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Supreme Judicial Court of Massachusetts
Hampshire, Franklin and Hampden.

Wilder S. Thurston
v.
Elhanan Whitney & others.

October Term 1848

On the trial of this action, which was in the court of common pleas, before Merrick, J., the defendants having called and offered a witness to be sworn, the plaintiff objected to his competency, on the ground of a want of religious belief; and offered to produce witnesses to prove, that the witness in question did not believe in the existence of God, or in a future state of rewards and punishments. The presiding judge declined to hear the testimony, so offered by the plaintiff, and overruled his objection to the competency of the witness; who was thereupon sworn and testified on the trial. The jury returned a verdict for the defendants, and the plaintiff alleged exceptions.

F. H. Dewey, for the plaintiff.

N. Wood, for the defendants.

Dewey.

Present: HON. LEMEUL SHAW, Chief Justice. HON. SAMUEL S. WILDE, HON. CHARLES E. FORBES, HON. THERON METCALF, JUSTICES.

[*108] WILDE, J.

At the trial of this cause, the defendants called a witness, to whose competency the plaintiff objected, on the ground that he did not believe in the existence of a God, or in a state of future rewards and punishments, and offered to prove the same by witnesses.

It has been argued, that this mode of proof was not admissible, the general rule of evidence being, that a witness shall not be permitted to disqualify himself by declarations not under oath, made out of court, as they might be untruly made for that purpose. But it has been frequently held, that this mode of proof is admissible, and is an exception to the general **[*109]** rule, from the necessity of the case; it being deemed unreasonable that the party objecting should be restricted to the testimony of the witness on the *voir dire*, as the objection supposes he has no regard to the sanction of an oath; and if so, his declarations made under oath are of no more weight than those made seriously when not under oath. 1 Greenl. Ev. *§ 370*. But the evidence of such declarations should be received cautiously. Remarks and avowals of belief, or disbelief, may be made in the heat of argument, and for the purpose of discussion, which may be no sure indications of the real belief or disbelief of the party. So the witness, after having made such declarations, may have changed his opinions; which, perhaps, could not be proved, unless he should be allowed to testify. But notwithstanding these objections, which have some weight, it is well settled, that the avowal of a witness of his religious belief or disbelief may be proved, like any other fact.

It has also been argued, that the disbelief of a future state of existence after death is no objection to the competency of a witness, provided he believes in his accountability to God, and that God will punish him in this life for false swearing or other evil deeds. In the case of *Hunscom v. Hunscom*, 15 Mass. 184, it was held, that a mere disbelief in

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a future existence went only to a witness's credibility. Whether such was the evidence offered in this case, does not distinctly appear; it might be that the witness could be proved to disbelieve a future state of rewards and punishments in this life. But, however this may be, it is immaterial in the decision of this case; for if such disbelief would not disqualify the witness, the plaintiff should have been permitted to prove that he disbelieved the existence of a God. On this point the law is extremely clear, and so it has been held from time immemorial. Lord Coke held that an infidel--meaning a person not believing the scriptures of the old and new testaments--was an incompetent witness. But this opinion of lord Coke has not been sustained by later authorities, and seems never to have been well founded. The question was very fully **[*110]** considered in the case of *Omichund v. Barker*, *1 Atk. 21*, and *Willes, 538*. And it was settled, in that case, that an infidel in general could not be excluded from being a witness, if he believed in a God and in a future state of rewards and punishments; but if he did not so believe, he ought not to be admitted as a witness. And all the authorities agree, that an atheist, who disbelieves in the existence of a God, who is "the rewarder of truth and avenger of falsehood," cannot be permitted to testify. It would indeed seem absurd, to administer to a witness an oath, containing a solemn appeal for the truth of his testimony, to a being in whose existence he has no belief. 1 Greenl. Ev. *§§ 368*, 369, and the cases there cited; 3 Dane's Abr. c. 98, *art.* 2; *Wakefield v. Ross*, 5 Mason, 18; *Jackson v. Gridley*, 18 Johns. 98; *Curtis v. Strong*, 4 Day, 51.

But the defendants' counsel contend, that this rule of law has been abrogated by the constitution, part 1st, art. 2d, which provides, "that no subject shall be hurt, molested, or restrained in his person, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience, or *for his religious profession or sentiments*."

In the opinion of the court, this article has no reference to atheists, and to their competency as witnesses. It was intended to prevent persecution by punishing any one for his religious opinions, however erroneous they might be. But an atheist is without any religion, true or false. The disbelief in the existence of any God, is not a religious, but an anti-religious, sentiment. If, however, it were otherwise, the rejection of a witness for such a disbelief or sentiment, as incompetent, would be no violation of this article of the constitution. It is not within its words or meaning. It would not hurt, molest, or restrain him, in his person, liberty, or estate. We are therefore very clearly of the opinion, that the witness was incompetent, and ought not to have been allowed to testify.

Exceptions sustained.

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