prescription for all the inhabitants to dig clams in a certain place;[1] nor, to prove a prescriptive right of way for all the inhabitants.[2] So, where the right to a seat in the common council of a borough was in controversy, and it was insisted, that by prescription no person was entitled, unless he was an inhabitant and also had a burgage tenure; it was held, that, though a person having but one of these qualifications was a competent witness to prove the prescription, one who had them both was not; for he would thereby establish an exclusive right in favor of himself.[3] So, where a corporation was lord of a manor, and had approved and leased a part of the common, a freeman was held incompetent to prove that a sufficiency of common was left for the commoners.[4] So, one who has acted in breach of an alleged custom by the exercise of a particular trade, is not a competent witness to disprove the existence of such custom.[5] Nor is the owner of property within a chapelry a competent witness to disprove an immemorial usage, that the land-owners there ought to repair the chapel.[6] And it is proper here to add, that in order to exclude a witness, where the verdict depends on a custom, which he is interested to support, it seems to be necessary that the custom should be stated on the record;[7] for it is said, that the effect of the verdict to support the custom may be aided by evidence.[8]

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[1] Lufkin *v.* Haskell, 3 Pick. 356; Moore *v.* Griffin, 9 Shepl. 350.

[2] Odiorne *v.* Wade, 8 Pick. 518. The statutes which render the inhabitants of towns competent witnesses, where the corporation is a party, or is interested, apply only to cases of corporate rights or interest, and not to cases of individual and private interest, though these may extend to every inhabitant. See Ante, § 331.

[3] Stevenson *v.* Nevinson, Mayor, &c. 2 Ld. Raym. 1353.

[4] Burton *v.* Hinde, 5 T. R. 174.

[5] The Carpenters, &c. of Shrewsbury *v.* Hayward, 1 Doug. 374.

[6] Rhodes *v.* Ainsworth, 1 B. & Ald. 87. See also Lord Falmouth *v.* George, 5 Bing. 286.

[7] Ld. Falmouth *v.* George, 5 Bing. 286; Stevenson *v.* Nevinson et al. 2 Ld. Raym. 1353.

[8] 1 Stark. Evid. 115, note (e).

§ 406. There are some cases, in which the interest of the witness falls under *both branches* of this rule, and in which he has been rejected, sometimes on the ground of immediate interest in the event of the suit, and sometimes on the ground of interest in the record, as an instrument of evidence. Such is the case of the tenant in possession in an action of ejectment; who is held incompetent, either to support his landlord's title,[1] or, to prove that himself, and not the defendant, was the tenant in possession of the land.[2] And where a declaration was served on two tenants, in possession of different parts of the premises, and a third person entered into a rule to defend alone, as landlord, it was held, that neither of the tenants was a competent witness for the landlord, to prove an adverse possession by the other of the part held by him; for as they were identified with the landlord in interest, the judgment for the plaintiff would be evidence of his title, in a future action against them for the mesne profits.[3]

§ 407. So, in *criminal cases*, a person interested in the record is not a competent witness. Thus, an *accessary*, whether before or after the fact, is not competent to testify for the principal.[4] And where several were indicted for a

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[1] Doe *v.* Williams, Cowp. 621; Bourne *v.* Turner, 1 Stra. 682.

[2] Doe *v.* Wilde, 5 Taunt. 183; Doe *v.* Bingham, 4 B. & Ald. 672.

[3] Doe *v.* Preece, 1 Tyrwh. 410. Formerly, it was not material in England, as it still is not in the United States, to determine with precision, in which of these modes the witness was interested. But by Stat. 3 & 4 W. 4, c. 42, § 26, 27, the objection arising from interest in the record, as a future instrument of evidence, is done away; the Court being directed, whenever this objection is taken, to indorse the name of the witness on the record or document, on which the trial shall be had, and of the party on whose behalf he was called to testify; after which the verdict or judgment in that action shall never be evidence for or against the witness, or any one claiming under him The practice under this statute seems to be not yet completely settled; but the cases which have arisen, and which it is deemed unnecessary here to examine, are stated and discussed in Phil. & Am on Evid. p. 108–113; 1 Phil. Evid. 114–117. See also Poole *v.* Palmer, 9 M. & W. 71.

[4] 1 Stark. Evid. 130.

conspiracy, the wife of one was held not admissible as a witness for the others; a joint offence being charged, and an acquittal of all the others being a ground of discharge for her husband.[1] Nor is the wife of one joint trespasser a competent witness for another, even after the case is already clearly proved against her husband.[2]

§ 408. The extent and meaning of the rule, by which an interested witness is rejected as incompetent, may be further illustrated by reference to some cases, in which the witness has been *deemed not disqualified.* We have already seen, that mere wishes or bias on the mind of the witness in favor of the party producing him, or strong hopes or expectations of benefit, or similarity of situation, or any other motive, short of an actual and legal interest in the suit, will not disqualify the witness.[3] Such circumstances may influence his mind, and affect his opinions, and perhaps may tempt him at least to give a false color to his statements; and therefore they should be carefully considered by the Jury, in determining the weight or credibility to be given to his testimony; but they are not deemed sufficient to justify its utter exclusion from the Jury. It may now be further observed, that a *remote, contingent, and uncertain interest* does not disqualify the witness. Thus, a paid legatee of a specific sum, or of a chattel, is a competent witness for the executor; for though the money paid to a legatee may sometimes be recovered back, when necessary for the payment of paramount claims, yet it is not certain that it will be needed for such purpose; nor is it certain, if the legacy has not been paid, that there are not other funds sufficient to pay it.[4] So, also, a creditor of an estate, not in a course of liquidation as an insolvent estate, is a competent witness for the administrator; for he stands in the same relation to the estate now, as he did to the

1 Rex *v.* Locker, 5 Esp. 107; 2 Russ. on Crimes, 602; Ante, § 403.
2 Hawkesworth *v.* Showler, 12 M. & W. 45.
3 Ante, § 387, 389.
4 Clarke *v.* Gannon, Ry. & M. 31.

debtor in his lifetime; and the probability that his testimony may be beneficial to himself, by increasing the fund out of which he is to be paid, is equally remote and contingent, in both cases.[1] It is only where his testimony will certainly have that effect, as in the case of a creditor to an insolvent estate, or a residuary legatee, or a distributee, that the witness is rendered incompetent.[2] Yet in these cases, and in the case of a creditor to a bankrupt estate, if the legatee, distributee, or creditor has assigned his interest to another person, even equitably, his competency is restored.[3] In an action of covenant against a lessee for not laying the stipulated quantity of manure upon the land; upon a plea of performance, a sublessee of the defendant is a competent witness for him, to support the plea;[4] for it does not appear that he is under the like duty to the defendant, or that a recovery by the latter would place the witness in a state of security against a similar action.[5] Upon the same principle, a defendant against whom a civil action is pending, is a competent witness for the government on the trial of an indictment for perjury, against one who has been summoned as a witness for the plaintiff in the civil action.[6]

§ 409. Thus, also, the tenant in possession is a competent witness to support an action on the case, brought by the reversioner for an injury done to the inheritance.[7] So, in an action against an administrator for a debt due by the intestate, a surety in the administrator's bond in the Ecclesiastical Court is a competent witness for him, to prove a tender; for

1 Paull *v.* Brown, 6 Esp. 34; Davies *v.* Davies, 1 Mood. & M. 345; Carter *v.* Pierce, 1 T. R. 164. An annuitant under the will is also a competent witness for the executor, in an action against him for the debt of the testator. Nowell *v.* Davies, 5 B. & Ad. 368.
2 Ante, § 392.
3 Heath *v.* Hall, 4 Taunt. 326; Boynton *v.* Turner, 13 Mass. 391.
4 Wishaw *v.* Barnes, 1 Campb. 341.
5 Ante, § 394.
6 Hart's case, 2 Rob. Virg. Rep. 819.
7 Doddington *v.* Hudson, 1 Bing. 257.

it is but a bare possibility that an action may be brought upon the bond.[1] So, in an action against a debtor, who pleads the insolvent debtor's act in discharge, another creditor is a competent witness for the plaintiff, to prove, that in fact the defendant is not within the operation of the act.[2] An executor or trustee under a will, taking no beneficial interest under the will, is a good attesting witness.[3] And in an action against an administrator, upon a bond of the intestate, and a plea of *plene administravit* by the payment of another bond debt, the obligee in the latter bond is a competent witness to support the plea.[4] A trespasser, not sued, is a competent witness for the plaintiff, against his co-trespasser.[5] In a *qui tam* action for the penalty for taking excessive usury, the borrower of the money is a competent witness for the plaintiff.[6] A person who has been arrested on mesne process and suffered to escape, is a competent witness for the plaintiff, in an action against the sheriff for the escape;[7] for though the whole debt may be recovered against the sheriff, yet, in an action on the judgment against the original debtor, the latter can neither plead in bar, nor give in evidence in mitigation of damages, the judgment recovered against the sheriff. And one who has been rescued, is a competent witness for the

[1] Carter *v.* Pierce, 1 T. R. 163.

[2] Norcott *v.* Orcott, 1 Stra. 650.

[3] Phipps *v.* Pitcher, 6 Taunt. 220; Comstock *v.* Hadlyme, 8 Conn. R. 254. In Massachusetts, the executor has been held incompetent to prove the will in the Court of Probate, he being party to the proceedings and liable to the cost of the trial. Sears *v.* Dillingham, 12 Mass. 358. But the will may be proved by the testimony of the other witnesses, he having been a competent witness at the time of attestation. Ibid.

[4] Bull. N P. 143; 1 Ld. Raym. 745.

[5] Morris *v.* Daubigny, 5 Moore, 319. In an action against the printer of a newspaper for a libel, a proprietor of the paper is a competent witness, as he is not liable to contribution. Moscati *v.* Lawson, 7 C. & P. 52.

[6] Smith *v* Prager, 7 T. R. 60.

[7] Cass *v.* Cameron, Peake's Cas. 124; Hunter *v.* King, 4 B. & Ald. 210. If the escape was committed while the debtor was at large, under a bond for the prison liberties, the gaoler, who took the bond, is a competent witness for the sheriff. Stewart *v.* Kip, 5 Johns. 256.

defendant, in an action against him for the rescue.[1] So, a mariner, entitled to a share in a prize, is a competent witness for the captain, in an action brought by him for part of the goods taken.[2] In all these cases, it is obvious, that whatever interest the witness might have, it was merely contingent and remote; and on this ground the objection has been held to go only to his credibility.

§ 410. It is hardly necessary to observe, that where a witness is produced to testify *against his interest*, the rule, that interest disqualifies, does not apply, and the witness is competent.

§ 411. The general rule, that a witness interested in the subject of the suit or in the record, is not competent to testify on the side of his interest, having been thus stated and explained, it remains for us to consider some of the *exceptions* to the rule, which, for various reasons, have been allowed. These exceptions chiefly prevail either in criminal cases, or in the affairs of trade and commerce, and are admitted on grounds of public necessity and convenience, and to prevent a failure of justice. They may be conveniently classed thus; — (1.) Where the witness, in a criminal case, is entitled to a reward, upon conviction of the offender; — (2.) Where, being otherwise interested, he is made competent by statute; — (3.) The case of agents, carriers, factors, brokers, or servants, when called to prove acts done for their principals, in the course of their employment; and — (4.) The case of a witness, whose interest has been acquired after the party had become entitled to his testimony. To these a few others may be added, not falling under either of these heads.

§ 412. And, in the *first place*, it is to be observed, that the circumstance that a witness for the prosecution will be *entitled to a reward from the government*, upon conviction of the

[1] Wilson *v.* Gary, 6 Mod. 211.

[2] Anon. Skin. 403.

offender, or to a restoration, as owner of the property stolen, or to a portion of the fine or penalty inflicted, is not admitted as a valid objection to his competency. By the very statute, conferring a benefit upon a person, who, but for that benefit, would have been a witness, his competency is virtually continued, and he is as much a witness after that benefit, as he would have been before. The case is clear, upon grounds of public policy, with a view to the public interest, and because of the principle on which rewards are given. The public has an interest in the suppression of crime, and the conviction of criminals; it is with a view to stir up greater vigilance in apprehending, that rewards are given; and it would defeat the object of the legislature, to narrow the means of conviction, by means of those rewards, and to exclude testimony, which otherwise would have been admissible.[1] The distinction between these excepted cases, and those which fall under the general rule, is, that in the latter, the benefit resulting to the witness is created chiefly for his own sake, and not for public purposes. Such is the case of certain summary convictions, heretofore mentioned.[2] But where it is plain, that the infliction of a fine or penalty is intended as a punishment, in furtherance of public justice, rather than as an indemnity to the party injured, and that the detection and conviction of the offender are the objects of the legislature, the case will be within the exception, and the person benefitted by the conviction will, notwithstanding his interest, be competent.[3] If the reward to which the witness will be

[1] Rex *v.* Williams, 9 B. & C. 549, 556, per Bayley, J. See also 1 Gilb. Evid. by Lofft, 245 – 250.

[2] Ante, § 403.

[3] Rex *v.* Williams, 9 B. & C. 549, 560, per Bayley, J. See also the case of The Rioters, 1 Leach, Cr. Cas. 353, note (a), where the general question of the admissibility of witnesses, to whom a reward was offered by the government, being submitted to the twelve Judges, was resolved in the affirmative. McNally's Evid. p. 61, Rule 12; United States *v.* Murphy, 16 Peters, R. 203; United States *v.* Wilson, 1 Baldw. 90; Commonwealth *v.* Moulton, 9 Mass. 30; Rex *v.* Teasdale, 3 Esp. 68, and the cases cited in Mr. Day's note; Salisbury *v.* Connecticut, 6 Conn. 101; 1 Phil. Evid. 252, the cases cited in Cowen & Hill's notes, Vol. 3, p. 1556.

entitled has been *offered by a private individual*, the rule is the same, the witness being still competent; but the principle on which it stands is different; namely this, that the public have an interest upon public grounds, in the testimony of every person who knows any thing as to a crime; and that nothing which private individuals can do will take away the public right.[1] The interest, also, of the witness is contingent; and, after all, he may not become entitled to the reward.

§ 413. The reason of this exception extends to, and accordingly it has been held to include, the cases where, instead of a pecuniary reward, a *pardon*, or *exemption from prosecution*, is offered by statute to any person participating in a particular offence, provided another of the parties should be convicted upon his evidence. In such cases, Lord Ellenborough remarked, that the statute gave a parliamentary capacitation to the witness, notwithstanding his interest in the cause; for it was not probable that the legislature would intend to discharge one offender, upon his discovering another, so that the latter might be convicted, without intending that the discoverer should be a competent witness.[2]

§ 414. And in like manner, where the witness will directly derive *any other benefit* from the conviction of the offender, he is still a competent witness for the government, in the cases already mentioned. Formerly, indeed, it was held, that the *person whose name* was alleged to be *forged*, was not admissible as a witness against the prisoner, on an indictment for the forgery, upon the notion that the prosecution was in the nature of a proceeding *in rem*, and that the conviction

[1] 9 B. & C. 556, per Bayley, J.

[2] Heward *v.* Shipley, 4 East, 180, 183. See also Rex *v.* Rudd, 1 Leach, Cr. Cas. 151, 156 – 158; Bush *v.* Ralling, Sayer, 289; Mead *v.* Robinson, Willes, 422; Sutton *v.* Bishop, 4 Burr. 2283.

warranted a judicial cancellation of the instrument. And the prosecutor in an indictment for perjury has been thought incompetent, where he had a suit pending, in which the person prosecuted was a material witness against him, or was defendant against him in a suit in equity, in which his answer might be evidence. But this opinion as to cases of perjury has since been exploded; and the party is in all such cases held admissible as a witness; his credibility being left to the Jury. For wherever the party offers as evidence, even to a collateral point, a record which has been obtained on his own testimony, it is not admitted; and, moreover, the record in a criminal prosecution is generally not evidence of the facts in a civil suit, the parties not being the same.[1] And as to the person, whose name has been forged, the unsoundness of the rule, by which he was held incompetent, was tacitly conceded in several of the more recent cases, which were held not to be within the rule; and at length it was repealed in England by an express statute,[2] which renders the party injured a competent witness in all criminal prosecutions for forgery. In America, though in some of the earlier cases the old English rule of exclusion was followed, yet the weight of authority, including the later decisions, is quite the other way, and the witness is now almost universally held admissible.[3]

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[1] 1 Gilb. Evid. by Lofft, p. 33, 34; Bull. N. P. 232, 245; 1 Stark. Evid. 234; 1 Phil. Evid. 62; Abrahams *v.* Bunn, 4 Burr. 2251. See further, Post, § 537.

[2] 9 Geo. 4, c. 32.

[3] Respublica *v.* Keating, 1 Dall. 110; Pennsylvania *v.* Farrell, Addis. 246; The People *v.* Howell, 4 Johns. 296, 302; The People *v.* Dean, 6 Cowen, 27; Commonwealth *v.* Frost, 5 Mass. 53; Commonwealth *v.* Waite, Ib. 261; The State *v.* Stanton, 1 Iredell, 424. See other cases in Cowen & Hill's note, 236, and Suppt. to 1 Phil. Evid. 124. Ld. Denman is reported to have ruled, at *nisi prius*, that where the prosecutor, in an indictment for perjury, expected that the prisoner would be called as a witness against him in a civil action about to be tried, he was incompetent as a witness to support the indictment. Rex *v.* Hulme, 7 C. & P. 8. But *quære*, and see Rex *v.* Boston, 4 East, 572; Ante, § 362.

§ 415. The *second class* of cases, in which the general rule of incompetency by reason of interest does not apply, consists of exceptions created by *express statutes*, and which otherwise would not fall within the reason of the first exception. Of this sort are cases, where the informer and prosecutor, in divers summary convictions and trials for petty offences, is, by the statutes of different States, expressly made a competent witness, notwithstanding his interest in the fine or forfeiture; but of which the plan of this Treatise does not require a particular enumeration.

§ 416. The *third class* of cases, excepted out of the general rule, is that of *agents*, *carriers*, *factors*, *brokers*, and other *servants*, when offered to prove the making of contracts, the receipt or payment of money, the receipt or delivery of goods, and other acts done within the scope of their employment. This exception has its foundation in public convenience and necessity;[1] for otherwise, affairs of daily and ordinary occurrence could not be proved, and the freedom of trade and commercial intercourse would be inconveniently restrained. And it extends, in principle, to every species of agency or intervention, by which business is transacted; unless the case is overborne by some other rule. Thus, where the acceptor of a bill of exchange was also the agent of the defendant, who was both drawer and indorser, he was held incompetent in an action by the indorsee, to prove the terms on which he negotiated the bill to the indorsee, in order to defeat the action, though the facts occurred in the course of his agency for the defendant, for whose use the bill was negotiated; it being

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[1] Bull. N. P. 289; 10 B. & C. 864, per Parke, J.; 1 Phil. Evid. 145; 1 Stark. Evid. 113; Mathews *v.* Haydon, 2 Esp. 509. This necessity, says Mr. Evans, is that which arises from the general state and order of society, and not that which is merely founded on the accidental want or failure of evidence, in the particular case. Poth. on Obl. by Evans, App. No. 16, p. 208, 267. In all the cases of this class, there seems also to be enough of contingency in the nature of the interest, to render the witness admissible under the general rule.

apparent that the witness was interested in the costs of the suit.[1] But in cases not thus controlled by other rules, the constant course is to admit the witness, notwithstanding his apparent interest in the event of the suit.[2] Thus, a porter, a journeyman, or salesman is admissible, to prove the delivery of goods.[3] A broker, who has effected a policy, is a competent witness for the assured, to prove any matters connected with the policy; even though he has an interest in it arising from his lien.[4] A factor, who sells for the plaintiff, and is to have a poundage on the amount, is a competent witness to prove the contract of sale.[5] So, though he is to have for himself all he has bargained for beyond a certain amount, he is still a competent witness for the seller.[6] A clerk, who has received money, is a competent witness for the party who paid it, to prove the payment, though he is himself liable on the receipt of it.[7] A carrier is admissible for the plaintiff, to prove that he paid a sum of money to the defendant by mistake, in an action to recover it back.[8] So, of a banker's clerk.[9] A servant is a witness for his master, in an action against the latter for a penalty, such, for example, as for selling coals without measure by the bushel, though the act were done by the servant.[10] A carrier's book-keeper is a competent witness for his master, in an action for not safely carrying goods.[11] A shipmaster is a competent witness for the defendant in an action against his owner, to prove the advancement of moneys for the purposes of the voyage, even though he gave the plaintiff a bill of exchange on his owner for the amount.[1] The cashier or teller of a bank is a competent witness for the bank, to charge the defendant on a promissory note,[2] or for money lent, or overpaid,[3] or obtained from the officer without the security which he should have received; and even though the officer has given bond to the bank for his official good conduct.[4] And an agent is also a competent witness to prove his own authority, if it be by parol.[5]

1 Edmonds *v.* Lowe, 8 B. & C. 407.
2 Theobald *v.* Tregott, 11 Mod. 262, per Holt, C. J.
3 Bull. N. P. 289; 4 T. R. 590; Adams *v.* Davis, 3 Esp. 48.
4 Hunter *v.* Leathley, 10 B. & C. 858.
5 Dixon *v.* Cooper, 3 Wils. 40; Shephard *v.* Palmer, 6 Conn. 95; Depeau *v.* Hyams, 2 McCord, 146; Scott *v.* Wells, 6 Watts & Serg. 357.
6 Benjamin *v.* Porteous, 2 H. Bl. 590; Caune *v.* Sagory, 4 Martin, 81.
7 Mathews *v.* Haydon, 2 Esp. 509.
8 Barker *v.* Macrae, 3 Campb. 144.
9 Martin *v.* Horrell, 1 Stra. 647.
10 E. Ind. Co. *v.* Gossing, Bull. N. P. 289, per Lee, C. J.
11 Spencer *v.* Goulding, Peake's Cas. 129.

§ 417. This exception being thus founded upon considerations of public necessity and convenience, for the sake of trade and the common usage of business, it is manifest, that it *cannot be extended* to cases where the witness is called to testify to facts *out of the usual and ordinary course* of business, or, to contradict or deny the effect of those acts which he has done as agent. He is safely admitted, in all cases, to prove that he acted according to the directions of his principal, and within the scope of his duty; both on the ground of necessity, and because the principal can never maintain an action against him, for any act done according to his own directions, whatever may be the result of the suit, in which he is called as a witness. But if the cause depends on the question, whether the agent has been guilty of some tortious act, or some negligence in the course of executing the orders of his principal, and in respect of which he would be liable over to the principal, if the latter should fail in the action pending against him, the agent, as we have seen,

1 Descadillas *v.* Harris, 8 Greenl. 298; Milward *v.* Hallett, 2 Caines, 77. And see Martineau *v.* Woodland, 2 C. & P. 65.
2 Stafford Bank *v.* Cornell, 1 N. Hamp. 192.
3 O'Brien *v.* Louisiana State Bank, 5 Martin, 305, N. S.; United States Bank *v.* Johnson, Ib. 310.
4 The Franklin Bank *v.* Freeman, 16 Pick. 535; U. S. Bank *v.* Stearns, 15 Wend. 314.
5 Lowber *v.* Shaw, 5 Mason, 242, per Story, J.; McGunnagle *v.* Thornton, 10 S. & R. 251; Ilderton *v.* Atkinson, 7 T. R. 480; Birt *v.* Kershaw, 2 East, 458.

is not a competent witness for his principal, without a release.[1]

§ 418. In the *fourth class of exceptions* to the rule of incompetency by reason of interest, regard is paid to the time and manner in which the interest was acquired. It has been laid down in general terms, that where one person becomes entitled to the testimony of another, the latter shall not be rendered incompetent to testify, by reason of any *interest subsequently acquired* in the event of the suit.[2] But though the doctrine is not now universally admitted to that extent, yet it is well settled and agreed, that in all cases where the interest has been subsequently created by the fraudulent act of the adverse party, for the purpose of taking off his testimony, or by any act of mere wantonness, and aside from the ordinary course of business, on the part of the witness, he is not thereby rendered incompetent. And where the person was the original witness of the transaction or agreement between the parties, in whose testimony they both had a common interest, it seems also agreed, that it shall not be in the power either of the witness, or of one of the parties, to deprive the other of his testimony, by reason of any interest subsequently acquired, even though it were acquired without any such intention on the part of the witness, or of the party.[3] But the question, upon which learned Judges have been divided in

[1] Ante, § 394, 395, 396; Miller *v.* Falconer, 1 Campb. 251; Theobald *v.* Tregott, 11 Mod. 262; Gevers *v.* Mainwaring, 1 Holt's Cas. 139; McBraine *v.* Fortune, 3 Campb. 317; 1 Stark. Evid. 113; Fuller *v.* Wheelock, 10 Pick. 135, 138; McDowell *v.* Stimpson, 3 Watts, 129, 135, per Kennedy, J. For other authorities, as to the admissibility of agents, see Cowen & Hill's notes, 89, 95, 103, 106, 241, 245, and Suppt. to 1 Phil. Evid. p. 96, 106, 110, 113, 254.

[2] See Bent *v.* Baker, 3 T. R. 27, per Ld. Kenyon, and Ashhurst, J.; Barlow *v.* Vowell, Skin. 586, per Ld. Holt; Cowp. 736; Jackson *v.* Rumsey, 3 Johns. Cas. 234, 237; Ante, § 167.

[3] Forrester *v.* Pigou, 3 Campb 381; 1 Stark. Evid. 118; Long *v.* Bailie, 4 S & R 222; 14 Pick. 47; Phelps *v.* Riley, 3 Conn. 266, 272; Rex *v.* Fox, 1 Stra. 652; Ante, § 167.

opinion is, whether, where the witness was not the agent of both parties, or was not called as a witness of the original agreement or transaction, he ought to be rendered incompetent by reason of an interest subsequently acquired in good faith, and in the ordinary course of business. On this point, it was held by Lord Ellenborough, that the pendency of a suit could not prevent third persons from transacting business *bonâ fide* with one of the parties; and that, if an interest in the event of the suit is thereby acquired, the common consequence of law must follow, that the person so interested cannot be examined as a witness for that party, from whose success he will necessarily derive an advantage.[1] And therefore it was held, that where the defence to an action on a policy of insurance was, that there had been a fraudulent concealment of material facts, an underwriter, who had paid on a promise of repayment if the policy should be determined invalid, and who was under no obligation to become a witness for either party, was not a competent witness for another underwriter, who disputed the loss.[2] This doctrine has been recognised in the Courts of several of the United States, as founded in good reason:[3] but the question being presented to the Supreme Court of the United States, the learned Judges were divided in opinion, and no judgment was given upon the point.[4] If the subsequent interest has been created by the agency of the party producing the witness, he is disqualified; the party having no right to complain of his own act.[5]

[1] Forrester *v.* Pigou, 3 Campb. 381; 1 M. & S. 9, S. C.; Hovill *v.* Stephenson, 5 Bing. 493; Ante, § 167.

[2] Forrester *v.* Pigou, 3 Campb. 381; 1 M. & S. 9, S. C.

[3] Phelps *v.* Riley, 3 Conn. 266, 272; Eastman *v.* Winship, 14 Pick. 44, 47; Long *v.* Bailie, 4 Serg. & R. 222; The Manchester Iron Manuf. Co. *v.* Sweeting, 10 Wend. 162; Cowen & Hill's note 273, and Suppt. to 1 Phil. Evid. 139. In Maine, the Court seem to have held the witness admissible in all cases, where the party objecting to the witness is himself a party to the agreement, by which his interest is acquired. Burgess *v.* Lane, 3 Greenl. 165, 170; Ante, § 167.

[4] Winship *v.* Bank U. States, 5 Peters, 529, 552.

[5] Hovill *v.* Stephenson, 5 Bing. 493; Ante, § 167.