

C. A. intrusted himself to the defendant to be carried, and there was
 1898 a clear duty on the part of the bailee towards the bailor not to
 COUGHLIN be guilty of gross negligence causing injury to him. That
 v. case can have no application to the present one, where the
 GILLISON. defendants were not bailees but lenders.

Appeal dismissed.

Solicitors for plaintiff: *Lovett & Liddle.*

Solicitors for defendants: *Thomas Cooper & Co., for Hill,
 Dickenson, Dickenson & Hill, Liverpool.*

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[CROWN CASE RESERVED.]

Nov. 5.

THE QUEEN v. GARDNER.

*Criminal Law—Evidence—Right of Counsel for Prosecution to sum up where
 Prisoner gives Evidence—Criminal Evidence Act, 1898 (61 & 62 Vict.
 c. 36), ss. 2, 3*

Where, upon the trial of an indictable offence, the person charged gives evidence in his own behalf, but does not call witnesses, the counsel for the prosecution is entitled, immediately after the person charged has given his evidence, to sum up the case for the Crown, and in so doing to comment upon the evidence given by the person charged.

CASE stated by the chairman of quarter sessions for the county of Oxford.

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

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

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

The learned chairman ruled—

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

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

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

The questions for the Court were—

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

(2.) If the prosecuting counsel is entitled to sum up at the close of the prisoner's evidence, is he entitled to comment on that evidence, or is he to be required to confine his summing-up to the evidence adduced by the prosecution? (1)

(1) By 61 & 62 Vict. c. 36 (The Criminal Evidence Act, 1898), s. 1, every person charged with an offence is made a competent witness for the defence at every stage of the proceedings.

By s. 2, "Where the only witness to the facts of the case called by the defence is the person charged, he shall be called as a witness immediately

after the close of the evidence for the prosecution."

By s. 3, "In cases where the right of reply depends upon the question whether evidence has been called for the defence, the fact that the person charged has been called as a witness shall not of itself confer on the prosecution the right of reply."

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

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

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

Yes; but there the statement is put in as part of the case for the prosecution, while a prisoner who gives evidence under the new Act is not a witness for the prosecution at all, and cannot be replied upon. [He referred to *Reg. v. Holchester*. (1)]

Biron, for the prosecution, was not called upon to argue.

(1) (1865) 10 Cox, 226.

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

Now, in the present case, after the evidence for the prosecution had closed, an application was made on behalf of the prisoner that he should be called as a witness, and an intimation given that no other evidence would be called. What was the proper course for the chairman to pursue ? In my opinion the question admits of a clear answer. The section says that in such a case the person charged is to be called as a witness *immediately* after the close, not of the case for the prosecution (which expression might include the summing-up of counsel), but of the *evidence* for the prosecution ; it is clear, therefore,

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that the magistrates were right in holding that the counsel for the prosecution was not to sum up at that moment, but that the prisoner's evidence must then be given. What was the effect of that upon the right of the prosecuting counsel to sum up? Did it operate as an extinguishment of the right altogether, or merely as a postponement of the time at which the right was to be exercised? I think that if an extinguishment of the right had been intended, the statute would have said so in so many words; and it is evident to me that the statute operates as a postponement only to a later stage of the proceedings of the right of the prosecuting counsel to sum up. I think that that is the answer which we must give to the first question asked us—that the magistrates were right in holding that the prisoner must be called at once as a witness, and that the right to sum up was not extinguished, but merely postponed.

Then comes the second question raised in the case, which is whether counsel for the prosecution, who is thus called upon to sum up, is entitled, if he thinks fit, to make references to, and comments upon, not merely the evidence called for the prosecution, but also the statement of the prisoner himself. It has been contended before us that he cannot make any comment in summing up except upon the evidence adduced on behalf of the prosecution, and the learned counsel based his argument upon the construction which he seeks to place upon s. 2 of Denman's Act, which enacts that, where a prisoner defended by counsel does not call evidence, counsel for the prosecution is to be allowed to address the jury a second time in support of his case for the purpose of summing up the evidence against the prisoner. When that statute was passed, prisoners were not competent witnesses in their own behalf; but the effect of the recent Act is that a prisoner can give evidence in his defence before the time at which the prosecuting counsel can exercise his right of summing-up. Is it good sense to say that the counsel must shut his eyes to the fact that the prisoner has given evidence which is, or may be, wholly inconsistent with the case for the prosecution? I may suggest as an illustration a defence of an alibi, in which the prisoner when called

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

HAWKINS J. I am of the same opinion, and my Lord has so entirely expressed my own views that I will add but very few words. If we construe strictly the provisions of Denman's Act, applying it to the present state of circumstances when prisoners are competent witnesses in their own behalf, I think that on the strictest construction of the language used the counsel for the prosecution would have the right to comment on the evidence given by the prisoner. In s. 2 of that Act the counsel for the prosecution is given the right of addressing the jury a second time "in support of his case, for the purpose of

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summing up the evidence against such prisoner." Where a prisoner gives evidence on his own behalf, his object is to lessen the force of the evidence for the prosecution ; and the object of the summing-up is to take the evidence of the prisoner and comment upon it, and shew that the effect of the evidence given on behalf of the prosecution ought not to be disturbed.

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

WRIGHT J. and BRUCE J. concurred.

Conviction affirmed.

Solicitor for prosecution : *Solicitor to the Treasury.*

Solicitor for prisoner : *George Mallam, Oxford.*

W. J. B.