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Witnesses--Competency of Wife's Testimony in a Criminal Action (Funk v. United States, 54 S. Ct. 212 (1933))

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WITNESSES—COMPETENCY OF WIFE'S TESTIMONY IN A CRIMINAL ACTION.—The defendant was indicted for conspiracy to violate the prohibition law. At the trial, he called his wife to testify in his behalf, but this testimony was excluded. On appeal, *held,* the wife of defendant in a criminal trial is a competent witness in his behalf, the old common law rule to the contrary being changed, in view of changing conditions. *Funk* v. *United States,* — U. S. —, 54 Sup. Ct. 212 (1933).

At common law, persons having an interest in the main were disqualified as witnesses.[1] The theory was to admit to the witness stand only those presumably honest, appreciating the sanctity of an oath, unaffected as a party by the result, and free from any temptations of interest.[2] Gradually changes had taken place and in 1864 Congress effected an enactment that no witness should be excluded from testifying in any civil actions, with certain exceptions, because he was a party to or interested in the issue tried, and in 1874 [3] Congress made the defendant in any criminal case a competent witness at his own request. The disposition of courts and of legislative bodies to remove disabilities from witnesses has continued [4] under dominance of the conviction of our time that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of facts involved in a case.[5] Any danger of an interested witness in not speaking the truth has greatly been diminished by the test of cross-examination, the increased intelligence of jurors and other circumstances. The exclusion of the testimony of the husband or wife is based upon his or her interest.[6] A refusal to permit the wife upon the ground of interest [7] to testify in behalf of her husband, while permitting him, who has the greater interest, to testify for himself,[8] presents a manifest incongruity. The exclusion of the wife's testimony cannot be justified on the ground of public policy. The public policy of one generation may not, under changed conditions, be the public policy of another.[9]

The court is justified in making changes in the common law rule. Flexibility and capacity for growth and adaptation is the

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[1] Logan v. United States, 144 U. S. 263, 12 Sup. Ct. 617 (1893); Hendrix v. United States, 219 U. S. 79, 31 Sup. Ct. 193 (1910); Jin Fuey Moy v. United States, 254 U. S. 189, 41 Sup. Ct. 98 (1920).

[2] *Ibid.*

[3] 20 STAT. 30 (1874); 28 U. S. C. A. §632 (1874).

[4] Benson v. United States, 146 U. S. 325, 13 Sup. Ct. 60 (1892); Rosen v. United States, 245 U. S. 467, 38 Sup. Ct. 148 (1917).

[5] Rosen v. United States, *supra* note 4; FEDERAL CRIMINAL CODE of 1909, omitted Rev. Stat. §5392, thus removing the disability of certain witnesses to testify.

[6] Jin Fuey Moy v. United States, *supra* note 1; Hendrix v. United States, *supra* note 1.

[7] *Supra* note 6.

[8] *Supra* note 3.

[9] Patton v. United States, 281 U. S. 276, 50 Sup. Ct. 253 (1930).

peculiar boast and excellence of the common law.[10] It adapts itself to varying changes in conditions [11] and modifies its own rules so as to serve the ends of justice.[12] No rule of the common law could survive the reason on which it was founded.[13] It needs no statute to change it but abrogates itself.[14]

M. E. W.

WORKMEN'S COMPENSATION—SCOPE OF EMPLOYMENT.—Plaintiff was employed to do "anything from clerical work to a coal heaver." On this occasion he was acting as a salesman soliciting business for his employer. When out of town he lunched at a restaurant in which the cook was a typhoid carrier. From the food there consumed he contracted the disease. He seeks compensation under the statute. *Held,* injury does not arise out of and in the course of employment. *Johnson* v. *Smith,* 263 N. Y. 10, 188 N. E. 140 (1933).

Undoubtedly the most significant of the provisions of The Workmen's Compensation Law [1] is the phrase "arising out of and in the course of employment." [2] "Arising out of," has been defined as referring to the origin or cause of the accident; "in the course of," is defined as referring to the time, place and circumstances of the accident.[3] An employer may be liable for the injuries sustained by the employee outside the place of employment especially where the duties of the employee are to be performed elsewhere [4] The

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[10] Hurtado v. California, 110 U. S. 516, 4 Sup. Ct. 111 (1884); Holden v. Hardy, 169 U. S. 366, 18 Sup. Ct. 383 (1898).

[11] Seeley v. Peters, 5 Gilman 130 (Ill. 1848); Reno Smelting Works v. Stevenson, 20 Nev. 269, 21 Pac. 317 (1889); Hannot v. Sherwood, 82 Va. 115 (1885).

[12] Netelsen v. Stilz, 184 Ind. 702, 111 N. E. 423 (1916).

[13] People v. Randolph, 2 Parker Cr. R. 174 (N. Y. 1855); Beardsley v. City of Hartford, 50 Conn. 529 (1883); Ketelsen v. Stilz, *supra* note 12.

[14] Beardsley v. City of Hartford, *supra* note 13; Ketelsen v. Stilz, *supra* note 12.

[1] Laws of 1913, c. 816, amended and re-enacted; Laws of 1914, c. 41; N. Y. CONS. LAWS, c. 67.

[2] N. Y. WORKMEN'S COMPENSATION LAW (1922) art. 2, subd. 4.

[3] Irwin v. Neisler & Co. v. Industrial Commission, 346 Ill. 89, 178 N. E. 357 (1931); see U. S. Fuel Co. v. Industrial Commission, 310 Ill. 85, 141 N. E. 401 (1923).

[4] Hospers v. Hungerford Smith Co., 194 App. Div. 945, 184 N. Y. Supp. 927 (3rd Dept. 1920), *aff'd,* 230 N. Y. 616, 130 N. E. 916 (1921); Harby v. Maxwell Bros., 203 App. Div. 525, 196 N. Y. Supp. 729 (3rd Dept. 1922), *aff'd,* 235 N. Y. 504, 139 N. E. 711 (1923); Habbershaw v. Shepard Co., 197 App. Div. 910, 187 N. Y. Supp. 935 (3rd Dept. 1921); Field v. Solomon Co., 197 App. Div. 911, 187 N. Y. Supp. 935 (3rd Dept. 1921); Goater v. D'Olier, 198 App. Div. 959, 189 N. Y. Supp. 944 (3rd Dept. 1921); Roberts v. Newcomb & Co., 201 App. Div. 759, 195 N. Y. Supp. 405 (1922).