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Ray C. Muirhead

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defendant was so intoxicated as to preclude the presence of a specific intent to kill or inflict great bodily harm, the appropriate verdict might well be manslaughter. Manslaughter is defined as "a homicide without any intent to cause death or great bodily harm when the offender is engaged in the perpetration or attempted perpetration . . . of any intentional misdemeanor directly affecting the person."[16] Thus, if death results from a battery, either aggravated or simple, the elements of the crime of manslaughter are present. Intoxication could not be used as a defense to the battery which would be the basis of the manslaughter charge because battery requires only a general criminal intent, which under the law is not precluded by intoxication. Therefore, any charge to the jury on intoxication would be misleading if it did not include an explanation of its application to this responsive verdict. The Louisiana Supreme Court has approved the practice of simply reading R.S. 14:15 to the jury in order to instruct them on the law relative to intoxication as a defense.[17] However, this is an area where a bare statement of the law is likely to confuse a jury. It will greatly facilitate a proper jury understanding of the issues involved if the judge elaborates upon the application of the intoxication article to the crime charged and to the crimes which may be responsive verdicts.

Allen B. Pierson, Jr.

EVIDENCE — GENERAL HUSBAND-WIFE PRIVILEGE IN FEDERAL CRIMINAL TRIALS

Defendant was convicted, under the Mann Act,[1] for transporting the prosecutrix from Arkansas into Oklahoma for immoral purposes. During the trial defendant's wife was allowed, over his objection, to testify that she was a prostitute and that the prosecutrix was coming to Oklahoma to go into business with her. Defendant claimed the husband-wife privilege and the government contended that the wife's testimony was allowable because it was given voluntarily. The Tenth Circuit Court of Appeals upheld the district court in allowing the wife to testify voluntarily. On certiorari, the Supreme Court, *held*, reversed. In the interests of fostering peace in the family, a spouse will not be permitted to testify against the other, even voluntarily,

16. LA. R.S. 14:31(2a) (1950). Clauses (1) and (2b) defining manslaughter in other ways are not applicable here.
17. State v. Ledet, 211 La. 769, 30 So.2d 830 (1947).
1. 18 U.S.C. § 2421 (1949).

over objection of the accused spouse. *Hawkins v. United States*, 79 Sup. Ct. 136 (U.S. 1958).

The federal courts have two systems by which the applicable rules of evidence are determined. In civil cases the courts consider the rules of the state in which the court is sitting, as well as the rules applied in the old federal equity cases, and then apply the more lenient of the rules.[2] In criminal cases, in an effort to effect uniformity in their prosecutions, the courts use the common law rules of evidence as presently interpreted in the light of reason and experience.[3]

Centuries ago the rule[4] was formulated in the common law that neither the husband nor the wife could testify *for* or *against* the other.[5] No one was allowed to give testimony *for* his own cause because of the obvious interest involved;[6] and since in legal fiction the husband and wife were considered one,[7] a spouse was precluded from so testifying.[8] The dominant reason[9] for not al-

2. 28 U.S.C. § 43(a) (1948). See Green, *The Admissibility of Evidence under the Federal Rules*, 55 HARV. L. REV. 197 (1941).

3. The present rule for federal criminal trials as to evidence is that it is to be the common law as interpreted by present day courts "in the light of reason and experience." This phrase was used by Justice Stone in Wolfie v. United States, 291 U.S. 7, 12 (1934) as descriptive of the standard employed in Funk v. United States, 290 U.S. 371 (1933). This criterion was codified in 1940 in Rule 26 of the Federal Rules of Criminal Procedure: "The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." See also Sharp v. United States, 195 F.2d 997 (6th Cir. 1952). It should be noted that this is approximately the same rule that was followed prior to the *Funk* case. See Logan v. United States, 144 U.S. 263 (1892); Cohen v. United States, 214 Fed. 23 (9th Cir. 1914).

4. The credit or condemnation for formulating this rule is usually given to Sir Edward Coke, Commentary on Littleton 6b. 2 WIGMORE, EVIDENCE § 600 (3d ed. 1948); 8 *id.* § 2227. One exception has been recognized to this rule. When one spouse directly injured the other, the injured spouse was allowed to testify against him. For further discussion of this "necessity" rule, see Rex v. Azire, 1 Str. 633, 93 Eng. Rep. 746 (K.B. 1725); Lord Audley's Case, 1 Hat. 115, 123 Eng. Rep. 1140 (C.P. 1631); State v. Pennington, 124 Mo. 388, 27 S.W. 1106 (1894); 8 WIGMORE, EVIDENCE § 2239 (3d ed. 1940).

5. The general husband-wife rule dealt with in this Note should be distinguished from the confidential connubial communication privilege. This latter privilege has quite different, and perhaps stronger, reasons for its existence, and may be generally stated as preventing the disclosure of confidential communications made between the spouses during the marriage. See United States v. Mitchell, 137 F.2d 1006 (2d Cir. 1943); MCCORMICK, EVIDENCE §§ 82-91 (1954); 8 WIGMORE, EVIDENCE §§ 2332-2341 (3d ed. 1940).

6. GREENLEAF, EVIDENCE 376, 384 (1842); 2 WIGMORE, EVIDENCE § 601 (3d ed. 1940).

7. COKE, LITT. § 6b—"two souls in one flesh."

8. GREENLEAF, EVIDENCE § 384 (1842). The rule prohibiting spousal testimony *for* each other is made because of interest. Jin Fuey Moy v. United States, 254 U.S. 189 (1920).

9. For other reasons advanced for the rule, see 2 WIGMORE, EVIDENCE § 601 (3d ed. 1940); 8 *id.* § 2228.

lowing testimony by one spouse *against* the other was to protect the sanctity of the marital relationship.[10] This reason was one of policy; it was felt that if a husband and wife were pitted against each other it would create marital disharmony and thereby cause harm not only to the husbands, wives, and children involved, but also to the institution of marriage. Under the rule as originally formulated, spouses were said to be *incompetent* to testify *for* or *against* each other.[11] Both reasons, interest and protection of marriage, supported the old rule of incompetency. However, as the rule received continued use, scholars came to the conclusion that the rule actually had two quite separate phases.[12] The first phase, testimony by one spouse *for* the other, was considered to be one aimed at the competency of the witness;[13] its primary basis was interest. Thus the testimony was excludable because it was considered unreliable and untrustworthy.[14] The second phase, testimony *against* one spouse by the other, had as

10. Mary Grigg's Case, Raym. Sir T. 1, 83 Eng. Rep. 1 (K.B. 1660); Stapleton v. Crofts, 18 Q.B. 367, 118 Eng. Rep. 137 (1852); Clements v. Marston, 52 N.H. 31 (1872); GREENLEAF, EVIDENCE 384 (1842); 2 WIGMORE, EVIDENCE § 601 (3d ed. 1940); 8 *id.* § 2228. See argument by Mr. Evarts in Tilton v. Beecher, 2 Abbott's Rep. 49 (N.Y. 1875), as quoted in 8 WIGMORE, EVIDENCE 226 (3d ed. 1940): "The common law has said, great as is the interest of the administration of justice, all-powerful as it should be, to draw into court all evidence that can speak the truth within the rules of evidence, yet the administration of justice was made for society, not society for the administration of justice; and there are certain institutions of society lying at the base of our civilization, sustaining the whole fabric of its prosperity, its purity, its dignity, and its strength, which must not be undermined, or corrupted, or disfigured, or defiled under the notion that in the administration of justice the truth must be sought in every quarter and from every witness. Thus the great minds, legislative and judicial, the great moralists, the great religious teachers, have all combined to say that there are certain limits imposed by the nature of human society in the fabric as it is constituted, for our defense and protection, that cannot be overpassed. . . . When the common law says that a man and his wife are one, or in Lord Coke's language, 'two souls in one person' — it is said no man shall put asunder those who are thus joined together, and, least of all, in the name of law, shall the administration of justice pull and tear asunder this conjugal relation by the step of the sheriff or the precept of the judge that compels one to come and betray the other. It is not, when the question comes before the Court, so much the interest, or the duty, or the particular circumstances of the individual case of marriage that are thus brought up for attention, as the institution itself."

11. See Stein v. Bowman, 38 U.S. (13 Pet.) 209 (1839); 3 JONES, EVIDENCE § 798 (5th ed. 1958); 8 WIGMORE, EVIDENCE § 2227 (3d ed. 1940); Note, 38 VA. L. REV. 359 (1952).

12. MCCORMICK, EVIDENCE § 66 (1954); 2 WIGMORE, EVIDENCE § 600 (3d ed. 1940); 8 *id.* § 2227; Note, 38 VA. L. REV. 359 (1952). This distinction has been recognized in Oleander v. United States, 210 F.2d 795, 42 A.L.R.2d 736 (9th Cir. 1954); Cohen v. United States, 214 Fed. 23 (9th Cir. 1914).

13. See note 12 *supra*.

14. See note 6 *supra*.

its primary basis the protection of the marital relationship. The testimony, though reliable,[15] was excluded because the value to society in finding the truth in particular cases was deemed less than the value in protecting the marital relationship.[16] Whenever the ascertainment of the facts is subordinated to the protection of a relationship, a *privilege* evolves because the question is not one of reliability of the evidence, but rather concerns the value of the relationship to society.[17] Thus the distinction between privilege and competency was drawn.

In 1839 the United States Supreme Court[18] enunciated the rule that neither spouse could testify for or against the other spouse. This rule remained intact,[19] though vigorously criticized,[20] until the Supreme Court rendered its decision in *Funk v. United States*,[21] holding that one spouse could testify *for* the other. The court there said that the reason for the incompetency rule, interest, had disappeared, since an accused could now testify for his own cause, thereby forcing the incompetency rule to fall. The court in *Funk* limited its decision to the competency rule, and expressly left open for further scrutiny the question of testimony *against* one spouse by the other. However, a broad policy of rejecting common law rules where the reasons behind them could no longer be considered valid in the light of modern reason and experience arose as a result of the *Funk* case.[22] This led the lower courts to conflicting conclusions in regard to the validity of the privilege rule prohibiting spouses from testifying *against* each other.[23]

15. There is perhaps some question as to just how reliable this testimony might be; however, basically it is considered reliable. See 8 WIGMORE, EVIDENCE § 2228 (3d ed. 1940).

16. MCCORMICK, EVIDENCE § 66 (1954); 2 WIGMORE, EVIDENCE § 600 (3d ed. 1940); 8 *id.* § 2227. See also note 10 *supra*.

17. See MCCORMICK, EVIDENCE § 72 (1954).

18. Stein v. Bowman, 38 U.S. (13 Pet.) 209 (1839).

19. Jin Fuey Moy v. United States, 254 U.S. 189 (1920); Hendrix v. United States, 219 U.S. 79 (1911); Graves v. United States, 150 U.S. 118 (1893); Dowdy v. United States, 46 F.2d 417 (4th Cir. 1931); Fisher v. United States, 32 F.2d 602 (4th Cir. 1929); Barton v. United States, 25 F.2d 967 (4th Cir. 1928), cert. denied, 278 U.S. 621 (1928); Liberato v. United States, 13 F.2d 564 (9th Cir. 1926); Israel v. United States, 3 F.2d 743 (6th Cir. 1925); Slick v. United States, 1 F.2d 897 (7th Cir. 1924); O'Brien v. United States, 299 Fed. 568 (8th Cir. 1924); Haddad v. United States, 294 Fed. 536 (6th Cir. 1923); Krashowitz v. United States, 282 Fed. 599 (4th Cir. 1922); Fitter v. United States, 258 Fed. 567 (2d Cir. 1919); Wesoky v. United States, 175 Fed. 333 (3d Cir. 1910).

20. 5 BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 337 (1828). See also 2 WIGMORE, EVIDENCE § 601 (3d ed. 1940); 8 *id.* § 2228; Brosman, *Edward Livingston and Spousal Testimony in Louisiana*, 11 TUL. L. REV. 243 (1937).

21. 290 U.S. 371 (1933).

22. See note 3 *supra*.

23. Compare Yoder v. United States, 80 F.2d 665 (10th Cir. 1935) and United

In the instant case the question of the validity of the privilege, as possessed by the accused spouse, was presented to the Supreme Court. The Court looked to the reasoning behind the rule and to the experience that had been had with the rule. The majority stated that the policy of protecting the sanctity of the marital relationship "has never been unreasonable and is not now."[24] Thus the phase of the rule prohibiting testimony *against* one spouse by the other was sanctioned and upheld. However, the Court was faced with a dual question, for the government did not expressly seek to have the privilege as a whole overruled, but rather to have it declared that the privilege belongs only to the witness-spouse. The majority disposed of this contention by saying that "it is difficult to see how family harmony is less disturbed by a wife's voluntary testimony against her husband than by her compelled testimony,"[25] for, in truth, "it seems probable that much more bitterness would be engendered."[26] The author of the concurring opinion dealt further with the question of to whom the privilege belonged. He stated that the government might coerce the witness spouse into testifying, as may have been done in the instant case, by threatening her with prosecution on other grounds; and since in most cases it would be virtually impossible to determine when such testimony was in fact voluntary, he concluded that the privilege must belong to the accused spouse in order to make the privilege a reality.

Within the various states the development of the husband-wife exclusionary rule has differed from that in the federal system, as the states have often legislated on the rule,[27] while Congress has remained silent.[28] In Louisiana the common law rule was adopted at an early date,[29] but in 1916[30] it was abrogated by a statute which provided: "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,"[31] and this

States v. Walker, 176 F.2d 564 (2d Cir. 1949), cert. denied, 338 U.S. 891 (1949); Brunner v. United States, 168 F.2d 281 (6th Cir. 1948).

24. 79 Sup. Ct. 136, 138 (U.S. 1958).

25. *Ibid.*

26. *Ibid.*

27. For an excellent work in which the rules of the various jurisdictions are traced, see Note, 38 VA. L. REV. 359 (1952).

28. Logan v. United States, 144 U.S. 263 (1892) held that the civil provisions had no application to criminal cases. In 1940, Congress enacted Rule 26 of the Federal Rules of Criminal Procedure, with rules of evidence generally, and lays down no express rules. See note 3 *supra*.

29. La. Acts 1805, c. 50, § 33, p. 440. See Brosman, *Edward Livingston and Spousal Testimony in Louisiana*, 11 TUL. L. REV. 243 (1937).

30. La. Acts 1916, No. 137, now LA. R.S. 15:461 (1950).

31. *Ibid.*

language is retained in R.S. 15:461. Since this statute allows, but does not compel, testimony, it is readily seen that only the competency phase of the common law rule is removed, leaving the privilege.[32] But this privilege is severely limited because the statute has been interpreted to mean that it belongs only to the witness spouse,[33] to exercise at his option, which he must do before the jury.[34] The accused may force his spouse to testify in his favor,[35] and if he fails to do so the prosecutor may comment on this failure.[36] Thus unless the testimony of the spouse is especially damning, it would seem that the protection given by the privilege is negligible because the accused is subject to the prosecutor's comments, which quite likely will make his situation worse than if the testimony were given.

It is submitted that the decision in the instant case is sound, for it would seem that the protection of the sanctity of the marital relationship, indeed the institution of marriage itself, is more important than an ascertainment of truth in any particular case. This decision will naturally have no direct effect outside of the federal courts; however, its indirect influence may be felt in the state systems. It is hoped that this influence will lead to a reconsideration of the privilege statute in Louisiana, for it would seem that the purpose behind the statute is not unlike the reasons advanced by the majority in the instant case to support the privilege. This purpose cannot be realized, however, as pointed out in the concurring opinion, unless the privilege is in the hands of the accused spouse.

Ray C. Muirhead

INCOME TAX — PROFIT ON SALE OF ENDOWMENT AND ANNUITY POLICIES — CAPITAL GAIN OR ORDINARY INCOME?

Whether the sale of an endowment or annuity insurance policy to a third person prior to its maturity results in capital gain or ordinary income to the vendor is left in question by two

32. For a more complete treatment of Louisiana's position and the interpretation of the statute, see Note, 14 LOUISIANA LAW REVIEW 427 (1954). This note is current, as there seems to have been no cases on the points covered since its writing.

33. State v. McMullan, 223 La. 629, 66 So.2d 574 (1953); State v. Dejean, 159 La. 900, 106 So. 374 (1925); State v. Webb, 156 La. 952, 101 So. 338 (1924).

34. State v. McMullan, 223 La. 629, 66 So.2d 574 (1953), 14 LOUISIANA LAW REVIEW 427 (1954).

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

36. *Ibid.*