§ 419. It may here be added, that where an interested witness does all in his power to divest himself of his interest, by *offering to surrender or release* it, which the surrenderee or releasee, even though he be a stranger, refuses to accept, the principle of the rule of exclusion no longer applies, and the witness is held admissible. Thus, in an ejectment, where the lessors of the plaintiff claimed under a will, against the heir at law, and the executor was called by the plaintiff to prove the sanity of the testator, and was objected to by the defendant, because by the same will he was devisee of the reversion of certain copyhold lands; to obviate which objection he had surrendered his estate in the copyhold lands to the use of the heir at law, but the heir had refused to accept the surrender; the Court held him a competent witness.[1] So, if the interest may be removed by the release of one of the parties in the suit, and such party offers to remove it, but the witness refuses, he cannot thereby deprive the party of his testimony.[2]

§ 420. Where the witness, though interested in the event of the cause, is so situated that the event is to him a matter of indifference, he is still a competent witness. This arises where he is equally *interested on both sides* of the cause, so that his interest on one side is counterbalanced by his interest on the other.[3] But if there is a preponderance in the amount or value of the interest on one side, this seems, as we have already seen, to render him an interested witness to the amount of the excess, and therefore to disqualify him from testifying on that side.[4] Whether the circumstance, that the

[1] Goodtitle *v.* Welford, 1 Doug. 139; 5 T. R. 35, per Buller, J. The legatee in a will, who has been paid, is considered a competent witness to support the will, in a suit at law. Wyndham *v.* Chetwynd, 1 Burr. 414.

[2] 1 Phil. Evid. 149.

[3] Ante, § 399. See also Cushman *v.* Loker, 2 Mass. 108; Emerson *v.* Providence Hat Man. Co., 12 Mass. 237; Roberts *v.* Whiting, 16 Mass. 186; Rice *v.* Austin, 17 Mass. 197; Prince *v.* Shephard, 9 Pick. 176. Other cases of balanced interest are cited in Cowen & Hill's note 117, and Suppt to 1 Phil Evid p 66. See also Lewis *v.* Hodgdon, 5 Shepl. 267.

[4] Ante, § 391, 399, and cases there cited.

witness has a *remedy over* against another, to indemnify him for what he may lose by a judgment against the party calling him, is sufficient to render him competent by equalizing his interest, is not clearly agreed. Where his liability to costs appears from his own testimony alone, and in the same mode it is shown that he *has funds in his hands* to meet the charge, it is settled that this does not render him incompetent.[1] So, where he stated that he was *indemnified* for the costs, and considered that he had *ample security*.[2] And where, upon this objection being taken to the witness, the party calling him forthwith executed a bond to the adverse party, for the payment of all costs with sureties, whom the counsel for the obligee admitted to be abundantly responsible, but at the same time he refused to receive the bond, the Court held the competency of the witness to be thereby restored; observing, however, that if the solvency of the sureties had been denied, it might have presented a case of more embarrassment, it being very questionable whether the Judge could determine upon the sufficiency of the obligors, so as to absolve the witness from liability to costs.[3] The point upon which the authorities seem to be conflicting, is, where there is merely a right of action over, irrespective of the solvency of the party liable, the productiveness of the remedy, in actual satisfaction, being wholly contingent and uncertain. But in such cases, the weight of authority is against the admissibility of the witness. Thus, in an action against the sheriff for taking goods, his officer, who made the levy, being called as a witness for the defence, stated upon the *voir dire*, that he gave security to the sheriff, and added, that he was indemnified by the creditor, meaning that he had his bond of indemnity. But Lord Tenterden held him not a competent witness; observing, that

[1] Collins *v.* McCrummen, 3 Martin, N. S. 166; Allen *v.* Hawks, 13 Pick. 79.

[2] Chaffee *v.* Thomas, 7 Cowen, 358; Contra, Pond *v.* Hartwell, 17 Pick. 272, per Shaw, C. J.

[3] Brandigee *v.* Hale, 13 Johns. 125; Lake *v.* Auborn, 17 Wend. 18, S. P.; Ante, § 392.

if the result of the action were against the sheriff, the witness was liable to a certainty; and he might never get repaid on his indemnity; therefore it was his interest to defeat the action.[1] So, where the money, with which the surety in a replevin bond was to be indemnified, had been deposited in the hands of a receiver designated by the Judge, it was held, that this did not restore the competency of the surety as a witness in the cause for the principal; for the receiver might refuse to pay it over, or become insolvent, or, from some other cause, the remedy over against him might be unproductive.[2] The true distinction lies between the case, where the witness must resort to an action for his indemnity, and that in which the money is either subject to the order of the Court, and within its actual control and custody, or is in the witness's own hands. Therefore it has been laid down by a learned Judge, that where a certain sum of money can be so placed, either with the witness himself, or with the Court and its officers, under a proper rule directing and controlling its application according to the event, as that the interest creating the disability may be met and extinguished before the witness is or can be damnified, it shall be considered as balancing or extinguishing that interest, so as to restore the competency of the witness.[3]

§ 421. In regard to the *time of taking the objection* to the competency of a witness, on the ground of interest, it is obvious that, from the preliminary nature of the objection, it

[1] Whitehouse *v.* Atkinson, 3 C. & P. 344; Jewett *v.* Adams, 8 Greenl. 30; Paine *v.* Hussey, 5 Shepl. 274.

[2] Wallace *v.* Twyman, 3 J. J. Marsh 459–461. See also Owen *v.* Mann, 2 Day, R. 399, 404; Brown *v* Lynch, 1 Paige, 147, 157; Allen *v.* Hawks, 13 Pick. 85, per Shaw, C J.; Schillenger *v.* McCann, 6 Greenl. 364; Kendall *v.* Field, 2 Shepl. 30; Shelby *v.* Smith, 2 A K. Marsh. 504. The cases in which a mere remedy over seems to have been thought sufficient to equalize the interest of the witness, are Martineau *v.* Woodland, 2 C. & P. 65; Banks *v.* Kain, Ib 597; Gregory *v.* Dodge, 14 Wend. 593. See further, Cowen & Hill's notes to Phil Evid Vol. 3, p. 1544, 1545.

[3] Pond *v.* Hartwell, 17 Pick 269, 272, per Shaw, C. J.

ought in general to be taken before the witness is examined in chief. If the party is aware of the existence of the interest, he will not be permitted to examine the witness, and afterwards to object to his competency, if he should dislike his testimony. He has his election, to admit an interested person to testify against him, or not; but in this, as in all other cases, the election must be made as soon as the opportunity to make it is presented; and failing to make it at that time, he is presumed to have waived it forever.[1] But he is not prevented from taking the objection at any time during the trial, provided it is taken as soon as the interest is discovered.[2] Thus, if discovered during the examination in chief by the plaintiff, it is not too late for the defendant to take the objection.[3] But if it is not discovered until after the trial is concluded, a new trial will not for that cause alone be granted;[4] unless the interest was known and concealed by the party producing the witness.[5] The rule on this subject in criminal and civil cases is the same.[6] Formerly, it was deemed necessary to take the objection to the competency of a witness on the *voir dire;* and if once sworn in chief, he could not afterwards be objected to, on the ground of interest. But the strictness of this rule is relaxed; and the objection is now usually taken after he is sworn in chief, but previous to his direct examination. It is in the discretion of the Judge, to permit the adverse party to cross-examine the witness as to his interest, after he has been examined in chief; but the usual course is not to

[1] Donelson *v.* Taylor, 8 Pick. 390, 392; Belcher *v.* Magnay, 1 New Pr. Cas. 110.

[2] Stone *v.* Blackburn, 1 Esp. 37; 1 Stark. Evid. 124. Where a party has been fully apprized of the grounds of a witness's incompetency by the opening speech of counsel, or the examination in chief of the witness, doubts have been entertained at nisi prius, whether an objection to the competency of a witness can be postponed. 1 Phil Evid. 154, note (3).

[3] Jacobs *v.* Laybourn, 11 M. & W. 685. And see Yardley *v.* Arnold, 10 M. & W. 141; 6 Jur. 718.

[4] Turner *v.* Pearte, 1 T. R. 717; Jackson *v.* Jackson, 5 Cowen, 173.

[5] Niles *v.* Brackett, 15 Mass. 378.

[6] Commonwealth *v.* Green, 17 Mass. 538; Roscoe's Crim. Evid. 124.

allow questions to be asked upon the cross-examination, which properly belong only to an examination upon the *voir dire*.[1] But if, notwithstanding every ineffectual endeavor to exclude the witness on the ground of incompetency, it afterwards should appear incidentally, in the course of the trial, that the witness is interested, his testimony will be stricken out, and the Jury will be instructed wholly to disregard it.[2] The rule in Equity is the same as at Law;[3] and the principle applies with equal force to testimony given in a deposition in writing, and to an oral examination in Court. In either case, the better opinion seems to be, that if the objection is taken as soon as may be after the interest is discovered, it will be heard; but after the party is *in morâ*, it comes too late.[4] One reason for requiring the objection to

[1] Howell *v.* Lock, 2 Campb. 14; Odiorne *v.* Winkley, 2 Gallis. 51; Perigal *v.* Nicholson, 1 Wightw. 64. The objection, that the witness is the real plaintiff, ought to be taken on the *voir dire*. Dewdney *v.* Palmer, 4 M. & W. 664; 7 Dowl. 177, S. C.

[2] Davis *v.* Barr. 9 S. & R. 137; Schillenger *v.* McCann, 6 Greenl. 364; Fisher *v.* Willard, 13 Mass 379; Evans *v.* Eaton, 1 Peters, C. C. R. 338; Butler *v.* Tufts, 1 Shepl. 302; Stout *v.* Wood, 1 Blackf. 71. In one case, however, where the examination of a witness was concluded, and he was dismissed from the box, but was afterwards recalled by the Judge, for the purpose of asking him a question, it was ruled by Gibbs, C. J., that it was then too late to object to his competency. Beeching *v.* Gower, 1 Holt's Cas. 313. And in Chancery it is held, that where a witness has been cross-examined by a party, with full knowledge of an objection to his competency, the Court will not allow the objection to be taken at the hearing. Flagg *v.* Mann, 2 Sumn. 487.

[3] Swift *v.* Dean, 6 Johns. 523, 538; Needham *v.* Smith, 2 Vern. 463; Vaughan *v.* Worrall, 2 Swanst. 400. In this case Lord Eldon said, that no attention could be given to the evidence, though the interest were not discovered until the last question, after he has been "cross-examined to the bone." See Gresley on Evid. 234–236; Rogers *v.* Dibble, 3 Paige, 238; Town *v.* Needham, Ib. 545, 552; Harrison *v.* Courtauld, 1 Russ. & M. 428; Moorhouse *v.* De Passou, G. Cooper, Ch. Cas. 300; 19 Ves. 433, S. C. See also Jacobs *v.* Laybourn, 7 Jur. 562.

[4] Donelson *v.* Taylor, 8 Pick. 390. Where the testimony is by deposition, the objection, if the interest is known, ought regularly to be taken *in limine;* and the cross-examination should be made *de bene esse*, under protest, or with an express reservation of the right of objection at the trial; unless the interest of the witness is developed incidentally, in his testimony to the merits. But the practice on this point admits of considerable latitude, in the discretion of the Judge. United States *v.* One Case of hair pencils, 1 Paine, 400; Talbot *v.* Clark, 8 Pick. 51; Smith *v.* Sparrow 11 Jur. 126; The Mohawk Bank *v.* Atwater, 2 Paige, 54; Ogle *v.* Pelaski, 1 Holt's Cas. 485; 2 Tidd's Pr. 812. As to the mode of taking the objection in Chancery, see 1 Hoffm. Chan. 489; Gass *v.* Stinson, 3 Sumn. 605.

be made thus early is, that the other party may have opportunity to remove it by a release; which is always allowed to be done, when the objection is taken at any time before the examination is completed.[1] It is also to be noted as a rule, applicable to all objections to the reception of evidence, that the ground of objection must be distinctly stated at the time, or it will be held vague and nugatory.[2]

§ 422. Where the objection to the competency of the witness arises from *his own examination*, he may be further interrogated to facts tending to remove the objection, though the testimony might, on other grounds, be inadmissible. When the whole ground of the objection comes from himself only, what he says must be taken together, as he says it.[3] Thus, where his interest appears, from his own testimony, to arise from a written instrument, which is not produced, he may also testify to the contents of it; but if he produces the instrument, it must speak for itself.[4] So, where the witness for a chartered company stated that he had been a member, he was permitted also to testify that he had subsequently been disfranchised.[5] So, where a witness, called by an administrator, testified that he was one of the heirs at law, he was also permitted to testify that he had released all his interest in

[1] Tallman *v.* Dutcher, 7 Wend. 180; Doty *v.* Wilson, 14 Johns. 378; Wake *v.* Lock, 5 C. & P. 454.

[2] Camden *v.* Doremus, 3 Howard, S. C. Rep. 515, 530.

[3] Abrahams *v.* Bunn, 4 Burr. 2256, per Ld. Mansfield.

[4] Butler *v.* Carver, 2 Stark. R. 433. See also Rex *v.* Gisburn, 15 East, 57.

[5] Butcher's Company *v.* Jones, 1 Esp. 160. And see Botham *v.* Swingler, Peake's Cas. 218.

the estate.[1] And generally a witness, upon an examination in Court as to his interest, may testify to the contents of any contracts, records, or documents not produced, affecting the question of his interest.[2] But if the testimony of the witness is taken upon interrogatories in writing, previously filed and served on the adverse party, who objects to his competency on the ground of interest, which the witness confesses, but testifies that it has been released; the release must be produced at the trial, that the Court may judge of it.[3]

§ 423. The *mode of proving the interest* of a witness is either by his own examination, or by evidence *aliunde*. But whether the election of one of these modes will preclude the party from afterwards resorting to the other, is not clearly settled by the authorities. If the evidence offered *aliunde* to prove the interest is rejected, as inadmissible, the witness may then be examined on the *voir dire*.[4] And if the witness on the *voir dire*, states that he does not know, or leaves it doubtful whether he is interested or not, his interest may be shown by other evidence.[5] It has also been held, that a resort to one of these modes, to prove the interest of the witness on one

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[1] Ingram *v.* Dade, Lond. Sittings after Mich. T. 1817; 1 C. P. 234, n.; 1 Phil. Evid. 155; Wandless *v.* Cawthorne, B. R. Guildhall, 1829; 1 M. & M. 321, n.

[2] Miller *v.* The Mariner's Church, 7 Greenl. 51; Fifield *v.* Smith, 8 Shepl. 383; Sewell *v.* Stubbs, 1 C. & P. 73; Quarterman *v.* Cox, 8 C. & P. 97; Luniss *v.* Row, 2 P. & D. 538; Hays *v* Richardson, 1 Gill & J. 366; Stebbins *v.* Sackett, 5 Conn. 258; Baxter *v.* Rodman, 3 Pick. 435. The case of Goodhay *v.* Hendry, 1 Mo. & M. 319, apparently *contra*, is opposed by Carlisle *v.* Eady, 1 C. & P. 234, and by Wandless *v.* Cawthorne, 1 Mo. & M. 321, n.

[3] Southard *v.* Wilson, 8 Shepl. 494; Hobart *v.* Bartlett, 5 Shepl. 429.

[4] Main *v.* Newson, Anthon's Cas. 13. But a witness cannot be excluded by proof of his own admission that he was interested in the suit. Bates *v.* Ryland, 6 Alabama R. 668; Pierce *v.* Chase, 8 Mass. 487, 488; Commonwealth *v.* Waite, 5 Mass. 261.

[5] Shannon *v.* The Commonwealth, 8 S. & R. 444; Galbraith *v.* Galbraith, 6 Watts, 112; Bank of Columbia *v.* Magruder, 6 Har. & J. 172.

ground, does not preclude a resort to the other mode, to prove the interest on another ground.[1] And where the objection to the competency of the witness is founded upon the evidence, already adduced by the party offering him, this has been adjudged not to be such an election of the mode of proof, as to preclude the objector from the right to examine the witness on the *voir dire*.[2] But, subject to these modifications, the rule recognised and adopted by the general current of authorities is, that where the objecting party has undertaken to prove the interest of the witness, by interrogating him upon the *voir dire*, he shall not, upon failure of that mode, resort to the other to prove facts, the existence of which was known when the witness was interrogated.[3] The party, appealing to the

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[1] Stebbins *v.* Sackett, 5 Conn. 258.

[2] Bridge *v.* Wellington, 1 Mass. 221, 222.

[3] In the old books, including the earlier editions of Mr. Starkie's and Mr. Phillips's Treatises on Evidence, the rule is clearly laid down, that after an examination upon the *voir dire*, no other mode of proof can in any case be resorted to; excepting only the case, where the interest was developed in the course of trial of the issue. But in the last editions of those works it is said, that "if the witness discharge himself on the *voir dire*, the party who objects, may still support his objection by evidence;" but no authority is cited for the position. 1 Stark. Evid. 124; Phil. & Am. on Evid. 149; 1 Phil. Evid. 154. Mr. Starkie had previously added these words — "as part of his own case"; (see 2 Stark. Evid. p. 756, 1st Ed); and with this qualification the remark is supported by authority, and is correct in principle. The question of competency is a collateral question; and the rule is, that when a witness is asked a question upon a collateral point, his answer is final, and cannot be contradicted; that is, no collateral evidence is admissible for that purpose. Harris *v.* Tippett, 2 Campb. 637; Philadelphia & Trenton Co. *v.* Stimpson, 14 Peters, 448, 461; Harris *v.* Wilson, 7 Wend. 57; Odiorne *v.* Winkley, 2 Gallis. 53; Rex *v.* Watson, 2 Stark. R. 149–157. But if the evidence, subsequently given upon the matter in issue, should also prove the witness interested, his testimony may well be stricken out, without violating any rule. Brockbank *v.* Anderson, 7 Man. & Gr. 295, 313. The American Courts have followed the old English rule, as stated in the text. Butler *v.* Butler, 3 Day, R. 214; Stebbins *v.* Sackett, 5 Conn. 258, 261; Chance *v.* Hine, 6 Conn. 231; Welden *v.* Buck, Anthon's Cas. 9; Chatfield *v.* Lathrop, 6 Pick. 418. See also Cowen & Hill's note 250, to 1 Phil. Evid. p. 132; Evans *v.* Eaton, 1 Peters, C. C. R. 322.

conscience of the witness, offers him to the Court as a credible witness; and it is contrary to the spirit of the law of evidence, to permit him afterwards to say, that the witness is not worthy to be believed. It would also violate another rule, by its tendency to raise collateral issues. Nor is it deemed reasonable to permit a party to sport with the conscience of a witness, when he has other proof of his interest. But if evidence of his interest has been given *aliunde*, it is not proper to examine the witness, in order to explain it away.[1]

§ 424. A witness is said to be examined upon the *voir dire*, when he is sworn and examined as to the fact whether he is not a party interested in the cause.[2] And though this term was formerly and more strictly applied only to the case where the witness was sworn to make true answers to such questions as the Court might put to him, and before he was sworn in chief, yet it is now extended to the preliminary examination to his interest, whatever may have been the form of the oath under which the inquiry is made.

§ 425. The question of interest, though involving facts, is still a preliminary question, preceding, in its nature, the admission of the testimony to the Jury. It is therefore to be *determined by the Court* alone, it being the province of the Judge, and not of the Jury, in the first instance, to pass upon its sufficiency.[3] If, however, the question of fact in any preliminary inquiry, such, for instance, as the proof of an instrument by subscribing witnesses, is decided by the Judge, and the same question of fact afterwards recurs in the course of the trial upon the merits, the Jury are not precluded by the decision of the Judge, but may, if they are satisfied upon the

[1] Mott *v.* Hicks, 1 Cowen, 513; Evans *v.* Gray, 1 Martin, N. S. 709.

[2] Termes de la Ley, Verb. *Voyer dire.* And see Jacobs *v.* Laybourn, 11 M. & W. 685, where the nature and use of an examination upon the *voir dire* are stated and explained by Ld Abinger, C. B.

[3] Harris *v.* Wilson, 7 Wend. 57; Ante, § 49; Cowen & Hill's notes to Phil. Evid. Vol. 3, p. 1501.

evidence, find the fact the other way.[1] In determining the question of interest, where the evidence is derived *aliunde*, and it depends upon the decision of intricate questions of fact, the Judge may, in his discretion, take the opinion of the Jury upon them.[2] And if a witness, being examined on the *voir dire*, testifies to facts tending to prove that he is not interested, and is thereupon admitted to testify; after which opposing evidence is introduced, to the same facts, which are thus left in doubt, and the facts are material to the issue; the evidence must be weighed by the Jury, and if they thereupon believe the witness to be interested, they must lay his testimony out of the case.[3]

§ 426. The competency of a witness, disqualified by interest, may always be *restored by* a proper *release*. If it consists in an interest vested in himself, he may divest himself of it by a release, or other proper conveyance. If it consists in a liability over, whether to the party calling him, or to another person, it may be released by the person to whom he is liable. A general release of all actions and causes of action for any matter or thing, which has happened previous to the date of the release, will discharge the witness from all liability consequent upon the event of a suit then existing. Such a release from the drawer to the acceptor of a bill of exchange, was therefore held sufficient to render him a competent witness for the drawer, in an action then pending by the payee against him; for the transaction was already passed, which was to lay the foundation of the future liability; and upon all such transactions and inchoate rights such a release will operate.[4] A release, to qualify a witness, must be given before the testimony is closed, or it comes too late. But if the trial is not over, the Court will permit the witness to be re-examined,

[1] Ross *v.* Gould, 5 Greenl. 204.

[2] Phil. & Am. on Evid. p. 2, note (1).

[3] Walker *v.* Sawyer, 13 N. Hamp. R. 191.

[4] Scott *v.* Lifford, 1 Campb. 249, 250; Cartwright *v.* Williams, 2 Stark. R. 340.

after he is released; and it will generally be sufficient to ask him if his testimony, already given, is true, the circumstances under which it has been given going only to the credibility.[1]

§ 427. As to the person *by whom the release should be given*, it is obvious, that it must be by the party holding the interest to be released, or by some person duly authorized in his behalf. A release of a bond debt by one of several obligees, or to one of several obligors, will operate as to them all.[2] So, where several had agreed to bear the expense of a joint undertaking, in preferring a petition to Parliament, and an action was brought against one of them, another of the contractors was held a competent witness for the defendant, after being released by him; for the event of the suit could at most only render him liable to the defendant for his contributory share.[3] But if there is a joint fund or property to be directly affected by the result, the same reason would not decisively apply; and some act of divestment on the part of the witness himself would be necessary.[4] Thus, in an action

[1] Wake *v.* Lock, 5 C. & P. 454; Tallman *v.* Dutcher, 7 Wend. 180; Doty *v.* Wilson, 14 Johns. 378.

[2] Co. Lit. 232, a; Cheetham *v.* Ward, 1 B. & P. 630. So, by one of several partners, or joint proprietors, or owners. Whitamore *v.* Waterhouse, 4 C. & P. 383; Hockless *v.* Mitchell, 4 Esp. 86; Bulkley *v.* Dayton, 14 Johns. 387. But where the interest of the parties to the record is several, a release by one of them only is not sufficient. Betts *v.* Jones, 9 C. & P. 199.

[3] Duke *v.* Pownall, 1 M. & Malk. 430; Ransom *v.* Keyes, 9 Cowen, 128. So, in other cases of liability to contribution. Bayley *v.* Osborn, 2 Wend. 527; Robertson *v.* Smith, 18 Johns. 459; Gibbs *v.* Bryant, 1 Pick. 118; Ames *v.* Withington, 3 N. Hamp. 115; Carleton *v.* Witcher, 5 N. Hamp. 196. One of several copartners, not being sued with them, may be rendered a competent witness for them by their release. Lefferts *v.* De Mott, 21 Wend. 136; (sed vide Cline *v.* Little, 5 Blackf. 486); but *quære*, if he ought not also to release to them his interest in the assets of the firm, so far as they may be affected by the demand in controversy? Ib.

[4] Waite *v.* Merrill, 4 Greenl. 102; Richardson *v.* Freeman, 6 Greenl. 57; 1 Holt's Cas. 430, note; Anderson *v.* Brock, 3 Greenl. 243. The heir is rendered a competent witness for the administrator, by releasing to the latter all his interest in the action; provided it does not appear, that there is any real estate to be affected by the result. Boynton *v.* Turner, 13 Mass. 391.

on a charter-party, a joint-owner with the plaintiff, though not a registered owner, is not a competent witness for the plaintiff, unless cross releases are executed between them.[1] A release by an infant is generally sufficient for this purpose; for it may be only voidable, and not void; in which case, a stranger shall not object to it.[2] But a release by a guardian *ad litem*,[3] or by a *prochein amy*, or by an attorney of record,[4] is not good. A surety may always render the principal a competent witness for himself, by a release.[5] And it seems sufficient, if only the costs are released.[6]

§ 428. Though there are no interests of a disqualifying nature, but what may in some manner be annihilated,[7] yet there are some which *cannot be reached by a release.* Such is the case of one, having a common right, as an inhabitant of a town; for a release by him, to the other inhabitants, will not render him a competent witness for one of them, to maintain the common right.[8] So, where in trover, the plaintiff claimed the chattel by purchase from B., and the defendant claimed it under a purchase from W., who had previously bought it from B., it was held, that a release to B. from the defendant would not render him a competent witness for the latter; for

[1] Jackson *v.* Galloway, 8 C. & P. 480.

[2] Rogers *v.* Berry, 10 Johns. 132; Walker *v.* Ferrin, 4 Verm. 523.

[3] Fraser *v.* Marsh, 2 Stark. R. 41; Walker *v.* Ferrin, ub. sup.

[4] Murray *v.* House, 11 Johns. 464; Walker *v.* Ferrin, ub. sub.

[5] Reed *v.* Boardman, 20 Pick. 441; Harmon *v.* Arthur, 1 Bail. 83; Willard *v.* Wickham, 7 Watts, 292.

[6] Perryman *v.* Steggall, 6 C. & P. 197. See also Van Shaack *v.* Stafford, 12 Pick. 565.

[7] In a writ of entry by a mortgagee, the tenant claimed under a deed from the mortgagor, subsequent in date, but prior in registration, and denied notice of the mortgage. To prove that he purchased with notice, the mortgagor was admitted a competent witness for the mortgagee, the latter having released him from so much of the debt as should not be satisfied by the land mortgaged, and covenanted to resort to the land as the sole fund for payment of the debt. Howard *v.* Chadbourne, 5 Greenl. 15.

[8] Jacobson *v.* Fountain, 2 Johns. 170; Abby *v.* Goodrich, 3 Day, 433; Ante, § 405.