[HIGH COURT OF AUSTRALIA.]

JOHN THOMAS RIDDLE . . . . APPELLANT;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *July* 27; *August* 4.

Griffith C.J. Barton and O'Connor JJ.

Criminal law—Evidence—Crimes Act 1900 (*N.S.W.*) (*No.* 40), *secs.* 407*, 428—*Husband charged with wounding his wife—Objection by wife to give evidence implicating her husband—Whether wife compellable witness—Statute—Construction of consolidating Act—Appeal—Question of law arising on the trial—Wife compelled to give evidence against her husband.*

Sec. 407 of the *Crimes Act* 1900 provides that the husband or wife of every accused person in a criminal proceeding shall be competent but not compellable to give evidence in such proceeding in every Court.

Held, that assuming that at common law, where a husband was charged with committing a personal injury upon his wife, she would be a compellable witness against him, effect must be given to the clear and unambiguous terms of sec. 407, and that a wife is not a compellable witness against her husband in a criminal proceeding. But, *semble*, in such a case the wife was not a compellable witness at common law.

R. v. *Stocks*, 5 S.R. (N.S.W.), 628, overruled on this point.

Principles of construction of consolidating Act considered.

Where a wife objected to give evidence against her husband in a criminal proceeding in which he was charged with wounding her, and the presiding Judge erroneously ruled that she was a compellable witness on behalf of the

* Sec. 407 of the *Crimes Act* 1900 provides:—"Every party to a civil proceeding, inquiry in which evidence is or may be given, or arbitration, and the husband or wife of such party, shall be competent to give evidence in such proceeding, inquiry, or arbitration.

"Every accused person in a criminal proceeding, and the husband or wife of such person, shall be competent, but not compellable, to give evidence in such proceeding in every Court."

Crown under sec. 407 of the *Crimes Act*, *held*, that a question of law had arisen on the trial which could be reserved on behalf of the accused for the consideration of the Supreme Court under sec. 428 of that Act.

Decision of the Supreme Court, 31st March 1911, reversed.

APPEAL from the decision of the Supreme Court, affirming a conviction, upon the following case stated by *Cullen* C.J.:—The prisoner, John Thomas Riddle, was tried before me and convicted on the 15th March 1911, at the Darlinghurst sittings, on a charge of wounding with intent to murder Ruby Riddle, who was at the time of the offence charged and still is his wife.

Ruby Riddle, on being called as a witness for the prosecution, stated that she did not wish to give evidence.

The Crown Prosecutor then asked me for a ruling that she was compellable to give evidence, the charge being one of personal injury to herself, and cited *R.* v. *Stocks* (1) for that proposition.

After hearing Mr. O'Reilly, counsel for the prisoner, I ruled that the case was governed by that decision, and that the wife in this case was a compellable witness against her husband. In obedience to my ruling she thereupon gave certain evidence, which was of a nature tending to criminate the prisoner. At Mr. O'Reilly's request I reserved the question whether this ruling was correct.

The material sections of the Acts cited are referred to in the judgment of *Griffith* C.J.

O'Reilly, for the appellant. The Supreme Court held, in accordance with the decision of that Court in *R.* v. *Stocks* (1), that a wife is a compellable witness against her husband when he is charged with assaulting her. The question, therefore, is whether that decision is right. The terms of sec. 407 of the *Crimes Act* are clear and unambiguous, and effect should be given to the language used: *Bennett* v. *Minister for Public Works* (*N.S.W.*) (2). It was assumed in *R.* v. *Stocks* (1) that, as at common law a wife is competent to give evidence against her husband where he is charged with assaulting her, she is also compellable to do so in such cases, and that the legislature, by omitting in sec. 407 the

(1) 5 S.R. (N.S.W.), 628.

(2) 7 C.L.R., 372, at p. 378.

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proviso to sec. 7 of the *Evidence Act* of 1898, did not intend to alter the common law. But it is questionable whether even at common law, in cases where she is competent to do so, a wife could be compelled to testify against her husband: *Hale, Pleas of the Crown*, vol I., p. 301; *R.* v. *All Saints, Worcester* (1); *Taylor on Evidence*, 10th ed., par. 1370; *Cartwright* v. *Green* (2). It may well be that the legislature when it enacted sec. 407 had in view the conflict of opinion expressed on this point, and intended to resolve the doubt by an express statutory provision. If the Judge was in error in ruling that the wife was a compellable witness, a question of law arose on the trial which could be reserved under sec. 428 of the *Crimes Act* 1900. [He also referred to the *Criminal Evidence Act* 1898, 61 & 62 Vict., c. 36; the *Evidence Act* 1898 (No. 11), sec. 7, and 55 Vict. (No. 5), sec. 6.]

Pickburn, for the respondent. The general rule that a witness who is competent to give evidence is also compellable applies to the case of a wife. The reason for the exception in this class of case to the common law rule, that husbands and wives are incompetent to testify for or against each other in criminal proceedings, was that it was considered more consistent with the public interest that wives should be protected from assaults by their husbands, than that domestic peace should be preserved. The fiction of the unity of person between husband and wife, having been disregarded to secure the safety of the wife, ceases to exist for all purposes, and the wife is placed in the position of an ordinary witness in all cases where she is competent to give evidence against her husband. The consent of the wife to testify is immaterial where the interests of justice require that the wife should be a competent witness: *Reeve* v. *Wood* (3). The same reasoning and necessity which apply to the wife's competency apply also to her compellability. In *R.* v. *Ellis*, cited in the preface to *Archbold, Criminal Pleading*, 23rd ed., p. VIII., it was held by *Wills* J. that a wife who is competent to give evidence against her husband is compellable to do so. [He also referred to *Best on Evidence*, 7th ed., pars. 176, 178.]

(1) 6 M. & S., 194; 1 Hale P.C., 301. (2) 2 Leach, 952; 8 Ves., 405.
(3) 10 Cox C.C., 58.

The history of the prior legislation can be looked at to show that sec. 407 is ambiguous. This section is a consolidation of sec. 7 of the *Evidence Act* 1898, and should not be held to have taken away a right which existed at common law, and was expressly preserved by the latter section. The effect of sec. 6 of the *Evidence Act* is that persons competent to give evidence shall, except as thereinafter provided, be compellable to do so, and that section has not been repealed. The repeal of an Act modifying the common law raises a presumption that a revival of the common law was intended: *Marshall* v. *Smith* (1). The Court will assume that in a consolidating section the legislature did not intend to alter the previous law: *R.* v. *White* (2). If the wife is competent her evidence is admissible. If she has a right to refuse to testify, that is a right personal to herself, of which the prisoner cannot take advantage.

[GRIFFITH C.J. referred to *R.* v. *Kinglake* (3).]

The wrong, if any, is done to the witness and not to the prisoner. This is not a question of law arising on the trial within the meaning of sec. 428 of the *Crimes Act*.

O'Reilly, in reply.

Cur. adv. vult.

August 4.

GRIFFITH C.J. This is an appeal from a decision of the Supreme Court affirming a conviction of the appellant for wounding his wife with intent to murder. At the trial the wife was called as a witness for the prosecution, and stated that she did not wish to give evidence. The learned Chief Justice, who presided, ruled that she was bound to give evidence, and she did so. The prisoner was convicted, and the question was reserved whether the ruling was correct. The learned Chief Justice, in so ruling, followed the opinion of the Supreme Court in the case of *R.* v. *Stocks* (4), as he was bound to do, and the Full Court held, and I think correctly, that this case was within the *ratio decidendi* in that case, and they affirmed the conviction. The question, therefore, for our consideration is really whether *R.* v.

(1) 4 C.L.R., 1617.
(2) 20 N.S.W. L.R., 12, at p. 22.
(3) 11 Cox C.C., 499.
(4) 5 S.R. (N.S.W.), 628.

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Stocks (1) was rightly decided. That depends entirely upon the construction of sec. 407 of the *Crimes Act* 1900, which, so far as it is material, is in these words:—"Every accused person in a criminal proceeding, and the husband or wife of such person, shall be competent, but not compellable, to give evidence in such proceeding in every Court."

The words of the section are *primâ facie* unambiguous, but a difficulty was said to be raised on comparison of them with the law as it stood before the passing of the *Crimes Act*, which was to some extent, though not altogether, a consolidation Act. The immediately previous law on the subject was contained in sec. 7 of the *Evidence Act* 1898. Sec. 6 of that Act provided:—

"In any legal proceeding in which witnesses are compellable to give evidence, every person offered as a witness and competent to give evidence shall, except as hereinafter provided, be compellable to give evidence."

Sec. 7 reads:—

"No accused person in a criminal proceeding, or husband or wife of any such accused, shall be compellable to give evidence in such proceeding.

"Provided that this section shall not apply to any person who, but for this Act, would be at common law or by any Act or Imperial Act compellable to give evidence in such proceeding."

It will be observed that the language of the *Crimes Act* is different from that of the former Act. It may or may not make a substantial change in the law. All the learned Judges, in deciding *R.* v. *Stocks* (1), proceeded upon the assumption that at common law a wife was in certain cases compellable to give evidence against her husband, and they thought it extremely unlikely that so radical a change as to provide that a wife should not be compellable to give evidence against her husband in such cases could have been intended to be made by, to use the words of Chief Justice *Cockburn*, "a mere side wind." That was the foundation of the judgment of the learned Judges in *R.* v. *Stocks* (1). *Pring* J. thought that this was sufficient reason for construing the words of this section contrary to what he thought was their ordinary meaning, and I myself was very much impressed

(1) 5 S.R. (N.S.W.), 628.

with the argument. If at common law a wife was compellable in certain cases to give evidence against her husband, it seems strange that it should have been changed without any direct words to that effect. But the question arises—is the foundation sound? Was a wife compellable at common law to give evidence against her husband? I propose, briefly, to inquire how the law stood on this subject so far as it can be ascertained. The earliest authority cited to us was *Hale's Pleas of the Crown*, vol. I., p. 301, where he investigates the question of what are lawful witnesses. He says:—"As in relation to the persons of witnesses, those are said lawful witnesses, which by the laws of England are allowed to be witnesses. A *feme covert* is not a lawful witness against her husband in case of treason, yet in Lord *Castlehaven's Case* upon an indictment for rape upon his lady by another by her husband's present force, she was received as a witness by the advice of the Judges, that assisted at that trial, and upon her evidence he was convicted and executed. But a woman is not bound to be sworn or to give evidence against another in case of theft, &c., if her husband be concerned, though it be material against another and not directly against her husband."

A fortiori, a wife was not bound to be sworn or to give evidence against her husband himself. The question whether a *feme covert* is a competent witness against her husband on a charge of treason is said to be in doubt notwithstanding that dictum.

In the case of *Cartwright* v. *Green* (1) in Chancery, which is reported in 8 Ves., 405, and also in 2 Leach, 952 (where it is properly inserted as having an important bearing upon the criminal law), it was decided that a wife, defendant to a bill in Chancery, was not compellable to answer upon oath as to a matter which, if admitted by her, would tend to show that her husband had been guilty of a criminal offence. Lord *Eldon* L.C. said at the conclusion of his judgment (2):—"Here the wife, if the act was a felony in the husband, would be protected: at all events she could not be called upon to make a discovery against her husband." That was, of course, decided upon the common law.

In the later case of *R.* v. *Inhabitants of All Saints, Worcester*

(1) 8 Ves., 405; 2 Leach, 952.

(2) 8 Ves., 405, at p. 410.

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(1), the question raised was whether a wife was a competent witness on a proceeding under the Poor Laws as to the settlement of a pauper. *Bayley* J., a Judge of very great experience and learning, said:—"On the best consideration which I can give to this case, it appears to me that Ann Willis was a competent witness, and I found this opinion not upon the order of time in which she was called, for in my judgment she would have been equally competent after the second wife had given her testimony. It does not appear that she objected to be examined, or demurred to any question. If she had thrown herself on the protection of the Court on the ground that her answer to the question put to her might criminate her husband, in that case I am not prepared to say that the Court would have compelled her to answer; on the contrary, I think she would have been entitled to the protection of the Court. But as she did not object, I think there was no objection arising out of the policy of the law, because by possibility her evidence might be the means of furnishing information, and might lead to inquiry, and perhaps to the obtaining of evidence against her husband. It is no objection to the information that it has been furnished by the wife."

In *Taylor on Evidence*, 10th ed., par. 1368, the learned author, after quoting *R.* v. *Inhabitants of All Saint's, Worcester* (2), says:—"But although, by the common law rule of incompetency, the wife may be *permitted* to give evidence which may indirectly criminate her husband, it by no means follows that she can be *compelled* to do so; and the better opinion is that under it she may throw herself on the protection of the Court, and decline to answer any question which would tend to expose her husband to a criminal charge."

At par. 1,453 he says:—"It has already been observed, that there are some questions which a witness is *not compellable* to answer. First, this is the case where the answers would have a *tendency* to expose the witness, or, as it seems, the husband or wife of the witness, to any kind of *criminal charge*, whether in the common law or ecclesiastical Courts, or to a *penalty* or *forfeiture* of any nature whatsoever."

(1) 6 M. & S., 194, at p. 200. (2) 6 M. & S., 194.

No other authorities were brought before us, although counsel had evidently taken great trouble in the matter, which threw any further light on the state of the common law. The better opinion is stated by *Taylor* to be that a wife was not compellable. Now, that being the state of the law, whatever it was (because, as I was once reminded in England by a distinguished lawyer, the law is always certain although no one may know what it is), the legislature in New South Wales passed the *Evidence Act* 1898, to which I have already referred. In the same year the English legislature passed the *Criminal Evidence Act* (61 & 62 Vict. c. 36), which, in sec. 1, made general provisions as to the competency of husbands and wives in criminal cases, as follows:—"The wife or husband, as the case may be, of a person so charged, shall be a competent witness for the defence." Then followed a number of qualifications. Sec. 4 provided that the wife or husband of a person charged with offences against certain Acts mentioned in the Schedule to the Act might be called as a witness without the consent of the person charged. The section went on:—"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 the person charged."

It will be observed that that provision, which is very much to the same effect as that in sec. 7 of the *Evidence Act* of New South Wales passed in the same year, assumed that there may be cases at common law in which the wife is compellable to give evidence against her husband. With respect to the Acts mentioned in the Schedule, they are all Acts relating to injuries or wrongs to the person or to the wife, and it was provided that in those cases the wife or the husband might be called as a witness for the prosecution or the defence without the consent of the person charged. It appears from a paragraph cited to us from the last edition of *Archbold* that that provision has been interpreted in England as meaning that, when a wife is called as a witness in a case under sec. 4, the wife is not only competent but compellable, although it is said that the law is still regarded as doubtful. That being the state of the law in England, and there being a very similar provision here, the legislature passed the *Crimes*

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Act 1900, and in sec. 407 they laid down a new rule—at any rate, a rule in new terms. What then did they mean? *Primâ facie*, they declared the law, and made a uniform rule for all criminal charges. If there was a doubt as to the law before, that was one way to resolve the doubt in favour of what was said in the text-books to be the better opinion. At any rate, they did not adopt the rule laid down in England, which resolved the doubt in the opposite direction. Under these circumstances I do not think that there is any sufficient ground for departing from the literal meaning of the words which they used, and the plain, literal meaning is that in all cases the wife is competent but not compellable. Under these circumstances I think that the learned Judges in *R.* v. *Stocks* (1), although on the premises on which they based their judgment they may have been right, proceeded on false premises, and the decision in that case ought not to be followed. The result therefore is that the ruling of the learned Chief Justice was wrong in law.

The next question is whether this is a point of law which can be raised by special case. Any point of law occurring at the trial may be raised. In the case of *R.* v. *Kinglake* (2) where the defendant was charged with bribery, a witness being called objected to answer a question on the ground that it might expose him to a criminal prosecution. The presiding Judge erroneously compelled him to answer, and the objection was taken by the defendant that that error vitiated the proceedings, but the Court of Queen's Bench said that it was merely a privilege of the witness. The witness was a competent witness, although he gave his evidence under compulsion. And they refused to give effect to the objection. But I think that that case is distinguishable from the present. The old doctrine of the unity of husband and wife, and the importance of preserving confidence between them, and the other reasons which have been variously given, have still a great deal of weight. The legislature has thought fit to say what shall be the rule, and if the legislature has in effect said that a wife shall not be compellable to give evidence against her husband in a criminal charge, and the Court nevertheless compels her to give evidence against her husband against

(1) 5 S.R. (N.S.W.), 628.

(2) 11 Cox C.C., 499.

her will, that is a departure from the law to the prejudice of the prisoner occurring at the trial, and I think that it is a point that may be raised by special case.

In such a case I am disposed to adopt the words of Chief Justice *Hale*, and to say that the witness is not "a lawful witness" according to the law of the land. Another argument was used, an argument *ab inconvenienti*, which, as I have often said, is always a dangerous argument, that it would be extremely dangerous and undesirable, in cases where the husband is guilty of violence to his wife, and she might be the only witness, that she should not be compellable to give evidence. On the other hand, it might be extremely inconvenient, and tend to disturb the peace of a great many families, if for every breach of the criminal law, however trivial, committed by a husband against his wife a stranger should be allowed to intervene and compel her to come into Court and give evidence against her husband. Arguments *ab inconvenienti* may have some weight, but they are for the legislature to solve.

I should like to add that I think the case of *R.* v. *Stocks* (1) was rightly decided in its result, although the reasons given by the learned Judges were erroneous, because in that case the wife had already voluntarily given evidence, and the putting in of her depositions in her absence gave rise to the question.

The result is that the appeal will be allowed, and the conviction quashed.

BARTON J. read the following judgment:—The provision of the *Crimes Act* upon which this case turns is that part of sec. 407 which reads thus:—"Every accused person in a criminal proceeding, and the husband or wife of such person, shall be competent, but not compellable, to give evidence in such proceeding in every Court."

There follow two exceptions which do not touch the present case. As it stands, the meaning of the provision is unmistakeable. The suggestion is that a proviso taken from the *Evidence Act* 1898 must be read into this section, because otherwise the Act of 1900, while professing merely to consolidate the criminal

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law, would make a substantial amendment. Assuming that the effect would be as stated—which it will be seen presently that I doubt—I refer to the case of *Taylor* v. *Corporation of Oldham* (1) because *Jessel* M.R. there stated the law with absolute clearness:—"Whatever I may think of the extraordinary results which are so caused, it is my duty to interpret Acts of Parliament as I find them. I must read them according to the ordinary rules of construction, that is, literally, unless there is something in the context or in the subject to prevent that reading."

No Statute, even though it be a consolidating Act, can constitute an exception to this undoubted rule. I think the most that can be said is that where two constructions are open, under one of which the Act is read to make an amendment of the law, while the other appears to confine the Act to its professed purpose of mere consolidation, then, other things being equal, the Court will adopt the construction which confines the Act to its purpose of consolidation. But if the Act itself speaks so plainly that Parliament will appear from its terms to have exercised its undoubted power of amending the law, even though the title of the Act professes that its purpose is consolidation, it is the duty of the Judge to read the Act in that plain sense. If there were any such ambiguity in the terms of this portion of sec. 407 as would justify the reading into it of some exception, then the exception suggested could reasonably be read into it. But when there is no doubt as to the meaning of the words used, a course of that kind cannot well be adopted. This I have said on the assumption that under the common law as it stood previously to the passing of the Act of 1898, in cases of bodily injury to the wife, her evidence was not only admissible, but she was compellable to testify. But I think that proposition is open to very serious doubt. The rule at common law, to which the cases of bodily injury are an exception, was that in cases of criminal charges the husband or wife of the accused was excluded; the testimony was not made subject to objection, if taken, but must under no circumstances be heard even if the accused and his or her spouse were both desirous that it should be heard. There has not been found either in any textbook or in any decided case any expression which carries the

(1) 4 Ch. D., 395, at p. 405.

exception beyond this—that in cases of bodily injury the wife is admissible to give testimony. I cannot find it laid down anywhere that the spouse is not only allowable to testify, but compellable. At the lowest, then, it was very doubtful whether at common law the wife in circumstances of this kind was compellable to testify, and, to that extent, I find it difficult to accept the foundation upon which the Supreme Court of this State in *R.* v. *Stocks* (1) founded its decision that the wife was a compellable witness.

There being this doubt, I, if it were necessary to express an opinion at the present moment, should be disposed to say that the exception in cases of personal injury went no further than the admittance of the wife to testify, and that it did not include the power of compulsion. The matter being in that condition, with this doubt of the existence of the compelling power, we find that the *Criminal Law and Evidence Act* 1891 provided that every person charged with an indictable offence and the husband or wife of such person should be competent, but not compellable, to give evidence in every Court on the hearing of such charge. The *Evidence Act* 1898 purported to be a consolidating Statute, but it added to the section in which this general rule was enacted the proviso that it should not apply to any person who, but for that Act, would be at common law or by any Act of New South Wales or any Imperial Act compellable to give evidence in such proceeding. After the passing of the *Evidence Act* 1898 there was passed in England the Act 61 & 62 Vict. c. 36. The first-named of these Acts was assented to on 29th July 1898 and the other on 12th August of the same year. So that it cannot be supposed that anything which is contained in the Act of New South Wales is founded upon the provision of the English Act. In the latter, sec. 4 says:—"The wife or husband of a person charged" with certain offences "may be called as a witness . . . . without the consent of the person charged."

The section goes on:—"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 the person charged."

(1) 5 S.R (N.S.W.), 628.

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This Act then, though it cannot be said to have influenced the New South Wales Act of 1898, may be looked at in conjunction with the later Act of 1900, and, as we find that an exception, something like that of the New South Wales Act of 1898, was subsequently placed in an English Act, and that two years later, when the legislature here came to consolidate the criminal law, it did not adopt what in all probability the framers of the Act must have known as the exception in the English Act of 1898, it seems to me that to some extent the presumption was strengthened that the step taken here in the Act of 1900, which reverted to the provision of the Act of 1891, was intended to make it clear that the wife was in no case to be compellable to testify. But it is not necessary to go as far as that, because it is not established that the wife at the date of that Act was a compellable witness, and that being so, the Act of 1900 cannot on that showing be held to be an amendment of the law, but remains a mere consolidation. In whatever way that matter may be put, I revert to the original position, that the words of this Act are so clear that they cannot be misread, and to read into it the proviso of the Act of 1898 would be, if I may so express myself, with all respect for the decision of the Supreme Court, an amendment of the law by the Bench. That is a step which I think this Court cannot adopt, and I therefore think that the case stands upon the clearness of the Act of 1900, and, upon the clear reading of it, the wife is expressly made a witness who is not compellable.

I think, therefore, that the conviction should be quashed.

O'CONNOR J. read the following judgment:—The question raised in this case depends entirely upon the construction of sec. 407 of the *Crimes Act* of 1900. The learned Chief Justice at the trial, following, as he was bound to do, the decision of the Supreme Court in *R.* v. *Stocks* (1), held that the prisoner's wife was compellable to give evidence against him, and the learned Judges of the Supreme Court, in afterwards considering the point, affirmed the conviction solely on the ground that the decision in *R.* v. *Stocks* (1) was applicable. That case interprets sec. 407 as rendering the wife, in such a case as the present, not only com-

(1) 5 S.R. (N.S.W.), 628.

petent but compellable to give evidence against her husband. We are therefore called upon to determine whether that is the true interpretation of the section, and incidentally whether *R.* v. *Stocks* (1) was rightly decided.

The section on the face of it purports to deal with the giving of evidence by parties, and the husbands and wives of parties, in all proceedings, civil and criminal, in which evidence may be taken. Although the measure is entitled "An Act to consolidate the Statutes relating to Criminal Law" the first paragraph of sec. 407 expressly applies to civil proceedings, and to civil proceedings only. It is a consolidation of the statutory provisions which swept away disability to give evidence on the ground of interest in the case of parties, and the husbands and wives of parties, in civil proceedings. It merely renders such persons competent as witnesses. But the paragraph must be read in light of what may be described as a fundamental rule of procedure, namely, that all witnesses competent to give evidence are in general compellable to give evidence: *Phipson on Evidence*, 3rd ed., p. 416. In sweeping away the disabilities of certain classes of witnesses, the legislature sometimes expressly negatives the application of the rule, as, for instance, in the second paragraph of the section under consideration. Sometimes it negatives the rule in part only, as in the *Married Women's Property Act* (N.S.W.), 56 Vict. No. 11. By sec. 20 relating to criminal proceedings, husband and wife are made competent and admissible witnesses in all cases within the section, but it is expressly enacted that the husband or wife when a party defendant is not compellable to give evidence. Sometimes the rule is expressly made applicable to its full extent as in the *Deserted Wives and Children Act* (N.S.W.), 22 Vict., No. 6, which by sec. 8 expressly renders husbands and wives compellable as well as competent witnesses in proceedings within the section. As far as the first paragraph of the section is concerned it may, I think, be fairly conceded that where, as by that section, a class of persons, before then incompetent as witnesses, are expressly rendered competent, and the legislature has used no words indicating that they are not compellable to give evidence, the rule to which I

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have referred will become applicable, and will operate to render such witnesses compellable as well as competent.

The first paragraph of the section, therefore, must, in my opinion, be so construed so as to render parties to civil proceedings, and the husbands and wives of parties, compellable as well as competent to give evidence.

But when we turn to the paragraph relating to criminal proceedings the change of language is very striking :—"Every accused person in a criminal proceeding, and the husband or wife of such person, shall be competent, but not compellable, to give evidence in such proceeding in every Court." There the applicability of the general rule that all competent witnesses are compellable to give evidence is expressly negatived. The same provision that renders the witness competent to give evidence expressly declares that he shall not be compellable to give evidence. Unless there is something to indicate that the legislature did not intend to include, within the general words I have quoted, those criminal proceedings in which either husband or wife is charged with inflicting personal injury on the other, the contention put forward on behalf of the Crown must fail. There is certainly nothing in the language of the section, or any part of the Act, which suggests an intention to exclude such cases from the operation of the section. Indeed, sec. 3 seems expressly directed to giving to the section under consideration the widest possible application. It declares that the sections mentioned in the Second Schedule (which include in Part XI., sec. 407) "so far as their provisions can be applied, shall be in force with respect to all offences, whether at Common Law or by Statute, whensoever committed and in whatsoever Court tried."

That language is clear and emphatic, and in sec. 407 there is no word which is not, on the face of it, precise and unambiguous. Under these circumstances it is the duty of the Court, if nothing more appears, to interpret the enactment in accordance with the principle laid down by the Judges in delivering their opinion to the House of Lords in the *Sussex Peerage Case* (1), and ever since universally applied. It is as follows :—"The only rule for the construction of Acts of Parliament is that they should be con-

(1) 11 Cl. & F., 85, at p. 143.

strued according to the intent of the Parliament which passed the Act. If the words of the Statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do in such case best declare the intention of the law-giver."

Construing sec. 407 in accordance with that rule, having regard to the generality of the application of the section disclosed by sec. 3, and expounding the language of the legislature in its ordinary natural meaning, it is to my mind impossible to find any ground on which the section under consideration can be construed as not applying to criminal proceedings in which a husband is being tried for an offence of personal violence to his wife. The learned Judges of the Supreme Court, in construing the section in *Stocks' Case* (1), must of course be taken to have held that there was some ambiguity in the words of the section, and they find it, as I gather from the judgments, in doubt whether the words "Every accused person in a criminal proceeding, and the husband or wife of such person," had been used by the legislature in their ordinary meaning, which would include all criminal proceedings in which the accused is husband or wife, or whether they had been used in the restricted sense, which will exclude those cases in which the competency and compellability of the wife to give evidence against her husband was, at the time of the passing of the Act, already provided for by the common law. No doubt there are many instances in which the Courts will construe general words with a restriction in their application, in order to carry out what the Court deems to be the intention of the legislature. But, in determining that the intention of the legislature is something other than appears from its words, construed according to their ordinary natural meaning, the counsel of Baron *Parke* in *Becke* v. *Smith* (2), adopted by the Privy Council in *Cargo ex Argos*; *Gaudet* v. *Brown* (3), must be borne in mind:— "It is a very useful rule," he says, "in the construction of a Statute, to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the legislature, to be collected from the

(1) 5 S.R. (N.S.W.), 628. (2) 2 M. & W., 191, at p. 195.
(3) L.R. 5 C.P., 134.

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Statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified, so as to avoid such inconvenience, but no further."

There is not, as I have already pointed out, anything in the *Crimes Act*, or in sec. 407 itself, to indicate an intention on the part of the legislature not to include the class of criminal cases now under consideration within the operation of the section. It remains to be considered whether the construction which would include such cases "leads," to use Baron *Parke's* phrase, "to any manifest absurdity or repugnance." The reasoning of the Judges in *Stocks' Case* (1) was founded on the state of the Statute law and of the common law at the time when the *Crimes Act* 1900 was passed. As to the Statute law, I do not think it necessary to go into any details. The *Crimes Act* repeals and replaces all then existing statutory provisions, and there alone the Statute law on the subject is now to be found. But the repealed Acts may, of course, be looked at in determining the meaning of the measure which purports to consolidate them. Taking the repealed legislation generally, it may be conceded that its tendency has been more and more to sweep away disabilities of witnesses in all proceedings civil and criminal. Also, it is common ground that the *Crimes Act* 1900 purports to do no more than consolidate the then existing Statutes relating to criminal law, and that the *Evidence Act* 1898, sec. 7 of which must be taken to have been consolidated in sec. 407 of the *Crimes Act*, expressly excepts from the operation of the provision which prevented husband and wife from giving evidence against each other in criminal proceedings, those cases in which husbands and wives were at common law compellable witnesses against each other. But I find myself bound to differ from the learned Judges in their view of what was the common law. That is really the vital part of their decision. The judgment of each of the learned Judges proceeds expressly on the ground that at common law, in cases such as that now under consideration, husbands and wives are compellable as well as competent witnesses against each other. If that is not the common law, sec. 7 of the *Evidence Act* 1898 can throw no light on what the legislature intended to enact by

(1) 5 S.R. (N.S.W.), 628.

the second paragraph of sec. 407 of the *Crimes Act*. In the view which I take of the latter section it is unnecessary to determine what precisely is the common law on the point. Because, in my opinion, whatever may have been the common law, the legislature has in the *Crimes Act* used language showing a clear intention to embrace all the law on the subject within the four corners of sec. 407. But, in considering *Stocks' Case* (1), it becomes necessary to advert to the state of the common law which the learned Judges assume to exist.

The general rule of the common law was that in no case could wife or husband give evidence against the other on a criminal charge. To that rule there was undoubtedly an exception in cases where the husband was on his trial for criminal personal injury to his wife. But how far did the exception extend? There is no statement of the common law in any judgment or in any text-book which states it as extending farther than to render the wife a competent witness, or, as it is put in some authorities, an admissible witness. No authority can be found which extends the exception so far as to make the wife a compellable as well as a competent witness. It has been argued that, being competent, she is, on the general principle I referred in the beginning of this judgment, also compellable to give evidence. That certainly does not follow. In the case of husband and wife it is not at all clear that the necessity which is the foundation of the exception in such cases goes beyond securing to the wife the protection of the law against her husband's criminal violence where it is her wish to avail herself of the protection. A somewhat similar question arose in *R.* v. *Ellis* (2) on a trial for abduction under the 48 & 49 Vict. c. 69, which renders the wife a competent witness. Mr. Justice *Wills*, following the practice adopted at the Central Criminal Court, held that sec. 4 of the *Criminal Evidence Act* 1898 rendered husbands and wives compellable to give evidence on the trial of such charges. But the case is not satisfactorily reported, and certainly cannot be regarded as of sufficient authority to extend the common law exception to the general rule a long way further than any judgment or recognized text-book had ever carried it before. Putting the position at

(1) 5 S.R. (N.S.W.), 628.

(2) Lewes Assizes, 25th Nov., 1899.

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common law in the most favourable way to the view of the learned Judges that the authorities will allow, the proposition cannot be expressed more widely than this:—Husbands and wives in such cases are competent witnesses against each other, but it is doubtful whether they are compellable. It would, of course, be impossible to uphold the reasoning of the learned Judges in *Stocks' Case* (1) in that condition of the common law. But, assuming that their Honors were right in taking it for granted that in such cases husbands and wives were compellable at common law to give evidence against each other, I am unable to see on what valid ground it can be argued that the legislature had not the intention, which it has so clearly expressed, to alter the common law in this respect. Can it be said that that interpretation would lead to any "manifest absurdity or repugnance?" If husbands and wives were in such cases compellable witnesses against each other at common law the alteration made by the Statute would no doubt be important—it might well be described as retrograde, inasmuch as it renders less efficient the power of the Courts for the protection of women from violence and for the punishment of crime generally. It must also be conceded that so material an alteration of the law is not to be looked for in a consolidating Statute. Yet it is in my opinion impossible to say that the alteration leads to any manifest absurdity, or is repugnant to any other provision of the Statute, or to the provisions of any other Statute with which it is to be read. It may no doubt be surmised that the mind of the legislature was not directed to the important alteration which this particular form of consolidation would effect in the common law. On the other hand, can it be assumed that the legislature did not intend to abolish the uncertainty of the common law and put husbands and wives as witnesses in all criminal cases on the same footing? No Court would be justified in refusing to give effect to the intention clearly expressed by the words of the legislature, taken in their ordinary meaning, on mere conjecture that its real intention was something quite different. It follows that the words of sec. 407, taken in their ordinary meaning, apply to all criminal proceedings, and there was no ground legally tenable for reading into it an exception in the case of

(1) 5 S.R. (N.S.W.), 628.

criminal proceedings in which the accused was charged with criminal violence to his or her wife or husband. In my opinion therefore *Stocks' Case* (1) was wrongly decided, and the learned Chief Justice, in directing the wife of the prisoner in this case against her will to give evidence against her husband, fell into error.

Mr. *Pickburn*, in the course of his argument, contended that the objection taken in the special case could be taken only by the witness compelled to give evidence, and that the evidence having been given, though under compulsion illegally applied, was lawful evidence against the prisoner. He relied on *R.* v. *Kinglake* (2). I think the principle laid down in that case has no application to the question raised, as this has been, under the provisions of the *Crimes Act* 1900. An accused person is entitled to have his trial conducted in accordance with the laws of evidence enacted in sec. 407. That section enacts that his wife shall not be compelled to give evidence against him. Sec. 428 entitles him to have reserved for the consideration of the Supreme Court any question of law arising on the trial. Sec. 470 directs the Supreme Court to determine the question so raised, and enables it to make certain orders as to the conviction which will give effect to its determination. The question of the wife's compellability was clearly a question of law arising at the trial—one which the prisoner himself raised, and which it was necessary for him to raise in the assertion of his right to have the trial conducted according to law. He was, in my opinion, entitled to take advantage of this, as he would have been entitled to take advantage of any other error in the admission of evidence at the trial. For these reasons I am of opinion that the decision of the Supreme Court was erroneous, that this appeal must be allowed and the conviction set aside.

Appeal allowed. Conviction set aside.

Solicitor, for appellant, *P. J. Clines.*

Solicitor, for respondent, *J. V. Tillett*, Crown Solicitor for New South Wales.

C. E. W.

(1) 5 S.R. (N.S.W.), 628.

(2) 11 Cox C.C., 499.