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Qualification of Defendant's Spouse As a Witness in Criminal Cases

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THE QUALIFICATION OF DEFENDANT'S SPOUSE AS A WITNESS IN CRIMINAL CASES

Introduction

Perhaps no two concepts in the law have had such an anomalous genesis, such a confused development, or have been subjected to so many varied corrective measures by legislative intervention as those dealing with the incompetency and privilege of the spouse at common law. And, it might be added, a fair amount of the confusion observable presently in the adjudications and legislative pronouncements is traceable to a failure to appreciate the exact nature of the relation which obtains between these two concepts.

In order that some semblance of order may be accomplished in this discussion, it will be necessary to keep in mind three distinct situations: (1) The *disqualification* of one spouse to testify *for* the other at common law; (2) The *privilege* of either spouse not to have the other spouse testify *against* him or her; and (3) The privilege of both spouses not to have confidential communications revealed. If these three situations are noted, it will simplify further analysis to a considerable degree.

At Common Law

It has been frequently stated that at common law neither husband nor wife could testify for or against each other.[1] While, in effect, this may not be an incorrect statement of the law, it fails entirely to suggest that the reasons why one

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1 Kent, Commentaries on American Law (12th ed. by O. W. Holmes, Jr., 1873) 215; 1 Morgan, First American Edition from the Sixth London Edition of the Principles of the Law of Evidence (1876) 270, § 175; Jones, The Law of Evidence in Civil Cases (3rd ed. by W. C. Jones, 1924) § 733; Hughes, An Illustrated Treatise on the Law of Evidence (1907) 278, § 16; Ex Parte Beville, 58 Fla. 170, 50 So. 685, 27 L. R. A. (NS) 273 (1908); Commonwealth v. Allen, 191 Ky. 624, 231 S. W. 41, 16 A. L. R. 484 (1921); William and Mary College v. Powell, 12 Gratt. (Va.) 372 (1865).

spouse might not testify for the other are not an explanation of the rule that one spouse may or may not testify against the other (*i. e.*, the privilege stated in 2, *supra*). It is because of the frequency of occurrence of the statement of these rules together in the same sentence that their separate identity is lost sight of. That these two rules with respect to the admissibility of the testimony of one spouse when the other spouse is a party have had entirely different origin in the common law has been amply demonstrated.[2] In discussing the history of the disqualification of one spouse to testify for the other at common law as distinguished from the privilege of one spouse not to have the other spouse testify adversely, Mr. Wigmore, in his customary exhaustive manner, demonstrates that the latter is observable earlier than the former.[3] That this should be the fact is apparent after a few moments reflection. From the nature of privilege, *per se*, it presupposes that except for the claim of privilege, the offered testimony would be receivable. But if the testimonial disqualification for all purposes of a spouse antedated the privilege, there would be no *raison d'etre* for the privilege. Furthermore, the privilege not to have one spouse testify against the other inferentially recognizes the admissibility of testimony for or in favor of the spouse on trial.[4] It was at this last situation that the testimonial disqualification of the spouse was aimed.

In an attempt to explain or justify the disqualification of one spouse to testify for the other at common law, many reasons have been assigned, most of them highly specious if searchingly scrutinized. Briefly, these defenses fall under five headings: (1) The identity of personality of the spouses; (2) The identity of interest of the spouses; (3) The probable bias and unreliability of the offered testimony;

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2 1 Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law (2nd ed., 1923) § 600; Vol. 4, § 2227.

3 4 Wigmore, *op. cit. supra* note 2, § 2227.

4 4 Wigmore, *op. cit. supra* note 2, § 2227, n.

(4) The consequent danger to marital happiness and mutual trust between the spouses; and (5) The danger of exposing the witness-spouse to a searching cross-examination and force the spouse to make unfavorable admissions against the other.[5] While all of the above-mentioned have been subjected to able and adverse criticism, some combination of them can be found restated and re-emphasized by courts everywhere, not, incredible as it may seem, to justify the incompetency of a spouse (since statutes everywhere have abolished this in various ways) but rather in defense of the *privilege* of one spouse not to have the other spouse testify adversely.[6] Thus is evidenced the first glimmerings of the confusion which has animated the courts, and, as will be presently seen, the various legislatures. The courts seem to have been dominated by a desire to preserve the marital state free from the dangers that might accrue if the law would permit one spouse to give testimony against the other.[7] But if this represented the controlling desire and reason for the rule, it is strange that the common law did not extend this safeguard to the other family relations so as to disqualify all members of the party's family. Is not the security and peace of the family just as much jeopardized by the damaging testimony of the son or daughter of the defendant as by that of the spouse? Yet the common law did not extend the disqualification to the son *qua* son or the daughter *qua* daughter or the other family relations. In this respect the common law did not receive its inspiration from the civil or ecclesiastical law.[8]

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5 1 Wigmore, *op. cit. supra* note 2, § 601.

6 Ex Parte Beville, *op. cit. supra* note 1; Bassett v. The United States, 137 U. S. 496, 11 S. Ct. 165, 34 L. Ed. 762 (1890) (Citing with approval the language of Mr. Justice McLean in Stein v. Bowman, 13 Pet. 209, 222); Commonwealth v. Allen, *op. cit. supra* note 1; Knowles v. People, 19 Mich. 408 (1867); Chamberlayne, A Treatise on the Modern Law of Evidence (Ed. by H. C. Joyce, 1916) § 3655, and cases cited.

7 2 Kent, *op. cit. supra* note 1, § 179.

8 Makenzie, Studies in Roman Law (3rd ed., 1870) 331; 1 Wigmore, *op. cit. supra* note 2, § 575, n. 13.

The history of the privilege of the party-spouse not to have the other spouse testify adversely resembles that of marital disqualification in the obscurity of its genesis, the confusion of its development, and the lack of appreciation of its separate identity by courts and legislatures alike.[9] Suffice it to say that many of the reasons already advanced in defense of the disqualification of the spouse found more justification when applied to the privilege not to have the adverse testimony of the spouse. This is true especially with respect to the preservation of the marital state free from the searching scrutiny of a court or other fact-finding tribunal. More credence may be given to this policy when it is remembered that the marital disqualification appeared chronologically along about the time that disqualification based on interest generally was being crystallized into a definite rule of law.[10] It might well be that inarticulate emphasis was given to the interest aspect of the marital disqualification rather than to disqualification growing out of the status *per se*. At any rate, the fusion of the reasons above mentioned, and their convertible application alike to disqualification and privilege has served to present a problem to the various legislative bodies which have attempted to deal with it, which, it is submitted, they have failed to fully comprehend.[11] The disqualification element has been disposed of in most jurisdictions either directly, or inferentially, by defining the competent witness in such terms that a spouse falls within the category.[12] It is not necessary, therefore, to dwell at any length on this phase of the problem. However, the attempt on the part of various legislative bodies to (so it seems) preserve in some form or other the common law rule

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9 4 Wigmore, *op. cit. supra* note 2, § 2227.

10 1 Wigmore, *op. cit. supra* note 2, § 600.

11 Wigmore, *A General Survey of the History of the Rules of Evidence*, 2 Select Essays in Anglo-American Legal History 691, at p. 693.

12 1 Wigmore, *op. cit. supra* note 2, § 488, n. (*Cf.* for a collection of various state statutes.)

with respect to privilege as applied to criminal cases has produced a maze of complexity.

The anomaly observable in the fact that the common law confined the testimonial disqualification to the marital parties and did not extend it to the other members of the family, has heretofore been adverted to. It has been further pointed out that in the civil law the disqualification was extended to include other family relationships. For the reason that the State of Louisiana has been traditionally committed to the civil law,[13] and for the further reason that the Civil Codes and Revised Civil Codes adopted by the State of Louisiana, preserved the civil law disqualifications until the revision of the year eighteen hundred and seventy,[14] it will be of more than passing interest to trace the various legislative pronouncements and the adjudications in this jurisdiction with respect to the problem stated. It should be noted at this point, however, that although the State of Louisiana espoused the Code Napoleon as its substantive law, the procedure and rules of evidence invoked in criminal trials were taken from the common law. And this by force of a legislative provision.[15] Thus the courts have always looked to the common law adjudications whenever questions of evidence and procedure in criminal trials have confronted them. Furthermore, the present unsatisfactory state of the law presents a typical example of the confusion rampant in other jurisdictions.

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13 Saunders, Lectures on the Civil Code of Louisiana (Ed. by A. J. Bonomo). (*Cf.* Introduction by H. P. Dart, p. xxxv.).

14 Revised Civil Code of Louisiana (1870) Art. 2281: "The competent witness of any covenant or fact, whatever it may be, in civil matters, is a person of proper understanding. The husband cannot be a witness for or against his wife, nor the wife for or against the husband . . ."

15 Acts of 1805, Chapt. 50, sec. 33, page 440. (Known as the Crimes Act.) "Et il est, de plus, décrété; Que tous les crimes, offenses, et délits ci-dessus désignës par le présent, seront pris, entendus et interpretés suivant et conformément a la loi commune d'Angleterre, et que les formes de l'accusation, (dépouillés cependant de toute prolixité inutile) le mode de judgement, les régles pour les preuves, et toutes les autres procéduers quelconques sur la poursuite desdits crimes, offenses et délits, en changeant ce qui doit être changé, se feront conformément à ladite loi commune, à l'exception de cequi sera autrement ordonne par le présent Acte."

LEGISLATION

Article 2260 of the Civil Code of 1825 provided that neither husband nor wife could be a witness for or against the other. It further provided that ascendants could not be witnesses for or against descendants, nor descendants for or against ascendants,[16] thus extending the common law doctrine of disqualification to include ascendants and descendants. It is further to be noted that this article created a legal disqualification and that there is no suggestion of privilege as yet. Article 2281 of the Revised Civil Code of 1870 confined the disqualification to husband and wife,[17] thus espousing the anomaly already cast upon the common law, at least insofar as one spouse was incompetent to testify for the other. The next legislation in Louisiana was in the form of an Act.[18] This Act declared who shall be a competent witness in a criminal case and still preserved the disqualification that neither husband nor wife could be a witness for or against the other, except as provided by law. There is still no suggestion of a possible right of the party-spouse in a criminal case to have the other spouse testify *for* the defendant if such testimony were desired. The next applicable Act[19] merely makes the spouse competent to testify when the other is on trial for bigamy. Act 157, adopted in 1916, presents the first suggestion of privilege. The last mentioned Act provides that "... the competent witness in any proceeding, civil or criminal, in court or before a person having authority to receive evidence, 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

16 Civil Code of Louisiana (1825) Art. 2260: "Le mari ne peut pas être temoin pour ou contre sa femme, ni la femme pour ou contre son mari; il en est de même des ascendans à l'egard de leurs descendans, et des descendans à l'egard de leurs ascendans."

17 *Op. cit. supra* note 14.

18 Act 29 of 1886.

19 Act 41 of 1904.

trial upon an indictment, complaint or other criminal proceeding, against the other . . ." In this Act it is recognized that private conversations between husband and wife shall be privileged. This relates to the third situation set out at the beginning of this paper. It will be well to observe at this point that the fundamental difference between disqualification and privilege is that the latter may be waived and the testimony received, whereas the former constitutes a legal impediment which no act of the parties can overcome.[20] On this basis then, private conversations between husband and wife could be received in evidence under Act 157 of 1916, providing the privilege is waived by the spouses. The most recent legislation in Louisiana with respect to this problem has been a provision adopted as a part of the Code of Criminal Procedure.[21] This Article, according to the terms of adoption of the Code of Criminal Procedure, supersedes all articles or acts in conflict with it.[22] In effect then, this provision in the Code of Criminal Procedure represents the present state of the statutory law on the subject and, so far as is applicable here, is merely a restatement of Act 157 of 1916, except that the former confines itself to criminal proceedings only. In brief, until the Act of 1916, the spouses were incompetent to testify in a case wherein the other was a party, either for or against the other. The privilege set-out in 2, *supra,* was not recognized as such but rather was put under class 1, *supra, i. e.,* incompetency. After the Act of 1916, this incompetency growing out of status was removed inferentially by a definition of the competent witness broad enough to include husband and wife. However, certain safeguards were established with respect to the marital relation, and private conversations were placed on the basis

20 4 Wigmore, *op. cit. supra* note 2, §§ 2175, 2196, 2197, 2242.

21 Code of Criminal Procedure for the State of Louisiana (1928) Art. 461.

22 Code of Criminal Procedure for the State of Louisiana (1928) Articles 582, 583.

of privilege. Finally, the legislature attempted to deal with situation 2, *supra,* fortified by all the confusion of ideas that had gone before.

In its obvious attempt to create a situation that would permit the testimony of the witness-spouse in behalf of the party-spouse and yet confine the qualification within those bounds, the legislature of the State of Louisiana used the following language:

". . . . 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 . . ." [23]

No purpose is served in an attempt to determine what a legislative body intended to accomplish by an enactment, especially when the language used is plain and unambiguous. However, when the language is not clear and contains ambiguity, something may be accomplished by a statement of the problem before the legislature, the various possible ends desired, and the approximation of the language used to the attainment of any one of these ends.[24] One aspect of the problem of this discussion, *i. e.,* the distinction between competency and privilege of the spouses, has been stated. The other aspect of the problem is one of policy. How desirable is the existence of the privilege of one spouse not to have the other testify adversely in a criminal case? To decide this involves a choice between the absolute desirability of truth, using every available source and the desirability of protecting certain social relationships from harms that might result from a full application of the search for truth, with a possible corresponding concealment of some material fact. The common law has traditionally selected the latter alternative, assuming that marital hardship and distrust will inevitably result from a relaxation of the rules set up to guard it. A powerful array of criticism has been directed against this

23 *Op. cit. supra* note 21.

24 Black, Handbook on the Construction and Interpretation of the Laws (2nd ed., 1911) p. 45 *et seq.*

attitude, however.[25] It is not the purpose of this discussion to weigh the relative merits of the two alternatives. Rather, it suffices for these purposes merely to state the problem in its entirety. A. The legislature might abolish then the privilege altogether on the ground that the securance of truth was more to be desired than the possible protection afforded to the marital relation. It is patent that the legislature of Louisiana has not seen fit to go this far. Is there any middle ground available? B. The legislature, failing to perceive that this privilege is distinct from the cloak of incompetency, might desire to partially remove the cloak (ill-fitting as it is) so as to make the witness-spouse competent to testify *for* the accused, if the accused so desired, and yet maintain the incompetency of the witness-spouse to testify *against* the party-spouse. In this situation the privilege (if such it may be so-called) certainly does not coincide with the common law privilege. The latter was a privilege not to have the witness-spouse testify against the party-spouse, thus recognizing a possible waiver and the reception of the adverse testimony if the privilege were not claimed. In example B. the witness-spouse would be totally incompetent to testify against the party-spouse, and the privilege, if any, is confined to the election of the party-spouse to have the favorable testimony of the witness-spouse or not, as he saw fit. C. Or again, the legislature might desire to maintain the incompetency just mentioned, *i. e.*, with respect to adverse testimony, and yet make the witness-spouse compellable with respect to favorable testimony. The effect of this would be to nullify the so-called privilege of the accused established in the last case, *i. e.*, to have the favorable testimony or not, and permit the State to comment upon the failure of the accused to call the witness-spouse in a proper case. D. Furthermore, it might be the purpose of the legislature to make the witness-spouse competent to testify either for or against

25 4 Wigmore, *op. cit. supra* note 2, § 2228-b.

the party-spouse, preserving the privilege to one or both not to have the offered testimony, and yet refuse the State the authority to call the witness-spouse to testify against the party-spouse. This would be nothing more than a retention of the ancient common law privilege considered together with the statutory removal of the incompetency attaching to the favorable testimony of the witness-spouse. It is apparent, from a review of the possible legislative antidotes, how confusing the problem can become when its real nature is not comprehended.

ADJUDICATIONS

A review of the cases in Louisiana which have construed Act 157 of 1916 and Article 461 of the Code of Criminal Procedure presents an even more appalling spectacle. The first case under Act 157 of 1916 was *State v. Bischoff*.[26] This was a prosecution for bigamy. On motion for a new trial, the defendant urged that his alleged wife was permitted to testify against him, but a *"per curiam"* (a practice usually followed in Louisiana) informed the reviewing court that no objection was made to her competency when she took the stand. The appeal court thereupon held that the objection had been raised too late since it was heard for the first time on the motion for a new trial. The opinion cited the Act, saying that it "permits" but does not compel one spouse to become a witness for or against the other, and the wife having testified without objection, the defendant cannot be heard to complain after conviction. The inference to be drawn from this decision is that Act 157 of 1916 created a privilege in favor of the party-spouse, which he had failed to claim and therefore he could not object to the testimony. The case does not decide, however, whether the privilege is *exclusively* that of the party-spouse. The next case construing Act 157 of 1916 is *State v. Webb*.[27] This was an

[26] 146 La. 748, 84 So. 41 (1919).
[27] 156 La. 952, 101 So. 338 (1924).

indictment for murder. The wife of the defendant was called by the State and testified against the defendant without objection until the State attempted to elicit testimony about a conversation that the witness had had with her husband. To this the defendant objected, which objection was over-ruled, and the defendant reserved an exception. In disposing of this portion of the record on appeal, the reviewing court said, in part:

". . . Act 157 of 1916 declares that the competent witness in any proceeding, civil or criminal, shall be a person of proper understanding. Under the express terms of this statute the wife was made a competent witness for or against her husband; the exercise of the privilege being left entirely to *her own inclination and discretion.* The husband was *powerless* under the terms of the statute to *prevent* his wife from testifying against him on any matters not expressly prohibited by law . . ."

How can this language be reconciled with that of the *Bischoff* case? In that case, a privilege claimable by the party-spouse was recognized but held to be waived. In the instant case the witness-spouse is the sole judge of whether or not he or she will testify. Thus the privilege now is exclusively that of the witness-spouse. The next case, *State v. Dejean,*[28] reiterates this doctrine wherein the witness-spouse was permitted to testify against the party-spouse over the objection of the latter. The last case to come before the Supreme Court of Louisiana[29] involved Article 461 of the Code of Criminal Procedure, which Article, as was stated *supra,* is a re-enaction of Act 157 of 1916, so far as here applicable. This case presented the Article squarely before the Court for interpretation and supplies an interesting example of the tremendous significance of the usually insignificant comma.

In *State v. Todd*[30] the defendant was indicted for murder and found guilty of manslaughter. On appeal two exceptions were particularly noted. In the trial court the defend-

28 159 La. 900, 106 So. 374 (1925).

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

30 *Op. cit. supra* note 29.

ant asked for the following instruction to the jury, which was refused and he took an exception:

"The court charges the jury that a wife has a right, under the law, to testify for or against her husband, but cannot be forced to do so, and in case she does not testify, her failure to testify shall not be construed against her husband."

The other exception particularly noted was that taken to the comment of the District Attorney to the jury on the failure of the defendant to call his wife to the stand when the evidence demonstrated that she, the defendant, and the deceased victim were the only witnesses to the alleged murder. In disposing of these exceptions, the reviewing court was perforce required to interpret the meaning of that part of Article 461 of the Code of Criminal Procedure which was:

". . . 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. . ."

In arriving at its decision, the prevailing opinion concluded that the words "against the other" related to the word "witness" and not to the phrase "indictment, complaint or other criminal proceeding." On the basis of this interpretation, it was not difficult for the court then to dispose of the exceptions. Since the Article was held to mean that the witness-spouse could not be compelled to be a witness against the other, its only effect was to prevent the State from calling the witness-spouse. The opinion goes on further to say:

"There is no sufficient reason why, if a spouse not on trial is to be a witness at all, such spouse should not be *compelled* [italics ours] to testify at the instance of the spouse on trial, as his or her witness . . ."

The court then concluded that the refusal to give the instruction asked for was not error, and that the objection to the comment of the District Attorney was not well-taken. The net result of this decision is that the witness-spouse is now compellable to testify when called by the other spouse (obviously in his favor), the State is powerless to compel the witness-spouse to testify (obviously against the defendant),

but still leaves open the question whether the witness-spouse might testify *against* the other at the former's election and against the wishes of the latter. The case of *State v. Bischoff* [31] answers the last question in the negative, and the case of *State v. Webb* [32] holds for the affirmative. Obviously this state of the law is anything but satisfactory. A vigorous dissent was voiced by Chief Justice O'Niell in the last-mentioned case, which opinion was concurred in by Mr. Justice Rogers. The dissenting opinion concerned itself chiefly with what it considered to be a flagrant violation of the rules of statutory interpretation and a manifest departure from the intent of the legislature as expressed in the Article under review. This phase of the problem has been commented upon elsewhere.[33]

What can be said then with respect to the state of the law in Louisiana? If Article 461 of the Code of Criminal Procedure is to be interpreted as if it read "Neither husband nor wife shall be compelled to be a witness against the other on any trial upon an indictment, complaint or other criminal proceeding," some very interesting conclusions may be drawn. The non-compellability of the spouses with respect to adverse testimony under this interpretation could be extended to all criminal prosecutions, whether the other spouse is a party or not. Thus is presented a situation comparable to that which anciently confronted the common law at the inception of this whole problem, and which was early disposed of by confining the privilege to anti-marital testimony unfavorable to the legal interests of the other spouse in the very case.[34] Suppose the witness-spouse were willing to give testimony detrimental to the other spouse in a criminal proceeding in which the latter was not a party. How would the Supreme Court of Louisiana react to the offer? If it were

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31 *Op. cit. supra* note 26.
32 *Op. cit. supra* note 27.
33 6 Tulane L. Rev. 489.
34 4 Wigmore, *op. cit. supra* note 2, § 2234.

held to be admissible, the testimony would no doubt cause just as much marital disturbance as if the spouse were a party. If the court denied the admissibility of the testimony, it would at the same time deny the force of the word "compel." To deny the power to compel merely negatives the ability to secure the end desired by the exercise of some possible outside effective force.[35] The person who is not compellable is not on that account denied the power to do the act in question, and may elect to do the act of his own volition. Therefore, to deny to the witness-spouse the right to elect to testify adversely in a collateral proceeding is tantamount to making the witness incompetent to testify against the other spouse. Is that what the legislature intended? Furthermore, assuming a privilege to have been created, whose privilege is it, that of the party-spouse, or that of the witness-spouse? According to the plain and obvious meaning of the words as above transposed, it would seem that the privilege (so-called) has been reserved to the witness-spouse. It is against the witness-spouse that no compulsion may be effected, thus confining the election to that spouse as well. This is more evident when it is remembered that, except for some legal prohibition applicable, either husband or wife is a competent witness in a criminal proceeding.[36] The prevailing opinion in the *Todd* case, however, held that the witness-spouse was compellable to testify when called by the party-spouse, assuming, no doubt, that the party-spouse would call the witness-spouse only for favorable testimony. Under this interpretation then in the *Todd* case, the only logical conclusion left for the court would be to hold that the witness-spouse may elect whether or not to

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35 *Cf.* Webster's New International Dictionary (1932): "Compel—to drive or urge with force, or irresistibly; to constrain; oblige; necessitate, whether by physical or moral force. Compel implies the exertion (frequently as if from without) of irresistible physical or moral force or constraint." *Cf.*, also, 2 Words and Phrases (3rd series), Judicial and Statutory definitions of "compel."

36 *Cf.* Code of Criminal Procedure for the State of Louisiana (1928) Art. 461, § 1.

take the stand against the other spouse, whether the latter is a party or not, and the spouse against whom the testimony is directed is powerless to object. How close does this conclusion approximate the common law privilege referred to in the beginning of this paper? This much is true: A distinction has now been made between testimony for the party-spouse and testimony against the party-spouse. The former, since it was a matter of incompetency, is now admissible since the witness-spouse falls within the definition of the competent witness, and therefore may testify. According to the *Todd* case, such testimony is compellable and the failure of the party-spouse to call the other may be commented upon adversely. So far as the adverse testimony of the witness-spouse is concerned, the claim of privilege not to testify reposes solely with the witness-spouse. Furthermore, the matter is no longer confined to cases wherein the other spouse is a party but extends to any "trial upon an indictment, complaint or other criminal proceeding." As to the confinement of the claim of privilege to the witness-spouse exclusively, this seems to conform to the reasons advanced by the common law for the existence of the privilege, *i. e.,* protection from condemnation by the witness-spouse, although clear-cut decisions are very few.[37] The latter extension of the matter to cases other than those in which the spouse was a party was never countenanced by the common law.[38]

If the matter were *res integra,* it would not seem difficult to determine what the legislature of Louisiana intended when it enacted the following provision:

> "That the competent witness in any criminal proceeding, in court or before a person having authority to receive evidence, shall be a person of proper understanding, but . . . 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."

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37 4 Wigmore, *op. cit. supra* note 2, § 2241.
38 4 Wigmore, *op. cit. supra* note 2, § 2234.

Proviso two is manifestly a restriction on the first statement. If proviso two were omitted, can any one doubt that a spouse would be a competent witness for any and all purposes, assuming the spouse to be a person of proper understanding? The proviso, then, was for the purpose of excepting a certain class from the operation of the first statement. If any one, not trained in the subtleties of legal jargon were asked his opinion as to meaning of clause two above, it is patent that he would say that the proposed witness-spouse could not be forced to testify on a trial in which the other spouse was a party unless the said witness elected so to do. This simply means that the testimony of the proposed witness-spouse, either for or against the party-spouse, will be received if the witness-spouse offers it, and not otherwise. The witness-spouse is not made incompetent to testify, nor is that witness under any legal obligation to testify. Upon this interpretation the conclusion must be that a privilege has been created solely for the benefit of the witness-spouse and it extends not only to the offer of adverse testimony but to favorable testimony as well. This analysis does not establish the common law privilege, it is true, but neither does it do violence to language. And, after all, what sanctity is there to the common law privilege? Finally, the above interpretation has the force of consistency behind it since it most closely approximates the exact nature of privilege, *per se, i. e.*, that it is a claim entirely personal to the witness called.[39]

If the policy of the claim of privilege is applied to the last analysis, what can be said? Not a great deal. If one spouse were a party in a criminal case and desired the testimony of the other spouse to prove an alibi, for instance (*i. e.*, favorable testimony), the witness-spouse might elect not to testify and thus some valuable extenuating evidence is lost to the defendant. It might be urged in reply, that a spouse would never refuse to testify in favor of the other. Such a

39 4 Wigmore, *op. cit. supra* note 2, § 2196.

reply simply begs the question, since there are any number of situations in which a spouse would be unwilling to take the stand, even to exonerate the other. However, if the legislature of Louisiana desired to invoke this policy, it would be more conducive to clarity if the Article under consideration [40] were amended by striking out the comma after the word "proceeding," and inserting a comma after the word "complaint." The enactment would then be identical with that in the Commonwealth of Massachusetts [41] where it has been held that the privilege is that of the witness-spouse.[42]

A review of the cases and an analysis of the legislative enactments which have attempted to solve this problem leaves one in a considerable quandry. Nothing positive can be concluded with respect to the actual policy of the State of Louisiana. Enough has been written to show that there is still a confusion of ideas growing out of the failure to appreciate the two distinct ideas with which the legislature is dealing. If the legislature is desirous of preventing one spouse from testifying against the other when a party-defendant, but still opens the way for the reception of the favorable testimony of the witness-spouse, it could be easily accomplished in simple and precise language. Instead of the proviso as now written, there should be substituted the following: "Neither husband nor wife shall be competent to testify against the other on any trial upon an indictment, complaint, or other criminal proceeding against the other." Such a provision puts the matter at rest. There is no longer any question of privilege; it now becames a matter of complete incompetence (*i. e.*, disqualification) so far as adverse testimony is concerned. Furthermore, it allows for the re-

40 Code of Criminal Procedure for the State of Louisiana (1928) Art. 461.

41 The General Laws of the Commonwealth of Massachusetts (Tercentenary ed., 1932) c. 233, § 20: ". . . . second: except as otherwise provided . . . neither husband nor wife shall be compelled to testify in the trial of an indictment, complaint, or other criminal proceeding against the other."

42 Commonwealth v. Spencer, 212 Mass. 438, 99 N. E. 266 (1912); Commonwealth v. Moore, 162 Mass. 441, 38 N. E. 1120 (1894).

ception of favorable testimony since for all other purposes the spouse qualifies as a competent witness under the definition heretofore alluded to. Finally, there would be no further doubt of the right of the State to comment upon the failure of the defendant-spouse to produce the favorable testimony of the other spouse, since the question of privilege (so-called) would be completely eliminated, even as to favorable testimony. What was the privilege not to have the adverse testimony of the witness-spouse at common law, would now be complete disqualification.

The problem confronting the legislature and the courts in the State of Louisiana is not unlike that encountered in the other jurisdictions. All of the states have employed legislative antidotes with varying degrees of success. Almost without exception, there has been a fusion of ideas growing out of a failure to recognize the distinction which the common law attempted to establish between the incompetency of a spouse to testify favorably and the privilege of a spouse not to give adverse testimony. Those states that have attempted to preserve some form of privilege have inevitably inaugurated a complexity of adjudications which it would be impossible to reconcile. Others have dealt with the problem on the basis of incompetency. These states have declared that the witness-spouse is incompetent to testify against the other when on trial in a criminal case. Among the latter states may be numbered Texas. The Texas Code of Criminal Procedure provides, in part:

". . . The husband and wife may, in all criminal actions be witnesses for each other; but they shall in no case testify against each other except in a criminal prosecution for an offense committed by one against the other." [43]

Pursuant to this legislative pronouncement, it has been held that when a spouse is a competent witness, he or she

[43] Vernon's Annotated Criminal Statutes of the State of Texas, Art. 714 (794-795).

can be compelled to testify.[44] Further, a spouse cannot testify against the other even with the consent of the spouse on trial, except for a crime committed against the other.[45] Nor can the disqualification of a spouse be waived, thus completely setting at rest any possible question of privilege.[46]

Conclusion

It is possible that some time in the future legislatures and courts may perceive that the only relation that the incompetency of a spouse to testify for the other bears to the privilege of a spouse not to have or give adverse testimony against the other, is that both ideas pertain to husband and wife. Aside from this, the concepts have no logical nor legal kinship, as much as the courts and legislatures have been prone to treat them as bed-fellows. It is possible, too, that the legislatures will agree upon a definite policy with respect to the desirability of the truth at whatever the cost as opposed to the notion that demands protection to the marital state from the disrupting (if such they are) influences produced by the disclosure of anti-marital facts.[47] It is hoped that when this day arrives, the respective legislatures will express their policies in clear and precise language.

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44 Alonzo v. The State, 15 Tex. Crim. App. Rep. 378 (1884); Bramlett v. The State, 21 Tex. Ct. of App. Rep. 611 (1886).

45 Brock v. State, 44 Tex. Crim. Rep. 335, 71 S. W. 21 (1902).

46 Eads v. State, 74 Tex. Crim. Rep. 628, 170 S. W. 145 (1914).

47 *Cf.* Schouler, Husband and Wife 85; Stimson, Popular Law-Making (1910) 299.