

[HOUSE OF LORDS.]

LEACH . . . . .	APPELLANT ;	H. L. (E.)
	AND	1912
REX . . . . .	RESPONDENT.	<u>Feb. 26.</u>

*Criminal Law—Evidence—Incest—Wife of Person charged—Competent or Compellable Witness—Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), s. 4.*

Under s. 4 of the Criminal Evidence Act, 1898, the wife of a person charged with an offence to which the section applies is not compellable to give evidence against her husband.

APPEAL from an order of the Court of Criminal Appeal.

The appellant was tried for an offence under the Punishment of Incest Act, 1908, at the Stafford Assizes before Pickford J. and a jury and was convicted. At the trial the wife of the appellant was called by the prosecution, but she raised the objection that under s. 4 of the Criminal Evidence Act, 1898 (1), she could not be compelled to give evidence against her husband. Pickford J. ruled that the wife was a compellable witness, and directed her to give evidence, which she did, and this ruling was affirmed by the Court of Criminal Appeal (Lord Alverstone C.J., Hamilton and Bankes JJ.) and the conviction upheld.

*Milward*, for the appellant. The question is whether under s. 4 of the Criminal Evidence Act, 1898, the wife of the accused

(1) Criminal Evidence Act, 1898, s. 4: "The wife or husband of a person charged with an offence under any enactment mentioned in the schedule to this Act may be called as a witness either for the prosecution or defence and without the consent of the person charged."

The enactments referred to in the schedule are :—(1.) The Vagrancy Act, 1824, the enactment punishing a man for neglecting to maintain or deserting his wife or any of his family; (2.) the Poor Law (Scotland) Act, 1845, s. 80; (3.) the

Offences against the Person Act, 1861, ss. 48 to 55; (4.) the Married Women's Property Act, 1882, ss. 12 and 16; (5.) the Criminal Law Amendment Act, 1885—the whole Act; (6.) the Prevention of Cruelty to Children Act, 1894—the whole Act.

Punishment of Incest Act, 1908, s. 4, sub-s. 4: "Section 4 of the Criminal Evidence Act, 1898, shall have effect as if this Act were included in the schedule to that Act."

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is merely competent or is also compellable to give evidence against her husband. To determine the construction of that section it is necessary to see what is the common law on the subject and whether it is still in existence. Now it is a fundamental principle of the common law that husband and wife are one person in law: Lush's Law of Husband and Wife, 3rd ed., p. 3; *Firebrass v. Pennant*. (1) It follows from that that at common law neither can testify for or against the other, or take civil or criminal proceedings against the other: *Rex v. Inhabitants of Cliviger* (2); *O'Connor v. Marjoribanks* (3); *Phillips v. Barnet* (4); *Reg. v. Lord Mayor of London*. (5) To this rule there are certain recognized exceptions, namely, in the case of (1.) high treason, (2.) personal injuries inflicted by husband or wife on the other, and (3.) forcible abduction followed by marriage. But except in those specified cases it is impossible at common law for a wife to testify against her husband, and that rule is founded on the unity of the husband and wife. That unity may be partially broken by statute by making either husband or wife a competent witness, or it may be absolutely broken by making either a compellable witness; but with that exception the common law still holds good, and in the absence of clear statutory authority the wife cannot be compelled to appear against her husband. The Evidence Act, 1851 (14 & 15 Vict. c. 99), s. 2, makes parties admissible witnesses, but s. 3 recognizes the existing common law and provides that nothing in that Act "shall in any criminal proceeding render . . . any wife competent or compellable to give evidence for or against her husband." That section still remains unrepealed. By the Evidence Amendment Act, 1853 (16 & 17 Vict. c. 83), husbands and wives of parties are made admissible witnesses, but s. 2 again expressly reserves the common law in criminal cases. At common law the wife is neither a competent nor a compellable witness against her husband. By the law of England no prisoner is a compellable witness, and if the husband is not compellable because he is a prisoner, then, in the absence of express

(1) (1764) 2 Wils. 254.

(3) (1842) 4 Man. &amp; G. 435, 443.

(2) (1788) 2 T. R. 263, 268.

(4) (1876) 1 Q. B. D. 436.

(5) (1886) 16 Q. B. D. 772, 775.

enactment to the contrary, the wife may seek the same protection as her husband and is not compellable because of the unity of husband and wife. The statutes dealing with this subject are set out in Russell on Crimes, 7th ed., vol. ii., p. 2272, and the effect of the legislation is that in practically every instance the wife is spoken of as "competent" or "competent but not compellable." The only exception is in the Married Women's Property Act, 1884. That is the only Act which completely breaks the unity. The Married Women's Property Act, 1882, ss. 12, 16, provides redress by way of criminal proceedings to the husband or wife in respect of offences against the property of the other, and either was made a competent witness against the other. Then by the Act of 1884 either, except when defendant, is made compellable to give evidence. But although ss. 12 and 16 of the Married Women's Property Act, 1882, are included in the schedule to the Criminal Evidence Act, 1898, the Act of 1884 is not so included.

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Sect. 1 of the Criminal Evidence Act, 1898, makes the wife a competent witness for the defence, but clause (c) recognizes that there is so much unity remaining that she cannot be called except upon the prisoner's application, and clause (b) recognizes that the wife is not an ordinary witness because it provides that the prosecution can no more comment on her absence than they could on the prisoner's absence. Reading the words of s. 4 "may be called as a witness" in sequence with the common law and the statutes already passed they must be construed as meaning competent merely and not competent and compellable. That section deals only with the husband's consent; it does not deal with the consent of the witness. Treating those words as meaning competent and nothing more, each of the scheduled enactments would have something added to it because the words "without the consent of the party charged" are new. The distinction between competent and compellable began as early as the Evidence Act, 1851, but it appears in the most recent Acts, 58 & 59 Vict. c. 24, s. 5; 58 & 59 Vict. c. 28, s. 2; 60 & 61 Vict. c. 60, s. 5, thus shewing the same line of thought throughout.

The true construction of s. 4 is that it is a re-enactment of the interpretation of the earlier statutes with the addition that the

II. L (E.) witness may give evidence against the prisoner's will. The protection accorded to the wife by the common law in a matter of such vital importance ought not to be taken away except by the clearest language.

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*Sir J. Simon, S.-G., and Rowlatt (with them Mordaunt Snagge),* for the respondent. Three questions arise with regard to the wife's testimony. The first is, Is her testimony admissible at all? That is expressed by saying, Is she competent? The second is, Is she a person who may refuse to give evidence although an admissible witness? If she is, that is expressed by saying she is competent but not compellable. The third is, Assuming that the wife's evidence is admissible and the wife is not unwilling to give evidence, can she give evidence against the will of her husband? There is no word to express that. That is the question which is dealt with by s. 4 of the Criminal Evidence Act, 1898. Before that Act there were twenty-six statutes in which the wife was made a competent witness. Out of those Acts the Act of 1898 has selected four and has added two others. The Act has picked out certain offences which are catalogued by reference to the enactments creating them. Those offences are selected by way of contrast to the other cases in which the wife has been made a competent but not compellable witness because it was desired by reason of the nature of the scheduled offences that the wife should be compellable. But upon the appellant's construction, although the Legislature selected some out of the many statutes and left the rest, they are all to stand on the same footing as before. It is said that the Married Women's Property Act, 1884, was not included in the schedule, but the reason for that is that s. 4 of the Act of 1898 was dealing with offences, and the offences to which the Act of 1884 relates are contained in ss. 12 and 16 of the Married Women's Property Act, 1882, which are included. It may be that the Act of 1898 adds nothing to the Act of 1884, but the one case in which the wife was already a compellable witness was included because, although it was not necessary, it was thought convenient that all the cases in which the wife was made compellable should be collected in one place. Saying that a witness "may be called" does not imply that the witness may refuse to give evidence. Those words relate

to the power of the person calling the witness. If a person may be called the legal consequence is that he must submit to examination. There is no standing rule that a wife if competent is not compellable to give evidence. The Act of 1898 eschews the use of the word "compellable" and that controversy. The words of the earlier statutes are "competent but not compellable," not "competent and compellable," and where the word "competent" is used without more the inference is that the witness is compellable. Among the Acts comprised in the schedule to the Act of 1898 is the Prevention of Cruelty to Children Act, 1894. That Act was repealed by the Prevention of Cruelty to Children Act, 1904, and s. 12 of the latter Act provides that the wife of a person charged with any offence under that Act shall be competent but not compellable to give evidence. That provision was unnecessary except on the assumption that the Act of 1898 rendered the wife compellable. That again is altered by the Children Act, 1908, which makes the Criminal Evidence Act, 1898, applicable to Part II. of the Act (which deals with cruelty to children) as if it were substituted for the reference to the Prevention of Cruelty to Children Act, 1894.

*Milward* replied.

EARL LOREBURN L.C. My Lords, I do not pretend to conjecture whether the decision which your Lordships, I think, will arrive at, is pro bono publico or not. It is very desirable that in a certain class of cases justice should not be thwarted by the absence of the necessary evidence, but upon the other hand it is a fundamental and old principle to which the law has looked, that you ought not to compel a wife to give evidence against her husband in matters of a criminal kind. It is not our duty to-day to consider consequences at all. What we have to consider is the meaning of the law that has been laid down in the Act of 1898.

My Lords, this appellant was indicted and was convicted for an offence under the Incest Act. In the course of that trial his wife was called and asked to give evidence; she objected to give evidence for the prosecution, but was directed to do so and compelled to do so. The question is whether this was lawful or

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H. L. (E.) not. It is clear that this question must be governed by the  
 1912 4th section of the Criminal Evidence Act, 1898, which runs  
 LEACH as follows: "The wife or husband of a person charged  
 v. with an offence under any enactment mentioned in the schedule  
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 Earl Loreburn cution or defence and without the consent of the person  
 L.C. charged."

Now, my Lords, if it had not been for that 4th section the wife could not have been allowed to give evidence, and the result of that was that the wife could not have been compelled to do so and was protected against compulsion. The difference between leave to give evidence and compulsion to give evidence is recognized in a series of Acts of Parliament. Does then the 4th section, which I have read, deprive the wife of this protection? It is capable of being construed in different ways, and it may hereafter lead, for all I know, to various other difficulties, but the present question is, does it deprive this woman of this protection? My Lords, it says in effect that the wife can be allowed to give evidence, even if her husband objects. It does not say she must give evidence against her own will. It seems to me that we must have a definite change of the law in this respect, definitely stated in an Act of Parliament, before the right of this woman can be affected, and therefore I consider that this appeal ought to be allowed, with what consequences, or how that may be conformable to what is in the true interests of society or the public in this particular case, we are not concerned and are not at liberty to inquire.

EARL OF HALSBURY. My Lords, I am entirely of the same opinion. I confess I do not think the matter is one upon which I should myself have entertained very much doubt in the first instance. You must consider, when you are dealing with Acts of Parliament, and examining what the effect of your proposed construction is, whether or not you are dealing with something that it is possible the Legislature might either have passed by definite and specific enactment or have allowed to pass by some ambiguous inference.

Now, dealing with that question, I should have thought that it

would occur not only to a lawyer, but to almost every Englishman, that a wife ought not to be allowed to be called against her husband, and that those who are under the responsibility of passing Acts of Parliament would recognize a matter of that supreme importance as one to be dealt with specifically and definitely and not to be left to inference.

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I think that observation is true also for this reason : that when you are dealing with a question of this kind you cannot leave out of sight the different enactments that have been passed upon this subject with a sort of nomenclature of their own ; and speaking for myself, as an ordinary person, I should have asked, when it was proposed to call the wife against the husband, “ Will you shew me an Act of Parliament that definitely says you may compel her to give evidence ? because since the foundations of the common law it has been recognized that that is contrary to the course of the law.” If you want to alter the law which has lasted for centuries and which is almost ingrained in the English Constitution, in the sense that everybody would say, “ To call a wife against her husband is a thing that cannot be heard of,”—to suggest that that is to be dealt with by inference, and that you should introduce a new system of law without any specific enactment of it, seems to me to be perfectly monstrous.

The result is that I entirely concur with the judgment of the Lord Chancellor, and particularly with that part of it in which he said that such an alteration of the law as this ought to be by definite and certain language.

LORD MACNAGHTEN. My Lords, I entirely agree with the views which have been expressed by my noble and learned friends.

LORD ATKINSON. My Lords, I concur. The principle that a wife is not to be compelled to give evidence against her husband is deep seated in the common law of this country, and I think if it is to be overturned it must be overturned by a clear, definite, and positive enactment, not by an ambiguous one such as the section relied upon in this case.

LORD SHAW OF DUNFERMLINE. My Lords, I agree.

H. L. (E.)      LORD ROBSON. My Lords, I agree, for the reasons which I  
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*Order of the Court of Criminal Appeal reversed and  
cause remitted to that Court accordingly.*

*Lords' Journals, February 26, 1912.*

Solicitors for appellant: *Mills, Curry & Gaskell, for Johnson &  
Son, Newcastle-under-Lyme.*

Solicitor for respondent: *Director of Public Prosecutions.*

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OWNERS OF KETCH FRANCES . . . . APPELLANTS ;

AND

OWNERS OF STEAMSHIP HIGHLAND LOCH      RESPONDENTS.

THE HIGHLAND LOCH.

*Admiralty—Ship—Collision—Launch—Negligence.*

The defendants, being about to launch a steamship which they had built in their shipbuilding yard on the Mersey, arranged with the owners of a buoy which was thought to be in the line of the launch for its removal. The buoy was removed, but its mooring chains were left unmarked at the bottom of the river. The plaintiffs' ketch, which was sailing up the river on the flood tide on the morning of the intended launch, finding the wind falling light, let go her starboard anchor and drifted up the river dragging her anchor, which fouled the mooring chains. The master being unable to free the anchor, the defendants sent messages to him warning him that his ketch was in a dangerous position and advising him to slip his anchor and clear away, but the master refused to slip unless the defendants would make themselves answerable for the anchor. The defendants, deeming it dangerous to life and property to postpone the launch and believing the risk of a collision with the ketch to be slight, launched the steamship, and a collision occurred. In an action of damage by collision brought by the owners of the ketch:—

*Held*, that the ketch acted unreasonably in refusing to slip her anchor and was alone to blame, inasmuch as the defendants, in the dilemma in