

Spring 3-1-1961

Privilege Against Compelled Adverse Testimony By A Spouse

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr>



Part of the [Evidence Commons](#)

Recommended Citation

Privilege Against Compelled Adverse Testimony By A Spouse, 18 Wash. & Lee L. Rev. 98 (1961),
<https://scholarlycommons.law.wlu.edu/wlulr/vol18/iss1/11>

This Comment is brought to you for free and open access by the Washington and Lee Law Review at Washington & Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington & Lee University School of Law Scholarly Commons. For more information, please contact lawref@wlu.edu.

whereas the *Stine* decision makes future agreements enforceable. Also, *Stine* deals with labor relations alone, and some states distinguish between commercial and labor arbitration as to applicable law.³⁰ Therefore, whether *Stine* will be followed in a commercial arbitration case in Nevada is not certain although the language of the opinion seems to declare that future agreements in both labor and commercial arbitration are enforceable.

It is submitted that in the interest of certainty, the legislature of Nevada as well as other states should adopt an act similar to the American Arbitration Association Draft Act which enforces submission agreements and future agreements in both commercial and labor arbitration. The commendable result so painstakingly achieved by the Nevada court could be more easily achieved by the legislature.

KENNETH O. HUNTINGDON, JR.

PRIVILEGE AGAINST COMPELLED ADVERSE TESTIMONY BY A SPOUSE

The privilege against adverse spousal testimony in criminal cases, though severely criticized by writers,¹ is still a fundamental privilege associated with marriage. In a typical case, the privilege belongs to the defendant-husband. But, when the husband commits a crime against the person of the wife, the common law has consistently recognized an exception by holding that the husband loses his privilege. The problem then becomes whether or not the privilege originally belonged to both spouses.² If it did, then the witness-wife should also

³⁰Sixteen states and the federal government have enacted arbitration statutes patterned after the Draft Act. See note 9 *supra*. Eight of these states and Congress have excluded labor-management contracts from the operation of their statute. 19 Mo. L. Rev. 280, 283 (1954). These states are Arizona, Michigan, New Hampshire, Ohio, Oregon, Louisiana, Rhode Island and Wisconsin. Also see Plock, *Methods Adopted by States for Settlement of Labor Disputes Without Original Recourse to Courts*, 34 Iowa L. Rev. 430-433-36 (1949).

¹For criticism of and argument against the privilege see 3 Vernier, *American Family Laws* § 226 (1935); 8 Wigmore, *Evidence* § 2228 (3d ed. 1940); Hines, *Privileged Testimony of Husband and Wife in California*, 19 Calif. L. Rev. 390 (1931); Hutchins & Slesinger, *Some Observations on the Law of Evidence: Family Relations*, 13 Minn. L. Rev. 675 (1929); 4 Ark. L. Rev. 426 (1950).

²It has been said that a wife was compellable at common law in a case involving the exception of necessity. Moser, *Compellability of One Spouse to Testify Against the Other in Criminal Cases*, 15 Md. L. Rev. 16 (1955). If the privilege belongs to the husband-defendant alone, then there is no problem, as the exception destroys his privilege and the wife is compellable as an ordinary witness. England solved

be able to exercise a privilege and refuse to testify. If not, she can be *compelled* to testify as any ordinary witness. Recently the United States Supreme Court recognized that the witness has a privilege, but held that a wife-victim in a Mann Act case would not be allowed to exercise it.³

In *Wyatt v. United States*,⁴ the defendant was charged with transporting a woman in interstate commerce for the purpose of prostitution.⁵ Subsequent to the offense, but prior to the prosecution, the woman became his wife.⁶ At the trial in the District Court, the wife-victim was compelled to testify over her own and the defendant-husband's objections, and the defendant was convicted.⁷ The Court of Appeals for the Fifth Circuit affirmed, basing its decision on the exception that the husband does not have a privilege when the wife is the victim of the offense.⁸ The Court distinguished *Hawkins v. United States*,⁹ a recent United States Supreme Court decision holding that a wife cannot voluntarily testify against her husband in a criminal prosecution over his objection, on the ground that in *Hawkins* the wife was not the victim of the offense, thus the exception did not apply.¹⁰

On certiorari the United States Supreme Court upheld the con-

the problem by considering the rule as one of competency; hence the exception made her competent and thus compellable. *Rex v. Lapworth* [1931] 1 K.B. 117; *Compellability of Husband and Wife as Witnesses Against One Another in Criminal Cases*, 94 J.P. 691 (1930); 47 L.Q. Rev. 11 (1931). However, where the privilege belongs to the witness-wife or to both spouses, the problem of compellability becomes more difficult. In *Shores v. United States*, 174 F.2d 838, 841 (8th Cir. 1949), the court in a Mann Act case said in dictum that both parties had the privilege, but because of public policy both parties were denied the privilege when the offense was committed against the spouse. See 48 Mich. L. Rev. 546 (1950). However, the Supreme Court in *Wyatt v. United States*, completely discredited this dictum by saying that the mere fact that one party had lost his privilege did not waive the other party's privilege. 362 U.S. 525, 529 (1960).

³*Wyatt v. United States*, 362 U.S. 525 (1960).

⁴*Ibid.*

⁵A violation of the Mann Act, 18 U.S.C. § 2421 (1958).

⁶362 U.S. at 526. The Supreme Court failed to consider the fact that the offense occurred before marriage. The exception of necessity (see note 26 *infra*) usually does not apply to offenses committed before marriage, the technical reason given by the courts being that the witness was not a wife at the time of the offense and the exception is only for the protection of wives. *United States v. Gwynne*, 209 Fed. 993 (E.D. Pa. 1914); *State v. McKay*, 122 Iowa 658, 98 N.W. 510 (1904); *State v. Woods*, 130 Kan. 492, 287 Pac. 248 (1930); 8 Wigmore, *Evidence* § 2230 (3d ed. 1940); 4 Ark. L. Rev. 426 (1950). See also *Annot.*, 76 A.L.R. 1088 (1932).

⁷362 U.S. at 526.

⁸*Wyatt v. United States*, 263 F.2d 304 (5th Cir. 1959).

⁹358 U.S. 74 (1958).

¹⁰See note 8 *supra*.

viction.¹¹ The Court reaffirmed the *Hawkins* rule,¹² but held that the husband lost his privilege because a Mann Act prosecution falls within the exception.¹³ The Court also held that even though the defendant had lost his privilege the witness-wife also had a privilege, and the loss by the defendant did not automatically waive the witness's privilege.¹⁴ This brought the Court to a review of congressional policy underlying the White Slave Act, and the Court found that under the Act the woman is presumed to have no independent will.¹⁵ Thus in Mann Act prosecutions¹⁶ the wife-victim may be presumed to be acting under the influence of her husband's stronger will in refusing to testify against him; hence her adverse testimony could be *compelled*. The dissenting Justices felt that the case did not warrant such a "radical departure from the *Hawkins* rule"¹⁷ and maintained that the majority had completely misinterpreted the intent underlying the Mann Act.¹⁸

The common-law privilege¹⁹ against the adverse testimony of spouses²⁰ in criminal trials²¹ has been recognized since the time of Lord Coke.²² Fundamentally, it is a privilege preventing a party to a

¹¹Wyatt v. United States, 362 U.S. 525 (1960).

¹²Id. at 526.

¹³Id. at 526-27. It might be argued that the exception should not apply in this case as the witness was not a wife at the time of the offense, see note 6 supra; and also, the offense was not one of physical violence. See note 26 infra.

¹⁴362 U.S. at 528-29.

¹⁵Id. at 530. White Slave Traffic Act, 18 U.S.C. § 2422 (1958).

¹⁶The court specifically limited the decision to Mann Act prosecutions. 362 U.S. at 531.

¹⁷362 U.S. at 531-32. The dissenting opinion was written by Chief Justice Warren joined by Justices Black and Douglas.

¹⁸Id. at 531-38.

¹⁹The modern feeling is that this rule of evidence is a privilege and not a question of competency, but some authorities still consider it an incompetency. See McCormick, Evidence § 66 (1954); 3 Vernier, American Family Laws § 226 (1935); 8 Wigmore, Evidence § 2227 (3d ed. 1940); Hines, Privileged Testimony of Husband and Wife in California, 19 Calif. L. Rev. 390 (1931); 4 Ark. L. Rev. 426 (1950); 38 Va. L. Rev. 359 (1952); 12 Vand. L. Rev. 947 (1959).

²⁰The privilege against adverse spousal testimony is one of four related evidence subjects. The other three are: (1) the disqualification and incompetency of the testimony of one spouse for and in behalf of the other; (2) the privilege against testimony concerning confidential communications between spouses; and (3) the disqualification of either spouse to testify to non-access in marriage so as to bastardize a child born in wedlock. McCormick, Evidence §§ 66, 82 (1954); 4 Ark. L. Rev. 426 (1950).

²¹The privilege has been largely eliminated in civil trials. McCormick, Evidence § 66 (1954); 3 Vernier, American Family Laws § 226 (1935); 8 Wigmore, Evidence § 2245 (3d ed. 1940); 19 Fed. B.J. 85 (1959).

²²8 Wigmore, Evidence § 2227 (3d ed. 1940); Hines, Privileged Testimony of Husband and Wife in California, 19 Calif. L. Rev. 390 (1931); 19 Fed. B.J. 85 (1959).

valid marriage²³ from appearing as a witness in opposition to a spouse's interest²⁴ in a criminal trial. The best approach is to consider the privilege as belonging to *both* the defendant-spouse and the witness-spouse.²⁵ At an early date, the common law began to recognize an exception to the general rule which was based upon necessity and denied the privilege to the defendant-spouse who had committed a crime against the person of the witness-spouse.²⁶ Today, one of the last major areas of common-law application appears to be the federal courts.²⁷

The public policy reasons advanced for the rule are the necessity of protecting marital harmony and the natural repugnance of causing one spouse to be the means of the other's condemnation.²⁸

The first reason for the rule against adverse spousal testimony was clearly expounded in the federal courts for the first time in the 1839 case of *Stein v. Bowman*²⁹ in which the Court said:

"This rule is founded upon the deepest and soundest principles of our nature. Principles which have grown out of those domes-

²³*Goodson v. State*, 162 Ga. 178, 132 S.E. 899, 901 (1926); *State v. Hancock*, 28 Nev. 300, 82 Pac. 95, 96 (1905); 8 Wigmore, Evidence § 2230 (3d ed. 1940); 25 Notre Dame Law. 382 (1950).

²⁴8 Wigmore, Evidence § 2234 (3d ed. 1940).

²⁵*Shores v. United States*, 174 F.2d 838, 841 (8th Cir. 1949); *United States v. Mitchell*, 137 F.2d 1006, 1007-08 (2d Cir. 1943); *State v. Mageske*, 119 Ore. 312, 227 Pac. 1065 (1924); *McCormick*, Evidence § 66 (1954); 3 Vernier, American Family Laws § 226 (1935); 8 Wigmore, Evidence § 2241 (3d ed. 1940).

²⁶This exception first appears to have been recognized in *Lord Audley's Trial*, Hutt. 115, 123 Eng. Rep. 1140, 1141 (1631). It is an exception based on the necessity of procuring a witness to a crime committed by the husband on the wife. The majority of courts require that the husband's action be one of physical violence before the exception applies and allows the wife to testify against her husband. A moral wrong to her or a public wrong is not sufficient. *Johnson v. United States*, 221 Fed. 250, 251 (8th Cir. 1915); *Meade v. Commonwealth*, 186 Va. 775, 43 S.E.2d 858 (1947); *State v. Woodrow*, 58 W. Va. 527, 52 S.E. 545, 546 (1905); *McCormick*, Evidence § 66 (1954); 3 Vernier, American Family Laws § 226 (1935); 8 Wigmore, Evidence § 2239 (3d ed. 1940). The federal courts have extended the exception to cover violations of the Mann Act as a serious moral wrong. *United States v. Rispoli*, 189 Fed. 271 (E.D. Pa. 1911). *Accord*, *Shores v. United States*, 174 F.2d 838, 841 (8th Cir. 1949); *Levin v. United States*, 163 F.2d 992 (5th Cir. 1947); *United States v. Mitchell*, 137 F.2d 1006, 1008-09 (2d Cir. 1943). See Annot., 3 L. Ed. 2d 1607 (1959); Annot., 97 L. Ed. 607 (1953).

²⁷Annot., 11 A.L.R. 2d 646 (1950). For a discussion of individual state statutes concerning the privilege, see 3 Vernier, American Family Laws § 226 (1935); 38 Va. L. Rev. 359 (1925).

²⁸*Hawkins v. United States*, 358 U.S. 74 (1958); *Stein v. Bowman*, 38 U.S. (13 Pet.) 209 (1893); *Commonwealth v. Allen*, 191 Ky. 624, 231 S.W. 41 (1921); *McCormick*, Evidence § 66 (1954); 3 Vernier, American Family Laws § 226 (1935); 8 Wigmore, Evidence § 2228 (3d ed. 1940).

²⁹38 U.S. (13 Pet.) 209 (1839).

tic relations, that constitute the basis of civil society, and which are essential to the enjoyment of that confidence which should subsist between those who are connected by the nearest and dearest relations of life. To break down or impair the great principles which protect the sanctities of husband and wife, would be to destroy the best solace of human existence."³⁰

Is this rule logical? Some authorities feel that it is based purely on "sentiment" rather than logic.³¹ However, individual marriages are based upon sentiment and emotion³² so that any action which tends to place the parties in opposition to each other will naturally weaken the harmonious emotional union between them. Certainly, legal action which compels one to be a witness against the other in a criminal case falls within this category. Assuming that the basic reason for the rule is the protection of the marriage institution itself,³³ then the logic—not sentiment—of the law is that the institution is best protected by recognizing and protecting the sentimental basis of the individual marriages.³⁴ The rule is based on the premise that it is more desirable to preserve a particular marriage than to secure a particular criminal conviction.

Many writers argue that if a wife will voluntarily³⁵ testify against her husband in a criminal case,³⁶ there is no harmony left in the marriage to be protected.³⁷ However, as Judge Learned Hand pointed out in *United States v. Walker*,³⁸ even though there may be present bitterness between the parties, "not all estrangements are final, and

³⁰Id. at 223.

³¹8 Wigmore, Evidence § 2228 (3d ed. 1940); Hines, Privileged Testimony of Husband and Wife in California, 19 Calif. L. Rev. 390 (1931); 4 Ark. L. Rev. 426 (1950).

³²The rule is founded on "common sense." Compellability of Husband and Wife as Witnesses Against One Another in Criminal Cases, 94 Just. P. 691 (1930).

³³The privilege necessitates a balancing of the desire for protection of marriage against the desire to obtain ultimate truth by testimony in criminal trials. The privilege requires a favorable balance for marriage. 8 Wigmore, Evidence § 2228 (3d ed. 1940); Moser, Compellability of One Spouse to Testify Against the Other in Criminal Cases, 15 Md. L. Rev. 16 (1955); 61 W. Va. L. Rev. 323 (1959).

³⁴See note 32 supra.

³⁵The writers suggest that if the wife voluntarily testifies there is no harmony left to protect. However, it would appear that where she refuses to testify and must be compelled, she is indicating that there is harmony in the marriage to be protected.

³⁶The writers seem to presuppose guilt—a presumption hostile to our system of justice. It should not be assumed that all harmony in the marriage has ceased because one of the parties has been accused of a crime. Mere indictment for a crime is not conviction.

³⁷The United States's argument in *Hawkins v. United States*, 358 U.S. 74 (1958). See also, 8 Wigmore, Evidence § 2228 (3d ed. 1940); 19 Fed. B.J. 85 (1959); 12 Vand. L. Rev. 947 (1959).

³⁸176 F.2d 564 (2d Cir. 1949).

nothing could more dispose the privileged spouse to treasure enmity and to repulse any overtures of reconciliation than the memory of what will ordinarily rankle as treachery.”³⁹ Mr. Justice Black, in *Hawkins v. United States*,⁴⁰ reiterated Judge Learned Hand’s argument stating that:

“Not all marital flare-ups in which one spouse wants to hurt the other are permanent. The widespread success achieved by courts throughout the country in conciliating family differences is a real indication that some apparently broken homes can be saved provided no unforgivable act is done by either party. Adverse testimony given in criminal proceedings would, we think, be likely to destroy almost any marriage.”⁴¹

Does this reason for the privilege still exist today? It has been contended that the family has become less unified and hence the present day need for the privilege is considerably weakened.⁴² However, it may be argued that with a recognized decline in family unity, as evidenced by our increasing divorce rate, any rule tending to perpetuate marriage should be retained. The Supreme Court in *Hawkins* seemed to agree with this position when Justice Black, speaking for a unanimous Court, said:

“The basic reason the law has refused to pit wife against husband or husband against wife in a trial where life or liberty is at stake was a belief that such a policy was necessary to foster family peace, not only for the benefit of husband, wife and children, but for the benefit of the public as well. Such a belief has never been unreasonable and is not now.”⁴³

The second reason for the rule is the “natural repugnancy” concept⁴⁴ which is based on the argument that our law has always felt an aversion to seeing a person convicted by the testimony of his spouse. It is an appeal to the “sporting” nature of the law.⁴⁵ If this seems to defeat justice, it must be remembered that all privileges are truth defeating.⁴⁶

³⁹176 F.2d at 568.

⁴⁰358 U.S. 74 (1958).

⁴¹358 U.S. at 77-78.

⁴²Hutchins & Slesinger, Some Observations on the Law of Evidence: Family Relations, 13 Minn. L. Rev. 675, 678-80 (1929); 61 W. Va. L. Rev. 323, 324-25 (1959).

⁴³358 U.S. at 77.

⁴⁴Even Wigmore finds this argument more “plausible.” 8 Wigmore, Evidence § 2228 (3d ed. 1940).

⁴⁵8 Wigmore, Evidence § 2288 (3d ed. 1940); Hines, Privileged Testimony of Husband and Wife in California, 19 Calif. L. Rev. 390, 408 (1931).

⁴⁶United States v. Walker, 176 F.2d 564, 568 (2d Cir. 1949); Hines, Privileged Testimony of Husband and Wife in California, 19 Calif. L. Rev. 390 (1931).