us from the general restraint on alienation or anticipation to infer a trust for the separate use of the wife. Consequently, the defendant had no property for her separate use at the time when she executed the two charges in favour of the plaintiff; and, therefore, on the authority of *Palliser* v. *Gurney* (1), the plaintiff's case fails, and we must give judgment for the defendant, with the costs of the action.

Appeal allowed.

Solicitors: *Agate & Garnett; J. C. Stogdon.*

W. L. C.

[IN THE COURT OF APPEAL.]

March 19.

THE QUEEN *v.* JACKSON.

Husband and Wife—Authority of Husband—Refusal of Wife to live with Husband—Restitution of Conjugal Rights—Absence of Power to deprive Wife of Liberty.

Where a wife refuses to live with her husband, he is not entitled to keep her in confinement in order to enforce restitution of conjugal rights.

ARGUMENT on the return to a writ of habeas corpus, commanding Edmund Haughton Jackson to bring up the body of Emily Emma Maude Jackson, his wife, taken and detained in his custody. (2)

(1) 19 Q. B. D. 519.

(2) Application for a writ of habeas corpus had in the first instance been made to and refused by the Queen's Bench Division (Cave and Jeune, JJ.). An application was then made to the Court of Appeal, alternatively, by way of original motion for the writ, and also by way of appeal against the refusal of it by the Queen's Bench Division. A discussion arose on such application as to whether the Court of Appeal had jurisdiction to entertain it, either original or by way of appeal. It was pointed out during the discussion that the Lord Chancellor, then sitting in the Court of Appeal, had jurisdiction as Chancellor to issue the writ. Ultimately, the writ was ordered by the Court of Appeal to issue, subject to the question as to their jurisdiction. Upon the return, the counsel for the husband declined to argue the question of jurisdiction, on the ground that it was not open to them in the Court of Appeal, having regard to the observations in the judgment in that Court in the case of *Ex parte Bell Cox* (20 Q. B. D. 1), on the question whether there is an appeal when the habeas corpus is refused, which was left open by the House of Lords in *Cox* v. *Hakes* (15 App. Cas. 506). There was, therefore, no argument on the subject of the Court's jurisdiction.

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The return made to the writ by the said E. H. Jackson was as follows. He stated that the said Emily Emma Maude Jackson was his wife; that, during his absence in New Zealand in the year 1888, she went to reside with her sisters and brother-in-law; that it was arranged that she should shortly join him in New Zealand; but she wrote pressing him to return to England, and he did so, but she then refused to live with him, and he was denied access to her; that he commenced proceedings in the Probate, Divorce, and Admiralty Division of the High Court of Justice against her for restitution of conjugal rights, and a decree was made for such restitution; that, since the making of such decree, he had endeavoured to persuade his wife by letters (personal access being still denied him) to come and live with him; but, acting under the advice and counsel of her sisters and brother-in-law, she had in no way responded to his overtures; that he, therefore, took his said wife, and had since detained her in his house, using no more force or constraint than was necessary to take her or to prevent her returning to her said relations; that she had had perfect liberty in and the full run of the house, short of leaving it; and he submitted that he could lawfully use such restraint in order to have an opportunity of regaining the affection of his wife, which had become alienated from him, and which it was impossible he could do when she was under the influence of her said relations.

Affidavits were filed on both sides, the substance of which, so far as material to this report, was as follows. It appeared from the husband's affidavit that the marriage took place on November 5, 1887; that he executed a settlement of his wife's property on November 9; that on the next day he started for New Zealand, it being arranged between him and his wife that she should join him there in about six months, as soon as he got settled; that, after his arrival there, he received letters from her urging him to return, and that he accordingly did so; but she refused then to live with him; whereupon he sued for and obtained a decree for restitution of conjugal rights. (1) His wife refusing to obey such decree, on Sunday,

(1) It should be observed that it appeared, as pointed out by the Lord Chancellor, that the wife had had no opportunity of making any affidavit.

March 8, 1891, the husband, assisted by two young men, one of whom it appeared was a solicitor's articled clerk, seized her, just as she was leaving a church in Clitheroe in company with her sister, and forced her into a carriage, which was in readiness. The affidavits of the husband, and those who assisted him, stated that, in obtaining possession of his wife, no violence was used, and no more force than was absolutely necessary to separate her from her sister, to whom she was clinging, and get her into the carriage. In the affidavit of the wife's sister, it was stated that the wife was seized in full view of the congregation coming out of church, and that she resisted seizure, and was dragged backwards into the carriage, her feet remaining outside until they were lifted into the carriage by the solicitor's clerk. Her arm was bruised in the struggle. The carriage was then driven off, the solicitor's clerk, with whom the wife was stated to have been previously acquainted, accompanying the husband and wife in it. The carriage proceeded to the husband's house in Blackburn, which the party entered, and in which the wife had been detained until she was brought up in obedience to the writ of habeas corpus. The husband placed his wife in charge of his sister, with instructions to give her every attention, and he also engaged a nurse to attend on her in the house. During her detention he caused her to be visited by a doctor. After the seizure of the wife, certain of her relations followed to Blackburn and appeared before the house. It was stated in the husband's affidavit, that under those circumstances his coadjutors in seizing the wife remained with him in the house to assist in preventing any attempt at a forcible rescue. In consequence of warrants being taken out for their arrest on a charge of assault on the wife's sister, and the arrival of the police to execute the same, the house was kept shut up, and no one was admitted for some days; but afterwards, an undertaking to appear before the magistrates having been given by their solicitors, the police were withdrawn, and, all fear of an arrest being at an end, the house was accessible to any one whom the husband cared to admit. It was stated by the affidavit of the husband, and those made on his behalf by the persons in the house during the wife's detention, that every kindness and consideration had been shewn by the husband to

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his wife; that she had had the free run of the house, doing just as she pleased, save leaving the house; and that he had offered several times to take her for a drive, but she had declined to go. It was admitted by the husband that on one occasion the blinds of a room in which she was were pulled down, to prevent her exchanging signals with her relations outside; but they were drawn up a few moments afterwards, and no restraint was subsequently placed upon her so seeing or communicating with her relations. It appeared from an affidavit made on the husband's behalf by the doctor, who attended the wife in the house, that the only complaint whatever made by the wife to him as to the treatment she received was that her husband had, when they entered the house, taken her bonnet off and thrown it in the fire, and that her arm had been hurt. (1)

Henn Collins, Q.C., and *Malcolm P. Douglas*, for the husband. It is contended that, if a wife refuses to live with her husband, he has a right by law to take possession of her person by force, and keep her, not imprisoned, but confined, till she consents to do so, in order to prevent her from permanently withdrawing her society from him. *In re Cochrane* (2) is an authority for that proposition. In that case the release of the wife was refused in a case similar to the present. Coleridge, J., in giving judgment in that case, said: "There can be no doubt of the general dominion which the law of England attributes to the husband over the wife; in Bac. Abr. tit. Baron and Feme, B., it is stated thus: 'The husband hath by law power and dominion over his wife and may keep her by force within the bounds of duty, and may beat her, but not in a violent or cruel manner.' And although by our ancient law she was entitled, in case of threats of violence, or violence offered, to sue out her writ of supplicavit, yet that writ, in such case, had a special saving of the husband's lawful power; he was to be bound 'Quod ipse

(1) Various statements were contained in the affidavit of the husband seeking to shew that his wife's refusal to live with him was due to the influence of her relations; but inasmuch as the Court, on seeing Mrs. Jackson, came to the conclusion that she was not acting otherwise than as a free agent, it is not thought necessary to set them out for the purposes of this report.

(2) 8 Dowl. 630.

præfatam A' (the wife) 'bene et honeste tractabit et gubernabit, ac damnum aut malum aliquod eidem de corpore suo, aliter quam ad virum suum, ex causâ regiminis, et castigationis uxoris suæ licite et rationabiliter pertinet, non faciet, nec fieri procurabit.' Fitz. Nat. Brev. 80." See also *Seymour's Case.* (1) It is not contended that the law entitles a husband to beat his wife, as stated in Bacon's Abridgment and some of the earlier authorities; but the authorities generally shew that he is entitled to the custody and control of his wife, and to detain her by force if she refuses to live with him: see *Atwood* v. *Atwood.* (2)

[LORD HALSBURY, L.C.: Where ancient dicta, which state that a husband is entitled to imprison his wife, also state that he has a right to beat her, can they be rejected as authorities for the latter proposition without being affected as authorities for the former?]

Hale, C.J., says, in *Lord Leigh's Case* (3), that the "salvâ moderatâ castigatione" of the Register was meant not of beating, but of admonition and confinement to the house in case of the wife's extravagance. In *Manby* v. *Scott* (4) it is stated that the law makes the wife subject to her husband, although the husband may not put her to death, for that would be murder; neither can he beat her. A husband cannot be guilty of a rape upon his wife. (1 Hale, P. C. 629) In Bacon's Abridgment, 7th ed. vol. i. p. 693, tit. Baron and Feme, B., a distinction is drawn between confinement and imprisonment, and it is said that the husband hath by law a right to the custody of the wife, and may, if he think fit, confine, but may not imprison her. It would appear from the context that the word "imprisonment," as there used, means imprisonment by way of punishment, involving circumstances amounting to "sævitia." In this case the wife was not imprisoned in that sense; she was not shut up in a single room, which might be imprisonment, but had the free run of the house, and might have gone out, if she had wished, in charge of the husband. In *Rex* v. *Lister* (5), it was no doubt said that, where

(1) Godbolt, 215.

(2) Finch's Chancery Precedents, 492.

(3) 3 Keb. 433.

(4) 1 Sid. 109; 1 Lev. 4; 2 Sm. L. C. 466, 479.

(5) 1 Str. 478.

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the wife will make an undue use of her liberty, either by squandering away the husband's estate or going into lewd company, it is lawful for the husband, in order to preserve his honour and estate, to lay such a wife under a restraint, but, where nothing of that appears, he cannot justify depriving her of her liberty; but, with regard to the latter part of this statement, it is to be observed that, in that case, there had been a separation by consent, and consequently a renunciation of the marital right, and the Court expressly rely on that ground.

[LORD HALSBURY, L.C. The judgment does not seem to me to be based on that ground, but on the idea that the only right to restrain the wife was when she was squandering the husband's estate or frequenting lewd company.]

In that case the facts shewed that the husband was abusing his power in order to make his wife part with some of her separate maintenance, and it has been held that the Court will not force a wife to live with the husband where he has been guilty of violence or ill-usage. In *Rex* v. *Mead* (1), the Court based their refusal to deliver the wife into the custody of the husband on the fact that there had been articles of separation, and therefore the husband had renounced his marital right.

[LORD HALSBURY, L.C. The proposition, apparently, must go the length of saying that any amount of force which may be necessary in order to take possession of the wife's person may be employed.

LORD ESHER, M.R. And also that, if the wife continues to refuse to live with the husband, the confinement may be perpetual.]

Reg. v. *Leggatt* (2) does not overrule *In re Cochrane.* (3) All that was really there decided was that a habeas corpus could not be granted at the suit of the husband where the wife was under no restraint, and living apart from the husband by her own desire. The Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68), does not affect the question. It took away the power of enforcing a decree for restitution of conjugal rights by attachment; but that cannot affect the common law right of the husband to the custody of his wife. The attachment in such case was punitive

(1) 1 Burr. 542. (2) 18 Q. B. 781. (3) 8 Dowl. 630.

in respect of a contempt committed by disobedience of the decree of the Court. All the Act does is to abolish that punitive process.

Finlay, Q.C., and *Forbes Lankester*, for the wife. The wife is entitled to be set at liberty. A husband has no power by the law of England to imprison his wife if she refuses to live with him. Every confinement is an imprisonment by law, whether it be to one room or to one house. The contention for the husband would result in the reintroduction into society of private war; for the male relations of a wife would naturally, if at hand, be likely to resist her capture by the husband. The contention for the husband involves wholly untenable propositions. First, it involves that the husband may take possession of the wife's person by force, though no process of law could give him such possession of her. There never was any process of law for seizing and handing over the wife to the husband; the Ecclesiastical Courts only imprisoned by way of punishment for contempt in disobeying the decree for restitution of conjugal rights. If the law was as contended for, what need would there ever have been for the husband to apply to the Ecclesiastical Court for restitution of conjugal rights? Again, there are numerous authorities to shew that, if a woman were living separate from her husband, and she apprehended that he would seize her person by violence, she could swear the peace against him. But the contention is that, if he has already seized her, he may detain her by force. If he may use any violence necessary to control and keep possession of her, it follows that he may beat her for that purpose if necessary. The two things necessarily go together, and are constantly associated in the ancient dicta that have been cited. In dealing with such authorities, it is impossible to throw overboard the right to beat and retain the rest of the proposition with regard to the right to imprison. The result of the contention is, that the husband must have a right to imprison the wife until she consents to restore him conjugal rights, and even to imprison her perpetually if she persists in refusing to do so. Such a result is monstrous, and shews that the contention cannot be correct in law. *In re Cochrane* (1) is really overruled by *Reg.* v.

(1) 8 Dowl. 630.

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Leggatt. (1) Lord Campbell, in giving judgment in that case, said: "If a writ of habeas corpus were to issue, and the wife were to be brought before us, we could not compel her to return to her husband; she would be at liberty to go where she chose. If she has no good cause for remaining away from her husband, he may obtain a decree of the Ecclesiastical Court ordering her to return to him. This case is quite different from that of an infant. There the parent has a right to the custody of the child; and, if it be of tender years, the Court will make an order for its restoration to him. But a husband has no such right at common law to the custody of his wife." It is inconceivable that the husband should be entitled to do by force for himself that which the law cannot enforce in his favour. *Rex* v. *Middleton* (2) and *Rex* v. *Lister* (3) are authorities against such a proposition. In the latter case, the right of the husband to restrain the wife is clearly limited to cases where she is guilty, or about to be guilty, of misconduct touching the husband's estate or honour. It would be a monstrous result that, although the legislature has taken away the power of attachment for disobeying a decree for restitution of conjugal rights, a husband should have the power of seizing and imprisoning a wife who refuses to live with him for himself, without the intervention of any Court.

[They also cited *Lord Vane's Case.* (4)]

LORD HALSBURY, L.C. The Court has satisfied itself that, in refusing to go to and continue in her husband's house, Mrs. Jackson was acting of her own free will, and that she is not compelled or indeed, so far as present circumstances are concerned, induced by any one to refuse to continue in his house, and was not compelled to remain where she was before he removed her. I confess that some of the propositions which have been referred to during the argument are such as I should be reluctant to suppose ever to have been the law of England. More than a century ago it was boldly contended that slavery

(1) 18 Q. B. 781.
(2) 1 Chit. 654.
(3) 1 Str. 478.
(4) 13 East, 171, n. At the close of the arguments the Court saw Mrs. Jackson in camerâ in order to ascertain whether, in refusing to live with her husband, she was acting as a free agent, and had not been compelled or induced by any external influences.

existed in England; but, if any one were to set up such a contention now, it would be regarded as ridiculous. In the same way, such quaint and absurd dicta as are to be found in the books as to the right of a husband over his wife in respect of personal chastisement are not, I think, now capable of being cited as authorities in a court of justice in this or any civilized country. It is important to bear this in mind, for many of the statements, which have been relied upon, of a more moderate character and less outrageous to common feelings of humanity, are bound up with these ancient dicta to which I refer. The only justification, as it appears to me, for such expressions as are found in some of the old books is that afforded by the free translation given to them by Hale, C.J., who suggests that "castigatio" may be taken to mean admonition merely. Whether the word will bear that translation in these passages I cannot say; but I am glad that some one even at that early period thought it inconsistent with the rights of free human creatures that such a power of personal chastisement of the wife should exist. I only mention the subject, because it appears to me that the authorities cited for the husband were all tainted with this sort of notion of the absolute dominion of the husband over the wife. The only case referred to in which it was decided, as a question of law in an abstract form, unaccompanied by circumstances which might import a qualification, that a husband had a right to the custody of his wife, was *Cochrane's Case.* (1) With regard to the proposition that the mere relation of husband and wife gives the husband complete dominion over the wife's person, apart from any circumstances of misconduct or any acts amounting to a proximate approach to misconduct on her part, which would give the husband a right to restrain her, none of the authorities cited appear to me to establish that proposition. I do not mean to lay it down as the law that there may not be some acts, acts of proximate approach to some misconduct, which might give the husband some right of physical interference with the wife's freedom—for instance, if the wife were on the staircase about to join some person with whom she intended to elope, I could understand that there might be to some extent a right to

(1) 8 Dowl. 630.

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restrain the wife. It is not necessary, however, on the present occasion to discuss that question any further than to say that I can understand that some authority on the part of the husband of such a nature and so limited might well be justified according to any system of reasonable law. We have to determine this case on the return to the writ, which states in substance that, because the wife refused to live with the husband, he took her and has since detained her in his house, using no more force or constraint than was necessary to take her or to prevent her from returning to her relations. Such is the return by which he justifies the admitted imprisonment of this lady. I do not know that I can express in sufficiently precise language the distinction which has been suggested between "imprisonment" and "confinement." If there be any such distinction, I should find that in this case there was imprisonment. I do not find any denial in the return that the lady is kept in imprisonment in the husband's house. The return seems to me to be based on the broad proposition that it is the right of the husband, where his wife has wilfully absented herself from him, to seize the person of his wife by force and detain her in his house until she shall be willing to restore to him his conjugal rights. I am not prepared to assent to such a proposition. The legislature has deprived the Matrimonial Causes Court of the power to imprison for refusal to obey a decree for the restitution of conjugal rights. The husband's contention is that, whereas the Court never had the power to seize and hand over the wife to the husband, but only the power to imprison her as for a contempt for disobedience of the decree for restitution of conjugal rights, and even that power has been now taken away, the husband may himself of his own motion, if she withdraws from the conjugal consortium, seize and imprison her person until she consents to restore conjugal rights. I am of opinion that no such right exists or ever did exist. Moreover, assuming that sufficient authority existed for such a proposition, it is subject in any case to the qualification which I observe is always imported, that, where the wife has a complaint of or reason to apprehend ill-usage of any sort, the Court will never interfere to compel her to return to her husband. This brings me to the particular

circumstances of this transaction. I am prepared to base my judgment on the ground that the husband has no such authority as he claims; that no English subject has such a right of his own motion to imprison another English subject, whether his wife or any one else—of course, I am speaking of persons of full age and sui juris; but, assuming that there were such authority, it would be subject to the qualification I have mentioned in the case of apprehended ill-usage, and I am of opinion that the facts of this case afford ample ground for refusing to allow the husband to retain the custody of his wife. It seems to have been thought that the question how far a lady may be dealt with in this way depends on the exact amount of force or violence used or pain inflicted. But is it nothing that a lady coming out of church on a Sunday afternoon is to be seized by a number of men and forcibly put into a carriage and carried off? Must not the element of insult involved in such a transaction be considered? Then, if the lady's statement to the medical man be true, the moment she got into the house the husband took off her bonnet and threw it into the fire. The affidavit of the medical man states that the wife told him so: that affidavit is one of the husband's affidavits, and there is no denial that this happened by the husband. 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. With regard to the statements as to the earlier part of the history of the case, contained in the husband's affidavits, I am unwilling to look at them for this reason: I do not deny that unqualified and uncontradicted they do make out a case in his favour, so far as shewing that this alliance was entered into under circumstances which do not reflect any discredit on him. But I am unwilling to discuss those statements of the affidavits, because I do not know how far they can be trusted, inasmuch as the wife has not been permitted to have any opportunity of communicating with any legal adviser as to any matters on which she might have contradicted those affidavits. Therefore, it seems to me that, though one has no right to say that one disbelieves those statements, it is impossible to rely upon them under the

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circumstances. The result is, in my opinion, that there is no power by law such as the husband claims to exercise, and, if there were, the facts give ample ground to the lady to apprehend violence in the future. Either of these grounds is sufficient to shew that the return to this writ is bad, and that this lady must be restored to her liberty.

LORD ESHER, M.R. In this case it is really admitted that this lady is confined by the husband physically so as to take away her liberty. The only question for us to determine is whether in this case we can allow that to continue. The husband declares his intention to continue it. He justifies such detention; and the proposition laid down on his behalf is that a husband has a right to take the person of his wife by force and keep her in confinement, in order to prevent her from absenting herself from him so as to deprive him of her society. A series of propositions have been quoted which, if true, make an English wife the slave, the abject slave, of her husband. One proposition that has been referred to is that a husband has a right to beat his wife. I do not believe this ever was the law. Then it was said that, if the wife was extravagant, the husband might confine her, though he could not imprison her. The confinement there spoken of was clearly the deprivation of her liberty to go where she pleases. The counsel for the husband was obliged to admit that, if she was kept to one room, that would be imprisonment; but he argued that, if she was only kept in the house, that was confinement only. That is a refinement too great for my intellect. I should say that confining a person to one house was imprisonment, just as much as confining such person to one room. I do not believe that this contention is the law or ever was. It was said that by the law of England the husband has the custody of his wife. What must be meant by "custody" in that proposition so used to us? It must mean the same sort of custody as a gaoler has of a prisoner. I protest that there is no such law in England. *Cochrane's Case* (1) was cited as deciding that the husband has a right to the custody, such custody, of his wife. I have read it carefully, and I think

(1) 8 Dowl. 630.

that it does so decide. The judgment, if I may respectfully say so, is not very exactly worded, and uses different expressions in many places where it means the same thing; but that seems to me to be the result of it. It appears to me, if I am right in attributing to it the meaning I have mentioned, that the decision in that case was wrong as to the law enunciated in it, and that it ought to be overruled. Sitting here, in the Court of Appeal, we are entitled to overrule it. I do not believe that an English husband has by law any such rights over his wife's person, as have been suggested. I do not say that there may not be occasions on which he would have a right of restraint, though not of imprisonment. For instance, if a wife were about immediately to do something which would be to the dishonour of her husband, as if the husband saw his wife in the act of going to meet a paramour, I think that he might seize her and pull her back. That is not the right that is contended for in this case. The right really now contended for is that he may imprison his wife by way of punishment, or if he thinks that she is going to absent herself from him, for any purpose, however innocent of moral offence, he may imprison her, and it must go the full length that he may perpetually imprison her. I do not think that this is the law of England. But, assuming that there is such a right, the question arises whether the way in which and the circumstances under which it has been exercised in this case are such that the law ought to give back to the husband the custody of this lady against her will. The seizure was made on a Sunday afternoon when she was coming out of church, in the face of the whole congregation. He takes with him to assist him in making the seizure a young lawyer's clerk and another man. The wife is taken by the shoulders and dragged into a carriage, and falls on the floor of the carriage with her legs hanging out of the door. These have to be lifted in by, I believe, the clerk. Her arm is bruised in the struggle. She is then driven off to the husband's house, the lawyer's clerk riding in the carriage with them. Could anything be more insulting? The lawyer's clerk remains at the house, and a nurse is engaged to attend to the wife, who is not ill. Obviously the lawyer's clerk and the nurse are to help to keep watch over her and control her. That in itself is insulting. She goes to a window in the house, and, one

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of her relations being outside, the blind is immediately pulled down. I think that the circumstances of this seizure and detention were those of extreme insult, and I cannot think that it can be that under such circumstances as these the husband has a right to keep his wife insultingly imprisoned till she undertakes to consort with him. In my opinion, the circumstances are such that the Court ought not to give her back into his custody. He has obtained, it is true, a decree for restitution of conjugal rights; but that gives him no power to take the law into his own hands and himself enforce the decree of the Court by imprisonment. Formerly that decree might have been enforced by attachment for contempt; but that would have been an imprisonment by the Court, not by the husband. The power of attachment in such cases is now taken away. The suggestion, therefore, must be that, though the Court has no power to force the wife to restore conjugal rights by imprisonment, the husband himself has a right to take her by force and imprison her without the assistance of the Court. I think that the passing of the Act of Parliament which took away the power of attachment in such cases is the strongest possible evidence to shew that the legislature had no idea that a power would remain in the husband to imprison the wife for himself; and this tends to shew that it is not and never was the law of England that the husband has such a right of seizing and imprisoning the wife as contended for in this case. If there is now a greater difficulty than there was in enforcing, or if it is now impossible effectively to enforce a decree for the restitution of conjugal rights, the legislature has caused this by Act of Parliament, and the legislature must deal with the matter. For these reasons I agree that the return to the writ is bad, and that the husband has so acted that we ought not to give back the custody of this lady to him.

FRY, L.J. The return to the writ raises the legal question whether a husband has, by the law of England, where his wife refuses to live with him, a right to capture and confine her until she renders to him conjugal rights. The affirmative of the proposition was contended for by the counsel for the husband.

The proposition divides itself into two parts, one having regard to the right to capture, the other to the right to confine. With

regard to the alleged right to capture, there does not appear to me to be a rag of authority in favour of such a right. No authority, even of the oldest times, was cited in support of such a right. *Cochrane's Case* (1) did not relate to the right of capture, but to the right of the husband to confine or imprison the wife until she rendered conjugal rights. That case occurred in 1840, and no earlier authority was cited in it for the proposition that the husband had such a right except the passage in Bacon's Abridgment, which affirms that "the husband has power and dominion over the wife, and may keep her by force within the bounds of duty." That proposition is so vague that it cannot be considered satisfactory authority, and it is directly at variance with the decision in *Rex* v. *Lister* (2), where it is said that the husband may restrain the wife on certain grounds, such as that she was spending his estate and consorting with lewd company, and that those are the only grounds on which he may restrain the wife. I cannot, under these circumstances, consider that *Cochrane's Case* (1) is a satisfactory authority. I cannot overlook this consideration: similar cases must have occurred over and over again; but the habitual course of practice has been to have recourse to the Ecclesiastical Court, and to obtain a decree for restitution of conjugal rights; and no case is to be found by which it is established that such a right as that contended for by the husband in this case is given by the law of England. This appears to me to be cogent evidence to shew that the law is not as contended for.

After *Cochrane's Case* (1) came *Reg.* v. *Leggatt* (3) which, to say the least, weakens the authority of *Cochrane's Case* (1). It is there said by Lord Campbell, C.J., that the husband has no such custody of the wife as a parent has of a child. Therefore, if the matter rested there, I should say it was clear that by law there was no such right in the husband as contended for; but assume that the matter were doubtful at the time of the passing of the Act of 1884 with regard to the practice of the Matrimonial Causes Court, I say that it is doubtful no longer. That Act deprived the Court of the power to enforce a decree for the restitution of conjugal rights by attachment, and substituted for that power two things: it gave power in the case of both husband

(1) 8 Dowl. 630. (2) 1 Str. 478. (3) 18 Q. B. 781.

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Fry, L.J.

and wife to order certain pecuniary allowances, and it further provided that non-compliance with the decree for restitution of conjugal rights should be deemed to amount to desertion without reasonable cause. These provisions are substituted for the old power to enforce the decree by attachment. I cannot think that, after the legislature has taken away the right of the Court to enforce restitution of conjugal rights by attachment, the husband has any right of imprisonment in a case in which he is at once a party, the judge, and the executioner, or that he can enforce such restitution by himself imprisoning the wife without the assistance of the Court.

I confine myself to determining the precise question which is raised by this return, and I prefer not to diverge into the consideration of other questions more or less cognate to this. I do not think it necessary for the present purpose to advert to the older authorities on those questions which have been cited to us, beyond saying that I do not regard them with exactly the same feelings as the Master of the Rolls, nor think that all our predecessors on the judgment seat were deficient in good sense. I also prefer to abstain from expressing an opinion as to the personal conduct of the husband in this transaction, and I do not make any view of his conduct any part of the grounds of my decision. I do not think that it is possible to arrive at a just conclusion on these matters without further knowledge of the circumstances which led up to the transaction. There may or may not have been matters which might more or less furnish excuses for what was done on both sides; but, for the reasons indicated by the Lord Chancellor, it seems to me to be unsafe to rely on any view of matters the history of which is not fully before us. I agree in the result at which the Lord Chancellor and the Master of the Rolls have arrived on the ground that the right set up by the husband does not exist by the law of England.

Return held bad, and wife to go free.

Solicitors for the wife: *Shaw, Tremellen, & Kirkman, for Hall, Baldwin, & Weeks, Clitheroe.*

Solicitors for husband: *F. J. Thairlwall, for Ainsworth, Sanderson, & Howson, Blackburn.*

E. L.