EVIDENCE -- COMPETENCY OF WIFE TO TESTIFY AGAINST HUSBAND--RULES OF EVIDENCE IN FEDERAL COURT

Philip A. Hart
University of Michigan Law School

Follow this and additional works at: https://repository.law.umich.edu/mlr
Part of the Criminal Procedure Commons, Evidence Commons, and the Family Law Commons

Recommended Citation
Available at: https://repository.law.umich.edu/mlr/vol35/iss2/14

This Regular Feature is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
Evidence — Competency of Wife to Testify Against Husband — Rules of Evidence in Federal Court — The defendant was convicted of transporting a female in interstate commerce for immoral purposes. Over the defendant's objection the trial court permitted testimony against him to be given by the defendant's wife. This ruling he assigned as error but held a wife is competent as a witness against her husband. \textit{Yoder v. United States}, (C. C. A. 10th, 1935) 80 F. (2d) 665.

At common law neither husband nor wife could be a witness for or against the other \(^1\) in civil \(^2\) or criminal \(^3\) suits. While "the history ... is involved ... in a tantalizing obscurity," \(^4\) prevention of the witness-spouse testifying against the party-spouse preceded disqualification of testimony in favor of the party-spouse. \(^5\) The two rules, testimony for and testimony against, rest upon different reasons, and the fusion into one concept, attributed to Lord Coke, \(^6\) is unfortunate. Against favorable testimony was a fear that the interest of the witness-spouse would cause discoloration of testimony, bias, and offer a temptation to perjure, \(^7\) creating an incompetency which waiver by neither spouse could remove. \(^8\) The reason a spouse could not testify against the other was that family dissension and discord would be occasioned. \(^9\) Such a reason is the basis, if anything, of a privilege, but not an absolute disqualification, for if the party-spouse did not object to the witness-spouse's testimony, dissension and discord would not object to the witness-spouse's testimony, dissension and discord would

\(^1\) \textit{Wigmore, Evidence}, 2d ed., § 600 (1923); \(^2\) ibid., § 2227, is the most complete treatment of the rule. See also, \textit{Encycl. Evid.} 845 (1905); \: William and Mary College v. Powell, 53 Va. 372 (1855); Dwelly v. Dwelly, 46 Me. 377 (1859).


\(^3\) Wilkie v. People, 53 N. Y. 525 (1873); People v. Hudson, 258 Ill. App. 378 (1930). The rule is applied in equity as well as law: \textit{Bird v. Davis}, 14 N. J. Eq. 467 (1862). And where spouse's interest was directly affected, although not a party of record, other spouse incompetent. Young v. Gilman, 46 N. H. 484 (1866); Farrell v. Ledwell, 21 Wis. 182 (1869), even where statute makes spouse competent when a party to the record.


\(^5\) Bent v. Allot, Cary 135 (1580), defendant's wife testified in his behalf, while he was privileged to prevent her testifying against him. No reference to disqualifying favorable testimony until 1628, Sir Edward Coke, \textit{Co. Litt.} 6b: "a wife cannot be produced either against or for her husband, quia sunt duae animae in carne una."


\(^7\) \textit{Appleton, Evidence}, c. 9, p. 144 (1860); \textit{Gilbert, Evidence}, 7th ed., 119, 133 (1805): "for if they swear for the benefit of each other they are not to be believed for their interests are absolutely the same." Another possibility is that an unhappy wife might perjure to harm her husband. Interest in the outcome made all testimony doubtful at common law. Kelly v. Proctor, 41 N. H. 139 (1860).


not arise. And at the outset it was but a privilege of the party-spouse to prevent adverse testimony by the other. But the privilege to object to adverse testimony soon became merged with the absolute disqualification of interest, which was subject only to necessary exceptions, and came to acquire another reason for existence—that public policy ought not to permit a man or woman to be convicted by the testimony of his or her own spouse, overlooking that no such policy existed to check convictions by testimony of others intimate in relationship. Total exclusion was virtually unquestioned until it became recognized that justice was best served by hearing all practical evidence, leaving it to the jury to consider to what extent interest influenced the testimony, and to conscience and fear of cross-examination to prevent perjury. Interest, the foundation for excluding favorable testimony, was thus attacked. As for the desire to prevent family dissension by making adverse testimony impossible, such is indeed a minor cause for family unrest, and though it were a real threat, the need to hear all testimony and not guarantee peace in the family life of a law-breaker should be countervailing, for thereby justice is

10 Possibly discord could arise also if favorable testimony was permitted with coercion by party-spouse of witness-spouse.


12 4 Wigmore, Evidence, 2d ed., § 2239 (1923), and authorities there collected; 1 Greenleaf, Evidence, § 343 (1899). The chief example of necessity was in case of crime committed by one spouse against the other. Violations of the White Slave Act, where husband transported wife, have been held cases of necessity. Cohen v. United States, (C. C. A. 9th, 1914) 214 F. 23; Denning v. United States, (C. C. A. 5th; 1918) 247 F. 463. But Anonymous, 58 Miss. 15 (1880), the exception does not apply to divorce suits, even as to acts committed on wife’s person which could be testified to in criminal suits.

13 I Starkie, Evidence 103 (1826). Spouse could not testify in favor of other “not because in its own nature it is suspicious or doubtful, but on grounds of public policy.” Also Dwelly v. Dwelly, 46 Me. 377 (1859), holding the rule was so important for reasons of public policy that agreement of the parties would not admit it. Knowles v. People, 15 Mich. 408 (1867); 4 Wigmore, Evidence, 2d ed., § 2228 (b) (1923). Constant reference may be found that to permit adverse testimony would be “unnatural.”

14 Gilbert, Evidence, 7th ed., 133 (1805), husband and wife, “but no other relations are excused,” because no other relation is absolutely the same in interest. Brown v. State, 142 Ala. 287, 38 So. 268 (1904) (father).

15 Writers accepted the rule. Best, Evidence, 9th ed., § 175 (1902); 1 Phillips, Evidence, 4th American ed., 77 ff. (1839); Stewart, Husband and Wife, § 56 (1887); 1 Wharton, Evidence, 2nd ed., § 422 (1879). The rule was questioned in 1 Albany L. J. 245 (1870) and 78 Law Times 57 (1884).

16 Attacked but not always removed. The majority of cases have held that statutes removing incompetency resulting from interest do not make competent one spouse in favor of another because the disability still remains, its basis being the public policy which is not interest only. In re Holt’s Will, 56 Minn. 33, 57 N. W. 219 (1893); Chase v. Pitman, 69 N. H. 423, 43 A. 617 (1898). The minority interpreted statutes removing interest as making husband or wife competent to testify in favor of other. Mercer v. State, 40 Fla. 216, 24 So. 154 (1898). Authority collected in 6 Encyc. Evid. 853, note 48 (1905).
better served. Under the force of these objections to the common law's rule of absolute exclusion, most states have by statute either modified or removed it. Being in derogation of the common law, these statutes are strictly interpreted, with consequent delay in effectuating sweeping reform. A majority of such statutes leave the party-spouse the privilege of preventing adverse testimony, despite legal commentators' vigorous opposition to any privilege. "An out-and-out abolition of the privileges ... demands to be made," not alone because of the rule's lack of reason, but because of the confusion and anomalies the less sweeping statutes create. Attack on the rule in the federal courts has been hampered because the Judiciary Act of 1789, authorizing federal

17 The supposed public policy is based upon the "sport" theory of litigation, the murderer escaping punishment if no one sees, or if only his or her spouse sees. A forceful illustration is where the wife could not testify to shots taken by husband at a third party which she witnessed prior to their divorce. State v. Kodat, 158 Mo. 125, 59 S. W. 73 (1900).

5 BENTHAM, RATIONALE OF JUDICIAL EVIDENCE, book 9, c. 5, pp. 341-345 (1827); 4 WIGMORE, EVIDENCE, 2d ed., § 2228 at p. 756 (1923); People v. Langtree, 64 Cal. 256, 30 P. 813 (1883). It is to be noted that the privilege against revelation of confidential communications is not herein discussed, and rests upon different reasons. 5 WIGMORE, EVIDENCE, 2d ed., § 2332 (1923).

18 1 WIGMORE, EVIDENCE, 2d ed., §§ 488, 602, 620 (1923), reprinting all statutes bearing on competency. 6 ENCYC. EVID. 848 (1905), stating they are so lacking in uniformity that it is practically impossible to state any general rule which would embrace their provisions. Collected 70 C. J. 120 ff., notes 76-79 (1935). England: 61 & 62 Vict., c. 36, § 1 (1898), both spouses competent in criminal cases.

28 Authorities collected in 6 ENCYC. EVID. 845-858 (1905), reveal the confusion. London v. London, 21 I Ky. 271, 277 S. W. 287 (1925), statute making spouses competent in divorce action does not make them competent in separate alimony action. Ex parte Beville, 58 Fla. 170, 50 So. 685 (1909), reviews the tedious process in that state: 1874, interest removed, but spouses still disabled, so 1879 statute authorizes wife to be a witness where husband was a party, but husband still disabled, for and against; 1891, amended so that neither were disabled in civil trial; 1892, extended to criminal trial. Counsel argues that there was a privilege to prevent, as well as the absolute disability, and urges the statute removing disability did not remove the privilege, and it remains for witness and for party-spouse. Held, any privilege merged with the disability, which is now removed.

courts to conform to the local law in absence of statutes, has by a “singular and indefensible construction” 25 been held to apply only to civil cases, common-law rules to apply in criminal. 26 Consequently, federal courts silenced a spouse testifying for or against the other, 27 whether the court held the applicable common law to be that of 1789 or of the date of the state’s admission into the Union. 28 Realizing the need for modernization of its rules, and seeing no action by Congress imminent, 29 in 1918 the Supreme Court used self-help, declaring that rules were to be applied according to the common law as interpreted “in the light of general authority and sound discretion.” 30 It proved not specific enough to wean inferior federal courts away from the older view, and the hoped for liberalization by decision failed to materialize. 31 In 1933, the Supreme Court, declaring evidence principles must be decided according to the common law as interpreted in the light of reason and experience, permitted the wife of the defendant to testify in his behalf. 32 It expressly left unanswered the competency of a wife to testify against her spouse. The principal case takes that next step, and in permitting the adverse testi-

26 United States v. Reid, 12 How. (53 U. S.) 361 (1851).
27 Wife cannot testify in husband’s favor: Johnson v. United States, (C. C. A. 8th, 1915) 221 F. 250. Should have been admitted as an exception to the rule, for husband was being prosecuted under the White Slave Act for transporting wife, a wrong to her. See note 12, supra.
28 The original proposition was that “the rules of evidence in criminal cases are the rules which were in force in the respective states when the Judiciary Act of 1789 was passed.” United States v. Reid, 12 How. (53 U. S.) 361 at 365 (1851). Later it was declared that the rule of admissibility was to be the common-law rule in the state at the date of its admission into the Union, Logan v. United States, 144 U. S. 263, 12 S. Ct. 617 (1892). This desire to avoid the local law’s evolution has been attributed to fear of subjecting a body of federal law to state control, with resultant divergence of rules in different federal districts. 47 HARV. L. REV. 853 (1934). To gain freedom from state control and uniformity the price was conformity with rules now outmoded.
30 Rosen v. United States, 245 U. S. 467 at 471, 38 S. Ct. 148 (1918). If followed, the common law would not be the inflexible body as fixed by the Logan and Reid cases.
mony it is submitted that the question has been decided in the light of reason. Until the day federal procedure is made certain by a means to be decided by those best qualified, it is to be hoped that this court’s recognition that federal precedent, even in a field where precedent is so reluctantly disturbed, is subject to “re-examination” indicates the attitude of all federal courts.

Philip A. Hart

33 Unlike a case decided less than three months earlier, Paul v. United States, (C. C. A. 3rd, 1935) 79 F. (2d) 561, holding it error to permit husband to testify against wife, remarking that the Funk case did not extend this far. The principal case explicitly states it reaches its decision upon the broad ground of policy, not upon the fact that the wife had divorced the defendant prior to the trial, and future cases should not seek to distinguish this decision because of the divorce aspect.


That some change is needed, see Report of Committee on Uniform Judicial Procedure, 49 Rep. A. B. A. 483 at 491 (1924), appraising federal procedure: “To the average lawyer it is Sanskrit; to the experienced federal practitioner it is a monopoly; to the author of text-books on federal procedure it is a golden harvest.”

If inferior federal courts were themselves to cut the old rules away in this field, it seems certain such action would be sustained by the Supreme Court. See Tracy, “Common Sense Versus Profundity in Judicial Decisions,” 16 A. B. A. J. 163 (1930).