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Evidence -- Impeaching Witness by Showing Religious Belief

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same policy behind the move to empower courts to render declaratory judgments furnishes a sound argument. The use of this method would spare the plaintiff whom the ordinance effects the necessity of choosing between a curtailment of operations to conform to the ordinance or the stigma of defending a criminal prosecution and risking an adverse result, with consequent fine or sentence.[28] One who tries in good faith to obey valid laws and ordinances should not be forced by the courts to become a lawbreaker in order to protect his constitutional rights, on the now exploded assumption that such a procedure constitutes an "adequate remedy" at law.

PEYTON B. ABBOTT, JR.

Evidence—Impeaching Witness by Showing Religious Belief

Can a witness be impeached by inquiring into his religious faith? This is one of the principal questions raised in *State v. Beal*,[1] the dramatic murder trial growing out of the recent Gastonia strike disturbances. The opinion expressly avoids a definite answer, but general phases of the problem may profitably be considered.

Competency and Credibility

The common law idea of purging the witness box of prejudiced and inferior witnesses has been superseded by a more enlightened technique. Those qualities which formerly prevented the witness from testifying at all—interest, infamy, and coverture—are now considered on the question of how much credit, conceding him to be competent, is to be given to the witness by the triers of fact.[2] This change has been facilitated by the broad scope of the theory of testimonial impeachment. All matters which give rise to an inference or chain of inferences leading to the conclusion that the witness is presently lying are relevant.[3] The grounds of attack most commonly accepted as thus relevant are those which formerly formed the basis

[28] In the recent case of Standard Oil Co. v. City of Charlottesville, 42 F. (2d) 88 (C. C. A. 4th., 1930), plaintiff sought to enjoin the enforcement of an ordinance intended to be a substitute for a zoning ordinance, which the city was without power to pass under the circumstances. The District Court held the ordinance valid, denied the injunction. Reversed, with instructions that the injunction would lie, because the penalty provided for violation was so great that it would be dangerous to test the validity in a criminal prosecution. Parker, Circuit Judge, quotes from Terrace v. Thompson, *supra* note 24, to the effect that "the legal remedy must be as complete, practical and efficient as that which equity could afford."

[1] 199 N. C. 276, 154 S. E. 604 (1930).

[2] 2 WIGMORE, EVIDENCE (1923) § 876.

[3] *Ibid.*, §877.

for excluding the witness: 1. Defects of organic capacity. 2. Character. 3. Bias, interest, and corruption.[4] But difference of opinion exists as to what phases of these generalized qualities—particularly of character—are relevant; and the whole problem is complicated by a mass of detailed rules, predicated on varying reasons of policy, as to how these qualities shall be evidenced.

The religious belief of the witness fits anomalously into this scheme of changing emphasis from the exclusionary to the impeaching process. It has not been so generally removed as a testimonial disqualification[5] as have interest, infamy, and coverture, and the question of its relevancy for impeachment purposes is not so readily solved.

In Jurisdictions with Religious Test for Competency

North Carolina is one of the minority jurisdictions retaining the common law rule which required the witness to believe in a God who will punish false swearing in this world or the next as a requisite of competency.[6] In such jurisdictions logically it should be allowable

[4] *Ibid.*, c. XXX.

[5] Wigmore (§§518 and 1816) propounds the theory that religious belief has never been considered strictly a testimonial qualification. Such belief is significant only as a qualification to take the oath, and the oath exists to subject a person possessed of the faculties (testimonial qualifications) considered inherently necessary for a *capacity* to tell the truth to the stimulus to tell it. At common law the oath requirement—"a prophylactic rule"—was important enough to exclude all testimony which was not generated from its impulse. This elusive distinction might have a practical application in construing at least one of a fairly common type of statute. N. M. ANN. STAT. §2165 provides: "Hereafter in the courts of this state no person shall be disqualified to give evidence on account of any disqualification known to the common law, but all such common law disqualifications may be shown for the purpose of affecting the credibility of any such witness and for no other purpose. . . ." A legitimate construction would be that want of religious belief was not a testimonial disqualification and is thus not covered by the statute. However, the express wording of the following unfortunate statutes would have to be disregarded to prevent impeachment by religious belief: NEV. REV. LAWS §5419 (". . . Facts which by the common law would cause the exclusion of witnesses may still be shown for the purpose of affecting their credibility. . . ."); NEB. COMP. STAT. (1922) §8845; IOWA CODE (1927) §3637, State v. Elliott, 45 Iowa 486 (1877); Searcy v. Miller, 57 Iowa 613, 10 N. W. 912 (1881).

[6] Shaw v. Moore, 49 N. C. 25 (1856); Omichund v. Barker, 1 Ark. 45 (1744); Note (1899) 42 L. R. A. 553; Biggs, *Religious Belief as Qualification of a Witness* (1929) 8 N. C. L. REV. 31. In State v. Pitt, 166 N. C. 268, 80 S. E. 1060 (1914) it was held that the ruling of competency of the trial judge was conclusive, although the proffered witness had stated that he did not know what would happen to him for lying other than imprisonment. Adams, J., in Lanier v. Bryan, 184 N. C. 235, 114 S. E. 6 (1922) interprets this decision as retaining the common law requirements in their pristine vigor. The finding of the trial court is conclusive, he argues, because it implies a finding of the "requisite facts," and he quotes the language of Pearson, J., in Shaw v. Moore, to the effect that one of the requisite facts is fear of punishment by the laws of God.

to impeach a witness by showing a lack of the exact theological belief required for competency, and his statements should be open to contradiction on the ground that the matter is not collateral.[7] Practically this exact information could not be elicited from the witness or proved extrinsically without opening up a broader inquiry, particularly when the course pursued consisted in contradiction. The cases abound with examples of crudely inquisitorial examinations of the witness' religious beliefs.[8] The abuses to which this course of questioning is subject by its inevitable appeal to the jury's prejudices furnish a cogent reason to exclude all evidence of religious belief for impeachment purposes. A better solution would be to remove the logical necessity by abolishing religious belief as one of the requisites of competency. New Hampshire, the only state retaining religious belief as a testimonial qualification which was found to rule on the form of impeachment in issue, properly disallows it. But the reason assigned—repugnance to the spirit of American institutions—is naïve.[9]

In Jurisdictions without Religious Test for Competency

The vast majority of states have abolished the testimonial disqualification of want of belief in a God who punishes for perjury. The weight of authority in these jurisdictions is against allowing inquiry into the religious belief of a witness as a form of impeachment. Statutes in Georgia, Indiana, Iowa, Massachusetts, Nebraska, Nevada, and Tennessee allow it.[10] It is disallowed by statute in Arizona, Connecticut, Michigan, Oregon, Pennsylvania, Vermont, and Washington.[11] In California, Kansas, and Kentucky constitutional and statutory provisions removing religious belief as a requisite

[7] 2 WIGMORE, EVIDENCE (1923) §§1003 and 1020 as to what matter is collateral.

[8] E.g., Louisville & N. Ry. Co. v. Mayes, 26 Ky. Law Rep. 187, 80 S. W. 1096 (1904).

[9] N. H. PUB. LAWS (1926) c. 336, §23; Free v. Buckingham, 59 N. H. 219 (1879).

[10] GA. ANN. CODE (Michie, 1926) §5857, Donkle v. Kohn, 44 Ga. 266 (1871); IND. ANN. STAT. (Burns, 1926) §§560-1, Snyder v. Nations, 5 Blackf. 295 (Ind. 1840); Iowa, *supra* note 5; MASS. GEN. LAWS (1921) c. 233, §19; Hunscom v. Hunscom, 15 Mass. 184 (1818); Com. v. Buzzell, 16 Pick. 153 (1834); Com. v. Burke, 16 Gray 33 (1860); Allen v. Guarante, 253 Mass. 152, 148 N. E. 461 (1925); Nebraska, *supra* note 5; Nevada *supra* note 5; TENN. ANN. CODE (Shannon, 1917) §5593. See Odell v. Kopper, 52 Tenn. 73, 77 (1871).

[11] Ariz. Const. II, §12; CONN. GEN. STAT. (1918) §5705 (disallowed by clear implication); MICH. COMP. LAWS (Cahill, 1915) §4336, People v. Jenness, 5 Mich. 305 (1858); ORE. LAWS (Olson, 1920) §731; PA. STAT. (West, 1920) §21834; VT. GEN. LAWS (1917) §1895; Wash. Const. I, §11.

of competency—along with constitutional guaranties of enjoyment of civil capacities irrespective of religious faith and freedom of religious worship—have been held to disclose a legislative intent to exclude such evidence for impeachment purposes.[12] England rules against it on the ground of its prejudicial effect.[13] The Maine court considers unfair surprise of the impeached witness as a reason *inter alia* for its exclusion.[14] Louisiana intimates categorically that it should be excluded,[15] while Illinois excludes it on the threefold ground of repugnance to constitutional guaranties, irrelevance, and prejudice.[16] The question must be regarded as unsettled in New York,[17] Ohio, and South Carolina,[18] and the other states appear not to have ruled on it.

[12] People v. Copsey, 71 Cal. 548, 12 Pac. 721 (1887); Dickinson v. Beal, 10 Kan. App. 233, 62 Pac. 724 (1900); L. & N. Ry. Co. v. Mayes, *supra* note 8; Bush v. Com., 80 Ky. 244 (1882).

The provisions of the North Carolina Constitution guaranteeing freedom of religious worship (I, §26) and disqualifying for office those who deny the existence of Almighty God (VI, §8) would seem to bear no logical connection with the problem in hand. However, Pearson, J., in Shaw v. Moore, *supra* note 6, at 31, said *arguendo* that had the strict common law excluding Jews and Christians who did not believe in future rewards not been changed to admit them by Omichund v. Barker, *supra* note 6, it would have been so changed by I, §26 (then §19 of declaration of rights). If this tenuous premise be accepted, it follows that *a fortiori* this provision would operate to admit atheists. Its supposed curative power might also be easily extended the next step to prevent the form of impeachment in issue, particularly in view of the looseness of the original idea that to exclude Jews and Christians of irregular conviction as to the hereafter would be unconstitutional because it would be "to degrade and persecute them for 'opinion's sake.'" This argument must be rejected at its first step. It is untenable to hold that to exclude a witness on religious grounds is to deprive him of worshipping as he pleases.

[13] Darby v. Ouseley, 1 H. & N. 1, 156 E. R. 1093 (1856). But *cf.* Bradlaugh v. Edwards, 11 C. B. N. S. 377, 142 E. R. 843 (1861).

[14] Holley v. Webster, 21 Me. 461 (1842) (Held improper to show that witness had said that he intended now to serve the devil as long as he had served the Lord; that he had a pack of cards with him which he carried about in his pocket and called them his bible.) The Me. statute is ambiguous. "No person is an incompetent witness on account of his religious belief, but he is subject to the test of credibility." Me. Rev. Stat. (1916) c. 87, §111.

[15] See State v. Dyer, 154 La. 379, 97 So. 563, 564 (1923).

[16] Starks v. Schlensky, 128 Ill. App. 1 (1906).

[17] People v. McGarren, 17 Wend. 460 (1837) (allowed); see Stanbro v. Hopkins, 28 Barb. 265 (N. Y. 1858) (dictum that it is allowable). But see Gibson v. Am. Mutual Life Ins. Co., 37 N. Y. 580, 584 (1868) (dictum that it is not allowable); Brink v. Stratton, 176 N. Y. 150, 68 N. E. 148, 150 (1903) (inconsistent dicta in *seriatim* opinions). In People v. Most, 128 N. Y. 108, 27 N. E. 970 (1891) the objection was held frivolous.

[18] Clinton v. State, 33 Ohio St. 27 (1877) (Defendant questioned on cross-examination as to his belief in God and future state of rewards and punishments. *Held*, prior inconsistent statements could not be shown); State v. Turner, 36 S. C. 534, 15 S. E. 602 (1892) (similar holding). Under the true rule as to the matters on which prior contradictory statements may be shown, these decisions are capable of two interpretations: 1. Religious belief is a proper inquiry for impeachment, but may be shown only by the witness. 2. The

Wigmore dismisses the problem summarily.[19] On the whole the decisions reveal no tendency to resolve the issue rationally into a question of relevancy.

It is generally held allowable to impeach the credibility of the declarant of a dying declaration by showing a lack of religious faith, and the reason underlying the exceptional admission of this hearsay testimony would seem to justify such a course.[20] Also it seems generally allowable to use evidence of religious belief substantively,[21] although the possibility of prejudice inherent in such evidence would seem equal to that in evidence of defendant's insurance in a personal injury action. The familiar ban on the latter might be extended to cover both.

No argument has been made that testimony of religious belief is proper for impeachment as character evidence. Language in the instant case gives opening for such an argument,[22] and it might find support in jurisdictions like North Carolina where the witness is impeached by evidence of his general character rather than his veracity-character.[23] However, belief is not so clearly an element of character that the admission of this prejudicial evidence is required.

It is fair to conclude that those jurisdictions which allow inquiry into the witness' religious faith to discredit him have lost sight of the fact that the impeaching process is limited by the principle of relevancy. Unorthodox religious convictions, even though they extend to the extremes of agnosticism and atheism, may quite often exist because of honest intellectual doubts. It is untenable to argue that there is a correlation between this kind of unorthodoxy and inveracity. That correlation which may exist between what Pope calls "blind unbelief" and untruthfulness is so slight that the value of the evidence is outweighed by the possibilities for prejudice with which it is pregnant. Furthermore, it might be safely assumed that such effect

contradiction is error, because the evidence was inadmissible in the first instance. See note 7.

[19] 2 WIGMORE, EVIDENCE (1923) §936.

[20] Note (1922) 16 A. L. R. 411; (1929) 8 TENN. L. REV. 56.

[21] State v. Dyer, *supra* note 15 (Held proper to show to what religion witness belonged to show improbability of his having been at a certain church). But *cf.* Brundige v. State, 49 Tex. Cr. Rep. 596, 95 S. W. 527 (1906).

[22] State v. Beal, *supra* note 1, at 301. "It has been said that a man is what he thinks, 'For as he thinketh in his heart, so is he.' Prov. 23:7." Compare language of Hunt, C. J., in Gibson v. Am. Mutual Life Ins. Co., *supra* note 17, at 584. "Conduct and life, as distinguished from belief, give the standard of character."

[23] Note (1927) 5 N. C. L. REV. 340.

as it does have will appear in the witness' reputation for veracity or his general reputation in the community—a familiar inquiry.

Conclusion

The witness box should not be made more forbidding to persons of potential value as witnesses by the fear of a scrutiny of their personal thoughts. The 1931 Legislature should adopt the remedy accepted by the majority of American states by removing religious belief as a test of competency and prohibiting evidence of it to impeach. The Pennsylvania statute is a desirable model: "No witness shall be questioned in any judicial proceeding concerning his religious belief; nor shall any evidence be heard upon the subject for the purpose of affecting either his competency or credibility."[24]

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Federal Procedure—Transfer of Cases Between Law and Equity Sides of Court

The case of *Clarksbury Trust Co. v. Commercial Casualty Co.*[1] was an action at law in a Federal District Court for West Virginia to recover on a bond issued by the defendant to cover a deposit of the plaintiff in a Pennsylvania bank. The deposit in question was upon a time certificate and was the only one contemplated in the security transaction; the bond, however, clearly applied only to deposits subject to check. The plaintiff's declaration alleged that this was due to a mutual mistake of law as to the meaning of the coverage clause in the bond. The trial court directed a verdict for the defendant. Held, on appeal, reversed and remanded with directions to transfer the case to the equity side for reformation, with leave to amend the pleadings and to introduce further evidence.

The questions of transfer between the law and equity sides of the Federal Courts arise under the Judicial Code, section 274a,[2] which provides: "That in case any of said courts (courts of the United States) shall find that a suit at law should have been brought in equity or a suit in equity should have been brought at law, the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice. Any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to

[24] PA. STAT. (West, 1920) §21834.
[1] 40 F. (2d) 626 (C. C. A. 4th, 1930).
[2] 38 STAT. 956 (1915), 28 U. S. C. A., §397 (1928).