each subsequent enactment limiting the exceptions by which evidence was excluded, so that now in almost all suits the parties litigant may give evidence in their own favour, and bills have been from time to time brought before parliament to extend the same principle to a certain class of indictable offences, so as to permit the defendants to be sworn in their own defence.

The preamble to our statute of 16 Vic , ch. 19, clearly refers to the obstruction interposed in courts of justice to enquiries after truth by *incapacities* created by law, and states that it was desirable that full information as to the facts in issue should be laid before the persons appointed to decide upon them, and that such persons should exercise their judgment on the credit of the witnesses adduced, and on the truth of their testimony. The first section of the act provides that no person offered as a witness shall be excluded by incapacity from interest from giving evidence on the trial of any issue joined in any court, or before any judge, jury, &c , but that every person so offered may and shall be admitted and compellable to give evidence on oath notwithstanding that such person may have an interest in the event of the trial of any issue or of the suit in which he is offered as a witness.

This section thus far seems to me in broad comprehensive terms to remove all *incapacity from interest* from any one who might give evidence; that was the ground of exclusion formerly as applicable to a party who offered to be sworn on his own behalf. He was not compellable to give evidence against himself, and the section without the proviso seems to contemplate that he might be compellable to give evidence; with the proviso, this point is beyond a doubt.

The proviso, as I read it, was not intended to give any additional right to any party, but rather to control the broad powers which were previously given in the clause. It in effect declares that the act shall not authorise or permit any party to a suit individually named in the record to be *called as a witness on behalf of such party*, but *such party may* in any civil proceedings *be called* and *examined as a witness* in any suit or action *at the instance* of the opposite party.

I think the latter part of the proviso as referred to above furnishes a strong, if not a conclusive, argument as to the meaning of the legislature. It does not say that a party may call his opponent as a witness for himself; if it had it might be contended (though I doubt if successfully) that the witness could only give evidence for the party who called him, and that he could not give evidence for himself. But framed as it now is, the section merely provides that a party may be *examined as a witness* at the instance of his opponent, there is nothing in it, or in the general principles of law to say that a witness may not be examined on any matter pertinent to the issue after he has been sworn in the cause.

To conclude my view of the statute as applicable to the point under discussion amounts briefly to this. By its provisions all persons, whether parties to a cause or not, may be called as witnesses and give evidence, but a party to the cause cannot be such witness unless called by his opponent.

When a witness is once placed in the box I see no reason why he may not give the jury all the information he has sworn to give touching the matters in question in the suit. The view taken by Mr. Taylor in continuation of the passage already quoted from, seems to me to accord with what I now contend for, he says "When it was requisite that the substantial, though not the nominal party, in the cause should be called his adversary for the sake of formal proof only, it was held that he was thereby made a witness for all purposes, and might be cross-examined to the whole cause.." He refers to *Morgan* v. *Bridges*, 2 Starkie Rep. 314, which bears out the doctrine stated, and to *R.* v. *Murphy*, 1 Arm. Mac. & Og. 206, which last authority I have not yet seen.

I am clearly of opinion that the plaintiff, in the case before us, having called the defendant and he having proved payments to the satisfaction of the jury to the amount of £12, that the rule allow that sum to be added to the verdict found by the jury in the court below ought not to be allowed to stand, and that this appeal should be allowed, and the rule *nisi* in the court below should be discharged.

HAGARTY, J.—I wish to rest my decision of this point on the broadest ground. A party to a suit is not a competent witness in his own behalf, and merely on his own motion. Our law, I presume, considers him disqualified by interest from giving a fair narrative to the jury of matters possibly fully known only to himself, and deems it a lesser evil to rest their decision on testimony that may balance its want of directness by its possibly superior credibility. I stop not to question the wisdom of the law, but accept it as it is. It can have no other logical foundation than want of faith in human nature when truth does not square with interest. Granted his good faith, the man who positively knows the facts of a disputed point, must be the proper medium to reflect them in their clearest light on those who must accept them as the basis of decision.

The law declines to risk the enquiry on the fidelity of the interested litigant. The opponent, however, for reasons satisfactory to himself, presents him to court and jury as worthy of credence for *his* purposes. To my mind the conclusion is irresistible that the opponent once offering him as a faithworthy witness on any point involved in the trial, at once removes all incompetency from supposed inability to sacrifice interest to truth, and that he forthwith becomes not merely a compellable, but also a thoroughly competent witness for every purpose on all the facts then in issue in the cause, however diverse and distinct may be the issues to be disposed of.

I am willing to accept the illustration offered in the court from which I have the misfortune to differ, and to hold that if in the same suit one issue be as to the execution of a bond, and the other as to a charge of slander, and the plaintiff avail himself of his undoubted right to make defendant a compellable witness to disprove the plea of *non est factum*, he thereby removes all objection to his adversary as a competent witness to prove or disprove any fact connected with the other issues as to slander or other disputed matter.

I think a party to a suit is necessarily either a competent or an incompetent witness to all the matters involved in any one trial as a whole, and that his incompetency once removed for any purpose is gone as to all.

No separation of competency as to parts of the matters to be tried is intelligible to my mind, nor can it be, I think, to a jury anxious to have the truth from the surest and most reliable sources. But for the judgment of the majority of the Court of Queen's Bench, which makes me pause long in maturing my opinion, I would entertain no shadow of doubt on this point.

I think we must allow the appeal, as our decision is final.

Per Cur.—Appeal confirmed.

CHAMBERS.

(*Reported by* ROBERT A. HARRISON, Esq., *Barrister-at-Law*)

WHITE ET AL. V. SHIRE.

Rule for costs of the day—From what office to be issued—When defendant entitled to costs of the day.

Held—1. That under sec. 225 of the C. L. P Act, authorising a rule for costs of the day to be drawn up on affidavit without motion made in Court, that the rule should be drawn up in the principal office of Toronto.

2. That Deputy Clerks of the Crown have no power under the 120th Rule of Practice to issue rules for costs of the day.

3. That where a cause is called on for trial, counsel for plaintiff and defendant both being present, counsel for plaintiff states he is not ready, and counsel for defendant states he is ready, and plaintiff not being ready the cause is struck out of the docket, defendant is entitled to his costs of the day.

(July 19, 1861.)

The record in this case was entered for trial at the last assizes for the county of Wentworth, before Mr. Justice Richards.

On the last day of the Assizes, the learned Judge read over the names of the untried cases, in open court, and asked if the parties were ready in any of them.

When this cause was called on, the counsel for plaintiff and defendant were both present. The counsel for plaintiff said he was not ready, but the counsel for defendant said he was ready. Plaintiff not being ready, the cause was struck out of the docket.

Afterwards, on 28th May last, defendant caused a rule for costs of the day to be issued from the office of the Deputy Clerk of the Crown at Hamilton. The rule, which was signed by the Deputy Clerk of the Crown, was in the usual form, directing that "the costs when taxed shall be paid by the plaintiff, if it shall appear to the Master that costs ought to be paid."