§ 354. It has been said, that where one of several *co-plaintiffs voluntarily* comes forward as a witness for the adverse party, he is admissible, without or even against the consent of his fellows; upon the ground, that he is testifying against his own interest, that the privilege of exemption is personal and several, and not mutual and joint, and that his declarations out of Court being admissible, *à fortiori* they ought to be received, when made in Court under oath.[1] But the better opinion is, and so it has been resolved,[2] that such a rule would hold out to parties a strong temptation to perjury, that it is not supported by principle or authority, and that therefore the party is not admissible, without the consent of all parties to the record, for that the privilege is mutual and joint, and not several. It may also be observed, that the declarations of one of several parties are not always admissible against his fellows, and that when admitted, they are often susceptible of explanation or contradiction, where testimony under oath could not be resisted.

§ 355. Hitherto, in treating of the admissibility of parties to the record as witnesses, they have been considered as still retaining their original situation, assumed at the commencement of the suit. But as the situation of some of the defendants, where there are several in the same suit, may be

[1] Phil. & Am. on Evid. 158; 1 Phil. Evid. 60. The cases which are usually cited to support this opinion are Norden *v.* Williamson, 1 Taunt. 377, Fenn *v.* Granger, 3 Campb. 177, and Worrall *v.* Jones, 7 Bing. 395. But in the first of these cases, no objection appears to have been made on behalf of the other co-plaintiff, that his consent was necessary; but the decision is expressly placed on the ground, that neither party objected at the time. In Fenn *v.* Granger, Ld. Ellenborough would have rejected the witness, but the objection was waived. In Worrall *v.* Jones, the naked question was, whether a defendant, who has suffered judgment by default, and has no interest in the event of the suit, is admissible as a witness for the plaintiff, by his own consent, where "the *only* objection to his admissibility is this, that he is party to the record." See also Willings *v.* Consequa, 1 Peters, C. C. R. 307, per Washington, J.

[2] Scott *v.* Lloyd, 12 Peters, 149. See also 2 Stark. Evid. 580, note (e).

essentially changed in the course of its progress, by default, or *nolle prosequi*, and sometimes by verdict, their case deserves a distinct consideration. This question has arisen in cases where the testimony of a defendant, thus situated, is material to the defence of his fellows. And here the general doctrine is, that where the suit is ended as to one of several defendants, and he has no direct interest in its event as to the others, he is a competent witness for them, his own fate being at all events certain.[1]

§ 356. In *actions on contracts*, the operation of this rule was formerly excluded; for the contract being laid jointly, the judgment by default against one of several defendants, it was thought, would operate against him, only in the event of a verdict against the others; and accordingly he has been held inadmissible in such actions, as a witness in their favor.[2] On a similar principle, a defendant thus situated has been held not a competent witness for the plaintiff; on the ground, that, by suffering judgment by default, he admitted that he was liable to the plaintiff's demand, and was therefore directly interested in throwing part of that burden on another person.[3] But in another case, where the action was upon a bond, and the principal suffered judgment by default, he was admitted as a witness for the plaintiff, against one of the other defendants, his surety; though here the point submitted to the Court was narrowed to the mere abstract question, whether a party to the record was, on that account alone, precluded from being a witness, he having no interest in the event.[4] But the whole

[1] Post, § 358, 359, 360, 363.

[2] Mant *v.* Mainwaring, 8 Taunt. 139; Brown *v.* Brown, 4 Taunt. 752; Schermerhorn *v.* Schermerhorn, 1 Wend. 119; Columbia Man. Co. *v.* Dutch, 13 Pick. 125; Mills *v.* Lee, 4 Hill, R. 549.

[3] Green *v.* Sutton, 2 M. & Rob. 269.

[4] Worrall *v.* Jones, 7 Bing. 395. See Foxcroft *v.* Nevens, 4 Greenl. 72, contra. In a case before Le Blanc, J., he refused to permit one defendant, who had suffered judgment to go by default, to be called by the plaintiff to inculpate the others, even in an action of trespass. Chapman *v.* Graves,

subject has more recently been reviewed in England, and the rule established, that, where one of two joint defendants in an action on contract, has suffered judgment by default, he may, if not otherwise interested in procuring a verdict for the plaintiff, be called by him as a witness against the other defendant.[1] So, if the defence, in an action *ex contractu* against several, goes merely to the personal discharge of the party pleading it, and not to that of the others, and the plaintiff thereupon enters a *nolle prosequi* as to him, which in such cases he may well do, such defendant is no longer a party upon the record, and is therefore competent as a witness, if not otherwise disqualified. Thus, where the plea by one of several defendants is bankruptcy,[2] or, that he was never executor, or as it seems by the later and better opinions, infancy or coverture,[3] the plaintiff may enter a *nolle prosequi* as to such party, who, being thus disengaged from the record, may be called as a witness, the suit still proceeding against the

2 Campb. 333, 334, note. See acc. Supervisors of Chenango *v.* Birdsall, 4 Wend. 456, 457. The general rule is, that a party to the record can, in no case, be examined as a witness; a rule founded principally on the policy of preventing perjury, and the hardship of calling on a party to charge himself. And this rule is strictly enforced against plaintiffs, because the joining of so many defendants is generally their own act, though sometimes it is a matter of necessity. 2 Stark. Evid. 581, note (a); Blackett *v.* Weir, 5 B. & C. 387; Barrett *v.* Gore, 3 Atk. 401; Bull. N. P. 285; Cas. temp. Hardw. 163.

[1] Pipe *v.* Steel, 2 Ad. & El. 733, N. S.; Cupper *v.* Newark, 2 C. & K. 24.

[2] Noke *v.* Ingham, 1 Wils. 89; 1 Tidd's Pr. 682, 1 Saund. 207, a. But see Mills *v.* Lee, 4 Hill, R. 549.

[3] 1 Paine & Duer's Pr. 642, 643; Woodward *v.* Newhall, 1 Pick. 500; Hartness *v.* Thompson, 5 Johns. 160; Pell *v.* Pell, 20 Johns. 126; Burgess *v.* Merrill, 4 Taunt. 468. The ground is, that these pleas are not in bar of the entire action, but only in bar as to the party pleading; and thus the case is brought within the general principle, that, where the plea goes only to the personal discharge of the party pleading it, the plaintiff may enter a *nolle prosequi*. 1 Pick. 501, 502. See also Minor *v.* The Mechanics Bank of Alexandria, 1 Peters, 74.

others.[1] The mere pleading of the bankruptcy, or other matter of personal discharge, is not alone sufficient to render the party a competent witness; and it has been held, that he is not entitled to a previous verdict upon that plea, for the purpose of testifying for the others.[2]

§ 357. In *actions on torts*, these being in their nature and legal consequences several, as well as ordinarily joint, and there being no contribution among wrong doers, it has not been deemed necessary to exclude a material witness for the defendants, merely because the plaintiff has joined him with them in the suit, if the suit, as to him, is already determined, and he has no longer any legal interest in the event. Accordingly, a defendant in an action for a tort, who has suffered judgment to go by *default*, has uniformly been held admissible as a witness for his co-defendants.[3] Whether, being admitted as a witness, he is competent to testify to the amount of dam-

[1] McIver *v.* Humble, 16 East, 171, per Le Blanc, J., cited 7 Taunt. 607, per Park, J.; Moody *v.* King, 2 B. & C. 558; Aflalo *v.* Fourdrinier, 6 Bing. 306.

[2] Raven *v.* Dunning, 3 Esp. 25; Emmett *v.* Butler, 7 Taunt. 599; 1 Moore, 332, S. C.; Schermerhorn *v.* Schermerhorn, 1 Wend. 119. But in a later case, since the 49 G. 3, c. 121, Parke, J. permitted a verdict to be returned upon the plea, in order to admit the witness. Bate *v.* Russell, 1 Mood. & M. 332. Where, by statute, the plaintiff, in an action on a parol contract against several, may have judgment against one or more of the defendants, according to his proof, there it has been held, that a defendant who has been defaulted is, with his consent, a competent witness in favor of his co-defendants. Bradley *v.* Neal, 16 Pick. 501. But this has since been questioned, on the ground, that his interest is to reduce the demand of the plaintiff against the others to nominal damages, in order that no greater damages may be assessed against him upon his default. Vinal *v.* Burrill, 18 Pick. 29.

[3] Ward *v.* Haydon, 2 Esp. 552, approved in Hawkesworth *v.* Showler, 12 M. & W. 48; Chapman *v.* Graves, 2 Camp. 334, per Le Blanc, J.; Commonwealth *v.* Marsh, 10 Pick. 57, 58. The wife of one joint trespasser is not admissible as a witness for the other, though the case is already fully proved against her husband, if he is still a party to the record. Hawkesworth *v.* Showler, 12 M. & W. 45.

ages, which are generally assessed entire against all who are found guilty,[1] may well be doubted.[2] And indeed the rule, admitting a defendant as a witness for his fellows in any case, must, as it should seem, be limited strictly to the case where his testimony cannot directly make for himself; for if the plea set up by the other defendants is of such a nature, as to show that the plaintiff has no cause of action against any of the defendants in the suit, the one who suffers judgment by default will be entitled to the benefit of the defence, if established, and therefore is as directly interested as if the action were upon a joint contract. It is therefore only where the plea operates solely in discharge of the party pleading it, that another defendant, who has suffered judgment to go by default, is admissible as a witness.[3]

§ 358. If the person, who is a material witness for the defendants, has been improperly joined with them in the suit, for the purpose of excluding his testimony, the Jury will be directed to find a *separate verdict* in his favor; in which case, the cause being at an end with respect to him, he may be admitted a witness for the other defendants. But this can be allowed only where there is no evidence whatever against him, for then only does it appear that he was improperly joined, through the artifice and fraud of the plaintiff. But if there be any evidence against him, though, in the Judge's opinion, not enough for his conviction, he cannot be admitted as a witness for his fellows, because his guilt or innocence

1 2 Tidd's Pr. 896.

2 In Mash *v.* Smith, 1 C. & P. 577, Best, C. J. was of opinion, that the witness ought not to be admitted at all, on the ground that his evidence might give a different complexion to the case, and thus go to reduce the damages against himself; but on the authority of Ward *v.* Haydon, and Chapman *v.* Graves, he thought it best to receive the witness, giving leave to the opposing party to move for a new trial. But the point was not moved; and the report does not show which way was the verdict.

3 2 Tidd's Pr. 895; Briggs *v.* Greenfield et al. 1 Str. 610; 8 Mod. 217; 2 Ld. Raym. 1372, S. C.; Phil. & Am. on Evid. 53, note (3); 1 Phil. Evid. 52, n. (1); Bowman *v.* Noyes, 12 N. Hamp. R. 302.

must wait the event of the verdict, the Jury being the sole judges of the fact.[1] In what stage of the cause the party, thus improperly joined, might be acquitted, and whether before the close of the case on the part of the other defendants, was formerly uncertain; but it is now settled, that the application to a Judge, *in the course of a cause*, to direct a verdict for one or more of several defendants in trespass, is strictly to his discretion; and that discretion is to be regulated, not merely by the fact that at the close of the plaintiff's case no evidence appears to affect them, but by the probabilities whether any such will arise before the whole evidence in the cause closes.[2] The ordinary course, therefore, is to let the cause go on, to the end of the evidence.[3] But if, at the close of the plaintiff's case, there is one defendant against whom no evidence has been given, and none is anticipated with any probability, he instantly will be acquitted.[4] The mere fact of mentioning the party in the *simul cum*, in the declaration,

1 1 Gilb. Evid. by Lofft, p. 250; Brown *v.* Howard, 14 Johns. 119, 122; Van Deusen *v.* Van Slyck, 15 Johns. 223. The admission of the witness, in all these cases, seems to rest in the discretion of the Judge. Brotherton *v.* Livingston, 3 Watts & Serg. 334.

2 Sowell *v.* Champion, 6 Ad. & El. 407; White *v.* Hill, 6 Ad. & El. 487, 491, N. S.; Commonwealth *v.* Eastman, S. J. C. Mass. March term, 1848, Suffolk.

3 6 Ad. & El. 491, N. S. per Ld. Denman.

4 Child *v.* Chamberlain, 6 C. & P. 213. It is not easy to perceive, why the same principle should not be applied to actions upon contract, where one of the defendants pleads a matter in his own personal discharge, such as infancy or bankruptcy, and establishes his plea by a certificate, or other affirmative proof, which the plaintiff does not pretend to gainsay or resist. See Bate *v.* Russell, 1 Mood. & M. 332. Upon Emmett *v.* Butler, 7 Taunt. 599, where it was not allowed, Mr. Phillips very justly observes, that the plea was not the common one of bankruptcy and certificate; but, that the plaintiffs *had proved*, (under the commission,) and thereby made their election; and that where a plea is special, and involves the consideration of many facts, it is obvious that there would be much inconvenience in splitting the case, and taking separate verdicts; but there seems to be no such inconvenience, where the whole proof consists of the bankrupt's certificate. Phil. & Am. on Evid. p. 29, note (3).

does not render him incompetent as a witness; but if the plaintiff can prove the person so named to be guilty of the trespass, and party to the suit, which must be by producing the original or process against him, and proving an ineffectual endeavor to arrest him, or that the process was lost, the defendant shall not have the benefit of his testimony.[1]

§ 359. If the plaintiff, in trespass, has *by mistake* made one of his own intended witnesses a defendant, the Court will, on motion, give leave to omit him, and have his name stricken from the record, even after issue joined.[2] In criminal informations, the same object is attained by entering a *nolle prosequi*, as to the party intended to be examined; the rule, that a

[1] Bull. N. P. 286; 1 Gilb. Evid. by Lofft, p. 251; Lloyd *v.* Williams, Cas. temp. Hardw. 123; Cotton *v.* Luttrell, 1 Atk. 452. "These cases appear to have proceeded upon the ground, that a co-trespasser, who had been originally made a party to the suit upon sufficient grounds, ought not to come forward as a witness to defeat the plaintiff, after he had prevented the plaintiff from proceeding effectually against him, by his own wrongful act in eluding the process." Phil. & Am. on Evid. p. 60, note (2). But see Stockham *v.* Jones, 10 Johns. 21, contra. See also 1 Stark. Evid. 132. In Wakeley *v.* Hart, 6 Binn. 316, all the defendants, in trespass, were arrested, but the plaintiff went to issue with some of them only, and did not rule the others to plead, nor take judgment against them by default; and they were held competent witnesses for the other defendants. The learned Chief Justice placed the decision partly upon the general ground, that they were not interested in the event of the suit; citing and approving the case of Stockham *v.* Jones, supra. But he also laid equal stress upon the fact, that the plaintiff might have conducted his cause so as to have excluded the witnesses, by laying them under a rule to plead, and taking judgment by default. In Purviance *v.* Dryden, 3 S. & R. 402, and Gibbs *v.* Bryant, 1 Pick. 118, both of which were actions upon contract, where the process was not served as to one of the persons named as defendant with the other, it was held, that he was not a party to the record, not being served with process, and so was not incompetent as a witness on that account. Neither of these cases, therefore, except that of Stockham *v.* Jones, touches the ground of public policy for the prevention of fraud in cases of tort, on which the rule in the text seems to have been founded. *Ideo quære.* See also Curtis *v.* Graham, 12 Mart. 289.

[2] Bull. N. P. 285; Berrington d. Dormer *v.* Fortescue, Cas. temp. Hardw. 162, 163.

plaintiff can in no case examine a defendant, being enforced in criminal as well as in civil cases.[1]

§ 360. If a material witness for a defendant *in ejectment* be also made a defendant, he may let judgment go by default, and be admitted as a witness for the other defendant. But if he plead, thereby admitting himself tenant in possession, the Court will not afterward, upon motion, strike out his name.[2] But where he is in possession of only a part of the premises, and consents to the return of a verdict against him for as much as he is proved to have in possession, Mr. Justice Buller said, he could see no reason why he should not be a witness for another defendant.[3]

§ 361. In *Chancery*, parties to the record are subject to examination as witnesses, much more freely than at law. A plaintiff may obtain an order, as of course, to examine a defendant, and a defendant a co-defendant, as a witness, upon affidavit that he is a material witness, and is not interested on the side of the applicant, in the matter to which it is proposed to examine him; the order being made subject to all just exceptions.[4] And it may be obtained *ex parte*, as well after as before decree.[5] If the answer of the defendant has been replied to, the replication must be withdrawn before the plaintiff can examine him. But a plaintiff cannot be examined by a defendant, except by consent, unless he is merely a trustee,

[1] Bull. N. P. 285; Berrington d. Dormer *v.* Fortescue, Cas. temp. Hardw. 162, 163.

[2] Ibid.

[3] Bull. N. P. 286. But where the same Jury are also to assess damages against the witness, it seems he is not admissible. See Mash *v.* Smith, 1 C. & P. 577; Ante, § 356.

[4] 2 Daniel's Chan. Pr. 1035, note, (Perkins's ed.); Ibid. 1043; Ashton *v.* Parker, 14 Sim. 632. It has been held in Massachusetts, that the answer of one defendant, so far as it is responsive to the bill, may be read by another defendant as evidence in his own favor. Mills *v.* Gore, 20 Pick. 28.

[5] Steed *v.* Oliver, 11 Jur. 365; Paris *v.* Hughes, 1 Keen, 1; Van *v.* Corpe, 3 My. & K. 269.

or has no beneficial interest in the matter in question.[1] Nor can a co-plaintiff be examined by a plaintiff without the consent of the defendant. The course in the latter of such cases is to strike out his name as plaintiff, and make him a defendant; and in the former, to file a cross-bill.[2]

§ 362. The principles which govern in the admission or exclusion of parties as witnesses in civil cases, are in general applicable with the like force to *criminal prosecutions*, except so far as they are affected by particular legislation, or by considerations of public policy. In these cases, the State is the party prosecuting, though the process is usually, and in some cases always, set in motion by a private individual, commonly styled *the prosecutor*. In general, this individual has no direct and certain interest in the event of the prosecution; and therefore he is an admissible witness. Formerly, indeed, it was supposed that he was incompetent, by reason of an indirect interest, arising from the use of the record of conviction as evidence in his favor in a civil suit; and this opinion was retained down to a late period, as applicable to cases of forgery, and especially to indictments for perjury. But it is now well settled, as will hereafter more particularly be shown,[3] that the record in a criminal prosecution cannot be used as evidence in a civil suit, either at law or in equity, except to prove the mere fact of the adjudication, or a judicial

[1] The reason of this rule has often been called in question; and the opinion of many of the profession is inclined in favor of making the right of examination of parties in equity reciprocal, without the intervention of a cross bill. See 1 Smith's Ch. Pr. 459, n. (1); Report on Chancery Practice, App. p. 153, Q. 49. Sir Samuel Romilly was in favor of such change in the practice. Ib. p. 54, Q. 266; 1 Hoffman's Ch. Pr. 345.

[2] 1 Smith's Ch. Pr. 343, 344; 1 Hoffman's Ch. Pr. 485 – 488. See further, Gresley on Evid. 242, 243, 244; 2 Mad. Chan. 415, 416; Neilson *v.* McDonald, 6 Johns. Ch. 201; Souverbye *v.* Arden, 1 Johns. Ch. 240; 2 Daniel's Ch. Pr. 455, 456; Piddock *v.* Brown, 3 P. W. 288; Murray *v.* Shadwell, 2 V. & B. 401; Hoffm. Master in Chan. 18, 19; Cotton *v.* Luttrell, 1 Atk. 451.

[3] Post, § 537.

confession of guilt by the party indicted.[1] The prosecutor, therefore, is not incompetent on the ground, that he is a party to the record; but whether any interest which he may have in the conviction of the offender, is sufficient to render him incompetent to testify, will be considered more appropriately under the head of incompetency from interest.

§ 363. In regard to *defendants in criminal cases*, if the State would call one of them, as a witness against others in the same indictment, this can be done only by discharging him from the record; as, by the entry of a *nolle prosequi*;[2] or, by an order for his dismissal and discharge, where he has pleaded in abatement as to his own person, and the plea is not answered;[3] or, by a verdict of acquittal, where no evidence, or not sufficient evidence, has been adduced against him. In the former case, where there is no proof, he is entitled to the verdict; and it may also be rendered at the request of the other defendants, who may then call him as a witness for themselves, as in civil cases. In the latter, where there is some evidence against him, but it is deemed insufficient, a separate verdict of acquittal may be entered, at the instance of the prosecuting officer, who may then call him as a witness against the others.[4] On the same principle, where two were

[1] Rex *v.* Boston, 4 East, 572; Bartlett *v.* Pickersgill, Ib. 577, n.; 1 Phil. Evid. 67; 1 Stark. Evid. 234; Gibson *v.* McCarty, Cas. temp Hardw. 311; Richardson *v.* Williams, 12 Mod. 319; Reg. *v.* Moreau, 36 Leg. Obs. 69. The exception, which had grown up in the case of forgery, was admitted to be an anomaly in the law, in 4 East, 582, per Ld. Ellenborough, and in 4 B. & Ald 210, per Abbott, C. J.; and was finally removed by the declaratory act, for such in effect it certainly is, of 9 Geo. 4, c. 32, § 2. In this country, with the exception of a few early cases, the party to the forged instrument has been held admissible as a witness, on the general principles of the criminal law. See Commonwealth *v.* Snell, 3 Mass. 82; The People *v.* Dean, 6 Cowen, 27; Furber *v.* Hilliard, 2 N. Hamp. 480; Respublica *v.* Ross, 2 Dall. 239; The State *v.* Foster, 3 McCord, 442.

[2] Bull. N. P. 285; Cas. temp. Hardw. 163.

[3] Rex *v.* Sherman, Cas. temp. Hardw. 303.

[4] Rex *v.* Rowland, Ry. & M. 401; Rex *v.* Mutineers of the Bounty, cited arg. 1 East, 312, 313.

indicted for an assault, and one submitted and was fined, and paid the fine, and the other pleaded not guilty; the former was admitted as a competent witness for the latter, because as to the witness the matter was at an end.[1] But the matter is not considered as at an end, so as to render one defendant a competent witness for another, by any thing short of a final judgment, or a plea of guilty.[2] Therefore, where two were jointly indicted for uttering a forged note, and the trial of one of them was postponed, it was held, that he could not be called as a witness for the other.[3] So, where two, being jointly indicted for an assault, pleaded separately not guilty, and elected to be tried separately, it was held, that the one tried first could not call the other as a witness for him.[4]

§ 364. Before we dismiss the subject of parties, it may be proper to take notice of the case, where the facts are personally known by the Judge, before whom the cause is tried. And whatever difference of opinion may once have existed on this point, it seems now to be agreed, that the same person cannot be both *witness and Judge*, in a cause, which is on trial before him. If he is the sole Judge, he cannot be sworn; and if he sits with others, he still can hardly be deemed capable of impartially deciding on the admissibility of his own testimony, or of weighing it against that of

[1] Rex *v.* Fletcher, 1 Stra. 633; Regina *v.* Lyons, 9 C. & P. 555; Regina *v.* Williams, 8 C. & P. 283.

[2] Regina *v.* Hincks, 1 Denis. C. C. 84.

[3] Commonwealth *v.* Marsh, 10 Pick. 57.

[4] The People *v.* Bill, 10 Johns. 95. In Rex *v.* Lafone, 5 Esp. 154, where one defendant suffered judgment by default, Lord Ellenborough held him incompetent to testify for the others; apparently on the ground, that there was a community of guilt, and that the offence of one was the offence of all. But no authority was cited in the case, and the decision is at variance with the general doctrine in cases of tort. The reason given, moreover, assumes the very point in dispute, namely, whether there was any guilt at all. The indictment was for a misdemeanor, in obstructing a revenue officer in the execution of his duty. See Phil. & Am. on Evid. 70, note (3); 1 Phil. Evid. 68.

another.[1] Whether his knowledge of common notoriety is admissible proof of that fact, is not so clearly agreed.[2] On grounds of public interest and convenience, a Judge cannot be called as a witness to testify to what took place before him in the trial of another cause;[3] though he may testify to foreign and collateral matters, which happened in his presence while the trial was pending, or after it was ended.[4] In regard to *attorneys*, it has in England been held a very objectionable proceeding on the part of an attorney, to give evidence when acting as advocate in the cause; and a sufficient ground for a new trial.[5] But in the United States no case has been found to proceed to that extent; and the fact is hardly ever known to occur.

§ 365. We proceed now to consider the SECOND CLASS of persons incompetent to testify as witnesses, namely, that of PERSONS DEFICIENT IN UNDERSTANDING. We have already seen,[6] that one of the main securities, which the law has provided for the purity and truth of oral evidence, is, that it be delivered under the sanction of an oath; and that this is none other than a solemn invocation of the Supreme Being, as the

[1] Ross *v.* Buhler, 2 Martin's R. N. S. 312. So is the law of Spain, Partid. 3, tit. 16, l. 19; 1 Moreau & Carleton's Tr. p. 200; — and of Scotland, Glassford on Evid. p. 602; Tait on Evid. 432; Stair's Inst. Book iv. tit. 45, 4; Erskine's Inst. Book iv. tit. 2, 33. This principle has not been extended to jurors. Though the Jury may use their general knowledge on the subject of any question before them; yet, if any juror has a particular knowledge, as to which he can testify, he must be sworn as a witness. Rex *v.* Rosser, 7 C. & P. 648; Stones *v.* Byron, 4 Dowl. & L. 393. See Post, § 386, note.

[2] Lord Stair and Mr. Erskine seem to have been of opinion that it was, "unless it be overruled by pregnant contrary evidence." But Mr. Glassford and Mr. Tait are of the contrary opinion. See the places cited in the preceding note.

[3] Regina *v.* Gazard, 8 C. & P. 595, per Patteson, J.

[4] Rex *v.* E. of Thanet, 27 Howell's St. Tr. 847, 848. See Ante, § 252, as to the admissibility of jurors.

[5] Dunn *v.* Packwood, 11 Jur. 242, a.

[6] Ante, § 327.

Omniscient Judge. The purpose of the law being to lay hold on the conscience of the witness by this religious solemnity, it is obvious, that persons incapable of comprehending the nature and obligation of an oath, ought not to be admitted as witnesses. The repetition of the words of an oath would, in their case, be but an unmeaning formality. It makes no difference, from what cause this defect of understanding may have arisen; nor whether it be temporary and curable, or permanent; whether the party be hopelessly an idiot, or maniac, or only occasionally insane, as a lunatic; or be intoxicated; or whether the defect arises from mere immaturity of intellect, as in the case of children. While the deficiency of understanding exists, be the cause of what nature soever, the person is not admissible to be sworn as a witness. But if the cause be temporary, and a lucid interval should occur, or a cure be effected, the competency also is restored.[1]

§ 366. In regard to persons *deaf and dumb* from their birth, it has been said, that in presumption of law they are idiots. And though this presumption has not now the same degree of force which was formerly given to it, that unfortunate class of persons being found, by the light of modern science, to be much more intelligent in general, and susceptible of far higher culture, than was once supposed; yet still the presumption is so far operative, as to devolve the burden of proof on the party adducing the witness, to show that he is a person of sufficient understanding. This being done, a deaf mute may be sworn and give evidence, by means of an interpreter.[2] If

[1] 6 Com. Dig. 351, 352, *Testmoigne*, A. 1; 1 Stark. Ev. 91, 92; Phil. & Am. on Evid. 4, 5; Livingston *v.* Kiersted, 10 Johns. 362; Evans *v.* Hettich, 7 Wheat. 453, 470; White's case, 2 Leach, Cr. Cas. 482; Tait on Evid. p. 342, 343. See, as to intoxication, Hartford *v.* Palmer, 16 Johns. 143; Heinec. ad Pandect. Pars 3, § 14.

[2] Rustin's case, 1 Leach, Cr. Cas. 455; Tait on Evid. p. 343; 1 Russ. on Crimes, p. 7; 1 Hale, P. C. 34. Lord Hale refers, for authority as to the ancient presumption, to the Laws of King Alfred, c. 14, which is in these words: — "Si quis mutus vel surdus natus sit, ut peccata sua confiteri nequeat, nec inficiari, emendet pater scelera ipsius." Vid. Leges Barbaror. Antiq. Vol. 4, p. 249; Ancient Laws and Statutes of England, Vol. 1, p. 71.

he is able to communicate his ideas perfectly by writing, he will be required to adopt that, as the more satisfactory, and therefore the better method;[1] but if his knowledge of that method is imperfect, he will be permitted to testify by means of signs.[2]

§ 367. But in respect to *children*, there is no precise age, within which they are absolutely excluded, on the presumption that they have not sufficient understanding. At the age of fourteen, every person is presumed to have common discretion and understanding, until the contrary appears; but under that age, it is not so presumed; and therefore inquiry is made as to the degree of understanding which the child, offered as a witness, may possess; and if he appears to have sufficient natural intelligence, and to have been so instructed as to comprehend the nature and effect of an oath, he is admitted to testify, whatever his age may be.[3] This examination of the child, in order to ascertain his capacity to be sworn, is made by the Judge, at his discretion; and though, as has been just said, no age has been precisely fixed, within which a child shall be conclusively presumed incapable, yet, in one case, a learned Judge promptly rejected the dying declarations of a child of four years of age, observing, that it was quite impossible that she, however precocious her mind, could have had that idea of a future state, which is necessary to make such declarations admissible.[4] On the other hand, it is not

[1] Morrison *v.* Lennard, 3 C. & P. 127.

[2] The State *v.* De Wolf, 8 Conn. 93; Commonwealth *v.* Hill, 14 Mass. 207; Snyder *v.* Nations, 5 Blackf. 295.

[3] McNally's Evid. p. 149, ch. 11; Bull. N. P. 293; 1 Hale, P. C. 302; 2 Russ. on Crimes, p. 590; Jackson *v.* Gridley, 18 Johns. 98.

[4] Rex *v.* Pike, 3 C. & P. 598; The People *v.* McNair, 21 Wend. 608. Neither can the declarations of such a child, if living, be received in evidence. Rex *v.* Brasier, 1 East, P. C. 443.