bringing home and storing stolen goods is a confidential communication,[42] that a defendant pleading self defense to a murder charge may not testify that his wife communicated to him threats made by the victim, her brother,[43] and that the former wife of a defendant would not be allowed to testify that, during the marriage, he had waited for her in a stolen car while she went to get a certificate of title for it.[44] About the only general rule that can be derived from the cases is that if the communication—and that word may be defined in remarkable ways—would not have been known to the spouse except for the existence of the marital relationship and as a consequence of it, then the spouse may not testify as to it over the objection of the other.

The disqualification is now practically extinct in the U.S.[45] but it was in effect in Wyoming Territory at one time.[46] The holding in this case was apparently based on the use of the obnoxious phrase "for or against" in the 1873 Act,[47] since the First Territorial Assembly, four years earlier, had made a specific provision that husband and wife could be witnesses for each other in criminal cases.[48] The objectionable language was deleted in 1879.[49] The present form of the statute was enacted in 1899, [50] and reads as follows:

> In no case shall the husband or wife be a witness against the other, except in criminal proceedings for a crime committed by one against the other, or in a civil action or proceeding by one against the other, or an action brought by the husband for criminal conversation with or seduction of his wife, or in an action brought by either husband or wife for the alienation of the other's affections; but they may in all civil and criminal cases be witnesses for each other the same as though the marital relation did not exist.[51]

The language regarding criminal conversation, seduction and alienation of affections has, in effect, been repealed by the banning of "heart balm" actions.[52] Section 1-139 of the 1957 compilation provides, in part, that husband or wife

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40. Sampson v. Sampson, 223 Mass. 451, 112 N.E. 84 (1916).
41. Thayer v. Thayer, 188 Mich. 261, 154 N.W. 32 (1915).
42. People v. Daghita, 209 N.Y. 194, 86 N.E. 2d 172 (1949).
43. Bernell v. State, 74 Okla. Crim. 92, 123 P. 2d 289 (1942).
44. State v. Robbins, 35 Wash. 2d 389, 213 P. 2d 310 (1950).
45. *Op. cit. supra* note 10 at § 2334.
46. Fein v. Territory, 1 Wyo. 276, 380 (1875).
47. Laws 1873, Title X, § 321.
48. Gen. Law 1869, Chapter 75, Title XVII, § 328.
49. Sess. Laws 1897, Chapter 2.
50. Rev. Stat. 1899, § 3681.
51. Wyo. Stat. § 1-142 (1957).
52. Wyo. Stat. § 1-727 (1957).

may not testify, except as provided by the section quoted above. This provision of 1-139, though it may appear redundant, is a remnant of the confidential communications law, first enacted as statute in 1869;[53] the present form of the statute was adopted in 1909.[54] The common law rule as to confidential communications applies in Wyoming since the repeal of the specific statutory provision,[55] except in criminal actions for desertion or non-support,[56] and in actions brought under the Uniform Enforcement of Support Act,[57] in both of which cases the legislature has decreed that testimony may not be excluded on the basis of confidential communication.

In one early Wyoming case,[58] a woman was convicted of kidnapping after her husband was allowed to testify for the prosecution. The conviction was upset on other grounds, and no mention was made of the marital privilege. Possibly the trial court considered the taking of his child a wrong against the husband, though the circumstances of the case tend to refute that rationale. Wyoming has disposed of one possible technical difficulty by holding that a spouse who testifies for a defendant may be impeached or contradicted on cross examination without violating the privilege.[59] The liberal view is further exemplified by the holding that, since the spouse may testify for the defendant, it is proper for the prosecution to comment on the defendant's failure to produce the spouse as a witness.[60]

The leading case in Wyoming is *Chamberlain v. State*.[61] Defendant was tried for the statutory rape of his minor daughter. The victim testified for the State, and the defendant took the stand to refute the charge, testifying that his wife had induced the child to perjure herself, and denying the allegations. The State called the wife in rebuttal, and the accused objected to her being allowed to take the stand. The trial court overruled the objection on the grounds that the offense charged was against the wife and that the accused had waived his right to assert that privilege by his own testimony; that court allowed the wife to testify, but only to the extent that his testimony concerned her. The sole ground of appeal was that it was error to admit the testimony of the wife. The Supreme Court affirmed the conviction. The court held that the legislature, in selecting the term "crime against the other" rather than "personal violence against the other" intended to broaden the law beyond the sought-for narrow construction, that "crime" meant "wrong," that this was a special, particular and personal wrong to the mother of the child, that the

53. Gen. Laws 1869, Chapter 75, Title XVIII, § 325.
54. Wyo. Stat. § 1-139 (1957); enacted as Chapter 45, Sess. Laws 1909.
55. Wyo. Stat. § 8-17 (1957).
56. Wyo. Stat. § 20-76 (1957).
57. Wyo. Stat. § 20-104 (1957).
58. Biggs v. State, 13 Wyo. 94, 77 P. 901 (1904).
59. Strand v. State, 36 Wyo. 78, 252 P. 1030, 1032 (1927).
60. State v. Spears, 76 Wyo. 82, 110, 300 P. 2d 551, 563 (1956).
61. 348 P.2d 280 (Wyo., 1960) *Accord*: Wilkinson v. People, 282 P. 257 (Colo., 1929), State v. Kollenborn, 304 S.W.2d 855 (Mo., 1957), State v. Chambers, 53 N.W. 1090 (Iowa, 1893).

cross-examination of the wife went so far that the defendant had made her his own witness and so had waived the privilege,[62] and that the privilege of confidential communication did not apply, since the conversation was in the presence of the daughter. The court held that the wife would be permitted to testify, and did not rule on whether she might have been compelled to do so, though this would probably follow as a logical extension.

Contrary to this liberal view is a Nebraska case[63] in which a conviction on very similar facts was reversed on the grounds that the offense was not a wrong against the wife. The Nebraska legislature quickly added this crime to the list of those where the wife's testimony would be received.

The confusion in the application of the three basic rules is perhaps best illustrated by the common practice of objecting "both to the competency of the witness and the competency of the evidence," when asserting the privilege. Conceptually, the only valid ground on which to urge the general privilege is that the witness is the spouse of the accused and is not the victim of the offense; while the only justification for the special privilege is on the basis of a confidential communication made during coverture. Both of these are privileges; either or both may be waived; both refer to the admissibility of evidence; neither has to do with the qualifications of the individual whose testimony is at issue. Keeping the distinction between disqualification and privilege in mind, it would seem that the only time one could properly object to the "competency of the witness" would be when the witness had some inherent and basic disability which prevented him from taking the stand.

Lord Coke's error (if, indeed, he was the guilty party) has been fortified by centuries of adherence to habit and rote. It is doubtful that any correction will be made now, in spite of the confusion that continues to plague the student and confound the analyst. Any clarification that is to be forthcoming will probably have to be via the legislative route. The widely-accepted doctrine that the common law is to be interpreted in the light of reason and experience will not suffice. For example, the Federal Rules of Criminal Procedure contain just such an admonition.[64] Yet, it was not until 1960 that the U. S. Supreme Court (by a six to three vote) reversed a lower Federal court decision that the effect of the common law rule that husband and wife were one person was to bar a prosecution of man and wife for the crime of conspiracy.[65]

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62. *Id.*, at 286.
63. Toth v. State, 141 Neb. 448, 3 N.W. 2d 899 (1942) *Accord*: Lacey v. State, 224 P. 994 (Okla., 1924), Vickers v. State, 154 S.W. 578, (Tex., 1912), State v. Beltner, 111 P. 344 (Wash., 1910), State v. Riley, 362 P.2d 1075 (Idaho, 1961). In Riley, the court expressly refused to concur in the view expressed in Chamberlain, footnote 61 *supra*.
64. Rule 26, Federal Rules of Criminal Procedure.
65. United States v. Dege et vir., 364 U.S. 51 (1960).