§ 338. This rule, in its spirit and extent, is analogous to that which excludes confidential communications made by a client to his attorney, and which has been already considered.[1] Accordingly, the wife, after the death of the husband, has been held competent to prove facts coming to her *knowledge from other sources*, and not by means of her situation as a wife, notwithstanding they related to the transactions of her husband.[2]

§ 339. This rule of protection is extended only to *lawful marriages*, or at least to such as are innocent in the eye of the law. If the cohabitation is clearly of an immoral character, as, for example, in the case of a kept mistress, the parties are competent witnesses for and against each other.[3] On the other hand, upon a trial for bigamy, the first marriage being proved and not controverted, the woman, with whom the second marriage was had, is a competent witness, for the second marriage is void.[4] But if the proof of the first marriage were doubtful, and the fact were controverted, it is conceived that she would not be admitted.[5] It seems, however, that a reputed or supposed wife may be examined on the *voir dire*, to facts showing the invalidity of the marriage.[6] Whether a woman is admissible in favor of a man, with whom she has cohabited for a long time as his wife, whom

[1] Ante, § 238, 240, 243, 244.

[2] Coffin *v.* Jones, 13 Pick. 445; Williams *v.* Baldwin, 7 Verm. 506; Wells *v.* Tucker, 3 Binn. 366.

[3] Batthews *v.* Galindo, 4 Bing. 610.

[4] Bull. N. P. 287.

[5] If the fact of the second marriage is in controversy, the same principle, it seems, will exclude the second wife also. See 2 Stark. Evid. 400; Grigg's case, T. Raym. 1. But it seems, that the wife, though indadmissible as a witness, may be *produced* in Court for the purpose of being *identified*, although the proof thus furnished may affix a criminal charge upon the husband; as, for example, to show that she was the person to whom he was first married; or, who passed a note, which he is charged with having stolen. Alison's Pr. p. 463.

[6] Peat's case, 2 Lew. Cr. Cas. 288; Wakefield's case, Ib. 279.

he has constantly represented and acknowledged as such, and by whom he has had children, has been declared to be at least doubtful.[1] Lord Kenyon rejected such a witness, when offered by the prisoner, in a capital case tried before him;[2] and in a later case, in which his decisions were mentioned as entitled to be held in respect and reverence, an arbitrator rejected a witness similarly situated; and the Court, abstaining from any opinion as to her competency, confirmed the award, on the ground that the law and fact had both been submitted to the arbitrator.[3] It would doubtless be incompetent for another person to offer the testimony of an acknowledged wife, on the ground that the parties were never legally married, if that relation were always recognised and believed to be lawful by the parties. But where the parties had lived together as man and wife, believing themselves lawfully married; but had separated on discovering that a prior husband, supposed to be dead, was still living; the woman was held a competent witness against the second husband, even as to facts communicated to her by him during their cohabitation.[4]

§ 340. Whether the rule may be relaxed, so as to admit the wife to testify against the husband, *by his consent*, the authorities are not agreed. Lord Hardwicke was of opinion that she

[1] 1 Price, 88, 89, per Thompson, C. B. If a woman sue as a feme sole, her husband is not admissible as a witness for the defendant, to prove her a feme covert, thereby to nonsuit her. Bentley *v.* Cooke, Tr. 24 Geo. 3, B. R. cited 2 T. R. 265, 269; 3 Doug. 422, S. C.

[2] Anon. cited by Richards, B. in 1 Price, 83.

[3] Campbell *v.* Twemlow, 1 Price, 81, 88, 90, 91. Richards, B. observed, that he should certainly have done as the arbitrator did. To admit the witness in such a case would both encourage immorality, and enable the parties at their pleasure to perpetrate fraud, by admitting or denying the marriage, as may suit their convenience. Hence, cohabitation and acknowledgment, as husband and wife, are held conclusive against the parties, in all cases, except where the fact or the incidents of marriage, such as legitimacy and inheritance, are directly in controversy. See also Divoll *v.* Leadbetter, 4 Pick. 220.

[4] Wells *v.* Fletcher, 5 C. & P. 12; Wells *v.* Fisher, 1 M. & Rob. 99, and note.

was not admissible, even with the husband's consent;[1] and this opinion has been followed in this country,[2] apparently upon the ground, that the interest of the husband in preserving the confidence reposed in her is not the sole foundation of the rule, the public having also an interest in the preservation of domestic peace, which might be disturbed by her testimony, notwithstanding his consent. The very great temptation to perjury, in such case, is not to be overlooked.[3] But Ld. Chief Justice Best, in a case before him,[4] said he would receive the evidence of the wife, if her husband consented; apparently regarding only the interest of the husband as the ground of her exclusion, as he cited a case, where Lord Mansfield had once permitted a plaintiff to be examined with his own consent.

§ 341. Where the husband or wife is not a party to the record, but yet has an *interest directly involved* in the suit, and is therefore incompetent to testify, the other also is incompetent. Thus, the wife of a bankrupt cannot be called to prove the fact of his bankruptcy.[5] And the husband cannot be a witness for or against his wife, in a question touching her separate estate, even though there are other parties, in respect of whom he would be competent.[6] So, also, where the one party, though a competent witness in the cause, is not bound

[1] Barker *v.* Dixie, Cas. temp. Hardw. 264; Sedgwick *v.* Walkins, 1 Ves. 49; Griggs's case, T. Raym. 1.

[2] Randall's case, 5 City Hall Rec. 141, 153, 154. See also Colbern's case, 1 Wheeler's Crim Cas. 479.

[3] Davis *v.* Dinwoody, 4 T. R. 679, per Ld. Kenyon.

[4] Pedley *v.* Wellesley, 3 C. & P. 558.

[5] Ex parte James, 1 P. Wms. 610, 611. But she is made competent by statute, to make discovery of his estate. 6 Geo. 4, c. 16, § 37.

[6] 1 Burr. 424, per Ld. Mansfield; Davis *v.* Dinwoody, 4 T. R. 678; Snyder *v.* Snyder, 6 Binn. 483; Langley *v.* Fisher, 5 Beav. 443. But where the interest is contingent and uncertain, he is admissible. Richardson *v.* Learned, 10 Pick. 261. See further, Hatfield *v.* Thorp, 5 B. & Ald. 589; Cornish *v.* Pugh, 8 D. & R. 65; 12 Vin. Abr. Evidence, B. If an attesting witness to a will afterwards marries a female legatee, the legacy not being given to her separate use, he is inadmissible to prove the will. Mackenzie *v.* Yeo, 2 Curt. 509. The wife of an executor is also incompetent.

to answer a particular question, because the answer would directly and certainly expose him or her to a criminal prosecution and conviction, the other, it seems, is *not obliged* to answer the same question.[1] The declarations of husband and wife are subject to the same rules of exclusion, which govern their testimony as witnesses.[2]

§ 342. But though the husband and wife are not admissible as witnesses against each other, where either is directly interested in the event of the proceeding, whether civil or criminal; yet, *in collateral proceedings*, not immediately affecting their mutual interests, their evidence is receivable, notwithstanding it may *tend to criminate*, or may contradict the other, or may subject the other to a legal demand.[3] Thus, where, in a question upon a female pauper's settlement, a man

Young *v.* Richards, Ib. 371. But where the statute declares the legacy void which is given to an attesting witness of a will, it has been held, that if the husband is a legatee, and the wife is a witness, the legacy is void, and the wife is admissible. Winslow *v.* Kimball, 12 Shepl. 493.

[1] See Phil. & Am. on Evid. 168.

[2] Alban *v.* Pritchett, 6 T. R. 680; Denn *v.* White, 7 T. R. 112; Kelly *v.* Small, 2 Esp. 716; Bull. N. P. 28; Winsmore *v.* Greenbank, Willes, 577. Whether, where the husband and wife are jointly indicted for a joint offence, or are othewise joint parties, their declarations are mutually receivable against each other, is still questioned; the general rule as to persons jointly concerned being in favor of their admissibility, and the policy of the law of husband and wife being against it. See Commonwealth *v.* Robbins, 3 Pick. 63; Commonwealth *v.* Briggs, 5 Pick. 429; Evans *v.* Smith, 5 Monroe, 363, 364; Turner *v.* Coe, 5 Conn. 93.

[3] Phil. & Am. on Evid. 162; 1 Phil. Evid. 72, 73; Fitch *v.* Hill, 11 Mass. 286; Baring *v.* Reeder, 1 Hen. & Mun. 154, 168, per Roane, J. In Griffin *v.* Brown, 2 Pick. 308, speaking of the cases cited to this point, Parker, C. J. said, — "They establish this principle, that the wife may be a witness to excuse a party sued from a supposed liability, although the effect of her testimony is to charge her husband upon the same debt, in an action afterwards to be brought against him. And the reason is, that the verdict in the action, in which she testifies, cannot be used in the action against her husband; so that, although her testimony goes to show that he is chargeable, yet he cannot be prejudiced by it. And it may be observed, that in these very cases, the husband himself would be a competent witness, if he were willing to testify,

testified that he was married to the pauper upon a certain day, and another woman, being called to prove her own marriage with the same man on a previous day, was objected to as incompetent, she was held clearly admissible for that purpose; for though, if the testimony of both was true, the husband was chargeable with the crime of bigamy, yet neither the evidence nor the record in the present case could be received in evidence against him upon that charge, it being *res inter alios acta*, and neither the husband nor the wife having any interest in the decision.[1] So, where the action was by the indorsee of a bill of exchange, against the acceptor, and the defence was, that it had been fraudulently altered by the drawer, after the acceptance; the wife of the drawer was held a competent witness to prove the alteration.[2]

§ 343. To this general rule, excluding the husband and wife as witnesses, there are *some exceptions;* which are allowed from the necessity of the case, partly for the protection of the wife in her life and liberty, and partly for the sake of public justice. But the necessity, which calls for this exception for the wife's security, is described to mean, "not a general necessity, as where no other witness can be had, but a particular necessity, as where, for instance, the wife would otherwise be exposed, without remedy, to personal injury."[3] Thus,

for his evidence would be a confession against himself." Williams *v.* Johnson, 1 Str. 504; Vowles *v.* Young, 13 Ves. 144; 2 Stark. Evid. 401. See also Mr Hargrave's note [29] to Co. Lit. 6, b.

[1] Rex *v.* Bathwick, 2 B. & Ad. 639, 647; Rex *v.* All Saints, 6 M. & S. 194, S. P. In this case, the previous decision in Rex *v.* Cliviger, 2 T. R. 263, to the effect, that a wife was in every case incompetent to give evidence, even *tending* to criminate her husband, was considered and restricted, Lord Ellenborough remarking, that the rule was there laid down "somewhat too largely." In Rex *v.* Bathwick, it was held to be "undoubtedly true in the case of a direct charge and proceeding against him for any offence," but was denied in its application to collateral matters.

[2] Henman *v.* Dickenson, 5 Bing. 183.

[3] Bentley *v.* Cooke, 3 Doug. 422, per Ld. Mansfield. In Sedgwick *v.* Walkins, 1 Ves. 49, Ld. Thurlow spoke of this necessity as extending only to security of the peace, and not to an indictment.

a woman is a competent witness against a man indicted for forcible abduction and marriage, if the force were continuing upon her until the marriage; of which fact she is also a competent witness; and this, by the weight of the authorities, notwithstanding her subsequent assent and voluntary cohabitation; for otherwise, the offender would take advantage of his own wrong.[1] So, she is a competent witness against him on an indictment for a rape, committed on her own person;[2] or, for an assault and battery upon her;[3] or, for maliciously shooting her.[4] She may also exhibit articles of the peace against him; in which case her affidavit shall not be allowed to be controlled and overthrown by his own.[5] Indeed, Mr. East considered it to be settled, that "in all cases of personal injuries committed by the husband or wife against each other, the injured party is an admissible witness against the other."[6] But Mr. Justice Holroyd thought, that the wife could only be

[1] 1 East's P. C. 454; Brown's case, 1 Ventr. 243; 1 Russ. on Crimes, 572; Wakefield's case, 2 Lewin, Cr. Cas. 1, 20, 279. See also Regina *v.* Yore, 1 Jebb & Symes, R. 563, 572; Perry's case, cited in McNally's Evid. 181; Rex *v.* Serjeant, Ry. & M. 352; 1 Hawk. P. C. c. 41, § 13; 2 Russ. on Crimes, 605, 606. This case may be considered anomalous; for she can hardly be said to be his wife, the marriage contract having been obtained by force. 1 Bl. Comm. 443; McNally's Evid. 179, 180; 3 Chitty's Crim. Law, 817, note (y); Roscoe's Crim. Evid. 115.

[2] Ld. Audley's case, 3 Howell's St. Tr. 402, 413; Hutton, 115, 116; Bull. N. P. 287.

[3] Lady Lawley's case, Bull. N. P. 287; Rex *v.* Azire, 1 Stra. 633; Soule's case, 5 Greenl. 407.

[4] Whitehouse's case, cited 2 Russ. on Crimes, 606.

[5] Rex *v.* Doherty, 13 East, 171; Lord Vane's case, Ib. note (a); 2 Stra. 1202; Rex *v.* Earl Ferrers, 1 Burr 635. Her affidavit is also admissible, on an application for an information against him for an attempt to take her by force, contrary to articles of separation; Lady Lawley's case, Bull N. P. 287; or, in a habeas corpus sued out by him, for the same object. Rex *v.* Mead, 1 Burr. 542.

[6] 1 East's P. C. 455. In Wakefield's case, 2 Lewin, Cr. Cas. 287, Hullock, B. expressed himself to the same effect, speaking of the admissibility of the wife only. 2 Hawk. P. C. c. 46, § 77; The People ex rel. Ordronaux *v.* Chegaray, 18 Wend. 642.

admitted to prove facts, which could not be proved by any other witness.[1]

§ 344. The wife has also, on the same ground of necessity, been sometimes admitted as a witness to testify to *secret facts*, which no one but herself could know. Thus, upon an appeal against an order of filiation, in the case of a married woman, she was held a competent witness to prove her criminal connexion with the defendant, though her husband was interested in the event;[2] but for reasons of public decency and morality, she cannot be allowed to say, after marriage, that she had no connexion with her husband, and that therefore her offspring is spurious.[3]

§ 345. In cases of *high treason*, the question whether the wife is admissible as a witness against her husband, has been much discussed, and opinions of great weight have been given on both sides. The affirmative of the question is maintained,[4] on the ground of the extreme necessity of the case, and the nature of the offence, tending as it does to the destruction of many lives, the subversion of government, and the sacrifice of social happiness. For the same reasons, also, it is said, that, if the wife should commit this crime, no plea of coverture shall excuse her; no presumption of the husband's coercion shall extenuate her guilt.[5] But, on the other hand, it is argued, that, as she is not bound to discover her husband's treason,[6] by parity of reason, she is not compellable

[1] In Rex *v.* Jagger, cited 2 Russ. on Crimes, 606.

[2] Rex *v.* Reading, Cas. temp. Hardw. 79, 82; Rex *v.* Luffe, 8 East, 193; Commonwealth *v.* Shepherd, 6 Binn. 283.

[3] Cope *v.* Cope, 1 M. & Rob. 269, 274; Goodright *v.* Moss, Cowp. 594; Ante, § 28.

[4] These authorities may be said to favor the affirmative of the question; — 2 Russ. on Crimes, 607; Bull. N. P. 286; 1 Gilb. Evid. by Lofft, 252; Mary Griggs's case, T. Raym. 1; 2 Stark. Evid. 404.

[5] 4 Bl. Comm. 29.

[6] 1 Brownl. 47.

to testify against him.[1] The latter is deemed, by the later text writers, to be the better opinion.[2]

§ 346. Upon the same principle, on which the testimony of the husband or wife is sometimes admitted, as well as for some other reasons already stated,[3] the *dying declarations* of either are admissible, where the other party is charged with the murder of the declarant.[4]

§ 347. The rule excluding parties from being witnesses applies to all cases where the party has any interest at stake in the suit, although it be only a liability to costs. Such is the case of a *prochein ami*, a *guardian*, an *executor* or *administrator*; and so also of *trustees*, and the *officers of corporations*, whether public or private, wherever they are liable in the first instance for the costs, though they may have a remedy for reimbursement out of the public or trust funds.[5]

§ 348. But to the general rule, in regard to parties, there are some *exceptions*, in which the *party's own oath* may be received as competent testimony. One class of these exceptions,

[1] 1 Hale's P. C. 48, 301; 2 Hawk. P. C. ch. 46, § 82; 2 Bac. Ab. 578, tit. *Evid.* A. 1; 1 Chitty's Crim. Law, 595; McNally's Evid. 181.

[2] Roscoe's Crim. Evid. 114; Phil. & Am. on Evid. 161; 1 Phil. Evid. 71. See also 2 Stark. Evid. 404, note (b).

[3] Ante, § 156.

[4] Rex *v.* Woodcock, 2 Leach, 563; McNally's Evid. 174; Stoops's case, Addis. 381; The People *v.* Green, 1 Denio, R. 614.

[5] Hopkins *v.* Neal, 2 Stra. 1026; James *v.* Hatfield, 1 Stra. 548; 1 Gilb. Evid. by Lofft, p. 225; Rex *v.* St. Mary Magdalen, Bermondsey, 3 East, 7; Whitmore *v.* Wilks, 1 Mood. & M. 220, 221; Gresley on Evid. 242, 243, 244; Bellew *v.* Russell, 1 Ball & Beat. 99; Wolley *v.* Brownhill, 13 Price, 513, 514, per Hullock, B.; Barrett *v.* Gore, 3 Atk. 401; Phil. & Am. on Evid. 48; Fountain *v.* Coke, 1 Mod. 107; Goodtitle *v.* Welford, 1 Doug. 139. In this country, where the party to the record is in almost every case liable to costs in the first instance, in suits at law, he can hardly ever be competent as a witness. Fox *v.* Adams, 16 Mass. 118, 121; Sears *v.* Dillingham, 12 Mass. 360. See also Willis on Trustees, p. 227, 228, 229; Frear *v.* Evertson, 20 Johns. 142.

namely, that in which the oath *in litem* is received, has long been familiar in Courts administering remedial justice according to the course of the Roman Law, though in the Common Law tribunals its use has been less frequent and more restricted. The oath *in litem* is admitted in two classes of cases; first, where it has been already proved, that the party against whom it is offered has been guilty of some fraud, or other tortious and unwarrantable act of intermeddling with the complainant's goods, and no other evidence can be had of the amount of damages; and secondly, where, on general grounds of public policy, it is deemed essential to the purposes of justice.[1] An example of the former class is given in the case of the bailiffs, who, in the service of an execution, having discovered a sum of money secretly hidden in a wall, took it away and embezzled it, and did great spoil to the debtor's goods; for which they were holden not only to refund the money, but to make good such other damage as the plaintiff would swear he had sustained.[2] So, where a man ran away with a casket of jewels, he was ordered to answer in Equity, and the injured party's oath was allowed as evidence, *in odium spoliatoris*.[3] The rule is the same at Law. Thus, where a shipmaster received on board his vessel a trunk of goods, to be carried to another port, but on the passage he broke open the trunk and rifled it of its contents; in an action by the owner of the goods against the shipmaster, the plaintiff, proving *aliunde* the delivery of the trunk and its violation, was held competent as a witness to testify to the particular contents of the trunk.[4] And on the same principle, the bailor,

---

1 Tait on Evid. 280.

2 Childrens *v.* Saxby, 1 Vern. 207; 1 Eq. Ca. Ab. 229, S. C.

3 Anon. cited per the Ld. Keeper, in E. India Co. *v.* Evans, 1 Vern. 308. On the same principle, in a case of gross fraud, Chancery will give costs, to be ascertained by the party's own oath. Dyer *v.* Tymewell, 2 Vern. 122.

4 Herman *v.* Drinkwater, 1 Greenl. 27. See also, Sneider *v.* Geiss, 1 Yeates, 34; Anon. coram Montague, B.; 12 Vin. Abr. 24, *Witnesses*, I. pl. 34. Sed vid. Bingham *v.* Rogers, 6 Watts & Serg. 495. This point, however, has recently been otherwise decided by the Sup. Jud. Court of Massachusetts, in Snow *v.* The Eastern Railroad Co. not yet reported; in which all the previous decisions were reviewed.

though a plaintiff, has been admitted a competent witness to prove the contents of a trunk, lost by the negligence of the bailee.[1] Such evidence is admitted not solely on the ground

---

1 Clark *v.* Spence, 10 Watts, R. 335; Story on Bailm. § 454, note, (3d edit.) In this case the doctrine in the text was more fully expounded by Rogers, J. in the following terms. "A party is not competent to testify in his own cause; but, like every other general rule, this has its exceptions. Necessity, either physical or moral, dispenses with the ordinary rules of evidence. In 12 Vin. 24, pl. 32, it is laid down, that on a trial at Bodnyr, *coram* Montague, B. against a common carrier, a question arose about the things in a box, and he declared, that this was one of those cases where the party, himself, might be a witness *ex necessitate rei*. For every one did not show what he put in his box. The same principle is recognised in decisions, which have been had on the statute of Hue and Cry in England, where the party robbed is admitted as a witness *ex necessitate*. Bull. N. P. 181. So, in Herman *v.* Drinkwater, 1 Greenl. R. 27, a shipmaster having received a trunk of goods on board his vessel, to be carried to another port, which, on the passage he broke open and rifled of its contents; the owner of the goods, proving the delivery of the trunk and its violation, was admitted as a witness in an action for the goods, against the shipmaster, to testify to the particular contents of the trunk, there being no other evidence of the fact to be obtained. That a party then can be admitted, under certain circumstances, to prove the contents of a box or trunk, must be admitted. But while we acknowledge the exception, we must be careful not to extend it beyond its legitimate limits. It is admitted from necessity, and perhaps on a principle of convenience, because, as is said in Vezey, every one does not show what he puts in a box. This applies with great force to wearing apparel, and to every article which is necessary or convenient to the traveller, which, in most cases, are packed by the party himself, or his wife, and which, therefore, would admit of no other proof. A lady's jewelry would come in this class, and it is easier to conceive than to enumerate other articles, which come within the same category. Nor would it be right to restrict the list of articles, which may be so proved, within narrow limits, as the Jury will be the judges of the credit to be attached to the witness, and be able, in most cases, to prevent any injury to the defendant. It would seem to me, to be of no consequence, whether the article were sent by a carrier, or accompanied the traveller. The case of Herman *v.* Drinkwater, I would remark, was decided under very aggravated circumstances, and was rightly ruled. But it must not be understood, that such proof can be admitted, merely because no other evidence of the fact can be obtained. For, if a merchant, sending goods to his correspondent, chooses to pack them himself, his neglect to furnish himself with the ordinary proof,

of the just odium entertained, both in Equity and at Law, against spoliation, but also because, from the necessity of the case and the nature of the subject, no proof can otherwise be expected; it not being usual even for the most prudent persons, in such cases, to exhibit the contents of their trunks to strangers, or to provide other evidence of their value. For, where the law can have no force but by the evidence of the person in interest, there the rules of the Common Law, respecting evidence in general, are presumed to be laid aside; or rather, the subordinate are silenced by the most transcendent and universal rule, that in all cases that evidence is good, than which the nature of the subject presumes none better to be attainable.[1]

§ 349. Upon the same necessity, the party is admitted in divers other cases to prove facts, which, from their nature, none but a party could be likely to know. But in such cases, *a foundation must first be laid* for the party's oath, by proving the other facts of the case down to the period to which the party is to speak. As, for example, if a deed or other material instrument of evidence is lost, it must first be proved, as we shall hereafter show, that such a document existed; after which the party's own oath may be received to the fact and circumstances of its loss, provided it was lost out of his own custody.[2] To this head of necessity may be referred the

is no reason for dispensing with the rule of evidence, which requires disinterested testimony. It is not of the usual course of business, and there must be something peculiar and extraordinary in the circumstances of the case, which would justify the Court in admitting the oath of the party." See 10 Watts, R. 336, 337. See also David *v.* Moore, 2 Watts & Serg. 220.

[1] 1 Gilb. Evid. by Lofft, p. 244, 245; Ante, § 82.

[2] Post, § 558; Tayloe *v.* Riggs, 1 Peters, 591, 596; Patterson *v.* Winn, 5 Peters, 240, 242; Riggs *v.* Taylor, 9 Wheat. 486; Taunton Bank *v.* Richardson, 5 Pick. 436, 442; Poignard *v.* Smith, 8 Pick. 278; Page *v.* Page, 15 Pick. 368, 374, 375; Chamberlain *v.* Gorham, 20 Johns. 144; Jackson *v.* Frier, 16 Johns. 193; Douglass *v.* Sanderson, 2 Dall. 116; 1 Yeates, 15, S. C.; Meeker *v.* Jackson, 3 Yeates, 442; Blanton *v.* Miller, 1 Hayw. 4; Seekright *v.* Bogan, Ib. 178, n. See other cases cited in

admission of the party robbed, as a witness for himself, in an action against the hundred upon the statute of Winton.[1] So also, in questions which do not involve the matter in controversy, but matter which is auxiliary to the trial, and which in their nature are preliminary to the principal subject of controversy, and are addressed to the Court, the oath of the party is received.[2] Of this nature is his affidavit of the materiality of a witness; of diligent search made for a witness, or for a paper; of his inability to attend; of the death of a subscribing witness; and so of other matters of which the books of practice abound in examples.

§ 350. The second class of cases, in which the oath *in litem* is admitted, consists of those in which public necessity or expediency has required it. Some cases of this class have their foundation in the edict of the Roman Prætor; — *Nautæ, caupones, stabularii, quod cujusque salvum fore receperint, nisi restituent, in eos judicium dabo.*[3] Though the terms of the edict comprehended only shipmasters, innkeepers, and stable keepers, yet its principle has been held to extend to other bailees, against whom, when guilty of a breach of the trust confided to them, damages were awarded upon the oath of the party injured, *per modum pœnæ* to the defendant, and

Cowen & Hill's note 122, to 1 Phil. Evid. p. 69. In Connecticut, the party has been adjudged incompetent. Coleman *v.* Wolcott, 4 Day, 388. In prosecutions for bastardy, whether by the female herself, or by the town or parish officers, she is competent to testify to facts within her own exclusive knowledge, though in most of the United States, the terms of her admission are prescribed by statute. Drowne *v.* Stimpson, 2 Mass. 441; Judson *v.* Blanchard, 4 Conn. 557; Davis *v.* Salisbury, 1 Day, 278; Mariner *v.* Dyer, 2 Greenl. 172; Anon. 3 N. Hamp. 135; Mather *v.* Clark, 2 Aik. 209; The State *v.* Coatney, 8 Yerg. 210.

[1] Bull. N. P. 187, 289.

[2] 1 Peters, 596, 597, per Marshall, C. J. See also Anon. Cro. Jac. 429; Cook *v.* Remington, 6 Mod. 237; Ward *v.* Apprice, Ib. 264; Scoresby *v.* Sparrow, 2 Stra. 1186; Jevans *v.* Harridge, 1 Saund. 9; Forbes *v.* Wale, 1 W. Bl. 532; 1 Esp. 278, S. C.; Fortescue and Coake's case, Godb. 193; Anon. Godb. 326; 2 Stark. Evid. 580, note (2), 6th Am. Ed.

[3] Dig. lib. 4, tit. 9, l. 1.

from the necessity of the case.[1] But the Common Law has not admitted the oath of the party upon the ground of the Prætor's edict; but has confined its admission strictly to those cases where, from their nature, no other evidence was attainable.[2] Thus, in cases of necessity, where a statute can receive no execution, unless the party interested be a witness, there he must be allowed to testify; for the statute must not be rendered ineffectual by the impossibility of proof.[3]

§ 351. Another exception is allowed in Equity, by which the *answer* of the defendant, so far as it is strictly responsive to the bill, is admitted as evidence in his favor, as well as against him. The reason is, that the plaintiff, by appealing to the conscience of the defendant, admits that his answer is worthy of credit, as to the matter of the inquiry. It is not conclusive evidence; but is treated like the testimony of any other witness, and is decisive of the question only where it is not outweighed by other evidence.[4]

§ 352. So, also, the oath of the party, taken *diverso intuitu*, may sometimes be admitted at law in his favor. Thus, in considering the question of the originality of an invention, the letters patent being in the case, the oath of the inventor,

1 This head of evidence is recognised in the Courts of Scotland, and is fully explained in Tait on Evid. p. 280 – 287. In Lower Canada, the Courts are bound to admit the decisory oath (*serment décisoire*) of the parties, in commercial matters, whenever either of them shall exact it of the other. Rev. Stat. 1845, p. 143.

2 Wager of law is hardly an exception to this rule of the Common Law, since it was ordinarily allowed only in cases where the transaction was one of personal and private trust and confidence between the parties. See 3 Bl. Comm. 345, 346.

3 The United States *v.* Murphy, 16 Peters, R. 203. See Post, § 412.

4 2 Story on Eq. Jur. § 1528; Clark *v.* Van Reimsdyk, 9 Cranch, 160. But the answer of an infant can never be read against him; nor can that of a feme covert, answering jointly with her husband. Gresley on Evid. p. 24. An arbitrator has no right to admit a party in the cause as a witness, unless he has specific authority so to do. Smith *v.* Sparrow, 11 Jur. 126.

made prior to the issuing of the letters patent, that he was the true and first inventor, may be opposed to the oath of a witness, whose testimony is offered to show that the invention was not original.[1] So, upon the trial of an action for malicious prosecution, in causing the plaintiff to be indicted, proof of the evidence given by the defendant on the trial of the indictment, is said to be admissible in proof of probable cause.[2]

§ 353. The rule which excludes the party to the suit from being admitted as a witness, is also a rule of protection, no person who is party to the record being *compellable* to testify.[3] It is only when he consents to be examined, that he is admissible in any case; nor then, unless under the circumstances presently to be mentioned. If he is only a nominal party, the consent of the real party in interest must be obtained before he can be examined.[4] Nor can one who is substantially a party to the record be compelled to testify, though he be not nominally a party.[5]

1 Alden *v.* Dewey, 1 Story, R. 336; 3 Law Reporter, 383, S. C.; Pettibone *v.* Derringer, 4 Wash. R. 215.

2 Bull. N. P. 14; Johnson *v.* Browning, 6 Mod. 216. "For otherwise," said Holt, C. J., "one that should be robbed, &c. would be under an intolerable mischief; for if he prosecuted for such robbery, &c., and the party should at any rate be acquitted, the prosecutor would be liable to an action for a malicious prosecution, without a possibility of making a good defence, though the cause of prosecution were never so pregnant."

3 Rex *v.* Woburn, 10 East, 395; Worrall *v.* Jones, 7 Bing. 395; Fenn *v.* Granger, 3 Campb. 177; Mant *v.* Mainwaring, 8 Taunt. 139.

4 Frear *v.* Evertson, 20 Johns. 142. And see The People *v.* Irving, 1 Wend. 20; Commonwealth *v.* Marsh, 21 Pick. 37, per Wilde, J.; Columbian Man. Co. *v.* Dutch, 13 Pick. 125; Bradlee *v.* Neal, 16 Pick. 501. In Connecticut and Vermont, where the declarations of the assignor of a chose in action are still held admissible to impeach it in the hands of the assignee, in an action brought in the name of the former for the benefit of the latter, the defendant is permitted to read the deposition of the nominal plaintiff, voluntarily given, though objected to by the party in interest. Woodruff *v.* Westcott, 12 Conn. 134; Johnson *v.* Blackman, 11 Conn. 342; Sargeant *v.* Sargeant, 3 Washb. 371. See Ante, § 190.

5 Mauran *v.* Lamb, 7 Cowen, 174; Phil. & Am. on Evid. 158, n. (3); 1 Phil. Evid. 60, n. (1).