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Article 8

Constitutional Law--State's Power to Regulate Non-Retail Pricing of Liquor Held Constitutional (Joseph E. Seagram & Sons, Inc. v. Hostetter, 16 N.Y.2d 47 (1965))

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jury may now exercise discretion which was not previously available in applying antitrust standards to labor-management agreements. This may give rise to evidentiary difficulties in ascertaining whether a union was acting alone or in concert with other employers. Especially significant is the fact that there was no direct evidence of a conspiracy in *Pennington,* but that this fact was inferred from the wage agreement and the circumstances arising therefrom. There may also be a judicial tendency toward a liberal construction of the "conspiracy" concept, which may lead to antitrust convictions on the basis of a collective bargaining agreement alone.[39]

The instant case represents a setback for organized labor. Unions will be more restrained at the bargaining table; they will try to avoid non-mandatory subjects in fear of setting adverse precedent. In addition, there is the possibility of court-and-jury-made labor legislation,[40] which may reflect the growing dissatisfaction with union policies which has asserted itself in the past two decades.

CONSTITUTIONAL LAW — STATE'S POWER TO REGULATE NON-RETAIL PRICING OF LIQUOR HELD CONSTITUTIONAL. — Plaintiff sought an injunction to restrain the enforcement of that section of the New York Alcoholic Beverage Control Law which regulated the price at which brand-name liquor was sold in New York.[1] Plaintiff contended that since the law was not designed to promote temperance, it was an unconstitutional exercise of police power and an unjustified interference with interstate commerce. In sustaining the statute, the Court of Appeals, in a four to three decision, *held* that the regulation was within the broad police power traditionally exercised by the states under the twenty-first amendment. *Joseph E. Seagram & Sons, Inc. v. Hostetter,* 16 N.Y.2d 47, 209 N.E.2d 701, 262 N.Y.S.2d 75 (1965).

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[39] It is possible that the "most favored nation" clause, found in many labor-management agreements, is now invalid according to the instant case. This clause allows renegotiation by the employer if competitors secure more favorable terms from the union. 59 LAB. REL. REP. (27 L.R.R.M.) 238, 242-43 (Aug. 2, 1965).

[40] This is the reasoning of Justice Goldberg. *Supra* note 34, at 697 (concurring opinion).

[1] The section provided that vendors must sell brand-name liquor in New York at prices certified by them to be no higher than the lowest price at which the brand was sold to any wholesaler or state agency elsewhere in the country, during the previous month. N.Y. ALCO. BEV. CONTROL LAW § 101-b(3)(d)-(k) (Supp. 1965).

Historically, because of their unique and deleterious effects on individuals and society, intoxicating beverages have often been the subject of special regulation.[2] In recognition of this fact, the twenty-first amendment of the United States Constitution has granted extensive powers to the state. It provides that "the transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." While it has been asserted that the purpose of this section was solely to protect "dry" states from the importation of liquor from "wet" states,[3] the United States Supreme Court has in some instances given it a much broader interpretation.

The state's power to forbid importation of liquor for noncompliance with its statutory conditions was sustained in *State Bd. of Equalization v. Young's Mkt. Co.*[4] The Court noted therein that the state's license fee on beer importers would have violated the commerce clause as a direct burden on interstate commerce before the enactment of the twenty-first amendment. In a subsequent case, the Court unequivocally held the amendment to render the equal protection clause inoperative.[5] Furthermore, relying on *Young's Market,* the Court has sustained regulations retaliating against the restrictive measures imposed by sister states.[6] In one such case, Justice Brandeis, speaking for the Court, indicated that whether or not the law is best described as a protective measure is of no moment, "for whatever its *character,* the law is valid." [7] In *Joseph S. Finch & Co. v. McKittrick,* Justice Brandeis reiterated the view that under the twenty-first amendment, it is immaterial that the statute "does not relate to protection of the health, safety, and morality or the promotion of their social welfare, but is merely an economic weapon of retaliation." [8]

Two decisions of the Court have recently limited the regulatory power of the state where liquor was not "for delivery or use therein." In one case, a tax upon imported whiskey remaining in the original package was struck down;[9] in another the Court held that

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[2] Rupert v. Liquor Control Comm'n, 138 Conn. 669, 674, 88 A.2d 388, 390 (1952); State *ex rel.* Wilkinson v. Murphy, 237 Ala. 332, 337, 186 So. 487, 492 (1939).

[3] Byse, *Alcoholic Beverage Control Before Repeal,* 7 LAW & CONTEMP. PROB. 544, 567 (1940).

[4] 299 U.S. 59, 62 (1936).

[5] Mahoney v. Joseph Triner Corp., 304 U.S. 401 (1938).

[6] Joseph S. Finch & Co. v. McKittrick, 305 U.S. 395 (1939); Indianapolis Brewing Co. v. Liquor Control Comm'n, 305 U.S. 391 (1939).

[7] Indianapolis Brewing Co. v. Liquor Control Comm'n, *supra* note 6, at 394. (Emphasis added.)

[8] Joseph S. Finch & Co. v. McKittrick, *supra* note 6, at 397-98.

[9] Department of Revenue v. James B. Beam Distilling Co., 377 U.S. 341 (1964). The invalidation of the tax, as a per se violation of the export-

the commerce clause precluded a state from regulating the mere sale of liquor within the state, when it was transported through the state.[10]

In view of the holdings in these cases, it has been asserted that the language of the Court portends a change in judicial attitude.[11] In fact, it has been suggested that in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*,[12] the Court withdrew traditional constitutional immunity from states when statutes did not purposely attempt to protect the citizens of the state from the evils of intoxicating beverages.[13] However, an analysis of *Hostetter* and other decisions would seem to indicate that no significant change has taken place with respect to the Court's position on the regulation of intrastate consumption of intoxicants. In these opinions, the state's plenary power to regulate liquor commerce terminating within the state was distinguished from its limited control over liquor merely passing through the state in interstate commerce.[14]

In the instant case, the majority believed that as a result of a long history of regulation and control, the liquor industry cannot claim a "constitutional legal parity" with dealers in other goods.[15] After tracing earlier cases decided in favor of the states on the basis of their extensive police power under the twenty-first amendment, Judge Bergan, speaking for the majority, concluded that the statute in question was constitutionally valid. He regarded as

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import clause, ended fears that this provision would also be made ineffective by the amendment. Note, 7 GEO. WASH. L. REV. 402, 414 (1939); Note, 55 YALE L.J. 815, 816 (1946).

[10] Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964). Plaintiff purchased liquor tax-free outside of New York State, and sold it to outgoing passengers on an international flight. The liquor was then placed on the airplane and was delivered to the passenger at the foreign destination. Two earlier decisions (Collins v. Yosemite Park & Curry Co., 304 U.S. 518 (1938), and Johnson v. Yellow Cab Transit Co., 321 U.S. 383 (1944)) denied states the power to prohibit liquor from passing *through* the state to an area under federal jurisdiction.

[11] See *The Supreme Court, 1963 Term*, 78 HARV. L. REV. 143, 240 (1964). In 1936, the Court in State Bd. of Equalization v. Young's Mkt. Co., 299 U.S. 59 (1936), stated: "A classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth." *Id.* at 64. Compare this language with the Court's 1964 statement: "Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of issues and interests at stake in any concrete case." Hostetter v. Idlewild Bon Voyage Liquor Corp., *supra* note 10, at 332.

[12] *Supra* note 10.

[13] See generally 6 B.C. IND. & COM. L. REV. 336, 343 (1965).

[14] A state is empowered to supervise and regulate liquor passing through its territory in order to guard against intrastate consumption. Hostetter v. Idlewild Bon Voyage Liquor Corp., *supra* note 10, at 328.

[15] Joseph E. Seagram & Sons, Inc. v. Hostetter, 16 N.Y.2d 47, 56, 209 N.E.2d 701, 704, 262 N.Y.S.2d 75, 79 (1965).

thoroughly settled the principle that a state may exercise police power in a plenary fashion when regulating liquor traffic without violating either the commerce clause, or the equal protection clause of the Constitution.[16] The Court also noted that the effects of this regulation on interstate commerce would be merely incidental and would not constitute a substantial interference. To the argument that the statute did not seek to foster temperance, the customary touchstone for a regulation of liquor, the Court replied: "As to what best promotes temperance . . . it seems preferable to take the opinion of the . . . Legislature rather than that of the liquor industry." [17]

Judge Desmond, dissenting, argued that regulatory statutes cannot be valid unless reasonably designed to promote health, safety, or public welfare. He observed that due process requires that such measures should not be arbitrary, and that even the exercise of the police power should be subject to judicial review when it departs from these stated purposes. As to the objectives sought to be attained by the statute, he said:

> No one has yet told us how any of these lawful purposes could be accomplished or furthered by forcing liquor prices down to the bottom level found anywhere in the United States. To promote temperance by making intoxicants cheaper is like trying to minimize the dangers of excessive smoking by abolishing cigarette taxes.[18]

Judge Desmond would require a justifiable end for any regulation, without which an exercise of police power is invalid—here, he found the justifiable end of temperance to be lacking.

Despite the majority's conclusion that the statute will have only an incidental effect upon interstate commerce, it seems likely that the "no higher than the lowest" provision will have economic impact across the country. Distillers will undoubtedly be forced to shape their national marketing practices so as to maintain profitable sales in the large New York market. To command a reasonable price in New York, the industry may have to charge artificially high prices in other states. Distillers would be loath to give price reduction to purchasers in other states, when by doing so they would be compelled to grant the same reduction to every purchaser in New York. The act will thus detrimentally affect marketing practices outside of New York, and will tend to set a nation-wide minimum price level for brand-name liquor.

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[16] *Id.* at 57, 209 N.E.2d at 705, 262 N.Y.S.2d at 80.

[17] *Id.* at 60, 209 N.E.2d at 706, 262 N.Y.S.2d at 82. The Court noted that the legislature had found "no correlation between consumption and prices looking at the experience in states in which prices were high compared to those in which they were low." *Id.* at 54, 209 N.E.2d at 703, 262 N.Y.S.2d at 77.

[18] *Id.* at 61, 209 N.E.2d at 707, 262 N.Y.S.2d at 83-84.

If New York may enact such a pricing restriction, so may other states. If two or more states enacted such regulations, a distiller would be unable to raise his price in one jurisdiction, without violating the law in another. In this manner prices could become "frozen," with the distiller powerless to legally increase them unless he withdrew his product for one month from the market of one of the regulated states.

If, as the New York Court of Appeals has decided, this statute does not interfere with interstate commerce then, it would seem, similar measures may be enacted for any commodity subject to price regulation.

Even if it were conceded that the statute would have significant effects upon interstate commerce, the Court's decision appears to be aligned with the weight of settled judicial precedent in this area. Past United States Supreme Court decisions have established the overriding regulatory power of the states even when the objection of interference with interstate commerce has been raised.[19] Although the dissent has argued that valid liquor regulation must be based on the promotion of temperance, the state's ability to control the sale of liquor embraces other traditional purposes of the police power, *e.g.*, controlling price discrimination and monopolistic practices.[20] In the context of a comprehensive regulatory program controlling distribution, sale and consumption of alcoholic beverages, a legislatively promoted decrease in liquor prices cannot be construed in isolation as an abdication of the responsibility to promote temperance.

Should the appeal of this decision be entertained by the Supreme Court, a crucial issue confronting that tribunal will be the role of the twenty-first amendment in this controversy. The clear import of the amendment grants to the states the power to regulate liquor in any manner designed to promote the general welfare. Unless the heavy influence of the traditionally free reign given to the states by this amendment has considerably lessened, it appears likely that the outcome of the instant case will be sustained.

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[19] See, *e.g.*, State Bd. of Equalization v. Young's Mkt. Co., *supra* note 11; Joseph S. Finch & Co. v. McKittrick, *supra* note 6.

[20] The declared policy of N.Y. ALCO. BEV. CONTROL LAW § 101-b(3)(d)-(k) (Supp. 1965) was:

> (a) that fundamental principles of price competition should prevail . . .
> (b) that consumers . . . in this state should not be discriminated against . . . by paying unjustifiably higher prices for brands of liquor than are paid by consumers in other states . . .
> (c) . . . to forestall possible monopolistic and anti-competitive practices designed to frustrate the elimination of such discrimination. . . . N.Y. Sess. Laws 1964, ch. 531, § 8.

EVIDENCE — ANTISPOUSAL TESTIMONY COMPETENT WHERE CHILD MURDERED BY HUSBAND. — Appellant, after conviction for the murder of his child, assigned as error the admission of his wife's testimony without his consent, in violation of a Colorado statute.[1] The Supreme Court of Colorado affirmed the conviction *holding* that the murder of the child by his father was a crime committed against the mother making her competent to testify against her husband. *Balltrip v. People,* 401 P.2d 259 (Colo. 1965).

At common law, one spouse could not testify against or on behalf of the other in any action to which the other was a party.[2] It has been stated that this rule was an outgrowth of the *"quia sunt duae animae in carne una"* or "unity" concept.[3] Three dominant reasons have been suggested for this policy: (1) to discourage strife between spouses and, thereby, to help preserve their marital relationship;[4] (2) to prevent false testimony prompted by one spouse's self-interest in the outcome;[5] and, (3) to prohibit testimony repugnant to a sense of fair-play.[6]

Notwithstanding these reasons, the common law recognized that severe injustice could result from preventing one spouse from testifying in cases of personal injury inflicted by the other. Hence, an exception arose whereby competency was granted in such cases to the injured spouse.[7] The interpretation of what constituted "personal injury to the spouse" was dependent upon judicial determination.

For example, West Virginia adopted a strict interpretation in *State v. Woodrow.*[8] There, while committing an assault upon his wife who was holding their child in her arms, the husband fired a bullet which passed through the child's head and struck the wife. The court held that the murder of the child did not constitute a "personal injury to the spouse" within the common-law meaning of that phrase as incorporated in the West Virginia statute.[9] The criticism aroused by this case resulted in the enactment of a statute which specifically provided that one spouse was competent to testify against the other when there was personal injury to him, or to the child, father, mother, brother or sister of either spouse.[10]

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[1] COLO. REV. STAT. ANN. § 153-1-7 (1953).

[2] Bassett v. United States, 137 U.S. 496, 505 (1890).

[3] Note, *Should the Rule Prohibiting Antispousal Testimony be Abolished?,* 15 U. PITT. L. REV. 318, 319-20 (1954).

[4] Jenkins v. State, 191 Ark. 625, 627, 87 S.W.2d 78, 79 (1935).

[5] Hawkins v. United States, 358 U.S. 74, 75 (1958).

[6] WIGMORE, EVIDENCE § 2228 (McNaughton rev. 1961).

[7] Bassett v. United States, 137 U.S. 496 (1890).

[8] 58 W. Va. 527, 52 S.E. 545 (1905); *accord,* Grier v. State, 158 Ga. 321, 123 S.E. 210 (1924).

[9] It was held: "The act must touch her person, or her personal individual right, as a person distinct and individual from the community. . . ." State v. Woodrow, 58 W. Va. 527, 529, 52 S.E. 545, 546 (1905).

[10] W. VA. CODE ANN. § 5728 (1961).

A case of similar import was *Jenkins v. State*,[11] wherein the wife was tried for the poisoning of her three children. The Supreme Court of Arkansas held that the testimony of the husband was inadmissible since the children were not property within the meaning of a statute which permitted a spouse to testify only in cases of injury to his person or property.[12]

The federal courts have generally followed the strict interpretation given "injury to the spouse" in *Bassett v. United States*.[13] In that case, the United States Supreme Court declared that polygamy was not an "injury to the spouse" sufficient to bring it within the exception to the common-law rule as embodied in a Utah statute. As a result, only in prosecutions for violations of the Mann Act [14] or for crimes committed directly against the spouse[15] have the federal courts permitted one spouse to testify against the other.

Today, every state has a statute affecting the competency of one spouse to testify against the other. Four states have retained the common-law rule by enacting statutes providing that one spouse is incompetent to testify against the other in the absence of a crime committed by one against the other.[16] Eleven jurisdictions allow a spouse to testify *for, but not against* the other, except in cases of crimes by one against the other.[17] In fourteen states consent is required before one spouse is allowed to testify against the other, although this may not be necessary in cases of injury to one spouse inflicted by the other.[18] Twenty states declare that one spouse is

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[11] 191 Ark. 625, 87 S.W.2d 78 (1935).

[12] ARK. STAT. ANN. § 43-2020 (1947).

[13] *Supra* note 7.

[14] Yoder v. United States, 80 F.2d 665 (10th Cir. 1935). The statute forbids the transportation of any woman in interstate or foreign commerce for the purposes of prostitution, debauchery or other immoral acts. 18 U.S.C. §§ 2421-23 (1964).

[15] Kerr v. United States, 11 F.2d 227 (9th Cir.), *cert. denied*, 271 U.S. 689 (1926); United States v. Smallwood, 27 Fed. Cas. 1131 (No. 16,316) (C.C.D.C. 1836); United States v. Graham, 87 F. Supp. 237 (E.D. Mich. 1949).

[16] IOWA CODE ANN. § 622.7 (1946); MONT. REV. CODES ANN. § 94-8802 (1947); N.J. STAT. ANN. § 2A:84A-17 (1964); PA. STAT. ANN. tit. 19 §§ 683-85 (Purdon 1964).

[17] ARK. STAT. ANN. §§ 43-2019, 20 (1947); CONN. GEN. STAT. ANN. § 54-84 (1960); HAWAII REV. LAWS §§ 222-18, 19 (1955); KAN. GEN. STAT. ANN. § 62-1420 (1964); MO. ANN. STAT. §§ 491.020, 546.260 (1959); NEB. REV. STAT. § 25-1203 (1964); N.M. STAT. ANN. § 40A-1-12 (1963); N.C. GEN. STAT. ANN. § 8-57 (Cum. Supp. 1963); OKLA. STAT. ANN. tit. 22, § 702 (Cum. Supp. 1964); TEX. CODE CRIM. PROC. art. 714 (1954); WYO. STAT. ANN. § 1-142 (1957).

[18] ARIZ. REV. STAT. ANN. § 13-1802 (Cum. Supp. 1964); CAL. PEN. CODE § 1322 (1961 ed.); COLO. REV. STAT. ANN. § 153-1-7 (1953); IDAHO CODE ANN. § 9-203 (Supp. 1965); MINN. STAT. ANN. § 595.02 (1947); MISS. CODE ANN. § 1689 (1954); NEV. REV. STAT. § 48.040 (1963); N.D. CENT. CODE § 31-01-02 (1960); ORE. REV. STAT. § 139.320 (1961); S.D. CODE § 36.0101 (1960); UTAH CODE ANN. § 77-44-4 (1953); VA. CODE ANN.

generally as competent to testify against the other spouse as any other witness.[19] However, many of these statutes forbid the spouse from divulging confidential communications.[20] Alaska appears to be the only state that does not have a general declaration on the competency of the spouse, but it allows such testimony in enumerated instances.[21]

The Colorado statute construed in the instant case allows one spouse to testify against the other if there is consent. Again, such consent is unnecessary where the action involves injury inflicted by one spouse upon the other.[22] In deciding that perjury in a divorce action was a crime against the spouse, the Supreme Court of Colorado, in *Dill v. People,* declared that the wife could testify against her husband since "she is the individual particularly and directly injured or affected by the crime for which he is being prosecuted." [23] The Colorado courts were thereafter to hold that bigamy,[24] or the rape of a child by its father [25] were injuries sufficiently affecting the other so as to make the injured spouse competent to testify.

The Court in *O'Loughlin v. People* [26] was faced with circumstances similar to those in the instant case. Noting that the murder of a child was as offensive, and therefore, as likely to directly affect the spouse as the rape of a child, the court held that the murder of a child was a "crime against the spouse" within the meaning of the statute.

The Court in the instant case relied entirely on *O'Loughlin* and reiterated that the murder of their child by one spouse was an injury to the other, making the latter a competent witness. Although this case appears to be based upon precedent established in Colorado, it is in opposition to the *Bassett, Woodrow,* and *Jenkins*

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§ 8-288 (Cum. Supp. 1964); WASH. REV. CODE ANN. § 5.60.061 (Supp. 1963); W. VA. CODE ANN. §§ 5727-729 (1961).

[19] ALA. CODE tit. 15, § 311 (1958); DEL. CODE ANN. tit. 11, § 3502 (1953); FLA. STAT. ANN. §§ 90.04, 932.31 (1963); GA. CODE ANN. § 38-1604 (Cum. Supp. 1963); ILL. ANN. STAT. ch. 38, § 155-1 (Smith-Hurd 1964); IND. ANN. STAT. §§ 2-1713, 1714 (1946); KY. REV. STAT. ANN. § 421.210 (1962); LA. REV. STAT. ANN. §§ 15:461, 462 (1950); ME. REV. STAT. ANN. ch. 15, § 1315 (1964); MD. ANN. CODE art. 35, § 4 (1957); MASS. ANN. LAWS ch. 233, § 20 (Supp. 1964); MICH. STAT. ANN. §§ 27A.2158, 2162 (1962); N.H. REV. STAT. ANN. § 516:27 (1955); N.Y. PEN. LAW § 2445; OHIO REV. CODE ANN. § 2317.02 (Baldwin 1964); R.I. GEN. LAWS ANN. § 12-17-10 (1956); S.C. CODE § 26-403 (1952); TENN. CODE ANN. § 24-103 (1955); VT. STAT. ANN. tit. 15, §§ 207, 268, tit. 12, § 1605 (1959); WIS. STAT. ANN. § 325.18 (1963).

[20] *E.g.,* IND. ANN. STAT. §§ 2-1713, 1714 (1946); N.Y. PEN. LAW § 2445.

[21] ALASKA STAT. ANN. §§ 11.40.430, 11.40.310 (1962).

[22] *Supra* note 1.

[23] 19 Colo. 469, 475, 36 Pac. 229, 233 (1894).

[24] Schell v. People, 65 Colo. 116, 173 Pac. 1141 (1918).

[25] Wilkinson v. People, 86 Colo. 406, 282 Pac. 257 (1929).

[26] 90 Colo. 368, 10 P.2d 543 (1932).

rules previously discussed. Thus, it would seem appropriate to examine the soundness of the Colorado rule.

The primary consideration for the non-admissibility of a spouse's testimony is that it would be disruptive of the marital relationship. However, the "unity" of the marriage upon which the policy of the law was founded may have already been destroyed. Illustrative is the fact that one spouse has committed bigamy or has raped his own child. Examples could be multiplied. It is submitted that a crime committed by one spouse and witnessed by the other is more of a strain to the marital trust and tranquility than the disclosure of that crime in a court of law. The breach of marital unity is accomplished by the commission of the crime, and not by the testimony in a courtroom.

Moreover, as a national phenomenon, modern social and legal theories have challenged the validity of the "unity" concept. For example, the laws in many states have been revised to facilitate divorce actions. In addition, women are permitted to own property in their own right and enjoy the privilege of contracting in their own name.[27] Thus, its rigor partially vitiated, the "unity" concept may be viewed in some of its aspects as a legal platitude, rather than as a subsisting social actuality.

Another consideration is the evidentiary value of such testimony. At common law such evidence was excluded on the ground of bias. However, the United States Supreme Court has allowed one spouse to testify on behalf of the other because of an apparent shift in policy based upon state statutes.[28] Moreover, the Court has shown recent approval of a tendency to allow a spouse to testify *against* the other in prosecutions for violations of the Mann Act.[29] It would appear then, that the courts will make liberal use of the common-law exception, viz., "crime against the spouse," to effect the admission of a spouse's testimony as an element of relevant evidence. It may be argued that should one spouse feel vindictive toward the other, it would be possible for him, or her, to testify falsely. However, it has always been the difficult task of the jury to determine the credibility of witnesses, and one could predict that they would find no more difficulty in this area than in any other.[30]

Whether an injury to a child is an injury to a spouse is a question still very much in conflict. It is not doubted that the Colorado courts have been correct in determining that crimes against

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[27] United States v. Graham, 87 F. Supp. 237 (E.D. Mich. 1949).

[28] Funk v. United States, 290 U.S. 371 (1933).

[29] See Hawkins v. United States, 358 U.S. 74 (1958) for the application of FED. R. CRIM. P. 26. See also Wyatt v. United States, 362 U.S. 525 (1960).

[30] See Note, *Should the Rule Prohibiting Antispousal Testimony be Abolished?*, 15 U. PITT. L. REV. 318 (1954).

the children are an "outrage upon nature in its dearest and tenderest relations." [31] However, this is a use of the term "crime" in its generic sense. Could the courts of Colorado charge a husband with a crime arising from the single act of injuring his child, and additionally, charge him with a distinct and "personal" crime against his wife? The answer would appear to be in the negative.

Although the result in the instant decision coincides with a concept of justice in the case of injury to a close blood relation, the Colorado courts would be hard pressed to extend it to cases of violence perpetrated by one spouse upon a total stranger, and witnessed by the other. Because of the construction of the Colorado statute, the courts there may be committed to expanding the realm of admissible testimony by a spouse in reference to "crimes committed by one against the other." It would appear that a statute is needed whereby the courts of Colorado could allow the wife to testify, and, at the same time, could preserve the concept of marital confidence.

To this end, the statute could be modeled upon those presently in force in New York and Illinois.

New York has approached the problem by declaring that spouses are competent to testify except as to confidential communications.[32] Illinois, on the other hand, does not recognize confidential communications as privileged when there is injury to the person or property of one spouse, or when the children are directly injured by a spouse.[33] Statutes such as these attempt to balance the values of marital confidence with the practical realization that an injured spouse should be allowed the same opportunity to testify as any other injured person. In so doing they obviate the difficulties inherent in strained judicial expansions, which are necessitated by the restricted scope of statutes such as that construed in *Balltrip*.

IMMIGRATION — ILLEGITIMATE CHILD OF NATURALIZED CITIZEN DEEMED STEPCHILD FOR IMMIGRATION PURPOSES. — The plaintiff, who married subsequent to becoming a naturalized United States citizen, petitioned for a declaratory judgment classifying her alien husband's illegitimate child as a nonquota immigrant. The Board of Immigration Appeals sustained the District Director's

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[31] O'Loughlin v. People, 90 Colo. 368, 378, 10 P.2d 543, 547 (1932).

[32] N.Y. PEN. LAW § 2445. See People v. Harris, 39 Misc. 2d 193, 240 N.Y.S.2d 503 (Sup. Ct. 1963) wherein a spouse's letter, containing a confession of guilt of the murder of the child, was held a confidential communication when mailed only to the other spouse.

[33] ILL. ANN. STAT. ch. 38, § 155-1 (Smith-Hurd 1964).