

This dictum of Tyndall, C.J., was cited with approval by the Judicial Committee in giving judgment in *Levinger v. R.* (1870). L.R. 3 P.C. 282, 289, a case in which a similar point was raised.

Chief Justice Mathers appears, if I may with deference say so, to have overlooked the fact that the privilege of an accused person to make an unsworn statement was in its origin given to him, not because he was unable to be called as a witness in his own defence, but because he was not allowed to have a counsel to speak for him. If any Act at all could be looked upon as taking away the prisoner's right to make an unsworn statement, surely it was the Prisoner's Counsel Act, and the law has long been settled in favour of the prisoner on that point. All that the Canada Evidence Act does is to give the prisoner a new right which is not necessarily inconsistent with the continuance of his former right, and this right, in my view, can only be abolished by express language.

Mr. Justice Phillimore seems to have been of the opinion that the English Criminal Evidence Act, 1898, did not in any case disturb the prisoner's right to make an unsworn statement. In the case of *Rex v. Pope* (1902), 18 Times L.R., p. 717, where he allowed a prisoner who was defended by counsel to make a statement to the jury without being sworn, the following summary of his address appears at p. 718:—

"In the course of his summing up Mr. Justice Phillimore pointed out to the jury that 70 years ago prisoners were not entitled to have counsel to represent them, and made whatever statement they could to the jury on their own behalf. The law was then changed, and prisoners were allowed to retain counsel for their defence, and the learned Judges at that time decided that the prisoners still retained their right to make a statement to the jury. Since the passing of the Criminal Evidence Act, 1898, a prisoner could go into the witness-box and give evidence on his own behalf if he wished to do so. This further right, in his opinion, did not do away with the former privilege; and he, therefore, allowed the prisoner to make his statement and fol-