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THE COMPETENCY OF WITNESSES.[1]

SECOND ARTICLE.

§ 36. (II.) Of incompetency from a relation not as party creating an interest in the suit. A person to be held incompetent under this rule, must be offered, not to testify against his interests, but under such circumstances that he may testify in favor of his own interest.[2] It is said the interest here intended must be a *legal* interest;[3] and it is conceived, as has already been stated,[4] that to be such it must be essentially *pecuniary* in its nature. For it is certain, that no similarity of situation with the party producing the witness,[5] no mere hopes or expectations of benefit, however strong;[6] no bias resulting from friendship or hatred or consanguinity, as fear or favor;[7] no mere honorary obligation;[8] no domestic tie or social relation

[1] Continued from page 27.

[2] 1 Greenlf. Ev. § 410.

[3] 1 Phill. Ev. 86; 1 Greenlf. Ev. §§ 408, 394, 402, 386, Hodsdon *vs.* Wilkins, 7 Greenlf. 113; Humphreys *vs.* Miller, 4 C. & P. 7.

[4] Ante, § 21. For an exception, see ante, §§ 29, 31.

[5] 1 Phill. Ev. 119; Sargeant *vs.* Gutterson, 13 N. Hamp. 467; 1 Greenlf. Ev. § 408; Bent *vs.* Baker, 3 Term R. 27; Rollins *vs.* Taylor, 25 Maine, 144.

[6] 1 Phill. Ev. 86, 119; authorities last cited; Philbrook *vs.* Handley, 27 Maine, 56, 58.

[7] 1 Leach's C Cases, 151; Rudd's case 2 H. P. C. 280; 1 Phill. Ev. 119; 1 Greenlf. Ev. 386; 1 Phill. Ev. 69.

[8] Fink *vs.* McClung, 4 Gilman, 569; Vanmeter, vs. McFadden, 8 B. Monroe, 435; Hopkinson *vs.* Holmes, 18 Verm. 18; State *vs.* Poteet, 7 Iredell, 356; 1 Phill. Ev.

(except that of husband or wife,) no mere belief or supposition of interest,[1] nor any other motive by which human conduct is determined; nothing except a *legal interest* in the result;[2] will render a person incompetent. But it may well be considered by the jury how far such *relations* and *states of mind* should affect the credibility of the witness;[3] the reason for rejecting persons interested as parties is conceived to be essentially the same as that for rejecting the parties themselves.[4]

§ 37. It has been said that the interest which renders a person incompetent must be a legal interest,[5] and that if it be such, its magnitude is of no consequence.[6] Of course the rank or fortune of the person interested is wholly immaterial.[7] But if a person is *equally* interested for both parties, he is competent for either; if more for one than the other, he is not competent for that one.[8] We

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128; 1 Stark. 102; Moore *vs.* Hitchcock, 4 Wend. 292; Union Bank *vs.* Knapp, 3 Pick. 96; Smith *vs.* Downs, 6 Conn. 365; Pond *vs.* Hartwell, 17 Pick. 272. The rule may be more doubtful in England. Gresley Ev. 251; 1 Stark. Ev. 104, note, (Metcalf's ed.); 1 Phill. Ev. § 128.

[1] Post. § 39, note.

[2] 1 Greenlf. Ev. § 386; 1 Phill. Ev. 120.

[3] 1 Phill. Ev. 86, 119; 1 Greenlf. Ev. § 386.

[4] 1 Phill. Ev. 81; 1 Greenlf. Ev. § 386. In this section Prof. Greenleaf says, the reason for excluding persons having an interest in the suit is the same as "that which excludes the parties themselves." It is true, he refers to considerations of public policy and to the danger of perjury. But it is conceived there is a radical distinction between excluding one as "incompetent" and excluding him as "inadmissible on grounds of public policy." Ante, § 4, note. If there is no interest, is there any danger of perjury? Does not danger of perjury imply interest? So far, then, as the mere question of *competency* is concerned, will not the rules which determine the competency of persons who are not parties, suffice also for persons who are parties?

[5] Ante, § 36.

[6] Ante, § 32; Burton *vs.* Hinde, 5 Term R. 175; Butter *vs.* Warren, 11 Johns. 57.

[7] 1 Greenlf. Ev. § 391; 1 Phill. Ev. 86, 87. The law demands general rules.

[8] 1 Phill. Ev. 87; 1 Greenlf. Ev. §§ 391, 399, 420. This rule is unquestionable and uniform. The cases are very numerous. It will suffice to cite a few of the later ones. Hunt *vs.* Chambers, 7 S. & M. 532; Ellis *vs.* Bervillier, 15 Ohio, 489; Morse *vs.* Green, 13 N. Hamp. 32; Kingsbury *vs.* Smith, 13 N. Hamp. 109. But see Barnetts *vs.* Snowden, 5 Wend. 181; Hale *vs.* Hale, 8 Conn. 336.

have seen that these principles apply equally to cases where the interest is only in the costs of the suit, as to cases in which the interest is in the subject matter.[1] If the person would be liable for costs only in one event of the suit, he will be incompetent for that party, which by prevailing, would fix the witness' liability.[2] It is of no consequence in what manner the liability for costs arises;[3] it is material only that it be a *legal* liability.[4]

§ 38. It having been made to appear that the interest must be pecuniary in its nature;[5] as well as legal,[6] it seems necessary to examine more in detail the elements of a *legal* interest.[7] An interest in the result of the suit, to be legal, and therefore to be such as will render a person incompetent, must (1) be *real*, and, (2) it must be *certain*, and (3,) it must be *direct*. But before proceeding further, it may be laid down as a very general rule, (subject to qualifications and exceptions to be hereafter mentioned;) that this *legal* interest may exist, and will render a person incompetent to give evidence when offered to *prevent* a verdict which will take away that which belongs to him,[8] or which will defeat a claim made against him;[9] or

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[1] Ante, § 22, and authorities last cited; Kingsbury *vs.* Smith, 13 N. Hamp. 109. The rule was formerly different in England, but now conforms to the rule stated in the text, or rather did, before the late statutes already cited. Townsend *vs.* Downings, 14 East, 565; post. § 43, note; ante, § 22.

[2] 1 Greenlf. Ev. § 391; Larbelestier *vs.* Clark, 1 B. & Ad. 899; Kingsbury *vs.* Smith, 13 N. Hamp. 109.

[3] Marland *vs.* Jefferson, 2 Pick. 240; Butter *vs.* Warren, 11 Johns. 57; Parker *vs.* Vincent, 3 C. & P. 38; Rush *vs.* Flickwire, 17 S. & R. 82; Riddle *vs.* Morse, 7 Cranch, 206.

[4] Ante, § 36, note.

[5] Ante, § 36, note.

[6] Ante, § 36, note.

[7] In strict accuracy of language, a legal interest is the correlative of an *illegal interest*, or such a claim as the law would not enforce on the ground of immorality, fraud or public policy; and hence could not be used to express the aggregate of the essential ingredients of that *kind* of interest which renders a person incompetent. But it is conceived to be clear that the law gives to the phrase "*legal interest*" a much wider import: that it includes that kind and degree of interest which renders one incompetent. I have therefore so treated it. See ante, § 36, note.

[8] Jacks *vs.* Nichols, 3 Sandford's Ch. R. 313; Bowman *vs.* Noyes, 12 N. Hamp. 302.

[9] Draper *vs.* W. and N. Railroad, 11 Met. 505. Or to satisfy a claim; Taylor *vs.* Paullin, 11 Ala. 512; Carrington *vs.* Hilabird, 17 Conn. 530. 1 Greenlf. Ev. § 393.

to procure a verdict which will give him what belongs to another,[1] or which will establish his claim against another.[2]

§ 39. (1) When it is said an interest must be *real*, it is meant to distinguish it from an interest which exists only in the belief or supposition of the witness.[3] Here again the law acts upon the necessity of general rules. To measure the sincerity or influence of the witness' belief would be an inquiry quite too difficult and metaphysical for the purposes of judicial tribunals.[4] If the witness might be rejected when he thinks he has an interest, but has none, it is not readily perceived why he would not be competent when he thinks he has no interest, and yet in fact is legally interested. To adopt such a rule would be, at least, to allow every dishonest man to be a witness or not at his pleasure.[5] To be governed by the actual interest is the safe and prevailing rule.[6] And we have seen that a mere honorary obligation does not render one incompetent.[7] The interest must *really* be an interest in *the suit*, and not merely an interest in the question to be decided.[8] Hence in an

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Or that may be made; but it must be certain to produce the result. Phibrook *vs.* Handley, 27 Maine, 56.

[1] Cully *vs.* Ross, 7 Blackford, 312; Porter *vs.* B. of Rutland, 19 Vt., 4 Wash. 533.

[2] Leiper *vs.* Gewin, 9 Ala. R. 326; Randall *vs.* Phillips, 3 Mason, 378. Or which will *prima facia* establish a claim against another. Latham *vs.* Kenniston, 13 N. H. 203.

[3] The authorities are not in harmony on this point. In England (before the late statutes removing incompetency by reason of interest,) the rule of the text was by no means clearly established. The prevailing doctrine in this country is that laid down in the text. 1 Stark. Ev. 104, note (Metcalf's ed.); Gresley Ev. 251; Greenlf. Ev. § 387, 388; 6 Conn. 365; 18 Wend. 466; 8 Watts, 227; Pond *vs.* Hartwell, 17 Pick. 272; ante, § 36, note; contra, 4 Bibb, 445; 2 J. J. Marsh, 391; 2 Mumf. 148; Plum *vs.* Whiting, 4 Mass. 518.

[4] 1 Phill. Ev. 127, 128; 1 Stark. Ev. 102; 1 Greenlf. Ev. § 387.

[5] Cochet *vs.* Dinon, 4 McCord, 311; where it was held, that the declarations of the witness that he was interested were not sufficient to render him incompetent, and that the party was *entitled* to have him examined. See also the People *vs.* McNair. 21 Wend. 608.

[6] 1 Greenlf. Ev. § 387; authorities cited in § 36, note.

[7] Ante, § 36, note.

[8] 1 Greenlf. Ev. § 389; Burt *vs.* Baker, 3 Term R. 27; Spurr *vs.* Pearson, 1 Mason, 104; Owens *vs.* Speed, 5 Wheaton, 423; J. *vs.* H., 6 Cowen, 248; Handly *vs.* Call, 27 Maine, 35.

action by one of several whose lands had been flowed by reason of defendant's dam, and though the defendant claimed the *right* to flow the lands of the others, as well as those of the plaintiff, they were held to be competent for the plaintiff.[1] So in an action for the diversion of a water course, one of those living on the stream and injuriously affected, is still competent for another (the plaintiff) similarly situated.[2] The interest is only in the question.[3] Neither the claim, the remedy, or the liability of the witness is changed by the suit.

§ 40. (2,) When it is said the interest must be certain, it is meant to exclude all doubtful or contingent interests. And it is conceived that an interest is contingent, not when, the *legal right* being *perfect*, it is merely uncertain whether *in point of fact* it ever *will be* enforced, but when it is *uncertain* whether the *legal right* or *possibility* of *enforcing* it ever will be *perfect*.[4] If it can be enforced as a legal consequence of the suit, it is conceived it will render the person who might acquire or lose it, incompetent, however uncertain or improbable it may be that it ever will be enforced.[5] Hence in

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[1] Sargent *vs.* Gutterson, 13 N. Hamp. 467.

[2] Parker *vs.* Griswold, 17 Conn. 288; and see Rollins *vs.* Taylor, 25 Maine, 144; Stewart *vs.* Conner, 9 Ala. 803.

[3] It would seem that all the numerous cases turning upon an interest in the question would equally well illustrate the rule that the interest must be certain and not contingent. For although the plaintiff may be deterred from bringing a second action by his defeat in the first, (which may have been caused by the testimony of him who might be a party in the second suit,) still as the result of the first suit *does not* affect *the legal rights* of the parties, but only the mere *probability* of a second action as a *matter of fact*, the competency is not affected. The interest is contingent. See post. § 40, note. See 1 Greenlf. Ev. § 400.

[4] 1 Phill. Ev. 81–86, 121, 122; 1 Greenlf. Ev. §§ 408, 409; Phibrook *vs.* Handley, 27 Maine, 56.

[5] So far as my examination has gone; but see 1 Greenlf. Ev. §§ 400, 397. I should have been justified by the example of the learned writers on this branch of the law, had I declined to give so much point to this statement. But I have not chosen to be obscure, rather than hazard the danger of an error. There is no little obscurity on this point, and there are some cases which seem to have lost sight of the distinction I have made. Nevertheless, I think it founded in reason and upon authority. Cornell *vs.* Vanartsdeller, 4 Barr, 364; Hopkins *vs.* Holmes, 18 Vt. 18; Carrington

an action against an administrator for a debt of the intestate, the surety in the administrator's bond is competent for the administrator to prove a tender.[1] So a mariner, entitled to a share in a prize, is competent for the captain in a suit by the captain for his share of the prize.[2] For, in the first case the result cannot make it certain that the witness will lose, nor in the latter can it make it certain that he will gain anything.[3] So a surety to a surety is competent for the first principal, it being uncertain whether the defeat of the principal would affect the witness.[4] So a legatee is competent for a devisee, if there is no certain evidence that he may be called upon to refund.[5] But one who has become bail for another,[6] or who endorses a writ and thereby becomes surety for costs,[7] is not competent, for their liability will be made certain by a judgment adverse to their interest. Nor is one competent to increase a fund out of which he is entitled to be paid.[8] The cases are very numerous upon this subject, and I can do no more than refer to them generally.[9]

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vs. Holabird, 17 Conn. 530; Adams *vs.* Barrett, 3 Kelly, 277, id. 523; Williams *vs* Little, 12 N. H. 29; Levers *vs.* Buskirk, 4 Barr, 309; Loud *vs.* Pierce, 25 Maine, (12 Ship,) 233; Allen *vs.* Adams, 17 Conn. 67; Jones *vs.* Brownfield, 2 Barr, 55; 1 Greenlf. Ev. §§ 408, 409. Perhaps all the cases of persons whose competency is called in question on the ground of an interest in the record, turn on this distinction. See ante, § 39, note.

[1] Carter *vs.* Pierce, 1 Term R. 163.

[2] Anon. Skin. 403.

[3] Philbrook *vs.* Handley, 27 Maine, 56, illustrates the same principle. The right of action is not made perfect by the judgment. There is a further contingency arising upon matter of fact.

[4] Allen *vs.* Adams, 17 Conn. 67.

[5] Levers *vs.* Vanbuskirk, 4 Barr, 309; Clarke *vs.* Gannon, Ry. & M. 31.

[6] 1 Term R. 164; 3 Stark. 132.

[7] Robert *vs.* Adam, 9 Greenlf. 9; Hall *vs.* Baylis, 15 Pick. 51; Salmon *vs.* Rance, 2 Serg. & R. 311.

[8] Cully *vs.* Ross, 7 Blackford, 312; Jacks *vs.* Nichols, 3 Sandford's Ch. R. 313.

[9] 1 Greenlf. Ev. §§ 392, 393, 408, 409, supra, note. Parties to notes and bills are generally competent in actions upon the notes, &c., because in most cases the witness is already liable to some one, or will in either event of the suit have a remedy against some one. 1 Greenlf. Ev. §§ 400, 401; 1 Phill. Ev. 110, 111; Bayley on Bills, 586. 2 Stark. Ev. 179, 182. See § 20 ante, as to the admissibility of parties to notes.

§ 41. (3) To render a person incompetent, his interest must be *direct*. There are many cases, some of which are cited in the notes to the last section, which equally well illustrate the present rule, and the one just considered. But there are others which require to be noticed in the present connection. The liability must be direct to the party calling the witness, to render him incompetent.[1] If the result of the suit would only make a person liable to some other individual, who would be liable to the party, that person will still be competent.[2] Hence if A would be rendered liable to B, and B to be a party, *A* is competent for that party.[3] So where an article has been sold by successive vendors with like warranty, an antecedent vendor will be competent for a subsequent one, if there be intermediate vendors who are liable.[4] The liability is too remote. But as a general rule at least, a person who is liable to make good, *to a party*, the title or quality of an article, will be incompetent for that party, when such title or quality are in dispute.[5] And it is immaterial whether this liability originate in an express contract, or in an implication of law;[6] or whether the liability be to indemnify the

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[1] 1 Greenlf. Ev. § 37. And see Rex *vs.* Luckeep, Willes, 425; 1 Phill. Ev. 65, 66.

[2] Clarke *vs.* Lucas, Ry. & M. 32; Allen *vs.* Adams, 17 Conn. 67.

[3] Allen *vs.* Carty et. al. 19 Vermont, 65.

[4] Clarke *vs.* Lucas, Ry. & M. 32; Martin *vs.* Kelly, 1 Sten. (Ala.) 198.

[5] Serle *vs.* Serle, 2 Roll. Abr. 685; Steers *vs.* Carwandine, 8 C. & P. 570; Lewis *vs.* Peake, 7 Taunt. 153; Biss *vs.* Mountain, 1 M. & Rob. 302. But see Baldwin *vs.* Dixon, 1 M. & Rob. 59; Biggs *vs.* Crick, 5 Esp. 99. See also Kingsbury *vs.* Smith, 13 N. Hamp. 109. But the vendor will not be incompetent unless his covenants or agreements are such as to make him *certainly* liable in the event of the suit terminating adversely to the party offering him. Lathrop *vs.* Muzzy, 5 Greenlf. 450; Davis *vs.* Spooner, 3 Pick. 284; Adams *vs.* Cuddy, 13 Pick. 460; Beidelman *vs.* Foulk, 5 Watts, 308.

[6] 2 Bla. Com. 451; 2 Kent's Com. 478; Elmerson *vs.* Bigham, 10 Mass. 203; (Rand's ed.) Peto *vs.* Blades, 5 Taunt. 657; Mockbee *vs* Gardiner, 2 Har. & Gill, 176; Heermance *vs.* Verney, 6 Johns. 5; Hale *vs.* Smith, 6 Greenlf. 416; Cow. & Hill's Notes to 1 Phill. Ev. vol. 3, p. 1532.

If the person will be liable to one or the other of the parties, in either event he will be competent for either, unless he is liable for costs in one event and not in the other. Kingsbury *vs.* Smith, 3 N. H. 109; Labalastier *vs.* Clarke, 1 B. & Ad. 899; 1 Starkie Ev. 109, note (n.) 2 Id. 894, note (a), 1 Greenlf. Ev. § 393.

party against the judgment itself, or only against some fact *essential* to the rendition of the judgment.[1] If the effect of a judgment for the plaintiff would be to confirm a person in the enjoyment of an interest in possession,[2] or would place him in the immediate enjoyment of a right;[3] or if a person, as an underwriter, is to be refunded a sum paid,[4] in the event of the plaintiff's success; in none of these cases, will the person having such direct interest be a competent witness for the plaintiff.

§ 42. In further illustration of the rule, that a direct interest will exclude a person, it may be laid down that no person is competent to give testimony, the direct legal effect of which will be to place him in a situation of entire security against a subsequent action.[5] But it must sufficiently appear that such action could legally be maintained.[6] Therefore, in an action against a principal for damages, occasioned by the misconduct of his servant or agent, the latter, (if it sufficiently appear that he would be liable over to his master

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[1] Forrester *vs.* Pigou, 3 Campb. 380; 1 M. & S. 9, S. C.; 1 Geeenlf. Ev. § 397.

[2] Doe *vs.* Williams, Cowp. 621. This was a case where a lessee was called by his lessor, in ejectment.

[3] Rex *vs.* Williams, 9 B. & C. 549.

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

[5] Draper *vs.* W. & N. Railroad, 11 Met. 505. But a prima facie evidence at least of a right of action against the witness, must appear. Holabird *vs.* Carrington, 17 Conn. 530; post. § 43, note. See Latham *vs.* Kenniston, 13 N. Hamp. 203.

[6] 1 Greenlf. Ev. § 394. Though Prof. Greenleaf has laid down this rule in such general and unqualified language that it would render a witness incompetent to testify in *every case* where he is *threatened* with a suit; yet it is conceived it should be regarded as applicable only in those cases where the legal *right to bring such suit* is certain; or in other words, where a *prima facie* case *appears* against the witness. Otherwise it would seem the interest is only contingent. Carrington *vs.* Holabird, 17 Conn. 540; Taylor et. al. *vs.* United States, 3 Howard, 306; Barnes *vs.* Cole, 21 Wend. 189; Carter *vs.* Pearce, 1 Term R. 162; 2 Stark. Ev. 762; Dudley *vs.* Bolles, 24 Wend. 465; Levers *vs.* Buskirk, 4 Barr, 309; Van Meter *vs.* McFadden, 8 B. Monroe, 435. It is conceived that it cannot be laid down as an unqualified rule, that the bare fact that a person's testimony "will prevent a suit being brought against him," will render him incompetent. 3 Howard, U. S. R. 306; 17 Conn. 540; Smith *vs.* Seward, 3 Barr, 342. Though he would be incompetent if his evidence would defeat a prima facie case Latham *vs.* Kenneston, 13 N. Hamp. 203.

in another action)[1] will not be competent for the defendant without a release.[2] In most such cases he would be liable over to his master or principal to refund the damages recovered by the plaintiff in the first action. The principle is one of extensive application. As to a shipmaster[3] to a wagoner,[4] to a sheriff's officer,[5] to a broker;[6] to the guard of a coach[7], to a pilot,[8] to a creditor in an action against an officer;[9] where, in the several cases referred to a judgment for the party adverse to the one calling the witness, would have exposed the witness to an action by the party calling him, and in some of them, at least, would have fixed the quantum of damages for which the witness would be liable.

§ 43. So if a person is to pay a sum of money to the plaintiff, if the plaintiff fail in the suit, such person is clearly incompetent for the plaintiff.[10] So when one action is to abide the event of another, all the parties have a direct interest.[11] So in an action against a surety on a joint and several bond, the surety cannot call the principal to prove payment by the latter; for the witness has an interest in favor of the surety to the amount of costs.[12] So one liable to an action himself, is not a competent witness to sustain an action against

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[1] Barnes *vs.* Coles, 21 Wend. 189; Hobbes *vs.* Paddock, 19 Wend. 456; and authorities cited in last note: In the cases cited from Wendell there may be reason for saying the actions were for the negligence of the *master*. But see 11 Met. 505; Draper *vs.* W. N. Railroad, 11 Metc. 505. See also Smith *vs.* Seward, 3 Barr, 342.

[2] 1 Greenlf. Ev. § 394.

[3] De Sequard *vs.* De la Tour, 2 New Rep. 374.

[4] Holabird *vs.* Carrington, 17 Conn. 530.

[5] Powell *vs.* Rand, 1 Stra. 650; Brown *vs.* Bradley, 8 C. & P. 500. So under analagous circumstances, the creditor is also incompetent. Jewett *vs.* Adams, 8 Greenlf. R. 30; Turner *vs.* Austin, 16 Mass. 181.

[6] Field *vs.* Mitchell, 6 Esp. 71; Boorman *vs.* Brown, 1 P. & D. 364.

[7] Whittemore *vs.* Waterhouse, 4 C. & P. 383.

[8] Hawkins *vs.* Finlayson, 3 C. & P. 305. But if his interest is balanced, he is competent. Vaisin *vs.* Ins. Co., 1 Wilcox, 283.

[9] Keightly *vs.* Birch, 3 Campb. 521; Turner *vs.* Austin, 16 Mass. 181; Rice *vs.* Wilkins, 8 Shepley's Maine R. 558;

[10] Frothingham *vs.* Greenwood, 1 Stra. 129.

[11] Forrester *vs.* Pigou, 1 M. & S. 9; 1 Greenlf. Ev. § 395.

[12] Townsend *vs.* Downing, 5 East, 565. See for an analagous principle, Griffin *vs.* Brown, 2 Pick. 304; Lefferts *vs.* De Mott, 21 Wend. 136. As to an interest in costs generally, see ante, § 22, note. But see Burt *vs.* Kershaw, 2 East, 460.

another which will discharge his own liability.[1] Hence a servant or agent *may* not be competent for his master or principal to prove an injury to the master's property by a stranger whilst it was in the custody of the servant or agent.[2]

§ 44. The interest which renders a person incompetent must be an interest in the suit, and not an interest in the *question merely*. The cases are very numerous, and the principle well settled. It is certain that no mere similarity of situation, or right, exposing a person to, or giving him a right to maintain a like action, or an action upon like evidence;[3] if the *direct legal effect* of the judgment does not give, or confirm him in some right, or take some right from him, it will render him incompetent.[4] Hence one freeholder is competent for another claiming under the same title,[5] one devisee for another claiming under the same will;[6] one person whose lands are flooded by reason of a dam, for another whose lands are flooded by the same dam.[7] But this subject has already been partially discussed, and may be here dismissed with the remark, that the rule itself is much clearer than the cases to which it is to be applied.[8]

§ 45. It may be further observed, that the principles which we have now laid down under the head of "a relation not as parties

[1] Emerton *vs.* Andrew, 4 Mass. 653; Hockson *vs.* Marshall, 7 C. & P. 16; ante, § 38.

[2] Moorish *vs.* Foote, 8 Taunt. 454; Sherman *vs.* Barnes, 1 M. & Rob. 69. But this doctrine is by no means satisfactorily established. The interest would seem to be no more than *contingent*. See 1 Greenlf. Ev. § 396, note (1) 544, 3d ed; also the authorities cited ante, § 42, note; especially Holabird *vs.* Carrington, 17 Conn. 540; where the general doctrine is doubted, though the decision was not directly upon the point. Johnson *vs.* Marsh, 2 Bail. 183; McDowell *vs.* Simpson, 3 Watts, 129, 134; 2d Part. Cowen & Hill's Notes to Phill. Ev., Supplement, 1525–1530. As to the difference in the principle whether the master be plaintiff or defendant, see Faucourt *vs.* Ball, 1 Bing, (N. C.) 681, 688. The servant is legally incompetent, (if his negligence or liability to an action sufficiently appears) in either case.

[3] Handley *vs.* Call, 27 Maine, 35.

[4] Evans *vs.* Eaton, 7 Wheaton, 356; Evans *vs.* Hettich, *ibid* 453; Steward *vs.* Kip, 5 Johns. 256, ante, § 36; Rollins *vs.* Taber, 25 Maine, 144; Parker *vs.* Griswold, 17 Conn. 288; Holabird *vs.* Carrington, 17 Conn. 530.

[5] Richardson *vs.* Carey, 2 Rand, 87; Owens *vs.* Speed, 5 Wheat. 423.

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

[7] Sargent *vs.* Gutterson, 13 N. Hamp. 467.

[8] Sargent *vs.* Gutterson, 13 N. Hamp. 467; ante, § 39. In the case last cited the general subject is discussed with great perspicuity and ability.

creating an interest in the suit," apply as well to criminal as to civil cases. If a person has a legal interest in the result of the trial, he will not be a competent witness for the prosecution.[1] Thus, in summary convictions where a penalty is imposed by statute, to the whole or part of which the informer or persecutor is entitled in case of conviction, he is not by the common law[2] competent for the prosecution.[3] But these are exceptions to the rule, which can be better treated in another connection.[4]

§ 46. (3,) Of incompetency from a relation creating an interest in the record of the judgment to be rendered in the suit.[5] The general rule in regard to using a record as evidence has been laid down by high authority to be that "the judgment of a court of concurrent jurisdiction *directly* upon the point, is as a plea in bar; or as evidence conclusive; between the same parties, upon the same, matter, *directly* in question in another court: Secondly, that the judgment of a court of exclusive jurisdiction *directly* upon the point, is in like manner conclusive upon the same matter between the same parties, coming incidentally in question in another court for a different purpose." But it is added, that the judgment of neither court is evidence of any matter which came collaterally in question, or is incidentally cognizable, or of any matter to be inferred by argument from the judgment.[6] By the parties, the law means those who have a right to make defence, to control proceedings and appeal from the judgment.[7] And, to give full effect to the principle by which parties

[1] Roscoe's Crim. Ev. 103; 1 Phill. Ev. 61–69. As to what constitutes a legal interest in certain criminal cases, see ante, §§ 21, 29, notes.

[2] R. *vs.* Williams, 9 B. & C. 549; Cornein *vs.* Paull, 4 Pick. 251; 2 Russ. on Crimes, 601, 602. But if the penalty is to be recovered in another action, the interest is too remote, and the person is competent. Rex *vs.* Luckeep, Willes, 425; 1 Phill. Ev. 65.

[3] United States *vs.* Patterson, 3 McLean, 53; Ibid. 299.

[4] Post. § 54, U. S. *vs.* Everest, 1 Morris, 206; U. S. *vs.* Murphy, 16 Peters, 302.

[5] This species of incompetency no longer exists in England, having been abolished by statute 3 & 4 Will. 4, ch. 42; s. 26, 27; 2 Taylor's Ev. 867, § 950.

[6] Duchess of Kingston's case, 20 How. St. Trials, 538, per De Grey, C. J. Harvey *vs.* Richards, 2 Gall. 229. The rule finds an application in equity also. Pearce *vs.* Gray, 2 Y. & C. 322. See generally, 1 Phill. Ev. 328, note 557, by C. & Hill. Arnold *vs.* Arnold, 17 Pick. 714; Cobb *vs.* Arnold, 12 Met. 39.

[7] 1 Greenlf. Ev. § 523, and if in the prior suit the party could not avail himself o

are bound by a judgment, all persons who are represented by the parties, or claim under them, or in privity with them, are equally bound by the same judgment.[1]

But both parties must be alike bound by the judgment, or it will bind neither.[2] It is a general rule that a judgment *in rem*, upon the personal *status* or relation of the party, or "upon the title, transfer, or disposition of property," will not only be binding upon parties, but upon all persons.[3] A verdict and judgment are always admissible to prove the fact that the judgment was rendered, or the verdict given, and the record is the only proper evidence of itself, of the rendition of the judgment and of all the legal consequences resulting from that fact. But this is widely different from using it as evidence of the facts recited in it, which in general can be done only in the cases just mentioned.[4]

§ 47. A judgment rendered in a former suit may be used by way of inducement, or to establish a collateral fact, though the parties be not the same.[5] As in proper cases to prove the amount which a principal has been compelled to pay by reason of the default of his agent,[6] and the allegations upon which the judgment was rendered.[7] But, unless the agent has undertaken the defence, or has been so dealt with that he ought to have undertaken it, the judgment cannot be used to prove that the agent was guilty of any thing alleged against him, in the action against the principal.[8]

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the same means of defence or redress which are open to him in the second suit, he will not be bound. 1 Stark. Ev. 214, 215.

[1] 1 Greenlf. Ev. §§ 523, 536, 189; Lock *vs.* Norboine, 3 Mod. 141; Buller's N. P. 232; Outrum *vs.* Morewood, 3 East, 353; Adams *vs.* Barnes, 17 Mass. 365.

[2] Wood *vs.* Davis, 7 Cranch, 271; Davis *vs.* Wood, 1 Wheat. 6.

[3] For the authorities on this point, and the reasons upon which the rule proceeds, and the exceptions and qualifications which belong to it, see 1 Stark. Ev. 27, 28; Story Confl. Laws §§ 532, 545, 551, 591; 1 Stark. Ev. 228, 232, 246–248; Story Confl. Laws, § 593; 1 Greenlf. Ev. §§ 525, 541, 543.

[4] Greenlf. Ev. §§ 538, 527, 527 a, 528.

[5] 2 Phill. Ev. 3; Adams *vs.* Balch, 5 Greenlf. 188; Barr *vs.* Gratz, 4 Wheat. 212; Jackson *vs.* Wood, 3 Wend. 27; 1 Greenlf. Ev. §§ 527, 404.

[6] Green *vs.* New River Co., 4 Term 589; Draper *vs.* W. & N. Railroad Co., 11 Met. 505; ante, § 42, notes. 1 Greenlf. Ev. §§ 527, 538, 539, 404; 1 Phill. Ev. 101, 102; 13 N. Hamp. 302, per Parker. Ch. J.

[7] 1 Greenlf. Ev. §§ 539, 404.

[8] 1 Stark. Ev. 114, 115; 1 Greenlf. Ev. 404; 1 Phill. Ev. 102.

§ 48. It is a general rule, that wherever a judgment has been rendered, affirming the existence of a custom or prescriptive right, especially when stated on the record,[1] and in another suit, this custom or prescriptive right is called in question, the record of the judgment in the former suit will be conclusive evidence of the existence of the custom or prescriptive right, though the parties be different.[2]

§ 49. Upon the principle that an interest in the record, as an instrument of evidence, in some other suit, renders a person incompetent, it may be laid down as a general rule, subject to some exceptions to be hereafter mentioned, that wherever the relation of a person to the judgment to be rendered in an action is such, that in the proper application of the principles laid down in the last three sections, it appears that his evidence for the party offering him would directly tend to procure a judgment which might be used in his favor in any action which it sufficiently appears[3] might be brought by or against him, or affecting his rights, he is not a competent witness for that party.[4] Hence, where a plaintiff prescribed for common of pasture in Hampton common, it was held that the other tenant who would be confirmed in a similar right, by judgment for the plaintiff establishing the prescription in question, was not competent for the plaintiff.[5] So an inhabitant of a town is not competent to prove a prescription for all the inhabitants to dig clams in a certain place,[6] or to prove a prescriptive right of way for all the inhabitants.[7] So one who has made himself liable by violating a

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[1] Lord Falmouth *vs.* George, 5 Bing. 286; 1 Stark. Ev. 115, note (e).

[2] Greenlf. Ev. § 405; Sargent *vs.* Gutterson, 13 N. Hamp. 467, where the general question was very clearly stated; 1 Phill. Ev. 83. 84.

[3] Ante, § 42, notes; Smith *vs.* Seward, 3 Barr, 342; Draper *vs.* W. & N. Railroad, 11 Met. 505; Holabird *vs.* Carrington, 17 Conn. 540.

[4] 1 Greenlf. Ev. § 404; 1 Phill. Ev. 83, 84; 1 Stark. Ev. 114, 115; Cobb *vs.* Arnold, 12 Met. 39; Anscomb *vs.* Shore, 1 Taunt. 261; Parker *vs.* Mitchell, 11 Ad. & El. 788; Odiorne *vs.* Wade, 8 Pick. 518; Moore *vs.* Griffin, 9 Shepley, 350; Rhodes *vs.* Ainsworth, 1 B. & Ald. 87; Branch *vs.* Doane, 17 Conn. 402.

[5] Anscomb *vs.* Shore, 1 Taunt. 261.

[6] Larkin *vs.* Haskell, 3 Pick. 365.

[7] Odiorne *vs.* Wade, 8 Pick. 518.