SPOUSES AS WITNESSES IN ENGLAND AND QUEENSLAND: DURING MARRIAGE AND AFTER DIVORCE

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An interesting aspect of the law of evidence concerns whether, in a criminal proceeding, a person who is married to the accused, or has at some time in the past been married to the accused but subsequently divorced, is either competent or compellable to give evidence against their spouse, or former spouse. The same question could be asked in relation to parties in civil cases. The case of the former spouse is of particular interest because it does not appear to have been the subject of any recent judicial or legislative attention in any State of Australia save Victoria. The purpose of this short article is to review the authorities concerning both spouses and former spouses under the law of Queensland.

The term 'spouse' will be used herein in the sense of lawfully wedded spouse[1] thus excluding any *de facto* relationship: the term 'former spouse' will have a corresponding meaning.[2] The term 'competent' is used herein to mean lawfully able to give evidence whilst the term 'compellable' is used to mean required by law to testify if called upon to do so.

As much of modern Queensland law turns on the common law of England it is necessary to consider the position in that jurisdiction at the outset.

A. English Law

1. Spouses

In both Coke [3]and Blackstone[4] there are conclusive statements that a spouse at common law was incompetent either for or against their partner in both civil and criminal proceedings.

By the late eighteenth century this was a well established rule (subject to certain exceptions) and even extended to matters occurring before the marriage. Thus, in *Bentley* v. *Cooke*[5] in 1784 Lord Mansfield was able to say:

> There never has been an instance either in a civil or a criminal case where the husband or wife has been permitted to be a witness for or against the other, except in the case of necessity, and that necessity is not a general necessity, as where no other witness can be had, but a particular necessity, as where, for instance, the wife would otherwise be exposed without remedy to personal injury.

The reasons advanced in the cases for the existence of such a rule are many and varied. For example in *Barker* v. *Dixie*[6] Lord Hardwicke said that a spouse should not testify against their partner in order 'to preserve the peace of families'. In *Davis* v. *Dinwoody*[7] Lord Kenyon C.J. said the reason a spouse should not testify for their partner was 'because their interests are absolutely the same'[8] and that the ground of both principles was the presumption of bias.

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1. *R* v. *Fuzil Deen* (1895) 65 Q.L.J. 302.
2. The Evidence Act 1977-1984 (Qld.) does not use the term 'spouse' nor define the terms 'husband' and 'wife'.
3. Co. Litt. 6b.
4. Commentaries at 556.
5. (1784) 3 Dougl. 422; 99 E.R. 729.
6. (1736) Hardw. 264.
7. (1792) 4 T.R. 678.
8. Despite abolition of the rule of incompetence in cases of common interest by the Evidence Act 1843 (U.K.) the rule of incompetence of spouses persisted thereafter.

Cross [9] in commenting on these reasons doubts the extent to which the law of evidence should 'promote conjugal felicity' and suggests that bias should be regarded as a matter of cogency rather than admissibility. Whatever the strength or otherwise of the reasons for the rule it was one well entrenched in the common law and observed in the courts of equity.

The exceptions at common law to the above rule, spoken of in the passage quoted above from Lord Mansfield as 'instances of necessity' were (and still are):

(a) Criminal proceedings wherein the accused was charged with personal violence against his or her spouse. This was the most common of the exceptions, dating back to 1631 and *Lord Audley's Case.*[10] The reason for it was that otherwise there would be no means of proving an assault by one spouse upon the other unless it had been witnessed by a third party, an unlikely occurrence.

(b) Charges of treason. Whilst there is little case law on this,[11] Cross[12] suggests that the exception can be justified 'on the ground that the public interest in the safety of the State outweighs whatever public interests are promoted by preventing one spouse from testifying against the other'.

Some doubt about the exception remains however due to the statement in Hale's Pleas of the Crown[13] that '. . . a *feme covert* is not a lawful witness against her husband in a case of treason'.

(c) Charges involving deprivation of liberty, such as in *R* v. *Wakefield*[14] where a woman was abducted and coerced into marrying the accused and it was held that as wife she would be a competent witness against her husband even where it transpired that the marriage was legally valid.

In *R* v. *Sergeant*[15] in 1826 it was held that a wife was a competent witness for her husband in all cases where she would be competent against him; it would seem that this must apply to all the above exceptions to the common law rule of incompetency of spouses and to husbands as well as wives. However, the fact that on certain occasions a spouse may have been competent at common law does not automatically mean that he or she was also compellable. Generally speaking of course anyone who is a competent witness is also compellable, unless he or she can show some exception in their favour.[16] Was there an exception in the case of competent spouses? While some doubt persisted until only a few years ago, the House of Lords in *Hoskyn* v. *Metropolitan Police Commissioner*[17] decided by a majority of four to one on grounds of both past authority and public policy that a wife was not compellable against her husband in a case of personal violence against her by him. There have been no decisions on the compellability of spouses in cases falling under the other common law exceptions to competence stated above.

The general common law rule of spouse incompetence has long been abolished in civil cases in England by Statute.[18] More recently the Police and Criminal Evidence Act 1984 has abolished it in all criminal cases. Section 80 of that Act provides that in any criminal proceeding:

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9. *Cross on Evidence*, 2nd Austn. Edn., ed. J. Gobbo, D. Byrne & J. Heydon, (1979), at 177.
10. Hutton, 115; 123 E.R. 1140.
11. See *R* v. *Griggs* 1 Hale 48.
12. *Cross on Evidence*, *op cit supra* n.9 at 163.
13. Vol. 1. at 301.
14. *R* v. *Wakefield* (1827) 2 Lew. C.C. 1; 279; 168 E.R. 1154.
15. (1826) Ry. & M. 352.
16. *Ex parte Fernandel* (1861) 10 C.B.N.S. 3.
17. [1979] A.C. 474.
18. Evidence Act 1853 (U.K.) s.1.

(a) the spouse of an accused is competent for the prosecution, subject to the proviso that spouses jointly charged are incompetent against one another until the liability to conviction at the trial of the offence charged of the one seeking to testify is removed i.e. by the charge against the latter being withdrawn or separate trials ordered.
(b) the spouse of an accused, subject to the above proviso, is compellable for the prosecution but *only* where:
(i) the offence charged involves an assault on, or injury or a threat of injury to, the spouse of the accused or any person who at the relevant time was under the age of sixteen or
(ii) the offence charged is a sexual offence alleged to have been committed on a person who at the relevant time was under the age of sixteen or
(iii) the offence charged consists of attempting or conspiring to commit, or of aiding, abetting, counselling, procuring or inciting the commission of, an offence of a type listed in (i) or (ii) above.

In all other cases the spouse of the accused is not compellable for the Crown. However, once a spouse has elected to give evidence for the Crown, he or she becomes an ordinary witness and cannot refuse to answer particular questions except on the ground of claim to privilege.[19]

Under the 1984 Act the spouse of an accused is competent for the defence generally and, subject to the proviso noted in (a) above, compellable for his or her spouse. The spouse of one co-accused is, subject to the same proviso, compellable for other co-accused(s) only in the cases listed in (b) above.

2. Former spouses

In 1802 the common law incompetence of a spouse was extended, in the key case of *Monroe* v. *Twisleton*,[20] to former spouses. In that case, the plaintiff in an action of *assumpsit* was prohibited from calling the divorced wife of the defendant to prove a contract concluded during her marriage to the defendant. The rule stated in *Bentley* v. *Cooke*[21] was accepted without question but, the matter of divorced spouses apparently not having arisen before, two further rules were laid down by Lord Alvanley, i.e.:

(a) that a former spouse was an incompetent witness as to anything which happened during (and, although his Lordship did not expressly say so, perhaps before[22]) the marriage in question. The grounds advanced by his Lordship for this ruling were that marital trust and secrecy whereby confidences were exchanged between spouses was not to be broken by a subsequent divorce. His Lordship did not address the point but presumably he intended his ruling to be subject to the exceptions stated above relating to spouses.[23]
(b) that a former spouse was competent to prove any fact arising after the divorce in the same way as any other witness. (As the coverture would be at an end, and the witness to be treated as any other, presumably he or she in this situation would also be compellable.)

Despite its being a civil case, Lord Alvanley in *Monroe* v. *Twisleton*[24] made it clear that the principles he laid down must apply also to criminal cases. No such case involving a former spouse arose until 1953, when the Court of Criminal Appeal in *R* v. *Algar*[25] approved and applied the first of the two principles stated above. The facts of *Algar* are not important

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19. *R* v. *Pitt* [1982] 3 All E.R. 63.
20. (1802) Peake Add. Cas. 219; 170 E.R. 250.
21. *Supra* n.5.
22. There is no authority on this but see Cross, *supra* n.9 at 174.
23. In *O'Connor* v. *Marjoribanks* (1842) 4 Man. & G. 435, Coltman J. took this to be the case.
24. *Supra* n.20.
25. [1954] 1 Q.B. 279.

here save for the fact that the former spouse had obtained a decree of nullity in respect of her marriage to the accused; this, the Crown argued, was equivalent to a judgment that Mrs Algar had never been the wife of the accused and therefore did not fall within the ambit of *Monroe* v. *Twisleton*.[26] Lord Goddard C.J., delivering the judgement of the court, held that this argument could not succeed, refusing to distinguish between a decree of nullity of a voidable marriage (as had been obtained by Mrs Algar) and a decree of divorce as had been obtained in *Monroe* v. *Twisleton*.[27] His Lordship said that the case would be otherwise with a decree of nullity of a void marriage, for such a marriage would be regarded as never having taken place and the parties to it would fall to be treated as any other witnesses. On the other hand, a voidable marriage subsists until it is avoided and thus the parties to it must be treated as spouses, and after the decree of nullity as former spouses. Thus, Mrs Algar was held to be incompetent as a witness against her former husband at his trial for forgery, a direct application of the rule in *Monroe* v. *Twisleton*.[28] The only reported English case since *Algar* dealing with the same principles is *Moss* v. *Moss*;[29] here, it was held that a decree of judicial separation did not render a spouse competent in a criminal trial where otherwise he or she would be incompetent. *Algar* has been followed in Canada[30] but not referred to in Australia.

The general common law incompetence of former spouses in criminal cases has now been abolished in England by the Police and Criminal Evidence Act 1984. Section 80(5) of that Act provides that in any criminal proceedings a person who has been but is no longer married to the accused shall be competent and compellable to give evidence as if that person and the accused had never been married.

B. Queensland Law

1. Spouses

In Queensland the competence and compellability of spouses in criminal proceedings is now governed by s.8 of the *Evidence Act* 1977-1984 (herein called 'the Act'), which covers not only trials on indictment but also committals and summary proceedings for simple offences.[31]

The definition in the Act of 'criminal proceeding' has not however been amended to cover offences created by the *Regulatory Offences Act* 1985 (offences distinct from simple offences which are not indictable and which are called 'regulatory' offences) and the latter Act makes no mention of this apparent anomaly. Nonetheless it is submitted that s.8 of the *Evidence Act* is to be taken as applicable to regulatory offences until the contrary is held to be the case, due to that section having been drafted in an inclusive rather than exhaustive manner. The alternative could only be a reversion to the common law doctrine of spouse incompetence,[32] thus creating one rule of evidence for most criminal cases but another for one particular class of case; surely parliament cannot be taken to have intended such a result without clear words?

Section 8 of the *Evidence Act* creates the following situation:

(a) by subs. (2) a spouse is made competent for both the prosecution and the defence generally, including any co-accused.

(b) by subs. (3) a spouse is compellable to give evidence for their partner. (The term 'partner' is used in this article to denote either husband or wife as the case may be, and 'former partner' has a corresponding meaning).

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26. *Supra* n.20.
27. *Ibid.* n.20.
28. *Ibid.* n.20.
29. [1963] 2 Q.B. 799.
30. *R* v. *Cooper (No. 1)* (1974) 51 D.L.R. 3d 216.
31. See *Criminal Code* s.3.
32. Previous statutes governing spouse competence have been repealed.

(c) by subs. (4) and (5) a spouse is compellable to give evidence for the prosecution, or for any of his or her partner's co-accused, only where the offence charged is one listed in the second schedule to the Act and the alleged victim was at the relevant time under the age of sixteen *or* that spouse would at common law have been 'competent or compellable to give evidence for the prosecution'. If a spouse, though not compellable, elects to testify then no accused can raise objection.

(d) by subs. (6), a spouse who pursuant to the above is competent but not compellable must be warned, before giving evidence and where applicable in the absence of the jury, that he or she is not compellable. Where a spouse wishes to testify on behalf of a co-accused but does not wish to risk assisting the prosecution case against his or her partner in so doing, separate trials should be ordered.[33]

(e) by subs. (7), no spouse jointly charged with his or her partner is competent for the prosecution and no such spouse is compellable for the defence, though he or she remains competent for the defence generally.

The provision in subs. (5) whereby the spouse of an accused is made compellable for both prosecution and defence generally wherever he or she would at common law be *either* competent *or* compellable for the prosecution is curiously worded. It is difficult to appreciate how a witness can be compellable if he or she is not competent; thus, use of the disjunctive 'or' does not appear to make sense, indeed the alternative of compellability *per se* is entirely superfluous. If this is so, then the expression could be read as if it means that wherever a spouse was competent for the prosecution at common law (as outlined earlier in this article) he or she is now to be considered not just competent but also compellable for both sides.

Alternatively, the word 'or' could be read as really meaning 'and'. Although rare, there have been occasions upon which the courts have been persuaded to engage in this type of statutory interpretation, particularly where it can be established that parliament has made a mistake and meant the conjunctive when a disjunctive has been used and vice versa. It is at least arguable that a mistake is what has occurred here, given the impossibility of having compellability without competence. Thus, the expression could be read as meaning that the spouse of the accused is now competent and compellable for both prosecution and defence whenever he or she was at common law competent and compellable for the prosecution. Such an interpretation would simply be giving effect to, albeit extending to compellability, the principle of reciprocity of competency referred to earlier in *R* v. *Sergeant*.[34]

The difficulty with this second interpretation is that it would seem that in no case where a spouse at common law was competent was he or she also compellable; thus subs. (5) would be rendered entirely nugatory. In *Riddle* v. *R*[35] the High Court (Griffith C.J., Barton and O'Connor JJ.) was unanimous in concluding that, so far as cases of personal violence were concerned, a spouse though competent at common law was never compellable against his or her partner. Technically, what was said by their Honours is *obiter dicta* in that the point did not have to be decided in *Riddle*. Nonetheless it is submitted, with respect, that the decision represents an accurate statement of the common law. Each judgment contains careful consideration of the issue and that of Griffith C.J. contains an extensive review of the authorities. It is submitted that, whilst not binding, *Riddle* should be regarded as being persuasive in the extreme. The same conclusion as that reached in *Riddle* was reached by the House of Lords, as noted earlier in this article, in *Hoskyn* v. *Metropolitan Police Commissioner*.[36] On the face of things, therefore, accepting the principle arising from these

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33. *R* v. *Knijff* [1982] Qd.R. 429.
34. *Supra* n.15.
35. (1911) 12 C.L.R. 622.
36. *Supra* n.17.

two cases, subs. (5) could have no effect in cases involving the personal violence exception, and by extension presumably the deprivation of liberty exception; no case has been decided on the latter, neither has there been any decision on the treason exception though admittedly there are more persuasive policy arguments for compellability in such a case.

It was not until 1958 that a reported case in Queensland considered the state of common law compellability for the purposes of subs. (5), and since then confusion has been caused by a series of apparently *ad hoc* decisions. In *R* v. *Byrne*[37] Stanley J. held that *Riddle* should be followed, notwithstanding the English Court of Criminal Appeal decision in *R* v. *Lapworth*[38] in 1931 to the contrary. In *R* v. *Netz*[39] Williams J. followed *Lapworth* in preference to *Riddle*, however his Honour admitted that he had not had the opportunity of 'going deeply into the subject'; with respect, it is submitted that he fell into error by placing too much emphasis on the case of *R* v. *Miller*[40] which turned on competence, rather than compellability, under s.618A of the Criminal Code. In *R* v. *Sokal*[41] Kelly A.J. applied *Riddle* and, with respect, correctly distinguished *Miller*. In 1975 the matter was considered by the Court of Criminal Appeal in *R* v. *Jackson*.[42] It was held by Hoare J, (with whom Lucas and Andrews JJ. agreed), that the decision in *Netz* was to be preferred to that in *Sokal*, in other words that *Riddle* was not to be followed. With respect it is submitted that it is *Jackson* which ought not to be followed, for three reasons. Firstly, it was a case which turned on competence not compellability and thus on the latter point what was said was *obiter dicta* only. Secondly, the issue of common law compellability was not considered in any depth at all; all that appears is a passing reference to the matter and a bare statement that *Riddle* can be distinguished without it being made clear as to whether this is on the point of competence or compellability. Thirdly, the Court did not have the benefit of the extensive review of the authorities undertaken by the House of Lords in *Hoskyn*. It is submitted therefore that *Jackson* ought to be confined to the issue of competence, and that if the issue of compellability were reviewed by the High Court this case would undoubtedly be rejected in favour of *Riddle*.

The most recent Queensland decision on compellability for the purpose of subs. (5) is that of Derrington J. in *R* v. *Kaye*.[43] His Honour noted the 'tautologous significance' of the disjunctive phraseology in the subsection but declined to read it any other way due to the probability that the legislature referred to competence plus compellability *ex abundanti cautela*. According to his Honour, even if a mistake had been made, the clear meaning of the words used would 'defeat any attempt to find an alternative meaning which would avoid the tautology.' His Honour held in the event that, on the facts, the witness in question was compellable because at common law she would have been competent, thus fulfilling the first of the alternative requirements set out in subs. (5). It is interesting to note however that Derrington J. appears to implicitly accept the decisions in *Hoskyn* and *Riddle* and omits any reference to *Jackson*.

With respect it is submitted that the approach of Derrington J. in *Kaye* is the most sensible and productive of the two alternatives. Even if a court could be persuaded to read competence and compellability conjunctively in subs. (5), it is clear from the decisions in *Riddle* and *Hoskyn* that an occasion where a spouse fell within the ambit of both concepts was and still is unknown to the common law, thus the section would have no effect. On the

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37. [1958] Q.W.N. 18.
38. [1931] 1 K.B. 117.
39. [1973] Qd.R. 13.
40. [1962] Qd.R. 594.
41. [1973] Qd.R. 301.
42. [1975] Qd.R. 137.
43. [1983] 2 Qd.R. 202.

other hand, if the subsection is read disjunctively and the obvious tautology ignored, effect can be given to it by concentrating on the qualification of competence to the exclusion of the alternative of compellability.

In relation to s.8(6) of the Act it should be noted that at common law where the accused's spouse is competent but not compellable, the relevant party is entitled to call that spouse to the witness box in the presence of the jury, even though the result might be a lawful refusal to give evidence.[44] Under the Act a *voir dire* must be conducted for the purpose perhaps of taking evidence that the witness is, in fact, the spouse of the accused but more importantly for the purpose of informing the witness of his or her right to decline to testify. However, subs. (6) is silent as to the course to be adopted once this information has been conveyed to the witness. In *Demirok* v. *R*[45] the High Court, considering s.400(2) of the *Crimes Act* 1958 (Vic.) which was in similar terms to the Queensland provision but confined in its operation to a witness called by the prosecution, held (per Gibbs and Stephen JJ., Aickin J. concurring) that the intention of the legislature was that the witness indicate in the absence of the jury his or her decision as to whether or not he or she would testify. Thus, their Honours said, if the witness declined to testify there could be no legitimate purpose in thereafter calling that person to the witness box in the presence of the jury and allowing the jury to hear of that decision: indeed, the accused may be prejudiced by the jury inferring that the testimony which the spouse does not wish to give must be unfavourable to the accused. The practice in Queensland, and properly so, is that the *voir dire* on this issue is held and the decision made before the party calling the spouse (usually the prosecution) opens its case. The alternative, that is waiting until the point in the trial where the spouse is to be called and then counsel asking for a *voir dire*, means that the party calling the spouse cannot canvass the evidence to be given by that person in the opening address.

2. Former Spouses

Unlike the U.K. Police and Evidence Act 1984, the Queensland Act makes no reference to former spouses and a great deal of uncertainty surrounds the status of such persons as witnesses against, and indeed even for, their former partner. To determine the exact position it is necessary to look to the common law.

As stated earlier in this article, it was held in *Monroe* v. *Twisleton*[46] that former spouses were incompetent witnesses as to anything which happened during their marriage, presumably subject to the exceptions referred to in *Bentley* v. *Cooke*,[47] and perhaps as to anything which occurred before their marriage but certainly not after its dissolution. Such then was the common law of England which became part of the law of the then Colony of New South Wales in 1828 by virtue of the Australian Courts Act 1828,[48] unless it be argued that this particular law was 'not wholly suitable to the condition of the colony and capable of being applied there.' In the author's view there is no merit in such an argument and it does not seem ever to have been raised; it is not proposed to pursue it here. The first question then is, has the law been changed since 1828 either judicially or by statute? The second question is, if not then what should a modern court faced with the problem decide?

In answer to the first question, it seems that no change in the law in New South Wales took place between 1828 and the date of separation of the Colony of Queensland on 6 June 1859.[49] Upon partition, Queensland inherited all laws in force in New South Wales.[50] Since

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44. *R* v. *Acaster* (1912) 7 Cr.App.Rep. 187.
45. (1977) 14 A.L.R. 199.
46. *Supra* n.20.
47. *Supra* n.5.
48. 9 Geo. IV C.83.
49. The statute 22 Vict. C.7 (N.S.W.) addressed the position of spouses in civil cases but no alteration was made to the law in criminal cases or concerning former spouses.
50. Order in Council 6 June 1859 s.20, and *Constitution Act* 1867 (Qld) 31 Vict. C.38 (Qld) s.33.

1859 no change to the original common law position of former spouses has been made in this State either judicially or by statute. Further, no United Kingdom Act on the subject can be regarded as having application in Queensland.[51] Accordingly, it must reluctantly be concluded that *Monroe* v. *Twisleton*[52] remains, theoretically at least, good law in this State. The fact that the law in England has since been altered is of course, irrelevant in this context.

In answer to the second question, it is submitted that a modern court in Queensland called upon to rule as to the competence and compellability of a former spouse of the accused in a criminal trial is faced with three alternatives. The first alternative is to follow the decision referred to earlier in this article in *R* v. *Algar*.[53] The effect of this would be twofold, i.e.

(a) to confirm the dictum of Lord Alvanley in *Monroe* v. *Twisleton*[54] that the principles of that case apply in criminal proceedings;

(b) to confirm that spouses whose lawful marriage has been terminated by a divorce decree or decree of nullity, as opposed to spouses whose void marriage has been declared so by a decree of nullity, are incompetent at common law in Queensland to testify as to matters occurring during their marriage (and presumably before it but not after) subject to the recognized exceptions. Consequently, as the common law has not been changed by statute, the position would rest there.

The second alternative is to refuse to accept the proposition that *Monroe* v. *Twisleton*[55] applies to criminal cases, thus placing former spouses in the same position as any ordinary witness in a criminal trial. Obviously, *Algar* would be disapproved.

The third alternative is to distinguish *Algar* as a case properly decided given the law of its time as to competence of spouses but now inappropriate given modern statutory prescriptions on that subject. Accepting the applicability of the general principle in *Monroe* v. *Twisleton*[56] that former spouses should be in the same position as spouses concerning matters occurring during the marriage, the court could then interpret the words 'husband or wife' in s.8 of the Act as including 'former husband or former wife'.

It is submitted that the first alternative above cannot be reasonably contemplated. To adopt it would be to countenance a situation where a spouse could, and in some cases could be required to, testify as to matters occurring during the marriage but a former spouse could not. The original reason given in *Monroe* v. *Twisleton*[57] for making former spouses incompetent was that spouses were incompetent. Clearly this is no longer the case, and the two classes of witness should remain on the same footing. The second alternative is an attractive means of achieving this by reason of its very simplicity, though of course it goes much further. However, it is somewhat illogical to argue that in a civil case a spouse should have been incompetent[58] as to matters which occurred during the marriage but in a criminal case he or she should not, even taking account of public policy considerations of bringing offenders to justice. The third alternative it is submitted is the most attractive in terms of both logic and practical result. It recognizes that in the past and even the very recent past (incompetence of spouses against their partner was the general rule in England until 1984[59]) there was need for a rule that if spouses were incompetent then it was unjust that the fact of divorce should enable revelation of hitherto unrevealable information. On the other hand it

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51. I.e. in terms of the Colonial Laws Validity Act 1865 (U.K.).
52. *Supra* n.20.
53. *Supra* n.25.
54. *Supra* n.20.
55. *Ibid.*
56. *Ibid.*
57. *Ibid.*
58. This is not the case now due to s.7 of the *Evidence Act* 1977-1984 (Qld).
59. See Criminal Evidence Act 1898 (U.K.) for specific statutory exceptions.

recognizes that the law has changed as to spouses and should be changed as to former spouses so as to achieve again uniformity of status between the two classes of witness. After all, it is submitted that uniformity is what Lord Alvanley sought to achieve in the first place.

It follows that if former spouses are made competent on the same terms as spouses they must also be made compellable on the same terms at least. There is an argument that former spouses do not need the same protection from compellability as do spouses, a protection summarised by Lord Salmon in *Hoskyn* v. *Metropolitan Police Commissioner*[60] (referring to spouses testifying against their partner) as one to protect the marriage. Thus it might be argued that former spouses should be made compellable generally. In *Leach* v. *R*[61] Lord Atkinson said that the principle of not compelling a spouse to testify against their partner was 'deep seated' in the common law. If this thinking is extended to former spouses and former partners it may be that the courts will find it too much of a quantum leap to impose general compellability on former spouses, considering such a step one more properly undertaken by parliament.

In any event, judicial preparedness to interpret s.8 of the Act in the manner referred to above so as to achieve an exact equality of status as between spouse and former spouse would at least correct the anachronism which still exists in this area. Indeed, given the current uncertainty of the matter it may be that the legislature should give consideration to amending the Act, by inserting a provision in terms that a person who has been but is no longer married to the accused shall be competent and compellable to give evidence as if that person and the accused were still married. Alternatively, a provision such as s.80(5) of the Police and Criminal Evidence Act 1984 (U.K.) could be adopted; whilst at first glance this appears harsh, the need to protect the candour and trust of the marriage relationship could be satisfied by an appropriate interpretation of s.11 of the *Evidence Act*, discussed below.

3. Marital Privilege

In *Rumping* v. *D.P.P.*[62] the House of Lords decided that in criminal cases where a spouse is compellable the common law affords no privilege to communications between spouses even though they be confidential in nature.

In England, the effect of s.80(9) of the Police and Criminal Evidence Act 1984 is that the common law position continues in that country.

In Queensland, s.11 of the *Evidence Act* provides that a spouse is not compellable in any criminal proceeding in which his or her spouse is charged, to disclose any communication made during the marriage to him or her by the spouse who has been charged. The wording of the section is such that the privilege applies only to communications made by the accused to the spouse who claims the privilege; whilst the spouse who is to testify may waive it, the spouse who made the communication cannot object to disclosure as the privilege is that of the witness. Matters which are covered by the privilege may always be proved through the agency of some other witness or a document.[63] No adverse inference should be drawn from the fact that the privilege is claimed.[64]

In *Shenton* v. *Tyler*[65] the Court of Appeal decided that marital privilege endures only so long as the recipient of the communcation remains the spouse of the person who made it; in other words, that the privilege does not apply to former spouses. The question is whether this is the case in Queensland. As the point has never been addressed in any reported case in this State the courts will be entirely at liberty to make a decision consistent with fairness and

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60. *Supra* n.17.
61. [1912] A.C. 305 at 311.
62. [1964] A.C. 814.
63. *Rumping* v. *D.P.P. Ibid.*
64. *Wentworth* v. *Lloyd* (1864) 10 H.L. Cas 589.
65. [1939] Ch.620.

public policy. Although *Shenton* v. *Tyler*[66] was a civil case heard in the Chancery Division, the marital privilege with which it dealt (that provided by s.3 of the Evidence Amendment Act 1853 (U.K.)) was identical in terms with s.11 of the Queensland *Evidence Act* save only for the reference in the latter to the husband or wife of a person charged. Much of the judgements in the case is taken up with reasoning leading to the conclusion that no marital privilege existed at common law, a matter not relevant here. On the point of the statutory privilege, Greene M.R. (with whom Finlay L.J. agreed) concluded that the plain words of the section referring to husbands and wives could not 'legitimately' be extended to include former husbands and former wives; his Lordship however undertook no examination of public policy reasons as to why he should be tempted to extend the meaning in that way, confining himself to the statement that previous cases such as *Monroe* v. *Twisleton*[67] were unhelpful because they dealt with competence not privilege. Luxmoore L.J. delivered a judgement in similar terms, confining himself to a literal interpretation of the statute.

It is submitted that *Shenton* v. *Tyler*[68] should not be followed in Queensland, for two reasons. Firstly, there are considerations of public policy not canvassed in the case which are important. The basis of marital privilege must be the desirability of protecting the candour and trust inherent in close matrimonial relationships, even to the extent of denying the courts valuable evidence. If confidences exchanged during marriage are protected whilst the bond subsists, why should that protection not extend after it is broken? How is the confidentiality of the communication when made altered by a subsequent dissolution of the marriage? Secondly, with respect to their Lordships in *Shenton*, it is not true that no assistance can be derived from an examination of *Monroe* v. *Twisleton*[69] in this context. The policy underlying Lord Alvanley's decision, as previously submitted, was to place former spouses in the same position as spouses in regard to events occurring during the marriage. Thus, it is submitted that in s.11 of the Act the words 'wife' and 'husband' should be read so as to include 'former wife' and 'former husband'. Any difficulty which the courts may encounter in extending what has been described as the 'plain meaning' of the section by judicial construction can be readily solved by legislative amendment. Certainly if s.8 is to be read so as to include former spouses then so must s.11. If it is difficult to accept that a divorced spouse should not be as competent and compellable as a spouse, then it is equally difficult to accept that a privilege enjoyed by a spouse should not be offered to a divorced spouse when it concerns matters which took place during the marriage.

Civil Cases

The primary purpose of this article, as stated at the outset, was to review the law relating to criminal proceedings. For the sake of completeness, however, brief mention is made of the position attending civil cases.

So far as spouses are concerned, in England the spouses of parties to a civil action have long been both competent[70] and compellable.[71] In Queensland the same is true[72] and s.7 of the *Evidence Act* 1977-1984 now provides that the husband or wife of any party is both competent and compellable for all parties in a civil 'proceeding', which includes an arbitration.

The position is again somewhat unclear so far as former spouses are concerned. Into this

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66. *Ibid.*
67. *Supra* n.20.
68. *Supra* n.65.
69. *Supra* n.20.
70. Evidence Act 1853 (U.K.) s.1.
71. *Ibid.* and Evidence Act 1869 (U.K.) s.1.
72. The statute 22 Vict. C.7 (N.S.W.) brought this about in N.S.W. in 1858 and thus in Queensland upon separation in 1859 (supra n.50).

category in civil proceedings must be placed widows and widowers as well as divorced spouses. If, for the reasons stated above, *Monroe* v. *Twisleton*[73] is still good law in Queensland, then theoretically former spouses are incompetent in actions involving their former partner. Again for the reasons stated above, it is difficult to believe that a modern court would tolerate such an absurd difference in status between the two classes of witness. Thus, the terms 'husband' and 'wife' in s.7 of the Act should, it is submitted, be read so as to include 'former husband' and 'former wife', as well as widow and widower in order to avoid the decision in *O'Connor* v. *Marjoribanks.*[74] In England, the same reading would need to be adopted in relation to s.1 of the Evidence Act 1853 since no case or statute in that jurisdiction has overruled the effect of *Monroe* v. *Twisleton*[75] in civil cases. Perhaps in both jurisdictions legislative intervention would be timely.

In Queensland, no marital privilege exists in civil cases. It does not exist at common law[76] and is not provided for by statute. In England, s.3 of the Evidence Act 1853 provides privilege for a spouse against disclosing any communication made by their partner during the marriage. This section is not confined to cases where the witness or their spouse is a party; it extends to all cases, and is conferred on the witness alone. It does not however extend to former spouses as was held in *Shenton* v. *Tyler*,[77] but for the reasons given above it is submitted that this decision should be altered by statute or overruled at the earliest opportunity so as to extend the privilege to divorced spouses, widows and widowers.

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73. *Supra* n.20.
74. *Supra* n.23.
75. *Supra* n.20.
76. *Rumping* v. *D.P.P.* Supra n.61.
77. *Supra* n.65.