GEORGE WILLIAM BATARY .....APPELLANT; 1964

AND *Dec. 7, 8, 9

THE ATTORNEY GENERAL FOR SASKATCHEWAN ET AL. ..... } RESPONDENTS. 1965

Apr. 6

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Criminal law—Coroner's inquest—Examination of person charged with murder at inquest into the death in question—Whether compellable witness—Coroners Act, R.S.S. 1953, c. 106, ss. 8, 8a, 15, 20, as amended by 1960 (Sask.), c. 14—Canada Evidence Act, R.S.C. 1952, c. 307, ss. 2, 4, 5—Canadian Bill of Rights, 1960 (Can.), c. 44, s. 2(d), (e)—Criminal Code, 1953-54 (Can.), c. 51, ss. 448, 488(3).

Constitutional law—Validity of legislation—Provincial legislation compelling person accused of murder to testify at coroner's inquest—Whether intra vires—Coroners Act, R.S.S. 1953, c. 106, ss. 8, 8a, 15, 20, as amended by 1960 (Sask.), c. 14—B.N.A. Act, 1867, ss. 91(27), 92(14).

On the same day that the coroner was holding an inquest into the death of one Thomas, the appellant and eight others were arrested and each of them was separately charged with the non-capital murder of Thomas. The coroner immediately closed the inquest. Subsequently, on the order of the Attorney-General, made pursuant to s. 8*a* of the *Coroners Act*, R.S.S. 1953, c. 106, as amended in 1960, the inquest was re-opened. On the fourth day of the inquest, counsel for the Crown stated his intention to call and examine as witnesses the appellant and the eight others who were present, they having been served with a subpoena. The coroner ruled that each of them was a compellable witness. The appellant applied for a writ of prohibition. The writ was refused by the trial judge, and his judgment was affirmed by the Court of Appeal. The appellant was granted leave to appeal to this Court.

Held (Fauteux J. dissenting): The appeal should be allowed.

Per Taschereau C.J. and Cartwright, Martland, Judson, Ritchie and Spence JJ.: The criminal law in force in Saskatchewan is that of England as it existed on July 15, 1870, except as altered, varied, modified or affected by the *Criminal Code* or any other Act of the Parliament of Canada. Under that law as it existed on that date, a person charged with murder and awaiting trial could not be compelled to testify at an inquest into the death of the deceased with whose murder he was charged. No alteration has been made in this state of the law by the combined effect of ss. 2, 4(1) and 5 of the *Canada Evidence Act* and ss. 448 and 488(3) of the *Criminal Code*. These sections of the *Canada Evidence Act* do not have the effect of rendering an accused a compellable witness at the coroner's inquest. It would require clear words to bring about so complete a change in the law as it existed in 1870. It would be a strange inconsistency if the law which carefully protects an accused from being compelled to make any statement at a preliminary inquiry should permit that inquiry to be adjourned in order that the prosecution be permitted to take the accused before a coroner and submit him against his will to examination and cross-examination as to his supposed guilt. In the absence of clear words in

*PRESENT: Taschereau C.J. and Cartwright, Fauteux, Martland, Judson, Ritchie and Spence JJ.

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an Act of Parliament or other compelling authority, that is not the state of the law. The case of *R. v. Barnes*, 36 C.C.C. 40, not followed. By enacting s. 15 of the *Coroners Act* in its present form, the Legislature intended to change the law and to render a person charged with murder compellable to give evidence at the inquest on the body of his alleged victim. Such legislation trenches upon the rule expressed in the maxim *nemo tenetur seipsum accusare*. Any legislation purporting to make such a change in the law or to abrogate or alter the existing rules which protect a person charged with a crime from being compelled to testify against himself, is legislation in relation to the Criminal Law including the Procedure in Criminal Matters and therefore within the exclusive legislative authority of the Parliament under s. 91(27) of the *B.N.A. Act*.

Per Fauteux J., *dissenting*. The proposition that the competency and compellability of a person to be called as a witness must be determined with reference solely to the particular proceeding in which it is proposed to call the person as a witness is a rule that receives an application even in criminal trials where several persons, though jointly indicted, are proceeded against separately. In such cases, it is the settled law that neither one is regarded as an accused person or a party in the trial against the others. Under our law, there is no party, no accused in a coroner's inquest and it is only at the conclusion of the inquest that may arise the possibility of a person being alleged to have committed murder and then compelled, by a coroner's warrant, to appear in the criminal Courts. The rule *nemo tenetur seipsum accusare* has, through the years, been modified or trenched upon by statute and the privileges to which it gave rise have, in certain cases, been conditioned or abrogated. The word "charged" in s. 4(1) of the *Canada Evidence Act* makes it clear that the privilege mentioned in that section is conferred to no other than a person charged with an offence, to whom it becomes available on no occasion and time other than when the prosecution against him for that offence is actually proceeded with in the criminal Courts. The provisions of s. 5(1) and (2) of the *Canada Evidence Act* are unqualified and of general application. Subject only to some exceptions which do not apply at a coroner's inquest, no one—other than a person charged of an offence, on the occasion and at the time at which he is actually proceeded against for that offence—is excused on the ground that the answers he might give may tend to incriminate him. If a co-accused, of which the prosecution is not actually proceeded with in the criminal Courts, is a compellable and competent witness when called to testify in the prosecution of another co-accused, *a fortiori* a person, whether charged or not with an offence is a compellable and competent witness at a coroner's inquest where no one is regarded by law as an accused.

The appellant could not be excused and was bound by s. 5(1) of the *Canada Evidence Act*, but was entitled to the protection of subs. 2. He was also protected by s. 2(*d*) of the *Canadian Bill of Rights*.

Droit criminel—Enquête du coroner—Interrogatoire d'une personne accusée de meurtre à l'enquête relativement au décès en question—Témoin est-il contraignable—Coroner's Act, S.R.S. 1953, c. 106, arts. 8, 8a, 15, 20, tels qu'amendés par 1960 (Sask.), c. 14—Loi sur la preuve au Canada, S.R.C. 1952, c. 307, arts. 2, 4, 5—Loi sur la déclaration canadienne des droits, 1960 (Can.), c. 44, s. 2(d), (e)—Code criminel, 1953-54, (Can.), c. 51, arts. 448, 488(3).

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Droit constitutionnel—Validité de la législation,—Statut provincial contraignant une personne accusée de meurtre de rendre témoignage à l'enquête du coroner—Statut est-il intra vires—Coroner's Act, S.R.S. 1953, c. 106, arts. 8, 8a, 15, 20, tels qu'amendés par 1960 (Sask), c. 14—Loi de l'Amérique britannique du Nord, 1867, arts. 91(27), 92(14).

Le jour même où le coroner tenait une enquête relativement au décès d'un nommé Thomas, l'appelant et huit autres personnes étaient mis sous arrêt et chacun d'eux était accusé séparément du meurtre non qualifié de Thomas. Le coroner mit fin immédiatement à l'enquête. Subséquemment, le procureur général ordonna, en vertu de l'art. 8*a* du *Coroner's Act*, S.R.S. 1953, c. 106, tel qu'amendé en 1960, la réouverture de l'enquête. Advenant le quatrième jour de l'enquête, le procureur de la Couronne déclara son intention d'assigner et d'interroger comme témoins l'appelant et les huit autres personnes qui étaient alors présents, ayant reçu signification d'un subpoena. Le coroner jugea que chacun d'eux était un témoin contraignable. L'appelant fit une requête pour l'obtention d'un bref de prohibition. Ce bref fut refusé par le juge au procès et son jugement fut confirmé par la Cour d'Appel. L'appelant a obtenu permission d'en appeler devant cette Cour.

Arrêt: L'appel doit être maintenu, le Juge Fauteux étant dissident.

Le Juge en Chef Taschereau et les Juges Cartwright, Martland, Judson, Ritchie et Spence: Le droit criminel en force dans la Saskatchewan est celui de l'Angleterre tel qu'il existait le 15 juillet 1870, excepté tel qu'amendé, varié, modifié ou affecté par le *Code criminel* ou tout autre statut du parlement du Canada. Sous le régime de ce droit tel qu'il existait à cette date, une personne accusée de meurtre et attendant son procès ne pouvait pas être contrainte de témoigner à l'enquête relativement au décès de la personne dont elle était accusée d'avoir causé la mort. Aucun changement n'a été fait à ce droit par l'effet combiné des arts. 2, 4(1) et 5 de la *Loi sur la preuve au Canada* et des arts. 448 et 488(3) du *Code criminel*. Ces articles de la *Loi sur la preuve au Canada* n'ont pas l'effet de rendre un accusé un témoin contraignable à l'enquête du coroner. Il faudrait des mots précis pour apporter un changement aussi complet au droit tel qu'il existait en 1870. Ce serait une étrange inconsistance si la loi qui protège soigneusement un accusé contre la contrainte de faire une déclaration à l'enquête préliminaire, permettait que cette enquête soit ajournée pour que la poursuite ait l'opportunité d'amener l'accusé devant un coroner et de la soumettre contre sa volonté à un interrogatoire et contre-interrogatoire sur sa prétendue culpabilité. En l'absence de mots précis dans une loi du parlement ou autre autorité irrésistible, ceci n'est pas la loi. La cause de *R. v. Barnes*, 36 C.C.C. 40, non suivie.

En promulguant l'art. 15 du *Coroner's Act* dans son état présent, la législature avait l'intention de changer la loi et de rendre une personne accusée de meurtre contraignable à rendre témoignage à l'enquête relativement au décès de sa prétendue victime. Une telle législation empiète sur la règle exprimée dans la maxime *nemo tenetur seipsum accusare*. Toute législation dont le but est de faire un tel changement dans la loi ou d'abroger ou de modifier les règles existantes qui protègent une personne accusée d'un crime contre la contrainte de témoigner contre elle-même est une législation concernant le droit criminel, y compris la procédure en matières criminelles, et conséquemment de l'autorité législative exclusive du parlement en vertu de l'art. 91(27) de la *Loi de l'Amérique britannique du Nord.*

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Le Juge Fauteux, dissident: La proposition que la compétence et la contraignabilité d'une personne d'être assignée comme témoin doivent être déterminées en référant seulement à l'instance particulière dans laquelle on se propose d'assigner la personne comme témoin, est une règle qui reçoit son application même dans un procès criminel où plusieurs personnes, quoique accusées conjointement, subissent leur procès séparément. Dans de tels cas, il est de règle bien arrêtée qu'aucune de ces personnes n'est considérée comme une personne accusée ou une partie au procès des autres. Sous le régime de notre droit, il n'y a aucune partie, aucun accusé à l'enquête du coroner, et c'est seulement à la conclusion de l'enquête que peut survenir la possibilité qu'une personne soit accusée d'avoir commis un meurtre et alors contrainte, par mandat du coroner, de se présenter devant les Cours criminelles. Avec les années, la règle *nemo tenetur seipsum accusare* a été modifiée ou empiétée par les statuts, et les privilèges qui en découlent ont en certains cas été conditionnés ou abrogés. L'expression «accusé» dans l'art. 4(1) de la *Loi sur la preuve au Canada* démontre clairement que le privilège mentionné dans cet article est conféré à nulle autre personne que la personne accusée d'un crime, à qui il devient accessible à nulle autre occasion et temps que lorsqu'elle est actuellement poursuivie pour ce crime devant les Cours criminelles. Les dispositions de l'art. 5(1) et (2) de la *Loi sur la preuve au Canada* sont absolues et d'application générale. Sujet seulement à quelques exceptions qui n'ont pas d'application à l'enquête du coroner, aucune personne—autre qu'une personne accusée d'un crime, à l'occasion et au temps où elle est actuellement poursuivie pour ce crime—est exemptée pour le motif que les réponses qu'elle pourrait donner pourraient tendre à l'incriminer. Si un co-accusé, qui n'est pas actuellement poursuivi devant les Cours criminelles, est un témoin contraignable et compétent lorsqu'il est assigné à témoigner au procès de son co-accusé, *a fortiori* une personne, qu'elle soit accusée ou non d'un crime est un témoin contraignable et compétent à l'enquête du coroner où personne n'est considéré par la loi comme étant un accusé.

L'appelant ne pouvait pas être exempté et était lié par l'art. 5(1) de la *Loi sur la preuve au Canada,* mais avait droit à la protection de l'alinéa (2). Il était aussi protégé par l'art. 2(d) de la *Loi sur la déclaration canadienne des droits.*

APPEL d'un jugement de la Cour d'Appel de Saskatchewan[1], rejetant un appel du jugement du Juge Bence qui avait refusé un bref de prohibition. Appel maintenu, le Juge Fauteux étant dissident.

Appeal from a judgment of the Court of Appeal for Saskatchewan[1], dismissing an appeal from a judgment of Bence J. who had refused a writ of prohibition. Appeal allowed, Fauteux J. dissenting.

David W. Scott, for the appellant.

Serge Kujawa, for the Attorney General for Saskatchewan.

[1] [1964] 2 C.C.C. 211, 41 C.R. 337, 46 W.W.R. 331.

T. D. MacDonald, Q.C., for the Attorney General for Canada.

Gérald LeDain, Q.C., for the Attorney General of Quebec.

F. W. Callaghan, for the Attorney General for Ontario.

W. Henkel, for the Attorney General for Alberta.

The judgment of Taschereau C. J. and Cartwright, Martland, Judson, Ritchie and Spence JJ. was delivered by

CARTWRIGHT J.:—This appeal is brought, pursuant to leave granted by this Court, from a judgment of the Court of Appeal for Saskatchewan[1] dismissing an appeal from a judgment of Bence C.J.Q.B. whereby the appellant's application for an order or writ of prohibition was dismissed.

The facts are not in dispute.

One Allan Thomas died at Glaslyn, Saskatchewan, on May 12, 1963. On the same day the Coroner, J. E. Nunn, commenced the holding of an inquest into the death. Later on the same day the appellant and eight other men were arrested and each of them was separately charged with the non-capital murder of Thomas. The Coroner then discharged the jury and closed the inquest as he was required to do by the terms of s.8(*a*)(2) of *The Coroners Act,* R.S.S. 1953, c. 106, as amended by Statutes of Saskatchewan, 1960, c. 14. Subsequently, on a date not given in the record, the Attorney General for Saskatchewan directed, pursuant to the last mentioned sub-section, that the inquest be reopened. On May 18, 1963, the appellant and the eight others charged were granted bail. June 12, 1963, was set for the preliminary hearing of the charges against the appellant and the other eight persons also charged. The Coroner fixed the same date for the commencement of the reopened inquest. On June 12, 1963, at the request of the Attorney General, the preliminary hearings were adjourned until after the conclusion of the inquest.

The inquest opened on June 12, 1963, and continued on June 13 and June 14. During this time twenty-two witnesses were called and examined. The appellant and each of the other persons charged with the murder of Thomas had been served with a Coroner's subpoena requiring attendance at the inquest and all were present. On June 14, counsel

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appointed by the Attorney General to act for the Crown at the inquest stated that he intended to call the appellant and each of the other accused persons as witnesses at the inquest. Counsel for all of the accused objected that neither the Coroner nor the Crown could compel a person already charged with the murder of Thomas, whose death was being investigated, to be sworn as a witness at the inquest. After hearing argument the Coroner ruled that each of the accused was a compellable witness at the inquest and must give evidence. In his brief reasons the Coroner stated that he was bound to rule as he did by the Saskatchewan legislation. His reasons do not indicate whether the constitutional validity of that legislation had been questioned in argument before him.

Following this ruling, at the request of counsel for the appellant, the Coroner adjourned the inquest *sine die* to permit the bringing of an application for prohibition. While this application was pending Mr. Nunn, the Coroner, died and the proceedings have been continued with the Attorney General for Saskatchewan substituted as respondent.

The application for prohibition came in due couse before Bence C.J.Q.B. and was dismissed. There is nothing in the material filed in support of the application or in the reasons of the learned Chief Justice to indicate that the validity of any provision of *The Coroners Act* was questioned.

The learned Chief Justice followed the decision of the Court of Appeal for Ontario in *Rex v. Barnes*[1] in which it was held, affirming the decision of Orde J., that Barnes who was charged with manslaughter in the death of one Rossiter was a compellable witness at an inquest being held to inquire into Rossiter's death. In the Court of Appeal Meredith C.J.C.P. expressed the opinion that while Barnes was compellable to be sworn as a witness at the inquest it would not be lawful to examine him in any way regarding the charge pending against him; this view was not shared by any other member of the Court of Appeal or by Orde J.

Having quoted ss. 8(*a*) and 15 of *The Coroners Act* and s. 5 of *The Canada Evidence Act,* Bence, C.J. Q.B. said in part:

> The provisions of The Coroners Act, which I have quoted, and Section 5 of the Canada Evidence Act seem to me to be quite clear.

[1] (1921), 36 C.C.C. 40, 49 O.L.R. 374, 61 D.L.R. 623.

The applicant herein is called as a witness to give evidence as to his knowledge of what took place. Authority to call him is contained in The Coroners Act and the Canada Evidence Act stipulates that he shall not be excused.

In my view there should be no such limitations on the questions put to him as were suggested by Meredith, C.J., in the Barnes case, which I have quoted.

The appellant appealed to the Court of Appeal; paragraph 2 of the notice of appeal reads as follows:

> The Coroner's Court is a Criminal Court of Record and Sections 8*a* and 15 of The Coroners Act, R.S.S. 1953, as amended by chapter 14 of the Statutes of Saskatchewan, 1960, on which the said judgment is wholly, or partly, based, were and are ultra vires of the Province, being enactments dealing with Criminal Law and Procedure.

The unanimous judgment of the Court of Appeal[1] was delivered by Culliton C. J. S. holding (i) that the impugned sections of *The Coroners Act* are *intra vires* of the legislature as being in relation to the administration of justice in the province rather than in relation to the criminal law or the procedure in criminal matters, (ii) that, even if the impugned sections were held to be invalid, the combined effect of ss. 2 and 5(1) of the *Canada Evidence Act* would render the appellant a compellable witness at the inquest; and (iii) that the provisions of the *Canadian Bill of Rights* were not contravened, because the appellant, although compelled to testify at the inquest, would be entitled to the protection afforded by s. 5(2) of the *Canada Evidence Act.* In the result the appeal was dismissed.

It will be convenient to consider first what the position of the appellant, when called upon to take the witness stand at the inquest in Saskatchewan, would be under the existing law apart from the provisions of the impugned sections of *The Coroners Act.*

By the combined effect of s. 7, of the *Criminal Code,* 1954, 2-3- Eliz. II, c. 51, s. 16 of the *Saskatchewan Act,* Statutes of Canada, 1905, 4-5- Ed. VII, c. 42 and s. 11 of the *Northwest Territories Act,* R.S.C. 1886, c. 50, the criminal law in force in Saskatchewan is that of England as it existed on July 15, 1870, except as altered, varied, modified or affected by the *Criminal Code* or any other act of the Parliament of Canada.

In 1870 a person accused of crime and the spouse of such person were incompetent to testify at trial either for or

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against the accused. This incompetency was done away with as to some offences by s. 216 of *The Criminal Procedure Act,* R.S.C. 1886, c. 174, but as to most offences, including that of murder, it was preserved by s. 217 of that Act and continued until the coming into force of *The Canada Evidence Act,* 1893, 56 Vict., c. 31. That Act came into force on July 1, 1893, and on the same day *The Criminal Procedure Act* was repealed.

Section 4 of *The Canada Evidence Act* as originally enacted read as follows:

> 4. Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness, whether the person so charged is charged solely or jointly with any other person. Provided, however, that no husband shall be competent to disclose any communication made to him by his wife during their marriage, and no wife shall be competent to disclose any communication made to her by her husband during their marriage.
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> 2. The failure of the person charged, or of the wife or husband of such person, to testify, shall not be made the subject of comment by the judge or by counsel for the prosecution in addressing the jury.

In *Gosselin v. The King*[1], the majority of the Court expressed the opinion that the effect of this section, read with s. 5, was to render an accused and his spouse not merely competent but compellable. We need not pause to inquire whether this opinion was well-founded as the Act was amended by 1906, 6 Ed. VII, c. 10, s. 1, by the insertion of the words "for the defence" after the word "witness".

The present form of s. 4(1) is as follows:

> 4 (1) Every person charged with an offence, and, except as in this section otherwise provided, the wife or husband, as the case may be, of the person so charged, is a competent witness for the defence, whether the person so charged is charged solely or jointly with any other person.

Section 5 is as follows:

> 5. (1) No witness shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.
>
> (2) Where with respect to any question a witness objects to answer upon the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering such question, then although the witness is by reason of this Act, or by reason of such provincial Act, compelled to answer, the answer so given shall not be used or receivable in evidence against him in any criminal trial, or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of such evidence.

[1] (1903), 33 S.C.R. 255, 7 C.C.C. 139.

It is now clear that a person who is being tried on a criminal charge is a competent witness if he decides to testify but that he cannot be compelled by the prosecution to enter the witness box. If he decides to testify he is subject to cross-examination and compellable to answer any relevant questions put to him on cross-examination although his answers may tend to establish his guilt of the charge on which he is being tried.

It seems equally clear that where two or more persons are, either jointly or separately, indicted for one offence and are tried separately one of those indicted who is not on trial is a compellable witness, for either the prosecution or the defence, at the trial of any of his co-accused. On this point it is sufficient to refer to the case of *Re Regan*[1] where the history and reasons of the rule are fully covered in the arguments of counsel and in the judgments.

In the case at bar, it is clear that had the preliminary hearing of the charge against the appellant proceeded he could not have been compelled to testify, and that it would have been the duty of the presiding justice to warn him, in the terms prescribed by s. 454(1) of the *Criminal Code,* that he was not bound to say anything.

We have not been referred to any case in England in which an accused awaiting trial on a charge of the murder of the person whose death was under investigation was compelled to give evidence at the inquest. It is unlikely that such a case would arise after the passing of s. 20 of the *Coroners (Amendment) Act 1926,* 16 and 17 Geo. V, c. 59; but if the power to compel such an accused person to testify existed previously it would seem strange that it was never exercised. In *Ex parte Cook*[2], an application was made to the Court of Queen's Bench at the instance of the Coroner who was conducting an inquest on the body of one Hannah Moore for a writ to bring before the Coroner and jury one Cook who was in custody in Newgate awaiting trial on a charge of having wilfully murdered her. His presence was stated to be required for two purposes, (i) to give evidence as to the deceased's state of mind, it being alleged that Cook and the deceased had entered into a suicide pact and that Cook was the only person who knew her and (ii) so that the witnesses called at the inquest could identify Cook. The

[1] (1939), 13 M.P.R. 584, 2 D.L.R. 135, 71 C.C.C. 221.
[2] (1845), 7 Q.B. 653, 115 E.R. 635.

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writ was refused. In commenting on this case it is suggested in *Jervis on Coroners*, 4th ed., (1880), at page 214 that an order of the nature sought "will generally be made if the prisoner is not the party under accusation; or, if he is accused or suspected, then when he is desirous of making a statement, and perhaps also when his presence is requisite for the purpose of identification".

In the course of the argument Patteson J, at page 658, asked counsel the question:—"Have you an instance where a writ has been granted to bring up a prisoner before a Coroner?" and the answer was "None has been found".

Earlier in the argument, Coleridge J. had said at page 657:

> I think it is usual, on a motion of this nature, to state the readiness of the party to come: at all events when he is to come as a witness.

Williams J. said at page 660:

> No case of inconvenience has existed in the Coroner's Court for centuries, by reason of no such writ having been granted.

In each of the cases of *The King v. Scorey*[1] and *Wakley v. Cooke*[2], referred to by counsel for the respondent, the Coroner was criticized for having refused to hear evidence tendered on behalf of a person suspected of being criminally responsible for the death of the person which was under investigation. In the latter case at page 518, Alderson B. said:

> Then comes the question whether the other part of the direction was correct. The direction had reference to the practice which prevailed in the examination of persons before inquests held in Middlesex, in refusing to examine parties whose conduct might afterwards become the subject of a criminal inquiry. I quite agree with what my Brother Parke has said upon the matter. I hope that the practice will be discontinued, for it is highly improper, and that persons will be permitted to make any statements they may wish, when they have any material information to communicate. The refusal to accept a person's testimony casts a gross imputation upon him. A person who comes before a coroner cannot be considered as being a party accused, and he is not so until after a verdict has been found. Such a practice is monstrous and most harassing, and I hope it will be discontinued for the future, and that people will be allowed to make statements. They are not bound to criminate themselves, and ought to be told so at the time.

There is nothing in the judgments in either of these cases to suggest that a person charged with the murder of a person into whose death an inquest was being held could be compelled to testify at such inquest.

[1] (1748), 1 Leach 43.
[2] (1849), 4 Exch. 511, 154 E.R. 1316.

In Stephen's History of the Criminal Law of England, (1883), vol. 1, at pp. 440 and 441, the learned author after pointing out that soon after the revolution of 1688 the practice of questioning the prisoner died out continues at page 441:

> . . . the statutes of Philip and Mary already referred to, repealed and re-enacted in 1826 by 7 Geo. 4, c. 64 authorized committing magistrates to "take the examination" of the person suspected. This examination (unless it was taken upon oath, which was regarded as moral compulsion) might be given in evidence against the prisoner.
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> This state of the law continued till the year 1848, when by the 11 and 12 Vic. c. 42, the present system was established, under which the prisoner is asked whether he wishes to say anything, and is warned that if he chooses to do so what he says will be taken down and may be given in evidence on his trial. The result of the whole is that as matters stand the prisoner is absolutely protected against all judicial questioning before or at the trial, and that, on the other hand, he and his wife are prevented from giving evidence in their own behalf. He is often permitted, however, to make any statement he pleases at the very end of the trial, when it is difficult for any one to test the correctness of what is said.

On a consideration of the cases and works of text-writers referred to above and of numerous others which were referred to in the full and helpful arguments of counsel I have reached the conclusion that under the law of England as of July 15, 1870, a person charged with murder and awaiting trial could not be compelled to testify at an inquest into the death of the deceased with whose murder he was charged and it is necessary to consider whether this state of the law has been altered by any Act of the Parliament of Canada.

It has been submitted that an alteration has been made by the combined effect of ss. 2, 4(1) and 5 of the *Canada Evidence Act* and ss. 448 and 488(3) of the *Criminal Code*.

Sections 4(1) and 5 of the *Canada Evidence Act* have already been quoted. Section 2 is as follows:

> 2. This Part applies to all criminal proceedings, and to all civil proceedings and other matters whatsoever respecting which the Parliament of Canada has jurisdiction in this behalf.

Sections 448 and 488(3) of the *Criminal Code* are as follows:

> 448. (1) Where a person is alleged, by a verdict upon a coroner's inquisition, to have committed murder or manslaughter but he has not been charged with the offence, the coroner shall
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> (*a*) direct, by warrant under his hand, that the person be taken into custody and be conveyed, as soon as possible before a justice, or
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> (*b*) direct the person to enter into a recognizance before him with or without sureties, to appear before a justice.

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(2) Where a coroner makes a direction under subsection (1) he shall transmit to the justice the evidence taken before him in the matter.

488. (3) . . .

No person shall be tried upon a coroner's inquisition.

The effect of the sections of the *Canada Evidence Act*, referred to above, was to give to a person charged with crime the right to be a witness in his own defence, it was not to enable the prosecution to call him as a witness. The choice as to whether or not he would give evidence was given to the accused alone and if he chose not to testify comment by the judge or by counsel for the prosecution was forbidden. None of this is challenged; but it is said that the sections have the effect of rendering the accused a compellable witness at the inquest into the death which he is charged with having caused by his criminal act.

If I am right in the view, which I have already expressed, that in 1870 the accused would not have been a compellable witness at such an inquest, it would, in my opinion, require clear words to bring about so complete a change in the law. Section 5 does not purport to say who shall or shall not be compelled to take the witness stand. It deals with the rights and obligations of a witness who is already on the stand. It does not protect him from the use against him of the answers he makes in the proceeding in which he makes them but only in "proceedings thereafter taking place". Let it be supposed that the only evidence given before the coroner which in any way implicated the accused was that of the accused himself; such evidence would warrant the jury in bringing in a verdict alleging that the accused had committed murder or manslaughter. It is true that such a verdict would not constitute an adjudication that the accused was guilty but equally the decision of the justice presiding at the preliminary hearing that the accused should be committed for trial is not such an adjudication. It would be a strange inconsistency if the law which carefully protects an accused from being compelled to make any statement at a preliminary inquiry should permit that inquiry to be adjourned in order that the prosecution be permitted to take the accused before a coroner and submit him against his will to examination and cross-examination as to his supposed guilt. In the absence of clear words in an Act of Parliament or other compelling authority I am unable to agree that that is the state of the law.

The conclusion which I have reached necessarily involves the view that *Rex v. Barnes*, supra, was wrongly decided and ought not to be followed.

All that I have so far said is as to the applicable law apart from the provisions of the impugned sections of *The Coroners Act*. These are as follows:

8*a*. (1) Where a person has been charged with a criminal offence arising out of a death, an inquest touching the death shall be held only upon the direction of the Attorney General.

(2) Where during an inquest any person is charged with a criminal offence arising out of the death, the coroner shall discharge the jury and close the inquest, and shall then proceed as if he had determined that an inquest was unnecessary, provided that the Attorney General may direct that the inquest be reopened.

* * *

15. (1) The coroner and jury shall at the first sitting of the inquest view the body unless a view has been dispensed with under section 9 or 10, and the coroner shall examine on oath, touching the death, all persons who tender their evidence respecting the facts and all persons who in his opinion are likely to have knowledge of relevant facts.

(2) Subject to subsection (3), no person giving evidence at the inquest shall be excused from answering a question upon the ground that the answer thereto may tend to criminate him or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person or to a prosecution under any Act of the Legislature, but if he objects to answering the question upon any such ground he shall be entitled to the protection afforded by section 5 of the *Canada Evidence Act* and by section 33 of the *Saskatchewan Evidence Act*.

(3) Before a person gives evidence at the inquest subsection (2) shall be read to him by the coroner.

(4) A person giving evidence at the inquest may be represented by counsel who may examine and cross-examine witnesses called at the inquest and may on behalf of his client take the objection mentioned in subsection (2).

* * *

20. Counsel appointed by the Attorney General to act for the Crown, at an inquest may attend thereat and may examine or cross-examine the witnesses called, and the coroner shall summon any witness required on behalf of the Crown.

Considered by themselves, without regard to the history of the Act, and bearing in mind the rule that the intention to legislate outside its allotted field is not lightly to be imputed to the legislature, these sections could, I think, be construed as not rendering a person charged with an offence arising out of the death compellable to give evidence at the inquest; but when s. 15 as it now reads is contrasted with its predecessor s. 15 which was repealed by Statutes of Saskatchewan, 1960, c. 14, s. 3, this construction scarcely seems possible.

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The earlier s. 15 read as follows:

> The coroner and jury shall, at the first sitting of the inquest, view the body, unless a view has been dispensed with under section 9 or 10, and the coroner shall examine on oath, touching the death, all persons who tender their evidence respecting the facts and all persons whom he thinks it expedient to examine as being likely to have knowledge of relevant facts; provided that a person who is suspected of causing the death, or who has been charged or is likely to be charged with an offence relating to the death, shall not be compellable to give evidence at the inquest, and if he does so shall not be cross-examined and provided further that before such person gives any evidence this section shall be read to him by the coroner.

I think the conclusion inescapable that by enacting s. 15 in its present form the legislature intended to change the law and to render a person charged with murder compellable to give evidence at the inquest on the body of his alleged victim. Such legislation trenches upon the rule expressed in the maxim *nemo tenetur seipsum accusare* which has been described (by Coleridge J. in *R. v. Scott*[1]) as "a maxim of our law as settled, as important and as wise as almost any other in it." This rule has long formed part of the criminal law of England and of this country. With great respect for the contrary view expressed in the Court of Appeal, I am of opinion that any legislation, purporting to make the change in the law referred to in the first sentence of this paragraph or to abrogate or alter the existing rules which protect a person charged with crime from being compelled to testify against himself, is legislation in relation to the Criminal Law including the Procedure in Criminal Matters and so within the exclusive legislative authority of the Parliament of Canada under head 27 of s. 91 of the *British North America Act.*

Questions other than those with which I have dealt above were raised in the course of the argument but I do not find it necessary to deal with them.

I would allow the appeal, set aside the judgments in the courts below and direct that an order issue prohibiting any coroner in the Province of Saskatchewan from requiring the appellant to attend as a witness or to give evidence at any inquest or at the continuation of any inquest into the death of Allan Thomas. I would make no order as to costs.

FAUTEUX J. (dissenting):—This is an appeal, with leave of this Court, from a unanimous judgment of the Court of

[1] (1856) Dears & B. 47 at 61, 169 E.R. 909.

Appeal of Saskatchewan[1] dismissing the appeal of the appellant from the judgment of Bence C.J. Q.B. denying appellant's application for a Writ of Prohibition against Coroner J. E. Nunn of Saskatchewan.

The material facts may be summarized. One Allan Thomas died at Glaslyn, Saskatchewan, on May 12, 1963 and, on the same day, Coroner Nunn opened an inquest into his death. Later in the day, appellant and eight other persons were arrested and separately charged with the non-capital murder of Thomas. The Coroner then discharged the jury and closed his inquest, as he was required by s. 8a(2) of the *Coroners Act*, R.S.S. 1953, c. 106, as amended by c. 14 of the 1960 Statutes of Saskatchewan. The following day, May 13, each of the accused was separately arraigned and remanded in custody to await Preliminary Inquiry which, contrary to s. 451(*b*) of the *Criminal Code*, was then set at a time exceeding eight clear days, to wit, to June 12, 1963. On May 18, each of the accused was admitted to bail by an order of Disbery J. On the date fixed for the Preliminary Inquiry, June 12, 1963, the Coroner's inquest was reopened by direction of the Attorney General for Saskatchewan and, on the same day, the Preliminary Inquiry was adjourned to an undetermined date, to wit, to the date following the conclusion of the inquest, which, because of the present proceedings, was and now stands adjourned *sine die*. Whether, in the circumstances, jurisdiction to proceed with the particular "information" laid against appellant on May 12, 1963, has been lost as a result of these adjournments of the Preliminary Inquiry, is a question which remains open and one which, if answered affirmatively, destroys the very basis upon which the application for Prohibition is predicated. However, and in view of the conclusion I have reached on the other aspects of the case, it is unnecessary to determine this particular question of jurisdiction.

The Coroner's inquest, reopened on June 12, 1963, had proceeded for three days during which twenty-three witnesses were examined when, on the fourth day, counsel then acting for the Crown, declared his intention to call and examine as witnesses, pursuant to s. 20 of the *Coroners Act*, appellant and the other accused who, having been summoned as witnesses, were present before the Coroner.

[1] [1964] 2 C.C.C. 211, 41 C.R. 337, 46 W.W.R. 331.

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Counsel acting for appellant and the other accused objected to the right of the Coroner or the Crown to compel appellant or any of these persons to give evidence, in view of the fact that each of them had been accused of the murder of Thomas. Having heard the argument related to the merits of this submission, the Coroner eventually ruled that each of them was a compellable witness at his inquest. Hence the application for Prohibition which, as above indicated, was dismissed by Bench C. J. Q.B., as was the appeal entered against this dismissal.

Bence C.J. Q.B. relied mainly on *Rex v. Barnes*[1]. This case being the leading case in the matter, it is pertinent to consider its circumstances and the views expressed in the various reasons for judgment.

Barnes was charged with manslaughter in the death of one Rossiter and, after Preliminary Inquiry, was committed to trial by a magistrate. Shortly thereafter,—and not prior to any committal or even the beginning of a Preliminary Inquiry, as in the present case where there was only an "information" laid against appellant—,Barnes was subpoenaed to attend a Coroner's inquest into Rossiter's death. Appearing at the inquest, he refused to give evidence or to hold himself bound by the subpoena, on the ground that he was neither a competent nor compellable witness at the inquest at the instance of the Crown, there being pending against him a charge of manslaughter upon which he had been committed to trial. He applied for an Order prohibiting the Coroner from issuing any further process or warrant to compel him to give evidence at the inquest. Orde J., to whom this application was directed in first instance, wrote a considered judgment. He noted particularly the admission made by counsel for Barnes that had the latter been called upon to give evidence before the criminal charge had been laid against him, he would have been bound by reason of the provisions of s. 5 of the *Canada Evidence Act* to answer any questions put to him, notwithstanding that his answers might tend to criminate him, the only protection afforded him being that his answers could not be used or received in evidence against him in any criminal trial or criminal procedure. Orde J. then said he could find no ground to support the submission that the fact that Barnes was not a compellable witness in the

[1] (1921), 36 C.C.C. 40, 49 O.L.R. 374, 61 D.L.R. 623.

criminal proceedings pending against him exempted him from being compelled to give evidence at the inquest of the Coroner. He said:

> The competency or the compellability of a person to be called as a witness must be governed by the nature of the proceeding in which that question arises. There is here no real connection between the proceedings before the coroner and those before the Magistrate or the Supreme Court of Ontario in the criminal proceedings.
>
> The proceedings therein are entirely distinct. If a civil action were now proceeding, in which the question of the responsibility for the accident in which Rossiter was killed was involved, Barnes could be compelled to give evidence and to answer even though his answers tended to criminate him: Re Ginsberg (1917), 38 D.L.R. 261, 40 O.L.R. 136. And I am unable to see how the fact that he is a defendant in certain criminal proceedings, in which he is not a compellable witness, can entitle him to exemption in all other proceedings. The question of competency or compellability must be determined with reference to the particular proceeding in which it is proposed to call the person as a witness, and not with reference to some other proceeding. And I can see no distinction in principle between the coroner's Court and any other Court in this respect. I cannot, therefore, discover any ground upon which Barnes is entitled to claim exemption from giving evidence upon the inquest now pending.

With this view of the law, I am in respectful agreement. The proposition that the competency and compellability of a person to be called as a witness must be determined with reference to the particular proceeding in which it is proposed to call the person as a witness, and not with reference to some other proceeding, is a rule that receives an application even in criminal trials where several persons, though jointly indicted, are proceeded against separately. In such cases, it is settled law that neither one is regarded as an accused person or a party in the trial against the others. This question was particularly considered by the Nova Scotia Supreme Court (in banco) in *Re Regan*[1]. At page 598, the Court said:

> Regan is not an *accused person* in the proceedings against Tanner, and the provisions of the Common Law and statute rendering an accused person on his trial not compellable as a witness for the prosecution against himself are therefore not applicable to him. Insofar as any prosecution against Regan himself is concerned, he can avail himself of the provisions of sec. 5 of The Canada Evidence Act R.S. Can., 1927, C. 59) and thus any evidence given by him on the proceedings against Tanner cannot be used against him in the proceedings against himself.

A similar matter was recently considered by the Court of Appeal in England in *William Gerald Boal, Roger John*

[1] (1939), 13 M.P.R. 584, 2 D.L.R. 135, 71 C.C.C. 221.

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Cordrey[1]. B. and C. were jointly indicated for, *inter alia,* conspiracy to stop and rob a mail train and for robbery with aggravation. On both counts, B. pleaded not guilty, and C. pleaded guilty to the count of conspiracy but not guilty to the count of robbery. The Court directed that the count of robbery should not be proceeded with with respect to C. without leave of the Court. B. was found guilty on both counts. In appeal, B. sought leave to call what was alleged to be "fresh evidence", to wit, the evidence of C. who was said to be then prepared to testify that B. had played the minor part in the affair. The submission that C. would have been a competent but not a compellable witness at the trial of B. under the *Criminal Evidence Act,* 1898, was rejected. The *ratio* of the decision is formulated as follows at page 345:

> This court takes the view that Cordrey was a competent and compellable witness at the trial and that, not being charged with an offence *actually within the consideration of the jury at the time,* he was not to be regarded as a "person charged" within the meaning of section 1 of the Act of 1898.

The italics are mine.

That this has long been the law in England is shown in *Winsor v. The Queen*[2], where it was said that where two prisoners are jointly indicted for felony and plead not guilty, but one only is "given in charge" to the jury, the other is an admissible witness although his plea of not guilty remains in the record undisposed of. Thus it appears that, under these provisions of the *Criminal Evidence Act* and of the *Canada Evidence Act* which deal with the question of compellability and of competency of a witness, a person "charged" is no other than a person who, being accused of an offence, is, at the time when the question arises, actually proceeded against for the offence. In England, a Coroner's inquisition is a mode of criminal prosecution, the finding of a Coroner's inquest accusing a person of causing the death of another, when held by a jury, is equivalent to the preferment and signing of a bill of indictment and the prisoner may be prosecuted upon such inquisition. *Archbold, Criminal Pleading Evidence and Practice, Thirty-fifth edition 314.* Such is not the case in Canada; and this, with

[1] (1964), 48 C.A.R. 342, 3 W.L.R. 593.
[2] (1866), L.R. 1 Q.B. 390.

respect to the compellability and competency of a witness, is a fundamental difference. Sections 488 and 448 of the *Criminal Code* provide:

488. (1) Except as provided in this Part no bill of indictment shall be preferred.

(2) No criminal information shall be laid or granted.

(3) No person shall be tried upon a coroner's inquisition.

448. (1) Where a person is alleged, by a verdict upon a coroner's inquisition, to have committed murder or manslaughter, but he has not been charged with the offence, the coroner shall

(*a*) direct, by warrant under his hand, that the person be taken into custody and be conveyed, as soon as possible, before a justice, or

(*b*) direct the person to enter into a recognizance before him with or without sureties, to appear before a justice.

(2) Where a coroner makes a direction under subsection (1) he shall transmit to the justice the evidence taken before him in the matter.

The predecessor to s. 448 was s. 667, the opening words of which were:

667. Every coroner, upon any inquisition taken before him whereby any person is *charged* with manslaughter or murder . . .

It is significant that in the 1955 Revision of the *Criminal Code,* the word "charged" appearing in the former section has been replaced in the new by the words "alleged . . . to have committed manslaughter or murder." Under our law, there is no party, no accused in a Coroner's inquest and it is only at the conclusion of the inquest that may arise the possibility of a person being alleged to have committed murder or manslaughter and then be compelled, by a Coroner's warrant, to appear in the Criminal Courts. Notwithstanding these fundamental differences between the Coroner's inquest in Canada and in England, it is interesting to note the decision rendered in England in *Re Cook*[1]. In that case, an application was made to the Court of Queen's Bench, at the instance of the Coroner who was conducting an inquest on the body of one Hannah Moore, for a writ to bring Cook before a Coroner and a jury so that the latter could be identified and give evidence before the Court. At the time of this application, Cook stood committed upon a charge of having wilfully murdered Hannah Moore. The writ was refused. However, this refusal was not founded on the reason that Cook was not a compellable or competent witness, but on the inconveniences attending upon his

[1](1845), 7 Q.B. 653, 115 E.R. 635.

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removal from the place of custody and the lack of sufficient ground being shown for his attendance before the Coroner. Coleridge J., as he then was, said:

> I presume the Court decides that it has power to grant the writ but that no necessity is made out on the present occasion.

Had the Court been of opinion that Cook was not a compellable and a competent witness, this would have been a peremptory reason and there would have been no occasion to rest the decision on the two grounds of inconvenience or lack of necessity for Cook's appearance at the inquest.

The appeal in *Rex v. Barnes, supra,* was heard by Meredith C.J. C.P. and Riddell, Latchford, Middleton and Lennox JJ. Meredith C.J. C.P. said, at page 51:

> On principle, therefore, it is not lawful, or proper, to examine the appellant in the coroner's Court in any way regarding the charge which is pending against him, as long as he is in jeopardy in respect of it. But he may, in my opinion, be examined as a witness in regard to the guilt of any other person, so long as the examination does not touch in any way the charge against him.

and at page 52:

> The result is that the appellant was wrong in disobeying his subpoena: he may be examined as to the guilt of others so long as the examination does not encroach upon his rights as a person charged with crime.

With the exception of Lennox J., who left the question open, none of the other Judges accepted the limitation of the examination suggested by Meredith C.J. C.P. Riddell J., at page 53, stated:

> I can find nothing in our legislation preventing the calling of any one as a witness before the coroner—had Parliament intended to make an exception in the case of one accused or supposed to be accused in some other Court or thought to be guilty of causing the death, no doubt such a provision would have been made in the Code.

And, at page 56, he added:

> Much has been said as to the alleged hardship upon Barnes' in being compelled to give evidence—it is, however, to be hoped that we have not yet arrived at the point that one accused of crime has so many and so high rights that the people have none. The administration of our law is not a game in which the cleverer and more astute is to win, but a serious proceeding by a people in earnest to discover the actual facts for the sake of public safety, the interest of the public generally. It is the duty of every citizen to tell all he knows for the sake of the people at large, their interest and security, and I am not inclined to stretch in any way rules which are directed to permitting any one to escape from the duties which all others admit and perform—it is for Parliament to frame rules and exceptions, not for the Court.

Middleton J., with the concurrence of Latchford J., dealing particularly with s. 5 of the *Canada Evidence Act*, said at page 57:

> Section 5 deals with this common law privilege and changes the Law, and now no witness shall be excused from answering any question put to him upon the ground that his answering might tend to criminate him. He is, however, granted some degree of protection, for the evidence that he may give shall not be used or receivable in evidence against him. That this protection is by no means as wide as that under the common law rule is obvious, and the change in our law no doubt shocks those whose mental inclination and training leads them to regard the common law privilege as a sacred thing. See, for example, the statement of the late Chief Justice of the King's Bench in Re Ginsberg, (1917) 27 Can. Cr. Cas. 447 where he points out that the protection afforded by the Legislature does not in his view, afford sufficient immunity, as the prosecutors are enabled to get information from the accused which would enable them to get convicting evidence aliunde without using his own evidence against him at all—that in fact the proceedings amount to an examination for discovery in a criminal case, "which cannot be". The Appellate Division, 38 D.L.R. 261, did not agree with this view, and in very fully considered judgments upheld not only the validity but the effectiveness of the change in the law.

Finally Lennox J., having said particularly, at page 59, that he had no right to advise or comment upon the action or attitude of the Crown, concluded that he saw no reason to doubt the correctness of the order appealed against.

Relying on these various excerpts from the reasons of the Court of Appeal in the *Barnes* case, *supra,* Bence C. J. Q.B., who heard the present case in first instance, added that the authority to call the appellant and the other accused as witnesses to give evidence as to their knowledge of what took place was contained in s. 8(*a*) and s. 15 of the *Coroners Act* and also that s. 5 of the *Canada Evidence Act* stipulated that they should not be excused. He also expressed his disagreement with the limitation suggested by Meredith C. J. C.P. in the *Barnes* case, *supra.*

The appeal in the Court of Appeal of the Province of Saskatchewan was heard by Culliton C.J.A. and Brownridge, Hall and Maguire JJ. A. At that stage of the proceeding, appellant questioned the validity of ss. 8(*a*), 15 and 20 of the *Coroners Act* of Saskatchewan submitting that they were beyond the powers of the provincial legislature in that such sections related to criminal law and procedure. Chief Justice Culliton rendered the judgment for the Court. With respect to the words "Procedure in Criminal Matters"

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appearing in s. 91(27) of the *B.N.A. Act,* he adopted the meaning ascribed thereto by *Macdonald C.J.A., at page 238, in In Re Public Inquiries Act*[1], to wit:

> "Criminal Matters" are, in my opinion, proceedings in the criminal Courts, and "procedure" means the steps to be taken in prosecutions or other criminal proceedings in such Courts.

and he concluded:

> In my opinion, the impugned sections do not relate to steps to be taken in a prosecution or other criminal proceeding, but rather, in pith and substance, relate to the administration of justice within the province and are thus within the competence of the Provincial Legislature.

He then said:

> Even if I should be wrong in this conclusion, the position of the appellant would not be improved. The Coroner's Court being a criminal court, the provisions of the Canada Evidence Act apply to its proceedings.
>
> * * *
>
> While the Coroner's Court is a criminal Court of record, it is a court of inquiry, not of accusation, and the verdict of a coroner's jury does not bind any person whose conduct may be involved in its findings and does not, in any way, constitute any adjudication of rights affecting either person or property. There is no accused and there are no parties. *Wolfe v. Robinson (supra).* Notwithstanding that the accused has been charged of an offence arising out of the death being investigated, he appears at the inquest as a witness and, as such, is bound by the provisions of s. 5(1) of the Canada Evidence Act. *Rex v. Barnes (supra).* In giving evidence he is entitled to the protection given to him by subsection 2 of section 5 and by the corresponding provision of the Saskatchewan Evidence Act.

Wolfe v. Robinson[2] was decided by Wells J. in a very fully considered judgment.

Finally and with respect to the submission of counsel for the appellant that an application of the law such as the one contended for by respondent would be in contravention of s. 2(*e*) of the *Canadian Bill of Rights,* Culliton C.J.A. said that the foregoing section had no application and that s. 2(*d*) of the *Canadian Bill of Rights* recognizes the right to compel a person to give evidence if he is represented by counsel and given protection against self-incrimination and that, inasmuch as appellant was represented by counsel at the inquest, he was given the protection envisaged by the *Canadian Bill of Rights.*

The rule *nemo tenetur seipsum accusare,* invoked on behalf of appellant, has, through the years, been modified or

[1] (1919), 48 D.L.R. 237, 3 W.W.R. 115, 33 C.C.C. 119.
[2] (1961), 129 C.C.C. 361, [1961] O.R. 250.

trenched upon by statute and the privileges to which it gave rise have, in certain cases, been conditioned or abrogated. This is illustrated particularly in *Walker v. The King*[1] and in *Re Frilegh*[2]. In the *Walker* case, *supra*, the Court had to consider the validity of a provincial enactment compelling the person in charge of a vehicle, directly or indirectly involved in an accident, to give certain informations in relation thereto. Sir Lyman Duff C.J., relying particularly on *Rex v. Coote*[3], considered the impugned enactment as

> a measure for securing information which may be employed for the purposes of legal proceedings, instituted either privately or *ad vindicatam publicam*

and stated that

> there was no rule of law that statements made by an accused under compulsion of statute are, because of such compulsion alone, inadmissible against him in criminal proceedings. Generally speaking, such statements are admissible unless they fall under the scope of some specific enactment or rule excluding them.

In *Re Frilegh, supra*, a debtor objected to submit to an examination, as any questions to be answered might tend to incriminate him on a criminal charge preferred against him for an offence under the *Bankruptcy Act*. The objection was rejected. The Court relied on an amendment made in 1933, c. 31, s. 33(2), adding subs. (9), and added that even prior to this amendment, a debtor was not entitled to object on the alleged ground in view of *Re Ginsberg*[4] and in view of the provisions of ss. 2 and 5 of the *Canada Evidence Act*.

The relevant sections of the *Canada Evidence Act* to be here considered are s. 4(1) and s. 5(1) and (2).

> 4. (1) Every person *charged with an offence,* and, except as in this section otherwise provided, the wife or husband, as the case may be, of the person so *charged,* is a competent witness for the *defence,* whether the person so *charged is charged solely or jointly with any other person.*

The words of s. 4(1), here italicized, make it clear that the privilege therein mentioned is conferred to no other than a person charged with an offence, to whom it becomes available on no occasion and time other than when the prosecution against him for that offence is actually proceeded with under the *Criminal Code*, in the criminal Courts.

[1] [1939] S.C.R. 214, 2 D.L.R. 353, 71 C.C.C. 305.
[2] (1926), 7 C.B.R. 487, 29 O.W.N. 394.
[3] (1873), L.R. 4 P.C. 599, 17 E.R. 587.
[4] (1917), 40 O.L.R. 136, 38 D.L.R. 261.

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5. (1) No witness shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.

(2) Where with respect to any question a witness objects to answer upon the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering such question, then although the witness is by reason of this Act, or by reason of such provincial Act, compelled to answer, the answer so given shall not be used or receivable in evidence against him in any criminal trial, or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of such evidence, R.S., c. 59, s. 5.

By these provisions, the *Canada Evidence Act* removes the safeguard a person had at Common Law to refuse to answer any questions that might criminate him. He is now obliged to do so but such evidence may not be used against him if he claims the protection of the Act. The provisions of s. 5 (1) and (2) are unqualified and of general application. Subject only to some specific statutory exceptions of which none applies at a Coroner's inquest, no one —other than a person charged of an offence, on the occasion and at the time at which he is actually proceeded against for that offence—is excused from being called to give evidence on the ground that the answers he might give may tend to incriminate him. If a co-accused, of which the prosecution is not actually proceeded with, under the *Criminal Code,* in the criminal Courts, is a compellable and competent witness when called to testify in the prosecution of another co-accused, *a fortiori* a person, whether charged or not with an offence, is a compellable and competent witness at a Coroner's inquest where no one is regarded by law as an accused, at and for the purpose of that inquest, prior to the very time of its conclusion. Being present and represented by counsel before the Coroner when called to the witness stand, appellant's objection to testify could not obtain.

With deference to those who entertain a contrary opinion, I am in respectful agreement with the conclusion reached by Orde J. and the Court of Appeal for Ontario in the *Barnes* case, *supra,* and with the conclusion reached by Bence C.J. Q.B. and the Court of Appeal for Saskatchewan, in the present case, with respect to the application and effect of s. 5 of the *Canada Evidence Act.*

I also agree with the opinion expressed in this case, in the Court below, as to appellant's submission based on the *Canadian Bill of Rights*; and as to this, I only want to add the following statement of our brother Ritchie, then speaking for the majority of the Court, in *Robertson and Rosetanni v. The Queen*[1]:

> It is to be remembered that the human rights and fundamental freedoms recognized by the Courts of Canada before the enactment of the *Canadian Bill of Rights* and guaranteed by that statute were the rights and freedoms of men living together in an organized society subject to a rational, developed and civilized system of law which imposed limitations on the absolute liberty of the individual.

In these views, it is unnecessary to consider the arguments related to the constitutionality of the impugned sections of the *Coroners Act* of Saskatchewan.

I would dismiss the appeal.

Appeal allowed, no order as to costs, Fauteux J. *dissenting.*

Solicitors for the appellant: John N. Conroy & Son, North Battleford.

Solicitor for the Attorney General for Saskatchewan: R. S. Meldrum, Regina.

Solictor for the Attorney General for Canada: T. D. MacDonald, Ottawa.

Solicitors for the Attorney General of Quebec: Riel, Le Dain, Bissonnette, Vermette & Ryan, Montreal.

Solicitor for the Attorney General for Ontario: F. W. Callaghan, Toronto.

Solicitor for the Attorney General for Alberta: W. Henkel, Edmonton.

[1] [1963] S.C.R. 651 at 655, 41 C.R. 392, [1964] 1 C.C.C. 1.