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EVIDENCE — FEDERAL PRACTICE — COMPETENCY OF WIFE TO TESTIFY IN DEFENSE OF HUSBAND IN CRIMINAL CASE — The defendant, being tried in a federal district court on an indictment for conspiracy to violate the prohibition law, offered his wife as a witness in his behalf. The district court, following what it concluded to be the established rule of the federal courts, refused to allow her to testify. The circuit court of appeals affirmed this ruling without discussing the point. Certiorari was granted by the Supreme Court, limited to the question as to what law was applicable in determining the competency of the wife. Held, that the federal courts have the power to determine for themselves the evidentiary rules to be used in the trial of criminal cases, and that, in view of the greatly changed conditions under which trials are conducted, it is desirable that the ancient rule which prohibited a wife from testifying in defense of her husband be abrogated. It was error, therefore, to refuse to allow the wife to testify. Funk v. United States, 290 U.S. 371, 616, 54 Sup. Ct. 91, 212 (1933).

In view of the pronounced trend in recent years toward the abrogation of this and of many other of the exclusionary rules of evidence, the wisdom of the Court's determination to alter the rule cannot be questioned. That the Court had the power to effect the change is not so clear, however. In 1851 the rule was announced, in spite of language in the Judiciary Act seemingly to the contrary, that the federal courts, in the trial of criminal cases, should follow the evidentiary rules in force in the respective States when the Judiciary Act was passed, or, in the case of States subsequently admitted into the Union, at the

1 Funk v. United States, (C. C. A. 4th, 1933) 66 F. (2d) 70.
2 1 Wigmore, Evidence, 2d ed., secs. 488, 600-620 (1923).
3 United States v. Reid, 12 How. (53 U. S.) 361 at 365 (1851). The pertinent provision of the Judiciary Act reads: "The laws of the several States . . . shall be regarded as rules of decision in trials at common law, in courts of the United States. . . ." Rev. Stat., sec. 721 (1878), U. S. C. tit. 28, sec. 725 (1926). The Court concluded, in the Reid case, that that provision could only have been intended to apply to civil cases, for it was said that to apply it to criminal cases would be to "place the criminal jurisprudence of one sovereignty under the control of another." It was concluded,
time the respective States were admitted. In other words, subsequent state statutory changes are not effective to change the rules in force under the Judiciary Act. On the other hand, in civil cases such statutory changes are operative in federal practice. This holding was said to be based on "the intention of Congress, necessarily to be implied from what these acts [the Judiciary Act] omit, as well as from what they contain." From this it might be concluded that the rules of evidence in force in the respective States at the time of the establishment of the federal courts therein were to be given the effect of a legislative enactment. This being so, it would seem the Court was to have no power to alter or modify such rules. Nevertheless, the Supreme Court, less than a half-century later, concluded that the earlier determination did not preclude the federal courts from examining the evidentiary rules to be applied by them "in the light of general authority and sound reason." The right was again asserted in Rosen v. United States, decided about twenty-five years later. The principal case may, therefore, be said to establish firmly that proposition. Strange as it may seem, it has never been expressly denied that the original rule was based on the "intent of Congress." That the courts should have this power of modification certainly seems desirable. It makes possible the establishment of evidentiary rules uniform in all the federal courts. It allows desirable modifications to be made by tribunals better acquainted with the demands of trial convenience than a Congress whose time is taken up, especially at the present time, with more urgent matters. In view of this decision the bill recently enacted, which provides that one spouse shall be competent to testify at the trial of the other in the federal courts, seems superfluous. That the Supreme Court should have taken upon itself the onus of changing this outmoded rule is another refreshing demonstration of the independence of the nation's highest tribunal.

W. L. H.

therefore, that, as the act contained no explicit provision in regard to the evidentiary rules to be followed in the trial of criminal cases, Congress must have intended that the rule in force in the respective States at the time of the establishment of the federal courts therein must have been intended to be applied. A later statute containing similar language, Rev. Stat., sec. 858 (1878), was construed in a like manner. United States v. Barefield, (D. C. E. D. Tex. 1885) 23 Fed. 136; Logan v. United States, 144 U. S. 263 at 300, 12 Sup. Ct. 617 at 629 (1892). See generally Rose, FEDERAL JURISDICTION AND PROCEDURE, 4th ed., sec. 131 (1931).

5 Logan v. United States, 144 U. S. 263 at 303, 12 Sup. Ct. 617 at 630 (1892).
6 United States v. Reid, 12 How. (53 U. S.) 361 at 365 (1851).
7 Benson v. United States, 146 U. S. 325 at 335, 13 Sup. Ct. 60 at 63 (1892).
8 245 U. S. 467, 38 Sup. Ct. 148 (1918).
9 S. 2842, 1 U. S. LAW WEEK, index p. 529 (1934).