

an understanding that if he gives his evidence in an unexceptionable manner, he shall be recommended for a pardon. Roscoe's Cr. Ev. 124. In Scotland the course pursued with regard to an accomplice who has been admitted against his confederate, differs from that adopted by the English law, and seems better calculated to further the ends of justice. There by the very act of calling the accomplice and putting him on the witness stand, the prosecutor debars himself from all right to molest him for the future with relation to the offence charged.

"This privilege is absolute and altogether independent of the prevarication or unwillingness with which the witness may give his testimony. Justice, indeed, may often be defeated by a witness retracting his previous disclosures, or refusing to make any confession after he is on the witness stand; but it would be much more put in hazard if the witness was sensible that his future safety depended on the extent to which he spoke out against his associates at the bar." Alison's Prac. Cr. Law of Scot. 453. But in the United States an accomplice, by turning informer and testifying for the prosecution, acts under the implied condition that he earns an exemption from punishment by declaring the whole truth; but how are we always to know he tells the truth, especially when it is not an absolute requirement that he must be corroborated?

If testifying to an untruth would, in the opinion of the accomplice, be more likely to bring him exemption from punishment—which is generally the question of greatest importance with persons of such character—would it not be a most powerful incentive for him to do so? But is he not more likely to tell the truth than otherwise, even though he is conscious there is no evidence to corroborate him? These are speculative questions, but under the caution exercised by a prudent court, in its instructions to the jury, no great harm need be feared. Still, we believe that if, after having made his confession to the prosecuting attorney, he should be sworn on behalf of the prosecution, with the full understanding that in any event he could never be punished for the offence charged, it would be much the safer rule.

In England the court usually considers not only whether the prisoners can be convicted without the evidence of the accomplice, but

also whether they can be convicted *with* his evidence. If therefore there be sufficient evidence to convict without his testimony the court will refuse to allow him to be admitted as a witness. Roscoe's Cr. Ev. 120. Accomplices may in all cases by permission of the court be used by the government as witnesses in bringing their associates to punishment. *Lindsay v. People*, 63 N. Y. 143. And although it is in the discretion of the court to admit or refuse, yet in practice this matter is left almost entirely to the discretion of the prosecuting attorney. This at least is the practice in the State of New York, and the court is not likely to interfere except in a case where under all the surrounding circumstances it seems to be necessary, as in the case of *People v. Whipple*, 9 Cowen, 708 (1827). In that case the district attorney moved the court that Jesse Strang, who had just been convicted by the verdict of a jury, as a principal, in the murder of which Mrs. Whipple stood charged as accessory before the fact, should be brought up and examined as a witness on the part of the prosecution. This was objected to by the prisoner's counsel, and the court, in a very elaborate opinion discussing the circumstances fully, denied the motion. The main ground for the denial of the motion seems to have been that Strang was the greater criminal of the two, even conceding Mrs. Whipple to be guilty of the charge brought against her, and that by allowing him to testify there would be an implied condition of recommendation of pardon if he told the truth. The court propounded the following significant question: "Why then should we select her for punishment in preference to him?" So in a later case where it was sought to make an accomplice a witness for the government upon an implied promise of pardon, the court held "that it rested upon judicial discretion and is not at the pleasure of the public prosecutor. An accomplice under an indictment for another offence, as a general rule, will not be admitted as a witness when such fact is known to the court, although he testify in good faith against his accomplice on the trial upon one indictment, he may be tried upon the other, and upon conviction punished. It would be a fraud upon the court and an obstruction of public justice if the public prosecutor should enter into an agreement unsanctioned by the court (if such