ascertains and awards the amount upon the principles mentioned in the agreement. His award is upon the subject-matter referred. It covers the whole controversy submitted to him, and nothing more; and upon that it is certain and final.

There is indeed in the written agreement for the reference a clause which provides that, upon the payment for the damages awarded, the defendant in error should convey to the company the land selected for permanent occupation; and the umpire has taken no notice of this agreement to convey. We think he very properly omitted to notice it, for it was not put in issue by the pleadings, nor proposed to be referred in the argument filed. On the contrary, the duty of the arbitrators was limited to the question of damage. The value of this land was indeed one of the items they were required to consider in calculating the amount of damage; but they had no power to award how or when it should be conveyed. Nor does the right of the canal company to the conveyance depend in any degree upon the award or direction of the arbitrators concerning it. Their right is absolute by the agreement, upon the payment of the damages awarded; and the conveyance may be enforced like any other right acquired by contract.

Upon the whole, we are of opinion that there is no error in the judgment of the Circuit Court; and it must therefore be affirmed, with costs.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the county of Wash-
*91] ington, and was *argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said Circuit Court in this cause be and the same is hereby affirmed, with costs and damages at the rate of six per cent. per annum.

HENRY D. BRIDGES, JOHN K. MABRAY, JAMES N. HARPER, AND STERN SIMMONDS, LATE MERCHANTS AND PARTNERS IN TRADE, UNDER THE NAME, FIRM, AND STYLE OF BRIDGES, MABRAY, AND COMPANY, PLAINTIFFS IN ERROR, *v.* WILLIAM ARMOUR, HENRY LAKE, AND FELIX WALKER, LATE MERCHANTS AND PARTNERS IN TRADE, UNDER THE NAME, FIRM, AND STYLE OF ARMOUR, LAKE, AND WALKER, DEFENDANTS IN ERROR.

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Bridges et al. *v.* Armour et al.

A party upon the record, although divested of all interest in the event of the suit, is not a competent witness in a cause.[1]

If a person be declared a bankrupt at a time when a suit is pending to which he is a party, his discharge would not be a bar to his liability for costs upon a judgment obtained subsequently to his discharge. His liability for costs, therefore, excludes him as a witness upon the ground of interest.[2]

[1] CHANGED BY STATUTE. *Good* v. *Martin*, 5 Otto, 98; *United States* v. *Clark*, 6 Id., 44. And see *Pino* v. *Beckwith*, 1 New Mex., 27.

[2] The authorities upon the point here decided are not harmonious. The case of *Hoswell* v. *Thorogood*, cited by the court, was decided in the King's Bench in 1828. Tenterden, C. J., said: "The rules deducible from all the cases are laid down in Mr. *Deacon's Treatise on the Law of Bankruptcy;* and after stating the rules applicable to cases where the plaintiffs have obtained verdicts, and the defendants have become bankrupt before judgment, he says: 'With respect to costs upon a judgment of nonsuit, the statute (6 Geo. IV., c. 16) is wholly silent, making no provision whatever for the proof of a defendant's costs, whether on a judgment of nonsuit or judgment after verdict. It was, indeed, formerly determined that where the nonsuit was before the bankruptcy of the plaintiff, the costs might be proved, though the judgment was not obtained till afterwards, on the ground that the costs related back to the nonsuit, by virtue of which the debt might be said to exist before the bankruptcy. But this position is to be found only in two cases which were impugned by Lord *Eldon* in *Ex parte Hill*, 11 Ves., 646, and which were overruled in *Ex parte Charles*, 14 East., 197. And it has since been decided, that where a defendant obtains a verdict, and the plaintiff becomes bankrupt before judgment is signed, the costs cannot be proved under the commission, on the principle that no debt arises in such case until judgment is signed. *Walker* v. *Barnes*, 5 Taunt., 778.' That is, I think, a correct statement of the decisions upon the subject. Now, here the plaintiff becomes a bankrupt after the nonsuit, but before judgment was signed. The costs of the cause did not constitute any debt until judgment was signed, for there is no distinction in this respect between a case where a defendant obtains a verdict, and one where the plaintiff is nonsuited. The verdict or nonsuit only entitles a defendant to tax his costs, but no debt arises, and no action can be maintained for them until judgment is signed. The case of *Walker* v. *Barnes* is a decisive authority to show that the amount of these costs could not be proved as a debt under the plaintiff's commission; and if that be so, then he is liable to pay them. As to the costs of the reference, there can be no question. They clearly did not constitute a debt provable under the commission. The rule for the attachment for the non-payment of the costs of the cause and of the reference must, therefore, be made absolute."

In 1831 the same conclusion was reached in the Common Pleas Court. *Brough* v. *Adcock*, 7 Bing., 650. Where the debt arose before bankruptcy, but a verdict was obtained and costs taxed after, the costs were considered as a part of the original debt, and the certificate was held to extend to both, because both were provable. This was an early case. *Lewis* v. *Piercy*, 1 H. Bl., 59. If the verdict, as well as the judgment, is after the bankruptcy, the costs are not provable. *Ex parte Pouchier*, 1 Glyn & J., 385; and in this same case it was held if the verdict is obtained before the bankruptcy, but the judgment after, the costs are provable; but not, in an early case, in an action of tort for words spoken of the plaintiff in his trade, where the defendant becomes bankrupt between the verdict and judgment. *Longford* v. *Ellris*, 1 H. Bl., 20 (1788); *Aylett* v. *Harford*, 2 W. Bl., 1317 (1778); *Hurst* v. *Mead*, 5 T. R., 365; *Watts* v. *Hart*, 1 Bos. & P., 134; *Gulliver* v. *Drinkwater*, 2 T. R., 261; *Riley* v. *Byrne*, 2 Barn. & Ad., 779. Where an arbitrator made his award, and the defendant afterward committed an act of bankruptcy, when judgment was signed, and then the defendant was adjudged a bankrupt, it was held that

If the event of the suit may increase the effects of the bankrupt in the hands of the assignee, and thus increase the surplus which would belong to him, he is an incompetent witness.

THIS case was brought up, by writ of error, from the District Court of the United States for the Northern District of Mississippi.

On the 26th of September, 1840, Bridges, Mabray, & Co., gave their promissory note to Armour, Lake, & Walker, or order, payable one day after date, for $3,158.69, being balance of book-account, bearing interest at eight per cent. per annum, from the 1st day of August, 1840, until paid.

The note not being paid, a suit was commenced on the 12th of November following. As no question arises upon the pleadings, it will be unnecessary to refer to them. They resulted in several issues of fact.

On the trial, in June term, 1844, the plaintiffs offered in

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the judgment and costs were provable. *Thornthwaite, Ex parte,* 1 Bank & Ins. R., 254; s. c., 18 Jur., 760; 23 L. J., Bank, 22. A obtained a verdict against B, subject to reference to an arbitrator, who might award the verdict against either party, by agreement. B then became a bankrupt. It was held that the judgment rendered was provable against B. *Ex parte Harding,* 5 DeG. & G., 367. The case of *Hoswell* v. *Thorogood* is very much shaken by the case last cited, and by *Ex parte Ferris,* 2 Mont., D. & D., 746. s. c., 6 Jur., 1070; and by *Ex parte Cocks,* 11 Jur., 270; s. c., DeG., 466. Under the English bankruptcy act of 1869, costs are provable against the bankrupt's estate, although judgment is not rendered until after the adjudication. *Ex parte Peacock; in re Duffield,* L. R. 8 Ch., 628; 42 L. T., Bank, 78; 21 W. R., 755; 28 L. T. N. S., 830.

The decisions in the State courts are not altogether harmonious. In Massachusetts it is held that if judgment is obtained between the date of filing the petition in bankruptcy and the granting of the discharge, the bankrupt is liable for the amount of such judgment, and his discharge is no bar to it. *Bradford* v. *Rice,* 102 Mass., 472; *Woodbury* v. *Perkins,* 59 Mass., 86. The decision is put upon the ground that the judgment is a debt of a higher order than the debt it was founded upon, that it is in fact a new debt, one created after the petition in bankruptcy was filed, and therefore not barred by the discharge. They further hold that it was the duty of the bankrupt to have applied for a stay of proceedings in the suit until he obtained his discharge, and failing to do so, he is bound by the judgment. *Ellis* v. *Ham,* 28 Me., 385; *Thompson* v. *Hewitt,* 6 Hill (N. Y.), 254; *Kelloy* v. *Schuyler,* 2 Den. (N. Y.), 73; *Holbrook* v. *Foss,* 27 Me., 441; *Uran* v. *Hondlette,* 36 Me., 15; *Pike* v. *McDonald,* 32 Me., 418; *Fisher* v. *Foss,* 30 Me., 459; *Roden* v. *Jaco,* 17 Ala., 344; *Ingersoll* v. *Rhoades,* 1 Hill & D. (N.Y.), 371; *Rees* v. *Butler,* 18 Mo., 173; *Leavitt* v. *Baldwin,* 4 Edw. (N. Y.), 289.

But in other States the discharge is held to be a release from the effect of the judgment; and the court will inquire into the original debt to see if it is one that would be barred by the discharge. *Harrington* v. *McNaughton,* 20 Vt., 283; *Dresser* v. *Brooks,* 3 Barb. (N. Y.), 429 (denying certain *dicta* in earlier cases); *Johnson* v. *Fitzhugh,* 3 Barb. (N. Y.) Ch., 360; *Clark* v. *Rowling,* 3 N. Y., 216; *Fox* v. *Woodruff,* 9 Barb. (N. Y.), 498; *McDonald* v. *Ingraham,* 30 Miss., 389; *Downer* v. *Rowell,* 26 Vt., 397; *Dick* v. *Powell,* 2 Swan (Tenn.), 632; *Stratton* v. *Perry,* 2 Tenn. Ch., p. 635; *Eberhardt* v. *Wood,* Id., 490; *Harris* v. *Vaughan,* Id., 486; *Lowry* v. *Hardwick,* 4 Humph. (Tenn.), 188; *Monroe* v. *Upton,* 50 N. Y., 593. See *Weeks* v. *Prescott,* 54 Vt., 318.

evidence the deposition of Walker, a coplaintiff on the record, taken in answer to interrogatories and cross-interrogatories before a commissioner in New Orleans, in pursuance of a stipulation between the attorneys; and in which the attorney for the defendants agreed to waive any exception for want of issuing a commission, in due form, to take the testimony, or for want of notice of its execution to the defendants.

It appeared on the trial that Walker had obtained a discharge under the bankrupt act, by which he was discharged from all his debts owing by him at the time of presenting his petition, to wit, on *the 30th of December, 1842. The discharge was granted on the 12th of May, 1843. [*92

In one of the interrogatories in chief the question was put to the witness whether or not he had any interest in the event of the suit, and, if none, in what manner his interest had ceased. To which he answered, that he had none, and that his interest ceased on obtaining his discharge.

The counsel for the defendants objected to the admission of the deposition, on the ground that Walker was a party to the record, one of the plaintiffs in the suit; but the objection was overruled, and the evidence admitted, to which the counsel excepted. The plaintiffs had a verdict.

The cause was argued by *Mr. Coxe*, for the plaintiffs in error, and by *Mr. Chalmers*, for the defendants in error.

Mr. Coxe contended,—

1. That the deposition of Walker, then and still a party plaintiff on the record, was inadmissible.

2. That even if his discharge, under the bankrupt act, could make him a competent witness, it was necessary to establish that fact, as preliminary to the reading of his deposition, and by independent proof.

Walker's name is still upon the record, and he is one of the defendants in error in this court. The general rule upon the subject is clear, and the exceptions are few. The plaintiff in error must bring himself within one of the exceptions. 1 Pet., 596.

The case in 1 Pet., C. C., 307, was overruled by this court in 12 Pet., 145, where it is said that the circuit decision is not to be sustained upon any ground.

The only exception to the general rule is in cases of tort where there are several defendants. The court will direct one to be acquitted, if justice requires it, in order that he may be a witness. 10 Pick. (Mass.), 18; 4 Wend. (N. Y),

453; 1 Bay. (S. C.), 308; 10 Pick. (Mass.), 57; 2 Bay. (S. C.), 427. As to the extinguishment of his interest by the bankruptcy, see 10 Wheat., 367, 375, 384.

An insolvent party cannot be a witness, but a certificated bankrupt may, provided his name be struck out of the record. 9 Cranch (Mass.), 153, 158.

Mr. Chalmers, for defendants in error.

The only question presented upon the record in this case is the competency of Felix Walker, a party to the record, whose deposition had been taken upon interrogatories, by consent, after his discharge under the bankrupt act of Congress, of the 19th of August, 1841. The suit was commenced 20th of November, 1840, by Armour, Lake, & Walker (the witness) against plaintiffs in error; on the 12th of May, 1843, Walker was discharged; and on the 24th *of May, *93] 1843, his deposition was taken, which upon the trial plaintiffs in error objected to being read, upon the ground "that the said Felix Walker is a party to the record," which objection was overruled by the court, and the deposition was read; to which opinion of the court a bill of exception was taken, and upon it the case is before this court.

It will not be seriously urged that Walker, the witness, was incompetent on the ground of interest, he having received his discharge under the bankrupt act, by which his interest was extinguished and so far his competency restored. For whatever interest he may have had, it was extinguished when he was sworn, and could form no objection to his competency. 1 Phill. Ev., 133, by Cow. & Hill; *Tennant* v. *Strachan*, 4 Car. & P., 31; 1 Moo. & M., 377. Indeed, if it did, plaintiffs in error waived the objection by failing to make it when the deposition was taken,—it being known to them at the time. *United States* v. *One Case of Hair-pencils*, Paine, 400. So when a witness has been cross-examined by a party with a full knowledge of an objection to his competency, a court of equity will not allow the objection. *Flagg* v. *Mann*, 2 Sumn., 486. But the objection was to the competency of Walker as a party to the record.

It is a general rule in all common law courts, that a party on the record cannot be admitted to testify; the reason of this rule is the interest of the party called, and wherever that can be extinguished the rule ceases. In New York the rule, it seems, excludes the party without regard to the question of whether he be interested or not; but see *Stein* v. *Bowman*, 13 Pet., 209, 219; *Worrall* v. *Jones*, 7 Bing., 395; *Aflalo* v. *Fourdrinier*, 6 Id., 306; *Bate* v. *Russell*, 1 Moo. & M., 332;

Hart v. *Heilner*, 3 Rawle (Pa.), 407; *Scott* v. *Lloyd*, 12 Pet., 145, 149; *Henderson* v. *Anderson*, 3 How., 73; *Smyth* v. *Strader*, 4 H., 404.

In the case of *Willings* v. *Consequa*, 1 Pet., C. C., 307, Washington, J., says "the general rule of law certainly is, that a party to a suit cannot be a competent witness. But it is equally so, that the interest which that party has in the event of the suit, both as to costs and the subject in dispute, lies at the foundation of the rule, and when that interest is removed the objection ceases to exist." Mills, J., in *Lampton* v. *Lampton's Executors*, 6 Mon. (Ky.), 617, 618. Upon a full view of all the cases,[1] the counsel for defendants in error respectfully contends, that the District Court did not err in permitting the deposition of the party, Walker, to be read *to the jury, upon the ground of interest, or being a party, and that if incompetent for either cause [*94 the objection was waived by not having been made at the taking of the deposition.

Mr. Justice NELSON delivered the opinion of the court.

Whether a party on the record, divested of all interest in the result of the suit, and therefore unexceptionable on that ground, is a competent witness or not in the cause, can scarcely be regarded as an open question in this court, after what has already fallen from it.

It is true, as stated by the counsel in the argument, that in all the cases in which the question has arisen, the party was liable for the costs of suit, and therefore interested; but whenever the question has been presented, the language of the court has been uniform, that the witness was incompetent on the ground of his being a party on the record; *De Wolf* v. *Johnson*, 10 Wheat., 367, 384; *Scott* v. *Lloyd*, 12 Pet., 145; *Stein* v. *Bowman et al.*, 13 Id., 209.

In *Scott* v. *Lloyd* the court referred to a case in 1 Pet., C. C., 301, where it had been held, that a party named on the record might be made a competent witness, by a release of his interest, and expressed its unqualified dissent; and in *Stein* v. *Bowman et al.* (13 Pet., 209), in which Bowman, a party, had been admitted, the court, after noticing his liability

[1] See those collected in 2 Phillips on Ev. by Cowen & Hill, notes, pages 134–136, 260–266; *Haswell* v. *Bussing*, 10 Johns. (N. Y.), 128; *Schermerhorn* v. *Schermerhorn*, 1 Wend. (N. Y.), 125, citing 3 Esp. & 3 Camp.; *Supervisors of Chenango* v. *Birdsall*, 4 Wend. (N. Y.), 453; *Duncan* v. *Watson*, 2 Sm. & M. (Miss.), 121; 1 Bing., 444; 6 Binn. (La.), 16; 4 N. Y., 24; 2 Day (Conn.), 404; 11 Mass., 527; 12 Id., 258; 16 Id., 118; 3 Harr. & M. (Va.), 152; 3 Stark. Ev. 1061, note *g*.

for costs, remarked, that if he had been released, or a sum of money sufficient to cover the costs of suit brought into court, his competency would not have been restored.

The exclusion is placed on the ground of policy, which forbids a party from being a witness in his own cause, and that this would be the practical effect and operation of a rule of evidence, which would enable a party to qualify himself for a witness by releasing his interest in the suit. Though nominally discharged by the release, he would, usually, be the real and substantial party to the suit in feeling, if not in interest; thereby holding out to litigants temptations to perjury, and to the manufacturing of witnesses, in the administration of justice.

The question is one in respect to which different courts have entertained different opinions, and we admit that the argument in favor of the admission of the party, upon the general principles of evidence governing the competency of witnesses, is plausible, and not without force. But the tribunals which maintain the competency of the party, if divested of interest, still hold that he cannot be compelled to testify, and, also, that he cannot be compelled to testify when called against his interest; which, upon general principles, if consistently carried out and allowed to govern the question in the admission of the party, would lead them to an opposite result. They should be compelled to testify; for if the admission is *placed, as it undoubtedly is, upon principles applicable to the admission and rejection of witnesses generally, in the cause, and the party to be regarded as competent when without interest, or indifferent, or when called against his interest, then, like all other witnesses, he should be subject to the writ of subpœna, and to the compulsory process of the court; and not left at liberty to withhold or bestow his testimony at will.

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There can be no distinction in principle, in this respect, in favor of a party to the record, if allowed as a witness at all; and the only ground upon which the court can stop short of going the length indicated, is, by giving up general principles, and placing itself upon policy and expediency, as upon the whole best subserving, in the instances mentioned, the interests of justice, and of all concerned in its administration,—a ground which has been supposed, by those holding a different opinion upon the question, quite sufficient to justify the entire exclusion of the party.

But the witness in this case is also liable to objection on the ground of interest. This suit was pending at the time he was declared a bankrupt and obtained his discharge; and

it is quite clear, if the defendants had eventually succeeded, the discharge would not have been a bar to his liability for the costs of the suit. The judgment would have been a debt accruing subsequent to the discharge, which could not have been proved under the act. Act of Congress, August 19, 1841, § 4 (5 Stat. at L., 443); *Haswell* v. *Thorogood*, 7 Barn. & C., 705; *Brough* v. *Adcock*, 7 Bing., 650. His future effects, therefore, would have been liable.

And even if the discharge could have operated in bar of his liability for the costs, the witness was still interested to procure a recovery in favor of the plaintiffs, as it would to increase the effects of his estate in the hands of the assignee, to the extent of his interest in the demand in suit, and to increase the surplus, if any, which would belong to him.

For this reason, a defendant, who has pleaded his certificate, upon which a *nolle prosequi* has been entered, by the plaintiff, is not a competent witness for his codefendant, without first releasing his interest in this fund. He would otherwise be interested in defeating a recovery of the demand in suit, as he would thereby diminish the claims upon his joint and separate property, and thus increase the surplus, if any, in winding up the estate. *Butcher* v. *Forman*, 6 Hill (N. Y.), 583; *Aflalo* v. *Fourdrinier*, 6 Bing., 306.

On all these grounds we think the witness was incompetent, and that the deposition should have been rejected.

It has been suggested that the objection to the witness came too late, and should have been made before the commissioner and before the cross-examination. But the case shows that both parties were aware of the legal objections to his competency, and that the testimony was taken by an arrangement between them, for the *purpose of presenting the question to the court. The counsel for [*96
the plaintiffs assumed, as is apparent from his interrogatories in chief, that the witness was incompetent on the ground of his being a party in interest, and took upon himself the burden of removing the objections. For this purpose, he produced his discharge in bankruptcy, and on the 14th inst., put the question to him whether he had any interest in the suit, and if not, to tell how it had ceased.

The question suggested does not arise in the case, and therefore it is unnecessary to examine it.

For the above reasons, we think the court below erred, and that the judgment must be reversed, with a *venire de novo*.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Mississippi, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court, in this cause, be and the same is hereby reversed, with costs, and that this cause be and the same is hereby remanded to the said District Court, with directions to award a *venire facias de novo*.

HENRY A. HALL, PLAINTIFF, *v.* WILLIAM SMITH.

Where there are privies in a contract with the knowledge of a debtor to secure to his creditor the payment of a debt, the payment of it by any one of them other than the debtor, is a payment at his request, and is an express assumpsit to reimburse the amount.

Where the surety of a surety pays the debt of a principal, under a legal obligation, from which the principal was bound to relieve him, such a payment is a sufficient consideration to raise an implied assumpsit to repay the amount, although the payment was made without a request from the principal.

THIS case came up on a certificate of division from the Circuit Court of the United States for the District of Maryland.

The United States of America, District of Maryland, to wit:—

At a Circuit Court of the United States for the Fourth Circuit, in and for the Maryland District, begun and held at the city of Baltimore, on the first Monday in April, in the year of our Lord one thousand eight hundred and forty-four.

Present, the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States; the Honorable Upton S. Heath, Judge of Maryland District; Z. Collins Lee, Esquire, Attorney; Thomas B. Pottenger, Esquire, Marshall; Thomas Spicer, Clerk.

Among other, were the following proceedings, to wit:—

*97] *HENRY A. HALL *v.* WILLIAM SMITH.

District of Maryland, Circuit Court of the United States, April term, 1844.

The declaration in this case contained counts, in the usual form, for money lent and advanced, money paid, laid out, and expended, and money had and received, and an averment