ENGLISH REPORTS.

CROWN CASES RESERVED.

REG. *v.* PAYNE.

Evidence—Joint charge—Incompetency of fellow prisoners as witnesses for one another.

After several prisoners jointly indicted are given in charge to the jury, one, while in such charge, cannot be called as a witness for another.

The 14 & 15 Vict. c. 99, does not apply to criminal proceedings.

[26 L. T., N. S., 42.]

Case reserved by Keating, J. for the opinion of the Court for the Consideration of Crown Cases Reserved, and directed by that court to be argued before all the Judges.

John Payne, George Owen, Isaac Owen, and Joseph Curtis were indicted before me at the Winter Assizes for the county of Worcester 1871, for that they to the number of three or more, armed with offensive weapons by night, did enter in and were on land belonging to Earl Dudley for the purpose of taking or destroying game.

It appeared that at one o'clock on the morning of the 4th Oct., 1871, the keepers of Earl Dudley discovered a number of poachers upon the Earl's lands taking game. They were armed with stones, bludgeons, &c., and advanced upon the keepers with whom they had a desperate struggle. Ultimately the keepers were forced to retire, one keeper being dangerously and another severely wounded.

The prisoner Payne and the two Owens were first apprehended, and on being brought before the magistrates each set up an *alibi* by way of defence, and called witnesses in support. Amongst the witnesses called by Payne was the prisoner Curtis, not then in custody, and he proved having been with Payne at the time in question at a place so distant from the scene of the affray as to render it impossible he could have been one of the poachers. Curtis with the other witnesses for the prisoners were bound over by the magistrates, under 30 & 31 Vict. c. 35, but having been afterwards identified as one of the party of poachers he was committed and indicted with the other three prisoners.

On the trial all four prisoners were sworn to by various witnesses as having formed part of the gang of poachers on the night in question. The defence by each was, as before the magistrate, an *alibi*, and the counsel for Payne proposed to call the prisoner Curtis to prove what he had deposed to before the justices. I held that he was incompetent and could not be called. All the prisoners were convicted and sentence passed.

I desire the opinion of the Court of Crown Cases Reserved, first, whether a prisoner jointly indicted with another can after they have been given in charge to the jury be called as a witness for the other without having been either acquitted or convicted, or a *nolle prosequi* entered: (*Winsor v. The Queen*, 35 L. J. 161, M. C.; 14 L. T Rep. N. S. 195; *Reg. v. Deeley*, 11 Cox C. C. 607.) Secondly, whether upon the present form of indictment, and under the circumstances of the case, the prisoner Curtis was competent, and ought to have been called as a witness for the prisoner Payne: (See Russell on Crimes, by Greaves, 626-7, 4th edit.; Taylor on Evidence, 1178-9.)

If the prisoner Curtis was a competent witness and might have been called on behalf of Payne in the present case, then the conviction is to be quashed or the prisoner to be discharged, otherwise the judgment is to stand.

H. S. KEATING.

T. S. Pritchard (*E. H. Selfe* with him) for the prisoner.—The question mainly depends on the construction of the 14 & 15 Vict. c. 99, s. 3. Sect. 1 of that Act repeals so much of the 6 & 7 Vict. c. 85, as provides that that Act shall not render competent any party to any suit, action, or proceeding individually named in the record, &c. Then sect. 2 enacts, that on the trial of any issue joined, or of any matter or question, or on an inquiry arising in any suit, action, or other proceeding in any court of justice, &c., the parties thereto and the persons in whose behalf any such suit, action, or other proceeding may be brought or defended, shall except as hereinafter excepted, be compelled and compellable to give evidence. And then sect. 3 provides that nothing herein contained shall render any person who in any criminal proceeding is charged with the commission of any indictable offence or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself, or shall render any person compellable to answer any question tending to criminate himself or herself, or shall in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband." Now, under the 1st section the prisoner Curtis was a competent witness for the prisoner Payne, and there is nothing in the 3rd section which prevents him from being a witness. Since that Act in *Reg. v. Deeley* 11 Cox C. C 607 where three prisoners were jointly indicted for robbery with violence, and were given in charge to the jury, Mellor, J. allowed two of the prisoners to be called as witnesses for the other one. And in a case at the Shropshire Assizes Pigott, B. also allowed one prisoner to be called as a witness for another on a joint indictment after they were given in charge to the jury. The same course has also been followed by Lush, J. The reason for the incompetency was the ground of interest, and not of being a party to the suit or proceeding: 1 Phil. on Ev 68, 8th edit. In *Worrall v. Jones* 7 Bing 395 Tindal, C. J. says that a party to the record would be an admissible witness if he were not interested. [MARTIN, B.—Suppose two persons jointly indicted for murder, what legal interest has one in the conviction or acquittal of the other? Was not the rule that parties to the proceeding were excluded? BRAMWELL, B.—If it was on the ground of interest, that was an objection for the benefit of the party interested which might be waived and the party called, but did anyone ever hear of such a thing being done?] It may be that the rule is qualified to the extent that a party to the immediate inquiry is not admissible. [BLACKBURN, J.—If a prisoner is competent to give evidence for a fellow prisoner, on cross-examination he may be forced to give evidence against himself.] He would be privileged from answering questions tending to criminate him-