Court of Law, or where the evidence of a material witness is likely to be lost, by his death, or departure from the jurisdiction, or by any other cause, before the facts can be judicially investigated. The defendant, in such cases, is compelled to appear and answer, and the cause is brought to issue, and a commission for the examination of the witnesses is made out, executed, and returned, in the same manner as in other cases; but no relief being prayed, the suit is never brought to a hearing; nor will the Court ordinarily permit the publication of the depositions, except in support of a suit or action; nor then, unless the witnesses are dead, or otherwise incapable of attending to be examined.[1]

[1] 1 Smith's Chancery Practice, 284-286.

CHAPTER II.

OF THE COMPETENCY OF WITNESSES.

§ 326. Although, in the ordinary affairs of life, temptations to practise deceit and falsehood may be comparatively few, and therefore men may ordinarily be disposed to believe the statements of each other; yet, in judicial investigations, the motives to pervert the truth, and to perpetrate falsehood and fraud, are so greatly multiplied, that if statements were received, with the same undiscriminating freedom as in private life, the ends of justice could with far less certainty be attained. In private life, too, men can inquire and determine for themselves, whom they will deal with, and in whom they will confide; but the situation of Judges and Jurors renders it difficult, if not impossible, in the narrow compass of a trial, to investigate the character of witnesses; and from the very nature of judicial proceedings, and the necessity of preventing the multiplication of issues to be tried, it often may happen that the testimony of a witness, unworthy of credit, may receive as much consideration as that of one worthy of the fullest confidence. If no means were employed totally to exclude any contaminating influences from the fountains of justice, this evil would constantly occur. But the danger has always been felt, and always guarded against, in all civilized countries. And while all evidence is open to the objection of the adverse party, before it is admitted, it has been found necessary, to the ends of justice, that certain kinds of evidence should be uniformly excluded.

§ 327. In determining what evidence shall be admitted and weighed by the Jury, and what shall not be received at all, or, in other words, in distinguishing between competent and incompetent witnesses, a principle seems to have been applied,

similar to that which distinguishes between conclusive and disputable presumptions of law,[1] namely, the experienced connexion between the situation of the witness, and the truth or falsity of his testimony. Thus the law excludes as incompetent those persons whose evidence, in general, is found more likely than otherwise to mislead Juries; receiving and weighing the testimony of others, and giving to it that degree of credit which it is found on examination to deserve. It is obviously impossible that any test of credibility can be infallible. All that can be done is to approximate to such a degree of certainty, as will ordinarily meet the justice of the case. The question is not, whether any rule of exclusion may not sometimes shut out credible testimony; but whether it is expedient that there should be any rule of exclusion at all. If the purposes of justice require that the decision of causes should not be embarrassed by statements generally found to be deceptive, or totally false, there must be some rule designating the class of evidence to be excluded; and in this case, as in determining the ages of discretion, and of majority, and in deciding as to the liability of the wife, for crimes committed in company with the husband, and in numerous other instances, the Common Law has merely followed the common experience of mankind. It rejects the testimony (1.) of parties; (2.) of persons deficient in understanding; (3.) of persons insensible to the obligations of an oath; and (4.) of persons, whose pecuniary interest is directly involved in the matter in issue; not because they may not sometimes state the truth, but because it would ordinarily be unsafe to rely on their testimony.[2] Other causes concur, in some of these

[1] Ante, § 14, 15.

[2] "If it be objected, that interest in the matter in dispute might, from the bias it creates, be an exception to the credit, but that it ought not to be absolutely so to the competency, any more than the friendship or enmity of a party, whose evidence is offered, towards either of the parties in the cause, or many other considerations hereafter to be intimated; the general answer may be this, that in point of authority no distinction is more absolutely settled; and in point of theory, the existence of a direct interest is capable of being precisely proved; but its influence on the mind is of a nature not to discover itself to the Jury, whence it hath been held expedient to adopt a general exception, by which witnesses so circumstanced are free from temptation, and the cause not exposed to the hazard of the very doubtful estimate, what quantity of interest in the question, in proportion to the character of the witness, in any instance, leaves his testimony entitled to belief. Some, indeed, are incapable of being biassed even latently by the greatest interest; many would betray the most solemn obligation and public confidence for an interest very inconsiderable. An universal exclusion, where no line short of this could have been drawn, preserves infirmity from a snare, and integrity from suspicion; and keeps the current of evidence, thus far at least, clear and uninfected." 1 Gilb. Evid. by Lofft, p. 223, 224.

cases, to render the persons incompetent, which will be mentioned in their proper places. We shall now proceed to consider, in their order, each of these classes of persons, held incompetent to testify; adding some observations on certain descriptions of persons, held incompetent in particular cases.

§ 328. But here it is proper to observe, that one of the main provisions of the law, for securing the purity and truth of oral evidence, is, that it be delivered under the *sanction of an oath*. Men in general are sensible of the motives and restraints of religion, and acknowledge their accountability to that Being, from whom no secrets are hid. In a Christian country it is presumed, that all the members of the community entertain the common faith, and are sensible to its influences; and the law founds itself on this presumption, while, in seeking for the best attainable evidence of every fact in controversy, it lays hold on the conscience of the witness by this act of religion, namely, a public and solemn appeal to the Supreme Being for the truth of what he may utter. "The administration of an oath supposes that a moral and religious accountability is felt to a Supreme Being, and this is the sanction which the law requires upon the conscience, before it admits him to testify."[1] An oath is ordinarily de-

[1] Wakefield *v.* Ross, 5 Mason, 18, per Story, J. See also Menochius, De Præsumpt. lib. 1, quæst. 1, n. 32, 33; Farinac. Opera, Tom. 2, App.

fined to be a solemn invocation of the vengeance of the Deity upon the witness, if he do not declare the whole truth, as far as he knows it;[1] or, a religious asseveration, by which a person renounces the mercy, and imprecates the vengeance of Heaven, if he do not speak the truth."[2] But the correctness of this view of the nature of an oath has been justly questioned by a late writer,[3] on the ground that the imprecatory clause is not essential to the true idea of an oath, nor to the attainment of the object of the law in requiring this solemnity. The design of the oath is not to call the attention of God to man; but the attention of man to God; — not to call on Him to punish the wrong-doer; but on man to remember that He will. That this is all which the law requires, is evident from the statutes in regard to Quakers, Moravians, and other classes of persons, conscientiously scrupulous of testifying under any other sanction, and of whom, therefore, no other declaration is required. Accordingly, an oath has been well defined, by the same writer, to be, "an outward pledge, given by the juror," (or person taking it,) "that his attestation or promise is made under an immediate sense of

p. 162, n. 32, p. 281, n. 33; Bynkershoek, Observ. Juris. Rom. lib. 6, cap. 2.

[1] 1 Stark. Evid. 22. The force and utility of this sanction were familiar to the Romans from the earliest times. The solemn oath was anciently taken by this formula, the witness holding a flint stone in his right hand; — *Si sciens fallo, tum me Diespiter, salva urbe arceque, bonis ejiciat, ut ego hanc lapidem.* Adam's Ant. 247; Cic. Fam. Ep. vii. 1, 12; 12 Law Mag. (Lond.) 272. The early Christians refused to utter any imprecation whatever; Tyler on Oaths, ch. 6; and accordingly, under the Christian Emperors, oaths were taken in the simple form of religious asseveration, *invocato Dei Omnipotentis nomine*, Cod. lib. 2, tit. 4, l. 41; *sacrosanctis evangeliis tactis*, Cod. lib. 3, tit. 1, l. 14. Constantine added, in a rescript, — *Jurisjurandi religione testes, prius quam perhibeant testimonium, jamjudum arctari præcipimus.* Cod. lib. 4, tit. 20, l. 9. See also Omichund *v.* Barker, 1 Atk. 21, 48, per Ld. Hardwicke; Willes, 538, S. C.; 1 Phil. Evid. p. 8; Atcheson *v.* Everitt, Cowp. 389. The subject of oaths is very fully and ably treated by Mr. Tyler, in his book on Oaths, their Nature, Origin, and History. Lond. 1834.

[2] White's case, 2 Leach, Cr. Cas. 482.

[3] Tyler on Oaths, p. 12, 13.

his responsibility to God."[1] A security to this extent, for the truth of testimony, is all that the law seems to have deemed necessary; and with less security than this, it is believed that the purposes of justice cannot be accomplished.

§ 329. And *first*, in regard to *parties*, the general rule of the Common Law is, that a *party to the record*, in a civil suit, *cannot be a witness* either for himself, or for a co-suitor in the cause.[2] The rule of the Roman Law was the same. *Omnibus in re propriâ dicendi testimonii facultatem jura submoverunt.*[3] This rule of the Common Law is founded, not solely in the consideration of interest, but partly also in the general expediency of avoiding the multiplication of temptations to perjury. In some cases at law, and generally by the course of proceedings in Equity, one party may appeal to the conscience of the other, by calling him to answer interrogatories upon oath. But this act of the adversary may be regarded as an emphatic admission, that, in that instance, the party is worthy of credit, and that his known integrity is a sufficient guaranty against the danger of falsehood. But where the party would volunteer his own oath, or a co-suitor, identified in interest with him, would offer it, this reason for the admission of the evidence totally fails;[4] "and it is not

[1] Tyler on Oaths, p. 15. See also the Report of the Lords' Committee, Ibid. Introd. p. xiv.; 3 Inst. 165; Fleta, lib. 5, c. 22; Fortescue, De Laud. Leg. Angl. c. 26, p. 58.

[2] Phil. & Am. on Evid. 47; 1 Phil. Evid. 45; 3 Bl. Comm. 371; 1 Gilb. Evid. by Lofft, p. 221; Frear *v.* Evertson, 20 Johns. 142.

[3] Cod. lib. 4, tit. 20, l. 10. Nullus idoneus testis in re sua intelligitur. Dig. lib. 22, tit. 5, l. 10.

[4] "For where a man, who is interested in the matter in question, would also prove it, it rather is a ground for distrust, than any just cause of belief; for men are generally so short-sighted, as to look to their own private benefit, which is near them, rather than to the good of the world, 'which, though on the sum of things really best for the individual,' is more remote; therefore, from the nature of human passions and actions, there is more reason to distrust such a biassed testimony, than to believe it. It is also easy for persons, who are prejudiced and prepossessed, to put false and unequal glosses upon

to be presumed that a man, who complains without cause, or defends without justice, should have honesty enough to confess it." [1]

§ 330. The rule of the Common Law goes still further in regard to *parties to the record* in *not compelling* them, in trials by Jury, to give evidence for the opposite party, against themselves, either in civil or in criminal cases. Whatever may be said by theorists, as to the policy of the maxim, *Nemo tenetur seipsum prodere*, no inconvenience has been felt in its practical application. On the contrary, after centuries of experience, it is still applauded by Judges, as "a rule founded in good sense and sound policy;" [2] and it certainly preserves the party from temptation to perjury. This rule extends to all the actual and real parties to the suit, whether they are named on the record as such or not.[3]

§ 331. Whether *corporators* are parties within the meaning of this rule, is a point not perfectly clear. Corporations, it is to be observed, are classed into public or municipal, and private corporations. The former are composed of all the inhabitants of any of the local or territorial portions, into which the country is divided in its political organization. Such are counties, towns, boroughs, local parishes, and the like. In these cases the attribute of individuality is conferred on the entire mass of inhabitants, and again is modified, or taken away, at the mere will of the legislature, according to its own views of public convenience, and without any

what they give in evidence; and therefore the law removes them from testimony, to prevent their sliding into perjury; and it can be no injury to truth to remove those from the Jury, whose testimony may hurt themselves, and can never induce any rational belief." 1 Gilb. Evid. by Lofft, p. 223.

[1] 1 Gilb. Evid. by Lofft, p. 243.

[2] Worrall *v.* Jones, 7 Bing. 395, per Tindal, C. J. See also Phil. & Am. on Evid. 157; Rex *v.* Woburn, 10 East, 403, per Ld. Ellenborough, C. J.; Commonwealth *v.* Marsh, 10 Pick. 57.

[3] Rex *v.* Woburn, 10 East, 395; Mauran *v.* Lamb, 7 Cowen, 174; Appleton *v.* Boyd, 7 Mass. 131; Fenn *v.* Granger, 3 Campb. 177.

necessity for the consent of the inhabitants, though not ordinarily against it. They are termed *quasi* corporations; and are dependent on the public will, the inhabitants not, in general, deriving any private and personal rights under the act of incorporation; its office and object being not to grant private rights, but to regulate the manner of performing public duties.[1] These corporations sue and are sued by the name of "the Inhabitants of" such a place; each inhabitant is directly liable in his person to arrest, and in his goods to seizure and sale, on the execution, which may issue against the collective body, by that name; and of course each one is a party to the suit; and his admissions, it seems, are receivable in evidence, though their value, as we have seen, may be exceedingly light.[2] Being parties, it would seem naturally to follow, that these inhabitants were neither admissible as witnesses for themselves, nor compellable to testify against themselves; but, considering the public nature of the suits, in which they are parties, and of the interest generally involved in them, the minuteness of the private and personal interest concerned, its contingent character, and the almost certain failure of justice, if the rule were carried out to such extent in its application, these inhabitants are admitted as competent witnesses in all cases, in which the rights and liabilities of the corporation only are in controversy. But where the inhabitants are individually and personally interested, it is otherwise.[3] Whether this exception to the general rule was solely created by the

[1] Angell & Ames, on Corp. 16, 17; Rumford *v.* Wood, 13 Mass. 192. The observations in the text are applied to American corporations of a political character. Whether a municipal corporation can in every case be dissolved by an act of the legislature, and to what extent such act of dissolution may constitutionally operate, are questions, which it is not necessary here to discuss. See Willcock on Municipal Corporations, Pt. 1, § 852; Terrett *v.* Taylor, 9 Cranch, 43, 51; Dartmouth College *v.* Woodward, 4 Wheat. 518, 629, 663.

[2] Ante, § 175, and note (4).

[3] Swift's Evid. 57; Rex *v.* Mayor of London, 2 Lev. 231. Thus, an inhabitant is not competent to prove a way by prescription for all the inhabitants; Odiorne *v.* Wade, 8 Pick. 518; nor, a right, in all the inhabitants to take

statutes, which have been passed on this subject, or previously existed at Common Law, of which the statutes are declaratory, is not perfectly agreed.[1] In either case, the general reason and necessity, on which the exception is founded, seem to require, that where inhabitants are admissible as witnesses for the corporation, they should also be compellable to testify against it; but the point is still a vexed question.[2]

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shell-fish; Lufkin *v.* Haskell, 3 Pick. 356; for in such cases, by the Common Law, the record would be evidence of the custom, in favor of the witness. This ground of objection, however, is now removed in England, by Stat. 3 & 4 W. 4, c. 42. The same principle is applied to any private joint or common interest. Parker *v.* Mitchell, 11 Ad. & El. 788. See also Prewit *v.* Tilly, 1 C. & P. 140; Ang. & Am. on Corp. 390 – 394; Connecticut *v.* Bradish, 14 Mass. 296; Gould *v.* James, 6 Cowen, 369; Jacobson *v.* Fountain, 2 Johns. 170; Weller *v.* The Governors of the Foundling Hospital, Peake's Cas. 153; Post, § 405. In the English Courts, a distinction is taken between *rated* and *rateable* inhabitants, the former being held inadmissible as witnesses, and the latter being held competent; and this distinction has been recognised in some of our own Courts; though, upon the grounds stated in the text, it does not seem applicable to our institutions, and is now generally disregarded. See Commonwealth *v.* Baird, 4 S. & R. 141; Falls *v.* Belknap, 1 Johns. 486, 491; Corwein *v.* Hames, 11 Johns. 76; Bloodgood *v.* Jamaica, 12 Johns. 285; Ante, § 175, note (4), and the cases above cited. But in England, rated inhabitants are now by statutes made competent witnesses on indictments for non-repair of bridges; in actions against the hundred, under the statute of Winton; in actions for riotous assemblies; in actions against churchwardens for misapplication of funds; in summary convictions under 7 & 8 Geo. 4, c. 29, 30; on the trial of indictments under the general highway act, and the general turnpike act; and in matters relating to rates and cesses. Phil. & Am. on Evid. 133 – 138, 395; 1 Phil. Evid. 138 – 144. In the Province of New Brunswick, rated inhabitants are now made competent witnesses in all cases where the town or parish may in any manner be affected, or where it may be interested in a pecuniary penalty, or where its officers, acting in its behalf, are parties. Stat. 9 Vict. cap. 4, March 7, 1846.

[1] Ante, § 175, and the cases cited in note (4). See also Phil. & Am. on Evid. p. 395, note (2); 1 Phil. Evid. 375; City Council *v.* King, 4 McCord, 487; Marsden *v.* Stansfield, 7 B. & C. 815; Rex *v.* Kirdford, 2 East, 559.

[2] In Rex *v.* Woburn, 10 East, 395, and Rex *v.* Hardwicke, 11 East, 578, 584, 586, 589, it was said, that they were not compellable. See accordingly Plattekill *v.* New Paltz, 15 Johns. 305.

§ 332. *Private corporations*, in regard to our present inquiry, may be divided into two classes, namely, *pecuniary*, or *monied institutions*, such as banks, insurance and manufacturing companies, and the like, and institutions or *societies for religious and charitable purposes*. In the former, membership is obtained by the purchase of stock or shares, without the act or assent of the corporation, except prospectively and generally, as provided in its charter and by-laws; and the interest thus acquired is private, pecuniary, and vested, like ownership of any other property. In the latter, membership is conferred by special election; but the member has no private interest in the funds, the whole property being a trust for the benefit of others. But all these are equally corporations proper; and it is the corporation, and not the individual member, that is party to the record in all suits by or against it.[1] Hence it follows, that the declarations of the members are not admissible in evidence in such actions, as the declarations of parties,[2] though, where a member or an officer is an agent of the corporation, his declarations may be admissible, as part of the *res gestæ*.[3]

§ 333. But the *members* or stockholders, in institutions created for private emolument, though not parties to the record, are *not* therefore *admissible as witnesses;* for, in matters in which the corporation is concerned, they of course have a direct, certain, and vested interest, which necessarily excludes them.[4] Yet the *members* of *charitable and religious*

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[1] Merchants Bank *v.* Cook, 4 Pick. 405. It has been held in Maine, that a corporator, or shareholder in a monied institution, is substantially a party, and therefore is not compellable to testify where the corporation is party to the record. Bank of Oldtown *v.* Houlton, 8 Shepl. 501. Shepley, J. dissenting.

[2] City Bank *v.* Bateman, 7 Har. & Johns. 104, 109; Hartford Bank *v.* Hart, 3 Day, 491, 495; Magill *v.* Kauffman, 4 S. & R. 317; Stewart *v.* Huntington Bank, 11 S. & R. 267; Atlantic Ins. Co. *v.* Conard, 4 Wash. 663, 677; Fairfield Co. Turnp. Comp. *v.* Thorp, 13 Conn. 173.

[3] Ante, § 108, 113, 114.

[4] This rule extends to the members of all corporations, having a common

societies, having no personal and private interest in the property holden by the corporation, *are competent witnesses* in any suit, in which the corporation is a party. On this ground, a mere trustee of a savings bank, not being a stockholder or a depositor,[1] and a trustee of a society for the instruction of seamen,[2] and trustees of many other eleemosynary institutions, have been held admissible witnesses in such suits. But where the member of a private corporation is inadmissible as a witness generally, he may still be called upon to produce the corporate documents, in an action against the corporation; for he is a mere depositary, and the party objecting to his competency is still entitled to inquire of him concerning the

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fund distributable among the members, and in which they therefore have a private interest; the principle of exclusion applying to all cases, where that private interest would be affected. Doe d. Mayor & Burgesses of Stafford *v.* Tooth, 3 Younge & Jer. 19; City Council *v.* King, 4 McCord, 487, 488; Davies *v.* Morgan, 1 Tyrwh. 457. See the cases cited in the notes to Cowen & Hill's edition of Phil. Evid. Vol. 3, p. 1541, 1542, 1552. Where a corporation would examine one of its members as a witness, he may be rendered competent, either by a sale of his stock or interest, where membership is gained or lost in that way; or, by being disfranchised; which is done by an information in the nature of a quo warranto against the member who confesses the information, on which the plaintiff obtains judgment to disfranchise him. Mayor of Colchester *v.* ———, 1 P. Wms. 595. Where the action is against the corporation for a debt, and the stockholders are by statute made liable for such debt, and their property is liable to seizure upon the execution issued against the corporation, a member, once liable, remains so, notwithstanding his alienation of stock, or disfranchisement, and therefore is not a competent witness for the corporation, in such action. Hovey *v.* The Mill-Dam Foundry, 21 Pick. 453. But where his liability to the execution issued against the corporation is not certain, but depends on a special order to be granted by the Court in its discretion, he is a competent witness. Needham *v.* Law, 12 M. & W. 560.

[1] Middletown Savings Bank *v.* Bates, 11 Conn. 519.

[2] Mariner's Church *v.* Miller, 7 Greenl. 51. See also Anderson *v.* Brock, 3 Greenl. 243; Wells *v.* Lane, 8 Johns. 462; Gilpin *v.* Vincent, 9 Johns. 219; Nason *v.* Thatcher, 7 Mass. 398; Cornwell *v.* Isham, 1 Day, 35; notes to Cowen & Hill's edition of Phil. Evid. Vol. 3, p. 1542, 1543, 1552; Richardson *v.* Freeman, 6 Greenl. 57; Weller *v.* Foundling Hospital, Peake's Cas. 153.

custody of the documents.[1] And if a trustee, or other member of an eleemosynary corporation, is liable to costs, this is an interest which renders him incompetent, even though he may have an ultimate remedy over.[2]

§ 334. The rule by which parties are excluded from being witnesses for themselves applies to the case of *husband and wife;* neither of them being admissible as a witness in a cause, civil or criminal, in which the other is a party. This exclusion is founded partly on the identity of their legal rights and interests; and partly on principles of public policy, which lie at the basis of civil society. For it is essential to the happiness of social life, that the confidence subsisting between husband and wife should be sacredly protected and cherished in its most unlimited extent; and to break down or impair the great principles which protect the sanctities of that relation, would be to destroy the best solace of human existence.[3]

§ 335. The principle of this rule requires its application to all cases, in which *the interests* of the other party are *involved.* And, therefore, the wife is not a competent witness against any co-defendant, tried with her husband, if the testimony concern the husband, though it be not directly given against him.[4] Nor is she a witness for a co-defendant, if her testi-

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[1] Rex *v.* Inhabitants of Netherthong, 2 M. & S. 237; Willcock on Municipal Corp. 309.

[2] Rex *v.* St. Mary Magdalen, Bermondsey, 3 East, 7.

[3] Stein *v.* Bowman, 13 Peters, 223, per McLean, J.; Ante, § 254; Co. Lit. 6, b.; Davis *v.* Dinwoody, 4 T. R. 678; Barker *v.* Dixie, Cas. Temp. Hardw. 264; Bentley *v.* Cooke, 3 Doug. 422, per Ld. Mansfield. The rule is the same in Equity. Vowles *v.* Young, 13 Ves. 144. So is the law of Scotland. Alison's Practice, p. 461. See also 2 Kent, Comm. 179, 180; Commonwealth *v.* Marsh, 10 Pick. 57; Robbins *v.* King, 2 Leigh. R. 142, 144; Snyder *v.* Snyder, 6 Binn. 488; Corse *v.* Patterson, 6 Har. & Johns. 153.

[4] 1 Hale, P. C. 301; Dalt. Just. c. 111; Rex *v.* Hood, 1 Mood. Cr. Cas. 281; Rex *v.* Smith, Ib. 289.

mony, as in the case of a conspiracy,[1] would tend directly to her husband's acquittal; nor where, as in the case of an assault,[2] the interests of all the defendants are inseparable; nor in any suit in which the rights of her husband, though not a party, would be concluded by any verdict therein; nor may she, in a suit between others, testify to any matter for which, if true, her husband may be indicted.[3] Yet, where the grounds of defence are several and distinct, and in no manner dependent on each other, no reason is perceived why the wife of one defendant should not be admitted as a witness for another.[4]

§ 336. It makes no difference *at what time the relation* of husband and wife *commenced;* the principle of exclusion being applied in its full extent, wherever the interests of either of them are directly concerned. Thus, where the defendant married one of the plaintiff's witnesses, after she was actually summoned to testify in the suit, she was held incompetent to give evidence.[5] Nor is there any difference in principle be-

[1] Rex *v.* Locker, 5 Esp. 107, per Ld. Ellenborough, who said it was a clear rule of the Law of England.

[2] Rex *v.* Frederick, 2 Stra. 1095.

[3] Den d. Stewart *v.* Johnson, 3 Harrison's R. 88.

[4] Phil. & Am. on Evid. 160, n. (2); 1 Phil. Evid. 75, n. (1). But where the wife of one prisoner was called to prove an *alibi* in favor of another jointly indicated, she was held incompetent, on the ground, that her evidence went to weaken that of the witness against her husband, by showing that that witness was mistaken in a material fact. Rex *v.* Smith, 1 Mood. Cr. Cas. 289. If the conviction of a prisoner, *against* whom she is called, will strengthen the hope of pardon for her husband, who is already convicted, this goes only to her credibility. Rex *v.* Rudd, 1 Leach, 135, 151. Where one of two persons, separately indicted for the same larceny, has been convicted, his wife is a competent witness against the other. Regina *v.* Williams, 8 C. & P. 284.

[5] Pedley *v.* Wellesley, 3 C. & P. 558. This case forms an exception to the general rule, that neither a witness nor a party can, by his own act, deprive the other party of a right to the testimony of the witness. See § 167, 418.

tween the admissibility of the husband and that of the wife, where the other is a party.[1] And when, in any case, they are admissible against each other, they are also admissible for each other.[2]

§ 337. Neither is it material, that this relation *no longer exists.* The great object of the rule is to secure domestic happiness, by placing the protecting seal of the law upon all confidential communications between husband and wife; and whatever has come to the knowledge of either by means of the hallowed confidence which that relation inspires, cannot be afterwards divulged in testimony, even though the other party be no longer living.[3] And even where a wife, who had been divorced by act of Parliament, and had married another person, was offered as a witness by the plaintiff, to prove a contract against her former husband, Lord Alvanley held her clearly incompetent; adding, with his characteristic energy, — "it never shall be endured, that the confidence, which the law has created while the parties remained in the most intimate of all relations, shall be broken, whenever, by the misconduct of one party, the relation has been dissolved."[4]

[1] Rex *v.* Serjeant, 1 Ry. & M. 352. In this case the husband was, on this ground, held incompetent as a witness against the wife, upon an indictment against her and others for conspiracy, in procuring him to marry her.

[2] Rex *v.* Serjeant, 1 Ry. & M. 352.

[3] Stein *v.* Bowman, 13 Peters, 209.

[4] Monroe *v.* Twistleton, Peake's Evid. App. lxxxvii. [xci.], expounded and confirmed in Aveson *v.* Ld. Kinnaird, 6 East, 192, 193, per Ld. Ellenborough, and in Doker *v.* Hasler, Ry. & M. 198, per Best, C. J.; Stein *v.* Bowman, 13 Peters, 223. In the case of Beveridge *v.* Minter, 1 C. & P. 364, in which the widow of a deceased promissor was admitted by Abbott, C. J. as a witness for the plaintiff to prove the promise, in an action against her husband's executors, the principle of the rule does not seem to have received any consideration; and the point was not saved, the verdict being for the defendants. See also Terry *v.* Belcher, 1 Bailey's R. 568, that the rule excludes the testimony of a husband or wife separated from each other, under articles. See further, Ante, § 254; The State *v.* Jolly, 3 Dev. & Bat. 110.