

The case is one to which the section does not apply. Finnessey was not a "person charged" within the meaning of sec. 4. The person who is by that section made a competent witness, and comment upon whose failure to testify is prohibited, is the person on trial, the person given in charge to the jury—"the prisoner at the bar whom they have in charge." The prohibition probably extends to the case of one of two or more prisoners who are thus charged, i.e., tried, jointly.

"It was a distinguishing characteristic of our criminal system that a prisoner on his trial could neither be examined nor cross-examined." Nor was one of several prisoners indicted and tried together a competent witness for the other: *Regina v. Payne*, L. R. 1 C. C. R. 349.

The object of the Act of 1893 was to alter the law in this respect, and, as I understand it, to render a person or persons on trial and the husbands or wives of such persons *competent* witnesses on their own behalf and on behalf of either of them. The Act may have gone even further than this: *Rex v. Gosselin*, 33 S. C. R. 255: but it is unnecessary at present to consider that case or to invoke its application, because, as I have said, the right of the Crown or of the prisoner at the trial of this case to call Finnessey does not depend upon the Act, but upon the general law, for which it is sufficient to refer to *Regina v. Payne*, *supra*, and *Winsor v. The Queen*, L. R. 1 Q. B. 390, 6 B. & S. 143, 7 B. & S. 491, where it was held that where two prisoners are jointly indicted for a felony and plead not guilty, but only one is given in charge to the jury—that is to say, where he is tried separately—the other is an admissible witness, although his plea of not guilty remains on the record undisposed of. Here, therefore, Finnessey, who was not on trial, was an admissible witness for the prosecution or the defence, and could not have refused to testify, although under sec. 5 of the Evidence Act, as amended by 61 Vict. ch. 53, he might have protected himself against anything he said being used as evidence against him on his own trial. . . .

Leave refused.