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UXORIAL PRIVILEGES IN SUBSTANTIVE CRIMINAL LAW:  
A COMPARATIVE LAW ENQUIRY

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A thesis submitted in partial fulfillment of the requirements  
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## ABSTRACT

This thesis investigates three exemplars of uxorial substantive privileges in the criminal law: the marital coercion doctrine, the intraspousal conspiracy exemption, and the uxorial post-offence accessorial immunity. Their history, choreography and variations are comparatively investigated across the common law jurisdictions including the impact of statutory interventions. The principal argument is that the judicial and legislative treatment of these uxorial privileges has been inconsistent or erratic so that they are not the products of any systematic, modern development in the criminal law. This thesis proposes that there is no justification for their continued retention in common law legal systems. Archival, Parliamentary, and other sources have been used to identify the factors impinging upon the creation of specific statutory uxorial privileges. The diaspora of these laws throughout the other common law jurisdictions is investigated. The discussion is illustrated by examination of the particular issues raised by polygamy, customary law concubinage as well as by gender-reassignment. This thesis examines whether both gender-specific and marriage-specific criteria are valid constituents within the parameters of substantive criminal law. It traces the genesis of these special defences within the criminal law available exclusively to women, from the time of King Ine of the West Saxons c712, to examine the current status of such laws throughout common law jurisdictions. The investigation explores factors shaping the creation of a statutory defence of marital coercion by the British Parliament in 1925 and outlines the challenges generated by that law and its extraordinary resilience. This thesis demonstrates the failure of the criminal law to provide an overarching construct to implement emergent gender equality.



## STATEMENT AS TO PRIOR PUBLICATIONS

Except as stated below, the text of this thesis has not been published in any form prior to its submission for examination. The following references are to prior publications by the author.

- (a) Footnote: Chapter 2 fn 266 refers to David Clark and Gerard McCoy '*The Most Fundamental Legal Right: Habeas Corpus in the Commonwealth*' (2000) Clarendon Press, Oxford pp 97 – 102.
- (b) Footnote: Chapter 3 fn 155 refers to an Editorial Note in *HKSAR v Au Yuen Mei* [2000] 1 HKC 411, 412.

Except for materials quoted, where quotations are indicated by the use of quotation marks and are attributed in footnotes, this thesis is entirely my own work.



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### **Australian Capital Territory**

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s10(2) *Merchant Shipping (Liner Conferences) Ord* Cap 482 [HK]

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*Statute Ordinacio de Conspiratoribus* (33 or 21 Ed 1) [UK]  
4 *Edw 3* cii [UK]  
1 *Edw VI* (1547) c12, s10 [UK]  
5 & 6 *Edw VI* (1552) c10 [UK]

8 *Eliz (1565)* c4 [UK]  
18 *Eliz (1576)* c7, s1 [UK]  
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5 *Anne* c6 s4 [UK]  
7 & 8 *Geo IV*, c28, s6 [UK]  
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*Evidence Amendment Act 1853* [UK]  
*Marriage Law (Scotland) Amending Act 1856* [UK]  
s57 *Offences Against the Person Act 1861* [UK]  
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*Representation of the People Act 1867* [UK]  
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*Married Women's Property Act 1870* [UK]  
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<i>Wright v United States</i> (1957) 243 F 2d 569	365, 326
<i>Yew v Attorney General</i> [1924] 1 DLR 116 (BC: CA)	375, 378

## TABLE OF ABBREVIATIONS AS USED IN FOOTNOTES

ALJ	Australian Law Journal
Blackstone	Blackstone's Commentaries on the Laws of England 1765-1769
Cr App R	Criminal Appeal Reports
Crim LR	Criminal Law Review
East PC	Pleas of the Crown 1803
Hale PC	Historia Placitorum Cronae 1736
Hawk PC	Pleas of the Crown 1716-1721
HCD	House of Commons Debates
HLD	House of Lords Debates
HLR	Harvard Law Review
LQR	Law Quarterly Review
NZLJ	New Zealand Law Journal
NZPD	New Zealand Parliamentary Debates
PC	Judicial Committee of the Privy Council
PRO	Public Record Office, Kew London
Russell	Russell on Crimes
SAPD	South Australia Parliamentary Debates



## UXORIAL PRIVILEGES IN SUBSTANTIVE CRIMINAL LAW

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### INTRODUCTION

This work aims to investigate existing uxorial privileges in substantive criminal law in common law jurisdictions. Three exemplars are focused upon: the marital coercion doctrine, the intraspousal conspiracy exemption, and the post-offence accessorial immunity. The thesis is whether these special rules of the substantive criminal law relating only to married women, are validly products of a systematic development of the law?

The three privileges identified have existed in English common law for a millennium or so, before uneven intervention by statute, in relation to each, in the twentieth century. Investigation of historical legislative and policy sources has been necessary as most materials are not synthesised in secondary material in an effective way. The ascertainment of the original laws, their choreography and present status, has also required intensive research of primary court documents, because of the inadequacy or non-existence of relevant secondary works. The diaspora of those progenitive and durable common laws and their statutory successors-in-title are investigated. The quest is how and why these ancient laws have continued, in modern force, in providing to only wives both a gender-specific and status-specific defence to criminal conduct. The scope of this work involves an analysis of positive law and related policy. What is not investigated, other than in an incidental way, is adjectival and procedural law, including the rules of evidence. Philosophical rationales are also outwith the scope of this work. The methodology invoked has been for the contemporary documents, text, caselaw, or legislative debate, to speak to identify the dynamic that contemporaneously influenced the turning points in the relevant laws, so as to be able to investigate whether those laws have been systematically developed or merely progressed or otherwise.

Chapter One provides a broad historical overview of uxorial substantive privileges in the criminal law from the law of King Ine (c712) of the West Saxons, until the decision of Darling J in *R v Peel*<sup>1</sup>. In that case, a jury was directed as a matter of law to acquit the daughter of a prominent baronet as she was entitled to succeed in employing the defence of marital coercion – a defence for centuries hitherto reserved to the crabbed lower classes. In a second ruling, it was also held that under English common law an intraspousal only criminal conspiracy was non-justiciable.

Chapter Two investigates the outcry that followed the triumph of Mrs Peel, the reaction of the media and proponents of female emancipation, culminating in the abrogation of the common law doctrine but the creation of a statutory defence, which is still the law of England and Wales: s47 *Criminal Justice Act 1925* [UK]. It was in 1945 domestically adopted in Northern Ireland. Scotland had never countenanced it.

Chapter Three investigates the 80 years of judicial and legislative responses to that defence; it having been successfully exported to many other common law jurisdictions, where it has played over the years to mixed reviews.

Chapter Four turns to the second ruling of Darling J and investigates the history and rationale of the intraspousal conspiracy exemption up until 1957, the year in which the Privy Council affirmed the existence of such an uxorial privilege, albeit in relation to a potentially polygamous marriage<sup>2</sup>.

Chapter Five investigates how for the next 50 years, courts and legislatures reacted to the decision in *Mawji v The Queen* and its implications for married women and customary law concubines, under the substantive criminal law.

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<sup>1</sup> *The Times*, 15 March 1922.

<sup>2</sup> *Mawji v The Queen* [1957] AC 126 (PC).

Chapter Six considers the ancient privilege of a wife to be exempt from being an accessory after the fact to her husband's crime and investigates the unfolding history, rationales, and legislative reactions, in common law jurisdictions.

Chapter Seven identifies the conclusions and engages the issue of whether these uxorial substantive defences to the criminal law are unconstitutional as being violative of the right of equality and draws the conclusions from the earlier chapters.

## AN HISTORICAL OVERVIEW

"The married woman's capacity to commit crimes is almost normal."<sup>3</sup> The adverb in that striking sentence alludes to but does not identify the special position of married<sup>4</sup> women<sup>5</sup> under the substantive criminal law. The formal fact that a woman is married may provide the essential component in possible exemptions from the criminal law unavailable to any other class of person.<sup>6</sup> Three such facets of uxorial privilege under the common law are

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<sup>3</sup> Sir William Holdsworth, *A History of English Law* (1942) 5 ed (reprinted 1991) Sweet and Maxwell London, vol III p530. cf Roland M Perkins, *The Doctrine of Coercion*, (1934), 19 Iowa Law Review 507: "Speaking, not in terms of human traits, but in the language of the criminal law, a woman has the same capacity to commit crime as is possessed by a man. And the criminal capacity of a married woman is the same as that of a *feme sole*." As early as *R v Fenner* (1680) 1 Siderfin 410 a married woman "sans sa baron" was indicted; in *R v Crofts* (1795) 2 Str 1121 the court affirmed a conviction of a feme covert for selling gin, adding that although such a woman could not lawfully take the benefit of a contract because of her coverture, she could be convicted: "Besides there would be a plain way to evade the Act, if feme coverts could not be convicted".

<sup>4</sup> In *Holmes v DPP* [1946] AC 588, 600 Viscount Simon said "we have left behind us the age when the wife's subjection to her husband was regarded by the law as the basis of the marital relation."

<sup>5</sup> D Mendes Da Costa 'Criminal Law' in R H Graveson and F R Crane (eds), *A Century of Family Law 1857-1957* (1957) Sweet & Maxwell, London, p165, "There appears to be no single underlying principle which, by itself, accounts for the special position of husband and wife in the criminal law. At least three concepts play an important part: the doctrine of conjugal unity, the doctrine of conjugal subjection and the duty, love and tenderness recognised by the law as being owed by a wife to her husband."; Carol Smart, *Women, Crime and Criminology: A Feminist Critique* (1978) Routledge & Kegan Paul, London at p6: "There are very few sex-specific offences in the English legal system as the law is, in principle, held to be equally applicable to all, regardless of sex, race, class and other distinctions."

<sup>6</sup> William F Walsh, *Outlines of the History of English and American Law*, (1916) New York University Press, reprinted Fred B Rothman & Co Littleton, Colorado (1995) at p469: "A married woman could not be guilty of larceny from her husband; and, except in the case of the worst crimes, such as murder and treason, it was presumed that she acted under coercion by her husband if she committed the offense in his presence and at his direction, though this presumption could be rebutted. Otherwise marriage did not affect her responsibility for crimes committed by her." This last sentence will be seen to be unsupportable.

comparatively examined in this work: the defence of marital coercion,<sup>7</sup> the intraspousal conspiracy exemption<sup>8</sup> and uxorial accessorial exemption from criminal liability<sup>9</sup>. Each is separately considered (and where applicable its statutory successor). The thesis to be tested is: whether that there has been any sufficient coherent development for exempting wives<sup>10</sup> as a particular class of womanhood from the criminal law. The complications induced by

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<sup>7</sup> Considered at length infra chp 3. There is no rule of criminal law preventing husband and wife from becoming accomplices in a given crime, whether as joint principals or as principal and accessory to each other.

<sup>8</sup> Considered at length infra chps 4 and 5. The first jurisdiction to actually decide that an intraspousal conspiracy was not possible at common law was the Supreme Court of New Zealand in a trial ruling of Johnston J in *R v Howard*, *The Lyttelton Times*, Friday 9 April 1886 p6 col 1, closely followed with the same conclusion by the Supreme Court of California in *People v Miller* (1889) 22 P 934; Delaware in *State v Clark* (1891) 33 A 310 reached the same conclusion. The first decision of a Federal Court in point was *Dawson v United States* (1926) 10 F2d, 106 which equally affirmed it. The first decision in any jurisdiction denying that the common law rule pertained was that of the Supreme Court of Colorado in *Dalton v People* (1920) 189 P 37. In an earlier decision the Texas Court of Criminal Appeals had in an obiter statement also denied the rule in *Smith v State* (1904) 81 SW 936. The first Federal decision repudiating the common law conspiracy exemption was *Johnson v United States* (1946) 157 F 2d 209.

<sup>9</sup> Considered at length infra chp 6. William Pinder Eversley, *The Law of the Domestic Relations* (1896) 2 ed, Stevens & Haynes, London, p174: “Where a wife receives stolen property, it is necessary to show that she took an active part in the receipt, and that if she only intended to conceal her husband’s guilt, and to screen him from the consequences, it is different; so if she harbours her husband or endeavours to conceal that which may lead to his apprehension, she ought to be acquitted”; Edward Jenks (ed), *Stephens Commentaries on the Laws of England* (1922) 17 ed, vol 4, Butterworth & Co, London at p35: “But so strict is the law, where a felony has been actually committed, that even the merest relations of the offender are not suffered to aid or to receive him. And therefore if the parent assists his child, or the child the parent, if the brother receives the brother, the master the servant, or the servant the master, or if the husband receives the wife – in every case they become accessory after the fact. But the wife receiving or concealing her husband is presumed to act under his coercion; and she is not bound in law, neither ought she, to discover her Lord. She is therefore not liable as an accessory after the fact.”

<sup>10</sup> The legal nature of the institution of marriage is to be found in the common law. Sir W Holdsworth, *A History of English Law*, 3ed (1942) vol 1, p622; author *Latey on Divorce*, (1952) 14 ed, p1-2 observing that “[t]he temporal courts had no doctrine of marriage”. As to the husband’s legal duty to support his wife and hers to serve him, see Joseph Warren, *Husband’s Right to Wife’s Services*, (1925) 38 Harvard LR 421-446 and 622-650 and Paul Sayre, *A Reconsideration of Husband’s Duty to Support and Wife’s Duty to Render Services*, (1943) 29 Virginia LR 858-875. *R v Watson and Watson* [1959] Crim LR 785. Husband and wife were jointly charged with manslaughter of their three year old child who died three days after sustaining serious injury from scalding. This proposition was supported by *R v Forsyth*, unreported 25 July 1899 Chester Summer Assizes itself following *R v Squire* unreported 1799 Stafford Lent Assizes, Lawrence J and *R v Saunders* (1836) 7 Car & P 277. The authorities had held that the wife was under no duty to provide in *R v Squire* an apprentice with food and in *R v Saunders* her illegitimate child with food, as the wife was in each case the servant of her husband and was under no duty to find food for the child herself and could only be made criminally liable if it was shown that she had omitted to give the child food, which the husband had provided. In *R v Saunders* the statute 4 & 5 Will 4 c76, s71 provided that a mother was bound to maintain her bastard child so long as she shall be unmarried or a widow which the Court had interpreted as being confirmation that her duty ceased when she had married. Thus, in *R v Shepherd* (1862) 9 Cox CC 123 it was held that no duty to act is owed by a parent to an 18 year old who was in childbirth. The view in P M Bromley *Family Law*, (1957) Butterworths & Co (Publishers) Ltd, London p148 was that “the wife is no longer the weaker partner subservient to the stronger but that both spouses are the joint, co-equal heads of the family”. Further s42 *National Assistance Act 1948* [UK] provided that for the purposes of that Act “a woman shall be liable to maintain...her children”.

polygamy, customary law concubinage and their special interface with the criminal law in relation to the three identified exemplars are also investigated.

Between spouses the adjectival laws of evidence generate special rights and the substantive criminal law provides in some jurisdictions for privileges for married women not available to any other person. The exceptional nature of these privileges is attributable to the interaction of the doctrine of conjugal unity, the social interest in marital harmony and the inferred dominance<sup>11</sup> of the husband over the wife. Judges recognised and endorsed the unequal positions occupied by the individual parties to a marriage and the hierarchical structure of the marital entity itself, a recognition by the judiciary that marriage was the dominant social institution in the lives of married women and that the husband had been assigned the leading role in controlling the conduct of his spouse.<sup>12</sup> A biblical imprimatur<sup>13</sup> for the commanding role of the husband, expounded by legal and other writers, was based on the extrapolated notion that upon marriage husband and wife were in law but one flesh. In the husband merged the social and property interests of both. His guardianship<sup>14</sup> role infiltrated all aspects of that

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<sup>11</sup> Her legal personality was sublimated by that of her husband to such an extent that a wife was not presumed to have the right to custody of their children and she was not liable in criminal law for their neglect it being the legal obligation of the husband alone to provide for their welfare. This notion persisted throughout much of the 19<sup>th</sup> century, however, in *R v Bubb* (1850) 4 Cox CC 455, where it was held by Williams J in an indictment against a caregiver, a sister-in-law of the father of the child, who systematically starved the child, that she was under a common law duty to provide necessaries of life. This general privilege of the wife, the result of being under the thralldom of the husband and therefore having no independent responsibility or even the means to provide the necessaries, was only and finally repudiated in England in 1959 in *R v Watson and Watson* [1959] Crim LR 785, 786 (Assizes). Modern social welfare legislation provides no excuse for any omission by a wife or mother. Modern criminal law now makes both spouses criminally responsible for the welfare of any child in their custody: *R v Lunt* [2004] 1 NZLR 498, 506 (CA).

<sup>12</sup> *R v Saunders* (1836) 7 Car & P 277, 173 ER 122, 123 “[T]he wife is only the servant of the husband.” This understanding of the law was extended in some jurisdictions into a collateral rule of evidence which presumed that any admissions made by a wife against her own interests, in the presence of her husband, were inadmissible. This was an adjunct to the privilege against spouse-incrimination, a common law rule, as it amounted on the logic of the conjugal identity, to self-incrimination. It was held therefore, that a wife’s silence in the presence of her husband could not be used as admissible evidence against her. An effect of the presumption of coercion was that it was doubtful whether a confession by a wife in the presence of her husband should be received as voluntary: *R v Laughler* (1846) 2 C & K 225, 226-227 per Pollock LCB where a confession to a constable induced by her husband “could not be received as a free and unbiased confession”, noted in WF Craies and H D Roome (eds), *Archbold’s Pleading, Evidence and Practice* (1910) 24 ed, Sweet and Maxwell, p19.

<sup>13</sup> Nancy F Cott, *Public Vows – A History of Marriage and the Nation*, (2000) Harvard University Press at p11: “The legal oneness of husband and wife derived from common law but it matched the Christian doctrine that “the twain shall be one flesh”, having exclusive rights to each others’ bodies.”

<sup>14</sup> The husband was the fountainhead of the family so that his wife was defined by where he lived. *Wellington v Whitchurch* (1863) 32 LJMC 189, 192 “a man’s home is where his wife lives.” per Cockburn CJ; to the same effect it was submitted *arguendo* in *R v Norwood* (1867) LR 2 QB 457, 459.

union which permitted the assumption that he was able at will to exercise control of his wife's will. The fundamental objective of the various privileges excluding married women from certain aspects of the criminal law, promoted the preservation of marital harmony, itself a significant societal value. From the wide central principle of intraspousal peace the special rules of evidence applicable to spouses naturally followed as intramarital confidences, if spilled under compelled testimony, might well undermine the greater objective of marital stability. Yet the defence of marital coercion only permitted the wife to succeed by establishing that the husband had so dominated and compelled her as to be instrumental in causing her to commit an offence in his presence. That is, a wife escaped the criminal law by proving, in essence, that her husband had broken the law as well as his guardianship obligation in relation to her; which ought to be potentially destructive of that very marital relationship. A wife could only save herself by implicating her husband, thereby destroying what the law otherwise had elevated into a special relationship deserving of privileges unavailable to any other duality.

The absolute defence of marital coercion as an uxorial privilege has existed in the criminal law for more than a thousand years.<sup>15</sup> It was almost a full general defence; at common law it was subject to only a few certain but definite exceptions<sup>16</sup> (treason and murder) while other exceptions including manslaughter and robbery were themselves the subject of problematic and conflicting decisions, as to their very existence as exceptions. This remarkable common law defence, which selectively yet presumptively positioned an entire class of femalehood beyond the ordinary reach of the criminal law, was abrogated as the stammering but direct result of its sensational and successful invocation and the consequential acquittal in 1922<sup>17</sup> of the daughter of a baronet. As a result of that acquittal, the Lord Chancellor established a Committee under the chairmanship of Avory J, to report on the state of that law and to recommend any necessary changes to it. This work examines that critical decision in *R v Peel*,

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<sup>15</sup> Wayne Morrison (ed), *Blackstone's Commentaries on the Laws of England* [28] stating that the defence was "at least a thousand years old in this kingdom". Francis Sayre, *Mens Rea*, (1932) Harvard Law Review 974, 1004 identified the growing particularisation of the general mens rea with respect to specific defences, stating "After the twelfth century new general defences began to take shape such as insanity, infancy, compulsion or the like, based upon the lack of a guilty mind and thus negating moral blameworthiness".

<sup>16</sup> Considered infra chp 3.

<sup>17</sup> Considered at length infra chp 2. *R v Peel* (1922) *The Times*, 8 March 1922 reporting the trial before Darling J at the Central Criminal Court.

the work of the Avory Committee, and the subsequent three years of tumultuous political and judicial machinations which finally led to the passage of s47 *Criminal Justice Act 1925* [UK], which created the rare, non-egalitarian, excusatory defence of marital coercion. By the statute it applies to every offence at law, save for the two exceptions of murder and treason. Since its inception, there have been only about 10 occasions on which this defence has been invoked in England and Wales (it never having been part of Scottish law) and but one example of its deployment, since its belated entry into force in Northern Ireland in 1945, is known. The caselaw is examined for its revelations.

The 1925 Act declaring the demise of the common law defence, the origins of which were traceable to the laws of King Ine<sup>18</sup> of the West Saxons in 712 AD, simultaneously created a new statutory defence, again of almost general applicability and again only available to married women. There had been sustained criticism of the marital coercion doctrine by law reform bodies<sup>19</sup> and even by the judges themselves throughout the nineteenth and twentieth centuries, but to no avail. This defence still is in force in England has been substantially replicated in other common law jurisdictions which continue to adopt it; although Arkansas in 1855<sup>20</sup>, Canada in 1892<sup>21</sup>, and New Zealand<sup>22</sup> in 1893 were pioneers<sup>23</sup> in rejecting it. The

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<sup>18</sup> H Adams, H C Lodge, J L Laughlin and E Young, *Essays in Anglo-Saxon Law* (1905) Little Brown & Co, Boston at p175: “Ine, 57: “If a ceorl steal a chattel and bear it to his dwelling, and it be intertiated therein, then shall he be guilty for his part without his wife; for she must obey her lord. If she dare to declare by oath that she tasted not of the stolen property, let her take her third party” ”; 1 Edmund H Bennett ‘*Leading Cases in Criminal Law*’, (1869) 2 ed 86; noted F Sayre, ‘*Mens Rea*’, (1932) 45 Harvard Law Review 974, 1012.

<sup>19</sup> WR Cornish, ‘*Crime and Law in Nineteenth Century Britain*,’ (1978) Dublin pp 66-71. Beginning in 1830 a series of Commissions were appointed to report on the state of the English criminal law.

<sup>20</sup> Considered at length infra chp 3.

<sup>21</sup> s13 *Criminal Code 1892* [Can]. Don Stuart, ‘*Canadian Criminal Law - A Treatise*’ (1982) Carswell Co Ltd, Canada, notes at p384 that the first Criminal Code in Canada abrogated the defence which was an “arbitrary and socially dated notion that a wife could rely on the defence of duress merely on account of the marital bond. Our abolition as early as 1892 was in terms more forthright than the later abolishing statutory provision in England, which still presents difficulties”.

<sup>22</sup> s24 *Criminal Code Act 1893* [NZ]. In *R v Annie Brown* (1896) 15 NZLR 18, 34 Williams J stated that if the defence of marital coercion was based solely upon a legal fiction, the abolition of the fiction would put an end to the entire defence. The Privy Council impatiently dismissed a further appeal, *Brown v Attorney-General for New Zealand* [1898] AC 234 (PC).

<sup>23</sup> The presumption (but not the defence) has now been abolished in all Australian jurisdictions: s32 *Criminal Code Act 1899* [Qld]; s32 *Criminal Code Act 1902* [WA]; s407 *Crimes Act 1900* [NSW]; s12 *Criminal Law Consolidation Amendment Act 1940* [Sth Aust]. In D Brown, D Farrier, D Neal and D Weisbrot, ‘*Criminal Laws, Materials and Commentary on Criminal Law and Process in New South Wales*’ (1996) vol 2, The Federation Press, at p778; “The Northern Territory was the last jurisdiction in Australia to abolish the presumption, in 1983”. This statement is incorrect the last jurisdiction was the Australian Capital Territory where it was only abrogated in 1999 after *R v Batt* unreported, Supreme Court of the Australian Capital Territory, SCC 18 of 1999,

defence was bodily copied by other common law jurisdictions, including the then British dependencies and colonies of Hong Kong and Gibraltar. The Australian States and Territories all received the defence at common law. All have now eventually provided for the abrogation of the presumption, with the Australian Capital Territory legislature hastily enacting such legislation in 1999 after a Supreme Court Judge had ruled that that jurisdiction still remained the law. The states of South Australia and Victoria still retain the defence by statute. The uneven position of the American states is also considered in detail.<sup>24</sup>

The doctrine that only a woman who, as a result of her husband's coercion, engages in any but the most serious criminal conduct, is absolved of criminal responsibility, is unique to the generic law of compulsion and duress,<sup>25</sup> in that the common law defence, because of the rebuttable presumption of coercion, could be maintained without any demonstration of actual or threatened physical violence. The doctrine is of ancient derivation and was based on an understanding of the legal and practical power of the husband to impose his will on his wife and of the resulting need therefore to protect her from criminal liability, when she lacked independent<sup>26</sup> criminal intent. It is also implicit in the doctrine that the close ties of emotion rendered the wife vulnerable and susceptible to coercion. The fact of the defence also exposes the accepted reality that a wife was to unquestioningly comply with any judgment made for her by her spouse. The defence necessarily reinforced his thralldom over her. The mere

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1 March 1999, Higgins J confirmed its existence. The Australian Capital Territory legislated urgently, responded and passed an amendment abrogating the presumption. The debate on the amendment via the *Crimes Amendment Bill (No 2) 1999* [ACT] was supported by all parties in the legislature. Mr. J Stanhope MLA, '*Legislative Assembly of the Australian Capital Territory*' (1999) week 12 Hansard (25 November) p3694 described the presumption as an "archaic and extremely sexist notion". Enacted as s407 *Crimes Act 1990* [ACT] (notified in ACT *Gazette* No 50: 15 December 1999).

<sup>24</sup> *Infra* chp 3.

<sup>25</sup> Robin S O'Regan, '*Essays on the Australian Criminal Codes*', (1979) The Law Book Company Ltd, Sydney at p126-136 discusses the position in relation to marital coercion under the Codes of Queensland and Western Australia as it stood at that time. "As Sir Samuel Griffith observed in a note appended to this section of his draft of the Queensland Code, the scope of the common law defence of marital coercion which the section replaced was obscure."

<sup>26</sup> In *R v Cohen* (1868) 11 Cox CC 99, 100 (CCCR), the Recorder directed a jury that if they thought the woman was acting independently of her husband and not under his control they could find her guilty. Anon, '*Husband and Wife in the Criminal Law*' (1927) 91 JP 662, 663 has a significant statement that "the common law development was such that: it was thus sometimes shown what was not coercion, but never positively what was". Noted Kenneth C Sears and Henry Y Weihofen, '*May's Law of Crimes*', (1938) 4 ed, Little Brown & Co, Boston at p40. Paul H Robinson, '*Criminal Law Defenses Criminal Practice Series*', (1984) vol 2, St Paul, Minn. West Publishing Co, at p371 §177(h). The presumption had as its aim a determination of whether the actions of the wife were "independently accountable".

existence of the marriage did not raise the defence, as it only applied to exculpate where the husband was present at the time his wife committed an offence. So the defence sprang from marriage but the operative feature was the physical proximity of the husband to the wife, on the basis that within a sufficiently near diameter of influence, possibly reinforced by actual physical assault, the wife was incapable of exercising free will.<sup>27</sup> If the husband could exert his immediate influence and control over her then the defence was available.

The matrimonial relationship still provides in some common law jurisdictions a complete defence, as much as any other general defence of the criminal law does in relation to an aspect of the substantive offence of conspiracy. The defence of marital coercion had a unique feature as it permitted complete exculpation without any evidence of a threat or actual violence being required as the defence operated on the presumption that marital coercion had existed unless and until it was displaced on all the evidence; normally by demonstrating that the wife had exercised independence and initiative in the offence.<sup>28</sup>

Marriage itself, as an institution, was protected by the criminal law<sup>29</sup> in different ways and it is also controlled by other aspects of the common law<sup>30</sup>. The defence of marital coercion was

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<sup>27</sup> Alan Wertheimer, *Coercion* (1987) Princeton, New Jersey p148 examines deontological theory that it is unjust to punish a person not possessed of freedom of choice and utilitarian theory that punishment for involuntary conduct is inefficacious. Stanley Yeo *Coercing Wives into Crime* (1992) 6 Australian Journal of Family Law 214, 217 argues that the threats to a wife (as much to a husband) could be of a psychological nature. Moral pressure can be the effect of economic or other threats. A threat of divorce which might go against a wife's religious belief or a threat to prevent her from seeing her children are all realistic scenarios. See also J L J Edwards, *Compulsion, Coercion and Criminal Responsibility* (1951) 14 Modern Law Review 297, 309 who gives similar examples as do Albert Lieck and ACL Morrison, *The Criminal Justice Act, 1925, with Explanatory Notes* (1926) Stevens and Sons Ltd, Chancery Lane, London p90-91.

<sup>28</sup> In *The City Council v Van Roven* (1832) 2 McCord 465 Nott J said "a husband is never to be presumed to act under the influence of the wife."

<sup>29</sup> *J v S-T* [1997] 1 FLR 402 at 438, per Ward LJ: "it seems to me that the status of married persons, the sanctity of the marriage union, and the institution of marriage itself are all objects of public policy requiring our protection." In *Whiston v Whiston* [1995] 2 FLR 268, a bigamist was held by the Court of Appeal, to be disqualified from obtaining ancillary relief on the nullification of her bigamous marriage. Ward LJ said *ibid* at 274, that to grant such relief would give "scant effect to the seriousness of bigamy", a crime which "undermines our fundamental notions of monogamous marriage". cf. *Rampal v Rampal (No2)* [2001] 2 FLR 1179 held that there is no absolute rule that a bigamist can never claim ancillary relief; and allowed such a claim to proceed. Thorpe LJ at p1188 stated that "the rule in *Whiston v Whiston*...does not preclude this court from having regard to the nature of the crime and all the surrounding circumstances". Bigamy is punished because it represents a threat to public morality, because it compromises the institution of marriage, aside from its inherent duplicity. Section 206 punishes bigamy. In *Hassen v Director of Public Prosecutions* unreported, Queens Bench Division (Crown Office List), 30 July 1997 Hobhouse LJ, Moses J, CO/182/97 it was held that in a prosecution for bigamy, if the defendant alleges that the supposed prior marriage is invalid he need not make it an evidential

dependent on the torque of the union. It approbated the matrimonial institution by identifying its breaking point yet also sacrificed it to save the wife from her husband if necessary.

The defence of coercion was allowed with far greater indulgence than the common defence of duress (interchangeably called compulsion). No threat of death or serious bodily harm needed be shown and the mere conduct of the wife in the presence of the husband itself raised a presumption of her coercion. However, in the late nineteenth and early twentieth century, various Legislatures often abandoned the presumption of marital coercion<sup>31</sup> or went further and entirely abolished the defence as being outmoded and reinforcing of the stereotypical inferiority and inequality of women generally and wives in particular.<sup>32</sup> The policy and imperatives that influenced the legislation in the different jurisdictions are analysed, including the position in relation to polygamy.<sup>33</sup> Late in the twentieth century the constitutional validity of the defence fell for consideration. Despite regular calls for statutory alteration in England

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issue as the burden remains on the prosecution to establish its validity: *R v Kay* (1887) 16 Cox CC 292, 293-294 per Huddleston B.

<sup>30</sup> In *Lowe v Peers* (1768) 4 Burr 2225 a contract which attempted to prevent a person from marrying at all, or considerably restricted that opportunity, was held invalid at common law. Any contract that imperilled an existing marriage was unlawful: see *Fender v St John Mildmay* [1938] AC 1, 33 (noted in Andrew Borrowdale (ed), *Criminal Law in New Zealand* (2000) 4 ed, Butterworths, p100). Lord Russell of Killowen said “it is in the interest of the State that, if possible, the marriage tie should remain stable and be maintained.” He sardonically noted at p35 that the institution of marriage was “steadily assuming the characteristics of a contract for a tenancy at will.” See Raphael Powell, *Marriage Brocage Agreements*, [1953] Current Legal Problems 254 for a comparative and historical inquiry of contracts in which one party agrees to cause a marriage between the other party to the contract, with another person as in *Herman v Charlesworth* [1905] 2 KB 123, 130 where *The Matrimonial Post and Fashionable Marriage Advertiser*, had contracted with the plaintiff to introduce several potential matrimony candidates in return for an advance payment. It has been persuasively argued that the public policy insured in *Herman v Charlesworth* is outdated: see John Dwyer, *Immoral Contracts* (1977) 93 LQR 386, 393. *Chuang Yue Chien Eugene v Ho Yau Kwong Kevin* [2002] 4 HKC 245, 261 G per Ma J. A court will not enforce any condition in a will which would operate as a restraint upon the devisee’s freedom to marry: *Bellairs v Bellairs* (1874) LR 18 Eq 510, 513; *Re Fentem (deceased) Cockerton v Fentem* [1950] 2 All ER 1073, 1076C.

<sup>31</sup> Nigel Walker, *An Analysis of the Penal System in Theory, Law and Practice: Crime and Punishment in Britain* (1968) University Press, Edinburgh at p298 notes “Women who co-operate with men in the commission of offences are frequently regarded as unwilling accomplices (often this is the case, but sometimes they are the instigators)”. This assumption, he asserts, is even reflected by statute referring to s47 *Criminal Justice Act 1925* [UK] noting that it originated as a legal fiction for the protection of women “but it is significant that it was perpetuated and not abolished.”

<sup>32</sup> A wife’s weakness did not suddenly appear on her wedding day. By the turn of the twentieth century many courts were becoming impatient with claims of marital coercion. Recent advances in the status of women had included the abolition of the husband’s right to imprison or chastise his wife and granted enfranchisement and separate property rights.

<sup>33</sup> In *R v Caroubi* (1912) 7 Cr App R 149 the Court of Criminal Appeal appeared to accept a concession that the presumption of marital coercion would apply to a potentially polygamous conjunction. In *R v Khan (Junaid)*, The Times, June 10 1986 (CA) a second and polygamous marriage was not regarded as a valid marriage for the purposes of spousal non-compellability.

and other common law countries the defence remains virtually intact in a significant number of common law countries, other than Canada and New Zealand, which were the first nations to repudiate the entire doctrine of marital coercion. The defence has, however, undergone a renaissance in 1977 in the State of Victoria where it has been modernised and extended. The defence still is in force in Alabama and North Carolina<sup>34</sup> and some other American states. Even Federal judges there remain unsure whether the marital coercion presumption continues to exist.<sup>35</sup>

Under the criminal law a married woman is generally as amenable to the offence provisions of law as any other man or single woman. Single women, *femes sole*, have always had identical legal responsibility for their crimes as men, but this equality disappeared on marriage only to revive immediately upon widowhood.<sup>36</sup> A wife is fully responsible for crimes she has committed alone and voluntarily, or for crimes which she has procured or incited her husband to commit. She can commit a crime jointly with her husband.<sup>37</sup> She can incite her husband to commit a crime.<sup>38</sup> She can aid and abet her husband to commit a crime.<sup>39</sup> She could not at common law, however, conspire with her husband alone nor could

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<sup>34</sup> *State v Owen* (1999) unreported, Supreme Court of North Carolina No COA 98-413, 15 June 1999, per Timmons- Goodson J at [z] “As we conclude that the presumption of spousal coercion remains a valid affirmative defense” Lewis and Walker JJ concurring.

<sup>35</sup> *United States v Harris* (1971) 328 F Supp 973 per Daugherty DJ.

<sup>36</sup> Montague Lush, ‘*A Century of Legal Reform, Twelve Lectures on the Changes in the Law of England during the Nineteenth Century, Delivered at the Request of The Council of Legal Education in the Old Hall, Lincoln’s Inn, during Michaelmas Term 1900 and Hilary Term 1901*’, reprinted (1972) South Hackensack, New Jersey, Rothman Reprints Inc. at p351. Married women were not entitled to enter contracts on their own behalf but there was an exception: “if a man were convicted of a crime and were civilly dead, his wife could acquire and hold property in contract and sue and be sued as a *feme sole*. This was an invention created by necessity rather than by enlightenment, and on the husband regaining his freedom the wife apparently lost hers”.

<sup>37</sup> *Somerville’s Case* (1584) 1 And 104; J M Beattie, ‘*Crime and the Courts in England 1660-1800*’, (1986), Clarendon Press, Oxford, p238: “The rule that a married woman could not be held responsible for illegal acts done in the company of her husband (unless he could be shown to be blameless) may also have discouraged some prosecutions. But under-reporting is not likely to explain differences in the types of offences men and women were charged with, particularly because serious capital crimes made up a much smaller proportion of women’s prosecuted offences than men’s.” In footnote 71 the author refers to the presumption of marital coercion and notes that married women were often indicted with their husbands “the more common experience, of which many examples could be cited in this period, was for a wife to be discharged after her husband was found guilty on the grounds that she must have acted under his direction”.

<sup>38</sup> P R Glazebrook (ed) Sir Matthew Hale 1 ‘*Historia Placitorum Coronae*’, [*Pleas of the Crown*] 1736, Professional Books Ltd, London (1971) pXXX, Cap VII, 45S. *R v Annie Brown* (1896) 15 NZLR 18, 32 per Prendergast CJ.

<sup>39</sup> *Mok Wei Tak v The Queen* [1990] 2 AC 333 (PC). In *Browning v Floyd* [1946] 1 KB 597 (DC) a railway regulation provided that an unused half ticket could not be transferred to another person. A wife transferred such a ticket to her husband who used it. He was charged with an offence and his wife with aiding and abetting him in

she be an accessory after the fact to his felony, as in that situation her marital duty was to harbour the husband<sup>40</sup> including obstructing his apprehension. Although scattered among the substantive law were a number of other disparate uxorial privileges,<sup>41</sup> exempting wives from criminal responsibility, as a class, they have almost all perished by statute or by judicial decision.

## INTRAMARITAL CONSPIRACY EXEMPTION

The second substantive exemption to be examined is the common law position which held that two spouses alone could not conspire together, on the basis of their supposed conjugal unity.<sup>42</sup> This conclusion was assumed to be English law<sup>43</sup> but no decision since 1365 had

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it. The justices acquitted on the basis that husband and wife must be treated as one person. This is the very decision which prompted the article by Glanville L Williams, *The Legal Unity of Husband and Wife* (1947) 10 MLR 16 fn 2. Lord Goddard CJ allowed a prosecution appeal on the basis that the regulation precluded a spouse relying on a ticket issued to the other.

<sup>40</sup> Coke 3 *Institutes* 108; 1 Hale PC 47; 1 Hawk PC 4; *People v Dunn* 53 Hun (NY) 381.

<sup>41</sup> Frederick Pollock and Frederic Maitland, *The History of English Law*, (1895) vol 2, (reprinted 1996) 2 ed, vol 1, The Law Book Exchange Ltd, Union, New Jersey, p482. A married woman could never be outlawed as she was never in law; or attained: *Lee Kei-Yick v The Queen* [1978] HKLR 510 (CA) (Briggs CJ, Leonard & Zimmern JJ) “as forfeiture was a necessary consequence on attainder for felony and a married woman could have nothing to forfeit”.

<sup>42</sup> In *Wenman v Ash* (1853) 13 CB 836 Maule J declined to carry the common law doctrine of unity to its logical conclusion holding the publication of a defamatory statement to the plaintiff’s wife was an actionable publication. “In the eye of the law, no doubt, man and wife are for many purposes one: but that is a strong figurative expression, and cannot be so dealt with as that all the consequences must follow which would result from its being literally true. For many purposes, they are essentially distinct and different persons” *Phillips v Barnett* (1876) 1 QBD 440: “It is a well established maxim of the law that husband and wife are one person. For many purposes this is a mere figure of speech; for other purposes it must be understood in its literal sense.” In *Re March, Mander v Harris* (1883) 24 Ch D 222 Chitty J said: “It appears to me that the [*Married Womens Property Act 1882*] makes such alterations in the relation of husband and wife that it severs the unity of person, and divides that compound person which the law formerly recognised to such an extent as to render it wrong for the Court to apply the old principle which was founded on unity of person”. De Montmorency, *The Changing Status of a Married Woman*, (1897) 13 LQR 187, 192 says of the doctrine of the legal identity of husband and wife: “The English Judges were too reasonable to be logical, if they could possibly help it.”

<sup>43</sup> In *Director of Public Prosecutions v Blady* [1912] 2 KB 89 Lush J dissented stating: “The foundation of the rule which prevented a wife from giving evidence against her husband was the fact that they were one person in the eye of the law. No doubt that rule was applied in every case except where it was necessary either for the safety of the wife or for her wellbeing to relax it.” The judge emphasised that the rule operated “in strange ways both in the criminal and in the civil law”. In particular he observed: “Husband and wife being one person could not be indicted or convicted of conspiracy one with the other. A wife could not be convicted of being an accessory after the fact when her husband had committed a felony; but the rule was relaxed in the converse case, and a husband could be convicted of being an accessory after the fact in the case of his wife’s felony.” Both New Zealand and Canadian Courts had by a majority concluded that the intraspousal doctrine was well-founded or alternatively was so well embedded in the common law that it could only be extirpated by a purpose-built repeal by specific

actually reached that position. However, the Privy Council on appeal from Tanganyika in *Mawji v The Queen*<sup>44</sup> had to starkly consider the issue in relation to whether the exemption applied to a polygamous marriage. Earlier, the New Zealand Court of Appeal<sup>45</sup> by a majority and the Supreme Court of Canada<sup>46</sup> also by majority had affirmed the existence of the intraspousal conspiracy exemption. This work examines that case law and the subsequent enactment of s2(2)(a) *Criminal Law Act 1977* [UK]<sup>47</sup> which now specifically provides for the exemption in relation to every criminal offence. This legislation has also been adopted in other common law jurisdictions and the implications of this exemption are considered in an investigation whether the exemption can be rationally justified on any persuasive criminal law basis.

#### ACCESSORY AFTER THE FACT EXEMPTION

The third exemplar is the common law defence available only to married women that they were exempt from criminal liability for any accessoryship role after the fact of a felony committed by their spouse. This common law offence has now been modified by s1(1) *Criminal Law Act 1967* [UK] by the introduction of a new offence of assisting offenders,

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legislation. The American Courts repeatedly upheld the existence of the doctrine until the matter came to the United States Supreme Court in *US v Dege* (1960) 364 US. Just after the critical decision in *Dege*, Lord Denning MR was able to state that the unity rule “has now been swept away in nearly all branches of the law.” *Gray v Formosa* [1963] P 259, 267 (CA).

<sup>44</sup> *Mawji v The Queen* [1957] AC 126 (PC).

<sup>45</sup> *R v McKeachie* [1926] NZLR 1 (CA). Until s67 *Crimes Act 1961* [NZ] the common law fiction of conjugal unity persisted. In *R v Howard and Howard* unreported, Supreme Court, Christchurch, 9 April 1886, Johnston J, it was held that the common law rule was in force. This decision predated the *Criminal Code Act 1893*. In *R v Annie Brown* (1896) 15 NZLR 18, 32 (CA) Prendergast CJ stated obiter “A husband and wife together with others have been considered indictable together, though a husband and wife, being one in the eye of the law, cannot be indicted for conspiracy without alleging that others were in the conspiracy.”

<sup>46</sup> *Kowbel v The Queen* [1954] 4 DLR 337 (SCC).

<sup>47</sup> Section 2(2)(a) *Criminal Law Act 1977* [UK] provides: “A person shall not...be guilty of conspiracy to commit any offence...if the only other person or persons with whom he agrees are...(a) his spouse” This provision was considered by the English Court of Appeal in *R v Chrastny (No.1)* [1992] 1 All ER 189, 192a (CA), Glidewell LJ stating “It will be seen that the section restates the previous position at common law” At 192b-c he added: “A wife, knowing that her husband is involved with others in a particular conspiracy, agrees with her husband that she will join the conspiracy and play her part she is thereby agreeing with all those whom she knows are the other parties to the conspiracy.” The Appeal Committee of the House of Lords (Lord Keith of Kinkel, Lord Templeman and Lord Lowry) refused leave to appeal: [1992] 1 All ER 189, 192g. It follows that where a husband and wife are charged with conspiring with another, the jury should be directed to acquit the spouses unless they are satisfied that there was another party to the conspiracy: *R v Lovick* [1993] Crim LR 890 (CA).

which allows anyone to rely upon the specific defences of lawful authority or reasonable excuse. The specific former spousal exemption has been intentionally abrogated, leaving it clear that marital status reliance does not fall within the new statutory exceptions.

The comparative position in common law jurisdictions is investigated to identify the rationale for this exception to the criminal law. Some jurisdictions have now significantly widened this exemption so that it applies to both spouses, or even to a schedule of identified family members, and irrespective of whether the spouse who committed the principal offence, did so with others. In certain common law jurisdictions, a wife (and sometimes a husband) has complete immunity for the offence of being an accessory after the fact to her husband's crime. Sometimes the liberality of the law laterally extends to protect her also where her husband's accomplices were involved.

While the dominance of the husband over his wife may have strengthened the unity doctrine, as that dominance was seen to result in but one will between them, it more specifically created a legal consequence, the presumed inability of a wife to be able to commit criminal conduct in the presence of her husband. The *feme covert*<sup>48</sup> concept was a civil law regime, derived from the property and inheritance law of marriage<sup>49</sup> in which a woman was excused if she committed an offence in the presence of any man.<sup>50</sup> This legal concept was a function of the notional dominance by the husband and was an ameliorative manifestation of the power imbalance between the spouses. One result of this was that few females and fewer wives<sup>51</sup>

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<sup>48</sup> TE *The Lawes Resolution of Women's Rights* (1632) John More, reprinted (2005) Lawbook Exchange Ltd, New Jersey. "When a small brooke or little river incorporateth with...the Thames, the poor rivulet looseth her name...A woman, as soon as she is married, is called covert;...she hath lost her streame."

<sup>49</sup> Blackstone, *Commentaries*, Vol 1:442.

<sup>50</sup> Wayne Morrison (ed), *Blackstone's Commentaries on the Laws of England*, vol 4, [29] "And it appears that, among the northern nations on the continent, this privilege extended to any woman transgressing in concert with a man, and to any servant that committed a joint offence with a freeman; the male or freeman only was punished, the female or slave dismissed: *'proculdubio quod alterum libertas, alterum necessitas impelleret'*." [Because doubtless one did it of his own free will, the other of necessity.]

<sup>51</sup> G Godfrey Phillips, *Kenny's Outlines of Criminal Law* (1933) 14 ed, Cambridge University Press, p74, fn 4, states: "Hence under Charles II and James II, though (just as now) few women were tried, I find them form about two-sevenths – sometimes even a majority – of those sentenced to *death* at each Old Bailey sessions." Women however were rarely tried but because of the severity of the criminal law which provided for many capital offences at the time, when convicted because of their ineligibility for benefit of clergy until 1692, formed a disproportionately high percentage of the numbers of people sentenced to death. In a study of the indictments between 1663 and 1802 in Surrey and Sussex reveals that 80% of those charged with felonies were men. "A strikingly lower level of criminality of women is clearly apparent.": JM Beattie, *The Criminality of Women in*

were ever charged with criminal offences as their circumstances simply did not provide them with the freedom of opportunity for autonomous action.

## INTRASPOUSAL EXEMPTIONS

The list of common law intraspousal exemptions from the criminal law was substantial. At common law spouses<sup>52</sup> could not: conspire alone together,<sup>53</sup> commit intraspousal theft,<sup>54</sup> commit intraspousal rape,<sup>55</sup> or commit intraspousal criminal libel.<sup>56</sup> Some spousal privileges

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*Eighteenth-Century England*' (1975) 8 *The Journal of Social History* 80. This is consistent with the position in Canada between 1712 – 1759 in which it was concluded that at a time when women accounted for 49% of the total population of Canada they were the accused in only 19.7% of total indictments: André Lachance, 'Women and Crime in Canada in the Early Eighteenth Century, 1712 – 1759', p158 in Louis A. Knafla (ed), 'Crime and Criminal Justice in Europe and Canada' (1985) Wilfrid Laurier University Press Ontario. Noting at p167 that the legal status of a Canadian woman under the French regime, was that of a minor.

<sup>52</sup> A pre-marriage conspiracy by an eventual husband and wife did not protect them, *R v Robinson* (1746) 1 Leach 37. In *R v Leonard* [1922] NZLR 721 (CA) on a charge of sexual intercourse with a female mental defective, the words "Every person" did not exclude the woman's husband.

<sup>53</sup> William F Walsh, 'A History of Anglo-American Law' (1932) 2 ed, reprinted (1993) *ibid* p390: "A married woman's disability to make contracts in her own behalf was due entirely to her incapacity to hold property, not to any personal incapacity growing out of the theoretical unity of husband and wife." At common law, a husband and wife could not contract with each other. For this reason a man could not grant anything to his wife, or enter into covenant with her (Co.Litt.112), except with the intervention of a trustee, for the grant would be to suppose her separate existence; and to covenant with her would only be to covenant with himself. (Co.Litt.30) noted P F Higgins 'The Law of Partnership in Australia and New Zealand', 2ed, Law Book Co (1970) p32-33. In *Millineri v Millineri* (1908) 8 SR (NSW) 471 spouses entered into a formal business partnership, after the *Married Women's Property Act 1893* [NSW]. In *Balfour v Balfour* [1919] 2 KB 571, 575 (CA) Atkin LJ stated at 579 "Agreements such as these are outside the realm of contracts altogether." "The consideration that really obtains for them is that natural love and affection which counts for so little in these cold Courts." Followed in *Cohen v Cohen* (1929) 42 CLR 91, 96 (HCA) per Dixon J. and *Jones v Padavatton* [1969] 1 WLR 328, 332B (CA) (mother and daughter same principles apply); *Magill v Magill* [2006] HCA 51, November 2006, para 53 (intraspousal deception as to paternity not justiciable).

<sup>54</sup> 1 Hale PC 513; 1 Hawk PC c 33 s19. "Husband and wife cannot, while living together, steal one another's property... This immunity from punishment for theft by the wife of her husband's goods was one of the few practical consequences of the theory behind the declaration in the marriage ceremony: 'with all my worldly goods I thee endow.'" Anon, 'Husband and Wife in the Criminal Law', (1927) 91 JP 662, 663; *R v Kenny* (1877) 2 QBD 307; *R v Creamer* [1919] 1 KB 564.

<sup>55</sup> Marriage after rape is no defence to the earlier rape: see *R v McKay* (1876) 2 NZ Jur (NS) 71. In *State v Smith* (1981) 426 A 2d 38 the Supreme Court of New Jersey repudiated the implied consent theory. If a wife can exercise a legal right to separate from her husband and eventually terminate the marriage 'contract', may she not also revoke a 'term' of that contract, namely consent to intercourse? Just as a husband has no right to imprison his wife because of her marriage vow to him, he has no right to force sexual relations upon her against her will." *R v R* [1992] 1 AC 599 (HL) the House of Lords concluded that the spousal immunity did not represent the law of England. The husband, undeterred, referred the matter to the European Court of Human Rights in *SW v UK* (1995) 21 EHRR 363; *CR v UK* [1996] 1 FLR 434 where the Court said "the abandonment of the unacceptable idea of a husband being immune against prosecution for rape of his wife was in conformity not only with a civilised concept of marriage but also, and above all, with the fundamental objective of the Convention, the very

were one-sided. A feme covert could not enter into a contract at all, so it seemed natural that she could hardly agree with her husband to commit a crime.

Only wives were incapable of being convicted as an accessory after the fact of the felony of their husbands. Nor equally could they be guilty of any offence of omission by breaching a duty owed to family members to provide necessaries, as this duty fell exclusively on the husband. But the most striking advantage under the law was the separate defence of marital coercion<sup>57</sup> which presumed that every wife<sup>58</sup> was coerced by her husband into committing a crime if her husband was present during its commission by her.

Marriage has modified the general rules of the criminal law in its adjectival, procedural and substantive aspects. It has substantially implicated the rules of evidence, so that issues of competence and compellability arise where a spouse is to adduce evidence for or against the

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essence of which is respect for human dignity and human freedom.” Patricia Easteal (ed), *Balancing the Scales, Rape, Law Reform and Australian Culture*, (1998) The Federation Press, Sydney, at p14 observes that the first legislation in a common law jurisdiction removing the marital rape immunity was in South Australia in 1975 and “was subject to considerable public and parliamentary opposition and succeeded in achieving only a partial removal of the exemption.” Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (2002) 2 ed, Wellington, LexisNexis, Butterworths at p20-21 note that the former law really provided that “the intercourse that takes place between husband and wife after marriage is not by virtue of any special consent on her part, but is mere submission to an obligation imposed upon her by law.”

<sup>56</sup> *R v Lord Mayor of London* (1886) 16 QBD 72, 77; *R v Barter* (1922) JP 176 it was held that in law an indictment against a husband does not lie for publishing a criminal libel concerning his wife. The Recorder of London at the Central Criminal Court, Sir Ernest Wild KC, stated “The law would protect a wife if physical injuries were inflicted upon her by her husband but apparently did not protect her from what was much more serious – cowardly attacks in postcards [by her husband]”. But in *Watt v Longsdon* [1930] 1 KB 130, 139 (CA) the doctrine of marital unity held inapplicable where a defamation of one spouse was published to the other; a case concerning the alleged “matrimonial delinquencies of the other party to the marriage.” Followed by Macnaghten J in *Ralston v Ralston* [1930] 2 KB 238 in a civil action for libel by a wife against her husband. Itself followed by McCardie J in *Gottliffe v Edelston* [1930] 2 KB 378. In *R v Reinke* (1972) 7 CCC (2d) 410 it was held that an indictment charging a wife with defamatory libel against her husband was not possible between spouses. In *Sesler v Montgomery* (1889) 21 P 185 (Supreme Court of California) six judges held that words spoken by a husband to a wife, were incapable of being a publication for the purposes of slander; *Heap v Green* (1926) II Butterworths Fortnightly Notes 328 per Alpers J.

<sup>57</sup> Charlotte L Mitra, *‘For She has no Right or Power to Refuse her Consent’*, [1979] Crim LR 558, 559. And at p 561: “The criminal law likewise developed special rules to accommodate the wife’s status as a legal nonentity, of which the defence of coercion is a modified survival”. J Tudor Rees, *‘Reserved Judgment, Some Reflections and Recollections’*, (1956) Frederick Muller Ltd, London at p197-198 refers to a case before him in which it was humourously argued where a husband and wife dispute was involved, that they were one entity for the purposes of s47 *Criminal Justice Act 1925*.

<sup>58</sup> Joseph Chitty, *‘A Practice Treatise on the Criminal Law’*, (1826) 2 ed, vol 1, Samuel Brooke, Pater-Noster Row, London, p265: “The only relation which excuses the harbouring a felon is that of a wife to her husband, because she is considered as subject to his controul, as well as bound to him by affection. But no other ties, however near, will excuse...”

other spouse, or even for or against a co-accused of the other spouse. Other disparate privileges under the criminal law continue to exist such as the privilege against spouse-incrimination<sup>59</sup> and the inability of the prosecution in a criminal case to comment on the fact that a husband has failed to call his wife to give evidence for him<sup>60</sup> and the inability to comment that the evidence of a wife exculpating her husband needed corroboration<sup>61</sup> and

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<sup>59</sup> Self-incrimination may extend to the incrimination of a spouse: *R v All Saints Worcester* (1817) 6 M & S 194; 105 ER 1215; and *Lamb v Munster* (1882) 10 QBD 110, 112-113 per Stephen J: “When the subject is fully examined, it will I think be found that the privilege extends to protect a man from answering any question which “would in the opinion of the judge have a tendency to expose the witness, or wife or husband of the witness, to any criminal charge”; Sir James Fitzjames Stephen ‘*A Digest of the Criminal Law (Crimes and Punishments)*’ (1887) 4 ed Macmillan and Co, London at p23, Art 30. New Zealand Law Commission, *Evidence Report 55 – Volume 1 Reform of the Law*, August (1999) Wellington at p78. Spouse-incrimination privilege is recognised in Hong Kong: *Salt & Light Development Inc. v Sjtun Sunway Software Industry Ltd* [2006] 2 HKC 440, 453 I. The Queensland Court of Appeal has held that the common law recognises self-incrimination and spouse-incrimination: *Callanan v B* (2004) 151 A Crim R 287, 293 per Jerrard JA “The marriage relationship and a wife’s position in it has accordingly resulted for at least a thousand years of our written legal history in special protections being available to a wife, including a principle that a wife cannot be compelled to incriminate her husband”, adopting the arguments of David Lusty, ‘*Is there a Common Law Privilege against Spouse Incrimination?*’, (2004) 27 University of New South Wales Law Journal 1. This decision was reluctantly followed in *S v Boulton* (2005) 155 A Crim R 152, 158 by Kiefel J. In *Stoten v Sage* (2005) 154 A Crim R 523, Dowsett J held that at common law a witness may decline to answer a question asked in non-judicial proceedings upon the ground that it may inculpate the witness’ spouse. In *Hawkins v Sturt* [1992] 3 NZLR 602 spouse could not be compelled to disclose communications made to her by him for the purpose of his trial, distinguished by Courtney J in *Director Serious Fraud Office v Mamfredos* [2007] NZAR 26 on the basis that the privilege against spousal-incrimination could not be invoked, to defeat the special investigative powers under the *Serious Fraud Office Act 1990* [NZ], which applied before the other spouse had been charged with an offence. The refusal of a wife to attend a compulsory interview under that Act therefore did not amount to a lawful excuse or justification for non-compliance with a statutory notice requiring the wife to so participate.

<sup>60</sup> An explanation by a prosecutor that as a matter of law he was prohibited from calling the wife of an accused was held not to constitute a prohibited comment: *R v Wildman* (1981) 60 CCC 2d 289 (Ont: CA); in *Hui Po v The Queen* [1966] HKLR 635 (FC) prosecuting counsel told the jury that they may find it significant that the accused husband had failed to call evidence from an obvious quarter, namely his wife and family. It was held that this clearly infringed the mandatory provision of s55(b) *Criminal Procedure Ordinance* which stated that the failure of any person charged with an offence, or of his wife or husband as the case may be, of the person so charged, to give evidence shall not be made the subject of any comment by the prosecution.

<sup>61</sup> *R v Stewart-Smith* (1960) 128 CCC 362 (Alb: CA) held that the theory of conjugal unity, should no longer apply, so as to prevent one spouse from corroborating the other in criminal matters. Johnson JA said: “If there is a rule that spouses cannot corroborate each other’s evidence, it must find its origin in the disqualification of the spouses to give evidence, for or against each other...” There were several reasons for this disqualification. The oldest “a piece of semi-mediaeval metaphysics” was the legal fiction that the husband and wife were one and were presumed to have “but one will”. It could be argued “their interests are absolutely the same, and therefore they can gain no more credit when they attest for each other than when any man attests for himself...If a rule for the exclusion of such testimony can now be found, it must rest on the old theory of the unity of the spouses.” The old doctrines still show “astonishing vitality”. *R v Neal & Taylor* (1835) 7 Car & P 168 was often taken as authority for the fact that a wife’s evidence could not corroborate her husband, but criticised in *R v Payne* (1913) 8 Cr App R 171. See also *R v Willis* [1916] 1 KB 933, 936. In Canada different provinces had taken different views. In *R v Galsky* (1936) 67 CCC 1018 (Man: CA) held that a wife’s evidence may corroborate her accomplice husband. The opposite result was reached in *R v Munevich* (1942) 78 CCC (BC: CA). *R v Stewart-Smith* (1960) 128 CCC 362 “Being thus unhampered by authority, and the status of a wife being completely changed, she being emancipated in law and in fact from the authority of her husband, it would be illogical to apply the concept of the unity of spouses at this time” heeding the admonition of Lord Atkin in *United Australia Ltd v Barclays Bank Ltd*

should be treated with automatic suspicion.<sup>62</sup> In addition, many of the rules of evidence as to admissibility,<sup>63</sup> competence and compellability<sup>64</sup> were designed to specifically cater for exemption by spouses from the general rules.

In some jurisdictions, a husband was presumed to have sole possession of any items found in premises jointly occupied by the spouses.<sup>65</sup> In others, a husband was liable for financial

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[1941] AC 1, 29 (PC): “When these ghosts of the past stand in the path of justice clanking their mediaeval chains the proper course for the judge is to pass through them undeterred.” This issue is alive in most jurisdictions as treason, sedition and perjury usually have a mandatory requirement.

<sup>62</sup> *R v Turnbull* (1976) 63 Cr App R 132 a jury should be warned “that they should not necessarily regard the fact that the witness is the defendant’s wife as derogating from the worth of her evidence when the nature and content of the defence is such that anyone would expect her to be called as a witness in any event.”; *R v Cheung Ping Kei* [1985] HKLR 57 (CA) husband relying on the defence of alibi called his wife as a witness to that issue. The prosecutor impermissibly told the jury that a wife, because of the nature of the relationship, would under any circumstances do all she possibly and humanly could do to extricate him from any difficulty that he might find himself in.

<sup>63</sup> *R v Smith* (1826) 1 Moody CC 289 “on an indictment against several accused the wife of any one of them is inadmissible as a witness”, per Littledale J. The wife of one of several accused where is an incompetent witness for any of his associates, when all of them are on trial: *R v Denslow and Newbury* (1847) 2 Cox CC 230 per Williams J (after consulting Cresswell J). ANE Amisshah, ‘*Criminal Procedure in Ghana*’, (1982) Sedco Publishing Ltd, Accra at p200: “Under the old [*Criminal Procedure*] Code (Cap 10) there was discrimination between the spouse married under the *Marriage Ordinance* and his or her counterpart married according to custom or Mohammedan law over the question of privilege from giving evidence in the criminal case against the other spouse. Both types of spouses were competent witnesses for the prosecution. But this spouse, married under the Ordinance, was not compellable while “one married to another person otherwise than by a Christian marriage” was compellable”.

<sup>64</sup> Lord Hardwicke in *Barker v Dixie* (1736) Cas temp Hard 264 gave the single rationale for the rule that spouses were incompetent witnesses against one another that: “The reason why the law will not suffer a wife to be a witness for or against her husband is, to preserve the peace of families” See Comyns, *Digest Justices* (1740) reprinted (1882) 4 ed, A Strahan, T.2. at p593: “The only natural relation, however, which the law regards as destroying competency, is that of husband and wife; for no other tie, however intimate, can render testimony inadmissible”. Neither husband nor wife were allowed to testify against the other because this would entail the anomaly on one legal personality effectively testifying against himself: Richard O Lempert, ‘*A Right to Every Woman’s Evidence*’, (1981) 66 Iowa Law Review 725, 726. A wife was unable to testify on behalf of her husband on the societal assumption her interests automatically mirrored his. Both the privilege and the incompetency doctrine were intended to promote marital unity: “In trials of any sort [husband and wife] are not allowed to be evidence for, or against, each other: partly because it is impossible their testimony should be indifferent; but principally because of the union of person”. Jeremy Bentham, ‘*Rationale of Judicial Evidence*’ vol 5, 344 (1827): “The reason likely to have been the original one, is the grimgribber, nonsensical reason,...Baron and Feme are one person in law...This quibble is the foundation of all reasoning.” There is some authority to suggest that the early privilege expressly prevented wives from testifying against their husband and only later became a gender-neutral prohibition: *People v Hamacher* (1989) 438 NW 2d 43, 55 Boyle J dissenting. The privilege does not prevent the admission into evidence of communications intercepted prior to the marriage even if the parties to the communication are married by the time of the trial: *R v Andrew* (1986) 26 CCC (3d) 111 (BCSC). Requiring a ‘common law’ spouse to testify against the accused does not infringe the equality rights of the testifying spouse as guaranteed by s15 of the Charter: *R v Duvivier* (1990) 60 CCC (3d) 353, affd 64 CCC (3d) 20. To a similar effect see *R v Thompson* (1994) 90 CCC (3d) 519 (Alta:CA). c.f *R v Lologa* [2007] 3 NZLR 844, 847.

<sup>65</sup> In early English law, *R v Boober, Boober and Boober* (1850) 4 Cox CC 272 Talfourd J had said that a wife cannot in law be said to have any possession separate from her husband; followed in Canada so a wife was entitled in criminal cases to a common law presumption in her favour that articles found in premises occupied by

penalties and fines imposed on his wife.<sup>66</sup> In some jurisdictions, criminal offences specifically provide for aggravated penalties when a crime is committed by a man against a woman,<sup>67</sup> without the converse scenario being equally so treated. In some common law jurisdictions there remain some offences, defined in other than gender-neutral physiological terms,<sup>68</sup> for example rape, but there is no obstacle in substantive criminal law terms for a woman to commit the offence of rape.<sup>69</sup> The offence of infanticide<sup>70</sup> only applies to women yet it

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her husband and herself were in his sole possession: see *R v Hang* (1931) 55 CCC 65; *R v Gun Ying* (1930) 53 CCC 378; *R v Tanchuk* (1936) 63 CCC 193 and *R v Klyne* (1958) 120 CCC 318; *Lee Kei-Yick v The Queen* [1978] HKLR 510, 513 (CA) strongly repudiated the existence of this presumption “it appears to me to grant a husband a pre-eminence over his wife in the home which is perhaps not generally recognised in these enlightened days”.

<sup>66</sup> In *State v Harvey* (1824) 3 New Hampshire 65 it was held that a husband and wife were jointly liable to prosecution for a forcible entry and detainer but that the fine should be imposed on the husband only. H Adams, H CLodge, J L Laughlin and E Young ‘*Essays in Anglo-Saxon Law*’ (1905), Little, Brown & Co, Boston p178: “Fines incurred by the wife were probably paid by the husband, as her active guardian, from her property. But, if this property did not suffice, not the husband but the wife’s kindred, were liable for the rest.” Early American law provided not only did the presumption excuse the wife but it also where successful made the husband liable. Charles Almy Jr and Horace W Fuller, ‘*The Law of Married Women in Massachusetts*’, (1878), George B Reed, Boston at p61 states that if a wife commits a crime in the presence of her husband, she is presumed to have acted under his coercion and will not be liable for it – but he will: *Commonwealth v Burk* (1858) 11 Gray 437; *Commonwealth v Gannon* (1867) 97 Mass 547; *State v Boyle* (1885) 13 RI 537. This development was an extension of the duty the husband had as head of the household, so that he became liable for his omission to control his wife. This early view persisted until *Commonwealth v Hill* (1887) 145 Mass 308 which repudiated it on the basis that the husband’s omission to perform a duty of this nature was not itself criminal but may be evidence of disproving the independence of his wife’s actions. James Schouler, ‘*A Treatise on the Law of the Domestic Relations; Embracing Husband and Wife, Parent and Child, Guardian and Ward, Infancy and Master and Servant*’, 1874, 2 ed Little, Brown and Company at p101 “it would be cruel and unjust to punish one person for the crime of another, or even to compel the two to bear the penalty together”. At p104 noting the presumption “is something to be easily rebutted, in the latest cases”. At common law, women’s status as independent actors degenerated so that they were not responsible for either their husband’s wrongs or their own – their husbands were.

<sup>67</sup> Section 214 *Crimes Act 1969* [Cook Islands] (aggravated penalty for assault on a woman). This offence is a clone of s194(b) *Crimes Act 1961* [NZ]. The prosecution must prove that the male defendant knew that the assaulted person was a female: *Chandler v The Queen* unreported, High Court Napier AP 4/93 10 February 1993, Greig J. Section 188(2)(b) *Criminal Code* [NT] also provides for this offence. In *Harris v Republic* [1969-1982] Nauru LR 51 a husband was charged with offensive behaviour directed to his wife, contrary to s5 *Police Offences Ordinance 1967* [Nauru]. His unsuccessful defence was he could not be charged since the person offended was his wife. The Supreme Court of Nauru ruled that their matrimony supplied no authority or excuse. In *R v Abraham* (1974) 30 CCC (2d) 332, (Qué: CA) a husband unsuccessfully argued on appeal against a conviction for common assault on his wife that by virtue of the marital relationship she must have consented to such an assault.

<sup>68</sup> For example, rape is still defined in many jurisdictions by the penetration of a vagina by a penis.

<sup>69</sup> A woman may incite rape: *R v Baltimore* (1768) 4 Burr 2179, 98 ER 136; *People v Haywood* (1955) 280 P2d 180, or may abet it; *R v Ram and Ram* (1893) 17 Cox CC 609 and a woman may commit rape by forcing a male under duress, as her innocent agent, to penetrate a female: *R v Scrubby* unreported, Supreme Court of Northern Territory, SCC 20315731, 1 March 2005, Angel J in which a wife forced her husband, by threatening him with both a spear and a knife, to have sex with a 13-year-old girl. The wife pleaded guilty and the husband was not charged as by the duress he was an innocent or non-responsible agent making it a case of rape by proxy: *Schultz v Pettit* (1980) 25 SASR 427, 438. A husband has been held capable of being a principal in the second degree to a rape of his wife if he assisted another person to commit a rape upon her: see *Lord Castlehaven’s Case* (1631) 3

substantively operates as a defence for females (not wives) to reduce what would otherwise be the crime of murder.<sup>71</sup>

Apart from feme covert status, women as contrasted with wives, had the special avenue of pregnancy for escape from the capital sentence necessarily imposed upon conviction of a felony. And in relation to that exemption the common law also provided for married women to have an adjudicative role in the criminal justice system, namely when a jury of matrons<sup>72</sup> was constituted to determine whether another woman convicted of a capital offence was or was not quick with child. A jury of matrons would establish whether a woman was pregnant – “one of the few official duties women performed in the criminal justice system.”<sup>73</sup> This

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St Tr 402; Sir W O Russell, *A Treatise on Crimes and Misdemeanours*, (1896) 6 ed, vol 3 at p224: “A husband cannot be guilty of a rape upon his wife, on account of the matrimonial consent which she has given, and which she cannot retract; but he may be guilty as a principal, by assisting another person to commit a rape upon his wife; for though in marriage the wife has given up her body to her husband, she is not by him to be prostituted to another.” *Bohanon v State* (1955) 289 P2d 200. In *R v A* [2003] 1 NZLR 1, Tipping, Glazebrook and Williams JJ held that under s128 *Crimes Act* a woman could violate a male by unlawful sexual connection, in this case the imposed envelopment of the penis by her genitalia.

<sup>70</sup> Carol Smart, *Women, Crime and Criminology: A Feminist Critique* (1978) Routledge & Kegan Paul, London at p6 “There are very few sex-specific offences in the English legal system as the law is, in principle, held to be equally applicable to all, regardless of sex, race, class and other distinctions. One exception to this is infanticide which is an offence that only women can commit”. Although a male could be an accessory or a secondary party as a principal. This defence has a convoluted history. By an Act of Parliament 21 Jac I c.27 in 1623 legislation was passed to punish “lewd women that have been delivered of bastard children” by making the mothers’ concealment of their death operate as a rebuttable presumption of murder. The severity of this legislation was even noted by Blackstone: *Commentaries on the Laws of England* (1775) vol 4 p198. The *Infanticide Act 1922* and the *Infanticide Act 1938 [UK]* introduced the current regime where what would otherwise be a murder conviction is reduced where a woman causes the death of her own child under 12 months old and “at the time of the act or omission, the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth or by reason of the effect of lactation consequent upon the birth of the child”. In *R v K A Smith* [1983] Crim LR 739, McCowan J held that if the child survived there could be a conviction for attempted infanticide, followed in *HKSAR v Ip Shui Kwan* [2003] 1 HKC 36. In *R v P* [1991] 2 NZLR 116 (CA) the expression in s178(1) “any child of hers” was held to include not only the killing of her natural children but to all children who could in fact in law and commonsense be said to be hers.

<sup>71</sup> In addition women had the special statutory defence of infanticide: so that parturition too was a further basis for differential treatment of women. In *R v Gordon*, unreported, CA 276/04, 16 December 2004, the New Zealand Court of Appeal considered that infanticide operated as something of a hybrid between an offence and a defence as it can be advanced by the defence to reduce the offence of murder or it could be charged as an offence in its own right.

<sup>72</sup> Sir Frederick Pollock and Frederic William Maitland, *The History of English Law* (1996), reprinted 2 ed, vol 1, The Law Book Exchange Ltd, Union, New Jersey at p484: “we never find women as jurors except when, as not unfrequently happened, some expectant heir alleged that there was a plot to supplant him by the production of a supposititious child, in which case a jury of matrons was employed. [Bracton, f.69; Not Book, pl.198]”

<sup>73</sup> N E H Hull *Female Felons Women and Serious Crime in Colonial Massachusetts* (1987) University of Illinois Press, Urbana, p23. James Oldham, *On Pleading the Belly* (1985) 6 Criminal Justice History p30 “In England the jury of matrons died a natural death of obsolescence”. However, this is quite incorrect as such juries were empanelled in 1913 and 1917. The jury of matrons was only abolished by the *Sentence of Death (Expectant Mothers) Act 1931 [UK]* which required the jury which had convicted her, on the evidence on the part of the

decision-making role in the criminal law was exclusively reserved for married women<sup>74</sup> who were empanelled to decide whether a woman sentenced to death was pregnant or not, so if enceinte she would be respited from execution.

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prosecution or the defence, to determine not whether she was quick with child, as before, but whether she was 'pregnant'. In 'A Jury of Matrons' (1879) 67 LT 212 the verdict in *R v Webster* is reported where a jury of matrons "retired with the prisoner to a private apartment, there to ascertain the fact to be inquired of." The forewoman of the jury informed Denman J that in answer to the question 'Do you find that the prisoner is with child – quick child – or not?' answered 'Not'. The author notes 'that the intended new *Criminal Code*, whilst it does away with a jury of matrons, and substitutes an examination by one or more registered medical practitioners, still adheres to the exploded doctrine about the woman being with a quick child". Section 531 of the *Criminal Code* would have abolished the jury of matrons and replaced it with the expert evidence of "one or more registered medical practitioners": *House of Commons Sessional Papers* (1878-79) vol 2 title 7 part 43. In *R v Edmunds*, *The Times* 18 January 1872 p5 the trial before Martin B involved a jury of matrons, a matter of "romantic ghastliness". Upon the verdict of guilty of murder being returned the prisoner made the unexpected announcement that she was pregnant "and in obedience to the injunction the Under-Sheriffs, with swords, cocked hats, and frills, sallied into the body of the court and galleries in quest of matrons. After about 20 minutes, a dozen well-to-do and respectably dressed women – who could have supposed that a dozen such were to be found in such a place? – were captured, and directed to enter the jury-box". This incident in that trial is detailed by Ernest Bowen-Rowlands, '*Seventy-Two Years At The Bar*' (1924) Macmillan and Co Ltd, London, p123-1234. The jury found that the prisoner was not enceinte. The author argued that a jury of matrons is more than an anachronism but was a scandal which should be "supplanted by a proper scientific investigation by competent medical men, will, like trial by battle or conviction for witchcraft, be consigned to the limbo of historical curiosities". The president of the Obstetrical Society of London described the proceedings in *R v Webster* in which a jury of matrons was involved as a "solemn farce of asking the opinion of a jury of matrons, whose decision on such a question is of about the same value as it would be on a point of disputed legal procedure". In *R v Williams* (1913) *The Times* 12 December 1913 p4 Ridley J had a jury of matrons empanelled, who returned a verdict that the prisoner was pregnant. Casenote on *R v Williams* (1914) 6 Criminal Justice History 280-281. In *R v Stevens*, *The Times* 19 July 1917 p3 Lawrence J ordered a jury of matrons which returned a verdict that the prisoner was pregnant. In *JEB v Alabama ex rel TB* (1994) 511 US 127, 132 the American history of the jury of matrons was reviewed.

<sup>74</sup> A jury of matrons was a jury *de circumstantibus*: Sir Harry B Poland, *The Times* 4 April 1923 p6. The jury consisted of twelve married women and if there was an insufficiency of such women then the sheriff of the court was entitled to pray a tales, by capturing from the neighborhood enough matrons to make up the quorum. The special oath taken by such married women is recorded in the report of *R v Wycherley* (1838) 3 Car & P 202, being based upon *R v Baynton* (1702) 14 Howell's State Trials 634, namely "to diligently, inquire, search and try [the prisoner] at the bar, whether she be quick with child or not and thereof a true verdict give according of the best of your skill and knowledge." In *R v Hunt* (1847) 2 Cox CC 261, 262, the jury of matrons found that the prisoner was not enceinte but the Surgeon of Newgate Prison, reached a different conclusion just prior to the date set for execution: 26 *Central Criminal Court Session Papers* p682 and p1088, where upon she was reprieved and after a few months gave birth. Sir Harry Poland, *The Times*, 4 April 1923, p6 strongly protested at the continuance of the institution of the jury of matrons, which held the power of life and death yet had no medical qualifications other than their combined experiences of pregnancy. He supported s531 *Criminal Code 1879*, which had been prepared by the Royal Commissioners, which would provide that henceforth "one or more registered medical practitioners" would make the decision. He specifically stated that this reform, which he had earlier urged in a letter published in *The Times* 8 February 1923 p 11, as well as the reform of the law relating to marital coercion, should be dealt with together in one Bill. His suggestion did not come to fruition until the enactment of the *Sentence of Death (Expectant Mothers) Act 1931* [UK]. In civil law a jury *de ventre inspiciendo* [to inspect the belly] could be empanelled to determine whether a woman was pregnant, in cases of supposititious heirs. A late example is *In re Blakemore* (1845) 14 LJ Ch 336 per Knight Bruce VC. Such a jury was finally abrogated in Victoria only by s73 *Juries Act 1967* [Vic]. Daniel Defoe, '*The Fortunes and Misfortunes of the Famous Moll Flanders*' (1722) Penguin Library, London, "my mother pleaded her belly, and

The apotheosis of the marital coercion defence was in the mid-nineteenth century, which coincided with the publication of a leading English criminal law text in 1867 which still found it apposite to record that publicly selling or buying a wife was an indictable offence<sup>75</sup> and enclosing a model indictment. This poignantly provides a contemporary insight as to the status of some married women in England at that time.

## ORIGINS OF THE MARITAL COERCION DOCTRINE

There is no complete consensus<sup>76</sup> as to the origin of the various uxorial privileges, but as was noted in a joint judgment of Dixon CJ, Williams Webb and Fullagar JJ:

To say that the common law rule is based upon the conception of the unity of husband and wife is probably to invert the order of historical development. One may suppose that the conception of the unity of husband and wife is but an ex post facto explanation and not a source of the state of early English law upon the subject. What Bracton actually said in reference to “vir et uxor” was “qui sunt quasi unica persona, quia caro una et sanguinis unus”: Bracton, *‘De Legibus’* fo.429b (Woodbines’ ed, vol4, p335).<sup>77</sup>

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being found quick with child, she was respited” Page 260, “I pleaded my belly, but I am no more quick with child than the judge that tried me.”

<sup>75</sup> J B Maule, *‘Burn’s Justice Of The Peace’* (1867) 30 ed, H Sweet; Maxwell & Son, and Stevens & Sons, London, p1235. The draft indictment for the offence is set out at p240-241. *R v Delaval* (1763) 3 Burr 1438, conspiracy to remove an 18 year old female apprentice and to place her in the hands of Sir Francis Delaval for the purpose of prostitution. The text notes “many prosecutions against husbands for selling, and others for buying, have been sustained, and imprisonment for six months inflicted (*R v Padley*, 27 July 1818)”. The fact that women were the property of their husbands is demonstrated by the practice of wife sale presumably a method of providing for divorce where it was otherwise unavailable or too costly: C Kenny, *‘Wife Selling in England’* (1920) 45 LQR 496; Thomas Hardy, *‘The Mayor of Casterbridge’* (1886) reprinted (1975) Macmillan and Co, London p32-36 identifies the practice.

<sup>76</sup> No single theory provides a coherent explanation for uxorial privileges. Sir W O Russell, *‘A Treatise on Crimes and Misdemeanours’* (1896) 6 ed, vol 1 at p145. Stating that a feme covert “is so much favoured in respect of that power and authority which her husband has over her” that she is not liable for committing most crimes if she is subject to her husband’s coercion. Smith and Hogan, *‘Criminal Law’* (1965) Butterworths, London, at p135: “Various theoretical justifications were advanced for the rule – the identity of husband and wife, the wife’s subjection to her husband and her duty to obey him – but the practical reason for its application to felonies was that it saved a woman from the death penalty when her husband was able, but she was not, able to plead benefit of clergy. This reason disappeared in 1692 when the benefit of clergy was extended to women, yet the rule continued and its scope increased.”

<sup>77</sup> *Tooth & Co Ltd v Tillyer* (1956) 95 CLR 605, 615; The origin of the defence of coercion is generally explained by the former state of subjugation of the wife and her duty to obey her husband: *R v Robins* (1982) 66 CCC (2d) 550, 561 (Qué: CA).

Any attempt however to identify a source involves an uncertain path into the miasma of Anglo-Saxon legal history, yet most commentators accept that the laws of King Ine,<sup>78</sup> AD 791, of the West-Saxons in England, provided much of the DNA for the modern legal position. Those laws were substantially re-enacted by King Canute,<sup>79</sup> who promulgated laws, undated,<sup>80</sup> and showing “no marked originality” but having the inestimable advantage of being comprehensive of earlier laws.

Blackstone<sup>81</sup> noted that the Northern nations<sup>82</sup> of Europe had extended a privilege not dissimilar to marital coercion to any woman<sup>83</sup> transgressing in the company of a man. Sir James Fitzjames Stephen<sup>84</sup> equally accepted that the Germanic races which populated early England had imported this legal rule which was applicable to all women. The Norman conquest<sup>85</sup> brought the overlay of the law of feme covert,<sup>86</sup> and over time it is probable that

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<sup>78</sup> Glanville Williams *Criminal Law: The General Part* (1961) 2 ed, Stevens & Sons Ltd, London, accepted that the presumption of coercion originated in the wife’s subjection to the husband and that laws of King Ine, *ibid* p762, AD 712, provided for the defence. Notwithstanding, 1 Hale PC 45-6. The presumption applied whether or not a wife was “a marionette, moved at will by the husband”: *Smith v Myers* (1898) 74 NW 277,278 (Nebraska:SC). In *Kowbel v R* [1954] 4 DLR 337 (SCC) Tachereau J asserted that the theory of unity and the defence of martial coercion were different concepts.

<sup>79</sup> *Ibid.* A J Robertson, *The Laws of the Kings of England from Edmund to Henry I* (1925) University Press, Cambridge, p213-214. King Canute issued his laws between 1020 and 1034. Robertson has translated law 76 as: “Concerning stolen goods. If any carries stolen goods home to his cottage and is detected, the law is that he (the owner) shall have what he tracked. (1) And unless the goods had been put under the wife’s lock and key, she shall be clear [of any charge of complicity]. (1a) But it is her duty to guard the keys of the following – her storeroom and her chest and her cupboard. If the goods have been put in any of these, she shall be held guilty. (1b) But no wife can forbid her husband to deposit anything that he desires in his cottage.”

<sup>80</sup> A J Robertson, *The Laws of the Kings of England from Edmund to Henry I* (1925) Cambridge University Press, p138, his laws are likely to have been in 1027 or 1029-34.

<sup>81</sup> 4 Blackstone *Commentaries* 29 stated that a feme covert occupied a favoured position in the law of England for at least a thousand years.

<sup>82</sup> Joh Stiernhook, *De Jure Sveonum et Gothorum Vetusto* (1672) Stockholm, 1.2.c4.

<sup>83</sup> Benjamin Paul, *The Doctrine of Marital Coercion*, [1956] 29 Temple Law Quarterly 190, 192. This exemption also applied to any servant committing an offence jointly with a free man. Both wives and servants being indistinguishable for this purpose.

<sup>84</sup> Sir James Fitzjames Stephen *A History of the Criminal Law of England* (1883) Macmillan & Co, London, p211, reprinted (1996) Routledge/Thoemmes Press, Wiltshire.

<sup>85</sup> Basil Edwin Lawrence, *The History of the Laws affecting the Property of Married Women in England*, (1884) reprint Fred B Rothman & Co, Colorado at p2: “The determination of such matters of early history is surrounded with difficulty, and the various steps in the development of this doctrine of unity can only be surmised. But this is certain that in Anglo-Saxon times a married woman had a legal individuality, and undoubtedly had a limited, if not an unlimited, power of disposition over her property, whereas, by the time of Glanville she had become a mere creature of her husband’s will; her property became his, and her personality was merged with his. The idea of the principle is clearly feudal: it was the man who fought, it was the man who attended the council chamber, it was the man who had the physical force, and therefore it was the man who had the property.”

the original privilege contracted to favour of wives only, partly as a compensation for their disability of coverture<sup>87</sup> which recognised their very substantial legal helplessness. A husband additionally had the right to control his wife through physical chastisement and it is probable that such an ability to enforce obedience and compliance in a wife was a facet of the defence<sup>88</sup> which presumed she acted pursuant to his command in criminal acts where he was sufficiently proximate to be able to effect physical compulsion over her. The savagery of the criminal law<sup>89</sup> too may in itself have produced a sympathetic environment for the defence to thrive. It followed that the custom of the law was to look exclusively at the husband as the head of the household and to treat him as being vicariously liable for all damages flowing from acts committed by the wife.<sup>90</sup> A wife was not economically independent<sup>91</sup> of her husband, nor did she have legal personality,<sup>92</sup> upon her marriage her separateness<sup>93</sup> became merged in him<sup>94</sup>

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<sup>86</sup> The status of coverture, being the condition or disability of a woman attendant upon her marriage, applied to the general law. The very origin of its name showing that the word is derived from Middle English 'covert'; meaning covered, protected and sheltered so that a feme covert was under the protection and wing of authority of her husband: *Black's Law Dictionary* (1968) 4ed p439; Tim Stretton 'Women Waging Law in Elizabethan England', 2000 Cambridge University Press p23. "Bias against women in English law can be found at every turn. In Elizabethan England a man who killed his wife was guilty of murder, but a woman who killed her husband was guilty of petty treason." The substantive law evinced the protection of the husband.

<sup>87</sup> Jennifer Stoddart 'Québec's Legal Elite Looks at Women's Rights: The Dorion Commission 1929-31', in David H Flaherty (ed) vol 1 'Essays in the History of Canadian Law' 249, 1992 University of Toronto Press, Toronto at p323: "Quebec had adopted its Civil Code in 1865, and the legal status of women had remained virtually unchanged since then. Indeed, many of the articles of the Code dealing with the status of women had been modelled on the Napoleonic Code of 1804 or even the provisions of the sixteenth century Coutume de Paris". Robert Ernest Ross (ed), 'Russell on Crime a Treatise on Felonies and Misdemeanors', Sir WM Oldnall Russell Knt, 9 ed, 1936 vol 1, p42 describes coverture as a position of "non-responsibility". JW Cecil Turner, 'Russell on Crime a Treatise on Felonies and Misdemeanors' 10 ed 1950 p70 continues to use this description, adding that it was uncertain whether this rested on the theory of identity of person created by marriage, or upon the theory that the wife acted in obedience to the will of her husband.

<sup>88</sup> David Rosenberg, 'Coverture in Criminal Law: Ancient "Defender" of Married Women', (1973) 6 University of California Davis Law Review 83, p84-85.

<sup>89</sup> Sir James Fitzjames Stephen, 'A Digest of the Criminal Law (Crimes and Punishments)', (1877) Macmillan & Co, London at p332 note II in reference to Article 30. Stephen wrote: "Hardly any legal doctrine is less satisfactory than [marital coercion]. The rule has been too long settled to be disputed; but on examining the authorities in their historical order, it appears to me to have originated, like some other doctrines, in the anxiety of Judges to devise means by which the excessive severity of the old criminal law might be evaded."

<sup>90</sup> 'Liability of a Married Woman for Crimes Committed in her Husband's Presence' (1892) 33 Am St Rep 88, 89.

<sup>91</sup> This economic position in the family involving looking to the husband in material matters swayed the Court to take cognisance of the tremendous influence a husband necessarily exerts over the affairs of his wife. Donna Dickenson, 'Property, Women and Politics Subjects or Objects?', (1997) Polity Press, Oxford p81: "Coverture was the culmination and consequence of a long decline in women's civil rights, including their rights in property. During the Middle Ages women's economic activity and autonomy were substantial." *Bradwell v Illinois* (1872) 83 US (16 Wall) 130, 141 (1872) per Bradley J: "The harmony...[of] the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband."

<sup>92</sup> John Hudson, 'The Formation of the English Common Law: Law and Society in England from the Norman Conquest to Magna Carta', (1998) Longman, London at 235: "As for criminal law, according to the opinion of a

who was by law able to determine her legal and factual volition.<sup>95</sup> The common law defence of marital coercion would make married women the object of special solicitude in recognition of their putative lack of free will and independent thought and action.<sup>96</sup>

The theories of conjugal unity, uxorial subjection<sup>97</sup> and the correlative rights and duties between spouses to each other all gelled to produce a power imbalance overwhelmingly in favour of the husband.<sup>98</sup> This outcome was itself conceived as being no less than the

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royal justice recorded in a plea roll, women could not bring appeals except concerning the death of their husband or concerning rape, whilst Magna Carta clause fifty-four mentions only the death of her husband”.

<sup>93</sup> *R v Graham Glassie and Frances Cooney* (1854) 7 Cox CC 1, 2 Lefroy and Monahan CJJ presiding at the Dublin Commission Court, directed the jury that even the clothes that a wife wore were in point of law the property of her husband; Sir Michael Myers, W Downie Stewart and James Christie, (H A Palmer ed), *The Public Acts of New Zealand (Reprinted) 1908-1931 Vol III*, (1932) Butterworth & Co, Wellington, ‘*Husband and Wife*’ p823: “At common law husband and wife were treated as one person and the property of the wife merged in that of her husband.”

<sup>94</sup> Norma Basch, *In the Eyes of the Law: Women, Marriage and Property in Nineteenth-Century New York*, (1982) Cornell University Press, Ithaca at p17: “At common law a wife was a nonentity in most situations; her husband subsumed her legal personality. The law created an equation in which one plus one equalled one by erasing the female one”. English literature in the 17<sup>th</sup> and 18<sup>th</sup> centuries was equally explicit: Timothy Rogers, *The Character of a Good Woman*, London (1697) p17-18; William Kenrick, *The Whole Duty of a Woman*, 13 ed London 1792 p44; *Laws Respecting Women as they Regard their Natural Rights or their Connections and Conduct*, (London 1777) p65. At p70-71 the law was described as “A Feme covert shall not be punished for committing any felony in company with her husband; the law supposing she did it by the coercion of her husband. But the bare command of her husband be no excuse for her committing a theft if he was not present; much less is she excused if she commit a theft of her own voluntary act.”

<sup>95</sup> Bruce Kercher, *Debt, Seduction and Other Disasters, The Birth of Civil Law in Convict New South Wales*, (1996) The Federation Press, Australia at p65: “In the common law of 18<sup>th</sup> century England, married woman had little more legal capacity than convicted felons”.

<sup>96</sup> 1 Blackstone *Commentaries*’ 445, who remarked of the legal consequences of coverture “even the disabilities which the wife lies under, are for the most part intended for her protection and benefit. So great a favourite is the female sex of the laws of England.” However, in early New South Wales the common law had to adapt to deal with the wife of a person under an unsatisfied sentence of transportation. In *Lyons v Cave*, *Sydney Gazette*, 27 March 1827, Forbes CJ and Stephen J held that a free woman trading as a feme sole, who married a person under an unsatisfied sentence of transportation and who had obtained goods upon her own credit was personally liable in an action for non-payment.

<sup>97</sup> L Stone, *The Family, Sex and Marriage in England 1500-1800*, (1977) Weidenfeld & Nicholson, London, p26-27 “the expectations of felicity from marriage were pragmatically low” and “William Stout’s comment on a marriage in 1699 could stand as an epitaph for many 16<sup>th</sup> and 17<sup>th</sup> century couples: ‘they lived very disagreeably but had many children.’”

<sup>98</sup> Pollock and Maitland, *History of English Law*, (1923) 2 ed, vol II pp405-406, writing of the 12<sup>th</sup> and 13<sup>th</sup> centuries: “If we look for any one thought which governs the whole of this province of law, we shall hardly find it. In particular we must be on our guard against the common belief that the ruling principle is that which sees an ‘unity of person’ between husband and wife. This is a principle which suggests itself from time to time; it has the warrant of holy writ; it will serve to round a paragraph, and may now and again lead us out of or into a difficulty; but a consistently operative principle it cannot be.” The authority of the husband in early American law is described “as unquestioned as that of a military officer” Robert O Blood Jr & Donald M Wolfe, *Husbands and Wives: The Dynamics of Married Living*, (1960) p3.

fulfillment of a biblical imperative. The religious<sup>99</sup> influence in the status and implications of marriage were to become decisive upon the creation of the benefit of clergy<sup>100</sup> which excused criminal offences for only those males who had a semblance of literacy. By contrast, only wives were excused by the marital coercion doctrine; no other class of person was so privileged.<sup>101</sup> The general assumption of the absence of a free choice in a wife, in the presence of her husband, prevailed as a matter of substance and reality as well as by a presumption in the criminal law.<sup>102</sup> Among the suggested theories for the development of the defence the prevailing social conditions of spouses seems the most plausible particularly “when the exceptional cruelty with which the ancient law treated the servile classes is remembered”.<sup>103</sup> In addition it has been argued that as crimes were capable of being atoned by the payment of money, *wergild*, those early offences were seen as torts for the purposes of punishment; it followed that when the state began to monopolise the function of prosecution for the more serious offences, the reason for the rule ceased to exist as virtually no offence remained expiable or compoundable by a payment.<sup>104</sup>

The origin and evolution of the defence had indubitably both secular and religious beginnings, involving a response to the limitations on the right of women to claim benefit of clergy. Thereafter, because of the harshness<sup>105</sup> of the law and uncertainty as to the scope of

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<sup>99</sup> Jennifer Stoddart, ‘*Quebec’s Legal Elite Looks at Women’s Rights: The Dorion Commission 1929-31*’, in David H Flaherty (ed) ‘*Essays in the History of Canadian Law*’ (1992) vol 1, 249, University of Toronto Press, Toronto at p324 the “Ideological force of the Catholic Church” was significant in the conscious and continuing choice by Québec lawmakers to keep the legal condition of married women substantially unchanged from 1865 until 1964.

<sup>100</sup> In *R v Hughes* (1829) 2 Lew CC 229; 168 ER 1137, the law reporter, put this as the basis for the defence namely the inability of a wife to plead benefit of clergy. Francis Sayre ‘*Mens Rea*’ (1932) Harvard Law Review 974, 1013 states that the law concerning this defence had rather “a curious development” as there was an ever-growing circle of men who could avoid the death penalty for clergyable felonies, whereas women had no such defence.

<sup>101</sup> Sir W O Russell, ‘*A Treatise on Crimes and Misdemeanours*’, (1896) 6 ed, vol 1 at p145-146. The principal case of subjection to the power of another in private relations is in relation to that of a wife, “neither a child nor a servant is excused the commission of any crime, whether capital or not capital, by the command or coercion of the parent or master.”

<sup>102</sup> Francis Sayre ‘*Mens Rea*’ (1932) Harvard Law Review 974, 1013: “Today the married woman’s defence of coercion bears little relationship to the defence of compulsion, although both were originally evolved from the same general principle that without a free exercise of choice one can not be said to have a guilty mind.”

<sup>103</sup> ‘*Liability of a Married Woman for Crimes Committed in her Husband’s Presence*’, (1892) 33 Am St Rep 88, 89 (a note to the report of *Bibb v State*).

<sup>104</sup> *Ibid* 90-91.

<sup>105</sup> Evidence of some marital coercion though insufficient to constitute the defence is always relevant in mitigation of sentence: Avory Committee ‘*Report of the Committee on the Responsibility of a Wife for Crimes*

the defence, English criminal law developed inconsistently and hesitantly in relation to married women, comforted by the convenience of the mollifying effect of the presumption of coercion.

In ancient Roman times, women were under the wing of their husband.<sup>106</sup> Wihtried, a late seventh century English King, issued a law stating that “if a husband, without his wife’s knowledge, makes offerings to devils, he shall forfeit all his goods”, but only if the wife participated were her goods forfeited.<sup>107</sup> King Ine provided that “if a husband steals a beast and carries it into his house, and it is seized therein, he shall forfeit his share [of the household property]”;<sup>108</sup> but not the wife, unless she had eaten any of the meat.<sup>109</sup> With these injunctions, the common law tradition developed, incorporating and intermingling the legal traditions of the Romans and the Normans with the canon law of the Catholic Church and the Anglo-Saxon traditions. Married women were under the cover and protection, and therefore influence, of their husbands.<sup>110</sup> The married woman had no proprietary interests separate from her husband, all her personal and real property immediately belonged to him upon marriage. The wife was ‘civilly dead’.<sup>111</sup> Social norms converged with Biblical imperative: “Your desire shall be for your husband, and he shall rule you.”<sup>112</sup> A husband had the limited satisfaction of knowing that although a man who killed his wife was guilty of murder; a wife who killed her husband was guilty of the enhanced crime of petit treason and could be punished by being drawn and burnt alive.<sup>113</sup>

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*Committed under the Coercion of her Husband*, Cmnd 1677 (1922); *Olsen v The Queen* unreported Northern Territory Court of Appeal [2002] NTCCA 7 (Angel, Mildren & Riley JJ). “There can be little doubt that conduct that falls short of providing an accused person with a defence of duress or coercion under the *Criminal Code* can be relevant to the sentencing process”. In Texas the law oddly provides that the presumption is abolished and the defence is removed but in relation to sentence the wife should receive only one-half the punishment that would otherwise have been administered, so that in that State coercion does not excuse the crime but only serves to mitigate the punishment: *Texas Penal Code Annotated* (1952) Art 32.

<sup>106</sup> Theodore Rivers, ‘*The Status of Women in Roman Private Law*’, 1987 *Juridical Review*, 143, 161. One of the rationales for marital coercion is the law’s “tenderness to the wife”; *R v Hughes* (1813) 2 Lew CC 229, 231.

<sup>107</sup> *Laws of Wihtried* (c695) cl 12 in Attenborough, ‘*Laws of the Earliest English Kings*’, p27.

<sup>108</sup> *Laws of Ine* (688-725) in Attenborough p55.

<sup>109</sup> *Ibid* p57.

<sup>110</sup> Norma Basch, ‘*Invisible Women: The Legal Fiction of Marital Unity in Nineteenth Century America*’, (1979), 5 *Feminist Studies*, 346, 347.

<sup>111</sup> *1848 Seneca Falls Declaration of Sentiments*, in Joan Hoff ‘*Law Gender and Injustice: A Legal History of United States Women*’, (1991) appendix 2. But a widow had the same rights as an unmarried woman. Theodore Rivers, ‘*Widows’ Rights in Anglo-Saxon Law*’, (1975) 19 *American Journal of Legal History* 208,215.

<sup>112</sup> ‘*Holy Bible*’ Genesis 3:16.

<sup>113</sup> William Blackstone, ‘*Commentaries*’ vol 4, 203.

During the Anglo-Saxon period in England, AD 580-1066, women had greater control over their destinies than under the Norman regime which succeeded it. Their capacity for self-determination was generally comparable with that of men.<sup>114</sup> The legal system brought to England the inherited notion of *wergild*, which was the monetary value of a person's life, which in turn depended upon one's rank in society. Women had the same *wergild* as men of their own rank. In fact pregnant women were further protected and valued by the assessment that they were measured as being entitled to not only their own but in addition also half of the unborn child's *wergild*.<sup>115</sup> The autonomy of Anglo-Saxon women included the specific right to enter into only voluntary unions of marriage; despite the considerable authority of father's over both sons and daughters.<sup>116</sup> Under the legal system Anglo-Saxon women were held accountable for their own crimes and were not accountable for those committed by their husbands.<sup>117</sup> Under the Norman<sup>118</sup> influence the status of women as independent actors degenerated to the point that they were no longer even responsible for their own wrongs.<sup>119</sup> Narrower attitudes were chronicled. There was a powerful decline in the influence of women. Women now generally had little choice in their selection of a husband.<sup>120</sup> The limitations placed on their education were seen as consonant with their intellectual capabilities. The teachings of the Christian church stressed the inferiority and subordination of women and this

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<sup>114</sup> Christine Fell, *Women in Anglo-Saxon England* (1984) Blackwell, 13 n3 "the evidence which has survived...indicates that women were then more nearly the equal companions of their husband's and brother's than at any other period before the modern age".

<sup>115</sup> Christine G Clark, *Women's Rights in Early England* [1995] Brigham Young University Law Review 207, 220.

<sup>116</sup> Ernest Young, *Anglo-Saxon Family Law*, 153 n6 in *Essays in Anglo-Saxon Law*, Rothman Reprints, Inc. 1972 (1905) referring to the 11<sup>th</sup> century laws of Canute "let no one compel either woman or maiden to [marry a man] whom she herself dislikes"; *Laws of Cnut* cl 74.

<sup>117</sup> *Laws of Wihtried* cl 12 (c 695) in *Laws of the Earliest English Kings* (F L Attenborough(ed) 1922) p 27 n 20. King Ine had issued a law to the same effect so that if a husband had stolen an animal and carried it into his own home his share of the household property was liable for forfeiture but the property of the wife was protected upon her oath that she had not consumed any of the meat: *Laws of Ine* (688-725) cl57 in *Laws of the Earliest English Kings*, (F L Attenborough(ed) 1922) p55 n20.

<sup>118</sup> Sheila C Dietrich, *An Introduction to Women in Anglo-Saxon Society*, p44 n1, stating that the feudal world of the Normans was essentially a masculine world. Women no longer had any real choice in the selection of a husband: Angela M Lucas, *Women in the Middle Ages-Religion, Marriage and Letters*, (1983) p85 n21 the Norman culture was steeped in chivalry: men were knights and women were to be protected.

<sup>119</sup> In *Culmer v Wilson* (1896) 44 P 833, 837 the Utah Supreme Court stated "Under the common law, [the husband] could inflict punishment on [the wife], for he was answerable for her misconduct, and the law left him with this power of restraint and correction, the same as he could correct his children or his apprentices."

<sup>120</sup> Angela M Lucas, *Women in the Middle Ages-Religion, Marriage and Letters*, (1983) Harvester Press, Sussex, p85 n21 "Widows and heiresses were freely sold to the highest bidder or to the friends of the king or overlord, even if those friends were of low degree, to the ladies' disparagement."

undoubtedly had an effect on how women were perceived in society and by the courts.<sup>121</sup> Occupations were regulated by male-controlled guilds. The preference for male land ownership became mandated by the establishment of primogeniture, so that a daughter could only inherit land in the absence of a brother. As land ownership became essentially a male prerogative the other legal incidents of landholding followed, so that a married woman could no longer make a valid will without her husband's consent.<sup>122</sup> The general waning of feminine power meant exclusion from the legal system so that a woman became either the responsibility of her father or her husband, having no choice to exercise as to whom she would be married. Even the dissolution of marriage upon widowhood became a financial enterprise, as she thereupon automatically became a ward of the King, who for profit could arrange and direct another marriage for her.<sup>123</sup> A married woman was unable on her own to initiate litigation or defend it. She regained this right if she was widowed but it ceased upon any remarriage.

The Anglo-Saxon legal system appears to have been much more benevolent to women than the succeeding Norman laws, customs and feudalism<sup>124</sup>, yet wives were accountable for their own crimes and never for those committed by their husbands.<sup>125</sup> The ability of women in the Saxon era to dispose of land also gave them a capacity for self-determination comparable to that enjoyed by men. By the eleventh century, the laws of Canute stated; "let no one compel either woman or maiden to [marry a man] whom herself dislikes".<sup>126</sup>

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<sup>121</sup> Lina Eckenstein, in Christine Fell (ed) *'Women in Anglo-Saxon England'* (1984) Blackwell, p11 n3 notes that no woman living during Anglo-Norman time had ever been honoured by being raised to sainthood. As church law became increasingly influenced by Canon Law with its view that women were not made in God's image, with the natural result of her subjection to man, the lesser serving the greater: Angela M Lucas, *'Women in the Middle Ages – Religion, Marriage and Letters'*, (1983) Harvester Press, Sussex, p6 n21.

<sup>122</sup> Jennifer C Ward, *'English Noblewomen in the Later Middle Ages'*, (1932) Longman, London, p9. Land was intrinsically valuable and conferred power, a woman who was incapable of controlling land during her lifetime was also prohibited from controlling it upon her death.

<sup>123</sup> Therefore Magna Carta provided that: "No widow shall be compelled to marry so long as she prefers to live without a husband, provided she gives security that she will not marry without [her overlord's] consent": 17 John § 8 (1215).

<sup>124</sup> Christine Fell, *'Women in Anglo-Saxon England'*, (1984) Blackwell, p13: "The evidence which has survived from Anglo-Saxon England indicates that women were then more nearly the equal companions of their husbands and brothers than at any other period before the modern age."

<sup>125</sup> Christine G Clark, *'Women's Rights in Early England'*, (1995) Brigham Young University Law Review 207, 213.

<sup>126</sup> Ibid 215 quoting Laws of Cnut cl 73. "One final interesting aspect of the Anglo-Saxon legal system is the fact that Anglo-Saxon women were held accountable for their own crimes and not those committed by their

The political structure of the Anglo-Saxon regime meant each person counted and therefore had to contribute to the defence of the community. But the Normans brought with them a culture steeped in chivalry<sup>127</sup> which denied women their own rights. They were to be coddled and protected from the criminal law when conduct also involved their husband. Self-determination and autonomous decision-making in the presence of the husband was presumed to be unthinkable. In the thirteenth century, because of various local urban customs, “the complete merging of personality being obviously out of harmony with bourgeois habits”<sup>128</sup> women’s property was sometimes outside the husband’s control<sup>129</sup>, an era which definitely rejected the principle of community property between husband and wife, which otherwise prevailed throughout a considerable part of the continent.<sup>130</sup> This was not so much because of the fiction that husband and wife were one; but rather the fact that the husband was head of the family.

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husbands. As reasonable as this seems, it is another indication that Anglo-Saxon women were their own creatures and not merely appendages to their husbands.”

<sup>127</sup> In *Commonwealth v Jones* (1954) 1 D&C 269, 274-5 a Pennsylvania judge stated: “While a married woman may not be her husband’s chattel...we have not yet reached the point where we decry the nobility, dignity or grace of a wife’s deference to her husband’s wishes. Chivalry alone would call for this explanation of a married woman’s participation in her husband’s crime.”

<sup>128</sup> Theodore F T Plucknett, *A Concise History of the Common Law* (1956) 5 ed, Butterworths & Co (Publishers) Ltd, London, p313.

<sup>129</sup> Plucknett, Year Book 13 Richard II (1389) (Ames Foundation) 80 (by village custom of Selby in Yorkshire husband not liable for wife’s separate trading).

<sup>130</sup> William F Walsh, *A History of Anglo-American Law*, 2 ed, (reprinted 1993) WM W Gaunts & Sons Inc, citing Pollock and Maitland, *History of English Law*, II 397-399; Holdsworth, *History of English Law*, III 523-524.

Brooke<sup>131</sup> in 1568 referred to *Anonymous*<sup>132</sup> where a woman was charged with stealing two shillings worth of bread. Her defence was that she did it by the command of her husband. The report continues [in translation] “And the Justices for pity’s sake would not hold her by her confession but took an inquest. By which it was found that she did it by the coercion of her husband and against her will. Therefore she went quit. And it was said that if she acted by the command of her husband, it would be no felony”. Bacon,<sup>133</sup> Dalton<sup>134</sup> and Noy<sup>135</sup> the Attorney-General, all wrote to similar effect.

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<sup>131</sup> Brooke’s *Abridgement Corone*, p108 states “the reason being that the law takes it for granted that the woman who is under the potestas of the man, does not dare to speak against her husband”. However, cf. Donald W Sutherland (ed), *The Eyre of Northamptonshire 3-4 Edward III AD 1329-1330, vol 1*, (1983) Selden Society, London, at p179: “Les iustices ne enquistunt pas si la feme fist la roberie en la compaignie son baron ne si ele le fist par cohercion de son baron, mes agarderunt qil fusent pendutz”. [“A man and his wife were arraigned of robbery upon an indictment. They pleaded not guilty. They were found guilty. The justices did not inquire whether the woman committed the robbery in the company of her husband, nor whether her husband forced her to do it, but condemned them to be hanged.”] Sir Frederick Pollock and Frederic William Maitland, *The History of English Law* (reprinted 1996), 2 ed, vol 1, The Law Book Exchange Ltd, Union, New Jersey p485, before the time of Edward I: “Women who have husbands are in a different position...here it may be well to observe that the main idea which governs the law of husband and wife is not that of an ‘unity of person’, but that of the guardianship, the mund, the profitable guardianship which the husband has over the wife and over her property”.

<sup>132</sup> (1353) Lib. Ass. Ann. 27 f. 137 pl.40; see Courtney Kenny *A Selection of Cases Illustrative of English Criminal Law* (1922) 5ed Cambridge University Press p64.

<sup>133</sup> Francis Bacon *The elements of the common lawes of England, branched into a double tract: the one containing a collection of some Principal rules and maxims of the common law, with their latitude and extent* (“Maxims”) (1690) reprinted (2003) Law Book Exchange, New Jersey, upon his maxim 56 “Necessitas inducit privilegium quoad jura privata” observes, “The second necessity is of obedience, and therefore where baron and feme commit a felony, the feme can neither be principal nor accessory, because the law intends her to have no will in regard of the subjection and obedience she owes to her husband!”

<sup>134</sup> Dalton, *Justice*, ch. clvii says: “A feme covert doth steal goods by the compulsion or constraint of her husband. This is no felony in her”. *The Lawes Resolution of Women’s Rights*, (1632) reprinted in 1 *Women in American Law* 27 Marlene Stein Wortman ed, (1985); “[W]edlock is a locking together. It is true that man and wife are one person; but understand in what manner....A woman, as soon as she is married, is called covert;...she hath lost her streame.”

<sup>135</sup> William Noy, *The Principal Grounds and Maxims with an Analysis of the Laws of England*, (1641) 3 American ed. (from the 9 London ed.) by William Waller Hening (1824) reprinted Fred B Rothman & Co., Littleton, Colorado (1980). Maxim 29: “The Husband and Wife are One Person”; Maxim 30: “All that a Woman has Appertains to her Husband”; Maxim 31: “The Will of the Wife is Subject to the Will of her Husband”.

Hale,<sup>136</sup> and Blackstone<sup>137</sup> all accepted that the wife was incapable of conspiring alone with her husband, nor could she be an accessory after the fact to his crime. While there was some doubt as to whether the only exceptions to the marital coercion doctrine extended to murder and treason,<sup>138</sup> there was no doubt that marital coercion was presumed in the great majority of serious criminal cases. In *Anonymous*<sup>139</sup> at the Cambridge Assizes of 1664 it was propounded by all the judges that if a husband and wife commit a burglary, both of them breaking into a house, entering and stealing goods, that the wife committed no offence.

For the wife, being together with the husband in the act, the law supposeth the wife doth it by the coercion of the husband. And so it is in all larcenies. But as to murder; if the husband and wife both join in it, they are both equally guilty.

## BENEFIT OF CLERGY AND THE DEVELOPMENT OF UXORIAL PRIVILEGES

Marital coercion is a form of private<sup>140</sup> civil<sup>141</sup> subjection with an obscure history. Sir James Stephen stated<sup>142</sup> that it developed as a response to the singular injustice in which, where

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<sup>136</sup> Hale 1 *Pleas of the Crown*, 45: "If she (the wife) commit larceny by the coercion of the husband, she is not guilty (27 Ass. 40), and, according to some, if it be by the command of her husband, which seems to be law if the husband be present, but not if her husband be absent at the time and place of the felony committed. But this command or coercion of the husband doth not excuse in case of treason nor of murder, or in regard of the heinousness of those crimes." Sir W O Russell, *A Treatise on Crimes and Misdemeanours* (1896) 6 ed, vol 1 at p146(l) in an extended footnote notes that there was no actual decision excepting treason from the presumption.

<sup>137</sup> Blackstone 4 *Commentaries* 29: "By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything; and is therefore called in our law-french a feme-covert, foemina viro co-operta; is said to be covert-baron, or under the protection and influence of her husband, her baron, or under the condition during her marriage is called her coverture. Upon this principle, of an union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage."

<sup>138</sup> Edward Jenks (ed) *Stephens Commentaries on the Laws of England* (1922) 17 ed, vol 4, Butterworth & Co, London p29: "The rule, moreover, was never applicable to such offences as murder, manslaughter and the like; these being of too deep a dye to be thus excused. In treason, also, no plea of coverture can excuse the wife, no presumption of her husband's coercion extenuate her guilt; as well because of the odiousness and dangerous consequence of the crime of treason itself, as because the husband, having broken through the most sacred tie of social community by rebellion against the State, has no right to that obedience from his wife, which he himself, as a subject, has forgotten to pay".

<sup>139</sup> (1664) Kelyng 31.

<sup>140</sup> Compare the defence of superior orders in a military context: *R v Smith* (1899) 17 Cape of Good Hope Reports 561.

<sup>141</sup> (1736) 1 Hale PC 44 where the defence is referred to as an "indulgence of the law".

<sup>142</sup> Sir James Fitzjames Stephen, *A History of the Criminal Law in England* (1883) Macmillan and Co, London, vol 2 p105.

spouses committed an offence together, the husband (often the far less deserving of the two) would become the beneficiary of the doctrine of benefit of clergy by the semblance of repeating a verse in the bible, whereas the wife would be sentenced to death. To counterbalance this comparative injustice the doctrine of marital coercion was a response which would allow a significant number of married women to be exempt from the criminal law thus placing a significant number of wives, in practical terms, in the same place as their husbands.<sup>143</sup> Marital coercion became the approximate working equivalent of benefit of clergy. While in some cases the outcome would be that both spouses would not suffer the punishment of the law, marital coercion existed at least some 500 years before benefit of clergy, which only arose out of the disputes between church and state in the thirteenth century. The reason advanced by Stephen is contradicted by Hale<sup>144</sup> who refers to:

‘the modern practice and *in favorem vitae* is fittest to be followed; and the rather, because otherwise for the same felony the husband may be saved by the benefit of his clergy, and the wife hanged, where the case is within clergy; tho I confess this reason is but of small value’.

This life-saving privilege arose from the struggle as to the jurisdiction to try clerics accused of crime. The church claimed sole adjudicative power over its own and for them only to answer in ecclesiastical tribunals<sup>145</sup> and not before courts of law. Churchmen claimed exemption from all secular jurisdictions. King Henry II reigned for 35 years but it was a reign “of bipartite legal systems; one set of laws governed the state and another set of laws governed the Church”.<sup>146</sup> It eventuated that any male who could mumble the small quantity of Latin necessary to repeat a standard verse from the Bible, was able to escape conviction in the courts of justice by ‘pleading his clergy’ – which was a bar to curial jurisdiction over him.<sup>147</sup> This outwitted the criminal law. But as no woman could be a cleric, from the twelfth century until statute finally intervened in 1692 and stretched the fiction to now allow females to claim

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<sup>143</sup> This explanation is advanced by Lewin in *R v Hughes* (1813) 2 Lew CC 225 n.

<sup>144</sup> (1736) Hale 1 PC 45; *R v Alison* (1838) 8 Car & P 418 noting *Anonymous* (1604) Moore KB 754.

<sup>145</sup> A T Carter, ‘*Outlines of English Legal History*’ (1899) Butterworths & Co, London, p79.

<sup>146</sup> Kurt von S Kynell, ‘*Saxon and Medieval Antecedents of the English Common Law*’ (2000) Studies in British History, vol 59, The Edwin Mellen Press, Lewiston, p14.

<sup>147</sup> Discussed in Edward Jenks, ‘*A Short History of English Law From the Earliest Times To The End Of The Year 1911*’ (1912) Methven & Co Ltd, London, pp157-159.

the benefit of clergy,<sup>148</sup> all women were haplessly exposed to the full rigour of the law. Their husbands and other males were set free – all in a time when society knew, understood and expected that he was able to control and command his wife.<sup>149</sup> The privilege:

developed into one of the most incongruous fictions in British legal history for it had become available to any person who could read, even if he had never had the remotest connection with the Church. It was, in fact, an absolute charter for the literate, whereby they might totally evade any effective punishment if they were convicted of a felony.<sup>150</sup>

It was in essence an exception from capital punishment in which the secular courts yielded to the ecclesiastical courts, where the punishments were comparatively insignificant. By a merciful fiction in favour of maledom, the clerical privilege was purged of its ecclesiastical character and ultimately of its scholarly connotation as well; its residuum was essentially as Hobart terms it “a kind of statute pardon”<sup>151</sup> for a limited group of offences.

It was decided that petty treason [murder of a husband] was an offence for which benefit of clergy would never be available...the British criminal code continued to be unscientifically divided into clergyable and non-clergyable offences.<sup>152</sup>

By the sixteenth century, Parliament stated that certain offences were enacted as being expressly “without benefit of clergy”.<sup>153</sup> In the reign of William and Mary, the advantages of the privilege were extended to women<sup>154</sup>, while in the succeeding reign the reading-text was abolished for all. Only in 1827, was the benefit of clergy privilege swept away by the British

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<sup>148</sup> 4 W & M (1692) c9. R S O'Regan, 'Married Women and the Defence of Compulsion Under the Criminal Code', (1979) 11 University of Queensland Law Journal 20, 21 “logically it [the presumption of marital coercion] should have disappeared in 1692 when benefit of clergy was extended to women but it continued in existence”.

<sup>149</sup> Courtney Stanhope Kenny 'Outlines of Criminal Law' (1920) 9 ed, Cambridge University Press, p74, stated that the outcome of benefit of clergy was that “where the spouses were jointly charged, the man, if he could make a semblance of reading, Psalm 51 v1– the so-called “neck” verse, would get off, whilst the woman, though probably less guilty of the two, would be sentenced to death. This injustice was evaded by the reinforcement of the artificial presumption of conjugal subjugation.”

<sup>150</sup> Anthony Babington, 'The Rule of Law in Britain from the Roman Occupation to the Present Day' (1995) 3 ed, Barry Rose, Chichester, p76.

<sup>151</sup> 1 Hobart 292.

<sup>152</sup> Anthony Babington, 'The Rule of Law in Britain from Roman Occupation to the Present Day', (1995) 3 ed, Barry Rose, Chichester at p126.

<sup>153</sup> 1 Edw VI (1547) c12, s10; 5 and 6 Edw VI (1552) c10; 8 Eliz (1565) c4; 18 Eliz (1576) c7, s1; 39 Eliz (1597) c9.

<sup>154</sup> Blackstone 4 *Commentaries* 369, Statutes 4-5 William and Mary c9 (1692); 5 Anne c6 (1706) s4.

Parliament<sup>155</sup>, although it continued to exist in its Colonies<sup>156</sup> and in American law<sup>157</sup> until 1850. (Until 1826 in England, treason and all felonies, except larceny and mayhem, were punishable by death).<sup>158</sup> The general tendency of newer statutory laws until the abolition of benefit of clergy in 1827, had been to restrict the privilege as to *crimes* and to extend it indefinitely as to *persons*.<sup>159</sup> Over time the optimum practice was for male prisoners of whatever status to plead not guilty, providing to them two separate opportunities to avoid capital punishment, as if found guilty, the claim to clergy was a total immunity.<sup>160</sup>

For the privilege of clergy; as if a clerk be ordered in court before a lay judge to answer to an action for a personal trespass, and especially in a case criminal and mortal plead that he is a clerk, the judge hath no further consance of the cause, for the church is so enfranchised, that no lay judge can have jurisdiction over a clerk, though the clerk will acknowledge him for his judge; and in such a case he is without delay to be delivered to his ordinary.<sup>161</sup>

Benefit of clergy “was to have a pervasive and benign, if counter-productive effect on the development of criminal law for the next few centuries”.<sup>162</sup> It has been unconvincingly argued<sup>163</sup> by Sir James Fitzjames Stephen that the origin of the marital coercion doctrine was

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<sup>155</sup> 7 & 8 Geo IV, c28, s6.

<sup>156</sup> G D Woods, ‘*A History of Criminal Law in New South Wales – The Colonial Period 1788-1900*’, The Federation Press (2002). At p112 ff reviews the benefit of clergy applicable in New South Wales in the early nineteenth century. It had been a part of English criminal law from at least the twelfth century. At p116 noting there appear to have been no references in any NSW criminal cases before 1828 of the privilege of clergy being either sought or used. In 1828 New South Wales adopted English law via s24 *Australian Courts Act 1828* [NSW]. William Forsyth, ‘*Cases And Opinions On Constitutional Law*’ (1869) Stevens & Haynes, London, pp457-459, records the Joint Opinion of the Attorney-General, Sir Thomas Denman and the Solicitor-General, Sir Williams Horne, dated 24 January 1832 to the Secretary of State, Viscount Goderich, that five slaves in the island of Tortola would “on the very technical point relating to benefit of clergy ... not have been entitled to that privilege”. William L Burdick, ‘*The Law of Crime*’ (1946) vol 1 §79, Matthew Bender & Co, Albany, NY. “The doctrine of ‘Clergy’ ... abolished in the Federal Courts of the United States of America by an act of 30 April 1790 [RS Sec.5329]. It existed as part of the common law in the USA as late as 1850: *State v Sutcliffe* 4 Strobbart (SC 372).”

<sup>157</sup> Benefit of clergy existed in the United States southern states until as late as 1854 – because executing a slave was a significant economic loss.

<sup>158</sup> See A T Carter, ‘*A History Of The English Courts*’ (1944) 7 ed, Butterworth & Co (Publishers) Ltd, London, p152.

<sup>159</sup> Leona C Gabel, ‘*Benefit of Clergy in England in the Later Middle Ages*’, (1928) 14 Smith College Studies in History, Northampton, Massachusetts, p124.

<sup>160</sup> Ibid p155.

<sup>161</sup> Andrew Horne, ‘*The Mirroure of Justices Written Originally in the Old French Long Before the Conquest and Many Things Added*’ (1642) reprinted 1968 Rothman Reprints Inc, New Jersey at p142 being ch 3, s4.

<sup>162</sup> Sir Frederick Pollock and Frederic William Maitland, ‘*The History of English Law*, 2 ed vol 1 (reprinted 1996), The Law Book Exchange Ltd, Union, New Jersey at p185

<sup>163</sup> Sir James Fitzjames Stephen, ‘*A History of Criminal Law in England*’ (1883) Macmillan and Co, London sl vol 2, p106 stated that the doctrine: “is at least a thousand years old in this Kingdom, being to be found among

a response to the inequality of the benefit of clergy doctrine, which did not apply to women, on the basis that no woman could become a cleric in the church.<sup>164</sup> However, this conclusion is irreconcilable with the fact that the marital coercion doctrine existed in its own right from at least 712 whereas the benefit of clergy doctrine did not exist and ultimately coalesced until some centuries later. The marital coercion position was a response to the inferior social and legal status of women whereas the benefit of clergy doctrine in its original formulation was mandated by ecclesiastical law and practice. Judges in deciding the contours of the common law had over time crafted the marital coercion doctrine so that it would apply only to where it was necessary to avoid executing a woman, as felonies were almost without exception, capital offences.<sup>165</sup> A complex interaction among social, legal and psychological forces shaped the status of wives during the life of the marital coercion doctrine. It literally applied the legal unity of husband and wife by the obliteration of the wife's separate personality. It is quite improbable that the anomalies of the benefit of clergy doctrine can explain the marital coercion defence. The two doctrines finally, yet partially, overlapped in 1692 but only until the abolition of the former in 1827, to provide a further level of protection for all women (not just wives); but benefit of clergy was principally a means of mitigation of punishment which permitted an alternative lesser sanction to be imposed. The marital coercion defence, by contrast, resulted in a complete acquittal. The coexistence of the benefit of clergy provision reduced the importance to wives of the marital coercion doctrine, although the non-clergyable exceptions were distinctly wider than the exceptions to the common law defence. The list of crimes which Parliament had placed outside the benefit of clergy was considerable by the time of the demise of the privilege in 1827.

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the laws of King Ina, the West Saxon. And it appears that among the northern nations on the Continent, this privilege extended to any woman transgressing in consent with a man, and to any slave that committed a joint offence with a freeman: the male or freeman only being punished, the female or slave dismissed: *procul dubio quod alterum libertas alterum necessitas, impelleret.*"

<sup>164</sup> In *R v Annie Brown* (1896) 15 NZLR 18, 36 Denniston J adopted this historical view.

<sup>165</sup> David Rosenberg 'Coverture in Criminal Law: Ancient "Defender" of Married Women' (1973) 6 University of California Davis Law Review 83, 85 "One can almost picture the common law judges' discomfiture when faced with a husband and wife charged with the same crime where the husband might receive the benefit of clergy and the subsequent mild punishment or acquittal, and the wife might face a death sentence. The expansion of the ancient doctrine of coverture to fit the criminal law situation and the subsequent presumptions of the husband's coercion are not unreasonable outgrowths in light of this dilemma".

By the turn of the nineteenth century English criminal law had reached a degree of unparalleled asperity<sup>166</sup> as there were in excess of 200 offences carrying capital punishment, without benefit of clergy. If the doctrine of marital coercion was a function of the unavailability of the benefit of clergy, upon the extension of that benefit to women in 1692, it may be surmised that the earlier doctrine would diminish in its virility, whereas it had continued with renewed vigour. But the benefit of clergy never applied to misdemeanors<sup>167</sup> so it could be inferred that with the significantly reduced sentences for misdemeanors, that the husband would suffer yet the wife, by virtue of the unrebutted presumption, would be free. It also avoided the “strange and monstrous consequences of a joint conviction”.<sup>168</sup>

From its inception, the presumption of coercion was never established as being conclusive, but by the seventeenth century it had been slowly transformed into an irrebuttable principle of law<sup>169</sup>. The mere fact of wifehood had become a complete defence for conduct committed in the presence of her husband. The wife could simply invoke that status as a total answer to the allegation of criminality, as long as the husband had been present. This approach was completely at odds with the developing theory of the law that combinative crime, such as exemplified by conspiracy, or joint enterprise, had a more pernicious effect than crime committed by an individual. The very justification in doctrine for criminalising concerted criminal effort was being undone where the joint action was between husband and wife, or by a wife where her husband was within a close distance. Once the presumption had become a legal, rather than a factual one, it was a passport to joint crime being indemnified from successful prosecution. The resilience of the marital coercion doctrine is explained by how the judges adapted it. While the very fact of the women’s marriage was the making of a conclusive defence<sup>170</sup>, by the early nineteenth century it was finally decided that it was now only a rebuttable presumption of fact. This position in turn became further weakened as courts responded to the unjust outcomes of acquittal by concluding that the quantum of evidence

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<sup>166</sup> L Radzinowicz, *A History of English Criminal Law*, (1948) vol 1 p24.

<sup>167</sup> Glanville L Williams, *Criminal Law: The General Part* (1953) Stevens & Sons Ltd, London p603.

<sup>168</sup> The Victorian Law Reform Commissioner *Criminal Liability of Married Persons* Report No.3 1975 p6.

<sup>169</sup> At this time the legal unity of husband and wife was at its zenith. William Shakespeare, *The Taming of the Shrew* Act 3 Scene 2: “I will be master of what is mine own: She is my goods, my chattels; she is my house, My household stuff, my field, my barn, My horse, my ox, my ass, my any thing.” cited by Isaacs J in *Wright v Cedzich* (1930) 43 CLR 493, 501.

<sup>170</sup> 4 Blackstone *Commentaries* 28.

required to tip the presumption was in effect less and less over time. The presumption diminished in terms of practical importance because judges began to robustly direct juries, that evidence of apparent independent action by a wife was inconsistent with the presumption and the defence. There was at common law no statement as to the standard of proof required to tilt the presumption, other than the orthodox requirement that the prosecution overall be proved beyond reasonable doubt. There was no rule that the presumption meant that the prosecution had to displace it on any narrated standard. The judges crafted the doctrine in order to achieve the flexibility of dictating a just result in the individual case.

The courts slowly modified the presumption so by the mid-nineteenth century it had returned to its original place as only a rebuttable presumption of fact and not a conclusive presumption of law, or even a rebuttable presumption of law.<sup>171</sup> This alteration was significant as it now required courts and lawyers to focus on how the presumption could be tipped. It became the approach that the prosecution needed to demonstrate that the wife had to some appreciable extent acted as an independent agent. To identify ostensibly independent acts, suffered from the logical fallacy: those acts themselves may have been the product of unwitnessed anterior coercion. An apparently free act performed in advance of the offence, narrowly defined in terms of its elements, may actually have been the product of coercive behaviour. With the presumption in place, those apparently free acts must be themselves presumed to be coerced. Therefore, it was on analysis a circular approach. The prosecution in reality could only beat the presumption if the innate features of the crime showed not that the wife took an independent part, but that she was the dominant participant in a joint crime. In a situation where she alone was charged, the fact her husband had been present and had not been charged, could look to all as though he had been responsible for her act and she was his proxy.

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<sup>171</sup> The transformation had not occurred by 1823. In *R v Knight* (1823) 1 Car & P 116 a reluctant husband was compelled by his wife to jointly commit robbery. The judge directed the jury to acquit the wife on the basis that the presumption of marital coercion was one of law, therefore irrebuttable. The reporter appended a note that “the modern practice is, on finding by the evidence that the offence was joint, for the court to direct the acquittal of the wife, without at all considering or inquiring how far she was or was not the principal actor or initiator of the offence.”

By 1867, the leading textbook in English criminal law<sup>172</sup> stated that the law was now settled so if a crime be committed in the presence of her husband then, as a generality subject to limited exceptions, the law presumed she acted under his immediate coercion. But the presumption was one of fact not law, as it was rebuttable<sup>173</sup> by evidence that the wife was principally instrumental in the commission of the felony by acting voluntarily. But even the exceptions which did not enable a wife to plead marital coercion were not themselves entirely certain.<sup>174</sup> In relation to misdemeanours there was some uneven<sup>175</sup> authority that they were outside the protection of the presumption.<sup>176</sup> The reason urged for restricting the defence to felonies was that in misdemeanours which involved “the government of the house” the wife would take a principal share in that governance. Prior to *R v Cruse*<sup>177</sup> in 1838 there appears to be no authority in the decided cases justifying the general exclusion of misdemeanours from the operation of the presumption. Even after *R v Cruse* courts continued to apply the doctrine,

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<sup>172</sup> William Bruce (ed), *Archbold’s Pleading and Evidence in Criminal Cases* (1867) 16 ed, Henry Sweet, Chancery Lane, p19.

<sup>173</sup> *Ibid* p20.

<sup>174</sup> Francis Sayre *‘Mens Rea’* (1932) HLR 974, 1012: “The defense assumed such generous outlines in various prosecutions for larcenies that it could not be allowed in cases of treason or murder (which were non-clergyable offenses) and probably not in cases of robbery.” In *State v Clark* 33 (1891) Atl 310 a Delaware court held marital coercion inapplicable as a defence to cases of conspiracy between husband, wife and another. But this analysis is incorrect on the basis that the origins of marital coercion and the origins of spousal immunity are not the same and conspiracy was never an exception to the doctrine. An earlier English decision had allowed it: *R v Duncan* (1849) 13 JP 220. The American cases were not uniform concerning the crimes to which the presumption of coercion applied; murder was held to be within it: *State v Kelly* (1888) 30 NW 503. It did not apply to criminal libel (see *R v Lady Lawley* (1732) 2 Barn KB 147; 94 ER 412) or perjury. *R v Dicks* (1817) 1 Russ C&M 16. *‘Russell on Crimes’* (1857) 8 ed, vol 1, p100. A married woman was indicted for falsely swearing to be next-of-kin and entitled to procure administration of an estate. She was held guilty notwithstanding that her husband was with her while she took the oath. But it does apply to perjury under American law: *Henderson v State* (1909) 63 SE 535; *Browning v State* (1943) 13 So 2d 54. However in *Commonwealth v Moore* (1894) 38 NE 1120 Lathrop J held that where a wife was competent but not compellable, the fact that she testified against her husband, excludes the possibility of marital coercion applying to provide a defence to a charge of her perjury, *‘Recent Cases’* (1894) 8 Harvard Law Review 430, 431. *R v Hudson & Taylor* [1971] 2 QB 202, where successful plea of duress was raised in relation to perjury, described as “an indulgent decision”: Glanville Williams *‘Textbook of Criminal Law: The General Part’* (1983) 2 ed p636. Halsbury’s *‘Laws of England’*, 1 ed vol 9 p244 treats the matter as to whether the defence applies to misdemeanours as one in which no general rule can be stated. W J Byrne *‘Broom, Legal Maxims’* (1924) 9 ed, p11; *‘Stephen Digest of Criminal Law’* (1894) 5 ed s31 and Kenny *‘Outlines of Criminal Law’* (1920) 9 ed p71 all state that the defence applies to misdemeanours. The Avory Committee reported that the defence applies to “all felonies and to all misdemeanours except treason and murder” (1922) Cmnd 1677.

<sup>175</sup> Sir James Fitzjames Stephen, *‘A Digest of the Criminal Law (Crimes and Punishments)’*, (1877) Macmillan & Co, London. At p17 article 30 has a specific heading *‘Married Women’*. The author states “It is uncertain how far this principle applies to felonies in general...it probably does not apply to robbery...it seems to apply to misdemeanours generally”.

<sup>176</sup> *R v Dicks* (1817) 1 Russ C&M 16; *R v Ingram* 1 Salk 384 and *R v Cruse* (1838) 8 Car & P 541. Russell at p151 was dogmatic, “I find no authority that the same rule as to coercion, which applies to felonies, does not extend to misdemeanours” citing *R v Price* (1837) 8 Car & P 19, 20n.

<sup>177</sup> (1838) 8 Car & P 541.

for example to the misdemeanour of an assault occasioning actual bodily harm.<sup>178</sup> If the reason for the exemption of the most heinous crimes of treason and murder from the exemption was their intrinsic seriousness and nature, then the lesser crimes ought to activate the defence, as otherwise only a very wide middle band of offences was covered. But it was inconsistently argued that certain misdemeanours were outside the doctrine which turned on the predilections of wives, namely offences “touching the domestic economy or government of the house, in which the wife has the principal share”<sup>179</sup> such as keeping a common gaming house<sup>180</sup> and keeping a common bawdy house.<sup>181</sup> It was stated “according to the prevailing opinion, it seems that the wife may be found guilty with the husband in all misdemeanours.”<sup>182</sup>

The presumption of marital coercion was easily rebuttable<sup>183</sup> especially where the husband was physically incapable<sup>184</sup> of exercising actual dominion over his wife at the time she committed the offence. The presumption was startling as it inverted the normal assumption underlying the inquiry of the criminal law into the responsibility of an individual for conduct. The initial assumption is that the accused is a fit subject for legal sanction because he or she had made an informed decision to commit a crime. It is only at that point evidence of either cognitive or volitional incapacity permits a lack of culpable blameworthiness to be

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<sup>178</sup> *R v Torpey* (1871) 12 Cox CC 45 after the Recorder had consulted Bramwell B.

<sup>179</sup> Blackstone 4 ‘*Commentaries*’ 29.

<sup>180</sup> *R v Dixon* (1795)10 Mod 335.

<sup>181</sup> *R v Williams* (1795)10 Mod 63. A supplementary reason was that an offence such as keeping a bawdy house “may generally be presumed to be managed by the intrigues of the sex”: 1 Hawk PC c1, s12. Offences for which it was said women were more naturally involved in criminal conduct than men, such as prostitution and keeping a bawdy house, were also engrafted as further exceptions from the generality of the privilege. The presumption did not apply here because it was presumed the wife exercised a principal share in the management of the house and the associated crime which was dependent on the use of the house. In *R v Howard* (1894) 13 NZLR 619 (CA) the defence was applied in relation to keeping a bawdy house. The common law entitlement to apply the doctrine to misdemeanours had been considered by the Court of Criminal Appeal in *R v Smith* (1916) 12 Cr App R 42, a case of the fraudulent conversion and falsification of accounts. This was a misdemeanour. To the same effect was *R v Jackson* (1904) 4 SR (NSW) 732.

<sup>182</sup> Relying on *R v Ingram* 1 Salk 384, although in *R v Price* (1837) 8 Car & P 19, the Common Serjeant after consulting Bosanquet and Coltman JJ did not accept the distinction that marital coercion was inoperative as a defence to a misdemeanour.

<sup>183</sup> Sir James Fitzjames Stephen, ‘*A Digest of the Criminal Law (Crimes and Punishments)*’, (1877) Macmillan & Co, London at p332 Note II in reference to Article 30. At p333: “The doctrine as it now stands is uncertain in its extent and irrational as far as it goes. It is, besides, rendered nearly unmeaning by the rule that the presumption is liable to be rebutted by circumstances.”

<sup>184</sup> *R v Pollard* (1838) 8 Car & P 553n where the husband was a bedridden cripple; *R v Banks* (1845) 1 Cox CC 238 the husband was blind; *R v McShane* (1876) 3 NZCA 314, *Excise Department v Pearce* (1893) 5 QJL 31 where the relevant husband was nearby but asleep.

excusatory. For a married<sup>185</sup> woman the law started from the assumption that she was so malleable that a crime physically committed by her was attributed not to her own exercise at will, but to the influence exerted upon her by her husband's will.<sup>186</sup> The cultural and political assumptions<sup>187</sup> underlying the doctrine were traceable to the laws of King Ine.<sup>188</sup>

Wives were believed to possess an immature or uninformed moral sense, so a miscreant wife was one who displayed any tendency toward autonomous action. In the era of the nineteenth century it was still permissible for a husband to lock up his wife and to cause a recalcitrant one to conform to his authority through physical punishment. Therefore independent action by a wife was perceived as a management failure by her husband. This explained why he was found to be vicariously liable for her acts and financial penalties. The marital coercion doctrine could be used to inflict detriment on the husband for a crime his wife had committed, on the basis that he had irresponsibly failed to exercise proper control of her.<sup>189</sup> The theory of criminal responsibility is based on the consequences of free choices, yet the effect of the marital coercion doctrine was to confirm that a wife was subjugated to her husband. It was hierarchical civil subjection, a reflection not only of the subordinate legal position occupied, but also of an obdurate belief in her intellectual, motivational and moral deficiencies. But quite inconsistently these assumptions ought to have, but did not, also applied to unmarried<sup>190</sup> women. The wife's weaknesses began with her wedding day: the status was itself the determinative debilitating fact, from which her reordered legal consequences now flowed.

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<sup>185</sup> Lawrence Stone, *The Family, Sex and Marriage in England 1500-1800*, (1977) p179 noting that during the seventeenth century that the choice of a career was not generally available so that marriage was the only vocation to which women could aspire.

<sup>186</sup> Anne M Coughlin, *'Excusing Women'* (1994) 82 California Law Review 1, 33.

<sup>187</sup> Norma Basch, *'In the Eyes of the Law: Women, Marriage, and Property in Nineteenth-Century New York'*, (1982) p27 who notes how striking the survival of the doctrine of marital unity has been in "its ability to serve the legal needs of three shifting social structures: the kin-oriented family of the late Middle Ages, the patriarchal nuclear family of early capitalism, and even the more companionate nuclear family of the late eighteenth century."

<sup>188</sup> F L Attenborough (ed) *'Laws of the Earliest English Kings'* (1922) The University Press, Cambridge, p54 sets out Ine s57 (AD 712) in English translation; David Wilkins, *'Leges Anglo-Saxons'* p24 translates the passage from Ine into Latin as: "Si maritus aliquid depraedetur, et persuadeat ad id uxorem suam, et deprehensus sit in eo vir, tunc suam partem compenset ille, excepta uxore, quoniam ipsa superiori suo obedire debet. Si ea jurejando confirmare audeat, se cum depraedato non participasse, sumat tertiam portionem".

<sup>189</sup> Anne M Coughlin, *'Excusing Women'* (1994) 82 California Law Review 1, 44 concluding that this liability encouraged men to prove that their lives were the specular image of the official story on marriage in which they mastered their wives with physical force when necessary. It also encouraged women to prove their submissive dependence on their husbands by punishing wives whose crimes displayed the exercise of free will.

<sup>190</sup> The term 'spinster' was generally applied.

## INCREASING JUDICIAL INTOLERANCE OF THE DEFENCE

The case law shows that by the beginning of the nineteenth century the tolerance for the entire doctrine was wearing very thin. The irritation of judges may have had the effect that prosecutors did not bring cases where there was an apparently strong defence. Courts became impatient with claims of marital coercion, which increasingly were separated from the realities of daily life in which women were begrudgingly becoming more independent. In 1837, Charles Dickens in *Oliver Twist*<sup>191</sup> memorably fixed a contemporary stare at the marital coercion defence.

The courts, however, consistently reaffirmed that the defence articulated an ostensibly benign explanation for the hierarchical distribution of power within marriage. The justification was to locate the source of the wife's subjugation to her husband's will in her submissive and confiding nature, coupled with the devoted affection she held for her husband. Judges contented themselves with the notion that it was natural, indeed noble, for wives to submit to the wills of their husbands. The inevitable effect of this defence to criminal conduct is to attribute irresponsibility to every woman who qualifies for the status of wife, irregardless to individual circumstances. The surging public policy propping up the defence trumped all considerations on inequality and emancipation. The defence was perceived as 'fair', chivalrous and not unreasonable. It was seen as affirmative discrimination necessary to deal with the grim realities of connubial life amongst the lower classes.

By the first three decades of the nineteenth century, the common law general defence of duress was so under-developed to be almost theoretical only; the common law knew but two or three examples of its deployment. The practical content of the general defence of duress was that of its overworked partial sub-set – marital coercion, which became the single focus

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<sup>191</sup> Philip Horne (ed) Charles Dickens, *Oliver Twist*, (1837), Penguin Books reprint (2002), p436, the henpecked Mr Bumble upon learning from Mr Brownlow that as he was present when his wife threw Oliver's possessions in the river, he would be legally held responsible stated, "If the law supposes that...the law is a ass – a idiot. If that is the eye of the law, the law's a bachelor, and the worst I wish the law is, that his eye maybe opened by experience – by experience." Allusion was made to the beadle's indignant protest against the theory of marital coercion in a case note on *People v Wright* (1878) 38 Mich 744, in *Note* (1890) vol 2 *The Green Bag* 560 "Thus the whirligig brings in its revenges."

to interest of contemporary legal commentators. Marital coercion was “the particular area which had received most formal judicial attention”.<sup>192</sup> Soon<sup>193</sup> it was openly acknowledged that a wife or feme covert was so much favoured by the law in respect of that power and authority which her husband had over her. She only lost the presumption if “it can clearly appear that the wife was not drawn to it by the husband, but that she was the principal actor and incitor of it.”

The law demanded the complete complicity<sup>194</sup> of the wife with the wishes and desires of the husband. Femininity was prized and derived from an optimum model of passivity: meekness, helplessness and innocence; the perfect recipe for successful coercion. Increased access to education and economic and technological changes slowly prompted women into the work place. Upon marriage a wife’s personal property<sup>195</sup> became absolutely vested in her husband. Her income was his and unless from an aristocratic family,<sup>196</sup> her land became his. Because of the economic dominion of the husband her options for independent thought and action were limited. Seen this way the marital coercion doctrine was a realistic and rational response by the criminal law to the predicament of women who were directed by their husbands to effect an unlawful act. The law presumed them guiltless of the dilemma. The disparate justifications for the doctrine included an assertion of the inferior intellect of women. This was a handy conclusion as the dominance of the husband was by linear logic a sensible and humane solution. It conveniently followed that the wife would act in accordance with the stipulations of the husband, as she was vulnerable when unaided in important decision-making. Biological justifications were also advanced for her frailty, including the debilitating effect of menstruation on the nervous system of the human female. But this could never, even if true, explain the quite separate and equal treatment of all other women, on identical terms as men,

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<sup>192</sup> KJM Smith, *Lawyers, Legislators and Theorists: Developments in English Criminal Jurisprudence 1800-1957*, (1998) Clarendon Press Oxford p102.

<sup>193</sup> J B Maule, *Burn’s Justice Of The Peace*, (1867), 30 ed, H Sweet; Maxwell & Son, and Stevens & Sons, London, p1235.

<sup>194</sup> Susan S M Edwards, *Female Sexuality and the Law*, Martin Robertson, Oxford p25 and at pp32-33 reviews the caselaw on the loss of a wife’s consortium (sexual congress and household duties) – value to be measured in terms of chastity-impairment: *Smith v Kaye* (1904) 20 TLR 263.

<sup>195</sup> Even her vestments became the property of her husband: *R v Glassie and Cooney* (1854) 7 Cox CC 1, 2 per Lefroy CJ “the clothes of the wife, which are, in point of law, the property of the husband.”

<sup>196</sup> Only few had the resources to create a trust in equity to avoid the harsh automatic consequences of the common law.

under the criminal law. (An entire theory of comparable medicine had been responsible for the earlier twentieth century statutory defence of infanticide which was created to explain away why lactating mothers would occasionally kill their newborn children.) The iconography of the Victorian female was a woman come to terms within the limited ability of her mind with the demands of childhood. Because the mind of a woman was considered incapable of safely processing the factual nuances and legal implications of her conduct, the law paternalistically provided a defence which positively encouraged her to comply with her husband's superior intellect. The criminal law reinforced the teaching that in almost<sup>197</sup> no circumstance should a wife question the judgment of her husband.

The common law position remained quite uncertain whether the defence applied to misdemeanors. A textbook, in its eleventh edition, published 14 years before the *Avory Report*,<sup>198</sup> could state that not all felonies were included "though it seems unsettled where the line is drawn"<sup>199</sup> and "in cases of misdemeanor, the prevailing opinion seems to have been that the wife is responsible for her acts".<sup>200</sup> The presumption never applied in non-indictable<sup>201</sup> offences in England, but it did in Australia and other common law jurisdictions. Now s47 *Criminal Justice Act 1925* [UK] which creates the statutory defence of marital coercion applies to all offences, summary<sup>202</sup> and indictable without distinction. Another exception, ill-defined as to its outer reaches, reappeared in the early nineteenth century in which a wife was not entitled to claim the defence in relation to offences concerning "the government of the house," as a wife was inconsistently held to have a principal share in its governance. It was said such offences "as may generally be presumed to be managed by the

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<sup>197</sup> 4 Blackstone 29 "even with regard to wives, this rule admits of an exception in crimes that are *mala in se*, in prohibited by the law of nature, as murder as the like...[i]n treason also". Murder being a crime of "so much malignity as to render it improbable that a wife would be constrained by her husband, without the operation of her will, into [its] commission": *State v McDonie* (1924) 123 SE 405, 407. In Anne M Coughlin, 'Excusing Women', [1994] 82 California Law Review 1, 40 in 190 it is incorrectly stated that the marital coercion excuse was available in relation to murder. The only known decision to that effect is *State v Kelly* which is wrong in principle.

<sup>198</sup> Avory Committee 'Report of the Committee on the Responsibility of a Wife for Crimes Committed under the Coercion of her Husband', Cmnd 1677 (1922).

<sup>199</sup> Charles L Attenborough, 'Principles of the Criminal Law' (1908) Stevens & Haynes, London, p24.

<sup>200</sup> Ibid 25.

<sup>201</sup> JW Cecil Turner, 'Kenny's Outlines of Criminal Law', (1962) 18 ed Cambridge University Press p63.

<sup>202</sup> J LI J Edwards, 'Compulsion, Coercion and Criminal Responsibility' (1951) 14 Modern Law Review 297, 309. In *Manuels v Crafter* [1940] SASR 7 and *Ewart v Fox* [1954] VLR 699 it was held that the presumption did not apply in summary offences. A L Pickering, 'Marital Coercion in Criminal Law' (1940) 14 Australian Law Journal 277.

intrigue of her sex” were outside the defence.<sup>203</sup> The bottom line was that by her running a bawdy house or engaging in prostitution, even with the husband nearby, was too far beyond the pale. Such wives were too brazen and contaminated by cashflow to be within the contemplation of the law’s magnanimity. Such women had irretrievably departed from the set course – they constituted a prohibited sub-sub-class. Upon this theory the use of the house, otherwise a matrimonial sanctuary for criminal offences such as keeping a brothel,<sup>204</sup> was violative of the sanctity enshrined by the defence.<sup>205</sup>

The imposing strength<sup>206</sup> of the doctrine in the mid-nineteenth century is demonstrated by a decision of the Court for Crown Cases Reserved. In *R v Samuel Smith and Sarah Smith*<sup>207</sup> the husband and wife had been convicted before Channell B and a jury of wounding one John Leach with intent to disfigure him and of another count of intending to do him grievous bodily harm. Mrs Smith did not personally inflict any violence upon Leach but she was present while her husband did so. Mrs Smith had written letters to Leach pretending that she had become a widow and beguiling him into a meeting with her at a secluded spot. Dressed as a widow she met Leach at a railway station where she induced him to go with her to a place where her husband, lying in wait, attacked Leach and inflicted the injuries on him. Pollock CB delivering the judgment of the Court found that the conviction of Sarah Smith had to be quashed because there was no evidence to rebut the presumption of her coercion.

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<sup>203</sup> Offences touching “the domestic economy or government of the house in which the wife has a principal share” were outside the defence: *R v Dixon* (1795) 10 Mod 335; *State v Gill* (1911) 129 NW 821; a wife living apart from her husband may be punished alone for keeping a house of ill-fame: *Commonwealth v Lewis* (1840) 1 Met 151.

<sup>204</sup> 1 Hawk c1 s12 because the wife was assumed to be the principal party in the offence. This was also the law in the United States of America: *Commonwealth v Cheney* (1873) 114 Mass 281. But in *R v Howard* (1894) 13 NZLR 619 (CA) a wife was acquitted on the basis of marital coercion that she had kept a common bawdy-house, contrary to s143 *Criminal Code Act 1893* [NZ].

<sup>205</sup> L I Stranger-Jones (ed) *‘Eversley’s Law of Domestic Relations’* (1951), 6 ed p149.

<sup>206</sup> Ronald Graveson, *‘The Background of the Century’*: in R H Graveson and F R Crane (eds) *‘A Century of Family Law’* (1957) Sweet & Maxwell, London, p3 referring to the presumption of marital coercion. “This reflect the general position in the early nineteenth century when the relations of society were largely relations of status, that is, a legal position imposed by rules of general law by virtue of persons being in certain relationships with one another...The dominant character of these relationships was one of an often profitable guardianship to the person to whom the law gave control.”

<sup>207</sup> (1858) Dearsly & Bell 553 (CCCR) noted by Courtney Kenny *‘A Selection of Cases Illustrative of English Criminal Law’* (1922), 5 ed, Cambridge University Press p65-66.

Case law demonstrated that the defence applied to virtually<sup>208</sup> every other offence, although there were occasionally expressions of judicial discontent that it applied to robbery, but Stephen J himself so applied it in *R v Dykes et Uxor*.<sup>209</sup> It had long been established that it applied to burglary,<sup>210</sup> forgery<sup>211</sup> and arson.<sup>212</sup> It applied to all crimes of violence<sup>213</sup> short of murder.<sup>214</sup>

“The anarchic state of the eighteenth century law of crimes”<sup>215</sup> was such that law reform of it was as inevitable as it was pedestrian. The Criminal Law Commissioners issued eight reports between 1833 and 1845<sup>216</sup> including a forlorn draft Bill<sup>217</sup> which would have consolidated all criminal law into a single unified code, the *Criminal Law Bill*. This work met with very substantial resistance from judges<sup>218</sup> who in reply to a request from the Lord Chancellor wrote detailed objections to the content and notion of a criminal code for England. In relation to marital coercion though, they were unanimous in representing their strong opposition to the perpetuation of the presumption. Wightman,<sup>219</sup> Platt,<sup>220</sup> and Williams<sup>221</sup> JJ agreed with the Law Commissioners “as to the expedience of altering the law respecting the presumption of

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<sup>208</sup> David S Evans, ‘*Criminal Law – Presumption of Coercion – Crimes Committed by Wife in Husband’s Presence*’ (1956) 35 North Carolina Law Review 104, p105: “In each jurisdiction in which a statute has been passed approving or modifying the defence of presumed coercion arising from a wife’s commission of an offence in her husband’s presence, provision has been made in the statute to exclude specific offences.”

<sup>209</sup> *R v Dykes et Uxor* (1885) 15 Cox CC 771; *R v Torpey* (1871) 12 Cox CC 45; *R v Buncombe* (1845) 1 Cox CC 183.

<sup>210</sup> *R v Wharton* (1664) Kel 37: it also applied to housebreaking *R v Hamilton* (1784) 1 Leach 348; *R v Archer* (1826) 1 Mood CC 143 (receiving stolen property)

<sup>211</sup> *R v Hughes* (1813) 2 Lew CC 229.

<sup>212</sup> *R v Pollard* (1838) 8 Car & P 553n.

<sup>213</sup> *R v Smith* (1858) 8 Cox CC 27 (wounding with intent).

<sup>214</sup> *Countess of Somerset’s Case* (1616) 2 State Tr 951; 1 Hale PC 45; Dalton c157.

<sup>215</sup> Jerome Michael and Herbert Wechsler, ‘*Criminal Law and its Administration*’, (1940), The Foundation Press Inc. Chicago at p1284.

<sup>216</sup> Michael Lobban, ‘*The Common Law and English Jurisprudence 1760-1850*’, (1991) Clarendon Press, Oxford p202. At p206: “As with real property, the profession reacted with venom against any proposal that the law could be briefly summarised”. referring to *Law Magazine* (1835) xiii p56-57.

<sup>217</sup> The Criminal Law Commissioners in 1845, ‘*Second Report (1854) Parliamentary Papers XXIV, 114*’, and the Criminal Code Commissioners in 1879 (draft Code s23) recommended the abolition of the presumption of coercion.

<sup>218</sup> ‘*Copies of the Lord Chancellor’s Letters to the Judges and of their Answers respecting the Criminal Law Bills of the Last Session*’, Ordered by the House of Commons to be printed 12 June 1854, *Parliamentary Papers* 1854 (389), LIII.

<sup>219</sup> Ibid p20. Wightman J had been a member of the Criminal Law Commissioners.

<sup>220</sup> Ibid p27 Platt J added that the recommendation “would in my judgment, operate beneficially to the public”.

<sup>221</sup> Ibid p28.

married women”. Two of the judges (Erle and Talfourd JJ) however, made extensive observations on the proposal to abolish the presumption and on the existing law.

Section 3 abolishes the presumption of coercion where a wife commits a crime in presence of her husband: but will she be allowed to prove that she was in fact coerced? – and if so, is she admissible as a witness against her husband? – and if so, will a less degree of coercion than that required for ordinary free against exempt her from responsibility? – and if she is not admitted to prove coercion, is there not a danger of wrong conviction?<sup>222</sup>

These concerns of Erle J were very apposite. At this juncture a defendant could not give evidence on her or his own behalf. How was a wife to establish marital coercion, without the benefit of the usual presumption, when she was required by law to stand mute in her defence? Additionally the introduction of a *Criminal Code* would leave the position unclear as to how the discarded presumption would impact on the very real possibility that a wife would be wrongly convicted and incapable of demonstrating that. It was also unclear how the abolition of the presumption would operate alongside the then very rare defence of common law duress. Talfourd J made very extensive commentary when, with original emphasis, he wrote:<sup>223</sup>

The third section enacts, that “the rule of law, whereby a married woman charged with the commission of *any* offence is presumed, in case her husband *be* (query, was?) present at the time (query, *what time?* According to the grammatical construction, the time *when she is charged*, but probably the time of the alleged offence is intended,) “to have acted under his coercion unless it appear that she did not so act, and all rules of law contrary to the provisions of this Act relating to incapacity, &c shall be repealed and cancelled.

The object of the section to annul the rule which, in certain cases, has raised a presumption of a wife’s coercion from her husband’s presence, is unquestionably good; but it is not necessary to mis-state the rule to be annulled by representing it as being more extensive and mischievous than it is. There is no such rule as that recited in this section. The rule respecting presumptive coercion *certainly* does *not* apply to cases of highest crimes of treason and murder; probably not to any crime of violence; certainly not to some misdemeanours, as keeping a brothel, keeping a gaming house, or assault; and, according to the greater current of authorities, not to *any misdemeanour*. It would be a simpler course to enact that no married woman shall hereafter be acquitted on the ground of coercion, unless the fact of such coercion shall appear in proof”.

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<sup>222</sup> Erle J, *ibid* p24.

<sup>223</sup> *Ibid* p32.

It is self-evident that this judge was out of kilter in exclaiming that the presumption and the defence probably did not apply to any crime of violence. Further, his solution in his last sentence would aggravate the problem, for how would a wife show the coercion; how could it “appear in proof”? The English judges were convinced that the common law should be left to them to decide, mould and to articulate. Their role would diminish under a code and this may explain the pedantic objections taken by them.

## NINETEENTH CENTURY AMERICAN CASE LAW AND LEGISLATION PERTAINING TO MARITAL COERCION

As early as 1766 in colonial Massachusetts wives were successfully invoking marital coercion as a defence. It has been noted that:

women were evidently apprised of the anomaly in the felony law. The survival of feme covert was not, however, an unmixed blessing: while it afforded women some relief in the criminal courts, it insured their subservience to their husbands on the civil side of the law.<sup>224</sup>

The *Seneca Falls Declaration of Sentiments*,<sup>225</sup> was the beginning of the organised women’s rights movement in America,<sup>226</sup> the earliest, systematic, public articulation there of the quest for full legal equality.<sup>227</sup> Texas in 1845 and Kansas in 1849 had written some degree of protection for married women’s property rights into their State Constitutions. Wyoming gave married women separate control over their earnings during marriage and equal custody of the children<sup>228</sup> and granted women the right to vote in 1869. The relevant common law of the American States was described in 1846:

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<sup>224</sup> Hull *ibid* p35.

<sup>225</sup> 19 July 1848, New York.

<sup>226</sup> Carolyn S Bratt, *The Sesquicentennial of the 1848 Seneca Falls Women’s Rights Convention: America Women’s Unfinished Quest for Legal, Economic, Political and Social Equality*, (1996) 84 Kentucky Law Journal 715.

<sup>227</sup> *Ibid* 716. See also Cheryl Hanna, ‘Everything Old is New Again: A Foreward to the Tenth Anniversary Edition of the Duke Journal of Gender Law & Policy’, (2004) 10 Duke Journal of Gender Law & Policy, iii,

<sup>228</sup> Mari J Matsuda, *The West and the Legal Status of Women: Explanations of Frontier Feminism*, (1985) 24 Journal of the West 50, 51.

A wife or feme coverte is so much favoured in respect of that power and authority which her husband has over her, that, in general, if a felony be committed by her in company with or in the presence<sup>229</sup> of her husband, the presumption of the law is that she acted under his immediate coercion and she will be excused from punishment.<sup>230</sup>

The first common law jurisdiction to legislatively abolish the presumption of marital coercion was the state of Arkansas<sup>231</sup> in 1855, which henceforth required actual coercion to be proved as it would no longer be presumed. In *Freel v The State*<sup>232</sup> English CJ set out that 1855 statute

Married women, acting under the threats, commands or coercion of their husbands, shall not be found guilty of any crime or misdemeanor, if it appears from all the facts and circumstances of the case that violence, threats, commands or coercion, were used.

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<sup>229</sup> But the sphere of the husband's influence linked his general physical presence, presumably as that would enable him to reinforce his threat by actual physical violence. "[T]he husband's presence need not be at the very spot, or in the same room, but it is sufficient if he was near enough for her to be under his immediate control or influence": *Commonwealth v Daley* (1888) 18 NE 579 (Supreme Judicial Court of Massachusetts) The defence became over-extended in relation to offences of a continuing nature when it was improbable in the extreme the husband would be physically present throughout the pendency of the entire crime: *State v Miller* (1901) 62 SW 692, 694 an extraordinary case where the wife smuggled a revolver into jail so her husband could escape. "In all she did she but yielded obedience to the will and direction of her husband, in the act itself, which the Statute denounces and makes criminal, was only completed in his presence, and by handing him the revolver which he required her to bring to him. It seems to us she was in no sense the independent inciter and mover in the crime, and, if ever a case can be made in which the law will indulge the presumption in a wife's favour, this is the one." So, a criminal act begun in the husband's absence might fall within the defence if completed in his presence. *R v Knight* (1823) 1 Car & P 116. This raised in itself conceptual problems as the initiatory steps would generally in themselves constitute an offence such as incitement or attempt or conspiracy or an accessory before the fact role; all of which could be also covered by the defence. In a conspiracy the offence is the agreement but the overt acts fulfilling the agreement are not elements of it. The wife could be coerced into the initial agreement, yet that coercion may well have dissipated before the overt acts in which she participated were carried out. In terms of the gravamen of the offence it is measured by the facilitation of the original concord yet the wife would have a complete defence.

<sup>230</sup> Francis Wharton, 'A Treatise on The Criminal Law of the United States; A Digest of the Penal Statutes of the General Government and of Massachusetts, New York, Pennsylvania, and Virginia; with the Decisions on Cases Arising upon those Statutes: Together with The English and American Authorities upon Criminal Law in General', (1846) James Kay Jun & Brother, Philadelphia at p19. Edmund H Bennett, 'A Selection of Leading Cases in Criminal Law with notes by Edmund H Bennett and Franklyn Fiske Heard', (1869) 2 ed. Little, Brown & Co., Boston, vol 1 p81 has an extensive section on the defence.

<sup>231</sup> *Freel v State* (1860) 21 Ark 212. Under early American law the presumption of marital coercion also applied to torts committed by the wife in her husband's presence. *Note* (1890) 41 The Albany Law Journal 448 a casenote on *Baker v Braslin* (1889) 2 Noe 1889, Rhode Island Supreme Court per Durfec CJ; *Simmons v Brown* 5 (1858) RI 299; *Marshall v Oakes* (1864) 51 Me 308; *Handy v Foley* (1876) 121 Mass 258; *Cassin v Delany* (1868) 38 NY 178.

<sup>232</sup> (1860) 21 Ark 212, 216. [Dig.Ch.51, sec 1, of Part I] *Laws of Arkansas*.

Around the same time, in 1858<sup>233</sup> the Supreme Court of Massachusetts<sup>234</sup> strongly doubted whether the emancipation of women in the modern understanding of society could justify the continuance of the marital coercion defence, but reluctantly acknowledged that it was a matter for the legislature to determine. In 1869 a leading American criminal law text<sup>235</sup> derided the presumption as one that “must be very weak” as it was not possible to accommodate a universal presumption of the criminal law that a husband had ordered his wife to commit a crime. The defence was incompatible with “the progress of civilisation and the extension of commerce, an artificial state of society has grown up, incompatible with that state of simplicity from which many rules of the common law have been derived”. Marital coercion as a defence was attributable to the fact that a feme covert had no legal status apart from her husband,<sup>236</sup> which was no longer the true legal position.

The earliest repudiation of the common law defence by a court<sup>237</sup> anywhere is the decision of the Kansas Supreme Court in 1884.<sup>238</sup> Spouses had been charged with murder and the evidence<sup>239</sup> disclosed that Mrs Hendricks had carried out the fatal shooting. At trial she had unsuccessfully sought a trial instruction to the jury permitting her to rely upon marital coercion. Valentine CJ stated:

The laws of Kansas do not presume that a wife who unites with her husband in the commission of a crime, acts under his coercion. On the contrary, the laws of Kansas presume that all persons of mature age and sound mind act upon their own volition, and are responsible for their acts.

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<sup>233</sup> *Commonwealth v Burk* 11 Gray 437. *Commonwealth v Hill* (1887) 145 Mass 307 Field J remarked that the presumption “has perhaps lost something of its force in modern times in consequence of the rights given to married women by statute, and the diminished power of control which by law and usage husbands now have over the person and property of their wives”.

<sup>234</sup> Laurie Sullivan, ‘*Manipulation of the Presumption of a Husband’s Coercion in the Trials of Wives in the Nineteenth Century*’, unpublished paper, Gender and the Law in American History, Professors Chused and Williams, Georgetown University, 24 January 2000.

<sup>235</sup> Edmund H Bennett and Franklin Fiske Heard, ‘*A Selection of Leading Cases in Criminal Law with Notes*’ (1869) 2 ed, vol 1 Little, Brown, and Company, Boston, p86.

<sup>236</sup> DSG, *Current Decisions*, (1930) 3 Rocky Mountain Law Review 218, 222 noting *State v Asper* (1930) 292 Pac 225, a New Mexico decision comporting with the view that legislation protecting married women’s property rights was leading most jurisdictions to construe the presumption of marital coercion very strictly, and to give it less weight than before.

<sup>237</sup> As opposed to a legislature: see Arkansas which repudiated the entire common law defence in 1855.

<sup>238</sup> *State v Hendricks* (1884) 4 Pac 1050.

<sup>239</sup> The court noted that murder had always been excepted from the operation of the presumption at common law, discussed by DSG, *Current Decisions*, (1930) 3 Rocky Mountain Law Review 218, 221.

The court reasoned that the changed conditions of society and its institutions meant that the common law presumption had to be abrogated by judge-made law, although adding it “was probably right when first adopted for the state of society which then existed”. Once the reason for the presumption ceased to exist, the presumption itself also ceased to exist.<sup>240</sup> The Supreme Court of Nebraska also exclaimed against the operation of the presumption in 1898<sup>241</sup> but courts in New Jersey<sup>242</sup> and North Carolina<sup>243</sup> continued to apply it.

In 1891 in Alabama it was claimed that the law was now “eminently unsatisfactory, and the matter seems to call very urgently for that legislative interference by which alone it can now be adjusted on a rational basis”.<sup>244</sup> The Supreme Court of Tennessee<sup>245</sup> and the Court of Appeals of Kentucky<sup>246</sup> in 1920 did not wait<sup>247</sup> and reached the conclusion that the presumption could no longer compatibly exist with emergent notions of female equality. Although the reason for it was unclear it must have had as a foundation the peculiar relationship between spouses as at common law a husband had almost absolute control of his wife “she was in a condition of complete dependence”. But equity had modified the harshness of the common law and disregarded the fiction of marital unity where it had been necessary to protect uxorial rights. Kentucky had never accepted the right of a husband to chastise his wife

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<sup>240</sup> This was the identical argument unsuccessfully raised by the Solicitor General in *R v McKeachie* [1926] NZLR 1, 3, in relation to the spousal conspiracy exemption.

<sup>241</sup> *Smith v Meyers* (1898) 74 NW 277, 278 per Irvine J “Certain it is that such presumption runs counter to our broad laws...in counter to the reason of men, in view of the domestic relations as they now exist, protected by more enlightened custom and a kindlier law”; ‘*Recent Decisions*’ (1925) 25 Columbia Law Review 99, 100-101 noting that criticism of the presumption is “frequent in the opinions of the courts”.

<sup>242</sup> *State v Martini* (1910) 78 Atl 12. It may be relevant that these states were all from the mid-west in agrarian economies where women were essential to the success and livelihood of families. Joanna L Grossman, ‘*Book Review: Separated Spouses*’ (2001) 53 Stanford Law Review 1613, 1626: “The conventional legal understanding of nineteenth-century marriage is primarily a story about the dutiful performance by husbands and wives of legally presented duties in exchange for legally assigned rights.”

<sup>243</sup> *State v Noell* (1911) 72 SE 590. But the next year the Supreme Court did hold that the presumption no longer exists: *State v Seahorn* (1914) 81 SE 687, noted *Recent Case Notes* (1920) 29 Yale Law Journal 802, 803 “in accord with the *mores* of the times”.

<sup>244</sup> *Bibb v State* (1891) 94 Ala 88, 96.

<sup>245</sup> *Morton v State* (1919) 209 SW 644. cf *State v McDonie* (1924) 123 SE 405 the Supreme Court of Appeals of West Virginia p407 per Miller J maintained the presumption, by concluding that it was only “a weak one and that the slightest evidence is sufficient to rebut it” by acknowledging that the reason for strictly applying the presumption no longer remains because the related right of a husband to chastise his wife had disappeared.

<sup>246</sup> *King v City of Owensboro* (1920) 218 SW 297. In *Bevins v Commonwealth* (1924) 264 SW 1063 the decision was confirmed in a case involving a wife selling unlawful liquor: ‘*Recent Decisions*’ (1925) 25 Columbia Law Review 99, 100.

<sup>247</sup> Clay C in *King v City of Owensboro* (1920) 218 SW 297, 298 noted that other States continued to apply the rule, referring specifically to Alabama and Maine.

and had by legislation in 1894 materially altered the rights and liabilities of married women, so that all former common law rules now had to be individually appraised for their continuing compatibility with the ethos of society and the momentum of legislation. The one-person fiction of the common law could no longer be maintained as the touchstone of a married woman's rights and capacity. But in *State v Miller*,<sup>248</sup> an extraordinary decision, the wife, Mrs Miller, had her conviction quashed for conveying a revolver into a jail with intent that her husband might use it to facilitate escape from prison. Gantt J stated at 694:

Marriage does not take from the wife her general capacity to commit crime, but, as it casts upon her the duty of obedience to and affection for her husband, the law indulges a presumption that, if she commits an offence in his presence, it is the result of his constraint or coercion and, in the absence of proof to the contrary, excuses her.<sup>249</sup>

Women were, on the cusp of the twentieth century in some American states, on a plane of significant legal equality and were therefore unable to shelter under the supposed former dominion of a husband. The defence of marital coercion, depended on a profound disability acquired by virtue of marriage, but that fiction had now been destroyed by emancipation.<sup>250</sup>

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<sup>248</sup> (1901) 62 SW 692. A decision of the Supreme Court of Missouri delivered by Gantt J (Sherwood PJ and Burgess J concurring).

<sup>249</sup> Citing 1 J Bishop *'New Criminal Law'* (1891) para 357. In *State v Baker* (1892) 19 SW 222 Supreme Court of Missouri (Gantt PJ, Macfarlane and Thomas JJ) the appellant, Annie Baker, also known as Annie Ma Foo, was convicted of mayhem. The court rejected a submission that the prosecution had to prove that the husband actually disapproved of the criminal act of his wife.. A p225 "It will be observed that learned counsel for defendant desire us to ingraft an additional modification on this rule of evidence, and require the State to go further, and prove that the husband not only was not the inciter or responsible criminal agent in the commission of the crime, but that he actually disapproved it, and, in the absence of evidence of his disapproval, the wife must be acquitted. This is not the law."

<sup>250</sup> In 1930 the Supreme Court of Iowa in *State v Renslow* (1930) 230 NW 316 completely repudiated the presumption and the defence. Albert J for the court noted that the origin of the defence was shrouded in mystery and that no consistent explanation for the defence was any longer available. "There seems to have been in the development of the law a struggle to get away from this rule" with various American states engrafting further exceptions to the standard ones of murder and treason. eg: in *Miller v State* (1885) 25 Wis 384 robbery was also excluded. Some jurisdictions rather than openly abrogating the presumption or the defence very substantially weakened them by concluding that the presumption was only very slight. This was but a stage in descending order to its eventual demise: *State v Cleaves* (1871) 59 Me 298, 302; *Brown v Commonwealth* (1928)115 SE 542. The court concluded that the emancipation of women from the disabilities of coverture meant the reason for the rule disappeared and with it the rule itself should go.

## THE FIRST CRIMINAL CODES IN THE DOMINIONS AND COLONIES AND THE MARRIED WOMENS' PROPERTY ACTS

While the American states were in flux, the Dominions were also reacting to and with the emerging newer status of women. In the late nineteenth century women in Canada, like in America,<sup>251</sup> Australia, and New Zealand, frequently entered the trades out of necessity, becoming merchants, as their husbands had to leave homes and farms to secure employment or to fight wars.<sup>252</sup> A robust independent class of women, so different from the Victorian ideals of womanhood, were shaping social conventions and manners. No longer were they the property of their husband, but still they monopolised the domestic private sphere, while the husband was responsible for all public activities and relationships outside the family. *Married Women's Property Acts*<sup>253</sup> were passed in almost every jurisdiction to ensure the stable transition of wealth and to secure financial independence and security.<sup>254</sup> Once married women had (limited) rights of ownership and control, changes occurred to effect other recognitions of their legal personality, including their privileges under criminal law. The *Married Women's Property Act 1882* [UK], permitted from 1 January 1883, the wife, whenever married,<sup>255</sup> capable to sue and be sued and have in her own name the same civil<sup>256</sup>

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<sup>251</sup> Mari Matouda, *The West and the Legal Status of Women: Explanations of Frontier Feminism*, (1985) 24 *Journal of the West* 47-56 (emphasising a concurrence of economic, geographical, ideological and political reasons, frontier women were hardly delicate creatures).

<sup>252</sup> In *Callender v Allan* (1888) 6 NZLR 436, 440 Williams J concluded that a married woman could not hold a publican's licence because the *Licensing Act 1881* [NZ] was enacted when a "wife was then under the dominion of her husband; she could have had at law no separate property, and was incapable at law of contracting or incurring obligations" making the occupation of publican or licensee impossible. Married women were persons "not sui juris, and under disability". "It is plain from the cases cited that the operation of the *Married Women's Property Act* is not so extensive as on a hasty perusal of it might be supposed, and that is very far from placing a married woman in the same situation for all purposes as a feme sole." *Ibid* at 443. The same result had been reached in *R v Nicholson* (1884) 10 VLR 255; Linda Grant DePauw, *Women and the Law: The Colonial Period*, (1977) 6 *Human Rights* 107, 110. In *Sail'er Inn v Kirby* (1971) 485 P 2d 529, 540 the Supreme Court of California invalidated a statute prohibiting women from bartending, unless they were the licensee or wife of the licensee.

<sup>253</sup> Philip Girard and Jim Phillips (eds), *Essays in the History of Canadian Law* (1990) vol III, University of Toronto Press, Toronto, at p84: "All Canadian common law provinces eventually adopted legislation modelled more or less on the *English Act of 1882*, a fact that can be interpreted as demonstrating a lack of originality on the part of the Canadian legal community".

<sup>254</sup> Reva B Siegel, *The Modernisation of Marital Status Law: Adjudicating Wives' Rights to Earnings 1960-1930*, (1994) 82 *Georgetown University Law Journal* 2127,2136.

<sup>255</sup> Ralph Thicknesse, *Digest of the Law of Husband and Wife as it Affects Property and the Married Women's Property Act 1882* (1884) W Maxwell & Son, London, p33.

<sup>256</sup> The *Married Women's Property Act 1884* [NZ] necessitated a complete revision of the *Code of Civil Procedure* for New Zealand, but by 1885 Rule 67 of the *Code of Civil Procedure* still provided: "67. Married

and criminal remedies<sup>257</sup> for the protection and security of her separate property, as if she were a feme sole. For those purposes the feme covert now became a feme discover. In America the courts in Kentucky<sup>258</sup> and Tennessee<sup>259</sup> had held that the *Married Women's Property Acts* verified that a wife was no longer under control of her husband; but other states<sup>260</sup> steadfastly saw property legislation designed in favour of a wife, as having no broader implications for the destruction of either the presumption or the defence. The pattern of responses by the courts generally tended to show contiguous State courts adopting the view of the neighbour. But some courts firmly decided that the passage of legislation providing for married women to have separate interests in property and distinct legal personality, meant that the doctrine of marital coercion had expired as being radically incompatible with the modern legislation; others saw this legislation as only providing for marital property and not having the necessary implication of removing a long-standing criminal defence, by a side wind of matrimonial property reform.<sup>261</sup> Commentators in England generally saw the legislation as creating equality under the criminal law but limited to only separate property interests.<sup>262</sup>

English common law was encrusted with precedent and historical anomalies and therefore condensing it to a cohesive set of principles was problematic. In England there had been attempts to systematise the law while reforming it; the judges were doing just that in relation to the defence by constantly softening the presumption and by expecting proportionately

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women, infants, idiots, and lunatics may sue and defend by a guardian ad litem, admitted for that purpose by the Court." Pennefather and Brown's, *Code of Civil Procedure of New Zealand*, (1885) University of Toronto Press, p29.

<sup>257</sup> *Weldon v Winslow* [1884] WN 184 (CA); *Gloucestershire Bank v Phillips* (1884) 12 QBD 533,536.

<sup>258</sup> *King v City of Owensboro* (1920) 218 SW 644.

<sup>259</sup> *Morton v State* (1919) 209 SW 644.

<sup>260</sup> *Neys v Taylor* (1900) 81 NW 901 (South Dakota); *Braxton v State* (1919) 82 So 657 (Alabama); *State v Murray* (1927) 292 SW 434 (Missouri).

<sup>261</sup> *Neys v Taylor* (1900) 81 NW 901 for a detailed exposition of this reasoning. In *Braxton v State* (1919) 82 So 657 (Court of Appeal of Alabama) Samford J at 659 stated that the marital coercion doctrine rules are "adopted to and are necessary for the well-being of society, and the various statutes of this state relative to married women and their rights to property do not change this rule."

<sup>262</sup> Ralph Thicknesse, *Digest of the Law of Husband and Wife as it Affects Property and the Married Women's Property Act 1882*, (1884), W Maxwell & Son, London, at p33 states that in view of the 1882 Act "On and after 1<sup>st</sup> January 1883, the wife whenever married, is capable of suing and being sued, and has in her own name the same civil and criminal remedies for the protection and security of her separate property as if she were a feme sole". William Pinder Eversley, *The Law of the Domestic Relations*, (1896) 2 ed, Stevens & Haynes, London, p173: "Generally speaking, a married woman is just as amenable to the criminal law as regards her crimes and delinquencies as a man or a single woman; but she is excused from liability in respect of certain crimes...on the ground that her acts have not been those of a free agent."

greater robustness from wives in evaluating the limits of their responsibility. The defence resisted irradiation in England as the necessary fundamental rethinking of the law required a mindset that freed itself from the inherited traditions of British common law.<sup>263</sup> That transformation had been achieved in 1879 by the English Law Commissioners who prepared the model code for criminal law, which contained a provision which would abrogate the presumption against marital coercion. It was never enacted. At that time Canada, Australia and New Zealand had legal systems that were unreformed and right for experimentation. Political force was needed to bring such a code into effect and in 1892 Canada and in 1893 New Zealand enacted (apart from the *Indian Penal Code*<sup>264</sup>), the first *Criminal Codes* in the British Empire.

James Stephen, Under-Secretary of the Colonial Office identified the challenge<sup>265</sup> of an infant colony and the adoption of its laws in these terms:

In the infancy of a colony the choice must be made between the adoption of an old and inapplicable code or of a new and immature code. Both are evils, but in my mind it is much safer to begin with a vigorous effort to lay the foundations of law on a right and durable basis, than to build it on a basis which must be wrong and which can never possess any stability.<sup>266</sup>

The draftsman of the *Criminal Code 1892* [Can] was Burbidge J<sup>267</sup> who modelled the draft on Stephen's *Digest of the Criminal Law* and the *Report of the English Criminal Code Commissioners 1879*.<sup>268</sup> The codification of criminal law was first mooted in the Canadian

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<sup>263</sup> Graham Parker, *The Origins of the Canadian Criminal Code*, in David H Flaherty (ed) vol 1 *Essays in the History of Canadian Law* (1990) 249, University of Toronto Press, Toronto.

<sup>264</sup> In 1870 the Colonial Office prepared a lengthy memorandum; *Some Considerations Preliminary to the Preparation of a Penal Code for the Crown Colonies*, PRO LCO/885/HP 00062 (20 May 1870). This commended colonial administrators to use the work of Macaulay. The writer urged that in the preparation of "theoretic or innovating legislation" preference should be given to reports of Commissions and Parliamentary Committees which had already examined the problems of criminal law.

<sup>265</sup> Minute on New Zealand Governor's Dispatch of 29 March 1842.

<sup>266</sup> JL Robson (ed), *New Zealand – The Development of its Laws and Constitution*, (1967) 2 ed Stevens & Sons, London. *Criminal Law*, ID Campbell, at p361.

<sup>267</sup> *R v Martin* [1933] 1 DLR 434, 454 (Man: CA) per Trueman JA. The 1879 ill-fated English Code had been the specific model for the defence of compulsion provided for in s20 Criminal Code [Can]: *R v Farduto* [1912] 10 DLR 669, 672 (Qué: KB: Appeal Side) per Cross J.

<sup>268</sup> Graham Parker, *The Origins of the Canadian Criminal Code*, in David H Flaherty (ed) vol 1 *Essays in the History of Canadian Law*, 249, (1981) University of Toronto Press, Toronto p259. In May 1892 Judge James Gowan, who was the force behind the code, wrote to Robert Sedgewick (the Deputy Minister of Justice) and George Burbidge (a judge and former Deputy Minister of Justice). He sent some suggestions for amendment "relating to abortion, libel, corroboration, and spousal immunity".

Parliament<sup>269</sup> on 12 May 1891 by Sir John Thompson. The next year<sup>270</sup> he introduced a Bill to codify the criminal law, which engaged only limited debate before it received the Royal assent.<sup>271</sup> The parliamentary consideration was a pallid affair. The second reading was on 12 April 1892 and the Bill passed within two months, with Committee hearings in the interim.<sup>272</sup> The debates in Canada, as in New Zealand, were really a desultory discussion of technical detail with a minimum of serious criticism or comment and even then many of the comments were more social than legal. The Code was proclaimed in force on 1 July 1893, a few months earlier than the New Zealand Code. The topic of marital coercion was almost summarily dealt with in the legislative debates, even though there was a real paucity of case law on it in Canada.<sup>273</sup> The Canadian proposal to abrogate the presumption of marital coercion was only challenged by a Member from Prince Edward Island, who questioned the need to alter the common law. In explanation, Sir John Thompson stated:<sup>274</sup>

The presumption under the common law is in many cases a strained one. In many cases the wife commits an act of violence in spite of her husband, but under the common law it is presumed that she is acting under the compulsion of her husband if she does that in his

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<sup>269</sup> *Official Report of the Debates of the House of Commons of the Dominion of Canada* vol XXXIII 1891 p156: Bill No 32, which stated “it has been prepared principally on the model of the Imperial codification”. Thompson later described the Bill as founded on the “draft code prepared by the Royal Commission in Great Britain in 1880, on Stephens’ *Digest of the Criminal Law*,” (1887 ed); Burbidge’s *Digest of the Canadian Criminal Law* 1889 and the Canadian Statutory Law: *Official Report of the Debates of the House of Commons of the Dominion of Canada* vol XXXIV p1312, 12 April 1892.

<sup>270</sup> *Official Report of the Debates of the House of Commons of the Dominion of Canada* vol XXX IV 1892 p106: Bill No 7.

<sup>271</sup> JM Ward, *Colonial Liberalisation and its Aftermath: New South Wales 1867-1917* (1981): 67 *Journal of Royal Australian Historical Society* 81, 86-87 “Some developments amounted to perfecting the individualism of the liberal state. In these instances the Colony usually began by following the lead of the Mother Country at a rather respectful distance and then so soon as the original inertia had been removed, plunged ahead.” The various peregrinations of Colonial judges and Governors (the Hong Kong, East Africa, Fiji, New Zealand and Australia interchange is an excellent example), lead to a transference of legal ideology.

<sup>272</sup> *House of Commons Debates, Canada 1892* vol 1 1312

<sup>273</sup> *R v Mrs Philip Williams* (1878) 42 UCR 462, 465 (in which the defence failed on a charge of selling liquor without a licence “while the husband was in gaol for a similar offence, the conviction must be upheld” per Gwynne J); *R v Warren et ux* (1888) 16 OR 590 (an unsuccessful application for habeas corpus on the basis that a wife could not be indicted for keeping a house of ill-fame as the ownership was in her husband; held both spouses could be indicted for the management of it.) *R v McGregor* [1895] 26 OR 115, 119 (a decision on s13 *Criminal Code*, confirming that “the presumption relied on is now entirely swept away” per Meredith CJ, Rose J concurring). Many years later in *R v Robins* (1982) 66 CCC (2d) 550, 562 (Qué: CA) it was held that the original s13 “had the effect of abolishing the antiquated defence of marital coercion and to place the woman on equal footing with other citizens” per Mayrand JA. The effect was to firmly repudiate the continued existence of the common law defence.

<sup>274</sup> *Official Report of the Debates of the House of Commons of the Dominion of Canada* vol XXXIV 1892 p2711: Bill No 7, 17 May 1892.

presence. We now leave that to be a matter of evidence, to be proved in the court, whether she acted upon the compulsion of her husband or in spite of her husband.

This intervention represents the total discussion in the debates as to the shape of marital coercion in the proposed code. A similar discussion in relation to the exemption of a wife from being an accessory after the fact to the offence of her husband, prompted slightly more discussion.<sup>275</sup> Sir John Thompson quixotically retorted that “The wife is not expected to give up her natural duty, which is to protect her husband; but that is not the duty of the husband to his wife”. An attempt to broaden the clause<sup>276</sup> so that the husband too was protected, in the converse situation, was rebuffed. A number of reasons<sup>277</sup> have been advanced as to why the public and parliamentarians appeared to show little interest in the prospective legislation.<sup>278</sup>

William Swainson, the first Attorney General of New Zealand, in 1859 referred to the earlier legislative years of the fledgling New Zealand colony:

Not being hampered by any complicated pre-existing system, nor impeded by the opposing influence of a powerful profession, the lawgivers of the Colony were enabled to effect amendments in the law which the British legislature has hardly yet succeeded in accomplishing.<sup>279</sup>

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<sup>275</sup> *Official Report of the Debates of the House of Commons of the Dominion of Canada* vol XXX IV 1892 p2794: Bill No 7. 18 May 1892. Mr Mulock MP: “the husband is compelled to bring his wife to justice or else he would become an accessory after the fact. Is that to be marital law?”

<sup>276</sup> *Official Report of the Debates of the House of Commons of the Dominion of Canada* vol XXX IV 1892 p2794: Bill No 7. 18 May 1892. Mr Davies (PEI): “There should be mutuality. Surely if one is to be protected the other should be. If the wife protects the husband the natural law would rather oblige the husband to protect the wife.” This was the very point made in P R Glazebrook (ed) Edward Hyde East *Pleas of the Crown* (1803) (reprinted 1973) II PC 559 Professional Books Ltd, London “And the husband, it is said, may be accessory to the wife in receiving her; though not the wife for the receipt of the husband; a technical distinction for which there seems no just reason”.

<sup>277</sup> Desmond Haldane Brown, *The Genesis of the Canadian Criminal Code of 1892*, 1989 The Osgoode Society, Toronto p136-141 notes that the sponsor of the Bill Sir John Thompson carefully chose committee members who were lawyers and who would support it. He also ensured that well disposed parliamentarians were aplenty. Further parliamentarians were informed that the “joint committee was not expected to go through the various clauses of the Bill”. It was distributed very late leaving little time for opposition to absorb and analyse it. It was a very long document some 300 pages long and levels of concentration would have suffered as each section was debated. Thompson had successfully implemented a non-confrontational approach.

<sup>278</sup> Even the judges hardly blinked at the proposal. Robert James Gowan, *Canadian National Archives*, RG vol 2273, 341/1894/49, 18 May 1891: “A question not of law and public policy comes in, whether under circumstances a discretion might not be given to mitigate sentence of a wife under circumstances.”

<sup>279</sup> William Swainson, *New Zealand and its Colonization*, p94.

Despite that catechism one legislator, Mr Carleton in 1854, would say: “I would model New Zealand upon England. I would reproduce, to the extremist verge of possibility, the noble institutions of the Mother Country.”<sup>280</sup> This wish to replicate English law for New Zealand was also seen in 1861 when a Commission was set up to consider the proposal to establish a Court of Appeal.<sup>281</sup> Until the first New Zealand Code was enacted in 1893 the common law of England as to crimes was applicable subject to the provisions of local statutes dealing with crime and the provisions of English statutes applicable to New Zealand.<sup>282</sup> English criminal law was, at this stage of its adoption overlaid with ponderous complexities, subtle distinctions and intricate technicalities. The pioneering pragmatists in the legislature had a free hand at reaching sensible solutions attuned to contemporary needs. Until the enactment of the Code there was little innovation in criminal law apart from a persistent path to more severe penalties. The prevailing ethos was that New Zealand should comfortably follow in the wake of English criminal law and should not embark itself on variants of substantive law and procedure not sanctioned there by experience or authority. In *Elliott v Hamilton*<sup>283</sup> a judge was able to say in relation to applicable English legislation proscribing gambling in the colony that “it might no doubt be argued that it is little suited to the necessities or the temper of a colonial population like our own”.<sup>284</sup>

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<sup>280</sup> 1854–1855 NZPD 59

<sup>281</sup> It reported in terms: “The principle upon which we think our present suggestions ought to be based is simply this, that with respect to the administration of criminal law, on the one hand, Colonial Society has a right to look for as much security for life and limb, liberty, property, and character, as the Society of the Mother Country, and on the other hand, the colonial subject accused of breaking the law, is entitled to as much protection and substance and by form as his fellow subjects in England. *Report of the Judges of the Supreme Court on a Court of Appeal for the Colony*, (1861) Appendices to the Journals of the House of Representatives 1861 D2 para 65.

<sup>282</sup> Jas M E Garrow, *The Crimes Act (annotated)*, Law Book Company of New Zealand Limited, Wellington, 1914 p354. The *English Laws Act 1858* [NZ] adopted the English criminal law, so far as suitable to the circumstances of NZ. This was the standard position amongst all colonies. T Olawale Elias, *British Colonial Law: A Comparative Study of the Interaction between English and Local Laws in British Dependencies*, (1962) Stevens & Sons Ltd, London at p182 observes that the application of English law to other territories often meant that there were “territorial idiosyncrasies...And yet it is difficult to see what else the draftsmen could have done, in the then state of knowledge, to take cognisance of such peculiarities.”

<sup>283</sup> (1874) 2 NZ Jur 95.

<sup>284</sup> BJ Cameron, *Law Reform in New Zealand*: [1956] 33 NZLJ 88, 89 “The policy of the founders of our legal system seems to have been to depart as little as possible in principle or detail from the law then existing in England. Alterations seem for the most part to have been imposed by compelling circumstances rather than desire.”

Only two New Zealand common law decisions raising the defence<sup>285</sup> can be traced. But two significant reported decisions, relying upon the new 1893 statute occurred within a very short time after its enactment.<sup>286</sup> The earlier common law case is *R v McShane*<sup>287</sup> which resulted in the Court of Appeal (Prendergast CJ, Johnston, Gillies and Williams JJ), on a Crown Case Reserved, quashing the conviction of Sarah McShane who had been convicted in the Supreme Court of Invercargill at a trial presided over by Williams J. After the Grand Jury had returned with a true Bill against the defendants<sup>288</sup> a petty jury was empanelled.<sup>289</sup> In opening the

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<sup>285</sup> But counsel for the Solicitor General in the Court of Appeal decision *In re Roche* (1888) 7 NZLR 206, 217 accepted the defence of marital coercion would apply to misdemeanors such as where a wife violated provisions of the *Licensing Acts*. “Any legal research into the 19<sup>th</sup> century of New Zealand is met by the fact that official law reporting did not commence until 1883, when the New Zealand Law Reports were instituted under auspices of the New Zealand Council of Law Reporting”: Hugh C Jenkins, *The History of Law Reporting in New Zealand*, (1926) II Butterworths Fortnightly Notes 291.

<sup>286</sup> *R v Howard* (1894) 13 NZLR 619 (CA) and *R v Annie Brown* (1896) 15 NZLR 18 (CA), affirmed by the Privy Council [1898] AC 234. The actual question of law left to the jury in *Annie Brown* is not set out in NZLR. But in the formal *Record of Proceedings: Privy Council Appeal No 83 of 1896* pp9-10 it is: Williams J “If you find her guilty then I think you should say whether or not you find that she was married to the other Defendant and if you find she was married to him did she in the part she took in the commission of the crime act freely and voluntarily or under the control and coercion of her husband? Answer – The jury find that the prisoner is married to the other Defendant and that she acted under his control.”

<sup>287</sup> (1876) 3 NZCA 314. In *R v Adams* (1883) 1 NZCA 311 one Longhurst had been convicted of rape on the evidence of Genevieve Adams aged “between seven and eight years old.” It was a miscarriage of justice and in due course Genevieve Adams and her father James Adams were tried for the offence of conspiracy to give false evidence against Longhurst. The person whom it was held had been “carnally abused”, by Longhurst was Genevieve Adams. On the conspiracy trial between father and daughter the jury found both of them guilty of conspiracy; the Judge passing “a nominal sentence on the child.” The Court of Appeal (Johnston, Gillies and Williams JJ) delivered separate judgments. Johnston J said: “With respect to the question regarding the effect of the relation between the parties charged with the conspiracy – namely, that of father and child – I think that, although in point of law there could be no presumption of coercion, of the child by her father, and although it is found by the case that there was no evidence of actual coercion, yet the circumstance that the one alleged conspirator is the father and the other his child between seven and eight years of age, is of most material importance with respect to the amount of evidence which ought to be required to rebut the prima facie presumption of the innocence of the girl. It seems, indeed, repulsive to common sense to believe that a girl between seven and eight years of age, “conspired, combined, confederated, and agreed” with her father to commit a crime.” (1883) 1 NZCA 311, 320. Gillies J (1883) 1 NZCA 311, 322 observed that as the daughter and father were alleged co-conspirators this raised the distinct issue “whether the child was not acting under, if not the coercion, at least the direction of her father.” Williams J concurred that “the only proper inference would be that she acted as her father’s mouthpiece and instrument.” (1883) 1 NZCA 311, 323. The conviction was quashed.

<sup>288</sup> Hugh McShane and another man were charged with robbery and Sarah McShane was charged with receiving some of the stolen property from her husband. The victim had £19 and a silver watch taken. After the robbery he made his way to the Police Station “naked to the waist, and half dead with pain, from the treatment he had received”: *The Southland Times*, 4 March 1876, p2. The police located her inside the family home with the silver watch on her. The defendants all appeared before the Resident Magistrate’s Court (*The Southland Times*, 4 March 1876, p2, before H McCulloch, Esq, RM.) and the case proceeded to a Grand Jury in the Supreme Court. In directing the Grand Jury, Williams J stated (*The Southland Times*, 13 June 1876, p2.) that before a true Bill could be returned against her, they should be satisfied that if: “there is nothing to show that she acted independently of [her husband] you should find no Bill against her. If however you should be in doubt...you should find a true Bill and have the question of coercion to be determined accordingly [by a petty jury].”

<sup>289</sup> *The Southland Times*, 13 June 1876, p2.

prosecution, the Crown Prosecutor<sup>290</sup> stated that the female<sup>291</sup> prisoner was indicted for receiving stolen property. Among the prosecution witnesses, was the accused's daughter. In summing up to the jury, Williams J said:

The law presumed that, where a female prisoner committed a theft, or received stolen property in the presence of her husband, she acted under his coercion. Their own experience might lead them to the opposite conclusion, namely, that when a man and his wife engaged in mischief, the woman was generally at the bottom of it; but that was not the law.<sup>292</sup>

He added that what: "was meant by the requirement of the presence of her husband in this context was the husband's being cognisant of the fact of her action in the matter. Anything done by the wife while her husband was asleep<sup>293</sup> would not come under the legal definition of act done in his presence." After a retirement of half an hour, the jury found both male prisoners and Mrs McShane guilty. Williams J remarked to the Crown Prosecutor "that her husband having been found guilty, it was doubtful whether the female prisoner could be convicted." He therefore reserved the point for the Court of Appeal and granted Mrs McShane bail<sup>294</sup> pending the decision of the Court of Appeal. In due course, no counsel appearing on either side, each of the four judges of the Court of Appeal delivered a judgment of one sentence in length. Prendergast CJ concluded that "there was no evidence of independent action of the wife sufficient to overcome the presumption". Johnston J was of the opinion that as the husband was guilty, "the receiving by his wife was part of the same transaction, and

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<sup>290</sup> All the accused were unrepresented at the trial.

<sup>291</sup> The prosecutor stated: "There was one point which he would particularly bring under the notice of the jury. The female prisoner was not indicted as the wife of the prisoner McShane, but if she could prove that she was his wife, and that she had received the property under his coercion, she would be entitled to acquittal – if she was his wife, and had received the property in his presence; otherwise – if this were not the case – she would not be entitled to acquittal." As the marriage was not pleaded in the indictment, nor Sarah McShane captioned as the wife of the co-accused, it correctly fell for the prisoner to establish the fact of the marriage. It transpired however that a police officer gave evidence that the two accused with the same surname were in fact married to each other.

<sup>292</sup> Williams J then directed the jury that if: "the female prisoner committed the theft in the presence of her husband, or received the stolen property from her husband or in his presence, they would have to acquit her, although morally, she would be guilty." This approach was wrong in law as it was a rebuttable presumption of fact, not an irrebuttable presumption of law as the judge directed.

<sup>293</sup> *The Southland Times*, 13 June 1876 p2. Their daughter had given hesitant evidence for the prosecution, that her father may have been asleep while her mother received the stolen watch from the other male accused.

<sup>294</sup> Two sureties in the sum of £50 each. Her husband and the other prisoner were sentenced to 12 month's imprisonment with hard labour.

must be taken to have been done under his coercion”. Gillies J expressed disquiet<sup>295</sup> about the state of the law of marital coercion while Williams J,<sup>296</sup> who had been the trial judge, concurred in the result.

In response to the stultification of the criminal code in England in 1879, the New Zealand government made a hesitant move to appoint Commissioners to prepare a draft Bill for presentation to the legislature. The *Criminal Code Act 1893* [NZ] involved a 10 year gestation period until its eventual enactment. The Note to clause 22 *Criminal Code Bill 1883* [NZ]<sup>297</sup> provided the initial justification for the provision in New Zealand law to discard the presumption and terminate the separate uxorial defence. The Note emphasised that “the application of this doctrine to particular cases has frequently led to the perpetration of grave crimes with impunity”.

In the second session of the Eighth Parliament on 20 June 1883 the Hon Mr Whitaker moved the Second Reading of the *Criminal Code Bill* noting that when the *Statutes Revision Bill* had been enacted, one clause provided that a *Criminal Code* should be adopted for the colony on the lines of the *Criminal Code* framed for England. The only objection he perceived was that the equivalent English Bill had been before the Imperial Parliament for some years and had not yet been passed. He noted:<sup>298</sup>

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<sup>295</sup> (1876) 3 NZCA 314, 317 “While the law upon the subject continues as it is, I think such evidence as was given in this case is insufficient to convict the wife”.

<sup>296</sup> He had recorded in the Crown Case Reserved that he had directed the jury that Mrs McShane had to be acquitted “unless it were proved clearly that she acted independently”: New Zealand Archives Reference AAAR W3558 1876/188; *The Evening Post* 2 December 1876.

<sup>297</sup> (called s22), New Zealand legislature, *Index to Bills Thrown Out, 1883* [NZ] “Sec.22 (sec.24, 1880). *Compulsion*, This clause, altered from the provisions of the Bill of 1878, and adopted by the English Commissioners, is the subject of a special elaborate note (A) annexed to their report. The first part of it deals with the sort of compulsion in fact which the law deems sufficient to afford an excuse for that which otherwise would have been a punishable offence. The second paragraph contains an alteration of the common law, which presumes that a married woman committing an offence in the presence of her husband does so under compulsion, and is therefore irresponsible. Experience has proved that the application of this doctrine to particular cases has frequently led to the perpetration of grave crimes with impunity; and the English Commissioners have not hesitated to recommend that this presumption of the common law should be abolished. If the Legislature of the colony are prepared to adopt that recommendation, it seems to us desirable to insert in sub clause (2) the word “only” after “compulsion”. The identical note appeared in 1886: New Zealand Legislature, *Index to Bills Thrown Out, 1886* [NZ] p11.

<sup>298</sup> 1883 44 NZPD 43.

It had been said that this Code should not be passed until the English one had come into operation; but to that he would answer that they might wait and wait for years, as they had already done, before that came to pass.

He emphasised that the Government had already waited four years for the parallel enactment to happen there and it was not prudent to wait any longer.<sup>299</sup> The Hon Mr Wilson following noted that the Bill contained 452 clauses and the members of the Legislative Council would only be doing their duty in a “perfunctory” way if they were not to consider it very carefully. He recalled that in New Zealand the Revision Commissioners had considered the English draft and one of the Commissioners had prefixed a statement to the *Criminal Code Bill* which read:

We are not prepared to undertake the responsibility of expressing a decisive opinion on the propriety of adopting at once the English Bill of 1880 with the necessary modification. We are still of opinion that it might be better to defer the enactment of the Code in the colony until the English Parliament has finally dealt with the subject.<sup>300</sup>

Although the Bill was read a second time it foundered.<sup>301</sup> In the first session of 1884, the Legislature threw out the *Criminal Code Bill*.<sup>302</sup> The next year the First Reading of the

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<sup>299</sup> 1883 44 NZPD 44. He remarked that alterations “had been made to adapt the Code to our circumstances and wants”.

<sup>300</sup> 1883 44 NZPD 44. Women, especially married ones, were still of diminished legal status in civil law: Sir Robert Stout & William Alexander Sim, *The Practice of the Supreme Court and Court of Appeal of New Zealand*, (1902) 2 ed. Whitcombe and Tombs Limited, Christchurch: Rule 67 of the *Code of Civil Procedure in the Supreme Court*, being Second Schedule to the *Supreme Court Act 1882* unhappily lumped together married women, infants, idiots and lunatics as the persons who could sue and defend civil actions by a guardian ad litem. See also F W Pennefather & J Brown *Code of Civil Procedure in New Zealand* (1885) Edwards & Green, Wellington at p29. Table D in the same schedule provided for witnesses expenses and stated “female witnesses at the rate of two-thirds the allowance of male witnesses of corresponding rank”. The decision of *In re Roche* (1888) 7 NZLR 206 (SC) and (CA) held that a married woman was disqualified from holding a publican’s licence under the *Licensing Act 1881* [NZ] and that the *Married Women’s Property Act 1884* [NZ], had not by implication repealed the prohibition. In the Supreme Court, Williams J followed his earlier decision in *Callendar v Allan* (1888) 6 NZLR 436. Williams J at 210 found that s56 *Licensing Act* required the applicant for a publican’s licence to stipulate after the Christian and surname the “addition”, stating: “Now the term ‘addition’ in the case of a woman certainly includes a statement of whether she is spinster, wife, or widow, and for all legal purposes a woman is imperfectly described in the absence of such a statement”. Mrs Roche had neutrally applied as “Margaret Roche – Applicant”.

<sup>301</sup> 1883 45 NZPD 578. The *Criminal Code Bill* was before the Legislative Council on 14 August 1883. The Hon Mr J C Richmond at 579 referred to “The impossibility of passing the Bill this session through the other branch of the Legislature seemed to him to be a good ground for asking that it should not be pushed on”. The Bill was thrown out. *New Zealand Legislature Index to Bills Thrown Out, 1883* No 8 Criminal Code.

<sup>302</sup> No 3 of 1884. *New Zealand Legislature Index to Bills Thrown Out, 1884* Clause 22 of the 1884 *Criminal Code Bill* provided: “22.(1) Except as hereinafter provided, compulsion by threats of immediate death or grievous bodily harm from a person actually present at the commission of the offence, shall be an excuse for the

*Criminal Code Bill* was given on 11 June 1885.<sup>303</sup> On 19 June 1885 Hon Mr P A Buckley rose in the Legislative Council in support of the *Criminal Code Bill* and referred to the Royal Commission in England in 1878 which had concluded that the reform of the criminal law “was a matter of the most urgent necessity”. He then referred to the proposed alteration of the law in relation to marital coercion:

There is a fiction of law which says that when a married woman is within sight of or under the supervision of her husband she cannot commit an offence; but, as we know, women often do commit offences in such circumstances without their husbands having any control over them. This Bill puts married women in the same position as men or single women in that respect. We have given women the same privileges in respect to their property as men have, and there can be no reason why they should not have the same liability as men in respect to being charged with offences, without being allowed to shelter themselves under their husbands against the law.<sup>304</sup>

On 28 June 1893 the *Criminal Code Bill* was given its First Reading.<sup>305</sup> On 4 July 1893<sup>306</sup> the Hon Sir P A Buckley, as he now was, rose and in terms of exasperation referred to the desultory history of the proposed legislation. “It was introduced, I think, in the first instance by myself in 1883. It was then passed through the Committee of this Council. I again introduced it in 1884 and it remained in the Council. In 1886 it passed through the Council again and went to another place. In 1888 and again in 1891 it also went to the House of

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commission, by a person subject to such threats, and who believes such threats will be executed, and who is not a party to any association or conspiracy he being a party to which rendered him subject to compulsion, of any offence other than high treason, murder, piracy, offences deemed to be piracy, attempting to murder, assisting in rape, forcible abduction, robbery, causing grievous bodily harm, and arson. (2) No presumption shall be made that a married woman committing an offence does so under compulsion, *only* because she commits it in the presence of her husband”.

<sup>303</sup> 1885 51 NZPD 4.

<sup>304</sup> 1885 51 NZPD 57. The *Criminal Code Bill* of 1885 was thrown out. New Zealand Legislature *Index to Bills Thrown Out, 1885*, No 9 Criminal Code. It was identical to the 1884 Bill. In 1886 the *Criminal Code Bill* was again thrown out. New Zealand Legislature *Index to Bills Thrown Out, 1886*, No 71 Criminal Code (Hon Mr Tole). It was identical, both in the terms of clause 22 and the accompanying explanation to that which had been thrown out in 1884 and 1885. In 1891 the *Criminal Code Bill* was again thrown out. New Zealand Legislature *Bills Thrown Out Sessions I and II – 1891*, No 7 Criminal Code (Hon Mr Buckley)]. Bill 59 of the same session *Female Suffrage Bill 1891* (Hon Sir J Hall) was also thrown out. By the 1891 Bill clause 22 had been renumbered as clause 24 but was otherwise identical with the 1883 original version. Keith Sinclair, ‘*A Destiny Apart New Zealand’s Search for National Identity*’, Allen & Unwin in association with the Port Nicholson Press at p66: “In 1886 73.25 per cent of the population were literate, and another 4.7 per cent could read but not write”. “From 1873 to 1880, 6 per cent falling to 4 per cent of marriage partners in New Zealand signed the register with a mark”.

<sup>305</sup> 1893 79 NZPD 57.

<sup>306</sup> 1893 79 NZPD 180.

Representatives; but it met its fate in the general slaughter of the innocents, and we heard no more about it.” After indicating some of the general changes he continued:

The Bill has a further advantage – namely that of giving a husband or wife in criminal cases the right to be examined if they think fit to be so. It also provides that, in the case of an offence committed by a wife, there shall be no presumption of compulsion merely because it was committed in the presence of her husband.<sup>307</sup>

In relation to the proposed provision providing that a wife would be exempt from being an accessory after the fact to the offence of her husband, the Hon Mr Scotland argued that no licence should be given to a wife to harbour her husband’s confederates in crime.<sup>308</sup> On 4 July 1893 the Bill was read a second time. It was given its third reading on 7 July 1893 and on the same day the *Criminal Code Bill* was given its First Reading in the House of Representatives. The *Criminal Code Act*<sup>309</sup> received the Royal Assent on 6 October 1893,<sup>310</sup> a year in which the New Zealand legislative was making extraordinary advances over its progenitor at Westminster. The franchise was extended to women and the criminal law was codified. With one stroke it abolished the distinction between treason, felony and misdemeanour and the attendant procedural differences that bedevilled English law.<sup>311</sup> It also abrogated the presumption and defence of marital coercion;<sup>312</sup> and introduced a statutory defence for a wife

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<sup>307</sup> 1893 79 NZPD 180. Keith Sinclair, *A Destiny Apart New Zealand’s Search for National Identity* (1986) Allen & Unwin in association with the Port Nicholson Press at p66. “There was an imbalance of sexes. Society was strongly male-dominated.” At p68 “in the late nineteenth century 40 per cent of men never married”.

<sup>308</sup> 1893 79 NZPD 181: “I think, perhaps, in one or two cases, it leans a little too much on the side of mercy. In clause 75(2) the first part of the clause reads as follows: “No married woman whose husband has been a party of an offence shall become an accessory after the fact thereto by receiving, comforting, or assisting her husband”. Surely that would be going far enough; but the Bill goes on to say “or by receiving, comforting, or assisting, in his presence and by his authority, any other person who has been a party to such offence, in order to enable her husband or such other person to escape”. Now, of course, a married woman would be doing a natural and almost praiseworthy thing in assisting her husband to escape. I think this offers too great a latitude – giving power actually to a married woman to assist in the escape of her husband and of her husband’s “pal” to use a slang term. For instance, in the case of a burglar, I think it is going a little too far.”

<sup>309</sup> Act No. 56 of 1893.

<sup>310</sup> Sir Samuel Griffith *‘Explanatory Letter to Attorney General Queensland with Draft Code,’* Queensland Parliamentary Papers (C.A. 89-1897) p7 noted that he had drawn “great assistance” from the *Penal Code of Italy 1888*, adding “In 1893 the Parliament of New Zealand adopted the Draft Bill of 1880, with some minor alterations, which, however, did not meet the criticisms of Sir A Cockburn”.

<sup>311</sup> I D Campbell, *‘Criminal Law’*, p365 in J L Robson (ed), *‘New Zealand – The Development of its Laws and Constitution’*, (1967) 2 ed Stevens & Sons, London states that “the proposal for codification had the enthusiastic approval of many influential lawyers”.

<sup>312</sup> In *R v Howard* (1894) 13 NZLR 619 (CA) a jury had acquitted a married woman of the offence of keeping a bawdy-house in Hawera. At the rear of the property in which she lived with her husband and children, there was an out-house to which she would invite men, receive money from them and have connection with them. The

exempting her from being an accessory after the fact to the offence of her husband. It said nothing as to whether an intraspousal conspiracy could exist, the very point which would lead in 1926 to a majority decision of the Court of Appeal<sup>313</sup> affirming the existence of that immunity.

Almost three decades later, in the very first Bill before the Irish Dáil, Members of the Irish Parliament referred to the inequality of women and the debate centred on existing inequalities - some of which were “really insulting and offensive to women”.<sup>314</sup> Mr Kevin O’Higgins for the Government stated that the intended statutory provision to confer on men and women equal political rights as citizens was not intended to alter the law,

as to the guardianship of children, the existing law with reference to marital coercion and crime. That is a matter in which women have a certain privilege. They are entitled to go into Court and say they committed a crime under duress of their husbands; husbands, unfortunately, are not entitled to go into Court and say they committed a crime under the duress of their wives.

In Ireland,<sup>315</sup> the metaphor of the convergence into one legal person of husband and wife existed at common law, in certain respects. Spouses could not commit conspiracy alone,<sup>316</sup> nor could the publication of a defamatory statement by one spouse to the other constitute

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offence was alleged to have been committed on 11 July 1894 contrary to s143 *Criminal Code Act 1893*. The jury returned a special verdict finding that she acted under the coercion of her husband, to whom the property belonged and who was generally at home. The prosecution appealed to the Court of Appeal on the basis that the decision of the jury was insensible as there was no evidence whatsoever that the husband had coerced the wife into leading a life of prostitution. On appeal, it was argued that the former common law presumption never applied to offences involving prostitution and that “there is a counter-presumption that the wife has just as much to do with the management as the husband”. In addition, the husband was not present during the acts of prostitution. The Court of Appeal dismissed the prosecution appeal. Prendergast CJ remarked that the finding of “coercion” must be taken as a finding of “compulsion” in terms of s24 *Criminal Code Act 1893*, as “whether the compulsion be that of her husband or of another matters not” as the new Code had abolished “whatever distinction there was at common law between the case of a married woman and a woman not married.” Denniston J also agreed that s24 “put an end altogether to the doctrine of excuse on the ground of coercion by a husband”. He decided that the jury must have been confusingly directed by the trial judge who appeared wrongly to assume “that the doctrine of coercion by a husband, as a part from compulsion as defined by the Code, remains”. Williams and Conolly JJ agreed with the dismissal of the appeal.

<sup>313</sup> *R v McKeachie* [1926] NZLR 1.

<sup>314</sup> Dáil Éireann vol 1, 18 October 1922, *Constitution of Saorstát Éireann Bill*. Another Member of the Dáil Professor Magennis added that the law of marital coercion provided “very necessary protection” for a “great many women”.

<sup>315</sup> The Law Reform Commission of Ireland, *Report on the Law Relating to Dishonesty*, LRC 43-1992, para 2.36.

<sup>316</sup> F Graham Glover, ‘*Conspiracy as Between Husband and Wife*’, (1979) 9 Family Law 181, 182.

actionable defamation.<sup>317</sup> The marital coercion defence existed but featured little in reported decisions of the nineteenth<sup>318</sup> and twentieth<sup>319</sup> centuries, although Lord Shandon, former Attorney General of Ireland has stated that the defence was frequently invoked in the twentieth century there.<sup>320</sup> In nineteenth-century Australia the earliest decisions go back to 1826.<sup>321</sup> In South Africa<sup>322</sup> the defence was recognised certainly in the Cape of Good Hope,<sup>323</sup> but in 1921 a Transvaal court determined that Roman-Dutch law did not recognise the presumption of marital coercion.<sup>324</sup> One uxorial privilege remained there though; a wife had a customary defence in relation to harbouring her husband and screening him from justice.<sup>325</sup>

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<sup>317</sup> C S Kenny *The History of the Law of England as to the Effects of Marriage on Property and on the Wife's Legal Capacity* (1897) Reeves and Turner, para 254; *R v Harrison* (1756) 1 Leach 47, 168 ER 126.

<sup>318</sup> *R v James & Catherine Stapleton* (1828) Jebb CC 93; *Anonymous* (1841) Ir Cir Rep 374 p374 [Irish case, Cases on the Munster Circuit]; *Smith's Case* (1842) p459 [Irish Case, case on the North West Circuit]. cf *R v Robert Collins & Alice Collins* (1841) p138 [Irish case on the North West Circuit] were jointly indicted with larceny of 105 £5 notes and sought an acquittal on the basis that the wife was presumed to have been acting under the control of her husband. Burton J directed the acquittal.

<sup>319</sup> *R v Hallett* (1911) 45 ILTR 84 involved a prosecution for public nuisance for obstruction of a navigable river.

<sup>320</sup> *Parliamentary Debates, House of Lords*, vol 53, 28 February 1923, p174.

<sup>321</sup> *R v Smithers and Smithers, Sydney Gazette* 30 December 1826, Supreme Court of New South Wales.

<sup>322</sup> *R v Hendrik Adams & Leah Adams* (1883) III Buch EDC 216 (Cases decided in the Eastern Districts' Court of the Cape of Good Hope) Barry JP on review quashed the conviction of a wife in circumstances where husband and wife had been convicted of the theft of a sheep. Following *R v Torpey* (1871) 12 Cox CC 45 it was held that marital coercion extends to "some misdemeanours, and even to cases of robbery". At p217 Barry JP stated "The question is, does this presumption exist here; and if positive proof be required that Leah was a free agent, is there such proof? The presumption of the English law has constantly been acted upon in our Courts here, and is consistent with the principles of the Roman-Dutch Law based upon the civil law".

<sup>323</sup> *R v John Feze and Sarah John* (1883) III Buch EDC 336 [Cases decided in the Eastern Districts' Court of the Cape of Good Hope] Buchanan J, referring to *R v Hendrik Adams & Leah Adams* (1883) III Buch EDC 216 quashed a conviction where the spouses had been convicted of theft of sheep stating that the only evidence against the wife was that she was with her husband when he was arrested at which time some meat was found in his possession. He added: "Even if the meat had been found with her, it has been laid down that a married woman cannot be convicted as a receiver of stolen goods when the property has been taken by her husband and given to her by him."

<sup>324</sup> *R v Mtetwa* (1921) TPD 227.

<sup>325</sup> Charles Lansdown, William Hoal and Alfred Lansdown, (eds) *Gardiner and Lansdown: South African Criminal Law and Procedure*, (1957), 6 ed, vol 1, Juta & Co Ltd, Capetown, p109. Ibid p156. But South African law provides that physical and moral coercion may constitute duress: *R v Mtetwa* 1921 TPD 227. Wessels JP at p229 concluded that Roman-Dutch law did not provide for the common law presumption of marital coercion, although noting such a defence had been accepted in earlier South African cases; *R v Adams* (1883) 3 EDC 216; *Bosch v R* (1904) TS 55. Wessels JP accepted that where there has been actual coercion: "physically and morally coerced" the wife could rely upon those facts as a defence.

## CONTROL BY THE HUSBAND OVER THE BODY OF HIS WIFE

While Canada and New Zealand were deciding to abolish the entire marital coercion doctrine, at almost the same time English common law was still struggling with the notion whether a husband could control the corporal being of his wife, by detention or by physical assaults. The common law had always appeared to permit a husband to reinforce his dominion over his wife by physical chastisement<sup>326</sup> and by physical restraint. This was justified as being:

For the happiness and the honour of both parties it [the law] places the wife under the guardianship of the husband and entitles him, for the sake of both, to protect her from the danger of unrestrained intercourse with the world, by enforcing cohabitation and a common residence.<sup>327</sup>

It was not until 1891 in *R v Jackson*<sup>328</sup> that it was finally settled that a husband was not entitled to imprison<sup>329</sup> his wife or to inflict personal chastisement on her.<sup>330</sup> Mr and Mrs Jackson married in 1887 but apart from a few days cohabitation she refused to live with her

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<sup>326</sup> In *R v Lister* (1795) 1 Str 478 Lord Kenyon CJ said a husband had no right to beat his wife but only to “admonish” her but could confine her to his house in circumstances “where the wife will make an undue use of her liberty either by squandering any of her husband’s estate or going into lewd company, it is lawful for the husband in order to preserve his honour and estate to lay such a wife under restraint. But when nothing of that appears, he cannot justify the depriving of her liberty”.

<sup>327</sup> *Re Cochrane* (1840) 8 Dowl 633 per Coleridge J. Marilyn Yalom ‘*A History of the Wife*’ (2002) Harper Collins, New York p186 “Cecilia Cochrane was sentenced to perpetual imprisonment”, adopting a phrase from Julia O’Faolain and Lauro Martines (eds). ‘*Not in God’s Image: Women in History from the Greeks to the Victorians*’ (1973) Harper & Rowe, New York p318. Bacon, ‘*Abridgement*’ Francis Baron and Feme Tit B: “The husband hath by law power and dominion over his wife, and may keep her by force within the bounds of duty, and may beat her, but not in a violent or cruel manner.”

<sup>328</sup> [1891] 1 QB 671 (CA). In 1920 McCardie J in *Butterworth v Butterworth & Englefield* [1920] P 126, 133 stated: “The diminution of his power of physical control or punishment was gradual and the decision of the Court of Appeal in *R v Jackson* marked the disappearance of the old and harsh view of a husband’s rights over the body of the woman he has taken to wife.”

<sup>329</sup> In an earlier case *Atwood v Atwood* (1718) Pr Ch 492 it was held that a wife cannot either by herself or prochein amy (next friend) bring this writ against her husband; for he has by law a right to the custody of her and the converse did not apply. A distinction was drawn between confinement and imprisonment of the wife. In s2 *Matrimonial Causes Act 1884* [UK] the power of the court to imprison a wife for non-compliance with an order for the restitution of conjugal rights was removed.

<sup>330</sup> *R v Jackson* [1891] 1 QB 671. In *Pal Singh v Amer Singh* [1935] 16 KLR 73 Gamble AJ held that a civil action for the harbouring of a wife will lie at the instance of a husband when the parties were married not in accordance with a Christian marriage but according to Hindu law, based on *Winsmore v Greenback* (1745) Willes 577. Willes LCJ had held that every moment a wife continues absent from her husband without his consent is a tort. Followed in *Place v Searle* [1932] 2 KB 497 (CA) the Court reversed McCardie J who had held at p503 that “sociological vision” should be applied leading to a reconsideration of the law in view of the new status of married women. Slessor LJ held at p521 the “husband’s right to the consortium of his wife” was unaffected by modern matrimonial law and the decision in *R v Jackson* .

husband, defying a court judgment despite his successful suit for restitution of conjugal rights<sup>331</sup> in 1889. In frustration the husband kidnapped the wife in public on 10 March 1891.<sup>332</sup> Her sisters immediately applied for a writ of habeas corpus to gain her release. Cave and Jeune JJ refused the application for the writ but an especially constituted Court of Appeal reversed that decision<sup>333</sup> and Mrs Jackson was freed from her husband and returned to her family.<sup>334</sup> This decision has correctly been seen as a benchmark in the evolution of the rights of married women under the law.<sup>335</sup> However, even in the outcome *R v Jackson* did not give a wife total security of the person, because Lord Halsbury LC<sup>336</sup> instanced an example of the right of a husband to still physically restrain his wife when she was found on the staircase about to join some person with whom she intended to elope. Lord Esher MR<sup>337</sup> concurring stated that if a wife was about to do something which would be to the dishonour of her husband, as where he saw her in the act of going to her paramour, he might seize her and pull her back. Victorian considerations still provided to a husband the defence of cuckold.

The alleged right of a husband to chastise his wife had been abolished in Alabama in 1871<sup>338</sup> yet it “continued to exist in many Western countries until the late nineteenth century”.<sup>339</sup> But

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<sup>331</sup> In *Cursetjee v Perozeboye* (1856) 10 Moo PCC 375, a suit between Parsees for restitution of conjugal rights, the wife (not the husband) was the petitioner and at p417 Dr Lushington remarked that in England “a prayer for restitution is, under such circumstances, wholly unheard of” particularly in view of their personal law “the husband is permitted to take a second wife, the first being alive”.

<sup>332</sup> George Robb and Nancy Erber (eds), *Disorder in the Court – Trials and Sexual Conflict at the Turn of the Century* (1999) Macmillan Press Limited, London. Ginger Frost, ‘A Shock to Marriage?: The Clitheroe Case and the Victorians’ p100-118.

<sup>333</sup> Jackson contemplated an appeal to the House of Lords (1891) *Note* 26 Law Journal 284.

<sup>334</sup> [1891] 1 QB 671, (1891) 64 LT 679

<sup>335</sup> See Maeve Doggett, *Marriage, Wife-Beating and the Law in Victorian England*, (1993) University of South Carolina Press at p1-15; 134-41. See also Mary Lyndon Shanley, *Feminism, Marriage, and the Law in Victorian England – 1850-1895* (1989) Princeton University Press, p177-183.

<sup>336</sup> *Ibid* 679

<sup>337</sup> *Ibid* 683. In *R v Reid* [1973] 1 QB 299, 302C (CA) per Cairns LJ it was held that a husband could not kidnap his wife irrespective of whether they were living apart or cohabiting. See the peculiar reference in PRB Webb, *Family Law NZ Edition* (1974) Wellington, Butterworths at p159 in relation to *R v Reid* in which the author laconically states “Kidnapping also presents nice problems”. In *State v Kay* 145 So 544 (1933) (Supreme Court of Louisiana) St. Paul J delivering the judgment of the court held that a husband could be guilty of kidnapping his wife and that any separation in existence was an irrelevancy.

<sup>338</sup> *Fulgham v State* (1871) 46 Ala 143.

<sup>339</sup> Bernadette D Sewell, *History of Abuse: Societal, Judicial and Legislative Responses to the Problem of Wife Beating*, (1989) 23 Suffolk University Law Review 983, 984.

with the resounding rejection in *R v Jackson*<sup>340</sup> of the asserted right to chastise a wife, another prop underpinning the doctrine of coercion disappeared, as Blackstone<sup>341</sup> had rationalised that the right of uxorial chastisement was granted to the husband to reinforce his dominion and decision-making. Her defence was therefore only a contingent response to the recognition of his failure to have secured her unquestioning compliance.

## TWENTIETH CENTURY ENGLISH CASELAW BEFORE *R v PEEL*

The sensational and successful invocation of the marital coercion defence in *R v Peel*<sup>342</sup> in 1922 was not startling in its originality (unlike the resurrected defence of trial by battle),<sup>343</sup> as it had featured in reported judgments both before the Court for Crown Cases Reserved and its successor the Court of Criminal Appeal on a number of occasions earlier in the twentieth century. In *R v Baines*<sup>344</sup> the jury found that Mary Baines was guilty of a separate receiving from that of her husband. On appeal resort to the marital coercion doctrine was quickly dispatched by Lord Russell CJ presiding, who held that there was no evidence that Mrs Baines was acting under the influence of her husband as she had gone into a house and returned with the stolen silver lamp by herself. In such a state of the evidence the trial judge ought to have told the jury that the mere fact of the marital relation did not raise any presumption as to her husband's control. The fact that the husband was in the "neighbourhood"<sup>345</sup> did not generate any presumption of non-independent action by the

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<sup>340</sup> Beirne Stedman 'Right of Husband to Chastise Wife' (1917) vol 3 Virginia Law Register at p241, 242 noted that the old law of moderate correction of the wife had been repudiated in Ireland and Scotland referring to *State v Rhodes*, 61 NC 453, 456. This article traced the disappearance of the ancient law through the American States.

<sup>341</sup> Blackstone *Commentaries* 1, 432 "For, he is to answer for her misbehaviour, the law thought it reasonable to entrust him with this power of restraining her, by domestic chastisement...".

<sup>342</sup> *Infra* chp 2.

<sup>343</sup> *Ashford v Thornton* (1818) 1 B & Ald 405.

<sup>344</sup> (1900) 16 TLR 413 (CCCR). The mere fact then of marriage did not raise this presumption and if the husband was nearby when the crime was committed the real issue for the jury was whether the wife took an independent part.

<sup>345</sup> Holmes J in *Commonwealth v Flaherty* (1886) 5 NE 258 in the Supreme Court of Massachusetts said that a husband need not be in the same room to fulfill the proximity requirement, so that he is considered at least constructively present, rather than absent, when he is near enough for the wife to act under his immediate influence and control. This approach of Oliver Wendell Holmes has subsequently been adopted by the South Australian Courts in relation to the doctrine. *Goddard v Osborne* (1978) 18 SASR 481. It is unavailable when the legislation requires "actual presence": *R v Pickard* [1959] Qd R 475, 470 per Stanley J; *R v Joyce* [1968] NZLR 1070, 1077, 133 (CA).

wife.<sup>346</sup> The Court of Criminal Appeal in *R v Court*<sup>347</sup> held that for the presumption to operate it was essential for the parties to be in law husband and wife and that it did not apply where a woman was living with a man as his wife, but not actually married to him. Isaacs CJ<sup>348</sup> in *R v Green*<sup>349</sup> pronounced in favour of the presumption that “is not one which rests on technical grounds, but is based on a knowledge and understanding of the relations that usually exist between husband and wife”.<sup>350</sup> It was essential though that the crime had been committed in the presence of the husband so that “he could have seen her, and she him, at any time during the transaction, and therefore they were in the presence of one another” per Hamilton J<sup>351</sup> in *R v Caroubi*.<sup>352</sup> In every case it was held to be a question of fact to be determined whether the wife had acted independently of any presumed coercion by the husband.

Around the time of *R v Peel* some common law jurisdictions in the American states and elsewhere had concluded that the marital unity doctrine had no contemporary validity<sup>353</sup> and had therefore refused to apply the common law rules. Others found a residuum of support for the doctrine despite other legislation.<sup>354</sup> The broader social policies of the time were fundamentally incompatible with the existence of marital privileges which differentiated between spouses on the basis of marriage. The disunity of the defence in promoting the interests of one half of the relationship over the other was to not enhance the status of marriage but to weaken its covalent bonds for the interests of a moiety. In 1901 a leading writer stated a hope or expectation that the doctrine would be finally imploded.

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<sup>346</sup> Applying *Brown v Attorney General for New Zealand* [1898] AC 234 (PC).

<sup>347</sup> (1912) Cr App R 127 (CCA).

<sup>348</sup> Later Lord Reading CJ.

<sup>349</sup> (1913) 9 Cr App R 228, 231 (CCA).

<sup>350</sup> The doctrine therefore reinforced unquestioning obedience to the judgment of the husband.

<sup>351</sup> Later Lord Sumner.

<sup>352</sup> (1912) 7 Cr App R 149, 152 (CCA). Glanville Williams, *The General Part* (1953) Stevens & Sons Ltd, London, p762-763 n.15 “Although the presumption could be rebutted, it was not rebutted by merely establishing the absence of coercion; the prosecution was required to affirmatively establish that the wife acted independently”.

<sup>353</sup> The position in Tasmania was very robust as s20(2) *Criminal Code 1924* [Tas] provided that “a married woman shall be in the same position as regards compulsion by her husband as if she were unmarried”.

<sup>354</sup> In the next decade the tide turned: *White v Proctor* [1937] OR 647, 651 the Ontario Court of Appeal said “I question if the old fiction of law that husband and wife are in law one person has much place in modern jurisprudence.” In *Broom v Morgan* [1953] 1 QB 597, 611 Hodson LJ stated that public policy was the basis for the principle of unity. But at p609 Denning LJ said that the theory “has no longer any place in our law.”

It is within the last half-century that married woman have been emancipated and set free from the restraints imposed upon them by the common law and placed in a position which they were long ago entitled to occupy – a position of independence and equality with their husbands.<sup>355</sup>

To redress the inherent difficulties of prosecution, the courts began to accept less and less was needed from the prosecution to rebut the presumption, which was atrophying in practice. The emancipation of married women had been accompanied by a proportionate decrease in the quantum of evidence necessary to rebut the presumption. Where it was not possible in law for an accused wife to even be able to give evidence, the prosecution faced the singular reality that not only did they have to prove the offence but they had in doing that to also prove that the woman was a free agent throughout. The ease with which the presumption now became rebutted explained the willingness of the courts to be generous in its application, since the reality was that generally the result would be the same whether the presumption existed or not. It withered<sup>356</sup> to the extent that it usually played no significant part in the criminal justice system as very slight evidence<sup>357</sup> within the prosecution case would nullify it. But the trial of *R v Peel*<sup>358</sup> became the catalyst for the law to be changed,<sup>359</sup> not as may have been anticipated

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<sup>355</sup> Montague Lush, 'A Century of Legal Reform, Twelve Lectures on the Changes in the Law of England During the Nineteenth Century, Delivered at the Request of The Council of Legal Education in the Old Hall, Lincoln's Inn, During Michaelmas Term 1900 and Hilary Term 1901', reprinted (1972) South Hackensack, New Jersey, Rothman Reprints Inc. at p378. David S Evans, 'Criminal Law – Presumption of Coercion – Crimes Committed by Wife in Husband's Presence', (1956) 35 North Carolina Law Review 104, p112: "At the time of its creation the presumption was in keeping with the then prevailing domestic relations; today it has no sound basis. However, the doctrine should not be abrogated in its entirety. Even now there still may be a few women who, either because of a marriage vow to obey their husband or for other reasons, would follow their husband's orders – even to the extreme of violating the law. These women should be entitled to prove coercion as a defense."

<sup>356</sup> Leo Kanowitz, 'Women and the Law', (1969) University of New Mexico, Albuquerque p89 n14 who discusses the presumption of coercion at p112: "based on the idea that husbands occupy a position of authority over their wives while wives dutifully obey their husbands, and although it may act as a form of discrimination in favour of married woman, it is founded upon the legal recognition of a woman's inferior social status in society. However, like other legal anomalies, which are based on traditional paternalistic and chauvinistic attitudes towards women, this exception in the law is likely to be removed or fall into disuse as the position of women in society improves."

<sup>357</sup> Kenneth C Sears and Henry Y Weihofen, 'May's Law of Crimes', (1938) 4 ed, Little Brown & Co, Boston at p40: "It is believed that there is nothing in our day to justify the continued existence of the presumption. Accordingly it has been frowned upon as a weak presumption; it has been regarded as inconsistent with the *Married Women's Property Acts*; and it has been repudiated by a few legislatures. In spite of all of this the presumption in most States is still a part of the law".

<sup>358</sup> In the very year of that trial: Edward Jenks (ed), 'Stephens Commentaries on the Laws of England', (1922) 17 ed, vol 4, Butterworth & Co, London at p29: "But the expediency of maintaining the rule has from time to time been questioned; and the presumption of coercion of the wife by the husband may be rebutted by evidence that she was acting voluntarily and not under his constraint, although he may have been present and have concurred in her acts". William G Riddell and Arthur H Holmes, 'The New Zealand Justices' Manual', (1922) 2 ed, WAG. Skinner, Government Printer, Wellington at p149: "A married woman who takes part with her husband in the

in conformity with the momentum by abrogating the marital coercion doctrine, but by giving it revivifying statutory force.

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commission of a crime is not now presumed to act under his coercion merely because she commits the offence in his presence, but coercion may be proved in other ways.”

<sup>359</sup> *United States v de Quilfeldt* (1881) 5 F 276, the defence of marital coercion was the “relic of a belief in the ignorance and pusillanimity of women.” The Law Commission, ‘*Criminal Law: Report on Defences of General Application*’, Law Com No.83 (1977) pp17-19 unsuccessfully urged the abrogation of the entire doctrine. Anon, ‘*Husband and Wife in the Criminal Law*’ (1927) 91 JP 662, 663: “The old presumption, which rendered proof of coercion unnecessary was applied without any exact determination of what coercion was, and if an offence was committed in the husband’s presence, the onus was cast on the prosecution to show that the wife acted of her own volition. It was thus sometimes shown what was not coercion, but never positively what was.” Peter Gillies, ‘*Criminal Law*’, (1997) 4 ed, LBC Information Services at p357 “There is, however, a paucity of authority on its meaning [coercion] at common law”. Donald Nicolson ‘*What the Law Giveth, It Also Taketh Away: Female-Specific Defences to Criminal Liability*’ p160 Donald Nicolson and Lois Bibbings (eds), ‘*Feminist Perspectives on Criminal Law*’, (2000) Cavendish Publishing Ltd, London. “While it has existed since at least the eighth century, its rationale remains obscure, being variously explained in terms of the identity of husband and wives, the latter’s subjection to the former, wifely duties of obedience and the law’s ‘tenderness to the wife’.

## CREATION OF AN UXORIAL STATUTORY DEFENCE

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The common law defence of marital coercion, which had existed for over 1000 years became discredited in a sensational criminal trial in 1922 when the daughter of a baronet successfully deployed it as a result of a highly dubious judge-directed acquittal. This defence had hitherto been the exclusive province of the subjugated lower classes, yoked to economic and other disadvantages. An immediate and sustained public reaction demanded the abrogation of this common law defence which was now seen as repugnant to the quest for female equality in all aspects of society. Only a few years earlier the British Parliament had enacted initial legislation proscribing certain discriminatory conduct on the basis of gender. The continuance of his ancient criminal defence conflicted with the intensification of suffragette demands for full equality. This chapter choreographs responses by the government to the unabating press demands for the existing law to be removed. Ironically it began by the Lord Chancellor appointing all all-male committee to consider the state of the law in light of the acquittal and to formulate necessary recommendations.

### ARISTOCRATS ON TRIAL – *R v PEEL* (1922)

Captain Edmund Owen Ethelston Peel MC<sup>1</sup> and his wife Violet Margaret Florence Peel<sup>2</sup> were each arraigned on 7 March 1922 before Darling J at the Central Criminal Court, she on seven

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<sup>1</sup> The son of Major Hugh Edmund Ethelston Peel and Gwladys Freda Rowley-Conwy. Born 13 July 1893. Married 18 November 1919. Divorced 1927. Died 21 March 1935.

<sup>2</sup> The daughter of Sir Robert William Buchanan Jardine of Castlemilk 2<sup>nd</sup> Bt and Ethel Mary Piercy. Sir Robert was the head of the firm Jardine Matheson, China merchants. He succeeded to the title of 2<sup>nd</sup> Baronet Jardine, of Castlemilk, co Dumfries [UK 1885] on 17 February 1905: see Charles Mosley (ed) *'Burke's Peerage, Baronetage & Knightage'* 107 ed Volume page 575 (Genealogy Books Ltd, 2000), Delaware. In 1927 Mr & Mrs Peel divorced [RIN: 4381 DIVORCE: 1927 404381]. Mrs Peel remarried John Drummond, the 15<sup>th</sup> Lord Strange on 8 February 1928. They had a daughter Jean Cherry Drummond b.17 December 1928 who inherited as the 16<sup>th</sup> Lady Strange. Mrs Peel, now Lady Strange, herself died on 16 October 1975. Lord Strange died 13 April 1982.

counts of having forged an instrument, contrary to *s7 Forgery Act 1913*, and he on 14 such counts.<sup>3</sup> The indictment alleged they had on 8 October 1921 in the village Post Office at Avon Dassett in Warwickshire by means of telegrams forged as to their timing, endeavoured to dishonestly obtain money from bookmakers. The prosecution alleged the couple had placed very large bets on a horse called Paragon which to their knowledge had already won the Duke of York Stakes<sup>4</sup> before they purported to heavily gamble on its possible success.

The trial of the spouses for fraud, he a decorated war hero and direct descendant of Mary Tudor, and she the daughter of Sir Robert and Lady Jardine of Castlemilk, was a sensation, widely reported throughout the United Kingdom. It exceeded all expectations though when the husband pleaded guilty upon arraignment. But it was the legal ruling of Darling J in relation to Mrs Peel that has had the greater effect. It led to the demise of a common law criminal defence traceable to AD 791, and in 1925 to the creation of an anomalous statutory defence in parts of the United Kingdom, that still exists over 80 years later. The wife was acquitted on the directed verdict of the jury, because of the Judge's ruling that she was entitled to succeed because of the unrebutted presumption of marital coercion in her favour; a defence hitherto the exclusive province of the crabbed lower classes. There was public uproar upon her acquittal, based as it was on a defence that seemed to sit very uneasily with the spirit of suffragettes, emancipation and equality, and a strong clamour for immediate statutory intervention to abrogate the entire defence followed.

The prosecution case at trial was the elderly village Postmaster was assisted by an impressionable 16 year old girl who specialised in the transmission of telegrams. She was overawed by the chic style and swanky manner of the Peels. Captain Peel attempted to send 45 telegrams placing bets to bookmakers in Dublin, London, Leeds and Newport while at the same time his wife was receiving a call in the Post Office, on the only telephone in the entire village. The call lasted 13 minutes 45 seconds, while the young assistant meekly waited to use it so as to transmit their telegrams. The Duke of York Stakes was officially due to run at 2.50pm but it started late and did not finish until 3.03 p.m. The prosecution case at trial was

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<sup>3</sup> Captain Peel also faced a single count contrary to the *Post Office (Protection) Act 1884* [UK].

<sup>4</sup> Paragon started at 100-8, was owned by Sir Ernst Paget and was ridden by Arthur Balding. The 5-4 favourite Abbots Trace was second at Kempton Park that day: *The Daily Telegraph*, 10 October 1921 p18.

that this deferment exactly explained why Mrs Peel was engaged on such an unusually long telephone call – because the person at the other end was informing her of the name of the winning horse. The allegation was that the time on the telegrams was then surreptitiously ante-dated to before the start of the official race time. The pair had expended £76 and their actual return was over £2,600 and would have been more, save several bookmakers refused to pay out, having become suspicious of their combined losses all attributable to bets placed at a minor rural outlet. The spouses were easily traced<sup>5</sup> and Mrs Peel upon being interviewed by officials on behalf of the Postmaster General, informed them she had not been talking on the telephone about horseracing at all, but was conversing with a friend about the purchase of “Anglo-Ecuadorian” railway shares.

Counsel for the prosecution<sup>6</sup> and for the accused couple<sup>7</sup> (including two knights)<sup>8</sup> were the cream of the English criminal bar.<sup>9</sup> Darling J<sup>10</sup> was renowned for playing to the gallery with his bon mots and witticisms, with which this trial too was ultimately embellished. Every detail of the trial including Mrs Peel’s daily couture and millinery was reported in intricate detail.<sup>11</sup> Noblemen, including the Duke of Sutherland,<sup>12</sup> were present in the public gallery. North and South of the Scottish border the press embraced the trial with a fervour, describing it as being “of great public interest”<sup>13</sup> and of “intense interest”.<sup>14</sup> The jury empanelled to try

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<sup>5</sup> The telegrams were in the name of “Plumage” and “Fieldbury” which were the secret betting names of Mrs Peel with the bookmakers.

<sup>6</sup> Sir Charles Gill KC, Mr Travers Humphreys and Mr Forster-Boulton.

<sup>7</sup> Sir Henry Curtis-Bennett KC, Sir Richard Muir and Mr J A C Keeves.

<sup>8</sup> Sidney Felstead, *Sir Richard Muir, A Memoir of a Public Prosecutor*, 1927, John Lane, The Bodley Head Limited, London, p368. “Lady Jardine, the mother of Mrs Peel, worked untiringly on behalf of her daughter”...the main object in the defence was Mrs Peel should be saved from prison and, although those responsible for it would have preferred to have got a clear acquittal from the jury, they could not afford to risk not undertaking what they considered the perfectly safe point of coercion.”

<sup>9</sup> Mr J P Valetta held a watching brief for the Postmaster General.

<sup>10</sup> His appointment to the Bench had been the subject of a lampoon that described Darling J as “the impudent little man in horse-hair, a microcosm of deceit and empty-headedness” for which a reporter for the *Birmingham Daily Argus* was found guilty of contempt in scandalising the court and only narrowly saved from imprisonment: *R v Gray* [1900] 2 QB 36 (DC).

<sup>11</sup> *The Times* 8 March 1922 reported the arraignment the day before, recording that Captain Peel pleaded guilty to each offence “in low tones”. Mrs Peel pleaded not guilty “wearing a blue costume with furs and a broad-brimmed red hat”. *The Glasgow Herald*, Tuesday 14 March 1922, on page 1, noted that upon arraignment, Mrs Peel had worn “a fashionable blue costume with large hat trimmed with cerise ribbon”.

<sup>12</sup> *The Pall Mall Gazette and Globe*, City Special Edition, Monday 13 March 1922.

<sup>13</sup> *The Manchester Guardian*, Monday 6 March 1922, p7, noting the trial would take place “this week”.

<sup>14</sup> *The Glasgow Herald*, Tuesday 14 March 1922, p8.

Mrs Peel, would by a lingering irony, contain two women,<sup>15</sup> this feature itself still such a novelty under English criminal law, that their selection was the banner headline on the front page of the evening London newspaper.<sup>16</sup> The trial, quickly known as “The Society Turf Case”,<sup>17</sup> involving an allegation of cheating<sup>18</sup> that the sport of Kings<sup>19</sup> was about to unplay. Three years later the British Parliament would because of the directed verdict, enact the first statutory defence of marital coercion, necessarily abrogating the common law defence which had existed for about 1,200 years.

The divergent pleas by the spouses may have taken the prosecution by surprise as Sir Charles Gill KC then intimated that the prosecution sought the Judge’s view as to the course it should then take,<sup>20</sup> as husband and wife were jointly charged with the first seven counts.<sup>21</sup> Mrs Peel was facing felonies not misdemeanours, so the Court would not be troubled with the disputable position that the defence of marital coercion was unavailable for misdemeanours. Gill stated as an aside, that no charge of conspiracy had been proffered “because as the law stood a husband and wife could not conspire together to commit a criminal offence”,<sup>22</sup>

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<sup>15</sup> Female jurors (or their absence) still attract occasional judicial attention. In *Kiwelesi v Republic* [1969] EACA 227 the Court of Appeal (de Lestang AP, Duffus AVP & Spry JA) quashed a conviction for murder that had been entered in the High Court of Tanzania (Georges CJ) because one of the Assessors was a woman. Spry JA stated: “So far as we are aware, this is the first time that a woman has sat as an Assessor at any trial in Tanzania or, indeed, in East Africa”. Without statutory authority female participation in decision-making invalidated the whole trial. More recently the Privy Council narrowly held 3:2 that a provision in Gibraltar very significantly restricting women from the general jury pool was unconstitutional: *Rojas v Berllaque (Attorney General Intervening)* [2004] 1 LRC 296 (PC)

<sup>16</sup> *Evening Standard, Late Night Special Edition*, Monday 13 March 1922, p1, ‘Two Women on Jury – Turf Terms Explained – Mr Dow and £200’. In *R v Evans and Pritchard* (1921) 15 Cr App R 111, 114 Lord Reading CJ had explained the operation of the recent *Rule 3 Women Jurors (Criminal Court) Rules 1920* [UK].

<sup>17</sup> *The Manchester Guardian*, Wednesday, 15 March 1922, p14.

<sup>18</sup> Cheating at cards had already produced an equivalent sensation, when one of the players and a witness at the trial was Prince Edward: *Gordon-Cumming v Green*, *The Times* 1 June 1891, Lord Coleridge CJ presiding over a special jury.

<sup>19</sup> Mrs Peel’s father, Sir RWB Jardine, Bart, was a “member of the Jockey Club and a prominent owner of racehorses”: *The Pall Mall Gazette and Globe, Final Night Edition*, Tuesday 14 March 1922, p2. The same report noted that Captain Peel’s mother was “Mrs Hugh Peel, the well-known racehorse owner”.

<sup>20</sup> *The Times*, 8 March 1922. Later, in mitigation, Sir Henry Curtis-Bennett KC said Capt Peel had pleaded guilty “on Counsel’s advice”: *The Evening Standard*, 14 March 1922, p8.

<sup>21</sup> Contrary to s7 *Forgery Act 1913* [UK].

<sup>22</sup> *The Times*, 8 March 1922. Could not conspire together “alone” was more correct. English law provides since 1977 by statute that a husband and wife cannot conspire together alone. That position had been consistently assumed to be the case, but never actually decided. The first ever ruling in the common law to that effect being a decision of the Supreme Court of New Zealand in 1886, a ruling of Johnston J in *R v Howard and Howard* unreported, *The Lyttelton Times*, Friday 9 April 1886, New Zealand Supreme Court, Christchurch.

exclusively relying upon a statement from Hawkins,<sup>23</sup> an eminent writer of the seventeenth century, for this proposition. Darling J rejoined “of course, it takes two persons to conspire, and being one person in law, the situation is that they cannot conspire”.<sup>24</sup> Gill noted that a husband and wife being one person in law, being presumed to have but one will, was “a somewhat quaint presumption”. Darling J, never able to let an opportunity for a witty retort be bypassed, added,<sup>25</sup> “[i]t is more likely to have been true in the time of Hawkins than it is today”. That jest would actually articulate the public response upon the conclusion of the trial.

The prosecution then itself directly referred to the possible availability of the defence of marital coercion, a defence “that went back about 1,500 years”,<sup>26</sup> and that the modern law existed in the law of King Ine<sup>27</sup> and the West Saxons in England at least a thousand years ago. Darling J added, “[b]ut is it not notorious in the time of King Ina women were not nearly so independent as they are now?”,<sup>28</sup> observing husbands formerly beat their wives and regularly

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<sup>23</sup> P R Glazebrook (ed) William Hawkins ‘*Pleas of the Crown 1716-1721*’ vol 1 ch 72 s8, Professional Books Limited, 1973, London p192 “no such Prosecution is maintainable against a Husband and Wife only, because they are esteemed but as one Person in Law, and are presumed to have but one Will”. In *R v Peel* 1922 *The Times*, 8 March 1922, Sir Charles Gill KC in his opening of the prosecution advised Darling J there was no charge of conspiracy on the indictment because of the “quaint” rule enunciated in Hawkins. This was met with the rejoinder “Mr Justice Darling – It is more likely to have been true in the time of Hawkins than it is today (laughter).” In his ruling discharging Mrs Peel, Darling J erroneously stated that the “pre-arrangement”, between the husband and wife to defraud the bookmakers, was a “conspiracy”: *The Times*, 15 March 1922, p7. In *R v Annie Brown* (1896) 15 NZLR 18, 27 a case where marital coercion was unsuccessfully relied upon, counsel for the prosecution conceded in argument that the common law rule precluding a conspiracy between husband and wife had not been “attempted to be dealt with by the Code” and that s21 of the Act “preserves it”. Section 21 *Criminal Code Act 1893* [NZ] preserved all common law defences, except in so far as altered by or inconsistent with it. (See now: s20(1) *Crimes Act 1961* [NZ] considered in *R v Hutchinson* [2004] NZAR 303, 310 (CA) per Heath J.) Prendergast CJ at p32 noted that it did not follow that because a husband and wife in the eye of the law were still “for many purposes one person, and cannot ordinarily agree together” that it precluded them engaging in “combination or concert, express or implied”. While expressly acknowledging that a husband and wife alone “cannot be indicted for conspiracy” he narrowly delimited the exemption from uxorial criminality to the crime of conspiracy. Williams and Conolly JJ refrained from the line of reasoning. Dennison J at p36-37 was evidently hesitant about the special spousal exclusion from conspiracy. The Chief Justice fortified his assertion that joint spousal action was no bar to prosecution by stating that a wife would be liable as an accessory before the fact to her husband’s offence “by procuring or inciting him” to commit it. The criminal law instances a remarkable paucity of authority on uxorial incitement.

<sup>24</sup> *The Times*, 8 March 1922.

<sup>25</sup> To laughter from the public gallery: *ibid*.

<sup>26</sup> *Ibid*.

<sup>27</sup> This law of King Ina (Ine) (c688-94) is quoted in Frederick L Attenborough, ‘*The Laws of the Earliest English Kings*’ (1922) The University Press, Cambridge, p55-6 as “[i]f a husband steals a beast and carried it into his house, and it is seized therein, he shall forfeit his share [of the property of the household] – his wife only being exempt, since she must obey her lord.”

<sup>28</sup> *The Times*, 8 March 1922. Percy H Winfield, ‘*The Chief Sources of English Legal History*’, 1925 Harvard University Press, Cambridge at p44: “A curious illustration of the need for a complete legal bibliography in

subjected them to violence, but asserting that that power imbalance no longer existed. Such a notion was as obsolete, the judge said, as the former right that a husband might beat his wife “so long as a man did not use a stick thicker than his thumb”.<sup>29</sup>

The discussion from the bench then turned to the exceptions from the common law defence and the rationale for the excepted offences. Darling J argued that murder and treason were outside the defence, because those crimes were so heinous<sup>30</sup> it being supposed a married woman would revolt against even her husband’s authority, than be guilty of them. The prosecution then submitted no issue could arise that the defence was unavailable in relation to an offence of forgery, as the very point had been previously decided.<sup>31</sup> Darling J then informed the prosecution he certainly would not stop the case at that juncture and that the prosecution ought to call its evidence.<sup>32</sup> “[T]he country formerly conceded to husbands control over their wives, which was no longer conceded. It conceded control over their persons and property, which had been to a large extent abolished.”<sup>33</sup>

The prosecution called the Post Office employees and the bookmakers with whom the bets were laid. Captain Peel had handed in 45 different telegraphic bets, but the telegrams were all

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general and of Anglo-Saxon law in particular was afforded by a trial at the Central Criminal Court, London, in 1922, the presiding judge traced back to the laws of Ine (a West-Saxon king who seems to have reigned from AD 688-725) one of the most stupid presumptions which still disfigures our criminal law – that any ordinary crime committed by a wife in the presence of her husband is done by his compulsion [*R v Peel*, *The Times* 8 and 15 March 1922]. The Court, presumably owing to lack of information, does not appear to have made use of the best authority for these early English laws, nor even of the second-best authority.”

<sup>29</sup> This revelation was also received with laughter from the public gallery. See, however, *R v Jackson* [1891] 1 QB 671, (CA) per Lord Esher MR. “One proposition that has been referred to is that a husband has a right to beat his wife. I do not believe this ever was the law.”; Reva R Siegel, ‘*The Rule of Love: Wife Beating as Prerogative and Privacy*’, (1996) 105 *Yale Law Journal* 2117, 2148.

<sup>30</sup> Samuel E Thorne (ed) ‘*Bracton on the Laws and Customs of England*’ ‘*De Legibus et Consuetudinibus Angliae*’, f.151b, Selden Society, 1977, vol II, p428, stating that the marital coercion doctrine was not applicable to “atrocioribus” [heinous crimes].

<sup>31</sup> *R v Atkinson* (1814) 1 ‘*Russell on Crimes and Misdemeanours*,’ 8 ed, pp96, 103.

<sup>32</sup> The trial was adjourned until Monday, 13 March 1922. An application for bail pending sentence by Captain Peel was refused and Mrs Peel was granted bail in the sum of £1,000.

<sup>33</sup> *The Times*, 8 March 1922. “The early 1920s were also notable in general legal history. The war had done much to put women on the map as responsible citizens and in November 1921 Miss Frances Kyle created a new precedent by being called to the Irish Bar. Six months later Miss Ivy Williams received her call to the English Bar”. M Ostrogorski, ‘*The Rights of Women A Comparative Study in History and Legislation*’, (1893) reprinted (1980) Porcupine Press Philadelphia at p141. Kristin Brandser, ‘*Alice in Legal Wonderland: A Cross-examination of Gender, Race and Empire in Victorian Law and Literature*’, (2001) 24 *Harvard Women’s Law Journal* 221, 252 lists some of the milestones in England in the early twentieth century achieved by women in terms of progress towards equality, identifying the first admission by women as solicitors, barristers, members of parliament and cabinet ministers and the first appointment of a female judge.

in Mrs Peel's handwriting.<sup>34</sup> The defence cross-examined highlighting the fact that Mrs Peel<sup>35</sup> was in immediate proximity to her husband even when she was on the telephone, and that the spouses could still see each other throughout the duration of her call.<sup>36</sup> At the conclusion of the prosecution case, on the third day of the trial it was submitted that Mrs Peel had no case to answer by invoking the presumption of marital coercion, which it was argued was unrebutted on all of the evidence. In particular, emphasis was placed on the fact that Mrs Peel had nothing to do with either the handing-in or the forging of the telegrams. The defence referred to a considerable number of authorities,<sup>37</sup> tracing the law from the early nineteenth century and noting three decisions of the Court of Criminal Appeal<sup>38</sup> in point, all delivered within the preceding eight years, substantiating the continued existence of the common law defence. Darling J himself additionally referred to the decision of Stephen J<sup>39</sup> in *R v Dykes et Uxor*<sup>40</sup> in which a wife was acquitted upon a special verdict of a jury, of highway robbery with violence, because there was some evidence to show she acted under the compulsion of her husband who was actively involved, and in fear of violence from him.

Darling J stated that the marital coercion doctrine should not be extended "seeing how things have altered in the last few years in this country, where women are now serving on juries and

<sup>34</sup> *The Times*, 14 March 1922. It also recorded Sir Robert and Lady Jardine were present in the public gallery. Captain Peel "was standing on the steps leading from the cells to the dock, out of sight of the public." *Coercion – The Peel Case* (1922) 86 JP 137 described the case as "of absorbing human interest".

<sup>35</sup> Douglas G Browne, *Sir Travers Humphreys – A Biography*, George C Harrap & Co Ltd, London, 1960, p197, relates that *The Times*, 14 March 1922 said Mrs Peel "was wearing a black costume with blue trimmings and furs and a black straw hat with blue quills crossed on one side." It was subsequently reported that "feminine readers of the *Times*" who learnt that Mrs Peel was so attired, "may have regretted that the reporter was a man. What did he mean by trimmings?"

<sup>36</sup> The Postmaster said in evidence when Capt Peel went to communicate with Mrs Peel in the telephone box "...he had one foot in and one foot out." *The Evening Standard*, 13 March 1922, p8.

<sup>37</sup> PRO LOC2/584, *Authorities Cited by The Defence in R v Peel*; *Halsbury's Laws of England*, vol 9, p244, para 519; *Russell on Crimes*, vol 1, pp93-94; *R v Hughes* (1813) 2 Lew CC 229; *R v Sarah and John Morris* (1814) Russ & Ry 270; *Seagar v White* (1884) 51 LT (NS) 261 (selling liquor contrary to licence: Stephen J); *R v Archer* (1826) 1 Mood CC 143; *R v Connolly* (1829) 2 Lew CC 229; *R v Price* (1837) 8 Car & P 19; *R v Cruse* (1836) 2 Mood CC 53; *R v Smith* (1858) 1 Dears & B 553; *R v Boober, Boober & Boober* (1850) 4 Cox CC 272; *R v Torpey* (1871) 12 Cox CC 45.

<sup>38</sup> *R v Caroubi* (1912) 7 Cr App R 149; *R v Court* (1912) 7 Cr App R 127; *R v Green* (1913) 9 Cr App R 228.

<sup>39</sup> Sir James Fitz-James Stephen, *Digest of Criminal Law*, (1894) 5ed

<sup>40</sup> (1885) 15 Cox CC 771 (a very inadequate one page report); in a contemporary newspaper report of the trial, the wife aged 20, a hop-picker "put her hand into his [the victim of her husband's robbery] left hand pocket, but finding nothing there the male prisoner again kicked the prosecutor and he became insensible". Her husband, by contrast, took £5 4s. Stephen J is reported to have said after the special verdict of the jury, in which they found the wife acted under the compulsion of her husband (although herself taking nothing) that "the opinion of the jury would best be met in the case of the female by a verdict of not guilty against her – for it nearly was that.": *Kent Messenger*, 30 October 1885 p3 under the heading '*Capel-Robbing With Violence*'.

becoming Members of Parliament.”<sup>41</sup> The judge then emphasised that apart from the usual reasons<sup>42</sup> given to substantiate the doctrine,<sup>43</sup> there was also the historical fact that for a very long time women had been unable to obtain the benefit of clergy<sup>44</sup> formerly available. This disability arose because of both their general illiteracy and the critical fact that as a class women were in any event not clergyable;<sup>45</sup> so the presumption of marital coercion was invented by the judges to ameliorate their comparatively wretched position. The presumption he added<sup>46</sup> was also founded upon the fact that women were excluded from benefit of clergy “and would be executed for doing the very thing their husbands could do without being executed because they could read a few words or learn them by heart for the very purpose.”<sup>47</sup>

## THE RULING OF DARLING J

The judge expressly stated there would have been a case to answer except for the fact the accused was a married woman.<sup>48</sup> That legal status guaranteed the presumption of marital coercion which applied to exonerate her. He particularly noted *Seagar v White*<sup>49</sup> where Stephen J had held the defence of marital coercion was still available in English law,<sup>50</sup> a

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<sup>41</sup> *The Times*, 14 March 1922. Curtis-Bennett KC added women were becoming Members of the Bar as well and Darling J replied “I don’t see what the Bar is to do, except marry them (laughter).” Counsel even exclaimed the possibility of women occupying judicial office one day had to follow. Douglas G Brown, ‘*Sir Travers Humphreys A Biography*’ (1960) George G Harrap & Co Ltd, London at p192 noted “The early 1920s were also notable in general legal history. The war had done much to put women on the map as responsible citizens...”

<sup>42</sup> Power imbalance, economic duress, dominance, psychological dependency, biblical imperative.

<sup>43</sup> Which he described as “a melancholy rule”; *The Times*, 14 March 1922. This exact expression had been used in relation to the defence of marital coercion by Stephen J in *Seagar v White* (1884) 51 LT (NS) 261, 268 (DC); but in *The Justice of the Peace* report of the same case, Stephen J is recorded as saying of the contemporary view of the common law defence “It was a state of the law which now causes some astonishment”: *Seagar v White* (1884) 48 JP 436,437 (DC).

<sup>44</sup> Sir Frederick Pollock and Frederic William Maitland, ‘*The History of English Law*’, reprint 2 ed vol 1 (1996), ‘The Law Book Exchange Ltd’, Union, New Jersey at p482 describe “benefit of clergy” as “one great exception” from the criminal law.

<sup>45</sup> See chapter 1 *infra*. This class restriction on women was removed by Act of Parliament in 1692; 4 W & M c9.

<sup>46</sup> Citing ‘*Brook’s Abridgement*’ p108 “Ratio videtur es que le ley extend que le feme ne osa contradire son Baron.” [The law is founded on the assumption a wife would never dare contradict her husband.]

<sup>47</sup> *The Times*, 15 March 1922.

<sup>48</sup> ‘*Coercion – The Peel Case*’ (1922) 86 JP 137, 138 stated that Darling J ‘has undoubtedly performed a public service in calling attention to the inapplicability of an ancient theory of law to the changed conditions of modern relationships’.

<sup>49</sup> (1884) 51 LT (NS) 261.

<sup>50</sup> Also citing *R v Hughes* (1813) 2 Lew CC 229 and *R v Sarah & John Morris* (1814) Russ & Ry 270.

position which that judge reaffirmed in 1885 at Maidstone Assizes in *R v Dykes et Uxor*.<sup>51</sup> Hamilton J<sup>52</sup> delivering the judgment of the Court of Criminal Appeal in *R v Caroubi*<sup>53</sup> had also confirmed the current longevity of the common law presumption and defence. In that latter case the same argument had been unsuccessfully advanced, namely because there was evidence of prearrangement between the spouses that demonstrated the wife was acting independently and without coercion. However, Hamilton J had noted the illogicality of this argument, as evidence of prearrangement might itself be the very product of the earlier coercion of the wife.<sup>54</sup> Darling J noted Mrs Peel was never alone in the Post Office while doing anything at all “which could contribute to this conspiracy”,<sup>55</sup> and her husband was there all the time. He had handed in the telegrams and it was he who kept them back until the proper moment. She had left the Post Office before he handed in the telegrams. The judge concluded he was unable to see that Mrs Peel did any individual act which was absolutely independent of the presumed coercion of her husband. He concluded there was no evidence<sup>56</sup> to rebut the common law presumption of marital coercion<sup>57</sup> and she was acquitted.<sup>58</sup>

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<sup>51</sup> (1885) 15 Cox CC 771. This decision had been referred to by the judge rather than by any of the counsel, see ‘*Authorities Cited By The Defence In R v Peel*’: PRO LCO2/584, recorded as *R v Dikes (sic) & Wife*.

<sup>52</sup> Noted as “the present Lord Sumner”, *The Times*, 15 March 1922.

<sup>53</sup> (1912) 7 Cr App R 149 (CCA). The husband had also been convicted: *R v Caroubi (Hadji Ben Ahmed)*(1912) 7 Cr App R 153.

<sup>54</sup> In *State v Houston* (1888) 29 SC 108 the South Carolina Supreme Court had ruled that the mere fact that a wife appears the more active participant in the crime is not logically conclusive proof of her guilt as that greater activity may itself have been the very product of antecedent actual coercion. The error of this reasoning, as with that in *R v Caroubi*, is to find that because there are possible competing inferences at the end of the prosecution case, there is no case to answer: *R v Galbraith* [1981] 1 WLR 1039 (CA); *Haw Tua Tau v Public Prosecutor* [1982] AC 136,151 (PC); *R v Fulcher* [1995] 2 Cr App R 251 (CA). The presumption must be fact-specific in its application and could not be elevated into an immutable rule of law.

<sup>55</sup> This reference to a conspiracy is a clear mistake. No conspiracy was, or could have been, charged between the two spouses alone. The judge’s view was so over-benevolent as to amount to an error of law. Her communication to her husband had been a critical step in the commission of the offence by him; she was involved in a joint enterprise with him and her role was indispensable.

<sup>56</sup> Darling J did not deal with the plain and obvious inference that Captain Peel antedated the telegrams after being told by his wife the result of the race, and without her contribution, including the remarkably lengthy telephone call, he could not have garnered the vital information.

<sup>57</sup> Darling J directed the jury to return a verdict of not guilty. Upon being discharged, “Mrs Peel then quietly left the dock”: *The Times*, 15 March 1922.

<sup>58</sup> Mrs Peel was “dressed in a dark costume over which were a brown coat and furs. Her hat was of black satin, trimmed with pink flowers. She also wore a necklace of pearls.” *The Pall Mall Gazette and Globe*, 14 March 1922, p1.

## THE SENTENCING REMARKS RE CAPTAIN PEEL

Captain Peel, then aged 26, was brought up and sentenced to 12 months' imprisonment<sup>59</sup> after his impressive war record had been the subject of evidence.<sup>60</sup> The judge stated he did not believe Captain Peel had actually coerced his wife; but the law presumed he had and there had been no evidence to rebut it. Mrs Peel had not been coerced by him in the course of the scheme.<sup>61</sup> Darling J said, as the shorthand notes<sup>62</sup> of his remarks reveal:

If I believed that you really had coerced your wife into taking part in these frauds with you, I would pass upon you a very heavy sentence, but notwithstanding what I look upon as a fiction of our law, I do not believe that you coerced her into doing anything which she did in the course of this scheme to defraud the bookmakers. You both profited by it, and I can see no evidence of it at all that she knew less about it than you did, or that she was a weak person who was compelled by you to do something which would have revolted her. I therefore take it that you were not guilty of that cruel and wicked act which the law would assume you to be guilty of.

## THE IMMEDIATE MEDIA REACTION TO THE ACQUITTAL OF MRS PEEL

The press went into a frenzy. The *Pall Mall Gazette* and *Globe*<sup>63</sup> and *Evening Standard*<sup>64</sup> flashed the acquittal before the morning newspapers could scoop the story. The next morning, the headlines<sup>65</sup> were baying about the injustice of the situation. Had not the war hero been

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<sup>59</sup> In the Second Division, ie without hard labour. "The prisoner, who was evidently deeply affected by the shame of his position, was then removed from the dock": *The Times*, 15 March 1922.

<sup>60</sup> He had joined the 5<sup>th</sup> Dragoon Guards at Ypres in November 1914, he had been "in every action in which the 1<sup>st</sup> Cavalry Brigade took part, including the three Battles of Ypres and the Battle of Loos and he was present on the Somme at Arras and Cambrai." He had been awarded the Military Cross for most conspicuous gallantry, including the fact he had captured six German soldiers singlehandedly: *The Times*, 15 March 1922. (The only child of their marriage, Hugh William Jardine Ethelston Peel (born 7 October 1920, died 17 February 1945 from wounds received in action): [thepeerage.com/p4305](http://thepeerage.com/p4305). The Peel family were direct descendants of Mary Tudor. Banks LJ gave a character reference in mitigation and his letter stated he was willing to attend to give evidence.

<sup>61</sup> *The Evening Standard*, 14 March 1922, p8.

<sup>62</sup> *Parliamentary Debates*, House of Lords, vol 49 p702, 21 March 1922, per Lord Askwith.

<sup>63</sup> *Final Night Edition*, 14 March 1922. It also carried on the front page photographs of Captain and Mrs Peel, and of Darling J.

<sup>64</sup> Tuesday, 14 March 1922, p1 (with photographs of Captain and Mrs Peel), p8, "Society Turf Drama Finale – Judge's Burning Censure on Capt. Peel – "You Supposed To Be A Gentleman" – Does Not Believe He Coerced His Wife".

<sup>65</sup> *The Scotsman*, Wednesday, 15 March 1922, p10, under the heading 'Back-Timed Betting Telegrams – Captain Peel Sent To Prison – Mrs Peel Discharged – Justice Darling And Doctrine Of Coercion'; *The Manchester Guardian*, Wednesday 15 March 1922, p4: "End Of The Society Turf Case – 'Coercion' Plea Succeeds – Judge

gallant again?<sup>66</sup> How could an aristocrat avail herself of such a defence? Why did the defence exist at all? What was the rationale and limits of the defence? The public agitation for law reform was strident and immediate.

A biography<sup>67</sup> of Sir Henry Curtis-Bennett KC, the senior knight for the Peels at trial, records the trial was closely followed by the “fashionable society and racing crowd”.

Curtis had shown the absurdity of the law as it stood. And when the Press rumbled and thundered on the theme the next day, the judgment was also criticised as being an illustration of one law for the rich and another for the poor, since a month before, a labourer had been sent to prison with hard labour for a similar offence. The law, which Sir Charles Darling had called “a melancholy doctrine”, was now called “musty and antiquated, a fly-blown legal doctrine”.<sup>68</sup>

The thundering editorial in *The Times* the day after the acquittal exclaimed:<sup>69</sup>

[t]his legal protection of the married woman, a remnant not of chivalry, but of serfdom, has more than served its time, and to use the words of the Judge is “absolutely inappropriate to modern life”, in which women become Justices of the Peace, serve on juries, and are elected members of Parliament.

*The Times* editorial of 15 March 1922 pungently reviewed the doctrine of marital coercion, noting it was “once utilitarian, now sometimes almost metaphysical”, and stated that it had to be removed by statute as it was irreconcilable with the *Sex Disqualification (Removal) Act*

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On Out-Of-Date Law – The Mysteries Of Betting By Telegram”; *The Daily Telegraph*, Wednesday, 15 March 1922, p12 “Betting Telegrams – Mrs Peel Acquitted – Judge’s Scathing Words – Sentence Of Mr Owen Peel”.

<sup>66</sup> *The Evening Standard*, 14 March 1922, p8, records counsel stating Capt Peel had taken “...the proper and manly course.”

<sup>67</sup> R Wild & D Curtis-Bennett, *King’s Counsel: The Life of Sir Henry Curtis-Bennett*, 1938, Macmillan Company, New York, p99.

<sup>68</sup> *Ibid* p101. Adding incorrectly though “[t]he Peel case was the last, therefore, in which the doctrine was heard that a woman was inevitably under the influence of her husband.” It is a remarkable fact, attributable probably to the notoriety of the Peel acquittal, that other later instances of the common law defence have been wholly overlooked. See fn 166-184 *infra*. When the statutory defence was introduced by s47 *Criminal Justice Act 1925* [UK], the first known example of it being invoked in a superior court was much later: *R v Pierce* (1941) 5 *Journal of Criminal Law* 124 (a decision not otherwise reported).

<sup>69</sup> *The Times*, 15 March 1922. ‘Coercion – The Peel Case’ (1922) 86 JP 137, 139 compared *Bourne v Keane* [1919] AC 815 (HL), where the lawfulness of a Catholic will for the bequest of masses was upheld as the *Roman Catholic Charities Act 1832* [UK] “changed fundamentally the entire situation, the whole outlook, and the underlying principle of the law in reference to the Roman Catholic religion.” The author said an analogy between the position of married women and Roman Catholics was now valid.

1919 [UK] the operation of which was a constant reminder “of things left undone in the levelling processes of democracy.”

#### COMMUNICATIONS BETWEEN LORD CHANCELLORS, ATTORNEY GENERAL AND DIRECTOR OF PUBLIC PROSECUTIONS IN THE IMMEDIATE AFTERMATH OF THE DECISION IN *R v PEEL*

There was an almost immediate reaction too by parliamentarians. Mr Leslie C Bowker,<sup>70</sup> the Legal Secretary to the Law Officers of the Crown,<sup>71</sup> wrote,<sup>72</sup> on 16 March 1922,<sup>73</sup> to Sir Claud Schuster<sup>74</sup> enclosing a copy of a Parliamentary Question which Mr Raper MP intended to ask the Attorney General in the House of Commons on the next Wednesday<sup>75</sup> “consequent on the remarks of Mr Justice Darling in the Peel case”. On the same day by Schuster to Bowker in reply which stated, “As regards Mr Raper’s question for Wednesday next...[i]t is obvious a very large question of policy is involved, upon which some discussion between the Lord Chancellor and the Attorney General may be desirable.”<sup>76</sup> That Parliamentary Question is recorded in Hansard<sup>77</sup> where Mr A B Raper asked the Attorney General whether the Government proposed to have the whole law of marital coercion repealed. Sir Ernest Pollock the Attorney General said on 22 March 1922, in the House of Commons that the Government intended to “set up a small but highly expert committee” to consider the whole issue.

The “very large question of policy” referred to by Schuster still remains an anomalous issue in English law. With an immediate challenge to the state of the law, one day after the acquittal of Mrs Peel, with implications that transcended the narrow law of marital coercion,

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<sup>70</sup> His brother was clerk to Sir Edward Marshall-Hall and Birkett J. See: A E Bowker, *‘Behind the Bar’*, 1947, Staples Press Limited, London, p22.

<sup>71</sup> Elected as Remembrancer of the City of London in 1933.

<sup>72</sup> PRO/LC02/584: *‘Criminal Law: Report of the Committee on the Responsibility of the Wife for Crimes Committed Under the Coercion of the Husband’*.

<sup>73</sup> The day after the acquittal was reported in *The Times*.

<sup>74</sup> KCB, CVO, KC, Law Officers Department, Royal Courts of Justice, London. Permanent Secretary to the Lord Chancellor 1915-1944 (b 1869 – d 1956). Later 1<sup>st</sup> Baron Schuster.

<sup>75</sup> 22 March 1922.

<sup>76</sup> PRO *ibid*.

<sup>77</sup> *Parliamentary Debates*, House of Commons, vol 152 p447, 22 March 1922.

Sir Claud must have considered the response to be ominous. As right hand man to the Lord Chancellor,<sup>78</sup> he must have felt the Lord Chancellor, who had overall responsibility for law throughout the United Kingdom, was shortly going to be very much on the back foot. A very high profile criminal case had, in the eyes of the public, gone awry because a common law criminal defence fashioned at least a thousand years earlier, had produced a result that did not just perplex, but angered the public. The injustice created by the application of the ancient law, compounded by the overwhelming lack of moral merit in the factual matrix was seen to have sullied the law itself. But the dimension of the quest for rapid change in the law instantly grew. On 17 March, the next day, Sir Harry Brittain MP, filed a Parliamentary Question.<sup>79</sup>

To ask Mr Attorney General, whether, the object of securing equality between the sexes, he can foreshadow an early alteration in the Law as to do away with the theory of the coercion of the wife by the husband, as illustrated by a recent decision in the High Court of Justice.

Bowker immediately sent a copy of the question to Schuster, adding it involved “an amendment of the law of coercion between husband and wife.”<sup>80</sup>

On 17 March 1922, *The Times* published a letter from the redoubtable Sir Harry Poland KC,<sup>81</sup> who stated no-one could doubt the law of marital coercion “ought to be amended”. He noted a Royal Commission<sup>82</sup> in 1879 had recommended the abolition of the presumption and suggested that as “about 42 years have elapsed since their recommendation” the government should “forthwith bring in a Bill to carry it out”. He optimistically adding “the law where there is actual compulsion requires no alteration.” He opined that there was no doubt that such a Bill would “readily pass both Houses of Parliament without opposition”. How wrong he was. On the same day the solicitor of the General Post Office<sup>83</sup> wrote to Schuster a long letter,

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<sup>78</sup> He served a remarkable 29 years as Permanent Secretary to the various Lord Chancellors (1915-1944).

<sup>79</sup> PRO LCO2/584 Parliamentary Question for Oral Answer on 21 March 1922.

<sup>80</sup> PRO LCO2/584.

<sup>81</sup> Who had been the Senior Prosecuting Counsel at the Old Bailey for many years – see his biography: Ernest Bowen-Rowlands, *Seventy-Two Years at The Bar*, (1924), Macmillan and Co Ltd, London.

<sup>82</sup> George Eyre & William Spottiswoode, *Law Relating to Indictable Offences*, Her Majesty’s Stationery Office 1879 at p18.

<sup>83</sup> Conduct of the prosecution of *R v Peel* had been in the hands of the solicitor to the Post Office as the forgeries had been of telegrams. Woods advocated that apart from abrogating the presumption that “[t]o secure consistency in principle, it would be desirable at the same time to alter the existing Common Law rule that husband and wife cannot conspire together without a third conspirator, which is based on an analogous legal fiction that they are supposed to have only one mind”: PRO LCO2/584.

sent at the request of the Secretary of the Post Office.<sup>84</sup> A transcript of the judgment was enclosed as well as an analysis of it. The solicitor concluded the decision demonstrated “very strikingly the necessity for the reconsideration of the law” so as to bring it into accord with the conditions of modern life, in which “women take so large and prominent a part”. He recommended<sup>85</sup> the presumption should be abrogated and instead there should be an onus of proof placed on the wife to establish that she had acted under coercion.

#### PROSECUTION SOLICITORS COMMUNICATE WITH LORD CHANCELLOR

On 17 March 1922 Mr R W Woods Esq CBE from the Solicitor’s Department, General Post Office, London, wrote “By Special Transfer” (an early form of courier) to Sir Claud on behalf of the Secretary of the Post Office enclosing a copy of the ruling of Darling J, a copy of the brief and trial exhibits, a list of the legal authorities upon which the defence relied and “an Extract from *The Times* of the 15<sup>th</sup> instant, which contains a reasonably full summary of the legal arguments”. Woods informed Sir Claud that Darling J held:

that in view of the long line of uniformly consistent authorities, he was bound to hold that this defence prevailed, but he expressed the opinion that the doctrine is one which is no longer in harmony with modern conditions, inasmuch as the principles upon which it was based have long since ceased to exist.

The Solicitor from the General Post Office, who had the particular interest that telegrams had been sent by the Post Office to effect the crimes, also advised Sir Claud:

Moreover, in passing sentence on Captain Peel, the Judge stated that he did not believe that the prisoner had coerced his wife in doing anything that she had done in the course of the scheme to defraud the Bookmakers by which they both profited, and, for reasons which he stated, he found that the prisoner Owen Peel was not in fact guilty of the act of [coercion] which the law presumed him to be guilty.

Woods continued:

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<sup>84</sup> The Secretary expressly sought to have the Lord Chancellor consider “the desirability of initiating legislation which will prevent a similar miscarriage of Justice in the future”: PRO LCO2/584.

<sup>85</sup> The letter was copied to the Attorney General.

That in the case of Mrs Peel the administration of justice was gravely impeded, if not defeated, by the artificial presumption of law, which in the particular case was at variance with the strong probabilities and in general can, at the present time, only be regarded as somewhat of an anachronism.

He had made a bold plea for instant law reform, so that the criminal law would be in “accord with the conditions of modern Life, in which women take so large and prominent a part.” He commended that the proper legislative solution would be to abrogate the existing presumption of coercion and to place upon the wife the onus of proof that she in fact acted under the coercion of the husband. Woods did not recommend the entire removal of wifely status as a defence: he proposed a modified version. He urged the Lord Chancellor to consider “the desirability of initiating legislation, which will prevent a similar miscarriage of Justice in the future.” Woods made an additional valuable observation:

To secure consistency in principle, it would be desirable at the same time to alter the existing Common Law rule that husband and wife cannot conspire together without a third conspirator, which rule is based on the analogous legal fiction that they are supposed to have only one mind.

This point, however, was not pursued by the Government, even though a copy of his letter of 17 March was also forwarded to the Attorney General. The terms of reference framed for the committee appointed to consider the issue of marital coercion provided no remit to consider any broader implications of the recently exposed position of married women under the general criminal law.

In a letter published in *The Times* on 18 March 1922, Rooper & Whately, solicitors of 17 Lincoln’s Inn-fields, desperately wrote on behalf of their clients, that although Captain Peel had pleaded guilty to ante-dating the telegrams, he did so without knowledge at that time of the name of the winning horse. In addition, in relation to Mrs Peel it was said, “By reason of the ruling of the Learned Judge, Mrs Peel was unable to go into the witness box as she desired to do, to deny on oath, that she had any knowledge of the winner or any complicity in any scheme to defraud such as the prosecution had put forward”.

Bowker, on 18 March 1922 wrote<sup>86</sup> to Schuster, stating the Attorney General was postponing giving answers on this issue pending Viscount Birkenhead LC's reply to Viscount Ullswater. He argued that as there were now four similar questions pending, from Mr Morgan Jones MP, Mr Raper MP, Mr Mills MP, and Sir Harry Brittain MP, it was prudent for the Attorney General to await the reply of Viscount Birkenhead LC<sup>87</sup> to Lord Ullswater, before himself answering the outstanding questions in the Commons.

Schuster had telephoned the Director of Public Prosecutions and on 18 March with reference to that conversation, Mr Guy Stephenson CB from that office wrote<sup>88</sup> to Schuster stating the law of marital coercion "appears to be fully dealt with in the note to Article 31 in *Stephen's Digest of the Criminal Law*".<sup>89</sup> His analysis of the ruling of Darling J concluded that "cogent evidence of independence on the part of the wife must be required and that there was no such evidence in this case". He also noted the text in *Stephen's Digest* took the view marital coercion seemed to be an available defence in relation to misdemeanours.<sup>90</sup> This second observation meant that the effect of the ruling of Darling J was likely to be far more pervasive than originally thought; as it would now apply in all trials before magistrates, as neither of the two well-grounded common law exceptions of murder and treason were tried before them. The ruling had confirmed that the defence generally applied to felonies so it would be very impolitic to have to justify it, if it was not of general application in all courts within the criminal justice hierarchy. Stephenson's letter, by double negative, also reasoned:

I do not understand the effect of Darling's ruling to be that the presumption of law that the woman who committed an offence of the nature with which Mrs Peel was charged is presumed to have acted under the coercion of her husband if her alleged offence was committed in the presence of her husband cannot be rebutted by evidence.

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<sup>86</sup> PRO LCO2/584.

<sup>87</sup> Schuster replied to the letter from Woods on 20 March 1922, stating that the Lord Chancellor would be replying to a question from Lord Ullswater and that Schuster would further correspond with him: PRO LCO2/584.

<sup>88</sup> PRO LCO2/584.

<sup>89</sup> Reference was made to the (1894) 5 ed p395.

<sup>90</sup> PRO LCO2/584 Schuster replied on 20 March, 1922 asking if Stephenson might be able to speak to the Director of Public Prosecutions for his views, prior to the Lord Chancellor having to answer the question from Lord Ullswater, the next day.

He concluded Darling J had found there was no evidence to rebut the presumption in Mrs Peel's case otherwise the judge would have been required to leave the case, specifically referring to the "fourth line from the bottom of *The Times* report of his judgment". Stephenson considered the ruling betrayed an apparent inconsistency, in view of an earlier passage in it to the effect that if the two had not been husband and wife, the judge would have allowed the case against the wife to go to the jury. But this apparent contradiction was eliminated because Stephenson tamely acknowledged that in order to rebut the presumption "cogent evidence of independence on the part of the wife must be required" and he conceded that there was no such evidence in this case.

Stephenson then referred to a formal legal opinion which he had coincidentally obtained on 17 March from Travers Humphreys<sup>91</sup> in relation to another fraud prosecution. In that case it appeared that a wife (Mrs Celis), had given fraudulent references as to the honesty of her husband, in a "long-firm fraud". Humphreys' opinion included the following:

On the charge against Mrs Celis of aiding and abetting her husband that is, of being a party to the obtaining of the goods, there is, in my view, ample evidence upon which a jury might find that the presumption of coercion by the husband is rebutted by the evidence that she acted apart from him and took an important and leading part in the transactions. I should be sorry to think that a wife, who, in a false name, and for purposes of fraud, gave untrue references for a firm consisting of her husband, is not amendable to the criminal law<sup>92</sup>

Stephenson noted the indictment in *R v Peel* had charged a felony and '*Stephen's Digest of Criminal Law*' stated the defence of marital coercion "seems to apply to misdemeanours generally".<sup>93</sup> Schuster replied to Stephenson on Monday 20 March and entreated him to speak to Sir Archibald Bodkin, the Director of Public Prosecutions, on the subject as the next day the Lord Chancellor had to answer the parliamentary question from Viscount Ullswater in the House of Lords.

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<sup>91</sup> One of the prosecution counsel in *R v Peel*.

<sup>92</sup> PRO LC02/584.

<sup>93</sup> Sir James Fitz James Stephen, '*Digest of Criminal Law*', (1894) 5ed Art 23.

## ANOTHER PARLIAMENTARY QUESTION IN THE HOUSE OF LORDS

Lord Askwith KCB also put down a Parliamentary Question for the Lord Chancellor:

Whether the doctrine of coercion of a wife by her husband as exemplified in the case of *R v Peel* may not lead a judge to assume the guilt of a wife, without any finding of a jury or any evidence given by her on her behalf or any proof of crime by her, in order to explain the sentence he may be giving to a husband and to obviate the necessity of having to find that the husband has in fact coerced her with consequent heavier sentence; and that the doctrine, for that reason and in view (inter alia) of the report of the Royal Commissioners on the Criminal Code prepared in 1878 and 1879, requires consideration and revision?

Within three days the acquittal of Mrs Peel had generated four questions in the House of Commons and two in the House of Lords. Schuster then wrote to both Lord Ullswater and Lord Askwith<sup>94</sup> inviting them to each postpone their Question, until some other unspecified date. To Lord Ullswater he specially referred<sup>95</sup> to the anticipated prolonged and highly contentious debate on the *Irish Free State (Agreement) Bill 1922* which would precede his Question. He observed that it would not therefore be reached until a late stage<sup>96</sup> in the evening.

The Lord Chancellor would prefer to reply to your question, which raises issues of great gravity, at a time when the House is not already wearied with so important a debate as that which will precede it, and he asks me, therefore, to suggest that you should postpone the question until some date when it can be reached earlier in the evening.

By a letter of the same date Schuster wrote to Lord Askwith, enclosing a copy of the letter to Lord Ullswater which had been written on the instructions of the Lord Chancellor, saying “Perhaps if [Lord Ullswater] sees fit to put off his question, you will be disposed to follow his example.” Lord Ullswater was not rebuffed by the invitation from Schuster to adjourn, so on Tuesday 21 March he handwrote a letter<sup>97</sup> in reply to Schuster. However, his letter was only receipted by a stamped impression from the Lord Chancellor’s Department on 22 March – the

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<sup>94</sup> PRO LCO2/584. The letter to Lord Askwith enclosed a copy of the letter to Lord Ullswater inviting him to defer his question.

<sup>95</sup> PRO LCO2/584.

<sup>96</sup> PRO LCO2/584 stating “...your question may not be reached until 8 o’clock or later”.

<sup>97</sup> PRO LCO2/584, from his address at 33 Great Cumberland Place.

day after his question was to be asked in the House of Lords. Perhaps showing both a canny sense of timing and of political intuition he responded:

I am very loth to postpone my question. In my experience postponement generally means disappearance. There is no certainty that the question, if postponed today, would be reached at a more convenient hour tomorrow or Thursday or on any day to which it might be postponed.<sup>98</sup>

That evening, Viscount Ullswater rose<sup>99</sup> to ask the Lord Chancellor the Parliamentary Question of which he had given notice, his question was:

Whether his attention has been called to the Judgment of Mr Justice Darling in the recent case of *R v Peel*, in which the learned judge held that the “melancholy doctrine” that a wife can be coerced by her husband into the commission of a crime is still the law of this land whenever husband and wife are jointly indicted of a crime, and that the doctrine is founded on the assumption that a wife will not dare to contradict her husband and whether he will introduce a Bill to abolish this doctrine, which appears to date from the reigns of King Canute and King Ina, and bring the law into close accord with the well-known facts of present day matrimonial life?<sup>100</sup>

He noted the same general issue was to be raised in the House of Commons the next day, but emphasising as “the head of the law is in this House” he was particularly anxious to have a reply from the Lord Chancellor rather than await the response of some “subordinate officer in another place”. The history of the defence was recounted in terms referred to by Darling J in *R v Peel*, and conveniently set out in ‘*Brook’s Abridgment*’. It stated the reason for the law was founded on the assumption a woman would never dare to contradict her husband: an assumption which Lord Ullswater argued was no longer in accordance with reality. It followed “respect for the law” could not co-exist with such a law that was not itself in accordance with “our customs, with our habits of thought, and with the social relations of the time”.<sup>101</sup> Lord Ullswater then cited a few sentences from Darling J’s ruling:

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<sup>98</sup> Lord Askwith had by contrast sent a telegram to Schuster from Sloane Square on 21 March, received at the House of Lords at 10.45am, “Certainly move my question to any day Ullswater takes for his. Askwith”.

<sup>99</sup> His maiden speech as Viscount Birkenhead noted. Ullswater had formerly been Speaker of the House of Commons. House of Lords Debates, vol 49, p697, 21 March 1922.

<sup>100</sup> *Parliamentary Debates*, House of Lords, vol 49 p699, 21 March 1922.

<sup>101</sup> *Parliamentary Debates*, House of Lords, vol 49 p699, 21 March 1922. He added light-heartedly the marital experience “of any of your Lordships” would confirm his supposition and “Bachelors, with more confidence in themselves than experience of women, are the only people who could take another view.”

If it appears on the facts that the husband was present when the wife committed the crime, the presumption is that she was acting under the coercion of her husband, except in certain cases. It would not be so in murder or treason. In my judgment it is not a doctrine which should be extended seeing how things have altered in the last few years in this country. I should do nothing to extend the doctrine because I think it is absolutely inappropriate to modern life.

The rationale for a rule of law which created a privilege for only certain women “in Saxon or Norman times” now lacked all validity as it now no longer represented a true picture. Although he accepted that “in many cases” a married woman may be able to prove that she was coerced by her husband into crime, that did not provide any necessity for the continuation of the general presumption of that coercion – which was itself an indictment of contemporary uxorial status. Where coercion was alleged a wife should be “entitled to prove it and to be acquitted; that is to say, on the facts she ought to get her acquittal.” The confined objective of his speech was to have the presumption removed as “it connotes an inferior and degrading status”<sup>102</sup> which conflicted with the whole tendency of the current social milieu. It was inconsistent with the broad thrust of modern equalising legislation which had sought to elevate the status of women, to the position of equality by removing gender distinctions as a basis for differential treatment under the law. He therefore asked the Lord Chancellor whether the latter would introduce a Bill to abolish the presumption and the doctrine, noting that there already existed a drafted precedent to achieve this in the short Bill, prepared in 1879 as annexed to the Report of the Royal Commissioners on the Criminal Code.

Lord Ullswater referred to the letter to *The Times* written by Sir Harry Poland KC a few days earlier,<sup>103</sup> which had observed that as long ago as 43 years earlier such a recommendation had been made, but not acted upon. He felt convinced that public sentiment would be equally in favour now of that recommendation. Scottish law, he added with an allusion to Lady Macbeth,<sup>104</sup> had never provided for the presumption of coercion and the comparatively

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<sup>102</sup> *Parliamentary Debates*, House of Lords, vol 49 p 699; 21 March 1922, emphasis in original.

<sup>103</sup> *The Times*, 17 March 1922. In fact there had been a recommendation to abolish the presumption three quarters of a century earlier: Criminal Law Commissioners, Second Report, (1845) vol 24 *Parliamentary Papers*, pp12-13.

<sup>104</sup> *Parliamentary Debates*, House of Lords, vol 49 p700; 21 March 1922, “May I point out this presumption does not exist in Scotland. I suppose that in the country whose inhabitants have Lady Macbeth always in mind they would not be likely to suppose that a husband would be capable of coercing his wife.”

asinine state of English law on this subject was a “cause for mirth”.<sup>105</sup> It only proved that the absurdity of the presumption, which Charles Dickens in 1837 memorably invoked against the hapless Mr Bumble in *Oliver Twist*,<sup>106</sup> continued to disfigure the state of the law. Lord Ullswater also commented on the recent decision of the Committee of Privileges of the House of Lords in a Peerage case, *Re Viscountess Rhondda’s Claim*,<sup>107</sup> to show that it had been argued there that a woman might even become Commander-in-Chief or become Lord Chancellor one day – so that the status of women was now recognised in virtually every forum as having been very significantly altered from how it had been regarded only some years earlier. He proposed that the 1879 Bill drafted by the Royal Commissioners (including Stephen J) be adopted, convinced that this course would be generally supported by women and in the opinion that it did not raise “controversial issues between the sexes”.

It is a Bill which seems to be to be eminently suitable for a Coalition Government to bring in...I hope that in reply the Lord Chancellor will be able to say that he sees no objection to this alteration of the law, that it will be useful, and will bring the law up to date.

Lord Askwith followed and stated the doctrine of coercion as exemplified by *R v Peel* needed urgent “consideration and revision.” His Lordship then recited from the shorthand note of the sentencing remarks of Darling J to illustrate Mrs Peel had not in fact been coerced it was simply that the law presumed she had been. He emphasised the facts of the case as recorded

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<sup>105</sup> *Parliamentary Debates*, House of Lords, vol 49 p700, 21 March 1922, stating Darling J in *R v Peel* had described, by contrast, the doctrine of marital coercion as a “melancholy” one.

<sup>106</sup> “That is no excuse replied Mr Brownlow...for the law supposes that you’re wife acts under your direction. If the law supposes that, said Mr Bumble...the law is an ass, an idiot.”

<sup>107</sup> [1922] 2 AC 339 (HL): Committee for Privileges, 27 June 1922. On 2 March 1922 Sir Gordon Hewart KC, the Attorney General, offered no opposition to the claim and Committee reported in favour of it. But on 30 March 1922, with the trial of *R v Peel* intervening, on the motion of Viscount Birkenhead LC, the report was referred back to the Committee for reconsideration and the case was reargued on 18 May 1922. By that time, Hewart had been elevated to Lord Chief Justice, on 8 March 1922. Sir Ernest Pollock KBE KC, was appointed Attorney General to succeed him: see [1922] 2 AC *Judges, Law Officers, Etc. Memoranda*. Counsel for the Peeress was G J Talbot KC, who along with Sir Ernest Pollock, was a member of the Ivory Committee. By a majority of 20-4 (Viscount Haldane and Lord Wrenbury among the dissentients), it was held the *Sex Disqualification (Removal) Act 1919* did not permit a Peeress of the United Kingdom in her own right, to receive a writ of summons to Parliament. This was consistent with: *Chorlton v Lings* (1868) LR CP 374 (women incapacitated from voting at Parliamentary elections); *Beresford-Hope v Lady Sandhurst* (1889) 23 QBD 79 (CA) (women incapacitated from being elected to a County Council); *Nairn v University of St Andrews* [1909] AC 147 HL (Sc) (women unable to vote for Parliamentary representative of Universities); cf *Edwards v Attorney General of Canada* [1930] AC 124 (PC) it was held that the word “persons” in the British North America Act included women and thus made them eligible for the Senate.

by the judge amply demonstrated her reliance on this ancient presumption only demonstrated that the relevant law had ossified.

I shall assume nothing as proved against you which, in my judgment, is not conclusively proved...If I believed that you really had coerced your wife into taking part in these frauds with you, I would pass upon you a very heavy sentence, but notwithstanding what I look upon as a fiction of our law, I do not believe that you coerced her into doing anything which she did in the course of this scheme to defraud the bookmakers. You both profited by it, and I can see no evidence at all that she knew less about it than you did, or that she was a weak person who was compelled by you to do something which would have revolted her. I therefore take it that you were not guilty of that cruel and wicked act [of coercion] which the law would assume you to be guilty of.<sup>108</sup>

Lord Asquith remonstrated that the assumptions made by the trial judge were unfair, as by acquitting her on the basis that there had been no case to answer, Mrs Peel was deprived of the opportunity of giving evidence to deny that she had any complicity in her husband's fraud. He added he supported an inquiry as to whether the common law presumption should continue to remain part of English law.

A former Lord Chancellor, Lord Buckmaster rose and stated that he was "utterly unable to agree"<sup>109</sup> with the reformatory arguments of Viscount Ullswater:

It is my firm conviction that the bulk of women to-day act under the direction of their husbands, both those who declined to say they would obey at the altar, and those who did say they would obey. That is most assuredly true as you get down into the poor and poorer conditions of life.

He added the presumption had not been introduced into the common law by people unaware of human nature:

and men and women were much the same then as they are now. You have not changed women by enabling them to vote, and enabling them to sit in all sorts of places. They are still what they were before these different opportunities for showing their capacities were given to them. And men are just the same too. If a woman commits a crime in the presence of her husband, I

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<sup>108</sup> *Parliamentary Debates*, House of Lords, vol 49 p702, 21 March 1922.

<sup>109</sup> *Parliamentary Debates*, House of Lords, vol 49 p703, 21 March 1922, stating "I do not agree with his view of life. I do not agree with the illustrations he has given."

think it shows the immense sagacity of the Common Law when it says you shall assume she was doing it under his direction.<sup>110</sup>

He stated that from what he had read of *R v Peel* “the woman had acted under the direction of her husband, and had she been acting alone she never would have done the things she did, and the fraud would never have been perpetrated.” His speech was truculent and reactionary.

For the government Viscount Birkenhead LC stated Stephen’s *‘Digest of the Criminal Law’* “accurately summarised”<sup>111</sup> the current law in relation to marital coercion.<sup>112</sup> He emphasised the doctrine “is actually a limiting one” as it did not apply to high treason or murder. (This was a facile point as for most practical purposes the doctrine applied across the board to every act or omission proscribed by criminal law.) He acknowledged there were valid divergent views, as demonstrated by the irreconcilable positions of Viscount Ullswater and Lord Buckmaster. The very fact of the non-implementation of the Report of the Royal Commissioners on the Criminal Code in 1879 might equally have suggested that opinion then too was not altogether uniform on this subject. The Lord Chancellor then added:<sup>113</sup>

But I do believe it to be the fact that in the lower orders of society – if I may use an expression to which I object – in the humbler ranks of society, it is, in my judgment, absolutely true that there is a very great degree of that kind of control which our ancestors had in their minds when they surrounded a woman with this protection. Then the question arises – and it is a difficult one – Has the gradual conquest of various offices and positions by women altered that which is basic and fundamental?”

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<sup>110</sup> The Marquess of Aberdeen and Temair was the last speaker in relation to the Questions. He remarked that a Lord High Chancellor of Scotland resigned his office c1691 rather than carry out the terms of a Scottish Act which proposed to make husbands liable for the non-attendance of their wives at church, as wives were perfectly well able to judge for themselves: *The Times*, 22 March 1922. It noted the Marquess had actually identified the former Lord High Chancellor of Scotland as his ancestor “the first Earl of Aberdeen”. This point was omitted from the formal Hansard version of the speech. *Parliamentary Debates*, House of Lords, vol 49 p706, 21 March 1922.

<sup>111</sup> *The Digest* heavily qualified its view as to the state of the law eg “It is uncertain how far this principle applied to felonies in general...It probably does not apply to robbery...It seems to apply to misdemeanours generally.”

<sup>112</sup> “If a married woman commits a theft or receives stolen goods knowing them to be stolen in the presence of her husband she is presumed to have acted under his coercion, and such coercion excuses her act; but this presumption may be rebutted if the circumstances of the case show that in point of fact she was not coerced. It is uncertain how far this principle applies to felonies in general. It does not apply to high treason or murder. It probably does not apply to robbery. It applies to uttering counterfeit coin. It seems to apply to misdemeanours generally.”

<sup>113</sup> *Parliamentary Debates*, House of Lords, vol 49 p705 21 March 1922.

Lord Birkenhead concluded he was not prepared to definitely commit to any decision on this topic, in the absence of further reflection. He specifically stated that little authority should be attributed to the opinion of a single puisne judge as in *R v Peel*, who was making a ruling coloured by the particular facts of that case, as a much more complex issue was fundamentally at stake. He announced that:

not only this matter but various other questions affecting the responsibilities of women require reconsideration in the light of the changes which have taken place; and I propose, after consultation with the Attorney-General, to set up a small but highly expert Committee which will express itself upon the question of principle, and make a Report to me on the whole subject. Without the Report of such a Committee, and giving further reflection to it, I am not prepared to recommend or carry out legislation.<sup>114</sup>

On 22 March 1922 a letter to the editor was published in *The Times*, from Lady Frances Balfour,<sup>115</sup> writing as President of the National Council of Women of Great Britain and Ireland. She protested<sup>116</sup> at the outcome of the *R v Peel* case as it “brought vividly before the public one of the absurdities surviving in our law of married women.” She noted the amelioration brought about by the *Married Women’s Property Act 1882* [UK] and the significant decision of the Court of Appeal in *R v Jackson*<sup>117</sup> which had finally “negated a claim that a husband had the right to imprison his wife”. Lady Balfour asserted that the extinction of the alleged common law right of a husband to imprison his wife meant that the common law presumption of marital coercion also should be similarly ended, as the two alleged common law rights stemmed from the same theory of the right and responsibility of a

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<sup>114</sup> *Parliamentary Debates*, House of Lords, vol 49 p705, 21 March 1922.

<sup>115</sup> (b 1858 – d 1930), daughter of the Duke and Duchess of Argyll, and sister in law of the former British Prime Minister (1902-1905), Arthur Balfour, 1<sup>st</sup> Earl of Balfour.

<sup>116</sup> PRO:LC02/584. A Mrs C Macmillan also wrote directly to the Lord Chancellor perturbed by the “Peel Case and the Law of Coverture”, a letter which Schuster acknowledged on 23 March 1922.

<sup>117</sup> [1891] 1 QB 671 (CA) (Lord Halsbury LC, Lord Esher MR, Fry LJ). In *Peck v Peck* (1778) Cas Temp Lif, p293 [Reports of Select Cases argued and determined in the High Court of Chancery in Ireland principally in the time of Lord Lifford] the case was heard on the Petty Bag Side of the High Court of Chancery. After nine months of marriage Mrs Peck left her husband to reside in her father’s home upon an allegation of ill-treatment by the husband. Mr Peck applied by petition to the Chancellor for a *writ de homine replegiando* alleging that she was unlawfully detained by her father. At p295 Mr Prime Serjeant Hussey Burgh for the husband submitted that this writ (was unlike a habeas corpus which would “set a person at liberty”) would have the effect that this “lady, when delivered under this writ, can go where and unto whom she lawfully may”. The Lord Chancellor ordered the writ to issue “declaring that if the husband used it for any improper purpose, or acted unduly in consequence or under colour of it” he would expose himself to severe penalties. In *Atwood v Atwood* (1718) Pr Ch 492 it was held that a wife cannot either by herself or *prochein amy* (next friend) bring this writ against her husband; for he had by law a right to the custody of her and the converse did not apply.

husband to dominate and control his wife. Such a notion was now utterly at odds with the emancipated status of modern British women. She added that the National Council of Women advocated the earliest possible demise of the marital coercion doctrine.

At the same time the wife's position as her husband's property is still in practice, as for example, when she is not allowed to decide for herself, like other adults, whether or not she shall submit to a surgical operation. Her husband must first give his consent. We submit that these doctrines, which belong to an age of servitude and serfdom should be specifically annulled by legislation, so that marriage may become an equally responsible partnership, which is necessary to the building up of the highest kind of family life.

## PRESS REACTION TO LORD CHANCELLOR'S SPEECH

*The Times*, on 22 March, approvingly referred to the fact Lord Ullswater had called for urgent revision of the law and that the Lord Chancellor had announced that a Committee would be appointed to consider the whole question of the status and responsibility of women under the law in the light of their changed standing. But despite that statement, the eventual terms of reference were significantly narrowed; only an attenuated reference was eventually bestowed. The Committee which was shortly to be established was only tasked<sup>118</sup> "to consider the doctrines of the criminal law with reference to the wife's responsibility for crimes committed by her in the presence of or under the coercion of her husband, and to report what changes, if any, are desirable in the criminal law upon the subject".

## SELECTION AND FORMATION OF THE COMMITTEE

On 4 April 1922 Schuster wrote<sup>119</sup> to Avory J stating Lord Birkenhead had decided "after consultation with the Lord Chief Justice"<sup>120</sup> to set up "a small expert Committee" and asked

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<sup>118</sup> Warrant of Appointment, Lord Birkenhead LC, 1 April 1922 'Report Of The Committee On The Responsibility Of Wife For Crimes Committed Under The Coercion Of Husband' [The Avory Report] Cmnd 1677, His Majesty's Stationery Office 1922.

<sup>119</sup> PRO LC02/584.

<sup>120</sup> Lord Hewart.

Avory J whether he would accept the Chairmanship of it. In addition, Avory J<sup>121</sup> was invited to make any observations he may have on the suggested terms of reference of the Committee. The next day Avory accepted the nomination and on 7 April he wrote to Schuster in reply stating he had no suggestion in that regard. Schuster then wrote to the Attorney General on 6 April stating as the Lord Chancellor had announced in the House of Lords he proposed to establish a Committee to consider the law exemplified in *R v Peel*, both the Lord Chancellor and the Lord Chief Justice were of the opinion one of the Law Officers ought to be a member of the Committee. The Attorney General, Rt Hon Sir Ernest M Pollock KBE, KC, MP, replied by handwriting a response on Schuster's letter; "Yes, I would wish myself personally to be a member of the Committee EMP 8/4/22."<sup>122</sup> On 7 April Schuster wrote to His Honour Judge Sir Alfred Tobin K.C. of the County Court inviting him to be a member and stating that the Attorney General would also be a member of the Committee. H D Roome<sup>123</sup> of 5 Paper Buildings, Sir Archibald Bodkin, the Director of Public Prosecutions, Judge Tobin, Travers Humphreys and Sir Richard Muir both of 3 Temple Gardens<sup>124</sup> and G J Talbot KC all accepted nomination to the Committee. On 13 April Schuster wrote to Avory revealing the appointment of "the 'Coercion' Committee". The Warrant of Appointment by Lord Birkenhead is dated and signed by him on 1 April 1922, yet none of the members had even been approached until later in that month. There clearly had been some ante-dating of the Warrant by the Lord Chancellor. On 2 May the Lord Chancellor's office circulated to "the press and the Law Papers", the membership and terms of reference of the Committee.<sup>125</sup> *The Times* of Wednesday 3 May 1922 reported a "Legal Committee of Inquiry" had been set up<sup>126</sup> to consider the doctrine of marital coercion. No time frame for the completion of the inquiry

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<sup>121</sup> Avory was described as a "spare, attenuated little man known familiarly to the more facetious counsel as "The Acid Drop": Iain Adamson, *A Man of Quality, a biography of the Hon Mr Justice Cassels*, Frederick Muller Limited, London, 1964 p72.

<sup>122</sup> PRO LC02/584.

<sup>123</sup> The Senior Editor of the then current edition of *Archbold Criminal Pleading Evidence and Practice*.

<sup>124</sup> Judge Sir Alfred Tobin KC occupied a flat at that address: PRO LC02/584, letter dated 13 April 1922.

<sup>125</sup> PRO LC02/584. A legal periodical described it as "a very strong committee": (1923) 87 JP 201. It was all male and no non-lawyers were invited onto it.

<sup>126</sup> PRO LC02/584. Tobin wrote to Schuster on 13 April concerned the Committee might meet before 28 April as he would be away on holiday in Algenires. He enclosed 2d postage so Schuster could send a letter on to Avory J effectively asking on behalf of Tobin for an adjournment of the first meeting. Schuster replied on the same day that he thought Avory J would "hardly think of calling a meeting before Easter". He added "I return your 2d as your letter to Avory will be franked".

was stated. The apparently<sup>127</sup> open-ended time-horizon for the Committee to complete its work had the opposite effect, if one was intended at all. For the Committee produced its six page report within three effective weeks of being established, as its initial meeting occurred not before the last days of April and the Report was formally transmitted to the Lord Chancellor in the middle of May. The speed by which the Report was produced is highly indicative of a superficial investigation leading to its conclusions and its recommendations.

On 6 May 1922 Bowker wrote<sup>128</sup> to Schuster stating the Attorney General was required to answer a fifth parliamentary question in the Commons pertaining to the law of marital coercion. This question, from Sir James Greig MP required a written answer for Monday 8 May:

To ask the Prime Minister whether the committee recently appointed by the Lord Chancellor to inquire into the inequalities in the law as between men and women is confined to matters relating to the Criminal Law; and, if so, whether he will consider the advisability of extending the inquiry so as to comprise also matters relating to the Civil Law?

The draft answer for a reply to be given by the Attorney General was, “The answer to the first part of the question is in the affirmative. It would not be advisable to extend the present inquiry as suggested, as an inquiry with so wide a scope would necessarily be prolonged”. No observations on the draft reply were made by the Lord Chancellor. The Question did not embarrass the Government as it dealt only with the separate position under civil law. No challenge was made to the tightly circumscribed terms of reference<sup>129</sup> focusing on the criminal law.

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<sup>127</sup> PRO LCO2/584, Schuster wrote to Avory J on 6 April 1922 stating “the Lord Chancellor wished the announcement of the appointment of the Committee to be made before Easter”.

<sup>128</sup> PRO LC02/584, Law Officers’ Department to Sir Claud Schuster KCB, CVO, KC.

<sup>129</sup> PRO LCO2/584. On 6 April 1922 Schuster wrote to the Attorney General stating “the exact terms of reference are in process of settlement with Avory”.

## THE AVORY COMMITTEE METHODOLOGY

The Committee decided it needed to address three issues. These were:<sup>130</sup>

- (1) What law is the subject at the present time as administered in practice?
- (2) The effect of the existing law as exemplified in the Peel case.
- (3) What alteration, if any, is to be recommended?

In relation to identifying the present state of the law the Committee hesitantly concluded the law “as applied in practice, appears to be” as they then described. The inapplicability of the defence to the crimes of murder and treason was accepted but the Committee also concluded that the defence applied “to all other felonies and to all misdemeanours.”<sup>131</sup> It also concluded that the presumption was only a prima facie one,<sup>132</sup> capable of being rebutted where the evidence showed where the wife had “done some independent act from which the inference can be drawn that she was acting voluntarily.”<sup>133</sup> In those circumstances there was a case to answer and it became a matter of fact for the decision maker to decide whether the wife had acted voluntarily or under coercion. The presumption only applied when the criminal acts were committed in the presence of her husband so the presumption and the entire defence did not avail her where the husband was absent or even where “crimes were committed by his order or procurement” if he were not concurrently present with her at that time. The Committee did not examine the rationale for the requirement of the presence of the husband or whether he could be constructively present.

The exceptional nature of the defence was acknowledged as there was no similar privilege from the criminal law for other persons in broadly parallel circumstances of possible

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<sup>130</sup> Cmnd 1677 p3.

<sup>131</sup> In *R v Mabel Smith* (1916) 12 Cr App R 42, 43 (CCA) Avory J had delivered the judgment of the Court, affirmed the operation of the defence but may have unintentionally extended it to a misdemeanour. The headnote of the report at p42 stated “The presumption...extends, semble, to misdemeanours.” This was a most audacious appeal, as the trial judge had recognised the wife as the much more culpable party – sentencing her to three months imprisonment – the husband a bindover.

<sup>132</sup> Confirmed in *R v Green* (1913) 9 Cr App R 228, 231 per Isaacs LCJ. The Lord Chief Justice said “The presumption is not one which rests on technical grounds, but is based on a knowledge and understanding of the relations that usually exist between husband and wife.”

<sup>133</sup> In *R v Mabel Smith* (1916) 12 Cr App R 42 Avory J had stated how the law should operate in practice: “If it appears that she was principally instrumental, acting voluntarily, and not by coercion (even though the husband was present and concurred), she will be guilty.”

subordination, such as a husband, a child of the family or an apprentice employee. No linkage was made to the possible cognate defence of superior orders applicable to military personnel required to unquestioningly comply with orders from superior officers. The Committee did not refer to a single case decision or a single textbook or institutional writing in purporting to record its view of the present state of the law, which did not extend to more than three quarters of a page of the Report. In noting the defence was not a general one, but one that did generally apply to married women, the Committee acknowledged that coercion that did not constitute duress as defined by the criminal law, could still be “taken into account in awarding punishment”.

#### MARITAL COERCION “AS EXEMPLIFIED IN *R v PEEL*”

The six-member Committee then moved to consider the case of *R v Peel*. Two members of the Committee had been respectively counsel for the prosecution and for the defence in the trial.<sup>134</sup> The Committee reported Mrs Peel had been betting on her own account using her own secret code name which she had registered with the bookmakers and she had used her own separate banking account for the transactions. Further, at the time Captain Peel was tendering the telegrams making the bets she “was telephoning to some person at the time when she might have ascertained the winner of this particular race, and was at the time in verbal communication with her husband.” On these facts the Committee recorded that Darling J held there was no evidence to rebut the presumption that she was acting under the coercion of her husband “as everything that she did was done in his presence and by pre-arrangement with him.”

The directed verdict to the jury to acquit was subsequently to be seen in light of the remarks of the judge that Mrs Peel was not in fact acting under the coercion of her husband, but for her own personal pecuniary benefit.<sup>135</sup> The Committee had gone as close as possible to saying

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<sup>134</sup> Travers Humphreys, one of the Prosecution Counsel, and Sir Richard Muir, one of the Defence Counsel.

<sup>135</sup> An expression used in the Report, not found though in any of the reports of the trial itself.

Darling J had wrongly found Mrs Peel had no case to answer; without saying it.<sup>136</sup> Their review resonated with an understanding the judge should never have withdrawn the case from the jury, as the facts showed significant concerted action between the spouses to place the bets in such a ‘timely’ manner. It was almost as though Darling J had had second thoughts about his ruling (in the knowledge of the press and public reaction to it) which he gave vent to in the sentencing remarks he made in relation to the husband.

The methodology employed was a comparative exercise to understand the state of the law in Scotland, the Colonies and a few other jurisdictions with a common law background. (It is striking the Committee never considered the earlier decision in *R v Torpey*<sup>137</sup> in 1871 and the significant commentaries on the state of the law that that decision had provoked by lawyers and Law Lords in Parliamentary Debates.) The Committee superficially considered the law from a number of other jurisdictions. It correctly noted Scottish law had never<sup>138</sup> recognised the defence of marital coercion. (Their statement should be contrasted with that made by the Scottish Law Lord, Lord Colonsay to Lord Hatherly LC, related by the latter, in the Parliamentary Debates in the House of Lords in 1871. The Lord Chancellor there had specifically but incorrectly remarked that Scotland did recognise marital coercion, but not its associated presumption.) Scottish law recognised neither.

Reference was made to the Penal Code of India which also contained no provision at all for the defence of marital coercion. That Code had been drafted by McCauley and Stephen J then a Legal Advisor to the British Government in India. Its form and content had influenced other British controlled jurisdictions. South African common law was quickly considered, again without any specific reference to either case law or text. The Committee concluded South Africa appeared to recognise coercion as a defence, while not recognising the presumption.

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<sup>136</sup> The Justice of The Peace, in reviewing the *Avory Report*, stated that the Committee left it “to be inferred that a miscarriage of justice resulted from the enforcement of the law as it stands”: (1923) JP 201.

<sup>137</sup> (1871) 12 Cox CC 45. See *infra* fn 367-379.

<sup>138</sup> Note the robust view of Scotland law that flatly rejected the notion of the coerced wife. In William Blackwood, *Principles of the Criminal Law of Scotland by Archibald Alison*, Edinburgh, 1832 at page 668: “1. A wife is not excusable in the commission of any crime by the influence or power of her husband, if she has taken any part in its commission along with him” At p669 it was later appositely remarked that the adoption of the *Avory Report* “would have the effect of assimilating the law of England and Scotland” on this point: *The Criminal Justice Bill and the Doctrine of Coercion*: (1923) 87 JP 201,202.

This broad generality was incorrect as different common law applied to different parts of South Africa and in those parts more heavily influenced by the English common law the defence and the presumption had been recognised and acted upon by the courts but by the time of the Committee's report South Africa had completely eschewed the entire marital coercion doctrine.<sup>139</sup> The colony of St. Lucia,<sup>140</sup> with its French Civil Code background was then noted as having recognised the defence, but not the presumption, in its recent *Criminal Code 1921*.

In relation to Australia, the Committee only referred to the *Criminal Code 1901* [Qld] and the *Crimes Consolidation Act 1915* [Vic], asserting those statutes were to the same effect as the common law of South Africa. This too was incorrect. An Australian commentator derided the incomplete and wholly erroneous view of the state of the law in that jurisdiction that the Committee had availed itself of.<sup>141</sup>

The Committee then made the sweeping and aggravatingly erroneous statement that with the exception of the United States of America, no jurisdiction could be found in which the presumption of marital coercion still existed. Even this statement was too broad as a number of appellate courts in some of the American states had by that time ruled that the presumption and/or the defence no longer represented the common law there.<sup>142</sup> A significant number of British Colonies, Protectorates and other common law jurisdictions at that time retained the

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<sup>139</sup> *R v Mtetwa* (1921) TPD 227, Wessells JP concluding that the common law position which had existed in certain parts of South Africa was inconsistent with Roman-Dutch law and should no longer be followed.

<sup>140</sup> s144, Chapter Sixth *'The Civil Code of St Lucia'* 1879, Harrison and Sons, St Martin's Lane, London, 1879. "A husband owes protection to his wife; a wife obedience to her husband."

<sup>141</sup> J G Norris, *Private Civil Subjection* [1928] 2 Australian Law Journal 10. The *Avory Report* was described as "strange to a Victorian lawyer" as to its finding of Victorian law. The Report in relation to the Victorian statute was erroneous as that Act did not purport to be a complete codification of the criminal law. The writer noted that the presumption had frequently been recognised in Victorian Courts: *R v Bailey et Uxor* (1864) 1 WW&A'B(L) 20; *R v Bolton* (1885) 11 VLR 776. At p12 s47 *Criminal Justice Act 1925* was doubted as representing a desirable change in the law. The Avory Committee also did not note that s20 (2) *Criminal Code Act 1924* [Tas] extirpated both the presumption and the defence; leaving married women in an identical position to all other persons *sui juris*. In Victoria, South Australia, Western Australia, Queensland and New South Wales the defence of marital coercion existed, although it was "not at all certain" to what extent precisely the presumption existed in each state.

<sup>142</sup> *Infra* ch 3 which details the position across the various American states from *Freel v State* (1860) 21 Ark 212 removing the presumption, to *State v Owen* unreported Supreme Court of North Carolina No COA 98-413, 15 June 1999 upholding the existence of the presumption.

presumption as part of their common law<sup>143</sup>. Finally, reference was made to the *Criminal Code Act 1893* [NZ] which introduced the general defence of “compulsion” to replace the earlier common law defence of marital coercion thereby conflating the position of married women with all other men and women. That legislation had specifically removed the presumption; and with the removal of the presumption the defence did not independently survive. In a single line the *Criminal Code 1906* [Can] was noted as being to the same effect as the law in Queensland, South Africa and St Lucia, whereas in fact it had abrogated the entire doctrine. The Committee had seriously misdirected itself as to the state of the common law jurisdictions. The speed within which it reported left it no serious opportunity for any scholarly appreciation of the nuances within the jurisdictions they considered and especially those to which they did not even refer.

The Committee particularly noted that for England and Wales, as early as 1878, in the Report of the Royal Commissioners appointed to consider the law relating to indictable offences had in their Draft Code recommended the abolition of the presumption as to coercion. (That was a reference to s23 of the Draft Code which, after providing that compulsion would be a general defence stated: “No presumption shall henceforth be made that a married woman committing an offence in the presence of her husband does so under compulsion.”) Apart from a tangential reference to *Brown v Attorney General for New Zealand*,<sup>144</sup> reference was approvingly made to a Note in *Stephen’s Digest of the Criminal Law*<sup>145</sup> which in part stated

Surely as matters now stand and have stood for a great length of time, married women ought as regards the commission of crimes to be on exactly the same footing as other people”.

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<sup>143</sup> The Australian Capital Territory only abolished the presumption in 1999 after a decision of its Supreme Court that the presumption continued to form part of its law: *R v Batt* unreported, Supreme Court of Australian Capital Territory, SCC 18 of 1999, 1 March 1999, Higgins J; *Crimes Amendment Bill (No 2) 1999* [ACT] introducing now s407 *Crimes Act 1990* [ACT].

<sup>144</sup> [1898] AC 234,237 (PC). The only decision other than *R v Peel* itself referred to by the Committee was *Brown v Attorney General for New Zealand* where Lord Halsbury said: “The mere fact that the parties are married never even formed a presumption of compulsion by the husband. Even as early as Bracton’s time, if the wife was voluntarily a party to the commission of a crime her coverture furnished no defence.” The bare fact of marriage never generated the presumption because it required the additional fact that the husband was present before the defence could operate.

<sup>145</sup> 5ed 1894, Note 1 to Article 31.

The Committee further adopted the same Note that the doctrine of coercion is, “...uncertain in its extent and irrational as far as it goes and appears to have originated in the anxiety of Judges to devise means by which the excessive severity of the old Criminal Law might be evaded”.

## THE AVORY COMMITTEE RECOMMENDATION

The Committee then considered two alternative proposals for alteration of the criminal law:

- (1). To abolish any presumption of coercion when a crime is committed by a wife in the presence of her husband leaving the defence of coercion open to the wife and to be established in the ordinary way.
- (2). To abolish the whole doctrine of coercion by the husband as a defence for the wife, leaving her on the same footing as other people free to establish any defence of that kind of compulsion (i.e. the fear of immediate death or grievous bodily harm) which affords a defence to any person except in the case of certain specified crimes.

In a short conclusory passage the Committee described the present law as “unsatisfactory” without condescending to particularity. It noted the “altered status of married women under the *Married Women’s Property Act* and *The (sic) Sex Disqualification Removal (sic) Act*” and unanimously recommended the second alternative proposal be adopted. The entire defence and apparatus of marital coercion as a defence in criminal law would be abolished, assimilating the position between wives and husbands and others, but leaving any wife, as much as any other person, free to establish any other defence including the common law defence of duress, or to urge the coercion in mitigation of sanction.<sup>146</sup>

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<sup>146</sup> In *Olsen v The Queen* unreported Northern Territory Court of Appeal, [2002] NTCCA 7, 14 June 2002, the significance of marital coercion was considered in a mitigation context, relying on *Ewart v Fox* [1954] VLR 699. In *R v Pierce* (1941) 5 J Cr L 124,126, although the wife’s defence failed, the sentence imposed on the wife was only one sixth of that of her husband in their joint enterprise. In *R v Z* [2005] 2 AC 467, 492 para [22] Lord Bingham acknowledged that where the defence of duress failed “it is always open to the judge to adjust his sentence to reflect his assessment of the defendant’s true culpability”.

A broad reforming perspective by the Committee was neither authorised nor expected as its jurisdiction was confined by the limiting nouns “coercion” and “presence” of the husband. No inquiry therefore could apparently be made into the other important facet of the ruling of Darling J in *R v Peel*, which confirmed that the intraspousal exemption from conspiracy, also existed under the common law. No synthesis of the special position of married women under the substantive criminal law was possible under such terms of reference. The significant issue as to whether a wife was incapable of being an accessory after the fact to the crime of her husband was never properly before the Committee, although in one flaccid paragraph<sup>147</sup> the Committee did, without any arguments or reasoning, simply state that there was no need to alter the state of the law in relation to the position of a wife in relation to other modalities of criminal participation. No overarching consideration of the wider implications of recommending only the extirpation of both the presumption and the entire defence was ever given. The conclusion of the Avory Committee was a recommendation that sought to entirely eliminate the marital coercion defence, leaving the remaining corpus of the criminal law intact, in relation to uxorial privilege. The unrelenting media attention and the obvious disenchantment by parliamentarians in both Houses with *R v Peel*, provided the impetus for a quick-fix legislative solution to be recommended. The opportunity for a wider vision, which would have challenged the suggested rationale for the other uxorial privileges, was forsaken. The law therefore was not subjected to any close analytical scrutiny as such introspection would have sat uneasily with the very recent decision of the Privileges Committee of the House of Lords only two months earlier, which had reversed itself in the same matter by eventually refusing to grant *Viscountess Rhondda’s Claim*, notwithstanding the *Sex Disqualification (Removal) Act 1919* [UK]. In that case Lord Birkenhead LC had been instrumental in fomenting the opposition to the Peeress. The inference is that the Lord Chancellor did not see that it was politically astute to have an all-embracing inquiry into the status of married women under the criminal law as it would necessarily throw up the whole issue of gender disparity and inequality. The Lord Chancellor, Lord Buckmaster, and even Lord Ullswater all accepted there still did exist in the lower stratified class system of England

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<sup>147</sup> Cmnd 1677 p6, “We do not recommend any alteration in the existing law under which a husband or wife are not liable to be indicted for conspiracy and a wife not liable to be indicted as an accessory after the fact to her husband’s felony and we report accordingly.”

significant evidence that husbands did control the decision-making of their wives who occasionally yielded to their commands under physical or psychological coercion.

In the last paragraph no recommendation was made to change any other aspect of uxorial privilege. This last paragraph is particularly intriguing because the recommendation of maintaining the existing law in all other cognate respects was itself wholly outside the terms of reference. More importantly, there is no evidence whatsoever the Committee had considered the comparative law on these points in the other jurisdictions to which reference had been made in relation to marital coercion. No documents even exist in the Public Records Office that the implications in terms of wider principle of this recommendation, were ever addressed by the Committee. Nor did it purport to rationalise how this position it was advocating in relation to both the spousal exemption from conspiracy and the privilege of uxorial and accessorial liability in criminal law, could be maintained consistent with its primary recommendation to abolish both the defence (and presumption) of coercion. The final recommendation appears to be almost a gratuitous tack-on. In addition, the Committee would also have had to deal with the implications of the very recent decision on 16 May 1922 in *R v Barter*.<sup>148</sup> There the Recorder of London, at the Central Criminal Court, Sir Ernest Wild KC, had remarked at the apparent schizophrenic nature of the law in relation to a married woman, “The law would protect a wife if physical injuries were inflicted upon her by her husband but apparently did not protect her from what was much more serious – cowardly attacks in postcards [by her husband]”, as intraspousal criminal libel was very reluctantly held to be immune from prosecution at common law – because of the fictional unity of the spouses.

The doctrinal importance of the final recommendation in the last paragraph of the Report is that the historical and conceptual linkages between the marital coercion position and other examples of uxorial special status in the criminal law were never explored. The Report produced an ad hoc solution to quickly satiate the baying public and media. The price for the inattention to these ramifications means that over 80 years later English criminal law still

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<sup>148</sup> (1922) JP 176 where it was reconfirmed that in law, an indictment against a husband did not lie for publishing a criminal libel concerning his wife, on the basis of the doctrine of conjugal unity; following *R v The Lord Mayor of London* (1886) 16 Cox CC 81. A wife had been held not to be a separate person where a defamatory statement was made only in her hearing to a third person, so there was no sufficient publication: *Sesler v Montgomery* (1889) 21 P 185, 186 (California: SC).

provides that spouses are incapable of conspiring alone together and no coherent single treatment of the wider issues has been explored either by Parliament or even by the English Law Commission. In other common law jurisdictions too the same piecemeal approach to the reform of the remaining uxorial privileges in criminal law, has meant that only partial inconsistent statutory solutions have been enacted. By contrast the Law Reform Commissioner of Victoria in 1975<sup>149</sup> published a report exclusively devoted to the criminal liability of married persons, which led to the introduction of a hyper-modern statutory form of the marital coercion defence<sup>150</sup>, only available to wives, as well as other associated reforms.

#### MR JUSTICE AVORY SENDS THE REPORT TO THE LORD CHANCELLOR

On 18 May 1922<sup>151</sup> Avory J handwrote directly to the Lord Chancellor enclosing a copy of the Report and adding, “I am glad to say it is unanimous”. The version of the Report, which carries the actual signatures of each member of the Committee,<sup>152</sup> shows Avory had made certain initialled amendments to it. In particular he was insistent the ordinary defence of duress, which the Committee recommended should equally cater for married women as much as any other person, should only be available where there was a fear of “immediate” death or grievous bodily harm. The signed Report inserts the word “immediate” against the initials “HA”.<sup>153</sup> The other amendments made by Avory are insignificant, save he altered the signed final version which carried the paragraph, “In none of these with the exception of the U.S.A. is there to be found any recognition of the presumption of coercion, as an excuse for crime committed by a wife in the presence of her husband”. He also deleted the phrase “as an excuse for” and substituting “in the case of”. But intriguingly, the formal published version<sup>154</sup> of the Report is different again to the formal signed version, as it reads, “In none of these, with the exception of the United States of America is there to be found any recognition of the

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<sup>149</sup> Victorian Law Reform Commissioner, Report No 3 ‘*Criminal Liability of Married Persons (Special Rules)*’ June 1975, Melbourne.

<sup>150</sup> Introducing s336 *Crimes Act 1958* [Vic] by s2 *Crimes (Married Persons’ Liability) Act 1977* [Vic].

<sup>151</sup> PRO LCO2/584. Remarkably though, the Report itself is undated.

<sup>152</sup> PRO LCO29/10.

<sup>153</sup> Horace Avory.

<sup>154</sup> Cmnd 1677.

presumption of coercion, in the case of crime committed by a wife in the presence of her husband”.

## LORD CHANCELLOR COMMUNICATES WITH THE HOME SECRETARY

On 22 May 1922 Schuster wrote to Avory J on behalf of the Lord Chancellor thanking him and the Committee for the “most valuable report”. Schuster sent an advance copy of it on 23 May 1922 to Rt Hon Edward Shortt KC, MP<sup>155</sup> asking for the latter to make observations in relation to “the course to be adopted to effect the amendments proposed”. By a letter of the same date, Schuster wrote to Lord Hewart CJ enclosing a copy of the Report, adding:

The Lord Chancellor thinks it would be desirable to deal with the matter by legislation in the course of the present Session, but before any decision is reached on the matter he would be very glad if you would furnish him with your observations upon the Committee’s proposals.

On 24 May Schuster wrote to The Controller HM Stationery Office asking for the estimated cost of printing and publishing the Report as it was the intention of the Lord Chancellor to lay it before both Houses of Parliament as a Command Paper.<sup>156</sup> On 30 May the Secretary to the Lord Chancellor provided a copy to the Clerk of the Votes & Proceedings office, asking for it to be presented to the House of Commons by “Command of His Majesty”. On 31 May 1922 HM Stationery Office replied that the cost of printing 875 copies of the Report would be £4.10.0,<sup>157</sup> each copy of the report was priced at 2d, as eventually published. *The Times*<sup>158</sup> prominently reported with approval<sup>159</sup> the recommendation in the Report that not only should the presumption be abolished but so should the entire defence. On the same day<sup>160</sup> it also

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<sup>155</sup> The Home Secretary.

<sup>156</sup> Published as Cmd 1677.

<sup>157</sup> This was held up as an excellent example of official economy: *The Times*, 3 June 1922 p15.

<sup>158</sup> *The Times*, 3 June 1922 p11 under the heading ‘Wife’s “Coercion” Plea – Abolition Recommended By Committee’, noting that the Committee accepted that marital coercion, once abolished as a defence, would still be significant evidence in mitigation of sentence. The newspaper reminded readers that it was the acquittal in *R v Peel* which had led to the Report and it affirmed its earlier statement that “this legal protection of the married woman, a remnant not of chivalry, but of serfdom, has more than served its time.”

<sup>159</sup> *The Times*, 3 June 1922 p11 “the Report is admirable for its conciseness and clearness of expression”.

<sup>160</sup> *The Times*, 3 June 1922 p15 “Wife Coercion in Law”, emphasising the common law had over the centuries adjusted itself to social changes and had also “often been jostled and ousted by statute”.

published an editorial critically analysing the presumption as “absolutely inappropriate to modern life” and emphasising the presumption was incongruous with the virtually equal status of married women, which had been substantially secured by the passage of legislation enhancing the rights of married women to property and the equalising effect of the *Sex Disqualification (Removal) Act 1919* [UK]. The continued dangling existence of the marital coercion presumption put English law out of step, not just with other English law, but also within the Empire. The adoption of the proposal in the Avory Committee would leave married women on the same footing as all other people, free therefore to establish any defence. The current law had fallen “out of correspondence with its environment”.<sup>161</sup>

Edward Hall, on behalf of Lord Hewart LCJ wrote<sup>162</sup> on 25 May to Schuster stating the Lord Chief Justice “entirely concurs in the proposals of Mr Justice Avory’s Committee.” Lord Hewart had nominated Avory J to the Lord Chancellor to be the Chairman of the Committee. Thereafter, no progress was made to have the recommendation passed into law. The Coalition Government, led by Lloyd George, did not survive the public humiliation caused by the Chanak Crisis, when Turkey invaded Smyrna. This led to the Conservatives withdrawing support from the Coalition Government and the Ministry fell<sup>163</sup> with the Prime Minister resigning in October 1922. The new Government meant a new Lord Chancellor and a new Attorney-General.<sup>164</sup>

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<sup>161</sup> *The Times*, 3 June 1922 p15, an expression which the editor thought had a biological connotation. (1922) Justice of the Peace 137, 138 noted that Darling J had “undoubtedly performed a public service in calling attention to the inapplicability of an ancient theory of law to the changed conditions of modern relationships”. And at p139 “No-one is prepared to deny that there may still be numerous cases in which women are dominated by their husbands, but the point is that it is no longer reasonable to presume that such is the case”.

<sup>162</sup> PRO LCO2/584 Edward Hall, Royal Courts of Justice to Sir Claud Schuster.

<sup>163</sup> Kenneth O Moran, *Consensus and Disunity: The Lloyd George Coalition Government 1918-1922*, Oxford University Press, USA, 1979, p111. The United Kingdom of Great Britain and Ireland ended on 6 December 1922 when the Anglo-Irish Treaty created the Irish Free State.

<sup>164</sup> Viscount Cave LC succeeded Viscount Birkenhead LC. Sir Ernest Pollock was succeeded by Sir Douglas Hogg (who was Attorney General 24 October 1922 – 22 January 1924), in turn who became Lord Chancellor as Lord Hailsham in 1928.

## THE CONTINUING SUCCESS OF COMMON LAW MARITAL COERCION AFTER *R v PEEL*

Despite the glare of the actual verdict in *R v Peel*, a consequence of that decision was that as a ruling of the King's Bench it bound all the lower courts to apply it. Those courts had no option because of *stare decisis*. The media took significant pleasure in reporting each available instance of the defence being employed and its success or otherwise. Small cases before a magistrate in suburban London now featured as individual reported stories, which appeared to have as their theme an opportunity to collect the remarks of the judicial officers, on the doctrinal merits of the presumption and the defence. Minor court proceedings that would otherwise never have elicited any general public interest now were reported, almost invariably under a headline that specifically incorporated reference to the law of marital coercion.

In *R v Cope*,<sup>165</sup> within a month after *R v Peel*, spouses were indicted, also at the Central Criminal Court, with fraudulent conversion. Judge Atherley-Jones KC directed the jury, upon a submission of no case to answer,<sup>166</sup> to acquit the wife because the evidence showed the husband was “the dominating party” and the evidence pointed “rather to the male than to the female.” The jury returned as directed a formal verdict of Not Guilty; the husband was convicted after trial. The judge stated that:

A married woman acting under the influence of her husband cannot be found guilty. I need not trouble about the logic of the law or its antiquity. It is some comfort to ladies of the jury to know that at any rate it is one of the privileges they still retain.

Just over a fortnight later in *R v Foster*<sup>167</sup> spouses were charged with theft of jewellery from their employer. A detective, who gave evidence for the prosecution stated there was “no

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<sup>165</sup> *The Times*, 11 April 1922, p1, under the heading ‘Another ‘Coercion’ Case – Accused Woman Discharged’.

<sup>166</sup> This decision is wrong in law. Even if there was substantial evidence of coercion by the husband this was always a matter for the jury to decide. There was evidence by which the jury could have concluded that there was no lack of volitional conduct by the wife. The judge had proceeded almost as though the presumption was a presumption of law, rather than a presumption of fact. Further for a wife to act under the influence of her husband wholly fails to satisfy the demands of the defence which requires coercion not influence which can range from benign, neutral to malign. To influence conduct is not to coerce it. In *Kanhaya Lal v The National Bank of India* (1913) 24 TLR 314 (PC), ‘coercion’ under s15 *Indian Contract Act* was considered.

<sup>167</sup> *The Times*, 27 April 1922, p11, under the heading ‘Jewel Theft and ‘Coercion’.

doubt” the wife had acted under her husband’s influence. The Stipendiary Magistrate<sup>168</sup> therefore acquitted the wife. A few months later in *R v Jenkins*<sup>169</sup> spouses were charged with stealing and receiving a purse which had been inadvertently left on their stall by a customer. Mrs Jenkins uplifted the purse and handed it to her husband who put it in the fruit basket. A Magistrate reluctantly acquitted the wife. In *R v Horton*<sup>170</sup> a young wife was acquitted of complicity in fraud with her husband by utilising the defence. Upon her arrest, her husband had the foresight to state to the detective he had coerced his wife into committing the crime.<sup>171</sup> With these periodic press reports of the presumption being employed with considerable success it was not long before the defence was employed in another serious case. In *R v Birt*<sup>172</sup> at the Central Criminal Court before the Common Serjeant, Sir HF Dickens KC it was submitted on behalf of the two wives that they were entitled to be acquitted at the end of the prosecution case, because of the presumption. The Common Serjeant refused to find that there was no case to answer commenting that there was no presumption in law of coercion instead it was a matter of fact whether they had taken independent parts in the receiving of the jewels or whether they were under the control of their husbands. Mrs Birt<sup>173</sup> then gave evidence and the jury acquitted her on the direction of the judge who acknowledged that it appeared that she had acted under coercion. He added it was “an out-of-date and ridiculous principle.”

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<sup>168</sup> Mr D’Eyncourt, Marylebone Police Court.

<sup>169</sup> *The Times*, 17 August, 1922, p5 under the heading ‘*The Law Of ‘Coercion’’*. Mr Forbes Lankester, Stipendiary Magistrate, West London Police Court, stated that he doubted that the presumption of marital coercion could apply, where the initial criminal act was performed by the wife herself, not in the presence of her husband, but he gave her the benefit of the doubt. The husband was convicted of receiving the stolen purse from the wife.

<sup>170</sup> *The Times*, 16 February 1925, p19 under the heading ‘*The Law Of ‘Coercion’’*’.

<sup>171</sup> He said to the officer “It’s quite right. I admit it. My wife acted upon my instructions. She is not to blame.” Mr Hay Halkett, the Stipendiary Magistrate at Marylebone Police Court pointedly remarked that the husband seemed to have an intelligent idea of the law.

<sup>172</sup> *The Times*, 28 November 1922, p7 under the heading ‘*Thieves’ Wives and Coercion Law – The Highgate Jewel Robbery*’. Of the five accused, three men were charged with burglary of the house of Sir Arthur and Lady Crosfield, the other two accused who were charged with receiving the burgled jewellery were wives of the majority of the burglars.

<sup>173</sup> The other accused wife Mrs Clarke was found guilty by the jury. The judge imposed an extremely light sentence on her only ordering her to be bound over to keep the peace. The husband of Mrs Birt had been sentenced to seven years imprisonment as he was “a notorious criminal known to the Johannesburg police.”

In the next year in *R v Cranston*<sup>174</sup> the spouses were charged with theft. The husband pleaded guilty and the wife was acquitted with the Court<sup>175</sup> stating the presumption of marital coercion “was very wise and sensible, and was founded on the wisdom of centuries.” In *R v Malcolm*<sup>176</sup> spouses were charged with obtaining money by false pretences. The husband had committed suicide since his arrest and Sir Richard Muir<sup>177</sup> prosecuting said it was doubtful if the doctrine of “common purpose”<sup>178</sup> applied to spouses, that spouses could not be charged with conspiring only with each other and as marital coercion “was still part of the English law”,<sup>179</sup> the prosecution had decided to withdraw<sup>180</sup> the proceedings against the wife, now a widow. Sir Vansittart Bowater, the Alderman, said<sup>181</sup> “it was time this antiquated dogma about marital coercion was swept away now that women’s rights were equal to men’s in nearly every direction.”

It is remarkable in every case reprinted in *The Times* since *R v Peel* where the defence was employed, the wife was acquitted. It may be supposed that, consistent with its editorial stance, *The Times* was delighting in the publication of these instances. It does also demonstrate that the defence was being far more frequently employed in London alone than has been hitherto demonstrated. On 3 June 1922,<sup>182</sup> *The Times* greeted the recommendation of the Avory Committee that the “whole doctrine of coercion” was to be abrogated, with the editorial comment that the defence was not “a remnant of chivalry, but of serfdom, and has more than served its time.”

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<sup>174</sup> *The Times*, 8 March 1923, p17 under the heading ‘*Wife Coercion*’.

<sup>175</sup> Mr JA Simmons, Stipendiary Magistrate, Marylebone Police Court.

<sup>176</sup> *The Times*, 7 November 1923, p7.

<sup>177</sup> Who had been one of the defence counsel in *R v Peel* the year before.

<sup>178</sup> ie. the doctrine of joint enterprise.

<sup>179</sup> *The Times*, 7 November 1923, p7 under the heading ‘*Doctrine of Marital Coercion*’.

<sup>180</sup> This decision may have been influenced more by gallantry than justice, in which case it showed the defence of marital coercion might cause an injustice where the husband was no longer available for whatever reason as a witness, as it would mean that the wife might be forced in a practical sense to have to give evidence when otherwise she could have relied upon her husband doing so. The decision of the prosecution also shows that while the defence was not invoked by the defendant it remained a significant discretionary factor with the prosecution in the calculus of evaluating the public interest.

<sup>181</sup> *The Times*, 7 November 1923, p7. He referred the papers to the Director of Public Prosecutions for him to take the matter up if he liked. The Director had been a member of the Avory Committee the year before which unanimously recommended the abolition of the defence and presumption.

<sup>182</sup> *The Times*, 3 June 1922, p11.

## A YEAR AFTER *R v PEEL*

Almost a year after the ruling of Darling J, Sir Harry Poland KC, wrote to *The Times*<sup>183</sup> referring to the forceful but unrequited leading article that newspaper had published<sup>184</sup> in the immediate aftermath of *R v Peel*.<sup>185</sup> He lamented the fact that the strong recommendation of the Royal Commissioners<sup>186</sup> on the draft *Criminal Code* in June 1879 that the presumption of marital coercion be abolished had been ignored as no remedial legislation had been enacted. His letter recollected that a private member's Bill<sup>187</sup> had been introduced by Viscountess Astor in the House of Commons would have achieved the same result, as had been proposed in 1879. But that Bill faltered amongst the competition for Government business in the House of Commons. He then declaimed the fact that the unanimous recommendation of the Avory Report to change "this absurd state of the law" had also not been implemented. Sir Harry continued to push for the necessary amendment to the law by another letter to *The Times*,<sup>188</sup> albeit principally written about a proposal to abolish the longstanding law providing for a jury of matrons in capital cases – curiously the one role women had as decision-makers under the criminal justice system, prior to their recent enfranchisement permitting them to sit as ordinary jurors.

The presumption and its necessary implications were also repudiated by Lady Frances Balfour in a further letter to *The Times*. She resented the entire doctrine as it was founded on the unsubstantiated belief that women lived in subjugation of their husbands. She argued that this

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<sup>183</sup> *The Times*, 8 February 1923 p11.

<sup>184</sup> *The Times*, 15 March 1922: "This legal protection of the married woman a remnant not of chivalry, but of serfdom, has more than served its time, and, to use the words of the Judge is "absolutely inappropriate to modern life", in which women become Justices of the Peace, serve on juries, and are elected members of Parliament." However, women could only serve on a jury from 1919 and the first woman elected to Parliament.

<sup>185</sup> Sir Harry Poland KC referred to the "gross scandal of the Peel case".

<sup>186</sup> Lord Blackburn, Barry J, Lush J and Sir J Fitzjames Stephen.

<sup>187</sup> '*Married Women (Presumption of Coercion Removal) Act (sic) 1922*' being Bill 56 12 Geo 5, ordered to be printed 21 March 1922. Clause 1 provided "No presumption shall henceforth be made that a married woman committing an offence in the presence of her husband does so under compulsion. But any married woman shall be entitled to be acquitted if it be found by the jury that, as a matter of fact, she committed the offence under the compulsion of her husband." Note by this Bill: 'compulsion' replaced 'coercion' and the defence would only apply to indictable matters before a jury.

<sup>188</sup> *The Times*, 4 April 1923, p6.

law meant that women were “being treated as young children”.<sup>189</sup> A year had passed, the Avory Committee had reported rapidly, yet nothing had happened on the legislative front.

Poland’s second letter had also snorted at a “ludicrous case [which] occurred recently at the Old Bailey”<sup>190</sup> in which a married woman pleaded guilty to an offence; but before sentence was imposed the Recorder learned from the mitigation advanced on her behalf that her husband had been present when she committed the offence. The judge thereupon recommended to her to withdraw her plea of guilty and plead not guilty, which she obligingly did. The Recorder then directed the jury that they must acquit her, as the law presumed that she acted under the coercion of her husband and there was no evidence to rebut the presumption “and so the astonished culprit went away rejoicing”. This vignette, which cast the administration of criminal justice in relation to the special position of married women into an even dimmer light, was employed by Poland to illustrate the urgency of the need for “forthwith” reform.<sup>191</sup>

#### NEW LORD CHANCELLOR WRITES TO THE PARLIAMENTARY DRAFTSMAN

On 9 February 1923, no doubt prompted by the letter from Poland to *The Times* the previous day, Schuster<sup>192</sup> wrote to Mr W M Graham Harrison CB,<sup>193</sup> of the Office of the Parliamentary Counsel, stating that the new Lord Chancellor, Viscount Cave LC, wished a clause “be added to the *Criminal Justice Bill* giving effect to the recommendations of Avory’s Committee”. A postscript to that letter stated “P.S. He wishes the clause to be in alternative form embodying both (1) and (2) on page 5”, being a reference to the two numbered alternative proposals of

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<sup>189</sup> *The Times*, 8 February 1923 p11 ‘*Married Women. The Doctrine of Coercion.*’ In her earlier letter *The Times*, 22 March 1922, p13 ‘*Married Women and the Law. Doctrines of Servitude*’ she had referred to the fact that a married woman was not allowed to decide for herself whether to submit to a surgical operation as the law required her husband must first give her consent.

<sup>190</sup> *Anonymous* (1923) referred to in Poland’s letter to *The Times*, 8 February 1923, p11.

<sup>191</sup> Yet, the Recorder appears to have acted responsibly in compliance with the prevailing law laid down by Darling J in *R v Peel*, as the wife fortuitously was entitled to a defence of which she had been ignorant and it was the duty of the Recorder to bring it to her attention. Indeed the prosecuting counsel had an independent duty himself in this regard.

<sup>192</sup> Jean Graham Hall and Douglas Martin, ‘*Yes, Lord Chancellor: A Biography of Lord Schuster*’ (2003) Barry Rose Law Publishers, Chichester p137-149 reviews the Chancellorship of Lord Cave.

<sup>193</sup> PRO: LC02/721.

that Committee, a copy of which was enclosed. On 13 February Graham Harrison replied to Schuster stating he had prepared a clause to give effect to both alternative recommendations and enclosed the draft as Clause 24 of the *Criminal Justice Bill*. He stated having drafted the clause he was not altogether satisfied with its concluding words and reformulated it to end “unless the coercion amounted to compulsion of such a kind as when applied otherwise than by a husband to a wife constitutes a good defence”.<sup>194</sup> This draft, though, confusingly blended compulsion with coercion, when the former was unknown as a concept other than as a variant of common law duress. This draft did not survive long.

On 22 February, 1923 Graham Harrison wrote<sup>195</sup> to Bowker, Secretary to the Attorney General, enclosing his draft and stating, “This is what the L.C.’s recommendation looks like when written out tidily, and in this form it will appear in the Bill when circulated unless you take steps to the contrary”.

#### LORD CHANCELLOR’S SECRET MEMORANDUM TO CABINET

On 20 February 1923 the Lord Chancellor prepared a memorandum<sup>196</sup> for Cabinet marked “Secret” in relation to the *Criminal Justice Bill*, stating which “it is proposed shortly to introduce in the House of Lords” and stating it has “already received the general approval of the Cabinet”. Page 3 of the memorandum provided that Clause 24 of the proposed Bill would abolish the rule by which a wife who commits an offence in the presence of her husband is presumed to have committed it under coercion by him. The Lord Chancellor added “The recent Peel case called public attention to this rule; but there have been many other cases in which the rule is believed to have led to the acquittal of persons who were not really under any kind of coercion”. A handwritten amendment to the memorandum has a line striking out the original word “many”. The memorandum then inaccurately continues, “No such rule obtains in the Dominions”. Viscount Cave LC then concluded by stating, “I think it should now be abolished”, after referring to the fact that the proposal to abolish the presumption had

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<sup>194</sup> PRO LCO2/721, 13 February 1923, Office of the Parliamentary Counsel to Schuster.

<sup>195</sup> PRO LCO2/721, Office of the Parliamentary Counsel to Secretary to the Attorney General.

<sup>196</sup> PRO LCO2/721, ‘*Secret-Cabinet-Criminal-Justice-Bill-Memorandum-by-the-Lord-Chancellor*’.

been recommended in 1878 by the Criminal Code Commissioners, by Sir James Fitzjames Stephens (sic) in his *'Digest of the Criminal Law'* and thirdly, by the Avory Committee. The Lord Chancellor did not inform his Cabinet colleagues that each of the three sources had recommended the more robust abrogation of the entire doctrine of marital coercion and not just the termination of the presumption suggested in his memorandum.

## LORD PARMOOR'S RECOMMENDATIONS

Lord Parmoor<sup>197</sup>, a Law Lord, recommended and personally drafted a new clause 24 to replace that drafted by Parliamentary Counsel. His desired clause read:

The whole doctrine of coercion by the husband as a defence for the wife is hereby abolished and a wife shall be in the same position as other people, free to establish any defence of that kind of compulsion which affords a defence to any person except in the case of certain specified crimes.<sup>198</sup>

The effect of Lord Parmoor's proposal was to implement the second alternative considered by the Avory Committee, whereas the draft government proposal intended to only implement the narrower and unadopted first proposal. In another detailed anonymous document, *'Criminal Justice Bill Notes on Amendments (Lords) Lord Parmoor'*<sup>199</sup> clearly emanating from a Government legal adviser, the author complained that Lord Parmoor's proposed new clause, "is taken almost verbatim from the words used in [the Avory] Report. The Committee, it may be conjectured, can scarcely have intended that their actual words should be adopted in this way". In an important high-level disclosure, the writer stated that the reason why the Government had decided to reject the Avory recommendation of the second alternative and adopt the first alternative instead:

was that it was felt that the relationship between husband and wife was substantially different to that which exists between two other persons, and that therefore it was not unreasonable to

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<sup>197</sup> Sir Charles Alfred Cripps KC, created as 1<sup>st</sup> Baron Parmoor 1914 (b 1852 – d 1941).

<sup>198</sup> PRO LCO02/721 *Criminal Justice Bill*, Notes on Amendments (Lords) Lord Parmoor.

<sup>199</sup> PRO LCO02/721. This document is some 22 pages long and is very heavily marked with comments, deletions and amendments by several different hands. It deals with Lord Parmoor's proposals in relation to clauses 2, 3, 6, 8, 12, 20, 24, 26 and 27 of the Draft Bill.

allow wives to defend themselves by a plea of coercion not amounting to such compulsion as is required between two persons, not being husband and wife.

This very important internal statement (never disclosed) is actually the key to understanding the intention of the language of what ultimately became s47 *Criminal Justice Act 1925* [UK]. Throughout the legislative debates no statement approximating these terms was ever advanced by the government of the day to justify the enactment of the first ever statutory defence based on marital status. The writer stated that if the second Avory alternative had been chosen, still Lord Parmoor's clause should not be adopted, but rather the words which appeared in an earlier draft of the Bill should be maintained but inserting, immediately after the phrase abolishing the presumption, the following words;

and it shall not be a good defence for a married woman charged with any offence to prove that the offence was committed under the coercion of her husband, unless the coercion amounted to such compulsion as would have been a good defence if the compulsion had been applied otherwise than by a husband to a wife.

#### OTHER JUDICIAL OFFICERS' VIEWS ON THE PROPOSAL

A government document called '*Criminal Justice Bill, 1923. Memorandum on Amendments Suggested to be moved in the House of Commons*',<sup>200</sup> further consider clause 24 of the Bill. It notes the Society of Chairmen of Quarter Sessions commended words should be added to the proposed sub-clause 1 of clause 24. The intention was to specifically provide for a final product in which;

a wife who commits a felony or misdemeanour other than treason or murder in the presence of her husband should be entitled to prove that she in fact committed the offence under the coercion of her husband; and if the jury found that she was coerced she should be acquitted.

The suggestion would retain the broad effect of the existing common law but place beyond doubt that it applied to misdemeanours. As appeals from magistrates were heard by Quarter Sessions, it is a strong inference that their Chairmen would have very considerable experience of the lesser criminal cases coming before them. The fact that these judicial officers

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<sup>200</sup> PRO LCO02/721 undated, 10 pages, probably drafted for the then Attorney-General.

exercising minor appellate jurisdiction, collectively recommended the express retention of the common law defence (and the upgrading of it to statutory form plus its extension to all misdemeanours), suggests that there were still a significant number of cases coming before them, where marital coercion fact-pattern was plainly engaged. The Society made it unequivocal that what the law required was an amendment which would;

leave coercion to be raised and proved as a defence at the trial and would also leave open to any woman – whether wife or not – the right to raise a defence of compulsion, which is different in law from coercion which is a doctrine applicable to married woman only, and compulsion imports in order to be a defence fear of death or serious bodily injury or actual force used to compel the doing of the criminal act and goes far beyond such influence as has given rise to the doctrine of coercion of married women.

#### DIRECTOR OF PUBLIC PROSECUTIONS PRIVATELY COMMENTS

In a six page uninitialed ‘*Memorandum*’<sup>201</sup> from the Director of Public Prosecutions to the Attorney General dated February 1923, paragraph 13 states the author had discussed clause 24 of the proposed Bill with Mr Graham Harrison, the Law Draftsman, who had been in some of the earlier correspondence loop. The Director stated he had suggested to the draftsman that after that part of the clause abolishing the presumption there should be inserted the words “which should make it clear that to the wife there was still open to her the defence of compulsion as now recognised by law.” The writer opposed the amendment proposed by Lord Parmoor as “open, I venture to say, to a good deal of criticism”.

Lord Parmoor, had proposed numerous amendments to the many provisions comprising the Criminal Justice Bill as a whole. No less than three separate committees had produced reports which together led to the various provisions suggested to be enacted by the *Criminal Justice Bill*. A committee on the detention in custody of prisoners committed for trial, under the chairmanship of Horridge J,<sup>202</sup> a committee on alterations in criminal procedure, under the chairmanship of the Director of Public Prosecutions, together with the Avory Committee had

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<sup>201</sup> PRO LC02/721, undated, Director of Public Prosecutions to Attorney General. [The communicants are only revealed by a subsequent document dated 9 April 1923 from the Director of Public Prosecutions to Sir Claud Schuster: PRO LC02/721.]

<sup>202</sup> Cmnd (1922) 1574.

provided the materials for the new Bill. Some of the materials were technical refinements to the law and others were drafted to reverse legal rulings given by various courts.

#### LORD CHANCELLOR MOVES THE SECOND READING OF THE BILL

On 28 February 1923, Viscount Cave LC moved<sup>203</sup> the Second Reading of the Bill. After introducing the other manifold proposals, he eventually referred, as the last separate matter in his speech, to clause 24. The Lord Chancellor informed the House the presumption of coercion was “a very old one, and in the case of all felonies other than murder and treason and all misdemeanours” it applied. He referred indirectly to *R v Peel* as one of “several cases, some in recent times” in which trial judges had most reluctantly ordered a married woman be acquitted without the matter having been left to the unfettered decision of a jury. He stated his opinion that this presumption ought now come to an end:

The presumption that every husband beats his wife, and that every wife goes in terror of her husband and would commit any crime rather than disobey him, if it was ever true, is not true to-day. Not every wife is a Lady Macbeth, but, speaking generally, I think that wives are free agents, and the question of their guilt or innocence ought to be considered on the facts and not be subject to such a presumption.

In support of this conclusion, he referred to the Draft Code of the Royal Commission of 1878 which had recommended the abolition of the presumption. In addition, he recited from Stephen’s *Digest of the Criminal Law* the time had come that married women “as regards the commission of crimes [should] be on exactly the same footing as other people”. He then noted that while the Avory Committee had recommended not only that the presumption but the whole doctrine should be abolished his position on behalf of the government was “I am not quite sure about that. I am not sure that where actual coercion is proved that should not continue to be a sufficient defence for the wife in nearly all cases, as it is today”.<sup>204</sup> His speech concluded<sup>205</sup> by inviting Members of the House “who have experience of the law on

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<sup>203</sup> *Parliamentary Debates*, House of Lords, vol 53, p155, 28 February 1923.

<sup>204</sup> ‘*The Criminal Justice Bill and the Doctrine of Coercion*’ (1923) 87 JP 248 a letter to the editor signed “Presumption” argued “The presumption is, in fact, the whole doctrine; there is nothing beyond it”.

<sup>205</sup> *Parliamentary Debates*, House of Lords, vol 53, p161, 28 February 1923.

this matter” to speak about clause 24, reminding their Lordships of his opinion, “I think for the moment the best course will be to abolish the presumption, and for the rest to allow the present law to take its course”.

## LORD BUCKMASTER OPPOSES THE PROPOSAL

The next speaker was Lord Buckmaster who spent more than half of his entire speech devoted to his principled objection to abrogating the presumption. He lamented that in his opinion, the terms of clause 24 were dealing with a very serious matter in a very light way. He remarked:

What is the history of this matter? From times long antecedent to the Conquest right down to the present time, it has been a Rule of Law that if a woman commits a crime in the presence of her husband she shall be assumed to be committing it under the result of his influence, and consequently shall not be independently convicted of the offence.

He reasoned, the requirement of presence of the husband meant the offence was committed with his connivance and consent.

This law is not based on foolishness; it is based on experience, and on something like 1100 years of wisdom, and until quite recently I do not believe there has been any objection raised to it.<sup>206</sup>

Lord Buckmaster referred to *R v Peel* and was agitated about the clamour of the press. He concluded the newspaper editorials subsequent to that case had essentially said “Oh, it is a shameful thing; here is this man sent to prison and the woman is not.” He saw no justification for clause 24 considering that the rationale for the defence was “not the physical violence, it is the personal influence that the man exercises over his wife, and to deny that such a thing exists is to deny one of the strongest of all influences in the world”. He stated any person with experience of law ought to agree that again and again examples of not just women entirely under the influence of their husband, but also of the converse situation existed. Lord Buckmaster emphasised Members of the House of Lords might generally be in a poor

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<sup>206</sup> Ibid p164. These assertions are quite inconsistent with the outcry following the acquittal in *R v Torpey* (1871) 12 Cox CC 45.

position to understand the reality that affected so many women. The appropriate sector of womanhood was still “the greater part of the population of this country, who still live under conditions in which they are in the habit of obeying their husbands, doing what their husbands desire them to do”.<sup>207</sup> He rejected reasoning that recent legislation which had altered the status of women and promoted their independence was relevant. He rejoined that limited changes in the law by those recent statutes had attempted to equiparate the position of both genders and such a result would be more aspirational than real.

You cannot change a woman’s nature by giving her a vote, or by enabling her to sit on the Bench, or by all the legislation you have passed recently. Woman’s nature will remain exactly what it was before, and if for over 1100 years the people of this country have believed that that nature is of such a character that in the presence of her husband the crime she will commit will be a crime committed under his influence, I see no reason why we should alter it.

This speech was much more rhetoric than substance. He had, almost wilfully, overlooked the points made by Viscount Cave LC, namely that in 1879 and in 1922, the year before, two investigatory bodies had concluded that the presumption (at least) had outrun its course. Lord Buckmaster principally asserted the matrimonial conditions of the average person had not altered, in the sense that the husband remained completely dominant in all respects, such that his wife would still commit a crime at his behest. To the extent that his speech was based on the special relationship created by marriage, it had some intrinsic historical merit. It may well have been a valid but lofty sociological glimpse at perceived lower classes. But his conclusion did not flow inexorably, or at all, from his asserted premise. Personal influence of a husband bore little resemblance to the much more demanding standard of the law, that there had to be coercion, to overcome a wife’s free will and to generate excusable dependent conduct.

The next speaker was Viscount Haldane,<sup>208</sup> also an ex Lord Chancellor. He rationalised that, contrary to opinion of Lord Buckmaster, clause 24 is:

hardly a question of getting rid of the coercive effect of the husband’s presence. What is proposed is that it should be left to the jury or the Judge to say whether there has been any

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<sup>207</sup> Lord Buckmaster specifically excluded “...the relationship of anyone of your Lordships with your own wife.” This overlooked that Mrs Peel was of aristocratic birth and that after her divorce from Capt Peel in 1927 (RIN: 4381, Divorce: 1927 404381), she had married the 15<sup>th</sup> Lord Strange on 8 February 1928.

<sup>208</sup> 1<sup>st</sup> Viscount Haldane, Lord Chancellor 1912-1915, succeeded by Lord Buckmaster.

coercion or not. If the Bill passes, that will be the effect of that clause; and surely it is right. It has been the opinion of Judges in recent cases which they have tried, and it commends itself to common sense.<sup>209</sup>

#### VISCOUNT ULLSWATER SUPPORTS THE BILL

Viscount Haldane was followed by Viscount Ullswater who stated<sup>210</sup> the presumption is “foolish and unnecessary”. He referred to the well-known case of Mr Bumble, a product of the authorship of Charles Dickens in 1837, who declared “the law is a ass” if it presumed women always acted under the coercion of their husbands. Viscount Ullswater stated he was “led to believe that popular opinion at that time was strongly in favour of the view which Mr Bumble then took”. In uncompromising terms he referred to the speech of Lord Buckmaster as “absurd”<sup>211</sup> when it contended that the presumption was in accordance with facts which are well-known to all. Lord Ullswater stated:

It is strongly resented by the advocates of women. After I raised this question a year ago, there was some correspondence in the newspapers, and many of the Women’s Rights Societies passed resolutions in favour of the abolition of the presumption. I feel certain that it is most desirable that, if we are to maintain a proper and due respect for the law, the law should embody the customs and views of the society of the present day, and not of the society of 1100 years ago.

He added in concurrence with Lord Haldane, “even if you abolish the presumption, it does not prevent the wife, if she is really coerced by the husband to commit a crime, making that plea in extenuation, and proving it”.

#### LORD PARMOOR SUPPORTS THE CLAUSE AND GOES FURTHER

Lord Parmoor, made his view clear<sup>212</sup> that the presumption should be “swept away” and it was an overdue change. He complained the wording of clause 24 as it stood did not introduce

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<sup>209</sup> *Parliamentary Debates*, House of Lords, vol 53, p165, 28 February 1923.

<sup>210</sup> *Parliamentary Debates*, House of Lords, vol 53, p168, 28 February 1923.

<sup>211</sup> *Ibid* p169.

<sup>212</sup> *Ibid* p172.

any substantial alteration in the law of marital coercion other than to delete the presumption. Therefore, he advocated “the strengthening” of clause 24 and proposed that the actual wording of the Avory Committee, in favour of abolishing the entire doctrine be adopted as the legislation. He was entirely unimpressed by contrary arguments that because the doctrine had been in operation for many years, that was a good reason to retain it. The law was “a wrong one”.<sup>213</sup>

### LORD SHANDON SUPPORTS THE CLAUSE

The last speaker was Lord Shandon,<sup>214</sup> who stated he had been for two years Attorney General for Ireland and had had “continuous experience” of cases dealing with the presumption of marital coercion, as it was his duty as Attorney General to read all the depositions taken at Petty Sessions. He stated:

I certainly was impressed in a way that has given me a conviction with regard to this presumption that nothing could alter. My view is that the presumption is absolutely ridiculous. The fact that it is eleven centuries old does not make it any the better, and the sooner we get rid of it the better.

The Bill was then read a second time and committed to a Committee of the Whole House.<sup>215</sup>

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<sup>213</sup> *Parliamentary Debates*, House of Lords, vol 53, p174, 28 February 1923, adding “I am afraid I am not such a Tory in these matters of my noble friend Lord Buckmaster”. *The Criminal Justice Bill and the Doctrine of Coercion* (1923) 87 JP 245 noted Lord Parmoor’s proposal and added ‘Of course, in most cases, the evidence which rebutted the presumption would also be sufficient to disprove the defence of coercion; but this cannot be taken for granted’.

<sup>214</sup> Sir Ignatius O’Brien LC, 1<sup>st</sup> Baron Shandon, Attorney General for Ireland 1912-1913, Lord Chancellor of Ireland 1913-1918. Only one reported Irish case in that decade deals with the common law defence: *R v Hallett* (1911) 45 ILTR 84 (HC), where a husband and wife were jointly charged with unlawful obstruction by public nuisance of a weir in the tidal waters of the river Corrib, a navigable river.

<sup>215</sup> *Parliamentary Debates*, House of Lords, vol 53, p183, 28 February 1923.

## THE MEDIA REPORT THE SECOND READING OF THE CRIMINAL JUSTICE BILL

*The Times*<sup>216</sup> delighted in the fact the Second Reading of the *Criminal Justice Bill* showed such divergent views being expressed by Law Lords as to the merits of the proposed abolition of the presumption. It noted in the debate the Lord Chancellor “dwelt especially upon Clause 24” which would abrogate the presumption, noting he said that the underpinning historical rationale for the presumption, if it held true in the past, was no longer valid, as generally it would now be accepted that “wives were free agents. The question of their guilt or innocence ought to be considered on facts and not under such a presumption.” However, the newspaper noted that the Lord Chancellor was hesitant as to whether the marital coercion doctrine “should not continue to be a defence”.<sup>217</sup> Lord Buckmaster had in opposition asserted the “influence which a man exercised over his wife was one of the strongest influences that existed in the world.”<sup>218</sup>

## COMMITTEE OF THE WHOLE HOUSE CONSIDERS THE PROPOSAL

On 8 March 1923, the House of Lords in Committee considered the *Criminal Justice Bill*, on a clause by clause basis. By this time, clause 24 contained a sub-clause (2) that this section would come into operation on a date to be notified after the passage of the Act.

However, consistent with his earlier protestation that the Bill did not go far enough and ought to replicate the recommendation of the Avory Committee, Lord Parmoor<sup>219</sup> moved an amendment to leave out clause 24 in its entirety and to replace it with his own version, namely:

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<sup>216</sup> *The Times*, 1 March 1923 p12 under the heading ‘*The Coercion Of Wives – Criminal Justice Bill – Illicit Drug Traffic*’, noting that the “legal luminaries in the House of Lords” were in implacable opposition.

<sup>217</sup> This double negative reveals the thinking of the Government in the Bill, namely to preserve the existing defence but to terminate the presumption.

<sup>218</sup> He added despite liberating measures such as giving the vote to women and even seats upon the Bench, their “nature would remain the same”. *The Times*, 1 March 1923, p12.

<sup>219</sup> House of Lords vol 53 1923, p326.

The whole doctrine of coercion by the husband as a defence for the wife is hereby abolished and a wife shall be in the same position as other people, free to establish any defence of that kind of compulsion which affords a defence to any person except in the case of certain specified crimes.<sup>220</sup>

Lord Parmoor argued it would be a mistake to deal with the law by only abolishing the presumption, as it did not go far enough. He particularly stressed that it would be a mistake to introduce unnecessary presumptions into the administration of the criminal law. “I think it is time that in these matters the position of husband and wife was reduced to the same condition as that in which it is in the ordinary criminal law in an ordinary case”. Lord Buckmaster opened his speech in reply to it with these words:

I remain entirely impenitent in this matter. I still think that it is unwise to assume that women who commit acts in the presence of their husbands are in the same position as free and independent agents.

In support, he noted an experienced Police Magistrate had expressed himself strongly to the same effect “in today’s newspaper”.<sup>221</sup> He complained that Lord Parmoor’s proposed amendment would only exacerbate the present situation, unnecessarily going much further than even the Government proposal. Viscount Cave came to the rescue and stated,<sup>222</sup> “My object is to abolish the presumption. Most of us, I think, if not all, are agreed upon that. We want to get rid of a presumption which really does not correspond with fact”. He too rejected Lord Parmoor’s proposal but on the rather cutting ground that the wording of the clause, “is not suitable for a Statute. It is an extract from a Report, and if it were adopted the clause would certainly need remodelling”. But much more importantly, he applauded the intention of government policy: “But, on merits, I think that it is true that a wife can often prove coercion by her husband when another person not in the position of a wife could not successfully raise any such defence”. He therefore said the proposal in the Bill correctly ought to be to leave it open to a wife to prove that she had been coerced, if that had been the case. Lord Parmoor’s amendment was then withdrawn by leave and clause 24 was agreed to by the House of Lords; the prospect for an early enactment of the clause looks propitious.

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<sup>220</sup> *Parliamentary Debates*, House of Lords, vol 53, p326-327, 8 March 1923.

<sup>221</sup> *The Times*, 8 March 1923.

<sup>222</sup> *Parliamentary Debates*, House of Lords, vol 53 p328, 8 March 1923.

On 9 April 1923 the Director of Public Prosecutions sent to Schuster a copy of the memorandum on the Bill which he had earlier sent to the Attorney General and to Graham Harrison, the Parliamentary Counsel. He further made specific comments on the points raised by the Society of Quarter Sessions Chairmen. In point 8 of his letter, Sir Archibald Bodkin states, in relation to the proposed amendment to Clause 24 urged by the Society of Chairmen of Quarter Sessions;

This suggestion as to the doctrine of coercion introduces rather a vexed question. In some quarters it is thought that all the Clause does is to abolish the presumption, leaving the wife to prove, as a fact, that she was coerced on the particular occasion, which coercion shall, if accepted by the Jury, procure her acquittal. On the other hand, it is thought that the whole doctrine of coercion, whether applicable to married women or not, has been abolished, and that even to prove that a married woman was coerced by her husband would not entitle her to be acquitted but only to affect sentence.

The Director stated he understood that the Lord Chancellor took the former view with the result:

that to a married women (sic) accused with her husband, there will be the defence, if she can establish it, of marital coercion, and she could also take advantage of the common law doctrine of compulsion. Unmarried women will only have the doctrine of compulsion to fall back upon as a defence.

This formula raised another issue, as the Director was now seeking to confine the defence to a situation where husband and wife were jointly charged. There had been no such requirement in the common law. While in the great bulk of cases the very nature of the offence raising the defence would mean both spouses would be on trial together, it did not at all follow. The defence only required that the wife be on trial and that the husband had been present at the time of the offence. If the husband had died or become insane before any charge or any trial, the wife was still entitled to raise the defence. Sir Archibald Bodkin, the Director of Public Prosecutions (who had been a member of the Avory Committee), concluded his letter to the Lord Chancellor by stating, "Probably this will be a fairly satisfactory position and therefore, the suggestion [from the Society of Quarter Sessions Chairmen] need not be adopted". The Director opposed the view of creating a general defence by seeking to have it available only at a joint spousal trial.

## MR JUSTICE AVORY COMPLAINS TO THE ATTORNEY GENERAL

A letter from Avory J dated 20 April 1923,<sup>223</sup> was written directly to the Attorney General. Avory J was obviously miffed with the real possibility that the government would not enact legislation to bring about the recommendation of his Committee completely abrogating the entire doctrine of marital coercion. He noted that Clause 24 of the Bill proposed to abolish only the presumption<sup>224</sup> of coercion but urged the Attorney General to recall that the Committee had gone much further and had unanimously recommended “that it was desirable in practice” that the entire defence should be abolished. In his last paragraph, Avory J petulantly noted that the Lord Chancellor, speaking in the House of Lords, had stated that the government did not wish to abolish the defence, only the presumption. Avory J complained “but I think it will lead to great confusion if the presumption only is abolished”. He added that duress was recognised by the law as a defence and in most cases would be still available to any wife, so no justification existed for a novel overlapping statutory defence.

## ATTORNEY GENERAL WRITES TO LORD CHANCELLOR

On 24 April 1923, the Attorney General, Sir Douglas Hogg, wrote<sup>225</sup> to the Lord Chancellor, Viscount Cave LC, enclosing the letter from Avory J, one “I think you ought to see”. The Bill was swelling in its number of clauses dealing with disparate matters in the criminal justice system. It was evident that the Government intended for there to be an omnibus Bill rather than put forward a number of minor Bills dealing with individual issues. For this reason, clause 24 became tied up with the retarded progress on the other contentious issues<sup>226</sup> in the *Criminal Justice Bill*. The Attorney General had “received a number of communications from various societies and individuals” about different points in the Bill and observed “it will be necessary for me to obtain your instructions before I undertake to take the Bill through the

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<sup>223</sup> PRO LCO02/721 Horace E Avory to Attorney-General, 20 April 1923.

<sup>224</sup> Ibid. The word “presumption” is underlined for emphasis in the original.

<sup>225</sup> PRO LC02/721, 24 April 1923.

<sup>226</sup> Probation of offenders, venue and jurisdiction of Magistrates, Quarter Sessions and Assizes, a provision dealing with the death of a juror during a trial, consecutive sentences of imprisonment, a prohibition against taking photographs inside a courtroom, the offence of driving a vehicle while drunk, and many other miscellaneous amendments.

House of Commons”. He asked for an interview with the Lord Chancellor once a date had been fixed for the Second Reading in the House of Commons.

## THE BILL MOVES TO THE HOUSE OF COMMONS

The Bill then moved to the House of Commons, having been originally introduced in the Lords. On 30 July 1923, the Solicitor-General, Sir Thomas Inskip, moved<sup>227</sup> the *Criminal Justice Bill* 1923 be read a second time in the House of Commons. After introducing the other provisions in the Bill and hoping that the provisions would “not be found controversial by any party or section in the House” he eventually<sup>228</sup> turned to clause 24. He recounted that the necessity for it had been prompted by “one of two recent cases in connection with the coercion of a wife”. The possible alternatives for altering the law were restated and the Solicitor-General acknowledged that Clause 24 did not adopt the recommendation of the Avory Committee, but proposed instead to abolish the presumption but otherwise maintain the defence.

It is remarkable that throughout the Parliamentary Debates to date there had been no questioning and no analysis directed to the core concept, namely, what constitutes “coercion”. At this juncture, the Solicitor-General sought<sup>228</sup> to define the content of the concept by stating that “coercion” was intended to mean:

not merely by physical compulsion or bodily fear, but by that power which the husband, when all is said and done, has over a woman...Hon Members...I hope...that that proposal agrees with the general feeling which we all have about the position of woman (sic). When all is said and done, although we recognise to the full her intellectual and spiritual, I was going to say equality, may I not say superiority over men, she is not yet, nor probably ever will be, built in such a way as to be able to hold her own against the domination of a powerful personality who also happens to be her husband, and we think that justice will be maintained if we allow a woman placed in such circumstances as those to show that, though she is not compelled by bodily fear or physical compulsion, she was in fact, dominated by the husband, and in those circumstances the jury may acquit her.

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<sup>227</sup> *Parliamentary Debates*, House of Commons, vol 167, p1203, 30 July 1923.

<sup>228</sup> *Ibid* 1210.

This “coercion” in the new defence, was nebulous in the extreme. It excluded nothing from the equation apart from emphasising that “coercion” included psychological violence or fear beyond physicality. This ethereal approach betrays the thinking of the time that although women had been granted substantial equality by other statutory provisions, in certain respects, there was a strong lingering belief that in fact the “intellectual and spiritual” dimension of women never equipped them for the implications and rigours of full gender or spousal equality. This handy supposition of the continuing and irremediable ‘weakness’ of women perpetuated the long-standing stereotype of the defenceless female. In short, the government would not remove the common law defence because of its belief that physical or mental compulsion by a husband against his wife would lead to involuntary conduct because of her biological inadequacy as she was not “built in such a way as to be able to hold her own against the domination of a powerful personality, who also happens to be her husband.”

Mr Cassels KC MP rose to speak<sup>229</sup> as he had “a keen desire to leave the ranks of those who have not spoken in this House”. In his maiden speech,<sup>230</sup> he regretted that clause 24 did not follow the recommendations of the Avory Committee. He stated:

The presumption is one matter, and defence is another. Now that it has been legally discovered that wives no longer obey their husband, but on the contrary that husbands obey their wives, the defence of the coercion of the wife ought to be abolished lest juries should be under the impression that whenever a woman commits an offence, it has been done at the command of the husband.

He argued that coercion ought to be a matter taken into account in mitigation but noted “in these days of equal rights women will claim to be punished just as much as men”.<sup>231</sup> Cassels was followed by Mr W A Jowitt MP, KC<sup>232</sup> who said he was in complete agreement with every word the previous speaker had said. After a number of other speeches that did not

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<sup>229</sup> Ibid p1222. In 1939 Cassels J was appointed to the Kings Bench Division.

<sup>230</sup> Ibid p1225.

<sup>231</sup> His speech in favour of the complete abolition of the defence “was enlivened with touches of humour” to show that it was often the husband whom the law should these days be protecting, so the proper result was to cancel out their respective needs for a special defence: Iain Adamson, *‘A Man of Quality’: a biography of the Hon Mr Justice Cassels*, (1964) Frederick Muller Limited, London, p131.

<sup>232</sup> Jowitt later became Lord Chancellor.

touch on clause 24, the Attorney General, Sir Douglas Hogg, moved<sup>233</sup> that the Bill should be given a Second Reading and then committed to a Standing Committee and this was done.

## LAW SOCIETY OPPOSES THE AVORY RECOMMENDATION

Over the next few months, the Law Society of England and Wales,<sup>234</sup> urged the government to amend clause 24 of the Bill so as “to make clear that [the] defence of coercion is still available” and only the presumption was to be abrogated. By November 1923, clause 24 still had not been accepted by the Home Office.<sup>235</sup> Both the Law Society and the Society of Chairmen of Quarter Sessions, highly influential bodies in relation to trials before magistrates, had each sought an amendment to the clause to ensure that the defence of coercion would remain available upon the demise of the presumption. Solicitors were responsible for not just legal representation but also for advocacy in the great majority of trials before magistrates in England and Wales.

## RAPID SUCCESSION OF PRIME MINISTERS

Since the time of *R v Peel*, there had been a rapid turnover in the highest echelons of government. Andrew Bonar-Law had led the Conservative Party for seven months and Stanley Baldwin had succeeded him on 10 May 1923 as Prime Minister. In turn, Baldwin resigned after losing a vote of confidence in January 1924, toppling his Conservative Ministry with him. On 22 January 1924, Ramsay MacDonald became the first Labour Prime Minister, but in the absence of a Parliamentary majority, he was in turn displaced in November 1924 by Stanley Baldwin, who then served his second term as a Conservative Prime Minister. Within these political vicissitudes, the *Criminal Justice Bill* 1923 was becalmed, including the clause to create the new statutory defence of marital coercion. Each change of government

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<sup>233</sup> *Parliamentary Debates*, House of Commons, vol 167 p1236, 31 July 1923.

<sup>234</sup> PRO LCO2/721, dated “Nov 1923”, ‘*Criminal Justice Bill. Proposals for Amendment. (Commons)*’.

<sup>235</sup> *Ibid.* Which states “the proposals marked X in red ink have been provisionally accepted by the Home Office, and the Justices Clerks Society so informed”. There is no X against clause 24.

consequentially meant a new Lord Chancellor and Law Officers. The instability of government at this time meant a reshuffling of priorities and a lack of traction with the overall legislative agenda. So the *Criminal Justice Bill 1923* died of its own inanition upon the successive collapses of the government.

## SECOND READING OF THE CRIMINAL JUSTICE BILL 1924 IN THE HOUSE OF LORDS

The new Ministry resurrected the Bill in a considerably expanded form but the old clause 24, now clause 37 *Criminal Justice Bill 1924*, remained unaltered in content. On 26 February 1924, Viscount Haldane, again the Lord Chancellor,<sup>236</sup> moved<sup>237</sup> the Second Reading of the *Criminal Justice Bill 1924* which he stated he had inherited from the former Lord Chancellor, Viscount Cave, who had in turn inherited it from his predecessor, Viscount Birkenhead. Viscount Haldane LC<sup>238</sup> considered the multifarious provisions dealing with the reform of probation in the Bill and eventually turned to the defence of marital coercion. He remarked that the administration of criminal justice in relation to the ancient common law defence of marital coercion had been identified as “deficient”<sup>239</sup> and stated that consequently the “very powerful”<sup>240</sup> Avory Committee had rendered a report on the subject. The impetus for the reform arose from “a well-known trial not very long ago, in which a lady escaped punishment in circumstances which led the Judge to make some comments”, a very thinly disguised reference to *R v Peel*. Viscount Haldane LC noted that there was in the law no presumption in favour of a husband and stated “I am afraid that it is the other way” on occasions. Yet, at no stage did he or the government justify why those husbands were not to be included within the statutory defence. The defence was to be anchored firmly in half of a marriage with no consideration ever to be given to the possibility of the creation of a spousal, rather than an

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<sup>236</sup> 1<sup>st</sup> Viscount Haldane LC had been the Lord Chancellor 1912-1915. His tenure as Lord Chancellor in 1924 did not last even the year when he was replaced by Viscount Cave LC.

<sup>237</sup> House of Lords Debates 1924, p306. *The Times*, 26 February 1924, p9 under the heading ‘*Criminal Justice Bill – Sterner Penalties For Motorists – Wife Coercion*’ reported the introduction of the Bill to the House of Lords, noting that Clause 37 of it proposed to abolish the presumption and noting that a memorandum issued by the Lord Chancellor “points out that not such rule obtains in the Dominions.”

<sup>238</sup> *Parliamentary Debates*, House of Lords, vol 56, p303, 26 February 1924.

<sup>239</sup> *Ibid* 305.

<sup>240</sup> *Ibid* 305.

uxorial, defence. The new era of equality did not operate to put husbands on the same plane as their wives – a wife was still gallantly the beneficiary of avuncular affirmative inequality. This was to be chauvinism and paternalism in a modern statutory form.

The government's position was that the proposals emanating from the Avory Report had been carefully considered "and embodied in the Bill".<sup>241</sup> But this assertion was quite incorrect. The Avory Report had never recommended the proposal in the Bill and had actually recommended the complete extirpation of the defence, whereas the Bill was providing the defence with a commodious statutory basis. Lord Haldane stated that the intention of Clause 37 was that as a "presumption of law"<sup>242</sup> the common law presumption would forever disappear from the law, yet the affirmative factual defence would remain.<sup>243</sup>

The presumption, as a presumption of law, disappears, but the wife will still have the benefit of any defence which she can set up to the satisfaction of the jury that she was acting under the coercion of her husband. It thus becomes a question of fact and not a question of law.

## LORD DARLING MAKES HIS MAIDEN SPEECH IN THE HOUSE OF LORDS

As if to complete the circle, Lord Darling<sup>244</sup> who had been only recently ennobled, made his maiden speech<sup>245</sup> and referred to the fact that the Bill dealt with matters that had come before him "as a Judge of the King's Bench"<sup>246</sup> and he thereafter referred to *R v Peel* "a case which I

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<sup>241</sup> Ibid 305.

<sup>242</sup> Ibid 306. But it was never a presumption of law, only a rebuttable presumption of fact: *Brown v Attorney General for New Zealand* [1898] AC 234 (PC).

<sup>243</sup> Parliamentary Debates, House of Lords, vol 56, p306, 26 February 1924. "It thus becomes a question of fact and not a question of law".

<sup>244</sup> The appointment of Darling J to the High Court led to the contempt proceedings in *R v Gray* [1900] 2 QB 36 (DC). The actual article found to be scurrilous abuse is published in full in (1900) 81 LT 534. See Borrie & Lowe, *Law of Contempt*, 3 ed p341. See also David Pannick *Judges*, (1987) Oxford University Press, p111-112 who said of the article in *R v Gray* "This splendid piece of invective effectively punctuated the vain pretensions of Mr Justice Darling whose injudicious behaviour on the bench was frequently a disgrace." Eames J in *R v Hoser; ex parte Attorney General (Victoria)*, unreported, Victoria Supreme Court, Common Law Division, 5928 of 2001, 29 November 2001, Eames J, p11 noted that Darling J was "...a judge who has been the subject of much criticism by writers since his retirement in 1923 (sic)".

<sup>245</sup> Ibid 311. *Lord Darling and His Famous Trials*, (undated) Hutchison & Co (Publishers) Ltd, London at p263-266 reproduces his entire maiden speech in the House of Lords.

<sup>246</sup> Ibid 311.

myself heard”.<sup>247</sup> He stated that the vital point was “whatever the evidence might be, whether it did or did not prove the offence”<sup>248</sup> there was a presumption of law, as distinguished from a presumption of fact, that if a woman commits a crime and her husband is present, she commits it solely by his instigation and under his coercion.<sup>249</sup>

Lord Darling acknowledged that for a very long time, the marital coercion rule was “a very good rule indeed.”<sup>250</sup> although the rule was now justifiably the subject of “[m]uch ridicule”.<sup>251</sup> It had been formulated in times when a wife was in some respects “little better than a chattel belonging to her husband”<sup>252</sup> so that the manners of the time dictated that the wife had no genuine free will, so the law understandably provided “She shall not be tried; he domineers over her in all the affairs of life, and we must presume that he coerced her by his dominance on this occasion”.<sup>253</sup> But separate from the sociological analysis of gross inequality between the spouses, Lord Darling ventured “another and a softer reason”<sup>254</sup> based on chauvinism – which he described as the instinctive dislike of punishing a woman at all – why the marital coercion defence had not been abrogated. Capital punishment had been the norm until the end of the eighteenth century for many crimes and the regularity of the mandatory requirement to inflict capital punishment on a woman “must have revolted the feelings of the Judges”<sup>255</sup> so that the marital coercion defence ascended as an important safeguard for clergyless women. Wives were in a significantly better position than all other women. Lord Darling considered that the effect of clause 37 of the Bill would be to alter the common law which had imposed an irrebuttable presumption of law<sup>256</sup> and to replace it with a rebuttable presumption of fact, so that the new statutory law would now require evaluation by the trier of fact as to whether,

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<sup>247</sup> Ibid 314.

<sup>248</sup> Ibid 314.

<sup>249</sup> Ibid 314. Both Viscount Haldane LC and Lord Darling unequivocally stated that marital coercion generated a presumption of law rather than a presumption of fact. There was no basis whatsoever for considering the presumption to be one of law. That conclusion was an Homeric nod by each of them. The presumption was fact-dependent and was displaced by autonomous uxorial conduct.

<sup>250</sup> Ibid 314. Lord Darling stated that the rule was made in the Middle Ages.

<sup>251</sup> Ibid 314.

<sup>252</sup> Ibid 314.

<sup>253</sup> Ibid 314.

<sup>254</sup> Ibid 314.

<sup>255</sup> Ibid 314. But while the widespread use of capital punishment existed by the mid-nineteenth century the number of offences carrying a fixed sentence of death had been hugely reduced. Both murder and treason, which were to be specifically exempted by s47 *Criminal Justice Act 1925* [UK] did then carry the death penalty. Other offences such as piracy though remained.

<sup>256</sup> Which Lord Darling said was an entitlement to “instant acquittal”, *ibid* 315.

on all the evidence, the wife, had been “a free agent”.<sup>257</sup> If the wife could prove that the crime was dictated to her by her husband in the form of coercion she would succeed.<sup>258</sup> He advocated the proposed amendment abrogating the presumption, because it still permitted the wife to have the defence of coercion decided in her favour as a question of fact. Viscount Haldane LC moved that the Bill be read a second time and committed to Committee of the Whole House.<sup>259</sup> No one ever raised how the new defence would operate together with the retained general defence of duress at common law.

On 18 March 1924<sup>260</sup> the House of Lords moved that the House resolve itself into committee to consider the *Criminal Justice Bill 1924*. But the Bill stalled because of the causes which led to the further change of government in November 1924. By the issue next the matter returned to Parliament 15 months would have elapsed.

#### *CRIMINAL JUSTICE BILL 1925: LORD JUSTICE ATKIN’S OBSERVATIONS ON THE CLAUSE*

The House of Commons ordered the *Criminal Justice Bill 1925* to be printed on 23 June 1925.<sup>261</sup> By now the old clause 37 of the 1924 Bill was renumbered as clause 42 in the 1925 Bill. On 1 July 1925 L S Brass wrote to Schuster enclosing a copy of a memorandum dated 18 June 1925 prepared by Atkin LJ regarding clause 42.

Lord Justice Atkin wrote an analysis of clause 42 concluding that its intention to abolish the presumption yet to create a defence which the wife would have to establish, would go too far. “The doctrine of marital coercion is a humane provision of our law: and is not to be attributed wholly or mainly to old fashioned doctrines as to the unity of husband and wife”.<sup>262</sup> He noted

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<sup>257</sup> Ibid 315.

<sup>258</sup> Lord Darling noted that the acquittal of the wife would provide for the conviction of the husband ibid 315. At p314 he had spoken that the defence applied (only) where the spouses were jointly charged. But this is an error.

<sup>259</sup> *Parliamentary Debates*, House of Lords, vol 56, p316, 26 February 1924.

<sup>260</sup> *Parliamentary Debates*, House of Lords, vol 56, p778, 18 March 1924; clause 37 was agreed to without amendment p797.

<sup>261</sup> His Majesty’s Stationery Office, Bill 201, 23 June 1925.

<sup>262</sup> PRO LCO2/721, dated and signed “J.R.A. 18.6.25.”.

that prior to the *Criminal Evidence Act 1898* [UK], which for the first time permitted an accused person to give evidence in his or her own defence in an indictable trial, a wife could not have realistically proved the defence at all, where husband and wife were tried together. This was because in most cases no third person would have been present to give the exonerating evidence of the husband's coercion and the wife herself, prior to that Act, was incompetent in law to give evidence in support of her own case. Therefore, Atkin LJ concluded that over time judges devised the presumption of marital coercion to compensate for the inability of the wife to be able to give evidence. The husband ironically was equally an incompetent witness, in a joint trial, unless he pleaded guilty whereupon only then could he give evidence for his wife. The presumption was therefore necessary for such a defence to be factually possible. It would be a very rare situation in which there would be a third party present, who was not also a defendant and who would be able to independently attest to the nature of the domination of the husband over the wife.

But a liberalising consequence of the *Criminal Evidence Act 1898* now meant that the wife could give evidence in her own defence; but where her defence necessarily involved imputations of criminality and domination by the husband, to save herself the wife inevitably condemned her husband. It was apparent that the 1898 Act had serious ramifications for the common law defence, which had not been taken into account in any of the Parliamentary Debates and wholly overlooked by the Avory Committee. Atkin LJ stated that the effect of clause 42 was that "a defence by the wife necessarily affords evidence of guilt of the husband". He added "[u]nfortunately the criminal classes do still coerce their wives: though more refined persons may not". Atkin LJ then analysed how the proposed statutory defence would work in practice as it was very improbable that there would be independent evidence in support of it. The two considerations that needed to be taken into account were:

1. On the hypothesis she has been under the coercion of a husband whom she fears, is the fear likely to be lessened if she goes into the box to give evidence? One would have supposed the likelihood of still stronger coercion restraining her from giving evidence – what will happen to her when the husband comes out?

2. Such a defence by the wife necessarily affords evidence of the guilt of the husband. Apart from any legal question as to the competence of the wife (as she is an accused person – I think that she is competent!). ie. it is not a mockery to say that a wife may only raise an effective defence by giving evidence which must condemn her husband. Not only all the traditions of the criminal classes are against it: but also I think of other classes as well. Again, how will the wife fare with her associates when the husband is doing time on her evidence.

He reasoned that if the provisions of the clause were intended to place the wife in the same position as all other persons who may plead the general defence of duress, then the intention failed, as the clause actually placed a wife in a worse position than under that defence. For by the proposed statute she would now have to prove that the offence had been committed “in the presence of and under the coercion of her husband.”<sup>263</sup> The proposed statutory formulation, based on a notion of equality, would amount to a material disadvantage for any wife, as the ordinary defence of duress could be established by her without any requirement that the offence had been “committed in the presence of the coercer”.<sup>264</sup> Atkin LJ added “[the husband] might be in the next room, or elsewhere: and yet his threats of death or violence might be operating on the mind of the offender”. He concluded the existing common law “appears to me to be humane and to do no injustice” and is not to be attributed wholly or mainly to old fashioned doctrines as to the unity of husband and wife.

#### LORD JUSTICE ATKIN CONSIDERS *R v PEEL*

Atkin LJ analysed that there was no need to change the law consequent upon the ruling of Darling J in *R v Peel*. He was highly critical not of the law, but of the way the trial judge had applied it in that case. Darling J had erroneously proceeded on the basis that there was no evidence to rebut the presumption, whereas Atkin LJ stated “to my judgment” there was ample evidence of facts which rebutted the presumption, adduced within the totality of the prosecution evidence. He referred approvingly, in preference to the approach that had been

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<sup>263</sup> PRO LCO2/721, Lord Justice Atkin, 18 June 1925, underlined emphasis in original.

<sup>264</sup> Ibid. Emphasis underlined in original.

taken in *R v Peel* to the summing up of Coltman J in *R v M'Clarens*.<sup>265</sup> The ruling in *R v Peel* that there was no case to answer was an aberrant ruling of law, that no evidence existed to rebut the presumption.

## CONSEQUENCES OF A WIFE HAVING TO PROVE THE DEFENCE

Atkin L J also argued that if a change were to be made to the common law by abolishing the presumption, the wife ought to be able to raise an effective defence without having to go into the witness box, in view of the consequences to herself whatever the result of the case. He suggested that the fact that an offence had been committed by a wife in the presence of her husband, should be evidence of coercion on which alone a jury might acquit if they thought right: but that they should always have the defence left to them together with all other relevant facts which support or are inconsistent with the defence. On this approach the onus would always remain on the wife. The presumption he argued could not be abolished while the onus still rested on the prosecution to disprove coercion beyond reasonable doubt. Atkin LJ also formulated a draft clause to carry out his proposal into legislative fruition.

The fact that an offence is committed by a wife in the presence of her husband shall not afford a presumption of law that such offence is committed under the coercion of the husband, but such fact shall of itself be evidence of such coercion: and a defence of coercion by her husband when raised by a wife shall be determined by the Jury or Court of Summary Jurisdiction as the case may be after consideration of the evidence of such fact and of all other relevant facts.<sup>266</sup>

This draft clause, received by the Lord Chancellor, unfortunately never features in any of the subsequent external government communications or Parliamentary Debates.

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<sup>265</sup> (1849) 3 Cox CC 425, 426. Cited Horace Smith and A P Perceval Keep (eds) *'A Treatise on Crimes and Misdemeanors by Sir W M Oldnall Russell'*, 6 ed, 1896, vol 1, p148. Coltman J had directed "primâ facie she might be presumed to be acting under the coercion of her husband that is rebutted by the active part she took in the matter..."

<sup>266</sup> PRO LC02/721.

## CRIMINAL JUSTICE BILL 1925: HOUSE OF COMMONS

The *Criminal Justice Bill* was amended by Standing Committee B of the House of Commons. It was ordered to be printed as Bill 201 on 23 June 1925 and was presented to the House by Sir William Joynson-Hicks, the Home Secretary, the Attorney General, Sir Douglas Hogg KC, the Solicitor-General, Sir Thomas Inskip KC, and Mr Godfrey Locker-Lampson. This happened five days after Atkin LJ's memorandum. There had been presumably no time for the government to consider his recommendations because it was only on 4 July 1925 that Schuster, on behalf of the Lord Chancellor, was able to deal with them. Only on that day did Schuster write to Rt Hon Sir John Anderson GCB<sup>267</sup> about the criticisms of clause 44 which had been made by Atkin LJ in private correspondence, Schuster stated:

The Chancellor is not moved by the criticisms so far as they are directed to the general policy of the Clause, and he asks me to say that if those criticisms have any effect upon the mind of the Secretary of State, the Chancellor thinks that before the clause is either amended or withdrawn there should be a consultation between the Secretary of State, the Attorney General and himself.

Schuster continued, "On the minor point taken to the drafting of the clause, directed to the insertion of the words "in the presence of and", the Lord Chancellor is somewhat impressed by Atkin's argument and would be prepared to assent to the omission of those words from the clause". If the government did adopt the suggestion by Atkin LJ, then the new clause would abolish the presumption, retain the defence but remove the pre-existing common law requirement that the offence be committed in the presence of the husband. That combination of features would mean that the outcome would eventually provide for the common law offence of duress to be in a statutory form but applicable for only married women, and with two differences. The first was that "coercion" was intended to have a broader inclusionary meaning than that encompassed by the comparative noun "duress", at common law. The second was that the statutory defence would now place the burden of proof on the defendant wife to establish the new affirmative defence, whereas at common law, it was unquestionably for the prosecution to disprove duress at common law beyond reasonable doubt. No analysis

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<sup>267</sup> Who later featured as the respondent in the notorious case of *Liversidge v Anderson* [1942] AC 206 (HL). Discussed in David Clark and Gerard McCoy, *The Most Fundamental Legal Right: Habeas Corpus in the Commonwealth*, Clarendon Press, Oxford 2000, pp97-102.

in the Parliamentary Debates was ever directed to the standard of proof that was to be placed upon the wife by this statute. The orthodox learning at the time would be that the only burden placed upon a defendant, save for the exceptional defence of insanity,<sup>268</sup> was that the defendant had to establish a statutory defence on the balance of probabilities.<sup>269</sup> However, the effect of a construction that interpreted the section as only imposing on the wife an evidentiary (rather than a legal) burden, would meet constitutional law norms and would revitalise the defence as being a less prescriptive form of duress, claimable only by wives.<sup>270</sup>

The next edition<sup>271</sup> of the *Criminal Justice Bill 1925* now renumbered the clause as 44 and it now read:

44. Any presumption of law that an offence committed by a wife in the presence of her husband is committed under the coercion of the husband is hereby abolished, but on a charge against a wife for any offence other than treason or murder it shall be a good defence to prove that the offence was committed in the presence of, and under the coercion of, the husband.

The marginal note to the clause stated “Abolition of Presumption of coercion of married women by husband”. Clause 46(3) provided that the Act would not extend to Scotland<sup>272</sup> or Northern Ireland.<sup>273</sup>

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<sup>268</sup> *Woolmington v Director of Public Prosecutions* [1935] AC 462, 481 (HL) per Viscount Sankey LC.

<sup>269</sup> *R v Carr-Briant* [1943] 1 KB 607 (CCA).

<sup>270</sup> Discussed infra ch 3.

<sup>271</sup> *Criminal Justice Bill 1925*, Bill 201, His Majesty’s Stationery Office.

<sup>272</sup> Note the robust view of Scottish law that flatly rejected the notion of the coerced wife. In Archibald Allison, ‘*Principles of the Criminal Law of Scotland*’, William Blackwood, Edinburgh, 1832 at page 668. “1. A wife is not excusable in the commission of any crime by the influence or power of her husband, if she has taken any part in its commission along with him” at p669.

<sup>273</sup> Twenty years later by s37 *Criminal Justice Act* [NI] 1945 (c. 15) Northern Ireland enacted a section identical to s47 *Criminal Justice Act 1925*. See ‘*The Statutes Revised – Northern Ireland Criminal Justice Act (Northern Ireland) 1945*’, ch 15. Note (1944) 1 Northern Ireland Legal Quarterly 170 stating that s37 *Criminal Justice Act 1945* [NI] was a “very necessary reform of the common law”.

## HOME SECRETARY WRITES TO LORD CHANCELLOR

On 15 July 1925 Sir William Joynson-Hicks, the Home Secretary, wrote to Viscount Cave LC, anticipating some difficulty in the passage of clause 44. He noted that “Greaves-Lord and several other lawyers” in the House of Commons, had put down in Committee, an amendment to the clause, which, if accepted, would make it merely declaratory of the law as it is at present, confirming the state of the existing common law determined in the Avory Report. The result of such an amendment would be to endorse both the presumption and the defence and to confirm that the defence applied to every criminal offence (felony and misdemeanour), save for murder and treason. Joynson-Hicks advised that the foreshadowed Committee amendment had not been pressed at that stage, upon an undertaking by him to reconsider their proposal before the Report Stage. The Lord Chancellor was advised that Greaves-Lord MP had now put down a proposal for the Report Stage to delete the entire clause 44, leaving the existing common law position completely untouched. The Home Secretary noted that clause 44 in fact adopted the first of two alternatives considered by the Avory Committee, but reflected the very one they did not adopt. He cautiously added:<sup>274</sup>

Yesterday Sir Archibald Bodkin told me that the Lord Chief Justice was anxious to see Clause 44 amended by leaving out all the words after “abolished” in line 19. The Clause then would appear in effect to carry out the second alternative as recommended by the Avory Committee.

The amendment proposed by the Lord Chief Justice would then simply provide that “Any presumption of law that an offence committed by a wife in the presence of her husband was committed under the coercion of the husband is hereby abolished.” That would not have had the effect of abnegating the defence, only the presumption; unless it could be argued that the defence could not separately survive without the presumption. But as the Solicitor-General was to inform the House of Commons that “coercion” in the Bill had a distinctly different and only partially overlapping meaning with that of “duress” at common law, the removal of the presumption in accordance with Lord Hewart’s formulation above, would still have provided wives with a separate and larger privilege under the criminal law than that enjoyed by any

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<sup>274</sup> PRO LCO2/721.

other person or class of persons. The three year quest for detail had successfully obscured the underlying criminal law macro-issues.

The Home Secretary also reacted that the terms of such a clause would then appear in effect to carry out the final recommendation of the Avory Committee. But that conclusion was also very doubtful because all that that legislation would have secured is the abolition of the presumption and not the abrogation of the defence. He stated to the Lord Chancellor the matter is certainly a difficult one and is complicated by the various opinions held in authoritative quarters as to what form the alteration of the law should take or whether any alteration of the present law is required. He added that Greaves-Lord MP and his cohort appeared to be in favour of an “alteration of the present law”. But this was the exact opposite of what Greaves-Lord had wanted to achieve, which was to retain the existing common law in all respects. The Home Secretary requested a conference with the Lord Chancellor and Attorney General to “settle what line is to be taken”. He warned that the Report Stage in the House of Commons could be taken as early as 17 July and they would therefore need to talk tomorrow (16 July). The next day,<sup>275</sup> Schuster sent to Viscount Cave a copy of: The Avory Committee Report, clause 44 *Criminal Justice Bill 1925*, Atkin LJ’s Memorandum and the Home Secretary’s letter of 15 July. On 17 July, Schuster made a file note “The Lord Chancellor spoke to the Secretary of State. They agreed to maintain the Clause as it stands”.<sup>276</sup>

#### *CRIMINAL JUSTICE BILL 1925: SECOND READING: ADJOURNED DEBATE*

On 16 November 1925, Sir William Joynson-Hicks<sup>277</sup> moved that the clauses in the reintroduced *Criminal Justice Bill 1925* be read a Second Time. The Adjourned Debate resumed a few days later<sup>278</sup> and clause 44 was the subject of extended criticism by Mr

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<sup>275</sup> PRO LCO2/721, 16 July 1925. “R.W.B for C.S” to Lord Chancellor.

<sup>276</sup> PRO LCO2/721, 17 July 1925. “C.S.”

<sup>277</sup> *Parliamentary Debate*, House of Commons, vol 188, p76, 16 November 1925, The Secretary of State for the Home Department.

<sup>278</sup> *Parliamentary Debates*, House of Commons, vol 188, p799, 20 November 1925.

Greaves-Lord MP,<sup>279</sup> who unsuccessfully moved for the clause to be left out of the Bill, asserting that the defence was “something like 300 years”<sup>280</sup> old. He accurately described the defence as involving a rebuttable presumption of fact but erroneously stated that the defence “only applies...to theft or the receipt of stolen property...uttering of counterfeit coins and it applies to misdemeanours”.<sup>281</sup> He noted that it was doubtful that the defence applied to robbery although he remarked that Stephen J held that the defence did so apply.<sup>282</sup>

This information base was sloppy and ill-prepared. The trial of *R v Peel*<sup>283</sup> was referred to and it was acknowledged that “[d]ecisions of that kind may create unfortunate precedents.”<sup>284</sup> A reference to the Avory Committee recalled that it had recommended the total abolition of the defence, so that the general law of duress would apply so that a wife “should be left to the other portion of the law which gives a right to anyone to be excused of crime if the crime is committed – the crime being short of murder – under an immediately threat to kill or to cause grievous bodily harm.” Mr Greaves-Lord KC MP argued that there:

is a very wide area of compulsion between an act committed under an immediate threat to kill or cause grievous bodily harm [as in the defence of duress at common law] and...one can realise what very wide powers of coercion a husband may have which fall short altogether of a threat to kill or cause grievous bodily harm.<sup>285</sup>

The Member for Norwood observed that the clause neither carried out the recommendation of the Avory Committee nor was the wife left with any effective defence so clause 44 was an unsatisfactory half-way house compromise. “[T]he result of it is to preserve the defence for those women who are not coerced, but to take it away entirely for those women who are.”<sup>286</sup>

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<sup>279</sup> *Parliamentary Debates*, House of Commons, vol 188, p868, 20 November 1925. Later Sir Walter Greaves-Lord KC and later still Hon. Mr Justice Greaves-Lord of the King’s Bench Division.

<sup>280</sup> *Ibid* 868. He short-changed it by 800 years.

<sup>281</sup> *Ibid* 869.

<sup>282</sup> Presumably a reference to *R v Dykes et Uxor* (1885) 15 Cox CC 771 (Maidstone Autumn Assizes).

<sup>283</sup> *Ibid* 869 “...a trial which caused a certain amount of excitement...” in which the Judge directed the jury to return an acquittal on the basis that “...there was no evidence that she had not acted under the coercion of her husband.”

<sup>284</sup> *Ibid* 869.

<sup>285</sup> *Ibid* 869-870

<sup>286</sup> *Ibid* 870. Although of undoubted epigrammatic value the dictum is more rhetoric than accurate. Mr Greaves-Lord MP further explained that the coerced woman cannot in reality go into the witness box to prove the coercion from her husband. Further, the husband could falsely give evidence of his coercion of the wife as an arrangement to ensure that although equal guilty partners in the crime, one parent remains acquitted.

The force of the argument is that the wife could only establish her defence from the witness box by proving the guilt of her husband. It was remarked a wife who had been under brutal coercion from her husband would not have the real choice to give evidence in the first place and the attendant risk was that to exculpate herself, she had to effectively inculpate him. Such a coerced woman would not go into the witness box and would almost inevitably be convicted, because of her ongoing coercion (involving implied or actual threats perhaps to their children) which meant any decision not to give evidence was itself involuntary, caused by the effects of that coercion. A wife under coercion at the time of the offence would not be able to realistically make a decision to allow herself to give evidence to prove the defence with the consequence of its success being the end of her marriage and the conviction of her husband. A wife might selflessly decline to avail herself of the defence because of the price it carried for matrimonial harmony, when the origins of the common law presumption and defence had been to enhance matrimonial harmony by not putting a wife in a position in which she could damage herself or the marriage, in exculpating herself.

Mr Greaves-Lord also considered the unprotected converse scenario of a coercing wife, who had induced her overborne husband into crime. While a wife is not generally a compellable witness against her husband, the proposed statutory defence would have two immediate effects. It would compel the wife to go into the witness box<sup>287</sup> and there she could be compelled to answer questions about her husband as a co-defendant to which she could not be able to claim privilege.<sup>288</sup> Mr Greaves-Lord concluded that the proposal was a very serious inroad upon the defences of married women which should not be lightly taken away from them. He identified the reversal of the onus of proof “which has rested on the prosecution for hundreds of years”, moving from the prosecution at common law but to the wife by this statute, as a seriously unjustifiable step that could not be sanctioned in terms of principle. The Member then criticised the fact that “none of the woman’s (sic) organisations who talk so much about the rights of women have taken any very great interest in [this clause].”<sup>289</sup> He declaimed them for their nonchalance in relation to this important matter. But this criticism

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<sup>287</sup> This is incorrect – the defence can be established without the wife giving any evidence herself.

<sup>288</sup> This is also incorrect – privilege is not waived by an election to call evidence.

<sup>289</sup> *Parliamentary Debates*, House of Commons, vol 188, p871, 20 November 1925. This is also incorrect. See *infra* fns 115 and 189.

was seriously misplaced as the women's organisations such as the National Council of Women had in fact staged a serious campaign in the press for the removal of the presumption, as to their mind, it stigmatised women as a class of subordinate beings. As early as 1871, the press had been urged by women to militate for the abrogation of the presumption. For the last half century, the groundswell of published material from women had been overwhelmingly in favour of the repudiation of the presumption. Mr Greaves-Lord MP, did acknowledge that the clause would put "...men and women on an equal footing"<sup>290</sup> and wondered whether, as a strategy, the silence from that sector which he (wrongly) believed to exist, may have been motivated by seeing the clause as a further opportunity to secure practical equality under the law. He noted the proposed statutory defence, which applied to the matters, concerns and conditions of the spousal relationship, would make inroads upon the general intimacy of married life, which "would bring about a very serious defect in our Criminal Law."<sup>291</sup>

#### MR CASSELS KC MP OPPOSES THE CLAUSE

Mr Cassels KC also moved the clause be deleted from the Bill, but for significantly different reasons from those advanced by Mr Greaves-Lord. His objection was that the Avory Report recommendation of complete abrogation of the entire doctrine had not been followed despite the "prevailing judicial opinion"<sup>292</sup> to the same effect. Since the enactment of the *Married Women's Property Act 1882* [UK] and the *Sex Disqualification (Removal) Act 1919* [UK] their combined effect in principle, justified<sup>293</sup> the rejection of the clause, so that upon abrogation of the entire doctrine, a married<sup>294</sup> woman should have to take full responsibility, just as any other adult. "We live in times when every woman thinks that she is at least if not more than the equal of any man. She should take her full responsibility for anything that

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<sup>290</sup> Ibid. But not so, as a separate additional statutory defence for married women was exclusively created.

<sup>291</sup> Ibid 872.

<sup>292</sup> Ibid 872.

<sup>293</sup> Ibid 872. Hansard, clearly is in error when it omits the word "no" from the phrase "in my opinion presents (sic) ground for its continued preservation".

<sup>294</sup> During the entire Debate in the House of Commons and the House of Lords over the three years and nine months the legislation was in gestation, not a single reference was ever made to the possibility of common law marriage or de facto marriage unions or arrangements being included or adjustment made for them to qualify within the proposed law; except by Mr Rawlinson KC MP *ibid* 877.

happens and be equal in all matters, not only innocent matters but criminal matters as well”.<sup>295</sup>

## SOLICITOR-GENERAL JUSTIFIES THE CLAUSE

The Solicitor-General urged the clause was not a technical legal matter but a matter of substance.<sup>296</sup> He referred to a statement from the Avory Committee<sup>297</sup> and remarked that the view there was appreciably wider as to the extent of the defence than the view commended by Mr Greaves-Lord, who had stated he relied in preference on the *‘Digest of Criminal Law’* by Sir James Fitzjames Stephen. The Solicitor-General stated that the marital concern doctrine raised only a prima facie and rebuttable presumption of fact. He referred to the “notorious case” of *R v Peel*<sup>298</sup> and acknowledged it was the very reason for the creation of that Committee and declared there were three possible courses which the government could take in light of the Avory Report recommendation. The first was to make no legislative intervention so “the old presumption should continue”,<sup>299</sup> with the possible consequence that the same result as happened in *R v Peel* could again ensue. The second course available was to abrogate the presumption completely and place a wife in the same position as a husband under the common law of “duress”,<sup>300</sup> a term which the Solicitor-General stated, imported some fear of bodily harm – in the nature of physical compulsion. The third option was that adopted in the Bill to abolish the purely technical, legal presumption, “but leave it open to the wife to establish not merely the defence that she was compelled – that is to say, was driven to commit the crime by fear of bodily, physical injury – but to satisfy the jury that she was in fact coerced”.<sup>301</sup>

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<sup>295</sup> *Parliamentary Debates*, House of Commons, vol 188, p872-873, 20 November 1925.

<sup>296</sup> Sir Thomas Inskip KC (later 1<sup>st</sup> Viscount Caldecote, Lord Chancellor). *Parliamentary Debates*, House of Commons, vol 188, p873, 20 November 1925, with an unfortunate invocation that Members of Parliament “address themselves to it as sensible men of the world.”

<sup>297</sup> *Ibid* 873.

<sup>298</sup> *Ibid* 874. “the public were shocked by a notorious case...owing to this presumption of coercion, the case against her would have to be withdrawn...”

<sup>299</sup> *Ibid* 874.

<sup>300</sup> *Ibid* 874.

<sup>301</sup> *Ibid* 874.

The Solicitor-General then importantly indicated what was intended by the vital noun “coercion” in the putative statutory provision. He said, in contradistinction to the law of “duress” that “coercion” gives the wife a rather wider and more extended line of defence than pure physical compulsion. Coercion in the clause “imports coercion in the moral, possibly even in the spiritual realm, whereas compulsion imports only something in the physical realm”.<sup>302</sup> The expressed intention was to leave it to a wife to convince a jury that her acts or omissions, while not done under actual threats of physical violence, were done under moral and spiritual compulsion, in point of fact. The Solicitor-General accepted that to make a married woman the beneficiary of this statutory offence was to give her “a slightly extended form of protection which is not available to the members of the general public.”<sup>303</sup> He stated that “the sense of a woman’s particular qualities will not blind us to the desirability of leaving it open to her to convince a jury, if she can, that she committed a crime...under such moral and spiritual compulsion in point of fact as is properly described by the word “coercion”.”<sup>304</sup> The Avory Report recommendation therefore was not a proposal which the government could adopt, which had chosen instead to advance “the sensible and humane course.”<sup>305</sup>

#### SIR E HUME –WILLIAMS MP CHALLENGES THE SOLICITOR- GENERAL

Sir E Hume-Williams MP questioned whether the defence would apply only where the husband was actually present at the time of the offence, instancing a situation where the wife was commanded “if you do not go round the corner and steal a purse I will shoot you.”<sup>306</sup> The Solicitor General saw this as being within the ordinary defence of duress. He reiterated the proposed statutory defence only applied when the offence occurred in the presence of the husband and was caused by his coercion. Coercion “is something more than physical violence”<sup>307</sup> – which connotes that it was intended to only encompass conduct other than physical acts or omissions. He stressed the necessity for the actual, physical presence of the

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<sup>302</sup> Ibid 875.

<sup>303</sup> Ibid 875.

<sup>304</sup> *Parliamentary Debates*, House of Commons, vol 188, p875, 20 November 1925.

<sup>305</sup> Ibid 875.

<sup>306</sup> Ibid 876.

<sup>307</sup> Ibid 876.

husband, because in his absence, the wife “ought to be humane enough to be able to avoid that spiritual or moral coercion”. While the wife was in his presence “the influence of moral or spiritual terror is very potent indeed”. To which E Hume-Williams immediately rejoined: “But the coercion ceases to exist when the husband is not present”.

#### MR RAWLINSON KC MP CRITICISES THE CLAUSE

Mr Rawlinson KC considered that of the Members of the House of Commons, only Mr Greaves-Lord KC was in favour of perpetuating the common law defence in its unaltered entirety. Mr Rawlinson stated that he had had 40 years of lecturing on law and that he had always understood that the marital coercion defence “was one of the anomalies of the law which was to come to an end very soon.”<sup>308</sup> He opposed the government clause as he (like Mr Cassels KC) supported the Avory Report recommendation. His opposition to it was based on the need for a pervasive notion of gender equality within the substantive criminal law and that the proposed clause would introduce an unjustifiable derogation from such equality. He argued that for the criminal law, “there is no ground for treating a married woman in this matter in any way different from any other member of the community.”<sup>309</sup> It followed, that the position of a woman living with a man to whom she is not legally married<sup>310</sup> was indistinguishable from that of a married woman. “Is the coercion which is likely to be exercised any less than in the case of a man who is married to a woman?” In addition, he argued that the concept of coercion in its effect should equally apply where either parent instigated a child or some other member of the extended family, to commit a crime. This was because there is no less likelihood of coercion in those examples as there is between a man and wife. To suggest otherwise, was “ridiculous” and at odds with the reality that there was as much prospect of a husband being under the coercion of his wife. Although the *Married Women’s Property Act 1882*<sup>311</sup> and the *Sex Disqualification (Removal) Act 1919* [UK] were

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<sup>308</sup> Ibid 877.

<sup>309</sup> Ibid 877.

<sup>310</sup> Ibid 877. At p878 he referred to “a woman living in adultery with a man.”

<sup>311</sup> See also: *Married Women’s Property (Scotland) Act 1881* [UK] c21 44 & 45 Vict. Discussed in a pioneering work Margaret H Kidd ‘*Women under Scots Law*’ p98-101 in Maud I Crofts, ‘*Women Under English Law*’ (1928) 2 ed, Butterworth & Co (Publishers), Ltd, Temple Bar. Maud Crofts was one of the first solicitors of the

important milestones towards equality, “long before they existed there was no sense in this particular law” so in criminal law terms, a married woman should be put in the same position as any other citizen.<sup>312</sup>

Mr Rawlinson KC decried the fact that the recommendation of the Avory Committee, supported by Sir Harry Poland, had been rejected, as both Avory J and Poland had incomparable experience of the criminal law. In addition, he also remarked that there were statistically very few crimes committed in the presence of a husband by a wife. He argued that as “very few cases to which [the defence can] apply” came before the Courts, this was a further reason not to make an elaborate distinction for a class of womanhood. But he trenchantly inquired, “What is the definition of coercion<sup>313</sup> here? I have no idea. An hon. Member opposite said there was not much difference between coercion and compulsion, but there is, legally, a great difference. What will the woman have to prove when she says that she acted under the coercion of her husband?”<sup>314</sup> This was a very pointed criticism of the particularly evanescent attempt of the Solicitor-General to define what had been intended to be included within the critical expression. At no stage, either in its private correspondence or in public, did the government ever consider inserting a definition of “coercion” for the new section. The curious phraseology adopted by the Solicitor-General that coercion involved a “spiritual” dimension,<sup>315</sup> is most unlikely to have been an allusion to ecclesiastical matters. It probably was a contemporary usage, meaning “of the mind” – in the sense of its fragility, and capacity to be overpowered by psychological domination. Mr Rawlinson KC considered that there was an insuperable difficulty in having a requirement that in practice a wife would have to enter the witness box to prove that she had acted under the coercion of her husband. A

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English Supreme Court of Judicature. The first edition, Maud I Crofts, *‘Women Under English Law’* (1925), The National Council of Women of Great Britain, London, was published the very year the common law marital coercion defence was abrogated by Parliament. At p45 “A Government measure, the Criminal Justice Bill now (Nov. 1925) before Parliament, will if passed into law, shortly abolish the presumption of co-ercion, though it will not prevent proof of actual co-ercion being advanced as a defence as a wife.”

<sup>312</sup> Ibid 878. “Can Hon. Members imagine anything more ridiculous than to suggest that there should be a power given to a wife to say ‘I acted under the coercion of my husband’ which is not allowed to any other human being to say of anyone else?”

<sup>313</sup> The intention of the expression, to differentiate it from duress, is that the moral force component includes mere threats, as opposed to actual physical force in duress.

<sup>314</sup> *Parliamentary Debates*, House of Commons, vol 188, p878, 20 November 1925. Earlier, Rawlinson KC had said, *ibid* 877, “There is a real difference between compulsion and coercion.”

<sup>315</sup> Lesley Brown (ed), *‘The New Shorter Oxford English Dictionary on Historical Principles’*, Clarendon Press, Oxford, 1993, p2990, n4.

separate privilege for married women could not be justified as it “puts a married woman in a different position from any other woman, for instance, a woman living in adultery with a man or [residing with her] parent and so on.”<sup>316</sup> The government made no reply to these observations other than to remind Members of the urgency of passing the entire Bill.

#### MR T SHAW MP SUPPORTS THE CLAUSE

Mr T Shaw<sup>317</sup> stressed the clause underlined the fact a married woman was responsible for her own actions. He added, “Whilst one can recognise the absolute right of a woman to equality before the law, one has also to realise the facts of actual life. Everyone knows that crimes have been committed by women under the coercion of their husbands”. He was in favour of it as it provided an opportunity for a married woman who had been wronged by her husband to escape liability. He was not perturbed by the absence of any definition of “coercion” as it would be an adverse reflection on judges and juries to suggest that they did not know what it meant. Contemporary mores no longer allowed a woman upon marriage to become “the chattel of her husband”.

#### GOVERNMENT SEEKS TO EXPEDITE THE WHOLE BILL

Mr Godfrey Locker-Lampson, the Under-Secretary of State for the Home Department, implored the House of Commons to pass the Bill through both the Report Stage and the Third Reading that very day, as the pressure of business was such that “unless we get this Bill today it will very likely have to be sacrificed.”<sup>318</sup> He noted that in return for speed, the Home Secretary had already “given up two of the contentious clauses altogether.” At this point, Captain Benn MP protested about the imposed rush, stating that there should be “due discussion”.<sup>319</sup>

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<sup>316</sup> *Parliamentary Debates*, House of Commons, vol 188, p878, 20 November 1925.

<sup>317</sup> *Ibid* 880.

<sup>318</sup> *Ibid* 880.

<sup>319</sup> *Ibid* 880.

## CAPTAIN GARRO-JONES MP OPPOSES THE CLAUSE

Captain Garro-Jones MP protested that after a three month vacation Parliament had only re-assembled on 16 November 1925 and that the government was unduly pressurising the Members. He observed that clause 44 “now offers a great deal of scope for discussions. It seems to have been very badly drawn.”<sup>320</sup> In particular, the expression “within the presence of and under the coercion of her husband” had not been drafted with any regard to the leading common law cases on the requirement. He drew attention to the fact that the requirement of physical presence of the husband meant that “crimes which extend over a long period of time or crimes of a double nature”<sup>321</sup> would be wholly outside this new defence and anticipated that the clause would “lead to endless litigation”<sup>322</sup> as a result of its inept drafting.

## HOUSE OF COMMONS PASSES THE CLAUSE

When the clause proceeded to a Division, it was passed without even a vote being actually taken<sup>323</sup> as no Members were willing to act as Tellers for the Noes whereupon the Deputy-Speaker declared the Ayes had it. Mr Rawlinson KC then withdrew his amendment which would have implemented the recommendation of the Avory Committee, but expressed the hope the government would reconsider the issue when the Bill moved back to the House of Lords. The resumed debate on other clauses in the Bill took place on 26 November 1925,<sup>324</sup> at which point, the clause became further and finally renumbered as Clause 47. The Bill then came before the House of Lords for its Second Reading and Viscount Cave LC moved it accordingly. Viscount Haldane<sup>325</sup> noted “this Bill has been through three Parliaments” and after Lord Phillimore, Earl Russell and Viscount Cave LC briefly spoke in support of the Bill as a whole, the Bill was read a second time and committed to a committee of the whole

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<sup>320</sup> Ibid 881.

<sup>321</sup> Ibid 881.

<sup>322</sup> Ibid 881.

<sup>323</sup> HC Debates p881 (20 November 1925).

<sup>324</sup> HC Deb 1758 (26 November 1925).

<sup>325</sup> Who was Lord Chancellor for a part of 1924 and had been also in 1912-1915. House of Lords Debates p1029 (1 December 1925).

House.<sup>326</sup> On both the ninth<sup>327</sup> and fifteenth<sup>328</sup> December 1925, the *Criminal Justice Bill 1925* was considered, but the clause was simply “agreed to”. The Royal Assent was authorised by the Speaker of the House of Commons on 22 December 1925<sup>329</sup> and the 1100 year old common law defence was abrogated, and the new statutory variant came into being for England and Wales<sup>330</sup> from 1 June 1926.<sup>331</sup>

#### THE INEXPLICABLE ABSENCE OF REFERENCE TO *R v TORPEY*

The clamour in 1922 for urgent law reform to abolish both the presumption and the defence of marital coercion, precipitated by *R v Peel*, had had an almost exact parallel in English law some 50 years earlier. The eventual pedestrian pace, leading to the enactment of s47 *Criminal Justice Act 1925*, had occurred without the slightest bit of notice having been taken by either the Avory Committee or the government or any Parliamentarian or indeed anyone of the remarkable similarity between *R v Peel* in 1922, and the equally sensational decision of *R v Torpey* some 50 years earlier in 1871. Half a century before *R v Peel*, the newspapers of the time, the House of Lords, and leading advocates for female emancipation and equality had all thundered, but for different reasons, at the condition of the law which permitted the presumption of marital coercion to operate to set Martha Torpey free. It is remarkable that the audacity of the crime and the outcome of the trial in *R v Torpey*,<sup>332</sup> which so incensed the public and Parliamentarians alike then should have been wholly overlooked in the Avory Report of 1922. Only the cursory attention paid to existing law by that Committee can excuse the oversight. But as neither the government nor anyone else made the linkage over the four year period, it is excusable only on the basis of consistency. This omission is even more striking in view of the detailed analysis to which the common law position was subjected in the House of Lords, in its Parliamentary role, in the wake of the verdict in *R v Torpey* and the

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<sup>326</sup> *Parliamentary Debates*, House of Lords, vol 67, p1034, 1 December 1925.

<sup>327</sup> *Parliamentary Debates*, House of Lords, vol 67, p1277, 9 December 1925.

<sup>328</sup> *Parliamentary Debates*, House of Lords, vol 67, p1439, 15 December 1925.

<sup>329</sup> *Parliamentary Debates*, House of Lords, vol 67, p2256, 22 December 1925.

<sup>330</sup> But not in Scotland or Northern Ireland: s49 (3) *Criminal Justice Act 1925* [UK].

<sup>331</sup> Section 49(5) *Criminal Justice Act 1925* [UK].

<sup>332</sup> *R v Martha Torpey* (1871) 12 Cox CC 45 (CCC)

additional fact that eight years after that *cause célèbre*<sup>333</sup> the Criminal Code Commission in 1879 recommended the complete abrogation of the presumption and the defence. The lessons from *R v Torpey* were undoubtedly in the minds of those Commissioners, but had evidently been forgotten<sup>334</sup> for the purposes of the policy formulation culminating in s47 *Criminal Justice Act 1925* [UK].

## MRS TORPEY AND THE JEWELLERY ROBBERY

In January 1871, Mrs Torpey and her husband systematically<sup>335</sup> preyed on London jewellers by luring them together with their precious wares into what was passed off as the plush Torpey residence. On the occasion which led to her arrest, Mrs Torpey had chloroformed<sup>336</sup> the victim<sup>337</sup> as her husband forcibly restrained him, allowing the robbery of the jewels<sup>338</sup> to be effected. But her active role was not restricted to her combinative participation in the

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<sup>333</sup> *The Times*, 30 January 1871, p10 “The circumstances of this daring and skillfully-executed robbery have, to judge by the large crowds who blocked the narrow approaches to the court long before the arrival of the prisoner, excited great interest, and the insufficiency of the accommodation provided in this court for solicitors, reporters, witnesses, and police cause great inconvenience to those whom business obliged to be present.”

<sup>334</sup> *Infra* fn 355-358. *The Times* 4 March 1871 p8 had expressly said that “The case should not be forgotten in future discussions on the subject”.

<sup>335</sup> The prosecution case before the magistrate during the committal proceedings leading to the eventual indictment was that the spouses had committed a series of robberies and similar fact evidence was adduced to show that the husband had attended upon a number of jewellers inviting them to call (with their jewels) at the Torpey residence: *The Times*, 10 Feb 1871 p10. Upon the acquittal of Mrs Torpey at trial, counsel for the prosecution informed the Recorder that there were other indictments against the spouses, including one for a misdemeanour which the case law (see *R v Cruise* (1834) 8 Car & P 541) and institutional writers (Hawkins PC c1 s10) agreed no defence of marital coercion was available; drawing a distinction between cases of felony and misdemeanour. However, counsel for the defence denied the suggested distinction, relying on *R v Price* (1837) 8 Car & P 19. After consulting Bramwell B, the Recorder ruled that the defence was available for a misdemeanour, whereupon the prosecution offered no evidence on the other indictments and Mrs Torpey was again acquitted: See *R v Torpey* (1871) 12 Cox CC 45, 49. The report of the trial in *The Times* wholly omits any reference to the other indictments, albeit the other crimes of robbery had been noted in its earlier report of the committal proceedings. At the subsequent separate trial of her husband, he admitted that they had originally selected another jeweller as the subject of the robbery: *The Times*, 3 May, 1871, p11.

<sup>336</sup> “[S]he then came quietly behind prosecutor and placed a handkerchief saturated with something over his face and mouth, whilst the male prisoner rushed at him and clasped him round the arms in front. They struggled together for two or three minutes, the female prisoner constantly applying the handkerchief to prosecutor’s face, who, after a short time, became unconscious, and was forced by the prisoners onto a sofa.” *R v Torpey* (1871) 12 Cox CC 45, 46

<sup>337</sup> Mr James Unett Parkes an employee of Messrs London and Ryder, Court jewellers, of 17 New Bond Street.

<sup>338</sup> Valued at over 5,000 pounds. In *People v Wright* (1878) 38 Mich 744 it was held that where a wife choked a man while her husband robbed him, it had to be left as a question of fact whether marital coercion had occurred: noted sardonically in *Note* (1890) 2 *The Green Bag* 560.

actual violence. She had in the days in advance of it set upon a course of action without which the robbery could never have taken place. Her initial act was to contact the jeweller by sending to him, from a purported third party,<sup>339</sup> a forged reference commending to him the antecedents of the Torpeys as wealthy potential customers. The husband and wife had rented<sup>340</sup> residential premises in a fashionable part of London and a maidservant was attached to their household. Mrs Torpey, on the day of the robbery, had by a letter in her own handwriting, directed the maid to attend upon an errand at a fictitious address on the other side of London which “kept [the maid] fully occupied until after the robbery had been completed”.<sup>341</sup>

Immediately after the robbery Mr Torpey<sup>342</sup> departed London for the Continent. Mrs Torpey bolted to the south of England and three days later a female relative received from her a parcel containing part of the stolen jewellery. A few days later Mrs Torpey was apprehended. Although co-indicted with her husband she stood trial alone,<sup>343</sup> after a magistrate had committed her for trial.<sup>344</sup> At the preliminary hearing advance notice that the defence of marital coercion would be relied upon at trial, was explicitly raised on her behalf. It was submitted that the law exonerated a wife from the consequences of her act where the husband was present. This provoked a sharp reply<sup>345</sup> from the magistrate, who refused to grant Mrs Torpey bail.<sup>346</sup>

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<sup>339</sup> A Madame de Madaillon who wrote that she was “( imperfectly acquainted with the English language)”: *R v Torpey* (1871) 12 Cox CC 45, 46.

<sup>340</sup> No 4 Upper Berkeley Street, W. The house had been rented for a week.

<sup>341</sup> *R v Torpey* (1871) 12 Cox CC 45,47.

<sup>342</sup> He had been “educated for the Church of Rome [but] disappointed the hopes of his friends by refusing to enter the priesthood”: *The Times*, 10 February 1871 p10.

<sup>343</sup> In the gaol calendar she was described as a married woman, that this did not appear on the face of the indictment, which contained no description of her status. However, counsel for the prosecution Mr Metcalfe had opened the case to the jury on the basis that she was undoubtedly a married woman: *R v Torpey* (1871) 12 Cox CC 45, 48. The implications of the prosecution acknowledging married status is dealt with infra ch 3.

<sup>344</sup> She was aged 28 and was described as “a small, slender women”, bearing in the dock a 6 week-old infant in her arms. The case even before the magistrate attracted huge interest under an imposing headline ‘*The Extraordinary Jewel Robbery*’: *The Times*, 10 February 1871 p10

<sup>345</sup> Mr Mansfield, Stipendiary Magistrate, remarked if that submission was the law “Mrs Manning was most unjustly hanged”: *The Times*, 30 January 1871, p10, referring to *R v Manning* (1849) 2 Car & K 887.

<sup>346</sup> *The Times*, 10 February 1871, p10.

## MRS TORPEY ON TRIAL

The facts of this robbery demonstrated all the hallmarks of a carefully organised plan, skilfully executed by concerted action in which Mrs Torpey had been significantly or dominantly involved. But these allegations did not avail the prosecution a jot as Mrs Torpey was acquitted by an Old Bailey jury after seven minutes deliberation, on the expressly stated basis<sup>347</sup> the presumption of marital coercion had not been rebutted. The jury unanimously concluded the wife had acted throughout under the control of her husband. In opening the case to the jury, counsel for the prosecution immediately told them that an issue would be raised by the accused that she had acted under her husband's coercion. The prosecutor specifically criticised the marital coercion doctrine stating it had been "to some extent misunderstood in some of the earlier cases quoted in books of law; but in these days of civilisation a different construction was put upon it".<sup>348</sup> Prosecution counsel emphasised that both the letter of reference to the jeweller and the letter to the maid had been written by Mrs Torpey independently of any domineering will of her husband. In addition she had been responsible for committing the first act of violence, by placing a chloroform-soaked handkerchief over the jeweller's face which then permitted her husband to complete the act of robbery. There was nothing on the state of the evidence to show that she had been compelled to act as she did. Counsel for the defence unsuccessfully<sup>349</sup> submitted that there was no case to answer, on the basis that even if the facts appeared to show that the wife had taken a more active part<sup>350</sup> than her husband, she was absolved from criminal liability by the marital coercion presumption.<sup>351</sup> The Recorder emphasised that the presumption was only a prima

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<sup>347</sup> *R v Torpey* (1871) 12 Cox CC 45, 49: the jury returned the following verdict "We are of opinion that the whole matter was pre-arranged by the husband, and the prisoner acted under his coercion and control at the time".

<sup>348</sup> *R v Torpey* (1871) 12 Cox CC 45, 47 emphasising that the real question was whether the wife had "committed certain acts of violence of her own will and accord, which rendered her clearly liable for the consequences" and adding that although there existed "a strong presumption in favor of a married woman that she had acted under the influence of her husband, was very easily to be rebutted by showing that she took active steps towards the perpetration of the crime".

<sup>349</sup> The trial judge was Rt Hon Russell Gurney, Recorder of London, who ruled whether the presumption was rebutted was a matter for the jury.

<sup>350</sup> Relying on *R v Cruise* (1834) 8 Car & P 541 and *R v Archer* (1826) 1Mood CC 143.

<sup>351</sup> An accused person could not give evidence on the trial of a felony until the enactment of the *Criminal Evidence Act 1898* [UK].

facie one so the decision was a question for the jury.<sup>352</sup> In his closing address, counsel for Mrs Torpey asked plaintively of the jury why was the wife “to be made the scapegoat of a man who had been coward enough to take flight and leave the weaker vessel behind”?<sup>353</sup>

The Recorder<sup>354</sup> in summing up to the jury emphasised that the issue was whether the part taken by Mrs Torpey showed that she was exercising her own free and independent will and was not coerced. He made particular reference to the fact that there was no evidence that her husband had been present when she dispatched the letters to the jeweller or sent off the maid and that the presumption only applied where a wife committed an offence in the presence of her husband. The overall thrust of the summing up was strongly for a conviction to be returned, by stressing to the jury that a wife was not always bound to obey the dictates of her husband.<sup>355</sup>

## REACTION TO THE ACQUITTAL OF MRS TORPEY

The verdict of acquittal provoked an immediate favourable<sup>356</sup> reaction within the courtroom only from supporters in the public gallery, but otherwise incited a torrent of outrage from all quarters.<sup>357</sup> Two days after the acquittal a sustained sarcastic piece was published,<sup>358</sup> written to denigrate the entire marital coercion doctrine.

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<sup>352</sup> *The Times*, 2 March 1871 p11.

<sup>353</sup> *Ibid.*

<sup>354</sup> Rt Hon Russell Gurney, Recorder of London, the trial Judge, in *R v Torpey*, had earlier moved the Second Reading of the *Married Women's Property Bill 1870* in the House of Commons, 18 May 1870.

<sup>355</sup> “A woman certainly was not to do a wicked act simply because her husband directed her to do it... was [she] exercising an independent will, or was she acting throughout acting under her husband's coercion?": *R v Torpey* (1871) 12 Cox CC 45, 49.

<sup>356</sup> *The Times*, 2 March 1871, p11 where it is recorded of the jury's verdict “The announcement elicited some applause.” That reaction led the *Pall Mall Gazette* to write sarcastically “the applause which greeted the acquittal of Martha Torpey on the occasion of her trial for the late jewel robbery will awaken a chord of sympathy in every manly bosom”: reprinted *The Times*, 18 March 1871 p11. The press reported with discomfort that the verdict was greeted with “to the great satisfaction, as it appeared, of the audience in court”: *The Times*, 4 March 1871 p8.

<sup>357</sup> *The Times*, 2 March 1871, p11 under a heading ‘*The Great Diamond Robbery*’ spat that the jury “after about seven minutes’ consultation, without leaving their box, returned a verdict of Not Guilty”.

<sup>358</sup> *The Times*, 3 March 1871, p11.

We are sorry for the shopman. Of course, it is not pleasant to be stupefied with chloroform, to have the arms tightly strapped, to be threatened with instant death, and then to be robbed; but, after all, the ligatures which bound the limbs were not so strong as those which bound that loving wife to her erring husband, and shopmen when they accept these situations, should be prepared for the consequences of conjugal affection.

The article wished the couple well with the jewels and “many years of unalloyed happiness in some sphere well suited to their anaesthetic tastes.”

#### MEDIA REACTION IN 1871 TO MARITAL COERCION DEFENCE

*The Times* wrote a leader<sup>359</sup> on the case, the “Great Diamond Robbery”, which it said had been executed with “consummate audacity and success” such that “[i]f two men, instead of a man and his wife, had planned this robbery, it could not have been executed, to all appearances, with a more equal division of labour.” The verdict exposed a law built out of the fact or theory of uxorial power imbalance; a law the continuance of which was dissonant with the aspirations of female equality.

The case deserves all the more notice on account of the demand for women’s rights and the equality of the sexes now preferred. How is this alleged position of a wife to be reconciled with the alleged rights of a woman? How can the sexes be equal before the law if a husband is to be convicted and a wife acquitted of a crime which they are proven to have committed between them, and with as much activity on one side as the other?

Martha Torpey, as a being with equal rights, ought to have been beyond undue influence or control; yet she is considered as so notoriously unequal and subordinate, both by nature and position, that it would be unjust to make her accountable for her proceedings. This plea may be reasonable at present, but it certainly cannot be urged in future if marriage is to be transformed into a commercial partnership between two persons of similar rights and responsibilities in the eyes of the law.

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<sup>359</sup> *The Times*, 4 March 1871, p8. The editorial raised the pragmatic issue as to how the prosecution would ever prove the cardinal question that the wife was irresponsible for her acts. It also added: “How is this alleged position of a wife to be reconciled with the alleged rights of a woman? How can the sexes be equal before the law if a husband is to be convicted and a wife acquitted of a crime which they have proved to have committed between them, and with as much activity on one side as on the other?”

*The Times* concluded “The case should not be forgotten<sup>360</sup> in future discussions on the subject.”

Millicent Garrett Fawcett<sup>361</sup> wrote a letter endorsing the leader in *The Times*; “It is therefore evident that the presumption which secured Mrs Torpey’s discharge is not based on fact, and that consequently the result of this trial is an additional argument for remodelling the law relating to the position of married women”. A further editorial in *The Times* stated<sup>362</sup> Mrs Torpey had become famous and her acquittal was likely to produce, if not a change in the law of England at least an interpretation of it “less favourable to adventuresses of her order”.<sup>363</sup> The editorial argued a woman who is “accustomed to defer” under the control of a resolute husband was in the same position as “a young daughter or an aged mother”, yet they had no equivalent privilege presumptively placing them beyond the criminal law. The presumption was noted as a rule of the type by which common law used to be distinguished, in making special provision for married women. But such privileges had been “gradually softened, until practice has almost effaced them.” The abolition of the defence was strongly urged, arguing that even the rationale which exempted the defence from the offence of murder was unjustifiable, to demonstrate that the entire defence was on analysis unjustifiable. “But murder was felt to be a crime which forbade technicalities, and so wives who take part in a murder are hanged, though, if there be any species of husband who is likely to frightening his wife into obeying him, it is the murderer.”

A sensational<sup>364</sup> focus on the undeserving application of the defence in favour of Mrs Torpey, led the press to mock the verdict and the apparent state of the law. The existence of the

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<sup>360</sup> But it was completely overlooked at the trial in *R v Peel* and in the evolution of s47 *Criminal Justice Act 1925* [UK].

<sup>361</sup> *The Times*, 9 November 1871, p4. Married to a British MP, she was later co-founder of Newnham College Cambridge, suffragist (not suffragette).

<sup>362</sup> *The Times*, 11 March 1871, p9.

<sup>363</sup> “No session [of the criminal calendar] passes without foolish verdicts, particularly where women are in question. Some philosophers may think that substantial justice is done by this manly weakness, and that the gentler sex ought not to be subjected to the strictest rigour of the criminal law, as not possessing that strong will and that clear moral perception which are attributed to the other sex. The Mrs Torpeys of every generation have escaped through the sympathy of their judges, and will escape to the end of time.”

<sup>364</sup> Even her surname became the eponymous expression for jewel robbery; an attempted similar robbery in Bristol in the same month was described as “Attempted “Torpey” Robbery” in *The Times*, 27 March 1871, p6 lamenting that no arrest of “this Torpey No 2” had been made.

uxorial presumption was an implacable obstacle to the quest for female equality. This is well illustrated by a deeply sarcastic letter published in *Punch* feigning support for the plight of all the Mrs Torpeys in England, on the basis that actively assisting in robbery was or ought to be a normal incident of the matrimonial relationship. The piece deeply ridiculed those supporting equal rights for women.

But what do the Strong-Minded women say to this case? Are they willing, for the sake of Equal Rights, to forego the delightful arrangement by which a married lady who does anything wrong is supposed to have done it under martial coercion? Or are they so confident in their own strongmindedness as to despise the idea that they could be ‘made’ to do anything?<sup>365</sup>

#### HOUSE OF LORDS CONSIDERS MARITAL COERCION

While the press continued their sustained invective at the law and the verdict, the wider issue of female equality was concurrently raised in the House of Commons.<sup>366</sup> But in the House of Lords,<sup>367</sup> Earl Stanhope<sup>368</sup> referred to *R v Torpey* in some detail, as a case of a “flagrant and glaring instance of the violation of justice.” He urged the law under which she had succeeded “was doomed and its fall was near...and Martha Torpey would be entitled to public credit if the case led to a reformation of the law where it was much needed.” He argued if the defence had validity it should apply to all offences “small and great, but the truth was it was found so repugnant to all ideas of equity and justice that a wife should escape punishment for murder” that it and treason were outside the defence. Lord Stanhope argued that the just solution was the abolition of the presumption that currently applied to any wife “in the same way that a child or an idiot escaped responsibility.” He protested that it was not the incompetence of the jury but the “defective law” that was responsible for the miscarriage of justice.

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<sup>365</sup> *Punch*, 18 March 1871, p114, ‘The Affair-Diamond’.

<sup>366</sup> *The Times*, 11 March, 1871, p6 under a cross heading ‘*The Case Of Martha Torpey*’. By an irony, on Monday 13 March 1871 the House of Commons had been petitioned by seven men to enact the *Women’s Electoral Disabilities Removal Bill*: *The Times*, 14 March, 1871, p5.

<sup>367</sup> In the House of Commons Mr Osborne Morgan MP gave a Notice of Motion on 21 March in the Committee on Supply that he would make a statement about *R v Torpey* “and the necessity of abolishing the rule of law in certain cases which exempts married women from the results of their own criminal acts”: *The Times*, 14 March 1871, p5.

<sup>368</sup> *The Times*, 11 March 1871, p6. The published index of the day’s paper made reference to two different pages dealing with *R v Torpey*; p6 ‘*The Case of Martha Torpey*’ and p9 ‘*The Torpey Case*’.

Lord Cairns, a former Lord Chancellor,<sup>369</sup> asked a factual question about the trial of Mrs Torpey to which he plainly already possessed the answer. He enquired whether it was correct that Mrs Torpey had in fact made a detailed confessional statement to the police that “she had been the author of the robbery that her husband acted under her directions.” That statement, his Lordship protested, had not apparently been placed before the jury. The Lord Chancellor,<sup>370</sup> Lord Hatherley<sup>371</sup> then followed and accepted that a miscarriage of justice had “certainly occurred” but went out of his way to criticise the jury (not the law) and to bewail the unfortunate fact that prosecuting counsel at trial had never been instructed as to the fact of Mrs Torpey’s statements, adverted to by Lord Cairns. The law was satisfactory,<sup>372</sup> asserted the Lord Chancellor. He argued the acquittal did not point to a defect in the marital coercion doctrine but “point[ed], if to anything, to a defect in our law with reference to the constitution of juries.” This retort was a standard device and a traditional refuge for a Lord Chancellor embarrassed by a forensic result that did not comport with the government’s existing jurisprudence.

## LORD CHANCELLOR CONSIDERS MARITAL COERCION DEFENCE

Lord Hatherley LC, in an even more determined way than earlier then attacked the acquittal so as to salvage the law. He reminded the House of Lords that before the magistrate at committal that, Mrs Torpey had stated “she had planned the whole, that her husband had done

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<sup>369</sup> 1<sup>st</sup> Baron Cairns, Lord Chancellor in 1868 and as 1<sup>st</sup> Earl Cairns, Lord Chancellor 1874-1880.

<sup>370</sup> 1<sup>st</sup> Baron Hatherley, Lord Chancellor 1868-1872.

<sup>371</sup> To conflate wives with infant and lunatics in terms of disability of criminal responsibility was the orthodox contemporary classification in criminal law texts. The Lord Chancellor added consistently with the viewpoint of Earl Stanhope, there were offences outside the defence which tended “to impugn the expediency of the law itself.”

<sup>372</sup> Ibid: noting it “has come down to us from Saxon times, and has existed a thousand years”. He added that the presumption was rebuttable “by proving...that the wife had acted apart from her husband and had taken part in the crime in his absence and free from his control.” He stressed Mrs Torpey had indubitably written the fraudulent reference as well as the written direction to the maidservant, in the absence of her husband. But, these were acts preparatory to the offence of robbery and although designed to create conditions for it were not elements of the offence of robbery, the Lord Chancellor’s emphasis on these two incidents to highlight the absence of the husband as being a disqualifying factor for the application of the defence, was simply beside the point. If may be the jury also gave no weight to the same sort of analysis made by the Lord Chancellor and prosecutor at trial. The Recorder had pointedly told the jury that the presumption was unavailable in relation to either incident.

nothing in the matter, and that she was the author and contriver of it.” Therefore he concluded “the law, whatever its merits or demerits, was not the cause of the woman’s escape<sup>373</sup> from condign punishment.” A second argument was because the indictment<sup>374</sup> had charged Mrs Torpey “as [Mr Torpeys] wife”, no inquiry was able to be made at the trial by the prosecution as to whether there actually existed a valid or any marriage. This was clearly an attempt to impeach by innuendo the acquittal by implying that a lawful marriage as a foundational requirement of the defence had never existed; again with the implication that the law as it stood was itself thoroughly sound.

#### LORD CHANCELLOR RECOMMENDS SCOTTISH LAW FOR ENGLAND

Lord Hatherley then referred to a communication with Lord Colonsay, a Scottish Law Lord, who had informed him that under Scottish law<sup>375</sup> a woman could be acquitted on the ground of her husband’s “coercion”, but that in Scotland there was no presumption of marital coercion. The Lord Chancellor stated that on this point the Scottish position was preferable to that under English law, but as any consequential reform would involve the

larger department of the law as to husband and wife – how far she should be allowed to act as a free agent in the disposal of her property,<sup>376</sup> and other questions – and it would not be right on the spur of the moment and on a single<sup>377</sup> case to hurry into an alteration of the law.

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<sup>373</sup> He attributed the acquittal to the fact that “[t]here was one unfortunate circumstance which I am afraid we cannot prevent – the appearance of the prisoner in the dock with an infant in her arms. (A laugh) That was a very effective feature of this case.”

<sup>374</sup> This was factually incorrect. No reference at all to Mrs Torpey’s marital status appeared on the face of the indictment. She was indicted as “Martha Torpey” without any description, rank, occupation or status expressed: *R v Torpey* (1871) 12 Cox CC 45 where this point is expressly made.

<sup>375</sup> This assertion by Lord Colonsay is inconsistent with the law expressed in every Scottish law text which unanimously stated that Scotland had never adopted any variant of marital coercion as its criminal law. The general defence of duress was available, which applied to married women as much as any other person. Lord Colonsay had instanced *H M Advocate v Burke and Hare* (1828) where Mrs Burke had been acquitted on the basis of “coercion”. It may be that the Lord Chancellor by adopting the word “coercion” in his speech really intended to use the different term “duress”. But that inference seems unlikely as it is countered by the Lord Chancellor’s immediate and explicit comparison with the law of England in relation to coercion “I do not think it would be tolerated in this country that a woman should be convicted when the crime was clearly shown to have been committed under the husband’s coercion”. But the existing general defence of duress would have amply covered that very situation.

<sup>376</sup> Only the rudimentary *Married Women’s Property Act 1870* [UK] was then in force. It was not until the Act of 1882 that any substantial equivalence of matrimonial property rights was granted.

## MEDIA REJECT LORD CHANCELLOR'S APPROVAL OF MARITAL COERCION DOCTRINE

*The Times*<sup>378</sup> noted the Lord Chancellor “thinks the miscarriage of justice is due solely to the jury... [i]f this view be right, there is nothing more to be said”. It was apparent the Lord Chancellor’s explanation was as unconvincing as it was inconvenient. The fault lay with the law not the application of it as there was “no reason why the question whether the wife was a free agent should not be decided in all cases by the jury, on the evidence as it comes before them, without any presumption at all.” The notion of presumed innocence already existed in the criminal law and to add upon it the additional presumption of marital coercion was to stack the system too highly in favour of any woman. The very fact of the defence was an unjustifiable affirmative discrimination in favour of all women irrespective of their own position.

## MR TORPEY ARRESTED AND GOES ON TRIAL

Mr Michael Torpey<sup>379</sup> was eventually apprehended<sup>380</sup> in England after his jaunt in Belgium<sup>381</sup> where he had sold at a vast undervalue most of the diamonds the proceeds of the robbery. He

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<sup>377</sup> But there had been numerous acquittals. There had been significant negative commentary by judges as to the continued existence of the presumption, if not the doctrine itself.

<sup>378</sup> *The Times*, 11 March 1871, p9, adding that “the question is whether a married woman should be excused from using due courage in resisting iniquitous commands.”

<sup>379</sup> *The Times*, 15 April, 1871, p10, aged 28.

<sup>380</sup> *Ibid* p10, under the heading ‘*Capture Of Michael Torpey*’. A minor sequel occurred in *Pitt v Ryder* *The Times*, 14 December, 1871, p8, which was an action to recover the reward of £100 which had been offered by the Bond Street jeweller to anyone giving information leading to the recovery of his property and the conviction of the Torpeys. The plaintiff kept a lodging-house and claimed that by her information Mrs Torpey and her husband were arrested. Before Hannen J a civil jury found the defendant jeweller liable to pay £56, reflecting the proportion of the recovered jewellery: *The Times*, 15 December, 1871, p11. By an oddity defence counsel at trial for Mrs Torpey was one of the counsel for the plaintiff Miss Pitt: *The Times*, 14 December, 1871, p8. Miss Charlotte Pitt of Leamington had reported her suspicions to the police and had taken to them a letter Mrs Torpey had asked her to post to a “Mr Thornton, Poste Restante, Ostend”, which they read. Mrs Torpey was then arrested. *The Times*, 10 February 1871, p10. Miss Pitt gave evidence at the committal proceedings against Michael Torpey: *The Times*, 21 April, 1871, p11.

<sup>381</sup> *Ibid* p10. Upon his arrest amongst his possessions was “a Bible, and a book called ‘*The Garden of the Soul*’, in which was the name “Michael Torpey”.

was brought, initially unrepresented,<sup>382</sup> before the same magistrate. On the next occasion evidence was given by Mr Ryder the jeweller that of the 37 diamonds found on Torpey he was able to identify one in particular<sup>383</sup> as having been taken from his employee. Torpey was then committed for trial at the next session<sup>384</sup> of the Central Criminal Court before which he pleaded guilty<sup>385</sup> in front of the same judge who had presided over the trial of his wife. The Recorder stated that the robbery “had been carefully and artfully conceived, and carried out with extraordinary determination and violence, resulting in success”.<sup>386</sup> He was sentenced to eight years imprisonment.

## THE CRIMINAL CODE COMMISSIONERS OF 1879

The Royal Commissioners on the *Criminal Code*<sup>387</sup> were tasked with the preparation of codifying the indictable offences under English law. Lord Blackburn was the chairman and another of the four members was Sir James Fitzjames Stephen. A few years after *R v Torpey* Stephen wrote (with “the assent of the Attorney General”) to *The Times*<sup>388</sup> appending to his letter a lengthy synopsis of the code, in an effort to attract public support<sup>389</sup> for it. It highlighted its major proposals, which were divided into two classes, with Class I<sup>390</sup> being “the more important of the proposed changes” to the substantive criminal law. The abrogation of marital coercion featured prominently as Item 2 in Class I:

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<sup>382</sup> Ibid p10. A police officer gave evidence that Mrs Torpey had been constantly watched by detectives since she had been set at liberty upon her acquittal.

<sup>383</sup> *The Times*, 21 April, 1871, p11 under the heading ‘*The Jewel Robbery*’, the centre stone described as “a thick and very peculiar one”.

<sup>384</sup> *The Times*, 28 April, 1871, p11 specifically noted that the next session would commence “on Monday...Among the prisoners for trial is Michael Torpey for the great jewel robbery”.

<sup>385</sup> *The Times*, 3 May 1871, p11, under the heading ‘*The Great Diamond Robbery*’. Counsel for the prosecution stated that since his apprehension Torpey had volunteered a statement explaining that he and his wife had lost £700 on horseracing. The concept for the robbery arose in the minds of himself and his wife after “reading a work of fiction in which a similar crime, in the mode of executing it, were portrayed”.

<sup>386</sup> *The Times*, 2 May 1871, p11.

<sup>387</sup> ‘*Report of the Royal Commission appointed to consider The Law Relating to Indictable Offences: With An Appendix containing a Draft Code embodying the Suggestions of the Commissioners*’, Her Majesty’s Stationery Office, London, 1879, Cmnd 2345, p10 (The Commissioners sat between May 1878 and April 1879). See generally John Hostettler ‘*Politics and Law in the Life of Sir James Fitzjames Stephen*’ 1995 Barry Rose Law Publishers, Chichester, p175 ff.

<sup>388</sup> *The Times*, 27 June 1878 p10.

<sup>389</sup> Ibid p10.

<sup>390</sup> Which contained 17 numbered proposals. Class II contained 55 such proposals.

## MARITAL COERCION

2. By the existing law a married woman committing a crime in her husband's presence is presumed to have acted under his coercion, and is excused thereby. It is doubtful to what crimes this rule extends, and coercion is not held to be an excuse for crime in the case of persons other than married woman. By Section 22 one rule is laid down for all persons alike, whether married women or not. The rule is believed to express the existing law in all cases other than the case of married women.

He entreated that the necessary legislation "can be discussed during the present session [of Parliament]" and expected that the publication of his letter setting out the draft would provide a platform for constructive discussion so that England and Wales could shortly have a Criminal Code.

Later, in the formal Report of the Royal Commission appointed to consider the '*Law Relating to Indictable Offences*'<sup>391</sup> at p18 the Commissioners dealt very tersely with the law of marital coercion:

With regard to compulsion we have already expressed our views. We recommend the abolition of the presumption as to the coercion of married women by their husbands. Upon the matter of compulsion generally the Draft Code and the Bill differ, but we need not notice their difference.

In the appendix to the Report the Commissioners they set out their Draft Code. Section 23 of it refers to p10 of the Report and Note A.

Compulsion by threats of immediate death or grievous bodily harm from a person actually present at the commission of the offence shall be an excuse for the commission of any offence other than high treason as hereinafter defined in section 75 sub-sections (a) (b) (c) and (e), murder, piracy, offences deemed to be piracy, attempting to murder, assisting in rape, forcible abduction, robbery, causing grievous bodily harm, and arson: Provided that the person under compulsion believes that such threat will be executed: Provided also that he was not a party to any association or conspiracy the being party to which rendered him subject to such compulsion. No presumption shall henceforth be made that a married woman committing an offence in the presence of her husband does so under compulsion.<sup>392</sup>

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<sup>391</sup> George Eyre & William Spottiswoode, '*Law Relating to Indictable Offences*', Her Majesty's Stationery Office 1879 at p18.

<sup>392</sup> It is to be noted that draft became almost identically s24 *Criminal Code Act 1893* [NZ] and the technique of listing exceptions has been adopted in the modern defence of compulsion in s24(2) *Crimes Act 1961* [NZ].

A number of reasons<sup>393</sup> have been advanced for the failure to enact the Code: the extensive changes it made in the law, criticism by Chief Justice Cockburn that it amounted to only partial codification of the criminal law, lack of Parliamentary time and the change of government in 1880. Three additional reasons have been subsequently proffered for its demise: organised labour's reservations, concern about the quality of Stephen's work shared by a number of influential people and the detailed programme of gradual reform put forward by the Statute Law Committee.<sup>394</sup> The 1879 Code was never enacted but its attempt to eradicate marital coercion was still in the mind of the profession.<sup>395</sup> It was therefore even more surprising that in the creation of the 1925 provision no recourse had ever been made to the periodic attempts to remove the presumption and the defence. There had been a formal recommendation in 1845<sup>396</sup> by the Criminal Law Commissioners to abolish the presumption some 80 years before s47 was enacted yet there was no reference during the Parliamentary Debates or the internal government papers to any of these repeated historical attempts to show that the law had fallen out of correspondence with its environment.

In *R v Peel* Darling J had made a ruling on the law of marital coercion which three years later led to the new statutory defence. His second ruling, although obiter, was that two spouses

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<sup>393</sup> M L Friedland, 'R.S Wright's Model Criminal Code: A Forgotten Chapter in the History of Criminal Law', (1981) 1 Oxford Journal of Legal Studies 307, 324. A contemporary American journal had favourably reviewed the English Code noting that the "comments of the English press upon this bill would lead one to suppose that it was likely to be passed; but the government have lingered over it, and a long letter from the Lord Chief Justice of England, which was printed along the Parliamentary documents last summer, may lead one to some distrust; the Lord Chief Justice closes his letter with a statement of his "profound conviction that the bill is as yet far from being in a condition in which it ought to become law": *Review* (1880) 14 *American Law Review* 68, 69; noting at p71 that marital coercion is to be abrogated.

<sup>394</sup> Sir Rupert Cross, 'The Making of English Criminal Law: (6) Sir James Fitzjames Stephen', [1978] Crim LR 652, 657. Its "fate had already been sealed by a letter from [Lord Chief Justice] Cockburn to [Attorney General] Holker dated 12 June 1879. Its synchronisation with the publication of the Royal Commission's report can hardly been a coincidence". A particular point noted was that the proposed Bill would alter the substantive law on a number of points: the accused would become a competent witness, the abolition of the distinction between felonies and misdemeanours and "the abolition of marital coercion". Described as "progressive changes".

<sup>395</sup> W Knox Wigram 'The Justices' Notebook' (1885) 4 ed, London: Stevens and Sons, 119 Chancery Lane, Law Publishers and Booksellers, p252 "Criminal Liability of Wife – According to a superstition which, Blackstone tells us, is upwards of a thousand years old, if a woman commit theft, burglary, or other like indictable offence in company with her husband, she is to be considered as acting under his coercion and treated as irresponsible. But murder or manslaughter are not thus to be exhausted. This venerable doctrine would at last have had its day if the *Criminal Code Bill* of a recent session had become law of the land. As regards non-indictable offences, cognisable under summary jurisdiction, a married woman has always been held answerable for herself. A husband and wife, if joint offenders, may be jointly charged, and jointly or severally convicted. But, in any case, if a wife be sentenced to a fine, she must pay or provide her own penalty, or undergo the alternative imprisonment, as her husband's goods cannot be levied upon for the amount."

<sup>396</sup> Criminal Law Commissioners, Second Report, (1845) vol 24 *Parliamentary Papers*, pp12-13.

could not alone conspire together at common law. That ruling also had a lineage of over a thousand years. The husband, by status of marriage, also qualified for this special position in the criminal law. To examine the history, justification and refutation for that exemption this work now turns. It will be found that what Darling J had said was the position at common law in England, was some 50 years later affirmed there by statute. But other common law jurisdictions have denied the exemption as being unenforced by reason or valid social policy. The lengthy gestation period leading to s47 *Criminal Justice Act 1925* was a function of the instability of successive British governments during 1922-1925. The Avory Committee had compiled its report for the Lord Chancellor, a document replete with controversial assumptions as to the existing law and containing demonstrable errors as to the status of the law in other common law jurisdictions that it had sampled. It was a shallow document, hastily written in less than three weeks. However, the committee had formidable experience in substantive criminal law and its unequivocal recommendation that the entire marital coercion doctrine be finally put asunder was ignored. That recommendation was consonant with the momentum of recent British legislation equalising the rights and responsibilities between men and women. No substantial reason was satisfactorily advanced for bypassing the Avory Committee conclusion – even a petulant letter from Avory J complaining to the Attorney General about the report being disregarded did not elicit a meaningful response. An upshot of the manner in which the legislation came into being was that the section was created without any consideration of the directly relevant debates in the House of Lords and the media in 1871, consequent upon the audacious acquittal in *R v Torpey*. Apart from an unsatisfactory cryptic insight provided by the Solicitor-General in the House of Commons that “coercion” extended to the influence of the “spiritual” dimension, at no stage (in its internal work or otherwise) did the government ever seek to define the critical noun in the legislation. There was never any direct commentary on the allocation of the burden and standard of proof. Nor was it ever contemplated that the defence would be available to women living in the nature of marriage, despite a last-minute objection to this omission from one parliamentarian in an attempt to derail the entire proposal. The legislation ignored doctrinal and structural criticisms that had been particularised by Atkin LJ, which were also sidelined without engaging (for political convenience) in the substantive issues that had wide criminal law implications. The fundamental defect of the legislation was that it only protected a sub-class of womanhood

from the criminal law when the overwhelming ethos was directed at eliminating exactly those types of discriminatory distinctions, which had generally existed to the detriment of women. The legislation met the paternalistic aspirations of the Conservative government that wives, as a special class of woman, also still needed special protection in relation to their husbands under the criminal law.<sup>397</sup> This legislation, which still exists, was a progression in the criminal law but not a development of it. One of the first female solicitors ever admitted in England said in the very year it was passed:

In several respects women are still subject to legal disabilities; but there can now be little doubt that the effect of the changes which have been made has been to alter the very principles of English Law with regard to the status of women. These changes have been gradual and unsystematic; alterations have been made in one branch of the law independently of alterations in other branches.<sup>398</sup>

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<sup>397</sup> In the same year Parliament had enacted the *Summary Jurisdiction (Separation and Maintenance) Act 1925* [UK], *Guardianship of Infants Act 1925* [UK] and the *Administration of Estates Act 1925* [UK], all designed to eliminate distinctions between men and women. The *Sex Disqualification (Removal) Act 1919* [UK] had eliminated discrimination on the basis of gender or marriage in relation to the exercise of public functions or in the appointment to or holding of any civil or judicial office.

<sup>398</sup> Maud I Crofts 'Women Under English Law' (1925) The National Council of Women of Great Britain, London, p xi.

## STATUTORY DEFENCE OF MARITAL COERCION

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### THE NEW STATUTORY DEFENCE: INITIAL REVIEWS

In 1922, the very year that *R v Peel*<sup>1</sup> was decided, ‘*Stephen’s Commentaries on the Laws of England*’<sup>2</sup> had remarked in a non-committal way that, “the expediency of maintaining the rule [of marital coercion] has from time to time been questioned.” After *R v Peel*, Professor Percy H Winfield<sup>3</sup> in 1925, castigated the presumption as, “one of the most stupid presumptions

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<sup>1</sup> A number of biographies have referred to the trial of *R v Peel*: R Wild & D Curtis-Bennett, ‘*King’s Counsel: The Life of Sir Henry Curtis-Bennett*’ (1938) Macmillan Company, New York, p99 states the *Peel* trial was popularly known as “the Society Turf Sensation” as Capt Peel was well known on the turf. The trial was followed by a fashionable society and racing crowd. At p101 the authors stated: “Curtis had shown the absurdity of the law as it stood. And when the Press rumbled and thundered on the theme the next day, the judgment was also criticised as being an illustration of one law for the rich and another for the poor, since a month before, a labourer had been sent to prison with hard labour for a similar offence. The law, which Sir Charles Darling had called “a melancholy doctrine” was now called “musty and antiquated, a fly-blown legal doctrine”. Quite wrongly it was said at p.101: “The *Peel* case was the last, therefore, in which the doctrine was heard that a woman was inevitably under the influence of her husband”. Sidney Theodore Felstead, ‘*Sir Richard Muir A Memoir of a Public Prosecutor*’(1927), John Lane The Bodley Head Limited, London p367-368 states, “The main object in the defence was that Mrs Peel should be saved from prison and, although those responsible for it would have preferred to have gotten a clear acquittal from the jury, they could not afford to risk not undertaking what they considered the perfectly safe point of coercion.” Douglas G Browne, ‘*Sir Travers Humphreys A Biography*’ (1960) George G Harrap & Co Ltd, London, p193-197. At p196, “She had signed eight of the forty-five telegrams, she had obtained the name of the winning horse from her caller on the telephone, and she had helped to enter that name on the forms. It had to be shown – and this was the difficulty – that such actions did not come under the head of conspiracy”. The autobiography, ‘*Lord Darling and His Famous Trials*’, Hutchinson & Co (Publishers) Ltd, London, (undated) does not refer to *R v Peel* as a trial that met the author’s classification. It may be inferred that Lord Darling did not wish to be remembered by his ruling. At p263-266 his maiden speech in the House of Lords is reproduced and at p265 there is an allusion to *R v Peel*.

<sup>2</sup> Edward Jenks (ed) ‘*Stephens Commentaries on the Laws of England*’ (1922) 17 ed, Butterworth & Co, London, vol ix, p29.

<sup>3</sup> ‘*The Chief Sources of English Legal History*’, (1925) Harvard University Press, Cambridge at p44. He criticised Darling J for insufficient attention to the original texts noting that *R v Peel* was a “curious illustration of the need for a complete legal bibliography in general and of Anglo-Saxon law in particular.” A review of the 1922 text by F L Attenborough, ‘*The Laws of the Earliest English Kings*’, noted it was the first English version of the Saxon laws since Benjamin Thorpe’s 1840 work for the Record Commission which states “Anglo-Saxon law is not so exclusively the property of the antiquarian as might be imagined. In March, 1922 ... a wife was acquitted on the ground of that irrational presumption of marital coercion which still disfigures the English criminal law. The learned Judge traced this doctrine back to the Laws of Ine, No 57 of which provides “if a

which still disfigures our criminal law”. Upon the passage of s47 *Criminal Justice Act 1925* [UK], with the demise of the presumption, legal commentators turned to evaluate the modern defence and understand how it differed from its common law counterpart. It did not take long at all for textbook writers to provide initial commentary, as two monographs<sup>4</sup> on the Act were very quickly published. Both monographs were in turn reviewed immediately upon publication<sup>5</sup> with one text described as “very workmanlike” and the other being reviewed even less favourably, particularly as it scarcely confronted the “difficulties of construction that may arise” in s47.

That reviewer, concluded<sup>6</sup> the critical noun “coercion” in s47, should bear the meaning “that it bears elsewhere in the criminal law”; a curious observation as that word was only known there as a synonym for compulsion in the context of the common law defence of duress. If “coercion” now only meant duress, then the new statutory defence was not only otiose, but in attempting to deal with the special position of married women it had now placed them in a significantly disadvantaged position, in comparison to that of all other persons. For by this remedial legislation married women, exclusively, would bear the onus of proof to establish the duress-like defence of coercion, which under the common law defence of duress, by contrast, remained throughout firmly on the prosecution to disprove. It would be a radical conclusion that the new statute had not only removed the common law uxorial privilege, but it had now inflicted upon only married women, a new and striking legal disability. Married women would have had their prior privilege toppled and instead of gender-equality would be now subject to a special liability distinguishing them from all others. Further, it had never been a requirement of the general law of duress, unlike in the marital coercion statute, that the offence be committed “in the presence of her husband”, therefore, leading to the conclusion

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husband steals a beast and carried it into his house, and it is seized therein, he shall forfeit his share of the household property, but the wife is exempt because she must obey her Lord”.

<sup>4</sup> Albert Lieck and ACL Morrison (1926) *The Criminal Justice Act 1925, with explanatory notes*, Stevens & Sons Ltd (respectively the Chief Clerks of the Marlborough Street and Lambeth Police Courts, London). The second monograph was R E Otter and G B McClure, *The Criminal Justice Act 1925, with notes*, Gordon E Touche & Frederic E Ruegg, London (1926) (respectively a retired judge of the Supreme Court of Rangoon and a barrister; McClure was then co-editor of R E Ross and G B McClure (eds), *Sir W O Russell: A Treatise on Crimes and Misdemeanours* (1923) 8 ed) Sweet & Maxwell, London.

<sup>5</sup> [1926] 42 LQR 541, *Coercion of Wives and the Criminal Justice Act 1925*.

<sup>6</sup> Ibid at 541.

that the new defence of coercion, was a significantly more limited one than that generally available to even other women.

Master Diamond pre-emptively and inconsistently concluded that common law insights as to what “coercion” meant were of no assistance in construing the section (having earlier decided that the continuity of common law meaning applied), as those cases had only determined on their own facts whether the presumption applied or was rebutted. This was a direct attack on common law method. Diamond contented himself that the “explanation of this pretty puzzle” was the rejection of the recommendation of the Avory Committee to abrogate the entire doctrine.<sup>7</sup> In particular he criticised “some loose language” in the monograph by Lieck and Morrison, as to their opinion of the effect of s47. They had stated:

Coercion, we suggest, would include previous ill-usage designed by the husband to enforce compliance with his criminal purposes generally, whether this operated by breaking the wife’s spirit, or by arousing fear of future ill-treatment. Prolonged moral domination by the husband, the wife being reduced to a meek condition in which she habitually followed his instructions, would operate as coercion on a particular occasion. A threat to cut off supplies, so that she and her children would suffer shortage of food and shelter, would, if believed, be coercion. Insistent entreaty with a veiled suggestion that she would be abandoned for a more compliant female partner might well be coercion.<sup>8</sup>

Those authors,<sup>9</sup> in their first edition explained that s47 was put into its form to avoid the controversy whether the effect of simply abolishing the presumption was to do away with the whole doctrine of coercion. The section as enacted, left open the defence and therefore affirmed the remainder of the doctrine. But there was no inkling of what specially constituted “coercion”, as compulsion by physical force or by fear was always a long-standing general defence. The authors concluded that to show coercion; “she has, we suggest, to show she

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<sup>7</sup> Lieck and Morrison were also criticised at p91 of their book, for theorising that the probable effect of public opinion would tend to narrow the operation of the defence. In [1928] LQR 127, Diamond reviewed the second edition of the work and noted the authors had removed the portion of the explanatory note to which he had taken objection. He asserted there was no useful purpose in an authoritative forecast of the sense in which the courts will interpret s4, complaining “It is useless to lay it down, for example ‘insistent entreaty with a veiled suggestion that she would be abandoned for a more compliant female partner might well be coercion’ of a wife by her husband.”

<sup>8</sup> Albert Lieck and ACL Morrison, *The Criminal Justice Act, 1925, with Explanatory Notes* (1926) Stevens and Sons Ltd, Chancery Lane, London p90-91.

<sup>9</sup> Ibid p90. Note the similar discussion in (1923) JP 245, 248.

acted under his direction. She acted in reasonable fear of painful consequences, or was so subject to her husband that she had no real will of her own”. This was insipid stuff.

The special relationship of husband and wife might realistically mean that a wife often cannot, except at the risk of grave inconvenience or suffering to herself and her children, escape from that relationship. From that it could lead to a conclusion that intraspousal threats are potentially as a class, more serious, as opportunities for carrying them out and fear of their execution will be constantly reinforced by cohabitation. Actual assaults, besides their immediate pain and ego-displacement, will induce apprehension of recurrent violence.

A little later, Anthony Hawke,<sup>10</sup> the editor of *Roscoe's Digest of the Law of Evidence*, in the first edition published after the passage of the *Criminal Justice Act 1925* [UK] referred to “s47 *Criminal Justice Act 1915*” (sic) and concluded that although the presumption had gone the Act now puts the onus on a wife of proving she was acting under her husband's coercion. Unhelpfully the author states, “it is impossible at present to get any guide as to what a wife, who has committed an offence in her husband's presence, will have to prove in order to put forward this defence successfully”. The authors of *Harris's Criminal Law*<sup>11</sup> suggested that the elusive feature of coercion was that it now conflated moral coercion with violence and threats of physical violence, thereby distinguishing it from the common law concept of duress.

The leading English text-writers were plainly perplexed by the scope of the defence. The initial commentaries were tentative and opaque.<sup>12</sup> The essence of the new defence was seen as

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<sup>10</sup> *Roscoe's Digest of the Law of Evidence and the Practice in Criminal Cases (chiefly on indictment) in England and Wales* (1928) 15 ed, Stevens & Sons Ltd, London. At p1153. Anthony Hawke *Roscoe's Digest of the Law of Evidence and the Practice in Criminal Cases (chiefly on indictment) in England and Wales* (1928) 15 ed, Stevens & Sons Ltd, London. This edition of Roscoe was the first published after the passage of the *Criminal Justice Act 1925* [UK]. At p1153 the author refers to s47 *Criminal Justice Act 1915* (sic) and concludes that although the presumption has gone, the defence of coercion is still available.

<sup>11</sup> H A Palmer & Henry Palmer, *Harris's Criminal Law* (1954) 19 ed, Sweet & Maxwell Ltd, London. At p24, they rely upon *R v Tyler & Price* per Lord Denman CJ. In the 20 ed published in 1960 by the same authors, there was now only an anodyne reference to s47 *Criminal Justice Act 1925*. The reality may have been that there simply was no case law and no proportionate need to discuss the separate statutory offence.

<sup>12</sup> Anthony Hawke, *Roscoes Digest of the Law of Evidence and the Practice in Criminal Cases (Chiefly on Indictment) in England and Wales* (1928) 15 ed, Stevens and Sons Ltd, London, p73: ‘It is impossible at present to give any guide as to what a wife, who has committed an offence in her husband's presence, will have to prove

a facet of civil subjection, namely conjugal subjection. Coercion they reasoned had to be actively<sup>13</sup> operating on the wife so that if the husband was immobile, he was incapable of coercion, and the defence ought to fail. But this approach wholly overlooks the effects of the moral dimension and the power of psychological control of the duressor, which need not be reinforced by physical power. It was argued<sup>14</sup> that marital coercion was no general defence as “the apprehension of personal danger does not furnish any excuse for assisting in doing any act which is illegal.”<sup>15</sup> But this too is unsustainable – the defence is plainly excusatory. One writer<sup>16</sup> unhelpfully concluded that: “Now it is for the wife to prove coercion, whereas previously the law presumed it,” but offered no commentary as to what coercion meant. In attempting to identify coercion, J W Cecil Turner<sup>17</sup> found an examination of the old authorities on duress or compulsion quite unprofitable as “the law of the matter is both meagre and vague”. As to marital coercion, he argued that this “singular privilege thus accorded to the wife, yet denied to the child, has an obscure history,” describing it as “hesitant legislation,”<sup>18</sup> as beyond a declaration that the defence existed for the benefit of every wife, the scope had not been identified with any particularity. Edwards,<sup>19</sup> in 1951 asserted that there

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in order to put forward this defence successfully.” It was now ‘a question of fact’ under ‘s47 *Criminal Justice Act 1915* (sic).’ The approach to coercion in the law of marriage requisites was that a marriage procured by threats or duress was invalid: *Harford v Morris* (1776) 2 Hag Con 423; *Scott v Sebright* (1886) 12 PD 21; *Bartlett v Rice* (1894) 72 LT 122.

<sup>13</sup> Alexander Cairns, *‘Eversley’s Law of the Domestic Relations’* (1937) 5 ed, Sweet & Maxwell Ltd, London, p159. In *R v Pollard*, cited in *R v Cruse* (1837) 8 Car & P 541, the defence at common law failed when the crime was carried out at the direction of a bed-ridden husband. The common law requiring a direct physical presence rather than a long range psychological one. The rationale appears to be based on the ability of the husband to reinforce his command by physical abuse of the wife.

<sup>14</sup> A M Wilshire, *‘Harris’s Principles and Practice of the Criminal Law’* (1950) 18 ed, Sweet & Maxwell Ltd, London, p22-23.

<sup>15</sup> Adopting *R v Tyler and Price* (1838) 8 Car & P 619.

<sup>16</sup> Edward Hooton, *‘Wigram’s Justice’s Note-Book’* (1951) 15 ed, Stevens & Sons Ltd, London, p206.

<sup>17</sup> J W Cecil Turner, *‘Kenny’s Outlines of Criminal Law’*, (1952)16 ed, Cambridge University Press, p54. J LI J Edwards *‘Compulsion, Coercion and Criminal Responsibility’*, (1951) 14 Modern Law Review 297 stated that “the absence of any satisfactory modern authority” demonstrated the rarity of the defence.

<sup>18</sup> Noting that the trial judge in *R v Caroubi* had repudiated the entire doctrine in 1911, (“when a woman was regarded as far more a chattel of her husband than she was since the *Married Women’s Property Act*, she was considered to be free from guilt although she agreed with her husband to do the thing. I am bound to instruct you that is not the law to-day”: *R v Caroubi* (1912) 7 Cr App R 149, 150. But that it was reinstated by the court of Criminal Appeal in 1912 quashing the conviction and explicitly stating that “The law is correctly laid down is a passage cited from 1 Hale 516”: (1912) 7 Cr App R 149, 152 (CCA).

<sup>19</sup> J LI Edwards *‘Compulsion, Coercion and Criminal Responsibility’*, (1951) 14 MLR 297, 313.

existed “a considerable proportion of married women who regard their husbands as their lord and master, to disobey whose commands would be unthinkable”.<sup>20</sup>

Professor Glanville Williams in his seminal text, *‘Criminal Law: The General Part’*,<sup>21</sup> examined duress at common law. The English Criminal Law Commissioners of 1833 had admitted duress as a defence to all crimes except treason and homicide. The draft Code of 1879 provided a more limited defence of duress and it was substantially embodied in the criminal law of: Canada,<sup>22</sup> New Zealand,<sup>23</sup> Tasmania,<sup>24</sup> Queensland,<sup>25</sup> Western Australia<sup>26</sup> and India.<sup>27</sup> Glanville Williams noted that the legal burden of proof has always been on the prosecution to negative common law duress.<sup>28</sup> He found the language of the new section to be so impenetrable that resort to the common law to supplement its deficiencies would be needed. Some writers<sup>29</sup> still clung to the belief that wives needed a wider protection than that given to all others by duress, on the ground that something of the notion of subordination still survived in social mores, yet Stephen, who held the special defence in contempt, had stated bluntly seventy years earlier that it was absurd to give a wife more protection than that given to her 15 year old daughter.<sup>30</sup> The outcome provided by the new statute was that a wife involved in a non-exempt offence had a complete defence, no matter how grave her conduct was. Yet the legislation imposed no overt requirement that the quantum of marital coercion should be compared with the gravity of the offence: a precursor to the integration of proportionality of response, with subjectivity of perception of the threat.

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<sup>20</sup> See: Law Commission Working Paper No 55 para 63 and Law Commission No 83, *‘Criminal Law: Report on Defences of General Application’*, (July 1977) para 3.8.

<sup>21</sup> Glanville Williams, *‘Criminal Law: The General Part’* (1958) Stevens & Sons Ltd, London.

<sup>22</sup> s20 Criminal Code [Can]

<sup>23</sup> s44 Crimes Act [NZ]

<sup>24</sup> s20(1) Criminal Code [Tas]

<sup>25</sup> s31 Criminal Code [Qld]

<sup>26</sup> s31 Criminal Code [WA]

<sup>27</sup> s94 Penal Code [Ind]

<sup>28</sup> *R v Purdy* (1945) 10 J Cr L 182. Glanville Williams *‘The Criminal Law : The General Part’* (1962) 2 ed p 765

<sup>29</sup> Eg, Edwards, *‘Compulsion, Coercion and Criminal Responsibility’*, (1951) 14 MLR 297, 311. *‘Coercion – The Peel Case’*, (1922) 86 JP 137, 139 “No one is prepared to deny that there may still be numerous cases in which women are dominated by their husbands. But the point is that it is no longer reasonable to presume that such is the case.” *R v Robins* (1982) 66 CCC (2d) 550, 563 (Qué: CA): “No one continues to believe that the married woman, in the presence of her husband, only acts as his puppet”.

<sup>30</sup> Stephen, *‘A History of the Criminal Law in England’*, (1883) Macmillan & Co, London, vol 2, p106.

Almost thirty years after the introduction of s47, J F Garner in *The Defence of Coercion*<sup>31</sup> stated, there “seems to be no reported decision<sup>32</sup> on the point” as to what constituted ‘coercion’. One significant reason for the paucity of caselaw may have been that a wife will avoid employing the defence because to do so she will need to give evidence, perhaps irretrievably damaging to the character of her husband. In a joint trial her defence is likely to be seriously prejudicial to him.<sup>33</sup> This problem was very much in the mind of Atkin LJ who in the months before the section was enacted had argued to maintain the existing common law and avoid the introduction of the statutory defence because of this very consequence. What had not been considered though, was that the common law position probably developed because of the very fact that the wife had been incapable at law to give evidence at all. Prior to 1898 accused persons were incompetent witnesses under English law. She therefore could never personally in court implicate her husband to exculpate herself. (This inability indirectly sustained the marriage – an original objective of Biblical imperative.) Stanley Yeo<sup>34</sup> has argued that the fact of the very low volume of litigation engaging the statutory defence justified its elimination. A reason for the virtual absence of legal literature pertaining to it, includes that the defence scarcely comes before the appellate courts and is therefore not noted by the journals. Trial decisions ending in acquittals are only very rarely the subject of legal, as opposed to salacious, review. The cases may also be of an ordinary nature where there is simply no distinctive feature other than the deployment of the defence itself, to command attention.<sup>35</sup>

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<sup>31</sup> *Anonymous* [1954] Crim LR 448, 449.

<sup>32</sup> Overlooking the obscurely reported decision in *R v Pierce*; (1941) 5 *Journal of Criminal Law* 124.

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<sup>34</sup> ‘*Coercing Wives into Crime*’, (1992) 6 *Australian Journal of Family Law* 214 in fn 1. J C Smith & Brian Hogan, ‘*Criminal Law*’, (1992) 7 ed, Butterworths, London, p245 “it is thought that the very absence of cases in which it has been relied on goes a long way towards showing that it is an unnecessary anomaly at the present day.” This passage was not repeated in the 8 ed.

<sup>35</sup> *R v Quissamba (Jacqueline)* 6 July 1998, Manchester Crown Court; letter from Circuit Judge Peter Lakin, 22 July 2005. Prosecution for fraud, marital coercion relied upon, prosecution offered no evidence.

CASE LAW ON s47 CRIMINAL JUSTICE ACT 1925 [UK]

There have been very few decisions in which the statutory defence of marital coercion has actually been invoked. It took twelve years after the statute before the first reference at all can be found of the defence being even referred to in any case, *R v Wright and Wright*,<sup>36</sup> but as it is an attenuated comment of a subordinate court it is of little other interest. The second occasion was in *R v Pierce*<sup>37</sup> where a wife unsuccessfully relied upon the defence, involving forgery of entries in a Post Office Saving Bank book. (Her husband, son and daughter all pleaded guilty.) She gave evidence that her husband had a dominating personality who became petulant if his wishes were not met and that he had required her to participate in the offence. The Common Serjeant directed the jury as to the meaning of ‘coercion’<sup>38</sup> in accordance with the common law. The defence failed – petulance was never going to be a synonym for coercion. Thereafter the defence did not feature at all for some considerable time. But in *R v Grondkowski and Malinowski*,<sup>39</sup> Lord Goddard CJ, delivering the judgment of the Court of Criminal Appeal had to deal on appeal with whether a separate trial should have been ordered between co-accused. He instanced the position where both duress and marital coercion may be relied upon as optimum examples when there should be a joint trial of spouses.

Suppose, for instance, that the defence of one was that he or she was acting under the positive duress of the other. It would be obviously right that they should be tried by the same jury, who might see in one prisoner a harmless or nervous-looking little man or woman and in the other a savage brute whom they might deem capable of forcing his co-prisoner against his will into assisting in a crime. Another instance would be the case of an indictment against husband and

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<sup>36</sup> (1937) 1 *Journal of Criminal Law* 366, 367. *Police v Howe* (1948) 12 J Cr L 123 examines the same issue where marital coercion and the law relating to stolen property intersected. The wife was acquitted by directed verdict as in *R v Brooks* (1853) 6 Cox CC Jervis CJ had said: “A wife cannot be an accessory after the fact in receiving her husband bodily when he has committed a felony, nor can she, in my opinion, be guilty as a receiver of stolen goods if she receives them from him.”

<sup>37</sup> (1941) 5 *Journal of Criminal Law* 124.

<sup>38</sup> Relying upon *Webster’s International Dictionary*: “an application to another such force either physical or moral, as to induce or constrain him to do against his will something he would not otherwise have done.” The Common Serjeant also referred to *R v Caroubi* (1912) 7 Cr App R 149, where Hamilton J had said “The law is correctly laid down in a passage from Hale: “If it appears that the wife was principally instrumental in the commission of a crime, acting voluntarily and not by constraint of her husband, although he was present and concurred, she will be guilty and liable to punishment.””

<sup>39</sup> [1946] 1 All ER 559, 560 H. This approach was followed as to joint trials of spouses in: *R v Quiring and Kuipers* (1974) 19 CCC (2d) 337 (Sask: CA); *R v Black* [1970] 4 CCC 251 (BC: CA) and *R (on the application of S v Waltham Forest Youth Court)* [2004] All ER (D) 590 (Mar) (DC) at p18.

wife; the latter is no longer presumed in law to be acting under the coercion of her husband, but may nevertheless prove that she was. It would be very desirable, not only in the interest of the prisoners, but of justice, that the same jury should try them both, and it is by no means beyond the bounds of possibility that so far from finding that the wife acted under the coercion of her husband, it might be found that the husband was coerced by the wife, and if the same jury ought to try them, it would be absurd to say that they should be tried separately.<sup>40</sup>

In *R v Bourne*<sup>41</sup> which involved bestiality, a husband had forced his wife to allow a dog to vaginally penetrate her. The husband only was charged with the offence as the wife was patently an unwilling victim of it. An appeal against his conviction was argued on the basis that the self-evident marital coercion of the wife meant that she was not capable of being a principal in the offence and therefore he could not have aided and abetted any notional offence by her. But Lord Goddard CJ dismissed the appeal on the basis that “duress” of the wife did not deny the wrongdoing of the duressor. In the following year a legal commentator referred to a “recent case at quarter sessions” (called *Anonymous*<sup>42</sup>) where a young married couple were charged with breaking and entering premises, had no means and were carrying on a “nomadic existence, not having any food for two days”. The husband pleaded guilty and the wife relied on the 1925 statutory defence on the basis that she had begged her husband not to commit the offence and said she would not accompany him. He had said he would leave her if she did not go with him and they broke into the premises and ate some of the food they found there. The wife was aged only 16 years and the Recorder told the jury they should not take any notice of fanciful threats but threats of unpleasant consequences could constitute

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<sup>40</sup> Where a cut-throat defence existed in which a wife denied her involvement on the basis of duress and blamed her husband for the murder, an application for separate trials was properly refused: *R v London and London*, unreported Court of Appeal of Trinidad and Tobago Crim App 31 & 32/2002, 29 July 2004, Hamel-Smith, Jones and Kangaroo JJA cf *R v Lee Shek Ching* [1986] HKLR 304 (CA) where a conviction for murder was quashed on the basis of improper spousal joinder. Upon a retrial another conviction was entered: *R v Lee Shek Ching* [1987] HKLR 31 (CA).

<sup>41</sup> (1952) 36 Cr App R 125 (CCA). The Court accepted that his overbearing negated the existence of her mens rea. He was convicted as a principal in the second degree to the bestiality. Lord Goddard CJ said “If this woman had been charged herself with committing the offence, she could have set up the plea of duress, not as showing that no offence had been committed but as showing that she had no mens rea because her will was overborne by threats of imprisonment or violence so that she would be excused from punishment”. This passage in *Bourne* can also be criticised as it suggests duress is a matter which only affects punishment rather than liability. That would be heretical, as where duress applies it must lead to an acquittal unless disproved. John Beaumont, ‘*Abetting Without a Principle: a Problem in the Law of Complicity*’, (1979) 50 Northern Ireland Law Quarterly 1, 13 fn 50 notes that *R v Bourne* was actually argued on the basis of the defence of marital coercion, and no reason for Lord Goddard CJ to speak of duress instead is known.

<sup>42</sup> J F Garner, ‘*The Defence of Coercion*’, *Anonymous* [1954] Crim LR 448, 449.

coercion. The jury acquitted the teenage wife.<sup>43</sup> This decision is of little intrinsic legal interest, yet from it Garner<sup>44</sup> extrapolated that coercion meant something “less than the duress per minas that would be a sufficient defence for that charge in the case of any defendant?” He concluded that the statutory defence must be appreciably wider than common law duress, otherwise the statutory defence would be wholly redundant. Eight years later no clear definition of ‘coercion’ existed,<sup>45</sup> yet any evidence of initiative by a wife, would count against her under the defence.

No example of the defence is known in the twenty years from *Anonymous* until 1974 when the defence was successfully invoked in a trial at the Central Criminal Court. In *R v White (Heather)*,<sup>46</sup> which involved a graphic fact pattern, the evidence disclosed that the defendant aged 20 and married for two years, had been terrorised into crime by her “dangerous and violent” husband, after suffering seven years of brutality. She was raped at 13, ran away from home at 16 and married at 18. Her husband was now serving ten years imprisonment for 13 robberies, and had slashed her with an open razor. Another time he knocked her senseless, revived her and knocked her out again. When she told him she was pregnant he threatened to rip open her stomach, when she said she was leaving him he pointed a gun at her and said he would kill her. On the night he ordered her to take part in the robbery she said she was too frightened to disobey. Mrs White, her husband and another couple booked into a hotel, were shown to their room by a 16 year old female receptionist who was gagged and bound and thrown face down on a bed. Mrs White and a Mrs Archbold guarded her while their husbands, who pleaded guilty to the offence at trial, attacked the hotel keeper downstairs. After a retirement of three hours Mrs White and Mrs Archbold were acquitted.

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<sup>43</sup> *Halsbury's Laws of England*, 3 ed, vol 10 (1955) para 542 deals with marital coercion in six lines. A footnote states: “A married woman cannot be convicted as accessory after the fact to her husband’s felony or of receiving stolen goods from her husband. There cannot be a criminal prosecution for a libel by a husband on his wife or vice versa and there cannot be a conspiracy between them alone”.

<sup>44</sup> J F Garner, *The Defence of Coercion*, [1954] Crim LR 448, 449.

<sup>45</sup> J W Cecil Turner, *Kenny's Outlines of Criminal Law*, (1962) 18 ed, Cambridge University Press, p65.

<sup>46</sup> *The Times*, 16 February 1974, p3 where duress or coercion is successfully pleaded. The will of the person who acts under coercion has been “overborne”.

In 1975, the defence was tangentially considered by the House of Lords in *Director of Public Prosecutions for Northern Ireland v Lynch*,<sup>47</sup> which held by a majority<sup>48</sup> that on a charge of murder, the defence of duress was open to a person charged with aiding and abetting the murder. (That decision has however been repudiated by the House of Lords<sup>49</sup> and the Privy Council<sup>50</sup> although it is consonant with South African law.<sup>51</sup>) In the Court of Criminal Appeal for Northern Ireland, in *R v Lynch*,<sup>52</sup> it had been argued that notwithstanding that s37 *Criminal Justice Act 1945* [NI]<sup>53</sup> specifically exempted murder and treason from the defence of marital coercion, there was no reason why common law duress should not be available in a murder prosecution.<sup>54</sup> Lord Lowry CJ giving the judgment noted that the trial judge had considered the effect of s37 *Criminal Justice Act 1945* [NI] and had held that the section “gives some indication that Parliament regarded the analogous defence of duress as generally not available in these two cases [murder and treason]”. Further, he observed that s37 does not distinguish between principals in the first and second degree “which is the more significant because a wife acting under coercion might frequently play an auxiliary role.”<sup>55</sup> In the House of Lords both Lord Morris of Borth-y-Gest and Lord Simon of Glaisdale discussed the conceptual congruence between statutory coercion and common law duress.<sup>56</sup> Lord Morris was dismissive that any material implication could be yielded from the statutory defence, for

<sup>47</sup> [1975] AC 653 (HL (NI)).

<sup>48</sup> Lord Morris of Borth-y-Gest, Lord Wilberforce and Lord Edmond-Davies; Lord Simon of Glaisdale and Lord Kilbrandon dissenting. Apart from a single reference by Lord Bingham of Cornhill in *R v Z* [2005] 2 AC 467 para 19, noted in *R v Quayle* [2005] EWCA Crim 1415 at para 35 by Mance LJ, *Lynch* remains the only House of Lords decision to have considered the defence: the only Privy Council decision is the common law case of *Brown v Attorney General for New Zealand* [1898] AC 234 (PC).

<sup>49</sup> This actual decision was not followed in *R v Howe* [1987] AC 417 (HL), but the enduring value is the comparative references to duress and marital coercion.

<sup>50</sup> *Abbott v The Queen* [1977] AC 755 (PC).

<sup>51</sup> *S v Goliath* 1972 (3) SA 1 (AD per Rumpff J) [translation at p456]

<sup>52</sup> [1975] NI 35, 46B. In 1944 1 Northern Ireland Legal Quarterly 170 anticipated that s37 *Criminal Justice Act 1945* [NI] was a “very necessary reform of the common law”.

<sup>53</sup> Identical to s47 *Criminal Justice Act 1925* [UK]: see [1975] AC 653, p661H.

<sup>54</sup> [1975] AC 653, 658 C-D Mr C M Lavery QC argued to “distinguish between coercion between husband and wife and duress. The former in order to operate does not require the same degree of threatening as the latter. Undue influence has never come within the criminal law.” At 660 H-661A Mr JBE Hutton QC (now Lord Hutton) for the prosecution replied that “The victim of duress has made a conscious, though unwilling, choice and intentionally, though reluctantly, committed a crime.” He submitted that “s37 of the Act of 1925 (sic), while recognising that coercion might be a good defence in all other offences, excepted murder and treason.” At 662B “s37 draws a distinction between the case of a wife charged in the first or second degree or as an accessory before the fact.”

<sup>55</sup> Ibid 46 C As in *R v Bourne* (1952) 36 Cr App R 125 (CCA).

<sup>56</sup> At 676H Lord Morris of Borth-y-Gest describes the defence of marital coercion as being “analogous” to the defence of duress. Also 684A-E per Lord Wilberforce. At 685 Lord Simon of Glaisdale said coercion was a “closely cognate juridical concept” with duress.

determining the scope of duress.<sup>57</sup> He additionally stated there were no indicia that the separate position of aiders and abettors had been specially considered in the formulation of the statutory defence.<sup>58</sup> Lord Simon accepted that “the law for a long time”<sup>59</sup> recognised the notion of uxorial obedience and specifically referred to the marital coercion position (based on unquestioning obedience) as understood by Bacon.<sup>60</sup> There was “a strong presumption”<sup>61</sup> that every wife acted under her husband’s coercion. Lord Simon unexpectedly equiparated coercion as understood in the law of probate,<sup>62</sup> with the concept in criminal law and reasoned that the doctrine of coercion and its limitations were of crucial significance in defining duress.<sup>63</sup> The state of mind in coercion was precisely that produced by duress, but threats are not necessary to constitute coercion.<sup>64</sup> He concluded that the exact scope and effect of the statutory defence is “obscure in the extreme”.<sup>65</sup> Parliament had recognised coercion as a subsisting defence in law, without it being defined by antecedent law, nor by the statute itself.

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<sup>57</sup> Lord Wilberforce at 684E found that the statutory defence caused “some difficulty for it seems to reflect a Parliamentary opinion that murder and treason are exceptions to the defence of coercion: and if so it may seem difficult to differentiate the case of duress.” However, he consoled himself that the section was one of “considerable obscurity.” He adopted the view of Glanville Williams, *Criminal Law*, (1961) 2 ed, pp764-766 that the section raises an almost insoluble problem of interpretation and is an incomplete statement of the common law, which therefore still exists to supplement the deficiency of the section. As a guide to the principles of duress, the statutory defence “such light as it shed is too dim to read by.” At 684G.

<sup>58</sup> Ibid 677A. This is entirely correct. The issue was never raised at any stage of the debates in the three years of the making of the defence. See infra chp 2. Note on the general issue though J LI Edwards, *Duress and Aiding and Abetting*, (1953) 69 LQR 226 and the reply by R Cross (1953) 69 LQR 354.

<sup>59</sup> Ibid 693D.

<sup>60</sup> *Maxims*’ reg 5. At that time a wife was, “like the infant or the insane...disqualified or disabled from forming a criminal intention”: ibid 703C.

<sup>61</sup> 693D-E. The defence of coercion is a gesture of a humane system of criminal law to not hold a person responsible for an act or omission made as an “agonizing” decision where he is overborne.

<sup>62</sup> *Wingrove v Wingrove* (1885) 11 PD 81, 83; *Baudains v Richardson* [1906] AC 169, 185 an appeal from the Royal Court of Jersey (Superior Number) where Lord Macnaghten distinguishes “degrading and pernicious” influence from ‘coercion’ which is so overbearing that it renders the actor’s conduct not his “wish and will”. In *Szechter (orse Karsov) v Szechter* [1971] P 286, 296 Sir Jocelyn Simon P himself, had referred to the dirimentary effect of a coercion-induced marriage. Where there was coercion, “-a yielding of the lips, not of the mind – it is of no legal effect”, Bishop, *Commentaries on the Law of Marriage and Divorce*, (1881) 6 ed, vol 1, p177, para 210. Christine Davies, *Duress and Nullity of Marriage*, (1972), 88 LQR 549, 551, notes *Cooper v Crane* [1891] P 369, 377, “though she understood what she was doing her powers of volition were so paralysed that, by her words and acts she merely gave expression to the will” of the duressor. Watson SJ held in *In the Marriage of S* (1980) FLC 90/280 in the Australian Family Court, that “a sense of mental oppression can be generated by causes other than fear or terror...This is so howsoever the oppression arises and irrespective of the motivation or propriety of any person solely or partially responsible for the oppression”, applying *Director of Public Prosecutions for Northern Ireland v Lynch* [1975] AC 653, 694 to family law; noted H A Finlay, *Family Law in Australia*’ (1983) 3 ed, Butterworths, Sydney, p177.

<sup>63</sup> Stating at 694F that the two concepts were “habitually treated by jurists as cognate.”

<sup>64</sup> 693F-G. In *Osborne v Goddard* (1978) 21 ALR 189, 196 Lord Simon’s approach was applied to the statutory defence of marital coercion in South Australia.

<sup>65</sup> [1975] AC 653, 694C.

Any constraint on the defendant due to external human pressure might suffice.<sup>66</sup> Self-induced terror leading to blind obedience does not suffice. The essential differential is that for duress, the method of pressure is limited to threats<sup>67</sup> whereas for coercion it extends to any type of external force, psychological, physical or otherwise, overbearing voluntary conduct. Lord Edmund-Davies adopted Smith and Hogan,<sup>68</sup> that coercion is a wider<sup>69</sup> defence than duress, incorporating the unstructured response advanced by the Solicitor-General to a question, during the debate on the *Criminal Justice Bill 1924*.<sup>70</sup>

But in *Lynch v Director of Public Prosecutions for Northern Ireland*<sup>71</sup> the jurisprudential theory that the result of the will being overborne meant an accused had never formed the mens rea necessary to constitute the crime charged, was correctly rejected.<sup>72</sup> The House of Lords held that the defence of duress was superimposed across the other ingredients of the offence, so that although the person who acted under duress completed the act with the mens rea required, the element of duress excusingly prevented the conduct from having a criminal complexion. Someone who successfully relies on duress had no choice in relation to the prohibited conduct, although in control of their bodily movements, aware of the relevant facts and also foresaw the relevant consequences of that conduct. It was involuntary.<sup>73</sup>

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<sup>66</sup> Michael J Allen, *Textbook on Criminal Law*, (2001) 6 ed, Blackstone Press, p194: “In *Lynch* at p693 Lord Simon stated that coercion in its popular sense denotes an external force which cannot be resisted and which impels its subject to act otherwise than he would wish. While duress suggested threats, he considered that coercion extends to any force overbearing the wish. In view of the decision in *R v Shortland*, [1966] 1 Cr App R 166 it would seem that a wife could not plead coercion on the basis that she committed the offence out of love or a sense of duty; there must be some pressure from the husband”.

<sup>67</sup> At 694E; but it also includes actual violence, not just apprehended violence. Lord Kilbrandon observed that coercion reduces a person’s constancy so that he or she is forced to do what is known to be wrong and would not have done it save for the threat or violence: 703C.

<sup>68</sup> *Criminal Law*, (1973) 3 ed, Butterworths, London, p169.

<sup>69</sup> Peter Murphy (ed), *Blackstone’s Criminal Practice* (2003) Oxford University Press at p57 in relation to s47 *Criminal Justice Act 1925* [UK]: “This section imposes a legal burden of proof on the wife, but it has not been clear what exactly constitutes coercion and in what sense it differs from duress. Coercion is presumably wider than duress since otherwise the defence is otiose, the wife having to prove duress plus the actual presence of her husband. It seems that it is wider in that there is no need for threats of death or serious injury, it being sufficient that the wife acted because of the dominating influence of her husband, her will being “overborne by the wishes of her husband” so that “she was forced unwillingly to participate” (See *Shortland* [1996] 1 Cr App R 116, following *R v Richman and Richman* [1982] Crim LR 507)”.

<sup>70</sup> “Coercion imports coercion in the moral, possibly even in the spiritual realm, whereas compulsion imports something only in the physical realm.”

<sup>71</sup> [1975] AC 653 (HL).

<sup>72</sup> Lord Bingham in *R v Z* [2005] 2 AC 467 accepted that the intention exists, but it is not the product of free will.

<sup>73</sup> The victim of duress has made a conscious, though unwilling, choice and intentionally, though reluctantly, committed a crime. In *Attorney General v Whelan* [1934] IR 518, 526 a decision of the Irish Court of Criminal

In *R v Neilson*,<sup>74</sup> for reasons which remain unclear, the statutory defence was not relied upon in an apparently optimal situation. A wife was charged with encashing for her husband, while he was standing beside her, a number of large postal orders, which he had stolen. The husband gave evidence that he had said to her he was prepared to use violence towards her to maintain his status as “boss” in the household. He had been convicted of four violent murders, prior to her trial. The fact pattern has a broad similarity with the case of *Goddard v Osborne*.<sup>75</sup>

The next decision to consider the statutory defence of marital coercion was *R v Richman and Richman*.<sup>76</sup> The defendants were tried for fraud upon an allegation that money had been obtained from an insurance company by deception, in making false claims of burglary. The husband pleaded guilty but the wife alleged that in relation to two of the charges, although she knew that the claims were dishonest, she signed the documentation because she was coerced to do so by her husband. The defence relied on the investigating police officer who said in evidence for the prosecution that the husband had a strong personality and that the wife was likely to have been dominated by him. The prosecution then submitted that the statutory defence should not be left to the jury in the absence of an actual threat by the husband to the wife. Judge Gabriel Hutton left the defence but stressed that “modern wives were not like Saxon wives”, also ruling that it was for the wife to prove coercion on the balance of probabilities. The judge accepted that coercion did not necessarily mean physical force or the threat of physical force, agreeing it could be either physical or moral, but the wife had to prove that her will was overborne by her husband, which was wholly different from

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Appeal the court held that “threats of immediate death or serious personal violence so great as to overbear the ordinary power of human resistance should be accepted as justification for acts which would otherwise be criminal”. “The law must...take a commonsense view. If someone is forced at gun-point either to be inactive or to do something positive – must the law not remember that the instinct and perhaps the duty of self-preservation is powerful and natural? I think it must. A man who is attacked is allowed within reason to take necessary steps to defend himself. The law would be censorious and inhumane which did not recognise the appalling plight of a person who perhaps suddenly finds his life in jeopardy unless he submits and obeys.”

<sup>74</sup> *The Daily Telegraph*, 28 September 1976.

<sup>75</sup> (1978) 18 SASR 481 (SC) and (FC).

<sup>76</sup> [1982] Crim LR 507.

persuading someone out of loyalty. A commentary<sup>77</sup> to this trial ruling (no appeal having ever been brought) notes the uncertainty<sup>78</sup> which surrounds the extent to which coercion differs from the general defence of duress. A wife has to establish that her will was “overborne” which “smacks of duress”; but voluntarily assisting a husband out of a sense of love or loyalty is excluded, even if the wife is unhappy with the enterprise and would prefer him to desist. The essence of coercion is pressure directed at the wife to the point she involuntarily conducts herself, this being consonant with what Lord Simon said in *Lynch* that coercion denotes “an external force which cannot be resisted and which impels its subject to act” otherwise than she would wish.

No further consideration of the defence is known until the important decision of *R v Ditta, Kara and Hussain*<sup>79</sup> in the Court of Appeal, which provided English criminal law with a direct confrontation with the intersection of marital coercion, polygamy and Muslim marriage and divorce laws.<sup>80</sup> The Court of Appeal, in dismissing the appeal by Madam Kara, referred to the facts and law in a rather superficial manner, which obscures the far-reaching nature of the underlying issues. The trial papers and particularly the summing up by the judge to the

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<sup>77</sup> The jury convicted Mrs Richman: [1982] Crim LR 507, 509 Professor Diane Birch there notes the English Law Commission in its Report No. 8 at p19 recommended the abolition of coercion as a general defence, partly because there was no definition of coercion. The commentator noted the irony that the definition has emerged after the recommendation for abolition.

<sup>78</sup> Edward Griew, *The Theft Acts 1968 and 1978*, (1986) 5 ed, Sweet & Maxwell, London p346 notes “the defence of marital coercion is rarely pleaded and, because s47 has not yet received authoritative judicial interpretation, may give rise to difficulty in the future, both because the nature of the threats covered by marital coercion is not certain, although they are probably not limited to threats of personal violence and because the words ‘presence’ may require elucidation”. At p365 the author instances an example of where a husband induced his wife to enter a house for the purpose of stealing something, by threatening to leave her if she did not comply with his wishes, while he remained outside and kept watch. Both difficulties will arise in that situation.

<sup>79</sup> Unreported, English Court of Appeal (Criminal Division) Lord Lane CJ, May LJ, Caulfield J, 6 August 1987, noted [1988] Crim L R 42.

<sup>80</sup> The first encounter with polygamy in the English criminal law is *R v Hadijah Ahmed Caroubi* (1912) 7 Cr App R 149 (CCA), The appellant was convicted with others, including her husband, of theft. Hamilton J noting the appellant was a Muslim said the court “need not consider how far [the presumption of marital coercion] applies in the case of persons who are permitted to be polygamous by the law of their religion or their domicile”. Her husband had distracted the shopkeeper while she stole money from the till. The Court applied a visual test, namely “He could have seen her, and she him, at any time during the transaction, and therefore they were in the presence of one another”. At trial the Recorder took the view that as the crime was preconcerted there was no basis for marital coercion to operate. But Hamilton J said “He failed to appreciate that the very fact of such an arrangement might be evidence, and perhaps strong evidence, that the husband has been coercing his wife”. The court quashed the conviction.

jury,<sup>81</sup> provide indispensable detail to show how the rival issues were framed and to establish that expert evidence had been called in relation to the competing contentions of Muslim law.<sup>82</sup> No previous consideration of this trial is known.

Mr Mahmood Hussain, Mr Alla Ditta, Mrs Sarifa Kara and Mrs Khatiza Begum were jointly charged with drug trafficking by the importation of heroin from Pakistan to England. Hussain pleaded guilty and Ditta was convicted by the jury. The jury acquitted Mrs Begum on the basis that she acted under common law duress from Hussain. But it is the trial of the other woman, Mrs Kara, that is of enduring importance, as she relied upon marital coercion.<sup>83</sup> The judge in summing up to the jury recounted the evidence and stated that the two female accused, Mrs Begum and Mrs Kara, denied that they willingly imported heroin into the United Kingdom.<sup>84</sup> He then reminded the jury that it was only Mrs Kara who relied upon marital coercion, yet she did not “in any way allege that she was under duress, merely that she was under coercion.”<sup>85</sup> The restriction of the defence being available “only to a wife who commits what would otherwise be an offence in the presence of her husband because she was under pressure from him” was emphasised. There had been a concession by the prosecution that what Mrs Kara had done was “technically at any rate in the presence of her husband,

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<sup>81</sup> *R v Ditta, Hussain, Begum and Kara*, unreported Isleworth Crown Court, ref 191/F2/87 and 142/E3/87, 11 December 1986, His Honour Judge Hopkin-Morgan and a jury.

<sup>82</sup> *Ibid*, summing up of Judge Hopkin-Morgan, p2B: “Matters that arise out of the allegation concerning marriage, divorce, and all these complications which have taken days to sort out and which you have to decide as a matter of fact.”

<sup>83</sup> Mrs Begum was stopped as she came through the green channel in Terminal 3 at Heathrow Airport, London. Her suitcases revealed a considerable quantity of heroin hidden in cigarette packets. A piece of paper with the name and address of a male co-accused Hussain was also found on her. Further packages of heroin, strapped to her body were also found. Hussain had been on the same flight from Pakistan and had sat on an adjoining seat to Mrs Begum on the flight. Hussain pleaded guilty at trial and stated that he had arranged for the two women Begum and Kara to carry heroin into the United Kingdom. By a controlled delivery Hussain deposited the drugs. Ditta arrived and uplifted the drugs and he was arrested.

<sup>84</sup> *Ibid* p4H-5B. “She also maintains in effect, as she has to under the law on duress, that those threats might well have caused a reasonable woman of her characteristics - and that is important, a Muslim wife with an unhappy marriage history - a reasonable woman of her characteristics who had suffered considerably in the past - these are the characteristics - suffered from a heart condition and who knew that the threatener, Mahmood Hussain, was a violent man, because she had met him with his first wife. So that she has to convince you that a reasonable person with her characteristics would in the circumstances act as she did in such a situation.” “First of all duress, which is raised by Mrs Begum and is not raised by Mrs Kara. Now Mrs Begum maintains that she brought in this heroin against her will solely because of threats made to her by Mahmood Hussain [the second accused] of death or serious injury to her, made at the time of the offence being committed, and those threats of death or serious injury if she did not do what he told her to do. So that what she did, she maintains, was not a voluntary act because she could not reasonably be expected to resist such threats and they broke her will.”

<sup>85</sup> *Ibid* 6B. This is a very odd approach, to rely upon marital coercion yet to deny that there had been any generic duress. The adverb “merely” diminishes the statutory defence.

Mahmoud Hussain, because they were both on that aeroplane.”<sup>86</sup> The degree or sufficiency of coercion required to be demonstrated by Mrs Kara bewildered the judge (and presumably the jury).<sup>87</sup>

Now the standard of such pressure it seems may be less than that required under the defence of duress. The law is not clear on this but that may well be the situation. But the House of Lords<sup>88</sup> has said that the mental state of the wife caused by the pressure of her husband must be the same, that is the question of being coerced by the husband, that her mental state must be the same as that of a person suffering from fear, because of threats made in the case of duress or in a case of duress.

The jury were directed that the relevant fact was “Mrs Kara’s mental state” at the time.

It is not essential that there be threats causing fear of death or serious physical injury as in the defence of duress, and Mrs Kara does not allege that there were any such threats. She just maintains that Mahmoud Hussain was still her husband and that being a Muslim she had to do what her husband told her to do, and that therefore her mental state was that she had to do what he said she must, although she did not want to.<sup>89</sup>

The judge identified that an initial issue for the jury to decide in considering the statutory defence, was whether in fact Mrs Kara was married at the time of the alleged crime, or whether she had been by that time divorced, according to Muslim rites. On this issue expert evidence was called by both the prosecution and the defence. “So you have to decide whether she had been irrevocably divorced or not at the time in May or before May 1986, way back in 1982.” An expert in Islamic law, Dr Hinchcliff, had given evidence, in the absence of the jury, as to the minimum formal requirements for an oral declaration of divorce under Muslim

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<sup>86</sup> This also appears to be wrong in law. Presence in a large vehicle, such as an aeroplane, is not presence for the purpose of the defence which requires an immediacy, and an accessibility of physical proximity between husband and wife. Yet the drugs were strapped on the body of Mrs Kara inside the toilet of the aeroplane, with only Mrs Begum present. When she returned to her seat, swaddled in bandages encasing the drugs, then the husband was present. But he was not ‘present’ when she walked through the green line at the customs arrival hall at the airport, which was the conduct constituting the offence.

<sup>87</sup> Summing-up 6H.

<sup>88</sup> Presumably, a reference to *Director of Public Prosecutions for Northern Ireland v Lynch* [1975] AC 653.

<sup>89</sup> The judge then contrasted the specific nature of marital coercion with duress, illustrating this by stating at 7J “That was also the mental state alleged by Mrs Begum of course, because her case is that she felt she had to do what Mahmoud Hussain told her to do, and that mental state of hers being brought about by fear caused by his threats. So the mental states reached were the same. This is very unusual, as counsel have pointed out, but the burden of proof in coercion is on Mrs Kara, not on the prosecution.”

law.<sup>90</sup> The judge then stated that although it was a matter of fact for the jury to decide whether there had been a divorce (precluding thereby any recourse to the statutory defence), they would be assisted in understanding the foreign legal context adverted to by the expert. The expert evidence was that if both parties agree to a divorce there and then, under Islamic law that constituted an irrevocable divorce known as a *mubarat* divorce. To help the jury decide that issue the judge then referred to the evidence of a Mohammed Arif who gave evidence for the prosecution that the husband, Hussain, had a first wife called Shafkat, with Mrs Kara being his second wife. Some four years before the material date of the arrival at Heathrow Airport, the witness stated that Hussain had divorced Mrs Kara, because his first wife had returned to him. That divorce, if it was so, had occurred in circumstances in which Hussain had caused Arif to record on paper that the parties, Mrs Kara and Hussain, agreed to divorce, although that document had not been signed by the husband. Dr Hinchcliff gave evidence that that written document did not establish there was a divorce in terms of the requirements under Islamic law. The written document exhibited by the prosecution to negative the existence of the marriage failed,<sup>91</sup> but the expert also stated the oral consensual agreement to divorce was fully valid.

The judge then turned to the evidence of Mrs Kara, who had been previously married and divorced “under Muslim law and then also divorced in the Coventry County Court in 1980. After that she met Mahmoud Hussain and she was married by a Muslim priest.” Mrs Kara said in evidence there was a time when Mahmoud Hussain had both Shafkat and herself as simultaneous wives. She stated that she had consented to the oral divorce, albeit, in anger because the former first wife had walked into the house and “my husband Hussain expected me and that other woman to sleep under the same roof, so I was angry.”<sup>92</sup> That night, she departed the home as the returned first wife remained there. Hussain accompanied her to a new address and now with the status of former wife, he had sexual intercourse with her,

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<sup>90</sup> Summing-up p8E: “But she [Dr Hinchcliff] raised a point which was a complete surprise to everyone in the Court, namely that if each party agreed to a divorce there and then taking place when the agreement was made, that would constitute an irrevocable divorce. So that is the question you have to decide.”

<sup>91</sup> Ibid 65B, the expert’s evidence was of this document “It doesn’t make divorce revocable or irrevocable because it wasn’t signed by the husband so it doesn’t constitute a divorce.”

<sup>92</sup> Ibid p61B Summing-up.

“within two hours of his divorce” from her. This point, Dr Hinchcliff found to be decisive as signifying the irrevocability of the oral divorce.<sup>93</sup>

However, Mrs Kara’s case was that her former husband (if the divorce was valid) had remarried her under Islamic law (and if the divorce was invalid) then the second marriage was as valid as the first undoubtedly had been. In a voir dire to decide on the status of the marriage(s) or divorce the prosecution therefore called a second expert on Islamic law,<sup>94</sup> who stated because Mrs Kara was a British citizen she could not have gone through a second ceremony of marriage, unless the man had been free to marry her. Although debarred under English law, under pure Islamic marriage law, the marriage would be valid subject to meeting certain conditions.<sup>95</sup> A Muslim divorce by oral *talaq* reduced to writing, was irrevocable.<sup>96</sup> The defence then called expert evidence<sup>97</sup> on the point as to whether the omission of dower at the original marriage meant that the marriage was null and void. His evidence on divorce<sup>98</sup> under Islamic law qualified the evidence of Dr Hinchcliff by stating that although an oral

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<sup>93</sup> Ibid 66B. Dr Hinchcliff emphasised that for *mubarat*, common consent of the spouses was required. In contrast, in answer to a question from the judge, the prosecution expert on Islamic law opined that the husband having “divorced” the wife, and who then went to her new premises and had sexual relations with her, had the effect that the divorce would have been thereupon revoked by the acts of the husband. The prosecution expert also stated that the divorce was invalid because of non-compliance with the provision in each marriage that before a divorce can take effect, an arbitration council composed of one representative of the wife and one representative of the husband, should try and reconcile the parties. In the absence of that taking place there cannot be a valid divorce.

<sup>94</sup> Mr Mahmood Ali Nusrat, a member of the English Bar and an advocate of the High Court of Pakistan.

<sup>95</sup> Marriage is a matter of offer and acceptance with stipulation of dower: ‘*Mulla’s Mohammedan Law*’ 1981 edition p308, para 286. There must be an agreement to pay dower and it must not be less than ten dirhams to be valid the marriage must occur after *tuhr*.

<sup>96</sup> ‘*Mulla’s Mohammedan Law*’ (1981 ed) p331 para 313. If the parties intend to remarry the wife must go through an intermediate marriage with another person: *Hayaad Khatun v Abdullah Khan* 1937 AIR Lahore 270. Tek Chand and Skemp JJ, dismissed an appeal by a Pardanashin lady who had been divorced by her husband who then remarried each other and then later redivorced. Tek Chand J at p271 held that the original divorce was “irrevocable” and it was not possible for the parties by reconciliation to “restore their relationship of husband and wife” without an intermediate marriage by the wife to another, so it meant the second divorce by Talak was “a meaningless formality”. The expert Mr Nusrat, stated, as recounted at p10B of the summing-up, that the reason for the need for the intermediate marriage was “That is a punishment.”

<sup>97</sup> Mr Mohammed Ali Syed, a practising member of the English Bar and a practising member of the Bangladesh Bar, formerly a member of the East Pakistan Bar. The evidence showed that no dower had been paid. The expert stated that the absence of dower or *mahr*, in Islamic law, did not render the marriage invalid; although the dower had to be paid. To be valid, the only point to be considered is whether the husband was a Muslim or not, as even the wife could be a Christian or a Jew, yet the marriage would still be valid under Islamic law.

<sup>98</sup> Divorce was prescribed in the *Holy Koran* ch4 v35, ch2 vs 228 and 229 and ch.65 v.1. Those verses authorised an oral divorce.

consensual divorce was permissible, its validity depended on the physiological<sup>99</sup> status of the wife at that time. In short, the expert for the defence said under Islamic law the marriage was valid and that the divorce invalid. The expert for the prosecution said the marriage was invalid and the divorce was valid. All the experts agreed that under English law the marriage was invalid as Hussain was already married. His bigamy precluded the lawfulness of the marriage ceremony.<sup>100</sup> Although the marriage was valid under Muslim law it was common ground that it was not valid under English law.

The Court of Appeal concluded that the defence of marital coercion probably did not apply to polygamous marriages<sup>101</sup> but could, in any event, only apply where the wife was in fact married according to the law of England, so the fact that the putative ‘wife’ honestly and reasonably believed herself to be married, but was in fact not, in law debarred her from raising the defence of marital coercion. One important aspect of the appeal centres on the marital status of Sarifa Kara and the defence of marital coercion in a polygamous or potentially polygamous situation. As Lord Lane CJ said<sup>102</sup> of her: “Kara, on the other hand, was genuinely a courier – indeed she was not even that. What she had done was to go to the lavatory in the aeroplane with Khatiza Begum to assist Begum to strap around her body the consignment of heroin” noting the unsuccessful invocation of marital coercion at trial.<sup>103</sup> Her

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<sup>99</sup> No divorce could be pronounced during the wife’s menstruation period or *tuhr*. In addition, there must elapse three menstruation periods before the divorce is irrevocable. The witness stated that the importance of that is to ensure that the wife is not pregnant and to confirm the legitimacy of any children conceived from the previous husband.

<sup>100</sup> But the experts had no right to give evidence on English law. Expert evidence can only be given of foreign law, not national law, which is a matter exclusively for the judge. Summing-up p8G.

<sup>101</sup> *R v Ditta, Kara and Hussein*, unreported English Court of Appeal (Criminal Division), 6 August 1987 p4. “We very much doubt, albeit in the absence of argument, whether the Judge was right”, to direct the jury that a polygamous Islamic marriage was a proper foundation for a defence under the section. The Court of Appeal went a long distance to try to avoid dealing with the issue. Lord Lane stated that the marriage, though valid under Islamic law was “polygamous and invalid for most purposes so far as the law of this country is concerned”. This is very questionable. JHC Morris, *Dicey and Morris, Conflict of Laws*, (1987) 11 ed. Sweet & Maxwell, London “Rule 77. A marriage which is polygamous under Rule 73 [which defines polygamous marriages] and not invalid under Rule 75 [marriage celebrated in England with polygamous forms] or Rule 76 [where either party is domiciled in England at the time of the ceremony] is a valid marriage unless there is some strong reason to the contrary”. The editors submit that there is now sufficient authority to warrant this generalisation.

<sup>102</sup> *Ibid* p2 Transcript: Marten Walsh Cherrer: Court Reporters.

<sup>103</sup> The jury acquitted Mrs Begum on whom the drugs were physically strapped, on the basis of Hussain’s duress. Most oddly, duress, as opposed to marital coercion, does not appear to have been left (or argued) as a further defence, on behalf of Sarifa Kara. Coercion is a defence for a wife in addition to that of duress by threats, not in

putative husband's first wife was still alive, yet Hussain had married Kara as his second wife<sup>104</sup> under Islamic law. Lord Lane CJ stated that a polygamous marriage was "invalid for most purposes so far as the law of this country was concerned".<sup>105</sup> Lord Lane read s47 *Criminal Justice Act 1925* [UK] which "has very seldom been brought into play" and then said of it:

There is a body of opinion which asserts that all that it did was simply to alter the burden of proof so far as coercion was concerned, since the defence of coercion of a wife by a husband has been something which at common law had been in existence for very many years.<sup>106</sup>

The prosecution case at trial had been that the second marriage had been properly dissolved according to Islamic practice and procedure. The Court of Appeal held, that the "[e]xtremely complicated" matters of Islamic matrimonial law were matters of foreign law and therefore "the judge rightly ruled that it was a matter for the jury to decide".<sup>107</sup>

Because the jury had convicted by a general verdict of guilty it is not possible to divine whether the jury had decided that there was no marriage in existence so the defence could not apply at all, as the prosecution primarily contended, or whether if there was still a marriage, the defence of marital coercion otherwise failed. The trial judge had ruled that Kara had been validly married under the law of Islam to the co-defendant Hussain.<sup>108</sup> But the real importance

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substitution for it: *Director for Public Prosecutions for Northern Ireland v Lynch* [1975] AC 653, 684 per Lord Wilberforce and at p713 per Lord Edmund-Davies.

<sup>104</sup> Judith E Tucker 'In the House of the Law - General and Islamic Law in Ottoman, Syria and Palestine', (1998) University of California Press noted that the Islamic practice of polygamy permitted a man "to be married to as many as four women at one time – but women were not permitted a parallel privilege". Polyandry was not contemplated by the common law.

<sup>105</sup> Ibid p3. This statement is completely inconsistent with *Mawji v The Queen* supra and the authorities cited therein.

<sup>106</sup> Ibid p3.

<sup>107</sup> Ibid p4. But this counter-intuitive approach completely contradicts *R v Hammer* [1923] 2 KB 786 (CCA) where Sankey, Salter and Swift JJ correctly held where the appellant was convicted of bigamy, that a question of foreign law was an issue of fact, (whether a marriage under Jewish and Russian law was valid), but because of s15 *Administration of Justice Act 1920* [UK] it was for the judge, not the jury, to have decided it. The argument for the prosecution was that this remedial act was restricted to civil law but as Sankey J observed at p791 "It would be a strange result if in a civil case foreign law was for the judge and in a criminal case for the jury." See the casenote [1988] Crim LR 42, 43. In New Zealand, it would undoubtedly be a matter for a judge alone to decide: s19C *Judicature Act 1908* [NZ].

<sup>108</sup> See PJ Richardson (ed), 'Archbold 2001 Criminal Pleading, Evidence and Practice', Sweet & Maxwell, London, 2001, p1630 para 17-133, which laconically notes that the court left open the question whether a polygamous Islamic marriage was a proper foundation for the defence under s47 *Criminal Justice Act 1925*

is if that second marriage was lawful under the *lex domicilii* of both Kara and Hussain. Why should she not be permitted to avail herself of the statutory defence. A valid polygamous marriage under the *lex domicilii* of both should not preclude the defence. The judgment of the Court of Appeal does not state whether either or both were domiciled in Pakistan where the marriage would have been quite lawful, as it had been found to be properly carried out in accordance with Islamic rites. This important point was simply not addressed and it is not possible to detect whether their domicile was in Pakistani. On the basis that they appeared to reside in England, that still cannot be definitive, because plainly a temporary occupation or residence in England does not constitute a change in their domicile. The prosecution urged the jury to find that although there had been an Islamic marriage it had been dissolved by “an unusual Islamic divorce by consent”.

This point identifies where the Court of Appeal case took a strange turn. Counsel for Mrs Kara argued in a written ground of appeal “notwithstanding that at the time that [Kara] committed the offence she held a genuine and reasonable belief that she was still married to the said co-defendant”.<sup>109</sup> Now the argument had become that the defence of marital coercion extended to a woman who mistakenly but reasonably believed that she was married to the coercer, even if she was not. This argument is designed to miss the point. Firstly, her domicile and that of Hussain had to be established. If they were domiciled in Pakistan then it was a lawful Islamic marriage, then that would have required the Court of Appeal to decide whether a polygamous marriage was valid for the purposes of s47 *Criminal Justice Act 1925* [UK]. To do that the decision of the Privy Council in *Mawji v The Queen*<sup>110</sup> would have been relevant. In fact counsel for Kara advanced a number of analogous situations to justify that marital coercion was extendable to a polygamous marriage. In particular he argued that the general law of a wife’s competence to give evidence against her husband and also questions of

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[UK]. This is too generous as Lord Lane CJ for the Court of Appeal expressing a very strong (“we very much doubt”) but provisional view against the polygamous marriage being a sufficient platform for the defence.

<sup>109</sup> See the appeal papers filed by Counsel for Mrs Kara in the Court of Appeal: 191/F2/87 and 142/E3/87. A Commentary to *R v Ditta, Hussain and Kara* [1988] Crim LR, 42 states: “The issue of foreign law would not have arisen if the court had decided that a polygamous marriage, even if valid, was not a proper foundation for a defence under section 47; but the court did not hear argument on this point and found it unnecessary to decide it. It is understood, however, that the expert evidence could lead to only one conclusion, namely that the defendant was not married, even according to Islamic law, at the date of the offence.”

<sup>110</sup> [1957] AC 126 (PC)

conspiracy were relevant. If a wife was incompetent as a polygamous wife, or if a wife who was polygamous was held not to be able to conspire with her husband, that showed some insight as to whether marital coercion was applicable in a polygamous marriage. But the Court of Appeal dismissed this approach without argumentation, in a single line “there again, in our judgment, those matters are entirely irrelevant to the question we have to decide here today”. No explanation was given why a thematic approach in the criminal law, based on the unity of husband and wife, failed upon a surplussage of wives or either why the privilege against spouse-incrimination was not an appropriate analytical point of entry.

Lord Lane CJ said for statutory coercion there were two halves to the defence; firstly, was the woman coerced, which could be: “either by physical, moral, psychological or mental processes”? But the second issue is: was there a valid marriage? That question he reasoned had nothing to do with the belief of the putative wife, although a different approach applied to the offence of bigamy. In *R v Gould*<sup>111</sup> the Criminal Court of Appeal had held where a defendant to a charge of bigamy, at the time of the second marriage honestly and reasonably held the mistaken belief the decree absolute dissolving his previous marriage had been granted, the conviction had to be quashed. Lord Lane distinguished s47 *Criminal Justice Act 1925* [UK] as being a statute in simple terms, which did not intend to additionally incorporate a special defence of reasonable belief<sup>112</sup> of marriage, as in the case of ss6 and 19 *Sexual Offences Act 1956* [UK].<sup>113</sup> He concluded that before a woman could bring herself within the saving terms of s47, it must be shown that she was a lawful wife, in the strict sense of the term and that the person who coerced her was her lawful husband. The Court of Appeal decided, in a very confusing oral judgment, that because her counsel had argued that she

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<sup>111</sup> [1968] 2 QB 65 (CCA) holding that a polygamous marriage gave the spouses the intraspousal conspiracy immunity.

<sup>112</sup> Michael Jefferson, *‘Criminal Law’*, 4 ed, Financial Times Pitman Publishing, 1999, at p243: “The court distinguished the defence of mistake to bigamy, which is available only when the accused erred on reasonable grounds, as being concerned with mistake as to a vital element of the offence, where as in coercion the mistake was one to a defence. Therefore, if one believes on reasonable grounds that one’s husband is dead, one is not guilty of the offence of bigamy, but if one believes on reasonable grounds that one is married one does not have the defence of coercion”.

<sup>113</sup> Michael J Allen: “When duress is pleaded there is no need to show that the person who issued the threats was present at the time the offence was committed; it is sufficient that the threats were imminent. In coercion, however, the husband must be shown to be present when the offence was committed. Duress may be pleaded even though the accused acted under a mistaken belief, provided this mistake was a reasonable one. In coercion a mistaken belief in marriage, albeit a reasonable one, will not avail as the statute is interpreted strictly (see *Ditta, Hussain and Kara* [1988] Crim LR 42]”.

thought she was married, that would not do. But that she thought she was married was only the secondary argument, the primary argument was that she was married, an argument that the Court of Appeal did not deal with, for then it would have had to deal with the direct implications of polygamy.

The common law of duress has required the duressee to hold genuine and reasonable belief of the executable threat. The wider subjective approach applicable to self-defence in which a genuine but unreasonably held belief suffices has not been adopted. *Beckford v The Queen*.<sup>114</sup> What possible difference can it make to the perspective or culpability of the duped “wife” that, unknown to her, the husband-apparent was already married at the time of their marriage ceremony? If she genuinely believes he is her husband, if there is coercion she is no less under his domination than if he were her husband in law. In the cognate defence of duress, it has been decided that the defendant is to be judged on the facts as he reasonably believed them to be.<sup>115</sup> The courts have been consistently and implacably opposed to extending to the defence any notion of the sufficiency of an honest and reasonable belief as to the existence of a marriage.

Ten years elapsed before the defence was next encountered in *R v Shortland*<sup>116</sup> where the “somewhat unusual defence of marital coercion”<sup>117</sup> was engaged in relation to two convictions for making a false statement to procure a passport. On appeal the convictions were quashed because of misdirection to the jury as to the meaning of coercion in the Act. The wife had signed application forms for passports in the presence of and under the coercion<sup>118</sup> of her husband. Kennedy LJ found that “the burden of proof is clearly on the defendant to prove it on a balance of probabilities in accordance with normal principles”.<sup>119</sup>

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<sup>114</sup> *Beckford v The Queen* [1988] 1 AC 130 (PC) – genuineness of subjective belief the touchstone; although the more unreasonable it is, the less likely it is to be genuine.

<sup>115</sup> See *R v Howe* [1987] AC 417 (HL).

<sup>116</sup> [1996] 1 Cr App R 116 (CA) (Kennedy LJ, Steel and Hooper JJ)

<sup>117</sup> *Ibid* 117 b-c.

<sup>118</sup> The court noted there was evidence that the wife was in constant fear of the husband as “he torments me”.

<sup>119</sup> *Ibid* 117 E, conformably with the decision of the Crown Court in *R v Richman and Richman* [1982] Crim LR 507 (Judge Gabriel Hutton). That decision had been followed in relation to identical legislation in *R v Kong Man Heung* [2000] 1 HKC 406 (decided in 1986), *HKSAR v Au Yuen Mei* [2000] 1 HKC 411. In *R v Holley* [1963] 1 WLR 199 (CCA) it had earlier been established. In *Richman* it was unsuccessfully argued that only an evidential burden was imposed on the defendant. The apparent intractability of the language in s47 *Criminal Justice Act*

The approach of Lord Simon of Glaisdale in *Director of Public Prosecutions for Northern Ireland v Lynch*<sup>120</sup> was “a useful start” to unlocking the meaning.<sup>121</sup> Kennedy LJ, lamenting the absence of a definition of coercion in s47, found that a distinction necessarily existed between duress and marital coercion. The Court of Appeal approved passages in *R v Richman* (supra) that had emphasised “coercion did not necessarily mean physical force or the threat of physical force, it could be physical, or moral, she had to prove that her will was overborne by the wishes of her husband”.<sup>122</sup> The wife had to establish that she had been overborne by her husband and had to succumb to his will. The convictions were quashed because the trial judge had emphasised the absence of actual or perceived threats of death or grievous bodily harm, without ever providing examples on the evidence at trial of what was properly within the defence.<sup>123</sup> The trial judge had therefore failed to differentiate between duress and coercion.

A second case on the defence came before the Court of Appeal within six years: *R v Cairns*.<sup>124</sup> A number of accused were tried for conspiracy to supply heroin. Mrs Cairns pleaded not guilty, her husband admitted the offence and gave evidence implicating the co-accused, but exculpating his wife.<sup>125</sup> The ground of appeal was that the judge had misdirected as to the meaning of coercion. Keene LJ accepted it had a broader meaning than duress,

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1925 [UK] would be no bar to a conclusion that it could be read down to impose not a legal burden, but only an evidential one: *R v Lambert* [2002] 2 AC 545 (HL); *HKSAR v Hung Chan Wa* [2006] 3 HKLRD 841 (CFA). This dichotomy had been anticipated in *R v Gill* [1963] 1 WLR 841 that s47 inconsistently places the burden of proof in coercion on the wife whereas the common law defence of duress only imposes an evidential burden. In Victoria, s336(5) *Crimes Act 1958* [Vic], which provides a defence of marital coercion, introduced in 1977, imposes an evidential burden which the prosecution must negative beyond reasonable doubt. There is no evidence at all to substantiate the assertion in Michael Jefferson, ‘*Criminal Law*’ 4 ed, Financial Times Pitman Publishing, (1999) p242: that “The reversal of the burden of proof may be the sole reason why s47 was enacted”. This very hypothesis was described as “naïve”: Glanville Williams, ‘*Criminal Law: The General Part*’ (1953) p604, Stevens & Sons Ltd, London. In *R v Cairns* [2003] 1 Cr App R 662 (CA) at para [56] Keene LJ held that the burden of proof was on the defendant on the balance of probabilities.

<sup>120</sup> [1975] AC 653, 693 “ ‘Coercion’ in its popular sense denotes an external force which cannot be resisted and which impels its subject to act otherwise than he would wish.”

<sup>121</sup> [1996] 1 Cr App R 116, 117 G.

<sup>122</sup> The Court of Appeal emphasised that coercion “was different from persuading someone out of loyalty and that the jury should try and put themselves in the position of the wife and ask themselves whether from what they had heard she was forced unwillingly to participate.”

<sup>123</sup> At 119 B Kennedy LJ referred to an extract from the evidence where the wife had said she was tormented by the husband and she would ultimately agree with anything he said.

<sup>124</sup> [2003] 1 Cr App R 662 (Keene LJ, Forbes J and Judge Rant QC). At the trial of Alison Cairns, aged 30, the evidence was of “persistent violent conduct of Barry Cairns during the whole of their relationship”. *R v Cairns* unreported, Portsmouth Crown Court, 31 May-27 July 2000, Judge Chubb and a jury (V Watson & Associates: Official Court Reporters) summing up page 19 C-D.

<sup>125</sup> *Ibid* para 55. Mrs Cairns put forward both the defence of duress and marital coercion.

otherwise the defence was not only otiose it additionally required the wife to prove the coercion in the presence of her husband, neither step being a requirement for duress. As a conspiracy is a crime of agreement, the prosecution argued that marital coercion was very difficult to apply when the criminal acts extended, as here, over a period of months as the husband could not have been continuously in the wife's presence. It followed, that a crime constituted by a single incident of act was the only type of offence to which the defence applied. This submission was rejected as it would have introduced a new class of exclusion which the statute had not prescribed. The presence of the husband was required for the agreement not the overt acts. Keene LJ accepted "moral force or emotional threats"<sup>126</sup> were encompassed by the defence and that the trial judge had, just as in *R v Shortland*, given no explicit reference or example to any form of coercion less than involving physical force, therefore the conviction had to be quashed for non-direction.

The House of Lords made an en passant reference to the statutory defence in *R v Z*.<sup>127</sup> The Crown informed the House of the significant, recent increase in reliance upon the common law defence of duress. Technological advances "had lead to the elimination of many false factual defences which could now be disproved". Duress was being consistently relied upon "in drug cases".<sup>128</sup> It was submitted, but not decided, that in marital coercion "the legal burden of proof [is] on the married woman,"<sup>129</sup> but as that proposition involves the imposition of a reverse legal burden it is now very doubtful, as being inconsistent with the presumption of innocence.<sup>130</sup> In contrast with marital coercion, only threats of death or serious injury will suffice for the defence of duress.<sup>131</sup> Lord Bingham accepted the correctness of an approach in which the threat must be directed against the defendant or his immediate family<sup>132</sup> or someone close to him, as a more open-textured defence would weaken its rationale. Baroness Hale of

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<sup>126</sup> Ibid para 64.

<sup>127</sup> [2005] 2 AC, 467 para [19] (HL).

<sup>128</sup> See *R v Z* [2005] 2 AC 467, 475 G.

<sup>129</sup> *R v Z* [2005] 2 AC 467, 477 B. The House of Lords did not deal with this point and only an oblique reference to the defence was made at all: "the only criminal defences which have any close affinity with duress are necessity...and, perhaps, marital coercion under section 47 of the *Criminal Justice Act 1925*" per Lord Bingham of Cornhill p489.

<sup>130</sup> *R v Lambert* [2002] 2 AC 545; *HKSAR v Hung Chan Wa* [2006] 3 HKLRD 841 (CFA). cf *Hansen v The Queen* [2007] 3 NZLR 1.

<sup>131</sup> *R v Abdul-Hussain* [1999] Crim LR 570; *R v Maurirere* [2001] NZAR 431, 434 para 14.

<sup>132</sup> *R v Z* [2005] 2 AC 467, 490.

Richmond identified that a special characteristic of duress (and inevitably of marital coercion) is that the facts on which the defence is founded are not necessarily part and parcel of the incident during which the offence was committed.<sup>133</sup> Yet in relation to the statutory defence of coercion this is not correct, as the requirement for the presence of the husband at the time of the offence, is to demonstrate that the coercion, which may have been initiated earlier, is still subsisting and materially operative at the time of the offence.<sup>134</sup> The battered wife knows that she is exposing herself to a risk of unlawful violence if she stays, but she may have no reason to believe that her husband will eventually use her broken will to force her to commit crimes.<sup>135</sup>

The 1925 model was exported to the Colonies, Dependencies, and as will be demonstrated, still remains in force in many jurisdictions. In the Crown Colony of Hong Kong the Attorney General moved the First Reading of the *Criminal Procedure Amendment Ordinance 1930* in the Legislative Council, by noting that “Amongst other things it abolishes, as in England under the *Criminal Justice Act 1925*, the presumption of coercion<sup>136</sup> in felonies where husband and wife are charged together.” This short statement remarkably contained two errors: the presumption did not only apply to felonies and the doctrine did not only apply where the spouses were jointly charged.<sup>137</sup> On the Second Reading of the Bill the Colonial

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<sup>133</sup> *R v Z* [2005] 2 AC 467, 510 para [72] “[The facts of the duress] will characteristically have happened well before, and quite separately from, the actual commission of the offence” on this basis however the plea of marital coercion will fail because of the lack of the presence of the husband at the actual commission of the offence. The requirement of the presence of the duressor is commonplace in criminal codes in ensuring that the defence is strictly controlled and scrupulously limited to situations that correspond to its underlying rationale.

<sup>134</sup> J LI J Edwards, ‘*Compulsion, Coercion and Criminal Responsibility*’, (1951) 14 *Modern Law Review* 297, 308 reasoned that the husband need only be present at the completion of the offence. In a continuing offence, or a conspiracy (as opposed to a single-focus offence) this is likely to prove a serious practical obstacle to the successful utilisation of the defence. cf *R v Cairns* [2003] 1 Cr App R 662.

<sup>135</sup> See *R v Z* [2005] 2 AC 467, 511 para 77.

<sup>136</sup> In Hong Kong the noun “coercion” is also referred to but undefined in s26(2) *Sale of Goods Ord Cap 26*; s10(2) *Merchant Shipping (Liner Conferences) Ord Cap 482*; s5(4)(d) *Human Organ Transplant Ord Cap 465* and A15(2) s8 *Hong Kong Bill of Rights Ord Cap 383*.

<sup>137</sup> In moving the introduction of the First Reading of the Bill, the Attorney General of the Colony of Hong Kong stated that it was considered desirable to assimilate the position in the Colony with that of England. It is quite unclear what prompted the Bill other than an inference that the Colony simply followed the leader. There was no known example of the common law defence of marital coercion ever having been relied upon between the creation of the Supreme Court of Hong Kong on 5 April 1843 or in the Magistrates Court, and the ensuing 87 years until 1930. The effect of the Bill was to abrogate the common law defence of marital coercion – a point not made by the Attorney General to the Legislative Council. The Bill was not precipitated by any criminal law litigation or by any policy other than that of following in the furrow of the British Government to whom the

Secretary referred to clause 9 of it as being almost identical<sup>138</sup> to s47 *Criminal Justice Act 1925* and laconically in eight lines summarised its effect and proffering a single reason for its enactment, namely “it seems desirable that this Colony should follow suit”.<sup>139</sup> The Attorney General offered no insight as to what was intended by the critical noun “coercion”. There was no discussion of the wider issue of whether or why a wife, or any woman or person, should enjoy this defence. No reference to the common law of duress was made. No reference was made as to whether the common law defence of marital coercion had hitherto existed in Hong Kong. There was no consideration of the position of wives in general<sup>140</sup> or of interface between the defence and the status of Chinese customary concubinage.<sup>141</sup> The 1930 amendment can be seen as entirely reactive legislation, with the exclusive intention to achieve parity with the modern English position. It was adhocism in England and then Hong Kong; with no or little contemplation of the wider significance of enacting a special substantive defence for a limited class of adults. In 1930, it was the only substantive criminal statutory

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Governor of the Colony had to report and who was bound by Royal Instructions and the Letters Patent of the Colony. The Legislative Council was a particularly somnolent body. Consensus politics was the norm.

<sup>138</sup> The punctuation of the provision is immaterially different from the 1925 Anglo-prototype.

<sup>139</sup> Andrew Bruce (ed) *Criminal Procedure Handbook: Criminal Procedure Ordinance (Cap 221) (with annotations)*,<sup>139</sup> Butterworths, Hong Kong, (2004) refers to s100 *Criminal Procedure Ordinance* and states at p232: “This section was added pursuant to s9 of the *Criminal Procedure Amendment Ordinance 1930* (17 of 1930), commencing 17 October 1930.” No case law is referred to in the text.

<sup>140</sup> The marital coercion legislation continues to exist in England where there has not been a focus on the issue. It would be unpopular in Hong Kong to make a specific repeal, in the absence of an obvious precipitator. But the wider issue is striking: criminal capacity. It is a particularly strange irony that whereas in the nineteenth century woman were categorised for the purposes of criminal intention with lunatics and children, that by modern legislation it is conceived that wives need extra help because of their continuing subjugation, the same is reintroduced. The only remaining justification for the exemption is that it has been thought to be the law for centuries. So it has its roots in the institutional arrangement of matrimony.

<sup>141</sup> The official statistics of the time shows that very few women (let alone married women or concubines) came before the superior Courts. There are no statistics for a gender analysis before the magistrate’s courts at the time. No system of law reporting existed in Hong Kong before 1905, although occasionally newspapers reported matters of mixed legal and society interest. The Law Reports reveal that almost no female accused ever came before the Hong Kong Courts for serious crimes. But a European woman, Mrs Carew, (see *The Graphic*, 13 January 1897 for her contemporary pretrial biography) was convicted of murder before Judge Mowatt and a jury of 5 persons. and sentenced to death on 1 February 1897 at the Consular Court of Japan at Yokohama. She had been found guilty of poisoning her husband with arsenic (who was 15 years older than her). Her sentence was commuted to life imprisonment with hard labour, and she was conveyed from Japan to Hong Kong. See generally *House of Commons Debate*, 14 February 1898 for a response by Sir W M Ridley that she had been transported to Hong Kong and England from Japan pursuant to the *Colonial Prisoners Removal Act 1884* (47 and 48 Vict c31) to undergo her imprisonment, while her petition for special leave to the Privy Council was heard. Special leave (argued on the basis of lack of constitutive jurisdiction for the trial to take place in Japan) was refused on 14 July 1897: *Carew v The Crown Prosecutor in Japan* (1897) 13 TLR 512 (PC) Lord Halsbury LC, Lord Hobhouse, Lord Morris, Sir Richard Couch, Sir Henry de Villiers and Sir Henry Strong). Apart from the absence of official law reporting the invasion of Hong Kong by the Japanese forces in World War II lead to the destruction of enormous numbers of official documents, lending the need for special remedial legislation in relation to property titles.

general defence in Hong Kong that applied to any adult.<sup>142</sup> Provocation and diminished responsibility came over 30 years later; whereas all other defences, justifications, excuses, capacity or incapacitating conditions remain wholly common law.

The Legislative Council in Hong Kong was under the special constraint that Bills could only be introduced by the government.<sup>143</sup> This meant that the government did not have to consider law reform on a macro-level. It could dictate the pace and content of all legislation. Unless there was an imperative for change the existing laws would be sufficient. The more rigorous dynamics of full democracy did not exist. The finer points of intellectual detail were left to the judges.

The same legislation in 1930 introduced a number of other reforms, some of which also had a parallel with the *Criminal Justice Act 1925* [UK].<sup>144</sup> It was completely typical of the era for a collation of generic reforms to be made in a single amending Ordinance.<sup>145</sup> But there is no explanation as to why the introduction of a substantive criminal law defence should be classified as a matter of “Criminal Procedure”.<sup>146</sup> There is no doubt that the Legislative Council (and the Westminster Parliament) intended to place a persuasive, as opposed to a merely evidential burden, on the defendant wife. Yet if only an evidential burden is incurred, then the statutory defence makes much more sense. No longer is a wife worse off than under the common law of duress. The equipiration would be meaningful because what it would then do is signal that the content of “coercion” is wider than that of “duress,” otherwise the new statutory provision is completely otiose. The statute provides an additional enhanced defence in comparison with the rights of other women. Why should a wife have a higher hurdle to surmount? The statute would then return to its common law roots that the physical presence

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<sup>142</sup> But infancy or nonage were and remain statutory defences.

<sup>143</sup> Even seventy years later only the government can introduce a Bill with fiscal implications: *Leung Kwok Hung v President of Legislative Council* [2007] 1 HKLRD 387

<sup>144</sup> Sections 15, 28, 29, 84 and 100 of the *Criminal Procedure Ord* Cap 221 [HK] survive. Section 15 was s4 of the 1930 Ord and deals with the right of the Attorney General not to prosecute. Sections 28 and 29 were respectively sections 5 and 6 of the *Criminal Procedure Amendment Ord* 1930 and deal with copies of an indictment and service of it. Section 84 was introduced as s8 of the 1930 Ord and deals with restitution of property in cases of conviction.

<sup>145</sup> In 1930 the Ordinance had not been the subject of any amendments at all since 1906.

<sup>146</sup> The Long Title to the Ordinance since 7 July 1899 is “To consolidate and amend the laws relating to criminal procedure, evidence and practice”.

of the husband was the dominant feature. Whereas for duress the threat to kill or cause grievous bodily harm would form part of the tableau, the immediacy of husbandly action and influence became central. A married woman is not precluded from simultaneously relying upon both (or more) defences, so the statutory defence must be seen as an additional<sup>147</sup> protection to married women.<sup>148</sup>

Under Hong Kong common law the defendant need only advance, from any witness, sufficient evidence to raise duress as a live evidential issue, then<sup>149</sup> the prosecution must disprove the defence beyond reasonable doubt.<sup>150</sup>

It is remarkable in itself that there is no reported instance of the invocation of the common law defence of duress (let alone the statutory defence of marital coercion) in Hong Kong until 1946. In *Lai Kit v R*<sup>151</sup> the appellant, a Japanese collaborator had been convicted of treason. On appeal it was argued that if it were shown that there was the threatened application of force or fear of death a legal presumption arose that the force or fear of death continued until the opportunity to escape presented itself. The Full Court in dismissing the appeal held that no such presumption of law existed, it would be at most a presumption of fact which the jury would be entitled to draw from all the circumstances. “Duress...has long been recognised as a general defence under the English common law, and likewise incorporated into the common law of Hong Kong.”<sup>152</sup> The caselaw shows that there have been very few occasions since

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<sup>147</sup> The provision [s100 *Criminal Procedure Ordinance*] does not affect the common law rule as to duress which is capable of application between husband and wife: see *R v Bourne* (1952) 36 Cr App R 125 CCA.

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<sup>149</sup> *R v Howe* [1987] AC 417, 435 per Lord Hailsham of St Marylebone L C ‘*Halsbury’s Laws of Hong Kong*’, (1998) vol 9 *Criminal Law and Procedure*, Butterworths Hong Kong p30 reveals no Hong Kong case law other than *R v Kong Man Heung*. It also notes “A husband and wife alone cannot be found guilty of conspiracy because they are, in law, one person.”

<sup>150</sup> *HKSAR v Buitrago* [1998] 3 HKC 113, 116 per Power ACJHC. The accused was unanimously acquitted on a retrial: [1998] 3 HKC 113, 118 C. Her defence was that she had been coerced to carry drugs because her five year old son had been kidnapped in Colombia which “made coercion a live issue”.

<sup>151</sup> See *Lai Kit v R* (1946) 31 HKLR 7 (FC), then 12 years until 1958 in *Leung Wing Cheung v The Queen* [1958] HKLR 49 (FC). cf *Wong Ching Chu v The Queen* [1957] HKLR 61 (FC) – cross-examination of wife as to whether she harboured her husband held improper. In *R v Purdy* (1945) 10 JCL 182 it was held that duress could amount to a defence in treason, but only if the threat was one of death. See also Mark Findlay and Carla Howarth, ‘*Criminal Law in Hong Kong Cases and Commentary*’ (1992) Butterworths Asia, p462.

<sup>152</sup> Michael Jackson, ‘*Criminal Law in Hong Kong*’ (2003) Hong Kong University Press, p300. Frank Addison ‘*Digest of Hong Kong Criminal Case Law 1905 – 1967*’, Government Press, Hong Kong (1968) refers to no relevant case law, but, *Leung Wing-Cheung v R* [1958] HKLR 49 (FC) is authority that duress provides a lawful excuse for unlawful conduct.

1846 when the common law of duress has been relied upon in Hong Kong and the defence of marital coercion has equally been very rarely invoked. The number of criminal trials in the Supreme Court was low, with robbery and kidnapping being the most numerous offences,<sup>153</sup> so it had been very rare indeed for married women to be accused persons in a trial upon indictment. The courts had virtually no experience of their defence being deployed.

Hong Kong law has encountered the defence on five occasions<sup>154</sup> and in only one case has it been successful.<sup>155</sup> While no case engaging the defence and customary concubinage is known, such a concubine should have the benefit of the defence in the reasoning which held that a concubine was an incompetent witness against her husband.<sup>156</sup>

## CUSTOMARY CONCUBINAGE AND POLYGAMY

The Privy Council explicitly recognised the notion of a valid polygamous marriage on a number of occasions.<sup>157</sup> By 1932, Beckett<sup>158</sup> noted that it<sup>159</sup> had repeatedly recognised

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<sup>153</sup> Sir William Meigh Goodman *Reminiscences of a Colonial Judge* (1907) The Kingsgate Press, London p170. “The Chief Justice’s Criminal Lists contained ninety or a hundred cases per annum”. (Chief Justice of Hong Kong 1901–1904).

<sup>154</sup> *Wong Ching Chu v The Queen* [1957] HKLR 61 (FC); *Lee Kei Yick v The Queen* [1978] HKLR 510 (CA); *R v Lee Shek Ching* [1986] HKLR 304 (CA); *R v Kong Man Heung* [2000] 1 HKC 406 (HC); *HKSAR v Au Yuen Mei* [2000] 1 HKC 411 (CFI).

<sup>155</sup> *HKSAR v Au Yuen Mei* [2000] 1 HKC 411 (CFI); see the extended Editorial Note by the present author [2000] 1 HKC 411, 412-414.

<sup>156</sup> *Chan Hing Cheung v The Queen* [1974] HKLR 196 (FC) infra chp 5.

<sup>157</sup> In *Cheng Thye Phin* in 1920 the Privy Council said that it was not disputed that the Chinese law of marriage permits concubinage. The judgment considered the situation of the principal wife (or *tsai*) and of the secondary wife (or *tsip*) and it was said that “The position of a secondary wife is superior to that of a mere concubine, though this term is sometimes applied to a *tsip*”: [1920] AC 369, 375 quoting with evident approval from the judgment of Braddell J in the *Six Widows Case* (1908) 12 Straits Settlements Law Reports 120,209. Further the Privy Council accepted [1920] AC 369, 374 that by Chinese ideas the child of the *tsip* would be regarded as one of the next of kin. “Concubinage is recognised as a legal institution under Chinese law conferring upon the *tsip* a legal status of a permanent nature, which subject to divorce, entitles her to maintenance during the lifetime.” *Khoo Hooi Leong v Khoo Hean Kwee* [1926] AC 529; *Khoo Hooi Leong v Khoo Chong Yeok* [1930] AC 346. See also: *Re Choo Eng Choon decd (Six Widows Case)* (1908) 12 SSLR 120 (discussed by Thomson J in *Dorothy Yee Yeng Nam v Lee Fah Kooi* [1956] 1 MLJ 257) and *Au Hung Fat v Lam Lai Ha* [1959] HKLR 527. In *Anonymous* (1866) 3 Mad HC Rulings VII (approved in *Attorney General of Ceylon v Reid* [1965] AC 720, 731 (PC)) it was held that as Hindu law recognised polygamy a second marriage according to Hindu rites would not be invalid, still less so, per Lord Upjohn “by reason of the earlier marriage under the Roman Catholic faith which Hindu law would not have recognised”. In *Drameh v Drameh* unreported Privy Council Appeal No 35 of 1968, 7 April 1970, Lord Morris of Borth-y-Gest, Lord Pearson, Lord Diplock at p3 noted that in Gambia marriage and divorce were separately regulated for Christians and others.

polygamous marriages and the legal rights that flowed from them; although none of those cases had involved the criminal law. Occasional dicta to the effect that English law did not recognise polygamous marriages<sup>160</sup>, were over-broad. In a number of African jurisdictions the criminal courts had concluded (with somewhat mixed results) that polygamous marriages

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<sup>158</sup> W E Beckett, *The Recognition of Polygamous Marriages Under English Law*, (1932) 48 LQR 341. Sir Dennis Fitzpatrick reviewed polygamy and the civil law of marriage in the Victorian era. *'Non-Christian Marriage'* (1900) 2 Journal of the Society of Comparative Legislation (NS) 359; *'Non-Christian Marriage'* (Second Article) (1901) 3 Journal of the Society of Comparative Legislation (NS) 157.

<sup>159</sup> *Cheng Thye Phin v Tan Ah Loy* [1920] AC 369; *Khoo Hooi Leong v Khoo Hean Kwee* [1926] AC 529; *Khoo Hooi Leong v Khoo Chong Yeok* [1930] AC 346. See also: *Re Choo Eng Choon decd (Six Widows Case)* (1908) 12 SSLR 120 (discussed by Thomson J in *Dorothy Yee Yeng Nam v Lee Fah Kooi* [1956] 1 MLJ 257) and *Au Hung Fat v Lam Lai Ha* [1959] HKLR 527.

<sup>160</sup> *R v Naguib* [1917] 1 KB 359 (CCA) (Egyptian Muslim – contracted second marriage in England).

were to be respected for evidential purposes.<sup>161</sup> The issue of the competence or compellability<sup>162</sup> of “natives wives”<sup>163</sup> in Canada<sup>164</sup> and in Africa<sup>165</sup> arose.

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<sup>161</sup> In *R v Sukina* [1912] TPD 1079 a “wife” within the meaning of an immigration statute which entitled a woman, otherwise a prohibited immigrant, to enter South Africa, did not include a polygamous spouse. The female spouse of a polygamous marriage (either wife) was not regarded as a “wife” under the common law rule which prevented a wife from being compelled to testify against her husband: *Nalana v R* [1907] TP 407; *R v Mboko* [1910] TP 445. Wife of a potentially polygamous North American Indian customary marriage were held valid: *Wall v Williamson* (1845) 8 Ala 48. Goldthwaite J at p50 distinguished the dictum of Lord Brougham in *Warrender v Warrender* (1835) 2 C6 & F 532 that English law “clearly never should recognize the plurality of wives, and consequent validity of second marriages”. Affirmed *Wall v Williamson* (1847) 11 Ala 826 per Collier CJ especially at 838. Note also *Morgan v McGhee* (1844) 24 Tenn 13 per Turley J confirming on appeal the validity of a Cherokee Nation customary marriage, in an action where the plaintiff instituted an action of detinue for slaves. The defence was that the plaintiff was a feme-covert and therefore incapable of suing. *R v Bear’s Shin Bone* (1899) 4 Terr LR 173 (SC) (first marriage according to the customs of the Blood tribe was valid and could give rise to a conviction for polygamy); *R v Davendra* 1 MC 51, 55 per Bucknill CJ (Singapore). M L Agabwala, ‘Asiatic Mixed Marriages’, (1895) LQR 373, 374 noted *Wall v Williamson*. Other early American decisions are also considered in *In re Ullee* (1885) 53 LT 711, affirmed 54 LT 286 (CA), where the Nawab Nizam of Bengal, a Muslim married two English women in England and the Courts upheld the descendent children’s interests in the succession. To the same effect is *Royal v Cudahy Packing Co* (1922) 199 NW 427 (Iowa SC). Thus debarring her from suing her husband on a promissory note (as a wife then was incapable of claiming “a separate estate”). But without such a customary marriage the woman was not a lawful wife and therefore remained a competent witness against her assumed husband. In *Ex parte Cote* (1971) 22 DLR (3<sup>rd</sup>) 353, 355 (Sask CA) it was held that in the absence of a religious or civil ceremony, (there being no evidence of any customary Indian marriage) a woman cohabiting with a man on a Native Indian reservation was both competent and compellable as a witness against her cohabitee. In *R v Kingi* (1909) 29 NZLR 317 Chapman J in a trial ruling in the Gisborne Supreme Court held that a Maori customary marriage (which was potentially polygamous) did not prevent a wife being a compellable witness against her husband. Chapman J relied upon *R v Neddy Monkey* (1861) 1 W&W (L) 40 in relation to Australian Aborigines. Counsel for the accused was never going to succeed in his objection to the prosecution application to call the wife by his initial concession at p372 that a Maori customary marriage was not a “marriage”. Chapman J robustly refused the objection stating that if the rule of evidence was applicable “it would apply to as many wives as a Maori had,” distinguishing the law of succession applied before the Native Land Court. But cf *R v Tom Williams* (1921) 37 CCC 126, 127 Gregory J, British Columbia Supreme Court, in a murder trial, held on a voir dire to determine admissibility that a witness the prosecution intended to call was polygamously married to the accused some 20 years earlier “according to Indian custom”. The accused had several wives, and an expert stated that the Department of Indian Affairs recognised such a marriage as valid. The judge agreed and followed *R v Nan-E-Quis-A-Ka* (1889) 1 NWTR 21; 1 Terr LR 211.

<sup>162</sup> In the formative years of the incompetence concept, a generous view of matrimony was taken, so that someone who was passed off as a wife was taken to be a wife: *Campbell v Twemlow* (1814) Pri 81. This was possibly influenced by the widespread penalty of capital punishment. But in *Batthews v Galindo* (1828) 4 Bing 610, 614 a mistress, even if treated as a wife and held out as the man’s wife, was a competent witness against the husband: “the witness is not to be excluded unless de jure wife of the party” per Best CJ. C.f *R v Lologa* [2007] 3 NZLR 844, 847 at para [17] which held a de facto partner does not have a “just excuse” in terms of s352 Crimes Act 1961 for not giving evidence against the father of her children charged with murder: but otherwise where she is the victim of the offence: *R v CTB (No 2)*, unreported, High Court Dunedin, T16/81, 18 February 1992, Williamson J. The true ratio of *R v Junaid Khan* (1987) 84 Cr App R 44 is not that a wife or husband of a polygamous marriage is a competent witness against the spouse; but rather the much narrower formulation that a spouse who is already married and who is domiciled in a country which prohibits polygamy may not enter into a further marriage. To date the law has erroneously abided in the conclusion that a polygamous marriage cannot be a lawful foundation for either bigamy or to claim spousal incompetence under the laws of evidence. In *Ali v Canada (Minister of Citizenship and Immigration)* (1998) 84 ACWS (3d) 338 Rothstein J of the Federal Court Trial Division of Canada, correctly found that a polygamous marriage valid in the country where it was entered into and where the parties were domiciled, would be recognised as valid by Canadian courts. Further, the

It was a marriage of a member of the House of Lords that starkly threw up the implications of polygamy for the criminal law. The eldest son of the late first Baron Sinha of Raipur in the

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validity of that marriage did not depend upon where the spouses reside after marriage or whether there was cohabitation in both marriages at the same location.

<sup>163</sup> In *Robin v Rex* (1929) 12 KLR 134 (East Africa Court of Appeal) Sheridan ACJ, Guthrie-Smith and Muir Mackenzie JJ rejected a submission that the evidence of a native wife, married by customary law in a polygamous marriage, was admissible against her husband, because of the “essential difference between the two unions” ie. Christian marriages and polygamous marriages. See *R v Amkeyo* (1917) 7 EALR 14 holding that the privilege accorded to marital communications by s122 *Evidence Ord* [East Africa Protectorate] was restricted to couples under Christian marriage. But Hamilton CJ held that in East Africa by native law “the woman is not a free contracting agent but is regarded rather in the nature of a chattel for the purchase of which a bargain is entered into between the intending husband and the father or nearest male relatives of the woman. In the second place there is no limit to the number of women that may be so purchased by one man and finally the man retains a disposing power over the woman he has purchased.” It could not be said that in any way the native custom approximated any legal idea of marriage according to Christian mores, so the rationale for spousal incompetence simply did not apply. At p18 Pickering AJ concurred: “Wives are acquired from their male guardians at a price. There is no limit to the number which can be acquired other than those imposed by the inclination and financial means of the purchaser.”

<sup>164</sup> In *The Queen v ‘Bear’s Shin Bone* (1899) 3 CCC 329 an Indian who according to the marriage customs of his tribe takes two women at the same time as his wives, and cohabits with them, is guilty of an offence under s278 *Criminal Code 1892* [Can]. The evidence showed that the prisoner had been married according to the marriage custom of the Blood Indians to two women, ‘Free Cutter Woman’ and ‘Killed Herself’, both of whom were living with him as his wives, and that there was a form of contract between the parties which they supposed binding upon them. *The Queen v Van-E-Quis-A-Ka* (1888-9) 1 Terr LR 211 against a prisoner, an Indian, on a criminal charge, the evidence of two Indian women, M and K was tendered for the defence. M stated: “that she was [in point of time the second] wife of the prisoner; that he had two wives, and that K was his other wife; ... that she and the prisoner got married Indian fashion; that he promised to keep her all her life and she promised to stay with him”. Wetmore J rejected the evidence of M and admitted that of K. c.f. *R v Tom Williams* (1921) 37 CCC 126. In *Connolly v Woolrich* (1867) 11 Lower Canada Jurist 197 affirmed on appeal. sub. nom. *Johnstone v Connelly* (1869) 1 Revue Légale 259 the trial court decided nine days after the existence of the Canadian nation that a marriage could lawfully exist between a native Indian and a non-native by an adaptation of customary law.

<sup>165</sup> *R v Sukina* (1912) TPD 1079 the appellant had been convicted of being found in the Transvaal as a prohibited immigrant. Her husband had married her in 1895 in India according to Muslim rites. The husband had contracted a second marriage according to Muslim rites in Johannesburg in 1905. He alleged he had since divorced, leaving the appellant the only wife. The Court (Wessels, Bristowe and Curlewis JJ) held that a woman married according to Muslim rites which permits polygamy, is not a “wife” under immigration law. Wessels J at p1081 dissenting correctly stated: “I have no doubt whatsoever that we cannot admit as valid a Mahomedan marriage which has taken place in the Transvaal; nor can we admit a Mahomedan divorce. The question, however, arises whether we should admit a woman who was married in India by Mahomedan custom and who was acknowledged as the wife of the immigrant Hassan before he came to this country.” In *R v Fatima* (1912) TPD 59 it had been held that an Asiatic married according to Muslim custom was entitled to bring one, but not more, of his wives to the Transvaal. Innes CJ, in a non-criminal case *Mashia Ebrahim v Mahommed Essop*, [1905] TS 59 was dogmatic: “It is quite certain that if this marriage were a polygamous one it would not be recognised in this country no matter whether it was recognised as valid in other countries or not.” This decision was consistently to deny the validity of native polygamous marriages: *Nalana v R* [1907] TS 407; *Rex v Mboko* [1910] TP 445; *Kaba v N’Tela* [1910] TP 964; *Seedat’s Executor v The Master (Natal)* 1917 AD 302; not followed in Southern Rhodesia: *Estate Mehta v Acting Master High Court* (1958) (4) SA 252, 253 “It is now clear that it is abundantly essential, if an intolerable situation is to be avoided, that foreign polygamous marriages, valid by the laws of the country in which they were contracted, should be recognised by our courts for certain purposes, however limited those purposes may be. Unless this is done the effectiveness of private international law, the system without which it would be impossible to maintain the legal relationships existing between that inhabitants of the various countries constituting the civilised world, would be most seriously impaired.”

Presidency of Bengal<sup>166</sup> prayed for the issue of a writ of summons to the House of Lords. His father had married in India according to Hindu rites which then permitted polygamy. After his marriage “he and his wife joined the religious sect known as the Sadharan Brahmo Samaj” which practised monogamy. The marriage was plainly a potentially polygamous one.<sup>167</sup> In the *Sinha Peerage Claim*,<sup>168</sup> the Committee for Privileges decided that the marriage was lawful, but were very doubtful as to the position if actual polygamy had occurred. It is a firmly established rule of private international law that status is determined by the *lex domicilii* of the parties, so the existence of the husband’s right to take an additional wife was to be determined by the husband’s *lex domicilii* as an application of his personal law. Where a husband can take an additional wife under his personal law that second marriage is lawful unless it occurs in a country where the statutory law does not permit it. What characterises a valid marriage, at any rate at its inception, as monogamous or polygamous is the law of the country in which it was conducted.<sup>169</sup> English law contemplates that a marriage will be monogamous hence the law of bigamy.<sup>170</sup> Marriage law in New Zealand<sup>171</sup> too only permits unmarried persons to marry, so, where the husband’s personal law permits polygamy, by going through a ceremony of marriage in the country of his domicile, he does not commit bigamy.<sup>172</sup>

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<sup>166</sup> Who as Sir Satyendra Prasanna Sinha, one of His Majesty’s Under-Secretaries of State for India, had been elevated by Letters Patent dated 14 February 1919 as Baron Sinha of Raipur.

<sup>167</sup> G W Bartholomew ‘*Polygamous Marriages*’, (1952) 15 Modern Law Review 35, 39.

<sup>168</sup> Decided 25 July 1939 but reported [1946] 1 All ER 348n, Lord Maugham L C delivered the decision of the Committee for Privileges and found that the claimant was entitled to the hereditary peerage; but was explicit that this decision was not to be taken as a precedent where such a claimant was “claiming as a son of a parent who has in fact married two wives, eg Hindu or a Mohammedan who has had a plurality of wives. It is apparent that great difficulties may arise in questions relating to the descent of a dignity where the marriage from which heirship is alleged to result is one of a polygamous character.”

<sup>169</sup> *Lee v Lau* [1967] P 14 per Cairns J.

<sup>170</sup> *A-M v A-M (Divorce: Jurisdiction: Validity of Marriage)* [2001] 2 FLR 6 para 50 per Hughes J.

<sup>171</sup> To the same effect is English law: see s11 *Matrimonial Cases Act 1973* [UK]: “A marriage celebrated after July 31 1971 shall be void on the following grounds only, that is to say...(b) that at the time of the marriage either party was already lawfully married.”

<sup>172</sup> An offence contrary to s205 *Crimes Act 1961* [NZ]. The note in B Robertson (ed), ‘*Adams on Criminal Law*’, Wellington, Brooker’s (1992) (looseleaf 2004) CA 205.18 and 205.21B is erroneous. The commentary to ‘*Adams on Criminal Law*’ states “New Zealand law does not recognise a polygamous marriage as a marriage, for the purposes of founding a prosecution for bigamy.” This sentence is untenable. A person who has contracted a polygamous marriage out of New Zealand, consonant with their personal law (*lex domicilii*) who while still in a subsisting marriage, then married again in New Zealand, commits bigamy contrary to s205(i)(a) *Crimes Act 1961*. The subsection is not restricted, unlike subsection (c) and (d) to “a New Zealand citizen”, who by domicile cannot practise polygamy. A polygamous marriage is valid for those whose domicile permits it. Such a husband may by marriage take an additional wife by his personal law, but not under New Zealand law. See *Re Rah Chong (deceased)* (1913) 33 NZLR 384 (SC).

Would an actual or potential polygamous marriage (eg by lawful customary concubinage) generate uxorial privileges in the substantive criminal law? This was exactly answered in the affirmative by *R v Shaiamunda et Uxores*<sup>173</sup> an early Southern Rhodesia decision where the convictions of both wives were quashed because of their husband's marital coercion. That conclusion comports with a proper understanding of conflicts of law jurisprudence that where actual or potential polygamy is lawful under the *lex domicillii*, the ordinary legal consequences (privileges and liabilities) ought to be available to the participants in the marriage.<sup>174</sup> But the criminal law generally had great difficulty<sup>175</sup> with the implications flowing from the concept of polygamy.

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<sup>173</sup> 1916 SR 33, where Russell J quashed convictions of (only) the two wives, Kamadza and Maripa, who had "demurred to the theft, but their husband ordered them to accompany him" to steal with him corn from a neighbour. Both wives were successfully entitled to rely upon the common law defence of marital coercion.

<sup>174</sup> It should follow that the intramarital conspiracy exemption and the accessory after the fact exemption too should be available to all lawful matrimonial configurations (involving at least one husband and one wife) where one husband (at least) and one wife (at least) would have had the relevant privilege or exemption available between them. An additional wife does not necessarily halve the coercion but may in fact double it. The principle must equally apply to polyandry as much as polygamy.

<sup>175</sup> Criminal law is virtually never discussed in the authorities or texts. In *R v Caroubi* (1912) 7 Crim App R 149 a woman married under the Muslim faith had been convicted of the offence of larceny. She appealed to the Court of Criminal Appeal. Hamilton J delivering the judgment of the court observed at p151 that the applicant was an Arab, presumably a Muslim. Her counsel had raised the issue that as the offence of theft had been committed by her in the presence of her husband, she was entitled to the presumption of marital coercion. The court expressly stated that they did not consider how far this presumption applied in the case of persons who were permitted to be polygamous by the law of their religion or their domicile. The court proceeded to deal with the issue as a matter of fact and found that she was entitled to have her conviction quashed. In *Caroubi* the Court of Criminal Appeal assumed that marital coercion applied to a valid polygamous marriage, noting that counsel for the Crown had raised no question as to the applicability of this law. There is a short and inconclusive discussion of *R v Naguib* [1917] 1 KB 634 in SG Vesey-Fitzgerald '*Nachimson's and Hyde's Cases*' (1934) 47 LQR 253, 268-269 who asserted that "there was no limit in English Law to the number of "silly girls" whom an unscrupulous, or perhaps a merely low-minded but honest polygamist can persuade to go through a ceremony with him." The statement of Avory J at Assizes that even where the *lex loci contractus* allows polygamy, such a marriage would not be regarded in England as a marriage was politely ignored by the Court of Criminal Appeal. A marriage between a Muslim and a non-Muslim celebrated in a foreign country is valid under Muslim law if it is performed in accordance with the *lex loci contractus* or the rites of the communion to which the wife belongs. See Sied Ameer Ali Vol II p183. In *Nahar v Cassab Gazette* (1952) *Des Tribunaux Mixtes* (Egypt) IX 289 two Christians in Egypt were married before a Muslim Qadi and this was held to be a valid marriage in that it was effected according to the *lex loci*. Few decisions in criminal law have investigated the issue and those authorities tend to be involved with evidential competence and compellability.

Concubinage was a significant facet<sup>176</sup> of Chinese customary law<sup>177</sup>. Concubinage<sup>178</sup> amongst Chinese<sup>179</sup> was recognised under lawful customary law all over Asia<sup>180</sup>. Concubinage under

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<sup>176</sup> In *Public Prosecution v D J White alias Abdul Rahman* [1940] MLJ 170 a husband who entered into a monogamous marriage could not, by changing his religion from Christian to Muslim, during the subsistence of that monogamous marriage, marry or go through a legally recognised form of marriage with another woman. “A conversion to another faith of either spouse of such a marriage has no legal effect on the status of that spouse.” Ibid p170. In *R v Davendra* (1940) 1 MC 51 per Bucknill CJSS a Hindu had married monogamously under the law of Ceylon and had upon conversion to Christianity married another woman in the Straits Settlements and was convicted of bigamy. To the same effect are *R v Rabia* (1889) 4 Kyshe 513 and *R v Nandi* 1920 ILR Lahore 440. The husband must “leave his polygamous freedom behind him and conduct himself while in this country as the husband of not more than one wife.” SG Vesey-Fitzgerald, ‘*Nachimson’s and Hyde’s Cases*’, (1934) 47 LQR 253, 256, a discussion of *Nachimson v Nachimson* [1930] P 277 (CA) and *Hyde v Hyde and Woodmansee* (1866) 1 P&D 130. Vesey-Fitzgerald at p263, refers to the Tanganyika Marriage Ordinance 1921 which contains “the same half-hearted hesitation” of how to deal with Christian, Hindu, Buddhist, Sikh, Muslim and Jain marriages in one statute.

<sup>177</sup> In *Ho Tsz Chun v Ho Au Shi* (1915) 10 HKLR 69; Havilland De Sausmarez P said “The common law of China was secured to the Chinese inhabitants, as it had existed prior to cession”, equally in *Lui Yuk Ping v Chow To* [1962] HKLR 515, 523 Macfee J held that Chinese customary law “is part of the general law of Hong Kong”. *Angu v Attah* unreported Privy Council Appeal No 78 of 1915, 23 June 1916, Lord Buckmaster LC, Earl Loreburn, Lord Shaw, Sir Arthur Channell ruling that once a customary law had been the subject of “frequent proof” it “crystallised” and judicial notice could be taken of it.

<sup>178</sup> A concubine in Hong Kong has rights to the administration of her husband’s estate. *Cheang Thye Phin v Tan Ah Loy* [1920] AC 369 (PC) (on appeal from the Straits Settlements); *Chan Yeung v Chan Shew Chi* (1925) 20 HKLR 35. Her children are considered to be legitimate. s14 *Legitimacy Ord Cap* 184 (1971 ed) and s13(2) *Interstates’ Estates Ord Cap* 73. She is considered to be part of the family and the state of concubinage comes no moral obloquy being described by Macfee J as “perfectly proper”: *Lui Yuk Ping v Chow To* [1962] HKLR 515, 523 “Nothing that I say is to be interpreted as casting any doubt on the respectability of the state of concubinage”. The matrimonial rights of a Hong Kong concubine are discussed in only a few works. DM Emrys Evans, ‘*Common Law in a Chinese Setting – The Kernel or the Nut?*’, (1971) 1 HKLJ 9, 28-29; DM Emrys Evans, ‘*The New Law of Succession in Hong Kong*’, (1973) HKLJ 7, 22-25. The Strickland Committee of 1953 stated that: “The tsip is in law considered a wife, a secondary or inferior wife it is true, who, both in law and in practice occupies a very different position to the tsai, but nevertheless a wife and not a kept mistress.” The result being that a tsip is considered a second concurrent wife, a jural conception outside the Christian conception of marriage.

<sup>179</sup> In *Public Trustee v Ng Kwok Shi* (1914) 16 GLR 405 Stout CJ held, after receiving expert evidence, that concubinage in China did not constitute polygamy. Noted JHC Morris, ‘*The Recognition of Polygamous Marriages in English Law*’, (1953) 66 Harvard Law Review 961, 974 who disagrees with Stout CJ and concludes that concubinage is polygamy, so that the distinction between secondary wives and concubines undoubtedly existed in theory, it was apt to become nebulous in practice. In *Lee v Lau* [1967] P 14 the husband and wife married in Hong Kong in 1942 according to customary law. Although a monogamous marriage “the husband had the right to take during the lifetime of the wife “tsip” or “secondary wives”, who had certain rights of succession and whose children were legitimate”. The marriage was therefore potentially polygamous and to find the marriage invalid “would result in a finding that the marriages of the majority of Hong Kong citizens was invalid” at p17.

<sup>180</sup> In *Re Ding Do Ca, Deceased* [1966] 2 MLJ 220 (Fed CA of Malaya) (Thompson L P, Ong Hock Thye ACJ, MacIntyre J), it was accepted that a connubial relationship of polygamy was lawful in Malaya: “in the case of persons domiciled in this country the local law allows a different personal law to different classes of persons”. He added [1966] 2 MLJ 220, 224. that issues of polygamy: “go to the very root of the law relating to the family which, after all, is the basis of society at least in its present form...”. The *Civil Code of the Republic of China* having on 24 January 1931 prohibited polygamy and concubinage. But this did not affect the then British Colony of Hong Kong. Concubinage was lawful in Hong Kong until 7 October 1971 and it was only prospectively abolished. There remain a very significant number of lawful concubines in Hong Kong and much litigation still pertains to them: Hon. Foo Ping Sheung LLD, the Chairman of the ‘*Civil Codification Commission of the*

Chinese customary law had to be significantly differentiated from that practised in India<sup>181</sup> and Samoa<sup>182</sup> which was also called concubinage<sup>183</sup>. Under the former it was given significantly enhanced formal and social recognition, carrying its own honour and legitimacy. Like the presumption of marriage available where persons lived together as man and wife, a presumption of customary concubinage existed. There was no recognition in the law of a mere mistress. “There is no presumption that because a married man keeps a mistress in another town where she passes for his wife, that the other woman is his wife, namely, a bigamous wife.”<sup>184</sup>

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*Republic of China*’, Kelly and Walsh Ltd, Hong Kong (1931) stated at p xxvii: “The enfranchisement of the woman, who is now placed on the same footing as the man, involves the disappearance of concubinage, and calls for equality with man in the matter of conjugal fidelity”. Polygamy and polyandry are both prohibited forms of marriage or conjugal union under Canadian criminal law – where the polygamy or polyandry was entered into under purported Canadian legal authority: *Trudeau v The King* [1935] 2 DLR 786 (Qué: KB) referring to s310 *Canadian Criminal Code*. In *R v Tolhurst* [1937] OR 570 (Ont CA) it was held variants of polygamy, not adultery, was the aim of the section.

<sup>181</sup> In *Nagubai Manglorkar v Bai Monghibai* 1926 AIR PC 73 Lord Darling delivering the judgment of the Privy Council said at p75 “This word concubine has long had a definite meaning, whether expressed in the language of India or Europe...a recognised status below that of wife and above that of harlot...Almost a wife, according to ancient authorities, the distinction of the concubine from harlots was due to a modified chastity, in that she was affected to one man only, although in an irregular union merely.” In Hindu law an *avaruddha stri* was a ‘continuously kept concubine’. The Privy Council held that such *avaruddha* had now been emancipated so that the former requirement that she lived in the house of the man with whom she had the relationship, was no longer a necessary requirement, so that an *avaruddha stri* was entitled to maintenance from his estate, approving *Ningareddi v Lakshmawa* (1901) 26 Bombay 163. The position in relation to concubinage is clear in Hong Kong but a concubine under Chinese customary law was very much in the nature of a second but lesser ranking wife, but a wife nonetheless. The position under Indian law is distinguishable in relation to concubines as the status does not equate with that of an additional wife.

<sup>182</sup> In Samoa, litigation lasted for 28 years in one case involving customary law and polygamy, culminating in the last decision of the New Zealand Supreme Court (as the final court of appeal for Samoa) before Samoa attained independence. *The Samoan Public Trustee v Collins*, unreported, Supreme Court of New Zealand, Hutchison and McGregor JJ, 13 December 1961 affirming the decision of Luxford CJ In *The Samoan Public Trustee v Collins*, unreported, High Court of Western Samoa, Apia, 23 June 1933, Luxford CJ stated, “Polygamy is not contrary to Samoan custom but the right to a plurality of wives at one and the same time was reserved (generally speaking) to the holders of the higher titles. The holder of the lower titles and the untitled men were allowed only one wife at a time, but as consent was necessary for the union, so was it necessary for severing the union.”.

<sup>183</sup> The basis of a bigamy charge must be a monogamous marriage and not one under a lawful system of polygamy: *R v Sagoo* [1975] QB 885 (Sikh married in Kenya when polygamous marriage permitted until *Hindu Marriage and Divorce Ordinance 1960* [No 28 of 1960] [Kenya]. That Ordinance was indistinguishable from the *Hindu Marriage Act 1955* [India] considered in *Parkasho v Singh* [1968] P 233, 248.) No such legislation was enacted in Malaysia: *Marimuthu v Thiruchitambalam* [1966] 1 MLJ 203, 204 per Gill J.

<sup>184</sup> W E Beckett, *The Recognition of Polygamous Marriages Under English Law*, (1932) 48 LQR 341. In *Sastry v Sembecutty* (1881) 6 App Cas 364,371 Sir Barnes Peacock for the Privy Council accepted that where concubinage was not considered as immoral it followed that the presumptions of the validity of marriage could equally apply to concubinage.

## WHO IS A WOMAN?

The definition of who is female or a 'wife' for the purpose of the statutory defence is itself elusive.<sup>185</sup> Issues of gender-reassignment raise for this defence particularly poignant issues, as does the situation where legislation provides for homosexual civil unions. The early decision of *Corbett v Corbett (orse Ashley)*<sup>186</sup> is no longer authoritative, in putting the basis of the determination of womanhood on the outcome of a congruence of chromosomal, gonadal and genital tests. Ormrod J had said "sex is clearly an essential determinant of the relationship called marriage, because it is and always has been recognised as the union of man and woman. It is the institution on which the family is built, and of which the capacity for natural heterosexual intercourse is an essential element."

In New Zealand,<sup>187</sup> Ellis J declined to follow *Corbett v Corbett* and emphasised that the modern approach ought to be to evaluate the psychological and social aspects of sex, in determining gender. Charles J in *W v W (Physical Inter-sex)*<sup>188</sup> held that where the biological sexual characteristics of an individual at birth were ambiguous and not congruent, other factors, including psychological and hormonal factors and secondary sexual characteristics should be taken into account in determining the individual's sex for the purpose of marriage. There the wife's genetic and gonadal sex was male, her genitalia were ambiguous and her body hiatus and gender orientation appeared to be female, resulting in a physical inter-sex

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<sup>185</sup> At common law the status of "hermaphrodites" was problematic: T E 'The Lawes Resolution of Women's Rights' (1632) John More, Chancery-Lane, (reprinted 2005), The Law Book Exchange Ltd, Clark New Jersey, p5.

<sup>186</sup> [1971] P 83. This approach was followed in South Africa in *W v W* (1976) (2) SALR 308 and in Canada *M v M (A)* (1984) 42 RFL (2d) 267. But rejected in Australia: *Re Kevin (Validity of Marriage of Transsexual)* [2001] Fam CA 1074, Chisholm J, affirmed by the Full Court of the Federal Family Court, *Re Kevin (Validity of Marriage of Transsexual)* unreported, Appeal No EA/97/2001, 21 February 2003, where the word "man" in the relevant marriage statute was held to include a post-operative female to male transsexual person. The Full Court did not decide the "more difficult" question of pre-operative transsexual persons. In *Goodwin v United Kingdom* (2002) 35 EHRR 18 para 100 it was held that a test of congruent biological factors can no longer be decisive in denying legal recognition to the change of gender of a post-operative transsexual.

<sup>187</sup> *Attorney General v Otahuhu Family Court* [1995] 1 NZLR 603 (HC) approving *M v M (marriage: transsexuals)* [1991] NZFLR 337 (Judge Aubin). The English approach was seen as too reductionistic in having regard only to the three factors of chromosomes, gonads and genitalia, ignoring the significance of the psychological status of the person.

<sup>188</sup> [2001] Fam 111, also reported as *W v W (Nullity:Gender)* [2001] 1 FLR 324; *MT v JT* (1976) 355 A 2d 204,211: a post-operative male to female transsexual was a female and a wife because her core identity was now female.

state. She had chosen to live as a woman before having hormone treatment and gender-reassignment surgery and, although before such surgery would have been unable to have sexual intercourse either as a man or as a woman, after surgery she was capable of consummating the marriage; and was held to be female for the purposes of her marriage to her husband.

In a criminal appeal, *R v Tan*<sup>189</sup> the co-accused Gloria Gina Greaves was convicted of keeping a disorderly house and of (being a man) living on the earnings of prostitution. It was argued that although Ms Greaves was biologically a male, she had been psychologically and socially female for more than 18 years and was therefore “deemed to be female” and therefore incapable of being a man living off the earnings of prostitution. In argument counsel observed that Ms Greaves was “registered for national insurance purposes as a woman”. The approach in *Corbett v Corbett (or se Ashley)*<sup>190</sup> was argued to be inapplicable to the criminal law, which should treat a person “in the way that that person is treated by society”. Parker J delivering the reserved judgment of the court, however, rejected that argument “without hesitation”.<sup>191</sup>

It would, in our view, create an unacceptable situation if the law were such that a marriage between Gloria Greaves and another man was a nullity, on the ground that Gloria Greaves was a man; that buggery to which she consented with such other person was not an offence for the same reason; but that Gloria Greaves could live on the earnings of a female prostitute without offending against section 30 of the Act of 1956 because for that purpose he/she was not a man and that the like position would arise in the case of someone charged with living on his earnings as a male prostitute.<sup>192</sup>

The European Court of Human Rights in *Rees v United Kingdom*<sup>193</sup> considered facts where the applicant was born with all the physical and biological characteristics of a female. The

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<sup>189</sup> [1983] 1 QB 1053 (CA). In *M v M (marriage: transsexuals)* [1991] NZFLR 337, 342 Judge Aubin in the Family Court, did not follow *R v Tan*, as it wrongly assumed the correctness of *Corbett v Corbett*.

<sup>190</sup> [1971] P 83.

<sup>191</sup> See 1064B-C.

<sup>192</sup> [1983] 1 QB 1053, 1063. The appeal was dismissed and the Appeal Committee of the House of Lords (Lord Diplock, Lord Bridge of Harwich and Lord Brandon of Oakbrook) dismissed a petition by Ms Greaves for leave to appeal.

<sup>193</sup> (1986) 9 EHRR 56. In *Public Prosecutor v Mongkon Pusuwan*, unreported Subordinate Court, Singapore, 19 January 2006, Judge Bala Reddy; *The Straits Times*, 20 January 2006, the defendant Thai national whose passport showed that the holder was a male, but who looked female, was convicted of a drug offence which apart from imprisonment carried mandatory corporal punishment for males (but not a punishment for females). The defendant had undergone gender reassignment surgery and the court, on medical evidence, accepted that the defendant was to be considered a female and spared the punishment.

Registrar General had refused to amend the Birth Certificate to that of a male, after the applicant had undergone surgical sexual conversion. Article 12 of the *European Convention on Human Rights* provides “Men and women of marriageable age have the right to marry and found a family, according to the national laws governing the exercise of this right.” The Court held there was no violation of Art. 12 because the provision only referred to the traditional marriage between persons of opposite biological sex. This view was first endorsed by the court in *Cossey v United Kingdom*<sup>194</sup> in which a male had undergone surgical sexual conversion to female status. Three judges dissented stating that a dynamic interpretation of the Convention would embrace social and moral developments including recognition under the law of transsexualism. The fact that a transsexual, after gender-reassignment surgery, is unable to procreate was not decisive and they held that reproductivity could not be a prerequisite for a lawful marriage. On analysis, the majority had concluded that the only reason against allowing Miss Cossey to marry a man was the fact that she biologically was not considered to be a woman. The minority commended a humane solution based on the fact that psychologically and physically she was now a member of the female sex and socially accepted as such. As she also could not now marry a woman (on the reasoning of the majority), she therefore was being wholly denied the right to marriage of any kind.<sup>195</sup>

In *Bellinger v Bellinger*,<sup>196</sup> the English Court of Appeal maintained the view expressed in *Corbett v Corbett* that the criterion for the legal determination of gender remained as described in 1971. On further appeal, the House of Lords<sup>197</sup> finessed the previous law as transsexual people<sup>198</sup> were to be distinguished from inter-sexual people. But although nature

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<sup>194</sup> (1990) 13 EHRR 622.

<sup>195</sup> Carol Smart, *Women, Crime and Criminology: A Feminist Critique* (1978) Routledge & Kegan Paul, London at p112 accepts that both sex and marital status may affect the legal definition of an offence, the assessment of culpability and the protection of both the accused and the victims of criminal offences “In one special case both the sex and marital status of the offender is significant in terms of culpability, namely where a married woman commits an offence in the presence of her husband...This legal anomaly is based on the idea that husbands occupy a position of authority over their wives while wives dutifully obey their husbands, and although it may act as a form of discrimination in favour of married woman, it is founded upon the legal recognition of a woman’s inferior social status in society. However, like other legal anomalies, which are based on traditional paternalistic and chauvinistic attitudes towards women, this exception in the law is likely to be removed or fall into disuse as the position of women in society improves.”

<sup>196</sup> [2002] 2 WLR 411 (a majority judgment).

<sup>197</sup> *Bellinger v Bellinger* [2003] 2 AC 467 (HL).

<sup>198</sup> *Ibid* para 7 per Lord Nicholls of Birkenhead: “Transsexual is the label given, not altogether happily, to a person who has the misfortune to be born with physical characteristics where are congruent but whose self-belief

does not always draw straight lines, the distinction between male and female was held to exist and confer a separate legal status that has differing legal consequences in “many areas of life, from marriage and family law to gender-specific crime and competitive sport”.<sup>199</sup> In view of the resulting legal consequences, self-definition was not a sufficiently rigorous way to categorise gender, which therefore had to be based on publicly available, objective, biological criteria for the determination. The legislature was enabled to provide that for certain purposes that a person who has undergone gender reassignment surgery will be entitled to enhanced legal recognition, such as for the purposes of discrimination legislation.<sup>200</sup> But the House of Lords reasoned that it did not mean that a person born with one sex may be regarded as a person of the opposite sex for the purposes of the criminal law. “A male to female transsexual person is no less a woman for not having had surgery, or any more a woman for having had it”: *Secretary, Department of Social Security v SRA*.<sup>201</sup> The relevant surgery involves a significant change from the apparatus of the original gender but it “does not supply the patient with a uterus, nor with ovaries. It is purely and simply an attempt to allow the person’s body to approximate to how they feel within themselves.” Under the criminal law therefore it is not possible for a person born a male to become a female, but that person may be treated for certain legislative or contractual purposes as being a female. The construct of marriage intensely engaged religious and social culture, but its fundamental arrangement was so intractable that it was held to exclusively apply to “two persons of the opposite sex.”<sup>202</sup> Legislation can alter those precepts, such as happened in New Zealand when Parliament extended to civil union partners the spousal privilege in relation to being an accessory after the fact to the other spouse,<sup>203</sup> but the common law cannot change a man into a woman or vice versa.

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is incongruent. Transsexual people are born with the anatomy of a person of one sex but with an unshakeable belief or feeling that they are persons of the opposite sex.”

<sup>199</sup> Ibid para 28.

<sup>200</sup> See the *Sexual Discrimination (Gender Re-assignment) Regulations 1999* (SI 1999/1102), [UK]

<sup>201</sup> (1993) 118 ALR 467, 477.

<sup>202</sup> *Quilter v Attorney General* [1998] 1 NZLR 523 (CA); M Henaghan ‘Same-Sex Marriages in the Court of Appeal’ [1998] New Zealand Law Journal 40; *Bellinger v Bellinger* [2003] 2 AC 476 para 46.

<sup>203</sup> s7 *Relationships (Statutory References) Act 2005* [NZ].

## MARRIAGE

The concept of marriage is the product of contemporary dominant ideologies. It has a specific legal status which generates consequences.<sup>204</sup> Marriage appears to have been based on Christian ideals and beliefs about family relationships.<sup>205</sup> Other types of living arrangements<sup>206</sup> may be broadly comparable to marriage but unless they are attained by certain formalities of the civic law and unless they exist for a specified minimum time they may not, unlike marriage, provide immunities under the law. Where however a jurisdiction does have modern legislation which treats certain civil unions as not being so dissimilar from marriage, then in order to avoid an invidious hierarchy between marriage and civil unions, the legislative philosophy has been to provide the same exemptions from the criminal law. In New Zealand the only remaining uxorial privilege in the substantive criminal law is the exemption from being an accessory after the fact to the act of the other spouse.<sup>207</sup> This has now been extended<sup>208</sup> to civil unions of either a heterosexual or homosexual nature, thereby equipping those unions with marriage for the purposes of the special exemption. While there was significant debate as to whether these overall equalities were rational there was no consideration given as to whether the existing exemption should be totally removed from the legislation. In the context of omnibus legislation providing a major reform of family law no specific consideration was given to the issue of whether the pre-existing law should have been completely abrogated rather than widened.

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<sup>204</sup> Mark Henaghan and Bill Atkin (eds), *Family Law Policy in New Zealand*, 2002 (2 ed), LexisNexis, Butterworths, Wellington.

<sup>205</sup> In *Quilter v Attorney General* [1998] 1 NZLR 523 (CA) it was held that although the *Marriage Act 1955* is silent on the explicit need for the parties to the marriage to be of the opposite sex, it is inherent in the object and spirit of that Act that the parties are of the opposite sex. Two of the five judges were of the view that not allowing same-sex couples to legally marry was discriminatory against them on the grounds of sexual orientation and was a violation of the principles in s19 *New Zealand Bill of Rights Act 1990*. The majority ruled there was no discrimination because marriage is a heterosexual concept.

<sup>206</sup> Mark Henaghan '*Legally Defining the Family*' (2002) in Mark Henaghan and Bill Atkin (eds), '*Family Law Policy in New Zealand, Second Edition*', Wellington, LexisNexis Butterworths, p7 states that the most critical statistic is "...the rapid growth of de facto relationships. Between 1981 and 1991 there was an increase of 84%...of those aged between 20-39 years."

<sup>207</sup> 271(2) *Crimes Act 1961*.

<sup>208</sup> *Ibid* p 16 noting that the *Domestic Violence Act 1995* first recognised de facto relationships as being "in the nature of marriage."

There exists in current society a range of options to replace or approximate marriage. The House of Lords in *Fitzpatrick v Sterling Housing Association Limited*<sup>209</sup> recognised a same-sex couple as constituting a family<sup>210</sup> for a particular statutory purpose.<sup>211</sup> The issue was whether two male individuals had lived together as man and wife, or whether one was a member of the other's family, for the purposes of succession to tenancies under various statutory regimes. In *Harrogate Borough Council v Simpson*<sup>212</sup> it had been previously held that a woman who lived in council accommodation with another woman and who shared a "committed, monogamous, homosexual relationship" with her was not a "member of the tenant's family" within s113(1) *Housing Act 1985* [UK] and accordingly could not succeed to the tenancy on the death of the tenant. As legal rights have now been extended to persons in relationships that resemble marriage, a person who psychologically and socially acts as a wife should, despite the view in *Bellinger*, be entitled to raise the defence, if there has been gender-reassignment surgery. The wider issue that arises is whether the existing inconsistent collection of statutory exemptions for wives should be fundamentally remodelled, not around a married woman, but around the concept of a person who irreversibly adopts the role and duties of a wife.<sup>213</sup> There is no satisfactory single definition of the uxorial union, as marriage is a concept identified by any one of a bundle of rights<sup>214</sup> and every definition of marriage may lack cross-cultural validity.<sup>215</sup>

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<sup>209</sup> [2001] 1 AC 27 HL. In the Court of Appeal [1998] Ch 304 Waite LJ stated "If endurance, stability, interdependence and devotion were the sole hallmarks of family membership, there could be no doubt about this case at all. Mr Fitzpatrick and Mr Thompson lived together for a longer period than many marriages endure these days."

<sup>210</sup> In *De Burgh v De Burgh* (1952) 250 P 2d 598, 601 "the family is the basic unit of our society, the centre of the personal affections that ennoble and enrich human life...Since the family is the core of our society, the law seeks to foster and preserve marriage".

<sup>211</sup> A Barlow and R Probert '*Displacing Marriage – Diversification and Harmonisation within Europe*', (2000) 12 Child & Family Law Quarterly 153.

<sup>212</sup> [1986] Fam Law 359 (CA).

<sup>213</sup> Law is really a codification of attitudes. In relation to wives, it is also a reflection of culture. Margaret J Chriss '*Troubling Degrees of Authority: The Continuing Pursuit of Unequal Marital Roles*' (1993) vol 12 Law and Inequality 225 (University of Minnesota Law School). *Maynard v Hill* (1888) 125 US 190, 211 stated that marriage "is an institution in the maintenance of which, in its purity, the public is deeply interested, because it is the foundation of the family and of society".

<sup>214</sup> For polyandry, said in 1900 to be practised "very extensively in Southern India" so that "the Madras Law Reports teem with cases". See: Sir Dennis Fitzpatrick, '*Non-Christian Marriage*', (1900) 2 Journal of the Society of Comparative Legislation (NS) 359, 362. H H Shephard, '*Marriage Law in Malabar*', (1892) 8 LQR 314 refers to the matriarchal system on which polyandry was based as being "a state of concubinage" in which the woman is "at liberty to change her consort when and as often as she pleases". An Indian Act dealt specifically with polyandry: *Malabar Marriage Act 1896*. In *Pazpena De Vire v Pazpena De Vire* [2001] Fam Law 95 para 65 the High Court stated that polyandry was not recognised by the law of England. But this is too

A structural requirement in all the uxorial privileges is that there be in place a lawful marriage.<sup>216</sup> The marital coercion defence is austere in its protection.<sup>217</sup> No de facto<sup>218</sup>, putative<sup>219</sup> or customary marriages<sup>220</sup> are included. The “sanctity of marriage”<sup>221</sup> has been

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wide. Lawrence Collins (ed), *Dicey and Morris on The Conflict of Laws* (2000) 13 ed, vol 2, Sweet & Maxwell, London, para 17-130 assert that the law of polygamy applies mutatis mutandis to polyandry; but not so if the statutory defence of marital coercion is predicted on a matrimonial power imbalance against the wife. E R Leach *Polyandry, Inheritance and the Definition of Marriage*, (1955) *Man* 155, No 199, p183.

<sup>215</sup> See E K Gough, *The Nayars and the Definition of Marriage*, (1959) 89 *Journal of the Royal Anthropological Institute*, 23, 32. Prior to British rule in India the polyandrous Nayar women customarily had a small but not a fixed number of husbands.

<sup>216</sup> In *R v Ditta, Hussain and Kara* [1988] Crim LR 42 CA, it was held that before a woman can bring herself within the terms of section 47 of the 1925 Act, it must be shown that she is a wife in the strict sense of the term and that the person who coerced her was her husband in the strict sense of the term. The judges were not referred to Blackstone who had specifically stated that both the common law and church law condemned polygamy yet it was permissible in other European jurisdictions. 1 Blackstone *Commentaries* 436, noting that in Turkey “duas uxores eodem tempore habere non licet” [It is not unlawful to have two wives at one time.] Where in the indictment in which a husband and wife are jointly charged, it is averred that the female accused is the wife of the male accused, it is not necessary for the female accused to prove that fact: *R v Knight* (1823) 1 Car & P 116.

<sup>217</sup> Joanna L Grossman, *Book Review: Separated Spouses*, (2001) 53 *Stanford Law Review* 1613, 1631: “Coercion - the existence of and protection from it - played an important role in the law of nineteenth-century marriage.”

<sup>218</sup> Michael Jefferson, *Criminal Law*, 4 ed, Financial, Times Pitman Publishing, (1999) at page 243: “Certainly a mistress does not have this defence.” A de facto wife is not a wife for the purposes of the defence: *Brennan v Bass* (1983) 35 SASR 311. A de facto relationship is not that of a “married person”. *Leaman v The Queen* [1986] Tas R 223. The New South Wales Court of Criminal Appeal, in *R v Brown (Mary Veronica)*, BC9806791, 9 December 1998, McInerney, Hulme and Barr JJ, did not accept an argument that there was in criminal law terms an equivalency between de facto relationships and actual marriage although acknowledging that both relationships could generally involve the same degree of permanence, commitment and support, because the description ‘de facto relationship’ covered a myriad situations and commonly involved no commitment beyond convenience the ancient exemptions of the criminal law did not apply to it. In New South Wales s14 *De Facto Relationships Act* [NSW] provided that only where such a relationship had existed for two years did the law recognise it, in contrast to the instantaneous recognition of marriage. The Victorian Law Reform Commissioner, *Criminal Liability of Married Persons (Special Rules)*, June 1975 had concluded that the existence of the legal bond of marriage was of real relevance in deciding whether criminal law exemptions ought to be available. The fragile reasoning was that the State did not have the same concern to preserve the stability of de facto relationships as it had to preserve the stability of marriages; and it was that concern in the stability which justified the objective of exemptions which supported loyalty, cooperation and confidentiality between the spouses. The second reason advanced by the Victorian Commissioner adopted by the New South Wales Court of Criminal Appeal was that a married woman’s difficulty in resisting pressures from her husband “will commonly be increased substantially, it may be thought, by her awareness that they are husband and wife and her recollection of the ceremony of marriage at which they made a formal public exchange of undertakings which were intended and expected to be observed throughout their lives”.

<sup>219</sup> In *R v Court* (1912) 7 Cr App R 127, 128 counsel unsuccessfully submitted that a woman living together with a man should be treated as a wife for the purposes of the presumption. Lord Alverstone CJ, in dismissing the appeal, added at 129: “It has been urged that the appellant might in some way to be given the benefit of the rule that a wife committing a crime in the presence of her husband is presumed to have acted under his coercion. I am not certain that this rule is beneficial in the administration of justice. It certainly ought not to be extended.”

<sup>220</sup> In 1905, a 16 year old Maori lad had, in terms of contemporary Maori customs and usages, cohabited with a 13 year 8 month old girl as a customary marriage. The girl’s father initially recognised the marriage but subsequently informed the police. *New Zealand Herald*, 17 May 1905, Edwards J (in *R v Hone Heiwari*,

described as a phrase which “conceals, on a juristic level, a timid and irrelevant approach”.<sup>222</sup> The formal and public exchange of marriage vows could be involuntary or the result of a failure to resist her husband’s overbearing pressure.<sup>223</sup> The first English ecclesiastical law treatise devoted to the requirements of marriage was published in 1686<sup>224</sup> – it was a subject attended by many rules and specific requirement. The traditional view that non-marriage unions are less worthy than marriage is overtly moralistic, paying no heed to the interests of children or proprietary interests. The formal legal undertaking of solemnised marriage is a wafer-thin justification for excluding de facto arrangements from any special protection of the criminal law, which fixes on the subjective position of the actor, not the actuality. If a marriage is valid according to the *lex loci celebrationis* then it “is good all the world over”<sup>225</sup> even if it would not constitute a valid marriage in the country of the domicile of either of the spouses. In some countries, a marriage can be effected by correspondence,<sup>226</sup> by proxy<sup>227</sup> and by habit and repute.<sup>228</sup> Validating legislation may have to be enacted.<sup>229</sup> Marriage celebrated

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unreported, Supreme Court, 16 May 1905 Auckland) stated the ‘marriage’ contravened the law of New Zealand (although it did not contravene Maori custom). The judge put the male youth on probation for two years and four months, noting that upon its effluxion the girl would be of a marriageable age. Where a North American Indian customary marriage occurred, which permitted polygamy, the first wife was incompetent to give evidence against her husband. *R v Nan-E-Quis-A-Ka* (1889) 1 Terr L R 211. But marrying two women under tribal custom, although permitted by it, contravenes the criminal law of Canada: *R v Bear’s Shin Bone* (1899) 3 CCC 329. Requiring a “common law” spouse to testify against the accused does not infringe the equality *R v Duvivier* (1990) 60 CCC (3d) 353, affd 64 CCC (3d) 20 (Ont: CA). To similar effect is: *R v Thompson* (1994) 90 CCC (3d) 519 (Alt: CA) rights of the testifying spouse as guaranteed by s15 *Canadian Charter of Rights*.

<sup>221</sup> A prisoner, awaiting trial for murder, asked the director of his prison for permission to marry a woman who was to be an important prosecution witness at his trial. By statute s80 *Police and Criminal Evidence Act 1984* [UK] she would thereupon cease to be a compellable witness for the prosecution. The Crown Prosecution Service in England and Wales sought judicial review of the decision of the Registrar General of Births, Deaths and Marriages that he had no objection to the forthcoming marriage. The Court of Appeal held that entering into a lawful marriage which would have as a consequence that a witness would no longer be compellable could not amount to an offence of attempting to pervert the course of justice or otherwise be contrary to public policy. *R (Crown Prosecution Service) v Registrar General of Births, Deaths and Marriages* [2003] 2 WLR 504 (Butler-Sloss P, Waller LJ, Sir Philip Otton).

<sup>222</sup> Bates, ‘*The Enforcement of Marriage*’, (1974) 3 *Anglo-American Law Review* 84, 85.

<sup>223</sup> *Hyde v Hyde and Woodmansee* (1866) LR 1 P&D 130,135, “The matrimonial law is correspondent to the rights and obligations which the contract of marriage has, by the common understanding of the parties, created.”

<sup>224</sup> Henry Swinburne, ‘*A Treatise of Spousals, or Matrimonial Contracts*’, (1686) (reprinted 2003) The Lawbook Exchange Ltd.

<sup>225</sup> *Berthiaume v Dastous* [1930] AC 79, 83 (PC).

<sup>226</sup> L Pålsson, ‘*Marriage and Divorce in Comparative Conflict of Laws*’ (1974) Sijthoff, Leiden, p208ff.

<sup>227</sup> A T Carter, ‘*Proxy Marriages*’, (1957) 35 *Canadian Bar Review* 1195.

<sup>228</sup> As in Scotland: *Wetherill v Sheik* [2005] ScotCS CSOH 25, 10 February 2005, Lord Philip.

<sup>229</sup> *Starkowski v Attorney-General* [1954] AC 155; *Re Howe Louis* (1970) 14 DLR (3d) 49 (BC: CA); s2 *Marriages Act 1970* [Ire] which retrospectively validated marriages celebrated by Irish Catholic couples at Lourdes, France, based on a Catholic ceremony only. French law only recognises civil marriages as valid. The legislation validated marriages solemnised “solely by religious ceremony in the department of Hautes Pyrénées,

on the high sea presents its own problems.<sup>230</sup> A presumption of marriage from cohabitation has been accepted and occasionally supplies the omission of formal documents.<sup>231</sup> In 1868, a Royal Commission concluded that a sound marriage law “ought to embrace the maximum of simplicity and the maximum of certainty.”<sup>232</sup>

Wives willingly submitted to the husband’s rule in exchange for their protection, the appearance of married life was as good as an actual marriage. Common law marriage, a relationship given legal recognition despite the lack of a licence and formal solemnisation, played an important role throughout the nineteenth century.<sup>233</sup> In the year 2000, several American states still permitted common law marriages.<sup>234</sup> By the eighteenth century there was a marked rise<sup>235</sup> in the number of irregular marriages, in which no banns were published and where no celebrant performed any ceremony<sup>236</sup>. A marriage of habit and repute was sufficient to establish the existence of a common law marriage<sup>237</sup>. In criminal trials where the defendant needed to demonstrate that a marriage was in place at the material time, the courts generally bent over backwards to assist, no doubt conscious of the severe limitations on a defendant (in custody) to be able to have access to and prove this fact in issue. A woman of marriageable age asserting she shared the same surname as her purported husband generally was

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France.” No thought seems to have been given to the position of estranged couples. See also, *Fiji Marriages Act 1878 [UK]* c61 41&42 Vic (regularising marriages solemnised there prior to Fiji becoming a British colony).

<sup>230</sup> In *Du Moulin v Druitt* (1860) ICLR 212 a marriage celebrated between a female stowaway and a soldier on board a troop ship headed for Australia was void (in the absence of a clergyman), the marriage was not one of necessity as en route various ports where the ship was calling, a clergyman would be reachable.

<sup>231</sup> Frank Bates, ‘*The Presumption of Marriage Arising From Cohabitation*’, (1978) 13 *University of Western Australia Law Review* 341; *Re Pennington Dec’d (No 2)* [1978] VR 617, 630 per Harris J.

<sup>232</sup> *Report of the Royal Commission on the Laws of Marriage* Cmnd (1868) at p xxv.

<sup>233</sup> Ariela R Dubler, ‘*Governing Through Contract: Common Law Marriage in the Nineteenth Century*’, (1998) 107 *Yale Law Journal* 1885, 1888-1890.

<sup>234</sup> Brian H Bix, ‘*State of the Union: The States’ Interest in the Marital Status of Their Citizens*’, (2000) 55 *University of Miami Law Review* 1, 11 n43.

<sup>235</sup> Leah Leneman, ‘*The Scottish Case That Led to Hardwicke’s Marriage Act*’, (1999) *Law and History Review*, vol 17, p162, para 5.

<sup>236</sup> R B Outwaite, ‘*Clandestine Marriage in England 1500-1850*’, Hambledon Press (1995) London, p76.

<sup>237</sup> Until 2005, Scottish law still permitted such marriages. In *Wetherhill v Sheikh* [2005] CSOH 25, 10 February 2005, Lord Philip “The theory of the present law on marriage by cohabitation with habit and repute is therefore that if a man and a woman cohabit as husband and wife in Scotland for a sufficient time and are generally held and reputed to be husband and wife and are free to marry each other, they will be presumed to have tacitly consented to be married and, if the presumption is not rebutted, will be legally married: *Campbell v Campbell* (1866) 4 M 876, affd (1867) 5 M (HL) 115, *Nicoll v Bell* 1954 SLT 314, 322.” See also Eric M Clive ‘*Husband and Wife*’ (1997) 4 ed, W Green, para 05.025.

sufficient.<sup>238</sup> A valid marriage, which included a common law one, was essential, although it did not have to be strictly proved.<sup>239</sup> In *R v Green*,<sup>240</sup> a conviction was quashed, when on appeal it was proved that co-accused had been married at all material times, and as they had used different surnames and had been unrepresented at trial, they had been oblivious of the defence of marital coercion. Anglo-American criminal procedure provided that where in any indictment in which a husband and wife were jointly charged, it was averred in the intitlement of the indictment or in the particulars of the offence that the female accused was the wife of the male accused, it was not necessary for the female accused to prove that fact.<sup>241</sup> The term ‘spinster’<sup>242</sup> in an indictment was ambiguous as it originally did not mean an

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<sup>238</sup> In *R v McGinnes* (1870) 11 Cox CC 391, 392. It was a matter of fact for the jury to decide whether the marriage existed, on all of the evidence, there being no strict proof imposed upon the putative wife. Byles J directed a jury that the fact that a woman, who shared the same surname as her male coaccused by whom she had given birth to a child, did not respond when he had denied to a police officer that he was married to her, ought not be construed against her, as she may have “thought fit to hold her tongue, this being a criminal charge”.

<sup>239</sup> *R v Knight* (1823) 1 Car & P 116, 117, fn (b). “Coercion is a (rarely used) defence akin to duress but available only to a married woman”. Michael Jefferson, ‘*Criminal Law*’, 4 ed, Financial Times Pitman Publishing (1999) page 242. In *R v Good*, (1842) 1 Car & K 185; the husband had been convicted of murder at a separate trial the day before. (1842) 1 Car & K 185 fn(a). At a trial before Alderson B and Coltman J, the Attorney General Sir F Pollock prosecuting, offered no evidence against the wife who was charged with harbouring her husband after he had murdered another. He accepted at p186 they were probably married “in the Kingdom of Ireland, at a place where the register was very imperfectly kept” and that they had considered each other as man and wife. It may have been factually difficult for the wife to prove the marriage. Alderson B accepted that “a wife is in a peculiar situation; she cannot be found guilty of comforting and assisting her husband.” He added that even if there was some irregularity in the marriage “she had acted under the supposition that she was the wife of Daniel Good, and according to the duty which she considered to be cast upon her, the Court would have felt it right to have inflicted a very slight punishment upon her.”<sup>239</sup> Ibid 186. But in *R v Ditta, Hussain and Kara* [1988] Crim LR 42 (CA) it was held that the marriage had to be strictly proved and a wife’s reasonable but erroneous belief that she was lawfully married was insufficient in law.

<sup>240</sup> (1913) 9 Cr App R 228 (CCA).

<sup>241</sup> *R v Knight* (1823) 1 Car & P 116. cf *R v McShane* unreported Invercargill Supreme Court 12 June 1876, Williams J; *Southland Times* 13 June 1876 p2, where the prosecutor rejoiced in the fact that the indictment did not aver that the putative Mrs McShane was in fact married, so she would have to prove it.

<sup>242</sup> J H Baker, ‘*Male and Married Spinsters*’, (1977) 21 American Journal of Legal History 255, 258 who notes that the Elizabethan Queen Bench twice confirmed the orthodox learning that “the wife of CD” was a valid description of status without more. ‘*Married Women – Pleading Marriage – Evidence – Declarations*’ (1881) 23 Albany Law Journal 261, 279 the decision in *US v De Quilfeldt* (1881) 5 F 276 is noted. Hammond DJ held that if a married woman is described in an indictment as a single woman or be neither described as married or single, she may move to have the indictment amended or quashed. But even a general plea of not guilty, where she takes no amendatory action, does not prohibit her, on the general issue, from proving the marriage “as well as other facts essential to show martial coercion.” In J H Baker ‘*Male and Married Spinsters*’ (1977) 21 American Journal of Legal History 255 it is stated that the addition of the term “spinster” after the name of the accused on the indictment, was “to prevent the defence of marital coercion”, but that in *R v Battersby and Others* (1525) Dyer 46 (KB) ‘spinster’ appeared at that time to also apply to a male, as it denoted an occupation or mystery; not a personal status. See further Carol Z Weiner, ‘*Is a Spinster an Unmarried Woman*’, (1976) 20 American Journal of Legal History 27. In *R v Christine Brown* (1525) Cro Eliz 198 the accused was stated to be a “huswyff” and describing an accused as a “wife of XY” was plainly sufficient: *R v Hooper* (1590) Cro Eliz 198; 2 Leon 183; *R v Lasington* (1600) Cro Eliz 750. The usual term employed until the fifteenth century was

unmarried woman. In *United States v De Quilfeldt*<sup>243</sup> the judge ordered that in an indictment that a female defendant must be alternatively described as “‘wife of A.B.,’ ‘widow’, ‘spinster’, or ‘single woman’”. The reason being that the status of femalehood had forensic significance and also immediately conveyed information to the decision-maker as to the type of woman so charged, especially if she were by law incompetent to give evidence for herself.

The *Indictments Act 1915* [UK]<sup>244</sup> introduced a number of reforms to the English law of criminal pleading. Clause 7 of the First Schedule to that Act provided that henceforth the description or designation of an accused person need only be such as to reasonably be sufficient to identify the person without having to state “abode, style, degree, or occupation”. No longer was a married woman required to be so described, as a separate class of individual, in an indictment. The issue of the description of females in criminal proceedings had been of significant importance in terms of the marital coercion defence. If the indictment stated that the accused female was a married woman there was no further requirement for her to establish that status. However, where she was indicted as a single woman it was open to her to challenge that averment by adducing evidence of it, for otherwise she was wholly precluded from asserting the defence. An accused married woman, discontent with being described in an indictment, filed against her alone, as a single woman, or not described at all as married or single, was entitled to move to quash the indictment or plead in abatement for want of a proper reference to her. If she did not challenge the erroneous status and denied the offence, this was treated as prima facie evidence that she was not a feme-covert. But on the general issue of the trial she was entitled to prove the marriage as well as any other facts essential to show marital coercion. In addition, her marital status was relevant to the crime of conspiracy, accessory after the fact and to issues of competence, compellability and spouse-incrimination. The importance of this issue pervaded the criminal law<sup>245</sup> and was the subject of precise

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‘singlewoman’ the English translation of *feme sole*. But the term ‘spinster’ was used in Elizabethan and Jacobean indictments, either to exonerate innocent husbands or to prevent the defence of marital coercion: Carol Z Wiener, *‘Is a Spinster an Unmarried Woman?’* (1976) 20 *American Journal of Legal History* 27, 29.

<sup>243</sup> (1881) 5 F 276, 281.

<sup>244</sup> 5&6 Geo 5 c90.

<sup>245</sup> In 1885, a wife, co-accused with her husband was still referred to as “Uxor”: *R v Dykes et Uxor* (1885) 15 Cox CC 771. Still in use in New Zealand in *Richards et Ux v Hill* [1959] NZLR 415.

statements<sup>246</sup> by judges, probably anxious to know the provenance of the person before them as much as to know the range of possible defences open to such a woman.

## PRESENCE OF HUSBAND

The focus at common law<sup>247</sup> had been on the need for the spouses to be physically present under the belief that the wife could not be coerced unless she was alongside her husband. This denied the insidious effect of psychological conduct which took place at a point in time separate from the physical presence of the dominating partner. If “he could have seen her, and she him, at any time during the transaction, and therefore they were in the presence of one another.”<sup>248</sup> In *R v Hughes*,<sup>249</sup> the presumption did not arise, since at the time of the wife’s offence, he was in the next room, albeit immediately after the offence he put his head into the room. However, inconsistently in *R v Connolly*,<sup>250</sup> where the husband waited outside the door of the room while the wife committed the offence, the presumption applied. Irish<sup>251</sup> law took a more liberal approach to the requirement of presence. The term ‘presence’ has not been closely analysed by the English authorities on the Act. But at common law in *R v Caroubi*<sup>252</sup> it was held that if the wife was within the sight of her husband that sufficed for the purposes of presence. This ocular test is inherently unworkable. There was no requirement that the husband be able to see the wife; on the common law test, the moment she had her back to him, the defence failed. It also followed that it would be improbable in the extreme that the husband could be ‘present’ as defined during the entire pendency of a continuing offence. A

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<sup>246</sup> In *United States v De Quilfeldt* (1881) 5 F 276, 281 per Hammond D J; noted ‘*Married Woman – Pleading Marriage – Evidence – Declarations*’ (1881) 23 *The Albany Law Journal* 279. In *R v Murray*, [1906] 2 KB 385 Lord Alvestone CJ said that since the *Married Women’s Property Act 1882* by its s12 it puts a wife in respect of her separate property “in the position of a third person” any misdescription of ownership between husband and wife would usually be immaterial and should be amended in the indictment.

<sup>247</sup> *R v Hughes* (1813) 2 Lew CC 229; *R v Morris* (1814) Russ & Ry 270; *R v Cohen* (1868) 18 LT 489 CCCR; *R v John* (1875) 13 Cox CC 100; *Reidy v Henry* (1897) 23 VLR 508; *R v Baines* (1900) 69 LJQB 681 CCCR.

<sup>248</sup> *R v Caroubi* (1912) 7 Cr App R 149. Also if the wife is inside a shop and the husband is outside: *R v Connolly* (1829) 2 Lew CC 229; 168 ER 137. But not if he was in the next room out of sight, but looked in immediately after the offence: *R v Hughes* (1813) 2 Lew CC 229. In *Vukodonovich v State* (1926) 150 NE 56 the husband was held to be present while upstairs, while the wife was downstairs. In Oklahoma the husband must be there by his “personal and physical presence”: *Trapp v State* (1954) 268 P 2d 913, 917.

<sup>249</sup> (1813) 2 Lew CC 229,230 per Thompson B.

<sup>250</sup> (1829) 2 Lew CC 229.

<sup>251</sup> *Anonymous* (1841) Ir Cir Rep 374.

<sup>252</sup> (1912) 7 Cr App R 149.

more expansive approach has been endorsed by the Australian Courts. In *R v Whelan*<sup>253</sup> it was more cogently reasoned that “it is sufficient if the husband is in a situation where he is close enough to influence the wife in doing what he wants done, even if he is not physically present in the room”. This test of pervasive influence has a much greater congruence with the realities of life than a test based on visual acuity. A more liberal test of presence was persuasively adopted in *Osborne v Goddard*.<sup>254</sup>

The requirement of the ‘presence’ of the husband to activate the defence, is best understood by a recognition that the overpowering of the wife’s will must be operative concurrent with the criminal conduct.<sup>255</sup> As psychological terror or compulsion is within the spirit of the defence, it follows that there is no need to impose a requirement that the husband and wife be in a continuous direct line of sight.<sup>256</sup> In *Osborne v Goddard*<sup>257</sup> the South Australia Supreme Court decided in relation to its provision, indistinguishable from s47 *Criminal Justice Act 1925* [UK], “In our opinion it is sufficient if the husband is in a situation where he is close enough to influence the wife into doing what he wants done, even if he is not physically

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<sup>253</sup> [1937] SASR 237.

<sup>254</sup> (1978) 21 ALR 189, 196. In *R v Whelan* [1937] SASR 237 a wife uttered a forged cheque inside a bank while the husband remained outside. The court held “in our opinion it is sufficient if the husband is in a situation where he is close enough to influence the wife in doing what he wants done, even if he is not physically present in the room, and that is the position in the case before us”.

<sup>255</sup> Lord Lowry CJ in *R v Lynch* [1975] NI 35, 47 noted the Criminal Codes of New Zealand, Queensland and Canada and that they had all been largely drafted on the Draft Criminal Code 1879 [UK]. He adopted *Attorney General v Whelan* [1934] IR 518 (CCA) where Murnaghan J stated “Where the excuse of duress is applicable it must further be clearly shown that the overpowering of the will was operative at the time the crime was actually committed.” To the like effect was Lord Parker CJ in *R v Hudson & Taylor* [1971] 2 OB 202 “It is essential to the defence of duress that the threat shall be effective at the moment when the crime is committed.”

<sup>256</sup> In *State v Nowell* (1921) 156 NC 648, 652 it was said ‘it is not necessary to show that the act was done literally in sight of the husband, but it is sufficient to raise the presumption if it was done near enough to her husband to be under his immediate control or influence’. If the husband was near enough for the wife to act under his immediate influence and control, though not in the same room, he was not absent within the meaning of the law: *Commonwealth v Munsey* (1873) 112 Mass 287 and *R v Connolly* (1829) 2 Lew CC 229; but held otherwise in *R v Hughes* (1813) 2 Lew 229. In *R v Caroubi* (1912) 7 Cr App R 149 the court remarked of the husband “he could have seen her, and she him, at any time during the transaction, and therefore they were in the presence of one another”. Where the husband was in an adjoining room “sick upon a bed, and the door between the room and the shop was open” (where the unlawful sale took place) there was no sufficient presence: *Commonwealth v Gormley* (1882) 133 Mass 580. In *R v Pollard*, cited in *R v Cruse* (1837) 8 Car & P 541, the defence at common law failed when the crime was carried out at the direction of a bed-ridden husband. In *R v McShane*, unreported Invercargill Supreme Court, *The Southland Times*, 13 June 1876, p2, Williams J directed that a husband was not “present” for the purposes of the common law defence of marital coercion if he was adjacent to his wife, but asleep at the time of the offence.

<sup>257</sup> (1978) 21 ALR 189 The South Australian court disapproved of its earlier decision in *R v Whelan* [1937] SASR 237.

present in the room.” This notion of constructive presence<sup>258</sup> is a significant departure from the more stringent common law which had insisted on his actual presence<sup>259</sup>.

Whilst it is improbable that coercion by a friend or relative on behalf of the husband would suffice, immediate physical presence is not measured by separation distance, but is a function of relative control. In the common law defence of duress, the fact that the duressor is physically out of range does not stymie the defence, albeit, this factor has been recently criticised as being too liberally applied – particularly because it should be addressed together with the ability of the wife to be able to seek intervention or escape. Lord Bingham in *R v Z*<sup>260</sup> was particularly critical of *R v Hudson and Taylor*<sup>261</sup> in this regard. If the wife has a “realistic choice to escape”,<sup>262</sup> as her actions had to be “proportionate to the peril she faced”, it followed the defence would fail if she did not decamp when she could have.

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<sup>258</sup> Constructive presence may be enough, on the basis that it suffices to render a person liable as a principal in the second degree to a felony. Rupert Cross and P Asterley Jones, *An Introduction to Criminal Law*, 3 ed (1953) Butterworths & Co (Publishers) Ltd, p65. The (4 ed) 1959 noted *R v Bourne* (1952) 36 Cr App R 125 where a wife was forced by her husband to consent to a dog having intercourse with her. She was not charged with bestiality but would have had a complete defence of marital coercion or duress.

<sup>259</sup> In *R v Pickard* [1959] Qd R 475, 477 Stanley J noted that the word “actually” was intended to exclude cases in which “a person might have the right to be present at the place where the criminal act or omission takes place, for example, in his own premises, in a house or a shop, but was not there at the relevant time”. This distinction, he said, was consistent with the common law in relation to marital coercion. Stanley J held that the phrase “actually present” in a statutory formulation of the defence of duress did not encompass a person keeping watch outside while a colleague had entered a building to steal a safe. P J Pace *Marital Coercion – Anachronism or Modernism?* [1979] Crim LR 82, 89 that there is no logical justification for a strict approach to the requirement of “presence”. He notes that the Solicitor-General in the *Criminal Justice Bill 1925* [UK] debate argued that continuity of the presence requirement was mandated as “while you were not in your husband’s presence you ought to be human [sic] enough to be able to avoid that spiritual or marital coercion. While the woman is still in the husband’s presence the influence of moral or spiritual terror is very potent.” House of Commons Debates 1925 vol 188 col 876.

<sup>260</sup> [2005] 2 AC 467 (HL).

<sup>261</sup> [1971] 2 QB 202. In New Zealand s24(1) *Crimes Act 1961* does not impose any independent condition obligating the defendant to have attempted to escape.

<sup>262</sup> *R v Maurirere* [2001] NZAR 431 (CA). The fact that the wife could have avoided the situation altogether by earlier terminating the abusive relationship that ultimately produced the threat, is not a relevant approach. *R v Aitkens* [2003] EWCA Crim 1573 (CA). The prosecution argued that as a matter of policy the defence of duress should be excluded where the risk of being subjected to coercion would have been obvious to an ordinary person *R v Z* [2005] 2 AC 467, 475 B.

The requirement that the wife be in the presence<sup>263</sup> of her husband as a pre-condition to the availability of the marital coercion defence is echoed under New Zealand law by the condition that a duressor be present before the defence of compulsion<sup>264</sup> can be available. The emergent common law defence of duress of circumstances imposes an identical jurisdictional obligation. In *R v Joyce*<sup>265</sup> the defendant agreed with other persons to rob a petrol station. His attempt to withdraw from the crime was met by a threat to shoot if he did not effect the agreed hoist. He then acted as look-out while the robbery was carried out. The Court of Appeal held that the defendant was not threatened by a person who was “present” at the time of the offence<sup>266</sup>. North P emphasised that the appellant “was not actually present when the assault occurred” notwithstanding that the adverb “actually”, found in the earlier version of the statute<sup>267</sup> had been omitted from the new definition of the defence of compulsion in the 1961 Act. The reasoning of the Court in justifying its construction of the section is plausible but not convincing<sup>268</sup>, involving a criticism of the law draftsman for having engaged in making (in

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<sup>263</sup> Southern Rhodesia law required a husband to be actually present before marital coercion was available to any of his wives: *R v Shaiamunda et Uxores* 1916 SR 33. In South Africa, this defence was available until 1928: Irene Geffen, *The Laws of South Africa Affecting Women and Children*, R L Esson & Co Ltd, Johannesburg 1928 p295.

<sup>264</sup> s24 Crimes Act 1961 [NZ]. Michael J Allen, *Textbook on Criminal Law*, (2001) 6 ed Blackstone Press, p194: “When duress is pleaded there is no need to show that the person who issued the threats was present at the time the offence was committed; it is sufficient that the threats were imminent. In coercion, however, the husband must be shown to be present when the offence was committed.” In some criminal codes dealing with compulsion or duress there is a very strict requirement of actual physical presence of the duressor: *R v Pickard* [1959] Qd R 475, 478; *R v Joyce* [1968] NZLR 1070, 1077-1078 (accepting that this requirement “may sometimes be a matter of degree depending on the particular circumstances of the case including the means adopted in making the threat” – envisaging the duressor aiming a rifle at the duressee from a long distance or being able to detonate a bomb from afar); *Kapi v Ministry of Transport* (1991) 8 CRNZ 49, 57 (CA). Duress may be pleaded even though the accused acted under a mistaken belief, provided this mistake was a reasonable one. In coercion a mistaken belief in marriage, albeit a reasonably one, will not avail as the statute is interpreted strictly [see *R v Ditta, Hussain and Kara* [1988] Crim LR 42].” The defence of duress is “still uncertain, and in the process of judicial clarification”: *R v Lawrence* [1980] 1 NSWLR 122, 134 per Moffitt P. A model direction is set out in *R v Abusafiah* (1991) 24 NSWLR 531, 544 – 545. The effect of Australian law is (a) - There must have been a threat of a certain type; (b) D’s will to resist the person making the threat must have been overborne, and the crime committed by D at a time when D’s will was overborne (the subjective test); and (c) The threat must have been such that an ordinary or average person in the same position as D would have been likely to yield and, further, there must not have been an avenue of escape which D could have reasonably used (the objective test).

<sup>265</sup> [1968] NZLR 1070.

<sup>266</sup> *ibid* 1077 line 32; *ibid* 1077 line 49

<sup>267</sup> s44 Crimes Act 1908 [NZ]. The same essential formula is found in Queensland legislation: *R v Pickard* [1959] Qd R 475 (CCA). Under Australian common law, there is no requirement that the threatener be present at the time of the commission of the offence: *R v Williamson* [1972] 2 NSWLR 281, 283 G. Kerr CJ at p286 D refers to the limits of the defence as a “matter of policy”.

<sup>268</sup> G Orchard *The Defence of Compulsion* (1980) 9 NZULR 105, 115 noting that the Court had simply reintroduced the word “actually” which had been legislatively deleted.

accordance with the outcome by the Court) a gratuitous alteration to the section having no legal effect. The requirement set out in an earlier part of the section that there be an “immediate” threat reinforced the conclusion that the person under compulsion had to be facing the real risk of immediate death or grievous bodily harm from a person physically present so as to be able to carry it out.<sup>269</sup> The decision is best seen as a pragmatic affirmation of a policy to tightly constrain the defence. By comparison, the Supreme Court of Canada in *R v Ruzic*<sup>270</sup> has controversially<sup>271</sup> upheld a constitutional challenge that the requirements in s17 *Criminal Code* [Can] for both the presence and immediacy of the duressor were unconstitutional, holding that the overriding imperative of the criminal law was that no one acting under compulsion and therefore acting involuntarily should be convicted, irregardless of either the physical absence of the duressor or the absence of a compelled immediacy by the

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<sup>269</sup> [1968] NZLR 1070, 1079 “the appellant was on the street and Pihema was in the service station holding up the attendant and subsequently shooting him”. In *R v Teichelman* [1981] 2 NZLR 64, 67 (CA) Richardson J said “The subsection is directly essentially on what are colloquially called stand over situations”. A duressor is not “present” when he threatens a fellow prison inmate, from another cell: *R v Carker (No 2)* [1967] 2 CCC 190, 192 (SCC); a woman who “incontestably was suffering from Battered Women’s Syndrome” could not avail herself of compulsion as her abusive partner was not present at the time of her drug offending, his constructive presence being insufficient: *R v Maureen Christine Richards* unreported New Zealand Court of Appeal, CA272/98, 15 October 1998, p2; *R v Witika* [1993] 2 NZLR 424, 435 1 44-p 436 1 15, *R v Raroa* [1987] 2 NZLR 486, 490 “The person making the threats must be present whilst the offence is committed so that his ability to carry the threat out is apparent and there is no chance of escape.”

<sup>270</sup> *R v Ruzic* [2001] 1 SCR 687 at [53] acknowledging however that “a threat will seldom meet the immediacy criterion if the threatener is not physically present at or near the scene of the offence”. In *Law Reform Commission of Canada Report: Recodifying Criminal Law* (No 30 Volume 1 1986) p33 the removal of the requirement for the presence of the threatener at the time of the crime was promoted on the basis that just like the requirement of immediacy “both are factors going ultimately to the reasonableness or otherwise of the accused’s response”. The decision in *R v Z* [2005] 2 AC 467 (HL) declined to adopt the open-textured defence now available in Canada since *Ruzic*. The House of Lords also emphasised that what had to be avoided was “the unfortunate effect of weakening the requirement that execution of a threat must be reasonably believed to be imminent and immediate” thereby inflicting upon *R v Hudson and Taylor* [1971] 2 QB 202 (CA) “such disapproving comment as to effectively render the decision no more than a historical anomaly”: Ryan and Ryan ‘*Resolving the Duress Dilemma: Guidance from the House of Lords*’ (2005) 56 NILQ 421, 427. Without these strictures the dictum of Lord Morris of Borth-y-Gest in *Director of Public Prosecutions for Northern Ireland v Lynch* [1975] AC 653, 670 that duress “must never be allowed to be the easy answer” becomes more persuasive. This position does not represent English, Australian, or New Zealand law.

<sup>271</sup> *R v Ruzic* [2001] 1 SCR 687 at [53] acknowledging however that “a threat will seldom meet the immediacy criterion if the threatener is not physically present at or near the scene of the offence”. In *Law Reform Commission of Canada Report: Recodifying Criminal Law* (No 30 Volume 1 1986) p33 the removal of the requirement for the presence of the threatener at the time of the crime was promoted on the basis that just like the requirement of immediacy “both are factors going ultimately to the reasonableness or otherwise of the accused’s response”. The decision in *R v Z* [2005] 2 AC 467 (HL) declined to adopt the open-textured defence now available in Canada since *Ruzic*. The House of Lords also emphasised that what had to be avoided was “the unfortunate effect of weakening the requirement that execution of a threat must be reasonably believed to be imminent and immediate” thereby inflicting upon *R v Hudson and Taylor* [1971] 2 QB 202 (CA) “such disapproving comment as to effectively render the decision no more than a historical anomaly”: Ryan and Ryan ‘*Resolving the Duress Dilemma: Guidance from the House of Lords*’ (2005) 56 NILQ 421, 427.

duressee. The possibility of constructive presence being sufficient for the defence of compulsion was eliminated by a strong policy consideration that the edges of the defence had to be sharply delimited and narrowly confined<sup>272</sup>. The austerity of the actual presence requirement required under s17 of the *Criminal Code*, wrongly permitted individuals who acted involuntarily, because of on-going duress (in the physical absence of the duressor), to be still found guilty of a criminal offence. The strict requirements of presence and immediacy were held to violate the Canadian Charter of Fundamental Rights as it was accepted that the pressure that may be maintained against an accused could be easily as great in cases where the effect make take place later. The Canadian Courts now provide a wider aspect to the defence but emphasise that the intrinsic limitation running thematically through the defence is the reasonableness of the conduct in all the circumstances, irrespective of temporal and proximity factors.

The common law defence of duress of circumstances is contemplated by s20 Crimes Act 1961 [NZ] as it is not inconsistent with the express defence of compulsion created by s24. But the common law defence does not preserve any notion of duress by a person not present at the time of the offence<sup>273</sup>. While the Courts have consistently insisted on a tight formalistic notion of what constitutes the actual presence of the duressor, it is difficult to see why that requirement is not itself but a matter of fact, degree and circumstance. For example, literal proximity between duressor and the compelled person at the time of the commission of the offence seems absurd when a bomb, which can be activated from a great distance by an electronic command, is strapped to the person under compulsion. The duressor, unless suicidal, will very sensibly be a considerable distance outside the explosion zone, yet is patently able to instantly carry out the threat without being physically present. The correct analysis of the presence requirement in the defence of compulsion, which is consonant with

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<sup>272</sup> Explained later in *R v Teichelman* [1981] 2 NZLR 64, 66; *R v Raroa* [1987] 2 NZLR 486, 490 “The legislation provides a narrow release from criminal responsibility where its strict requirements are met. It reflects a policy decision that in those limited circumstances ... a person ... may properly be excused ... .”

<sup>273</sup> *Kapi v Ministry of Transport* (1991) 8 CRNZ 49, 54-55 (CA). The Court emphasised that there was a “deliberate legislative intent to restrict the scope” of the defence of duress or compulsion. The common law defence of necessity arising from duress by threats has probably been wholly subsumed by the statutory defence of compulsion: *R v Hutchinson* [2004] NZAR 303 (CA). Heath J adding at p316 “there is a need for strict control of this defence”. If a common law defence of duress of circumstances exists via s20 *Crimes Act 1961* [NZ], it is only available where the threat was from a person who was present at the time the offence was committed: *Police v Kawiti* [2000] 1 NZLR 117, 119-145.

the defence of marital coercion, is that the threatener need not be physically adjacent to the person under compulsion, but needs only to have the immediate capacity to implement the threat irrespective of the distance between them. In the great majority of cases, for example the classic stand over situation postulated in *Teichelman*, an immediate ability to carry out the threat requires an immediate physical presence. But the rule imposing the need for actual presence does a complete disservice to any notion of compelled involuntary behaviour if it cannot provide a defence where the person under duress can be blown up or shot from a very considerable distance. The theme of the “actually present” requirement must be understood not to exclusively impose a literal requirement, but a requirement that emphasises the actual capacity for immediately carrying out the threat. That approach in South Australia in relation to the defence of marital coercion, concluded that the presence requirement only meant that the husband be “close enough to influence the wife into doing what he wants even if he is not physically present in the room”.<sup>274</sup> This extended approach to presence, is commensurate with the intrinsic excusatory nature of the special defence, underscoring that psychological control caused by threats or actions may remain operative in the physical absence of the abusive husband.<sup>275</sup>

## COERCION

Duress at common law requires a threat of death or serious physical harm.<sup>276</sup> Threats to property or a threat to expose a person’s immorality are insufficient to constitute the terror which the law expects. People are expected to be sufficiently robust to withstand a significant range of and intensity of pressures.<sup>277</sup> Threats to cause psychological injury will only suffice if it constitutes immediate and serious psychological injury.<sup>278</sup> The threat had to be directed at

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<sup>274</sup> *Goddard v Osborne* (1978) 18 SASR 481, 493 which is entirely consistent with *R v Connolly* (1829) 2 Lew CC 229.

<sup>275</sup> For example, where a husband, over a mobile phone, threatens the wife he will kill their child unless she commits the offence.

<sup>276</sup> *R v Graham* [1982] 1 WLR 294.

<sup>277</sup> *R v Valerama-Vega* [1985] Crim LR 220 (threat to expose homosexuality). Holding it to be an immaterial misdirection for direction to jury that duress only availed when it operated “solely as the result of threats of death or serious injury”; Andrew Ashworth ‘*Principles of Criminal Law*’ 2 ed (1995) Clarendon Press, Oxford pp218-219.

<sup>278</sup> *R v Baker and Wilkins* [1997] Crim LR 497, 498 of *R v Burstow* [1997] 1 Cr App R 144.

the defendant or his immediate family or someone in relation to whom there was a *parens patriae* relationship.<sup>279</sup> The threat must involve an element of immediacy, one of imminent harm.<sup>280</sup> Fear of harm is insufficient; a perceived actual threat is required.<sup>281</sup> Mental injury would suffice.<sup>282</sup> Psychological evidence would be admissible to verify the defence<sup>283</sup> but a threat of really serious ‘psychological injury’ is accepted to be a threat of grievous bodily harm.<sup>284</sup> “[L]ong and wasting pressure may break down resistance more effectively than a threat of immediate destruction.”<sup>285</sup>

Initially the statutory defence of marital coercion was perceived as being only modern nomenclature for the versatile defence of duress or compulsion, but restricted to wives. The boundaries and content of the statutory defence and its cognate common law counterpart were seen to be indistinguishable. This suggested overlap is illogical as it cannot justify the existence of the specific statutory defence; unless the only intended difference was an allocation of the burden of proof. It has become recognised that coercion is intended to be more flexible<sup>286</sup> and broader in concept than that of duress.

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<sup>279</sup> *R v Ortiz* (1986) 83 Cr App R 173.

<sup>280</sup> *R v Abdul-Hussain* [1999] Crim LR 570. The Court of Appeal, for the fourth time in five years emphasised the urgent need for legislative reform to define the defence of duress with precision.

<sup>281</sup> *Rihari v Department of Social Welfare* (1991) 7 CRNZ 586, 588.

<sup>282</sup> See the English Law Commission draft, *Criminal Liability (Duress) Bill* cl 1(3)(a) providing that duress requires that the harm threatened must be ‘death or serious personal injury (physical or mental).’ Cl 26(2) *Criminal Law Bill (1993)* annexed to the Law Commission ‘*Report on Offences Against the Person*’ was ready for adoption.

<sup>283</sup> *R v Williams* [1998] 4 VR 301 (CA), *R v Runjanjic* (1991) 56 SASR 114, *R v Singleton* (1994) 72 A Crim R 117.

<sup>284</sup> *R v Chan-Fook* [1994] 1 WLR 689 (CA); *R v Mwai* [1995] 2 NZLR 149; *R v Ireland* [1998] AC 147 (HL).

<sup>285</sup> American Model Penal Code §2 2.09. Comment at 8 (Tent. Draft No 10, 1960).

<sup>286</sup> For example it has been suggested that it would cover matters “such as a threat by the husband not to buy food for his wife and children, a threat to desert the wife and a threat to bring a mistress into the matrimonial home”. Michael Jefferson, ‘*Criminal Law*’, 4 ed Financial Times Pitman Publishing (1999) p242. “This leaves open the extent of a “moral threat”. Threatening to deprive the wife of her children would be a moral threat, but what about a threat to reveal her dishonesty to her employer? The answer must surely be “no”. A threat to the wife’s property would not seem to be a moral threat but it may be held that it can suffice if it has the requisite effect.” It is arguable that a threat against a child of the family will be for the wife imputed as a threat to her, so that a third party threat or moral coercion suffices. Marital coercion is not a defence necessarily of self-preservation; this is true of duress. *R v Hurley* [1967] VR 526,543; *R v Z* [2005] 2 AC 461 para [21](3).

The Victorian legislation has uniquely defined ‘coercion’<sup>287</sup> for the defence of marital coercion. Section 336(3) and (4) *Crimes Act* [Vic] inserted by the *Crimes (Married Persons’ Liability) Act 1977* [Vic] provides:

- (3) For the purpose of this section “coercion” means pressure, whether in the form of threats or any other form, sufficient to cause a woman of ordinary good character and formal firmness of mind, placed in the circumstances in which the woman was placed, to conduct herself in the manner charged.
- (4) Without limiting the generality of the expression “the circumstances in which the woman was placed” in sub-section (3), such circumstances shall include the degree of dependence, whether economic or otherwise, of the woman on her husband.

The word ‘coercion’ has never been comprehensively defined in the caselaw,<sup>288</sup> rather the case law is replete with examples of what it is not. A command from a husband to a wife had been held capable of constituting coercion but such forcefulness was not required as even a request might suffice, depending on the exact status and circumstances of the particular relationship. The will of then notionally average wife was considered to be so fragile that her own responsibility was subjugated by any material pressure.<sup>289</sup> The doctrine incorporated a

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<sup>287</sup> Its avowed aim was to protect a wife who may not be able to satisfy the austerity of duress, but who had not acted unreasonably in submitting to pressure to which she is susceptible because of her marital (and possibly maternal) role. Examples from P J Pace ‘*Marital Coercion – Anachronism or Modernism?*’ [1979] Crim LR 82,88 include: 1) threat to take children away from wife, 2) threat to commit adultery, 3) threat to bring mistress to live in the matrimonial home, 4) threat to bring up their children in a religion different from wife. No angelic standard of human fortitude need be displayed by a wife – law looks to a “reasonable wife”. In *R v Ditta* [1988] Crim LR 42 (CA) the test was “Was she forced by her husband either by physical, moral, psychological or mental processes, to do what she would not otherwise have done?” In the defence of duress a threat to expose the accused’s homosexuality is insufficient; is a threat to reveal one’s wife’s lesbianism to the tabloid press such a threat as to fall within moral, psychological or mental’ pressure? Michael Jefferson, *Criminal Law* (1999) 4 ed, Financial Times Pitman Publishing, p242-243. In *R v Valderrama-Vega* [1985] Crim LR 220 the defendant was threatened with the disclosure of his homosexuality and was under financial pressure and received threats of death or serious harm. It was held that the first two factors were incapable of amounting to duress but the court held that the jury was entitled to look at the cumulative effect of all of the threats and it was wrong to direct the jury that the threat of death or serious injury had to be the sole reason for him committing the crime, cf *R v Ortiz* (1986) 83 Cr App R 173 where the court upheld a direction that the threat to life should be the sole threat.

<sup>288</sup> In *DPP for Northern Ireland v Lynch* [1975] AC 653, 694 Lord Simon said “Since coercion was defined neither by the antecedent law or by statute, I take it that it is used in its ordinary sense, as it is in the law of probate, and which I have just discussed. The state of mind produced, and which excuses from liability, is thus the same for both ‘coercion’ and duress – namely, ‘This is not my wish, but I must do it’ – and in both the constraint is due to external human pressure. The difference lies, first, in the method of pressure (for duress it is limited to threats, whereas for ‘coercion’ it extends to any force overbearing the wish).”

<sup>289</sup> *R v Knight* (1823) 1 Car & P 116, (1823) 171 ER 1126. The presumption was an assumption about the character of the model female actor in criminal law terms. Acting out of loyalty to the husband can never be sufficient to raise the defence. It is not a question of faithful commitment to the husband but rather the perspective of the husband overawing the free will and capacity of the wife. Peter Gillies, ‘*Criminal Law*’ (1997)

rule of evidence that required the prosecution to affirmatively demonstrate<sup>290</sup> that a wife had acted on her own volition as in the absence of such evidence the presumption remained intact.

## BURDEN AND STANDARD OF PROOF

The Victorian legislation expressly<sup>291</sup> requires that the prosecution negatives the defence as the wife only has an evidential burden and not a legal one. There can be no doubt that the original statutory defence in England was intended to place a legal burden on the wife<sup>292</sup>. However, modern constitutional law would now see that burden on the wife as being unconstitutional and interpret it as only imposing an evidential burden<sup>293</sup>. This would also synchronise the two defences of common law duress and statutory coercion and would then emphasise that the statutory defence was more expansive in concept than duress.

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4 ed, LBC Information Services, p358. “The form of pressure needed to ground coercion is not, that is, limited to threats of death or bodily injury, as is duress”.

<sup>290</sup> It was for the prosecution to rebut the presumption and it was not rebutted unless it was established that the wife had acted independently of her husband. This concept was itself problematic as it denied the wife independence of decision-making while she was in the presence of her husband. The defence was contracted into a situation whereby the presence of the husband became the presumptive defence, irrespective of the actual volition as expressed through act or omission by the wife. The concentration wrongly was on the husband’s role rather than on the role of the wife which was presumed not capable of being other than determined by him.

<sup>291</sup> Section 338(5) *Crimes Act* 1958 [Vic] “The accused shall bear the burden of adducing evidence that she conducted herself in the manner charged because she was coerced by her husband, but if such evidence has been adduced, the prosecution shall bear the burden of providing that the action or inaction charged was not due to coercion by the husband.”

<sup>292</sup> *R v Cairns* [2003] 1 Cr App R 662 (CA). The same result had been reached in Hong Kong: *R v Kong Man Heung* [2000] 1 HKC 406 (decided though in 1986); *HKSAR v Au Yuen Mei* [2000] 1 HKC 411. Glanville Williams, ‘*Criminal Law: General Part*’ (1961) 2 ed, p762 conceived that the statutory defence might operate only to cast an evidential burden on the wife, leaving the legal burden of disproving coercion on the prosecution. Robert W H Fanner, ‘*Wigram’s Justice’s Note-book A Short Account of the Jurisdiction and Duties of Justices and an Epitome of Criminal Law*’, (1935) Stevens & Sons Ltd, London at p250: “Now it is for the wife to prove coercion, whereas previously the law presumed it. It will be observed that the defence of coercion may now be pleaded in the case of any offence other than treason or murder.” Michael Jefferson, ‘*Criminal Law*’ (1999) 4 ed, Financial Times Pitman Publishing, p242: “The reversal of the burden of proof may be the sole reason why s47 was enacted.”

<sup>293</sup> R S O’Regan, ‘*Married Women and the Defence of Compulsion under the Criminal Code*’, (1979) 11 University of Queensland Law Journal 20, 24 argues that the provision in the *Criminal Code* [Qld] as an excusatory provision only imposes an evidential burden on the accused for which the prosecution must negative beyond reasonable doubt; *R v Lambert* [2002] 2 AC 545 (HL) reading down a legal presumption to an evidential one, as otherwise being violative of the presumption of innocence.

At common law, the only persuasive burden placed on an accused was in relation to the defence of insanity<sup>294</sup> but the general rule was subject to modification by statute<sup>295</sup>. International constitutional norms<sup>296</sup>, now echoed in domestic legislation in much of the common law world, affirm the presumption of innocence as an independent right of great importance, such that there cannot be any derogation from the concept of a fair trial. It has been urged that the presumption of innocence can only be safeguarded by imposing on the prosecution the persuasive burden of proof<sup>297</sup> in a criminal trial, as that standard and onus, proportionately factor in the margin of error existing in litigation. But a limitation impinging on the presumption of innocence may be a justifiable derogation where there is a compelling reason for the legislation. The relevant methodology<sup>298</sup> involves an analysis as to whether the objective to be served by the measure limiting that presumption is sufficiently important or compelling<sup>299</sup> to warrant overriding the constitutionally protected right. The State as the party required to prove<sup>300</sup> that the infringement of the presumption is constitutional, must also show that the impairment is no greater than is reasonably necessary to obtain the objective. Finally, an evaluation is called as to whether the limit to the presumption of innocence is in due proportion to the importance of the legislative objective. Critical to that evaluation is the very high level of importance<sup>301</sup> that society attaches to the presumption of innocence. It is a bulwark between the resources of the State advocating the prosecution and the comparative position of the defendant against whom an allegation is propounded.<sup>302</sup> The paradox being the more serious the intrinsic nature of the allegation, the greater the defendant is at risk and therefore the greater the importance of the presumption of innocence to that person.<sup>303</sup> For that reason, the presumption of knowledge against a defendant flowing from the possession of

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<sup>294</sup> *Woolmington v Director of Public Prosecutions* [1935] AC 462.

<sup>295</sup> *HKSAR v Ng Po On* [2007] 2 HKLRD 245 McMahon J held that a negative averment provision in relation to corruption ought to be construed as only imposing an evidential burden despite its language clearly speaking of a persuasive burden, because it would otherwise violate the presumption of innocence.

<sup>296</sup> Art 14(2) *International Covenant on Civil and Political Rights*.

<sup>297</sup> *Speiser v Randall* (1958) 357 US 513, 525-6.

<sup>298</sup> The approach in *R v Oakes* [1986] 1 SCR 103 has been widely adopted although in *Attorney-General of Hong Kong v Lee Kwong Kut* [1993] AC 951, 967 Lord Woolf cautioned against an overelaborate or mechanistic approach, either of which if unheeded could stultify proper parliamentary legislative initiatives. In *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Land and Housing* [1999] 1 AC 69 (PC) Lord Clyde reproduced the *Oakes* methodology.

<sup>299</sup> *R v Johnstone* [2003] 1 WLR 1736 para [49] per Lord Nicholls of Birkenhead.

<sup>300</sup> *Multani v Commission Scolaire Marguerite-Bourgeoys* [2006] 1 SCR 256 at para [43].

<sup>301</sup> McGrath J in *R v Hansen* [2007] 3 NZLR 1, 67-68 identifies three factors in particular.

<sup>302</sup> Andrew Ashworth 'Principles of Criminal Law' 5ed 2006, Clarendon Press, p83.

<sup>303</sup> *S v Coetzee* (1997) 3 SA 527 (SA:Const Ct) at para [220] per Sachs J.

any article which contains drugs, has been ruled unconstitutional in most jurisdictions as impermissibly infringing the presumption of innocence.<sup>304</sup> On analysis, the marital coercion defence is a varietal of the compulsion defence. It is inconsistent and illogical (poignantly demonstrated where a wife relies upon both defences at trial<sup>305</sup>) for different burdens to be placed on her. A legal burden realistically requires the wife to give evidence herself in most cases, and in the process prove that true nature of the pressure which caused her to commit the offence – thus likely destroying the marriage in many cases – a marriage which she may genuinely wish to exist. The persuasive burden on the wife is fundamentally unconstitutional being inconsistent with the presumption of innocence (and incidentally placing her in the same position as someone relying upon the defence of insanity). The English and Hong Kong decisions to date must be read in the light that no direct constitutional challenge to the burden of proof has been yet advanced.

## EXCEPTIONS TO THE DEFENCE

For Victoria, the statute removed<sup>306</sup> the problematic issue of categorising the exclusions<sup>307</sup> to the common law defence. The list of exceptions was never definitively settled at common law.

In each jurisdiction in which a statute has been passed approving or modifying the defence of presumed coercion arising from a wife's commission of an offence in her husband's presence, provision has been made in the statute to exclude specific offences.<sup>308</sup>

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<sup>304</sup> *R v Lambert* [2002] 2 AC 545; *HKSAR v Hong Chan Wa* (2006) 9 HKCFAR 614. The same presumption in relation to possession of firearms was also held unconstitutional: *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574.

<sup>305</sup> *R v Ditta, Hussain, Begum and Kara*, unreported, Isleworth, Crown Court, ref 191/F2/87 and 142/E3/87, 11 December 1986, Judge Hopkin-Morgan

<sup>306</sup> J C Smith and B Hogan, '*Criminal Law*', 7 ed, (1992) p243: "the exact extent of the defence is uncertain. It did not apply to treason or murder; Hale excluded manslaughter as well and Hawkins ruled out robbery."

<sup>307</sup> D Mendes da Costa, '*Criminal Law*', in R H Graveson and F R Crane (eds), '*A Century of Family Law*', Sweet and Maxwell Ltd, London (1957) p169 states that the burden of proof has now been shifted to the wife and it is up to her to prove that she acted under her husband's control. The section was arguably wider than the common law because it now undoubtedly extended to misdemeanors by the use of the expression "any offence other than treason or murder".

<sup>308</sup> David S Evans, '*Criminal Law – Presumption of Coercion – Crimes Committed by Wife in Husband's Presence*', (1956) 35 North Carolina Law Review 104 at p105:

Murder<sup>309</sup> and treason<sup>310</sup> had always been exceptions to the defence because of their inherent gravity. Marital coercion in both its common law<sup>311</sup> and its statutory formulation<sup>312</sup> does not apply to treason. Neither version ever applied to murder.<sup>313</sup> These offences were self-referential of extremely heinous behaviour. The consequences and enormity of those crimes underlined the obvious juristic basis<sup>314</sup> for their special exempting status. Yet, manslaughter, grievous bodily harm and armed robbery were never definitively within the class of

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<sup>309</sup> In J W Harris, *Towards Principles of Overruling – When Should a Final Court of Appeal Second Guess*, (1990) 10 Oxford Journal of Legal Studies 135, 185 fn 254 reference is made to the need for coherence of the law which denies necessity, marital coercion and superior orders, as valid defences to murder. In *State v Kelly* (1888) 38 NW 503 it was wrongly concluded that the presumption applied to a prosecution for murder. But in *State v Reynolds* (1920) 179 NW 308 that decision was overruled by the Supreme Court of Iowa holding that murder was no exception to the defence. In *State v McDonie* (1924) 123 SE 405, 407 the West Virginia Supreme Court emphasised that murder must remain an exception as it was an offence of “so much malignity as to render it improbable that a wife would be constrained by her husband” to involuntarily carry it out.

<sup>310</sup> It is a fact that throughout the Parliamentary debate the issue of what offences should be excepted was literally never debated resulting from the unsatisfactory treatment of duress in the standard legal works of the era. The exception of treason was simply never considered in the passage of s47 *Criminal Justice Act 1925* [UK]; so the earlier examples (*Oldcastle’s Case* (1419) 1 Hale PC 50; *R v McGrowther* (1745) 18 St Tr 391, *R v Ahlers* [1915] 1 KB 616 of the defence of duress being invoked in relation to treason were never referred to at all. Neither the extended debates from 1922 – 1925 or any of the government papers or internal documents identify that the issue was ever addressed, but rather was assumed throughout “...because of the odiousness and dangerous consequence of the crime of treason against the State, has no right to that obedience from his wife, which he himself, as a subject, has forgotten to pay”. But duress is, by contrast, a defence to treason: *R v M’Growther* (1746) Foster 13, 18 St Tr 391; *R v Purdy* (1945) 10 J Cr L 182 cf *Lai Kit v R* (1946) 31 HKLR 7 (FC)/

<sup>311</sup> *Coercion – The Peel Case* (1922) 86 JP 137, 138, justified the two exceptions of treason and murder “because they are so heinous that a woman ought to revolt from them, even if pressed by her husband.”

<sup>312</sup> Glanville Williams, *Criminal Law: The General Part* (1953) Stevens & Sons Ltd, London p605 who describes the addition of treason “as a parliamentary mistake, resulting from the unsatisfactory treatment of duress in the standard legal works of the time. Parliament could not have intended to deprive the wife of a defence possessed by other people, so that she must still have the defence of duress at common law to a charge of treason”.

<sup>313</sup> Bacon’s *Maxims* 57; 1 Hale PC 45, 47; 1 Hawk PC c1 s11. *Attorney General v Whelan* [1934] IR 518, 526 (CCA): “The commission of murder is so heinous that murder should not be committed even for the price of life and in such a case the strongest duress would not be any justification.” Note reference to justification is wrong in principle as the defence is excusatory in character: *R v Z* [2005] 2 AC 467. The early authorities treated coverture as a disability which eliminated, unless rebutted, a wife having the capacity to commit crime. In *Bibb v State* (1891) 94 Ala 31 Clopton J said: “The exceptions ingrafted on the general rule are based on the nature, grade, and heinousness of the felonies; and among these is murder”. In *R v Mtetwa* (1921) TPD 227, 230 Wessels JP considered that duress was a defence even to murder. In *R v Alison* (1838) 8 Car & P 423, 425 Patteson J referred to a case in the reign of James I where a wife was acquitted of murder (a suicide pact between spouses in which she failed) “solely on the ground that, being the wife of the deceased, she was under his control; and inasmuch as the proposal to commit suicide had been first suggested by him, it was considered that she was not a free agent”.

<sup>314</sup> In *Commonwealth v Neal* (1813) 10 Mass 512 the Attorney-General unsuccessfully argued that very serious assault and battery should be exempted from the defence as the wife “must know, as well as [her husband], that the action is wrong”. The emphasis is that every person should be able to discriminate between the most obvious categories of right and wrong. Even the immature moral sense of a wife or her diminished capacity for rational choice because coercion, was considered to be triggered in carrying out the most atrocious crimes, so that she ought to resist the husband’s authoritarian decision-making.

exceptions, although inconsistent nineteenth century trial rulings were the hallmark in this area. Duress is no defence to attempted murder,<sup>315</sup> but marital coercion is a defence to that charge.<sup>316</sup> Manslaughter,<sup>317</sup> which usually carries life imprisonment as a maximum sentence is also within the defence. In s32 *Criminal Code* [WA] but, unlike at common law, the marital coercion defence has been modified so that it is now not a defence to an offence punishable with strict security life imprisonment or to an offence of which grievous bodily harm, or an intention to cause such harm, is an element. This was broadly comparable with the former position in Queensland.<sup>318</sup> Because the common law was malleable it was able to adjust to the realities of the emerging wifely status – one where her position tended to be significantly ameliorated in comparison with those wives of even a generation before her. Judges were

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<sup>315</sup> *R v Gotts* [1992] 2 AC, 412 (HL). There are differing opinions whether duress is available on a charge of attempted murder: *R v Goldman* (2004) 147 A Crim R 472. However, the common law defence of duress also excludes attempted murder therefore removing the symmetry with marital coercion, unless the approach in *Gotts* also applies. In *Gotts*, Lord Jauncey at p426 stated: “I can...see no justification in logic, morality or law in affording to an attempted murderer the defence which is withheld from a murderer.” As the intent for attempted murder can only be an intention to kill and not the generic intention of an intention to cause grievous bodily harm which suffices for actual murder, a more criminous intent is needed. If murder is excluded from the ambit of the defence of duress then there must be a powerful case, that on the true construction of the statutory defence of marital coercion, the reference to “murder” includes attempted murder and except where the two spouses are the only conspirators, conspiracy to murder. The difference between the attempted and complete offence of murder is so often a matter of chance and therefore not a deliberate act of withdrawal on the defendant’s part. In the Court of Appeal, Lord Lane CJ said “that the fact that the attempt failed to kill should not make any difference”. But if the real reason for the common law exclusion of murder from the defence of duress is the fact of death then the construction of the statutory defence of marital coercion is far less powerful. Further, as the intent of the action is conditioned by duress, does it follow that the more rigorous intent required for attempted murder (than murder itself), is of any consequence?

<sup>316</sup> *Lai Kit v R* (1946) 31 HKLR 7 (FC): treason by a collaborator during the Japanese occupation. However, the common law defence of duress also excludes attempted murder, *R v Gotts* [1992] 2 AC 412, therefore removing the symmetry with marital coercion, unless the approach in *Gotts* applies. In *Gotts*, Lord Jauncey at p426 stated “I can...see no justification in logic, morality or law in affording to an attempted murderer the defence which is withheld from a murderer.” As the intent for attempted murder can only be an intention to kill, *R v Whybrow* (1951) 35 Cr App R 141. and not the generic intention of an intention to cause grievous bodily harm which suffices for actual murder, a more criminous intent is needed. If murder is excluded from the ambit of the defence of duress then it is arguable that on its true construction the reference to “murder” includes its variants eg. attempted murder and conspiracy to murder. The difference between attempted and complete offence of murder is so often a matter of chance and therefore not a deliberate act of withdrawal on the defendant’s part. In the Court of Appeal, Lord Lane CJ said “that the fact that the attempt failed to kill should not make any difference”. *R v Gotts* [1991] 1 QB 660. But if the real purpose for the common law exclusion of murder from the defence of duress is the gravity of the fact of death, then the statute should be narrowly so construed.

<sup>317</sup> The Victorian Law Reform Commission Victorian Law Reform Commission, ‘*Defence to Homicide Issues Paper*’ (2002) chp 8.2, p94, noting s336(2) *Crimes Act 1958* [Vic] in 2002 noted that the marital coercion defence was available for manslaughter (which carries the maximum penalty of life imprisonment) and consideration was to be given as to whether it should be extended also to murder. *Ibid* chp 8.8 p96.

<sup>318</sup> M J Shanahan, ‘*Carter’s Criminal Law of Queensland*’ (2003) 13 ed, Australia Butterworths p1167 noted that the former s32(2) *Criminal Code Act 1899* [Qld] which provided for the defence of marital coercion until 30 June 1997 exempted treason, murder, piracy, attempted piracy or any offence of which grievous bodily harm to the person of another, or an intention to cause such harm, was an element of the offence.

responsive to the increasing assertiveness of women. It became increasingly unjust to provide a defence to a wife who was clearly at least an equal partner in very serious criminal conduct. In the result, trial decisions fluctuated as to the fixed nature of the exceptions to the defence. It became recognised that certain offences were almost the exclusive province of women, such as keeping a common bawdy house.<sup>319</sup> Over time, the common law reacted by unevenly engrafting further exceptions to the defence. These had as their central feature the fact that the offences were committed inside the domestic dwelling. The rationale for widening the exceptions to include prostitution-related<sup>320</sup> offences was that the wife ought to be responsible for the governance of the domestic sphere. When she committed prostitution there or organised it, at the insistence of and in the presence of her husband, no defence was available to her. But within the gallimaufry of trial decisions<sup>321</sup> there was no unanimity by the Courts or by institutional writers as to the precise list of other exceptions at common law.

In *R v Stratton*<sup>322</sup> it was said that the nature of the duress must be in proportion to the malignity of the crime<sup>323</sup> yet in more than one case a wife was even provided with the defence of marital coercion where she was charged with aiding and abetting her husband in the crime of rape of another.<sup>324</sup> Modern statutory versions<sup>325</sup> of duress/compulsion have tended to adopt the approach of the *English Draft Criminal Code of 1879* which additionally exempted a range of other offences from the defence, typically excluding manslaughter but including the offences of: wounding with intent, kidnapping, robbery and arson.

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<sup>319</sup> The Law Reform Commission of Ireland ‘*Consultation Paper: Duress and Necessity*’ (LRC CP 39-2006), April 2006, Dublin p48 para 2.160 accepts that “brothel keeping” was a common law exception.

<sup>320</sup> In *State v Weeden* (1927) 114 So 604, 605 the Supreme Court of Louisiana recognised this exception.

<sup>321</sup> In particular, there was a serious question whether misdemeanours were exempt. It is remarkable that the Avory Report stated that the common law did apply to all misdemeanours as well as all felonies as the leading contemporary texts denied that very proposition. This is further evidence of the fragility of the report and its lack of scholarship. It may have been the view of the Avory Committee that as on their recommendation the entire corpus of the law was to be abrogated, it was pragmatic to accept that misdemeanours were included to achieve a neat solution.

<sup>322</sup> (1779) 1 Doug KB 239.

<sup>323</sup> See also *Lai Kit v R* (1946) 31 HKLR 7. See also *HKSAR v Buitrago* [1998] 3 HKC 113 (CA).

<sup>324</sup> *Commonwealth v Balles* (1946) 62 Montg 293 (Pa Quar Sess); *State v Owen* unreported Supreme Court of North California, No COA 98-413, 15 June 1999.

<sup>325</sup> Glanville L Williams, ‘*Criminal Law: The General Part*’ (1953) Stevens and Sons Ltd p594 lists the Codes of Canada, New Zealand, Tasmania, Queensland, Western Australia and India as such examples. Some jurisdictions additionally exempt a particular offence: s17 *Crimes Ord Cap 200* [HK] substantially denies compulsion as a defence in relation to the taking of unlawful oaths.

## RARITY

J F Garner stated, 29 years after the passage of the 1925 Act, there “seems to be no reported decision on the point”<sup>326</sup> as to what constituted coercion. The very rarity of this defence has been suggested as a sufficient justification for its repeal. Reasons for the paucity of case law may include that a wife may avoid taking advantage of the defence because to employ it she will need to give evidence and substantially blacken the character of her husband.<sup>327</sup> This was very much in the mind of the English legislators who fought to maintain the existing common law and avoid the introduction of the statutory defence. What had not been realised by them was that the common law position probably existed because of the fact that the wife could not give evidence at all prior to 1898 when accused persons finally became competent witnesses.

The policy background of the defence of compulsion/duress is for the defence to be sparingly available, it is austere in its demands. In New Zealand, it has been authoritatively said that the defence is “a narrow release from criminal responsibility where its strict requirements are met. It reflects a policy decision that in those limited circumstances (and where the offence is not in the grossest category excluded from the application of the defence under s24(2)[*Crimes Act 1961*] [NZ] a person faced with the threat of immediate death or grievous bodily harm may properly be excused if he chooses the lesser evil of committing the offence.”<sup>328</sup> The

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<sup>326</sup> J F Garner, ‘*The Defence of Coercion*’, [1954] Crim LR 448, 449.

<sup>327</sup> The absence of caselaw may be a function of prosecutorial decision-making, conscious of the implications of the defence for the marriage (and children). The concept of prosecutorial discretion was perhaps not well developed in earlier times but it had been employed in favour of married women, even after the indictment had been laid. *R v Good* (1842) 1 Car & K 185. Charles W H Lansdown, William G Hoal and Alfred V Lansdown (eds), Gardiner and Lansdown ‘*South African Criminal Law and Procedure*’ (1957) 6 ed, vol 1, Juta & Company Ltd Cape Town, at p155 states that while the Transkeian territories have a specific provision immunising a wife from the offence of being an accessory after the fact to her husband’s offence, unlike the other parts of the Union, but “in practice so general has it become not to prosecute a wife who does no more than discharge towards her husband such a duties as he may reasonably demand, and she may reasonably render him”, that a well-established custom having the force of law exists to this effect: *R v Mtetwa* 1921 TPD 227. Another discretion in favour of married women was the successful recommendation for a pardon even where the defence had failed such as where the husband had been in prison, and therefore not present, when the wife committed the offence, but where the other evidence of her coercion was overwhelming: *R v Brown* noted in *R v Knight* (1823) 1 Car & P 116, 117 (a). Further the defence gave the court a considerable margin of discretion in deciding whether the prosecution had established a case: J M Beattie, ‘*The Criminality of Women in Eighteenth-Century England*’, (1975) 8 *The Journal of Social History* 80, 95-96.

<sup>328</sup> *R v Teichelman* [1981] 2 NZLR (CA) 64, 66. Lord Bingham notes “the features of duress...incline me, where policy choices are to be made, towards tightening rather than relaxing the conditions to be met before duress may be successfully relied on”: *R v Z* [2005] 2 AC 467.

defence of duress has been so narrowly defined by legislation or by common law that it does not permit a defence except in extreme situations.<sup>329</sup>

Stephen said

in the course of nearly thirty years' experience at the bar and on the bench, during which I have paid special attention to the administration of criminal law, I never knew or heard of the defence of compulsion being made except in the case of married women, and I have not been able to find more than two reported cases which bear upon it.<sup>330</sup>

But the position expressed in 1886 by Stephen is no longer a valid overview. Lord Bingham in *R v Z* has recently referred to the huge growth in the number of cases in which the defence of duress is now invoked.

In recent years, the popularity of the plea of duress has shown inexorable increase since it is easy to assert (with plausibility in a context of violent crime) and difficult for the prosecution to investigate and discharge its burden of disproving it beyond reasonable doubt, especially when, as is often the case, the defence only raises it (or discloses the details on which the claim is founded) at or just before the trial.<sup>331</sup>

It was also argued that because the defence is very rarely raised, a reason for the paucity of cases is that it is nowadays "much more difficult for a wife to show that she had not taken an independent part"<sup>332</sup> which is a compelling reason to terminate it. Because of its rarity, the defence has been bypassed as being worthy of academic study.<sup>333</sup> Its very rarity has been convincingly advanced as a rationale for its abolition.<sup>334</sup> It does not apply to relationships outside marriage and as the ratio of marriage per head of population diminishes, its immediate practical utility follows suit. There does not appear to be any decision of a superior court in

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<sup>329</sup> In *Rhode Island Recreation Center v Aetna Casualty & Surety Company* (1949) 177 F 2d 603, 605 where it was noted that even in the mid-twentieth century the state of the law of duress was revealed by the observation that a part from "cases involving children, wives, and mental defectives, they do not seem to be many cases in point."

<sup>330</sup> Sir James Stephen, *A History of the Criminal Law of England* (1883) Maccillan & Co, London, vol 2, p106.

<sup>331</sup> Russell Heaton, *Criminal Law* (2006) 2 ed, Chp 8.3.

<sup>332</sup> Anthony Hooper, *Harris's Criminal Law*, 21 ed (1968) Sweet & Maxwell, London, p103. (Now Lord Justice Hooper)

<sup>333</sup> *R v Z* [2005] 2 AC 467, 491 Lord Bingham said "For many years it was possible to regard the defence of duress as something of an antiquarian curiosity, with little practical application".

<sup>334</sup> *English Law Commission, Working Paper No 55, Defences of General Application* (1974) p63. Stanley Yeo, 'Coercing Wives into Crime', (1992) 6 Australian Journal of Family Law 214 fn 1 states that the low volume of litigation justifies its disappearance.

England<sup>335</sup> where the defence has been successfully invoked on the merits (as opposed to where a conviction was quashed for misdirection).

## AUSTRALIA

In 1924 the Tasmanian legislature<sup>336</sup> not only abolished the presumption but it also abolished the complete defence of marital coercion, in unequivocal terms. The Northern Territory legislature<sup>337</sup> in 1983 introduced a Criminal Code which abolished the defence but also widened the cognate defence of duress. Courts of Appeal in Québec<sup>338</sup> and New Zealand<sup>339</sup> concluded that despite the appearance of the statutory provision abrogating only the presumption, the net effect was to abrogate the defence, on the basis that the defence could not exist independently of the presumption. Other Australian jurisdictions,<sup>340</sup> including the other two Criminal Code states of Western Australia<sup>341</sup> and Queensland,<sup>342</sup> removed the presumption but recast the statutory defence. But the position in Victoria<sup>343</sup> is the most

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<sup>335</sup> But in *HKSAR v Au Yuen Mei* [2000] 1 HKC 411 a jury acquitted a woman who relied only on marital coercion; the Hong Kong defence is identical to that in England.

<sup>336</sup> s20(2) *Criminal Code Act 1924* [Tas].

<sup>337</sup> s41 *Criminal Code Act 1983* [NT].

<sup>338</sup> *R v Robins* (1982) 66 CCC (2d) 550, 562. Mayrand JA stated that the 1892 *Criminal Code* [Can] unlike the position in England abolished the antiquated defence of marital coercion “to place the woman on a equal footing with all other citizens” as “...no one continues to believe that the married woman, in the presence of her husband, only acts as his puppet.” The defence of marital coercion was incompatible with the prevailing morals and state of Canadian law.

<sup>339</sup> *R v Annie Brown* (1896) 15 NZLR 18.

<sup>340</sup> s328A *Criminal Law Consolidation Act 1935* [SA].

<sup>341</sup> s32 *Criminal Code Act Compilation Act 1913* [WA].

<sup>342</sup> s32 *Criminal Code 1899* [Qld]. It reads: “A married woman is not free from criminal responsibility for doing or omitting to do an act merely because the act or omission takes place in the presence of her husband. But a married woman is not criminally responsible for doing or omitting to do an act which she is actually compelled by her husband to do or omit to do, and which is done or omitted to be done in his presence, except the case of an act or omission, which would constitute [the crime of treason or...murder, or any of the crimes defined in the second paragraph of section eighty-one and in section eighty-two of this Code], or an offence of which grievous bodily harm to the person of another, or an intention to cause such harm to the person of another, or an intention to cause such harm, is an element, in which case the presence of her husband is immaterial.”

<sup>343</sup> s336(1) *Crimes Act 1958* [Vic]. In *Katsuno v The Queen*, M88/1998 (9 March 1999) p50 (High Court of Australia transcript) *Osborne v Goddard* [1996] 1 Cr App R 116 was discussed, noting that the offence there was a federal offence, so that marital coercion was therefore available as a general defence under s4 *Crimes Act* [Cth]. In *Olsen v The Queen*, unreported, Court of Criminal Appeal of the Northern Territory, Court of Appeal 24 of 2001, 14 June 2002 Angel, Mildren and Riley JJ, in a sentencing appeal, there was unsuccessful recourse by an appellant to the acts of her de facto husband and to the marital coercion doctrine in *Ewart v Fox* [1954] VLR 699. In *R v Dempsey*, [2000] VSC 527, 28 November 2000, Supreme Court of Victoria, No 1437 of 2000, 28 per Harper J, a child had died of severe injuries to his head and the husband was indicted for murder and the

significant as inconsistently with all other states and territories in Australia (and the great majority of the common law world) it introduced in 1977 a specific marital coercion defence; although the presumption was not introduced. In none of the other states or territories is there a definition of what constitutes “coercion”. The South Australian model is a virtual replication of s47 *Criminal Justice Act 1925* [UK] whereas the code states retained a provision imposing the general requirement on the duresser of having been “actually compelled”, until repealed in 1997.

Marital coercion had been invoked in Australian courts since 1826<sup>344</sup> and a number of examples of the defence being deployed exist in the law reports. Academic writing also occasionally considered the defence<sup>345</sup> An article in 1940<sup>346</sup> notes that by that year in the State of Victoria there had been no legislation which impacted on the old common law. The significance was that “the question has arisen on a number of occasions within the last few months in Victorian Courts”. The early decision in *R v Bolton*<sup>347</sup> was criticised because there the court had additionally exempted burglary from the common law defence, a position that had never been reached in English law. On the contrary, Hale<sup>348</sup> made it clear that burglary was well within the doctrine. Blackstone also accepted that burglary was within the defence:

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wife with manslaughter. They sought separate trials. Such a request under Australian law should be granted where its denial would result in “a substantial miscarriage of justice” or “improper prejudice...against an accused”. See *Webb v R* (1994) 181 CLR 41, 89 per Toohey J. The wife intended to rely upon the defence of marital coercion and counsel for the prosecution submitted that it was crucial that the one jury see both parties to the marriage in order to assess that defence. The judge ordered a separate trial. cf *R v Lee Shek Ching* [1986] HKLR 304 (CA). In *R v Dempsey* the wife intended to adduce material, including the convictions of her husband and his violent and aggressive nature because her defence was that any neglect of the welfare of her child was attributable to her husband and she feared that he would cause her to suffer if she exposed him by taking the child for medical treatment. M J Shanahan, *‘Carter’s Criminal Law of Queensland’* (2003) 13 ed, Australia Butterworths at p262 observes that ss32 (defence of marital coercion), 33 (spousal conspiracy exemption), 35 (liability of husband and wife for offences committed by either with respect to the other’s property) were all repealed by *Criminal Law Amendment Act* (No 3 of 1997) [Qld] in operation from 1 July 1997.

<sup>344</sup> *R v Smithers and Smithers* [1826] NSW SupC 81, 28 December 1826, Forbes CJ and Stephen J; *Sydney Gazette*, 30 December 1826

<sup>345</sup> J G Norris *‘Private Civil Subjection’* (1928) 2 Australian Law Journal 10, where reference is made to the Avory Committee. D O O’Connor and P A Fairall, *‘Criminal Defences’* (1984) Butterworths, Sydney p131 consider that the defence was developed as an aspect of the “matrimonial subjection of the wife to the husband.”

<sup>346</sup> T K Doyle, *‘Marital Coercion’*, (1940) 14 ALJ 239.

<sup>347</sup> (1885) 11 VLR 776.

<sup>348</sup> 1 Hale 45, 47, 48.

“and therefore if a woman commit theft, burglary or other civil offences against the laws of society by the coercion of her husband ... or even in his company, she is not guilty.”<sup>349</sup>

The three Australian Code States (Queensland, Tasmania and Western Australia) had provided for the defence, or otherwise<sup>350</sup>, in the initial formulation of their Criminal Codes. Victoria had no statutory law until 1977. In New South Wales, a common law jurisdiction, a provision was enacted removing the presumption from the law but it most ambiguously failed to provide whether the defence has been given its quietus.<sup>351</sup> Academic writing is sharply divided<sup>352</sup> as to whether the common law defence exists or not in New South Wales, the point never having arisen at trial.

The position in South Australia is most informative. That jurisdiction enacted s328A *Criminal Law Consolidation Act Amendment Act 1940* [SA] in terms identical to s47 *Criminal Justice Act 1925* [UK]. The section had its genesis in the Second Reading<sup>353</sup> of the *Criminal Law Consolidation Act Amendment Bill 1940* [SA] which dealt with a number of substantive amendments to the criminal law. Clause 10 was introduced<sup>354</sup> to abolish the presumption of marital coercion. It was urged that the rule (actually the presumption) had been abolished in England since 1925 “and in some Australian States”, so that clause 10 upon its enactment

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<sup>349</sup> 4 *Commentaries* 28. Hawkins *Pleas of the Crown* (vol 1 c 1 s.11) excludes murder, treason and robbery. The author refers to the Avory Committee and accepts the correctness of that Committee that there were no exceptions other than murder and treason.

<sup>350</sup> As early as 1924, Tasmania wholly abolished the defence, putting all women of whatever status on an equal basis, a year before the *Criminal Justice Act 1925* [UK] introduced the wife-specific statutory defence: s20(2) *Criminal Code Act 1924* [Tas]. Sir Samuel Griffith the author of the *Criminal Code Act* [Qld] 1899 appended to his draft of the marital coercion provision in it that “the case should be treated as a particular instance of the general law of compulsion and dealt with in the same way” *Queensland Parliamentary Papers* CA 89-1897, 17; Robin S O’Regan, *Essays on the Australian Criminal Codes*, (1979) The Law Book Company Ltd, Sydney at p126-136 discusses the making of the Griffith Code.

<sup>351</sup> s407A *Crimes Act 1900* (NSW).

<sup>352</sup> Yeo notes that while New South Wales abolished the presumption, it did not classify whether the defence still existed. Stanley Yeo, *Coercing Wives Into Crime*, (1992) 6 *Australian Journal of Family Law* 214, 216. Peter Gillies *Criminal Law* 4 ed (1997) LBC Information Services 1997, Sydney, p357 notes that s407A *Crimes Act 1900* (NSW) abolishes the presumption of coercion. That section is virtually identical to the first phrase in s47 *Criminal Justice Act 1925*, save that the New South Wales version omits the first use of the word “committed”. Gillies asserts that in NSW the defence cannot be raised “(it being accepted that there is no defence of coercion independent of the presumption).” But contrast Brett, Waller and Williams, *Criminal Law Text and Cases*, (1993) 7 ed, Butterworths, Sydney, p697 para 12.43. where the authors state that only the presumption was abolished and that no positive affirmation that the defence exists was required.

<sup>353</sup> Hansard, South Australia House of Assembly, 9 October 1940 at p856.

<sup>354</sup> *Ibid*, by the Hon A L McEwin (Northern – Chief Secretary) at p857.

would produce a result “similar to the English law of 1925”. Hon H Homburg,<sup>355</sup> who had been Attorney General of South Australia for several years,<sup>356</sup> referred to clause 10 and emphasised its importance, by demonstrating that the need for the abolition of the presumption of marital coercion:

was brought about by a case<sup>357</sup> which came before our Courts last year in which a man and wife were charged with illegally selling intoxicating liquors. The wife set up the defence that she was influenced by her husband and raised the presumption of law that we now seek to abolish. In England it has already been abolished, still leaving it open to be raised if it can be proved. The amendment will bring our law into line with the amended legislation of Great Britain.<sup>358</sup>

In *R v Whelan*<sup>359</sup> only a few years earlier, the Court of Criminal Appeal of South Australia had dealt with the doctrine at common law but it had not led to legislative intervention. Upon the resumption of the debate<sup>360</sup> there was initially no specific focus on clause 10, but the Hon C R Cudmore<sup>361</sup> described the presumption of marital coercion as having been “more than once termed one of the most stupid provisions of our law” and correctly stated that it would bring South Australia into line with “other parts of the Empire” in abolishing the presumption. However no consideration at all was given to whether the vestigial defence should also be abolished. The South Australian provision remains in force and has been the subject of litigation. In *Goddard v Osborne*<sup>362</sup> a wife was convicted of presenting a false document to secure unemployment benefit. Her husband was found to be a man of brutal and violent nature and she was found to be a simple person. She initially refused to carry out his suggestion but after he hit her several times she agreed to his plan. He accompanied her to the government office but waited outside. The Supreme Court accepted that her fear of the unknown could be particularly potent. In an important contribution, the court accepted that

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<sup>355</sup> Ibid, at p889 on 10 October 1940, the member for Central No. 2.

<sup>356</sup> Ibid, at p888.

<sup>357</sup> *Manuels v Crafter* [1940] SASR 7.

<sup>358</sup> Stanley Yeo, ‘*Coercing Wives Into Crime*’, (1992) 6 Australian Journal of Family Law 214,215 states that the demise of the marital coercion presumption “was welcomed and passed without opposition”, instancing the details of the amendments in the various Australian states. But the record of the Parliamentary debates show there were heated contests as to the doctrine, its modern rationale and significance, as the debates in South Australia and New South Wales amply demonstrate.

<sup>359</sup> (1937) SASR 237.

<sup>360</sup> Hansard, South Australia House of Assembly, 15 October 1940 at p911.

<sup>361</sup> Ibid, 16 October 1940 at p948.

<sup>362</sup> (1978) 18 SASR 481 Casenote [1978] 2 Crim LJ 228.

the mere fact that the offences were committed outside the physical presence or line of sight of the husband was not fatal to the defence of marital coercion.<sup>363</sup> The Court also departed from the earlier South Australian decision in *Manuels v Crafter*<sup>364</sup> which had held that the defence was not available at all in summary proceedings, so the defence was now a general one and not linked to the former felony/misdemeanour distinction which had conditioned much of the criminal law. The court further rejected a prosecution argument that the defence was not available in proceedings brought under an Act of the Commonwealth Parliament, but had to be confined to offences created by State Legislatures. In South Australia the defence had been reinvigorated by judicial interpretation; but it only protected a lawfully married wife.<sup>365</sup>

Western Australia, which abrogated the intraspousal conspiracy exemption in 1987<sup>366</sup> did not abrogate the marital coercion defence until 2003<sup>367</sup> and then only as part of a legislative overhaul to give unmarried persons and persons in de facto marriage situations the identical legal rights as married persons. Section 35 *Criminal Code* [WA] which precluded theft charges between spouses was also repealed so spouses were treated “as if not married”.

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<sup>363</sup> This incidentally aligned with the law in the State of Massachusetts which had never imposed a requirement of immediate physical presence but accepted the constructive presence of the husband sufficed: *Commonwealth v Flaherty* (1886) 5 NE 258 per Oliver Wendell Holmes J; *Commonwealth v Daley* (1888) 18 NE 579, 580. By contrast in Oklahoma a strict personal physical presence test was applied: *Trapp v State* (1954) 268 P2d 913.

<sup>364</sup> [1940] SASR 7. *Manuels v Crafter* had undoubtedly been the spur for the passage of the legislation in the same year which created the statutory defence.

<sup>365</sup> *Brennan v Bass* (1984) 35 SASR 311. In White J held that the defence of marital coercion is available only to a lawfully married wife and does not extend to a de facto wife. Brennan, who was serving a term of life imprisonment, escaped and was harboured by his de facto wife. White J ruled that the words “husband” and “wife” in the statutory defence mean “lawfully married”. The subsequent statutory recognition of de facto relationships and putative spouses in the *Family Relationships Act 1975* [SA] did not partially repeal s328A of the *Criminal Law Consolidation Act Amendment Act 1940* [SA]. The court approved Smith & Hogan, ‘*Criminal Law*’, (4 ed) p209 “the defence is confined strictly to husband and wife and not be extended to unmarried couples living de facto as man and wife.”

<sup>366</sup> s6 *Criminal Code Amendment Act (No 2) 1987* [WA], in force 14 March 1988, *Western Australia Gazette* 14 March 1988.

<sup>367</sup> s118(2) *Acts Amendment (Equality of Status) Act 2003* [WA]. The explanatory memorandum to clause 117 (as it was then numbered) *Acts Amendment (Equality of Status) Bill 2002* [WA] stated that upon the repeal of s32 *Criminal Code* (marital coercion) the general defence of duress provided in s31 *Criminal Code* [WA] would be available to all “regardless of their gender or marital status”.

## VICTORIA

This defence (and other cognate reforms) was introduced upon the recommendation of the Law Reform Commissioner of Victoria (Hon T W Smith, a former Judge of the Supreme Court of Victoria) in 1975 in Law Reform Commissioner Report No 3: '*Criminal Liability of Married Persons (Special Rules)*', Melbourne, June 1975. He concluded that there existed a persuasive justification for a criminal defence that applied only to a limited class of women, notwithstanding that (almost 100 years earlier) an American judge had described the defence as a "relic of a belief in the ignorance and pusillanimity of women"<sup>368</sup> and another American judge in the same era had seen the defence as treating a wife as "a marionette, moved at will by the husband;"<sup>369</sup> neither reference being noted by the Commissioner.

The Victorian Law Reform Commissioner recommended the enactment of the defence in 1975,<sup>370</sup> two years later the English Law Commission (without noting the Victorian work)<sup>371</sup> decided that the spousal conspiracy exemption should be put in declaratory legislation. All other Australian states had by 1975 abolished the presumption except Victoria, although later, in 1999, for the Australian Capital Territory there was to be a real shock when the Supreme Court of that jurisdiction concluded that the presumption was still part of its law. In Victoria the presumption was only abolished by s2(b) *Crimes (Married Persons Liability) Act 1977*.<sup>372</sup> A special defence was warranted, the Commissioner argued, because wifely status increases the susceptibility of coercion from a husband.

Where a wife, as is still commonly the case, has to look to her husband for support and shelter, and especially when she has young children to care for, the pressure upon her of insistent demands, and of threats of abandonment, may in many cases be just as difficult for her to resist as threats of physical violence sufficient to found a defence of duress. Moreover, the duty and habit of loyalty and co-operation which arise from the special relationship of

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<sup>368</sup> *United States v De Quilfeldt* (1881) 5 F 276,278.

<sup>369</sup> *Smith v Myers* (1898) 74 NW 277,278 (Supreme Court of Nebraska).

<sup>370</sup> Law Reform Commissioner (Victoria), Report No 3, '*Criminal Liability of Married Persons (Special Rules)*', Melbourne, June 1975.

<sup>371</sup> '*Marital Coercion – Anachronism or Modernism?*' P J Pace [1979] Crim LR 82, 89.

<sup>372</sup> Noted by P J Pace, '*Marital Coercion – Anachronism or Modernism?*', [1979] Crim LR 82, 83. But the real significance is that over 50 years after the Avory Report which stated that the presumption did not exist in Victoria, it was still in operation.

husband and wife will commonly make it more difficult for a wife to resist pressure from her husband than from a stranger.<sup>373</sup>

He reasoned that non-physical threats or psychological harm may have as much impact as actual violence yet the common law defence of duress may not safely cater for that type of intraspousal cruelty.<sup>374</sup> The recommendation of the Commissioner led to the irony that it was now again a progressive approach to reconsider the desiccated defence of marital coercion, at least as a short-term bridge to a more expansive reform in the law of duress. Therefore in Victoria in 1977 a complete defence to most crimes was enacted where a woman can establish affirmatively that she acted under “coercion by a man to whom she was then married”. It was introduced by the *Crimes (Married Persons’ Liability) Act 1977* [Vic], inserting s336 into the *Crimes Act 1958* [Vic]. This extended criminal defence would promote loyalty and cooperation between spouses and tend, in the interest of public policy, to preserve the stability of marriages.<sup>375</sup> The justification for the defence lay in the realities of married life, that certain wives in certain relationships were mired in oppressive circumstances that denied them genuine voluntariness in their conduct.<sup>376</sup> If the existing criminal law was not sufficiently expansive to protect them then the new defence would go some way to prevent possible uxorial injustice. The presumption of marital coercion however was now an absurdity but the inadequacy of the general criminal law to provide a sufficient defence via the law of duress was such that a special defence only for wives was required as compensation. The Victorian Law Commissioner found support for the marital coercion defence in the common law rule that a wife could not be convicted of harbouring her husband.<sup>377</sup> The Commissioner

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<sup>373</sup> Victoria Law Reform Commissioner, *‘Criminal Liability of Married Persons’* (1975) para 16. Yeo gives various examples that would qualify in evaluating the Victorian defence: “threat of divorce as usual pressure to someone who believes in sanctity of marriage; economic threats, emotional threats to separate and leave her homeless.”; Stanley Yeo “Coercing Wives Into Crime” (1992) 6 *Australian Journal of Family Law* 214, 217.

<sup>374</sup> Since the 1977 Act, the new Victoria Law Reform Commissioner has now unsuccessfully recommended that the marital coercion defence be repealed and assimilated into a wider reformulated general defence of duress: Report No 9, *‘Duress, Necessity and Coercion’* (1990), p47.

<sup>375</sup> Victoria Law Reform Commissioner, *‘Criminal Liability of Married Persons’*, 1975 para 83.

<sup>376</sup> There is no requirement under the statute, unlike the common law, that the wife acted in the presence of her husband.

<sup>377</sup> s338 *Crimes (Married Persons’ Liability) Act 1977* [Vic].

“A married person shall not become an accessory after the fact to any indictable offences or guilty of –

(a) an offence under section 40 of this Act;

(b) an offence under section 52 of the *Summary Offences Act 1966* ; or

(c) the offence at common law of obstructing an officer of justice in the execution of his duty-

successfully recommended that this be extended to husbands. He also argued that the common law unity of husband and wife, recognised by the spousal conspiracy exemption should not be removed but should be given statutory recognition, excepting only treason and murder as being unprotected by the exemption. There was no sufficient basis for differentiating between the offence of conspiracy and that of incitement,<sup>378</sup> so statutory provision for that law reform was also commended. All of these recommendations became law.<sup>379</sup>

While the Victorian Law Commissioner was of the opinion that the marital coercion defence should be inclusionary of any “working relationship between a man and a woman living together as a husband and wife”,<sup>380</sup> he ultimately found decisive against this novel extension the difficulty of establishing such a relationship, an issue which he concluded had unsatisfactorily bedevilled social welfare legislation. The relative ease of proving the existence of a marriage outweighed the considerable uncertainty which attended other relationships in the nature of a marriage. But an argument that the State was more concerned to preserve marriage than de facto arrangements is inconsistent with notions of stability and mutual integrity which are equally available outside of marriage. The subliminal reasoning was that marriage was such a unique institution it deserved special recognition even under the criminal law.

A very important part of the new statutory defence is s336(5) which explicitly and uniquely states that while the wife must discharge an evidential burden it remains for the prosecution to

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By receiving, relieving, comforting or assisting his or her spouse, or the spouse and another person or persons, though with knowledge that the spouse, whether alone or with the other person or persons, has committed an offence and though the purpose of what is done is to enable the spouse, or the spouse and the other person or persons, to escape being apprehended, tried or punished.”

<sup>378</sup> Ibid para 66 and 70. If duress or marital coercion negatives mens rea, then a person who incites another to commit a criminal act under those conditions does not incite another to commit a crime: I R Scott, *The Common Law Offences of Incitement to Commit Crime*, (1975) 4 Anglo-American Law Review, 289, 309.

<sup>379</sup> Section 339 *Crimes (Married Persons' Liability) Act 1977* [Vic].

“1. A married person shall be criminally responsible for incitement or conspiracy to commit treason or murder and for any offence specified in s4 as if he or she were unmarried.

2. Subject to sub-section (1), a married person shall not be criminally responsible for conspiracy with his or her spouse alone, nor for incitement of his or her spouse to commit a criminal offence.

3. Nothing in sub-section (2) shall affect the liability of a married person as a principal offender in any offence except conspiracy or incitement.”

<sup>380</sup> Vic LRC para 81.

negative it beyond reasonable doubt.<sup>381</sup> This is not the interpretation given to the analogous English and Hong Kong provisions<sup>382</sup> which have been held to impose a legal burden on the wife (subject to an argument that to do so is itself unconstitutional as implicating the presumption of innocence). The statutory defence expressly does not affect the law relating to duress.<sup>383</sup>

In *R v Williams*<sup>384</sup> the Victorian Court of Appeal had to deal “for the first time” with the new s336 *Crimes Act 1958* [Vic]. A robbery of a supermarket took place. Surveillance evidence showed that the applicant was involved in the planning and preparation of the robbery including driving one of the cars to the site, being able to communicate with them by walkie talkie and following their get away car in her car after the robbery. The applicant was married to one of the robbers and her defence was duress and also marital coercion. Section 336 *Crimes Act* [Vic] provides for the statutory defence.<sup>385</sup> In an unsuccessful appeal, the Court

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<sup>381</sup> Sub-section 5. Both s32 of the *Queensland Criminal Code Act 1899* [Qld] and s32 of the *Criminal Code Act 1913* [WA] provided for an affirmative defence of marital coercion (until their abrogation in 1997 and 2003 respectively) – while abolishing the presumption: R S O’Regan, ‘*Married Women and the Defence of Compulsion under the Criminal Code*’, (1979) 11 *University of Queensland Law Journal* 20.

<sup>382</sup> *R v Cairns* [2003] 1 Cr App R 662 (CA), *R v Kong Man Heung* [2000] 1 HKC 406 (HC), *HKSAR v Au Yuen Mei* [2000] 1 HKC 411 (CFI).

<sup>383</sup> Sub-section 7.

<sup>384</sup> [1998] 4 VR 301 (CA). Winneke ACJ, Batt JA and Hampel AJA. In *R v Williams* it was held that for the defence to apply to events they must be shown to have had causal significance to the question of dependence required by s336(4) of the statute. The question of the degree of dependence was usually one for expert opinion: For coercion the violence to which the woman is subjected is psychological, whereas in duress it is fear of physical violence: *R v Robins* (1982) 66 CCC (2d) 550, 561 (Qué: CA). In *R v Batt* unreported Supreme Court of Australian Capital Territory, SCC 18 of 1999, 27 September 1999, Crispin J accepted that expert evidence could be given by a wife relying on marital coercion to establish her degree of dependence on her husband, not limited to economic issues but resonating of his power and control.

<sup>385</sup> “(1). Any presumption that an offence committed by a wife in the presence of her husband is committed under his coercion is hereby abolished.

(2). Where a woman is charged with an offence other than treason, murder or an offence specified in section 4, 11 or 14 of this Act, that woman shall have a complete defence to such charge if her action or inaction (as the case may be) was due to coercion by a man to whom she was then married.

(3). For the purpose of this section “coercion” means pressure, whether in the form of threats or any other form, sufficient to cause a woman of ordinary good character and formal firmness of mind, placed in the circumstances in which the woman was placed, to conduct herself in the manner charged.

(4). Without limiting the generality of the expression “the circumstances in which the woman was placed” in sub-section (3), such circumstances shall include the degree of dependence, whether economic or otherwise, of the woman on her husband.

(5). The accused shall bear the burden of adducing evidence that she conducted herself in the manner charged because she was coerced by her husband, but if such evidence has been adduced, the prosecution shall bear the burden of providing that the action or inaction charged was not due to coercion by the husband.

noted that the wife had been actively involved in planning and preparation for the robbery including communicating with her husband and the others “by walkie-talkie and following their getaway car in her car”.<sup>386</sup> On examination of the novel legislation, it concluded that subsection (3) imposed an objective test, while subsection (4) introduced subjective considerations focused on the question of the accused wife’s vulnerability, as her degree of dependence involved the effect of pressure by that husband in that specific marriage. The emphasis was that any question as to the degree of dependency within a relationship required “expert evidence”<sup>387</sup>, especially when the issue was whether and to what extent prior experiences of the wife causally created or exacerbated her dependency within the marriage.

#### AUSTRALIAN CAPITAL TERRITORY 1999

In 1999, the Supreme Court of the Australian Capital Territory decided that the presumption and defence of marital coercion still existed in that jurisdiction.<sup>388</sup> The Australian Code States<sup>389</sup> had an express defence of marital coercion but the Australian Capital Territory had

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(6). This section shall operate in substitution for the common law as to any presumption or defence of marital coercion.

(7). This section shall not affect the law relating to the defence of duress.”

<sup>386</sup> [1998] 4 VR 301, 303. The defence was relied upon in a charge of manslaughter of an infant: *R v Dempsey* [2000] unreported, VSC 527, 28 November 2000, Supreme Court of Victoria, No 1437, Harper J.

<sup>387</sup> In *R v Batt*, unreported Supreme Court of Australian Capital Territory, SCC 18 of 1999, 27 September 1999, Crispin J ruled expert evidence was admissible in relation to “battered women syndrome” and its relationship to the defence of marital coercion. It is striking that in the cases under the English defence no psychological or psychiatric expert evidence ever seems to have been adduced, yet this would be necessarily probative of the issue of uxorial dependency.

<sup>388</sup> A decision reversed by legislation later in the year. D Brown, D Farrier, D Neal and D Weisbrot’s *‘Criminal Laws, Materials and Commentary on Criminal Law and Process in New South Wales’* (1996), The Federation Press, vol 2 p778. “The Northern Territory was the last jurisdiction in Australia to abolish the presumption, in 1983”. That statement proved to be incorrect. “This presumption was, of course, a relic from the period when women had no independent legal status (eg women were unable to vote, hold property in their own name, practice (sic) a profession, and so on). Thus, abolition was seen as a liberal reform aimed at ensuring equality before the law.” In 1992 a writer had made the same mistake in stating that the presumption had been abolished in all Australian jurisdictions, when this was not to happen until 1999 when the Australian Capital Territory legislature rapidly removed it after it had been raised in a trial there in the Supreme Court. Stanley Yeo, *‘Coercing Wives into Crime’*, (1992) 6 Australian Journal of Family Law, p214, 215.

<sup>389</sup> Eric J Edwards, Richard W Harding, Ian G Campbell, *‘The Criminal Codes Commentary and Materials being Cases and materials on the criminal law in Queensland, Western Australia and the Northern Territory’* (1992) 4 ed, The Law Book Company Ltd p329: “Section 32 of the *Griffith Code* sets out a rule that certain criminal acts committed by a married woman in the presence of her husband shall be free from criminal responsibility. This is on the basis of the stunningly dated presumption that her own will must, in such circumstances, have been

always followed the common law. In *R v Batt*<sup>390</sup> a husband and wife had been arraigned for armed robbery before Higgins J, who on 1 March 1999 refused to accept the 18 year old wife's plea of guilty, on the basis that the totality of the prosecution materials suggested that the defence of marital coercion was available to her. The case was adjourned and on its resumption, Crispin J stated that, "it is clear that a presumption of marital coercion could have been raised". He heard evidence from a number of persons including a psychologist,<sup>391</sup> Crispin J noted that the Australian Capital Territory was the only Australian jurisdiction where the presumption and defence still existed. He reasoned that for the defence to succeed, "it must involve a set of circumstances which involve force overbearing the wish and intention of the prisoner and coercing her in a real sense into committing the offence".<sup>392</sup> The judge accepted that the husband had imposed "a long history of violence and other intimidating conduct upon his wife". The husband was "a violent and dangerously unpredictable man who had subjected her to physical violence and who had left her in a state of constant anxiety by threatening to take her child away from her and by the unpredictable and potentially violent nature which he constantly displayed." The wife "was ensconced in a controlling and abusive relationship with an aggressive man who was nine years older and that relationship was characterised by frequent episodes of threats and violence". But Crispin J held that the defence of marital coercion was not made out on the facts by the wife:

The ultimate decision is simply did the prisoner commit this offence because she was coerced into doing so by her husband or did she commit the offence as a result of an independent decision, albeit one that was influenced by a persuasion from her husband and albeit one made in context of a diminished ability to make and adhere to a moral judgment as a result of past abuse.<sup>393</sup>

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overborne by his – constructive compulsion. The *Murray Report* recommended the repeal of this section." It was apparent that s32(2) was wider than s31(1)(d) *Criminal Code* [Qld] which provided for the defence of duress.

<sup>390</sup> unreported Supreme Court of Australian Capital Territory, SCC 18 of 1999, 27 September 1999, Crispin J.

<sup>391</sup> Expert evidence is admissible in relation to "battered woman syndrome": *R v Runjanjic* (1991) 56 SASR 114 at 117, 123, 124.

<sup>392</sup> *Ibid*, *R v Batt* p3.

<sup>393</sup> *R v Batt* p5.

The decision that the defence existed was a catalyst for urgent legislative action to abolish the presumption<sup>394</sup> and within a few months it had been abrogated by a statutory amendment supported by all parties in the Legislature.<sup>395</sup>

## THE SLOW DISAPPEARANCE OF THE MARITAL COERCION DEFENCE IN THE UNITED STATES

A number of American states decided that modern Acts giving married women equal property and political rights had by implication abolished the presumption and in effect the entire defence.<sup>396</sup> But in others it was held that the rules of the common law, modified in relation to property did not alter the presumption of marital coercion.<sup>397</sup> Yet in other states, without reference to contemporary married women's property legislation, it was decided that the presumption simply no longer existed because of a re-evaluation of the common law in contemporary society. In *Neys v Taylor*<sup>398</sup> it was held in 1900 that the presumption remained

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<sup>394</sup> Stanley Yeo, 'Coercing Wives Into Crime', (1992) 6 Australian Journal of Family Law 214,216 exhorted that while the presumption was certainly gone, the new legislation did not state whether the defence still existed.

<sup>395</sup> cf. *R v Peel* and its immediate legislative sequel. The Australian Capital Territory legislated responding to *R v Batt* and passed an amendment abrogating the presumption: "Any presumption of law that an offence committed by a wife in the presence of her husband is committed under the coercion of the husband is abolished." The debate on the amendment via the *Crimes Amendment Bill (No 2) 1999* was supported by all parties in the legislature: Mr J Stanhope MLA, Legislative Assembly of the Australian Capital Territory, 1999, Week 12 Hansard (25 November) p3694 an "archaic and extremely sexist notion". The ACT provision was enacted s407 *Crimes Act 1990* [notified in ACT Gazette No 50: 15 December 1999].

<sup>396</sup> See *Morton v State* (1919) 209 SW 644 and *King v City of Owensboro* (1920) 218 SW 297. In *State v Cauley* (1956) 94 SE 2d 915 a decision of the Supreme Court of North Carolina. (Winborne CJ, Denny, Parker, Bobbitt, Higgins and Rodman JJ). A wife was convicted of aiding and abetting the crime of her husband committing assault with a deadly weapon with intent to kill their three year old child. The wife's defence at trial was marital coercion. Parker J said at p922 "However, with certain exceptions not material to consider here, it is generally held that there is a rebuttable presumption that a married woman was acting under the influence or coercion of her husband where she committed a criminal act in his presence." Parker J added that other American States take the view the presumption is "out of place in this age, and hold against it, and some states have abolished it by statute. See *State v Seahorn* 81 SE 687. Some courts have taken the view that under *Married Women's Acts* completely removing the disabilities of coverture and emancipating married woman, this common law presumption no longer exists."

<sup>397</sup> *Braxton v State* (1919) 82 So 657 (Alabama) and *State v Murray* (1927) 292 SW 434 (Missouri).

<sup>398</sup> (1900) 81 NW 901 Supreme Court of South Dakota. In *Caldwell v State* (1922) 137 NE 179 the Indiana Court of Appeals concluded that the scope of the statute providing for the property of married women was not wide enough to undermine the general nature of coverture and the marital coercion defence. The same result occurred a year later in the same state *Dressler v State* (1923) 141 NE 801; 'Current Decisions' (1923) 33 Yale Law Journal 670, 671. In *Commonwealth v Jones* 1 D&C 2d 269 (Pa 1955) the presumption of coercion was upheld, the court stating that it reflected human experience therefore the equalisation provisions in relation to

in force in South Dakota, notwithstanding the enactment of a *Married Women's Property Act* in 1887. Corson J noted that ss6215 and 6219 of the Compiled Laws of South Dakota together provided together that the “involuntary subjection to the power of superiors” was a statutory defence and that “coverture” was listed as a specific example of subjection in the statute. Section 6221<sup>399</sup> stated: “A subjection sufficient to excuse from punishment may be inferred in favor of a wife, from the fact of coverture, whenever she committed the act charged in the presence and with the assent of her husband.” The appellant argued that these sections had been impliedly repealed by the later matrimonial property legislation. This argument was firmly rejected as it was reasoned that there was no basis to conclude that the more modern and specific matrimonial law intended in any way to alter<sup>400</sup> the long-standing criminal law, conferring the specific defence of coverture. In Kentucky<sup>401</sup> and Tennessee<sup>402</sup> the courts held that the *Married Women's Property Acts* verified that a wife was no longer under control of her husband; other states seeing property legislation designed in favour of a wife as having no broader implications destroying either the presumption or the defence. The pattern of responses by the courts generally tended to show contiguous-state courts adopting the view of the neighbour.

The most extreme position was taken in Oklahoma, Oregon and South Dakota which specifically provided that the law presumed coercion when the wife committed an offence in the presence of her husband.<sup>403</sup> American writers<sup>404</sup> were strongly opposed to the continuation

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personal and property rights that married women now had, was not a valid reference point; Benjamin Paul, *The Doctrine of Marital Coercion*, (1956) 29 Temple Law Quarterly 190, 195.

<sup>399</sup> The statute is unique in speaking of an inference rather than a presumption in this context.

<sup>400</sup> “But it is not in terms at all by inference declared that she shall not be entitled to the protection which the law had previously guaranteed to her. We are unable to discover any conflict...we think the sections are entirely consistent”: *Ney v Taylor* (1900) 81 NW 901, 903 per Corson J for the court.

<sup>401</sup> *King v City of Owensboro* (1920) 218 SW 644.

<sup>402</sup> *Morton v State* (1919) 209 SW 644.

<sup>403</sup> This is the opposite of the position reached by Lord Halsbury in *Brown v Attorney General for New Zealand* [1898] AC 234, 237 (PC). Those three states provided that subjection is inferred when the offence was committed in the presence of the husband.

<sup>404</sup> Kenneth C Sears and Henry Y Weihofen *May's Law of Crimes*, (1938) 4 ed, Little Brown & Co, Boston, p38; At p40 “It is believed that there is nothing in our day to justify the continued existence of the presumption. Accordingly it has been frowned upon as a weak presumption; it has been regarded as inconsistent with the *Married Women's Property Acts*; and it has been repudiated by a few legislatures. In spite of all of this the presumption in most States is still a part of the law”; 1929 91 JP 662, 663 has a significant statement that “the common law development was such that: it was thus sometimes shown what was not coercion, but never positively what was”.

of the presumption and the defence. But the defence was in 1976, available in Oklahoma<sup>405</sup> and it still existed in Missouri in 1977<sup>406</sup> and 1993<sup>407</sup> and in North Carolina in 1999.<sup>408</sup>

In some states the defence had never been invoked at all so it was not until 1930<sup>409</sup> that the State of New Mexico had to consider whether the common law defence existed or not in that jurisdiction. The nearby states of Louisiana<sup>410</sup> and Texas<sup>411</sup> had respectively concluded that because of their civil law and Spanish law lineages the common law defence had not been

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<sup>405</sup> In 1976 *In the matter of Gault* (1976) 546 P 2d 639 (Wilma Gault, married, aged 17; 4 pounds of marijuana discovered in the matrimonial dwelling) the Court of Criminal Appeals of Oklahoma considered the statutory 21 Oklahoma Statutes 1971 s152(7), renders anyone incapable of committing an offence who does so "...under involuntary subjection to the power of superiors..."; s155 provides that the involuntary subjection of power "...exonerates..."; s157 "A subjection sufficient to excuse from punishment may be inferred in favor of a wife from the fact of coverture whenever she committed the act charge in the presence and with the absence of her husband, except where such act is a participation in: (exceptions omitted)"; s159 "The influence of subjection arising from the fact of coverture may be rebutted by any facts showing that in omitting the act charges the wife acted freely." Brett PJ stating at p641 "The possibility that this presumption has become a legal anachronism, a rule whose reason has long since vanished, does not prevent appellant from claiming whatever benefits its employment right bring her because it remains a part of our statutory law." The court held following its earlier decision in *Paris v State* (1939) 90 P 2d 1078; *Stewart v State* (1941) 111 P 2d 200 that the sections created a true presumption and not a mere permissible inference – although, the presumption is a "slight one, rebuttable by slight circumstances".

<sup>406</sup> In *State v Davis* (1977) 559 SW 2d 602 Missouri Court of Appeals (Shangler PJ, Welborn and Higgins Special Judges.) the defendant, Geraldine Davis was convicted of burglary and theft. The evidence was that she, together with her husband and another, committed the offences. The wife contended that the evidence showed she was under the compulsion of her husband. The wife was the driver of the getaway car used by her husband and another to remove items stolen from private residences. Inside the vehicle were found burglarious instruments proven to have been used in the various burglaries. At p605 Shangler PJ said that in the criminal law of the State of Missouri "A cognate rule, developed at common law and adopted into our jurisprudence, holds that a crime [other than those beyond the operation of duress] committed by a wife in the presence of her husband is presumed, in the absence of evidence to the contrary, to have been done under the constraint of the husband is therefore excused." There was "little in the present organisation of society upon which the prima facie presumption [that a crime committed by a wife in the presence of her husband results from his coercion]...can stand, and certainly nothing calling for any extension of the presumption". .

<sup>407</sup> A modified version of the marital coercion presumption still exists in some jurisdictions: *State of Missouri v Isa* (1993) 850 SW 2<sup>nd</sup> 876 rejecting a modified claim for the coercion presumption by Mrs Isa who was appealing a conviction for murdering her daughter committed in the presence of her husband. "Marriage also imposed duties upon husbands. Husbands were obliged to support their wives, although this obligation did not extend beyond providing wives with necessities. Placing the duty on husbands to support their wives relieved the state of its burden of supporting women who, faced with the economic and social constraints of the time, would have been rendered destitute. Husbands also were held responsible for their wives' premarital debts, as well as all debts that occurred during the marriage. [See generally Blackstone at 432]."

<sup>408</sup> *State v Owen* (1999) Supreme Court of North Carolina No COA 98-413, 15 June 1999, per Timmons – Goodson J at [z] "As we conclude that the presumption of spousal coercion remains a valid affirmative defense" Lewis and Walker JJ concurring.

<sup>409</sup> *State v Asper* (1930) 292 Pac 225 in which spouses were jointly indicted for selling liquor to a minor.

<sup>410</sup> *State v Weeden* (1927) 114 SE 604 (Supreme Court of Louisiana).

<sup>411</sup> *Marks v State* (1942) 164 SW 2d 690 (Court of Criminal Appeals of Texas).

inherited. The New Mexico Court assumed that the common law position was applicable<sup>412</sup> in that state but queried whether the principle may have disappeared “by reason of modern statutes, ideas and practices affecting the legal and social status of married women”.<sup>413</sup>

By 1930 the defence had been abrogated by statute in New York<sup>414</sup> and had disappeared in Canada 40 years earlier.<sup>415</sup> In Arkansas<sup>416</sup> from 1860 the common law defence had been modified so that the presumption no longer existed although actual coercion was a defence for a married woman. Equally in Colorado<sup>417</sup> since 1921 the statute provided that a woman is excused if she commits a crime in the presence of her husband “provided it appears from all the facts and circumstances of the case that violent threats, command or coercion were used.” It was recognised that the common law presumption arose out of the fact that a feme-covert had no legal status separate from that of her husband, a situation which had been radically altered by the *Married Woman Acts* and other legislation emphasising equality. The result was that in practice courts would “construe the presumption of marital coercion very strictly, and to give it less weight than formerly”<sup>418</sup> as the historical reason for the rule no longer existed.<sup>419</sup>

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<sup>412</sup> DSG ‘Note’ (1930-1931) 3 Rocky Mountain Law Review 220, 222 describing it as “in line with the current weight of authority.”

<sup>413</sup> *State v Asper* (1930) 292 Pac 225 (Supreme Court of New Mexico) per Watson J for the court.

<sup>414</sup> Penal Laws of New York (Consolidated Laws Sec1092).

<sup>415</sup> s13 *Criminal Code 1892* [Can]. Therefore in *R v McGregor* (1895) 26 OR 115 the defence was denied where a wife had sold liquor in the presence of her husband.

<sup>416</sup> *Freel v State* (1860) 21 Ark 212; *Edwards v State* (1872) 27 Ark 493. Georgia followed suit: *Bell v State* (1893) 18 SE 186.

<sup>417</sup> *Compiled Laws of Colorado* 1921, Sec 6641.

<sup>418</sup> DSG ‘Note’ (1930-1931) 3 Rocky Mountain Law Review 220, 222.

<sup>419</sup> In *State v Ma Foo* (1892) 19 SW 222 the court said “there is little in the present organization of society upon which they prima facie presumption itself can stand, and certainly nothing calling for any extension of the presumptions”.

By the middle of the twentieth century a writer<sup>420</sup> could state that allowing a wife the defence of marital coercion “is the policy followed in the majority of the states in America”. However, he noted that the doctrine was losing ground because of the elevated position of married women who had generally now achieved economic independence.<sup>421</sup> Wives were no longer tied to the purse-strings of their husbands. For over 30 years a number of state Supreme Courts had decided that the emancipation of women should be followed by the imposition of full criminal responsibility in wives. The attainment of a position of equality ought to be accompanied by correlative obligations and responsibilities which those rights and privileges entailed. The same conclusion had been reached in Canada and New Zealand by legislation in the late nineteenth century and was emphatically reaffirmed by twentieth century caselaw.<sup>422</sup> In addition there was a discernible tendency by the mid twentieth century in American courts to hold that the presumption was slight and easily rebuttable.<sup>423</sup> Every American jurisdiction had also made some provision to exclude certain offences from the defence, although murder and treason had always been excepted at common law.<sup>424</sup> David S Evans noted<sup>425</sup> that there

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<sup>420</sup> Benjamin Paul, *The Doctrine of Marital Coercion*, (1956) 29 Temple Law Quarterly 190, 193. Jerome Hall, *General Principles of Criminal Law*, (1960) 2 ed, Robbs-Merrill Company, Indianapolis, at p418 stated that the modern law of coercion derived from marital coercion although marital coercion was now “relatively unimportant in modern America. The same was still true in 1973. David Rosenberg, *Coverture in Criminal Law: Ancient “Defender” of Married Women*, (1973) 6 University of California Davis Law Review 83, 99. Anne M Coughlin, *Excusing Women* [1994] 82 California Law Review 1, 29 “The marital coercion defence...had all but disappeared in [the United States] by the mid 1970s.”: *Commonwealth v Santiago* (1975) 340 A 2d 440, 445-446 described the defence as “outmoded, outdated and inapplicable to modern society” as it formally represented a hierarchical allocation of power within marriage.

<sup>421</sup> In *Callot v Nash* (1923) 39 TLR 291, 293 McCardie J stated: “The position of married woman in status and in property has vastly improved in recent years. Her economic independence is now established.” Shakespeare in *The Taming of the Shrew* had the title character, Kate, not only become chastened and reformed by the end of the play but she also advised other recalcitrant wives to obey their husbands:

“Such duty as the subject owes the prince  
Even such a woman oweth her husband,  
And when she is forward, peevish, sullen, sour  
And not obedient to his honest will,  
What is she but a foul contending revel  
And graceless traitor to her loving lord?”

<sup>422</sup> In *R v Robins* (1982) 66 CCC (2d) 550, 563 the Québec Court of Appeal (Crête CJQ, Mayrand and Malouf JJA) stated that “for no one continues to believe that the married woman, in the presence of her husband, only acts as his puppet.” An existence would be “incompatible with the prevailing morals and state of our law.”

<sup>423</sup> David S Evans, *Notes and Comments* (1956) 35 North Carolina Law Review 104, 105.

<sup>424</sup> *Martin v Commonwealth* (1925) 123 SE 348. The decision in *State v Kelly* (1888) 38 NW 503 (murder) is plainly wrong.

<sup>425</sup> David S Evans, *Criminal Law - Presumption of Coercion - Crimes Committed by Wife in Husband's Presence*, (1956) 35 North Carolina Law Review 104, p107.

was little uniformity<sup>426</sup> in the different American states as to how the defence of marital coercion should be modified or applied. A number of states had abolished the doctrine by statute.<sup>427</sup> The most remarkable provision was in the Penal Code of Georgia which required that the coercing husband was to receive the punishment that his wife would have got under the criminal law had she not been under his coercion.

A married woman, acting under the violent threats, commands or coercion of her husband shall not be found guilty of any crime or misdemeanour not punishable by death or life imprisonment; and, with this exception, the husband shall be prosecuted as principal, and, if convicted, shall receive the punishment which otherwise would have been inflicted on the wife, if she had been found guilty.<sup>428</sup>

In 1956 it could still be said that the majority of American states provided for the defence of marital coercion.<sup>429</sup> Some states applied the common law,<sup>430</sup> others civil law, Spanish-infused

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<sup>426</sup> He asserts that four states had abolished the defence entirely, nineteen had abolished the presumption but left the defence available (14 by statute and five by court decision), 16 still recognised the doctrine when the issue was last before the court, and three had specifically provided for the presumption by statute. The doctrine was abolished by judicial decision in a number of American states. In Arkansas it was first abolished in 1860, *Freel v State* (1860) 21 Ark 212, confirmed in *Edwards v State* (1872) 27 Ark 493. Kansas was the only other state to abrogate the defence in the nineteenth century: *State v Hendricks* (1884) 4 Pac 1050, 1053. "The laws of Kansas do not presume that a wife who unites with her husband in the commission of a crime acts under his coercion. On the contrary, the laws of Kansas presume that all persons of mature age and sound mind act upon their own volition, and are responsible for their acts. The statutes relating to crimes and punishments, and to the mode of procedure in criminal actions, do not, except in rare instances, make any distinction between married women and unmarried women, or between married women and married men, or between any kind of women and any kind of men." per Valentine J. This decision was followed by Tennessee in *Morton v State* (1919) 209 SW 644, Kentucky in *King v City of Owensboro*, (1920) 218 SW 297 West Virginia in *State v McDonie* (1924) 123 SE 405 and Iowa in *State v Renslow* (1930) 230 NW 316.

<sup>427</sup> *Illinois Statutes Anno c 38 §596* (1935), *New York Penal Law §1092* (1944), *California Penal Code §26* (Deering 1950).

<sup>428</sup> *Georgia Code §401* (26PC) 1953.

<sup>429</sup> Benjamin Paul, 'The Doctrine of Marital Coercion', (1956) 29 Temple Law Quarterly 190, 193. In *Commonwealth v Jones* (1955) 1 D&C 2d 269 the presumption of coercion was upheld by caselaw with the Court stating that it had continuing validity and was not affected by any change in a wife's property or personal rights.

<sup>430</sup> In *State v Weeden* (1927) 114 SE 604 Supreme Court of Louisiana. (O'Niell CJ, Overton, Land, St Paul, Rogers, Brunot and Thompson JJ) a husband and wife were charged in separate indictments with the manufacture and sale of intoxicating liquor. The wife was convicted of selling beer, and appealed. The evidence showed that the husband and wife operated the relevant place and that on the occasion in question the husband sold the witnesses whisky and the wife sold them beer. Land J at 605 said "Since the common law is the basis of the criminal law of this State, we are governed necessarily by its principles, regardless of what may be the ruled followed in the decisions of our sister States. As stated in *Wharton's Criminal Law*, 11 ed, pp128 and 129 s96. By the English common law, if a wife is a party to a crime under her husband's direct command and constraint, she is entitled to an acquittal; and though by some of the old writers an exception is made in cases of treason, murder, and robbery, the weight of authority is against this exception. It is also a doctrine of the same law that if a crime of minor grade be committed by a wife in company with or in the presence of her husband, it is a rebuttable presumption of law that she acted under his immediate coercion."

law and others had modern criminal codes. Another writer sighed about the “ancient problem of marital coercion”<sup>431</sup> which arose before the Supreme Court of North Carolina also in 1956. That court affirmed the existence of the presumption and the defence. Where a wife committed a felony in the presence of her husband it was a fatal error in a jury trial that the judge did not leave the defence even if it was obvious that the wife was taking an active part.<sup>432</sup> It was held in another case,<sup>433</sup> that the defence did not prevent spouses conspiring together. The presumption was a weak one and domination of husbands by wives is as likely as the reverse. Cases invoking marital coercion were not uncommon across the United States.

Oklahoma<sup>434</sup> still retained the presumption of marital coercion by 1976. The Court of Criminal Appeals<sup>435</sup> of Oklahoma considered the statutory defence, Brett PJ noting: “The possibility that the presumption has become a legal anachronism, a rule whose reason has long since vanished, does not prevent appellant from claiming whatever benefits its employment might bring her because it remains a part of our statutory law.” The court held<sup>436</sup> that the statute created a true presumption and not a mere permissible inference in favour of a wife. But Oklahoma had exempted from the defence a whole list of crimes<sup>437</sup> yet a wife could still claim it successfully where she was charged with aiding and abetting her husband in a rape.<sup>438</sup> In Texas, the modern law provides that evidence of marital coercion only goes to mitigation.<sup>439</sup>

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<sup>431</sup> Rex A Collings Jr, ‘*Criminal Law and Administration*’, (1957) Annual Survey of American Law 93, 104.

<sup>432</sup> *State v Cauley* (1956) 94 SE 2<sup>nd</sup> 915, affd (1957) 97 SE 2d 115.

<sup>433</sup> *United States v Anthony* (1956) 145 F Supp 323, 341.

<sup>434</sup> *Oklahoma Statutes Annotated* tit 21 § 157 (West 1958); *Goodwin v State* (1973) 506 P 2d 571 (Oklahoma Court of Criminal Appeals). *In the Matter of Gault* (1976) 546 P 2d 639 (Oklahoma Court of Criminal Appeals: 17-year-old wife, four pounds of marijuana discovered in matrimonial dwelling)

<sup>435</sup> *In the Matter of Gault* (1976) 546 P 2d 639, 641.

<sup>436</sup> Following its earlier decisions in *Paris v State* (1939) 90 P 2d 1078; *Stewart v State* (1941) 111 P 2d 200.

<sup>437</sup> *Oklahoma Statutes Annotated* title 21 § 157 (1958), including seduction, child abuse, abortion, bigamy.

<sup>438</sup> *Commonwealth v Balles* (1946) 62 Montg. 293.

<sup>439</sup> *Texas Penal Code Annotated* art 32 (1952) stating that in non-capital cases, a coerced wife, receives only half the punishment that would otherwise have been administered. In capital cases, she only is imprisonable.

By 1973<sup>440</sup> marital coercion still existed in 24 of the 50 states<sup>441</sup> with the defence uncertainly existing in four others. But legislative intervention had seriously whittled away much of its importance. As far back as 1885, the Californian statute only provided for the defence in offences other than felonies.<sup>442</sup> This early approach was one of several legislative and judicial techniques to narrow the ambit of the defence. The American courts became frustrated with the defence and generally decided that it only raised a weak presumption easily rebutted.<sup>443</sup> In *Commonwealth v Barnes*<sup>444</sup> the entire defence of marital coercion was eliminated in 1976 by judicial decision of the Supreme Judicial Court of Massachusetts. Braucher J for the court observed that the female claimant of the defence had been convicted of both breaking and entering a building to commit a felony and with being an accessory after the fact to murder. The court prospectively<sup>445</sup> abrogated the defence of marital coercion and also examined a local statute that provided for a “defense of affinity”.<sup>446</sup> The appellant inconsistently claimed at trial that she was married to the principal in Arkansas and/or Virginia in 1965 and under the common law of the State of Rhode Island. However she also relied upon the statutory defence

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<sup>440</sup> David Rosenberg, ‘*Coverture in Criminal Law: Ancient “Defender” of Married Women*’, (1973) 6 University of California Davis Law Review 83, 91. At p92 a table is set out identifying the states by class. However at p97 the author erroneously and without references states “Thus, Canada, South Africa and Scotland all apply the doctrine to varying degree, while England and India reject it”. None of these jurisdictions except England applies it at all. Canada (1892), South Africa (1922) removed it by statute and case law respectively. Scotland and India have never accepted the doctrine. Four American States; Minnesota (1947), New York (1944), Washington (1952) and Wisconsin (1955) completely abrogated the common law presumption and defence. A large number of other states took action to modify the common law rule by abolishing the presumption but perpetuating the defence, with the burden on the wife to prove the defence. Texas oddly provided that the presumption is abolished and the defence is removed but in relation to sentence the wife should receive only one-half the punishment that would otherwise have been administered, so that in that state coercion does not excuse the crime but only serves to mitigate the punishment. *Texas Penal Code Annotated*, Art 32 (1952).

<sup>441</sup> In 1971 a federal court indicated that the marital coercion presumption still existed *United States v Harris* (1971) 328 F Supp 973.

<sup>442</sup> *California Penal Code* §26 provides “All persons are capable of committing crimes except...(7) Married women (except for felonies) acting under the threats, command or coercion of their husbands”; *People v McCann* (1956) 43 Cal Rptr 789, 793.

<sup>443</sup> David Rosenberg, ‘*Coverture in Criminal Law: Ancient “Defender” of Married Women*’, (1973) 6 University of California Davis Law Review 83, 93: “a curiously grudging [recognition] whereby the courts rather weakened the presumption than discard it entirely”.

<sup>444</sup> *Commonwealth v Barnes* (1976) 340 NE 2d 863 (Supreme Judicial Court of Massachusetts) (Tauro CJ, Quirco, Braucher, Hennessey and Kaplan JJ)

<sup>445</sup> *Ibid* 865 “...as to crimes committed hereafter we abandon any presumption that a wife who acts in her husband’s presence acts under his coercion”. Noting at 867 “...a rule favourable to criminal defendants, no matter how irrational, cannot be overruled with retrospective effect”.

<sup>446</sup> GL c274 X 4, st. 1943, c488 X 1 “Whoever, after the commission of a felony, harbors, conceals, maintains or assists the principal felon or accessory before the fact...knowing that he has committed a felony...[commits an offence]...The fact that the defendant is the husband or wife, or by consanguinity, affinity or adoption, the parent or grandparent, child or grandchild, brother or sister of the offender, shall be a defence to prosecution under this section.”

of affinity, if the court concluded that her marriage was invalid. That defence only applied “in a marriage context” and it was argued on her behalf that in failing to extend to a cohabitee it violated her equal protection guarantees.<sup>447</sup> The prosecution rejoined by putting in issue the purpose<sup>448</sup> of the affinity immunity, which it argued was as a matter of public policy restricted to persons lawfully married. The court, despite noting the view of a leading writer,<sup>449</sup> explicitly found that the statutory provision was constitutional as being not irrational in delimiting its coverage to include the broad categories of consanguinity, affinity and adoption yet excluding “close friends, employees, business partners and paramours”.<sup>450</sup> The purpose and objective of the law was to only protect persons related by blood or by marriage. Other categories, no matter how possibly deserving they may be on an individual basis, were outside the central theme of this ameliorative law.

In its consideration of the common law defence of marital coercion, Braucher J first referred to the history of the general defence of duress<sup>451</sup> in Massachusetts and then to the “separate principle”<sup>452</sup> of marital coercion. The latter defence had even a longer<sup>453</sup> historical lineage, as it was imported with the common law which had actively engaged it for almost 1000 years. A significant reason why that separate defence had flourished was said to be attributable to the unavailability of the benefit of clergy to women in medieval England. As early as 1927 the same court had considered the defence and concluded<sup>454</sup> that because of “the wider liberty of married women established by legislative enactments and by the usages of society” the force of the defence had considerably diminished. The disputable presumption of coercion was in contemporary society “more easily overcome by evidence”<sup>455</sup> but until now it remained

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<sup>447</sup> Art 1 and 10 Declaration of Rights of the Massachusetts Constitution; Fourteenth Amendment, Constitution of the United States.

<sup>448</sup> Ibid 866 “...somewhat obscure...” as it amounts to a “license to destroy evidence”.

<sup>449</sup> Roland Perkins, *Criminal Law*, (1969) 2 ed p683 “In view of the moral timbre of our time, however, even if it be viewed as weakness, it is asking too much of a jury to expect a conviction of one who has merely opened his door or given some similar aid to a parent, child or other intimate relation”.

<sup>450</sup> Ibid 867.

<sup>451</sup> Traceable to *Commonwealth v Elwell* (1840) 2 Metc 190, 192.

<sup>452</sup> Ibid 867.

<sup>453</sup> Traceable to *Martin v Commonwealth* (1805) 1 Mass 347, 391; *Commonwealth v Lewis* (1840) 1 Metc 151, 153.

<sup>454</sup> *Commonwealth v Helfman* (1927) 155 NE 448, 450.

<sup>455</sup> *ibid*.

extant. Braucher J noted that in many jurisdictions<sup>456</sup> the presumption<sup>457</sup> had been abolished and the court concluded that it would lay “this ghost to rest” so that the position of married women “or anyone else”<sup>458</sup> would prospectively be, in terms of criminal law, indistinguishable in relation to duress or coercion from that of any other.

The defence of coercion of marital coercion is still available in a few American jurisdictions today<sup>459</sup>, but it is now an exceptional rarity. However, it has been argued that the defence should be seen as a precursor to, and succeeded by, battered women syndrome.<sup>460</sup> That modern syndrome is not gender-specific<sup>461</sup>, but almost every decided case involves a female victim. It permits a claim of excusatory conduct by women (as opposed to wives) to avoid criminal responsibility almost invariably in relation to males, where the focus is on the dynamics of the impugned relationship. It is open to criticism as reinforcing the same negative stereotypes about women implied in the marital coercion defence. This modern syndrome, it has been argued, is a valid reconfiguration of the former marital coercion defence, which unhappily is predicated upon assumed gender traits.<sup>462</sup> A common and central feature of both the defence and the syndrome is the notion of excusable dependency. In the syndrome, the female is perceived as suffering from a mental health disorder<sup>463</sup>, explicated as ‘learned helplessness’.<sup>464</sup> It is distinguished by discernible emotional and behavioural disabilities, leaving the woman dysfunctional and incapable of resisting threats, pressure or coercion from the male abuser. That form of dependence, often reinforced by economic

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<sup>456</sup> Roland Perkins, ‘*Criminal Law*’ (1969) 2 ed, p915 “the trend against it is so obvious and so persistent as to forecast its eventual disappearance.”

<sup>457</sup> The abolition of the presumption though still left the defence, as in s47 *Criminal Justice Act 1925* [UK].

<sup>458</sup> *Ibid* 867.

<sup>459</sup> *State of Missouri v Isa* (1993) 850 SW (2d) 876, noted Margaret J Chriss, ‘*Troubling Degrees of Authority: The Continuing Pursuit of Unequal Marital Rules*’, (1993) 12 *Law and Inequality Journal* 225, 228 fn 20. It has been recently reaffirmed to exist by the highest court of North Carolina. *State v Owen* unreported Supreme Court of North Carolina No COA 98-413, 15 June 1999.

<sup>460</sup> Ann M Coughlin *Excusing Women* (1994) 82 *California Law Review*, p1, 48-49. “The coincidence in timing is striking. All but a dead letter in this country by the mid-1970’s, the marital coercion doctrine reappeared, with its patriarchal understandings about women’s incapacity for responsible conduct virtually intact, at that precise moment, in the form of the battered woman syndrome defense.” See also p51-57

<sup>461</sup> In *Commonwealth v Kacsmar* (1992) 617 A 2d 725, 726 it was held also applicable to males.

<sup>462</sup> In *United States v Anthony* (1956) 145 F Supp 323, 34 a Federal judge had stated that domination of husbands by wives is just as likely as the reverse.

<sup>463</sup> Lenore EA Walker ‘*Battered Women Syndrome and Self-Defense*’ (1992) 6 *Notre Dame Journal of Law Ethics and Public Policy* 321, 331.

<sup>464</sup> Lyn Y Abramson, Martin EP Seligman, John D Teasdale ‘*Learned Helplessness in Humans: Critique and Reformulation*’ (1978) 87 *Journal of Abnormal Psychology* 49, 54

pressures, is on analysis, little different from the very vulnerability which beset wives and underlies the ideology of the defence. The recognition and development of the syndrome did generally coincide with a number of international instruments<sup>465</sup> recognising and affirming the rights and status of women. The slow demise of the marital coercion defence did not, however, lead to the creation of the battered women syndrome as was argued<sup>466</sup>. While a shared doctrinal connection exists, in terms of the provision for and recognition of the class of dependent women incapable of independent cognition, there is no causal link between them. One had very substantially atrophied before the other emerged as a result of enhanced understanding in the area of mental health analysis. Both recognise that coercive conduct may be constituted by a disparate variety of threats or actual physical or psychological violence<sup>467</sup>, so that the woman is subjugated to the overriding will of the male which dictates her actions. There is no evidence that the defence spawned the syndrome. The syndrome is an enlightened approach designed to bridge the inadequacy of the defences of compulsion and duress. But it is not a defence in most common law jurisdiction in its own right, but a form of evidence. It is available as an adjunct to the defences.

The syndrome eschews any reliance on the common law concept of the husband's presence<sup>468</sup>, being a more protean form of excuse. It is a hybrid which engages aspects of both psychological dependence and the *raison d'être* for the defence of compelled involuntary behaviour<sup>469</sup>, but without the imprimatur of a free-standing defence. Its efficacy lies in its ability to present how judgment and perception can be overborne. The syndrome provides

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<sup>465</sup> United Nations General Assembly, A/RES/48/104, 1993 '*Declaration on the Elimination of Violence against Women*' which in its preamble states "Recognizing that violence against women is a manifestation of historically unequal power relations between men and women, which had led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men."

<sup>466</sup> Anne M Coughlin '*Excusing Women*' (1994) 82 California Law Review 1, 57 "Dressed up as a duress claim, the battered woman syndrome defense resembles almost perfectly the marital coercion doctrine".

<sup>467</sup> In *R v Richards (Maureen Christine)* unreported, New Zealand Court of Appeal, CA272/98, 15 October 1998 a woman who "incontestably was suffering from Battered Women's Syndrome" could not rely on compulsion in the absence of her abusive partner while the offence was committed.

<sup>468</sup> Rebecca Cornia '*Current Use of Battered Woman Syndrome: Institutionalization of Negative Stereotypes About Women*' (1998) vol 8 UCLA Women's Law Journal 99, 105-107 states that the syndrome is the doctrinal heir to the defence.

<sup>469</sup> *R v Oakes* [1995] 2 NZLR 673, 675 (CA) "the reality of the syndrome and its effects are not in question". In *R v Lavalley* (1990) 55 CCC (3d) 97, 118 the cyclical nature of the abuse was highlighted. Anne M Coughlin '*Excusing Women*' (1994) 82 California Law Review 1, 58. The syndrome "vigorously reinforces the hierarchical allocation of power within marriage that supported the marital coercion doctrine".

confirmation that uxorial dependence has been exploited by men for centuries and continues to do so.<sup>470</sup> In that sense, it bridges the defence. The marital coercion defence for much of the previous millennium displayed vitality as its underpinning theory possessed a real moral force, which the syndrome now advances.

## COMPARISON BETWEEN DURESS AND COERCION

Unless 'coercion' means something more than duress/compulsion as understood in that common law defence, the entire statutory defence is not only otiose, but actually imposes additional formidable hurdles in front of any married woman. It is a pointless gesture to create a statutory defence only for married women, if the operative content of the defence exactly coincides with the diameter of the common law defence. It is apparent from the speeches in Hansard that the government of the time intended, quite explicitly, to create a larger liberating defence than the common law provided. This could be achieved by either or both of two means: the widening of 'coercion'<sup>471</sup> beyond physical threats or actions as the concept, or the liberalisation of the requirement of presence, as understood in the cognate common law defence. To extend both concepts would introduce a significant benefit for married women and would validate the utility of the special defence. There is no discrete consideration of the concept of 'presence' in any of the parliamentary debates, where the principal issue was whether the special position of married women could justify a separate defence of virtually general application. Glanville Williams said of s47 "[t]hese simple-seeming words raise an almost insoluble problem of interpretation"<sup>472</sup> as the issue is whether undefined 'coercion' in the section creating the defence is simply a synonym for duress/compulsion. If a married woman only has to raise an evidential<sup>473</sup> burden, rather than establish an affirmative burden, then the statute does provide a considerable advance beyond the common law position. The

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<sup>470</sup> "The scientific bases for our understanding of woman's submissive nature may have changed, but the underlying understanding endures": Anne M Coughlin *'Excusing Women'* (1994) 82 California Law Review 1, 62.

<sup>471</sup> Rupert Cross & P Asterley Jones, *'An Introduction to Criminal Law'* (1953) 3 ed, Butterworth and Co (Publishers) Ltd London, p65, conjectures whether 'coercion' covers anything other than threats of physical violence.

<sup>472</sup> Glanville Williams, *'Criminal Law: The General Part'*, (1961), 2 ed, Stevens & Sons Ltd, London p764.

<sup>473</sup> J C Smith & Brian Hogan, *'Criminal Law'*, (1965) London p130.

affirmative defence would require the wife to establish the defence on the balance of probabilities<sup>474</sup>. There was, however, nothing in the parliamentary debates to give credence to this interpretation as the manifest intention was to squarely place the persuasive burden of proof on a wife. This is unequivocally apparent from the debates.

Recent constitutional instruments such as the *Human Rights Act 1998* [UK] now mandate that any derogation of the presumption of innocence (which is always implicated when the burden of proof on any element of an offence is placed on a defendant) must be justified according to the strictures of proportionality, with an increasing tendency for legislation to be read down so that an ostensible affirmative defence is interpreted by constitutional construction as only imposing an evidential burden. In relation to marital coercion such a construction would involve the overruling of every one of the existing few decisions on the defence, as all have either assumed or explicitly found that the wife carries an affirmative burden of proof. A reallocation of the burden of proof would mean that as with the common law defence of duress, so too would the statutory defence require the prosecution to disprove it beyond reasonable doubt, once the wife had raised the initial evidential burden to make the defence a live issue.

The terminology in case law is distractingly inconsistent. Sometimes duress is erroneously used interchangeably as a synonym for coercion; sometimes coercion is seen as simply the orthodox defence<sup>475</sup> of duress as merely applied to a married woman. One argument against the retention of the defence funded by this terminological confusion, is that it is not sufficiently distinct from duress ‘to give it much practical utility.’<sup>476</sup> Marital coercion, as well

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<sup>474</sup> *R v Hansen* [2007] 3 NZLR 1, 18 para [30] per Elias CJ; *Jayasena v R* [1970] AC 618, 623 (PC).

<sup>475</sup> In 1883 Sir James Fitzjames Stephen ‘*History of the Criminal Law in England*’ specifically doubted whether duress was available as a general defence, although as a trial judge he specifically permitted a (successful) defence of marital coercion as late as 1885 in *R v Dykes et Uxor* (1885) 15 Cox CC 771 where husband and wife were indicted for highway robbery with violence.

<sup>476</sup> Glanville Williams, ‘*Textbook of Criminal Law*’ (1978) Stevens & Sons, London, p585. “It is plainly unrealistic to ascribe to Parliament the intention of treating the defences of duress and marital coercion in an altogether disparate manner”. Robin S O’Regan, ‘*Essays on the Australian Criminal Codes*’, (1979) The Law Book Company Ltd, Sydney at p126, “These statutory defences of marital coercion have a quaint ring about them ...and serve no useful point if, ...the defence of duress is not limited to threats of death or violence.”

G L Peiris, ‘*Duress, Volition and Criminal Responsibility: Current Problems in English and Commonwealth Law*’, (1988) 17 *Anglo-American Law Review* 182, 197-198 also noting “the proliferation of decided cases” now relating to duress.

as duress, are unsuccessful where the wife acts “as an independent and autonomous individual”.<sup>477</sup> Both defences involve involuntariness, where the cognition of the actor has been captured by the controlling power of another, a person in a position of dominance. By the presumption of marital coercion that dominance was taken to be a verity a natural aspect of ordinary married life. A husband was also able to coerce his wife by threatening not her, but a third party, such as their child.<sup>478</sup> In that way the child became an innocent instrument who reflected the psychological awe of one parent against the presumed weaker one who lacked, the law believed, the fortitude to resist. The limits of fortitude are the stuff of duress.

The statutory defence created by s47 *Criminal Justice Act 1925* [UK] actually places a wife in a disadvantaged position in relation to the same comparator under the common law defence of duress. The section imposes the legal burden of proof to establish the defence on the wife, whereas in duress the wife has only an initial evidential burden which if discharged then requires the prosecution to negative the defence beyond reasonable doubt. Further the statute expressly removes from the protective covering of the defence the offence of treason; yet it has been accepted that the common law defence of duress is available in relation to treason.<sup>479</sup>

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<sup>477</sup> See *R v Fournier* (1991) 15 WCB (2d) 314 (NWTSC) per de Weerd J at para [11]. Wayne R La Fave and Austin W Scott Jr, *Handbook on Criminal Law*, (1972), West Publishing Co, St Paul Minnesota at p380 “Something less in the way of pressure was required for a wife to be coerced than for an ordinary person to meet the requirements of the defence of duress: One early English case held that the husband’s near command would do.” But no analysis of the uxorial difference was made.

<sup>478</sup> Paul H Robinson, *Criminal Law* (1995) Aspen Law & Business at p537 noting *State v Toscano* (1977) 378 A 2d 75: conviction quashed for failure to allow jury to consider whether threats against defendant and family qualified as duress.

<sup>479</sup> In *Director of Public Prosecutions for Northern Ireland v Lynch* [1975] AC 653 Lord Morris of Borth-y-Gest accepted that duress was available as a defence to at least some forms of treason: relying on *Oldcastle’s Case* (1419) Hale 1 PC 50; *McGrowther’s Case* (1746) Fost 13; *R v Stratton* (1779) 1 Doug KB 239; *R v Purdy* (1946) 10 J Cr L 182 (Oliver J). While hardly a common offence it does still get prosecuted in the common law; *State v George Speight* [2002] NZAR 922, 923 (Fiji High Court) which refers to other South Pacific instances of the offence.

## LAW REFORM

Law reform of the marital coercion defence was urged as early as 1845,<sup>480</sup> then 1879,<sup>481</sup> then 1922,<sup>482</sup> then 1977,<sup>483</sup> then 1993<sup>484</sup>. As a defence, it has survived repeated attempts to remove it.<sup>485</sup> It should be debunked as inimical to rights of equality.

The English Law Commission in 1977<sup>486</sup> and 1993<sup>487</sup> proposed the abolition of the entire statutory defence. Earlier in the nineteenth century there had twice been recommendations made limited to removing the presumption. The Royal Commission in 1845<sup>488</sup> recommended the abolition of the presumption (which was only adopted almost 80 years later). It was also supported in 1879 by the Royal Commissioners charged with creating the draft criminal code.<sup>489</sup> The Avory Committee recommendation, by contrast, in 1922 had been to remove the presumption<sup>490</sup> but only on the basis that the entire common law defence be abrogated. For

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<sup>480</sup> The Criminal Law Commissioners (1845), Second Report 'Parliamentary Papers' 1846, vol xxiv, p 114.

<sup>481</sup> The Criminal Law Commissioners (1879). 'Draft Code' s23.

<sup>482</sup> The Avory Committee Report 'Report on the Responsibility of the Wife for Crimes Committed Under the Coercion of the Husband', Cmnd 1677, 1922.

<sup>483</sup> Law Commission, 'Criminal Law: Report on Defences of General Application', Law Com No83 1977, p17-19 para 3.9. This Report also proposed to liberalise the common law defence of duress.

<sup>484</sup> Law Commission 1993 No 218 para 32.6

<sup>485</sup> Even though it was removed in New Zealand in 1893, the modern version of that formula, s24(3) *Crimes Act 1961* [NZ], was itself recently amended to place beyond doubt that a wife in a "civil union" is equally denied it as much as a wife: *Schedule 1, Relationships (Statutory References) Act 2005* [NZ]. In *R v Elisha Barbara Brett*, unreported, High Court Auckland, CRI-2006-44-7302, 8 August 2007, Priestley J at [15] stated that he would refer the "fascinating policy difficulty" under s71(2) *Crimes Act 1961*, which exempts spouses and civil union partners only from being an accessory after the fact to the offence of the other spouse or partner, to the Law Commission for further investigation.

<sup>486</sup> The Law Commission, *Criminal Law Report on Defences of General Application*, Her Majesty's Stationery Office, London, 1977 (Law Com No. 83) at para 3.3 noted "As early as 1845 the abolition of this common law presumption was recommended, and this was also proposed in the draft Code of 1879".

<sup>487</sup> Under clause 36(2)(b) of the draft Criminal Law Bill, a wife would not have a separate defence of marital coercion. Law Commission, *Legislating the Criminal Code: Offences against the Person and General Principles* (1993), Law Com No. 218. "It might be though surprising that it has survived for so long." Great Britain, Law Commission, Report No. 143, 'Codification of the Criminal Law', Draft Criminal Code Bill, clause 45. Michael J Allen *Textbook on Criminal Law, Sixth Edition*, (2001) Blackstone Press, p194. "The need for this defence is highly questionable as it is doubtful whether a woman coerced to commit an offence would give evidence in court which could be used to establish the guilt of her husband as her accomplice. The Law Commission (Law Com No 83) recommended the abolition of the defence and it is not included in the Draft Criminal Code (Law Com No 177)."

<sup>488</sup> Criminal Law Commissioners of 1845, 2<sup>nd</sup> Report (1845) *Parliamentary Papers* XXIV 114.

<sup>489</sup> Criminal Law Commissioners (Draft Code s23).

<sup>490</sup> Avory Committee (1922) Cmnd 1766.

quite unsatisfactory reasons the British Parliament proceeded to revitalise the defence by recasting it as a unique gender-status and marital-status dependent statutory defence.

The Law Commission Working Party in 1977 had drawn attention to the uncertain features of the statutory defence, which included its failure to address the position of any unmarried woman who was very likely to be as equally deserving of the shield of the special defence. The exclusion from it of women living in a de facto relationship in the nature of a wife, or the position of a dependent female member in the same household or family,<sup>491</sup> identified that the defence was designed to buttress the institution of marriage, thereby supplanting or displacing any rival forms of legal relationship. The primary issue considered by the Working Party was to decide whether the defence was appropriate to modern societal conditions. That inquiry engaged the issue as to whether a defence in law which specifically glorified matrimony was a rational basis for excusatory behaviour. It concluded after “consultation, wide support and no opposition” to the proposal, that advocating the abolition of the entire doctrine of marital coercion was the plainly deserving outcome. It proceeded curtly to deny the marital coercion doctrine on “the implicit assumption that no-one could seriously question that marital coercion had outlived its usefulness”.

The Law Commission was convinced that the general common law defence of duress/compulsion already encompassed the position of married women as well as every other class of person and there was no sustainable basis for any differential treatment under modern law.<sup>492</sup> A failed defence of duress would still provide to a wife as much as to anyone substantial possibilities in mitigation.<sup>493</sup> The abrogation of marital coercion has been advocated upon the creation of a wider<sup>494</sup> duress defence by state<sup>495</sup> and national bodies in Australia,<sup>496</sup> England and Wales.<sup>497</sup> Both the Australian and English models turn on a

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<sup>491</sup> The Law Commission, *Working Paper No 55* paras 63 and 64.

<sup>492</sup> The Law Commission, *Criminal Law Report on Defences of General Application*, Her Majesty's Stationery Office, London (1977) (Law Com No. 83) at para 3.8.

<sup>493</sup> This very point had been made by the Avory Committee in 1922.

<sup>494</sup> D O'Connor & P A Fairall, *'Criminal Defences'*, (1984) Butterworths, Sydney at p132 suggest that a possible justification for the retention of the separate defence of marital coercion is the limited character of the defence of duress.

<sup>495</sup> Victoria Law Reform Commissioner, Report No 9, *Duress, Necessity and Coercion* (1990) para 5.03.

<sup>496</sup> Review of Commonwealth Criminal Law, *Interim Report, Principles of Criminal Responsibility and Other Matters* (1990) paras 12.21 and 12.38.

narrowly defined scope for duress, confining it to its existing common law formulation in which threats of death or grievous bodily harm are required. While coercion has an obvious subjective element it ought to include a limiting boundary of reasonableness indexed to the gravity of the situation, so that the genuineness of the coercion is proportionate to the impelled crime. The Australian Commonwealth Review Committee would abolish marital coercion for all federal offences, leaving wives to plead a reformulated defence of duress. The ontological foundation of a gender-specific defence is destroyed when it does not apply to a person who reasonably, but mistakenly, believes she is married. That complexity is obviated by the general law of duress as are the difficulties occasioned by the implications of polygamy, customary law concubinage and gender-reassignment.

While the law is entitled to protect the institution of marriage by the criminal law it is properly confined to the formalities of marriage eg bigamy. No other legal relationship provides a general criminal law defence. Stephen had considered it absurd to give a wife more protection than an adolescent daughter. He had unveiled contempt for the defence.<sup>498</sup> A further alternative is to increase the exclusion zone, on the basis of a diameter of dominance, to include children, guardians and wards.<sup>499</sup> It was rejected by the Victorian Law Reform Commissioner because of the difficulty of compiling a comprehensive list of such relationships and an incomplete list would be unsatisfactory.

In the state of Victoria since 1977 a complete defence to virtually every crime was enacted in circumstances where a woman can establish affirmatively that she acted under “coercion by a man to whom she was then married”. The term “coercion” is defined in s336(3) to mean:

pressure, whether in the form of threats or any other form, sufficient to cause a woman of ordinary good character and normal firmness of mind, placed in the circumstances in which the woman was placed, to conduct herself in the manner charged.

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<sup>497</sup> English Law Commission, No 177, *A Criminal Code for England and Wales* (1989) vol 2, para 12.11-12.18.

<sup>498</sup> Sir James Fitzjames Stephen, *History of the Criminal Law*, vol 2 p106. In Papua New Guinea *R v Yigwai and Aku* [1963] P&NG LR 40, 41 Mann CJ held that the defence of marital coercion in s32 *Criminal Code* [PNG] “and the common law rules antecedent to it” were based on marriage and were not of general application so the statutory defence of marital coercion did not apply to a daughter.

<sup>499</sup> Victorian Law Reform Commission para 80.

(That definition has eluded the common law with the English judges in particular floundering to identify what constituted the difference between duress and coercion. It was not until fifty years after the section had been enacted that the House of Lords tentatively identified the true characteristics of coercion in this statutory formulation.) The irony of the defence is that what was once considered to be desiccated was again seen as progressive, at least as a short-term bridge to a more expansive reform of the law of duress. The justification for the creation of this hyper-modern statutory defence was the notion that the “duty and habit of loyalty which arise from the special relationship of husband and wife”<sup>500</sup> could not satisfactorily be dealt with by the general law of duress. The essential argument was based on a symbiotic understanding of the uxorial position in which the wife was dependent on the husband as head of the household. A second justification<sup>501</sup> turned on the fact that a wife could be unfairly deprived of relying upon the general defence of duress by her failure to seek early or immediate intervention by law enforcement agencies. Her risk was in being seen to have acquiesced in illegal conduct which provided the factual context for the coerced offence. Her omission to disengage from the relationship by reporting her husband to the police was capable of amounting to evidence that she had failed to avail herself of a reasonable opportunity to escape from the dilemma which she was now sheltering behind. This was seen to be a structural defect in the general law of duress and the Victorian Law Reform Commissioner considered it important to supplement that defence with the defence of marital coercion. There is however, little valid comparison between a person voluntarily joining a criminal organisation (with eyes wide open) and a wife trapped by psychological, economic and moral pressure in a lawful union with a lawless content.<sup>502</sup> On this basis the suggested

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<sup>500</sup> Victorian Law Commissioner, Report No 3, *Criminal Liability of Married Persons*, para 16 “Where a wife, as is still commonly the case, has to look to her husband for support and shelter, and especially when she has young children to care for, the pressure upon her of insistent demands, and of threats of abandonment, may in cases be just as difficult for her to resist as threats of physical violence sufficient to found a defence of duress. Moreover, the duty and habit of loyalty and co-operation which arise from the special relationship of husband and wife will commonly make it more difficult for a wife to resist pressure from her husband than from a stranger.”

<sup>501</sup> Victorian Law Commissioner, Report No 3, *Criminal Liability of Married Persons*, para 17. “A further objection to confining a married woman to the ordinary defence of duress is that, even when she is subjected by her husband to threats of grave physical violence, that defence will ordinarily be unavailable to her because, in strictness, she will have a safe means of avoiding the threatened violence by informing the police of her husband’s threats and criminal plans. But this recourse will often be available to her only at the cost of putting an end to her marriage.”

<sup>502</sup> In *Kelso et ux v State* (1953) 255 P2d 284, 288 per Jones J: “the law does not call upon her, in order to avoid being guilty of the offence, to abandon her home, separate from her husband, and dissolve the bonds of

rationale for the Victorian defence, namely the inadequacy of the common law of duress, has no plausibility.

The other imperative for the Victorian legislation was to address the correlative loyalty between spouses. The inarticulate premise being that a wife (as the defence only operates in one direction) may not be able to resist a natural impulse to comply with her husband's will. This makes the legislation a morality play about the feebleness of wives. The insult is aggravated by the objective test set out s336 (3) of the legislation which measures "coercion" in terms of "a woman of ordinary good character".<sup>503</sup> This legal test is as random as the "moron in a hurry"<sup>504</sup> test, invented by one English judge in the tort of passing-off. It is perplexing why the reputation of the wife should be relevant to any assessment. "Perhaps the underlying assumption is that a woman of bad character would be less hesitant in committing crimes because she has less moral compunction about harming others"<sup>505</sup> The reverse assumes that women of good character can somehow better resist pressure to commit all kinds of crimes; she is considered to be appropriately equipped to weigh the consequences between the competing obedience to husband or to law.

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matrimony between them". To like effect in *R v Z* [2005] 2 AC 467, 512 Baroness Hale of Richmond noted "it is one thing to deny the defence to people who choose to become members of illegal organizations, join criminal gangs or engage with others in drug-related criminality. It is another thing to deny it to someone who has a quite different reason for becoming associated with the duressor and then finds it difficult to escape. I do not believe that this limitation on the defence is aimed at battered wives at all or at others in close personal or family relationships with their duressors and their associates, such as their mothers, brothers or children."

<sup>503</sup> The language of the criminal law for too long has differentiated between the individual gender responses of males and females. But an early example of equality Viscount Simon in *Holmes v Director of Public Prosecutions* [1946] AC 588, 600 made men and women equivalent for the purposes of the law of provocation. This progressive development was retarded by the subsequent decision in *Director of Public Prosecutions v Camplin* [1978] AC 705, 718 (per Lord Diplock "the power of self-control to be expected of an ordinary person of the sex....of the accused"), 724 (per Lord Simon of Glaisdale). The High Court of Australia have denied that gender specificity is a proper consideration: *Stingel v The Queen* (1990) 65 ALJR 141, 147. "Indeed, it may be that the average power of self-control of the members of one sex is higher or lower than the average power of self-control of the other sex. The principle of equality before the law requires, however, that the differences between different classes or groups be reflected only in the limits within which a particular of self-control can be characterised as ordinary."

<sup>504</sup> Foster J invented this legal test in *Morning Star Cooperative Society Ltd v Express Newspaper Ltd* [1979] FSR 113, 117 (Ch)

<sup>505</sup> Stanley Yeo 'Coercing Wives into Crime' (1992) 6 Australian Journal of Family Law 214, 222.

The Victorian defence is primly confined to legal marriage.<sup>506</sup> The Commissioner concluded that the state does not have an interest to preserve the stability of de facto relationships that it does in relation to marriage.<sup>507</sup> This was a myopic conclusion, as a female partner in a de facto relationship could be subject to similar levels of coercion as a legally married wife. The “duty and habit of loyalty” which the Commissioner found arise from marriage are found in every species of personal relationship involving long term commitment. During this period the Victorian Law Commission never once paused to consider whether the implications of same-gender relationships were, in themselves, reason to preclude the creation of a special defence for married women. The exclusive perspective was whether *married* women might be slightly disadvantaged under the common law of duress; not whether all *non-wives* would be significantly disadvantaged if a special marital defence was enacted.

In Ireland, the Law Reform Commission<sup>508</sup> provisionally recommended that the defence be formally abolished by statute, noting that the defence of duress would remain available to married women. However, this Report is characterised by significant errors in its comparative law considerations.<sup>509</sup> It adopted the view that the defence “presupposes a disparity in status and capacity between husband and wife which runs counter to the normal relations between a married couple in modern times”.<sup>510</sup> A second and complementary reason was that the defence was repugnant to the concept of equality before the law, as a constitutional norm. The Commission ought to have additionally reasoned that it was a gender-specific defence without contemporary, rational justification such as distinguishably existed in the offence of infanticide (which operating as a gender-specific defence, reduces the offence from murder).

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<sup>506</sup> *Brennan v Bass* (1984) 35 SASR 311. The Court of Criminal Appeal held that the statutory recognition of de facto relationships in the Family Relationships Act 1975 [SA] did not extend to the defence of marital coercion.

<sup>507</sup> Frank Bates ‘*The Enforcement of Marriage*’ (1974) 3 Anglo-American Law Review 75, 84-85 criticised this approach as “conceal[ing], on a juristic level, a timid and irrelevant approach”.

<sup>508</sup> Law Reform Commission of Ireland ‘*Consultation Paper: Duress and Necessity*’ (LRC CP39-2006), April 2006, Dublin, p54, para 2.181

<sup>509</sup> *ibid* p52 para 2.173(ii) wrongly identifies the abolition of the presumption in New Zealand as occurring in 1908. In para 2.173(iii) it wrongly states that New South Wales established a defence similar to that in England. It wrongly notes that Victoria acted similarly by wholly overlooking that in 1977 that State repealed the earlier statute and introduced a hyper-modern version without parallel in other jurisdictions. It wrongly states that Queensland and Western Australia have replaced the defence with one similar to English law. Those States have entirely abrogated the defence. It wrongly states “In the Northern Territory the defence has remained at common law.” This is utterly incorrect as that jurisdiction totally abolished the defence upon the introduction of its Criminal Code in 1983.

<sup>510</sup> *State (DPP) v Walsh and Conneely* [1981] IR 412 (SC).

In Canada<sup>511</sup> a modern draft reformulation of its Criminal Code wholly omitted reference to even providing for a section of the Code declaring that the defence was abrogated, as it was simply an anachronism. The American Model Penal Code<sup>512</sup> for the avoidance of doubt explicitly removes both presumption and defence.

The defence provides an endorsement of only one form of civil union to the exclusion of all others. As a defence predicated upon some innate power imbalance it could equally apply to the henpecked male or the other members of the family unit. Power imbalances in sexual relationships are unlikely to be exacerbated by the simple additional fact of the formality of marriage.<sup>513</sup> In relation to marital coercion, there may well be a power imbalance in some opposite or same-sex relationships under different cultural conditions within the common law<sup>514</sup>, but there is no evidence that such an imbalance is aggravated only because it has been formalised by a marriage or civil union ceremony. Marriage, in criminal defence terms, has no principled advantage over other civil unions or relationships.<sup>515</sup> The public policy engaged “in having stability and permanence of marriages” exists in other combinative personal unions.<sup>516</sup> It has been argued that unless the defence is an anachronism,<sup>517</sup> it ought to be extended on the basis of sexual equality to husbands acting under the dominating influence of their wives.<sup>518</sup> But that solution too would only create a further illegitimate distinction and

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<sup>511</sup> Law Reform Commission of Canada ‘*Recodifying Criminal Law*’ (No 30, 1986) Vol 1. Law Reform Commission of Canada ‘*Criminal Law: The General Part – Liability and Defences*’ (Working Paper 29, 1982) noted that both defence and presumption were now simply irrelevant in Canadian law.

<sup>512</sup> American Model Penal Code s2.09 (1984).

<sup>513</sup> Donald Nicolson, ‘*What the Law Giveth, It Also Taketh Away: Female-Specific Defences to Criminal Liability*’, p165 in Donald Nicolson and Lois Bibbings (eds), ‘*Feminist Perspectives on Criminal Law*’, Cavendish Publishing Ltd, London, 2000.

<sup>514</sup> Ms Emele Duituturaga, Chef Executive Officer for Women, Ministry of Women’s Affairs, Suva, Fiji 19 May 2005 “The presumption of marital coercion in s19 Penal Code unfortunately should still remain as in the rural sector of Fiji this issue of coercion was very much a live matter.”

<sup>515</sup> George W Hersey III and Alfred Avins, ‘*Compulsion as a Defense to Criminal Prosecution*’, (1958) 11 Oklahoma Law Review 283, 288. “No good purpose is served by treating the husband and wife situation differently from a case involving persons not standing in that relationship.”

<sup>516</sup> ‘*Recent Decisions*’ (1929) 29 Columbia Law Review 219, 220.

<sup>517</sup> Peter Murphy (ed), ‘*Blackstone’s Criminal Practice*’ (2003) Oxford University Press, p57.

<sup>518</sup> A solution commended Boilard JSC in *Thompson v Attorney General* (1998) 23 CR (5<sup>th</sup>) 347, 353 (Superior Court of Québec).

exemption from the general criminal law. An alternative theme is to extend<sup>519</sup> the defence to include “a parent, spouse, employer, or any other person having actual or moral authority over such a person”.<sup>520</sup> The critical objection is that this proposed differential treatment of certain adults under the substantive criminal law, fails constitutional muster.

The original presumption of constructive compulsion was probably a sensitive response to the uxorial dilemma of a duty to the husband and a competing duty to the state. The bond of matrimony excused her, for otherwise the husband as the significantly dominant force between them determined her culpability, as she abided his will. The resilience of the doctrine in the common law is best demonstrated by its renaissance in the state of Victoria in 1977.

The defence reinforces outmoded notions of: female inferiority, passivity and weakness. It normalises the institution of marriage as an ideal under the criminal law, deserving of special auxiliary protection.<sup>521</sup> It also endorses a paternalistic form of gallantry, uniting a socio-cultural notion of female dependence with consequential legal protection. The entire doctrine demeans the position of all women by conferring a special benefit by way of a virtually general excusatory defence.<sup>522</sup> A class of womanhood is set apart for special protection of the law, justified only by the vulnerability that apparently descends upon them simultaneously with their exchange of marriage vows.

Marriage was the only vocation to which women could realistically aspire for much of the period before the twentieth century. Much of society was geared toward women achieving this ambition and many influences ordained that outcome as a supreme attainment. The increasing education and economic independence of women began the transformation of that

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<sup>519</sup> This has been accomplished in Vanuatu, where Parliament remodelled the defence and widened it to include all relationships, rather than abrogate it. In the Solomon Islands, it was extended to husbands as well, to give effect to the constitutional right to equality.

<sup>520</sup> s26(1)(b) *Penal Code* [Van]

<sup>521</sup> Donald Nicolson in *What the Law Giveth, It Also Taketh Away: Female-Specific Defences to Criminal Liability* Donald Nicolson and Lois Bibbings (eds) *Feminist Perspectives on Criminal Law* ch9 (2000) Cavendish Publishing Ltd, London, p170, “The marital coercion defence also reflects notions of female passivity, as well as implicitly normalising the institution of marriage and reinforcing the idea that wives are, or at least ought to be, under their husbands’ sway.”

<sup>522</sup> *Commonwealth v Lewis* (1840) 1 Metcalf 151 Dewey J remarked “much consideration is due to the great principle of confidence which a feme covert may properly place in her husband, as well as the duty of obedience to the commands of the husband, by which some femes covert may be reasonably supposed to be influenced in such cases”.

ideal. The speed and dynamic effect of those changes in society was not matched in the direction and pace of criminal law reform. Wives were the beneficiaries of special solicitude to redress the power imbalance presumed to exist in every marriage. Her independence was dictated by her spouse so she was submissively accountable to him. However, even a wife was expected to successfully differentiate between right and wrong when it came to such serious crimes as treason and murder. The presumed susceptibility needed to be counter-balanced by an ameliorating provision. Earlier science had concluded that women were biologically disabled by a cognitive defect.

The abolition of the identity of marital property interests by both statutory and constitutional law had the effect of fatally weakening the underlying rationale for the excusatory defence of marital coercion. The package of uxorial privileges was slowly disaggregated not by just statutory intervention but by the powerful shaping effects of social change in its recognition of the right to equal status. But the marital coercion defence pegged women back to a definite linkage with the yoke of subordination. While they alone enjoyed the particular privileges from criminal conduct, that unique status is irreconcilable with equality. The modern emphasis is not the notion of obedience and the unquestioning compliance with the command of the male spouse, but of a partnership with emphasis on equality as a concept which transcends all features of the relationship. Although there will exist individual spouses of either gender who are emotionally and psychologically constrained or directed in their acts and omissions by the other spouse, the apparatus of modern society with its governmental resources designed to protect the members of families, now provides no justification for any exceptional set of rules to place those who have chosen to marry above and beyond those who have chosen to live combined lives other than pursuant to the dictates of marriage.

The fact of the special marital coercion defence is suggestive of a scenario where a wife is potentially incapable of free individual will or decision-making, yet implicit in her own evidence exonerating herself by implicating her husband, is the notion that she does have the freedom to control her own actions. The defence (as well as for duress) is open to the

manipulation<sup>523</sup> that where spouses have jointly and equally participated in a criminal offence, without any jot of coercion, the husband might, in order to prevent both spouses being imprisoned and thereby separated from their children, accept the sole blame for the offence and give false evidence that he had coerced an unwilling wife to commit the offence beside him. He thus ensured, together with her own meek evidence of submissiveness, that only one spouse will be found guilty. The defence actually institutionalises the dominant role of the husband by enticing him to exaggerate his dominance in order to secure her acquittal. Even if that did not succeed, sentencing considerations may mean that the wife is treated much more benevolently than the husband. In this way their agreement to falsify his coercion further perverts the course of justice. One real practical difficulty with these cognate defences is that it is difficult to identify spurious claims. This is compounded when the defence is only revealed during the course of the trial leaving little realistic opportunity for the law enforcement agencies to investigate its truth and reliability.

In the last few years duress has undergone a resurgence in popularity. For decades commentators had stated “little is heard of it”<sup>524</sup> but the House of Lords in 2005 was able to refer to the marked increase in the frequency with which resort was being made to this defence.<sup>525</sup> The very fact of this increased reliance upon duress at common law may be the catalyst for elimination of the marital coercion defence.

Without an overarching framework securing legal equality and without discrimination, the marital coercion defence in the criminal law itself perpetuates injustice. The doctrine of coverture reinforced and maximised the principle of the unity between husband and wife.<sup>526</sup> It

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<sup>523</sup> *R v Cole* [1994] Crim LR 582, 584: “Duress is a unique defence in that it is so much more likely than any other to depend on assertions which are particularly difficult for the prosecutions to investigate or subsequently to disprove.”

<sup>524</sup> A L Hart, *Punishment and Responsibility* (1960) p16; *R v Harmer* [2002] Crim LR 401: “50 years ago the defence of duress was very rare indeed”.

<sup>525</sup> Ian Dennis, *Duress, Murder and Criminal Responsibility*, (1980) 96 LQR 208: “In recent years duress has become a popular plea in answer to a criminal charge”. In Scotland the defence re-emerged after a long period of dormancy: *Cochrane v HM Advocate* 2001 SCCR 655, 659-661.

<sup>526</sup> William Blackstone, *Commentaries*, Vol 1, 442. “By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs every thing; and is therefore called out french-law a feme covert...under the protection and influence of her husband, her baron; and her condition during the marriage is called her coverture”.

was, on analysis, a very successful control mechanism of half the marriage by the other moiety. Its interrelated social and legal consequences significantly pervaded the criminal law and the long, slow process of the equalisation of spousal status within it (in contradistinction to the ambiguous cipher of spousal unity) still is incomplete.

The uxorial privileges have dwindled in number but there has been no total atrophy, only piecemeal dismantling. One repugnant residuum of coverture – the irrebutable presumption that a wife consented to sexual intercourse with her husband – was only destroyed in the last 20 years. The common law defence of marriage to marital rape was for so long based on the theory of the presumption of a wife's irrevocable consent.<sup>527</sup> However, that evisceration has inexplicably not affected the surviving remnants of coverture in the criminal law, the most prominent remainder of which is the marital coercion doctrine.

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<sup>527</sup> Jill Elaine Hasday, '*Contest and Consent: A Legal History of Marital Rape*', (2002) 88 California Law Review 1373,1391. Rebecca M Ryan, '*The Sex Right: A Legal History of the Marital Rape Exemption*', (1995) 20 Law & Social Inquiry 941.

## COMMON LAW INTRASPOUSAL CONSPIRACY UNTIL 1957

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The broad definition or description, which is widely accepted, is that conspiracy<sup>1</sup> is a combination of two or more persons to accomplish, by concerted action, some criminal or unlawful act or to accomplish by criminal or unlawful means some act not in itself criminal or unlawful. The same idea is substantially expressed by cases defining conspiracy as an agreement, confederation, or combination of two or more persons to do an unlawful act or to do or accomplish a lawful act or legal end by unlawful means, to do something wrongful whether as a means or an end, or to effect an illegal purpose whether by legal or illegal means or to effect a legal purpose by illegal means.

### SPOUSAL EXEMPTION IN CRIMINAL CONSPIRACY

From at least the fifteenth until the end of the nineteenth century, English institutional writers were almost unanimous in proclaiming that at common law a husband and wife could not, based only on an agreement between themselves, be guilty of any crime of conspiracy. It was a distinct oddity of the criminal law that no English court would itself ever reach this conclusion as *ratio decidendi*. Although there were tangential references in a small number of criminal decisions, surmising that this exemption existed, those dicta were on analysis only conforming to an assumed theory of conjugal unity. The supposed rule existed only because

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<sup>1</sup> Ian Dennis, *The Rationale of Criminal Conspiracy* (1977) 93 LQR at 51 stated: "A conspiracy is constituted by an agreement, it is true, but it is the result of the agreement, rather than the agreement itself, just as a partnership, although constituted by a contract, is not the contract, but is a result of it. The contract is instantaneous, the partnership may endure as one and the same partnership for years. A conspiracy is a partnership in criminal purpose." Conspiracy is the articulation of a common intention expressed by an agreement to commit an unlawful act and at its purest incipient stage is the earliest form of concerted preparatory offence. A standard rationale for criminalising the conduct is that the very fact of combinative effort being engaged increases the potential perniciousness of the conduct agreed to be effected.

the criminal law, in adjectival, procedural and substantive law and practice, was otherwise considered to be inexplicable. The parrot-like repetition of the alleged exemption by text writers and judges alike, added nothing of substance beyond the effect of creating a verity from a fiction.

The underpinning theory or theories supporting the exemption were subject to hesitant criticism by very few writers, who analysed it as an unconvincing remnant of the former doctrine of coverture, inconsistent too with the incipient emancipation of women under the general law. But the overwhelming substantial weight of learned writing remained ensconced in the thinking of the preceding centuries. Despite sustained and occasional excoriating criticism of the theory and a few ‘near misses’ in Commonwealth appellate courts,<sup>2</sup> in the twentieth century, the spousal exemption has now taken even deeper root by the passage of legislation in England and a number of other common law jurisdictions, which specifically proclaim the spousal criminal conspiracy exemption. Other jurisdictions, including Canada, maintain the exemption via decisions of superior courts in the jurisdiction.

This chapter traces the history<sup>3</sup> and rationales of the spousal exemption, through comparative Commonwealth law, and how the exemption ontologically intermarries with the corpus of the criminal law, in relation to uxorial privilege from it. The spousal conspiracy exemption allows though both spouses to be beneficiaries of the exemption; not just the wife. The law could not at that point cleave apart the indivisibility of the marital union. The end point of this chapter is an examination of a decision of the Privy Council in 1957 which grappled with whether and how a polygamous marriage interfaces with the exemption born from deeply Christian origins. The succeeding chapter considers the next half century of case law and legislative intervention and whether the exemption is justifiable as an exemption from the criminal law being pegged to matrimony.

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<sup>2</sup> *R v McKeachie* [1926] NZLR 1 (CA) (3-2 decision upholding the exemption); *Kowbel v The Queen* [1954] 4 DLR 337 (SCC) (4-1 decision upholding the exemption).

<sup>3</sup> James Wallace Bryan, *The Development of the English Law of Conspiracy*, (1909 reprinted 1970) Da Capo Press, New York, at p113: “the English law relating to criminal conspiracy is unique. Being largely the creature of special circumstances, it has no parallel in the legal systems of France, Germany, and other continental countries in which the conditions under which it originated and grew were not duplicated”. Wienczyslaw J Wagner, *Conspiracy in Civil Law Countries* (1951) 42 *Journal of Criminal Law, Criminology and Police Science* 171 reviewing French, German, Italian and Polish law in relation to criminal conspiracies.

## BIBLICAL ORIGINS OF THE EXEMPTION

Chapter 2, Verse 24, Book of Genesis<sup>4</sup> states:

Therefore shall a man leave his father and his mother, and shall cleave<sup>5</sup> unto his wife: and they shall be one flesh.

Glanville Williams observed that “[t]here can be no doubt that it was this theological metaphor that produced the legal maxim.”<sup>6</sup> The early Christian religion as well as the common law courts saw this metaphor as having profound legal significance, in providing a deific command that the wife should have no separate legal personality from that of her husband. Her autonomy was indistinguishably merged with that of her husband. They became one before God and the common law said that that one was the husband.<sup>7</sup> This ideology,

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<sup>4</sup> *Holy Bible*, Old Testament, Matthew 19 v5-6; Mark 10 v8. In *Midland Bank v Green (No.3)* [1982] 1Ch 529, 540 (CA) involving a tortuous spousal conspiracy, Fox LJ accepted the ancient exemption probably derived simply from biblical ideas about husband and wife being one flesh. That became the principle that in law husband and wife, were one person. Sir George Baker concurring at 542F said: “The legal doctrine, in so far as there ever was one, of unity of husband and wife, whether founded originally on unity of flesh from Genesis, Chapter 2 verse 24 (and it is to be remembered that the medieval lawyers and writers were clerics) or on the subjugation of woman to man resulting in the submersion of the wife in the husband, he being the head, the two are one and that one is the husband... To extend this rule or exemption to the tort of conspiracy because of the legal fiction of ancient times that husband and wife being one person could not agree or combine with each other, would to my mind be akin to basing a judgment on the proposition that the Earth is flat, because many believed that centuries ago. We now know that the Earth is not flat. We now know that husband and wife in the eyes of the law and in fact are equal.” Sir George Baker P had been President of the Family Division of the High Court.

<sup>5</sup> Lesley Brown (ed), *The New Shorter Oxford English Dictionary on Historical Principles*, Clarendon Press, Oxford 1993 p415, states of the word ‘cleave’ that in context it can have either of two exactly opposite meanings – to separate or divide, or to stick fast and adhere to; apparently ‘cleave’ is the only verb in the English language capable of two exactly opposite meanings.

<sup>6</sup> Glanville Williams, *The Legal Unity of Husband and Wife*, (1947) 10 *Modern Law Review* 16, 19. Sir William Holdsworth, *A History of English Law*, (1944) 3 ed (impression 1982) vol 1X p197 “it was justified by Cooke, partly on the ground that husband and wife are one flesh” being one of the justifications for the non-compellability of spouses. F Graham Glover *Conspiracy as Between Husband and Wife* (1979) *Family Law* 181, 182 “the connection between the common law doctrine and Scripture is tenuous. To identify the former with any passage in the latter would involve a false exegesis”.

<sup>7</sup> In *Midland Bank Trust Co Ltd v Green (No 3)* [1979] 1 Ch 496, 512C Oliver J observed that the incompetence of a spouse can hardly be traced to the passage in Genesis at Ch 3 v 12 and 13 as “Adam, after all, was treated as a competent witness against Eve and his evidence was accepted and acted upon”. The Judge added that it was an absurdity that as a wife could enter into a contract with her own husband, that they could not agree to commit a crime. In *Hoskyn v Metropolitan Police Commissioner* [1979] AC 474, 483-4, 488 (HL) Lord Wilberforce identified the true basis for the law as regards the incompetence of spouses as witnesses, as resting upon a combination of various considerations: the doctrine of unity, the privilege against self-incrimination, and a policy which embraces the danger of perjury and public repugnancy at seeing spouses testify against one another. In 1736 Lord Hardwicke in *Barker v Dixie* (1736) Cas temp Hard 264 gave the single rationale for the rule of spousal incompetence, “The reason why the law will not suffer a wife to be a witness for or against her

pronounced by God, reinforced the general helplessness of the wife and mandated her dependence upon her husband.<sup>8</sup> As the head of the household she moved at his command.<sup>9</sup> The harmony of the marital union would be vulnerable if both combinants were to act as free-willed<sup>10</sup> individuals as the result may well be serious discord which in itself would unravel the fabric of the union. By the twelfth century<sup>11</sup> the doctrine of the unity of husband and wife was referred to in an early English law tract as an established norm. Five centuries later, in *Manby v Scott*,<sup>12</sup> Hyde J, who was considering the liability of a husband to pay for necessaries, ordered by his wife from whom he was separated, stated that there were two grounds upon which the applicable common law was founded. One being that a wife could not enter into a contract herself because she is “subject to the will or mind of her husband” and the “second ground of the law of England is the law of God.”

Hereupon our law put the wife sub potestate viri, and says, quod ipsa potestantem sui non habeat, sed vir suus, and she is disabled to make any grant, contract, or bargain, without the allowance or consent of her husband.

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husband is, to preserve the peace of families.” The position of married women became radically altered by the *Married Women’s Property Act 1882* [UK]. In *Pearce v Merriman* [1904] 1 KB 80, 83 Kennedy J highlighted since the *Married Women’s Property Act 1882* [UK] there was nothing to prevent a wife from standing in the position of landlord to her husband. Since 1853, spouses have been competent witnesses against one another in civil proceedings; *Evidence Amendment Act 1853* [UK]. In criminal proceedings where the allegation involved physical abuse of the wife, she has been competent since 1885. It was only much later that any accused person was generally competent to give evidence for themselves in a criminal trial; *Criminal Evidence Act 1898* [UK]. In s5 *Evidence Act 1875* [NZ] spouses became competent to give evidence “for or against himself or herself” in summary proceedings.

<sup>8</sup> All English marriages to be valid, had to be celebrated and consecrated in a church, until s21 *Marriage Act 1836* [UK].

<sup>9</sup> *Smith v Myers* (1898) 74 NW 277, 278 (Supreme Court of Nebraska) “a marionette, moved at will by her husband.”

<sup>10</sup> *Taylor v Fisher* (1591) Cro Eliz 246, it was held that the law did not permit a wife to give any person authority to enter her husband’s house. The majority of the New Zealand Supreme Court expressly followed *Taylor v Fisher* in *Mackenzie v Harper* [1937] NZLR 672 (FC) in holding upon antediluvian reasoning that while a licensee of a hotel, and even his lodger, could both supply liquor after hours to their own guests inside the hotel, the wife of the licensee could not do so lawfully as she had no inherent common law right to allow a person to enter her husband’s premises and be entertained there.

<sup>11</sup> Johnson ed, *Dialogus de Scaccario* (1950), C1100, book II, XVIII pp114-115, noted by Fauteux J (dissenting) in *Kowbel v The Queen* [1954] 4 DLR 337, 346 (SCC). Glanville Williams, *The Legal Unity of Husband and Wife*, (1947) 10 Modern Law Review 16 refers to it as “the earliest English law book”.

<sup>12</sup> (1663) 1 Mod 124.

The doctrine was repeated by Bracton,<sup>13</sup> who speaks of “Husband and wife, who are, so to speak, a single person, because they are one flesh and one blood.” In addition he added in reference to the proprietary control of the husband, “the thing is the property of the wife, and the husband its custodian, since he rules his wife, in which case no answer will be made the husband without his wife nor conversely.”

The doctrine of unity is descended from the biblical concept of husband and wife being “one flesh”.<sup>14</sup> In addition the theological tenet that marriage is an institution created by God was furthered by principles which endorsed the biblical image of the relationship between man and wife. Therefore, the relationship of husband and wife was singled out as a divine specialty, surpassing all relationships of consanguinity.<sup>15</sup> The spousal exemption had the natural appeal of an apparently self-explanatory axiomatic, biblical truth. It necessitated the conclusion that a wife was incapable of concluding an agreement with her husband. She had, in any event, no independent will, as it had been presumptively overborne by him.<sup>16</sup>

## THE EARLIEST CRIMINAL CONSPIRACY CASES IN ENGLISH LAW

Writing of the twelfth and thirteenth centuries Pollock and Maitland<sup>17</sup> said:

If we look for any one thought which governs the whole of this province of law, we shall hardly find it. In particular we must be on our guard against the common belief that the ruling principle is that which sees an ‘unity of person’ between husband and wife. This is a principle which suggests itself from time to time; it has the warrant of holy writ; it will serve to round a paragraph, and may now and again lead us out of or into a difficulty; but a consistently operative principle it cannot be.

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<sup>13</sup> *De Legibus et Consuetudinibus Angliae*, as translated in Samuel E Thorne, *Bracton on the Laws and Customs of England* (1968) (Thorne ed) (1977), vol IV p335. There can be little doubt that the crime and the tort of conspiracy grew from a common root. Statutes in the reign of Edward I gave both a civil and a criminal remedy under the writ of conspiracy: see Prof Winfield *History of Conspiracy and Abuse of Legal Procedure*, (1921) Cambridge University Press.

<sup>14</sup> *Holy Bible*, Old Testament Genesis II 24, also Matthew XIX 5-6; Mark X 8.

<sup>15</sup> John H Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, (1940) 3 ed v 8 §2227 which records the history of the privilege. Roman law had extended testimonial privileges to all family members. In *R v Annie Brown* (1896) 15 NZLR 18, 38 (CA) Conolly J noted that the position of a child or a servant was under this law much more unfavourable.

<sup>16</sup> Under whose potestas she was: *Midland Bank Trust Co Ltd v Green (No 3)* [1979] 1 Ch 496, 521A.

<sup>17</sup> Pollock and Maitland, *History of English Law*, (1923) 2 ed vol II pp405, 406.

Conspiracy as a modality for effecting a criminal wrong, was specifically referred to in a statute of 1305<sup>18</sup> in a Year Book. In 1330,<sup>19</sup> in the fourth year of the reign of Edward III a statute was passed for the first time, devoted exclusively to criminal conspiracy. In a Year Book decision<sup>20</sup> in 1345, conspiracy was alleged against spouses and another. In objecting to the validity of the proceeding, it was argued that:

because it cannot be understood in law that a woman could be supposed to conspire, and particularly a feme covert, for, if this writ were good, for the same reason one would be good if it were brought against a husband and wife alone, and it could not be understood that a wife, who is at the will of her husband, could conspire with him, because the whole would be accounted the act of the husband.

Without reasons the proceeding was held to be regular. This decision was seen as the seminal statement that conspiracy would not lie against spouses alone. What emerges from this extract is the emphasis is on the predominant position of the male at whose behest the woman is deemed to act, rather than on the biblical notion of unity. In 1367 a husband and wife were sued in an action for trespass to property by wrongfully taking a horse. In argument on behalf of the wife it was said:

At least for the wife it ought to be pleaded that there was nothing wrongful: for what she did, was with her husband, and that cannot be adjudged her act, since her husband did it: for the wife cannot conspire with her husband.

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<sup>18</sup> David Harrison, *Conspiracy as a Crime and as a Tort in English Law* (1924) Sweet & Maxwell, London. At p7: "Conspiracy was finally and authoritatively defined (for it will have been noticed that neither the 21 Edw I nor the 28 Edw I c10, contains any definition of the offence, by the 33 Edw I st 2 (1305), commonly known as the *Ordinatio de Conspiritoribus*". At p11 "there is no mention in the old writers prior to 1293 of any such crime".

<sup>19</sup> 4 Edw III c11. Noted by James Wallace Bryan, *The Development of the English Law of Conspiracy*, (1909) (reprinted 1970) Da Capo Press, New York, at p51. The essential features of the crime of conspiracy were authoritatively expressed five centuries later by Willes J in *Mulcahy v The Queen* (1868) LR 3 HL 306, 317: "A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, actus contra actum, capable of being enforced, if lawful, punishable if for a criminal object or for the use of criminal means".

<sup>20</sup> YB (1345) 19 E 3, RS 346. In a further decision, YB (1363/4) H 38 E 3, 3a, it was argued that spouses could not be guilty of conspiracy, though the report does not decide the issue. These references, aptly described as "scant authority". Glanville L Williams, *The Legal Unity of Husband and Wife*, (1947) 10 MLR 16, 21 fn 16. The Year Book cases constitute the basis upon which a succession of early text writers formulated the rule of spousal exemption.

Earlier in *Harison v Errington*<sup>21</sup> in 1365, it had been held that one person alone cannot conspire. From this basis it was only an elemental step to conclude that a husband and wife, ordained as one person in law, could not themselves conspire alone. It had never been, however, a requirement that both spouses should be brought to trial at the same time. One accused could be indicted for conspiring with another who could not be located, or was dead. It did not matter whether the co-accused was unavailable before<sup>22</sup> or after<sup>23</sup> the charge was laid. In 1471 Fortescue<sup>24</sup> could say: “For a man is never so subject to his wife, though she be the greatest lady, as this free woman is subject to this serf, whom she makes her lord; for the Lord says to every wife, Thou shall be under the power of they husband, and he shall rule over thee.”

#### IMPORTANCE OF MARRIAGE IN EARLY CONSPIRACY CASES

Many of the early examples of criminal conspiracy cases involved as their subject matter aspects of marriage. Marriage was for the middle and upper classes a matter of great consequence as it involved a transmission of property and estates and was therefore, not a status to be entered into lightly. For that reason, serious protections were erected to prevent heiresses and females of potential means from being swindled into marriage or forced into matrimony. On occasions it would be a father desperate to protect his son or daughter<sup>25</sup> from an unwise marriage that came before the courts under the umbrella of a criminal conspiracy, as there was an active industry of persons confederating to outwit the parental wishes<sup>26</sup> or

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<sup>21</sup> (1365) Popham 202. In *R v Anonymous* (1353) Liber Assisarum, 137 pl 40, a woman was arraigned for having stolen 2/- worth of bread. She said that she did it by the command of her husband. A jury found that she “did it by coercion of her husband, in spite of herself. Wherefore she was acquitted. And it was said that by command of her husband, without other coercion there shall be no sought of felony etc”. Joseph Henry Beale, ‘*A Selection of Cases and other Authorities upon Criminal Law*’, (1907) 2 ed, Harvard Law Review Publishing Association p475 refers to that decision. Beale refers to *Commonwealth v Eagan* 103 Mass 71 and *State v Williams* 65 NC 398 as being leading American cases.

<sup>22</sup> As in *R v Nichols* (1745) 2 Stra 1227.

<sup>23</sup> As in *R v Kinnersley* (1719) Stra 193.

<sup>24</sup> ‘*De Laudibus Legum Angile*’, (1942 Chrimes ed) at p105.

<sup>25</sup> *R v Thorpe* (1696) 5 Mod 221, a conspiracy to entice a young man under 18 years of age to marry a woman of ill-fame.

<sup>26</sup> A conspiracy to induce a female Ward in Chancery to marry a man in low circumstances which would constitute an interference with the jurisdiction of the Court of Chancery: *R v Locker* (1804) 5 Esp 107.

even the parish laws<sup>27</sup> to secure the rewards of property and title that occurred upon the marriage. Cases of impersonation in the marriage context also came before the courts.<sup>28</sup>

It is apparent from the early cases and writers that the arguments for recognising the special position of married women in criminal law engaged the commingling of the notions of conjugal unity, the disability and effects of coverture and the domination of the husband. Bracton<sup>29</sup> made mention of the offence of “conspiracy” by name. The special dangers to be apprehended from concerted evil-doing were understood. An inventory<sup>30</sup> of the historical beginnings of conspiracy show that it was only in the fourth year of the reign of Edward III (1330) that a statute was passed<sup>31</sup> devoted exclusively to the criminal aspect of conspiracy.

During the period between the reign of Edward I and that of Charles II the criminal aspect of conspiracy was far less important than the civil. With the exception of several cases reported during the reign of Edward III, the books record practically no criminal prosecutions for conspiracy.<sup>32</sup>

No case can be traced in which husband and wife were tried together for conspiracy alone. Conspiracies involving marriages<sup>33</sup> as the subject of the crime existed, but not a conspiracy by married persons. The leading cases involving spouses are *R v Cope*<sup>34</sup> and *R v Robinson*<sup>35</sup> in which the defendants were punished for a conspiracy to marry under a false name in order to obtain the estate of the man personated.

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<sup>27</sup> *R v Watson* (1743) 1 Wils 41, the allegation was a conspiracy to procure a marriage between paupers for the purpose of charging another parish with their support.

<sup>28</sup> *R v Robinson and Taylor* (1746) 1 Leach 37. In this case, the conspiracy included the act of the husband getting married, albeit under circumstances of impersonation so as to be able to defraud the new wife’s employer of his property.

<sup>29</sup> Bracton, *De Legibus et Consuetudinibus Angliae*, (Twiss ed) vol 2, pp335-337. In *Best v Samuel Fox & Co Ltd* [1952] AC 716, 731 (HL) Lord Goddard referred to Bracton and Blackstone in terms of there being “no books of higher authority.”

<sup>30</sup> J W Bryan *ibid* p15.

<sup>31</sup> 4 Edw 3 CII.

<sup>32</sup> Bryan *ibid* p52.

<sup>33</sup> *R v Watson* (1743) 1 Wils 41; *R v Herbert* (1759) 2 Ld Ken 406; *R v Fowler* (1788) East PC 461; *R v Tanner* (1795) 1 Esp 304, where the conspiracy was to procure a marriage between paupers for the purpose of charging another parish with their support. In *R v Locker* (1804) 5 Esp 107; *Ball v Coutts* (1812) 1 Ves & B 292, 296; *Wade v Broughton* (1814) 3 Ves & B 172 a conspiracy to induce a female ward in chancery to marry a man in low circumstances (such acts constituting an interference with the jurisdiction of the Court of Chancery) – said to be ‘a species of robbery’.

<sup>34</sup> (1719) 1 Stra 144, a conspiracy to ruin the trade of the King’s card maker by bribing his apprentice to put grease into the card paste.

<sup>35</sup> (1783) 1 Leach Cr L 38.

In 1471 Fortescue in '*De Laudibus Legum Anglie*',<sup>36</sup> had stated:

Is it not, then, more convenient that the condition of the son should follow that of the father rather than that of the mother, when Adam says of married couples that These two shall be one flesh, which the Lord explaining in the Gospel said, Now they are not twain, but one flesh. And since the masculine comprises the feminine, the whole flesh thus made one ought to be referred to the masculine, which is more worthy.

By 1534, the writ of conspiracy was specifically the subject of consideration by Fitzherbert<sup>37</sup> who assigned as the rationale why no conspiracy could exist between spouses alone the simple conclusion that "they are but one person."<sup>38</sup> But, if any agreement made by them involved any additional person then conspiracy, "against husband and wife and a third person it well lyeth." In Staunford, '*Les Plees del Corone*'<sup>39</sup> the emphasis is on the subservience<sup>40</sup> of the wife. In Law French he remarked that a husband and wife cannot conspire but acknowledged a wife had the autonomy to commit any offence by herself in the absence of her husband.<sup>41</sup> Staunford emphasises a wife is subject in all respects to the will of the husband so what they decide between themselves is only the decision of the husband.

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<sup>36</sup> (1942) '*Chrimes*' ed at p103 And at p105: "For a man is never so subject to his wife, though she be the greatest lady, as this free woman is subject to this serf, whom she makes her lord; for the Lord says to every wife, Thou shall be under the power of they husband, and he shall rule over thee."

<sup>37</sup> '*La Nouvelle Natura Brevium*' (1567 ed) p1161.

<sup>38</sup> *Midland Bank Trust Co Ltd v Green (No 3)* [1979] 1 Ch 496, 525C, where it is described as a "primitive and inaccurate maxim".

<sup>39</sup> Staunford, '*Les Plees del Corone*', (1607 ed) p174.

<sup>40</sup> There was a presumption of marital coercion that the physically weaker party to the marriage had been overborne: Sir William Holdsworth, '*A History of English Law*', (1942) 5 ed reprinted 1991, vol III, p373.

<sup>41</sup> Ibid: "Auterment est si el fait chose a parly sans sa baron" [It is otherwise if she has acted without her husband].

## EMERGENCE OF THE MODERN GENERAL LAW OF CONSPIRACY

The inchoate nature of the crime of conspiracy means that it is the agreement<sup>42</sup> itself which is the offence. This understanding can be traced to the seminal decision in *The Poulterer's Case*,<sup>43</sup> which confirmed that the criminal law provided no immunity for the agreement itself or for actually carrying into effect the agreement. The overt acts were referable to the initial agreement and the intention to carry it out, therefore the subsequent facilitative steps were themselves neither the offence nor elements of it, but evidence of the pre-existing agreement.<sup>44</sup> In relation to spouses, however, the common law had adjusted itself to the position that they were immune for the initial agreement, but not for the contemplated substantive crime. If the overt act was charged in its own right then neither spouse had immunity under the spousal exemption: although the wife might additionally have the privilege of defending the substantive crime on the basis of marital coercion. That defence might generally be awkward to apply to a conspiracy because the agreement may not have occurred in a face-to-face situation (so the husband would not be 'present'). A letter agreeing to the proposal of the other spouse to commit an offence would be evidence of their conspiracy, but would not allow the marital coercion defence due to the lack of presence of the husband. Conspiracy was the only inchoate offence which provided for both uxorial and

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<sup>42</sup> Robert Spicer, *Conspiracy Law, Class and Society*, Lawrence & Wishart, London 1981 p149 discusses the rationales for the offence of conspiracy. The preventive factor inherent in the crime means that a conspiracy, being unlawful, enables the law to intervene at an early stage before a contemplated crime has actually been committed. The 1879 Law Commissioners stated: "...the formation of an intention necessarily precedes the achievement of the intended consequences and, during the period between these two events, there exists a clear social danger which ought if possible to be avoided. The law recognises the absurdity which would be entailed if, knowing that someone was on the way to achieving a prohibited event, it could only stand by until the event had happened. The law, therefore, steps in under some circumstances at an earlier stage than completion of the intended consequence and makes certain conduct during that time criminal. This it does by use of the inchoate common law offences of attempt, incitement and conspiracy...conspiracy is, of all the preparatory offences, the one which can occur at the earliest time".

<sup>43</sup> (1611) 9 Co Rep 55b.

<sup>44</sup> Ian Dennis, *The Rationale of Criminal Conspiracy*, (1977) 93 LQR 39, 51, stated, refers to the dicta of Holmes J in *US v Kissel* (1910) 218 US 601, 608: "A conspiracy is constituted by an agreement, it is true, but it is the result of the agreement, rather than the agreement itself, just as a partnership, although constituted by a contract, is not the contract, but is a result of it. The contract is instantaneous, the partnership may endure as one and the same partnership for years. A conspiracy is a partnership in criminal purposes.' Thus, the word "agreement" is being used in its contractual sense, as denoting an exchange of promises in respect of future action, rather than the mere 'coming into accord' or 'mutual understanding' which is its looser dictionary meaning. In addition it is seen as constituting a relationship of the conspirators inter se which will continue to exist until the enterprise is performed, frustrated or abandoned. This relationship has such harmful characteristics and consequences for the rest of the community who are excluded from it that society acquires an interest in its suppression and prevention".

spousal immunity. An attempt to commit a substantive crime was not privileged. Nor was accessorial conduct before the fact. Incitement to commit an offence was not protected by the exemption either. A wife was though protected against being an accessory after the fact to her husband's offence. The logic of the fiction<sup>45</sup> was only prepared to exempt spouses for an agreement, but not prepared to exempt spouses for any other mode of criminal conduct which was also the product of their agreement. The oddity of the law<sup>46</sup> turned on the parameters of the conspiracy offence. Once a provable step had been taken to implement the conspiracy, in furtherance of it, where that overt act was itself a criminal offence, there was at that juncture no need for the exemption of the spouses from the criminal law. This suggests, quite separate from the figurative metaphor of conjugal unity, that an unimplemented, bare illicit agreement between spouses, as a matter of policy,<sup>47</sup> was considered to be unnecessary for criminal intervention. The agreement had not thereafter gone far enough to outweigh the maintenance of family stability, which would otherwise be imperilled by any prosecution. In addition the immunity disappeared if at any time another person was a party to the agreement, so at that point both husband and wife became individually liable for a tripartite agreement. The concept of marital unity was disaggregated upon the interpolation of another person into their intimate relationship.

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<sup>45</sup> David Rosenberg 'Coverture in Criminal Law: Ancient "Defender" of Married Women', (1973) 6 University of California Davis Law Review 83, pp85-86 "Indeed, the legal fiction of coverture had its rightful place in the early law where the artificiality of fictions worked as a counter balance to the weight and severity of punishments".

<sup>46</sup> The gist of the tort of conspiracy is not the conspiratorial agreement alone but that agreement plus the overt act causing damage: *Marrinan v Vibart* [1963] 1 QB 234, 238-9 per Salmon J. See also S Todd, 'The Law of Torts in New Zealand', 2 ed Brookers (1997) p695. Because the tort of conspiracy requires actual infliction of damage, there is no public policy argument which would protect a spouse for liability in such circumstances. By analogy, in the criminal law, where the crime is carried into effect, the spouses have no immunity – if a substantive offence is charged. Because damage is essential in tort, the judges who developed and expounded the immunity in crime are unlikely to have contemplated an immunity where the actual offence took place.

<sup>47</sup> *Midland Bank Trust Co. Ltd v Green (No 3)* [1979] 1 Ch 496, 521 G. Oliver J, noted "These limitations are, I think, important. They demonstrate when the parties to a common design chose to travel from mere agreement to the sphere of criminal action, the common law, which was, after all, a practical system, made a corresponding journey from fiction to reality." In the tort of conspiracy damage upon the agreement being implemented is essential. In the crime of conspiracy the damage is the agreement itself. In *R v Anonymous* (1664) Kelyng 31, at the Cambridge Assizes, all the Judges held that if a husband and wife burgle a dwelling house in the night and steal the goods the wife had committed no felony "for the wife, being together with the husband in the act, the law supposeth the wife doth it by coercion of the husband". The Court found that this principle extended to all larcenies but would not avail a wife in relation to a murder.

## EIGHTEENTH CENTURY

The crime of conspiracy has characteristics and ingredients which separate it from all other crimes, including the spousal exemption. In 1719, Pratt CJ<sup>48</sup> presided over *R v Cope* in which a husband and wife and their servants were convicted of a conspiracy to ruin the business of the King's card-maker by putting grease into the paste thereby spoiling the cards. Such a family conspiracy, including a husband and wife, was held to be indictable being unobjectionable in law. The importance of this decision lies in the fact of the recent publication by Hawkins<sup>49</sup> of his major text<sup>50</sup> which stated of conspiracy "it hath been holden that no such prosecution is maintainable against a husband and wife only, because they are esteemed but one person in law, and are presumed to have but one will." The fact therefore the spouses could not conspire<sup>51</sup> together alone, did not deter them, as a juridic person (sharing a single will) from agreeing with one or more others. During this era it followed from the proposition of conjugal unity that a wife had no separate right to transact in relation to the property she brought to the marriage.<sup>52</sup>

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<sup>48</sup> The future Lord Camden CJ. *R v Cope* (1719) 1 Strange 144, 93 ER 438. In *R v Whitehouse* (1852) 6 Cox CC 38, the conspiracy to defraud lodging-housekeepers and tradesmen involved spouses and their daughter.

<sup>49</sup> William Hawkins, 'A Treatise of the Pleas of the Crown', book 1 ch 72 s8. In 1716 Hawkins in 'Pleas of the Crown', (1824) 8 ed pp448-9 said, in relation to conspiracy: "Also upon the same ground it hath been holden, that no such prosecution is maintainable against a husband and wife only, because they are esteemed but one person in law, and are presumed to have but one will."

<sup>50</sup> William Hawkins, 'A Treatise of the Pleas of the Crown', book 1 ch 72 s8. Hawkins appears to have based his statement on Fitzherbert's 'La Nouvelle Natura Brevium', (1567 ed) p1161; Staunford, 'Les Plees del Corone' (1607 ed) p174. Subsequent writers tended to uncritically repeat what Hawkins had said without analysis: Sir WO Russell 'A Treatise on Crimes and Misdemeanours', (1896) 6 ed vol 1 p152 in a single sentence states "[a] prosecution for conspiracy is not maintainable against a husband and wife only; because they are esteemed as but one person in law and are presumed to have one will." Lush, 'The Law of Husband and Wife' (1910) 3 ed p17; Halsbury's 'Laws of England', (1909) vol 9 p264; 'Russell on Crimes', 8 ed vol I, p150; Roscoe's 'Criminal Evidence', 14 ed p520; H D Roome and R E Ross (eds) 'Archbold's Criminal Pleading, Evidence and Practice' (1922) 26 ed para 1417; 'English and Empire Digest' (1924) vol 14, para 835-836. Even the year before, the United Kingdom Parliament gave statutory authority to the common law position in 1977, it continued to be asserted in the text by reference to the statement in Hawkins' 'Archbold Criminal Pleading, Evidence and Practice', (1976) 39 ed para 4051d; Halsbury's, 'Laws of England', (1976) 4 ed vol 11 para 59. The rule immunising a husband and wife from the law of conspiracy is not a judge-made rule but a jurist-made rule.

<sup>51</sup> Lesley Brown (ed), 'The New Shorter Oxford English Dictionary', 1993, Clarendon Press, Oxford, p487 shows the derivation of 'conspiracy' to be "Con + spirare (breathe)" – breathe together.

<sup>52</sup> In *Firebrass v Pennant* (1764) 2 Wils (KB) 254: "We are dealing with a fundamental maxim of the common law, and might as well repeal the first section of Littleton as determine this grant from the husband immediately to the wife to be good, and where there is not so much as the shadow of a person intervening."

It was decided by 1746, that a subsequent marriage,<sup>53</sup> however, did not prevent a husband and wife from being convicted in respect of an ante-marital conspiracy.<sup>54</sup> The conspiracy could include the very act of the husband getting married.<sup>55</sup> None of the three judges of the court of trial<sup>56</sup> or counsel for the prosecution or defence raised any objection to the indictment involving the spouses. By the middle of the eighteenth century it was a non-issue that a conspiracy between persons who were at the time unmarried, but subsequently did marry, provided no exemption from the criminal law.<sup>57</sup> There was no backdating of the exclusion. The marital unity theory could only prospectively operate.<sup>58</sup> Then in 1765, Blackstone in his '*Commentaries on the Laws of England*'<sup>59</sup> stated:

By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every thing; and is therefore called in our law-French a feme-covert, foemina viro co-operta; is said to be covert-baron, or under the protection and influence of her husband, her baron, or lord; and her condition during her marriage is called her coverture. Upon this principle, of an

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<sup>53</sup> It is a fundamental requirement for the exemption to operate that the spouses are in fact lawfully married. This criterion equally needs fulfilment for the defence of marital coercion. In *People v Little* (1940) 107 P 2d 634, Court of Appeal of California (Barnard PJ, Marks and Griffin JJ) the exemption failed because although the spouses had in fact gone through a form of marriage in 1938, both had spouses living from whom they had not been divorced. The offence of bigamy is no basis for a valid defence to the crime of conspiracy. "To give life to this rule the alleged conspirators must actually be husband and wife which implies a valid marriage" per Marks J p636. A mistaken belief of marriage will not do, even if reasonably held: *R v Byast* (1997) 96 A Crim R 61 (Qld:CA), "For the purposes of that exceptional position, husband and wife should be taken to mean husband and wife constituted as such by a lawfully solemnised union."

<sup>54</sup> Tom Hadden, '*The Original and Development of Conspiracy to Defraud*', (1967) 11 *The American Journal of Legal History*, 25, 30 refers to *R v Robinson & Taylor* (1746) 1 Leach 37 in which the defendants were convicted for conspiring together to entitle Robinson to her master's estate by arranging for Taylor to impersonate him in a purported marriage ceremony with Robinson.

<sup>55</sup> At p38 "and in pursuance of which conspiracy they were married." In *State v Thyfault* (1972) 297 A 2d 873, the spousal conspiracy existed prior to, through and after the wedding. The Court found that the spousal exemption applied from after the wedding.

<sup>56</sup> Lord Willes CJ, Foster J and Reynolds B. The prisoners were represented by counsel; see p39. Tom Hadden, '*The Original and Development of Conspiracy to Defraud*', (1967) 11 *The American Journal of Legal History*, 25, 30 refers to *R v Robinson & Taylor* (1746) 1 Leach 37 as a significant development in the emergence of the crime of conspiracy to defraud.

<sup>57</sup> *Boots v Grundy* (1900) 82 LT 769, 773; *Comment* (1955) 33 *Can Bar Review* 75, 76 n9. Glanville Williams, '*The Legal Unity of Husband and Wife*', (1946) 10 *MLR* 16, 21 n17.

<sup>58</sup> In Ireland, a significant number of couples had travelled to Lourdes in France to get married at the Catholic shrine there. But under French law a valid marriage required a civil ceremony not a religious one. Years later it was realised these religious marriages of Irish people were all unlawful under French law. The Irish Government enacted the remedial *Lourdes Marriages Act 1970* [Ireland] to retrospectively give validity to the marriages and by implication also retrospectively provided the defence of spousal exemption from any conspiracy they had committed during the years they assumed they were married.

<sup>59</sup> Wayne Morrison (ed) '*Commentaries on the Laws of England*', Cavendish Publishing Limited, London, 2001 vol 1, [442] p339-340.

union of person in husband and wife, depend almost all of the legal rights, duties, and disabilities, that either of them acquire by the marriage.

That robust statement summarised the legal position of married women under the criminal law. She could not have a separate agreement with her husband as her husband spoke for her in all legal matters. It followed that the nature of coverture incidentally provided a wife with protection from the criminal law generally unavailable to others. Her position was assimilated with that of lunatics and infants who were equally disabled. For each of those classes of person, the law excused them as they were not able to exercise unencumbered rational decision-making.

## NINETEENTH CENTURY ENGLISH LAW

The general uncertainty of the limits and principles of the law of conspiracy is exemplified by a statement of the time,<sup>60</sup> in a leading criminal law text:

The offence of conspiracy is more difficult to be ascertained precisely than any other for which indictment lies; and is, indeed, rather to be considered as governed by positive decisions than by any consistent and intelligible principles of law. (Serjeant Talfourd, 1829)

Yet that uncertainty as to the parameters did not extend to the spousal exemption which was treated as a verity. In *R v Duncan*<sup>61</sup> a husband and wife and her brother, were indicted for conspiracy to defraud the London & North Western Railway Company. There, the allegation was the husband, wife and another conspired to falsely assert they had been injured in a railway accident. A doctor was sent to investigate the injuries. Mrs Duncan was in bed when the doctor arrived, and she gave a false account of an accident. At their trial the Recorder,<sup>62</sup> said the wife was “a mere tool in the hands of her husband”. He directed the jury that the wife had to be acquitted of the conspiracy because the defence of marital coercion clearly

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<sup>60</sup> K Dickinson's, *Practical Guide to the Quarter Sessions* (1885) 3 ed, Baldwin and Craddock, London.

<sup>61</sup> (1849) 13 JP 220.

<sup>62</sup> Hon C E Law.

succeeded. This ruling is one of very few examples known to the law in which that defence was applied to an offence of conspiracy.<sup>63</sup>

A variant of a family conspiracy occurred in *R v Whitehouse*.<sup>64</sup> A husband and wife and daughter were indicted for conspiracy to defraud, successively, tradesmen and lodging-house keepers, by obtaining services on credit representing to them that Joseph Whitehouse was “a person of considerable property and in opulent circumstances”, whereas the indictment alleged that the three family members were “evil-disposed persons, and in low and indigent circumstances”.<sup>65</sup> Platt B directed the jury<sup>66</sup> that “[w]ith respect to the daughter, it would be for the jury to say how far she might be acting under the control of her father or mother or both of them.” An acquittal of the daughter ought to have led to the acquittal of the spouses as the sole remaining co-accused, but the jury convicted all three members of the family of the conspiracy on two of the counts,<sup>67</sup> so a direct opportunity to decide the assumption of the law became unavailable. The judge never indicated to the jury what verdict would follow had they decided as a matter of fact that the daughter was not a party to the various conspiracies. No special verdict was left to the jury should that scenario have become their conclusion. The summing-up contains no reference to the issue at all, presumably as that scenario (of convictions against her parents only) would be dealt with as a motion to arrest judgment. The trial is however informative because although defended and prosecuted by two counsel on each side<sup>68</sup> and although a motion in arrest of judgment was unsuccessfully moved<sup>69</sup> on other

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<sup>63</sup> R S Wright, *Criminal Conspiracies and Agreements* (1887) Blackstone, Philadelphia, p59: “Proof, however, of coercion by the husband would in such a case [of a pure spousal conspiracy] have the effect of negating the fact of conspiracy, since the force would avoid the agreement.” In *Commonwealth v Kendig* (1908) 18 Pa Dist 659, the court held proper an indictment charging a husband and wife “and divers other persons whose names are as yet to the grand inquest unknown” with conspiracy, the court pointing out that if both conspired she might be protected by her coverture, but if she conspired with other persons in his absence, when she was not presumed to have been under his control, she could be convicted. In *R v Howard*, an unreported decision of the Supreme Court of New Zealand, *The Lyttelton Times*, 9 April 1886, p6, the prosecutor accepted, in a case where spouses were indicted together with two brothers for a conspiracy to defraud an insurance company, he would need to show “a combination not under coercion, between the husband and wife” if to secure a conviction of the wife.

<sup>64</sup> (1852) 6 Cox CC 38 at Staffordshire Spring Assizes before Platt B.

<sup>65</sup> At p44.

<sup>66</sup> At p45 no reference by counsel or the judge was made to marital coercion; yet a direction on the common law defence of duress, by the parents, directed against the daughter was given.

<sup>67</sup> Platt B sentenced the parents to 12 months imprisonment with hard labour and the daughter to three months imprisonment with hard labour. The differential sentencing outcome, it may be inferred, as being explained by the judge’s overall impression of the state of the parental domination of the daughter.

<sup>68</sup> Mr Huddleston and Mr PM M’Mahon for the accused; Mr Greaves QC and Mr Hodgson for the prosecution.

<sup>69</sup> The jury were asked a clarifying question about the 4<sup>th</sup> count, after delivering their verdict. See p48.

grounds, no issue was ever raised as to the fact of or effect of a conspiracy being proved only between father and mother.

In the leading working text for English magistrates in the late nineteenth century, *'The Justices' Notebook'*,<sup>70</sup> the author stated, three years after the *Married Women's Property Act 1882* [UK]:

Criminal Liability of Wife – According to a superstition which, Blackstone tells us, is upwards of a thousand years old, if a woman commit theft, burglary, or other like indictable offence in company with her husband, she is to be considered as acting under his coercion and treated as irresponsible. But murder or manslaughter are not thus to be exhausted. This venerable doctrine would at last have had its day if the Criminal Code Bill of a recent session had become law of the land. As regards non-indictable offences, cognisable under summary jurisdiction, a married woman has always been held answerable for herself. A husband and wife if joint offenders may be jointly charged and jointly or severally convicted. But, in any case, if a wife be sentenced to a fine, she must pay or provide her own penalty, or undergo the alternative imprisonment, as her husband's goods cannot be levied upon for the amount.

It is remarkable that this accurate summary of the law of the time had lasted for over 500 years without any English decision ever testing its ostensible validity. The position in criminal law of married women and substantive conspiracy was but one facet of the much wider special position which the law had hewn for wives. The apparatus of the law of coverture extended privileges to women but those privileges were only a necessary consequence of the supervening disabilities under which they laboured by it.

#### *R v HOWARD AND HOWARD* (1886)

Before the Supreme Court at Christchurch in 1886,<sup>71</sup> a Mr Howard, and a Mrs Howard and two other persons, brothers surnamed Godfrey, faced an indictment<sup>72</sup> for conspiracy to defraud and also a count of attempting to defraud an insurance company. The Godfreys went fishing at Taylor's Mistake and "a hand apparently recently severed, and having a ring

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<sup>70</sup> W Knox Wigram, 4 ed, 1885, Stevens and Sons, 119, Chancery Lane, Law Publishers and Booksellers, London, at p252.

<sup>71</sup> *The Weekly Press*, 8 April 1886, p20, under the heading '*Conspiracy*'. It was reported "The Court was crowded to excess".

<sup>72</sup> *The Lyttelton Times*, 9 April 1886, p6, under the heading '*Conspiracy*'.

bearing engraved letters, and with a recent wound upon it” was located on the beach. Some days earlier, Mr Howard had been reported drowned and his life had been heavily insured a short time earlier. Mrs Howard recognised the hand as being that of her husband and the Godfreys played their part in ‘finding it’, as it was the only evidence to establish that the drowning had resulted in the probable death of Mr Howard. The insurance company declined to pay out and in due course Mr Howard was arrested, very much alive. The prosecution stated that Mrs Howard was not lawfully married to her co-accused putative husband so no exemption from conspiracy arose but added that in any event there was no evidence of marital coercion between the husband and the wife for the purpose of defrauding the insurance company. The judge, Johnston J, was concerned that the apparent spouses would not be able to face an indictment for conspiracy if they were in fact lawfully married. They had been born in Scotland and the defence position was that they were lawfully married onboard the vessel by custom and repute in accordance with Scottish law. The ‘*Janet Court*’, on which they had emigrated to New Zealand, was registered and owned in Glasgow.<sup>73</sup> The issue arose to whether a Scottish irregular marriage was valid onboard a ship. A marriage by repute and followed by co-habitation was valid under Scottish law.<sup>74</sup> In addition, reference was made at trial to *Dalrymple v Dalrymple*,<sup>75</sup> and *Piers v Piers*<sup>76</sup> further affirming that a Scotch marriage could be established by habit and repute. The judge ruled that the marriage was not valid “by the law of England” and that English common law applied in the Colony of New Zealand.<sup>77</sup> He ruled that a husband and wife alone could not conspire together, but that in any event, the jury would have to treat the totality of evidence as insufficient to show a legal marriage,<sup>78</sup> adding that the matter could proceed to a higher court if a conviction was returned.<sup>79</sup> The jury “consulted for a minute or two” and acquitted the Godfreys and both Mr and Mrs Howard on the conspiracy count and only convicted Mr Howard on the attempt to defraud, acquitting all the others. The judge had indicated on the evidence “that the wife took an active part in the

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<sup>73</sup> *The Lyttelton Times*, 10 April 1886, p8.

<sup>74</sup> *Dysart Peerage Case* (1881) 6 App Cas 489, 537 (HL) per Lord Watson: “The law of Scotland accepts the continuous cohabitation of a man and woman as spouses, coupled with the general repute of their being married persons, as complete evidence of their having deliberately consented to marry; but in order to sustain that inference their cohabitation must be within the realm of Scotland.”: *Longworth v Yalverton* LR 1 HL Sc 218.

<sup>75</sup> (1811) 2 Hag Con 54.

<sup>76</sup> (1849) 2 HL Cas 331.

<sup>77</sup> *The Lyttelton Times*, 12 April 1886, p6. But the domicile of the Howards was Scotland.

<sup>78</sup> But the issue was a question of fact for the jury; not a question of law for the judge.

<sup>79</sup> *Ibid.*

absence of her husband, and therefore without coercion”.<sup>80</sup> So by dint of a merciful verdict the opportunity for the Court of Appeal to decide the conspiracy issue was lost; but the judge’s ruling that spouses could not conspire remained. But the case was only a gentle forerunner of the complexities of marriage law within the criminal law.

## UNEVEN APPROACH IN THE NINETEENTH CENTURY TO ADVANCEMENT OF WOMENS’ RIGHTS

In *Wenman v Ash*<sup>81</sup> Maule J declined to carry the common law doctrine of conjugal unity to the logical conclusion that as a husband and wife were one person in law the communication of a defamatory statement to the plaintiff’s wife did not amount in law to publication to a third party.

In the eye of the law, no doubt, man and wife are for many purposes one: but that is a strong figurative expression, and cannot be so dealt with as that all the consequences must follow which would result from its being literally true. For many purposes, they are essentially distinct and different persons.

A few years later though a more retrograde position was taken by the three judges in *Phillips v Barnet*.<sup>82</sup> A divorced wife was held incapable of bringing an action for an assault which happened during the time of her marriage to her former husband. Blackburn J<sup>83</sup> said that the objection to the action was “a requirement of the law founded upon the principle that husband and wife are one person.”

The reason, therefore, why the wife cannot sue the husband for beating her must be because they are one and the same person, and the same reason exists in criminal law, where a woman cannot be convicted of larceny though she has in fact carried away her husband’s goods. Other instances might easily be given, all showing that the reason is not the technical one of parties, but because, being one person, one cannot sue the other.<sup>84</sup>

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<sup>80</sup> Ibid.

<sup>81</sup> (1853) 13 CB 836.

<sup>82</sup> (1876) 1 QBD 436.

<sup>83</sup> Ibid 438. Later in 1879 Lord Blackburn was one of the Royal Commissioners for the Criminal Code who recommended the complete abolition of the presumption and the defence of marital coercion.

<sup>84</sup> At p441 Field J agreed that it is a “general principle of the common law that the husband and wife are one person.”

Lush J, who was the author of the leading contemporary text<sup>85</sup> on the law of husband and wife said:

Now it is a well-established maxim of the law that husband and wife are one person. For many purposes no doubt, this is a mere figure of speech, but for other purposes it must be understood in its literal sense. For example, the husband cannot covenant with or make a grant to his wife, and she cannot in law be convicted of stealing his property.

A few years later, consistent with that almost literal rendering of the conjugal unity principle, in *Wennhak v Morgan*<sup>86</sup> a libel action based on a publication by a husband to his wife failed. Huddleston B stating: “I think that the question can be decided on the common law principle that husband and wife are one. The uttering of a libel to the party libelled is clearly no publication for the purposes of a civil action.” Manisty J concurred but pointedly<sup>87</sup> observed that the original policies of the law that had led to this theory of indivisibility were illusory. Six years earlier legislation had been enacted that provided for the separate rights of wives, who therefore had the right and duty to protect and enhance their property share. But as the asserted rationale for the rule was based on the intimacy of all marital communications, a cause of action which identified in the wife a separate right thereto, had potentially destabilising consequences for the primacy of the marital union. The judge distinguished the position in relation to defamation because there had been no judicial clamour or public momentum for change in this regard. This was reasoning by a self-serving formula:

But what is the real foundation of it? It is after all, a question of public policy...Public opinion has altered in some circumstances, and no better illustration of that can be given than the change of view as to deeds of separation between husband and wife...what is there to show any change in judicial opinion or public policy with respect to communications between husband and wife hitherto held sacred?

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<sup>85</sup> At p440 Lush J, *The Law of Husband and Wife*, 3 ed at p126 stated “For more than two centuries the stringency of the common law rule that the wife’s existence was merged in that of her husband.”

<sup>86</sup> (1888) 20 QBD 635.

<sup>87</sup> Ibid at p639.

## NINETEENTH CENTURY AMERICAN CASELAW: CRIMINAL LAW: SPOUSAL CONSPIRACY

The marital conspiracy exemption issue, unlike the defence of marital coercion which was engaged in Massachusetts in the late eighteenth century, was not the subject of any caselaw in the United States until 1885. In the nineteenth century, the courts of the United States of America were as to this issue completely dominated by the assumed position of English law that the spousal exemption existed. In *State v Clark*,<sup>88</sup> Cullen J, where spouses were among the accused, directed the jury in accordance with the orthodoxy<sup>89</sup> that “it takes two to make a conspiracy – they being one in law” so no verdict of conspiracy could be returned if only the spouses were proved to be involved. This direction had been preceded two years earlier by a decision of the Supreme Court of California sitting en banc, to the same effect, in *People v Miller*.<sup>90</sup> In a solitary page it declared that the assumed common rule existed<sup>91</sup> and that there was nothing in either the *California Penal Code* or “statutes of this State to indicate an intention of the legislature to change it.” Four years earlier the same court<sup>92</sup> had in the course

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<sup>88</sup> (1891) 33 A 310, Court of General Sessions of Delaware.

<sup>89</sup> At p312 the judge additionally refused to leave marital coercion to the jury, on the unsatisfactory basis that there was no proof of influence exerted over the wife. But the presumption applied to be displaced, if possible. Reference was made to the English text by RS Wright, ‘*Criminal Conspiracies and Agreements*’ at p127 and to *R v Locker, Wainwright and Wife* (1804) 5 Espinasse 107 per Lord Ellenborough CJ. (But this dealt with the inadmissibility of the evidence of Mrs Locker, who was not indicted with her husband, to give evidence in favour of some of the co-accused. The reason for the ruling appears to be that if the other accused were acquitted, the husband would necessarily have been acquitted too; as the crime could not be committed by one alone.)

<sup>90</sup> (1889) 22 P 934: Beatty CJ, Sharpstein, Works, McFarland, Fox and Paterson JJ. This was the first affirmation of the exemption as ratio decidendi, by an American State Supreme Court.

<sup>91</sup> At p935 “the rule of the common law, we cannot doubt.”

<sup>92</sup> *People v Richards* (1885) 7 P 828 (albeit completely differently constituted from that four years later in *People v Miller*): Morrison CJ, McKinsty, Myrick, Ross, Thornton and McKee JJ “No one can dispute, or ever has disputed, the offence cannot be committed by one alone, and it would seem the husband and wife were one in the sense they could not conspire without the cooperation of another at least.” This decision was followed in *Sesler v Montgomery* (1889) 21 P 185 by six Justices of the Supreme Court of California who held that words spoken by a husband to a wife were incapable of being a publication for the purposes of slander. (An English court had reached the same conclusion in *R v The Lord Mayor of London* (1886) 16 Cox CC 81, and again in *R v Barter* (1922) JP 176, on the basis of the consequences of the doctrine of conjugal unity). McFarland J for the court at p186 relied upon the criminal spousal exemption and defended it, “It is said this rule was a legal fiction, and in the course of modern legislation and judicial development it has been exploded. But it is no more a fiction than any other general principle by law, and we have seen no authentic account of the explosion”. The Supreme Court concluded “every sound consideration of the public policy, every just regard for the integrity and inviolability of the marriage relation, the most confidential relation known to law” justified the retention of the fiction that the wife’s civil existence merged with that of her husband. The remarkable insight was added: “When husbands and wives talk to each other alone, the conversation differs but little from the process of talking to one’s self, or, as it is sometimes called ‘thinking aloud’.

of accepting an argument that it was lawful for one alleged conspirator alone to stand trial (where the indictment expressly referred to an absent co-conspirator) had delivered apparently approving dicta<sup>93</sup> in support of the unanimous position expressed by American writers<sup>94</sup> at that time, that the spousal exemption existed.

A few years later a new twentieth century approach was heralded by the Court of Criminal Appeals of Texas<sup>95</sup> which heard argument where a father, mother and son had been jointly indicted for a substantive charge of murder. While unanimous in the result of allowing the wife's appeal, the reasons for the decision given by Brooks J were considerably different from those of Davidson PJ,<sup>96</sup> who agreed in the result but not the reasoning, flatly stating that a conspiracy between spouses was not possible; yet Henderson J in a further separate concurring judgment stated that a spousal conspiracy to commit murder was possible. The limited significance of the dictum is that it exposed the first crack in the doctrine. Henderson J was to more fully return to the issue in *Addison Smith v State*,<sup>97</sup> which involved the appeal of the son, in the same murder trial. Mr TE Smith and Mrs Catherine Smith and their son Addison were convicted of murder in the second degree. The family farm had been foreclosed by Court Order. Notwithstanding this, the dispossessed Smiths returned to the farm and regained possession. They were aware that police officers would attend to extract them, so they prepared arms and ammunition to resist the officers and barricaded the doors and windows of the house with sacks of wheat. In the course of the eviction, one of the officers was shot and killed. On appeal the Court of Criminal Appeals of Texas referred<sup>98</sup> to the earlier related decision involving her mother: *Catherine Smith v State*.<sup>99</sup> In relation to her son

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<sup>93</sup> At pp 829, 830, 831.

<sup>94</sup> *Russell on Crimes*, (8 American ed) edited by Davis & Metcalf vol 2 p690; *Wharton on Criminal Law*, §1388; *Wharton's Criminal Pleading and Practice*, § 305; The Court in *People v Richards* noted at p830 1 Hawk PC c72 was only authority that "under the statute, 21 Edw 1, one person alone cannot be guilty of conspiracy; and therefore no prosecution under it was maintainable against a husband and wife only." In *State v Slutz* (1901) 30 So 298 (Supreme Court of Louisiana) Monroe J accepted the crime of conspiracy was "known to ancient Common Law, antedating the statute of Edward I" (There is also an observation of the propriety of the conversion of nouns and adjectives into verbs, by the addition of the suffix, ize.)

<sup>95</sup> *Catherine Smith v State* (1904) 81 SW 936. Brooks J for the majority at p939 stating obiter, that a pure spousal conspiracy to murder a deputy sheriff was possible. But the son did not fare so well: *Addison Smith v State* (1905) 89 SW 817.

<sup>96</sup> At p945.

<sup>97</sup> (1905) 89 SW 817.

<sup>98</sup> At p820-821.

<sup>99</sup> (1904) 81 SW 936.

Henderson J delivered the judgment of the court<sup>100</sup> and acknowledged that in the judgment involving her mother, “we held that a conspiracy to commit murder could be formed between husband and wife. The question was not particularly discussed, and no authorities were cited in support of the proposition.” The court concluded that it should now closely analyse the position in law, as it had been argued that a husband and wife could not be co-conspirators and to the extent that the trial judge had used the law of conspiracy and merged it into the substantive offence he therefore fell into error. Henderson J accepted that the common law text writers and American caselaw was entirely uniform and the decision in *Catherine Smith v State* was the only known doubt thrown upon the uxorial conspiracy doctrine. On the facts there was always a conspiracy between spouses and son, so on any basis Henderson J reasoned the common law theory could not apply. But the Texas Court was not content with simply distinguishing the common law on that factual basis. The Court continued that the common law position was “speaking of a conspiracy pure and simple and not of a consummated act in which the conspiracy might be merged in the substantive offence”.<sup>101</sup> But the court proffered a further and separate reason, “we believe that our statutes in this state contravene the common law rule in such measure as to render it entirely inapplicable, especially when viewed in the light of our advanced civilisation, which in a great measure has emancipated the wife from the thralldom under which she formerly laboured under the English system”.<sup>102</sup> Henderson J observed that there was no exception in favour of the wife in the statute which created the crime of conspiracy, and concluded from that, that each individual person is equally amenable to the crime. He added that although Article 36 of the *Texas Penal Code* provided for the defence of marital coercion, that was a narrow exception, in favour of only a married woman, and no such issue arose in the present case. In addition, Texas law provided that although the wife may be a principal in her own right, an exception was provided so that neither husband nor wife could be an accessory to the other. Because the law provided these specific exemptions from criminal liability, in the absence of such a provision for the law of conspiracy, the court held that a husband and wife may conspire together,

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<sup>100</sup> At p825 Brooks J delivered a short concurring judgment stating he did not agree with the view of Henderson J that a distinction could be drawn between the law of principals and the law of conspirators.

<sup>101</sup> At p821.

<sup>102</sup> At p821.

without the intervention of a third person, to commit a murder.<sup>103</sup> If there is a third party to the agreement then the conspiracy between husband and wife was also plainly good.<sup>104</sup>

## EARLIEST AMERICAN REPUDIATION OF SPOUSAL EXEMPTION IN CRIMINAL LAW

Apart from the obiter remarks in *Addison Catherine Smith v State*,<sup>105</sup> the first sustained repudiation of the entire spousal conspiracy exemption is found in *Dalton v People*, a 1920 decision of the Supreme Court of Colorado.<sup>106</sup> A trial Court had directed a jury that if the husband had entered into a conspiracy “with his co-defendants or one of them, to steal” this was a sufficient basis for a conviction.

In *Dalton v People*,<sup>107</sup> James Dalton was convicted of conspiracy to steal an automobile. The conspirators named were his wife Olive Dalton and one, Mrs Rose. Mr Dalton was tried separately. Mrs Rose pleaded guilty and was the principal witness against him. The trial judge had directed the jury that if the husband entered into a conspiracy with his co-defendants “or one of them” to steal the car it was an offence. It was argued on appeal that this direction wrongly permitted a conviction for conspiracy between a husband and wife alone. In the Supreme Court of Colorado, Denison J said:

The prosecution, however, claims that the Married Women’s Acts of this State have removed the reason for the common-law rule that man and wife cannot conspire, which was because they are one person. We think this position sound. The proposition that man and wife are so literally one person that they cannot agree with each other to commit a crime is as discordant with the present policy and tendency of our laws as it was harmonious with the older laws of England.<sup>108</sup>

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<sup>103</sup> An application to the Court for a rehearing was overruled: *Addison Smith v State* (1905) 48 Tex Crim 247, Henderson J noting at p250 “The conclusion is irresistible if he entered into a conspiracy with one of them, he entered into a conspiracy with both.”

<sup>104</sup> *Shannon v United States* 76 F2d 490 (1935) (CA 10<sup>th</sup> Oklahoma); *People v Estep* 104 NE 2d 562 (1952) (Illinois).

<sup>105</sup> (1904) 81 SW 936.

<sup>106</sup> (1920) 189 P 37.

<sup>107</sup> (1920) 189 P 37: A decision of the Supreme Court of Colorado: Garrigues CJ, Scott, Teller, Bailey, Allen, Burke and Denison JJ.

<sup>108</sup> (1920) 189 P 37, 38.

Denison J argued that the common law exemption was formerly explicable by two intertwined concepts:

There were two reasons on which the proposition was based: First, that man and wife are one and that one cannot conspire; second, that the husband is presumed to control the wife. Both these propositions have been abandoned in all our legislation in respect to the marital relation.

The Supreme Court of Colorado held that the presumption of marital coercion had to be taken as having been abolished by statute in 1861 in that state, and that as well now the spousal exemption from conspiracy also no longer existed in the state as they were fundamentally incompatible with the status of married women and their emancipation, recognised by modern statutes.

The common law theory that control by the husband is presumed was in effect, abolished by Statute in 1861. R.S.1908, § 1616. The law of this State requires the coercion by the husband to be proved. We agree with the theory of *Smith v State* 89 SW 817 rather than with *People v Miller* 22 P 934.

The exemption was now obsolete.

On appeal it was argued that the direction permitted the jury to return a verdict based on the prohibited combination of husband and wife. The Attorney General of the State appeared before the Supreme Court and argued that the common law rule no longer existed in Colorado as “the married women’s acts (sic. Acts) of this State have removed the reason for the common law rule.”<sup>109</sup> The court agreed holding that the proposition of unity on which the rule rested was “as discordant with the present policy and tendency of our laws as it was harmonious with the older laws of England.”<sup>110</sup> Denison J for the court, deconstructed the common law position as being the product of the unity of will and the presumption of marital coercion, noting that in Colorado both propositions had been abandoned “in all our legislation in respect of the marital relation.” The presumption of marital coercion or control by the husband had been abolished<sup>111</sup> by statute as early as 1861 as State law required any coercion

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<sup>109</sup> At p38.

<sup>110</sup> Ibid.

<sup>111</sup> Referring to: *Revised Statutes of Colorado 1908*, § 1616, and Denison J adding at p38 “in effect, abolished by statute.” cf *Emerson v Clayton* (1863) 32 Ill 493, 497 noting that the *Married Women’s Property Acts* were

of the wife to be proved by her. The decision of the Supreme Court of California in *People v Miller*<sup>112</sup> was rejected in favour of the emerging Texan position stated in *Addison Smith v State*.<sup>113</sup> However, a close examination of the authorities and legislation cited by the Colorado Supreme Court does not support the robustness of the conclusion it reached. In *Wells v Caywood*<sup>114</sup> Thatcher CJ delivering the judgment of the court was engaged in a consideration of the relation of husband and wife with respect to the acquisition, enjoyment and disposition of property. It was noted that the general tendency of Colorado legislation had been to make husband and wife equal in all respects in the eye of the law: “The legislation...has doubtless been animated by a growing sense of the unjustly subordinate position assigned to married women by the common law, whose asperities are gradually softening and yielding to the demands of this enlightened and progressive age. The benignant principles of the civil law are being slowly but surely grafted into our system of jurisprudence.”<sup>115</sup>

Thatcher CJ noted that under Colorado law a wife’s rights had to be decided under State legislation and she was not therefore the notional wife at common law. A State Act of 1874<sup>116</sup> provided that any married woman could bargain, sell and convey real and personal property and enter into any contract in relation to the same as if she were a feme sole. The court concluded that this statute asserted the individuality of a wife and emancipated her “in the respects within its purview from the condition of thralldom in which she was placed by the common law” so that husband and wife became strangers to each other’s estates. This decision was decidedly confined to the narrow issue of matrimonial property and did not seek to impinge on the common law defence of marriage which provided an exemption from the law of criminal conspiracy. In *Williams v Williams*<sup>117</sup> Elliott J for the same court referred to the “modern American doctrine” which removed the disabilities of coverture, in relation to the law of tort and property. In *Schuler v Henry*<sup>118</sup> Steele CJ, for the majority of the Colorado

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designed to “and did make, a radical and thorough change in the condition of a feme covert.” Per Breese J (Walker J concurring). One result was that the husband should no longer be liable for the torts of his wife: *Martin v Robson* (1872) 65 Ill 129, 133 “If she is emancipated, he should no longer be enslaved” per Thornton J.

<sup>112</sup> (1889) 22 P 934, which tersely affirmed the existence of the common law rule.

<sup>113</sup> (1905) 89 SW 817.

<sup>114</sup> (1877) 3 Colo 487.

<sup>115</sup> *Ibid* 490-491.

<sup>116</sup> An Act concerning married women.

<sup>117</sup> (1894) 37 P 614.

<sup>118</sup> (1908) 94 P 360.

Supreme Court concluded that there was scarcely any semblance of the common-law reciprocal liabilities and duties remaining in property and tort law, between husband and wife, in holding that a husband was not liable for the tort of his wife committed during coverture and without his presence and in which he in no manner participated. Reference to *Bacon's Abridgment*<sup>119</sup> which proclaimed that at common law the husband and wife were considered as one person, as having but one will between them and that seated in the husband as the head and governor of the family. The effect of this ethos was that the wife's identity was completely merged in that of her husband<sup>120</sup> and with few limitations he had the control of her person, her property, her children and her labour. A comparison of the position at law in a number of American states was examined to reach the conclusion that in none of the others was the wife so completely emancipated from the dominion of her husband as in Colorado.<sup>121</sup> It was observed that neither courts nor textbook writers now agreed as to what constituted the basis for the rule at common law that also made the husband responsible for the torts committed by his wife. The possibilities included: that the husband at common law had the power of correcting his wife and was therefore responsible for her conduct; that the husband had the control of her property and should therefore be answerable for her wrongs; that as the wife could not be sued alone, the injured party would be without redress unless the husband were held liable with her. An early American work<sup>122</sup> regarded this last reason as the controlling reason for holding the husband liable. The Colorado Supreme Court rejected all these reasons including the supposed unity of husband and wife:

The unity has been severed, and we have grafted into our system of jurisprudence the benign principle of the civil law, where under 'husband and wife are considered as two distinct persons, and may have separate estates, contracts, debts and injuries.'<sup>123</sup>

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<sup>119</sup> *'Baron and Femme'*, D. See also *State v Burlingham* (1838) 15 Me 104 (Supreme Judicial Court of Maine) "The merging of her name in that of her husband is emblematic of the fate of all her legal rights. The torch of hymen serves but to light the pile on which those rights are offered up. The legal theory is, that marriage makes the husband and wife one person, and that person is the husband, that there may be an indissoluble union of interest between the parties" per Emery J.

<sup>120</sup> Walker's American Law p246 noting "lest the wife might be sometimes tempted to assert rights in opposition to her husband, the law humanely divests her of rights".

<sup>121</sup> *Schuler v Henry* (1908) 94 P 360, 370 – 371.

<sup>122</sup> Tyler, *'Infancy and Coverture'*, p30 "the legal existence of the wife during marriage is incorporated or consolidated into that of the husband, and if the husband was protected from responsibility, as the wife could not be sued alone in such a case, the injured party would be without redress; the husband's liability results from the incapacity of the wife to be sued without him."

<sup>123</sup> *Schuler v Henry* (1908) 94 P 360, 375.

The Supreme Court determined that where the reason, which is the spirit and soul of the law, fails, the law fails.<sup>124</sup> But the decision was by a bare majority with Maxwell and Gabbert JJ dissenting. They reasoned that there had been no express repeal of the husband's liability in tort for the acts or omissions of his wife. Any change to a long standing common law rule ought more properly be addressed by the Legislature as it will not be held to have intended to abrogate a common law rule unless the language used in the statute requires it. The dissenting judges noted that at the first session of the Colorado Legislature in 1861 an Act was passed entitled '*An Act to Protect the Rights of Married Women*' but it was exclusively concerned with debts and liabilities of a wife contracted before marriage, therefore it did not follow that the courts should annul the law in any other particular, based on the Act. This reticence was consistent with the intimate relation of husband and wife and also with the nature of the control given by the husband at law and social usage<sup>125</sup> over the wife's conduct and actions. Reference was made to the responsibility of the spouses together – the family<sup>126</sup> – being a juridical unit. In addition, the religious nature and effect of marriage<sup>127</sup> was emphasised. In *Whyman v Johnson*<sup>128</sup> the fiction of one legal personality in the law of tort, between husband and wife, was held no longer to exist. It followed that it was an easy and last step in *Dalton v People* to repudiate the common law exemption and its implications for womanhood.

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<sup>124</sup> A dictum in *Martin v Robson* (1872) 65 Ill 129, 138 (Supreme Court of Illinois) was referred to "But a line has been drawn between them, distinct and ineffaceable except by legislative power. His legal supremacy is gone, and the sceptre has departed from him." per Thornton J.

<sup>125</sup> *McQueen v Fulgham* (1864) 27 Tex 463, 467 it was specifically stated that it would "be difficult, if not impossible, for the courts to determine when she had acted at her own instance, and when she was guided by his dictation".

<sup>126</sup> See *Nichols v Nichols* (1898) 48 SW 947, 954 (Supreme Court of Missouri) "As contemplated by that law, they were two persons, made one by marriage, one entity – the family – whose head was the husband, with power to control and direct the conduct and action of its members, and with a corresponding liability to society for such conduct and action" per Brace PJ.

<sup>127</sup> *Schuler v Henry* (1908) 94 P 360, 392 per Maxwell J "His control, implanted by the laws of nature, and the Divine law, exercised through love and affection...is more potent...than any right recognised by any law, common or statutory..." See also *Nichols v Nichols* (1898) 48 SW 947, 954 "When, by legislative enactment, marriage in this state becomes a mere civil contract – a mere community of interest based on property – then the reason for the rule may cease to exist; but so long as it remains, the sacred relation contemplated in the common, as in the Divine, law, a reason therefore must remain."

<sup>128</sup> (1917) 1 63 P 76 (Supreme Court of Colorado).

In *Dawson v United States*,<sup>129</sup> before the Court of Appeals of the Ninth Circuit the narrow issue was whether a man and wife could be convicted of conspiracy, there being no other party charged with complicity in the crime. McCamant, Circuit Judge,<sup>130</sup> noted that apart from *Addison Smith v State*<sup>131</sup> and *Dalton v People*,<sup>132</sup> every other decision in the States or Federal system of America and all the text writers were agreed that a husband and wife could not conspire together alone, which was followed. The wife also relied on appeal upon the refusal of the trial court to direct the jury on the basis of marital coercion. The husband and wife were convicted of transportation of a woman from Idaho to Nevada for the purposes of prostitution. The intention was to establish a bawdy house in Nevada and the woman transported was taken there to engage in commercial vice. The evidence showed that the wife was the moving spirit in the enterprise. The court found that the presumption did not arise on the facts because an exception to the marital coercion doctrine was any offence which was of a nature “more likely to be committed by a woman than a man, such as keeping a house of prostitution or abducting girls for amoral purposes.”<sup>133</sup> The Court in *Dawson v United States* said though of the conspiracy exemption, “The common law rule unquestionably supports defendants’ contention; a rule so well established and so generally recognised by the modern authorities should not be judicially repealed”.

In *State v Nowell*<sup>134</sup> a married woman was charged with the abduction of a 14 year old girl. The presumption of coercion was invoked. But the court there said:

Among the crimes excepted from the rule are keeping bawdy houses and offences of a like character. This principle would cover, we are inclined to think, abducting girls by solicitation for immoral purposes, a business in which the defendant was more likely to be acting upon her own initiative, rather than under the coercion of her husband.

The court found there was no error in relation to this aspect but held that husband and wife could not be guilty of conspiracy and that conviction was quashed. In *Gros v United States*<sup>135</sup>

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<sup>129</sup> 10F 2d 106 (1926) CCA.

<sup>130</sup> Hunt and Rudkin CJJ concurring.

<sup>131</sup> 89 SW 817m 820 (1905).

<sup>132</sup> 189 P 37 (1920).

<sup>133</sup> Relying upon 4 Blackstone ‘Commentaries’ 29; *State v Jones* (1903) 45 SE 916; *People v Wheeler* (1905) 105 NW 607; *Haffner v State* (1922) 187 NW 173 and *State v Gill* (1911) 129 NW 821.

<sup>134</sup> 72 SE 590.

the Court of Appeals for the Ninth Circuit, indicated that a conspiracy prior to the marriage, of parties eventually married, would have no immunity but the court felt constrained to follow its earlier decision in *Dawson v United States* that the general common law rule applied. So upon the acquittal of the third party charged with participancy in the conspiracy, it left but the two spouses, whose incapacity was not removed by the disproved charge against the third party. The Supreme Court of Illinois's decision in *People v Martin*<sup>136</sup> involved a conspiracy by the spouses to sell heroin. The Court acknowledged that caselaw as to whether the spousal exemption remained valid or ever was, was uneven throughout the width of American law.<sup>137</sup> Upon a consideration of the origin of the rule, the court concluded that it was based upon the disability of a wife to own separate property at common law, and her lack of capacity to institute an action, independently of her husband.<sup>138</sup> It therefore concluded that the overall paradigm shift in both statute and decisional law necessitated the conclusion that this exemption no longer existed, particularly as the year before the Illinois legislature had abolished the presumption of marital coercion.

## TORTIOUS SPOUSAL CONSPIRACY: AMERICAN CASELAW

Up until the turn of the twentieth century the spousal exemption was generally also applied to tortious conspiracies in most American jurisdictions. The first decision refusing to apply the exemption to tort was in *Jones v Manson* where, the Supreme Court of Wisconsin<sup>139</sup> recognised in 1909 that the defence of marital coercion would be available in a criminal conspiracy and that the “common-law doctrine undisturbed by statute”<sup>140</sup> exempted the spouses from the crime of conspiracy – but not for the tort of conspiracy. Marshall J

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<sup>135</sup> 138 F 2d 261 (1943).

<sup>136</sup> (1954) 122 NE 2d 245.

<sup>137</sup> The spousal exemption was criticised in (1927) 27 *Columbia Law Review* 219.

<sup>138</sup> Relying upon Blackstone *Commentaries* 442 – The Supreme Court also referred to the fact that the presumption of marital coercion had been abolished: *Illinois Revised Statutes 1953*, ch38, para 596, and concluded that, at p247, that spouses “are not immunized from prosecution by surviving radiations from the common law fiction of unity of husband and wife.”

<sup>139</sup> *Jones v Monson* (1909) 119 NW 179. In *Merrill v Marshall* (1904) 113 Ill App 447 (Court of Appeals of Illinois) applying the criminal conspiracy decision in *People v Miller* (1889) 22 P 934 held that a tortious spousal conspiracy was not possible, noting that whatever a wife does in the presence of her husband is done under his coercion: *Rather et ux v State* 1 Ala 132, 138.

<sup>140</sup> At p182 in *Miller v State*.

delivering the judgment of the court added that although on the narrow basis of conspiracy a wife was exempt, she was still liable for the consequences of criminal acts in execution of the conspiracy committed jointly with her husband, which are of themselves subjects of criminal prosecution. This reasoning exempt the spouses for only the incipient agreement but not the overt acts committed in furtherance of and in evidence of it.<sup>141</sup> That is an especially austere view of the law of conspiracy. The overt acts are encompassed by and contemplated by the agreement and it is wholly artificial to divide the concept or plan from the implementation of it. The crime cannot be disaggregated this way so as to very substantially reduce its protective purview as an exemption from general liability. The Wisconsin Court then however, closely and correctly differentiated the concepts of tortious<sup>142</sup> and criminal conspiracy,<sup>143</sup> adjudicating that in the former, the gist of the tort is the actual damage caused, by the combination of acts, making it a substantive wrong; whereas in the criminal law it is the confederacy of intentions formed into an agreement which is the gist of the inchoate offence. In *Worthy v Birk*<sup>144</sup> the decision in *Jones v Monson* was not followed, the Illinois Court observing that the Wisconsin decision was the only case which had held that a husband and wife could commit a civil conspiracy. It was reinforced in its conclusion by the fact that a husband and wife were generally incompetent as witnesses against the other. So if a conspiracy were possible “we do not see how the fact could be proved, if incompetent when called as a witness, upon what theory could it be held that her acts and declarations would be admissible?”<sup>145</sup> Later English law would adopt the Wisconsin position.

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<sup>141</sup> Relying upon 2 Bishop *New Criminal Law*, § 187; and RS Wright *Criminal Conspiracies*, p221.

<sup>142</sup> *Kirtley v Deck* (1811) 16 Va 10, Supreme Court of Virginia, dealt with the tort of conspiracy to commit malicious prosecution. The defendants included a Mr and Mrs Munger, the latter of whom it was alleged had in 1799 falsely alleged, in furtherance of the conspiracy, that the plaintiff had attempted “to have carnal knowledge of her body”, see p10 cf *The Poulterer’s Case* (1610) 9 Co Rep 556; 77 ER 813, a conspiracy to falsely allege that a person had committed robbery. Tucker J citing the 1534 text by Fitzherbert, *Natura Brevium*, at p116, a conspiracy involving a third person “well lieth” rejected a ground of appeal based on spousal exemption where a third party was also involved at p15 Roane and Fleming JJ concurred. In *People v Gilbert* (1938) 26 Cal App 2d 1 the Court of Appeal of California at p48 said this position was “elementary”.

<sup>143</sup> Applying *People v Miller* (1889) 22 P 934.

<sup>144</sup> (1922) 224 Ill App 574 (Court of Appeals of Illinois). In *Barnett v Harshbarger, Administrator* (1886) 5 NE 718, 720 (Supreme Court of Indiana) “It is for the Legislature, and not the Courts, to destroy the rule of the common law declaring the unity of husband and wife.” per Elliott J.

<sup>145</sup> At p583.

## SPANISH CIVIL LAW INFLUENCE ON TEXAN CRIMINAL SPOUSAL CONSPIRACY EXEMPTION

In *Marks v State*<sup>146</sup> a husband and wife were convicted of conspiracy to commit theft. The wife was a clairvoyant<sup>147</sup> who duped a customer into parting with a very large amount of money. The ground of appeal related solely to the spousal exemption. Graves J acknowledged that in a number of American states the common law rule still prevailed that a husband and wife could not conspire alone together. But he stated that Texas was not such a state as it had inherited Spanish civil law<sup>148</sup> concepts and this different history relative to the initial adoption of its laws provided a different answer to the status of a woman under coverture. Graves J referred to *Addison Smith v State*<sup>149</sup> where it had been held that spouses could conspire to commit a felony, voiding the fiction of the wife being a chattel merged into the identity of her husband upon marriage. Texas law had introduced a radically different system of marital rights,<sup>150</sup> as since 1905 it “had long been held” that a husband and wife can conspire together, a result justified in view of the inception of the adoption of the common law, mingled with the Spanish law, not only by statutes but by each succeeding *State Constitution of Texas* from 1845 to 1876. In addition, Graves J referred to Article 32 of the *Texas Penal Code* which provided that where a wife commits an offence under marital coercion this does not amount to a defence, but the punishment of her offence shall only be met by one half of the punishment she would otherwise have merited. This was complemented by Article 33 of the *Texas Penal Code* which provided that where a wife was instigated or aided in committing an offence, by her husband, the husband was to be punished by twice the punishment he would otherwise

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<sup>146</sup> (1942) 164 SW 2d 690 (Court of Criminal Appeals of Texas).

<sup>147</sup> She advertised in the Waxahachie Newspaper “Don’t fail to see Madam Thompson who answers all questions of love, business and law suits”. There is no evidence that she predicted either her own law suit or its unsuccessful outcome.

<sup>148</sup> See 23 Tex Jur p36 “The Spanish civil law looked upon the marriage union as a species of partnership in which each might own and control a separate estate, as well as a common interest in a common fund called the ganancial goods. It accorded necessarily a great many rights and privileges to the wife that were unknown to the common law. The two systems were fundamentally opposed to each other.”

<sup>149</sup> (1905) 89 SW 817

<sup>150</sup> By an Act of 20 January 1840 ‘*An Act to Adopt the Common Law of England, to Repeal Certain Mexican Laws, and to Regulate the Marital Rights of Parties*’, referred to by Gaines CJ in *Barkley v Dumke* (1905) 87 SW 1147.

have received.<sup>151</sup> It is extremely difficult to understand how the double-jeopardy of a husband is consistent with the very notion of equality being advanced as the reason for the annulment of the spousal exemption. The court noted the husband had performed his part of the conspiracy by arranging the trap and inviting the victim, while the wife performed her portion “by her chicanery and stratagems,”<sup>152</sup> so that she was a non-coerced, manipulative woman who represented the very best of example as to why full unrelenting equality should prevail.

### *R V McKECHIE*: NEW ZEALAND LAW CONFRONTS THE SUPPOSED EXEMPTION

In *R v McKechie*<sup>153</sup> the New Zealand Court of Appeal (Sim, Reed and Adams JJ; Stout CJ and Ostler J dissenting) was confronted with the direct primary issue that had eluded the English courts.<sup>154</sup> Although in *R v Peel* Darling J had remarked that the spousal exemption still existed at common law, his remarks in that case were obiter, no conspiracy having been charged. But, the influence of his ruling was such that it was adopted by the English texts and against that background the exact issue had to be decided under the *Crimes Act 1908* [NZ] where no express provision had been made by the legislature to deal in any way with the common law defence, although it had specifically abrogated the common law presumption of marital coercion at the same time in 1893. In the Court of Appeal the prosecution was represented by the Solicitor-General. By a majority the court held that a husband and wife could not in law alone conspire together.<sup>155</sup>

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<sup>151</sup> The Court noted that the trial Judge had overlooked this provision and had failed therefore to impose “...a double penalty...”

<sup>152</sup> A motion for a rehearing was denied: *Marks v State* (1942) 164 SW 2d 693 per Beauchamp J.

<sup>153</sup> [1926] NZLR 1 (CA).

<sup>154</sup> J L Robson (ed), *New Zealand – The Development of its Laws and Constitution*, (1967) 2 ed Stevens & Sons, London. ‘*Criminal Law*’, I D Campbell, at p365 “Many old common law rules which no longer commanded general acceptance were abolished”. Campbell adds a mischievous footnote at the end of this sentence “But there was one that got away” and refers to *R v McKechie* [1926] NZLR1(CA).

<sup>155</sup> Three years after the *Criminal Code Act 1893* was in force, the New Zealand Court of Appeal, Prendergast CJ, Williams, Denniston and Conolly JJ, indirectly considered the marital exemption in *R v Annie Brown* (1896) 15 NZLR 18 a case where incidentally the defence of marital coercion was unsuccessfully relied upon. In the only consideration ever by the Privy Council of the marital coercion defence, it affirmed the conviction: see *Annie Brown v Attorney-General for New Zealand* [1898] AC 234 (PC) A husband and wife having been jointly charged with using an instrument to procure the miscarriage of a young woman, counsel for the prosecution conceded in argument (1896) 15 NZLR 18, 27 that the common law rule precluding a conspiracy between husband and wife had not been “attempted to be dealt with by the Code” and that s21 of the Act “preserves it”. Prendergast CJ, at p32, noted it did not follow that because a husband and wife in the eye of the law were still

## TRIAL IN THE SUPREME COURT

A husband and wife had been indicted at the Dunedin Supreme Court<sup>156</sup> in August 1925 with four counts of conspiring between themselves, on individual days, to induce a young woman to commit adultery with the husband. It was plain that the Crown Prosecutor at Dunedin Mr F B Adams, took the innovative view that under the new *Crimes Act 1908* [NZ] ( and indeed its predecessor the *Criminal Code Act 1893* [NZ]) that a conspiracy between a husband and wife alone was now possible, irrespective of the apparent common law position. Prior to arraignment counsel for the spouses, pursuant to s399 *Crimes Act 1908*, applied to have the indictment quashed on the basis that the spouses could not be properly indicted for conspiracy.<sup>157</sup> But Sim J stated that he would not accede to the applications for two reasons, “the indictment does not show on the face of it that they are husband and wife”<sup>158</sup> and that the proper time to raise the objection was at “a later stage”.<sup>159</sup>

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“for many purposes one person, and cannot ordinarily agree together” that it precluded them engaging in “combination or concert, express or implied.” While expressly acknowledging that a husband and wife alone “cannot be indicted for conspiracy” narrowly delimited the exemption from uxorial criminality, to the crime of conspiracy. Williams and Conolly JJ refrained from the line of reasoning. Denniston J at p36-37 was evidently hesitant about the special spousal exclusion from conspiracy. The Chief Justice fortified his assertion that joint spousal action was no bar to prosecution, by stating that a wife would be liable as an accessory before the fact to her husband’s offence “by procuring or inciting him” to commit it. The criminal law instances a remarkable paucity of authority on uxorial incitement. That conclusion remains valid and represented the common law position too. However, the position in New Zealand of a wife as an accessory after the fact of her husband’s crime is the exact opposite. At common law *R v Good* (1842) 1 Car & Kir 185 and by legislation: s92(2) *Crimes Act 1908* [NZ] (defence only available to a “married woman”); s71(2) *Crimes Act 1961* [NZ] (spouse-neutral language: now defence available to “a married person”).

<sup>156</sup> On 6 August 1925 *The Otago Daily Times* reported the Supreme Court trial, before Sim J and a jury, of David Nevin McKeachie and his co-accused and wife, Ruby Hinton McKeachie. The husband was singularly indicted with the indecent assault of a female aged 19 and the spouses were jointly indicted with several counts of conspiring, by themselves, alone, together, of having by false representations induced the husband to commit adultery with a girl, contrary to s219 *Crimes Act 1908*. That offence (now repealed) provided: “Every one is liable to two years imprisonment with hard labour who conspires with any other person, by false pretences, or false representations, or other fraudulent means, to induce any woman or girl to commit adultery or fornication”. Section 136 *Crimes Act 1961* now provides: “Every one is liable to imprisonment for a term not exceeding 5 years who conspires with any other person by a false representation is or by other fraudulent means to induce any woman or girl to have sexual intercourse with any male who is not her husband.”

<sup>157</sup> *Otago Daily Times*, 6 August 1925.

<sup>158</sup> *Ibid.*

<sup>159</sup> This is difficult to follow. A motion to quash is almost always made prior to arraignment. *R v Heane* (1864) 4 B&S 947, 956 (Cockburn CJ), 957 (Blackburn J) 958 (Mellor J), *R v Asif (Masood)* (1985) 82 Cr App R 123 (CA) The reality may be that Sim J saw the implications of a successful motion to quash (with there being no right of appeal vested in the prosecution) and wished the matter to proceed, if at all, to the Court of Appeal by way of an appeal against conviction. Further, even on the motion to quash the accused could have called evidence on a voir dire to establish their marriage, if it was not formally admitted by the prosecution. But the

The allegation underpinning the conspiracy, the Crown Prosecutor said in his opening was: “The fraudulent representations appeared to have come entirely from the side of the wife, with the exception of the incident which might have been a pretence at intimacy between husband and wife.”<sup>160</sup> At the close of the prosecution case counsel for the spouses again raised the question of quashing the indictment. Sim J again stated that there was no evidence before the Court that the accused were husband and wife. The judge said he would reserve a case stated to the Court of Appeal under s442 *Crimes Act 1908* if the accused were convicted. Counsel stated if necessary he would produce evidence that the accused were in fact married at the material time.<sup>161</sup> Neither accused gave evidence and the judge in summing up directed the jury that the intimacies, which included “smoozing”,<sup>162</sup> could constitute indecency or fornication, and a “conspiracy might be established between two persons without any words at all”.<sup>163</sup> The jury convicted both spouses but with “a very strong recommendation”<sup>164</sup> for leniency in favour of the wife. The judge sentenced the husband to five years imprisonment with hard labour on the indecent assault count and postponed sentence on the conspiracy counts. The wife was admitted to bail, with a surety of £10, pending the decision of the Court of Appeal. Sim J directed that the case stated be heard at the next session before the Court of Appeal.<sup>165</sup>

By an oddity the Court of Appeal three years earlier in *R v Leonard*<sup>166</sup> with a majority of the same judges having sat in that case, as well as in *R v McKeachie*, had decided that a husband was included within the words “every person” in s127 (1) *Mental Defectives Act 1911* [NZ], which criminalised the act of every person having sexual intercourse with any female detained under the provisions of that Act. The accused had had sexual intercourse with his wife, who was detained as a mental patient, and argued unsuccessfully that he was outside the

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indictment was plainly predicated on the existence of a subsisting marriage at the material time, between the McKeachie, as the averment was one of adultery.

<sup>160</sup> Ibid.

<sup>161</sup> *The Otago Witness*, 11 August 1925 shows that the marriage certificate was adduced in evidence, showing they had been married since 1919.

<sup>162</sup> A term which remained tantalisingly undefined, for the readers of *The Otago Daily Times*, 7 August 1925, Sim J, upon the entry of pleas of not guilty, had ordered the Court to be cleared during the hearing of the case, excepting the presence of the media.

<sup>163</sup> Ibid.

<sup>164</sup> Ibid.

<sup>165</sup> Sim J was a member of the majority in the Court of Appeal which quashed the conspiracy convictions.

<sup>166</sup> [1922] NZLR 721 (CA).

prohibited category of “every person” because he had a common law right to have sexual intercourse with his own wife, so that the provision meant on its proper construction, every male except the husband. In *R v McKeachie* the majority were to conclude<sup>167</sup> that a wife did not fall within the expression “[a]ny person” because of the on-going effects of coverture. In *R v Leonard Stout* CJ<sup>168</sup> reasoned that the doctrine which provided that the relationship of marriage meant that a wife’s rights were merged in those of her husband was distinguishable by the very subject nature of the Act, as its stated<sup>169</sup> that such a detained female person was incapable of giving a valid consent, in view of her mental condition. Sim and Hosking JJ concurred each like Stout CJ seeing the husband’s argument as an attempt to revive the vestigial remnant of the husband’s authority to physically abuse his wife, repudiated in *R v Jackson*.<sup>170</sup> Adams J additionally concluded that if the wife had given any consent it would have been deemed to have been under marital coercion,<sup>171</sup> and therefore no valid consent. Stringer J dissented on the basis that he could not accept that the Legislature had intended to criminalise the act of sexual intercourse between a husband and a wife, founding himself on words written by Hale hundreds of years earlier, “by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract”. He saw “the matrimonial rights of the husband” to include his entitlement<sup>172</sup> to sexual intercourse with his wife. In addition he applied the approach in *The Queen v Harrald*<sup>173</sup> where although s9 *Municipal Corporation Act 1869* [UK] provided references to the masculine gender should include the female gender, for all purposes connected with the right to vote at the election of municipal councillors, it was held that this reference only ameliorated the disability of woman based on their general gender, but was not powerful enough to remove the additional disability of coverture of married women. Where therefore in

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<sup>167</sup> The result of the Court of Appeal majority decision was widely published, with, in one instance, a terse rendition of the ratio as headline ‘*Conspiracy Not Legally Possible*’, *The Otago Daily Times*, 21 October 1925 and a factual outcome ‘*M’Kechies Acquitted*’ in another, *The Otago Witness*, 27 October 1925.

<sup>168</sup> *Ibid.* 725-726.

<sup>169</sup> s127 (4) *Mental Defectives Act 1911* [NZ].

<sup>170</sup> [1891] 1 QB 671 (CA).

<sup>171</sup> Referring at [1922] NZLR 721, 746 to ‘*Archbold’s Criminal Practice*’ 25 ed p21.

<sup>172</sup> *R v Clarence* (1888) 22 QBD 23 per Pollock B “The husband’s connection with his wife is not only lawful, but it is in accordance with the ordinary condition of married life. It is done in pursuance of the marital contract and of the status which was created by marriage, and the wife, as to the connection itself, is in a different position from any other woman, for she has no right or power to refuse her consent.” This judgment remained good law until overruled in *R v Dica* [2004] QB 1257 (CA); *R v Brady* [2006] All ER (D) 239 (Oct) per Hallett LJ para [23].

<sup>173</sup> (1872) LR 7 QB 361.

an election in which a candidate succeeded by one vote but where two married women had cast votes for the candidate, quo warranto issued to quash the election result. Cockburn CJ stated “by the common law, a married woman’s status was so entirely merged in that of her husband that she was incapable of exercising almost<sup>174</sup> all public functions.”<sup>175</sup> The Lord Chief Justice ruled that the subsequent *Married Women’s Property Act 1870* [UK] altered the status of married women in relation to property only<sup>176</sup> and certainly had not “by a side wind given them political or municipal rights.”<sup>177</sup>

In *R v McKeachie* the principal argument for the spouses<sup>178</sup> was that the common law precluded their conviction and that as the Legislature had not distinctly abrogated the common law exemption or defence upon the introduction of the first statutory criminal code in New Zealand, then the common law position remained. By s119 *Criminal Code Act 1893* [NZ], reproduced as s219 *Crimes Act 1908* [NZ], the offence of conspiracy to induce adultery or fornication by false pretences was created which provided:

Every one is liable to two years’ imprisonment with hard labour, who, conspires with any other person, by false pretences, or false representations, or other fraudulent means, to induce any woman or girl to commit adultery or fornication.

It was argued, on behalf of the spouses, that the common law unity between husband and wife was maintained, unless expressly<sup>179</sup> abrogated and that the operative phrases in the section of the *Crimes Act* were not intended to override the longstanding protection. The Solicitor-General, Mr A Fair KC mounted an a priori argument by denying that the text books “accurately state the common law”. He argued that no reasons had been advanced to justify the anomaly and that the famous passage in Hawkins ‘*Pleas of the Crown*’ that spouses were “esteemed but one person in law, and are presumed to have one will” were but a figurative expression. A further argument was that it would be an extraordinary and anomalous thing if

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<sup>174</sup> But marriage was the vital qualification for a jury of matrons in capital cases.

<sup>175</sup> (1872) LR 7 QB 361, 362.

<sup>176</sup> Hannen J agreeing at p364 “...not intended to extend in anyway to the political rights of women.”

<sup>177</sup> Ibid 363, Mellor J stating that at common law marriage was a total disqualification so that a wife could not vote as “her existence for such a purpose” had merged in her husband. The outcome then was that the Act only applied per Cockburn CJ at p362 to females who were “spinsters and unmarried women”.

<sup>178</sup> They were jointly represented by one counsel: [1926] NZLR 1, 2.

<sup>179</sup> [1926] NZLR 1, 3 “Coercion is analogous to conspiracy: but the Legislature has not saw it fit to abrogate the common law with regard to conspiracy.”

conspiracy was the only case in the criminal law where husband and wife were to be treated as one. The independent legal status of a wife was now incompatible with the former common law, so once the reason for the rule had gone the rule had gone with it: “Reason is the soul of the law, and when the reason of any particular law ceases, so does the law itself.”<sup>180</sup>

The majority judgment affirming the existence of the common law spousal exemption was delivered by Reed J<sup>181</sup> who emphasised that the facts showed that the only possible conspirators were the spouses. The Legislature had first partially codified its criminal law in 1893 as “an adaptation to the circumstances of New Zealand of the *English Draft Code of 1879*.”<sup>182</sup> It was correct to point to the virtually<sup>183</sup> unanimous opinions of “text-book writers of repute”<sup>184</sup> who accepted the validity of the exemption, which was a conclusion “too well established in this respect to be challenged.”<sup>185</sup> (There had been, curiously, no reference to the ruling by Darling J in *R v Peel* by either counsel or the court, which affirmed the common law exemption, only three years earlier). Reed J stated that no case had been brought to the attention of the court where the law had been questioned.<sup>186</sup> The majority reasoned that

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<sup>180</sup> *Broom’s Legal Maxim’s*, 7 ed, p126: “Cessante ratione legis, sessat ipsa lex”.

<sup>181</sup> [1926] NZLR 1, 10-14 (CA). Conspiracy to commit a crime was a misdemeanour at common law: *R v MacKenzie and Higginson* (1910) 6 Cr App R 64, 71 (very low maximum sentence available) for misdemeanours. The considerable uncertainty as to whether the marital coercion doctrine applied at all to misdemeanours, may explain the almost total absence of the invocation of that defence in a conspiracy context.

<sup>182</sup> Ibid 11. An explanation for the abrogation of marital conspiracy lies in the fact that it was removed in the very year female enfranchisement was granted. The spousal conspiracy exemption may have been simply overlooked as requiring specific attention in the 1893 Code, as the only example dealing with it was the unreported judgment in *R v Howard* (1886) where the judge ruled the marriage was not valid. In short the defence of marriage was a non-issue in real terms in New Zealand.

<sup>183</sup> Two contemporary texts disavowed the exemption R S Wright *The Law of Criminal Conspiracies and Agreements*, (1887) p59 where that writer doubted the effect of the ancient authorities. “The ancient writ of conspiracy appears not to have lain against husband and wife alone. It is said to have lain against husband, wife and a third person. (See Year Book 38 Edw 3, 3a: 40 Edw 3, 19: 41 Edw 3, 29: Fitzb, NB 116 1:Staundf, 174). But the effect of the ancient authorities is doubtful; and it may be questioned whether a husband and wife could not be convicted of conspiracy in any of its modern forms. Proof, however, of coercion by the husband would in such a case have the effect of negating the fact of conspiracy, since the force would avoid the agreement”. The other was *Eversley on Domestic Relations*, (1906) 3 ed which provided “It is said that a husband and wife cannot be indicted for a conspiracy because they are deemed to be as one person in law and have but one will; but it is doubtful now whether that proposition would be held to be good law if it were shown that the agency of the wife was as active as that of the husband.”

<sup>184</sup> *Stephen’s Commentaries on the Laws of England*, 16 ed vol 4 p213; *Halsbury’s Laws of England*, vol 9 para 544; *Russell on Crimes*, 8 ed vol 1 p150 note (c) *Archbold’s Criminal Pleading*, 26 ed p1417; and *Roscoe’s Criminal Evidence*, 14 ed p520.

<sup>185</sup> At p12 Reed J described it as “that basic rule.”

<sup>186</sup> In *Dalton v People* (1920) 189 P 37 the Supreme Court of Colorado had decided that spouses had no exemption from criminal conspiracy because of the general tenor of legislation in that state enhancing the civil

marriage was a formal defence<sup>187</sup> to the offence of conspiracy at common law, and that as all common law defences not inconsistent with the Code had been preserved by the 1893 Act and carried on by s40 *Crimes Act 1908* [NZ] it followed that the common law defence of marriage still existed.<sup>188</sup> In particular s40 was “essentially the same as s19 of the *English Draft Code of 1879*” of which the Royal Commissioners at that time had said:<sup>189</sup> “While, therefore, digesting and declaring the law as applicable to the ordinary cases, we think that the common law, so far as it affords a defence, should be preserved in all cases not expressly provided for”. From this adopted basis, acclimatised to the pioneering conditions of New Zealand in 1893, the majority deduced that no manifested intention to alter the common law was made. On the contrary, the thrust of s40 *Crimes Act* was to preserve the pre-existing common law position. In particular the court was highly conscious of the fact, that having recognised marriage as an actual defence in criminal law, if it were to decide that the common law had perished upon the passage of the 1893 Act, the court would be declaring that a very long-standing criminal defence, traceable to at least 1365, had gone, without the slightest consideration of it by the Legislature. The court therefore adopted the orthodox penal construction<sup>190</sup> approach to s40, which did not lead to a conclusion that the common law defence had dissipated at a time prior to the 1893 Act. The minority concluded that the common law defence had not travelled to the Code as it had already expended itself before that time. Reed J for the majority had argued that in “the closely connected case of compulsion in the case of a married woman,<sup>191</sup> the common law is abrogated in plain and unequivocal terms” yet no such language had been employed in relation to the conspiracy exemption – the issue simply did not directly appear anywhere in the Act. The reluctance by

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and political rights of married women. In *Smith v State* (1905) 89 SW 817 a Texan court had by dicta anticipated that result.

<sup>187</sup> At p12 “...it is quite rightly admitted by the Solicitor-General that, assuming the law to be as above stated, proof of the marriage of the parties alleged to have conspired would be a defence at common law to the indictment.” At p5 Stout CJ also referred to marriage as a “defence”. Ostler J at p14 referred to the “defence that they were man and wife.”

<sup>188</sup> For necessity as a valid common law defence, via this same portal see *R v Hutchinson* [2004] NZAR 303 (A).

<sup>189</sup> [1926] NZLR 1, 12 quoting ‘*Report of the Royal Commission appointed to consider The Law Relating to Indictable Offences: With An Appendix containing a Draft Code embodying the Suggestions of the Commissioners*’, Her Majesty’s Stationery Office, London, 1879, Cmnd 2345, p10.

<sup>190</sup> In *Attorney General v Sillem* (1864) 2 H & C 431, 509 Pollock CB said: “In a criminal statute you must be quite sure that the offence charged is within the letter of the law.”

<sup>191</sup> In JP Bishop, ‘*Commentaries on the Criminal Law*,’ 6 ed vol 1 ch xxiv, para 357 it was stated that a married woman had not lost by marriage her general capacity for crime, only that “the law has cast upon her a certain duty to him, of obedience, of affection, and of confidence, it has compensated her by the indulgence” of the doctrine of marital coercion.

the majority to declare that a common law defence could be supervened by anything other than the Legislature itself is a major premise of their reasoning.

There were two separate dissenting judgments. Stout CJ<sup>192</sup> was trenchant in his criticism of the majority reasoning. The fact that the leading case for the proposition that the exemption ever existed occurred in the reign of Edward III, was itself the very reason needed for a contemporary justification of the common law position. He stated he would not “allow such an old law to dominate us” like the law assumed that a husband controlled and dominated the acts of his wife. As a wife and husband could jointly commit a crime, *R v Cruse*,<sup>193</sup> there was no rational basis for exempting any antecedent agreement to commit that joint crime. Stout CJ reasoned that the rationale for the exemption was in fact the same rationale for marital coercion,<sup>194</sup> namely a belief that the wife acted under the control of the husband, which by contrast was never the law of Scotland. It was an incident of coverture which had now disappeared upon the granting of civil and political rights to married women. The old common law was not in force for two reasons, firstly because the specific defence of marital coercion had been abolished by the 1893 Act and where the “common law has been invaded” in that regard the remnant could not independently survive. Secondly, the common law defence was inconsistent with the statute, so that the common law defence was not included within s40 *Crimes Act*.

Ostler J dissenting concluded that “the separate criminal liability of wives had been fully recognised”. From the time of Bracton a wife who committed a crime by herself or committed a crime incited by her husband when he was not present, had no exemption from criminal liability. In neither situation was there any presumption of marital coercion so it followed that a wife had a freestanding separate legal independence in the criminal law from at least from before the time that the earliest known recognition of the judge-made conspiracy exemption was formulated in 1365 in caselaw. Therefore, no cogent analysis existed to rationalise why if

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<sup>192</sup> [1926] NZLR 1, 4-10. Stout CJ questioned whether now “even in England it would be held that a woman could set up this defence [of marital exemption from conspiracy]”.

<sup>193</sup> (1837) 8 Car & P 541 where marital coercion failed as a defence on the facts although the husband was present.

<sup>194</sup> [1926] NZLR 1, 6-8, referring to Joel Prentice Bishop, ‘*Commentaries on the Criminal Law*’, 6 ed vol 1 chap xxiv, para 357.

spouses can be guilty of a crime individually in their own right, particularly a crime which implied a prior agreement between them, why they should they not be equally guilty of a conspiracy to commit that very crime.

The abolition of marital coercion meant on this reasoning that the conspiracy exemption (which Stout CJ said was founded on the same rationale as that for marital coercion) necessarily disappeared upon the abolition of marital coercion. But a conspiracy between spouses where the husband was present would have raised the former presumption of marital coercion, but would not have excused the actual overt acts in furtherance of the conspiracy if the husband had not been present throughout.<sup>195</sup> Further, the natural meaning of the offence-creating section of the *Crimes Act* and the critical phrase “any person” plainly included within it a husband and a wife. Taken together with the reforms of the *Married Women’s Property Protection Act 1893* [NZ] and the grant of universal franchise the fact that there was no express provision in the *Crimes Act* to abrogate the conspiracy exemption was of no moment.

The dissent by Ostler J, amounted to a sustained repudiation of the old common law exemption.<sup>196</sup> Unlike Stout CJ, Ostler J would have found that the common law defence fitted within s40 *Crimes Act 1908*, but for the fact that he additionally concluded it no longer existed. He noted the last clear decision affirming the existence of the exemption was when the feudal system was in full vigour, before the first ray of light from the Renaissance had reached England, and when the social status of women was a little higher than that of chattels. The sole reason to justify the suggested exemption had been given in Hawkins’ ‘*Pleas of the Crown*’<sup>197</sup> namely that a husband and wife are esteemed but one person. But that justification, if it was ever valid, was no longer true upon the enactment of the first *Criminal Code*. It had

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<sup>195</sup> [1926] NZLR 1, 9.

<sup>196</sup> Rejecting the contention that it was legally impossible for a husband and wife to conspire with each other, the court in *Johnson v United State*:(1946) 157 F 2d 209: “The old rule was based on common-law fiction that husband and wife were one person. Acts of Congress have established the separation of husband and wife as to property, contracts, and torts in the District of Columbia, which ruled upon the question in denying the motion of the present appellant’s wife for a new trial, that this legislation has made the fiction obsolete. No reason remains why the law should not recognize the obvious fact that the relation of husband and wife does not prevent two persons from conspiring to commit an offense. The interest of society in repressing crime requires that the fact be recognized, and our common-law system does not require that its recognition await express legislative action.”

<sup>197</sup> Hawkins 1 PC c72 s8.

been preceded by a “long series of decisions in Equity” that had abrogated the hard rule of the common law that the wife’s person merged in that of her husband. In New Zealand from as early as the passage of s38 *Conveyancing Ordinance 1842* [NZ] the Legislature had enacted that a wife could convey property to her husband and the converse situation was equally lawful. This advance had been consolidated by the *Married Women’s Property Act 1884* [NZ]<sup>198</sup> and a long list of similar reforms meant that although the law “did not completely free a married woman from the legal status” of a feme sole imposed by the common law, it had made such an inroad into that doctrine “as practically to eat it away.” The Legislature by the *Destitute Persons Act 1877* [NZ] provided that wives were entitled to rights of maintenance from deserting husbands. These legislative developments were “sweeping changes in our social structure” so that the fact and implications of uxorial status were now animated by a very different spirit from that which had pertained “in the dark days of Edward III”.

The merger caused by coverture between the husband and the wife had now been reversed by the acquisition by the wife of her own separate legal rights and liabilities. The courts in both civil and criminal law and the Legislature had removed the theory of the absolute subjection of the wife to her husband and;

reason and the spirit of fair dealing required that a separate identity should be imputed to her. She had acquired the rights and liabilities, subject to unimportant exceptions, of a feme sole. Consequently the tooth of Time had eaten away the old rule before the passing of the Criminal Code, so that it was no longer common law in 1893.<sup>199</sup>

By parallel reasoning, the English Court of Appeal in 1891<sup>200</sup> had concluded that the common law right of a husband to administer reasonable castigation to his wife, confirmed only 50

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<sup>198</sup> In *Ewart v Sheerin* (1908) GLR 145 Cooper J decided that it was unnecessary for a married woman as plaintiff to sue by a guardian ad litem, as a result of s4 *Married Women’s Property Act 1884* [NZ], following *Douglass (sic) v Warner* (unreported) 1884. In the earlier case, Richmond J had held that Rules 67 and 70 of the *Code of Civil Procedure* in the *Supreme Court of New Zealand* were impliedly repealed. Rule 67 had grouped married women with “infants, idiots and lunatics” – as all required a guardian ad litem in order to sue or defend any cause.

<sup>199</sup> [1926] NZLR 1, 17. Sir John Salmond, *Theory of Judicial Precedents*, (1900) 16 LQR 383 had written: “The tooth of time will cut away an ancient precedent, and gradually deprive it of all authority and validity. The law becomes animated by a different spirit and assumes a different course, and the older decisions become obsolete and inoperative.”

<sup>200</sup> *R v Jackson* [1891] 1 QB 671, 679 (CA) in which Lord Halsbury LC overruled the “quaint and absurd dicta” holding otherwise.

years earlier,<sup>201</sup> had been superseded as repugnant to the momentum of legislative and social development of the rights of women.<sup>202</sup> In a peroration<sup>203</sup> Ostler J argued, “the time has come to recognize that for all the purposes of the criminal law man and wife are separate persons, with separate wills and the power in law, as they undoubtedly have in fact, of conspiring together to commit a crime”.

### SIR ROBERT STOUT CRITICISES THE MAJORITY JUDGMENT IN *R V MCKECHIE*

In a remarkable article,<sup>204</sup> written by Sir Robert Stout, shortly after his retirement<sup>205</sup> from the position of Chief Justice of New Zealand, published on 22 June 1926, he closely examined the majority judgment<sup>206</sup> of the Court of Appeal in *R v McKechie* over which he had presided and in which he dissented. For a judge to contribute to legal literature at this time was exceptional; but to write an article excoriating a majority judgment (in which the author had dissented) was simply unprecedented. He had not given up at being outvoted.

The granting of rights to women has been a slow process. At one time a married woman was looked upon as almost a slave or a vassal, and it has only been in recent years that her rights have been recognised. In olden times it was thought that the husband had power to punish her and thrash her. That was denied not so many years ago by one of the highest courts in England, but at the end of the last century and in this century her position has been greatly altered.

Stout observed that because of the *Married Women's Property Protection Act* a wife could now be a partner with her husband in business and had a right to her own property. No longer could her husband take it from her, and her property did not pass by marriage to her husband,

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<sup>201</sup> *In re Cochrane* (1840) 8 Dowl 630; ‘*A Treaty of Feme Coverts: or the Lady's Law*’, London (1732) p81; C S Kenny ‘*The History of the Law of England as to the Effects of Marriage on Property and on the Wife's Legal Capacity*’, London (1879) pp153-4. Both to the effect that husbands were exercising the opportunity to physically assault their wives in a belief based on common law entitlement.

<sup>202</sup> The decision in *R v Jackson* not only took away the common law right recorded in *Bacon's Abridgment*. “The husband has by law power and dominion over his wife, and may keep her by force within the bounds of duty, and may beat her but not in a violent or cruel manner” but it also destroyed the writ of *supplicavit*, which was expressly predicated on the right of the husband to use lawful physical correction on his wife.

<sup>203</sup> *R v McKechie* [1926] NZLR 1, 19.

<sup>204</sup> Sir Robert Stout, ‘*Married Women and the Law*’ (1926) II Butterworths Fortnightly Notes 391. The editor of this journal (the forerunner of the New Zealand Law Journal) referred approvingly to the article at p385.

<sup>205</sup> Resigned 31 January 1926: [1926] NZLR, ‘*Judges of the Court of Appeal and Supreme Court*’.

<sup>206</sup> Heard 29 September 1925, delivered 20 October 1925: [1926] NZLR 1.

except with her consent. The advances of New Zealand law in terms of the equality of women were incomparable. Women had now been granted the rights of citizenship. Women could vote at a Parliamentary election and for members of local bodies. He lamented that because of the Ceylonese decision in *Le Mesurier v Le Mesurier*<sup>207</sup> by the Privy Council the domicile of a husband was automatically her domicile and a wife was powerless to create a domicile for herself. He referred to Bell's *Principles of Scotch Law*<sup>208</sup> as well as Bishop's *Law of Husband and Wife*<sup>209</sup> to show the proper path for further advances towards the full emancipation of women under the law.

He regretted that the provision in s224(1)(a) *Crimes Act 1908*, which provided for the offence of bigamy as, "Bigamy is (a) the act of a person who, being married, goes through the form of marriage with any other person in any part of the world." had been interpreted by the majority of the Court of Appeal in *R v Lander*<sup>210</sup> (in which he had also dissented), as not being extra-territorial, following *MacLeod v Attorney General for New South Wales*.<sup>211</sup> The extended jurisdiction was therefore held beyond the competence of the Legislative Council to enact. In the aftermath of *R v Lander*, the same section was reconsidered two months later in *R v Jackson*<sup>212</sup> where the majority of the Court of Appeal, again Stout CJ dissenting, held that the last six words of the subsection considered in *R v Lander* "in any part of the world", were severable, leaving the residuum valid: "we must say that it would be difficult to find a clearer case of separability."<sup>213</sup>

Sir Robert then gave a bitter commentary on the decision of the Court of Appeal in *R v McKeachie*. He said of it that at the time the appeal was decided the court did not have

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<sup>207</sup> [1895] AC 517 (PC) where it was held that a wife can only be sued in husband's own domicile, because a wife has no domicile of her own. In *Attorney General of Alberta v Cook* [1926] AC 444, 460 it was again held that the domicile of a wife is the same as that of her husband, expressly applying the maxim *vir et uxor sunt quasi unica persona* postulated by Bracton *'De Legibus'* lib v c 25 s10.

<sup>208</sup> Para 1535.

<sup>209</sup> Para 157.

<sup>210</sup> [1919] NZLR 305 (CA). Stout CJ dissenting at 313 concluded that s53 *New Zealand Constitution Act 1852* [UK] was the authority for such extra-territorial legislation. In *Croft v Dunphy* [1933] AC 156 (PC) Stout CJ's dissent was validated when the Privy Council diminished to the point of zero the former highly restrictive approach: Philip A Joseph, *'Constitutional and Administrative Law in New Zealand'* (2001) 2 ed, Brookers, Wellington, p450.

<sup>211</sup> [1891] AC 455 (PC).

<sup>212</sup> [1919] NZLR 607 (CA) a Court of Appeal of 7 judges, Stout CJ alone dissenting.

<sup>213</sup> [1919] NZLR 607, 630 per Cooper J, delivering the judgment for the majority.

available<sup>214</sup> to consider the powerful contradicting analysis made by various King's Counsel in the House of Commons in relation to the cognate<sup>215</sup> provision of marital coercion in clause 44 of the *Criminal Justice Bill 1925*.<sup>216</sup> He referred to the fact that the English Solicitor-General reminded the House of Commons of the recommendation in 1922 of the Avory Committee, which exposed the fallacy of the common law presumption of marital coercion. That Committee additionally identified the artificiality<sup>217</sup> of the whole doctrine of marital coercion. Section 44(2) *Crimes Act 1908*, which provided where a married woman commits an offence, the fact that her husband was present at the commission of it shall not of itself raise the presumption of compulsion was a relevant marker and he asked rhetorically whether the law in New Zealand could be different from that which the British Parliament had enacted. He said of that subsection:

That leaves a married woman power to prove that she was compelled, but it was not to be presumed without proof. The Court of Appeal [in *R v McKeachie*], however, held that this provision – and I suppose it would also have held the same with regard to the English provision – was not applicable because a married woman is not “a person” that she has no will of her own, that her will is dominated by her husband, and even if she and her husband had conspired to murder she would not be liable for any offence nor would her husband because there could be no conspiracy unless there were two persons. In this respect it may be said that our law is more kindly to the married woman than the English law but it is kindness at the expense of what? Of declaring that she is not “a person” that she has no will of her own, and that she is still under the dominance of her husband even in matters of crime.

He noted that in the House of Commons the Rt Hon Mr Rawlinson KC was very sceptical of the clause proposed by the Solicitor-General as it would still maintain the marital coercion doctrine and give it statutory force. Rawlinson had argued “Can Honourable Members imagine anything more ridiculous than to suggest that there should be power given to a wife

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<sup>214</sup> Sir Robert Stout, *Married Women and the Law*, (1926) II Butterworths Fortnightly Notes p392. “There was not brought before the Court of Appeal – as the papers had not reached New Zealand when the case was heard – an interesting discussion that took place in the House of Commons when the “*Criminal Justice Bill, 1925*” was before the House. This appears in the English “Hansard” of Friday 20<sup>th</sup> November 1925”.

<sup>215</sup> It was argued for the spouses in *R v McKeachie* [1926] NZLR 1, 2-3 the fact s44 (2) *Crimes Act 1908* specifically abrogated marital coercion but had left the spousal conspiracy exemption unaltered indicated an intention to preserve that exemption. “My contention is that the common-law unity of person between husband and wife is retained in every case except where expressly abrogated by statute.”

<sup>216</sup> Which became s47 *Criminal Justice Act 1925*.

<sup>217</sup> The width of the spousal conspiracy exemption was wider than the purview of marital coercion, as it also applied to the heinous offences of treason and murder; there was no limit to its subject matter at common law. The State of Victoria in 1977 introduced legislation to provide for the spousal exemption in conspiracy, but at least aligned it with marital coercion, in specifically excepting both murder and treason from its protection.

to say, ‘I acted under the coercion of my husband’ which is not allowed to any other human being to say in respect to anyone else? The Bill proposes to do this.” Sir Robert despaired that the point that was successfully raised in *R v McKeachie* could be taken in New Zealand<sup>218</sup> and concluded, “To leave a married woman in that position is surely not for her honour, and this, no doubt, could be amended by our law.”<sup>219</sup> This legal article, particularly its comments on *R v McKeachie*, shows a scarcely veiled derision of the reasoning of the majority as being antediluvian.<sup>220</sup> That decision was the first time that an appellate court (outside the United States) in a common law jurisdiction had ruled on the validity of the common law exemption. A consequence of this decision, was that it was eventually considered and followed in the Supreme Court of Canada, and had attracted consideration in other jurisdictions as well.

The issue that had confronted the New Zealand Court of Appeal in *R v McKeachie*<sup>221</sup> was identified by the tension between the court’s acceptance that public policy towards women and indeed marriage had changed, and whether that alteration justified the court at being at liberty to modify<sup>222</sup> the contours of the common law. There was a reluctance in the common

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<sup>218</sup> The Solicitor-General had argued the change in the legal position of married women meant that the reason for the spousal exemption rule had gone and with it the rule had gone: [1926] NZLR 1, 3.

<sup>219</sup> In the final paragraph Sir Robert Stout observed that there were other instances in which married women had not yet obtained their proper and right position identifying that one such instance was the current legal inability to appoint married women as Justices of the Peace. Less than two months later, this was reversed by s2 *Justices of the Peace Amendment Act 1926* [NZ] “a woman shall not be disqualified by sex or marriage from being appointed to be, or from being by virtue of her holding any office, a Justice of the Peace.” By s2 *Women Jurors Act 1942* [NZ] any woman between 25 and 60 “shall be qualified and liable to serve on juries in the same manner in all respects as if she were a man.” This was hardly the most elegant formula to grant equality. But it was not complete equality in any event as s3 *Juries 1908* (just as by its predecessor s3 *The Juries Act 1880* [NZ]) provided that men were eligible between the ages of 21 and 60 – and from 1945 men were eligible until they were 65: s36 *Statutes Amendment Act 1945* [NZ].

<sup>220</sup> In (1926) II *Butterworths Fortnightly Notes* 406 *Wives for Sale* reference to the Annual Register for 1832 which talks of sale at Carlisle where a husband sold his wife at public auction after an hours bidding for 20 shillings and a Newfoundland dog.

<sup>221</sup> [1926] NZLR 1 (CA). Shortly before the hearing, an English monograph had cast some further doubt on the exemption. David Harrison, ‘*Conspiracy as a Crime and as a Tort in English Law*’, (1924) Sweet & Maxwell, London at p76: “It is generally stated (for example, by Hawkins, ‘*Pleas of the Crown*’, i., 72, 8) that husband and wife cannot by themselves be convicted of conspiracy, since in the eyes of the law they constitute one person, and one alone cannot conspire. This was the case as regards the old writ of conspiracy (see Y.B. 38 Edw 3. 3a; 40 Edw. 3, 3, 19; 41 Edw 3. 3, 29; Fitz. D.N.B. 116, 1) but it has been doubted whether it would apply to the modern offence unless coercion could be proved or presumed (‘*Wright on Conspiracies*’, p.75). In *R v Peel* (*The Times*, 8 March, 1922), however, Darling J said this rule still obtained: “Of course, it takes at least two people to conspire, and being one person in law the situation is that they” (that is, husband and wife) “cannot conspire”. Husband and wife can conspire jointly with another person (see *R v Whitehouse* (1852) 6 Cox CC 38)”.

<sup>222</sup> The majority accepted that no court should usurp a jurisdiction which it did not have: *DPP v Blady* [1912] 2 KB 89, 93 (DC) per Lush J.

law jurisdictions to erode what was an accepted immunity from prosecution. Express and unequivocal legislation compelling that result would be required. Just a year before *R v McKeachie*, at a time when the New Zealand Court of Appeal had yet to develop its own ability to depart from judgments of the House of Lords, that tribunal in *Edwards v Porter*<sup>223</sup> on 31 October 1924,<sup>224</sup> by a majority of three of the five Law Lords, held that a husband was still liable to be sued with his wife, for a tort committed exclusively by her during coverture, unless the tort was directly connected with a contract made with her. This conclusion was reached notwithstanding s1(2) *Married Women's Property Act 1882* [UK], which provided a married woman was now capable of suing or being sued as if she were a *feme sole*. Viscount Cave stated, “the true explanation of the rule [that a husband was liable for the torts of his wife] is to be found in that legal unity between husband and wife which existed when the rule was formulated, and which in those days rendered it inconceivable to a lawyer that a married woman should sue or be sued alone.”<sup>225</sup> The courts were hesitantly moving away from Victorian avuncular jurisprudence, reinforced by modern legislation underpinned by notions of uxorial equality. But there was no confident and coherent reappraisal – merely a collection of individual decisions<sup>226</sup> from which some definition would eventually emerge. The New Zealand Court of Appeal only a few years before *R v McKeachie*, had demonstrated its capacity for a purposive interpretation of statutory criminal law relating to the rights of wives. In *R v Leonard*<sup>227</sup> the accused was charged with the offence of having carnal knowledge of his wife at the time when she was detained in a mental hospital as mentally defective. The

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<sup>223</sup> [1925] AC 1 (HL).

<sup>224</sup> Viscount Cave's approach in the judgment coincided with his arguments in the Parliamentary Debates on the *Criminal Justice Bill 1924*.

<sup>225</sup> Ibid p9. At p6 Earl of Birkenhead concurred with the speech of Viscount Cave.

<sup>226</sup> In *R v Kingi*, (1909) 24 NZLR 371 (SC) Chapman J ruled that the rule of evidence that a wife cannot be compelled to give evidence against her husband has no application to a Maori customary marriage, and a Maori woman married according to native custom to a Maori man is a compellable witness against him in a criminal prosecution. In his charge to the Grand Jury, Chapman J said after noting that the prisoner was charged with having carnal knowledge of a girl under the age of sixteen: “These parties are referred to as having made a customary Maori marriage. The man took the girl away and lived with her. You are not to take into account the so-called Maori custom. If the Maori people were permitted to go back to Maori custom with respect to marriages, and to call those unions marriages, that might include polygamous marriages...The Court does not recognise so-called customary marriages.” Chapman J at p372 noted that in *R v Neddy Monkey*, (1861) 1 W&W (L) 40, an Australian Court had said of an Aborigine marriage based on customary principles that it was of no effect. In *R v Kingi* the essence of the objection was that because the prisoner had married the complainant, the complainant was not a compellable witness against her husband – a position that the court rejected. Notwithstanding that evidence showed that the two had been married by “the heads of the tribe”. See p372.

<sup>227</sup> [1922] NZLR 721 (CA).

majority of the Court of Appeal<sup>228</sup> held that the words of s127(1) *Mental Defectives Act 1911*<sup>229</sup> extended to the husband of the person against whom the offence was alleged to have been committed and that therefore the accused had committed an offence in having carnal connection with his wife. The argument of counsel for the appellant was that s127 had to be construed so as not to interfere with the common law rights of intercourse between husband and wife. It was argued that “By the contract of marriage there is conferred on the husband an irrevocable right to intercourse, enforceable by a restitution decree, but subject perhaps to the wife’s right to relief in certain cases.” The common law rule was laid down in Hale’s *Pleas of the Crown*.<sup>230</sup> Stout CJ said to counsel *arguendo* “You cannot go back to the old law of husband and wife. We have progressed somewhat, and the object of s127 may be eugenic.” Hosking J in *Mitchell v Madden*<sup>231</sup> had held that there is no presumption that the wife of a licensee is authorised to sell liquor on behalf of her husband. The judge ruled that there had to be express evidence of the husband’s authority to the wife’s exposure of alcohol for the purposes of any contravention to be established, so there had to be some *prima facie* evidence of authority that the wife was entitled to sell or expose the liquor for sale in order to convict the husband as licensee vicariously. The judge added:

In the present case there is no evidence to show that the licensee’s wife had any authority whatever to sell liquor at any time on behalf of her husband. It does not follow because she was his wife that she had such authority. Not infrequently the licensee’s wife, though living on the premises, has nothing whatever to do with the bar or the sale of liquor.

## ENGLISH LAW DEVELOPMENTS AFTER *R v McKECHIE*

A few years later in *Gottliffe v Edelston*<sup>232</sup> McCardie J said of the doctrine of marital unity, “It is not easy to discover the original basis of the doctrine as a common law principle.” He noted

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<sup>228</sup> Stout CJ, Sim J, Hosking J and Adams J.

<sup>229</sup> “Every person is guilty of an indictable offence who has or attempts to have carnal knowledge of any female who is detained under the provisions of this Act, or is otherwise under oversight, care or control as mentally defective.”

<sup>230</sup> vol 1, p629.

<sup>231</sup> [1920] NZLR 13 (SC).

<sup>232</sup> [1930] 2 KB 378, 383. This decision was overruled in *Curtis v Wilcox* [1948] 2 KB 474 (CA) in which it was held a wife’s claim against her husband in respect of an antenuptial tort, was part of her separate property. In *Tinkley v Tinkley* (1909) 25 TLR 264 (CA) a wife was held not entitled to bring an action for false imprisonment

that wives had achieved parity in almost all respects and had freedom of decision-making, when the absence of that had been the driving force for the protections given by the law to surround the wife. He said:

I find it difficult to see how the old and conventional doctrine of unity can be said to operate at the present day. There is, of course, no physical unity, save in the most unlimited and occasional sense. There is no mental unity in any just meaning of the word. Husbands and wives have their individual outlooks. They may belong to different political parties, to different schools of thought. A wife may be counsel in the courts against her husband. A husband may be counsel against his wife. Each has a separate intellectual life and activities.

McCardie J commended the law should proceed on the basis of a presumption of modified unity. The old doctrine<sup>233</sup> had been significantly eroded and he spoke with evident disapproval of the decision of three judges in *Phillips v Barnet*.<sup>234</sup> The criminal law had advanced to provide necessary exceptions so a wife was now competent to give evidence against her husband upon an allegation of physical mistreatment, for if not her, who? But he added:

But in spite of all this the fact remains that marriage creates a most important status and one which should create also a substantial identity of social and other interests between husband and wife. Hence there seems to be a sound sociological basis for the view of the law that in certain respects there should be a presumption of modified unity between husband and wife.

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against her husband, as it was not an action brought for the protection or security of her separate estate within s12 *Married Women's Property Act 1882* [UK].

<sup>233</sup> *Gottliffe v Edelston* [1930] 2 KB 378, 392-393, McCardie J, stated in seeking to find a sustainable principle for the doctrine he had found "nothing but confusion, obscurity and inconsistency." *White v Proctor* [1937] OR 647, 651 the Ontario Court of Appeal questioned "if the old fiction of law that husband and wife are in law one person has much place in modern jurisprudence." In *Midland Bank Trust Co Ltd v Green (No3)* [1979] 1 Ch 496, 519 Oliver J said "It is a useful instrument for the furtherance of the policy of the law to protect the institution of marriage, but as an exposition in itself of the living law it is as real as the skeleton of the brontosaurus in a museum of natural history."

<sup>234</sup> (1876) 1 QBD 436.

## MACKENZIE V HARPER

In 1937,<sup>235</sup> the Full Court of the Supreme Court of New Zealand, dividing 3:2, affirmed a conviction of a Mrs MacKenzie, who was the wife of the licensee of Tatterall's Hotel in Christchurch. At 8.20pm on the material day, she had provided, in a lounge, alcohol to two men and two women. It was accepted that the four persons were *bona fide* guests of Mrs MacKenzie, and friends of her husband and herself. Her husband was not in the hotel and had left her in charge of it. She was charged with supplying liquor to persons not entitled to it. There was an exemption by s205(e) *Licensing Act 1908* by which "the licensee" was entitled to lawfully supply liquor to *bona fide* guests outside licensing hours. The wife relied upon the fact that she was in charge of the hotel and could entertain and supply her guests in her home, identically to her husband. Myers CJ said<sup>236</sup> the answer as to whether the wife had acted lawfully "must depend upon a consideration of her common-law rights as a married woman." He then added, "it was held more than three hundred years ago that a wife has no inherent right to give a person authority to enter her husband's house. *Taylor v Fisher* (1591) Cro Eliz 246. If that was the common law then, it remains the common law now." After referring to *R v Jackson*<sup>237</sup> in which the right of a husband to chastise his wife was finally repudiated, Myers CJ stated that *Taylor v Fisher*<sup>238</sup> had never been disapproved and stated "[i]t may possibly be said to be a relic of medieval times, but, nevertheless, there it is!" The exclamation mark did not cause him to conclude other than a wife is in no better position than

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<sup>235</sup> English law still persisted with the marital exemption: G Godfrey Phillips, *Outlines of Criminal Law Based on Lectures Delivered in the University of Cambridge* Courtney Stanhope Kenny LL D FBA, 14 ed (1933) Cambridge University Press p75 noted that as a consequence of conjugal unity no criminal agreement to which spouses are the only parties can amount to conspiracy. In 1936 it could be confidently stated that a wife could not conspire with her husband alone, although the authority for that proposition was itself very uncertain. Robert Ernest Ross, *Russell on Crime A Treatise on Felonies and Misdemeanors*, Sir W M Oldnall Russell Knt (1936) 9 ed vol 1 p42 Stevens & Sons Ltd London. Relying upon 1 Hawk c72 s8; *Anonymous* YB 38 Edw III 3; L I Stranger-Jones *Eversley's Law of Domestic Relations* (1951) 6 ed p150 Sweet & Maxwell Ltd London. J W Cecil Turner *Kenny's Outlines of Criminal Law* (1952) 16 ed p58 Cambridge University Press. Rupert Cross & P Asterley Jones, *An Introduction to Criminal Law* (1953) 3 ed Butterworth and Co (Publishers) Ltd London p66 conjectures whether 'coercion' covers anything other than threats of physical violence. T R Fitzwalter Butler & Marston Garsia (eds) *Archbalds Pleading, Evidence & Practice in Criminal Cases*, (1954) 33 ed Sweet & Maxwell Ltd London p22.

<sup>236</sup> [1937] NZLR 672, 678; In *Police v Allan* [1939] MCD 322 Mr A M Goulding SM at Levin dismissed a charge against a husband for selling liquor contrary to his licence when the only evidence was that his wife had done so. The magistrate, following the view of Hosking J in *Mitchell v Madden* [1920] NZLR 13 stated that a husband was not vicariously liable for the acts of his wife per se.

<sup>237</sup> [1891] 1 QB 671.

<sup>238</sup> (1591) Cro Eliz 246; 78 ER 501.

the licensee's guest. A wife, it followed, was also a guest in her husband's home. The same point was decided earlier in *Waterson v Low*<sup>239</sup> by Adams J. Further, it had already been accepted that at common law mere lodgers could entertain their guests with liquor after closing-hours in *Ryland v Foley*,<sup>240</sup> it should follow that a wife must have at least the same right in the matrimonial property. But the interpretation of the common law right to entertain and grant hospitality, the Chief Justice decided, meant that a married woman had no right at common law to allow any person authority to enter her husband's house and therefore no authority to entertain them there. A wife was therefore, in a significantly disadvantaged position in relation to the status of her own husband and was in law even worse off than a lodger at the hotel. The Supreme Court had held a few years earlier<sup>241</sup> that a servant had no authority to entertain guests on the premises of his master; but could do so only with permission of the master. Myers CJ, had no difficulty in concluding "The same reasoning applies to the position of the wife and her guests."<sup>242</sup> Ostler J, also in the majority for affirming the conviction, initially concentrated on the wording of the germane provision<sup>243</sup> in the Act. Where in any licensed premises any person other than the licensee either sells or give liquor to any person at a time when the license premises must be closed that person shall be liable to a fine. He held that the licensee's wife was a person other than the licensee and therefore the provision applied to the appellant. He recorded<sup>244</sup> the argument, "because a licensee and a lodger may at common law without committing an offence entertain their guests with liquor after closing-hours, the wife of a licensee in his absence must be held to have the same right at common law, it being contended that there is no statutory provision taking away this alleged common-law right".

While a lodger<sup>245</sup> had a common law right to entertain his guests with liquor after-hours in licensed premises, and the licensee<sup>246</sup> a similar right, he denied that the wife of the licensee had such a common law right. Even in a private house a wife has no legal right to entertain

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<sup>239</sup> [1926] NZLR 751.

<sup>240</sup> (1898) 16 NZLR 670.

<sup>241</sup> *O'Connell v Clausen* [1928] NZLR 227.

<sup>242</sup> [1937] NZLR 672, 679.

<sup>243</sup> Section 205(e) *Licensing Act 1908*.

<sup>244</sup> [1937] NZLR 672, 681.

<sup>245</sup> *White v Nestor* (1895) 13 NZLR 751 followed later in *Greenfield v Cruden* [1955] NZLR 822, 824-825.

<sup>246</sup> *Ryland v Foley* (1898) 16 NZLR 670.

her friends without the express or implied permission of her husband.<sup>247</sup> While distancing himself from the particular conclusion stated in *'Bacon's Abridgement'*<sup>248</sup> that the husband was entitled to keep the wife by force within the bounds of duty, Ostler J continued:<sup>249</sup>

In modern times more liberal ideas have prevailed, and most of the disabilities under which married women formerly laboured have been removed by legislation. But some of them still linger. The old idea that on marriage the persona of the wife has merged in that of her husband still prevails to some extent in the criminal law. For example, to this day a married woman cannot conspire with her husband to commit a crime: *The King v McKeachie* [1926] NZLR 1.

The irony of this reference to *R v McKeachie* was that Ostler J had delivered a sustained dissent in that majority judgment in which he denied that husband and wife were, by the fiction of the law, one person and therefore incapable of conspiring alone together. Ostler J stated that in view of the history described in *'Bacon's Abridgement'*, the absence of a specific contrary decision to that of *Taylor v Fisher* in 1591 was unsurprising and indeed understandable. He reasoned that there was a strong obligation on the wife to identify a specific common law right to entertain her guests in her husband's house and she needed to point to some express authority for that proposition. To say that she has such a common law right unless expressly forbidden to do so by her husband begged the question. It meant no more than that she has that right with his implied permission, but no such right if he refuses his permission. The wife was therefore under a legal "disability" which prevented her entertaining her own guests. The third majority judge, Kennedy J, also based himself upon *'Bacon's Abridgement'*<sup>250</sup> where it was said, "The law looks upon the husband and wife but as one person and it therefore allows of but one will between them, which is placed in the husband as the fittest and ablest to provide for and govern the family". While noting<sup>251</sup> that "the law has in modern times not been lagging far behind prevailing notions as to her proper status" and accepting the anomaly that a wife could not do in her husband's house what their

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<sup>247</sup> [1937] NZLR 672, 682. Ostler J was not perturbed that the authority for this proposition was some 400 years old at the time. He added "but it is not remarkable that there is no modern authority. If the history of the law as to the status of married women is considered, it will be seen that down to comparatively recent times they were in a decidedly inferior position. For most purposes upon marriage the *persona* of the wife was merged in that of the husband, and he had rights of *dominium* over her person and property which put her in a position akin to that of a servant."

<sup>248</sup> *'Baron and Feme'*, 7 ed, 693.

<sup>249</sup> [1937] NZLR 672, 682-683.

<sup>250</sup> *'Baron and Feme'*, 7 ed p694.

<sup>251</sup> [1937] NZLR 672, 689-690.

lodger could do, also found himself unable to discern that the wife had any individual common law right. “There is, so far as I am aware, no modern authority, and the tenor of old authority is to the contrary.”

Two judges, Callan and Northcroft JJ dissented. However, the former, Callan J, by a most retrograde step reached the view that the wife was able to entertain guests because by “applying the ancient doctrine of the common law, that husband and wife are but one person” he reasoned that the wife had the inseparable right that the husband as licensee had. The majority had found that the wife was under a disability that not even a married woman lodger in their home would have been under by basing this on a decision in 1591. Yet Callan J found that the wife was under no special disability in this regard because of the doctrine of unity (which was otherwise a disability) but was, on his reasoning, actually a benefit in this particular case. He noted *Gottliffe v Edelston*<sup>252</sup> in which McCardie J emphasised that marriage creates a substantial identity of social and other interests between husband and wife. Hence there seems to be a sound sociological basis for the view of the law that in certain respects there should be a presumption of modified unity between husband and wife. While his first reason turned on unity in the further and alternative he reasoned that guests invited at the matrimonial home by either spouse are *prima facie* guests of both. He considered *Taylor v Fisher* and caustically remarked that it did not follow that even in Elizabethan England any guests entertained by a wife in a matrimonial home belonging to the husband, without her husband’s express consent, were trespassers.

But since a unity of two human beings requires a head, and since the common law gives that position of headship to the husband, it appears to follow that guests received their by the wife contrary to the express or implied will of the husband are, in law, the guests of neither.

Callan J would have quashed the conviction because the wife was granted the privilege of the common law via her husband, so that in law they were but one person and she was therefore incorporated within his own right and privilege. Northcroft J referred to the dictum of Pennefather J in *Ryland v Foley*,<sup>253</sup> “It is the common law right of every man to entertain his

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<sup>252</sup> [1930] 2 KB 378, 385.

<sup>253</sup> (1898) 16 NZLR 670, 677.

guests as he likes” but as the majority had concluded it would not include the common law right of his wife. He reasoned contrary to the position of the other four judges that there was a common law right “of all citizens” to entertain their friends at home, which extended to the provision of alcoholic hospitality. This was the most expansive reasoning placing the right given at common law only apparently to a husband now on a full egalitarian basis of citizenship. “A person living privately has a right to entertain his guests in his home as and when he likes. The wife of such a person surely has the same right in respect of her guests in her husband’s home.” He concluded that the wife had the same rights as the husband and that she “enjoys the same immunity from conviction” that he had.

## TENACITY OF THE COMMON LAW RULE

In 1933 a seven-judge Supreme Court of California<sup>254</sup> held that where there had been an acquittal for a conspiracy, the fact that an essential or even the sole element of which was itself a substantive offence, did not amount to a successful plea of autrefois acquit in relation to the subsequent trial of that substantive offence – yet the reverse was true.<sup>255</sup> But on a successful application to rehear the appeal before the Court of Appeal of California,<sup>256</sup> 28 days later (and consisting of two judges fewer), the Court of Appeal by a majority of 3:2, reversed the earlier decision, on the quite new basis that it (and counsel) had together overlooked the direct applicability of the spousal exemption rule. Burroughs J delivering the judgment of the majority quashing the conviction, noted the consistency of the case law position in Californian law. By 1933, he said it could be safely stated<sup>257</sup> that the common law rule “unquestionably” existed and that it was a rule that was so well established and so generally recognised in America by the modern authorities<sup>258</sup> that it should not be judicially

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<sup>254</sup> *People v MacMullen* (1933) 24 P 2d 793: Waste CJ, Curtis, Langdon, Preston, Shenk, Seawell and Thompson JJ, decided 1 August 1933.

<sup>255</sup> *Oliver v Superior Court* (1928) 267 P 764.

<sup>256</sup> *People v MacMullen* (1933) 24 P 2d 794: Tyler PC, Burroughs, Cashin, Curtis and Seawell JJ. The facts showed that two married couples, the MacMullen and the Connor spouses, were indicted with conspiring to commit theft. The Connors were acquitted by the jury and the MacMullens were convicted.

<sup>257</sup> *People v MacMullen* (1933) 24 P 2d 795. The only caselaw holding otherwise was: *Dalton v People* (1920) 189 P 37 in Colorado and the earlier Texan dicta in *Smith v State* (1905) 89 SW 817.

<sup>258</sup> In *Commonwealth v Allen* (1900) 24 Pa Co Ct R 65, 66 Yerkes PC stated that the exemption was the law of Pennsylvania, relying upon a passage in ‘*Carson on Criminal Conspiracies*’, p221. The case involved a

repealed; any alteration of it was a matter for the Legislature. Burroughs J reasoned that for the Court to act contrary to the rule would amount to judicial repeal. However, the Attorney General of California, argued that the earlier 1889 decision of the same court in *People v Miller* ought no longer to prevail as since that time, “the status of married women has undergone a great change; and although at common law the wife was little more than a chattel, at the present time she occupies before the law practically the same status as the male.”<sup>259</sup> But the court was not persuaded that there had been by statute such a conceptual alteration in the law. It accepted that there had been a positive enhancement of the civil rights and duties of women, but added that these changes did not purport to affect the criminal responsibility of women.<sup>260</sup> In addition, s26 of the *California Penal Code*, provided for the defence of marital coercion and conspiracy was not excepted from that statutory defence. Burroughs J concluded that as the 1889 decision in *People v Miller* had never been overruled so the spousal exemption remained good law, noting though that the question merited further consideration by the Supreme Court of California or by the Legislature. The conviction of the spouses was quashed. Seawell and Curtis JJ<sup>261</sup> dissented. The prosecution petitioned the Supreme Court to have the case heard, but it was denied.<sup>262</sup>

The District Court of Mississippi<sup>263</sup> later followed the decision in *Dawson v United States* that the exemption stood. But in a much more significant decision in *Gros v United States*,<sup>264</sup> the

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conspiracy to obstruct “...the investigation of a horrible murder of a near relative” at p69. (1926) 10 F 2d 106, 108. The court also discussed marital coercion but concluded that it could not have been successfully raised as the intention of the conspiracy was “...to establish a bawdyhouse ...” (at p108) and held it was well established that the presumption of marital coercion will not be indulged in when the charge pertains to the keeping of a house of ill fame: applying *State v Jones* (1903) 45 SE 916; *People v Wheeler* (1905) 105 NW 607; *Haffner v State* (1922) 187 NW 173 and *State v Gill* (1911) 129 NW 821. Further the Supreme Court of North Carolina in *State v Nowell* (1911) 72 SE 590 had held that the offence of abduction of girls by solicitation for immoral purposes was outside the marital coercion defence. The court also rejected a submission that a question in cross-examination of Mrs Dawson was prejudicial: “A great part of your life, you had seen a great many sporting women, had you not?” Her answer in denial must have been held by the jury to be rocambollesque.

<sup>259</sup> At p796.

<sup>260</sup> At p796 the Court distinguished the Texas and Colorado approach, on the basis that those courts had concluded in their states, that the legislatures had intended to alter the criminal responsibility of women.

<sup>261</sup> Both had been members of the original decision to dismiss the appeal: *People v MacMullen* (1933) 24 P 2d 793.

<sup>262</sup> On 28 September 1933; *People v MacMullen* (1933) 24 P 2d 794, 796. In *People v Eppstein* (1930) 2 90 P 1054 (Court of Appeal of California) en passant reference to the common law position was found at p1058, noting too that s31 of the *California Penal Code* provided for the defence of marital coercion.

<sup>263</sup> *United States v Shaddix* (1942) 43 F Supp 330, Mize D J oddly stating that he could find no authority inconsistent with *Dawson v Unites States*, presumably meant no authority in the Federal Court system.

United States Court of Appeals affirmed the existence of the spousal exemption. A husband and wife were convicted for conspiring to disclose to the German Reich information affecting the national defence in violation of a federal statute. An appeal to the United States Court of Appeals was initially dismissed. However, on an application for a rehearing of the appeal, the same court, this time by a majority<sup>265</sup> quashed the conviction on the basis that the principal evidence against the spouses was a confession by Mrs Gros, made at a date when she was married<sup>266</sup> so that there was no evidence to show the existence of the conspiracy prior to the marriage. In an application of *Dawson v United States* (also a decision of the Ninth Circuit) the court concluded that the conviction now could not now stand.

#### MOMENTUM IN FAVOUR OF QUASHING THE RULE

The United States Court of Appeals in 1943 in *Ansley v United States*<sup>267</sup> by a majority<sup>268</sup> upheld a conviction of spouses to conspire to violate the internal revenue laws relating to intoxicating liquor. Then in 1952 in *People v Estep*<sup>269</sup> a husband and wife were found guilty of perpetrating a confidence trick contrary to the *Medical Practice Act*, rejecting their defence that they were practising faith healing. The court noted that no Illinois court had yet been called upon to decide whether a husband and wife could conspire in criminal law, although the court had in 1904<sup>270</sup> and 1922<sup>271</sup> reached the view that even in a civil case spouses could not conspire. In *Johnson v United States*<sup>272</sup> the Court of Appeals of the District of Columbia had said:

No reason remains why the law should not recognise the obvious fact that the relation of husband and wife does not prevent two persons from conspiring to commit an offence. The

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<sup>264</sup> (1943) 138 F 2d 261 (21 June 1943).

<sup>265</sup> Denman and Stephens Cir JJ, Mathews Cir J dissenting.

<sup>266</sup> The marriage having taken place on 8 October 1940.

<sup>267</sup> (1943) 135 F 2d 207.

<sup>268</sup> Hutcheson CJ dissenting, following *Dawson v United States* (1926) 10 F 2d 106 that spouses could not conspire together and also relying upon the existence of the doctrine of marital coercion.

<sup>269</sup> (1952) 104 NE 2d 562 (Appellate Court of Illinois).

<sup>270</sup> *Merrill v Marshall* (1904) 113 Ill App 447, 455-456.

<sup>271</sup> *Worthy v Birk* (1922) 224 Ill App 574, 583 noting that only *Jones v Monson* (1909) 119 NW 179 had held to the contrary.

<sup>272</sup> (1946) 157 F 2d 209.

interest of society in repressing crime requires that the fact be recognised, and our common-law system does not require that its recognition await express legislative action.

But on the facts in *People v Estep* no decision on the point was required because other persons unknown were referred to on the indictment and the conspirators must have agreed with one or more of them.<sup>273</sup> The intrepid Mr and Mrs Estep then were arrested in Texas and their extradition was sought by the Governor of the State of Illinois. They applied for habeas corpus to the United States District Court<sup>274</sup> on the repeated basis that husband and wife could not conspire together. Atwell J noted that a wife is no longer “hidden in the personality of the husband in America” and dismissed the application. The United States Court of Appeals, Fifth Circuit, in *Thompson v United States*<sup>275</sup> involved a conspiracy by a husband and wife to violate the *White Slave Traffic Act*.<sup>276</sup> The court noted that the Federal Courts, the District Courts as well as the State Courts were completely at odds as to the true legal position<sup>277</sup> in spousal conspiracy. Rives Cir Judge (Tuttle and Jones Cir JJ concurring) noted that the offence of conspiracy proscribes the conduct of “two or more persons”.<sup>278</sup> He added:

The Roman or civil law, forming the basis of the marital law in some of the States, always recognised the separate existence of husband and wife. In most, if not all, of the strictly common law States the unity of the spouses has been severed by Married Women’s Acts.

Rives Cir J added that there are no common law federal crimes and there was therefore no reason to import into the present federal statute the concept of the common law unity of

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<sup>273</sup> Applying *People v Mather* (1839) 4 Wend [New York] 229; *State v Slutz* (1901) 30 So 298, 299 (Supreme Court of Louisiana).

<sup>274</sup> (1955) 129 F Supp 557.

<sup>275</sup> (1955) 227 F 2d 671.

<sup>276</sup> 18 USCA § 2421.

<sup>277</sup> *Dawson v United States* (1926) 10 F 2d 106; *Gros v United States* (1943) 138 F 2d 261 accepting the common law position; *Johnson v United States* (1942) 157 F 2d 209 rejecting it. In the District Court the rule was accepted in: *United States v Shaddix* (1942) 43 F Supp 330 but rejected in *Ex Parte Estep* (1955) 129 F Supp 557, 558.

<sup>278</sup> 18 USCA § 371.

husband and wife<sup>279</sup> “now prevailing in few, if any, of the states.”<sup>280</sup> However, in some of the American states the spousal conspiracy exemption was expressly provided for by statute.<sup>281</sup>

## CANADIAN CASELAW

In *R v Nerlich*<sup>282</sup> the court, Meredith CJO, Garrow, Maclaren, Magee and Hodgins JJA, had before them a case stated by Mulock CJ Ex. A husband and wife were indicted that they did “traitorously conspire, confederate, and agree with each other, and with others” to assist a German, Zirzow, to leave Canada and join the enemy’s forces in fighting the war. This was a landmark<sup>283</sup> decision involving treachery during World War I. Maclaren JA delivered the judgment of the majority<sup>284</sup> and noted that the trial judge had directed the jury to acquit Mrs Nerlich as there was no evidence against her. The court found that Zirzow was not an alleged co-conspirator himself because he was only the object individual to be incited in consequence of the spousal agreement. However, Maclaren JA added<sup>285</sup> “if only Mr & Mrs Nerlich had been indicted for conspiracy, her discharge would necessarily have been followed by his”. The court ascribed the reason for that conclusion as being where only two persons were indicted for conspiracy both must be acquitted or both must be convicted, noting that the prosecution had accepted that there was no evidence that Mr Nerlich had conspired with any person other than Zirzow. In the circumstances Mr Nerlich could not be convicted of conspiracy as there was no other person with whom he could have agreed.

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<sup>279</sup> It was noted by the Court of Appeals that the foreman of the jury in the court below, was a married woman.

<sup>280</sup> *Thompson v United States* was followed two years later in *Wright v United States* (1957) 243 F 2d 569 in which Hutcheson CJ reversed the earlier dissenting opinion he had expressed in *Ansley v United States* (1943) 135 F 2d 207.

<sup>281</sup> *Hawaii Revised Laws* §268-5 (1955), noted ‘*The Effect of Marriage on the Rules of the Criminal Law*’, (1961) 61 Columbia Law Review 73, 95. But this no longer pertains: *Hawaii Revised Statutes* §705 – 511 (2006).

<sup>282</sup> (1915) 25 DLR 138 (Ont: SC: AD)

<sup>283</sup> Leading counsel for the prosecution was J R Cartwright K C, later to sit in *Kowbel v The Queen* in the Supreme Court of Canada.

<sup>284</sup> Hodgins JA dissented but curiously no judgment in dissent was published.

<sup>285</sup> (1915) 25 DLR 138, 141 (Ont SC AD).

*R v KOWBEL*

The spousal exemption issue arose much more directly in *R v Kowbel*,<sup>286</sup> a decision of the Ontario Court of Appeal (Laidlaw and J K Mackay JJA; Hogg JA dissenting), which refused to follow the common law rule of spousal exemption. A husband was charged with conspiracy to forge documents. His wife was the named co-accused. Only the husband stood trial.<sup>287</sup> Laidlaw JA<sup>288</sup> accepted that there was “no doubt”, (Hogg JA used the same language at p819), that at common law a pure spousal conspiracy was impossible.<sup>289</sup> However, he argued that the common law theory now “requires careful examination” as in many cases a wife could be prosecuted and convicted as a separate person for offences against the criminal law. She was responsible for: crimes she committed alone, crimes she incited or procured her husband to commit<sup>290</sup> and crimes committed in the presence of her husband where she acted voluntarily. Laidlaw JA argued that the reason why a wife could not be guilty of conspiracy with her husband was that at common law a married woman “had no capacity to contract with another person. She was incapable of making an agreement with her husband.”<sup>291</sup> Once the incapacity of a married woman to contract with her husband had been removed, by modern property law, and she was given the freedom to exercise her own will “she thereupon became subject to the criminal law respecting conspiracy”. He therefore concluded because of modern property law powers an agreement could exist between a husband and wife “as separate persons”<sup>292</sup> so that there was no room for the application of the theory of the unity of person.

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<sup>286</sup> [1953] 3 DLR 809 (Ont CA). In *White v Proctor* [1937] OR 647, 651 the Ontario Court of Appeal questioned “if the old fiction of law that husband and wife are in law one person has much place in modern jurisprudence”.

<sup>287</sup> In *R v Chambers* (1973) 11 CCC (2d) 282 it was confirmed that while spouses could not conspire, they may be on trial individually as where the other does not appear at trial.

<sup>288</sup> (With whom J K Mackay JA agreed) at p810.

<sup>289</sup> On further appeal to the Supreme Court, Taschereau J said the common law was “well settled”: [1954] 4 DLR 337, 341.

<sup>290</sup> 4 Blackstone ‘*Commentaries*’ 29; 1 Hale ‘*Pleas of the Crown*’ 1676, vol 1 p516 (“A feme covert alone may be guilty of larceny, if done without coercion of her husband 27 Affiz.40”): *R v Buncombe* (1845) 1 Cox CC 183, where Coleridge J accepted an offence that a wife was guilty “of her own voluntary act,” even, if the husband was present: *R v Baines* (1900) 19 Cox CC 524, 526 (CCCR). In *Brown v Attorney General for New Zealand* [1898] AC 234, 237 Lord Halsbury LC said, “The mere fact that the parties are married never even formed a presumption of compulsion by the husband. Even as early as Bracton’s time, if the wife was voluntarily a party to the commission of the crime, her coverture furnished no defence: see Bracton, book 3, c32.”

<sup>291</sup> [1953] 3 DLR 809, 811 (Ont CA).

<sup>292</sup> In *Pearce v Merriman* [1904] 1 KB 80 it was held that a married woman could enter into a commercial contract with her husband. How then can she not enter into an agreement to commit a crime? This question

There was no continuing incapacity in a married woman to prevent her from entering into an agreement with her husband for an unlawful purpose. In keeping with the approach of both Stout CJ and Ostler J in *R v McKeachie*<sup>293</sup> he held that there was no exception which took a married woman out of the natural scope of the two introductory words to s573 *Criminal Code* [Can] or the phrase in it “any person”, which provided “Every one is guilty of an indictable offence who conspires with any person to commit any indictable offence”.<sup>294</sup> He held that there was a consistency in the analysis because of the newer policy of the criminal law, which by s21 *Criminal Code* [Can] had now abolished the presumption of marital coercion. It would be an inconsistency indeed if Parliament intended by s21 to abolish the doctrine of coercion and at the same time permitted the common law theory of unity of married persons to be available in respect of the crime of conspiracy.<sup>295</sup>

As a married woman now has “equal rights with her husband” to enter into agreements in the exercise of her own free will, to say that the law will not hold either of them responsible for conspiracy, which was only a type of agreement, would be inconsistent and an absurdity. If the law provides that spouses cannot conspire together, the husband, to whom the law has never attributed any favour or disability, is entirely discharged from criminal responsibility only by the serendipity of the fact of his marriage - the wife’s legal personality absolves him. The legal fiction of marital unity had no place in contemporary Canadian society<sup>296</sup> and it was one “which creates a failure of justice by its application.”

The dissenting judge, Hogg JA, accepted there was a “paucity of authority in decisions” and that text-book writers<sup>297</sup> stated only “the bare proposition” but concluded that it had now become a venerable doctrine too late to change. He referred to the ruling of Darling J in *R v*

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showed the obscurity of the alleged common law: *Midland Bank Trust Co Ltd v Green (No3)* [1979] 1 Ch 496,521 C.

<sup>293</sup> [1926] NZLR 1.

<sup>294</sup> A wife was within the expression “any person”.

<sup>295</sup> [1953] 3 DLR 809, 813 (Ont CA).

<sup>296</sup> [1953] 3 DLR 809, 813 “I am not willing to give life to a dead principle which would make an absurdity of part of our criminal law as it exists today.”

<sup>297</sup> ‘*Harrison on Conspiracy*’ (1924) Sweet & Maxwell, London, p76 merely restated the general proposition.

*Peel*.<sup>298</sup> In addition he relied upon what Lush J had said, dissenting on another point, in *Director of Public Prosecutions v Blady*.<sup>299</sup>

The foundation of the rule which prevented a wife from giving evidence against her husband was the fact that they were one person in the eye of the law. No doubt that rule was applied in every case where it was necessary either for the safety of the wife or for her wellbeing to relax it. The rule shewed itself in strange ways both in the criminal and in the civil law. Husband and wife being one person could not be indicted or convicted of conspiracy one with the other. A wife could not be convicted of being an accessory after the fact when her husband had committed a felony; but the rule was relaxed in the converse case, and a husband could be convicted of being an accessory after the fact in the case of his wife's felony.

The doctrine was an ineluctable consequence of the theory of conjugal unity. Hogg JA gave the additional reason for affirming the spousal exemption that the statutory law of Canada recognised “the intimate relationship of husband and wife”, as by *Canada Evidence Act RSC 1927 c59* which provided that neither spouse was compellable to disclose any communication made during their marriage. Further the fact that the doctrine of marital coercion had been abolished in Canada was insignificant, as it did not mean that the separate common law defence of conjugal unity had been impliedly abolished. He found the majority judgment in *R v McKeachie* to be persuasive on that point. As the common law had not been “altered, abrogated or abolished”, Parliament would have to expressly take away “a defence” to a criminal charge. Whereas New Zealand by statute had expressly preserved defences not inconsistent with its *Criminal Code*, the Province of Ontario had by the different route of common law decision<sup>300</sup> held that common law defences, not inconsistent with the Code, still existed.<sup>301</sup>

The mere passage of time, and the changed conditions under which a husband and wife live, in relation to each other in these days, especially with respect to the extensive rights conferred upon married women with regard to property, are not, as I see the matter, a sufficient sanction

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<sup>298</sup> *The Times*, 8 March 1922.

<sup>299</sup> [1912] 2 KB 89, 92 (DC) per Lush J dissenting. The majority (Pickford and Avory JJ) holding that a wife was not a competent witness for the prosecution against her husband where he was charged with living on the earnings of her prostitution. This decision was followed in South Africa: *R v Bonthuys* 1922 TPD 446 (wife forced into prostitution by husband).

<sup>300</sup> *R v Cole* (1902) 5 CCC 330 per Boyd C.

<sup>301</sup> Sedgewick J in *Union Colliery Co v The Queen* (1900) 4 CCC 400, 405 (SCC): “Parliament never intended to repeal the common law, except in so far as the Code either expressly or by implication repeals it.”

to deprive an accused of a defence and to transfer to the Court a power that may be exercised only by Parliament.<sup>302</sup>

### *KOWBEL V THE QUEEN*

The convicted husband appealed to the Supreme Court of Canada: *Kowbel v The Queen*,<sup>303</sup> which by a majority (Fauteux J dissenting), reversed the majority judgment of the Ontario Court of Appeal and the conviction of Mr Kowbel was thereby quashed, on the basis that as a matter of law, he was unable to conspire with his wife.

Taschereau J (with whom Kerwin J concurred) held that at common law a husband and wife, judicially speaking, formed but one person and were therefore presumed to have but one will and could not therefore conspire between themselves.<sup>304</sup> He rejected the basis (which had been advanced by Stout CJ in *R v McKeachie*) that the theory of conjugal unity and the defence of compulsion were aspects of the same concept, relying on '*Lush on Husband and Wife*',<sup>305</sup> to the contrary. He reasoned that the two matters were of entirely different origin, so that the statutory abrogation of marital coercion had no effect on spousal exemption from conspiracy. The fiction that spouses are one person in law was the underlying principle at the root of the law which stated that during cohabitation, one spouse could not steal the property of the other. From this Taschereau J concluded that the theory of unity between husbands and wives and the defence of marital coercion should not be confused as they were entirely different in concept. He denied that the expressions "Every one" and "any person" included a married woman as her coverture was an indelible incapacity in law. Therefore, her status was

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<sup>302</sup> [1953] 3 DLR 809, 819.

<sup>303</sup> [1954] 4 DLR 337 (SCC) Kerwin, Taschereau, Estey, Cartwright and Fauteux JJ.

<sup>304</sup> Sir James Fitzjames Stephen, '*Commentaries on the Laws of England*' 21 ed vol 2 at p491-2 stated: "A husband and wife cannot, with certain important exceptions, be guilty of stealing one another's property, nor can any agreement to which they alone are parties amount to a criminal conspiracy nor can a wife be an accessory after the fact to her husband's felony." To the same effect Sir James Fitzjames Stephen, '*Commentaries on the Laws of England*' 21 ed vol 2 at p491-2. Kenny, '*Outlines of Criminal Law*', (1952) p340 stated that the combination by husband and wife cannot be unlawful. '*Phillips On Evidence*', 9 ed, p99, is to the same effect. Halsbury's '*Laws of England*', 2 ed, vol 9, p48. A A Clarke, Gordon and Alan Garfitt (eds) '*Roscoe, On Criminal Evidence*' (1952) 16 ed, p749 and W Blake Odgers and A H Armstrong '*Warburton and Grundy, Leading Cases in the Criminal Law*', (1932) 6 ed, Stevens, London, p136 are all to the same effect.

<sup>305</sup> 4 ed, p597.

indistinguishable from that of “children under 7 years of age or insane persons”.<sup>306</sup> This collation of married women with imbeciles was not new as it had featured as a standard analysis of criminal law in the leading published works throughout the nineteenth century. He held that a married woman had by common law a fundamental incapacity to conspire with her husband and that this defence was in harmony with “all the other dispositions of the Code dealing with incapacities resulting from marriage”. Taschereau J reasoned that he would not allow “the hesitations of a few modern writers” to “brush aside” six centuries of law, acknowledging that this position “may very well be amended by legislative intervention, but as long as it is not, it must be applied.”

Reference was made to the decision<sup>307</sup> in 1365 repeated uncritically by Hawkins.<sup>308</sup> Taschereau J noted that judgment was based on it being common ground that the spouses could not conspire and because a third party was allegedly involved the writ was abated because no conspiracy was actually revealed on the facts. In many ways, the ancient case was a non-decision though, with it having only the obiter value of demonstrating how the legal profession and judiciary understood the general criminal law at that time.

Estey J added that a portion of the law of conspiracy must be found in the common law and in the absence of express words the defence had not been removed. The fact that certain statutes had given a married woman the right to contract with her husband had been in the main, “directed to her proprietary rights and have not interfered with her status”,<sup>309</sup> nor had those laws dealt with the confidential and intimate relationship between husband and wife. Therefore it did not follow that the capacity to contract with her husband was an answer to the common law. A wife had new and additional rights but her status under the law was not that of unrelenting equality with her husband. Her disability by coverture provided her with the privilege of uxorial exemption which incidentally benefited her husband and her together. Cartwright J agreed with this approach and stated that plain words were needed if it were to be concluded that the intention in enacting the *Criminal Code* had been to abolish the

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<sup>306</sup> [1954] 4 DLR 337,338-339. Thereby equating coverture with marriage and in turn with incapacity to commit crime.

<sup>307</sup> *Anonymous* (1365) *Year Book*, 38 Edw III, Parts 2-3.

<sup>308</sup> Hawkins ‘*Pleas of the Crown*’, book 1 c27 s8. The intraspousal conspiracy exception rested on the institutional writing of Hawkins. 1 Hawk PC ch 72 s 8, Blackstone, ‘*Commentaries*’, book 4, comm. 136. *State v Covington* 4 Ala 603.

<sup>309</sup> [1954] 4 DLR 337, 343.

common law defence of marriage, in conspiracies. He accepted that marriage was a criminal defence<sup>310</sup> to conspiracy. What would have been required was language as focused as that used in s21 *Criminal Code* [Can] when the presumption of marital coercion was abolished. The approach of the majority of the Supreme Court of Canada comported with the majority judgment of the New Zealand Court of Appeal in *R v McKeachie*.

## FAUTEUX J DISSENTS IN THE SUPREME COURT OF CANADA

Fauteux J noted that all text writers effectively traced the rule to what was said in Hawkins '*Pleas of the Crown*' on which the entire doctrine apparently rested as there seemed to have been no case in which the rule had been applied by an English court, referring to a comment to that effect by Glanville Williams.<sup>311</sup> Hawkins had not referred to an earlier case<sup>312</sup> in 1345 in which the court held that conspiracy could not exist between spouses, because the act of the wife "would be accounted the act of the husband". Fauteux J concluded that the rule "stemmed from the doctrine of conjugal unity and that text writers had merely repeated it, without having received judicial sanction".<sup>313</sup> The common law rule owed its existence to the doctrine of unity which was based on the wife's subordination and had a biblical origin, but it was based on a misleading figurative expression.<sup>314</sup> He preferred the analysis by Pollock and Maitland:<sup>315</sup>

The main idea which governs the law of husband and wife is not that of 'an unity of person,' but that of the guardianship, the mund, the profitable guardianship, which the husband has over the wife and over her property.

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<sup>310</sup> [1954] 4 DLR 337, 344.

<sup>311</sup> Glanville Williams, '*Legal Unity of Husband and Wife*', (1947) 10 MLR 16.

<sup>312</sup> *Anonymous Year Book* (1345) 19 Edward III RS 346.

<sup>313</sup> [1954] 4 DLR 337, 345. In Blackstone '*Commentaries*', book 1, pp 442, 443 it was said: "By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband."

<sup>314</sup> *Wenman v Ash* (1853) 13 CB 836, 844; 138 ER 1432 "in the eye of the law, no doubt, man and wife are for many purposes one: but that is a strong figurative expression, and cannot so be dealt with as that all the consequences must follow which would result from its being literally true" per Maule J.

<sup>315</sup> Pollock & Maitland, '*History of English Law*', (reprinted 1996) 2 ed, The Law Book Exchange, New Jersey, p485.

Although some parts of the substantive criminal law did place a married woman in a special position those exceptions;

stem from the very nature of domestic relations of those having marital status, but a marital status which, in so far at least as our criminal law is concerned, it is sufficient to say, no longer embodies the legal notion of conjugal unity or subordination as it is said to have had in a far distant past.<sup>316</sup>

The assimilation of married women with the insane and infants, was a violation of fundamental principle as the latter were incapable of forming the mens rea, similarly nor could young children. With a married female the historical lack of legal capacity could not be combined with those other classes, because to do so was to deprive any wife of the ability to form a rational criminous judgment, which as a conclusion offended fact and reality. Fauteux J relied upon the abolition of marital coercion by federal statute in Canada as the proof that married women no longer were entitled to the notion of conjugal unity or subordination and that the status was one of equality. In keeping with the approach of the dissenting judges in *R v McKeachie*, a judgment he referred to, Fauteux J concluded that the doctrine of conjugal unity was the ultimate substratum of Hawkins' rule and, it having perished, it followed that the rule had perished. The rule perished with the disappearance of the reason that gave it life and support. As it had never been denied that a spouse could incite the other spouse to commit a crime<sup>317</sup> there was therefore no good reason "for distinguishing between incitement and conspiracy; for in both of the cases, commission of the crime is inconceivable unless there are, at least, two persons".

A robust examination<sup>318</sup> of this decision of the Supreme Court concluded that truth was now stranger than fiction as the court had affirmed a result that was 'patently ridiculous' to the layman, 'very unreal' to lawyers and generally absurd as it was incompatible with modern

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<sup>316</sup> [1954] 4 DLR 337, 348.

<sup>317</sup> In *R v O'Connor* (1975) 23 CCC 2d 110 (BC:CA) McFarlane J delivering the judgment in which a husband transported to his home for the use of his wife and himself drugs which had been purchased out of their joint funds, transporting drugs to a second person, his wife, constituted trafficking. At p112, after reference to *Kowbel v The Queen* in the Supreme Court, it was said "that the effect of that judgment should not be extended to mean that one spouse cannot, as a matter of law, transport drugs to the other."

<sup>318</sup> RS Mackay, 'Case and Comment', (1955) 33 The Canadian Bar Review 75.

realities applicable to transactions<sup>319</sup> between spouses; the perpetuation of the common law exemption itself ‘creates a failure of justice by its application’.<sup>320</sup> The addition of even their own child into the agreement removed the exemption from the criminal law, even if the agreement was a post-marriage agreement. The asserted basis of conjugal intimacy and confidence was necessarily destroyed by the augmentation of the scion into the wider agreement. If one of the rationales of conspiracy is for the law to intercept a criminal relationship at the earliest possible time, as a preventative measure, then it is difficult to see that the addition of a third person into the agreement (which as another of the rationales is to protect against injurious combinations) should make any difference at all as the spouses are ‘just as dangerous as any other combination of persons’ so that the exemption built around them must have as its justification the special nature of their coexistence.

#### *MAWJI V THE QUEEN* : POLYGAMY AND THE SPOUSAL CONSPIRACY EXEMPTION

The unity rule was put to the test in a most unusual way in *Mawji v The Queen* an appeal from Tanganyika. The conspirators were husband and wife in, and were parties to a potentially polygamous marriage.<sup>321</sup> The Privy Council concluded that the spousal conspiracy exemption “primarily contemplated” a monogamous union. But in Tanganyika polygamous marriage was “fully valid” and almost the norm under local law. This case ought to have strained beyond breaking point the fusion rule – with its acceptance that at least two women could be conjoined into the single union with their shared husband. However, for reasons that cannot be satisfactorily explained counsel for the Crown, in the Privy Council, conceded the validity of the underlying exemption. This concession renders the judgment very marginal as an authority as to whether the common law rule had really existed. But it has been conveniently

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<sup>319</sup> Ibid p75 fn4 noting that the policy preventing a spouse bringing a charge of theft against the other during cohabitation was designed to prevent spiteful or vexatious prosecutions.

<sup>320</sup> *R v Kowbel* [1953] 3 DLR 809, 813 per Laidlaw JA.

<sup>321</sup> In *Maleksultan v Sherali Jeraj* unreported, Civil Appeal No 41 of 1954, Court of Appeal for East Africa, 22 January 1955, Nihill P, Briggs JA and Cox CJ, the appellant an Ismailia Khoja Muslim woman had had her marriage dissolved extra-judicially in accordance with the personal law of the spouses. Briggs JA doubted that the earlier common law view that polygamous marriage was not recognised for any purpose was no longer sustainable noting *Sinha Peerage Claim* (1939) House of Lords Journal, vol 171 p 350 per Lord Maugham LC. This decision, was curiously, not referred to in any of the Courts in the prosecution of *Mawji*.

followed by courts in other common law jurisdictions. To assess its real value a close understanding of all four tiers of the various courts which considered the proceedings is required.

The appellants were lawfully married in accordance with the rules of the Ismailia Khoja Sect of the Shia Muslims who owed their religious allegiance to the Aga Khan and were living together in a common matrimonial home, for all purposes appearing to be in a monogamous union. However, the husband was permitted by law to take additional wives and the issue was whether the English criminal law doctrine was applicable in those exotic circumstances. The position was made more complicated by the fact that s4 *Penal Code [Tanganyika]* provided that the *Penal Code* should be “interpreted in accordance with the principles of legal interpretation obtaining in England...with the meaning attaching to them in English criminal law...” To this end oddly the focus of the African appeal would then turn on the status of the common law of England. The actual offence which led to the relevant conviction was provided by s110 *Penal Code [Tanganyika]*: “Any person who (a) conspires with any other person to obstruct the course of justice” commits an offence. Was a wife of a potentially polygamous marriage “any other person” for the purposes of the law of conspiracy? The husband and wife were charged in the District Court of Dar-Es-Salaam, Tanganyika with:

Statement of Offence

Conspiring to obstruct, prevent, pervert or defeat the course of justice, contra. Section 110(a), Penal Code, Cap 16.

Particulars of Offence:<sup>322</sup>

The persons charged on 17.11.54 between the hours of 3:00pm and 4:30pm at No 37 Mkunguni Street in the Municipality of Dar-Es-Salaam, conspired together to obstruct, prevent, pervert, or defeat the course of justice, in that the said persons did conceal a German made wall clock bearing the trade mark “Mouthe” which they well knew was required for the purposes of an enquiry into a criminal offence.

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<sup>322</sup> See p1 of the Record of Proceedings, Criminal Case No 3563 of 1954, in the District Court of Dar-Es-Salaam District at Dar-Es-Salaam, 19 November 1954, found in Privy Council Appeal No 9 of 1956: *Laila Jhina Mawji v Her Majesty the Queen* held by the Registrar, Judicial Committee of the Privy Council, London.

The couple was also charged with the offence of retaining property feloniously stolen or obtained.<sup>323</sup> The essential facts were that between 3:00pm and 3:30pm two police officers enquired of the wife about a wall clock in the sitting room of their dwelling. She referred them to her husband, who worked in the Public Works Department, for an explanation. The police interviewed the husband who gave an unsatisfactory explanatory statement. The officers went back to the police station at 4:50pm. One of the officers returned to the matrimonial dwelling to seize the clock as an exhibit. He found the husband and wife both there – but, “the wall clock was no longer there. In its place was a photograph of the first accused.”<sup>324</sup> Later the wife explained that she had, after the initial enquiry by the police officers, thrown the wall clock over the wall of the yard at the back of the house because she “was angry with both Inspector Solanky and the clock.”<sup>325</sup> At trial before the Resident Magistrate,<sup>326</sup> the Liwali<sup>327</sup> of Dar-Es-Salaam gave evidence<sup>328</sup> as a prosecution expert on Muslim law. He gave evidence that under the Koran a man may have up to four concurrent wives. He stated that in the Koran there was no rule that a husband and wife were seen or treated as one person or in any way regarded as such, but pointed out that it was stipulated<sup>329</sup> “each of the married couple is like a garment to the other”. In the course of his evidence the Liwali referred to an unreported Privy Council Appeal<sup>330</sup> from Zanzibar, to illustrate that Ismailia Khoja married women have an indefeasible right to a life interest in their husband’s estate, even though that was not consonant with general Muslim law.

Defence counsel submitted that the spouses had no case to answer as a matter of law as they were incapable in law of conspiring together. The Resident Magistrate gave a ruling rejecting a submission of no case to answer, on the conspiracy charge,<sup>331</sup> noting that the evidence

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<sup>323</sup> Contrary to s311(1) *Penal Code of Tanganyika*, Cap 16, Laws of Tanganyika.

<sup>324</sup> *Ibid* p49.

<sup>325</sup> *Ibid* p49.

<sup>326</sup> J A Scollin Esq.

<sup>327</sup> J A Iliffe, *Tanganyika under German Rule 1905 – 1912*, Cambridge University Press (1969) p114, defines a Liwali as the “African Governor of a town or district headquarters.”

<sup>328</sup> *Ibid* Page 27.

<sup>329</sup> *Holy Koran*, Part XXVII ss3 and 38.

<sup>330</sup> *Jafferli Bhaloo Lakha v The Standard Bank of South Africa Limited*, unreported, Privy Council Appeal No 38 of 1927, 7 November 1927, Viscount Cave LC, Lord Buckmaster, Lord Carson, Lord Darling and Lord Warrington of Clyffe approving the first instance judgment of Tomlinson J of the High Court of Zanzibar that a Khoja widow was entitled by custom to maintenance out of her deceased husband’s estate.

<sup>331</sup> *Ibid* p31.

disclosed that the husband and wife are “Ismailia Khojas” a sect of the Mohammedan religion. It had been argued for the spouses that the offence was “incompetent: because of the common law of England<sup>332</sup> and that by s4 *Penal Code* [Tanganyika] expressions<sup>333</sup> used in it were to be construed in accordance with “English Criminal Law<sup>334</sup>” “so far as consistent with their context”. The magistrate rejected this argument stating: “the facts (sic) that they are Mohammedans of a particular sect and that by the religious laws of this sect marriage is polygamous does not matter for the purposes of the criminal law; the application of their personal law is limited to marriage and succession.”<sup>335</sup> The prosecution had argued that as the *Indian Penal Code* had applied in Tanganyika until 1930, that Code should be considered as the proper source of law where there was sought to be “a deviation from English Law,”<sup>336</sup> and that the *Indian Penal Code*<sup>337</sup> had never recognised the spousal exception from the law of conspiracy. The prosecution additionally acknowledged that monogamous marriage was the exception in Tanganyika and that s155 (competence of witnesses) and s164 (bigamy)<sup>338</sup> of the *Penal Code* [Tanganyika] confirmed that legal position. It was argued that the intention of the spousal immunity conspiracy provision could not apply to Mohammedans, as “English criminal law assumes monogamy.”

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<sup>332</sup> citing 1 Hawkins, ‘*Pleas of the Crown*’, C 72 s8.

<sup>333</sup> viz “person” or “conspire”.

<sup>334</sup> s4 *Penal Code of Tanganyika*, Cap 16, Laws of Tanganyika.

<sup>335</sup> Ibid p31.

<sup>336</sup> Ibid p31.

<sup>337</sup> As evidenced by a citation from. ‘*Gour’s Penal Law of India*’, (1955) 2 ed vol 1 p666 para 1042. SC Manchanda and RB Sethi (eds), ‘*Dr Sir Hari Singh Gour The Penal Law of India*’, (1966) 8 ed, Law Publishers Allahabad, p797 referring to the Supreme Court of Colorado in *Dalton v People* (1920) 189 P 37. No exemption under s120A of the Penal Code of India applies to exempt married couples from the general law of conspiracy. Anjani Kant, ‘*Women and the Law*’, APH Publishing Corporation New Delhi (2001) p127 wrongly asserts in this regard “In respect of criminal matters, husband and wife can not be guilty of conspiring together, or of larceny from each other while living together.”

<sup>338</sup> *Attorney General of Ceylon v Reid* [1965] AC 720. In 1993 the respondent husband, who at all material times was domiciled and resident in Ceylon, married W., the marriage being a Christian marriage. In 1957 W. left the respondent. In 1959 the respondent and P. were converted to the Muslim faith, the conversion being admitted to be genuine. About a month later the respondent and P. were duly married according to the Muslim *Marriage and Divorce Act 1951*, the Muslim faith recognising polygamy. By s362B of the *Ceylon Penal Code* a man committed if he, having a wife living, married in a case where such marriage was void by reason of its taking place during the life of the wife. The respondent was convicted of bigamy, but the conviction was quashed on appeal. On further appeal, Held: in a country where there were many creeds, many races and a number of marriage ordinances or Acts there was an inherent right in the inhabitants domiciled there to change their religion and personal law, and thus to contract a valid polygamous marriage if recognised by the laws of the country, notwithstanding the subsistence of an earlier marriage (see p817, letter J, post); Ceylon was such a country and, accordingly, the second marriage was not void by the law of Ceylon and the offence of bigamy contrary to s362B of the *Ceylon Penal Code* was not, therefore, established. See *R v Moustafa* (1991) 12 WCB (2d) 727 Ontario Court (Provincial Division).

The magistrate considered that the word “person” (in the offence provision) in the *Penal Code* possibly excluded any need for special consideration at all as the potentially polygamous nature of the marriage would be decisive as “husband and wife even in a monogamous marriage could properly be charged with conspiring with each other in Tanganyika”.<sup>339</sup> In the *Penal Code* only marital coercion had been specifically addressed in relation to the uxorial privileges. “The only specific provision about a wife’s criminal responsibility, as distinguished from a joint responsibility, is s20 of the *Penal Code* following s47 of the *Criminal Justice Act 1925* and dealing with coercion and not with unity of person which the [sic] accepted basis of the English Rule about the competency of a charge of conspiracy.”<sup>340</sup> The magistrate, was of the opinion that if the *Penal Code* required him to construe “person” and “conspire” in s110(a) in accordance with English<sup>341</sup> criminal law, then applying the dicta of Lord Brougham in *Warrender v Warrender*;<sup>342</sup> that “Marriage is one and the same thing substantially all the Christian world over. Our whole law of marriage assumes monogamy”.<sup>343</sup> The Magistrate concluded:

No authorities were cited and I have found none to show that in England law this unity of person is accredited to any other union, and in the absence of such authority I cannot assume that this specialised conception of unity extends in England jurisprudence to a potentially polygamous union which has none of the features which are involved in the legal unity.<sup>344</sup>

In addition the resident magistrate found that the marriage of an Ismailia Khoja woman did not affect her legal personality,<sup>345</sup> as was otherwise a consequence under common law: her marriage was not coverture as an Ismailia Khoja woman entered into no disabilities in respect of her property, upon the marriage, the relationship being “purely contracted and it is polygamous”. Under Tanganyikan law, spouses were competent witnesses for the prosecution

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<sup>339</sup> Ibid p32.

<sup>340</sup> Ibid p32.

<sup>341</sup> The magistrate noted s3 *Divorce Ordinance* Cap 110, Laws of Tanganyika applied the common law definition of marriage.

<sup>342</sup> (1835) 2 Cl & F 532 (HL).

<sup>343</sup> The passage in *Hawkins* confirmed this, so that the common law only envisaged a monogamous marriage. 1 Hawk *Pleas of the Crown* c72 s8.

<sup>344</sup> Ibid p32.

<sup>345</sup> Vesey – Fitzgerald, *Abridgement of Mohammedan Law*, p87.

in all cases<sup>346</sup> and it was not possible for a Mohammedan marriage to legally be made monogamous.<sup>347</sup> The magistrate concluded that it followed the husband and wife in a potentially polygamous marriage could be charged “for an offence for which Christian spouses are not answerable.”<sup>348</sup> He rejected a submission based on *R v Esop*<sup>349</sup> the personal law of the parties should prevail as it was the law of the land where the marriage occurred that was vital. “Their personal or religious law is not being applied in this case either: it is relevant only in construing the meaning of the word “person” in English criminal law.”<sup>350</sup>

The wife, Laila Jhina Mawji gave evidence,<sup>351</sup> she was married to Kassamali Karim Mawani, the second accused, at HM Aga Khan Ismailia Jamat Khana in Dar-Es-Salaam six years earlier and produced a marriage certificate to verify that. She gave a defence<sup>352</sup> denying any wrongful intent. For the spouses, the Honorary Secretary of His Highness Aga Khan Ismailia Provincial Council gave evidence that the defendants were subjects of the Shia Mohammedan sect and what that entailed.

## VERDICT OF RESIDENT MAGISTRATE

On 3 January 1955, JA Scollin delivered his judgment.<sup>353</sup> He recalled his ruling that there had been a case to answer, which was based on the proposition that the marriage, “did not possess certain features which I considered inseparable from the kind of marriage which English law has in mind.”<sup>354</sup> He referred to the evidence of the Constitution, Rules and Regulations of the

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<sup>346</sup> s155 *Penal Code of Tanganyika*. In *Idiong v R* (1950) 13 WACA 30, the West African Court of Appeal had to consider ss2 and 161 *Evidence Ordinance* [Nigeria] which rendered as incompetent the evidence of a spouse, only if the spouse was in a monogamous marriage. The court held that the prosecution had to establish by affirmative evidence that it was a polygamous marriage, as it would otherwise be presumed to be a monogamous marriage rendering the evidence inadmissibility.

<sup>347</sup> s3 *Marriage Ordinance* Cap 109 [Tanganyika].

<sup>348</sup> *Ibid* p33.

<sup>349</sup> (1836) 7 Car & P 456, 457 per Vaughn J “but if it is not a crime there, that does not amount to a defence here”.

<sup>350</sup> *Ibid* p33.

<sup>351</sup> *Ibid* p35.

<sup>352</sup> *Ibid* p39-40, she stated the clock had been given to her son as a birthday present, by an anonymous clerk in the Public Works Department (where her husband was employed).

<sup>353</sup> *Ibid* p48.

<sup>354</sup> *Ibid* p48.

Ismailia Council of Africa called to demonstrate that as members of that sect, the marriage was in fact monogamous. The magistrate, however, rejected that proposition as Rule 19(a) of chapter IX<sup>355</sup> provided a list of grounds (“serious illness, insanity, cruelty, or non-bearing of children”) upon which, by application to the Ismailia Council of Africa, the husband could apply “to marry a second wife”. Included in such an application was a requirement stipulated in Rule 19(b), that the husband had to deposit with the Council “a minimum sum of Shs10,000/- or any greater sum as fixed by the Council.” That deposited sum would then be invested by the Council “on account and risk of the parties concerned, on sound securities, and its income shall be paid to the husband if the first wife is living with him.” It further provided that the income from that fund would be paid direct to the first wife if she actually leaves the husband. The magistrate found on the facts:<sup>356</sup> “The taking of a second wife does not operate as a divorce of the first wife – if she wants to remarry she must apply for divorce and then wait four months – and she can chose to live with her husband. There is nothing to say that she can enforce full conjugal rights but equally there is nothing to say the husband cannot exercise them with impunity.”

He concluded:<sup>357</sup>

However close to monogamy the Ismailia Khoja sect are coming, I am satisfied that this situation of one wife and another optional or semi-wife is not monogamous and not the kind of union to which legal unity is accredited in English Criminal Law.

Therefore a potentially polygamous marriage was before him, and he reasoned that the common law never intended to apply so that the wife was not entitled (or the husband to benefit from) the spousal conspiracy exemption. Although inter-spousal communications were privileged by s122 *Indian Evidence Act* (and that it would therefore be generally very difficult to “bring home a charge of conspiracy” between spouses), this did not matter as here, “the accused themselves put the communications made between them in evidence.”<sup>358</sup> He

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<sup>355</sup> p7 as an Annex to the Case for the Respondent sets out Rules 19(a) and (b).

<sup>356</sup> Ibid p48.

<sup>357</sup> Ibid p48.

<sup>358</sup> Ibid p48.

therefore, convicted both spouses and sentenced<sup>359</sup> each spouse to two months hard labour for the conspiracy and four months hard labour (to run consecutively) for the offence of receiving. The wife was granted bail pending appeal.<sup>360</sup>

## APPEAL TO HIGH COURT OF TANGANYIKA

The spouses appealed<sup>361</sup> to the High Court of Tanganyika. Sir Herbert Cox CJ heard the appeal in which the principal ground was that the spouses were entitled to the common law immunity. After a brief consideration of the facts<sup>362</sup> he considered the substantive argument advanced by the appellants that “it did not matter what was the form of the marriage, that it need not be monogamous, a marriage being a marriage so long as the marriage was subsisting”.<sup>363</sup> For the respondent, it was argued that the phrase “any person” in the offence-creating section of the *Penal Code* clearly meant in natural language terms, any individual; it did not mean any person (as understood more narrowly at common law). This point was reinforced by reference to ss384-386 *Penal Code* (relating to conspiracies) and ss388 and 389 (relating to accessories), all of which also commenced with the same inclusive introductory formula “Any person”. By contrast, s387 of the Code (providing for the offence of being an accessory after the fact of another) only used the significantly constricted language “A person...” when it was intended that a section of the *Penal Code* made special protection for spouses, so that in that particular situation neither spouse could become liable as an accessory after the fact to the other. Cox CJ stated:<sup>364</sup>

The need for special legislation in this instance [s387 Penal Code of Tanganyika] it is argued, clearly shows that where in the Penal Code effect is to be given to the fiction that husband and

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<sup>359</sup> Ibid p55.

<sup>360</sup> Ibid p58.

<sup>361</sup> *Mawji v The Queen* unreported Criminal Appeals No 12 and 13 of 1955, High Court of Tanganyika, 17 March 1955, Sir Herbert Cox CJ.

<sup>362</sup> Cox CJ noted that the wall clock in question was “of a particular design and make [Mouthe], of which there were only four in all of Dar-Es-Salaam, if not indeed in the Territory” and that it had been reported stolen in a burglary some six months earlier. He was amused by the extraordinary skill and rapidity with which this clock was made to disappear and a portrait hung on the wall in its place.

<sup>363</sup> Ibid p60. It was additionally argued that the common law exemption was consonant with s122 *Indian Evidence Act*, which applied in Tanganyika that confirmed the privilege of inter-spousal communications.

<sup>364</sup> Ibid p60.

wife are one it is made clear in the section in question and thus the words “Any person” used elsewhere in the Penal Code does not permit of any interpretation other than the word “person” so used means any individual.

He ruled in agreement with the magistrate, that the marriage was not monogamous, but potentially polygamous but added that that finding did not fully dispose of the issue, because in *Mawji Damji v Ayalbai Damji Devraj and Dhanji Damji*<sup>365</sup> it had been held that it may be inequitable to strictly apply common law in Tanganyika, as the *Tanganyika Order in Council 1920*, provided for local differentiating circumstances to prevail and led to an altered meaning of the common law, where required. In common with the magistrate, Cox CJ rejected the argument that the personal law of the appellants was decisive. He accepted that whether their personal law would permit a second wife to be taken was irrelevant as the question in issue on the appeal, is one between the two individuals and the Crown. He concluded that the individuals were endeavouring to use the common law fiction of the unity of husband and wife exclusively available in a monogamous marriage, while their marriage is not in fact monogamous within the meaning of the common law stipulation.<sup>366</sup>

The Chief Justice wryly concluded, in dismissing the appeals:<sup>367</sup>

It is interesting to see an example of an eastern sect, namely, the Ismailia Khoja sect, a sub-sect of the Shia sect of Mohammedans, moving towards western ideas and endeavouring to claim the benefit of an out-moded Common Law fiction. I say “out-moded” because while the Common Law fiction was doubt (sic) based on reasonably good grounds when in the old days a woman in marriage became in effect the property of her husband and all her property became his property, those days have gone as there has been much legislation relating to the independent status of women and to the reservation to wives of separate estates.

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<sup>365</sup> unreported Tanganyika Civil Appeal No 72 of 1954, Eastern African Court of Appeal. In *Maleksultan v Sherali Jeraj* [1957] JAL 58, the East African Court of Appeal held that the approach in English common law of not recognising polygamous marriages and divorces, was inapplicable in Tanganyika.

<sup>366</sup> Ibid p61.

<sup>367</sup> Ibid p61 para 7 of the judgment. The Chief Justice dismissed the appeals against conviction on both charges and allowed a prosecution application for enhancement of sentences, so that the wife was to undergo one year imprisonment consecutive on each count now and the husband one year imprisonment on the conspiracy and two years consecutively on the receiving. The wife’s bail pending appeal was revoked upon dismissal of the appeal.

## APPEAL TO THE EAST AFRICAN COURT OF APPEAL

The spouses further appealed<sup>368</sup> to the Court of Appeal for Eastern Africa. The appeal was heard by Nihill P Worley V P and Lowe J on 1 August and the decision dismissing the appeal was pronounced by the President on 10 August 1955,<sup>369</sup> who described the conspiracy charge between spouses as “somewhat exceptional”<sup>370</sup> and involving “a very important” point of law. The judgment accepted that “If the doctrine of the English Common Law that husband and wife are one person is applicable to these two appellants there can be no doubt that count one was ill-founded”, but it ultimately affirmed the decisions of the Courts below.”<sup>371</sup> Weight was placed on the dictum of Lord Penzance in *Hyde v Hyde*<sup>372</sup> that “marriage as understood in Christendom may for this purpose be defined as the voluntary union for life of one man and one woman to the exclusion of all others,” and that as the Rules of the Ismailia Council permitted a husband a second concurrent wife, the court concluded “after much consideration”<sup>373</sup> that potential polygamy ousted the common law fiction. The interesting issue therefore directly arose whether a conception of the common law based on a monogamous marriage system, had any relation to a lawful system of marriage which permits polygamy, even if only under stringent conditions.<sup>374</sup>

In keeping with the two lower courts, the Court of Appeal rejected an argument that the phrase “any person” in the *Penal Code* should be construed other than in its ordinary literal meaning.<sup>375</sup> But it did so, because of the wider criminal law implications that would follow of placing a potentially polygamous marriage in the same category as a Christian marriage. The rules of competence and compellability and the uxorial privileges would all have to be extended. But East African courts for the preceding half century had consistently refused to

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<sup>368</sup> unreported Criminal Appeals Nos 169 and 170 of 1955, Court of Appeal for Eastern Africa.

<sup>369</sup> Ibid p89.

<sup>370</sup> Ibid p90.

<sup>371</sup> Ibid p90.

<sup>372</sup> (1866) LR 1 P&D 130.

<sup>373</sup> Ibid p91.

<sup>374</sup> Ibid p91.

<sup>375</sup> This was the exact conclusion rejected by Stout CJ and Ostler J (dissenting) in *R v McKeachie* [1926] NZLR1 (CA) and by Fauteux J (dissenting) in *Kowbel v The Queen* [1954] 4 DLR 357 (SCC)

find that non-Christian “marriages” were not valid for generating ordinary marital privileges and incompellability.

In rejecting the Crown submission that the plain language of the phrase “any person” created “no exception or provision covering married spouses”<sup>376</sup> thereby overruling the common law, the Court of Appeal noted that the prosecution argument was attractive “because if it could be accepted it would place the law as regards conspiracy between spouses in Tanganyika on the same footing no matter what the nature of the marital union”<sup>377</sup> namely that the common law immunity would be abrogated. Unfortunately, the Court of Appeal never grappled with the fundamental issues as to whether the common law conception was sound. It asserted that the common law rule was irrefragable, “Nothing can be more certain than that in England a husband and wife cannot alone be found guilty of conspiracy.”<sup>378</sup> Because s4 *Penal Code*, Tanganyika provided:

“4. This Code shall be interpreted in accordance with the principles of legal interpretation obtaining in England, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English Criminal Law and shall be construed in accordance therewith.”	General rule of construction.
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the Court reasoned the expression “any other person: in s110 *Penal Code*, “could not be applied to either spouse of a union recognised as a marriage under the English common law, for both spouses are regarded as one person.”<sup>379</sup> But, the essential reasoning was that, “where the union is polygamous [the reason for the spousal immunity] is not the same, because a union of this kind would not be recognisable as a marriage at all within the framework of the English Common Law”. The Court continued that, it is a different thing however to extend

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<sup>376</sup> Ibid p91.

<sup>377</sup> Ibid p91.

<sup>378</sup> Ibid p91. Relying on 1 Hawk c 72 s8 as restated in *Archbold* (33ed) p22.

<sup>379</sup> Ibid p91. A N Allott, ‘Cases’, [1957] 1 *Journal of African Law* 116, 117 noted that s4 *Penal Code* [Tanganyika] was designed so “the doctrines of English criminal law can be imported into the criminal law.”

the common law fiction that husband and wife are one person and possess one will, to a form of union where the female spouse is not limited to one.<sup>380</sup> The East African Court of Appeal, which was peripatetic, but sitting at Dar-Es-Salaam to hear the appeal, observed:

We have not the library here at our disposal to enable us to trace the precise source from which the common law doctrine has sprung, but that it was Christian in character we have little doubt. To apply a doctrine based on the principle that the sacrament of marriage constitutes the parties “bone of one bone and flesh of one flesh” to form of marital union based solely on a contractual conception would to our mind be entirely wrong.<sup>381</sup>

The Court was significantly influenced by the recent decision in *Nyali Ltd v Attorney General*<sup>382</sup> where Denning LJ considering the proviso to Article 15 *Kenya Order-In-Council 1902*, spoke of the great task entrusted to Judges in Africa, “to prune and cut away the offshoots of the common law uncongenial to the soil of the African Continent.”<sup>383</sup> On the face of it the appeal presented a perfect opportunity to find the common law had to be adapted to the special circumstances of Tanganyika in which the great majority of people were Muslim and therefore, polygamy and potential polygamy was by far the usual matrimonial condition. However, the court dealt with Denning LJ’s statement of obligation, by distinguishing it,

Fortunately here our task is not so onerous as that depicted in *Nyali Ltd v Attorney General* because we have not to consider the cutting away of a principle which would prima facie be applicable. We are merely refusing to extend a doctrine to a set of circumstances to which under the common law the doctrine could never have been applied.<sup>384</sup>

The Court of Appeal dismissed the spouses’ appeal against the conspiracy charge.

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<sup>380</sup> Ibid p92.

<sup>381</sup> Ibid p92.

<sup>382</sup> [1955] 1 All ER 646 (which involved a 1929 pontage franchise in the Kenya Protectorate under the sovereignty of the Sultan of Zanzibar).

<sup>383</sup> Ibid p92.

<sup>384</sup> Ibid p92. The Court stressed that the common law view could not itself be pruned away because of s4 *Penal Code*, which had to govern the construction of s110 *Penal Code*.

## WIFE'S CONVICTION FOR RECEIVING FROM HUSBAND QUASHED

However, the wife's conviction for receiving the stolen clock was quashed because, (inconsistently), she was entitled to an uxorial privilege.<sup>385</sup> The Court concluded that both lower courts had overlooked the applicable law:

Namely, whether a wife living with her husband in a matrimonial home can properly be convicted of receiving or retaining stolen property unless there is evidence that she acted independently of her husband. In English law it is clear that wife (sic) charged jointly with her husband for receiving may be convicted where there is evidence that she acted independently in receiving the stolen goods but it would seem not otherwise (*R v Baines*<sup>386</sup> (1900) 69 LJQB 681). This is because there is a natural presumption in the absence of evidence to the contrary, that the goods and chattels gathered together in the matrimonial home are the property of the husband and in his possession.<sup>387</sup>

Nihill P concluded that to support the receiving charge against the wife evidence was needed establishing some independent act by her of retaining the clock, knowing or having reason to believe that it was stolen property. The wife's reaction when first approached by the police could have been based on a natural "desire to shield her husband from embarrassing and inconvenient enquires; it does not, in our opinion, constitute proof that she had appropriated the clock to her own special use and possession independently of her husband's possession",<sup>388</sup> so what might appear to have been an admission by her was held to be an equivocal statement and therefore an unsafe basis for her conviction on the substantive charge of receiving.

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<sup>385</sup> Reducing her sentence to one year imprisonment with the husband still to serve three years.

<sup>386</sup> This judgment also reported *R v Baines* (1900) 19 Cox CC 524 (CCCR) was also a case where a wife had been convicted of receiving stolen goods. The court affirmed the conviction because there was no evidence the husband was present at the time so there could be no defence of marital coercion. The wife's marriage in that case was no answer to the charge as she had acted independently of her husband and in his absence. See the submissions of Counsel for the Crown at p525. Lord Russell CJ delivering the judgment of the court had said "there is nothing in the marital relation *per se* to protect a wife, and he [the judge] ought further to tell the jury, even if the husband was in the immediate neighborhood, it was a question for them to decide whether the wife was acting independently." Reference was made to *Brown v Attorney General for New Zealand* [1898] AC 234.

<sup>387</sup> *Ibid* p93.

<sup>388</sup> *Ibid* p93. This is almost what Parke B had said in *R v Brooks* (1853) 6 Cox CC 148, 149 (CCCR).

## PRIVY COUNCIL HEARS APPEAL

The Privy Council on 7 May 1956<sup>389</sup> granted special leave to appeal to the spouses “limited to the Count of conspiracy”.<sup>390</sup> On 3 and 4 December 1956 the Appeal<sup>391</sup> was argued and Lord Oaksey presiding in the Privy Council<sup>392</sup> announced that on the second day of the hearing, for reasons to be given later, that it would advise the quashing of the conspiracy convictions.<sup>393</sup> On 19 December 1956,<sup>394</sup> before the reasons of the Judicial Committee of the Privy Council were delivered on 15 January 1957 by Lord Somervell of Harrow, the Privy Council at Buckingham Palace formally ordered that the conspiracy convictions be quashed.<sup>395</sup> Mrs Mawji had completed her sentence of imprisonment before then.

## THE WRITTEN CASE OF APPELLANTS BEFORE PRIVY COUNCIL

The formal written case for the Appellants exclusively relied in argument on extracts from: Genesis<sup>396</sup> in the *Bible*, and passages from Blackstone<sup>397</sup> and Hawkins. Only a single and

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<sup>389</sup> Ibid p95: Order of Her Majesty in Council granting special leave to Appeal dated 1 June 1956.

<sup>390</sup> Ibid p96.

<sup>391</sup> The appeal was lodged as Appeal No 9 of 1956.

<sup>392</sup> Lord Oaksey, Lord Tucker, Lord Cohen, Lord Keith of Avonholm, Lord Somervell of Harrow. The majority of the Law Lords (except Lord Tucker and Somervell) had judicial experience involving polygamy. Lord Oaksey delivered the advice in: *Penhas v Tan See Eng* [1953] AC 304 (PC) on appeal from Singapore/Lord Tucker later delivered the advice in: *Coleman v Shang* [1961] AC 481 (PC)/Lord Cohen had heard: *Bamgbose v Daniel* [1955] AC 107 (PC) (on appeal from Nigeria)/Lord Keith of Avonholm delivered the advice in: *Bamgbose v Daniel* [1955] AC 107 (PC)/Lord Somervell was appointed a Lord of Appeal in Ordinary (from the Court of Appeal) on 1 October 1954 (see: *Judges, Law Officers Etc 1954 Memoranda*: [1954] AC b(2), having been Solicitor-General from 1933 to 1936 and Attorney General from 1936 to 1945.

<sup>393</sup> At the end of the hearing of the oral argument in the appeal.

<sup>394</sup> Present: Her Majesty the Queen, Lord President, Earl of Home, Mr Secretary Lennox-Boyd and Sir Reginald Manningham-Buller (the Attorney General, later Viscount Dilhorne).

<sup>395</sup> *Mawji v The Queen* was briefly considered in three casenotes. One observing, (1957) 78 LQR 140, 141 that the decision “leaves undecided the question whether the various wives of a polygamous marriage can conspire with each other. If each one must be regarded as one person with the husband it would seem to follow that all of the wives must be one person with each other, and therefore incapable of joining in a conspiracy”. A second, [1957] Crim LR 185 inquiring “Could two wives of the polygamous marriage be convicted for conspiring together?” The third, [1957] 1 *Journal of African Law* 116, notes that the identical provision to s4 *Penal Code* [Tanganyika] “[is] found in the other East African Penal Codes”, but not in other African criminal codes.

<sup>396</sup> Ch 2, v21; C3 v16.

<sup>397</sup> Blackstone’s, *Commentaries on the Laws of England*, vol 1 para 433, “Our Law considers marriage in no other light than as a civil contract, and until very recently the holiness of the matrimonial state was left entirely to the matrimonial law: the temporal courts not having jurisdiction to consider unlawful marriage as a sin, but merely as a civil inconvenience.”

tangential reference to the decision of *R v Sharp*<sup>398</sup> was made. No reference whatever to the relevant caselaw in the United States, Canada or New Zealand was made. It was argued that the spouses were “living together in a common matrimonial home under conditions in all respects similar to a monogamous union.”<sup>399</sup> In particular it was argued in the written case “as the origins of the doctrine are to be found in the Old Testament (Genesis II 21 and III 16) which was written against the general background of polygamy which presented at that time”,<sup>400</sup> then the common law doctrine should give effect to its true biblical origins. It was also argued that Genesis provided two origins, firstly “mythological theory”<sup>401</sup> as to the manner in which woman was first created from the body of Adam and secondly the “theory of subordination”<sup>402</sup> as a result of the words “He shall rule over thee.”

Because polygamy had an underlying contractual basis it was argued that Blackstone’s, ‘*Commentaries on the Laws of England*’,<sup>403</sup> was authority:

Our Law considers marriage in no other light than as a civil contract, and until very recently the holiness of the matrimonial state was left entirely to the matrimonial law: the temporal courts not having jurisdiction to consider unlawful marriage as a sin, but merely as a civil inconvenience ...

The Appellant’s written argument<sup>404</sup> was that the theory of subordination (which is applicable while the marriage is monogamous or polygamous) has been accepted as the origin and basis for the doctrine in English Law.

By marriage, the husband and wife are for most purposes one person in law: that is the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything; and is therefore called in our Law French a feme-covert,

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<sup>398</sup> [1938] 1 All ER 48. Which did not involve the common law doctrine at all, but a conclusion that conspiracy to pervert the course of justice could exist without actual pending proceedings being the object of the conspiracy.

<sup>399</sup> Case for the Appellants, *Mawji v The Queen*, Privy Council Appeal No 9 of 1956, para 2.

<sup>400</sup> Ibid para 8.

<sup>401</sup> Ibid para 8.

<sup>402</sup> Ibid para 8.

<sup>403</sup> In Wayne Morrison (ed), Blackstone’s, ‘*Commentaries on the Laws of England*’, Cavendish (2001) p333, vol 1 [433] the passage is rendered: “1. Our law considers marriage in no other light than as a civil contract. The holiness of the matrimonial state is left entirely to the ecclesiastical law: the temporal courts not having jurisdiction to consider unlawful marriage as a sin, but merely as a civil inconvenience.”

<sup>404</sup> Ibid para 9.

foemina viro co-operta; is said to be covert baron, or under the protection and influence of her husband, her baron, or lord; and her condition during her marriage is called her coverture. Upon this principle of a union of person in husband and wife, depend almost all the legal rights, duties, and disabilities that either of them acquires by the marriage. I speak not at present of the rights of property, but of such as are merely personal.<sup>405</sup>

## THE WRITTEN CASE OF RESPONDENT BEFORE PRIVY COUNCIL

In the written Case for the Respondent it was flaccidly contended that the common law doctrine perhaps did not apply to the offence created by s110(a) *Penal Code*:

The said English rule is not a rule of interpretation as provided in Section 4 of the said Code. The only effect of Section 4 was that the word “conspire” in Section 110(a) of the Code had the same meaning as in English Law. The English rule that two persons of a particular relationship to one another could not alone conspire with one another was not a matter of interpretation or meaning of word “conspire” but was based another principle of English Law namely the fiction that here two persons, namely a husband and wife, were in law one person. Section 4 of the Penal Code does not import that principle into the Code.<sup>406</sup>

A separate submission was made that whereas s17(1) *Tanganyika Order in Council 1920*, established the High Court of Tanganyika, s17(2) of it provided the criminal jurisdiction of the High Court should be exercised in accordance with the *Penal Code [India]*; so that the English Rule of spousal exemption was not imported into the law of Tanganyika at all. If the common law (of England) applied, it was subject to the local laws of the Colony, so far as local laws did not extend or apply. It was instanced that s20 *Penal Code*, “provided that a married woman should not be free from criminal responsibility for doing an act merely because the act took place in the presence of her husband”<sup>407</sup> Therefore, it was argued that the general rule was that a wife was liable for her crimes, so there was no room for the common law exception to consistently apply with that statutory abrogation. However, the Respondent

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<sup>405</sup> See (ed) Wayne Morrison p339-340: “By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every thing; and is therefore called in our law-french a feme-covert, foemina viro co-operta; is said to be covert-baron, or under the protection and influence of her husband, her baron, or lord; and her condition during her marriage is called her coverture. Upon this principle, of an union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage. I speak not at present of the rights of property, but of such as are merely personal.”

<sup>406</sup> Respondent’s Case paragraph 15.

<sup>407</sup> Ibid para 16.

never argued that the common law rule of spousal exemption did not exist in England even though no appellate court had ever decided the point. The basic issue went by default, the Crown never taking the opportunity in the Privy Council that it had tried to take in the East African Court of Appeal. Instead the strategy adopted by the prosecution was to show that the assumed Common Law rule did not become Tanganyikan law, because it was a fiction incompatible with the prevailing Indian law<sup>408</sup> there and in any event, inapplicable in a potentially polygamous situation. It followed<sup>409</sup> that s17(2) *Tanganyika Order in Council 1920* prevailed so that common law only existed if valid by local circumstances.

The said English Rule being based on a Christian view of marriage, that is, the taking by a man of a wife to the exclusion of all others, should not apply to a territory where the inhabitants practised and were permitted to practise polygamy.<sup>410</sup>

#### ORAL SUBMISSIONS BEFORE THE PRIVY COUNCIL

Apart from the tiresome repetition of the Biblical origin and context for the sublimation of wives it was advanced that English law further acknowledged the principle of subordination of married women, relying on *Manby v Scott*.<sup>411</sup> The argument followed that the element of subordination in an orthodox marriage was just as lively in polygamy: *Phillips v Barnet*<sup>412</sup> was cited as authority for the theory of conjugal unity and in oral argument (but not written) *Kowbel v The Queen*<sup>413</sup> was relied upon as identifying the pedigree of the doctrine. The Privy Council had previously recognised polygamy was acceptable for purposes of: legitimacy, rights of property and testamentary succession. Two articles from the Law Quarterly Review were cited<sup>414</sup> to show the law's acceptance of potentially polygamous marriages in a wide

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<sup>408</sup> Section 120A *Indian Penal Code*, in force in Tanganyika, did not maintain the alleged common law exception.

<sup>409</sup> *Ibid* para 16.

<sup>410</sup> *Ibid* para 16.

<sup>411</sup> (1659) 1 Mod 124.

<sup>412</sup> (1876) 1 QBD 436.

<sup>413</sup> [1954] 4 DLR 337 (SCC).

<sup>414</sup> W E Beckett, 'The Recognition of Polygamous Marriages Under English Law', (1932) Vol 48 LQR 341; *Cheng Thye Phin v Tan Ah Loy* [1920] AC 369; *Khoo Hooi Leong v Khoo Hean Kwee* [1926] AC 529; *Khoo Hooi Leong v Khoo Chong Yeok* [1930] AC 346. Later cases in other jurisdictions have also upheld the validity of polygamous marriages were valid under the personal law of the parties. See the Straits Settlement decision: *Re Choo Eng Choon decd (Six Widows Case)* (1908) 12 SSLR 120 (discussed by Thomson J in *Dorothy Yee Yeng*

variety of circumstances.<sup>415</sup> And in *Srini Vasan (or se Clayton) v Srini Vasan*<sup>416</sup> Barnard J had also recognised the validity of a potentially polygamous marriage, a decision which was collaterally affirmed in *Baindail (otherwise Lawson) v Baindail*.<sup>417</sup>

For the Respondent it was argued that the common law position did not apply at all to the *Penal Code* but it was conceded that the common law rule was “a substantive principle of English Law”.<sup>418</sup> Authority from India<sup>419</sup> was cited to show that the exemption did not apply there and although the courts in Canada<sup>420</sup> and New Zealand<sup>421</sup> had upheld the exemption “[t]he New Zealand and Canadian statutes are very different from this Penal Code.”<sup>422</sup> It was argued that the English doctrine, “was based on the unity of the spouses and not on any principle of coercion or subordination and that the spousal exemption rule was an anomalous rule for which there was “no direct authority.” Because s47 *Criminal Justice Act 1925* [UK] had abolished in England the presumption of coercion, and as had been abolished subsequently in Tanganyika, it was not possible to rely on coercion as being a subsisting principle that could ground the spousal exemption for conspiracy. Therefore, the Respondent argued that the true principle could only be based upon the notion that spouses are presumed to have but one will. English<sup>423</sup> and American<sup>424</sup> academic writing all confirmed there was no decided case by a court of final appeal, other than the decision of the Supreme Court of Canada. Two English texts<sup>425</sup> even doubted the existence of the basic underlying rule so in extension of it to polygamy should be countenanced as monogamy was the essential tenet of marriage as recognised hitherto by the common law.

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*Nam v Lee Fah Kooi* [1956] 1 MLJ 257) and the Hong Kong judgment in *Au Hung Fat v Lam Lai Ha* [1959] HKLR 527.

<sup>415</sup> Carleton Kemp Allen, ‘*Status and Capacity*’, (1930) 46 LQR 277.

<sup>416</sup> [1946] P 67.

<sup>417</sup> [1946] P 122 (CA).

<sup>418</sup> [1957] AC 126, 130.

<sup>419</sup> ‘*Gour’s Penal Law of India*’, 6 ed (1955) p508.

<sup>420</sup> *Kowbel v The Queen* [1954] 4 DLR 337 (SCC).

<sup>421</sup> *R v McKechie* [1926] NZLR 1 (CA).

<sup>422</sup> [1957] AC 126, 131.

<sup>423</sup> (1947) 10 Modern Law Review 27.

<sup>424</sup> 66 Harvard Law Review 992, 1001.

<sup>425</sup> RS Wright, ‘*Law of Criminal Conspiracy and Agreements*’, (1873) p75, Percy Henry Winfield, ‘*The History of Conspiracy and Abuse of Legal Procedure*’, (1921) Cambridge University Press p88.

The Respondent's case was firmly based on the theory of unity and not of coercion, but it accepted after making reference<sup>426</sup> to s25 (sic) *Criminal Justice Act 1925* [UK] that the abolition there precluded further reliance upon any basis of coercion for grounding the spousal exemption. In reply for the Appellants it was argued that the legislature of Tanganyika must have had well in mind the notion of polygamous and monogamous marriages existing side by side and for the common law rule only to apply to monogamous marriages<sup>427</sup> would operate oppressively against the great majority of the community who were polygamists.

#### DECISION OF PRIVY COUNCIL

The Privy Council concluded that the supposed rule “primarily contemplated” monogamous union. But in Tanganyika polygamous marriage was “fully valid” under local law. This case ought to have strained beyond breaking point the fusion rule – with its necessary acceptance that at least two women could be conjoined into the single union with their shared husband. However, for reasons that cannot be satisfactorily explained Counsel for the Crown accepted the validity of the underlying rule. This concession significantly devalues the judgment although the decision has been almost indiscriminately followed by courts in other countries. It is a convenient authority for that purpose. For the Crown it was conceded that the uxorial conspiracy exemption doctrine is a “substantive principle of English law”. The closest the Crown got to injuring the rule was to submit that to validate polygamy via the common law is “really anomalous” at p131.<sup>428</sup> It was stated that monogamy remains in England “the essential tenet of a valid marriage”.<sup>429</sup> Lord Somervell of Harrow delivered the judgment and noted that Hawkins<sup>430</sup> quoted the *Statute Ordinacio de Conspiratoribus* (33 or 21 ed 1) “that

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<sup>426</sup> [1957] AC 126, 132.

<sup>427</sup> However, in Nigeria the Legislature had exactly differentiated between Christian monogamous marriages and Muslim polygamist marriages by expressly providing that the marital conspiracy exemption continued but only applied to the former class of marriage: Robert Yorke Hedges *Introduction to the Criminal Law of Nigeria* (1903) Sweet & Maxwell, London, p174.

<sup>428</sup> [1957] AC 126, 131 (PC) Reference was made to vol 66 HLR 992, 1001.

<sup>429</sup> The Crown said the rule should not be extended referring to Percy H Winfield's, *History of Conspiracy and Abuse of Legal Procedure*, (1921) Cambridge University Press, p88; R S Wright, *Law of Criminal Conspiracy and Agreements*, (1873) Butterworths, p75. See also *Baindail (or se Lawson) v Baindail* [1946] P 122, 130.

<sup>430</sup> 1 Hawk, *Pleas of the Crown*, c27 s8 p448.

conspirators be they that do confederate or bind themselves by oath, covenant” et cetera. Hawkins argued that it followed from the wording of the statute that one person alone could not be guilty of conspiracy and added:

Also upon the same ground it hath been holden, that no such prosecution is maintainable against a husband and wife only, because they are esteemed but one person in law, and are presumed to have but one will.

From this short and inadequate overview Lord Somervell added “It was not disputed that the rule is part of the English criminal law.” It is that assumption which has bedevilled this area of the law which led to the conclusion that a wife is not an “other person”. For the purposes of criminal conspiracies Lord Somervell reasoned that the exemption “is an example of the fiction that husband and wife are regarded for certain purposes, of which this is one, as in law one person.”<sup>431</sup> adding that in the criminal law of Tanganyika, the words ‘husband’ and ‘wife’ if unqualified are not restricted to monogamous unions. Express words had to be used to achieve the limit to monogamy.<sup>432</sup> It was observed that s155(2) *Criminal Procedure Code Tanganyika* restricts the competence in the case of a wife or husband to those of a monogamous marriage. A reason for its decision was that certain sections of the criminal law appeared to recognise the “unity” of husband and wife in relation to criminal responsibility. In particular s387 *Criminal Penal Code* provided that a wife who assists her husband to escape punishment does not become an accessory after the fact. Further s264 *Criminal Penal Code* assumed the general common law principle that a wife could not steal from her husband. In addition s161(d) *Criminal Penal Code* provides that neither husband nor wife can be made to disclose communications made by one to the other during marriage. Lord Somervell added “It is clear, of course, that the marriages primarily contemplated by the rule in England were monogamous marriages...” In relation to England the Privy Council expressed no opinion but added “It may be that such a [polygamous] marriage would be recognised for the purpose of this rule”.<sup>433</sup>

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<sup>431</sup> [1957] AC 126, 135.

<sup>432</sup> Since that decision Nigerian criminal law, now expressly provides that uxorial privileges in criminal law are only available if there is a “Christian” monogamous marriage: s34 *Criminal Code* Cap 77, 1990 [Nigeria]

<sup>433</sup> [1957] AC 126, 135.

It is apparent that the Privy Council was essentially of the view that so much of the corpus of Tanganyikan criminal law expressly or impliedly operated on the premise of marital unity, that it could not carve an exception so that the anomalous medieval rule was terminated for monogamous marriages – so it had to be extended to polygamous ones. The reasons for allowing the appeal are short and superficial. It stated that “the point is not an easy one”. Only *Kowbel v The Queen*<sup>434</sup> in the Supreme Court of Canada and a limited reference to the matrimonial decision of the English Court of Appeal in *Baindail v Baindail*<sup>435</sup> are noted. There is a brief historical survey of the institutional writers, but the objective of that survey appears to have been limited to showing the provenance of the common law, rather than wrestling with its validity. It demonstrated that the common law existed in the fourteenth century<sup>436</sup> was reiterated uncritically by Hawkins<sup>437</sup> and the incipient law of conspiracy is traced to the *Statute Ordinacio de Conspiratoribus*.<sup>438</sup>

Lord Somervell accepted that the common law rule is an example of a fiction that husband and wife “are regarded for certain purposes”<sup>439</sup> as in law one person. There was no analysis of what the limited purposes were or why those purposes, whatever they may be, should subsist. Lord Somervell noted that some of the consequences of the fiction “have been removed or modified by statute.”<sup>440</sup> The next reason advanced was that in Tanganyikan criminal law the words “husband” and “wife” are not, if unqualified, restricted to monogamous unions. The legislature by s155(1) *Criminal Procedure Code*, Tanganyika provided that the wife or

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<sup>434</sup> [1954] 4 DLR 337 (SCC).

<sup>435</sup> [1946] P 122 (CA).

<sup>436</sup> Stanford’s *‘Pleas of the Crown’*, p174.

<sup>437</sup> 1 Hawk PC c27 s8 p448. The Queensland Court of Appeal in 1997 explicitly applied *Mawji v The Queen*, accepting that spouses alone cannot conspire together: *R v Byast* (1997) 96 A Crim R 61. But in that case, the court found that there was no valid marriage as the parties had merely been living together and the so-called ‘common law’ marriage was unauthorised in law. The court found that assistance could be obtained in reaching that conclusion from the position that a woman who was in a common law marriage had no privilege and was not incompetent to give evidence against her so-called common law husband: *R v Fuzil Deen* (1895) 6 QLJR 302; *R v Yacoob* (1981) 72 Cr App R 313: “There is no reason to believe that so far as this exceptional ‘fiction’ has been applied in relation to conspiracy, the law has taken a more expansive view of what species of married relationship might be sufficient.” The general presumption that where “the parties lived together and were accepted as man and wife raised a presumption that they were validly married...which is rebutted by clear and cogent evidence”, was rebutted by the putative wife’s admission that no marriage ceremony had ever taken place: *Jacombe v Jacombe* (1961) 105 CLR 355, 359 (HCA).

<sup>438</sup> (33 or 21 Ed 1).

<sup>439</sup> [1957] AC 126, 135.

<sup>440</sup> This was probably a reference to s47 *Criminal Justice Act 1925* (UK), as it was relied upon arguendo.

husband of a person charged is a competent witness for the prosecution; yet s155(2)<sup>441</sup> specifically restricts the competence in the case of a wife or husband of a monogamous marriage. Other provisions also made specific reference to exempting wives from criminal liability.<sup>442</sup> Lord Somervell accepted that the marriages primarily contemplated by the common law were monogamous marriages.<sup>443</sup> He therefore concluded that potentially polygamous marriages have been recognised for various purposes. He added in relation to the position in England and a polygamous marriage involving the common law, “It may be that such a marriage would be recognised for the purpose of this rule”.<sup>444</sup> He however, added that the prosecution had conceded that the spousal exemption rule existed: “It was not disputed that the rule is part of the English common law.” It is that assumption which has bedevilled this area of the law which led to the conclusion that a wife is not an “other person”.

## IMPLICATIONS OF MODERN SPOUSAL CONSPIRACY EXEMPTION

Where a husband and wife are charged with another, the spouses<sup>445</sup> alone may literally face trial alone for that conspiracy and they may be convicted of it. If the other person is not tried with them or does not appear at the trial, that provides no legal impediment to their conviction for that conspiracy. The very fiction that spouses cannot conspire together is at breaking point

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<sup>441</sup> The Privy Council continued that the rule “is an example of the fiction that husband and wife are regarded for certain purposes, of which this is one, as in law one person.” It was added that in the criminal law of Tanganyika the words husband and wife, if unqualified, are not restricted to monogamous unions. Express words had to be used to achieve the limit to monogamy. It was observed that s155(2) *Criminal Procedure Code* [Tanganyika] restricts the competence in the case of a wife or husband to those of a monogamous marriage.

<sup>442</sup> A reason for the Privy Council decision was that certain sections of the criminal law, in the *Penal Code*, appeared to recognise the “unity” of husband and wife in relation to criminal responsibility. Section 387 *Penal Code* [Tanganyika] provided that a wife who assists her husband to escape punishment does not become an accessory after the fact. Section 264 *Penal Code* [Tanganyika] was based on a legislative assumption that a wife could not steal from a husband. Further s161(d) *Penal Code* [Tanganyika] provides that neither husband nor wife can be made to disclose communications made by one to the other during marriage. It is apparent that the Privy Council was essentially of the view that so much of the corpus of Tanganyikan criminal law expressly or impliedly operated on the premise of marital unity that it could not carve an exception so that the anomalous medieval rule was terminated.

<sup>443</sup> Based upon Lord Penzance’s statement in *Hyde v Hyde* (1866) LR 1 P&D 130.

<sup>444</sup> [1957] AC 126, 136. In *Mtoakodi v Republic* [1969] EALR (T) 422 Seaton J quashed a conviction because the defendant husband intended to call a wife as his defence witness but the magistrate ruled he had to call all of his wives or none of them. The High Court took the view that this was wrong in principle.

<sup>445</sup> It has been held that a husband and wife must have been validly married according to the law of the trial jurisdiction: *R v Nerlich* (1915) 24 CCC 256 (CA); *R v Whitehouse* (1852) 6 Cox CC 38.

in terms of public perception, when the spouses are the only remaining representatives of a wider conspiracy physically before the court.<sup>446</sup> In that circumstance, the prosecution has to prove beyond reasonable doubt that there had in fact been some other party, other than the spouses, with whom they had conspired. If guilt is only established against the husband and wife because their alleged co-conspirator is acquitted then they obtain the windfall of an automatic acquittal. This scenario does occur in practice.<sup>447</sup> A spouse may also be tried for a conspiracy involving others (including the other spouse), where none of the other co-accused appear at trial.<sup>448</sup> These presentational aspects of the law are likely to reinforce a conclusion by members of the public that the wider spousal exemption is anachronistic and asinine.

Glanville L Williams<sup>449</sup> concluded the unity principle was a very imperfect representation of judge-made law, as in criminal matters the wife was wholly capable of acting both independently of and in concert with her husband. The law had been shaped by jurists and was not synchronised with evolving modern conditions. The English Court of Appeal in *Broom v Morgan*<sup>450</sup> stated that public policy was the basis for the original principle of unity which was adopted by the common law. As early as the time of Coke the rationale for spousal incompetence in evidentiary matters had moved towards a consideration of the public policy which ought to guide the law away from the rigid formalistic imperatives of yore. In the extent to which there could be intrusion into the marital relationship, in '*Coke upon Littleton*',<sup>451</sup> it was recorded:

Note, it hath been resolved by the justices, that a wife cannot be produced either against or for her husband, quia sunt duae animae in carne unâ; and it might be a cause of implacable

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<sup>446</sup> *R v Chambers* (1973) 111 CCC (2d) 282.

<sup>447</sup> *R v Lovick (Sylvia)* [1993] Crim LR 890; *HKSAR v Luk Shu Keung* [2004] 1 HKC 568, where upon the acquittal of the wife's sister, both spouses as the only remaining alleged conspirators were reluctantly acquitted by the judge.

<sup>448</sup> In *R v Nichols* (1742) 2 Stra 1227 the other co-accused had died; *R v Plummer* [1902] 2 KB 339.

<sup>449</sup> Glanville L Williams, '*The Legal Unity of Husband and Wife*', (1947) 10 Modern Law Review 16, 19. In *R v McKeachie* [1926] NZLR 1, 6 (CA) Stout CJ expressed the view that the basis of the common law rule was that the husband was supposed to dominate and control the acts of his wife. But in *Kowbel v R* [1954] 4 DLR 337 (SCC) Tachereau J pointed out the theory of unity and the defence of martial coercion were different concepts.

<sup>450</sup> [1953] 1 QB 597, 611 per Hodson LJ. But at p609 Denning LJ said the theory "has no longer any place in our law."

<sup>451</sup> 18 ed (1823) vol 1 chapter 1 at p6b.

discord and dissention between the husband and the wife, and a means of great inconvenience.<sup>452</sup>

The prescient observation of Oliver J was that public policy was the basis for the exemption, not the doctrine of unity, although it had generated the public interest in the preservation of the marital relationship.

[T]he continued existence of the rule, in relation to the crime of conspiracy rests, as the more modern cases suggest, not upon a supposed inability to agree as a result of some fictional unity, but upon a public policy which, for the preservation of the sanctity of marriage, accords an immunity from prosecution to spouses who have done no more than agree between themselves in circumstances which would lay them open, if unmarried, to a charge of conspiracy.<sup>453</sup>

By the time of *Mawji*, the inarticulate premise of the common law providing for the spousal exemption could have been based upon a view of public policy and less upon marital unity, yet still the fictional conjugal unity dominated the judicial approach. With marital unity being identified as the core principle understandably, there could be no inhibition to a conspiracy between a parent and child. But that policy does not extend to a parent and child.<sup>454</sup> But it does not survive close scrutiny at other than the level of rhetoric. Its continuance is awkwardly inconsistent as it is confined to the bare agreement. It grants no protection beyond the radius of the marital communication completing the agreement. The logic for its survival

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<sup>452</sup> But that rationale may have applied only to the admissibility of inter-spousal evidence, because in *'Coke Upon Littleton'*, vol 1 c10 p112 it is stated, without qualification, that a man cannot grant tenements to his wife during coverture "for that his wife and he be but one person in the law." Oliver J in *Midland Bank Trust Co Ltd v Green (No 3)* [1979] 1 Ch 496, 519H stated, "I doubt in fact whether it is possible to trace or to state any single and consistent rationale for the application of the fiction of marital unity in its various contexts. For instance, as regards the competence of spouses as witnesses, that has been said recently to have rested upon a combination of various considerations: the doctrine of unity, the privilege against self-incrimination, a policy which embraces the danger of perjury and public repugnance at seeing spouses testify against one another, see the speech of Lord Wilberforce in *Hoskyn v Metropolitan Police Commissioner* [1979] AC 474, 483, 484, 488."

<sup>453</sup> *Midland Bank Trust Co Ltd v Green (No3)* [1979] 1 Ch 496, 521C.

<sup>454</sup> *R v Adams* (1883) 1 NZCA 311, Johnston J said in his judgment "With respect to the question regarding the effect of the relation between the parties charged with the conspiracy – namely, that of father and child – I think that, although in point of law there could be no presumption of coercion, of the child by her father, and although it is found by the case that there was no evidence of actual coercion, yet the circumstance that the one alleged conspirator is the father and the other his child between seven and eight years of age, is of most material importance with respect to the amount of evidence which ought to be required to rebut the prima facie presumption of the innocence of the girl. It seems, indeed, repulsive to common sense to believe that a girl between seven and eight years of age, "conspired, combined, confederated, and agreed" with her father to commit a crime." Gillies J observed that as the daughter and father were alleged co-conspirators this raised the distinct issue "whether the child was not acting under, if not the coercion, at least the direction of her father." Williams J concurred.

is more bounded in emotion than on demonstrable need in the criminal law once it is accepted, as it must be, that every other mode of criminal conduct provides no similar privilege; save for the accessory after the fact position, in some jurisdictions. But if the rationale for the spousal exemption is the same as that for the accessory after the fact privilege then the inconsistency has no principled basis.

So after almost six decades of the twentieth century the common law exemption was well embedded in the case law. This work now turns to examine the responses in different common law jurisdictions in which the somewhat hesitant position of the common law has been in some of those jurisdictions, upgraded to a statutory rule.

## INTRASPOUSAL CONSPIRACY POST-1957

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That one Person alone cannot be guilty of Conspiracy...it follows...that no such Prosecution is maintainable against a Husband and Wife only, because they are esteemed but as one Person in law, and are presumed to have but one will.<sup>1</sup>

Almost 300 years later, that encomium by William Hawkins remains true as the substantive criminal law of England and Wales,<sup>2</sup> Canada<sup>3</sup> and other<sup>4</sup> common law jurisdictions. The medieval fiction has become the modern fact. In other jurisdictions it survived until well into the twentieth century<sup>5</sup> and indeed the twenty-first<sup>6</sup> until it was terminated by statutory intervention. Johnston J, a single puisne judge of the New Zealand Supreme Court, had ruled in 1886 in the unreported case of *R v Howard*<sup>7</sup> that at common law a conspiracy between a

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<sup>1</sup> P R Glazebrook (ed), William Hawkins, *Pleas of the Crown*, 1716 – 1721, vol 1 c 72 s8, Professional Books Limited, 1973. *Midland Bank Trust Co Limited v Green (No. 3)* [1979] 1 Ch 496, 527E Oliver J said: “I do not think that it can be against the policy of the law to recognise as an historical truth that the female of the species is not markedly inferior to the male when it comes to the matter of hatching plots – the contrary notion would have seemed a little less than convincing to John the Baptist and would have surprised the Thane of Cawdor.” A colourful example is *R v Sargeant* (1826) 1 Ryan & Moody 352 where a married woman was indicted and convicted with others for conspiring to procure her husband to marry her.

<sup>2</sup> s2(2)(a) *Criminal Law Act 1977* [UK]. The subsection is not even noted in the major work: Peter Murphy ed, *Blackstone’s Criminal Practice 1999*, Blackstone Press Ltd, London.

<sup>3</sup> *Kowbel v The Queen* [1954] 4 DLR 337 (SCC), *R v Robotham* (1988) 63 CR (3d) 113 (Ont: CA), *R v Kam Hong Kwan* (1992) 10 BCAC 274 (BC: CA).

<sup>4</sup> Hong Kong: *R v Cheung Ka Fai* [1995] 3 HKC 214 (CA); s159 A (1) *Crimes Ord*, Cap 200 [HK]

<sup>5</sup> The 3:2 majority decision in favour of the historical orthodoxy in *R v McKeachie* [1926] NZLR 1 (CA) was only reversed 35 years later by s67 *Crimes Act 1961* [NZ].

<sup>6</sup> s33 *Criminal Code* [Qld], s33 *Criminal Code* [WA]. But reversed in Queensland and Western Australia by 1997 by s120 *Criminal Law Amendment Act 1977, Act 3 of 1997* [Qld] and s6 *Criminal Code Amendment Act (No 2) 1987* [WA] respectively. For example, until the enactment of the *Criminal Code Act 1893* [NZ] the common law controlled the parameters of substantive criminal law in New Zealand.

<sup>7</sup> Summarised in *The Lyttelton Times*, 12 April 1886, p6, col 3 (an irregular shipboard marriage). Mr and Mrs Howard and others were indicted for conspiracy to defraud the Mutual Life Association of Australia of £1,000, by the husband feigning his death, “with considerable skill and consummate effrontery” per Johnston J in sentencing the husband. (For a conspiracy with some factual similarities see *R v Mackenzie & Higginson* (1910) 6 Cr App R 64 (CCA).) Mrs Howard identified a severed hand as her husband’s. She was acquitted by the jury. They were both Scottish and relied upon the *Marriage Law (Scotland) Amending Act 1856* [UK], to provide them with their defence to the conspiracy charges. That Act validated an “irregular Marriage contracted in Scotland” as long as the parties had lived in Scotland for 21 days preceding such marriage. The defendants argued that they entered into, on board a Scottish registered vessel en route for New Zealand, an irregular but lawful marriage by cohabitation with habit and repute, fully in accordance with Scots Law. The argument was

husband and wife alone was impossible. It is a striking oddity that that point of far-reaching substantive criminal law appears never to have been decided anywhere else in the common law, for at least 500 years. Hawkins himself had only referred to a single decision in the fourteenth century<sup>8</sup> as the decisional basis for his proposition. It was supported by the views of all other text-writers but on close analysis that accord appears to have essentially been but an uncritical repetition of the prevailing wisdom. Later text-writers<sup>9</sup> were also, until much closer to the end part of the twentieth century,<sup>10</sup> unanimous in their acceptance of the principle of conjugal fusion necessarily preventing the spousal entities from unlawfully confederating. The institutional writers had always accepted that a pre-marriage<sup>11</sup> conspiracy, between eventual spouses, was not precluded in law or fact by their subsequent matrimony.<sup>12</sup> The immunity was coextensive with the duration of the marriage. Although divorce was extremely difficult to procure before the twentieth century,<sup>13</sup> the exemption from criminality only related to what had occurred during the period of matrimony when the law recognised enforceable correlative rights, obligations and expectations deriving from marriage law.

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that the vessel which was registered in Glasgow, was by law of their domicile a floating island. Johnston J ruled after considering *Dysart Peerage Case* (1881) 6 App Cas 489. There Lord Watson held that the law of Scotland accepts the continued cohabitation of a man and woman as spouses, coupled with the general repute of their being married persons, as complete evidence of their having deliberately consented to marry, but in order to sustain that inference their cohabitation must be within the realm of Scotland. Prior to the *Marriage (Scotland) Act 1939* [UK] an irregular but lawful Scottish marriage could be entered into by a number of different means: marriage de presenti (marriage by present consent), marriage prome subsequente copula (marriage by promise followed by intercourse) and marriage by cohabitation with habit and repute. (Only the first two forms of marriage were abolished and then prospectively by *Marriage (Scotland) Act 1939* [UK]). The third form of common law marriage, unsuccessfully relied upon by Mr and Mrs Howard, was only abolished in 2006 in the wake of the decisions in *Ackerman v Logan's Executors* 2002 SLT 37 and *Wetherhill v Sheikh* [2005] Scot CS CSOH 25, 10 February 2005, Lord Philip.

<sup>8</sup> (1365) 3 Edw 3.

<sup>9</sup> 'Halsbury's Law of England', Criminal Law vol 9, p264 para 544 (1909); Horace Smith and A P Perceval Kemp (eds) 'Russell on Crimes' (1896) 6 ed, vol 1, p152, note(f); Roome, H D and Ross, R E (eds) 'Archbold's Criminal Pleading' (1922) 26 ed Sweet & Maxwell (Publisher) Ltd, p1417; 'Lush on Husband and Wife', 3 ed, p17; A A Gordon Clarke and Alan Garfitt (eds) *Roscoe 'On Criminal Evidence'* (1952) 16 ed, Stevens, London

<sup>10</sup> R S Wright 'The Law of Criminal Conspiracies and Agreements' (1873) Butterworths, London; William Pinder Eversley, 'Eversley on Domestic Relations', 3 ed (1906) Stevens and Haynes, London, p29 doubted the universal proposition.

<sup>11</sup> If an indictment describes an accused as a single woman, she must establish the marriage to avail herself of the exemption unless it is otherwise proved on the whole of the prosecution evidence. *R v Jones* (1664) Kel (J) 37. The actual marriage should be proved: *R v Hassall* (1826) 2 Car & P 434 although evidence of cohabitation and reputation will be sufficient: *Morris v Miller* (1767) 4 Burr 2057.

<sup>12</sup> *R v Robinson* (1746) 1 Leach 37, noted in *Boots v Grundy* (1900) 82 LT 769, 773.

<sup>13</sup> 'Punishment of a Bigamist', [1926] Butterworths Fortnightly Notes, 538-539, referring to the remarks of Maule J prior to the passing of the *Divorce Act 1857* [UK].

The common law delimited the immunity to the combination of husband and wife only.<sup>14</sup> Those two, alone,<sup>15</sup> enjoyed a special exempt status under the criminal law. A conspiracy between a husband and wife and one or more others<sup>16</sup> were always justifiable. No other relationship was in such an elevated position of security from the inchoate criminal law. The exemption was not available to a single parent and child combination,<sup>17</sup> a master and servant combination, or otherwise; but it did apply to a polygamous union.

The common law was immalleable, despite the advancement the quest by women for equality in political and civil rights. It had re-affirmed the orthodoxy in a number of different common law jurisdictions. In *R v McKeachie*<sup>18</sup> the New Zealand Court of Appeal, by a majority, held that the *Crimes Act 1908 [NZ]* perpetuated the common law position, by its omission to deal with it at all, a position not finally reversed until the general package of criminal law legislation culminating in s67 *Crimes Act [NZ] 1961*.<sup>19</sup> The Supreme Court of Canada in *Kowbel v The Queen*<sup>20</sup> also by a majority, and after a consideration of *R v McKeachie* also maintained the long-standing rule. Shortly thereafter the Privy Council, on appeal from Tanganyika in *Mawji v The Queen*<sup>21</sup> reached the same conclusion. Yet for practical reasons it is generally very difficult for the prosecution to have evidence of a pure spousal conspiracy; very few such cases are ever prosecuted.<sup>22</sup>

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<sup>14</sup> See *Smith v State* (1904) 46 Tex Crim 267; (1905) 48 Tex Crim 233. Glanville Williams at 675-6 n1 states: "There is no legal protection for partners, or for parent and child, man and mistress, or lovers, notwithstanding that de facto the relationship in any of these cases may in particular circumstances be closer than the relationship between an individual husband and wife".

<sup>15</sup> In *R v Cope* (1719) 1 Stra 144 a husband, wife and servants put "grease into the paste" to ruin the business of the King's card-maker.

<sup>16</sup> *R v Duncan* (1849) 13 JP 220 (husband, wife and other, wife acquitted of the conspiracy on the basis of marital coercion); *R v Whitehouse* (1852) 6 Cox CC 38 (husband, wife and daughter).

<sup>17</sup> *R v Adams* (1883) 1 NZCA 311 (between conspiring father and eight year old daughter, to give false evidence implicating one Longhurst of raping that daughter).

<sup>18</sup> [1926] NZLR 1 (CA).

<sup>19</sup> Despite the legislation providing for the removal of the cloak of cosy immunity only one example of a pure intraspousal conspiracy appears ever to have been charged in New Zealand since the 1961 Act, and that was a private prosecution, see fn 22.

<sup>20</sup> [1954] 4 DLR 337 (SCC).

<sup>21</sup> [1957] AC 126 (PC).

<sup>22</sup> But in a private prosecution, a woman (X) and her husband (Y) were indicted with seven counts of conspiracy to have a man (Mr Hartley) prosecuted for false allegations of sexual violation by rape, sexual connection, indecent assault and stupefaction, X was found guilty on two counts. Y did not stand trial. In that jury trial, *Hartley v X* (X and Y having been granted permanent name suppression), unreported Blenheim District Court, T011186, 26 November 2002, Judge DC McKegg presiding; written communication from Deputy Registrar, Blenheim, District Court to author dated 4 November 2006. The trial was additionally noted in *The Press*, 27

## AMERICAN SUPREME COURT DESTROYS THE EXEMPTION

However, it was the United States Supreme Court in 1960 in *United States v Dege* (1960) 364 US 51 which by a majority, extirpated the common law rule as being unnourished by common sense and an indignity to all concepts of equality before the law. This remains the only occasion in which the highest court of any common law country has repudiated the doctrine. A contemporary writer<sup>23</sup> noted that the decision of the Court of Appeal in *R v McKechie* upholding the marital exemption had “been placed beyond doubt by the Privy Council decision” in *Mawji v The Queen*, which must have been taken as approving it. That outcome was correct on the basis of precedent then<sup>24</sup> prevailing. It is clear<sup>25</sup> that prior to 1959, ie two years after *Mawji v The Queen*, that no intention had been manifested<sup>26</sup> to alter the New Zealand statutory law to remove the intraspousal immunity. It is very likely that the American decision caused an urgent re-evaluation of the policy considerations driving the *Crimes Bill 1959* [NZ]. The destructive analysis of the spousal exemption by the American Supreme Court, must have impelled an epiphanous conversion for its removal.

It may be remarked that no court has ever decided whether the common law exemption also applied to variants of the crime of conspiracy such as an attempt to commit conspiracy,<sup>27</sup>

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November 2002, A7. In some jurisdictions on a charge of conspiracy a wife is an incompetent prosecution witness against her husband and against his alleged co-conspirators. *R v Singh and Amar* (1970) 1 CCC (3d) 299 (BC: CA) following *R v Thompson, Danzey and Hide* (1872) LR 1 CCCR 377. At p303 Bull JA added “in a charge of conspiracy of which the gist is a conspirational agreement between the two accused, evidence against one must of necessity be evidence against the other, albeit in some instances, indirect.” *R v Yung Kit Mei* unreported, Cr App 1025/1981, Hong Kong Court of Appeal. McMullin VP, Li and Silke JJA, 2 July 1982 is to the same effect. This is a practical prosecution reason why there are so few pure spousal conspiracies charged.

<sup>23</sup> BD Inglis ‘*Family Law*’ Sweet & Maxwell (NZ) Limited, Wellington (1960) p527.

<sup>24</sup> And still now: *Owens v Chief Executive of the Ministry of Social Development* [2007] NZAR 185, 190 (CA).

<sup>25</sup> BD Inglis ‘*Family Law*’ Sweet & Maxwell (NZ) Limited, Wellington (1960) p527 “The relevant sections of the *Crimes Act 1908* relating to conspiracy must accordingly be read in this light. Perusal of the recently introduced *Crimes Bill* in its present form reveals no indication that the position is likely to be altered in the foreseeable future.” But then *United States v Dege* intervened and the Bill was redrawn.

<sup>26</sup> Clauses 320 and 321, *Crimes Bill 1959* [NZ] (No 61-1).

<sup>27</sup> In *R v Harris* [1927] NPD 330, a South African decision, one party approached another who feigned agreement to carrying out an unlawful object, it was held this amounted to the offence of attempting to conspire to commit an offence. To the same effect is *R v Kotyszyn* (1949) 95 CCC 261 (Qué: KB).

counselling or procuring a conspiracy<sup>28</sup> or incitement to commit conspiracy.<sup>29</sup> (The very existence of these double inchoate or accessorial inchoate offences is problematic in the law.) Other relationships in law, which involve an agreement between a person and an entity (of which the person is the mind and will of it) throw up issues of split legal personality, which undermine the jurisdiction of the intraspousal immunity. A corporation may conspire with its managing director,<sup>30</sup> this combination is a justiciable conspiracy,<sup>31</sup> even where the conspiracy is between a corporate person and its own members.<sup>32</sup> The closeness of the relationships in those instances identify that unless there is a compelling necessity for exempting any person (corporate or otherwise) from the general purview of the criminal law, the law should apply without distinction to all before it. It follows that the justification for concluding that a marriage licence is also a licence to be exempted from certain criminal conspiracies, must be able to withstand close analysis and scrutiny, as justifiable differential treatment.<sup>33</sup> Otherwise

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<sup>28</sup> *R v Lanteri* (1985) 4 NSWLR 359, 360 (CCA) Street CJ (Priestley JA and Maxwell J concurring) queried whether the offence of counselling or procuring a conspiracy existed at all. Under such a law it follows that a wife could incite her husband to commit an offence: *R v Annie Brown* (1896) 15 NZLR 18, 32 per Prendergast CJ “wife may be accessory to her husband by procuring or inciting him to commit an offence, and a husband in the same way be accessory to the wife’s crime”. They could also jointly incite another person to commit an offence including a conspiracy: Glanville Williams (1966-1967) 9 *Journal of the Society of Professional Teachers of Law (NS)* 169, 170. But they still could not conspire themselves. An attempt to incite is also an offence too: *R v Rainsford*, (1874) 13 Cox CC 9, 16 per Kelly CB (Lush, Brett, Quain JJ and Pollock B concurring); *R v Chelmsford Justices ex parte JJ Amos* [1973] Crim LR 437 (DC).

<sup>29</sup> It was accepted in *R v De Kromme* (1892) 17 Cox CC 492 (CCCR) that it is possible to incite another person to commit a conspiracy. But that judgment, which is very short and equally superficial has been cogently criticised in *R v Dungey* (1979) 51 CCC (2d) 87, 91. However, s5(7) *Criminal Law Act 1977* [UK] abolished the offence of incitement to conspire. No such legislation has been enacted in Hong Kong. Clive Grossman ed, ‘*Archbold Hong Kong 2005*’, Sweet and Maxwell, Hong Kong (2005) p1829 para 36-77. In *Mak Sun Kwong v The Queen* [1980] HKLR 466 (CA) an incitement to commit a conspiracy was held to be an offence known to the law. A conspiracy to attempt to commit an offence however, must exist where the substantive offence is itself framed in terms of an attempt to achieve an unlawful object: *R v Westcott*, *The Guardian*, 1 October 1975, *The Times*, 11 December 1975.

<sup>30</sup> *R v ICR Haulage Ltd* [1944] KB 551. (It is only in the report at [1944] 1 All ER 691, 692 that the fact is set out that a co-conspirator was the managing director.) The same outcome was reached in Australia: *O’Brien v Dawson* (1942) 66 CLR 18, 32; Canada: *R v Electrical Contractors Association of Ontario* (1961) 27 DLR (2d) 193, 201 and England: *R v Blamires Transport Services Ltd* [1964] 1 QB 278.

<sup>31</sup> *Belmont Finance Corp. v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393; *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1981] Ch 257.

<sup>32</sup> Indeed a conspiracy to fix prices such as *R v British Columbia Professional Pharmacists Society* (1970) 17 DLR (3d) 285 demonstrates that there can be a conspiracy between the professional body of a group of people and its individual members and it matters not that the later are members of the former.

<sup>33</sup> See the note by R E Megarry ‘*Notes*’ (1966) 82 LQR 151, 153 that if X is in sole control of three separate companies which are charged with taking part in a conspiracy to raise prices illegally, X is acting in three different capacities and his *mens rea* will be different in each case, so that conspiracy will lie. cf Livingston Hall “*The Substantive Law of Crimes*” (1937) 50 *Harvard Law Review* 616, 648 “there can be no conviction for conspiracy where a plurality of parties is logically necessary for the crime, since the corporation could not be held for any affirmative crime unless one of its agents acted on its behalf”: *R v McDonnell* [1966] 1 QB 233, 245

it is marriage which is really being protected, at the expense of the general criminal law. The ethos of the criminal law in the nineteenth century, in relation to the needs and status of wives, is poignantly demonstrated by an 1869 American text.<sup>34</sup> Married women were still a separate class under the substantive criminal law. Almost a hundred years later American law would give the common law position its quietus.<sup>35</sup>

## AMERICAN STATE COURTS GIVE THE IMMUNITY ITS QUIETUS

In *United States v Dege*<sup>36</sup> in 1960 the United States Supreme Court decided by a majority 6-3 that the common law privilege could not be sustained. From 1889, when the issue arose for the first time in any American court, the general view was that a husband and wife could not be convicted of conspiring to commit an offence alone.<sup>37</sup> The basis of the spousal exemption was an ill-fitting justification that the wife had been presumptively coerced by her husband and in any event, that as one person in law, they could not conspire.<sup>38</sup> Entry of a third party into the conspiracy terminated the exemption and both husband and wife could in that circumstance be convicted, even when the third person was not tried at the same time<sup>39</sup>. There had been conflicting decisions in the United States at the intermediate Court of Appeal level. In *Dawson v United States*<sup>40</sup> and in *Gros v United States*<sup>41</sup> the Court of Appeal for the Ninth

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per Nield J (no two minds between a one-man company and the man for the law of conspiracy); In Massachusetts, the same result was reached: *Goulart v Trans-Atlantic Marine Inc.* [1970] 2 LI LR 389. But the one-man company may contract with the man and vice versa: *Lee v Lee's Air Farming Ltd* [1961] AC 12 (PC) reversing [1959] NZLR 393 (CA).

<sup>34</sup> Edmund H Bennett and Franklyn Fiske Heard, 'A Selection of Leading Cases in Criminal Law with Notes', (1869) Little Brown & Co, Boston vol 1 p83. In *Commonwealth v Lewis* (1840) 1 Metcalf 151 Dewey J said: "The humanity of the criminal law does, indeed, in some instances, consider the acts of the wife as venial, although she has in fact participated with her husband in certain acts, which, on the part of her husband, would constitute an offence, as against him; upon the ground that much consideration is due to the great principle of confidence which a feme coverte may properly place in her husband, as well as the duty of obedience to the commands of the husband, by which some femes coverte may be reasonably supposed to be influenced in such cases."

<sup>35</sup> Only for federal offences. The common law position in the various states took years to unravel.

<sup>36</sup> (1960) 364 US 51.

<sup>37</sup> *People v Miller* (1889) 22 Pac 934; *Gros v United States* (1943) 138 F 2d 261; and *Dawson v United States* (1926) 10 F 2d 106.

<sup>38</sup> See *People v Gilbert* (1938) 78 P2d 770.

<sup>39</sup> Canadian law is to the same effect: *R v Chambers* (1973) 11 CCC (2d) 282 so the spouses could alone stand trial for a wider conspiracy.

<sup>40</sup> (1926) 10 F 2d 106.

Circuit, on appeal from Idaho and California respectively, had affirmed the common law rule. By contrast the Fifth Circuit in *Thompson v United States*<sup>42</sup> and *Wright v United States*,<sup>43</sup> both cases on appeal from Georgia, had rejected the common law rule as had the Court of Appeals for the District of Columbia Circuit in *Johnson v United States*.<sup>44</sup>

Frankfurter J, delivering the majority opinion of the Supreme Court, trenchantly rejected the continuation of the common law rule, because legitimate business enterprises between husband and wife had long been commonplace and “it would enthrone an unreality into a rule of law”<sup>45</sup> to suggest that husband and wife were legally incapable of agreeing to carry out an unlawful act. None of the policy considerations based on “domestic felicities” which were the basis for the restrictive rules pertaining to testimonial compulsion, were relevant to this issue of providing an immunity to the spouses. The two assumptions which founded the original rule were identified, namely that responsibility of husband and wife for joint participation in a criminal enterprise would promote marital disharmony and the second basis being the presumed coercive influence of her husband. Frankfurter J roundly dispatched the first assumption by stating it was “unnourished by sense”<sup>46</sup> and the second, the doctrine of marital coercion, implied a view of womanhood “offensive to the ethos of our society”. (Yet 40 years later it still exists in some American states.) He declined to find surviving in the law a doctrine that had been hitherto uncritically examined. Frankfurter J placed weight on the criticism of the doctrine by Glanville Williams<sup>47</sup> and earlier Winfield.<sup>48</sup> He concluded that to adopt the English common law position for the United States would be only “blind imitation of the past”, repeating the phrase of Holmes J in ‘*The Path of the Law*’.<sup>49</sup> The common law rule disregarded the vast changes in the status of women, particularly “the extension of her

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<sup>41</sup> (1943)138 F 2d 261. In *People v Pierce* (1964) 395 P 2d 893, following *United States v Dege* the Supreme Court of California formally overruled all inconsistent previous jurisprudence.

<sup>42</sup> (1955) 227 F 2d 671.

<sup>43</sup> (1957) 243 F 2d 569.

<sup>44</sup> (1946) 157 F 2d 209.

<sup>45</sup> (1960) 364 US 51, 52.

<sup>46</sup> *Midland Bank Trust Co Limited v Green (No 3)* [1979] 1 Ch 496, 526G Oliver J declined “to contribute to the domestic contentment” of marital conspirators. He said that the notion that civil responsibility for the infliction of jointly planned injuries would generate marital disharmony was “unnourished by sense” adopting the phrase of Frankfurter J in *United States v Dege*. (1960) 364 US 51, 53.

<sup>47</sup> (1947)10 MLR 16.

<sup>48</sup> Winfield, P ‘*The History of Conspiracy and Abuse of Legal Procedure*’ (1921) Cambridge University Press p64 and p88.

<sup>49</sup> Oliver W Holmes ‘*The Path of the Law*’ (1897) 10 Harv L Rev 457, 469.

rights and correlative duties”.<sup>50</sup> American law would not slavishly follow such an unprincipled theory and upgrade it to a valid doctrinal norm.

Warren CJ (with whom Black and Whittaker JJ concurred) dissented. He noted that the Privy Council in *Mawji*, the Supreme Court of Canada in *Kowbel* and the New Zealand Court of Appeal in *McKechie* had all maintained the rule at common law. This “tenacious adherence of the judiciary to the husband-wife conspiracy doctrine,” was itself evidence that the impugned rule might be predicated upon underlying policies unconnected with women’s suffrage or her capacity to sue. Warren CJ reasoned that a wife, by virtue of matrimony, “might easily perform acts that would technically be sufficient to involve her in a criminal conspiracy” with her husband but which were quite different acts from the arms-length agreement typical of conspiracy.<sup>51</sup> Warren CJ concluded that to allow a conspiracy between husband and wife could “endanger the confidentiality of the marriage relationship.” But as a result of the decision of the majority the ancient common law position disappeared for all federal offences (only) and at the resumed trial Mr and Mrs Dege were eventually convicted.<sup>52</sup>

The Supreme Court of Illinois had 6 years in advance of the decision of the United States Supreme Court settled the question for that State by holding that the common law rule no longer existed, in *People v Martin*<sup>53</sup> where a husband and wife who entered into a criminal conspiracy to sell heroin in violation of the *Uniform Narcotic Drug Act* were not immune from prosecution, by the surviving radiations from the common law fiction of the unity of husband and wife. The fiction was based upon the disability of the wife to own separate property at common law and her lack of capacity to maintain a legal action independently of her husband. Much of its vitality of the former view had gone in view of legislation abolishing the presumption of coercion of the wife, and often legislation permitting a married woman to: own her separate property, to sue and be sued in her own right, and to testify

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<sup>50</sup> Just after the critical decision in *United States v Dege*, Lord Denning MR was able to state that the unity rule “has now been swept away in nearly all branches of the law.”: *Gray v Formosa* [1963] P 259, 267.

<sup>51</sup> This remark might have been directed at intraspousal buggery, for which Canadian law specifically exempted spouses: s158(1)(a) *Criminal Code* [Can]; Patrick J Knoll ‘*Criminal Law Defences*’ (1987) Carswell, Toronto, p69. Warren CJ had no plausible reason for considering arms-length distance to be typical for conspirators. What about other close family members?

<sup>52</sup> *Dege v United States* (1962) 308 F 2d 534.

<sup>53</sup> (1954) 122 NE 2d 245.

against her husband. No relevant reason was considered to exist any longer which might support the asserted common-law rule.

After *United States v Dege* the Supreme Court of California<sup>54</sup> finally reversed its decision of 1889,<sup>55</sup> saying “The fictional unity of husband and wife has been substantially vitiated by the overwhelming evidence that one plus one adds up to two, even in togetherness.”<sup>56</sup> The inevitability of this result, it reasoned, flowed from the fact that either spouse could be convicted of a crime against the physical person of the other and since as early as 1926 the same court had decided that either spouse could be convicted of a crime against the property of the other.<sup>57</sup> The spouses could be convicted of conspiracy when a third party was involved: and most decisively against the fiction was that a spouse could be convicted of a conspiracy with another person, to criminally injure the absent spouse.<sup>58</sup> As a wife or husband could also be an accessory before the fact to the offence of the other, no persuasive justification for not including an anterior mode of criminality existed.<sup>59</sup> It therefore serenely followed that:

The law, however, poses no threat to their domestic harmony in lawful pursuits. It would be ironic indeed if the law could operate to grant them absolution from criminal behavior on the ground that it was attended by close harmony.<sup>60</sup>

The Supreme Court of California also reasoned that if the argument for spousal exemption was applied in terms of the extent of the influence between individuals, it would or might absolve married people, yet it could be as readily invoked to absolve people linked in any other close association, instancing a secret society.<sup>61</sup> But the court accepted that because a

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<sup>54</sup> *People v Pierce* (1964) 395 P 2d 893.

<sup>55</sup> *People v Miller* (1889) 22 P 934. Some three years after *People v Pierce*, the Court of Appeal of California quashed the conviction of a husband and wife for a conspiracy to ostensibly distribute Bibles, when the acts involved occurred before that decision was pronounced. See *People v Reeves* (1967) 250 Cal App 2d 490 (8 persons indicted, 6 acquitted, leaving only husband and wife, who could not, at the time of the offence, conspire together). In *People v Lockett* (1977) 25 Cal App 3d 433 *People v Pierce* was applied.

<sup>56</sup> *People v Pierce* (1964) 395 P 2d 893, 894 per Traynor CJ enjoying a pun.

<sup>57</sup> *People v Graff* (1926) 211 P 829.

<sup>58</sup> *People v Brown* (1955) 281 P 2d 319.

<sup>59</sup> *People v Eppstein* (1930) 290 P 1054.

<sup>60</sup> *People v Pierce* (1964) 395 P 2d 893, 895 per Traynor CJ.

<sup>61</sup> *Ibid* p895 “Spousehood may afford a cover for criminal conspiracy. It should not also afford automatically a blanket of immunity from criminal responsibility.” The court added that there should be no automatic immunity based on the assumption that a wife invariably acts under the compulsion of her husband “...particularly in view of the advances status of married women in this State.” At p891 it added: “There is nothing in the contemporary

wife was aware of her husband's illegal activity and even passively helpful to him in the everyday acts incidental to marriage, caution was needed from reaching the inferential conclusion that the wife (or husband) had agreed with the other spouse. Their acts, to constitute an agreement, had to amount to active participation by informed acquiescence, incapable of any other explanation, in transcending acts that were otherwise explicable as being ordinary in furtherance of the marital union. That caution though only goes to the weight of the evidence, not to whether the offence should be justiciable.

The Supreme Court of Pennsylvania decided the issue of the spousal exemption for the first time ever in 1973,<sup>62</sup> finding the non-binding decision of the Supreme Court in *United States v Dege*<sup>63</sup> compelling. The court emphasised that there was no express statutory provision prohibiting a conviction of two spouses conspiring alone together, so from that premise the role of the common law exemption needed to be evaluated against present-day conditions.<sup>64</sup> The "immunity"<sup>65</sup> originated from the doctrine of unity with the fictional consequence that there was but one shared will between the spouses, reinforced by the common law's belief in "the natural state of a wife's submissiveness to her husband."<sup>66</sup> This led in linear fashion to the conclusion that the wife could not possibly formulate the necessary criminal intent to be guilty of a conspiracy with her husband. In a forceful declamation of the common law, Manderino J delivering the judgment of the court stated:

There is no reason to perpetuate the fiction that husband and wife are one person with one will in the eyes of the law. They are not. They are separate individuals. Each has a distinct personality and a will which is not destroyed by any process of spousal fusion. Each acts

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mores of married life in this State to indicate that either a husband or a wife is more subject to losing himself or herself in the criminal schemes of his or her spouse than a bachelor or a spinster is to losing himself or herself in the criminal schemes of fellow conspirators."

<sup>62</sup> *Commonwealth v Lawson* (1973) 309 A 2d 391, 395 (Supreme Court of Pennsylvania) per Manderino J. The Court oddly did not note two earlier decisions from the state, of the County Court and District Court, to the contrary: *Commonwealth v Allen* (1900) 24 Pa Co Ct R; *Commonwealth v Kendig* (1908) 18 Pa Dist 659.

<sup>63</sup> (1960) 364 US 51.

<sup>64</sup> "Initially, it must be noted that in reality a husband and wife can conspire to commit a crime just as any other two persons might do." *Commonwealth v Lawson* (1973) 309 A 2d 391,395.

<sup>65</sup> *Ibid* p396.

<sup>66</sup> *Ibid* p396.

separately and should be separately responsible for their conduct. We have so recognized in other areas of the law.<sup>67</sup>

Eight years before *United States v Dege*, the Supreme Court of New Jersey in *State v Carbone*<sup>68</sup> had delivered a comprehensive judgment on the law of criminal conspiracy. New Jersey is a common law state and the great bulk of the caselaw referred to in the judgment of Heher J for the court, is English caselaw. In an introductory part<sup>69</sup> it was affirmed that a husband and wife could not conspire together. Five years later, a State trial Judge<sup>70</sup> applied this conclusion and upheld the spousal exemption, noting that New Jersey had enacted in 1829<sup>71</sup> its first statute proscribing conspiracy and had re-enacted penal laws against conspiracy on several occasions. Waugh JSC concluded that to accede to a submission that the exemption did not exist would be “to lightly cast aside one of the most longstanding common law rules.”<sup>72</sup> It was reasoned that the Legislature had deliberately made only piecemeal intrusions into the fiction and that no general abolition of the doctrine of marital unity had been made.<sup>73</sup> Handler JSC in the Essex County Court of New Jersey in 1972<sup>74</sup> applied *State v Struck* where a husband and wife were indicted alone for a conspiracy to obtain money by false pretences, such acts existing, both prior to and after their wedding. The judge directed that while the spouses were liable for the pre-marriage phase the intra-marriage overt acts in furtherance of the conspiracy, by contrast, were exempt from the orbit of the criminal law.

But the next year an opposite result obtained.<sup>75</sup> McCowan AJSC reviewed the earlier New Jersey decisional law and declined to follow it on the basis that earlier decisions of trial courts were only persuasive and the binding decision of the Supreme Court of New Jersey in *State v*

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<sup>67</sup> *Commonwealth v Lawson* (1973) 309 A 2d 391, 396. Manderino J then added, “Women should not lose their identity – or their responsibility – when they become wives. The status of wife or husband should not relieve any person of one’s obligation to obey the law.”

<sup>68</sup> (1952) 91 A 2d 571.

<sup>69</sup> *Ibid* at p574 “a conspiracy consists not merely in the intention but in the agreement of two or more persons (not being husband and wife) to do an unlawful act, or to do a lawful act by unlawful means.”

<sup>70</sup> *State v Struck* (1957) 129 A 2d 910 (Essex County Court of New Jersey, Law Division).

<sup>71</sup> s53, *An Act for the Punishment of Crimes*, 1829, New Jersey.

<sup>72</sup> *State v Struck* (1957) 129 A 2d 910, 912.

<sup>73</sup> Noting that in 1934 the New Jersey Legislature abolished the presumption of marital coercion by Revised Statutes 2:103-3, re-titled and renumbered by 1957 as NJJ 2A:85-3 and adding at p912 “It is axiomatic that such deep-rooted philosophies are not to be altered unless in the most explicit terms”, consistently, with (at p913) “the doctrine of the strict construction of penal statutes”.

<sup>74</sup> *State v Thyfault* (1972) 297 A 2d 873, 883.

<sup>75</sup> *State v Pittman* (1973) 306 A 2d 500 (Superior Court of New Jersey, Law Division (Criminal)).

*Carbone* was only an obiter pronouncement in relation to spousal exemption. The judge emphasised that the language of conspiracy involves “Any two or more persons<sup>76</sup>” and there was no legislative indicator that spouses were not included in that open-ended formula. That conclusion was fortified by the fact that the Legislature had in the same Act creating the general offence of criminal conspiracy, expressly provided that either spouse was exempt from the general crime of being an accessory after the fact, where the principal was the other spouse.<sup>77</sup> “Thus, it could be inferred that if the Legislature had intended to immunise married couples from the proscription of NJSA 2A:98-1, it would have included an appropriate provision in the statute”.<sup>78</sup>

This conclusion was consonant with “the recent happenings in our society” so that it followed that the common law concept of spousal oneness had been vitiated in New Jersey.<sup>79</sup> *United States v Dege* was a compelling authority to demonstrate it was unrealistic to apply the anachronism to conclude spouses are incapable of engaging or agreeing to engage in a criminal enterprise. No reason existed to infuse into the statute the common law concept of repressing crime means a common law rule should be undone by the judiciary – legislative action was not necessary. The Appellate Division of the Superior Court of New Jersey in *State v Infinito*<sup>80</sup> decided that sociolegal<sup>81</sup> changes required that New Jersey law be adapted to conform, with the view in *State v Pittman*. So within 15 years of the decision in *Dege* the last residuum of the uxorial conspiracy exemption had finally disappeared from the United States legal landscape; whereas the rule continues to flourish in contiguous Canada.

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<sup>76</sup> NJSA 2A: 98-1.

<sup>77</sup> NJSA 2A:85-2.

<sup>78</sup> *State v Pittman* (1973) 306 A 2d 500, 501.

<sup>79</sup> Noting that the Supreme Court of New Jersey had abolished the common law rule of inter-spousal immunity for personal torts arising out of the negligent operation of a motor vehicle: *Immer v Risko* (1970) 65 NJ 482.

<sup>80</sup> (1981) 433 A 2d 816.

<sup>81</sup> Based on *Romeo v Romeo* (1980) 84 NJ 289 which marked the attrition of the spousal unity concept, otherwise “a procedural rule intended solely to promote marital harmony becomes, if not a suit of armor against the weapons of truth ascertainment in a criminal prosecution, at least a bullet-proof vest.” *State v Infinito* (1981) 433 A 2d 816, 819 Joelson JAD remarked that the public policy supporting the marital union is considered more important than the evidence or crime excluded, ruling that in a joint trial of husband and wife, severance may be necessary otherwise the spouses are “faced with the Hobson’s choice of deciding to testify in their individual defenses or testify adversely to the interests of the spouse”.

## RE-EXAMINATION OF THE IMMUNITY UNDER ENGLISH LAW

The English Law Reform Commission<sup>82</sup> in their Report No 76 '*Conspiracy and Criminal Law Reform*', (1976) assumed<sup>83</sup> that the common law position<sup>84</sup> endured. It then considered<sup>85</sup> whether the common law position<sup>86</sup> should be maintained. It identified five aspects of public policy in favour of maintaining the rule.<sup>87</sup>

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<sup>82</sup> Don Stuart, '*Canadian Criminal Law: A Treatise*' (1982) Carswell Company Limited, Toronto, p566, after reviewing '*Report No 76: Conspiracy and Criminal Law Reform*', of the Criminal Law Commission at pp20-21 concluded that on balance the immunity was justifiable. The Commissioners had stated: "A change in the law to permit a spouse to be charged with conspiracy with his or her spouse might offer excessive scope for improper pressure to be applied to spouses in particular cases; where, for example, a husband refuses to confess to the commission of a crime, he would be open to the threat that his wife should be charged with conspiracy with him. Such a change in the law in this respect could, therefore bring practical disadvantages which might outweigh its possible advantages." He opined at p566 that "the present immunity should be broadened to cover some notion of common law marriages." The same suggestion was adopted judicially in *Thompson v Canada (Attorney General)* (1998) 23 CR (5<sup>th</sup>) 347, 351 "the common-law exception should include partners of the opposite sex living together as husband and wife without having gone through the formality of a marriage, be it religious or civil."

<sup>83</sup> It is not until the early twentieth century that the courts next appear to have considered the issue since 1365. In *Director of Public Prosecutions v Blady* [1912] 2 KB 89, 92 (DC), Lush J dissenting accepted with ill-disguised disdain the "strange" rule. In *R v Peel*, *The Times*, 15 March 1922. Sir Charles Gill KC in his opening of the prosecution advised Darling J there was no charge of conspiracy on the indictment because of the "quaint" rule enunciated in *Hawkins* that spouses being "one person in law were presumed to have but one will" which was met with the rejoinder recorded in *The Times* "Mr Justice Darling – It is more likely to have been true in the time of *Hawkins* than it is today (laughter)." No English decision has directly reached the conclusion that is the essence of the suggested doctrine. Both New Zealand and Canadian Courts had by a majority concluded that the doctrine was well-founded or alternatively was so well embedded in the common law that it could only be extirpated by a purpose-built repeal by specific legislation. In his judgment discharging Mrs Peel, Darling J actually stated that the "pre-arrangement", between the husband and wife to defraud the bookmakers, was a "conspiracy".

<sup>84</sup> It is astonishing to note that the authority for the rule rests on arguments found in three cases in the Year Books: *Anon* (1345) YB (RS ed Pike) 19 Edw III, Mich 24; *Anonymous* (1365) YB (Fitzherbert) 38 Edw III, Hil 3a and *Anonymous* (1366) YB (Fitzherbert) 40 Edw III, Pasch 10. The doubtful basis for the rule was earlier noted by Professor Winfield in '*History of Conspiracy and Abuse of Legal Procedure*' (1921) Cambridge University Press p48.

<sup>85</sup> (Law Com No 76) (HMSO, London, 1976).

<sup>86</sup> The Commission noted that "there is, however, no direct English authority on the point" as to whether spouses could conspire alone. But *Mawji v The Queen* was seen as supporting the supposed rule. Most of the modern textbook writers<sup>86</sup> had equally assumed this to be the case: But not in Canada. The spousal immunity rule for conspiracy has been widely condemned as "anachronistic and foolish" see M R Goode, '*Criminal Conspiracy in Canada*', (1978) Carswell, Toronto at p99-100. Don Stuart, '*Canadian Criminal Law, A Treatise*', 1982, Carswell Company Ltd, Toronto, p565: "The rules seem inconsistent in themselves and with the lack of immunity given husbands and wives elsewhere in the criminal law. It is difficult to see why marriage should be a haven exempt from the criminal law. It has, however, been argued that there are countervailing social policy considerations such as the desire not to jeopardise the stability of marriage."

<sup>87</sup> That Report adopted a similar conclusion reached by the Law Reform Commissioner (Victoria), Report No 3 '*Criminal Liability of Married Persons*', (1975) at p27.

- (a) Making a husband and wife liable would represent a factor tending to undermine the stability of the marriage;<sup>88</sup>
- (b) A change in the law might offer excessive scope for improper pressure to be applied to spouses in particular cases;
- (c) Public trials on charges of conspiracy in respect of communications between spouses only might be likely to have a significant effect in discouraging marital confidences.<sup>89</sup>
- (d) Faced with an apparent conflict between their duty to each other and their duty to society the making of an agreement between spouses might be much less reprehensible than one between persons owing no duties to each other.
- (e) The agreement of one spouse to the project of the other is less likely to bring in additional resources or make the agreement a formidable one than the agreement of a stranger would be.<sup>90</sup>

The English Law Commission volunteered the pragmatic consideration that:

A change in the law to permit a spouse to be charged with conspiracy with his or her spouse might offer excessive scope for improper pressure to be applied to spouses in particular cases; where, for example, a husband refuses to confess to the commission of a crime, he would be open to the threat that his wife would be charged with conspiracy with him. Such a change in the law in this respect could, therefore, bring practical disadvantages which might outweigh its possible advantages.<sup>91</sup>

The Working Party of the Law Commission<sup>92</sup> was divided as to whether the supposed rule should be given statutory recognition and the Law Commission itself was also divided on the issue. In the end it decided to “recommend no change in the law which exempts from the

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<sup>88</sup> The notion that criminal responsibility for the infliction of jointly planned injuries would generate marital disharmony was “unnourished by sense”, adopting the phrase of Frankfurter J in *United States v Dege*. Connubial confidences are not going to be inhibited in the absence of a “cloak of cosy immunity”.

<sup>89</sup> The Criminal Law Revision Committee in 1972 proposed the abolition of the spousal communication privilege. The Criminal Law Revision Committee proposed in its Eleventh Report, *Evidence (General)* Cmnd 4991 (1972) para 173 that the abolition of the privilege against the disclosure of marital communications provided by s1(d) *Criminal Evidence Act 1898* [UK] should be effected. Yet the *Criminal Law Act 1977* preserves the exculpatory fiction of the legal unity of spouses in relation to the crime of conspiracy. The Law Commission was of the opinion that to abolish the marital unity fiction would tend “to undermine the stability of the marriage”; Law Commission Working Paper No. 50 *‘Inchoate Offences, Conspiracy, Attempt and Incitement’* para 36. Of the sanctity of communications during marriage, there never was at common law any privilege protecting disclosure: *Shenton v Tyler* [1939] Ch 620 (CA). *Rumping v Director of Public Prosecutions* [1964] AC 814, 835, 861, 865 no rule of public policy precluded the reception in evidence of communications between spouses.

<sup>90</sup> *Ibid* p 20 para 1.47-1.48.

<sup>91</sup> But if there was evidence of unlawful agreement no harm is done; if there was no evidence, malicious prosecution would avail: *A v State of New South Wales* [2007] HCA 11, 21 March 2007, High Court of Australia. The objection is invalid and the police technique an abuse of process.

<sup>92</sup> The Law Commission, *Criminal Law, Report on Conspiracy and Criminal Law Reform*, Working Paper No 50 para 36.

crime of conspiracy agreements between spouses”.<sup>93</sup> The majority view of the Law Commission, which led to s2(2)(a) *Criminal Law Act 1977*<sup>94</sup> (which declares the assumed common law rule) was that public policy required the rule to be preserved in order to maintain the stability of marriage<sup>95</sup> and also to avoid the danger of improper pressure being applied by the investigative agencies of the state. It also adopted the Victorian view that the retention of the common law rule would preserve the sanctity of marital communications. It was additionally argued that the making of an agreement between husband and wife might be less reprehensible than a similar agreement between strangers; because the inclusion of a third party tended to make an agreement more formidable or provide additional resources for carrying out the agreed conduct.

Richard Card appositely stated:<sup>96</sup>

It seems odd that if a husband and wife agree between themselves to commit an offence they cannot be convicted of conspiracy, whereas if the substantive offence is committed by one of them pursuant to the agreement they can both be convicted of that offence, as perpetrator and

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<sup>93</sup> (Law Com No 76) (HMSO, London, 1976) Ibid 1.49 and 1.120. The Commission annexed a draft of a Bill which it called the *Conspiracy and Criminal Law Reform Bill 1976*, p156.

<sup>94</sup> Section 2(2)(a) *Criminal Law Act 1977* [UK]<sup>94</sup> provides that: “A person shall not...be guilty of conspiracy to commit any offence...if the only other person or persons with whom he agrees are...(a) his spouse.”<sup>94</sup> *Halsbury’s Laws of England*, 4 ed Reissue, vol 11 (1) para 66. In a single sentence the text boldly states “a person is not guilty of conspiracy at common law where the only parties to the agreement are husband and wife; but husband and wife may be guilty as co-conspirators where others are involved”. It follows that where a husband and wife are charged with conspiring with another, the jury should be directed to acquit the spouses unless they are satisfied that there was another party to the conspiracy. See *R v Lovick* [1993] Crim LR 890 (CA). PJ Richardson (ed) *Archbold 2001*, Sweet & Maxwell (2001), London, para 33-25 says in terms that a husband and wife cannot be guilty of conspiracy, which reflects the common law. J C Smith and Brian Hogan, *Criminal Law*, 10 ed, 2002, London Butterworths at p322-323 the authors stated that the application of the exemption is based “upon a social policy of preserving the stability of marriage” noting Law Comm No 76 para 1.46-1.49. But a wife is guilty if she agrees only with her husband, if she knows that there are other parties to the conspiracy, even though she has never met or communicated with them. See *R v Chrastny* [1991] 1 WLR 1381 (CA).

<sup>95</sup> *Midland Bank Trust Co Ltd v Green (No. 3)* [1979] 1 Ch 496, 511H Oliver J noted: “The proposition that husband and wife are one has been asserted by many ancient and respected authorities and no doubt the biblical notion of the origins of man lies at the root of many of the privileges and immunities, and indeed of the disabilities, attendant upon the married state, such as, for instance, the common law rule that a wife was not a competent witness against her husband and the fiscal approach to the sinful possession of the fruits of thrift.”

<sup>96</sup> Richard Card, *Card, Cross & Jones, Criminal Law* (2001) 15 ed, Butterworths, London at p549. This 1977 statutory provision was considered by the English Court of Appeal in *R v Chrastny (No.1)*. [1992] 1 All ER 189, 192a (CA) Glidewell LJ stated the sub-section restates the position at common law. “A wife, knowing that her husband is involved with others in a particular conspiracy, agrees with her husband that she will join the conspiracy and play her part she is thereby agreeing with all those whom she knows are the other parties to the conspiracy”. The Appeal Committee of the House of Lords (Lord Keith of Kinkel, Lord Templeman and Lord Lowry) refused leave to appeal: [1992] 1 All ER 189, 192g.

accomplice respectively. Given the existence of the rule, it also seems odd that there is no bar to a conviction for conspiracy in relation to an agreement between a man and a woman who are living together in an extra-marital relationship, however stable.

## CONCUBINAGE, POLYGAMY AND CRIMINAL LAW DEVELOPMENTS

But while English common law reached a conclusion, it did so without ever contemplating the over-extending complexities engendered by polygamous marriages and lawful customary concubinage<sup>97</sup>.

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<sup>97</sup> Under Chinese customary law a concubine had a distinct status and was to be wholly differentiated from any notion of a paramour, mistress or occasional lover. A male was entitled to take an additional 'wife', who, if certain irreducible requirements were met, occupied a formal position within the household: Vermier Y Chiu, *'Marriage Laws and Customs of China'*, Institute of Advanced Chinese Studies and Research, New Asia College, The Chinese University of Hong Kong (1966) p26-27. In *Anonymous Appeal No 1534 of 1916* Supreme Court of China a concubine was: "one who, with intention to live permanently and continuously and to become a member of his family, has had or intends to have a relationship that is akin to that of husband and wife with the pater familias, shall acquire the status of concubine." Leonard Pegg, *'Chinese Marriage, Concubinage and Divorce in Contemporary Hong Kong'*, (1975) 5 Hong Kong Law Journal 4, 29-32, noting that this definition remains authoritative. "The conditions requisite for the establishment of a relationship between that concubine and the pater familias are not expressly provided for by the law. According to juristic principles based on custom, however, it may be properly interpreted thus; there must be intention on the part of the pater familias to acknowledge the woman as his life long companion, with a place in the family second only to that of his wife; on the part of the concubine, there must be intention to enter the family of the pater familias to become a member of the pater familias's family, with a position subordinate to that of the wife. (This is 'Ju Kung') these conditions must be present before the woman can become a legitimate concubine of the pater familias. If a man and a woman merely have planned this clandestine relationship of cohabitation, it can hardly be recognised as a relationship between pater familias and concubine and the woman is (sic) such cases will not acquire the status of a concubine.": *Anonymous Appeal No 186 of 1918*, Supreme Court of China. By the operation of s3 Article 1123 of the *Nationalist Civil Code of the Republic of China*, concubines are regarded as members of the family and not as the *pater familias'* secondary wives as they had been so regarded prior to the promulgation of the *Nationalist Civil Code* on 26 December 1930. *Re Tsang Kwok Lit* [2007] 1 HKLRD 472 (CFI) – the consent of the first wife was not a requirement for taking a concubine. Some legislation expressly provides in the criminal law that a "wife" includes a concubine: s2 Prevention of Bribery Ordinance Chapter 210 Laws of Hong Kong.

In *Chan Hing Cheung v The Queen*<sup>98</sup> three men who had been sentenced to death for arson and double murder had their convictions quashed because the principal prosecution witness was the tsip or concubine of a co-accused (who was acquitted by the jury). The effect of the decision was that a secondary wife under Chinese customary law, was indistinguishable in status from a wife in a Christian marriage<sup>99</sup> for the purposes of uxorial rights and she was therefore not a competent witness against her spouse or indeed any of the other co-accused in a joint trial.<sup>100</sup> The common law incompetence of a “wife” to give evidence against her “husband” was extended to encompass a Chinese customary concubine.<sup>101</sup> Concubinage required an intention to take as a concubine and a public holding out of the woman as a

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<sup>98</sup> [1974] HKLR 196 (FC) Huggins, McMullin and Pickering JJ. Concubinage was prospectively outlawed in China by s3 Article 1123 of the *Nationalist Civil Code of the Republic of China 1931*, noted in *Re Leong Ba Chi* [1953] 2 DLR 766 (BC: CA). *Anonymous* Supreme Court of China, Appeal 2518 of 1934 provided that upon the outlawing of concubinage it became an offence punishable with penal servitude of not more than one year for both participants as “repeated and continuous adultery.” It remained lawful in Hong Kong until 7 October 1971 when the *Marriage Reform Ordinance* Cap 178 prospectively abrogated its status. In Hong Kong a concubine has rights to maintenance: s2 *Separation and Maintenance Ordinance* Cap 16 [HK]. By s19 *Affiliation Proceedings Ordinance* Cap 183 [HK] a wife was defined as including a concubine. As the custom had been prevalent a significant number of concubines still feature in a variety of litigious matters: *Kwan Chui Kwok v Tao Wai Chun* [1995] 1 HKC 374 Patrick Chan J held that when the principal wife died but the concubine was still living, the husband could not enter into a Christian marriage or its civil equivalent with a third woman because he was already party to a polygamous marriage. *Re Y (Infants)* [1946–1972] HKC 378 involved a child whose mother was a concubine under Burmese customary law. The Privy Council had held that a tsip or concubine was entitled to share as a widow in her husband’s estate: *Cheang Thye Phin v Tan Ah Loy* [1920] AC 369, followed *In the Estate of Chan Yan* (1925) 20 HKLR 35. In both *Yew v Attorney General* [1924] 1 DLR 1166 (BC CA) and *Estate of Bir* (1948) 188 P 2d 499 (Cal App) it was held that both polygamous wives were surviving spouses for the purposes of succession duty.

<sup>99</sup> The New South Wales Supreme Court decided that a Christian marriage did not connote that the parties were Christians or that the rites observed were Christian rites; rather it meant a marriage in the sense in which that relationship is understood in Christendom: *Ng Ping On v Ng Choy Fung Kam* (1963) 63 SR (NSW) 782, 783 per Sugerman J, Collins J concurring at p793.

<sup>100</sup> The prosecution case was that the four had combined and executed a pre-concerted design to set fire to a dwelling house in which two victims resided, by pouring petrol under the door and setting it a light. The principal witness for the prosecution was Madam Wong Shuk Han and it was her status on which the appeal turned. She had lived for some years with the first defendant and from the very outset of the trial, objection was taken by the defence, on the basis that as it was a joint trial, she was not a compellable witness for the Crown against him or indeed against any of the other accused, relying upon *R v Mount and Metcalfe* (1934) 24 Cr App R 135. *R v Payne* (1872) LR 1 CCCR 349. A husband or wife could not be a witness for or against any other person indicted jointly with the other spouse: Thomas Lefroy, ‘*An Analysis of the Criminal Law of Ireland*’, (1865) 3 ed, Hodges, Smith and Co, Dublin, pXVII, citing *R v Smith* (1826) 1 Mood CC 289. A wife of an accused person is an incompetent witness against her husband on a charge of conspiracy but she is also an incompetent witness against the husband’s co-accused unless the complainant spouse alleges an offence affecting her person, health or liberty: *R v Singh and Amar* (1970) 1 CCC 299 (BC: CA).

<sup>101</sup> In Hong Kong the Strickland Committee ‘*Chinese Law and Custom in Hong Kong*’, (1953), Hong Kong Government Printer, p25 had reported: “the tsip is in law considered a wife, a secondary or inferior wife it is true, both in law and in practice to the tsai, but nevertheless a wife and not a kept mistress.” By s54 *Criminal Procedure Ordinance* Cap 221 a wife was not competent as a witness for the prosecution against the defence.

concubine, combined with an acceptance (or recognition) by both the principal wife and family or public.<sup>102</sup>

We see no reason to think that whatever may have been originally the practical reason or reasons for the rule rendering spouses not competent as witnesses against each other (reasons conveniently enshrined in the Christian concept of the marriage union) those reasons which have been suggested are not equally applicable to a Chinese customary marriage. The fact that in some respects a tsip is of a lower status than a tsai and, therefore, of the wife of a monogamous union does not affect the basic similarity arising from the fact that she is a wife.

The implications for uxorial privileges were awakened by these novel circumstances beyond the original contemplation of the common law. On appeal the Full Court had reviewed a number of authorities from different corners of the former British Empire which had been required to evaluate the exotica of polygamy and concubinage under the criminal law. But none of these dealt with conspiracy apart from *Mawji*; the others being decisions on competence and compellability. The appellate court reasoned that in determining the nature of the special status of a concubine in criminal law, it was appropriate to consider what was considered to be the analogous criminal law scenarios in relation to polygamous wives<sup>103</sup>. Where Muslim law<sup>104</sup> strongly influences the criminal law, such as in much of East Africa, the Court of Appeal of Zanzibar has stated that the approach in *Mawji*<sup>105</sup> was wholly

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<sup>102</sup> [1974] HKLR 196, 212.

<sup>103</sup> In *Abdulrahman Bin Mohamed & Anor v R* [1963] EACA 188 the Court of Appeal at Zanzibar (Sinclair P, Gould AVP, and Newbold JA) held that a wife married according to native law or custom which permits potentially polygamous marriages, is a competent witness against her husband upon a charge of murder, even if the marriage is in fact monogamous. In *R v Anderea Edoru s/o Okomera* (1941) 8 EALR 87 the Court of Appeal (Sheridan, Webb CJJ and Wilson J) quashed a conviction for murder because evidence was given against the husband by his wife and the trial record revealed that her evidence had been given “on oath”. The Court of Appeal concluded that s151 Criminal Procedure Code [Uganda], applied, and it provided that the wife in a monogamous marriage was not competent as a witness against her husband except in certain cases, of which murder was not one. As she had given sworn evidence the court said there was an un rebutted presumption that she was a Christian and that therefore the marriage was monogamous. The same point had been made in *R v Sumbuso s/o Ruhinda*. (1945) 12 EALR 99 (Nihill, Edwards and Gray CJJ) and in *R v Absolute Nakone s/o Mamumi* (1947) 14 EALR 119 (Nihill and Paul CJJ; Bartley J).

<sup>104</sup> Wilson’s *Anglo-Muhammadan Law*, 6 ed at p 113 para 39(2). In *Abdulrahman Bin Mohamed & Anor v R* [1963] EACA 188 the Court of Appeal noted the first appellant was a Muslim but his “wife” was not. Under the common law of England which applied to Zanzibar by Art 24 Zanzibar Order in Council 1924 [UK] subject to certain exceptions, the husband or wife of a person charged was not a competent witness for the prosecution. Section 147 *Criminal Procedure Decree* [Zanzibar] Cap 8 was to the same effect.

<sup>105</sup> Morris *The Recognition of Polygamous Marriage in English Law* (1953) 66 Harvard Law Review 961, 1001, in 1953 (three years before *Mawji*), states based on Dicey, *Conflict of Laws*, (1949) 6 ed, p227. that a husband and wife cannot be guilty of a criminal conspiracy and that a polygamous marriage would yield a different result “for the rule that one man and one woman are one person in law would be extended to the breaking point if it were held that one man and four women were one person”.

distinguishable as Zanzibar law “does not distinguish between monogamous and polygamous marriages.” The same broad approach was adopted by the earliest decisions of the courts constituting the present nation of South Africa<sup>106</sup> and continues in modern England.<sup>107</sup> It has been inaccurately observed<sup>108</sup> that “the criminal courts have not been squarely faced with the problem of [the vicissitudes of polygamous marriages and] the judicial significance”. The common law had thrown up the examples, but they had not been systematically marshalled from the far-flung and disparate jurisdictions.

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<sup>106</sup> In *Nalana v R* [1907] TS 407 it was held that a second native marriage, the first marriage being still in force, was not legal, so the newer wife was a competent witness for the prosecution against her husband, notwithstanding s2 Law 4 of 1885 Transvaal provided: “The law, habits and customs hitherto observed by the natives shall continue to remain in force in this Republic as long as they have not appeared to be inconsistent with the general principles of civilisation recognised in the civilised world” and even though law recognised a native’s second wife as his wife “because natives are taxed for each wife”. At p409 Innes CJ commented that “no legislative expression in which the term “wife” is loosely used for taxation purposes can alter the legal position”. In a single striking sentence the court dispatched polygamy, so the compellability of natives wives’ married by custom became open season: “To my mind a polygamous marriage is inconsistent with the general principles of civilisation recognised in the civilised world and this is a polygamous marriage.” At p409. In *R v Mboko* (1910) TP 445. it was held that the first wife of a native husband married according to native custom (there being no second or other wife) was “not legally married” per Innes CJ at p447-448: “whether he marries one wife or twenty, if he marries under a law or custom that permits him legally to marry a second wife the marriage is polygamous”, as the marriage was potentially polygamous.

<sup>107</sup> In *R v Junaid Khan* (1987) 84 Cr App R 44 (CA). In *R v Yacoob* (1981) 72 Cr App R 313 (CA). the competence and compellability of a woman, whose matrimonial adventures extended to at least four marriages, was in issue. Her competence and compellability depended on whether she had lawfully married the appellant Yacoob. Watkins LJ held at 317, that she was undoubtedly a competent witness for the purpose of giving evidence about her marriages. The Court of Appeal concluded that it was well-settled that if either party lacked capacity to contract a marriage, the ‘marriage’ will be void. But she had no entitlement to polyandry under her personal law and the law of her domicile. So the decision while correct, is of little moment. It was held that a second wife married in accordance with Muslim rites, but not in accordance with English law, was a competent and compellable witness. This is undoubtedly correct but had the marriage taken place in accordance with her *lex domicilii* the second wife would not have been a competent witness. In *Hoskyn v Metropolitan Police Commissioner* [1979] AC 474, 484 C Lord Wilberforce concluded that the doctrinal basis for the incompetence of a spouse was: “the unity of husband and wife, coupled with the privilege against self-incrimination. The danger of perjury is also involved.” Much earlier it had been said that the rationale for spousal evidential incompetence is the wish to promote harmony within the family: *Stapleton v Croft* (1852) LJ QB 367.

<sup>108</sup> JA Andrews, ‘A Licence for Bigamy?’ [1963] Crim LR 261. But this is to overlook both *R v Caroubi* and *Mawji*. The article exposed the fragility of *R v Sarwan Singh* [1962] 3 All ER 612, which held that a prior polygamous or potentially polygamous marriage was not a valid first marriage, for the law of bigamy. G W Bartholomew, ‘Polygamous Marriages and English Criminal Law’, (1954) 17 Modern Law Review 344, the article is betrayed by the title, as it is confined to an analysis of bigamy and does not venture into the general criminal law significance of polygamy at all or in relation to the position of polygamous wives. At p359 though Bartholomew in his summary correctly anticipates *R v Sagoo*, [1975] 1 QB 885 [CA] 21 years later. Michael Plonsky, ‘Polygamous Marriage: A Bigamists Charter?’ [1971] Crim LR 401 concluded that it was untenable that only a monogamous marriage could be the foundation for a bigamy prosecution. The opposite view resonates with what Lush JA had said in *Harvey v Farnie* (1880) 6 PD 35, 53: “If one of the numerous wives of a Mohammedan was to come to this country, and marry in this country, she could not be indicted for bigamy, because our laws do not recognise a marriage solemnised in that country, a union falsely called marriage, as a marriage to be recognised in our Christian country.”

The only previous (and inadequate) consideration of polygamy in the criminal law in England had been *R v Caroubi*<sup>109</sup> and the trial ruling of Avory J considered on appeal in *R v Naguib*<sup>110</sup> that a first marriage which was either polygamous or potentially polygamous could not constitute a marriage for the purposes of subsequent bigamy. In *Baindail v Baindail*<sup>111</sup> Lord Greene MR expressly declined to make any ruling on the criminal law in relation to polygamy. He accepted that the Privy Council in *Mawji* must be taken as having generally assimilated the reluctant acceptance by the civil law of the concept of intraspousal immunity to the general corpus of the criminal law. In a pluralistic society it is a reality that the common law had to confront.

Subsequent to *Mawji* polygamous marriages or potential examples have been constantly recognised<sup>112</sup> as valid according to the rules of English private international law. Would it follow that the two wives could conspire amongst themselves and therefore be liable, but the two wives and the husband were to be exempt? The out of court admission by one spouse against the other is inadmissible.<sup>113</sup> But the evidence could be of a fourth party. So Hong

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<sup>109</sup> (1912) 7 Cr App R 149

<sup>110</sup> [1917] 1 KB 359, 361 per Viscount Reading CJ who described the issue as “an interesting question, but we need not deal with it”.

<sup>111</sup> [1946] P 122, 130 (CA) At p129 recognising that polygamy “is necessarily of very great practical importance in the everyday running of our Commonwealth and Empire”. In *R v Sagoo* [1975] 1 QB 885 (Lord Widgery CJ, James LJ, Ashworth J) (CA) approved the view “that the marriage which is to be the foundation for a prosecution for bigamy must be a monogamous marriage”. The appellant, the court held, had transmuted his original polygamous marriage into a monogamous one. In *Ali v Ali* [1968] P 564 (to the same effect *Parkasho v Singh* [1968] P 233) Cumming-Bruce J accepted that a change to English domicile was possible so that “by operation of the personal law which he has made his own, precluded himself from polygamous marriage to a second wife, although he has not changed his religion”. The potentially polygamous marriage had been remodelled, by virtue of the acquisition of English domicile, into a monogamous one – so the original Kenyan marriage was a valid subsisting marriage for the purposes of the bigamy prosecution based on the English marriage. Although the offence of bigamy can be committed under New Zealand law whenever the offence takes place, that only applies to “a New Zealand citizen” s205(1)(c)(d) *Crimes Act 1961* [NZ] so a non-NZ citizen may by their *lex domicilii* marry an additional wife, but not in New Zealand, if that law permits it. But the critical analysis is completely missing as to why a spouse who was lawfully and polygamously married in his *lex domicilii*, cannot upon changing his domicile be convicted of bigamy if he goes through another form of marriage. In *Yew v Attorney General of British Columbia* [1924] 1 DLR 1166 (BC: CA) a specially constituted court of five members of the British Columbia Court of Appeal held that where the *lex loci contractus* and the law of the domicile both concur, then Canadian courts will recognise as lawful wives, women who have the legal status of secondary wives in a country where polygamy is not illegal. There is no reason why in those circumstances only a monogamous marriage can be the foundation for a bigamy prosecution.

<sup>112</sup> See Harley, ‘*Polygamy and Social Policy*’, (1969) 32 MLR 155, 169. The central difficulty with *Mawji* is that it is based on a concession by the Crown. The conspirators were parties to a potentially polygamous marriage and the Privy Council accepted that the defence of marriage was “*fully valid*” in Tanganyika. The rule immunising a husband and wife from the law of conspiracy was not a judge-made rule but a jurist-made rule.

<sup>113</sup> *Mawaz Khan v The Queen* [1967] 1 AC 454 (PC).

Kong developed its own jurisprudential approach in relation to concubines, but it fell into orthodoxy when it came to intraspousal conspiracy. But the conspiracy may not even be at an end upon the arrest of the spouses.<sup>114</sup> Anthony Allott<sup>115</sup> considers *Mawji* raised two separate issues; one, whether the rule of English criminal law forms part of the law of Tanganyika, namely that a husband and wife could not conspire together; and two, whether it applied to a husband and wife of a potentially polygamous marriage. The magistrate, the High Court and the Court of Appeal for East Africa all held that this rule of English law was applicable in Tanganyika, but that it could not apply to anyone other than the spouses of a Christian or monogamous marriage.

#### REAFFIRMATION OF THE IMMUNITY

In *R v Cheung Ka Fai*<sup>116</sup> the Hong Kong Court of Appeal confirmed that under Hong Kong common law a husband and wife were legally incapable of conspiring together, “the old common law rule” continued unabated. Although based “upon the doctrine of conjugal unity, they are considered as constituting but one juridic person. And being one person in law, they are presumed to have but one will: see *Mawji*.” The court added that although this common law rule was “anachronistic” it remained the law. By curious coincidence the appellant Cheung Ka Fai was convicted in Hong Kong of conspiring with his wife and others. His wife was Kam Hong Kwan who was separately convicted in British Columbia of conspiring with her husband for the identical crime.<sup>117</sup> Both spouses’ convictions were affirmed on different sides of the Pacific and in both jurisdictions the Courts of Appeal affirmed the existence of the common law rule, but distinguished it in the event, on the basis that the spouses had, as a

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<sup>114</sup> *Wong Wai Man v HKSAR* [2003] HKC 735 (CFA).

<sup>115</sup> Anthony Allott, *New Essays in African Law*, (1960), Butterworths, London, p39. “The great interest of *Mawji* ‘lies in the double shifted meaning involved in this chain of reasoning. First of all the words of the Tanganyika Code are qualified so as to give them an ‘English’ meaning; but in the application of the Tanganyika provision thus qualified the Court is not limited by the special rules of English law in regard to marriage, and may adapt the English rule to the local circumstances of Tanganyika by making it applicable to *any* husband and wife whose marriage is valid by the law of Tanganyika. The submission that the English rule would not apply to the appellants unless it would apply to them if the alleged conspiracy had take place in England was expressly rejected by the Judicial Committee’.”

<sup>116</sup> [1995] 3 HKC 214 (CA). (Litton VP, Mortimer and Ching JJA).

<sup>117</sup> *R v Kwan Kam Hong* (1992) 10 BCAC 274, 288 – 9.

matter of fact, additionally conspired with others. But if spouse A had been in country X (that did not recognise the immunity) and the other spouse B in country Y (which did) then the results would be extraordinary; particularly as the acquittal in Y (for impossibility) would generate *autrefois* acquit implications that ought to protect the other spouse A in country X. Different jurisdictions do not agree as to whether a conviction or an acquittal in another jurisdiction generate double jeopardy so as to preclude a further prosecution for the same or substantially similar offence already adjudicated upon.<sup>118</sup>

The acceptance of the common law position is open in *R v Cheun Ka Fai* to criticism, and the value of the finding is limited, because it was obiter and based on a concession of law by the prosecution<sup>119</sup> (as the appeal did not depend on it).<sup>120</sup> The court accepted the notion that the couple were “but one juridic person” and therefore presumed to have but one will. However, there was no close consideration of whether the supposed rationale for spousal exemption could be conceptually sustained. The ability of a wife or a husband or both, to be able to commit a crime by any other criminous modality exists. Nothing precludes a wife being an accessory before the fact of her husband’s act; or of being an accessory after that act. The spouses can carry out as a joint enterprise every substantive offence. They can jointly or severally attempt to commit any offence; so the rationale for spousal conspiratorial exemption

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<sup>118</sup> English common law has always accepted the position: *R v Thomas* (1664) 1 Keb 677, 83 ER 1180 (Welsh law); *Beak v Thyrrwhit* (1678) 3 Mod 194, 87 ER 124; *R v Hutchinson* (1677) 3 Keb 785, 84 ER 1011 (Portuguese law); *R v Roche* (1775) 1 Leach 134, 168 ER 169 (Cape of Good Hope Colony law) and *R v Azzopardi* (1843) 2 Mood 288, 169 ER 115 (Smyrna law). The same rule applies between a verdict of a foreign court martial and a domestic criminal trial; *R v Aughet* (1918) 13 Cr App R 101 (Belgium law). More recent English law has affirmed the position: *Treacy v Director of Public Prosecutions* [1971] AC 537, 562 per Lord Diplock; *R v Thomas (Keith)* [1985] QB 604 (Italian law); *R v Lavercombe* [1988] Crim LR 435 (Thailand law). Canadian law is much more disposed against this rule: *R v Leskiw, Morgan and Eedy* (1986) 26 CCC (3d) 166, 171-172; *R v Frisbee* (1989) 48 CCC (3d) 386, 403-408 and in particular *Van Rassel v The Queen* (1990) 53 CCC (3d) 353, 358-359 (SCC). South African law by contrast recognises the double jeopardy: *S v Pokela* 1968 (4) SA 702 (E); *McIntyre v Pietersen* 1988 (1) BCLR 18 (T) which held that because the rule against double jeopardy is a constitutional as opposed to a common law right now, that “broadens the circumstances in which a plea of *autrefois* acquit should succeed”. So did British Burmese law: *R v Maung Hmin* [1946] Rangoon LR 1 (CA) per Dunkley ACJ, Ba U and Moothan JJ (decision of occupying Japanese court valid upon resumption of British Burmese control); Article 14 (7) ICCPR provides for the constitutional right against double jeopardy. Double jeopardy applies also to conspiracies: *S v Ndou* 1971 (1) SA 668 (AD). Recent English law has confirmed that in an application for a permanent stay based on double jeopardy the burden of proof is exceptionally on the prosecution and not on the defence, unlike the burden in an orthodox application for a stay claiming an abusive process: *R v Beedie* [1998] QB 356 (CA); *R v Phipps* [2005] EWCA Crim 33, 14 January 2005 per Clarke, LJ at paras 10 and 11.

<sup>119</sup> At p221B.

<sup>120</sup> At p221H.

cannot lie in the inchoate nature of the crime. The court never confronted the fundamental proposition that as the alleged exemption was judge-made law it could be unmade; contenting itself with a rapidly uncritical acceptance of the sole juridic person status theory – which inexorably leads in the law of conspiracy to the exclusion. The Court of Appeal may have considered themselves constrained, as a matter of precedent, by *Mawj*. Lord Diplock in *de Lasala v de Lasala*<sup>121</sup> had delivered a speech that required Hong Kong courts to consider themselves bound by decisions of the Privy Council as well as of the House of Lords<sup>122</sup> having had as an optimal object in uniform maintenance of the common law in the jurisdictions from which appeals to it could be brought.<sup>123</sup> It is only in much more recent times that the Privy Council has explicitly acknowledged the individuality of the common law in existence<sup>124</sup> in different common law jurisdictions. It thereby repudiated its earlier conception of a monolithic, homogenous common law.<sup>125</sup>

A short time later the Hong Kong legislature put the decision of the Court of Appeal beyond doubt by legislation rendering non-justiciable a pure intraspousal criminal conspiracy. Now by s159B(2)(a) *Crimes Ordinance* (Cap 200) [HK]<sup>126</sup> a husband and wife<sup>127</sup> are exempted

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<sup>121</sup> [1980] AC 546, 558C (PC), itself an appeal from Hong Kong.

<sup>122</sup> The nature of the bindingness of Privy Council cases on appeal from other than Hong Kong was considered in *R v Chan Kai Lap* [1969] HKLR 463, 469-471 (FC).

<sup>123</sup> Anthony Allott, *Essays in African Law*, (1960) London: Butterworths, p82

<sup>124</sup> *Australian Consolidated Press Ltd v Uren* [1969] 1 AC 590 (PC) and *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC).

<sup>125</sup> *Fatuma Binti Mohamed Bin Salim Bakhshuwen v Mohamed Bin Salim Bakhshuwen* [1952] AC 1, 14 (PC) per Lord Simonds

<sup>126</sup> Since that common law decision, the Hong Kong Legislature has enacted s159A(1) *Crimes Ordinance* Cap 200, added by s2 *Crimes (Amendment) Ordinance* [HK] No 49 of 1996. Existing statutory offences of conspiracy, such as in s5 of the *Offences Against the Persons Ordinance*, were not repealed but s159E(6) provides that sections 159A and 159B shall apply in determining whether a person is guilty of an offence of conspiracy under any such enactment. Where the conduct is an offence of conspiracy under any such other enactment, it must then be charged under that enactment and does not amount to an offence under s159A and s159E(6) which introduced a statutory offence of conspiracy, modelled on s1(1) *Criminal Law Act 1977* [UK]. The effect of s159B is to set out three categories of exempt persons and the law provides that if “the only other person or persons with whom the Defendant agrees” falls “both initially and at all times during the currency of the agreement” within one or more of these exemptions, then the charge of conspiracy will fail against the defendant. This exemption applies both to conspiracies under s159A(1) and also to “statutory offences of conspiracy” under s159E(6). A specific exemption provided by s159B(2)(a) deals with married couples, who are by law incapable of conspiring amongst themselves only.

<sup>127</sup> Of course, the requirement that the man and woman actually be husband and wife implies a valid marriage. Accordingly, in *People v Little* (1941) 107 P 2d 634, 108 P 2d 63, where a man and woman went through a marriage ceremony although they had spouses living and undivorced, it was held that the ceremony was illegal and void and they could conspire together to commit crimes until they had gone through a second ceremony after their disabilities had been removed. The court was of the opinion that the fact that a man and woman not legally

from what is otherwise a general provision of the criminal law, as they are deemed, conclusively, at law incapable of conspiring to commit alone any offence. This statutory position in Hong Kong is identical to the statutory position in England. There are since 1996 (when the provision was first introduced) already at least two examples<sup>128</sup> in Hong Kong of a married couple being acquitted of serious conspiracies, because the other co-accused with whom they had originally been indicted, was or were found not guilty, leaving the spouses in the wholly serendipitous position of being forcibly acquitted. In England, the same outcome has necessarily followed.<sup>129</sup> It is very likely to be an abuse of process for the prosecution, having elected to prosecute the spouses (and others) with a conspiracy, to later seek in light of the verdict on the conspiracy charge, to prosecute the spouses for substantive offences<sup>130</sup> available at the time of the prosecution election.

The court in *Cheung Ka Fai* had missed a rare opportunity to rationalise the uxorial relationship in a common law setting. Although its passive adoption of the old law made no difference to the result of the appeal, its effects of the fundamental position it found still

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qualified to be married to each other go through a marriage ceremony did not make them husband and wife within the rule that a husband and wife could not conspire together to commit a crime. As to marriage by proxy under Article 100 *Uruguayan Civil Code* 1964: see *Pazpena De Vire v Pazpena De Vire* [2001] Fam Law 95.

<sup>128</sup> In *HKSAR v Luk Shu Keung* [2004] 1 HKC 568 (DC) Judge Wright (original accused: husband, wife and her sister) at 571C “it is a matter of law that a married couple cannot commit the offence of conspiracy absent there being at least one other conspirator”. The judge had to acquit the spouses whom he found otherwise to be guilty because the only other co-conspirator he found not to be proved to be guilty. In *People v MacMullen* (1933) 134 Cal App 81, 24 P2d 794, where the defendants, husband and wife, were jointly indicted with another husband and wife for conspiracy to commit grand theft, and the latter were acquitted, it was held that the conviction of the defendants was erroneous, the court being of the opinion that the offence of conspiracy could not be committed by one person alone, and a husband and wife, being in law regarded as one person, they could not be convicted of a criminal conspiracy between themselves in the absence of other parties to the conspiracy. Likewise, in *Gros v United States* (1943) CA 9th Cal 138 F2d 261, where acquittal of a third party charged with participating in a criminal conspiracy left only a charge against a husband and wife, it was held that they could not be guilty of the conspiracy, the court being of the opinion that their incapacity was not removed by the disproved charge against the third party.

<sup>129</sup> *R v Lovick (Sylvia)* [1993] Crim LR 890. MJ Murray, ‘*The Criminal Code: A General Review*’ (June 1983), Attorney General’s Chambers, Western Australia, vol I. In relation to s33 *Criminal Code* [WA], which made it impossible for a husband and wife to criminally conspire together, a recommendation was made to repeal this section “I can see not good reason for its retention and in fact we have had instances where it has done positive harm to the administration of justice. In one particular case the only offence potentially available arising out of the business activities of a husband and wife was a conspiracy to defraud. The couple had over a lengthy period of time engaged in a determined conspiracy which had netted them a considerable financial advantage, but because of the operation of Section 33 and for no other reason it proved impossible legally to lay any charge against them at all.”

<sup>130</sup> Note *Practice Direction (Crime: Conspiracy)* [1977] HKLR 489 (CA) that prosecution must justify joinder or elect to prosecute either substantive(s) or conspiracy offences, where both on indictment.

existed would continue. The judgment was a terse confirmation of what it believed the common law position to be. No cavil or reservation was made to it. When the Legislative Council of Hong Kong came shortly, to consider the need for a statutory form of conspiracy, the precedent of *Cheung Ka Fai* for the spousal exemption was there.<sup>131</sup> It now meant that if the Legislative Council wanted to alter the law, it could only do so by wholly removing an existing uxorial right that had explicitly and recently been validated by a strong Court of Appeal. There was no political advantage for any legislator to agitate for a diminution of settled legal rights; especially in the knowledge of the application of the Basic Law of the Hong Kong Special Administrative Region<sup>132</sup> which affirmed and continued the common law of Hong Kong, across the transition of British Colony to Special Administrative Region of the People's Republic of China. There was, in addition, the exact precedent that the Westminster Parliament had enacted s2(2)(a) *Criminal Law Act 1977* [Eng]. Hong Kong had often eclectically and in a wholesale way borrowed legislation from England – as a function of its legal heritage. The political will was not to engage in unnecessary in-fighting, so with both the Hong Kong Court of Appeal and the English Parliament ad idem, the spousal exemption was duly enacted, without a whimper of dissent.

If the rationale for the conspiracy exemption (which of course is not an exemption of either spouse, but concurrently both of them) is that in historical times, the male was usually the initiator or protagonist in the crime, so the law generated the exemption really for the benefit of the wife only. Yet both are its beneficiaries. If there is duress between the spouses, then the defence applies. It is available for conspiracy<sup>133</sup> or any mode of criminality. If there is no duress then the existing rationale must turn on the 'sanctity of marriage' and the notions of privacy and confidentiality. The exemption does not apply if at some time "during the currency of the agreement" another person joins the conspiracy (in this case, all three may be convicted of conspiracy).<sup>134</sup> This rule applies only to conspiracy. It also does not protect spouses from liability as parties, in the event one of them actually commits the offence of

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<sup>131</sup> Each of the members of the Court of Appeal, Litton VP, Mortimer and Ching JJA were elevated to the Court of Final Appeal, as Permanent or Non-Permanent Judges, providing to legislators an additional endorsement of the persuasive value of the principle in the decision.

<sup>132</sup> In force in Hong Kong from 1 July 1997.

<sup>133</sup> See *Tripodi v The Queen* (1961) 104 CLR 1.

<sup>134</sup> *R v Chrastny* [1991] 1 WLR 1381.

which they conspired. Retention of the spousal conspiracy exemption rule has been criticised<sup>135</sup> on the basis that other traditional rules ostensibly protecting the sanctity of marriage, such as the husband's immunity from rape, have been abolished at common law. But rules of evidence still underline the importance of the sanctity of marriage.<sup>136</sup> Further, it applies only to spouses; two persons in a long-term but non-marital relationship would not attract the protection of this exemption.<sup>137</sup> A wife can aid and abet her husband<sup>138</sup> and is otherwise guilty of all other modalities of committing a crime other than an accessory after the fact.

## CANADA MAINTAINS THE IMMUNITY

The obverse of the very marriage considered in *R v Cheung Ka Fai* was the focus in *R v Kam Hong Kwan*.<sup>139</sup> The British Columbia Court of Appeal<sup>140</sup> was confronted with the intraspousal conspiracy rule. It had been held by the Ontario Court of Appeal a few years earlier in *R v Rowbotham*<sup>141</sup> that *Kowbel v The Queen*<sup>142</sup> still prevailed as the definitive law of Canada, notwithstanding the prominence of the dissent of Fauteux J and other cognate developments in the law.

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<sup>135</sup> Philip Asterley Jones and Richard Card, *'Cross and Jones' Introduction to Criminal Law*, (1976) 8 ed, Butterworths, London. At p336 in relation to the conspiracy immunity states: "This fiction has been eroded elsewhere in our law and the present rule should be abolished. It remains undecided whether the rule applies to a husband and wife whose marriage is of a type which is actually or potentially polygamous." It certainly seems odd that if a husband and wife agree between themselves to commit an offence they cannot be convicted of conspiracy, whereas if the substantive offence is committed, they can both be convicted of that offence. Moreover, the fact that a husband and wife can be convicted of conspiring together with a third party is inconsistent with the principle of marital unity, since, if a husband and wife, being one, cannot make an agreement, how can they be a party to one agreement?

<sup>136</sup> In *R v Yung Kit-Mei* unreported Cr App 1025/81 2 July 1982, McMullin VP, Li and Silke, JJA, on a charge of conspiracy to forge, the wife of one co-accused who was incompetent was called to give evidence for the prosecution. This was a material irregularity.

<sup>137</sup> See generally Michael Jackson, *'Criminal Law in Hong Kong'*, Hong Kong University Press (2003) p421. *'Halsbury's Laws of Hong Kong'*, vol 9 *Criminal Law and Procedure*, Butterworths Hong Kong (1998) page 30 notes: "A husband and wife alone cannot be found guilty of conspiracy because they are, in law, one person." See 1 Hawk PC c27 s8; *Mawji v The Queen* [1957] AC 126 (PC); *R v Cheung Ka Fai* [1995] 3 HKC 214 (CA).

<sup>138</sup> *Mok Wei Tak v The Queen* [1990] 2 AC 333 (PC).

<sup>139</sup> (1992) 10 BCAC 274, 288-289 (BC: CA).

<sup>140</sup> McEachern CJBC Legg and Holinrake JJA.

<sup>141</sup> (1988) 63 CR (3d) 113, 177-179.

<sup>142</sup> [1954] 4 DLR 337 (SCC).

However, an argument was advanced that because the Supreme Court of Canada in *R v Salituro*<sup>143</sup> had decided that where a spouse was separated and without reasonable possibility of reconciliation with the other, such a spouse was henceforth to be declared a competent witness for the prosecution. Iacobucci J in *R v Salituro* stated that there was a duty to see that the common law developed in accordance with the values in the Canadian Charter. On an examination of the history of the rule which declared a spouse incompetent for the prosecution, and the policy justifications, the Court concluded “Where spouses are irreconcilably separated, there is no marriage bond to protect and we are faced only with a rule which limits the capacity of the individual to testify”. Despite the temptation to adopt such a radical approach (sanctioned by the highest court in Canada) the Court of Appeal concluded that there was nothing in *R v Salituro* which enabled it to depart from *Kowbel* which was directly in point. It was, in a sense, serendipity that both jurisdictions, Canada and Hong Kong, provided that by common law the spousal exemption existed. If it had been the United States and Hong Kong, with the wife in the former (instead of Canada) and the husband in Hong Kong, and there were no other conspirators or third parties, then the husband would be acquitted under Hong Kong common law (and now by statute) and the wife in America would have no defence. The two different systems of law would have produced different results. Indeed the impact theory<sup>144</sup> of international conspiracy law might well provide the necessary jurisdiction for the spouse to be tried as the place identifiable as an intended conspiratorial objective.

*Salituro* did not consider *Kowbel*, which reformulated for Canada a novel exception to the spousal incompetence rule. In Canada now where a spouse is separated from the other, without reasonable possibility of reconciliation, that spouse is now a competent witness for the prosecution; significantly invading the common law position. The British Columbia Court of Appeal commended that the dissenting view of Fauteux J in *Kowbel*:

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<sup>143</sup> (1991) 68 CCC (2d) 289 (Supreme Court of Canada).

<sup>144</sup> *Attorney General v Yeung Sun Shun* [1987] HKLR 987, 998 (CA); *Liangsiriprasert v Government of the United States of America* [1991] 1 AC 225, 249 (PC); and *Libman v The Queen* (1985) 21 CCC (3d) 206 (SCC).

The common law rule that a husband and wife cannot be guilty of conspiring alone stems from the doctrine of conjugal unity and that doctrine had disappeared because husbands and wives each had an independent entity in both civil and criminal matters

The Court of Appeal in *Kam Hong Kwan* distinguished the approach in *Salituro* remarking:

We also wish to mention that in *Salituro* the Court was dealing with a rule of evidence. We are concerned with a substantive defence which has been a part of the criminal law both of England and Canada for a very long time. We think, with respect, that if that defence is to be abolished, and on that question we offer no opinion, it should be abolished not by judges but rather by Parliament.<sup>145</sup>

In the Ontario Court of Appeal earlier in *R v Rowbotham*,<sup>146</sup> after reference to *Kowbel* and the fact that it had been severely criticised by modern criminal law texts<sup>147</sup> and noting in particular the repeated views of Glanville Williams, in 1961<sup>148</sup> and in 1983<sup>149</sup> who had observed “the rule have changed, the rule has been preserved in England for other reasons of social policy”.

In *R v Barbeau*,<sup>150</sup> the Québec Court of Appeal accepted that *Kowbel* still prevailed in Canada, in an appeal in which the trial judge had strongly criticised that decision. Rothman JA stated:<sup>151</sup>

The reason for the difference in the elements is that there is an old rule of law, which might be outmoded but which still exists all the same, a rule of law which states that there can be no conspiracy between two spouses. In fact, spouses were traditionally considered to form one person only. It was the absolute union. That was probably before the emergence of divorces, of common-law relationships and what have you. But traditionally spouses formed one person only. However, a plot or a conspiracy necessarily involves at least two people. The court held

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<sup>145</sup> This had been the same reasoning which appealed to the majority of the Court of Appeal in *R v McKeachie* [1926] NZLR 1. There was a reluctance in the common law jurisdictions to erode an accepted immunity from prosecution, without express and unequivocal legislation compelling that result.

<sup>146</sup> (1988) 63 CR (3d) 113, 178 (Ont CA) (Martin, Cory and Grange JJA) considered the issue at 177-178.

<sup>147</sup> Matthew R Goode, ‘*Criminal Conspiracy in Canada*’, (1975) Carswell Company Ltd, Toronto p 99-100, who describes the exemption as “anachronistic and foolish”. Don Stuart, ‘*Canadian Criminal Law A Treatise*’, 1982, Carswell Toronto at p565. “It is difficult to see why marriage should be a haven exempt from the criminal law.”

<sup>148</sup> Glanville Williams, ‘*Criminal Law: The General Part*’, 2 ed (1961) at pp 675-676.

<sup>149</sup> Glanville Williams, ‘*Textbook of Criminal Law*’, 2 ed (1983) at p432.

<sup>150</sup> (1996) 110 CCC (3d) 36 Québec Court of Appeal (Rothman, Fish & Robert JJA).

<sup>151</sup> 1993 RJQ 2398. Don Stuart, ‘*Canadian Criminal Law*’, 2 ed (1993) Carswell Toronto p689 notes p162 *Canadian Bar Association Report* referred to in the 1993 Government White Paper which would abolish the spousal immunity rule in relation to conspiracy by enacting a subsection to state “Spouses are capable of conspiring with each other, either with or without other persons”.

there was considerable evidence to justify a conspiracy with others and it was a non-point.  
[translation]

In a subsequent decision of the Superior Court of Québec in *Thompson v Canada (Attorney General)*<sup>152</sup> Boilard JCS, in an obiter statement,<sup>153</sup> favoured an extension of the spousal immunity rule in relation to conspiracy to include partners of the opposite sex living together in a conjugal quasi marital relationship. In that case, the prosecution had argued that *Kowbel* should no longer be followed as the doctrine it approbated “was created at a time when women had no juridical personality and were totally subservient to their husbands” noting that the common law should be the servant of society.<sup>154</sup> But *Kowbel* was faithfully followed and Canada remains the only jurisdiction in the common law where the highest court of the jurisdiction has ruled that the spousal conspiracy exemption is upheld.

## AUSTRALIA ELIMINATES THE IMMUNITY

In Australia, the position varies between States, Territories,<sup>155</sup> and the Commonwealth. The State Legislatures of Queensland,<sup>156</sup> Western Australia<sup>157</sup> and Tasmania,<sup>158</sup> had codified the

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<sup>152</sup> (1998) 23 CR (5<sup>th</sup>) 347 (Qué SC).

<sup>153</sup> (1998) 23 CR (5<sup>th</sup>) 347, 353-4 (Qué SC).

<sup>154</sup> *R v Salituro* [1991] 3 SCR 654, 679 (SCC). Noted by Boilard JCS in *Thompson v Canada (Attorney General)* (1998) 23 CR (5ed) 347, 353 that in a Bill of the Canadian Parliament, Bill C-37, to amend the *Judges Act 1998* [Can] to provide that a surviving spouse of a judge “now means a person of the opposite sex who has cohabited with a judge in a conjugal relationship for one year”.

<sup>155</sup> Note s291 *Criminal Code Act* [NT] expressly provides that a husband and wife are capable of criminally conspiring together.

<sup>156</sup> See s33 *Criminal Code Act 1899* [Qld]. This provision was repealed in 1997. Also in 1997 s32 *Criminal Code* [Qld] was also repealed. This had provided for the defence of marital coercion.

<sup>157</sup> In *R v Byast* (1997) 96 A Crim R 61 (Qld CA) the court accepted that *Mawji v The Queen* was still good law, although in that case the exemption was unsuccessful as the *soi-disant* wife was not lawfully married. This case precipitated the statutory abrogation of the long-standing exemption in the Australian Code States. Section 33 *Criminal Code Act 1902* [WA]. This provision was repealed in 1987. R G Kenny ‘*An Introduction to Criminal Law in Queensland and Western Australia*’, 5 ed Butterworths, Sydney (2000) at p167 notes that s33 of each Code was repealed in 1997 but the intraspousal conspiracy had been repealed in 1987: s6 *Criminal Code Amendment Act (no 2) 1987* [WA]. However, he also observed that in Western Australia by s10 *Criminal Code* [WA] one spouse who assists the other to escape punishment does not thereby become an accessory after the fact. This was the position in Queensland but it was repealed in 1997. Further by s35 *Criminal Code* [WA] neither spouse was liable for acts done by one to the property of the other while they are living together, except where the act was done when leaving or deserting the other; but this too was repealed in 2003 by the same legislation: *R v Carton* [1913] QWN 8 (a husband cannot be guilty of wilfully and unlawfully setting fire to the property of his wife with whom he is living). The previous equivalent law in Queensland was repealed in 1997.

<sup>158</sup> s297(2) *Criminal Code Act 1924* (Tas).

criminal law, unlike the other States, which maintained it. Those three Australian states originally provided in their legislation that there could be no conspiracy between a husband and a wife. For nearly a century, it was not possible for spouses alone to conspire, until those statutes were recently amended. In the common law States, the point had never arisen in practice in criminal law, but it has in tortious conspiracy where it was decided that at least the fiction did not survive in that context.<sup>159</sup> The textbook writers<sup>160</sup> remain unanimous that the common law fiction is maintained for criminal conspiracies with the stability of marriage having been adverted to as the justification for the exemption.<sup>161</sup>

As a result of a commissioned study<sup>162</sup> in 1983 into deficiencies in the West Australian *Criminal Code*, it was recommended that sweeping changes be made in relation to the law pertaining to uxorial privileges. The recommendations made were “in fact parallel, although they do not precisely follow the statutory offence of conspiracy introduced in the United Kingdom by the *Criminal Law Act 1977*, ss 1-5”.<sup>163</sup> That detailed report<sup>164</sup> had been made by

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<sup>159</sup> In *Carlton & United Breweries Ltd v Tooth & Co Ltd*,<sup>159</sup> unreported Supreme Court of NSW, Equity Division, EQ 4146/85, 13 August 1986, Young J held that a holding company and its subsidiary, by acting together, are capable as being classed as conspirators. Referring to the fiction that a husband and wife are one person he said “The contrary decision in New Zealand in *R v McKechie* [1926] NZLR 1 would now seem no longer to be good law.”

<sup>160</sup> Colin Howard, *Australian Criminal Law*, (1965) Law Book Company, Australia, at p246 in relation to conspiracy adds: “although there is an outmoded rule that husband and wife cannot be convicted for conspiring with each other alone, there seems to be no reason why they should not be convicted of the attempt.” Peter Gillies, *Criminal Law* (1997) 4 ed, p693, Law LBC Information Services, notes that the crime of conspiracy is a common law offence in only the States of New South Wales and South Australia. In Victoria it is found in statutory form as is the *Commonwealth Crimes Act*. At p732 the author opines that the old common law rule continues in force in those States. See Rollin M Perkins and Ronald N Boyce, *Criminal Law* (1982) 3 ed The Foundation Press Inc, New York, p693. There is no decision at common law in Australia on the point: Brent Fisse, *Howard’s Criminal Law* (1990) 5 ed, Law Book Company p366.

<sup>161</sup> In Peter Gillies, *The Law of Criminal Conspiracy*, (1991) The Law Book Company, Sydney, p45.

<sup>162</sup> Eric J Edwards, Richard W Harding, Ian G Campbell, *The Criminal Codes Commentary and Materials being Cases and materials on the criminal law in Queensland, Western Australia and the Northern Territory* (1992) 4 ed, The Law Book Company Ltd. At p10: Of all the Code jurisdictions, Western Australia has in recent years given the most rigorous attention to the question of amendments, notably through the *Murray Report 1983* [M J Murray *The Criminal Code: A General Review* Western Australian Crown Law Department, July 1983]. Peter Gillies *Criminal Law*, (1997) ed, Law LBC Information Services, p693 notes that the crime of conspiracy is a common law offence in only the States of New South Wales and South Australia. At p732 the author opines that the old common law rule continues in force in those States.

<sup>163</sup> M J Murray *The Criminal Code: A General Review* Western Australian Crown Law Department, July (1983) p350.

<sup>164</sup> In relation to s33, which makes it impossible for a husband and wife to criminally conspire together, the recommendation was to repeal this section. “I can see no good reason for its retention and in fact we have had instances where it has done positive harm to the administration of justice. In one particular case the only offence potentially available arising out of the business activities of a husband and wife was a conspiracy to defraud. The

auditing every provision in the *Criminal Code* for compliance with contemporary jurisprudence and it recommended the complete abrogation of the defence of marital coercion. But this was not adopted by the legislature for 20 years, until 2003 and then only as part of a broad batch of laws enforcing equality. A further principal recommendation was to repeal the spousal conspiracy exemption in the *Criminal Code*, which did occur four years later in 1987.

In Queensland ss32, 33 and 35 were all repealed by *Criminal Law Amendment Act (No 3 of 1997)* [Qld] in operation from 1 July 1997. Section 32 was marital compulsion of husband, s33 was no conspiracy between husband and wife alone<sup>165</sup> and s35<sup>166</sup> was liability of husband and wife for offences committed by either with respect to the other's property. The significance was that in Queensland, the legislature comprehensively abrogated all uxorial privileges in the criminal law at one time, whereas, in Western Australia, the legislature there decided to only remove a portion<sup>167</sup> of those privileges. By s291 *Criminal Code Act 1983* [NT] spouses may criminally conspire in the Northern Territory of Australia. In Victoria, the position was more complicated because that state had enacted a revived version of the defence of marital coercion in 1977, which, however, expressly did not apply to treason or murder and to a conspiracy to commit treason or murder.<sup>168</sup> The Victorian position was the outcome of a

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couple had over a lengthy period of time engaged in a determined conspiracy which had netted them a considerable financial advantage, but because of the operation of Section 33 and for no other reason it proved impossible legally to lay any charge against them at all. If precedent is needed for this recommendation it may be found in the *Vic Crimes (Married Persons Liability) Act 1977*".

<sup>165</sup> M J Shanahan, *'Carter's Criminal Law of Queensland'*, (2003) 13 ed, Australia Butterworths. At p1168 the authors state in relation to s33: "The immunity is derived from the notion that husband and wife were to be regarded as one person. The immunity does not extend to de facto relationships".

<sup>166</sup> 35(1) When a husband and wife are living together,<sup>166</sup> neither of them incurs any criminal responsibility for doing or omitting to do any act with respect to the property of the other, except in the case of an act or omission of which an intention to injure or defraud some other person is an element, and except in the case of an act done by either of them when leaving or deserting, or when about to leave<sup>166</sup> or desert, the other.

(2) Subject to subsection (1) a husband and wife are, each of them, criminally responsible for any act done by him or her with respect to the property of the other, which would be an offence if they were not husband and wife, and to the same extent as if they were not husband and wife.

(3) But neither of them can institute criminal proceedings against the other while they are living together.

(4) In this section – "property" used with respect to a wife means her separate property.

<sup>167</sup> The defence of marital coercion was expressly preserved in 1997 after the other removals of uxorial privilege by s32 *Criminal Code* [WA] but, unlike at common law, the defence was modified so that it was not a defence to an offence punishable with strict security life imprisonment or to an offence of which grievous bodily harm, or an intention to cause such harm, is an element. This is a unique formulation of exemptions from the marital coercion doctrine.

<sup>168</sup> s339(1) *Crimes Act* [Vic].

specific law reform task in which it was concluded that the special position of married women ought to be recognised as generating a limited privilege from the criminal law.<sup>169</sup>

In the Victorian Law Reform Report<sup>170</sup> the Commissioner noted that two principal justifications were advanced for the existence of the crime of conspiracy. One that the very fact of the agreement, being one for concerted action by two or more persons, renders it a dangerous thing in itself or gives it a “formidable or aggravated character”.<sup>171</sup> The spousal exemption really fails the test of numeracy as it is difficult to conceive that the conjunction of one mind with another, without more done to carry the agreement into effect, adds, to the gravity of the conduct. Where the other mind is the spouse of the first, that other may be less able to bring in resources and supporters not available to the first. The second general justification for conspiracy to be criminalised is that the criminal law, by penalising initial agreements, might thwart or deter the actual commission of the planned crimes. With conspiracy often being a mutual incitement, the extension of the immunity to spousal incitement would be at least consistent with the conspiracy exemption. Such an extension to incitement though would be flatly contrary to the common law.<sup>172</sup>

## ANALYTICAL OVERVIEW

The spousal exemption is unsustainable. The Supreme Court of the United States dealt with the ancient justification for the rule in uncompromising terms. Frankfurter J said: “For this court now to act on Hawkins’ formulation of the medieval view that husband and wife “are

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<sup>169</sup> In Law Reform Commissioner of Victoria, *Report No 3, Criminal Liability of Married Persons*, (Melbourne, June 1975) at p27 the Law Reform Commissioner stated that the stability of marriage might be impaired “if public trials of husband and wife were taking place in...court today, upon charges of conspiracy in respect of communication between themselves only this, it may well be considered, would be likely to have a significant effect in discouraging marital confidences and consequently the quality of marital relationships.” To the same effect is the British Law Commission’s *Report on Conspiracy and Criminal Law Reform* (Law Comm No 76) (HMSO, London, 1976) p20-21.

<sup>170</sup> See Report No 3, *Criminal Liability of Married Persons*, Victorian Law Reform Commissioner (1975) part v, para 60.

<sup>171</sup> Being the words of Barry J in *R v Parnell* (1880) 14 Cox CC 508, 514. A further justification is found in *R v Jones* (1974) 59 Cr App R 120, 124 per James LJ, “where charges of substantive offences do not adequately represent the overall criminality”, that where the substantive charges do not reflect the overall criminality it may be appropriate to add a conspiracy charge. The third justification is based on the significance of numbers. The Criminal Law Commission in 1843 at p90 expressed the state’s particular horror of criminal combinations. *Quinn v Leatham* [1901] AC 495, 510 (HL).

<sup>172</sup> *R v Annie Brown* (1896) 15 NZLR 18, 30 (CA)

esteemed but as one Person in Law and are presumed to have but one Will” would indeed be “blind imitation of the past”. It would require us to disregard the various changes in the status of woman – the extension of her rights and correlative duties – whereby a wife’s legal submission to her husband has been wholly wiped out, not only in the English-speaking world generally, but emphatically so in this country.” The exemption has been based on a legal fiction that husband and wife are one person and because of that fiction they could not constitute two persons, whose participation was necessary, to form a conspiracy. Even if the legal fiction were justifiable in days of yore, to compensate for the wife’s lesser role and position in decision-making, it is dissonant with modern notions of equality and independence.<sup>173</sup> There is no plausible basis for removing this one relationship from outside the scope of the criminal law, as it is to overvalue the concept of marriage, above all other legal relationships and all other family commitments. Wives were never above the law in relation to general criminal responsibility. The law has consistently remained that husband and wife are each separately liable for their crimes, whether committed separately or jointly with each other. The fiction became the reality once their joint effort moved beyond an agreement. The proposition that husband and wife were a single juristic person was always applied only in a very artificial and selective way. The conjugal unity formula was designed to achieve in law a result seen to accord with fact – it validated typical experience as a policy to be encouraged by the law. So the exemption was not based on womanhood, but on the marriage pact, and conveniently relied upon to explain as rules of law what was in fact reasonable practices derived from uxorial subjugation.

The force of the policy underlying the spousal conspiratorial exemption<sup>174</sup> has been radically altered by the attainment of full civil, political and economic and economic status for married women;<sup>175</sup> though a significant proportion of married women are still likely to be dependent on their husbands’ earnings, with a possible consequence of that dependency being their practical inability to refuse their assent to a criminal agreement inspired by him. The very

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<sup>173</sup> J Tudor Rees, *Reserved Judgment, Some Reflections and Recollections*, (1956) Frederick Muller Ltd, London. At p197-198 the author facetiously refers to a case before him in which it was argued where a husband and wife dispute was involved, that they were one entity.

<sup>174</sup> See *Comment* (1955) 33 Can Bar Review 75 n9 “To the layman such a result is patently ridiculous”.

<sup>175</sup> Undoing the fiction of masculine prepotency.

intimacy and interdependence between spouses may generate an irreproducible set of special circumstances outside matrimony, that justifies the exemption.

“Whether the exception arose from a legal fiction or not is not relevant to a decision as to the desirability of the exception. Legal fictions were invented to further the interests of justice. The fiction of legal unity “has subserved public policy, or at least humanitarianism”.”<sup>176</sup> This quotation declaims the quiddity of the spouses’ criminal defence. The common law maxim is as “ill-adapted to the society in which we live as it is repugnant to common sense”.<sup>177</sup>

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

Glanville Williams<sup>178</sup> objected to the statutory exemption as being based on false reasoning and doubtful policy. Richard Card<sup>179</sup> criticises the rule as being incapable of a safe rationalisation and argues if the rule has to exist for some reason based on the stability of relationships, it has to logically be available to relationships in the nature of marriage that have existed for sufficient time to identify their own stability.<sup>180</sup>

In issue is whether there can be any jurisprudential justification for the maintenance of the common law rule. Further, if the rule cannot be rationalised, does there need to be other coherent changes made to the substantive criminal law so that there is a coherent homogenous principle which states that the fact of marriage, per se, provides no exemption or privilege in the substantive criminal law. The law of conspiracy certainly contains anomalous features and one of them is the facet that a husband and wife cannot agree to commit a crime. Any two other people may do so. In fact a person who agrees to commit a crime with someone who is insane is still guilty of the conspiracy even though the insane person is unable to commit, by

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<sup>176</sup> Glanville L Williams *Criminal Law: The General Part* (1961) 2 ed, Stevens & Sons Ltd, London. p31.

<sup>177</sup> Oliver Wendell Holmes, *Collected Legal Papers* (1920) Harcourt, Brace and Howe, New York, p187.

<sup>178</sup> Glanville Williams, *Textbook of Criminal Law*, (1978) Stevens & Sons, London at p360.

<sup>179</sup> *Card, Cross & Jones, Criminal Law*, (2001) 15 ed, Butterworths, London at p549.

<sup>180</sup> It seems odd that if a husband and wife agree between themselves to commit an offence they cannot be convicted of conspiracy, whereas if the substantive offence is committed by one of them pursuant to the agreement they can both be convicted of that offence, as perpetrator and accomplice respectively. Given the existence of the rule, it also seems odd that there is no bar to a conviction for conspiracy in relation to an agreement between a man and a woman who are living together in an extra-marital relationship, however stable.

law, a crime. An unhappy consequence of the modern exemption is the taxonomy that wives are once again classified by law as properly grouped with infants and lunatics.

In particular the immunity is not granted to people who stand in a relationship of consanguinity such as children or parents or siblings. It does not stand in a relationship of propinquity.

If we look for any one thought which governs the whole of this province of law, we shall hardly find it. In particular we must be on our guard against the common belief that the ruling principle is that which sees an “unity of person” between husband and wife. This is a principle which suggests itself from time to time; it has the warrant of holy writ; it will serve to round a paragraph, and may now and again lead us out of or into a difficulty; but a consistently operative principle it can not be.<sup>181</sup>

It is inconsistent<sup>182</sup> with other branches of the criminal law, as “most cases of conspiracy can be treated as mutual incitements”.<sup>183</sup> Both spouses could be treated as conspirators if an offence has been committed where the liability of the other depends on what they had previously agreed. In addition, the doctrine is imploded when a husband and wife are charged in a joint enterprise. Ever since the powerful judgment of the High Court of Australia in *Tripodi v The Queen*<sup>184</sup> there has been an assimilation between joint enterprise and conspiracy in terms of evidentiary requirements. The so-called ‘co-conspirators rule’ applies to a joint enterprise as an exception to the hearsay rule. It was emphasised in *Ahern v R*<sup>185</sup> by the High Court of Australia that the rule is available “when two or more persons are bound together in the pursuit of an unlawful object, anything said, done or written by one in furtherance of the

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<sup>181</sup> Pollock and Maitland, *History of English Law*, 2nd ed. (1923), vol. II, pp406, 406. The spousal exemption only applied to the husband and wife relationship. *Smith v State* (1904) 46 Tex Crim 267; (1905) 48 Tex Crim 233. Glanville Williams ‘*The General Part*’ at 675-6 n1 states: “There is no legal protection for partners, or for parent and child, man and mistress, or lovers, notwithstanding that de facto the relationship in any of these cases may in particular circumstances be closer than the relationship between an individual husband and wife”.

<sup>182</sup> Herbert Morris, ‘*On Guilt and Innocence*’, (1976) University of California Press, Berkeley ch 2 ‘*Persons and Punishment*’. A “fundamental clarification and rejustification” is required so that the very notion of individual responsibility is the basis of law.

<sup>183</sup> Glanville Williams, ‘*Book Review*’, (1966-1967) 9 ‘*The Journal of The Society of Public Teachers of Law*’ 169, 170 did not accept that every incitement is an attempt to conspire, as a person who incites another to commit a crime ‘without asking for the other’s undertaking to commit it’ is not attempting to conspire. Although the proposition that every incitement involves an attempt to conspire is too wide many such incitements will involve agreement. Therefore mutual incitement is almost indistinguishable from a conspiracy.

<sup>184</sup> (1961) 104 CLR 1 (HCA).

<sup>185</sup> (1988) 165 CLR 87 (HCA).

common purpose is admissible in evidence against the others” for the purpose of proving an assertion or implied assertion contained in the act or declaration in question. In *R v Duguid*<sup>186</sup> the admission of a co-conspirator was permitted even though that person was immune from prosecution.

A hallowed view of the innate nature of marriage must be the basis for the exemption, because once a third party is admitted to the confederacy then the nature of the relationship between the three is conceptually different from the nature of the relationship shared only by the married couple. The substratum for the exemption cannot be maintained as a principle, when one spouse may incite or be an accessory to the crime of the other. What magic occurs in the moment when an incitement ends and a conspiracy starts; or between the act before an offence and the substantive offence itself? A concentration on the teleological aspect identifies the poverty of the suggested principle. To be valid the fiction would have to exist in all these possibilities, but it does not. The fiction has been inconsistently modified by statute in different ways in different jurisdictions.

The evidence of a spouse is capable of amounting to corroboration of the evidence of the other spouse.<sup>187</sup> The marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup.”<sup>188</sup> The fact that husband and wife commit an offence together does not, without more permit the inference that those two had agreed<sup>189</sup> to commit the offence. The fact of agreement does not rationally flow as the only reasonable inference from the fact of them being spouses.<sup>190</sup>

The *Married Women’s Property Act* 1882 [UK] conferred contractual capacity on wives. It became from that time illogical that a married woman could enter into a commercial contract

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<sup>186</sup> (1906) 94 LT 887.

<sup>187</sup> *R v Allen and Evans* [1964] Crim LR 716 overruling *R v Neal and Taylor* (1835) 7 Carr & P 168, and following *Tripodi v The Queen* (1961) 104 CLR 1 (HCA).

<sup>188</sup> *Eisenstadt v Baird* (1972) 405 US 438, 453.

<sup>189</sup> *Cotter v Commonwealth* (1994) 452 SE 2d 20, 23 (Court of Appeals of Virginia) per Burrow J. Equally the fact that the couple are “paramours and living together does not eliminate the necessity to prove an agreement between them in order to establish a conspiracy.”; *Jones v Commonwealth* (1990) 396 SE 2d 844.

<sup>190</sup> *Henry v Commonwealth* (1986) 342 SE 2d 655, 656; *Stump v Commonwealth* (1989) 379 SE 2d 480, 484.

with her husband,<sup>191</sup> but to deny that she was capable of agreeing with him to commit a crime. The spousal exemption is the “law’s vision of married women gripped by marital obedience”.<sup>192</sup> “The continued existence of the rule, in relation to the crime of conspiracy rests, as the more modern cases suggest, not upon a supposed inability to agree as a result of some fictional unity, but upon a public policy which, for the preservation of the sanctity of marriage, accords an immunity from prosecution to spouses who have done no more than agree between themselves in circumstances which would lay them open, if unmarried, to a charge of conspiracy”. The crime of conspiracy is the agreement<sup>193</sup> and there was no immunity for actually carrying it out. That is only the inchoate offence was immune not the substantive crime. Secondly, there was no immunity if another person was a party so that both husband and wife became individually liable for a tripartite agreement. Thirdly, either spouse could be convicted of inciting the other to commit a crime. Fourthly, either spouse could be convicted of being an accessory before the fact to a crime. But public policy absolved a wife, but not a husband, from a charge of being accessory after the fact by harbouring her husband.

Early American courts blandly followed the English common law position that spouses could not agree amongst themselves alone for a criminal purpose. While that process was unquestioning of the suggested underlying principle, it also meant that between spouses it was thought that there was insufficient increased risk of harm to society resulting from the spousal combination to justify the intervention of the criminal law. This was so, and even when a husband acted alone, the wife was often likely to be aware of the act and to tacitly support it, so that the margin of increased risk to society did not merit the special vigilance of the criminal law. But there is no evidence to support the theory that the marriage combination presents any less risk to society as compared to any other combination of persons not *doli incapax*.<sup>194</sup> No analysis to justify the exemption can go beyond a fond assertion that the nature of the confidence between spouses is such that it deserves protection by exemption while other combinations of equal confidence and intimacy are unrewarded. This puts an

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<sup>191</sup> See *Pearce v Merriman* [1904] 1 KB 80. In *Pearce* the husband was a tenant of his wife.

<sup>192</sup> Lois Bibbings, ‘Groups, Girls and Fears’, p128 in Donald Nicolson and Lois Bibbings (eds) ‘*Feminist Perspectives on Criminal Law*’ (2000) Cavendish Publishing Ltd.

<sup>193</sup> *The Poulterer’s Case* (1611) 9 Co Rep 55b.

<sup>194</sup> ‘*Developments in the Law: Criminal Conspiracy*’ (1958-59) 72 Harvard Law Review 920, 950, written prior to the decision in *United States v Dege* (1960) 364 US 51.

identifiable premium on the formalism of marriage over all other relationships. The danger to society is just as real and poignant here as otherwise. In fact, if there is to be any special recognition of the nature of marriage in contrast with other civil union relationships or partnerships it may be the very fact that the law provides additional recognition to the status of marriage, that actually permits it to become a cloak for criminal activity. Once the law specifically elevates the relationship to the altar of criminal exemption it is not unreal to expect that spouses will alter their communications to fall within its protection. This way the law actually provides a platform for crime. The vestigial remnant of the formal attributes of marriage provides an undeserved exemption that is unjustifiable on a specific-object or general-object rationale. It is a partnership in crime and carries therefore the same potential for risk to society as any other combination. It is only pandering to whimsical notions of romance and chivalry to conclude that there is something so indefinably special about the relationship that it should be placed above and beyond the criminal law in contrast to an identical agreement between two persons of whatever combination of gender who have entered into a recognisably civil union, predicated upon commitment.

As the rule of the fiction of unity has been eroded by exceptions or abrogated by statute, it is odd that the common law continued to maintain it unabridged in relation to the crime of conspiracy. “A search for a wholly logical rationale in the field of ancient judge-made, or in this case, jurist-made, law is unlikely to be fruitful.” It is probable that the axiomatic biblical truth was superseded by a subsequent search for a more compelling analysis which resulted in the premise that because the wife had no independent will of her own (her will being overborne by that of her husband, under whose potestas she was) she was incapable of concluding with him the agreement which was the essence of the crime of conspiracy. But developments in the law recognised the retention by a married woman of a distinct legal capacity and the earlier rationale could not have survived the contractual capacity conferred on the wife by the *Married Women’s Property Act 1882* [UK].

Therefore the continued existence of the rule must rest not as a result of some fictional unity, but upon a public policy which, for the preservation of the sanctity of marriage, accords an

immunity from prosecution to spouses who have done no more than agree between themselves in circumstances which would lay them open, if unmarried, to a charge of conspiracy.

*McKechie* and *Kowbel* can be explained by the reluctance of common law jurisdictions to erode accepted immunities from prosecution, except where express and unequivocal legislative enactment so compels. But the criminal law never conferred any immunity on spouses who actually carried out, whether individually or in concert, the criminal design. Further there was no immunity in respect of conspiracies to which a stranger was a party and in such a case both husband and wife were individually liable and properly charged with a single tripartite agreement.

The fact of the great change in the status of married women, would not be a reason to remove the exemption, if the real reason for it was not uxorial inequality, but was instead an informed response to their mutual, confidential trust and reliance. The participants in a marriage, a relationship recognised by law, owed duties to each other as well as to the state. It can be argued that the invidious choice between the competing duties to spouse or state in a conspiracy, needs the overriding protection of the law. An intraspousal conspiracy may well be less blameworthy than others and as long as it goes no further than an agreement and an unconsummated intention to carry the agreement into effect, a line drawn there in favour of the spouses is a fair balance to protect the stability of marriage. Marital relationships could be impaired if the freedom to agree upon joint-conduct could become justiciable, thereby inhibiting frank communications. The intrinsic nature of intraspousal agreements may reduce the capacity for effecting the agreement, so that such conspiracies should be seen as less likely than others to be truly potent. The English Law Commission also gave weight to the idea that if such a conspiracy was justiciable, it may provide injurious scope for improper pressure being placed on a spouse to confess an offence of which the spouse was innocent to prevent a false prosecution being initiated against the other.

However, the exemption is awkwardly inconsistent with the substantive rules for joint-responsibility, complicity and of general criminal responsibility. A spouse can be an accessory before the fact of a crime committed by the other spouse and may also be guilty of

an attempt or an incitement to commit the very crime the subject matter or objective of the conspiracy. The incitement analogy demonstrates the present anomaly perpetuated by so many different common law jurisdictions. It destroys the validity of the conceptual basis for the conspiratorial exemption, as both modes of crime (incitement and conspiracy) require by definition two or more persons to effect it. So a conspiracy will often be capable of being analysed as concurrent mutual incitements, for which the law offers no protection. Both spouses could be treated as conspirators in a scenario where an offence occurs that is the product of, or intention of, what the spouses had previously assented to do.

There is no plausible reason to place marital confidences above those in any other legal relationship, and more importantly, there is no marital communication privilege in such a situation to rely upon to exempt the spouses from what would be for any other persons a crime. Once a third person is involved, the exemption from the criminal law fails, yet the same marital confidence would be the very basis for that offence as much as it would have been if it were but the two spouses involved.

A marriage certificate should not provide an immunity to insulate from the criminal law an agreement coupled with an intention to commit a crime. The artificiality of the position is demonstrated by a case where fiancées conspire, become married and throughout continue with the unlawful agreement. A conspiracy that straddles a wedding ceremony<sup>195</sup> makes a nonsense of the law which protects the joint unlawful agreement in the afternoon but not earlier in the morning. A further consequence that undermines the immunity is that if a child of the union agrees with his or her parents to effect their unlawful conspiracy, the child's participation in the agreement makes them all liable under the criminal law for the conspiracy.

If a wife has become involved in a conspiracy because of the relationship it is possible that this could be seen as a feature of mitigation in any sentencing exercise, but it cannot justify elevation to an immunity. It is understandable that the motivation for the crime may arise out of the relationship, but that does not affect the requisite intention for the commission of the

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<sup>195</sup> *State v Struck* (1957) 129 A 2d 910, 912 held as fiancées guilty of the conspiracy but criminal liability terminated upon their marriage although the same conspiracy extended throughout.

crime. Matters of motivation can be properly taken into account in assessing penalty but are irrelevant to the issue of liability for crime.

One other uxorial privilege in the substantive law remains to be considered: the privilege of a wife from not being convicted as an accessory after the fact to her husband's crime. This privilege has a formidable pedigree. In some jurisdictions it is the sole survivor of the special position of married women in the substantive criminal law. The approach of the courts and legislatures is now investigated to inquire into the reasons for its apparent imperishability.

## UXORIAL ACCESSORIAL IMMUNITY

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The wife who provides refuge to her husband from the criminal law may be an accessory after the fact of his offence, defined as a person who in the knowledge that a felony has been committed by another “receives, maintains, comforts, or assists the felon in any way, either to aid in the disposing of the proceeds of the crime or to hinder his being apprehended or tried or suffering punishment”.<sup>1</sup> The law in England has however specifically provided since before the common law:

A wife cannot be an accessory after the fact to a felony committed by her husband, as she is not bound to discover the crime of her husband. Except in this one case, relationship of the parties can be no excuse, and a husband may be an accessory to his wife’s felony by assisting her.<sup>2</sup>

The common law privilege was though uni-directional, not working to absolve the equally motivated husband. This concept of privileged accessoryship was defined by gender and marital status to protect a wife who “knowing a felony to have been committed, receives, relieves, comforts, or assists “her spouse to avoid suffering punishment under the criminal

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<sup>1</sup> Viscount Simonds (ed), *Halsbury’s Laws of England*’ (1955) 3ed, Butterworth and Co (Publishers) Ltd, London, vol 10 para 561 p302. The assistance must tend to prevent the principal form being brought to justice: *R v Lee* (1834) 6 Carr & P 536. The traditional formula at common law involved having knowingly received, comforted, harboured, assisted and maintained: see *R v McKenna* [1960] 1 QB 411. The act includes one of harbouring while the police are seeking the principal: see *R v Richards* (1877) 2 QBD 311.

<sup>2</sup> Viscount Simonds (ed), *Halsbury’s Laws of England*’ (1955), 3 ed, Butterworth and Co (Publishers) Ltd, London, vol 10 para 561 p303, citing only 2 Hawkins *‘Pleas of the Crown’* c 29 s 34 and 1 Hale *‘Pleas of the Crown’* 47, 621 as authority. In *R v Hughes* (1813) 2 Lew CC 229 Thomson B said: “But when the crime has been completed in his absence, no subsequent act of his (although it might possibly make him an accessory to the felony of the wife) can be referred to what was done in his absence.” In *R v Woodward* (1862) L&C 122 and *R v M’Athey* (1862) Le & Ca 250 (CCCR) husbands were convicted of receiving goods stolen by their wives. The special privilege only operated in favour of half of the matrimonial combination. In *R v Walters* *The Times* 6 November 1953 a husband was convicted as an accessory after the fact to his wife’s crime of manslaughter. But a wife could not be convicted of receiving property stolen by her husband: *R v Brooks* (1853) 6 Cox CC 148 (CCCR).

law.”<sup>3</sup> An accessory after the fact is not a principal in the substantive offence; such accessoryship being a separate and subsequent phase of criminality, distinguishable by existing only upon the completion of the substantive crime.<sup>4</sup> It is therefore a derivative offence. Its protean nature has as its central objective to make the substantive offence successfully undetected, including the obstruction of the course of justice in relation to the principal. A wife was only immune however for her post-substantive role in his offence, shielding her husband was a veritable wifely duty.<sup>5</sup> So a wife had no exemption in relation to being an accessory before the fact<sup>6</sup> of her husband’s crime, nor for aiding and abetting him<sup>7</sup> in the substantive offence nor for the offence of inciting<sup>8</sup> him to commit the offence, or to conspiring with another person to commit it.<sup>9</sup> A wife could be both an accessory to a theft and

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<sup>3</sup> Blackstone, *Commentaries on the Laws of England*, (1769) vol 4 p37. This definition has been approved: see *R v Ready* [1942] VLR 85, 92; *Sykes v DPP* [1962] AC 528, 561. The position in South Africa has been expressed as “a person who, with a view to defeating the ends of justice, receives, comforts or assists anyone who, to his knowledge, has committed an offence, is indictable and punishable as an accessory after the fact to that offence. Those who knowingly do any act with the object of promoting the attainment of the ends of an offence already committed, may, in some cases, be indictable and punishable as principals in that offence”: Gardiner & Lansdown, *South African Criminal Law and Procedure* (1957) p153 6 ed Charles W H Landsdown, William G Hoal and Alfred V Landsdown (eds), Juta & Co Ltd, Capetown. The writers note that the term “accessory after the fact” is one derived from English law but one which has been adopted in South African practice although quite unknown to the Roman-Dutch criminologists: *R v Mlooi* 1925 AD 131. In *Nkau Majara v R* [1954] AC 235 (PC) on appeal from Basutoland, it was held under Roman-Dutch law that impassive conduct assisting escape may make a person accessory after the fact.

<sup>4</sup> *R v Bubb* (1906) 70 JP 143; *R v Beuth* [1937] NZLR 282.

<sup>5</sup> In *R v Brooks* (1853) 22 LJ 121 Jervis CJ said: “A wife cannot be an accessory after the fact in receiving her husband bodily when he has committed a felony, nor can she, in my opinion be guilty as a receiver of stolen goods if she receives them from him”. This dictum is not found in the report at 6 Cox CC 148.

<sup>6</sup> Serjeant Hawkins said: “Yet if she be in any way guilty of procuring her husband to commit it, it seems to make her an accessory before the fact in the same manner as if she had been sole”: 2 Hawkins’ *Pleas of the Crown*, cap29, c.34. There is no rule of law preventing a husband and wife from becoming accomplices in a given crime, whether as joint principals *R v Conroy and Conroy* [1954] Crim LR 141 or as principal and accessory: *R v Payne* [1965] Crim LR 543.

<sup>7</sup> In *Browning v Floyd* [1946] 1 KB 597 a wife was held guilty of aiding and abetting her husband. The wife bought a return train ticket but used only the second half of it as she was unexpectedly given a ride. She gave her husband the unused forward half ticket. The overall inconsistency of the law can be identified in that a husband and wife in New Zealand may be convicted of conspiring to obstruct the course of justice by doing a certain act yet the wife would have a complete defence to a charge of being an accessory after the fact to the same act if it involved her husband: s67 and s71(2) *Crimes Act 1961* [NZ], whereas in England the spouses could not be convicted of conspiracy and the wife may well have no defence to being an accessory: s2(2)(a) *Criminal Law Act 1977* [UK] and s4(1) *Criminal Law Act 1967* [UK] respectively.

<sup>8</sup> *R v Annie Brown* (1896) 15 NZLR 18, 32 per Prendergast CJ.

<sup>9</sup> Edmund H Bennett and Franklyn Fiske Heard, *A Selection of Leading Cases in Criminal Law with Notes*, vol 1 Edmund H Bennett, (1869) Little Brown & Co, Boston at p83 noting *R v Serjeant* (1826) 1 Ryan & Moody 352 a married woman was indicted and convicted with others for conspiring to procure her husband to marry her. *R v Crastny (No 1)* [1992] 1 All ER 189. A wife can conspire with any other person other than her husband alone, or the intended victim of the conspiracy: *R v Duguid* (1906) 75 LJKB 470; s2(2)(c) *Criminal Law Act 1977* [UK].

later, depending on the circumstances, also a receiver of the stolen goods.<sup>10</sup> She could be convicted of both conspiracy to steal and also of receiving;<sup>11</sup> so the uxorial position was particularly illogical, turning on the sometimes overlapping classification of the modality of the offence. As every harbouring by a wife almost certainly encompassed an agreement by the spouses for that objective, where spouses have no immunity for intraspousal conspiracy it would follow the wife may still have exemption from the criminal law by reason of her accessory immunity.

“The desire to shield her husband from detection is hardly a fault in a wife”<sup>12</sup> That dictum of Parke B, in the mid-nineteenth century, was a precursor step in identifying the special position of every married woman under the criminal law, privileged by it to be exempt from the offence of being an accessory after the fact to the felony of her husband. Unlike all other persons, a wife was acknowledged by the law, indeed expected, to harbour her husband (and even his confederates) so as to protect him from detection. The wife’s immunity, though originally narrowly drawn to only exempt passive acts of receiving, was gradually widened to include more affirmative and extensive acts of assistance. This meant, apart from providing nourishment and accommodation (in his house) the wife was required as part of her uxorial compact with her husband, to suspend her civic duty to the State to apprehend any felon, by actively shielding him from capture. This could involve her in receiving stolen goods<sup>13</sup> and in

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<sup>10</sup> *Wessel v Carter Pattisons & Pickfords Carriers Ltd* (1947) 63 TLR 517, noted (1948) 21 Australian Law Journal 388. Brent Fisse, *Howard’s Criminal Law*, (1990) 5 ed, The Law Book Company Ltd, p274.

<sup>11</sup> *R v Froggett* [1966] 1 QB 152; *R v Whitehouse* (1852) 6 Cox CC 38; *R v Nerlich* (1915) 24 CCC 256 (CA). See also *R v Kam Hong Kwan* (1992) 10 BCAC 274, 288-9 where the old common law rule is considered.

<sup>12</sup> *R v Brooks* (1853) 6 Cox CC 148, 149 (CCCR). In *R v Manning* (1849) 2 Car&K 887, 903n it was held that the mere fact of harbouring and comforting her husband after the commission of a crime by him would not render the wife liable as an accessory after the fact to his felony. In the same year in *R v M’Clarens* (1849) 3 Cox CC 425 it was decided that where a husband and wife were jointly indicted for receiving stolen property, if the motive for the act of the wife was merely to conceal her husband’s guilt, or screen him from the consequences, she ought to be acquitted, but not him. *R v Good* (1842) 1 C&K 185 Alderson B (after conferring with Coltman J) stated: “persons charged with such an offence ought to know that it is a very serious offence to afford any assistance to a criminal, so as to obstruct the course of public justice. But a wife is in a peculiar situation: she cannot be found guilty of comforting and assisting her husband.”

<sup>13</sup> In *R v Matthews* (1850) 1 Denison CC 549 (CCCR) a man and wife were indicted for jointly receiving stolen goods first found in their dwelling house. On both being found guilty the conviction of the wife was quashed. Patterson J stating: “If the husband and wife received jointly, how do you convict the wife?” Because of the legal unity of the parties a wife could not be indicted for stealing her husband’s goods; *R v Tollette* (1841) 1 Carrington & Marshman 112 and also *R v Willis* (1833) 1 Moody CC 375.

obstructing all his pursuers, including the destruction of incriminating evidence.<sup>14</sup> She was encouraged by an immunity from the criminal law to actively engage in the obstruction of criminal justice in relation to her husband<sup>15</sup>.

A wife shall not be held answerable for harbouring, concealing or comforting, her husband, even after the commission of the greatest crimes; and if any crime with which she is charged appears to have flowed from such a motive, she shall be absolved for its commission. By the first principles of nature, a wife is bound to protect, defend and cherish her husband in all circumstances, and not the less so because he has been involved in crime and has no refuge but in her affection and fidelity. She cannot, therefore, be involved in any prosecution for any act done by her from such motives, even though it should, in itself, savour of a criminal nature.<sup>16</sup>

This approach was consonant with that in Scotland which similarly immunised a wife for any acts done by her motivated by an attempt to protect her husband from detection; but Scotland by contrast, had never countenanced the English common law defence of marital coercion<sup>17</sup> and robustly rejected the notion of the coerced wife, leaving her to exercise the ordinary defence of duress, available to all under Scottish law. It also did not recognise the intraspousal conspiracy exemption. But Scottish law had for centuries provided:

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<sup>14</sup> In *R v M'Clarens* (1849) 3 Cox CC 425 Coltman J said "A wife cannot be convicted of harbouring her husband when he has committed a felony; and the mere circumstance of her attempting to conceal what may lead to his detection, appears to come within the same principle."

<sup>15</sup> Marriage is an institution which not only creates the status of husband and wife, but also, without further or specific agreement, creates certain mutual rights and obligations owed to and by the respective spouses: Stranger-Jones, L I, *Eversley's Law of Domestic Relations* (1951) 6 ed, Sweet & Maxwell Ltd, London, p2-3.

<sup>16</sup> Criminal Law Commissioners, *Parliamentary Papers* (1846) vol xxiv p12. "No woman shall be liable to conviction in respect of any act of receiving her husband; or of receiving any other person in his presence and by his authority, or of harbouring or concealing her husband, or any other person in his presence and by his authority, or of aiding the escape of her husband from justice." This proposal, like so many of the structural reforms to the substantive criminal law in the nineteenth century, was never adopted.

<sup>17</sup> Archibald Alison, *Principles of the Criminal Law of Scotland* (1832) William Blackwood, Edinburgh at p668 under a heading 'Of Subjection to Others': "Nothing is better established in our practice, than that the authority or coercion of the husband is no palliation for the commission of crimes by the wife, who is presumed to have at least such freedom of action left as to be capable of resisting the temptations to crime, of whatever sort they may be [Hume i. 47, 48]. And this holds not only in regard to the more atrocious crimes, such as murder robbery, or fire-raising, but the smaller, such as theft, assault, reset, forgery, or the like, which are not so perilous by the danger and alarm with which they are attended. [Hume i. 48]. Nothing is more common, accordingly, than to have a husband and wife put to the bar and tried together on the same libel for the same offence." Gerald H Gordon, *The Criminal Law of Scotland*, (1978) W Green & Son Ltd, Edinburgh, at p433 fn 72 refers to private compulsion very fleetingly and certainly does not state that the wife is under any special position under Scot's Law. The earliest Scottish reference to reset is made in a text of 1609 *Regiam Majestatem ad Quoniam Attachiamenta*, (1609 ed) where reference is made to a statute of King William c19 that "the wife is nocht oblisched to accuse hir husband; nor to disclose his thift or felonie; because sho hes na power of hir selfe".

(1) A wife is not excusable in the commission of any crime by the influence or power of her husband, if she has taken any part in its commission along with him.

(2) A wife shall not be held answerable for harbouring, concealing, or comforting, her husband, even after the commission of the greatest crimes; and if any crime appears to have flowed from a motive, she shall be absolved for its commission.<sup>18</sup>

The Scottish legal system recognises this analogous defence of reset.<sup>19</sup> The basis of reset, which compares with uxorial accessoryship after the fact, is described in terms of the emotional covalent bond between spouses – a jurisprudential version of blood being thicker than water.

But what shall be said of cases such as reset of theft, where the act of the wife, in harbouring or concealing her husband, or the goods he has stolen, is not only yielding to the natural and excusable feelings which she must entertain towards him in every situation.<sup>20</sup>

But like the common law of England, the Scottish defence was also only available to the female spouse:<sup>21</sup>

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<sup>18</sup> Archibald Alison, *Principles of the Criminal Law of Scotland* (1832) William Blackwood, Edinburgh, p 668.

<sup>19</sup> Christopher H W Gane, Charles N Stoddart and James Chalmers, *A Casebook on Scottish Criminal Law* (2001) 3 ed, W Green, Edinburgh. At p519 “the receiving and keeping of stolen goods, knowing them to be such, and with an intention to conceal and withhold them from the owner”. The authors note that the traditional approach of Scots law was to exempt a wife from criminal responsibility for resetting goods stolen by her husband, unless she took an active part in the disposal of the goods as being: Hume (i,113). *Hume on Crimes*, vol I, 49 noted that, unlike the law of England, there was no presumption that a Scottish wife committed crimes out of dread of her husband and said: “Last of all, it is not to be imagined, that the wife shall in any case be held guilty, or be implicated as art and part of her husband’s crime, by affording him that harbourage or concealment and comfort after the fact, which the feelings of nature and duty require of her at that season of terror and distress, when her fidelity has become his only refuge. And indeed, it is not to be presumed that she has it in her power, if she were so disposed, to refuse him this assistance”. Reset is a process in the disposition of the primary evidence of the original theft, originally limited to the reset of theft but by s51 *Criminal Law (Consolidation) (Scotland) Act 1995* it was extended to cover appropriations by breach of trust and commercial fraud.

<sup>20</sup> Archibald Alison, *Principles of the Criminal Law of Scotland* (1832) p 670. In *HM Advocate v Camerons* (1911) 6 Adam 456, 487-488 Lord Dunedin on the question of concert (joint enterprise) said: “If what he [the husband] really did was that at a late period – that is to say, after the simulated theft – he only learned of the scheme then and did what he did do after that time to screen his wife, then no doubt he has been guilty of an offence against the law, for it is an offence against law to screen the guilty.”

<sup>21</sup> Gerald H Gordon, *The Criminal Law of Scotland*, (1978) W Green & Son Ltd, Edinburgh, at p520. In *Miln v Stirton* (1982) SLT (Sh Ct) 11 the accused was charged that she harboured and concealed her husband at the matrimonial home “knowing that there was an extract conviction warrant outstanding for his apprehension and this she did to defeat the ends of justice”. The wife argued that the libel (the charge) did not disclose an offence known to Scottish law. The procurator fiscal argued that since the days of Hume and Alison the status of a wife had changed. The court noted that under Scottish law “being a married woman in itself did not alter the capacity of a person to commit a crime, but in certain cases the law recognised that, in relation to a husband, a married woman’s responsibility was different from that of other persons” instancing harbouring her husband, reset, competence and compellability in the law of evidence. Archibald Alison, *Principles of the Criminal Law of*

it is to be noted that a husband does not enjoy the privilege of avoiding prosecution for reset in respect of his wife's thefts, and presumably cohabittees (of both sexes) are struck at with the full vigour of the criminal law. Whether the discriminatory nature of the privilege would withstand a challenge under the European Convention on Human Rights is uncertain. Could a man, charged with resetting property stolen by his wife, or a female cohabitee charged with resetting property stolen by her male partner claim that they were the victims of discrimination?

In *Smith v Watson*<sup>22</sup> the respondent was the wife of a man currently serving a lengthy sentence of imprisonment for robbery. A few months after his sentence had begun, money being proceeds from the robbery was delivered to her letterbox and she retained it with the intention of keeping it until it could be made available to her husband. At trial the sheriff acquitted her of reset. However, an appeal by the prosecution was successful from that ruling by holding that a wife's exemption from liability for reset should not be extended beyond its established scope, and was limited to a case in which the stolen property was brought into the home by the husband, and was concealed by the wife with the purpose of protecting him from detection or punishment. Lord Hunter<sup>23</sup> noted the appeal concerned a doctrine which developed under a social and legal order substantially different from that prevailing in contemporary life. Reference to Alison<sup>24</sup> demonstrated that the privilege never extended in similar circumstances to a husband, which is internal evidence that the doctrine is a relic of an age when wives were expected as a matter of course to submit to their husbands and could therefore be presumed to have done wrong ex reverential mariti [out of matrimonial reverence]:

that the wife is considered as bound, by the humanity of the law, to cherish and protect her husband, and, so far from informing against him, to conceal his delinquencies, and protect him from punishment.

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*Scotland*', (1832) p669: "On this point the law of England is more favourable than that of Scotland to the wife of a prisoner."

<sup>22</sup> (1982) SCCR 15 p15. The Laws of Scotland, '*Stair Memorial Encyclopaedia*', (1995), The Law Society of Scotland, Butterworths, Edinburgh, vol 7 para 392 Criminal Law: "A wife cannot be convicted of resetting goods from her husband, if all she does is conceal them to screen or protect him, and provided she takes no active part in his crimes. But this exemption from criminal liability will be strictly construed."

<sup>23</sup> At p17. In *Clark v Mone* (1950) SLT (Sh: Ct) 69 a wife was acquitted where her husband had brought home stolen goods, had been convicted of that offence and imprisoned and whilst imprisoned his wife was found wearing some of the stolen items.

<sup>24</sup> Archibald Alison, '*Principles of the Criminal Law of Scotland*', (1832) p 669.

The court concluded that this uxorial privilege, which is intended to be a narrow merciful release from criminal liability, only applies when the stolen property was brought into the matrimonial home by the husband and not by a third party acting in his interests. No legislation has intervened to either widen the privilege to husbands or to remove the ancient uxorial defence to substantive criminal law. In this regard only Scottish criminal law is more liberal than English law in continuing to acknowledge marriage as a defence in its own right to allegations of certain criminal conduct.

## ORIGINS OF THE UXORIAL ACCESSORIAL IMMUNITY

This uxorial-only<sup>25</sup> immunity under the criminal law can be traced<sup>26</sup> back to the laws of the Anglo-Saxon kings. In ‘*Essays in Anglo-Saxon Law*’<sup>27</sup> law 57 of King Ine,<sup>28</sup> the West Saxon king living in England AD 712 provided:

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<sup>25</sup> P R Glazebrook (ed), ‘*Sir Matthew Hale Historia Placitorum Coronae*’ vol 1 621 “But the husband may be an accessory for the receipt of his wife.” An early example of a husband not being liable as an accessory after the fact of his wife’s felony is found in the *Year Book Pasch* 15 E.2, fol 463 (Maynard’s ed) itself cited in *Fitzherbert’s Abridgement Corone* 383: A man and his wife and their son were arrested in possession of eight sheep skins feloniously stolen. The wife and their son were guilty, the husband was acquitted as it was found he had given up their company and his own house and lived elsewhere. The mere fact that the stolen items were located in his house was insufficient as he had separated from his wife because of his disapproval of her ways; so he did not receive, relieve or comfort her.

<sup>26</sup> P J Pace “‘*Impeding Arrest*’-A Wife’s Right as a Spouse?’ [1978] Crim LR 82, 84 fn 14 erroneously states that the common law rule could only be traced to 1557, referring to ‘*Les Plees del Coron*’, Lib 1 c19 fol 26a; Sir James Fitzjames Stephen, ‘*A Digest of the Criminal Law (Crimes and Punishments)*’, (1877) Macmillan & Co, London at p333; “The first authority on the subject is Bracton, in whose time the more recent doctrine appears to have been unknown.” This too is contrary to the evidence as the accessorial exemption can be traced to the laws of King Ine AD 712 and the laws of King Cnut AD 1020: H Adams, H C Lodge, J L Laughlin and E Young, ‘*Essays in Anglo-Saxon Law*’ (1876), Little Brown and Co, Boston p175, reprinted 1972, Hackensack, New Jersey, Rothman Reprints p175-176; A J Robertson, ‘*The Laws of the Kings of England from Edmund to Henry I*’, (1925) University Press, Cambridge, §76.

<sup>27</sup> H Adams, H C Lodge, J L Laughlin and E Young, ‘*Essays in Anglo-Saxon Law*’ (1876), Little Brown and Co, Boston p175, reprinted 1972, Hackensack, New Jersey, Rothman Reprints p175-176.

<sup>28</sup> Edmund H Bennett and Franklyn Fiske Heard, ‘*A Selection of Leading Cases in Criminal Law with Notes*’, vol 1 Edmund H Bennett, (1869) Little Brown & Co, Boston at p86: “At the present day (1869), indeed the presumption that a wife is compelled by her husband to commit a crime, must be very weak, and it is not easy to see how any one’s orders, even a husband’s, should be a shield for criminal violations of law. It is certain that a father’s commands to a child, or a master’s to a servant, will not exonerate him from the consequences of his acts, even of a trespass; and on principle it seems difficult to discover a satisfactory reason for the difference in the two cases”. [See *Commonwealth v Butler* 1 Allen E4].” Edmund H Bennett and Franklyn Fiske Heard, ‘*A Selection of Leading Cases in Criminal Law with Notes*’, vol 1 Edmund H Bennett, (1869) Little Brown & Co, Boston at p86: “The distinction, however, seems well-established and recognised in both ancient and modern

Ine, 57: “If a ceorl<sup>29</sup> steal a chattel and bear it to his dwelling, and it be intertiated therein, then shall he be guilty for his part without his wife; for she must obey her lord. If she dare to declare by oath that she tasted not of the stolen property, let her take her third party”.

The laws of King Cnut, another English king, promulgated between AD 1020 and 1034,<sup>30</sup> were very similar in this regard:

76 Concerning stolen goods.

If anyone carried stolen goods home to his cottage, and is detected, the law is that he (the owner) shall have what he has tracked.

And unless the goods had been put under the wife’s lock and key, she shall be clear [of any charge of complicity].

But it is her duty to guard the keys of the following – her storeroom and her chest and her cupboard. If the goods have been put in any of these, she shall be held guilty.

But no wife can forbid her husband to deposit anything that he desires in his cottage.

Bracton<sup>31</sup> could authoritatively state that a married woman does not become an accessory after the fact to a felony committed by her husband by harbouring him, even though she may know that he has committed the felony; nor, in such circumstances, does she become a principal even when his offence is treason. He stated that:

A wife, however, who is the spouse of thief shall not be liable for the act of the man, because she ought not to accuse her husband, nor to disclose his theft or felony since she has not any power over herself, but her husband has.

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times. And in the laws of Ina, King of the West Saxons, who reigned in the year 712 see Wilkins’s *Leges Anglo-Saxons*’ p24 Art 57 the same principle was adopted.”

<sup>29</sup> Lesley Brown (ed) *The New Shorter Oxford English Dictionary on Historical Principles*, Clarendon Press, Oxford 1993 vol 1 p400 defines “ceorl”, alternatively churl, as “A man, esp. as correlative to ‘wife’”.

<sup>30</sup> A J Robertson, *The Laws of the Kings of England from Edmund to Henry I* (1925) University Press, Cambridge, p212. King Cnut also issued an edict that the defence of infancy would henceforth be available so that persons of nonage would be also exempt from the criminal law: “It has been the custom up till now for grasping persons to treat a child which lay in the cradle, even thought it had never tasted food, as being as guilty as though it were fully intelligent. But I strictly forbid such a thing henceforth, and likewise very many things which are hateful to God”: *Laws of King Cnut II*, 76.

<sup>31</sup> Bracton, *De Carona*, c32 ss8-10; Sir James Fitzjames Stephen, *A Digest of the Criminal Law (Crimes and Punishments)*, (1877) Macmillan & Co, London at p334; “the wife is not bound to accuse her husband, nor is she to be regarded as accessory after the fact to a theft committed by him merely because she receives the stolen goods, though she may be so regarded if she so conducts herself as to show actual consent to the theft. The passage [in Bracton] does not contain a word about her right to steal with impunity in his presence.” Bracton fo 413b refers to the case of Roger de Fanborne and his wife Agnes who were charged with uttering a forged writ. The husband was executed but the wife was freed irrespective of whether or not she had been a party to the offence since she was under the control and domination of her husband.

The same sources, King Ine and King Cnut, had provided the laws prescribing the earliest forms of the defence of marital coercion. However, the accessorial immunity<sup>32</sup> never depended on any presumption (unlike marital coercion), nor did it require the presence of the husband at the time of the commission of the offence (as it did with marital coercion). In addition the accessory immunity applied to all offences, unlike marital coercion.<sup>33</sup> During the Anglo-Saxon period in England, AD 580-1066, women had greater control over their destinies than under the Norman regime which succeeded it. Their capacity for self-determination was generally comparable with that of men<sup>34</sup> but inside and outside the home a wife was provisioned with special privileges from the criminal law.

This significant exemption of wives from a major substantive part of the criminal law, by being immune from accessoryship after the crime of their husbands, was uncritically<sup>35</sup> recited by the early institutional writers<sup>36</sup> as a natural corollary to matrimony, which inspired obligations of indomitable loyalty based on the desiderata of divine law.<sup>37</sup> The same

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<sup>32</sup> In *R v Holley* [1963] 1 All ER 106, 108 (CCA) Lord Parker CJ in delivering the judgment there concluded that the common law privilege of a wife to assist her husband after his felony had disappeared upon the passage of s47 *Criminal Justice Act 1925* [UK] which abolished the presumption of marital coercion. This approach is unsustainable. Apart from an unsupported reference it was never a rationale for the accessorial immunity that the wife was acting under coercion. cf Wayne Morrison (ed), *Blackstone's Commentaries on the Laws of England* vol IV [39], Cavendish Publishing Limited, London, 2001, p30. "But a feme covert cannot become an accessory by the receipt and concealment of her husband; for she is presumed to act under his coercion, and therefore she is not bound, neither ought she, to discover her lord." P R Glazebrook (ed) *Sir Matthew Hale Historia Placitorum Coronae* vol 1 p621 simply stated "A feme covert cannot be an accessory for the receipt of her husband, for she ought not discover him." But if she knowingly received any other felon, without her husband's knowledge, she alone was an accessory after the fact in relation to that felon.

<sup>33</sup> Edward Jenks (ed.), *Stephens Commentaries on the Laws of England* (1922), 17 ed, Butterworth & Co, London vol iv p29: "The rule, moreover, was never applicable to such offences as murder, manslaughter and the like; these being of too deep a dye to be thus excused. In treason, also, no plea of coverture can excuse the wife, no presumption of her husband's coercion extenuate her guilt; as well because of the odiousness and dangerous consequence of the crime of treason itself, as because the husband, having broken through the most sacred tie of social community by rebellion against the State, has no right to that obedience from his wife, which he himself, as a subject, has forgotten to pay".

<sup>34</sup> Christine Fell, *Women in Anglo-Saxon England*, (1984) 13 n3 "the evidence which has survived...indicates that women were then more nearly the equal companions of their husbands' and brothers' than at any other period before the modern age".

<sup>35</sup> Anon, *Can a Husband be Accessory after the Wife's Crime?* (1900) 64 JP 129, 131 "Their names too carried such weight of themselves as to make lawyers of many succeeding generations willing to accept what they said without inquiring into the grounds of it."

<sup>36</sup> Staunford *Les Plees del Coron*, 1, 26; Hale 1 PC 621.

<sup>37</sup> Coke 3 *Institutes* 108 "A feme covert committeth not larceny if it be done by the coercion of her husband, but a feme covert may commit larceny if she doth it without the coercion of her husband; and there it appeareth that a man may be accessory to his wife, but the wife cannot be accessory to her husband, though she knows that

obligations were conceived as requiring a wife agreeing with her husband to be incapable of committing a conspiracy, as in ecclesiastical terms as reflected by the common law, they had but a unity of purpose, namely that decided by the husband. The privileges of the accessorial immunity and the intraspousal conspiracy immunity could overlap where there was an agreement between the spouses as to how he would be protected from the criminal law, yet the substantive offence of being an accessory after the fact did not need to rely on any derived assistance from the conspiracy immunity, as it was a free-standing defence.

It was Bracton<sup>38</sup> who outlined a detailed formulation of the responsibility and duty of a wife where her husband had criminally acted. Fleta<sup>39</sup> puts the position in substantially similar terms. Their conclusion reinforcing her innocently-deemed, uxorial acquiescence emphasised the rationale that she could not be required by law to accuse her husband or prove his felony – thus separating her position and duty from that of all others. By the general law all were required by the offence of misprision of felony, to be proactive in reporting any such serious crime. A subsequent writer, Britton<sup>40</sup>, wrote that “the felon’s wife may plead, that although she was privy to the crime of her husband, yet she neither could nor ought to accuse him”. Sir William Staunford<sup>41</sup> added that “a wife cannot be accessory to her husband because by the law divine she ought not to discover him”. Lord Coke<sup>42</sup> emphasised “the wife cannot be accessory to her husband...for the Law Divine, she is not bound to discover the defence of her husband”. With God on her side a wife ought to feel no compunction in elevating her matrimonial interests above those of the State. These early institutional writers on English law acknowledged the parallel existence of martial coercion as being a necessary complement to

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he committed larceny, and relieve him, and discover it not; for by the law divine she is not bound to discover the offence of her husband.”

<sup>38</sup> Bracton, *De Legibus et Consuetudinibus Angliae*, (c1250-1259) as translated in Samuel E Thorne, *Bracton on the Laws and Customs of England* (1968) Bellknap Press, Harvard University Press, vol 2 p428-9 “A wife ought not to accuse her husband nor disclose his theft or felony, but neither ought she assent to it or act as his confederate;...But a concubine or housemaid will not be in the same case as a wife, for such persons are bound to accuse the man or to withdraw from his service; otherwise they are taken to consent”.

<sup>39</sup> Fleta, *Fleta seu Commentarius Luris Anglicani*, (c1290) translated in Henry G Richardson and George O Sayles, *Fleta*, (1955) B Quaritch, London, p92.

<sup>40</sup> Translated in Frances M Nichols, *Britton* (1983) Seldon Soc, Oxford, p120.

<sup>41</sup> Sir William Staunford, *Les Plees Del Coron*, (1557) Aedibus Richardi Tottelli, London (reprinted 2006) The LawBook Exchange Ltd ,26b. A similar viewpoint is expressed by Ferdinando Pulton, *De Pace Regis et Regni*, (1609) Printed [by Adam Islip] for the Companie of Stationers., An. Dom, p130.

<sup>42</sup> Sir Edward Coke, *Third Part of the Institutes of the Laws of England*, (1628) p108. To the same effect Sir Matthew Hale *History of the Pleas of the Crown*, (c1676) vol 2, p279.

the accessoryship privilege. A wife was always going to succeed by saying “he made me let him into his house” when her husband returned home from a crime spree. The power imbalance was overwhelming. She was in a position of obliging docility. Bracton<sup>43</sup> refers to the case of *Agnes de Fanborne* who was set free “irrespective of whether or not she had been a party to the offence since she was under the control and domination of her husband”. Fitzherbert<sup>44</sup> in 1565, Staunford<sup>45</sup> in 1583, and Coke<sup>46</sup> later all accepted that some core rule existed for the accessoryship exemption but were generally content to merely repeat the inconclusive references of the earlier writers.

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<sup>43</sup> Bracton fo 413b. Sir James Fitzjames Stephen, *A Digest of the Criminal Law (Crimes and Punishments)*, (1877) Macmillan & Co, London at p332 note II in reference to Art.30. At p333: “The first authority on the subject is Bracton, in whose time the more recent doctrine appears to have been unknown”. William F Walsh, *A History of Anglo-American Law* (1932) 2 ed (Reprint 1993) Wm W Gaunts & Sons Inc. at p389: “The common law of the thirteenth century definitely rejected the principle of community property between husband and wife which prevailed throughout a considerable part of the continent” quoting Pollock and Maitland, *History of English Law*, II, 397-399; Holdsworth, *History of English Law III*, 523-524. Theodore F T Plucknett, *A Concise History of the Common Law*, (1956) 5 ed. Butterworth & Co, London at p313 noted that “local customs frequently kept the woman’s property free from her husband’s control, accord her liberty of contract (which was denied at common law), and even allowed her to trade separately upon her own account”. The author noted [Plucknett YB 13 Richard II (Ames Foundation) 80, and Introduction, xlvi] that a decision of the Court of Common Pleas in 1389 showed that the common law, even at so late a stage, did not extend to all persons and places and that there was an incalculably large mass of customary law involving very different principles in numerous different communities ...”. Bracton, in giving reasons for the rule that husband and wife were required to join in an action to recover the wife’s land after stating that ‘they are quasi one person’, added ‘for the thing is the wife’s own, and the husband is guardian as being the head of the wife.’ Bracton f 429b, Pollock and Maitland *History of English Law*, II II 403.

<sup>44</sup> Fitzherbert’s Abridgment (AD 1565), *Corone*, 199.

<sup>45</sup> Sir William Staunford, *Les Plees del Coron*, Aedibus Richardi Tottelli, 1557, London, reprinted The Law Book Exchange, Ltd. 2006. c19; In *Gottliffe v Edelston* [1930] 2 KB 378, 383 McCardie J said “It is not easy to discover the original basis of the doctrine as a common law principle.” He said at p384: “I find it difficult to see how the old and conventional doctrine of unity can be said to operate at the present day. There is no mental unity in any just meaning of the word. Husbands and wives have their individual outlooks. Each has a separate intellectual life and activities.”

<sup>46</sup> 3 *Institutes* 47. In *Coke upon Littleton*, (1823) 18 ed, vol 1, ch 1 at p6b: “Note, it hath been resolved by the justices, that a wife cannot be produced either against or for her husband, quia sunt duae animae in carne unâ; and it might be a cause of implacable discord and dissention between the husband and the wife, and a meane of great inconvenience;...”

## RATIONALES FOR THE ACCESSORIAL PRIVILEGE

Other than the incidental benefits conferred by the coincidence of divine<sup>47</sup> and common law, early commentators saw the impelling reason for the privilege as lying in the duty a wife owed to her husband, as it was a superior bond that even the law itself should not require to be broken by the opposing pull of the public interest in the detection and prosecution of serious crime. Clive & Wilson<sup>48</sup> in concluding that for the comparable exemption of reset under Scottish law, it was strictly applicable too only to wives that:

the essence of the rule is simply that in a conflict between conjugal and public obligations the law in this case, as in certain of the rules on evidence, allows the conjugal obligations to prevail. The family is *pro tanto* preferred to the state.

Indeed the law had a separate interest in preserving the efficacy of uxorial duties owing to the husband as the doctrine of feme covert was built upon the unseparateness of the will of married women from that of their husband; a conjugal unity.<sup>49</sup> Hale writing in 1736 stated:

If the husband commit a felony or treason,<sup>50</sup> and the wife knowingly receive him, she shall neither be accessory as to the felony, nor principal to the treason, for such bare reception of her husband; for she is *sub potestate viri*, and she is bound to receive her husband; but otherwise it is, of the husband's receiving the wife knowingly after an offence of this nature committed by her husband.<sup>51</sup>

The husband had no equivalent protection as he was most assuredly in law not the weaker vessel. He could not claim an exemption based on marriage. He was undone by his own

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<sup>47</sup> Staundford, '*Pleas of the crown*' fol 26 a. c.10; "But if the husband commits felony and the wife well knowing of it, receives him and keeps his company, she is not, therefore, accessory to the felony, for the wife cannot be accessory to her husband because that by the divine law she ought not to discover him, &c."

<sup>48</sup> Clive & Wilson, '*Husband and Wife*', (1974) p376-377.

<sup>49</sup> At common law a wife was exempt from prosecution for arson of her husband's dwelling even after they lived apart, because the theory of the legal unity of spouses was stronger than their actual separation in fact. *R v Marsh*, (1828) 1 Moody 182. This metaphor of unity in the face of formal separation did not provide exemption in America: *Kopczynski v State*, (1908) 118 NW 863.

<sup>50</sup> The Roman-Dutch jurist, Matthaëus (48.2.2.20) stated that even in the crime of high treason an immunity should be extended to anyone who acted out of humane motives and impelled by the force of a natural obligation, gave necessities to a person aiding the enemy: cited in Gardiner & Lansdown, '*South African Criminal Law and Procedure*', (1957) 6 ed, Charles W H Lansdown, William G Hoal and Alfred V Lansdown (eds), Juta & Co Ltd, Capetown p155.

<sup>51</sup> P R Glazebrook (ed) '*Sir Matthew Hale Historia Placitorum Coronae*', vol 1 47, referring to Coke 3 *Institutes* 108.

proven inadequacy and was not to be rewarded for his own failure within the marriage to control his wife, if circumstances obtained in which she had, without his participation, committed a crime. Such conduct by her was inimical to sustaining the ideology of male dominance and therefore he had failed in his responsibility.

#### WIVES ONLY – PROOF OF MARRIAGE

In *R v Good*<sup>52</sup> the allegation was that Mrs Good was an accessory after the fact to a murder committed by her husband. (No crime is outside the privilege.) Her defence was that she was married to him. She could produce no documentary evidence of the celebration of the marriage which reputedly took place in Ireland, because of the unreliable nature of the contemporary keeping of marriage registers in that country. The judge acceded to the position that the prosecution could properly take the view that she was married, notwithstanding the absence of any formal documentation to support her claim. The court endorsed the prosecution offering no evidence against Mrs Good. It was said by Alderson B that:

if the prisoner in this case went through the ceremony of marriage, and it should have turned out that there was some irregularity in the marriage, nevertheless, if it appeared that she had acted under the supposition that she was the wife of [the accused Mr Good] and according to the duty which she considered cast upon her, the Court would have inflicted a very slight punishment upon her.

This decision is generally cited for the proposition that a putative wife need not strictly prove her marriage as a basis for claiming the accessorial exemption. The kindly view of the judge was to the effect that a presumption of marriage<sup>53</sup> applied because of the circumstances in

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<sup>52</sup> (1842) 1 Car&K 185; *R v Boober, Boober & Boober* (1850) 4 Cox CC 272 Talford J said the fact that the man and woman were living together was itself evidence from which it should be inferred that they were man and wife. So, recognition of a common law marriage simply by their relationship.

<sup>53</sup> In *R v Hassall* (1826) 2 Car & P 434 a man and woman were jointly indicted for larceny. The indictment described the woman as being single. It was held insufficient for her to prove that she had lived with the man for two years and was his reputed wife. What was necessary was evidence that she was in fact the lawful wife although it was not necessary to prove the actual marriage. See *R v Good* (1842) 1 Car Kir 185, *R v Atkinson* (1814) 1 Russell on Crimes and Misdemeanours 8 ed, 96, 103. In *Berthiaume v Dastous* (1929) 47 Banc du Roi 533 PC, the Privy Council (on appeal from Quebec) had held that a valid religious marriage was not necessarily a valid legal marriage. Where it is proved that a couple went through a ceremony of marriage and subsequently

which the wife was reputed to be married and declared herself to be married.<sup>54</sup> However, the general proposition cannot be sustained on close analysis. In that judgment Alderson B also decided that if prosecution counsel had reason to believe that the woman had been married to the principal at the time of the alleged accessoryship and it appeared that she considered herself as his wife and had lived with him as such the prosecutor will be justified in not offering any evidence against her. That conclusion, the judge added, would apply apparently even though there was reason to believe that the marriage was in some respects irregular and probably invalid. This gallant approach is probably explicable by the fact that in the mid-nineteenth century it would have been a very onerous requirement for a person remanded in custody to be able to obtain the necessary formal documents. If it was a common law marriage this would have required even greater demands as there may have been no documentary evidence at all. Where here it was asserted that the marriage had taken place in a different country, Ireland, the difficulties would have been virtually insuperable.<sup>55</sup> The requirement to establish a valid marriage<sup>56</sup> is a condition precedent to employment of any of the cognate special defences available only to married women. For marital coercion, the Court of Appeal would not countenance any diminution in the necessary proof that a valid, subsisting marriage was in place at the material time.<sup>57</sup>

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lived together, it is presumed that the marriage between them is valid. Where it is the prosecution, rather than the defence, seeking to rely on the existence of a marriage, it must be strictly proved; *R v Birtles* (1911) 6 Cr App R 177, and *R v Umanski* [1961] VR 242. In turn, the onus and therefore the standard of proving death of a person as at any particular date lies on the party to whom proof of that fact is essential: *Lal Chand Marwari v Mahant Ramrup Gir* (1925) 42 TLR 159 (PC). It has long been established that if a man and woman cohabit and hold themselves out as husband and wife this itself raises a presumption that they are legally married, *Doe d Fleming v Fleming* (1827) 4 Bing 266; *Sastry Velaidier Aronegary v Sembecutty Vaigalie* (1881) 6 App Cas 364 (PC); and *Re Taplin, Watson v Tate* [1937] 3 All ER 105 but in a prosecution for bigamy the marriage must be strictly proved by the prosecution. *R v Ford* (1913) 32 NZLR 1219 (CA) cf *R v Riddehough* (1919) GLR 143.

<sup>54</sup> This is in accord with *Au Hung Fat v Lam Lai Ha* [1959] HKLR 527, *Ng Ping On v Choy Fung Lam* (1963) SR (NSW) 782. A marriage proved by the prosecution to be void could not be relied upon: *De Reneville v De Reneville* [1948] 1 All ER 56, 60.

<sup>55</sup> The judge may also have been subliminally influenced by the fact that Mr Good had already been sentenced to death by an earlier jury for the substantive offence.

<sup>56</sup> In *Mohamed v Knott* [1968] 2 All ER 563, 567 Lord Parker CJ appeared to accept the validity of polygamous marriage and said they are “recognised...unless there is some strong reason to the contrary”. This is preferable to but incompatible with the seminal Christian concept identified by Lord Penzance in *Hyde v Hyde* (1866) LR 1P&D 130, 133: “marriage, as understood in Christendom, may...be defined as the voluntary union for life of one man and one woman, to the exclusion of all others”. The common law of marriage knew only Christian marriage.

<sup>57</sup> *R v Ditta, Hussain and Kara* (1988) Crim LR 42 CA.

The critical fact of the existence of a valid marriage permeated the uxorial privileges in the criminal law. It translated into an essentiality from which protections flowed. Its status was elemental. Therefore, for the purposes of the rules of admissibility a mistress was always a competent witness for the prosecution; whereas a wife was not.<sup>58</sup> It also followed that under the substantive general criminal law a man owes no duty to aid his “weekend mistress”;<sup>59</sup> she was in terms of the law a stranger whose position in relation to him, generated no corresponding obligation to her imposed by law. So although the outer limits of the duty of responsibility to preserve life imposed by the criminal law are undetermined, relationships by blood or marriage create a legal duty. It was a structural requirement of all the special criminal rules applying to married women that the woman be the lawful wife to be able to claim the relevant benefit from the criminal law.<sup>60</sup>

#### WIDTH OF THE ACCESSORIAL EXEMPTION

In compliance with her pre-ordained responsibility to be faithful to her husband’s intent, a wife would have to act to protect him from successful apprehension in many different ways, all of them being animated by an intention to impede his arrest. In *R v M’Clarens, Middleton, Draddy and Draddy*<sup>61</sup> M’Clarens and Middleton were indicted for stealing sugar and Mr and

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<sup>58</sup> *Batthews v Galindo* (1828) 4 Bing 610, *R v Young* (1847) 2 Cox CC 291; Comyns *Digest Justices* T.2. at p593: “The only natural relation, however, which the law regards as destroying competency, is that of husband and wife; for no other tie, however intimate, can render testimony inadmissible.”

<sup>59</sup> In *R v Instan* [1893] 1 QB 450 (CCCR) it was held if the defendant assumes responsibility toward another or voluntarily assumes a duty towards another then he or she also comes under a legal duty to act (73 year old immobile aunt); *People v Beardsley* (1907) 113 NW 1128; CMV Clarkson and H M Keating, ‘*Criminal Law: Text and Materials*’, (1994) 3 ed, Sweet & Maxwell, London, p113.

<sup>60</sup> *R v Levy* [1912] 1 KB 158. AM Wilshere, ‘*A Selection of Criminal Cases Illustrating the Criminal Law*’, (1935) 3 ed Sweet & Maxwell London p78. In *State v Carpenter* (1947) 176 P 2d 919 (Supreme Court of Idaho) Mrs Carpenter was charged with “carrying hacksaw blades to prisoners to aid their escape” of her husband. At p921 the court approved the trial judge’s direction that the defence needed to produce a marriage licence or proof of having entered “into a formal marriage ceremony”, to meet the requirements of the *Idaho Penal Code* s17-201, subd 7, ICA; “All persons are capable of committing crimes except those belonging to the following cases...(7) Married women (unless the crime to be punishable with death) acting under the threat, command or coercion of their husbands.”

<sup>61</sup> (1849) 3 Cox CC 423. Mrs Draddy was acquitted by the jury. In *R v Archer* (1826) 1 Moody CC 143 the judge held that the law does not impute to the wife those offences which she might be supposed to have concurred in by the coercion or influence of her husband, especially where his house is made the receptacle of stolen goods. She had been more active than her husband. To the same effect is *R v Banks* (1845) 1 Cox CC 238 where it was

Mrs Draddy for receiving it. The husband received the sugar without his wife being present. But a witness later found the wife flushing the remains of the sugar down a sink in the kitchen. Coltman J stated that the wife prima facie might be acting under the coercion of her husband but that could be rebutted “by the active part she took in the matter”. But if the jury concluded that the act of flushing the sugar was “merely for the purpose of concealing her husband’s guilt, and of screening him from the consequences” then she should be acquitted as she could not be convicted of harbouring her husband where he has committed a felony. And equally, although she could not be convicted of harbouring her husband when he has committed a felony, the circumstances of her attempting to conceal what may have lead to his detection appeared to have come within the same principle.

In *R v Boober, Boober & Boober*<sup>62</sup> a husband, wife and their 10 year old son were indicted at the Central Criminal Court for possession of moulds on which was impressed the obverse side of a shilling. Talford J directed the jury to acquit the boy as “he is acting under the control of his parents, they are living in the house where the coin implements are found”. Counsel for the wife submitted that if the husband was found guilty she must be acquitted on the basis that possession by her was in law and fact possession by the husband. When the police entered the home the wife was seen quickly breaking the coin mould. But counsel argued that this was done to screen her husband so therefore she could not be liable, although such an act done by another person might well make him or her an accessory after the fact. The judge also found that the wife could not in law be said to have any possession separate from her husband. But the judge said if the criminality was on her part alone and he was entirely guiltless, she could be convicted. He directed the jury that if the wife was trying to break the mould when the police officers went to the house, that would not affect the case if they considered that her object was to screen the husband from detection.

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held that stolen goods found in the house of a married man could not be considered to be in the possession of his wife.

<sup>62</sup> (1850) 4 Cox CC 272.

In *R v Brooks*<sup>63</sup> five judges pondered the consequences of a husband who as a salesman had stolen from his shopkeeper employer “dressing-cases, bell-corals, pencil-cases”. He handed these items to his wife who promptly pawned them. On the first suspicion of his dishonesty he absconded “and was not subsequently taken into custody”. However, upon a search of the matrimonial dwelling a box was found which the wife struggled to prevent being opened. Inside was a quantity of pawn-tickets which led to the eventual discovery of the stolen property. It was established that the wife had herself pledged the items to the pawn-broker. She was indicted for receiving the stolen articles. The Recorder of Liverpool directed the jury (at p149) that

as her husband had delivered the stolen articles to the prisoner, the law presumed she acted under his control in receiving them, but that this presumption might be rebutted.

He instanced that if Elizabeth Brooks had acted “not by reason of any control or coercion of her husband, but voluntarily and with a dishonest and fraudulent intention” the jury could convict her; which it did. The Recorder reserved the case which was considered by Jervis CJ, Parke and Alderson B, Wightman and Cresswell JJ. Counsel for the prosecution relied upon her “violent attempt at concealment” of the box containing the pawn-tickets but Parke B instantly rejoined “I do not see how, under any circumstances, a wife can be convicted of receiving from her husband”. In *R v Wardroper*<sup>64</sup> it was held that where a husband and wife are jointly indicted as receivers of stolen property, and it is consistent with the facts that he may have received the stolen property at his house, and that it might have come into the possession of the wife knowing that it had been wrongfully acquired, the issue for the jury was whether she received the property from her husband, which would lead to an acquittal or whether she received it in his absence. The mid-nineteenth century English cases demonstrate that while the matrimonial dwelling was a sanctum, the wife was in peril if she acted beyond passive reception of her husband. The fine line which divided furthering the husband’s crime from acquiescing in the uxorial obligation to shelter him was wholly unpredictable. The law

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<sup>63</sup> (1853) 6 Cox CC 148. Where a husband and wife are jointly indicted for receiving, the wife may be convicted if there is evidence of a receiving by her separate and apart from the husband: *R v Baines* (1900), 69 LJQB 681, (CCCR). The Law Reform Commission, Ireland, Report No 23 December 1987 ‘*Receiving Stolen Property*’ para 33: “Husband and wife “stand in no special position” [Smith & Hogan, ‘*Criminal Law*’ (1965) p459] with regard to the offence of receiving; either may receive property stolen or received by the other.”

<sup>64</sup> (1861) 29 LJMC 116 (CCCR)

was anxious that a wife did not re-energise the original crime and its consequences by her own participation in furtherance of it – albeit her obstruction of her husband’s apprehension indirectly achieved the same end. But that was seen as ordained by the marriage compact and not the escalation of the original offence or illegitimate activity in relation to it.<sup>65</sup>

Sir James Fitzjames Stephen was of the opinion that the rationales for marital coercion and for accessorial exemption partially, if not completely, overlapped. The severity of the criminal law he concluded had been tempered by the ameliorating provisions<sup>66</sup> which removed to a considerable extent the ordinary processes of the criminal law from married women, when they acted in relation to or were physically proximate to their husbands while engaging in criminal conduct. But he decried this doctrine which placed married women beyond the criminal law<sup>67</sup> for being “uncertain in its extent and irrational as far as it goes”.<sup>68</sup> There had been virtually no discussion of the reason for the broad exemption in the case law, as the judges saw it as not necessary for them to rationalise the law, only to apply it. Gratuitous comments on law reform of the criminal law in the nineteenth century were almost non-

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<sup>65</sup> Where a wife receives stolen property from her husband and intended to enjoy the benefit of it, as coercion had been negated, she was held properly convicted. *People v Hartwell* (1900) 55 NY App Div 234 noted ‘Recent Cases’ (1914) 14 Harvard Law Review 544 noting that the New York statute expressly provided that both spouses may be jointly convicted of this offence. The rule is otherwise at common law, *R v Matthews* (1850) 4 Cox CC 214, 217 where Platt B stated the wife would be “sub potestate viri”. The writer asserted that the wife’s inability to be an accessory after the fact to her husband’s crime rest on totally independent considerations of policy from that which provides that spouses may jointly commit a crime.

<sup>66</sup> Sir James Fitzjames Stephen ‘*A Digest of the Criminal Law (Crimes and Punishments)*’, (1877) Macmillan & Co, London at p332 Note II in reference to Art.30. “Hardly any legal doctrine is less satisfactory than the one embodied in this Article. The rule has been too long settled to be disputed; but on examining the authorities in their historical order, it appears to me to have originated, like some other doctrines, in the anxiety of Judges to devise means by which the excessive severity of the old criminal law might be evaded.”

<sup>67</sup> Thomson B in *R v Hughes* (1813) 2 Lew CC 229 attributed the special position of wives in the criminal law to be justified “out of tenderness to the wife”. Special rules of the criminal law operated humanely when the penalty for treason and felony was savage and the reality that wives were still far from emancipation and equality. It is probable that judges in a soft chivalric way took the realities into account in their overall approach to any direction to the jury. But it may be doubted whether they are necessary in the present administration of the law. In *R v Mtetwa* (1921) TPD 227, 229 Wessels JP said: “Our law takes into consideration our ordinary human experience that a woman who lives with a man as his wife and who is supported by him as such, and is entirely dependent on him, is in most cases bound, even against her wish to carry out his behests in the ordinary domestic relationship which results from their common life.” Irene Geffen ‘*The Laws of South Africa Affecting Women and Children*’, R L Esson & Co Ltd, Johannesburg 1928, states that it was an invariable “custom” not to prosecute a wife who merely harboured her husband; but if she acted other than neutrally receiving him such as by furthering the crime by disposing of property, it was otherwise: *R v Brett and Levy* 1915 TPD 53.

<sup>68</sup> Sir James Fitzjames Stephen, ‘*A Digest of the Criminal Law (Crimes and Punishments)*’, (1877) Macmillan & Co, London at p333, adding “It is, besides, rendered nearly unmeaning by the rule that the presumption is liable to be rebutted by circumstances”.

existent. It was not until after the passage of the *Married Women's Property Act 1882* [UK] that murmurs for any change were stirred. No Court of Appeal for criminal cases existed in England until 1907 and prior to its creation the decisions of the Court for Crown Cases Reserved very often tended to be short assertions of the law, without any wider discussion of its anatomy. Many of the judgments of that court consist of only a few sentences and often counsel did not appear for either the convicted person or the prosecution. So the consideration was of the nature of a limited collegiate discussion with the trial judge often a member of the reviewing court. The general outcome was that other than in a few exceptional cases, the decisions of the Court for Crown Cases Reserved did little to establish a principled corpus of substantive criminal law as opposed to generating a miscellany of individual narrow points. In addition the court did not conceive it as being either its duty or within its power to pass on the desirability of statutory and common law, leaving its decisions and their implications to speak for themselves. In the twentieth century Glanville Williams saw this uxorial privilege, which had by then existed for over a thousand years, as a "concession to inevitable human feeling".<sup>69</sup> For centuries it had been treated as a given and its continuance never endangered.

#### CAN A HUSBAND BE AN ACCESSORY AFTER THE FACT AT COMMON LAW?

The privilege was bypassed, usually in a line, in the standard legal texts. Modern writers have very infrequently paused to comment on the accessorial privilege<sup>70</sup> or its justification, but in 1900 a trial ruling of Ridley J at the Central Criminal Court prompted some introspection as to whether a husband was also protected at common law. In *R v Williams and Williams*<sup>71</sup> a husband and wife were charged with child murder. The jury convicted the wife who was

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<sup>69</sup> Glanville Williams, *'Legal Unity of Husband and Wife'*, (1947) 10 *Modern Law Review* 16, 26. J W Cecil Turner, *'Russell on Crime'*, 12 ed (1964) Stevens & Sons London vol 1 p94 "it is not clear whether these exemptions rest on the theory of identity of person created by marriage, or upon the theory that the wife's acts in receiving her husband or conspiring with him, are done in obedience to his will."

<sup>70</sup> Anon, *'Can a Husband be Accessory after the Wife's Crime?'* (1900) 64 *Justice of the Peace* 129 said of even the position of the wife "the authorities, though by no means numerous, are not very clear".

<sup>71</sup> *The Times* 17 and 19 February 1900, a trial at the Central Criminal Court before Ridley J. *The Central Criminal Court Session Papers, Fourth Session, (1899-1900)* 225, 240 records that after his wife had been sentenced to death the husband was indicted as an accessory after the fact "for assisting and harbouring Ada Chard Williams, who had committed the crime of wilful murder. On the suggestion of the learned judge, Mr Matthews, for the prosecution, offered no evidence, and the jury returned a verdict of not guilty."

sentenced to death, but acquitted the husband. The prosecution then proposed to proceed against the husband upon an indictment charging him with being an accessory after the fact to his wife's felony. Ridley J advised the prosecution that in his opinion there were serious obstacles in law to a prospective conviction. Ultimately the Crown offered no evidence and the husband was discharged. This outcome generated two contemporary articles which doubted the proposition whether a husband could be convicted as an accessory after the fact of his wife's felony, by leveraging off the uxorial privilege.<sup>72</sup> These articles, remarkable for both their obscurity and breadth of vision in the year 1900, concluded that if the principle underlying this rule of law was that a wife owes to her husband a duty of love and tenderness, then in terms of equality the same principle should apply in the case of a husband; although there was no case law to this effect and the opposite conclusion had been directly reached.<sup>73</sup>

The anonymous author of the casenote at (1900) 44 Solicitors' Journal 254 refers to the general rule that everyone can be an accessory after the fact, except a married woman "who receives, comforts, or relieves her husband, knowing him to have committed a felony, does not thereby become an accessory after the fact". The note describes it as "strange" that the law was silent on the issue of whether a husband can be so exempted. Equal rights in this regard were advocated<sup>74</sup> for all husbands – but not for a wider category of family members. But such an observation completely overlooks the historical exegesis leading to the slow equalisation and emancipation of married women, a sub-class specifically disabled from breaching a class of the general criminal law. The duty of love and obedience was reposed

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<sup>72</sup> Anon, '*Can a Husband be Accessory after the Wife's Crime?*' (1900) 64 JP 129; Anon, (1900) 44 Solicitors' Journal 254.

<sup>73</sup> *R v M'Athey* (1862) 32 LJMC 35 (CCCR). In *R v Jones* [1949] 1 KB 194 the appellant was acquitted of charges of receiving stolen goods but was found by the jury to be an accessory after the fact to those felonies which the jury found had been committed by the wife. Peter Gillies, '*Criminal Law*' (1990) 2 ed Law Book Company, Sydney p767: "At common law a wife cannot be an accessory after the fact to her husband's felony. The converse is, however, possible. But notwithstanding the protection afforded to the wife, if by virtue of an act of assistance to her husband, she also assists his accomplice, she becomes an accessory after the fact to the accomplice's felony at common law."

<sup>74</sup> (1900) 44 SJ 254, 255 "Can, then, anyone give any good reason why a wife may shield her guilty husband from justice, while a husband commits a crime if he shields his guilty wife?" The author contends that on a principle of parity the same result should apply when the positions of the spouses are reversed and adds "there would be something almost indecent in a man turning his wife out of doors and giving information to the Police if he discovered she had committed some felony". This casenote was prescient as most modern jurisdictions, a century later, had altered their law accordingly.

only in wives<sup>75</sup> under the common law and for a husband to have been given the same exemption would have been to seriously weaken the edifice of marriage and the legal implications of it, particularly the authority and control of the husband over the wife. To have provided such a defence to the husband would have been seen as destructive of the vestigial remnants of his assured dominance, seen in the continuing sporadic effects of the doctrine of the unity of marriage.

### EARLY STATUTORY REFORM OF CRIMINAL LAWS SPECIAL TO WIVES

John R Wunder noted that it has been thought that in nineteenth century America “marital matters in farming communities tend[ed] to be conservative, with little room for women to escape”<sup>76</sup> but the reality was “a mixture of morality and economic expediency...crafting the law in instrumental ways so as to protect the integrity and earning power of the family”. Texas in 1845 and Kansas in 1859 gave some early degree of protection for married women’s property rights in their State Constitutions.

The development of civil and political rights was often a function of the intraregional or interregional societies, with the agrarian sector seeing women as closer worthy equals, out of practical working necessity. “In the case of suffrage, the motives behind the legal and constitutional reforms were more varied. In the East, entrenched political structures prevented broader social change; in lonely Wyoming there were no established political machines and accordingly there was no established opposition to the idea of women’s suffrage.”<sup>77</sup> To grant new legal rights to wives and women would invariably involve a desultory process, but to declare the recognition of existing rights involved no political disquiet. So, Massachusetts had

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<sup>75</sup> Lord Coke was the first to declare definitely that there was a vital difference between the position of the husband and that of the wife in terms of the accessorial immunity: 1 Hale PC 621; Joseph Chitty, *A Practical Treatise on the Criminal Law*, 2 ed, (1826) Samuel Brooke, Pater-Noster Row, London, vol 1 p265 “The only relation which excuses the harbouring a felon is that of a wife to her husband, because she is considered as subject to his controul, as well as bound to him by affection. But no other ties, however near, will excuse...”

<sup>76</sup> John R Wunder (ed), *Law and the Great Plains, Essays on the Legal History of the Heartland* (1996) Greenwood Press, Westport, Connecticut, p18.

<sup>77</sup> Mari J Matsuda, *The West and the Legal Status of Women: Explanations of Frontier Feminism* (1985) 24 Journal of the West 50, 54.

by 1862 a statute that expressly provided that a wife could not be an accessory after the fact to her husband's crime.<sup>78</sup> Even in more emancipated times than its medieval roots ever envisaged, the role of a wife to receive her husband was specifically protected by law.

In an early nineteenth century<sup>79</sup> American decision, Dewey J could say:

The humanity of the criminal law does, indeed, in some instances, consider the acts of the wife as venial, although she has in fact participated with her husband in certain acts, which, on the part of her husband, would constitute an offence, as against him; upon the ground that much consideration is due to the great principle of confidence which a feme coverte may properly place in her husband, as well as the duty of obedience to the commands of the husband, by which some femes coverte may be reasonable supposed to be influenced in such cases.<sup>80</sup>

Canada and New Zealand as pioneering societies codified their respective criminal law within a few months of each other in 1893 and both had thereby abrogated the doctrine of marital coercion. The first *Canadian Criminal Code*<sup>81</sup> introduced a bold original<sup>82</sup> provision defining the accessory after the fact offence and its exceptions. Full marital equality was granted so that in Canada at least the husband had finally caught up with the wife in terms of securing access to a specific criminal defence. This development left behind over one thousand years<sup>83</sup> of common law as by s63(2) of the 1892 Code it provided:

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<sup>78</sup> Charles Almy, Jr, and Horace W Fuller *The Law of Married Women in Massachusetts* (1878), George B Reed, Boston, p63 referring to Gen. St. c. 168 §6.

<sup>79</sup> In the same era the English Criminal Law Commissioners in their Second Report in 1845 *Parliamentary Papers* (1846), Vol 24 p12 (*Alison's Principles of the Criminal Law of Scotland*, p669 was quoted), sought the enactment of a provision reflective of the common law, whereby a wife would not be criminally liable for receiving, harbouring, concealing or aiding the escape from justice of her husband. Ibid p84.

<sup>80</sup> *Commonwealth v Lewis* (1831) 1 Metcalf 151.

<sup>81</sup> s63(1) *Criminal Code 1892* [Can].

<sup>82</sup> Don Stuart, *Canadian Criminal Law: A Treatise* (1982), The Carswell Co Ltd, Toronto at p507. In *Paskazia d/o Kabaikye v Reginam* (1954) 21 EACA 359 Court of Appeal for Eastern Africa (Worley AP, Jenkins AVP, Briggs JA), the appellant was convicted of being an accessory after the fact to murder on the basis that she gave a false account to hinder the proper investigation and allowed the murderer to escape. The appellant was originally charged with the murder of her co-wife. Section 387 *Penal Code* [Tanganyika] defined an accessory after the fact as "a person who receives or assists another who is, to his knowledge, guilty of an offence in order to enable him to escape punishment. Section 387(2) prescribed an exception relating to husbands and wives. But at p360 the court said, "It is sufficient to say that in the instant case the exception for a wife is not relevant, since the murder of the woman Aurelia (if she was murdered) was almost certainly committed at a time when the appellant's husband was in prison and could not have taken a hand in it or been privy to it."

<sup>83</sup> J H Baker, *The Common Law Tradition Lawyers, Books and the Law*, (2000), The Hambledon Press, London, at p177: "A married woman has some kind of defence if accused with her husband, though the explanation is not here stated (in reviewing some Early Newgate Reports from the 14<sup>th</sup> century) [compare 97

No married person whose husband or wife has been a party to an offence shall become an accessory after the fact thereto by receiving, comforting or assisting the other of them, and no married woman whose husband has been a party to an offence shall become an accessory after the fact thereto, by receiving, comforting or assisting in his presence and by his authority any other person who has been a party to such an offence in order to enable her husband or such other person to escape.<sup>84</sup>

But the original 1892 provision while providing equality to the husband did not give him full unrelenting equality in the scenario where “any other person” had been involved. A wife was immunised in a husband plus other situation, whereas a husband was only immunised in relation to his wife. This asymmetry was rectified in 1976,<sup>85</sup> by wholly removing the third party exception in favour of the wife, rather than granting it too to the husband.<sup>86</sup>

New Zealand by contrast granted the protection against accessorial liability to only a wife in 1893. It was further reproduced in s92(2) *Crimes Act 1908* [NZ]:<sup>87</sup>

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Selden Soc. 179 (1329)]. The reporter in one case wonders whether the rule is confined to receiving her husband after the fact (D6)”.

<sup>84</sup> The operative phrase, “receives, comforts or assists” is obviously wide and applies to anyone who helps in any way. See *R v Young* (1950) 98 CCC 195 (Qué: CA). An ambitious attempt to immunise drug trafficking by this provision was stopped in *R v O'Connor* (1975) 23 CCC 2d 110 (BC: CA) McFarlane J delivering the judgment in which a husband transported to his home for the use of his wife and himself drugs which had been purchased out of their joint funds, transporting drugs to a second person, his wife, constituted trafficking. At p112, after reference to *R v Kowbel* in the Supreme Court, it was said “that the effect of that judgment should not be extended to mean that one spouse cannot, as a matter of law, transport drugs to the other.”

<sup>85</sup> In 1976 the Canadian Parliament repealed by SC (1974-1976) s7 c66 the original s23(3) *Criminal Code Act 1892*. It introduced a section which removed the immunity given to a wife only in respect of helping a person other than her husband. The spousal immunity contained in s23(2) now reads: “No married person whose spouse has been a party to an offence is an accessory after the fact to that offence by receiving, comforting or assisting the spouse for the purpose of enabling the spouse to escape.”

<sup>86</sup> V Gordon Rose, *Parties to an Offence*, (1982) Carswell Press, Toronto at p176 “Spouses occupy a special position in the law of accessories; presumably in the interests of preserving marital accord.” See *R v Pedderson* (1979) 47 CCC (2d) 375 (Alta: CA).

<sup>87</sup> Jas M E Garrow, *The Crimes Act (Annotated)*, (1914) The Law Book Company of New Zealand Ltd, Wellington at p53 noted that s92(2) *Crimes Act 1908* [NZ] provided “no corresponding privilege in the case of a husband who assists his wife to escape after she has committed a crime”. The Court of Appeal concluded in *R v McKeachie* [1926] NZLR 1, 6 that the abolition of the rule that a wife cannot be an accessory after the fact to her husband’s offence “is unquestionably a matter for the legislature”, as the common law was very clear it applied only to a wife. The common law privilege applied only to a wife, who did not need to strictly prove her marriage to gain this privilege. In Australia it was suggested that legislation should provide immunity similar to that provided by the common law based, not upon marriage, but upon “the existence of a working relationship between a man and a woman living together as husband and wife”. This view was rejected because of the difficulty of providing such a relationship and the fact that the State was less concerned with preserving the stability of de facto relationships than with preserving the stability of marriages: see Law Reform Commissioner (Victoria) Report No 3, *Criminal Liability of Married Persons (Special Rules)*, (Melbourne, June 1975), para 81-84.

(2) No married woman whose husband has been a party to an offence shall become an accessory after the fact thereto by receiving, comforting, or assisting her husband, or by receiving, comforting or assisting in his presence and by his authority any other person who has been a party to such offence, in order to enable her husband or such other person to escape.

But s71(2) *Crimes Act 1961* [NZ] finally introduced spousal equality by introducing the privilege to a “married person” rather than one or both nominated spouses.<sup>88</sup> But no offence has been exempted from the defence, so that in New Zealand spouses are protected even in relation to being an accessory after the fact to murder.<sup>89</sup> Since 26 April 2005<sup>90</sup> in New Zealand the privilege or immunity has been recontoured to accommodate the existence of civil union partnerships<sup>91</sup> but not de facto arrangements.<sup>92</sup> Thus the current New Zealand position is:

No person whose spouse or civil union partner has been a party to an offence becomes an accessory after the fact to that offence by doing any act to which this section applies in order to enable the spouse or civil union partner, or the spouse, civil union partner, and any other

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<sup>88</sup> “(2) No married person whose spouse has been a party to an offence shall become an accessory after the fact to the offence by doing any act to which this section applies in order to enable the spouse, or the spouse and any other person who has been a party to the offence, to escape after arrest or to avoid arrest or conviction.” Peter Burns, *A Casebook in the Law of Crimes*, (1972) 2 ed Sweet & Maxwell (NZ) Ltd, Wellington p290 notes that “the protection afforded by s71(2) *Crimes Act 1961* [NZ] extends to either spouse whereas formerly it was granted only to the wife of a party to an offence” [This is incorrect. It always applied to the wife in relation to the husband and in relation to the husband’s co-principal, but it was now extended in gender-neutral terms to all variants, for the first time]. JB Garrow and R Caldwell, *Garrow & Caldwell’s, Criminal Law in New Zealand*, (1981), 6ed, Butterworths, Wellington, p75 refers to s67 *Crimes Act 1961* as a new section which also applies to proceedings under the *Summary Proceedings Act 1957*. P R H Webb, *Family Law*, New Zealand Ed. (1974) Butterworths, Wellington p157 states that s71(2) *Crimes Act 1961* [NZ] clearly “overrules” the English Court of Criminal Appeal decision in *R v Holley* as far as New Zealand is concerned.

<sup>89</sup> S176 *Crimes Act 1961* is the offence of accessory after the fact to murder. Because of s71(2) a married person is exempt from prosecution under this offence.

<sup>90</sup> s7 *Relationships (Statutory References) Act 2005* (2005 No 3) substituted subsection (2).

<sup>91</sup> It now provides: “(2) No person whose spouse or civil union partner has been party to an offence becomes an accessory after the fact to that offence by doing any act to which this section applies in order to enable the spouse or civil union partner, or the spouse, civil union partner, and any other person who has been party to the offence, to escape after arrest or to avoid arrest or conviction.” A civil union is defined in ss4 and 5 *Civil Union Act 2004* [NZ]. J Bruce Robertson ed, *Adams on Criminal Law*, Thomson, Wellington (2003) p1-546.

<sup>92</sup> *Leaman v The Queen* [1986] Tas R 223. In *R v Elisha Barbara Brett*, unreported, High Court Auckland, CRI-2006-44-7302, 8 August 2007, Priestley J, the accused “could be termed a de facto partner” and although “she comes close to the policy of s71(2)” was outside it. At [14] “It seems, with respect, anomalous that although s71(2) has recently been amended ... to include a civil union partner, that there has been no extension to de facto partners, despite legislative initiatives in recent years extending the substantive law which applies to husbands and wives to de facto couples, such as the *Property (Relationships) Act* and other family law legislation.”

person who had been a party to the offence, to escape after arrest or to avoid arrest or conviction.<sup>93</sup>

This exceptional law only protects couples, a gender-neutral expression, who have attained the necessary legal and formal commitment.<sup>94</sup> But other jurisdictions have widened the privilege beyond the spouses so that it applies to the extended family.<sup>95</sup> This was achieved in parts of the United States in the middle of the twentieth century. The House of Commons in 1966 learned that under Greek criminal law<sup>96</sup>, a very wide list of people is automatically immune from accessorial liability after the fact. An attempt to replicate that Hellenic model as statutory English law foundered when the *Criminal Law Bill 1966* [UK] was debated.

But in *'Archbold's Criminal Pleading, Evidence and Practice'*<sup>97</sup> in 1962, (immediately before the decision of the Court of Criminal Appeal in *R v Holley*) the privilege was synthesised in these terms:

If a married woman incites her husband to the commission of a felony, she is an accessory before the fact; but she cannot be treated as an accessory after the fact for receiving her husband, knowing that he has committed treason or felony.

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<sup>93</sup> s71(2) *Crimes Act 1961* [NZ], amended from 26 April 2005, by s7 *Relationships (Statutory References) Act 2005* [NZ].

<sup>94</sup> A de facto female partner is not a wife for the purposes of any uxorial defence: *Brennan v Bass* (1983) 35 SASR 311.

<sup>95</sup> Kenneth C Sears and Henry Y Weihofen, *'May's Law of Crimes'*, (1938) 4 ed, Little Brown & Co, Boston at p91: "According to the older authorities at least, a wife could not be an accessory after the fact to her husband's felony...no other relationship, except that of wife, carried with it any exemption. Blackstone stated the reason to be that the husband was presumed to have coerced the wife [4 Blackstone *'Commentaries'* 28] but Hawkins stated that the indulgence was granted the wife in consideration of the duty and love she owes her husband [2 Hawkins *'Pleas of the Crown'* c29 s34]. Some modern statutes extend the immunity to other relations than the wife. For example; Callaghan's *'Illinois Statutes Annotated'* ch38 §613.

<sup>96</sup> Mr Percival MP advised the House that under the Greek Criminal Code the exceptions for the equivalent of an accessory after the fact apply not only to the husband and wife but also "children, natural and adopted" as well as other lateral and vertical family members defined in extremely wide terms. *Parliamentary Debates*, House of Commons, *Official Report*, Standing Committee F, Criminal Law Bill [Lords] Third Sitting, 1 June 1967, Her Majesty's Stationery Office, London, p129.

<sup>97</sup> TRF Butler, and M Garsia *'Archbold Criminal Pleading Evidence & Practice'* (1962) 35 ed, Sweet & Maxwell, para 46. This formulation is little different from that advanced by Hale 300 years earlier; see footnote 6 above. G Godfrey Phillips *'Outlines of Criminal Law Based on Lectures Delivered in the University of Cambridge Courtney Stanhope Kenny LLD FBA'*, 14 ed (1933) Cambridge University Press p74: "if a husband who has committed a crime is received and sheltered by his wife she is not regarded by the law as becoming by such "bare reception" an accessory after the fact (or a participator in his treason; for she is bound to receive him."

This is a striking result. A married woman can induce her husband to commit an offence and she is liable for that act under the criminal law and so is he if he carries the offence out. But if the husband commits an offence, to the knowledge of his wife, she alone commits no offence if she harbours him after his crime, including actively secreting any stolen property; whereas if the roles are reversed the husband has no protection under the criminal law. The focus therefore appears to be on the need for the husband to be able to rely on receiving safe accommodation; but if the wife inside that very home had incited her husband to steal from another home, which he later did, and then he returned with the loot to that home, the law immunises her for the second phase of the crime but not the first – unless the first phase is depicted as an intra-spousal conspiracy, which would provide for the immunity of both spouses, as they cannot conspire alone together. Any prosecutor in that simple scenario would be perplexed<sup>98</sup> why the law allows the husband to be charged with the actual theft which would not have occurred save for the incitement of the wife, yet she can only be charged with incitement if there is a witness other than her husband to the incitement – as he is not a compellable witness against his own wife in this regard.

In the accessory after the fact mode there will often be an agreement between the wife and husband to harbour him. This could not be charged as a conspiracy, and it also provides an immunity under the accessory after the fact rule. But it is inconsistent with the position under conspiracy where a marital agreement involving a third party is itself no objection. Under accessory after the fact the wife's action in respect of a third party is protected. The policy between conspiracy and accessory after the fact appears to be indistinguishable. Why there has not been a systematic and coherent approach to uxorial immunity is unclear. The consequence of ad hoc legislation, the unavailability of time slots in busy legislatures and the misplaced belief that this is, in the criminal law terms, an issue of little consequence are all implicated. Yet the privilege actually constitutes a significant invasion of the principle of responsibility.

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<sup>98</sup> Richard Card, *Card, Cross & Jones, Criminal Law*, (2001) 15 ed, Butterworths, London at p549 stated: “It seems odd that if a husband and wife agree between themselves to commit an offence they cannot be convicted of conspiracy, whereas if the substantive offence is committed by one of them pursuant to the agreement they can both be convicted of that offence, as perpetrator and accomplice respectively.”

The common law exemption of wives as accessories after the fact was directly considered in 1963 by the Court of Criminal Appeal.<sup>99</sup> In *R v Holley*<sup>100</sup> a wife had been convicted of being an accessory after the fact to a felony committed by her husband and his associate. The two males had broken into a home and burgled items from it. The wife was the getaway driver and drove them back to the Holley home where the items were divided up. The wife was charged with the joint enterprise of the burglary and she was also charged with being an accessory after the fact to the burglary of the husband's associate. There was no charge against Mrs Holley of being an accessory after the fact to her husband's burglary. At the trial the jury was directed that "for reasons which you may think are common sense as well as merciful"<sup>101</sup> a wife could not be an accessory after the fact to her husband (explaining the absence of the charge against her, in that regard).

We expect our wives to help us and if wives, owing the duty that they do to their husbands, help when husbands have broken the law, the law mercifully says that wives are in an impossible position. They have got a duty to their husbands on the one hand and a duty to society on the other. If a wife puts the duty to her husband first, she has not broken the law. That is a merciful view.<sup>102</sup>

The trial judge then directed that a particular complexity arose in the case. Although Mrs Holley could not be charged with being an accessory after the fact to what her husband had done, she certainly could be charged with being an accessory after the fact to her husband's associate's offence, who with him had been intimately involved in the actual burglary. But the complication was that whatever Mrs Holley did for her husband, was equally applicable to helping the associate. The judge ruled that because of the abolition of the presumption of marital coercion in 1925, the proposition that a wife could not in law be guilty of concealing a felon jointly with her husband no longer existed in English law:

I direct you that in law if a wife does something for two people, one of whom is her husband, to assist in escaping apprehension, knowing that they had committed a crime, then she is accessory after the fact to that crime in respect of the man to whom she is not married.<sup>103</sup>

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<sup>99</sup> *R v Holley* [1963] 1 All ER 106.

<sup>100</sup> [1963] 1 All ER 106 (CCA) (Lord Parker CJ, Gorman and Fenton Atkinson JJ).

<sup>101</sup> [1963] 1 All ER 106, 107 C (CCA), where the summing up to the jury is set out. This does not appear in the report of the case in *R v Holley* [1963] 1 WLR 199. (CCA)

<sup>102</sup> *Ibid* 107 D.

<sup>103</sup> *Ibid* 107 F.

He postulated that the alternative view of the law would have required him to direct the jury to dismiss that particular count as “there is no evidence against her for being an accessory after the fact to [the associate] which is not also evidence of performing precisely the same service for her husband”. The jury acquitted Mrs Holley of the joint enterprise, but convicted her of being an accessory to the associate, for which she was fined £10 or to one month’s imprisonment in default. The case was certified<sup>104</sup> by the trial judge as raising a pure point of law being fit for appeal. On appeal Lord Parker CJ delivered a terse judgment on behalf of the Court of Criminal Appeal, to dismiss Mrs Holley’s appeal. That court accepted that prior to the alteration of the marital coercion law in 1925 upon the passage of s47 *Criminal Justice Act 1925* [UK], “a wife could not be guilty of being an accessory after the fact for receiving her husband knowing that he had committed a felony”.<sup>105</sup> Lord Parker conflated common law of accessorial immunity with common law marital coercion and in one sweeping sentence gave them a joint requiem.

The basis of [accessorial immunity] is that there was, under the old common law, a presumption, albeit a rebuttable presumption, that an act done by a wife in the presence of her husband was deemed to have been done under his coercion.<sup>106</sup>

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<sup>104</sup> Pursuant to s3(b) *Criminal Appeal Act 1907* [UK].

<sup>105</sup> [1963] 1 All ER 106, 108 G. Brett, Waller and Williams, *Criminal Law Text and Cases* (1993), 7 ed, Butterworths, Sydney, p697 para 12.42 remarks that the presumption of marital coercion applied also in relation to a wife acting as an accessory after the fact to a felony committed by her husband. A general discussion of the common law position is set out in *Ewart v Fox* [1954] VLR 699.

<sup>106</sup> The Law Reform Commission, Ireland (LRC 43 – 1992), *Report on the Law Relating to Dishonesty* para 2.36: “In several respects, the common law adopted the metaphor of the convergence into one legal person of husband and wife”. A consequence of the express preservation of marital coercion may be the abrogation of the exemption of a wife from being an accessory after the fact to her husband’s offence. It has been doubted though that this was an intended effect of the statutory provision, J C Smith & Brian Hogan, *Criminal Law*, (1965) London p131. Rupert Cross & P Asterley Jones, *An Introduction to Criminal Law*, (1959) 4 ed, Butterworth and Co (Publishers) Ltd, p76 notes that while a husband may be convicted of receiving stolen goods from his wife, *R v M’Athey* (1862) Le & Ca 250, that the converse position is now governed by s47 *Criminal Justice Act 1925* [UK].

The court further asserted that no authority existed<sup>107</sup> to demonstrate that the accessorial immunity also applied if the person being assisted was not her husband but a third party who had acted in the same offence with him.<sup>108</sup> To this was added the confusing statement “Logically, there is no reason why the presumption of coercion should not apply in that case also”. Lord Parker then reasoned that as there was no evidence that Mr Holley had coerced his wife, so it followed that the trial judge’s ruling was correct, that accessorial immunity was not available.

This judgment is seriously awry.<sup>109</sup> No authority at all was cited in the judgment for the interdependability of martial coercion and accessorial liability. While they probably had a common origin in the control of the husband and the converse duty of the wife to protect the head of the household, the two special positions of married women under the criminal law had considerably divaricated. The coercion doctrine was significantly more onerous in requiring as a minimum the presence of the husband at the time of the offence and also it

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<sup>107</sup> P R Glazebrook (ed), *Sir Matthew Hale Historia Placitorum Coronae*, vol 1, p48 accepted that the exemption did apply when the wife gave asylum to her husband and a third party. Even in relation to treason. Hale accepted that “she shall never be adjudged a traitor barely for receiving her husband, that is a traitor, or for receiving jointly with her husband any other person, that is a traitor, unless she were also consenting to the treason, for it shall be entirely adjudged the act of her husband”. In *Dey’s Case* 37 Edw III Coram Reffe Rot 83 Lincoln a wife was acquitted of harbouring felons jointly with her husband: “Quia ipsa, in vita mariti sui de aliquot receptamento in presentia viri sui, cui contradicere non potuit, occasionari non de bet.” This decision was noted by Coke 3 *Institutes* 108, 1 Hale PC 47 and 8 Car & P 553. Mrs Holley had been acquitted of the burglary so she conclusively had not committed it and was therefore only giving shelter to her husband and his associate. The Criminal Law Commissioners of 1833 took the view that the state of the common law was that a wife was not responsible for harbouring a third party in her husband’s presence and with his authority: Seventh Report (1843) *Parliamentary Papers*, xix 36. The next Commissioners in 1845 acknowledged that the present law only applied when a third party was harboured jointly with her husband. But they proposed that the law be specifically amended to cater for that scenario: Second Report (1845) *Parliamentary Papers*, xxiv 118.

<sup>108</sup> At one time the Penal Code in parts of South Africa extended the immunity so that she was protected in relation to acts assisting her husband but also in relation to her acts performed to benefit any other party to the substantive offence, if she did so in the presence of her husband and by his authority. See §81 Act 24 1886 (C). This Code only applied to the Transkeian territories.

<sup>109</sup> J C Smith ‘*Case and Comment*’, [1962] Crim LR 829 described it as “a surprising ruling”. *R v Holley* had been subjected to trenchant criticism. In ‘*Russell on Crime*’ 12 ed 1964 p166 it is described as “unsound and should not be followed”. The Criminal Law Revision Committee did not deal with any criticism of *R v Holley*, neutrally reaching the conclusion that the uxorial immunity had been invalidated by the decision: Seventh Report ‘*Felonies and Misdemeanours*’ Cmnd 2659 (1965). In *R v Holley*, in so far as it purports to decide the validity of the common law rule of immunity, is a wholly unsatisfactory treatment. The decision of the Court of Criminal Appeal was reserved overnight and its very concision, occupying less than a page of the Reports, betrays its lack of authoritativeness. In addition Mr Awdry MP stated after making express reference to *R v Holley* that the “state of the law seems to be in some doubt”: Parliamentary Debates, House of Commons, *Official Report, Standing Committee F, Criminal Law Bill [Lords] Third Sitting* (1965) Her Majesty’s Stationery Office, London, p124. Mr Grieve MP was even more scathing about that decision of the Court of Criminal Appeal; Parliamentary Debates, House of Commons p 1421, 13 July 1967.

applied to all offences except murder and treason. The accessorial liability only applied to felonies and was never extended to misdemeanours<sup>110</sup> and certainly not to purely summary offences. “The presumption of marital coercion also applied in relation to a wife acting as an accessory after the fact to a felony committed by the husband.”<sup>111</sup>

Further, coercion was never a component of the uxorial accessorial immunity. Rather than being a product of fear, it was a response out of love, loyalty and affection. Lord Parker’s decision meant that the United Kingdom Parliament in 1925 had unwittingly abrogated a criminal defence (the substantive uxorial privilege against post-felony accessoryship) which had existed for a thousand years.<sup>112</sup> At no stage in the almost four year period spanning the successive versions of the *Criminal Justice Bill* that occupied Parliament from 1922 did any person inferentially or expressly refer to this consequence as even a possibility. Nothing could have been further from what was actually intended in 1925, as it was the plain outcome of the legislative landscape to preserve and upgrade the law of uxorial substantive privileges, save for the limited abolition of the presumption from the marital coercion doctrine. To conclude that as a sidewind this ancient defence of accessorial immunity had perished upon the strengthening of the defence of marital coercion by its statutory format is not only an unintended consequence, but one flatly contrary to its intentment.

The error of Lord Parker CJ was exacerbated in that there was no requirement that the act of the accessory be done in the presence of the husband. So in 1849 Coltman J had said: “But if the part she took was merely for the purpose of concealing her husband’s guilt, and of screening him from the consequences, then I think she ought to be acquitted. A wife cannot be convicted of harbouring her husband, where he has committed a felony; in the mere circumstance of her attempting to conceal what may lead to his detection appears to come within the same principle.”<sup>113</sup> Further, marital coercion was rebuttable where the wife acted independently or of her own initiative<sup>114</sup> (which was evidence of her non-coerced state), yet if

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<sup>110</sup> Receiving stolen goods was a misdemeanor at common law.

<sup>111</sup> Brett, Waller and Williams, *Criminal Law Texts and Cases*, 7 ed, (1993) Butterworths, Sydney, p697.

<sup>112</sup> Glanville Williams, *The Criminal Law, the General Part* §138 n25.

<sup>113</sup> *R v M’Clarens, Middleton, Draddy and Draddy* (1849) 3 Cox CC 425, 426.

<sup>114</sup> *State v Weeden* (1927) 114 So 604 (Supreme Court of Louisiana). “the common law is the basis of the criminal law of [Louisiana]”: *Wharton’s Criminal Law* 11 ed pp128-129.

a wife acted in these ways it did not prevent her from the accessorial immunity. Indeed the immunity was strongly redolent of a basic duty in a wife to spontaneously act in these ways, as a function of her matrimonial responsibility.<sup>115</sup>

Lord Parker may have been influenced by the fact that since giving asylum to her husband is likely to be the most common form of wifely assistance, the husband's physical presence would give rise to the presumption of coercion. But this overlooks the reality that a wife may assist her husband in his absence in which case the marital coercion requirement would also be absent. It is, however, possible that the common law only intended that the immunity be available while the husband was present, thereby putting the accessory after the fact immunity into a double helix with the doctrine of marital coercion. This would mean that direct physical personal assistance was outside the purview of the criminal law, but other more indirect forms of assistance or help to the husband, distant in time and place, would be outside her immunity. It is also possible that over time there was severance from the original conjoined position and whereas the defence of marital coercion remained steadfastly pivotal on personal presence of the husband the immunity by accessory after the fact may have independently developed to protect actions of the wife to assist the absent husband.

In *R v Holley* it was counsel for Mrs Holley who raised the conjunction of marital coercion and accessorial immunity. It can be argued that the original common law defence was intended to deal only with the case where the wife was herself a principal in the offence. This does not appear to have ever been specifically discussed as a conceptual requirement of the defence at common law, but it may have been implicit. Against the background that an accessory after the fact at common law meant only an accessory who assisted someone who had committed a felony (but not a misdemeanour),<sup>116</sup> it is possible then, as some of the authorities suggested, that the marital coercion defence also only applied to felonies. The decision of *R v Holley* in October 1962 did not eliminate the accessoryship immunity but it had delivered a heavy body blow to it.

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<sup>115</sup> J C Smith, 'Case and Comment', [1962] Crim LR 829, 830. The conclusion made by Professor J C Smith is that marital coercion and accessorial immunity were two separate rules at common law, so that the terms of s47 *Criminal Justice Act 1925* [UK] were not intended to apply to accessorial immunity.

<sup>116</sup> *R v Field* (1943) 29 Cr App R 151. An accessory after the fact was itself a misdemeanour.

The Criminal Law Revision Committee within two years of the decision directed themselves that *R v Holley* had badly wounded the immunity. They proceeded on this assumption and said in their Seventh Report<sup>117</sup> that the common law defence should now disappear upon the passage of legislation that would remove the distinction between felonies and misdemeanours. As the common law defence was based on a post-felony role then that defence also fell. But it recommended the creation of a new offence to replace the common law offence. The uxorial defence, however, proved to be very contentious:

We are at first inclined to recommend that the offence should not apply to things done for a criminal by his or her spouse, parent or child. There is a case for such an exemption on compassionate grounds. On the other hand, it is difficult to devise a satisfactory exemption. Other family relationships, or perhaps professional or other relationships, might equally deserve protection, while there seems no strong reason for giving the exemption where, for example, a father and his grown-up son are both engaged in crime.

It is not at all obvious why the Committee decided that compassion was the operative normative factor. Tenderness of the law towards the wife was predicated on an understanding of her dilemma in terms of subjective decision-making, itself a function of spousal responsibility. The common law had directly inculcated that responsibility by imposing a duty on a wife to assist her husband.<sup>118</sup> The dilemma was obvious: “They have got a duty to their husbands on the one hand and a duty to society on the other. If a wife puts the duty to her husband first, she has not broken the law.”<sup>119</sup> The analysis did not turn on compassion at all but on her correlative duty from her matrimonial pact.

But the final recommendation was that the new offence should carry no class exception so no particular relationship would be exempted from the law. However, it commended as a safeguard against borderline prosecutions that the fiat of the Director of Public Prosecutions should be required as a condition precedent for any prosecution under the new offence.

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<sup>117</sup> ‘*Felonies and Misdemeanours*’, Cmnd 2659 (1965) para 31. Sellers LJ was the Chairman.

<sup>118</sup> P J Pace, “‘*Impeding Arrest*’ – *A Wife’s Right as a Spouse?*” [1978] Crim LR 82, 87 also refers to “the common law of a duty on spouses to cohabit and, secondly, the common law duty of a wife to receive her husband.”

<sup>119</sup> *R v Holley* [1963] 1 All ER 106, 107d.

Only four years later the common law position was abrogated by statutory intervention for England and Wales by s4(1) *Criminal Law Act 1967* [UK], when misdemeanours and felonies were finally assimilated for all purposes. A consequence of expunging felonies from the lexicon of the law was the understanding that the marital exemption necessarily fell too, as it was a product of the law of felonies. However, many other jurisdictions, including non-common law ones,<sup>120</sup> continue to provide for a version of the common law exemption, even though the former law distinguishing felonies from misdemeanours has long since perished in those jurisdictions.

#### PARLIAMENTARY CONSIDERATION OF THE ACCESSORY AFTER THE FACT IMMUNITY

After the Criminal Law Revision Committee<sup>121</sup> had wrongly reached the conclusion that as a result of *R v Holley* the common law exemption in favour of wives had been destroyed, it took little to lead to the conclusion that the defence should be expressly terminated by Parliament. It followed that the Parliamentary debates were all predicated on the false view that the common law position had already been set at naught.<sup>122</sup> To argue that the new statutory offence of assisting offenders (which was to replace and widen the common law offence of accessory after the fact) should also maintain a specific exemption for wives, was a forlorn hope.

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<sup>120</sup> David Harter, '*Criminal Law in Yugoslavia*', (1962) 5 *The Lawyer* 33, 35 noting that the former law of Yugoslavia provided that an accessory after the fact was immune from prosecution if that accessory was "the offender's spouse, whether husband or wife, relatives by blood in direct lineage, brother or sister, adopter or adoptee". The specific extension of the law to adopter and adoptee is unique. In the House of Commons Debates leading to the 1967 provision the similar law in Greece was considered: *Parliamentary Debates*, House of Commons, *Official Report*, Standing Committee F, Criminal Law Bill [Lords] Third Sitting, 1 June 1967, Her Majesty's Stationery Office, London, p129.

<sup>121</sup> Seventh Report '*Felonies and Misdemeanours*' *Criminal Law Revision Committee* (1965) Cmnd 2659

<sup>122</sup> P J Pace, "'Impeding Arrest"-A Wife's Right as a Spouse?' [1978] *Crim LR* 82, 86.

## STATUTORY REFORM OF THE COMMON LAW IMMUNITY

On 28 July 1966 the Joint Parliamentary Under-Secretary of State for the Home Office, Lord Stonham, introduced the *Criminal Law Bill 1966* [UK] which would have the effect of abolishing the division of crimes into felonies and misdemeanours.<sup>123</sup> At that juncture little other information was provided. The Bill was read the first time. At the second reading the Under-Secretary stated that the intention of the Bill included replacing

the present Common Law offence of being an accessory after the fact to felony – which will disappear with the abolition of felony. First, there will be a new general offence of doing acts intended to impede the apprehension or prosecution of offenders for arrestable offences. This will be generally similar to the present offence of being an accessory after the fact to felony. It will cover such conduct as driving a criminal away after a crime, providing a car for the purpose, hiding him from the police or destroying finger-prints or other traces of the crime.<sup>124</sup>

The House of Commons resolved that a Standing Committee should consider the Bill from the Lords. At the third sitting of Standing Committee F consideration was given to the position of wives if the proposed abrogation of the offence of accessory after the fact became law.<sup>125</sup> Clause 4 of the Bill was expressly stated to replace the common law offence of being accessory after the fact to felony, it being noted that no offence of being an accessory after the fact to misdemeanour existed.<sup>126</sup> In the House of Commons, during the Second Reading in Committee, one Member of Parliament argued that “the sacredness of the very special relationship of husband and wife”<sup>127</sup> necessitated the common law exemption be available to both spouses in the special legal relationship of marriage and be incorporated into the new offence as a specific defence. Mr Daniel Awdry MP moved an amendment to the wording of clause 4 which would exempt both spouses from the criminal law if they had harboured the other.

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<sup>123</sup> House of Lords Debates vol 750 p906, 28 July 1966.

<sup>124</sup> *Parliamentary Debates* House of Lords Debates p511, 1 November 1966. On 24 November 1966 the House of Lords resolved itself into Committee to consider the Bill.

<sup>125</sup> *Parliamentary Debates, House of Commons, Official Report, Standing Committee F, Criminal Law Bill [Lords] Third Sitting*, Her Majesty’s Stationery Office, London.

<sup>126</sup> *Ibid* p 123, per Mr Taverner.

<sup>127</sup> Mr Grieve MP, House of Commons Debates, 9 February 1966 vol 1, col 24, *Official Report*; 1965-66 Second Reading in Committee.

Provided that it shall not be an offence for the husband or wife of a person who has committed an arrestable offence to harbour such person or to do any act to impede his apprehension or prosecution.<sup>128</sup>

He observed that the Criminal Law Revision Committee had initially been inclined to recommend that the new offence should not apply to things done for a criminal by his or her spouse, parent or child. The Committee had based its initial recommendation for the exemption “on compassionate grounds”<sup>129</sup> but had also been concerned about the difficulty of devising a satisfactory exemption, as other family relationships might equally deserve protection, yet there seemed no reason for exempting a father and his adult son when they had engaged in joint crime. It was argued that exempting parents and children was “in a totally different position” from that of spouses who are “regarded by the law as one person”. During the debate parliamentarians were concerned that an open-ended exemption would even prevent the prosecution of a wife who shot a policeman pursuing her husband.<sup>130</sup> Lawmakers were not prepared to sanction even in the name of marriage such appalling conduct. Any derogation from the generality of the offence (by an uxorial defence) would have to be very narrowly drawn to meet public policy concerns. The solution advocated was to propose a variation of the government amendment, so that only more neutral or passive conduct involved in harbouring the other spouse would become exempt under the new statute. This opposition amendment was countered by an undertaking from the Under-Secretary of State to consider whether the underlying policy of the proposal and its wording met the expectations of the government. Later another attempt to provide a thematic spousal defence was proposed. This amendment would have exempted “the husband or wife or parent or child natural or adopted of the person who has committed the arrestable offence.”<sup>131</sup> For this reason the original amendment (above) was acknowledged as being unnecessarily wide and it was proposed to delete the words “or to do any act to impede his apprehension or prosecution”.<sup>132</sup> The government saw the issue as raising “a difficult question” as the intention was to ensure

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<sup>128</sup> Ibid p 124.

<sup>129</sup> Seventh Report, *‘Felonies and Misdemeanours’ Criminal Law Revision Committee*, Cmnd 2659, para 31.

<sup>130</sup> Later in the debate another Member stated that a form of wording could be provided which exempted the immediate family relationship in respect of harbouring, while leaving out any license to shoot policemen. Parliamentary Debates, House of Commons, *Official Report, Standing Committee F, Criminal Law Bill [Lords] Third Sitting*, Her Majesty’s Stationery Office, London, p127, 1 June 1967.

<sup>131</sup> HC Debate 13 July 1967 vol 750 col 1415.

<sup>132</sup> Ibid p125.

that even a spouse could not destroy evidence which might lead to the arrest of the other spouse.

A further difficulty is the extension of the various relationships. What has been said about the husband and wife can, to some extent, apply to the mother and son. It might seem hard if a mother were not allowed to harbour her son, whereas a wife could harbour her husband. These questions of relationships are not simple and it is not satisfactory to put it on the basis that, in law, the husband and wife are one. This is a rule which applies for some purposes only. It derives from two ancient principles, that for certain purposes they were one person and that the wife was also regarded as subordinate to the husband. Invoking that ancient rule is not satisfactory for drawing a distinction between husband and wife on the one hand and parent and child on the other.<sup>133</sup>

In response, Mr W R Rees-Davies MP emphasised that the state of matrimonial law compels spouses to live together as the marital relationship realistically requires spouses to live in the same dwelling, so an inordinate burden is placed upon any spouse by a law which would prevent one giving passive assistance to the other.<sup>134</sup> Mr Bell MP was concerned that the proposed law would be extremely harsh where a parent could be convicted of harbouring a child as there was a moral obligation to do so and it would go against human nature for spouses not to harbour each other also. “These are basic relationships. The family is older and more fundamental than the State, and the obligations between spouses, parents and children are more fundamental and ought to have precedence and priority over the duties which someone has to the State, which is a very much more superficial element in human affairs.”<sup>135</sup> The response from the government was an undertaking to consider the points raised further. Mr Taverne MP emphasised that the offence would not occur where a wife merely allowed her husband to stay in the matrimonial home as the clause provided for the defence of lawful authority or reasonable excuse.

Mr Taverne: The simple case of the husband staying at home with his wife would not be a case where an offence was committed –

Mr Rees-Davies: If a constable came to the door and asked, “Is your husband there?” and she said, “No”, she would be committing an offence.

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<sup>133</sup> Ibid 126.

<sup>134</sup> Ibid 126-127.

<sup>135</sup> Ibid 127. Mr Percival MP argued against the clause on the basis of the special nature of marriage and added “We must not try to understand matters all the time or to think only on legal bases”.

Mr Taverne: Yes, but simply allowing her husband to stay at home would not be an offence. However, that is one of the points which we shall look at, and we hope to be able to draft a suitable amendment.<sup>136</sup>

The issue returned to the House of Commons when the clause was read a second time. The tension was to create a practicable formula which avoided a collision between the rationality of the law and the special nature of family life.<sup>137</sup> A number of speakers stated that the common law rule was profoundly sensible in taking the attitude that a spouse would not be criminally liable for harbouring the other. The clause would remove that long-standing protection. It would have the effect of separating the unity of spouses. Mr Grieve MP noted that a second reason for the exemption was the concept of marital coercion, a rule which “might be regarded as a little out of date in 1967”, but apart from these two reasons the wholly special relationship of husband and wife should be protected by the law, he argued. “The mere fact of the marriage is, I suggest, justification in itself, provided that no positive act of wrongdoing is done.” In due course, the Under-Secretary reported to the Commons that any variant exempting spouses from the criminal law in the new offence, would fall beneath the position in principle that was driving the reform. Mr Taverne MP stated that no formula had been devised which would protect a spouse from simply remaining in the matrimonial home, yet would not protect that spouse from serious acts such as the provision of false information or the destruction of evidence.

It would seem impossible by Statute to draw a line which would distinguish the circumstances in which the public interest might require a prosecution and those where clearly it would not. One would not wish to see a wife prosecuted simply because, on being asked by a policeman if her husband was in the house, she replied, “No”, although she knew that he was in the house.<sup>138</sup> However, he specifically acknowledged<sup>139</sup> that the proposed law which expressly contained the defences of “lawful authority” or “reasonable excuse,” would cater for and thus protect from criminal liability, either spouse who simply gave comfort to the other, by permitting that spouse to enter the matrimonial dwelling, after having committed the

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<sup>136</sup> Ibid 129.

<sup>137</sup> Parliamentary Debates, House of Commons vol 750 p1416-1417, 13 July 1967.

<sup>138</sup> Ibid p1425.

<sup>139</sup> HC Debates 1 June 1967 vol 10 col 129, Official Report 1966-67, Standing Committee F.

qualifying offence. In this way some form of the common law, diluted as to its content but doubled in terms of its subject of exemption, would persist. By s4(1) *Criminal Law Act 1967* [UK] the ancient common law defence was terminated and a more insipid gender-neutral substitute was created.

The House of Commons in 1966 wrongly concluded that no statutory formula could be found to absolve the wife from passive conduct yet leave her to be liable for active furtherance of the husband's crime, eg selling or pawning the goods he had freshly burgled. The House of Commons was distractedly concerned too that a wife who shot a police officer in pursuit of her husband might somehow be able to claim immunity for the killing.

Because it was not possible to anticipate those cases where the circumstances may not be in the public interest for a prosecution under the new offence, the solution finally decided upon was to require the consent of the Director of Public Prosecutions as a condition precedent to any prosecution, who would thereby apply an overall measure of consistency in decision-making and who would factor in the plight of a spouse, in real terms. The Under-Secretary noted that prosecutions of any spouse for being an accessory after the fact to the other spouse "have been extremely rare". With that, proposed amendments to alter the government clause lapsed and the Bill was enacted.<sup>140</sup>

Apart from equalising the immunity between spouses, the other significant development was the abolition of the distinction between felonies and misdemeanours. By s1 *Criminal Law Act 1967* [UK] the common law offence of accessory after the fact, which was felony-dependent, no longer existed. It was, however, partially revived by s4 *Criminal Law Act 1967* [UK] which created a new statutory offence generally referred to as the offence of 'assisting offenders'. It provides:<sup>141</sup>

Where a person has committed an arrestable offence, any other person who, knowing or believing him to be guilty of the offence or of some other arrestable offence, does without

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<sup>140</sup> Ibid p2659, 21 July 1967.

<sup>141</sup> A very similar, almost identical, provision was later introduced in 1971 as s90 *Criminal Procedure Ordinance Cap 221* [HK] by s7 *Ordinance 5 of 1971* [HK].

lawful authority or reasonable excuse any act with intent to impede his apprehension or prosecution shall be guilty of an offence.

Since that enactment in 1967, the appellate courts in two common law jurisdictions, New South Wales and Hong Kong, have closely examined the uxorial accessorial defence, since its abolition in England and Wales.

#### NEW SOUTH WALES COURT OF CRIMINAL APPEAL UPHOLDS THE EXISTENCE OF THE IMMUNITY

In an important but unreported decision from the New South Wales Court of Criminal Appeal<sup>142</sup> the issue was whether there a wife could, as a matter of law, be convicted as an accessory after the fact of a felony, committed by her husband. That jurisdiction had very rarely encountered this issue. In 1932 the same court in *R v Williams* had held that exemption for accessorial liability, protected wives<sup>143</sup> only. In that case a husband was found guilty of being an accessory after the fact to the murder of a child by his wife. In a separate and subsequent trial the wife was charged with that murder and acquitted. The Court of Criminal Appeal affirmed the conviction of the husband on the basis that because the principal had been acquitted it did not preclude another being convicted for aiding and abetting or being an accessory after the fact.<sup>144</sup>

The appeal in 1996 turned on the common law. The facts disclosed that a husband had stolen a large sum of money from a woman. With the assistance of his wife the husband used some of this money to purchase travel tickets on an overseas flight and converted the balance into travellers' cheques. The husband, wife and their child decamped to the United States. The wife had, together with her husband, purchased foreign currency and travellers' cheques from various banks at different locations. She signed travellers' cheques and secreted them inside

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<sup>142</sup> *R v CAL* unreported, New South Wales Court of Criminal Appeal 24 October 1996, Handley JA, Grove & Ireland JJ.

<sup>143</sup> In *Leaman v The Queen* [1986] Tas R 223 it was held that someone living in a de facto relationship was not a "married person" for the purposes of the accessorial exemption: see s6(2) *Criminal Code* [Tas].

<sup>144</sup> *Morris v Tolman* [1923] 1 KB 166 applied.

magazines which were sent to her sister in England to mind for her. At their trial a certificate of marriage was adduced in evidence.<sup>145</sup> The judge proposed to direct the jury as a matter of law to return verdicts of acquittal of the wife on the six charges of being an accessory after the fact of her husband's larceny. The material part of each charge she faced was:

and it is further charged that (the wife) knowing the said (husband) to have committed the said felony in the manner aforesaid, afterwards, to wit, between (specified dates) at Sydney in the State of New South Wales did receive, harbour, maintain and assist (her husband).<sup>146</sup>

The jury acquitted the wife in accordance with a direction in law of the judge, that she was entitled to rely upon her marriage as a complete defence; the Director of Public Prosecutions appealed by way of a question of law<sup>147</sup> to the Court of Criminal Appeal asking "whether or not a wife can be convicted as an accessory after the fact of a felony committed by her husband?" The approach of the prosecutor on appeal was to adopt the judgment of Lord Parker CJ in *R v Holley*. It was argued that because s407A *Crimes Act 1900* [NSW] enacted in 1924, had abolished the marital coercion defence in that state and because of the partially parallel restriction in England and Wales which maintained the marital coercion defence but abrogated the presumption, it followed that the common law position, which had hitherto recognised uxorial accessorial immunity, had now disappeared. In the alternative, the prosecutor argued that the maintenance of the immunity "flies in the face of modern human rights and anti-discrimination legislation" and was no longer valid at law as being necessarily inconsistent.

Ireland J delivering the judgment of the Court of Criminal Appeal referred to the "long established tenet that at common law a wife cannot be convicted on a charge of accessory after the fact to the felony of her husband"<sup>148</sup> and then undertook a comparative exercise to determine the state of cognate laws throughout the States and Territories of Australia and also

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<sup>145</sup> (1932) 32 SR (NSW) 504 (Street CJ, James and Davidson JJ).

<sup>146</sup> s347 *Crimes Act 1900* [NSW] as applied to s117 *Crimes Act 1900* [NSW].

<sup>147</sup> Pursuant to s5A (2) *Criminal Appeal Act 1912* [NSW].

<sup>148</sup> *R v CAL* unreported, New South Wales Court of Criminal Appeal 24 October 1996, Handley JA, Grove & Ireland JJ, p3.

of New Zealand, noting that such change as there had been “has been other than consistent”.<sup>149</sup>

The court concluded that the overall Australasian legislative landscape in relation to the privilege was as follows:

- Queensland<sup>150</sup> and Western Australia<sup>151</sup> retained marital coercion as a defence for a wife only for an offence committed in her husband’s presence (with some exception due to the nature and gravity of the crime).
- Tasmania abolished marital coercion as a defence in 1924,<sup>152</sup> but it retained the protection to a husband and wife of conspiring alone,<sup>153</sup> it also protected both husband and wife from prosecution for accessorial liability of the offence of the other.<sup>154</sup>
- Northern Territory had abolished the rule relating to the protection against accessorial liability,<sup>155</sup> it also abolished the protection against conspiracy.<sup>156</sup>
- New Zealand had abolished marital coercion as a defence<sup>157</sup> and had abolished the rule that a wife and husband are unable to conspire alone.<sup>158</sup> But it had retained the protection against accessorial liability for both spouses.<sup>159</sup>

But this was a significantly incomplete overview, as it did not deal at all with the position in Victoria<sup>160</sup> and South Australia<sup>161</sup> both of which still now maintain the defence of marital

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<sup>149</sup> Ibid p5. “Counsel for [CAL] submitted that *Holley* is distinguishable for the reasons that firstly that case was concerned with a charge of being an accessory after the fact of a felony committed by a person other than the wife’s husband and in the presence of the wife’s husband but secondly, in those circumstances it was only marital coercion which could have excused the wife and there was no evidence of that. I accept these submissions.”

<sup>150</sup> s32 *Criminal Code* [Qld]. Note that s223 *Criminal Code* [Qld] and s198 *Criminal Code* [WA] provide that “coercion” is a defence to a woman charged with incest and neither section defines the operative word. s10 *Criminal Code* [Qld] provides for the offence of accessory after the fact.

<sup>151</sup> s32 *Criminal Code* [WA]. Neither the Queensland nor Western Australia Code define “coercion” in this section: cf s129A *Crimes Act 1961* [NZ] where in relation to the offence of inducing sexual connection by coercion, the section speaks of “an express or implied threat”. s10 *Criminal Code* [WA] provides for the offence of accessory after the fact.

<sup>152</sup> s20(2) *Criminal Code* [Tas]. The position in Tasmania abolishing the entire doctrine of marital coercion and not just the presumption of it, is very robust as it provides that “a married woman shall be in the same position as regards compulsion by her husband as if she were unmarried”.

<sup>153</sup> s22(2) *Criminal Code* [Tas].

<sup>154</sup> s6(1) *Criminal Code* [Tas]. Under this section anyone who assists another who has committed an indictable offence to escape apprehension thereby hindering the administration of justice is an accessory after the fact.

<sup>155</sup> s13 *Criminal Code Act* [NT].

<sup>156</sup> s291 *Criminal Code Act* [NT].

<sup>157</sup> s24(3) *Crimes Act 1961* [NZ]. The defence was originally abolished in 1893.

<sup>158</sup> s67 *Crimes Act 1961* [NZ]. This enactment reversed the majority decision in *R v McKechie* [1926] NZLR 1 (CA).

<sup>159</sup> s71(2) *Crimes Act 1961* [NZ].

<sup>160</sup> s336(1) *Crimes Act* [Vic].

<sup>161</sup> s328 a *Criminal Law Consolidation Act* [SA].

coercion, as did the Australian Capital Territory<sup>162</sup> (at the time of that judgment). In addition a wife was at that time incapable of conspiring alone with her husband in Tasmania<sup>163</sup> Queensland<sup>164</sup> and Western Australia<sup>165</sup> and in Victoria<sup>166</sup> a wife at that time could not be convicted of inciting<sup>167</sup> her husband to commit an offence either. In Western Australia the accessory immunity also applies to a husband.

The court then closely examined the decision in *R v Holley*<sup>168</sup> where Lord Parker CJ had said “it is true that at any rate up to 1925 that a wife could not be guilty of being an accessory after the fact for receiving her husband knowing that he has committed a felony”. But the accessory immunity was an absolute immunity.<sup>169</sup> No presumption, rebuttable or otherwise, was involved. The critical and decisive fact was the existence of a valid marriage which authorised the wife to protect her husband from the State. There was no requirement for the husband to be in the physical presence of his wife when she was acting to protect him.<sup>170</sup>

The Court of Criminal Appeal noted that Lord Parker in *Holley* appeared to have overlooked the fact that a wife may assist her husband in his absence, which would not have permitted her to invoke the doctrine of marital coercion.<sup>171</sup> *Holley* was both obiter and unsound in its reasoning, to the extent it purported to decide the common law rule of immunity of a married woman – Mrs Holley was not charged in relation to her husband, only in relation to a third party, his associate. On the facts, in *Holley* there was no question of coercion.<sup>172</sup> The Court

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<sup>162</sup> s407 *Crimes Act* [ACT].

<sup>163</sup> s297(2) *Criminal Code* [Tas].

<sup>164</sup> *Criminal Code* [Qld].

<sup>165</sup> *Criminal Code* [WA].

<sup>166</sup> But s339(1) *Crimes Act 1958* [Vic] specifically exempted conspiracy to commit murder or treason.

<sup>167</sup> s339(2) *Crimes Act 1958* [Vic] also exempting incitement to commit murder or treason.

<sup>168</sup> *R v Holley* [1963] 1 All ER 106, 108 (CCA).

<sup>169</sup> The English Criminal Law Revision Committee in 1965 said in their Seventh Report ‘*Felonies and Misdemeanours*’ Cmnd 2659 (1965) para 25 that under the common law “a wife could not in any circumstances be accessory after the fact to the felony of her husband”. A limitless immunity existed.

<sup>170</sup> P J Pace ‘*Impeding Arrest – A Wife’s Right as a Spouse*’ [1978] Crim LR 82, 86. In *R v CAL* the trial judge, Judge Flannery, observed that Lord Parker CJ in *R v Holley* “appears to have overlooked the fact that a wife may assist her husband in his absence in which case the doctrine of marital coercion would be irrelevant”: *R v CAL*, Unreported, New South Wales Court of Criminal Appeal, 24 October 1996, Handley JA, Grove & Ireland JJ, p5. The Court of Criminal Appeal specifically endorsed the criticism by P J Pace ‘*Impeding Arrest – A Wife’s Right as a Spouse*’ [1978] Crim LR 82, 86 of *R v Holley*.

<sup>171</sup> *Brown v Attorney General for New Zealand* [1898] AC 234, 237 (PC).

<sup>172</sup> *R v Holley* [1963] 1 All ER 106, 108 I (CCA) “no evidence whatsoever to show that, in fact, she was coerced by the husband”.

also accepted that *Holley* was distinguishable as it dealt with the position of a wife as an accessory after the fact of a felony committed by a person other than the wife's husband. The principal holding of the New South Wales Court is that the common law rule granting immunity to a wife against prosecution as an accessory after the fact of a felony committed by her husband remains unaffected by s407A *Crimes Act 1900* [NSW], which had abrogated the defence of marital coercion. The decision was the exact opposite conclusion to that reached in *Holley*. It follows from the persuasive Australian judgment that whatever the initial origin of the common law rule in relation to those two strands, they had bifurcated over time, so that they were capable of a separate and independent existence.<sup>173</sup> Another decision of the same court only a few years later would closely examine the existence of a related special uxorial defence in the criminal law, in relation to the offence of misprision of felony.

#### NEW SOUTH WALES IMMUNITY OF WIFE FOR MISPRISION OF FELONY

In this important and unreported decision, the New South Wales Court of Criminal Appeal in 1998<sup>174</sup> considered the unusual offence of misprision of felony<sup>175</sup> in circumstances where a woman concealed the fact that a man had induced a young female, a minor, the appellant's daughter, to indecently assault him, while the appellant sat next to him and knowingly did not intervene. The man and the appellant lived in a de facto relationship. It was argued that as under New South Wales law a married woman is immune from prosecution as an accessory after the fact to her husband's felony,<sup>176</sup> the principle extended analogously to de facto wives and misprision of felony was both conceptually and pragmatically comparable to the offence

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<sup>173</sup> This conclusion had been anticipated by '*Russell on Crime*', 1964 12 ed p166.

<sup>174</sup> *R v (Mary Veronica) Brown*, unreported, BC 9806791 60304/98, McInerney, Hulme and Barr JJ, 9 December 1998.

<sup>175</sup> The offence has since been abrogated by s341 *Crimes Act 1990* [NSW] introduced by the *Crimes (Public Justice) Amendment Act 1990* [NSW]. s337 *Crimes Act 1958* [Vic] inserted in 1977 provides "A married person shall not become guilty of misprision by concealing or failing to disclose the commission of an indictable offence by his or her spouse, or by the spouse and another party or parties, nor by concealing or failing to disclose facts which might lead to the apprehension of the spouse, or the spouse and such other or others, in respect of the offence." When the *Criminal Law Bill 1966* [UK] destroying inter alia the concept of felony was under consideration in the House of Lords (which would affect the offence of misprision of felony) there was real doubt as to the effect that this crime in the legal system would have, upon the criminal liability of relatives: Viscount Colville of Culross, *Parliamentary Debates* House of Lords Debates, p440, 24 November 1966.

<sup>176</sup> *R v CAL*, unreported, New South Wales Court of Criminal Appeal, 24 October 1996.

of accessory after the fact. The court noted that the disparate justifications or historical basis for the immunity for a wife include, divine law,<sup>177</sup> the assertion that a wife is “*sub potestate viri* and she is bound to receive her husband”,<sup>178</sup> “questions of social policy rather than of unity of person”<sup>179</sup> and agreed that the existing law was described as a “concession to inevitable human feeling.”<sup>180</sup>

Hulme J, delivering the judgment of the court stated:

Although the exception may be justified on the basis either that it was a consequence of the somewhat sporadic effect of the common law unity of husband and wife, so that one could not be an accessory to one’s own felony, or that it was a concession to human feeling, these reasons would require that a husband should enjoy a similar immunity, which he does not.<sup>181</sup>

The one-sided nature of the rule was explicable by its historical origin, when a husband’s power over his wife was considerable. Because the “de facto” arrangement covers a myriad of situations, and although it may involve the “same degree of permanence, commitment, support, and merit of the other attributes of marriage”,<sup>182</sup> the court held that a de facto relationship was outside the scope of any substantive uxorial privilege. This was because, while the law might recognise such unions for certain purposes, when it did, those rights were circumscribed or attended with further variations or conditions,<sup>183</sup> not found in matrimony. The New South Wales Court specifically endorsed the view of the Victorian Law Reform Commissioner,<sup>184</sup> in which it was asserted that:

in the first place the State does not have the same concern to preserve the stability of ‘de facto’ relationships as it has to preserve the stability of marriages, and it is the State’s concern to stability in the relationship that is the main justification for special rules directed to supporting loyalty, co-operation and confidentiality between the parties.

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<sup>177</sup> Sir William Staunford, ‘*Les Plees del Coron*’, 1 84b; Coke 3 *Institutes* 108.

<sup>178</sup> Hale 1 PC 72 s28.

<sup>179</sup> S N Grant Bailey, ‘*Lush on Husband and Wife*’, (1933) 4 ed, Stevenson & Sons, p587

<sup>180</sup> Glanville L Williams, ‘*The Unity of Husband and Wife*’, (1947) 10 *Modern Law Review* 16, 26.

<sup>181</sup> *R v Brown (Mary Veronica)* NSW CCA, 9 December 1998, p3.

<sup>182</sup> *Ibid* p3

<sup>183</sup> s14 *De Facto Relationship Act* [NSW], requires that such relationships must exist for at least two years, before the law will give them any recognition.

<sup>184</sup> Hon A T Smith, ‘*Criminal Liability of Married Persons (Special Rules)*’, Victorian Law Reform Commission, June 1975.

A second reason advanced by the Victorian Law Reform Commissioner is prosaic and formalistic. His view that “[a wife’s] recollection of the ceremony of marriage” and the significance of a public exchange of undertakings justifies a special defence, has romantic, chocolate-box appeal only. There is nothing to differentiate the significance to the parties to a civil union as having any less or more meaning. Marriage automatically confers immediate, special, uxorial privileges. For a de facto union there may be some deferment of the prospective legal effect and consequences, and this was the express position under the New South Wales legislation recognising de facto unions. That delay, however, does not exist under the *Civil Union Act 2005* [NZ] which now includes civil unions within the accessorial exemption and provides instantaneous exemption from the criminal law. The court reasoned that a de facto arrangement was held not to be a common law marriage and was in fact a non-marriage. This was so even though other cognate unions, involving the solemn exchange of vows of public commitment and intended permanence between persons of different or the same gender, have all the essential attributes of marriage.<sup>185</sup> Misprision of felony was not to be trumped by a de facto union; only by a hallowed connubial relationship.

#### EXPRESS STATUTORY EXCLUSION OF THE COMMON LAW IMMUNITY

The common law accessorial privilege was capable of being excluded by an express statutory provision although such provisions were extremely rare. One example was the offence contrary to s153(3) *Army Act 1881* [UK] forbidding any person to conceal any soldier knowing that soldier to be a deserter or absentee without leave. In *R v Davis*<sup>186</sup> a husband was found by Military Police hiding in a cupboard in the matrimonial house, after the wife had informed them that she had not seen him for months and did not know where he was. Reference was made to *R v Good*<sup>187</sup> to argue that the wife by her bare reception of her husband had not done enough to warrant her conviction, on the basis that as an accessory after the fact she was excused by the criminal law. It was also argued that the wife was entitled to

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<sup>185</sup> *Reference Re Same-Sex Marriage* [2004] 3 SCR 698.

<sup>186</sup> (1945) 9 *Journal of Criminal Law* 81.

<sup>187</sup> 1 C&K 185.

the defence of marital coercion<sup>188</sup> which raised the interesting issue of whether the husband was ‘present’ for the purposes of influencing her, while he was hiding in the cupboard. The wife however, after some initial sparring, pleaded guilty.<sup>189</sup> But the issue of the defence being exempted did directly arise in *Wong Ching Chu v The Queen*.<sup>190</sup> A provision in an immigration statute<sup>191</sup> created the express offence of harbouring a person in Hong Kong who was the subject of a deportation order – more usually this meant that the person had unlawfully re-entered the territory after having been deported from it. Hogan CJ for the Full Court stated that if a wife had committed that offence of harbouring her husband she necessarily lost the uxorial accessorial privilege by the statute, but she would still have had available to her the defence of marital coercion.<sup>192</sup>

#### HONG KONG COURT OF APPEAL

When England and Wales abrogated the common law defence in 1967, Hong Kong as a colony dutifully followed suit in 1971<sup>193</sup> by enacting virtually identical legislation. However, unlike the Anglo counterpart which also finally removed the distinction between felonies and misdemeanours this was not achieved in Hong Kong until 1991.<sup>194</sup> For the 20 years between the two sets of Hong Kong legislation, there existed the very curious position that the offence of being an accessory after the fact remained at common law while the statutory offence of assisting offenders was also in force.<sup>195</sup> The former had carried the uxorial defence but whether that defence had been impliedly repealed by the creation of the parallel statutory offence, was a conundrum that was never tested. But in 1986 the Hong Kong Court of Appeal had to decide whether the new statutory offence (virtually identical to the English position)

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<sup>188</sup> Under s47 *Criminal Justice Act 1925* [UK].

<sup>189</sup> By an anomaly under s25 *Naval Discipline Act 1865* [UK] the maximum penalty for concealing a deserter was a fine of £30, whereas under s153(3) *Army Act 1881* [UK] provision was made for imprisonment. Mrs Davis was sentenced to one month imprisonment.

<sup>190</sup> [1957] HKLR 61 (FC) at p69.

<sup>191</sup> s14 *Deportation Ordinance Cap 240* [HK].

<sup>192</sup> This was provided in terms identical to s47 *Criminal Justice Act 1925* [UK], by s101 *Criminal Procedure Ordinance* [HK] (now renumbered as s100 *Criminal Procedure Ordinance Cap 221* [HK]).

<sup>193</sup> s90 *Criminal Procedure Ord Cap 221* [HK]

<sup>194</sup> *Administration of Justice (Felonies and Misdemeanours) Ord Cap 328* [HK]

<sup>195</sup> *R v Ly Cam Sang* unreported Cr App 751/82, Sir Alan Huggins ACJ, McMullin VP and Yang JA, at p5-6.

still potentially permitted the uxorial defence, via the two specific statutory defences which obviated criminal liability if there was “lawful authority” or “reasonable excuse”. It has been suggested<sup>196</sup> that the common law immunity of wives remains unscathed by the statutory version, on an argument that a married woman still has, in the circumstances, either “lawful authority” or “reasonable excuse”<sup>197</sup> if she harbours her husband to shield him from apprehension. This analysis was tentatively confirmed by the Hong Kong Court of Appeal,<sup>198</sup> which had to consider a very unusual set of circumstances.

A husband was charged with murder and his wife was charged, contrary to s90(1) *Criminal Procedure Ordinance*, with doing an act without “lawful authority” or “reasonable excuse”<sup>199</sup> with the intent to impede his apprehension or prosecution. Both were tried together, the husband having applied unsuccessfully for a separate trial. The wife gave evidence in her own defence. It was very damaging to her husband who was convicted of murder whereas she was acquitted of the statutory offence. The prosecution could not have made the wife a compellable witness for them and it was only because the wife chose to give evidence in her own behalf that it became available in the joint trial. On appeal the court had to examine the common law immunity and the basis for the general statement that a wife could not be an accessory after the fact to a crime committed by her husband. The Hong Kong Court of Appeal<sup>200</sup> discerned two different and conflicting rationales for the exemption, “that it would be repugnant to her common law obligation to give help and comfort to her husband and to respect his confidences” and alternatively “that it derives from the presumption that any act

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<sup>196</sup> Bromley, Peter Mann *‘Bromley’s Family Law’* (1976) 5 ed Butterworths, London, p155; Halsbury’s *‘Statutes of England’* (1968) 2 ed vol 47 p341 states that the phrase “any other person” in s4(1) of the Act includes the wife of the offender and cites *R v Holley* as authority for its proposition.

<sup>197</sup> s4(1) *Criminal Law Act 1967* [UK].

<sup>198</sup> *R v Lee Shek Ching* [1986] HKLR 636.

<sup>199</sup> There was some flaccid discussion of the content of these exceptions when the equivalent English provision was being debated, *Official Report 1966-67, Standing Committee F*, HC Debates, vol 750 col 129 (June 1 1967). The concept of “lawful authority” is considered: P J Pace, *‘Impeding Arrest – A Wife’s Right as a Spouse?’*, [1978] Crim LR 82 p88 and to Richard Card, *‘Authority and Excuse as Defences to Crime’* [1969] Crim LR 359, 415 where it is said that lawful authority connotes “some authority from a public source (such as a Court or a government department) given in pursuance of some statutory power”. In *Bryan v Mott* (1976) 62 Cr App R 71, 73 it was stated that the phrase “reasonable excuse” confers a wider discretion than that of “lawful authority”. It seems unlikely that the phrase connotes an excuse in law that is a general defence to a crime since such defence does not exist unless expressly made otherwise. In *R v Brindley & Long* [1971] 2 All ER 698 the question of motive was held to be relevant and if it were in fulfilment of the obligations of married life it may qualify.

<sup>200</sup> *R v Lee Shek Ching* [1986] HKLR 636 (CA) (Huggins ACJ, Cons and Kempster JJA).

done by a wife in the presence of her husband is deemed to have been done under his coercion”.

Cons JA delivering the judgment of the court accepted that it was “well settled” that a wife was immune at common law for being an accessory after the fact to the felony of her husband. However, s1 *Criminal Law Act 1967* was not enacted in Hong Kong until 1991 and during that period (at least) the common law offence of accessory after the fact continued to exist,<sup>201</sup> but in relation to the enduring common law offence the Court of Appeal said it “cannot be gainsaid” that the wife’s common law immunity continued.

The immunity given by the common law is in respect of an offence created by the common law. It is not to be presumed to follow that it extends to a statutory offence which, although similar, casts a wider net. Arrestable offences, with which s90(1) is concerned may be misdemeanours as well as felonies and the subsection may capture circumstances which would not be sufficient to constitute the common law offence. There is nothing in its language which indicates an immunity for wives.<sup>202</sup>

But the Court then considered whether despite the conclusion that wives were not excluded as a class from the new offence, whether the wife could have “lawful authority” or “reasonable excuse”<sup>203</sup> for her act. The charge particularised that she acted with the appropriate intent as having “departed from Hong Kong for Macau to offer financial assistance to” her husband who had absconded while on bail. The argument adopted was that although the common law immunity may have fallen with the abolition of felonies, the reasons behind the immunity remained and should continue to afford similar protection to the modern wife, via the defences of “lawful authority” or “reasonable excuse”.<sup>204</sup> The Court of Appeal did not accept that reasoning stating “the wife’s immunity at common law rested either on duty or coercion or perhaps on a combination of the two.” Presumption of coercion was no longer a valid basis for sustaining the exemption as the presumption had been abrogated in Hong Kong in 1930,

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<sup>201</sup> *R v Ly Cam Sang* unreported Cr App 751/82. Huggins ACJ, McMullin VP, Yang JA at p5-6 holding that the offence of being an accessory after the fact to a felony remained part of Hong Kong law.

<sup>202</sup> *R v Lee Shek Ching* [1986] HKLR 636, 750.

<sup>203</sup> See *Official Report 1966-67, Standing Committee F*, HC Debates, vol x col 129 (June 1 1967).

<sup>204</sup> P J Pace, ‘*Impeding Arrest – A Wife’s Right as a Spouse?*’ [1978] Crim LR 82, 88. The fact that the felony distinction was abolished does not mean that the common law defence fell away if the common law defence was not based on the fact that the husband has committed a felony but on the position that her conduct was a function of the husband’s power over her.

so that coercion now had to be positively proved. Duty of a wife to her husband therefore alone remained. While a wife in modern Hong Kong is not required to behave as she would have been centuries ago the Court of Appeal concluded:

Even so, we think it may be that on occasion her marital obligations, at least in so far as they apply within the matrimonial home, would afford sufficient excuse for what would otherwise be a breach of s90(1).

Cons JA held that this possible excuse had not been established on the facts to provide the wife with the immunity, where she had assisted her husband to extra-territorially maintain his life on the run.<sup>205</sup> The reasoning permits continuing scope for a wife or a husband (the words being gender-neutral in the offence-creating section) to rely on an insulated duty to harbour the other, particularly in the matrimonial dwelling. But why the exception should be confined to the spouse acting within the matrimonial home, as opposed to anywhere, is quite uncertain and is redolent of a reincarnation of the former duty of compliance that the common law believed a wife owed to her husband. But any such duty of either spouse must be a general one and not one artificially linked to the home. If the statutory excuse is based on a public policy belief in the bonds of human nature and dilemma of loyalty it is equally obscure why this should end at the doorstep.

## VICTORIA, OTHER AUSTRALIAN JURISDICTIONS AND PAPUA NEW GUINEA

In 1977 upon the recommendation of the Victorian Law Commissioner<sup>206</sup> a statutory defence<sup>207</sup> was introduced relieving spouses from criminal liability for harbouring the other

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<sup>205</sup> However, the court quashed the murder conviction of the husband and ordered a retrial on the basis that the trial judge had not carried out a satisfactory balancing exercise involving the prejudice to the husband of the wife exercising her right to give evidence in the joint trial. The mere fact that the wife was a competent witness in her own defence without the consent of the husband, in terms of s54(1)(c) *Criminal Procedure Ordinance Cap 221* [HK] was an inadequate basis for decision-making. The court took into account the long-established opposition of the common law to the calling of the evidence of one spouse against another and concluded there has been a miscarriage of justice. It noted that the general proposition where a husband and wife are jointly charged would not be affected.

<sup>206</sup> Law Reform Commissioner of Victoria, Report No 3; *Criminal Liability of Married Persons (Special Rules)*, Melbourne June 1975.

<sup>207</sup> s338 *Crimes (Married Persons' Liability) Act 1977* [Vic].

A married person shall not become an accessory after the fact to any indictable offences or guilty of –

and for impeding that person's apprehension. But it still remained an offence for a spouse to handle stolen goods from the other spouse.<sup>208</sup> Other legislation was also amended to insert an immunity from prosecution where the spouse harboured or employed the other spouse, whether or not that married person knew the spouse to be illegally at large.<sup>209</sup> Even the hyper-modern Northern Territory legislation did not remove all substantive uxorial privileges. While explicitly abrogating intraspousal conspiracy (s291) and the uxorial accessorial exemption (s13(2)), it still protects spouses from intraspousal theft, unless they were leaving or deserting the other spouse or attempting to do so: s42 *Criminal Code Act 1983* [NT]. In Queensland, there is no longer any protection for a wife as an accessory after the fact (s10 *Criminal Code* [Qld]), but both spouses are protected in Western Australia (s10 *Criminal Code* [WA]). In Papua New Guinea, the uxorial immunity is maintained. She is not guilty as an accessory after the fact, "(a) by receiving or assisting him in order to enable him to escape punishment; or (b) by receiving or assisting in her husband's presence and by his authority, another person who is guilty of an offence in the commission of which her husband has taken part in order to enable that other person to escape punishment": s10(2) *Criminal Code Act 1974* [PNG]. But most unequally, by s10(3) *Criminal Code Act 1974* [PNG] "a married man does not become an accessory after the fact to an offence of which his wife is guilty by receiving or assisting her in order to enable her to escape punishment". His right is only to protect his wife; her right extends to his confederates as well.

Although a wife who harbours her husband, unquestionably but for the accessory exemption, commits an offence "in his presence", and would where the defence of marital coercion exists have that possible additional protection, that defence was intended to apply only to principals

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(a) an offence under section 40 of this Act;

(b) an offence under section 52 of the *Summary Offences Act 1966* ; or

(c) the offence at common law of obstructing an officer of justice in the execution of his duty –

By receiving, relieving, comforting or assisting his or her spouse, or the spouse and another person or persons, though with knowledge that the spouse, whether alone or with the other person or persons, has committed an offence and though the purpose of what is done is to enable the spouse, or the spouse and the other person or persons, to escape being apprehended, tried or punished.

<sup>208</sup> s88(3) *Crimes Act 1958* was inserted by s2 *Crimes (Married Persons' Liability) Act 1977* [Vic]. A provision, such as this, was beyond English Under-Secretary for State who had informed Parliament that now law could be drafted that exempted the offence of handling stolen goods, yet protected a spouse from harbouring or impeding the arrest of the other.

<sup>209</sup> s134(1A) *Social Welfare Act 1970* [Vic] was so amended.

and not an accessory after the fact.<sup>210</sup> The reasoning for that conclusion, advanced by Prof J C Smith, turns on the lack of cocentricity between the different but cognate exemptions from the criminal law. However, his analysis overlooks a crucial, additional difference. Marital coercion applied to felonies and misdemeanours, whereas the accessorial exemption only applied to felonies.<sup>211</sup> An essential requirement of marital coercion was that the husband was present so as to demonstrate the continuous and immediate nature of his presumed or actual coercion over the wife. In the accessorial scenario the wife was able to operate quite independently of the actual or constructive presence of her husband. Indeed in many situations she would need to act in places removed from where her husband was to accomplish their joint objective of preventing his detection. The marital coercion defence at common law always excluded the offences of murder and some forms of treason. There was considerable uncertainty as to whether other particularly serious offences were outside its scope. But the accessorial exemption applies to all indictable crimes that were felonies.<sup>212</sup> The former presumption of marital coercion was rebuttable by demonstrating that the wife was a free agent in the offence. This was shown by the prosecution proving that she acted independently or on her own initiative. If the presumption was rebutted a conviction would ensue. For accessorial exemption it was completely irrelevant why the wife acted as she did as her motivation was based on the fulfilment of a duty perceived to be owed to her husband.

The proper analysis is that there were two separate but related rules at common law. The institutional texts always, apart from Blackstone,<sup>213</sup> saw the rules as being different and serving different purposes. But the wording of s47 *Criminal Justice Act 1925* expressly applies to any offence, although throughout the Parliamentary Debates leading to its enactment, there was never any consideration of the fact that it also applies to the position of a wife as an accessory after the fact to her husband's offence.<sup>214</sup>

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<sup>210</sup> J C Smith 'Case and Commentary' [1962] Crim LR 829 considered it "very doubtful" whether the statutory defence in s47 was ever intended to extend to accessories.

<sup>211</sup> *R v Field* (1943) 29 Cr App R 151

<sup>212</sup> In New Zealand s176 *Crimes Act 1961* [NZ] separately provides for the offence of accessory after the fact to murder; although the marital exemption in s71(2) *Crimes Act* applies to it.

<sup>213</sup> 4 *Commentaries* 39 "But a feme covert cannot become an accessory by the receipt and concealment of her husband; for she is presumed to act under his coercion, and therefore she is not bound, neither ought she, to discover her lord."

<sup>214</sup> A mismatch of intention and history.

## MODERN APPROACHES TO THE IMMUNITY

But so strict is the law, where a felony has been actually committed, that even the merest relations of the offender are not suffered to aid or to receive him. And therefore if the parent assists his child, or the child the parent, if the brother receives the brother, the master the servant, or the servant the master, or if the husband receives the wife – in every case they become accessory after the fact. But the wife receiving or concealing her husband is presumed to act under his coercion; and she is not bound in law, neither ought she, to discover her Lord. She is therefore not liable as an accessory after the fact.<sup>215</sup>

Many of the complexities flowing from the privilege have been resolved in some common law jurisdictions by equalising the privilege between spouses. In some cases it has been extended to others – such development ameliorating a long-standing anomaly.<sup>216</sup> The intriguing aspect is that rather than perpetuate a privilege only for married women, the option of abrogating the entire privilege was forsaken in place of widening it beyond the spouses. To understand why the law has reacted so unevenly in this regard in different jurisdictions, involves analysing why the defence of marital coercion and the spousal conspiracy have also remained in certain jurisdictions. The uneven nature of the position is best illustrated by English law which retains the defence of marital coercion and the intra-spousal conspiracy immunity and maintains a variant<sup>217</sup> of the former accessory after the fact immunity. By contrast in New Zealand the marital coercion defence and the intra-spousal conspiracy immunity have long been abrogated by statute and only the accessorial immunity now exists, in a form that encompasses now both spouses and civil union partners.

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<sup>215</sup> Edward Jenks (ed) *Stephens Commentaries on the Laws of England* (1922), 17 ed, Butterworth & Co, London vol iv, p35. At p36 the author refers to Russell, *Crimes and Misdemeanours*, 7 ed, p106-128 and H D Roome and R E Ross (eds) *Archbold, Criminal Pleading* (1918) 25 ed, p1367-1387, all to the same effect.

<sup>216</sup> 2 Hawkins' *Pleas of the Crown*, cap 29, c.34. "Also it seems agreed that no other relation beside that of a wife to her husband will exempt the receiver of a felon from being an accessory to the felony. From whence it follows that if a master receive a servant, or a servant a master, or brother a brother, or even a husband a wife, they are accessories in the same manner as if they had been mere strangers to one another".

<sup>217</sup> The specific offence of accessory after the fact has been abrogated in England by s1 *Criminal Law Act 1967* [UK] upon the abolition of the distinction between felonies and misdemeanours, but a new offence of assisting offenders has been instituted, which provides for the defence of reasonable excuse. Whether that defence entitles a spouse per se to assist the other spouse with immunity has only been decided in Hong Kong: *R v Lee Shek Ching* [1986] HKLR 304 (CA) where the almost identical offence to that in England also exists.

The tendency<sup>218</sup> in some legislatures<sup>219</sup> has been to extend protection of this character to persons other than the wife.<sup>220</sup> Some legislatures even-handedly deny the exemption to both spouses;<sup>221</sup> in some the common law position protecting wives is replicated<sup>222</sup> and in some a wife is austere defined only in terms of Christian marriage.<sup>223</sup> In South Africa there was never an express immunity in favour of a wife, “who does no more than discharge towards her husband such duties as he may reasonably demand, and she may reasonably render him”, but a general practice became so well established in her favour, not to prosecute such wives, that it was held to amount to a custom having the force of law.<sup>224</sup>

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<sup>218</sup> Rollin M Perkins, *‘Criminal Law’*, (1957) The Foundation Press Inc, Brooklyn at p580: “The exception has been extended somewhat liberally by some of the modern statutes [E.g., 9 Mass.Laws Ann. C.274 § 4 (Supp.1955)].” The *Florida Penal Code* exempts a “husband or wife, parent or grandparent, child or grandchild, brother or sister, by consanguinity or affinity to the offender”: 4 Fla Stats Ann § 776.03.

<sup>219</sup> David Harter, *‘Criminal Law in Yugoslavia’*, (1962) 5 *The Lawyer* 33, 35. noting that the former law of Yugoslavia provided that an accessory after the fact was immune from prosecution if that accessory was “the offender’s spouse, whether husband or wife, relatives by blood in direct lineage, brother or sister, adopter or adoptee”.

<sup>220</sup> Glanville Williams, *‘The Criminal Law: The General Part’*: “If the full immunity of the wife is thought to be required as a matter of policy, the same policy would seem to require immunity for the husband in the converse situation; and this conclusion is accepted in the *Canadian Code* s23(2).” Kenneth C Sears and Henry Y Weihofen *‘May’s Law of Crimes’*, (1938) 4 ed, Little Brown & Co, Boston. At p91 “According to the older authorities at least, a wife could not be an accessory after the fact to her husband’s felony...no other relationship, except that of wife, carried with it any exemption. Blackstone stated the reason to be that the husband was presumed to have coerced the wife [4 Blackstone *Commentaries* 28] but Hawkins stated that the indulgence was granted the wife in consideration of the duty and love she owes her husband [2 Hawkins *‘Pleas of the Crown’* c29 s34]. Some modern statutes extend the immunity to other relations that the wife. For example Callaghan’s *Illinois Statutes Annotated* ch.38 §613. Either spouse may be an accessory before the fact to the other as a principal, *R v Morris* R&R 270 and *R v Manning* 2 C&K 903.”

<sup>221</sup> s388 *Penal Code*, Cap 17 [Fiji]. “A person who receives or assists another who is, to his knowledge, guilty of an offence, in order to enable him to escape punishment, is said to become an accessory after the fact to the offence.”

<sup>222</sup> s387 *Penal Code* [Tanganyika] provided that a wife (only) who assists her husband to escape punishment does not become an accessory after the fact.

<sup>223</sup> In the *Criminal Code Act* Cap.77, *‘Laws of the Federation of Nigeria 1990’* the Schedule to the Act sets out the *Code of Criminal Law* and Part I Ch.1 defines “Christian marriage” as meaning “a marriage which is recognised by the law of the place where it is contracted as the voluntary union for life of one man and one woman to the exclusion of all others”. Ch.2 s10 provides for the crime of an accessory after the fact and then adds an exemption in these terms: “A wife does not become an accessory after the fact to an offence of which her husband is guilty by receiving or, assisting him in order to enable him to escape punishment; nor by receiving or assisting, in her husband’s presence and by his authority, another person who is guilty of an offence in the commission of which her husband has taken part, in order to enable that other person to escape punishment; nor does a husband become accessory after the fact to an offence of which his wife is guilty by receiving or assisting her in order to enable her to escape punishment.” The section expressly states that the term “wife” and “husband” mean respectively the wife and husband of a Christian marriage.

<sup>224</sup> Gardiner & Lansdown, *‘South African Criminal Law and Procedure’*, (1957) 6 ed Charles W H Landsdown, William G Hoal and Alfred V Landsdown (eds), Juta & Co Ltd, Capetown, p155. See *R v Mtetwa* 1921 TPD 227. Anon, *‘Can a Husband be Accessory after the Wife’s Crime?’* (1900) 64 JP 129, 131: “None have since disputed the position of the wife, and there have been notable instances where wives might have been prosecuted

## MODERN JUSTIFICATION FOR THE EXEMPTION

Wives are no longer subject to the thralldom of their husbands. The issue involves striking a balance between the preservation of the stability of marriage and the duty of individuals to society.<sup>225</sup> Any special exemption in favour of any class of person must be scrupulously justified and not infringe the permeating principle of equality, if the legislation is to be constitutional.<sup>226</sup> The constitutional right to family life should not be interpreted as a sanctuary from the criminal law.

The Law Reform Commissioner of Victoria stated:

the relationship of husband and wife involves, for the wife, a deep obligation to give help and comfort to her husband and to respect his confidences and...if, being faced with a conflict of duties, she gives precedence to that personal obligation, over her general duty as a citizen not to obstruct the administration of justice, her conduct is at least so far excusable, or extenuated, that it should not be regarded as criminal. The special rule, resting upon this foundation, ought, it is considered, to be accepted and maintained, not only as being supported by the clearest authority, but also because personal loyalty between husband and wife may properly be regarded as of fundamental importance to the stability of the family as the basic unity in our society.<sup>227</sup>

But the issue could equally be seen that it is not whether husband and wife are the basic unit in society, but whether the family is the basic unit in society.<sup>228</sup>

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if there had been any idea that the law could be otherwise. No doubt it is good enough sense as well, as law, but if that argument be once admitted it applies equally to the case of the husband.”

<sup>225</sup> In Peter Gillies, *The Law of Criminal Complicity* (1980), Law Book Company, p277: “The distinction between the respective positions of the spouses is a curious one, it being envisaged that while it is forgivable that the wife should take positive steps to prevent her husband from being incriminated, it is not forgivable that the husband should take such steps on behalf of his wife.”

<sup>226</sup> R H Graveson and F R Crane (eds), *A Century of Family Law 1857-1957*, D Mendes Da Costa, *Criminal Law* (1957), Sweet & Maxwell, London, p191, the marital coercion presumption “was incongruous to the claim for equality by the married woman”.

<sup>227</sup> Victorian Law Reform Commissioner, Report No 3 *Criminal Liability of Married Persons (Special Rules)* (June 1975), Melbourne, cf The Law Reform Commission, Ireland, Report No 23 December 1987 *Receiving Stolen Property* Para 33: “As regards the position relating to receiving goods stolen by one spouse from another, it may happen that by reason of the restrictions contained in section 9(3) of the *Married Women’s Status Act 1957* the receiver of what would be stolen goods, save for this provision, will be exempt from responsibility.”

<sup>228</sup> See *Satchwell v President of the Republic of South Africa* (2002) 13 BHRC 108 (SA: Const Ct). So where a witness is called to give evidence on some matter which is privileged on the part of a minor, the minor’s parent is entitled on the minor’s behalf either to object to the admission of that evidence on the ground that it is

## CONCLUSION

It is possible to differentiate between merely harbouring a spouse as a form of asylum, from actively concealing<sup>229</sup> say stolen goods<sup>230</sup> brought by the spouse. The interest in protecting the spouse by offering a place of refuge is founded on the marital obligation to support each other.<sup>231</sup> There is a competing interest in the state being able to detect and apprehend the spouse but it can be seen as an interest which to a certain point (passive asylum) can be over-valued measured against the intraspousal or family<sup>232</sup> commitment. Where, however, goods have been stolen the state has a strong interest in the recaption of the goods and the spouse has no special interest in harbouring them, other than the fact that they may be evidence of the whereabouts of the other spouse. In relation to the goods the state has a stronger claim and its rights of recapture of the goods belonging to a third party can be seen separately from the claim of the wife to protect the husband or vice versa. In that situation the third party interests is only that of the state.

Wives did not uniformly act from the motivation of fear or victimisation but also by a desire to protect the husband from arrest. This motive was seen in contemporary culture, by the judges<sup>233</sup> and possibly by the woman herself, as displaying appropriate affection for the

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privileged, or to waive privilege. In *R v McNally* [1958] NZLR 1075 a father objected to a question asked of his son on the basis that it was privileged in terms of self-incrimination.

<sup>229</sup> In *R v M'Clarens* (1849) 3 Cox CC 425 Coltman J said summing up to the jury "that if a wife took part merely for the purpose of concealing her husband's guilt and of screening him from the consequences, then I think she ought to be acquitted."

<sup>230</sup> In New Zealand s246 *Crimes Act 1961* [NZ] defines the offence of receiving stolen goods. It makes no provision for any exemption based on spousal duty. The difference between receiving stolen goods and being an accessory after the fact to the offence of theft or burglary by sheltering the principal and storing the stolen goods may be difficult to make.

<sup>231</sup> In *Leaman v The Queen* [1986] Tas R 223, 225 (CCA) noted that in an accessory after the fact situation it had "sympathy with the call which a husband's predicament may make on a wife's application and sense of uxorial duty."

<sup>232</sup> Rollin M Perkins, *'Criminal Law'*, (1957) The Foundation Press Inc, Brooklyn at p581: "it is asking too much of a jury to expect a conviction of one who has merely opened his door or given some similar aid to a parent, child or other intimate relation." CMV Clarkson and H M Keating, *'Criminal Law: Text and Materials'* (1994) 3 ed, Sweet & Maxwell, London at p113: "However, such a rationale can no longer be accepted. The true reason for the existence of a duty in such cases must be the inter-dependence that springs from shared family life or close communal living. [G Fletcher, *'Rethinking Criminal Law'* (1978) p613]. In such a situation one comes to rely on the other members of the family and it is this reliance and expectation of assistance if necessary that generates the duty to act, rather than any blood tie".

<sup>233</sup> *R v Brooks* (1853) 6 Cox CC 148, 149 (CCCR): per Parke B (later Lord Wensleydale). In this case the husband received stolen goods from her husband at their home. Alderson B refuted the idea that she could be an

husband and fidelity to his interests. Therefore the focus on the material and psychological circumstances that bound a wife to her husband was a sensitive judgment, that a woman that joined him in facilitating crime was distinguishably less culpable than other persons, as her fate was inevitably determined by his. The doctrine was a logical and humane recognition of the consequences of the wife's legal disabilities. Yet the doctrine did not confront the question why a crime motivated by uxorial love should be excused when that of her husband was not. The defence did not deal with other subordinated persons such as children, servants, and apprentices. They as a group were legally bound to obey the commands of the head of the household. The reason for the differential treatment of the wife lies much more deeply in the history of the common law and also in the religious brocade that influenced it.

Any attempt to extract a single rationale for the uxorial immunity is however frustrated by the same factors militating against identifying a single rationale for the defence of marital coercion. As these two uxorial notions were generated about the same time it was probable that originally each was but a facet of a wider notion of general uxorial duty. But with the transition from robust Anglo-Saxon law which recognised the independence of women, to the genteel and chivalric Norman law, the emphasis on wifely duties to the husband appears to have altered. So that by the latter time, married women were now ensconced with additional protections all emanating from the central concept of the relative helplessness and vulnerability of a *feme covert*. The quest for a single rationale for uxorial exemptions is ultimately unproductive. Over time the very significant impacts of the different systems of law and how they regarded married women produced varying developments in their rights and duties. This choreography over time was a reflection of societal perceptions of the proper status of wives and more importantly, what the law should expect from them. Attitudes meant that the law accommodated the contemporary view of the uxorial relationship and the responsibilities of wives to their husbands. In short the law had been infused with several complementary justifications for the privilege of married women, all borne out of the implications of the concept of unity of spouses. Upon the slow dissipation by the common

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accessory after the fact of her husband's offence. In *R v Boober, Boober & Boober* (1850) 4 Cox CC 272, 273 Talfourd J directed a jury that a wife "cannot in law be said to have any possession separate from her husband" adding that if a wife took steps to destroy the evidence against her husband this was no offence if "her object was to screen him from detection". In *R v M'Clarens, Middleton, Draddy and Draddy* (1849) 3 Cox CC 425, 426 Coltman J directed that if a wife acted for the purposes of "screening [her husband] from the consequences" of the law her attempt "to conceal what may lead to his detection" was no offence. See also *R v Holley* [1963] 1 All ER 106 F which notes '*Halsbury's Laws of England*', (1955) 3 ed, vol 10 p303 para 561.

law fiction of marital unity as a valid marker, modern jurisprudence now regards the shape of the criminal law in relation to wives as a matter of social policy<sup>234</sup> or of constitutional imperative. To treat a class of *sui juris* individuals differently from all others requires a correspondingly powerful justification if that law is to survive the scrutiny of a constitutional challenge based on inequality.

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<sup>234</sup> S N Grant Bailey '*Lush on Husband and Wife*', (1933) 4 ed, Stevenson & Sons, p597 noting that the immunity now turned "upon questions of social policy and not of unity of person".

## DENOUEMENT AND CONCLUSION

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It is a quiddity for substantive uxorial privileges based on historical rationales about the inferiority and vulnerabilities of wives, to subsist on the back of a legal fiction traceable over 1000 years. Those historical rationales supply no reason for its endurance. For centuries, the prevailing wisdom had been that wives were understandably dependent on their husbands. Courts and legislatures alike exercised a “humane paternalism over marriage”<sup>1</sup> to redress the natural imbalance consequent upon wives being considered incapable of informed, autonomous decision-making. Wives were by cultural conditioning and subliminal religious dictates perceived as being too helpless to be left unaided amidst the sordid real world. Legal rules emerged as a function of society’s concern for the welfare of wives; rules animated by a laudable desire to protect wives and superintend their best interest. These rules had a pedigree before the origin of coverture and were premised upon the inferiority of women and of wives in particular.

It is striking that the defence of marital coercion is unknown in Continental law (from which it first originated) and the legal systems in other continents such as South America which it profoundly influenced. The defence does not exist in other major legal systems either such as under Chinese law or in those countries strongly influenced by Muslim tenets. The intramarital conspiracy exemption cannot be located outside the common law legal system. The accessory after the fact exemption is, however, recognised in a very few jurisdictions under Continental law such as Greece<sup>2</sup>. These uxorial privileges display a transcendent Christian heritage value increasingly out of step with modern pluralistic societies.

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<sup>1</sup> Richard Morris, *Studies in the History of American Law* (1959) J M Mitchell Company, Philadelphia, p71.

<sup>2</sup> See fn 120 Chp 6 infra.

To gratuitously exempt a class of person from the reach of the general criminal law requires a formidable rationalisation, “an exceedingly persuasive justification”.<sup>3</sup> To perpetuate the special exemption of married women from the criminal law without cogent, objective justification, is to subvert the centripetal notion of ordinary, individual responsibility.<sup>4</sup> The principle of individual autonomy has normative elements, emphasising that individuals are presumptively free agents in determining their own conduct.<sup>5</sup> Yet, the common law jurisdictions have not engaged in that necessary dialectic, contenting themselves with sporadic minor adjustments of the law leaving the macro-issue untouched. To validate the continuation of these gender-differentiating exemptions would require a wistful belief in the pusillanimity of modern wives. The historically benign distinctions in favour of wives, reflected a belief that the law needed to show them special solicitude. Such distinctions now resonate with a demeaning assumption about the relative status of married women.<sup>6</sup> Such distinctions in law reinforce the notion of uxorial inequality and inferiority, generating anomalous outcomes too when measured against the fact of the liability of wives for all other modalities of criminal conduct. The present exemptions are on an analysis arbitrary and illogical once it is accepted that wives and husbands who commit all other joint or derivative crimes are not exonerated by their marital or gender status.

A fundamental principled recontouring of the criminal law is required to deny any exemption based on gender or status-differentiating characteristics, unless grounded on a demonstrably

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<sup>3</sup> An “exceedingly persuasive justification” is needed to show that a gender-based law is substantially related to an important governmental objective and that it is a proportionate response to it: *Mississippi University for Women v Hogan* (1982) 458 US 718, 724 per O’Connor J. “Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions. Thus if the statutory objective is to exclude or ‘protect’ members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate”.

<sup>4</sup> Herbert Fingarette and Ann Fingarette Hasse, *Mental Disabilities and Criminal Responsibilities* (1979) University of California Press, Berkeley, p11 “The criminal law must be liberated from the inherited pseudo-solutions that have generated past and present confusion – and, in the end, therefore, injustice. The problems are ripe for a return to the basic common law principles centering around the notion of responsibility, which lies at the heart of the criminal law in all common law lands.”

<sup>5</sup> Andrew Ashworth *Principles of Criminal Law* 2 ed (1995) Clarendon Press, Oxford pp25-26.

<sup>6</sup> Celia Wells, *Groups, Girls and Fears* in Donald Nicolson and Lois Bibbings (eds) *Feminist Perspectives on Criminal Law* (2000) Cavendish Publishing Limited, London, p128, “Criminal laws have tended to see women as unstable, as in submission to men, or as unable to make rational decisions. Some of the more egregious examples have now gone, such as the marital rape immunity [*R v R* [1992] 1 AC 599 HL; and s142 *Criminal Justice and Public Order Act 1994*] and rules about the need for corroboration warnings in relation to women’s evidence”. [s32 *Criminal Justice and Public Order Act 1994*].”

valid jurisprudential underpinning. Special uxorial defences should be debunked in the quest for equality, as the underlying premise of the subjugation of women is not borne out under contemporary conditions – at least in developed jurisdictions.<sup>7</sup> The obvious reason why the existing exemptions are unsatisfactory is that they exonerate persons who are deserving of incrimination yet who are devoid of any excusatory or justificatory basis for being beyond the law, other than possessing a fortuitous qualifying marital status. American literature, based on a seminal article<sup>8</sup> has developed the theory that the battered woman syndrome defence is the modern successor-in-title to marital coercion,<sup>9</sup> so as to retrogressively reclaim in that jurisdiction, a special modern exemption from the criminal law, available only to all women.

Any taxonomy of the general criminal law, excluding from incrimination a sub-class of the female gender involves an aberration of principle, unless distinctly justifiable (on physiological or empirical medical evidence) such as in the defence of infanticide. The early motivation for special rules for wives was avuncular. Rules governing the conduct of women were adopted in what was honestly seen as women's best interest,<sup>10</sup> obliging women to

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<sup>7</sup> The Commission for Women's Rights in Fiji has expressly sought to maintain the marital coercion defence because of the realities of life in rural village conditions, where the dominance/subjugation factors still exist. Ms Emele Duituturaga, Chef Executive Officer for Women, Ministry of Women's Affairs, Suva, Fiji 19 May 2005 "The presumption of marital coercion in s19 Penal Code unfortunately should still remain as in the rural sector of Fiji this issue of coercion is very much a live matter." In *Jaulim v Director of Public Prosecutions* [1976] MR 96 Latour-Adrien CJ concluded that the exclusion of Mauritian women from juries was justified as "the Mauritian woman's status, her place and role in the home and family, and social conditions prevailing in this country are incompatible with a service which, as our law has stood and still stands, may require that they be kept away from home for sometimes long periods, sleeping in hotels, and unable to move about except under the vigilant eyes of court ushers. It seems unquestionable to us that such as obligation would cause much distress to many Mauritian women and arouse deep resentment among many of their male relatives." This decision was followed by a majority in *Peerbocus v The Queen* unreported Mauritius Court of Criminal Appeal, 25 June 1991, cf the comment of Justice Elizabeth Evatt in forward to R Graycar and J Morgan (eds) *The Hidden Gender of Law* (1990) Federation Press, Sydney, p vii, "while the idea of a gender-neutral law has its attractions, there are important aspects of life, such as conception, childbirth, sex and sexual violence, in which women's experience is quite different from that of men. The law can not readily be gender-neutral in areas where the specific experience of women needs recognition, or where there is continuing disadvantage".

<sup>8</sup> Anne M Coughlin, 'Excusing Women' (1994) 82 California Law Review 1.

<sup>9</sup> See further: Rebecca D Cornia, 'Current Use of Battered Women Syndrome: Institutionalization of Negative Stereotypes About Women', (1998) 8 UCLA Women's Law Journal 99, 105 where battered woman syndrome is described as the "Doctrinal Heir To The 'Marital Coercion Doctrine' " – under both the syndrome and the doctrine the fundamental premise is that women lack the psychological capacity to choose lawful means to extricate themselves from abusive males – "learned helplessness". This defence has been accepted as part of the law of South Australia: *R v Runjanjic and Kontinnen* (1991) 56 SASR 114

<sup>10</sup> *Sail'er Inn v Kirby* (1971) 485 P 2d 529, 540. "Laws which disable women from full participation in the political, business and economic arenas are often characterised as 'protective' and beneficial. Those same laws applied to social or ethnic minorities would readily be recognised as invidious and impermissible. The pedestal upon which women have been placed has all too often, upon close inspection, been revealed as a cage."

behave just as they would have if they had been able to fully appreciate what was best for them.<sup>11</sup>

“[M]any facets of women’s inequality are justified, explained, and thereby perpetuated by presenting a picture of women as something different and special, something different and debilitated...In law women have been, or so lawmakers proclaim, protected because of these differences, or excluded and exempted.”<sup>12</sup>

In common law jurisdictions the modern constitutional law approach to the right not to be discriminated against (as well as to the right to equality before the law) has been significantly shaped by international instruments such as the International Covenant on Civil and Political Rights.<sup>13</sup> The Human Rights Committee has by its General Comment 18 on Non-Discrimination<sup>14</sup> emphasised the plenitude of the right. The insidious nature of inequality is often camouflaged by the subtlety of stereotyping,<sup>15</sup> so unlawful discrimination is a matter of impact and consequences rather than engaging any enquiry as to its motivation. There have been inequality challenges in common law jurisdictions, almost invariably brought by those historically disadvantaged or discriminated against, such as females, wives and homosexuals.<sup>16</sup> A challenge to the unconstitutionality of uxorial substantive privileges in the criminal law, by irony, could be initiated by any person including a male. A court too is always entitled to act on its own motion if it considered that common law or legislation, materially engaged in a dispute before it, was susceptible of harbouring illicit discriminatory beliefs.

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<sup>11</sup> D L Kirp, M G Yudof and M Strong Franks, *‘Gender Justice’* (1986) The University of Chicago Press, Chicago, p31.

<sup>12</sup> Susan Edwards (ed), *‘Gender Sex and the Law’*, (1985) Croom Helm, London, p1.

<sup>13</sup> (1966) 999 UNTS 171.

<sup>14</sup> Human Rights Committee, General Comment 18 on Non-Discrimination, 37<sup>th</sup> Session, 9 November 1989 “Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitutes a basic and general principle relating to the protection of human rights.”

<sup>15</sup> *Quilter v Attorney General* [1998] 1 NZLR 523, 532 (CA) “Laws which treat individuals unfairly simply on the basis of personal characteristics which bear no relation to their merit, capacity or need are inherently discriminatory” per Thomas J.

<sup>16</sup> *National Coalition for Gay & Lesbian Equality v Minister of Justice* (1998) 6 BHRC 127 (SA: CC); *L v Austria* (2003) 36 EHRR 55; *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 (HL); *Leung v Secretary for Justice*; [2006] 4 HKLRD 211 (CA); *Secretary for Justice v Yau Yuk Lung Zigo* [2006] 4 HKLRD 196 (CA). (Challenges to laws discriminating against certain homosexual inequalities.)

In *Reed v Reed*<sup>17</sup> legislation in Idaho governing the administration of intestate estates preferred males over females who otherwise stood in the same relation to the deceased. The United States Supreme Court held that the preference was not rationally based and was a legislative distinction based on gender which failed to comply with the equality provision of the Fourteenth Amendment to the American Constitution. In *JEB v Alabama ex rel TB*,<sup>18</sup> the Supreme Court affirmed that discrimination as to the composition of a jury on the basis of gender, violated the constitutional right to equality particularly where it “serves to ratify and perpetuate invidious, archaic and overbroad stereotypes about the relative abilities of men and women”. The Privy Council has held that statutory law and practice in Gibraltar, which virtually precluded any woman becoming a juror there, was unconstitutional as being contrary to the right of equality.<sup>19</sup> “In the absence of cogent objective justification, there is an unacceptable discriminatory practice undermining confidence in any system of law which still maintains it.”<sup>20</sup>

The American state constitutions invariably provide for gender equality. The statutory formulation of duress in Pennsylvania<sup>21</sup> for example applies to any “actor engaged in the conduct”.<sup>22</sup> In rebuffing recourse to the old uxorial doctrines the Supreme Court of that state has held “The law must not be reluctant to remain abreast with the developments of society and should unhesitatingly discard former doctrines that embody concepts that have since been discredited”.<sup>23</sup> The separate position of wives under the law was repudiated as being violative of fundamental constitutional norms.

Experience has shown that challenges to the criminal law on the basis of inequality have most usually been directed to evidential and procedural issues, rather than to substantive offences

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<sup>17</sup> (1971) 404 US 71; Barbara A Brown, ‘*The Equal Rights Amendment: Constitutional Basis for Equal Rights for Women*’ (1971) 80 Yale LJ 871. In *Craig v Boren* (1976) 429 US 190, 210, an Oklahoma statute prescribed different ages for female teenagers and male teenagers to be able to drink alcohol – unconstitutional.

<sup>18</sup> (1994) 511 US 127 per Blackmun J

<sup>19</sup> *Rojas v Berllaque (Attorney General Intervening)* unreported Privy Council Appeal No 100 of 2002, 10 November 2003.

<sup>20</sup> Ibid para [15] per Lord Nicholls of Birkenhead.

<sup>21</sup> Pa Const art 1 §27.

<sup>22</sup> *Pennsylvania Crimes Code* 1972, 18 Pa CS §309 (a). The court in *Conway v Dana* reasoned that to allow the common law defence to coexist would “be to abort truth and to subvert the basic purposes of the adjudicative process”.

<sup>23</sup> See *Conway v Dana* (1974) 318 A 2d 324, 326.

or defences.<sup>24</sup> In any constitutional challenge the burden is on the state to prove the importance of its asserted objective and the substantial relationship between the classification and that objective as well as the proportionality of the nexus between them; which means that the state cannot meet the burden of demonstrating constitutionality without showing that a gender-neutral<sup>25</sup> or marital status-neutral law would be a demonstrably less effective means of achieving that goal.<sup>26</sup> The law will fail unless the departure from equality is necessary, proportionate to that need and is rational in a free-standing way. In relation to the substantive law, *Michael M v Superior Court of Sonoma County*<sup>27</sup> was an audacious challenge to the constitutionality of the offence of rape in California, which defined that offence so that men alone could be criminally liable as principals in the first degree. The unsuccessful challenge was that the statute was impermissibly under-inclusive as it did not criminalise the identical activities of females. Inequality may in fact be reasonable, depending upon whether there is a sufficient underlying interest that justifies the derogation from equality. Identical treatment is not in itself a constitutional norm as such rigidity would subvert rather than promote even-handedness.<sup>28</sup>

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<sup>24</sup> But as to provocation see *Stingel v The Queen* (1990) 65 ALJR 141, 147. “Indeed, it may be that the average power of self-control of the members of one sex is higher or lower than the average power of self-control of the other sex. The principle of equality before the law requires, however, that the differences between different classes or groups be reflected only in the limits within which a particular of self-control can be characterised as ordinary.”

<sup>25</sup> s21 *Human Rights Act 1993* [NZ] includes “marital status”, “sex” and “family status” as prohibited grounds for discrimination; the linkage is to s19 *New Zealand Bill of Rights Act 1990* which grants freedom from discrimination on at least the enumerated grounds in the *Human Rights Act 1993*.

<sup>26</sup> M J Murray, ‘*The Criminal Code A General Review*’ (June 1983) Attorney General’s Chambers, Western Australia vol 1, p53 “In my view, unless good reason can be seen for retaining special rules with respect to criminal responsibility of spouses they should generally be abolished. Husbands and wives should with respect to offences committed by them with respect to each other or persons outside the marriage be in the same position as ordinary persons from the point of view of criminal responsibility. I would propose generally to remove distinctions drawn by the law with respect to married persons in connection with their criminal responsibility. Only in specific areas, such as with respect to accessories after the fact under Section 10, would I propose to remain any differential as to criminal responsibility based solely on the fact that the accused has a status as a married person.” This last sentence does not fit the protocol of the others. Why is marriage a valid differentiating factor?

<sup>27</sup> (1981) 450 US 464. The United States Supreme Court has held the offence of rape to be constitutional notwithstanding that it is not drafted in gender-neutral language. A gender-based classification will be upheld if it bears a “fair and substantial relationship” to legitimate state ends”. In *People v Liberta* (1984) 64 NY 2d 152, cert denied (1985) 471 US 1020 the unsuccessful constitutional challenge was to the rape and sodomy laws of New York which exempted married persons. The defendant had been ordered by a Court to leave apart from his wife, at the material time. “[W]here a statute draws a distinction based upon marital status, the classification must be reasonable and must be based upon some ground of difference that rationally explains the different treatment”: *Eisenstadt v Baird* (1972) 405 US 438, 447. In *R v Hess* [1990] 2 SCR 906 (SCC) statutory rape law did not discriminate against men because the offence was defined in terms of penile penetration.

<sup>28</sup> *R v Man Wai Keung (No 2)* [1992] 2 HKCLR 207, 217 (CA) per Bokhary J.

A direct challenge to the unconstitutionality of the marital coercion doctrine emerged before the Supreme Court of Ireland in *State (DPP) v Walsh and Conneely*<sup>29</sup> which easily concluded that the doctrine could not co-exist with the right to equality. A Special Criminal Court had found spouses guilty of the capital murder of a police officer and both had been sentenced to death. They sought leave to appeal against conviction in the Court of Criminal Appeal.<sup>30</sup> While their applications for leave to appeal were pending, *The Irish Times* newspaper published a report as to whether the Irish Cabinet would intervene in commuting the death sentences passed on them. The Director of Public Prosecutions applied for orders of attachment or committal and sequestration for a criminal contempt against the journalist, editor and publisher of the newspaper. The High Court found them all in contempt and they appealed to the Supreme Court. One argument advanced to that court<sup>31</sup> was that the female respondent who had drafted the published statement said to be a criminal contempt, did so in the presence of and with the extensive assistance of her husband. She relied on the defence of marital coercion as a complete excusatory defence to the contempt.<sup>32</sup> Henchy J described the submission as “strange” and “lacking in persuasiveness”. The offence of criminal contempt was not the composition of the statement when the husband was present, but in causing it to be published. The husband had taken no part in its dissemination although he was beside her when she telephoned it to the newspaper. But the court then dealt with the issue on its merits, accepting that there had been undoubtedly a common law defence of coercion available in Ireland although the last reported case in which it had been considered there was *R v Hallett* in 1911<sup>33</sup>. The defence was in an effort “to compensate the wife for her inferior status, and in particular to make up for her inability to plead benefit of clergy, as her husband could, the law concocted the fiction of a prima facie presumption that the act done by her in the presence of husband was done under his coercion”. Evidence of initiative by the wife would rebut the

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<sup>29</sup> [1981] IR 412 (SC). In *R v Ruzic* (2001) 153 CCC (3d) 1, 30 (SCC) a constitutional challenge to the lawfulness of both the presence and immediacy requirements in s17 *Criminal Code*, which defined the defence of duress/compulsion, was upheld.

<sup>30</sup> *The People v Murray* [1977] IR 360.

<sup>31</sup> Henchy, Griffin and Kenny JJ.

<sup>32</sup> Reference was made to *R v Green* (1913) 9 Cr App R 228; *R v Stapelton* (1828) 1 Cr & D 163; *R v Hallett* (1911) 45 ILTR 54; *Lynch v Director of Public Prosecutions* [1975] NI 25 and T C Purcell ‘*Purcell’s Criminal Law*’ (1848) Law Times, London, p15.

<sup>33</sup> (1911) 45 ILTR 54.

presumption. The court found that the wife had been the prime mover as it was she, “and she alone” who telephoned the statement to the newspaper, while her husband merely happened to be present. “His mere physical presence in the room could no more provide a defence for her than it could form the basis of a conviction of him”. But, although the court found that no factual matrix existed to properly generate the defence, it carried on to consider whether the defence remained part of Irish law or whether it had been rendered unconstitutional as an impermissible derogation from the right of equality before the law.

The Supreme Court ruled that as a matter of constitutional law the marital coercion doctrine “was no longer extant”. Henchy J said:

The idea that, where a wife performs a criminal act, there should be a prima facie presumption that the mere physical presence of her husband when she did it overbore her will, stultified her volitional powers, and drove her into criminal conduct which she would have avoided but for his presence, pre-supposes a disparity in status and capacity between husband and wife which runs counter to the normal relations between a married couple in modern times.<sup>34</sup>

An uxorial privilege unavailable to any other person of equally deserving character similarly conditioned jarred by its stark inequality, particularly as it deprived other persons of a concession or criminal defence provided by law.

The conditions of legal inferiority which attached at common law to the status of a married woman and which gave rise to this presumption have been swept away by legislation and by judicial decisions. Nowadays, to exculpate a wife for an actus reus because it was done when her husband was present is no more justifiable than if she were granted immunity from guilt because the act was done in the presence of her father, her brother or any other relative or friend. Any other conclusion would be repugnant to the degree of freedom and equality to which a wife is entitled in modern society and which has been extensively recognised in the statutes and judicial decisions of this State.

A legal rule that presumes, even on a prima facie and rebuttable basis, that a wife has been coerced by the physical presence of her husband into committing an act prohibited by the criminal law, particularly when a similar presumption does not operate in favour of a husband for acts committed in the presence of his wife, is repugnant to the concept of equality before the law guaranteed by the first sentence of Article 40, s1, and could not, under the second sentence of that Article, be justified as a discrimination based on any difference of capacity or

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<sup>34</sup> [1981] IR 412, 449 (SC).

of social function as between husband and wife. Therefore the presumption contended for must be rejected as being a form of unconstitutional discrimination.<sup>35</sup>

The whole substratum of the doctrine was based upon the outmoded notion of the inferior position of the wife in temporal affairs. The abolition of the doctrine underlined the married woman's present responsibility as being one of equality and therefore co-extensive with her present economic status;<sup>36</sup> there could be no jurisprudential or even sociological justification for the maintenance of the ancient common law rule.<sup>37</sup>

A second constitutional challenge to a substantive uxorial privilege occurred in *United States v Hill*.<sup>38</sup> There an issue arose as to whether it was constitutional to prosecute a wife for harbouring her fugitive husband or for being an accessory after the fact to his crime. A wife had been convicted of both offences<sup>39</sup> in relation to her spouse who was sheltering in Mexico for failure to pay child support in the United States. That failure constituted a criminal offence in America but not in Mexico, and Mexico was unwilling to extradite the husband.<sup>40</sup> On appeal, Mrs Hill argued that the two statutory offences were unconstitutional on the basis that they impermissibly infringed her constitutional rights of association and marriage. Laws that

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<sup>35</sup> The Law Reform Commission of Ireland 'Report on Landlaw and Conveyancing Law: (6) Further General Proposals Including the Execution of Deeds' (May 1998). para 1.30 fn 6: "Some [provisions] involved rules which were inherently objectionable on policy grounds, such as *The State (Director of Public Prosecutions) v Walsh* [1981] IR 412. There, the defence of marital coercion, which provided a defence to a wife who committed an offence in the presence of her husband, was abolished. In other cases, a gender-neutral extension of the rule would have been meaningless: in the case of *In re Tilson Infants* [1951] IR 1, the rule giving fathers a permanent right to custody and control of children was abolished; so too in *CM v TM (No.2)* [1992] 2 IR 52, where extension of the rule on dependent domicile would have been no solution in that a wife's domicile would have been dependent on that of her husband, and the husband's on that of his wife."

<sup>36</sup> In *Gottliffe v Edelston* [1930] 2 KB 378, 385 "But in spite of all this the fact remains that marriage creates a most important status and one which should create also a substantial identity of social and other interests between husband and wife. Hence there seems to be a sound sociological basis for the view of the law that in certain respects there should be a presumption of modified unity between husband and wife." In *Conyer v United States* (1935) 80 F 2d 202, 204 it was said of married women, "their independence...in political, social and economic matters rightly places upon them an increased responsibility". cf *R v Annie Brown* (1896) 15 NZLR 18,38 per Conolly J "Indeed, it may be fairly argued that a wife is in a less favourable position than a child or a servant, since the tendency of modern legislation is to place husbands and wives in a position of absolute equality, in which coercion or control is no more to be presumed on one side than on the other."

<sup>37</sup> It is improbable that prosecution counsel in England and Wales would take the initiative to have the defence declared to be unconstitutional under the *Human Rights Act 1999* [UK] but it cannot be beyond the realm of possibility that a trial or appellate court in England would, of its own motion, find that any uxorial defence was unconstitutional and could not prospectively avail anyone from the time of that decision.

<sup>38</sup> Unreported United States Court of Appeals, Ninth Circuit, No 00-30023, DC No CR-99-60010-1-HO, 27 July 2001, Nelson, Graber and Rawlinson JJ.

<sup>39</sup> Contrary to 18 USC § 1071 and 18 USC § 3.

<sup>40</sup> *United States v Hill* *ibid* fn 4 judgment.

“slice deeply into the family”<sup>41</sup> do not logically infringe the status of marriage, particularly if there is a compelling state interest that justifies the intrusion. The United States Court of Appeals Ninth Circuit, rejected the wife’s argument that the offences were unconstitutional. A wife when so acting in relation to a husband<sup>42</sup> had no protection from the criminal law. The court reasoned that to exclude a wife by providing her with an immunity “is tantamount to a suggestion that spouses may relieve, comfort, or assist each other in violating any and all federal criminal laws”<sup>43</sup> which was inconsistent with the reasoning of the decision of the Supreme Court in *United States v Dege*<sup>44</sup> that spouses could conspire alone together under modern American Law. The Court of Appeals determined that the old common law immunity of wives had now exhausted itself as being irreconcilable with constitutional imperatives. Each of the three exemplars investigated in this work fail the demand of constitutional law that the law not be unequal without proportionate substantiation. The ideology of the current law to ‘protect’ a wife via marriage (within the criminal law) is itself an illegitimate objective.

Uxorial defences could be fundamentally remodelled to include a husband and also to cover wider relationships beyond that of marriage.<sup>45</sup> That institution confers a status that is now rivalled in numbers and by alternative modes of intimate personal partnership<sup>46</sup> – heterosexual and homosexual. Other equally close personal relationships<sup>47</sup> are generally not provided with the protection given to married couples. Intimacy and confidentiality have always been the special features of that legal relationship, but it is not rational to suggest that these hallmarks

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<sup>41</sup> *Moore v City of East Cleveland* (1977) 431 US 494, 499.

<sup>42</sup> In *Michael v United States* (1968) 393 F 2d 22, the United States Court of Appeals Tenth Circuit rejected an argument that a wife was immune by law for harbouring her wanted husband. It was not unconstitutional to remove the old common law immunity; it was unconstitutional to retain it.

<sup>43</sup> *United States v Hill* per Nelson J.

<sup>44</sup> (1960) 364 US 51.

<sup>45</sup> Stanley Yeo, ‘*Coercing Wives Into Crime*’, (1992) 6 Australian Journal of Family Law 214. (The most comprehensive treatment of the Victorian legislation).

<sup>46</sup> Mary Glendon, ‘*Withering Away of Marriage*’ (1976) 62 Virginia LR 663, 686 “Motivations to enter informal rather than legal marriage include economic advantages as in the case of many elderly people, inability to enter a legal marriage, unwillingness to be subject to the legal effects of marriage, desire for a ‘trial marriage’, and lack of concern with the legal institution.”

<sup>47</sup> R H Graveson and F R Crane eds ‘*A Century of Family Law 1857-1957*’, (1957) Sweet & Maxwell, London p1. “There appears to be no single underlying principle which, by itself, accounts for the special position of husband and wife in the criminal law. At least three concepts play an important part. The doctrine of conjugal unity, the doctrine of conjugal subjection and the duty, love and tenderness recognised by the law as being owed by a wife to her husband.” In *Holmes v DPP* [1946] AC 588, 600 Viscount Simon said “we have left behind us the age when the wife’s subjection to her husband was regarded by the law as the basis of the marital relation”.

are only found in marriage<sup>48</sup> and that any other arrangement is unable to provide approximate or greater fulfilment of those criteria. A contemporary restatement of the marital coercion defence “would have to recognise the frequency of unhallowed unions, and perhaps of coerced men”.<sup>49</sup> The hen-pecked male is an anthropomorphic extrapolation known to the law. A reason commonly advanced for confining the defence to actual marriage, as opposed to similar relationships, is the difficulty in proving the existence of the latter.<sup>50</sup> This objection is over-rated, the burden of proving the existence of that relationship is on the proponent of it. It is a matter of fact and degree, fitting exactly within the usual fact-finding function of courts, to be determined in all the circumstances. It is not a plausible structural reason for inequality. Difficulties of proof can attend actual marriage, particularly when it involves polygamous circumstances or concubinage, lawful in the jurisdiction of the parties. Common law marriage (as opposed to de facto unions) is still available<sup>51</sup> and valid in 10 American states as well as in the District of Columbia.<sup>52</sup> Proof of such marriage requires evidence of cohabitation and repute as the marriage is not formally registered. Unless there is a justification on a logical, reasonable and sustained basis for separate treatment between spouses, turning on either the recent experience of the law or as a remedy for an avowed inequality, the law should provide a gender-neutral response in the design of defences to criminal conduct.

Wives are no longer as a generality subject to the thralldom of their spouse so the essential policy of the uxorial immunities is decidedly fallacious. In its time those immunities represented a pragmatic balance between preserving the stability of the union and the competing duty of wives to society. The marital conspiracy exemption is the outcome of a

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<sup>48</sup> It is understandable that the motivation for the crime may arise out of the relationship, but that does not affect the requisite intention for the commission of the crime. Matters of motivation can be properly taken into account in assessing penalty but are irrelevant to the issue of liability for crime.

<sup>49</sup> Nigel Walker ‘*Aggravation, Mitigation and Mercy in English Criminal Justice*’ (1999) Blackstone Press Ltd London p200 noting that any combination of sexual partnership can involve domination of one participant.

<sup>50</sup> Victorian Law Commissioner, Report No 3, ‘*Criminal Liability of Married Persons*’ (1975) para 82 noting it “would commonly be an additional area of dispute and difficulty” in proving the existence of any common law or de facto relationship. This principle was approved by the New South Wales Court of Appeal in *R v Brown (Mary Veronica)* New South Wales Court of Criminal Appeal, BC9806791, 9 December 1998, McInerny, Hulme and Barr JJ: s29A *Interpretation Act 1999* [NZ] which defines the requirements of a defacto relationship.

<sup>51</sup> In *Meisher v Moore* (1877) 96 US 76 the Supreme Court affirmed the lawfulness of common law marriage, unless the state jurisdiction specifically abolished that form of marriage. It still exists in Alabama; *Piel v Brown* (1978) 361 So 2d 90, 93. A recent statute in Kansas expressly maintains it: 2002 *Kan. Sess. Laws SB 486* § 23 – 101.

<sup>52</sup> *Johnson v Young* (1977) 372 A 2d 992, 994.

particular reductionist policy that sublimates the individuality of the spouses.<sup>53</sup> But it also undeservedly reinforces marriage as a special attainment that bestrides other similar relationships in that it alone exempts from the criminal law. Yet where a wife is irreconcilably separated from her husband, she is still entitled to the disparate uxorial privileges. This is notwithstanding that the fact of that marriage has become a fiction,<sup>54</sup> whereas the uxorial privileges have ossified a fiction into a fact.

The common law did not contemplate the vicissitudes of marriage thrown up by polygamy and customary law concubinage, seeing marriage only in terms of the orthodox Christian model. These other marital configurations are no longer irksome exotica but are practical complexities in modern pluralistic jurisdictions.<sup>55</sup> Their existence further militates against the perpetuation of special rules in the substantive criminal law for married women. When the criminal law places a particular premium on the single institution of marriage, it is significant that in practice the freedom to marry may itself not be a valid assumption.<sup>56</sup> The common law has never, even now, equipped itself to deal with the twilight zone of persons of reassigned gender, whose rights under the law to claim uxorial privileges are as yet undefined. The complete removal of uxorial privileges would eliminate the need for such classification.

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<sup>53</sup> *Eisenstadt v Baird* (1972) 405 US 438, 453 per Brennan J “The marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup.”

<sup>54</sup> See *R v Salituro* (1991) 68 CCC (3d) 289 (SCC). In Canada, the factually dead but legally existing marriage concept was created so that the common law exception to spousal incompetency (eg where the spouses have become divorced by the time of the trial, although not at the time of the offence) was extended to cases where there was no reasonable possibility of reconciliation at the time of the trial. This reasoning would, in itself, undermine any valid defence based on marriage as a status, as the qualitative nature and endurance of the marriage would be itself a matter of evidence designed to impact on the very sanctity that the institution is assumed to provide. In *R v Hawkins* (1996) 111 CCC (3d) 129 (SCC). the Supreme Court left open the position where there may be a sham marriage to render a key witness uncompetable.

<sup>55</sup> Dame Brenda Hale, Judge David Pearl, Elizabeth J Cooke, Philip D Bates (eds) *The Family, Law and Society Cases and Materials* at p16: “The challenge for the law is to respond to the wide range of family patterns we see in society today. It has been very difficult for legal systems to develop the necessary breadth of vision.”

<sup>56</sup> *Miron v Trudel* [1995] 2 SCR 418; *Reference Re Same-Sex Marriage* [2004] 3 SCR 698, 725 “The decision to marry or not is intensely personal and engages a complex interplay of social, political, religious and financial considerations by the individual. In theory, the individual is free to choose whether to marry, or not to marry. In practice, however, the reality may be otherwise. The sanction of the union by the state through civil marriage cannot always be obtained. The law; the reluctance of one’s partner to marry; financial, religious or social constraints – these factors and others commonly function to prevent partners who otherwise operate as a family unit from formally marrying. In short, marital status often lies beyond the individual’s effective control.”

On a time-line basis, the history of the change in marital status in criminal law exemplifies the adhocism which has characterised significant parts of criminal law reform in common law jurisdictions. All too often the priority has been significant single issue reforms, which have deflected the possibility of attention and the finesse required for meso-level evaluations and overviews. In addition, the relative importance in the law of marriage has palpably diminished, as it has been statistically overtaken by alternative modes of special partnerships of personal and intimate commitment. The introductory formalities of marriage are generally settled and no longer represent matters of serious legal consideration; the emphasis now is not on the entry process but on the responsiveness of the law to the consequences<sup>57</sup> flowing from the arrangement or ones like it.

The erratic nature of uxorial law reform is evidence that individualised reaction to a specific litigation outcome, rather than a principled review of the underlying basis for the collection of disparate rules, has shaped legislative approaches. In New Zealand, for example, the first significant incision was made in 1893 followed in the next century by other modifications; yet still in the twenty-first century marital status still constitutes a defence in law in one circumstance. To compare the development between the pioneering criminal code jurisdictions and other common law countries is truly instructive as most of the uxorial privileges rejected almost 120 years ago in Canada and New Zealand still subsist in England and Wales, not just in the open-textured nature of the common law, but engrossed by legislative enactment.

It is the lack of consistency that is the design-fault in criminal law in this area. To have removed marital coercion, yet to have left intact the exemption for marital conspiracy, makes the current Canadian position truly anomalous. It was the English Law Commission that concluded to remove the conspiracy exemption<sup>58</sup> would undermine marital stability,<sup>59</sup> so it proposed its retention; yet in almost the same breath it recommended the abrogation of the marital coercion doctrine. But the abolition of the privilege against the disclosure of marital

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<sup>57</sup> If a wife or a husband has become involved in a conspiracy because of the relationship this could be legitimately seen as a substantial feature of mitigation in any sentencing exercise, but it cannot justify elevation to an absolute immunity.

<sup>58</sup> Law Commission No76, *'Criminal Law: Report on Conspiracy and Criminal Law Reform'*, (March 1976) para 1.46.

<sup>59</sup> Law Commission, Working Paper No 50: *Inchoate Offences, Conspiracy, Attempt and Incitement*, para 36.

communications,<sup>60</sup> it supported.<sup>61</sup> A hallmark of law reform in this sector has been adhococracy and unevenness.

Apart from the omission of the law reform bodies, common law judges have not generally dealt with the uxorial privilege issue in terms of gender-equality, but to date have seen it in a reliquary as a stubborn remnant of coverture. While the English common law of crime progressed<sup>62</sup> it had not become an homogenous development because of its inconsistency and intrinsic contradictions.<sup>63</sup> The advent of statutory intervention has not been accompanied by a general reappraisal of the fundamental issue, but is a piecemeal response that ultimately has only served to exacerbate the dissymmetry between the uxorial privileges and the general criminal law. The present status of the relative positions between wives under English and New Zealand criminal law demonstrates that there is no coherent approach. In the former the two common law rulings of Darling J in *R v Peel* in 1922 as to marital coercion and intraspousal conspiracy remain, 85 years later, entrenched in English law; now consecrated by statute. In the latter neither uxorial privilege remains. In the former the accessorial uxorial privilege has been diluted by statute to a generic anodyne provision, making no gender-specific distinction at all, whereas in the latter, that privilege remains available to wives, has been extended to husbands and has been recast to include homosexual unions.

Sometimes an omnibus enactment may mean that the precise implications of all the consequential amendments flowing from the new legislation, may have been overlooked. The New Zealand Parliament enacted the *Relationships (Statutory References) Act 2005* in which some 113 other Acts were consequentially amended, including the provision dealing with

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<sup>60</sup> Provided by s1(d) *Criminal Evidence Act 1898*.

<sup>61</sup> Law Commissioner, Eleventh Report, *Evidence (General)*, 1972, Cmnd 4991, para 173. Where a statute draws a distinction based upon marital status, the classification must be reasonable and must be based upon "some ground of difference that rationally explains the different treatment"; *People v Liberta* (1984) 474 NE 2d 567, 573 (NY: CA).

<sup>62</sup> *Haseldine v CA Daw and Son Ltd* [1941] 2 KB 343, 362 (CA) per Scott LJ. "The common law of England has throughout its long history developed as an organic growth...and in the last hundred years at an ever increasing rate of progress, as new cases arising under new conditions of society, of applied science, and of public opinion, have presented themselves for solution by the courts."

<sup>63</sup> *Best v Samuel Fox & Co* [1952] AC 716, 727 per Lord Porter. "The common law is a historical development rather than a logical whole, and the fact that a particular doctrine does not logically accord with another or others is no grounds for its rejection." While the first clause is accurate, the second clause is no longer accurate as, if a legal doctrine is not syncoated with constitutional minima, then it is exactly grounds for its rejection.

marital coercion. It is now provided by the amended s24(3) *Crimes Act 1961*, that the presumption of marital coercion also does not exist for persons in a civil union. At the same time, the accessory immunity was extended to persons in a civil union. The very limited opportunity to debate whether that accessory immunity, which had been by some variant in the statute since 1893, should be maintained in any form at all, was lost. The issue was simply never raised as the systematic quest to substitute for “wife” the phrase “wife or civil union partner” monopolised the parliamentary attention span. By default the underlying substantive criminal law issue went unnoticed having been overlooked in the quest to equalise marriage and civil unions.

Since 1843, the marital coercion defence has been ear-tagged for destruction but has survived in England and other jurisdictions where it has become fortified in statute. It is entirely possible that it will survive for many years on the basis that it is relatively harmless and hardly a grotesque interference with the equanimity of the criminal law. Further, parliamentary time and resources may not be devoted to it or the other uxorial remnants because of other priorities.

A number of reasons explain the chaotic state of the relevant law. The general ennui<sup>64</sup> of courts and legislatures to extinguish the uxorial privilege doctrine is significantly due to nonchalance. There has been no comprehensive single issue study since the Victorian Law Reform Commissioner in 1975 successfully recommended the introduction of a package of amendments to introduce wife-specific protections in the criminal law. Some of the inertia is also attributable to the ineradicable belief that some soft compensatory advantage in favour of married women remains a harmless gesture. There still continues in some common law jurisdictions a demonstrated need for protection in the criminal law for wives, because of the quantum and nature of physical and psychological spousal dominance still a reality of cultural diversity. The lack of economic independence of wives in those societies correlates with a lack of genuine choice. In Canada, despite its pioneering removal of the marital coercion defence in 1892, it has sustained the spousal conspiratorial exemption for the last 50 years, relying on the

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<sup>64</sup> *Re Xerox of Canada Limited and Regional Assessment Commissioner Region No 10* (1980) 30 OR 2d 90, 95 per Jessup JA: “Perhaps we can all be forgiven; we were nurtured uncritically on the good old English common law principles and over the years they have become our security blanket that we are loathe to part with.”

theory of *stare decisis*. In other jurisdictions the uxorial laws have provoked little in the way of legal literature or other interest, resulting in virtually no caselaw. The somnolence is explicable by the perception of the comparative unimportance of the wider issue and the possible political risks in raising it. For a significant number of jurisdictions, like the former colonies which acquired the Anglo-prototype of uxorial privileges, the necessity to deal with the modern implications is unlikely to arise in the absence of a change or reform in England or without an innovative constitutional challenge. It is remarkable that the very issue which divided the New Zealand Court of Appeal in 1926 in *R v McKeachie*, whether criminal legislation by its implication intended to remove the 'defence of marriage' from the law, is still likely to identify the separation point in any constitutional challenge to primary legislation, in those jurisdictions which permit it. The primary issue still is whether the statutory objective is itself defensible and consequentially whether a special exemption from the general criminal law is a legitimate response. The modern linking language of proportionality was not evoked by either Stout CJ or Ostler J in their dissenting judgments, but their methodology in reasoning that an intraspousal conspiracy ought to be justiciable, is a prescient example of it.

If one such privilege ought no longer to exist, other changes become inevitable to produce an overall principle, in which the fact and consequences of marriage provide no exemption from the substantive criminal law. The conclusion is that changes to the law have accrued without any logical coherence, with only limited individual aspects of the greater issue having ever been considered. There has been occasional progression but no systematic development. In seeking to find a single sustainable principle for the uxorial privileges in the substantive criminal law there is found nothing but confusion, obscurity and inconsistency. These defences, radiations of conjugal unity, have been useful instruments for the furtherance of the policy of the law to protect the institution of marriage and especially to compensate for the supposed vulnerabilities of wives, but they are unreal as expositions in themselves of the living law. The doctrine of marital unity was always a gnomonic but misleading perception of the law. Even from the time of King Ine matrimony had never constituted a general defence to criminal law, as a wife was always recognised as thoroughly capable of independent or complicit criminal conduct.

One of the aims of the rule of law is to render law intelligible, as far as possible, to those who are subject to it.<sup>65</sup> Despite its pedigree of over 1000 years, and indeed because of it, the special position of married women under the substantive criminal law remains a serious doctrinal anomaly, divorced from the truth of the exultation that:

Happily, in our day, the law, if not exactly “the perfection of reason”, will generally warrant the conclusions of an accurate thinker.<sup>66</sup>

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<sup>65</sup> R S Mackay ‘*Case and Comment*’ (1955) 33 Can Bar Review 75 n9 “To the layman such a result is patently ridiculous” – the notion that spouses could not in law conspire together.

<sup>66</sup> *Pearson v Clark* (1864) Mac 136, 144 (CA). Sir James Fitzjames Stephen ‘*Edinburgh Review*’ (1861) cxiv 481: “History without analysis is at best a mere curiosity; and analysis without history is blind, though it may not be barren.”

## APPENDIX

### SUBSTANTIVE UXORIAL PRIVILEGES IN COMMON LAW JURISDICTIONS

Anguilla,<sup>67</sup> Australian Capital Territory,<sup>68</sup> Belize,<sup>69</sup> Canada,<sup>70</sup> Canal Zone (of Panama, administered by the United States of America),<sup>71</sup> Cayman Islands,<sup>72</sup> Cook Islands,<sup>73</sup> Cyprus,<sup>74</sup>

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<sup>67</sup> In Anguilla a conspiracy between two spouses is not possible; Section 32(b)(i) *Criminal Code*, Revised Statutes of Anguilla, Chapter c140, 2000, Attorney General's Chambers, Anguilla marital coercion exists under the English model Section 19 *ibid*. The accessory immunity exists for a wife and is the extended husband plus cohort exemption; the husband has the immunity only in relation to his wife s28 *ibid*. Revised Statutes of Anguilla, ch C140, *Criminal Code*, 15 December 2000. There can be no intranspousal conspiracy in Anguilla. Exceptions to section 31: *Revised Statutes of Anguilla*, ch C140, *Criminal Code*, 15 December 2000. "32. A person shall not, by virtue of section 31, be convicted of conspiracy to commit an offence, if - (a) he is the sole intended victim of the offence; or (b) the only other person with whom he agrees is (both initially and at all times during the currency of the agreement) a person of any one or more of the following descriptions - his spouse ..."

<sup>68</sup> s407 *Crimes Act 1990* [ACT], notified in ACT Gazette No 50: 15 December 1999.

<sup>69</sup> The law of Belize does not exempt intramarital conspiracy: s24 *Belize Criminal Code*, ch 101, Revised Edition 2000 and only the presumption of marital coercion but not the defence is actually abolished: s29 *Belize Criminal Code*.

<sup>70</sup> Section 13 *Criminal Code 1892* [Can]. Don Stuart, '*Canadian Criminal Law A Treatise*', (1982) Carswell Co Ltd, Toronto, p384, says of that section that it abolished "an arbitrary and socially dated notion that a wife could rely on the defence of duress merely on account of the marital bond. Our abolition as early as 1892 was in terms more forthright than the later abolishing statutory provision in England, which still presents difficulties". *R v Warren et Ux* (1888) 16 OR 590 (QBD) MacMahon J followed *R v Williams* (1795) 10 Mod R 63 and *R v Dixon and his wife* (1795) 10 Mod R 335 and held that there may be a joint conviction against husband and wife for keeping a house of ill-fame. At 592: "the criminal management of the house (in which the wife may probably have as great, nay a greater share than the husband". *R v McGregor* (1895) 26 OR 115 (CPD) Meredith CJ and Rose J referred to *R v Williams* (1878) 42 UCR 462 but found that if the presumption had existed it would have been rebutted as "the wife was the more active party" but the presumption had been "now entirely swept away" by s13 *Criminal Code 1892* [Can] so reliance upon it was misconceived. *R v Mrs Philip Williams* (1878) 42 UCR 462 the appellant had been convicted of unlawfully selling liquor without a licence. Gwynne J noted that as early as *R v Crofts* (1795) 2 Str 1120 that a married woman had been convicted of this offence and that there was no evidence that the husband had been present at the sale, as, at p465, at the material time "the husband was in gaol for a similar offence", so no presumption arose. In *R v Robins* (1982) 66 CCC (2d) 550, 562 the Québec Court of Appeal (Crête CJQ, Mayrand and Malouf JJA) stated that the 1892 Criminal Code abolished the antiquated defence of marital coercion "to place the woman on a equal footing with all other citizens." There can be no intranspousal conspiracy in Canada: *Kowbel v The Queen* [1954] 4 DLR 337 (SCC).

<sup>71</sup> *Canal Zone Code 1963* title 6 § 45(a)(9).

<sup>72</sup> s30 *Criminal Code* [Cayman Islands] Title 8, Item 31, 1971 Revised, excuses the wife in relation to the husband and where in his presence and by his authority another who committed the offence is involved. No provision for her as the principal and him as an immune accessory after the fact exists. The spouses cannot conspire alone Section 50 *ibid* but marital coercion s49 operates where the wife "is actually compelled by her husband" and "in his presence", with capital offences excepted.

<sup>73</sup> *Crimes Act 1969* [Cook Is] [1994 Revised Edition] s27(3) provides "where a married woman commits an offence, the fact that her husband was present at the commission of it shall not of itself raise the presumption of compulsion".

<sup>74</sup> Section 19 *Cyprus Criminal Code* Order in Council 1928, Government Printing Office, Nicosia, 1928, reprinted 1939. The same section appears later as s18 *Criminal Code 1959* (Revised Edition) Cap 154 provided "A married woman is not free from criminal responsibility for doing or omitting to do an act merely because the act or omission takes place in the presence of her husband". But s24 provides "A wife does not become an

England,<sup>75</sup> Fiji,<sup>76</sup> Gibraltar,<sup>77</sup> Guyana,<sup>78</sup> Hong Kong,<sup>79</sup> India,<sup>80</sup> Ireland,<sup>81</sup> Isle of Man,<sup>82</sup> Kenya,<sup>83</sup> Kiribati,<sup>84</sup> New South Wales,<sup>85</sup> New Zealand,<sup>86</sup> Nigeria,<sup>87</sup> Niue,<sup>88</sup> North Carolina<sup>89</sup>

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accessory after the fact to the offence of which her husband is guilty by receiving or assisting him in order to enable him to escape punishment; not by receiving or assisting, in her husband's presence and by his authority, another person who is guilty of an offence in the commission of which her husband has taken part, in order to enable that other person to escape punishment; nor does a husband become accessory after the fact to an offence of which his wife is guilty by receiving or assisting her in order to enable her to escape punishment". No exemption from conspiracy exists though.

<sup>75</sup> s47 *Criminal Justice Act 1925* [UK]. There can be no intraspousal conspiracy in England and Wales: s2(2)(a) *Criminal Law Act 1977* [UK].

<sup>76</sup> s19 *Penal Code* Cap 17 (1985 Edition) [Fiji] provides "A married woman is not free from criminal responsibility of doing or omitting to do an act merely because the act or omission takes place in the presence of her husband; but, on a charge against a wife for any offence other than treason or murder, it shall be a good defence to prove that the offence was committed in the presence of, and under the coercion of the husband": Mark Findlay, '*Criminal Laws of the South Pacific*' (2000) 2 ed, Institute of Justice for Applied Legal Studies, p191, states "Thus the presumption is removed but the defence remains if the defendant can discharge the nominated evidentiary requirements." '*Conspiracies*' ss385-387 does not exempt a wife from conspiring with her husband. P Imrana Jalal, '*Law for Pacific Women, a Legal Rights Handbook*', (1998) Fiji Women's Rights Movement, Suva, Fiji at p82: "Marital rape is not seen as a crime in our region; if a man is legally married to the woman he rapes, he may not be found guilty of rape". Intrasposal conspiracy is possible: ss385-387 *Penal Code*[Fiji].

<sup>77</sup> In Gibraltar marital coercion is treated differently again. Section 5 *Criminal Offences Ordinance* [Gibraltar](1984). "5. Where a married woman is charged with an offence other than treason or murder, it is a good defence to prove that the offence was committed in the presence of, and under the coercion of, her husband." By s12 (2) (a) intraspousal conspiracy is impossible. There can be no intraspousal conspiracy in Gibraltar: *Criminal Offences Ordinance* [Gibraltar] 1984 edition: 5. Where a married woman is charged with an offence other than treason or murder, it is a good defence to prove that the offence was committed in the presence of, and under the coercion of, her husband." "11(1) Subject to the following provisions of this Part, a person who agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions, either ... (5) This Part shall not apply to any conspiracy under the common law of England." Exemptions from liability. "12.(1) A person shall not by virtue of section 11 be guilty of conspiracy to commit any offence if he is an intended victim of that offence. (2) A person shall not by virtue of section 11 be guilty of conspiracy to commit any offence or offences if the other person or persons with whom he agrees are (both initially and at all times during the currency of the agreement) persons of any one or more of the following descriptions, that is to say – his spouse;"

<sup>78</sup> In Guyana, if the marital coercion was rebutted conviction followed and the formal order of conviction did not have to recite that the defendant was the wife of the husband: *Govia v King* unreported, 29 August 1874, Supreme Court of British Guiana, noted by BEJC Belmonte, '*An Alphabetical Digest and Index Appended of about 1,800 Reprinted written Judgments of Decisions of the Several Courts of Justice in British Guiana from 1856 to 31<sup>st</sup> December 1906*' (1907) Sweet & Maxwell, LW, London, p133. "Married woman may be convicted for offence committed by her without coercion of her husband; not necessary to join husband in the conviction. [*Govia v King*, 29.8.74]" "Wife convicted together with husband on charge of making use of distillery apparatus while not having a licence. Evidence that she acted under control and coercion of her husband. [*Bassie v Kerr*, 18.6.04]" Where spouses were convicted of using an unlicensed still, the presumption of marital coercion applied and was not rebutted. *Bassie v Kerr* unreported 18 June 1904 Supreme Court of British Guiana noted by O E Sharples, '*A Digest of Cases Decided in the Supreme Court of British Guiana During the Years 1901-1905*', (1906) Sweet & Maxwell Ltd, London, p35-36.

<sup>79</sup> s9 *Criminal Procedure Amendment Ord* 1930 [HK] now renumbered as s100 *Criminal Procedure Ord* Cap 221 [HK] provides for marital coercion. There can be no intraspousal conspiracy in Hong Kong: s159B(2)(a) *Crimes Ordinance* Cap 200 [HK]. Accessorial immunity follows the English model: s90 *Criminal Procedure Ord*.

<sup>80</sup> The *Indian Penal Code* gave no special privilege to the wife: The law of India never recognised marital coercion. John D Mayne, '*Commentaries on the Indian Penal Code*', 14 ed (1890) Higginbotham and Co,

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Madras, p64. “follow[ing] the Scotch law in this respect with the single exception of “harbouring” which is no offence when a wife harbours her husband.” Citing: “Mad HC Rul, 12<sup>th</sup> April 1870”, to this effect s136 *Penal Code* [India], dealing with harbouring of military deserters, specifically exempts a wife, whereas sections 212 and 216 dealing with harbouring offenders, excuses both husbands and wives. Intraspousal conspiracy is possible, s120A *Penal Code* does not exempt married couples.

<sup>81</sup> *State (DPP) v Walsh and Conneely* [1981] IR 412 (SC) declared that the marital coercion doctrine was unconstitutional, being violative of equality rights.

<sup>82</sup> The Isle of Man makes no exemption and gives no immunity to a wife from any crime *Criminal Code 1872*, Isle of Man.

<sup>83</sup> In *R v Wambogo* (1924) 10 KLR 3 the Supreme Court of Kenya had to decide whether a native woman, married according to native law and custom, acted under the coercion of her husband. At that time the Indian Penal Code applied to the Colony of Kenya and the East Africa Court of Appeal held there was no room for the common law presumption of marital coercion. But in 1955 Worley VP, delivering the judgment of the court held that *Wambogo* must now be read in the light of s20 *Penal Code* (Kenya) which has put in effect a statutory enactment of the common law presumption: “We are not aware of any reported decision of any court in East Africa on the application of this section to a woman married according to native custom”: *Lenson Ambindwile s/o Mafubila v Reginam* [1955] 22 EACA 448 (Nihill P, Worley V P, Briggs JA) s20 of the *Penal Code* (Kenya) provided: “A married woman is not free from criminal responsibility for doing or omitting to do any act merely because the act or omission takes place in the presence of her husband; but on a charge against a wife for any offence other than treason or murder, it shall be a good defence to prove that the offence was committed in the presence of, and under the coercion of the husband”.

<sup>84</sup> s19 *Penal Code Cap 67* (Revised Edition 1977) [Kiribati] provides compulsion by husband “A married woman is not free from criminal responsibility for doing or omitting to do an act because the act or omission takes place in the presence of her husband; but on a charge against a wife any offence other than treason or murder, it shall be a good defence to prove that the offence was committed in the presence of, and under the coercion of the husband”.

<sup>85</sup> s407A *Crimes Act 1900* (as amended) (1924) [NSW].

<sup>86</sup> *Criminal Code Act 1893* [NZ], now s24(3) *Crimes Act 1961* [NZ]. Intraspousal conspiracy is possible: s67 *Crimes Act 1961* [NZ]. Accessorial immunity still exists: s71(2) *Crimes Act 1961* [NZ].

<sup>87</sup> In the *Criminal Code Act Cap.77, ‘Laws of the Federation of Nigeria 1990’* the Schedule to the Act sets out the Code of Criminal Law and Part I ch 1 defines “Christian marriage” as meaning “a marriage which is recognised by the law of the place where it is contracted as the voluntary union for life of one man and one woman to the exclusion of all others”. Ch 2 s10 provides for the crime of an accessory after the fact and then adds an exemption in these terms: “A wife does not become an accessory after the fact to an offence of which her husband is guilty by receiving or, assisting him in order to enable him to escape punishment; nor by receiving or assisting, in her husband’s presence and by his authority, another person who is guilty of an offence in the commission of which her husband has taken part, in order to enable that other person to escape punishment; nor does a husband become accessory after the fact to an offence of which his wife is guilty by receiving or assisting her in order to enable her to escape punishment”. The section expressly states that the term “wife” and “husband” mean respectively the wife and husband of a Christian marriage. In Part I ch 4 clause 33 it states: “A married woman is not free from criminal responsibility for doing or omitting to do an act merely because the act or omission takes place in the presence of her husband. But a wife of a Christian marriage is not criminally responsible for doing or omitting to do an act which she is actually compelled by her husband to do or omit to do, and which is done or omitted to be done in his presence, except in the case of an act or omission which would constitute an offence punishable with death, or an offence of which grievous harm to the person of another, or an intention to cause such harm, is an element, in which case the presence of her husband is immaterial”. It can be noted that this legislation uniquely deals with criminal acts by omission. Ch 4 clause 34 finally provides: “A husband and wife of Christian marriage are not criminally responsible for a conspiracy between themselves alone”. This country which embraces both Christianity and the Muslim religions also recognises the defence of marital unity to the crime of conspiracy. See Robert Yorke Hedges, *‘Introduction to the Criminal Law of Nigeria’* (1983) Sweet & Maxwell, London, p174. Section 34 of the *Criminal Code of Nigeria* expressly restricts the concept to a “Christian marriage” thereby excluding polygamy. It seems unarguably clear that a Christian marriage is intended to be a monogamous one. ANE Amisssah, *‘Criminal Procedure in Ghana’* (1982) Sedco Publishing Ltd, Accra at p200: “Under the old [Criminal Procedure] Code (Cap 10) there was discrimination between the spouse married under the Marriage Ordinance and his or her

Northern Ireland,<sup>90</sup> Northern Territory,<sup>91</sup> Papua New Guinea,<sup>92</sup> Queensland,<sup>93</sup> Samoa,<sup>94</sup> St Lucia,<sup>95</sup> Scotland,<sup>96</sup> Solomon Islands,<sup>97</sup> South Africa,<sup>98</sup> South Australia,<sup>99</sup> Tasmania,<sup>100</sup>

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counterpart married according to custom or Mohammedan law over the question of privilege from giving evidence in the criminal case against the other spouse. Both types of spouses were competent witnesses for the prosecution. But this spouse married under the Ordinance was not compellable while “one married to another person otherwise than by a Christian marriage” was compellable”. There can be no intraspousal conspiracy in Nigeria. This country which embraces both Christianity and the Muslim religions also recognises the defence of marital unity to the crime of conspiracy. See Robert Yorke Hedges, *Introduction to the Criminal Law of Nigeria* (1903) Sweet & Maxwell, London, p174. Section 34 of the *Criminal Code* of Nigeria expressly restricts the concept to a “Christian marriage” thereby excluding polygamy. It seems unarguably clear that a Christian marriage is intended to be a monogamous one. Ch 4 clause 34 *Criminal Code Act*, Cap 77, *Laws of the Federation of Nigeria*, 1990 finally provides: “A husband and wife of Christian marriage are not criminally responsible for a conspiracy between themselves alone”. The Nigerian *Criminal Code* based on the Griffith code, was enacted in 1904 and was essentially adopted in Kenya, Uganda, Tanganyika and Nyasaland and became ‘the foundation of the criminal law in much of Anglophonic Africa. Robin S O’Regan, *New Essays on the Australian Criminal Codes*’ (1988) The Law Book Company Ltd, Sydney p107 discusses its formation. Drafted by Gollan CJ of the British Protectorate of Northern Rhodesia (later Sir Henry Gollan, Chief Justice of Hong Kong), it principally follows the Griffith model. Note that it differentiates between Christian and non-Christian marriages: see P J Pace *‘Impeding Arrest’ – A Wife’s Right as a Spouse?’* [1978] Crim LR 82. In *Idiong v The King* (1950-1951) 13 WACA 30 a conviction for murder was quashed where the prosecution had relied upon the evidence of a woman married to the first appellant, without ascertaining whether that marriage was monogamous. As it had not been proved affirmatively that she was the wife of a polygamous marriage it was held to be a material irregularity as she would not otherwise be a competent witness.

<sup>88</sup> s238 *Niue Act 1966* [NZ] provides “Common Law Defences – all rules and principles of the Common Law which render any circumstance a justification or excuse for any act or omission, or a defence to any charge, shall remain in force with respect to all offences constituted by this or any other enactment, except so far as inconsistent with this or any other enactment”.

<sup>89</sup> *State v Owen* unreported Supreme Court of North Carolina, No COA 98-413, 15 June 1999; affirming the existence of the marital coercion defence there.

<sup>90</sup> s37 *Criminal Justice Act 1945* [NI] abolishes the presumption of coercion and is in the identical form to s47 *Criminal Justice Act 1925* [UK].

<sup>91</sup> The Northern Territory see s40 (duress) and s41 (coercion) *Criminal Code Act 1983* (NT) abolished the entire defence but reformulated the general defence of duress in wider terms than those appearing in other Australian jurisdictions. The test imposed by s40 *Criminal Code Act 1983* [NT] ensures a proportionate relationship between the harm caused by the offence and the intensity of the external pressure brought to bear on the defendant. Intrasposal conspiracies are possible: s291 *Criminal Code Act 1983* [NT].

<sup>92</sup> s33(2) *Criminal Code Act 1974* [PNG] a wife is “not criminally responsible for doing or omitting to do an act that (a) she is actually compelled by her husband to do or omit to do and (b) is done or omitted to be done in his presence”. There can be no intraspousal conspiracy in Papua New Guinea: s34 *Criminal Code Act 1974* [PNG].

<sup>93</sup> s32 *Criminal Code Act 1899* [Qld] (repealed in 1977). The intraspousal conspiracy exemption was abrogated by s120 *Criminal Law Amendment Act (No.3 of 1997)* [Qld].

<sup>94</sup> By ss24 and 97 *Crimes Ordinance 1961* [Samoa] marriage is not a defence to the charge of conspiracy, as under coercion: see Mark Findlay, *Criminal Laws of the South Pacific* (2000) 2 ed, Institute of Justice and Applied Legal Studies, p96.

<sup>95</sup> s63 *Criminal Code of St Lucia*. The 1992 revision of the criminal law of St Lucia passed in the House of Assembly 3 April 1992 and in the Senate on 7 April 1992. An earlier version of which had been expressly noted by the Ivory Committee, exactly replicates s47 *Criminal Justice Act 1925* [UK]. No exemption though is made from an intra-spousal conspiracy. Section 99 *ibid*. “63. No presumption shall be made that a married woman committing an offence does so under compulsion because she commits it in the presence of her husband, but on a charge against a wife for any offence other than treason or murder it shall be a good defence to prove that the offence was committed in the presence of, and under the coercion of, the husband.” “99. If two or more persons agree to act together with a common purpose in committing or abetting a crime, whether with or without any

Tokelau,<sup>101</sup> Tonga,<sup>102</sup> Trinidad and Tobago,<sup>103</sup> Tuvalu,<sup>104</sup> United States of America<sup>105</sup>,  
Vanuatu,<sup>106</sup> Victoria<sup>107</sup> and Western Australia.<sup>108</sup>

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previous concert or deliberation, each of them is guilty of conspiracy to commit or abet that crime, as the case may be.”

<sup>96</sup> Has never recognised any part of the marital coercion defence: Archibald Alison, *Principles of the Criminal Law of Scotland* (1832) William Blackwood, Edinburgh p668.

<sup>97</sup> s19 *Penal Code* Cap26 (Revised Edition 1996) [Solomon Is] “Compulsion by Spouse “a married person is not free from criminal responsibility for doing or omitting to do an act merely because the act or omission takes place in the presence of that person’s spouse; from a charge against a married person for any offence other than treason or murder, it shall be a good defence to prove that the offence was committed in the presence of and under the coercion of that person’s spouse”. This section was amended by s2 of Act 5 of 1989 [SI] to extend marital coercion to spouses rather than confine it to a wife. This is a unique formulation of the old law. The explanation for this equality is that it “was in line with the provisions of the Constitution on discrimination on the basis of gender”: Mark Findlay, ‘*Criminal Laws of the South Pacific*’ (2000) 2 ed, Institute of Justice for Applied Legal Studies, p191. See s15(4), Chapter II, *The Constitution of Solomon Islands*, SI 1978 No 83 [Solomon Is].

<sup>98</sup> *R v Mtetwa* 1921 TPD 227 where Wessels JP concluded that Roman-Dutch law did not recognise the common law defence of marital coercion, although prior to then South African common law had.

<sup>99</sup> s12 *Criminal Law Consolidation Amendment Act 1940* [SA].

<sup>100</sup> Tasmania, not only abolished the presumption, but also the entire defence, on the basis of incompatibility with female emancipation; s20(2) *Criminal Code Act 1924* [Tas].

<sup>101</sup> *Tokelau Crimes Regulations 1975* 1975/1929 made on 1 December 1975 applied the provisions of Part v, vi, vii of the *Niue Act 1966* to Tokelau subject to the provisions of the regulations.

<sup>102</sup> s22 *Criminal Offences Act* Cap 18 [Tonga] provides in Part III “Exemptions from Criminal Responsibility and Responsibility for Acts of Involuntary Agents”. Section 22 provides “A married woman committing an offence in the presence of her husband shall not be presumed to have committed it under his compulsion.”

<sup>103</sup> Trinidad and Tobago has the identical English model for marital coercion. s7 *Criminal Law Act 1936* Laws of Trinidad and Tobago, ‘*Criminal Law*’ c.10:04.

<sup>104</sup> s19 *Penal Code* Cap 8 (Revised Edition) [Tuvalu] provides “A married woman is not free from criminal responsibility for doing or omitting to do an act merely because the act or omission takes place in the presence of her husband; but on a charge against a wife for any offence other than treason or murder, it shall be a good defence to prove that the offence was committed in the presence of, and under the coercion of, the husband”. Section 19 is found in Part IV called “General Rules as to Criminal Responsibility”.

<sup>105</sup> Intraspousal conspiracy is an offence: *United States v Dege* (1960) 364 US 51.

<sup>106</sup> s26 *Penal Code* [Vanuatu] Laws of the Republic of Vanuatu Revised, edition 1988, chapter 135, Penal Code. “26(1) Criminal responsibility shall be diminished in the case of an offence committed by a person acting – (a) under actual compulsion or threats, not otherwise avoidable, of death or grievous harm; (b) under the coercion of a parent, spouse, employer or other person having actual or moral authority over such persons”. Sub-section 2 criminal responsibilities shall not be diminished under sub-section 1 if the person acting has voluntarily exposed himself to the risk of such compulsion, threats or coercion. There is no provision for a conspiracy between spouses. *Vanuatu Penal Code* Cap 135 (Revised Edition 1988). Section 29(2) *Penal Code* provides “there can be no conspiracy between husband and wife”. In addition, it has a unique formulation of coercion which extends well beyond a married woman, to include her spouse, an employer or “other person having actual or moral authority” over another. There can be no intraspousal conspiracy in Vanuatu: *Penal Code* Cap 135 (Revised Edition 1988). Section 29(2) provides: “there can be no conspiracy between husband and wife”. “A husband and wife alone cannot be found guilty of conspiracy because they are, in law, one person.” *The Penal Code* (1988) by ss28-29: “Only criminal offences can be the subject of criminal charges, and the offence must state that conspiracy to commit that offence is an offence in itself. There is no provision for a conspiracy between a husband and wife in Vanuatu.” Mark Findlay, ‘*Criminal Laws of the South Pacific*’ (2000) 2 ed, Institute of Justice and Applied Legal Studies, p96.

<sup>107</sup> s336 (1) *Crimes Act 1958* [Vic], inserted in 1977: there can be no intraspousal conspiracy or incitement in Victoria: s339(2) *Crimes Act 1958* [Vic] which by ss(1) exempts “conspiracy to commit treason or murder”.

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<sup>108</sup> s32 *Criminal Code Act 1902* [WA] repealed s118(2) *Acts Amendment (Equality of Status) Act 2003* [WA]. Intrapousal conspiracy has been possible since 14 March 1988: s6 *Criminal Code Amendment Act (No 2) 1987* [WA].



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