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Evidence--Competency of Husband and Wife

Albert R. Jones

University of Kentucky

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terms, the extent of an easement acquired by prescription is governed by the character and the extent of the user during the prescriptive period plus reasonable deviations in degree but not in character, from the original user, so long as such deviations do not impose a materially greater burden upon the servient estate.

In the determination of whether or not the dominant owner has exceeded his rightful use of a prescriptive easement, we are not aided by the distinctions between character, or nature, and degree, of the use. This is due largely to the fact that we are unable to reach any satisfactory working definitions of these terms. Apparently the courts merely say that an excessive use is a deviation in character or a deviation in degree. As an example of the arbitrariness of the courts in this matter, let us compare Atwater v. Bodfish, supra, and Parks v. Bishop, supra. In the former, carrying products from cultivated land was held to be a deviation in character from the original use of carrying wood from the same land when it was in an uncultivated state. In the latter, using the dominant estate for a storehouse and for a manufactory, where formerly it was used as a paint shop, a carriage shop, and a blacksmith shop, was held to be, not a deviation in character, but a change in the degree of the use. The writer is of the opinion that the real distinction between these two cases is that in the former a materially greater burden was imposed on the servient estate, whereas in the later case the added burden to the servient estate was not materially greater.

Thus it is submitted that the proper method of handling the problem of the extent of a prescriptive easement—a method which will reach the same results as have the courts—is to hold that the user acquired is governed by the prescriptive user, plus reasonable deviations therefrom, as long as such deviations do not impose a materially greater burden upon the servient estate.

WILLIAM MELLOR.

EVIDENCE—COMPETENCY OF HUSBAND AND WIFE.

The recent case of Funk v. U. S., 54 Sup. Ct. 212 (1933), considers the problem of the common law disqualification of husband and wife to testify for or against the other in criminal cases. In that case the petitioner had twice been tried and convicted in a Federal District Court upon an indictment for conspiracy to violate the National Prohibition Act. The case reached the Supreme Court by the grant of a writ of certiorari which was limited to the question as to what law was applicable to the determination of the competency of the wife of the petitioner as a witness in his behalf. The court, in reversing the conviction meted out by the District Court and ruling that the wife was a competent witness in her husband’s behalf, said: “a refusal to permit the wife, upon the ground of interest, to testify in behalf of her husband, while permitting him, who has the greater interest, to
testify for himself, presents a manifest incongruity." In making this departure from the usual line of decisions, Sutherland, J., who delivered the opinion, remarked: "The public policy of one generation may not, under changed conditions, be the public policy of another."

At common law, and under some statutes, husband and wife are incompetent as witnesses for or against each other in either civil or criminal proceedings. Barron v. Anniston, 157 Ala. 399, 48 So. 58 (1908); Reaves v. Coffman, 87 Ark. 60, 112 S. W. 194 (1908); Lucas v. State, 23 Conn. 18 (1854); State v. Smith, 5 Pennew. 1, 57 Atl. 365 (1904); Ex. p. Bevillé, 58 Fla. 170, 50 So. 685 (1909); Stanford v. Murphy, 63 Ga. 410 (1879); Schreffler v. Chase, 245 Ill. 395, 92 N. E. 272 (1910); Copeland v. State, 60 Ind. 394 (1878); Karney v. Paisley, 13 Iowa 89 (1862); Jenkins v. Lewis, 25 Kan. 332 (1881); Allen v. Commonwealth, 134 Ky. 110, 119 S. W. 795 (1909); State v. Pain, 48 La. Ann. 311, 19 So. 138 (1896); Burlen v. Shannon, 14 Gay 433 (1860); Finkbein v. State, 94 Miss. 777, 45 So. 1 (1909); State v. Willis, 119 Mo. 485, 24 S. W. 1008 (1894); Blain v. Patterson, 47 N. H. 523 (1867); Bird v. Davis, 14 N. J. Eq. 467 (1862); Wilke v. People, 53 N. Y. 525 (1873); Anonymous, 3 N. C. 127 (1800); Schultz v. State, 32 Ohio St. 276 (1877); Nia v. Gilmor, 5 Okla. 740, 50 Pac. 133 (1897); Canole v. Allen, 223 Pa. St. 156, 70 Atl. 1053 (1908); Briggs v. Titus, 7 R. I. 441 (1863); Hyden v. Hyden, 6 Baxt. 406 (1873); Simpson v. Brotherton, 62 Tex. 170 (1884); Boyce v. Bolster, 79 Vt. 40, 64 Atl. 79 (1906); Bowman v. Reinhardt, 89 Va. 435, 16 S. E. 279 (1892); Grabowski v. State, 126 Wis. 447, 105 N. W. 805 (1905).

The disqualification of husband and wife seems to have been recognized in the common law from the time of Lord Coke, 1 Wigmore, Evidence (2d ed., 1923), Sec. 600; 4 ibid., Sec. 2247. Certain exceptions were recognized by reason of necessity, such as crimes of personal violence by the husband against the wife. 1 Wigmore, Evidence (2d ed., 1923), Sec. 612; 4 ibid., Sec. 2239. Dean Wigmore states the common law view in the light of a distinction between a privilege of one spouse not to testify against the other, and absolute incompetency in either situation. 33 Harv. L. Rev. 873 (1920).

From 1840 to 1870 legislation by degrees removed the disqualification in England and the United States, though in the latter jurisdictions the process was tediously slow. 1 Wigmore, Evidence (2d ed., 1923), Sec. 602; 5 ibid., Sec. 2333. The rule is, at this time, considerably modified by statutes making the husband and wife competent to testify for or against each other in some, although not in all, instances. Thomas v. State, 155 Ala. 125, 46 So. 771 (1908); Fitzgerald v. Livermore, 13 Pac. 187 (1887); Rivers v. State, 118 Ga. 42, 44 S. E. 859; Larson v. Carter, 14 Idaho 511, 94 Pac. 825 (1908); Johnson v. McGregor, 157 Ill. 350, 41 N. E. (1895); Hutchison v. State, 67 Ind. 449 (1879); Auchanpaugh v. Schmidt, 77 Iowa 18 (1889); Smith v. Doherty, 109 Ky. 616, 60 S. W. 380 (1901); Martin v. Derenbeckner, 116 La. 495, 40 So. 849 (1906); Fowler v. Tidd, 15 Gray 94 (1860); O'Toole

The statutes in these jurisdictions usually make the following exceptions to the common law rule of disqualification: (1) where the spouse offered as a witness is also a party to the action; (2) where the trial concerns the separate estate of the wife; (3) where the wife, if unmarried, would be a plaintiff or defendant in the action; and (4) where the transaction in issue was alleged to have been conducted by the wife as agent for the husband. 1 Wigmore, Evidence (2d ed., 1923), Sec. 613.

In a few states the relationship of husband and wife has no effect on the competency of a witness; Ex. p. Belville, 58 Fla. 170, 50 So. 685 (1909); State v. McCord, 8 Kan. 232, 12 Am. Rep. 469 (1871); Thompson v. Warleigh, 48 Me. 66 (1881); Richardson v. State, 103 Md. 112, 63 Atl. 317 (1906); Matteson v. N. Y. Cent. Ry. Co., 62 Barb. 364 (1862); State v. Reynolds, 48 S. C. 384, 26 S. E. 679 (1897); Guillame v. Flannery, 21 S. D. 1, 108 N. W. 255 (1906), except as respects confidential communications. Most of the states which abolished incompetency of the husband and wife retain the rule in the form of a privilege as to testimony against the spouse, and all provide for privilege as to confidential communications. 1 Wigmore, Evidence (2d ed., 1923), Secs. 448, 620.

The common law rule still obtains except as modified or abrogated by express statutes. Phares v. Barbour, 49 Ill. 370 (1868); Roberts v. Porter, 78 Ind. 139 (1881); Ward v. Dickson, 96 Iowa 708, 65 N. W. 997 (1896); Turpin v. State, 55 Md. 462 (1881); State v. Armstrong, 4 Minn. 261 (1860); Howard v. Brower, 37 Ohio St. 402 (1881); Paul v. Leavitt, 53 Mo. 595 (1873); Donnelly v. Smith, 7 R. I. 12 (1861); Owen v. State, 89 Tenn. 698, 16 S. W. 114 (1891); Watkins v. Wortman, 19 W. Va. 78 (1881); Crawford v. State, 98 Wis. 623, 74 N. W. 537 (1898). Since the basis of the rule was public policy, on the ground that to admit such testimony would endanger the harmony and confidence of marital relations, and, moreover, would subject the witness to the temptation to commit perjury, statutes removing the disqualification arising from interest do not remove the disqualification arising from the relationship of husband and wife. Dawley v. Ayers, 23 Cal. 108 (1863); Haworth v. Norris, 28 Fla. 763, 10 So. 18 (1891); Mitchinson v. Gross, 53 Ill. 368 (1871); Stanley v. Stanton, 36 Ind. 445 (1871); McKee v. Frost, 46 Me. 239 (1858); Kelley v. Drew, 12 Allen 107, 90 Am. Dec. 138 (1866); Young
The decisions in the federal courts with regard to this question, are, for the most part, inconsistent with the result reached in the case at hand. The federal courts have, up to the present time, followed the decision in the leading case of *Jin Fuey Moy v. U. S.*, 254 U. S. 189 (1920), which arbitrarily ruled that a wife was incompetent to testify for her husband because of her interest in the event. *Krashowitz v. U. S.*, 282 F. 599, 282 F. 601 (1922); *U. S. v. Davidson, et al.*, 288 F. 662 (1922); *Haddad v. U. S.*, 294 F. 536 (1923); *Liberato v. U. S.*, 12 F. (2d) 564 (1928); *U. S. v. Swiczdenski*, 18 F. (2d) 688 (1927); *Barton, et al. v. U. S.*, 25 F. (2d) 967 (1928); *Fisher v. U. S.*, 32 F. (2d) 604 (1929). The *Jin Fuey Moy* case was a prosecution for the violation of the Anti-Narcotic Act and the court in its opinion stated that not only could the wife not testify in behalf of her husband to prove his innocence, but also could not contradict the testimony of a certain witness for the government who had testified to certain matters as having transpired in his presence. The basic reason why the federal courts have up to the present time, adhered so closely to the old established rule is aptly expressed in the case of *Colston v. U. S.*, 51 F. (2d) 178 (1931), which said that in criminal cases, within the federal courts, the competency of a witness is determined by the common law of the particular jurisdiction as it existed when the state was admitted to the Union. It necessarily follows that since at the time of admittance to the union each state's common law provided for disqualification of husband and wife, this rule would obtain in the federal courts established in those states.

Kentucky decisions seem to support the majority of the various state decisions to the effect that except for approximately six exceptions, the general rule of incompetency applies. *Commonwealth v. Woefs*, 121 Ky. 48, 88 S. W. 1061 (1905); *Joseph v. Commonwealth*, 30 K. L. R. 638, 99 S. W. 311 (1907); *Rultand v. Commonwealth*, 160 Ky. 77, 169 S. W. 584 (1914); *Lawson v. Commonwealth*, 160 Ky. 180, 169 S. W. 587 (1914); *Thomas v. Commonwealth*, 195 Ky. 623, 243 S. W. 1 (1923); *Vaughn v. Commonwealth*, 204 Ky. 229, 263 S. W. 752 (1924). Kentucky Code, Sec. 606, provides that husband and wife are incompetent to testify for or against each other except (1) in an action for lost baggage against a common carrier, innkeeper, or wrongdoer, or (2) in an action which might have been brought by or against the wife if she had been unmarried, or (3) when a husband or wife is acting as agent for his or her consort, or (4) where the husband or wife is charged with the commission of a crime under Chapter 19, p. 70 of the Acts of 1922 (Ky. Statutes, Sec. 3311-1), or (5) in a prosecution for the crime of bigamy.
In conclusion it may be noted that at the present time the various privileges and disqualifications surrounding the testimony of husband and wife are being diminished with surprising rapidity by frequent code amendments and by judicial decisions. An entire abolition of these privileges and disqualifications, of doubtful benefit, should be effected. This will probably come about in time through judicial decisions since flexibility and capacity for growth are the peculiar boasts of the common law. Sutherland, J., aptly puts it when he says, "the fundamental basis upon which all rules of evidence must rest—if they are to rest upon reason—is their adaptation to the successful development of the truth". And reason dictates that a rule of evidence, at one time thought indispensable to an expedient ascertainment of the truth, should yield to the experience of a new generation, if that experience justifies the conclusion that the old rule is fallacious.

ALBERT R. JONES

AUTOMOBILES—THE FAMILY PURPOSE DOCTRINE IN KENTUCKY.

The Kentucky court has uniformly upheld the family purpose doctrine from the beginning of its adjudication in this state, either by actual decision or by dictum. *Stowe v. Morris*, 147 Ky. 388, 144 S. W. 62 (1912); *Miller v. Weck*, 186 Ky. 552, 217 S. W. 904 (1920); *Holland v. Goode*, 188 Ky. 525, 222 S. W. 950 (1920); *Doss v. Monticello Electric Light and Power Co. & Myers*, 193 Ky. 499, 36 S. W. 1046 (1922); *Sale v. Atkins*, 206 Ky. 224, 267 S. W. 223 (1924); *Thixton v. Palmer*, 210 Ky. 838, 276 S. W. 971 (1925); *Rauckhorst v. Kraut*, 216 Ky. 323, 287 S. W. 895 (1929); *Kennedy v. Wolf*, 221 Ky. 111, 238 S. W. 188 (1927); *Bradley v. Schmidt*, 223 Ky. 784, 4 S. W. (2d) 703 (1928); *Malcolm v. Nunn*, 226 Ky. 225, 10 S. W. (2d) 817 (1928); *Buster v. Vogel*, 227 Ky. 735, 13 S. W. (2d) 1028 (1929); *Steel v. Age's Adm'x*, 233 Ky. 714, 26 S. W. (2d) 563 (1930); *Marsee v. Bates*, 235 Ky. 60, 29 S. W. (2d) 632 (1930); *Wallace v. Hall*, 235 Ky. 739, 32 S. W. (2d) 324 (1930); *Craghead v. Hafele's Adm'x*, 236 Ky. 250, 32 S. W. (2d) 324 (1930); *United States Fidelity & Guaranty Co. v. Hall*, 237 Ky. 355, 35 S. W. (2d) 550 (1931); *Myer's Adm'x v. Brown*, 250 Ky. 64, 61 S. W. (2d) 1052 (1933). The doctrine places liability on the owner of an automobile, which is purchased and maintained for the pleasure of his, or her family for negligent injuries inflicted by the vehicle while it is being used by some member with his consent, express or implied, on the theory that it is the owner's business to furnish pleasure for the family. The court has based its decisions mainly on the principal and agent, and master and servant theory. *Stowe v. Morris*, supra; *Rauckhorst v. Kraut*, supra; *Myer's Adm'x v. Brown*, supra. It is preferable to support the doctrine on the relationship of master and servant, rather than on that of principal and agent, since a principal is liable only for torts (expressly or impliedly) authorized, while a master is liable for all torts committed by the servant, while engaged within the