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## Compulsory Husband-Wife Testimony In Criminal Cases

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to be determined what type of belief qualifies as being religious. The *Kolbeck* case attempts to decide this problem.

This same question was raised in the conscientious objector cases, and in 1930, in *Macintosh v. United States*,<sup>38</sup> it was suggested that membership in a recognized religious sect was not essential to qualification for the exemption. This dictum was supported by an act of Congress in 1940, granting exemptions to those who objected to military service on religious grounds.<sup>39</sup>

The Selective Service Act of 1948 modified the exemption to make it apply to beliefs in relation to a Supreme Being. In 1964, this modification was declared unconstitutional by *United States v. Seeger*.<sup>40</sup> Thus, in the conscientious objector cases, any religious belief qualifies, and the only proper grounds for denying the exemption to those who claim it is to attack the sincerity of the individual's belief.<sup>41</sup>

The *Kolbeck* case represents a developmental stage, with respect to the vaccination cases, similar to that which the *Macintosh* case represents in the conscientious objector cases.

It appears, therefore, that, for the purpose of seeking exemptions from vaccination requirements, membership in a recognized religious sect is not necessary in order for a belief to qualify as being religious.<sup>42</sup>

HENRY ANGEL

### COMPULSORY HUSBAND-WIFE TESTIMONY IN CRIMINAL CASES

It is an established principle of law that a husband or wife may testify against the other spouse in a criminal prosecution for an offense committed by one upon the other.<sup>1</sup> Although the spouse is a com-

<sup>38</sup>42 F.2d 845 (2d Cir. 1930).

<sup>39</sup>Selective Training and Service Act of 1940, § 5.

<sup>40</sup>326 F.2d 846 (2d Cir. 1964).

<sup>41</sup>Supra note 21.

<sup>42</sup>If the courts centered their attention upon the sincerity of the individual's claim, as was done in the conscientious objector cases, supra note 21, then the constitutional issues would be avoided.

<sup>1</sup>Lord Audley's Trial, 3 How. St. Tr. 401 (1631). The wife, a willing witness, was held to be competent to testify against her husband in a prosecution for rape upon her, which was instigated by the husband. See: 3 Jones, Evidence § 800 (5th ed. Gard rev. 1958); 8 Wigmore, Evidence § 2227 (McNaughton rev. 1961); 3 Wharton, Criminal Evidence § 780 (12th ed. 1955). See also notes infra 17, 18, 22, 24.

petent witness in such cases,<sup>2</sup> there still remains the question of whether he or she can be compelled to testify.

This problem is illustrated in the recent Ohio case of *State v. Antill*,<sup>3</sup> wherein the defendant was convicted of assaulting his wife with a dangerous weapon likely to produce great bodily harm. At the trial, the prosecution called Mrs. Antill, the victim, as a witness against her husband. Upon refusing to testify, she was found in contempt and ordered by the court to be confined in the county jail until she was willing to testify. A short time later she took the stand. Subsequently, the husband was convicted.

On appeal, the principal question considered was whether the lower court had committed prejudicial error by compelling the wife to testify. In answering the question in the negative, the court held that according to the statute the wife was a competent witness,<sup>4</sup> and like any other witness, could be compelled to testify. The court reasoned that every member of the community has a duty to give whatever testimony he is capable of giving in order to protect the public and to provide justice in each case.<sup>5</sup>

Although concurring in the majority opinion delivered by Judge Matthias, holding that the wife was a competent witness, Judge Gibson stated that she would not be compelled to testify, since being "competent" only gave the wife an "option" to testify when the injury was to her person.<sup>6</sup> Judge Gibson also maintained that when the wife is unwilling to testify against the husband, the interest of the state in preserving domestic tranquility and the family unit is superior to the state's interest in punishing the husband.<sup>7</sup> In dissenting Judge Herbert and Brown stated that since an assault was not a "personal injury," within the meaning of the statute, the wife was not a competent witness. The judges reasoned that since the indictment only alleged an assault, the prosecution was not founded upon any "personal injury"

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<sup>2</sup>See authorities cited in note 1 supra.

<sup>3</sup>176 Ohio St. 61, 197 N.E.2d 548 (1964).

<sup>4</sup>Ohio Rev. Code Ann. § 2945.42 (Baldwin 1964), says in part: "Husband and wife are competent witnesses to testify in behalf of each other in all criminal prosecutions, and to testify against each other in all actions, prosecutions, and proceedings for personal injury of either by the other . . ."

<sup>5</sup>Supra note 3, 197 N.E.2d at 551.

<sup>6</sup>Id at 553-555. Judge Gibson, at 554, stated: "[T]he proposition that a husband or wife, being legally competent or qualified as a witness, *may*, if they so elect, testify against one another in the excepted cases enumerated in the statute, and the proposition that they *must* testify against one another particularly in an assault case . . . are antipodal."

<sup>7</sup>Id. at 555.

inflicted upon the wife, but merely upon the threat to injure her.<sup>8</sup>

At early common law neither the husband nor the wife was allowed to testify for or against the other in any proceeding, civil or criminal.<sup>9</sup> This policy was based on doctrines of disqualification and privilege.<sup>10</sup>

In nearly all jurisdictions, the disqualification doctrine, under which a spouse was incompetent to testify for the other, has been abolished by statute.<sup>11</sup> The privilege, on the other hand, which at common law was available to both a witness-spouse and a defendant-spouse,<sup>12</sup> has been entirely removed in only a minority of jurisdictions.<sup>13</sup>

Application of the general rule, granting the privilege to both spouses, generally affords a spouse immunity from criminal prosecution for offenses committed in secret against the other. This led to the early adoption of the "exception of necessity,"<sup>14</sup> which prevented

<sup>8</sup>Id. at 555-57.

<sup>9</sup>Coke, A Commentary Upon Littleton (1628). At page 6.b. of this famous treatise, Sir Edward Coke stated: "[I]t hath been resolved by the justices, that a wife cannot be produced either for or against her husband, *quia sunt duae animae in carne una*; and it might be a case of implacable discord and dissension between the husband and wife, and a meane of great inconvenience; but in some cases women are by law wholly excluded to beare testimony; as to prove a man to be villeine . . ." It is interesting to note that in the same sentence, Sir Edward Coke couples both the disqualification and the privilege.

<sup>10</sup>Wigmore, supra note 1. The privilege not to testify against one's spouse was recognized as early as 1580 (Bent v. Allot, Cary 135, 21 Eng. Rep. 50 (Ch. 1580)), whereas the disqualification doctrine, which renders spouses incompetent to testify for each other, is not found until Coke's treatise appeared in 1628 (Coke, A Commentary Upon Littleton, supra note 9).

<sup>11</sup>2 Wigmore, Evidence § 601 (3d ed. 1940). In this section, Dean Wigmore states five basic reasons for the disqualification: 1) the belief that husband and wife were one; 2) marital identity of interests; 3) bias of affection; 4) danger of disturbance of marital peace; 5) danger of adverse testimony on cross-examination of the spouse. See also statutes, infra notes 17, 18, 22, 24.

<sup>12</sup>Wigmore, supra note 1 at § 2241.

<sup>13</sup>Id. at § 2245. See statutes, infra notes 17, 18, 22, 24. Dean Wigmore, in § 2227, supra note 1, states that the privilege was based on two main propositions: 1) the danger of disturbing the marital peace; 2) the natural repugnance of compelling one to be the means or victims of spousal condemnation.

<sup>14</sup>Although there is a diversity of opinion as to what constitutes a crime against the other or a personal wrong in order to come within the "exception of necessity," courts have held these crimes to come within the scope of the common law exception: assault and battery: *Williams v. State*, 149 Ala. 4, 43 So. 720 (1907), and *Stevens v. State*, 76 Ga. 96 (1885); rape: *Lord Audley's Trial*, supra note 1; abortion: *Commonwealth v. Allen*, 191 Ky. 624, 231 S.W. 41 (1921); pimping: *United States v. Rispoli*, 189 Fed. 271 (E.D. Pa. 1911); incest: *Wilkinson v. People*, 86 Colo. 406, 282 Pac. 257 (1929); bigamy: *State v. Locke*, 77 Ore. 492, 151 Pac. 717 (1915); injury to property: *United States v. Graham*, 87 F. Supp. 237 (E.D. Mich. 1949); and perjury: *West v. State*, 13 Okla. Crim. 312, 164 Pac. 327 (1917).

the defendant-spouse from asserting the privilege and allowed the husband or wife to testify against the other where the injury was to his or her person.<sup>15</sup>

While statutes adopting the common law "exception of necessity" have been passed in every jurisdiction,<sup>16</sup> most of these statutes are not clear as to whether the witness-spouse continues to have a privilege not to testify. There are basically three types of statutes:

Firstly, two states have statutes that expressly state that a spouse is both a competent and compellable witness when the offense is against his or her person.<sup>17</sup>

Secondly, seven states and the District of Columbia have statutes that expressly provide that a spouse is competent, but not compellable, to testify against the other when the injury is to his or her person.<sup>18</sup>

Thirdly, forty-one states have statutes that fail to clearly indicate the legislative intent on the question of compulsory spousal testimony.<sup>19</sup> These statutes usually provide that when the injury is to the spouse's person, he or she is either "competent" to testify,<sup>20</sup> or "may" testify.<sup>21</sup> It appears that this class of statutes leaves the question of

<sup>15</sup>Lord Audley's Trial, *supra* note 1.

<sup>16</sup>*Infra* notes 17, 18, 22, 24.

<sup>17</sup>Conn. Gen. Stat. Rev. § 54-84 (1958). (The Connecticut statute only states that a wife may be compelled, and does not mention the husband.) S.C. Code § 26-403 (1962). In *States v. Volpe*, 113 Conn. 288, 155 Atl. 223, 225 (1931), in a prosecution for carnal abuse of a minor female under the Connecticut statute which provides a wife may be compelled to testify when she had received personal violence from her husband, the court held that the defendant's wife, the prosecutrix, could not be compelled to testify concerning illicit relations before marriage. The court stated that violence before marriage was not within the scope of the statute, since at the time of the violence he was not her husband.

<sup>18</sup>Ala. Code tit. 15, § 311 (Recomp. 1958); D.C. Code Ann. § 14-306 (1961); Ga. Code Ann. § 38-1604 (1954); Kan. Gen. Stat. Ann. § 62-1420 (1949); Ky. Rev. Stat. Ann. § 421.210 (1955); La. Rev. Stat. § 15:461 (1950); Mass. Gen. Laws Ann. ch. 233, § 20 (1956); Mo. Rev. Stat. § 546.260 (1959). In *State v. McCord*, 8 Kan. 161 (1871), the court held that under the Kansas statute, which provides that the husband and wife are competent to testify, but are not "required" to do so, the state could not compel the wife to testify. And in *State v. Dunbar*, 260 Mo. 788, 230 S.W.2d 845 (1950), applying a similar statute and reaching the same decision as the McCord case, the court, in dictum at 846, said: "We believe that the administration of justice would be aided by *permitting* one spouse to testify against the other in any criminal case, but that such testimony should not be *compelled* except as to charges of a serious nature. Perhaps the dividing line should be between misdemeanors and felonies."

<sup>19</sup>*Infra* notes 22, 24.

<sup>20</sup>E.g., Ohio Rev. Code Ann., *supra* note 4.

<sup>21</sup>E.g., Ark. Stat. § 43-2020 (1947), states: "In any criminal prosecution a husband and wife may testify against each other in all cases in which an injury has been done by either against the person or property of either."

compulsory spousal testimony almost entirely to judicial interpretation. There is, however, some classification by the wording of these statutes. Eleven of the statutes appear to grant the witness-spouse an option or privilege to testify<sup>22</sup> by using either the phrase, "the spouse may testify"<sup>23</sup> or other permissive language. The remaining thirty statutes,<sup>24</sup> by using more restrictive language,<sup>25</sup> appear to apply the rule of compulsory spousal testimony.

The judicial interpretations of the third type of statute are few. Two cases were decided under statutes which provide that the witness-spouse is "competent" to testify, while one was decided under a "non-exclusion" statute. Three of the cases, however, have been decided in the absence of any applicable statute.

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<sup>22</sup>Ark. Stat., supra note 21; Del. Code Ann. tit. 11, § 3502 (1953); Ill. Ann. Stat. ch. 38, § 734 (Smith-Hurd Supp. 1963); Iowa Code Ann. § 622.8 (1950); Mich. Stat. Ann. § 28.363 (1962); N.M. Stat. Ann. § 40A-1-12 (1953); Okla. Stat. tit. 22, § 702 (Supp. 1964); Ore. Rev. Stat. § 139.320 (1963); Pa. Stat. Ann. tit. 19, § 683 (1964); R. I. Gen. Laws Ann. § 12-17-10 (1956); Wyo. Stat. Ann. § 1-142 (Supp. 1963). There appear to be no cases on the matter of compulsory spousal testimony under these statutes.

<sup>23</sup>E.g., see supra note 21.

<sup>24</sup>Alaska Rules, Crim. Rule 26 (1963); Ariz. Rev. Stat. Ann. § 13-1802 (1956); Cal. Pen. Laws Ann. § 1322 (Deering 1954); Colo. Rev. Stat. Ann. § 153-1-7 (1953); Fla. Stat. Ann. § 932.31 (1941); Hawaii Rev. Laws § 222-18 (1955); Idaho Code Ann. § 19-3002 (1947); Ind. Ann. Stat. § 9-1603 (Repl. Vol.); Me. Rev. Stat. Ann. ch. 148, § 22 (1954); Md. Ann. Code art. 35, § 4 (1957); Minn. Stat. Ann. § 595.02 (1945); Miss. Code Ann. § 1689 (Recomp. 1956); Mont. Rev. Codes Ann. § 94-8802 (1947); Neb. Rev. Stat. § 25-1202 (1943); Nev. Rev. Stat. § 48.040 (1963); N.H. Rev. Stat. Ann. § 516:27 (1955); N.J. Stat. Ann. § 2A: 84A-17(2) (Supp. 1963); N.C. Gen. Stat. § 8-57 (Supp. 1963); N.Y. Pen. Law § 2445; N.D. Cent. Code § 31-01-01, 31-01-02 (1960); Ohio Rev. Code Ann. § 2945-42 (Baldwin 1964); S.D. Code § 36.0101 (1939); Tenn. Code Ann. § 40-204 (1955); Tex. Code Crim. Proc. art. 714 (1948); Utah Code Ann. § 77-44-4 (1953); Vt. Stat. Ann. tit. 12, § 1605 (1958); Wash. Rev. Code § 5.60.060 (1963); W. Va. Code Ann. § 5727 (1961); Wis. Stat. § 325-18 (1959). See also, 18 U.S.C.A. Rule 26 (1940).

Va. Code Ann. § 8-287 (Repl. Vol. 1957), provides: "Husband and wife shall be competent witnesses to testify for or against each other in all cases, civil and criminal, except as otherwise provided." Va. Code Ann. § 8-288 (Repl. Vol. 1957), states in part that "In criminal cases husband and wife shall be allowed, and, subject to the rules of evidence governing other witnesses, may be compelled to testify in behalf of each other, *but neither shall be compelled, nor, without the consent of the other, allowed to be called as a witness against the other, except in the case of a prosecution for an offense committed by one against the other...*" (Emphasis added.) It is not clear under this statute whether the witness-spouse may be compelled to testify in a prosecution for an offense committed by one against the other. It is uncertain whether the exception only makes it unnecessary to have the "consent of the other" (the defendant-spouse), or if it also renders the witness-spouse compellable to testify. There appear to be no Virginia cases on this point. It is interesting to note, however, that Virginia, unlike Ohio, has separate statutes concerning "competency" and "compellability" of spouses.

<sup>25</sup>E.g., see supra note 4.

In applying a statute that made a wife a "competent" witness, the Supreme Court of Maine, in *State v. Black*,<sup>26</sup> held that in a prosecution for having carnal knowledge of a child, a wife could be compelled to testify against her husband. In the more recent decision of *Young v. Almeda*,<sup>27</sup> the court, in denying a petition to prohibit further proceedings, held that under the California statute which made a spouse a "competent" witness, the husband was compelled to testify against his wife where she was being prosecuted for shooting him.

Under a statute which provides that spouses in criminal cases should not be "excluded," the Florida Supreme Court, in *Ex parte Belville*,<sup>28</sup> in denying the wife's petition for a writ of habeas corpus after she had been sentenced for contempt of court for refusing to testify against her husband in a murder prosecution, held that the statute removed both the common law disqualification and the privilege of the spouses.

In the absence of any applicable statute, the Supreme Court of Mississippi, in the early case of *Turner v. State*,<sup>29</sup> held that under the common law "exception of necessity," a wife was a competent witness, and could be compelled to testify in a prosecution of her husband for an assault and battery committed upon her. The court reasoned that her testimony was not only for herself, but for society. A similar result was reached in *Bramlette v. State*,<sup>30</sup> where the Texas court, in affirming the husband's conviction of assault with intent to murder his wife,

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<sup>26</sup>3 Me. 210 (1874). In holding that the spouse could be compelled to testify under the Maine statute, the court, at page 212, stated: "[W]e can have no doubt that it was the design of the legislature in a criminal case to compel the production of the husband's or wife's testimony in favor of or against each other." The present statute is Me. Rev. Stat. Ann. ch. 148, § 22 (1954).

<sup>27</sup>190 Cal. App. 2d 759, 12 Cal. Rptr. 331 (1961). On the question of policy, the court, at page 335, said that "the interests of the public in suppressing crimes of violence are paramount to the nebulous benefits of marital peace where such peace, after violence, is doubtful."

<sup>28</sup>58 Fla. 170, 50 So. 685 (1909). The statute's basic language was that spouses "shall not be excluded" in either civil or criminal cases. Justice Whitfield, joined by Justice Shackleford, dissenting, said: "To abrogate a rule excluding testimony because incompetent does not affect a rule exempting the same testimony because it is privileged, in the absence of such an intent express or implied." Id. 50 So. at 691.

<sup>29</sup>60 Miss. 351 (1882). The court noted that even if the wife did have a privilege which had been violated, the husband had no right to assert it, since as to him it was not prejudicial error. Under the present Mississippi statute, Miss. Code Ann. § 1689 (Recomp. 1956), the wife is a "competent" witness.

<sup>30</sup>21 Tex. Crim. 611, 2 S.W. 765 (1886). The court at page 766, stated that "if the action of the court be error, it is the privilege of the witness, and not the legal right or immunity of the defendant, which is impaired."

held that under the common law exception the wife did not have an option since she was testifying for the public.

In a Mann Act prosecution, the United States Supreme Court, in *Wyatt v. United States*,<sup>31</sup> held, in the absence of any applicable statute,<sup>32</sup> that the victim-wife could be compelled to testify against her husband for this "moral injury"<sup>33</sup> to her person. The court stressed the fact, however, that its decision only applied to Mann Act prosecutions.<sup>34</sup>

It appears that the majority of courts which have held that a spouse may be compelled to testify against the other spouse in a criminal prosecution for an offense committed by one upon the other, have extended the common law "exception of necessity" into the field of the witness-spouse privilege. The reason generally given for this "extension," which abrogates the privilege of the witness-spouse, is that the witness-spouse should be compelled since he is testifying not for himself, but for society.

EMMITT FRANKLIN YEARY

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<sup>31</sup>362 U.S. 525 (1960). The court also noted that in ordinary cases the privilege belonged to both witness and defendant-spouse, but the defendant-spouse lost his privilege in prosecutions for offenses committed upon the other spouse. The privilege is also lost to the witness-spouse in Mann Act prosecutions.

<sup>32</sup>18 U.S.C.A. Rule 26 (1940), provides in part: "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."

<sup>33</sup>Other Federal cases which have held that this "moral injury" is within the common law exception are: *United States v. Mitchell*, 137 F.2d 1006 (2d Cir. 1943); *Levine v. United States*, 163 F.2d 992 (5th Cir. 1947); *Shores v. United States*, 174 F.2d 838 (8th Cir. 1949). (The court in the *Shores* case said a wife could be compelled in all cases); *Pappas v. United States*, 241 Fed. 665 (9th Cir. 1917); *Hayes v. United States*, 168 F.2d 996 (10th Cir. 1948). In *United States v. Nelms*, 190 F. Supp. 677 (W.D. Va. 1960), the court cited *Wyatt v. United States* for the proposition that the victim-wife was compelled to testify in Mann Act prosecutions where the parties had been married before the violation.

<sup>34</sup>*Supra* note 31, at 529, the court stated: "Neither can we hold that, whenever the privilege is unavailable to the party, it is ipso facto lost to the witness as well. It is a question in each case, or in each category of cases, whether in light of the reason which has led to a refusal to recognize the party's privilege, the witness should be held compellable."