the defendant's remedy was not against B., but against W. alone.[1] And in the case of a covenant real, running with the land, a release by the covenantee, after he has parted with the estate, is of no avail, no person but the present owner being competent to release it.[2] Where the action is against the surety of one, who has since become bankrupt, the bankrupt is not rendered a competent witness for the surety by a release from him alone; because a judgment against the surety would still give him a right to prove under the commission. The surety ought also to release the assignees from all claim on the bankrupt's estate, it being vested in them; and the bankrupt should release his claim to the surplus.[3] So, a residuary legatee is not rendered a competent witness for the executor, who sues to recover a debt due to the testator, merely by releasing to the executor his claim to that debt; for, if the action fails, the estate will still be liable for the costs to the plaintiff's attorney, or to the executor. The witness must also release the residue of the estate; or, the estate must be released from all claim for the costs.[4]

§ 429. It is *not necessary* that the release be *actually delivered* by the releasor into the hands of the releasee. It may be deposited in Court for the use of the absent party.[5] Or, it may be delivered to the wife for the use of the husband.[6] But in such cases it has been held necessary that the delivery of the release to a third person should be known to the witness at the time of giving his testimony.[7] The objection

1 Radburn *v.* Morris, 4 Bing. 649.

2 Leighton *v.* Perkins, 2 N. Hamp. 427; Pile *v.* Benham, 3 Hayw. 176.

3 Perryman *v.* Steggall, 8 Bing. 369.

4 Baker *v.* Tyrwhitt, 4 Campb. 27.

5 Perry *v.* Fleming, 2 N. Car. Law Repos. 458; Lilly *v.* Kitzmiller, 1 Yeates, 30.

6 Van Deusen *v.* Frink, 15 Pick. 449; Peaceable *v.* Keep, 1 Yeates, 576.

7 Seymour *v.* Strong, 4 Hill, R. 225. Whether the belief of the witness, as to his interest, or the impression under which he testifies, can go farther than to affect the credibility of his testimony, *quære;* and see Ante, § 387, 388, 419.

of interest, as before remarked, proceeds on the presumption that it may bias the mind of the witness; but this presumption is taken away by proof of his having done all in his power to get rid of the interest.[1] It has even been held, that where the defendant has suffered an interested witness to be examined, on the undertaking of the plaintiff's attorney to execute a release to him after the trial, which, after a verdict for the plaintiff, he refused to execute, this was no sufficient cause for a new trial; for the witness had a remedy on the undertaking.[2] But the witness, in such cases, will not be permitted to proceed with his testimony, even while the attorney is preparing or amending the release, without the consent of the adverse party.[3]

§ 430. There are *other modes*, besides a release, in which the competency of an interested witness may be restored. Some of these modes, to be adopted by the witness himself, have already been adverted to;[4] namely, where he has assigned his own interest, or done all in his power to assign it; or, where he refuses to accept a release tendered to him by another. So, where, being a legatee or distributee, he has been fully paid.[5] An indorser is made a competent witness for the indorsee, by striking off his name from the back of the note or bill; but if the bill is drawn in sets, it must appear that his name is erased from each one of the set, even though one of them is missing and supposed to be lost; for it may be in the hands of a *bonâ fide* holder.[6] A guarantor, also, is rendered a competent witness for the creditor, by delivering up the letter of guaranty, with permission to destroy it.[7] And this may be done by the attorney of the party, his relation as

1 Goodtitle *v.* Welford, 1 Doug. 139, 141, per Ashhurst, J.

2 Hemming *v.* English, 1 Cr. M. & R. 568; 5 Tyrwh. 185, S. C.

3 Doty *v.* Wilson, 14 Johns. 378.

4 Ante, § 419.

5 Clarke *v.* Gannon, Ry. & M. 31; Gebhardt *v.* Shindle, 15 S. & R. 235.

6 Steinmetz *v.* Currie, 1 Dall. 269.

7 Merchants' Bank *v.* Spicer, 6 Wend. 443.

such and the possession of the paper being sufficient to justify a presumption of authority for that purpose.[1] The bail or surety of another may be rendered a competent witness for him, as we have already seen, by substituting another person in his stead; which, where the stipulation is entered into in any judicial proceeding, as in the case of bail, and the like, the Court will order upon motion. The same may be done by depositing in Court a sufficient sum of money; or, in the case of bail, by a surrender of the body of the principal.[2] So, where the liability, which would have rendered the witness incompetent, is discharged by the operation of law; as, for example, by the bankrupt or the insolvent laws, or by the statute of limitations.[3] Where, in trespass, several justifications are set up in bar, one of which is a prescriptive or customary right in all the inhabitants of a certain place, one of those inhabitants may be rendered a competent witness for the defendant, by his waiving that branch of the defence.[4] In trover by a bailee, he may render the bailor a competent witness for him, by agreeing to allow him, at all events, a certain sum for the goods lost.[5] The assignee of a chose in action, who, having commenced a suit upon it in the name of the assignor, has afterwards sold and transferred his own interest to a stranger, is thereby rendered a competent witness for the plaintiff.[6] But the interest which an informer has in a statute penalty, is held not assignable for that purpose.[7] So,

[1] Ibid.; Watson *v.* McLaren, 19 Wend. 557.

[2] Ante, § 392, note (1); Bailey *v.* Hole, 3 C. & P. 560; 1 Mood. & M. 289, S. C.; Leggett *v.* Boyd, 3 Wend. 376; Tompkins *v.* Curtis, 3 Cowen, 251; Grey *v.* Young, 1 Harper, 38; Allen *v.* Hawks, 13 Pick. 79; Beckley *v.* Freeman, 15 Pick. 468; Pearcy *v.* Fleming, 5 C. & P. 503; Lees *v.* Smith, 1 M. & Rob. 329; Comstock *v.* Paie, 3 Rob. Louis. R. 440.

[3] Murray *v.* Judah, 6 Cowen, 484; Ludlow *v.* Union Ins. Co. 2 S. & R. 119; United States *v.* Smith, 4 Day, 121; Quimby *v.* Wroth, 3 H. & J. 249; Murray *v.* Marsh, 2 Hayw. 200.

[4] Prewitt *v.* Tilly, 1 C. & P. 140.

[5] Maine Stage Co. *v.* Longley, 2 Shepl. 444.

[6] Soulden *v.* Van Rensselaer, 9 Wend. 293.

[7] Commonwealth *v.* Hargesheimer, 1 Ashm. 413.

the interest of a legatee being assigned, he is thereby rendered competent to prove the will; though the payment is only secured to him by bond, which is not yet due.[1] So, a stockholder in any money-corporation may be rendered a competent witness for the corporation, by a transfer of his stock, either to the company, or to a stranger; even though he intends to repossess it, and has assigned it merely to qualify himself to testify; provided there is no agreement between him and the assignee or purchaser for a reconveyance.[2] Where a witness was liable to the plaintiff's attorney for the costs, and the attorney had prepared a release in order to restore his competency in case it should be questioned, but no objection being made to the witness, he was examined for the plaintiff without a release, this was considered as a gross imposition upon the Court; and in a subsequent action by the attorney against the witness for his costs, he was nonsuited.[3] These examples are deemed sufficient for the purpose of illustrating this method of restoring the competency of a witness disqualified by interest.[4]

[1] McIlroy *v.* McIlroy, 1 Rawle, 423.

[2] Gilbert *v.* Manchester Iron Co. 11 Wend. 627; Utica Ins. Co. *v.* Cadwell, 3 Wend. 296; Stall *v.* The Catskill Bank, 18 Wend. 466; Bank of Utica *v.* Smalley, 2 Cowen, 770; Bell *v.* Hull, &c. Railway Co. 6 M. & W. 701.

[3] Williams *v.* Goodwin, 11 Moore, 342.

[4] There are numerous decisions on this point, which are collected in Cowen & Hill's notes 257–272, to 1 Phil. Evid. p. 133–137.