HOUSE OF LORDS.

Monday, February 26, 1912.

(Before the Lord Chancellor (Loreburn), Earl of Halsbury, Lords Macnaghten, Atkinson, Shaw, and Robson.)

LEACH *v.* DIRECTOR OF PUBLIC PROSECUTIONS.

(ON APPEAL FROM THE COURT OF CRIMINAL APPEAL.)

Evidence — Criminal Evidence Act 1898 (61 *and* 62 *Vict. cap.* 36), *sec.* 4 — *Whether Wife of Panel Compellable Witness.*

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

Held (*rev.* judgment of the Court of Criminal Appeal — LORD ALVERSTONE, C.J., HAMILTON and BANKES, JJ.) that a husband or wife cannot be compelled to testify against his will.

The appellant was indicted for an offence under the Punishment of Incest Act 1908, and the Crown proposed to call his wife as a witness, as provided by section 4 of the Criminal Evidence Act 1898 (61 and 62 Vict. cap. 36), quoted *supra in rubric.*

Their Lordships gave judgment as follows:—

LORD CHANCELLOR (LOREBURN)—I do not pretend to conjecture whether the decision at which I think that your Lordships will arrive is *pro bono publico* or not, because, on the one hand, it is very desirable in a certain class of cases justice should not be thwarted by the absence of the necessary evidence, but upon the other hand it is a fundamental and old principle to which the law has looked that you ought not to compel a wife to give evidence against her husband, especially in matters of a criminal kind. Fortunately it is not our duty to-day to consider these consequences at all. What we have to consider is, what is the meaning of the law which has been laid down in the Act of 1898? This appellant was indicted, and was convicted, for an offence under the Incest Act. In the course of the trial his wife was called and asked to give evidence for the prosecution; she objected, but was directed and compelled to do so. The question is whether this was lawful or not.

It is clear that this question must be governed by section 4 of the Criminal Evidence Act 1898, which runs as follows—"... [*quotes, v. sup.*] ..." Now if it had not been for that section the wife could not have been allowed to give evidence, and the result of that was that the wife could not have been compelled to do so, and was protected against compulsion. The difference between leave to give evidence and compulsion to give evidence is recognised in a series of Acts of Parliament. Then, does the 4th section which I have read deprive the wife of this protection? It is capable of being construed in different ways, and it may hereafter lead, for all I know, to various other difficulties; but the present question is, Does it deprive this woman of this protection? It says, in effect, that the wife can be allowed to give evidence even if her husband objects. It does not say that she must give evidence against her own will. It seems to me that we must have a definite change of the law in this respect, definitely stated in an Act of Parliament, before the right of this woman can be affected, and therefore I consider that this appeal ought to be allowed, with what consequences or how it may be conformable to what is the true interest of society or the public we are not concerned, and have no liberty to inquire.

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

In dealing with that question I should have thought that it is one of the things which would not only occur to a lawyer, but is one which almost everybody in English life would recognise, that a wife ought not to be compelled to be called against her husband. It is not necessary to enter into that question, but what I mean is that those who are under the responsibility of passing Acts of Parliament would recognise a matter of that supreme importance as one to be dealt with specifically and definitely, and not to be left to an inference. I think, for this reason also, that this observation is true, that when you are dealing with a question of this sort you cannot leave out of sight the different Acts of Parliament which have been passed, in one sense, upon this subject, with a sort of nomenclature of their own, and I must say for myself, speaking as an ordinary person, that I should have asked, when it was proposed to call the wife against the husband, "Will you show me an Act of Parliament which says definitely that you may do so, because since the foundations of the common law it has been recognised that it is contrary to the course of the law," and if no statute was capable of being produced, I say, after the extremely able argument which we have had on behalf of the Crown, urged not a bit more earnestly than it was right that it should be—for it is most proper that those who represent the Crown should urge every argument which could be urged to show what is the true construction of the statute—that when that is

the condition of things with which we are dealing, I cannot doubt what the ordinary and natural course of events would have been. If you want to alter the law which has lasted for centuries, and is almost ingrained in the English Constitution, in the sense in which everybody would say, "To call a wife against her husband is a thing which cannot be thought of"—to suggest that it is to be dealt with by inference, and that you should introduce a new system of law without any specific enactment of it, seems to me to be perfectly monstrous. The result is that I entirely concur with what the Lord Chancellor has said, and with nothing more entirely than with what he urged, that such an alteration of the law as this ought to be by definite and certain language.

LORD MACNAGHTEN—I entirely agree.

LORD ATKINSON — I concur. I think that the principle that a wife is not to be compelled to give evidence against her husband is deep-seated in the common law of this country, and if it is to be overturned it must be by a clear, definite, and positive enactment.

LORD SHAW and LORD ROBSON concurred.

Order appealed from reversed. Case remitted to the Court of Criminal Appeal.

Counsel for the Appellant—V. Milward. Agents — Mills, Curry, & Gaskell, for Johnson & Son, Newcastle-under-Lyme, Solicitors.

Counsel for the Crown—The Solicitor-General (Sir J. Simon, K.C)—Rowlatt — Mordaunt Snagge. Agent—Director of Public Prosecutions.

PRIVY COUNCIL.

Wednesday, February 28, 1912.

(Before Lords Macnaghten, Shaw, Mersey, and Robson.)

LEMM *v.* MITCHELL.

(ON APPEAL FROM THE SUPREME COURT OF HONG-KONG.)

Statute—Repeal—Re-enactment—Effect on Concluded Action—Res judicata.

When an action has been dismissed on the ground that the right of action has been taken away by statute, the judgment dismissing the action is *res judicata* should the Legislature subsequently pass an ordinance that the enactment in question "is hereby repealed and its effect on existing legislation is hereby declared to have been and to be inoperative and of none effect, and the ordinances thereby affected are hereby declared not to have been affected, but to have remained and to remain of the same force and effect as if" the enactment had not been enacted.

By Ordinance in 1905 action for criminal conversation was abolished in Hong-Kong. In 1907 the respondent raised such an action against the appellant, which was dismissed on the plea that the Court had no jurisdiction in respect of the alleged cause of action. In December 1908 the right of action was revived, inclusive of actions for conduct during the period when the right of action had ceased to exist. The respondent thereafter instituted a new action based on the same alleged acts of misconduct as had formed the basis of his previous action. The defendant pleaded *res judicata*. PIGGOTT (C.J.) decided in the plaintiff's favour, and the Supreme Court of Hong-Kong (PIGGOTT, C.J., and HAZELAND, J.) dismissed an appeal.

The defendant now appealed.

Their Lordships' judgment, given after consideration, was as follows:—

LORD ROBSON—The appellant in this case was the defendant in an action to recover damages for criminal conversation brought by the respondent in the Supreme Court of Hong-Kong (original jurisdiction) on 19th December 1908. To that action he pleaded *res judicata*. The learned Chief-Justice held the plea to be bad, and on appeal to the Full Court his decision was affirmed.

In 1906 the respondent was a master mariner, living with his wife at Hong-Kong, where the appellant also resided. The respondent in that year commenced a suit in the First Division of the Court of Session, Edinburgh, for the dissolution of his marriage with his wife on the ground of misconduct with the appellant, who was not a party to the action, and in November 1906 the marriage was dissolved. Afterwards, on the 29th July 1907, the respondent commenced an action of criminal conversation in the High Court of Hong-Kong against the defendant-appellant to recover damages for the misconduct above mentioned. In that action the defendant pleaded that the Court had no jurisdiction in respect of the alleged cause of action. The point of law thus raised was set down for hearing, and was heard by the learned Chief-Justice, who on the 5th of May 1908 delivered judgment in favour of the defendant-appellant and dismissed the action with costs.

It is unnecessary for the purposes of the present case to go in detail through the various Ordinances of the colony on which the learned Chief-Justice based his judgment in the action just mentioned. It is sufficient to say that in his view the introduction of the English Divorce Act 1857 into the colony by Ordinance 5 of 1858 had abolished the common law action for criminal conversation in Hong-Hong; that on the repeal of Ordinance No. 5 of 1858 by Ordinance No. 5 of 1860 the action for criminal conversation was revived, but that by the retroactive effect of certain subsequent enactments, more particularly Ordinance No. 3 of 1895, the right to bring that action in the colony was again abolished.