

MAINE STATE LEGISLATURE

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THE LEGISLATURE,

OF THE

STATE OF MAINE,

DURING ITS SESSION

A. D. 1833.

STATE OF MAINE.

HOUSE OF REPRESENTATIVES, *January 31, 1833.*

The Committee of both branches of the Legislature, to whom was referred an *Order*, instructing said Committee “to inquire into the justice and expediency of providing, by law, that the religious sentiments of any person, who shall hereafter be offered as a witness in the Judicial Courts of this State, or in the course of Judicial proceedings, shall not be made the subject of *investigation* or *inquiry*, or the testimony of such person be *rejected* or *discredited* on account of his opinions in matters of *Religion*,” have given the subject the careful attention and mature deliberation, which its importance seemed to require ; and ask leave to

REPORT:

That, in the opinion of your Committee, *Religion* is a solemn concern between the *conscience* of every human being and his Maker—that all persons for their Religious sentiments are accountable to Him, and to Him *only*—that human laws cannot rightfully interrupt or disturb any person in the free enjoyment of his own Religious views—that to entertain such opinions in Religion, as the *conscience* dictates, is a natural, indefeasible and unalienable *right*, which every person has received from his Creator—that no Religious *test* should be required as a qualification for any office or trust, or to bear testimony in Judicial proceedings—that no subordination or preference of any one sect or denomination to another should be countenanced or suffered—that no connexion of Religion, either direct or indirect, with the civil affairs of the Government, should ever be

permitted to subsist, but that all persons should be free to profess, and by argument to maintain, *their own opinions in matters of Religion*.

Such being the general views of your Committee, it will be proper to examine the subject more minutely. The questions which naturally present themselves are—First, what is the Law, of which a large and respectable portion of our fellow citizens complain? Second, is it *unjust or inexpedient*?

I. To ascertain what the Law *now is* in this State, it may not be improper to inquire what *it was* in the Country from which we derived it, and what it is considered to be by some of the sister States, which derived their common Law from the same fountain.

By the common Law of England, the Religious sentiments of a person offered as a witness may be made the subject of inquiry and investigation, in order to render him an incompetent witness. The party objecting to his competency may introduce other witnesses to prove the previous declarations and admissions of the person objected to, for the purpose of showing that he is not a competent witness; or he may put the inquiries directly to the person himself.

The person offered may be inquired of as follows. Do you believe in the existence of a God? Do you believe that by taking an oath you imprecate his *vengeance* on you if you do not swear truly? Do you believe in a future state of rewards and punishments? These and various other inquiries of a similar nature may be put by the party objecting to the witness as incompetent; and the investigation may be extended to such a length as the disposition of the party or his counsel, and the will of the presiding Judge may be inclined to countenance. If he answer either of the questions in the negative, or if it be proved that his belief negatives either of them, he cannot give evidence. His testimony is rejected as incompetent, and the party calling him is deprived of the benefit of it, though he *may be* a person of the most *undoubted veracity*.

Such is substantially the common law of England, as laid down in McNally, Peake, Phillips, and Starkie's Treatises on the law of evidence.

The Judicial Courts of Connecticut, New York, and some other States, have made decisions which go to establish that doctrine to the fullest extent as the law of this country. It may be sufficient for the present purpose that we refer to but two or three of them.

The decision of the case of Jackson vs. Gridley, Johns. N. Y. Rep. vol. 18, page 98, is founded on and is in accordance with the common law of England, the English common law, in the language of Chief Justice Spencer, having been *adopted* in that State. The case of Curtiss vs. Strong, decided in the Supreme Court of Errors in Connecticut, Day's Rep. vol. 4, page 51, and the case of Atwood vs. Welton, Day's Rep. vol. 7, page 66, recognize to a great extent the common law of England relative to that subject as in force in Connecticut. And in November 1827, Judge Story, of the United States Court, in a case which occurred before him and the United States District Judge, in Rhode Island, (Wakefield vs. Ross,) made a decision which seems to come quite up to the principles of the English common law.

While Maine was connected with Massachusetts, and constituted a part of that Commonwealth, the question came up in the Supreme Judicial Court of that State, and was determined in some respect differently. We refer to the case of Hanscom vs. Hanscom, Mass. Rep. vol. 15, page 184. This was a libel for divorce *a vinculo*. The libellant introduced a witness, against whom the counsel for the respondent objected, and offered to prove his declarations that he did not believe in a future state of existence; but the Court decided that this was not an objection to the *competency*, but to the *credibility* of the witness. This decision differs from the New York, Connecticut and other adjudications, in *one* particular—and *one only*. They all permit the religious sentiments of the witness to be made the subject of *inquiry* and *investigation*; but for different purposes. The

first named decisions permit it as an objection to the *competency*, and the last as an objection to the *credibility*.

This decision of the Supreme Court of Massachusetts having been made prior to the separation and independence of Maine, would perhaps be considered as a settlement of the law in the State, so far as relates to the particular point decided. Accordingly, whenever the objection has been made, that case has been cited, the investigation has been permitted, and the examination has been unpleasant, and the result has sometimes been unfortunate, if not *unjust*. It is not known to your committee, that the question has ever been directly decided by the Supreme Judicial Court of *this* State, though the objection has frequently been made and sustained to a greater or less extent in the inferior Courts, and in judicial proceedings before Commissioners and Magistrates. The law in this State may, therefore, be considered, if settled at all, as not materially different from the English common law, except in the objection going to the *credibility* instead of the *competency* of the witness.

II. Having ascertained as nearly as practicable what the law *is*, we come now to the second inquiry. Is it *unjust* and *inexpedient*?

Your committee cannot entertain a doubt of the injustice or inexpediency of any legal enactment or adjudication, which *might* deprive a party in a civil or criminal cause of the testimony of an individual whose character for truth in the community is unimpeachable, who knows the facts necessary to be proved, and may be the *only* person who does know them; and it is not, we apprehend, very material whether the Courts declare the testimony *incompetent* or *incredible*. If incompetent it is not to be *heard*; and if incredible, it is not to be *believed*. Though it does not necessarily follow, that the testimony would be adjudged incredible, because it is *liable* to be so adjudged. It is not only injustice to the party who needs his testimony, but also to the individual offered as a witness, to deprive him of the right of bearing testimony. It is unjust to compel him to

submit to an examination relative to a subject, over which human tribunals have no rightful jurisdiction. It is unjust because it infringes his natural and unalienable right, and by public inquisition elicits those sentiments, which he may not choose to make known to earthly courts. In fine, it is unjust, because it gives *fallible*, and sometimes *weak* or *wicked* men, the power to assume God's prerogative of judgment.

Is it *inexpedient*? Whether the examination be made for the purpose of rejecting or discrediting testimony, it is equally inexpedient, because it opens a wide door to fraud and mischievous consequences. To illustrate our views, we will suppose the person objected to had previously declared to certain individuals, that he did not believe in a future state of rewards and punishments; but those declarations were made inconsiderately; and since by a more thorough examination of the Scriptures and more mature deliberation, he had become convinced of his error. The party objecting has perhaps discovered this change in his sentiments, and to get rid of his testimony, he calls the individuals to whom the declarations had been made, instead of inquiring of the person offered as a witness—the declarations are proved—he cannot be permitted to make a new declaration of his sentiments—and his testimony is rejected as *incompetent*, or may be disregarded as *incredible*!

Again, let us suppose an honest, upright, honorable man, who does not happen to believe fully the doctrine of endless torments in a future state of existence, be offered as a witness, and the objection raised against him, and the inquiries put to him as to his Religious belief. He being an honest man, will answer *truly*; and his testimony may be adjudged *incompetent* or *incredible*!

Again, let us suppose the person offered as a witness to be entirely destitute of correct moral principles—unjust in his private dealings—fraudulent and vicious in his relations with others—one, who does not believe that virtue will be rewarded, or vice punished, either here or hereafter—a person, who neither fears God, nor regards man. He has perhaps chosen to

keep both his sentiments and his vices as secret as possible; his declarations, therefore, cannot be proved; and the inquiries, if made at all, must be made *of* him; and his competency and credibility depend on his own answers. It is probable that he might be tempted to answer them *falsely*; yet his testimony must be taken as competent, and so far as relates to his belief, entitled to *credit*!

A law, founded on principles, which lead to such results, and admit of such absurdities, cannot, in the opinion of your committee, be either *just* or *expedient*.

That *many* persons may be found in every Religious denomination in our country, who are esteemed for their virtues, and respected for the morality of their lives, and who would if testifying in a court of justice, state truly all the facts within their knowledge, is a truth taught by reason and observation. That there may be *some* in every sect, who would not be believed when testifying under oath even by their own brethren, experience will compel all to admit. Why then should any Religious *test* be required?

It has been argued to your Committee, that if you debar the Courts from all investigation of Religious sentiments, persons may be admitted to testify, who do not believe in the existence of a Supreme Being; and that such persons cannot feel the obligations of an oath, and might, therefore, consider themselves under no moral obligation to tell the truth.

This objection merits and has received our serious consideration. We hope, and believe, that there are but few, if any persons of sane mind, in the World, who do not believe in the existence of a Supreme Being, his superintending power, and moral government of the Universe. The guard imposed by human laws in the severe but merited punishment of *perjury*—may also be thought by many to be a sufficient barrier against this danger. Nevertheless as it is *possible* for the evil to exist, we would recommend to guard against it by requiring the person offered as a witness to believe in the *obligation* and *binding efficacy* of an oath.

It has also been urged as an argument in favor of the common law on this subject, that a person who does not believe in a future state of rewards and punishments, would be more easily tempted to testify falsely than one who did so believe, because he would have no fear of punishment after this life. In answer, we reply, that all, or nearly all, who do not believe in a future *state* of endless torments, believe most sincerely in rewards and punishments, that as virtue and happiness are inseparably connected, so vice and misery are necessarily united, and the one an unavoidable consequence of the other. It is, therefore, respectfully submitted, whether the belief of a severe punishment, to be inflicted in another state of existence, to commence as is natural for the offender to hope, many years hence, if at all, would deter from the commission of crimes, more than a full belief, that the punishment would be inflicted in this life, *promptly* and *immediately* after the commission of the offence.

The same objection may also be made with equal propriety, and much greater force, to the testimony of many pious Christians, who are said to believe themselves and their sectarian brethren, to be God's *Elect*, and that their future salvation is *secured* to them, through the *faith of assurance, and absolute election*. It cannot be perceived, why the person who has faith to believe that his own election to salvation in a future state is secured, *whatever may be his conduct in this life*, would feel the binding ties or Religious obligation of an oath, more than, one who believes that all punishment for human offences will be inflicted in this life ; and yet persons of that belief have never been excluded from bearing testimony, nor has an attempt been made to deprive them of that right.

Inquiries respecting the religious opinions of witnesses cannot be necessary. All the purposes of justice may be answered without them. It may be asked—Is the person offered as a witness *interested* in the *event* of the suit?—Does he understand the *nature* of an oath and the *obligation* it imposes on the person taking it to tell the truth, the whole truth, and nothing but the

truth? These inquiries being answered satisfactorily, there cannot perhaps be any good reason why he should not be considered a *competent* witness. The questions relative to credibility are necessarily more numerous. It may be asked—What is his general character for *truth* and *veracity* among his neighbors and with the community where he resides? It is of little consequence what the particular *faith* of the person is, provided his *actions* are good. Good *works* are the *evidence* of a good faith. It may be asked—Is he an honest and upright man?—Is his statement a *probable* one?—Is it supported by the circumstances of the case?—Is it corroborated or contradicted by the testimony of others? The answers to these and similar questions, it is believed, have ever been found sufficient for the purposes of *Justice*; and we cannot think for a moment that the interests of *Religion* require the existence of any legal Inquisition.

All history teaches that *true Religion* needs no other assistance from the Legislature or the Judicial Courts, than simply to unshackle and permit it to be *free*; it flourishes most when entirely separate and distinct; the line of demarcation should be distinctly drawn and clearly marked; the first step towards uniting them is generally the first step towards the destruction of both; and the infringement of our *religious* rights is necessarily followed, to a greater or less extent, by the loss of our *civil* freedom.

Finally, in the opinion of your committee, the law which permits an *investigation* of the *religious* sentiments of a witness, either for the purpose of *rejecting* or *discrediting* his testimony, is a relic of the barbarism of other countries and the bigotry of other times—is contrary to the spirit of our institutions—repugnant to the genius of our Government—and subversive of the great principles of civil and religious liberty.

Your committee have, therefore, *unanimously* agreed to report a Bill, which is herewith submitted.

J. A. LOWELL, *per order*.

STATE OF MAINE.

IN THE YEAR OF OUR LORD ONE THOUSAND EIGHT HUNDRED
AND THIRTY-THREE.

AN ACT to secure to Witnesses Freedom of
Opinion in matters of RELIGION.

Be it enacted by the Senate and House of
2 *Representatives, in Legislature assembled,*
3 That no person who believes in the existence of
4 a Supreme Being, shall be adjudged an incom-
5 petent or incredible witness, in the Judicial
6 Courts, or in the course of Judicial Proceedings
7 in this State, on account of his opinions in mat-
8 ters of Religion; nor shall such opinions be
9 made the subject of *investigation* or *inquiry*.

STATE OF MAINE.

HOUSE OF REPRESENTATIVES, }
February 1, 1833. }

Ordered, That three hundred copies of the foregoing Report
and Bill be printed for the use of the Legislature.

[Extract from the Journal.]

Attest: ASAPH R. NICHOLS, *Clerk*.