In agreement with the Master of the Rolls, therefore, I would hold that the High Court remains capable of exercising its curial jurisdiction over the arbitration and of adjourning, if it thinks fit, any decision on the enforceability of the award until the pending proceedings for review have been determined. Accordingly I would dismiss the appeal on this ground.

In the circumstances I have not found it necessary to express any view on Mr. Coleman's further submission that, in any event, an award in Paris was contrary to the arbitration agreement so that he was enabled to rely upon section 5(2)(*e*)—a ground not argued in the Court of Appeal but raised, by leave, before this House. It has, equally, been unnecessary to hear argument on the question of estoppel which constituted the ground upon which the majority in the Court of Appeal upheld the decision of Hirst J.

Appeal dismissed with costs.

Solicitors: Elborne Mitchell; Fishburn Boxer.

J. A. G.

[HOUSE OF LORDS]

REGINA . . . . . RESPONDENT

AND

R. . . . . APPELLANT

1991 Feb. 27; March 14 — Lord Lane C.J., Sir Stephen Brown P., Watkins, Neill and Russell L.JJ.

July 1; Oct. 23 — Lord Keith of Kinkel, Lord Brandon of Oakbrook, Lord Griffiths, Lord Ackner and Lord Lowry

Crime—Sexual offences—Rape—Husband and wife living apart—Husband attempting sexual intercourse with wife against her will—Whether husband immune from charge of attempted rape—Sexual Offences (Amendment) Act 1976 (c. 82), s. 1(1)

The defendant married his wife in 1984. As a result of matrimonial difficulties the wife left the matrimonial home in 1989 and returned to live with her parents, informing the defendant of her intention to petition for divorce. The defendant also communicated to the wife his intention to "see about a divorce." While the wife was staying at her parents'

house, the defendant forced his way in and attempted to have sexual intercourse with her, in the course of which attempt he assaulted her. He was charged on indictment with rape and assault occasioning actual bodily harm. The judge rejected his submission that by virtue of section 1(1) of the Sexual Offences (Amendment) Act 1976 the offence of rape was one which was not known to the law where the defendant was the husband of the alleged victim. He thereupon pleaded guilty to attempted rape and assault occasioning actual bodily harm and was convicted. On the defendant's appeal against his conviction of attempted rape, the Court of Appeal (Criminal Division) dismissed the appeal.

On appeal by the defendant:—

Held, dismissing the appeal, that there was no longer a rule of law that a wife was deemed to have consented irrevocably to sexual intercourse with her husband; and that, therefore, a husband could be convicted of the rape or attempted rape of his wife where she had withdrawn her consent to sexual intercourse; that section 1(1) of the Sexual Offences (Amendment) Act 1976 did not give statutory recognition to and perpetuate the former rule; and that, accordingly, the defendant's conviction would be upheld (post, pp. 616D, 617F–618B, 621C, 623B, D–F).

S. v. H. M. Advocate, 1989 S.L.T. 469 applied.

Per curiam. The word "unlawful" in section 1(1) of the Act of 1976 is mere surplusage and should be ignored (post, p. 623A, D–F).

Decision of the Court of Appeal (Criminal Division) post, pp. 603B et seq.; [1991] 2 W.L.R. 1065; [1991] 2 All E.R. 257 affirmed.

The following cases are referred to in the opinion of Lord Keith of Kinkel:

Advocate, H.M. v. Duffy, 1983 S.L.T. 7
Advocate, H.M. v. Paxton, 1985 S.L.T. 96
McMonagle v. Westminster City Council [1990] 2 A.C. 716; [1990] 2 W.L.R. 823; [1990] 1 All E.R. 993, H.L.(E.)
Reg. v. C. (Rape: Marital Exemption) [1991] 1 All E.R. 755
Reg. v. Caswell [1984] Crim.L.R. 111
Reg. v. Chapman [1959] 1 Q.B. 100; [1958] 3 W.L.R. 401; [1958] 3 All E.R. 143, C.C.A.
Reg. v. Clarence (1888) 22 Q.B.D. 23
Reg. v. H. (unreported), 5 October 1990, Auld J.
Reg. v. J. (Rape: Marital Exemption) [1991] 1 All E.R. 759
Reg. v. Jackson [1891] 1 Q.B. 671, C.A.
Reg. v. Kowalski (1987) 86 Cr.App.R. 339, C.A.
Reg. v. Miller [1954] 2 Q.B. 282; [1954] 2 W.L.R. 138; [1954] 2 All E.R. 529
Reg. v. O'Brien (Edward) [1974] 3 All E.R. 663
Reg. v. Roberts [1986] Crim.L.R. 188, C.A.
Reg. v. S. (unreported), 15 January 1991, Swinton Thomas J.
Reg. v. Sharples [1990] Crim.L.R. 198
Reg. v. Steele (1976) 65 Cr.App.R. 22, C.A.
Rex v. Clarke [1949] 2 All E.R. 448; 33 Cr.App.R. 216
S. v. H. M. Advocate, 1989 S.L.T. 469

A The following additional cases were cited in argument in the House of Lords:

Reg. v. Button [1966] A.C. 591; [1965] 3 W.L.R. 1131; [1965] 3 All E.R. 587, H.L.(E.)
Reg. v. Morgan [1976] A.C. 182; [1975] 2 W.L.R. 913; [1975] 2 All E.R. 347, H.L.(E.)
Reg. v. Reid [1973] Q.B. 299; [1972] 3 W.L.R. 395; [1972] 2 All E.R. 1350,
B C.A.
Reg. v. Taylor (Vincent) [1973] A.C. 964; [1973] 3 W.L.R. 140; [1973] 2 All E.R. 1108, H.L.(E.)
Shaw v. Director of Public Prosecutions [1962] A.C. 220; [1961] 2 W.L.R. 897; [1961] 2 All E.R. 446, H.L.(E.)

C The following cases are referred to in the judgment of the Court of Appeal:

Popkin v. Popkin (1794) 1 Hag.Ecc. 765n.
Reg. v. C. (Rape: Marital Exemption) [1991] 1 All E.R. 755
Reg. v. Chapman [1959] 1 Q.B. 100; [1958] 3 W.L.R. 401; [1958] 3 All E.R. 143, C.C.A.
Reg. v. Clarence (1888) 22 Q.B.D. 23
Reg. v. J. (Rape: Marital Exemption) [1991] 1 All E.R. 759
Reg. v. Jackson [1891] 1 Q.B. 671, C.A.
D *Reg. v. Miller* [1954] 2 Q.B. 282; [1954] 2 W.L.R. 138; [1954] 2 All E.R. 529
Reg. v. O'Brien (Edward) [1974] 3 All E.R. 663
Reg. v. Roberts [1986] Crim.L.R. 188, C.A.
Reg. v. S. (unreported), 15 January 1991, Swinton Thomas J.
Reg. v. Steele (1976) 65 Cr.App.R. 22, C.A.
Rex v. Clarke [1949] 2 All E.R. 448; 33 Cr.App.R. 216
E *S. v. H.M. Advocate*, 1989 S.L.T. 469

The following additional cases were cited in argument:

Reg. v. Cogan [1976] Q.B. 217; [1975] 3 W.L.R. 316; [1975] 2 All E.R. 1059, C.A.
Reg. v. H. (unreported), 14 March 1990, Auld J.
F *Reg. v. Jones* [1973] Crim.L.R. 710
Reg. v. Kowalski (1987) 86 Cr.App.R. 339, C.A.
Reg. v. Reid [1973] Q.B. 299; [1972] 3 W.L.R. 395; [1972] 2 All E.R. 1350; 56 Cr.App.R. 703, C.A.
Reg. v. Sharples [1990] Crim.L.R. 198
Rex v. Audley (Lord) (1631) 3 St.Tr. 401

G APPEAL against conviction

The appellant, R., on 30 July 1990 in the Crown Court at Leicester before Owen J., was convicted of the attempted rape of, and assault occasioning actual bodily harm upon, his wife. He was sentenced to three years' imprisonment for the attempted rape and 18 months' imprisonment concurrent for the assault. He applied for leave to appeal against his conviction on the ground that the trial judge had erred in law
H in ruling that a man might rape his wife when her consent to intercourse had been revoked by neither a court order nor agreement of the parties. Leave to appeal was granted by the court.

The facts are stated in the judgment.

Graham Buchanan (assigned by the Registrar of Criminal Appeals) for the appellant. The trial judge's ruling was wrong. A husband cannot be guilty of rape upon his lawful wife because of the marriage contract. Upon marriage the wife consents to her husband's exercise of his marital rights: see *Hale, History of the Pleas of the Crown*, 1st ed. (1736), vol. 1, ch. 58, p. 629; *Archbold, Pleading and Evidence in Criminal Cases*, 1st ed. (1822), p. 259; *Rex v. Audley (Lord)* (1631) 3 St.Tr. 401; *Reg. v. Cogan* [1976] Q.B. 217 and *Reg. v. Kowalski* (1987) 86 Cr.App.R. 339. The wife's consent could only be withdrawn in certain circumstances, such as her death, or if the marriage was avoided by a private Act of Parliament, a separation order (see *Rex v. Clarke* [1949] 2 All E.R. 448), a decree nisi (see *Reg. v. O'Brien (Edward)* [1974] 3 All E.R. 663), an undertaking (see *Reg. v. Steele* (1976) 65 Cr.App.R. 22), a deed of separation (see *Reg. v. Roberts* [1986] Crim.L.R. 188), or a family protection order (see *Reg. v. S.* (unreported), 15 January 1991, which did not follow *Reg. v. Sharples* [1990] Crim.L.R. 198). As none of those factors existed, the appellant's immunity was not lost by what happened between his wife and himself. Accordingly he should not be tried for or convicted of rape.

John Milmo Q.C. and *Peter Joyce* for the Crown. The statement in *Hale, History of the Pleas of the Crown*, vol. 1, ch. 58, p. 629 that a wife cannot withdraw her consent was unsupported by authority and appears in a part of his text which he did not revise prior to his death in 1676. It was doubted by some of the judges in *Reg. v. Clarence* (1888) 22 Q.B.D. 23. In its absolute terms the statement is inconsistent with *Rex v. Clarke* [1949] 2 All E.R. 448; *Reg. v. O'Brien* [1974] 3 All E.R. 663; *Reg. v. Steele*, 65 Cr.App.R. 22 and *Reg. v. Roberts* [1986] Crim. L.R. 188. *Reg. v. Miller* [1954] 2 Q.B. 282 is the only decision in the appellant's favour but it was doubted in *Reg. v. Reid* [1973] Q.B. 299 and should not be followed.

The Crown accepts that on marriage the law presumes that a wife consents to sexual intercourse with her husband. That presumption is rebuttable and may be rebutted by evidence that the wife did not in fact consent: she may make it clear that she does not consent by simply saying "No." The established exceptions are inconsistent with Hale but consistent with the existence of such a rebuttable presumption. The present conviction may be upheld either by extending those exceptions or, alternatively and preferably, by declaring that Hale's statement was never the law or is no longer the law. Antiquity is no reason in itself to uphold an outmoded doctrine: see *Reg. v. Jackson* [1891] 1 Q.B. 671. [Reference was made to *Reg. v. H.* (unreported) 14 March 1990.]

The inclusion of the word "unlawful" in section 1 of the Sexual Offences (Amendment) Act 1976 was not intended to, nor did it, overturn *Reg. v. Steele*, 65 Cr.App.R. 22 or the cases referred to therein. Although the word was construed as meaning "illicit," i.e., outside the bond of marriage, in *Reg. v. Chapman* [1959] 1 Q.B. 100 to apply that construction to section 1 would overturn *Reg. v. Steele*. [Reference was made to *Reg. v. Jones* [1973] Crim.L.R. 710.] If Parliament had intended to do so it would have used clear words. The

word should therefore be regarded as surplusage and *Reg. v. J.* (*Rape Marital Exemption*) [1991] 1 All E.R. 759 should be overruled.

Buchanan replied.

Cur. adv. vult.

14 March. LORD LANE C.J. read the following judgment of the court. On 30 July 1990 at the Crown Court at Leicester, this appellant appeared before Owen J. upon an indictment containing two counts. The first count alleged rape and the second assault occasioning actual bodily harm.

A submission was made to the judge that the charge of rape was one which was not known to the law by reason of the fact that the appellant was the husband of the alleged victim. The judge rejected the submission. Thereupon the appellant pleaded not guilty to rape but guilty to attempted rape on count 1 and guilty to assault occasioning actual bodily harm on count 2. He was sentenced to three years' imprisonment for the attempted rape and 18 months' imprisonment to run concurrently in respect of the assault. He now appeals against conviction upon the ground that the judge's ruling was erroneous.

The facts of the case are these. The appellant married his wife on 11 August 1984. They had one son who was born in 1985. On 11 November 1987 the parties had separated for a period of about two weeks before becoming reconciled. On 21 October 1989, as a result of further matrimonial difficulties, the wife left the matrimonial home with their son, who was then aged four, and returned to live with her parents. She had by this time already consulted solicitors regarding her matrimonial affairs and indeed had left a letter for the appellant in which she informed him that she intended to petition for divorce. However, no legal proceedings had been taken by her before the incident took place which gave rise to these criminal proceedings. It seems that the appellant had on 23 October spoken to his wife by telephone indicating that it was his intention also to "see about a divorce."

Shortly before 9 o'clock on the evening of 12 November 1989, that is to say some 22 days after the wife had returned to live with her parents, and while the parents were out, the appellant forced his way into the parents' house and attempted to have sexual intercourse with the wife against her will. In the course of that attempt he assaulted her, in particular by squeezing her neck with both hands. That assault was the subject of count 2. The appellant was interviewed by the police after his arrest and admitted his responsibility for these events as his eventual plea of guilty indicates. The only other matter which need be noted is that on 3 May 1990 a decree nisi of divorce was made absolute.

The question which the judge had to decide was whether in those circumstances, despite her refusal in fact to consent to sexual intercourse, the wife must be deemed by the fact of marriage to have consented. The argument before us has ranged over a wider field and has raised the question whether there is any basis for the principle, long supposed to be part of the common law, that a wife does by the fact of marriage give

any implied consent in advance for the husband to have sexual intercourse with her; and secondly, the question whether, assuming that that principle at one time existed, it still represents the law in either a qualified or unqualified form.

Any consideration of this branch of the law must start with the pronouncement by Sir Matthew Hale which appears in his *History of the Pleas of the Crown* (1736), vol. 1, ch. 58, p. 629:

> "But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband which she cannot retract."

That was published in 1736, although Hale had died 60 years earlier in 1676. He held the office of Chief Justice for five years, and there can be little doubt that what he wrote was an accurate expression of the common law as it then stood, despite the fact that it was contained in a part of the work that his revision had not yet reached.

It is of interest to note that immediately before the passage we have cited, Hale says that the wider defence based on cohabitation stated by Bracton was no longer the law. Hale explained the change in the law on the basis that though "unlawful cohabitation" might be evidence of consent, "it is not necessary that it should be so, for the woman may forsake that unlawful course of life."

It seems clear from the passage we have cited and from a later passage in the same chapter where Hale wrote, at p. 629, "in marriage [the wife] hath given up her body to her husband," that he founded the proposition that a husband could not be guilty of rape upon his lawful wife on the grounds (a) that on marriage a wife "gave" up her body to her husband; and (b) that on marriage she gave her irrevocable consent to sexual intercourse. These two grounds are similar, though not identical.

The theory that on marriage a wife gave her body to her husband was accepted in matrimonial cases decided in the Ecclesiastical Courts. Thus in *Popkin v. Popkin* (1794) 1 Hag.Ecc. 765n., Lord Stowell, in a suit by a wife for divorce a mensa et thoro, stated, at p. 767: "The husband has a right to the person of his wife," though he added the important qualification, "but not if her health is endangered."

These concepts of the relationship between husband and wife appear to have persisted for a long time and may help to explain why Hale's statement that a husband could not be guilty of rape on his wife was accepted as an enduring principle of the common law.

The first edition of *Archbold, Pleading and Evidence in Criminal Cases* (1822), at p. 259, stated simply: "A husband also cannot be guilty of a rape upon his wife."

However, in *Reg. v. Clarence* (1888) 22 Q.B.D. 23, there was no unanimity among the judges of a full court of Crown Cases Reserved on the effect of Hale's proposition. Wills J. said, at p. 33:

> "If intercourse under the circumstances now in question constitute an assault on the part of the man, it must constitute rape, unless, indeed, as between married persons rape is impossible, a proposition

A to which I certainly am not prepared to assent, and for which there seems to me to be no sufficient authority."

Field J. in the course of his judgment said, at p. 57:

"But it is argued that here there is no offence, because the wife of the prisoner consented to the act, and I entertain no doubt that, if that was so, there was neither assault nor unlawful infliction of B harm. Then, did the wife of the prisoner consent? The ground for holding that she did so, put forward in argument, was the consent to marital intercourse which is imposed upon every wife by the marriage contract, and a passage from *Hale's Pleas of the Crown*, vol. 1, p. 629, was cited, in which it is said that a husband cannot be guilty of rape upon his wife, 'for by their mutual matrimonial C consent and contract the wife hath given up herself in this kind to her husband, which she cannot retract.' The authority of Hale C.J. on such a matter is undoubtedly as high as any can be, but no other authority is cited by him for this proposition, and I should hesitate before I adopted it. There may, I think, be many cases in which a wife may lawfully refuse intercourse, and in which, if the husband imposed it by violence, he might be held guilty of a crime."

D

Apart from those dicta in *Reg. v. Clarence* no one seems to have questioned Hale's proposition until Byrne J. in *Rex v. Clarke* [1949] 2 All E.R. 448 held that the husband's immunity was lost where the justices had made an order providing that the wife should no longer be bound to cohabit with the defendant. In the course of his ruling Byrne J. said, at p. 448:

E "As a general proposition it can be stated that a husband cannot be guilty of rape on his wife. No doubt, the reason for that is that on marriage the wife consents to the husband's exercising the marital right of intercourse during such time as the ordinary relations created by the marriage contract subsist between them."

F However, in *Reg. v. Miller* [1954] 2 Q.B. 282, Lynskey J., having examined the authorities, ruled that Hale's proposition was correct and that the husband had no case to answer on a charge of rape although the wife had before the act of intercourse presented a petition for divorce, which had not reached the stage of a decree nisi.

In *Reg. v. O'Brien (Edward)* [1974] 3 All E.R. 663, 665, Park J. ruled that a decree nisi effectively terminated a marriage and upon its G pronouncement the consent to marital intercourse given by a wife at the time of marriage was revoked:

"Between the pronouncement of a decree nisi and the obtaining of a decree absolute a marriage subsists as a mere technicality. There can be no question that by a decree nisi a wife's implied consent to marital intercourse is revoked. Accordingly, a husband commits the H offence of rape if he has sexual intercourse with her thereafter without her consent."

In *Reg. v. Steele* (1976) 65 Cr.App.R. 22, this court held that where a husband and wife are living apart and there is in existence an

undertaking given by the husband to the court not to molest the wife, that is in effect equivalent to the granting of an injunction and eliminates the wife's implied consent to sexual intercourse. In the course of delivering the judgment of that court, having referred to the cases already mentioned here, I said, at p. 25:

> "Here there has been no decree of the court, here there has been no direct order of the court compelling the husband to stay away from his wife. There has been an undertaking by the husband not to molest his wife. The question which the court has to decide is this. Have the parties made it clear, by agreement between themselves, or has the court made it clear by an order or something equivalent to an order, that the wife's consent to sexual intercourse with her husband implicit in the act of marriage, no longer exists?"

I then went on to set out, obiter, a number of matters which would not be sufficient to remove the husband's immunity, having the judgment of Lynskey J. in *Reg. v. Miller* [1954] 2 Q.B. 282 in mind.

Reg. v. Roberts [1986] Crim.L.R. 188 was another decision of this court. The husband had been restrained from molesting or going near to his wife for two months; an ouster order was made ordering him out of the matrimonial home. On the same day a formal deed of separation was entered into; there was no non-cohabitation or non-molestation clause. The trial judge had rejected a submission that the wife's implied consent to intercourse with her husband revived when the injunction ran out in August 1984. It was held that the lack of a non-molestation clause in the deed of separation could not possibly have operated to revive the consent of the wife which had been terminated.

It is against that brief historical background that we turn to consider the submissions of the appellant advanced by Mr. Buchanan in a carefully researched argument that the husband's immunity was not lost by what had happened between his wife and himself and that accordingly he was not liable to be tried or convicted for rape.

In the course of his ruling upon the submission, Owen J., having set out the authorities, reached a conclusion in the following terms [1991] 1 All E.R. 747, 754:

> "What, in law, will suffice to revoke that consent which the wife gives to sexual intercourse upon marriage and which the law implies from the facts of marriage? . . . It must be sufficient for there to be an agreement of the parties. Of course, an agreement of the parties means what it says. It does not mean something which is done unilaterally . . . As it seems to me, from his action in telephoning her and saying that he intended to see about a divorce and thereby to accede to what she was doing, there is sufficient here to indicate that there was an implied agreement to a separation and to a withdrawal of that consent to sexual intercourse, which the law, I will assume and accept, implies. The next question is whether a third set of circumstances may be sufficient to revoke that implicit consent. Mr. Milmo argues that the withdrawal of either party from cohabitation is sufficient for that consent to be revoked . . . I accept that it is not for me to make the law. However, it is for me to state

A the common law as I believe it to be. If that requires me to indicate a set of circumstances which have not so far been considered as sufficient to negative consent as in fact so doing, then I must do so. I cannot believe that it is a part of the common law of this country that where there has been withdrawal of either party from cohabitation, accompanied by a clear indication that consent to sexual intercourse has been terminated, that that does not amount B to a revocation of that implicit consent. In those circumstances, it seems to me that there is ample here, both on the second exception and the third exception, which would enable the prosecution to prove a charge of rape or attempted rape against this husband."

Since that ruling in July 1990 there have been two other decisions at C first instance to which reference must be made. The first was on 5 October 1990, when Simon Brown J. in the Crown Court at Sheffield was asked to rule upon a similar question in *Reg. v. C. (Rape: Marital Exemption)* [1991] 1 All E.R. 755. The judge examined in detail the pros and cons of the various suggested solutions to the problem and came to the conclusion that Hale's proposition was no longer the law. He said, at p. 758:

D "Were it not for the deeply unsatisfactory consequences of reaching any other conclusion upon the point, I would shrink, if sadly, from adopting this radical view of the true position in law. But adopt it I do. Logically, I regard it as the only defensible stance, certainly now as the law has developed and arrived in the late twentieth century. In my judgment, the position in law today is, as already E declared in Scotland, that there is no marital exemption to the law of rape. That is the ruling I give."

The mention of Scottish law by Simon Brown J. is a reference to the decision of the High Court of Justiciary in *S. v. H.M. Advocate*, 1989 S.L.T. 469 delivered by the Lord Justice-General, Lord Emslie. The proposition which had governed courts in Scotland for very many years F in the same way as Hale's proposition had operated in England, emanated from *Hume on Crimes* (1797), vol. 1, ch. 7, and contained the following passage, at p. 306:

"This is true without exception even of the husband of the woman, who though he cannot himself commit a rape on his own wife, who has surrendered her person to him in that sort, may, however, be G accessory to that crime . . . committed upon her by another."

In the course of his opinion, Lord Emslie said, at p. 473:

"the soundness of Hume's view, and its application in the late 20th Century, depends entirely upon the reason which is said to justify it. Our first observation is that if what Hume meant was that by marriage a wife expressly or impliedly consented to sexual intercourse H with her husband as a normal incident of marriage, the reason given affords no justification for his statement of the law because rape has always been essentially a crime of violence and indeed no more than an aggravated assault . . . If . . . Hume meant that by marriage

a wife consented to intercourse against her will and obtained by force, we take leave to doubt whether this was ever contemplated by the common law, which was derived from the canon law, regulating the relationship of husband and wife."

The final decision to which we must refer is a ruling of Rougier J. in *Reg. v. J. (Rape: Marital Exemption)* [1991] 1 All E.R. 759. The argument in that case proceeded upon different lines from those adopted in *Reg. v. C. (Rape: Marital Exemption)* [1991] 1 All E.R. 755. The submission addressed on behalf of the prosecution to Rougier J. was based on the wording of the Sexual Offences (Amendment) Act 1976, section 1(1) of which provides:

"For the purposes of section 1 of the Sexual Offences Act 1956 (which relates to rape) a man commits rape if—(*a*) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it . . ."

Section 1(1) of the Sexual Offences Act 1956 provided: "It is felony for a man to rape a woman."

The contention was that the Act of 1976 for the first time provided a statutory definition of rape; that the only possible meaning which can be ascribed to the word "unlawful" is "illicit," that is to say outside the bounds of matrimony, and that accordingly Parliament's intention must have been to preserve the husband's immunity.

This argument was reinforced by reference to the decision of this Court in *Reg. v. Chapman* [1959] 1 Q.B. 100, which gave that interpretation to the use of the word "unlawful" in the Act of 1956, which of course was dealing with the same type of offence. Moreover, it was pointed out that if the word in section 1 of the Act of 1976 is mere surplusage, this would, it is said, be the only place in the Act where that is so.

The judge rejected the contentions of the prosecution and ruled that the intervention of the Act of 1976 has, as he put it, "precluded any up-to-date declaration of the state of the common law on this subject. The matter has become one of statutory interpretation and remains so." The judge also rejected the subsidiary argument addressed to him by the prosecution, namely that the wording of the Act still left it open to the court to enlarge the number of exceptions to the husband's immunity and did so in the following terms, at p. 767:

"Once Parliament has transferred the offence from the realm of common law to that of statute and, as I believe, has defined the common law position as it stood at the time of the passing of the Act, then I have very grave doubt whether it is open to judges to continue to discover exceptions to the general rule of marital immunity by purporting to extend the common law any further. The position is crystallised as at the making of the Act and only Parliament can alter it."

Those three recent decisions, including that of Owen J. in the instant case, neatly exemplify the possible solutions, each with its concomitant

drawbacks with which we are confronted. They may be summarised as follows:

(1) *The literal solution.* The Act of 1976 by defining rape as it did and including the word "unlawful" made it clear that the husband's immunity is preserved, there being no other meaning for the word except "outside the bounds of matrimony." It is not legitimate to treat the word as surplusage when there is a proper meaning which can be ascribed to it.

(2) *The compromise solution.* The word "unlawful" is to be construed in such a way as to leave intact the exceptions to the husband's immunity which have been engrafted on to Hale's proposition from the decision in *Rex v. Clarke* [1949] 2 All E.R. 448 onwards and is also to be construed so as to allow further exceptions as the occasion may arise.

(3) *The radical solution.* Hale's proposition is based on a fiction and moreover a fiction which is inconsistent with the proper relationship between husband and wife today. For the reasons expressed by Lord Emslie in *S. v. H.M. Advocate*, 1989 S.L.T. 469, it is repugnant and illogical in that it permits a husband to be punished for treating his wife with violence in the course of rape but not for the rape itself which is an aggravated and vicious form of violence. The court should take the same attitude to this situation as did Lord Halsbury L.C., albeit in different circumstances, in *Reg. v. Jackson* [1891] 1 Q.B. 671, 681:

> "I confess to regarding with something like indignation the statement of the facts of this case, and the absence of a due sense of the delicacy and respect due to a wife whom the husband has sworn to cherish and protect."

The drawbacks are these. The first solution requires the word "unlawful" to be given what is said to be its true effect. That would mean that the husband's immunity would remain unimpaired so long as the marriage subsisted. The effect would be to overrule the decisions in *Rex v. Clarke* [1949] 2 All E.R. 448; *Reg. v. O'Brien (Edward)* [1974] 3 All E.R. 663; and *Reg. v. Steele* (1976) 65 Cr.App.R. 22; and all the other cases which have engrafted exceptions on to Hale's proposition. It is hard to believe that Parliament intended that result. If it was intended to preserve the exceptions which existed at the time the Act of 1976 came into force, it would have been easy to say so.

The second or compromise solution adopts what is, so to speak, the open-ended interpretation of the Act of 1976 and would permit further exceptions to be engrafted on to Hale's proposition. In particular, an exception in circumstances such as those in the instant case where the wife has withdrawn from cohabitation so as to make it clear that she wishes to bring to an end matrimonial relationships. There would be formidable difficulties of definition and interpretation. How, one asks, would it be possible accurately to define "withdrawal from cohabitation?" It is not every wife who can, as the wife here could, go to live with her parents or indeed has anywhere else other than the matrimonial home in which to live. It may be thought that a total abolition of the immunity would be a preferable solution, as has been the experience in some other common law jurisdictions, Canada, Victoria, New South Wales,

Western Australia, Queensland, Tasmania and notably in New Zealand, where the compromise solution was found to be unworkable.

The third or radical solution is said to disregard the statutory provisions of the Act of 1976 and, even if it does not do that, it is said that it goes beyond the legitimate bounds of judge-made law and trespasses on the province of Parliament. In other words the abolition of a rule of such long standing, despite its emasculation by later decisions, is a task for the legislature and not the courts. There are social considerations to be taken into account, the privacy of marriage to be preserved and questions of potential reconciliation to be weighed which make it an inappropriate area for judicial intervention. It can be seen that there are formidable objections, and others no doubt exist, to each of the possible solutions.

What should be the answer?

Ever since the decision of Byrne J. in *Rex v. Clarke* [1949] 2 All E.R. 448, courts have been paying lip service to the Hale proposition, whilst at the same time increasing the number of exceptions, the number of situations to which it does not apply. This is a legitimate use of the flexibility of the common law which can and should adapt itself to changing social attitudes.

There comes a time when the changes are so great that it is no longer enough to create further exceptions restricting the effect of the proposition, a time when the proposition itself requires examination to see whether its terms are in accord with what is generally regarded today as acceptable behaviour.

For the reasons already adumbrated, and in particular those advanced by the Lord Justice-General in *S. v. H.M. Advocate*, 1989 S.L.T. 469, with which we respectfully agree, the idea that a wife by marriage consents in advance to her husband having sexual intercourse with her whatever her state of health or however proper her objections (if that is what Hale meant), is no longer acceptable. It can never have been other than a fiction, and fiction is a poor basis for the criminal law. The extent to which events have overtaken Hale's proposition is well illustrated by his last four words, "which she cannot retract."

It seems to us that where the common law rule no longer even remotely represents what is the true position of a wife in present day society, the duty of the court is to take steps to alter the rule if it can legitimately do so in the light of any relevant Parliamentary enactment. That in the end comes down to a consideration of the word "unlawful" in the Act of 1976. It is at the best, perhaps a strange word to have used if the draftsman meant by it "outside marriage." However sexual intercourse outside marriage may be described, it is not "unlawful" if one gives to the word its ordinary meaning of "contrary to law." We have not overlooked the decision in *Reg. v. Chapman* [1959] 1 Q.B. 100 to which we have already referred, but if the word is to be construed as "illicit" or "outside marriage," then it seemingly admits of no exception. The husband who is the subject of an injunction or undertaking to the court or in respect of whose marriage a decree nisi has been pronounced or is a party to a formal separation agreement would be nevertheless

A immune from prosecution for raping his wife. This would apply equally to a husband who is the subject of a family protection order, a situation which was the subject of a judgment by Swinton Thomas J. in the Crown Court at Stafford in *Reg. v. S.* (unreported), 15 January 1991.

The alternative to that unwelcome conclusion would be to interpret the word as including the various exceptions to the husband's immunity which we have examined earlier in this judgment. If so, one asks B whether the situation crystallises at the date the Act came into force. If that is the case, then all the decisions since the time when the Act of 1976 came into force which have narrowed the husband's immunity would have been wrongly decided.

It may be on the other hand that the draftsman intended to leave it open to the common law to develop as it has done since 1976.

C The only realistic explanations seem to us to be that the draftsman either intended to leave the matter open for the common law to develop in that way or, perhaps more likely, that no satisfactory meaning at all can be ascribed to the word and that it is indeed surplusage. In either event, we do not consider that we are inhibited by the Act of 1976 from declaring that the husband's immunity as expounded by Hale no longer D exists. We take the view that the time has now arrived when the law should declare that a rapist remains a rapist subject to the criminal law, irrespective of his relationship with his victim.

The remaining and no less difficult question is whether, despite that view, this is an area where the court should step aside to leave the matter to the Parliamentary process. This is not the creation of a new offence, it is the removal of a common law fiction which has become E anachronistic and offensive and we consider that it is our duty having reached that conclusion to act upon it.

Had our decision been otherwise and had we been of the opinion that Hale's proposition was still effective, we would nevertheless have ruled that where, as in the instant case, a wife withdraws from cohabitation in such a way as to make it clear to the husband that so far as F she is concerned the marriage is at an end, the husband's immunity is lost.

The appeal fails and is dismissed.

Appeal dismissed.

Certificate under section 33(2) of the Criminal Appeal Act 1968 that a point of law of general public importance was involved in the decision namely, "Is a husband criminally liable for raping his wife?"

G

Leave to appeal.

Legal aid, one counsel and solicitor.

H

Solicitors: Crown Prosecution Service, Leicester.

[Reported by MRS. GURINDER GOSAL, Barrister]

The defendant appealed. A

Graham Buchanan for the defendant. This appeal raises the question: is a husband criminally liable for raping his wife? The trial judge and the Court of Appeal (Criminal Division) were in error in holding that the defendant was so liable in the circumstances of the case. The general principle of English law is that a husband cannot be prosecuted for B raping his wife, save in certain exceptional circumstances. The principle, which is founded on *Hale, History of the Pleas of the Crown*, 1st ed. (1736), vol. 1, ch. 58, p. 629, is repeated in *East's Pleas of the Crown* (1803), vol. 1, ch. X, p. 446. The principle also appears in *Archbold, Pleading and Evidence in Criminal Cases*, 1st ed. (1822), at p. 259. The principle was mentioned in the cases for the first time in *Reg. v. Clarence* (1888) 22 Q.B.D. 23, where the principle was accepted in C various dicta by the majority of the 13 judges. The principle remained unchallenged until 1949.

By 1949 matrimonial law had developed to the extent that it was now possible to obtain orders of judicial separation or decrees of divorce with greater facility. The effect of this was that wives were able to obtain court orders which contained non-cohabitation clauses. This gave D rise to a potential conflict between the husband's immunity from prosecution for rape on the one hand and a court order which prevented, inter alia, intercourse on the other. In *Rex v. Clarke* [1949] 2 All E.R. 448 it was held that the implied consent given by the wife could be revoked by process of law. In subsequent authorities further exceptions to the immunity were recognised. But in all the cases the general rule E was accepted as the law: see *Reg. v. Miller* [1954] 2 Q.B. 282; *Reg. v. Reid* [1973] Q.B. 299; *Reg. v. O'Brien (Edward)* [1974] 3 All E.R. 663; *Reg. v. Steele* (1976) 65 Cr.App.R. 22. By the time of the decision in *Reg. v. Steele* the law accepted that the implied consent of the wife to intercourse could be revoked only by process of law or by express agreement between the parties. The Report of the Criminal Law F Revision Committee on Sexual Offences (1984) (Cmnd. 9213) clearly indicates that the committee also believed the general rule to be the law: see paragraphs 2.55, 2.56, 2.81.

In *Reg. v. Roberts* [1986] Crim.L.R. 188; *Reg. v. Kowalski* (1987) 86 Cr.App.R. 339 and *Reg. v. H.* (unreported), 5 October 1990, the courts proceeded on the premise that the law was as hitherto understood. G The absence of a binding House of Lords decision does not undermine what has been accepted as the law for over 250 years. Moreover, by virtue of the Sexual Offences (Amendment) Act 1976 rape ceased to be a common law offence and became a statutory offence as defined in section 1(1) of the Act. Consequently, the decision in *Reg. v. C. (Rape: Marital Exemption)* [1991] 1 All E.R. 755 cannot be sustained: see commentary by Professor J. C. Smith [1991] Crim.L.R. 62, 63. The H correct approach is to be found in *Reg. v. J. (Rape: Marital Exemption)* [1991] 1 All E.R. 759, where it was held that the exemption stated in *Hale* had been preserved by section 1(1)(*a*) of the Act of 1976, save for

A the exceptions established by cases decided before the passing of the Act; and, further, by reference to *Reg. v. Chapman* [1959] 1 Q.B. 100, that the word "unlawful" in section 1(1)(*a*) of the Act of 1976 meant "illicit," i.e. outside marriage.

As to the construction of "unlawful," it is a bold tribunal that would hold that a word or phrase in a statute is mere surplusage and got there by accident. [Reference was made to *McMonagle v. Westminster City* B *Council* [1990] 2 A.C. 716.] Since the Act of 1976 refers to the Sexual Offences Act 1956 it is important to consider the meaning of the word "unlawful" in the context of the Act of 1956, which uses the phrase "unlawful sexual intercourse" constantly. The phrase must be presumed to have the same meaning throughout the Act. It is pertinent to contrast sections 10 and 11 of that Act with sections 5, 7, 8 and 9 thereof. There C is no use of the word "unlawful" in sections 10 and 11 because by definition the offence with which those sections are concerned does not take place within marriage. In the latter sections it is the use of the word "unlawful" which prevents a man who is married to a mental defective from being guilty of an offence. The word "unlawful" got into the Act of 1976, not by accident, but by design. The draughtsman believed that the immunity propounded by Hale was still good law, D subject to the exceptions recognised by the common law at the date of the passing of the Act.

John Milmo Q.C. and *Peter Joyce Q.C.* for the Crown. The argument falls under three heads: (1) use of the word "unlawful" in the Sexual Offences (Amendment) Act 1976; (2) the alleged immunity depending upon the statement in *Hale*; (3) whether it was open to the Court of E Appeal and whether it is open to the House of Lords to state that Hale was wrong or, if he was right in his time, that his statement of the law can now be departed from.

The word "unlawful" in an English criminal statute means "without lawful authority or excuse." Whether there is such authority must depend on the common law, and what is justifiable must depend on the nature of the offence in question. [Reference was made to the Offences F against the Person Act 1861 (24 & 25 Vict. c. 100), sections 18 and 20 and *Coke's Institutes*, (1660) III, ch. 11, p. 60.] The construction of the word "unlawful" as meaning "outside marriage" in *Reg. v. Chapman* was correct for the purposes of section 19(1) of the Sexual Offences Act 1956. But such a construction leads to extraordinary results if applied to other statutory provisions, e.g. sections 4, 6(1) and 6(3) of the Act of G 1956. The object of the Act of 1976 was to define rape in statutory form in light of the House of Lords decision in *Reg. v. Morgan* [1976] A.C. 182. The Act does not give a complete definition of rape.

The proposition that the law crystallised in 1976 flies in the face of the assertion that "unlawful" means "outside marriage." The proposition also creates a considerable practical problem as exemplified by *Reg. v. S.* (unreported), 15 January 1991, where it was held that while section 1(1) H of the Act of 1976 preserved the marital exemption subject to the established common law exceptions, nevertheless the courts would be barred from creating new exceptions. If "unlawful" means "outside marriage" then all exceptions recognised hitherto are swept away, as are

also the *Reg. v. Steele* line of cases. It would be extraordinary if a husband could be convicted of every type of violent assault save the most serious, namely, rape.

There is nothing in the words of the early textbook writers, Glanvill, Bracton or Dalton, nor in the most respected authority, *Coke's Institutes*, which supports *Hale*. If Hale was merely recognising a well known principle of law it is surprising that no authority is cited in support of it. Both Hawkins and Blackstone do not refer to the marital immunity. The first author after Hale to refer to the immunity was East in 1803 followed by Archbold in 1822.

Since the advent of the Matrimonial Acts in the last century a wife has been able to retract her consent by means of divorce or judicial separation. Therefore the whole rationale of Hale's statement of the law falls to the ground. There is no reference to Hale in any case until *Reg. v. Clarence*, 22 Q.B.D. 23 in 1888. In light of the observations in *Reg. v. Jackson* [1891] 1 Q.B. 671, 678, 679 it is difficult to sustain Hale's statement. [Reference was made to *Reg. v. Steele*, 65 Cr.App.R. 22 and *Reg. v. Roberts* [1986] Crim.L.R. 188.]

Since the time of Hale there have been only two instances in the books where a husband has successfully invoked the *Hale* exemption, namely *Reg. v. Miller* [1954] 2 Q.B. 282 and *Reg. v. J.* (*Rape: Marital Exemption*) [1991] 1 All E.R. 759. Over the years the judges have created more and more exceptions to the rule in *Hale*. It is time for the position taken by the Court of Appeal in the present case to be adopted and for the law of England and Wales to be the same as that in Scotland: see *S. v. H.M. Advocate*, 1989 S.L.T. 469.

Joyce Q.C. following. The solution adopted by the Court of Appeal ante, pp. 610F–611E was open to it as a matter of law: see *Shaw v. Director of Public Prosecutions* [1962] A.C. 220. Further, the House of Lords will remove a defence where it is deemed necessary to do so: see *Reg. v. Button* [1966] A.C. 591. [Reference was also made to *Reg. v. Taylor (Vincent)* [1973] A.C. 964.] The present case is either concerned with the removal of a fiction or the removal of a defence.

Buchanan replied.

Their Lordships took time for consideration.

23 October. LORD KEITH OF KINKEL. My Lords, in this appeal to the House with leave of the Court of Appeal (Criminal Division) that court has certified the following point of law of general public importance as being involved in its decision, namely: "Is a husband criminally liable for raping his wife?"

The appeal arises out of the appellant's conviction at Leicester Crown Court on 30 July 1990, upon his pleas of guilty, of attempted rape and of assault occasioning actual bodily harm. The alleged victim in respect of each offence was the appellant's wife. The circumstances of the case were these. The appellant married his wife in August 1984 and they had one son born in 1985. On 11 November 1987 the couple separated for about two weeks but resumed cohabitation at the end of that period. On 21 October 1989 the wife left the matrimonial home

A with the son and went to live with her parents. She had previously consulted solicitors about matrimonial problems, and she left at the matrimonial home a letter for the appellant informing him that she intended to petition for divorce. On 23 October 1989 the appellant spoke to his wife on the telephone indicating that it was his intention also to see about a divorce. No divorce proceedings had, however, been instituted before the events which gave rise to the charges against
B the appellant. About 9 p.m. on 12 November 1989 the appellant forced his way into the house of his wife's parents, who were out at the time, and attempted to have sexual intercourse with her against her will. In the course of doing so he assaulted her by squeezing her neck with both hands. The appellant was arrested and interviewed by police officers. He admitted responsibility for what had happened. On 3 May 1990 a
C decree nisi of divorce was made absolute.

The appellant was charged on an indictment containing two counts, the first being rape and the second being assault occasioning actual bodily harm. When he appeared before Owen J. at Leicester Crown Court on 30 July 1990 it was submitted to the judge on his behalf that a husband could not in law be guilty as a principal of the offence of raping his own wife. Owen J. rejected that proposition as being capable of
D exonerating the appellant in the circumstances of the case. His ground for doing so was that, assuming an implicit general consent to sexual intercourse by a wife on marriage to her husband, that consent was capable of being withdrawn by agreement of the parties or by the wife unilaterally removing herself from cohabitation and clearly indicating that consent to sexual intercourse had been terminated. On the facts
E appearing from the depositions either the first or the second of these sets of circumstances prevailed. Following the judge's ruling the appellant pleaded guilty to attempted rape and to the assault charged. He was sentenced to three years' imprisonment on the former count and to eighteen months imprisonment on the latter.

The appellant appealed to the Court of Appeal (Criminal Division)
F on the ground that Owen J.:

> "made a wrong decision in law in ruling that a man may rape his wife when the consent to intercourse which his wife gives in entering the contract of marriage has been revoked neither by order of a court nor by agreement between the parties."

On 14 March 1991 that court (Lord Lane C.J., Sir Stephen Brown P.,
G Watkins, Neill and Russell L.JJ.) delivered a reserved judgment dismissing the appeal but certifying the question of general public importance set out above and granting leave to appeal to your Lordships' House, which the appellant now does.

Sir Matthew Hale, in his *History of the Pleas of the Crown*, 1st ed. (1736), vol. 1, ch. 58, p. 629, wrote:

H

> "But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself up in this kind unto her husband which she cannot retract."

There is no similar statement in the works of any earlier English commentator. In 1803 East, in his *Treatise of the Pleas of the Crown*, vol. 1, ch. X, p. 446, wrote: "a husband cannot by law be guilty of ravishing his wife, on account of the matrimonial consent which she cannot retract." In the first edition (1822) of *Archbold, Pleading and Evidence in Criminal Cases*, at p. 259 it was stated, after a reference to *Hale*, "A husband also cannot be guilty of a rape upon his wife."

For over 150 years after the publication of Hale's work there appears to have been no reported case in which judicial consideration was given to his proposition. The first such case was *Reg. v. Clarence* (1888) 22 Q.B.D. 23, to which I shall refer later. It may be taken that the proposition was generally regarded as an accurate statement of the common law of England. The common law is, however, capable of evolving in the light of changing social, economic and cultural developments. Hale's proposition reflected the state of affairs in these respects at the time it was enunciated. Since then the status of women, and particularly of married women, has changed out of all recognition in various ways which are very familiar and upon which it is unnecessary to go into detail. Apart from property matters and the availability of matrimonial remedies, one of the most important changes is that marriage is in modern times regarded as a partnership of equals, and no longer one in which the wife must be the subservient chattel of the husband. Hale's proposition involves that by marriage a wife gives her irrevocable consent to sexual intercourse with her husband under all circumstances and irrespective of the state of her health or how she happens to be feeling at the time. In modern times any reasonable person must regard that conception as quite unacceptable.

In *S. v. H.M. Advocate*, 1989 S.L.T. 469 the High Court of Justiciary in Scotland recently considered the supposed marital exemption in rape in that country. In two earlier cases, *H.M. Advocate v. Duffy*, 1983 S.L.T. 7 and *H.M. Advocate v. Paxton*, 1985 S.L.T. 96 it had been held by single judges that the exemption did not apply where the parties to the marriage were not cohabiting. The High Court held that the exemption, if it had ever been part of the law of Scotland, was no longer so. The principal authority for the exemption was to be found in *Hume on Crimes*, first published in 1797. The same statement appeared in each edition up to the fourth, by Bell, in 1844. At p. 306 of vol. 1 of that edition, dealing with art and part guilt of abduction and rape, it was said:

> "This is true without exception even of the husband of the woman, who though he cannot himself commit a rape on his own wife, who has surrendered her person to him in that sort, may, however be accessory to that crime . . . committed upon her by another."

It seems likely that this pronouncement consciously followed *Hale*.

The Lord Justice-General, Lord Emslie, who delivered the judgment of the court, expressed doubt whether Hume's view accurately represented the law of Scotland even at the time when it was expressed and continued, 1989 S.L.T. 469, 473:

> "We say no more on this matter which was not the subject of debate before us, because we are satisfied that the Solicitor-General

was well founded in his contention that whether or not the reason for the husband's immunity given by Hume was a good one in the 18th and early 19th centuries, it has since disappeared altogether. Whatever Hume meant to encompass in the concept of a wife's 'surrender of her person' to her husband 'in that sort' the concept is to be understood against the background of the status of women and the position of a married woman at the time when he wrote. Then, no doubt, a married woman could be said to have subjected herself to her husband's dominion in all things. She was required to obey him in all things. Leaving out of account the absence of rights of property, a wife's freedoms were virtually non-existent, and she had in particular no right whatever to interfere in her husband's control over the lives and upbringing of any children of the marriage.

"By the second half of the 20th century, however, the status of women, and the status of a married woman, in our law have changed quite dramatically. A husband and wife are now for all practical purposes equal partners in marriage and both husband and wife are tutors and curators of their children. A wife is not obliged to obey her husband in all things nor to suffer excessive sexual demands on the part of her husband. She may rely on such demands as evidence of unreasonable behaviour for the purposes of divorce. A live system of law will always have regard to changing circumstances to test the justification for any exception to the application of a general rule. Nowadays it cannot seriously be maintained that by marriage a wife submits herself irrevocably to sexual intercourse in all circumstances. It cannot be affirmed nowadays, whatever the position may have been in earlier centuries, that it is an incident of modern marriage that a wife consents to intercourse in all circumstances, including sexual intercourse obtained only by force. There is no doubt that a wife does not consent to assault upon her person and there is no plausible justification for saying today that she nevertheless is to be taken to consent to intercourse by assault. The modern cases of *H.M. Advocate v. Duffy*, 1983 S.L.T. 7 and *H.M. Advocate v. Paxton*, 1985 S.L.T. 96 show that any supposed implied consent to intercourse is not irrevocable, that separation may demonstrate that such consent has been withdrawn, and that in these circumstances a relevant charge of rape may lie against a husband. This development of the law since Hume's time immediately prompts the question: is revocation of a wife's implied consent to intercourse, which is revocable, only capable of being established by the act of separation? In our opinion the answer to that question must be no. Revocation of a consent which is revocable must depend on the circumstances. Where there is no separation this may be harder to prove but the critical question in any case must simply be whether or not consent has been withheld. The fiction of implied consent has no useful purpose to serve today in the law of rape in Scotland. The reason given by Hume for the husband's immunity from prosecution upon a charge of rape of his wife, if it ever was a good reason, no longer

applies today. There is now, accordingly, no justification for the supposed immunity of a husband. Logically the only question is whether or not as matter of fact the wife consented to the acts complained of, and we affirm the decision of the trial judge that charge 2(b) is a relevant charge against the appellant to go to trial."

I consider the substance of that reasoning to be no less valid in England than in Scotland. On grounds of principle there is now no justification for the marital exemption in rape.

It is now necessary to review how the matter stands in English case law. In *Reg. v. Clarence*, 22 Q.B.D. 23 a husband who knew that he suffered from a venereal disease communicated it to his wife through sexual intercourse. He was convicted on charges of unlawfully inflicting grievous bodily harm contrary to section 20 of the Offences against the Person Act 1861 and of assault occasioning actual bodily harm contrary to section 47 of the same Act. The convictions were quashed by a court of 13 judges of Crown Cases Reserved, with four dissents. Consideration was given to Hale's proposition, and it appears to have been accepted as sound by a majority of the judges. However, Wills J. said, at p. 33, that he was not prepared to assent to the proposition that rape between married persons was impossible. Field J. (in whose judgment Charles J. concurred) said, at p. 57, that he should hesitate before he adopted Hale's proposition, and that he thought there might be many cases in which a wife might lawfully refuse intercourse and in which, if the husband imposed it by violence, he might be held guilty of a crime.

In *Rex v. Clarke* [1949] 2 All E.R. 448 a husband was charged with rape upon his wife in circumstances where justices had made an order providing that the wife should no longer be bound to cohabit with the husband. Byrne J. refused to quash the charge. He accepted Hale's proposition as generally sound, but said, at p. 449:

> "The position, therefore, was that the wife, by process of law, namely, by marriage, had given consent to the husband to exercise the marital right during such time as the ordinary relations created by the marriage contract subsisted between them, but by a further process of law, namely, the justices' order, her consent to marital intercourse was revoked. Thus, in my opinion, the husband was not entitled to have intercourse with her without her consent."

In *Reg. v. Miller* [1954] 2 Q.B. 282 the husband was charged with rape of his wife after she had left him and filed a petition for divorce. He was also charged with assault upon her occasioning actual bodily harm. Lynskey J. quashed the charge of rape but refused to quash that of assault. He proceeded on the basis that Hale's proposition was correct, and also that *Rex v. Clarke* had been rightly decided, but took the view, at p. 290, that there was no evidence which entitled him to say that the wife's implied consent to marital intercourse had been revoked by an act of the parties or by an act of the court. As regards the count of assault, having referred to *Reg. v. Jackson* [1891] 1 Q.B. 671, where it was held that a husband had no right to confine his wife in order to

enforce a decree for restitution of conjugal rights, he said, at pp. 291–292:

> "It seems to me, on the reasoning of that case, that although the husband has a right to marital intercourse, and the wife cannot refuse her consent, and although if he does have intercourse against her actual will, it is not rape, nevertheless he is not entitled to use force or violence in the exercise of that right, and if he does so he may make himself liable to the criminal law, not for the offence of rape, but for whatever other offence the facts of the particular case warrant. If he should wound her he might be charged with wounding or causing actual bodily harm, or he may be liable to be convicted of common assault. The result is that in the present case I am satisfied that the second count is a valid one and must be left to the jury for their decision."

So the case had the strange result that although the use of force to achieve sexual intercourse was criminal the actual achievement of it was not. Logically, it might be thought that if a wife be held to have by marriage given her implied consent to sexual intercourse she is not entitled to refuse her husband's advances, and that if she resists then he is entitled to use reasonable force to overcome that resistance. This indicates the absurdity of the fiction of implied consent. In the law of Scotland, as Lord Emslie observed in *S. v. H. M. Advocate*, 1989 S.L.T. 469, 473, rape is regarded as an aggravated assault, of which the achievement of sexual intercourse is the worst aggravating feature. It is unrealistic to sort out the sexual intercourse from the other acts involved in the assault and to allow the wife to complain of the minor acts but not of the major and most unpleasant one.

The next case is *Reg. v. O'Brien (Edward)* [1974] 3 All E.R. 663, where Park J. held that a decree nisi effectively terminated a marriage and revoked the wife's implied consent to marital intercourse, so that subsequent intercourse by the husband without her consent constituted rape. There was a similar holding by the Criminal Division of the Court of Appeal in *Reg. v. Steele* (1976) 65 Cr.App.R. 22 as regards a situation where the spouses were living apart and the husband had given an undertaking to the court not to molest his wife. A decision to the like effect was given by the same court in *Reg. v. Roberts* [1986] Crim.L.R. 188, where the spouses had entered into a formal separation agreement. In *Reg. v. Sharples* [1990] Crim.L.R. 198, however, it was ruled by Judge Fawcus that a husband could not be convicted of rape upon his wife in circumstances where there was in force a family protection order in her favour and he had had sexual intercourse with her against her will. The order was made under section 16 of the Domestic Proceedings and Magistrates' Courts Act 1978 in the terms that "the respondent shall not use or threaten to use violence against the person of the applicant." Judge Fawcus took the view that it was not to be inferred that by obtaining an order in these terms the wife had withdrawn her consent to sexual intercourse.

There should be mentioned next a trio of cases which were concerned with the question whether acts done by a husband preliminary to sexual

intercourse with an estranged wife against her will could properly be charged as indecent assaults. The cases are *Reg. v. Caswell* [1984] Crim.L.R. 111, *Reg. v. Kowalski* (1987) 86 Cr.App.R. 339, and *Reg. v. H.* (unreported), 5 October 1990, Auld J. The effect of these decisions appears to be that in general acts which would ordinarily be indecent but which are preliminary to an act of normal sexual intercourse are deemed to be covered by the wife's implied consent to the latter, but that certain acts, such as fellatio, are not to be so deemed. Those cases illustrate the contortions to which judges have found it necessary to resort in face of the fiction of implied consent to sexual intercourse.

The foregoing represent all the decisions in the field prior to the ruling by Owen J. in the present case. In all of them lip service, at least, was paid to Hale's proposition. Since then there have been three further decisions by single judges. The first of them is *Reg. v. C. (Rape: Marital Exemption)* [1991] 1 All E.R. 755. There were nine counts in an indictment against a husband and a co-defendant charging various offences of a sexual nature against an estranged wife. One of these was of rape as a principal. Simon Brown J. followed the decision in *S. v. H.M. Advocate*, 1989 S.L.T. 469 and held that the whole concept of a marital exemption in rape was misconceived. He said, at p. 758:

> "Were it not for the deeply unsatisfactory consequences of reaching any other conclusion on the point, I would shrink, if sadly, from adopting this radical view of the true position in law. But adopt it I do. Logically, I regard it as the only defensible stance, certainly now as the law has developed and arrived in the late 20th century. In my judgment, the position in law today is, as already declared in Scotland, that there is no marital exemption to the law of rape. That is the ruling I give. Count seven accordingly remains and will be left to the jury without any specific direction founded on the concept of marital exemption."

A different view was taken in the other two cases, by reason principally of the terms in which rape is defined in section 1(1) of the Sexual Offences (Amendment) Act 1976, viz.:

> "For the purposes of section 1 of the Sexual Offences Act 1956 (which relates to rape) a man commits rape if—(*a*) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it; and (*b*) at that time he knows that she does not consent to the intercourse or he is reckless as to whether she consents to it; . . ."

In *Reg. v. J. (Rape: Marital Exemption)* [1991] 1 All E.R. 759 a husband was charged with having raped his wife, from whom he was living apart at the time. Rougier J. ruled that the charge was bad, holding that the effect of section 1(1)(*a*) of the Act of 1976 was that the marital exemption embodied in Hale's proposition was preserved, subject to those exceptions established by cases decided before the Act was passed. He took the view that the word "unlawful" in the subsection meant "illicit," i.e. outside marriage, that being the meaning which in *Reg. v. Chapman* [1959] 1 Q.B. 100 it had been held to bear in section

19 of the Sexual Offences Act 1956. Then in *Reg. v. S.* (unreported), 15 January 1991, Swinton-Thomas J. followed Rougier J. in holding that section 1(1) of the Act of 1976 preserved the marital exemption subject to the established common law exceptions. Differing, however, from Rougier J., he took the view that it remained open to judges to define further exceptions. In the case before him the wife had obtained a family protection order in similar terms to that in *Reg. v. Sharples* [1990] Crim.L.R. 198. Differing from Judge Fawcus in that case, Swinton-Thomas J. held that the existence of the family protection order created an exception to the marital exemption. It is noteworthy that both Rougier J. and Swinton-Thomas J. expressed themselves as being regretful that section 1(1) of the Act of 1976 precluded them from taking the same line as Simon Brown J. in *Reg. v. C. (Rape: Marital Exemption)* [1991] 1 All E.R. 755.

The position then is that that part of Hale's proposition which asserts that a wife cannot retract the consent to sexual intercourse which she gives on marriage has been departed from in a series of decided cases. On grounds of principle there is no good reason why the whole proposition should not be held inapplicable in modern times. The only question is whether section 1(1) of the Act of 1976 presents an insuperable obstacle to that sensible course. The argument is that "unlawful" in the subsection means outside the bond of marriage. That is not the most natural meaning of the word, which normally describes something which is contrary to some law or enactment or is done without lawful justification or excuse. Certainly in modern times sexual intercourse outside marriage would not ordinarily be described as unlawful. If the subsection proceeds on the basis that a woman on marriage gives a general consent to sexual intercourse, there can never be any question of intercourse with her by her husband being without her consent. There would thus be no point in enacting that only intercourse without consent outside marriage is to constitute rape.

Reg. v. Chapman [1959] 1 Q.B. 100 is founded on in support of the favoured construction. That was a case under section 19 of the Sexual Offences Act 1956, which provides:

> "(1) It is an offence, subject to the exception mentioned in this section, for a person to take an unmarried girl under the age of 18 out of the possession of her parent or guardian against his will, if she is so taken with the intention that she shall have unlawful sexual intercourse with men or with a particular man. (2) A person is not guilty of an offence under this section because he takes such a girl out of the possession of her parent or guardian as mentioned above, if he believes her to be of the age of 18 or over and has reasonable cause for the belief."

It was argued for the defendant that "unlawful" in that section connoted either intercourse contrary to some positive enactment or intercourse in a brothel or something of that kind. Donovan J., giving the judgment of the Court of Criminal Appeal, rejected both interpretations and continued, at p. 105:

> "If the two interpretations suggested for the appellant are rejected, as we think they must be, then the word 'unlawful' in section 19 is either

surplusage or means 'illicit.' We do not think it is surplusage, because otherwise a man who took such a girl out of her parents' possession against their will with the honest and bona fide intention of marrying her might have no defence, even if he carried out that intention. In our view, the word simply means 'illicit,' i.e., outside the bond of marriage. In other words, we take the same view as the trial judge. We think this interpretation accords with the common sense of the matter, and with what we think was the obvious intention of Parliament. It is also reinforced by the alternatives specifically mentioned in sections 17 and 18 of the Act, that is, 'with the intent that she shall marry, or have unlawful intercourse . . .'"

In that case there was a context to the word "unlawful" which by cogent reasoning led the court to the conclusion that it meant outside the bond of marriage. However, even though it is appropriate to read the Act of 1976 alongside that of 1956, so that the provisions of the latter Act form part of the context of the former, there is another important context to section 1(1) of the Act of 1976, namely the existence of the exceptions to the marital exemption contained in the decided cases. Sexual intercourse in any of the cases covered by the exceptions still takes place within the bond of marriage. So if "unlawful" in the subsection means "outside the bond of marriage" it follows that sexual intercourse in a case which falls within the exceptions is not covered by the definition of rape, notwithstanding that it is not consented to by the wife. That involves that the exceptions have been impliedly abolished. If the intention of Parliament was to abolish the exceptions it would have been expected to do so expressly, and it is in fact inconceivable that Parliament should have had such an intention. In order that the exceptions might be preserved, it would be necessary to construe "unlawfully" as meaning "outside marriage or within marriage in a situation covered by one of the exceptions to the marital exemption." Some slight support for that construction is perhaps to be gathered from the presence of the words "who at the time of the intercourse does not consent to it," considering that a woman in a case covered by one of the exceptions is treated as having withdrawn the general consent to intercourse given on marriage but may nevertheless have given her consent to it on the particular occasion. However, the gloss which the suggested construction would place on the word "unlawfully" would give it a meaning unique to this particular subsection, and if the mind of the draftsman had been directed to the existence of the exceptions he would surely have dealt with them specifically and not in such an oblique fashion. In *Reg. v. Chapman* Donovan L.J. accepted, at p. 102, that the word "unlawfully" in relation to carnal knowledge had in many early statutes not been used with any degree of precision, and he referred to a number of enactments making it a felony unlawfully and carnally to know any woman-child under the age of 10. He said, at p. 103 "one would think that all intercourse with a child under 10 would be unlawful; and on that footing the word would be mere surplusage." The fact is that it is clearly unlawful to have sexual intercourse with any woman without her consent, and that the use of the word in the

A subsection adds nothing. In my opinion there are no rational grounds for putting the suggested gloss on the word, and it should be treated as being mere surplusage in this enactment, as it clearly fell to be in those referred to by Donovan L.J. That was the view taken of it by this House in *McMonagle v. Westminster City Council* [1990] 2 A.C. 716 in relation to paragraph 3A of Schedule 3 to the Local Government (Miscellaneous Provisions) Act 1983.

B I am therefore of the opinion that section 1(1) of the Act of 1976 presents no obstacle to this House declaring that in modern times the supposed marital exemption in rape forms no part of the law of England. The Court of Appeal (Criminal Division) took a similar view. Towards the end of the judgment of that court Lord Lane C.J. said, ante, p. 611:

C > "The remaining and no less difficult question is whether, despite that view, this is an area where the court should step aside to leave the matter to the Parliamentary process. This is not the creation of a new offence, it is the removal of a common law fiction which has become anachronistic and offensive and we consider that it is our duty having reached that conclusion to act upon it."

D I respectfully agree.

My Lords, for these reasons I would dismiss this appeal, and answer the certified question in the affirmative.

LORD BRANDON OF OAKBROOK. My Lords, for the reasons given in the speech of my noble and learned friend, Lord Keith of Kinkel, I would answer the certified question in the affirmative and dismiss the E appeal.

LORD GRIFFITHS. My Lords, for the reasons given by my noble and learned friend, Lord Keith of Kinkel, I would dismiss this appeal and answer the certified question in the affirmative.

LORD ACKNER. My Lords, for the reasons given in the speech of my F noble and learned friend, Lord Keith of Kinkel, I, too, would answer the certified question in the affirmative and dismiss the appeal.

LORD LOWRY. My Lords, for the reasons given by my noble and learned friend, Lord Keith of Kinkel, I would dismiss this appeal and answer the certified question in the affirmative.

G *Appeal dismissed.*

Solicitors: Kingsford Stacey for Hawley & Rodgers, Leicester; Crown Prosecution Service.

J. A. G.

H