Denver Law Review

Volume 38 | Issue 6 Article 4

January 1961

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WITNESSES – COMPETENCY – HUSBAND AND WIFE – COMPELLING TESTIMONY IN CRIMINAL PROSECUTIONS

James Ivey Wyatt was convicted in a federal district court for knowingly transporting a woman in interstate commerce for the purpose of prostitution in violation of the White Slave Traffic Act.[1] Subsequent to the date of the offense but prior to the trial, he married the victim. At the trial the prosecution called his wife as a witness against him, but she claimed the privilege of not testifying against her husband. Over objection the trial court compelled her to testify. *Held,* a prosecution under the Mann Act constituted an exception to the common law rule ordinarily permitting a party to exclude the adverse testimony of his or her spouse, and in such a prosecution the witness, who was both victim and defendant's wife, could be compelled to testify against him. *Wyatt v. United States,* 362 U.S. 525 (1960).

Before considering the admissibility of the wife's testimony, it is necessary to distinguish between the general privilege prohibiting testimony by one spouse against the other, and the special privilege as to confidential communications. The latter seems widely recognized and approved in this country,[2] while the former, although recognized except where modified by statutes or limited by exceptions,[3] has been strongly criticized because of its obscure origin, uncertain rationale, and unfortunate results in limiting the judicial search for truth.[4]

The federal courts have consistently applied the common law rule that neither spouse may testify against the other where one is accused of a crime.[5] Therefore, in *Stein v. Bowman,*[6] one of the earliest Supreme Court decisions, where the wife was called as a witness to prove that her husband had committed perjury, the Court stated, *inter alia,* that neither husband nor wife could be a witness for or against the other; that this rule was subject to some exceptions as where one spouse commits an offense against the other; and that this rule rested upon considerations of family peace.[7]

The Court's position in *Stein v. Bowman* was reaffirmed and received further support in *Graves v. United States.*[8] However, in *Funk v. United States*[9] the Court held that in a federal court the wife of the defendant on trial for a criminal offense was a competent witness in his behalf. The Court rested its decision on the ground that the exclusion had been based on interest, and now that the defendant was allowed to testify in his own behalf there was no reason for refusing to permit his wife to also testify for him.[10]

1 18 U.S.C. § 2421 (1952).
2 8 Wigmore, Evidence §§ 2332-2341 (3rd. ed. 1940).
3 *Ibid.*
4 United States v. Mitchell, 137 F.2d 1006, 1007-08 (1943).
5 38 Va. L. Rev. 359, 368 (1952).
6 38 U.S. (13 Pet.) 209 (1839).
7 *Id.* at 221.
8 150 U.S. 118 (1893).
9 290 U.S. 371 (1933).
10 *Id.* at 381.

In a footnote to the principal case,[11] the Court indicates the interpretation it has placed on the *Funk* case by saying: "*Funk v. United States, supra,* abolished for the federal courts the disqualification or incompetence of the spouse as a witness, thus establishing the admissibility of his or her testimony, and leaving the question one of privilege only."[12]

In the process of adopting the common law rule of incompetency, which is now defined as a privilege, the federal courts also adopted the exception known as "necessity."[13] This exception embodies a class of cases which at common law was narrowly construed to be "personal wrongs" done to the spouse, *i.e.,* "crimes against the other."[14]

The narrow limits, within which the exception applied, have been broadened by legislative action. In 1887, Congress made it permissible for a spouse to testify in cases where the defendant spouse was prosecuted in the federal courts for bigamy, polygamy, or unlawful cohabitation.[15] In 1917, a statute aimed at preventing the importation of aliens for immoral purposes was enacted, and the testimony of either spouse against the other was made admissible and competent in prosecutions thereunder.[16] In neither of these legislative enactments was any mention made of compelling the spouse to testify.

With the passage of the Mann Act[17] in 1910, making it a federal offense to transport a female in interstate commerce for immoral purposes, several cases involving the "necessity" exception arose. Often in these cases the testimony of the female transported was necessary for a conviction, and in many instances the female turned out to be the defendant's wife.

In one of the first cases to arise, *Johnson v. United States,*[18] the court held that a violation of the Act was not such a "personal wrong" against the wife as would bring the testimony within the exception.[19] At approximately the same time as the *Johnson* case, the Court of Appeals for the 9th Circuit, in deciding that violations

11 Wyatt v. United States, 362 U.S. 525, 528 n.4 (1960).
12 While the Funk case, *supra* note 9, specifically establishes only the competency of the spouse to testify for the accused, this statement by the Court is indicative of the later view taken by the federal courts that the question is no longer one of competency but of privilege.
13 8 Wigmore, *op. cit. supra, note* 3, § 2239.
14 *Ibid.*
15 28 U.S.C. § 633 (1946).
16 39 Stat. 878 (1917), reenacted as 66 Stat. 230, 8 U.S.C. §1328 (1952).
17 18 U.S.C. § 2421 (1952).
18 221 Fed. 250 (8th Cir. 1915).
19 174 F.2d 833 (8th Cir 1949).

of the Act were within the privilege, said that the term "personal injury" was not confined to acts of personal violence, but might include torts against the wife or a serious moral wrong against her.[20]

The initial conflict between the Courts of Appeals of the 8th and 9th Circuits presented an opportunity for the Supreme Court to intervene, but it did not. Subsequently, the Courts of Appeals of the 2nd Circuit,[21] the 5th Circuit,[22] the 10th Circuit,[23] and several district courts[24] have supported the view that cases involving violations of the Mann Act were within the exception and have allowed the wife to testify against her husband.

It is interesting to note that in every one of the cases the wife has testified voluntarily, and the only objection interposed has been that of the defendant-spouse. His privilege of excluding the adverse testimony of his spouse fails because of the "necessity" exception. The interesting question then arises: Does the marital witness also have a privilege, to wit, refusing to testify?

In *Hawkins v. United States*,[25] the Government urged the Court to rule that the privilege resided in the witness only. In refusing to do so, the Court rejected any distinction between voluntary and compelled testimony, and reaffirmed its position that where the crime was not against the other spouse the defendant could exclude his spouse's adverse testimony.[26] This decision supports Professor Wigmore's view that the husband-wife privilege is a dual one, residing in both the spouses.[27]

The law had reached this point when the principal case arose. The Court specifically affirmed the view that in most instances the privilege resides in both the party and the witness.[28] It also made clear that it was not holding that in all cases where the party's privilege is lost because of the "necessity" exception the witness' privilege is also lost, but rather: "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."[29]

The Court, therefore, decided that in cases involving the Mann Act, as a matter of public policy and in order to facilitate the legislative intent embodied in the act, the witness-wife would not be allowed to voluntarily make the choice whether or not to testify against her husband. It felt that a man who could influence a woman to the extent that she would prostitute herself could also influence her to the point where she would marry him and refuse to testify against him. This same line of reasoning was applied to

20 Cohen v. United States, 214 Fed. 23, 29 (9th Cir. 1914).
21 United States v. Mitchell, 137 F.2d 1006 (2d Cir. 1943).
22 Denning v. United States, 247 Fed. 463 (5th Cir. 1918).
23 Hayes v. United States, 168 F.2d 996 (10th Cir. 1948).
24 Wilhoit v. Hiatt, 60 F. Supp. 664 (M.D. Pa. 1945); United States v. Williams, 55 F. Supp. 375 (D. Minn. 1944).
25 358 U.S. 74 (1958).
26 There are three significant items in this case. First, the woman transported across state lines was not, and did not become the defendant's wife. Secondly, although there was some doubt, the defendant's wife did not object to testifying. Thirdly, there was no evidence to show that the dedefendant had sexual relations with the transported female; had there been, the Court might have found that this was a crime against the wife and therefore within the exception.
27 8 Wigmore, Evidence § 2241 (3rd ed. 1940).
28 Wyatt v. United States, 362 U.S. 525, 529 (1960).
29 *Ibid.*

the defendant's argument that there was no basis for the "necessity" exception where the marriage occurred after the date of the offense.

Mr. Chief Justice Warren, in a dissenting opinion,[30] concurred with the majority's reasoning but disagreed with their conclusions. He felt that there was no congressional support for the Court's decision, and that without it this decision represented an intrusion into what was essentially a legislative area. He states: "It is more properly Congress' business, not ours, to place comparative values upon the quest for facts in the judicial process as against the safe-guarding of the marriage relationship. . . ."[31] The dissent also pointed out that under section 1328[32] the testimony of the spouse is made admissible and competent, but not compulsory.[33]

Rule 26 of the Federal Rules of Criminal Procedure gives to the federal courts the right to interpret the common law in the light of "reason and experience." In the instant case, the Court did exactly that. Finding little or no authority in either the common law or congressional acts, the Court exercised its power in a very limited area to reach a just and logical result. It is difficult to conceive of a more vicious offense than that of inducing a woman to prostitute herself for the benefit of another, and the crime takes on an added repugnancy when the female is the wrong-doer's wife. On the grounds of public policy and morality the decision in the *Wyatt* case should receive approval as an effective method of curtailing these offenses.

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QUO WARRANTO

The unsuccessful candidates for offices in an unincorporated labor union local asked the district attorney to bring an action under the Rule of Civil Procedure[1] which abolishes the ancient writ of quo warranto and allows a civil action against officers allegedly elected through use of unfair election procedures and in violation of the organization's constitution. When the district attorney refused the unsuccessful candidates brought their own action as permitted by the rule. *Held*: Judgment for defendants affirmed. The action was not properly brought because quo warranto applies only to public, not private, offices. *People ex rel. Mijares v. Kniss*, 357 P. 2d 352 (Colo. 1960).

Quo warranto is traditionally viewed as a proceeding to test a party's right to a public office or franchise.[2] It is an extraordinary and highly prerogative writ,[3] warranted only when a wrong against

30 With whom Mr. Justice Black and Mr. Justice Douglas joined.
31 Wyatt v. United States, 362 U.S. 525, 535 (1960).
32 66 Stat. 230 (1952), 8 U.S.C. §1328 (1952).
33 Wyatt v. United States, 362 U.S. 525, 538 (1960).

1 Colo. R. Civ. P. 106(a)(3) provides: "Special forms of pleadings and writs in . . . quo warranto . . . are hereby abolished. In the following cases relief may be obtained by appropriate action or by an appropriate motion under the practice prescribed in these rules:
". . . (3) When any person usurps, intrudes into, or unlawfully holds or exercises any office or franchise. The district attorney . . . may . . . bring an action against such person in the name of the people of the state, but if the district attorney declines so to do, it may be brought upon the relation and complaint of any person . . . . When such an action is brought against a defendant alleged to usurp, intrude into, or unlawfully hold or exercise any public office, civil or military, or any franchise it shall be given precedence over other civil actions . . . ."
2 2 Spelling, Extraordinary Relief in Equity and At Law § 1765 (1893).
3 People *ex rel.* v. Blake, 128 Colo. 111, 260 P.2d 592 (1953).