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REGINA v. KOPS.

May 31. Criminal Law and Evidence Amendment Act (55 Vic. No. 5, s. 6)—Prisoner competent but not compellable to give evidence—Prisoner refraining from giving evidence—Failure to contradict or explain incriminating evidence—Presumption of guilt arising therefrom.

The C.J.
Windeyer J.
Innes J.
Stephen J.
Owen J.
Foster J.
and
Manning J.

Upon the proper construction of s. 6 of 55 Vic. No. 5, which provides that a prisoner charged with an indictable offence shall be competent but not compellable to give evidence on the hearing of such charge, the Judge is entitled to comment to the jury upon the fact that the prisoner has not given evidence himself, and to invite them to draw inferences adverse to the prisoner from the fact that he has failed to contradict or explain matters upon which incriminating evidence has been given by the prosecution, and which, if untrue, it must be within the power of the prisoner to contradict or explain.

CROWN CASE RESERVED.

The prisoner was tried at the Cowra Quarter Sessions, before *Docker*, D.C.J., on a charge of attempted arson. It was established beyond all question that an attempt had been made by some person to burn down a building in which the prisoner had carried on business as a storekeeper, and the evidence pointed strongly to the accused as that person. An elaborate arrangement of inflammable materials was found underneath the counter, in the middle of which was a black round-topped hat with a burning candle fixed inside it, and so arranged as to ignite the materials about it at a certain time. A leather hat box, with a piece of red cord attached to it, was also found in the office inside the shop. The accused boarded at an hotel a short distance from the shop, and the housemaid proved that before the occurrence there used to be a leather hat box with a red cord on it, similar to the one found in the shop, in the prisoner's bedroom, but that it was not there afterwards.

The prisoner did not himself give evidence, nor did he make any statement.

In summing up, the Judge told the jury that the law permitted an accused person to give evidence on his own behalf, but that he need not do so unless he wished. Referring to the evidence about the hat box, the Judge said:—"If the hat, in which the candle was burning, was not the accused's, would you not expect

him to deny it? Can you doubt it was his hat? If it was not his hat, why does he not deny it? If it was his hat, why does he not explain how it got there? The hat is a very important bit of the circumstantial evidence." His Honour also made similar remarks and comments upon other portions of the case.

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The counsel for the accused did not take any exception to the observations at the time, but after the jury had retired he asked for the point to be reserved whether it was right for the Judge to comment on the fact that the accused had chosen not to give evidence. The question, therefore, for the Supreme Court was whether the learned Judge was right in calling the attention of the jury to the fact that the accused had not given evidence upon matters which must have been within his knowledge, and about which he could have given evidence if he had chosen.

The case was argued before the Full Bench of seven Judges.

Sect. 6 of 55 Vic. No. 5 provides that:—"Every person charged with an indictable offence, and the husband or wife, as the case may be, of the person so charged shall be competent, but not compellable, to give evidence in every Court on the hearing of such charge, provided that the person so charged shall not be liable to be called as a witness on behalf of the prosecution, nor to be questioned on cross-examination without the leave of the Judge as to his or her previous character or antecedents."

Sir *Julian Salomons*, Q.C., and *Wise*, for the prisoner. If the course pursued by the learned Judge in this case is held to be a proper one, it will effect an enormous change in the existing law, and sweep away some of the most ancient and well-established rules of criminal procedure. It will introduce the inquisitorial system into our criminal law, and even though it may be a question whether that system or our own litigious one is the better under all circumstances, yet the Court will not give effect to such an enormous alteration unless the Legislature expresses the intention in the clearest and most precise terms. The Act most distinctly says that the prisoner is to be "competent *but not compellable*" to give evidence, but if the jury are to be directed to draw inferences from the fact of the prisoner's declining to avail himself of this newly-conferred privilege, the result is that the prisoner *is compelled*, and that in the most forcible manner,

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They referred to *R. v. Makin* (1), *R. v. Morrison* (2), *R. v. McLeod* (3), *R. v. Spencer Cowper* (4), *R. v. Watson* (5), *R. v. White* (6), *R. v. Gibson* (7), *R. v. Brittleton* (8), *R. v. Owen* (9), *Lloyd v. Passingham* (10), *R. v. Payne* (11), *Wentworth v. Lloyd* (12), *Rose v. Blakemore* (13), *R. v. Garbett* (14), *Roe v. Harvey* (15), *Best on Evidence* (7th Ed.), s. 112, 383, 415, 551 ; *Taylor on*

(1) 14 N.S.W.L.R. 1 ; 9 W.N. 129.

(2) 10 N.S.W.L.R. 197 ; 6 W.N. 32.

(3) 11 N.S.W.L.R. at 236.

(4) 13 State Trials, at 1148.

(5) 32 State Trials, at 491.

(6) 4 F. & F. 383.

(7) 18 Q.B.D. 537.

(8) 12 Q.B.D. 266.

(9) 58 L.T. N.S. at 782.

(10) 16 Ves. 59.

(11) L.R. 1 C.C.R. 349.

(12) 10 H.L.C. 589.

(13) Ry. & Moo. (N.P.) at 383.

(14) 1 Den. C.C. at 257.

(15) 4 Burr. at 2489.

Evidence (7th Ed.), s. 112; *Maxwell on Statutes* (2nd Ed.), p. 95, 133; *Archbold*, 258; *Stephen's History of the Criminal Law*, Vol. 1, p. 441; *The Indian Evidence Act*; *The South Australian Act*, 1882 (45 & 46 Vic. No. 245) (1); *The New Zealand Criminal Evidence Act*, 1889 (2).

The *Attorney-General, Healy, and Wade*, for the Crown: *Giblin v. McMullen* (3), *Morgan v. Evans* (4), *Bessela v. Stern* (5), *Wiedeman v. Walpole* (6), *Sutton v. Devonport* (7), *R. v. Scott* (8), *R. v. Burdett* (9), *R. v. Gillyard* (10), *Russell on Crimes* (5th Ed.), Vol. 3, p. 323; *Stephen's General View of the Criminal Law*, p. 354; *Best on Evidence* (6th Ed.), ss. 314, 321, 322, 329, 346, 521, 574, 575; *Taylor on Evidence* (6th Ed.), ss. 96, 102.

On 24th of July the Court delivered judgment.

THE CHIEF JUSTICE. The prisoner in this case was tried before Mr. District Court Judge *Docker*, upon a charge of attempted arson. Evidence was given of several matters which pointed strongly to the prisoner as being the person who had made the attempt. The prisoner was in a position to deny or explain these matters. In fact, some of them, if capable of explanation, could be explained by the prisoner, and by him alone. Nevertheless, the prisoner made no statement to the jury under the provisions of s. 470 of the *Criminal Law Amendment Act*, nor did he give any evidence under the provisions of s. 6 of the 55th Vic. No. 5. Under these circumstances the learned Judge made comments in summing up to the jury upon the fact that the prisoner had not denied or explained the various matters

(1) *The South Australian Act* (45 & 46 Vic. No. 245, s. 1) provides that:—"Any person accused of any felony, misdemeanour, or other indictable offence shall, if such person so desires, be competent and entitled to be sworn to give evidence as a witness on the trial of the felony, &c., with which he is charged. Provided that no presumption of guilt shall be made from the fact of such person electing not to give evidence."

(2) *The New Zealand Criminal Evidence Act* of 1889, No. 16, s. 4, provides:—"If a person charged with an offence shall refrain from giving evidence, such person shall not be prejudiced thereby, and no comment adverse to the person charged shall be allowed to be made thereon."

(3) L.R. 2 P.C. at 335.

(4) 3 Cl. & F. at 201, 205.

(5) 2 C.P.D. 265.

(6) [1891] 2 Q.B. 534.

(7) 27 L.J. C.P. 54.

(8) 25 L.J. M.C. 128.

(9) 4 B. & Ald. at 121, 140, 150, 161

(10) 12 Q.B. 527.

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1893. referred to. For instance, his Honour, referring to a certain hat
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The C.J. inflammable materials was found to be burning, said, "If the hat was
not the accused's would you not expect him to deny it? Can you
doubt it was his hat? If it was not his hat, why does he not
deny it? If it was his hat, why does he not explain how it got
there?" The case states that this hat was a very important
portion of the circumstantial evidence. Counsel for the prisoner
asked that the point should be reserved as to whether it was
right for the Judge to comment on the fact that the accused had
chosen not to give evidence. The question accordingly for our
decision is, whether the Judge was right in calling the attention
of the jury to the fact that the accused had not given evidence
upon matters which must be within his knowledge, and which he
could have given evidence about if he had chosen.

This case raises, for the first time, a very important question
which should be set at rest as soon as possible, in order that all
those who have to preside over criminal Courts may know their
position, and what is the proper course to pursue in the event of
a prisoner not giving evidence on his own behalf and not
explaining an important allegation against him, which, if capable
of explanation, it may be that he only can explain. No such
question could have been raised before the passing of the 55 Vic.
No. 5. Sect. 6 of that Act for the first time rendered it possible
for an accused person to give evidence on his own behalf,
and thus introduced into our system of criminal procedure some-
thing quite novel to that procedure. It is not, therefore, to be
much wondered at if some uncertainty exists as to the exact
meaning of the Legislature's intention and the full scope of this
important measure.

It is only since the year 1852 that parties in civil actions
were enabled to give evidence either as plaintiff or defendant
on their own behalf or as witnesses for their opponents. At
first this was by many considered to be a dangerous innova-
tion, and likely to bring about much perjury in Courts of justice.
The experience of mankind has, however, been otherwise; and
when, in 1869, further restrictions were being removed, the Act
of Parliament which removed them—the 32nd and 33rd Vic., cap.

68—in its preamble stated in terse words the result of that experience. That preamble is in the words following:—"Whereas the discovery of truth in Courts of justice has been signally promoted by the removal of restrictions on the admissibility of witnesses, and it is expedient to amend the law of evidence with the object of still further promoting such discovery."

I have no doubt that the intention of our Legislature in passing s. 5 of 55 Vic. No. 5, was to still further promote the discovery of truth in Courts of criminal justice, and not merely, as has been sometimes said, to give to the accused person a privilege not previously possessed. In one sense it is a privilege, as it may enable the innocent accused to make his innocence the more readily apparent. I am, however, convinced that it was not intended to give the guilty any privilege, or to make the establishment of his crime more difficult. In a word the Act was passed believing that the introduction of a system found to work well in civil cases would probably promote the discovery of truth in criminal cases. Sect. 6 of the Act is in the following words:—"Every person charged with an indictable offence, and the husband or wife, as the case may be of the person so charged, shall be competent, but not compellable, to give evidence in every Court on the hearing of such charge. Provided that the person so charged shall not be liable to be called as a witness on behalf of the prosecution, nor to be questioned on cross-examination without the leave of the Judge as to his or her previous character or antecedents." It will be observed that while the accused is made a competent witness he cannot be compelled to give evidence. He cannot be called as a witness for the prosecution, and he cannot be cross-examined as to his previous character or antecedents without the leave of the Judge. He is not compellable to give evidence, because nothing in the Act touches the maxim that "No man can be compelled to incriminate himself."

Now the question in this case is—Is the Judge entitled to comment upon the fact that the accused has not given evidence, and has not by his evidence denied or explained some important fact, on which evidence has been given; and may the jury draw an inference to his prejudice from his not denying or explaining

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1893. such facts? On the part of the accused it is contended that any
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 The C.J. inference, amounts to an indirect compelling of the accused to give
 evidence, and is, therefore, opposed to the spirit of the Act, and
 the case is said to resemble the case of a witness who is asked a
 question, the answer to which may incriminate him, and who,
 therefore, may refuse to answer. It is said that in such a case
 no comment can be made, and the jury should be told not to draw
 any inference to the witness's prejudice. I at once deny that this
 is the law. In my opinion, the conduct of a witness who claims
 the privilege of silence on the ground that the answer to any
 question may incriminate him is open to comment, and the jury
 may draw from the circumstance such reasonable inference as to
 his credit as they see fit. "The object of the law is to afford a
 party, called upon to give evidence in a proceeding *inter alios*,
 protection against being brought by means of his own evidence
 within the penalties of the law," per *Cockburn, C.J., R. v. Boyes*
 (1). If the object of the law be here correctly stated, there can
 be no reason why in the suit at hearing the jury should not take
 the circumstances of the claim to the privilege of silence into their
 consideration when deliberating upon the weight to be attached to
 the witness's evidence. *Cessante ratione legis cessat ipsa lex.*

It is true that there are the dicta of learned Judges to the
 contrary. In *Lloyd v. Passingham* (2), Lord *Eldon*, and in
Rose v. Blakemore (3), *Abbott, C.J.*, say that a refusal to
 answer is not to be taken as an admission of the fact inquired
 into. If by that these learned Judges mean that the refusal to
 answer in a suit is not to be taken as an admission of the truth
 of the fact in a criminal proceeding against the witness, well and
 good; but if they mean that no inference is to be drawn in the
 particular suit in which the privilege of silence is claimed, then
 such a conclusion is not only opposed to reason, but also to much
 authority both of Judges and text writers. In a note to the case
 of *Rose v. Blakemore* (4), a learned writer says, "It would seem
 that the witness is sufficiently secured from penalties, punishment,
 or forfeiture if he is not compelled to say anything which would

(1) 1 B. and S. at 330.

(3) Ry. and Moo N.P. 384.

(2) 16 Ves. at 64.

(4) Ry. and Moo. N.P. at 384.

be evidence against him in proceedings instituted with those objects, and as neither the inferences of counsel nor the opinion of the jury could have that effect, it appears as unreasonable to prevent counsel from drawing the one as it is impossible to prevent the jury from forming the other." In *Taylor on Evidence*, 6th Ed., s. 1321, that learned writer says, "Although it would be going too far to say that the guilt of the witness *must* be implied from his silence, it would seem that in accordance with justice and reason the jury should be at full liberty to consider that circumstance as well as every other when they come to decide on the credit due to the witness." In the case of *Rex v. Watson* (1), *Bayley, J.*, says, "The witness may demur to the question, for he is not bound to criminate himself, and, if he refuse, this is not without its effect with the jury. If you ask a witness whether he has committed a particular crime, it would perhaps be going too far to say that you may discredit him if he refuse to answer; it is for the jury to draw what inference they may." In that case *Holroyd, J.*, seems to have been of a contrary opinion, for he says (p. 158): "His not answering can have no effect with the jury." I confess I do not understand his remark, for it is impossible to suppose that the claim for the privilege of silence would have no effect upon a jury.

In the case of the *Queen v. Gillyard* (2), where a man declined to answer an affidavit upon the ground that his answer might criminate him, Lord *Denman* says, "such an answer clenches the accusation;" and *Coleridge, J.*, says, "If a man when such a serious charge is made against him will not deny it, he must not complain if the case is taken *pro confesso*." In the case of the *Attorney-General v. Radloff* (3), where the Court were equally divided upon the question as to whether the defendant to an information by the Attorney-General for smuggling was a competent witness on his own behalf, *Martin, B.*, who held that he was a competent witness, says, at p. 98, "It was also said that, if the Attorney-General called the defendant as a witness, he might refuse to answer any question whatever. This is quite true; but, supposing him to be called and refuse to answer, there

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(1) 2 Stark. at 153.

(2) 12 Q.B. 527.

(3) 10 Exch. 84.

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can be no doubt that, if there was the slightest evidence in the case, the practical consequence would be that this his refusal would lead to an immediate verdict against him." *Parke, B.*, who held that he was not a competent witness, says, at p. 107: "On the other hand, the defendant in all these cases not provided for by the statute may be examined for himself, and yet not be compelled on cross-examination to answer any question tending to render him liable to the information or action; but then if he did so" (that is if he claimed the privilege of silence), "his evidence would very likely not profit him at all, and the power of being examined on his own behalf would be of little avail." Mr. Justice *Fitzjames Stephen*, in his work, "General View of the Criminal Law," at p. 191, says, "It has never been doubted that such questions" (that is, questions tending to incriminate) "may be asked, or that a refusal to answer them may be used as an argument that the person so refusing was guilty of the guilty conduct suggested by them." It appears to me, therefore, that reason and the weight of authority are all in favour of the position so clearly stated by Mr. Justice *Stephen*. *Wentworth v. Lloyd* (1) has been referred to as supporting the contrary conclusion. That, however, was a case where an objection was made to the disclosure of professional confidence. This objection rests on a different principle. It is against public policy that professional confidence should be broken, and if in such a case any presumption were to be drawn to the prejudice of the party objecting, such presumption would at once get rid of the privilege which public policy supports, for the reasons so clearly stated in Lord *Chelmsford's* judgment. The rule laid down in that case appears to me to be entirely beside the question we have to consider in this.

The argument on behalf of the accused in this case is principally based upon the meaning of the word "compellable" in s. 6 of the Act. It is said if a Judge permitted a jury to draw any inference to the prejudice of the accused from the fact that the accused did not give evidence, then the accused would in effect be compellable, *i.e.*, morally compellable, to give evidence. I am unable to see the force of this argument. In my opinion the

(1) 10 H.L. Cas. 589.

word compellable is used in its primary and ordinary sense, which is that no one can demand that the prisoner give evidence. It remains at his own option whether he will do so or not; but as he has this option expressly given to him then if he does not avail himself of it every reasonable inference may be drawn from the fact of his silence. His declining to give evidence as to a matter he is in a position to explain is not to be taken as an admission that such fact has been conclusively established, but his non-explanation is a fact to be taken into consideration by the jury together with all the other facts in the case. In the *Evidence Acts*, where parties to a cause were for the first time made competent witnesses, it was enacted that they should be competent and compellable to give evidence. An exception was made as to criminal proceedings; there the person charged was neither competent nor compellable. The Act we are considering makes him competent, but not compellable. It was in this way that the word "compellable" found its way into the statute book. The argument that because an inference may be drawn from silence compels a prisoner to speak, and thus defeat the statute, is equally applicable to almost every stage of a criminal trial in which the prisoner takes part. An inference may be drawn, it is admitted, from a material witness not being called on behalf of the prisoner. Is he, therefore, placed under any compulsion to call him? Is he placed under any compulsion to cross-examine upon material statements? Or is he placed under compulsion to make a statement? And yet from the prisoner abstaining from adopting these steps very grave inferences may, it is admitted, be drawn. As I have already mentioned, the sole argument presented in this case was to the effect: "If you permit an inference to be drawn from the silence of the accused in Court you indirectly compel him to break that silence by giving evidence." If, however, a Judge is not to comment upon a prisoner's silence in Court, now that he can lawfully speak, then what about silence out of Court? A grave statement is made out of Court in the prisoner's presence. It is alleged, perhaps in the prisoner's presence, that he has been seen at the spot where the alleged crime took place at the time of the occurrence. To this the prisoner at the time makes no reply. It is quite clear that on this the Judge may comment, and from this

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R. v. Kops. argument the Judge cannot comment upon, nor the jury draw
The C.J. an inference from the fact that the prisoner has not in Court
explained his silence out of Court, or how he came to be at the
place in question, and yet the comments as to the silence out of
Court are just as well calculated to bring about this so-called
moral compulsion as the comments on the silence in Court.

During the argument I suggested this case to the prisoner's counsel. Two men, the accused and another, are in a position to explain or deny a material fact which has been adduced in evidence by the Crown. If the witness is not called by the accused it is admitted that his not being called is a fair and proper subject of comment, and that an inference, fatal perhaps to the accused according to the circumstances, may reasonably be drawn by the jury from his not being called. Nevertheless, although the accused stands in the same position as the witness as regards his power of explanation or denial, no comment is to be made upon or inference drawn from the want of such explanation or denial on his part. And yet it cannot be denied that comments in the case of the witness are likely to exercise as much moral compulsion on the prisoner as comments on his own silence. To push this argument on behalf of the accused to its logical conclusion, would, in my opinion, bring about an absurd result. If comment on the accused's non-explanation, or non-denial, exercises a moral compulsion over the accused, forbidden by law, how much more must the evidence of the facts laid before the jury exercise that moral compulsion ; therefore, no evidence tending to prove the guilt of the accused should be allowed, lest the adducing of such evidence may exercise moral compulsion on the accused to explain or deny it. In the case of questions put to disgrace or disparage a witness under certain circumstances, the witness cannot be compelled to answer. It has been said that the inference in the case of a refusal to answer is so obvious that the only complete protection is for the Judge to refuse to allow the question to be put. So in this case the only complete protection against this so-called moral compulsion is to refuse to allow the evidence to be given, a course which leads to the absurd result pointed out. But the argument goes further

than requiring the Judge to abstain from comment upon the prisoner's silence; and it is contended broadly that he must not only do this, but must also direct the jury that they are to draw no inference hostile to the prisoner from the fact that no explanation has been afforded, and tell them that no presumption of any kind arises from the prisoner's conduct in observing silence. They are in fact to ignore the logical result which flows from silence, and are not to permit their reason to have full sway. This appears to me to be asking a jury to do something unnatural, and in fact impossible, and to what purpose? Why should a guilty man be allowed this advantage? The innocent does not require it. In my opinion the argument derived from the words "not compellable" was not within the contemplation of the Legislature when they introduced this novelty into criminal procedure. No false sentiment, I am convinced, entered the minds of the Legislature in passing this clause; no desire to throw some difficulty in the way of establishing crime, which would follow were we to construe this Act as now pressed to do; they did not intend that "common sense should be sacrificed at the shrine of guilt." On the contrary, finding that the change in the law had tended towards the elucidation of truth in civil Courts, they saw no reason why the same result should not follow from the extension of the principle to criminal Courts. The Legislature desired to bring about a better means to enable the innocent accused the more readily to establish his innocence, a better means to secure the conviction of the guilty.

In support of my views I refer to the judgment in the well-known case of *Rex. v. Burdett* (1). At p. 161, *Abbott, C.J.*, says:—"In drawing an inference or conclusion from facts proved regard must always be had to the nature of the particular case and the facility that appears to be afforded either of explanation, or contradiction. 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

(1) 4 B. and Ald. 95.

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R. v. Kops. do otherwise than adopt the conclusion to which the proof tends?"

The C.J. According to the argument in this case it is now the duty of the Judge to direct the jury: You may adopt the conclusion to which the proof tends; but you are not to permit yourself to be aided in so doing by taking into your consideration the fact that the accused has had the opportunity afforded him of offering explanation or contradiction, and has offered none. Surely human nature will revolt against such a direction. If this be so, as I believe it must be, can it be right to call upon a Judge to direct a jury in such a way as to cause those following the dictates of their reason to refuse obedience to the direction of the Judge? In the same case Mr. Justice *Best* (no mean authority), at p. 121, says: "It has been said that there is to be no presumption in criminal cases. Nothing is so dangerous as stating general abstract principles. We are not to presume without proof. We are not to imagine guilt where there is no evidence to raise the presumption. But when one or more things are proved, from which our experience enables us to ascertain that another, not proved, must have happened, we presume that it did happen as well in criminal as in civil cases. Nor is it necessary that the fact not proved should be established by irrefragable inference. It is enough if its existence be highly probable, particularly if the opposite party has it in his power to rebut it by evidence, and yet offers none; for then we have something like an admission that the presumption is just." *Holroyd, J.*, at p. 140, says: "It is established, as a general rule of evidence, that in every case the *onus probandi* lies on the person who wishes to support his case by a particular fact, which lies more peculiarly within his own knowledge, or of which he is supposed to be cognisant. This, indeed, is not allowed to supply the want of necessary proof, whether direct or presumptive, against a defendant of the crime with which he is charged; but when such proof has been given, it is a rule to be applied in considering the weight of the evidence against him, whether direct or presumptive, when it is unopposed, un rebutted, or not weakened by contrary evidence which it would be in the defendant's power to produce, if the fact directly or presumptively proved were not true."

I cite these observations of these very learned Judges as shewing that there are cases where the accused is called upon to give an answer, and that if he refrains from so doing, a presumption to his prejudice may, nay must, arise. Can it be possible, I ask, that the sole case where such presumption is not to arise, is where the power of giving the answer rests with the prisoner himself? This, in my opinion, is so unreasonable, and so illogical, that it cannot be the law. For these reasons, I am of opinion that the learned Judge was right in calling the attention of the jury to the facts in question. The conviction therefore, in my opinion, ought to be supported.

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WINDEYER, J. The question raised in this case is not only one that must arise in our criminal Courts whenever a prisoner declines to avail himself of his right under the provisions of the *Criminal Law and Evidence Amendment Act* of 1891 to give evidence on his own behalf, but one upon the right determination of which, to a large extent, depends that proper consideration of the evidence adduced to establish guilt which is to be expected in every Court of justice. Its importance, therefore, cannot be over-estimated, though it is a question which appears to me very easy of solution. The matter for consideration is whether, under the new law, it is permissible for a jury to draw any inference from the fact that the prisoner does not choose to avail himself of his right to give evidence respecting matters which are within his own knowledge, and which, uncontradicted or unexplained, tend to prove his guilt, and consequently whether a Judge may comment upon the prisoner's abstention from giving evidence. This question, though raised with reference to and in consequence of the recent great reform in the law which allows accused persons to give evidence in their own behalf, it appears to me, may be settled by simply applying those principles which guided Courts in deciding what inferences might be legitimately drawn by a jury under the old state of the law. The points submitted to us, therefore, though argued on behalf of the prisoner, as if the Court was in peril of making some dangerous innovation upon our time-honoured English mode of conducting criminal trials, seems to me, upon consideration of a few elementary principles and rules which

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R. v. Kops. justice, to permit of no doubt. The fact that a prisoner, though
Windeyer J. now allowed, declines to give evidence in his own behalf can
affect the conclusions which are to be drawn from uncontradicted
or unexplained evidence in no other way than by intensifying the
strength of the conviction irresistibly forced upon the mind by
uncontradicted testimony.

With reference to matters which can be proved or disproved
by human testimony, we cannot, as our minds are constituted,
help regarding credible uncontradicted evidence, leading us to
one conclusion, as proof; and when it is possible to contest
the truth of evidence and its truth is not attacked by opposing
evidence, there is a tendency in the human mind to assume that
a statement is not disputed because it is known to be true. All
contentious argument is based upon this assumption, and it applies
not only to the investigation of scientific facts, but with three-
fold force in all the affairs of life where motives of self-interest
supply the strongest inducement to contradict incriminating
evidence. We assume that where strong self-interest would
naturally lead a man to contradict a damaging statement he will
contradict it if he can. Just as we naturally regard a plea of
guilty as the most satisfactory and complete proof of guilt
because made against the strongest motives of self-interest, so
we regard every admission of a fact tending to shew guilt as
damaging in proportion to the extent that it tends to prove guilt.
The law has ever recognised the importance of such admissions,
whether made out of Court or in Court, whether made in the
most informal and unguarded expression of an accused person, or
whether made in Court when he is upon his trial. So far does
the law go in recognising the importance of such admissions
made with reference to a charge of crime, that any conduct on
the part of a person on hearing an accusation, or on hearing a fact
stated which raises an inference of his guilt, is regarded as
evidence against him. On the principle that silence gives consent,
his mere silence on a charge being made against him becomes
evidence which a jury is entitled to take into consideration with
the other facts of the case. Undoubtedly cases do arise where
from the silence of a prisoner no inference could safely be drawn;

but others are often met with in which, coupled with other facts, his silence may have weight. It is for the jury in every case to judge from the surrounding circumstances whether any, and if so, what, weight is to be attached to such silence when a damaging statement or charge is made against one accused of crime. If A is told that a person standing by saw his hand in B's pocket (B having lost his purse) and A remains silent, looks confused and hangs his head, two inferences may be drawn. Either A does not deny the accusation because he knows it to be true, and his demeanour is that of a guilty person, or his demeanour is that of a person who is so inexpressibly shocked by a false accusation and the difficulty of his position that he cannot find words to express himself. If A, who up to the time of his hand being in B's pocket was proved to be in needy circumstances and shortly before had borrowed a shilling, was afterwards seen spending a 5*l.* note, several of which kind of notes were in B's purse, it would be for the jury to say whether A's silence was to be attributed to the shock given by a false accusation to his delicate sensibility as an innocent man, or to his consciousness of guilt.

Though much to my surprise, a question was raised during the argument whether a prisoner's silence when accused of crime was evidence against him, every practitioner in our criminal Courts must know that such evidence has always been received. All the Judges who have sat on this Bench for the last 35 years, including Sir *Alfred Stephen* and Sir *James Martin*, both accomplished criminal lawyers, have in many cases in which I have acted either as defending or prosecuting counsel admitted such evidence. If authority were required for so elementary a proposition, *Rex v. Smithies* (1), decided 60 years ago, followed by *Rex v. Bartlett* (2), and ever acted on since, would suffice. In the first of these cases, Mr. Justice *Gazellee* and Mr. Justice *J. Parke* held that whatever was said to a prisoner on the subject of the charge to which he made no reply "was receivable as evidence of an implied admission on his part." The authority of these cases has never been disputed. So in *Bessela v. Stern* (3) *Bramwell*, J., says, "If a statement is such that a denial of it is not to be expected, then

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(1) 5 C. & P. 332.

(2) 7 C. & P. 832.

(3) 2 C.P.D. at 272.

1893. silence is no admission of its truth; but, if two persons have a
 R. v. KOPS. conversation in which one of them makes a statement to the
 Windeyer J. disadvantage of the other, and the latter does not deny it, there
 is evidence of an admission that the statement is correct." The
Queen v. Gillyard (1) is to the same effect. "If a man," says
Coleridge, J., "when such a serious accusation is preferred against
 him will not deny it, he must not complain if the case is taken *pro*
confesso."

It is equally clear that juries have always been allowed to draw such inferences from silence, and this even with respect to observations made by a wife, who could not be called as a witness. The reason of this is obvious. It is the prisoner's mode of dealing with the accusation or observation which is evidence against him, and not the mere accusation or observation made in his presence. The same inference which the jury has always been at liberty to draw from the silence of the prisoner when first accused, it has always been at liberty to draw from his conduct in Court. If he does not attempt by cross-examination to shake the evidence of those who have testified to incriminating facts, and when called upon for his defence simply states that he has nothing to say, or if he calls no witnesses to contradict or explain the evidence against him, the jury has always been at liberty to draw its own inference from this failure in any way to contradict the evidence for the prosecution.

As the right of a Judge to comment on any matter from which an inference can be drawn, in other words, on a fact which is recognised by law as evidence material to the issue, cannot be disputed, really the only question is whether the failure of a prisoner personally to contradict or explain incriminating evidence is, or is not, a matter from which an inference can be drawn under the new law, just as an inference could be drawn under the old state of the law from his failure to contradict or explain by the evidence of other witnesses. Acting upon the hitherto undoubted law (which I have, to my astonishment, for the first time heard questioned in the course of this argument) that the failure of a prisoner to contradict or explain incriminating evidence was a matter from which a jury was entitled to draw, and would

(1) 12 Q.B. 527.

inevitably draw, an inference, Judges have from time immemorial, I might say, been in the habit of commenting upon such failure to contradict or explain. Every criminal lawyer knows this, and the reports are full of instances where Judges have made such comments. Two of the very cases cited in the course of this argument give illustrations of this. In *Rex v. Watson* (1), Lord *Ellenborough*, in summing up, after referring to certain portions of the evidence of a witness for the Crown, says, "But there are other things, and of much more material import, as to which there is not the same or any other adequate reason to be assigned for the non-contradiction on the part of the prisoner of the particulars stated by the witness Castle; he has comprehended in his evidence a period of time from the month of October to the beginning of December, in respect of which he has laid himself open to contradiction on the business of almost every day, and to which no sort of contradiction is offered. Look at the important fact of his hiring a house from Mr. Cosser for the purpose of depositing combustibles in it; is there any contradiction given to that fact?" If the prisoners in that case could have given evidence would it have been wrong for his Lordship to ask is there any contradiction of these facts given by the prisoners? and if not, why not? In the *King v. Burdett* (2), the argument mainly turned upon the question whether there was evidence from which a jury might reasonably infer that a libel was published at L., and whether the jury had been rightly told that they might infer such publication had taken place from certain evidence which had been given against the prisoner, and from his having failed to contradict such evidence. In dealing with the question whether the presiding Judge had rightly told the jury that such inference might be drawn, Lord Chief Justice *Abbott* says, "In drawing an inference or conclusion from facts proved, regard must always be had to the nature of the particular case and the facility that appears to be afforded either of explanation or contradiction. 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

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(1) 32 State Trials, at 670.

(2) 4 B. & Ald. 95.

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Windeyer J. nature of the case is such as to admit of explanation or contradiction, if the conclusion to which the proof tends be true, and the accused offers no explanations or contradictions, can human reason do otherwise than adopt the conclusion to which the proof tends?"

This passage alone, cited by me in my judgment in *R. v. Makin* (1), when observing incidentally that the jury was at liberty to draw an inference from the fact that the prisoners had offered no contradiction of the incriminating evidence in that case, sums up in a few words the whole argument in support of the position that an inference can be drawn from the failure of the prisoner to give his own evidence to contradict or explain incriminating evidence. If, when a prisoner was not allowed to give evidence, it was permissible to draw an inference from his failure to bring evidence to contradict or explain, even though he might have been the only person who could have given such evidence, how much more reasonable is it that such an inference should be permitted now that the prisoner is allowed to give evidence himself as freely as any other witness? I always thought that the reproach against our old law was that the jury might draw an inference from the failure of a prisoner to contradict or explain, though he was not allowed by his own evidence to contradict or explain. As far as his own evidence was concerned, the prisoner's mouth was closed, notwithstanding all that was said to the contrary in defence of the old law. As Lord *Bramwell* said in 1886, "Of all persons in the world, the man who knew best whether an accused person was guilty or not was the man who was charged with any offence, and yet under the present law that was precisely the man whose mouth was closely shut." It is true that through counsel, or under s. 470 of our *Criminal Law Amendment Act*, he might make an explanation himself, but such modes of explanation could never have the same weight as if given upon oath. As far as they were made through counsel, except when strongly supported by evidence, they were open to the imputation of being simply the ingenious concoctions of an advocate; whilst statements made by the prisoner under s. 470 of the Act have been expressly held by this Court in *R. v. Morrison* (2) not to be evidence, but simply statements like any other

(1) 14 N.S.W.L.R. 1; 9 W.N. 129.

(2) 10 N.S.W.L.R. 197; 6 W.N. 32.

statements made by a prisoner in conducting his defence, to which the jury might attach such weight as they thought reasonable. It was because the law, which thus prevented a prisoner from telling his story on oath with all the weight attaching to it as evidence, was thought to be unjust towards innocent men who might be quite willing to submit their account of a transaction to the test of cross-examination, that it was altered—in my opinion, wisely. Defending counsel, who, too often assuming that—

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A rogue or a thief
Was a gentleman worthy implicit belief
Because his attorney had sent him a brief,

used in impassioned tones to warn juries against the danger of convicting unfortunate clients who could prove their innocence if allowed to give evidence, but whose mouths were closed by an absurd law, now when the reform has come for which they clamoured seem to think differently both of the reform and of the bygone system, which, whilst well abused because its abuse frightened weak jurymen, allowed guilty men, perhaps at the expense of the innocent, to hide their guilt behind the mask of silence. Juries are now warned in equally impassioned tones against the operation of what is denounced as a cruel law because whilst it professes to give a great privilege to accused persons it in reality drives a prisoner into the position of either being tempted to commit perjury or to admit by his silence his inability to contradict or explain evidence which, uncontradicted or unexplained, proves his guilt.

This argument, which has been reproduced to us, amounts to nothing more than saying that the law is one which is found inconvenient by guilty men. But the Act was passed in the interests of justice and humanity to secure the acquittal of the innocent who could by their evidence satisfy a jury. If in securing the acquittal of the innocent its operation makes doubly clear the guilt of the guilty, it is surely no less a righteous law. The fact that this great reform would have this result was an argument in its favour used by Bentham 90 years ago in his treatise on circumstantial evidence. Probably no legislation will ever be devised to secure the safety of the innocent which will not always act to the disadvantage of the guilty. That a law should be “a

1893. terror to evildoers but a praise to them that do well" is no
 R. v. KOPS. argument against its wisdom. On what rational ground is this
 Windeyer J. Court to countenance efforts to defeat the natural and legitimate
 operation of the Act in demonstrating the guilt of the guilty
 whilst it enables the innocent to demonstrate their innocence?
 The time is past when Judges and juries combined in a humane
 conspiracy to defeat the effect of a barbarous and bloody code of
 laws, in which nearly 200 crimes were of a capital character, the
 former by inventing all sorts of absurd technicalities which
 favoured the escape of the accused, and the latter by returning
 perjured verdicts. Human nature proved then, as it will prove
 now, stronger than artificial systems of jurisprudence. Juries
 then, to save wretched creatures in peril of their lives for stealing
 40s. worth of property, constantly, in the face of the clearest
 evidence, found that it was only worth 1*l.* 19s., and when the death
 value of stolen property was in some cases raised to 5*l.*, proved
 themselves equal to the occasion by as constantly finding it to be
 worth but 4*l.* 19s., though it might be worth hundreds. Judges
 equally human and humane built up a system of Judge-made law
 favouring the escape of the guilty, which in some respects, even
 in its remnants still unrepealed, seems shocking to our common
 sense. The criminal under the influence of an inhuman code
 became regarded as a creature to whom, as to a bird allowed to
 get on the wing by a sportsman, a certain amount of "law" should
 be given, a certain chance of escape should be left open. With the
 growth of more humane feelings, and with a clearer perception
 of the relative magnitude of crimes, of proportion in their
 punishment, and of the rights of the criminal as a human being,
 society has also come to a clearer perception that no system of
 criminal law which allows the guilty to escape can be sound; that
 every act of fraud or of violence against the property or the
 person of the citizen which goes undiscovered or unpunished is a
 wrong to society which makes the enjoyment of life and property
 less secure, by the encouragement which it gives wrongdoers to
 hope that they may escape condign punishment as others have
 escaped before them. Instead of having that morbid feeling of
 sympathy with criminals as victims of a barbarous code—nearly
 every penalty in which was death—we more rightly feel that

every man must be held strictly responsible for his misdeeds, and that that system of criminal law is the best which, whilst it secures the acquittal of the innocent, will also secure the conviction of the guilty, by allowing Judges and juries to act upon those processes of reasoning which guide us in the affairs of every day life.

It has been argued that if a jury is to be allowed to draw an inference from the prisoner's declining to give evidence, it will change what has been termed by jurists our litigious mode of conducting criminal cases to one of an inquisitorial character. How a system can be said to be inquisitorial which leaves a man entirely free to say whether he will give evidence or not in his own behalf, I am at a loss to understand. That a jury, on the other hand, should be at liberty to draw an inference from his failure personally to contradict or explain incriminating evidence respecting facts entirely within his own knowledge is, it appears to me, altogether in accordance with the litigious character of our criminal law, as the rules of evidence are the same in civil and criminal Courts. As I said in *R. v. Makin* (1) I see no reason why the same inference should not be drawn in a criminal as in a civil case, if the evidence is the same. To use my own words judicially, as in *R. v. Makin* (1) it might be said they were *obiter dicta* with reference to a point not expressly raised in that case—"The only difference between such cases is as to the mode in which juries should act upon evidence, deciding, as they must in criminal cases, not upon a mere balance of it, but upon proof beyond reasonable doubt. In a civil case, on evidence being given by a plaintiff that the defendant met him in George-street opposite the Post Office, and knocked him down and jumped upon him, if the defendant does not contradict any part of such evidence, the inevitable inference is that the defendant does not attempt to contradict it because he knows it to be true. The plaintiff's evidence being thus left uncontradicted, any Judge would tell a jury that, as the defendant had not ventured to contradict the plaintiff, only one inference could be drawn. If the defendant, instead of having a civil action brought against him, is prosecuted for the same assault, and having under our law the right, as he

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(1) 14 N.S.W.L.R. 1 ; 9 W.N. 129.

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has in this colony, to give evidence in his defence, does not deny on oath the prosecutor's evidence, can any reason be alleged why the charge which is applicable to the civil case should not be applicable to a trial upon the same facts in a criminal Court? If there should be any special circumstances proved connected with the prisoner which might account for his failure to contradict the evidence, such circumstances might have weight. But in the absence of any reasonable explanation, the failure to contradict or explain should, it appears to me, be considered like the same failure in a civil action."

That this reform in our criminal law has worked beneficially in favour of really innocent persons, no one who has seen it in operation can doubt. I have tried several cases in which prisoners who would have stood in great peril had they been unable to give evidence, have by their own evidences convinced me, as doubtless they convinced the juries who acquitted them, that they were innocent. The experience of our Chairmen of Quarter Sessions, they inform me, is the same. Of the operation of the law no innocent men complain. That the guilty may complain that it places them unfairly, as they regard it, between the convicting fiend and the deep sea of an unanswered Crown case, demonstrating their guilt or the commission of obvious perjury with its further penal consequences, is a consideration with which society, interested alone in seeing that the innocent go free and that the guilty are convicted, has no concern. It will inevitably follow that the more evidence allowed, the more perjury will be committed. The innocent man with truth on his side, proof against cross-examination, fearless of indictments for perjury, will gladly avail himself of a law which allows him to give evidence. That *rara avis* amongst accused persons, whose painful position has been so strongly depicted, who refuses to answer or explain evidence incriminating himself, upon the chivalrous ground that his evidence, though it would exculpate him, might damage the reputation of some frail woman, must be left to the intelligence and common sense of juries for the vindication of his innocence, or must be content in martyrdom to his peculiar sense of duty to suffer the consequence of his Quixotic abnegation of self, or the penalty for the sin which has

thus found him out. Conduct such as this may be heroic, but, as *Bentham* says, "the more heroical the more rare, and therefore the less fit a subject to constitute a ground for the steps of the legislator," and I would add, or of a Judge.

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We have been referred to the Acts of South Australia and New Zealand as supporting the contention on behalf of the prisoner that the jury should be told that they are not at liberty to draw any inference from the fact that the prisoner has not contradicted the evidence given by the Crown. The South Australian Act of 1882 provides that "no presumption of guilt shall be made from the fact of the accused electing not to give evidence." The New Zealand *Criminal Evidence Act* of 1889 provides "that if a prisoner shall refrain from giving evidence, or from calling his or her wife or husband, he shall not be prejudiced thereby, and no comment adverse to the person charged shall be allowed to be made thereon." If the words in the South Australian Act, "no presumption of guilt shall be made from the prisoner's electing not to give evidence" mean that no *à priori* presumption of guilt shall arise, it appears to me that the provision was unnecessary, as no such presumption could or ought to arise, as any Judge would tell a jury. The only presumption would be that he could not deny the truth of the evidence; whether such evidence proved his guilt would be quite another matter. No one disputes that the Crown must make out its case, or that an abstention from giving evidence on the part of the prisoner cannot make up a deficiency of proof on the part of the Crown. It is quite a different thing to say that no inference is to be drawn from refusing to explain or contradict incriminating evidence respecting matters within the prisoner's own knowledge, when such evidence establishes a *prima facie* case of guilt. In such a case the same inference must be drawn as is inevitable whether the failure to contradict arises from the election of the prisoner not to call another witness who can be called, or from his election not to give evidence himself. The inference is that he does not call the available witness, whether it be himself or any other person, either because his evidence would not be believed, or because it would not help him.

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The enactment in the New Zealand Act, that "the refraining of the prisoner from giving evidence shall not prejudice him," appears to me, with all respect to the framers of the provision, as one of those futile legislative attempts to control thought which are the outcome of timidity to accept the natural consequence of a great reform. The operations of the mind cannot be neutralised by an Act of Parliament, nor our instinctive beliefs be obliterated by a proviso. Dutifully as we may expect juries to obey the instructions of a Judge when directing them as to some positive rule of common or statute law, it is absurd to expect them so far to divest themselves of all sense of responsibility as free agents and rational beings as not to act upon those principles of reasoning which are a part of our mental constitution and which naturally constrain every man in deciding upon evidence. Given the instinctive belief that men act for their own interests, that self-preservation is a law of nature, that every man will avail himself of the means best calculated to protect himself, and it is impossible for a jury to do otherwise than to come to the conclusion that if a prisoner can contradict or explain any incriminating evidence, he will. In my opinion any jurymen who could allow himself thus slavishly to follow a direction so opposed to the beliefs on which we invariably act would be as unfit to discharge the responsible duties of his position as any other weakling who shrank from drawing a painful conclusion forced upon him by evidence. Despite all legislative attempts to restrain them and all the directions of Judges, jurymen of robust minds, if they saw no reasonable explanation why a prisoner did not contradict incriminating evidence respecting matters within his own knowledge, would still draw and could not help drawing the conclusion which must be drawn from uncontradicted evidence. There is no analogy to my mind between the case of a jurymen who should be required to act in opposition to the dictates of reason, and either the case put of a jurymen being bound to follow the direction of a Judge who tells him that he must not allow the evidence of conversations, which can tell against one prisoner only, to be taken into consideration against another not present, or the case put of a jury being told that a confession of misconduct by a wife is not evidence against a co-respondent.

Those are directions which any person capable of thinking can at once see are founded in reason and justice, on the principle that what is said behind a person's back cannot be evidence against him, and we must presume that a jury is composed of men sufficiently intelligent to find no difficulty in obeying instructions based on principles of justice of so elementary a character. In my opinion the only inference to be drawn from the language of these Acts is that those who framed them, and the Legislatures which passed them, were of opinion that if such provisions as appear in them affecting to restrain juries from drawing an inference were not inserted, the natural consequence would follow that juries would draw inferences from the fact of a prisoner not personally contradicting or explaining evidence affecting him.

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The Legislature of this colony when passing our Act made no futile attempt to restrain the reasoning of juries, but, just as the House of Lords has done in the bill passed through that Chamber in the present session of the Imperial Parliament, has simply made the prisoner competent, but not compellable, to give evidence if he chooses; the House of Lords, too, leaving the reasoning of juries unfettered as to drawing conclusions, though expressly told by a Lord Chancellor and an Ex-Lord Chancellor, both of whom supported the measure, that its effect would necessarily be virtually to compel prisoners to give evidence or to admit their guilt by refusing to do so. The Acts passed by our sister colonies, so far from supporting the argument on behalf of the prisoner, go to shew by contrast how different was the view taken by our Legislature as to the right of a jury to draw an inference from the silence of the prisoner.

Thinking, as I do, that the question before us is to be determined simply by reference to the principle which makes the failure of the prisoner to call any other available witness to rebut incriminating evidence a relevant fact from which the jury may draw an inference, it seems to me unnecessary to follow the argument on behalf of the prisoner in all its minute details. Broadly stated, it resolves itself into a contention that by allowing the jury to draw an inference from the prisoner's silence, the Act becomes one which compels the prisoner to give evidence, and

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that thus its intention, as declared by its language, is defeated. This argument is founded upon the wording of s. 6. It runs: "Every person charged with an indictable offence, and the husband or wife of the person so charged, shall be competent, but not compellable, to give evidence in every Court on the hearing of such charge: Provided that the person so charged shall not be liable to be called as a witness on behalf of the prosecution, nor to be questioned in cross-examination, without the leave of the Judge, as to his or her previous character or antecedents." The time of the Court was occupied for some days in the elaboration of this argument, it being urged that the Legislature could never have intended any such result. I am of opinion that the words of the section cannot be strained to mean that the prisoner shall not be morally compelled to give evidence, for that was the construction which counsel really sought to put upon the words "not compellable." These words must be construed according to their accepted meaning in every other statute in which they are used. In the *Evidence Act*, 22 Vic. No. 7, and in every other statute as in this, the words "competent but not compellable" simply mean that, whilst the person may be a witness if he likes, he cannot be compelled by any process of law to appear as a witness, or to give evidence, or be punished as guilty of contempt for refusing to do so. The words "not compellable" in the phrase "competent but not compellable" are simply the converse of the words "and compellable" in the phrase "competent and compellable" in other statutes, and as the word "compellable" in other statutes clearly means compellable by legal process, the words "not compellable" mean not compellable by such process. The words of the proviso, "that the person so charged shall not be liable to be called as a witness on behalf of the prosecution," if they are not such surplusage as we too frequently see in Acts of Parliament, inserted for more abundant caution to accentuate previous language to the same effect, mean that the accused shall not be liable by being called as a witness to be placed in the difficult position of refusing to give evidence, a provision similar to that in the *Matrimonial Causes Act* which says that "a witness shall not be liable to be asked" any question tending to shew that he has been guilty of adultery except under certain circumstances. The Legislature by

the proviso has simply left the prisoner in such a position that as far as legal compulsion is concerned he is altogether free to act as he chooses in the matter of giving evidence.

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At the same time there is no doubt that the ability to give evidence, from the inexorable logical inference to be drawn if the prisoner does not, to which I have already alluded, may compel him to give evidence if he can to rebut or explain incriminating evidence. This moral compulsion that he is under is, however, no greater than that always placed upon him by the law to answer incriminating evidence, or to fail at the peril of conviction. This moral compulsion indeed commences with his arraignment. The fact that the ability to give evidence may from its attendant consequences be regarded by guilty men as casting an odious burden upon them, though regarded as a valued privilege by the innocent, is as I have already pointed out, no argument against allowing the natural operation of a law framed in the interests of justice, and not for the benefit of the guilty. It is idle to argue that allowing the jury to draw an inference from the prisoner's silence would enable the prosecution to open a case of mere suspicion, and then to invite the jury to convict the prisoner unless he went into the box and gave evidence to clear himself. No man is called upon to answer a mere case of suspicion. No Judge would allow such treatment of a prisoner. The onus of proving a *prima facie* case must now, as ever, rest upon the Crown, and no inference of guilt can be drawn by a jury unless there is such an amount of incriminating evidence as admits of no reasonable doubt as to guilt. The right to draw an inference will only arise when the prisoner fails either by his own or by the evidence of others to rebut the evidence establishing a *prima facie* case against him.

Much was said in the course of the argument about the right of a jury to draw an inference being inconsistent with the maxim "A man is presumed to be innocent till he is proved to be guilty." There is no such inconsistency. The argument has its origin in a confusion of thought between the right to draw the inference that the prisoner does not contradict the evidence establishing a *prima facie* case against him because he cannot, and some imaginary assertion of a right to draw an inference of guilt when

1893. the evidence is insufficient to establish a *prima facie* case. No
R. v. KOPS. one has contended that where the evidence fails to establish a
Windeyer J. *prima facie* case the defect can be supplied by the silence of the
prisoner. That would indeed be opposed to the maxim "Every
man is supposed to be innocent until he is proved to be guilty,"
and this is the misconception upon which the argument appears
to me to be based. The maxim referred to is one upon which
we act simply to give the prisoner a trial unbiassed by any pre-
conceived idea that he is, or must be guilty. The presumption,
however, does not last in its entirety throughout the case, other-
wise the prisoner could never be convicted. The object of
evidence adduced by the prosecution is to destroy the presump-
tion with which the case started simply to give the prisoner a
fair or unbiassed trial. The process of destroying the presumption
lasts till enough evidence is adduced to establish the guilt of the
prisoner in the mind of the jury, and at this point the presumption
vanishes. Supposing the Crown to have thus demolished the
presumption of innocence and to have established a *prima facie*
case of guilt, the onus then lies upon the prisoner to establish
his innocence, or so far destroy the case for the Crown as to
make it reasonably doubtful whether he is guilty. The onus
of doing this when a *prima facie* case was once established
always lay upon the prisoner, and it lies upon him in no greater
degree now, though it is doubtless true that the *prima facie*
case for the prosecution will have all the additional weight to be
given to an unanswered case, when besides the prisoner failing to
rebut it by the evidence of other witnesses, he fails to rebut it by
his own. In criminal, as in civil cases, the *onus probandi* shifts
to a certain extent during the progress of a trial. If the prose-
cution makes out a *prima facie* case and nothing is done by the
prisoner to answer it, he must lose, and in every case the onus lies
upon him where the evidence is left in such a state that if
unanswered a conviction ought to follow. This is pointed out by
Lord Brougham in *Waring v. Waring* (1): "There are," he
says, "other principles applicable to all cases whatsoever, but
especially to such as rest upon circumstantial evidence. The
burthen of the proof often shifts about in the process of the cause,

(1) 6 Moore P.C. at 355.

according as the successive steps of the inquiry, by leading to inferences decisive, until rebutted, cast on one or the other party the necessity of protecting himself from the consequences of such inferences." So in the *King v. Burdett* (1), *Holroyd, J.*, says: "It is established as a general rule of evidence that in every case the *onus probandi* lies on the person who wishes to support his case by a particular fact, which lies more peculiarly within his own knowledge or of which he is supposed to be cognisant. This, indeed, is not allowed to supply the want of necessary proof, whether direct or presumptive, against a defendant of the crime with which he is charged; but when such proof has been given it is a rule to be applied in considering the weight of the evidence against him, whether direct or presumptive, when it is unopposed, unrebutted, or not weakened by contrary evidence, which it would be in the defendant's power to produce if the fact directly or presumptively proved were not true." So Mr. Justice *Bayley* says: "I agree that where a matter is peculiarly within the knowledge of one party the *onus probandi* may be shifted, and his neglect to give the evidence may furnish ground for a presumption against him."

The pertinence of these observations to the consideration of the question before us is apparent. Though much was said during the course of the argument as to the impossibility of supposing that it was ever intended to make what was termed so extraordinary a revolution in the law as to allow a jury to draw an inference from the failure of a prisoner to give his own evidence to rebut incriminating evidence, no writer on jurisprudence was cited who during the many years that this reform in the law has been advocated has ever suggested the expediency of limiting the right of a jury to draw inferences as the Court is now asked to limit it. So far from there being any authority of Judges or jurists supporting the contention on behalf of the prisoner, their authority is all the other way. As far as I can discover, all thinkers upon legal subjects who, beginning with Bentham, have advocated the humane and wise reform enabling a prisoner to give evidence, have apparently contemplated with perfect equanimity that right to draw an inference from the

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(1) 4 B. & Ald. at 140.

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R. v. Kops. silence of the prisoner in Court, which, we have been told, is to be so perilous to our British mode of administering justice. Sir
Windeyer J. *Fitzjames Stephen*, one of the most earnest promoters of the reform, in his *History of the Criminal Law* (1), speaking of the expediency of admitting the prisoner's evidence, says, "If the prisoner did not offer his testimony it would be hard to allow the prosecution to call him. . . . The fact of his refusing to testify would always have its weight with the jury." This language clearly implies that juries would have the right to draw an inference from the prisoner's silence. Lords *Bramwell* and *Halsbury*, both distinguished criminal lawyers, in advocating the reform in the House of Lords in 1887, on the second reading of a bill similar in its object to our Act, distinctly recognised the fact that the operation of the measure, whilst favourable to the innocent, would be injurious to the interests of the guilty, for if a prisoner were not called the inevitable conclusion would be that it was because he could not rebut the evidence against him. Lord *Bramwell* said, "The object of the present measure was to remove the last piece of the old law of evidence, and to enable persons charged with crime and the husbands and wives respectively of those so charged to give evidence on their trial or enquiry. The bill was not compulsory; no person could be called under it against his or her inclination to give evidence, and it would be entirely at the option of the prisoner whether he was called as a witness or not. Any person giving evidence would have to submit himself to cross-examination. He doubted very much whether prisoners as a class would be benefited by the bill. It would be to the advantage of innocent persons, but it was very likely that the measure would do some harm to those who were not innocent, to which he trusted their Lordships would have no objection. There was a notion that a prisoner had a right to make a statement without being sworn, but he very much questioned whether he had the privilege. He had never heard of it until very recently. The practice, no doubt, had crept in; but any statement made by a prisoner in such circumstances was comparatively worthless, for the reason that it was not made on oath, and what was even more important, was not subject to

(1) Vol. 1, p. 445.

cross-examination." Lord Chancellor *Halsbury* said, "It had been his opinion for a great number of years that an alteration of the law as recommended by the noble and learned lord should undoubtedly be made. . . . The noble and learned lord had recommended the bill on the ground that it was not compulsory; but while it might not be so in terms, he thought it was compulsory in effect. If they made it competent for prisoners to be called, and they were not called, the inevitable conclusion, the irresistible force of logic, would be that they were not called because they would be obliged to admit their guilt. He entirely approved the object of the bill; but he did not think it right that their Lordships should adopt it without fully understanding that it forced upon accused persons the necessity of making explanations on their trials." Lord *Herschell*, the present Lord Chancellor, a thoughtful law reformer, in advocating a similar measure in 1886, equally recognised the fact that the measure would tend "to the greater certainty of convicting the guilty."

I mention these opinions discovered by me since I gave my judgment in *R. v. Makin* (1) because they confirm the opinion which I had already expressed in that case. Though it is true that what is said in debate in a Legislative Chamber cannot be taken as authority in the interpretation of an Act, it is impossible to ignore the weight of opinions such as I have quoted, expressed by most distinguished Judges, two of them Lord Chancellors, when advising the Legislature as to the general effect of a legal measure. They certainly are of no less weight than the opinion of a jurist like Sir *Fitzjames Stephen* expressed in a book, and, equally with it, may be cited as authority for thinking that the recognition of the right of a jury to draw an inference from the prisoner's silence involves no departure from the principles which have hitherto governed the administration of our criminal law. For 1900 years since the memorable question was put, "Answerest thou nothing? Behold how many things they witness against thee," even sorrowful tribunals, reluctant to condemn, have ever felt the terrible force of unanswered evidence. Chief Justice *Abbott* asked, "Can human reason resist the irresistible inference arising from it?" and this when the

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(1) 14 N.S.W.L.R. 1; 9 W.N. 129.

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Windeyer J. prisoner could give no evidence. I would ask, this great reform in our law having come, is not that irresistible inference more overwhelming still when the accused, who best knows whether the evidence against him is true, does not attempt to contradict it? That the learned Judge in the Court below had a right to comment on the failure of the prisoner to contradict or explain by his own evidence incriminating evidence concerning matters within his own knowledge, correlative with the right of the jury to draw an inference from such failure, I have never doubted, and I am consequently of opinion that the conviction must be sustained.

INNES, J. The question submitted for our consideration and determination is: Has the Judge presiding at the trial of a person charged with an indictable offence a right to tell the jury that, as such a person is now by statute a competent witness on his own behalf, if he does not choose to go into the witness-box and give evidence on oath they are at liberty, from the fact of his not going into the witness-box and giving evidence, to draw inferences hostile to the accused with regard to his guilt of the charge upon which he is being tried? The answer at first sight would appear to be that a Judge certainly had such a right, and without serious consideration of all the bearings of the question, I for one am free to confess that such would have been my answer to that question; but upon mature reflection I am constrained to the opinion that no such right exists in a Judge, and that if a Judge so tells a jury, a verdict of guilty so obtained must be avoided. I am of opinion, therefore, that in this case the conviction cannot stand. I at first inclined to the opinion that the right in the Judge existed, and that whether or not it would be expedient in a Judge to exercise that right in any particular case must be left to the discretion of the Judge, and therefore that it would be impossible to lay down any general rule upon the matter. But after hearing the full and able arguments which have been addressed to the Court and after the most anxious consideration of the question in all its aspects, I have arrived at the conclusion to which I have above given expression.

The whole question turns upon what is the proper construction of s. 6 of our statute 55 Vic. No. 5, which came into force on

the 5th December, 1891. Against the conclusion at which I have arrived, it is argued, not without much apparent force, that as not only in civil cases, but also on criminal trials, the silence of a person charged (I mean, of course, where there is no question of giving evidence on oath by an accused in a criminal trial) naturally and legitimately gives rise to the comment and the inference that such silence is an admission to some extent of the truth of the charge, that comment and that inference may also arise from the fact that a person charged with a criminal offence does not choose to avail himself of the opportunity now permitted by statute to an accused person to give to his denial of the charge generally, and of any circumstances given in evidence to establish his guilt, the high sanction of evidence on oath. It is impossible to say that such an argument does not at first sight carry great weight. But there are, in my view, preponderating reasons for the opinion that such an argument, though at first sight apparently cogent, is really fallacious. And the main reason why I think the argument fallacious is that in my opinion the statute means that no sort of compulsion, direct or indirect, is to be put upon an accused person to give evidence on oath. Here we come at once to the gist of the thing—Do the words “not compellable” mean merely “not compellable by the ordinary actively punitive processes of law, such as committal for contempt, or fine,” or do they include what may be called indirect or moral compulsion?

I understand that the majority of the Court are of opinion that the former of these two alternatives is the proper construction of the words “not compellable.” I think differently. I see no reason for thus narrowing down the broad and comprehensive meaning that the words would ordinarily bear. I do not now touch upon the question of whether the provision generally for making accused persons “competent but not compellable” witnesses on their own behalf was intended to be a privilege to such persons or whether it was intended to be merely a means of furthering the interests of justice by extending the domain of investigation into criminal charges, but I think it must be conceded that at all events these two words “not compellable” were intended to be a privilege—a shield—a protection of some sort, to an accused

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person. They are, *ex vi terminorum*, in the interest exclusively of the person to whom they refer. That person is the accused. That person's liberty or life is at stake. Surely, then, when one is construing the language of a most highly penal statute, one should not be astute to narrow down the meaning of words as against a person on his trial, but rather, *in favorem vitæ aut libertatis*, to give them as comprehensive an interpretation as they are fairly and ordinarily susceptible of. Not that you are, from any weak or squeamish or maudlin consideration, to go outside of the legitimate or ordinary meaning of words. It seems to me, then, that the words "not compellable" include every means of compulsion which in the ordinary acceptance of the word suggest themselves. No rule in the conduct of cases is more uniformly and more properly insisted upon than this—That you shall not be allowed to do indirectly that which you are not allowed to do directly. Now, why should not this rule be applied to so important a matter as the trial of an accused upon an indictable offence—it may be a capital offence? The Legislature has in terms said:—You shall not compel a man in such a position to give evidence. If by indirect or "moral" compulsion you put such a pressure on the man as to force him to do that which the statute says he shall not be compelled to do, what is this but a violation of this most salutary and just rule? It seems to me, with all deference, that for a Judge to lend himself to such a course is not calculated to increase respect for the administration of criminal justice.

And let it not be said that in saying a man is "forced," by the construction which the majority of the Court put upon this section, to give evidence, I am in any way begging the question: for it strikes me as unanswerable that if you say to an accused on his trial: "You can give evidence on oath; you need not do so if you do not choose to do so, but if you refrain from giving evidence the Crown Prosecutor may observe upon that fact to the jury, and may ask them to believe that because you do not give evidence you cannot truthfully deny your guilt, or—what is the same thing in effect—deny the truth of the evidence given against you; the Judge may comment upon your not giving evidence on oath and may tell the jury that they may draw against you those same

hostile inferences; and the jury may act upon this intimation;”—this amounts, indirectly and directly too, to strong compulsion. As was tersely and most forcibly (none the less forcibly because somewhat colloquially) put by my brother *Owen* in the course of the argument—does it not amount to saying, *uno flatu*, “You needn’t, but you must?” The citations which my brother *Windeyer* has just given from Lords *Bramwell*, *Halsbury*, and *Herschell*, apparently in some debate in the House of Lords, seem to me strongly to support that view. Sect. 6 of 55 Vic. No. 5 is as follows:—“Every person charged with an indictable offence, and the husband or wife, as the case may be, of the person so charged, shall be competent, but not compellable, to give evidence in every Court on the hearing of such charge. Provided that the person so charged shall not be liable to be called as a witness on behalf of the prosecution, nor to be questioned on cross-examination, without the leave of the Judge, as to his or her previous character or antecedents.” The provision in the English statute with reference to the subject of an accused giving evidence on oath is s. 20 of 48 and 49 Vic., c. 69. It is confined in its operation to offences of a particular kind, which I may comprehensively call sexual offences. That section is as follows:—“Every person charged with an offence under this Act, or under s. 48 and ss. 52 to 55, 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 enquiry before a grand jury.” There are some verbal, and probably some very substantial, differences between the wording of our section and that of the English section; but in both the accused is not a compellable witness. Our section has the additional protection thrown over the accused with reference to his being a witness:—“The person so charged shall not be liable to be called as a witness on behalf of the prosecution.” So that no matter how willing or even anxious an accused might be to give evidence for the prosecution (of course in that case against some other person or persons associated with him in the same indictment), he could not be allowed to do so, whereas under the English statute he could do so if willing.

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1893. I am not aware, nor have we been told, that the point now
 R. v. KOPS. before us has ever arisen in England, except on some criminal
 Innes J. trial before the late Mr. *Baron Huddleston*, when, as we are
 informed at the Bar, that learned Judge interposed to prevent the
 counsel for the prosecution asking the jury to draw hostile
 inferences against the accused from his choosing not to go into the
 witness-box. Of course, to an unreported case of that kind we
 cannot pay much attention, nor do I in any way rely on it. Nor
 has any case been cited from any of the colonial Courts bearing
 upon the point; the matter, therefore, comes before us as a case
primæ impressionis to say what, upon general principles, is the
 proper construction of our section upon the matter. Neither
 reason nor authority is wanting to establish the position advanced
 by Sir *Julian Salomons* in argument that if a witness is
 absolutely privileged from answering some question put to him,
 the fact that he declines to answer cannot in any way be made
 the foundation of an inference against him on the subject of the
 question. This position, I understood, was not only admitted by
 the Attorney-General, but received the unanimous assent of the
 seven members of this Bench. Some observations in the case of
Wentworth v. Lloyd (1), though the decision in the case did not in
 any way turn upon the point, seem to me to support that position.
 In that case the then Master of the Rolls, Sir *John Romilly*, had
 dismissed a suit instituted by Mr. *Wentworth*, to set aside, on the
 ground of unfairness in the transaction, a sale of certain estates
 and other property in this colony, and in the judgment which the
 Master of the Rolls delivered he held that although Mr. *Wentworth*,
 as the client of a solicitor who was a witness under examination
 in the suit, might interpose to prevent, on the ground of privilege
 arising from professional secrecy, the witness's disclosing state-
 ments made to him by Mr. *Wentworth*, yet that in such a case if
 he did so "he," says the Master of the Rolls, "must be subject to
 the rule laid down in *Armory v. Delamirie* (2), where the keeping
 back of evidence must be taken most strongly against the person
 who does so." The Master of the Rolls proceeds in these words:
 —"When I say this I wish to distinguish between the case of
 suppression of evidence by a witness and the case where he

(1) 10 H.L.C. 589.

(2) 1 Strange 504.

declines to answer the question on the ground that he is not bound to criminate himself; in which case no presumption of guilt can be fairly drawn from his refusal to answer, or the privilege would be at once destroyed." The House of Lords affirmed the decision of the Master of the Rolls; but Lord *Chelmsford* points out that even in such a case as that of privilege on the ground of professional secrecy no presumption of fact can be made against a party who enforces the rule against the disclosure, by his solicitor, of knowledge professionally acquired, or indeed by himself of his own statements made to his solicitor with reference to professional business. "The exclusion of such evidence," says Lord *Chelmsford*, "is for the general interest of the community, and therefore to say that when a party refuses to permit professional confidence to be broken, everything must be taken most strongly against him, what is it but to deny him the protection which, for public purposes, the law affords him, and utterly to take away a privilege which could only thus be asserted by him to his prejudice?"

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Now, it does seem to me that this position and this reasoning go a very long way to establish the view I take in this case. Surely no professional privilege can go further than the absolute privilege which is vested in a man to decline to answer any question tending to criminate himself. *Nemo tenetur seipsum accusare* is a rule quite as much "for the general interest of the community" as that of preserving inviolable professional secrecy. And surely the reason so cogently put by Lord *Chelmsford* applies in all its force to the case of such a man. Nay, the judgment of the Master of the Rolls shows that if possible it should be applied *a fortiori*. I am aware that Sir *James Stephen*, who was, as we all know, for many years a Judge, and who is deservedly regarded as a great authority on criminal law, in his able work on the criminal law of England (published in 1863, before accused persons were competent witnesses), speaking of the maxim "*Nemo tenetur prodere seipsum*," and of another maxim of a cognate character, "Torture is unknown to the common law," says:—"These two maxims prove, not that a prisoner cannot be questioned" (clearly a questioning when the accused is not on his oath), "but that he cannot be forced to answer

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Clearly there is no difference whatever in principle between the privilege attaching to such a man sheltering himself from any damaging consequences through not going into the witness-box and the privilege which attaches to an ordinary witness, who, in the witness-box, is sheltered from any damaging consequences through declining to answer any question which he cannot be

compelled to answer, or, what is the same thing, which he is absolutely privileged from answering—for in the case of a man who, being on his trial for an indictable offence, enters the witness-box to give evidence on his own behalf, then at all events with regard to the particular charge under investigation, he is no longer protected by the rule which privileges a man from answering a question because it may criminate him. When he enters the witness-box, then, but not till then, that privilege is at an end. No longer, once in the witness-box, can he fall back on the fundamental rule: "*Nemo tenetur seipsum accusare.*" He must answer then, or, if he remains silent, then in the emphatic language of Lord *Denman*, C.J., his silence "clenches the accusation." (I may, in passing, point out that the case in which Lord *Denman* makes that statement was not a case of a man on his trial for an indictable offence.) That a witness, accused, must answer any question, though directly tending to criminate him, I venture to think, is beyond controversy. Otherwise it would be a farce to say that the ends of justice are to be served by permitting an accused to give evidence on oath to clear himself, and not subject that evidence to cross-examination with a view, if he be really guilty, to convict him out of his own mouth, and to expose the falsehood of his testimony. From such a risk he is absolutely privileged if he remains out of the witness-box. But to say that if he does not go into the witness-box, inferences in support of his guilt may be drawn by the jury is altogether to defeat the privilege. And indirectly, and directly too, it is to make him "compellable to give evidence," which the statute expressly says he is not to be.

The statute, in my opinion, says:—While an accused shall be competent to give evidence on oath, he shall retain the absolute privilege to decline to put himself in a position in which his right to refrain from criminating himself would be absolutely gone. If, because he declines to place himself in that position, inferences are to be drawn hostile to him upon the question of his guilt, the shield which the statute affords him is taken away, and it puts compulsion upon him to enter the witness-box, and in the witness-box to criminate himself if he, being guilty, answers truthfully. Of course the Legislature may do this. It

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1893. was done by the statute 12 and 13 Vic. c. 106, s. 117, in the
R. v. Kops. case of an examination in bankruptcy under that statute. See
Innes J. *Reg. v. Scott* (1). So here, if the prisoner chooses to enter the
witness-box, he submits himself to cross-examination on that
evidence, and the law then overrules the maxim *Nemo tenetur
seipsum accusare*. If he so takes the benefit of the provision he
takes with it the necessary corresponding burden. That is the
application to this case of the maxim referred to in the argument,
Qui sentit commodum sentire debet et onus. But to say, as
was said during the argument by one member of the Bench,
that the statute has conferred the benefit of competency to
give evidence and has therefore imposed the burden of
obligation to give evidence (or to have hostile inference
against the accused if he does not give evidence, which is
pretty much the same thing) is strangely to misapply a maxim.
No benefit is conferred unless it is accepted, and unless it is
accepted no obligation is imposed. This was well pointed out by
my brother *Stephen* with the illustration of a legacy, acceptance
of which was saddled with something to be done by the legatee.
The obligation to do that something does not arise by the mere
bequest, the acceptance of which is optional with the legatee, but
from the acceptance thereof by the legatee.

It is said that the reasoning upon the score of privilege applies
equally to the fact of an accused remaining silent when a charge
is made against him, and that, as he is even then privileged from
incriminating himself, no inference, if the foregoing reasoning be
just, ought to be allowed against him from his silence; and that, as
the law says that in such a case an inference may be drawn
against him, the foregoing reasoning cannot be just. But this, it
seems to me, is fallacious argument, the fallacy being that no
question of compulsion to criminate himself arises where it is
a mere question of a statement by the accused not on oath and
not liable to cross-examination, whereas, as I trust I have shewn,
evidence on oath is clearly accompanied by that liability and
attendant compulsion. The fallacy is to confound "opportunity
to exculpate" with "obligation to self incriminate." An oppor-
tunity to answer a charge or to deny certain incriminatory

statements, such opportunity being unaccompanied by any compulsion to answer questions the drift of which may not be seen by the person under examination, but which may have a direct and damning tendency to incriminate him, is surely a very different thing from an opportunity not attended by an obligation or compulsion to answer such questions. An admission may fairly be drawn from the neglect in the one case to avail of the opportunity, while in the other it would be manifestly unfair to make any such inference. And against the inference in the latter case I think the statute protects the accused. In the one case, to adopt the apt phrase of my brother *Stephen* on the argument, it may be said to be incumbent on the person charged to make the denial or to offer the explanation, while in the other the statute has in effect said it shall not be incumbent upon the accused to enter the witness-box and to give evidence. This confusion of "opportunity" with "compulsion" seems to me—I say it with unfeigned respect—to be the fallacy which ran through the otherwise able argument of the learned Attorney-General.

It is, in my view, a great mistake to suppose that up to the passing of this statute on a criminal charge "the prisoner's mouth was closed," to use a phrase so frequently put forward before a jury by ingenious advocates. The mouth of an accused person has certainly not within the last 50 years been closed. When first charged he can say what he likes, and this is not kept back from the jury. While in custody and awaiting the preliminary investigation at the Police Court he may make a statement, and this may be, and generally is, given in evidence. Certainly no Crown Prosecutor or Judge of the present day would think of shutting it out, though according to the circumstances of the case it might have little or no weight. At the preliminary investigation the accused may make a statement, and that again could hardly be shut out; and at the trial the accused could say what he pleased, whether defended or not, though some difference in the practice upon this point formerly existed. [See *Reg. v. Shimmis* (1)]. And the statement so made at the trial was, though not evidence on oath, a "fact in the case," which might be regarded by the

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R. v. KOPS. jury, and to which they certainly were entitled to give some weight, varying, of course, according to the whole circumstances of the case. With all these opportunities of making a statement in denial, or in explanation, it seems to me absurd to say that the prisoner's mouth was closed. But none of these statements by an accused were in any way like the giving evidence on oath, which proceeding on the part of an accused must bring with it the liability to cross-examination, and the compulsion to answer questions, though put with a direct view of eliciting answers incriminating the accused.

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It is no part of the Judge's duty to vindicate the policy of an enactment; but, with a view to the proper construction to be placed upon the language of an enactment where, as here, the words are not so express as to admit of no doubt, it is not out of place to consider the operation of existing law and practice upon the words actually to be found in that enactment. The accused then, if under this section he enters the witness-box, is not only liable to cross-examination upon the main point on which he offers himself as a witness—his guilt or innocence of the charge in the indictment—but also to cross-examination, with a view to destroy his credibility, upon the wide range of matter ordinarily permitted for such a purpose. It is true that the section says, "the person charged shall not be liable to be questioned on cross-examination without the leave of the Judge, as to his or her previous character or antecedents;" but I do not think it would work well for the administration of justice to leave the testimony of any witness, even though that witness were the person on his trial, untested by the tests which are ordinarily applied to the trustworthiness of testimony. The testimony of all witnesses is liable to be attacked by cross-examination, which fairly goes to the credibility of the witness, because every witness puts himself forward as a witness worthy to be believed. Why should not the testimony of this particular class of witnesses be subjected to the same test? If it stands it unshaken, well; but if not, or if it is not to be tried by that test, why should a higher degree of credence be given to it than attaches to the evidence of other witnesses whose credibility has been broken down under that test? Then, if you do admit—as I think you ought to admit—cross-examination on

irrelevant matters (*i.e.*, irrelevant to the charge, but distinctly relevant to the trustworthiness of the witness) for the purpose of attacking the credibility of the witness you get into this difficulty—that where there is an accused, innocent of the charge upon which he is being tried, but with a discreditable, a disgraceful, a criminal past (and how many of the wretched creatures who are accused are there who are thus situated !), you run a great risk of a conviction being obtained by reason of that past, although the man be really not guilty of the charge upon which he is being tried—a result which would unquestionably be a lamentable miscarriage of justice. The risk of such an exposure on cross-examination might well deter an innocent man from going into the witness-box. Many other cases could be put—many others were put in the argument—nervousness, the desire to keep back the names of other persons, &c., why an innocent man should not enter the witness-box. I do not say for one moment that this section was passed exclusively in the interests of accused persons. I take it that it was passed to enlarge the field of criminal investigation into criminal charges, and to make a trial what it should be, an inquiry into truth. I think myself, and I know of my own personal knowledge that I share this opinion with many of the most eminent Judges in England, that this particular legislation is a mistake, and that in the majority of instances it will not tend to the more efficient administration of justice. I think, while in some cases it is useful, that it does more harm than good ; but I am not the Legislature, and my sole duty is to administer, not to make, the law.

The learned writer and eminent criminal lawyer to whom I have already alluded, Sir *James Stephen*, says :—"The proposal to make the prisoner a competent witness has an appearance of system about it which at first sight is extremely plausible. It would no doubt harmonise well with what I have called the litigious theory of criminal trial, but there are strong objections to it. In the first place, the prisoner could never be a real witness ; it is not in human nature to speak the truth under such a pressure as would be brought to bear on the prisoner, and it is not a light thing to institute a system which would almost enforce perjury on every occasion. It is a mockery to swear a man to speak the

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truth who is certain to disregard it. . . . To leave the discretion of calling the prisoner or not in the hands of his counsel would be carrying the litigious view of a criminal trial to an unwise extent. After all, a trial ought to be an enquiry into truth, but it is idle to suppose that the counsel for the prisoner will regard it in that light. He would call or decline to call the prisoner, not with an eye to the interests of truth, but with an eye to the verdict only, under the special circumstances of the case. The exercise of this discretion would introduce all sorts of difficulties into the case. To the counsel for the prisoner it would be a most painful discretion. By not calling the prisoner he might expose himself to the imputation of a tacit confession of guilt; by calling him he might expose an innocent man to a cross-examination which might make him look guilty. To the Judge and jury it would be equally unwelcome. How would they know what construction to put on the fact that the prisoner was not called? The construction put upon it by them would be a mere guess. Various subordinate questions of difficulty would arise. It would not be easy to arrange the right of reply, and it would be very difficult to put the cross-examination by the counsel for the Crown under proper restrictions. If he examined the prisoner himself, as an independent part of his own duty, he would probably do so with a good deal of the feeling of a Judge, and with an eye to the discovery of truth; but if he had to treat him as a witness called on the other side, the case would be much altered, and the Judge would be merged in the advocate fighting for the verdict. Many delicate questions will arise on such an occasion. For instance, might the counsel for the Crown cross-examine the prisoner to his credit, and ask him whether he had been previously convicted, &c., as he might with other witnesses? Regard the prisoner solely as a witness, and there is no reason why he should not. Yet this would indirectly put the man upon his trial for the whole of his past life."

No apology is needed for the length of this citation. In those observations I cordially concur. I think, moreover, that in the case of a Judge, to whom the examination and cross-examination of an accused person was not "unwelcome," to use Sir *James Stephen's* expression, there would be a great risk of the system of

interrogation which obtains in France becoming part of our system. Now, Sir *James Stephen*, while he deals ably and elaborately with the question of interrogation of accused persons, and while he seems to think that under certain limitations it might be beneficially introduced into our system of criminal procedure, says this: "The way in which French Judges deal with prisoners would neither be practised nor tolerated in England. A Judge or Magistrate in England who dared to treat a man on his trial as *Léotade* and *Joanon* were treated would be the object of universal execration, and no jury would act upon evidence so obtained." I hope this is and always will be true; but I am by no means sure that if we introduce the French system of interrogation of prisoners it would for many years continue to be true. I very much fear that after some years of the inquisitorial system we should as inevitably come to the French feeling in the matter as the French people have. We have no reason to suppose—though no doubt we do suppose—that we are innately more just or fair than the French people—and custom marvellously moulds the mind. Mr. Pope is not without warrant from almost universal experience when he says:—

"Vice is a monster of so frightful mien
As, to be hated, needs but to be seen;
Yet, seen too oft, familiar with her face,
We first endure, then pity, then embrace."

A Judge who, in his anxiety to discover the truth, thinking, as I fear, many Judges do, that a prisoner giving evidence for himself is in the great majority of cases only adding perjury to the crime charged in the indictment, and who therefore wishes to expose the prisoner's lie, is led into asking the prisoner-witness various questions, and is soon led thereby into a departure from strict impartiality. Sir *James Stephen* says: "It would be most injurious to do anything which could diminish the absolute impartiality of the Judges; and no man who examines an unwilling witness is really quite impartial."

I have not gone into these somewhat lengthy observations and citations merely to support what I think should be the law; but I have done so to support my view of what I think is the law, now that the Legislature has seen fit to make accused persons competent witnesses—in other words, the meaning of the

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1893. *R. v. Kops.* Legislature when it says: "An accused person shall not be compellable to give evidence on oath." I say again that to narrow these words down to saying they mean merely that the prisoner shall not be committed for contempt, or shall not be fined, if he does not give evidence on oath, is to absolutely fritter away the substance of their meaning. To say to an accused, "You can give evidence, and if you do not we will infer you guilty" (for that is what it really comes to), is to punish him most cruelly for his not giving evidence on oath, and is to put upon him the strongest conceivable compulsion.

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The section in question was passed by our Legislature in December, 1891. I do not know whether it was known to our Legislature then that before that date—in 1882 and 1889 respectively—the Legislatures of two other Australian colonies, South Australia and New Zealand, had passed enactments dealing with the evidence of accused persons. In neither of those enactments do the words "not compellable" occur, but words are used which, in my view, are the equivalent of those words. They are more satisfactory, because they leave no room for doubt or difference of opinion, as, unhappily, the words in our statute do. In the South Australian statute, 1882, after enacting that an accused person shall be "competent and entitled" to give evidence on oath, the statute says: "Provided that no presumption of guilt shall be made from the fact of such person electing not to give evidence." In the New Zealand statute, 1889, after saying that an accused person may be called as a witness for the defence, if he consents thereto, the statute says: "If a person charged with an offence shall refrain from giving evidence, such person shall not be prejudiced thereby, and no comment adverse to the person charged shall be allowed to be made thereon."

I humbly think that our Legislature, by saying that an accused person shall be "competent but not compellable" to give evidence, meant to say more briefly what these other Legislatures have said with more words. It would seem, from the difference of opinion existing on this Bench, that our Legislature, wishing to be brief, has become obscure. It is said by those from whom I differ that it "shocks common sense," or "is an outrage upon the understanding" (or words to that effect), to ask a jury not to

draw adverse inferences against an accused when they see that he, being allowed to deny or explain on oath, does not do so. In the face of these two positive enactments it seems to me to be going rather too far for any Judge or any number of Judges, not absolutely infallible, to say that. I, for my part, see no shock to common sense, no outrage upon the understanding, in a direction to Judges or juries not to allow a particular course of conduct by an accused person, for which course of conduct there may be, quite consistently with his innocence, satisfactory reasons, to militate against that accused; nor do I think that juries would have more difficulty in following such a direction than in excluding from their consideration hearsay evidence or accusations by one prisoner of another, or any of the numerous cases familiar to lawyers, where, though to the untrained and undisciplined mind such things are apparently strong evidence, they are not allowed to weigh against an accused. For these reasons I am of opinion that this conviction ought not to stand.

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STEPHEN, J. In this case the Judge called the attention of the jury to the circumstance that the accused had not denied on oath particular portions of the evidence for the prosecution and had not on oath given certain reasons and explanations with reference to portions of the case relied on as evidence of his guilt. The Judge said that the accused "might have been expected to do so," and therefore allowed the jury to draw an inference of his guilt from his not having made the denials and explanations referred to. This raises the important question, not as to what may be the effect of the evidence for the prosecution remaining unchallenged, but whether, beyond this, an inference may be drawn against an accused from the circumstance of his not going into the box as a witness to deny or explain, as the case may be.

Before the passing of section 6 of the Act of 1891, the accused had the right, by virtue of the *Criminal Law Amendment Act* of 1883, to make any statement at the close of the prosecution. I need not consider the question how far such a statement, if made, should have been regarded, but, if none were made, it simply (in my opinion) came to this—that the evidence for the Crown remained wholly unimpeached and unexplained, and a

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1893. *prima facie* case having been made out, sufficient for the Judge
R. v. Kops. to send to the jury, there would be no alternative to the jury (in
Stephen J. the absence on their part of any reasonable doubt) but to convict.
A case having arisen which rendered it necessary to discuss the
effect of a statement, and the Court having determined it not to
be "evidence," the Legislature conferred upon accused the right
to sanction any statement he might please to make by his oath.
Now it seems to me that the question is, did the Legislature, by
granting this right or privilege, make any difference in the law as
(in my view) it stood before with respect to an unanswered,
unimpeached *prima facie* case made for the Crown? Has it had
the effect of allowing an inference to be drawn from the mere
fact of the non-volunteering of a statement, merely because silence
may be, but is not, broken in a manner to which superior credit
may be attached. The argument in favour of the contention is
that a *prima facie* case having been made out (until which time
it is said that the point cannot arise, as it is not till then that the
onus of disproving the case for the prosecution is cast upon the
accused) it is only natural and reasonable that the accused,
having now the opportunity of being examined on oath,
would give evidence on his behalf, unless conscious that
the evidence against him is true or incapable of explanation,
and that the Legislature must be taken to have granted the
privilege with this consequence attendant upon its non-acceptance.
This brings us face to face with the question whether, if this is so,
the accused has not, by being rendered "competent" to give
evidence, practically had compulsion put upon him to do so, and
whether this is what the Legislature has intended and so
expressed. How does the matter stand? He is told, "A *prima facie*
case has been made out against you, and the presumption of
your innocence no longer exists. You may give evidence upon
oath." He replies, "What if I do not?" "In that case, and
because of your not doing so, any fact supposed to be within your
knowledge may be taken as true—in all probability will be so
taken; any matter that requires explanation and that you do not
explain will in all probability be considered as susceptible of
none." The accused is thus confronted with a danger from which
he can only escape by presenting himself for cross-examination

(and possibly, as pointed out by my brother *Innes*, incrimination also), no matter how cogent and just his reasons may be for not subjecting himself to the ordeal. The innocent man runs the risk of committal for perjury in case of an adverse verdict. The guilty man is tempted to commit perjury to avoid the consequence of refraining from giving evidence. That this is indirect compulsion, no one can, I think, reasonably deny. And I submit that the Legislature did not intend to put compulsion, direct or indirect, upon any one. It is said that the words "not compellable" apply only to the case of husband or wife of the person charged. It may be so, and, doubtless, the section has created a difficulty as to its applicability. The word "competent," however, clearly applies to both accused and the husband or wife of the accused, and is immediately followed by the qualifying or explanatory words "not compellable." The latter part of the section provides that the accused shall not be compellable to give evidence on behalf of the prosecution. It cannot be said that when the Legislature made it "competent" to the accused to give evidence, it was considered necessary to add the words "not compellable" in order to provide against the inference that the accused was bound to make himself a witness on his own behalf, any more than when the Legislature made a party to a suit competent to give evidence on his own behalf, it would have been necessary to add "not compellable" to do so. Are we then to eliminate the words as applied to an accused? It appears to me that we should not, but that it is a reasonable construction to retain them and to give them a sense other and less than legal compulsion. The Legislature meant, I think, to say to an accused person, "You need not consider yourself under any compulsion to give evidence, you have an unfettered option, without any risk of suspicion attaching to your silence." It is contended that the word "compellable" may be satisfied by holding that it prevents a person charged with accused from calling him. I may acknowledge that there is considerable force in that argument. I do not think, however, that this excludes the application of the word in the sense suggested by me. Even without those words I should have doubted whether the Legislature, in rendering accused a "competent" witness, meant that he should be in any way

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1893. prejudiced by declining to avail himself of the provision. I do
R. v. Kops. not think that the maxim relied upon, "*Qui sentit commodum*
Stephen J. *sentire debet et onus*," applies. Assuming for a moment (which I
doubt) that a general right of this kind conferred by the Legis-
lature is within the meaning of the word *commodum*, I think
that the onus attaches only when the privilege is enjoyed.

It is said that the Act must be regarded as having been passed not alone in the interest of accused persons, but generally to advance the administration of justice. I cannot but think that what was supposed to advance the administration of justice was to enable an accused to tell his own tale, if he thought fit, with the additional credit that might be attached to the taking of an oath, and it was not supposed, nor was the Act passed with the view, that the administration of justice would be advanced by enabling a jury to draw conclusions against an accused if he should not offer himself as a witness. In civil cases a verdict is given according to the balance of testimony. A party abstaining from giving evidence neglects to add weight to the scale in his own favour. An accused can only be convicted if no theory can be advanced consistent with his innocence—if the only rational conclusion is that of guilt. Is it now to be considered that the jury in deciding the question may make it a factor in their conclusion that the accused has not denied or explained on oath? May they say in a case where a theory on the facts in evidence may be propounded consistent with accused's innocence, that the theory of the Crown may be adopted because of accused's failure on oath to explain or contradict? Where no explanation or theory whatever is put forward on accused's behalf, it appears to me that the ends of justice have been and still are amply secured by instructing the jury that the facts deposed to on behalf of the Crown remain uncontradicted and unexplained, leaving the jury to draw from them alone the inference of guilt. In this particular case such a direction would have been amply sufficient to secure a conviction. It may have been proper to tell the jury what the law is and to say that the evidence, as a matter of fact, stands by itself wholly uncontradicted. But it appears to me to be going farther than is warranted to allow the jury to assume, because of the accused not on oath denying such and such

allegations, that he must be conscious that they are true. It is this conclusion that I object to, that the allegations may be taken to be true because this particular course is not adopted by the accused. It is virtually speculating upon the accused's conduct, the reasons and motives actuating him being wholly unknown. It is very near, if not equivalent to, holding that the accused's absence from the box is tantamount to an admission and that the verdict may be taken *pro confesso*.

It has been urged in favour of the presumption, that a similar one may be drawn against the accused, (1) if proved to have been silent on some occasion when the crime was laid to his charge and he might have been expected to repudiate it; (2) if he does not make a statement in Court; (3) if he does not cross-examine a witness whose evidence tends to shew his guilt; (4) if he does not call witnesses who are available and who, if accused be innocent, can negative or explain the case for the prosecution. Now as to (1) assuming that in such case an inference adverse to the accused may be drawn, it does not seem to me that the same result follows in (2). The accused is on his trial, he has by his plea denied his guilt, and it is the duty of the Crown to establish the case against him. If it makes out a *prima facie* case against him, the accused may tell his own story or not as he pleases, he may exculpate himself if he can, but, by saying nothing, does he inculpate himself? does he add an additional element to the Crown case by remaining silent? can the Judge say, "Would you not expect him to make a statement?" I think not, though, as I have before mentioned, he leaves the jury to draw its own inference from, as a matter of fact, an uncontradicted and unexplained case. However, even if I am wrong in this, the case before us is an *a fortiori* one, because (and on this point I again refer to the judgment of my brother *Innes*) he declines to submit himself to an inquisitorial examination. As to the third point, I maintain that, though it may be fairly pointed out to the jury that the evidence of the witness remains unshaken, to draw any inference whatever from the fact of accused declining to undertake a task which to accomplish successfully may require all the skill and acuteness of a practised advocate, seems to me neither just nor according to law. As to the fourth point, the

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1893. case of *Regina v. Burdett* (1) is very strongly relied upon, and if
R. v. KOPS. the various judgments are held to have application to this case,
Stephen J. they are opposed undoubtedly to my conclusion. It must be
remembered that they were dealing with the neglect to call
witnesses, whose position would wholly differ from that of
an accused as witness. No such question arose as here, none as
to the construction of an Act of Parliament conferring a right for
the first time, none as to the peculiar and delicate position of an
accused on his trial having the alternative of silence or submission
to a cross-examination without the protection hitherto afforded to
a witness of declining to answer questions having a tendency to
incriminate him. The accused in *Burdett's Case* "came prepared"
to dispute the publication of a libel in the county of Leicester,
presumptive proof having been given that it was there published.
Accused knew that a Mr. Bickersteth (to whom accused published
it) could prove, if true, that it was published elsewhere, but
accused did not call him. This is a simple state of things to
which the Judges referred and which led *Best, J.*, to say that the
presumptive evidence not having been rebutted was "in his mind
conclusive proof of the fact of publication in Leicestershire,"
and again that if a party has it in his power to rebut the existence
of a fact as to which there is presumptive evidence and does not
do so, "we have something like an admission that the presump-
tion is just." If this inference from not calling a witness—as to
whom the same considerations do not arise—is to be carried to
its full length in the case of an accused not giving evidence on
his own behalf, inasmuch as it must always be within the know-
ledge of an accused whether he committed the crime or not, why
not help the jury to a conclusion of his guilt by reminding them
that he has not stepped from the dock into the witness-box and
sworn that he is innocent? This in many cases, indeed, is all that
he could allege. Why not say to the jury, "Would you not expect
him to do so?" It is said that the same presumption should be
drawn as in a civil case against a suitor who does not contradict
or explain a damaging assertion. I think that the cases are very
different. As pointed out by Sir *Julian Salomons*, suitors are
voluntarily urging upon a jury to accept or reject particular

(1) 4 B. & Ald. 95.

statements. Guilty or innocent, the accused is compulsorily before the Court, liable to conviction on an uncontroverted *prima facie* case being made out against him, but not (as I have already urged) to the further danger of an adverse inference from their hesitation to add to the character of the accused that of witness.

If I may judge of the intentions of the Legislature by what I assume would be their knowledge of the class of persons who would in general have to determine between silence and cross-examination, I should say that it could not have desired to expose such persons to the alternative. The large majority of the criminal class are ignorant and of a comparatively low order of intelligence, incapable of judging for themselves what course they ought to pursue, even if aware what is open to them. Most of them are undefended and, of course, opposed to the experience and ability of the prosecuting counsel. Many of them, on calling witnesses, are utterly unable to extract by questions what they desire, leaving to the Judge the task of endeavouring to ascertain and to elicit what may be required, at the peril of asking some question the answer to which may perhaps unfairly prejudice the accused. Still less competent are they sometimes to tell their own story in the witness-box—easily betrayed, however innocent, into contradictions or inconsistencies which they may have no opportunity of explaining even if they could. Undefended, silence may in many cases be preferable to the ordeal of the witness-box. I believe that far more injustice would arise from the assertion than from the denial of the right to counsel or Judge to animadvert upon the absence of the accused as a witness. If so, I have an additional reason for construing this doubtful statute in favour of my view. If the contrary be maintained, it must, I think, follow that where the accused does make a statement, it will be equally competent for the Judge to allow the jury to conclude that it is false, however rational, because it is not substantiated by an oath. It seems to me that this would deprive the accused of the alternative which he clearly has by statute, of making an unsworn or a sworn statement. The privilege of making a statement conferred by s. 470 of the *Criminal Law Amendment Act* of 1883 is not taken away. It stands with that given by s. 6 in question. But if the statement

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1893. is not to be regarded (for what it is worth) because the accused
R. v. Kors. would be expected to swear to it if true, the right seems to me to
Stephen J. be practically absolutely worthless. This appears to me another
ground for my view of this matter. I think that the Judge
should not have commented upon the accused's neglect to deny or
explain on oath the matters alluded to by him, and that the
accused should be discharged.

OWEN, J. I express my opinion on this point with great diffidence, as I have had no experience in the administration of the criminal law. But the question we have to determine does not turn on the practice of the criminal Courts previously to the passing of the Act 55 Vic. No. 5, but upon s. 6 of that Act, introducing a new practice. That section should, in my opinion, be interpreted, not from the point of view whether it is or how far it is a boon to the accused, but from the point of view of the administration of justice, the primary aim and object of which is the ascertainment of the truth of the facts upon which the verdict is to be based. That truth was often difficult to ascertain when the prisoner's mouth was stopped and he was not allowed to deny, explain, or qualify circumstances within his own knowledge which without such denial, explanation, or qualification made for his guilt. A great advance was made when prisoners were allowed to make a statement not upon oath, for although that statement was not evidence, the jury could hear from the lips of the prisoner his own version of the facts and could take that into consideration in determining his guilt or innocence. But such statement was eminently unsatisfactory—it was not subjected to any of the tests of truth, it was not upon oath, nor was it subjected to cross-examination. That defect was removed by the Act we are considering providing that the accused "shall be competent but not compellable to give evidence." It was admitted in argument that if the Act had merely provided that the accused should be competent to give evidence, the Judge might comment on his refusal or neglect to go into the witness-box, and the jury might draw an inference from his silence, but it was contended that the words "not compellable" precluded such comment and inference, as if made or drawn they would have the effect indirectly of

compelling a prisoner in every case to go into the box and be subjected to cross-examination. It was argued that he might have reasons for not submitting to the ordeal of cross-examination, known only to himself, or such as he would not willingly divulge, and that therefore, although able to deny or explain the facts he might decline to do so, lest on cross-examination he should be compelled to disclose matters which he desired to remain secret, and that under those circumstances any comment upon or inference from his silence would be improper. That argument standing by itself has considerable weight, but in construing the statute I think we must take other matters into consideration.

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It was admitted in argument that a Judge might comment on the fact that a prisoner had not made a statement under s. 470 of the *Criminal Law Amendment Act* denying or explaining matters within his own knowledge and a jury might draw an inference unfavourable to the prisoner from the fact.

Now it appears to me absurd that although a Judge may comment on a prisoner not making any statement, yet if he does make a statement the Judge may not draw the attention of the jury to the fact that prisoner could if he chose have verified his statement upon oath and have submitted it to the test of cross-examination and that the jury may not draw an inference from the fact. Now the jury are clearly entitled to give some weight to the prisoner's statement, and in determining what weight ought to be given to it the jury cannot help taking into consideration the circumstance that the prisoner could if he chose have verified that statement on oath and have had its truth tested by cross-examination, but that he did not do so. It would be wrong for a jury necessarily to conclude from such silence the truth of the facts, but it is a circumstance which they are entitled to consider in determining the truth of those facts. If the argument is pushed to its logical conclusion, the Judge ought not even to read this section to the jury or to tell them that a prisoner is now competent but not compellable to give evidence on oath, or if he does so he ought to tell the jury that they must dismiss from their minds the fact that the prisoner has not availed himself of the Act. Such a direction would in my opinion be futile if the

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jury knew that there were facts in evidence against the prisoner calling for denial or explanation and which were within his own knowledge, possibly within his sole knowledge. Whatever the tribunal, the truth of the facts has to be ascertained in the same way in criminal as in civil cases, and in dealing with evidence the mind of the tribunal operates in the same way in both cases. If, therefore, a necessary inference is to be drawn in civil cases from silence where there is a necessity and an opportunity for giving evidence, you cannot exclude such inference in criminal cases. Human reason cannot fail to draw such an inference. It is not a mere legal inference, but one which every man draws in the daily affairs of life when a statement is made in a person's presence as to facts within his knowledge calling for denial or explanation but which is not denied or explained. If this is so, then in my opinion the Judge ought to direct the jury as to the limits of such inference and to caution them against its improper use, and not to maintain silence on the subject or direct a jury to do an impossible thing. Nor do I see that a prisoner can be prejudiced by such inference—the necessity for his evidence can only arise when facts have been proved calling for denial or explanation. The Crown is bound in the first instance to prove its case and when a *prima facie* case has been made the presumption of guilt arises and the onus of proof shifts to rebut that presumption. If the prisoner could give his evidence on oath without cross-examination, the jury might draw an inference from his silence, as in the case where he did not make a statement under the old law. What, then, is the effect of cross-examination? When not abused it is a most powerful test of truth, and if the prisoner is speaking the truth he ought not to object to having the truth tested in the same way as in a civil case. The prisoner is protected against cross-examination as to his previous character and antecedents without the leave of the Judge, and we must assume that such cross-examination would not be permitted by the Judge unless he saw that it was necessary. There remain then those cases referred to in argument in which the prisoner may desire to shield some one from participation in his guilt or dishonour. Such cases in my opinion cannot be taken into consideration. They are matters of feeling, of sentiment, or of

compliance with social codes of honour which, however excellent or desirable in themselves, cannot be allowed to stand in the way of justice; and when a person resolves to maintain silence rather than run the risk of disclosing matters of this kind, he must take the consequences of his silence, even though the consequences of his silence be an inference unfavourable to his innocence. It was further contended that a nervous or stupid prisoner might break down in cross-examination and be induced to make admissions against himself. That objection is inherent to all human testimony and applies equally to civil cases, although in such cases the consequences may be different. But in my experience such a result is very rare where the witness is speaking the truth. The Court or the jury can see if a witness is nervous or stupid, and deal with his evidence accordingly.

We have been referred to the analogous provision in the statutes of South Australia and New Zealand. Those statutes contain words which may be considered to give effect to the interpretation contended for by the prisoner's counsel. But no such words occur in the statute in this colony, and as the Legislature has not thought fit to introduce those words, we cannot read them into the statute. The Courts cannot construe a statute of one Legislature by the words of the statute of another Legislature, even though the two statutes be in *pari materia*. Now in interpreting the words "not compellable," if the construction sought to be given to them leads, as I think it does, to an absurdity, we must see if the words are capable of some other interpretation. The origin of the expression is, I think, to be found in the Act 16 Vic. No. 14, s. 2, providing for the first time that a party in a civil action is "competent *and* compellable to give evidence." In the section we are considering a prisoner is "competent but not compellable to give evidence." The words "not compellable" in my opinion mean only "at his own option," and the proviso in the same section, "Provided that the person so charged shall not be liable to be called as a witness on behalf of the prosecution," only amplifies and elucidates those words. I think, therefore, that a Judge is entitled to comment on the silence of a prisoner, and that the conviction in this case ought to be sustained.

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FOSTER, J. It was admitted at the outset that this was a test case, and that there were no merits upon the evidence. We have, therefore, simply to deal with the dry point of law whether a Judge can in any case legally comment on the fact that a prisoner on his trial, having heard the case against him, which is sufficient in law to go to the jury, has declined to avail himself of the recently acquired right of giving evidence in person to answer or explain that case. All the arguments for the accused seem to me to have come to this, that if his failing to give his own evidence could in any case be prejudicial to his defence, this fact would virtually render him "compellable" to give evidence, contrary to the express words of the statute; in other words, that to draw a conclusion in any case unfavourable to an accused person from the fact that he declined to give evidence would be to make him compellable to give evidence.

In ordinary cases where a person is charged with a wrong or a serious liability, and a *prima facie* case is made out against him, and he must necessarily be cognisant of the facts, if any, which would excuse him or refute the charge, if he refuses to give any evidence when the opportunity is offered to him, a natural inference arises adverse to him, and the human mind is so constituted that this inference will arise even if some technical rule were to prevent us from giving effect to it. Indeed it is admitted that in civil cases this is and ought to be so, and that the inference in such cases is often overwhelming; but it is said that in criminal cases this is not so, and that if a Judge were to tell a jury they might take into their consideration this conduct of the accused as being prejudicial to him, he would no longer be free to go into the box or not, but would become "compellable" to do so.

I cannot accede to this definition of the word "compellable." I think "not compellable" is equivalent to saying that it shall be discretionary with the prisoner whether he will do so or not; and so long as it remains discretionary with him, he cannot be said to be compellable within the meaning of this Act, even though the consequence of his failing to do so may be prejudicial to his position on his trial. I do not think the objection that by thus holding we make the prisoner's conduct a means to his conviction has any weight, or that it is any violation of the principle *nemo*

tenetur seipsum accusare, for this principle is not limited to prisoners on their trial, but applies generally; and side by side with it has always gone the rule that an accused person's conduct might form part of the case against him, and it makes no difference whether it be conduct before or at the trial. We are asked, on the contrary, to say that in no case ought the jury to consider this part of the prisoner's conduct, and that if the Judge tells them they may do so he violates the law.

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It is urged that you virtually make a prisoner accuse himself by allowing him to be cross-examined if he goes into the box, or as an alternative, allowing his failure to do so to be prejudicial to him. I think the answer is that if this results from the cross-examination of the prisoner, that has been allowed by law, and if the Legislature had intended that this consequence of his being admitted as a witness should not attach, it could have provided that he should not be liable to cross-examination; it has in fact made him liable to cross-examination without other limitation than this, that he shall not be questioned as to his previous character without leave of the Judge; and if we were to hold that in consequence of this no comment should be made by the Judge upon his refusal to submit himself as a witness, we should be making law, not expounding it. It is said no such right existed before the recent statute, and it ought not to be taken against the prisoner by implication. It might as well be argued that no right ought to be implied to comment upon the prisoner's evidence when he chooses to give it, because there was no right to do so before the statute, and it is not expressly given. The right to comment arises with the existence of the fact to be commented on in each case and on the same principle, that is, that the Judge may comment upon all facts legally appearing on the trial and affecting the charge against the accused. And I think it would be as unreasonable to say that no adverse comment shall be made on the prisoner's conduct in declining to give evidence as it would be to say no adverse comment shall be made on the prisoner's evidence if he chooses to give any. It is said that this would be an inquisitorial mode of extracting materials for a charge against a man by examination, contrary to the English mode of procedure, but we must not forget that a case

1893. sufficient to go to the jury must have been established before the
 R. v. Kops. accused can be called upon for any defence at all, and that the
 Foster J. novel right to examine the prisoner, if he chooses to go into the
 box, is indeed contrary to the practice of British Courts of law
 in time past, but it is expressly allowed by law now, and this
 necessarily involves innovation.

I think it would be alike injurious to the cause of justice, morality, and truth, were we to make this new enactment a ground for establishing a technical rule that juries, when they go into the box, must throw their common sense behind them and not draw from the facts legally coming before them the inference which a rational mind would naturally draw. The authorities upon this subject have been so exhaustively cited and effectively commented upon by their Honours the *Chief Justice* and Mr. Justice *Windeyer* that I abstain from adding to their observations lest I be guilty of ineffectual repetition. Suffice it to say that I agree with the opinion of the *Chief Justice*, contrary to that of Mr. Justice *Innes*, that an adverse inference may, and often must, be drawn from the fact that a witness claims a privilege, given by law, of declining to answer any question.

MANNING, J. The point of law for decision in this case is whether on the interpretation of s. 6 of 55 Vic. No. 5, the jury are justified in drawing any inference of any kind from the fact that a prisoner does not avail himself of the right given him by that section to give evidence on oath on his own behalf. If the reasonable inference in this particular case can legally be drawn, then it is clearly the duty of the Judge to guide the jury on that point as upon any other point in the case. If an inference cannot in any case be legally drawn by a jury, then I take it that it would be the duty of the Judge either to tell the jury that they must not draw any inference or to abstain from comment of any kind whatsoever. The difficulty of this position is pointed out by *Parke, B.*, in *Boyle v. Wiseman* (1) in answer to the argument that if a witness who was compellable to give evidence declined to answer a question on the ground that it might criminate himself, that would amount to an admission of the fact. To that

(1) 10 Exch. 647.

the learned Judge says, "It is impossible to prevent the jury drawing their own conclusions." There is the further difficulty that it never could be ascertained whether any such inference had in fact been drawn, because the opportunity of drawing an inference could not arise until a sufficient case had been proved for the Crown.

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The main argument of the Attorney-General in this case was that there was nothing in the section to interfere with the exercise of ordinary human reason in drawing the proper inference in the proper case from the fact that an opportunity for exculpation in the best form had not been availed of. This very point has been dealt with in the legislation on the same subject by the colonies of South Australia and New Zealand, but in different ways, one providing that no inference shall be drawn and the other that no comment shall be made; and they further differ in this that under the one law an inference may be drawn from the fact of a husband or wife, as the case may be, not being called on behalf of the other, but not under the other.

I doubt very much if this legislation assists us in any way, because our Legislature may either not have known of the existence of these Acts or may have deliberately omitted them as unnecessary or undesirable. The point must be decided as to the effect of the language used in our Act that a person charged, though a competent witness, should be "not compellable" to give evidence, and we must no doubt consider this by the light of prior and existing legislation on the subject.

For the prisoner, it was most forcibly and ably contended that these words included compulsion of any sort, moral or otherwise, and that the alternative of having to submit to such inference as any reasonable man might draw from the refusal to give an explanation on oath, with the necessary sequence of having to submit to cross-examination, amounted in fact to compulsion. The arguments of Sir *Julian Salomons* in support of this contention impressed me very much, and made it difficult to come to a conclusion, but it seems to me now, after very careful consideration, that his arguments as to what might happen, such as the case for the Crown being supplemented by the prisoner's silence in very grave cases, are met by the assumptions—(1) That

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the law will in the future, as in the past, be administered by upright and able Judges who are actuated by no other feeling but a desire for the honest administration of justice on the fairest lines for a prisoner, who cannot be treated as guilty until the case has been proved against him; and (2) that juries will, as heretofore, act as reasonable men and require to be satisfied beyond all reasonable doubt as to a man's guilt before they find a verdict to that effect. Then as to the argument that a man may feel impelled by a sense of honour or regard for others to refrain from taking a course that would require him to answer on cross-examination, there are the two answers—first, that the jury can be informed of such feeling by means of the ordinary statement, which would necessarily affect them in the process of drawing an inference; and secondly, that legally such considerations cannot be taken into consideration by the Court. It has often happened that a man has remained dumb, and I would go further and say has, by the code of honour which we all recognise, remained properly dumb, but he has done so prepared to accept the alternative of the reasonable inference being drawn from his silence.

We come then to the real question as to whether the words of the statute include moral compulsion, and whether the acceptance of a course from which a reasonable inference may be drawn amounts to compulsion in any form.

Before considering the section itself it is necessary to bear in mind the previously existing law and the course of legislation on the subject. Without going back to the barbarous age when a person charged with a crime had practically no rights at all, it is sufficient to see how the difficulties in a man's way of proving his innocence have been removed, and that facilities were from time to time afforded to the prisoner, while the Crown was kept within the old limits. By the *Criminal Law Amendment Act* the prisoner was allowed to make a statement from the dock independently of any comment by himself or his counsel on the weakness of the case for the Crown, and he was also enabled on the advice of his counsel to make any admissions. The value of the statement consisted in giving the prisoner himself an opportunity of in his own words explaining his real position and

thereby setting up for the consideration of the jury a suggested reality instead of the hypothesis submitted by the Crown. In explanation of evidence admitted in its main features to be true it was most valuable, but where it amounted to a denial of the Crown evidence it naturally carried very little weight as being a mere statement untested by cross-examination and unassisted by the solemnity of an oath. Even in cases of explanation juries have always been told that while they were bound to take the subject matter into consideration they must also remember that it was not "evidence," and not being on oath might only be one hypothesis suggested instead of another as was done before by clever counsel who made capital out of the prisoner's mouth being closed and enlarged on what the prisoner might have said had the law allowed him to speak.

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Thus there was this evil to be remedied, and the remedy was especially required for cases where by the law of statute or of reason the prisoner was upon the proof of certain facts called upon for an answer. Such are the cases of offences done "without lawful excuse," and the well known case of the presumption arising from the unexplained possession of recently stolen goods. The underlying principle of such cases is that at a certain point the ordinary presumption of innocence is rebutted and a presumption of guilt arises which itself demands rebuttal. At the same time it was thought desirable to remove the disability as to the evidence of husbands and wives, as it was felt that in many cases a wife or husband might be the only person capable of proving the innocence of the other.

In the statute before us both these cases are dealt with in the same section, and the words "competent but not compellable" are equally applied to both, the only difference being that the section goes on to provide that a person charged cannot be called as a witness for the Crown in the case against himself. The reason for this latter provision is explained by the case of *Boyle v. Wiseman* before referred to, which arose shortly after the Act which made interested parties "competent and compellable" to give evidence, and it was then held that a witness was bound to go into the witness-box and take the oath and then refuse to answer, on the ground of privilege, possibly the only question that

1893. he could be asked that was material to the case, and it was with
R. v. KOPS. reference to the result of such refusal that *Parke*, B., made the
Manning J. remark I have already mentioned.

This case is no doubt different, because the person charged is not compellable, but without the proviso the Crown might have put the prisoner in the box and put him in the almost similar position of refusing to be sworn.

Apart from this, we find the words "not compellable" applied to both cases, and there seems to me no reason why the words should have a more extended meaning in one case than in the other. Now does it mean anything more than "of her own free will" in the case of a wife? Here at once we see the difference between the case of privilege which has been referred to and the inference capable of being drawn from opportunity not availed of. If a stranger who appeared a material witness were not called by the prisoner, it is admitted that an inference might be drawn, and the same reasoning would apply to a wife not called. If, however, she was called and declined to be sworn, no inference could be drawn against the husband prisoner, the privilege or right to refuse, whatever it is called, being her own, though I agree with the *Chief Justice* in the view that if a witness does decline to answer any question damaging to his own character an inference may be drawn. The position of the prisoner is, however, different. He has the opportunity given him by the law of calling his wife and giving evidence himself. Are the jury to be told that they can draw any inference they please as reasonable men from the fact that the prisoner has not availed himself of the opportunity to call his wife, but that they must dismiss their reasoning powers with regard to the prisoner, who must be able to explain, if any explanation is open, although he had the same opportunity, simply because the Act says he is not compellable to give evidence on oath?

It seems to me that the reasonable intendment of this legislation is that the prisoner should be *quite free to act as he pleased*—first, to rely on the weakness of the case for the Crown and shew that no sufficient case was made beyond reasonable doubt calling on him for an answer; second, to rely on the effect of his statement either to confute the hypothesis of the Crown or raise a

reasonable doubt in the case and by statement or hint of his reasons for avoiding a course which involves cross-examination weaken any inference which might otherwise be drawn from his failure to give evidence and thus supply the best material for the consideration of the case; or third, to go into the witness-box and stand the test of cross-examination; but I can see no reason why the jury should not draw the fair inference whatever it may be from the *fact* before them as to the way the prisoner's case has been conducted.

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We have nothing to do with the policy of the law, as to which so much argument was in reality addressed, though put forward as a test for interpretation of the section, but I think I am justified in expressing an opinion that the Act was passed with reference to the better administration of justice, and not simply to give prisoners a privilege, and I do not believe that it will lead to the conviction of innocent men. A nervous innocent man is far more likely to commit himself by an answer to a charge suddenly made than in giving evidence on his trial, and juries who have always the tendency to strain a doubt in favour of a prisoner would very quickly determine between a nervous or confused and a guilty man, and if the change leads to the more certain conviction of the guilty, who can complain?

The provision that no cross-examination is to be allowed as to previous character without the leave of the Judge is a sufficient safeguard to prevent a previous and repented of offence being the cause of conviction, and the English love of fair-play and the impulse to give every hunted thing a run would impel an English Judge to see that no unfair inference was in any case drawn and prevent a jury from drawing such an inference.

Applying these remarks to the facts of the case, we find a strong case proved—a clear attempt at arson, and the evidence pointing to the prisoner as the only person who had an interest coupled with opportunity. It seems to me that the Judge was perfectly right in calling attention to certain salient points as to which the prisoner could have offered an explanation, and pointing out that he had not done so. It would no doubt have been sufficient to have said that no explanation was given and no statement was made even, and then the point would never have arisen,

1893.
R. v. KOPS. but I think the jury were justified in drawing an inference as to
Manning J. these various matters from the fact that the prisoner did not give
evidence on oath, and the Judge therefore was within his powers
in his comments. Nothing can turn on the form of expression
used—whether it was “would you not expect” or “one would
expect,” for a Judge is not simply a conduit-pipe to conduct the
evidence to the jury and see fair-play between the parties, but in
his summing up he is bound to do all in his power to aid the jury
in coming to a proper determination, even to the extent of giving
his own opinion if he thinks it necessary, provided he make it
clear to the jury that the issue is in their hands alone.

Conviction sustained.

Attorney for the prisoner: *E. T. Newell* (for *M. T. Phillips*,
Cowra).