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Perhaps the only accurate statement that can be made, after examination of the decisions, is that, once a photograph has been admitted, it is extremely unlikely that the Supreme Court will declare its admission to be error. It would probably be difficult to phrase a precise rule which is fair to the accused and which does not, at the same time, unnecessarily hamper the prosecution. Nevertheless, by indicating that *only* in cases of most unusual circumstances should photographs of a corpse be rejected in a trial involving homicide, the latest decisions of the Louisiana Supreme Court have undoubtedly encouraged the admission in evidence of gruesome photographs which have no real probative value.

Sidney B. Galloway

EVIDENCE—THE HUSBAND-WIFE TESTIMONY PRIVILEGE

On the day before the trial began, defense counsel informed both the district attorney and the judge that the defendant's wife, who had been summoned as a witness by the state, wished to exercise her privilege of refusing to testify against her husband. In spite of this, the judge required that she appear in open court and assert the privilege in the presence of the jury. On appeal this procedure was sustained by the Supreme Court. *State v. McMullan*, 223 La. 629, 66 So.2d 574 (1953).¹

Recognition of the husband-wife privilege came about comparatively recently in the law of Louisiana,² and the jurisprudence of this state has not clearly settled all the aspects in connection with the exercise of the privilege. Before discussing the effect of the principal case, it will be helpful to review briefly the policy and historical background of the law on the general subject of husband-wife testimony.

In its early stages, the common law recognized numerous

1. In the instant case the defendant was convicted of manslaughter. On the night of the crime, his wife returned home and found him lying across the bed, apparently intoxicated and asleep. When she woke him up, he became enraged, got his shotgun and drove her from the house. A police officer, who happened to be in the vicinity, answered her cries for help and returned with her to the house to quiet the defendant. As they entered the house, the defendant, pointing the shotgun directly at the officer, told him not to come any closer. After repeating this command several times, defendant shot and killed the officer.

2. La. Act 157 of 1916, now La. R.S. 1950, 15:461.

grounds³ for declaring a witness incompetent. One of these was interest. A party to litigation could not testify because it was feared that his self-interest would prevent truthful testimony. Husband and wife were considered, in the eyes of the law, as being one and the same person. For this reason, the spouse of an interested party was also declared incompetent.⁴ In recent years, incompetency has to a great extent been abolished and, in some instances, replaced by a privilege.⁵ Most jurisdictions today recognize spouses as competent witnesses for or against each other.⁶ In connection with their testimony, two separate and distinct privileges have evolved: (1) that preventing the disclosure⁷ of confidential communications made during marriage by one spouse to the other,⁸ and (2) that preventing one spouse from being required to testify against the other during the marriage.⁹

Although the confidential communications privilege is not within the scope of this note, it may be pointed out that the policy behind it is entirely separate from that of the general spousal testimony privilege. Its purpose is to foster and preserve the trust and intimacy which should be inherent in the matrimonial relation.¹⁰ Numerous reasons have been advanced for the general spousal testimony privilege.¹¹ Perhaps the most frequently stated is society's desire to preserve the harmony of the existing mar-

3. In 8 Wigmore, Evidence § 2227 (3d ed. 1940), a quotation from Sir Edward Coke, Commentary on Littleton 6b, lists the five most important grounds for incompetency: infamy, infidelity, insanity, infancy, and interest.

4. See Greenleaf, A Treatise on the Law of Evidence 384 (1842).

5. Thayer, Cases on Evidence 1066 (2d ed. 1900), quoted in Morgan and Maguire, Cases and Materials on Evidence 322 (3d ed. 1951): "At last in the fourth and fifth decades of the [nineteenth] century, in England, nearly all objections to competency were abolished, or turned into matters of privilege. Similar changes, a little later, were widely made in this country."

6. *Ibid.*: "This last incompetency is largely abolished in this country; the accused and the husband or wife have merely a privilege of silence."

7. This privilege applies, in nearly all jurisdictions, to both civil and criminal cases. 2 Wigmore, Evidence § 488 (3d ed. 1940) lists for each state all statutes affecting organic and emotional capacity of witnesses, i.e., insanity, infancy, infamy, interest and marital relationship. For Louisiana law, see note 22 *infra*.

8. In 8 Wigmore, Evidence § 2332 (3d ed. 1940), the author states that this privilege is ordinarily that of the spouse who has made the communication, and his or her consent is required before the other spouse is allowed to reveal such communication.

9. In most jurisdictions this privilege is applicable in criminal cases only. It is normally conferred on the accused, who must consent before the spouse may testify against him. A few states, among them, Louisiana, Massachusetts and Connecticut, confer the privilege solely on the witness spouse. 2 Wigmore, Evidence § 488 (3d ed. 1940).

10. 8 Wigmore, Evidence § 2332 (3d ed. 1940).

11. *Id.* at § 2228.

riage by preventing the permanent ill feeling between the spouses that might result if one were required to give unfavorable testimony against the other.¹²

It can readily be seen that both these privileges, by permitting a party to withhold evidence, can be an obstruction to truth and justice. The policies underlying these privileges are, therefore, in conflict with the public desire to see crime punished and to have a just decision rendered in each litigation. Since the inception of the general husband-wife privilege, many legal scholars and jurists¹³ have argued that the purpose served by this privilege is of little value and does not justify the withholding of competent, material evidence.¹⁴ Nevertheless, the privilege is widely recognized today.¹⁵

The development of the law on husband-wife testimony in Louisiana, particularly in criminal cases, has been closely aligned with that in the common law. In 1805, by the so-called "Crimes Act,"¹⁶ the common law principles in the field of criminal law were formally accepted by the Territorial Legislature. Thereafter, in 1821, Edward Livingston was commissioned by the Legislature "to draw and prepare a criminal code."¹⁷ Among the four codes that Livingston prepared was a Code of Evidence, which proposed that husband and wife be competent witnesses and made no provision for privileges of any kind in regard to their testimony for or against one another.¹⁸ The Legislature never adopted the proposed code and retained instead those common law principles which had been adopted in 1805. Louisiana cases in the period following held the husband and wife to be incompe-

12. Greenleaf, *A Treatise on the Law of Evidence* 384 (1842); Brosman, *Edward Livingston and Spousal Testimony in Louisiana*, 11 *Tulane L. Rev.* 243 (1937).

13. Appleton, Bentham, Livingston, Wigmore, Brosman. *The American Law Institute Model Code of Evidence* does not contain a provision for the general testimony privilege.

14. Apparently the general feeling is that the confidential communications privilege is justifiable and necessary. No strong criticisms of this privilege were found by the writer, and such a privilege is provided for in A.L.I., *Model Code of Evidence* c. III, § 215 et seq. (1942).

15. See note 7 supra.

16. La. Acts of 1805, c. 50, § 33, p. 440, provided that the rules of evidence in criminal cases "shall be except as is by this act provided for, according to the said common law." For a discussion of the Civil Code articles which before Act 157 of 1916 provided for the incompetency of husband and wife in civil cases, see Brosman, *Edward Livingston and Spousal Testimony in Louisiana*, 11 *Tulane L. Rev.* 243 (1937).

17. 1 *Complete Works of Edward Livingston on Criminal Jurisprudence* 4 (1873).

18. *Id.* at 452 et seq., discussed in Brosman, supra note 16, at 251.

tent to testify either for or against one another.¹⁹ Act 29 of 1886,²⁰ applying to criminal cases, incorporated this principle into statute.

By Act 157 of 1916,²¹ Louisiana abandoned this early common law concept. Spouses were made competent witnesses in all cases, and the two privileges mentioned above were set forth as follows:

"Section 1. . . . the competent witness in any proceeding, civil or criminal, . . . shall be a person of proper understanding, but: First. Private conversations between husband and wife shall be privileged. Second. Neither husband nor wife shall be compelled to be a witness on any trial upon an indictment, complaint or other criminal proceeding, against the other."²²

The application of the general testimony privilege is limited to criminal cases in which one spouse is the accused, and the privilege is made solely that of the witness spouse. There were several cases,²³ decided shortly after the enactment of this statute, which contained dicta to the effect that the witness spouse could refuse to testify either for or against the accused. In *State v. Todd*,²⁴ however, the statute was interpreted to limit the privilege to a refusal to take the stand at the instance of the state.²⁵ The court stated that the witness spouse had no right to refuse to testify if called by the accused.

Thus, the extent of the privilege under Louisiana law may be summed up briefly as follows:

(1) It is applicable only in criminal cases.

19. Several cases typical of this period are *State v. Brown*, 23 La. Ann. 279 (1876); *Cull v. Herwig*, 18 La. Ann. 315 (1866); *Tulley v. Alexander*, 11 La. Ann. 421 (1856); *State v. Johnson*, 9 La. Ann. 308 (1854).

20. ". . . the competent witness in all criminal matters, shall be a person of proper understanding; provided, that the husband cannot be a witness for or against his wife, nor the wife for or against her husband. . . ."

21. The pertinent part of this statute was incorporated into the Code of Criminal Procedure as Article 461 by La. Act 2 of 1928, § 1, now La. R.S. 1950, 15:461.

22. When the Revised Statutes of 1950 were enacted, the part on confidential communications was left out of 13:3665, which applies to civil cases. Whether or not this privilege now applies in civil cases or was omitted merely through oversight is an open question.

23. *State v. Guillory*, 163 La. 98, 111 So. 612 (1927); *State v. Dejean*, 159 La. 900, 106 So. 374 (1925); *State v. Webb*, 156 La. 952, 101 So. 338 (1924); *Tortorich v. Maestri*, 146 La. 124, 83 So. 431 (1919).

24. 173 La. 23, 136 So. 76 (1931).

25. For a discussion of the interpretation of this statute, see Comment, 6 *Tulane L. Rev.* 489 (1937).

- (2) The witness spouse may testify for the prosecution regardless of the wishes of the accused.²⁶
- (3) The witness spouse may refuse to testify for the prosecution.²⁷
- (4) The accused may require the testimony of the spouse whether or not the spouse wishes to testify.²⁸

The uncertain aspects of the privilege in Louisiana involve the inference which is drawn both when the witness spouse asserts the privilege and will not testify for the state, and when the accused fails to have the spouse testify in his or her behalf. The most natural inference in these situations is that the testimony would be unfavorable to the accused.²⁹ There are several means by which a district attorney might impress this inference on the minds of the jury. He might require the witness to assert the privilege in the presence of the jury, comment on the assertion of the privilege, or comment on the failure of the accused to have the spouse testify. *Quaere*: Is it necessary, in order to carry out the policy behind the privilege, that the accused be protected from any unfavorable inference that might arise from the exercise of the privilege?

In the case of *State v. Morgan*,³⁰ the district attorney began to comment on the failure of the accused's wife to testify, but, on objection by defense counsel, the trial judge prevented any further comment along these lines. The Supreme Court held that, in view of the judge's intervention, there was no reversible error, but the court expressly refused to rule on whether or not comment should have been allowed.

The question thus left unanswered by the *Morgan* case was placed squarely before the court in the case of *State v. Todd*.³¹

26. *State v. Dejean*, 159 La. 900, 106 So. 374 (1925); *State v. Webb*, 156 La. 952, 101 So. 338 (1924).

27. *State v. Warlick*, 179 La. 997, 155 So. 460 (1934); *State v. Todd*, 173 La. 23, 136 So. 76 (1931).

28. *State v. Todd*, 173 La. 23, 136 So. 76 (1931).

29. It is possible that a spouse, who knows facts which would be favorable to the defendant, might wish to see the defendant convicted. Therefore, the inference that his or her testimony would be damaging to the accused might lead to a false conclusion in some cases. Also, the failure of the accused to call the spouse to the stand might be due to fear that the testimony given would be untruthful or deliberately colored so as to be unfavorable. These situations are probably encountered very rarely, if at all, and there is hence justification for the natural inference that, in the absence of a showing of animosity between the spouses, the testimony is withheld to protect the accused.

30. 142 La. 755, 77 So. 588 (1918).

31. 173 La. 23, 136 So. 76 (1931).

In the trial the district attorney had been permitted, over the objection of defense counsel, to comment on the failure of the accused to call his wife to the stand. On appeal, the Supreme Court stated: "The wife, in this case, witnessed the homicide. Defendant had the right to place her on the stand, whether she was willing to take the stand or not. The state did not have that right. Therefore the district attorney had the right to comment upon defendant's failure to put his wife on the stand, . . ."³² It can be seen that the court's main concern with the privilege was in its consideration of whether or not the statute allows the accused to call his wife as a witness. After holding that it does, the court found no difficulty in allowing comment upon the failure of defendant to call his wife to the stand.³³ No mention was made of the policy and purpose which the privilege was meant to serve, but the court undoubtedly considered them, or was at least influenced by their attitude towards the policy.

The procedure upheld by the *Todd* decision, while not directly affecting the privilege or its exercise, nevertheless has the tendency to coerce an accused into placing his or her spouse on the stand in order to avoid harmful comments that might otherwise be made. No cases could be found involving comment by the district attorney on the actual assertion of the privilege by the witness spouse. Whether or not such comment would be permitted is an open question, but in view of the present tendency of the court, as shown in the principal case, it would, in all probability, be permitted.

In the instant case the court carried the process of reducing the application of the husband-wife privilege even further. Relying somewhat on the *Todd* case,³⁴ but principally on the case of *State v. Warlick*,³⁵ the court held that the wife of the accused could be required to assert her privilege in the presence of the jury. It was argued with considerable logic by the defense counsel that the *Warlick* case could be distinguished on its facts,³⁶

32. 173 La. 23, 29, 136 So. 76, 78.

33. La. R.S. 1950, 15:382, provides that "counsel have the right to draw from evidence received, or from the failure to produce evidence shown to be in the possession of the opposite party, any conclusion which to them may seem fit."

34. The court cited *State v. Todd* and stated that: "Under the jurisprudence, the district attorney has the right to comment on the failure of he accused to have his witness spouse testify in his behalf. Surely, this practice causes greater harm to the party on trial than that complained of in the instant case." 66 So.2d 574, 576 (La. 1953).

35. 179 La. 997, 155 So. 460 (1934).

36. The *Warlick* opinion states the facts in that case to be as follows:

inasmuch as the defense counsel in that case voluntarily informed the court in the presence of the jury that the wife wished to assert her privilege. In the principal case the court rejected this as a basis for distinguishing the *Warlick* case and stated that the rationale of the decision was that the accused "was not prejudiced" by the procedure. It refused to limit the rule of the *Warlick* case to the particular facts involved. On the basis of the facts and holding of the principal case, there seems to be no means by which the defense counsel may prevent the witness spouse from being called and required to assert her privilege in the presence of the jury.³⁷ This procedure very forcibly calls the attention of the jury to the logical implication that the witness spouse is withholding his or her testimony because of a desire not to harm the accused. The effect is to place the spouse in somewhat of a dilemma. Assume that the testimony of a wife, for instance, would be of some, but only slight, value to the prosecution in convicting her husband. She might therefore wish not to testify; yet the assertion of the privilege in the presence of the jury might create in the jury's minds an exaggerated idea as to the nature and importance of her testimony. As in the *Todd* case, the result of the *McMullan* decision is to reduce the freedom of choice as to whether or not the privilege will be exercised.

True, the procedures sanctioned by the *Todd* and *McMullan* cases could hardly have created ill feeling between the particular spouses involved. Nevertheless, the decisions, by limiting the protection afforded the marriage relation by the privilege, have limited the extent to which the policy underlying it may be carried out. As mentioned previously, legal scholars have long been opposed to the general husband-wife privilege.³⁸ In recent

"The wife of the accused was summoned as a witness by the state. After a jury was impaneled, counsel for defendant requested the court to sequester all witnesses, both for the state and for the defense. The wife of the accused, being one of the witnesses, was called to the bar along with the others. Counsel for defendant informed the court that Mrs. Warlick was not willing to testify in the case. Whereupon the court, in the presence of the jury, asked her if she would refuse to testify and she stated that she would. On being asked why, she stated that her refusal was based upon the ground that she was the wife of the accused. Whereupon the court excused her." 179 La. 997, 999, 155 So. 460, 461.

37. There is possibility for argument that the holding of *State v. McMullan* overruled to some extent the decision in *State v. Todd*. The earlier decision was apparently based in part on the theory that the district attorney could not call the witness spouse. As he now unquestionably has this right, although he cannot require testimony, does this affect the right of comment? Should the district attorney be allowed to comment on the failure of the accused to have his spouse testify if he (the district attorney) makes no effort himself to call the spouse?

38. See note 13 supra.

years the force and logic of their arguments have received increasing recognition, possibly because of the change in present-day attitude towards the matrimonial relation.³⁹ There has been a slow but definite trend throughout the common law jurisdictions towards the abolition of the privilege altogether.⁴⁰ The Legislature, in drafting Act 157 of 1916, did not clearly indicate the extent to which it intended the policy behind the privilege to be carried out.⁴¹ Therefore, in cases presenting aspects of the privilege not covered specifically by the statute, the court has been obliged to rely largely on its own discretion as to whether the protection afforded by the privilege should be limited or extended. It is submitted that the position taken by the court is completely justified.

Sidney B. Galloway

MINERAL RIGHTS—DAMAGES FOR FAILURE TO DRILL—
LEASE INTERPRETATION

Plaintiff, lessor, sought damages from defendant, lessee, for alleged breach of contract to drill on her land. A rider attached to a form lease provided:

"Notwithstanding any other provisions contained herein it is understood and agreed that this lease shall be forfeited and rendered null and void *unless* on or before sixty days from the date lessee commences the actual drilling of a well at some point within one mile of the above described property and prosecutes such drilling with due diligence to a depth of 3,300 feet unless oil or gas is discovered in paying quantities at a lesser depth, and if said well is completed as well capable of producing oil or gas in paying quantities, then, in the event, lessee shall commence the actual drilling of a

39. Hutchins and Slesinger, *Some Observations on the Law of Evidence: Family Relations*, 13 Minn. L. Rev. 675 (1929).

40. Report by the American Bar Association's Committee on the Improvement of the Law of Evidence as quoted in 8 Wigmore, *Evidence* § 2228 (3d ed. 1940): "The privilege has been abolished in only a few States; but a tendency to extend the abolition has recently been apparent, not only in civil litigation but in criminal prosecutions. . . . It is recommended that the privilege protecting from being called one against the other be abolished (1) in civil cases, and (2) in criminal cases."

41. Statutes which include a specific provision protecting the accused from adverse inference created by the exercise of the husband-wife privilege are by no means rare. For a full list of such enactments, see 3 Wigmore, *Evidence* § 2272 (3d ed. 1940).