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Evidence--Admissibility of an Atheist's Dying Declaration

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stronger than the presumption that they were guided by a dictionary.[13]

The court's method of interpretation might be justified, from a practical standpoint, if its result were sufficiently desirable. However, it does not seem that large repair shops used only secondarily for storage, should be granted exemptions, and license tax levies made on small storage buildings, rented indiscriminately to the public. It appears that such would be the result of the "dictionary-minded" distinction drawn by the West Virginia court.

—JACK C. BURDETT.

EVIDENCE — ADMISSIBILITY OF AN ATHEIST'S DYING DECLARATION. — In a murder prosecution, a question arose as to the admissibility of the dying declaration of an atheist. The dying declarant did not believe in any Supreme Being, or in any future existence beyond death. He did not possess a belief in any form of divine punishment or reward. The court relying on a statute abolishing the requirement that a witness must testify under oath, held the declaration admissible. *Wright v. State.*[1]

The common law admitted dying declarations, within certain limits, as an exception to the hearsay rule. It required that the dying declarant possess a belief in God, in addition to a belief that he was to die very soon. The courts felt that the gravity of death under such circumstances was equal to the solemnity of an oath in court as a guaranty of trustworthiness.

In the principal case the court recognized the common law rule, but held that it was abrogated by the statute making an atheist competent to testify.

It is clear that the statute cited by the court removed the bar of atheism from the declarant's testimony and made him fully competent to be a witness. There still remains, however, the problem of determining whether the dying declaration is sufficiently

C. Va. 1917); Wilkinson v. Mutual Saving Ass'n., 13 F. (2d) 997 (C. C. A. 7th 1926); Balanced, *etc.*, Attractions v. Town of Manitou, 38 F. (2d) 28 (C. C. A. 10th 1930); Perrin v. Miller, 35 Cal. App. 129, 69 Pac. 426 (1917); People v. Muldoon, 306 Ill. 234, 137 N. E. 863 (1922); Bohannon v. City of Louisville, 193 Ky. 276, 235 S. W. 750 (1921); West v. Lysle, 302 Pa. 147, 153 Atl. 131 (1931); Scott v. Doughty, 124 Va. 358, 97 S. E. 802 (1919); Brown v. Robinson, 175 N. E. 269 (Mass. 1931).

[13] People v. Elliff, 74 Colo. 81, 219 Pac. 224 (1923).

[1] 135 So. 636 (Ala. 1931).

trustworthy to warrant its being admitted. The case illustrates the modern trend.[2] There is a feeling that all men hold death in awe and experience a physical revulsion towards its unknown and unascertainable consequences.[3] This the courts apparently are willing to recognize, and rightly so, as sufficient assurance of trustworthiness, without any requirement of a belief in God or a hereafter.

There is some authority that the credibility of the dying declarant may be impeached by a showing of atheism.[4] There would not seem to be any more valid reason for permitting a showing of atheism to destroy credibility than to permit it to make the declaration inadmissible.[5] Why admit a declaration only to leave it discredited by a clever lawyer playing upon the religious prejudices of the jury?

—DONALD F. BLACK.

INJUNCTIONS — EQUITABLE SERVITUDES — BOARDING HOUSE AS "RESIDENCE PURPOSE". — In a suit to enjoin the operation of a boarding house on property subject to a covenant limiting the use to residential purposes only, the court, on appeal, dissolved the injunction holding the operation of a boarding house not violative of the covenant providing that "said land shall not be used otherwise than for residence purposes, and shall not be used for a sanatorium, hospital or infirmary, and no apartment-house shall be erected thereon". Beck, P. J., dissented vigorously on the ground that both the spirit and the letter of the covenant were violated. *John Hancock Life Insurance Co. v. Davis.*[1]

It is an elementary rule of law that covenants restricting land should be strictly construed in favor of the free and untrammeled use of property.[2] The majority of the court, pur-

[2] State v. Hood, 63 W. Va. 182, 59 S. E. 971 (1907). State v. Williams, 36 Idaho 214, 209 Pac. 1068 (1922). People v. Lim Foon, 29 Cal. App. 270, 155 Pac. 477 (1915). State v. Yee Gueng, 57 Ore. 509, 112 Pac. 424 (1910). Perry's Case, 3 Grat. 631 (1846). Hronek v. People, 134 Ill. 139, 24 N. E. 861 (1890).

[3] 2 WIGMORE ON EVIDENCE (1904) § 1443.

[4] State v. Elliott, 45 Iowa 486 (1877). Nesbit v. State, 43 Ga. 238 (1871).

[5] As to this related problem note (1930) 9 N. C. L. Rev. 77.

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[1] 160 S. E. 393 (Ga. 1931).

[2] Jones v. Williams, 56 Wash. 588, 106 Pac. 166 (1910); Hutchinson v. Ulrich, 145 Ill. 336, 34 N. E. 556 (1893); *Re* Walsh, 175 Mass. 68, 55 N. E. 1043 (1900).