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Virgil W. Duffie Jr.

THE REQUIREMENT OF A RELIGIOUS BELIEF FOR COMPETENCY OF A WITNESS

COMMON LAW RULE

Since the very first trials were conducted, the competent witness has been a necessary link through which the plaintiff or defendant must prove his case. Many elements make up the requirements that determine whether or not a witness is competent. Under the common law, mental incapacity, conviction of a crime, or direct interest in the outcome of the litigation would disqualify a witness. Another requirement strictly adhered to was the rule that the witness must have a belief in God. This meant that before a witness could testify and before a jury might weigh his testimony, the witness had to swear to a belief in God or in a Supreme Being. This common law requirement was carried over into the jurisprudence of this country. The oath administered to a witness called upon God to witness that what was said would be true and invoked divine vengeance if what was said were false.

The purpose of this oath was not to call the attention of God to the witness, but the attention of the witness to God; not to call upon Him to punish the false swearer, but to remind the witness that he will assuredly do so. By thus laying hold of the conscience of the witness and appealing to his sense of accountability, the law best insured the utterance of truth.

In England, prior to 1744, it was considered, on authority from Coke, that the law allowed only a Christian to testify, since the oath was an appeal to the God of the Bible.[1] However, in a 1744 decision, the strict rule underwent a slight modification. In the case of *Omichund v. Barker*[2], the court said:

> Nothing but the belief in a God, and that he will reward and punish us according to our deserts, is necessary to qualify a man to take an oath. Though I am of opinion that infidels who believe in a God and future rewards and punishments in the other world may be witnesses, yet I am as clearly of opinion that if they do not believe in a God or future rewards and punishments, they ought not to be admitted as witnesses.[3]

In a concurring opinion Lord Hardwick said that all that was

1. 6 WIGMORE, EVIDENCE § 1817 (3d ed. 1940).
2. 1 Atk. 45; 125 Eng. Rep. 1310 (1744).
3. Lord Chief Justice Willes speaking for the court.

necessary to an oath was an appeal to a Supreme Being, and thinking of Him as the rewarder of truth and the avenger of falsehood.[4] This allowed the Jew and the Mohammedan as well as the Christian to testify as a witness. However, the atheist or agnostic still could not qualify.

These criteria for a witness' competency were generally adopted in the United States.[5] The question was whether or not the obligation of an oath had a binding tie upon the witness' conscience. Or, in other words, did the witness believe in the existence of a God who would punish his perjury? If he swore falsely, did the witness believe he would be punished by an overruling Providence, either in this world or in the world to come?[6]

MODIFICATION OF COMMON LAW RULE

The strict common law rule has undergone significant modification in some jurisdictions. To what degree the competency of a witness is dependent on religious belief is not easy to ascertain in every case. But important changes have been made in many jurisdictions by express constitutional or statutory provisions. Relief from the requirement has commonly been found under constitutional provisions guaranteeing that theological belief shall not affect one's civil capacities (or, specifically, one's competency as a witness). These provisions are almost universal.[7]

The courts have not hesitated to ease the rule in some jurisdictions. In an early Iowa case it was held that a witness could not be compelled to testify as to his opinions on matters of religious faith for the purpose of showing his incompetency.[8] The Florida Court has held that neither belief in a Supreme Being nor in a divine punishment is requisite to the competency of a witness.[9] A sense of moral responsibility on the part of a witness, not belief in a Supreme Being, is the test of a witness' qualifications in Connecticut.[10] Minnesota has held specifically, that a competent witness does not have to believe in God.[11] As early as 1840 the Indiana Supreme Court held, in a

4. Omichund v. Barker, 1 Atk. 45, 125 Eng. Rep. 1310 (1744).
5. 6 WIGMORE, EVIDENCE § 1817 (3d ed. 1940).
6. The distinction of whether the punishment is believed to impend in a future existence or in the present one caused some difficulty at first. The English Court declared the distinction immaterial and American Courts particularly in later rulings, have reached the same results. *See* Blocker v. Burness, 2 Ala. 355 (1841); Noble v. People, 1 Ill. 56 (1822); Jones v. Harris, 1 Strob. 160 (S. C. 1846).
7. 6 WIGMORE, EVIDENCE § 1828 (3d ed. 1940).
8. Dedric v. Hopson, 62 Iowa 562, 17 N. W. 772 (1883).
9. Thomas v. State, 73 Fla. 115, 74 So. 1 (1917).
10. Ruocco v. Logiscco, 104 Conn. 585, 134 Atl. 73 (1926).
11. State v. Peterson, 167 Minn. 216, 208 N. W. 761 (1926).

most unusual decision, that even a deaf or dumb person would be a competent witness if he understood that perjury was punished by law, though he had no conception of the religious obligation of an oath.[12]

Most jurisdictions are adopting the test of the Illinois Court as set out in the recent case of *People v. Mueller*:[13] "The test of religious belief or opinion in this state [Illinois] is no longer required to determine a witness' competency, the requirement is one of intelligence or understanding on the part of a witness."

In New Jersey, the common law rule is still in force, *i. e.*, it is necessary that a witness believe in a Supreme Being before he may testify. However, the New Jersey Court early created an exception in one situation. The Court said that the statutory right of a party to testify in his own behalf was a civil right, the enjoyment of which could not, under the state constitution, be denied to any person merely because of his religious principles.[14]

From the decisions, statutes and constitutions, it can be noted that in many states[15] no religious opinion is required.[16] In some states even an atheist may be a competent witness.[17] Six jurisdictions, however, still appear to follow the old common law rule.[18]

As in other cases when competency is at issue, the trial judge determines whether or not the witness has sufficient understanding of the oath he is taking. In cases where the competency of a witness is attacked for religious disbeliefs, there is a presumption in favor of a competent religious faith. The burden of showing a want of belief rests upon the party objecting to the witness.[19] Furthermore, the witness' belief in God is to be presumed until the contrary is shown.[20] When a witness is accused of being an atheist, there is a presumption in favor of his competency and such an accusation

12. Snyder v. Nations, 5 Blackf. 295 (Ind. 1840).
13. People v. Mueller, 2 Ill. 2d 311, 313, 118 N. E. 2d, 1, 2 (1954).
14. State v. Power, 51 N. J. L. 432, 17 Atl. 969 (1889).
The Court made it clear, however, that it did not mean to imply that religion did not affect the competency of a witness. The ruling was simply restricted to the civil rights of the proffered witness himself.
15. California, Colorado, Illinois, Indiana, Iowa, Kansas, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey (where witness is testifying in his own behalf), New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Utah, Vermont, Washington, West Virginia and Wisconsin.
16. 42 A. L. R. 553.
17. Connecticut, Florida, Kentucky, Maine, Missouri, New York, Tennessee, Texas.
18. Alabama, Arkansas, Maryland, North Carolina, New Jersey, South Carolina.
19. State v. Cooper, 2 Overt. 96, 5 Am. Dec. 656 (Tenn.)
20. Donnelly v. State, 26 N. J. L. (2 Dutch.) 463 (1857).

must be proved.[21] In proving religious disbelief, the testimony of others may be taken concerning the witness or the court may decide on explanation by the party himself.[22]

Legislation in this area has been very limited. In no jurisdiction has the use of the oath been abolished by statute.[23] However, in all but a few jurisdictions (*e. g.*, Oklahoma and Virginia) a statute does allow the witness to choose to make an affirmation instead of an oath.[24] This choice is usually provided for those who lack the requisite belief and for those who may have the belief but are forbidden to swear by conscientious scruples.[25]

COMPETENCY OF CHILDREN

Most jurisdictions fail to provide any exception to the general rule or any special rule for the competency of children qualified to testify but lacking in theological understanding. This is unfortunate, for they are a special class of persons of whom an oath ought not to be required nor even the exercise of an option to affirm be expected. It has long been settled in the American cases that if a witness called to testify is of tender years, the opposite party may require that he shall be examined as to his understanding of the nature and obligation of an oath.[26]

However, the courts in the United States as well as in England have been liberal in declaring a child competent to testify. It will suffice to mention only a few such holdings here.

A child, believing that falsehood will be punished in a future state, though ignorant of the meaning of an oath, was allowed to testify in *Commonwealth v. Ellenger*.[27] As early as 1884 the Missouri Court held that the fact that a child, otherwise competent, had never received religious instruction did not disqualify him as a witness.[28] Moreover, a child may become competent to take the oath after an interlocutory instruction by the Court. It is settled that a previous

21. Commonwealth v. Winnemore, 1 Brewst. 356 (Pa. 1867).
22. Central Military Tract. Ry. Co. v. Rockafellow, 17 Ill. 541 (1856).
But note the old Delaware case of State v. Townsend, 2 Har. 543 (Del. 1837), where after evidence of witness' belief was admitted, his own assertion of a change of belief, made at the time he was offered to be sworn, did not restore him to competency.
23. 6 WIGMORE, EVIDENCE § 1828 (3d ed. 1940).
24. See CODE OF LAWS OF SOUTH CAROLINA, 1952 § 26-4.
25. 6 WIGMORE, EVIDENCE § 1828 (3d ed. 1940).
26. See, *e. g.*, People v. McNair, 21 Wend. 608 (N. Y. 1839).
27. 1 Brewst. 352 (Pa. 1867).
But see Jones v. State, 145 Ala. 51, 40 So. 947 (1906), where a girl, who had been to Church and Sunday School and thought that if she lied, God would put her in jail, was excluded.
28. Cadmus v. St. Lo. Bridge and Tunnel Co., 15 Mo. App. 86 (1884).

general religious education is not necessary, and that the judge may then and there impart theological instruction and produce the necessary belief.[29]

The age of the witness apparently makes no difference. The Ohio Court allowed a four year old child to testify, who on examination said that if he didn't tell the truth, "God won't love me."[30]

The Federal Courts have likewise been liberal in finding children competent who do not possess complete knowledge of an oath. The rule as generally stated is that a child of sufficient intelligence to have a just appreciation of the difference between right and wrong, and a proper consciousness of the punishment for false swearing, is competent to testify.[31] The fact that a child's testimony is intelligently given and that he believes that it is wrong to lie is generally a better indication of competency than is the child's knowledge of an obligation of an oath or its idea of where liars go now or hereafter. Many courts have accepted this line of reasoning.

THE RULE IN SOUTH CAROLINA

South Carolina authority in this area is limited. The reports yield few occasions where the Supreme Court has passed on the question of the competency of a witness based on religious belief. In an 1833 case, Justice O'Neall speaking for the court said:

> [T]he man who believes he is under no legal or moral obligation at all times and under all circumstances, to tell the truth under the sanction of an oath, has destroyed the only test by which he can claim credit at the hands of men . . . . The witness holds such opinion of the obligation of an oath, as to render him unworthy of belief, when he has called God to witness the truth of what he asserts.[32]

In *Jones v. Harris*,[33] the rule which is generally considered to be the present law in South Carolina was pronounced. In this old case the Court said that where a witness has been objected to on account of defective religious belief, an acknowledgment of belief in God and His providence was sufficient to establish his competency. Forty years later, in *State v. Belton*,[34] the Court reaffirmed the rule as stated in *Jones v. Harris*. Mr. Chief Justice Simpson, speaking for

29. 6 WIGMORE, EVIDENCE § 1821 (3d ed. 1940).
30. Hell v. Skinner, 81 Ohio App. 375, 79 N. E. 2d 787 (1949). [Action for injuries sustained by the child when bitten by defendants' dog.]
31. William v. United States, 3 App. D. C. 335 (1894).
32. Anonymous, 1 Hill 251 (S. C. 1833).
33. 1 Strob. 160 (1846).
34. 24 S. C. 185 (1886).

the majority, held incompetent as a witness a boy of twelve who could repeat the Lord's Prayer and had heard that the bad man caught those who lied. However, the child had never heard of a God, or the devil, or of heaven or hell, or of the Bible, and had no idea what became of the good or the bad after death.

The last decision on this subject appears to be the case of *State v. Abercrombie*[35] which again stated that a belief in God and His providence was necessary to establish the competency of a witness objected to on account of defective religious belief.

CONCLUSION

We have no holding in South Carolina concerning an atheist or agnostic, but if our cases are carried to their logical conclusions, they would not be allowed to testify. It would seem to be a better rule to apply the test used in many other jurisdictions, *i. e.*, if the witness understands right from wrong and realizes the gravity of what he is saying, he should be competent to testify. Otherwise, the day will come in South Carolina when not an ordinary witness who is interested in a case but some eminent, though unbelieving scientist, who happens to be the sole eye-witness of a serious accident will be refused as a witness on the ground that he does not believe in God and in a divine providence after death.

VIRGIL W. DUFFIE, JR.

35. 130 S. C. 358, 126 S. E. 142 (1925).