Maryland Law Review

Volume 15 | Issue 1 Article 4

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Recommended Citation

M. P. Moser, *Compellability of One Spouse to Testify Against the Other in Criminal Cases*, 15 Md. L. Rev. 16 (1955)
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COMPELLABILITY OF ONE SPOUSE TO TESTIFY AGAINST THE OTHER IN CRIMINAL CASES[1]

By M. PETER MOSER*

I. INTRODUCTION

Can one spouse in a criminal case be forced to testify against the other if the accused or the spouse called as a witness against him objects? This problem has repeatedly arisen in the Maryland Courts, particularly in assault cases. Frequently a husband beats his wife, and the only witness to the incident is the wife herself. When the wife is called as a witness against her husband, she refuses to testify.

This article concerns only certain facets of the problem. We shall first discuss the basic concepts of law that courts follow in this type of case and mention some of the public policy considerations upon which these concepts are based. Next we shall develop the common law on compelling a wife to give testimony against her husband in a criminal prosecution for an offense of actual violence against her person. Then the effect of Maryland statutes and case law on the common law will be considered. Lastly we shall discuss briefly the types of criminal cases in which one spouse may be compellable to give testimony against the other.[2]

Although the discussion will be in terms of a wife testifying against her husband, the analysis and the rules developed would today also apply to a case in which a husband is called as a witness against his wife.

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[1] The author, while accepting full responsibility for the conclusions and opinions stated herein, wishes to thank Judge S. Ralph Warnken of the Supreme Bench of Baltimore City for his advice in the preparation of this Article.

[2] This Article deals only with the rules compelling one spouse to testify against the other in criminal cases. Section 1 of Article 35 of the 1951 Maryland Code clearly makes one spouse both competent and compellable as a witness in a civil case wherein the other is a party in interest. See Turpin v. State, 55 Md. 462 (1881).

II. Law and Public Policy

Three separate and distinct rules of law based on different considerations of public policy have, through the years, influenced courts in determining the competency or compellability of a wife to testify against her husband in a criminal proceeding wherein he is an accused.[3] We shall state the rules, indicate the more important policies on which they are based, and determine the importance of each rule to our general topic. The reasons which courts announce as a basis for exceptions to the rules will then be discussed.

A. *Confidential Communications.* The first rule of law is the doctrine of confidential communications, which is based on the belief that the closeness of the marital relationship requires that one spouse not be permitted to disclose confidential communications made to him by the other spouse during the marriage. This doctrine was first mentioned in Maryland statutory law in 1864.[4] It operates to prevent spouses from testifying to verbal statements made by one to the other and does not apply to notorious facts, such as that the parties are married, or to actions other than verbal statements, even though the spouses are the only

[3] This Article does not treat the related doctrine, Lord Mansfield's Rule, which prevents either spouse from bastardizing issue conceived and born during the marriage. Under this rule, after non access of the husband is proved by clear and convincing evidence, either spouse may testify to any fact reflecting upon the legitimacy of such issue, except to non access of the husband. See Harward v. Harward, 173 Md. 339, 196 Atl. 318 (1938); Hale v. State, 175 Md. 319, 2 A. 2d 17 (1938); Hall v. State, 176 Md. 488, 5 A. 2d 916 (1939); Comment, *The "Lord Mansfield Rule" as to "Bastardizing the Issue"*, 3 Md. L. Rev. 79 (1938).

[4] Md. Laws 1864, Ch. 109, Sec. 3, in part provided: ". . ., nor in any case, civil or criminal, shall any husband be competent or compellable to disclose any communication made to him by his wife during the marriage, nor shall any wife be *(sic)* compellable to disclose any communication made to her by her husband during the marriage." In 1876 this provision was repealed by Chapter 357, Section 1, of the Maryland Laws of that year. From 1876 until 1888, no legislation covered the subject of confidential communications. Chapter 545, Section 1(3), of the 1888 Maryland Laws included the following language, which appears in the 1951 Code in Section 4 of Article 35: ". . .; but in no case, civil or criminal, shall any husband or wife be competent to disclose any confidential communication made by the one to the other during the marriage; . . .". For a detailed discussion of the doctrine of confidential communications, see VIII Wigmore, Evidence (3d ed. 1940), Secs. 2332-2341. A conflict of authorities exists whether this doctrine is of common law or statutory origin. See Shenton v. Tyler (1939) 1 Ch. 620, an English Court of Appeal case subscribing to the latter view.

persons present at the time of such actions.[5] Therefore, the doctrine of confidential communications has importance to the problem of compellability of one spouse to testify against the other accused of a crime only to the extent that in such a case, upon proper objection, neither spouse may testify to confidential verbal statements made by one to the other.

B. *Party-in-Interest Testimony.* The second rule, which was first stated by Lord Coke, may be called the doctrine of party-in-interest testimony.[6] It was believed that if a party to a law suit or an accused in a criminal case were permitted to testify, he would tend to commit perjury in order to win his case. Therefore, he was not a competent witness. This reasoning also applied to the wife of a party-in-interest or of an accused. An additional reason for prohibiting the wife from testifying was based on the theory that a married woman was the same person as her husband. Being the same person as the party-in-interest or the accused, she could not testify for her husband, who could not himself take the witness stand.[7] This common law rule was eliminated by the statute in Maryland as to civil cases in 1864 and as to criminal proceedings in 1888.[8] Today the rule has been eliminated in most other jurisdictions.[9]

C. *Anti-Marital Testimony.* The third rule may be called the privilege against anti-marital testimony, and is based on the policy favoring the preservation of marriages.

[5] See Richardson v. State, 103 Md. 112, 63 Atl. 317 (1906) — first wife permitted to testify that she and her husband on trial for bigamy were married; Hanon v. State, 63 Md. 123 (1885) — wife permitted to relate the circumstances of an assault upon her by her accused husband. See also UNDERHILL, CRIMINAL EVIDENCE (4th ed. 1935), Sec. 347, and cases there cited; VIII WIGMORE, *op. cit., supra*, n. 4, Sec. 2337.

[6] II WIGMORE, EVIDENCE (3d ed. 1940), Sec. 600.

[7] II WIGMORE, *ibid*, Sec. 601.

[8] Md. Laws 1864, Ch. 109, Sec. 1, now Md. Code (1951), Art. 35, Sec. 1; Md. Laws 1888, Ch. 545, Sec. 1(3), now Md. Code (1951), Art. 35, Sec. 4.

[9] See II WIGMORE, *op. cit., supra*, n. 6, Sec. 577; MAGUIRE, EVIDENCE, COMMON SENSE AND COMMON LAW (1947) 80. In Funk v. United States, 290 U. S. 371 (1933), the common law rule of incompetency of one spouse to testify for the other accused of a crime was overruled as to the Federal Courts. The last vestige of the party-in-interest testimony rule appears in statutes of most jurisdictions of the United States, and bars testimony of parties to a case regarding transactions with a deceased or insane person, when such testimony is offered against the personal representatives of the deceased or insane person or the heirs, devisees, legatees, or distributees of a deceased person. II WIGMORE, *op. cit., supra*, n. 6, Sec. 488, n. 2; Md. Code (1951), Art. 35, Sec. 3.

One spouse should not be compelled to testify against the other, because this would tend to disrupt the marital relationship. This rule originated at the same time as the doctrine of party-in-interest testimony and grew with it as a corrollary.[10]

To understand the privilege against anti-marital testimony, we must first determine by whom the privilege may be asserted in cases where it exists. Some courts have held that the privilege may be asserted only by the witness-spouse, and not by the accused.[11] Other courts have held that the accused spouse has the right to assert the privilege, but that the witness does not.[12] Still other courts have held that the privilege may be asserted by either the witness or the accused spouse.[13] Because a majority of the jurisdictions which have ruled on this question, including Maryland, hold that the privilege may be asserted only by the spouse who is called as a witness, we shall speak of it as existing in the witness only.

D. *Necessity.* Appellate courts have held that the doctrine of party-in-interest testimony and the privilege against anti-marital testimony are inapplicable at common law in certain cases, and as a result, one spouse is competent and compellable to testify against the other. As a basis for such decisions courts cite the doctrine of necessity, which springs from the duty of the public to protect the person of a married woman from acts of violence or wrongs committed against her by her husband, which might, because of the relationship of the parties, go unpunished were she not to testify against him.[14] Cases invoking the doctrine of necessity and holding that a wife

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[10] VIII WIGMORE, *op. cit., supra*, n. 4, Sec. 2227. For a thorough discussion of this doctrine, see VIII WIGMORE, *op. cit., supra*, n. 4, Secs. 2227-2245.

[11] *E.g.*, Raymond v. State, ex rel. Younkins, 195 Md. 126, 72 A. 2d 711 (1950).

[12] *E.g.*, People v. Medina, 32 P. R. 140 (1923). The earliest English decisions applying the anti-marital testimony doctrine apparently held that the accused could object to his spouse's testimony against him. See Bent v. Allot, Cary 94, 21 Eng. Rep. 50 (1580); Anonymous, 1 Brownlow & Goldsborough 47 (1613).

[13] *E.g.*, State v. Mageske, 119 Or. 312, 249 Pac. 364 (1926); United States v. Mitchell, 137 F. 2d 1006 (2d Cir., 1943).

[14] *E.g.*, Bentley v. Cooke, 3 Doug. 422, 99 Eng. Rep. 729 (1784); Hanon v. State, 63 Md. 123 (1885); Johnson v. State, 94 Ala. 53, 10 So. 427 (1892). See also VIII WIGMORE, *op. cit., supra*, n. 4, Sec. 2239.

is competent to testify against her husband were decided about the time of origin of the party-in-interest and anti-marital testimony rules.

III. THE COMMON LAW

The common law making one spouse competent or compellable to testify against the other in certain types of criminal cases has developed with confusion of the rules we have just discussed. The basic rule is stated by Hochheimer to be that:

> "The . . . defendants and the husband or wife of any of them are, at common law, incompetent to testify . . . (but) the wife is a competent witness against her husband, only when he is charged with an offense of actual violence against her person, committed during marriage, and is then compellable to testify."[15]

This represents a combined statement of the party-in-interest and anti-spousal testimony doctrines with the exception to both rules, which we have noted was based upon the necessity of protecting the wife from bodily harm inflicted upon her by her husband.[16] Let us now consider the last phrase of the exception as stated by Hochheimer, that the wife is *compellable,* as well as competent, to testify against her husband accused of an offense of actual violence against her person. In our discussion of this topic we shall analyze first the cases holding that the wife is compellable to testify against her husband, and then the single case which holds that the wife is not compellable.

A. *Cases Holding the Wife Compellable.* As authority for his statement that in certain cases the wife is compellable to testify against her husband, Hochheimer cites *Johnson v. State.*[17] Here a wife refused to testify against her husband accused of assaulting her, unless the court

[15] HOCHHEIMER, CRIMES AND CRIMINAL PROCEDURE (2d ed., 1904) 198, 199. *Contra:* GORTER, EVIDENCE (2d ed. 1924) 210-211, citing Richardson v. State, 103 Md. 112, 63 Atl. 317 (1906). Parentheses added.

[16] The first reported case recognizing the exception where force or violence is exercised by a husband against his wife is Lord Audley's Trial, 3 How. St. Tr. 401 (1631). A wife was permitted to testify against her husband accused of committing rape upon her by directing his servants in the attack. The wife was a willing witness at the trial.

[17] 94 Ala. 53, 10 So. 427 (1892).

compelled her to do so. Although she did not initiate the complaint or testify before the committing magistrate or the grand jury, the action of the trial judge compelling her to testify to the circumstances of the assault was upheld on appeal. The Supreme Court of Alabama says:

> "We do not think there can be any doubt of the power of the court to compel her to testify. She is made competent for her own protection, not as an individual simply, but as an individual member of society; and that society — the public — has interest in her testimony, to the end that crime may be punished, which is distinct from any purely personal right of hers, and which she cannot waive. Upon considerations of this character, the law has come to be well settled in recognized texts and by adjudications of courts of high standing that the wife is not only competent in such cases, but is compelled, to testify."[18]

The *Johnson* case has been cited with approval in several later Alabama cases.[19] However, in 1915, Alabama

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[18] *Ibid*, 427-428.

[19] Williams v. State, 149 Ala. 4, 43 So. 720 (1907) — husband who was a willing witness said to be both competent and compellable to testify against his wife accused of assaulting him with intent to murder; McGee v. State, 4 Ala. App. 54, 58 So. 1008 (1912) — over objection of defendant, wife permitted to testify against husband charged with assaulting her with intent to murder; Court states that had wife not wished to testify, she could have been compelled to do so. As authority for its holding, the Court in the Johnson case, *supra*, n. 17, quotes from volume 7 of the American and English Encyclopedia of Law (1st ed. 1889), 102, as follows: ". . . in any criminal proceeding against a husband or wife for any bodily injury or violence inflicted upon his or her wife or husband, such wife or husband is competent and compellable to testify." The Court also cites the following cases: Turner v. State, 60 Miss. 351 (1882) — wife compelled over her objection to testify against her husband accused of assault upon her; Dumas v. State, 14 Tex. Cr. App. 464 (1883) — wife compelled to testify for her husband accused of bigamy [based upon provision now in Tex. Code Crim. Proc. (1941), Tit. 8, Art. 714, 2 Vernon's Tex. Stat. (1948), ". . . 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."]; Bramlette v. State, 21 Tex. Cr. App. 611, 2 S. W. 765 (1886) — wife compelled to testify against husband accused of assault to murder her (based upon the Texas statutory provision quoted above). None of these cases has been overruled. In a later Texas case, Calloway v. State, 92 Tex. Cr. App. 506, 244 S. W. 549 (1922), where a husband was charged with murdering his wife, a letter she had written was held to have been properly admitted in evidence against him on the theory of the Turner, Dumas and Bramlette cases. The Calloway case reaffirms the view that under the Texas statute the wife is compellable in cases where an offense is committed against her. See also State v. Dunbar, 360 Mo. 788, 230 S. W. 2d 845 (1950), decided under a statute providing; in part: "No person shall be

passed a statute providing that one spouse cannot be compelled to testify for or against the other.[20] After this, the cases so hold, but indicate that the *Johnson* case states the common law rule, which the statute changed.[21]

The rule in England is stated in the Court of Appeal case of *Rex v. Lapworth*,[22] in which a wife was compelled over her objection to testify against her husband accused of assaulting her. The Court says:

> "There is no doubt that at common law the husband or wife was always a competent witness in such a case, and by the very nature of things it must have been so, for otherwise, where the assault was committed in secret by one spouse upon the other, there would be no means of proving it. Whatever the reason, we are satisfied that at common law the wife was always a competent witness for the prosecution when the charge against her husband was one of having assulted her. Once it is established that she is a competent witness, it follows that she is a compellable witness; that is to say that she, having made her complaint of, or independent evidence having been given of, an assault on her by her husband, and she having

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incompetent to testify as a witness in any criminal cause or prosecution by reason of being . . . the husband or wife of the accused, . . . Provided, that no person on trial or examination, nor the wife or husband of such person, shall be required to testify, but any such person may, at the option of the defendant, testify in his behalf, . . ." (Mo. Rev. Stat. (1949), Sec. 546.260, formerly Sec. 4081). The Court in the Dunbar case reviews the Alabama decisions, noting that the Alabama statute (*infra*, n. 20), changed the common law rule of compellability, then follows the decision in DeBardeleben v. State, 16 Ala. App. 367, 77 So. 979 (1918), *infra*, n. 21.

[20] Now Ala. Code (1940), Tit. 15, Sec. 311, providing: "The husband and wife may testify either for or against each other in criminal cases, but shall not be compelled so to do."

[21] DeBardeleben v. State, 16 Ala. App. 367, 77 So. 979 (1918), which held, pursuant to the statute (*supra*, n. 20), that if either the husband or wife objects, it is reversible error to compel a wife to testify against her husband accused of statutory burning. See also McCoy v. State, 221 Ala. 466, 129 So. 21 (1930); Taylor v. State, 25 Ala. App. 408, 147 So. 647 (1933); Jordan v. State, 30 Ala. App. 313, 5 So. 2d 110 (1941). In Wyatt v. State, 35 Ala. App. 147, 46 So. 2d 837 (1950), the wife was called to testify against her husband accused of rape of their fourteen year old daughter, and was advised before the jury that she did not have to testify, if she did not wish to. She refused to testify, as the State knew she would, and the Trial Judge permitted the State to prove what she had testified at a former hearing regarding her husband's relations with their daughter. The Court said that the Defendant could not object to the advice to the wife before the jury, and held that testimony given at the former trial was properly admitted.

[22] (1931) 1 K. B. 117. *Cf.* Rex v. Leach, (1912) A. C. 305, 81 L. J. K. B. 616.

been summoned, as she may be, she is, like all other witnesses, bound to answer any questions put to her. In other words, she becomes a compellable witness."[23]

B. *Cases Holding the Wife Not Compellable.* Only one case was found holding that at common law one spouse is not compellable to testify against the other accused of an offense of actual violence against his person. In *Rex v. Phillips,*[24] a single judge of the Supreme Court of South Australia sitting as a trial judge ruled that where a wife is charged with wounding her husband with intent to murder him, he is competent, but not compellable, to testify against her. Upon defendant's objection, the trial judge advised the husband that he did not have to testify against his wife, if he did not wish to do so. This result was reached after consideration of the common law cases holding that a wife is incompetent to testify against her husband accused of an offense other than one of violence against her. The case is contrary to the weight of authority and devoid of consideration because of the public policy involved in this type of situation.

C. *Summary.* The reasoning of courts which have declared that a wife is compellable to testify against her husband accused of an offense of actual violence against her person follows two different lines of thought. The result in the *Johnson*[25] case is based upon the interest of the public in the injured spouse's well-being. The result in the *Lapworth*[26] case is reasoned from the premise that a wife is competent to testify against her husband accused of assaulting her. The wife, being competent, has the same rights, privileges, and duties as does an ordinary witness.

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[23] *Ibid,* 121. See Comment, *Compellability of One Spouse as a Witness against the Other Spouse in a Criminal Prosecution,* 9 Can. B. Rev. 216 (1931), approving the decision in the Lapworth case. Compare the analysis of the case in the following Notes, *Compellability of Husband and Wife as Witnesses against one another in Criminal Cases,* 94 Just. P. 691 (1930); *Compellability of Spouse to give Evidence in Criminal Proceedings,* 4 Aust. L. J. 329 and 360 (1931).

[24] (1922) S. A. S. R. 276. See also Riddle v. The King, 12 C. L. R. (Aust.) 622 (1911) — dictum that at common law the wife was not a compellable witness against her husband even where he was charged with committing violence upon her.

[25] *Supra,* n. 17.

[26] *Supra,* n. 22.

It follows that in such a case she is compellable to testify either for or against her accused husband, just as is any other witness. The holding in these cases, by whichever line of thought it is reached, represents the rule that has always been the common law.

IV. MARYLAND LAW

Having determined that at common law a wife is compellable to testify against her husband accused of an offense of actual violence against her person, we shall now see whether Maryland statutes or cases change this rule. Two provisions of the Maryland Code are pertinent to a discussion of this question. The provision which was first enacted is now Article 35, Section 1 of the 1951 Code. The second provision now appears in Article 35, Section 4 of the 1951 Code. We shall discuss these statutory provisions with cases that construe them, in the order in which the statutes were enacted.

A. *Section 1 of Article 35.* Section 1 of Article 35, unchanged since first enacted in 1864, removes the incapacity of a person as a witness in any civil or criminal case because of crime (except perjury) or interest in the proceedings.[27]

[27] Md. Code (1951), Art. 35, Sec. 1. As originally enacted, Md. Laws 1864, Ch. 109, Sec. 1, provided:

> "No person offered as a witness shall hereafter be excluded by reason of incapacity from crime or interest, from giving evidence, either in person or by deposition, according to the practice of the courts, in the trial of any issue joined or hereafter to be joined, or of any matter or question, or on any inquiry arising in any suit, action or proceeding, civil or criminal, in any court, or before any Judge, Jury, Justice of Peace or other person having, by law or by consent of parties, authority to hear, receive and examine evidence; but that every person so offered may and shall be admitted to give evidence, notwithstanding that such person may or shall have an interest in the matter in question, or in the event of the trial of any issue, matter, question or inquiry, or of the suit, action or proceeding in which he is offering *(sic)* as a witness, and notwithstanding that such person offered as a witness may have been previously convicted of any crime or offence; but no person who has been convicted of the crime of perjury shall be admitted to testify in any case or proceeding whatever, and the parties litigant and all persons in whose behalf any suit, action or other proceeding may be brought or defended, themselves and their wives and husbands shall be competent and compellable to give evidence in the same manner as other witnesses, except as hereinafter excepted."

Md. Laws 1864, Ch. 109, Sec. 3, provided in part:

> ". . ., nor, in any criminal proceeding, shall any husband be competent or compellable to give evidence for or against his wife, nor shall any wife be competent or compellable to give evidence for or against her husband, except as now allowed by law, . . .".

Section 3 was repealed by Md. Laws 1876, Ch. 357, Sec. 1.

The last clause of this Section reads as follows:

> ". . . and the parties litigant and all persons in whose behalf any suit, action or other proceeding may be brought or defended, themselves, and their wives and husbands shal *(sic)* be *competent and compellable* to give evidence in the same manner as other witnesses, except as hereinafter excepted."[28]

The quoted language at first glance seems clearly to make both competent and compellable a husband or wife called to testify in any criminal proceeding. However, in 1881, a case was decided by the Court of Appeals which held that Section 1 applied only to civil cases and not to criminal prosecutions. This was *Turpin v. State,*[29] wherein a husband was charged with murdering a third person, and his wife was called as a witness on his behalf, but was not permitted to testify. The Court of Appeals upheld the action of the trial judge, reasoning that if a wife were permitted to testify for her husband in a case of this type,

> ". . . it would follow that the wife of the accused would not only be competent to testify in his behalf, but would be compellable to testify against him — a conclusion which we would hesitate to adopt, unless compelled by the plain meaning and intent of the statutes."[30]

This case did not involve an offense of actual violence against the person of the wife. Had the husband been accused of assault upon his wife, the result would have been different, as is illustrated by *Hanon v. State,*[31] decided four years later. This case holds that a wife is competent to testify to the fact of marriage and to the circumstances of an assault upon her by her husband, charged under a statute prescribing whipping as an additional punishment for wife beating. The Court of Appeals reasoned:

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[28] Md. Code (1951), Art. 35, Sec. 1. (Italics supplied.)

[29] 55 Md. 462 (1881).

[30] *Ibid,* 477. The defense argued that the repeal of the provisions of Section 3 of Chapter 109 of the 1864 Laws in 1876 (*supra,* n. 27), made a wife competent to testify for her husband in a criminal case. The Court refused to adopt this reasoning, despite the broad language of Section 1 (*supra,* n. 27), which ends, "except as hereinafter excepted". The repealed Section 3 obviously was intended by the Legislature as an exception to Section 1.

[31] 63 Md. 123 (1885).

> "The necessity of permitting the wife to testify against her husband springs from the duty of protecting her person from violence, and the impunity with which from the privacy and close relations of married life assaults upon her might otherwise be perpetrated. In allowing her to testify, her disability of coverture is as much removed as if she were a *feme sole* or a stranger in the case, and she therefore has all the capacity any other witness would have. This being so, she is as competent to prove the marriage as any one else would be. It is not a fact arising from the confidential relations of the parties, but a fact in its very nature notorious and public; and we perceive no reason why she cannot supply the proof of this essential link in the chain of facts necessary to be proved, as well as show the aggrevated character of the assault."[32]

Since the wife in this case is said to have all the capacity as a witness that a stranger would have, it is possible that had she been compelled to testify over her objection, the Court would have held that the trial judge was correct in forcing her to testify.

B. *Section 4 of Article 35.* Section 4 of Article 35 of the 1951 Maryland Code, unchanged since its reenactment in 1888, provides in part, "In all criminal proceedings the husband or wife of the accused party shall be competent to testify; . . ."

In *Richardson v. State,*[33] the Court of Appeals ruled that the first wife could testify to the fact of marriage to her husband, who was charged with bigamy with a second woman. This statement appears in the opinion: "She was a competent witness against the accused under *Sec. 4, Art. 35, Code 1904, although she could not have been compelled to testify.*"[34] This last phrase is *dictum,* since the wife testified voluntarily. It could be explained on the ground that the Court believed that bigamy was not an offense of violence against the wife within the common law exception to the privilege against anti-marital testimony. However, because no authority is cited for the proposition, it is

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[32] *Ibid,* 127.
[33] 103 Md. 112, 63 Atl. 317 (1906).
[34] *Ibid,* 117. (Italics supplied.)

unlikely that the Court gave much attention to this language. A more plausible explanation is that the phrase was adopted from the brief submitted by the State, in which it was conceded that the wife was not compellable.[35] This *dictum* should have little weight were the direct question of compellability today presented to the Court of Appeals for decision.

The only other Maryland case bearing even remotely on the question of a wife's compellability to testify against her husband accused of an offense of actual violence against her person is *Raymond v. State ex rel. Younkins,*[36] an appeal from an order granting a writ of habeas corpus. The defendant had been convicted by a magistrate of assault upon his wife, who had testified against him without first being advised that she did not have to do so. The Court of Appeals reversed the order granting the writ, stating that no fundamental right of the defendant had been violated at the trial. If there was any right of the wife to be advised that it was her free choice to testify or not, it was her right alone and not that of the accused husband. The Court cites as illustrative of this principle the right of a witness not to incriminate himself, which is personal to the witness and cannot be asserted by the accused against whom the witness is called. The question of whether a wife has a privilege not to testify against her spouse accused of assaulting her was expressly left undecided by the Court.[37]

C. *Summary.* The Maryland cases, as we have seen, do not decide whether a wife can be compelled to testify against her husband accused of a crime of actual violence against her person. The language of the *Hanon*[38] case tends to support the conclusion that the wife in such a case has all the capacity as a witness that a stranger would have, and therefore is compellable to testify either for or against her husband. However, in the *Richardson*[39] case the Court of Appeals states that a wife is competent, but not com-

[35] 103 Records and Briefs, Pt. 2, Court of Appeals No. 112 (1906), Brief of Appellee, p. 2.
[36] 195 Md. 126, 72 A. 2d 711 (1950).
[37] *Ibid,* 129.
[38] *Supra,* n. 31.
[39] *Supra,* n. 33.

pellable, to testify against her husband charged with bigamy. The recent *Younkins*[40] case leaves the question of the wife's compellability in an assault case undecided.

The Maryland Code expressly provides that a husband or wife *may* testify for or against his spouse accused in a criminal proceeding. This applies whether or not the offense charged is one of actual violence against the person of the spouse called as a witness. One might argue that this Code provision was intended by the Legislature to include all the law on the competency and compellability of one spouse as a witness in a criminal proceeding involving the other; that by excluding all mention of compellability, the Legislature intended by implication to change the common law making one spouse compellable to testify against the other in certain cases; and that as a result, one spouse is not compellable to testify against the other in any criminal case. But this argument is contrary to a basic rule of statutory construction, the presumption against implicit alteration of existing law.[41] The only logical interpretation which can be placed upon the Maryland statutes, reading Sections 1 and 4 of Article 35 together, is that they remove the common law prohibition against party-in-interest testimony in both civil and criminal cases, but do not in any way govern the privilege against anti-marital testimony. The Legislature, when it enacted these provisions, did not intend to deal with the problem of compellability of one spouse to testify against the other accused of an offense of actual violence against the person of the spouse called as a witness.

For the rule in Maryland, we must therefore refer to the common law, which we have developed in the preceding Section of this Article. At common law a wife can be compelled to testify against her husband accused of an offense of actual violence against her person.[42]

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[40] *Supra*, n. 36.

[41] MAXWELL, INTERPRETATION OF STATUTES (10th ed., 1953), 81-86.

[42] See *supra*, Section III, p. 20. Even if a later statute or Court of Appeals decision changes this rule, the witness under certain circumstances may be held to have waived his privilege against anti-marital testimony. If he testifies against his wife before the committing magistrate or grand jury, most courts hold that he is compellable at the trial of the case, or that

V. CONCLUSION

Because this common law rule of compellability speaks in terms of an offense of actual violence against the wife's person, we shall consider briefly the types of offenses included in this phrase. It is clear that all types of assault and battery upon the wife, as well as rape of the wife during the marriage, are included. These crimes obviously involve actual violence against the wife's person.

Modern courts in jurisdictions not having legislation on this subject, have tended to broaden the application of this rule in criminal cases where the question is whether the wife can testify voluntarily against her husband. These courts have held that at common law a wife is competent to testify voluntarily against her husband charged with bigamy,[43] desertion and non-support,[44], incest,[45] rape of another woman,[46] and abortion performed during the marriage.[47] Although this trend is illustrated only by cases involving voluntary testimony of the wife, it is submitted that the reasoning of the courts in these cases also would

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his former testimony may be introduced by the state. McCoy v. State, 221 Ala. 466, 129 So. 21 (1930); Wyatt v. State, 35 Ala. App. 147, 46 So. 2d 837 (1950), *supra*, n. 21. *Cf.* People v. Chadwick, 4 Cal. App. 63, 87 Pac. 384 (1906) — testifying at former trial not a waiver of privilege not to testify at a subsequent trial. Other cases hold that a waiver of the privilege exists if the witness does not object before she testifies on direct examination. *E.g.*, State v. Tola, 222 N. C. 406, 23 S. E. 2d 321 (1942); People v. Rios, 34 P. R. 519 (1925).

[43] Hills v. State, 61 Neb. 589, 85 N. W. 836 (1901). See VIII WIGMORE, Sec. 2239, n. 19.

[44] Md. Code (1951), Art. 27, Sec. 99, authorizes the State's Attorney to take evidence in desertion and non-support cases. If a witness summoned to appear before the State's Attorney refuses to testify, the Criminal Court may issue an order requiring such witness to give testimony. Although no specific mention is made of compelling a wife to give evidence against her husband, it is likely that this provision applies to her. The offense is one involving direct harm to the wife, or in some cases, children, and in cases where the Department of Public Welfare is contributing to her support or to the support of her children, the public has a definite interest in the proceedings. See also WIGMORE, *ibid*, Sec. 2239, n. 14.

[45] State v. Shultz, 177 Iowa 321, 158 N. W. 539 (1916). *Contra:* Toth v. State, 141 Neb. 448, 3 N. W. 2d 899 (1942), noted, 27 Minn. L. Rev. 205 (1943).

[46] Wilkinson v. People, 86 Colo. 406, 282 Pac. 257 (1929). *Contra:* Cargill v. State, 25 Okla. Cr. Rep. 314, 220 Pac. 64 (1923).

[47] Commonwealth v. Allen, 191 Ky. 624, 231 S. W. 41 (1921). *Contra:* Miller v. State, 37 Tex. Cr. App. 575, 40 S. W. 313 (1897). See also VIII WIGMORE, EVIDENCE (3rd ed., 1940), Sec. 2239, n. 11.

apply to compelling a wife to testify against her husband accused of one of these crimes, if she refused to do so.[48]

This trend toward broadening the common law of compellability certainly is based upon a common sense approach to the problem. As Dean Wigmore puts it,

> ". . . if the promotion of marital peace, and the apprehension of marital dissension, are the ultimate ground of the privilege, it is an overgenerous assumption that the wife who has been beaten, poisoned, or deserted, is still on such terms of delicate good feeling with her spouse that her testimony must not be enforced lest the irridescent halo of peace is dispelled by the breath of disparaging testimony."[49]

The interest of the public in prosecuting most cases of this type far outweighs the public policy favoring the protection of marriages.

However, a logical argument can be made that one spouse should not be compelled to testify against the other in a criminal prosecution of a minor nature involving just the husband and wife. An example would be assault not involving injury sufficient to require a doctor's care. No one but the victim is bothered, and the more important public policy would favor preservation of the marriage, provided the parties are reconciled. A reconciliation is likely if the wife, called as a witness for the prosecution, expresses a desire not to testify and states that she is living with her husband. But where a serious criminal offense is charged, or one in which the public is concerned, one spouse should be compellable to testify against the other, whether or not the harm to the witness-spouse is actual violence or some type of more indirect harm. Examples of such an offense include aggravated assault and battery, rape and attempted rape of the wife or of another, sodomy with an-

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[48] See *supra*, Section III, p. 20. The exceptions at common law to the party-in-interest testimony and anti-marital privilege rules had to be made by a court at the same time for the spouse to be permitted to testify. Therefore, if a spouse is competent to testify against his spouse at common law, he would also be compellable. See Rex v. Lapworth, (1931) 1 K. B. 117, 121, *supra*, Sec. III, n. 22.

[49] VIII WIGMORE, *op. cit.*, *supra*, n. 47, Sec. 2239, p. 252. Dean Wigmore's views are criticized in a Note, *Compellability of Husband and Wife as Witnesses against one another in Criminal Cases*, 94 Just. P. 691 (1930).

other, attempted murder of the wife, bigamy, incest, and abortion. Legislation is needed to discriminate in this way between minor and serious offenses. Such legislation would be the most practical approach to the problem of compellability of a wife to testify against her husband accused in a criminal case.[50]

Until the Legislature acts to change the common law, the Court of Appeals would probably adopt the common law as to compellability if the question ever were presented directly to it for decision. Ample authority in other jurisdictions now exists for Maryland trial judges to compel a husband or wife to testify against the spouse accused of an offense of actual violence against the other's person. However, application of this rule of compellability ought not be limited by such judges to offenses of actual violence. It is submitted that one spouse should be compelled to testify against the other accused in any criminal prosecution wherein the offense charged is a serious one involving harm to the spouse called as a witness, whether or not that harm is actual physical violence.

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[50] This is similar to the solution suggested by the Court in State v. Dunbar, 360 Mo. 788, 230 S. W. 2d 845, 849 (1950), where the wife of accused charged with assaulting her was forced over her own and the accused's objections to testify to the circumstances of the assault. In reversing the conviction because of the Missouri statute (Mo. Rev. St. (1949), Sec. 546.260, formerly Sec. 4041), the Court says:

> "We believe that the administration of justice would be aided by *permitting* one spouse to testify against the other in any criminal case, but that such testimony should not be *compelled* except as to charges of a serious nature. Perhaps the dividing line should be between misdemeanors and felonies."

See also, A. L. I. MODEL CODE OF EVIDENCE (1942), Rules 214-218, dealing with privileged communications between husband and wife. This privilege is not operative where a spouse is charged with a crime against the person, property, or child of either spouse; a crime against a third person committed during the commission of a crime against the other spouse; bigamy or adultery; or desertion of the other spouse or the child of either (Rule 216). The Model Code omits all mention of the privilege against the antimarital testimony or its equivalent, but concerns itself exclusively with confidential communications, and strictly limits both the definition and application of this doctrine.