# THE MAINTENANCE OF CONCUBINES

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## INTRODUCTION

Tasmania alone of the Australian States—alone perhaps in the common law world—accords by its legislation rights to a '*de facto* wife' or, as the Chief Justice of Tasmania prefers to call her,[1] a concubine, which fall little short of those enjoyed by a lawful spouse. This article is concerned with the history of the present provisions, which are to be found in the Maintenance Act 1921, and with some of the problems which they present and how the courts have attempted to solve them.

## HISTORY

In 1837 an Act of Council[2] was passed for the maintenance of deserted wives and children. The Act conferred summary jurisdiction on the magistrates' courts when a husband was found guilty of unlawful desertion or of leaving his wife or children without means of support.[3] In its essentials the Act was the result of the recommendations of a committee set up by the Legislative Council in the previous year.[4] Section 4 of the Act, however, was the product of the unprompted wisdom of the Council itself. The *Hobart Town Courier* of Friday, 21st July 1837, contains the following report[5]:

> 'Proceedings of the Legislative Council Chamber Friday 14th July.
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> Wives and Children Act.
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> Mr. Stephen moved second reading. He next moved report on this Act to be read before Council, resolved itself into committee. Act was read as well as the report from Gazette of July 8th 1836 by the Clerk of the Council. Mr. Stephen moved a committee on this Act. The first sections of which were passed without any material deviation being made from them as they stood. In coming to Section 4, Mr. Stephen observed that as it stood it had not been recommended by the committee who drew up the report read — he stated the difficulty of proving wife really to be so in many cases — the dishonesty incurred by men holding out women to be their wives and allowing them to incur debts as such, and then denying her to be such, and evading the demands of a creditor — of whose credit given to his reputed wife he was cognizant — he argued the cruelty of men who kept women as their wives for years and then expelled them.

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1 *Maddock* v. *Beckett* (as yet unreported) April 19, 1961, Serial No. 14/1961, at 14, where the Chief Justice characterizes the popular term as an 'inaccurate euphemistic neologism'.

2 8 Will. IV, No. 9.

3 Section 1.

4 *Gazette* of July 8, 1836.

5 The somewhat eccentric punctuation is that of the *Courier*.

> Captain Forster concurred—deprecated the evils arising from illicit connection, and supported the section as it stood amended, as calculated to prevent dishonesty—the section as amended, stands thus—'and it be enacted, that (for the purposes of the said Act) every woman shall be conclusively deemed and taken to be in fact the wife of the party complained against, although never married, if he shall be proved to have cohabited with her as his wife, and to have permitted her generally to assume that character—provided that nothing in this Act shall extend to render any man liable for a woman's maintenance where he shall have put her away or separated himself from her for adultery, and her guilt shall be established upon such enquiry as aforesaid to the reasonable satisfaction of the sitting Justices'. Sections 5, 6, 7, 8, 9, 10, 11 and 12 were read and agreed to without any important discussion or material deviation from the Act as it stood. The third reading of the Wives and Children Act was ordered for Friday 21st July. Council adjourned at 5 o'clock.'

This report bears out in part the suggestion of Burbury C.J. that section 4 may have been 'intended originally as an evidentiary provision because of some difficulty at that time of proving legal marriages in the Colony'.[6] It is to be observed, however, that the presumption of marriage is made irrebuttable. A further social policy is not far to seek. The manners and morals of the Colony at this period of its history still left much to be desired, and cohabitation outside the bonds of matrimony cannot have been uncommon; moreover, the man who left his mistress, and his children by her, made them a burden on the community. It was not unreasonable that the Government should be enabled to hold him responsible for her maintenance rather than suffer her to become a charge upon the public funds.[7]

In 1863 the Act was replaced[8] and a new requirement was introduced, *viz.*, that 'he shall be proved to have cohabited with her as his wife and to have permitted her generally to assume that character *within twelve*

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[6] *Maddock* v. *Beckett, supra,* at 14. Doubts as to the validity of marriages in New South Wales were expressed in a petition of the inhabitants dated April 13, 1836 (*Historical Records of Australia,* Series I, vol. 18, at 393), and led to an Act of the same year (7 Will. IV, No. 6) entitled 'An Act to prevent clandestine marriages and to provide for issuing of licences'. The issuing of licences was the subject of a letter of August 30, 1828, from Archdeacon Scott to Solicitor-General Sampson, who advised him that, there being no local law on the subject, he was entitled to issue licences as commissary of the bishop of his diocese (*Historical Records of Australia,* Series I, vol. 14, at 400).

[7] *Bents News,* Hobart Town, July 22, 1837, commented on the passing of the Act. Their report was copied from the *Colonial Times.* Allowing that the Act was a good one, the *News* suggested it might nevertheless be improved. 'Most of the wives and children that are deserted in this Colony, are so deserted by men leaving the Island, and the passing of an Act by which a worthless scamp of a fellow shall contribute to the maintenance of his deserted wife or children, is only a strong inducement for him to visit Port Phillip or some other Colony. We cannot help thinking that a clause would be advisable to the effect, that every man about leaving the Colony should be compelled to publish his intention, and that if any protest were made by the wife or children, that he should not be allowed to leave without finding security for their maintenance. The Act does not provide in any way for the wives or children of men absent from the Island; and what is strange, by the Act a woman is allowed to abandon her children if she so pleases. It may be said that such an act is impossible on the part of a woman, but to this we reply by stating, that there are women in this Colony that have deserted their children, and those women too, well off in the world'.

The first criticism was a little unfair since the Act, by section 1, did in fact make provision for the arrest of a person in case of actual desertion, threatened desertion or even 'quitting his usual place of residence'. The second criticism was met by the 1863 Act, *infra,* which was made to apply where it appears that (s.l.) 'any wife has been left by her husband, or that any child, whether legitimate or illegitimate, has been left by its father or mother, without means of support'.

[8] 27 Vic. No. 14.

*months previous to the commission of the alleged offence*'.[9] A time element was thus introduced into the Act, though the wording is not altogether clear. Did it mean that a period of twelve months' cohabitation was necessary, or did it mean that any period of cohabitation was sufficient provided that some or all of it was in the previous twelve months?

This doubt was clarified when in 1873 new legislation was introduced,[10] repealing the 1863 Act, and requiring the cohabitation to have been 'for' a period of twelve months prior to the offence.[11] Another important change made by the 1873 Act was that it ceased to be necessary to prove that the man in question had permitted the woman to assume the character of a wife. The wording of the relevant section is:[12] 'As well in respect of any wife as of any woman with whom any man is proved to have cohabited for a period of twelve months previous to the commission of the act of desertion complained of.' Doubtless by this time it had been realized that the particular abuse mentioned by Mr Stephen in debate on the Bill—the evasion of the demands of creditors to whom the woman had been held out as a wife—did not require any special legislation for its remedy, and that the common law sufficiently covered the situation. However, the dropping of the earlier requirement marks a much more significant innovation than that, for it robs the section entirely of its evidentiary character. If a man lives with a woman for twelve months then he incurs the responsibilities placed on him by the Act even though all the world knew quite well that they were not married; even, perhaps, though it was well-known that one or both of them were already married to other persons.

The 1873 Act was repealed and substantially re-enacted in 1919;[13] and the latter Act was in turn replaced by the Maintenance Act 1921, which is the Act in force at the present day.

## Maintenance Act 1921 and its Interpretation

This Act extends the protection afforded to a concubine in a most startling manner. Section 5 occurs in Part I of the Act, which concerns (*inter alia*) the power of the court to order maintenance of a wife against a husband guilty of desertion, leaving without means of support, such cruelty or misconduct towards her as to render it unjust that she should be longer compelled to live with him, habitual drunkenness or adultery; or convicted of an aggravated assault upon her within the meaning of section 35 (2) of the Police Offences Act 1935. (The earlier Acts, it will be recalled, dealt exclusively with desertion or leaving without means of support.) The section provides that Part I 'shall be applicable as well in respect of any wife as of any woman with whom any man is proved to have cohabited for a period of twelve months immediately prior to the

9 Section 1.
10 37 Vic. No. 14.
11 Section 1.
12 Section 1 (2).
13 Maintenance Act 1919.

commission of the act of which she complains; and such woman shall, for the purposes of this Part, be deemed to be the wife of such man'.[14] The reader might well pause at this point to wonder whether section 5 really can be intended to cover adultery. Sub-section (2) leaves no doubt. 'The word "adultery",' it reads, 'used in relation to any such woman as aforesaid shall, for the purposes of this Part, extend to and include any act which would amount to adultery if such woman were legally married to such man'.

The Act presents obvious problems of interpretation and still greater problems of social policy. Unfortunately, until 1961, when in *Maddock* v. *Beckett*[15] the learned Chief Justice wrestled with some of these problems, there is a complete absence of authority on this particular aspect of the Act, perhaps because few concubines were conscious that the legislature had so conveniently given them the whip-hand over their reluctant partners.

In the first place, what is meant by cohabitation? In *Maddock* v. *Beckett* the plaintiff (respondent) met the defendant (appellant) in 1955, when both were already married, and shortly thereafter she began to live with him as his wife. In September 1956 the defendant's marriage was dissolved, and in 1957 the plaintiff's marriage was also dissolved. The defendant did not dispute the fact that he and the plaintiff cohabited as man and wife for a period from August 1956 until August 1959. At that time he went to New Zealand on business, and she acccompanied him. She returned alone to Tasmania in October of that year.

From that point on there was a conflict of evidence between the parties. The defendant, on the one hand, contended that before the plaintiff left New Zealand they had agreed to go their separate ways, and that although he returned to Tasmania in December 1959 and they lived in their former home together for a short time during January 1960 no sexual intercourse had taken place and there had been no effective resumption of cohabitation. He was able to show that on 31st January 1960 he had left again for New Zealand, and that they had not lived under the same roof since that time. On 6th May 1960 he married another woman in New Zealand.

On the other hand, the plaintiff was able to produce affectionate correspondence from the defendant until April 1960, and to show that she was in fact maintained by the defendant until August 1960, which she claimed as recognition of a continuing relationship between the parties.

She thereafter laid a complaint against the defendant of leaving her without means of support, and in the Police Magistrate's Court was awarded £1/10/- per week maintenance. Against this Order the defendant appealed.

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14 The section also applies to Part V of the Act, which is concerned with the enforcement of orders made under the Act and certain other procedural matters.

15 Note 1, *supra*.

It was essential for her to show that there had been cohabitation right up to the time of the act complained of. Burbury C.J. was prepared to give to the term 'cohabitation' a meaning substantially similar to that used in relation to a lawful marriage. He referred to a number of cases in which an existing matrimonial relationship (as distinct from an illicit relationship) was defined,[16] and continued[17]:

> 'Having regard to the purposes of the Maintenance Act 1921 and the legislative context in which Section 5 appears, I think the word "cohabited" must be taken to connote cohabitation by a man with a woman *as his wife*. I do not think its connotation in this context is confined to the actual state of living together under the same roof. As applied to an illicit association of a permanent domestic character between a man and a woman I am of opinion that the word "cohabited" in Section 5 is equally as capable of expressing a wide and flexible conception of that association as the word is when applied to a lawful conjugal association. This should be qualified by saying that in the case of an illicit association the inference that cohabitation continues during a period of actual separation of the parties would no doubt be less easily drawn than in the case of husband and wife. In the present case the illicit association between the Appellant and the Respondent was on a permanent domestic basis. So long as the Appellant continued to maintain the Respondent in his home and there was a mutual recognition of the continuance of the domestic association between them, I think cohabitation must be taken to continue notwithstanding periods of actual separation. Their physical separation from October 1959 until early in 1960 and the unimplemented decision of the Appellant expressed in his letter of the 30th December 1959 to terminate the relationship were I think insufficient to interrupt cohabitation.'

The Chief Justice went on to hold, however, that cohabitation had already terminated by the time the defendant ceased to maintain the plaintiff, and that the latter was therefore not entitled to succeed. Her counsel had submitted that the offence of 'leaving without means of support' involves some 'wrongful' element, some repudiation of the relationship other than simply the cutting-off of financial supply, and argued that 'the act complained of' ought to relate back to the defendant's marriage to the other woman, since this, *vis-a-vis* the plaintiff, was a 'wrongful' repudiation of the illicit relationship. Otherwise, he pointed out, it would mean that a man could terminate an illicit relationship of more than twelve months' standing without the burden of paying maintenance by the simple expedient of continuing to maintain his mistress for a short period after termination of the relationship. If a man breaks up a relation with his concubine but 'chooses to maintain her for a few months out of sweet charity, she cannot claim that he had left her without means of support, because she is no longer deemed to be his wife'.[18]

Burbury C.J. had little difficulty in rejecting this submission. He cited *Zacher* v. *Zacher*[19] in which Gavan Duffy J., in delivering the judgment of the Full Court, said that 'the words "leaves his wife without adequate means of support" mean wrongly lets his wife be without adequate means of support and have no denotation or connotation of

16 *Tulk* v. *Tulk* (1907) V.L.R. 64 at 65; *Thomas* v. *Thomas* [1948] 2 K.B. 294 at 297; *Bailey* v. *Bailey* (1909) V.L.R. 229 at 302; *Maud* v. *Maud* (1919) 26 C.L.R. 1 at 4.

17 At 11.

18 At 17.

19 (1954) V.L.R. 204 at 207.

physical movement'. Nor in the three other cases cited[20] was there any suggestion that there must be a wrongful act such as desertion or adultery in addition to the cessation of financial support. All that is required is that the act of leaving the woman without means of support must be wrong, *i.e.*, not justifiable.

The Chief Justice then said: 'The element of fault, as applied to a man who is one of the parties to an illicit relationship, is a matter of some difficulty. It can only be a fiction of the statute. And the statute only gives an unlawful quality to the act if it is done while the illicit relationship exists in fact'.[21] Since there was no subsisting state of cohabitation between the Appellant and the Respondent on the 20th August 1960, which was the date when it could be said that financial support had been withdrawn, the appeal was allowed and the complaint dismissed.

So much for the requirement of cohabitation. Let us consider now certain other problems which are suggested.

Suppose that the plaintiff in *Maddock* v. *Beckett* had complained, not of leaving without means of support, but of desertion. This would have given the magistrate equal jurisdiction to make the order he did, and there is no doubt that the desertion took place at the point of time, however you choose it, at which cohabitation ceased. Would she not have been entitled to succeed on this ground?

If such were the case, could the defendant have terminated his liability for desertion by making a genuine offer to return? In the case of a true married relationship there is a mutual duty to render conjugal rights. An offer to return by the party in desertion casts upon the other party a duty to resume cohabitation. Is it then the policy of the law that there may be circumstances in which there is a duty cast upon a woman to live in concubinage with a man?

The position, of course, is even more paradoxical where, as in *Maddock* v. *Beckett*, the man has married another woman, for then the duty, if it exists, is a duty to commit adultery. A possible escape from the dilemma may lie in recognizing that there is no desertion if a party has good cause or reasonable excuse for terminating cohabitation. It might perhaps be possible to accept the view that where a man wishes to terminate what is, after all, generally accepted as an immoral relationship in order to contract a lawful marriage, this of itself is a sufficient excuse to cease cohabitation. The solution does not fit in easily, however, for hitherto the good cause or reasonable excuse has always been held to be constituted by some conduct on the part of the other party, and not by extraneous circumstances beyond his or her control.

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20 *Chantler* v. *Chantler* (1906) 4 C.L.R. 583 at 592; *Walker* v. *Walker* (1937) 57 C.L.R. 630 at 637; *Ex parte Powter* (1941) 63 N.S.W.W.N. 34.

21 At 20.

If 'desertion' presents some problems, how much more so does 'adultery'. The learned Chief Justice had this to say:[22]

> 'The literal application of this provision would lead to the startling result that a man who terminates an illicit relationship of twelve months standing and lawfully marries another woman and has marital intercourse with her commits "statutory adultery" *vis-a-vis* his former concubine.'

Further, suppose that a man leaves his wife to live with another woman, which he does for a period of twelve months, he is then guilty of 'statutory adultery' if he returns to his wife and has intercourse with her. The unhappy husband, compelled by law to be faithful to two women at once and possibly to support both indefinitely, has good cause to repeat with feeling Gay's lines:

> 'How happy I could be with either
> Were t'other fair charmer away'.

It may be contended that all the statute does in the last analysis is to place a financial obligation upon anyone rash enough to live with a woman for a year without marriage, and that nothing in the statute is intended to confer any kind of recognition of mutual rights and duties beyond this. But such a contention is untenable for at least two reasons.

In the first place, there is the wording of section 6 III (b) which allows a complaint to be made where a husband (or wife) has 'been guilty of such cruelty or other misconduct towards him or her as to render it unjust that the complainant should be longer compelled to live with the defendant'. This seems to recognize clearly that there are circumstances in which it would be just that the complainant *should* be compelled to live with the defendant.

Secondly, by section 67 of the Act, it is a misdemeanour for any person, being of sufficient means, without lawful or reasonable cause or excuse, to desert his wife (including, of course, his 'wife') or to leave her without means of support for a period of three consecutive months. The offence carries with it a penalty of twelve months' imprisonment.

Some slight consolation may be afforded to the incontinent male by the provisions of section 12 of the Act, which empower the court to order a wife to pay maintenance where a husband is unable, either permanently or temporarily, to support himself by his own means or labour. Unfortunately, sub-section (2) makes the order entirely discretionary —a discretion which, one imagines, the court would be little disposed to exercise where the 'wife' was a concubine.

## The Act and Public Policy

How far would the courts be prepared to recognize that the Act makes any incursion on the well-settled principles of public policy established by the common law?

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22 At 15.

This question was raised by the learned editor of the Tasmanian Law Reports in a footnote to *Zapletal* v. *Wright*.[23] In that case a married man and his concubine of fifteen years' standing became registered proprietors of a piece of land as joint tenants, the purchase money having been paid by the man. In a suit for partition or sale[24] by the woman, Gibson J. at first instance found as a fact that the presumption of a resulting trust arising from the voluntary nature of the conveyance was rebutted by the circumstances, which showed that the defendant intended the purchase to be by way of a gift to the plaintiff. He also accepted evidence of a collateral agreement between the parties which had the effect, so he held, of creating a joint interest in favour of the plaintiff in fee simple defeasible by condition subsequent, the condition being that if the plaintiff at any time ceased to cohabit with the defendant her estate would come to an end and her share pass over to the defendant.[25]

Gibson J. came to the conclusion that it was not contrary to public policy for a woman to cease to live in adultery and hence that the condition was valid.

On appeal the Full Court (Burbury C.J., Green and Crisp JJ.) unanimously reversed the decision. Burbury C.J. said: 'The purpose of the respondent's gift was to provide some sort of security by way of maintenance for the appellant while she was living with him and in the event of the respondent predeceasing her while they were still living together to ensure that the appellant should have the property to the exclusion of the respondent's wife.[26]. . . The presence of the condition subsequent in the transaction from its inception I think must be taken as tending to perpetuate the illicit relationship and to keep the respondent apart from his legal wife. I think it must follow that the condition is void as tending to immorality'.[27]

This decision, of course, is thoroughly in line with earlier authority. No reference, however, was made to the Maintenance Act. It is submitted that the statute clearly recognizes an obligation, under certain circumstances, to accord to a concubine some of the rights granted normally only to a wife, included among which is the right to material support. When, therefore, a man enters into a bond or other undertaking[28] or makes a gift, with or without condition, expressly in order to maintain a mistress whom the law apparently requires him to maintain if he has lived with her for twelve months, can it any longer be said that his bond is void as being contrary to public policy?

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23 (1957) Tas. S.R. 211.

24 Partition Act 1869, s. 4.

25 The acceptance by the court of first instance and by the Full Court of the view that there was either a determinable fee or a fee defeasible by condition subsequent is one of the less satisfactory features of this decision, since the evidence showed no more than a purely oral discussion between plaintiff and defendant. One is also somewhat surprised that the plaintiff did not plead the Statute of Frauds in reply to the defendant's contention that he retained a future interest in her share of the land.

26 At 214.

27 At 215.

28 See, *e.g. Walker* v. *Perkins* (1764) 3 Burr. 568.

In one case, at least, the court has been prepared to revise its concept of public policy in the light of the Act. In *The Queen* v. *Lyden*[29] the accused was charged with murder and raised the defence of provocation. The circumstances which provoked him were that he saw his mistress, with whom he had been living for some time as man and wife, performing or about to perform an act of sexual intercourse with another man. It is well settled that such an act, when the woman is the wife of the accused, can amount to provocation. But Gibson J. thought that this rule could be extended, by reason of the Maintenance Act 1921, to a mistress of more than twelve months' standing.

Provocation is defined in section 16 (2) of the Criminal Code as follows: 'Any wrongful act or insult of such a nature as to be sufficient to deprive an ordinary person of the power of self-control, and which, in fact, deprives the offender of the power of self-control, is provocation, if the offender acts upon it on the sudden, and before there has been time for his passion to cool'. Referring to the act witnessed by the accused, Gibson J. said: 'Now, that, in my opinion, is a wrongful act because, although the parties were not married, there are certain provisions of the Act of Parliament called the Maintenance Act which protect the situation of a woman who has lived with a man not her husband for a period of over twelve months. She is put in the same position as a legal wife. This is done for reasons of policy, I suppose, so that people who assume the situation of married persons, even if not actually and legally married, must undertake the obligations appertaining to marriage of support and maintenance and of looking after the children, mutual obligations towards one another; and these mutual obligations towards one another include not having sexual relations with other persons.

'For the purposes of the Maintenance Act that is put on the same footing as adultery of married persons, and so, if Mrs. Lyden (or Miss Wells as her real position at law was) was committing an act of sexual intercourse it could affect her rights, and would affect the liabilities of the accused, in respect of living together and of maintenance, and of the obligations of support, and it would also be capable of affecting the question of the custody of the children. So, too, misconduct on her part, misconduct of a character which would be marital misconduct if she were in fact married, would be an act which would be capable of affecting those same relations between these parties, their obligations towards one another, their rights in respect of the other person's actions, and also in respect of maintenance and custody of the children. So, for those reasons, I think that whatever Mrs. Lyden was doing on that occasion, it was a wrongful act for the purposes of the Maintenance Act, and for the purposes of the Criminal Code in this connection'.

What, one wonders, would have been the position if Miss Wells had been a married woman, and the man with whom she was found in intercourse had been her husband? Would the court have regarded the

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29 February 24, 1962, Serial No. 11/1962 (as yet unreported).

marital intercourse as a 'wrongful act'? This would be to accept an inference which, as we have seen, the Chief Justice temperately described as 'startling'. Again, is the test of wrongfulness objective? Does 'wrongful act' mean wrongful in the eyes of the law or wrongful in the eyes of the provoked? If Miss Wells had been having intercourse with her husband, but the accused did not know that he was her husband, would this have afforded him a defence? Possibly so, since the question of provocation is essentially one of fact, and the psychological effect in either case could be expected to be the same.

## Conclusion

Sufficient has been said to reveal the sort of 'Alice-in-Wonderland' world in which one is liable to wander when construing the Maintenance Act; a world in which wives commit adultery with their husbands and men are imprisoned for leaving their mistresses in the lurch. May it perhaps be suggested that, whatever the initial policy of those provisions may have been, our present Matrimonial Causes Act is sufficiently liberal to provide a means, where appropriate, of dissolving a distasteful union, and our Marriage Act adequate to provide a means of contracting a new one? There seems no longer to be any good reason why our laws should protect an illicit union into which, after all, persons have always entered at their own risk. We submit that the proper solution to the problems we have posed is to repeal section 5 of the Act.