crime. The admission of accomplices, as witnesses for the government, is justified by the necessity of the case, it being often impossible to bring the principal offenders to justice without them. The usual course is, to leave out of the indictment those who are to be called as witnesses; but it makes no difference as to the admissibility of an accomplice, whether he is indicted or not, if he has not been put on his trial at the same time with his companions in crime. He is also a competent witness in their favor; and if he is put on his trial at the same time with them, and there is only very slight evidence, if any at all, against him, the Court may, as we have already seen,[1] and generally will, forthwith direct a separate verdict as to him, and upon his acquital, will admit him as a witness for the others. If he is convicted, and the punishment is by fine only, he will be admitted for the others, if he has paid the fine.[2] But whether an accomplice already charged with the crime, by indictment, shall be admitted as a witness for the government, or not, is determined by the Judges, in their discretion, as may best serve the purposes of justice. If he appears to have been the principal offender, he will be rejected.[3] And if an accomplice, having made a private confession, upon a promise of pardon made by the attorney-general, should afterwards refuse to testify, he may be convicted upon the evidence of that confession.[4]

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[1] Ante, § 362.

[2] 2 Russ. on Crimes, 597, 600; Rex *v.* Westbeer, 1 Leach, Cr. Cas. 14; Charnock's case, 4 St. Tr. 582, (Ed. 1730); 12 Howell's St. Tr. 1454, S. C.; Rex *v.* Fletcher, 1 Stra. 633. The rule of the Roman Law, *Nemo, allegans turpitudinem suam, est audiendus*, though formerly applied to witnesses, is now to that extent exploded. It can only be applied, at this day, to the case of a party seeking relief. See also 2 Stark. Evid. 9, 10; 2 Hale, P. C. 280; 7 T. R. 611; Musson *v.* Fales, 16 Mass. 335; Churchill *v.* Suter, 2 Mass. 162; Townsend *v.* Bush, 1 Conn. 267, per Trumbull, J.

[3] The People *v.* Whipple, 9 Cowen, 707; Phil. & Am. on Evid. p. 28; 1 Phil. Evid 28, 29.

[4] Commonwealth *v.* Knapp, 10 Pick. 477; Rex *v.* Burley, 2 Stark. Evid. 12, note (r).

§ 380. The *degree of credit* which ought to be given to the testimony of an accomplice, is a matter exclusively within the province of the Jury. It has sometimes been said, that they ought not to believe him, unless his testimony is corroborated by other evidence; and, without doubt, great caution in weighing such testimony is dictated by prudence and good reason. But, there is no such rule of law; it being expressly conceded that the Jury may, if they please, act upon the evidence of the accomplice, without any confirmation of his statement.[1] But, on the other hand, Judges, in their discretion, will advise a Jury not to convict of felony, upon the testimony of an accomplice alone, and without corroboration; and it is now so generally the practice to give them such advice, that its omission would be regarded as an omission of duty on the part of the Judge.[2] And considering the respect always paid by the Jury to this advice from the bench, it may be regarded as the settled course of practice, not to convict a prisoner, in any case of felony, upon the sole and uncorroborated testimony of an accomplice. The Judges do not, in such cases, withdraw the cause from the Jury by positive directions to acquit, but only advise them not to give credit to the testimony.

§ 381. But though it is thus the settled practice, in cases of felony, to require other evidence in corroboration of that of an accomplice; yet in regard to the *manner and extent of the corroboration* to be required, learned Judges are not perfectly

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[1] Rex *v.* Hastings, 7 C. & P. 152, per Ld. Denman, C. J.; Rex *v.* Jones, 2 Campb. 132, per Ld. Ellenborough; 31 Howell's St. Tr. 315, S. C.; Rex *v.* Atwood, 2 Leach, Cr. Cas. 521; Rex *v.* Durham, Ib. 528; Rex *v.* Dawber, 3 Stark. R. 34; Rex *v.* Barnard, 1 C. & P. 87, 88; The People *v.* Costello, 1 Denio, N. Y. Rep. 83.

[2] Roscoe's Crim. Evid. p. 120; 2 Stark. Evid. 12; Rex *v.* Barnard, 1 C. & P. 87. For the limitation of this practice to cases of felony, see Rex *v.* Jones, 31 Howell's St. Tr. 315, per Gibbs, Attor. Gen. arg. See also Rex *v.* Hargrave, 5 C. & P. 170, where persons present at a fight, which resulted in manslaughter, though principals in the second degree, were held not to be such accomplices as required corroboration, when testifying as witnesses.

agreed. Some have deemed it sufficient, if the witness is confirmed in any material part of the case,[1] others have required confirmatory evidence as to the *corpus delicti* only;

[1] This is the rule in Massachusetts, where the law was stated by Morton, J. as follows: — "1. It is competent for a Jury to convict on the testimony of an accomplice alone. The principle which allows the evidence to go to the Jury, necessarily involves in it a power in them to believe it. The defendant has a right to have the Jury decide upon the evidence which may be offered against him; and their duty will require of them to return a verdict of guilty or not guilty, according to the conviction which that evidence shall produce in their minds. 2 Hawk. P. C. ch. 46, § 135; Hale's P. C. 304, 305; Roscoe's Crim. Ev. 119; 1 Phil. Ev. 32; 2 Stark. Ev. 18, 20. 2. But the source of this evidence is so corrupt, that it is always looked upon with suspicion and jealousy, and is deemed unsafe to rely upon without confirmation. Hence the Court ever consider it their duty to advise a Jury to acquit, where there is no evidence other than the uncorroborated testimony of an accomplice. 1 Phil. Evid. 34; 2 Stark. Ev. 24; Rex *v.* Durham, Leach, 528; Rex *v.* Jones, 2 Campb. 132; 1 Wheeler's Crim. Cas. 418; 2 Rogers's Recorder, 38; 5 Ibid. 95. 3. The mode of corroboration seems to be less certain. It is perfectly clear, that it need not extend to the whole testimony; but it being shown, that the accomplice has testified truly in some particulars, the Jury may infer that he has in others. But what amounts to corroboration? We think the rule is, that the corroborative evidence must relate to some portion of the testimony which is material to the issue. To prove that an accomplice had told the truth in relation to irrelevant and immaterial matters which were known to every body, would have no tendency to confirm his testimony involving the guilt of the party on trial. If this were the case, every witness, not incompetent for the want of understanding, could always furnish materials for the corroboration of his own testimony. If he could state where he was born, where he had resided, in whose custody he had been, or in what jail, or what room in the jail he had been confined, he might easily get confirmation of all these particulars. But these circumstances having no necessary connexion with the guilt of the defendant, the proof of the correctness of the statement in relation to them, would not conduce to prove that a statement of the guilt of the defendant was true. Roscoe's Crim. Ev. 120; Rex *v.* Addis, 6 Car. & Payne, 388." See Commonwealth *v.* Bosworth, 22 Pick. 397, 399, 400; The People *v.* Costello, 1 Denio, R. 83. A similar view of the nature of corroborative evidence, in cases where such evidence is necessary, was taken by Dr. Lushington, who held that it meant evidence not merely showing that the account given is probable, but proving facts *ejusdem generis*, and tending to produce the same result. Simmons *v.* Simmons, 11 Jur. 830. And see Maddox *v.* Sullivan, 2 Rich. Eq. R. 4.

and others have thought it essential, that there should be corroborating proof, that the prisoner actually participated in the offence; and that when several prisoners are to be tried, confirmation is to be required as to all of them, before all can be safely convicted; the confirmation of the witness, as to the commission of the crime, being regarded as no confirmation at all, as it respects the prisoner. For, in describing the circumstance of the offence, he may have no inducement to speak falsely, but may have every motive to declare the truth, if he intends to be believed, when he afterwards fixes the crime upon the prisoner.[1] If two or more accomplices are produced as witnesses, they are not deemed to corroborate each other; but the same rule is applied, and the same confirmation is required, as if there were but one.[2]

§ 382. There is one class of persons, *apparently accomplices*, to whom the rule, requiring corroborating evidence, does not apply; namely, persons who have entered into communication with conspirators, but either afterwards repenting, or having

[1] Rex *v.* Wilkes, 7 C. & P. 272, per Alderson, B.; Rex *v.* Moore, Ib. 270; Rex *v.* Addis, 6 C. & P. 388, per Patteson, J.; Rex *v.* Wells, 1 Mood. & M. 326, per Littledale J.; Commonwealth *v.* Bosworth, 22 Pick. 399, per Morton, J. The course of opinions and practice on this subject is stated more at large in 1 Phil. Evid. p. 30–38, and in 2 Stark. Evid. p. 12, note (x), to which the learned reader is referred. See also Roscoe's Crim. Evid. p. 120. Chief Baron Joy, after an elaborate examination of the English authorities, states the true rule to be this, that — "the confirmation ought to be in such and so many parts of the accomplice's *narrative*, as may reasonably satisfy the Jury that he is telling truth, without restricting the confirmation to any particular points, and leaving the effect of such confirmation (which may vary in its effect according to the nature and circumstances of the particular case) to the consideration of the Jury, aided in that consideration by the observations of the Judge." See Joy on the Evidence of Accomplices, p. 98, 99. By the Scotch Law, the evidence of a single witness is in no case sufficient to warrant a conviction, unless supported by a train of circumstances. Alison's Practice, p. 551.

[2] Rex *v.* Noakes, 3 C. & P. 326, per Littledale, J.; Regina *v.* Bannen, 2 Mood. Cr. Cas. 309. The testimony of the wife of an accomplice, is not considered as corroborative of her husband. Rex *v.* Neale, 7 C. & P. 168, per Park, J.

originally determined to frustrate the enterprise, have subsequently disclosed the conspiracy to the public authorities, under whose direction they continue to act with their guilty confederates, until the matter can be so far advanced and matured, as to insure their conviction and punishment. The early disclosure is considered as binding the party to his duty; and though a great degree of objection or disfavor may attach to him for the part he has acted as an *informer*, or on other accounts, yet his case is not treated as the case of an accomplice.[1]

§ 383. Whether a *party to a negotiable instrument*, who has given it credit and currency by his signature, shall afterwards be admitted as a witness, in a suit between other persons, to prove the instrument *originally void*, is a question upon which Judges have been much divided in opinion. The leading case against the admissibility of the witness is that of *Walton* v. *Shelley*,[2] in which the indorser of a promissory note was called to prove it void for usury in its original concoction. The security was in the hands of an innocent holder. Lord Mansfield and the other learned Judges held, that, upon general grounds of public policy, the witness was inadmissible; it being "of consequence to mankind, that no person should hang out false colors to deceive them, by first affixing his signature to a paper, and then afterwards giving testimony to invalidate it." And in corroboration of this opinion, they referred to the spirit of that maxim of the Roman Law, — *Nemo, allegans suam turpitudinem, est audiendus.*[3]

1 Rex *v.* Despard, 28 Howell's St. Tr. 489, per Ld. Ellenborough.

2 1 T. R. 296.

3 This maxim, though it is said not to be expressed, in terms, in the text of the Corpus Juris, (see Gilmer's Rep. p. 275, note,) is exceedingly familiar among the civilians; and is found in their Commentaries on various laws in the Code. See Corpus Juris Glossatum, Tom iv. col. 461, 1799; Corp. Juris Gothofredi (fol. ed.) Cod. lib. 7, tit. 8, l. 5, in margine; Codex Justiniani (4to. Parisiis, 1550), lib. 7, tit. 16, l 1; Ib. tit. 8, l. 5, in margine. It seems formerly to have been deemed sufficient to exclude witnesses, testifying to their own turpitude; but the objection is now held to go only to the credibility of the testimony. 2 Stark. Evid. 9, 10; 2 Hale, P. C. 280; 7 T. R. 609, per Grose, J.; Ib. 611, per Lawrence, J. Thus, a witness is competent to testify that his former oath was corruptly false. Rex *v.* Teal, 11 East, 309; Rands *v.* Thomas, 5 M. & S. 244.

§ 384. The doctrine of this case afterwards came under discussion in the equally celebrated case of *Jordaine* v. *Lashbrooke*.[1] This was an action by the indorsee of a bill of exchange against the acceptor. The bill bore date at Hamburgh; and the defence was, that it was drawn in London, and so was void at its creation, for want of a stamp; the statute[2] having declared, that unstamped bills should neither be pleaded, given in evidence, or allowed to be available, in law or equity. The indorser was offered by the defendant as a witness, to prove this fact, and the Court held that he was admissible. This case might, perhaps, have formed an exception to the general rule, adopted in *Walton* v. *Shelley*, on the ground, that the general policy of the law of commerce ought to yield to the public necessity in matters of revenue; and this necessity was relied upon by two of the three learned Judges who concurred in the decision. But they also concurred with Lord Kenyon in reviewing and overruling the doctrine of that case. The rule, therefore, now received in England, is, that the party to any instrument, whether negotiable or not, is a competent witness to prove any fact, to which any other witness would be competent to testify; provided he is not shown to be legally infamous, and is not directly interested in the event of the suit. The objection, that thereby he asserts that to be false which he has solemnly attested or held out to the world as true, goes only to his credibility with the Jury.[3]

1 7 T. R. 599.

2 31 Geo. 3, c. 25, § 2, 16. This act was passed subsequent to the decision of Walton *v.* Shelley, 1 T. R. 296.

3 1 Phil. Evid. 39, 40. On this ground, parties to other instruments, as well as subscribing witnesses, if not under some other disability, are, both in England and in the United States, held admissible witnesses to impeach the original validity of such instruments. 7 T. R. 611, per Lawrence, J.; Heward *v.* Shipley, 4 East, 180; Lowe *v.* Jolliffe, 1 W. Bl. 365; Austin *v.*

§ 385. The Courts of some of the *American States* have adopted the later English rule, and admitted the indorser, or other party to an instrument, as a competent witness to impeach it, in all cases where he is not on other grounds disqualified. In other States, decisions are found which go to the exclusion of the party to an instrument, in every case, when offered as a witness to defeat it, in the hands of a third person; thus importing into the law of evidence the maxim of the Roman Law, in its broadest extent. In other States, the Courts, referring the rule of exclusion to the ground of public convenience, have restricted its application to the case of a negotiable security, actually negotiated and put into circulation before its maturity, and still in the hands of an innocent indorsee, without notice of the alleged original infirmity, or any other defect in the contract. And in this case, the weight of American authority may now be considered as against the admissibility of the witness, to impeach the original validity of the security; although the contrary is still holden in some Courts, whose decisions in general are received with the highest respect.[1]

Willes, Bull. N. P. 264; Howard *v.* Brathwaite, 1 Ves. & B. 202, 208; Title *v.* Grevett, 2 Ld Raym. 1008; Twambly *v.* Henley, 4 Mass. 441.

[1] The rule, that the indorser of a negotiable security, negotiated before it was due, is not admissible as a witness to prove it originally void, when in the hands of an innocent indorsee, is sustained by the Supreme Court of the United States, in The Bank of the United States *v.* Dunn, 6 Peters, 51, 57, explained and confirmed in The Bank of the Metropolis *v.* Jones, 8 Peters, 12, and in The United States *v.* Leffler, 11 Peters, 86, 94, 95; Scott *v.* Lloyd, 12 Peters, 149; Henderson *v.* Anderson, 3 Howard, S. C. Rep. 73; Taylor *v.* Luther, 2 Sumner, 235, per Story, J. It is also adopted in *Massachusetts;* Churchill *v.* Suter, 4 Mass. 156; Fox *v.* Whitney, 16 Mass. 118; Packard *v.* Richardson, 17 Mass. 122. See also the case of Thayer *v.* Crossman, 1 Metcalf, R. 416, in which the decisions are reviewed, and the rule clearly stated and vindicated by Shaw, C. J. And in *New Hampshire;* Bryant *v.* Ritterbush, 2 N. Hamp. 212; Hadduck *v.* Wilmarth, 5 N. Hamp. 187. And in *Maine;* Deering *v.* Sawtel, 4 Greenl. 191; Chandler *v.* Morton, 5 Greenl. 374. And in *Pennsylvania;* O'Brien *v.* Davis, 6 Watts, 498, Harrisburg Bank *v.* Forster, 8 Watts, 304, 309. In *Louisiana*, the rule was stated and conceded, by Porter, J. in Shamburg *v.* Commagere, 10 Martin,

§ 386. Another class of persons, incompetent to testify in a cause, consists of those who are *interested in its result.*

18; and was again stated, but an opinion withheld, by Martin, J. in Cox *v.* Williams, 5 Martin, 139, N S. In *Vermont*, the case of Jordaine *v.* Lashbrooke, was followed, in Nichols *v.* Holgate, 2 Aik. 138; but the decision is said to have been subsequently disapproved by all the Judges, in Chandler *v.* Mason, 2 Verm. 198, and the rule in Walton *v.* Shelley, approved. In *Ohio*, the indorser was admitted to prove facts *subsequent* to the indorsement; the Court expressing no opinion upon the general rule, though it was relied upon by the opposing counsel. Stone *v.* Vance, 6 Ohio Rep. 246. In *Mississippi*, the witness was admitted for the same purpose; and the rule in Walton *v.* Shelley was approved. Drake *v.* Henly, Walker, R. 541. In *Illinois*, the indorser has been admitted, where, in taking the note, he acted as the agent of the indorsee, to whom he immediately transferred it; without any notice of the rule. Webster *v.* Vickers, 2 Scam. 295. But the rule of exclusion has been rejected, and the general doctrine of Jordaine *v.* Lashbrooke, followed, in *New York;* Stafford *v.* Rice, 5 Cowen, 23; Bank of Utica *v.* Hillard, Ib. 153; Williams *v.* Walbridge, 3 Wend. 415 And in *Virginia;* Taylor *v.* Beck, 3 Randolph, R. 316. And in *Connecticut;* Townsend *v.* Bush, 1 Conn. 260. And in *South Carolina;* Knight *v.* Packard, 3 McCord, 71. And in *Tennessee;* Stump *v.* Napier, 2 Yerger, 35. In *Maryland*, it was rejected by three Judges against two, in Ringgold *v.* Tyson, 3 H. & J. 172. It was also rejected in *New Jersey*, in Freeman *v.* Brittin, 2 Harrison, 192. And in *North Carolina;* Guy *v.* Hall, 3 Murthy, 151. And in *Georgia;* Slack *v.* Moss, Dudley, 161. And in *Alabama;* Todd *v.* Stafford, 1 Stew. 199; Griffing *v.* Harris, 9 Porter, 226. In *Kentucky*, in the case of Gorham *v.* Carrol, 3 Littel, 221, where the indorser was admitted as a witness, it is to be observed, that the note was indorsed without recourse to him, and thereby marked with suspicion; and that the general rule was not considered. More recently in *New Hampshire*, the doctrine of Walton *v.* Shelley, has been denied, and the rule of the Roman Law has been admitted only as a rule of estoppel upon the parties to the transaction and in regard to their rights, and not as a rule of evidence, affecting the competency of witnesses; and therefore, the maker of a note, being released by his surety, was held competent, in an action by an indorsee against the surety, to testify to an alteration of the note, made by himself and the payee, which rendered it void as to the surety. Haines *v* Dennett, 11 N. Hamp. 180. See further, 2 Stark. Evid. 179, note (A); 1 Phil. Evid. p 44; Cowen & Hill's note 78, and Suppt.; Bayley on Bills, p. 586, note (b), (Phillips & Sewell's Ed.) But all these decisions against the rule in Walton *v.* Shelley, except that in New Jersey, and the last cited case in New Hampshire, were made long before that rule was recognised and adopted by the Supreme Court of the United States.

The principle on which these are rejected, is the same with that which excludes the parties themselves, and which has already been considered;[1] namely, the danger of perjury, and the little credit generally found to be due to such testimony in judicial investigations. This disqualifying interest, however, must be some legal, certain, and immediate interest, however minute, either in the event of the cause itself; or in the record, as an instrument of evidence, in support of his own claims, in a subsequent action.[2] It must be a legal interest, as distinguished from the prejudice or bias resulting from friendship or hatred, or from consanguinity, or any other domestic or social or any official relation, or any other motives by which men are generally influenced; for these go only to the credibility. Thus, a servant is a competent witness for his master, a child for his parent, a poor dependent for his patron, an accomplice for the government, and the like. Even a wife has been held admissible against a prisoner, though she believed that his conviction would save her husband's life.[3] The rule of the Roman Law, — *Idonei non videntur esse testes, quibus imperari potest ut testes fient*,[4] — has never been recognised in the Common Law, as affecting the competency; but it prevails in those countries in whose jurisprudence the authority of the Roman Law is recognised. Neither does the Common Law regard as of binding force the rule that excludes an advocate from testifying in the cause, for his

[1] Ante, § 326, 327, 329. And see the observations of Best, C. J. in Hovill *v.* Stephenson, 5 Bing. 493.

[2] 1 Stark. Evid. 102; Bent *v.* Baker, 3 T. R. 27; Doe *v.* Tyler, 6 Bing. 390, per Tindal, C. J.; Smith *v.* Prager, 7 T. R. 62; Willox *v.* Farrell, 1 H. Lord's Cas. 93.

[3] Rex *v.* Rudd, 1 Leach, Cr. Cas. 135, 151. In weighing the testimony of witnesses naturally biassed, the rule is, to give credit to their statements of facts, and to view their deductions from facts with suspicion. Dillon *v.* Dillon, 3 Curt. 96.

[4] Dig. lib. 22, tit. 5, l. 6. Poth. Obl. [793]. In Lower Canada, the incompetency of the relations and connexions of the parties, in civil cases, beyond the degree of cousins german, is removed, by Stat. 41 Geo. 3, c. 8. See Rev. Code 1845, p. 144.

client; — *Mandatis cavetur, ut Præsides attendant, ne patroni, in causa cui patrocinium præstiterunt, testimonium dicunt.*[1] But on grounds of public policy, and for the purer administration of justice, the relation of lawyer and client is so far regarded by the rules of practice in some Courts, as that the lawyer is not permitted to be both advocate and witness for his client in the same cause.[2]

§ 387. The *interest*, too, must be *real, and not merely apprehended* by the party. For it would be exceedingly dangerous to violate a general rule, because, in a particular case, an individual does not understand the nature or extent of his rights and liabilities. If he believes and states that he has no interest, the very statement of the objection to his competency may inform him that he has; and, on the other hand, if he erroneously thinks and declares that he is interested, he may learn, by the decision of the Court, that he is not. Indeed, there would be danger in resting the rule on the judgment of a witness, and not on the fact itself; for the apprehended existence of the interest might lead his judgment to a wrong conclusion. And moreover, the inquiry which would be necessary into the grounds and degree of the witness's belief, would always be complicated, vague, and indefinite, and productive of much inconvenience. For these reasons, the more simple and practicable rule has been adopted of determining the admissibility of the witness by the actual existence, or not, of any disqualifying interest in the matter.[3]

[1] Dig. lib. 22, tit. 5, l. 25; Poth. Obl. [793].

[2] Stones *v.* Byron, 4 Dowl. & Lowndes, 393; Dunn *v.* Packwood, 11 Jur. 242; Reg. Gen. Sup. Court, N Hamp Reg. 23; 6 N. Hamp. R. 580.

[3] 1 Phil. Evid. 127, 128; 1 Stark. Evid. 102; Gresley on Evid. p. 253; Tait on Evid. p. 351. In America, and in England, there are some early but very respectable authorities to the point, that a witness, believing himself interested, is to be rejected as incompetent. See Fotheringham *v.* Greenwood, 1 Stra. 129; Trelawny *v.* Thomas, 1 H. Bl 307, per Ld. Loughborough, C. J. and Gould, J.; L'Amitie, 6 Rob. Adm 269, note (a); Plumb *v.* Whiting, 4 Mass. 518; Richardson *v.* Hunt, 2 Munf. 148; Freeman *v.* Lucket, 2 J. J. Marsh. 390. But the weight of modern authority is clearly

§ 388. If the witness believes himself to be under an *honorary obligation*, respecting the matter in controversy, in favor of the party calling him, he is nevertheless a competent witness, for the reasons already given; and his credibility is left with the Jury.[1]

§ 389. The disqualifying interest of the witness must be in the event of the cause itself, and not in the *question* to be decided. His liability to a like action, or his standing in the same predicament with the party, if the verdict cannot be given in evidence for or against him, is an interest in the question only, and does not exclude him.[2] Thus, one underwriter may be a witness for another underwriter upon the same policy;[3] or, one seaman for another, whose claim for wages is resisted, on grounds equally affecting all the crew;[4] or, one freeholder for another, claiming land under the same title, or by the same lines and corners;[5] or, one devisee for another, claiming under the same will;[6] or, one trespasser for his co-trespasser;[7] or, a creditor for his debtor;[8] or, a tenant

the other way. See Commercial Bank of Albany *v.* Hughes, 17 Wend. 94, 101, 102; Stall *v.* The Catskill Bank, 18 Wend. 466, 475, 476; Smith *v.* Downs, 6 Conn. 371; Long *v.* Baillé, 4 S. & R. 222; Dellone *v.* Rehmer, 4 Watts, 9; Stimmel *v.* Underwood, 3 G. & J. 282; Havis *v.* Barkley, 1 Harper's Law Rep. 63.

[1] Pederson *v.* Stoffles, 1 Campb. 144; Solarete *v.* Melville, 1 Man. & Ryl. 198; 1 Phil. Evid. 128; 1 Stark. Evid. 102; Gilpin *v.* Vincent, 9 Johns. 219; Moore *v.* Hitchcock, 4 Wend. 292; Union Bank *v.* Knapp, 3 Pick. 96, 108; Smith *v.* Downs, 6 Conn. 365; Stimmel *v.* Underwood, 3 Gill & Johns. 282.

[2] Evans *v.* Eaton, 7 Wheat. 356, 424, per Story, J.; Van Nuys *v.* Terhune, 3 Johns. Cas. 82; Stewart *v.* Kip, 5 Johns. 256; Evans *v.* Hettich, 7 Wheat. 453.

[3] Bent *v.* Baker, 3 T. R. 27.

[4] Spurr *v.* Pearson, 1 Mason, 104; Hoyt *v.* Wildfire, 3 Johns. 518.

[5] Richardson *v.* Carey, 2 Rand. 87; Owings *v.* Speed, 5 Wheat. 423.

[6] Jackson *v.* Hogarth, 6 Cowen, 248.

[7] Per Ashhurst, J. in Walton *v.* Shelley, 1 T. R. 301. See also Blackett *v.* Weir, 5 B. & C. 387, per Abbott, C. J.; Duncan *v.* Meikleham, 3 C. & P. 172; Curtis *v.* Graham, 12 Martin, 289.

[8] Paull *v.* Brown, 6 Esp. 34; Nowell *v.* Davies, 5 B. & Ad. 368.

by the curtesy, or tenant in dower, for the heir at law, in a suit concerning the title.[1] And the purchaser of a license to use a patent may be a witness for the patentee, in an action for infringing the patent.[2]

§ 390. The *true test of the interest* of a witness is, that he will either gain or lose by the direct legal operation and effect of the judgment, or, that the record will be legal evidence for or against him, in some other action.[3] It must be a present, certain, and vested interest, and not an interest uncertain, remote, or contingent. Thus, the heir apparent to an estate is a competent witness in support of the claim of his ancestor; though one, who has a vested interest in remainder, is not competent.[4] And if the interest is of a doubtful nature, the objection goes to the credit of the witness, and not to his competency.[5] For, being always presumed to be competent, the burden of proof is on the objecting party, to sustain his exception to the competency; and if he fails satisfactorily to establish it, the witness is to be sworn.

§ 391. The *magnitude or degree of the interest* is not regarded, in estimating its effect on the mind of the witness; for it is impossible to measure the influence which any given interest may exert. It is enough, that the interest which he has in the subject is direct, certain, and vested, however small

[1] Jackson *v.* Brooks, 8 Wend. 426; Doe *v.* Maisey, 1 B. & Ad. 439.

[2] De Rosnie *v.* Fairlie, 1 M. & Rob. 457.

[3] 1 Gilb. Evid. by Lofft, p. 225; Bull. N. P. 284; Bent *v.* Baker, 3 T. R. 27; 6 Bing. 394, per Tindal, C. J.; Ante, § 386; Rex *v.* Boston, 4 East, 581, per Ld. Ellenborough.

[4] Smith *v.* Blackham, 1 Salk. 283; Doe *v.* Tyler, 6 Bing. 390. But in an action for waste, brought by a landlord, who is tenant for life, the remainder-man is a competent witness for the plaintiff; for the damages would not belong to the witness, but to the plaintiff's executor. Leach *v.* Thomas, 7 C. & P. 327.

[5] Bent *v.* Baker, 3 T. R. 27, 32; Jackson *v.* Benson, 2 Y. & J. 45; Rex *v.* Cole, 1 Esp. 169.

may be its amount;[1] for, interest being admitted as a disqualifying circumstance in any case, it must of necessity be so in every case, whatever be the character, rank, or fortune of the party interested. Nor is it necessary, that the witness should be interested in that which is the subject of the suit; for if he is liable for the costs, as in the case of a *prochein amy*, or a guardian, or the like, we have already seen,[2] that he is incompetent. And though, where the witness is equally interested on both sides, he is not incompetent; yet if there is a certain excess of interest on one side, it seems that he will be incompetent to testify on that side; for he is interested, to the amount of the excess, in procuring a verdict for the party, in whose favor his interest preponderates.[3]

§ 392. The *nature of the direct interest* in the event of the suit which disqualifies the witness, may be illustrated by reference to some adjudged cases. Thus, persons having become bail for the defendant have been held incompetent to testify as witnesses on his side; for they are immediately

[1] Burton *v.* Hinde, 5 T. R. 173; Butler *v.* Warren, 11 Johns. 57; Doe *v.* Tooth, 3 Y. & J. 19.

[2] Ante, § 347. See also, Post, § 401, 402.

[3] Larbalestier *v.* Clark, 1 B. & Ad. 899. Where this preponderance arose from a liability to costs only, the rule formerly was to admit the witness; because of the extreme difficulty which frequently arose, of determining the question of his liability to pay the costs. See Ilderton *v.* Atkinson, 7 T. R. 480; Birt *v.* Kershaw, 2 East, 458. But these cases were broken in upon, by Jones *v.* Brooke, 4 Taunt. 464; and the witness is now held incompetent, wherever there is a preponderancy of interest on the side of the party adducing him, though it is created only by the liability to costs. Townsend *v.* Downing, 14 East, 565; Hubbly *v.* Brown, 16 Johns. 70; Scott *v.* McLellan, 2 Greenl. 199; Bottomley *v.* Wilson, 3 Stark R. 148; Harman *v.* Lesbrey, 1 Holt's Cas. 390; Edmonds *v.* Lowe, 8 B. & C. 407. And see Mr. Evans's observations, in 2 Poth. Obl. p. 269, App. No. 16. The existence of such a rule, however, was regretted by Mr. Justice Littledale, in 1 B. & Ad. 903; and by some it is still thought that the earlier cases, above cited, are supported by the better reason. See further, Barretto *v.* Snowden, 5 Wend. 181; Hall *v.* Hale, 8 Conn. 336.

made liable, or discharged, by the judgment against or in favor of the principal. And if the bail have given security for the appearance of the defendant, by depositing a sum of money with the officer, the effect is the same.[1] If an underwriter, who has paid his proportion, is to be repaid in the event of the plaintiff's success in a suit against another underwriter upon the same policy, he cannot be a witness for the plaintiff.[2] A creditor, whether of a bankrupt, or of an estate, or of any other person, is not admissible as a witness to increase or preserve the fund, out of which he is entitled to be paid, or otherwise benefitted.[3] Nor is a bankrupt competent in an action by his assignees, to prove any fact tending to increase the fund; though both he and his creditors may be witnesses to diminish it.[4] The same is true of a legatee, without a

[1] Lacon *v.* Higgins, 3 Stark. R. 132; 1 T. R. 164, per Buller, J. But in such cases, if the defendant wishes to examine his bail, the Court will either allow his name to be stricken out, on the defendant's adding and justifying another person as his bail; or, even at the trial, will permit it to be stricken out of the bail piece, upon the defendant's depositing a sufficient sum with the proper officer. 1 Tidd's Pr. 259; Baillie *v.* Hole, 1 Mood. & M. 289; 3 C. & P. 560, S. C.; Whatley *v.* Fearnley, 2 Chitty, R. 103. And in the like manner the surety in a replevin bond may be rendered a competent witness for the plaintiff. Bailey *v.* Bailey, 1 Bing. 92. And so, of the indorser of a writ, who thereby becomes surety for payment of the costs. Roberts *v.* Adams, 9 Greenl. 9. See further, Salmon *v.* Rance, 3 S. & R. 311, 314; Hall *v.* Baylies, 15 Pick. 51, 53; Beckley *v.* Freeman, Ib. 468; Allen *v.* Hawks, 13 Pick. 79; McCulloch *v.* Tyson, 2 Hawks, 336; Post, § 430; Comstock *v.* Paie, 3 Rob. Louis. R. 440.

[2] Forrester *v.* Pigou, 3 Campb. 380; 1 M. & S. 9, S. C.

[3] Craig *v.* Cundell, 1 Campb. 381; Williams *v.* Stevens, 2 Campb. 301; Shuttleworth *v.* Bravo, 1 Stra. 507; Powel *v.* Gordon, 2 Esp. 735; Stewart *v.* Kip, 5 Johns. 256; Holden *v.* Hearn, 1 Beav. 445. But to disqualify the witness, he must be legally entitled to payment out of the fund. Phenix *v.* Ingraham, 5 Johns. 427; Peyton *v.* Hallett, 1 Caines, 363, 379; Howard *v.* Chadbourne, 3 Greenl. 461; Marland *v.* Jefferson, 2 Pick. 240; Wood *v.* Braynard, 9 Pick. 322. A mere expectation of payment, however strong, if not amounting to a legal right, has been deemed insufficient to render him incompetent. Seaver *v.* Bradley, 6 Greenl. 60.

[4] Butler *v.* Cooke, Cowp. 70; Ewens *v.* Gold, Bull. N. P. 43; Green *v.* Jones, 2 Campb. 411; Loyd *v.* Stretton, 1 Stark. R. 40; Rudge *v.* Fergu-