

The High Sheriff of Oxfordshire's Annual Law Lecture

Given by Lord Wilson on 9 October 2012

Out of his shadow: The long struggle of wives under English Law

1. When from 1963 to 1966 I was an undergraduate here, studying law at Worcester, one of the subjects which most interested me was legal history, taught to me by Dr Derek Hall at Exeter; and, when I retire, I want to take it up again. When in 1967 I became a barrister, it was, albeit by accident, into the practice of family law that I fell; and in which, although nowadays I am required to turn my attention to many other fascinating areas of law, I remain engrossed. So, when honoured to be invited to give this lecture to you, I found it easy to resolve to marry my interest in legal history with my proud commitment to family law and thus to look, on your behalf, into the history of the law of England and Wales in relation to wives. I have found the research which this lecture has required of me (including into a mass of obscure material unearthed by Maria Roche, who until recently was my brilliant judicial assistant) to be a pleasure rather than a burden; and, if during the next forty five minutes I can infect you with some of my interest in the subject, the exercise will have been worthwhile. In choosing what to say and how to say it, I have borne in mind that many of you are neither lawyers nor – or not yet – students of law.

2. Of course, even today, wives have legal rights and duties different from those of unmarried women. They have, for example, different inheritance, social security and immigration entitlements. The divorce laws apply to them so, in part still depending – I am sorry to say – on misconduct on the part of them or of their husbands, they can be divorced and can obtain a divorce; and there is a network of rights and duties between wives and husbands which operate during the marriage and extend beyond divorce. But we also take it for granted that, like all other adults of sound mind, wives can, on their own, hold property, enter into contracts and sue or be sued if they are the victims or perpetrators of the wrongs which the law calls torts. In today's law wives have a status separate from, but equal to, that of their husbands. It was not always so.

3. Things got worse for wives following the Norman conquest. The law of Normandy was far less prepared to recognise that they had rights than the Germanic and Nordic law which had operated in England in Anglo-Saxon times and which had been influenced by a curiously enlightened code of laws adopted in 654 AD by the Visigoths in Spain. Under their law a wife could hold and dispose of property in her own right. Thus, at about that time, during King Ethelbert's reign in Kent, wives who left their husbands were allowed to take the children and half

the goods. And, by 1000 AD, under the law of King Canute, the Anglo-Saxon wife had the right to hold the keys of the store-room, the chest and the coffer. She thereby controlled the food, the linen and the cash; so those keys gave her considerable power.

4. The change following the Norman conquest reflected the hierarchical nature of the feudal system which was then introduced. Just as you went from the King at the top, down to the Lord, then down to the master, and ultimately down to the peasant, so you went from the husband down to the wife. Norman society was also much more pre-occupied with land tenure and its passage down from father to son. The heart of the new order was reflected in the principle of coverture. In the words of law-French, the wife was a “feme covert” instead of a “feme sole”. In law she was ‘covered up’ by her husband. Hence my title this afternoon: the wife was legally in the *shadow* of the husband and she was substantially invisible to the law. Coverture subsisted throughout a marriage and since, as I will explain, there was until 1857 no practical ability for a husband or wife to get a divorce, it therefore subsisted while both of them remained alive. If, however, the King banished the husband, or if in effect the husband banished himself by becoming a monk, his wife’s coverture was over.

5. Coverture had all sorts of consequences. But the main one was that a wife could not own property. Upon the marriage all her property – her freehold land, her leaseholds, her other personal property and her chattels – in effect became the property of her husband. Except in one respect, he could dispose of all of it without her consent. The exception related to what had been her freehold land. He was certainly entitled to keep the rents generated by the land. But he could not actually dispose of it without her consent: that was because, if he died before she did, she was entitled to get it back so, in case he were to do so, it was important that in the interim it should not have been disposed of without her consent.

6. Just as, upon the marriage, the wife lost ownership of her property, so, during its subsistence, she was not entitled to become an owner of property. “Here’s your birthday present, my darling, it comes with all my love” the husband might – or, yes I suppose, he might not – have said. But, while the wife could use the present so long as he was content that she should do so, it remained his property. There was a second consequence of his death prior to hers. It was that, no longer being covered up, the wife became the owner of all the jewellery, clothing and ornaments of which she had had the use at the time of his death. All that stuff was called the widow’s paraphernalia.

7. But what happened to the land formerly owned by the wife if, by contrast, she predeceased her husband? The coverture of course was over. The answer was that, subject to one condition, the husband retained an interest in it for the rest of his life. He was called a tenant of it by the curtesy. The condition was that during the marriage at least one child had been born alive to the wife; and it was irrelevant that the child might later have died. Often children were born alive but died only minutes or hours afterwards. In such circumstances, how was a husband to prove that a child had been born alive, particularly since he and his male friends and relations were not allowed into the wife's bedchamber during the birth? The answer was that they listened from outside the door and, if they heard a baby's cry from within the four walls of the chamber, he would later be able to prove what was necessary to secure his curtesy.

8. An allied consequence of the wife's coverture was that she was not legally able to enter into a contract. Apart from anything else, she had no property against which to enforce any order against her for payment under a contract; so it was only a small step for the law to conclude that she did not have the ability to enter into the contract in the first place. If, however, the wife went into a shop and ordered goods, say of food or clothing, which the law regarded as necessary for the household, the law presumed, unless the husband proved to the contrary, that she had entered

into the contract as his authorised agent. So the shopkeeper could sue him for the price if the wife had obtained the goods on credit.

9. In the seventeenth century there was a development in the law relating to this so-called agency of necessity. It was an attempt to serve the needs of wives whose husbands had deserted them. The law began to say that, if a deserted wife had not committed adultery, she could buy from the shopkeeper all such goods as were necessary for her and, even if (as was highly likely) the husband had *not* authorised her to buy them, he was liable to pay the shopkeeper for them. But the shopkeeper had a problem. How was he to know whether the wife at the counter had been deserted and had not committed adultery? Sometimes a husband even placed a notice in the local newspaper to the effect, true or untrue, that his wife *had* deserted him or *had* committed adultery and that accordingly he would *not* be liable to pay for her purchase of necessaries. I had been a family barrister for three years when, in 1970, the wife's agency of necessity was abolished: it had become useless – I certainly had never encountered its operation – and it had already been replaced by more effective provisions, enlarged in 1971, to force husbands to support wives following their separation.

10. Another consequence of coverture in the Middle Ages was that, if a tort – say an assault – was committed against a wife, she could not, on her own, sue the perpetrator for damages. Her husband had to join her in suing him and, if damages were awarded, it was the husband who was entitled to receive them. The corollary was that, if the wife committed a tort – say, again, an assault - the victim had to sue her husband as well as her; and, if damages were awarded, it was the husband who had to pay them.

11. Mediaeval law did recognise that a wife could commit a crime. Indeed in one major respect there was one criminal law for the husband and a different one for her. If *he* killed *her*, it was murder. But, if *she* killed *him* (and poison was usually her weapon of choice), it was, until the abolition of the offence in 1828, petty treason because her attack on her lord and master was regarded as akin to a challenge to the authority of the Crown. The usual sentence for all types of treason was to be hanged, drawn and then quartered; but, because it was thought inappropriate for a woman's body to be cut up into four pieces, the sentence for a woman was, until 1790, to be burnt at the stake. The execution was postponed if she was pregnant and, as was apparently regarded as a further act of mercy, she was sometimes strangled to death before her body was tied to the stake and burnt.

12. For his murder of her, however, the husband would usually escape capital punishment as a result of legal reasoning which went like this:

- (a) A clergyman guilty of a felony could not be put to death: he was entitled to “benefit of clergy” and could only be imprisoned.
- (b) A clergyman was someone who was clever enough to read.
- (c) It followed that anyone clever enough to read was a clergyman. [Whoever claimed that the law was logical?]
- (d) If a defendant could read – in latin of course - the first verse of the 51st Psalm (which aptly speaks of blotting out a person’s transgressions and which, for obvious reasons, became known as the “neck verse”), he was a clergyman and was entitled to “benefit of clergy”.

So what defendants did was to learn the neck verse by heart and then, in court, to pretend to read it to the judge. Women could not make use of this bizarre fiction because, obviously, they could not be clergymen.

13. But, other than when she killed her husband, the wife might have a defence to a criminal charge. The defence was known as marital coercion, namely that he had forced her into doing it. The law presumed that he had

forced her unless the evidence established otherwise. This is where Mr Bumble in *Oliver Twist* comes in. At the end of the book Mr Brownlow accused him of being responsible for his wife's theft of a gold locket and a ring on the basis that the law supposed that she had taken them under his direction. " 'If the law supposes that,' replied Mr Bumble, squeezing his hat emphatically in both hands, 'the law is a ass – a idiot. If that's the eye of the law, the law is a bachelor.' " We have read in the newspapers that, in a forthcoming trial about penalty points for speeding, there might be some argument about alleged marital coercion.

14. Extraordinary though it sounds, the law was, until 1898, that, if you were charged with a crime, you could not give sworn evidence in your own defence. All you could do is to make an unsworn statement from the dock, about which no one could ask you questions. Equally, since in law the husband and wife were one person, the defendant's spouse was not, until then, allowed to give evidence, whether on his or her behalf or in support of the prosecution.

15. But at least mediaeval law had to address this question: if a wife had no property and was unable to enter into a contract, not even into a contract of employment which would enable her to earn, how was she to be supported financially? The answer had to be that her husband was

obliged to support her. Thus arose the obligation of the husband to maintain the wife which in 1857 became enshrined in the first of a number of Acts of Parliament and which now we take for granted. And, although the law washed its hands of her if she deserted her husband or committed adultery, the law also had to cater for the wife's support in the event that, in the absence of behaviour of that kind, her husband predeceased her. I have already referred to her recovery of what had been her land, together with her receipt of paraphernalia. But such might be wholly insufficient for her maintenance. So the law developed the concept of dower; and the widow became a dowager. What she got by way of dower was a life interest, which endured beyond any remarriage on her part, in one third of her late husband's land. Some husbands tried to hide their land by putting it in the name of friends so as to defeat any future claim to dower on the part of their widows. The dower house which we see in the grounds of a stately home was, in these wealthy cases, a central part of the widow's one third; and there she usually lived for the rest of her life. For, following her husband's death, a widow's right to continue to occupy *his* home endured only long enough to enable her dower to be arranged, namely for only 40 days: that was called her quarantine and King John had assured it to her, albeit only for that period, by Article 7 of Magna Carta. If, however, a widow did not get dower, she

got a jointure, namely a guaranteed yearly income, generated by rentals from land, which, like dower, endured for the rest of her life.

16. In 1753, in the hall of All Souls College only two hundred yards from here, the great Sir William Blackstone delivered lectures which, 12 years later, formed the basis of his Commentaries on the Laws of England. They remain the first port of call for any legal historian today. Blackstone concluded Chapter 15 of Book One as follows:

“These are the chief legal effects of marriage during the coverture; upon which we may observe, that even the disabilities which the wife lies under, are for the most part intended for her protection and benefit. So great a favourite is the female sex of the laws of England.”

It is clear that, in that last sentence, Blackstone was not being ironic. In my edition of the Commentaries, printed in 1809, the doubtful editor adds a long footnote in which he explains why, in relation to women in general and wives in particular, Blackstone may there have attributed to English law what he calls “a glory which it may not justly deserve”.

17. The duty of a wife to obey her husband, cast upon Eve by God in the Garden of Eden according to the Book of Genesis and repeated by St.

Paul in his letter to the Ephesians, was, for about a thousand years, fiercely reflected in English law. Indeed remnants of it are still visible today. If you were to pick up the Book of Common Prayer at the back of a church, you would find that the priest asks the bridegroom “Wilt thou love her, comfort her, honour and keep her...?”. But he asks the bride “Wilt thou obey him, and serve him, love, honour and keep him...?”. An alternative marriage service, now generally in use in the Church of England, omits the bride’s promise to obey and serve the groom. But until only about 40 years ago the promise was quite commonly made; indeed in Sydney, of all places, the Anglican Church is currently proposing to invite the bride to promise to “submit” to the groom. Conversely, and intriguingly, did you notice that, in the prayer-book’s list of the bride’s promises, there is nothing corresponding to the groom’s promise to comfort her? Most modern husbands need their wives’ comfort. Perhaps the Anglican perception that it would only be the wife who would need comfort reflected Luther’s view – echoed in a High Court judgment which was extraordinary in that it was delivered as late as 1910 – that the wife was “the weaker vessel”.

18. One aspect of the wife’s duty of obedience under English law was reflected in the husband’s right to beat her. The law described it as “moderate correction”. The Norman law was that he could inflict any

violence on her apart from killing her, putting out her eye or breaking her arm. From the time of the accession of Charles II in 1660 the law became marginally less barbarous. The law however said one thing and some husbands, whether drunk, angry or plain vicious, did another. “A woman, a spaniel, a walnut-tree: the more you beat them, the better they be”; so ran a rhyme in the eighteenth century. But by then a popular mood against those who persistently or savagely beat their wives was taking hold; and crowds sometimes made a public spectacle of violent husbands by surrounding their home and subjecting them to what was called “rough music” with, for example, whistles, horns, rattles, saucepans and gongs. Although public sentiment was there running ahead of it, the law then, according to some legal historians, introduced a rule whereby a husband was prohibited from beating his wife with a stick or rod thicker than his thumb. So here, if this theory is correct, we find the rule of thumb. The husband’s right of moderate correction of the wife was abolished only in 1891. Since then all assaults by a husband upon a wife have been a criminal offence. But the pressures on a battered wife not to be responsible for securing the criminal conviction of her husband severely compromise enforcement of this area of the law.

19. In 1674 a relatively enlightened Chief Justice had controversially held that the husband’s right of moderate chastisement meant only that he

had a right to confine his wife to the house. As decent public opinion moved against domestic violence, husbands chose more often to lock their wives up instead. Thus in *Jane Eyre*, when she is at the altar and about to marry Mr Rochester, it is revealed that he already has a wife, a disturbed woman, whom he keeps locked in an attic. In 1840, in real life, a court held that a husband whose wife had deserted him and who, by a trick, had persuaded her to return home was entitled to keep her locked inside the house indefinitely. But in 1890 a similar case was decided the other way. As I will explain, wives had secured other great improvements in their legal position during that particular half century.

20. Another aspect of the wife's duty of obedience was reflected in the husband's right to force the wife to have sexual intercourse with him.

For centuries the law reflected the distaste of the early and mediaeval church for sex. St. Paul advised that it was better for people to be celibate, like him, but that, if they couldn't manage it, they had better get married and then do it; and St Jerome and St. Augustine were particularly hostile to sex. The only type of sexual activity which, even within marriage, the mediaeval church permitted was when the nature of the particular sexual act, and the circumstances in which it took place, were such as might lead to the conception of a child; and, although intended also to satisfy a husband's needs, the act was not supposed to be enjoyed,

particularly not by the wife. Such doctrines had effects on the law which unfortunately long outlived the doctrines themselves. Until Victorian times, most wives who had been physically forced by their husbands to have sex could not even leave them because, if they did so for that reason, they would not be entitled to maintenance and (being a subject to which I will return) they would lose custody of their children. John Stuart Mill wrote that the husband's slave had been in a better position to resist his sexual advances than was his wife. It was only in 1937 that cruelty, which could include sexual violence, became a free-standing ground for divorce. And it was as recently as 1991 that the House of Lords ruled that a husband who forced his wife to have sex with him committed the offence of rape: until then, and save when they were separated pursuant to a court order, the criminal law took the view that, by marrying him, the wife had given irrevocable consent to his having sex with her whenever he wanted it.

21. This subject leads seamlessly to the wife's sexual conduct outside her marriage, in other words to her adultery. Our law was for long ruthless in punishing a wife's adultery. It was regarded as the grossest possible act of disobedience to the husband. It often also made him a public laughing-stock. But, in particular, it placed a question-mark against the crucial biological link between him and his apparent male

heir; a husband's adultery, by contrast, had no such devastating effects. Views about a husband's adultery shifted during the centuries. From the Restoration of Charles II until the end of the reign of George IV, it was, at least in aristocratic circles, regarded as inevitable. A wife's adultery, however, was another matter. In 1650 Oliver Cromwell caused Parliament to pass the Adultery Act. Under it a wife was to be sentenced to death if she had committed adultery with anyone. But an adulterous husband was to be sentenced to death only if his adultery has been with a married woman; otherwise he was only to be imprisoned for three months. The wife's execution for adultery was a particularly neat solution for a husband because, in those days when he could not get a divorce, he was of course free to marry again following his wife's death. So Cromwell's Act was a particularly horrific sort of divorce law. But, upon the Restoration ten years later, the Act of 1650 lapsed.

22. The common law principle of coverture rendered the wife so helpless against her husband that a few fair-minded judges began to devise ways of intervening on her behalf. In mediaeval times a person who considered that he had suffered a wrong made a written request to the King to remedy it. These requests became so numerous that the King set up a committee to handle them; and in about 1542 the committee evolved into a court, namely the Court of Requests. It validated its

orders by sealing them with the King's privy seal, which meant his private seal. The court sat in Westminster Palace and the most distinguished of its judges, who were called Masters, was Sir Julius Caesar, who sat in the court between 1591 and 1606. The court also provided an admirable early version of free legal aid to poor litigants. Among the mass of different requests made to the court were a few by wronged wives. Thus in 1553 Dame Margery Acton complained that her husband, Sir Robert, had driven her from the home and had refused to maintain her. The court ordered him to pay her £30 per annum, to be handed over to her in four equal instalments at the font in the old St. Paul's Cathedral between 1:00 pm and 3:00 pm on each of four specified saints' days. And in 1595 Joan Spragin, who was separated from her husband, Martin, persuaded the court that, in order to deprive her of household goods which she had acquired by her hard work, Martin had persuaded a crony to obtain a judgment against him for a non-existent debt and then, by reference of course to the principle of coverture, had caused the crony to enforce the judgment by seizing her goods. This practice of pretending that you had a debt by getting a friend to obtain a judgment against you on phoney grounds which you did not challenge seems to have been quite widespread; indeed I wonder whether, faced with financial claims by their ex-wives, some ex-husbands play the same trick today without us judges always tumbling to it. At all events Sir

Julius Caesar ordered Martin to pay Joan ten pounds by way of damages. In 1642, however, the Court of Requests was suddenly and finally closed: for, at the start of the Civil War, Charles I brought the privy seal here to Oxford with the result that the court in Westminster could not issue any further valid orders.

23. At around the same time the law of equity, administered by the Lord Chancellor in the Court of Chancery, was developing, at least for wealthy families, a much more sophisticated way of mitigating the effects of coverture. The development was of the law of trusts and was to have effects, the significance of which is hard to overstate. Under the principle of coverture any property which, for example, a father gave outright to his daughter prior to, or following, her marriage of course went straight into the ownership of her husband. But equity allowed her father to avoid that result by transferring the property to trustees who would remain its legal owners but who would hold it for her benefit. Thus emerged the marriage settlement.

24. There was, for most people, no ability to obtain a divorce in England and Wales until 1857. This was very late in comparison with other, civil law, jurisdictions, including Scotland. Just as, in order to get married, people ran off to Gretna Green because of the requirement in

England after 1753 that a marriage had to take place in church, following the calling of banns on three Sundays, so too, prior to 1857, some people moved temporarily to Scotland in order to try to persuade stern Scottish judges to grant them a divorce. The ecclesiastical courts in England, which applied canon or Christian law, would grant a decree of nullity of the marriage if they could be persuaded that for some reason it had never been valid in the first place; and they could grant an innocent wife a decree of judicial separation, as an adjunct to which, taking their cue from the old Court of Requests, they could grant her maintenance. But a decree of judicial separation did not dissolve the marriage so it did not enable the parties to marry again.

25. For the very rich, however, there had been a way out. In 1670 Lord Roos persuaded Parliament to pass a specific Act to the effect that he and Lady Roos were thereby divorced; and, from then until 1857, there were on average about two such Acts of Parliament each year by which individual marriages were dissolved. But the cost of securing a divorce by Act of Parliament was out of reach of almost everybody. Already by then married people often separated; and a number of them lived with new partners without, of course, being able to get married to them.

26. Between about 1700 and 1850 there was an extraordinary practice among poorer people, albeit relatively uncommon, under which a husband sold his wife at a public auction. It was later vividly to be portrayed by Thomas Hardy in *The Mayor of Casterbridge*, in the opening chapter of which Michael Henchard sells his wife Susan to a sailor for a bid of five guineas. In law, of course, the sale of the wife did not dissolve the marriage; but the participants and the local community appear to have acted as if it did. Indeed most of the wives seem to have cooperated in their husbands' auction of them; some, like Hardy's Susan, almost welcomed it. What happened was that the husband put a rope around the wife's neck and led her to a market or fair, where she was auctioned and led away by the successful bidder. The sale was carefully and publicly documented; the price was usually a few guineas but occasionally it was a leg of mutton or a pint of beer.

27. What deterred an unhappy wife from leaving her husband was less that she would be held to have deserted him and so not be entitled to maintenance than that she would lose the children. At common law the husband had the sole right of custody of the children, however young they were, unless he was manifestly unfit to exercise it. In 1839, following a notorious case in 1836 in which Mrs Greenhill, a good mother of three young children, was obliged to surrender them into the custody of a bad

father, Parliament took the first, halting, step towards reform by providing that the courts could award custody of a child aged under seven to the mother and could grant her access to a child of any age. But this was subject to an exception which by now you will be able to guess: it was that, irrespective of whether the husband had committed adultery, a wife who had committed adultery was ineligible to secure such orders. It was only in 1925 that the last vestiges of the husband's right to keep the children following separation were swept away and issues about custody and access (or, as they are presently called, residence and contact) came to be resolved exclusively by reference to what was in the children's best interests.

28. I return to Parliament's introduction of divorce in 1857. The jurisdiction of the ecclesiastical courts in family matters was then abolished and the Court for Divorce and Matrimonial Causes (now the High Court, Family Division, in which I served for 12 years) was established. But even then the playing-field remained uneven as between husbands and wives. For, while the husband could obtain a divorce on the ground of the wife's adultery, she could obtain a divorce on the ground of his adultery only if she could also establish additional misconduct on his part, for example that he had been cruel to her or had deserted her. It was only in 1923 that this thread of discrimination

against a wife in relation to adultery was finally plucked from the fabric of the law: from then onwards the grounds for divorce were to be the same for husbands as for wives.

29. When in 1967 I started to practise at the bar, we family lawyers keenly felt the need for the court to have power in appropriate circumstances to order a husband to transfer some of his property to his wife following divorce. In decisions in and after 1962 the great Lord Denning had made a characteristically brazen attempt to stretch the law in order to serve the ends of justice. He had concluded that such a power was to be found in the Married Women's Property Act 1882. But in 1965 the House of Lords had held that, in so concluding, Lord Denning had been entirely out of order. I therefore assumed that the Act of 1882 was of very limited significance. My work on this lecture has shown me how wrong I was. Although, inevitably in the light of its date, it did not go so far as to confer on the court the power to transfer one spouse's property to the other, it kicked away the principal effects of coverture. It provided that a wife could, in her own right, acquire, hold and dispose of property; could enter into a contract; could, on her own, sue and be sued in contract, tort and otherwise; and could keep, or be ordered to pay, the damages, as the case may be. The years 1882 in relation to property and 1925 in relation to children are the key dates which mark the victory of

brave campaigners, including Mary Wollstonecraft back in 1792 and John Stuart Mill in 1869, for the rights of wives.

30. But, when I started in practice, one vestige of coverture still remained. It was the right of the husband to seek damages against the man who had committed adultery with his wife and whom he had cited as the co-respondent to his petition for divorce. Prior to 1857 it had been called an action for criminal conversation, being, of course, another word for intercourse. But could a wife claim damages against a woman with whom her husband had committed adultery? Of course not. In deciding whether damages, and if so how much, should be paid to the husband by the co-respondent, particularly of course if the wife had run off with him altogether, the court was required to conduct a bizarre exercise in which it sought to reflect in financial terms the lost value of the wife to the husband, together with the injury to his honour (which depended on how much he had had in the first place).

31. The right of a husband to claim damages against a co-respondent was abolished on 1 January 1971. It so happened that I was briefed to represent a husband in a claim for damages against a co-respondent which was heard on Monday 21 December 1970. It might well have been the last claim for damages against a co-respondent ever heard. It came before

Mr Justice Ormrod, a brilliant, impatient and progressive judge, who regarded such a claim as obscene. But, on the facts of the case and under the law as it then stood, I had a very strong case. In the end, with seething reluctance, the judge ordered the co-respondent to pay damages to my client. But the judge had the last laugh: for he assessed them at £100, to be paid at the rate of £10 a year for ten years.

32. It is however easy to overlook a significant legacy of coverture still generally operative in our society. I refer to surnames. This is not part of the law because, in law, whether married or not, adults can adopt – and choose for their children - whatever surname they want. But in the UK, unlike in Spain, it is still usual for the bride to adopt the groom's surname and thus for any child also to bear that name. On reflection it is the clearest imaginable way in which the husband continues to cover the wife up. A modern, non-discriminatory, alternative is to create, at any rate for the children even if not also for the couple themselves, a double-barrelled surname out of both of their surnames. But one cannot continue, down the generations, to add yet further barrels to surnames; so that solution gives rise to the knotty question of which name gets lopped off and at what stage.

33. We should surely conclude, however, that in substance the long struggle of wives for rights under our law equal to those of their husbands has prevailed. This we should all celebrate. Yet I leave you with these questions to which, I should stress, I offer no answers. Has the vindication of the rights of wives arrived too late? Is the institution of marriage on the way out? A steadily increasing number of people in the UK, currently almost six million, cohabit with members of the opposite sex otherwise than in marriage. In part this reflects a dramatic fall in the number of marriages: in 1968 463,000 marriages were celebrated in the UK but, by 2008, the figure had gone down to 273,000. Now that no social stigma attaches to a couple who live together without being married, nor to a child whose parents have never been married, what arguments in favour of marriage remain? Does marriage make us feel locked into a relationship and so, at times during what may well now be our very long lives, drive us to seek release from it all the more? Or, during a bad patch, does it deter us from ending a relationship which, had it endured, would have brought renewed and lasting benefit to each of us and to our children? The tax advantages of marriage have largely been abolished. The main financial effects of marriage are reflected in the hard-won rights and duties as between the parties to it which arise in the event of its dissolution. But the growth of pre-nuptial agreements indicates that even some couples who do want to enter into marriage do

not want such rights and duties to attend it; in other words, even they do not want marriage in its full legal sense. If Parliament allows gay couples to get married, that would to some extent counter the decline in the number of marriages; but it might mean that in some marriages couples would not wish to use the language of “wives” or “husbands” at all. So, ladies and gentlemen, will our great-grandchildren be asking our grandchildren: “In the old days what exactly was a wife?”.