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Rules Governing Competency of Witnesses in Criminal Trials in Federal Courts

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gation based upon evidence,[12] to declare that in its opinion repression was both desirable and necessary of groups of all kinds—whether workingmen or non-workingmen—which advocate force for the accomplishment of their objects; and whatever arguments of undesirability or unsoundness are raised by doubting Thomases must be addressed to their constituents and not to the courts.[13]

Such is the viewpoint of the majority opinion in the instant case, which is has consistently maintained in analogous cases which have come before it in the past.[14] From a constitutional standpoint, the conclusions reached seem impregnable; with reference to the desirability of such legislation, opinions will differ. But the strong urge of the present seems to be the sacrifice of many rights once regarded as fundamental in the paramount interest of sound government, or, in the words of Mr. Justice Brandeis, "exalting order at the cost of liberty."

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EVIDENCE—RULES GOVERNING COMPETENCY OF WITNESSES IN CRIMINAL TRIALS IN THE FEDERAL COURTS.—[Federal] The lack of a satisfactory statute on the subject has led to more or less doubt as to the precise rules governing the admissibility of evidence and the competency of witnesses in criminal prosecutions in the federal courts, and a questionable opinion by the Supreme

12. *Wigmore* "The Abrams Case" 14 ILLINOIS LAW REVIEW 539; *People* v. *Lloyd* (1922) 304 Ill. 23, 136 N. E. 505; *People* v. *Ruthenberg* (1924) 229 Mich. 315, 210 N. W. 358. In *Gitlow* v. *New York*, Mr. Justice Sanford said: "A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the State is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration. It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency." 45 Sup. Ct. Rep. 625, 631.

13. The dissenting justices, by insisting that the statute cannot be constitutional unless construed to mean the presence of an imminent, serious, real danger to the State, appear to be doing that which they strongly criticized in the majority when the latter overthrew the minimum wage act of the District of Columbia in *Adkins* v. *Children's Hospital* (1923) 261 U. S. 525, 43 Sup. Ct. Rep. 394, 67 L. Ed. 785—namely, postulating an "inarticulate major premise" in order to achieve a certain conclusion desired by them, and thus holding the statute unconstitutional.

14. See cases cited, supra, note 6. It is, of course, well established that great weight must be given by the courts to the declaration of a state legislature of the urgency and wisdom of the statute as a means to reach the result contemplated. Unless the statute is "clearly and palpably" unreasonable or arbitrary, the sound principle has been to uphold the legislation under judicial scrutiny. Necessarily, conclusive finality could not be sanctioned, for this would enable the state to set itself above the inhibitions of the federal Constitution. Tested by these well-settled criteria, the dissenting justices seem to be departing into "heretical" fields. Consult *Warren* "Congress, the Constitution, and the Supreme Court" ch. 9.

Court[1] a few years ago increased the uncertainty. A recent decision[2] by the circuit court of appeals of the ninth circuit raises the question, whether the rules are uniform throughout the United States, or whether they vary according to the law of the particular state, in which the federal court functions, as the state rule happened to be at the time of the passage of the judiciary act in 1789, or at the time of the subsequent admission of the state. At common law one spouse was incompetent as a witness for the other, and at the time of the passage of the judiciary act that disability had not been removed in any of the states. Subsequent legislation in most of the states has qualified husband and wife as witnesses for each other in criminal cases, but there is no corresponding federal statute.[3] Accordingly in criminal prosecutions in the federal courts sitting in various states there has been a uniform line of decisions that the husband or wife of the defendant was not a competent witness.[4]

In the *Rendleman* case the district court excluded the wife of the defendant in accordance with what was assumed to be the general federal rule.

The court of appeals reversed the case on the ground that the competency was to be determined by the law of the State of Washington at the time of its admission as a state, and that it appeared that prior to that time the territorial legislature had removed the common law disqualification.

The same court had reached a similar conclusion in an earlier case[5] involving the competency of an atheist. And in the fifth circuit the majority opinion[6] took the same view in a case involving the competency of a witness who had been convicted of a felony, where that disability had been removed prior to the admission of the state. According to the view of these cases, the husband or wife of a defendant is incompetent in a criminal prosecution in a federal court sitting in one of the older states where the common law disqualifications had not been removed in 1789, but is competent where the court sits in one of the newer states where modern legislation had taken place prior to its admission to the Union. It is somewhat shocking to think that in a prosecution for a violation of a criminal statute of the United States, one defendant should stand in a worse position than another because the federal court in which he is tried sits in one of the older states. This precise question has not been passed on by the Su-

1. *Rosen* v. *United States* (1918) 245 U. S. 467.

2. *Rendleman* v. *United States* (1927) 18 Fed. (2nd) 27.

3. The act of March 3, 1887, qualified the husband or wife of the defendant in prosecutions for bigamy, polygamy, or unlawful co-habitation.

4. *Hendrix* v. *United States* (1910) 219 U. S. 79; *Jin Fuey Moy* v. *United States* (1920) 254 U. S. 189; *Lowe* v. *United States* (1922) 282 Fed. 597; *Kraskowitz* v. *United States* (1922) 282 Fed. 599; *Allen* v. *United States* (1924) 4 Fed. (2nd) 688.

5. *Ding* v. *United States* (1918) 247 Fed. 12.

6. *McCoy* v. *United States* (1918) 247 Fed. 861.

preme Court. It is important therefore to consider whether its decisions on related questions necessarily lead to this unfortunate lack of uniformity.

The general question as to what rules of evidence were to be applied in criminal prosecutions in the federal courts first came before the Supreme Court in the *Reid* case[7] in 1851. Reid and Clements had been jointly indicted in the United States circuit court for the district of Virginia for the crime of murder on the high seas committed on an American ship. Reid was tried separately, and called his co-indictee as a witness, insisting on his competency under a statute of Virginia passed in 1848, and that section[8] of the judiciary act of 1789, providing that the laws of the several states, except as otherwise provided, should be the rules of decision in trials at common law in the federal courts.

The trial court excluded the witness, but certified the question to the Supreme Court as authorized by statute. It should be noticed that it was not suggested or contended that a co-indictee was a competent witness for the defendant unless the Virginia statute of 1848 was applicable to a criminal trial in a federal court. The applicability of the Virginia statute, passed long after the judiciary act, was the all important question under consideration.

The opinion, delivered by Mr. Chief Justice Taney, answered the question in the negative, that the section thirty-four of the judiciary act was limited to civil cases, because it could not be assumed that Congress intended to subject federal criminal prosecutions to varying and changing state rules, and hence that the incompetency of the witness was not affected by the subsequent Virginia statute.

But if subsequent state legislation was not to govern, the court felt that it was necessary to indicate what rules should be applied, and the greater part of the opinion is taken up with that problem. On this subject the opinion states:

"Neither could the court look *altogether* to the rules of the English common law, as it existed at the time of the settlement of this

7. *United States* v. *Reid* (1851) 12 How. 361. Until quite modern times few criminal cases came before the Supreme Court since the statute did not provide for review by writs of error. *United States* v. *Gooding* (1827) 12 Wheat. 460.

In the few cases where a question of evidence was certified prior to the *Reid* case, it seems to have been assumed without question that the common law governed. In the *Gooding* case, the question certified involved the admissibility of a statement by the defendant's agent.

In *United States* v. *Murphy* (1842) 16 Pet. 203, the competency of the informer was certified and sustained on the basis of the English decisions.

8. Act of September 24, 1789, ch. 20, sec. 34, now Rev. Sts. sec. 721:

"The laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

country, for reasons that will presently be stated.[9] Nor is there any act of Congress prescribing in express words the rule by which the courts of the United States are to be governed, in the admission of testimony in criminal cases. But we think they may be found with sufficient certainty, not indeed in direct terms, but by necessary implication, in the acts of 1789 and 1790, establishing the courts of the United States, and providing for the punishment of certain offenses. And the law by which, in the opinion of this court, the admissibility of testimony in criminal cases must be determined, is the law of the state, as it was when the courts of the United States were established by the judiciary act of 1789. . . .

"The only known rule upon the subject which can be supposed to have been in the minds of the men who framed these acts of Congress, was that which was then in force in the respective states, and which they were accustomed to see in daily and familiar practice in the state courts. . . .

"But no law of a state made since 1789 can affect the mode of proceeding or the rules of evidence in criminal cases; and the testimony of Clements was therefore, properly rejected."

The case is clear and certain on the primary problem, that subsequent state legislation was not applicable. The implications as to the prior law of the state will be noticed later.

The *Logan* case,[10] decided in 1892, raised a similar question in a criminal prosecution in a federal court sitting in the State of Texas.

The trial court admitted two witnesses on behalf of the prosecution, one of whom had been convicted of a felony in the court of another state, and the other by a Texas court. The Texas felon had received a general pardon. The Republic of Texas had adopted the common law in general terms. The legislature of the *State* of Texas had subsequently passed a statute disqualifying persons convicted of felony by the courts of any state, unless they had received a pardon expressly removing all disabilities.

In 1862, 1864 and 1865, Congress had passed several evidence acts which had been consolidated into section 858[11] of the revised statutes, providing that no witness should be excluded in any action on account of color, nor in any civil action because he was a party; and that in all other respects the laws of the state in which the court was held should be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty.

It is to be noted that the two witnesses objected to were clearly competent at common law, the one because a foreign con-

9. The reasons pointed out in the opinion for this limitation were certain English abuses in criminal trials in the early part of the seventeenth century, which had been guarded against in the bill of rights in the various state constitutions, and hence it could not be supposed that Congress intended to perpetuate certain objectionable practices, which had long since disappeared.

10. *Logan* v. *United States* (1892) 144 U. S. 263.

11. Now repealed.

viction had no extra-territorial effect, and the other because he had received a general pardon, and hence the defendant in his assignment of error was forced to rely on the subsequent Texas statute which he claimed was made applicable by that clause of section 858 of the revised statutes making the state law govern in trials at common law, etc.

The Supreme Court adopted the reasoning of the *Reid* case limiting a similar provision of the judiciary act to civil cases, and accordingly held that the witnesses were not disqualified by the Texas statute:

"For the reasons above stated, the provisions of section 858 of the revised statutes, that the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty, have no application to criminal trials; and, therefore, the competency of witnesses in criminal trials in the courts of the United States held within the State of Texas is not governed by a statute of the state which was first enacted in 1858, but, except so far as Congress has made specific provisions upon the subject, is governed by the common law, *which as has been seen, was the law of Texas before the passage of that statute and at the time of the admission of Texas into the Union, as a State.*"

This concluding recital of the fact that the common law was in force in Texas at the time of its admission as a state furnishes the basis for the assumption by the circuit court of appeals that it was *because* the common law was in force in Texas when admitted to statehood that the federal court was to apply the common law, and for the same reason, since a statute was in force in Washington at the time of its admission, the federal court was bound to apply the statute. The whole contention of the defendant in the *Logan* case, as in the *Reid* case, was that the court was bound to apply a subsequent state statute because a federal statute apparently so declared. If that contention failed, there was no dispute on the proposition that it must be governed by the common law, but whether because Texas had adopted the common law or because the judiciary act had impliedly adopted the common law was of no particular importance in that case. Hence a casual statement in the *Logan* case furnished an extremely slender basis for the determination of such a question when it did become important.

The same year the *Benson* case[12] came before the court, and has been said to overturn the *Reid* case, though how it does so is difficult to see since it was assumed by court and counsel that the competency of the witness in that case was governed by the common law.

The defendant was indicted and tried in the United States circuit court for the district of Kansas for murder committed on the Fort Leavenworth military reservation. Whether the com-

12. *Benson* v. *United States* (1892) 146 U. S. 325.

mon law was in force in Kansas at the time of its admission is not stated, though it may be assumed.

A co-indictee, not on trial, was received as a witness for the prosecution. The defendant insisted that the co-indictee was incompetent at common law and relied on the *Reid* case in support of that proposition. The court found that there was a conflict of opinion as to the common law rule, and that a difference had been taken between the competency of a co-indictee as a witness for the prosecution and as a witness for the defense:

> "The precise question in that case *(United States* v. *Reid)* was as to the right of the defendant to call his co-defendant, and not that of the government to call the co-defendant, and a distinction has been recognized between the two cases. It is true that the reasons given for the exclusion of the witness in one are largely the same as those given for his exclusion in the other. . . . It was assumed both in this court and in the circuit court that by that law (the common law in Virginia) the co-defendant was incompetent. . . . We do not feel ourselves, therefore, precluded by that case from examining the question in the light of general authority and sound reason. . . . The last fifty years have wrought a great change in these respects, and today the tendency is to enlarge the domain of competency."

The court accordingly held the witness competent for the prosecution as a matter of common law. It is obvious that the *Benson* case throws no light on the problem in hand, though it may throw doubt on the assumption made in the *Reid* case that the common law disqualified a co-indictee as a witness for the defence. It also doubtless implied that the development of the common law did not stop in 1789.

In 1910 the *Hendrix* case[13] came before the court to review a ruling of a federal court sitting in the State of Oklahoma, excluding the wife of the defendant as a witness on his behalf.

This ruling was affirmed with the brief statement that it was clearly correct, presumably on the ground that the subsequent qualifying statute of Oklahoma was inapplicable. There was no discussion as to what the law of Oklahoma was at the time of its admission.

The next was the *Rosen* case[14] in which the United States district court for the eastern district of New York admitted as a competent witness for the government a person who had been convicted of a felony by a state court in New York and sentenced to the state reformatory.

It was insisted by the defendant that the witness was incompetent because that was the rule of the common law in force in New York in 1789. In an opinion by Mr. Justice Clarke the court announced that the *Reid* case had been shaken by the *Benson*

13. *Hendrix* v. *United States* (1910) 219 U. S. 79.
14. *Rosen* v. *United States* (1920) 245 U. S. 467.

case and that the question was to be decided in the light of sound reason and authority:

"While the decision in *United States* v. *Reid* supra, has not been specifically overruled, its authority must be regarded as seriously shaken by the decisions in *Logan* v. *United States* 144 U. S. 263-301, and in *Benson* v. *United States* 146 U. S. 325. . . . Accepting as we do the later, the *Benson* case, rather than that of the earlier decision, we shall dispose of the first question in this case, 'in the light of general authority and sound reason.' . . . Since the decision in the *Benson* case we have significant evidence of congressional opinion upon this subject in the removal of the disability of witnesses convicted of perjury, revised statutes, sec. 5392, by the enactment of the federal criminal code in 1909 with this provision omitted and sec. 5392 repealed. . . .

"Satisfied as we are that the legislation and the very great weight of judicial authority which has developed in support of this modern rule, especially as applied to the competency of witnesses convicted of crime, proceed upon sound principle, we conclude that the *dead hand of the common law rule of 1789* should no longer be applied to such cases as we have here, and that the ruling of the lower courts on this first claim of error should be approved."

These extraordinary statements certainly do not clarify the law, or throw any light on the uniformity problem. If, as the unnecessarily discredited *Reid* case declared, the judiciary act impliedly adopted the existing common law in 1789, that would not so crystallize it as to exclude subsequent judicial modification and development. Many of the states have by statute adopted the common law, but it has continued to grow and change in its new environment. Whether the court correctly decided the common law problem of the competency of a convicted felon is beyond the scope of this inquiry. The witness might well have been held competent on the ground that the conviction of a person by the courts of one sovereignty did not disqualify in the courts of another. The *Logan* case so held in the case of a witness convicted in another state, and a circuit court of appeals has sustained the competency of a witness convicted by a court of the state in which the federal court sat.[15]

At all events the *Rosen* case throws no light on the effect of qualifying legislation in a particular state at the time of its admission, where admittedly a different rule is applied by the federal courts in other localities. The last case[16] came before the court in 1920 to review the action of the United States district court for the western district of Pennsylvania in excluding the wife of the defendant as a witness in his behalf.

In an opinion by Mr. Justice Pitney the ruling was sustained on this statement:

"But a single point remains—hardly requiring mention—the refusal to permit the defendant's wife to testify in his behalf. It is conceded

15. *Brown* v. *United States* (1916) 233 Fed. 353, L. R. A. 1917-A, 1133, annotated.

16. *Jin Fuey Moy* v. *United States* (1920) 254 U. S. 189.

that she was not a competent witness for all purposes, a wife's evidence not having been admissible at the time of the first judiciary act, and the relaxation of the rule in this regard by sec. 858, revised statutes, being confined to civil actions. *Logan* v. *United States* 144 U. S. 263, 299-302; *Hendrix* v. *United States* 219 U. S. 79, 91."

So far as the writer has been able to discover there are no other decisions by the Supreme Court that have any bearing on the problem in hand. If some of the language of the opinion in the *Reid* case is taken out of its setting, we have an apparently clear statement that the law of the state in 1789 is to govern in cases tried in one of the original states. And there is undoubtedly an implication in the *Logan* case that the law of Texas at the time of its admission was to govern in criminal prosecutions in the federal courts sitting in that state. There is also an apparent analogy—in the one case the law of Virginia when the judiciary act took effect, and in the other the law of Texas when the judiciary act took effect there by its admission as a state.

But it is improbable that the opinion in the *Reid* case meant the law of Virginia as distinguished from the law of the other states. In fact it is improbable that there were any substantial differences in the rules of evidence in criminal cases in the several states in 1789, and the Supreme Court clearly was not thinking about possible differences.

When the court speaks of the only known rules which the framers of the judiciary act could have had in mind as those in force in the respective states and which they were accustomed to see applied in daily practice, it would rather seem that the court was thinking of a body of rules common to all the states and which was to be applied uniformly by all the federal courts. At least the language is quite as susceptible of that construction as any other.

On this theory the witnesses were competent in the *Logan* case, not because of the accidental fact that the Republic of Texas had adopted the common law, but because they were competent by the common law impliedly adopted by the judiciary act for all federal courts.

If the judiciary act is to be construed as impliedly adopting the common law of the states and excluding subsequent state legislation, because Congress was presumably familiar with the existing common law, it involves a curious inconsistency to construe the same act as impliedly adopting subsequent territorial legislation when the territory should at some future time be admitted to statehood. It is to be hoped that the Supreme Court will soon have an opportunity to settle this vexed question.

E. W. HINTON.

SPECIFIC PERFORMANCE—MUTUALITY OF REMEDY.—[Federal] "What equity exacts today as a condition of relief is the assurance that the decree, if rendered, will operate without injustice or op-