

THE

AMERICAN LAW REGISTER.

~~~~~  
FEBRUARY, 1860.  
~~~~~

THE COMPETENCY OF WITNESSES.¹

THIRD ARTICLE.

Having laid down and illustrated the general rules of incompetency from a relation creating an interest in the suit and the record, it will be convenient, in this last paper of the series, to consider together some exceptions to these rules. They seem to be allowed mainly upon grounds of public policy.²

§ 51. (1) It would be too obvious to mention, did not completeness require it, that where a person incompetent is made competent by *express statute*, his evidence must be received.³

§ 52. (2) If a person interested does all in his power to divest his interest, as by offering to surrender or release it, but by the refusal of some other person he is unable to do so, his competency will nevertheless be restored.⁴ So on the other hand, if a party desiring the testimony of a person, offers to remove an interest which

¹ Continued from page 78.

² 1 Phill. Ev. 144, 145, 149; and hence are mainly beyond the province of this dissertation (see ante, § 4, note, though apparently within the scope of some of its general rules, and so, needful to be considered.

³ 1 Greenlf. Ev. § 415; 1 Phill. Ev. 134-144.

⁴ 1 Phill. Ev. 149; Goodlittle *vs.* Walford, Doug. 143; 5 Term, 35, by Buller J. The language of Mr. Phillips would hardly justify the assertion that a refusal of any but a *party* would have the effect of restoring the witnesses competency. Mr. Greenleaf says, the *refusal* of a *stranger* would have the same effect. It is conceived this better expresses the spirit of the rule. It ought not to be in the power of a third person, by a mere *non-feasance*, to deprive a party of a material witness.

renders that person incompetent, he cannot, by refusing to have his interest removed, deprive the party of his testimony.¹ Nor can a witness render himself incompetent by refusing to release his interest, or to have it released.²

§ 53. (3) The older authorities seem to have held 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.³ If the rule be narrowed to cases where the interest has been created by the fraudulent act of the adverse party,⁴ or out of the usual course of business, by the witness,⁵ except it be in cases where the person was the original witness of the agreement between the parties,⁶ it would be questioned by fewer cases. If the subsequent interest has been created by the party offering the witness, he is thereby rendered incompetent for such party.⁷ Whether, if the person offered was not the agent of both parties, and was not called as a witness of the original transaction, but has *bonâ fide* in the usual course of business, subsequently acquired an interest, is competent, is a question upon which there are conflicting decisions:⁸

¹ 1 Phill. Ev. 149; 1 Greenf. Ev. § 419.

² 1 Phill. Ev. 152; *Horil vs. Stephenson*, 5 Bing. 493; *Clarke vs. Brown*, 1 Barb. 215, (N. Y. R.)

³ *Bent vs. Baker*, 3 Term 27; 1 Phill. Ev. 150, 151; *Jackson vs. Rumsey*, 3 Johns. Cases, 234, 237.

⁴ *Barbour vs. Nowel*, Skin. 586; *Cow*. 736; 1 Phill. Ev. 150, 152; *Forrester vs. Pigou*, 3 Camp. 389; 1 M. & Selw. 9, S. C.

⁵ Authorities in last note; 1 Greenf. Ev. § 418.

⁶ If the party is the original witness, he is competent. See 1 Phill. Ev. 151; 1 Stark. Ev. 118; *Rex vs. For*. 1 Stra. 652; *Phillips vs. Riley*, 3 Conn. 266, 272; *Long vs. Ballie*, 4 S. & R. 222; *Eastman vs. Winship*. 14 Pick. 47.

⁷ 1 Phill. Ev. 152, 153; *Horil vs. Stephenson*, 5 Bing. 493.

⁸ Phill. Ev. 151, 152; 1 Greenf. Ev. § 418. Several States have held such a person would be incompetent (authorities cited supra note 6.) *The I. Manchester Manuf. Co.* 10 Wend. 162; *Cowen & Hill's*, notes, 273; Supplement to 1 Phill. Ev. 139. The Supreme Court of the United States were equally divided in opinion in *Winship vs. U. S. Bank*, 5 Pet. 529, 552. A question may arise which is well stated in a recent case in Maine, 27 Maine R. 56, thus: "the question to be decided is, whether one who is liable to pay a debt may by his testimony as a witness cause another, who would on payment of it have no claim on him, to become liable to pay the same debt."

§ 54. (4) It is a general rule that agents, carriers, factors, brokers and servants generally, are competent for their masters to prove acts done within the scope of their authority, and according to their directions,¹ but not to disprove any tortious or negligent act, which would subject them to an action by the master, if the master should fail in the first action.² Thus a porter, journeyman or salesman, is competent to prove the delivery of goods;³ a factor to prove the contract of sale even though he has a poundage, or is to have all he has bargained for beyond a certain sum.⁴ So a carrier is competent for a bailor to prove that he paid money by mistake, in an action to recover it back.⁵ So a carrier's bookkeeper is competent for his master;⁶ the teller of a bank for a bank;⁷ or a banker's clerk for a banker;⁸ also a shipmaster for the ship owner.⁹ So an agent is

And he was held competent, *Philbrook vs. Handley*, 27 Maine, 56. The same doctrine was held in *Eastman vs. Winship*, 14 Pick. 44; *Rowcroft vs. Bassett*, Peake's Add. Cas. 199; *Nicholson vs. May*, 1 Wright, 660. In *Winship vs. U. S. Bank*, 5 Peters, 529, the court was divided. In *Collins vs. Ellis*, 21 Wend, 397, the witness was held incompetent, and the reason of the thing, as well as the weight of authority, requires he should be, in actions, *ex contractu*. The interest is contingent. In actions *ex delicto* the similarly situated is universally held competent.

¹ See ante; § 42, notes, 1 Phill. Ev. 145, 146; *Draper vs. W. N. Railroad*, 11 Met. 505; *Greenlf. Ev.* § 416. But if the agent has a direct legal interest, he will be incompetent. *Edwards vs. Lowe*, 8 B. & C. 407; I do not observe that Mr. Greenleaf has noticed the fact that this exception, allowing agents to testify, is limited to *general agents*, and does not extend to agents to do *single acts*. 1 Phill. Ev. 146, case last cited. *Williams vs. Little*, 12 N. Hamp. 29, per Parker J.; *Noble vs. Paddock*, 19 Wend. 457; 13 N. H. 32.

² 1 Phill. Ev. 147; 1 Stark. Ev. 113; *Fuller vs. Wheelock*, 10 Pick. 135, 138; *McDowell vs. Stimpson*, 3 Watts, 129; see ante, § 42 notes; *Smith vs. Seward*, 3 Barr, 342; 11 Met. 505.

³ *Bull. N. P.* 289, 4 Term 590; *Adams vs. Davis*, 3 Esp. 48.

⁴ *Sheppard vs. Palmer*, 6 Conn. 95; *Scott vs. Wells*, 6 Serg. & R. 357; *Benjamin vs. Porteous*, 2 H. Bla. R. 590; *Canne vs. Sagoy*, 4 Martin, 81.

⁵ *Barker vs. Macrea*, 3 Camp. 144.

⁶ *Spencer vs. Goulding*, Peake's Cas. 129.

⁷ *Stafford Bank vs. Cornell*, 1 N. Hamp. 192; *O'Brien vs. La. State Bank*, 5 Martin, 305, (N. S.) *U. S. B. vs. Johnson*, Id. 310; *The Franklin Bank vs. Freeman*, 11 Pick. 535; *U. S. Bank vs. Stearns*, 15 Wend. 314.

⁸ *Martin vs. Howell*, 1 Stra. 647.

⁹ *Millard vs. Hallett*, 2 Caines, 77; *Discadillas vs. Harris*, 8 Greenlf. 298; *Marnean vs. Woodland*, 2 C. & P. 65.

competent to prove his own authority, if it be by parol.¹ This class of exceptions is allowed on grounds of necessity and public policy; for otherwise, affairs of daily occurrence could not be proved, and trade and commerce would be ruinously embarrassed.²

§ 55. (5) There is another exception which relates to persons who, upon the conviction of an offender, would be entitled to a reward from government, or from a private individual;³ or to restoration of property stolen; or to a portion of a fine or penalty.⁴ If the benefit to be derived from a conviction was designed for the individual's own advantage, he will, under the general rule, be incompetent;⁵ if to further public justice, by procuring the conviction of offenders, his interest comes under the exception, and he is competent to sustain the prosecution.⁶ The legislature gives rewards to induce individuals to exert themselves to bring the guilty to punishment. Were the courts to make this reward a ground of incompetency, they would in a measure defeat the purpose of the legislature.⁷ The principle of this exception includes the case where, instead of a pecuniary reward, an exemption from prosecution, or pardon, is offered a person, upon conviction of another person.⁸ The person entitled to such pardon or exemption, is a competent witness for the prosecution.⁹ So generally, where the person will derive any other benefit from the conviction of the offender, that person is still com-

¹ *Birt vs. Kirshaw*, 2 East, 458; *McGonagle vs. Thornton*, 10 Serg. & R. 251; *Lowbar vs. Shaw*, 5 Mason, 242

² 1 Phill. Ev. 144, 145, 146; 1 Stark. Ev. 113.

³ *Rex vs. Williams*, 9 B. & C. 556; per Bayley J. The interest is contingent.

⁴ 1 Phill. Ev. 135-137; 1 Greenlf. Ev. § 412.

⁵ *Rex vs. Williams*, 9 B. & C. 549; *Conner vs. Paull*, 4 Pick. 251; 2 Russ. on Crimes, 601, 602. But if the penalty is to be recovered in a subsequent civil action, he is not incompetent. 1 Phill. Ev. 65, 66; 9 B. & C. 557.

⁶ *U. S. vs. Patterson*, 3 McLean, 53, Id. 299; *U. S. vs. Murphy*, 16 Pet. 213. And he will still be competent, though in event of failure he will be liable to costs. *United States vs. Everests*, 1 Morris, R. 206.

1 Phill. Ev. 136, 137, 135; 1 Gilbert's Ev. 114; 1 Greenlf. Ev. § 412; *U. S. vs. Wilson*, 1 Bald. 90; *Conner vs. Moulton*, 9 Mass. 30; *Cowen & Hill's Notes to Phill. Ev.* 2d part, Supplement, 1556.

⁸ 1 Phill. Ev. 136, 137; 1 Greenlf. Ev. § 413.

⁹ *Mead vs. Robinson*, Willes, 422; *Howard vs. Shepley*, 4 East, 180.

petent for the government.¹ As in an indictment for perjury where the party indicted is a witness against him in a pending suit,² so a person whose name is forged is a competent witness for the State against the forger.³

§ 56. Having disposed of the exceptions to the general rules of incompetency, it seems necessary that something should be said as to the time and manner of bringing forward the objection of incompetency, and of removing it. The question of interest is a preliminary question, to be determined by the court in the first instance.⁴ A party may admit an interested witness to give evidence against him;⁵ but, if he knows the witness' interest, he should make objection the first opportunity.⁶ The proper time is before examination in chief; but if not then discovered, it may be taken when discovered during the trial.⁷ The party having a right to object, ought to do so as soon as he is able, so as to give the opposite party an opportunity to release the witness' interest.⁸ But here the court has considerable discretion.⁹

¹ 1 Phill. Ev. 62, 136, 137; 1 Greenlf. Ev. § 114, 1 Stark. Ev. 234.

² Bull. N. P. 232, 245; *Abraham vs. Bunn*, 4 Burr. 2251; a verdict in a criminal case cannot be given in evidence in a civil action. 1 Greenlf. Ev. 537, 414; *Bradley vs. Bradley*, 2 Fairf. 367; *Com. vs. Horton*, 9 Pick. 206.

³ *The People vs. Howell*, 4 Johns. 296, 302. *The People vs. Dean*, 6 Cowen, 27; *Com. vs. Frost*, 5 Mass. 53; *The State vs. Staunton*, 1 Iredell, 424. The rule was anciently otherwise, 1 Greenlf. Ev. § 414.

⁴ See ante, § 5, and notes. See *Walker vs. Sawyer*, 13 N. Hamp. 191; *Strawbridge vs. Spane*, 8 Ala. 820; which perhaps may be thought to somewhat limit the judge's discretion or authority.

⁵ Ante, § 3, note.

⁶ *Donaldson vs. Taylor*, 8 Pick. 390, 392; *Griggs vs. Voorhies*, 7 Blackf. 561. If the objection is not taken as soon as the party has an opportunity, it cannot be taken at all. 1 Greenlf. Ev. § 421, case.

⁷ 1 Stark. Ev. 124; 1 Phill. Ev. 153, 154. See *Griggs vs. Voorhies*, 7 Blackf. 561.

⁸ *Talman vs. Dutcher*, 7 Wend. 180; *Doty vs. Wilson*, 14 Johns. 378; *Wade vs. Lock*, 5 C. & P. 454; 1 Greenlf. Ev. § 121. The interest must be made clearly to appear. *Camden vs. Doveness*, 3 How. S. C. R. 515, 530. After the examination of the witness is completed, he cannot be objected to as interested. *Dewdney vs. Palmer*, 4 M. & W. 664; 1 Phill. Ev. 154. See *Jackson vs. Jackson*, 5 Cowen, 173; *Flagg vs. Mann*, 2 Sumner, 487.

⁹ *U. S. vs. O.* 1 Paine, 400; *Talbert vs. Clarke*, 8 Pick. 51; *Mohawk River vs. Atwater*, 2 Paige, 54; 1 Greenlf. Ev. § 421.

If the interest of the witness is disclosed by his *own testimony*, he will be allowed to answer questions tending to remove or explain his competency, which if otherwise discovered, he would not be allowed to answer.¹

§ 57. There are two modes of proving the interest of the witness; by his own examination;² and by evidence *aliunde*.³ If evidence of interest has been given *aliunde*, it will not be proper to examine the witness himself, to explain away his interest.⁴ But if the evidence *aliunde* be rejected, he may be examined on the *voir dire*.⁵ If the interest of the witness was known before the examination on the *voir dire*, and this fails to show his interest, the objecting party cannot resort to other means of examination.⁶ But if the party did not know the interest, it may be otherwise.⁷ If the party have

¹ 1 Greenlf. Ev. § 422; *Rex vs. Gisburn*, 15 East, 57; *Wandlers vs. Cawthorn*, 1 M. & W. 321, (n); *Miller vs. Mariners' Church*, 7 Greenlf. 51; *Stebbins vs. Sackett*, 5 Conn. 258; *Baxter vs. Rodman*, 3 Pick. 435.

² And his own mere statement that he is interested, is not sufficient to render him incompetent. The party has a right to have him examined. *C. vs. D.* 4 M'Cord, 311 T. vs.M. 21 Wend. 608.

³ 1 Phill. Ev. 154.

⁴ *Mott vs. Hicks*, 1 Cowen, 573; *Evans vs. Gray*, 1 Martin's R. N. S. 709; a party cannot object to the competency of his own witness, 2d part Cowen & Hill's Notes to Phill. Ev. Sup. 1576; but the rule is subject to qualifications. *Crary vs. Sprague*, 12 Wend. 41, 45; 1 Greenlf. Ev. § 423.

⁵ *Main vs. Nowson*, Anthon's Cas. 13. So if the witness on his *voir dire* leaves it doubtful whether he is interested, his interest may be shown *aliunde*. *Shannon vs. The Com.* 8 S. & R. 444; *Bank of Columbia vs. Magruder*, 6 Har. & J. 172; 1 Greenlf. Ev. § 423. The mere statement of the witness that he is interested, without actually showing such to be the fact, will not render him incompetent. *C. vs. D.*, 4 McCord, 311.

⁶ *Phila. & Trenton Co. vs. Stimpson*, 14 Peters, 448, 461; *Harris vs. Wilson*, 7 Wend. 57; *Ordiorne vs. Winkley*, 2 Gall. 53; *Jacobs vs. Layburn*, 11 M. & W. 685. This rule is no where very satisfactorily settled. See 1 Greenlf. Ev. § 423, and notes. If in a subsequent stage of the suit the interest of the witness should appear, his testimony will be rejected. *Brockbank vs. Anderson*, 7 Man. & Granger, 295, 313; *Walker vs. Sawyer*, 13 N. Hamp. 191.

⁷ This would seem to be deducible from the general principles applicable to the subject, though I have found no direct authority for the position. If a party did not *know* the witness' interest it could not be said he had *selected* his method of proof, 1 Greenlf. Ev. § 423, 1 Phill. Ev. 156.

knowledge of the interest he should select his means of proof in the outset, and he will generally be bound by it.¹

§ 58. Release. It is a general rule having very few exceptions,² that whenever a person is incompetent by reason of an interest in the suit, his competency may be restored by release, whether his interest be a vested one in himself, or consist of a liability over to another person.³ The release should be given before the testimony is closed,⁴ but if the trial be not ended, the court will permit the witness to be examined,⁵ whether the release be given to or by the witness, it must be legally sufficient to extinguish his interest in the suit or record.⁶ But it seems there are some interests which a release is not sufficient to extinguish;⁷ and still more which will require releases to more than one person.⁸ A delivery of a release to a third person⁹ or to the court for the witness' benefit may restore the competency of the witness, if at the time of giving his testimony he knew of the release.¹⁰ So when a witness gave his testimony, relying upon the

¹ 1 Greenlf. Ev. § 423; *Stebbins vs. Sacket*, 5 Conn. 258; authorities cited supra, note a resort to one mode to prove interest on *one ground* will not prevent a resort to the other to prove interest on a *different ground*, 5 Conn. 258.

² There may be exceptions. *Eastman vs. Winship*, 14 Pick. 47.

³ 1 Phill. Ev. 156, 157; 1 Greenlf. Ev. § 426; *Farmers & Mech. Bank vs. Champ. Trans. Co.*, 18 Vt. R. 131; *ibid.* 614; *ibid.* 395; *Dogan vs. Ashley*, 1 Strobbart, 433; *Cunningham vs. Knight*, 1 Barb. N. Y. 399.

⁴ *Wade vs. Lock*, 5 C. & P. 454; *Talman vs. Dutcher*, 7 Wend. 180; 1 Greenlf. Ev. § 426.

⁵ Authorities cited in last note; *Doty vs. Wilson*, 14 Johns. 378.

⁶ *Beecher vs. Buckingham*, 18 Conn. 110; *Bridges vs. Armour*, 5 Howard, U. S. 91; *Gully vs. Ross*, 7 Blackf. 312; *ibid.* 317; *Hutchinson vs. Potts*, 18 Vermont, 614; *Ball vs. Bank of Ala.*, 8 Ala. R. 590; *Cunningham vs. Knight*, 1 Barb. 399; *Ackley vs. Buck*, 18 Vt. 395; *Kirk vs. Ewing*, 2 Barr, 453; 1 Phill. Ev. 160.

⁷ *Jacobson vs. Fountain*, 2 Johns. 170; *Abbey vs. Goodrich*, 3 Day, 433; 1 Greenlf. Ev. § 428.

⁸ *Hutchinson vs. Peters*, 18 Vermont, 614; 1 Phill. Ev. 158, 159; *W. vs. K.* 4 B. & Ad. 760; *B. vs. S.*, 8 Bing. 369.

⁹ *L. vs. K.*, 1 Yeates, 30; *S. vs. S.*, 4 Hill, 225; *V. vs. F.*, 15 Pick. 449. But see *Bull vs. Bank of Ala.*, 8 Ala. R. 590.

¹⁰ *S. vs. S.* 4 Hill, 225; 1 Greenlf. Ev. § 429, note; *Kyle vs. Bostick*, 10 Ala. 589, seems to restrict the general doctrine as to giving release to third persons for the witness' benefit. So a witness may pay a sum of money into court, 1 Phill. Ev. 161

promise of a release, a refusal to give one was held to be no ground for a new trial.¹ So if a witness offer a release which is refused,² his competency is restored.³

§ 59. It is not by a release only that a witness' competency may be restored. Any act⁴ or writing which has the legal effect of extinguishing the interest which renders a person incompetent, restores his competency.⁵ Thus the transfer of stock by a stockholder,⁶ the assignment of his interest by a legatee;⁷ the delivery to the guarantor of the letter of guaranty;⁸ the removal from the note of the name of the endorsee;⁹ the payment of a legatee or distributee,¹⁰ as they severally extinguish interest, will restore competency. So by depositing a sufficient sum of money in court,¹¹ or surrendering the principal, the competency of the bail may be restored.¹² So by the operation of law extinguishing the interest, as by the statutes of bankruptcy¹³ and limitation.¹⁴ So a defendant relying upon a customary right may restore the competency by a waiver of so much of

¹ *Hemming vs. English*, 1 Cr. M. & R. 568; and 1 Phill. Ev. 160.

² But a party may object to witness till the release is completed, 1 Greenlf. Ev. § 429.

³ 1 Phill. Ev. 161; ante, § 52, and see *G. vs. W.*, 1 Doug. 139; 1 Greenlf. Ev. § 430.

⁴ 1 Phill. Ev. 160, 161; *Beecher vs. Buckingham*, 18 Conn. 110; *Soulder vs. Van Rensselaer*, 9 Wend. 293; *Cowen & Hill's notes* 257, 272, to Phill. Ev. 133, 137, 156; *Drinkwater vs. Holaday*, 11 Ala. R. 134; *Warner vs. Daniels*, 1 W. & M. 90; 1 Greenlf. Ev. § 392, note 2. So the delivery of a bond by an obligee. *Beecher vs. Buckingham*, 18 Conn. 119.

⁵ 1 Phill. Ev. 156.

⁶ *State vs. Catskill Bank*, 18 Wend. 466; 11 *ibid* 627; *B. vs. H.*, 6 M. & W. 701.

⁷ 1 Phill. Ev. 156, 159; *McIlroy vs. McIlroy*, 1 Rawle, 423.

⁸ *Merchants Bank vs. Spicer*, 6 Wend. 443. Or of a bond by the obligee. *Beecher vs. Buckingham*, 18 Conn. 119.

⁹ *Stinmetz vs. Currie*, 1 Dallas, 269; *Watson vs. McLaren*, 19 Wend. 557.

¹⁰ *Levers vs. Van Buskirk*, 4 Barr, 309; *Clarke vs. Gannon*, Ry. & M. 31.

¹¹ 1 Tidd's Pr. 259; *R. vs. H.*, 1 M. & M. 289; *W. vs. F.*, 2 Chitty, 103.

¹² *Legget vs. Boyd*, 3 Wend. 376; *A. vs. H.*, 13 Pick. 79, 15 *ibid* 468; 1 Phill. Ev. 161.

¹³ *Wright vs. Rogers*, 3 McLean, 229; *Bridges vs. Armour*, 5 Howard, U. S. 91; *Onion vs. Fullerton*, 19 Vermont, 317.

¹⁴ *Murray vs. Judah*, 6 Cowen, 484; *Ludlow vs. Un. Ins. Co.*, S. & R. 119; *G. vs. W.* 3 H. & J. 249.

the defence as depends upon the custom.¹ So by a sale, assignment or other transfer of an interest.² But where the witness has a real, direct and certain interest in the suit, his competency, as a general rule, will not be restored by a mere remedy *over* against another person.³ This remedy may not be equally certain as his interest; and it hardly seems possible for the court, even if it have authority, to determine upon the certainty or sufficiency of the remedy.⁴ But the witness may be competent, if the sufficiency of the indemnification be admitted; so he will be if he have funds in his own hands sufficient to indemnify him, or if funds are deposited for that purpose with some officer of the court, or so under the control of the court that the witness is certain of an indemnification without the trouble and expense of resorting to an action. Where the only indemnity is a bond, unless the sufficiency be admitted, or other mere right of action, as it would rarely render a person indifferent, the better authorities hold the witness incompetent.⁵

This brings us to the consideration—

§ 60. (IV.) Of incompetency from a relation as husband or wife of one of the parties or persons interested, creating an interest in the suit. Incompetency under this rule is founded in part upon interest and in part upon considerations of public policy.⁶ In some cases it is

¹ Peawitt *vs.* Tilly, 1 C. & P. 140.

² Cowen & Hill's Notes 257, 272, to 1 Phill. Ev. 133, 137; 1 Phill. Ev. 156.

³ Paine *vs.* Henssey, 17 Maine, 274; P. *vs.* H., 27 *ibid* 57, 58; 1 Phill. Ev. 104; 1 Greenlf. Ev. § 420; W. *vs.* A., 3 C. & P. 344; O. *vs.* M., 2 Day, 399, 404; B. *vs.* L., 1 Paige, 157; A. *vs.* H., 13 Pick. 85; W. *vs.* T., 3 J. J. Marsh, 459, 461; S. *vs.* M., 6 Greenlf. 364. If the witness admits he has ample security, he may be competent, C. *vs.* T., 7 Cowen, 359; or if the adverse party admits the efficiency of the bond, L. *vs.* A., 17 Wend. 19; B. *vs.* H., 13 Johns. 125; *contra* P. *vs.* H., 17 Pick. 272; see also E. *vs.* W., 14 Pick. 47.

⁴ 13 Johns. 125; 1 Greenlf. Ev. § 420.

⁵ 17 Pick. 269, 272; 17 Maine, 274; 27 Maine, 57, 58; Philbrook *vs.* Handly, Supplement to 2d part C. & H. notes, 1544, 1545.

⁶ So far as this species of incompetency is founded upon "considerations of public policy," it is conceived not strictly to be within the scope of this dissertation. See *ante*, § 4. But the conflict of opinions well known to exist upon this subject, and the great difficulty of determining how far the rule of interest may be properly considered as prevailing, have brought me to the conclusion that it will be

easy, and in others it is difficult to determine which prevailed: and yet in others both co-exist. In some cases the interests of husband and wife are identical, while in others their interests are conflicting. While therefore the law does not lose sight of the general rule with regard to interest, it substantially proceeds upon the assumption that it would be dangerous to the peace, and destructive of the happiness of matrimonial and domestic life, and consequently in a high degree detrimental to the public well-being, to permit a husband or a wife to be a witness in a suit in which the other has an interest or is a party.¹

§ 61. Therefore neither husband nor wife is competent to testify in a cause either civil or criminal to which the other is a party.² The principle extends further and applies also to cases where the husband or wife has an interest if it be direct³ in the suit which renders him or her incompetent, and renders the other incompetent also.⁴ So a wife cannot testify to any matter which would subject her

safer to treat the whole subject together; if indeed, it could not be so treated in *less space*, which is by no means certain. 1 Phill. Ev. 69; Mr. Phillips says "they cannot be witnesses for each other, because their interests are absolutely the same; they are not witnesses against each other because this is inconsistent with the relation of marriage." Though this rule is quite comprehensive, yet it is conceived not to extend to or furnish a test for all cases in which the question of competency may be raised. *Burrell vs. Bull*, 1 Sanford's N. Y. Ch. R. 15; *Snyder Trustee vs. Taft*, 6 Binney, 483; 7 J. J. Marsh. 263; 8 Paige, 50; *Langley vs. Fisher*, 9 Lond. Jur. 837. (But see 10 Pick. 261); 1 Burr. 424, per Ld. Mansfield; *Davis vs. Dinwoody*, 4 Term, 678.

¹ See generally 1 Phill. Ev. 69-74. Supplement to 2d part Cowen & Hill's Notes to Phill. Ev. 1554, 1555; 2 Taylor's Ev. § 985, to 1003; 1 Greenlf. Ev. § 334, 336. It may be laid down generally that where one is incompetent the other will be also. *Abbott vs. Clarke*, 19 Vermont, 444. So the husband is not competent for the wife in a suit respecting her separate property, though he has no interest, and this on grounds of public policy. *Burrell vs. Bull*, Sandf. N. Y. Ch. R. 15; 8 Paige, 50; See *R. vs. L.*, 10 Pick. 261.

² 1 Phill. Ev. 69, 70, 71, 74; 1 Greenlf. Ev. § 334; *Burrell vs. Bull*, Sandf. N. Y. Ch. R. 15.

³ *Dyer vs. Homer*, 22 Pick. 253.

⁴ 1 Phill. Ev. 70; 1 Greenlf. Ev. § 341; *Abbott vs. Clarke*, 19 Vt. 444. Though the authorities are numerous, the rule is too clear to require any citation of them. But see *Littlefield vs. Rice*, 10 Met. 287. Where the wife, being the hus-

husband to a criminal indictment,¹ or which would directly tend to discharge him,² nor in any suit by the result of which the rights of her husband will be bound, though he be not a party.³ And in all such cases the same rule prevails and renders the husband⁴ incompetent, if the wife have an interest or be a party.

§ 62. But in collateral proceedings not immediately affecting their marital interests, though the evidence may tend to criminate the other, or subject the other to a legal demand, they are nevertheless competent.⁵ It is conceived this exception only prevails in cases in which neither has a legal interest, and of which the record could not be evidence for or against either in another action.⁶

§ 63. The general rule as to the incompetency of husband and wife will apply without regard to the time when the relation of husband and wife commenced.⁷ Hence if one party marry the other's witness, even after she is summoned, the marriage makes her incom-

band's agent was held competent to swear to entries made by his direction, though he was interested, and this on the ground of necessity. See *contra Carr vs. Cornell*, 4 Vt. 116.

¹ *Dew vs. Johnson*, 3 Harr. 87.

² *Pullen vs. The People*, 1 Doug. (Mich.) 48; 1 Phill. Ev. 74, 75; 1 Greenlf. Ev. § 335; 1 Stra. 104; *R. vs. Fadwick*, 2 Stra. 1095.

³ *Dew vs. Johnson*, 3 Harr. 87; see also 1 H. P. C. 301; *R. vs. H.*, 1 Moody Cr. Cases, 281, 289, where the principle is extended. She is not competent in case of conspiracy. *The Comm. vs. Munson*, 2 Ashurst, 31; 1 Ry. & M. 352; 5 Esp. 107.

⁴ *Rex vs. Sergeant*, 1 Ry. & Moo. 352; 1 Greenlf. Ev. § 336; 1 Phill. Ev. 74.

If they are admissible for, they are also against each other, *R. vs. Sergeant*, 1 Ry. & M. 352.

⁵ 1 Phill. Ev. 71, 72; *Rex vs. All Saints*, 6 M. & S. 194; *Griffin vs. Brown*, 2 Pick-308; 2 Stark. Ev. 401; *Baring vs. Ruder*, 1 Hen. & Mum. 154; *Herman vs. Dickinson*, 5 Bing. 183.

⁶ 1 Phill. Ev. 73, 74; 1 Greenlf. Ev. § 342. It would seem to follow from this that, what in the text is stated as an exception to the general rule of incompetency is in truth no exception at all. For since the evidence affects no *direct* interest, and the record cannot be used as evidence in any subsequent action, the case comes within *no rule* rendering a person incompetent, and at most can be but an exception to some principle of *public policy*, rendering testimony *inadmissible*. Even in these collateral cases, Mr. Taylor, in his new work, 2 Taylor on Ev. § 997, p. 907, thinks the wife could not be *compelled* to testify, and cites, *R. vs. All Saints*, 6 M. & S. 200, per Bayley J.

⁷ 1 Greenlf. Ev. § 336.

petent.¹ And whatever comes to the knowledge of husband or wife, *through the marriage relation*, neither will be competent to disclose in evidence,² even after that relation has ceased to exist.³ But neither the reason nor the rule applies to knowledge derived *from other sources*, when sought to be disclosed after that relation is terminated.⁴ This protection, however, only applies to cohabitations innocent in the eye of the law;⁵ or at best to cases where parties *bona fide* live together, thinking themselves lawfully married.⁶

§ 64. It is yet unsettled by the authorities, whether the husband's consent will render the wife a competent witness against him.⁷ And the difficulty of the question seems mainly to grow out of a difference of opinion, as to whether the husband and wife are held incompetent on the ground of interest, or from considerations of public policy.⁸ If on the ground of interest, consent may consistently be held to restore competency;⁹ if from considerations of public policy, it is difficult to perceive why consent should render the testimony admissible.¹⁰

§ 65. Exceptions. The ends of justice, and the protection of the wife, alike demand some exceptions to the foregoing rule.¹¹ Thus the enormity and danger of the crime of high treason has been held to

¹ *Pedley vs. Wellesley*, 3 C. & P. 558. This is an exception to the general rule that one party cannot deprive another of his witness. *Birt vs. Baker*, 3 Term. 27.

² 1 Phill. Ev. 75; *Stein vs. Bowman*, 13 Pet. 209; *State vs. Jolly*, 3 Dev. & Batt. 110. This does not apply to unlawful cohabitations, *W. vs. F.* 5 C. & P. 12.

³ *Barnes vs. Camack*, 1 Barb. (Law) N. Y. R. 392; 1 Greenlf. Ev. § 337.

⁴ *Connell vs. Vanartedale*, 4 Barr, 364; *Coffin vs. Jones*, 13 Pick. 445.

⁵ 1 Phill. Ev. 69, 70; 2 Stark. Ev. 400; *Batthems vs. Galindo*, 4 Bing. 610; Bull. N. P. 287.

⁶ 1 Phill. Ev. 70; *Campbell vs. Twemlon*, 1 Rice, 81; *Divoll vs. Leadbetter*, 4 Pick. 220; *Wells vs. Fisher*, 1 M. & Rob. 99, *note*; 5 C. & P. 12.

⁷ 1 Phill. Ev. 76; 1 Greenlf. Ev. § 340; 2 Taylor on Ev. 905, 906, § 905.

⁸ 1 Phill. Ev. 76; 1 Taylor's Ev. § 995, 1 Greenlf. Ev. § 341.

⁹ 2 Taylor Ev. § 995; *Barker vs. Dinie*, Cas. temp. Hardw. 264; *Randall's case*, 5 City Hall Rec. 141, 153, 154; *Colburn's case*, 1 Wheeler's Crim. Cas. 479.

¹⁰ 2 Taylor Ev. § 995; *Pedley vs. Wellesley*, 3 C. & P. 558; *D. vs. D.*, 4 Term, 679.

¹¹ 1 Gilbert's Ev. 19; 1 Phill. Ev. 71; 1 Greenlf. Ev. § 345; 4 Bla. Com. 29; 2 Stark. Ev. 404, *note* (6); *Roscoe's Crim. Ev.* 114. The prevailing opinion is that the wife is not compellable to testify against her husband. 2 Taylor's Ev. 910, § 1001.

set aside the general rule of incompetency, as regards husband and wife. But the authorities are contradictory.¹ Important exceptions also are allowed in certain cases for the protection of one party against the other. But these exceptions do not avail in every case where no other evidence can be had,² but only in those cases where the party would otherwise be exposed without remedy to personal injury.³ Hence the wife may exhibit articles of peace against her husband, and her affidavit will be received.⁴ So she is competent against him in an indictment for rape;⁵ or for an assault and battery upon her.⁶ Upon similar principles the wife has been allowed to testify to secret facts, which none but herself could know;⁷ as to prove her criminal connection;⁸ but public decency forbids that she should be heard in a court of justice to deny that she had lawful connection with her husband.⁹ If the husband make the wife his agent, he will be bound by her admissions,¹⁰ and (if she consent at least) she will be a competent witness in certain cases for him.¹¹

¹ Mr. Phillips thinks the wife cannot in a case of high treason be *compelled* to give evidence against her husband. 1 Phill. Ev. 71.

² 1 Greenlf. Ev. § 343; 2 Taylor's Ev. § 1000, p. 908; *Bailly vs. Cook*, 3 Doug. 424.

³ 1 Phill. Ev. 79; *Whitehouse case*, 2 Russ. 606, per Holroyd J.; 1 Greenlf. Ev. § 343. But see *Wakefield's case*, 2 Selw. Cr. Cases, 287; per Hullock, B.; *People vs. Chegary*, 18 Wend. 64. 2 See an analagous principle in *County vs. Leidy*, 10 Barr, 46.

⁴ 1 Phill. Ev. 79; *Vane's case*, 2 Stra. 1202; notes to *Ford's case*, 13 East, 171.

⁵ 1 Phill. Ev. 79; 1 Hale's P. C. 301; *Audley's case* 3 Howell's St. Tr. 413; *R. vs. Jellyman*, 8 C. & P. 604.

⁶ *Juggan's case*, 1 East P. C. 454; *Bull. N. P.* 287; *State vs. Davis*, 3 Brevand, 3. So she is competent for her husband in such case. *State vs. Weill*, 6 Ala. 685; *Soule's case* 5 Greenlf. 407.

⁷ 1 Phill. Ev. 78. She is equally competent for or against him, *Bull. N. P.* 287. So a wife's dying declarations are admissible. *John's case*, 1 East P. C. 357; 2 Taylor's Ev. § 1002.

⁸ 1 Phill. Ev. 80; *R. vs. Reading*, temp. Hard. 82; *Com. vs. Sheppard*, 6 Binn. 283.

⁹ *The State vs. Patteway*, 3 Hawk. 623; 1 Phill. Ev. 74; *R. vs. Ken*, 11 East, 132; 8 *ibid* 203; (but see *R. vs. Stufe*, 8 East, 203; 1 Phill. Ev. 80); *G. vs. M.* *Cowp.* 594; *C. vs. C.*, 1 M. & Rob. 369, 276.

¹⁰ 1 Phill. Ev. 77; *White vs. Cuyler*, 6 Term 176; *Clifford vs. Barton*, 1 Bing. 198.

¹¹ *Littlefield vs. Rice*, 10 Met. 287; *contra Carr vs. Cornell*, 4 Vt. 116; see also *County vs. Leidy*, 10 Barr, 46; see *McGill vs. Rowland*, 3 Barr, 451, where the wife