T H E L A W R E F O R M C O M M I S S I O N

AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

(LRC 13-1985)

REPORT ON COMPETENCE AND COMPELLABILITY OF SPOUSES AS WITNESSES

IRELAND
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First published July 1985

THE LAW REFORM COMMISSION

COMPETENCE AND COMPELLABILTY OF SPOUSES AS WITNESSES

CHAPTER 1: THE PRESENT LAW

At common law, in both civil and criminal proceedings, it was a general rule that a spouse of a party was not competent to testify. As Sir Edward Coke put it at the beginning of the seventeenth century:

> "Note it hath been resolved, that a wife cannot be produced either for or against her husband, quia sunt duae animae in carne una, and it might be a cause of implacable discord and dissension between them, and a means of great inconvenience."

This rule existed in the context of other rules of evidence which made the parties to civil litigation and the prosecutor or accused in criminal proceedings incompetent. Apart from the parties and their spouses, others with a proprietary or pecuniary interest in the outcome of proceedings were also incompetent.

These rules were abolished as far as civil proceedings were concerned in the middle of the last century. The Evidence Act, 1843 abolished incompetence through interest except in the case of the parties and their spouses. Parties to civil proceedings were made competent and compellable by the Evidence Act, 1851. Their spouses were made competent and compellable, except in proceedings instituted in consequence of adultery, by the Evidence Amendment Act, 1853.[1]

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[1] The terms of the Act are:

> "1. On the trial of any issues joined, or of any matter or question, or any inquiry arising in any suit, or other proceeding in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, the husbands and wives of the parties thereto, and of the persons in whose behalf any such suit, action or other proceedings

There are, however, several matters relating to the competence and compellability of spouses in civil proceedings which are still not free from doubt. The Evidence Further Amendment Act, 1869 provided that parties to proceedings instituted in consequence of adultery and their husbands and wives were to be competent to give evidence.[2] This leaves open the question whether these persons are also compellable. In England it has been held that competence implies compellability in this provision.[3] But there has been no reported decision on the point in Ireland and, in other contexts, as will be noted, it seems that competence does not imply compellability.[4]

Fn. 1 Cont'd

may be brought or instituted, or opposed or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence either viva voce or by deposition according to the practice of the court, on behalf of either or any of the parties to the said suit, action or other proceeding.

2. Nothing herein shall render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband, in any criminal proceeding, or in any proceeding instituted in consequence of adultery.

3. No husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage."

2 The relevant section, section 3, reads as follows:

"The parties to any proceedings instituted in consequence of adultery, and the husband and wives of such parties, shall be competent to give evidence in such proceeding: provided that no witness in any proceeding, whether a party to a suit or not, shall be liable to be asked or be bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have given evidence in the same proceeding in disproof of his or her alleged adultery."

3 Tilley v Tilley [1949] P. 240.

4 See infra, pp. 5-6, 9-10.

The position of former spouses is also not free from doubt. In an English case decided before the enactment of the Evidence Amendment Act, 1853 it was held that a divorced wife was not competent to give evidence relating to matters which had occurred during her marriage in proceedings to which her former husband was party.[5] In another case, a widow was held not competent in an action taken by the personal representatives of her deceased husband for conversion of part of an estate from a bank.[6] It might be questioned whether the provision in the Evidence Amendment Act, 1853 making husbands and wives competent and compellable is effective to make a former spouse of a party to an action competent and compellable to testify on matters occurring while they were married. While this may appear to be the interpretation producing the most reasonable result it is noteworthy that an English court has held that the term wife does not include a widow for the purposes of a provision in another section of the same statute conferring on a wife a privilege not to disclose communications made to her by her husband.[7]

In criminal proceedings the law making spouses incompetent was subject to certain exceptions. In Lord Audley's Case, where the husband was charged as an accessory to the rape of his wife, it was laid down that a spouse was a competent witness in cases of assault perpetrated by the other party to the marriage.[8] This exception has been held to extend to a charge of attempting to murder a wife by poisoning although no violence was involved.[9] It may also extend to any offence involving infringement of liberty.[10] On a charge of abducting and marrying a girl against her will, it was held that she was a competent witness notwithstanding the fact that the marriage was legally valid.[11]

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5 Munroe v Twistleton (1802) Peake Add. Cas. 219.

6 O'Connor v Marjoribanks (1842) 4 Man. & G. 435.

7 Shenton v Tyler [1939] Ch. 620. For text of the Act see supra, pp. 1-2.

8 (1631) 3 State Trials 401.

9 R. v Verolla [1963] 1 Q.B. 285.

10 Cross on Evidence, pp. 176-8 (5th ed., 1979).

11 R. v Wakefield (1827) 2 Lew. C. C. 279.

Treason is another possible exception.[12] On a charge of bigamy, when the first marriage and the existence of the first wife or husband had been proved, the second wife could be called[13] but this was not really an exception as the second marriage was invalid.

These exceptions were expanded piecemeal by individual statutes enacted from 1872 onwards. At that time the accused was not as a general rule a competent witness even on his own behalf and provisions making the spouse of an accused competent were usually included in statutes which also made the accused himself a competent witness in a trial for the offence in question.[14] In most cases it was provided either that the spouse "may be called" as a witness or that he or she "is competent" to give evidence. While it was sometimes stated expressly that the spouse was not compellable,[15] it was more common to make no

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12 Taylor, The Law of Evidence, p.976, fn.3 (16th ed.,1906).

13 R. v Young, (1847) 2 Cox. 291.

14 Licensing Act, 1872, section 51(4); Sale of Food and Drugs Act, 1875, section 21; Conspiracy and Protection of Property Act, 1875, section 11; Evidence Act, 1877, section 1; Married Women's Property Act, 1882, sections 12, 16; Explosives Act, 1881, section 4(2); Corrupt and Illegal Practices Prevention Act, 1883, section 53(2); Married Women's Property Act, 1884, section 1; Criminal Law Amendment Act, 1885, section 20; Merchandise Marks Act, 1887, section 10; Law of Libel Amendment Act, 1888, section 9; Public Health Act, 1891, section 118; Betting and Loans (Infants) Act, 1892, section 6; Prevention of Cruelty to Children Act, 1894, section 12; Law of Distress Amendment Act, 1895, section 5; False Alarms of Fires Act, 1895, section 2; Factory Act, 1895, section 49; Corrupt and Illegal Practices Prevention Act, 1895, section 2 Chaff-Cutting Machines (Accidents) Act, 1897, section 5; Motor Car Act, 1903, section 19(4); Prevention of Cruelty to Children Act, 1904, section 12; Children Act, 1908, section 133 (28).

15 See Criminal Law Amendment Act, 1885, section 20; Law of Libel Amendment Act, 1888, section 9; Law of Distress Amendment Act, 1895, section 5; False Alarms of Fire Act, 1895, section 2; Chaff-Cutting Machines (Accidents) Act, 1897, section 5; Prevention of Cruelty to Children Act, 1904, section 12; Children Act 1908, section 133(28).

express reference to compellability.[16] It was then not clear whether it was intended that the witness should be compellable. In two cases the spouse was expressly made competent and compellable.[17] There were a number of statutes where it was stated that a spouse of an accused "may be called" to give evidence but only on behalf or with the consent of that accused.[18] It was then not clear whether the spouse was compellable as well as competent for the accused in such cases.

The Criminal Justice (Evidence) Act, 1924, which made the accused a competent witness for the defence in every case, also dealt with the position of spouses as witnesses. Section 1 provides:

> "Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person: Provided as follows:
>
> (a) A person so charged shall not be called as a witness in pursuance of this Act except upon his own application:
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> (b) the failure of any person charged with an offence, or of the 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:

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16 See Licensing Act, 1872, section 51(4); Conspiracy and Protection of Property Act, 1875, section 11; Army Act, 1881, section 156(3); Public Health Act, 1891, section 118; Building Societies Act, 1894, section 24; Motor Car Act, 1903, section 19(4); Summary Jurisdiction (Ireland) Act, 1908, section 12; Criminal Law Amendment Act, 1912, section 7(6).

17 See Evidence Act, 1877, section 1; Married Women's Property Act, 1884, section 1. In the latter case an exception was made when the spouse was a co-accused.

18 See Sale of Food and Drugs Act, 1875, section 21; Explosive Substances Act, 1883, section 4; Merchandise Marks Act, 1887, section 10; Betting and Loans (Infants) Act, 1892, section 6.

(c) the wife or husband of the person charged shall not, save as in this Act mentioned, be called as a witness in pursuance of this Act except upon the application of the person so charged:"

Although there is no case in which the point has been fully argued, it seems to be accepted that the effect of these provisions making the spouse of an accused competent for the defence in every criminal case was not to make that spouse compellable.[19]

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[19] See Cross on Evidence, p. 178 (5th ed., 1979). R. v Boal [1965] 1 Q.B. 402 at p. 416. Criminal Law Revision Committee, Eleventh Report: Evidence (General), para. 145. The existence of statutes where spouses were stated to be "competent and compellable" is an argument against implying compellability [see supra, fn. 17]. However, see also T.M.S. Toswill, "The Accused's Spouse as Defence Witness" [1979] Criminal Law Review 696, at p. 699.

> ".... That competence generally includes compellability is 'a constitutional principle underlying our whole system of Justice'.... It might therefore be expected that in the absence of any clear reason to the contrary, 'competent' in section 1 should include compellability. The word 'competent' has been used in statutes before 1898 to mean both competent-and-compellable and competent-but-not- compellable.
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> If Parliament had here intended the latter, there would have been no need for paragraph (a), which restricts the meaning of 'competent' in section 1 by expressly saving D (a defendant) from being compelled to go into the witness box. Although the rules of statutory interpretation do not permit the courts to ascertain legislative intention by studying reports on parliamentary debates, these interestingly confirm that Parliament did intend section 1 to made S. (a spouse of a defendant) compellable for the defence. An amendment specifically designed to negative her compellability for the defence - by adding the words 'and the wife or husband, as the case may be, of the person so charged shall not be called as a witness witnout his or her consent' to what is now section 1(e) - was defeated."

In Tilley v Tilley [1949] P. 240 it was held that a provision in the Evidence Further Amendment Act, 1869 declaring a spouse competent in adultery proceedings had the effect of making such a spouse compellable. However this conclusion was based on rather special arguments.

Where several persons are charged together, one accused may not call the spouse of another accused by virtue of this section unless the latter gives his or her consent. But where a spouse of one accused is called for the defence by a co-accused pursuant to another statutory provision, section 1(c) is not applicable and it seems, therefore, that the consent of the accused spouse is not required unless the statute in question so provides.

Section 4 dealt with cases where a spouse of an accused may give evidence for the prosecution or for a co-accused without the consent of the accused spouse. Sub-section 1 provides:

> "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 in the Schedule to which reference was made in Section 4(1) were the Vagrancy (Ireland) Act, 1847, section 2; the Offences Against the Person Act, 1861, sections 48, 52, 53, 54, so far as unrepealed, and section 55; the Married Women's Property Act, 1882, sections 12 and 16; and the Prevention of Cruelty to Children Act, 1904 (The Whole Act).

The Vagrancy (Ireland) Act, 1847, section 2, which created the offence of deserting or wilfully neglecting to maintain a wife or child was repealed by section 4 of the Public Assistance Act, 1939 which, as will be noted, created a similar offence which was to be treated as if it were contained in the Schedule.[20] It, in turn, was repealed by section 24 of the Social Welfare (Supplementary Welfare Allowances) Act, 1975. The Married Women's Property Act, 1882 was repealed in its entirety by the Married Women's Status Act, 1957 which provides for the competence of spouses in proceedings under it.[21]

Sections 48, 53, 54 and 55 of the Offences Against the Person Act, 1861 which deal with the rape and abduction of women remain in force. Section 52 (as amended by section

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[20] See infra, p. 23.

[21] See infra, p. 24.

19 of the Criminal Law Amendment Act, 1885), which provided that anyone convicted of indecent assault upon any female should be liable to not more than two years imprisonment, was repealed by the Criminal Law Amendment Act, 1935, section 6 of which is stated to be enacted in lieu of section 52 of the Offences Against the Person Act, 1861 and provides for penalties for indecent assault on a female. As a result of section 13(1) of the Interpretation Act, 1923 the reference in the Schedule of the Criminal Justice (Evidence) Act, 1924 to section 52 of the Offences Against the Person Act, 1861, must now be read as a reference to section 6 of the Criminal Law Amendment Act, 1935.[22]

The reference to the "Prevention of Cruelty to Children Act, 1904 (The Whole Act)" in the Schedule is strange as most of the provisions in that Act creating offences had been repealed and re-enacted in the Children Act, 1908.[23] The only provisions creating offences in the 1904 Act which had survived this repeal are in section 2. The offences chargeable under that section are (i) causing a boy under

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22 The Interpretation Act, 1923, section 13(1) provides:

> "Where this Act or any Act passed after the commencement of this Act repeals and re-enacts, with or without modification, any provisions of a former Act, reference in any other Act to the provisions so repealed shall, unless the contrary intention appears, be construed as references to the provisions so re-enacted."

23 The Interpretation Acts are not effective to ensure that the reference in the Criminal Justice (Evidence) Act, 1924 to the repealed sections of the Prevention of Cruelty to Children Act 1904 be construed as references to the re-enacting sections of the Children Act, 1908. The Interpretation Act, 1889 is not applicable to the Criminal Justice (Evidence) Act, 1924 because the latter was passed after the commencement of the Interpretation Act, 1923, section 18(2) of which provides:

> "The Interpretation Act, 1889, shall not apply .... to any Act passed after the commencement of this Act ...."

Section 13(1) of the Interpretation Act, 1923 applies only where the Act repealing and re-enacting was passed after its commencement. On this, see argument of Counsel in McGonagle v McGonagle [1951] I.R. 123 at p. 124.

fourteen or a girl under sixteen to be in a street or licenced premises for the purpose of singing, playing or performing, or being exhibited for profit, or offering anything for sale between nine p.m. and six a.m.; (ii) causing a child under eleven to be in a street or certain other places for the purpose of singing, playing or performing, or being exhibited for profit, or offering anything for sale; and (iii) causing any child under sixteen to be trained as an acrobat, contortionist or circus performer, or for any exhibition or performance which in its nature is dangerous.

In the case of offences under the enactments in the Schedule to the Criminal Justice (Evidence) Act, 1924, it was clear that by virtue of section 4(1) a spouse was competent for the prosecution and for a co-accused without the consent of the accused spouse. What was not so clear was whether competence implied compellability in this context. The matter had arisen in England in Leach v R.[24] on the construction of their Criminal Evidence Act, 1898 whose terms were identical to section 4(1) of the Criminal Justice (Evidence) Act, 1924. The House of Lords decided that the provision in the Criminal Evidence Act, 1898 that the wife of the person charged may be called as a witness for the prosecution without the consent of the person charged did not make the wife a compellable witness. Lord Atkinson, who was, incidentally, the Irish Law Lord at the time, put their argument for rejecting the submission that competence should imply compellability in accordance with the normal common law rule:

> "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."[25]

There has been no Irish decision on the point. The decision may be criticised on the ground that if compellability was not intended when it was stated that the spouse "may be called as a witness", section 4(1) would have followed the terminology of section 1 and merely declared that the spouse

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24 [1912] A.C. 305.

25 Ibid., at p. 311.

was "competent". However it is unlikely that section 4(1) of the Criminal Justice (Evidence) Act, 1924 would have followed verbatim the English Criminal Evidence Act, 1898 had the decision in Leach v R. not been accepted by the Irish draftsman. In these circumstances that decision, if not actually binding, must be regarded as the strongest persuasive authority that in prosecutions for offences under the enactments in the Schedule to the Criminal Justice (Evidence) Act, 1924 a spouse is not compellable for the prosecution or for the defence.

It was also unclear if the Criminal Justice (Evidence) Act 1924 was intended to contain an exhaustive list of the enactments under which the spouse of the accused was to be a competent witness for the prosecution or for a co-accused without the acccused spouse's consent.[26] If it was, the effect of the Act would have been to restrict the competence of spouses as many existing enactments which had made a spouse competent to testify were not included in the Schedule.[27] This question arose directly in McGonagle v McGonagle in 1951.[28] A husband was charged with wilful neglect of a child contrary to section 12 of the Children Act, 1908. Under section 133(28) of that Act the wife or husband of the person charged with that offence was competent but not compellable to give evidence. Objection was, however, taken to calling the wife in this case on the ground that the Children Act, 1908 was not among the enactments listed in the Schedule to the Criminal Justice (Evidence) Act, 1924. It was held by the Supreme Court

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26 The debates in the Oireachtas on the legislation are not helpful on this point. Hugh Kennedy, the Attorney General, had drafted the Bill but did not participate in the debates as he had been appointed Chief Justice before its introduction. In his absence the speeches on the Bill were short and uninformative. (See Dail Debates vol. 7, cols 1914-5, 2649-53; Seanad Debates, vol. 3, cols 840-3, 900-2).

27 The list of enactments in the Schedule was more restricted than those included in the corresponding legislation in Northern Ireland, the Criminal Evidence (Northern Ireland) Act, 1923. Notable differences were the omission from the Schedule of the Irish Free State legislation of the Criminal Law Amendment Act, 1885, which dealt mainly with sexual offences against young girls, and the Punishment of Incest Act, 1908.

28 [1951] I.R. 123.

that the wife was competent by virtue of section 133(28) of the Children Act, 1908 notwithstanding the omission of that statute from the Schedule to the Criminal Justice (Evidence) Act, 1924. In his judgment O'Byrne J. (with whom Maguire C.J. agreed) said:

> "It is a general rule of construction that a prior statute is held to be repealed, by implication, by a subsequent statute which is inconsistent with and repugnant to the prior statute. This rule, however, does not apply where, as in the present case, the prior statute is special and the subsequent statute general. In such a case the Court applies the doctrine 'generalis specialibus non derogant'."

Later in his judgment O'Byrne J. remarked:

> ".... It will be noted that the Schedule refers to certain sections of the Offences Against the Person Act, 1861, so far as unrepealed; whereas, in the case of the Prevention of Cruelty to Children Act, 1904, it refers to the whole Act. The words which I have underlined would seem to indicate that, per incuriam, the Legislature overlooked the fact that a great deal of the Act of 1904 had been repealed and re-enacted in the Act of 1908.
>
> In particular, s. 1 of the Act of 1904 was repealed and provisions to substantially the same effect re-enacted in s. 12 of the Act of 1908 under which the prosecution was brought. If, as contended by counsel for the appellant, the Legislature directed its attention to this special matter and considered that the wife or husband of the person charged with an offence under s. 1 of the Act of 1904 might be called as a witness either for the prosecution or defence and without the consent of the person charged, it is difficult to understand on what possible grounds it could determine that a different principle should be applied with reference to the trial of an offence under s. 12 of the Act of 1908. What I have to consider is whether the Oireachtas has clearly manifested its intention to repeal the provisions of clause 28 of s. 133 of the Act of 1908. Not only has it not done so, but, in my opinion, it has indicated a clear intention that the provisions to which I have referred should apply on the trial of a person for such offence as that which the District Justice had to investigate ...."

In his concurring judgment in the Supreme Court, Black, J. said:

> "The wife could only give evidence in such a case against her husband by virtue of s. 133, clause 28 of the Children Act, 1908, and if that section is repealed, she could not give evidence against her husband at all on the hearing of a charge of cruelty to children under s. 12 of the Children Act, 1908. That such a repeal, which would have such a result, could have been intended by the Legislature of 1924 seems to me so extravagantly improbable as to make it unthinkable for me to imply it, and more especially when one remembers that such a change in the law would be highly retrograde, for the whole trend of legislation since as far back as the Criminal Evidence Act, 1898, has been to enlarge, rather than to narrow, the range of offences upon the trial for which a wife may give evidence against her accused husband."

Nor was he prepared to imply repeal because the reference in the Schedule to the Criminal Justice (Evidence) Act, 1924 to certain sections of the Offences Against the Person Act, 1861 would have been otiose if section 133(28) of the Children Act, 1908 and the First Schedule to that Act had not been repealed.

> "This is so, and, no doubt, there is a certain presumption against a statutory provision being otiose; but otiose provisions in statutes are not unheard of. They may be due to the draftman's wish to lend them emphasis or they may be due to inadvertance; but, whatever the reason, such presumption as there may be against a provision being otiose is, in my view, far from strong enough to counteract the gross improbability that s. 4, sub.s. 1, and the Schedule to the Criminal Justice (Evidence) Act, 1924, could have been intended impliedly to repeal s. 133, clause 28, and the First Schedule of the Children Act, 1908."

The final argument in favour of repeal was based on section 5 of the Criminal Justice (Evidence) Act, 1924 which provides:

> "This Act shall apply to all criminal proceedings, notwithstanding any enactment in force at the commencement of this Act, except that nothing in this Act shall affect the Evidence Act, 1877."

Black, J. disposed of this briefly:

> ".... in my view, when that section provides that the Act 'shall apply to all criminal proceedings,' subject to a specified exception, it does not mean that only that Act shall apply, or that s. 133, clause 28, of the Children Act, 1908, shall not continue to apply, to those criminal proceedings to which the First Schedule of the said Act of 1908 made it apply."

If section 133(28) of the Children Act, 1908 is not repealed by the Criminal Justice (Evidence) Act, 1924, the same must be true of other pre-1924 statutes making the spouse of the accused competent or compellable to testify in criminal trials which were not listed in the Schedule to that Act.[29] The following pre-1924 statutes dealing with the competence of the spouse of the accused in criminal trials are still in force:

(i) The Licensing Act, 1872 under which the wife of the defendant is competent to give evidence not only for her husband but also for the prosecution or for a co-accused of her husband without the latter's consent.[30] She appears,

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29 However see Attorney-General v Power [1932] I.R. 610, which was not cited in McGonagle v McGonagle [1951], I.R. 123 where the Court of Criminal Appeal held that a wife was not competent to testify for the prosecution where a person was charged with an offence contrary to the Criminal Law Amendment Act, 1885 despite a provision in the latter making her competent but not compellable (see infra, pp. 17-18). In England it seems to have been assumed that the equivalent legislation, the Criminal Evidence Act, 1898, superseded or impliedly repealed all previous individual statutes making a spouse competent for the prosecution (Archbold, Criminal Pleading, pp. 443, 449 (25th ed., 1902); Halsbury, Laws of England, vol. 10, section 881 (3rd ed.)).

30 Section 51(4) of the Act provides:

> ".... in all cases of summary proceedings under this Act the defendant and his wife shall be competent to give evidence."

See O'Connor, The Irish Justice of the Peace, p. 260 (1st ed., 1911) where it is stated, it is submitted wrongly, that a wife is not competent for the prosecution in this case.

however, not to be compellable.[31] Offences still chargeable under this Act include selling less than standard measure, being found drunk, permitting drunkenness on licenced premises, serving a drunken person, permitting licenced premises to be a brothel, serving police officers, and selling intoxicating liquor outside the permitted hours. Some offences, such as the last-named, though the provisions creating them have never been repealed, have been overtaken by similar offences in subsequent legislation.[32] Neither this legislation nor any other legislation regulating the licensed trade has contained any provision making the wife or husband of the defendant a competent witness.

(ii) The Sale of Food and Drugs Act, 1875 under which the wife of the defendant is competent and may even be compellable for him or for any co-defendant with her husband's consent.[33] Offences chargeable under this Act are mixing injurious ingredients with food or drugs and the sale of food and drugs not of the nature, substance and quality demanded by the purchaser.[34]

(iii) The Conspiracy and Protection of Property Act, 1875 (as amended by the Electricity (Supply) Act, 1927) under which (a) the husbands and wives of servants charged with breach of contract, relating either to the supply of gas, water or electricity or involving injury to persons or

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31 On whether compellability should be implied from competence see supra, fn. 19.

32 See, for example, the Intoxicating Liquor Act, 1927.

33 Section 21 of this Act provides:

> ".... and the defendant may, if he thinks fit, tender himself and his wife to be examined on his behalf, and he or she shall, if he so desire, be examined accordingly."

In favour of compellability it may be argued that the terminology of this section differs sufficiently from that in section 4(1) of the Criminal Justice (Evidence) Act, 1924 to make the precedent of Leach v R. inapplicable. However see O'Connor, The Irish Justice of the Peace, pp. 260-1 (1st ed., 1911) where it is stated that a wife is not compellable under this statute.

34 Sale of Food and Drugs Act, 1875, sections 3,4,5.

property and (ii) the wives of masters neglecting to provide their servants or apprentices with necessary food or lodgings are competent not only for their accused spouse but also for the prosecution and for a co-accused of their spouse without the latter's consent.[35] However such a spouse would appear not to be compellable.[36]

(iv) The Explosive Substances Act, 1883, section 4, under which the wife or husband of a person charged with the possession of explosives under suspicious circumstances may be called not only for the accused spouse but also, if the latter sees fit, for a co-accused of the spouse charged.[37] However, on the basis of Leach v R. it does not appear that the spouse of an accused is ever compellable, even on behalf

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35 Section 11 of the Act provides:

> "Provided, that upon the hearing and determining of any indictment or information under sections 4, 5 and 6 of this Act, the respective parties to the contract of service, their husbands and wives, shall be deemed and considered as competent witnesses."

See O'Connor, Irish Justice of the Peace, pp. 260-1 (1st ed., 1911) where it is stated, it is submitted wrongly, that a husband or wife of a defendant is not competent for the prosecution under this statute.

36 As to whether compellability should be implied from competence see supra, fn. 19.

37 Section 4(2) provides:

> "In any proceedings against any person for a crime under this section such person and his wife, or husband, as the case may be, may, if such person thinks fit, be called, sworn, examined, or cross-examined as an ordinary witness in the case."

In theory a spouse may also be called for the prosecution under this provision but as this depends on the consent of the accused such an eventuality may be discounted for practical purposes.

of that accused, under this provision.[38]

(v) The Corrupt and Illegal Practices Prevention Act, 1883 under which the husband and wife of the person prosecuted may be called not only for that person but also for the prosecution or for a co-accused without the accused spouse's consent.[39] However it does not appear that a husband or wife of an accused is ever compellable, even on behalf of the latter, under this provision.[40] Most of this statute has been repealed by the Prevention of Electoral Abuses Act, 1923 and the Electoral Act, 1963 but a person may still be

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38 [1912] A.C. 305. The similarity of the wording to that in section 4(1) of the Criminal Justice (Evidence) Act 1924 is indicative that the husband or wife of the accused is not compellable. While the fact that the right to call the spouse depends on the accused thinking fit may be called in aid to support an argument in favour of compellability, it is considered that the condition that the accused should think fit that his or her spouse should testify was designed to limit competence and the issue of compellability must be judged independently of it. See also O'Connor, Irish Justice of the Peace, pp. 260-1 (1st ed., 1911) where it is stated that a spouse is not compellable under this provision.

39 Section 53(2) of the Act provides:

> "On any prosecution under this Act, whether on indictment or summarily, and whether before an election court or otherwise, and in any action for a pecuniary forfeiture under this Act, the person prosecuted or sued, and the husband or wife of such person, may, if he or she thinks fit, be examined as an ordinary witness in the case."

See O'Connor, Irish Justice of the Peace, pp. 260-1 (1st ed., 1911) where it is stated, it is submitted wrongly, that the husband or wife of the person prosecuted is not competent for the prosecution under this statute.

40 It might, perhaps, be argued that the pronouns in the phrase "if he or she thinks fit" refer to the person prosecuted but it is submitted that this is not correct and that they refer to the spouse witness.

charged under it arising out of the improper withdrawal of an election petition.[41]

(vi) The Criminal Law Amendment Act, 1885 under which the husband or wife of a person charged with an offence under that Act is stated to be a competent but not a compellable

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[41] The Corrupt and Illegal Practices Prevention Act, 1883, section 41 provides:

"1. Before leave for the withdrawal of an election petition is granted, there shall be produced afidavits by all the parties to the petition and their solicitors, and by the election agents to all of the said parties who are candidates at the election ....

2. Each affidavit shall state that, to the best of the deponent's knowledge and belief, no agreement or terms of any kind whatsoever has or have been made, and no undertaking has been entered into, in relation to the withdrawal of the petition; but if any lawful agreement has been made with respect to the withdrawal of the petition, the affidavit shall set forth that agreement, and shall make the foregoing statement subject to what appears from the affidavit.

3. The affidavits of the applicant and his solicitor shall further state the ground on which the petition is sought to be withdrawn.

4. If any person makes an agreement or terms, or enters into any undertaking, in relation to the withdrawal of an election petition, and such agreement, terms, or undertaking is or are for the withdrawal of the election petition in consideration of any payment, or in consideration that the seat shall at any time be vacated, or in consideration of the withdrawal of any other election petition, or is or are (whether lawful or unlawful) not mentioned in the aforesaid affidavits, he shall be guilty of a misdemeanour ...."

witness.[42] Such a spouse may testify for the prosecution or for a co-accused of the accused spouse without the latter's consent. The offences still chargeable under this Act are (i) procuring any woman to have unlawful carnal connexion with any person[43] (ii) procuring any woman for prostitution or to become a brothel inmate,[44] (iii) procuring the defilement of any woman by threats, frauds or administering drugs or alcoholic or other intoxicants[45] (iv) the permitting by a householder of the defilement of young girls under a certain age on his premises[46] (v) the abduction of a girl under 18 with intent to have unlawful carnal

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[42] Section 20 of the Act provides:

> "Every person charged with an offence under this Act or under section 48 and sections 52 to 55, both inclusive, of the Offences against the Person Act 1861, or any such sections, and the husband and wife of the person so charged, shall be competent but not compellable witnesses on every hearing at every stage of such charge ...."

The sections of the Offences against the Person Act, 1861 were listed in the Schedule of the Criminal Justice (Evidence) Act, 1924 whose provisions have, therefore, to that extent overtaken those of section 20 of the Criminal Law Amendment Act, 1885. See O'Connor, Irish Justice of the Peace, pp. 260-1 (1st ed., 1911) where it is stated, it is submitted wrongly, that the husband or wife of the person prosecuted is not competent for the prosecution under this statute.

[43] Section 2. The limitation of this offence to women under 21 was deleted by section 7 of the Criminal Law Amendment Act, 1935.

[44] Section 2.

[45] Section 3. The reference to alcoholic or other intoxicants was inserted by section 7 of the Criminal Law Amendment Act, 1935.

[46] Section 6. The age limits under this section were varied upwards by section 9 of the Criminal Law Amendment Act, 1935.

knowledge,[47] (vi) unlawful detention of a woman with intent to have carnal knowledge[48] and (vii) gross indecency between males.[49]

(vii) The Merchandise Marks Act, 1887 under which the wife or husband of the defendant may, with the latter's consent, be called not only for himself but also for a co-accused.[50] Offences chargeable under this Act related to fraudulent trademarks and false trade descriptions. On the basis of Leach v R. it would appear that a spouse is not compellable under this legislation.[51]

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47 Section 7. It was a defence under this section that the person charged had reasonable cause to believe that the girl was over 18. This defence was abolished by section 20 of the Criminal Law Amendment Act, 1935.

48 Section 8.

49 Section 11. Sections 4 and 5 of the Criminal Law Amendment Act, 1885, dealing with the offence of defilement of young girls and section 13 dealing with the offence of keeping a brothel, were repealed by the Criminal Law Amendment Act, 1835 which contained similar provisions (see Criminal Law Amendment Act, 1935, sections 1, 2, 13). But the 1935 Act contains no provision by virtue of which the spouse of the accused would be a competent witness. It may have been assumed that the provision in the 1885 Act making a spouse competent had been repealed by the omission of that Act from the Schedule to the Criminal Justice (Evidence) Act, 1924.

50 Section 10 of the Act provides:

> "A defendant, and his wife, or her husband, as the case may be, may, if the defendant thinks fit, be called as a witness, and if called, shall be sworn and examined, and may be cross-examined and re-examined in like manner as any other witness."

In theory a spouse may also be called for the prosecution under this provision but as it depends on the consent of the accused such an eventuality may be disregarded for practical purposes.

51 An argument for compellability on behalf of the defence may be made on the same basis as in respect of the Explosive Substances Act, 1883. See supra, fn. 38.

(viii) The Betting and Loans (Infants) Act, 1892, under which it is an offence to incite an infant to beg or to borrow, contains a provision in similar terms to section 10 of the Merchandise Marks Act, 1887, the effect of which would appear to be to make a spouse competent for an accused spouse, and also for a co-accused with the consent of the accused spouse but not compellable in either case.[52]

(ix) The Chaff-Cutting Machines (Accidents) Act, 1897 under which the husband or wife of a person charged with using or permitting the use of a defective chaff-cutting machine is stated to be a competent but not a compellable witness.[53] Such a spouse may, therefore, testify not only for the accused spouse, but also for the prosecution and for a co-accused without the consent of the accused spouse.

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[52] Section 6 of the Act provides:

> "In any proceedings against any person for an offence under this Act such person and his wife or husband as the case may be, may, if such person thinks fit, be called, sworn, examined, and cross-examined as an ordinary witness in the case."

In Phipson on the Law of Evidence, p. 439 (2nd ed., 1898) it was stated that the husbands and wives of defendants are competent and compellable under this Act. However it is submitted that no satisfactory distinction can be drawn between the wording of this section and that of section 10 of the Merchandise Marks Act, 1887 from which Phipson did not infer compellability. As in the case of the Merchandise Marks Act 1877, a spouse may, in theory, be called for the prosecution under section 6 of the Betting and Loans (Infants) Act, 1892 but, as this depends on the consent of the accused, such an eventuality may be disregarded for practical purposes.

[53] Section 5 of the Act provides:

> "Every person charged with an offence under this Act before any court of criminal jurisdiction, and the husband or wife of the person so charged, shall be competent but not compellable witnesses on every hearing at every stage of such charge."

See O'Connor, Irish Justice of the Peace, pp. 260-1 (1st ed., 1911) where it is stated, it is submitted wrongly, that the husband or wife of a person charged is not competent for the prosecution.

(x) The Summary Jurisdiction (Ireland) Act, 1908, under which a husband or wife is competent not only for the accused spouse but also for the prosecution or for a co-accused[54] without the accused spouse's consent. Offences chargeable under this Act are (i) drunkenness in charge of a person, animal or vehicle; (ii) drunkenness in possession of a firearm or other instrument endangering limb or life; (iii) drunkenness in charge of children; and (iv) aiding and abetting a drunken person.[55] However, such a spouse would appear not to be compellable.[56]

(xi) The Children Act, 1908, under which a spouse of the accused is stated to be competent but not compellable in proceedings for certain offences.[57] In such cases a spouse may, therefore, testify not only for the accused spouse but also for the prosecution and for a co-accused without the accused spouse's consent. Offences in respect of which the spouse is competent under this legislation are (i) cruelty

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54 Section 12 of the Act provides:

> "In all proceedings under this Act a husband or wife shall be a competent witness."

See O'Connor, Irish Justice of the Peace, pp. 260-1 (1st ed., 1911) where it is stated, it is submitted wrongly, that the husband or wife of a person charged is not competent for the prosecution.

55 Summary Jurisdiction (Ireland) Act 1908, sections 7,9,10.

56 See supra, fn. 19.

57 Section 133(28) provides:

> ".... in any proceeding against any person for an offence under Part II of this Act, or for any of the offences mentioned in the First Schedule to this Act, such person shall be competent but not compellable to give evidence, and the wife or husband of such person may be required to attend to give evidence as an ordinary witness in the case, and shall be competent but not compellable to give evidence."

See O'Connor, Irish Justice of the Peace, pp. 260-1 (1st ed., 1911) where it is stated, it is submitted wrongly, that the husband or wife of a person charged is not competent for the prosecution.

to children and young persons;[58] (ii) causing a child or young person to beg in a street;[59] (iii) exposing a child under seven to the risk of burning;[60] (iv) allowing a child or young person to be in a brothel;[61] (v) causing or encouraging the seduction or prostitution or unlawful carnal knowledge of a girl under sixteen;[62] (vi) assisting the escape of a child or young person from the person to whose care he has been committed by a court pursuant to the Act;[63] (vii) exposing a child whereby its life or health is endangered;[64] (viii) abduction of a girl under 16;[65] (ix) child-stealing;[66] (x) manslaughter of a child;[67] (xi) assault or battery of a child;[68] (xii) indecent assault on a female child;[69] (xiii) attempted sodomy or indecent assault on a male child;[70] (xiv) employment of a boy under 16 or a girl under 18 in any public exhibition or performance whereby the life or limb of such child is

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58 Section 12. A child is defined in section 131 of the Act as a person under fourteen. Those between fourteen and sixteen are young persons.

59 Ibid., section 14.

60 Ibid., section 15.

61 Ibid., section 16.

62 Ibid., section 17. The reference to unlawful carnal knowledge was inserted by the Children Act (1908) Amendment Act, 1910, section 1.

63 Ibid., section 22.

64 Ibid., First Schedule and Offences against the Person Act, 1861, section 5.

65 Children Act, 1908, First Schedule, and Offences against the Person Act, 1861, section 55.

66 Offences against the Person Act, 1861, section 56.

67 Ibid., section 5.

68 Ibid., section 42.

69 Ibid., section 52.

70 Ibid., section 62.

endangered;[71] and (xv) any other offence involving bodily injury to a child or young person.[72]

(xii) The Criminal Law Amendment Act, 1912 under which the wife or husband of a person charged under the Vagrancy Act, 1898 (as amended) may be called as a witness not only for his or her spouse but also for the prosecution or for a co-accused without the consent of the person charged.[73] The offences chargeable under the Vagrancy Act, 1898 are living on the earnings of prostitution and soliciting or importuning for immoral purposes in a public place.[74] On the basis of Leach v R it would appear that a spouse is not compellable under this legislation.

Legislation subsequent to the Criminal Justice (Evidence) Act, 1924 has extended the competence of a spouse of the accused still further. However the inconsistency in drafting terminology to effect this end noted in relation to the pre-1924 legislation has been repeated. The Public Assistance Act, 1939, having provided for the offence of deserting or wilfully neglecting a wife or child (which was abolished by section 24 of the Social Welfare (Supplementary Welfare Allowances) Act, 1975), went on in the same section to state that "subsection (1) of section 4 of the Criminal Justice (Evidence) Act, 1924 .... shall apply and have effect in relation to persons charged with an offence under this section as if this section were mentioned in the Schedule to that Act".[75] On the basis of Leach v R. the effect of this sub-section was to make the spouse of an

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71 Dangerous Performances Act, 1879, section 3; Dangerous Performances Act, 1897, section 1.

72 Children Act, 1908, First Schedule.

73 Section 7(6) of the Criminal Law Amendment Act, 1912, provides:

> "The wife or husband of a person charged with an offence under either of the said Acts may be called as a witness either for the prosecution or defence and without the consent of the person charged ...."

(The other Act referred to is one applying only to Scotland, the Immoral Traffic (Scotland) Act, 1902.)

74 Vagrancy Act, 1898, section 1.

75 Section 83(2).

accused competent but not compellable for the prosecution and for a co-accused of the spouse without the consent of the latter. By virtue of section 1 of the Criminal Justice (Evidence) Act, 1924 such a spouse was competent to testify for the spouse charged. The same situation obtains by virtue of the Married Women's Status Act, 1957 (whose wording is akin to section 4(1) of the Criminal Justice (Evidence) Act, 1924) where criminal proceedings are brought against one spouse for the protection and security of the other spouse's property.[76] Under the Redundancy Payments Act, 1967 the wife or husband of the person charged is competent but not compellable to give evidence whether for or against that person.[77] No provision is made in relation to a spouse giving evidence for a co-accused of the other spouse but it appears that the spouse of an accused is competent for a co-accused by virtue of the Criminal Justice (Evidence) Act, 1924[78] and so only where the accused spouse consents.

Offences under the Redundancy Payments Act, 1967 are (i) the failure of an employer to give notice of redundancy a fortnight before dismissal,[79] (ii) his failure to give a redundancy certificate,[80] (iii) furnishing false information

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[76] Section 9(4) of the Married Women's Status Act, 1957 provides:

> "In any criminal proceedings to which this Section relates brought against one spouse, the other spouse may, notwithstanding anything to the contrary in any enactment or rule of law, be called as a witness either for the prosecution or defence and without the consent of the person charged."

[77] Section 45 of the Act provides:

> "Section 53 of the Act of 1952 [now section 116 of the Social Welfare (Consolidation) Act, 1981] shall apply in relation to offences under this Act or under regulations thereunder as it applies to offences under the Act of 1952 or to offences under regulations thereunder ...."

For the text of section 116 see infra, fn. 84.

[78] Criminal Justice (Evidence) Act, 1924), section 1(c). For text see supra, p. 6.

[79] Section 17.

[80] Section 18.

in a notice of redundancy or a redundancy certificate,[81] (iv) giving false information when seeking a rebate on a redundancy payment made to an employee[82] and (v) the failure to produce documents where the Redundancy Fund is liable for the payments due from an insolvent employer.[83]

Under the Social Welfare (Consolidation) Act, 1981, Part II, the wife or husband of the person charged is competent to give evidence, whether for or against that person, but is stated not to be compellable.[84] No provision is made for evidence given by one spouse on behalf of a co-accused of the other spouse but it would appear that the spouse of an accused is competent for a co-accused by virtue of the Criminal Justice (Evidence) Act, 1924[85] and so only where the accused spouse consents. Offences under Part II of the Social Welfare (Consolidation) Act, 1981, which is the governing legislation of the Social Insurance system, are (i) obstruction of an inspector or the refusal to furnish information; (ii) misuse of insurance cards; (iii) making false representations to obtain a benefit; (iv) failure to pay employment contributions; and (v) wrongful deduction of

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81 Sections 17, 18.

82 Section 36.

83 Ibid.

84 The Social Welfare (Consolidation) Act, 1981, section 116(4) of which consolidates section 52 of the Social Welfare Act, 1952 reads:

> "In any proceedings for an offence under this Part of under regulations made under or applying the provisions of this Part, the wife or husband of the person charged with the offence shall, notwithstanding any other Act, be competent to give evidence, whether for or against that person, but the wife or husband shall not be compellable either to give evidence or, in giving evidence, to disclose any communication made to her or him, as the case may be, during the marriage by that person."

85 See Criminal Justice (Evidence) Act, 1924, section 1(c). For text, see supra, pp. 5-6.

such contributions from an employee's remuneration.[86] Part III, Chapter II, of the same Act, which consolidates the Unemployment Assistance Act, 1933 and the Unemployment Assistance (Amendment) Act, 1935 provides that the wife or husband of a person charged with an offence under the Chapter may be called as a witness either for the prosecution or the defence and without the consent of the person charged.[87] On the basis of Leach v R., it does not appear that the spouse of an accused is ever compellable under this provision. Offences chargeable under this Chapter are (i) the failure by the holder of a "qualification certificate" to inform a deciding officer that his means have increased or that he otherwise no longer fulfils the conditions specified in the certificate;[88] (ii) the failure by such a holder to deliver up his certificate when it is determined that he is not entitled to it:[89] and (iii) the making of a false statement to obtain a

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86 Social Welfare (Consolidation) Act, 1981, sections 114(4), 115(1)(2). For offences under regulations made pursuant to the Social Welfare (Consolidation) Act, 1981, section 116, see Social Welfare (Claims and Payments) Regulations, 1952, Article 19; Social Welfare (Collection of Employment Contributions by the Collector General) Regulations, 1979, Article 19; Social Welfare (Collection of Employment Contributions for Special Contributors) Regulations, 1979, Article 21; Social Welfare (Contributions) (Transitional) Regulations, 1979, Article 7.

87 Social Welfare (Consolidation) Act, 1981, section 145(4) the full terms of which are as follows:

> "The wife or husband of a person charged with an offence under this Chapter may, notwithstanding anything contained in section 1 of the Criminal Justice (Evidence) Act 1924, be called as a witness either for the prosecution or the defence and without the consent of the person charged."

88 Section 141(1) consolidating the Unemployment Assistance (Amendment) Act, 1935, section 7 and the Social Welfare (No. 2) Act, 1976, section 9.

89 Section 141(3).

qualification certificate or any payment or to avoid a repayment.[90]

Two classes of case where the spouse of an accused may be called as a witness were stated by the Criminal Justice (Evidence) Act, 1924 to be unaffected by its provisions. One had been created by the Evidence Act, 1877, section 1 of which provides:

> "On the trial of any indictment or other proceeding for the non-repair of any public highway or bridge, or for a nuisance to any public highway, river, or bridge and of any other indictment or proceeding instituted for the purpose of trying or enforcing a civil right only, every defendant to any such indictment or proceeding, and the wife or husband of any such defendant, shall be admissible witnesses and compellable to give evidence."[91]

The second were cases where at common law the wife or husband of a person charged with an offence might be called as a witness.[92] As has been noted, the most important such case is a charge of personal violence to the spouse. At that time there was no authority either in England or Ireland as to whether the injured spouse was compellable as well as competent on such a charge. Then in R. v

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90 Section 144, consolidating the Unemployment Assistance Act, 1933, section 29, Unemployment Assistance (Amendment) Act, 1935, section 14, Unemployment Assistance (Amendment) Act, 1938, section 8, and the Social Welfare (No. 2) Act, 1976, section 9.

91 The Criminal Justice (Evidence) Act, 1924, section 5 provides:

> "This Act shall apply to all criminal proceedings, notwithstanding any enactment in force at the commencement of this Act, except that nothing in this Act shall affect the Evidence Act, 1877."

92 The Criminal Justice (Evidence) Act, 1924, section 4(2) provides:

> "Nothing in this act shall affect a case where the wife or husband of a person charged with an offence may at common law be called as a witness without the consent of that person."

Lapworth[93] the Court of Criminal Appeal in England, while accepting that there was no direct authority on the point, held that a wife had been rightly compelled to give evidence against her husband on a charge of causing her grievous bodily harm. That case held the field until 1978 when in Hoskyn v Commissioner for Metropolitan Police[94] the House of Lords held by a majority of four to one that a wife ought not to have been compelled to give evidence against her husband who was charged with wounding her with intent to do grievous bodily harm. Lord Wilberforce, summing up, argued:

> ".... a wife is in principle not a competent witness on a criminal charge against her husband. This is because of the identity of interest between husband and wife and because to allow her to give evidence would give rise to discord and to perjury and would be, to ordinary people, repugnant. Limited exceptions have been engrafted on this rule, of which the most important, and that now relevant, relates to cases of personal violence by the husband against her. This required that, as she is normally the only witness and because otherwise a crime would go without sanction, she be permitted to give evidence against him. But does this permission in the interest of the wife, carry the matter any further, or do the general considerations, arising from the fact of marriage and her status as a wife, continue to apply so as to negative compulsion? .... My Lords, after careful consideration I have reached the conclusion .... that the wife should be held non-compellable."[95]

Lord Dilhorne, concurring, said that he would find it "very repugnant" if a wife could be compelled at the instance of any prosecutor to testify against her husband on a charge involving violence, no matter how trivial and no matter what the consequences to her marriage and to her family.[96] Lord Salmon referred to the fact that under the Criminal Evidence Act, 1898 it had been held that a wife was not compellable to testify against her husband on charges of incest against his daughter[97] although this was a far more serious case

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93 [1931] 1 K.B. 117.

94 [1979] A.C. 474.

95 Ibid., at p. 488.

96 Ibid., at p. 494.

97 Leach v R., [1912] A.C. 305.

than a husband's physical violence against his wife. But Lord Edmund Davies, dissenting, relied on the general principle that competent witnesses are compellable. Taking up Lord Dilhorne's reference to cases of trivial violence he countered:

> ".... For my part I regard as extremely unlikely any prosecution based on trivial violence being persisted in where the injured spouse was known to be a reluctant witness. Much more to the point, as I think, are cases such as the present, ... or arising from serious physical maltreatment by one spouse of the other. Such cases are too grave to depend on whether the injured spouse is, or is not, willing to testify against the attacker. Reluctance may spring from a variety of reasons and does not by any means necessarily denote that domestic harmony has been restored. A wife who has once been subjected to a 'carve up' may well have more reasons than one for being an unwilling witness against her husband. In such circumstances, it may well prove a positive boon [for] her to be directed by the court that she has no alternative but to testify. But, be that as it may, such incidents ought not to be regarded as having no importance extending beyond the domestic hearth. Their investigation and, where sufficiently weighty, their prosecution is a duty which the agencies of law enforcement cannot dutifully neglect."[98]

It cannot be regarded as certain that the majority opinion of the House of Lords in Hoskyn v Commissioner of Metropolitan Police would be followed in Ireland. It is noteworthy that there are judgments in Australia (by Gavan Duffy,J.) New Zealand and Canada favouring the view that one spouse is compellable for the prosecution where the other spouse is charged with violence to her.[99] But equally there are other judgments in Australia and one in Canada favouring the view taken in Hoskyn v Commissioner of Metropolitan Police.[100]

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98 [1979] A.C. 474, at p. 507.

99 Sharpe v Rodwell [1947] V.L.R. 82; R. v Haukaman [1951] N.Z.L.R. 251; R. v Londsdale [1974] W.W.R. 157, (1973) 15 C.C.C. (2d) 201.

100 Riddle v R. (1911) 12 C.L.R. 620; R. v Phillips (1922) S.A.S.R. 276; R. v Carter [1970] 5 C.C.C. 1550.

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The position of a spouse who being a competent but not compellable witness, chooses to give evidence was considered in 1982 by the Court of Appeal in England in R. v Pitt.[101] It was held that

> ".... once the wife had started on her evidence, she must complete it. It is not open to her to retreat behind the barrier of non-compellability if she is asked questions she does not wish to answer. Justice should not allow her to give evidence which might assist, or injure, her husband and then to escape from normal investigation. It follows that if the nature of her evidence justifies it, an application may be made to treat her as a hostile witness. There is, in our view, no objection in law which will preclude a judge from giving leave to treat as hostile a wife who chooses to give evidence for the prosecution of her husband. We have not been able to find any direct authority on this point. This makes it particularly important that the wife should understand when she takes the oath that she is waiving her right to refuse to give evidence ...."

Although denying any intention to lay down any rule of practice for the future, the Court went on to state that it was "desirable that where a wife is called as a witness for the prosecution of her husband, the judge should explain to her, in the absence of the jury, that before she takes the oath she has the right to refuse to give evidence but that if she chooses to give evidence she may be treated like any other witness".

Former Spouses

There have been no reported cases in Ireland on the competence and compellability of former spouses in criminal cases. In England the Court of Criminal Appeal has held that a wife is incompetent to testify against a man with whom she has had a voidable marriage, which was later annulled, when the charges related to events which occurred before the annulment.[102] Presumably the same principle

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101 [1982] 3 All E.R. 63.

102 R. v Algar, [1954] 1 Q.B. 279.

would be applied where there had been a divorce. In a later case a husband was held not competent to testify against a wife from whom he was judicially separated even as to matters occurring after the judicial separation.[103] Where a marriage is void, the rules making spouses incompetent or non-compellable have been held to have no application.[104]

Communications Between Husband and Wife

Closely associated with the law relating to the competence and compellability of spouses is the privilege attaching to communications between spouses. The Evidence Amendment Act, 1853 which, as noted, made spouses competent and compellable witnesses in civil proceedings, also made provision that all communications between spouses should be privileged. Section 3, which so provided, reads as follows:

> "No husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage."

This provision was based on the Second Report of the Commissioners on Common Law Procedure who argued thus:

> "So much of the happiness of human life may fairly be said to depend on the inviolability of domestic confidence that the alarm and unhappiness occasioned to society by invading its sanctity and compelling the public disclosures of confidential communications between husband and wife would be a far greater evil than the disadvantage which may occasionally arise from the loss of light which such revelations might throw on questions in dispute."[105]

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103 Moss v Moss [1963] 2 Q.B. 799.

104 R. v Yacob (1981) 72 Cr. App. Rep. 313.

105 Cited in Shenton v Tyler [1939] 1 All E.R. 827 at p. 833 (per Sir Wilfred Greene M.R.).

Where, by virtue of some other statute, a spouse is competent to testify in cases where the other spouse is charged, it seems that section 3 of the Evidence Amendment Act, 1853 is effective to confer this privilege although, when passed, it could not have had any application to criminal proceedings as neither the accused nor the spouse of the accused was then ever competent to give evidence in them.[106] In the case of a spouse-witness called by virtue of the Criminal Justice (Evidence) Act, 1924 this position is confirmed by Section 1(d) which provides:

> "nothing in this Act shall make a husband compellable to disclose any communication made to him by his wife during the marriage, or a wife compellable to disclose any communication made to her by her husband during the marriage."

A number of features of this privilege should be noted. Only the spouse to whom the communication is made and not the spouse by whom it is made is entitled to claim privilege. Thus in the Scots case of H. M. Advocate v H.D.[107] an accused husband was unable to prevent his wife from waiving this privilege and disclosing the contents of a relevant statement made by him to her. In England the House of Lords has held that a marital communication is not privileged at the instance of either spouse if evidence of it is given by a third party.[108] Accordingly the prosecution was entitled to tender in evidence a letter admitting a crime written from the accused to his wife which had been intercepted by the police. In both England and Canada it has been held that the privilege may not be claimed after the marriage has ended even if the

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106 In fact one such statute viz., the Social Welfare (Consolidation) Act, 1981, section 116(4) contains a provision that a wife or husband should not be compellable to disclose any communication made to her or him during the marriage.

107 1953 S.C. (J.) 65.

108 Rumping v Director of Public Prosecutions [1964] A.C. 814. However there was a powerful dissent by Lord Radcliffe which might well be followed in Ireland.

communication had been made while the marriage subsisted.[109] In Canada, in a case early in the century, the Supreme Court decided that a privilege relating to communications did not extend to facts discovered so as to enable a wife to refuse to testify as to the bloodstained condition of the clothing her accused husband had left in their house.[110] In Ireland the existence of a constitutional right to marital privacy in the context of sexual relations and procreation was recognised by the Supreme Court in McGee v Attorney General.[111] But the relevance of any such right to the confidentiality of verbal or written communications between spouses or of other facts discovered during a marriage has not so far been canvassed in any reported case. It has also been recognised by the Supreme Court that evidence obtained as a result of a conscious and deliberate violation of the constitutional rights of the accused, such as the inviolability of the dwelling, is not admissible.[112] In application of this principle, photographs and letters taken by a separated wife from her husband's house years after the separation have been ruled inadmissible in an application for maintenance brought by the wife.[113]

Privilege Against Self-Incrimination

Another privilege relevant to cases where it is proposed to call a spouse of a party to testify is that against self-incrimination. While the point has never been authoritatively decided there are judicial dicta to support

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109 Shenton v Tyler [1939] Ch. 620; Regina v Kanester (1906), 55 W.W.R. 705: [1966] S.C.R.V., 57 W.W.R. 576. However, see also Connolly v Murrell (1891), P.R. 187, 270 where the opposite view was taken.

110 Gosselin v The King (1903), 33 S.C.R. 255. A different view has been taken in some jurisdictions in the United States. See Shephard v State, 257 Ind. 229, 277 N.E. 2d 165 (1971).

111 [1974] I.R. 284.

112 The People (Attorney General) v O'Brien [1965] I.R. 142.

113 O.C. v T.C., unreported, High Court, McMahon, J., 9 December 1981, reproduced in William Binchy, A Casebook on Irish Family Law, p. 221.

the view that this privilege extends to answers tending to incriminate the witness's spouse.[114] In the Criminal Justice (Evidence) Act, 1924, there is no reference to the right of a spouse-witness to refuse to answer a question on grounds of self-incrimination or spouse-incrimination although there is a provision that an accused giving evidence in pursuance of the Act "may be asked any question in cross-examination notwithstanding that it would tend to incriminate him as to the offence charged."[115] The exact scope of this privilege is unsettled in other respects, notably whether it covers matrimonial offences, such as adultery,[116] and whether it extends to incrimination under foreign law.[117]

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114 Cross on Evidence, p. 230 (3rd ed., 1967); R. v All Saints, Worcester (1817) 6 M. & S. 194, at p. 210, per Bayley, J.

115 Criminal Justice (Evidence) Act, 1924, section 1(e).

116 Redfern v Redfern [1891] P. 139 at p. 147, per Bowen, L.J.; Blunt v Park Lane Hotel Ltd. [1942] 2 K.B. 253.

117 The State (Magee) v O'Rourke [1971] I.R. 205.

CHAPTER 2 PROPOSALS FOR REFORM

1. Civil Proceedings

The Commission is of the opinion that the doubts existing in relation to the competence and compellability of spouses in civil cases should be resolved. It sees no reason why spouses should not be compellable in proceedings instituted in consequence of adultery when they are compellable in every other class of civil action. As regards former spouses it would be absurd if they were not competent and compellable when existing spouses are. Accordingly the Commission recommends that the provisions which have given rise to doubts viz., sections 1 and 2 of the Evidence Act, 1853 and section 3 of the Evidence Further Amendment Act, 1869 should be repealed and replaced by a provision stating that a present or former spouse of a party to civil proceedings shall be a competent and compellable witness.

2. Criminal Proceedings

(a) Competence of the Spouse of an Accused for the Prosecution.

The present list of exceptions to the general rule that spouses are incompetent to testify is difficult to justify on any rational basis. Why should the wife of an accused be a competent witness on any charge involving bodily injury to a child and not on a charge of incest against the same child? Why should the wife of a person accused of a breach of a "barring order" under the Family Law (Protection of Spouses and Children) Act, 1981 where no violence to that spouse is involved not be a competent witness when she would be competent on a charge of an offence against her property under the Married Women's Status Act, 1957? It is clearly anomalous that the wife of an accused should be competent on charges of sexual offences under the Criminal Law Amendment Act, 1885 but not in the case of similar offences under the Criminal Law Amendment Act, 1935. It is difficult to find any justification apart from a feeling of tenderness for the Central Fund for the special treatment of offences under the Redundancy Payments Act, 1967 and the Social Welfare (Consolidation) Act, 1981. It cannot be said either that they are exceptionally serious

offences or that their proof is likely to depend on the testimony of a spouse.[1]

However the problem of deciding on the offences where the spouse of an accused should be made competent for the prosecution would not arise if there were no general rule that such a spouse is incompetent to testify for the prosecution. As recently as 1958, the United States Supreme Court upheld this rule on the ground that "adverse testimony given in criminal proceedings would be likely to destroy any marriage".[2] However that Court has subsequently modified its position and has held that an accused may not prevent his spouse testifying for the prosecution as "the witness spouse alone has a privilege to refuse to testify adversely and may be neither compelled to testify nor foreclosed from testifying".[3] In Australia a spouse is always competent to testify for the prosecution against the other spouse.[4] In England, the Criminal Law Revision Committee, which reported in 1972, had "no doubt that the wife should be made competent as a witness for the prosecution in all cases":[5]

> "We have no doubt that the wife should be made competent as a witness for the prosecution in all cases. If she is willing to give evidence, we think that the law would be showing excessive concern for the preservation of marital harmony if it were to say that

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[1] In fact there is no record that a spouse has ever testified for the prosecution in such a case.

[2] Hawkins v United States (1958) 358 U.S. 74 at p. 87, per Black, J.

[3] Trammel v United States (1979) 445 U.S. 40 at p. 53.

[4] Crimes Act, 1906, section 407 (New South Wales); Evidence Act, 1906, section 8(1) (Western Australia); Crimes (Competence and Compellability of Spouse Witnesses) Act 1978, section 3 substituting a new section 400 in the Crimes Act, 1958 (Victoria); Evidence Amendment Act, 1981, section 6(6) substituting a new section 85 in the Evidence Act 1910 (Tasmania); Evidence Act Amendment Act (No.2), 1983, section 4 substituting a new section 21 in the Evidence Act 1929-1982 (South Australia).

[5] In their treatment the committee assumed for the sake of simplicity that the husband was the accused spouse and the prospective witness was the wife.

> she must not do so. There is only one argument of any substance which we can think of against making the wife competent in all cases. This is that, as we are not proposing to make her compellable for the prosecution in all cases, it would be a mistake to make her competent without being compellable. The argument is that compellability saves her from the embarrassing choice between her duty to the public to give the evidence and her loyalty to her husband. It is said that, if her husband is convicted on her evidence, she can answer his reproaches by saying that she could not have avoided giving the evidence. But we do not think that much of this argument. It may perhaps have some force in the case of a minor offence, but in the case of a serious offence it seems to us too subtle to be likely to be advanced by the wife or appreciated by her husband. We therefore do not think that competence and compellability on behalf of the prosecutiion should coincide. Moreover the great majority of those whom we consulted agreed that the wife should be competent in all cases; and there seems little if any reason why she should be competent in the case of some offences and not in that of others. Therefore clause 9(1) makes the wife competent for the prosecution (unless she is being tried jointly with her husband) in all cases."[6]

This recommendation was adopted in the Police and Criminal Evidence Act, 1984.[7] The Law Reform Commission of Canada made a similar recommendation in 1975[8] and it was adopted in the Canada Evidence Bill which received its first reading in Parliament in 1982. In a Discussion Paper published by the New South Wales Law Reform Commission in 1980 it was pointed out that a spouse had been competent in that jurisdiction since 1891 and so far as they were aware this had been fully accepted and they had never heard any claim that the long-established change should be reversed.[9]

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[6] Criminal Law Revision Committee, Eleventh Report: Evidence (General), para. 148.

[7] Section 80(1).

[8] Law Reform Commission of Canada, Report on Evidence, (1975) pp. 88-89.

[9] New South Wales Law Reform Commission, Discussion Paper, Competence and Compellability (1980), para. 1.25A.

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The matter is not without practical importance. The Director of Public Prosecutions has stated that the incompetence of a spouse as a witness for the prosecution has inhibited prosecutions:

> "There are many cases coming before me in which a wife is only too willing to give evidence against her husband; offences involving the children of the marriage, sexual offences involving other persons very often are capable of proof by a wife who is to the forefront in offering statements of evidence to the gardai. If that case every reaches court at all it will do so in a very garbled fashion because the person who, very often, can give the clearest, most cogent evidence as to the truth of the matter is by law forbidden from entering the witness box except for the defence. So as a small step in the general direction of facilitating the judicial search for truth, consideration might be given to, at least, making the wife a competent witness for the prosecution."[10]

In 1984, in a case where a husband was returned for trial by the District Court on a charge of bigamy, the D.P.P. announced that he was not lodging an indictment because the only witness in the Book of Evidence was the wife of the accused who was not a competent or compellable witness for the prosecution.[11]

In making a recommendation on this matter the Commission is conscious of the provisions of Article 41 of the Constitution, especially Article 41.3.1. which provides:

> "The State pledges itself to guard with special care

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10 Irish Press, 2 July 1979. In fact, by virtue of the Children Act, 1908, a wife is competent to testify against a husband charged with an offence involving bodily injury to a child as well as a number of other offences involving children. However the Director of Public Prosecutions may have had in mind charges of incest under the Punishment of Incest Act, 1908 or of the defilement of young girls under the Criminal Law Amendment Act, 1935, which are not covered by the provisions as to competence of spouses in the Children Act, 1908.

11 Irish Times, 3 November 1984.

> the institution of Marriage, on which the Family is founded and to protect it against attack."

However, it is not considered that the marriages would be endangered by making one spouse competent to testify against the other.[12]

Moreover, it may be argued that to deny to a court the right to hear a person willing to give relevant testimony in a matter before it is repugnant to the guarantee of fair procedures and the due administration of justice which have been held to be inherent in the Constitution. In S. v S., when holding unconstitutional the rule under which a party to a marriage was not allowed to give evidence of non-access during the marriage so as to bastardise a child born in wedlock, O'Hanlon, J. said:

> "It is not so long ago since the law applicable both here and in England excluded from the witness box the parties to an action and their husbands and wives, apparently to protect them from 'the temptation to foreswear themselves'. This remarkable rule of the common law, which applied even to the defendant in a criminal proceedings, survived into the 19th century, until a series of statutes passed in the second half of that century made the parties and their spouses competent witnesses in civil and criminal proceedings. Similarly, an accused person in a criminal proceeding could not be represented by counsel until quite a late stage of the development of the criminal law. It appears to me that if our Legislature were now to attempt to reintroduce these outmoded rules of the common law as features of the administration of justice within our jurisdiction, such legislation could not withstand constitutional challenge as it would be repugnant to modern thinking as to what constitutes fair procedures and the due administration of justice in the courts."[13]

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12 "So far as competence is concerned .... can it be seriously maintained that many marriages would be saved from destruction if persons who were willing and anxious to do so were restrained from testifying against their spouse." (Cross on Evidence, p. 183 (5th ed., 1979)).

13 [1983] I.R. 68, at p. 79.

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Accordingly the Commission recommends that any rule of law making the spouse or former spouse of an accused incompetent as such to testify in criminal proceedings should be abolished.

(b) Compellability of the Spouse of an Accused for the Prosecution

Compellability on behalf of the prosecution is a more difficult question. Respect for the institution of marriage, enshrined in the Constitution, may be felt to require that one spouse should not be compelled to incriminate the other by testimony in court or be put in the invidious position of having to commit perjury so as to avoid this. Given the unity of husband and wife, the right of one spouse not to testify against the other may be considered to be a logical corollary of the right of an accused person not to give evidence at his own trial. It may also be presented as a consequence of the confidential relationship of spouses. As it was put in a Discussion Paper by the New South Wales Law Reform Commission:

> "The present law gives to a spouse a privilege against being compelled to disclose communications between them. But is there not, on current standards in the community, a relationship of trust and confidence between spouses going beyond mere respect for confidentiality as regards communications? Would it not be felt that a spouse would betray that relationship if, by giving evidence against the other, he had a part in drawing down criminal punishment on the other? And if there is a betrayal and it is compelled by the law, would not the community pay too high a price, even in pursuit of the clear public interest in the suppression of crime?"[14]

The basic argument in favour of making the spouse of the accused compellable is that the public interest in the suppression of crime should be paramount. Whenever relevant evidence is withheld from a trial court there is interference with the due administration of justice and it is significant that the courts, relying on the Constitution,

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[14] New South Wales Law Reform Commission, Discussion Paper, Competence and Compellability (1980) para. 1.7.

have restricted rules of privilege having this effect.[15] On some charges, notably those of domestic violence, often the only evidence available is that of the other spouse and it may be impossible to mount a successful prosecution if that spouse cannot be compelled to give evidence. Where the spouse is the victim of violence, given that consent is no defence under the substantive law on a charge of causing serious bodily harm, it is anomalous that the law of evidence should sanction what is, in effect, a retrospective evasion of that rule.[16] Having regard to the fact that other relatives of the accused, such as parents and children, are compellable for the prosecution and to the compellability of a spouse of a party for either side in civil proceedings, the argument that it is intolerable that a spouse witness should be put in a position where there is a sharp conflict between the duty to tell the truth and family loyalty seems dubious. Indeed, it is arguable that compellability would be less detrimental to marital harmony than competence as more resentment may be excited if a spouse, being competent but not compellable, chooses to testify than if the testimony is extracted under compulsion of law.

The tendency in legislation in other common law jurisdictions has been to steer a middle course between total compellability and total non-compellability. This has sometimes involved making a spouse compellable in trials for enumerated offences. The offences named have generally been ones against the property or person of the other spouse, violence or sexual offences against children, and bigamy.[17] They share the characteristic that the evidence of a spouse is often crucial to the prosecution in such cases.

This approach found favour with the English Criminal Law

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15 See Murphy v Dublin Corporation [1972] I.R. 215; see also S. v S. [1983] I.R. 68.

16 Cross on Evidence, p. 177 (5th ed., 1979).

17 Married Women's Property Acts, 1884, section 1 (United Kingdom); Crimes Act, 1900, section 407 (New South Wales); Crimes Act, 1967, section 9 (Victoria); Evidence Act, 1977-1979, section 8 (Queensland); Evidence Amendment Act, 1981, section 6 substituting a new section 85 of the Evidence Act, 1910 (Tasmania); Police and Criminal Evidence Act, 1984, section 80 (England).

Revision Committee which reported in 1972 before the decision of the House of Lords in Hoskyn v Commission of Metropolitan Police.[18] The Committee, which, as noted, assumed for simplicity of exposition that it was the husband who was the accused spouse, proceeded on the assumption that a wife was compellable on a charge arising out of personal violence towards her by her husband:

> "How far the wife should be compellable for the prosecution is a more difficult question. We are in favour of maintaining the existing rule that she is compellable on a charge against her husband of violence to her. We considered an argument that in these days, when wives are so much less under the domination of their husbands, a wife should be made competent only, so that the choice whether to give evidence would be left to her. The result would no doubt be that in many cases it would depend on her whether there was a prosecution or not. We recognize the force of the argument that this would be right in policy, especially because the wife might think that by refraining from giving evidence she would have a better hope that her husband would treat her well in future. But on the whole we think that the public interest in the punishment of violence requires that compellability should remain. It is true that the wife may still refuse to give evidence even though compellable; but the fact that there is compellability should make it easier to counter the effect of possible intimidation by her husband and to persuade her to give evidence. In any event there does not seem to us to be any evidence that the present rule of compellability does any harm, so it seems safest to preserve it.
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> We favour going further and making the wife compellable in the case of offences of violence towards children under the age of sixteen belonging to the same household as the accused. The seriousness of some of these cases seems to us to make it right to strengthen the hand of prosecuting authorities by making the wife compellable, especially as the wife may be in fear of her husband and therefore reluctant to give evidence unless she can be compelled to do so. In the case of violence towards the children compellability seems to us even more important than in cases of violence towards the wife herself. For although violence towards children may be easier to detect than violence towards the wife, it is likely to be harder to prove it in court against the spouse responsible, especially if

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18 [1979] A.C. 474.

the child is unable to give evidence. Another reason for giving the wife no choice whether to give evidence is that she may have been a party to the violence or at least have acquiesced in it, although it is not proposed to prosecute her. For similar reasons we think that the wife should be compellable on a charge of a sexual offence against a child under sixteen belonging to the accused's household. We considered an argument that this would be unnecessary because some of these offences may not be serious and it may be better for all those concerned, parent or child, that the offence should be overlooked than that it should be exposed in court and the offender punished, especially as the marriage might as a result be broken up. It has been argued that for this reason it is better to leave it to the wife to judge whether she should give the evidence. On the other hand some sexual offences may have worse effects than all but the most serious offences of violence. On balance we concluded that it was right to draw no distinction in relation to compellability between sexual offences and offences of violence.

Our decision to recommend limiting compellability in respect of offences against children under sixteen to children of the same household as the accused was taken after a good deal of consideration as to whether compellability should apply to offences against any child under that age even if unconnected with the spouses. This would have the desirable effect of giving further protection to children, and the proposed limitation would exclude some cases where compellability might be thought desirable in any event - for example, if the offence was against a neighbour's child visiting the spouses' house or against a nephew or niece of the offender. But on the whole we think it excessive to extend compellability so far and to apply it, for example, to a common assault on a boy of fifteen having nothing to do with the family. Short of this it would be difficult to draw the line satisfactorily without great complication. Besides, part of the reason for applying compellability to offences committed in the family may be harder to prove if the unoffending spouse is free to choose whether to give evidence, whereas in the case of an offence outside the family other evidence is likely to be available.

We do not think that the wife should be compellable for the prosecution in the case of offences other than those mentioned above. We need waste no time on the doubtful compellability under the present law in treason and abduction. It might be argued that the

> wife should be compellable in very serious cases such as murder and spying or perhaps in all serious cases of violence; but the law has never, except perhaps in treason, made the seriousness of an offence by itself a ground for compellability, and we do not favour doing so now. Therefore clause 9(3) provides expressly that the wife shall not be compellable except in the cases (mentioned above) specified in the subsection."[19]

The Police and Criminal Evidence Act, 1984 adopted these recommendations in so far as it provided that the spouse of an accused was to be competent to give evidence for the prosecution in all criminal proceedings and compellable to give evidence where the offence charged involved an assault on or injury to that spouse. However the Act went further than the Report by making the spouse of an accused compellable when the latter was charged with injuring a child under sixteen or committing a sexual offence in respect of such a child irrespective of whether that child belonged to the same household.[20]

This approach of listing specific offences has also found favour in Canada in the draft Canada Evidence Act presented to Parliament in 1982, and in Australia in reports of the South Australian Criminal Law and Penal Methods Committee, the Queensland Law Reform Commission, the Tasmanian Law Reform Commission, and the Law Reform Commission of Western Australia.[21] The South Australian and Tasmanian bodies commented that the English report was over-restrictive in not extending the compellability of spouses to offences against all children rather than restricting it to cases where the child belonged to the same household as the

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19 Criminal Law Revision Committee, Eleventh Report: Evidence (General), paras. 149-152.

20 Police and Criminal Evidence Act, 1984, section 80.

21 Uniform Law Conference of Canada, Uniform Evidence Act, (1981) sections 92, 93; Criminal Law and Penal Methods Reform Committee of South Australia, Third Report on Court Procedure and Evidence (1975), chapter 8; Queensland Law Reform Commission, The Law Relating to Evidence (1975), para. 8; Law Reform Commission (Tasmania), Competence and Compellability of Spouses to Give Evidence in Criminal Proceedings Preferred against the other Spouse (1977), pp. 9-10; Law Reform Commission of Western Australia, Report on Competence and Compellability of Spouses to Give Evidence in Criminal Proceedings, (1977), paras. 7, 16 17, 25.

accused. "It is better," ran the argument "to go a little too far in the protection of children than to err in not giving sufficient protection."[22] The Western Australian Commission also decided against a limitation to children in the same household and then went further by recommending that a spouse of the accused should be compellable for all serious sexual offences and offences involving personal violence, or harm, irrespective of whether or not the victim is a member of the household or a child:

> "The Commission has given consideration to the possibility of adopting the proposals in England and Queensland to extend compellability to serious offences committed against a child of the same household as the accused. This would include sexual offences, violent offences, and offences of endangering the health or interfering with the liberty of the child. Its most obvious application would be to cases of child-battering. However, an extension limited in this way could give rise to difficulties of definition and to anomalies. The following questions may illustrate the difficulties -
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> (1) At what age does a person cease to be a child for the purposes of the rule?
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> (2) Would a son who normally resides at boarding school but who is at home for two weeks holiday or less be regarded as a child of the same household?
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> (3) Would the son's friend who accompanies him to his home for the holiday be regarded as a child of the same household?
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> (4) Would the rule apply to offences committed against a child of the household outside the privacy of the accused's home?
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> (5) On what logical basis can a distinction be drawn between offences committed against a child of the household and another child not related to the household?
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> In addition to creating anomalies, distinctions of this sort give rise to practical difficulties, uncertainty,

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22 Law Reform Commission (Tasmania), Competence and Compellability of Spouses to Give Evidence in Criminal Proceedings Preferred against the other Spouse, (1977) p. 10.

> and possible delays during trials while the question of compellability is argued before a judge in the absence of a jury.
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> Apart from the technical difficulties and anomalies connected with the limited extension proposed in England and Queensland, the Commission considers that compellability is warranted on general policy grounds over a wider range of circumstances. The Commission can see no real justification for limiting compellability to offences against children of the accused's household. If a child of the household deserves protection against sexual offences and offences of violence, equally should a child living elsewhere; and if a child deserves protection, so equally, in the view of the Commission, should an adult. The reason given by the English Criminal Law Revision Committee for limiting compellability to offences against a child of the household was that in the case of an offence outside the family other evidence is likely to be available. However, as the Commission pointed out in the working paper, if difficulty of proof is to be the basis of the compellability of spouses in selected areas, compellability should extend to every case where it would be difficult to prove an offence without the evidence of the spouse. It may, for example, be difficult to prove a murder unless the accused's spouse is compelled to testify."[23]

Making spouses compellable in trials for enumerated offences has the advantage of precision. If it is considered that it is the gravity of the offence which makes compellability appropriate, this is a justifiable approach as long as all serious crimes are listed. Difficulty may arise because the gravity of many crimes, such as larceny, varies enormously according to the circumstances. If compellability of a spouse is justified on account of the difficulty of obtaining other evidence against the spouse charged, anomalies must result if a spouse is made compellable for some offences and not others. The evidence of a spouse may be crucial in some cases on charges other than those enumerated and unnecessary in some cases of the enumerated charges as when the accused has made a confession or damning forensic evidence is available. Also, it cannot be predicted that compelling a spouse to testify will be

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[23] Law Reform Commission of Western Australia, Report on Competence and Compellability of Spouses in Criminal Proceedings (1977), paras. 7.17-7.20.

disruptive of a marital relationship with one class of offence and not another. For these reasons the Law Reform Commissioner in Victoria, Australia, concluded

> ".... that the difficulties inherent in the listing method are so substantial and intractable that the procedure should be abandoned and replaced by a procedure under which in those special cases where a genuine problem arises, the question whether the spouse of an accused person is compellable to be a witness for the prosecution is determined by the judge or magistrate or justice, at the hearing, upon a weighing of the relevant policy considerations in the light of the circumstances of the particular case."[24]

The Commissioner discounted the argument that "such a provision would leave the prosecution uncertain as to what evidence it would be able to elicit":

> "But that is the situation to-day whenever it calls the accused's spouse or a member of the family. The prosecution can never be sure that there will not be a fictitious loss of memory, or a change of story or a refusal to give evidence."[25]

Accordingly he recommended that not only the spouse but also the parent, child or de facto spouse of an accused should be exempted from the obligation to give evidence where the judge is satisfied

> "that, having regard to all the circumstances including -
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> (i) The nature of the conduct charged
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> (ii) The importance in the case of the facts which the witness is to be asked to depose to
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> (iii) The availability of other evidence to establish those facts and the weight likely to be attached to the witness' testimony as to those facts

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[24] Victoria Law Reform Commissioner, Report, Spouse-Witnesses (Competence and Compellability), (1976), para. 50.

[25] Ibid., para. 54.

(iv) The nature, in law and in fact, of the relationship between the proposed witness and the person charged

(v) The likely effect upon the relationship and the likely emotional, social and economic consequences if the witness is compelled to give the evidence, and

(vi) Any breach of confidence that would be involved,

the interest of the community in obtaining the evidence is outweighed by the likelihood of damage to the relationship and/or the harshness of compelling the giving of the evidence."[26]

These recommendations were substantially adopted in Victoria by the Crimes (Competence and Compellability of Spouse Witnesses) Act, 1978.[27] A similar provision was enacted into law in South Australia by the Evidence Amendment Act (No. 2) 1983.[28] In Canada the same approach was recommended by their Law Reform Commission.[29]

In a Discussion Paper published in 1980 the New South Wales Law Reform Commission made a proposal on spouse-witnesses which represented a synthesis between the two approaches. Having proposed that a spouse should be generally compellable on charges of violence or sexual misconduct in respect of that spouse or any child, they went on to suggest that this compellability should also extend to other cases where "in the opinion of the court, the interests of justice outweigh the importance of respecting the bond of marriage". The Commission recommended that the court, when forming its opinion on this matter, should have regard to (a) the nature of the conduct charged; (b) the importance of the facts to which the wife may depose, and the availability of another mode of proof of those facts; (c) the likely weight of the

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26 Ibid., para. 56.

27 Section 3 substituting a new section 400 in the Crimes Act, 1958.

28 Section 4 substituting a new section 21 in the Evidence Act, 1929-1982.

29 Canadian Law Reform Commission, Report on Evidence (1975), Draft Evidence Code, section 57.

wife's testimony; (d) the effect on the marriage of compelling a wife's testimony; (e) the hardship to the wife of testifying; (f) the effect on any child of the marriage; and (g) any other relevant factor.[30]

A provision recognising compellability but making it subject to a wide discretion vested in the individual judge (or justice) might well just replace one set of anomalies with greater but better concealed anomalies in that no two judges will weigh the relevant factors alike. The result would then be some arbitrariness and uncertainty. Parties would not know in advance of the trial what evidence might be admitted and require to be answered. Problems might arise if the discretion were exercised differently at the preliminary examination from the trial itself. It would also be necessary to decide whether an appeal court should be entitled to interfere with the trial judge's exercise of discretion in the matter.[31]

The Commission is of the opinion that anomalies must inevitably arise if an attempt is made to make a spouse compellable for the prosecution in some cases and not in others. It is mindful that in the wake of Hoskyn v Commissioner of Metropolitan Police the weight of authority now favours the view that, apart from the Evidence Act, 1877, a spouse is never compellable to testify for the prosecution. It is not convinced that it is necessary at this stage to go further than making the spouse of an accused competent in all cases. This is the position in the United States. It is not aware that prosecutions have been prevented or have failed on account of the refusal of competent spouse witnesses to testify on behalf of the prosecution. Accordingly it recommends that it should be a general rule that a spouse is not compellable for the prosecution where the other spouse is charged with a criminal offence. The judge presiding at proceedings where a spouse of the accused is called as a witness by the prosecution should be required to satisfy himself that that

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30 New South Wales Law Reform Commission, Discussion Paper, Competence and Compellability (1980), Appendix A, p. 84.

31 See Law Reform Commission of Western Australia, Report on Competence and Compellability of Spouses to give Evidence in Criminal Proceedings (1977), para. 7.13; New South Wales Law Reform Commission, Discussion Paper on Competence and Compellability (1980), Appendix B (pp. 86-90).

spouse is aware of his or her right to refuse to testify. As indictments for nuisance to a highway, or otherwise for the enforcement of a purely civil right under the Evidence Act 1877 are obsolete, there is no need to preserve the rule making spouses compellable witnesses in such cases as an exception to the general rule here proposed.

However the Commission believes that special provision should be made for joint trials where the evidence of a spouse of one accused may be relevant to secure the conviction of a co-accused. Accordingly, the Commission recommends that in joint trials the spouse of an accused should be a competent and compellable witness to give evidence for the prosecution but, when so testifying, should be entitled to refuse to answer any question or to produce any document if to do so would tend to incriminate the spouse accused.

(c) Compellability of the Spouse of an Accused for that Accused

It is already the law in Canada, Queensland, South Australia and England that one spouse is compellable to give evidence for the other spouse when the latter is accused.[32] The English Criminal Law Revision Committee, the Victorian Law Reform Commissioner, the Law Reform Commission of Western Australia and the Discussion Paper of the New South Wales Law Reform Commission and the Research Paper of the Australian Law Reform Commission have all recommended that the law in their respective jurisdictions should be amended

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[32] Canada Evidence Act, section 4; Evidence Act, 1977-1979, section 8(3) (Queensland); Crime (Competence and Compellability of Spouse Witnesses) Act, 1978, section 2, substituting a new section 399 in the Crimes Act 1958 (Victoria); Evidence Amendment Act (No. 2), 1985, section 4 substituting a new section 21 of the Evidence Act 1929-1982 (South Australia); Police and Criminal Evidence Act, 1984, section 80(2) (England).

to achieve this.[33] In support of their recommendation which was enacted into law by the Police and Criminal Evidence Act 1984 the English Criminal Law Revision Committee argued thus:

> ".... The only possible argument against this seems to be that the wife ought not to be put into a position where she may have had to choose between incriminating her husband and committing perjury. But this argument seems to us quite unacceptable in these days and in any event to have very little weight compared with the argument that the husband might feel a great grievance if he could not compel his possibly estranged wife to give evidence for him. No doubt the accused would prefer, if possible, to avoid calling his wife, if she was reluctant to give evidence, for fear that her evidence would be unfavourable to him because of the compulsion; but if she could in fact give true evidence which would be in his favour, he would probably think that, however reluctant she was to give evidence, the truth would emerge if she did so."[34]

However, the Law Reform Commission in Tasmania, which reported on the subject in 1977, came to a different conclusion:

> "We recognise that it might well be argued that a spouse should be a compellable witness for the other spouse in the same way as any other witness. However, we accept the persuasive argument in a submission from one of our judges that there is a real danger that an

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33 Criminal Law Revision Committee, Eleventh Report, Evidence (General) (1972) para. 153; Victoria Law Reform Commissioner, Report: Spouse-Witness (Competence and Compellability) (1976), para. 40; Law Reform Commission of Western Australia, Report on Competence and Compellability of Spouses to give Evidence in Criminal Proceedings (1977), paras. 7.14-7.15; New South Wales Law Reform Commission, Discussion Paper, Competence and Compellability (1980), paras. 1.24-1.25c; the Australian Law Reform Commission, Evidence Reference, Research Paper No. 5 (1981) p. 75.

34 Criminal Law Revision Committee, Eleventh Report: Evidence (General) (1972) para. 153.

> unscrupulous guilty husband could, by threats or some other form of duress, compel a reluctant wife to give evidence for him, in support, for example, of a false alibi. We respectfully agree that there are arguments both ways on the question of compellability for the defence and agree, in these circumstances, that the law should be left as it is."[35]

The Commission is firmly of the view that it would be intolerable if a person accused of a criminal offence were unable to compel testimony from the other spouse which might help to disprove the charge. It does not agree that compellability would result in more intimidation of spouse witnesses than would occur if they were merely competent. It may be anticipated that cross-examination will be effective to expose false testimony which is the result of intimidation. If a spouse is compellable for the defence it would make it legitimate to draw inferences where that spouse is not called. This would offset to some extent any unfair disadvantage at which the prosecution may find itself as a result of not being able to compel an unwilling spouse to testify. Accordingly the Commission recommends that, except in cases where spouses are jointly accused, one spouse should be compellable to give evidence for the other spouse when the latter is charged with a criminal offence.

(d) Comment by the Prosecution on Failure of Spouse to Testify

The prohibition on comment by the prosecution on the failure of the spouse of the accused to give evidence was examined by the English Criminal Law Revision Committee in 1971:

> "The prohibition in s. 1(b) of the 1898 Act of comment by the prosecution on the failure of the accused's

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35 Law Reform Commission (Tasmania), Competence and Compellability of Spouses to Give Evidence in Criminal Proceedings Preferred Against the Other Spouse, (1977), p. 11. The Evidence Amendment Act 1981, section 6 substituting a new section 85 in the Evidence Act, 1910 followed this recommendation. The argument was criticised in the Research Paper No. 5 of the Australian Law Reform Commission on Competence and Compellability of Witnesses, p. 77.

> spouse to give evidence should in our opinion be lifted. The case for this is not so obvious as is that for lifting the prohibition of comment on failure of the accused himself to give evidence. In favour of lifting the former prohibition it is argued that, if the accused puts forward a defence which, if true, his wife should be able to corroborate by her evidence, and she is not called, it is natural that the prosecution should be able to comment on this just as they may on the failure of the defence to call somebody else who would have been able to corroborate his evidence if it was true. Also the prohibition is not one which one would expect to exist, especially in a reformed and modernized law of evidence, and there would be the danger that it might be forgotten and that a conviction might have to be quashed in consequence. Moreover in any event it seems right to continue to allow comment by the judge, because in a proper case the judge might think it right to advise the jury that in the circumstances they should not hold the failure against the accused although it might have seemed right to them to do so; and we are not in favour of prohibiting comment by the prosecution when comment by the judge is allowed. In favour of the present prohibition it is argued that inexperienced prosecutors might use their new freedom without sufficient discrimination (though the effect of this should be counteracted by the court). Another argument is that the real reason for the failure to call the wife might have been that the accused was afraid that, because she was being compelled to give evidence, she might deliberately be unhelpful to him. It was also pointed out that a practice might grow up of calling the wife unnecessarily in order to avoid adverse comment on failure to call her. We think that the arguments in favour of lifting the prohibition are the stronger."[36]

However, the Police and Criminal Evidence Act, 1984 has maintained the prohibition.[37] The Commission is inclined

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36 Criminal Law Revision Committee, Eleventh Report: Evidence (General), (1972), para. 154. The Law Reform Commission of Western Australia reached the same conclusion: see Report on Competence and Compellability to Give Evidence in Criminal Proceedings (1977), paras. 7.40-7.43.

37 Police and Criminal Evidence Act, 1984, section 80(8).

to the view that the balance is tilted sufficiently in favour of the accused if (as is recommended) a spouse is compellable for him and not for the prosecution. The present prohibition of comment by the prosecution on the failure of a spouse to testify exists in a context where one spouse cannot be compelled to give evidence for the defence on behalf of the other spouse. It would be unfair if an accused had inferences drawn against him where his or her spouse had refused to testify for the defence although requested to to so.[38] This situation cannot arise once a spouse is made compellable for the defence on behalf of the other spouse. In these circumstances the Commission recommends that it should be permissible for the prosecution as well as the judge to comment on the failure of the spouse of an accused to give evidence in criminal proceedings and section 1(b) of the Criminal Justice (Evidence) Act, 1924 should be repealed in so far as it prohibits such comment by the prosecution.

(e) Compellability of the Spouse of an Accused for a Co-Accused

A more difficult problem arises where one accused wishes to call the spouse of a co-accused. At present the general rule established by section 1(c) of the Criminal Justice (Evidence) Act, 1924 is that such a spouse is competent only upon the application of the accused spouse. Some exceptions to that rule were created by that Act itself.[39] Others exist by virtue of previous and subsequent

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[38] A different view has been taken in Tasmania: see the Evidence Amendment Act, 1981, section 6 substituting a new section 85 in the Evidence Act, 1910. Their Law Reform Commission Report, on whose recommendation the legislation was based, had argued that there was no reason why the prosecution should be denied the right to comment when the judge had such a right and when the prosecution had such a right of comment in respect of other witnesses. (Competence and Compellability of Spouses to Give Evidence in Criminal Proceedings Against the Other Spouse (1977), p. 11.)

[39] See supra, p. 7.

legislation.[40] This question was considered in England by the Criminal Law Revision Committee which recommended "that the wife of accused A should be competent to give evidence on behalf of his co-accused B whether or not A is willing":[41]

> ".... We do not think that A should have any right to prevent Mrs A from giving evidence on behalf of B if she is willing. A more difficult question seems to be whether she should be compellable on behalf of B in all cases. In favour of making her so it is argued that the interest of justice require that B should be able to compel anybody not being tried with him to give evidence on his behalf and that the fact that the witness happens to be A's wife should make no difference, even though the result might be her incriminating A. Against this it is argued that, since the prosecution cannot call Mrs A as a witness in order that she may incriminate A, it is wrong that they should be able to compel her to incriminate him by cross-examination if she is called by B. We think that the argument against compellability is the stronger. We considered a possible compromise by which Mrs A should be compellable on behalf of B only if A consented. Then A should give his consent if Mrs A could help B's defence without incriminating A. But on the whole we are opposed to this, because it might be procedurally awkward, and embarrassing for A's defence, if it were necessary to ask him in court whether he consented to his wife's giving evidence, especially if he agreed at first that she should do so but changed his mind before the time came to call her because of evidence given meanwhile. But we propose

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40 Licensing Act, 1872, section 51(4); Conspiracy and Protection of Property Act, 1875, section 21; Corrupt and Illegal Practices Prevention Act, 1883, section 53(2); Criminal Law Amendment Act, 1885, section 20; Chaff-Cutting Machines (Accidents) Act, 1897, section 5; Summary Jurisdiction (Ireland) Act, 1908, section 1; Children Act, 1908, section 133(28); Criminal Law Amendment Act, 1912, section 7(6); Public Assistance Act, 1939, section 83(2); Married Women's Status Act, 1957, section 9(4); Social Welfare (Consolidation) Act, 1981, section 145(4).

41 Criminal Law Revision Committee, Eleventh Report: Evidence (General) (1972), para. 155.

> that Mrs A should be compellable on behalf of B in any case where she would be compellable on behalf of the prosecution even though the result might be that she would incriminate A. Here the argument mentioned above against making her compellable for B in general does not apply; and although the general arguments for compellability on behalf of the prosecution (in particular the possibility of intimidation by the witness's husband) do not apply either, it seems wrong to deny to the co-accused a right which is given to the prosecution."[42]

The conclusion that as a general rule the spouse of an accused should be competent for a co-accused without that accused's consent but that such a spouse should not, apart from exceptional cases, be compellable was given effect by the Police and Criminal Evidence Act, 1984.[43] This is the law in a number of the Australian States.[44] A different view was taken by the Victoria Law Reform Commissioner[45] and the Law Reform Commission of Western Australia.[46] The former stated his argument thus:

> "The problem presented is a difficult one. It is submitted, however, that the husband or wife of an accused person ought to be a compellable witness not only for that accused, but also for any co-accused being tried jointly with that accused. Moreover it is not considered that there should be any power of exemption in this case as has been recommended in relation to the calling of witnesses for the prosecution. For though the community can properly

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42 Ibid.

43 Section 80(1), (3).

44 Crimes Act, 1900, section 407 (New South Wales); Evidence Act, 1977-1979, section 8 (Queensland); Evidence Amendment Act, 1981, section 6 substituting a new section 85 in the Evidence Act, 1910 (Tasmania).

45 Victoria Law Reform Commissioner, Report: Spouse-Witness (Competence and Compellability) (1976), para. 58.

46 Law Reform Commission of Western Australia, Report on Competence and Compellability of Spouses to Give Evidence in Criminal Proceedings, (1977), paras 7.26-7.32

> be called on to regard its interest in securing a conviction as being outweighed by the hardship that the witness would incur, an accused man cannot properly be required to run the risk of being wrongly convicted in order to spare the witness from hardship."[47]

Legislation in Victoria and South Australia has adopted this recommendation.[48] The conflicting policy-ends involved could, in theory, be reconciled by providing that an accused would be entitled to a separate trial if the spouse of another accused indicates unwillingness to testify on his or her behalf. But it is feared that such an extension of the right to a separate trial would inhibit prosecutions unduly. A less drastic solution would be to give the spouse of an accused called by a co-accused the right not to answer a question if the answer would tend to incriminate the spouse who is accused. This might sometimes result in the accused being denied the right to have evidence adduced which might exculpate him. But this already happens at a joint trial if one accused, whose evidence would exculpate another accused, elects not to testify. In all the circumstances, therefore, the Commission recommends that the spouse of an accused should be competent and compellable to give evidence on behalf of a co-accused but a spouse so testifying should be entitled to refuse to answer any question or produce any document if to do so would tend to incriminate the spouse who is accused.

(f) Former and Separated Spouses

The position of former and separated spouses merits separate consideration. A number of law reform bodies have recommended that spouses whose marriage has terminated

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47 Victoria Law Reform Commissioner, Report: Spouse-Witnesses (Competence and Compellability) (1976), para. 58.

48 Crimes (Competence and Compellability of Spouse Witnesses Act, 1978 substituting a new section 399 in the Crimes Act, 1958 (Victoria); Evidence Act Amendment Act (No.2), 1983 substituting a new section 21 in the Evidence Act 1929-1982 (South Australia).

should be treated in the same way as strangers.[49] Consequently compellability would extend even to events occurring during the marriage. In England, the Police and Criminal Evidence Act, 1984 provides that in any proceedings a person who has been but is no longer married to the accused should be competent and compellable to give evidence as if that person and the accused had never been married.[50] In Tasmania the Evidence Amendment Act, 1981, which provides that a spouse of the defendant is, as a general rule, not compellable, defines a spouse as a person who is married to the defendant both at the time of trial and when the offence was alleged to have been committed.[51] Consequently, not only is a former spouse generally compellable to testify for the prosecution but a present spouse is compellable where the offence was committed before the marriage.

The question is of marginal significance in Ireland at present as the only form of divorce available is judicial separation (divorce a mensa et toro) and this is seldom sought by estranged spouses as orders for maintenance and for the custody of children can be obtained without seeking judicial separation. Foreign divorces have been recognised only where at the time of the divorce the parties were domiciled in the country where the divorce was granted.[52]

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49 Criminal Law Revision Committee (England), Eleventh Report: Evidence (General) (1972), para. 157; Law Reform Commissioner of Victoria, Report: Spouse-Witnesses (Competence and Compellability) (1976), para. 65; New South Wales Law Reform Commission, Discussion Paper: Competence and Compellability (1980), para. 1.33.

50 Police and Criminal Evidence Act, 1984, section 80(5); see also the Victoria Crimes (Competence and Compellability of Spouse Witnesses) Act, 1978, sections 2 and 3 substituting new sections 399 and 400 in the Crimes Act, 1958, where former spouses are made generally compellable and no provision is made for exempting them as is done for present spouses.

51 Evidence Amendment Act, 1981, section 6 substituting a new section 85(3) in the Evidence Act, 1910.

52 Bank of Ireland v Caffin, [1971] I.R. 123; Gaffney v Gaffney [1975] I.R. 133; T. v T., [1983] I.R. 29. See also Law Reform Commission Working Paper No. 11-1984, Recognition of Foreign Divorces and Legal Separations; Law Reform Commission, Report on Recognition of Foreign Divorces and Legal Separations (LRC 10-1985), especially Chapter 2.

The Commission believes that the reticence of a former spouse as to events occurring during a marriage is entitled to the same respect as that of a present spouse. As regards events occurring during a marriage a former spouse should not therefore be compellable if a present spouse would not be compellable.

Accordingly, the Commission recommends that a former spouse of an accused should be competent and compellable to give evidence for any party in criminal proceedings but (i) if called by the prosecution, such a former spouse should not be compelled to answer any question relating to events which occurred while the marriage was still subsisting and (ii) if called by a co-accused such a former spouse should not be compelled to answer any question or to produce any document if to do so would tend to incriminate the former spouse accused relative to an event which occurred while the marriage was still subsisting.

The next question is whether estranged spouses who are not divorced should be treated as if they are married. In England, the Criminal Law Revision Committee concluded that they should be so treated:

> "We considered whether to provide that, if the spouses were judicially separated or were not cohabiting, they should be treated for the purpose of competence and compellability as if they were unmarried. There is clearly a case for this, at least where they are judicially separated, for the law recognizes that for many purposes this is equivalent to a divorce. But it is difficult to draw a line for this purpose without complicating the clause (and the other provisions in the draft Bill where a similar question arises). For if there is to be an exception from the general rule in cases of judicial separation, it would seem logical to apply the exception to cases where there is a matrimonial order under the Matrimonial Proceedings (Magistrates' Courts) Act 1960 (c.48) containing a provision under s. 2(1)(a) that the spouses should no longer be bound cohabit, as this provision has the same effect as a judicial separation. But the inclusion or non-inclusion of such a provision in a matrimonial order depends very much on the circumstances of the cases in question and may therefore be an inappropriate test for the purpose of compellability. Moreover, the parties often resume cohabitation even when there is a provision of the kind mentioned in the order; and, although this causes the order to cease to have effect under s. 7(2) of the 1960 Act, the provision would

> involve the side issue whether the spouses had resumed cohabitation. Again, if such a provision as suggested were to be included, it would be necessary to consider whether it should apply to orders made by courts outside England. We considered providing that the spouses be treated as unmarried for the purpose of compellability if there were in existence any judicial order relating to the marriage and they were not cohabiting or if, irrespective of whether there was such an order in existence, they were in fact not cohabiting. But again this would involve the question whether they were cohabiting. On the whole we think that it is unnecessary to complicate the clause by any provision for these purposes. For if the parties are judicially separated or otherwise not cohabiting, and if there is little prospect that they will become reconciled, the spouse in question is likely to be willing to give evidence; and if there is a prospect of reconciliation, it may be better to avoid the risk of spoiling the prospect by compelling the spouse to give evidence when he or she would not have been compellable in the ordinary case."[53]

The Commission does not share the view that it is impossible to make a satisfactory distinction between judicial separation and other forms of de facto separation.[54] It is considered that judicial separation should be treated on the same basis as divorce so that a spouse should be compellable to testify as to events occurring before the marriage and since the separation. In theory it would be possible to frame a wider definition of a separated spouse to include cases where there is a separation agreement or where spouses are not co-habiting and an order has been made under the Guardianship of Infants Act, 1964, the Family Law (Maintenance of Spouses and Children) Act, 1976 or the Family Law (Protection of Spouses and Children) Act, 1981. However, it is difficult to justify a distinction between such cases and those where spouses separate without making provision for children or maintenance. It is considered that it would be better to adopt the test of whether the spouses are living apart, which is known to the law in other

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[53] Criminal Law Revision Committee, Eleventh Report: Evidence (General), para. 156.

[54] See Law Reform Commission, Working Paper No. 9-1980, The Rule Against Hearsay, p. 124.

contexts,[55] it it is desired to make provision for the compellability of separated spouses who have not been divorced or judicially separated. However, the Commission believes that it is an objection to any such provision that it would be too easy for spouses to pretend that they had been living together if they desired to avoid compellability.

Accordingly, the Commission recommends that in cases where spouses are judicially separated, and one spouse is charged with a criminal offence, the other spouse should be competent and compellable to give evidence for any party to the proceedings but (i) if called by the prosecution such a spouse should not be compelled to answer any question relating to events which occurred after the marriage and before the judicial separation and (ii) if called by a co-accused such as spouse should not be compelled to answer any question or to produce any document if to do so would tend to incriminate the spouse accused relative to an event which occurred after the marriage and before the judicial separation.

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[55] See, for example, the Married Women's Status Act, 1957, section 9(3) which provides:

> "No criminal proceedings concerning any property claimed by one spouse (in this subsection referred to as the claimant) shall, by virtue of subsection (1) or subsection (2), be taken by the claimant against the other spouse while they are living together nor, while they are living apart, concerning any act done while living together by the other spouse, unless such property was wrongfully taken by the other spouse when leaving or deserting or about to leave or desert the claimant."

See also Income Tax Act, 1967, section 196(1) (as substituted by Finance Act, 1980, section 17) which provides:

> "A married woman shall be treated for income tax purposes as living with her husband unless either -
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> (a) they are separated under an order of a court of competent jurisdiction or by deed of separation, or
>
> (b) they are in fact separated in such circumstances that the separation is likely to be permanent."

(g) Void and Voidable Marriages

In its Report on Nullity of Marriage [LRC 9-1984] the Commission has made recommendations as to the grounds on which a marriage may be annulled. The effect of these recommendations is that a marriage would be void on grounds of prohibited degrees of relationship, certain formal defects, bigamy and nonage; a marriage would be voidable on account of lack of consent, lack of mental capacity, homosexual orientation, fraudulent misrepresentation and fraudulent non-disclosure of certain matters.

In the case of a void marriage the Commission sees no alternative to treating the parties as strangers for purposes of their competence and compellability as witnesses. However where a marriage is voidable, the parties should be treated as if they had been married until the time when the decree of annulment was granted. The Commission recommends that for the purposes of the law relating to the competence and compellability of witnesses, the parties to a void marriage should be treated as if they had never been married and the parties to a voidable marriage should be regarded as having been married from the time of the marriage ceremony to the time when the decree of annulment was granted.

(h) Compellability of Other Members of a Family

Reference has been made to legislation in Australia under which the court has power to exempt a close relative of the accused from the obligation to give evidence against him. Similar legislation exists in Israel and was, as noted, proposed in Canada by their Law Reform Commission. Any such discretionary power of exemption would involve the weighing of the hardship of compelling such evidence with its importance in a particular trial and the gravity of the offence. Consistency in the application of this process of weighing incommensurables would be almost impossible to achieve especially as it would not be practicable to make decisions subject to appeal. However the Commission is of opinion that prosecutors should exercise restraint in compelling members of a family to give evidence against one another. Such restraint may be absent in private prosecutions, including cases where a member of the Garda Siochana institutes a prosecution in a case which he has investigated. Accordingly the Commission recommends that provision should be made that a parent or child of an accused should not be compelled to give evidence for the

prosecution incriminating that accused unless a certificate from the Director of Public Prosecutions is tendered stating that he personally has examined the case and having considered the hardship of compelling the witness to testify, the importance of the evidence that witness could give and the gravity of the offence charged believes that it is in the public interest that the evidence be heard; where a person is in loco parentis to a child the relationship of parent and child should be deemed to exist. The Commission does not believe that provision need be made for other close relatives. Nor does it believe that an accused should have to seek the approval of the Director of Public Prosecutions to compel the child or parent of a co-accused to give evidence which might exculpate him. In limiting its recommendation as it has done the Commission has been mindful of the fact that the courts may impose a sentence which is lenient in cases where a refusal to testify is not reprehensible.

3. Communications between Husband and Wife

The privilege by which a spouse is not compellable to disclose any communication made to him or her by the other spouse has been much criticised and has been amended or abolished in several common law jurisdictions. In its Report on Privilege in Civil Proceedings published in December 1967 the English Law Reform Committee recommended its abolition in civil cases.[56] This was duly done for England in the Civil Evidence Act, 1968, and for Northern Ireland in the Civil Evidence Act (Northern Ireland) 1971.[57] Referring to section 3 of the Evidence (Amendment) Act, 1853, the Committee said:

> "This curious provision, which is repeated in section 1(d) of the Criminal Evidence Act 1898 with reference to criminal proceedings, was presumably intended to prevent use being made of admissions made by one spouse to the other, but if so, it gives the liberty to disclose to the spouse in whom confidence was reposed and not to the spouse who reposed the confidence. The

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[56] Law Reform Committee, Sixteenth Report (Privilege in Civil Proceedings), (1967), paras 42, 43.

[57] Civil Evidence Act, 1968, section 16(3); Civil Evidence Act (Northern Ireland), 1971, section 12(3).

communicator has not the right to prevent the spouse to whom the communication was made from waiving the privilege. This does not make sense. The Model Code and the Uniform Rules of Evidence in the United States make the privilege that of the communicator alone and exclude the privilege in actions between spouses. The Indian Evidence Act, section 122, makes the privilege a joint one requiring waiver by both spouses and also excludes the privilege in actions between the spouses and some criminal proceedings. But there are practical disadvantages in making the privilege a joint one. One of the spouses may not be present or readily available when the claim for privilege arises. In such a case the evidence would be shut out even although the absent spouse, if asked, whould have had no objection to the disclosure. Presumably the absence of consent of a deceased spouse would be irrelevant, but what is to happen when the marriage between the spouses is dissolved?

We have no doubt that this statutory privilege ought to be altered. The decision whether there should be any absolute privilege at all involves a value judgment and depends upon the social and religious importance which one attaches to the institution of marriage. If a privilege for communications between spouses were to be retained, we think that it should clearly be that of the comunicator and waivable by the communicator alone. There can be no breach of marital confidence if the spouse who made the communication is willing that it should be disclosed. There would, however, have to be a provision that the privilege should not apply in proceedings between spouses. On the other hand, there is, we think, great force in the contention that such a privilege is of little practical importance and would have a minimal effect upon marital relations. It is unrealistic to suppose that candour of communication between husband and wife is influenced today by section 3 of the Evidence (Amendment) Act 1853, which, as we have pointed out, does not ensure that marital confidences will be respected, or would be enhanced tomorrow by an amendment of the law on the lines indicated above. Other family relationships, such as those between parent and child, are equally close, yet it has never been suggested that communications between parent and child should be privileged. On the whole, we think that the reasonable protection of the confidential relationship between husband and wife is best left to the discretion of the judge and, we may add, the good taste of counsel. We accordingly recommend that section 3 of the Evidence (Amendment)

Act 1853 be repealed."[58]

The Criminal Law Revision Committee which reported in 1972 recommended that this privilege should be abolished in cirminal proceedings also. But their endorsement was perhaps less than whole hearted:

> "In the case of communications between spouses there may be a case for preserving the privilege and extending it to communciations made by the witness to his wife, and the former might be given the right to prevent the wife from disclosing the communcation; but the abolition of this privilege .... in civil proceedings was in accordance with recommendations of the Law Reform Committee .... [I]t would in our views be undesirable that witnesses in criminal proceedings should enjoy greater privileges in these respects than witnesses in civil proceedings."[59]

The privilege was, in fact, abolished for criminal proceedings by section 80(9) of the Police and Criminal Evidence Act, 1984.

The Ontario Law Reform Commission has also recommended the abolition of this privilege.[60] They noted that there was a basic confusion of thought as to whether the privilege was designed to promote candour in marriage or to prevent disharmony between spouses resulting from the revelation of marital communications. If the purpose of the privilege was to promote candour as between spouses they found it difficult to understand why the privilege was that of the recipient or why it did not survive after the marriage had terminated. On any view of the policy underlying the privilege, they felt that the definition of communciations protected by the privilege was unnecessarily restrictive:

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58 Law Reform Committee, Sixteenth Report (Privilege in Civil Proceedings), (1967), paras. 42, 43.

59 Criminal Law Revision Committee, Eleventh Report: Evidence (General), (1972), para. 173.

60 Ontario Law Reform Commission, Report on the Law of Evidence, (1976), pp. 133-142.

> "If the privilege seeks to encourage confidences between spouses, it would appear artificial to exclude from the ambit of protected communications, information obtained as a result of the marital relationship. Similarly, it may be said that it is as disruptive to marital harmony to require a spouse to disclose information obtained as a result of the marital relationship, as it is to require disclosure of a conversation or other protected communication."[61]

It was their view that if the privilege were to be retained it should be a joint privilege enabling either spouse to object to the disclosure of marital communications. However they came down against this:

> ".... we are of the view that, even if the privilege was altered by extending it to both the communicating and recipient spouses and expanding the definition of communications protected by the privilege, its effect upon the matrimonial relationship would be minimal. Any formulation of an altered or expanded privilege would have to be subject to many exceptions, in order to prevent privilege from being claimed in circumstances in which a claim would result in a miscarriage of justice, or would otherwise be clearly inappropriate."[62]

Accordingly, they concluded that marital privilege should be abolished.

However it cannot be said that there is a unanimity of opinion against a privilege relating to marital communications. Indeed a note of dissent to the recommendation of the Ontario Law Reform Commission was entered by its own chairman, who argued as follows:

> "It is certainly true that one cannot establish, or cannot establish easily, the extent to which candour as between husband and wife and the strengthening of the marital union is enhanced by the existence of the marital privilege .... But this is as one would

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61 Ibid., p. 138.

62 Ibid., p. 141. The Commission instances proceedings between the spouses or concerning the welfare of children as cases where a claim of privilege should not apply.

> expect, and the fact that the case cannot be documented does not mean that the privilege does not serve a useful, indeed an essential, purpose. I suspect we will know very quickly the unhappy consequences of removal the moment that abolition is accomplished .... I would prefer the retention of the privilege, as a right, with amendments as follows:
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> (i) that the privilege be altered by extending it to both the communicating and recipient spouses;
> (ii) that the definition of communications be expanded;
> (iii) that the privilege should continue to exist notwithstanding the dissolution of the marriage, and
> (iv) that the privilege should not apply in actions between husband and wife."[63]

He wished to follow the relevant provisions of the California Evidence Code, section 980 of which provides:

> "Subject to Section 912 and except as otherwise provided in this article, a spouse (or his guardian or conservator when he has a guardian or conservator), whether or not a party, has a privilege during the marital relationship and afterwards to refuse to disclose, and to prevent another from disclosing, a communication if he claims the privilege and the communication was made in confidence between him and the other spouse while they were husband and wife."

The exceptions prescribed by the California Code are (i) communications made to enable or aid anyone to commit or plan to commit a crime or fraud; (ii) proceedings to place either spouse or his property under the control of another because of his alleged mental or physical condition; (iii) proceedings brought by or on behalf of one spouse against the other spouse; (iv) proceedings between a surviving spouse and a person who claims through the deceased spouse; (v) criminal proceedings in which one spouse is charged with a crime committed at any time against the person or property of the other spouse or of a child of either; (vi) criminal proceedings in which one spouse is charged with a crime committed at any time against the person or property of a third person committed in the course of committing a crime

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[63] Ibid., pp. 141-142.

against the person or property of the other spouse; (vii) criminal proceedings in which one spouse is charged with bigamy; and (viii) criminal proceedings in which the communication is offered in evidence by a defendant who is one of the spouses between whom the communication was made.[64]

In the United States, the Supreme Court has held that information disclosed between husband and wife in confidence is protected from disclosure,[65] going so far on one occasion as to describe the privilege as "the best solace of human existence".[66] The privilege permits a spouse or ex-spouse to object to evidence concerning confidential communications made or received by him during the marriage. There is a rebuttable presumption that any marital communication is confidential and so privileged. However it seems that communications between a husband and wife about crimes in which they were joint participants are not privileged.[67]

The Uniform Rules of Evidence in the United States also recognise the privilege and make it a joint privilege:

> "Subject to rules 216, 217, 218 and 231, a person, whether or not a party, has a privilege to refuse to disclose, and to prevent a witness from disclosing, a communication, if he claims the privilege and the judge finds that
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> (a) the communication was a confidential communication between spouses
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> (b) the witness was at the time of the communication one of the spouses or is the duly appointed, qualified and acting guardian of his person, and
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> (c) the claimant is the holder of the privilege, or a

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64 California Evidence Code, sections 981-987.

65 Wolfe v United States, (1934) 291 U.S. 7; Blau v United States, (1951) 340 U.S. 332.

66 10 U.S. (13 Pet.) at 223.

67 Unites States v Mendoza, 574 F. 2d 1373 (5th Circuit).

person authorised to claim the privilege for him."[68]

It should be noted that this privilege applies only to confidential communications and is thus more restricted in its scope than that under the Evidence Amendment Act, 1853. Rule 216 lists some further limitations:

> "Neither of the spouses has a privilege under Rule 215 in
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> (a) an action by one of them for annulment of marriage or for divorce or separation from the other, or for damages for the alienation of the affections of the other, or for criminal conversation with the other, or
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> (b) an action for damages for injury done by one of them to the person or property of the other, including an action for wrongful death of the other, or
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> (c) a criminal action in which one of them is charged with
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> (i) a crime against the person or property of the other or of a child of either, or
> (ii) a crime against the person or property of a third person committed in the course of committing a crime against the other, or
> (iii) bigamy or adultery, or
> (iv) desertion of the other or of a child of either, or
>
> (d) a criminal action in which the accused offers evidence of a communication between him and his spouse."

Rule 217 restricts this marital privilege where a communication is in aid of a crime or tort. It provides:

> "Neither spouse has a privilege under Rule 215 if the judge finds that sufficient evidence, aside from the communication, has been introduced to warrant a finding that the communication was made, in whole or in part,

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68 Uniform Rules of Evidence, rule 218.

> to enable or aid anyone to commit or to plan to commit a crime or a tort."

Another restriction is to be found in Rule 128 which provides:

> "A person who would otherwise have a privilege under Rule 215 has no such privilege if the judge finds that he or any other person while the holder of the privilege has testified or caused another to testify in any action or any communication between the spouses upon the same subject-matter."

The Canadian Law Reform Commission also came down against the abolition of marital privilege but pinpointed several aspects of the privilege which it felt should be amended:

> "The major purpose of the rule is to foster frankness and candour between spouses, and thereby support conjugal union. But the privilege applied no matter what the state of the marital union and, oddly enough, the privilege was that of the person receiving the communication, not the one making it. This section attempts to achieve a better balance between the desirability for confidentiality and the need for obtaining evidence by giving the judge a discretion to allow or disallow the privilege in the light of the circumstances. It rationalizes the law by making the privilege that of the person making the communication. And it extends the privilege to other family and similar relationships."[69]

The section proposed by the Canadian Law Reform Commission read as follows:

> "A person has a privilege against disclosure of any confidential communication between himself and a person who is related to him by family or similar ties if, having regard to the nature of the relationship, the probable probative value of the evidence and the importance of the question in issue, the need for the person's testimony is outweighed by the public interest

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69 Law Reform Commission of Canada, Report on Evidence (1975), p. 79.

> in privacy, the possible disruption of the relationship or the harshness of compelling disclosure of the communication."[70]

In fact the solution adopted in the Canada Evidence Bill presented to Parliament in 1982 was closer to the United States law. The relevant sections provided:

> "166. In sections 167 to 173 'spouse' means spouse at the time the statement was made.
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> 167. In a proceeding before a court, tribunal, body or person with jurisdiction to compel the production of evidence, a person is entitled to claim a privilege against production or disclosure by himself or his spouse of a statement made in confidence by him to his spouse.
>
> 168. The privilege under section 167 subsists for the lifetime of the declarant, notwithstanding any subsequent dissolution of the marriage.
>
> 169. Unless the court is satisfied otherwise, a statement made by a declarant to his spouse shall be presumed to have been made in confidence.
>
> 170. (1) A claim under section 167 may be made by the declarant or his spouse on his behalf, whether or not the declarant is a party to the proceeding in which the claim is made.
>
> (2) Unless the court is satisfied otherwise, the spouse of the declarant shall be presumed to be authorized to make a claim under section 167 on behalf of the declarant.
>
> 171. (1) No claim under section 167 may be made in a civil proceeding between the declarant and his spouse.
>
> (2) A claim under section 167 may be denied in a civil proceeding in which the court is satisfied that the denial is necessary in order to protect the interests of a child.
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> 172. No claim under section 167 may be made in a criminal proceeding against the declarant in respect of

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70 Ibid., p. 30, Evidence Code, section 40.

(a) an offence set out in subsection 93(2),[71] whether the declarant's spouse is called as a witness for the prosecution or defence; or

(b) an offence against a third person that is alleged to have been committed by the declarant in the course of committing an offence against his own spouse.

173. The right to claim a privilege under section 167 is lost if the declarant or anyone with his authority voluntarily produces or discloses or consents to the production or disclosure of any significant part of the privileged statement, unless the production or disclosure is made in circumstances that give rise to a privilege."

The Commission is of the view that there may be more to be said for the present law than has been conceded by its critics. That law respects the confidentiality of marital communications to the extent that the testifying spouse does but not more so. Not only may this be the right balance but it avoids the thorny problem of distinguishing confidential and non-confidential communications. However the Commission believes that the confidentiality of marital communications would be preserved in most cases by the exercise of the same judicial discretion as obtains in respect of other confidential relationships, such as that of doctor and patient. The recognition of a privilege not to incriminate one's spouse (which is proposed below) will ensure that a spouse will not be bound to disclose a marital communication which would incriminate the other spouse. Even if the statutory provisions by virtue of which a spouse may refuse to disclose a communication made by the other spouse are repealed, a privilege rooted in the Constitution based on the right to privacy in a marital context, may remain. Accordingly the Commission recommends that section 3 of the Evidence Amendment Act 1853 and section 1(d) of the Criminal Justice (Evidence) Act 1924 should be repealed.[72]

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[71] These are offences on the trial for which a spouse is compellable for the prosecution or for a co-accused of the other spouse.

[72] For texts of these provisions see supra, pp. 31- 2.

4. Privilege against Spouse-Incrimination

The privilege against self-incrimination is based on an old principle that it is repellant that a man should be compelled to give answers exposing himself to the risk of criminal punishment. If such a privilege did not exist, witnesses might be more reluctant to come forward to testify. It is not within the scope of this Report to examine whether this privilege is justified. But, given its existence, the Commission considers that it should extend to answers tending to incriminate the spouse of a witness. It shares the view expressed by the English Law Reform Committee that it is more repellant that a person should be compelled to incriminate his or her spouse, than that that person should be compelled to incriminate himself or herself.[73]

The Law Reform Committee's recommendation that the privilege against self-incrimination should be extended to include incrimination of a spouse was given effect as regards civil proceedings in England by the Civil Evidence Act, 1968, section 14 of which provides:

> "The right of a person in any legal proceedings other than criminal proceedings to refuse to answer any question or produce any document or thing if to do so would tend to expose that person to proceedings for an offence or for recovery of a penalty -
>
> (a) shall apply only as regards criminal offences under the law of any part of the United Kingdom and penalties provided for by such law; and
>
> (b) shall include a like right to refuse to answer any question or produce any document or thing if to do so would tend to expose the husband or wife of that person to proceedings for any such criminal offence or for the recovery of any such penalty."[74]

In a later section of the Act it was declared for the avoidance of doubt that "references to a person's husband or

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73 Law Reform Committee, Sixteenth Report (Privilege in Civil Proceedings) (1967), para. 9.

74 To the same effect see Civil Evidence Act (Northern Ireland), 1971, section 10.

wife do not include references to a person who is no longer married to that person."[75]

The English Criminal Law Revision Committee considered the matter in their Eleventh Report published in 1972. They recommended that a provision similar to section 14 of the Civil Evidence Act, 1968 should be enacted for criminal proceedings. However they also recommended that where a spouse of the accused gives evidence, that spouse should not be entitled to refuse to answer a question or to produce a document or thing on the ground that to do so would tend to prove the commission by the accused of the offence charged.[76] Surprisingly, no detailed argument supported this recommendation.[77] No action has been taken on it in subsequent legislation.

The Commission believes that the right of a spouse-witness not to incriminate an accused spouse in testimony is a logical corollary of the right of a spouse not to be compelled to testify for the prosecution when the other spouse is accused of a criminal offence. It may, of course, result in some injustice if relevant evidence is withheld from the court of trial. The injustice is likely to be most acute where a witness who might exculpate an accused refuses to answer a question because it might incriminate that witness's spouse. However the fact that such a privilege is invoked is likely to tell in favour of the accused. Under the present law, evidence exculpating an accused may be withheld where a witness claims that he would be incriminated or where one of several accused persons exercises his right not to testify. So no new departure of principle is involved in recognising the right of a witness not to give evidence incriminating his or her spouse, even where this evidence might exculpate an accused.

The Commission does not favour a situation where there is no privilege not to incriminate a former spouse as to events occurring during the marriage. It is considered

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75 Civil Evidence Act, 1968, section 18(2). For Northern Ireland see Civil Evidence Act 1971 (Northern Ireland), section 14(2).

76 Criminal Law Revision Committee, Eleventh Report: Evidence (General) (1972): Draft Criminal Evidence Bill, clause 15(3).

77 Ibid., para. 172.

that in this context as in others the reticence of a former spouse as to events occurring during a marriage should be respected. But where a marriage, being voidable, has been annulled or has been dissolved in circumstances where the dissolution is recognised here or the spouses have been judically separated, the privilege not to incriminate a spouse should be restricted to events occurring after the marriage and before the annulment, divorce or judicial separation. Accordingly the Commission recommends that a witness in criminal or civil proceedings should have the same right to refuse to answer any question or produce any document or thing tending to incriminate his or her spouse as he enjoys not to incriminate himself. But where a marriage has been annulled or dissolved or an order for judicial separation granted, it recommends that the privilege should be restricted to events occurring after the marriage and before the annulment, dissolution or judicial separation.

The Commission is, however, of opinion that a spouse of an accused should not be entitled to withold testimony on the ground of spouse incrimination where that spouse is called by the accused. An accused who calls his spouse should run the risk that that spouse may incriminate him just as he himself, if he gives evidence, may be asked any question in cross-examination notwithstanding that it would tend to incriminate him as to the offence charged.[78] Accordingly the Commission recommends that where the spouse of an accused is called as a witness by that accused he or she should not be entitled to refuse to answer any question or to produce any document on the ground that it would tend to incriminate the accused as to the offence charged or any other offence proof of the commission of which is admissible evidence against the accused in the trial.

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[78] Criminal Justice (Evidence) Act, 1924, section 1(c).

CHAPTER 3 RECOMMENDATIONS OF THE COMMISSION

1. The existing enactments making a spouse of a party competent or compellable in civil proceedings should be repealed or replaced by a provision stating that a present or former spouse of a party to civil proceedings shall be a competent and compellable witness. (p. 35)

2. Any rule of law making the spouse or former spouse of an accused incompetent as such to testify in criminal proceedings against his or her spouse (including former spouse) should be abolished. (p. 39)

3. A spouse should not be compellable to testify for the prosecution in any case where the other spouse is charged with a criminal offence. However in a joint trial the spouse of an accused should be a competent and compellable witness to give evidence for the prosecution but, when so testifying, should be entitled to refuse to answer any question or to produce any document if to do so would tend to incriminate the spouse accused. The Evidence Act, 1877, section 1 should be repealed. (pp. 49-50)

4. Except where two spouses are jointly accused, one spouse should be compellable to give evidence for the other spouse where that other spouse is charged with a criminal offence. (p. 52)

5. It should be permissible for the prosecution and the judge to comment on the failure of the spouse of an accused to give evidence in criminal proceedings and the Criminal Justice (Evidence) Act, 1924, section 1(b) should be repealed in so far as it prohibits such comment by the prosecution. (p. 54)

6. The spouse of an accused should be competent and compellable to give evidence on behalf of a co-accused but a spouse so testifying should be entitled to refuse to answer any question or produce any document if to do so would tend to incriminate the spouse who is accused. (p. 57)

7. A former spouse of an accused should be competent and compellable to give evidence for any party in criminal proceedings but (i) if called by the prosecution such a former spouse should not be compelled to answer any question relating to events which occurred while the marriage was still subsisting and (ii) if called by a co-accused, such a former spouse should not be compelled to answer any question or to produce any document if to do so would tend to incriminate the former spouse accused relative to an event which occurred while the marriage was still subsisting. (p. 59)

8. Where spouses are judicially separated, and one spouse is charged with a criminal offence, the other spouse should be competent and compellable to give evidence for any party to the proceedings but (i) if called by the prosecution he should not be compelled to answer any question relating to events which occurred after the marriage and before the judicial separation and (ii) if called by a co-accused, such a spouse should not be compelled to answer any question or to produce any document if to do so would tend to incriminate the spouse accused relative to an event which occurred after the marriage and before the judicial separation. (p. 61)

9. For the purposes of the law relating to the competence and compellability of witnesses, the parties to a void marriage should be treated as if they had never been married and the parties to a voidable marriage should be regarded as having been lawfully married from the time of the marriage ceremony until the time when the decree of annulment was granted. (p. 62)

10. A parent or child of an accused should not be compelled to give evidence for the prosecution incriminating that accused unless a certificate from the Director of Public Prosecutions is tendered stating that he personally has examined the case and having considered the hardship of compelling the witness to testify, the importance of the evidence that witness could give and the gravity of the offence charged, believes that it is in the public interest that the evidence be heard: where a person is in loco parentis to a child the relationship of parent and child should be deemed to exist. (pp. 62-63)

11. Section 3 of the Evidence Amendment Act 1853 and section 1(d) of the Criminal Justice (Evidence) Act 1924 should be repealed. (p. 72)

12. In both criminal and civil proceedings, a witness should have the same right to refuse to answer any question or produce any document or thing tending to incriminate his or her spouse as that witness has not to incriminate himself. But where a marriage has been annulled or dissolved or an order for judicial separation granted, this privilege should be restricted to events occurring after the marriage and before the annulment, dissolution or judicial separation. (p. 75)

13. Where the spouse of an accused is called as a witness by that accused he or she should not be entitled to refuse to answer any question or to produce any document on the ground that it would tend to incriminate the accused as to the offence charged or any other offence proof of the commission of which is admissible evidence against the accused in the trial. (p. 75)

The Commission has drafted a General Scheme of a Bill to reform the law relating to the evidence of spouses in criminal proceedings and this is contained in an Appendix to this Report.

GENERAL SCHEME OF A BILL TO REFORM THE LAW RELATING TO THE EVIDENCE OF SPOUSES IN CRIMINAL PROCEEDINGS

1. **(a)** Provide that a spouse or former spouse of an accused shall be competent to give evidence for the prosecution and for the defence.

(b) Provide that nothing in this section shall affect any rule of law by virtue of which an accused is not competent to give evidence for the prosecution.

2. **(a)** Provide that a spouse of an accused shall not be compellable to give evidence for the prosecution.

(b) Provide that notwithstanding paragraph (a), where spouses are separated pursuant to an order of the court, and one spouse is accused, the other spouse shall be compellable to give evidence for the prosecution but a spouse thus compelled to give evidence shall be entitled to refuse to answer any question or to produce any document or thing relating to events occurring after the marriage and before the aforesaid order of the court.

(c) Provide that a person who has been but is no longer a spouse of an accused shall be compellable to give evidence for the prosecution but a person so compelled to give evidence shall be entitled to refuse to answer any question or to produce any document or thing relating to events which occurred while the marriage was still subsisting.

(d) Provide that a person whose marriage to the accused, being voidable, has been annulled shall be compellable to give evidence for the prosecution but a person so compelled to give evidence shall be entitled to refuse to answer any question or to produce any document or thing relating to events which occurred between the time of the marriage ceremony and the time of the decree of annulment.

(e) Provide that where several persons are jointly charged with an offence, the spouse of any accused shall

be compellable to give evidence for the prosecution but any witness so compelled to give evidence shall be entitled to refuse to answer any question or to produce any document or thing if to do so would tend to show that his or her spouse was guilty of an offence charged or would tend to expose that spouse to proceedings for any other offence or the recovery of a penalty.

3. (a) Provide that a spouse of an accused shall be competent and compellable to give evidence for that accused.

(b) Provide that nothing in this section shall affect any rule of law by virtue of which an accused person is not compellable to give evidence.

(c) Provide that section 1 of the Criminal Justice (Evidence), 1924 shall be amended by the deletion of the words "and the wife or husband, as the case may be, of the person so charged".

(d) Provide that section 1(b) of the Criminal Justice (Evidence) Act, 1924 shall be amended by the deletion of the words "or of the wife or husband, as the case may be, of the person so charged".

4. (a) Provide that a spouse of an accused shall be competent and compellable to give evidence on behalf of any other person jointly charged with that offence without the consent of the other spouse.

(b) Provide that any person compelled to give evidence pursuant to this section shall be entitled to refuse to answer any question or to produce any document or thing if to do so would tend to show that his or her spouse was guilty of the offence charged or would tend to expose that spouse to proceedings for any other offence or the recovery of a penalty.

(c) Provide that where spouses are separated pursuant to an order of the court, and one spouse is compelled to give evidence for the defence on behalf of a person jointly charged with an offence with the other spouse, the spouse compelled to give evidence shall be entitled

to refuse to answer any question or to produce any document or thing if it relates to events which occurred after the marriage and before the aforesaid order of the court and to do so would tend to incriminate the spouse who is accused.

(d) Provide that where a person who has been but is no longer a spouse of an accused is compelled to give evidence on behalf of a person jointly charged with an offence with that accused, that person shall not be compelled to answer any question or to produce any document or thing if it relates to events which occurred while the marriage was still subsisting and to do so would tend to incriminate the spouse who is accused.

(e) Provide that where a person whose marriage to the accused, being voidable, has been annulled is compelled to give evidence on behalf of a person jointly charged with an offence with that accused, that person shall not be compelled to answer any question or to produce any document or thing if it relates to events which occurred between the time of the marriage ceremony and the time of the annulment and to do so would tend to incriminate the person whose marriage was annulled.

5. (a) Provide that without prejudice to sections 2 and 4, the right of a person to refuse to answer any question or produce any document or thing if to do so would tend to expose that person to proceedings for an offence or for recovery of a penalty shall include a like right to refuse to answer any question or produce any document or thing if to do so would tend to expose the spouse of that person to proceedings for any such criminal offence or for the recovery of any such penalty.

(b) Provide that in cases where parties are separated by order of the court or where they have been and are no longer married, or where their marriage being voidable has been annulled, the aforesaid right shall extend only to events occurring or offences committed before the aforesaid order or while the marriage was still subsisting or between the time of the marriage ceremony and the annulment as the case may be.

(c) Provide that where a spouse or former spouse of an accused is called to give evidence on behalf of that accused, no such right as is set out in paragraph (a) and

(b) shall exist on the ground that it would tend to show that the accused was guilty of the offence charged or of any other offence the commission of which is admissible evidence against the accused at the trial. For the purposes of this paragraph a former spouse shall include a person whose marriage to the accused, being voidable, has been annulled.

6. Provide that the Evidence Amendment Act, 1853, section 3 is hereby repealed.

7. Provide that the provisions listed in the Schedule are hereby repealed.

8. (a) Provide that the parent or child of an accused shall not be compelled to give evidence for the prosecution or to produce any document or thing on behalf of the prosecution if to do so would tend to show that the accused is guilty of the offence charged or any other offence the commission of which is admissible evidence against the accused at the trial unless a certificate is tendered purporting to be signed by the Director of Public Prosecutions stating that he has examined the case personally and having considered the hardship of compelling the witness to give evidence or to produce the document or thing, the importance of the evidence which that witness could give and the gravity of the offence charged, is of the opinion that it is in the public interest that the evidence, the document or thing should be presented to the court.

(b) Provide that a parent shall include a person in loco parentis.

SCHEDULE

Licensing Act, 1872, section 51(4)

Sale of Food and Drugs Act, 1875, section 21.

Conspiracy and Protection of Property Act, 1875, section 11.

Evidence Act, 1877, section 1

Explosive Substances Act, 1883, section 4(2).

Corrupt and Illegal Practices Prevention Act, 1883, section 53(2)

Criminal Law Amendment Act, 1885, section 20.

Merchandise Marks Act, 1887, section 10.

Betting and Loans (Infants) Act, 1892, section 6.

Chaff-Cutting Machines (Accidents) Act, 1897, section 5.

Summary Jurisdiction (Ireland) Act, 1908, section 12.

Children Act, 1908, section 133(28).

Criminal Law Amendment Act, 1912, section 7(6).

Criminal Justice (Evidence) Act, 1924, section 1(c)(d), section 4(1), Schedule.

Married Women's Status Act, 1957, section 9(4).

Social Welfare (Consolidation) Act, 1981, sections 116(4), 145(4).