EVIDENCE OF ACCUSED PERSONS.

A statutory rule prohibiting comment by the prosecuting counsel upon the failure of the accused, either to testify on his own behalf, or to call his wife as a witness in a criminal case, is contained in the Canada Evidence Act, 1893, s. 4. This was viewed as prohibitive, and not as directory only, in the Nova Scotia case of *The Queen* v. *Corby* (1898) 1 Can. Cr. Cas. 457, and its infraction resulted in a conviction being set aside and a new trial ordered. The same doctrine was applied in the more recent decisions of *The King* v. *Hill* (1903) 7 Can. Crim. Cas. 38, by the Supreme Court of Nova Scotia, although the prisoner's counsel was the first to comment on the absence of the prisoner's wife as a witness. The prisoner's counsel had there suggested in his address to the jury an explanation of the failure to have the wife present as a witness at the trial, and the prosecuting counsel was thus led into commenting in answer. The court granted a new trial, holding that the section specified is an absolute mandate.

The same rule is contained in the Criminal Evidence Act, 1898 (Imp.), and that Act is also silent as to what is to be the result should the prosecution disregard the prohibition. But it is interesting to note that in Scotland a different interpretation is given to it from that which obtains here.

The *Law Times* (England), in a recent issue says: "The learned editor of the last edition of Best on Evidence expresses the opinion (at p. 521) that any comment by the prosecution on an accused person's failure to go into the box would be sufficient to vitiate the proceedings and render voidable any conviction obtained. As appears from two decisions, reported in the last issued part of the Session Cases, the judges of the High Court of Judiciary are not disposed to take so serious a view of the consequences of disobedience to the statutory injunction. In each of the two cases in question it was sought to set aside a conviction on the allegation that the prosecutor had commented upon the fact that the accused had not given evidence on his own behalf, but in each case the judges, while stating that the statutory direction ought to be scrupulously observed, nevertheless thought that the mere fact of its transgression was not enough to entitle the accused to acquittal, and they accordingly refused to quash the convictions: *Ross* v. *Boyd*, 5 F. (J.C.) 64; *M'Attee* v. *Hogg*, 5 F. (J.C.) 67. Both appellants