unusual to receive the testimony of children under nine, and sometimes even under seven years of age, if they appear to be of sufficient understanding;[1] and it has been admitted even at the age of five years.[2] If the child, being a principal witness, appears not yet sufficiently instructed in the nature of an oath, the Court will, in its discretion, put off the trial, that this may be done.[3] But whether the trial ought to be put off for the purpose of instructing an adult witness, has been doubted.[4]

§ 368. The THIRD CLASS of persons incompetent to testify as witnesses, consists of those who are INSENSIBLE TO THE OBLIGATIONS OF AN OATH, from defect of religious sentiment and belief. The very nature of an oath, it being a religious and most solemn appeal to God, as the Judge of all men, presupposes that the witness believes in the existence of an omniscient Supreme Being, who is "the rewarder of truth and avenger of falsehood;"[5] and that, by such a formal appeal,

[1] 1 East, P. C. 442; Commonwealth *v.* Hutchinson, 10 Mass. 225; McNally's Evid. p. 154; The State *v.* Whittier, 8 Shepl. 341.

[2] Rex *v.* Brasier, 1 Leach, Cr. Cas. 237; Bull. N. P. 293, S. C.; 1 East, P. C. 443, S. C.

[3] McNally's Evid. p. 154; Rex *v.* White, 2 Leach, Cr. Cas. 482, note (a); Rex *v.* Wade, 1 Mood. Cr. Cas. 86. But in a late case before Mr. Justice Patteson, the learned Judge said, that he must be satisfied that the child felt the binding obligation of an oath, from the general course of her religious education; and that the effect of the oath upon the conscience should arise from religious feelings of a permanent nature, and not merely from instructions, confined to the nature of an oath, recently communicated for the purpose of the particular trial. And therefore, the witness having been visited but twice by a clergyman, who had given her some instructions as to the nature of an oath, but still she had but an imperfect understanding on the subject, her evidence was rejected. Rex *v.* Williams, 7 C. & P. 320.

[4] Phil. & Am. on Evid. p. 6, note (2); 1 Phil. Evid. 5; Rex *v.* Wade, 1 Mood. Cr. Cas. 86.

[5] Per Ld. Hardwicke, 1 Atk. 48. The opinions of the earlier as well as later Jurists, concerning the nature and obligation of an oath, are quoted and discussed much at large, in Omichund *v.* Barker, 1 Atk. 21, and in Tyler on Oaths, *passim*, to which the learned reader is referred.

the conscience of the witness is affected. Without this belief, the person cannot be subject to that sanction, which the law deems an indispensable test of truth.[1] It is not sufficient, that a witness believes himself bound to speak the truth from a regard to character, or to the common interests of society, or from fear of the punishment which the law inflicts upon persons guilty of perjury. Such motives have indeed their influence, but they are not considered as affording a sufficient safeguard for the strict observance of truth. Our law, in common with the law of most civilized countries, requires the additional security afforded by the religious sanction implied in an oath; and, as a necessary consequence, rejects all witnesses, who are incapable of giving this security.[2] Atheists, therefore, and all infidels, that is, those who profess no religion that can bind their consciences to speak truth, are rejected as incompetent to testify as witnesses.[3]

§ 369. As to the nature and *degree of religious faith* required in a witness, the rule of law, as at present understood, seems to be this, that the person is competent to testify, if he

[1] 1 Stark. Evid. 22. "The law is wise in requiring the highest attainable sanction for the truth of testimony given; and is consistent in rejecting all witnesses incapable of feeling this sanction, or of receiving this test; whether this incapacity arises from the imbecility of their understanding, or from its perversity. It does not impute guilt or blame to either. If the witness is evidently intoxicated, he is not allowed to be sworn; because, for the time being, he is evidently incapable of feeling the force and obligation of an oath. The non compos, and the infant of tender age, are rejected for the same reason, but without blame. The atheist is also rejected, because he, too, is incapable of realizing the obligation of an oath, in consequence of his unbelief. The law looks only to the fact of incapacity, not to the cause, or the manner of avowal. Whether it be calmly insinuated, with the elegance of Gibbon, or roared forth in the disgusting blasphemies of Paine, still it is atheism; and to require the mere formality of an oath, from one who avowedly despises, or is incapable of feeling, its peculiar sanction, would be but a mockery of justice." 1 Law Reporter, p. 346, 347.

[2] Phil. & Am. on Evid. 11; 1 Phil. Evid. 10.

[3] Bull. N. P. 292; 1 Stark. Evid. 22; 1 Atk. 40, 45; Phil. & Am. on Evid. 11; 1 Phil. Evid. 10.

believes in the being of God, and a future state of rewards and punishments; that is, that Divine punishment will be the certain consequence of perjury. It may be considered as now generally settled, in this country, that it is not material, whether the witness believes that the punishment will be inflicted in this world, or in the next. It is enough, if he has the religious sense of accountability to the Omniscient Being, who is invoked by an oath.[1]

§ 370. It should here be observed, that defect of religious faith is *never presumed.* On the contrary, the law presumes that every man brought up in a Christian land, where God is generally acknowledged, does believe in him, and fear him. The charity of its judgment is extended alike to all. The burden of proof is not on the party adducing the witness, to prove that he is a believer; but it is on the objecting party, to prove that he is not. Neither does the law presume that

[1] The proper test of the competency of a witness on the score of religious belief was settled, upon great consideration, in the case of Omichund *v.* Barker, Willes, 545, 1 Atk. 21, S. C., to be the belief of a God, and that he will reward and punish us according to our deserts. This rule was recognised in Butts *v.* Swartwood, 2 Cowen, 431; The People *v.* Matteson, 2 Cowen, 433, 573, note; and by Story, J. in Wakefield *v.* Ross, 5 Mason, 18; 9 Dane's Abr. 317, S. P.; and in Brock *v.* Milligan, 1 Wilcox, 125. Whether any belief in a future state of existence is necessary, provided accountability to God in this life is acknowledged, is not perfectly clear. In Commonwealth *v.* Bacheler, 4 Am. Jurist, 81, Thacher, J. seemed to think it was. But in Hunscom *v.* Hunscom, 15 Mass. 184, the Court held, that mere disbelief in a future existence went only to the credibility. This degree of disbelief is not inconsistent with the faith required in Omichund *v.* Barker. The only case, clearly to the contrary, is Attwood *v.* Welton, 7 Conn. 66. In Curtis *v.* Strong, 4 Day, 51, the witness did not believe in the obligation of an oath; and in Jackson *v.* Gridley, 18 Johns. 98, he was a mere atheist, without any sense of religion whatever. All that was said, in these two cases, beyond the point in judgment, was extrajudicial. See also 3 Phil. Evid. by Cowen & Hill, p. 1503, note 53, 55; Fernandis & Hall *v.* Henderson, Cor. Dessaussure Ch. Union Dist. S. Car. Aug. 1827, Ib. cit. In Maine, a belief in the existence of the Supreme Being is rendered sufficient, by Stat. 1833, ch. 58, without any reference to rewards or punishments. Smith *v.* Coffin, 6 Shepl. 157.

any man is a hypocrite. On the contrary, it presumes him to be what he professes himself to be, whether atheist, or Christian; and the state of a man's opinions, as well as the sanity of his mind, being once proved, is, as we have already seen,[1] presumed to continue unchanged, until the contrary is shown. The state of his religious belief, at the time he is offered as a witness, is the fact to be ascertained; and this is presumed to be the common faith of the country, unless the objector can prove that it is not. The ordinary mode of showing this is by evidence of his declarations, previously made to others; the person himself not being interrogated; for the object of interrogating a witness, in these cases, before he is sworn, is not to obtain the knowledge of other facts, but to ascertain, from his answers, the extent of his capacity, and whether he has sufficient understanding to be sworn.[2]

[1] Ante, § 42; The State *v.* Stinson, 7 Law Reporter, 383.

[2] Swift's Evid. 48; Smith *v.* Coffin, 6 Shepl. 157. It has been questioned, whether the evidence of his declarations ought not to be confined to a period shortly anterior to the time of proving them, so that no change of opinion might be presumed. Brock *v.* Milligan, 1 Wilcox, 126, per Wood, J. "The witness himself is never questioned in *modern* practice, as to his religious belief; though formerly it was otherwise. (1 Swift's Dig. 739; 5 Mason, 19; American Jurist, Vol. 4, p. 79, note.) It is not allowed, even after he has been sworn. (The Queen's case, 2 B. & B. 284.) Not because it is a question tending to disgrace him; but because it would be a personal scrutiny into the state of his faith, and conscience, foreign to the spirit of our institutions. No man is obliged to avow his belief; but if he voluntarily does avow it, there is no reason why the avowal should not be proved, like any other fact. The truth and sincerity of the avowal, and the continuance of the belief thus avowed, are presumed, and very justly too, till they are disproved. If his opinions have been subsequently changed, this change will generally, if not always, be provable in the same mode. (Attwood *v.* Welton, 7 Conn. 66; Curtis *v.* Strong, 4 Day, 51; Swift's Evid. 48–50; Mr. Christian's note to 3 Bl. Comm. 369; 1 Phil. Evid. 18; Commonwealth *v.* Bacheler, 4 Am. Jur. 79, note.) If the change of opinion is very recent, this furnishes no good ground to admit the witness himself to declare it; because of the greater inconvenience which would result from thus opening a door to fraud, than from adhering to the rule requiring other evidence of this fact. The old cases, in which the witness himself was questioned as to his belief, have on this point been *overruled*. See Christian's note to 3 Bl. Comm. [369], note (30). The

§ 371. It may be added, in this place, that all witnesses are to be sworn according to the peculiar ceremonies of their own

law, therefore, is not reduced to any absurdity in this matter. It exercises no inquisitorial power; neither does it resort to secondary or hearsay evidence. If the witness is objected to, it asks third persons to testify, whether he has declared his disbelief in God, and in a future state of rewards and punishments, &c. Of this fact they are as good witnesses as he could be; and the testimony is primary and direct. It should further be noticed, that the question, whether a person, about to be sworn, is an atheist or not, can never be raised by any one but an adverse party. No stranger or volunteer has a right to object. There must, in every instance, be a suit between two or more parties, one of whom offers the person in question, as a competent witness. The presumption of law, that every citizen is a believer in the common religion of the country, holds good until it is disproved; and it would be contrary to all rule to allow any one, not party to the suit, to thrust in his objections to the course pursued by the litigants. This rule and uniform course of proceeding shows how much of the morbid sympathy expressed for the atheist is wasted. For there is nothing to prevent him from taking any oath of office; nor from swearing to a complaint before a magistrate; nor from making oath to his answer in chancery. In this last case, indeed, he could not be objected to, for another reason, namely, that the plaintiff, in his bill, requests the Court to require him to answer upon his oath. In all these, and many other similar cases, there is no person authorized to raise an objection. Neither is the question permitted to be raised against the atheist, where he is himself the adverse party, and offers his own oath, in the ordinary course of proceeding. If he would make affidavit, in his own cause, to the absence of a witness, or to hold to bail, or to the truth of a plea in abatement, or to the loss of a paper, or to the genuineness of his books of account, or to his fears of bodily harm from one, against whom he requests surety of the peace, or would take the poor debtor's oath; in these and the like cases, the uniform course is to receive his oath, like any other person's. The law, in such cases, does not know that he is an atheist; that is, it never allows the objection of infidelity to be made against any man, seeking his own rights in a Court of Justice; and it conclusively and absolutely presumes that, so far as religious belief is concerned, all persons are capable of an oath, of whom it requires one, as the condition of its protection, or its aid; probably deeming it a less evil, that the solemnity of an oath should, in few instances, be mocked by those who felt not its force and meaning, than that a citizen should, in any case, be deprived of the benefit and protection of the law, on the ground of his religious belief. The state of his faith is not inquired into, where his own rights are concerned. He is only prevented from being made the instrument of taking away those of others." 1 Law Reporter, p. 347, 348.

religion, or in such manner as they may deem binding on their own consciences. If the witness is not of the Christian religion, the Court will inquire as to the form in which an oath is administered in his own country, or among those of his own faith, and will impose it in that form. And if, being a Christian, he has conscientious scruples against taking an oath in the usual form, he will be allowed to make a solemn religious asseveration, involving a like appeal to God for the truth of his testimony, in any mode which he shall declare to be binding on his conscience.[1] The Court, in ascertaining whether the form in which the oath is administered, is binding on the conscience of the witness, may inquire of the witness himself; and the proper time for making this inquiry is before he is sworn.[2] But if the witness, without making any objection, takes the oath in the usual form, he may be afterwards asked, whether he thinks the oath binding on his conscience; but it is unnecessary and irrelevant to ask him, if he considers any other form of oath more binding, and therefore such question cannot be asked.[3] If a witness, without objecting, is sworn in the usual mode, but being of a different faith, the oath was not in a form affecting his conscience, as if, being a

[1] Omichund *v.* Barker, 1 Atk. 21, 46; Willes, 538, 545–549, S. C.; Ramkissenseat *v.* Barker, 1 Atk. 19; Atcheson *v.* Everitt, Cowp. 389, 390; Bull. N. P. 292; 1 Phil. Evid. 9, 10, 11; 1 Stark. Evid. 22, 23; Rex *v.* Morgan, 1 Leach, Cr. Cas. 64; Vail *v.* Nickerson, 6 Mass. 262; Edmonds *v.* Rowe, Ry. & M. 77; Commonwealth *v.* Buzzell, 16 Pick. 153. "Quumque sit adseveratio religiosa, — satis patet, — jusjurandum attemperandum esse cujusque religioni." Heinec. ad Pand. Pars 3, § 13, 15. "Quodcunque nomen dederis, id utique constat, omne jusjurandum proficisci ex fide et persuasione jurantis; et inutile esse, nisi quis credat Deum, quem testem advocat, pejurii sui idoneum esse vindicem. Id autem credat, qui jurat per Deum suum, per sacra sua, et ex sua ipsius animi religione," &c. Bynkers. Obs. Jur. Rom. lib. 6, cap. 2.

[2] By Stat. 1 & 2 Vict. c. 105, an oath is binding, in whatever form, if administered in such form and with such ceremonies as the person may declare binding. But the doctrine itself is conceived to be Common Law.

[3] The Queen's case, 2 B. & B. 284.

Jew, he was sworn on the Gospels, he is still punishable for perjury, if he swears falsely.[1]

§ 372. Under this general head of exclusion because of insensibility to the obligation of an oath, may be ranked the case of *persons infamous;* that is, persons who, whatever may be their professed belief, have been guilty of those heinous crimes which men generally are not found to commit, unless when so depraved as to be unworthy of credit for truth. The basis of the rule seems to be, that such a person is morally too corrupt to be trusted to testify; — so reckless of the distinction between truth and falsehood, and insensible to the restraining force of an oath, as to render it extremely improbable that he will speak the truth at all. Of such a person Chief Baron Gilbert remarks, that the credit of his oath is overbalanced by the stain of his iniquity.[2] The party, however, must have been legally adjudged guilty of the crime. If he is stigmatized by public fame only, and not by the censure of law, it affects the credit of his testimony, but not his admissibility as a witness.[3] The record, therefore, is required as the sole evidence of his guilt; no other proof being admitted of the crime; not only because of the gross injustice of trying the guilt of a third person in a case to which he is not a party, but also, lest, in the multiplication of the issues to be

[1] Sells *v.* Hoare, 3 B. & B. 232; The State *v.* Whisenhurst, 2 Hawks, 458. But the adverse party cannot, for that cause, have a new trial. Whether he may, if a witness on the other side testified without having been sworn at all, *quære*. If the omission of the oath was known at the time, it seems he cannot. Lawrence *v.* Houghton, 5 Johns. 129; White *v.* Hawn, Ib. 351. But if it was not discovered until after the trial, he may. Hawks *v.* Baker, 6 Greenl. 72.

[2] Gilb. Evid. by Lofft, p. 256. It was formerly thought, that an infamous *punishment*, for whatever crime, rendered the person incompetent as a witness, by reason of infamy. But this notion is exploded; and it is now settled, that it is the crime and not the punishment that renders the man infamous. Bull. N. P. 292; Pendock *v.* Mackinder, Willes, R. 666.

[3] 2 Dods. R. 186, per Sir Wm. Scott.

tried, the principal case should be lost sight of, and the administration of justice should be frustrated.[1]

§ 373. It is a point of no small difficulty to determine precisely the crimes which render the perpetrator thus infamous. The rule is justly stated to require, that "the *publicum judicium* must be upon an offence, implying such a dereliction of moral principle, as carries with it a conclusion of a total disregard to the obligation of an oath."[2] But the difficulty lies in the specification of those offences. The usual and more general enumeration is, *treason*, *felony*, and the *crimen falsi*.[3] In regard to the two former, as all treasons, and almost all felonies were punishable with death, it was very natural that crimes, deemed of so grave a character as to render the offender unworthy to live, should be considered as rendering him unworthy of belief in a Court of Justice. But the extent and meaning of the term, *crimen falsi*, in our law, is nowhere laid down with precision. In the Roman Law, from which we have borrowed the term, it included not only forgery, but every species of fraud and deceit.[4] If the offence

[1] Rex *v.* Castel Careinion, 8 East, 77; Lee *v.* Gansell, Cowp. 3, per Ld. Mansfield.

[2] 2 Dods. R. 186, per Sir Wm. Scott.

[3] Phil & Am. on Evid. p. 17; 6 Com. Dig. 353, *Testmoigne*, A. 4, 5; Co. Lit. 6, b.; 2 Hale, P. C. 277; 1 Stark. Evid. 94, 95. A conviction for petty larceny disqualifies, as well as for grand larceny. Pendock *v.* Mackinder, Willes, R. 665.

[4] Cod. Lib. 9, tit. 22, ad legem Corneliam de falsis. Cujac. Opera. Tom. ix. in locum. (Ed. Prati, A. D. 1839, 4to p. 2191 – 2200); 1 Brown's Civ. & Adm. Law, p. 426; Dig. lib. 48, tit. 10; Heinec. in Pand. Pars vii. § 214 – 218. The law of Normandy disposed of the whole subject in these words: — "Notandum siquidem est, quod nemo in querelà sua pro teste recipiendus est; nec ejus hæredes nec participes querelæ. Et hoc intelligendum est tam ex parte actoris, quam ex parte defensoris. Omnes autem illi, qui *perjurio* vel *læsione fide* sunt infames, ob hoc etiam sunt repellendi, et omnes illi, qui in bello succubuerunt." Jura Normaniæ, Cap. 62; [in Le Grand Coustumier, fol. Ed. 1539.] In the ancient Danish Law it is thus defined, in the chapter entitled, *Falsi crimen quodnam censetur*. "Falsum est, si terminum, finesve quis moverit, monetam nisi venia vel mandato regio

did not fall under any other head, it was called *stellionatus*,[1] which included "all kinds of cozenage and knavish practice in bargaining." But it is clear, that the Common Law has not employed the term in this extensive sense, when applying it to the disqualification of witnesses; because convictions for many offences, clearly belonging to the *crimen falsi* of the civilians, have not this effect. Of this sort are deceits in the quality of provisions, deceits by false weights and measures, conspiracy to defraud by spreading false news,[2] and several others. On the other hand, it has been adjudged, that persons are rendered infamous, and therefore incompetent to testify, by having been convicted of forgery,[3] perjury, subornation of perjury,[4] suppression of testimony by bribery, or conspiracy to procure the absence of a witness,[5] or other conspiracy, to accuse one of a crime,[6] and barratry.[7] And from these decisions it may be deduced, that the *crimen falsi* of the Common Law not only involves the charge of falsehood, but

cusserit, argentum adulterinum conflaverit, nummisve reprobis dolo malo emat vendatque, vel argento adulterino." Ancher, Lex Cimbrica, lib. 3, cap. 65, p. 249.

[1] Dig. lib. 47, tit. 20, l. 3, Cujac (in locum,) Opera, Tom. ix. (Ed. supra) p. 2224. Stellionatus nomine significatur omne crimen, quod nomen proprium non habet, omnis fraus, quæ nomine proprio vacat. — Translatum autem esse nomen stellionatus, nemo est qui nesciat, ab animali ad hominem vafrum, et decipiendi peritum. Ib. Heinec. ad Pand. Pars vii. § 147, 148; 1 Brown's Civ. & Adm. Law, p. 426.

[2] The Ville de Varsovie, 2 Dods. R. 174. But see Crowther *v.* Hopwood, 3 Stark. R. 21.

[3] Rex *v.* Davis, 5 Mod. 74.

[4] Co. Lit. 6, b.; 6 Com. Dig. 353, *Testm.* A. 5.

[5] Clancey's case, Fortesc. R. 208; Bushell *v.* Barrett, Ry. & M. 434.

[6] 2 Hale, P. C. 277; Hawk. P. C. b. 2, ch. 46, § 101; Co. Lit. 6, b.; Rex *v.* Priddle, 2 Leach, Cr. Cas 496; Crowther *v.* Hopwood, 3 Stark. R. 21, arg.; 1 Stark. Evid. 95; 2 Dods. R. 191.

[7] Rex *v.* Ford, 2 Salk. 690; Bull. N. P. 292. The receiver of stolen goods is incompetent as a witness. See the Trial of Abner Rogers, p. 136, 137. If a statute declare the perpetrator of a crime "infamous," this, it seems, will render him incompetent to testify. Phil. & Am. on Evid. p. 18; 1 Phil. Evid. p. 18; 1 Gilb. Evid. by Lofft, p. 256, 257.

also is one which may injuriously affect the administration of justice, by the introduction of falsehood and fraud. At least it may be said, in the language of Sir William Scott,[1] "so far the law has gone, affirmatively; and it is not for me to say where it should stop, negatively."

§ 374. In regard to the *extent and effect of the disability* thus created, a distinction is to be observed between cases in which the person disqualified is a party, and those in which he is not. In cases between third persons, his testimony is universally excluded.[2] But where he is a party, in order that he may not be wholly remediless, he may make any affidavit necessary to his exculpation or defence, or for relief against an irregular judgment, or the like;[3] but it is said, that his affidavit shall not be read to support a criminal charge.[4] If he was one of the subscribing witnesses to a deed, will, or other instrument, before his conviction, his hand-writing may be proved, as though he were dead.[5]

§ 375. We have already remarked, that no person is deemed infamous in law, until he has been legally found guilty of an infamous crime. But the mere verdict of the Jury is not sufficient for this purpose; for it may be set aside, or the judgment may be arrested, on motion for that purpose. It is *the judgment*, and that only, which is received as the legal and conclusive evidence of the party's guilt, for the purpose of rendering him incompetent to testify.[6] And it must appear,

[1] 2 Dods. R. 191. See also 2 Russ. on Crimes, 592, 593.

[2] Even where it is merely offered as an affidavit in showing cause against a rule calling upon the party to answer, it will be rejected. *In re* Sawyer, 2 Ad. &. El. 721, N. S.

[3] Davis and Carter's case, 2 Salk. 461; Rex *v.* Gardiner, 2 Burr. 1117; Atcheson *v.* Everitt, Cowp. 382; Skinner *v.* Perot, 1 Ashm. 57.

[4] Walker *v.* Kearney, 2 Stra. 1148; Rex *v.* Gardiner, 2 Burr. 1117.

[5] Jones *v.* Mason, 2 Stra. 833.

[6] 6 Com. Dig. 354, *Testm.* A. 5; Rex *v.* Castel Careinion, 8 East, 77; Lee *v* Gansell, Cowp. 3; Bull. N. P. 292; Fitch *v.* Smalbrook, T. Ray. 32; The People *v.* Whipple, 9 Cowen, 707; The People *v.* Herrick, 13

that the judgment was rendered by a Court of competent jurisdiction.[1] Judgment of outlawry for treason or felony will have the same effect;[2] for the party, in submitting to an outlawry, virtually confesses his guilt; and so the record is equivalent to a judgment upon confession. If the guilt of the party should be shown by oral evidence, and even by his own admission, [though in neither of these modes can it be proved, if the evidence be objected to,] or, by his plea of guilty, which has not been followed by a judgment,[3] the proof does not go to the competency of the witness, however it may affect his credibility.[4] And the judgment itself, when offered against his admissibility, can be proved only by the record, or, in proper cases, by an authenticated copy, which the objector must offer and produce at the time when the witness is about to be sworn, or at farthest in the course of the trial.[5]

§ 376. Whether judgment of an infamous crime, passed by a foreign tribunal, ought to be allowed to affect the competency of the party as a witness, in the Courts of this country, is a question upon which Jurists are not entirely agreed. But the weight of modern opinions seems to be, that personal disqualifications, not arising from the law of nature, but from the positive law of the country, and especially such as are of a penal nature, are strictly territorial, and cannot be enforced

---

Johns. 82; Cushman *v.* Loker, 2 Mass. 108; Castellano *v.* Peillon, 2 Martin, N. S. 466.

[1] Cooke *v.* Maxwell, 2 Stark. R. 183.

[2] Co. Lit. 6, b.; Hawk. P. C. b. 2, ch. 48, § 22; 3 Inst. 212; 6 Com. Dig. 354, *Testm.* A. 5; 1 Stark. Evid. 95, 96. In Scotland it is otherwise. Tait's Evid. p. 347.

[3] Regina *v.* Hinks, 1 Dennis. Cr. Cas. 84.

[4] Rex *v.* Castel Careinion, 8 East, 77; Wicks *v.* Smallbroke, 1 Sid. 51; T. Ray. 32, S. C.; The People *v.* Herrick, 13 Johns. 82.

[5] Ib. Hilts *v.* Colven, 14 Johns. 182; Commonwealth *v.* Green, 17 Mass. 537. In The State *v.* Ridgley, 2 Har. & McHen. 120, and Clark's lessee *v.* Hall, Ib. 378, which have been cited to the contrary, parol evidence was admitted to prove only the fact of the witness's having been transported as a convict; not to prove the judgment of conviction.

in any country other than that in which they originate.[1] Accordingly it has been held, upon great consideration, that a conviction and sentence for a felony in one of the United States, did not render the party incompetent as a witness, in the Courts of another State; though it might be shown in diminution of the credit due to his testimony.[2]

§ 377. The *disability* thus arising from infamy may, in general, be *removed* in two modes; (1.) by reversal of the judgment; and (2.) by a pardon. The reversal of the judgment must be shown in the same manner that the judgment itself must have been proved, namely, by production of the record of reversal, or, in proper cases, by a duly authenticated exemplification of it. The pardon must be proved, by production of the charter of pardon under the great seal. And though it were granted after the prisoner had suffered the entire punishment awarded against him, yet it has been held sufficient to restore the competency of the witness, though he would, in such case, be entitled to very little credit.[3]

---

[1] Story on Confl. of Law, § 91, 92, 104, 620–625; Martens' Law of Nations, B. 3, ch. 3, § 24, 25.

[2] Commonwealth *v.* Green, 17 Mass. 515, 539–549, per totam Curiam; Contra, The State *v.* Candler, 3 Hawks, 393, per Taylor, C. J. and Henderson, J.; Hall, J. dubitante, but inclining in favor of admitting the witness. In the cases of the State *v.* Ridgley, 2 Har. & McHen. 120; Clark's lessee *v.* Hall, Ib. 378; and Cole's lessee *v.* Cole, 1 Har. & Johns. 572; which are sometimes cited in the negative, this point was not raised nor considered; they being cases of persons sentenced in England for felony, and transported to Maryland, under the sentence prior to the Revolution.

[3] The United States *v.* Jones, 2 Wheeler's Cr. Cas. 451, per Thompson, J. By Stat. 9 Geo. 4, c. 32, § 3, enduring the punishment to which an offender has been sentenced for any felony not punishable with death, has the same effect as a pardon under the great seal, for the same offence; and of course it removes the disqualification to testify. And the same effect is given by § 4, of the same statute, to the endurance of the punishment awarded for any misdemeanor, except perjury and subornation of perjury. See also 1 W. 4, c. 37, to the same effect; Tait on Evid. 346, 347. But whether these enactments have proceeded on the ground, that the incompetency is in the nature of punishment, or, that the offender is reformed by the salutary discipline he has undergone, does not clearly appear.

§ 378. The rule, that a pardon restores the competency and completely rehabilitates the party, is *limited* to cases where the disability is a consequence of the judgment, according to the principles of the Common Law.[1] But where the disability is annexed to the conviction of a crime by the express words of a statute, it is generally agreed that the pardon will not, in such a case, restore the competency of the offender; the prerogative of the sovereign being controlled by the authority of the express law. Thus, if a man be adjudged guilty on an indictment for perjury, at Common Law, a pardon will restore his competency. But if the indictment be founded on the statute of 5 Eliz. c. 9, which declares, that no person, convicted and attainted of perjury or subornation of perjury, shall be from thenceforth received as a witness in any Court of record, he will not be rendered competent by a pardon.[2]

---

[1] If the pardon of one sentenced to the penitentiary for life, contains a proviso that nothing therein contained shall be construed, so as to relieve the party from the legal disabilities consequent upon his sentence, other than the imprisonment, the proviso is void, and the party is fully rehabilitated. The People *v.* Pease, 3 Johns. Cas. 333.

[2] Rex *v.* Ford, 2 Salk. 689; Dover *v.* Maestaer, 5 Esp. 92, 94; 2 Russ. on Crimes, 595, 596; Rex *v.* Greepe, 2 Salk. 513, 514; Bull. N. P. 292; Phil. & Am. on Evid. 21, 22. See also Mr. Hargrave's Juridical Arguments, Vol. 2, p. 221, et seq., where this topic is treated with great ability. Whether the disability is, or is not, made a part of the judgment, and entered as such on the record, does not seem to be of any importance. The form in which this distinction is taken in the earlier cases, evidently shows that its force was understood to consist in this, that in the former case, the disability was declared by the statute, and in the latter, that it stood at Common Law. "Although the incapacity to testify, especially considered as a mark of infamy, may really operate as a severe punishment upon the party; yet there are other considerations affecting other persons, which may well warrant his exclusion from the halls of justice. It is not consistent with the interests of others, nor with the protection which is due to them from the State, that they should be exposed to the peril of testimony from persons regardless of the obligation of an oath; and hence, on grounds of public policy, the legislature may well require, that, while the judgment itself remains unreversed, the party convicted shall not be heard as a witness. It may be more safe to exclude in all cases, than to admit in all, or attempt to distinguish by investigating the grounds, on which the pardon may have been granted. And it is without doubt as clearly within the power of the legislature, to modify the law of evidence, by declaring what manner of persons shall be competent to testify, as by enacting, as in the statute of frauds, that no person shall be heard vivâ voce in proof of a certain class of contracts. The statute of Elizabeth itself seems to place the exception on the ground of a rule of evidence, and not on that of a penal fulmination against the offender. The intent of the legislature appears to have been not so much to punish the party, by depriving him of the privilege of being a witness or a juror, as to prohibit the Courts from receiving the oath of any person convicted of disregarding its obligation. And whether this consequence of the conviction be entered on the record or not, the effect is the same. The judgment under the statute being properly shown to the Judges of a Court of Justice, their duty is declared in the statute, independent of the insertion of the inhibition as part of the sentence, and unaffected by any subsequent pardon. The legislature, in the exercise of its power to punish crime, awards fine, imprisonment, and the pillory against the offender; in the discharge of its duty to preserve the temple of justice from pollution, it repels from its portal the man who feareth not an oath. Thus it appears, that a man convicted of perjury cannot be sworn in a Court of Justice, while the judgment remains unreversed, though his offence may have been pardoned, after the judgment; but the reason is found in the express direction of the statutes to the Courts, and not in the circumstances of the disability being made a part of the judgment. The pardon exerts its full vigor on the offender; but is not allowed to operate beyond this, upon the rule of evidence enacted by the statute. The punishment of the crime belongs to the criminal code; the rule of evidence to the civil." See Amer. Jurist, Vol. 11, p. 360, 361, 362. In several of the United States, the disqualification is expressly declared by statutes, and is extended to all the crimes therein enumerated; comprehending not only all the varieties of the *crimen falsi*, as understood in the Common Law, but divers other offences.

§ 379. The case of *accomplices* is usually mentioned under the head of Infamy; but we propose to treat it more appropriately, when we come to speak of persons disqualified by Interest, since accomplices generally testify under a promise or expectation of pardon, or some other benefit. But it may here be observed, that it is a settled rule of evidence, that a *particeps criminis*, notwithstanding the turpitude of his conduct, is not, on that account, an incompetent witness, so long as he remains not convicted and sentenced for an infamous