THE LAW OF EVIDENCE IN CRIMINAL CASES,

AS ALTERED BY THE CRIMINAL EVIDENCE ACT 1898.

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THE PRINCIPLES OF THE LAW OF EVIDENCE PECULIAR TO CRIMINAL CASES.

SECOND EDITION.

THE

PRINCIPLES OF THE LAW OF EVIDENCE PECULIAR TO CRIMINAL CASES

AS ALTERED BY

THE CRIMINAL EVIDENCE ACT 1898,

WITH THE TEXT OF THAT STATUTE ANNOTATED AND REPORTS OF THE CASES DECIDED THEREUNDER.

BY ERNEST ARTHUR JELF, M.A.,

Of New College, Oxford; Barrister-at-Law of the Honourable Society of the Inner Temple and of the South-Eastern Circuit; Author of "Where to Find Your Law"; and Editor of "The Corrupt and Illegal Practices Prevention Acts 1883-1895."

"No person is to be required to explain or contradict until enough has been proved to warrant a reasonable and just conclusion against him in the absence of explanation or contradiction. But when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to which the proof tends be untrue, and the accused offers no explanation or contradiction, can human reason do otherwise than adopt the conclusion to which the proof tends?"

From a judgment of Abbott, C.J. (*see* page 17).

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PREFACE.

SINCE the Criminal Evidence Act 1898 has become law, the time for arguments as to its wisdom or unwisdom has passed away: and the sole wish of all those concerned in the administration of the Law must be so to work the Act that its practical effect may be to assist the attainment of Justice.

The Act must, of course, be carefully considered in relation to the previous Law of Evidence in Criminal Cases. There are certain principles of the Law of Evidence which are *peculiar* to Criminal Cases: and the Editor hopes that the short discussion of these principles and of the authorities establishing them, which here precedes the text of the Act itself, may be useful to those who have to apply what has recently been enacted in the light of the general rules which obtained before. The present edition of the book also contains the new procedure in criminal trials, which has been established by the Act: and the several important cases which have been decided since the first edition will be found not only noted

up under the sections to which they relate, but fully set forth according to the best available reports at the end of the volume.

The Editor is indebted to the kindness and the learning of Sir Harry Poland, Q.C., for many valuable suggestions.

ERNEST A. JELF.

4, TEMPLE GARDENS, TEMPLE
June, 1899.

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PRINCIPLES OF THE LAW OF EVIDENCE PECULIAR TO CRIMINAL CASES,

INCLUDING THE ALTERATIONS EFFECTED BY THE ACT OF 1898.

"It has been solemnly decided," said Best, J., in 1820, "that there is no difference between the rules of evidence in civil and criminal cases."

Rex v. *Burdett* (4 B. & Ald. 122).

"The rules of evidence," said Parke, B., in 1839, "must be the same in civil as in criminal cases."

Leach v. *Simpson* (5 M. & W. 312).

To these propositions there are certain recognised exceptions: but, before dealing with such exceptions, it will be best to make clearly understood what is the meaning of the propositions themselves.

What is *evidence to be heard* in criminal cases must not be confounded with what is *evidence to convict.* The distinction, which is the same as that which gives rise to the distinction between objections to the admissibility and to the weight of evidence, was made by

For text of Criminal Evidence Act, 1898 (*annotated*), *vide pp.* 46–57.

Coleridge, J., in 1837, in this connection. The propositions of Best, J., and Parke, J., are true only of what is *evidence to be heard.*

Reg. v. *Murphy* (8 C. & P. 303).

And, indeed, even with regard to *evidence to be heard,* the proposition that the rules of evidence must be the same in civil as in criminal cases is subject to certain exceptions, which will presently claim our attention. [*Vide infra,* p. 18.]

We will first show the distinction between civil and criminal cases as to what is *evidence to convict.*

THE DIFFERENCE BETWEEN CIVIL AND CRIMINAL CASES AS TO WHAT IS EVIDENCE TO CONVICT.

If there is a difference between civil and criminal cases as to what is evidence to convict, it remains for us to show what this difference is.

"In civil cases," said Willes, J., in 1858, "the preponderance of probability may constitute sufficient ground for a verdict."

Cooper v. *Slade* (6 H. L. Cas. 772).

Martin, B., in 1865, in summing up a criminal case to the jury, told them that, "in order to enable them to return a verdict against the prisoner, they must be satisfied beyond reasonable doubt of his guilt: and this as a conviction created in their minds not merely as a matter of probability: and if it was only a matter of probability, their duty was to acquit."

Reg. v. *White* (4 F. & F. 384) :—*vide* the learned notes appended by the reporters to this last case.

In the light of this distinction, let us now approach the subject of what is called "the presumption of innocence," which applies to the case of every man until he is proved to be guilty.

For text of Criminal Evidence Act, 1898 (*annotated*), *vide pp.* 46–57.

Bayley, J., in 1819, said: "The law presumes against the commission of crimes (and that even in civil cases) until the contrary be proved."

Rex v. *The Inhabitants of Twyning* (2 B. & Ald. 388).

"The presumption always is that a party complies with the law," said the same judge in 1826.

Sissons v. *Dixon* (5 B. & C. 758).

In consequence of this presumption, although the general rule is that in every issue the affirmative is to be proved, yet in a criminal case the old principle of the common law was to throw the onus upon the prosecution, even where their averments were negative. This was the law laid down by the Court of King's Bench so long ago as 1688.

Rex v. *Combs* (Comberbach, 57).

And Parker, C.J., in 1711, held accordingly, that in a criminal information for refusing to deliver up the rolls, the negative averment—viz., that the defendant did not deliver them up—lay upon the plaintiff.

Lord Halifax's case (Bull N. P. 298a).

Lord Ellenborough, C.J., in 1802, likewise said: "Where any act is required to be done on the one part so that the party neglecting it would be guilty of a *criminal* neglect of duty in not having done it, the law presumes the affirmative and throws the burden of proving the contrary—that is, in such case of proving a negative—on the other side."

Williams v. *The East India Co.* (3 East, 199).

For text of Criminal Evidence Act, 1898 (*annotated*), *vide pp.* 46–57.

There are now several statutory exceptions to this rule, of which the following are examples :—

By sect. 24 of the statute 2 & 3 Vict. c. 71,—"The Metropolitan Police Courts Act, 1839" :—

"Every person who shall be brought before any of the said magistrates charged with having in his possession or conveying in any manner anything which may be reasonably suspected of being stolen or unlawfully obtained, and who shall not give an account to the satisfaction of such magistrate how he came by the same, shall be deemed to be guilty of a misdemeanor. . . ."

In sect. 14 of the statute 11 & 12 Vict. c. 43,—"The Summary Jurisdiction Act, 1848," dealing with proceedings on the hearing of complaints and informations, there is the following proviso :—

"Provided always that if the information or complaint in any such case shall negative any exemption, exception, proviso, or condition in the statute on which the same shall be framed, it shall not be necessary for the prosecutor or complainant in that behalf to prove such negative, but the defendant may prove the affirmative thereof in his defence, if he would have advantage of the same."

By sects. 9, 10, 11, 13, 14, 16, 17, 18, 19, and 34 of the statute 24 & 25 Vict. c. 98,—"The Forgery Act, 1861," various offences are constituted which consist in making, using, engraving, purchasing, receiving, or knowingly having in custody or possession, etc., certain respective articles without lawful authority or excuse. Each of these sections contains, after the words "without lawful authority or excuse," these words also :—

"the proof whereof shall lie on the party accused."

Similarly, by sects. 6, 7, 8, 19, 23, 24, and 25 of the statute 24 & 25 Vict. c. 99,—"The Coinage Offences Act, 1861," various offences are constituted which consist in buying, selling, receiving, paying, putting off, importing, exporting, having in custody or possession, making, mending, or conveying out of Her

5

For text of Criminal Evidence Act, 1898 (*annotated*), *vide pp.* 46–57.

Majesty's Mint certain respective articles without lawful authority or excuse. Each of these sections contains, after the words "without lawful authority or excuse," these words also :—

"the proof whereof shall lie on the party accused."

By sect. 7 of the statute 38 & 39 Vict. c. 25,—"An Act to consolidate with amendments the Acts relating to the Protection of Public Stores" :—

"If any person is brought before a Court of summary jurisdiction charged with conveying or with having in his possession or keeping any of Her Majesty's stores reasonably suspected of being stolen or unlawfully obtained, and does not give an account to the satisfaction of the Court how he came by the same, he shall be deemed guilty of a misdemeanor. . . ."

By sect. 39, sub-sect. 2, of the statute 42 & 43 Vict. c. 49,—"The Summary Jurisdiction Act, 1879," it is enacted :—

"The following enactments shall apply to proceedings before Courts of summary jurisdiction (that is to say) . . .

"(2) Any exception, exemption, proviso, excuse, or qualification, whether it does or does not accompany in the same section the description of the offence in the Act, order, bye-law, regulation, or other document creating the offence, may be proved by the defendant, but need not be specified or negatived in the information or complaint, and, if so specified or negatived, no proof in relation to the matter so specified or negatived shall be required on the part of the informant or complainant."

By sect. 4, sub-sect. 1, of the statute 46 & 47 Vict. c. 3,—"The Explosive Substances Act, 1883" :—

"Any person who makes or knowingly has in his possession or under his control any explosive substance, under such circumstances as to give rise to a reasonable suspicion that he is not making it or does not have it in his possession or under his control for a lawful object, shall, unless he can show that he made it or had it in his possession or under his control for a lawful object, be guilty of felony. . . ."

6

For text of Criminal Evidence Act, 1898 (*annotated*) *vide pp.* 46–57.

Sect. 6 of the statute 50 & 51 Vict. c. 28,—"The Merchandise Marks Act, 1887," when a defendant charged with certain offences under the Act

"And proves"

certain things specified in the section,

"He shall be discharged from the prosecution, but shall be liable to pay the costs incurred by the prosecutor, unless he has given due notice to him that he will rely on the above defence."

57 & 58 Vict. c. 60, sect. 457,—"The Merchant Shipping Act, 1894."

"(1) If any person sends or attempts to send, or is party to sending or attempting to send, a British ship to sea in such an unseaworthy state that the life of any person is likely to be thereby endangered, he shall in respect of each offence be guilty of a misdemeanor, unless he proves either that he used all reasonable means to insure her being sent to sea in a seaworthy state, or that her going to sea in such an unseaworthy state was, under the circumstances, reasonable and justifiable . . .

"(2) If the master of a British ship knowingly takes the same to sea in such an unseaworthy state that the life of any person is likely to be thereby endangered, he shall in respect of each offence be guilty of a misdemeanor, unless he proves that her going to sea in such an unseaworthy state was, under the circumstances, reasonable and justifiable. . . ."

It is sometimes said that there is another exception to the rule that the onus lies upon the prosecution to prove every averment of the charge to the satisfaction of the jury. This is when, upon the trial an indictment for stealing property or receiving it well knowing it to have been stolen, the prisoner is proved to have been found in possession of property which has recently been stolen. And it is sometimes said that a new presumption then arises and shifts the onus. But whenever such new presumption arises, it should be regarded as one of fact and not of law.

For text of Criminal Evidence Act, 1898 (*annotated*), *vide pp.* 46–57.

Blackburn, J., sitting as a member of the Court for Crown Cases Reserved, in 1864, said: "Where it has been shown that the property has been stolen and has been found recently after its loss in the possession of the prisoner, *he* is called upon to account for having it, and on his failing to do so, the jury may very well infer that his possession was dishonest, and that he is either the thief or the receiver, according to circumstances."

Reg. v. *Langmead* (L. & C. 441).

All that this case decided was that the evidence was sufficient to justify the verdict. It is true that it is possible to read the words "he is called upon" as stating a proposition of law: and Bayley, J., in 1826, did use the phrase "rule of law" in this connection.

Anon (2 C. & P. 459.)

But the better opinion seems to be that the so-called rule, which calls upon a man who is found in possession of recently stolen property to give a reasonable account of how he came by it, is merely a rule of common sense which judges have recommended to juries.

"You may probably infer, gentlemen, that the circumstances call upon the prisoner for an explanation" is in this view a more correct way of directing the jury in a case where the prisoner is proved to have been found in possession of recently stolen property than "I must tell you, gentlemen, that under the circumstances the prisoner *is* called upon for an explanation."

By way of analogy we may refer to the remarks of the late Lord Bowen, in one of the judgments delivered by him when a member of the Court of Appeal, with regard to cases in which gross negligence is evidence of fraud.

Bowen, L. J., said in 1893 "If the case had been tried

with a jury the judge would have pointed out to them that gross negligence might amount to evidence of fraud, if it were so gross as to be incompatible with the idea of honesty, but that even gross negligence, in the absence of dishonesty, did not of itself amount to fraud. Cases of gross negligence in which Chancery judges decided that there had been fraud were piled up one upon another until at last a notion came to be entertained that it was sufficient to prove gross negligence in order to establish fraud."

Le Lievre v. *Gould* ([1893] 1 Q. B. 500.)

So here—although there has not been any such excuse for confusion as was afforded in that class of cases which the learned Lord Justice had under consideration by the circumstance that the Chancery Judges had to decide both law and fact—yet the result has been somewhat similar. Cases have been piled up in which judges have recommended to juries as a rule of common sense that unexplained possession of recently stolen property raises a presumption of guilt, until it has been imagined that the existence of this presumption is actually a rule of law.

The presumption is merely a presumption of fact. In a case where possession of recently stolen property is proved against the prisoner, the judge at the end of the case for the prosecution has to decide whether there is evidence to go to the jury. If there is *not,* he stops the case and directs an acquittal : if there is, he calls upon the prisoner—not in terms to account for having the stolen property, but to say what he pleases in his defence and to call his witnesses. Supposing that the prisoner, so called upon, gives no explanation, the judge, in summing up, still need not say a word about the prisoner's possession of the recently stolen property, nor as to the

onus: though, no doubt, in practice he would naturally call their attention to the fact of this unexplained recent possession as an element in the case for their decision.

The indictment in this, as in every other case, must be proved by the prosecution. The onus is upon the prosecution to prove that the prisoner stole the property; and the question is—*do* the facts prove this?

The case should not be regarded as any exception to the ordinary rule. Possession of recently stolen property must be regarded just like any other piece of circumstantial evidence: *e.g.*, possession of a deadly weapon, or something appertaining thereto, in a case of murder. Unexplained, it may, in the circumstances of the particular case, give rise to an irresistible inference that the prisoner is guilty. For instance, Lord Eldon in 1820 cited a case where a murder had been committed by shooting the deceased with a pistol, and it was proved that the wadding of the pistol was part of a letter belonging to the prisoner, the remainder of which was found upon his person.

Anon (1 Starkie's Evidence 4th ed., 844).

Compare again the case of base coin. The Court for the consideration of Crown cases reserved, held in 1816 that having a large quantity of base coin was evidence of having procured it with intent to utter it as good.

Rex v. *Fuller and Robinson* (Russ and Ry. 308).

The rule, even when regarded as a mere rule of common sense, which calls upon a man found in possession of recently stolen property to give a reasonable account of how he came by it, should always be applied

with great caution. From the day when "the cup was *found* in Benjamin's sack,"

Genesis xliv. 12.

to the day when an innocent man was convicted and hanged at Oxford for being *found* on a horse which had recently been stolen,

Hale's "Pleas of the Crown" (ed. 1800), Vol. II., p. 288.

there have been numerous instances of errors to show that the inference from "being *found* in possession" is one which may be pressed too far.

If the rule be a mere rule of common sense and the presumption only a presumption of fact which may be recommended to juries, it is obvious that precedents can be of no very great assistance.

What is "recent possession"? This is entirely a question for the jury in the circumstances of the particular case. A few cases may, however, be mentioned by way of illustration.

In a case where the prisoner was found in possession of woollen cloth in an unfinished state two months after it had been stolen, Patteson, J., said, in 1836: "I think the length of time is to be considered with reference to the nature of the articles which are stolen. If they are such as pass from hand to hand readily, two months would be a long time. But here that is not so. It is a question for the jury."

Rex v. *Partridge* (7 C. & P. 551).

Bayley, J., said, in a case of larceny of goods, in 1826:—

"I think that after so long a period as sixteen months

had elapsed, it would not be reasonable to call upon a prisoner to account for the manner in which property supposed to be stolen came to his possession."

Anon. (2 C. & P. 459).

When the only evidence against a prisoner charged with larceny, in stealing an axe, a saw, and a mattock, was that the stolen property was found in his possession three months after the loss of it, Parke, J., in 1829, directed an acquittal, without calling upon him for his defence.

Rex v. *Adams* (3 C. & P. 600).

So where a stolen horse was found in the possession of the prisoner six months after it was lost, and there was no other evidence against the prisoner, Maule, J., in 1852, said that he thought that there was no case to go to the jury.

Reg. v. *Cooper* (3 C. & K. 318).

Again, what is a reasonable explanation? This also must necessarily be a question of fact in each particular case.

Alderson, B., said, in 1844: "In cases of this nature you should take it as a general principle that, where a man in whose possession stolen property is found gives a reasonable account of how he came by it, as by telling the name of the person from whom he received it, and who is known to be a real person, it is incumbent on the prosecutor to show that that account is false, but if the account of the prisoner be unreasonable or improbable on the face of it, the onus of proving its truth lies on him. Suppose, for instance, a person were to charge me with stealing this watch and I were to say I bought

it from a particular tradesman whom I name, that is *primâ facie* a reasonable account, and I ought not to be convicted of felony, unless it is shown that the account is a false one."

Reg. v. *Crowhurst* (1 C. & K. 370).

Lord Denman, C. J., in 1845 said :—"I quite agree with the case of *Reg.* v. *Crowhurst,* which is very correctly reported. It was mentioned to me by Alderson B. at the time when it occurred. If a person in whose possession stolen property is found give a reasonable account of how he came by it, and refer to some known person, as the person from whom he received it, the magistrate should send for that person and examine him, as it may be that his statement may entirely exonerate the person accused and put an end to the charge; and it also very often may be that the person thus referred to would become a very important witness for the prosecution, by proving, in addition to the prisoner's possession of the stolen property, that he has been giving a false account as to how he came by it."

Reg. v. *Smith* (2 C. and K. 208).

But Pollock, C.B., in 1848, in summing up a case to the jury, told them that the rule on this matter was that the prosecutor was not bound to call persons named by the prisoner unless his account was evidently true, and it was for the prisoner to make out its truth by calling the man from whom he had bought the stolen property.

Reg. v. *Harmer* (2 Cox C. C. 487).

And, where the prisoner was indicted for stealing certain articles which were stolen from the prosecutor's

house on 2 November and sold by the prisoner on the night of 4 November in a room in a public-house in which there were about thirty persons and the prisoner told the constable that C. and D. brought the goods to his house and that E. would say so, and that being on the spree, he, the prisoner, sold the goods and spent the money, and C. had been subsequently convicted of stealing articles taken from the prosecutor's house at the same time when the articles in question were stolen, and neither C., D., nor E., though real persons and known to the constable, were called on the part of the prosecution, the Court for Crown Cases Reserved, in 1857, held that there was evidence for the jury upon which the prisoner might be convicted. Pollock, C.B., however, added: "But I should be sorry that upon such evidence any prisoner should be convicted before me."

Reg. v. *Wilson* (Dears. & B. 160).

Grove, J., and The Court for Crown Cases Reserved, in 1884, again held that it could not be laid down as necessary that however strong the circumstances might be against the prisoner, if he said he had received the goods from a third party, that party must be called.

Reg. v. *Ritson* (15 Cox C. C. 478).

The law, then, stands that, with the exceptions to which we have alluded and in the sense which we have explained, the prosecution must prove every averment, which is necessary to sustain the charge to the satisfaction of the jury.

We will now inquire what was the effect of the so-called "presumption of innocence" before the passing of the statute 61 & 62 Vict. c. 36 "The Criminal Evidence

For text of Criminal Evidence Act, 1898 (*annotated*),
vide pp. 46–57.

Act 1898," and what is to be its effect since the passing of that Act.

When a prisoner has been arraigned he stands at the bar "upon his deliverance": and he is, as we have seen, entitled to his deliverance unless the prosecution satisfies the jury beyond reasonable doubt of his guilt.

Previously to the passing of the Criminal Evidence Act 1898, no inference *could* logically be made by any person who understood the position from the failure of any person charged with an offence, or the husband or wife, as the case might be, of the person so charged, to give evidence in his own behalf, since, except in certain special cases, the law did not permit them to give any evidence at all.

But now, by sect. 1 of the statute 61 & 62 Vict. c. 36 "The Criminal Evidence Act 1898" it is enacted that:—"Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person"—subject to the provisions contained in that section.

The important question, therefore, arises whether any inference ought *now* to be made from the failure of any person charged with an offence, or of the wife or husband, as the case may be, of the person so charged, to give evidence for the defence? And if such an inference ought ever now to be made, when and under what conditions?

First observe, that whether such inference ought or ought not ever to be made, the Act itself provides that at any rate "the failure of any person charged with an offence, or of the wife or husband, as the case

may be, of the person so charged, to give evidence, shall not be *made the subject of any comment by the prosecution.*"

The question, however, remains—ought any *inference* ever to be *made at all* from his or their failure to give evidence?

The first proposition which upon this it is important to bear in mind is, that even now—since (in theory at least) the statute 61 & 62 Vict. c. 36, "The Criminal Evidence Act 1898" has not altered the law with regard to the presumption against crime—the onus remains upon the prosecution to satisfy the jury beyond reasonable doubt as to every averment which is necessary to sustain the charge made against the prisoner.

But the prosecution may, of course, so satisfy the jury by circumstantial evidence; and weight will, of course, be added to the circumstantial evidence when the judge is in a position to ask the jury, or the jury to ask themselves, "why, if he is innocent, does the prisoner not go into the box and swear so?"

The Court for Crown Cases Reserved held, in 1898, that it is left to the discretion of the individual judge to decide whether he shall comment or not.

Reg. v. *Rhodes* ([1899] 1 Q. B. 77).
[*Vide* full report at p. 63 *infra.*]

But the mere fact of the failure of the prisoner to give evidence is, of course, no reason for finding him guilty if the evidence, circumstantial or otherwise, does not satisfy the jury beyond reasonable doubt of his guilt.

The effect of the failure of one party to give evidence in a civil case is no criterion: for "in civil cases the preponderance of probability may constitute sufficient ground for a verdict."

Cooper v. *Slade* (6 H. L. Cas. 772).

For text of Criminal Evidence Act 1898 (*annotated*), *vide pp.* 46–57.

The onus in the case above alluded to, where the prisoner is proved to have been found in possession of recently stolen property, seems to stand in law just where it did before the passing of the Criminal Evidence Act 1898.

But now, of course, a judge may say, though the prosecution may not: "If the prisoner did not steal the property, why does he not go into the box and say how it came into his possession?"

If such an explanation is given, whether on oath or not, as that suggested by Alderson, B., in *Reg.* v. *Crowhurst* (1 C. & K. 370—*vide supra*, p. 12), it may be sufficient in common sense to shift back on to the prosecution any onus which common sense may have thrown upon the defence.

But as the whole question is one of fact, the failure of the person charged to give evidence on oath may, of course, be taken into consideration by them in forming their conclusion.

Abbott, C.J., said, in 1820: "No person is to be required to explain or contradict until enough has been proved to warrant a reasonable and just conclusion against him in the absence of explanation or contradiction; but when such proof has been given and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to which the proof tends be untrue, and the accused offers no explanation or contradiction, can human reason do otherwise than adopt the conclusion to which the proof tends?"

Rex v. *Burdett* (4 B. & Ald. 161).

THE DIFFERENCE BETWEEN CIVIL AND CRIMINAL CASES AS TO WHAT IS EVIDENCE TO BE HEARD.

The rules of evidence to be heard must in general, as we have seen, "be the same in civil cases as in criminal cases."
Leach v. *Simpson* (5 M. & W. 312).

But there are a number of definite exceptions with which we will proceed to deal under different headings.

Disqualification from Interest.

There are certain distinctions, which fall in principle under this heading, between the law of evidence applicable to civil and criminal cases respectively, but one thing is first to be observed.

Neither in civil nor in criminal cases does the mere fact of having an interest in the matter in question now disqualify a person for giving evidence. In this respect, therefore, there is no distinction between the law applicable to civil and that applicable to criminal cases. This appears from sect. 1 of the statute 6 & 7 Vict. c. 85, "An Act for Improving the Law of Evidence," commonly called "Lord Denman's Act." That section enacts:—

That no person offered as a witness shall hereafter be excluded by reason of incapacity from crime or interest from giving evidence, either in person or by deposition, according to the practice of the Court, on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or proceedings, civil or criminal, in any Court, or before any judge, jury, sheriff, coroner, magistrate, officer, or person, having by law or by consent of parties

For text of Criminal Evidence Act 1898 (*annotated*), *vide pp.* 46–57.

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authority to hear, receive, and examine evidence: but that every person so offered may and shall be admitted to give evidence on oath or solemn affirmation in those cases wherein affirmation is by law receivable notwithstanding that such person may or shall have an interest in the matter in question, or in the event of the trial of any issue, matter, question, or injury: or of the suit, action, or proceeding in which he is offered as a witness notwithstanding that such person offered as a witness may have been previously convicted of any crime or offence: provided that this Act shall not render competent any party to any suit, action or proceeding individually named in the record, or any lessor of the plaintiff or tenant of premises sought to be recovered in ejectment, or the landlord or other person in whose right any defendant in replevin may make cognizance, or any person in whose immediate and individual behalf any action may be brought or defended, either wholly or in part, or the husband or wife of such persons respectively: provided also that this Act shall not repeal any provision in a certain Act passed in the session of Parliament holden in the seventh year of the reign of his late majesty and in the first year of the reign of her present majesty, intituled "An Act for the Amendment of the Laws with respect to Wills": provided that in Courts of Equity any defendant to any cause pending in any such Court may be examined as a witness on the behalf of the plaintiff or of any co-defendant in any such cause, saving just exceptions: and that any interest which such defendant so to be examined may have in the matters or any of the matters in question in the cause shall not be deemed a just exception to the testimony of such defendant, but shall only be considered as affecting or binding to affect the credit of such defendant as a witness.

But it will appear from a perusal of this section that there are two classes of interested persons who were excluded from the operation of this enactment—viz., the parties themselves and the husbands and wives of the parties. The position of both of these classes depends upon subsequent statutes.

As to both of these classes, there are distinctions between the law of evidence now in force applicable to civil and that applicable to criminal cases.

For text of Criminal Evidence Act 1898 (*annotated*), *vide pp.* 46–57.

First, as to the parties themselves :—

In civil cases no person is now excluded by reason of his or her being a party from being a witness, not only competent, but compellable, for either side. This appears from sect. 2 of the statute 14 & 15 Vict. c. 99, "An Act to amend the Law of Evidence," commonly called "Lord Brougham's Act (No. 2)." This section enacts :—

> On the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any court of justice, or before any person having by law, or by consent of parties authority to hear, receive and examine evidence, the parties thereto, and the persons in whose behalf any such suit, action or other proceeding may be brought or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either *viva voce* or by deposition, according to the practice of the court, on behalf of either or any of the parties to the said suit, action, or other proceeding.

Sect. 3 of the same enacts :—

> But nothing herein contained shall render any person who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable for or against himself or herself, or shall render any person compellable to answer any question tending to criminate himself or herself. . . .

In criminal cases the prisoner is now a competent witness, but is not a compellable witness. This appears from sect. 1 of the statute 61 & 62 Vict. c. 36,—"The Criminal Evidence Act 1898," which enacts *inter alia* that "every person charged with an offence . . . shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person," subject to the provisions contained in the section.

But by sect. 1 (*b*) "A person so charged shall not be called as a witness, except upon his own application."

For text of Criminal Evidence Act 1898 (*annotated*), *vide pp.* 46–57.

Next, as to the husbands and wives of parties:—

In civil cases the husbands and wives of the parties are now competent and compellable witnesses, except that any communication made by the one to the other during the marriage is privileged.

This appears from the statute 16 & 17 Vict. c. 83,— "An Act to amend an Act of 14 & 15 Vict. c. 99."

By sect. 1:—

"On the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any Court of Justice, or before any person having by law or by consent of parties authority to hear, receive and examine evidence, the husbands and wives of the parties thereto and of the persons in whose behalf any such suit, action, or other proceeding may be brought or instituted, or opposed or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either *viva voce* or by deposition according to the practice of the court, on behalf of either or any of the parties to the said suit, action, or other proceeding."

By sect. 2 of the same:—

"Nothing herein shall render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband in any criminal proceeding . . . "

By sect. 3 of the same:—

"No husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage."

In criminal cases the wife or husband of the person charged are now *competent* witnesses for the defence, but may not—save in certain specified cases—be called except upon the application of the person so charged. Whether they are compellable witnesses—*i.e.*, whether they can be called without their own consent as witnesses

For text of Criminal Evidence Act 1898 (*annotated*), *vide pp.* 46–57.

under the statute 61 & 62 Vict. c. 36,—"The Criminal Evidence Amendment Act 1898," is doubtful; but probably not. Wills, J., in a case *under sect.* 4 which came before him in 1899, inclined to this opinion.

Reg. v. *Brazil* (Law Journal, 4 March, 1899, p. 132). [*Vide* full report at p. 69 *infra*].

By sect. 1 of the statute 61 & 62 Vict. c. 36,—"The Criminal Evidence Act 1898," it is enacted *inter alia* that . . . "The wife or husband, as the case may be, of the person so charged shall be a competent witness for the defence at every stage of the proceedings" . . . subject to the provisions contained in the section.

But by sect. 1 (*c*) "The wife or husband of the person charged shall not, save as in this Act mentioned, be called as a witness except upon the application of the person so charged." The prosecution therefore cannot, "save as in this Act mentioned," call the husband or wife of the prisoner.

"Save as in this Act mentioned" refers to three classes of exceptions: (1) To the scheduled sections of statutes 5 Geo. 4, c. 83,—"The Vagrancy Act, 1824": 8 & 9 Vict. c. 83,—"The Poor Law Scotland Act, 1845": 24 & 25 Vict. c. 100,—"The Offences against the Person Act, 1861": 45 & 46 Vict. c. 75,—"The Married Women's Property Act, 1882": 47 & 48 Vict. c. 14,—"The Married Women's Property Act, 1884": 48 & 49 Vict. c. 69,—"The Criminal Law Amendment Act, 1885": and 57 & 58 Vict. c. 41,—"The Prevention of Cruelty to Children Act, 1894." *Vide* pp. 71–97 *infra*, where the sections of these statutes referred to are set out in an Appendix. (2) To cases 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. *Vide* p. 54 *infra*, where these cases are collected. (3) To cases of any indictment or other proceeding (under the Evidence Act, 1877) for the non-repair of any public highway or bridge, or for a nuisance to any public highway, river, or bridge, and of any other indictment or proceeding instituted for the purpose of trying or enforcing a civil right only.

And by sect. 1 (*d*) "Nothing in this Act shall make a husband compellable to disclose any communication made to him by his wife during the marriage, or a wife compellable to disclose any communication made to her by her husband during the marriage."

This preserves the privilege given by sect. 3 of the statute 16 & 17 Vict. c. 83 "An Act to amend an Act of 14 & 15 Vict. c. 99." *Vide* p. 21 *supra.*

Cross-Examination.

In civil cases any party or other witness called by one side may be cross-examined as to his credit by the other side. The only limitation imposed upon this rule is that the right to cross-examine is subject to The Rules of the Supreme Court, 1883, Order XXXVI., Rule 38. By that rule, "The judge may in all cases disallow any questions put in cross-examination of any party or other witness which may appear to him to be vexatious and not relevant to any matter proper to be inquired into in the cause or matter."

The rule is very seldom applied: but Chitty, J., in 1886, disallowed under it a question which suggested an issue of fraud, which had not been raised upon the pleadings. And he was subsequently upheld in the Court of Appeal by Cotton, Lindley, and Bowen, L.JJ.

Lever and Co. v. *Goodwin Bros.* (W. N. [1887] 107).

For text of Criminal Evidence Act 1898 (*annotated*), *vide pp.* 46–57.

In a civil case, then, the law is that unless the judge disallows the question under the rule last mentioned, a witness may be generally cross-examined to his credit: and in particular "a witness in any cause may be questioned as to whether he has been convicted of any felony or misdemeanour, and upon being so questioned, if he either denies the fact or refuses to answer, it shall be lawful (by section 25 of statute 17 & 18 Vict. c. 125, the Common Law Procedure Act, 1854) for the opposite party to prove such conviction."

In a criminal case also every witness *other than* a person charged and being a witness under the statute 61 & 62 Vict. c. 36 "The Criminal Evidence Act 1898" is liable to be cross-examined to his credit, and may also "be questioned as to whether he had been convicted of felony or misdemeanour, and being so questioned, if he either denies, or does not admit the fact, or refuses to answer, it shall be lawful (by sect. 6 of the statute 28 Vict. c. 18 'An Act for amending the Law of Evidence and Practice in Criminal Trials,' commonly called 'Mr. Denman's Act') for the cross-examining party to prove such conviction." But there is one witness in a criminal case whose position as regards cross-examination is very different; and that is a person charged and being a witness under the statute 61 & 62 Vict. c. 36,—"The Criminal Evidence Act 1898."

For, by sect. 1 (*f*), "a person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed, or been convicted of or been charged with, any offence other than that wherewith he is then charged, or is of bad character, unless

"(i.) the proof that he has committed or been convicted of such other offence is admissible evidence to show

that he is guilty of the offence wherewith he is then charged; or

"(ii.) he has personally or by his advocate asked questions of the witnesses for the prosecution, with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or

"(iii.) he has given evidence against any other person charged with the same offence."

As an instance of (i.) we may mention the case of a prosecution in 1899 for offences under the statute 37 & 38 Vict. c. 36 "The False Personation Act 1874," in which Sir Forrest Fulton, Q.C. (the Common Serjeant) allowed cross-examination as to other transactions of a similar nature to that of the offences charged in the indictment.

Reg. v. *Senior* (Law Journal, 18th Feb., 1899).
[*Vide* full report at p. 68 *infra*].

Other cases in which such evidence is admissible at common-law are collected in the note to this section at p. 50 *infra*: and in the same note, Sect. 19, of the statute 34 & 35 Vict. c. 112 "The Prevention of Crimes Act 1871" is set out. This section affords another instance of a case in which the proof that he has committed or been convicted of such other offence is admissible evidence to show that the prisoner is guilty of the offence wherewith he is charged.

As an instance of (ii.) we may refer to the case in which Darling, J., in 1899, allowed cross-examination as to previous convictions for stabbing where the prisoner in her evidence had suggested that one of the witnesses

for the prosecution had committed the murder with which the indictment charged her.

Reg. v. *Marshall* (Law Journal, 21st Jan., 1899).
[*Vide* full report at p. 66 *infra*].

And to the case in which Day, J., in 1899, allowed cross-examination as to previous convictions where the prisoner, who was charged with rape, had suggested in his evidence that the prosecutrix had consented.

Reg. v. *Fisher* (Law Journal, 18th Feb., 1899).
[*Vide* full report at p. 70 *infra*].

ESTOPPELS AND CONFESSIONS.

The doctrine of estoppel has a much larger operation in civil proceedings than in criminal proceedings.

See Best on Evidence (8th ed. 1893) p. 75.

For instance, in a case before Le Blanc, J., at York, a prisoner, who was charged upon the indictment with bigamy, confessed the first marriage: but it afterwards appeared that the marriage was void for the want of the consent of the woman's guardian, and the prisoner was acquitted.

Anon. (3 Starkie's Evidence, ed. 1842, p. 894, n).

In a civil case Lord Ellenborough, C.J. said, in 1807: "If a fact is admitted by the attorney on the record with intent to obviate the necessity of proving it, he must be supposed to have authority for this purpose and his client will be bound by the admission."

Young v. *Wright* (1 Camp. 139).

But in a criminal case, where the attorneys on both sides had agreed that the formal proofs should be

dispensed with, Lord Abinger, C.B., in 1838, nevertheless acquitted the prisoner for want of these formal proofs.

Reg. v. *Thornhill* (8 C. & P. 575).

Again, in a criminal case confessions by the prisoner may be inadmissible as evidence for reasons which would not exclude them in a civil case.

"By the law of England," said Parke, B., in 1852, "in order to render a confession admissible in evidence, it must be perfectly voluntary: and there is no doubt that any inducement by way of a promise or a threat by a person in authority vitiates a confession."

Reg. v. *Baldry* (2 Den. C. C. 430).

Gurney, B., in 1833, said that "It would have been better if you had told at first" was an inducement to confess which rendered a statement made thereupon inadmissible.

Rex v. *Walkley and Clifford* (6 C. & P. 175).

Patteson, J., in 1834, decided that "You had better split and not suffer for all of them" was such an inducement to confess as will exclude what the prisoner afterwards said.

Rex v. *Thomas* (6 C. & P. 353).

Lord Coleridge, C.J., and the Court for Crown Cases Reserved, in 1885, decided that where the prosecutor had said "You had better tell the truth; it may be better for you," this was sufficient to exclude a confession made immediately afterwards.

Reg. v. *Fennell* (7 Q. B. D. 147).

But on the other hand the Court for Crown Cases Reserved, in 1881, decided that "I am going to ask you

a very serious question, and I hope you will tell me the truth in the presence of the Almighty" was not such an inducement as to exclude a confession made thereon.

Rex v. *Wild* (1 Moo. C. C. 452).

The promise or threat must be made by a person in authority.

The Court for Crown Cases Reserved, in 1836, decided that the prosecutor's wife was a person in authority.

Rex v. *Upchurch* (1 Moo. C. C. 465).

Channell, B., in 1865, decided that a "searcher" of female prisoners at the gaol was a person in authority.

Reg. v. *Windsor* (4 F. & F. 360).

The Court for Crown Cases Reserved held, in 1852, that the wife of the person in whose house the offence was committed, but who was not the prosecutor, was not a person in authority.

Reg. v. *Moore* (2 Den. C. C. 523).

The same Court, in 1853, decided that the married daughter of the prosecutor, who did not live in his house, was not a person in authority.

Reg. v. *Sleeman* (1 Dears. C. C. 249).

Opening a Case Without Evidence.

In civil cases nothing must be opened to the jury which it is not intended to substantiate by proof. "You have no right," said Parke, B., in 1835, to defendant's counsel opening his case, "to open as facts any matters which you cannot prove. It is often done, but it is irregular."

Stevens v. *Webb* (7 C. & P. 61).

For text of Criminal Evidence Act 1898 (*annotated*), *vide pp.* 46–57.

"I think," said Lord Denman, C.J., in 1837, "that counsel ought not to state anything they do not intend to prove."

Duncombe v. *Daniell* (8 C. & P. 227).

In criminal cases, "if a prisoner does not employ counsel," said Coleridge, J., in 1837, "he is at liberty to make a statement for himself and tell his own story, which is to have such weight with the jury as, all circumstances considered, it is entitled to. But, if he employs counsel, he must submit to the rules which have been established with respect to the conducting of cases by counsel."

Reg. v. *Henry Beard* (8 C. & P. 142).

Stamp Objections.

In civil cases (by sect. 14 of statute 54 & 55 Vict. c. 39, "The Stamp Act 1891"), except where the Act allows instruments to be stamped after their execution upon payment of a penalty, an instrument executed in any part of the United Kingdom, or relating, wheresoever executed, to any property situate or to any matter or thing done or to be done in any part of the United Kingdom, is not to be given in evidence or to be available for any purpose whatever unless it is duly stamped in accordance with the law in force at the time when it was first executed.

In criminal cases no such rule applies.

By sect. 17 of the statute 17 & 18 Vict. c. 83, "The Stamp Act 1854," it was provided that every instrument liable to stamp duty should be admitted in evidence in any criminal proceedings, although it might not have the stamp required by law impressed thereon and affixed.

For text of Criminal Evidence Act 1898 (*annotated*), *vide pp.* 46–57.

This section is repealed by sect. 2 of the statute 33 & 34 Vict. c. 99, "The Inland Revenue Repeal Act": but it is in effect re-enacted by the above-cited sect. 14 of the statue 54 & 55 Vict. c. 39, "The Stamp Act 1891," which contains the words "except in criminal proceedings."

General Character.

In civil cases evidence of general character is not admissible, when character is not of the substance of the issue. Thus Buller, J., in 1789, decided that in an ejectment by an heir-at-law to set aside a will for fraud and imposition committed by the defendant, he was not to be permitted to call witnesses to prove his general good character.

Goodwright d. Faro v. *Hicks* (Bull. N. P. 296).

And in an information in the Court of Exchequer against the defendant for keeping false weights, Eyre, C.B., in 1791, refused to admit evidence of the defendant's character. "I cannot admit this evidence in a civil suit. The offence imputed by the information is not in the shape of a crime."

The Attorney-General v. *Bowman* (2 B. & P. 532, n).

In criminal cases a prisoner is entitled to give evidence of his general character. Cockburn, C.J., in 1865, having stated this as the rule laid down in the books, proceeded: "What does that mean? I think it means evidence of reputation only." Such evidence, he further concluded, was rebuttable by evidence of bad character, which must be similarly general in its nature.

Reg. v. *Rowton* (34 L. J. M. C. 60).

It is to be noted also that *in certain cases* if the

For text of Criminal Evidence Act 1898 (*annotated*), *vide pp.* 46–57.

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prisoner gives evidence of his good character, the prosecution may prove certain previous convictions against him. These cases are dealt with in the statutes 6 & 7 Will. 4, c. 111; 24 & 25 Vict. c. 96; and 24 & 25 Vict. c. 99.

The statute 6 & 7 Will. 4, c. 111 "An Act to present the fact of a previous conviction being given in evidence to the jury on the case before them, except when evidence to character is given," enacts as follows:—

Whereas, by an Act passed in the seventh and eighth years of the reign of King George IV., intituled "An Act for further improving the administration of justice in criminal cases," provision is made for the more exemplary punishment of offenders who shall commit any felony not punishable with death after a previous conviction for felony: and, whereas, since the passing of the said Act the practice has been on the trial of any person for any such subsequent felony to charge the jury to inquire at the same time concerning such previous conviction: and, whereas, doubts may be reasonably entertained whether such practice is consistent with a fair and impartial inquiry as regards the matter of such subsequent felony, and it is expedient that such practice should from henceforth be discontinued. Be it therefore enacted by the King's most excellent Majesty, by and with the advice, &c.: That from and after the passing of this Act it shall not be lawful on the trial of any person for any such subsequent felony to charge the jury to inquire concerning such previous conviction until after they shall have inquired concerning such subsequent felony, and shall have found such person guilty of the same: and, whenever in any indictment such previous conviction shall be stated, the reading of such statement to the jury as part of the indictment shall be deferred until after such finding as aforesaid. Provided, nevertheless, that if upon the trial of any person for any such subsequent felony as aforesaid such person shall give evidence of his or her good character, it shall be lawful for the prosecutor, in answer thereto, to give evidence of the indictment and conviction of such person for such previous felony before such verdict of guilty shall have been returned, and the jury shall inquire concerning such previous conviction for felony at the same time that they inquire concerning the subsequent felony.

For text of Criminal Evidence Act 1898 (*annotated*), *vide pp.* 46–57.

By sect. 116 of the statute 24 & 25 Vict. c. 96, "The Larceny Act 1861," it is enacted (*inter alia*) that

The proceedings upon any indictment for committing any offence after a previous conviction or convictions shall be as follows (that is to say), the offender shall, in the first instance, be arraigned upon so much only of the indictment as charges the subsequent offence, and if he plead not guilty, or if the Court order a plea of not guilty to be entered on his behalf, the jury shall be charged in the first instance to inquire concerning such subsequent offence only: and if they find him guilty, or if on arraignment he plead guilty, he shall then, and not before, be asked whether he had previously been convicted as alleged in the indictment, and if he answer that he had been so previously convicted the Court may proceed to sentence him accordingly, but if he deny that he had been so previously convicted, or stand mute of malice, or will not answer directly to such question, the jury shall then be charged to inquire concerning such previous conviction or convictions, and in such case it shall not be necessary to swear the jury again, but the oath already taken by them shall for all purposes be deemed to extend to such last-mentioned inquiry: provided that if upon the trial of any person for any such subsequent offence such person shall give evidence of his good character, it shall be lawful for the prosecutor, in answer thereto, to give evidence of the conviction of such person for the previous offence or offences before such verdict of guilty shall be returned, and the jury shall inquire concerning such previous conviction or convictions at the same time that they inquire concerning such subsequent offence.

Sect. 37 of the statute 24 & 25 Vict. c. 99, "The Coinage Offences Act 1861," contains the same words.

Witnesses Absent from the Trial.

In civil cases it is provided by the Rules of the Supreme Court, 1883, Order XXXVII., Rule 5, that "The Court or a judge may, in any cause or matter where it shall appear necessary for the purposes of justice, make any order for the examination upon oath

before the Court or judge or any officer of the Court, or any other person, and at any place, of any witness or person, and may empower any party to any such cause or matter to give such deposition in evidence therein on such terms, if any, as the Court or a judge may direct."

In criminal cases this rule does not exist, and there is no means in criminal cases of examining witnesses otherwise than at the trial so as to read their depositions at the trial, except when the depositions are taken by a justice or justices of the peace in accordance with the provisions of the statutes 11 & 12 Vict. c. 42, and 31 & 32 Vict. c. 35, to which we shall presently refer.

In civil cases again what a witness has once stated on oath in a judicial proceeding may, if that witness cannot possibly be produced again, be given in evidence, provided the inquiry be substantially the same on both occasions and between the same parties. Thus in an action of ejectment in 1835, where a deceased witness had given evidence in a former action of ejectment between the same parties but concerning different land, Tindal, C.J., had no doubt that secondary evidence of the examination of this witness was admissible, the question being the same in both actions, viz., who was the heir at law of Mrs. Travers.

> *Doe dem. Foster* v. *The Earl of Derby* (1 Ad. & E. 791, n).

In criminal cases, upon the same principle, the depositions taken in the proceedings against a prisoner before the magistrates were under similar circumstances admissible at common law upon the trial of an indictment. But this matter is now regulated by the statutes 11 & 12 Vict. c. 42, and 30 & 31 Vict. c. 35.

For text of Criminal Evidence Act 1898 (*annotated*), *vide pp.* 46–57.

By sect. 17 of the statute 11 & 12 Vict. c. 42, "An Act to facilitate the performance of the duties of justices of the peace out of sessions within England and Wales with respect to persons charged with indictable offences," it is enacted as follows:—

"That in all cases where any person shall appear or be brought before any justice or justices of the peace charged with any indictable offence, whether committed in England or Wales, or upon the high seas, or on land beyond the sea, or whether such person appear voluntarily upon summons or have been apprehended, with or without warrant, or be in custody for the same or any other offence, such justice or justices before he or they shall commit such accused person to prison for trial, or before he or they shall admit him to bail, shall, in the presence of such accused person, who shall be at liberty to put questions to any witness produced against him, take the statement on oath or affirmation of those who shall know the facts and circumstances of the case, and shall put the same into writing, and such deposition shall be read over to and signed respectively by the witnesses who shall have been so examined, and shall be signed also by the justice or justices taking the same: and the justice or justices before whom any such witness shall appear to be examined as aforesaid shall, before such witness is examined, administer to such witness the usual oath or affirmation, which such justice or justices shall have full power and authority to do: and if upon the trial of the person so accused as first aforesaid it shall be proved, by the oath or affirmation of any credible witness, that any person whose deposition shall have been taken as aforesaid is dead, or so ill as not to be able to travel, and if it also be proved that such deposition was taken in the presence of the person so accused, and that he or his counsel or attorney had a full opportunity of cross-examining the witness, then, if such deposition purport to be signed by the justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution, without further proof thereof, unless it shall be proved that such deposition was not in fact signed by the justice purporting to sign the same."

By sect. 3 of the statute 30 & 31 Vict. c. 35, "An Act

to remove some defects in the administration of the Criminal Law," it is provided :—

"And whereas complaint is frequently made by persons charged with indictable offences, upon their trial, that they are unable by reason of poverty to call witnesses on their behalf, and that injustice is thereby occasioned to them : and it is expedient to remove, as far as practicable, all just ground for such complaint : therefore in all cases where any person shall appear or be brought before any justice or justices of the peace, charged with any indictable offence, whether committed within this realm or upon the high seas or upon land beyond the sea, and whether such person appear voluntarily upon summons, or has been apprehended with or without warrant, or be in custody for the same or any other offence, such justice or justices, beforehe or they shall commit such accused person for trial or admit him to bail, shall, immediately after obeying the directions of the 18th section of the Act 11 & 12 Vict. c. 42, demand and require of the accused person whether he desires to call any witness : and if the accused person shall in answer to such demand, call or desire to call any witness or witnesses, such justice or justices shall, in the presence of such accused person, take the statement on oath or affirmation, both examination and cross-examination, of those who shall be called as witnesses by such accused person, and who shall know anything relating to the facts and circumstances of the case tending to prove the innocence of such accused person, and shall put the same into writing : and such depositions of such witnesses shall be read over to and signed respectively by the witnesses who shall have been so examined, and shall be signed also by the justice or justices taking the same, and transmitted in due course of law with the depositions, and such witnesses, not being witnesses merely to the character of the accused, as shall in the opinion of the justice or justices give evidence in any way material to the case or tending to prove the innocence of the accused person, shall be bound by recognisance to appear and give evidence at the said trial : and afterwards, upon the trial of such accused person, all the laws now in force relating to the depositions of witnesses for the prosecution shall extend and be applicable to the depositions of witnesses hereby directed to be taken."

By sect. 6 of the same Act it is provided :—

"And whereas by the 17th section of the Act 11 & 12 Vict. c. 42

For text of Criminal Evidence Act 1898 (*annotated*), *vide pp.* 46–57.

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it is permitted under certain circumstances to read in evidence on the trial of an accused person the deposition taken in accordance with the provisions of the said Act of a witness who is dead or so ill as to be unable to travel: and whereas it may happen that a person dangerously ill and unable to travel may be able to give material and important information relating to an indictable offence, or to a person accused therof, and it may not be practicable or permissible to take, in accordance with the provisions of the said Act, the examination or deposition of the person so being ill, so as to make the same available as evidence in the event of his or her death before the trial of the accused person: and it is desirable in the interest of truth and justice that means should be provided for perpetuating such testimony, and for rendering the same available in the event of the death of the person giving the same: therefore, whenever it shall be made to appear to the satisfaction of any justice of the peace that any person dangerously ill, and in the opinion of some registered medical practitioner not likely to recover from such illness, is able and willing to give material information relating to any indictable offence, or relating to any person accused of any such offence, and it shall not be practicable for any justice or justices of the peace to take an examination or deposition in accordance with the provisions of the said Act of the person so being ill, it shall be lawful for the said justice to take, in writing, the statement on oath or affirmation of such person so being ill, and such justice shall thereupon subscribe the same, and shall add thereto, by way of caption, a statement of his reason for taking the same, and of the day and place when and where the same was taken, and of the names of the persons (if any), present at the taking thereof, and if the same shall relate to any indictable offence for which any accused person is already committed or bailed to appear for trial, shall transmit the same with the said addition to the proper office of the court for trial, at which such accused person shall have been so committed or bailed: and in all other cases he shall transmit the same to the clerk of the peace of the county, division, city, or borough in which he shall have taken the same, who is hereby required to preserve the same and file it of record: and if afterwards, upon the trial of any offender or offence to which the same may relate, the person who made the same statement shall be proved to be dead, or if it shall be proved that there is no reasonable probability that such person will ever be able to travel or to give

For text of Criminal Evidence Act 1898 (*annotated*), *vide pp.* 46–57.

evidence, it shall be lawful to read such statement in evidence, either for or against the accused, without further proof thereof, if the same purports to be signed by the justice by or before whom it purports to be taken, and provided it be proved to satisfaction of the Court that reasonable notice of the intention to take such statement has been served upon the person (whether prosecutor or accused), against whom it is proposed to be read in evidence, and that such person or his counsel or attorney, had, or might have had, if he had chosen to be present, full opportunity of cross-examining the deceased person who made the same.

Dying Declarations.

All of the preceding exceptions to the general rule, which states that the law of evidence is the same in civil as in criminal cases, are based upon the principle that more indulgence is to be given to a prisoner upon his defence *in favorem vitæ et libertatis* than to any other litigant.

The rule concerning dying declarations, which obtains only in cases of homicide, has an entirely different object. "Evidence of this sort," says East, "is admissible on the fullest necessity, for it often happens that there is no third person present to be an eye witness to the fact: and the usual witness on occasion of other felonies, namely, the party injured himself, is gotten rid of."

East's "Pleas of the Crown," vol. I., p. 353.

"The principle upon which this species of evidence is received," said Eyre, B., in 1784, "is that the mind, impressed with the awful idea of approaching dissolution, acts under a sanction equally powerful with that which it is presumed to feel by a solemn appeal to God upon an oath. The declarations, therefore, of a person dying

under such circumstances are considered as equivalent to the evidence of the living witness upon oath."

Rex v. *Drummond* (1 Leach, 337).

In civil cases the rule of dying declarations has no application. This was decided by the Exchequer Chamber in 1836.

Stobart v. *Dryden* (1 M. & W. 627).

In criminal cases "evidence of this description," as Abbot, C.J., and the Court of King's Bench, laid it down in 1824, "is only admissible when the death of the deceased is the subject of the charge and the circumstances of the death the subject of the dying declaration."

Rex v. *Mead* (2 B. & C. 608).

The conditions of admissibility are lucidly stated by Brett, J., in 1869. "I take the law," said he, "to be that two facts must concur: *first,* that the deceased was, at the time of making the statement, in such a condition that his death was imminent and impending, *and* that he was in danger of dying in a short time, *without hope of recovery.* If these two circumstances are proved, I think the statement is admissible."

Reg. v. *Bernadotti* (11 Cox C. C. 316).

Coleridge, J., in 1836, admitted the dying declaration of the deceased in a case of manslaughter in favour of the prisoner.

Rex v. *Scaife* (1 Moo. & Rob. 551).

PROCEDURE UNDER THE STATUTE

61 & 62 Vict. c. 36,

"THE CRIMINAL EVIDENCE ACT 1898."

There are four matters in respect of which the statute 61 & 62 Vict. c. 36, "The Criminal Evidence Act 1898," directly touches the law of procedure in criminal trials as distinct from the law of evidence proper.

The first is the prohibition of *comment* by counsel on the failure of the person charged, or the husband or wife of the person charged to give evidence.

The second is as to *the place* from which evidence under the Act is to be given.

The third is as to *when* the person charged shall give his evidence.

And the fourth is as to the *right of reply*.

The Prohibition of Comment by the Prosecution.

By sect. 1. (6) "The failure of any person charged with an offence, or of the wife or husband, as the case may be, of the person so charged, to give evidence, shall not be made the subject of any comment by the prosecution."

The Court for Crown Cases Reserved, held in 1898 that the prohibition does not apply to the Court: but

For text of Criminal Evidence Act 1898 (*annotated*), *vide pp.* 46–57.

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that it is left to the discretion of the individual judge to decide whether he shall comment or not.

Reg. v. *Rhodes* ([1899] 1 Q. B. 77).
[*Vide* full report at p. 63 *infra*].

The Place from which Evidence under the Act is to be Given.

By sect. 1. (g) "Every person called as a witness in pursuance of this Act shall, unless otherwise ordered by the Court, give his evidence from the witness box or other place from which the other witnesses give their evidence."

Ignorant persons when asked whether they will give their evidence on oath from the witness box or make a statement from where they stand in the dock, have, in some cases which we have observed, appeared to suppose that the *place* is the important matter for decision. It seems, therefore, to the present writer that it is the better way to ask persons charged merely whether they wish to *give evidence on oath:* and *then,* if they answer that they do so wish, to direct them to proceed to the "witness box or other place from which the other witnesses give their evidence," in compliance with this section.

Even if the prisoner be not so innocent of the real meaning of the alternative before him as he pretends, it is still desirable that no room for any question on the matter should be left, since it is barely possible that the Jury may be deceived.

The Time when the Person Charged is to Give his Evidence.

When the person charged is not the only witness to the facts of the case called by the defence, he may give

his evidence before, after, or in between the other witnesses, for there is nothing in the statute to oblige him to do otherwise.

But by sect. 2: "Where the only witness to the facts of the case called by the defence is the person charged, he shall be called as a witness immediately after the close of the evidence for the prosecution.

The Right of Reply.

By sect. 3. "In cases where the right of reply depends upon the question whether evidence has been called for the defence (that is, in all cases except where the Attorney-General appears for the Crown), the fact that the person charged has been called as a witness shall not of itself confer on the prosecution the right of reply."

But the Court for Crown Cases Reserved has held, in 1898, that where the person charged gives evidence in his own behalf under the Act, but does not call witnesses, the counsel for the prosecution is entitled, immediately after the person charged has given his evidence, to sum up the case for the Crown, and in so doing to comment upon the evidence given by the person charged.

Reg. v. *Gardner* ([1899] 1 Q. B. 150).
[*Vide* full report at p. 58 *infra*].

Present Rules as to the Order of Evidence and Speeches.

The result of the above-cited sections relating to procedure, and of the cases decided thereunder, when taken together with the previous law of procedure as far as the order of evidence and speeches in criminal trials are concerned, is that a somewhat elaborate set of rules are required to sum up the present law upon the

matter. Eight cases of different circumstances may arise, and there will be some variation in the procedure in regard to each of them.

(1) Defended prisoner adducing no evidence at all.

When the prisoner is defended by counsel, and does not apply to give evidence on his own behalf, and no witnesses at all are called for the defence, *the counsel for the prosecution first opens his case, and then examines his witnesses, who are cross-examined and re-examined : and then the counsel for the defence addresses the jury : and then the Court sums up the case to the jury.* Where, however, the Attorney-General appears for the Crown, *the Attorney-General has a right of reply, though no evidence be called for the defence, but he must not comment on the failure of the prisoner, or the husband or wife of the prisoner, to give evidence.*

(2) Defended prisoner adducing his own evidence only.

When the prisoner is defended by counsel, and he does apply to give evidence in his own behalf, but no other witness to the facts of the case is called for the defence, *the counsel for the prosecution first opens his case, and then examines his witnesses, who are cross-examined and re-examined : and then the prisoner, on his applying to do so, gives evidence, and is cross-examined and re-examined : and then the counsel for the prosecution sums up his case, and is entitled in so doing to refer to the evidence which the prisoner has given: and then the Court sums up the case to the jury.* Where, however, the Attorney-General appears for the Crown, *the Attorney-General has a right of reply, though no witnesses be called for the prisoner, but he must not comment on the failure of the husband or wife of the prisoner to give evidence.*

(3) Defended prisoner adducing his own and other evidence.

For text of Criminal Evidence Act 1898 (*annotated*), *vide pp.* 46–57.

Where the prisoner is defended by counsel, and he does apply to give evidence on his own behalf, and other evidence is also adduced for the defence, *the counsel for the prosecution first opens his case, and then examines his witnesses, who are cross-examined and re-examined: and then the counsel for the defence examines his witnesses, including the prisoner, and the witnesses for the defence, including the prisoner, in such case are cross-examined and re-examined (the prisoner in this case can give evidence before, after, or in between the other witnesses for the defence): and then the counsel for the defence sums up his case: and then the counsel for the prosecution replies, but must not comment on the failure of the husband or wife of the prisoner to give evidence: and then the Court sums up the case to the jury.* Where the only witnesses for the defence are witnesses to character, *in practice the counsel for the prosecution does not insist upon his right of reply.*

(4) Defended prisoner adducing other evidence, but not his own.

Where the prisoner is defended by counsel and he does not apply to give evidence on his own behalf, but other evidence is adduced for the defence, *the counsel for the prosecution first opens his case, and then examines his witnesses, who are cross-examined and re-examined: and then the counsel for the defence examines his witnesses, who are cross-examined and re-examined: and then the counsel for the defence sums up his case: and then the counsel for the prosecution replies, but must not comment on the failure of the prisoner, or the husband or wife of the prisoner, to give evidence: and then the Court sums up the case to the jury.* Where the only witnesses for the defence are witnesses to character, *in practice the counsel for the prosecution does not insist upon his right of reply.*

For text of Criminal Evidence Act 1898 (*annotated*), *vide pp.* 46–57.

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(5) Undefended prisoner adducing no evidence at all.

Where the prisoner is not defended by counsel and neither calls witnesses, nor applies to give evidence on his own behalf, *the counsel for the prosecution first opens his case, and then examines his witnesses, who are cross-examined and re-examined: and then the prisoner addresses the jury: and then the Court sums up the case to the jury.* Where the Attorney-General appears for the Crown, *the Attorney-General has a right of reply, though no evidence be called for the defence, but he must not comment on the failure of the prisoner, or the husband or wife of the prisoner, to give evidence.*

(6) Undefended prisoner adducing his own evidence only.

Where the prisoner, not being defended by counsel, applies to give evidence in his own behalf, but no other witness to the facts of the case is called, *the counsel for the prosecution first opens his case, and then examines his witnesses, who are cross-examined and re-examined: and then the prisoner gives evidence on his own behalf, and is cross-examined: and then the prisoner addresses the jury: and then the Court sums up the case to the jury.* Where the Attorney-General appears for the Crown, *the Attorney-General has a right of reply, though no witnesses be called by the prisoner, but he must not comment on the failure of the husband or wife of the prisoner to give evidence.*

(7) Undefended prisoner adducing his own and other evidence.

Where the prisoner, not being defended by counsel, does adduce evidence in addition to his own evidence, *the counsel for the prosecution first opens his case, and then examines his witnesses, who are cross-examined and re-examined: and then the prisoner adduces his evidence,*

including that given by himself (the prisoner can give his own evidence before, after, or in between the evidence of his other witnesses) : he is cross-examined, and his other witnesses are cross-examined and re-examined : and then the prisoner addresses the jury : and then the counsel for the prosecution replies : and then the Court sums up the case to the jury. Where the only witnesses called by the prisoner are witnesses to character, *in practice the counsel for the prosecution does not insist upon his right of reply.*

(8) Undefended prisoner adducing other evidence, but not his own.

Where the prisoner, not being defended by counsel, does not apply to give evidence on his own behalf, but does adduce evidence other than his own evidence, *the counsel for the prosecution first opens his case, and then examines his witnesses, who are cross-examined and re-examined : and then the prisoner examines his witnesses, who are cross-examined and re-examined : and the prisoner addresses the jury : and the counsel for the prosecution replies : and then the Court sums up the case to the jury.* Where the only witnesses called by the prisoner are witnesses to character, *in practice the counsel for the prosecution does not insist upon his right of reply.*

TEXT OF THE STATUTE

61 & 62 Vict. c. 36,

THE CRIMINAL EVIDENCE ACT 1898 ANNOTATED.

An Act to Amend the Law of Evidence.—[*12th August,* 1898].

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the lords spiritual and temporal in this present Parliament assembled, and by the authority of the same, as follows :—

Section 1.—Competency of witnesses in criminal cases.—Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness[a] for the

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[a] Witness, *i.e.* one who gives evidence under the sanction of an oath and is liable to be indicted for perjury if he swears to what he knows to be false regarding anything material to the issue. Any material false statement sworn to on the first trial gives ground for a good assignment of perjury, though it may go only to credit and so indirectly affect the question raised in the first trial—and this even though the statement may have been made in answer to a question which ought not to have been asked. *Reg.* v. *Gibbon* (L. & C. 109) (1861). And a prisoner who falsely swears that he did not commit the act which constitutes the offence charged, and is thereupon acquitted, is still liable to be indicted for perjury. Vaughan Williams, J., in such a case is said to have expressed his entire concurrence with the prosecution, where the prisoner had given evidence under sect. 20 of "The Criminal Law Amendment

defence[β] at every stage of the proceedings,[γ] whether the person so charged is charged solely or jointly with any other person. Provided as follows:

(*a*) A person so charged shall not be called as a witness in pursuance of this Act except upon his own application:

(*b*) The failure of any person charged with an offence, or of the wife or husband, as the case may be, of the person so charged, to give evidence shall not be made the subject of any comment by the prosecution:[δ]

Act 1885" (48 & 49 Vict. c. 69), and had been acquitted, saying that it was essential to prevent prisoners thinking that they could commit perjury with impunity. *Anon.* (L. T., 1st Oct. 1898). And cf the case in New South Wales of *Reg.* v. *Dean* (17 N. S. W. Rep. 357). Where, however, it is proposed to try over again the same question in fact upon the same evidence, judges have discouraged such prosecutions. *Anon.* (L. T., 30th July, 1898).

[β] For the defence. A Grand Jury have nothing to do with the defence: and a prisoner cannot therefore claim to be a competent witness before a Grand Jury. *Reg.* v. *Rhodes* ([1899] 1 Q. B. 77) (1898). [*Vide* full report at p. 63 *infra.*]

[γ] When under the "Criminal Law Amendment Act, 1885" (48 & 49 Vict. c. 69), sect. 20, *see* page 82 *infra*, the person charged elected to give evidence in the proceedings before the magistrates, but at his trial elected not to give evidence, the depositions containing his evidence before the magistrates were held to have been rightly allowed to be read against him at his trial. *Reg.* v. *Bird* (79 L. T. Rep. 359) (1898). In the particular case of *Reg.* v. *Bird*, in the proceedings before the magistrates, the prisoner before he was cautioned was sworn and gave evidence. After he was cautioned, he said: "What I have already sworn is true." Russell, L.C.J., and Hawkins, Wills, Wright, and Bruce, J.J., in 1898, held that the depositions were rightly put in.

[δ] "By the Prosecution." This prohibition does not apply to the Court. It is left to the discretion of the individual judge to decide whether he shall comment or not. *Reg.* v. *Rhodes* ([1899] 1 Q.B. 77.)

[*Vide* full report at p. 63 *infra*].

(*c*) The wife or husband of the person charged shall not, save as in this Act mentioned,[ε] be called as a witness in pursuance of this Act except upon the application of the person so charged:

(*d*) Nothing in this Act shall make a husband compellable to disclose any communication made to him by his wife during the marriage, or a wife compellable to disclose any communication made to her by her husband during marriage:[ζ]

(*e*) A person charged and being a witness in pursuance of this Act may be asked[η] any

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[ε] "Save as in this Act mentioned" refers to three classes of exceptions. Firstly, by sect. 2 (1), cases which come under the scheduled statutes, which are set out at pp. 71–97 in the Appendix. Secondly, by sect. 2 (2), cases when the husband or wife may at common law be called as witnesses without the consent of the person charged. Thirdly, by sect. 5, cases which fall under the Evidence Act, 1877. *See* the notes to each of these sections.

[ζ] By statute 16 & 17 Vict. c. 83:—"No Husband shall be compellable to disclose any Communication made to him by his Wife during the Marriage, and no Wife shall be compellable to disclose any Communication made to her by her Husband during the Marriage."

[η] Though he "may be asked," this Act does not make him compellable to answer. By the common law "if a witness claims the protection of the Court on the ground that the answer would tend to criminate himself, and there appears reasonable ground to believe that it would do so, he is not compellable to answer." *Reg.* v. *Garbett* (1 Den. C. C. 257) (1847.) As to "being asked" even at common law, the witness "must be sworn and must either (*a*) answer the questions put to him, or (*b*) object to answer them if he insists on any privilege in that respect." *Boyle* v. *Wiseman* (10 Exch. 653) (1855.) As the result, however, of certain special statutes, there are cases in which witnesses not only may be asked but are compellable to answer questions which tend to criminate them. *See* stat. 24 & 25 Vict. c. 96 ("the Larceny Act 1861"), sect. 85. [But compare 53 & 54 Vict. c. 71 ("the Bankruptcy Act 1890"), sect. 27.] *See* also stat. 50 & 51 Vict. c. 28 ("the Merchandise

question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged:

(*f*) A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless—

(i.) the proof that he has committed or been convicted of such other offence is admissible evidence[θ] to show that he is guilty of the offence wherewith he is then charged; or

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Marks Act 1887"), sect. 19, sub-sect. 2; also 46 & 47 Vict. c. 51 ("the Corrupt and Illegal Practices Prevention Act 1883"), sect. 59, at p. 107 of the present Editor's edition of that Act; and 46 Vict. c. 3 ("the Explosive Substances Act 1883"), sect. 6, sub-sect. 2. It will, of course, be noted that this section 1 (*e*) leaves the "person charged and being a witness in pursuance of this Act" exactly in the same legal position as any other witness with regard to questions tending to criminate him as to offences *other* than "the offence charged."

[θ] By stat. 34 & 35 Vict. c. 112 ("the Prevention of Crimes Act 1871"), sect. 19. "Where proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, evidence may be given at any stage of the proceedings that there was found in the possession of such person other property stolen within the preceding period of twelve months, and such evidence may be taken into consideration for the purpose of proving that such person knew the property to be stolen which forms the subject of the proceedings taken against him. When proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, and evidence has been given that the stolen property has been found in his possession, then if such person

(ii.) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such

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has within five years immediately preceding been convicted of any offence involving fraud or dishonesty, evidence of such previous conviction may be given at any stage of the proceedings, and may be taken into consideration for the purpose of proving that the person accused knew the property which was found to be in his possession to have been stolen; provided that not less than seven days' notice in writing shall have been given to the person accused that proof is intended to be given of such previous conviction; and it shall not be necessary for the purposes of this section to charge in the indictment the previous conviction of the person so accused." Apart from statute, no such evidence will in general be admissible. "The rule of rejecting all manner of evidence in criminal prosecutions that is foreign to the point in issue," says Sir M. Foster, "is founded on sound sense and common justice. For no man is bound at the peril of life or liberty, fortune or reputation, to answer at once and unprepared for every action of his life. Few even of the best men would choose to be put to it." Discourses on Crown Law (Ed. 1792), page 246. Thus even an admission by the prisoner that he had at another time committed an offence similar to that with which he is now charged ought not to be received. *Rex* v. *Cole* (1 Phil. and Arn. Ev. 508) (1810). But "when several felonies are connected together and form part of one entire transaction, then the one is evidence to show the character of the other" *Rex* v. *Ellis* (6 B. & C. 147) (1826). This rule has been applied in the following cases, viz.: *Reg.* v. *Bleasdale* (2 C. & K. 765) (1848); *Reg.* v. *Geering* (18 L. J. M. C. 215) (1849); *Roupell* v. *Haws* (3 F. & F. 784) (1863); *Reg.* v. *Rearden* (4 F. & F. 76) (1864); *Reg.* v. *Garner et ux.* (4 F. & F. 346) (1864); *Reg.* v. *Firth* (11 Cox C. C. 234; L. R. 1 C. C. 172) (1869); *Reg.* v. *Henwood* (22 L. T. Rep. 486) (1870); *Reg.* v. *Cotton* (12 Cox C. C. 400) (1873); *Reg. v. Roden* (12 Cox C. C. 630) (1874); *Reg.* v. *Cooper* (1 Q. B. D. 19) (1875); *Reg.* v. *Heeson* (14 Cox C. C. 40) (1878); *Reg.* v. *Flannagan and Higgins* (15 Cox C. C. 403) (1884); *Reg.* v. *Neill* (116 Old

as to involve imputations[ι] on the character of the prosecutor or the witnesses for the prosecution; or

(iii.) he has given evidence against any other person charged with the same offence.

(*g*) Every person called as a witness in pursuance of this Act shall, unless otherwise ordered by the court, give his evidence from the witness box or other place from which the other witnesses give their evidence:

(*h*) Nothing in this Act shall affect the provisions of section eighteen of the Indictable Offences Act, 1848,[κ] or any right of the person

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Bailey Sessions Papers, p. 1451) (1892); and *Makin et ux.* v. *the Attorney-General for New South Wales* (17 Cox C. C. 704) (1893). On this principle questions were allowed to be asked under this section in *Reg.* v. *Senior* (Law Journal, 18 Feb., 1899, p. 100). [*Vide* full report at p. 68, *infra*.]

ι Cross-examination of the prosecutrix in a case of rape with a view to prove her consent involves such an imputation: per Day, J., *Reg.* v. *Fisher* (Law Journal, 18 Feb., 1899, p. 100). [*Vide* full report at p. 70, *infra*.] Where in a trial for murder the prisoner in her evidence suggested that one of the witnesses for the prosecution had committed the very murder which was the subject of the indictment, Darling, J. held that the nature of the defence was such as to involve an imputation on the character of this witness. *Reg.* v. *Marshall* (Law Journal, 21 Feb., 1899). [*Vide* full report at p. 66, *infra*.]

κ Stat. 11 & 12 Vict. c. 42 ("the Indictable Offences Act 1848") sect. 18, is as follows:—"And be it enacted that after the Examinations of all the Witnesses on the Part of the Prosecution as aforesaid shall have been completed, the Justice of the Peace or one of the Justices by or before whom such Examination shall have been so completed as aforesaid, shall, without requiring the Attendance of the Witnesses, read or cause to be read to the Accused the Depositions taken against him, and shall say to him these Words, or Words to the like effect: 'Having heard the Evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will

charged to make a statement[λ] without being sworn.

Section 2.—*Evidence of person charged.*—Where the only witness to the facts of the case called by the

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be taken down in Writing, and may be given in Evidence against you upon your Trial;' and whatever the Prisoner shall then say in answer thereto shall be taken down in Writing, and read over to him, and shall be signed by the said Justice or Justices, and kept with the Depositions of the Witnesses, and shall be transmitted with them as hereinafter mentioned; and afterwards upon the Trial of the said accused person the same may, if necessary, be given in Evidence against him, without further Proof thereof, unless it shall be proved that the Justice or Justices purporting to sign the same did not in fact sign the same. Provided always, that the said Justice or Justices before such accused Person shall make any statement shall state to him and give him clearly to understand that he has nothing to hope from any Promise of Favour, and nothing to fear from any Threat which may have been holden out to him to induce him to make any Admission or Confession of his guilt, but that whatever he shall then say may be given in evidence against him upon his Trial, notwithstanding such Promise or Threat, provided nevertheless that nothing herein enacted or contained shall prevent the Prosecutor in any Case from giving in Evidence any Admission or Confession or other Statement of the Person accused or charged, made at any Time, which by Law would be admissible as Evidence against such Person."

[λ] Undoubtedly it has long been law that "if a prisoner does not employ counsel he is at liberty to make a statement for himself." *Reg.* v. *Henry Beard* (8 C. & P. 142) (1837). In cases where the prisoner employs counsel, the question is one which has given rise to many doubts. But Cave, J. in *Reg.* v. *Shimmin* (15 Cox C. C. 123) (1882), said that it is allowable for a prisoner on his trial defended by counsel at the conclusion of his counsel's address himself to address the jury and make a statement, subject to this, that what he says will be treated as additional facts laid before the Court and entitling the prosecution to reply. That was the rule he intended to follow, and it was one with which the other judges of the High Court concurred. *See* also *Reg.* v. *Doherty* (16 Cox C. C. 306) (1887), in which Stephen, J. said that the statement ought to be made before counsel's address. In cases of treason, since the passing of

defence is the person charged, he shall be called as a witness immediately after the close of the evidence for the prosecution.[μ]

Section 3.—Right of reply.—In cases where the right of reply depends upon the question whether evidence has been called for the defence,[ν] the fact that the person charged has been called as a witness shall not of itself confer on the prosecution the right of reply.

Section 4.—Calling of wife or husband in certain cases.—(1) The wife or husband of a person charged with an offence under any enactment mentioned in the schedule[ξ] to this Act may be called as a witness[ο] either

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Stat. 7 & 8 Will. 3, c. 3, which allowed the defence of prisoners by counsel in cases of treason, the practice has been for prisoners so defended themselves to make statements. *Rex* v. *Thistlewood* (33 St. Tri. 894) (1820).

[μ] "Immediately after the close of the evidence for the prosecution." He must therefore be called before the counsel for the prosecution sums up his case. The counsel for the prosecution may *then* sum up his case; and in so doing is entitled to refer to the evidence of the prisoner—per Russell, L.C.J., and the Court for Crown Cases Reserved. *Reg.* v. *Gardner* ([1899] 1 Q. B. 150) (1898). If and so far as inconsistent with this, Denman's Act 28 & 29 Vict. c. 18 is impliedly repealed—per Wills, J., *Ib.* [*Vide* full report at p. 58, *infra.*]

[ν] This is in all cases except where the Attorney-General appears for the Crown, in which case he has right of reply, though no evidence be called for the defence. The right is usually confined to cases where the Attorney-General appears in person. *Reg.* v. *Christie* (1 F. & F. 75) (1857); *Reg.* v. *Beckwith* (7 Cox C. C. 505) (1858). But the Solicitor-General, appearing on behalf of the Attorney-General, has been allowed the same privilege. *Reg.* v. *Toakley* (10 Cox C. C. 406) (1866); *Reg.* v. *Barrow* (*Ib.* 407) (1866).

[ξ] *See* these enactments, so far as referred to, set out in the Appendix at pages 71–97.

[ο] Called as a witness, but with the privilege mentioned in the note (ε) to sect. 1 (*d*).

for the prosecution or defence and without the consent of the person charged.[π]

(2) Nothing in this Act shall affect a case where the wife or husband of a person charged with an offence may at common law[ρ] be called as a witness without the consent of that person.

Section 5.—Application of Act to Scotland.—In Scotland, in a case where a list of witnesses is required,[σ] the husband or wife of a person charged shall not be called as a witness for the defence, unless notice be given in the terms prescribed by section thirty-six of the Criminal Procedure (Scotland) Act, 1887.[τ]

Section 6.—Provision as to previous Acts.—(1) This Act shall apply to all criminal proceedings, notwithstanding any enactment in force at the commencement of this Act, except that nothing in this Act shall affect the Evidence Act 1877.[υ]

[π] "Without the consent of that person." But, *quaere*, not without the consent of the witness. *See Reg.* v. *Brazil* (Law Journal, 4 March, 1899, p. 132). [*Vide* full report at p. 69, *infra*.]

[ρ] A wife is a competent witness at common law against her husband in respect of any charge which affects her liberty or person. *Rex* v. *Lord Audley* (3 St. Tr. 402) (1631); *Rex* v. *Azire* (1 Str. 633) (1724); *Reg.* v. *Wakefield* (2 Lewin C. C. 279) (1827). It would appear from an old case that she was also regarded as a competent witness against her husband in cases of treason. *Rex* v. *Griggs* (T. Raym. 1) (1660).

[σ] As to when such a list is required, refer to Anderson's "Criminal Law of Scotland" (Ed. 1892), pp. 198, 199.

[τ] That is to say, written notice of the names and designations of witnesses and productions.

[υ] By stat. 40 & 41 c. 14 (the Evidence Act 1877), it is enacted as follows:—"On the trial of any indictment or other proceeding for the non-repair of any public highway or bridge, or for a nuisance to any public highway, river, or bridge, and of any other indictment or proceeding instituted for the purpose of trying or enforcing a civil right only, every defendant to such indictment or proceeding,

(2) But this Act shall not apply to proceedings in courts martial unless so applied—

(*a*) as to courts martial under the Naval Discipline Act, by general orders made in pursuance of sect. 65 of that Act;[ϕ] and

(*b*) as to courts martial under the Army Act by rules made in pursuance of sect. 70 of that Act.[x]

Section 7.—*Extent, commencement, and short title.*— (1) This Act shall not extend to Ireland.

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and the wife or husband of any such defendant, shall be admissible witnesses and compellable to give evidence."

ϕ Sect. 65 of stat. 29 & 30 Vict. c. 109 (the Naval Discipline Act 1866), is as follows: " The Admiralty may from Time to Time frame General Orders for altering and regulating (subject to the provisions of this Act) the Procedure and Practice of courts martial under this Act; and any such General Orders shall have full Effect if and when approved by Her Majesty in Council, on a Report of the Judicial Committee of the Privy Council, but not sooner or otherwise; and every Order in Council made under this Section shall be laid before both Houses of Parliament."

x Sect. 70 of stat. 44 & 45 Vict. c. 58 (the Army Act), is as follows:—" (1) Subject to the provisions of this Act Her Majesty may, by rules to be signified under the hand of a Secretary of State, from time to time make, and when made repeal, alter, or add to, provisions in respect of the following matters or any of them; that is to say, (*inter alia*) . . . (*d*) the procedure to be observed on trials by courts martial; (*i*) any other matter or thing expedient or necessary for the purpose of carrying this Act into execution so far as relates to the investigation, trial, and punishment of offences triable or punishable by military law: (2) Provided always that no such rules shall contain anything contrary to or inconsistent with the provisions of this Act. (3) All rules made in pursuance of this section shall be judicially noticed. (4) All rules made in pursuance of this section shall be laid before Parliament as soon as practicable after they are made, if Parliament be then sitting, and if Parliament be not then sitting, as soon as practicable after the beginning of the then next session of Parliament."

(2) This Act shall come into operation on the expiration of two months from the passing thereof.[ψ]

(3) This Act may be cited as "the Criminal Evidence Act, 1898."

[ψ] In matters of mere procedure an Act *prima facie* applies to pending as well as future proceedings. *Wright* v. *Hale* (6 H. & N. 227) (1860); *Kimbray* v. *Draper* (37 L. J. Q. B. 80) (1868). This Act therefore will regulate the procedure of all proceedings which may take place on or after the expiration of two months (calendar months) from the passing thereof. The passing thereof refers to the giving of the Royal Assent, which assent was given on 12th August, 1898.

SCHEDULE.

Enactments referred to.

See Section 4.

Session and Chapter.	Short Title.	Enactments referred to.	Page of this Book.
5 Geo. 4, c. 83.	The Vagrancy Act 1824.	The enactment punishing a man for neglecting to maintain or deserting his wife or any of his family.	71
8 & 9 Vict. c. 83.	The Poor Law (Scotland) Act 1845.	Section eighty.	71
24 & 25 Vict. c. 100.	The Offences against the Person Act 1861.	Sections forty-eight to fifty-five.[ω]	72
45 & 46 Vict. c. 75.	The Married Women's Property Act 1882.	Section twelve and section sixteen.	74
48 & 49 Vict. c. 69.	The Criminal Law Amendment Act 1885.	The whole Act.	74
57 & 58 Vict. c. 41.	The Prevention of Cruelty to Children Act 1894.	The whole Act.	82

[ω] Sections 49, 50, and 51 of this enactment, though included in this schedule, are repealed. *See* the repealed statute 38 & 39 Vict. c. 94—"The Offences against the Person Act 1875," and the statute 48 & 49 Vict. c. 69—"The Criminal Law Amendment Act 1885."

REPORTS OF CASES DECIDED UNDER THE STATUTE

61 & 62 Vict. c. 36,

"THE CRIMINAL EVIDENCE ACT 1898."

REG. *v.* GARDNER.

(5th Nov. 1898. Court for the Consideration of Crown Cases Reserved).

Where, upon the trial of an indictable offence, the person charged gives evidence in his own behalf under the statute 61 & 62 *Vict. c.* 36, "*The Criminal Evidence Act* 1898," *but does not call witnesses, the counsel for the prosecution is entitled, immediately after the person charged has given his evidence, to sum up the case for the Crown, and in so doing to comment upon the evidence given by the person charged.*

Case stated by the Chairman of Quarter Sessions for the County of Oxford.

The prisoner Gardner and one Beale were tried upon an indictment for breaking into a warehouse and stealing goods therefrom. Both prisoners were defended by counsel. At the close of the case for the prosecution the counsel for each prisoner announced that the prisoners applied to be called as witnesses, and that no other evidence would be called for the defence.

The counsel for Gardner submitted (1) That inasmuch as the prisoners were required by sect. 2 of the Criminal Evidence Act 1898 (61 & 62 Vict. c. 36) to be called "immediately after the close of the evidence for the prosecution," the counsel for the prosecution could not sum up the evidence at that stage, as he would have been entitled to do under 28 & 29 Vict. c. 18, sect. 2, and (2) that if his right to sum up the evidence was not altogether taken away by the

first-mentioned Act, he was at any rate not entitled to comment on the evidence offered by the prisoners.

The learned chairman ruled :

(1) That inasmuch as it was enacted by sect. 3 that the calling of the prisoners as witnesses should not confer upon the prosecution the right of reply, and as sect. 2 merely required the immediate calling of the prisoners at the close of the evidence for the prosecution, that Act did not by implication take away from the counsel for the prosecution the right to sum up the evidence conferred by 28 & 29 Vict. c. 18, sect. 2, but that he was entitled to sum up at the close of the prisoner's evidence.

(2) That the counsel for the prosecution was entitled, in summing up the evidence against the prisoners, to deal with the evidence which they had given, as well as with the evidence which the prosecution had adduced.

The counsel for the prosecution summed up after the prisoners had given their evidence, and dealt with all the evidence before the Court. The counsel for the defence replied. The prisoner Beale was acquitted, but Gardner was convicted and sentenced to eighteen months imprisonment with hard labour.

The questions for the Court were :

(1) Has the Criminal Evidence Act 1898 taken away the right of the prosecuting counsel to sum up cases where a prisoner applies to give evidence, but does not call witnesses ?

(2) If the prosecuting counsel is entitled to sum up at the close of the prisoner's evidence, is he entitled to comment on that evidence, or is he to be required to confine his summing-up to the evidence adduced by the prosecution ?

Turrell (for the prisoner).—The ruling of the chairman was wrong on both points. The rights of counsel for prosecution are not enlarged by the recent Act. Apart from the provisions of sect. 2 of Denman's Act (28 & 29 Vict. c. 18), counsel for the prosecution had no right to sum up his evidence at all in cases where the prisoner called no witnesses. The provisions of sect. 2 of the Act of 1898 impliedly take away the right of the defendant or his counsel to open his case when the person charged is the only witness called in his behalf, for it enacts in plain terms that the person charged must be called immediately after the close of the evidence for the prosecution. These provisions equally take away by implication the right of the counsel for the prosecution to sum up his evidence; the right to sum up is not merely postponed until after the prisoner has given his evidence, it is altogether extinguished.

Secondly, assuming that the Act operated merely to postpone the time at which the counsel for the prosecution can exercise his right of summing up, that right must be strictly confined to summing up the evidence called on behalf of the Crown, and cannot include a right to criticise or comment upon the evidence given by the prisoner. Such a right of comment would be an extension of the right of reply as it existed before the passing of the Act of 1898—sect. 3 of which provides expressly that the fact that the person charged has been called as a witness is not of itself to confer on the prosecution a right of reply.

[Lord Russell of Killowen, C.J.—Is not a prisoner's statement before the magistrate invariably put in at his trial, and is it not frequently commented upon by the counsel for the Crown?]

Yes: but then the statement is put in as part of the case for the prosecution, while a prisoner who gives evidence under the new Act is not a witness for the prosecution at all, and cannot be replied on. [He referred to *Reg.* v. *Holchester* (10 Cox, C. C. 226).]

Biron (for the prosecution) was not called upon to argue.

Lord Russell of Killowen, C.J.—I am of opinion that the Court of Quarter Sessions took a right view of and acted in a right manner in regard to each of the points raised in this case. The material facts may be stated in a short compass. Two men, Gardner and Beale, were charged with breaking into a warehouse and stealing goods therein: they were both defended by counsel, and at the close of the evidence for the prosecution counsel for each prisoner claimed the right of his client to be called as a witness, adding that it was not proposed to call further evidence for the defence. The first question that arises is, When is that evidence to be given? Is it to be given before or after the counsel for the prosecution has summed up his case, as undoubtedly under Denman's Act he had a right to do? The answer to this question depends upon the Criminal Evidence Act 1898. That Act (reading it shortly) provides in sect. 1 that every person charged with an offence is to be a competent witness for the defence at every stage of the proceedings: and the effect of the provisoes is that a prisoner is a competent, but not a compellable, witness, and that he cannot be called as a witnesss except upon his own application. Then sect. 2 provides that where the person charged is the only witness for the defence, he is to be called *immediately* after the close of the evidence for the prosecution: and sect. 3 provides that where the right of reply depends upon whether evidence has been called for the defence, the calling of the person charged as a witness is not of

itself to give the right of reply. These are the only material sections in this connection.

Now, in the present case, after the evidence for the prosecution had closed, an application was made on behalf of the prisoner that he should be called as a witness, and an intimation given that no other evidence would be called. What was the proper course for the chairman to pursue? In my opinion the question admits of a clear answer. The section says that in such a case the person charged is to be called as a witness *immediately* after the close, not of the *case* for the prosecution (which expression might include the summing up of counsel), but of the *evidence* for the prosecution. It is clear, therefore, that the magistrates were right in holding that the counsel for the prosecution was not to sum up at that moment, but that the prisoner's evidence must then be given. What was the effect of that upon the right of the prosecuting counsel to sum up? Did it operate as an extinguishment of the right altogether, or merely as a postponement of the time at which the right was to be exercised? I think that if an extinguishment of the right had been intended the statute would have said so in so many words; and it is evident to me that the statute operates as a postponement only to a later stage of the proceedings of the right of the prosecuting counsel to sum up. I think that that is the answer which we must give to the first question asked us—that the magistrates were right in holding that the prisoner must be called at once as a witness, and that the right to sum up was not extinguished, but merely postponed.

Then comes the second question raised in the case, which is whether counsel for the prosecution who is thus called upon to sum up is entitled if he thinks fit to make references to, and comments upon, not merely the evidence called for the prosecution but also the statement of the prisoner himself. It has been contended before us that he cannot make any comment in summing up, except upon the evidence adduced on behalf of the prosecution, and the learned counsel based his argument upon the construction which he seeks to place upon sect. 2 of Denman's Act, which enacts that, where a prisoner defended by counsel does not call evidence, counsel for the prosecution is to be allowed to address the jury a second time in support of his case for the purpose of summing up the evidence against the prisoner. When that statute was passed prisoners were not competent witnesses in their own behalf: but the effect of the recent Act is that a prisoner can give evidence in his defence before the time at which the prosecuting counsel can

exercise his right of summing up. Is it good sense to say that the counsel must shut his eyes to the fact that the prisoner has given evidence which is, or may be, wholly inconsistent with the case for the prosecution? I may suggest as an illustration a defence of an alibi, in which the prisoner when called, says that at the time of the offence charged against him he was many miles away working in a factory with several companions: is it good sense to say that in such a case, when the prisoner has given evidence on oath, the counsel for the prosecution is to be obliged in addressing the jury to refrain from making the simple comment that not a single witness has been called by the prisoner to corroborate his statements? It seems to me that it would be an idle suggestion: there would be no reason or good sense in such a course. If, too, we recollect the state of things that existed before the statute which enabled parties to give evidence, no reason will be found for departing from a reasonable course of practice. Under the provisions of Jervis's Act a prisoner charged with an indictable offence is cautioned, and any statement made by him after such caution is taken down, and it is the invariable course at his subsequent trial, whether such statement tells for him or against him, to put it in as part of the case for the prosecution, treating it not as evidence, but as a statement made by the prisoner: and it is further a most ordinary thing for counsel to point out inconsistencies apparent in the statement. I have come, therefore, to the conclusion, without any doubt, that the magistrates were right in their rulings as to the postponement of the right of summing up, as to the time at which the prisoner's evidence was to be given and the right of summing up exercised, and as to the right of counsel to refer in his summing up to the evidence given by prisoner. The conviction must, therefore, be affirmed.

Sir Henry Hawkins.—I am of the same opinion, and my lord has so entirely expressed my own views that I will add but very few words. If we construe strictly the provisions of Denman's Act, applying it to the present state of circumstances when prisoners are competent witness in their own behalf, I think that on the strictest construction of the language used the counsel for the prosecution would have the right to comment on the evidence given by the prisoner. In sect. 2 of that Act the counsel for the prosecution is given the right of addressing the jury a second time "in support of his case for the purpose of summing up the evidence against such prisoner." Where a prisoner gives evidence on his own behalf, his object is to lessen the force of the evidence given for the prosecution: and the object of the summing-up is to take the evidence of

the prisoner and comment upon it, and show that the effect of the evidence given on behalf of the prosecution ought not to be disturbed.

WILLS, J.—I am entirely of the same opinion. In my opinion the answer to the second question is really settled by the answer to the first. Unless the right of addressing the jury a second time has been altogether taken away from the counsel for the prosecution, his address must be founded upon all the materials then before the Court. By postponing the time at which it is to take place, an extension is given to the range of the summing-up: and if there be anything in Denman's Act which is inconsistent with this view, I should have no hesitation in saying that to that extent that Act had been impliedly repealed. I cannot suppose that the legislature intended anything so absurd and so mischievous as that the counsel for the prosecution should be compelled to confine his observations to a portion only of the case.

WRIGHT and BRUCE, JJ., concurred.

Conviction affirmed.

Law Reports (1899) 1 Q. B. 150.

REG. *v.* RHODES.

(12th Nov. 1898. Court for the consideration of Crown Cases Reserved.)

The statute 61 & 62 *Vict. c.* 36, "*The Criminal Evidence Act* 1898," *does not confer on a prisoner the right of giving evidence on his own behalf before the grand jury, nor does it deprive the Court of the right to comment on the failure of the prisoner to give evidence at the trial.*

Case stated by the Chairman of Quarter Sessions for the Isle of Ely.

The defendant had been committed for trial on a charge of obtaining a certain quantity of eggs by false pretences.

Before the bill of indictment was sent to the grand jury, the defendant, who was in custody, applied in person under sect. 1 of the Criminal Evidence Act 1898, to give evidence for the defence before the grand jury. The chairman declined to permit him to do so on the ground that the Act did not allow a prisoner to give evidence on his own behalf before the grand jury, but reserved the point for the consideration of the Court for Crown Cases Reserved.

At the close of the case for the prosecution, counsel for the defendant intimated that he called no witnesses for the defence, and both counsel then addressed the jury. In summing up the evidence to the jury, the chairman pointed out that it was open to the defendant to give evidence on his own behalf under the Criminal Evidence Act 1898. Counsel for the defence objected; but the chairman ruled that the prohibition in sect. 1 (*b*) of the Act did not apply to the Court, but reserved this point also for the consideration of the Court.

The jury returned a verdict of guilty: and the defendant was sentenced to ten months' imprisonment.

Lord Russell of Killowen, C.J.—In this case there are three points which we have to decide: The first is, that before the bill was sent up to the grand jury, the prisoner applied under sect. 1 of the Criminal Evidence Act 1898 to give evidence for the defence before the grand jury. The chairman refused to allow him to do so: and in my opinion he was quite right in his refusal. The question depends on the construction of sect. 1 of the Criminal Evidence Act 1898, which provides (omitting the immaterial words) that "Every person charged with an offence . . . shall be a competent witness for the *defence* at every stage of the proceedings." It is clear that the limitation of the right of a person charged with an offence to give evidence is that he may be called for the defence, and for the defence alone. A grand jury have nothing whatever to do with the defence. Their functions are well known. They sit in private. They have to hear evidence, or at any rate part of the evidence for the prosecution, and to say whether in their opinion a *primâ facie* case against the prisoner has been made out. It would be difficult to believe that the legislature intended by this section to enable a grand jury to hear evidence for the defence. Such a thing would be no less than an anomaly.

It is worth notice that if the prisoner were to go before the grand jury and give evidence, nevertheless, if they thought that the evidence for the prosecution disclosed a *primâ facie* case against him, they would be unable to give any effect to the prisoner's evidence, even though they believed it to be true. It is sufficient therefore to say that the prisoner can only give evidence for the defence, and that as that does not arise before the grand jury, who have not to determine finally the guilt or innocence of the prisoner, he cannot give evidence before the grand jury.

. . . The third and last question is whether the presiding judge has a right under the Criminal Evidence Act 1898 to

comment on the failure of the prisoner to give evidence on his own behalf. In this case the prisoner was not called: and the only question that we have to consider is whether the chairman of Quarter Sessions had a right to comment on his absence from the witness-box. It seems to me that he undoubtedly had that right. There is nothing in the Act that takes away or can purport to take away the right of the Court to comment on the evidence in the case, and the manner in which the case has been conducted. The nature and degree of such comment must rest entirely in the discretion of the judge who tries the case: and it is impossible to lay down any rule as to the cases in which he ought or ought not to comment on the failure of the prisoner to give evidence, or as to what those comments should be. There are some cases in which it would be unwise to make any such comment at all: there are others in which it would be absolutely necessary in the interests of justice that such comments should be made. That is a question entirely for the discretion of the judge: and it is only necessary now to say that that discretion is in no way affected by the provisions of the Criminal Evidence Act 1898.

For these reasons I think that the conviction must be affirmed.

WILLS, WRIGHT, BRUCE, and DARLING, JJ., concurred.

Conviction affirmed.

Law Reports (1899), 1 Q. B. 77.

REG. *v.* HOLMES.

(Lancashire Assizes. Jan., 1899).

To suggest that the prosecutrix is a "drunken wastrel" involves an imputation on her character within the meaning of sect. 1 (*f*) (ii.) *of the statute* 61 & 62 *Vict. c.* 36, "*The Criminal Evidence Act* 1898."

The prisoner was indicted for feloniously wounding his daughter Jane Holmes, at Lancaster, on 26th Dec., 1898. It appeared that on the day in question the prisoner produced a bread-knife from a cupboard, and, flourishing it about, drew it across his daughter's throat. The wound inflicted was clean cut, two inches in length and half-an-inch in depth, and from its position was a dangerous wound. In his defence the prisoner said that he had playfully placed the back of the knife against the throat of the prosecutrix. and she pushed him back and must have received the cut in so doing.

The prisoner asked the prosecutrix whether just before the occurrence he had not patted her child upon the head and said, "Poor little fellow! You can't help your mother being a drunken wastrel."

The prisoner gave evidence in his own behalf.

L. Sanderson (for the prosecution) proposed to cross-examine the prisoner as to his character, upon the ground that the expression "drunken wastrel," came within sect. 1 (*f*) (ii.) of the statute 61 & 62 Vict. c. 36, "The Criminal Evidence Act 1898."

Day, J., allowed the cross-examination to be proceeded with in the manner proposed.

It appeared that the prisoner had been convicted several times of assaults upon his wife and other offences.

Verdict.—Guilty of unlawful wounding.

Sentence.—Four months' imprisonment with hard labour.

(*The Times*, 31st January, 1899.)

REG. *v.* MARSHALL.

(12th January, 1899. Central Criminal Court.)

When is an imputation involved by the nature or conduct of the defence within the meaning of sect. 1 (*f*) (ii.) *of the statute* 61 *&* 62 *Vict. c.* 36, "*The Criminal Evidence Act* 1898."—*Suggestion of the prisoner that a witness for the prosecution committed the crime wherewith she was charged in the indictment.*

Indictment for murder. The accused gave evidence on her own behalf, and therein suggested that the deceased had been killed by her own husband, a witness for the prosecution.

In cross-examination the prisoner was asked whether she had ever stabbed anybody.

Counsel (for the prisoner) objected to the question on the ground that the prosecution was not entitled under the statute 61 & 62 Vict. c. 36, sect. 1 (*f*) (ii.).

He submitted that no question which he had put "involved an imputation on the character of the prosecutor or witnesses for the prosecution." He contended that it could not fairly be said, that questioning the defendant as to material facts or acts which occurred in connection with the crime before the Court could be

imputation on the character such as was pointed to by the Act, or intended by the Act. The imputation must have reference to something altogether anterior to the precise occurrence.

[DARLING, J.—Does not the nature or conduct of this defence involve an imputation against Roberts? What has been said is that it was Roberts who killed the woman with that knife? If you can satisfy me that that is not an imputation against Roberts, then I am with you.]

Of course it was an imputation in one sense, but not an imputation within the meaning of the section. He submitted that if the Court put upon the Act the construction which the Crown asked it to put, it would deny an accused person the opportunity of denying his or her guilt. There were only two persons present when the deceased was stabbed. What did the prisoner's simple denial mean? It meant that it was Roberts who did it.

[DARLING, J.—No. It might have been suicide.]

The evidence negatived the possibility of suicide. Evidence as to the mere facts of what took place at the time was not casting an imputation. Casting an imputation meant when other facts not connected with the Act for which a prisoner was tried were brought in. It would be a very serious matter if it were to be held that a statement of the bald, bare facts of what took place could be construed into an imputation on the character of a person within the meaning of the section. He submitted that, on the true construction of the statute, it could not be held that there was any intention of casting an imputation on the character of anyone, when it was merely intended to state the facts connected with the deed.

[DARLING, J.—Do you or do you not say that to charge a person with committing the very murder which is being investigated is not an imputation on the character of that person?]

He did not. It was in one sense, but not within the meaning of the Act. It was not made for the purpose of casting an imputation, it was made because it was necessarily part of the denial.

Avory (for the prosecution) submitted that the suggestion that a witness for the prosecution committed the offence came within the words "nature of the defence" in the Act, and therefore that question he put to the prisoner was admissible.

DARLING, J., said that the point taken by counsel for the accused was that questions relating to the character of the accused, who had given evidence, could not be put, because they did not come within the words of the recent statute which allowed such questions to be put in among other cases, this case:—"If the nature or

conduct of the defence is such as to involve an imputation on the character of the prosecutor or the witnesses for the prosecution." He said nothing of the "conduct" of the defence, because he did not think that anything which defendant's counsel had done in the conduct of the defence had in any way prejudiced the decision of the question. The wording of the statute was "the nature or conduct of the defence is such as to involve an imputation on the character of the prosecutor." The imputation was that the prosecutor himself committed the murder with which the prisoner was charged. He could not imagine a stronger instance of the "nature of the defence" involving an imputation on the character of the prosecutor than that. It appeared to him that this was directly such a case as the legislature intended to provide for when this exception was introduced into the statute. He ought to say that he had no doubt upon the matter, but as this was a case of gravity, he thought it wise, before deciding the point, to consult the learned Recorder and the Common Sergeant. He was permitted by them to say that they entirely agreed with him in thinking that the questions which Mr. Avory desired to put were admissible, and that neither of them had any kind of doubt upon the matter.

Verdict.—Guilty.

(*Law Journal*, 21st Jan., 1899.)
(*Cf.* 129 Old Bailey Sess. Pa., p. 146.)

REG. *v.* SENIOR.

(10th February, 1899. Central Criminal Court.)

Cross-examination of a person charged and giving evidence under the statute 61 & 62 *Vict. c.* 36, "*The Criminal Evidence Act* 1898"—*Construction of sect.* 1 (*f*) (i.).

Four men were indicted jointly for an offence against the False Personation Act 1894. The prisoner Senior gave evidence on his own behalf.

Muir (for the prosecution) proposed to cross-examine him as to other transactions of a similar nature, which had occurred within a few days of the transaction on which the indictment was founded.

The Common Serjeant (Sir Forrest Fulton, Q.C.) ruled the question to be admissible under sect. 1 (*f*) (i.) of the Act of 1898.

Verdict—Guilty.

(*Law Journal*, 18th Feb., 1899.)
(*Cf.* 129 Old Bailey Sess. Pa., p. 232.)

REG. *v.* BRAZIL.

(7th February, 1899. Sussex Assizes.)

Construction of sect. 4 of the statute 61 & 62 *Vict. c.* 36, "*The Criminal Evidence Act,* 1898."—*Quære, on the trial of an indictment for an offence under the statute* 48 & 49 *Vict. c.* 69—*can the wife of the person charged be called without her own consent?*

William Brazil the younger was indicted under the statute 48 & 49 Vict. c. 69, "The Criminal Law Amendment Act, 1885," for having had unlawful carnal knowledge of Matilda Rausby, she being a young person of the age of fifteen years.

Grantham for the prosecution.

King-Farlow for the defence.

It appeared that on November, 1898, the prisoner and the girl, who were both gipsies, went off together from Batch Fair for two or three weeks and lived in various places. On their return home the girl's father told the prisoner that he ought to marry the girl and he agreed to do so. The banns were in due course put up, and the marriage day was fixed, but the prisoner failed to appear. Criminal proceedings were then instituted, and since the prisoner had been awaiting trial he had married the girl. The prosecution tendered the girl as a witness.

King-Farlow (for the defence) submitted that on the true construction of sect. 20 of the Criminal Law Amendment Act 1885, and sect. 4 of the Criminal Evidence Act 1898, the prisoner's wife was a competent but not a compellable witness against him. Section 20 of the 1885 Act provides "Every person charged with an offence under this Act . . . . and the husband or wife of the person so charged shall be competent, but not compellable witnesses." Sect. 4 of the 1898 Act provides that "the wife or husband of a person charged with an offence under any enactment mentioned in the schedule to this Act may be called as a witness either for the prosecution or defence, and without the consent of the person charged." The statute 48 & 49 Vict. c. 69, is one of the Acts mentioned in the schedule.

Wills, J., said that he did not know what the Act of Parliament meant, and he did not suppose that anybody else did so either.

In answer to the learned judge the girl declined to give evidence, and he allowed her to leave the witness-box, without actually deciding the point raised.

The Jury acquitted the prisoner.

(*Law Journal*, 6th March, 1899.)

REG. *v.* FISHER.*

(Lancaster Assizes. Jan. 1899.)

To suggest in the case of an indictment for attempted rape that the prosecutrix consented to what was done involves an imputation upon her character within the meaning of sect. 1 (*f*) (ii.) *of the statute* 61 & 62 *Vict. c.* 36, "*The Criminal Evidence Act* 1898."

The prisoner was indicted for attempting to ravish Sarah Ann Jackson.

The defence raised was that the prosecutrix was a consenting party to what had been done.

The prisoner gave evidence on his own behalf.

Overend Evans (for the prosecution) asked the Court to say that the questions in cross-examination which raised the issue of the consent of the prosecutrix were such as to involve an imputation upon the character of the prosecutrix within sect. 1 (*f*) (ii.) of the statute 61 & 62 Vict. c. 36, "The Criminal Evidence Act 1898": and he proposed to cross-examine the prisoner as to previous convictions.

McKeever (for the defence) contended that such questions as had been put to the prosecutrix went to the main issue, and were never contemplated by the section which had been referred to.

Day, J., ruled that the questions did involve an imputation within the meaning of the section.

It then appeared that the prisoner had been once convicted for larceny, and had numerous summary convictions against him for drunkenness.

Verdict—Guilty.

Sentence—Two years' imprisonment with hard labour.

(*The Times*, 31st Jan., 1899.)
(*Cf. Law Journal*, 18th Feb., 1899.)

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* The Editor is indebted to the kindness of Sir Herbert Stephen, Bart., Clerk of Assize on the Northern Circuit, for several of the particulars of this case, including the nature of the previous convictions which came to light as a result of the cross-examination permitted by the judge, and which afford a not altogether uninteresting illustration of the way in which the section works.

APPENDIX.

STATUTE 5 GEO. 4, c. 83.

An Act for the Punishment of idle and disorderly Persons and Rogues and Vagabonds in that Part of Great Britain called England.—[21*st June*, 1824].

Section 3.—And be it further enacted That every Person being able wholly or in part to maintain himself or herself, or his or her Family, by Work or by other Means, and wilfully refusing or neglecting so to do, by which Refusal or Neglect he or she, or any of his or her Family, whom he or she may be legally bound to maintain, shall have become chargeable to any Parish, Township, or Place . . . . shall be deemed an idle and disorderly Person within the true Intent and Meaning of this Act ; and it shall be lawful for any Justice of the Peace to commit such Offender (being thereof convicted before him by his own View, or by the Confession of such Offender, or by the Evidence on Oath of One or More credible Witness or Witnesses) to the House of Correction, there to be kept to hard Labour for any Time not exceeding One Calendar Month.

Section 4.—And be it further enacted That every Person committing any of the offences hereinbefore mentioned, after having been convicted as an idle and disorderly Person . . . (and) every Person running away and leaving his Wife, or his or her Child or Children, chargeable, or whereby she or they or any of them shall become chargeable to any Parish, Township, or Place . . . shall be deemed a Rogue and Vagabond within the true Intent and Meaning of this Act; and it shall be lawful for any Justice of the Peace to commit such Offender (being convicted thereof before him by the Confession of such Offender, or by the Evidence on Oath of One or More credible Witness or Witnesses) to the House of Correction, there to be kept to hard Labour for any Time not exceeding Three Calendar Months.

STATUTE 8 & 9 VICT. c. 83.

An Act for the Amendment and better Administration of the Laws relating to the Relief of the Poor in Scotland.—[4*th August*, 1845].

Section 80.—And be it enacted That every Husband or Father who shall desert or neglect to maintain his Wife or Children, being able so to do, and every Mother and every putative Father of an illegitimate Child after the Paternity has been admitted or otherwise established, who shall refuse or neglect to maintain such Child being able so to do, whereby such Wife or Children or Child shall become chargeable to any Parish or

Combination, shall be deemed to be a Vagabond under the Provisions of the aforesaid Act of the Scottish Parliament passed in the year one thousand five hundred and seventy-nine, and may be prosecuted criminally before the Sheriff of the County in which such Parish or Combination or any Portion thereof is situate, at the instance of the Inspector of the Poor of such Parish or Combination, and shall upon Conviction be punishable by Fine or Imprisonment, with or without Hard Labour, at the Discretion of the said Sheriff.

STATUTE 24 & 25 VICT. c. 100.

An Act to consolidate and amend the Statute Law of England and Ireland relating to Offences against the Person.—[*6th August*, 1861].

Section 48.—Whosoever shall be convicted of the Crime of Rape shall be guilty of Felony, and being convicted thereof shall be liable, at the Discretion of the Court, to be kept in Penal Servitude for Life, or for any Term not less than Three Years, or to be imprisoned for any Term not exceeding Two Years, with or without Hard Labour.

The repealed section 49.—[Whosoever shall, by false Pretences, false Representations, or other fraudulent Means, procure any Woman or Girl under the age of Twenty-one Years to have illicit carnal Connection with any Man, shall be guilty of a Misdemeanor, and being convicted thereof shall be liable, at the Discretion of the Court, to be imprisoned for any Term not exceeding Two Years, with or without Hard Labour.] *See* sects. 2 & 19 of the statute 48 & 49 Vict. c. 69, " The Criminal Law Amendment Act 1885."

The repealed section 50.—[Whosoever shall unlawfully and carnally know and abuse any Girl under the Age of Ten Years shall be guilty of Felony, and being convicted thereof shall be liable, at the Discretion of the Court, to be kept in Penal Servitude for Life or for any Term not less than Three Years, or to be imprisoned for any Term not exceeding Two Years, with or without Hard Labour.] *See* sect. 2 of the repealed statute 38 & 39 Vict. c. 94, " The Offences against the Person Act 1875," and *cf.* sects. 4 & 19 of the statute 48 & 49 Vict. c. 69, " The Criminal Law Amendment Act 1885."

The repealed section 51.—[Whosoever shall unlawfully and carnally know and abuse any Girl being above the Age of Ten Years and under the Age of Twelve Years shall be guilty of a Misdemeanor, and being convicted thereof shall be liable, at the Discretion of the Court, to be kept in Penal Servitude for the Term of Three Years, or to be imprisoned for any Term not exceeding Two Years, with or without Hard Labour.] *See* sect. 2 of the repealed statute 38 & 39 Vict. c. 94, " The Offences against the Person Act 1875," and *cf.* sects. 5 & 19 of the statute 48 & 49 Vict. c. 69, " The Criminal Law Amendment Act 1885."

The partly repealed section 52.—Whosoever shall be convicted of any indecent Assault upon any Female, [or of any Attempt to have carnal

Knowledge of any Girl under Twelve Years of Age,] shall be liable, at the Discretion of the Court, to be imprisoned for any Term not exceeding Two Years, with or without Hard Labour. *See* sects. 4 & 19 of the statute 48 & 49, Vict. c. 69 "The Criminal Law Amendment Act 1885."

Section 53.—When any Woman of any Age shall have any Interest, whether legal or equitable, present or future, absolute, conditional, or contingent, in any Real or Personal Estate, or shall be a presumptive Heiress or Co-heiress, or presumptive Next of Kin, or One of the presumptive Next of Kin, to any one having such Interest, whosoever shall, from Motives of Lucre, take away or detain such Woman against her Will, with Intent to marry or carnally know her, or to cause her to be married or carnally known by any other Person; and whosoever shall fraudulently allure, take away, or detain such Woman being under the Age of Twenty-one Years out of the Possession and against the Will of her Father or Mother, or of any other Person having the lawful Care or Charge of her, with intent to marry or carnally know her, or cause her to be married or carnally known by any other Person, shall be guilty of Felony, and being convicted thereof shall be liable, at the Discretion of the Court, to be kept in Penal Servitude for any Term not exceeding Fourteen Years and not less than Three Years, or to be imprisoned for any Term not exceeding Two Years, with or without Hard Labour; and whosoever shall be Convicted of any Offence against this Section shall be incapable of taking any Estate or Interest, legal or equitable, in any Real or Personal Property of such Woman, or in which she shall have any such Interest, or which shall come to her as such Heiress, Co-heiress, or Next of Kin as aforesaid; and if any such Marriage as aforesaid shall have taken place, such Property shall, upon such Conviction, be settled in such manner as the Court of Chancery in England or Ireland shall upon any Information at the suit of the Attorney-General appoint.

Section 54.—Whosoever shall, by Force, take away or detain against her Will any Woman, of any Age, with intent to marry her or carnally know her, or to cause her to be married or carnally known by any other Person, shall be guilty of Felony, and being convicted thereof shall be liable, at the Discretion of the Court, to be kept in Penal Servitude for any Term not exceeding Fourteen Years and not less than Three Years, or to be imprisoned for any Term not exceeding Two Years, with or without Hard Labour.

Section 55.—Whosoever shall unlawfully take or cause to be taken any unmarried girl, being under the age of Sixteen Years, out of the Possession and against the Will of her Father or Mother, or of any other Person having the lawful Care or Charge of her, shall be Guilty of a Misdemeanor, and being convicted thereof shall be liable, at the Discretion of the Court, to be imprisoned for any Term not exceeding Two Years, with or without Hard Labour.

STATUTE 45 & 46 VICT. c. 75.

An Act to consolidate and amend the Acts relating to the Property of Married Women.—[*18th August*, 1882].

Section 12.—Every woman, whether married before or after this Act, shall have her own name against all persons whomsoever, including her husband, the same civil remedies, and also (subject, as regards her husband, to the proviso hereinafter contained) the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property belonged to her as a *feme sole*, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a *tort*. In any indictment or other proceeding under this section it shall be sufficient to allege such property to be her property; and in any proceeding under this section a husband or wife shall be competent to give evidence against each other, any statute or rule of law to the contrary notwithstanding: Provided always, that no criminal proceeding shall be taken by any wife against her husband by virtue of this Act while they are living together, as to or concerning any property claimed by her, nor while they are living apart, as to or concerning any act done by the husband while they were living together, concerning property claimed by the wife, unless such property shall have been wrongfully taken by the husband when leaving or deserting, or about to leave or desert, his wife.

Section 16.—A wife doing any act with respect to any property of her husband, which if done by the husband with respect to property of the wife would make the husband liable to criminal proceedings by the wife under this Act, shall in like manner be liable to criminal proceedings by her husband.

STATUTE 48 & 49 VICT. c. 69.

(*The Whole Act*).

An Act to make further provision for the Protection of Women and Girls, the suppression of brothels, and other purposes.—[*14th August*, 1885].

Section 1.—This Act may be cited as the Criminal Law Amendment Act, 1885.

Section 2.—Any person who—

(1) Procures or attempts to procure any girl or woman under twenty-one years of age, not being a common prostitute, or of known immoral character, to have unlawful carnal connexion, either within or without the Queen's dominions, with any other person or persons; or

(2) Procures or attempts to procure any woman or girl to become, either within or without the Queen's dominions, a common prostitute; or

(3) Procures or attempts to procure any woman or girl to leave the United Kingdom, with intent that she may become an inmate of a brothel elsewhere; or

(4) Procures or attempts to procure any woman or girl to leave her usual place of abode in the United Kingdom (such place not being a brothel), with intent that she may, for the purposes of prostitution, become an inmate of a brothel within or without the Queen's dominions,

shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years, with or without hard labour.

Provided that no person shall be convicted of any offence under this section upon the evidence of one witness, unless such witness be corroborated in some material particular by evidence implicating the accused.

Section 3.—Any person who—

(1) By threats or intimidation procures or attempts to procure any woman or girl to have any unlawful carnal connexion, either within or without the Queen's dominions; or

(2) By false pretences or false representations procures any woman or girl, not being a common prostitute or of known immoral character, to have any unlawful carnal connexion, either within or without the Queen's dominions; or

(3) Applies, administers to, or causes to be taken by any woman or girl any drug, matter, or thing, with intent to stupefy or overpower so as thereby to enable any person to have unlawful carnal connexion with such woman or girl,

shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years, with or without hard labour.

Provided that no person shall be convicted of an offence under this section upon the evidence of one witness only, unless such witness be corroborated in some material particular by evidence implicating the accused.

Section 4.—Any person who—

unlawfully and carnally knows any girl under the age of thirteen years shall be guilty of felony, and being convicted thereof shall be liable at the discretion of the court to be kept in penal servitude for life, or for any term not less than five years, or to be imprisoned for any term not exceeding two years, with or without hard labour.

Any person who attempts to have unlawful carnal knowledge of any girl under the age of thirteen years shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years, with or without hard labour.

Provided that in the case of an offender whose age does not exceed sixteen years, the court may, instead of sentencing him to any term of imprisonment, order him to be whipped, as prescribed by the Act of the

twenty-fifth and twenty-sixth Victoria, chapter eighteen, intituled "An Act to amend the law as to the Whipping of Juvenile and other Offenders," and the said Act shall apply, so far as circumstances admit, as if the offender had been convicted in manner in that Act mentioned; and if, having regard to his age and all the circumstances of the case, it should appear expedient, the court may, in addition to the sentence of whipping, order him to be sent to a certified reformatory school, and to be there detained for a period of not less than two years and not more than five years.

The court may also order the offender to be detained in custody for a period of not more than seven days before he is sent to such reformatory school.

Where, upon the hearing of a charge under this section, the girl in respect of whom the offence is charged to have been committed, or any other child of tender years who is tendered as a witness, does not, in the opinion of the court or justices, understand the nature of an oath, the evidence of such girl or other child of tender years may be received, though not given upon oath, if, in the opinion of the court or justices, as the case may be, such girl or other child of tender years is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth: Provided that no person shall be liable to be convicted of the offence unless the testimony admitted by virtue of this section and given on behalf of the prosecution shall be corroborated by some other material evidence in support thereof implicating the accused: Provided also, that any witness whose evidence has been admitted under this section shall be liable to indictment and punishment for perjury in all respects as if he or she had been sworn.

Whereas doubts have been entertained whether a man who induces a married woman to permit him to have connexion with her by personating her husband is or is not guilty of rape, it is hereby enacted and declared that every such offender shall be deemed to be guilty of rape.

Section 5.—Any person who—

(1) Unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any gir being of or above the age of thirteen years and under the age of sixteen years; or

(2) Unlawfully and carnally knows, or attempts to have unlawful carnal knowledge of any female idiot or imbecile woman or girl, under circumstances which do not amount to rape, but which prove that the offender knew at the time of the commission of the offence that the woman or girl was an idiot or imbecile,

shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years, with or without hard labour.

Provided that it shall be a sufficient defence to any charge under sub-

section one of this section if it shall be made to appear to the court or jury before whom the charge shall be brought that the person so charged had reasonable cause to believe that the girl was of or above the age of sixteen years.

Provided also, that no prosecution shall be commenced for an offence under sub-section one of this section more than three months after the commission of the offence.

Section 6.—Any person who, being the owner or occupier of any premises, or having, or acting or assisting in, the management or control thereof—

induces or knowingly suffers any girl of such age as is in this section mentioned to resort to or be in or upon such premises for the purpose of being unlawfully and carnally known by any man. whether such carnal knowledge is intended to be with any particular man or generally,

(1) shall, if such girl is under the age of thirteen years, be guilty of felony, and being convicted thereof shall be liable at the discretion of the court to be kept in penal servitude for life, or for any term not less than five years, or to be imprisoned for any term not exceeding two years, with or without hard labour ; and

(2) if such girl is of or above the age of thirteen and under the age of sixteen years, shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years, with or without hard labour.

Provided that it shall be a sufficient defence to any charge under this section if it shall be made to appear to the court or jury before whom the charge shall be brought that the person so charged had reasonable cause to believe that the girl was of or above the age of sixteen years.

Section 7.—Any person who—

with intent that any unmarried girl under the age of eighteen years should be unlawfully and carnally known by any man, whether such carnal knowledge is intended to be with any particular man, or generally—

takes or causes to be taken such girl out of the possession and against the will of her father or mother, or any other person having the lawful care or charge of her,

shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years, with or without hard labour.

Provided that it shall be a sufficient defence to any charge under this section if it shall be made to appear to the court or jury that the person so charged had reasonable cause to believe that the girl was of or above the age of eighteen years.

Section 8.—Any person who detains any woman or girl against her will—

(1) In or upon any premises with intent that she may be unlawfully and carnally known by any man, whether any particular man, or generally, or

(2) In any brothel,

shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years, with or without hard labour.

Where a woman or girl is in or upon any premises for the purpose of having any unlawful carnal connexion, or is in any brothel, a person shall be deemed to detain such woman or girl in or upon such premises or in such brothel, if, with intent to compel or induce her to remain in or upon such premises or in such brothel, such person withholds from such woman or girl any wearing apparel or other property belonging to her, or, where wearing apparel has been lent or otherwise supplied to such woman or girl by or by the direction of such person, such person threatens such woman or girl with legal proceedings if she takes away with her the wearing apparel so lent or supplied.

No legal proceedings, whether civil or criminal, shall be taken against any such woman or girl for taking away or being found in possession of any such wearing apparel as was necessary to enable her to leave such premises or brothel.

Section 9.—If upon the trial of any indictment for rape, or any offence made felony by section four of this Act, the jury shall be satisfied that the defendant is guilty of an offence under section three, four, or five of this Act, or of an indecent assault, but are not satisfied that the defendant is guilty of the felony charged in such indictment, or of an attempt to commit the same, then and in every such case the jury may acquit the defendant of such felony, and find him guilty of such offence as aforesaid, or of an indecent assault, and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such offence as aforesaid, or for the misdemeanor of indecent assault.

Section 10.—If it appears to any justice of the peace, on information made before him on oath by any parent, relative, or guardian of any woman or girl, or any other person who, in the opinion of the justice, is bonâ fide acting in the interest of any woman or girl, that there is reasonable cause to suspect that such woman or girl is unlawfully detained for immoral purposes by any person in any place within the jurisdiction of such justice, such justice may issue a warrant authorizing any person named therein to search for, and, when found, to take to and detain in a place of safety such woman or girl until she can be brought before a justice of the peace; and the justice of the peace before whom such

woman or girl is brought may cause her to be delivered up to her parents or guardians, or otherwise dealt with as circumstances may permit and require.

The justice of the peace issuing such warrant may, by the same or any other warrant, cause any person accused of so unlawfully detaining such woman or girl to be apprehended and brought before a justice, and proceedings to be taken for punishing such person according to law.

A woman or girl shall be deemed to be unlawfully detained for immoral purposes if she is so detained for the purpose of being unlawfully and carnally known by any man, whether any particular man or generally, and—

(*a*) Either is under the age of sixteen years ; or

(*b*) If of over the age of sixteen years, and under the age of eighteen years, is so detained against her will, or against the will of her father or mother or of any other person having the lawful care or charge of her ; or

(*c*) If of or above the age of eighteen years is so detained against her will.

Any person authorized by warrant under this section to search for any woman or girl so detained as aforesaid may enter (if need be by force) any house, building, or other place specified in such warrant, and may remove such woman or girl therefrom.

Provided always, that every warrant issued under this section shall be addressed to and executed by some superintendent, inspector, or other officer of police, who shall be accompanied by the parent, relative, or guardian or other person making the information, if such person so desire, unless the justice shall otherwise direct.

Section 11.—Any male person who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of any act of gross indecency with another male person, shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years, with or without hard labour.

Section 12.—Where on the trial of any offence under this Act it is proved to the satisfaction of the court that the seduction or prostitution of a girl under the age of sixteen has been caused, encouraged, or favoured by her father, mother, guardian, master, or mistress, it shall be in the power of the court to divest such father, mother, guardian, master, or mistress of all authority over her, and to appoint any person or persons willing to take charge of such girl to be her guardian until she has attained the age of twenty-one, or any age below this as the court may direct, and the High Court shall have the power from time to

time to rescind or vary such order by the appointment of any other person or persons as such guardian, or in any other respect.

Section 13.—Any person who—

1) keeps or manages or acts or assists in the management of a brothel, or

(2) being the tenant, lessee, or occupier of any premises, knowingly permits such premises or any part thereof to be used as a brothel or for the purposes of habitual prostitution, or

(3) being the lessor or landlord of any premises, or the agent of such lessor or landlord, lets the same or any part thereof with the knowledge that such premises or some part thereof are or is to be used as a brothel, or is wilfully a party to the continued use of such premises or any part thereof as a brothel,

shall on summary conviction in manner provided by the Summary Jurisdiction Acts be liable—

(1) to a penalty not exceeding twenty pounds, or, in the discretion of the court, to imprisonment for any term not exceeding three months, with or without hard labour, and

(2) on a second or subsequent conviction to a penalty not exceeding forty pounds, or, in the discretion of the court, to imprisonment for any term not exceeding four months, with or without hard labour;

and in case of a third or subsequent conviction such person may, in addition to such penalty or imprisonment as last aforesaid, be required by the court to enter into a recognizance, with or without sureties, as to the court seems meet, to be of good behaviour for any period not exceeding twelve months, and in default of entering into such recognizance, with or without sureties (as the case may be), such person may be imprisoned for any period not exceeding three months, in addition to any such term of imprisonment as aforesaid.

Any person on being summarily convicted in pursuance of this section may appeal to a court of general or quarter sessions against such conviction.

The enactments for encouraging prosecutions of disorderly houses contained in sections five, six, and seven of the Act passed in the twenty-fifth year of the reign of King George the Second, chapter thirty-six, as amended by the enactment contained in section seven of the Act passed in the fifty-eighth year of the reign of King George the Third, chapter seventy, shall, with the necessary modifications, be deemed to apply to prosecutions under this section, and the said enactments shall, for the purposes of this section, be construed as if the prosecution in such enactments mentioned included summary proceedings under this section as well as a prosecution on indictment.

Section 14.—In this Act—

The expression "The Summary Jurisdiction Acts"—

(*a*) as regards England means the Summary Jurisdiction (English) Acts within the meaning of the Summary Jurisdiction Act, 1879, and

(*b*) as regards Ireland means within the police district of Dublin metropolis the Acts regulating the powers and duties of justices of the peace of such district or of the police of such district, and elsewhere in Ireland the Petty Sessions (Ireland) Act, 1851, and the Acts amending the same.

Section 15.—In the application of this Act to Scotland—

The expression "misdemeanor" shall mean a crime and offence.

The expression "felony" shall mean a high crime and offence.

The expression "a justice of the peace," and the expression "two justices," shall include sheriff and sheriff substitute.

The expression "The Summary Jurisdiction Acts" shall mean the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, and any Acts amending the same.

The expression "enter into a recognizance with or without sureties" shall mean "grant a bond of caution."

The expression "High Court or Court of General or Quarter Sessions" shall mean the High Court or a Circuit Court of Justiciary.

Section 16.—This Act shall not exempt any person from any proceeding for an offence which is punishable at common law, or under any Act of Parliament other than this Act, so that a person be not punished twice for the same offence.

Section 17.—Every misdemeanor under this Act shall, in England and Ireland, be deemed to be an offence within, and subject to, the provisions of the Act of the session of the twenty-second and twenty-third years of the reign of Her present Majesty, chapter seventeen, intituled "An Act to prevent vexatious indictments for certain misdemeanors," and any Act amending the same, and no indictment under the provisions of this Act shall in England be tried by any court of quarter sessions.

Section 18.—The court before which any misdemeanor indictable under this Act, or any case of indecent assault, shall be prosecuted or tried may allow the costs of the prosecution, in the same manner as in cases of felony, and may in like manner, on conviction, order payment of such costs by the person convicted; and every order for the allowance or payment of such costs shall be made out, and the sum of money mentioned therein paid and repaid upon the same terms and in the same manner in all respects as in cases of felony.

Section 19.—The Acts mentioned in the Schedule to this Act are hereby

repealed to the extent mentioned in the third column of the said Schedule, except as to anything heretofore duly done thereunder, and except so far as may be necessary for the purpose of supporting and continuing any proceeding taken or of prosecuting or punishing any person for any offence committed before the passing of this Act.

Section 20.—Every person charged with an offence under this Act or under section forty-eight and sections fifty-two to fifty-five, both inclusive, of the Act of the session of the twenty-fourth and twenty-fifth years of the reign of Her present Majesty, chapter one hundred, or any of such sections, and the husband or wife of the person so charged, shall be competent but not compellable witnesses on every hearing at every stage of such charge, except an inquiry before a grand jury.

SCHEDULE.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
24 & 25 Vict. c. 100.	An Act to consolidate and amend the Statute Law of England and Ireland relating to Offences against the Person.	Section forty-nine, and in section fifty-two the words "or any attempt to have carnal knowledge of any girl under twelve years of age."
38 & 39 Vict. c. 94	The Offences against the Person Act, 1875.	The whole Act.

STATUTE 57 & 58 VICT. C. 41.

(*The Whole Act.*)

An Act to consolidate the Acts relating to the Prevention of Cruelty to, and Protection of, Children.—[*17th August*, 1894.]

Section 1.—(1) If any person over the age of sixteen years who has the custody, charge, or care of any child under the age of sixteen years, wilfully assaults, ill-treats, neglects, abandons, or exposes such child, or causes or procures such child to be assaulted, ill-treated, neglected, abandoned, or exposed in a manner likely to cause such child unnecessary suffering, or injury to its health (including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement), that person shall be guilty of a misdemeanor; and

(*a*) on conviction on indictment, shall be liable, at the discretion of the court, to a fine not exceeding one hundred pounds, or alternatively, or in default of payment of such fine, or in addition thereto, to imprisonment, with or without hard labour, for any term not exceeding two years; and

(*b*) on summary conviction shall be liable, at the discretion of the court, to a fine not exceeding twenty-five pounds, or alternatively, or in default of payment of such fine, or in addition thereto, to imprisonment, with or without hard labour for any term not exceeding six months.

(2) A person may be convicted of an offence under this section either on indictment or by a court of summary jurisdiction notwithstanding the death of the child in respect of whom the offence is committed.

(3) If it is proved that a person indicted under this section was interested in any sum of money accruable or payable in the event of the death of the child, and had knowledge that such sum of money was accruing or becoming payable, the court, in its discretion, may

(*a*) increase the amount of the fine under this section so that the fine does not exceed two hundred pounds; or

(*b*) in lieu of awarding any other penalty under this section, sentence the person indicted to penal servitude for any term not exceeding five years.

(4) A person shall be deemed to be interested in a sum of money under this section if he has any share in or any benefit from the payment of that money, though he is not a person to whom it is legally payable.

(5) An offence under this section is in this Act referred to as an offence of cruelty.

Section 2.—If any person—

(*a*) causes or procures any child, being a boy under the age of fourteen years, or being a girl under the age of sixteen years, or, having the custody, charge, or care of any such child, allows that child, to be in any street, premises, or place for the purpose of begging or receiving alms, or of inducing the giving of alms, whether under the pretence of singing, playing, performing, offering anything for sale, or otherwise ; or

(*b*) causes or procures any child, being a boy under the age of fourteen years, or being a girl under the age of sixteen years, or, having the custody, charge, or care of any such child, allows that child, to be in any street, or in any premises licensed for the sale of any intoxicating liquor, other than premises licensed, according to law for public entertainments, for the purpose of singing, playing, or performing for profit, or offering anything for sale, between nine p.m. and six a.m.; or

(*c*) causes or procures any child under the age of eleven years, or having the custody, charge, or care of any such child, allows that child, to be at any time in any street, or in any premises licensed for the sale of any intoxicating liquor, or in premises licensed according to law for public entertainments, or in

any circus or other place of public amusement to which the public are admitted by payment, for the purpose of singing, playing, or performing for profit, or offering anything for sale; or

(*d*) causes or procures any child under the age of sixteen years, or, having the custody, charge, or care of any such child, allows that child to be in any place for the purpose of being trained as an acrobat, contortionist, or circus performer, or of being trained for any exhibition or performance which in its nature is dangerous,

that person shall, on summary conviction, be liable, at the discretion of the court, to a fine not exceeding twenty-five pounds, or alternatively, or in default of payment of such fine, or in addition thereto, to imprisonment, with or without hard labour, for any term not exceeding three months.

Provided that—

(i.) This section shall not apply in the case of any occasional sale or entertainment the net proceeds of which are wholly applied for the benefit of any school or to any charitable object, if such sale or entertainment is held elsewhere than in premises which are licensed for the sale of any intoxicating liquor but not licensed according to law for public entertainments, or if, in the case of a sale or entertainment held in any such premises as aforesaid, a special exemption from the provisions of this section has been granted in writing under the hands of two justices of the peace; and

(ii.) Any local authority may, if they think it necessary or desirable so to do, from time to time by byelaw extend or restrict the hours mentioned in paragraph (*b*) of this section, either on every day or on any specified day or days of the week, and either as to the whole of their district or as to any specified area therein; and

(iii.) Paragraphs (*c*) and (*d*) of this section shall not apply in any case in respect of which a licence granted under this Act is in force, so far as that licence extends; and

(iv.) Paragraph (*d*) of this section shall not apply in the case of a person who is the parent or legal guardian of a child, and himself trains the child.

Section 3.—(1) A petty sessional court, or in Scotland the School Board, may, notwithstanding anything in this Act, grant a licence for such time and during such hours of the day, and subject to such restrictions and conditions as the court or board think fit, for any child exceeding seven years of age,—

(*a*) to take part in any entertainment or series of entertainments to take place in premises licensed according to law for public

entertainments, or in any circus or other place of public amusement as aforesaid ; or

(*b*) to be trained as aforesaid ; or

(*c*) for both purposes ;

if satisfied of the fitness of the child for the purpose, and if it is shown to their satisfaction that proper provision has been made to secure the health and kind treatment of the children taking part in the entertainment or series of entertainments or being trained as aforesaid, and the court or board may, upon sufficient cause, vary, add to, or rescind any such licence.

Any such licence shall be sufficient protection to all persons acting under or in accordance with the same.

(2) A Secretary of State may assign to any inspector appointed under section sixty-seven of the Factory and Workshop Act, 1878, specially and in addition to any other usual duties, the duty of seeing whether the restrictions and conditions of any licence under this section are duly complied with, and any such inspector shall have the same power to enter, inspect, and examine any place of public entertainment at which the employment of a child is for the time being licensed under this section as an inspector has to enter, inspect, and examine a factory or workshop under section sixty-eight of the same Act.

(3) Where any person applies for a licence under this section he shall, at least seven days before making the application, give notice thereof to the chief officer of police for the district in which the licence is to take effect, and that officer may appear or instruct some person to appear before the authority hearing the application, and show cause why the licence should not be granted, and the authority to whom the application is made shall not grant the same unless they are satisfied that notice has been properly so given.

(4) Where a licence is granted under this section to any person, that person shall, not less than ten days after the granting of the licence, cause a copy thereof to be sent to the inspector of factories and workshops acting for the district in which the licence is to take effect, and if he fails to cause such copy to be sent, shall be liable on summary conviction to a fine not exceeding five pounds.

(5) Nothing in this or in the last preceding section shall affect the provisions of the Elementary Education Act, 1876, or the Education (Scotland) Act, 1878.

Section 4.—(1) Any constable may take into custody, without warrant, any person—

(*a*) who within view of such constable commits an offence under this Act, or any of the offences mentioned in the Schedule to this Act, where the name and residence of such person are unknown to such constable and cannot be ascertained by such constable ; or

(*b*) who has committed or who he has reason to believe has committed any offence of cruelty within the meaning of this Act, or any of the offences mentioned in the Schedule to this Act, if he has reasonable ground for believing that such person will abscond, or if the name and address of such person are unknown to and cannot be ascertained by the constable.

(2) Where a constable arrests any person without warrant in pursuance of this section, the inspector or constable in charge of the station to which such person is conveyed shall, unless in his belief the release of such person on bail would tend to defeat the ends of justice, or to cause injury or danger to the child against whom the offence is alleged to have been committed, release the person arrested on his entering into such a recognizance, with or without sureties, as may in his judgment be required to secure the attendance of such person upon the hearing of the charge.

Section 5.—(1) A constable may take to a place of safety any child in respect of whom an offence under paragraph (*a*) of section two of this Act has been committed, or in respect of whom an offence of cruelty within the meaning of this Act, or any of the offences mentioned in the Schedule to this Act has been, or there is reason to believe has been, committed.

(2) A child so taken to a place of safety, and also any child under the age of sixteen years who seeks refuge in a place of safety, may there be detained until it can be brought before a court of summary jurisdiction, and that court may make such order as is mentioned in the next following sub-section, or may cause the child to be dealt with as circumstances may admit and require until the charge made against any person in respect of any offence as aforesaid with regard to the child has been determined by the committal for trial, or conviction, or discharge of such person.

(3) Where it appears to a court of summary jurisdiction or any justice that an offence of cruelty within the meaning of this Act or any of the offences mentioned in the Schedule to this Act has been committed in the case of any child that is brought before such court or justice, and that the health or safety of the child will be endangered unless an order is made under this sub-section, the court or justice may, without prejudice to any other power under this Act, make such order as circumstances require for the care and detention of the child until a reasonable time has elapsed for a charge to be made against some person for having committed the offence, and, if a charge is made against any person within that time, until the charge has been determined by the committal for trial or conviction or discharge of that person, and any such order may be carried out notwithstanding that any person claims the custody of the child.

(4) Boards of guardians, and, in Scotland, parochial boards, shall provide for the reception of children brought to a workhouse in pursuance of this Act, and where the place of safety to which a constable takes a child is a workhouse, the master shall receive the child into the workhouse if there is suitable accommodation therein for the same, and shall detain the child until the case is determined, and any expenses incurred in respect of the child shall be deemed to be expenses incurred in the relief of the poor.

Section 6.—(1) Where a person having the custody, charge, or care of a child under the age of sixteen years has been—

(*a*) convicted of committing in respect of such child an offence of cruelty within the meaning of this Act, or any of the offences mentioned in the Schedule to this Act; or

(*b*) committed for trial for any such offence; or

(*c*) bound over to keep the peace towards such child,

by any court, that court either at the time when the person is so convicted, committed for trial, or bound over, and without requiring any new proceedings to be instituted for the purpose, or at any other time, and also any petty sessional court before which any person may bring the case, may, if satisfied on inquiry that it is expedient so to deal with the child, order that the child be taken out of the custody of the person so convicted, committed for trial, or bound over, and be committed to the custody of a relation of the child, or some other fit person named by the court (such relation or other person being willing to undertake such custody), until it attains the age of sixteen years, or for any shorter period, and may of its own motion or on the application of any person from time to time by order renew, vary, and revoke any such order; but no order shall be made under this section unless a parent of the child has been convicted of or committed for trial for the offence, or is under committal for trial for having been or has been proved to have been party or privy to the offence, or has been bound over to keep the peace towards such child.

(2) Every order under this section shall be in writing, and any such order may be made by the court in the absence of the child; and the consent of any person to undertake the custody of a child in pursuance of any such order shall be proved in such manner as the court may think sufficient to bind him.

(3) Where an order is made under this section in respect of a person who has been committed for trial, then if that person is acquitted of the charge, or if the charge is dismissed for want of prosecution, the order shall forthwith be void except with regard to anything that may have been lawfully done under it.

(4) A Secretary of State in England, and in Scotland the Secretary for Scotland, and in Ireland the Lord Lieutenant of Ireland, may at any

time in his discretion discharge a child from the custody of any person to whose custody it is committed in pursuance of this section, either absolutely or on such conditions as such Secretary of State, Secretary, or Lord Lieutenant, approves, and may, if he thinks fit, make rules in relation to children so committed to the custody of any person, and to the duties of such persons with respect to such children.

(5) A Secretary of State, in any case where it appears to him to be for the benefit of the child who has been committed to the custody of any person in pursuance of this section, may empower such person to procure the emigration of the child, but, except with such authority, no person to whose custody a child is so committed shall procure its emigration.

Section 7.—(1) Any person to whose custody a child is committed under this Act shall, whilst the order is in force, have the like control over the child as if he were its parent, and shall be responsible for its maintenance, and the child shall continue in the custody of such person, notwithstanding that it is claimed by its parent.

(2) Any court having power so to commit a child shall have power to make the like orders on the parent of the child to contribute to its maintenance during such period as aforesaid as if the child were detained under the Industrial Schools Acts, but the limit on the amount of the weekly sum which the parent of a child may be required, under this section, to contribute to its maintenance shall be one pound a week instead of the limit fixed by the Industrial Schools Acts.

(3) Any such order may be made on the complaint or application of the person to whose custody the child is for the time being committed, and either at the time when the order for the child's committal to custody is made, or subsequently, and the sums contributed by the parent shall be paid to such person as the court may name, and be applied for the maintenance of the child.

(4) If a person fails to pay any sum payable by him in pursuance of any such order, he may be dealt with in like manner as if the sum were due from him in pursuance of an order under the Bastardy Law Amendment Act, 1872, or in Scotland were a sum decerned for aliment, or in Ireland were a sum ordered to be paid by him under the Summary Jurisdiction (Ireland) Acts.

(5) Where an order under this Act to commit a child to the custody of some relation or other person is made in respect of a person who has been committed for trial for an offence, the court shall not have power to order the parent of the child to contribute to its maintenance prior to the trial of that person.

Section 8.—(1) In determining on the person to whose custody the child shall be committed under this Act, the court shall endeavour to ascertain the religious persuasion to which the child belongs, and shall, if possible, select a person of the same religious persuasion, or a person

who gives such undertaking as seems to the court sufficient that the child shall be brought up in accordance with its own religious persuasion, and such religious persuasion shall be specified in the order.

(2) In any case where the child has been placed pursuant to any such order with a person who is not of the same religious persuasion as that to which the child belongs or who has not given such undertaking as aforesaid the court shall, on the application of any person in that behalf, and on its appearing that a fit person who is of the same religious persuasion or who will give such undertaking as aforesaid, is willing to undertake the custody, make an order to secure his being placed with a person who either is of the same religious persuasion or gives such undertaking as aforesaid.

(3) Where a child has been placed with a person who gives such undertaking as aforesaid, and the undertaking is not observed, the child shall be deemed to have been placed with a person not of the same religious persuasion as that to which the child belongs as if no such undertaking had been given.

Section 9.—(1) Where any child under the age of sixteen years is brought before a petty sessional court under circumstances authorising the court to deal with the child under the Industrial Schools Acts, the court, if it thinks fit, in lieu of ordering that the child be sent to an industrial school, may make an order under this Act for the committal of the child to the custody of a relation or person named by the court.

(2) Where a court orders a child to be sent to an industrial school, the order may, at the discretion of the court, be made to take effect either immediately or at any later time specified therein, regard being had to the age or health of the child; and if the order is not made to take effect immediately, or if at the time specified for the order to take effect the child is deemed unfit to be sent to an industrial school, the court may commit the child to the custody of a relation or person named by the court, as provided by this Act, until the time so specified or the time when the order actually takes effect.

Section 10.—(1) If it appears to any stipendiary magistrate or to any two justices of the peace, on information made before him or them on oath by any person who, in the opinion of the magistrate or justices, is bonâ fide acting in the interests of a child under the age of sixteen years, that there is reasonable cause to suspect that such a child has been or is being assaulted, ill-treated, or neglected in any place within the jurisdiction of such magistrate or justices in a manner likely to cause the child unnecessary suffering or to be injurious to its health, or that any offence mentioned in the Schedule to this Act has been or is being committed in respect of such a child, such magistrate or justices may issue a warrant authorising any person named therein to search for such child,

and if it is found to have been or to be assaulted, ill-treated, or neglected in manner aforesaid, or that any such offence as aforesaid has been or is being committed in respect of the child, to take it to and detain it in a place of safety, until it can be brought before a court of summary jurisdiction, or authorising any person to remove the child with or without search to a place of safety and detain it there until it can be brought before a court of summary jurisdiction ; and the court before whom the child is brought may cause it to be dealt with in the manner provided by section five of this Act :

Provided that—

(*a*) the powers herein-before conferred on any two justices may be exercised by any one justice, if upon the information it appears to him to be a case of urgency ; and

(*b*) in the case of Scotland the jurisdiction hereby conferred on a magistrate or two justices shall be exercised only by a sheriff or sheriff substitute.

(2) Any person issuing a warrant under this section may by the same warrant cause any person accused of any offence in respect of the child to be apprehended and brought before a justice, and proceedings to be taken for punishing such person according to law.

(3) Any person authorised by warrant under this section to search for any child, or to remove any child with or without search, may enter (if need be by force) any house, building, or other place specified in the warrant, and may remove the child therefrom.

(4) Every warrant issued under this section shall be addressed to and executed by some superintendent, inspector, or other superior officer of police, who shall be accompanied by the person making the information, if such person so desire, unless the persons by whom the warrant is issued otherwise direct, and may also, if the persons by whom the warrant is issued so direct, be accompanied by a registered medical practitioner.

(5) It shall not be necessary in any information or warrant under this section to name the child.

Section 11.—Where it appears to the court by or before which any person is convicted of the offence of cruelty within the meaning of this Act, or of any of the offences mentioned in the Schedule to this Act, that that person is a parent of the child in respect of whom the offence was committed, or is living with the parent of the child, and is an habitual drunkard within the meaning of the Inebriates Acts, 1879 and 1888, the court, in lieu of sentencing such person to imprisonment, may, if it thinks fit, make an order for his detention for any period named in the order not exceeding twelve months in a retreat under the said Acts, the licensee of which is willing to receive him, and the said order shall have the like effect, and copies thereof shall be sent to the local authority and Secretary of State in like manner as if it were an application duly made by such

person and duly attested by two justices under the said Acts; and the court may order an officer of the court or constable to remove such person to the retreat, and on his reception the said Acts shall have effect as if he had been admitted in pursuance of an application so made and attested as aforesaid: Provided that—

(*a*) an order for the detention of a person in a retreat shall not be made under this section unless that person, having had such notice as the court deems sufficient of the intention to allege habitual drunkenness, consents to the order being made; and,

(*b*) if the wife or husband of such person, being present at the hearing of the charge, objects to the order being made, the court shall, before making the order, take into consideration any representation made to it by the wife or husband; and

(*c*) before making the order the court shall, to such extent as it may deem reasonably sufficient, be satisfied that provision will be made for defraying the expenses of such person during detention in a retreat.

Section 12.—In any proceeding against any person for an offence under this Act or for any of the offences mentioned in the Schedule to this Act, such person shall be competent but not compellable to give evidence, and the wife or husband of such person may be required to attend to give evidence as an ordinary witness in the case, and shall be competent but not compellable to give evidence.

Section 13.—(1) Where a justice is satisfied by the evidence of a registered medical practitioner that the attendance before a court of any child, in respect of whom an offence of cruelty within the meaning of this Act or any of the offences mentioned in the Schedule to this Act is alleged to have been committed, would involve serious danger to its life or health, the justice may take in writing the deposition of such child on oath, and shall thereupon subscribe the same and add thereto a statement of his reason for taking the same, and of the day when and place where the same was taken, and of the names of the persons (if any) present at the taking thereof.

(2) The justice taking any such deposition shall transmit the same with his statement—

(*a*) if the deposition relates to an offence for which any accused person is already committed for trial, to the proper officer of the court for trial at which the accused person has been committed; and

(*b*) in any other case to the clerk of the peace of the county or borough in which the deposition has been taken;

and the clerk of the peace to whom any such deposition is transmitted shall preserve, file, and record the same.

Section 14.—Where on the trial of any person on indictment for any offence of cruelty within the meaning of this Act or any of the offences mentioned in the Schedule to this Act, the court is satisfied by the evidence of a registered medical practitioner that the attendance before the court of any child in respect of whom the offence is alleged to have been committed would involve serious danger to its life or health, any deposition of the child taken under the Indictable Offences Act, 1848, or the Indictable Offences (Ireland) Act, 1849, or the Petty Sessions (Ireland) Act, 1851, or this Act, shall be admissible in evidence either for or against the accused person without further proof thereof—

(*a*) if it purports to be signed by the justice by or before whom it purports to be taken; and

(*b*) if it is proved that reasonable notice of the intention to take the deposition has been served upon the person against whom it is proposed to use the same as evidence, and that that person or his counsel or solicitor had, or might have had if he had chosen to be present, an opportunity of cross-examining the child making the deposition.

Section 15.—(1) Where, in any proceeding against any person for an offence under this Act or for any of the offences mentioned in the Schedule to this Act, the child in respect of whom the offence is charged to have been committed, or any other child of tender years who is tendered as a witness, does not in the opinion of the court understand the nature of an oath, the evidence of such child may be received, though not given upon oath, if, in the opinion of the court, such child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth: and the evidence of such child, though not given on oath but otherwise taken and reduced into writing, in accordance with the provisions of section seventeen of the Indictable Offences Act, 1848, or of section fourteen of the Petty Sessions (Ireland) Act, 1851, or of section thirteen of this Act, shall be deemed to be a deposition within the meaning of those sections respectively:

Provided that—

(*a*) A person shall not be liable to be convicted of the offence unless the testimony admitted by virtue of this section and given on behalf of the prosecution is corroborated by some other material evidence in support thereof implicating the accused; and

(*b*) Any child whose evidence is received as aforesaid and who shall wilfully give false evidence shall be liable to be indicted and tried for such offence, and on conviction thereof may be adjudged such punishment as is provided for by section eleven of the Summary Jurisdiction Act, 1879, in the case of juvenile

offenders, or in Ireland by section four of the Summary Jurisdiction over Children (Ireland) Act, 1884, in the case of children.

(2) This section shall not apply to Scotland.

Section 16.—Where in any proceedings with relation to an offence of cruelty within the meaning of this Act, or any of the offences mentioned in the Schedule to this Act, the court is satisfied by the evidence of a registered medical practitioner that the attendance before the court of any child in respect of whom the offence is alleged to have been committed would involve serious danger to its life or health, and is further satisfied that the evidence of the child is not essential to the just hearing of the case, the case may be proceeded with and determined in the absence of the child.

Section 17.—Where a person is charged with an offence under this Act, or any of the offences mentioned in the Schedule to this Act, in respect of a child who is alleged in the charge or indictment to be under any specified age, and the child appears to the court to be under that age, such child shall for the purposes of this Act be deemed to be under that age, unless the contrary is proved.

Section 18.—(1) Where a person is charged with committing an offence under this Act or any of the offences mentioned in the Schedule to this Act in respect of two or more children, the same information or summons may charge the offence in respect of all or any of them but the person charged shall not be liable to a separate penalty for each child unless upon separate informations.

(2) The same information or summons may also charge the offences of assault, ill-treatment, neglect, abandonment, or exposure, together or separately, but when those offences are charged together the person charged shall not be liable to a separate penalty for each.

(3) A person shall not be summarily convicted of an offence under this Act or of an offence mentioned in the Schedule to this Act unless the offence was wholly or partly committed within six months before the information was laid ; but, subject as aforesaid, evidence may be taken of acts constituting, or contributing to constitute, the offence, and committed at any previous time.

(4) Where an offence under this Act or any offence mentioned in the Schedule to this Act charged against any person is a continuous offence, it shall not be necessary to specify in the information, summons, or indictment, the date of the acts constituting the offence.

Section 19.—When, in pursuance of this Act, any person is convicted by a court of summary jurisdiction of an offence, and such person did not plead guilty or admit the truth of the information, or when in the case of any application under sections six, seven, or eight of this Act,

other than an application to a judge or court of assize, any party thereto thinks himself aggrieved by any order or decision of the court, he may appeal against such a conviction, or order, or decision, in England and Ireland to a court of quarter sessions, and in Scotland to the High Court of Justiciary, in manner provided by the Summary Prosecutions Appeal (Scotland) Act, 1875, or any Act amending the same.

Section 20.—(1) Where a misdemeanor under this Act is tried on indictment, the expenses of the prosecution shall be defrayed in like manner as in the case of a felony.

(2) This section shall not apply to Scotland.

Section 21.—A board of guardians, or in Scotland the parochial board of any parish or combination, may, out of the funds under their control, pay the reasonable costs and expenses of any proceedings which they have directed to be taken under this Act in regard to the assault. ill-treatment, neglect, abandonment, or exposure of any child, and, in the case of a union, shall charge such costs and expenses to the common fund.

Section 22.—Every byelaw under this Act shall be subject—

(*a*) In England to section one hundred and eighty-four of the Public Health Act, 1875, as if every local authority in England under this Act were a local authority within the meaning of that section, but with the substitution of Secretary of State for the Local Government Board; and

(*b*) In Scotland to so much of section sixty-two of the Public Health (Scotland) Act, 1867, as provides for the confirmation of rules and regulations and the proceedings preliminary to confirmation as if such rules and regulations included byelaws under this Act, and the local authority under this Act were a local authority within the meaning of that section, but with the substitution of the Secretary for Scotland for the Board of Supervision; and

(*c*) In Ireland to section two hundred and twenty-one of the Public Health (Ireland) Act, 1878, with the substitution of Lord Lieutenant for the Local Government Board.

Section 23.—(1) The provisions of this Act relating to the parent of a child shall apply to the step-parent of the child and to any person cohabiting with the parent of the child, and the expression "parent" when used in relation to a child includes guardian and every person who is by law liable to maintain the child.

(2) This Act shall apply in the case of a parent who being without means to maintain a child fails to provide for its maintenance under the Acts relating to the relief of the poor, in like manner as if the parent had otherwise neglected the child.

(3) For the purposes of this Act—

Any person who is the parent of a child shall be presumed to have the custody of the child; and

Any person to whose charge a child is committed by its parent shall be presumed to have charge of the child; and

Any other person having actual possession or control of a child shall be presumed to have the care of the child.

Section 24.—Nothing in this Act shall be construed to take away or affect the right of any parent, teacher, or other person having the lawful control or charge of a child to administer punishment to such child.

Section 25.—In this Act unless the context otherwise requires—

The expression "local authority" means, as regards any borough in England, the council of the borough; as regards the city of London, the common council; as regards the county of London, the county council; and as regards any other place in England the district council, and until a district council is established the urban or rural sanitary authority:

The expression "chief officer of the police" means—

in the city of London and the liberties thereof, the commissioner of city police;

in the metropolitan police district, the commissioner of police of the metropolis;

elsewhere in England, the chief constable, or head constable, or other officer, by whatever name called, having the chief local command of the police in the police district in reference to which such expression occurs:

The expression "street" includes any highway or other public place, whether a thoroughfare or not:

The expression "place of safety" includes any place certified by the local authority under this Act for the purposes of this Act, and also includes any workhouse or police station, or any hospital, surgery, or place of the like kind:

The expression "Industrial Schools Acts" means as regards England and Scotland the Industrial Schools Act, 1866, and the Acts amending the same.

Section 26.—In the application of this Act to Scotland, unless the context otherwise requires—

The Secretary for Scotland shall be substituted for a Secretary of State:

The expression "local authority" means as regards any burgh in Scotland, being either a royal burgh or a burgh returning or contributing to return a member of Parliament, the town council; as regards any police burgh in Scotland, the Commis-

sioners of Police thereof, and as regards any county in Scotland exclusive of any such burgh, the county council:

The expression "chief officer of police" means the chief constable, or head constable, superintendent or inspector, or other officer, by whatever name called, having the chief local command of the police in the police district in reference to which such expression occurs:

The expression "court of summary jurisdiction," the expression "petty sessional court" and the expression "justice of the peace" mean the sheriff or sheriff substitute:

The expression "misdemeanor" means crime and offence:

The expression "manslaughter" means culpable homicide:

The expression "defendant" includes panel, respondent, or person charged:

The expression "enter into a recognisance with or without sureties" means grant a bond of caution:

The expression "workhouse" means poor house.

Section 27.—In the application of this Act to Ireland, unless the context otherwise requires—

The Chief Secretary shall be substituted for a Secretary of State:

The expression "local authority" means the sanitary authority within the meaning of the Public Health (Ireland) Act, 1878:

The expression "chief officer of police" means in the police district of Dublin metropolis the chief commissioner of the police for the said district; and in any other police district the county inspector of the Royal Irish Constabulary:

The expression "committed for trial' means committed to prison or admitted to bail in manner provided in the Summary Jurisdiction (Ireland) Acts:

The expression "petty sessional court" means a court of summary jurisdiction:

The expression "Industrial Schools Acts" means the Industrial Schools Act (Ireland), 1868, and any Act amending the same.

Section 28.—(1) This Act may be cited as the Prevention of Cruelty to Children Act, 1894.

(2) The Prevention of Cruelty to, and Protection of, Children Act, 1889, and the Prevention of Cruelty to Children (Amendment) Act, 1894, are hereby repealed.

(3) This Act shall come into operation on the twenty-first day of August one thousand eight hundred and ninety-four.

SCHEDULE.

Any offence under sections twenty-seven, fifty-five, or fifty-six of the

Offences against the Person Act, 1861, and any offence against a child under the age of sixteen years under sections forty-three or fifty-two of that Act.

Any offence under the Children's Dangerous Performances Act, 1879.

Any other offence involving bodily injury to a child under the age of sixteen years.

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