

case that sec. 242A is to be viewed as an entirely separate section of the Code apart from sec. 242, and notwithstanding the non-inclusion of sec. 242A in the list of sections referred to in sec. 4 of the Canada Evidence Act, the wife is not a competent witness against her husband on a summary charge for failure to provide for her, whereby she falls into destitute or necessitous circumstances.

It seems clear that on the creation of a new offence without restriction as to the class of evidence or the competency of the witnesses, the analogy of the common law would apply, together with such general statutory enactments as were referable to the offence or to witnesses or evidence. The Canada Evidence Act, R.S.C. 1906, ch. 145, sec. 2, makes sec. 4 applicable to "all criminal proceedings"; and while sec. 4 specifies particular offences as to which the wife of the accused shall be a "competent and compellable witness for the prosecution" without the consent of the person charged, it further provides, in the fourth sub-section, that "nothing in this section shall affect a case where the wife or husband of a person charged with an offence may at common law be called as a witness without the consent of that person."

Before it can be concluded that the evidence of the wife is not admissible, it is necessary not only to find if the offence is specially designated in sub-section 2 of sec. 4 of the Canada Evidence Act, but to ascertain if the case comes within the class of common law exceptions under which the wife's testimony was admissible. The common law rule as to the evidence of husband and wife either for or against each other is thus stated in Pritchard on Quarter Sessions (1875), p. 278:—

"In criminal, as in civil cases, there is only one relationship which disqualifies, viz., that of husband and wife. In no case, *except* those where either husband or wife complains of an injury directly inflicted by the one on the other, can either party in this connection give evidence for or against the other. Even where the husband consented to the wife being examined *against* him, the evidence was rejected, 1 Hale, Pleas of the Crown, 47. In case of personal violence or wrong, the wife is from necessity a competent witness against the husband, and the husband against the wife. It is said that a wife is a competent witness against her husband in respect of any charge which affects her liberty and person. *Per* Hullock B. in *R. v. Wakefield*, 2 Lewin, C.C. 1, 279, 2 R.C. & M. 605. So on an indictment against the husband for an assault upon his wife, *R. v. Azire*, 1 Str. 633, Buller, N.P. 7th ed. 287. And upon an indictment under the statute of Henry VII, for taking away and marrying a woman contrary to her will, she was a competent witness to prove the case against her husband *de facto*, and being competent against him she was consequently competent as a witness for him; *R. v. Perry*, Ry. & Mov. N.P.C. 353; though it has been doubted whether if the woman afterwards assented to the marriage and lived with the man for any considerable time, she would be capable of being a witness either for or against him. Roscoe Cr. Evid., 13th ed., 106. In *R. v. Wakefield*, 2 Lewin C.C. 288, 2 R.C. & M. 607, Hullock, B., was of opinion that even assuming the witness to be at the time of the trial the lawful wife of one of the defendants, she was yet a competent witness for the prosecution on the