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# Criminal Liability of Spouse for Theft of the Other Spouse's Property

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## NOTES AND COMMENT

### CRIMINAL LIABILITY OF SPOUSE FOR THEFT OF THE OTHER SPOUSE'S PROPERTY

#### *Introduction*

Today in most of the states the legal personality of the wife is almost as complete as that of her husband. This has not always been true.<sup>1</sup> At the common law a husband became entitled to the rents and profits of his wife's real property, having an interest denominated a freehold estate *jure uxoris*;<sup>2</sup> he was entitled to enjoy her choses in action upon reducing them to possession;<sup>3</sup> and upon marriage her personal property became his.<sup>4</sup> The effects of marriage, however, did not stop there. A *feme covert* could not sue or be sued in her own name.<sup>5</sup> She could not make a valid contract with third persons,<sup>6</sup> and neither she nor her husband had capacity mutually to contract.<sup>7</sup> Neither spouse could sue the other for torts committed against person or property,<sup>8</sup> and neither could be convicted for crimes against the property of the other.<sup>9</sup>

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<sup>1</sup> "By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband. \* \* \* Upon this principle, of a union of person in husband and wife, depend almost all the legal rights, duties and disabilities, that either of them acquire by the marriage." 1 BL. COMM.\* 442; HOLLAND, JURISPRUDENCE (13th ed. 1924) 353.

<sup>2</sup> *Finnegan v. Humes*, 163 Misc. 840, 298 N. Y. Supp. 50, 53 (1937) ("Under the common law, the husband was entitled to the rents and profits of his wife's lands during their joint lives, and to the rents and profits of lands held in entirety; and this was his right as husband"); DICEY, LAW AND OPINION IN ENGLAND (2d ed. 1914) 372n.; 2 KENT, COMM. 130.

<sup>3</sup> DICEY, *op. cit. supra*; KENT, *op. cit. supra*, at 138; 2 BL. COMM.\* 434.

<sup>4</sup> 2 BL. COMM.\* 433; 2 KENT, *op. cit. supra*, at 144; TIFFANY, THE LAW OF PERSONS AND DOMESTIC RELATIONS (2d ed. 1909) 92.

<sup>5</sup> 1 BL. COMM.\* 443; 30 C. J. 945; ANSON, ENGLISH LAW OF CONTRACTS (8th ed. 1895) 149; EDGAR, LAW OF TORTS (3d ed. 1936) 68.

<sup>6</sup> TIFFANY, *op. cit. supra*, at 117; CLARK, HANDBOOK OF THE LAW OF CONTRACTS (2d ed. 1904) 188.

<sup>7</sup> 1 BL. COMM.\* 443; 2 KENT COMM. 129; 3 VERNIER, AMERICAN FAMILY LAWS 65; 30 C. J. 669.

<sup>8</sup> *Schultz v. Schultz*, 89 N. Y. 644 (1882); *Allen v. Allen*, 246 N. Y. 571, 159 N. E. 656 (1927); *Caplan v. Caplan*, 268 N. Y. 445, 198 N. E. 23 (1935); VERNIER, *op. cit. supra*, at 353; EDGAR, *op. cit. supra*, at 69; TIFFANY, *op. cit. supra*, at 73.

<sup>9</sup> *People v. Rossiter*, 173 Misc. 268, 17 N. Y. S. (2d) 30 (1940); *People ex rel. Troare v. McClelland*, 146 Misc. 545, 263 N. Y. Supp. 403 (1933); see *People v. Decker*, 143 App. Div. 590, 127 N. Y. Supp. 1059 (2d Dep't 1911); *Thomas v. Thomas*, 51 Ill. 62 (1869); cf. *Lamphier v. State*, 70 Ind. 317 (1880); *State v. Banks*, 48 Ind. 197 (1874); see *Commonwealth v. Hartnett*, 69 Mass. 450 (1855); *Snyder v. People*, 26 Mich. 106 (1872); *State v. Arnold*, 182 Minn. 313, 235 N. W. 373 (1931); *People ex rel. Carr v. Martin*, 261 App. Div. 865, 24 N. Y. S. (2d) 729 (3d Dep't 1941); *State v. Phillips*, 85 Ohio St.

Under the married women's enabling acts of New York a married woman may contract with third persons or with her husband as though she were single;<sup>10</sup> she may sue or be sued in contract or in tort in her own name,<sup>11</sup> and in New York, by a recent enactment, she may sue her husband in tort for personal injuries as well as for injuries to her property.<sup>12</sup> Correlatively, the husband may also sue

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317, 97 N. E. 976 (1912); *State v. Parker*, 3 Ohio Dec. (Reprint) 551 (1882); *Golden v. State*, 22 Tex. App. 1, 2 S. W. 531 (1886) *semble*; *VERNIER, op. cit. supra*, at 164.

<sup>10</sup> N. Y. DOM. REL. LAW § 51: "Powers of married woman: A married woman has all the rights in respect to property, real or personal, and the acquisition, use, enjoyment and disposition thereof, and to make contracts in respect thereto with any person, including her husband, and to carry on any business, trade or occupation, and to exercise all powers and enjoy all rights in respect thereto and in respect to her contracts, and be liable on such contracts, as if she were unmarried; but a husband and wife cannot contract to alter or dissolve the marriage or to relieve the husband from his liability to support his wife. All sums that may be recovered in actions or special proceedings by a married woman to recover damages to her person, estate or character shall be the separate property of the wife. Judgment for or against a married woman, may be rendered and enforced, in a court of record, or not of record, as if she was single. A married woman may confess a judgment specified in section five hundred and forty of the civil practice act. As amended L. 1941, c. 13, § 1, eff. Feb. 17, 1941."

<sup>11</sup> N. Y. DOM. REL. LAW § 51; *id.* § 57: "Right of action by or against married woman, and by husband or wife against the other, for torts: A married woman has a right of action for an injury to her person, property or character or for an injury arising out of the marital relation, as if unmarried. She is liable for her wrongful or tortious acts; her husband is not liable for such acts unless they were done by his actual coercion or instigation; and such coercion or instigation shall not be presumed, but must be proved. *A married woman has a right of action against her husband for his wrongful or tortious acts resulting to her in any personal injury as defined in section thirty-seven-a of the general construction law, or resulting in injury to her property, as if they were unmarried, and she is liable to her husband for her wrongful or tortious acts resulting in any such personal injury to her husband or to his property, as if they were unmarried.* Italic portion added by L. 1937, c. 669, § 1, eff. Sept. 1, 1937."

N. Y. CIV. PRAC. ACT § 200: "A married woman may be a party in the same manner as if she were single. Her husband is not a necessary or proper party solely because of his relationship as such husband."

As to a married woman's property the following sections apply:

N. Y. DOM. REL. LAW § 50: "Property, real or personal, now owned by a married woman, or hereafter owned by a woman at the time of her marriage, or acquired by her as prescribed in this chapter, and the rents, issues, proceeds and profits thereof, shall continue to be her sole and separate property as if she were unmarried, and shall not be subject to her husband's control or disposal nor liable for his debts."

N. Y. DOM. REL. LAW § 56: "Husband and wife may convey or transfer real or personal property directly, the one to the other, without the intervention of a third person; and may make partition or division of any real property held by them as tenants in common, joint tenants or by the entirety. If so expressed in the instrument of partition or division, such instrument bars the wife's right to dower in such property, and also, if so expressed, the husband's tenancy by curtesy."

<sup>12</sup> N. Y. DOM. REL. LAW § 57.

the wife.<sup>13</sup> Thus it may be seen that the tendency has been to divest marriage of many of its old attributes and to place both husband and wife in a position of independence as to their respective legal personalities. The question here to be considered is whether or not as the law stands today in New York, acts by a spouse against the other's property, which would be criminal if committed against the property of a third person, are crimes. Such acts at the common law were not crimes because in contemplation of law husband and wife were one. But today, in many jurisdictions where the wife is almost completely emancipated the courts have continued to hold that neither spouse may be guilty of larceny or embezzlement of the other's property.<sup>14</sup> Apparently this result is not logical, for if the spouses' immunity rested upon the "unity" concept, a destruction of the elements which constituted the unity should, *a fortiori*, also destroy the immunity.<sup>15</sup> Nevertheless, a "legal", if not logical, reason may be found. The common law rule as to immunity has rarely, if ever, been expressly altered by the married women's enabling acts. These statutes are in derogation of the common law, and hence are to be strictly construed.<sup>16</sup> Giving to these statutes a strict construction will result only in an alteration of the rights of the spouses, but will not give the state a right which it may protect by criminal proceedings.<sup>17</sup> This affords a technical, but certainly not a satisfactory, reason for the refusal of the majority of the states to abandon the old rule of immunity. It is more than likely that social policy has always been at the bottom of the immunity although the courts have found it easier to attribute it to the fiction that husband and wife are one person. On the other hand if the unity of husband and wife consists of more than the rights and disabilities which have been split off from the relation by the

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<sup>13</sup> *Ibid.*; *Bodine, et al. v. Killeen*, 53 N. Y. 93, 96 (1873) ("With the removal of common-law disabilities from married women, corresponding liabilities have necessarily been imposed upon them. They take the civil rights and privileges conferred, subject to all the incidental and correlative burdens and obligations, and their rights and obligations are to be determined by the same rules of law and evidence by which the rights and obligations of the other sex are determined under like circumstances.").

<sup>14</sup> *State v. Arnold*, 182 Minn. 313, 235 N. W. 373 (1931) (larceny); *People ex rel. Carr v. Martin*, 261 App. Div. 865, 24 N. Y. S. (2d) 729 (3d Dep't 1941); *People ex rel. Troare v. McClelland*, 146 Misc. 545, 263 N. Y. Supp. 403 (1933); *State v. Phillips*, 85 Ohio St. 317, 97 N. E. 976 (1912) (larceny); *State v. Parker*, 3 Ohio Dec. (Reprint) 551 (1882); *Golden v. State*, 22 Tex. App. 1, 2 S. W. 531 (1886) (embezzlement).

<sup>15</sup> *People v. Rossiter*, 173 Misc. 268, 17 N. Y. S. (2d) 30 (1940); *Beasley v. State*, 138 Ind. 552, 38 N. E. 35 (1894).

<sup>16</sup> *Jooss v. Fey*, 129 N. Y. 17, 29 N. E. 136 (1891); *Fitzgerald v. Quann*, 109 N. Y. 441, 17 N. E. 354 (1888); *Bertles v. Nunan*, 92 N. Y. 152 (1883). Statutes are not to be construed as effecting any change in the common law beyond their express terms or by necessary implication. *Tompkins v. Hunter*, 149 N. Y. 117, 43 N. E. 532 (1896); *People v. Hall*, 80 N. Y. 117 (1880); *Graves El. Co. v. Callanan*, 11 App. Div. 301, 42 N. Y. Supp. 930 (3d Dep't 1896); *State v. Arnold*, 182 Minn. 313, 235 N. W. 373 (1931).

<sup>17</sup> *State v. Arnold*, 182 Minn. 313, 235 N. W. 373 (1931).

married women's acts it is not inconsistent to hold that the unity has not been destroyed to an extent which will make it incapable of supporting the immunity of a spouse. The "free marriage" of the Romans, unlike the older form, marriage with *manus*, did not impair a wife's antenuptial rights, and whatever she acquired by her own labor, by inheritance, or otherwise, during marriage she held in her sole right. But despite this, the spouses could not sue one another for theft.<sup>18</sup> Thus it appears that the idea of immunity was formulated centuries before the common law idea of "unity" was developed.

### Case Law

#### (a) The Majority Rule

In an early case, *Snyder v. People*,<sup>19</sup> the Supreme Court of Michigan reversed a conviction for arson of a husband who had burned his wife's house. Title to the house was in the wife, but it was not clearly shown on trial whether it was the dwelling of both spouses. The court apparently held that if the husband lived in the house with his wife it was his dwelling and, hence not "the dwelling-house of another" within the meaning of the arson statute, but that it would not be *his* dwelling if he were living apart from his wife. This reasoning seems to have been the basis for the reversal of the conviction, but the court also referred to the common law rule that a husband cannot be guilty of arson in burning his wife's house, and considered the effects of statutory changes in the rights of married women, saying:

As regards her individual property, the law has done little more than to give legal rights and remedies to the wife, where before, by settlement or contract, she might have established corresponding equitable rights and remedies, and the unity of man and woman in the marriage relation, is no more broken up by giving her a statutory ownership and control of property, than it would have been before the statute, by such family settlement as should give her the like ownership and control. At the common law, the power of independent action and judgment was in the husband alone; now it is in her also, for many purposes; but the authority in her, to own and convey property, and

<sup>18</sup> SOHM, INSTITUTE OF ROMAN LAW (3d ed. 1907) 462, *et seq.*

<sup>19</sup> *Snyder v. People*, 26 Mich. 106 (1872). Another case which the writer has found frequently cited in support of the proposition that a spouse cannot be guilty of larceny or embezzlement of the other spouse's property is *Golden v. State*, 22 Tex. App. 1, 2 S. W. 531 (1886), cited in notes 9 and 14, *supra*. A careful examination of this case reveals that its bearing on the point is uncertain. It appears that *H.* embezzled money from *W.*'s mother. The Court of Appeals held that a charge that *H.* could not be convicted if the money in fact belonged to *W.* was not error. On the evidence there could have been no conviction of *H.* if the money had belonged to *W.* because she had apparently assented to *H.*'s acts. Also, as the indictment laid the ownership in another, if the jury found that such other had no property in the money an acquittal would have been proper.

to sue and be sued, is no more inconsistent with the marital unity, than the corresponding authority in him.<sup>20</sup>

In this opinion appears the view that the unity of husband and wife does not consist solely of property rights.<sup>21</sup> Substantially the same view was taken a few years later by the Supreme Court of Ohio in *State v. Phillips*.<sup>22</sup> In this case the court held that the married women's enabling acts should not be construed to extend beyond their necessary intendment, and that the common law rules prohibiting civil actions between spouses and giving a spouse immunity from criminal prosecution for injuries to the other's property should be abrogated only by clearly expressed legislation. The court went beyond this, however, and assigned social interest in the family relation as an additional reason for reversing the conviction of the defendant wife for larceny. In this connection the court said:

Moreover, the unity of husband and wife as recognized in the common law, is founded not merely on a community of goods, but upon the recognized obligation of both to the family and to society. The unit of society is not the individual but the family; and whatever tends to undermine the family, by the irrepealable laws of nature will crumble and destroy the foundations of society and the state. So that the peace and sanctity of the home and family are the ultimate reason for the common-law rule. We do not think that we can safely hold by mere inference that the Legislature has taken such a long step in the direction of destructive legislation.<sup>23</sup>

In another leading case<sup>24</sup> the Supreme Court of Minnesota held that a wife could not be guilty of larceny of her husband's property. The court took the view that although the rule of strict construction of criminal statutes in favor of the accused no longer prevails in Minnesota, the "fair import" rule did not justify the creation of a crime by implication, from the married woman's act.<sup>25</sup> The court quoted

<sup>20</sup> 26 Mich. 106, 108 (1872).

<sup>21</sup> Cf. *People v. Rossiter*, 173 Misc. 268, 17 N. Y. S. (2d) 30 (1940); see 30 MICH. L. REV. 622.

<sup>22</sup> 85 Ohio St. 317, 97 N. E. 976 (1912).

<sup>23</sup> 97 N. E. 976, 977. Apparently the court was of the opinion that to allow actions between spouses as well as to allow their prosecution under the stated circumstances would be equally destructive of the family. The writer has not encountered any evidence which would tend to show that the family is less stable in New York than in other states where actions between spouses are not permitted for both tort and contract.

<sup>24</sup> *State v. Arnold*, 182 Minn. 313, 235 N. W. 373 (1931); see (1932) 30 MICH. L. REV. 30; (1931) 15 MINN. L. REV. 589.

<sup>25</sup> 235 N. E. 373, 376 ("To create crimes was not the purpose of these acts. Their purpose was to protect and extend the rights of married women, not to subject them to penalties not theretofore existing. Crimes were farthest from the thoughts of the advocates of these acts, as well as from those of the legislators who enacted them. Their advocates were doubtless ardent feminists who sought equality of property rights before the law, and an accusation that they were trying to break up the marital unity in any other respect and make it a mere legalized cohabitation would have been resented by them, as well as by the Legislatures which yielded to their persuasion. Marriage was looked upon,

from the *Phillips* and *Snyder* cases and in expressing a like view as to the nature of the marriage unity said:

The common-law rule that a wife could not commit larceny of her husband's property rested, not alone upon the doctrine that her property and possessions were his, but upon the unity of husband and wife which marriage created; the community of interest in the social institution of marriage. The technical ownership of his wife's personal property by the husband might have been sufficient to protect him if he were accused of its theft, but certainly his ownership and control of her personal property was not alone sufficient to justify the doctrine as to her immunity. Something more was needed to protect her, and that was the unity of the social relationship of marriage, giving the word social its broadest meaning.<sup>26</sup>

The court also said that criminal remedies are not to be used as private remedies, and seems to have embraced the opinion that the spouses' rights were to be limited to civil actions for property torts. This, of course, is a point which comes very close to the heart of the problem. The enabling acts purport to give rights to the wife, and consequently to impose corresponding obligations upon her. They do not purport to give new rights to the state. Loosely, one may say that a spouse seeks to prosecute the other for larceny. It is obvious, as an elementary proposition, that this is not correct. The state prosecutes an offender for criminal acts, although often the person from whom the goods were stolen is the "star" witness, or is the instigator of the proceedings. A crime is an injury to the state, not, in a legal sense, to the person or persons who are directly affected by it. It is an act "against the peace and dignity of the state". The three cases discussed above have not emphasized this point, but all have made it unmistakably clear that it would have been an easy matter for the legislatures involved to render spouses liable in the premises by the simple expedient of passing a law which would leave no room for doubt.

#### (b) The Minority Rule

The cases most frequently cited which have taken the view that the married women's acts make a conviction possible are *Beasley v. State*,<sup>27</sup> *Hunt v. State*<sup>28</sup> and *State v. Koontz*.<sup>29</sup> In the *Beasley* case, under circumstances involving extreme moral turpitude, the defendant took from his wife money and a watch. He thereupon abandoned her, and after she began proceedings against him, wrote her letters which the court found "too vulgar and indecent" to be copied

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at the time these acts were passed, as a sacred social institution, and the family as the fundamental basis of civilization.").

<sup>26</sup> 182 Minn. 313, 235 N. W. 373, 374 (1931).

<sup>27</sup> 138 Ind. 552, 38 N. E. 35 (1894).

<sup>28</sup> 72 Ark. 241, 79 S. W. 769 (1904).

<sup>29</sup> 124 Kan. 216, 257 Pac. 944 (1927).

in the opinion. Here was a case in which the defendant richly merited punishment, and perhaps this fact had some influence upon the court. In affirming the judgment of the trial court the Supreme Court of Indiana held that the statute endowing the wife with property rights so completely destroyed the husband's interest that he stood as a third person with respect to his wife's property.<sup>30</sup> The court treated the marriage unity as consisting only of property rights and gave no consideration to the fact that the immunity of the spouses may have rested more on sound public policy than on mere rights of property. In *Hunt v. State*<sup>31</sup> the Supreme Court of Arkansas remarked that the circumstances under which the husband obtained his wife's money "were of the most aggravating character". The defendant learned that Miss Nevills had saved \$600 out of her earnings as a saleswoman in a Little Rock, Ark., dry goods store, paid court to her, and almost immediately after marriage set out to get the money. Defendant induced his wife to withdraw the money from the bank and to give it to him to invest in certain business property. On the same day, in company with another woman, he left the city and was later apprehended in California. There was some evidence that defendant had planned the marriage as part of a scheme to obtain the money. The trial judge charged in substance that if the property was secured from the wife by fraudulent artifices the defendant should be convicted for "a husband in this state, may steal the property of his wife."<sup>32</sup> In affirming the conviction the Supreme Court said:

The conclusion of the whole matter is that while modern civilization has greatly, if not entirely, relieved the personal unity of the husband and wife, and the superior control of the husband, of the disgraceful cruelty practiced in the early stages of the common law, yet the very letter of the law in that respect has not undergone very marked changes, but as to property rights that unity has been destroyed, so far as affects the question at issue, by positive enactments in this state \* \* \*<sup>33</sup>

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<sup>30</sup> 138 Ind. 552, 553, 38 N. E. 35, 36 (1894) ("Under the enabling statutes of Indiana the husband's interest in the wife's goods and chattels is abolished, and with its destruction the right also to fraudulently misappropriate them. In *Garrett v. State*, 109 Ind. 527, 10 N. E. 570 (1887), the defendant was indicted for burning the property of "another person", to wit, the property of Hannah Garrett. The evidence showed that he and his wife, Hannah, the owner of the dwelling house so destroyed, occupied, used and dwelt therein as their habitation, and yet this court said: 'If a man unlawfully, feloniously, willfully, and maliciously sets fire to and burns the dwelling house of his wife, wherein she permits him to live with her as her husband, he is guilty of the crime of arson, as such crime is defined in our Statute.' Arson, as defined in our statute, is an offense against the property, as well as the possession. Larceny is also an offense against the right of private property, and, if the husband can commit the crime of arson against her private property, it would seem to follow as a legal conclusion that he can also perpetrate the crime of larceny of his wife's goods.").

<sup>31</sup> 72 Ark. 241, 79 S. W. 769 (1904).

<sup>32</sup> 72 Ark. 241, 79 S. W. 769, 770 (1904).

<sup>33</sup> *Ibid.*; 1 BL. COMM.\* 445 ("\* \* \* even the disabilities, which the wife lies under, are for the most part intended for her protection and benefit. So



The same view is expressed by the Supreme Court of Kansas in *State v. Koontz*.<sup>34</sup> In this case the defendant administered sleeping powders to her husband and when he was fast asleep departed with his property. She was convicted of petty larceny and the decision was affirmed upon the theory that the common law rule was not in force for two reasons:

First, we have no common-law crimes in this state \* \* \* ; all crimes are statutory. Second, by our constitution \* \* \* and statutes \* \* \* the common-law rule of the unity of property rights of husband and wife has been abrogated.<sup>35</sup>

In the *Beasley* and *Hunt* cases it was the husband who was convicted upon the theory that the wife had been given complete protection of her property by the enabling acts, but in the *Koontz* case the same type of provision was held to have imposed criminal liability upon a woman with respect to her husband's property. It is easy to see that the rights and duties of marriage ought to be correlative, but it is difficult to see how a law guaranteeing property rights to a woman could be construed as creating a new and separate liability in her. Surely it would be a surprise to the average layman to know that a law which purports to give one property rights is in reality a criminal statute in disguise. Perhaps this thought was what prompted Parliament to legislate specifically on the point.

### (c) The English Rule

In England, by the common law rule a wife could not be guilty of larceny of her husband's goods even though she were an adulteress.<sup>36</sup> Her adultery was a significant factor in determining the culpability of a person who assisted the wife in taking her husband's goods. If such person had not committed adultery with the wife there was no larceny, but if he had he could be convicted.<sup>37</sup> Much of the language in the earlier English decisions is confusing, particularly a *dictum* of Lord Campbell in *Regina v. Featherstone*,<sup>38</sup> to the

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great a favorite is the female sex of the laws of England." Prof. Dicey says that "this splendid optimism of 1765 is too much for even the complacent Toryism of 1809, and at that date, Christian, an editor of Blackstone's Commentaries, feels bound to deny that the law of England has shown any special partiality to women." He poignantly illustrates how a husband could despoil his wife's estate and hold her in a state of virtual servitude. See DICEY, *LAW AND OPINION IN ENGLAND* (2d ed. 1914) 371 ff.

<sup>34</sup> *State v. Koontz*, 124 Kan. 216, 257 Pac. 944 (1927).

<sup>35</sup> *Ibid.*

<sup>36</sup> *Reg. v. Kenny*, 2 Q. B. D. 307, 3 Am. Cr. Rep. 448 (1877); *Reg. v. Featherstone*, 6 Cox C. C. 376, 1 Dears. 369 (1854).

<sup>37</sup> *Reg. v. Featherstone*, *supra* note 36. But *cf.* *Reg. v. Kenny*, *supra* note 36; *State v. Banks*, 48 Ind. 197 (1874); see 15 *ENG. AND EMP. DIG.* § 9893.

<sup>38</sup> *Reg. v. Featherstone*, *supra* note 36 (Campbell, C. J. "The general rule of law is, that a wife cannot be found guilty of larceny for stealing the goods of her husband, and that is upon the principle that the husband and wife are, in the eye of the law, one person; but this rule is properly and reasonably qualified

effect that when a wife commits adultery her position is altered. The paramour and not the wife was on trial, and subsequent cases make it clear that although the wife was an adulteress she could not be convicted. This *dictum* has no doubt provoked some confusion in this country, as some American courts have indicated that an adulteress might be convicted of larceny.<sup>39</sup> Whatever the English law may have been prior to 1882, a statute enacted in that year<sup>40</sup> dispels any doubts. Under this enactment the stealing by the wife of the goods of her husband, when about to leave or desert him, has been made a crime.<sup>41</sup> The husband's liability is the same as that of the wife under this statute.<sup>42</sup>

#### (d) New York Cases

The courts of New York have as yet done little towards clarifying the position of the spouse who steals the other spouse's property with respect to responsibility to the state. Apparently the first reported case in New York which has dealt with the question is *People*

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when she becomes an adulteress. She thereby determines her quality of wife and her property in her husband's goods ceases.").

<sup>39</sup> *State v. Banks*, *supra* note 37; see 2 ВИСНОР, CRIM. LAW § 1803 *et seq.*; *cf.* Note (1932) 12 B. U. L. REV. 283, which takes Lord Campbell's *dictum* at face value and apparently reaches the conclusion that an adulterous wife may be convicted of larceny of her husband's goods. The significance of Lord Campbell's *dictum* becomes clear when the opinion of Alderson, B., in the same case is considered, "The wife could not be convicted, so as to make the two accomplices in the commission of the offense; but the adulterer cannot set up as a defense the delivery by her when he takes the goods with a knowledge of the circumstances." Lord Campbell had no intention to alter the common law rule, and the decision was not considered to do so by either Cox or Dearsly, the reporters.

<sup>40</sup> Sections 12 and 16 of the Married Women's Enabling Act are reproduced in Section 36 of the Larceny Act, 1916, *vis.*:

Larceny Act, 1916 (6 & 7 GEO. V, c. 50) § 36: "A wife shall have the same remedies and redress under this Act for the protection and security of her own separate property as if such property belonged to her as a *feme sole*: Provided that no proceedings under this Act shall be taken by any wife against her husband while they are living together as to or concerning any property claimed by her, nor while they are living apart as to or concerning any act done by the husband while they were living together concerning property claimed by the wife, unless such property has been wrongfully taken by the husband when leaving or deserting or about to leave or desert his wife. 2. A wife doing an act with respect to any property of her husband, which if done by the husband in respect to property of the wife, would make the husband liable to criminal proceedings by the wife under this Act, shall be in like manner liable to criminal proceedings by her husband."

<sup>41</sup> *Rex v. Creamer*, 1 K. B. 564 (1919) (*H.* and *W.* are not living apart within the meaning of the Larceny Act when *H.* is temporarily abroad on military duty. Hence if *W.* steals *H.*'s property during such an absence, and thereafter commits adultery and abandons him she is not guilty of the crime, and her paramour who received the property also is not guilty. Here the taking of the property preceded the adultery).

<sup>42</sup> *Lemon v. Simmons*, 57 L. J. Q. B. (N.S.) 260 (1888).

*ex rel. Troare v. McClelland*,<sup>43</sup> a *habeas corpus* proceeding before the Supreme Court of Albany County. The relator, Dorothy Troare, was charged with grand larceny, first degree, in violation of Section 1294, subdivision 2, of the Penal Law,<sup>44</sup> for allegedly taking and carrying away from her husband eighty dollars. The sole question raised by the application for a writ of *habeas corpus* was whether or not a wife may be guilty of larceny of her husband's property. The court stated the common law rule and held that unless abrogated by statute it remains in force. Finding no derogatory statute, the court said:

The penal statutes of this state must be strictly construed and if the Legislature intended that one spouse could charge the other with such crime, it should have used such language as to have left no room for doubt. The Legislature had power to enact a statute that would cover a situation of the character here presented. It evidently did not see fit so to do.<sup>45</sup>

The court found no New York case to be "precisely in point", and quoted freely from *State v. Arnold, supra*, *Snyder v. People, supra*, and *State v. Phillips, supra*. The court did not cite any cases in sister states which have taken the other view.

The question arose next before Chief Magistrate Bromberger, in the City Magistrate's Court of New York, Borough of Manhattan, Seventh District, in *People v. Rossiter*.<sup>46</sup> The defendant, husband of the complainant, was charged with violation of Section 1290 of the Penal Law,<sup>47</sup> for alleged embezzlement of the proceeds of a check

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<sup>43</sup> 146 Misc. 545, 263 N. Y. Supp. 403 (1933).

<sup>44</sup> N. Y. PENAL LAW § 1294 ("A person is guilty of grand larceny in the first degree who steals, or unlawfully obtains or appropriates, in any manner specified in this article: \* \* \* 2. Property of the value of more than twenty-five dollars, by taking the same in the night time from any dwelling-house, vessel or railway car, \* \* \*").

<sup>45</sup> 146 Misc. 545, 546, 263 N. Y. Supp. 403, 405 (1933).

<sup>46</sup> 173 Misc. 268, 17 N. Y. S. (2d) 30 (1940).

<sup>47</sup> N. Y. PENAL LAW § 1290, Larceny defined:

"A person who, with the intent to deprive or defraud the true owner of his property, or of the use and benefit thereof, or to appropriate the same to the use of the taker, or of any other person: 1. Takes from the possession of the true owner, or of any other person; or obtains from such possession by color or aid of fraudulent or false representation or pretense, or of any false token or writing, or secretes, withholds, or appropriates to his own use, or that of any person other than the true owner, any money, personal property, thing in action, evidence of debt or contract, or article of value of any kind: or, 2. Having in his possession, custody, or control, as a bailee, servant, attorney, agent, clerk, trustee, or officer of any person, association, or corporation, or as a public officer, or as a person authorized by agreement, or by competent authority, to hold or take such possession, custody, or control, any money, property, evidence of debt or contract, article of value of any nature, or thing in action or possession, appropriates the same to his own use, or that of any other person other than the true owner or person entitled to the benefit thereof, "Steals such property, and is guilty of larceny. Hereafter it shall not be a defense to a prosecution for larceny, or for an attempt or for conspiracy to commit the same, or for being accessory, thereto, that the purpose for which the owner was induced by color or aid of fraudulent or false representation or

given to defendant to be deposited in the bank account of defendant's corporation for collection. At the close of complainant's direct testimony defendant moved to dismiss the charges on the ground that as a matter of law he could not be guilty of the crime of larceny or embezzlement of his wife's funds. This motion was denied. The Chief Magistrate's opinion is far more analytical and scholarly than any other opinion on this subject which the writer has encountered. He takes into account all of the American authority on the point and points out that "The decisions which refuse to find the common-law rule as to larceny by a spouse abrogated by the Married Women's Acts, consider that this unity of social relationship still exists, though the relationship as to property status has been altered. \* \* \* Indeed, this is made the specific test for the decision in *People ex rel. Troare v. McClelland*."<sup>48</sup> Discussing the other view which represents the minority rule, he says:

The authorities which favor renunciation of the common-law rule concede that the cases thus holding ignore the fact that the common-law unity must have consisted of more than the ownership of the wife's property by her husband, but find justification for this lack of technical or logical unity in the fact that "the result is more consistent with the modern view of the family, which may well ignore a common-law principle, any possible reason for the existence of which has long since disappeared".<sup>49</sup>

In reaching the conclusion that the common law rule has been abrogated, the Chief Magistrate states that "the Legislature patently intended a complete emancipation of married women in their property rights", and adds:

To deny a spouse the right to prosecute the other for a crime against the property rights thus assured, would be tantamount to imposing and judicially enacting a limitation never intended by the legislative body. Had such restrictive result been contemplated as against any person, it is fair to assume the Legislature would have expressly so provided in the various so-called emancipatory acts.<sup>50</sup>

In short, the view is taken that the courts should supplant "fictional refinements" with "realism",<sup>51</sup> and that the "implication" of

pretense, or of any false token or writing, to part with his property or the possession thereof was illegal, immoral or unworthy."

<sup>48</sup> 173 Misc. 268, 270, 17 N. Y. S. (2d) 30, 32 (1940).

<sup>49</sup> *Ibid.*

<sup>50</sup> 173 Misc. 268, 271, 17 N. Y. S. (2d) 30, 33 (1940).

<sup>51</sup> *People v. Rossiter*, 173 Misc. 268, 272, 17 N. Y. S. (2d) 30, 34 (1940) "A conception of law must here be established 'which realism can accept as true'. Under the common-law doctrine there were no illusions or fictions attaching to the unity of the being by merger of marriage. That status was there firmly established as an actuality in every phase of legal recognition. This conception, in present reality, has been so materially altered in such various, and fundamental characteristics through legislative modifications and social revisions that it has become almost illusory. Such being the modern concept and realism, there is no sound basis for reverting to the fictional

the husband's answerability for larceny from his wife, indicated in *People v. Decker*,<sup>52</sup> should be adopted rather than adhering to the rule expressed in *Troare v. McClelland*. It is difficult, however, to determine whether or not an implication may fairly be drawn from the *Decker* case. This case has not been recognized as a leading case. It was decided in 1911 and was never even cited in an opinion by a New York court until that in the *Rossiter* case. *Decker* was convicted of grand larceny in the second degree in the County Court of Kings County. The indictment laid the property in his wife, but no point was made of this on appeal. The conviction was reversed on other grounds and no mention was made of the relationship of the defendant to the complaining witness. The fact that a new trial was ordered could indicate that the Appellate Division believed that a husband could commit larceny of his wife's goods, but it also could indicate that the court did not think of the point or assumed the defense could be and in fact had been waived. In any event, the case is of very doubtful authority. The only other New York case in which the point has arisen is *People ex rel. Carr v. Martin*,<sup>53</sup> in which defendant was convicted of grand larceny for having stolen two rings from his wife. Defendant, after sentence and while in prison, applied for a writ of *habeas corpus*. He appealed to the Appellate Division, from an order denying his application, and the court unanimously reversed, sustained the writ, discharged the prisoner with \$50 costs and disbursements, and said: "A husband may not be convicted for larceny from his wife." In support of this conclusion the court did not cite any cases in point but relied on *Caplan v. Caplan*,<sup>54</sup> *Allen v. Allen*<sup>55</sup> and *Schultz v. Schultz*.<sup>56</sup> The *Caplan* case held that the wife could not sue a partnership in which her husband was a member for personal injuries. In the *Allen* case a wife was held unable to sue her husband for malicious prosecution, and the *Schultz* case held that a wife had no cause of action against her husband for damages for assault and battery. The authority of this decision is rendered even more doubtful by the fact that the doctrine of the cases relied upon was abrogated by the 1937 amendment of Section 57 of the Domestic Relations Law.<sup>57</sup> Thus at the time of the decision of the *Martin* case, these cases were no longer law.

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refinements to re-establish an unreality and thereby to limit the reciprocal property rights of married persons and the natural consequences flowing from them contrary to what I deem to have been the legislative intent."

<sup>52</sup> 143 App. Div. 590, 127 N. Y. Supp. 1059 (2d Dep't 1911).

<sup>53</sup> 261 App. Div. 865, 24 N. Y. S. (2d) 729 (3d Dep't 1941).

<sup>54</sup> 268 N. Y. 445, 198 N. E. 23 (1927).

<sup>55</sup> 246 N. Y. 571, 159 N. E. 656 (1927).

<sup>56</sup> 89 N. Y. 644 (1882).

<sup>57</sup> See note 11, *supra*.

*Conclusion*

The position which the New York Court of Appeals will take if this question comes before it is highly speculative. True, the Appellate Division of the Third Department held in the *Martin* case that there could be no conviction, but the court did not write an opinion and rested its decision on three cases which do not even contain *dicta* on the point. The writer feels, however, that if the question does reach the Court of Appeals, that court should hold in favor of the spouse's immunity. This conclusion is not the result of a belief that such a holding would greatly aid in preserving the unity of the family, but is predicated upon the firm conviction that penal laws should be written so that the layman can fully understand them. They should be expressed in clear, unmistakable terms, and should not be implied from words of doubtful meaning. Personal liberty is too precious to be destroyed by subtleties of legal reasoning. Where the law has become obscure because of conflicting decisions it is the duty of the legislature to take the initiative and restate or clarify it.

ANDREW J. GRAHAM.

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THE APPLICATION OF SECTION 295(L) OF THE CODE OF CRIMINAL  
PROCEDURE TO THE DEFENDANT'S TESTIMONY

The defense of alibi is the defense<sup>1</sup> that at the time the crime charged was committed the accused was at another place.<sup>2</sup> The literal meaning of the term alibi being "elsewhere",<sup>3</sup> the potency of alibi as a defense is derived from the impossibility of the guilt of the accused, because of physical circumstances.<sup>4</sup> Impossibility of the defendant's presence in the place and at the time involved is the essential feature of this defense<sup>5</sup> and any proof whose tendency it is to show that it was reasonably impossible for the accused to have been present at the time and place of the commission of the offense charged, is sufficient

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<sup>1</sup> 1 WHARTON, CRIMINAL LAW (12th ed. 1932) 505 ("The defense of alibi is not, properly speaking, a defense within any accurate meaning of the word defense, but is a mere fact shown in rebuttal of the evidence introduced by the State. The *corpus delicti* is not denied by the claim of alibi, its only design is to prove that the defendant, being in another place at the time, could not have committed the offense charged").

<sup>2</sup> *Dees v. State*, 99 Fla. 1144, 128 So. 485 (1930); *Huckett v. State*, 121 Neb. 36, 237 N. W. 159 (1931).

<sup>3</sup> *Azbill v. State*, 19 Ariz. 499, 172 Pac. 658 (1918).

<sup>4</sup> *Singh v. State*, 35 Ariz. 432, 280 Pac. 672, 67 A. L. R. 129 (1929); *Harris v. State*, 120 Ga. 167, 47 S. E. 520 (1923).

<sup>5</sup> *Williams v. State*, 123 Ga. 138, 51 S. E. 322 (1905).