LAW REFORM COMMISSIONER

Working Paper No. 2

CRIMINAL LIABILITY OF MARRIED PERSONS

(Special Rules)

MELBOURNE
JANUARY 1975

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Comment and criticism are invited
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INTRODUCTION

1. The functions of the Law Reform Commissioner, as defined by Section 8 (a) of the Law Reform Act 1973, include advising the Attorney-General on the modernisation of the law, having regard to the needs of the community.

2. The purpose of this Working Paper is to examine those special rules of law which in some cases relieve wives, and in other cases both husbands and wives, from criminal liability for conduct which would render them liable if they were unmarried.

3. Those rules originated long before the reforms of the law on the civil side which, during the past 100 years, have removed the legal disabilities of married women in matters of property, contract and family law, and long before those social changes which, in modern times, have reduced the discrimination to which women have been subjected in respect of education and economic opportunities.

4. It therefore seems appropriate that a critical examination should now be made of these long standing special rules of the criminal law relating to married persons, with a view to determining whether any changes in them have now become desirable and, if they have, to formulating specific recommendations for amendments to the law.

PART I — THE DEFENCE OF MARITAL COERCION.

PRESENT POSITION IN VICTORIA

5. Victoria, alone among the States, retains the old common law rule that, subject to limited exceptions, if a wife commits a crime in her husband's presence, she is presumed, prima facie, to have committed it under such coercion as to entitle her to be acquitted[1]. The mere fact of the presence of the husband at the time of the commission of the offence is sufficient to raise the presumption. In the absence of evidence that the wife was principally instrumental in the commission of the crime (or at least that she was acting independently) she must be acquitted, even though there is no evidence that she was acting under threats, pressure, or instructions from her husband[2]. The presumption does not arise in cases of treason or murder, and it would seem that some other grave crimes too, may be excepted. The presumption seems to be limited, also, at the other end of the scale. It has been said to apply only to felonies and indictable misdemeanours, and not to summary offences[3]. There is a strict requirement that the husband should have been physically present while the crime was being committed; it is not sufficient to show merely that the wife was living with her husband[4]. If the husband is not within the actual sight of the wife he has to be close enough to be able to apply force to her, e.g. just outside the door: R. v. Whelan[5]. Although it has never been suggested that the presumption applies to de facto wives, and indeed this application has been specifically denied[6], it has been held that the accused woman need not prove her marriage formally to raise the presumption; she may rely on evidence of cohabitation and reputation[7].

6. This doctrine of the presumption of marital coercion originated in very early times when a wife's subjection to her husband was extreme. It survived into modern times because it was a merciful doctrine which enabled the courts, during the period in which felony carried the death penalty, to avoid "the strange and monstrous consequences of a joint conviction"[8], that the wife, being unable to rely on benefit of clergy, would be sentenced to death, when her husband, though no less guilty, escaped with a light punishment.

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1 Archbold, Criminal Pleading (1848) 11th Edition, p. 17.
2 Report of Avory Committee (1922)—Cmd. 1677, and Peel Case there referred to; R. v. Whelan (1937) S.A.S.R. 237: Glanville Williams, The Criminal Law—The General Part, Section 249.
3 Manuels v. Crafter (1940) S.A.S.R. 7.
4 Williams v. Shippey (1844) 3 L.T.O.S. 342.
5 (1937) S.A.S.R. 237.
6 R. v. Court, 7 Cr. App. R. 127.
7 Morris v. Miller, 4 Burr. 2057: R. v. Woodward, 8 C. & P. 561.
8 Seventh Report of the Criminal Law Commissioners of 1833, p. 21: Glanville Williams op. cit. Section 249.

HISTORY OF THE ABOLITION OF THE PRESUMPTION IN ENGLAND

7. The Seventh Report of the English Criminal Law Commissioners of 1833 expressed some doubts as to the proper limits of the rules of the common law regarding the presumption of marital coercion, but the Commissioners did not feel justified in recommending any substantial change in those rules. The Criminal Law Commissioners of 1845, however, in their Second Report, recommended, by a majority, that all provisions as to the presumption should be omitted from the proposed code of criminal law upon which they were advising. They supported this recommendation by reference to the arbitrary and uncertain limits of the doctrine, and the insufficiency of the reasons assigned for exceptions to it[9]. Then the Criminal Code Commissioners, in their report of 1879 upon the draft code of 1878, recommended the abolition of the presumption[10]. And Stephen, in his writings on the criminal law stigmatized the doctrine of the presumption as uncertain, irrational, and admitting of no defence[11]. In 1922 the Avory Committee, adopting a view put earlier by Stephen[11], recommended that there should be abolished, not only the doctrine of the presumption, but also any defence of coercion which would put a wife in any better position than any other member of the community[12]. And finally, in 1925, the Parliament, while rejecting the wider proposal of the Avory Committee, abolished the doctrine of the presumption[13].

ABOLITION OF THE PRESUMPTION IN OTHER JURISDICTIONS

8. Over the last eighty years or thereabouts, legislation putting an end to the presumption has been enacted in a large number of jurisdictions. This was done in Canada in 1892, in New Zealand in 1893, in Queensland in 1899, in Western Australia in 1902, in Tasmania and New South Wales in 1924, in England (as already mentioned) in 1925, and in South Australia in 1940[14]. The variations between the forms of legislation enacted in these jurisdictions will be referred to hereunder.

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9 English Parliamentary Papers 1846, volume 24, H. of C. pp. 12 and 13 of Report.

10 H. of L. Papers, 1878-9, Volume 36 pp. 18 and 68 of Report.

11 Digest of the Criminal Law, 5th edition, pp. 395 and 399: History of the Criminal Law of England (1883) Volume 2, pp. 105-6.

12 Cmd. 1677.

13 Criminal Justice Act 1925 (Eng.) S.47.

14 See Criminal Code 1892 (Can.) S. 13: Crimes Act 1893 (N.Z.) S. 24: Criminal Code Act 1899 (Qld.) S. 32: Criminal Code Act 1902 (W.A.) S. 32: Criminal Code Act 1924 (Tas.) S. 20: Crimes Act (Amendment) Act 1924 (N.S.W.) S. 17: Criminal Justice Act 1925 (Eng.) S. 47: Criminal Law Consolidation Act Amendment Act 1940 (S.A.) S. 12.

NEED FOR ABOLITION OF PRESUMPTION IN VICTORIA

9. The status, both social and economic, of married women in Victoria today is such that it seems plainly to be erroneous to assume, as the presumption requires the courts to do, that the most likely situation is that any indictable misdemeanour, and (subject to limited exceptions) any felony, that may have been committed by a wife in the presence of her husband, will have been committed under his coercion. Extreme subjection of a wife to her husband being today quite exceptional, the general probabilities now are not for, but against, the existence of marital coercion; and, of course, the problems arising from benefit of clergy no longer exist. The old presumption is therefore an anachronism[15]. Indeed Frankfurter J. in U.S. v. Dege, 364 U.S. 51, at p. 53 put the matter so high as to assert that the presumption of coercion "implies a view of American womanhood offensive to the ethos of our society". But whether or not one accepts that view, the case for abolition of the presumption appears, in the light of all that has been stated above, to be clearly made out and to require that we should no longer delay adopting this reform in Victoria.

RETENTION OF DEFENCE OF MARITAL COERCION

10. To enact the abolition of the presumption, however, would solve only the first of the problems involved in a reform of the law relating to marital coercion. For, with the presumption abolished, there would remain for consideration the questions —

(i) whether marital coercion should still be available as a defence where there is affirmative evidence that it caused the commission of the offence by the wife and, if so,

(ii) what should be the legal limits of such a defence and the elements necessary to constitute it.

11. In the legislation of Canada the course taken was to say nothing about these further questions, but merely to enact that the presumption should not be made "by reason only that" the offence was committed in the presence of the husband. Similarly, in the New Zealand legislation, all that was said was that the fact that the husband was present should not "of itself" raise the presumption. And again in New South Wales all that the legislation said was that the presumption was abolished. Formulations such as these may seem attractive on grounds of simplicity but they have the highly undesirable effect of leaving it uncertain whether a defence of marital coercion continues to exist and, if so, what are its limits and essential elements.

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[15] Howard, Australian Criminal Law, 2nd edn. p. 417: Waller and Merrals, 7 Res Judicatae at pp. 193-5.

12. The course taken in Tasmania was not open to this objection; for what was there enacted was that a married woman should be in the same position, as regards compulsion by her husband, as if she were unmarried. This clearly put an end, not only to the presumption, but also to any special defence of marital coercion, leaving a married woman who was coerced by her husband into committing an offence to bring herself, if she could, within the narrow limits of the general defence of duress. The course so taken was, as already mentioned, what Stephen had proposed and what the Avory Committee had recommended; see paragraph 7 above. The English Parliament, however, in the Criminal Justice Act 1925, S. 47, rejected that course. It has been rejected, also, by the legislature of South Australia; and it had, at a much earlier stage, been rejected in Queensland and Western Australia, in legislation that has already been referred to[16].

13. The attractions of the bold course taken in Tasmania diminish, or disappear, when one considers how limited is the defence of duress, and how difficult it would ordinarily be for married women, even when subjected to extreme pressure by their husbands, to bring themselves within that defence.

14. The defence of duress, according to the weight of authority, can have no application unless the accused person, throughout the time when the offence was being committed, was subject to a threat of imminent death or grave physical violence; and this is so, however minor may be the offence charged. Furthermore the defence has application only where the accused had no safe means of preventing the execution of the threat, by going to the police or otherwise[17]. A wife, however, may be subjected to very grave pressures indeed, without being able to satisfy these conditions. Where a wife, as is still commonly the case, has to look to her husband for support and shelter, and especially when she has young children to care for, the pressure upon her of insistent demands, and of threats of abandonment, may in many cases be just as difficult for her to resist as any threats of physical violence such as would found a defence of duress. Moreover, the duty and habit of loyalty and co-operation which arise from the special relationship of husband and wife will commonly make it more difficult for a wife to resist pressure from her husband than from a stranger. And that duty and habit, it may be observed, find clear recognition, within a related area of the criminal law, in the long established rule that a wife is not chargeable as an accessory after the fact to a felony committed by her husband, though she receives, shelters, feeds and hides him, with full knowledge of his guilt (see Part II below).

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16 See the Statutes of those States cited in Note 14.

17 See, for example, R. v. Smyth (1963) V.R. 737: R. v. Hurley & Murray (1967) V.R. 526: R. v. Hudson & Taylor (1971) 2 W.L.R. 1047.

15. A further objection to confining a married woman to the ordinary defence of duress is that, even when she is subjected by her husband to threats of grave physical violence, that defence will ordinarily be unavailable to her because, in strictness, she will have a safe means of avoiding the threatened violence by informing the police of her husband's threats and criminal plans. But this recourse will often by available to her only at the cost of putting an end to her marriage.

16. It would appear that it was by reason of the narrow limits within which the defence of duress is confined, and the special pressures, apart altogether from fear of imminent death or grave physical violence, to which wives may be subjected, that the English Parliament, in its legislation of 1925, preserved for them a defence of marital coercion.

17. In the light of all these considerations, and notwithstanding a contrary opinion that has sometimes been expressed[18], the better view would seem to be that a defence of coercion of a wife by her husband ought to be retained[19]. This, as already mentioned, is the course that has been followed in England, South Australia, Queensland and Western Australia. But the form which the legislation has taken in those jurisdictions raises substantial and unnecessary difficulties.

DEFINING ELEMENTS AND LIMITS OF DEFENCE

18. The English provision[20], which was adopted in South Australia[21], is as follows:—

> "Any presumption of law that an offence committed by a wife in the presence of her husband is committed under the coercion of the husband is hereby abolished, but on a charge against a wife for any offence, other than treason or murder, it shall be a good defence to prove that the offence was committed in the presence of, and under the coercion of, the husband."

19. The legislation in Queensland and Western Australia follows a generally similar scheme, but with some differences of importance, the principal being (a) that the nature of the defence retained is indicated, not by the words "under the coercion", but by the words "actually compelled", and (b) that the list of excepted offences is wider.

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18 See, for example, Smith & Hogan, Criminal Law, 3rd edn. p. 170.

19 Compare Edwards, 14 Mod. L.R. 296 at pp. 312-3: Draft Criminal Code for Australian Territories, Sec. 21.

20 Criminal Justice Act 1925 (Eng.) S. 47.

21 Criminal Law Consolidation Act Amendment Act 1940 (S.A.) S. 12.

20. It is a grave difficulty, under these enactments, that no attempt is made to define what is meant, in the English and South Australian provisions by the word "coercion", and in the other two cases by the words "actually compelled". It is clear that in England the word "coercion" was intended to make available a defence less narrowly confined than that of duress[22]. But the absence of a definition of the word "coercion" leaves judge and jury with no clear guidance as to what are the elements of the defence[23]; and little or no help as to this can be obtained from the cases that were decided while the doctrine of presumption was in operation[23]. Similar difficulties arise, under the Queensland and Western Australian provisions, from the absence of a definition of what is meant by the expression "actually compelled".

21. It would therefore seem desirable that any legislation which abolishes the presumption, but preserves a defence of marital coercion, should state what are the elements of that defence, set out any conditions that must be satisfied before the defence will be available, and specify any crimes which are to be outside its scope.

22. For the purpose of defining "coercion" a test needs to be formulated that will protect a wife who, though she cannot satisfy the stringent requirements of the defence of duress, has nevertheless acted not unreasonably in yielding to severe pressure to which she has been made vulnerable by her role of wife, or wife and mother. On the other hand, however, it is, of course, necessary to exclude the possibility that the defence may, to use the warm language of Coleridge C. J., be "made the legal cloak for unbridled passion and atrocious crime"[24]. The formulation should be such as to require a due proportion between the gravity of the threats or pressures to which the wife is subjected and the seriousness of the conduct with which she is charged.

23. Perhaps the best solution to this problem of definition would be to adopt a general objective test, expressed in terms of normal human fortitude under threat or pressure.

24. It may be added that there appears to be no logical justification for requiring that the husband should have been present while the offence was being committed, since the defence of coercion proposed to be retained will not necessarily depend upon the existence of a threat of physical violence. It may rest upon threats of evils far more enduring, and upon pressures far more difficult to resist.

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22 See Smith & Hogan, Criminal Law, 3rd edn., p. 169, quoting the words of the Solicitor-General to Parliament.
23 See Glanville Williams, The Criminal Law—The General Part, 2nd edn., Sec. 249.
24 R. v. Dudley & Stephens, 14 Q.B.D. 273.

25. As regards offences to be excepted from the defence of coercion it would seem appropriate to specify the crimes of treason and murder, both of which, by reason, no doubt, of their extreme gravity, were excluded from the benefit of the common law presumption of coercion. But to attempt to include a list of other crimes regarded as being too heinous for the defence of coercion to be applicable to them would present considerable difficulties. Perhaps the better course would be to exclude, in general terms, all crimes carrying a specified term of imprisonment, and to rely, so far as other offences are concerned, upon the proposed general objective test of normal human fortitude, to render the defence inapplicable to offences, the gravity of which is out of proportion to that of the threats or pressures sought to be relied upon. Subject to the foregoing the defence, it is suggested, should be applicable to all offences, both indictable and summary.

EVIDENTIARY AND ULTIMATE BURDENS OF PROOF

26. A difficulty that arises upon the form of the provision adopted in England and South Australia, and also under the provisions adopted in Queensland and Western Australia, is that the language used may have the effect of casting on the accused, not merely the onus of leading evidence of the elements necessary to constitute the defence, but also the ultimate burden of proof[25]. To do this would, of course, be contrary to the basic principle laid down in Woolmington v. Director of Public Prosecutions (1935) A.C. 462, that the prosecution carries the ultimate burden of proving guilt; and it would place the wife's defence of coercion on a different footing from other defences such as duress, self-defence and provocation. It is considered that any legislation of the kind suggested above should make it clear that as regards the ultimate burden of proof, the defence of marital coercion is to be on no different footing from those other defences.

FORM OF LEGISLATION PROPOSED

27. With the foregoing considerations in mind it is *provisionally recommended* that legislation in the form or to the effect of the following draft should be enacted:

"(1) Any presumption that an offence committed by a wife in the presence of her husband is committed under his coercion is hereby abolished.

(2) It shall be a defence for a wife to a charge of any offence, except treason or murder or an offence for which the maximum term of imprisonment is fifteen years or more, that the action or inaction charged was due to coercion by her then husband.

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[25] Glanville Williams, The Criminal Law—The General Part, 2nd edn. Sec. 249.

(3) For the purposes of this Section "coercion" means such a degree of pressure by the husband, whether by threats or otherwise howsoever, as would have caused a wife of ordinary firmness and good character, placed in the circumstances in which the wife was placed, to conduct herself in the manner charged.

(4) Without limiting the generality of the expression "the circumstances in which the wife was placed" appearing in the preceding sub-section, that expression shall include the degree to which she was in fact dependent economically or otherwise upon her husband.

(5) The burden of adducing evidence supporting such a defence shall rest on the accused and, where there is evidence supporting the defence, the burden shall rest on the prosecution of satisfying the jury or the court, as the case may be, beyond reasonable doubt, upon the issue so raised.

(6) This Section shall apply in respect only of offences committed after its coming into operation but in relation to such offences it shall have operation in substitution for any law as to any presumption or defence of marital coercion which would have been applicable if this section had not been enacted."

PART II — SPOUSES AS ACCESSORIES AFTER THE FACT

EXCEPTION IN FAVOUR OF WIVES

28. At common law a person who, knowing a felony to have been committed, receives, relieves, comforts or assists the offender in order to enable him to escape being arrested, or tried, or undergoing punishment imposed, is guilty of being an accessory after the fact to the felony and is punishable accordingly[1]. By way of exception however, to that general principle there is a very old and well-established rule that a wife cannot be an accessory after the fact to the felony of her husband[2].

JUSTIFICATION FOR THE EXCEPTION

29. The justification for this special rule has been variously stated over the centuries. Thus, in 1557, in Staunford[3], the law was expressed (in Law French) to be that a wife cannot be accessory after the fact to her husband because, by the law divine, she ought not to discover him. Coke followed Staunford's formulation fairly closely, stating that a wife "cannot be accessory to her husband though she know that he committed the larceny and relieve him and discover it not: for by the law divine she is not bound to discover the offence of her husband"[4]. Hale omitted the reference to divine law and (in one of two relevant passages) stated, as the reason for the rule, simply that "she ought not to discover him"[5]. Hawkins put the matter more fully, stating that "the law hath such a regard to that duty, love and tenderness which a wife owes to her husband as not to make her an accessory to felony for any receipt whatsoever given to her husband"[6]. And Hawkins' language was followed in the 1843 edition of Russell[7] with an addition of the words "considering that she ought not to discover her husband". Then the Criminal Law Commissioners of 1845, in their Second Report, in which they recommended the enactment of a provision that a wife should not be criminally liable for receiving, harbouring, concealing, or aiding the escape of her husband, quoted in support the following statement, made in relation to the law of Scotland: "By the first principles of nature, a wife is bound to protect, defend and cherish her husband in all circumstances, and not the less because he has been involved in crime, and has no refuge but in her affection and fidelity". And

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1 Archbold, 36th edn., S. 4155; Kenny, Outlines of Criminal Law, 19th edn., S. 70.

2 See, in addition to the authorities presently to be cited in the text, R. v. Good, 1 Car. & Kir. 185: R. v. Manning 2 Car. & Kir. 887, notes at pp. 903 & 905: Stephen, Digest of Criminal Law, 3rd edn. p. 35.

3 Les Plees del Coron 1, 19.

4 3 Co. Inst. p. 108.

5 Hale, Pleas of the Crown, Vol. I, p. 618.

6 Hawkins, Pleas of the Crown, Vol. II, Ch. 29. S. 34.

7 Russell on Crimes and Misdemeanours, 3rd edn., p. 38.

in this same vein is the observation of Baron Parke in 1853 in R. v. Brooks[8] that the desire to shield her husband is hardly a fault in a wife.

30. Coming to more recent times we find that in Lush on Husband and Wife[9], it is put that the special rule in favour of wives obviously proceeds upon questions of social policy. In Kenny, Outlines of Criminal Law[10], it is said that the reason a wife is under no liability for hiding her husband from justice is that it is her duty to aid him and keep his secrets. And Glanville Williams has expressed the view that the rule may be justified as a concession to inevitable human feeling[11].

31. In the Court of Criminal Appeal in England it has been said that the basis of the accessory rule in favour of wives is the presumption of coercion, and that consequently their immunity has been affected by the enactment of Section 47 of the Criminal Justice Act 1925[12]. With great respect, however, this cannot be right, for the accessory rule in favour of wives was and is an absolute one, and consequently it cannot have been based upon a mere rebuttable presumption. Moreover the presumption of coercion arises only in relation to acts done in the presence of the husband, whereas the accessory rule in relation to wives is not so confined. The Court of Criminal Appeal may, perhaps, have been led to express the view it did, by the fact that Blackstone treated the duty of a wife not to "discover" her husband as arising in some way from the presumption[13]; or perhaps by the fact that Hale stated, as an explanation for the accessory rule, that a wife is "sub potestate viri" and "is bound to receive her husband"[14].

32. Upon a consideration of the history of the matter, and the whole of the authorities referred to above, the proper conclusion, it seems clear, is that the special accessory rule in favour of wives rests upon a view that the relationship of husband and wife involves, for the wife, a deep obligation to give help and comfort to her husband and to respect his confidences; and upon a view that if, being faced with a conflict of duties, she gives precedence to that personal obligation, over her general duty as a citizen not to obstruct the administration of justice, her conduct is at least so far excusable, or extenuated, that it should not be regarded as criminal.

33. The special rule, resting upon this foundation, ought, it is considered, to be accepted and maintained, not only as being supported by the clearest authority, but also because personal loyalty between husband and wife may properly be regarded as of fundamental importance to the stability of the family as the basic unit in our society.

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8 As reported in 6 Cox C.C. 148.
9 4th edn., at p. 597.
10 19th edn., S. 70.
11 "Legal Liability of Husband and Wife", 10 Mod. L. Rev. 16, 26.
12 R. v. Holley (1963) 1 All E.R. 106: Brett & Waller, Criminal Law, Cases & Text pp. 669-670.
13 4 Comm. p. 39.
14 Pleas of the Crown, Vol. 1, p. 47.

NEED FOR A LIKE RULE IN FAVOUR OF HUSBANDS

34. The reason upon which the rule in favour of the wife rests appears plainly to require that a like rule should operate in favour of a husband who receives, relieves, comforts or assists his wife after she has committed a felony. The common law, however, did not have any such corresponding rule. Possibly the extreme subjection of married women under the common law during the period when the special accessory rule in favour of wives was developed, prevented realisation of the need for a like rule in favour of husbands. But whether the rule in favour of wives be regarded (see paras. 29 and 30) as resting on "social policy" or on "inevitable human feelings" or on "the first principles of nature" or on "divine law"[15], it seems clear that there ought to be such a corresponding rule.

35. As long ago as 1803, the distinction between husbands and wives in this respect was characterised as "a technical distinction for which there seems no just reason"[16]; and it has been pointed out by Glanville Williams[17] that if the wife's immunity be justified as a concession to inevitable human feelings, the same justification would require that the husband should have a corresponding immunity. Moreover effect has been given to this view of the matter by the Tasmanian Parliament in Section 6 of the Tasmanian Criminal Code Act 1924 and by the Queensland Parliament in S. 10 of the Criminal Code 1899; for each of these sections provides for immunity for a husband as well as a wife. See also the Revised Statutes of Canada, 1970, C. 34, Section 23, for a similar enactment.

FORM OF LEGISLATION PROPOSED

36. For all these reasons it is *provisionally recommended* that legislation to the following effect should be enacted:—

> A married person shall not become an accessory after the fact to a felony of which his or her spouse is guilty by receiving, relieving, comforting or assisting the spouse, or the spouse and another party or parties to the crime, with knowledge of its commission, though the purpose of what is done be to enable the spouse, or the spouse and such party or parties, to escape being apprehended, tried or punished for the crime.

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15 "Therefore shall a man leave his father and his mother and shall cleave unto his wife and they shall be one flesh". Gen. c. 2, verse 24: and compare Matt. c. 19, verse 5: Mark c. 10, verses 7 & 8: Eph. c. 5, verses 31 & 32.

16 East, Pleas of the Crown, Vol. 2, p. 559.

17 "Legal Unity of Husband and Wife", 10 Mod. L. Rev. 16, 26.

37. It is not only in relation to the offence of being an accessory after the fact to a felony that the question arises whether a married person should be criminally liable by reason merely of having received, relieved, comforted or assisted his or her spouse or the spouse and another person or persons in order to enable apprehension, trial or punishment to be avoided. It arises also in relation to the offence created by Section 134 of the Social Welfare Act 1970 of harbouring or employing a person under sentence of imprisonment who is illegally at large. It arises, too, in relation to the offence under Section 40 of the Crimes Act 1958, of wilfully obstructing a member of the police force in the execution of his duty or any person acting in aid of such officer. For that offence, according to the English authorities, is not confined to cases of forceful or physical obstruction. It covers any conduct, such as the giving of a warning, which makes it more difficult for the police to carry out their duty to detect crime and bring offenders to justice[18]. A third offence in relation to which the same question arises is that, under Section 52 of the Summary Offences Act 1966, of obstructing, hindering, or delaying a member of the police force in the execution of his duty or any person lawfully assisting him. And a fourth such offence is the common law misdemeanour of obstructing an officer of justice in the execution of his duty[19].

38. If legislation is to be enacted, as proposed in paragraph 36, providing for a defence which is to be available to a married person charged with being an accessory after the fact to a felony committed by his or her spouse, then it would seem desirable to enact, in addition, that a married person charged with any of the four offences referred to in paragraph 37 shall have the benefit of a corresponding defence.

39. It is therefore *provisionally recommended* that legislation should be enacted to the effect that a married person shall not, by reason of receiving, relieving, comforting or assisting his or her spouse, or the spouse and another person or persons, with knowledge of the commission of an offence by him, her or them, and to enable avoidance of apprehension, trial or punishment therefor, become guilty of any of the four offences referred to in paragraph 37. Such an enactment, it will be observed, would not relieve from criminal liability a married person who, to enable his or her spouse to avoid apprehension, trial or punishment, took the offensive against the forces of law and order by committing other offences such as assault, rescue, aiding and abetting escape, improper interference with witnesses, or conspiracy with a third person to defeat or obstruct the course of public justice. The question of conspiracy between husband and wife only, is the subject of separate recommendations in Part V of this Paper.

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18 See Archbold 38th edn., SS. 2723 and 2718, but see further Smith & Hogan, Criminal Law, 3rd edn., p. 295: Curlett v. M'Kechnie (1938) S.C. (J.) 176.

19 See Archbold, 32nd edn., p. 1480.

PART III — MISPRISION OF FELONY

NEED FOR LEGISLATION

40. The offence of misprision of felony is committed when a person conceals, or fails to make known to the authorities, the commission of a felony of which he has knowledge, or facts known to him which might lead to the apprehension of the felon[1].

41. The reasons which support the view that one spouse should not be criminally liable as accessory after the fact to the felony of the other, support also the conclusion that a corresponding rule should apply where one spouse conceals, or fails to disclose, the felony of the other. Indeed the case is a stronger one.

FORM OF LEGISLATION PROPOSED

42. It is therefore *provisionally recommended* that legislation should be enacted to the following effect:—

> A married person shall not become guilty of misprision by concealing or failing to disclose the commission of a felony by his or her spouse, or by the spouse and another party or parties, nor by concealing or failing to disclose facts which might lead to the apprehension of the spouse, or the spouse and such other or others, in respect of the crime.

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[1] R. v. Crimmins (1959) V.R. 270: Sykes v. D.P.P. 1962, A.C. 528: R. v. King (1965) 1 W.L.R. 706.

CRIMINAL LIABILITY OF MARRIED PERSONS

(Special Rules)

SCOPE OF REPORT NO. 3.

The Report reviews long standing rules of the criminal law which, in special circumstances, afford a defence to wives, or to husbands and wives, in respect of acts which would be punishable if done by an unmarried person. Insofar as the rule merely reflects the extreme subjection of wives in earlier times, abolition is recommended. But where the rule supports the stability of marriages by recognising the need for loyalty, co-operation, and confidential communication between spouses, retention and even some extension is recommended. In outline the recommendations are as follows:—

Under Part I 1. Abolition of the presumption, which is still part of our law, that a wife who commits a crime in the presence of her husband was coerced by him into doing so. (This presumption has already been abolished in a large number of jurisdictions.)

2. That a wife's defence of actual coercion by her husband should be retained but its operation clarified:—

(a) by defining what constitutes "coercion".

(b) by specifying those crimes of extreme gravity to which "coercion" shall not be a defence.

(c) by allocating the evidentiary and ultimate burdens of proof in relation to coercion".

Under Part II 1. That the long established rule that for a wife to receive, relieve, comfort or assist her husband does not make her an accessory after the fact to his crime should be re-affirmed, and a like rule enacted in favour of husbands.

2. That it should also be provided that the receiving, relieving, comforting, or assisting of one spouse by the other shall not be punishable under the Crimes Act 1958 or at common law on the ground that it was an obstruction of the course of justice or on like grounds.

Under Part III That it should be provided that for one spouse to fail to inform against the other shall not be punishable as a misprision.

Under Part IV That in order to remove doubts, it should be enacted that the fact that the person from whom a married woman receives stolen property is her husband shall not of itself be a defence to a charge of handling stolen property.

Under Part V 1. That the long established rule that a mere agreement between husband and wife only, can not amount to a criminal conspiracy ought to be re-affirmed; and that a corresponding rule should be enacted that a mere communication between husband and wife only can not amount to the crime of incitement.

2. That the enactment last-mentioned should further provide that married persons are not, by its provisions, relieved from liability for aiding, abetting, counselling or procuring, or being accessory before the fact to, any crime actually committed; nor from liability for any conspiracy or incitement to commit treason or murder.

PART IV — RECEIVING OR HANDLING STOLEN GOODS

DOES A RULE OF IMMUNITY EXIST?

43. In editions of Archbold published between 1856 and the abolition, in England, in 1925, of the presumption of coercion[1], statements appeared to the effect that at common law a married woman was not indictable for receiving from her husband goods stolen by him, and the authority cited was R. v. Brooks, 6 Cox. C.C. 148[2]. In later editions however, the statement has been omitted, and it is difficult to find in current texts upon the criminal law any support for this proposition of law. It will be observed that the proposition was in no way confined to cases in which a presumption of coercion stood unrebutted: it asserted an absolute immunity.

44. The case of R. v. Brooks is not a satisfactory authority for such a rule of immunity. It is true that, according to most of the reports of the case, two of the five members of the court, namely Jervis C. J. and Parke B., stated their opinions to be that a wife could not be guilty of the crime of receiving stolen goods if it was from her husband that she received them. These opinions, however, appear to have been expressed only during argument, and not in any formal reasons for judgment. Moreover, they were not necessary for the decision of the case, since there was no evidence whatever to rebut the presumption of coercion; and this was expressly stated by Jervis C. J. and (according to the Law Times and Justice of the Peace Reports) by Parke B. Furthermore it would appear[3] that each of them relied, in support of this suggested rule of immunity, upon the analogy of a wife's immunity from prosecution as an accessory after the fact to a felony committed by the husband. But this analogy is a false one, because the latter immunity is based upon the existence of an obligation binding the wife to receive and assist her husband; and it would only be in special cases that the receipt of stolen goods from him could be regarded as falling within this obligation.

45. The importance to be attached to the appearance in Archbold, between 1856 and 1925, of the statements already mentioned, is perhaps qualified to some extent by the circumstance that the title page to the 13th edition (1856), in which the earliest of those statements appeared, attributed the work to "John Jervis Esq., (now Lord Chief Justice of Her Majesty's Court of Common Pleas)".

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1 Criminal Justice Act 1925 (Eng.) S. 47.

2 Also reported in Dearsley 184: 22 L.J.M.C. 121: 21 L.T.O.S. 80: 17 J.P. 297: 17 Jur. 400: 1 W.R. 313.

3 See the reports in 22 L.J.M.C. 121 and 17 Jur. 400.

46. R. v. Brooks was referred to in the Full Court of New South Wales in R. v. Cunis Jourdain, 1 Knox 465. Martin C. J., who presided, found it unnecessary to decide whether a wife had an immunity from prosecution for receiving stolen goods from her husband, but thought that the English authorities seemed to go so far. Manning J. said that his strong impression was that there was only a rebuttable presumption of coercion in such cases. And Hargrave J., too, seems to have thought that there was no immunity, but only this rebuttable presumption.

47. In R. v. Morton, 21 V.L.R. 387, Holroyd and Hood JJ., referring to the case of a wife receiving stolen property from her husband, said that "in that case it appears that she would not be punishable at all"; and they cited R. v. Brooks as authority for this. It would seem, however, from the judgment of the third member of the Court, a'Beckett J., that the point had been conceded during argument.

48. This history adds little, if anything, to the original weight of the observations of Jervis C. J. and Parke B. in R. v. Brooks. And those observations, it is suggested, should now be considered to have been erroneous, having regard to the false analogy upon which, as already stated, they appear to have been based, and to the following criticism by Greaves in the 4th edition of Russell on Crimes and Misdemeanours at p. 36[4]:—

> "Baron Parke said that as the prisoner received the goods from her husband 'it is difficult to see how she could be guilty of this offence'. With all deference it is perfectly easy to suggest cases where a wife may be convicted of receiving stolen goods from her husband. Suppose she incites him to steal a diamond necklace for her and he does so in her absence, delivers it to her, and she wears it; or suppose a thief brings stolen goods to a house and the husband refuses to receive them but is induced by the wife so to do and afterwards the husband delivers them to his wife; it cannot be doubted that in these and like cases she may be convicted, for the plain reason that she is acting in no way under coercion."

CONCLUSION

49. The proper conclusion, it is suggested, is that there is no rule that a wife cannot be guilty of receiving stolen property from her husband; and that any such rule of immunity would be undesirable. It is open to a wife, in an appropriate case, to raise a defence of coercion to a charge of receiving stolen goods from her husband; and if it is said that hard cases can be

[4] Quoted in the 8th edn. (1923) at pp. 97-8.

suggested to which such a defence would, on the facts, be inapplicable, the same would seem to be equally true in relation to theft by a wife; and, indeed, to theft or receiving by persons other than wives. These exceptional situations are ordinarily regarded as being adequately dealt with on sentencing, by the imposing of no more than nominal or light penalties.

50. It is thought, however, that the doubts raised by the observations of Jervis C. J. and Parke B. should be disposed of by a clarifying section.

FORM OF LEGISLATION PROPOSED

51. It is therefore *provisionally recommended* that it should be enacted that the fact that the person from whom a married woman receives stolen property is her husband shall not of itself afford a defence to a charge of receiving or handling stolen property.

PART V — CONSPIRACY BETWEEN HUSBAND AND WIFE

EXISTING RULE

52. It is a rule of the common law that a husband and wife cannot be guilty of the crime of conspiracy by reason of any agreement made between themselves only. This rule has stood for centuries and has been re-affirmed by high authority in recent times[1]; and it has been embodied in the Criminal Codes of Queensland, Western Australia and Tasmania[2]. It has been suggested, however, that the rule has no justification today, and ought to be abolished or restricted[3]. And in New Zealand it has in fact been abolished by Section 67 of the Crimes Act 1961.

THE CRIME OF CONSPIRACY

53. The history of conspiracy, as a crime at common law, can be traced back to the days of Bracton & Britton[4]. The definition and limits of the crime have been the subject of a vast amount of discussion and analysis, both in judgments in courts of the highest authority and by eminent writers. Yet the law of criminal conspiracy remains "one of the most difficult and controversial branches of our criminal law"[5].

54. Nearly a century ago Barry J. in Reg. v. Parnell, 14 Cox C. C. 508, expressed the opinion that "there must be necessarily in the law of conspiracy considerable vagueness and uncertainty which in many respects is contrary to our law", and that "it should be administered with very great care and not extended . . . ". Today the uncertainty remains, but the admonition against extending the limits of the crime has not been observed. This has been made unhappily apparent by the examination of the present scope of criminal conspiracy that was made by the House of Lords in 1973 in Kamara v. D.P.P., cited in footnote[4] above.

55. One thing, it is true, has been clearly established, namely that an agreement between two or more persons to commit any criminal offence whatever (whether indictable or summary, and whether as an end in itself or as a means to an end) is sufficient to constitute the indictable misdemeanour of conspiracy. But as to all other categories, or suggested categories, of criminal conspiracy, grave uncertainty exists, either because only vague limits are assigned to the category, or because no certainty exists as to whether there is, in law, such a category of conspiracy.

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[1] Mawji v. The Queen, 1957 A.C. 126; Kowbel v. The Queen (1954) 4 D.L.R. 337; The King v. McKechnie (1926) N.Z.L.R. 1.

[2] Criminal Code Act 1899 (Qld.) S. 33; Criminal Code Act 1902 (W.A.) S. 33; Criminal Code Act 1924 (Tas.) S. 297 (2).

[3] Compare "The Legal Unity of Husband and Wife", Glanville Williams, 10 Mod. L. Rev. 16; U.S. v. Dege 364 U.S. 51; Smith & Hogan "Criminal Law", 3rd edn., p. 180.

[4] See the discussion in Kamara v. D.P.P. (1973) 2 All E.R. 1242, 1252, et seq. per Lord Hailsham L.C.

[5] S.C. at pp. 1248-9.

56. What was laid down by the House of Lords in relation to these areas of uncertainty may, it is thought, be summarised as follows:—

(1) Where what is agreed to be done does not constitute the commission of a crime but merely the commission of a civil wrong, the agreement nevertheless is sufficient to constitute a criminal conspiracy if its object is either (a) "the invasion of the public domain" or (b) the infliction on the victim of "injury and damage which goes beyond the field of the nominal"[6].

(2) Where what is agreed to be done constitutes neither a crime nor a civil wrong, but merely a breach of contract, it is uncertain whether this can be sufficient to render the agreement indictable as a criminal conspiracy[7].

(3) Even where what is agreed to be done is not a crime or civil wrong, nor even a breach of contract, the agreement can nevertheless constitute a criminal conspiracy if it falls within one of the numerous and diverse categories of agreements which have so far been held to be agreements to effect a public mischief; or within any categories which may hereafter be added to the list[8]. (Extension, it was said, in the speech of Lord Hailsham L. C., "should be very closely and jealousy watched by the courts"; but this, it may be observed, would require a marked change of attitude on the part of the courts)[9].

IS CONSPIRACY A CRIME TO BE EXTENDED?

57. The great width of the crime of conspiracy and the extreme vagueness of its present limits, as well as its proved capacity for expansion, may well raise doubts in relation to any proposal that legislation should be enacted to bring within the scope of the crime agreements made between husband and wife only. And there are, in addition, anomalous features of the crime which give further grounds for doubting the desirability of extending it.

58. Ordinarily, under our criminal law, a person does not become guilty of any crime unless and until some criminal act has been committed, or attempted to be committed, by him, or by some person in whose actions he is implicated. With the crime of conspiracy, however, the position is otherwise. "The offence is complete as soon as the parties agree, and it is immaterial that they never began to put their agreement into effect."[10].

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[6] S.C. pp. 1260-1: and see further Law Commission Working Paper No. 54, paras. 23-32.
[7] S.C. pp. 1258-9.
[8] S.C. pp. 1253-4, 1258.
[9] Compare Law Commission Working Paper No. 50, para. 8.
[10] Law Commission Working Paper No. 50, para. 6.

59. A second anomalous feature is that the making of the agreement constitutes an indictable misdemeanour, even though what is agreed to be done is merely to commit a summary offence, or even, in some categories of criminal conspiracy, something that is no offence at all.

60. Two justifications have been suggested for the existence of a crime having these anomalous characteristics:—

(a) In the first place it has been put that the very fact of the agreement being one for concerted action by two or more persons renders it (where what is to be done would be unlawful or would tend to produce public mischief) a dangerous thing in itself[11], or gives it a "formidable or aggravated character"[12]. As to this, however, the Law Commission has made the following observation: "It may be that a combination of, say, a dozen, is formidable; but it is difficult to see how much gravity is added to one man's conduct by the agreement of one other"[11]. And the difficulty may be thought to be still greater if the "one other" is the spouse of the first, and therefore less likely to be able to bring in resources and supporters not available to the first.

(b) The second justification that has been suggested is that the existence of the crime of conspiracy, by enabling the criminal law to impose its sanctions at the planning stage, helps to deter and prevent the commission of crimes[13]. This argument, however, does not appear to provide any justification for the inclusion, within the crime of conspiracy, of agreements to do acts which are not criminal. And even in relation to agreements to commit offences, the justification may not be altogether convincing, except, perhaps, where the offences are grave ones.

61. A common weakness, therefore, of each of these suggested justifications is that it is relevant only to a part of the field over which the crime of conspiracy extends. And the proper conclusion, in the light of all the foregoing considerations, would appear to be that the crime of conspiracy is not one which ought to be extended[14].

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[11] Law Commission Working Paper No. 50, para. 11.

[12] Reg. v. Parnell, 14 Cox C. C. 508, 514.

[13] Law Commission Working Paper No. 50, para. 12.

[14] The Law Commission, in its Working Paper No. 50, paras. 9, 14, 32 and 62, has proposed that the crime should be restricted to agreements to commit criminal offences.

ARGUMENTS FOR EXTENDING THE CRIME OF CONSPIRACY TO AGREEMENTS BETWEEN SPOUSES

62. The main grounds upon which it has been argued that the crime of conspiracy should be extended to cover agreements between husband and wife only, may be summarised as follows:—

(1) The exclusion of such agreements from the crime of conspiracy arose out of a legal fiction that husband and wife are one person, and rests upon a view that, because of this fiction, they cannot, between them, make up the two persons whose participation is necessary to constitute a criminal conspiracy.

(2) The legal fiction, whether or not it was justifiable in days gone by, is today out of accord with the law relating to married persons by reason of the legislation which has enabled a married woman to vote, to own and dispose of property, and to make contracts, as if she were unmarried, and to take civil and criminal proceedings, even against her husband.

(3) Accordingly, it is put, the basis upon which the exception of husband and wife agreements was rested does not today support it, and the exception should therefore be abolished.

63. An extremely forceful statement of the argument was put forward in the following passage from the majority judgment in U.S. v. Dege [15], delivered by Frankfurter J.:—

> "For this court now to act on Hawkins' formulation of the medieval view that husband and wife "are esteemed but as one Person in Law, and are presumed to have but one Will" would indeed be "blind imitation of the past". It would require us to disregard the various changes in the status of woman—the extension of her rights and correlative duties — whereby a wife's legal submission to her husband has been wholly wiped out, not only in the English-speaking world generally, but emphatically so in this country".

COUNTER ARGUMENTS

64. The foregoing arguments may be thought to be open to the following counter arguments:—

(1) To say that the exception arose from a legal fiction throws no substantial light, one way or the other, upon the desirability of the exception, either in its origins, or under present-day conditions.

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[15] 364 U.S. 51.

Legal fictions were useful devices, in the days when legislation was rare, for narrowing or extending the operation of rules of law, in order to further the interests of justice. In present-day legislation "deeming" clauses are often used for a similar purpose. And as has been observed by Glanville Williams, the fiction of legal unity of husband and wife, in almost all the contexts in which it has been applied, "has subserved public policy, or at least humanitarianism"[16].

(2) When Hawkins wrote, in the passage cited in U.S. v. Dege (see para. 63), that husband and wife "are esteemed but as one Person in Law"[17] this was certainly not the law in relation to criminal responsibility generally. It is true that there was then, in England, a rebuttable presumption of coercion operating in a limited area. But subject to this, the law was then, as it is now, that husband and wife are each separately liable for their crimes, whether committed separately or jointly with each other, and liable also for aiding and abetting, or being accessory before the fact to, each other's crimes[18]. The proposition that husband and wife were one person was applied only in a selective way. And in truth it would seem to have been no more than a hallowed formula called in aid in a few special situations to explain rules of law which were in fact derived from considerations of policy[19].

(3) What then were the policy reasons which brought it about that, in the particular case of a prosecution for conspiracy, husband and wife were "esteemed but as one Person in Law"? Hawkins, by his immediately following statement that husband and wife "are presumed to have but one Will" may be thought to imply that a basic reason was that the legal subjection of married women made it appear unjust, in those days, to hold a married woman liable for joining in a conspiracy proposed to her by her husband, and unlikely, perhaps, that she would herself be the one to make the proposal. This is put more fully in Staunford, Les Plees del Coron (1557) p. 174, where it was said (in law French) that the reason for the exception of husband-and-wife agreements was "that husband and wife by common presumption must needs have but one Will" and that "when they speak together all shall be understood the speech of the husband, and nothing of the wife".

(4) The force of such a policy reason has, it is true, been impaired by the changes that have taken place since Hawkins' day in the legal,

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16 "Legal Unity of Husband and Wife", 10 Mod. L.R. 16, 31.

17 Hawkins, P. C., 1st Edition, (1716) Bk. 1, Ch. 72, Sect. 8.

18 Compare 1 Hale, P. C. 516; Hawkins, P. C. 8th edition (1824) Bk. 1, Ch. 1, Sects. 9-13, and Note (7).

19 See Tooth & Co. Ltd. v. Tillyer, 95 C.L.R. 605, 615.

economic, and political status of married women; though it may be observed that even today most married women are dependent on their husbands' earnings, and are therefore less able than a stranger would be, to refuse their assent to illicit plans of their husbands. But apart altogether from reasons based on subjection or dependency there were, when Hawkins wrote, a number of substantial considerations of policy, which subsist today, favouring the exclusion of husband and wife agreements from the scope of the crime of conspiracy.

POLICY CONSIDERATIONS FAVOURING RETENTION OF THE EXCEPTION

65. (1) The stability of marriages is still a matter of the first importance in our society; and an important aid to that stability, it may be thought, is the maintenance between spouses of a confidential relationship in which hopes and fears, and plans for joint action and mutual assistance, can be discussed without any inhibiting thought of subsequent public disclosure. But if public trials of husband and wife were taking place in our courts today, upon charges of conspiracy in respect of communications between themselves only, this, it may well be considered, would be likely to have a significant effect in discouraging marital confidences and consequently the quality of marital relationships.

(2) Again, the changed status of married women has not affected the duty of spouses to provide comfort and support for each other. Married persons, therefore, at the time of making any agreement that might be charged against them as a conspiracy, will commonly be faced with an apparent conflict between their duty to each other and their duty to society. And in such circumstances the making of the agreement may be much less reprehensible than the making of a like agreement between persons owing no duties to each other. Indeed, as was pointed out by Warren C. J. in U.S. v. Dege[20], a wife may, simply by virtue of the close and confidential life that she shares with her husband, do things "that would technically be sufficient to involve her in a criminal conspiracy, though far removed from the arm's length agreement typical of that crime." And a husband, of course, could face corresponding difficulties.

(3) As has been mentioned in paragraph 60 (a) above, the addition of the agreement of one spouse to the project of the other is less likely than the agreement of a stranger would be, to bring in additional resources or make the agreement a formidable one.

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[20] 364 U.S. 51.

(4) Finally, there is a consideration which was suggested by the Law Commission[21], namely that if agreements between spouses were capable of constituting the crime of conspiracy, this might offer excessive scope for improper pressure on a husband or a wife, e.g. to confess to a crime that he or she is innocent of and has denied committing.

66. When the opposing arguments traversed in paragraphs 62-65 above are weighed, the balance, it is suggested, is against any proposal that the exception of husband and wife agreements should be abolished. And this was the provisional conclusion reached in England last year by the majority of the Law Commission[22]. It is therefore *provisionally recommended* that an exception of husband and wife agreements from the crime of conspiracy should be retained.

RELATED PROBLEMS

67. If this recommendation be adopted there will be two further problems calling for consideration, and the first of these relates to the common law offence of incitement. The general legal position in relation to that offence was stated by Stephen in the following terms:—

> "A person who counsels, procures or commands another to commit a felony or misdemeanour is guilty of the misdemeanour of incitement if the offence suggested is not committed, and, if it is committed, is an accessory before the fact if the offence is a felony, and a principal if the offence is either treason or misdemeanour"[23].

68. In the second of the two basic situations referred to by Stephen, namely that in which the crime incited has been committed, it seems clear that married persons have no exemption from criminal liability. If they incite their spouses to commit criminal offences, and the offences are in fact committed, then they are liable (according to the circumstances) either as accessories before the fact or as principals. But is it possible for one spouse to be guilty of the misdemeanour of incitement by reason of counselling, procuring or commanding the other to commit a felony or misdemeanour which is not in fact committed? If this were the law then the odd situation would exist that where the second spouse has rejected a proposal for criminal action the first will be criminally liable for incitement (amounting in reality to an attempt to conspire), but that if the second spouse accepts the proposal neither of them will be criminally liable for the conspiracy thus entered into.

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[21] See Working Paper No. 50, para. 36, and compare the allegations in R. v. Middleton (1974) 2 All E.R. 1190.
[22] Law Commission Working Paper No. 50, Section 36.
[23] Stephen, History of the Criminal Law, Ch. 22, p. 230.

69. No satisfactory authority exists for saying that one spouse is criminally liable for inciting the other to commit an offence which is never in fact committed. It is true that in the 38th edition of Archbold it is stated in Section 47 that "if a married woman incites her husband to the commission of an offence, she is liable"; but the authorities cited for this proposition merely show that she is liable as an accessory before the fact to a felony committed by her husband upon her incitement. And the statement in the 38th edition of Archbold was represented in the 36th and earlier editions by the very different statement that "If a married woman incites her husband to the commission of a felony, she is an accessory before the fact". Again Lush on Husband and Wife, in the 4th edition, at page 597, goes no further than to say "A wife inciting her husband to the commission of a felony is an accessory before the fact". Glanville Williams has expressed a somewhat tentative view that one spouse can commit the crime of incitement by inciting the other to a crime that is never committed; but he concedes that the point has not been decided and he rests his view upon the doubtful analogy of the rule that where a felony incited by one spouse is actually committed by the other, guilt attaches to the inciter as an accessory to the felony[24]

70. It is suggested that if husband and wife agreements are to remain excepted from the crime of conspiracy, then the inciting by one spouse of the other to commit an offence should likewise be excepted from the crime of incitement. And it is *provisionally recommended* that the legal situation should be made clear by enacting that these two immunities shall exist, but that this shall not affect the liability of a married person (a) as an accessory before the fact to a felony committed or as a principal in the second degree therein, or (b) as a principal offender in an indictable misdemeanour or summary offence by reason of having aided, abetted, counselled or procured its commission.

71. The second problem referred to in paragraph 67 above is whether, if there is to be an exemption of married persons from criminal liability for conspiracy with each other and incitement of one by the other, this exemption should apply even when the conspiracy or incitement is for the commission of the gravest of crimes. The presumption of coercion which at present applies in favour of a woman in relation to crimes committed in the presence of her husband does not extend to treason or murder; and the provisional recommendation in Part I of this paper that there should be a defence of coercion available to a married woman extends only to crimes other than treason and murder. The gravity of those two crimes is such that the need to deter the commission of them would seem to outweigh the policy considerations relied on to support an exemption in favour of married persons

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[24] Glanville Williams, Criminal Law—The General Part, Sect. 215.

in relation to conspiracy with each other and incitement of one by the other. It is therefore *provisionally recommended* that such an exemption should not extend to conspiracy to commit treason or murder or to incitement of either of those crimes and that legislation enacting the exemption should make this clear[25].

FORM OF LEGISLATION PROPOSED

72. It is *provisionally recommended* that legislation to the following effect should be enacted to implement the provisional recommendations in the preceding paragraphs of this Part.

1. (1) A married person shall be criminally responsible for incitement or conspiracy to commit treason or murder as if he or she were unmarried.

(2) Subject to sub-section (1) a married person shall not be criminally responsible for conspiracy with his or her spouse only, nor for incitement of his or her spouse to commit a criminal offence.

(3) Nothing in sub-section (2) shall affect the criminal liability of a married person

(a) as accessory before the fact to any felony committed or as principal in the second degree therein, or

(b) as a principal offender in any indictable misdemeanour or summary offence by reason of having aided, abetted, counselled or procured its commission.

[25] The cases cited in Note 1 to para. 52 of this Part make it doubtful whether Sec. 4 of the Crimes Act 1958 (which relates to conspiracy to murder and incitement to murder) is applicable to conspiracy and incitement between spouses

PART VI — CRIMINAL PROCEEDINGS BY ONE SPOUSE AGAINST THE OTHER

73. Before the passing of the Married Women's Property legislation in the second half of last century the law was that, in general, one spouse could not maintain criminal proceedings against the other. Cases of unlawful application of force by one to the person of the other constituted an exception to this general rule[1]. One spouse, accordingly, could maintain criminal proceedings against the other for assault and similar offences; and one spouse could have the other bound over not to commit such offences[2]. By what seems to have been regarded as an extension of this category of violent offences, a woman who had been abducted and then gone through a ceremony of marriage with her abductor could prosecute him for the abduction[3]. But there is little authority for the existence of any other exception to the general rule[4].

74. It was also the law that one spouse could not be guilty of stealing from the other, at least while they were living together[5].

75. By the Married Women's Property legislation these special rules of the criminal law were altered to the extent of providing that husband and wife should have, against each other, the same remedies and redress by way of criminal proceedings for the protection and security of their property as if they were unmarried[6]. This made it possible in law for one spouse to be guilty of stealing from the other and enabled the victim to prosecute the thief; but it was expressly provided that no criminal proceedings should be taken by one spouse against the other by virtue of the legislation unless

(a) they were living apart when the proceedings were taken,

—and—

(b) either they were living apart at the time of the acts charged or else the property in question was wrongfully taken when leaving or deserting or when about to do so[6].

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1 R. v. Lord Mayor of London, 16 Q.B.D. 772; 8th Report of Criminal Law Revision Committee, para. 196, (Cmnd. 2977).
2 Stephen, Commentaries on the Laws of England, 4th edn., Vol. 2, p. 273; Paul, Justices of the Peace (1936) pp. 55-6, 796.
3 R. v. Lord Mayor of London, 16 Q.B.D. 772.
4 See, however, Reg. v. Smith, 1 M. & Rob. 155, and 5 C. & P. 201.
5 Encyclopaedia of the Laws of England, Volume 8, pp. 309-310; 8th Report of Criminal Law Revision Committee, para. 190, (Cmnd. 2977).
6 See Marriage Act (Vic.) 1958, Section 160.

76. Finally, by Section 2 of the Crimes (Theft) Act (Vic.) 1973, a new Section 95 was introduced into the Crimes Act 1958 whereby it was provided:—

(i) That the Crimes Act 1958 should apply to the parties to a marriage and to property belonging to either of them as if they were not married.

(ii) That, subject to limited exceptions, proceedings against a person for stealing, or doing malicious damage to, property of his or her spouse, or for any attempt, incitement or conspiracy to commit such an offence, might not be instituted except by the Attorney-General or with his consent.

(iii) That in all cases to which the requirement that the prosecution should be instituted by, or with the consent of, the Attorney-General did not apply, one spouse could bring criminal proceedings against the other for any offence whatever as if they were not married.

77. The result of these provisions would appear to be that there are no longer any special rules relating to criminal proceedings between spouses or to stealing by one spouse from the other, save and except those referred to in paragraph 76 (ii) above.

78. The provisions so introduced by our Crimes (Theft) Act 1973 are based on the English Theft Act 1968 and follow reviews of the relevant law by the Criminal Law Revision Committee in England and by the Chief Justice's Law Reform Committee in this State. It is not thought that a further review of this aspect of the law is warranted at this time, and it is *provisionally recommended* that any such review be deferred until the new provisions have been in operation for a substantial period and it can be seen whether they have worked satisfactorily.

END