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WITNESSES-WIFE AS WITNESS AGAINST HUSBAND IN PROSECUTION UNDER MANN ACT

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WITNESSES—Wife AS WITNESS AGAINST HUSBAND IN PROSECUTION UNDER MANN ACT—Defendant was convicted of having transported his wife in interstate commerce for the purpose of prostitution in violation of the White Slave Traffic Act. Defendant's wife testified to the various transportations which defendant had made of her and to her practicing of prostitution at their different destinations. Defendant contended that the trial court erred in permitting his wife, over his objection, to testify against him. On appeal, *held,* affirmed. So far as appellant's rights were concerned, the wife's testimony was competent evidence against him. *Shores v. United States,* (8th Cir. 1949) 174 F. (2d) 838.

It was a common law rule of great antiquity that one spouse could testify neither for nor against the other in a criminal action.[1] As well settled as the rule itself, though not as clearly defined, was the exception, said to lie in the necessities of justice, where the crime involved was one against the person of the spouse.[2] The early courts quite generally limited the exception to cases of personal violence directed against the spouse.[3] The Supreme Court in *Funk v. United States,*[4] in allowing a wife's testimony in favor of the defendant spouse, held that the federal courts were not bound by state laws of evidence as they existed at an arbitrary historical date having no rational connection with present conditions, and that the admissibility of evidence and the competency and privileges of witnesses should be governed by the principles of the common law as they are interpreted

[1] Bassett v. United States, 137 U.S. 496, 11 S.Ct. 165 (1890); Stein v. Bowman, 13 Pet. (38 U.S.) 209 (1839). The usual reason advanced for the rule was the protection of marital tranquility. The rule has been seriously questioned, and has been covered in all states by statute. See 8 WIGMORE, EVIDENCE, 3d ed., §§2227-45 (1940) for a discussion of the general problem. The rule is omitted in the American Law Institute's Model Code of Evidence, see Rules 214-218.

[2] The reason being that otherwise the injured spouse would be unprotected. United States v. Gwynne, (D.C. Pa. 1914) 209 F. 993; Meade v. Commonwealth, 186 Va. 775, 43 S.E. (2d) 858 (1947); Commonwealth v. Allen, 191 Ky. 624, 231 S.W. 41 (1921).

[3] Williams v. State, 149 Ala. 4, 43 S. 720 (1907); Commonwealth v. Sapp, 90 Ky. 580, 14 S.W. 834 (1890); State v. Marriner, 93 N.J. L. 273, 108 A. 306 (1919); State v. Vaughan, 136 Mo. App. 645, 118 S.W. 1186 (1909); Kitchen v. State, 101 Tex. Cr. R. 439, 276 S.W. 252 (1925).

[4] 290 U.S. 371, 54 S.Ct. 212 (1933).

by the courts of the United States in the light of reason and experience. The *Funk* case specifically reserved the question of testimony against the defendant spouse, but the result ought to be the same in that situation for two reasons, though there has been no clear cut decision on the question by the Supreme Court. First, the rule stated in the *Funk* case has been codified in its broad aspects in Rule 26 of the Federal Rules of Criminal Procedure,[5] and, second, the Supreme Court has denied certiorari in a recent case where the wife's testimony was held competent evidence against the defendant spouse in a "white slave" case.[6] The result of the principal case seems sound, therefore, on the ground that the common law rule denying the wife the right to testify against her spouse has been altered, the reason for the rule having disappeared in "white slave" cases. Further, authority supports the view of the principal case that "white slave" cases come within the common law exception to the rule, in spirit if not in letter.[7] The real exception is said to be in cases of crimes which are directed primarily against the person of the spouse, as distinguished from those directed merely against the marital relation.[8] To say that the wife cannot testify against her husband where he has injured her morally, merely because the common law provided for a wife's testimony against her husband only when he had used personal violence on her person, is unrealistic in the extreme. The reason the common law so limited the exception was that it never had occasion to consider the question further than the personal violence situation; it was never confronted with crimes involving moral injury to the spouse, as such crimes are generally of recent and statutory origin.[9] As some courts which have considered the question of moral injury have pointed out, such acts are in reality the same as an act of personal violence against the spouse; they are undoubtedly an offense against the wife, and operate directly and immediately upon her.[10] In holding a violation of the White Slave Traffic Act to be a crime against the wife's person, the court in *United States v. Mitchell* said, "Whatever else this statute may do, it strikes at the exploitation of women, and comes directly within the reason of the exception. . . . A woman is as much entitled to protection against complete degradation as against a simple assault."[11]

[5] 18 U.S.C.A. (1946) §687.

[6] United States v. Mitchell, (C.C.A. 2d, 1943) 137 F. (2d) 1006, affd. 138 F. (2d) 831, cert. den. 321 U.S. 794, 64 S.Ct. 785 (1944).

[7] United States v. Mitchell, supra, note 6; United States v. Williams, (D.C. Minn. 1944) 55 F. Supp. 375; Cohen v. United States, (C.C.A. 9th, 1914) 214 F. 23; United States v. Rispoli, (D.C. Pa. 1911) 189 F. 271; United States v. Bozeman, (D.C. Wash. 1916) 236 F. 432; Pappas v. United States, (C.C.A. 9th, 1917) 241 F. 665; Denning v. United States, (C.C.A. 5th, 1918) 247 F. 463; Levine v. United States, (C.C.A. 5th, 1947) 163 F. (2d) 992; Hayes v. United States, (C.C.A. 10th, 1948) 168 F. (2d) 996; Yoder v. United States, (C.C.A. 10th, 1935) 80 F. (2d) 665. The only federal case to the contrary was the early case of Johnson v. United States, (C.C.A. 8th, 1915) 221 F. 250, in which the exception was not considered.

[8] Denning v. United States, supra, note 7.

[9] United States v. Williams, supra, note 7; Denning v. United States, supra, note 7.

[10] See note 7.

[11] (C.C.A. 2d, 1943) 137 F. (2d) 1006 at 1009.

The necessity, said to be the foundation of the exception, applies equally in "white slave" cases, for if the husband can corrupt his wife's morals without fear of her testifying against him in a prosecution therefor, she would have little or no means of protecting her morals against him. Nor will domestic tranquility, said to be the main reason for the rule, be impaired more where the wife testifies as to moral injuries inflicted than it would be where she testifies as to physical injuries inflicted, for it is as conspicuously absent in either case. As a matter of policy, men should not be permitted to invoke a sacred institution and the rules established for its protection to secure immunity from punishment for the most infamous crime that could be devised for its degradation.[12]

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[12]Denning v. United States, supra, note 7.