HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HEYDON, CRENNAN, KIEFEL AND BELL JJ

AUSTRALIAN CRIME COMMISSION APPELLANT

AND

LOUISE STODDART & ANOR RESPONDENTS

Australian Crime Commission v Stoddart [2011] HCA 47
30 November 2011
B71/2010

ORDER

1. *Appeal allowed.*

2. *Set aside paragraphs 1, 2 and 3 of the order of the Full Court of the Federal Court of Australia made on 15 July 2010 and in their place order that the appeal to that Court be dismissed.*

3. *The appellant pay the first respondent's costs in this Court.*

On appeal from the Federal Court of Australia

Representation

S J Gageler SC, Solicitor-General of the Commonwealth with B Lim for the appellant (instructed by Australian Government Solicitor)

B W Walker SC with N A Martin and T F N Pincus for the first respondent (instructed by Bernard Bradley & Associates)

Submitting appearance for the second respondent

CATCHWORDS

Australian Crime Commission v Stoddart

Evidence – Privilege – Spousal privilege – Witness summonsed pursuant to s 28(1) of *Australian Crime Commission Act* 2002 (Cth) ("Act") to give evidence regarding "federally relevant criminal activity" involving her husband – Witness declined to answer examiner's questions by claiming spousal privilege – Whether spousal privilege exists at common law and, if so, whether spousal privilege extends to non-curial proceedings – If spousal privilege exists at common law, whether Act restricts or abrogates spousal privilege.

Words and phrases – "compellability", "competence", "spousal privilege".

1 FRENCH CJ AND GUMMOW J. The first respondent ("Mrs Stoddart") was born in 1966 and for more than 20 years has been the wife of Mr Ewan Alisdair James Stoddart ("Mr Stoddart"). For some years Mr Stoddart was self-employed as an accountant carrying on a practice at several locations in Queensland. Mr Stoddart ceased to conduct his accountancy practice in about 2006; in the preceding couple of years Mrs Stoddart provided part-time secretarial assistance in the practice.

The Summons

2 On 3 April 2009, Mrs Stoddart appeared in response to a summons ("the Summons"), issued under s 28(1) of the *Australian Crime Commission Act* 2002 (Cth) ("the Act"). The appellant, the Australian Crime Commission ("the ACC"), is established by s 7(1) of the Act. One of its functions is to investigate matters related to "federally relevant criminal activity" (s 7A(c)), when authorised by its Board (established by s 7B).

3 Section 24A of the Act empowers an examiner appointed by the Governor-General under s 46B to conduct an examination for the purposes of a "special ACC operation/investigation" (as defined in s 4(1)). This was identified in the present case as "Operation Grindelford". An examiner, in the exercise of powers in relation to an examination, has the same protection and immunity as a Justice of this Court (s 36(1)).

4 The Summons was issued on 26 March 2009 by the second respondent, Mr W M Boulton, as examiner ("the Examiner")[1], and required her to attend at the premises of the ACC in Brisbane to give evidence of "federally relevant criminal activity" involving named corporations and persons, including Mr Stoddart. The expression "federally relevant criminal activity" is defined in s 4(1) and s 4A of the Act in detailed terms. The expression includes offences against a law of the Commonwealth and certain offences against a law of a State, the Northern Territory and the Australian Capital Territory which potentially fall within federal legislative power.

5 Before issuing the Summons, the Examiner was obliged by s 28(1A) to be satisfied that it was "reasonable in all the circumstances to do so" and to record in writing the reasons for the issue of the Summons.

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1 The Examiner, as second respondent, has filed a submitting appearance.

6 Section 28(1) states:

> "An examiner may summon a person to appear before an examiner at an examination to give evidence and to produce such documents or other things (if any) as are referred to in the summons."

Failure to answer questions as required (s 30(2)) is an offence punishable on conviction by penalties including imprisonment for a term not exceeding five years (s 30(6)).

7 Section 28(5) empowered the Examiner to take evidence on oath or affirmation and to require a person appearing to take an oath or make an affirmation administered by the Examiner. Mrs Stoddart was sworn by the Examiner. To refuse to take an oath or make an affirmation would have been: (i) an offence punishable on conviction by penalties including imprisonment for a term not exceeding five years (s 30(2), (6)), and (ii) a contempt which could have led to her being dealt with by the Federal Court or the Supreme Court of Queensland. Paragraphs (a) and (b) of s 25A(2) provided that as a person giving evidence Mrs Stoddart might be represented by a legal practitioner and she elected to do so.

8 The law relating to legal professional privilege is preserved by s 30(9). With respect to the privilege against self-incrimination, s 30(5) limits the use that can be made of answers given or documents produced, but only if the requirements of s 30(4) are met. These include (par (c) of s 30(4)) the making at the time of a claim that answering the question or producing the document or thing "might tend to incriminate *the person* or make *the person* liable to a penalty" (emphasis added).

9 After swearing in Mrs Stoddart, the Examiner explained to her that she had the privilege against self-incrimination in the terms provided by s 30(4) and (5) of the Act. She indicated that she wished to claim the privilege and the Examiner extended to her what he called "a blanket immunity".

The claim to privilege against spousal incrimination

10 It will be apparent from the terms of the provisions of the Act respecting a summons that the Act is drawn on the basis that, except as the Act might otherwise provide (and it is not said that it does otherwise provide), Mrs Stoddart was a competent and compellable witness[2].

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2 cf *Evidence Act* 1995 (Cth), s 12.

11 Further, the terms in which par (c) of s 30(4) is expressed show that the Act, in dealing with the self-incrimination privilege, proceeds upon the foundation supplied by the common law. This was stated by Lord Diplock in *In re Westinghouse Uranium Contract*[3] as follows:

> "the privilege against self-incrimination was restricted to the incrimination of the person claiming it and not anyone else. There is no trace in the decided cases that it is of wider application; no textbook old or modern suggests the contrary. It is not for your Lordships to manufacture for the purposes of this instant case a new privilege hitherto unknown to the law."

12 In *Environment Protection Authority v Caltex Refining Co Pty Ltd*[4], McHugh J, after citing this passage, indicated that the apparent common law exception respecting rejection of evidence by the spouse of the accused rested upon a distinct principle, namely, lack of competence to testify.

13 In *Rumping v Director of Public Prosecutions*[5] the House of Lords rejected the proposition that at common law communications between spouses were protected against disclosure both in civil and criminal proceedings by the other spouse or by some third person. Lord Reid said with respect to the narrower protection afforded by s 3 of the *Evidence Amendment Act* 1853 (UK) ("the 1853 Act")[6]:

> "It is true that there are cases where it has been held that Parliament has legislated under a misapprehension of the existing law, but that can hardly be the case here."

14 Yet that is the substance of what Mrs Stoddart so far has successfully contended in this litigation. In effect, she seeks extension of her common law privilege beyond that of her self-incrimination (which she maintained before the

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3 [1978] AC 547 at 637-638. This passage was cited with approval by Mason J in *Rochfort v Trade Practices Commission* (1982) 153 CLR 134 at 145; [1982] HCA 66 and by Brennan J in *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 516; [1993] HCA 74. In his treatise on evidence, Wigmore likewise wrote that the privilege "is that of the person under examination as witness": *Evidence in Trials at Common Law*, McNaughton rev (1961), vol 8, §2270.

4 (1993) 178 CLR 477 at 549.

5 [1964] AC 814 at 834.

6 16 & 17 Vict c 83.

Examiner) to that of incrimination of her spouse by her evidence, and then relies upon the failure of the legislature in s 30 of the Act to restrict or abrogate that extended privilege.

15 In the course of her examination by counsel assisting, Mrs Stoddart was asked whether she was aware of invoices prepared at the premises of her husband's practice for services provided by other entities. Her counsel then objected that her client claimed "the privilege of spousal incrimination" and chose not to answer the question. The Examiner responded that the objection "on the basis of spousal privilege" needed to be determined elsewhere and adjourned the examination.

The litigation

16 On 14 May 2009 Mrs Stoddart commenced a proceeding in the Federal Court in which she sought an injunction restraining the Examiner from asking her questions relating to her husband and a declaration that "the common law privilege or immunity against spousal incrimination has not been abrogated by [the Act]".

17 Reeves J dismissed the application on 1 October 2009[7]. The Full Court (Spender and Logan JJ; Greenwood J dissenting)[8] allowed an appeal by Mrs Stoddart and granted a declaration that "the common law privilege against spousal incrimination has not been abrogated by [the Act]". Implicit in the terms of this declaration is the assumption that the common law in question is that of Australia at the time of the passage of the Act. In granting this relief, the majority followed the Queensland Court of Appeal in *Callanan v B*[9] and the Full Federal Court in *S v Boulton*[10]. In the latter case, the primary judge (Kiefel J) had expressed her preference for the contrary view as to the existence of such a privilege at common law and it will be necessary to return to her Honour's reasons in that case[11].

18 On its appeal to this Court, the ACC makes two distinct submissions. The first is that the Full Court erred in following *Callanan* and the Full Court

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7 *Stoddart v Boulton* (2009) 260 ALR 268.

8 *Stoddart v Boulton* (2010) 185 FCR 409.

9 [2005] 1 Qd R 348.

10 (2006) 151 FCR 364.

11 *S v Boulton* (2005) 155 A Crim R 152.

decision in *Boulton* by recognising "a distinct common law privilege against spousal incrimination"; the second, and alternative, submission is that the Full Court should have held that s 30 of the Act, on its proper construction, does abrogate that privilege if it otherwise exists in the common law of Australia and, if so, it extends to non-curial proceedings such as those of the ACC. For the reasons which follow, the appeal should succeed on the first ground, so that the second ground does not arise.

Essential distinctions

19 A reading of the critical reasoning in *Callanan*[12], the principal Australian authority upon which Mrs Stoddart relies, shows what appears to be an unremarked shift between the concept of competence and compellability of parties on the one hand and, on the other, that of testimonial privilege. The same even may be said of the treatment of the subject by Professor Julius Stone in *Evidence: Its History and Policies*[13].

20 As noted above, no question arises respecting competence and compellability of witnesses on this appeal. The question concerns the existence of a particular privilege. But in view of some looseness of expression apparent in some of the authorities, the distinctions involved are of considerable importance. They are stated as follows in the eighth Australian edition of *Cross on Evidence*[14]:

> "It is necessary to distinguish between three separate, though closely related, concepts – the competence, compellability and privilege of a witness. A person is competent if that person may lawfully be called to give evidence. Nowadays, most people are competent witnesses, but under the law which applied to civil cases down to the middle of the nineteenth century, and to criminal trials until the end of that century, many of those who could give relevant evidence were not allowed to do so. A person is compellable if that person can lawfully be obliged to give evidence. The general rule is that all competent witnesses are compellable, but there are a few exceptions which will have to be mentioned in due course. The essential difference between competence and compellability on the one hand, and privilege on the other, is that the two former matters must be resolved before the witness begins to testify.

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12 [2005] 1 Qd R 348 at 352-353.

13 (1991) at 606-611.

14 (2010) at 417 [13001].

> Once the witness has entered the witness-box and has been sworn, has affirmed or is permitted by law to give unsworn evidence, the witness must answer all questions put unless excused or unless the refusal to answer is based upon a privilege conferred by law. Competence and compellability therefore attach to the witness and not to the evidence the witness may give."

21 In *Hoskyn v Metropolitan Police Commissioner*[15], Lord Wilberforce observed that: (i) the term "compellable" is of comparatively recent origin, first appearing in the *Evidence Act* 1851 (UK)[16] to indicate that a spouse can be competent without being compellable; (ii) as a matter of fundamental principle, a competent witness is a compellable witness; and (iii) at general law, the only certain exception seemed to be in favour of the Sovereign and those protected by diplomatic immunity.

22 In *Shenton v Tyler*[17], Sir Wilfrid Greene MR distinguished four rules of evidence. The first was that neither a party nor the spouse of a party was a competent witness on behalf of that party; the second was that a party was not a compellable witness against that party; and the third was that one spouse was not a competent witness against the other spouse. The fourth, long uncertain but eventually upheld by the House of Lords in *Rumping*, denied the existence of a privilege which protected marital communications as such, and is not in issue in the present litigation. It should, however, be added that the equitable principles respecting the protection of confidences may apply, independently of the rules of evidence, to matrimonial confidences[18], but that equity will not protect confidential communications involving crime or fraud[19].

23 The second rule identified by the Master of the Rolls was that in the common law courts, a party was not a compellable witness against that party. The rule did not apply in Chancery, where interrogatories might be administered to the opposite party and discovery ordered. This emphasises the importance, in the period before the fusion by the Judicature system of the administration of several court structures in England, of an appreciation that the rules of "the common law" primarily were those administered at jury trials by the courts of

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15 [1979] AC 474 at 484-486.

16 14 & 15 Vict c 99.

17 [1939] Ch 620 at 626-627.

18 *Argyll v Argyll* [1967] Ch 302 at 329-330.

19 *A v Hayden* (1984) 156 CLR 532 at 544-545, 571-572; [1984] HCA 67.

common law, and these rules were not necessarily followed in Chancery, Admiralty or the ecclesiastical courts[20].

24 The first rule identified by the Master of the Rolls in *Shenton v Tyler* was that in the common law courts neither a party nor the spouse of a party was a competent witness on behalf of that party. The third rule also came into operation where the other spouse was a party. That spouse was not a competent witness against the other. As rules affecting competence, they extended to the whole of the evidence the witness might be able to give, whether or not relating to marital communications. One reason given to support the rules, in an era when a party was seen as having an interest in the litigation rendering him or her incompetent as a witness, was that the interest of the spouse of a party was exactly the same.

25 There were limited and indefinite exceptions to the incompetency of one spouse as witness for or against the other spouse. The early authorities were collected in 1796 as Note (a) to the report of a ruling in 1709[21]. Subsequent authorities included *Aveson v Kinnaird*[22], where in an action on an insurance policy taken out by a husband on the life of his wife there was admitted a dying declaration by the wife which tended to show fraud on the part of her husband.

26 In *Shenton v Tyler*, the Master of the Rolls, in dealing with the fourth rule, referred[23] to the Second Report of the Common Law Commissioners presented in 1853. The Commissioners recommended (at 13-14) that the law provide that all communications between spouses be privileged. That particular recommendation was acted upon by the Parliament (in s 3 of the 1853 Act), but only in a limited fashion[24]. Hence the statement in the eighth Australian edition of *Cross on*

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20 See the discussion by Luxmoore LJ in *Shenton v Tyler* [1939] Ch 620 at 646.

21 *Anonymous* (1709) 11 Mod 224 [88 ER 1004]. In this action brought by the husband against the defendant for assault and battery by the defendant of the wife, she was admitted by Sir John Holt CJ to give evidence. In *Thompson v Trevanion* (1693) Skinner 402 [90 ER 179], his Lordship had admitted in an action by the husband and wife for assault and battery by the defendant, a statement by the wife made immediately upon receiving the hurt, as part of the *res gestae*. See Kent, *Commentaries on American Law*, (1827), vol 2, Lecture XXVIII at 151.

22 (1805) 6 East 188 [102 ER 1258].

23 [1939] Ch 620 at 628-629.

24 [1939] Ch 620 at 629.

Evidence[25] that while "[f]rom time to time it has been suggested that there was a common law privilege attaching to marital communications ... the privilege is entirely the creature of statute"[26]. In the United States the development of the common law took a different course in many jurisdictions with the development of a privilege respecting communications between spouses[27].

27 Another point of present significance is that when reporting in 1853, the Common Law Commissioners (who included Sir John Jervis, then Chief Justice of the Court of Common Pleas, Sir Alexander Cockburn, then Attorney-General, Martin B, and practitioners who were to become Willes J and Lord Bramwell) made no reference to any then existing common law rule of privilege relating to communications between husband and wife, or to the protection of one spouse against incrimination of the other.

28 It may be said that in the great majority of cases decided before the mid-Victorian era of statutory reform, evidence of this nature was effectively excluded by the first and third rules respecting spousal competency identified above, and that only in exceptional cases could evidence attracting the alleged privilege be given where neither spouse was a party.

All Saints

29 As Kiefel J noted in *S v Boulton*[28], the critical authority said to favour the extension to one spouse of the privilege to the other against self-incrimination appears to be that of the Court of King's Bench in *R v Inhabitants of All Saints, Worcester*[29]. The case thus invites some attention, particularly to appreciate, despite the darkening of time elapsed since 1817, the setting in which that litigation took place.

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25 (2010) at 876 [25200].

26 For example, *Evidence Act* 1958 (Vic), s 27; *Evidence Act* 1906 (WA), s 18. Section 97(2) and (3) of the *Matrimonial Causes Act* 1959 (Cth) rendered each spouse competent and compellable to disclose communications made between them during the marriage, where both spouses were parties to proceedings under that statute. Section 100(2) of the *Family Law Act* 1975 (Cth) extends this competence and compellability to any proceedings under that Act.

27 Wigmore, *Evidence in Trials at Common Law*, McNaughton rev (1961), vol 8, Ch 83.

28 (2005) 155 A Crim R 152 at 156.

29 (1817) 6 M & S 194 [105 ER 1215].

30 It is necessary to begin with the "old" poor law[30] before the reforms beginning with the *Poor Law Amendment Act* 1834 (UK)[31], and so to refer to the *Poor Relief Act* 1662 (Eng)[32]. This confirmed that a parish must maintain its settled poor, so that settlement law underpinned both the right to poor relief and the duty to provide it; in particular, non-settled destitute people could be removed to their parish of settlement. Significantly for an understanding of *All Saints*, a wife undertook the settlement of her husband and, thus, usually of his birth place.

31 The operation of the 1662 statute is described as follows by Sir Thomas Skyrme in his *History of the Justices of the Peace*[33]:

> "Under s 1 of the 1662 Act the churchwardens or overseers in any parish could complain to a single justice within 40 days after a person came 'to settle in any tenement under the yearly value of £10' in the parish, and the justice could then issue a warrant to bring the party before him for examination. It then required two justices, however, (one of the *Quorum*) to order the removal of the individual to the parish where he was last legally settled. If he failed to comply, a single justice might send him to a house of correction to be punished as a vagabond (s 3). There was a right of appeal to Quarter Sessions against the ruling of the two justices. It was common practice for the parish to which the pauper was to be sent to lodge an appeal, and many were successful."

32 Further, Quarter Sessions might decide to send up a case for consideration by the Court of King's Bench, although mandamus did not lie to compel this to be done[34].

33 In *All Saints*, Quarter Sessions had confirmed an order for removal of Esther Newman (or Willis) from the parish of Cheltenham to that of All Saints. This, then, was an example of an unsuccessful appeal to Quarter Sessions by the receiving parish. The removal order bound Esther, but the contestants in Quarter

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30 The term is used by Professor Cocks, in his account in *The Oxford History of the Laws of England*, (2010), vol 13 at 473-478.

31 4 & 5 Will IV c 76.

32 13 & 14 Car II c 12. The relevant text is conveniently set out in Montague, "The Law of Settlement and Removal", (1888) 4 *Law Quarterly Review* 40 at 41-42.

33 *Volume II: England 1689-1989*, (1991) at 101-102.

34 *R v Justices of the County of Carnarvon* (1820) 4 B & Ald 86 [106 ER 870].

Sessions were the two parishes. Quarter Sessions sent up the case for the opinion of the King's Bench, which confirmed the order for removal of Esther to the parish of All Saints. The case was fully argued in the King's Bench, with two counsel appearing for Cheltenham and three[35] for All Saints.

34 As a single woman, Esther, a pauper, had gained a settlement in All Saints. This would make that parish the appropriate destination on her removal from Cheltenham. All Saints sought to avoid that result by establishing her subsequent marriage to George Willis, who had a settlement in a third parish, which was that of his birth. However, Esther would have retained her All Saints settlement if her marriage to George was bigamous. This Cheltenham sought to establish by calling Ann Willis to prove her earlier marriage to George. Counsel for All Saints objected to the competency of that witness and unsuccessfully sought to have her evidence struck out.

35 Neither Ann nor George Willis was a party to the litigation and neither had any other interest in the decision. Ann was a competent witness unless her competency was denied by some applicable principle. None was found in what the judges referred to as the policy of the law. However, Bayley J was of the view that Ann had not been a compellable witness[36].

36 Counsel for All Saints had submitted[37] that to show that Ann Willis was a competent witness to prove her marriage to George Willis, it was not necessary to dispute the rule that spouses could not be witnesses for or against each other; this rule was limited to cases when the interest of the spouses was in controversy, as was the case where either was a party to the record. That argument prevailed. The subsequent significance of the case is limited to the opinion of Bayley J, unnecessary for the decision, respecting compellability.

37 In the treatment of the competency of husband and wife, Starkie wrote in his treatise on *The Law of Evidence*[38] that:

> "Where neither of them is either a party to the suit, or interested in the general result, the husband or wife is, it seems, competent to prove any

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35 The leading counsel appears to have been Jervis KC, father of Sir John Jervis, who was to be chairman of the Common Law Commission which reported in 1853: see Holdsworth, *A History of English Law*, (1965), vol 15 at 450.

36 (1817) 6 M & S 194 at 200 [105 ER 1215 at 1217-1218].

37 (1817) 6 M & S 194 at 197 [105 ER 1215 at 1216].

38 *A Practical Treatise on the Law of Evidence*, 3rd ed (1842), vol 2 at 551.

> fact, provided the evidence does not directly criminate the other, or, as it seems, involve the disclosure of some communication made by the other."

He added[39], with respect to *All Saints*, that the evidence of Ann Willis did not directly criminate her husband, and could not be used against him afterwards or made the groundwork of any future prosecution.

38 Starkie made no reference in this discussion to any distinction between competence and compellability. However, it later was said in the treatise by Taylor on *The Law of Evidence* that Bayley J had expressed "the better opinion" in distinguishing between competence and compellability[40]. That provides no firm foundation for the decision in *Callanan*[41] recognising a privilege against spousal incrimination.

39 In *Hoskyn*[42] Lord Wilberforce treated *All Saints* as one of the sparse authorities bearing upon the question whether, the Sovereign and diplomats apart, there were common law exceptions to the general rule that competent witnesses were compellable. *Hoskyn*, like *Riddle v The King*[43], in which Griffith CJ referred to *All Saints*, was concerned with charges of personal violence of husbands against wives and the compellability, in addition to the competence, of the victims as witnesses for the prosecution.

40 The more recent New Zealand decision in *Hawkins v Sturt*[44] appears to have turned upon the question whether on its proper construction a statutory provision that one spouse was not compellable "in any proceeding" to disclose any communication made by the other during marriage, applied to investigative proceedings under the *Serious Fraud Office Act* 1990 (NZ). Thereafter, the New Zealand Law Commission in its Report on Evidence, presented in 1999, did treat *Hawkins* as "some authority to the effect that a person may claim the privilege [against self-incrimination] on behalf of his or her spouse" but favoured (par 284) limiting the protection to the person claiming it.

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39 At 552.

40 *A Treatise on the Law of Evidence*, 10th ed (1906), vol 2, §1368.

41 [2005] 1 Qd R 348.

42 [1979] AC 474 at 485-489.

43 (1911) 12 CLR 622 at 627-628; [1911] HCA 33.

44 [1992] 3 NZLR 602.

Conclusions

41 In our view, it cannot be said that at the time of the enactment of the Act in 2002 the common law in Australia recognised the privilege asserted by Mrs Stoddart or that it does so now. We agree with the conclusion of Kiefel J in *Boulton*[45] that in *All Saints* and the subsequent decisions, in particular *Hoskyn* and *Riddle*, the term "compellable" was used to indicate that the witness might be obliged to give evidence in the ordinary sense of the term, not that, in response to particular questions, a privilege might be claimed by the witness.

Orders

42 The appeal should be allowed, but in accordance with the undertaking it gave to this Court on the grant of special leave, the ACC should pay the first respondent's costs of the appeal to this Court and the costs order against it made in the Full Court should not be disturbed. Orders 1, 2 and 3 made by the Full Court should be set aside and in place thereof the appeal to that Court against order 1 made by Reeves J on 1 October 2009 should be dismissed.

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45 (2005) 155 A Crim R 152 at 159.

43 HEYDON J. Did the first respondent have the legal right to refuse to give to particular questions asked on behalf of the appellant answers which might have a tendency to expose her husband to conviction for a crime? That is the ultimate question in this appeal. Behind that ultimate question lie three issues.

44 First, does a competent and compellable witness in proceedings before a court have a common law right to refuse to give to particular questions answers which might have a tendency to expose his or her spouse to conviction for a crime? (Below that alleged right will be called, as the appellant called it, "spousal privilege".)

45 Secondly, if so, subject to any statute to the contrary, does a person appearing before an institution which is not a court bound by the rules of evidence have a right to invoke spousal privilege?

46 Thirdly, if so, did the *Australian Crime Commission Act* 2002 (Cth) ("the Act") abolish that right?

47 The answers to these questions are "Yes", "Yes" and "No".

48 Some preliminary points arise before these three issues are examined.

Must the privilege be certain?

49 The appellant contended that this Court should not recognise spousal privilege unless it was "clear". It contended that "[a]ny doubt in the historical record should be resolved against the existence of spousal privilege." The submission spoke of *any* doubt, no matter how footling, far-fetched or fanciful. On this submission, the existence of the common law privilege should not be recognised unless that existence is certain. The submission has an initial attraction but must, with respect, be rejected.

50 According to Griffith CJ, "the law is always certain although no one may know what it is"[46]. Putting aside that pronouncement, there is no requirement that the law be certain before its existence can be recognised. A court cannot recognise a rule of the common law unless it believes, after making due inquiries, that the rule exists. It is not necessary that that belief rise to the level of certainty. There is no analogy between the process of recognising a rule of the common law and the process of deciding whether the guilt of an accused person

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46 *Riddle v The King* (1911) 12 CLR 622 at 629; [1911] HCA 33.

has been established beyond reasonable doubt. A fortiori, there is no need to meet the higher standard of "certainty"[47].

51 Below it will be concluded that "clear" statutory language is required to abolish spousal privilege because it is one of the rules of common law to which the "principle of legality" applies[48]. But it does not follow that spousal privilege itself will not be found to exist at common law unless its existence is "clear". The test by which the existence of a common law rule, fundamental or non-fundamental, is recognised differs from the test which determines whether a statute has achieved the destruction of a rule of the fundamental kind to which the principle of legality applies.

52 There are many cases in which appellate courts, after the most learned, earnest and bona fide examination, have concluded, but only by bare majority, that a rule of law exists[49]. From one point of view it is hard to describe the existence of that rule as "certain" or "clear". On the appellant's approach it should not have been recognised because just before it was recognised its existence could not be described as "certain" or "clear".

Does the recognition of a rule of law depend on a series of rulings?

53 It has been pointed out that Mr Justice Holmes said[50]: "A well settled legal doctrine embodies the work of many minds, and has been tested in form as well as substance by trained critics whose practical interest it is to resist it at every step." By "trained critics" he meant litigation lawyers seeking to advance the material interests of their clients. It has therefore been suggested that spousal privilege is not a "well settled legal doctrine". The suggestion assumes that spousal privilege is not the work of many legal minds and is untested by the type of trained critic he had in mind. The suggestion also assumes that those are the only relevant criteria. Those words were published when Mr Justice Holmes was 29 and had two years' standing as a practitioner. They are none the worse for that. They are, nonetheless, limited to "well settled legal doctrines". Those doctrines usually evolve over time. They come to develop limitations, qualifications and exceptions. The experience which lawyers have gained through examining and applying them on numerous past occasions makes them

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47 *Miller v Minister of Pensions* [1947] 2 All ER 372 at 373-374; *R v Summers* [1990] 1 Qd R 92 at 94-95.

48 See below at [165]-[169].

49 For example, *Donoghue v Stevenson* [1932] AC 562.

50 Holmes, "Codes, and the Arrangement of the Law", in Novick (ed), *The Collected Works of Justice Holmes*, (1995), vol 1, 212 at 213.

easier to apply in future. But does that preclude legal doctrines at earlier stages of their evolution from embodying rules of law? The "well settled legal doctrine" theory, if advanced as an exhaustive test for identifying common law rules, does not explain how one ascertains what the law is before it becomes "well settled". A rule of law may exist even if it comes to be modified and matured in consequence of fresh considerations thrown up by the circumstances in which it has to be applied in later cases.

54 The quoted passage was not the only thing Mr Justice Holmes said. Just before it he said[51]:

> "It is the merit of the common law that it decides the case first and determines the principle afterwards. Looking at the forms of logic it might be inferred that when you have a minor premise and a conclusion, there must be a major, which you are also prepared then and there to assert. But in fact lawyers, like other men, frequently see well enough how they ought to decide on a given state of facts without being very clear as to the *ratio decidendi*. In cases of first impression Lord Mansfield's often-quoted advice to the business man who was suddenly appointed judge, that he should state his conclusions and not give his reasons, as his judgment would probably be right and the reasons certainly wrong, is not without its application to more educated courts."

In short, far from contending that a doctrine could not be recognised unless it could be seen to be the work of many minds, hammered out between expert rivals on the anvil of many contested cases, Mr Justice Holmes was stating that the outcome of legal problems could often be reached almost instinctively.

55 What is more, this is the same Mr Justice Holmes who developed the "bad man" theory of the law. The bad man "does want to know what the Massachusetts or English courts are likely to do in fact. I am much of his mind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."[52] That assumes that lawyers who advise the bad man will seek to prophesy – to predict – what the courts, on the basis of the materials available to them, will do. Prophecy involves an element of uncertainty, not an assurance of certainty. In many instances among the materials available for consideration before the prophecy is made will not be any long stream of decided cases having a relevant ratio decidendi or even one such case. Rather the materials may include only prior dicta, arguments by analogy,

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51 Holmes, "Codes, and the Arrangement of the Law", in Novick (ed), *The Collected Works of Justice Holmes*, (1995), vol 1, 212 at 212-213.

52 Holmes, "The Path of the Law", (1897) 10 *Harvard Law Review* 457 at 461.

arguments seeking to avoid incoherence, moral criteria, the teachings of practical pressures, and the opinions of learned writers.

Stare decisis

56 This appeal does not involve any question of stare decisis. The only sense in which this Court is "bound" by any decision is that it will not lightly overrule one of its own. There is no decision of this Court precisely in point. There are in point dicta of Bayley J, sitting as one member of the Court of King's Bench in banc in *R v Inhabitants of All Saints, Worcester*[53]. Even if the propositions he stated had been part of the ratio decidendi, since *Cook v Cook*[54] struck off the fetters of the vile servitude under which Australian courts had groaned before 1986, they would not now be binding on any Australian court.

57 Max Radin said[55]:

> "If a court follows a previous decision, because a revered master has uttered it, because it is the right decision, because it is logical, because it is just, because it accords with the weight of authority, because it has been generally accepted and acted on, because it secures a beneficial result to the community, that is not an application of *stare decisis*. To make the act such an application, the previous decision must be followed because it is a previous decision and for no other reason".

What Bayley J said is not to be followed because it is "a previous decision and for no other reason". It is to be followed because it is the work of "a revered master" which is "right", "logical", "just" and "beneficial". It accords with "the weight of authority", limited though that is. It has been "generally accepted and acted on" for many generations in the sense that only one judicial opinion is adverse to it[56], until very recently no text writer had criticised it, and very many treatises have asserted it to be true. In that respect this unusual appeal is valuable in that it reveals how the weight of professional, and latterly academic, opinion can play a significant role in recognising common law rules.

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53 (1817) 6 M & S 194 at 200-201 [105 ER 1215 at 1217-1218].

54 (1986) 162 CLR 376 at 390; [1986] HCA 73.

55 "Case Law and Stare Decisis: Concerning *Präjudizienrecht in Amerika*", (1933) 33 *Columbia Law Review* 199 at 200.

56 *S v Boulton* (2005) 155 A Crim R 152.

The distinction between competence, compellability, privilege and discretionary relief

58 A person who desires not to give evidence adverse to another person – in particular, a spouse who seeks a ruling from the court that he or she not be compelled to give evidence which might incriminate the other spouse – might seek to rely on one of four doctrines. Three are clear. In 1977 a fourth was suggested in England. There are no others.

59 *Competence.* First, the person may not be *competent* to give evidence of any kind – that is, may not lawfully be called to give evidence. In modern Australian law, the topic of non-competence is heavily regulated by statute. Instances of non-competence are limited to certain types of children, to persons of defective intellect, and to the accused or the accused's spouse when called as a prosecution witness (save in relation to particular offences).

60 *Compellability.* Secondly, though competent, the person may not be *compellable* to give evidence – that is, the person may lawfully be called to give evidence, but may not lawfully be compelled to enter the witness box. The word "non-compellability" is often used in a loose and wider sense to mean "privilege", and vice versa, but it is desirable to be more precise. In modern Australian law, the topic of compellability, too, is heavily regulated by statute. Instances of witnesses who are competent but not compellable are probably limited to an accused (who is competent in the defence case, and competent but not compellable at the instance of co-accused persons); the spouse and other relatives and associates of the accused; the sovereign, foreign sovereigns, and the diplomatic representatives of foreign sovereigns; and to some extent members of Australian legislatures.

61 *Privilege.* Thirdly, a person who is competent and compellable, and has entered the witness box, may have a *privilege* not to answer particular questions. In the last 16 years a fashion for creating new statutory privileges has grown up. They fall faster and pile up deeper than the leaves of Vallombrosa. But the best-known privileges are three of the privileges developed at common law – the privilege against self-incrimination, legal professional privilege and "without prejudice" privilege. A person who validly claims privilege is seeking vindication of a right, not supplicating for the favourable exercise of a discretion[57]. The right on which the claimant is relying may be waived, but if it is asserted by a properly formulated objection assigning valid grounds for refusing to answer, the right – ie the privilege claimed – must be upheld by the court.

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57 *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380 at 442.

62 *Links between non-compellability and privilege.* There are links between questions of non-compellability and privilege. A question of whether a witness is competent is for the parties and for the court, for the court has a duty to preserve the orderly administration of justice by ensuring that untoward events do not take place like the entry into the witness box of very youthful children, or mentally defective persons, or accused persons in the prosecution case. But questions of non-compellability and privilege are pre-eminently for witnesses, not the parties or the court. A person who is non-compellable and declines to enter the witness box is in effect refusing to answer any questions at all. A person who is non-compellable but decides to enter the witness box and claim privilege is refusing to answer only questions falling within the category for which privilege can be claimed. In some circumstances the court may have a duty to advise persons who are non-compellable or may claim a privilege of their rights, or may follow a practice of doing so. But in the end it is those persons who must exercise a choice to make a claim of non-compellability or of privilege. Like non-compellability, a privilege is personal to the person claiming it, or, in the case of legal professional privilege, the person on whose behalf it is claimed. Thus at least in the case of the privilege against self-incrimination, evidence given by a witness wrongly compelled to answer may not be used against the witness in other proceedings[58]. If the court wrongly fails to uphold the claim to privilege, and the witness whose claim was wrongly rejected is a party, there is a right of appeal. A witness whose claim was wrongly rejected who is not a party obviously cannot appeal. And there is authority suggesting that a party adversely affected by the wrongful rejection (or acceptance) of a claim for privilege may not appeal[59].

63 The personal character of spousal non-compellability and spousal privilege is significant. If spousal privilege exists, the fundamental reasons for it overlap with the fundamental reasons for the existence of spousal non-compellability. Indeed much of the argument for the first respondent proceeded on the assumption that that overlap conclusively established the existence of spousal privilege. It is a suggestive factor, but it is not conclusive.

64 *Discretionary power of rejection.* Where a competent and compellable witness cannot claim any privilege but desires not to give evidence adverse to another, a party may contend that the court has a discretionary power to reject the question seeking that evidence. There is a statement of Hoffmann J that "in a

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58 *R v Garbett* (1847) 2 Car & K 474 [175 ER 196]; *R v Coote* (1873) LR 4 PC 599; *Brebner v Perry* [1961] SASR 177 at 181; *R v Clyne* (1985) 2 NSWLR 740.

59 *R v Kinglake* (1870) 22 LT 335; *Markovina v The Queen (No 2)* (1997) 19 WAR 119 at 126. See also *Doe d Earl of Egremont v Date* (1842) 3 QB 609 [114 ER 641].

civil action the court does not have a discretion to permit a witness giving evidence at the trial to refuse to disclose relevant and admissible facts which are not covered by any recognised privilege."[60] That is an impeccably orthodox statement. Statute apart, are there any exceptions to it? Over the years since *R v Christie*[61] was decided in 1914 there have developed discretions in criminal cases to exclude evidence if its prejudicial effect would exceed its probative value[62] and to exclude evidence if the strict rules of admissibility would operate unfairly against the accused[63]. But it is not easy to point to the existence of these discretions in general form before 1914, and in large measure before quite recent periods. Their existence at common law outside criminal proceedings has been termed "highly doubtful"[64] in this Court and was emphatically denied in 1914 by both the House of Lords[65] and the Privy Council[66]. There has been, however, recognition of a limited discretion in civil cases concerning the special field of similar fact evidence to exclude evidence which, though relevant, is only remotely relevant or has small probative value compared to the additional issues which it would raise and the additional time required for their investigation, or might tend to confuse the jury as to the real issues[67]. The first respondent did not rely on these discretions. And they are not privileges because they can be invoked only by a party, not a witness.

65 In 1977 an exception in civil cases to Hoffmann J's statement swam into view as a possibility in England. It concerns claims by witnesses to refuse to answer which, though falling outside any relevant category of privilege strictly

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60 *Arab Monetary Fund v Hashim (No 2)* [1990] 1 All ER 673 at 681.

61 [1914] AC 545.

62 *R v Swaffield* (1998) 192 CLR 159 at 191-193 [62]-[64]; [1998] HCA 1.

63 *Driscoll v The Queen* (1977) 137 CLR 517 at 541; [1977] HCA 43; *Stephens v The Queen* (1985) 156 CLR 664 at 669; [1985] HCA 30.

64 *CDJ v VAJ* (1998) 197 CLR 172 at 215 [142] n 106 per McHugh, Gummow and Callinan JJ; [1998] HCA 67. There are many authorities to the same effect, and only a handful to the contrary: *Mood Music Publishing Co Ltd v De Wolfe Ltd* [1976] Ch 119 at 127; *Pearce v Button* (1985) 8 FCR 388 at 402; *Taylor v Harvey* [1986] 2 Qd R 137.

65 *R v Christie* [1914] AC 545 at 564.

66 *Ibrahim v The King* [1914] AC 599 at 610.

67 *D F Lyons Pty Ltd v Commonwealth Bank of Australia* (1991) 28 FCR 597 at 604 and 607.

so called, nonetheless attract sympathy. In *D v National Society for the Prevention of Cruelty to Children*[68], Lord Hailsham of St Marylebone approved the following views of the Law Reform Committee[69]:

> "Privilege in the main is the creation of the common law whose policy, pragmatic as always, has been to limit to a minimum the categories of privileges which a person has an absolute right to claim, but to accord to the judge a wide discretion to permit a witness, whether a party to the proceedings or not, to refuse to disclose information where disclosure would be a breach of some ethical or social value and non-disclosure would be unlikely to result in serious injustice in the particular case in which it is claimed."

Lord Kilbrandon agreed with Lord Hailsham[70]. Lord Simon of Glaisdale (with whom Lord Edmund-Davies was in substantial agreement[71]) emphatically differed[72]. He said: "it must be law, not discretion, which is in command." He also said[73]:

> "the true position is that the judge may not only rule as a matter of law or practice on the admissibility of evidence, but can also exercise a considerable moral authority on the course of a trial. For example, in the situations envisaged the judge is likely to say to counsel: 'You see that the witness feels that he ought not in conscience to answer that question. Do you really press it in the circumstances?' Such moral pressure will vary according to the circumstances – on the one hand, the relevance of the evidence; on the other, the nature of the ethical or professional inhibition. Often indeed such a witness will merely require a little gentle guidance from the judge to overcome his reluctance. I have never myself known this procedure to fail to resolve the situations acceptably."

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68 [1978] AC 171 at 227.

69 Law Reform Committee, *Sixteenth Report (Privilege in Civil Proceedings)*, (1967) Cmnd 3472 at 3 [1] (footnote omitted).

70 [1978] AC 171 at 242.

71 [1978] AC 171 at 243. Lord Diplock did not deal with the matter. The House of Lords was thus evenly divided.

72 [1978] AC 171 at 239.

73 [1978] AC 171 at 239.

But judges who by "moral pressure" persuade counsel not to ask the question are not exercising a discretion to reject the question. And judges who with "a little gentle guidance" propel the witness towards a willingness to answer are not exercising a discretion to allow the question.

66 The authorities cited by the Law Reform Committee were *Attorney-General v Clough*[74] and *Attorney-General v Mulholland*[75]. Do these cases support the proposition for which they were cited? They agree with the well-established rule that at common law a journalist while testifying has no privilege to refuse to disclose the source of that journalist's information[76]. But they contain three relevant passages. First, in the former case Lord Parker CJ said[77]: "it … would remain open to this court to say in the special circumstances of any particular case that public policy did demand that the journalist should be immune". Secondly, in the latter case Lord Denning MR said of members of the clergy, bankers and doctors[78]:

> "The judge will respect the confidences which each member of these honourable professions receives in the course of it, and will not direct him to answer unless not only it is relevant but also it is a proper and, indeed, necessary question in the course of justice to be put and answered. A judge is the person entrusted, on behalf of the community, to weigh these conflicting interests – to weigh on the one hand the respect due to confidence in the profession and on the other hand the ultimate interest of the community in justice being done or, in the case of a tribunal such as this, in a proper investigation being made into these serious allegations. If the judge determines that the journalist must answer, then no privilege will avail him to refuse."

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74 [1963] 1 QB 773.

75 [1963] 2 QB 477.

76 *McGuinness v Attorney-General (Vict)* (1940) 63 CLR 73; [1940] HCA 6; *British Steel Corp v Granada Television Ltd* [1981] AC 1096; *Independent Commission Against Corruption v Cornwall* (1993) 38 NSWLR 207.

77 *Attorney-General v Clough* [1963] 1 QB 773 at 792.

78 *Attorney-General v Mulholland* [1963] 2 QB 477 at 489-490.

And, thirdly, in the latter case Donovan LJ said[79]:

> "While the journalist has no privilege entitling him as of right to refuse to disclose the source, so I think the interrogator has no absolute right to require such disclosure. In the first place the question has to be relevant to be admissible at all: in the second place it ought to be one the answer to which will serve a useful purpose in relation to the proceedings in hand – I prefer that expression to the term 'necessary.' Both these matters are for the consideration and, if need be, the decision of the judge. And over and above these two requirements, there may be other considerations, impossible to define in advance, but arising out of the infinite variety of fact and circumstance which a court encounters, which may lead a judge to conclude that more harm than good would result from compelling a disclosure or punishing a refusal to answer."

These three statements are very vague. They are largely limited to the questioning of journalists about their sources. In Australia they have been treated as resting on a power in the trial judge to control the propriety of the proceedings by disallowing irrelevant or improper questions[80]. Thus Clancy ACJ, Brereton and Wallace JJ said[81]:

> "It has never been suggested that if the question is relevant and proper any further discretion remains in the trial judge as to whether or not the witness should be compelled to answer, and if it did it is difficult to see upon what material it could be exercised."

It is plain that irrelevant questions are impermissible and open to objection, independently of any discretion. So are improper questions.

67 The proposition asserted by the Law Reform Committee may be a questionable transplant into a new area of a practice relating to discovery – a process which does have a discretionary element, since orders for discovery result from a procedure based on enactments with an equitable history[82]. There is a practice in defamation proceedings where qualified privilege or fair comment is relied on of limiting discovery which might reveal the source of a journalist's

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79 *Attorney-General v Mulholland* [1963] 2 QB 477 at 492.

80 *Re Buchanan* (1964) 65 SR (NSW) 9.

81 (1964) 65 SR (NSW) 9 at 11.

82 *British Steel Corp v Granada Television Ltd* [1981] AC 1096 at 1174.

information. Dixon J refused to treat this practice as the basis for a rule of evidence excluding the testimonial revelation of the material[83].

68 In short, although there are indications that the discretion of which the Law Reform Committee spoke has been introduced by judicial fiat into English law[84], the Australian authorities are against it[85]. There is no reason to doubt the correctness of the Australian authorities.

Does a curial spousal privilege exist at common law?

69 The question as debated between the parties was whether there is a common law privilege by which one spouse can decline to answer questions the answers to which may have a tendency to expose the other spouse to conviction for a crime. The common law privilege against *self*-incrimination extends beyond convictions for crime to the imposition of a civil penalty. Since modern legislatures often seek to deal with misconduct, particularly commercial misconduct, by creating, in addition to crimes backed by criminal sanctions, civil contraventions backed by civil penalties, the question whether there is a common law spousal privilege relating to answers tending to expose the other spouse to the imposition of a civil penalty may be important in some circumstances. But it did not have to be debated in this appeal, and it was not.

70 It is generally not safe to embark on an examination of pre-19th century authorities in the law of evidence without the assistance of modern legal historians. That assistance usually demonstrates that earlier accounts call for significant revision[86]. And it is not necessary to examine pre-19th century authorities in order to resolve this appeal in favour of either party. Hence the debate between the parties about the opinions of Dalton[87] and "Lord [sic]

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83 *McGuinness v Attorney-General (Vict)* (1940) 63 CLR 73 at 104-105, quoted with approval by Viscount Dilhorne in *British Steel Corp v Granada Television Ltd* [1981] AC 1096 at 1180.

84 *Science Research Council v Nassé* [1980] AC 1028 at 1067; *British Steel Corp v Granada Television Ltd* [1981] AC 1096 at 1129, 1168-1169 and 1175.

85 *McGuinness v Attorney-General (Vict)* (1940) 63 CLR 73 at 104; *Re Buchanan* (1964) 65 SR (NSW) 9.

86 For example, Helmholz et al, *The Privilege Against Self-Incrimination: Its Origins and Development*, (1997); Langbein, *The Origins of Adversary Criminal Trial*, (2003).

87 *Countrey Justice*, (1619) London Professional Books Ltd 1973 ed at 270.

Coke"[88] (as the parties persistently called Sir Edward), and about early bankruptcy practice, need not be examined.

71 The appellant argued, first, that there is no spousal privilege at common law, and, secondly, that the Court should not now create one. The appellant did not argue that if there were spousal privilege at common law the Court should now abolish it.

72 The appellant argued that the common law "never had occasion to develop spousal privilege" because until the mid-19th century spouses were generally not competent or compellable witnesses against each other in civil cases and until the late 19th century they were generally not competent witnesses against each other in criminal cases. During the periods of spousal incompetence which preceded those changes, no occasion could rationally arise for assuming that, contrary to the legal position, a spouse was competent and compellable to enter the witness box, and then considering, on that assumption, whether that spouse could claim a privilege against answering particular questions the answers to which incriminate the other spouse. But the rule of incompetence was less wide than the appellant's argument assumed. The rule of spousal incompetence did not prevent one spouse ever testifying about the conduct of the other spouse. It left some room for occasions on which a privilege question might arise. Hence, the submission that the common law "never had occasion" to consider spousal privilege is incorrect. The occasions were relatively limited, but they could arise. They could arise when a spouse was competent and compellable. They could also arise when a spouse was competent and, though not compellable, chose to enter the witness box, while reserving a desire not to answer particular questions which might incriminate the other spouse. In *R v Inhabitants of All Saints, Worcester*[89] Bayley J discussed an instance of the latter kind.

Bayley J's dicta in *R v Inhabitants of All Saints, Worcester*

73 In that case Ann Willis was called to give evidence that she had married George Willis. If that evidence were accepted, it would follow that a later marriage by George Willis was bigamous. It was contended that she was not competent to give evidence. The contention failed. Neither Ann Willis nor George Willis were parties. There was no controversy or adverseness of interest between them in the proceedings. Hence, according to the principles of

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88 Coke, *The First Part of the Institutes of the Lawes of England. Or, a Commentarie Upon Littleton, Not the Name of a Lawyer Onely, but of the Law It Selfe*, (1628) at 6b.

89 (1817) 6 M & S 194 at 200-201 [105 ER 1215 at 1217-1218].

competence then in force[90], there was no bar to her entering the witness box. The court overruled *R v Inhabitants of Cliviger*[91], which was to the contrary. Bayley J, however, went further[92]:

> "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 enquiry, 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."

The appellant described this as a "snippet" incapable of supporting spousal privilege.

74 What was Bayley J talking about in this passage – non-competence, non-compellability, privilege, or discretionary protection?

75 Bayley J cannot have been talking about non-competence, because he, like Lord Ellenborough CJ and Abbott J, decided that Ann Willis was a competent witness.

76 Though his references to "thrown herself on the protection of the Court" might suggest an appeal to discretionary protection, he cannot have been talking about discretionary protection. That is partly because no lawyer has thought that any such thing was possible until the last four decades of the 20th century. And it is partly because a claimant to a favourable exercise of discretion is merely an object of hoped-for advantage, not someone who is, in the words of Bayley J, "*entitled* to the protection of the Court."

77 Contrary to the specific submission of the appellant, Bayley J cannot have been talking about non-compellability. If Ann Willis were not compellable she

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90 *Bentley v Cooke* (1784) 3 Dougl 422 [99 ER 729].

91 (1788) 2 T R 263 [100 ER 143].

92 (1817) 6 M & S 194 at 200-201 [105 ER 1215 at 1217-1218].

would not have been sworn. Yet Bayley J's assumption was that she had been sworn and had been asked a question. The references to "protection" do not point unequivocally and exhaustively to non-compellability. A court which upholds the claim of a witness to privilege is giving the witness "protection" as much as a court which upholds the claim of a person to non-compellability.

78 By that process of negative elimination, privilege remains. But as well as what flows from negative elimination, there are positive indications that Bayley J was speaking of privilege. To say: "the spouse did not demur to any question" is to imply that she had willingly entered the witness box, for otherwise no question could have been asked. Privilege can be waived, and a failure to "demur to a question", or to "object" to a question, amounts to a waiver. When Bayley J said: "It does not appear that she objected to be examined", he meant the same thing as not demurring or not objecting to a question. That is, he meant that a privilege had been waived. Where a witness has demurred or objected to a question and the court compels an answer, the most probable characterisation of what has happened is that the demurrer or objection has been overruled and a claim to privilege has failed. Where on the other hand a witness has demurred or objected to a question and the court concludes that she is "entitled" not to be compelled to answer, the most probable characterisation of what has happened is that a claim to privilege has succeeded.

79 The wife's evidence could not directly incriminate her alleged husband, because if he were later to be prosecuted for bigamy she would not be either a competent or a compellable witness against him and her evidence would not have been admissible hearsay at the bigamy trial. But her evidence of the first marriage could indirectly incriminate him by causing inquiries to be instituted and other persons to be located – guests at the first marriage ceremony, the person who performed it, witnesses who could give evidence of cohabitation and repute to support a presumption of marriage. That is what the concluding words of the passage refer to.

80 Bayley J was thus assuming that an objection or demurrer by the spouse witness of whom he was speaking to answering a question on the ground that it might incriminate her husband was sufficiently based on a risk of that incrimination. In the words of Cockburn CJ in *R v Boyes*[93] about the privilege against self-incrimination 44 years later, he was assuming that there was a "danger [which was] real and appreciable, with reference to the ordinary operation of law in the ordinary course of things – not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct." Bayley J was saying that that danger was insufficient to

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93 (1861) 1 B & S 311 at 330 [121 ER 730 at 738].

support a conclusion of incompetence or non-compellability, but sufficient to render a claim to privilege valid.

81 Bayley J's language has been called "notably tentative"[94]. But that is to read bits of it in isolation. "I am not prepared to say that the Court would have compelled her to answer" may be, taken by itself, tentative. But the next words negate any tentativeness and are quite firm: "on the contrary, I think she would have been entitled to the protection of the Court."

82 It is therefore necessary, with respect, to reject the appellant's submission that Bayley J was stating a proposition about non-compellability, not privilege[95].

83 It is also necessary to disagree with the view that later legal writers treated Bayley J as having discussed only non-compellability, not privilege.

Mr Justice Bayley

84 For the reasons given by Radin, a dictum can make the law. The shrewd enunciation of dicta was a primary technique in Chief Justice Marshall's illustrious career. And legal writers, too, can make the law. Indeed, they can make the law by saying things which though they may be questionable at the outset become so widely accepted that they are the law. A most important consideration is the rational force of the opinion propounded in the dictum or the writings. But something may depend on the identity of the author of the dictum, or the writer. An opinion on a point of law of the early 20th century or the early 14th century by Maitland will naturally carry more weight than the opinion of … some others.

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94 *Hoskyn v Metropolitan Police Commissioner* [1979] AC 474 at 503 per Lord Edmund-Davies.

95 Apart from the materials to be examined in detail shortly, others have thought that Bayley J was dealing with privilege, not non-compellability: *Hoskyn v Metropolitan Police Commissioner* [1979] AC 474 at 502 per Lord Edmund-Davies; Tapper (ed), *Cross and Tapper on Evidence*, 12th ed (2010) at 250. To the extent that the majority in *Hoskyn's* case disagreed, Lord Edmund-Davies, it has been said, "convincingly demonstrated" that they were wrong: Buzzard, May and Howard (eds), *Phipson on Evidence*, 13th ed (1982) at 704 [31-22].

85 In *Riddle v The King*[96] Griffith CJ called Bayley J "a Judge of very great experience and learning". In *Hoskyn v Metropolitan Police Commissioner*[97] Lord Salmon said of his dictum that "coming from such a master of the common law it deserves to be treated with the greatest respect: I regard it as being of the highest persuasive authority." In the same case Lord Edmund-Davies described him as "a judge of outstanding quality"[98]. But nothing will be known of Bayley J by most modern lawyers. This obstructs an understanding of the later significance of *R v Inhabitants of All Saints, Worcester*.

86 John Bayley was born in 1763. After practising as a special pleader, he was called to the Bar in 1792. In 1789 he had published a *Treatise on the Law of Bills of Exchange*. That is a subject difficult enough for most lawyers even after its codification[99], but much more so before codification. By 1836 there had been five English and two American editions. In 1790 he edited Lord Raymond's Reports, with notes. Around 1790 he "compiled a manuscript digest of the law of evidence, which was widely used by later pupils."[100] Explaining legal doctrines, orally or in writing, to neophytes in the law is an excellent way of increasing the understanding not only of those who are taught, but of those who teach. In 1799 he was made a Serjeant-at-Law. In 1808 he became a puisne judge of the Court of King's Bench. When he sought to lighten his burdens by going to the Exchequer in 1823, 11 silks and 101 barristers practising in the King's Bench presented two memorials to him urging him to stay. In 1830, however, he did leave and became a Baron of the Exchequer – an occasion on which Brougham paid him great tributes on behalf of the Bar. Fearing a decline in his powers, he retired in 1834. He has been described as having had a "large practice", a "mastery of case law" and a "particular mastery of the common law."[101] He had a habit which, in a minor way, was prevalent within living memory in New South Wales. Napier said that he always carried with him seven little red manuscript books "which are said to contain every case that ever was or

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96 (1911) 12 CLR 622 at 628.

97 [1979] AC 474 at 496.

98 [1979] AC 474 at 502.

99 *Bills of Exchange Act* 1882 (UK); *Bills of Exchange Act* 1909 (Cth).

100 Lobban, "Sir John Bayley", in Matthew and Harrison (eds), *Oxford Dictionary of National Biography*, (2004), vol 4 at 448.

101 Lobban, "Sir John Bayley", in Matthew and Harrison (eds), *Oxford Dictionary of National Biography*, (2004), vol 4 at 448.

ever will be decided in Westminster Hall"[102]. Information about cases that "will be decided" is information from which inferences as to future legal development can be drawn: that is, prophecies or predictions. Foss said of him[103]:

> "No judge since the act was passed in 1799 granting a pension on retirement after fifteen years' service has declined to avail himself of the privilege for so long a period as Sir John Bayley."

How different, how very different, from the mercantile, even mercenary, retirement policies of some modern Australian judges. Lord Campbell regarded him as "among the best lawyers that have appeared in Westminster Hall" in his time[104]. Lord Campbell also said[105]:

> "When M. Cottu, the French advocate, went [to] the Northern Circuit, and witnessed the ease and delight with which Mr Justice Bayley got through his work, he exclaimed, 'Il s'amuse à juger'".

87 Mr Justice Bayley, then, may be said to have seen men and cities. He was viewed as a happy warrior. He had popularity and reputation. Popularity and reputation do not guarantee quality, but they can engender trust and influence. The trust may turn out to be misplaced. The influence may turn out to be pernicious. But they can both be real.

Mr Justice Bayley and legal writers

88 The appellant submitted that Taylor in his work on evidence had said that "it seems" that spousal privilege may exist "on one view of what [Bayley J] was saying." What Taylor actually did say will be examined below[106]. Taylor was only one of many writers who have treated the dicta of Bayley J as reflecting the existence of spousal privilege.

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102 Quoted from Napier's *Manual of Improved Precedents*, (1831) by Lobban, "Sir John Bayley", in Matthew and Harrison (eds), *Oxford Dictionary of National Biography*, (2004), vol 4 at 448.

103 *The Judges of England; With Sketches of their Lives, and Miscellaneous Notices connected with the Courts at Westminster, From the Conquest to the present time*, (1864), vol 9 at 75.

104 *The Lives of the Chief Justices of England: From the Norman Conquest till the death of Lord Tenterden*, (1857), vol 3 at 155.

105 *The Lives of the Chief Justices of England: From the Norman Conquest till the death of Lord Mansfield*, (1849), vol 2 at 397n.

106 See below at [91]-[93].

89 Some cases make a great impact at the time of decision, but gradually fade away. Others make no impact at the time of decision, nor for some time thereafter, but eventually become leading cases and pillars of the law. An example of the latter is the celebrated decision in *Morice v Bishop of Durham*[107], which, although now seen as fundamental to the law of trusts, was originally cited only for purposes which are now obsolete[108]. *R v Inhabitants of All Saints, Worcester* has been much cited. But what was its initial reception in legal treatises? What was its subsequent career there?

1817-1852: Phillipps

90 The first treatise to notice *R v Inhabitants of All Saints, Worcester* was published in the same year as that case was decided. It was the third edition of S M Phillipps's *A Treatise on the Law of Evidence*. After a lengthy discussion of *R v Inhabitants of All Saints, Worcester,* the author said[109]:

> "The result therefore appears to be, that, on the trial of an appeal against an order of removal [of a person to her maiden settlement], (and, upon the same principles, in any suit or proceeding between third persons,) a husband or wife is a competent witness to prove a former marriage, even after proof of a second marriage, although perhaps the witness would not be *compellable* to answer such questions." (emphasis in original)

This is plainly a reference to Bayley J's dicta. It is clear that, like Bayley J, the author is assuming that the spouse has entered the witness box. That is plain from the second use of the word "witness". It is also plain from the reference to questions, for if the spouse had not entered the box, no questions could have been asked. Hence the word "compellable" is a reference to privilege, not compellability. The same passage appeared in the next four editions, published in 1820, 1822, 1824 and 1829[110]. In the eighth edition in 1838 (with Andrew Amos)[111] and the ninth edition in 1843[112] the entire discussion of *R v Inhabitants*

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107 (1804) 9 Ves Jun 399 [32 ER 656]; (1805) 10 Ves Jun 522 [32 ER 947].

108 Getzler, "Morice v Bishop of Durham", in Mitchell and Mitchell (eds), *Landmark Cases in Equity* (forthcoming).

109 3rd ed (1817) at 69.

110 4th ed (1820), vol 1 at 83; 5th ed (1822), vol 1 at 80; 6th ed (1824), vol 1 at 75; 7th ed (1829), vol 1 at 80.

111 8th ed (1838) at 165.

112 9th ed (1843), vol 1 at 73.

of All Saints, Worcester was shortened and the passage quoted above was omitted. In 1852, in the tenth edition (with Thomas James Arnold, one of the Police Magistrates for the Metropolis), the following appeared[113]:

> "Although a wife is not to be rejected as a witness because her evidence has a tendency to criminate her husband, yet it seems she cannot be compelled to give such evidence."

Bayley J's judgment in *R v Inhabitants of All Saints, Worcester* was cited in support. Again, it is likely that the words "cannot be compelled" referred to a privilege. Phillipps's *Treatise* must have been influential. Apart from its eight English editions from 1817 to 1852, there were several American editions[114].

1848-1931: Taylor

91 In 1848 John Pitt Taylor, then a barrister, later a County Court judge, published the first edition of *A Treatise on the Law of Evidence, as Administered in England and Ireland*. It was based on Simon Greenleaf's *A Treatise on the Law of Evidence*, published in the United States of America in 1842. According to Twining, "[f]or nearly fifty years it was regarded as the leading practitioners' treatise, replacing Starkie and Phillipps and in due course being overtaken by Phipson."[115] Taylor cited Bayley J for the following proposition[116]:

> "But although, in these cases, the wife will be *permitted* to testify against her husband, it by no means follows that she will be *compelled* to do so; and the better opinion is that she may throw herself upon the protection of the Court, and decline to answer any question, which would tend to expose her husband to a criminal charge."[117] (emphasis in original)

Below this will be called "the first proposition". A reading of the passage as a whole suggests that by "these cases" Taylor meant cases in which a wife who was competent and compellable wished to give evidence tending to incriminate

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113 10th ed (1852), vol 1 at 73.

114 See generally Twining, *Rethinking Evidence: Exploratory Essays*, 2nd ed (2006) at 49.

115 Twining, *Rethinking Evidence: Exploratory Essays*, 2nd ed (2006) at 54.

116 (1848), vol 2 at 907 [997] (footnote omitted).

117 Taylor cited *R v Inhabitants of All Saints, Worcester* (1817) 6 M & S 194 at 200 [105 ER 1215 at 1218].

her husband. He read Bayley J's dicta as recognising the possession by a witness of a privilege, not as recognising a facility for the wife not to enter the witness box at all.

92 Taylor repeated the first proposition in the second edition[118], in 1855. He added a cross-reference to a later paragraph. To the footnote referring to *R v Inhabitants of All Saints, Worcester*, he added a further case in support of the first proposition, namely *Cartwright v Green*[119]. In *Cartwright v Green* one of the grounds on which Lord Eldon LC allowed a demurrer to a bill of discovery was that it would compel production of material by a wife which could incriminate her husband. The bill was against three defendants, the first two of whom were husband and wife. Lord Eldon LC said[120]:

> "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; and the third Defendant is directly implicated. The demurrer therefore is good as to all the Defendants".

That is, the husband and the third defendant could claim the privilege against self-incrimination, and the wife could not be required to give discovery incriminating her husband. There is some controversy whether this decision supported the first proposition. Brennan J, for example, treated the case as authority for the proposition that discovery "is denied because the policy of the law requires that the court should not give discovery at all in" an action to recover a penalty[121]. Seton said that a party could object to giving discovery or answering interrogatories on the ground that "an answer or document would form evidence or links in a chain of evidence of facts that would expose the deft [to] criminal proceedings". In support he said, citing *Cartwright v Green*: "A wife may decline to answer on the ground that her answers might tend to convict her husband"[122]. But the question whether *Cartwright v Green* in truth supported the first proposition is less important than the fact that Taylor said it did. In the later paragraph to which Taylor's footnote cross-referred, Taylor said[123]:

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118 2nd ed (1855), vol 2 at 1064 [1234].

119 (1803) 8 Ves Jun 405 [32 ER 412].

120 (1803) 8 Ves Jun 405 at 410 [32 ER 412 at 413].

121 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 520; [1993] HCA 74.

122 *Forms of Decrees in Equity and of Orders Connected With Them*, 3rd ed (1862), vol II at 1056.

123 2nd ed (1855), vol 2 at 1131-1132 [1308] (footnotes omitted).

> "It has already been casually observed, that some questions 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." (emphasis in original)

Below this will be called "the second proposition". It plainly deals with privilege. The reference to "the husband or wife of the witness" is supported by a footnote referring to *Cartwright v Green* and *R v Inhabitants of All Saints, Worcester*, and also referring back to the first proposition. Taylor's use of the term "it seems" should not be taken to suggest doubt about the second proposition: for in stating the first proposition he had said it was the "better opinion", and that is a standard lawyer's technique for saying: "I am not absolutely certain about it, but my opinion is that it is so." There are many things lawyers think in the course of their professional lives which they are not absolutely certain about, but believe to be the case, and on which other people rely. Thereafter it became not uncommon for *Cartwright v Green* to be treated as an authority relevant to spousal privilege in trials, to be cited with cases specifically on that topic like *R v Inhabitants of All Saints, Worcester*[124] and *Lamb v Munster*[125].

93 Taylor repeated the statement of the first and second propositions as they had appeared in the second edition in 1858 in the third edition[126]; in 1864 in the fourth edition[127]; in 1868 in the fifth edition[128]; in 1872 in the sixth edition[129]; in 1878 in the seventh edition[130] and in 1885 in the eighth edition[131]. Following

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124 For example, Thicknesse, *A Digest of the Law of Husband and Wife*, (1884) at 214 n 7 and 296.

125 (1882) 10 QBD 110 at 112-113, in which Stephen J relied on his own extra-curial statement of spousal privilege: see, for example, Bray, *The Principles and Practice of Discovery*, (1885) at 342.

126 3rd ed (1858), vol 2 at 1105 [1234] and 1174 [1308].

127 4th ed (1864), vol 2 at 1165 [1234] and 1236 [1308].

128 5th ed (1868), vol 2 at 1188-1189 [1234] and 1260 [1308].

129 6th ed (1872), vol 2 at 1188 [1234] and 1258 [1308].

130 7th ed (1878), vol 2 at 1150 [1369] and 1223 [1453].

131 8th ed (1885), vol 2 at 1164 [1369] and 1242 [1453].

Taylor's death, the two propositions were retained by G Pitt-Lewis QC in 1897 in the ninth edition[132], with one change to the first proposition – the replacement of "in these cases" with "by the common law rule of Incompetency". That expression was defined thus: "the common law rule of Incompetency renders husband and wife inadmissible as witnesses for or against each other."[133] In 1906 the tenth edition appeared. It was edited by W E Hume-Williams KC, who was also to be an editor of the relevant title in the first edition of Halsbury's *The Laws of England*, and who was the Recorder of Norwich and a Bencher of the Middle Temple. The tenth edition stated the two propositions as they had appeared in the ninth[134]. The same was true of the eleventh edition in 1920, edited by J B Matthews KC and G F Spear[135], although the first proposition reverted to the form in which it appeared in Taylor's lifetime. In 1931 the twelfth edition, edited by the future Mr Justice Croom-Johnson and G F L Bridgman, had the same form as the eleventh[136].

1853: Starkie

94 The fourth edition of Thomas Starkie's *A Practical Treatise of the Law of Evidence* (1853) was the first not to be prepared by the original author. It was prepared by G M Dowdeswell and J G Malcolm. It sets out the privilege against *self*-incrimination. In a long supporting footnote the following appears[137]: "The same rule applies if the husband or wife would be exposed in like manner". For that proposition *Cartwright v Green* is cited.

1862-1934: Roscoe

95 In 1862 David Power QC, Recorder of Ipswich, edited the sixth edition of *Roscoe's Digest of the Law of Evidence in Criminal Cases* (having previously

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132 9th ed (1897), vol 3 at 892 [1369] and 960 [1453].

133 9th ed (1897), vol 3 at 891 [1368].

134 10th ed (1906), vol 2 at 973 [1368] and 1052-1053 [1453]. It was from that edition that Griffith CJ quoted the two propositions in *Riddle v The King* (1911) 12 CLR 622 at 628 and Lord Wilberforce quoted the first proposition in *Hoskyn v Metropolitan Police Commissioner* [1979] AC 474 at 485-486. In the latter case at 491 Viscount Dilhorne quoted the first proposition from the ninth edition.

135 11th ed (1920), vol 2 at 923 [1368] and 997 [1453].

136 12th ed (1931), vol 2 at 860-861 [1368] and 925-926 [1453].

137 4th ed (1853) at 204 n (s).

edited the fourth (1857) and the fifth (1861)). He inserted two new passages. The first was[138]:

> "A doubt has arisen whether the principle of law which considers husband and wife as one person, extends to protect persons who stand in that relation to each other from answering questions which tend to criminate either, even although they are neither of them upon trial, or in a situation in which the evidence can be used against them."

He then set out a discussion of competence which had appeared in earlier editions. Then he set out the second new passage[139]:

> "But though the husband or wife be competent, it seems to accord with principles of law and humanity that they should not be compelled to give evidence which tends to criminate each other; and in *R v All Saints, Worcester*, Bayley, J, said that if in that case the witness 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, he thought she would have been entitled to the protection of the court. A similar opinion is expressed in 1 *Phil & Arn Ev* 73[140]".

The editor of the seventh edition, published in 1868, was James Fitzjames Stephen QC, Recorder of Newark-on-Trent. He retained the two new passages from the sixth edition[141]. They also remained in the eighth edition (1874), prepared by Horace Smith[142], and the ninth edition (1878), also prepared by Smith, with the addition of a reference to *Cartwright v Green*[143]. The tenth edition (1884), by Smith, was in the same form as the ninth[144]. The eleventh edition (1890), by Smith and G G Kennedy, a metropolitan magistrate, was the same[145], as was the twelfth (1898), by

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138 6th ed (1862) at 140.

139 6th ed (1862) at 141.

140 It is quoted above at [90].

141 7th ed (1868) at 146.

142 8th ed (1874) at 150.

143 9th ed (1878) at 153.

144 10th ed (1884) at 153.

145 11th ed (1890) at 142-143.

A P Perceval Keep[146]. The thirteenth edition (1908), by Herman Cohen, retained the first passage and substituted for the second the following[147]: "But the tendency of the courts is to spare such witnesses as much as possible." This was followed by a citation of Bayley J in *R v Inhabitants of All Saints, Worcester* and of *Cartwright v Green*.

96 In 1866 the eleventh edition of *Roscoe's Digest of the Law of Evidence on the Trial of Actions at Nisi Prius* appeared. It was edited by William Mills and William Markby. William Markby was to become a puisne justice of the High Court of Calcutta, Vice-Chancellor of Calcutta University, and Reader in Indian Law at Oxford. For the first time, that edition of *Roscoe's Digest* contained[148] a passage almost identical with the second passage in Power's edition of *Roscoe's Digest of the Law of Evidence in Criminal Cases* which appeared in the sixth edition of 1862. That passage in *Roscoe's Digest* was repeated in the twelfth, thirteenth and fourteenth editions, appearing in 1870, 1875 and 1879 respectively under the editorship of John C Day (who had taken silk by the time of the thirteenth edition) and Maurice Powell[149]. The same was true in the fifteenth through to the eighteenth editions, prepared by Maurice Powell in 1884, 1891, 1900 and 1907 respectively[150]. In the nineteenth and twentieth editions, prepared by James S Henderson in 1922 and 1934, the passage was repeated, but without the reference to Phillipps and Arnold[151].

1869-1921: Powell

97 In 1869 the third edition of Edmund Powell's *The Principles and Practice of the Law of Evidence* was published under the editorship of John Cutler and E F Griffin. Apart from being a barrister at law, Cutler was Professor of English Law and Jurisprudence and Professor of Indian Jurisprudence at King's College, London. E F Griffin was to become a Lecturer on English Law at King's College, London. The following passage appeared[152]:

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146 12th ed (1898) at 132-133.

147 13th ed (1908) at 127.

148 11th ed (1866) at 106.

149 12th ed (1870) at 176; 13th ed (1875) at 186; 14th ed (1879) at 168.

150 15th ed (1884), vol 1 at 159; 16th ed (1891), vol 1 at 168; 17th ed (1900), vol 1 at 171; 18th ed (1907), vol 1 at 169.

151 19th ed (1922), vol 1 at 151; 20th ed (1934), vol 1 at 173.

152 3rd ed (1869) at 90-91 (footnotes omitted).

> "The question whether a wife is bound to answer questions criminating her husband is not in a satisfactory state. It was held at common law, in *R* v [*Cliviger*], that a wife could not be compelled to answer questions criminating her husband. In *R* v *Worcester*, Lord Ellenborough held that a wife was competent to answer such questions, and that the answers were not excluded on the ground of public policy: but Bayley, J, was of opinion that a wife who threw herself upon the protection of the court would not be compelled to answer. In equity there is no doubt that a wife cannot be compelled to answer any question, which may expose her husband to a charge of felony."

The footnote to the last sentence referred to *Cartwright v Green*. Whether the statement is an accurate account of the case or not, the statement itself reveals a belief that there was support from equity for Bayley J's view of the common law. The quoted passage had not appeared in previous editions, the last being by Powell himself in 1859.

98 In 1875 the fourth edition, by the same editors, repeated the passage[153]. In neither the third nor the fourth edition did the editors explain why the question whether a wife was bound to answer questions incriminating her husband was not in a satisfactory state. In 1885 the fifth edition, by the same editors, and in 1892 the sixth edition, by Cutler and Charles F Cagney, did not contain the sentence raising that question but the balance remained in substance[154]. The seventh and eighth editions of 1898 and 1904 were the same[155]. The ninth edition of 1910, by W Blake Odgers KC (Director of Legal Studies at the Inns of Court, Gresham Professor of Law, and Recorder of Plymouth), introduced a new sentence at the start of the passage[156]:

> "There seems to be some doubt as to how far a witness is privileged as to answering questions tending to criminate his or her wife or husband."

A footnote to that sentence referred in a truncated way to Taylor (apparently the tenth edition of 1906)[157], Phillipps (apparently the ninth edition of 1843 or the

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153 4th ed (1875) at 110.

154 5th ed (1885) at 118; 6th ed (1892) at 123.

155 7th ed (1898) at 102; 8th ed (1904) at 97.

156 9th ed (1910) at 223.

157 See above at [93].

tenth of 1852)[158] and "Roscoe, N. P." (apparently the eighteenth edition of *Roscoe's Digest of the Law of Evidence on the Trial of Actions at Nisi Prius* of 1907). Those three works cited, apart from Phillipps's use of the word "seems"[159], do not suggest "some doubt". The footnote also referred to "Starkie, Ev 204". That appeared to refer to the fourth edition (1853) of Starkie's *Practical Treatise of the Law of Evidence*[160]. The relevant text and footnote was discussed above[161]. Again, that text and footnote scarcely suggests "some doubt".

1870-1922: Best

99 In 1870 the fifth edition of W M Best's *The Principles of the Law of Evidence* was published. It was the last edition to come from Best's own hand. That edition for the first time contained the following passage[162]:

> "Whether a husband or wife is bound to answer questions tending to criminate each other seems unsettled."

A footnote cited Bayley J in *R v Inhabitants of All Saints, Worcester, Cartwright v Green*, and *R v Inhabitants of Cliviger*[163]. The last-named case is in fact neutral on the point. It held that a wife was not a competent witness if her evidence incriminated her husband, but it was overruled on that point in *R v Inhabitants of All Saints, Worcester*. It is thus difficult to see why the question seemed unsettled. The passage was repeated in the sixth edition, edited by John A Russell QC, a County Court judge[164].

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158 See above at [90].

159 See above at [90].

160 4th ed (1853) at 204.

161 See above at [94].

162 5th ed (1870) at 174 [126].

163 (1788) 2 T R 263 [100 ER 143].

164 6th ed (1875) at 175 [126].

100 In 1883 the seventh edition, edited by J M Lely, stated[165]:

> "Husbands and wives do not seem to be bound to answer questions tending to criminate each other; but the authorities are somewhat conflicting."

This more positive assertion of the privilege was supported in a footnote by the three cases just mentioned and *R v Halliday*[166]. That was a case about competence, not privilege. It is therefore difficult to see how the authorities are conflicting. In 1893 the eighth edition, by Lely, repeated the passage in the seventh edition[167]. In 1902 in the ninth edition[168], and in 1906 in the tenth edition[169], Lely retained the passage quoted above and added after it:

> "They 'show that even under the old law which made the parties and their husbands and wives incompetent witnesses, a wife was not incompetent to prove matter which might tend to criminate her husband.' But they 'do not decide that if the wife claimed the privilege of not answering, she would be compelled to do so, and to some extent they suggest that they would not'."

A footnote reveals that the quoted words within Best's text are from a footnote to Art 120 of Stephen's *Digest*; as will be seen immediately, those words had been in that work since the first edition in 1876.

101 In 1911, the eleventh edition of Best's *Principles*, by Sidney L Phipson, retained the expanded passage[170], and added to the supporting footnote a reference to Taylor[171]. In 1922, the twelfth edition[172], again by Phipson, followed the eleventh, with an updated reference to Taylor[173].

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165 7th ed (1883) at 123 [126].

166 (1860) Bell CC 257 [169 ER 1252].

167 8th ed (1893) at 114 [126].

168 9th ed (1902) at 114 [126].

169 10th ed (1906) at 115 [126].

170 11th ed (1911) at 118 [126].

171 10th ed (1906), vol 2 at 973 [1368].

172 12th ed (1922) at 116 [126].

173 11th ed (1920), vol 2 at 923 [1368].

1876-1948: Stephen

102 The appearance of the two propositions in the fifth and sixth editions of Taylor[174] is significant from the point of view of Stephen's work. It has been claimed that Stephen placed very heavy reliance on Taylor in drafting the *Indian Evidence Act* 1872[175]. The claim is extremely exaggerated. But the *Indian Evidence Act* 1872 did reveal that Stephen had a close familiarity with Taylor, although that Act departed in many respects from Taylor where Stephen followed Indian legislative models or acted on his own opinions as to what Indian law, as distinct from English law, should be. On Stephen's return from India to England in 1872, the Attorney-General, Sir John Coleridge, asked him to use the *Indian Evidence Act* 1872 as the basis for an evidence code for England. Stephen did draft an evidence code which Coleridge introduced into the House of Commons on 5 August 1873[176]. But it was not reintroduced after the fall of the first Gladstone government. Stephen then decided to adapt his Evidence Bill, omitting the amendments it made to English law, into *A Digest of the Law of Evidence*, published in 1876. The fifth and sixth editions of Taylor were the latest editions available at that time.

103 Article 120 opened as follows[177]:

> "No one is bound to answer any question if the answer thereto would, in the opinion of the judge, have a tendency to expose the witness [or the wife or husband of the witness] to any criminal charge, or to any penalty or forfeiture which the judge regards as reasonably likely to be preferred or sued for".

The square brackets were in the original. To the proposition just quoted was appended a footnote. That footnote read in part[178]:

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174 See above at [93].

175 Stokes (ed), *The Anglo-Indian Codes, Vol II: Adjective Law*, (1888) at 819 and Twining, *Rethinking Evidence: Exploratory Essays*, 2nd ed (2006) at 57.

176 HC Debates, 5 August 1873, vol 217 at c1559.

177 (1876) at 117.

178 (1876) at 117-118.

> "As to husbands and wives, see 1 Hale, PC 301; *R* v *Cliviger*, 2 TR 263; *Cartwright* v *Green*, 8 Ve 405; *R* v *Bathwick*, 2 B and Ad 639; *R* v *All Saints, Worcester*, 6 M & S 194. These cases show that even under the old law which made the parties and their husbands and wives incompetent witnesses, a wife was not incompetent to prove matter which might tend to criminate her husband. *R* v *Cliviger* assumes that she was, and was to that extent overruled. The cases, however, do not decide that if the wife claimed the privilege of not answering she would be compelled to do so, and to some extent they suggest that she would not."

That "extent", of course, is the extent marked out by Bayley J. In short, the material on which the assertion in Art 120 is based may not be extensive, but it is itself quite clear, and so is Stephen's considered view stated in the Article itself.

104 Stephen was responsible for the first four English editions of his *Digest*. Sir Herbert Stephen (Clerk of Assize for the Northern Circuit) and Harry Lushington Stephen (who became a judge of the High Court of Calcutta) were responsible for the fifth (1899), the sixth (1904), the seventh (1905), the eighth (1907), the ninth (1911), the tenth (1922) and the eleventh (1925). There are bibliographical difficulties with the early English and American editions of Stephen's *Digest*, but these difficulties are immaterial to the fundamental point that neither in the Article nor the footnote was any change made in either the English or, generally, foreign editions (such as American editions and Shaw's Australian edition[179]), apart from the addition to the footnote of a reference to *R v Halliday*[180]. Sir Harry Lushington Stephen and L F Sturge were responsible for the twelfth edition in 1936, reprinted with corrections in 1948. The same was true of that edition, save that the number of the relevant Article was changed from 120 to 129 and the material in the footnote was omitted.

105 In his lifetime and for many years after his death, Stephen had a peculiar stature in relation to the law of evidence. Isaacs J spoke of Stephen's restatement of a proposition of Lord Mansfield CJ's as "clothed with the most eminent and the most authoritative recognition"[181]. In 1909 Phillimore J, after quoting a passage in the *Digest* which F E Smith KC had cited in oral argument, and referring to a passage in Taylor, said: "The authority of Taylor is not so high as that which I have just cited, and before accepting [Taylor's] statement as

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179 The New South Wales edition published in 1909 by Henry Giles Shaw contained both Art 120 and the footnote unchanged, as well as an additional Art 120 for New South Wales to the same effect as the English one, but expanded.

180 (1860) Bell CC 257 [169 ER 1252] (as noted above at [100], this is a case on competence).

181 *Houston v Wittner's Pty Ltd* (1928) 41 CLR 107 at 123; [1928] HCA 34.

conclusive one would prefer to look at the cases cited in support of his proposition."[182] That is, a statement by Stephen was seen as authoritative independently of its sources; not so a statement by Taylor. In similar fashion, in 1954 Harman J was prepared to accept a statement in the *Digest* that there was no authority on a point as conclusive of the proposition that there was none[183]. These judges viewed Stephen's opinions not simply as those of an able writer, but as having a more fundamental significance.

1892-1970: Phipson

106 Sidney L Phipson's *The Law of Evidence* was and remains a leading treatise. The first ten editions did not refer to *R v Inhabitants of All Saints, Worcester*, but they each stated the effect of what Bayley J said. The first stated[184]:

> "No witness (whether party or stranger) is, except in the cases hereafter mentioned, compellable to answer any question or to produce any document, the tendency of which is to expose the witness, or the wife or husband of the witness, to any *criminal charge, penalty, or forfeiture*." (emphasis in original)

That statement was repeated in the next two editions[185]. It was also repeated in the fourth edition, supported[186], in relation to the incrimination of a spouse, by reference specifically to passages in Taylor[187], Best[188] and Stephen[189]. That statement was repeated in the fifth edition[190] with an additional reference to

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182 *Ex parte Bottomley* [1909] 2 KB 14 at 21.

183 *In re Overbury, decd; Sheppard v Matthews* [1955] Ch 122 at 126.

184 (1892) at 111.

185 2nd ed (1898) at 194; 3rd ed (1902) at 181.

186 4th ed (1907) at 193.

187 The reference is to [1368] and could be to either the ninth edition (1897) or the tenth edition (1906): see nn 132-134.

188 The reference is to [126] and could be to any edition from the sixth (1875) through to the tenth (1906): see nn 164-165, 167-169.

189 The note to Art 120.

190 5th ed (1911) at 198.

Taylor[191]. The same was said in the sixth edition[192]. All these editions were from Phipson's hand. The seventh edition was by Roland Burrows, Recorder of Cambridge and Reader to the Inns of Court in, inter alia, evidence, who was assisted by C M Cahn. It repeated the sixth edition[193]. The eighth and ninth editions, by Burrows alone, repeated the passage without reference to prior works[194]. The passage was also repeated in the tenth edition, by Michael V Argyle QC, Recorder of Northampton, who was assisted by E Havers and P Benady[195].

107 In the eleventh edition (1970), Phipson did not contain the traditional passage, but did quote s 14(1)(b) of the *Civil Evidence Act* 1968 (UK), which made the question of privilege at common law academic, at least in civil cases[196]. Thereafter the common law position was not dealt with in Phipson.

1908-1980: Phipson's *Manual*

108 In 1908 Phipson published his *Manual of the Law of Evidence*. It was intended for the use of students, and was described as an abridgement of the fourth edition of his treatise. It stated[197]:

> "No witness (whether party or stranger) is, except in the cases hereafter mentioned, compellable to answer any question … the tendency of which is to expose the witness, or the wife or husband of the witness, to any *criminal charge, penalty, or forfeiture*". (emphasis in original)

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191 The reference is to [1453] and could be to any edition from the seventh (1878) through to the tenth (1906): see nn 130-134.

192 6th ed (1921) at 211.

193 7th ed (1930) at 205.

194 8th ed (1942) at 198; 9th ed (1952) at 213.

195 10th ed (1963) at 264 [611].

196 Buzzard, Amlot and Mitchell, *Phipson on Evidence*, 11th ed (1970) at 260-261 [610].

197 (1908) at 48.

The same statement appeared in the third through to the tenth editions[198]. The third and fourth editions were by Phipson[199]. Burrows and Cahn edited the fifth edition[200]. Burrows edited the sixth and seventh[201]. The next four editions were edited by D W Elliott[202].

109 Phipson's *Manual* is not a work of original learning, but it was used by generations of students.

1907-1963: Cockle

110 The same is true of Ernest Cockle's *Leading Cases on the Law of Evidence*. The first edition stated[203]:

> "No witness, whether a party or stranger, is compellable to answer any question, or to produce any document, the tendency of which would be to expose the witness, or the wife or husband of the witness, to any criminal charge, penalty, or forfeiture reasonably likely to be brought, sued for, or enforced."

The second edition repeated that statement, with the addition of the word "probably" before "the wife"[204]. The third edition was the same[205], but the following note was added[206]:

> "As regards questions tending to criminate husbands and wives of witnesses, there may be some doubt. Probably the privilege exists in such cases."

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198 It has not been possible to examine the second edition.

199 3rd ed (1921) at 58; 4th ed (1928) at 87.

200 5th ed (1935) at 94-95.

201 6th ed (1943) at 95; 7th ed (1950) at 81.

202 8th ed (1959) at 81; 9th ed (1966) at 93; 10th ed (1972) at 99-100; 11th ed (1980) at 148.

203 (1907) at 211.

204 2nd ed (1911) at 235.

205 3rd ed (1915) at 290.

206 3rd ed (1915) at 292.

The author then referred to Taylor, Best and Stephen. Phipson took over the fourth edition, and made no change but to add to the references to other authors a reference to the sixth edition of his treatise[207]. The fifth[208] and sixth[209] editions, by Cahn, were unchanged. Sturge prepared the seventh and eighth editions, with no change but the omission of the Phipson reference[210]. G D Nokes, Professor of Law in the University of London, edited the ninth, tenth and eleventh editions. Only the ninth and tenth editions contain material relevant to the common law. They omitted the first statement quoted above. They retained the second, but substituted "possibly" for "probably", and omitted the references to other works. No reason for these changes was stated[211].

1910-2009: Halsbury

111 In 1910 the first edition of Halsbury's *The Laws of England* stated[212]:

> "A witness may refuse to answer a question on the ground that the answer may tend to incriminate him, that is, may tend to expose the witness, *or the husband or wife of the witness*, to any kind of criminal charge, or to any kind of penalty or forfeiture." (emphasis added)

R v Inhabitants of All Saints, Worcester was cited as one authority for the italicised words. The editors of that title were Hume-Williams, Phipson, J R V Marchant, A Clive Lawrence, Maurice L Gwyer, H G Robertson and W A Greene. Of these, Gwyer was editor of Anson's *Law and Custom of the Constitution: Parliament* and several editions of Anson's *Law of Contract*; Treasury Solicitor; First Parliamentary Counsel to the Treasury; and Chief Justice of the Federal Court of India. Greene was to become Master of the Rolls. In 1934 that passage was repeated verbatim in the second edition with the same citation[213]. The editors were Mr Justice Roche, E Gibbs Kimber and T G Roche. In 1956 there was a passage to almost the same effect in the third

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207 4th ed (1925) at 312 and 314.

208 5th ed (1932) at 318 and 320.

209 6th ed (1938) at 331 and 333.

210 7th ed (1946) at 331 and 333; 8th ed (1952) at 304 and 306.

211 9th ed (1957) at 295; 10th ed (1963) at 111.

212 (1910), vol 13 at 574 [784] (footnotes omitted).

213 (1934), vol 13 at 729 [804].

edition, which did not cite *R v Inhabitants of All Saints, Worcester*[214]. The editors were Nokes and James W Wellwood. In 1976 the fourth edition contained a passage to the same effect, with the deletion of a reference to forfeiture, but limited to non-criminal proceedings[215]. *R v Inhabitants of All Saints, Worcester* was cited, but so was s 14(1)(b) of the *Civil Evidence Act* 1968[216]. The editors were J Roy V McAulay, G Charles W Harris and Richard Inglis. In a reissue of the fourth edition in 1990, in the title on Criminal Law, Evidence and Procedure, the following appeared[217]:

> "It is not clear whether a spouse who gives evidence may refuse to answer a question on the grounds that to do so would incriminate the other spouse, but it seems probable that there is no such privilege."

A footnote cited *R v Pitt*[218], which appears to have caused the change; the other case cited, preceded by "Cf", was *R v Inhabitants of All Saints, Worcester*. It will be necessary to return to *R v Pitt*[219].

112 Further, *Cartwright v Green*[220] was cited in all five editions of Halsbury for a proposition to the effect that the privilege against self-incrimination in relation to the inspection of documents "only extends to the party, and his or her wife or husband in the case of a criminal charge or penal proceedings"[221]. In the fifth edition, however, *R v Inhabitants of All Saints, Worcester* was relied on as an authority for spousal privilege[222].

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214 (1956), vol 15 at 422 [760].

215 (1976), vol 17 at 167-168 [240].

216 See below at [114].

217 (1990), vol 11(2) at 993 [1186] (footnote omitted).

218 [1983] QB 25.

219 See below at [128].

220 (1803) 8 Ves Jun 405 [32 ER 412].

221 Halsbury, *The Laws of England*, (1910), vol 11, "Discovery, Inspection, and Interrogatories" at 84 [135]; 2nd ed (1933), vol 10, "Discovery, Inspection, and Interrogatories" at 396 [477]; 3rd ed (1955), vol 12, "Discovery, Inspection and Interrogatories" at 52 [72]; 4th ed (1975), vol 13, "Discovery, Inspection and Interrogatories" at 75 [92]; 5th ed (2009), vol 11, "Civil Procedure" at 468 [580].

222 5th ed (2009), vol 11, "Civil Procedure" at 735-736 [974].

1958-1979: Cross

113 In the first edition of *Evidence*, Cross raised the question whether the privilege against self-incrimination "extends to answers which would criminate the witness's spouse"[223]. He answered it thus[224]:

> "There is no direct authority on the … point, but dicta suggest that the privilege does extend to answers tending to criminate the witness's spouse."

He cited *R v Inhabitants of All Saints, Worcester*. He went on[225]:

> "The policy considerations underlying the existence of the privilege – conformity with public opinion and the encouragement of testimony appear to apply to such a case".

That passage refers to an earlier passage[226]:

> "[T]he idea that a man should be compelled to give answers exposing himself to the risk of criminal punishment is probably still repellent to public opinion … There is the additional consideration that people must be encouraged to testify freely, and they might not be prepared to come forward as witnesses in the absence of some kind of privilege against incrimination."

That is, Cross saw the privilege as existing. He saw its existence as justified by the repellent spectacle of one spouse giving answers exposing the other spouse to the risk of criminal punishment, and by the importance of encouraging the attendance of one spouse as a witness by enabling that spouse to give evidence on all topics except those involving the risk of incriminating the other spouse. To compel a competent witness to give evidence against that witness's wishes may be a fruitless enterprise. "The only good witness is a willing witness", says the practitioner's saw. But if that witness is prepared to give evidence on some issues, though not so as to incriminate the witness's spouse, there is some point in calling the witness if the witness can claim a privilege in the latter respect: it renders the witness less resistant to the idea of giving evidence at all.

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223 (1958) at 229.

224 (1958) at 229.

225 (1958) at 230.

226 (1958) at 229.

114 The passages from the first edition of Cross just quoted also appeared in the second, third and fourth editions[227]. In the fourth edition, Cross added the following[228]:

> "To make assurance doubly sure with regard to the incrimination of the witness's spouse, section 14(1)(b) of the Civil Evidence Act, 1968 expressly extends the privilege to questions tending to have that effect."

He also stated in a footnote:

> "There is a corresponding provision in clause 15(1)(b) of the draft Bill attached to the 11th Report of the Criminal Law Revision Committee; perhaps it is merely declaratory of the common law."

Taken with the rest of the text, these additions do not suggest any doubt by Cross that the common law rule was as stated by Bayley J. The fifth edition was unchanged[229].

115 In a memorial address for Cross, A M Honoré said that *Evidence* was Cross's "major work". He said that it "broke new ground, and became the standard work not merely in Britain but throughout the English speaking Commonwealth." He said that it "established him as an authority in the eyes of academics, practitioners and those concerned with law reform." He said that "[m]any an English judge kept it by his side in court, and some, not finding the answer in the book, would even ring" the author at home. He went on:

> "Probably no living author has been so often cited by English judges in his own lifetime. … *Evidence* is the sort of book that is difficult to fault. Based on a complete mastery of the sources, legislative, judicial and literary, it sets out the law with virtually perfect precision. Every proposition incorporates all the appropriate qualifications, yet, in reading it, one is never in danger of losing the thread. [Cross] turned a subject which, in the hands of his predecessors, had been a confused jumble of doctrines, statutes, and decisions, into an academic discipline. A worthy successor of Blackstone, it was he who first in this country forced the

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227 2nd ed (1963) at 231-232; 3rd ed (1967) at 229-230; 4th ed (1974) at 245.

228 4th ed (1974) at 246.

229 5th ed (1979) at 278.

> ragged strands of the law of evidence to speak the language of a scholar and a gentleman."[230]

116 H L A Hart added some points to be borne in mind in considering the significance of what Cross said on the present subject. He described *Evidence* as having presented "for the first time a fully comprehensive, lucid, and precise analytical account of the law. … To the successive editions of this renowned work, Cross devoted much thought and care, in effect reworking the subject each time he returned to it and often providing fresh evaluations even of the oldest and most obscure cases."[231]

117 Hart continued[232]:

> "He had an instinctive understanding, sharpened by practical experience as a solicitor, of what lawyers would find difficult and in need of explanation and what arguments would be acceptable to the Courts. Throughout, his main purpose was to formulate and explain clear rules, where the law as it stood was sufficiently settled to permit this, and to point out inconsistencies and to suggest acceptable principles for their resolution."

118 There is no doubt that Cross had immense influence on the judges of his generation. To contend that any statement of his on the common law is erroneous is to assume a very heavy burden of persuasion. With respect, the appellant has not discharged it.

1985-2010: Cross and Tapper

119 The sixth edition of Cross was published in 1985, after his death, and after two decisions which impelled the editor, Colin Tapper, then All Souls Reader in Law and Fellow of Magdalen College, Oxford, to change the text. The text now read[233]:

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230 "Alfred Rupert Neale Cross 1912-1980", in Tapper (ed), *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross*, (1981) xxi at xxiv.

231 "Alfred Rupert Neale Cross 1912-1980", (1984) 70 *Proceedings of the British Academy* 405 at 409.

232 "Alfred Rupert Neale Cross 1912-1980", (1984) 70 *Proceedings of the British Academy* 405 at 410-411.

233 Cross and Tapper, *Cross on Evidence*, 6th ed (1985) at 384 (two footnotes omitted).

> "In civil cases s 14(1)(b) of the Civil Evidence Act 1968 has extended the privilege to questions tending to criminate a spouse. The Criminal Law Revision Committee recommended a similar rule for witnesses in criminal proceedings, excepting only the accused and his spouse, though no such rule has as yet been enacted. It was unwilling to recommend such a general rule in respect of the accused or the spouse of the accused, nor has any such rule been included in the Police and Criminal Evidence Act 1984. Despite some old dicta to the contrary it seems that the privilege did not extend so far at common law. Thus in *R v Pitt*[234] it was held that a spouse should be advised that if she chose to testify for the prosecution she would be treated like any other witness. In such circumstances she can be treated as hostile. All of this would be quite futile if she could nevertheless claim a privilege against incriminating her spouse."

The reference to "old dicta" is to Bayley J in *R v Inhabitants of All Saints, Worcester*, given in a footnote to the text, followed by the words: "compare Lord Diplock in *Rio Tinto Zinc Corpn v Westinghouse Electric Corpn* [1978] AC 547 at 637 …, 'At common law … the privilege against self-incrimination was restricted to the person claiming it and not anyone else.'"

120 The new material was repeated in succeeding editions[235].

121 The first of the decisions which impelled these changes was *Rio Tinto Zinc Corp v Westinghouse Electric Corp*[236], where Lord Diplock said:

> "It was submitted that since the companies were entitled to withhold the documents from production, they had a privilege in English law to require their officers and servants to refuse to answer questions that might lead to the disclosure of the contents of the documents or provide evidence that would tend to expose the companies to a penalty. At common law, as declared in section 14(1) of the Civil Evidence Act 1968, the privilege against self-incrimination was restricted to the incrimination of the person claiming it and not anyone else. There is no trace in the decided cases that it is of wider application; no textbook old or modern

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234 [1983] QB 25.

235 7th ed (1990) at 422; 8th ed (1995) at 458; 9th ed (1999) at 426-427; 10th ed (2004) at 452; 11th ed (2007) at 456; 12th ed (2010) at 425. The eleventh and twelfth editions added references to *Callanan v B* [2005] 1 Qd R 348, *S v Boulton* (2006) 151 FCR 364 and Lusty, "Is there a common law privilege against spouse-incrimination?", (2004) 27 *University of New South Wales Law Journal* 1.

236 [1978] AC 547 at 637-638.

> suggests the contrary. It is not for your Lordships to manufacture for the purposes of this instant case a new privilege hitherto unknown to the law."

122 The following points may be made about this passage.

123 First, it is part of reasons for judgment delivered on 1 December 1977. In its broad and dramatic statement of historical fact it is reminiscent of a statement he made earlier in the same year on 23 March in *United Scientific Holdings Ltd v Burnley Borough Council*[237]:

> "My Lords, if by 'rules of equity' is meant that body of substantive and adjectival law that, prior to 1875, was administered by the Court of Chancery but not by courts of common law, to speak of the rules of equity as being part of the law of England in 1977 is about as meaningful as to speak similarly … of Quia Emptores."

As was soon pointed out, at that date, "*Quia Emptores* remained in force as a pillar of English real property law."[238]

124 Secondly, Lord Diplock was not dealing with an issue that had anything to do with the present question – whether one spouse could claim a privilege against answering questions, the answers to which might tend to incriminate the other. The question he was dealing with was whether companies which were entitled to withhold documents from production on the ground of a privilege against self-incrimination also had a privilege to require their officers and servants to refuse to answer questions that might lead to the disclosure of the contents of the documents or provide evidence that would tend to expose the company to a penalty. That is a very different question from the present question[239].

125 Thirdly, there is nothing to suggest that any argument on the present point was offered to the Court of Appeal or the House of Lords, or that Lord Diplock had it in mind.

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237 [1978] AC 904 at 924.

238 Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies*, 2nd ed (1984) at xi.

239 That consideration and the next consideration are also relevant in distinguishing Australian cases sometimes relied on to negate spousal privilege: *Rochfort v Trade Practices Commission* (1982) 153 CLR 134; [1982] HCA 66; *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* (1985) 156 CLR 385; [1985] HCA 6; *Master Builders Association (NSW) v Plumbers and Gas Fitters Employees' Union (Aust)* (1987) 14 FCR 479; *Concrete Constructions Pty Ltd v Plumbers and Gasfitters Employees' Union* (1987) 15 FCR 31.

126 Fourthly, from one point of view, it is not true that s 14(1) was restricted to the incrimination of the person claiming under s 14(1). Section 14(1)(b) specifically provided for its application in favour of one spouse in relation to the incrimination of the other. From another point of view, Lord Diplock's observation is true of s 14(1) omitting par (b); but the concept of a statutory provision "declaring" the common law is a contradiction in terms. A statute may preserve the common law. It may modify the common law. It may abolish the common law. But it cannot declare the common law. It is another branch of government which declares the common law.

127 Fifthly, it is necessary to deal with Lord Diplock's statements that there is "no trace in the decided cases" and "no textbook old or modern" suggesting that the privilege against self-incrimination applies beyond the incrimination of the person claiming it. The materials examined above provide many illustrations of old and modern textbooks suggesting that it extends to the spouse, including the current edition of the leading textbook available when Lord Diplock spoke. And those materials all construe *R v Inhabitants of All Saints, Worcester* as a case stating a position which is to the contrary of Lord Diplock's. A statement, per incuriam, by a single member of the House of Lords on a point not argued without offering any reasoning cannot alter the law stated in the treatises described above. And, as will be seen below, it is not true that there is "no trace in the decided cases" of spousal privilege[240].

128 The other case which impelled the change in the sixth edition of Cross was *R v Pitt*. A husband was accused of assault occasioning actual bodily harm to his baby. His wife made a witness statement adverse to her husband. Although she was not a compellable witness[241], she entered the witness box, was sworn, and was examined in chief. She then gave answers inconsistent with the witness statement. The trial judge acceded to a prosecution application that she be treated as a hostile witness, and she was cross-examined on the witness statement. The husband was convicted by the jury. The English Court of Appeal allowed an appeal. It reasoned that the verdict was unsafe and unsatisfactory on the ground that insufficient steps had been taken to ensure that the wife was in truth willing to enter the witness box and thus waive her right, as a person who was not compellable as a witness, not to do so. Hence she ought not to have been declared hostile. The consequence of declaring her hostile was to put before the jury the contents of the witness statement, which went only to credit, not to the truth of its contents, and this possibly affected the minds of the jury. The passage

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240 See below at [141]-[150].

241 *Leach v The King* [1912] AC 305; *Hoskyn v Metropolitan Police Commissioner* [1979] AC 474.

which persuaded Tapper to alter the text appears to have been the following[242]: "If [the wife] waives her right of refusal [to enter the witness box], she becomes an ordinary witness." This was not a necessary part of the reasoning leading towards the allowing of the appeal. The argument was presented by two juniors; judgment was reserved for only two days; and there is no trace in the argument of counsel or the reasoning of the Court that anyone had in mind the existence or otherwise of the type of privilege recognised by Bayley J in *R v Inhabitants of All Saints, Worcester*.

129 These two English cases, not directed to the present problem and not containing any reasoning germane to it, cannot affect Australian law.

1964-1980: Cross and Wilkins

130 In 1964, in *An Outline of the Law of Evidence*, Cross and Nancy Wilkins cited *R v Inhabitants of All Saints, Worcester* in support of the proposition that "probably" spousal privilege existed[243]. The same was true of the second edition[244]. In the third edition[245] it was stated, citing *R v Inhabitants of All Saints, Worcester*, that spousal privilege existed in civil cases by reason of the *Civil Evidence Act* 1968, s 14(1)(b), and in criminal cases "probably … by virtue of the common law." The same was true of the fourth edition[246]. In the fifth edition Art 29 referred to spousal privilege. The explanation contained a statement similar to that appearing in the third and fourth editions[247].

Post-1980 questioning

131 There has been some recent questioning, in England and elsewhere[248], about whether spousal privilege exists at common law. That may have been stimulated by the English Law Reform Committee's statement in 1967 that the

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242 [1983] QB 25 at 30.

243 (1964) at 75-76.

244 2nd ed (1968) at 75.

245 3rd ed (1971) at 79-80.

246 4th ed (1975) at 83.

247 5th ed (1980) at 99-100.

248 For example, McNicol, *Law of Privilege*, (1992) at 224-227; Ligertwood and Edmond, *Australian Evidence: A Principled Approach to the Common Law and the Uniform Acts*, 5th ed (2010) at 458-459 [5.165].

position was "not clear"[249] and by the English Criminal Law Revision Committee's statement in 1972 that the common law position was "doubtful"[250]. It may also have been stimulated by a feeling that if a law reform committee recommends legislation on a point, there can be no equivalent common law on that point. The feeling is surely irrational, particularly when those two Committees thought the spousal privilege to be, not pernicious, but desirable. But no one has explained why the position is unclear or doubtful.

The weight of professional tradition

132 The appellant did not point to any authority[251] in which it has been held or even said that Bayley J was wrong. The appellant did not focus on writers, whose works were for it mostly very barren fields, but the above survey reveals that no writer has ever said, until the 1980s, that Bayley J was wrong either. Even writers who used expressions conveying less than certainty, like "seems", did not say "does not seem". Even less can it be said that any writer advanced an argument for why Bayley J might be wrong. And the modern English writers who cast a shadow over Bayley J do so only on the strength of decisions which are on this point unsatisfactory like the *Rio Tinto Zinc* case and *R v Pitt*.

133 Hale justified the practice of holding jury trials mainly before the "twelve men in scarlet who sit in Westminster Hall"[252] in the following way[253]:

> "[I]t keeps both the Rule and the Administration of the Laws of the Kingdom uniform; for those Men are employ'd as Justices, who as they have had a common Education in the Study of the Law, so they daily in Term-time converse and consult with one another; acquaint one another with their Judgments, sit near one another in *Westminster-Hall*, whereby their Judgments and Decisions are necessarily communicated to one another, either immediately or by Relations of others; and by this Means their Judgments and their Administrations of common Justice carry a Consonancy, Congruity and Uniformity one to another, whereby both the

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249 Law Reform Committee, *Sixteenth Report (Privilege in Civil Proceedings)*, (1967) Cmnd 3472 at 6 [9(1)].

250 Criminal Law Revision Committee, *Eleventh Report: Evidence (General)*, (1972) Cmnd 4991 at 103 [169].

251 Apart from *S v Boulton* (2005) 155 A Crim R 152.

252 Simpson, "The Common Law and Legal Theory", in Simpson (ed), *Oxford Essays in Jurisprudence (Second Series)*, (1973) 77 at 96.

253 Hale, *The History of the Common Law of England*, 2nd ed (1716) at 252-253.

> Laws and the Administrations thereof are preserv'd from that Confusion and Disparity that would unavoidably ensue, if the Administration was by several incommunicating Hands, or by provincial Establishments".

That professional background continued to exist well after *R v Inhabitants of All Saints, Worcester* was decided. It supports Simpson's view that[254]:

> "the common law system is properly located as a customary system of law in this sense, that it consists of a body of practices observed and ideas received by a caste of lawyers, these ideas being used by them as providing guidance in what is conceived to be the rational determination of disputes litigated before them, or by them on behalf of clients, and in other contexts. These ideas and practices exist only in the sense that they are accepted and acted upon within the legal profession, just as customary practices may be said to exist within a group in the sense that they are observed, accepted as appropriate forms of behaviour, and transmitted both by example and precept as membership of the group changes."

It is significant that included within the relevant "caste of lawyers" are those who act "on behalf of clients" – "the legal profession". Simpson continued[255]:

> "Now a customary system of law can function only if it can preserve a considerable measure of continuity and cohesion, and it can do this only if mechanisms exist for the transmission of traditional ideas and the encouragement of orthodoxy. There must exist within the group – particularly amongst its most powerful members – strong pressures against innovation; young members of the group must be thoroughly indoctrinated before they achieve any position of influence, and anything more than the most modest originality of thought treated as heresy. In past centuries in the common law these conditions were almost ideally satisfied. The law was the peculiar possession of a small, tightly organized group comprising those who were concerned in the operation of the Royal courts, and within this group the serjeants and judges were dominant. Orthodox ideas were transmitted largely orally, and even the available literary sources were written in a private language as late as the seventeenth century. A wide variety of institutional arrangements tended to produce cohesion of thought. The organization of the profession was gerontocratic, as indeed it still is, and promotion depended upon approval by the senior members of the profession. The system of education and

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254 Simpson, "The Common Law and Legal Theory", in Simpson (ed), *Oxford Essays in Jurisprudence (Second Series)*, (1973) 77 at 94.

255 Simpson, "The Common Law and Legal Theory", in Simpson (ed), *Oxford Essays in Jurisprudence (Second Series)*, (1973) 77 at 95.

> apprenticeship, the residential arrangements, the organization of dispute and argument … all assisted in producing cohesion in orthodoxy and continuity."

134 Hence Blackstone said that the "chief corner stone" of the laws of England was "general immemorial custom, or common law, from time to time declared in the decisions of the courts of justice; which decisions are preserved among our public records, explained in our reports, and digested for general use in the authoritative writings of the venerable sages of the law."[256] By at least the 19th century a key mechanism for the transmission of traditional ideas and the encouragement of orthodoxy was the treatise, written by practitioners and for practitioners. Hence the relevant "caste" of experts is not only not limited to the twelve men in scarlet and those who appear in front of them, but includes those responsible for authoritative writings. And the status of those writings depended partly on the audience at which they were directed and its reaction to them.

135 It has been contended, not without reason, "that the self-image of the common law as judge-made is incomplete. It is judge-and-jurist-made. The common law is to be found in its library, and the law library is nowadays not written only by its judges but also by its jurists." The same author said: "it is a fact that the author-practitioner is a rarity, and for its library the common law now relies for the most part on the university jurists."[257] So far as this last proposition is true, it only became true quite recently. Its incorrectness for earlier times is illustrated, in a specific field, by the survey of the authors and editors attempted above. The subjects of that survey have all, until very recent times, been barristers. Not all became known to fame, but some did. Of evidence authors, as of others in the 19th century, it is true that[258]:

> "many authors were young men and not prestigious figures when they published their treatises (though some became celebrated later in life, either through success in practice, or through a reputation for learning acquired by means of their writings)."

Some wrote or edited more than one of the works referred to above. As authors and editors, they were likely to be keeping an eye on each other's work and on

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256 Blackstone, *Commentaries on the Laws of England*, (1765), bk 1 at 73.

257 Birks, "The academic and the practitioner", (1998) 18 *Legal Studies* 397 at 399-400. Cf Simpson, "The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature", (1981) 48 *University of Chicago Law Review* 632 at 666-668.

258 Simpson, "The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature", (1981) 48 *University of Chicago Law Review* 632 at 667-668.

any decision likely to affect their work. As barristers they belonged to a tightly knit class centralised in a small part of London. It was in many ways a class ideally suited for the protection of liberty and the rule of law. It was a moody murmurous class. Its members were prone to gossip and asperity amongst themselves, conscious of the infirmities of each other and of the judiciary, in constant touch at breakfast, dinner, lunch and tea, or while moving to and from court, and eager to pass on any errors in law books or developments which might affect their accuracy. Premchand said: "What does a thief get by killing another thief? Contempt. But a scholar who slanders another gets glory." The evidence writers sought no glory in that way in relation to the efforts of each other on spousal privilege. Their works reveal a general professional consensus. Writings of that kind generated out of that professional tradition are capable of constituting a source of law in their own right[259].

136 Best CJ said, speaking of an opinion of Coke on a point of real property law[260]:

> "The fact is, … Coke had no authority for what he states, but I am afraid we should get rid of a good deal of what is considered law in Westminster hall, if what … Coke says without authority is not law. He was one of the most eminent lawyers that ever presided as a judge in any court of justice, and what is said by such a person is good evidence of what the law is, particularly when it is in conformity with justice and common sense."

If that is true of a single eminent lawyer, it is true also of a school of thought among a large number of less eminent lawyers, even leaving aside the authority, relatively limited though it may be, which supports it[261]. That proposition is not negated by the rule supposedly existing at various times in the past against citing

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259 An illustration coming from the somewhat different conditions of modern-day Australia is Mr Lusty's first class article, "Is there a common law privilege against spouse-incrimination?", (2004) 27 *University of New South Wales Law Journal* 1. It furnished the first respondent with a considerable amount of ammunition. Rarely can one party have paid so great a tribute to a legal work by devoting so much of its argument to the attempted destruction of a single article as the appellant did. It is an article which may have led to this litigation: for McPherson JA said that he would have denied the existence of the common law spousal privilege had he not read it (*Callanan v B* [2005] 1 Qd R 348 at 352 [6]) and it may be surmised that if so scholarly and respected a judge had denied it no one else would have supported it.

260 *Garland v Jekyll* (1824) 2 Bing 273 at 296-297 [130 ER 311 at 320].

261 See below at [141]-[150].

living authors, for there was no ban on taking their reasoning into account. As Lord Buckmaster said[262]:

> "the common law must be sought in law books by writers of authority and in judgments of the judges entrusted with its administration. … [T]he work of living authors, however deservedly eminent, cannot be used as authority, though the opinions they express may demand attention".

137 Of course professional conditions began to change in the generations after *R v Inhabitants of All Saints, Worcester* was decided. But the opinions of Bayley J entered the common law in part through treatises, and changes in professional conditions alone – even changes much more radical than those which have occurred – could not remove them.

138 The submissions of the appellant entail an assumption that the body of legal writing from 1817 to 1980 surveyed above represents a massive deception of the reading public – judiciary, practitioners and students – stemming from a general self-delusion on the part of nearly 70 writers and editors over nearly two centuries. With respect to the appellant's position, it is not possible to accept that assumption.

The silence of the Commissioners

139 One argument advanced by the appellant was that spousal privilege does not exist, because if it did it would have been mentioned in the second report of Her Majesty's Commissioners for inquiring into the process, practice and system of pleading in the superior courts of common law (1853). The report dealt with many topics over 46 pages. It treated the law of evidence in 17 pages, and those pages dealt with many subjects in that field. It recommended enactment of a statutory privilege for marital communications, but that is a very different thing from spousal privilege. The report did not deal with privilege against self-incrimination, with legal professional privilege or with "without prejudice" privilege; it does not follow that they did not know of the existence of these privileges. Their failure to discuss it is more consistent with a desire to leave it untouched than with a view that it did not exist.

Pointers to spousal privilege of secondary significance

140 It is possible to identify, but desirable only to assign secondary significance to, various instances on which the first respondent relied, and various other instances. One category comprises cases in which counsel whose client would have been advantaged by a denial of the privilege in fact assumed its

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262 *Donoghue v Stevenson* [1932] AC 562 at 567.

existence. An example is *R v Wilde*, in which the accused was charged with stealing some property of W Stallard. Mrs Stallard was called. "She appealed to the Court, that she should not be bound to answer questions which might have a tendency to criminate her husband." The Solicitor-General, who was counsel for the prosecution, "pledged himself not to put any question that could have such a tendency."[263] Another category comprises circumstances in which counsel have claimed the privilege or advanced arguments which depend on its existence[264]. Another category comprises instances in which the court has assumed the privilege[265]. Another category of instances are those in which non-curial bodies have assumed the existence of spousal privilege[266]. These cases are pointers to a state of professional opinion which recognises the existence of the privilege. They have similarities in that respect with statutes which assume the existence of the privilege. Legislatures have assumed that spousal privilege exists at common law by enacting legislation preserving it in both curial[267] and extra-curial[268] contexts. Legislatures have also assumed that spousal privilege exists at common law by enacting legislation abolishing it in relation to particular curial[269]

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263 *Colonial Times* (Hobart), 20 July 1831 at 3.

264 *Re Robert Sterling Pty Ltd (in liq) and the Companies Act (No 2)* [1979] 2 NSWLR 723 at 726.

265 *Re Wagner* [1958] QWN 49.

266 The *Southampton* case (1842) Barr & Aust 376 at 399 (election petition heard by Members of Parliament). See also *The Hobart Town Daily Mercury*, 25 June 1859 at 3 (Coroner cautioned witness not to answer any questions which might criminate her husband); *The Sydney Morning Herald*, 11 September 1906 at 8 and *The Mercury* (Hobart), 12 September 1906 at 3 (Royal Commissioner "told witness she need not answer any question tending to incriminate her husband, whereupon she replied defiantly, 'I do not fear doing that.'").

267 *Evidence Act* 1971 (ACT), s 57 (now repealed).

268 Australia: *Coroners Act* 1958 (Q), s 33(2) (now repealed); *Parole Act* 1976 (ACT), s 19(3)(b) (now repealed); *Police (Complaints and Disciplinary Proceedings) Act* 1985 (SA), ss 25(10) and 28(13). United Kingdom: *Pensions Act* 1995, s 102(1) (now amended); *Jobseekers Act* 1995, s 33(9) (now amended); *National Minimum Wage Act* 1998, s 14(2). New Zealand: *Apple and Pear Marketing Act* 1971, s 45(b) (now repealed); *Petroleum Demand Restraint Act* 1981, s 18.

269 Australia: *Defamation Act* 1974 (NSW), s 56 (now repealed); Local Government Regulations 1994 (Tas), reg 11 (now repealed). United Kingdom: *Theft Act* 1968, s 31(1); *Criminal Damage Act* 1971, s 9; *Senior Courts Act* 1981, s 72; *Representation of the People Act* 1983, s 141; *Children Act* 1989, s 48(2);

(Footnote continues on next page)

or extra-curial[270] proceedings. A distinct category comprises authorities turning not on privilege but on whether a person is not competent or not compellable (for example, *Riddle v The King*[271], *Leach v The King*[272] and *Hoskyn v Metropolitan Police Commissioner*[273]). They are not useful save to the extent that they contain statements about, or capable of extension to, privilege.

The authorities

141 It is true that there is not a vast quantity of authority in the field of privilege (as distinct from non-compellability) to support Bayley J. Despite that, the first respondent correctly submitted that the appellant had failed to "identify any judicial statements, obiter or otherwise, to support its contention that there is no such privilege."[274] She might have added: "nor any but very recent and scanty statements by legal writers".

142 The fewness of the cases supporting Bayley J is a consequence of the relatively limited number of occasions on which the point can arise. In particular, a non-compellable spouse alert to protect the interests of the other spouse is more likely to rely on non-compellability to avoid entering the box at all than to rely on privilege after entering it. But there are authorities which support Bayley J. Contrary to one of the appellant's submissions, spousal privilege has been "applied". A claim to it was upheld in *R v Hamp*[275].

143 In *Lamb v Munster*[276] Stephen J quoted his own *Digest* to the effect that the privilege against self-incrimination extends to questions which "have a

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European Parliamentary Elections Regulations 2004, reg 98. New Zealand: *Destitute Persons Act* 1910, s 69 (now repealed).

270 Australia: *Workers Compensation Act* 1951 (ACT), s 163(4) (now amended); *Fair Trading (Consumer Affairs) Act* 1973 (ACT), s 13(3) (now amended). New Zealand: *Commerce Act* 1986, s 106(4) (now amended); *Takeovers Act* 1993, s 11(4) (now amended).

271 (1911) 12 CLR 622.

272 [1912] AC 305.

273 [1979] AC 474.

274 Apart from *S v Boulton* (2005) 155 A Crim R 152.

275 (1852) 6 Cox CC 167 at 170.

276 (1882) 10 QBD 110 at 112-113.

tendency to expose the witness, or the wife or husband of the witness, to any criminal charge". Self-corroboration has strictly limited virtues, but it cannot be said that he permitted any doubt to affect his expression of the privilege.

144 What of the United States? In *Commonwealth v Reid*, Paxson J of the Supreme Court of Pennsylvania quoted Bayley J with approval[277]. The case concerned the evidence of a woman on whom an abortion had allegedly been performed by the defendant, and also by a man who was the defendant in a separate prosecution. The latter had married the woman shortly before the trial. She did not object to being examined: that is, the case did not concern non-compellability. Paxson J stated the following rule: in cases where "the husband or wife is a competent witness for the commonwealth, it is, notwithstanding, his or her privilege to decline to testify to such facts as will criminate the other."[278] Paxson J also said[279]:

> "the District Attorney advised the witness when she went upon the stand that she was not bound to answer any questions which would criminate her husband. This was a proper instruction, and would have been given by the court, if asked for."

In 1924 the law was stated thus[280]: "A witness may … refuse to disclose matters tending to show that the husband or wife of such witness is guilty of a crime." In the United States the privilege has been pushed from view by a formally different "privilege against adverse spousal testimony"[281].

145 Turning to Canadian authority, in *Millette v Litle*[282], an action for civil libel, the defendants, who were married, were examined by way of oral discovery. The husband apparently answered some questions, but objected to

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277 4 Am L Times Rep 141 at 147 (1871).

278 4 Am L Times Rep 141 at 149 (1871).

279 4 Am L Times Rep 141 at 150 (1871). See also *State v Briggs* 9 RI 361 at 366 (SCRI, 1869) (approving Bayley J in *R v Inhabitants of All Saints, Worcester*); *Williams v State* 69 Ga 11 (SC Ga, 1882); *Woods v State* 76 Ala 35 at 39-40 (SC Ala, 1884); *Watson v State* 61 S 334 at 335 (SC Ala, 1913); *State v Deslovers* 100 A 64 at 71-72 (SCRI, 1917).

280 McKelvey, *Handbook of the Law of Evidence*, 3rd ed (1924) at 443 [236]. See also Torcia (ed), *Wharton's Criminal Evidence*, 13th ed (1972), vol 2 at 237 [391].

281 See *Trammel v United States* 445 US 40 (1980).

282 (1884) 10 Ont Pr Rep 265.

others on the ground that the answers would tend to expose both himself and his wife to prosecution for criminal libel. The wife took the same approach. The Master in Chambers upheld the objection in relation to questions tending to incriminate the defendant questioned, but not in relation to questions tending to incriminate the spouse of the defendant questioned. Galt J, to whom the defendants cited *R v Inhabitants of All Saints, Worcester* and *Lamb v Munster*, allowed an appeal. His reasons are summarised thus in the report[283]:

> "the privilege of declining to answer questions of an incriminating tendency … extended to cases where the danger … apprehended was the criminal prosecution of the wife or husband of the witness."

146 The judgment of Mills J in the Supreme Court of Canada (dissenting, but not on this point) in *Gosselin v The King* contained a dictum stating spousal privilege[284]. So did that of the Ontario Court of Appeal (Morden JA, speaking for himself, Porter CJO and LeBel JA) in *R v Mottola*[285].

147 There are dicta quoting Stephen J's statement in *Lamb v Munster* with approval[286]. There are remarks of McLachlin JA (as she then was) approving the dicta of Bayley J. Like Lord Edmund-Davies, she construed them[287] as "not directed to compellability in the sense of whether a witness must take the stand and testify, but at the quite different question of privilege – what questions a witness properly on the stand may be compelled to answer."[288] There are also remarks of McLachlin JA[289] quoting with apparent approval the proposition that *R v Inhabitants of All Saints, Worcester* is "some authority for the proposition

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283 (1884) 10 Ont Pr Rep 265 at 266.

284 (1903) 33 SCR 255 at 279-280.

285 [1959] OR 520 at 525.

286 *Attorney-General v Kelly (No 2)* (1915) 9 WWR 863 at 866; *Bell v Klein* [1954] 1 DLR 225 at 229-230; *Thomson Newspapers Ltd v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)* [1990] 1 SCR 425 at 472-473; *R v S (RJ)* [1995] 1 SCR 451 at 491 [57].

287 *Hoskyn v Metropolitan Police Commissioner* [1979] AC 474 at 502.

288 *R v McGinty* (1986) 27 CCC (3d) 36 at 51. See also at 58.

289 *R v McGinty* (1986) 27 CCC (3d) 36 at 51.

that the privilege of a witness against self-incrimination extends at common law to questions which might incriminate the witness's spouse."[290]

148 Turning to Australia, in *Tinning v Moran*[291] the Industrial Commission of New South Wales (Cantor, Ferguson and De Baun JJ), obiter, quoted with approval Stephen's formulation of spousal privilege as it appeared in Shaw's edition of Stephen's *Digest*[292]. In *Re Intercontinental Development Corp Pty Ltd* Bowen CJ in Eq uttered dicta supporting spousal privilege, citing *Lamb v Munster*[293]. His dicta have been quoted[294] or referred to with approval[295] in numerous later cases. Stephen J's formulation in *Lamb v Munster* has been quoted with approval quite recently[296]. There are also dicta taking the form of quotation from treatises which state that spousal privilege exists[297].

149 In New Zealand Tompkins J held that a wife examined by the Director of the Serious Fraud Office could not be forced to answer particular questions the answers to which could disclose any inter-spousal communication during marriage: s 29 of the *Evidence Amendment Act (No 2)* 1980 (NZ) created a statutory privilege to that effect. He treated that as "lawful justification or excuse" (within the meaning of s 45(d) of the *Serious Fraud Office Act* 1990 (NZ)) for not answering. He also held that she had a lawful excuse or justification for not providing answers "which may contain information that may assist in proving" charges against her husband. The latter holding does not

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290 Williams, "Case and Comment" on *Hoskyn v Metropolitan Police Commissioner*, [1978] *Criminal Law Review* 429 at 430.

291 (1939) 38 IAR (NSW) 148 at 151.

292 *Digest of the Law of Evidence*, NSW edition (1909) at 156.

293 (1975) 1 ACLR 253 at 259.

294 *Navair Pty Ltd v Transport Workers' Union of Australia* (1981) 52 FLR 177 at 193; *Metroplaza Pty Ltd v Girvan NSW Pty Ltd (in liq)* (1992) 37 FCR 91 at 92; *Re New World Alliance Pty Ltd; Sycotex Pty Ltd v Baseler* (1993) 47 FCR 90 at 96.

295 *Re Robert Sterling Pty Ltd (in liq) and the Companies Act (No 2)* [1979] 2 NSWLR 723 at 726 (spousal privilege claimed in support of a stay application).

296 *Australian Securities and Investments Commission v United Investment Funds Pty Ltd* (2003) 46 ACSR 386 at 387 [2].

297 *Trade Practices Commission v Abbco Iceworks Pty Ltd* (1994) 52 FCR 96 at 125.

concern a statutory privilege, and can only relate to common law spousal privilege[298].

150 The appellant said that Stephen J's statement of spousal privilege in *Lamb v Munster* had been "uncritically" repeated in later cases and in texts. It does not follow from the fact that some judges did not engage in close reasoning about spousal privilege that they were merely mouthing formulae. In his own *Digest* Stephen – who was one of the least uncritical lawyers who ever lived, least of all about himself – set out briefly some competing considerations as well as a firm statement of spousal privilege. The memory of Sir Nigel Bowen remains green in contemporary minds, and his reputation stands high: it was not his practice uncritically to parrot the propositions of law to which he referred. Further, what is believed to be true does not necessarily have to be re-examined critically in every case. Some things can be so much the subject of agreement that they need not be re-agitated. "Uncritical" repetition can be a badge both of the universal acceptance of spousal privilege and of its importance.

151 Apart from the explanations given above to account for the lack of authority for spousal privilege[299], there is another possible explanation both for it and for the expression of such doubts about privilege as the writers expressed. Simpson, writing in 1973, put it thus[300]:

> "In a tightly cohesive group there will exist a wide measure of consensus upon basic ideas and values as well as upon what views are tenable. Argument and discussion will commonly produce agreement in the end, and so long as this is the case there will be little interest in how or why this consensus is achieved. There is no *a priori* reason for supposing that just because agreement is commonly reached this is because there in fact is a rational way of deciding disputes. When however cohesion has begun to break down, and a failure to achieve consensus becomes a commoner phenomenon, interest will begin to develop in the formulation of tests as to how the correctness of legal propositions can be demonstrated, and in the formulation of rules as to the use of authorities – that is to say warrants or proofs that this or that is the law. This is the phenomenon of laws of citation, and it has really struck the common law only in the last century. It seems to me to be a symptom of the breakdown of a system of customary or traditional law. For the only function served by rules telling

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298 *Hawkins v Sturt* [1992] 3 NZLR 602 at 610.

299 See above at [72] and [142].

300 Simpson, "The Common Law and Legal Theory", in Simpson (ed), *Oxford Essays in Jurisprudence (Second Series)*, (1973) 77 at 98-99.

> lawyers how to identify correct propositions of law is to secure acceptance of a corpus of ideas as constituting the law. If agreement and consensus actually exist, no such rules are needed, and if it is lacking to any marked degree it seems highly unlikely that such rules, which are basically anti-rational, will be capable of producing it. It is therefore not surprising to find that today, when there is great interest in the formulation of source rules in the common law world, the law is less settled and predictable than it was in the past when nobody troubled about such matters. In a sense this is obvious. There is only a felt need for authority for a legal proposition when there is some doubt as to whether it is correct or not; in a world in which all propositions require support from authority, there must be widespread doubt. The explanation for the breakdown in the cohesion of the common law is complex, but it is easy to see that the institutional changes of the nineteenth century, and the progressive increase in the scale of operations, had much to do with the process."

These institutional changes began after *R v Inhabitants of All Saints, Worcester* was decided. For much of the 19th century there was nothing like the modern obsession with the citation of authority, particularly recent authority. In that period there was no need for authority about spousal privilege. It was only when the factors referred to by Simpson began to generate that citation obsession that any doubts were expressed about spousal privilege.

Conclusion on curial spousal privilege at common law

152 The Queensland Court of Appeal[301], the Federal Court of Australia[302] and the Full Court of the Federal Court of Australia[303] were correct to accept that for some time the common law has recognised one spouse as having a privilege not to answer questions the answers to which may incriminate the other spouse. It is therefore not necessary to consider the arguments advanced by the appellant against now creating spousal privilege for the first time.

Is spousal privilege a "rule of evidence" or a "rule of substantive law"?

153 The second of the three key issues in this appeal is whether spousal privilege is limited to trials in court, or is available before bodies other than courts. It has been said that the issue rests on a distinction between rules of

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301 *Callanan v B* [2005] 1 Qd R 348.

302 *Stoten v Sage* (2005) 144 FCR 487.

303 *S v Boulton* (2006) 151 FCR 364; *Stoddart v Boulton* (2010) 185 FCR 409.

evidence and rules of substantive law[304]. Examples of "rules of substantive law" in that sense include the privilege against self-incrimination and legal professional privilege.

154 There are several reasons for treating spousal privilege as being, in this sense, a rule of substantive law.

155 Within its narrow sphere it is at least as important a privilege as legal professional privilege. Its basis is different, but it lacks any of the unattractive features of legal professional privilege. One unattractive feature is its tendency to engender ex parte decisions by clients, or by the lawyers representing them, which, in borderline cases or even cases which are far from the borderline, almost always favour that party. Another is its tendency to stimulate false swearing when the opposing party challenges the claim to privilege. Another is its tendency to dominate not only the interlocutory stages of litigation to the exclusion of any other question, but to some extent trials as well. Yet another is its extraordinary and growing complexity.

156 Spousal privilege reflects greater altruism than the privilege against self-incrimination. The privilege against self-incrimination gives witnesses a right to protect their *self*-interest. It is true that there may be elements of self-interest when spousal privilege is claimed – the claim by a wife with a view to keeping her husband out of gaol may be made to improve the wife's financial position, for his capacity to earn will be much greater out of gaol than in. But the claim may also be made to protect the children of the marriage, to preserve the family and to save a once-loved, perhaps still-loved, spouse from suffering. If the privilege against the incrimination of oneself is a fundamental right applying outside litigation in relation to all compulsory fact-finding, why not a privilege against the incrimination of another person or persons, who may, to the claimant for the privilege, be dearer than self?

157 Then there are considerations underlying the non-compellability of spouses which, if sound, are relevant to spousal privilege. It is not proposed to set out fully all the considerations which might be marshalled on these points, including those which, though appropriate for the thinking of past periods, carry less or very little significance in many minds today. It is proposed merely to point to a few which have been adopted by final appellate courts. The question is not whether those considerations are in the end convincing, but whether, assuming that they are convincing, as one must in view of their adoption as the basis of rules of law, they mark out spousal non-compellability and spousal

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304 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 552-553 [10], 563 [44] and 575-576 [85]; [2002] HCA 49.

privilege as rules viewed by the courts as sufficiently important to be treated as "rules of substantive law", not merely "rules of evidence".

158 One consideration identified by Griffith CJ in *Riddle v The King* was[305]:

> "it might … 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."

159 Another consideration is that courts have thought that to compel one spouse to give evidence against the other is to create a spectacle which, by reason of the interrelationship of the spouses, both emotional and financial, arising out of shared experiences in the past and the expectation of them for the future, would be repugnant to the public. Thus in *Hoskyn v Metropolitan Police Commissioner* Lord Wilberforce (Lord Keith of Kinkel concurring) said[306]:

> "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 requires 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?"

In his view the answer to the latter question was "Yes". That approach would support spousal privilege as well as non-compellability. Viscount Dilhorne found 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 the consequences to her and to her family."[307] Lord Salmon said of the non-compellability rule[308]:

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305 (1911) 12 CLR 622 at 631.

306 [1979] AC 474 at 488.

307 [1979] AC 474 at 494.

308 [1979] AC 474 at 495.

> "This rule seems to me to underline the supreme importance attached by the common law to the special status of marriage and to the unity supposed to exist between husband and wife. It also no doubt recognised the natural repugnance of the public at the prospect of a wife giving evidence against her husband in such circumstances."

The repugnance referred to arises as much with inquiries conducted by a non-court in private as it does with litigation conducted before a court in public.

160 To say there is "natural repugnance" is to make an empirical statement. It has never been empirically verified, but can it be doubted? Stone found it to be a very powerful proposition – not resting on the impact of a particular instance, but on a more general consideration. He said[309]:

> "Its real force lies, not in regard to the particular family on whom sordid tragedy has descended, but in the shock to all other citizens whose imagination is led to play upon the horror of such possibilities. Its evil lies in the blow, not to a concrete family, but to the idea of the family which society at large has built up. The evil thus aimed at is socio-psychological merely, but it is not thereby the less grave."

161 Those considerations also underlie spousal privilege. Many might disagree with them, but the law assumes them to be sound. On that assumption, they are plainly important.

162 There are other arguments which have received less explicit recognition in the authorities but which were referred to in Lord Salmon's allusion to "the special status of marriage". Janice Brabyn has convincingly submitted that "even, perhaps especially, our relatively fragmented, highly individualistic 21st century society has a real stake in the viability and stability of marriages."[310] She argued that this was "because of the nature of modern marriages as *intimate* and *committed* relationships and the crucial roles such relationships play in the current and future stability, quality and development of human societies."[311] After giving specific reasons for those conclusions she continued[312]:

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309 Stone, *Evidence: Its History and Policies*, (1991) at 606-607.

310 Brabyn, "A Criminal Defendant's Spouse as a Prosecution Witness", [2011] *Criminal Law Review* 613 at 616 (footnote omitted).

311 Brabyn, "A Criminal Defendant's Spouse as a Prosecution Witness", [2011] *Criminal Law Review* 613 at 616 (footnote omitted; emphasis in original).

312 Brabyn, "A Criminal Defendant's Spouse as a Prosecution Witness", [2011] *Criminal Law Review* 613 at 617-618 (footnotes omitted).

> "Committed, intimate relationships both require and promote relatively high levels of intra-relationship interaction and trust. Intimate self-disclosures are common and necessary. Simply by virtue of close proximity and interaction intimate relationship participants are likely to observe or otherwise learn facts that could directly or circumstantially incriminate the defendant. … No doubt, those involved in preventing, investigating and prosecuting crime would often find such 'relationship information' useful – but forming and maintaining committed intimate relationships requires that potential and actual participants must be confident that relationship information is not generally accessible to the outside world. It is noteworthy that societies that have experienced widespread officially enforced intra family denunciations have found them extremely socially and individually destructive.
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> So, fewer relationships may form. Certainly few will survive one spouse giving significant incriminating evidence against the other. That the spouse was compelled to testify will rarely assist – the defendant will likely deny the spouse was compelled to say the incriminating words actually uttered. In families that do carry on, the residual acrimony and distrust may destroy much of their value. Society has an interest in minimising such damage.
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> Finally, at the level of particular families, all the arguments against compelling a spouse to sacrifice marriage and family interests, perhaps even risk physical injury from the defendant or other family members in the name of criminal justice are as strong as they ever were. Respect for 'personal and family life' must at least mean that imposing these exceptional burdens on spouses cannot be routinely justified whenever the defendant is accused of having broken any criminal law."

These arguments for spousal non-compellability also support the existence of spousal privilege even in the case of compellable spouses; and, once it is accepted that spousal privilege exists, they demonstrate why it is thought to be important.

163 In this age of human rights protection, arguments of the above kind might be said to require spousal privilege to be characterised as a human right. It favours liberty[313]. It preserves a small area of privacy and immunity from the great intrusive powers of the state, and those who invoke them. It fosters human dignity. It helps maintain self-respect. It avoids what is sometimes called a "trilemma" for a wife, for example. Without the privilege, if the wife tells the truth, the husband will be punished; if, to avoid that outcome, she contrives an

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313 *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380 at 442.

untrue answer to protect the husband, she will be punished; and if she seeks to avoid the first two consequences by refusing to answer, she will be punished. Many discount these considerations when the selfish interests of a claimant to the privilege against self-incrimination are involved. They have more force in the case of a spouse not wholly motivated by selfish considerations, but by considerations touching the protection of another and the maintenance of family unity.

164 For those reasons, if legal professional privilege, with all the harm it causes, and the privilege against self-incrimination, with its dominant character of selfishness, are "rules of substantive law", and not merely "rules of evidence", spousal privilege is too.

Did the Act abolish spousal privilege?

165 The third of the three key issues in this appeal is whether spousal privilege, even though it has not been much invoked, is of sufficient importance to attract the "principle of legality". Tompkins J thought so in *Hawkins v Sturt*. He thought, with respect correctly, that it was not to be removed "save by a clear, definite and positive enactment" to that effect[314].

166 The appellant denied that spousal privilege was a fundamental right. It submitted that whether it was fundamental depended on whether it had "entrenched and consistent recognition in the decided cases *as* a fundamental right" (emphasis in original). But a right does not become fundamental merely because cases call it that. And a right does not cease to be fundamental merely because cases do not call it that. In any event, its sibling, spousal non-compellability, has been described in language pointing to the fundamental character of both spousal non-compellability and spousal privilege.

167 The Act has specifically dealt with legal professional privilege (s 30(3)) and the privilege against self-incrimination (s 30(4)). In each case it has cut down the privilege, but with what the first respondent called "a trade-off". The Act has not referred to spousal privilege at all, with or without "a trade-off". If the Act is to be construed as modifying or abolishing spousal privilege it is necessary to find in it explicit language or a necessary implication to that effect. There is none. There are some negative propositions which it is not useful to develop at any length, and this is one of them.

168 In *Coco v The Queen* Mason CJ, Brennan, Gaudron and McHugh JJ said that the principle of legality:

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314 [1992] 3 NZLR 602 at 610. The quoted words are in substance those of Lord Atkinson in *Leach v The King* [1912] AC 305 at 311.

> "may be displaced by an implication if it is necessary to prevent the statutory provisions from becoming inoperative or meaningless. However, it would be very rare for general words in a statute to be rendered inoperative or meaningless if no implication of interference with fundamental rights were made, as general words will almost always be able to be given some operation, even if that operation is limited in scope."[315]

Here the survival of spousal privilege would limit the operation of the provisions slightly, but it would not make them inoperative.

169 Hence, with respect to the detailed arguments of the appellant and the dissenting opinion in the Federal Court[316] to the contrary, the Act has not abrogated spousal privilege, and the opinion of the majority of the Full Court of the Federal Court to that effect is to be preferred[317].

Orders

170 The appeal should be dismissed with costs.

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315 (1994) 179 CLR 427 at 438; [1994] HCA 15.

316 *Stoddart v Boulton* (2010) 185 FCR 409 at 416-433 [40]-[104].

317 *Stoddart v Boulton* (2010) 185 FCR 409 at 410-413 [1]-[29] and 437-447 [130]-[161].

171 CRENNAN, KIEFEL AND BELL JJ. The factual background and statutory materials relevant to this appeal are set out in the reasons of French CJ and Gummow J.

172 In response to a summons issued under s 28 of the *Australian Crime Commission Act* 2002 (Cth) ("the ACC Act") the first respondent attended before the second respondent, an examiner of the Australian Crime Commission, in connection with a "special ACC investigation", as the ACC Act obliged her to do. She took an oath, which was administered by the second respondent, and proceeded to answer questions put to her. Section 30(2)(b) of the ACC Act provides that a person appearing as a witness before an examiner shall not refuse or fail to answer a question that he or she is required to answer by the examiner.

173 The common law has for some time extended certain privileges or immunities to witnesses in court proceedings, by which a witness may be entitled to refuse to answer a question of a particular kind or to produce a document. Some statutes recognise those privileges. The ACC Act expressly recognises legal professional privilege and provides that that privilege is not affected by the ACC Act[318]. The ACC Act does not preserve the common law privilege against self-incrimination; rather it provides a more limited immunity relating to the use to which an answer, or a document or other thing produced, may be put in criminal and other proceedings when the witness claims that the answer, or the production of the document or thing which is sought, may tend to incriminate him or her[319]. The first respondent was advised of her rights in this regard by the second respondent and made that claim.

174 In the course of answering further questions concerning details of her husband's business activities, the first respondent claimed to be entitled to another privilege, described as "the privilege of spousal incrimination", which is to say the right not to give evidence that might incriminate her husband. The ACC Act contains no mention of such a privilege.

175 The existence of a common law privilege of the kind claimed by the first respondent was accepted by the Queensland Court of Appeal in *Callanan v B*[320]

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318 *Australian Crime Commission Act* 2002 (Cth), s 30(3) and (9).

319 *Australian Crime Commission Act* 2002, s 30(4) and (5).

320 [2005] 1 Qd R 348.

and a Full Court of the Federal Court in *S v Boulton* followed that decision[321]. In *Callanan v B*, McPherson JA said[322] that he was disposed to agree with the conclusion of the trial judge (Douglas J) that there was no privilege against incrimination of a spouse at common law. However, a paper then recently published[323] influenced his Honour to a contrary view. The further question in *S v Boulton* was whether that privilege extended to de facto spouses. It was held that it did not. A majority in that case further considered that the privilege had, in any event, been abrogated by the ACC Act.

176 It was against this background that the second respondent, whilst rejecting the first respondent's claim to a spousal privilege, adjourned the examination to enable her to bring proceedings in which the questions whether the claimed privilege existed, and if so whether it continued to have effect, might be determined.

177 In the Federal Court[324] the primary judge (Reeves J) dismissed the first respondent's application for declaratory and injunctive relief directed to the second respondent, holding that a spousal privilege existed at common law, but that it was abrogated by the ACC Act. The first question was not in contention on appeal, but a Full Court held, by a majority (Spender and Logan JJ, Greenwood J dissenting on this point), that the ACC Act had not abrogated that privilege[325].

The nature of the "privilege" claimed

178 Questions about the competence and compellability of spouses to give evidence against one another have had a long history. Statutes of the Commonwealth, and of the States and Territories, now deal with these questions for the purposes of criminal proceedings, although the provisions are not uniform

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321 (2006) 151 FCR 364. (As primary judge in that case Kiefel J did not share this view: *S v Boulton* (2005) 155 A Crim R 152.)

322 [2005] 1 Qd R 348 at 352 [6] per McPherson JA, 351 [1], 356 [17] per McMurdo P and Jerrard JA, respectively, agreeing.

323 Lusty, "Is There a Common Law Privilege Against Spouse-Incrimination?", (2004) 27 *University of New South Wales Law Journal* 1.

324 *Stoddart v Boulton (Examiner, Australian Crime Commission)* (2009) 260 ALR 268.

325 *Stoddart v Boulton* (2010) 185 FCR 409.

in their effect. The *Evidence Act* 1995 (Cth) makes provision for the compellability of spouses and others in certain criminal proceedings[326] but the Act is not expressed to apply to an examination under the ACC Act[327]. Therefore, it is necessary to turn to the common law and the provisions of the ACC Act on these questions.

179 The first respondent does not contend that the common law would regard her as incompetent to give evidence under examination. The rule relating to spousal competency, which will shortly be explained, does not apply to her situation. Whilst there may be a question whether the common law, at least as developed in England, might regard her as not compellable to give evidence such a determination could only operate as a rule of evidence. As such it is more readily negated by statute than is a substantive rule of law. In any event the provisions of the ACC Act require her to give evidence upon summons. Thus it is a right in the nature of a privilege which the first respondent seeks in the common law. If the privilege claimed is recognised by the common law, the parties do not dispute that it might apply to her examination[328].

180 It is necessary to be clear about what it is the first respondent claims as a "privilege", not the least because the term is sometimes used in a sense which does not correspond with that of a privilege in the strict sense, namely a substantive right or immunity of a witness which is provided by law.

181 The first respondent claims a privilege in this sense. She claims that the common law long ago created a right of a fundamental nature which entitled a spouse to refuse to answer questions which might incriminate the other spouse. The principle of legality would therefore apply to it and require clear and definite statutory language to affect or negate it.

182 The principle of legality "governs the relations between Parliament, the executive and the courts."[329] It is an aspect of the rule of law. The presumption to which it gives rise, that it is highly improbable that Parliament would act to

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326 *Evidence Act* 1995 (Cth), ss 18 and 19.

327 *Evidence Act* 1995, s 4.

328 In this regard see *Callanan v B* [2005] 1 Qd R 348 at 353 [8] per McPherson JA.

329 *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 329 [21]; [2004] HCA 40, referring to *R v Secretary of State for the Home Department; Ex parte Pierson* [1998] AC 539 at 587, 589; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 259 [15]; [2010] HCA 23.

depart from fundamental rights or principles without expressing itself with "irresistible clearness"[330], has been described as a working hypothesis, known to both the Parliament and the courts, upon which statutory language will be interpreted[331]. It would appear to accord with that principle and hypothesis that the fundamental right, freedom, immunity or other legal rule which is said to be the subject of the principle's protection, is one which is recognised by the courts and clearly so.

183 The principal question on this appeal is whether that recognition is evident from the historical record. In the consideration of that record it is necessary to bear in mind the distinctions between competence, compellability and privilege.

184 The distinction is explained in *Cross on Evidence*[332]. A person is not competent to give evidence if the law, for whatever reason, does not permit him or her to do so. A person is compellable if that person can lawfully be obliged to give evidence. In the absence of statutory provision, these questions are determined by the court and they are usually determined before the person enters the witness box. Thus both competency and compellability relate to the question whether a person gives evidence. Once sworn, a witness must answer all relevant and proper questions put to him or her unless their refusal to answer is based upon a privilege conferred by the law.

185 A person's duty to provide answers, once he or she has been sworn as a witness, has also been referred to in connection with compellability at common law[333]. Used in this sense, compellability might, on occasions, involve the question whether a claimed privilege is available to the witness. But if a witness was held not to be obliged to answer on that account, one would expect to see a reference to a right in the witness in the reasons given by the court – a right which the court must recognise. In such a case the reasons ought not to suggest that the matter remains within the purview of the court.

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330 *Potter v Minahan* (1908) 7 CLR 277 at 304; [1908] HCA 63.

331 *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 329 [21] per Gleeson CJ.

332 8th Aust ed (2010) at 417 [13001].

333 Phipson, *The Law of Evidence*, (1892) at 322; see also Wigmore, *Evidence in Trials at Common Law*, (1904), vol 3 at 2963 [2190].

186 A true privilege, such as legal professional privilege, operates as a substantive rule of law and not as a rule of evidence[334]. It enables a person, who is otherwise competent and compellable as a witness, to refuse to answer a question directed to a particular subject, a question which is otherwise relevant to the matters in issue. A privilege has been described as relating to an area of interrogation[335]. A privilege permits a witness to make a choice as to whether he or she will claim it, or provide the answer or produce the document.

187 At an early point the common law established a rule of competency relating to the testimony of spouses. It may be more correct to refer to rules of competency, for husband and wife were prevented from giving evidence *for* or *against* each other and these rules may have been created separately and by reference to somewhat different policy considerations. We shall continue to refer to the rule of competency as a combined rule, as it has commonly been so described.

188 There seems no reason to doubt that at the time of the development of the trial process, to which these rules were relevant, the common law courts distinguished between competence and compellability. And in the latter regard they appear also to have distinguished between a person's duty to attend and be sworn as a witness and a person's duty to disclose what he or she knows once sworn[336]. These duties were recognised by the early 1600s[337].

189 If a spousal privilege existed, the occasion for it to be claimed could only arise in a case where the rule of competency did not apply and the spouse was both competent and compellable to give evidence. Where the rule of competency applied no question of compellability, let alone privilege, could arise.

190 The rule of competency was held in *R v The Inhabitants of All Saints, Worcester*[338] not to apply where the wife's evidence would only indirectly incriminate her husband, by rendering him liable to charges. An analogy with

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334 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 552 [9]-[10]; [2002] HCA 49.

335 McNicol, *Law of Privilege*, (1992) at 301.

336 Wigmore, *Evidence in Trials at Common Law*, (1904), vol 3 at 2963 [2190]; see also Phipson, *The Law of Evidence*, (1892) at 322.

337 Wigmore, *Evidence in Trials at Common Law*, (1904), vol 3 at 2963 [2190].

338 (1817) 6 M & S 194 [105 ER 1215].

the evidence which might be given by the first respondent under examination is apparent. Observations made in that case, and references in later cases, are the principal source for the first respondent's argument that the claimed privilege has been recognised by the courts. Those observations and commentary upon them were later considered in connection with the compellability of a wife to give evidence against her husband when he was charged with injuring her person[339]. Such a circumstance is one of the few exceptions to the rule of competency.

191 For the reasons which follow we conclude that the cases and historical materials do not provide a sufficient basis for a conclusion that the claimed privilege exists.

The rule of competency

192 Professor Holdsworth explains that considerable control came to be exercised by the common law courts in the 16th century, in the course of the development of the trial as a process and of the giving of oral evidence within it. That control extended to issues as to who was competent to testify, the compellability of witnesses and what evidence might be tendered as relevant in the proceedings. The control exercised over witnesses was a natural progression of the control, and the discretion, the courts had earlier exercised with respect to documentary evidence and in particular with respect to the averments of counsel which would be admitted in the proceedings[340].

193 In medieval times no means had been available to compel witnesses to come forward to testify. The Statute of Elizabeth of 1562-1563 established, at least in civil proceedings, that all competent witnesses were compellable to give evidence[341]. In aid of that power the common law courts borrowed procedures such as that of subpoena from the Chancery courts[342]. The common law courts developed their own rules, different from those of the canon law, concerning who

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339 See for example *Hoskyn v Metropolitan Police Commissioner* [1979] AC 474 at 485-486.

340 Holdsworth, *A History of English Law*, 3rd ed (1944), vol 9 at 131-132.

341 5 Eliz c 9; see also Holdsworth, *A History of English Law*, 3rd ed (1944), vol 9 at 131 and Wigmore, *Evidence in Trials at Common Law*, (1904), vol 3 at 2961 [2190].

342 Holdsworth, *A History of English Law*, 3rd ed (1944), vol 9 at 131.

was able to testify[343]. The variety of persons held by the courts not to be competent to testify was elaborated upon in the 16th and 17th centuries[344].

194 The courts determined that parties were incompetent as witnesses in their own cause. The rule may have owed something to the viewpoint of continental and of Roman law. It was extended to disqualify other witnesses who had an interest in the case and it was later applied in criminal proceedings[345]. It may have been thought to follow, logically, from the disqualification on account of interest, that a husband and wife should be disqualified in giving evidence in favour of the other. The source of the rule that spouses were disqualified from giving evidence against each other is not clear. But by the time of Coke's First Institute, in 1628, a single rule was expressed – that husband and wife were not competent to give evidence *for or against* each other.

195 Coke stated[346] that it had been resolved by the justices that a wife "cannot be produced either against or for her husband" and gave as reasons that husband and wife were regarded by the law as one flesh and that to allow her to give evidence might be a "cause of implacable discord and dissention between the husband and the wife, and a meane of great inconvenience". The firstmentioned reason was later adapted to the husband and wife having a common or unified interest. A text on evidence, of 1801[347], stated the rule as:

> "no one can be a witness for himself; and it follows of course that husband and wife, whose interests the law has united, are incompetent to give evidence on behalf of each other … and the law, considering the policy of marriage, also prevents them from giving evidence against each other … [S]uch a rule would occasion implacable divisions".

196 Professor Wigmore suggested that the explanation, for what he terms the "privilege" of a spouse not to give evidence against the other, is the repugnance which was felt "in those days of closer family unity and more rigid paternal authority" to condemning a man by "admitting to the witness-stand" those who

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343 Holdsworth, *A History of English Law*, 3rd ed (1944), vol 9 at 186-187.

344 Holdsworth, *A History of English Law*, 3rd ed (1944), vol 9 at 187.

345 Holdsworth, *A History of English Law*, 3rd ed (1944), vol 9 at 194-195.

346 Coke, *Commentary upon Littleton*, (1628) at 6b.

347 Peake, *A Compendium of The Law of Evidence*, (1801) at 121.

depended upon him[348], although other family members and servants were not excluded from giving evidence. The policy of the law has regarded the prospect of a party to a marriage giving evidence against the other with distaste, and as reflecting community sentiment, although the ascertainment of the facts and the enforcement of the criminal law have been seen by some as competing policy objectives[349]. Professor Wigmore, in particular, described it as "an indefensible obstruction to truth, in practice."[350] Nevertheless, in 1978, when the House of Lords came to consider the position of the common law on the question of compellability, in *Hoskyn v Metropolitan Police Commissioner*[351], it was said that the rule was based upon "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."

197 Professor Wigmore used the word "privilege" in distinguishing the two aspects of the rule. He described the rule as it operated to prevent a spouse from giving evidence *for* the other as a "disqualification" and its operation to prevent a spouse giving evidence *against* the other as a "privilege"[352]. The latter term is maintained throughout the chapter on "Marital Relationship as a Testimonial Disqualification"[353] and may have been influential with others[354] to describe this aspect of the rule.

198 A report of a ruling in a case[355] which predates Coke's statement suggested to Professor Wigmore that a "privilege" may have existed prior to, and was

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348 Wigmore, *Evidence in Trials at Common Law*, (1904), vol 3 at 3035 [2227].

349 See for example *R v Lapworth* [1931] 1 KB 117 at 122 per Avory J; *Hoskyn v Metropolitan Police Commissioner* [1979] AC 474 at 507 per Lord Edmund-Davies.

350 Wigmore, *Evidence in Trials at Common Law*, 3rd ed (1940), vol 8 at 232 [2228].

351 [1979] AC 474 at 488 per Lord Wilberforce; see also at 494 per Viscount Dilhorne.

352 Wigmore, *Evidence in Trials at Common Law*, (1904), vol 3 at 3034 [2227].

353 Wigmore, *Evidence in Trials at Common Law*, (1904), vol 1 at 728-743 [600]-[620].

354 For example, Holdsworth, *A History of English Law*, 3rd ed (1944), vol 9 at 197-198, although he also refers to it as a "disqualification".

355 *Bent v Allot* (1580) Cary 94 at 94-95 [21 ER 50 at 50]: "*The defendant's wife examined as a witness*. – It is informed that Colston, one of the defendants,

(Footnote continues on next page)

therefore separate from, the "disqualification". He draws from the report the court's acknowledgement that a husband had a right to prevent his wife testifying against him[356].

199 Professor Wigmore suggested that Coke was in error in his statement and merged two rules[357]. Regardless of the correctness of that view, the matter of the testimony of a spouse, whether for or against the other, has long been treated as one of competence effecting a disqualification[358], subject to certain exceptions and limitations upon that rule to which reference will be made. In *Barker v Dixie*[359] Lord Hardwicke CJ refused to allow the plaintiff's wife to be called as a witness, although the defendant consented to that course:

> "The reason why the law will not suffer a wife to be a witness for or against her husband is, to preserve the peace of families; and therefore I shall never encourage such a consent; and she was not examined".

In *Shenton v Tyler*[360] Sir Wilfrid Greene MR denied that the privilege spoken of by Professor Wigmore had been part of English law and stated that the rules of evidence applied by the courts in connection with spouses related to competence and compellability[361].

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examined his own wife as a witness: it is therefore ordered, the plaintant may take a subpoena against her on his behalf; and if Colston will not suffer her to be examined on the plaintant's party, then her examination on the said Colston's party is suppressed".

356 Wigmore, *Evidence in Trials at Common Law*, (1904), vol 3 at 3034 [2227].

357 Wigmore, *Evidence in Trials at Common Law*, (1904), vol 3 at 3037 [2228].

358 Stephen, *A Digest of the Law of Evidence*, 4th ed (1881) at 124 fn 1; *Rumping v Director of Public Prosecutions* [1964] AC 814 at 836 per Viscount Radcliffe; *Hoskyn v Metropolitan Police Commissioner* [1979] AC 474 at 484 per Lord Wilberforce, 489 per Viscount Dilhorne, 495 per Lord Salmon.

359 (1736) Cas T Hard 264 [95 ER 171].

360 [1939] Ch 620, which concerned another claim of spousal privilege which Professor Wigmore supported, that of a marital communication: Wigmore, *Evidence in Trials at Common Law*, (1905), vol 4 at 3257-3270 [2332]-[2341].

361 *Shenton v Tyler* [1939] Ch 620 at 626, 638.

200 Professor Wigmore does not suggest that the privilege of the husband to which he referred was derived from the privilege against self-incrimination. He regarded that privilege as irrelevant to marital testimony[362]. And Professor Holdsworth said that it is possible that that privilege may have followed upon the rules of incompetency[363]. Moreover, the privilege against self-incrimination has not been regarded as a privilege against incrimination by others, rather it is directed to the prospect of a person suffering a penalty or conviction out of his or her own mouth[364].

201 If it were suggested that the claimed spousal privilege had its foundations in the privilege against self-incrimination, the question would arise whether a wife could maintain it for her husband when the ACC Act appears to abrogate, or severely curtail, the husband's privilege against self-incrimination. We do not understand the first respondent to contend that status for the claimed privilege is gained by some connection to the privilege against self-incrimination.

The spouse as a compellable witness

202 The rule of competency, when it applied, meant that a person could not be called to give evidence in proceedings, for or against his or her spouse. In such a circumstance questions of the compellability of a spouse, or any privilege he or she had to refuse to answer a question, would not arise.

203 It has been suggested that an authoritative statement, earlier than that of Coke, appears in Michael Dalton's *Countrey Justice*, published in 1619[365], to the effect that a wife was not to be bound to give evidence against her husband[366]. If the words "not to be bound" were understood as "not obliged" they might imply

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362 Wigmore, *Evidence in Trials at Common Law*, (1904), vol 3 at 3039 [2228].

363 Holdsworth, *A History of English Law*, 3rd ed (1944), vol 9 at 198.

364 *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* (1985) 156 CLR 385 at 393; [1985] HCA 6; *Rio Tinto Zinc Corp v Westinghouse Electric Corp* [1978] AC 547 at 637.

365 Dalton, *Countrey Justice*, (1619) at 270.

366 Lusty, "Is There a Common Law Privilege Against Spouse-Incrimination?", (2004) 27 *University of New South Wales Law Journal* 1 at 12-13.

some choice, on the part of the wife, consistent with a privilege. The particular passage relied upon in this regard[367] is as follows[368]:

> "And yet the wife is not to be bound to give evidence, nor to be examined against her husband; for by the lawes of God, & of this land, she ought not to discover his counsell, or his offence in case of theft, (or other felony, as it seemeth) … I have knowen the Judge of Assise greatly to disallow, that the wife should be examined, or bound to give in any evidence against others in case of theft, wherein her husband was a partie, and yet her Evidence was pregnant and material to have proved the felony against others that were parties to the same felony, and not directly against the husband."

204 However, the words which immediately precede this passage are[369]:

> "The Justices of Peace have authoritie (by the words of the Statute) to binde by Recognizance all such as do declare any thing materiall to proove the felony, to give evidence against the offendor".

Dalton is describing the operation of the "Marian Committal Statute" of 1555[370], which authorised the examination of witnesses for the purposes of criminal proceedings. It has been suggested that the reference to the wife "not to be bound to give evidence" may be to the act of binding her over by recognisance to attend trial[371]. The statement which follows would appear to be in the nature of a prohibition against her being examined as a witness at all and is consistent with a rule of competency.

205 The first respondent submitted that Dalton ought to be taken to refer to the compellability of the wife, rather than her incompetence. Reference was made in this regard to Sir Matthew Hale's summary of Dalton's observations[372] and to the following commentaries thereon:

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367 Lusty, "Is There a Common Law Privilege Against Spouse-Incrimination?", (2004) 27 *University of New South Wales Law Journal* 1 at 12.

368 Dalton, *Countrey Justice*, (1619) at 270.

369 Dalton, *Countrey Justice*, (1619) at 270.

370 2 & 3 Ph & M c 10.

371 In argument in *Hoskyn v Metropolitan Police Commissioner* [1979] AC 474 at 481.

372 Hale, *The History of the Pleas of the Crown*, 2nd ed (1778), vol 1 at 301.

> "The wife of a receiver who is not indicted, cannot be *compelled* to give evidence against a prisoner accused of the larceny, nor to be sworn or give evidence against another in case of theft, &c if her husband be concerned, though material against another, and not directly against her husband"[373] (emphasis added, footnote omitted)

and

> "Lord Hale's … authority goes no further than this, that the wife is not *compellable* to give any evidence charging the husband with an offence"[374]. (emphasis in original)

206 These commentaries, and the latter part of the passage from Dalton, appear to be directed to the question whether the wife should be compelled to give evidence which might indirectly incriminate her husband and lead to him being charged with an offence. The passage from Dalton and the first commentary raise the question whether the wife should give evidence in a case where her husband was a party to an offence, but is not charged, where that evidence would be relevant against his co-offenders. Dalton suggests that the court would not require her to give evidence in such a circumstance. This does not equate to a privilege.

207 It has been observed that no authority dealt with the question of the compellability of the wife, where she is otherwise competent, until the 19th century[375]. The question whether a wife was competent to give evidence which might tend to, but not directly, incriminate her husband arose in *All Saints*[376] and it was held that she was competent. The earlier decision in *R v The Inhabitants of Cliviger*[377] had held to the contrary. A subsidiary question, which was

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373 Talfourd, *A Practical Guide to The Quarter Sessions, and Other Sessions of the Peace*, 4th ed (1838) at 507.

374 Phillipps, *A Treatise on the Law of Evidence*, 3rd ed (1817) at 67.

375 *Hoskyn v Metropolitan Police Commissioner* [1979] AC 474 at 485 per Lord Wilberforce.

376 *R v The Inhabitants of All Saints, Worcester* (1817) 6 M & S 194 [105 ER 1215].

377 (1788) 2 T R 263 [100 ER 143].

addressed by Bayley J in *All Saints*[378], was whether the wife ought then to be compelled to give such evidence.

208 Each of *Cliviger* and *All Saints* concerned the obligation of a parish to maintain a woman, to which issue her status as a married woman was relevant. Neither she nor her husband were parties to the proceedings and the husband did not stand as accused in them. However, a person, said to be the husband's wife by an earlier and continuing marriage, was sought to be called as a witness to give evidence, the effect of which might be to expose him to a charge of bigamy.

209 In *Cliviger* the evidence of the alleged first wife would also have contradicted the husband's sworn evidence that he had not been earlier married. Ashhurst J said that the situation presented "creates the doubt, whether it was competent to the wife to prove" that he had been married[379]. His Honour said that, although no question of those persons' interest in the proceedings arose, the proposed witness was incompetent to give evidence on the ground of public policy, which did not permit husband and wife to give evidence that "may even tend to criminate each other", observing that her evidence could prove him guilty of perjury, as well as bigamy[380]. Likewise, in *Cartwright v Green*[381] a wife's demurrer against a bill of discovery was upheld by Lord Eldon LC, on the ground that disclosure might incriminate her husband of a felonious taking of monies. But in a later case, *R v The Inhabitants of Bathwick*[382], Lord Tenterden CJ described the authority of the decision in *Cliviger* as "much shaken" by the decision in *All Saints*, which he followed, holding the wife to be a competent witness.

210 Lord Ellenborough CJ, in *All Saints*, considered that it would be going too far to hold a wife incompetent "as to every fact which may possibly have a tendency to criminate her husband"[383]. To hold that a wife could give evidence

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378 *R v The Inhabitants of All Saints, Worcester* (1817) 6 M & S 194 at 200-201 [105 ER 1215 at 1217-1218].

379 *R v The Inhabitants of Cliviger* (1788) 2 T R 263 at 267 [100 ER 143 at 146].

380 *R v The Inhabitants of Cliviger* (1788) 2 T R 263 at 268 [100 ER 143 at 146].

381 (1803) 8 Ves Jun 405 [32 ER 412].

382 (1831) 2 B & Ad 639 at 646 [109 ER 1280 at 1283].

383 *R v The Inhabitants of All Saints, Worcester* (1817) 6 M & S 194 at 199 [105 ER 1215 at 1217].

would not cut across the rule of competency, that husband and wife shall not be permitted to be witnesses for or against or to incriminate each other, which he said was "founded in the policy of the law"[384]. Bayley and Abbott JJ were of like view. The ratio of *All Saints* is therefore that the rule of competency does not extend to a case where the evidence of a spouse may only indirectly incriminate the other spouse.

211 In *All Saints* the wife gave evidence of the fact of the earlier marriage. She did not "refuse to be examined", as Lord Ellenborough observed[385]. Whether he was implying a choice in her not to do so is not plain in what followed in his reasons. Neither he nor Abbott J discussed the question whether she would have been compellable in any event, but Bayley J did say something on this topic. It is his statement upon which the first respondent's argument substantially relies. He said, by way of obiter dictum[386]:

> "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 enquiry, and perhaps to the obtaining of evidence against her husband."

212 Bayley J observed that the rule of competency did not avail the wife (there was "no objection arising out of the policy of the law"). In any event she was willing to, and did, give evidence. It was in this context that he raised the question, whether she may have been obliged to do so, had she not been willing. This would appear to point to considerations of her compellability as a witness.

213 The first respondent rightly points out that the hypothesis of Bayley J is couched in terms as to whether the wife would be obliged to answer a question

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384 *R v The Inhabitants of All Saints, Worcester* (1817) 6 M & S 194 at 199 [105 ER 1215 at 1217].

385 *R v The Inhabitants of All Saints, Worcester* (1817) 6 M & S 194 at 198 [105 ER 1215 at 1217].

386 *R v The Inhabitants of All Saints, Worcester* (1817) 6 M & S 194 at 200-201 [105 ER 1215 at 1217-1218].

put to her. This could only arise after she had been sworn as a witness. Posing the question in this way might imply that Bayley J had something like a privilege in mind. But this is not clear from other references he makes. He does not refer to the wife as being able to claim a right as a witness, but to her seeking the protection of the court, and he does so on two occasions. This more strongly suggests that he had in mind an exercise of the court's power. The occasion for its exercise would be as to the question of her compellability as a witness. This is the issue which later cases regard Bayley J as having addressed.

214 It may be that the question of the wife's compellability had not been the subject of much consideration by the time of *All Saints*, given that the antecedent question as to the operation of the rule of competency had not been resolved. This may explain what Lord Edmund-Davies later observed in *Hoskyn*, that Bayley J expressed his view "in notably tentative language"[387]. These matters do not suggest the existence at this point of a recognised, freestanding privilege in a spouse as a witness as likely.

215 The later cases of *Riddle v The King*[388] and *Hoskyn* dealt with the question of the compellability of a wife in the circumstance where the rule of competency did not apply but for a different reason. In each case the husband was charged with offences against the wife. In *Riddle* the husband stood charged with wounding with intent to murder his wife; in *Hoskyn* the charge was of wounding the wife with intent to do her grievous bodily harm. In *Hoskyn*'s case, notably, the marriage took place only a few days before the trial of the husband. In both cases the evidence of the wife could directly incriminate the husband on the charges and the rule of competency could therefore apply.

216 Cases of personal violence against a wife have long been treated as an exception to the rule of competency. Three years after Coke's statement of the rule it was held that a wife was *allowed* to give evidence against her husband when he was charged with her rape[389]. Although the decision was doubted for a time it later came to be applied. In *Bentley v Cooke*[390] Lord Mansfield said that a wife (or husband) had been *permitted* to be a witness when necessity required;

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387 *Hoskyn v Metropolitan Police Commissioner* [1979] AC 474 at 503 (his Lordship was in dissent in the outcome).

388 (1911) 12 CLR 622; [1911] HCA 33.

389 *The Trial of Mervin Lord Audley* (1631) 3 St Tr 401 at 414.

390 (1784) 3 Dougl 422 at 423-424 [99 ER 729 at 729].

and personal violence was a case of necessity for otherwise the wife would have no protection[391].

217 The question of whether the wife could, in these circumstances, then be compelled to give evidence was raised in *Riddle* and in *Hoskyn*. In each case the wife expressed herself as unwilling to give evidence when she was called as a witness, but the judge ruled that she was compellable and she gave her evidence[392]. The question was whether she ought to have been compelled to do so, which is to say whether she was compellable in the broader sense, mentioned at the outset of these reasons. No mention is made in the judgments and speeches in these cases of any privilege which might be claimed by the wife were she compelled to give evidence, nor is *All Saints* referred to in connection with any such privilege[393].

218 The decision in *All Saints* and the commentary upon it in *Taylor on Evidence*[394] were referred to in some of the judgments in *Riddle* and in *Hoskyn*, in relation to the state of the common law on the question of the compellability of the wife[395]. Taylor's view of what was said in *All Saints* was clearly regarded as influential. The author, citing *All Saints*, had said[396]:

> "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 upon the

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391 See also Wharton, *An Exposition Of The Laws Relating To The Women Of England*, (1853) at 392.

392 See *Riddle v The King* (1911) 12 CLR 622 at 623; *Hoskyn v Metropolitan Police Commissioner* [1979] AC 474 at 482.

393 With the exception of Lord Edmund-Davies, who was in dissent in *Hoskyn v Metropolitan Police Commissioner* [1979] AC 474 at 502.

394 10th ed (1906), vol 2 at 973 [1368].

395 *Riddle v The King* (1911) 12 CLR 622 at 628 per Griffith CJ; *Hoskyn v Metropolitan Police Commissioner* [1979] AC 474 at 485-486 per Lord Wilberforce (with whom Lord Keith of Kinkel agreed), 493 per Viscount Dilhorne, 496 per Lord Salmon, 502 per Lord Edmund-Davies.

396 *Taylor on Evidence*, 10th ed (1906), vol 2 at 973 [1368].

> protection of the court, and decline to answer any question which would tend to expose her husband to a criminal charge." (emphasis in original)

219 Like Bayley J's judgment in *All Saints*, Taylor's commentary might be taken to suggest something like a right in the wife, as he refers to her being able to decline to answer any question which might incriminate her husband. But Taylor also restated what Bayley J had said, that it was necessary for the wife to seek the protection of the court. For the reasons earlier given, this suggests a determination as to her compellability.

220 The extract from Taylor does not suggest the existence of a rule concerning whether the wife is to be obliged, generally speaking, to give evidence. She might be able to do so because the rule of competency does not apply, the "permission" spoken of. But the question whether the court would compel her to do so is not considered by Taylor to have been resolved by *All Saints* ("it by no means follows that she can be *compelled* to do so"). Rather he favoured the view that she should not. Another authoritative writer on the law of evidence, Sir James Fitzjames Stephen, did not consider *All Saints* and other contemporaneous cases to be conclusive of the question of the wife's compellability:

> "The cases, however, do not decide that if the wife claimed the privilege of not answering she would be compelled to do so, and to some extent they suggest that she would not." [397]

221 It is unsurprising that judgments of this Court in *Riddle* did not express any certainty about the state of the law on the subject.

222 In *Riddle* two statutes dealt with the question of compellability in criminal proceedings[398]. They provided that a husband or wife of an accused was not a compellable witness, but one of the provisions of one of the Acts[399] contained a proviso rendering it inapplicable where a person would be compellable at common law. The question whether a wife was compellable at common law "to give evidence" was thereby raised[400]. Griffith CJ considered that the "better

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397 Stephen, *A Digest of the Law of Evidence*, 4th ed (1881) at 124 fn 1.

398 *Crimes Act* 1900 (NSW), s 407; *Evidence Act* 1898 (NSW), s 7.

399 *Evidence Act* 1898, s 7.

400 *Riddle v The King* (1911) 12 CLR 622 at 627 per Griffith CJ.

opinion" was that a wife was not, by reference to Taylor[401]. Barton J could find no clear ruling by a court that a spouse is both competent ("allowable to testify") and compellable, and concluded that it was "not established" that she was[402]. O'Connor J did not consider that the law could be stated any more highly than that husband and wife "are competent witnesses against each other, but it is doubtful whether they are compellable."[403]

223 The House of Lords did not determine the question of spousal compellability in criminal proceedings until *Hoskyn*. In *Leach v The King*[404], a case which involved a charge of incest, it was held that, by s 4 of the *Criminal Evidence Act* 1898 (UK), the wife of a person charged with an offence to which the Act applies is not compellable to give evidence against her husband. Reference was made in passing in that case to the position at common law and to the "fundamental and old principle" that the court "ought not to compel a wife to give evidence against her husband in matters of a criminal kind."[405] That dicta was not followed in *R v Lapworth*[406], in connection with charges of personal violence by a husband against his wife, and that position was maintained until *Hoskyn*.

224 The first respondent pointed to a statement by Earl Loreburn LC in *Leach*, that a clearly stated law would be necessary "before the right of this woman can be affected"[407], as indicative of the existence of a privilege. The statement must be read in context. At issue in that case was a statutory provision which said that a wife or husband of an accused person *may* be called as a witness for the prosecution or the defence. His Lordship observed that, without the provision, the wife could not have been allowed to give evidence and it followed that she could not have been compelled to do so "and was protected against

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401 *Riddle v The King* (1911) 12 CLR 622 at 629.

402 *Riddle v The King* (1911) 12 CLR 622 at 633-634.

403 *Riddle v The King* (1911) 12 CLR 622 at 640.

404 [1912] AC 305.

405 *Leach v The King* [1912] AC 305 at 309 per Earl Loreburn LC; see also at 310-311 per Earl of Halsbury, 311 per Lord Atkinson.

406 [1931] 1 KB 117, nor in *R v Algar* [1954] 1 QB 279 at 285.

407 *Leach v The King* [1912] AC 305 at 310.

compulsion."[408] The protection referred to is that afforded by the rule of competency. It was against this background that he enquired whether it would have been intended by the provision to deprive her of this protection. The "right" of which he spoke was therefore what was provided by the rule of competency and this was not a privilege.

225 The majority in *Hoskyn* did not consider that the courts should require a wife to give evidence against her husband, even when he was charged with injuring her. The principal question in *Hoskyn* was whether the fact that a wife was competent to give evidence, because of the exception to the rule, meant that she was thereby compellable and it was held she was not. It was in this context that reference was made to *All Saints* and to Taylor's comments upon that case[409]. No reference was made by the majority to *All Saints* in connection with a spousal privilege[410]. The decision in *Hoskyn* as to the wife's compellability ultimately rested upon policy considerations as to marriage. Lord Edmund-Davies dissented, regarding the gravity of crimes of personal violence of this kind and the duty to prosecute them as more important[411].

226 Lord Wilberforce[412] acknowledged that there were arguments of policy either way[413]. He agreed with what had been said in *Leach*, that as a matter of principle a wife "ought not to be forced into the witness box"[414], and approved the approach taken by Griffith CJ in *Riddle*[415]. He was clearly influenced by the view the law, historically, had taken to marriage and which had informed the rule of competency. Lord Salmon considered it would be inconsistent with the

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408 *Leach v The King* [1912] AC 305 at 310.

409 *Hoskyn v Metropolitan Police Commissioner* [1979] AC 474 at 485-486 per Lord Wilberforce, 490-491 per Viscount Dilhorne, 496 per Lord Salmon.

410 Although Lord Edmund-Davies, in dissent, did so: *Hoskyn v Metropolitan Police Commissioner* [1979] AC 474 at 502.

411 *Hoskyn v Metropolitan Police Commissioner* [1979] AC 474 at 507. It has been observed that this policy has found more favour with Australian legislatures: see *Cross on Evidence*, 8th Aust ed (2010) at 443 [13125].

412 With whom Lord Keith of Kinkel agreed.

413 *Hoskyn v Metropolitan Police Commissioner* [1979] AC 474 at 483.

414 *Hoskyn v Metropolitan Police Commissioner* [1979] AC 474 at 487-488.

415 *Hoskyn v Metropolitan Police Commissioner* [1979] AC 474 at 488-489.

common law's attitude to marriage, if a wife were to be compelled to give evidence incriminating her husband[416]. Viscount Dilhorne approved the statement of Griffith CJ in *Riddle*[417] that "[t]he old doctrine of the unity of husband and wife[418], and the importance of preserving confidence between them, and the other reasons which have been variously given, have still a great deal of weight."[419]

227 The decision in *Hoskyn* is not directly applicable to a case such as this, for the reasons already mentioned. The first respondent did not suggest that it was. In argument for the first respondent it was put that the views of the majority regarding non-compellability were necessarily founded upon the privilege ("the underlying right"). That is to say, the considerations of marriage there referred to, which also informed the rule of competency, pointed to the existence of the claimed privilege. Later application of *Hoskyn* does not support such an inference. It has been taken to refer to the claim that a wife might make before she is sworn as a witness, which is to say to her non-compellability, by contrast with that of a holder of a privilege[420]. In any event the first respondent merely states an assumption. It needs to be shown that the common law addressed the question of the privilege claimed and provided the answer. They are the issues on this appeal.

228 In *Hoskyn* Viscount Dilhorne observed that he would have expected Lord Ellenborough or Bayley J in *All Saints* to have referred to any existing rule, by which a wife, competent to give evidence, was compelled to do so[421]. Likewise, had a privilege not to answer questions existed, one would have expected that they would have made reference to it.

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416 *Hoskyn v Metropolitan Police Commissioner* [1979] AC 474 at 495.

417 *Riddle v The King* (1911) 12 CLR 622 at 630.

418 But see in this connection *Tripodi v The Queen* (1961) 104 CLR 1; [1961] HCA 22.

419 *Hoskyn v Metropolitan Police Commissioner* [1979] AC 474 at 494.

420 *R v Pitt* [1983] QB 25 at 30.

421 *Hoskyn v Metropolitan Police Commissioner* [1979] AC 474 at 491.

229 The second report of the Common Law Commissioners[422], of 1853, might have been expected to mention a spousal privilege, had it been recognised by the law at that time. Statutory reforms to that point had removed the incompetence of parties and witnesses on the ground of interest but had maintained an exception in the case of husbands or wives of parties[423]. It is of interest to observe that s 3 of the *Evidence Act* 1851 (UK)[424] ("Lord Brougham's Act") had provided that neither a husband nor a wife was "competent or compellable to give evidence" for or against the other spouse[425]. The Commissioners recommended that the exception be abolished but that communications between spouses be privileged[426]. That privilege had not previously existed at common law, it was held in *Shenton v Tyler*[427]. As Sir Wilfrid Greene MR observed, the Common Law Commissioners made no mention of such a rule of law[428], and one would have expected them to had it existed. The same observation may be made concerning spousal privilege.

230 Legislation was introduced in the United Kingdom dealing with the competence and compellability of spouses as witnesses in civil and, later, criminal proceedings[429]. In Australia provision is made with respect to criminal proceedings in legislation, but not uniformly, as mentioned at the outset of these reasons. This reflects differences of opinion as to the importance to be afforded to different policy considerations as giving effect to the public interest. By way of example, in Queensland a spouse is generally compellable in criminal

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422 *Second Report of Her Majesty's Commissioners for Inquiring into the Process, Practice, and System of Pleading in the Superior Courts of Common Law*, (1853).

423 *Evidence Act* 1843 (UK); *Evidence Act* 1851 (UK); see generally as to the history *Shenton v Tyler* [1939] Ch 620 at 627-628 per Sir Wilfrid Greene MR.

424 14 & 15 Vict c 99.

425 Wharton, *An Exposition Of The Laws Relating To The Women Of England*, (1853) at 381.

426 *Second Report of Her Majesty's Commissioners for Inquiring into the Process, Practice, and System of Pleading in the Superior Courts of Common Law*, (1853) at 13-14.

427 [1939] Ch 620.

428 *Shenton v Tyler* [1939] Ch 620 at 629, 639.

429 See *Shenton v Tyler* [1939] Ch 620 at 628-629.

proceedings[430]. Under the *Evidence Act* 1995 (Cth), a spouse is competent and compellable as a witness with respect to certain offences, but the spouse of an accused is given a right to object to giving evidence as a witness for the prosecution[431]. The right is less than a privilege, however, for it is provided that the court determines the question of the compellability of the spouse, after considering certain facts and the consequences which might follow were the spouse obliged to give evidence[432]. It confirms the role of the court in determining the question of compellability, whilst providing the factors relevant to that determination.

Summary of conclusion and orders

231 Opinions may differ as to the interpretation of statements in older texts and cases. Such statements as there are, which suggest that one spouse might not be obliged to give evidence or answer questions which may tend to incriminate the other, do not provide a sufficient foundation for a conclusion that a spousal privilege of the kind claimed existed. Statements in *All Saints* were addressed to the question of compellability and later cases show that they have been so understood. Those observations are consistent with a view that the court retains the power to determine the question of the wife's compellability. Even so, the question of her compellability was not finally determined in that case. Its lack of resolution until much later, in England, does not suggest that the topic of a substantive witness privilege was likely to have been addressed. The later application of some of the old common law views towards marriage, which informed the rule of competency, and about which it is not necessary to proffer a view on this appeal, with respect to the compellability of a spouse in criminal proceedings, does not point to the existence of a privilege. It merely states an assumption that those views meant that a privilege arose. It has not been shown that that question has been addressed by the common law courts.

232 The observations of Justice Oliver Wendell Holmes concerning the creation of legal doctrine are apposite here. He spoke of a statement of principle occurring only after a series of determinations on the same subject matter and by a process of induction and went on to say[433]:

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430 *Evidence Act* 1977 (Q), s 8(2).

431 *Evidence Act* 1995, s 18(2).

432 *Evidence Act* 1995, s 18(6) and (7).

433 Holmes, "Codes, and the Arrangement of the Law", in Novick (ed), *The Collected Works of Justice Holmes*, (1995), vol 1, 212 at 213.

> "And this statement is often modified more than once by new decisions before the abstracted general rule takes its final shape. A well settled legal doctrine embodies the work of many minds, and has been tested in form as well as substance by trained critics whose practical interest it is to resist it at every step."

No such developments are evident in the cases and materials to which reference has been made in this case. They suggest, at most, that a spouse might seek a ruling from the court that he or she not be compelled to give evidence which might incriminate the other spouse.

233 No question of compellability arises in this case. The first respondent was a competent witness to be examined under the ACC Act and was compelled by the provisions of that Act to do so. No privilege of the kind claimed could be raised in answer to that obligation.

234 We agree with the orders proposed by French CJ and Gummow J.