THE CRIMINAL EVIDENCE ACT, 1898 (61 AND 62 VICT. C. 36): WITH NOTES; AND A SHORT HISTORY OF THE ACT

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WILFRED BAUGH ALLEN

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Trieste

THE

CRIMINAL EVIDENCE ACT,

1898.

(61 & 62 VICT. c. 36.)

WITH NOTES,

BY

WILFRED BAUGH ALLEN, ESQ.,

Of the Inner Temple; Barrister-at-Law.

AND A

SHORT HISTORY OF THE ACT,

BY

SIR HARRY BODKIN POLAND, Q.C.,

Recorder of Dover.

Innocence claims the right of speaking [in the witness box], *as guilt invokes the privilege of silence.*

8°

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PREFACE.

THIS Edition of the CRIMINAL EVIDENCE ACT, 1898, has been prepared as it is thought that a small book containing the Principal Act, and all the Enactments therein referred to, may be found convenient and handy to practitioners. A few notes to the Act itself have been added.

The general effect of the Act is that on the expiration of two months from the passing thereof, in all cases where a person is charged with a criminal offence, the defendant, and the defendant's wife or husband, will in ALL courts, inferior as well as superior, and whether tried by a jury or not, be competent witnesses for the defence on the application of the defendant, except that with regard to a person charged with neglecting to maintain or deserting his wife or any of his family under the Vagrancy Act, 1824, the wife; and, with regard to a person charged with an offence under s. 80 of the Poor Law (Scotland) Act, 1845, or under ss. 48 to 55 of the Offences against the Person Act, 1861, or under ss. 12 and 16 of the Married Women's Property Act, 1882, or under the Criminal Law Amendment Act, 1885, or under the Prevention of Cruelty to Children Act, 1894, the wife and husband of the defendant will be compellable witnesses, both for the prosecution and the defence.

The prosecution may not comment on the fact that the defendant has not gone into the witness box, or

has not called the wife or husband, but there is no restriction on the right of the court to do so. The defendant, or the wife or husband of the defendant if he or she gives evidence, will be subject to cross-examination like any other witness, with the specific exceptions, so far as the defendant is concerned, referred to in s. 1 (*f*), (i.), (ii.), (iii.) (*post*, p. 2), which, of course, must be carefully studied. The Act will not affect s. 18 of the Indictable Offences Act, 1848, as to a defendant before a magistrate being allowed to make a statement, if he should think fit to do so, or his right to make a statement at the trial in addition to the speech of his counsel. The privilege as to communications between husband and wife during marriage is preserved. The Act does not affect the cases where the wife, or husband, were compellable witnesses at common law (see *post*, p. 14). If the defendant elects to give evidence himself, and no other evidence is given for the defence, he will still have his right to the last word, subject, of course, to the right of reply in the Crown where it exists when no evidence is given for the defence. There are numerous enactments under which the defendant, and the wife or husband, could have been called before the passing of this Act; they differ in their terms, but they are by this Act substantially repealed, and the procedure provided by this Act now governs all those cases. This is only a brief summary of the main provisions of the Act, but the terms of the Act itself must in all cases be consulted, and it is hoped the notes may help to make it clear.

A criticism to the Act has been that it will lead to perjury. A person charged who gives false evidence on his trial is liable, like any other witness, to be prosecuted for perjury. But WILLS, J., at the Summer Flint Assizes, 1898, in his charge to the

Grand Jury, strongly condemned the prosecution of a man for perjury in respect of evidence given by him on his trial at the Spring Assizes, when he was acquitted. The judge's charge is called in question in (1898), 23 Law Journal, 392, where it is said: "The learned judge seems to mean that, if the defendant succeeds, his truthfulness must be taken to be *res judicata*." This can hardly have been the judge's meaning. The true view seems to be that the same issue ought not to be tried again on substantially the same evidence before another jury, because there would be no finality. The second verdict would be no better than the first, and there ought to be a third trial to decide which of the other two verdicts was correct. There can be no doubt that if a person procured his acquittal by perjured evidence, by suborning other witnesses to commit perjury, and by putting before the court false documents, which may have taken the prosecution entirely by surprise, and which they could have had no opportunity of meeting, and the prosecution afterwards obtained clear evidence to show that the defendant's evidence was wilfully false, he not only could, but ought to, be prosecuted for perjury. The Editor of the Law Journal refers to an interesting case tried in the Central Criminal Court, Sydney, New South Wales, where a prisoner who had procured his acquittal by perjury was afterwards prosecuted and convicted for that offence (*R.* v. *Dean*, 17 N. S. W. Rep. 35). It is obvious that each case, in which it is alleged that the prisoner has committed perjury, must be dealt with according to the facts of the particular case, and that no general rule can be laid down.

As it will be desirable that the practice of all the courts should be the same, it is possible that the judges may, at one of their meetings, agree upon the

course of practice to be adopted by them when trying criminal cases in the future. The Courts of Quarter Sessions and all the inferior courts will be anxious to follow the practice of the judges. After the passing of the Prisoners Counsel's Act, 1836, twelve of the judges met and settled "the course of practice which they thought it would be most advisable to adopt" under that Act. (See 1 Moo. C. C. 495, and 7 C. & P. 676).

The author is indebted to Sir HARRY POLAND for the short and interesting history of this Act contained in this work, and also for revising the proofs of the notes. Mr. C. WILLOUGHBY WILLIAMS, 1, Brick Court, has kindly prepared the Index.

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