Self-interest is perhaps the fundamental fact in human nature. Every man naturally seeks to promote the welfare of himself and his family before that of his neighbor. Unless he be largely influenced by considerations of morality or religion, he will, if necessary, tell a lie for that purpose. Even in a highly moral community of to-day, a man who will never misrepresent is extremely rare. In the primitive ages he was probably an unknown species. He is, exclusively, the product of education and religious training.

Of self-interest is born distrust of others. If a man will lie to serve his own interests, he will instantly suspect his neighbor of doing the same thing.

It is, therefore, a natural presumption and we can safely assume from the evidence that primitive man had little faith in the accuracy of facts, related to him by his fellows, if they in any way affected the interests of the relators. With the growth of his intelligence, however, he clearly realized that it is impossible for a well-ordered community to exist unless some reliance can be placed upon the words of the
members of that community. Some means, therefore, had to be devised, by which men could be bound to tell the truth and to perform their promises, so that there might be faith between them.

The evidence of the customs of prehistoric times must be found largely in survivals of those customs, particularly among primitive tribes as they now exist. Among uncivilized people in various parts of the world, a few ancient methods of binding a man to speak the truth are still extant. It is said that in Siberia, when a member of the wild tribe of Ostyaks is to be a witness, the head of a wild boar is brought into court. The Ostyak will then imitate the actions of the boar in eating and call upon wild boars in general to devour him if he does not speak the truth. The efficacy of the ceremony depends upon the fact that the witness believes he will fall a victim to the ferocity of a boar if he fails to keep his pledge.1

There are numerous similar customs which are related upon very good authority. They involve calling upon a beast, a mountain, the sun, a river or some similar thing, to witness the truth of one's words and to destroy him if they be untrue. Those who perform these ceremonies are said to implicitly believe that the thing invoked will avenge a falsehood by the destruction of the witness and perhaps of his descendants.2

These customs embody about all we know concerning the origin of "oaths." They were methods of securing a guarantee of truth. The one demanding the pledge would insist upon its being taken in the name of the being which, as he

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2 In India some tribes, particularly the Santals, make assertions upon the skins of tigers, believing tigers will avenge a false statement by devouring them. Tyler on Oaths, p. 168; Encyclopaedia Britannica, 9th ed., Vol. 18, p. 718; see also article "Oaths," by R. V. Rogers, Green Bag, 57. Among the Egyptians assertions in the names of beasts were very common. Tyler, p. 143; Rollin's Ancient Hist., Vol. I, C. 2. In New Guinea it is said that some tribes still call the sun or mountains to witness, believing the sun will burn them or the mountains will fall upon them if they speak falsely. See authorities supra. Assertions made by calling to witness celestial bodies are also mentioned by Baron Puffendorf, chapter on Oaths.
thought, inspired the most awe in the breast of the swearer. This obviously would be some god or supernatural being in whom he believed and whom he feared. Oaths were consequently taken in a multitude of ways. They were very numerous among the Egyptians, Carthaginians, Greeks, Persians, Romans, Jews, etc., and in each case conformed to the prevailing religious belief. 3

3 In Egypt oaths were sworn in the names of various sacred beasts, as we have said, also by various mythical deities, Isis, Osiris, etc., and by the lives of their kings, who, particularly after their death, were thought to become invested with supernatural attributes. "By the life of Pharaoh" was a form of oath which the Jews borrowed from Egypt and for the use of which, with other "false oaths," they were afterwards rebuked. Gen. xlvi. 15, 16.

The Carthaginians swore by many gods and by sacred rivers and celestial bodies. Polybius reports a treaty of peace between Philip of Macedonia and the Carthaginians, which was concluded "in the presence of Jupiter, Juno and Apollo; in the presence of the demon of the Carthaginians, of Hercules and Iolaus; in the presence of Mars, Triton and Neptune; in the presence of all the confederate gods of the Carthaginians, and of the sun, moon and the earth; in the presence of the rivers, meads and waters; in the presence of all these gods who possess Carthage." This conglomerate mixture of Greek and Carthaginian gods was deemed to make the treaty solemnly binding on both parties.

The oaths of the ancient Greeks were as numerous as the sands of the sea. They swore separately and collectively by "all the gods in the calendar," by the "Waters of the Styx." Hesiod, Theog. 400, by the sacred altar, by the souls of the departed, Xenocrates, Epist. Attic. Lib. 1, 16, by the ashes of their fathers, etc. Tyler on Oaths, C. 3. The Persians swore by the stars, Puffendorf, supra. Xenophon represents Cyrus as swearing in this wise: "I swear to thee, Lysander, by Mithra, never when in health to take my chief meal before I have discharged the duties of exercise." The Romans swore by their gods, by "the genius of the Emperor," by Hercules, etc. After the murder of Caesar the Roman Senate expressly established an oath, "by the genius of Caesar." Dio. Lib. XLIV. See also Tyler, C. 4. See further as to various forms of oaths in ancient countries; Tyler on Oaths; Potter on Oaths; "Oaths," 9 Green Bag. 57; Menage Divy. Laertius, Lib. II, section 40; Herodotus Lib. IV; Sozomenus, Lib. V. See also Bishop Sanderson De Jura. Obligat. Praelect 1, sec. 4; Ovid Amor. Lib. III, El. 3. 13. 14; Ovid Trist. Lib. V. El. 4. 45. 46; Athenæum Deipnosoph. Lib. IX, Cap. 2; Apollonius Lib. VI, Cap. 9; Virgil, Aeneas IX, v. 300; Apuleius De Deo Socrat; Pliny Lib. II, Epist. 20, N. 5. 6; Lysias Orat. Advers. Dingiton; Pietr. della Valle Itin., Part II, Epist. 1; Eusebius Eccle. Hist. Lib. IV, C. 15; Grammond Hist.
The earliest record of an oath taken in the name of the God of the Jews and Christians, and perhaps the earliest satisfactory record of any oath is that found in the Book of Genesis. It is there related that Abimelech came to Abraham and said, "God is with thee in all that thou doest. Now therefore swear unto me here by God, that thou wilt not deal falsely with me, nor with my son, nor with my son's son; but according to the kindness that I have done unto thee, thou shalt do unto me and to the land wherein thou hast sojourned. And Abraham said I will swear."

This passage clearly shows that both among the Jews and also among the inhabitants of Gerar, where Abraham then was, the custom of swearing was well known. Abimelech probably did not believe in the God of the Jews, but he required Abraham to swear by his God knowing that such an oath would be binding upon him. The Jews of course were the only nations of antiquity that swore by Jehovah.

In the Code of Laws of Hammurabi, king of Babylon, at about 2250 B.C. we find records of oaths of even an earlier date. This king (the same as Amraphel, king of Shinar) was a contemporary of Abraham and hence his code was written long before Moses composed the book of Genesis. His code, graven upon a huge block of black diorite, was recently discovered by M. de Morgan, conducting excavations at Susa in Elam on behalf of certain French scientists. This code contains no less than twelve instances where oaths were required in judicial procedure.

The peculiar form which they used may be seen from another passage in Genesis xxiv. 2, 3, 9. "And Abraham said unto his eldest servant of his house, that ruled over all that he had, Put I pray thee thy hand under my thigh: And I will make thee swear by the Lord, the God of heaven and the God of the earth that thou shalt not take a wife unto my son of the daughters of the Canaanites, among whom I dwell, ... And the servant put his hand under the thigh of Abraham his master, and swear to him concerning that matter." See also, Gen. xlv. 29. The custom of holding up the hand when pronouncing the words of the oath was also common among the Jews. In the book of Genesis when the King of Sodom was tempting Abraham to retain certain goods which he had captured in battle he refused, saying, "I have lifted up my hand unto the Lord, the most high God, possessor of heaven and earth, that I will not take from a thread
After the beginning of the Christian era the oath by the Christian God was adopted by those who professed Christianity. The very early Christians of the Apostolic age used no oaths at all, or at least were opposed to their use because they believed them to be productive of evil, and to have been forbidden by Christ in His sermon on the Mount. When Christianity, however, became the religion of the civilized world the "heathen" custom of swearing was carried bodily into the Christian Church. The world which embraced Christianity was so far wedded to the custom that it was deemed indispensable.

After the Church had grown to such tremendous proportions and so much pomp and ceremony were subjoined to the worship of God, oaths multiplied to a very great extent. There were almost as many different oaths sanctioned by the Christian world as there had been among the Greeks. The laying of hands on the book and kissing it were known very early. Sozomenus records an oath to the Emperor Theodosius by laying hands on the book, and during the time of Pope Nicholas the kissing of the Holy Scriptures was known according to an incident related by Arsenius. Later the practice of swearing by innumerable holy symbols and the like was introduced. Oaths by the Virgin, by the Cross, by the "body of Christ," "by God's Arms Two," by "Nails and by Blood," etc.

even to a shoe latchet, and that I will not take anything that is thine, lest thou shouldst say, I have made Abram rich." See also Deut. xxxii. 40, Ex. vi. 8, Dan. xii. 7, Rev. x. 5, Psalms cv. 9, Jer. x. 4, Numbers xxx. 13, Deut. xxix. 12, Josh. ii. 19, Ibid. ix. 20, Judges xxi. 5, I Sam. xiv. 26, II Ibid. xxi. 7, I Kings ii. 43, Ibid. viii. 31, I Chron. xv. 15, Nehem. x. 29, Ezek. xvi. 59, Dan. ix. 11, Zach. viii. 17, Mat. xiv. 17, Ibid. xxvi. 72, Luke i. 73, Acts ii. 30, Ibid. xxiii. 12, 21, Hebrews vii. 21, 28, James v. 12, Ezek. xxi. 23, Habak. iii. 9, Mat. v. 33.

* See Constantine Aug. De Civ. Dei; Tyler, C. VI; Dymond's Essays, C. VII; Grotius, Rights of War and Peace; Tertullian, De Idol., Cap. II.

* Sozomenus de Enagrio.

* Du Cange, 1607.

* There were a great many oaths of course which have not been and cannot even be mentioned here. Oaths in far eastern countries I have entirely omitted, because I have been unable to find any records of them, except such as have been written in and concerning recent
There is one essential feature of all these oaths which furnishes the keynote of their real or supposed efficiency, viz: Each ceremony of oath taking involves an expressed or implied imprecation of the vengeance of the being invoked, if the swearer does not speak the truth. It has already times, and I will speak of them later. The modern oaths of China, India, and other Asiatic countries (in so far as they exist at all), are evidently old forms which have survived from a much earlier period, but I have no proof of it at hand. Oaths have been found wherever human society exists, and hence we may safely say that "swearing" in some form is a natural and universal custom. Other forms not specifically mentioned will be found among the citations herein given, which are believed to include everything of importance ever written in the English language.

The oaths to which I have referred were those tendered on solemn occasions, when the truth was being diligently sought. As is usually the case, however, where a custom of this kind has become established, it was used on occasions to which it was not at all adapted. An impious man seeing how much credit was added to one's words if they were spoken under oath, would voluntarily swear to statements, the truth of which he desired to impress upon his hearers, when in fact they were untrue. In such cases if he were at all fearful of the punishment of the gods, he would swear by some deity or thing of which he felt less fear or none at all. Thus arose the great cloud of oaths which are sometimes called "false oaths." The ancients invented a multitude of them, and it is not necessary to stop to consider them, further than to say, that they consisted of oaths sworn by inanimate or non-sacred things, or by calling upon the names of gods which were obsolete (so to speak).

Potter says in "Oaths of Greece" that Socrates swore by a dog, and Lucian in commenting upon this report says, "What think ye? does not the dog appear to you a divinity? See you not how great in Egypt is Anubis, and in heaven Serius, and among the infernals Cerberus." This oath if it was so taken was I think merely a jocular or false oath.

William Rufus, King of England, habitually swore "per vultum de Lucca." Tyler devotes a chapter to discussing the origin of this oath, and ascribes it to a certain painting or figure of Christ in the Chapel of Lucca in Tuscany, which was thought to have been brought there by miraculous means. Thus the oath would mean, "by the face of God in the Chapel of Lucca." I think it quite as likely, however, that William, who is described to us as being not at all distinguished for reverence, adopted it simply because it had a euphonious sound, and probably thought it meant what it is usually translated to mean, "by the face of St. Luke."

There were also many oaths, such as "by St. Paul's bell," "by the
been related how among primitive tribes, those who swore in the name of beasts, or of inanimate things believed the thing invoked would avenge the insult of a false oath. This expectation or imprecation, particularly among the older forms, was usually expressly stated, but whether so

rood," "by the halidome" (holy dome), etc., which can hardly rise to the dignity of true oaths. They certainly were never used upon judicial or other similar occasions. At the present time "By Jove," "Jupiter," etc., are common as mere exclamations or by way of emphasis. Similarly arose the vulgar and impious habit so prevalent at the present time of swearing in ordinary speech, merely by way of rounding out one's sentences and with no thought of the import of the words used.

Various forms of solemn compact have sometimes been referred to as oaths, e.g., the custom of clasping hands in confirmation of an agreement, or more anciently killing an animal and drinking the blood, or even the practice of cutting a cock or pig in halves by a blow of a sword and imprecating a similar fate upon one's self if his words be untrue. I think none of these are properly oaths at all. There is no calling upon a supernatural being, merely an emphatic way of saying, "I speak the truth." Later in England the expression, "I hope I may die if I speak not the truth" was used. It is a mere vulgar expression.

Puffendorf and Tyler also both speak of various forms of oaths sworn upon weapons or by the members of the body, or by the bright eyes or the golden tresses of one's mistress, etc. I have found no record of such oaths being used upon solemn occasions, such as judicial proceedings—hence I pass them with the remark that they should be classed with frivolous or "false oaths," not being intended to really bind, but only to be used by way of emphasis. One exception should be noted, viz: that where a weapon or other inanimate thing had been made sacred by some ceremony, a false oath on this weapon or thing was deemed blasphemy of the deity to which it had been consecrated.

A curious instance of an oath upon a weapon is mentioned in V Scottish Law Rev. 166. An old forestry law is there quoted to the effect that if a stranger is found in a forbidden place in the forest and hence is liable to be punished, he may free himself by swearing on his "Wapin" that he did not know the way, but wandered into the forest by mistake. This probably arose from a common custom of swearing on weapons, then prevalent and the essential significance, or insignificance of an oath so taken was probably unnoticed.

Among the Hindoos it is believed that a false witness "shall be fast bound under water in the snyk y cords of Varuna, and he shall be wholly deprived of power to escape torment during a hundred transmigrations; let mankind give, therefore, no false testimony. . . . Headlong and in utter darkness shall the impious wretch tumble into hell, who, being interrogated in a judicial inquiry, answers one question
expressed or not it was the fundamental idea of the oath. To be more explicit, it was a belief that a supernatural being, called upon to witness the truth of the swearer's words, would feel itself outraged by a lie told under the sanctity of that ceremony and would avenge the consequential insult or blasphemy. How this idea first originated we can only conjecture, but it is not at all surprising to find it among people who believed in the divinity of things which they understood but little, and who thought those supposed deities, whether they were savage beasts, dark and mighty rivers, unexplored mountains, celestial bodies, or mere creatures of imagination, exercised a direct and personal control over the doings of men. They, therefore, as we could well believe, were the evidence less convincing than it is, also thought such a divinity would act as a witness and an avenger when called upon.

It follows from what has been said that the purpose of the oath was to frighten the swearer into telling the truth. Whether or not this purpose was accomplished, depended

falsely," quoted in Appleton on Evidence, p. 257. For various other forms of a similar character see Ibid. C. XVI. One form of Roman oath called the oath “Per Jovem Lapidem” concludes thus, “If I knowingly deceive . . . may Jupiter cast me away from all that is good, as I do this stone.” the swearer at the same time casting away a stone. Polybius III. 25.

In some instances the words of imprecation were added to oaths given in the Old Testament. Ruth to Naomi says, “The Lord do so to me and more also, if aught but death part thee and me.” Ruth i. 17. The same words were used by Eli to Samuel when he was adjuring him to speak the truth. I Sam. iii. 17.

Many of the later Christian oaths contained express imprecaions of God's vengeance for false swearing. Selden says that among the Spaniards the oath used in making a covenant concluded thus, “If I first designedly fail of this oath on that day, ye powers above torment my body in this life and my soul in the next with horrid tortures. Make my strength and my words fail. In battle let my horse and arms and spurs and subjects fail me when need is the sorest.” II. 11.

The words now used, “So help me God,” at present little understood, are but a shorter way of expressing the same imprecation. When this precise form was first adopted is uncertain. Tyler says that he has been unable to find any oath in England which does not contain it or a similar phrase. The meaning of the phrase is, “So may God help me at the judgment day if I speak true, but if I speak false, then may He withdraw His help from me.” Tyler, C. III.
entirely upon his state of mind. It was necessary that he should believe two things: (1) That the being upon whom he called had a supernatural power to search his heart and to divine the lie hidden there; (2) That that being would be outraged by the affront of a false oath and would punish him for it. If he did believe, and if he was compelled to faithfully perform the ceremony which was supposed to arouse the watchfulness of his god, then he would in all probability tell the truth, unless his hope of immediate gain by lying overbalanced his fear of future punishment by an outraged deity. If, on the other hand, the swearer had no fear of the deity upon whom he called, or if he could evade the ceremony in some particular, or if he did not believe the god would be offended by the ceremonial breach, then the oath became a mere cloak for lying.\textsuperscript{11} The

\textsuperscript{11} In ancient times there is no doubt that the oath was of great efficacy in securing the truth. During many centuries of the world's history no important act of state was ever undertaken without first seeking some external sign of the approval or disapproval of the gods. The whole business of a nation could be tied up by the behavior of a chicken in eating its food, or by virtue of the appearance of the entrails of a beast, or by the foolish tale of an augur or an oracle.

The human race held a very material idea of the duties of the celestial beings. They believed that they arranged and governed the material affairs of men to the minutest detail, and would judge each act and manifest by some external sign their approval or disapproval in advance.

The oath was the direct product of this idea. The ancients believed that a god would, when called upon, witness the truth of the speaker's words, and if he spoke falsely would then wreak upon him a special punishment for the affront offered. It is true that such absurd and childish ideas were soon abandoned by the educated classes; but inasmuch as the belief of the swearer is the only thing of importance, the one who administered the oath need not believe in it at all.

Polybius asserts that superstitious reverence was fostered advisedly among the common people of Rome, for the very reason that they could thereby be controlled by wise men, who did not themselves believe in the things they made use of. He says: "The great superiority of the Roman constitution appears to me to consist in their sentiments towards their gods; and what seems to be held as a reproach among other nations, appears to me to be the preservative of the Roman State, a superstitious reverence for their divinities; for this principle is carried to such an extravagant pitch among them, that nothing can exceed it, whether in the lives of individuals or the gen-
thought that should be particularly noticed is that the oath was believed to create an obligation to tell the truth not previously existing. If the gods summoned as witnesses by the oath would have punished without such a ceremony for the sin of lying, it does not appear that the fear of such punishment was in any way relied upon as a guarantee of truth. But the insult involved in a false oath was believed to involve the most awful consequences.

eral conduct of the state, a circumstance this which to many might seem marvelous. I, however, am persuaded that they adopted this system for the sake of the body of the people. Had they had to form a commonwealth of wise men only, such a system would perhaps not have been necessary; but since every populace is full of levity and lawless desires, anger uncontrolled by reason and impetuosity of temper driving them on to violence, the only expedient left is to restrain them by invisible terrors and such-like alarming fictions. The ancients consequently in my opinion brought in their doctrines about the gods and the affairs of hell for the belief of the people, not at random and by chance.” Tyler, p. 139.

On the other hand if the swearer had no belief, the oath was of course but an idle form, pernicious in that it induced credulity in others.

Plutarch relates that Callippus, after having sworn “the great oath” not to harm Dion—which “great oath” consisted of various weird ceremonies supposed to greatly add to the solemnity of the occasion, and was taken in the consecrated sane of Ceres, the goddess—held so little its supposed obligation that he committed the murder of Dion upon the very birthday of the goddess by whom he had sworn. He purposely waited until that day in order to show his contempt for the ceremony.

“The exact truth of these observations may be clearly seen from two well-known facts in history: (1) The great sacrifices which the ancients would make to avoid breaking their oaths. (2) The utter disregard for honor or truth which they exhibited when by some technicality they had been excused, as they imagined, from the performance of an oath.

As an example of the first may be mentioned the Scriptural instance of Jephtha killing his daughter, who met him on his return from the war, he having sworn to sacrifice the first creature that came out to meet him. The sacrifice of John the Baptist is another familiar example. Herod did not want to give the head of the prophet to the daughter of Herodias, with whose dancing he was pleased, “yet for his oath’s sake” he commanded that it be given to her.

Plutarch says that Lycurgus, having secured the passage of wise laws and a promise of the people not to repeal these laws until his return, voluntarily banished himself from Sparta, and, dying, ordered
Such in brief being the essential character of the oath, the next step in the development of the subject is to trace its use. For purposes of this paper we may roughly divide oaths with respect to their use into (1) Oaths used upon non-judicial occasions and (2) Those used in judicial proceedings. With the first-class we have little to do. It comprises oaths given and required in ordinary transactions, whenever one man desired a solemn asseveration from another. It was at one time common for an oath to be given in confirmation of a contract. and there is competent evidence that the Roman courts recognized the use of the oath as imposing more solemn obligations in various civil matters. Its use in treaties between nations, and upon other innumerable occasions of ancient society, was common. It has also from very ancient times been deemed a proper and necessary ceremony to be performed by any person about to be placed in a position of trust, e.g., when he is about to be inducted into an office of some kind. Practically all public officers in the greater number of countries of the

his ashes to be thrown into the sea. He rested secure in the belief that, no matter what happened, their oath would prevent the repeal of the laws by the Spartans. Lycurg. Justin. L. III, C. 3.

As examples of the second fact may be mentioned the instance of the Roman captive who was allowed to depart from the enemy's camp, having sworn to return. When he had gone but a little way he came back on pretence of having forgotten something, and then remained permanently at Rome, having fulfilled his oath as he claimed. Puffendorf, 345. Likewise we are told that Dercyllides, besieging the city of Scepsis, requested the leader of the enemy to come out to a parley, swearing to give him an immediate safe return. When he came out, Dercyllides ordered him to open the city's gates on pain of death, and accompanied him (safely) with his army back into the city. Polyain Strateg., L. II, C. 6. So also the Count de la Fontain, having sworn never to fight the French either on foot or on horseback, had himself carried in a chair against them. Benj. Prioli Hist. Gall., L. II. In the same way as Aelian says, Cleomenes the Spartan, who had sworn never to do anything without the head of Archonides (meaning to make him a confidential adviser), cut it off, placed it in a vessel of honey, and always consulted it before undertaking any business. V. H. Lib. XII, C. 8. Many other such instances are mentioned by Puffendorf, supra.

13Muirhead's Roman Law, p. 51.
14Ibid. 165.
world are to-day required to subscribe to an oath before presuming to discharge their duties. Oaths of allegiance, formerly universal, are now less often required, particularly in English-speaking countries, than formerly.\textsuperscript{15}

The main theme of this paper is the second class, viz: oaths used in judicial proceedings; those which have been adopted as a part of the machinery of the courts. The evidence as to their use in ancient judicial proceedings is meagre, although among the Jews we find satisfactory records of the use of the oath which has come to be called in later times the "decisory oath." This is an oath which under certain prescribed conditions may be taken by one of the parties to the action and which may result in the decision of the case, hence the phrase "decisory oath."\textsuperscript{16}

There was no provision in Jewish law by which witnesses in criminal cases should be sworn to tell the truth. They were cautioned and warned of the sin of lying and were rigidly cross-examined, but no oath had to be taken.\textsuperscript{17} In

\textsuperscript{15} See generally "Tyler on Oaths."

\textsuperscript{16} In the Talmud it is laid down, "If one owes a note to a party and the latter said to him, 'Swear to me by your life and I will be satisfied,' according to R. Mair he may retract and according to the sages he may not." It appears more fully from the explanation following that this was a decisory oath. The plaintiff having elected to abide by the oath of the defendant was bound thereby. Rodkinson's Babylonian Talmud, Vol. 7 and 8, p. 68. The use of these oaths is very fully explained in a later volume of the same work, \textit{Ibid}. Vol. 9 and 10, "Tract Shehuoth." We find similar evidence of the use of the decisory oath in the Old Testament. It is commanded in Exodus that if a bailee be accused of theft and the thing bailed cannot be found, the bailee may clear himself by an oath, provided no other witnesses can be found. This is a slightly different form, but is unmistakably one kind of decisory oath. Ex. xxii. 10, 11. So also in Hebrews vi. 16, it is said that an oath shall settle all strife between man and man.

\textsuperscript{17} Mendelssohn's Criminal Jur. of Ancient Hebrews, p. 120.

The method of cautioning Jewish witnesses is set forth in \textit{Ibid} and also in the Talmud, \textit{supra}, pp. 85, 111. The method deemed most effective was to solemnly remind the witness of the sin of lying and particularly of bearing false witness, and in criminal cases that the blood of the innocent man condemned by false testimony will be upon the head of the false witness and of his descendants, even unto the most remote generations.

The method of cross-examining is set forth in the Talmud with particularity, so that a false witness may be detected. See Talmud, \textit{supra}, p. 115.
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civil cases, however, witnesses appear to have been sworn.\(^{17a}\) In the code of Hammurabi there are eleven instances of
decisory oaths and one where clearly the witnesses were
required to take oath.\(^{17b}\)

The oath in judicial proceedings in the early Roman
law was used as a mode of deciding the case, when taken
by one of the parties to the action, but not to bind wit-
tnesses to speak the truth. It was strictly an alternative
to evidence, it was not used to add weight to it. The parties
could not voluntarily take a decisory oath, but only when
tendered by the opposite party or required by the judge,
and the personality of the party was always taken into
account before the entire decision of the question was re-
ferred to his single oath.\(^{18}\).

Just when the practice of swearing witnesses originated
in the Roman law is uncertain. Hunter says it began in
the time of Constantine.\(^{19}\) It is true that witnesses were
sworn as early as that, but whether or not they were sworn
earlier is doubtful. It is certain, however, that from about
the time of Constantine it has been the practice in the
Roman law to require witnesses to swear that they will tell
the truth.

It is neither possible nor desirable to examine minutely
the use of oaths in the judicial proceedings of other systems
of law. Puffendorf states that oaths have been used in all
countries, although he does not go into detail as to the way
in which they were used. We find a great deal of frag-
mentary evidence of their use in the Teutonic countries and
in others, but nothing sufficiently authoritative to warrant
any generalizations as to when they were first introduced
into judicial proceedings or the manner of their use in early
times. All that we do know is that the oath as an institution

\(^{17a}\) In the ninth and tenth volume of the Talmud, supra, it is shown that
such oaths were required upon some occasions though apparently not
always.

\(^{17b}\) John's translation, \(\S\) 9.

\(^{18}\) A very excellent and concise description of this oath is given in
Greenidge's "The Legal Procedure of Cicero's Time," p. 259 \textit{et seq.}
See also Hunter's Roman Law, p. 1005 \textit{et seq.}; Roby's Private Law,
p. 394 \textit{et seq.}

\(^{19}\) Page 1060.
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is and has been world wide and that it is now used in the judicial proceedings of all countries with but few exceptions.20

The oath has been a part of judicial proceedings of the common law from the very dawn of its history. It was used in connection with the older methods of trial, e. g., trial by battle, trial by witnesses, by wager of law, by the ordeal, etc.21

Some of these modes of trial were introduced at the time of the Norman conquest, but others were in common use prior to that time. The trial by wager of law bore a marked resemblance to the decisory oath and no doubt was a variation of it.22 It is impossible to say when the oath first formed a part of judicial procedure in English courts. All that we know is that so far back as the light of modern research has extended we have found it. It was in use by the Saxon tribes who came to the island in 449 A. D. and may have formed a part of the Celtic system of law prior to that time. Having existed long before the development of the English jury system, it became an integral part of the jury trial and by the earliest records both jurors and witnesses were sworn.23

The prevailing religion in England at the time when the common law was slowly rounding into form was, of course, Christianity. The forms of oath in most common use there-

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22 See 3 Bl. Com., C. 22; Thayer on Ev., C. 1; 1 Poll. & Mait. 90.

fore were modelled upon the assumption that the swearer was a Christian. They contained an appeal to the Christian God and were ordinarily taken either upon the Holy Scriptures or upon some sacred relic.

How the idea originated that only Christian oaths were of sufficient solemnity to be accepted in English courts, is a mystery. It was of course due to the spirit of intolerance which unfortunately seemed to dominate most religious people of early times. The assumption of the Church, which then controlled secular affairs, was that all "heathen" were wholly unfit to be believed. Therefore, among the very earliest of English commentators we find it stated that jurors and witnesses must be sworn according to the Christian method upon the Holy Scriptures.

Britton says jurors shall be sworn "So help me God and the Saints," and "it was provided on account of people difficult of belief that oaths should be taken upon the Holy Gospels of God for avoidance of idolatry."

It follows of course that if an oath of this form was the only one which could legally be taken in an English court, all persons other than Christians would be disqualified as witnesses, because even if they would be willing to take such an oath, it would have no binding effect upon them owing to their disbelief in the Christian God and their lack of reverence for the Holy Writ.

Sir Edward Coke made the first positive statement to this effect. He says in his Institutes that none but Christians can be witnesses in English courts. At the same place he

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Footnotes:

24 Page 135.
25 501, see also Fleta, supra, Bracton f. 116, Vol II, p. 242-41; Britton de chal. de Jurors, C. 53, p. 135; Fortescue de Laud. Leg. Angliae, C. 26, pp. 54-58, as to supposed essentials of the oath in the earliest times.
26 Lord Coke defines an oath to be an affirmation or denial by a Christian. 3 Inst. 165, and he says an oath must be accompanied by the fear of God (meaning the Christian God), and that an alien infidel cannot be a witness. 4th Inst. 278. He also says the form of the oath is essential, and can be varied only by act of Parliament (Ibid.). See also to the same effect Coke upon Lit., Sec. 6 (b); Hale, Pleas of Crown, Vol. II, p. 279; Hawkins, Pleas of Crown, title "Evidence"; Calvin's Case, 7 Co. 17 (a), where Lord Coke says infidels are perpetual enemies to Christendom.
makes the further statement that the form of oath cannot be varied save by act of Parliament. This would result in excluding Jews as they would not be sworn upon the New Testament. As a matter of fact, however, they were admitted even before the authority of Coke’s statement was finally overthrown. Lord Coke, who is said to have been an ardent hater of Catholics, even went so far as to exclude popish recusants and all excommunicated persons from being witnesses.

The oath having become firmly incorporated into the machinery of the English courts, it was the theory of the common law that no witness ought to be allowed to give evidence unless he did so under the sanctity of an oath, which was thought to be the strongest possible guarantee of

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27 See Barker v. Warren, 2 Mod. 271; Anonymous, 1 Vern. 263; Serra v. Muner, 2 Strange, 821; Robey v. Langston; Keble, 314. In fact the oath of a Jew is said to have been given more weight than that of a Christian in some proceedings. 15 Sed. Soc. XII, 1b. 1.

28 As to Coke’s sentiments toward Catholics, see Johnson’s Life of Coke, Vol. II, p. 389 et seq. As to the exclusion of papists, see Att’y. Gen. v. Griffin, 2 Bulstrode, 155, in which he declared “every recusant convict is to be excommunicated; and, therefore, in my circuit I do not admit them for witnesses between party and party, they being no competent witnesses.” He said further, addressing himself to some popish recusants before him, “the writ was used De Leproso Amovendo, for fear of infecting of the body, and such writs are now very requisite to remove you, for you infect the soul, which is much more dangerous.” Although some later writers have sought to excuse Coke on the ground that he could not be expected to be ahead of his time (see note by Scott, J., in Perry’s Case, 3 Gratt, 632), he was roundly abused as early as the first half of the eighteenth century for his narrow intolerance. See remarks of Willes, J., in Omnychund v. Barker. Willes, 538.

Gilbert on Evidence, p. 261 et seq., and Buller, N. P. 292 (b), are also authority for the statement that both excommunicated persons and popish recusants were at one time inadmissible as witnesses, although Phillips seems to doubt. See p. 19, note 7. The absurdity of these rules of exclusion is fully demonstrated by Bentham. He remarks, “No sooner are you excommunicated than a discovery is made, that being ‘excluded out of the church’ you are ‘not under the influence of any religion.’ You are a sort of atheist. To your own weak reason it appears to you that you believe; but the law, which is the perfection of reason, knows that you do not. Being omniscient and infallible and so forth, she knows that, were you to be heard, it would be impossible you should speak true.” Vol. V, p. 140. These disabilities were removed by 58 Geo. III, C. 127.
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truth. It follows that if a man did not possess the necessary qualifications of an oath taker, heretofore mentioned, he would be excluded from the witness stand; that is, if he did not believe in a supernatural being who would, when called upon, witness the words spoken and punish a deviation from the truth. The only essential was that the witness should relate his evidence under the sanctity of a belief on his part in some superior power (no matter what) which was taking note of his words for the purposes mentioned. Hence, as has already been noticed, each person was to be sworn according to his own religious belief. It was not in the least necessary that the belief of the witness should conform to that of him who administered the oath. There is nothing in its nature, if properly understood, which could have given rise to the error of the early English law writers. It must be ascribed to a feeling then prevalent in England that all non-Christians or even non-agreeing Christians were without honor and unworthy of belief, coupled with the fact that the customary oaths used in England were Christian oaths.

However the error may have arisen, it was recognized to be an error by the great case of Omychund v. Barker in 1744, by which all preceding authorities were swept aside. Opinions were delivered by the Lord Chief Baron, the Lord Chancellor, Lord Chief Justice Willes and Lord Chief Justice Lee. The precise question was as to the admission of two witnesses who professed the “Gentoo” religion. After elaborate arguments it was unanimously decided that the two Gentoos should be sworn after the manner of their own religion and admitted as witnesses. The authority of Lord Coke was disregarded, Lord Chief Justice Willes remarking, “this notion (that non-Christians cannot be sworn), though advanced by so great a man, is contrary to religion, common sense and common humanity, and I think the devils them-

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21 A rather amusing incident is mentioned in 17 Ir. L. T. 69: One Pastor Ilapke refused to be sworn in a Berlin court until he knew whether the judge who proposed to administer the oath was a Christian. Since no information on that point was forthcoming he declined to be sworn, and was fined 300 marks.
22 1 Atkin, 21; Willes, 538.
selves to whom he has dedicated them (Jews and non-
Christians), could not have suggested anything worse."
The learned Chief Justice further remarked: "I lay no
stress upon the authority of Bracton, Briton and Fleta, for
they lived in popish times when no other trade was carried
on except the trade of religion; and I hope such times will
never come again."
The principal features of the decision were resolved as
follows:
1. That the oath is not a Christian institution, but has
existed from the earliest times.
2. That an oath is of binding force when taken by any
person, Christian or infidel, if taken according to the rites of
his own religion.
3. That the form of oath usually administered in English
courts is not essential, but that any persons may be ad-
mitted sworn as above.
4. That this decision does not warrant the admission of
witnesses with no religion, but that such must be excluded,
because an oath cannot possibly have any binding force upon
them, since they believe nothing.23
The rule in Onychund v. Barker has been uniformly fol-
lowed both in England and America, so that at common law
infidels may be admitted sworn according to the ceremonies
of their own religion,3 but atheists and those who have no
belief are excluded from testifying.34

23 One reason this decision came when it did was divulged by Lord
Chief Justice Willes, when he said he ignored the old commentators,
because they lived in a time when no trade except religion was carried
on. In view of England's great and growing commerce with India,
the necessity of admitting people of that country as witnesses was fully
realized.
24 Woodeson’s Lectures, p. 156; Phillips’ Ev. 17; Morgan’s Case, i
Leach. C. C. 64; Peake’s Evidence, 266; Fachiha v. Sabine, 2 Strange,
1184; Rex v. Entreman, C. & M. 249; Rex v. Alsley, O. B. Sess.
1804; Ramkisseencait v. Barker, v Atkin 59; Athesen v. Everitt, Cwp.
389; Duller N. P. 292; 1 Stark on Ev. 22; Edmonds v. Rowc, Ry. &
M. 77; Miller v. Solomon, 7 Exch. 475; Greenleaf on Ev., sec. 366;
Maddox Hist. of Exch. 166; Wilkins’ Saxon Laws, 348; Vail v. Nick-
erson, 6 Mass. 262; Con. v. Buzzell, 16 Pick. 153; Newman v. Newman,
7 N. J. Eq. 26; Washington v. Gin Pon, 16 Wash. 425; R. v. Pah-Mah-
34 Buller N. P. 292, Gilb. on Ev. 129; Rushton’s Case, i Leach C. C.
Omychund v. Barker, having settled the question as to the admission of "infidels" provided they believe in a god who will punish them if they speak falsely, a controversy, as foolish as it was needless, arose as to whether it is necessary for the witness to believe in a hereafter during which he will suffer punishment for violating his oath or whether it is sufficient if he believes a god will punish him in this life.

What Chief Justice Willes really said in Omychund v. Barker on this point is somewhat doubtful. In the report of the case in Atkins he is made to say, "Though I have shown that an infidel in general cannot be excluded from being a witness, and 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." In Willes's report, however, his language is essentially different. He says, "And on the other hand I am clearly of opinion that such infidels (if any such there be) who either do not believe in a God, or if they do not think that He will either reward or punish them in this world or in the next, cannot be witnesses." The latter is probably the correct report.

Had it not been for this inaccuracy there would probably have been no controversy over this point (as is observed in Atkins reports are considered by English judges to be very inaccurate. See comments upon them in La Vic v. Phillips, 1 W. Bl. 570; Olive v. Smith, 5 Taunt. 64.
the case of *People v. Matteson*), and those cases in which it was held that belief in a "future state" is necessary, would never have been decided. It is now well-settled that it is sufficient for the witness to possess belief in a supreme being who will punish him for violating his oath, and it is immaterial whether he believes the punishment will be inflicted upon him in this world or in the world to come.

The final conclusion of the common law, therefore, is that an unbeliever is incompetent to take an oath because it cannot have any binding effect upon him, and without the oath no person can be heard to give evidence, for, unless he invokes the vengeance of God for false swearing, there is no security that he will tell the truth.

With the growth of religious toleration, however, it began to dawn upon the legal world that perhaps an unbeliever or even an atheist might on some occasions tell the truth, and hence their continued exclusion might result in injury to the cause of innocent suitors who needed their testimony:

\*2 Cowen (N. Y.), 433.


It has been one of the most difficult problems of the common law to decide upon the competency of witnesses. Two ends somewhat inconsistent have to be attained: First: Those persons who will probably tell the truth should be admitted, and those who will probably tell falsehoods, or who are totally unreliable from incapacity to understand or relate, should be excluded (supposing these things to be discoverable). Second: No persons or class of persons should be excluded...
The first great work which attacked the rule excluding unbelievers as witnesses. Bentham's Judicial Evidence, started an agitation of the subject in England which never ceased until it bore fruit in the entire abolition by statute of all defects arising from religious belief or the lack of it, in that country and most of its colonies. 40

from testifying if their testimony may at some time be necessary to the proper administration of justice, unless it be reasonably sure that it will in all cases be unworthy of belief. In early times the first of these principles seems to have been given much more weight than the second. The law was very jealous of the character of witnesses. Thus those persons were excluded:

1. Who had any pecuniary interest however small in the subject matter of the controversy, they being thought more likely to regard this interest than temporal or divine punishment for perjury.

2. Who having been convicted of certain crimes were deemed "infamous" and unfit to be believed.

3. Who were defective in religious belief, and so could not be moved by fear of divine punishment.

4. Who by reason of infancy or mental weakness were unreliable, and unable to relate intelligently that which they had seen and heard.

The English Parliament and the American legislatures have realized that the exclusion of witnesses merely by reason of their having an interest in the decision of the controversy was a mistake, and such disability has been removed by statute. In England Lord Denman's Act, 6 and 7 Vict., C. 85, removed entirely the disability of interest, except as to parties to the action, reciting that it was thought better to hear all that such persons had to say, trusting the jury to judge of their credibility. The disability of the parties was finally abolished also by 14 and 15 Vict., C. 99. For a statement of the reasons formerly supposed to be at the bottom of this rule, see Gilbert on Ev. 722.

The rule is now substantially the same all over the United States. See note to 1 Greenleaf on Evidence, Lewis' edition, p. 672, sec. 430. The same may be said of England and of most American states with respect to the disqualification for conviction of crime, the fact of such conviction now going only to the credibility of the witness. Lord Denman's Act, supra, absolutely sweeps away all disability for conviction of crime. The American states have in many instances done away with it entirely in a similar manner, but others have merely cut down the list of crimes, making usually a conviction of perjury and sometimes of forgery a disqualification. See note to 1 Greenleaf on Evidence, Lewis' edition, p. 590, sec. 372.

The class incompetent by reason of defective understanding is very generally excluded at the present day for the same reason, although some changes have been brought about as to the proper test of a sufficient understanding, which will be commented upon later.

* Of all the articles written on the subject I have seen but one which
None of these statutory changes had been accomplished by the British Parliament at the time of the American Revolution, hence the competency of witnesses in this country is at common law except in so far as it has been altered by legislative action in the different states. Such action, in spite of our fancied greater share of religious liberty, has favors the exclusion of atheists, an article by S. G. in 1-2 Law Reporter, 345. Among those which take the opposite view are, Bentham on Judicial Evidence, Book 2, Chap. 6: "Judicial Oaths," by F. S. Reilly, in 1 Jur. Soc'y Papers, 435; paper entitled "Ought any person to be excluded from giving evidence on the ground of Religious Unbelief?" by Rev. F. D. Maurice, III Ibid. 95; "Judicial Oaths as administered to Heathen Witnesses," by T. C. Anstey, Ibid. 371; 23 C. L. J. 505 (Ed.); 4 Am. Jur. 286; "Ought atheists to be received as competent witnesses?" 15 Law Reporter, 301.

The first step taken by the British Parliament toward the admission of atheists was the act of 6 and 7 Vict., C. 22, which authorized the legislatures of the colonies to pass laws to admit unsworn testimony, for the reason that there were, particularly in India, many persons who not only had no religious scruples against lying under oath, but whose religion in some cases commanded them to lie. Next in order came the act of 32 and 33 Vict., C. 68, sec. 4, which provided that "If any person called to give evidence in any court of justice, whether in a civil or criminal proceeding, shall object to take an oath, or shall be objected to as incompetent to take an oath, such person shall, if the presiding judge is satisfied that the taking of an oath would have no binding effect on his conscience, make the following promise and declaration:

"I solemnly promise and declare that the evidence given by me to the court shall be the truth, the whole truth and nothing but the truth."

Some doubts having arisen with respect to the interpretation of this act, it was superseded by 51 and 52 Vict., C. 46, in the following language:

"Sec. 2. Every person upon objecting to being sworn, and stating, as the ground of such objection, either that he has no religious belief or that the taking of an oath is contrary to his religious belief, shall be permitted to make his solemn affirmation instead of taking an oath in all places and for all purposes where an oath is or shall be required by law, which affirmation shall be of the same force and effect as if he had taken the oath; and if any person making such affirmation shall wilfully, falsely and corruptly affirm any matter or thing which, if deposed on oath, would have amounted to wilful and corrupt perjury, he shall be liable to prosecution, indictment, sentence and punishment in all respects as if he had committed wilful and corrupt perjury.

"Sec. 3. Where an oath has been duly administered and taken, the fact that the person to whom the same was administered had, at the
not been so spontaneous nor so complete as in England. In thirty-three states and territories atheists or unbelievers have been made competent witnesses. The same is probably true of three others, but in fourteen and probably fifteen the common law rule is still unchanged.

time of taking such oath, no religious belief, shall not for any purpose affect the validity of such oath.”

Substantially the same rules now exist in India. Chap. IX, p. 318, of the Anglo-Indian Codes, Vol. II, admits all persons to be witnesses who are capable of relating intelligently those things which they have seen and heard. No general act has abolished the incompetency arising from religious unbelief in Canada, according to the construction of the Canada Evidence Act (56 Vict., C. 31). Bell v. Bell, 34 N. B. Rep. 615, but some of the territorial legislatures have done so. Ontario has, see Practical Statutes, p. 78.

“The citation in detail of the statutes and constitutions of all the states and territories is so extensive that for convenience the statutory and constitutional rules on this and kindred subjects are classified and topographically arranged in an appendix at the end. The statutory changes, however, naturally fall into groups, which are here given together with their construction by the courts of the different states.

Ten states and one territory, viz: ARIZONA, CONNECTICUT, FLORIDA, INDIANA, MAINE, MASSACHUSETTS, MISSISSIPPI, NEW MEXICO, TENNESSEE, TEXAS and UTAH have laws which expressly admit persons as witnesses who have no religious belief. The methods of expressing the change in the law vary, but all have for their purpose the abolition of the common-law rule, that one who has no belief in the existence of a God who will punish for false swearing cannot testify. Thus the ARIZONA code provides, “no person shall be incompetent to testify on account of his religious opinions, or for want of any religious belief.” Code of Crim. Proc., sec. 1109, Rev. Stats., p. 1373. The general statutes of CONNECTICUT provide, “No person shall be disqualified as a witness . . . by reason . . . of his disbelief in the existence of a Supreme Being.” Sec. 1096.

Twenty-four states and territories, viz: ALASKA, ARKANSAS, CALIFORNIA, COLORADO, GEORGIA, IDAHO, INDIAN TERRITORY, IOWA, KANSAS, MARYLAND, MICHIGAN, MINNESOTA, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW YORK, NORTH DAKOTA, OHIO, OREGON, VERMONT, WASHINGTON, WISCONSIN, WYOMING (see appendix) provide that no person shall be incompetent as a witness by reason of “his opinions on religious matters” or on account of “his religious belief,” etc. These provisions are contained sometimes in constitutions and sometimes in statutes. They are very generally construed to mean that no person can be rejected as a witness either because of the character of his belief (which would be merely declaratory of the common law) or because he has none.
While, therefore, the tendency of modern legislation is to abolish the religious test for the competency of witnesses, there is yet a considerable portion of the United States where an unbeliever cannot testify. If we suggest the propriety of statutory alterations of the law in this respect, the burden


It will undoubtedly be the rule in COLORADO, IDAHO, MONTANA, NEVADA, OREGON, WASHINGTON, WISCONSIN and WYOMING, as these states all have statutes so worded as to admit witnesses who have no religious belief. See appendix.

In ALASKA and VERMONT the same result will also undoubtedly follow, as there are in these states express statutes forbidding all inquiry into the religious belief of witnesses. See appendix. It is more than probable that the courts of NORTH DAKOTA will also admit atheists under their statutory rules so soon as the question is brought before them.

In OHIO, however, a different construction has been adopted. The constitution of that state provides, "Nor shall any person be incompetent to be a witness on account of his religious belief." The court in Clinton v. The State, 33 Ohio, St. 27, decided that these words did not remove the incompetency arising from lack of religious belief, but were merely declaratory of the common law. The position assumed was that inasmuch as oaths were not abolished, witnesses were bound to be sworn or affirmed in the manner most binding on their consciences, and that one is not capable of taking an oath or affirmation unless he have a religious belief. This decision, which is a very narrow one, proceeded on the ground that under the Ohio statutes, which allow only those having conscientious scruples to affirm, one is incapable of taking an affirmation unless he be a believer. This is not the law in other states in which atheists may testify, as in them oaths and affirmations have not been abolished. In a number of them, however, an affirmation may be taken at the option of the witness, irrespective of any conscientious scruples. See appendix.

In the remaining three states and territories, viz: ARKANSAS, INDIAN TERRITORY and MARYLAND, of the list last given there are express constitutional provisions that one who "denies the being of a God," as in ARKANSAS and INDIAN TERRITORY (both have the same constitution), or who does not believe in a Supreme Being who will punish for false swearing, as in MARYLAND, cannot be a witness. See appendix.
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is upon us to show either that the common law rule was founded upon a misconception or that it has outlived its usefulness.

If the atheist or unbeliever is to be admitted it will mean the abandonment of the oath as to him. He will assume

In eight other states, viz: ALABAMA, ILLINOIS, KENTUCKY, NEW JERSEY, RHODE ISLAND, SOUTH DAKOTA, VIRGINIA and WEST VIRGINIA (see appendix), there are general provisions, either statutory or constitutional, to the effect that one's civil rights shall be in no way affected by his religious "belief," "principles" or "opinions on religious matters."

In NEW JERSEY a provision that "no person shall be denied any civil right merely on account of his religious principles," is construed not to admit persons who at common law were, by reason of lack of religious "principles" or belief, incompetent as witnesses. Donnelly v. State, 2 Dutcher, 601; State v. Powers, 51 N. J. L. 432.

In ALABAMA similar phraseology is used, i. e., one's civil rights not affected by "religious principles." There is no positive decision since this constitutional clause was adopted in 1875, but a recent case, Beeson v. Moore, 31 South, 456, 1903, in admitting a witness who believed in God but not in a future state, seemed to lean toward the NEW JERSEY view, which will probably be followed.

In RHODE ISLAND, VIRGINIA and WEST VIRGINIA the phraseology used is that civil rights shall not be affected by "opinions on matters of religion." This provision has been construed in VIRGINIA to abolish all religious tests of the competency of witnesses. Perry's case, 3 Gratt, 632.

In WEST VIRGINIA the opposite construction would seem to have been adopted from the remarks of the court in the case of State v. Michael, 37 W. Va. 565, where the test of the admissibility of a child was said to be his religious education and belief. There is no decision as to adult witnesses. In RHODE ISLAND there are no decisions.

In ILLINOIS and SOUTH DAKOTA the provisions are the same except that the phrase, "religious opinions," is used instead of "opinions on matters of religion." In ILLINOIS the construction that all religious tests are abolished by this provision has been adopted. Hornek v. People, 134 Ill. 139; Ewing v. Daily, 36 Ill. App. 191; McAmore v. Wiley, 49 Ill. App. 615; People v. Hartel, 20 Am. L. Rev. 95.

There are no decisions in SOUTH DAKOTA, but a dictum in State v. Reddington, 7 S. D. 368, at p. 376, follows the ILLINOIS rule, and it will in all probability be adopted.

In KENTUCKY a provision that civil rights shall not be affected by "belief or disbelief of any religious tenet, dogma or teaching" has been held to abolish all religious tests of the competency or credibility of the witness. Bush v. Ky., 80 Ky. 244. The remarks on this point, however, were dicta, as a provision of the civil code was deemed broad enough to admit the witness in the absence of any constitutional provision.
one of two positions. Either he will decline to be sworn in the name of the Deity in which he has no belief, or he will consent to perform the ceremony but with no faith in its efficacy. In either case the religious sanctity of the oath is absent. The proposition to admit the atheist therefore in-


In Pennsylvania some question has been raised whether a recent statute enlarging the competency of witnesses has not opened the door for the admission of the testimony of atheists and agnostics. This contention that unbelievers are now competent in Pennsylvania is based upon the terms of the act of May 23, 1857, P. L. 158, which provides as to the competency of witnesses in criminal cases "except [certain cases enumerated in this act] all persons shall be fully competent witnesses in any criminal proceeding before any tribunal," and as to civil cases, "No . . . interest or policy of law except as is provided in Section 5 of this act shall make any person incompetent as a witness." No exception of persons lacking religious belief is made; therefore, it is said, they are competent.

I should be very glad if I could think this act really has the effect claimed for it, but I am compelled to take the opposite view for the following reasons:

1. There is no dispute that prior to the passage of this act it was necessary in Pennsylvania for all witnesses to have a belief in a Supreme God, who will punish for false swearing either in this world or in the next. Quinn v. Crowell, 4 Whart. 334; Cubbison v. McCreary, 2 W. & S. 262; McFadden v. Com., 23 Pa. 12; Blair v. Seaver, 26 Pa. 274; Com. v. Winnemore, 2 Brewst. 378.

2. There is no express reference to the subject of religious belief in the act, and since, if it has the effect claimed it will abolish a rule of common law, it must be construed so as to be consistent with the common law, if this is at all possible. English on Interpretation of Statutes, Secs. 127, 128, and cases there cited.

3. There are two possible constructions which may be put upon the words of this act. First, they may be taken in their actual and literal sense to admit all persons not expressly excluded. Second, they may be construed merely to destroy certain incapacities at which the act
volves the question whether it is better for the interests of justice to exclude him because he cannot take the oath or admit him without that security. This does not involve the broad question as to the value of oaths in general; that is reserved for a later part of this paper.

was obviously aimed and among which religious unbelief was admittedly not included.

If one of these constructions be adopted, we must apply it to all classes of persons incompetent at common law for any reason whatsoever. We cannot apply one construction to some classes whom we desire to admit and the other to some whom we are (for reasons that are plain to everyone) obliged to exclude. It becomes at once apparent that we are compelled to adopt the second construction and interpret the act to destroy only those incapacities at which it was obviously aimed (see the pamphlet explaining the purpose of the act by its draftsman, Hon. John B. McPherson) and which are specifically dealt with by its terms, but that it does not destroy the fundamental grounds of incompetency which rendered a man incapable of being a witness because, judged by the standard of the common law, he was unable to take an oath. The common-law capacity to take an oath consists of (1) understanding, (2) belief. If either is lacking the witness is excluded. Now if this act is taken literally to admit all persons not excluded, it must admit not only atheists and agnostics, but also children too young to understand the meaning of an oath and insane persons, for they also are not excluded from its terms. It will not do to say that one at common law incapable of taking an oath because of the lack of one element, viz: religious belief, is admitted by the general terms of this act, and one likewise incapable for want of the other element, viz: understanding, is still excluded.

There are many acts in various states which do have the effect claimed for this one, but they are all drawn so as to expressly exclude all persons whose understanding is too limited to enable them to perceive and to relate their perceptions accurately and truly. Thus the very admirably drawn law of Oregon provides:

"All persons without exception, except as otherwise provided in this title, who having organs of sense can perceive, and perceiving can make known their perceptions to others, may be witnesses."

Among the exceptions we find:

"1. Those of unsound mind at the time of their production for examination."

"2. Children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined or of relating them truly." Hill's Annotated Laws of Oregon, Secs. 710, 711. See also other similar statutes cited in appendix.

The argument heretofore has applied equally to witnesses in both criminal and civil cases. The fourth contention applies only to witnesses in civil cases.
Any capable witness will ordinarily tell the truth. The influences which combine to lead him to do so may be said to be three.

1. Natural indolence.

It is always easier to tell the truth than a lie. This is evi-

4. Section 4 of the act relating to witnesses in civil cases contains no general words making all persons competent, but purports to destroy all incompetency arising from "interest or policy of law." Can it be said upon a reasonable interpretation of these words that the clause destroying all incompetency arising from "policy of law" shall be taken to destroy that incompetency which at common law was thought to lie at the very basis of the law of evidence—that which was deemed to render a man incapable of subscribing to an oath and wholly unworthy of belief? Under the usual rules of interpretation of statutes in derogation of the common law this view is inadmissible. That the act cannot have such an effect is of course much clearer when we remember the first reason advanced, supra, i.e., if incompetency arising from religious belief is abolished, so is that arising from defective understand-}

Moreover judicial authority is against the position assumed. In Tioga County v. South Creek Tp., 75 Pa. 433, it was contended that precisely this same expression as used in the act of April 15, 1869, P. L. 30, rendered a wife a competent witness to prove non-access of her husband. Mr. Justice Gordon delivered the opinion of the court, in the course of which he said:

"But the counsel for the appellant insists that the case is within the purview of the act of 1869. The language of that act at first blush might seem to include a case of this kind. 'No interest or policy of law shall exclude a party or person from being a witness in any civil proceeding.' The words we have italicised are those relied upon to support the appellant's theory. But when we come to consider the fact that 'the interest or policy of law' which the legislature had in view in passing that act was that which, before that time, excluded parties from testi-

fying in their own suits, or where they had an interest in the subject matter in controversy, it becomes obvious that a case, such as the one under discussion, was not in the legislative mind when the act was passed. It would, therefore, be an unnecessary and violent construction of the statute to make it include a 'policy of law' wholly different from that under contemplation when it was framed. We, therefore, without hesitation, adopt the view taken of this question by the learned judge of the Court of Quarter Sessions, and agree with him that the act of 1869 was not intended to abolish a valuable rule of law founded in good morals and public decency." See p. 437.

The same rule was re-affirmed in Jane's Estate, 147 Pa. 527, which was decided after the passage of the act of 1887.

If "policy of law" does not have reference to a rule excluding a wife as a witness to prove non-access, it would be quite unreasonable to
dent because the memory only is exercised in relating a thing as it really happened, whereas otherwise the creative imagination must be used. While the memory must prompt the witness so that he weave not a "tangled web."42

contend that it includes that relating to incompetency arising from defect of religious belief—a rule thought at common law to be much more fundamental than the other. See also Bank of Harrisburg v. Rhoads, 89 Pa. 353, at p. 356, where Mr. Justice Sterrett remarks, "All witnesses are now prima facie competent so far as interest and policy of the law are concerned," showing that he did not think the act admitted all witnesses not expressly excluded. The argument of counsel to the effect that "policy of law" had reference to that class of witnesses hitherto excluded not by reason of a direct interest, but on account of mercantile policy resulting from interest, was apparently adopted by the court. See also Karns v. Tanner, 66 Pa. 257.

In Com. v. Kaufman, 1 Pa. C. C. 410, there is a dictum by Latimer, J., to the effect that an ordinary witness would be excluded by defect in religious belief, although in the case before him the defendant, he said, should be admitted. Parties to the action have long been admitted at common law irrespective of their belief. See Hronek v. People, 134 Ill. 139; Appleton on Ev., p. 28; 1 Greenleaf on Ev., Sec. 370, note; Searcy v. Miller, 57 Iowa, 621; Dyer v. Dyer, 87 Ind. 20; Free v. Buckingham, 59 N. H. 226; Donelley v. State, 2 Dutch. 506; Stanbro v. Hopkins, 28 Barb. 268.

Finally Judge Briggs, in Lucas v. Piper, 40 L. I. 5, has decided that since the act of 1869, containing the identical language of the act of 1887 on this point, witnesses in civil cases are still incompetent if they do not believe in a God who will punish for false swearing.

If Clinton v. State, 33 Ohio St. 27, supra, be accepted as authority, it could be said further that inasmuch as only those persons who have conscientious scruples against swearing are allowed to affirm in Pennsylvania (acts of 1718, 1 Sm. L. 105, and 1772, Ibid. 387) atheists or unbelievers cannot testify in any event, since they cannot take either oath or affirmation even if otherwise competent. I do not subscribe to the narrow view of that court however. To say that an unbeliever cannot affirm in Pennsylvania, if otherwise competent, would be to declare that he is incapable of having conscientious scruples against a reference to a deity in which he does not believe—a position which I am not prepared to assume.

In Porto Rico and the Philippine Islands it seems that religious unbelief does not disqualify a witness, although all are required to be sworn. See as to these points Sundry Laws, Vol. II, p. 162; Civil Procedure, p. 137.

* See Bentham's Judicial Evidence, Vol. I, Ch. XI, p. 201 et seq., where this idea is elaborately worked out. See also generally as to this topic Best on Evidence, p. 8 et seq. (ninth ed.).
2. Fear of disgrace.

From the earliest times truth has been venerated and lying despaired. Particularly does infamy attach to him who tells that which he knows to be false, upon a solemn occasion when the rights of others depend upon his words.

3. Religious belief coupled with fear of punishment by a divine agency. Practically all religions teach that men will suffer divine punishment for lying. ⁴₃

On the other hand, there may be many influences more concrete which tend to lead a witness to distort or conceal the truth or to create fabrications. These influences arise from motives which may be present in any particular case—motive of interest, pecuniary or otherwise, fear, love, hate, sympathy and others which it is unnecessary to enumerate.

In order to accentuate the tendency to tell the truth, until in ordinary minds it would overbalance any contrary tendency, two artificial restraints upon the propensity of a witness to prevaricate were made use of by the common law:

1. The institution of the oath.
2. Temporal punishment for perjury.

The first, as we know, appealed to his fears of divine vengeance for the blasphemy connected with a false oath and the second appealed to his fears of human punishment. The prospect of the latter may of course influence all witnesses, that of the former those only who believe in it. The precise question, therefore, raised by a proposition to admit unbelievers, is whether the absence of the one artificial restraint of the oath will render the evidence so unreliable that it should be rejected altogether, although all the other influences toward truth-telling are present.

It is the policy of the law to obtain all the light possible upon the question of fact before the court and jury. No evidence should be excluded unless it is reasonably certain that it will be wholly unreliable or insidiously deceptive.

⁴₃ It is said that the Hindoo code alone sanctions lying in certain specified instances. 1. Bentham on Evidence, 235; Halhead's Code of Gentoo Laws, Bk. 4, C. 3, Sec. 9. Thus one may lie to free himself except, as Bentham remarks, where he has committed a crime of "particular atrocity," such as murdering a cow or drinking wine. Halhead's Code of Gentoo Laws, pp. 129, 130. One may also tell three lies for the purpose of procuring for himself a wife. Ibid.
Even though it may be distrusted, it should be received and the jury should judge of its credibility. A serious injury is done to the administration of justice whenever any evidence which is at all reliable is rejected. It is evident therefore that if the lack of the religious sanction is proper in any case to be shown, such lack should go only to the credibility and not to the competency of the witness. To adopt a contrary idea is to say in effect that an unbeliever is an infamous monster, who seeks to maliciously deceive upon all occasions for no reason except a wicked desire to do wrong.

I suppose no one will at this day subscribe to so cruel and unchristian a doctrine, especially when we reflect that unbelief is not the result of a wicked heart, but is merely a failure to understand or appreciate the evidence of the existence of an eternal God. "There is more faith in honest doubt than in half the creeds."

The assumption that unbelievers are wholly unreliable is of course entirely false, as everybody knows. Many of the most eminent scientists of the last century would, under the common law, be incapable of being witnesses. To say that Darwin, Huxley, Tyndall and many others who could not avow a belief in God, were entirely unworthy of credit is mere nonsense.

If the witness, be he atheist or pretended Christian, is an infamous person, who has led a life so wicked as to render him unworthy of credence, the evidence of this, equally in both cases, can of course go to the jury for the purpose of destroying the effect of his words. Whether or not an individual will tell the truth depends far more on his personality, his good character, his moral education, etc., than upon his belief. Some men will under no circumstances tell a lie, others will on all occasions where their interest prompts them to do so, and neither human nor divine sanc-

"The judges of earlier times, however, were quite of the other opinion. Lord Chief Justice Willes said atheists should be excluded "because an oath cannot possibly be any tie or obligation upon them." Onychuard v. Barker, Willes, 538, and in Norton v. Ladd, 4 N. H. 444, the court said. "He who openly and deliberately avows that he has no belief in the existence of a God, furnishes clear and satisfactory evidence against himself that he is incapable of being bound, by any religious tie, to speak the truth, and is unworthy of any credit in a court of justice."
tion will stop them. If the charge of unbelief be allowed at all, surely it should be but one element tending to show that the evidence received ought not to be given undue weight by the jury, and never to exclude the person from the witness stand.

There are certain other serious objections to the rule excluding atheists. It places in the power of an unwilling witness, who wishes to save his fellow-criminal and is yet unwilling to incur the penalties of perjury or to run the risk of cross-examination, a method by which he can disqualify himself. All he has to do is to avow his unbelief, or pretend unbelief if he believes, and the thing is done, his evidence cannot be received. This is not an improbable supposition. Cases have occasionally happened where women have married accused persons to avoid testifying against them.

Moreover, the continued exclusion of atheists and unbelievers is grossly inconsistent with the later development of the law. It has already been remarked that religious unbelief is only one of several disqualifications which existed at common law—among which were pecuniary interest in the decision of the controversy and conviction of an infamous crime. The first of these has been totally destroyed and the second nearly so by modern legislation. At the present time, therefore, in a large portion of America a condemned murderer or a man of known evil character whose interest will be vitally affected by his evidence may testify, while an atheist, although educated, refined, of spotless integrity and the highest character, cannot. This is an anomaly which should not be allowed longer to exist.

But the most fundamental objection is that the rule entirely fails to do that which it intends, and excludes atheists or unbelievers only under circumstances which belies and disproves the assumption that their word is unreliable.

Whether or not a man believes in the existence of a God who will punish him for false swearing is a psychological

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*See Bentham on Evidence, Vol. V, p. 131; Appleton on Ev., C. II, where this and various other arguments against the exclusion of atheists are developed.
*See supra.
fact—it is a state or condition of his mind. How shall we discover what that condition is? There is only one human being who can possibly know, viz: the man himself. Shall we ask him? Surely not, for we suspect he may be an unbeliever, and if indeed he declare himself to be, will this not raise a presumption that he is deceiving us and secretly believes while alleging his unbelief? And if, therefore, because we think he speaks falsely when he says he believes not, shall we not admit him on the theory that in fact he does believe? In which case he has already proven himself a liar and unworthy of credence. This sounds like foolish sophistry, but if we seriously examine into the matter it is no more foolish than the rule itself.

Your knowledge of the state of your brother's mind must come from him—there is no other way. You may learn of it from his present declarations to you or from his past declarations, either oral or written. When, therefore, a man is offered as a witness, how shall we show to the court that he is "utterly unworthy of belief"? We must show that either in the past, or now before the court, he says *and says truly that he believes not. There are, therefore, two ways that may be resorted to: First, produce witnesses who in the past have heard the suspected atheist declare his disbelief in God; second, interrogate the man himself on his voir dire.

Evidence of the first kind is unsatisfactory for several reasons and indeed seems wholly irrelevant. It is unsatisfactory because at best it is but hearsay, declarations which cannot be said to be against interest made not upon a judicial occasion, but perhaps during a frivolous and loose conversation. Thus in *McFadden v. Com.*, the evidence was that the man whose religious belief was questioned had on a previous occasion "in quarreling with his fellow-jurors" said that he "did not care for the Bible any more than for a spelling book" and that he was "a Tom Paine man and would as lief swear on a spelling book as on a Bible." In *Brock v. Milligan* it was testified that the witness accused of unbelief had in a casual conversation, about three years before, stated that "a man was like the beast: had nothing to

47 33 Pa. 12.  48 to Ohio, 121.
do after death; and that after that period there would be nothing more of him."

The character of such evidence as this is very questionable in any event. The statements may have been made under circumstances of peculiar provocation, as in 

_McFadden v. Com._, where after a long, tiresome dispute a juryman made some impious remarks. Any man of a not very reverent nature is apt sometimes to make unthinking remarks which when repeated from memory by a hearer may disqualify him as a witness. As was remarked in _Easterday v. Kilborn_, "You take a man’s loose declarations and introduce them against him, without assurance that those who give them do not think as he does, and then adjudge that he is incompetent to testify, although you believe he will tell the truth, and would confide in him as soon as in any man." 49

Moreover, is not such evidence irrelevant? What is the question at issue? It is whether the proposed witness _now_, at this moment, believes in the existence of a God who will punish him if he violates his oath. Whether, should he be admitted _now_ as a witness, he could feel the influence of the religious sanction. The question is not whether he made impious and blasphemous remarks at some time in the past, nor whether in fact he was at one time a pronounced atheist. The inquiry must be confined to the present state of his mind. It may be said that the fact that the person under examination was an avowed atheist a year or two ago is evidence that he is now. This argument at first thought appeals to one’s reason, but its soundness is questionable. It depends upon the assumption of consistency. "With consistency a great soul has simply nothing to do. . . . Speak what you think now in hard words and to-morrow speak what to-morrow thinks in hard words again, though it contradict everything you said to-day." 50 Even if the previous declarations were made only a short time before the trial, 51 this would prove nothing. There is no reason why one’s belief may not be changed in the twinkling of an eye by the observation of some fact never before noticed or perhaps by

49 Wright, 345.  
50 Emerson, Essay on Self-Reliance.  
51 In _Brock v. Milligan_, _supra_, the witness’s declarations were made three years before. In _Blair v. Seaver_, 26 Pa 274, two years before, etc.
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giving serious thought to the matter for the first time, as seemed to be the case in State v. Townsend.\textsuperscript{52}

Whether the testimony of other persons as to what the proposed witness has said in the past be relevant or not, it is a very low grade of evidence indeed and cannot stand against the positive declarations of the witness himself, which constitute after all the only direct evidence of the state of his mind that it is possible to get. It has, therefore, come to be recognized that the proper way to ascertain the witness's belief is to interrogate him on his \textit{voir dire}. If he avow his unbelief, he is to be excluded; if he deny it, he must be admitted even though there may be extrinsic evidence tending to show unbelief in the past. There is not entire unanimity on this point, but the great weight of authority is in favor of the law as stated. The English cases all say interrogation of the witness is the only proper way to find out his belief.\textsuperscript{53} The English text-writers also take the same view,\textsuperscript{54} and one Phillips,\textsuperscript{55} says that the \textit{only} way is to ascertain it from the witness himself. On the other hand, some of the American cases have fallen into the error of deciding that the fact is to be proven by extrinsic evidence only, and that the proposed witness will not be allowed to contradict or explain his previous declarations.\textsuperscript{56} The absurdity of this view is apparent when we consider that the statement now made by the witness that he believes, is no contradiction of the testimony of the other witnesses. He may not deny that he made the statements attributed

\textsuperscript{52}2 Harr. 543. The court here, however, refused to consider the witness's statements at all, apparently assuming that the testimony of other witnesses who had heard loose declarations of his in the past, conclusively proved that he did not believe, no matter how much he might protest that he did.

\textsuperscript{53}The Queen's Case, 2 B. & B. 284; King v. Taylor, Peake 11; King v. White, 1 Leach C. L. 430; King v. Serra, 2 C. & K. 56; Maden v. Catanach, 7 H. & N. 360

\textsuperscript{54}1 Stark on Ev. 93; Gresley's Eq. Ev. 332, n. (c); Bentham on Ev., p. 127 \textit{et seq.}; Best on Ev., Sec. 161.

\textsuperscript{55}Page 20.

\textsuperscript{56}State v. Townsend, 2 Harr. 543; Curtis v. Strong, 4 Day, 51; Jackson v. Gridley, 18 Johns. 98; Brock v. Milligan, 10 Ohio, 126; Com. v. Smith, 2 Gray, 516; Smith v. Coffin, 6 Shep. 157; Odell v. Hopper, 5 Heisk. 88; Scarcy v. Miller, 57 Iowa, 621; Com. v. Wyman, Thacher C. C. 432; Com. v. Burke, 16 Gray, 33.
to him, all that he denies is that a doubtful presumption that he at some former time disbelieved cannot affect his testimony now because it no longer exists. Therefore reduced to its lowest terms all that the witness denies in averring his belief, is the presumption that another presumption still exists.\(^5\)

Later American cases, however, evidently realizing the incongruity of refusing to hear the witness as to a point neither affirmed nor denied, have very generally allowed the suspected unbeliever to be heard.\(^5\)

This erroneous view can be traced to a misconception of a note to the third volume of Christian's Blackstone. Greenleaf in his book on Evidence (section 370) says the witness is not to be interrogated, citing the note in question. This note has a different meaning from the one accredited to it. The note says, "But I have since heard a learned judge declare at nisi prius that the judges had resolved not to permit adult witnesses to be interrogated respecting their belief of the Deity and a future state. It is probably more conducive to the course of justice that this should be presumed till the contrary is proved." The true meaning of this note is not that no adult witness may be permitted to state his belief, but merely that he ought not to be interrogated until the presumption of his belief has been overcome by extrinsic evidence.

This erroneous view has, however, been adopted by some American text writers (see Headley on the Competency of Witnesses, p. 23), and is the foundation of the decisions referred to.

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Greenleaf further says that one is not questioned before he is sworn for the purpose of hearing his testimony as to facts, but merely for the purpose of ascertaining his capacity to understand and relate, etc. This is inconsistent with the next section, 371, where he says each witness is to be sworn in the manner which he shall declare to be binding on his conscience, and that the proper time to make this inquiry is before he is sworn.

This view of Greenleaf has, however, been adopted by some American text writers (see Headley on the Competency of Witnesses, p. 23), and is the foundation of the decisions referred to.

\(^5\) C. M. T. R. R. Co. v. Rockafellow, 17 Ill. 541; Clinton v. State, 33 Ohio St. 27; Arnd. v. Amling, 53 Md. 192; 20 Amer. Law Review, 95; Hagan v. Carr, Phila. Co., Pa., C. P. 284, D. T. 1898 (unreported case); Quinn v. Crowell, 4 Whart. 334; Jones v. Harris, 1 Stroh, 160; Bennett v. State, j Swan, 411; Harrell v. State, 1 Head. 125; U. S. v. White, 5 Cranch C. C. 38; U. S. v. Kennedy, 3 McLean, 175; Thurston v. Whitney, 2 Cush. 101; The Merrimac, 1 Ben. 490. The repetition of authorities in detail is unnecessary, as the most common way of ascertaining the belief is, as is well known, by interrogating the witness himself. See cases cited supra.
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v. Com., says: "When a witness is objected to for defect of religious belief, the rule is to let him speak for himself, and if he professes faith enough to give a religious sanction to his oath, his testimony is taken," and in Cubbison v. McCrae, Sergeant, J., commented unfavorably upon the rule in Connecticut and New York to the effect that the witness himself could not be heard.

Inasmuch as the only feasible way of ascertaining one's religious principles is through his own declarations, the absurdity and uselessness of the rule excluding atheists and unbelievers becomes clearly apparent. What is the purpose of the exclusion? Not to punish a man for an impious avowal,—not for impudently asserting that there is no God. We do not exclude him because he is an atheist, but because we assume he will not speak the truth; because we think not having the religious sanction, he will not feel bound to keep faith with the court. But since we must depend upon his own candor to enable us to exclude him on this ground, therefore we deny him the right to testify, because we believe him when he says he is an atheist.

Bentham in his own forceful, half-humorous style thus puts it, "Next let the answer be, Yes, I am an atheist. Then, indeed, the man must be an atheist; at any rate he must be taken for an atheist. But shall this answer be regarded as a piece of evidence warranting the exclusion? No, surely, and for this reason: The answer is either false or true. If false, the supposed cause of the exclusion fails in point of fact. He is not an atheist; he cannot, therefore, with propriety be excluded on the ground of atheism. If the answer be true, the cause of exclusion fails to the ground; the presumption of mendacity, the presumption grounded on the atheism is proved to be erroneous.

It requires a man of more than usual frankness and regard for the truth to avow such sentiments upon such an occasion. If he does avow them the consequences are severe. He subjects himself certainly to criticism, if not to infamy, as was once thought; he makes it impossible for himself to be a witness, in a case in which perhaps he desires to testify—

possibly he may be an expert who depends upon his right to testify for his living. The presumption therefore of mendacity is not only completely destroyed, but is sup- planted by another, the strongest kind of presumption that the witness will adhere strictly to the truth. He may indeed be lacking the religious sanction, but he has shown that the other inducements to truth-telling are present in him to an extraordinary degree. How palpably inconsistent to exclude such a man and to admit an abandoned criminal who declares, whether true or false, that he believes in a God!

But the rule fails to do what it purports to do, viz: exclude believers. Whom does it exclude? Some believers, yes. Those who are incredible, no. Those unbelievers who declare they believe are admitted, while those who declare their real sentiments are excluded. In short, the abandoned lying atheist is a good witness, but a conscientious, frank one, never! Let us assume that the common law presumption is a true one, viz: that the atheist will never tell the truth, but goes about seeking to deceive all persons on all occasions. Suppose such an one is interrogated on his voir dire. How easy to say he believes, thus escaping all the infamy of an impious avowal and rendering himself competent to impose his lying evidence upon court and jury! The supposed security, therefore, in fact does not exist.

The next question which it is proposed to discuss is as to the propriety of hearing evidence concerning one's religious belief for the purpose of affecting his credibility as a witness. The common law rule, as laid down by Chief Justice Willes in Omychund v. Barker, is that evidence may be introduced to show that the witness is not a Christian for the purpose of attacking his credibility. He says: "Before I conclude this head I must beg leave again to take notice of what is said by Lord Hale, that it must be left to the jury what credit must be given to these infidel witnesses: For I do not think that the same credit ought to be given either by a court or a jury to an infidel witness as to a Christian, who is under much stronger obligations to swear nothing but the truth. The distinction between the competency and credit of a witness is a known distinction.

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Willes, at p. 550.
and many witnesses are admitted as competent to whose credit objections may be afterwards made. The rule of evidence is that the best evidence must be given that the nature of the thing will admit. The best evidence which can be expected or required according to the nature of the case must be received, but if better evidence be offered, on the other side, the other evidence, though admitted, may happen to be of no weight at all. To explain what I mean, suppose an examined copy of a record (as it certainly may) be given in evidence; if the other side afterwards produce the record itself, and it appears to be different from the copy, the authority of the copy is at an end.

"To come nearer to the present case; supposing an infidel who believes in a God and that He will reward and punish him in this world, but does not believe in a future state, be examined on his oath (as I think he may), and on the other side to contradict him a Christian is examined, who believes a future state and that he shall be punished in the next world as well as in this, if he does not swear the truth, I think that the same credit ought not to be given to an infidel as to a Christian, because he is plainly not under so strong an obligation."

It is startling, to say the least, to think that at this day evidence can be introduced to show that a witness is a Jew or a Mohammedan or a Buddhist, for the purpose of lessening his credibility, but the law has not been changed since Omychund v. Barker, except partially in America. The reason it has not been is probably due to the fact that such evidence is rarely introduced, almost never has it been in America, except in a few cases to impeach the evidence of Chinese witnesses."84

In ordinary cases it would probably prejudice the jury against the side of the party offering it, much more than it would incline them against the testimony of the "infidel."

"See People v. Chin Mock Sow, 51 Cal. 597, where the court allowed evidence to be introduced as to the Chinese idea about transmigration of souls. The real purpose was probably to impress the jury with the absurdity of such ideas and thus raise a doubt as to the intelligence of the witness. In this particular case, however, the counsel failed to connect the witness with the belief in question."
The production of evidence to show unbelief or atheism, however, is not at all uncommon and it may be done for the purpose of attacking the credibility of the witness in England and in nearly all the states and territories in America. In fifteen express statutes allow the credibility to be thus attacked and in all the remaining ones, with four exceptions, there is no provision on the point, hence the common law rule prevails.

The objections to allowing inquiry into religious belief for the purpose of attacking the credibility of a witness are much the same as those which have been discussed in opposition to the rule making religious belief a test of competency.

The great and fundamental objection is that the proof of the fact itself depends upon the frankness of the person under examination, at a time and under circumstances which

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63 The Oaths Act, supra, does not touch the question of the admission of evidence of religious belief for the purpose of questioning the credibility of the witness, hence the rule is left as at common law.

64 Viz: in Arizona, California, Colorado, Connecticut, Georgia, Idaho, Indiana, Maine, Massachusetts, Minnesota, Montana, Nevada, New Mexico, Tennessee and Utah. See appendix.

65 The four are Alaska, Kentucky, Oregon and Vermont, whose constitutions forbid inquiry into the religious belief of the witness. See appendix. As to the rule in the remaining states, see Hunscom v. Hunscom, 17 Mass. 184; Atwood v. Welton, 7 Conn. 69; People v. McGarren, 17 Wend. 46; People v. Matteson, 2 Cowen, 473 (note); Cubbon v. McCrory, 2 W. & S. 262; Blair v. Scaer, 26 Pa. 274; Scarey v. Miller, 57 Iowa, 613; Dedrick v. Hopson, 62 Iowa, 562; Wilder v. Peabody, 21 Hun. 376; U. S. v. Kennedy, 3 MeLean, 175; Jones v. Harris, 1 Strohri, 169.

In four states however, viz: Colorado, Michigan, Oregon and Washington (see appendix) it is forbidden to question the witness concerning his belief, so that if evidence be introduced to affect his credibility, it must be of an extrinsic nature. The same result has been reached in Kansas, where it has been decided that the constitutional provision abolishing religious belief as a test of the competency of a witness prevents him from being questioned about the subject. Dickson v. Beal, 62 Pac. 724. In Kentucky it has been decided that constitutional provisions that one's civil rights shall not be affected by his religious belief, prevent inquiry into the subject for the purpose of affecting one's credibility as a witness, atheists and believers being declared to be an absolute equality. Bush v. Com., 80 Ky. 244. This was also the rule in Massachusetts (Com. v. Buzzell, 16 Pick. 153), until a later statute altered the law. See appendix.
most strongly tempt a man to deceive. As has already been pointed out, the only true way to show the state of one's mind, and the way it is done in practically all cases where a witness is impeached on this ground is to examine him. If he avow unbelief or a belief different from the common one of the country, it must necessarily expose him to consequences which he would much prefer to avoid. Therefore, if he has so high a sense of personal honor that he will not deceive even to save himself much annoyance, to put it mildly, this instead of casting a shadow of distrust over his testimony should be the best possible proof that it is to be given full credit.

It should again be recalled that there are many influences which in the mind of any ordinary man tend toward truth-telling—the sanction resulting from a religious belief is but one of these—and in the mind of the average witness it is a question whether it is of much, if any, practical force. The prospect of temporal punishment on the one hand, or of possible pecuniary gain on the other, are of far more importance in the minds of many, perhaps a majority of persons who testify upon the stand, than a vague shadowy fear of some punishment in the dim future, the character of which is not known to any person upon the earth.

Besides there is always the saving thought that one may repent before he is called to account for the deeds done in the body and thus may escape punishment altogether. Be this as it may, it is surely incongruous to urge the fact that a witness has acknowledged himself to be an unbeliever, as a blow to his credibility, while the lying, deceitful believer escapes wholly such imputation.

Then it is clearly foreign to the spirit of our American institutions to permit such sacred subjects to be probed by perhaps unbelieving and scoffing lawyers. The relations which exist between man and his God ought to be forever secure from prying inquisition. One's belief or unbelief, which are not matters of will or motive, ought to have no connection with or effect upon any civil right or capacity whatsoever. The existence of the common law rule is a survival of the intolerance of the time of Lord Coke, for it is based upon the assumption that Christians only are to be
fully trusted to follow the dictates of honor; and that non-
Christians and unbelievers are perpetually under the ban of
suspicion for the opinions which they hold and perhaps can-
not change. It should be abolished by statutory or consti-
tutional-provisions permanently prohibiting any inquiry into
one’s religious belief upon any pretence whatever and estab-
lishing at last entire freedom of conscience.

Irrespective, however, of the rules concerning the admiss-
ion or exclusion of atheists the oath is still required of most
witnesses in modern judicial proceedings. Having grown
up with the common law, as we have seen, it still seems
firmly imbedded in our legal procedure. Whether it is a
living plant or one from which life has long since departed,
so that it may be safely rooted up and thrown upon the rub-
bish heap of old and useless customs, is the last topic which
will be discussed in these pages. It is necessary to know
first whether the essential idea which lies at the bottom of
the institution is the same as the one which existed in its
early stages. The entire usefulness of the oath as a guaran-
tee of truth depended, as we have seen, upon a belief of the
witness, that by reason of the ceremony, divine vengeance
is stirred up against him, provided he tells a falsehood.
This was fully recognized by both civil and common law,
and is as true to-day as it ever was. Puffendorf defines an
oath to be a religious asseveration, by which we either
renounce the mercy or imprecate the vengeance of heaven,
if we speak not the truth, and says,68 “The scope and mean-
ing of oaths is . . . that persons might be more firmly
engaged to tell the truth . . . by the just awe and dread
of the Divinity . . . whose wrath they thus knowingly
invite upon their heads if they knowingly deceive.” Phillips says, “A witness in taking an oath, must be under-
stood to make a formal and solemn appeal to the Supreme
Being for the truth of the evidence which he is about to give,
and further, to imprecate the divine vengeance on his head

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68 P. 334.

68 Gratius, Liber II. Cap. XIII. Sec. X, says similarly, “Forma juris-
jurandi verbis differt, re convenit. Hunc enim sensum habere debet, ut
Deus invocatur, quae duo in idem recidunt.” See also definition of
Fleta and Britton, supra.
EFFECT UPON THE COMPETENCY OF WITNESSES. 415

if what he say shall be false.” There is no doubt that this is the true and essential common law meaning of an oath. In Rex v. White, the court said: “An oath is a religious asseveration, by which a person renounces the mercy and imprecates the vengeance of Heaven if he do not speak the truth.” And in the Queen’s case, Lord Chief Justice Abbott said that in taking the oath a witness “has imprecated the divine vengeance upon his head if what he shall afterwards say is false.” We find substantially the same words used by Daggett, J., in Atwood v. Welton, “The oath is an appeal to God by the witness for the truth of what he says and an imprecation of divine vengeance upon him, if his testimony shall be false,” and in Arnold v. Arnold, the court says, “An oath is well defined to be a solemn invocation of the vengeance of the Deity if the person sworn do not regard the requisitions of the oath.” In its essential features therefore the oath is a religious ceremony which is thought to impose upon the swearer an added obligation to tell the truth, in that if he violate his oath he will suffer divine punishment greater than that which he would have suffered had he told an untruth when unsworn.

1 Phillips on Ev. 16. 2 Leach C. L. 430. 3 Brod. & Bing. 285.
4 Conn. 66, st p. 73. See also Perry’s Case, 3 Gratt. at p. 638.
5 13 Vt. at p. 367.

It has been suggested by some text writers that the true purpose of the oath is not to imprecate divine vengeance for false swearing or to impose an added obligation upon the witness to tell the truth, but that it is to solemnly remind him of his existing obligation to God to tell the truth at all times. Thus Tyler in his book on Oaths says, at p. 12, “An oath is an outward pledge given by the juror (swearer) that his attestation or promise is made under an immediate sense of his responsibility to God,” and Greenleaf adopts this sentiment at Sec. 328 of Vol. 1 of his book on Evidence. He says, “The design of the oath is not to call the attention of God to man, but the attention of man to God; not to call on Him to punish the evildoer, but on man to remember that He will,” quoting Tyler’s definition. Best also says, at p. 42, Sec. 58, “Imprecation is, however, no part of the essence of an oath.” Almost the exact language of Greenleaf is used in a dictum by Ashburn, J., in Clinton v. State, 33 Ohio St., at p. 33. He says: “The purpose of the oath is not to call the attention of God to the witness, but the attention of the witness to God; not to call on Him to punish the false swearer, but on the witness to remember 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 insures the utterance of truth.”
Omitting all reference to merely superstitious practices among the ancients, a very material idea of the functions of the Deity was entertained by practically everybody at the time when the common law was emerging from the chaos.

Further credence to this view is lent by the method sometimes used to examine children as to the extent of their knowledge of the meaning and obligation of an oath. In England prior to the act of 1869, supra (when unbelievers were incompetent), it was necessary that an infant should understand the nature and obligation of an oath, else he could not be sworn. Best on Evidence, Sec. 151, et seq. But since the disability arising from defect of religious belief has been removed, it is sufficient if the child has enough intelligence to understand the moral obligation to speak the truth; the question of some added punishment, to be invoked by an oath or suffered for its violation, enters not into the question. Ibid., Sec. 155, et seq.

In America of course the same rules should follow. In those states where the incompetency arising from defect of religious belief yet exists, a child should logically be required to give evidence that it understands (or seems to understand) what is meant by the obligation of an oath. The courts, however, have in a few cases departed from this rule, adopting the test of intelligence only. In Com. v. Ellenger, 1 Brewst. 352, a girl nine years old, being questioned as to her knowledge of an oath, replied: “I would be punished if I told a lie without taking an oath. I do not know the difference between telling the truth here and elsewhere. . . . God would punish me if I told a lie out of court.” The child was admitted as a witness by Brewster, J., although it is clearly apparent from the above answers that she did not understand what was meant by “oath.” It is very questionable whether this decision be sound law, as the qualification of children as to the necessary amount of religious belief has long been recognized to be the same as that of adults (1 Greenleaf, Sec. 367; State v. Doherty, 2 Overton, 80; State v. Washington, 42 L. R. A. 553; State v. Belton, 24 S. C. at p. 188; Phillips on Ev., p. 11), the only difference being that in the one case the defect arises from lack of understanding and in the other from lack of belief. In those cases where dicta seem to lean the other way, the error probably arose from the examination of similar cases where the test of religious belief has been abolished, e. g., McGuff v. State, 88 Ala. 147.

It is not very clear exactly what the eminent authors quoted above mean by their language. If they mean that the oath as customarily administered with the words “so help me God” does not include an express imprecation of divine punishment, but recognize that the ceremony of the oath is thought to impose an added obligation with an additional sanction, then the distinction amounts to nothing. If there is a distinct obligation derived from the oath resting upon the swearer to speak truly, then it must be that there will be some greater divine
of loose and conflicting customs. They believed that God stands ready to answer human summons and in an outward manner to indicate the guilt or innocence of one accused of a crime. Trial by the ordeal and trial by battle, both so

punishment for a breach of that added obligation; hence whether he expressly invokes that punishment or not is of no consequence. If they mean what the dictum in Clinton v. State, supra, may be construed to mean, viz: that the oath is intended to impose no additional obligation, but merely to remind the witness of his existing obligations, they are clearly in error.

The authorities are uniform (unless Clinton v. State be an exception) that an oath imposes "an obligation" upon the witness. Indeed the very phrase, "obligation of an oath," imports such a meaning. If the only purpose of the oath were to call the witness' attention more particularly to an existing duty, there could be no such thing as the "obligation of an oath." The following cases all contain language too clear to be misunderstood as to the added obligation to speak truly, which one lays upon his soul by taking an oath: Blocker v. Burness, 2 Ala. at p. 355. "An oath is a solemn adjuration to God to punish the affiant if he swears falsely"; Jackson v. Gridley, 18 Johns at p. 103. "It (the oath) is appealing to God to witness what we say, and invoking punishment if what we say be false"; Smith v. Coffin, 18 Me. 157; Bush v. Com., 80 Ky. 244; Shaw v. Moore, 4 Jones 25; Colter v. The State, 37 Cr. Rep. 284; C. M. T. Ry. Co. v. Rockafellow, 17 Ill. at p. 554; Blair v. Searler, 26 Pa. 274; Brock v. Milligan, 10 Ohio St. at p. 123; Searcy v. Miller, 57 Iowa, 613; note by Thacher, J., 4 Am. Jr. at p. 81; Perry's Case, 3 Gratt. at p. 698; Curtiss v. Strong, 4 Day, 51; State v. Washington, 42 L. R. A. 553; Bell v. Bell, 34 N. B. Rep. 615.

Moreover Greenleaf and Best both elsewhere use repeatedly the phrase, "obligation of an oath," in such a way as to leave no doubt that they recognize the common-law idea as already explained. See 1 Greenleaf, Sec. 368: "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."

The very form of the oath is conclusive of the point. The phrase, "so help me God," has always been interpreted, as we have seen, to include a prayer for the continued support and protection of the Deity for keeping the oath and a voluntary renouncement of the same in case of its violation. This is admitted by Mr. F. S. Reilly in an article on "Judicial Oaths," although he subscribes to Tyler's idea - supra, that the oath creates no additional obligation, and, therefore, deprecates the continued use of the common form of imprecation. 1 Jur. Soc'y Papers, p. 435. In view of the fact that the original theory of the oath included an imprecation of vengeance, the burden of showing that a new idea has been engrailed upon the old ceremony is clearly upon those who
common in England at one time, depended upon this belief. Men had not "passed the stage at which they look to the supernatural for proof of doubtful facts. The means of proof are solemn formal oaths and ordeals designed to elicit the judgment of God." The ordeal depended upon a belief that God would interfere in a particular case and suspend natural laws for the purpose of pointing out guilt or innocence. The use of oaths both as a mode of proof and as administered to witnesses, were grounded upon an assumption that God's vengeance would follow the breach of them. Both the ordeal and the oath therefore are seen to depend in the last analysis upon precisely the same idea of the interference of God to assist the procedure of the courts.

As there was implicit faith in the result of the trial by the ordeal, so there was in the efficacy of the oath. God's vengeance would surely follow perjury, hence no man would dare to lie under oath. Puffendorf says, "But when an omniscient and omnipotent being is called to be both a witness or guarantee and likewise an avenger, we therefore presume upon the truth of what is delivered, because we cannot conceive any person to be arrived at such a pitch of impiety, as lightly to stir up the divine vengeance against himself. And hence perjury appears to be a most monstrous sin, inasmuch as by it the sworn wretch shows that he at the same time contemns the divine and yet is afraid of human punishment." So firmly fixed was this idea that no false testimony would be given by a sworn witness that a claim or defence might be affirm it. Indeed if the oath does not involve the idea of an additional bond, then it is of no use whatever, never was, and would long ago have been abandoned. The idea that it is merely intended to remind the witness of his existing obligations is wholly fallacious. Those who favor its continued use do so on the ground that in the minds of many persons it does furnish an additional bond. See infra.

78 See Bigelow, Hist. of Proc. in England 322. Stephen Hist. of Crim. Law in Eng., p. 73, says: "They were appeals to God to work a miracle in attestation of the innocence of the accused person." Bracton, Vol. II, p. 441.
79 Oaths were required at every stage of the procedure. See various forms of them in Bigelow's Hist. of Proc. in Eng. 249, et seq.
80 Page 334.
proven merely by the oath of a party supported by others who swore that they believed him.\textsuperscript{60} And so sure were the ancient lawyers that God's punishment would follow the crime of perjury, that it was not punished by temporal power at all; this it was thought would be interfering with the functions of the Deity.\textsuperscript{81}

The essential thought to be noticed both in the trials mentioned and in use of oaths, was that it was the human ceremony which drew down the attention and action of the Deity. Where God was invoked to point out guilt He would do so and not otherwise. He would inflict punishment for perjury not because lying is sinful but because He had been invoked as a witness to a lie. The witness was not actuated by fear of God's punishment for telling an untruth, but by fear of His vengeance for violating an oath. It was not the essential wrong but the ceremony which afforded the security.

The dawn of more enlightened thought has destroyed or modified these superstitious ideas. The belief that God will interfere to rescue an innocent accused person from a physical predicament disappeared long ago. The ideas as to the efficacy of the oath also have been very greatly changed. Temporal punishment for perjury was an admission that there was doubt about the perjurer getting his deserts from a superhuman power. The idea that one will not dare to lie under oath is so completely obliterated that one method of impeaching the credit of a witness is to bring in others who swear they would not believe him on his oath, a complete reversal of trial by wager of law.\textsuperscript{82}

With the decline of belief in the efficacy of the oath there was a corresponding decline in the belief in its necessity. At common law some form of swearing by which the witness made an appeal to God was absolutely imperative. No

\textsuperscript{60} In IV Bracton, 407, it is said, "Likewise there is a certain oath which is tendered by a party to a party in judgment or by a judge to a party, in which there is no conviction. For it is sufficient for them to wait for the vengeance of God." The procedure in trial by wager of law is set forth in Anonymous, 2 Salk. 68t. See generally Pollock & Maitland's Hist. of Eng. Law and Thayer on Evidence.

\textsuperscript{81} 2 Pollock v. Maitland, p. 541, citing Brunner D. R. G. 2, 68t; Kovalievsky, Droit, coutimier Ossetien, p. 324.

\textsuperscript{82} See 3 Bl. Com. 341.
one could be permitted to testify until he had taken an oath which could be done according to the ceremonies peculiar to his own religion. When the members of the Society of Friends first refused to be sworn there was no thought of admitting their testimony in courts of justice. What security was there that they would speak the truth? They would neither kiss the book, nor raise the right hand and invoke divine vengeance, nor touch the toe of a priest, nor hold the tail of a cow, nor crack a saucer, nor perform any other such ceremony; it was quite clear that their evidence could not be heard. A mere solemn affirmation that their "yea should be yea, and their nay, nay," was as nothing in comparison with the sanction afforded by these rites.

It is a matter of history that Friends and other sects suffered persecution for many years by reason of their conscientious scruples against taking an oath or in any way subscribing to a ceremony which involved a reference to the Deity, and were of course denied the right to be heard in courts of justice.

Finally, however, there came a change of heart. Perhaps the incongruity of receiving the evidence of a mendacious Hindu swinging the tail of a cow in his hand, or of a Chinese man burning a joss stick or cracking a saucer and invariably grinning as he did it, and refusing to hear that of the plain, straightforward Friend, finally forced itself upon the prejudiced minds of the British legislators. Hence in the reign of William and Mary we have various acts of Parliament "for the relief of the people commonly called Quakers." The first one of the kind, passed in 1688, allowed Friends to substitute a declaration of fidelity for the oath of allegiance, beginning with these words, "I, A. B., do sincerely promise and solemnly declare before God and the world," etc.

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1 Phil. on Ev. 15; Omuchu v. Barker, 1 Atkin, 21; Lord Shaftsbury v. Lord Digby, 3 Kebr. 631; 2 Roll. Abr. 686; Rex v. Sutton, 4 M. & S. 532 (note at p. 537).

2 These methods of swearing heathen witnesses were all in use; most of them still are. See infra.

3 It was expressly provided by 13 and 14 Car. II, C. 1, that "Quakers" refusing to take oaths should be fined any sum not exceeding 2s.


5 1 Wm. & Mary, C. 18.
Eight years later, in 1696, the idea that only those who had sworn were fit to be believed was definitely overthrown by an act allowing "Quakers" to testify on affirmation in certain cases, in this wise: "I, A. B., do declare in the presence of Almighty God, the witness of the truth of what I say," etc. Bentham says this exception in favor of Quakers was made because they of all the people in England were recognized to be the most truthful. It indicated a tremendous change in public sentiment. It was an abandonment of all previous ideas on the subject to allow any person to give evidence without having first called down upon himself the wrath of God if he spoke falsely. The members of the Society of Friends were not pleased with the form of declaration as they objected to subscribing to any ceremonial involving what they believed to be a profane and impious reference to the Deity. Parliament, therefore, again intervened for them in 1721 and prescribed the form of affirmation now in general use, viz: "I A. B. do solemnly, sincerely and truly declare and affirm," etc. These provisions have since been extended to Moravians and Separatists and those who have once been members of these sects, and finally to all persons of any denomination who state that they have conscientious scruples against swearing. When the law was changed so as to admit atheists and unbelievers it was provided that their testimony also should be received on affirmation. The same law in all particulars

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*7 & 8 Wm. & Mary, C. 34. Made perpetual by 1 Geo., 1 Stat. 2, C. 6.*

*8 Geo. I, C. 6.*


*17 & 18 Vict., C. 125, Sec. 20; 51 and 52 Vict., C. 46. It was provided in the latter act, "Every person upon objecting to being sworn, and stating, as the ground of such objection, either that he has no religious belief or that the taking of an oath is contrary to his religious belief, shall he permitted to make his solemn affirmation instead of taking an oath in all places and for all purposes where an oath is or shall be required by law, which affirmation shall be of the same force and effect as if he had taken the oath." There were anciently in England myriads of promissory oaths, which had to be taken upon every conceivable occasion, e. g., university oaths, custom house oaths, military
has been extended to India.\textsuperscript{92} and in Canada all who have conscientious scruples may affirm.\textsuperscript{93}

When the first settlers came to America from England they of course brought with them the English law as to oaths, and unless that law were changed by some express enactment, it would continue to bind them. The only colony which would be at all likely to attempt an innovation at a time when oaths were required in England on all occasions, was the Quaker province of Pennsylvania. Accordingly in the laws agreed upon in England in 1682, by William Penn and those who had associated themselves with him for the purpose of founding the new colony, we find one which provides that testimony shall be given in the courts upon simple affirmation without oath as follows: "All witnesses, coming or called to testify their knowledge in or to any matter or thing in court, or before any lawful authority within the said province, shall there give or deliver in their evidence or testimony, by solemnly promising to speak the truth, the whole truth, and nothing but the truth, to the matter or thing in question. And in case any person so called to evidence shall be convicted of wilful falsehood, such person shall suffer and undergo such damage or penalty, as the person or persons against whom he or she bore false witness, did or should undergo; and shall also make satisfaction to the party wronged, and be publicly exposed as a false witness, never to be credited in any court, or before any magistrate, in the said province."\textsuperscript{94}

This law was far in advance of any English law of that day and indeed of this day, and was consequently soon interfered with by the English government and was repealed by its action in 1693.\textsuperscript{95}

The act of 1696, however, which extended to Quakers the

oaths, etc. Their absurdity and uselessness was recognized early in the nineteenth century, and a great many, in fact nearly all such oaths, have been abolished except oaths of allegiance and some few official oaths.

\textsuperscript{92} "Indian Oaths Act." Anglo-Indian Codes, Vol. II, appendix. p. 937.
\textsuperscript{93} Can. Ev., Act of 1893, section 23.
\textsuperscript{94} 1 Col. Rec. XXXII.
privilege of testifying on affirmation was made applicable to the American colonies so that members of that society, except during a short period in Pennsylvania, were never subjected to persecution in America for refusing to swear.

At the time of the Declaration of Independence the law in England allowed only "Quakers" to affirm. Owing to the advanced ideas on the subject of religious liberty in America we might expect more latitude in their early constitutions. Some of them justified this expectation, but others did not. Lack of space prevents an extensive historical review, but in brief the thirteen original colonies generally provided for the affirmation of Quakers; some included Dunkers and Mennonites, and a few all persons having religious scruples against swearing. Some had no express provision, but in their absence the law would stand as it was before the Declaration of Independence, i.e., Quakers only could affirm.

Sentiments of liberality in America have since that time grown steadily, the new states being especially liberal on such matters. Any person having religious scruples against swearing may (as in England) affirm in every state or territory of America except North Carolina, in which only Quakers, Dunkers and Mennonites are allowed such privileges. In nine of these states the affirmation may be taken by any person irrespective of scruples against the oath. In the constitution of Idaho it is provided "Any person who desires it may at his option, instead of taking an oath, make his solemn affirmation or declaration," etc. The provisions of the other states are similar. All which admit unbelievers do so upon affirmation.

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* See appendix.
* The nine states are Alabama, Colorado, Florida, Georgia, Idaho, Montana, Nevada, Rhode Island, Utah and West Virginia. See appendix.
* It has been decided that where the act provides that the affirmation may be taken only where the witness states that he has conscientious scruples against swearing, this statement must be drawn out by the court or objection to the evidence may be taken, even after verdict. *Reg. v. Moore*, 61 L. J. M. C. 80, in which an Indian student requested the usher to administer an affirmation but did not state why he declined to swear. The judge paid no attention to him, and his evidence
What is the true significance of this legislation? The testimony of a very large class of people, some of whom are devoid of any religious belief, is admitted unsworn. Although some text writers have said that the affirmation is in effect an oath, yet this must be taken to mean only that those who affirm do so under the pains and penalties of perjury. There is no appeal to God—no imprecation either expressly or impliedly of His vengeance—merely a solemn declaration that the witness will speak the truth. Therefore the supposed added obligation by the religious ceremony is wholly lacking. And yet does any person ever seek to question this testimony because it is unsworn? On the contrary no distinction is or can be made between that which is sworn and that which is unsworn, but is received on affirmation only.

In Great Britain and her colonies and in all the American states evidence received on oath and that received on affirmation (if given by those having scruples against swearing) is accorded equal weight. And in nine American states sworn evidence and affirmation evidence (irrespective of "scruples") is received without question and upon the same footing. Practically the latter rule is almost universally true; i.e., it is customary for the court crier to administer the affirmation without any interference either by court or attorneys merely upon a request by the witness.

was admitted. For this reason Hawkins, J., assisted by Wills, Charles, Lawrence and Wright, quashed the conviction of the defendant, against whom the evidence in question had been given. This rule would probably not apply where the act does not expressly say that the witness must state that he has religious scruples, but merely that he must have them. It is perhaps a question whether it would be followed in America anyway. See, however, Williamson v. Carroll, 1 Har. 217; State v. Putnam, Coxe, 260; Anon., Pennington 930; State v. Harris, 2 Hal. 361; Coxe v. Field, 1 Green, 215, all New Jersey cases, which decide that an indictment or deposition taken upon affirmation must set forth that the affiants are Quakers or have scruples against swearing.


"I have upon all occasions affirmed instead of taking the oath, and although I have made this request many times, never once have I been called upon to state my membership in the Society of Friends or asked
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All lawyers, and many who are not, know that when a jury or any number of persons are to be sworn together, the crier first says, "All who swear put your hands on the book," etc., and after the oath has been administered, "All who affirm, come forward," etc., or some similar phrases, no questions being asked and no distinction whatever being made between the two classes.

These facts clearly show that, at least from the point of view of those to be affected by the evidence, there is no distinction between the solemnity of the two ceremonial. What is the conclusion? That the idea of an added obligation imposed upon the witness by an appeal to God has vanished—that no intelligent persons any longer believe that God stands ready in the guise of a "sheriff's officer," as Bentham puts it, to devise and inflict a special punishment upon a man for the violation of a ceremonial.

But they show more than this, not only that there is no belief in the oath in its true common law significance, but that even adopting the erroneous ideas of Tyler,108 to the effect that an oath can be deemed merely as a reminder of one's existing obligation to God, it is no longer thought to be of the slightest importance whether the witness swears or affirms.109 This is due to two facts:

1. There is no such reminder in the oath as usually administered. The common form consists: First, Of a promise to tell the truth; and second, of the words "so help you God." The whole is administered in the monotonous sing-song voice so common to court cryers and is usually abruptly followed by the query, "What's your name?" Instead of being calculated to impress the witness with any ideas of God and His laws, it is merely a species of profanity.110

why I preferred to affirm, and nearly always have these requests been made in Pennsylvania courts, where theoretically only those stating that they have conscientious scruples are at liberty to affirm.

108 See note supra.

109 In point of fact this is not the main purpose of the institution of the oath, but it was deemed to act as a solemn reminder as well as to impose an added tic. See supra.

110 Edward A. Thomas, in an article in the North American Review for September, 1882, says: "Notwithstanding the dignity of our courts
2. The conviction of most men that religious belief or duty to God, if firmly rooted in one's nature, will govern him on all occasions without the assistance of a "reminder," and that if he has no sufficient convictions of his duty to God in the matter of truth-telling, such convictions are not likely to be suddenly called into being by the dreary song of the court crier.

It seems therefore that modern legislators, judges and attorneys think of the oath merely as a form to be gone through with by the witness, for the purpose of notifying him that from the moment he subscribes to it his words become of great importance because they are spoken upon a judicial occasion when the rights of others depend upon them—that he is expected to tell the truth without equivocation or concealment—that should he fail to do so, his words will probably be shown to be false by cross-examination and that in case of detection, punishment for perjury awaits him—a promise is also exacted from the witness, to which, if he be an honorable man and particularly if he has

of justice, the customary methods of tendering oaths are far from impressive, and to people possessed of great veneration are somewhat shocking. The person who administers them is not usually eminent for piety. To obtain the position of clerk, he must rather have evinced political shrewdness and profound sagacity. He is far better acquainted with the voters of the Ninety-ninth Ward than with the Psalms of David or the Holy Gospels. He hardly seems to be the proper person to invoke the Supreme Being to aid a faltering witness, or to denounce the wrath of heaven upon the one who gives false testimony. Upon the opening of a term of court, one of the first duties of the clerk is to swear the grand jury. Directing the one who has been selected as foreman to stand up, he hurries through with the prescribed form in a manner scarcely intelligible to those even who are familiar with it. The rest of the grand jury are then sworn in squads and platoons, without having the oath repeated to them, and at the close the man of cleanliness and refinement is compelled to bow down and kiss the same ancient and greasy volume, which for years has been used for similar purposes, with his next neighbor, whose mouth has never known a tooth brush, whose lips are dripping with tobacco juice, and whose breath is redolent of whisky and onions. Is it remarkable that some should prefer to be sworn with the uplifted hand? Then as each witness takes the stand the Supreme Being is again called in by the clerk to assist in the judicial proceedings and to brace up the witness to do his duty."
religious convictions, he will strictly adhere. All this the affirmation accomplishes. The query then naturally arises, why retain the oath, a religious ceremonial which appears to have become but an idle form?

The proposition to abolish the use of the oath altogether is not a new one. Aside from the influence of religious people who do not believe in swearing, many legal minds have for more than one hundred years conceived that this ceremony has outlived its usefulness. Bentham, writing early in the nineteenth century, says that it is utterly useless and that the supposed obligation which it imposes upon the witness is a myth; that he heeds it not at all in comparison with the other influences which affect him. Pothier thus expresses his convictions, "A man of integrity does not require the obligation of an oath to prevent his demanding what is not due him; and a dishonest man is not afraid of incurring the guilt of perjury. In the exercise of my profession for more than forty years, I have often seen the oath deferred; and I have not more than twice known a party restrained by the sanctity of an oath from persisting in what he had before asserted."

The Indian Law Commissioners, in a report in 1856,

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103 There are no doubt many members of the above-mentioned classes who would deny holding such an opinion. All that is meant is that the existing legislation and customs point to the universality of such an estimate of the oath.

104 The abolition of a large number of oaths used on non-judicial occasions was accomplished in England a number of years ago. Chitty's Eng. Stats., Col. VIII, title "Oaths and Affirmations." See supra.

105 Bentham on Ev., Vol. I, Chap. 6. Bentham says, however, that if the oath is to be used at all it should be made effective, and makes various suggestions tending to that end. Thus he says, inter alia, that it would be well to emphasize the terror of religious punishment by having upon the wall of the court room a copy of "Raphael's painting of the death of Ananias and Sapphira" (who were killed by divine punishment for false testimony). He also suggests that the penalty for perjury be inscribed in raised letters upon a tablet and placed before the witness and a graphic portrayal of a convict suffering the usual punishment for the same offence be exhibited to him, to both of which a court officer shall, at the proper moment (presumably as he is about to tell a lie), call his attention by a motion of a wand. See 1 Bentham on Ev., p. 399.

106 1 Ev. Poth, Sec. 831.
recommended the entire abolition of oaths in Indian courts, but their recommendation was never acted upon.\textsuperscript{107}

Thomas Chisholm Anstey, Esq., in a paper read before the Juridical Society of England in 1865\textsuperscript{108} says, "In common with many persons, I entertain the opinion that the abolition of all oaths whatsoever, judicial or promissory, affirmative or compurgatory, would be a very wise and useful measure; and my convictions on that head have ripened and strengthened with an experience of many years spent in various countries of the Queen's allegiance." In a pamphlet written shortly after the introduction of the "affirmation act" into the House of Commons, Mr. Justice Mellor says, "Profoundly convinced by a long judicial experience of the general worthlessness of oaths, especially in cases in which their falsity cannot be tested by cross-examination or be criminally punished, I have become an advocate for the abolition of oaths as the test of truth.\textsuperscript{109}

Best, in a very recent book on evidence (Ed. of 1902), says, "Would it not be the most desirable course . . . to substitute affirmations for oaths in every case, to print on each subpoena a statement of the punishment of perjury, and to add a repetition of such statement to the affirmation which each witness is about to make."\textsuperscript{110}

Sir Herbert Stephen, Bart., referring to oaths in criminal cases, says, "Some people seem to have a notion that a statement made on oath has an almost mechanical advantage in credibility over one which is not so made. I am not sure whether this belief is founded upon the theory that the moral difficulty of telling a lie when you have sworn to tell the truth is necessarily and invariably greater than the moral difficulty of telling a lie when you have not so sworn or whether the idea is that the fact of being on oath gives to the matter deposed a supernatural tendency towards accuracy, independently of the deponent's volition. In either case I am perfectly satisfied that this view is wholly and absolutely chimerical. . . . To imagine that any prisoner who would assert his innocence without oath would hesi-
tate to swear it, appears to me babyish. No doubt there have been in the world's testimony, and are now, many persons willing to lie, but afraid to lie in some form of peculiar sanctity. No human being in England is willing to lie in a court of justice, yet afraid to do so because he has kissed a book after listening to a well-known formula. Witnesses are constantly heard in the criminal courts telling gross and unquestionable lies. They do so—if at all—as a rule, with the most entire willingness, and if any caution makes them hesitate (which is not often) it is being reminded, not that they are upon oath, but that they are liable to prosecution for perjury."

In our own country Mr. Justice Redfield remarked in his opinion in the case of *Arnold v. Arnold*, decided in 1841, "Almost all sober and especially religious men, have for many years, in ruminating upon reforms in our system of jurisprudence, sincerely regretted the very unnecessary frequency of oaths: and not a few men of that same class have even questioned the necessity of resorting to the sanctity of an oath, in any department of the civil administration."

Edward A. Thomas, in 1882, wrote: "In this land of freedom no particular religious faith is recognized. Why should ancient forms of religion and of superstition be insisted upon? While liberal laws have been enacted which permit a person to be affirmed or to swear in the presence of the ever-living God, without making use of the Gospels if he so desires, what benefits can accrue from maintaining a practice which shocks the sensibilities of one class of the community and excites the derision of another? Why would it not be sufficient if the laws provided ample penalties against all who should give false evidence upon the witness stand, and that the clerk of the court should distinctly state to each witness at the commencement of his examination what those penalties were? Why not adopt a rule which in this enlightened age will permit all citizens of this great country, whether their beliefs accord with that of Washington or of Penn, of Jefferson or of Parker, to give their testimony in court, or to enter upon the duties of office, on the same equality and under precisely similar

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forms, without enacting what may seem to be a sacrilege to one and a mummery to another?"113


Mr. Edward Gardner's paper before the "National Association for the Promotion of Social Science," discussed in 1 Ir. L. T. (1867), 591; 17 Ir. L. T. 425; Benj. P. Moore in 18 Am. L. Rev. 503; C. A. Smith, 5 Solicitors' Journal and Reporter, 51; "Oaths in Courts of Justice," 6 Law. Rev. 265; "Oaths, Judicial and Extra Judicial," by R. H. Thornton in 1 Inter. Law J. 177; "The Oath," V. Scottish Law Rev. & Sher. Ct. Rep. 106; 5 Sol. J. & R. 52; J. L. H. in an article "On Judicial Oaths" in 19 Am. Jurist, 77, says (p. 85): "The uselessness of oaths is a matter of everyday experience. We believe that we may hazard the assertion that the testimony of most members of the profession would be that the oath offers a very slight if any security for veracity. There is no class of men whose veracity is so much relied on as the Quakers, who never use the oath. The Anabaptists in Holland have been suffered to testify for over two hundred years without the oath. To the Mennonites, a branch of the Anabaptists, belong a very large share of the wealth, commerce and influence of Holland. The witnesses before committees in both houses of the British Parliament are examined without oath. The peers of England are never required to take the oath in delivering their testimony in courts of justice. Oath evidence is not required in court-martials. No inconvenience has ever resulted from the disuse of the oath in these cases. And there are no peculiar motives to veracity, which apply to these individuals and cases, which will not apply to every case and every individual. We may then say that the testimony of experience is decided that affirmations and the natural obligations of duty are sufficient."

A great deal of discussion about oaths was created in England a few years ago by the famous "Bradlaugh case." Chas. Bradlaugh, who had been elected to Parliament, asked to be affirmed instead of sworn upon taking his seat, stating that he had no belief in God. The privilege was refused him, and afterwards he presented himself to be sworn in. This also was refused him, on the ground of his agnosticism. He then took the oath himself without its being administered, took his seat and voted, for which he was afterwards punished by the House of Commons. See a review of the case in 24 Journ. of Jur. 322; 25 Ib. 349; 69 L. T. 75; Ib. 223; 19 Ir. L. T. 451. See also generally article on "Oaths," 12 Journ. of Jur. 629; "The Making of Oaths," 31 Ir. L. T. & Sol. J. 441; "Parliamentary Oaths in Foreign Countries," 26 Journ. Jur. 356; "Oaths in Legal Procedure," 4 Am. Lawyer, 249; "Swearing Witnesses," 56 Just. Peace, 83; "The Use of an Oath," 15 C. L. J. 438; 18 Am. L. Rev. 502; "Oaths and Affirmations," 3 Law Rev. 212; 18 Ir. L. T. 198; 17 Ir. L. T. 7.
On the other hand, the English Common Law Commissioners, in their report for 1853, \^{114} said, "The expediency of examination upon oath has in recent times been much called in question. It has been urged that where the moral and legal sanctions to speak the truth are insufficient, the religious sanction, acting with a more remote motive, will have little or no effect; while the reliance placed on the efficacy of an oath tends to lull the tribunal which has to deal with the evidence into a false security. To this, however, it may be answered that this reliance on the oath results from the general experience of mankind of the effect of the religious sanction in this respect on the minds of men. It can, we hardly think, be doubted that there is a large class of persons who though less alive than they ought to be to a sense of moral duty or to the fear of legal penalties, yet may be deterred from falsehood when to these is added the dread of divine vengeance. Moreover, we think it cannot be doubted that the effect of a transition from the use of judicial oaths to simple declaration would, at least at the outset, by removing one of the barriers to falsehood, encourage false testimony and tend materially to lessen the confidence of the public in the administration of justice."

Before proceeding further it should be observed that should the oath be abolished this would in no sense destroy the solemnity of the proceeding. The only change would be in administering on all occasions the same ceremonial which is now administered theoretically in some and practically in all the states at the option of the witness. The only change would be the omission in the ceremonial of all reference to the Deity. The argument, therefore, in favor of or against the continued retention of the oath must be directed solely to that one element, viz: the appeal to God because all other elements are retained by the affirmation.

What is the argument in its favor? It will be found to rest upon the assumption as set forth above in the report of the Law Commissioners, to the effect that there is a large class of persons who, through ignorance or superstition, still believe that there is some special punishment reserved for those who violate an oath, other than that which would

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be suffered by one who tells an untruth while unsworn, e. g., when testifying upon affirmation. 115

This argument depends for it validity upon the further assumption that this class, if it exists, is compellable to so testify under oath, and hence can be frightened into truth-telling.

It is very doubtful whether either assumption be true. Suppose we have an individual who has been called as a witness upon a judicial occasion. If he tells the truth, injury will result to him. He desires to lie. He weighs the chance of detection and punishment and decides to take the risk. If he is religious he knows lying is sinful, he decides also that he will risk punishment by divine justice. Now, is it probable that he will by virtue of having taken an oath which as usually administered is of little or no solemnity, relinquish his previous purpose and speak the truth? It is barely possible, although surely the probabilities are extremely remote.

"It appears difficult at the present day to conceive the character of a person who, neither fearing the penal enactments of man against false witnesses, nor the denunciations of God against liars; a person who would not hesitate to rob his neighbor of all his possessions by means of false testimony, nor to send him to the penitentiary or the gallows by the same instrumentality; yet who, in opposition to his own interest, would be restrained from the commission of all these enormities solely by the sanctity of an oath and the fear of the additional punishment in the future world. He"

115 It is a very common habit of witnesses when testifying to use such expressions as "Being on my oath, I would not like to say so and so," or "I would not like to swear to that," etc. These expressions are pointed out by the upholders of the oath in confirmation of the assertion that it has a deterrent effect. These expressions, however, prove nothing unless it can be demonstrated that the witness using them is deterred by the particular element of the appeal to God and not by the other elements present in the oath. It is quite as reasonable to suppose that a witness uses such expressions because, since he is testifying upon a judicial occasion when the rights of others are involved, and when legal punishment is threatened for falsifying, unusual care must be observed. They are very common whether the witness be sworn or affirmed, and mean nothing except a real or feigned desire to be accurate upon a judicial occasion.
might reason with himself that man. unable to prove his
guilt, would not punish him; but that an omniscient God
certainly would. Could not God as readily perceive and
punish the sin of making a false statement, by which an
innocent man would be defrauded, imprisoned or judicially
murdered? If any man does exist with the character just
described, he must closely resemble that robber mentioned by
Irving, who had no scruples whatever about cutting the
throats of several of his fellow-beings before breakfast for
a small sum of gold; but was thrown into an agony of re-
morse when he learned that he had been eating a piece of
meat upon a fast day."

But what about the second assumption? Can we require
this man to take the oath and thus frighten the truth out of
him by the fear of divine vengeance? No at all. He does
not have to take the oath. In nine states he will express his
preference to affirm—no questions can be asked; it is his
right, although the reason he prefers to affirm may be that
he desires to lie, unsworn. In the remaining states and
territories and in England he will in all human probability
also be allowed to affirm without question. But suppose he
is challenged. Suppose he is asked, "Why do you wish to
affirm?" He replies, "I have conscientious scruples against
swearing." This is a lie, but he has already made up his
mind to lie when not bound by the tie of the oath. What,
therefore, becomes of the security afforded by the oath?
Nothing can be clearer than that it is utterly dissipated.

Two classes of witnesses are sworn:
1. Those who have no scruples against swearing; but who
intend to and do tell the truth.
2. Those who have no scruples of any kind, either against
swearing or lying.

Two classes are likewise affirmed:
1. Those who have conscientious scruples against swear-
ing, and who will and do tell the truth.
2. Those who have no scruples against lying, but who
declare they have against swearing, because they are afraid
to lie under oath (if this class really exists).

It therefore becomes apparent that the only persons who

16 Mr. E. A. Thomas' article, referred to, supra.
are compelled to swear are conscientious, upright persons, who will not falsely allege scruples against swearing. All mendacious witnesses are either quite indifferent as to whether they lie with or without oath, or else by exercising the right to choose, they lie without it.

On the other hand, it has been suggested that very few, if any, witnesses would think of such a method of escaping the oath. The idea is that a witness will not appreciate the solemnity of the proceeding in his previous determination to lie, but when actually confronted with the fact that he has taken an oath, he will weaken or break down completely. The "breaking down" in such cases may be due to one or all of various causes:

1. Confusion under cross-examination.
2. Fear of temporal punishment for perjury.
3. Fear of divine punishment for lying.
4. Fear of divine punishment for violating the ceremony of the oath.

The first three are equally present in both oath and affirmation. The last is peculiar to the oath. Assuming for the sake of argument that the last element is the "straw that breaks the camel's back," and proves the undoing of the witness, the contention is that the witness will not, at least in all cases, foresee this predicament in which he will find himself, and, therefore, will not adopt the simple expedient of taking the affirmation.

In the first place, will the witness who has determined to perjure himself blunder into taking a ceremony which he fears to violate? I doubt this very much. Committing perjury is not such a light matter. If one has determined to take all the risks, he would surely have carefully thought out the whole thing in his mind, and if, braving detection and imprisonment, he is afraid to lie after hearing the crier say, "so help you God," surely he will ascertain, if he does not already know, that he may avoid the oath by affirming. A method which must be less satisfactory, has long been in use by mendacious witnesses, i.e., to kiss the thumb instead of the book. However, it is fair to assume that on some occasions, there may be witnesses who fear neither man's nor God's punishment for lying, who forget
either to kiss the thumb instead of the book or to substitute
the affirmation for the oath and then may be frightened into
disclosing the truth through the reiterated, "Remember you
are on your oath" of counsel, when a similar reminder, "Re-
member you are on your solemn affirmation," would have
been wholly ineffective. It must be confessed, however, that
the probabilities of such a combination of circumstances
seems extremely remote.

With this most liberal assumption as to its efficacy the oath
seems all but useless. Since it has become such an integral
part of our system of procedure, however, it may be the
part of prudence to retain it. This is the position assumed
by many who admit that logically its present use is an
absurdity, but who declare that they feel its power in the
courts. They say they can see its deterrent influence upon
witnesses who, if questioned, could not tell themselves why
they are affected by it. There is a widespread belief among
members of the bar, that to admit all testimony unsworn
would be a dangerous experiment and would materially in-
crease perjury.

This feeling is perhaps nothing more than the sentiment
always encountered when a change in existing institutions
is proposed. It is a little hard to understand why a lawyer,
who will not even take pains to see whether his jurors or
witnesses take oath or affirmation, should profess so great
an apprehension when it is proposed to allow all alike to be
affirmed. It is a striking reminder of the early days in
Pennsylvania, when there was a great outcry of horror in
England because two British citizens had been condemned to
death by Quaker juries, the members of which were un-
sworn. However, before deciding that we should bow
before a "feeling" which cannot be justified by logical
reasons, it is but just that the positive arguments against
the use of the oath shall be considered.

The first is to the effect that an oath is avowedly but an
imposition upon the ignorance or superstition of the witness.
No intelligent man at this day pretends to believe that it is
any greater sin to tell an untruth upon oath than upon-

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177 See Sharpless' "History of a Quaker Experiment in Government,"
Vol. I. p. 149 (Hav. ed.).
affirmation—it is the lie not the violation of the ceremony that is wicked. When taken by such a man the oath is hypocritical. The words, if they mean anything, involve the most awful consequences. But it is safe to say that it would be extremely difficult to find anyone willing to admit that he has the slightest belief in the ceremony to which he subscribes. The man who lacks belief in God is incapable of taking the oath; but a belief in the vengeance of God for false swearing is an equally essential part of it; then all intelligent men are in fact ineligible. The only persons truly capable are the ignorant and credulous, whose superstition or "feeling" is made use of to further the administration of the courts. Probably there are some ignorant persons who believe many other witch’s tales, long since become the laughing stock of the world, but the administration of justice ought not to be rested upon such a foundation.

It is particularly to be regretted that the competency of a child should ever be determined by his real or apparent belief as to what will happen to him if he tells a lie while under oath. Rev. F. Dennison Maurice, in a paper read before the Juridical Society of England, says, "A child is not taught by wise parents the meaning of kissing a book. It is taught not to lie; it is told that God is true and hates lies. If you substitute one kind of teaching for the other, when it comes into a court, you do not obtain fresh protection for its veracity; you lose the protection that you had. . . If, on the other hand, the child has been taught to lie, if it comes primed with lies into the witness box, your terrors will not frighten it. The expectation of the flogging which awaits it at home, if it stumbles into any wrong confessions, will be far more effectual than the apprehension of any more distant punishment which may be in reserve for it if it does not speak all that it knows."118 The test of a child’s capacity ought never to be his understanding of the obligation of an oath—it should be merely his capacity to observe and relate and whether he understands that he is required to speak the truth. He should never be required to take an oath—a species of profanity which we feel, especially, should never be forced upon him. The extract from the examination

118 III Juridical Society Papers, 105.
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quoted in the note, shows that a child is often intentionally deceived for the purpose of making him appear competent. The further possibility of his being told that "the old bad man will burn him up," or that he "will be hung" if he does not tell the truth, ought to be abolished.\(^{119}\)

\(^{119}\) This subject as to the proper test of an infant's capacity is too large to be treated in this paper. I feel very strongly that the test in all cases should be wholly disconnected from any question of religious belief, and that a simple affirmation only should be administered. The principal cases which have been decided on this point in America within the last fifteen years are here cited for the convenience of those who may care to examine this phase of the subject further. ALABAMA: Test is intelligence only: McGuff v. State, 88 Ala. 147, 1889; Grimes v. State, 105 Ala. 86, 1894; Williams v. State, 109 Ala. 64, 1895; Walker v. State, 32 So. 703, 1902. ARKANSAS: Arbitrary age limit fixed by statute: St. Louis I. M. & S. Ry. Co. v. Wren, 65 Ark. 619, 1898. GEORGIA: Test seems to be intelligence only under the code by the earlier decisions: Johnson v. State, 76 Ga. 76, 1885. The following extract from the examination of the witness, a child six years of age (referred to in the text, supra), is instructive:

"By the Court:
"Q. Who made you? Do you know?
"A. No, sir.
"Q. Don't you know that God made you?
"A. Yes, sir.
"Q. Did you never hear about that?
"A. Yes, sir.
"Q. Did you never hear about the old bad man?
"A. No, sir.
"Q. That gets bad children and burns them up?
"A. Yes, sir.
"Q. Did you never hear about that?
"A. Yes, sir.
"Q. When they tell lies?
"A. Yes, sir.
"Q. Did you never hear about people going to the penitentiary or to jail for telling lies?
"A. No, sir.
"Q. Don't you know that if you were to tell a lie, and a man were hung on your evidence, that you would be hung too?
"A. Yes, sir.
"Q. Which is the proper thing for you to do, to tell the truth or to tell a lie?
"A. To tell the truth.
"Q. Which is it right to tell, the truth or a lie?
"A. I don't know, sir."
Another objection to the oath as now used is the discrimination made by requiring certain people to swear, while others are permitted to affirm. This objection is re-enforced by the inconsistency above noted, viz: that those only are compelled to swear who are entirely reliable and therefore need no guarantee that they will speak the truth. Even in the

"Q. Do you know that there is any difference between telling the truth outside of the court house and inside of the court house?

"A. No, sir."


New York: Knowledge of oath essential: People v. Luizcy, 79 Hun. 23, 1894; People v. Frindek, 58 Hun. 482.

Arizona Territory: Test knowledge of oath: Downey v. Territory, 52 Pac. 368, 1898.


Nebraska: Ability to understand nature and obligation of oath, seems to be a test of intelligence under the statutes: Davis v. State, 31 Neb. 247, 1891; State v. Meyers, 46 Neb. 152, 1895.
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Roman times a proposition to swear to a promise was deemed a reflection upon one's integrity. Shakespeare makes Brutus say:

_Bru._ Give me your hands all over, one by one.
_Cas._ And let us swear our resolution.
_Bru._ No, not an oath: if not the face of men,
The sufferance of our souls, the time's abuse,—


A list of older English and American authorities on this point is also here given. This list does not purport to be complete. It consists only of those cases which have been incidentally examined during the preparation of this paper:


If these be motives weak, break off betimes,
And every man hence to his idle bed;
So let high-sighted tyranny range on,
Till each man drop by lottery. But if these,
As I am sure they do, bear fire enough
To kindle cowards and to steel with valour
The melting spirits of women, then, countrymen,
What need we any spur but our own cause,
To prick us to redress? what other bond
Than secret Romans, that have spoke the word,
And will not palter? and what other oath
Than honesty to honesty engaged.
That this shall be, or we will fall for it?
Swear priests and cowards and men cautelous,
Old feeble carriions and such suffering souls
That welcome wrongs; unto bad causes swear
Such creatures as men doubt; but do not stain
The even virtue of our enterprise,
Nor the insuppressive mettle of our spirits,
To think that or our cause or our performance
Did need an oath; when every drop of blood
That every Roman bears, and nobly bears,
Is guilty of a several bastardy,
If he do break the smallest particle
Of any promise that hath pass’d from him.\(^{120}\)

Another objection is the profanity of the oath. Even if it were administered in a reverent and solemn manner, it would still be shocking to the religious feelings of a large portion of the community. This is amply demonstrated by the fact that provision is made in all English-speaking countries for those who have religious scruples against swearing. Irrespective of the grounds of this belief, that swearing is sinful, that fact that it is possessed by a very large and eminently respectable portion of the community should be entitled to great weight. In some parts of Pennsylvania, largely inhabited by members of the Society of Friends and their descendants, the affirmation is much more frequent than the oath and one who swears is looked upon as

\(^{120}\) Jul. Caes., Act II. Sc. 1.
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But the oath is not administered in a solemn and reverent manner, on the contrary, it is administered on practically all occasions in a very light and irreverent manner. Even if one subscribes to the

The Society of Friends, commonly called Quakers, who were among the earliest Christian sects to take an advanced stand against the oath, and indeed all others who hold similar religious views, base their objections to it both upon a natural repugnance to irreverent reference to God and also upon the Commandments in the Scriptures. There are many instances in the Bible where swearing upon judicial occasions is referred to. It was not forbidden in the anti-Christian era, but was fully sanctioned. Christ, however, commands a complete reversal of custom in this matter. He says, in Matthew v. 33-37: "Ye have heard that it hath been said by them of old time, Thou shalt not forswear thyself, but shalt perform unto the Lord thine oaths: But I say unto you, Swear not at all: neither by heaven, for it is God's throne: Nor by the earth, for it is his footstool: neither by Jerusalem, for it is the city of the Great King. Neither shalt thou swear by thy head, because thou canst not make one hair black or white. But let your communication be Yea, yea; Nay, nay: for whatsoever is more than these cometh of evil."

It is said by Dr. Paley, by Milton and by others whose ideas have been incorporated into the articles of the English Church, that oaths before "magistrates" are not forbidden by the passages quoted. It is contended that these words refer only to profanity as commonly understood. This position, however, is as to this passage clearly untenable. In the text quoted from the sermon on the Mount, Christ was speaking of oaths taken upon solemn occasions, not merely of vain and wanton speech. He refers to the laws of "old time," which permitted swearing and prohibited only false swearing. It cannot be supposed that these laws of "old time" permitted vain and wanton profanity. Then He must have been dwelling upon solemn obligations undertaken under oath. Then follow His words, "But I say unto you, swear not at all," followed up by a positive injunction, "But let your communication be Yea, yea; Nay, nay: for whatsoever is more than these cometh of evil."

It is said the intervening words specifying various oaths which may not be taken and not mentioning an oath taken in the name of God impliedly permit such an oath. This argument is not convincing however. In the face of a positive prohibition, further particular prohibitions could not have such an effect. Moreover, it is declared in Matthew xxiii. 22, that to swear by heaven is to swear by the Deity, hence swearing by the Deity is likewise forbidden. There is more force in the argument that later on in the Scriptures, various apostles and indeed Christ Himself took an oath. It fails, however, to convince many people and did not the early Christians, who opposed swearing. Anyone who feels further interested in the views of those who cannot conscientiously
The doctrine of the English Church, that swearing before magistrates is not forbidden by the Scriptures and therefore has no scruples against it, yet such continual reference to the most sacred name surely can be thought of as little better than "vain and false swearing."

Aside from our own moral or religious feelings concerning this subject the law, as it stands at present concerning so-called "heathen" witnesses, subjects them to the probes of lawyers and judges into their belief. In twenty-eight states and territories there are express statutory provisions that each witness may be sworn in the manner most binding on his conscience. This is merely declaratory of the rule at common law which would be the same in the absence of such legislation. The manner of ascertaining the manner of swearing most binding on the conscience of the witness, is by interrogating him. The witness is entitled to be

swear will find them quite fully set forth in Dymond's Essays on Morality, Chapter VII; Tertullian De Idol, Cap. II, and Grotius' Rights of War and Peace, are authority for the statement that the early Christians understood the use of oaths to be forbidden to them.

Viz: ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, CONNECTICUT, DELAWARE, IOWA, INDIANA, INDIAN TERRITORY, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW YORK, OREGON, SOUTH CAROLINA, TENNESSEE, TEXAS, UTAH, WASHINGTON, WISCONSIN, WYOMING. See appendix.

This is admitted by all text writers, even those who object to ascertaining whether a witness has religious belief by so interrogating him. See 1 Greenleaf on Ev., Sec. 371. There is of course no security that the witness will not name some ceremony which has in fact no binding effect upon him whatever, hence the security sought for by this rule does not exist. Mr. T. C. Anstey, in a paper read before the Juridical Society of Great Britain, 3 Jur. Soc'y Papers, 379, says that the ceremony commonly used for swearing a Chinaman, by his cracking a saucer and declaring that if he does not tell the truth his soul will be cracked like the saucer, has in fact no existence whatever except in English courts. That it, with several other similarly absurd methods of taking oaths, was invented by imaginative Englishmen and accepted with glee by the Chinsmen, to whom it means no more than to us. In fact no oaths are ever administered in the Chinese courts, according to the best information on the subject. Alabaster on Chinese Crim. Law, p. 497.

There are several other ridiculous methods of swearing witnesses which are occasionally called for in our courts. An instance happening
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protected from such an inquisition, sometimes not too serious into subjects which to him are most sacred. Moreover, the time for the performance of strange barbaric rites in courts of justice has surely gone by. If they afforded great security they might be tolerated, but since they do not, they should be abolished.

There is a final objection against the use of oaths which does not depend upon purely ethical considerations. There is a large class of persons who not only have conscientious scruples against swearing, but also against administering oaths. This is particularly true of the Society of Friends.

In New Jersey, where an attorney demanded that a Chinaman be sworn by the ceremony of decapitating a chicken, is mentioned in 19 N. J. L. J. 30. Of course not having Hindoo witnesses in our courts very often, it seldom becomes necessary to bring a cow into court or to allow the Hindoo to go through the ceremony of touching the toe of a priest, etc.

In People v. Chin Mook Sow, 51 Cal. 597, a Chinaman was examined with respect to his religion, an extract from which examination is here given, to show its general character:

"Q. Does not belief in regard to being transformed into a chicken, duck, hog or horse extend simply to a probational time?

"A. For a certain time.

"Q. And then?

"A. They die and become transformed into some other animal again.

"Q. A little higher in respectability?

"A. According to the degree of their crime. If they are a little bad, they will be transformed once or twice; if they are more bad they have to go through eight or ten transformations, and then be born again still as a human-being.

"BY THE COURT.

"Q. Does the fact whether the chicken is a good chicken or not make any difference?

"A. When it is transformed into some other animal.

"Q. The character of the chicken makes no difference?

"A. No, sir.

"Q. He never gets to heaven after he once got into an animal form?

"A. After having gone through different transformations they will be born as human beings in this world. And if they are unusually good they go to heaven, and if unusually bad they have to go through the same operation again.

"Q. So he has another opportunity to come back to the earth and discharge his duty and get to heaven?

"A. Yes, sir."

As a matter of fact Friends who maintain their standing in their society are to-day excluded from holding the offices of judge, magistrate, or any other office as a part of the duties of which they may be called upon to administer oaths. This is not true religious liberty. This is not consistent with the spirit of the Constitution of the United States or of the various states. If persons having conscientious scruples against administering oaths are capable of filling such offices creditably, and there can be no doubt of this, they and the community are both injured by a rule or custom which prevents them from becoming candidates. If William Penn, the great founder of Pennsylvania, were alive to-day, it would be impossible for him to hold the office of judge or magistrate.

The time surely has come when affairs secular and affairs religious should be separated finally. When the duties of civil office should be definitely severed from all questions which could affect the religious belief of a possible incumbent.

Thomas Raeburn White

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126 In Pennsylvania for a number of years after Wm. Penn founded the colony no oaths whatever were administered. (See law quoted supra). Later, however, through interference from England, the use of the judicial oath was required. One having conscientious scruples could be affirmed, but there was no provision that a Quaker judge could administer affirmations to those having no such scruples. As a result the Quakers resigned their offices as judges or magistrates, and declined thereafter to become candidates for such offices. Their conscientious belief has compelled them to persist in such action until the present day. See Sharpless, "A History of Quaker Government in Pennsylvania," Vol. I, Chap. V.

It is not impossible even now that witnesses may be found who decline to swear for other reasons than conscientious scruples, and hence may be barred from the witness stand. It is stated in 12 Law Mag. 387 that there are many women of the poorer class in Ireland who refuse to be sworn (particularly during pregnancy), for superstitious reasons.

127 Legislation having this for its purpose has already been agitated for many years in some states, and has been successful in some. In Maryland the imprecatory form of oath in judicial proceedings has been abolished by recent legislation, largely through the instrumentality of Benjamin P. Moore, a member of the Society of Friends. The form of affirmation there, prescribed by the act of 1868, Pub. Stats., Art. I, section 8a, is:
"The form of judicial and all other oaths to be taken or administered in this state and not prescribed by the constitution shall be as follows: 'In the presence of Almighty God. I do solemnly promise or declare,' etc., and it shall not be lawful to add to any oath the words, 'so help me God,' or any imprecatory words whatever."

Similar legislation has been introduced in the legislature of North Carolina and I understand in Delaware, and is likely to be enacted at the present session (1903).

This form is yet not entirely satisfactory to Friends, because it contains a reference to the Deity. The omission of all such reference would be a decided gain.

Mexico has in this respect gone beyond any state in this country. The law there is, "The simple promise to tell the truth . . . shall be substituted for the religious oath in its effects and penalties." Hall's Mexican Law, Sec. 1201. This provision was first enacted I understand in 1878.

California made an effort in 1901 to abolish all references to the Deity in their form of oath, but the act was declared unconstitutional in 134 Cal. 291, for reasons which had nothing to do with its subject matter. The law as passed was: "Section 2094. An oath or affirmation in an action or proceeding may be administered as follows, the person who swears or affirms expressing his assent when addressed in the following form: 'You do solemnly swear (or affirm as the case may be) that the evidence you shall give in this issue (or matter) pending between ——— and ——— shall be the truth, the whole truth, and nothing but the truth.'" (Commissioners amendment, approved March 8, 1901; took effect July, 1901.)

A law in these or similar words would I think be a great step in advance:

“All witnesses in any judicial proceeding shall before testifying be required to subscribe to the following form of affirmation: ‘You do solemnly and sincerely declare and affirm that you will answer truly and fully all questions that may be put to you under the direction of the court in the matter now pending between ——— and ———, and no religious ceremony shall in such cases be required.'”

It will be noticed that in this act the usual form of affirmation, i.e., a promise to "tell the truth, the whole truth, and nothing but the truth," has been varied. The old form has been justly criticised, because it does not accurately express the true promise which the witness intends to perform, viz: not to tell all he knows about the case, but to answer "truly and fully" only those questions which the court permits him to answer. The form here given seems a more sensible as well as a more accurate method of expression.

Since writing the above I have received a letter from a Japanese ex-judge, Fukusaburô Yamada, disclosing the fact that no ceremony at all was required until recently, and that their present form is in fact not an oath, as there is no imprecation and no reference to the Deity. The letter is in part as follows: "I am very glad to answer your
question concerning oath in our land. In ancient times in Japan, as in China and Corea at present, we had no ceremony concerning oath. However after we adopted European system of procedure, we use similar ceremony with yours. If a witnesser appear to a court, judge will ask him his name and command him to make oath; then clerk stand up and will read the sentence of oath, which, printed in a paper, 'I swear that I will tell the truth according to my conscience, don't conceal or add anything;' then witnesser will sign his name and seal his stamp on the paper.