

# LAWS OF THE UNITED KINGDOM

## THE CRIMINAL PROCEDURE ACT 1865

(28 & 29 Vict. c. 18)

### ARRANGEMENT OF SECTIONS

#### Section

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*An Act for amending the Law of Evidence and Practice on Criminal Trials*

[9th May 1865]

**Short title.** The short title, which is misleading, was given to this Act by the Short Titles Act 1896. Ss. 3-8, *post*, repeat the Common Law Procedure Act 1854, ss. 22-27 (repealed), which applied only to civil proceedings, and s. 1, *post*, applies those sections "to all courts of judicature as well criminal as all others".

Cases on the above-mentioned sections of the Act of 1854 are therefore of importance in interpreting ss. 3-8, *post*.

**Courts-martial.** See as to the application of the rules of evidence at courts-martial, the Army Act 1955, s. 99, and the Air Force Act 1955, s. 99, both Vol. 29, title Royal Forces. There are no corresponding provisions as to naval courts-martial.

**Northern Ireland.** This Act applies. See also as to the construction of the reference to attorneys in s. 9, *post*, the Solicitors (Ireland) Act 1898 (not printed in this work). See, further, the notes to ss. 3 and 7, *post*.

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**1. Section 2 to apply to all trials for felony or misdemeanour; sections 3 to 8 to all courts and persons authorized to hear evidence**

. . . The provisions of section two of this Act shall apply to every trial . . . and . . . the provisions of sections from three to eight, inclusive, of this Act shall apply to all courts of judicature, as well criminal as all others, and to all persons having, by law or by consent of parties, authority to hear, receive, and examine evidence.

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#### NOTE

The words omitted were repealed by the S.L.R. Act 1893, the Criminal Law Act 1967, s. 10(2) and Sch. 3, Part III, and the Criminal Law Act (Northern Ireland) 1967, s. 15(2) and Sch. 2.

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## 2. Summing up of evidence in cases of felony and misdemeanour

If any prisoner or prisoners, defendant or defendants, shall be defended by counsel, but not otherwise, it shall be the duty of the presiding judge, at the close of the case for the prosecution, to ask the counsel for each prisoner or defendant so defended by counsel whether he or they intend to adduce evidence; and in the event of none of them thereupon announcing his intention to adduce evidence, the counsel for the prosecution shall be allowed to address the jury a second time, in support of his case, for the purpose of summing up the evidence against such prisoner or prisoners, or defendant or defendants; and upon every trial . . ., whether the prisoners or defendants, or any of them, shall be defended by counsel or not, each and every such prisoner or defendant, or his or their counsel respectively, shall be allowed, if he or they shall think fit, to open his or their case or cases respectively; and after the conclusion of such opening or of all such openings, if more than one, such prisoner or prisoners, or defendant or defendants, or their counsel, shall be entitled to examine such witnesses as he or they may think fit, and when all the evidence is concluded to sum up the evidence respectively; and the right of reply, and practice and course of proceedings, save as hereby altered, shall be as at present.

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#### NOTES

The words omitted were repealed by the Criminal Law Act 1967, s. 10(2) and Sch. 3, Part III, and the Criminal Law Act (Northern Ireland) 1967, s. 15(2) and Sch. 2.

**Counsel.** For meaning, see s. 9, *post*.

**Prosecution's right to sum up.** Prosecuting counsel's right of reply must be distinguished from his right to sum up the evidence.

The latter was first created by this section. It should only be exercised when necessary in the interests of justice (*R. v. Holchester* (1865), 10 Cox C.C. 226; *R. v. Webb* (1865), 4 F. & F. 862).

Counsel for the prosecution may not sum up the evidence unless the accused person is defended by counsel (*R. v. Madden* (1872), 12 Cox C.C. 239). The time to sum up is at the close of the evidence for the prosecution (*R. v. Madden, supra*). If the defence calls any witnesses (other than the accused) the prosecution may reply but not sum up.

At the time this Act was passed, accused persons were not competent witnesses. They were made so by the Criminal Evidence Act 1898, s. 1, p. 865, *post*. S. 2 of that Act provided that the defendant, if called as the only witness for the defence, should be called

immediately after the close of the evidence for the prosecution. Where a defendant enters the witness box and does not call any other witnesses, the right to sum up is not destroyed but postponed until after he has given his evidence (*R. v. Sherriff* (1903), 20 Cox C.C. 334; *R. v. Gardner*, (1899) 1 Q.B. 150), upon which counsel may comment; *R. v. Gardner, supra*.

By virtue of s. 1, proviso (b), of the Act of 1898, the prosecution may not comment on the failure of the accused or his or her spouse to give evidence.

This section must be read in the light of the Criminal Justice Act 1948, s. 42(1), Vol. 8, p. 362, and the Criminal Procedure (Right of Reply) Act 1964, s. 1(1)(b), p. 906, *post*.

**Rights of defence.** The defence is also given the right, not previously held, of summing up the evidence. Where no witness (other than the defendant) has been called by the defence, this right is exercised after the prosecuting counsel has summed up. When doing so, counsel for the defence may make observations on the whole case (*R. v. Wainwright* (1875), 13 Cox C.C. 171).

Counsel who intends to call witnesses for the defence has an absolute right to open his case (*R. v. Hill* (1911) 7 Cr. App. Rep. 1, C.C.A.).

**Northern Ireland.** See the first note above.

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### 3. How far witness may be discredited by the party producing

A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character; but he may, in case the witness shall in the opinion of the judge prove adverse, contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.

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### NOTES

**General Note.** This section applies to civil as well as criminal proceedings; see s. 1, *ante*.  
**Prove adverse.** This expression must be interpreted as meaning "hostile" and not merely "unfavourable" (*Greenough v. Eccles* (1859), 5 C.B.N.S. 786).

Whether the witness is adverse is a question for the judge to decide (*Greenough v. Eccles, supra*; *Price v. Manning* (1889), 42 Ch. D. 372, C.A.; but see *R. v. Bateman* (1946), 174 L.T. 336); and his decision cannot be reviewed on appeal (*Rice v. Howard* (1886), 16 Q.B.D. 681; *R. v. Williams* (1913), 77 J.P. 210).

**Previous inconsistent statement.** Where by leave of the judge the fact that a witness has made a previous inconsistent statement which may be contained in a series of documents (*Jackson v. Thomason* (1861), 1 B. & S. 745), is proved, such a statement is relevant only to the credit of the witness and cannot be used as evidence, even if it is a deposition (*R. v. Birch* (1924), 93 L.J.K.B. 385), against any other person (*R. v. White* (1922), 17 Cr. App. Rep. 60). See, however, now, as to civil proceedings, the Civil Evidence Act 1968, s. 3(1), p. 912, *post* (not yet in force).

For other relevant cases, see 14 Digest (Repl.) 295 *et seq.*, and 22 Digest (Repl.) 477 *et seq.*

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#### 4. As to proof of contradictory statements of adverse witness

If a witness, upon cross-examination as to a former statement made by him relative to the subject matter of the indictment or proceeding, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.

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#### NOTES

**General Note.** This section applies to civil as well as criminal proceedings; see s. 1, *ante*. It must, in relation to civil proceedings, be read in conjunction with the Civil Evidence Act 1968, s. 3(1), p 912, *post* (not yet in force).

**Previous inconsistent statement.** See the note to s. 3, *ante*. As to statements in writing, see also s. 5, *post*.

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#### 5. Cross-examinations as to previous statements in writing

A witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the subject matter of the indictment or proceeding, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him: Provided always, that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he may think fit.

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#### NOTES

**General Note.** This section applies to civil as well as to criminal proceedings; see s. 1, *ante*. It must, in relation to civil proceedings, be read in conjunction with the Civil Evidence Act 1968, s. 3(1), p. 912, *post* (not yet in force).

**Production of statement.** The production for purposes of cross-examination and use in evidence by the defence of a witness's previous statement in writing does not give the prosecution a right to reply on a trial on indictment; see the Criminal Justice Act 1948, s. 42(1), Vol. 8, p. 362.

A witness may be cross-examined as to a statement without such statement being put in evidence, but it is irregular to cross-examine a witness on the contents of a statement not capable of being produced (*R. v. Anderson* (1929), 142 L.T. 580).

See also s. 3, *ante*.

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## 6. Proof of conviction of witness for felony or misdemeanour may be given

A witness may be questioned as to whether he has been convicted of any felony or misdemeanour, and upon being so questioned, if he either denies or does not admit the fact, or refuses to answer, it shall be lawful for the cross examining party to prove such conviction; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for such offence, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court where the offender was convicted, or by the deputy of such clerk or officer, (for which certificate a fee of five shillings and no more shall be demanded or taken,) shall, upon proof of the identity of the person, be sufficient evidence of the said conviction, without proof of the signature or official character of the person appearing to have signed the same.

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### NOTES

**General Note.** This section applies to civil as well as criminal proceedings; see s. 1, *ante*.

**Incriminating questions.** See the Evidence Act 1851, s. 3, p. 816, *ante*, and the notes thereto.

**Questioning of accused.** As to when an accused person may be asked and compelled to answer questions tending to show that he has been convicted, see the Criminal Evidence Act 1898, s. 1(f), p. 865, *post*. See also as to the abolition of the distinctions between felony and misdemeanour, the Criminal Law Act 1967, s. 1, Vol. 8, p. 552, and the Criminal Law Act (Northern Ireland) 1967, s. 1 (not printed in this work).

**Other methods of proving convictions.** For alternative methods of proving convictions, see the Evidence Act 1851, s. 1; p. 820, *ante*, and the General Note thereto.

**Proof of identity.** Conclusive proof is not necessary, but there must be some evidence to show that the person previously convicted and the accused are the same persons (*Martin v. White*, [1910] 1 K.B. 665, at p. 681, *per* Lord Alverstone).

**Northern Ireland.** See the note "Questioning of accused" above.

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## 7. Proof of instrument to validity of which whereof attestation is not necessary

It shall not be necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite, and such instrument may be proved as if there had been no attesting witness thereto.

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### NOTES

**General Note.** This section applies to civil as well as criminal proceedings; see s. 1, *ante*. In any proceedings an instrument to the validity of which attestation is requisite, may, if not a testamentary document, be proved as if no attesting witness were alive (Evidence Act 1938, s. 3, p. 879, *post*).

**Former law.** Even after the passing of the Evidence Act 1851, p. 815, *ante*, by s. 2 of which parties were made competent witnesses, an admission by a party who had executed an attested instrument was insufficient to prove its execution (*Whyman v. Garth* (1853), 8 Exch. 803).

**Ex parte proceedings.** Notwithstanding this section, in any proceedings ex parte a deed must be proved by the attesting witness, if any (*Re Reay's Estate* (1855), 3 Eq. Rep. 512) or by proving his handwriting (*Re Rice* (1886), 32 Ch.D. 35, C.A.).

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## 8. Comparison of disputed writing with writing proved to be genuine

Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute.

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### NOTES

**General Note.** This section applies to civil as well as criminal proceedings; see s. 1, *ante*.

**Proof of handwriting.** See, generally, as to the proof of handwriting, 15 Halsbury's Laws (3rd Edn.) 324 *et seq.*, and 22 Digest (Repl.) 185 *et seq.* See also *R. v. Tilley*, [1961] 3 All E.R. 406, and *R. v. Harden*, [1963] 1 Q.B. 8; [1962] 1 All E.R. 286.

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## 9. "Counsel"

The word "counsel" in this Act shall be construed to apply to attorneys in all cases where attorneys are allowed by law or by the practice of any court to appear as advocates.

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### NOTE

**Northern Ireland.** See the Introductory Note to this Act.

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## 10. Extent

This Act shall not apply to Scotland.

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