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Fearing Hell As Essential to Validity of Affidavit

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Applicable case law is conflicting on the proposition that any affidavit can be legally assailed and judicially declared a nullity where it is found that the affiant does not fear that deposing falsely would result in divine punishments *after death*. Assuming that some old cases are controlling or persuasive authority, one hounded by adversaries and intending to make an affidavit affecting them ought, as a precautionary measure, to publicly profess the protective beliefs, agreeing for example, with the doctrine, invoked by Judge Jefferies,[1] concerning "eternal flames" and "the bottomless lake of fire and brimstone." The reason is that an oath or affirmation is part of an affidavit, and at common law there can be no oath unless the person attempting to make it has some belief in divine punishments for infidelity to an oath. A Connecticut court[2] would not permit Mr. Scott to take the oath as a witness because what he believed was "that men were punished *in this life* for their sins." A New York court[3] announced the rule that no one is a competent witness, or oath taker, unless he believes in divine punishments "in the world *to come*."

The New York court did not explain the mode and duration of the punishment "in the world to come," but possibly there was a silent agreement with Jonathan Edwards, mentioned here because quoted in a New Hampshire opinion.[4]

One of the old cases deals a blow even to the theory that the Bill of Rights grants to everyone the "privilege or capacity" of taking an oath, making an affidavit, etc., without regard to his opinions on theological subjects. The Ohio judges[5] seized upon the clause, which we also have in Section 4 of our Bill of Rights, providing that "the liberty of conscience hereby secured shall not be construed to dispense with oaths and affirmations." They held that a person disqualified under the common law to make an oath, because of absence of belief in divine punishments, remains disqualified, and in spite of the fact that the Constitution also

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[1]Quoted in Section 1816, Wigmore on Ev. (2d ed.). The judge said: "* * * that God of Heaven may justly strike thee into eternal flames and make thee drop into the bottomless lake of fire and brimstone, if thou offer to deviate the least from the truth * * *."

[2]Atwood v. Welton, 7 Conn. 66 (1828).

[3]Jackson v. Gridley, 18 Johns. 98, 103 (1820).

[4]Hale v. Everett, 53 N. H. 7, 163, where the court quoted Edwards thus: "The God who holds you over the pit of hell, much as one holds a spider or some loathsome insect over the fire, abhors you, and is dreadfully provoked. * * * The sight of hell-torments will exalt the happiness of the saints for ever. * * *"

[5]Clinton v. The State, 33 Ohio St. 27 (1877).

provided that no person is incompetent as a witness "on account of his religious belief." They assumed that a constitutional retention of "oaths and affirmations" is a retention also of all the common law requisites for competency to make an oath.

The Ohio decision, a scarecrow in the field of case law, need not, as yet, terrorize anyone, for there is much persuasive authority to the effect that any person may take an oath, and be a witness or affiant, without regard to his opinions, under a Bill of Rights like ours, which provides that "no person shall be denied any * * * privilege or capacity, on account of his opinions concerning religion."[6] The question is still unsettled, for in 1883 our legislature acted as if uncertain whether the Bill of Rights already fully protected witnesses, and passed an act providing that no persons "shall be excluded" as witnesses "on account of their opinions on matters of religious belief."[7] In a sense, affiants too are "witnesses," but the act as a whole shows that the legislative intent was to liberate only those who are "witnesses" in the ordinary sense; that is, those who testify orally or by deposition in a judicial proceeding. The same is true of the territorial act of 1872, concerning competency of witnesses.[8]

The distinction between "witness" and "affiant" was recognized in a case where it was held that a free man of color, incompetent as a witness against a white man, could, as "incident to his freedom," make an affidavit in a proceeding to compel a white man to give a peace bond.[9] Suppose that in Colorado a citizen makes affidavit before a Justice of the Peace, deposing that someone threatens to do bodily harm. The J. P., having taken an oath to support the Constitution (which preserves oaths and affirmations), can cross-examine the complainant, and if he finds that the latter does not fear "the bottomless lake of fire and brimstone," he can, according to the reasoning in some opinions, ignore the complaint and refuse to issue a warrant, for there is no oath, the affiant being incapable of making one under the common law. Where there is no oath or affirmation, there is no affidavit. Charles Bradlaugh had in fact said and performed all that was possible in the making and subscribing of an oath as a member of the House of Commons, yet because he had no fear of "future punishments," the court held that he had made no oath and was incapable of making one.[10] He was prosecuted and penalized

[6]Hronek v. People, 134 Ill. 139, 24 N. E. 861, 23 A. S. R. 652, 8 L. R. A. 837; Perry's Case, 3 Gratt. (Va.) 632; Bush v. Com., 80 Ky. 244; People v. Copsey, 71 Cal. 548, 12 Pac. 721; McClellan v. Owens (Mo.), 74 S. W. 2d 570, 95 A. L. R. 724, and note.

[7]Sec. 1, Ch. 177, C. S. A.

[8]Sec. 7, Ch. 177, C. S. A.

[9]Com. v. Oldham, 1 Dana (Ky.) 466.

[10]Attorney General v. Bradlaugh, 14 Q. B. D. (1885) 667. Same reasoning in Arnold v. Arnold, 13 Vt. 362 (1841).

for having voted without first having made and subscribed the oath required of a member of Parliament.

By way of dictum an Illinois court said that one incompetent as a witness "may take official oaths, and make ex parte affidavits,"[11] because there is no one who can object to competency. There could, however, be an objecting party if the affidavit is made in the course of an adversary proceeding. Moreover, if Bradlaugh's case is still the law, it is possible for the officer who administers oaths to refuse to administer it to a person not believing in "future punishments," or if the oath is administered, then the public official to whom the affidavit is presented may refuse to recognize it as such. Under the reasoning of Bradlaugh's case, there is a vacancy in any public office where the incumbent, at the time he took the oath of office, concurred in Bradlaugh's opinions and was, therefore, incapable of taking an oath according to the common law. He could not even verify a pleading.

It has been held that an "infamous" person may make an affidavit, because to hold otherwise would be "a denial of justice."[12] But judges were not so considerate of persons, not "infamous" but having opinions differing from their own. The expressions "utter want of moral sensibility,"[13] and "grossest moral depravity,"[14] were used against such persons. A complainant from whom goods were stolen was not permitted to testify against the thief because he, the victim, believed God and Nature to be equivalents.[15] A child criminally assaulted was held incompetent to testify because she did not understand, and therefore did not profess, the doctrine of "future punishments."[16] While nearly all the case law in point deals with witnesses in a court room, it was recognized that the same rules apply also to affiants.[17]

Litigants desire to use as witnesses those who know the facts. Hence, constitutional and statutory provisions liberate all prospective witnesses. But most affiants swear only for their own purposes, and for this reason may have been overlooked when new written law was made. They are plainly omitted in the clause of the Iowa, Minnesota, Texas and Wisconsin constitutions, which provide that "no person shall be * * * rendered incompetent to *give evidence in any court* of law or equity, in consequence of his opinions on the subject of religion." In Wyoming the clause uses the words "serve as a witness,"[18] which would exclude an affiant.

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[11]The Central, etc. Co. v. Rockafellow, 17 Ill. 541, 554 (1856).
[12]Ritter v. Stutts, 8 Ired. (N. C.) 240 (1852).
[13]Odell v. Koppee, 5 Heisk. (Tenn.) 88 (1871).
[14]Stanbro v. Hopkins, 28 Barb. (N. Y.) 265 (1859).
[15]U. S. v. Lee, Fed. Cas. No. 15,586.
[16]Beason v. State, 72 Ala. 191 (1882).
[17]Leonard v. Manard, 1 N. Y. Super. (1 Hall's Rep.) 200 (1828).
[18]Sec. 18, Art. I, providing "* * * no person shall be rendered incompetent to * * serve as a witness or juror, because of his opinion on any matter of religious belief whatever; * * *"

It is popularly supposed that anyone may make an "affirmation." If so, still an invalid oath could not be converted into a valid affirmation. But a person not fearing supernatural punishments is as much disqualified to make an affirmation as he is to take an oath.[19] That is the case law. Our statute permits affirmations only where the "person shall have conscientious scruples against taking the oath."[20] This was modeled after such foreign statutes as had the intent not to relax the rule requiring fear of "future punishments," but to accommodate Quakers, Nicolites, Tunkers and Mennonists,[21] or "Quakers and the like,"[22] who believe that the divine command is to "Swear not at all." Only in Florida does the statute clearly permit affirmations by "all persons who do not believe in the doctrine of future rewards and punishments."[23] In England the whole situation was remedied, possibly as the result of Bradlaugh's case,[24] by a statute which provided that "every person * * * stating * * * that he has no religious belief, * * * shall be permitted to make his solemn affirmation * * * in all places and for all purposes where an oath is or shall be required by law, * * *"[25]

Civil Procedure Rule 43 (d) permits "a solemn affirmation" in any proceeding under the rule. The implications of the word "solemn" are conflicting, but since it was also used in the English statute, affecting persons with "no religious belief," it can be so applied here. But there is found judicial expression which would support the thesis that a person not fearing hell is legally incapable of making either oath or affirmation before a Justice of the Peace, or as part of an affidavit in connection with an initiative and referendum petition. In other words, there are many situations where a public official may ignore an affidavit, as if it did not exist, just as the prosecutors of Charles Bradlaugh regarded his written oath as no oath at all, if the common law applied against him is the common law existing here and was not abrogated by Section 4 of our Bill of Rights. Our local courts have not yet declared whether they agree with the Illinois opinion,[26] which would free all affiants from molestation, thus giving vitality to the Bill of Rights, or with the judicial waif in Ohio,[27] which would continue the common law disability based on private opinions on theological matters.

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[19]Leonard v. Manard, supra, note 17.
[20]Sec. 2, Ch. 115, C. S. A. 1935.
[21]Ch. 71, sec. 3, Compl. Sts. D. C. 1894.
[22]Samford, J., in Wright v. State, 24 Ala. App. 378, 135 So. 636, 640 (1931).
[23]R. S. 1919, Sec. 2703, as quoted in 3 Wigmore on Ev. (2d ed.) 880.
[24]Supra, note 10.
[25]51-52 Vict., Ch. 46, Sec. 1, quoted 3 Wigmore on Ev. (2d ed.) 877.
[26]Hronek v. People, supra, note 6.
[27]Clinton v. The State, supra, note 5, cited by annotator of Sec. 89-1701 R. S. Wyo. 1931 as if still applicable in Wyoming.