

THE SURVIVING RELIGIOUS TEST

BY FRANK SWANCARA

Mr. Mechem in his classic work on Public Officers wrote that "it is well settled that religious beliefs or opinions *can not* be a *test* of political rights and privileges."¹ This statement is true only in a restricted sense. While no public officer need believe in any doctrine which is peculiar to some particular sect, yet in many states one is not eligible to public office unless he possesses the religious belief which at common law was required of witnesses. Generally this situation results from the constitutional requirement of an oath of office.

To understand the current American law on this subject it is necessary to know what religious beliefs were required by the common law for the taking of a valid oath. In the early stages of the development of the common law only those who believed in all the tenets of the Catholic Church were allowed to take an oath.² This intolerant view was natural in days before the Reformation when the Church and state were very closely intertwined. This harshness was only slightly relaxed in the time of Lord Coke. In *Calvin's Case*³ the Lord Chief Justice announced that "only a Christian" could take an oath. To support his position, Lord Coke invoked the Bible as the foundation of the Common Law, citing the text, "And what concord hath Christ with Belial? or what portion hath a believer with an unbeliever?"⁴

When the famous case of *Omichund v. Barker*⁵ arose in 1744, Lord Chancellor Hardwicke announced during the course of the argument by counsel that Lord Coke's rule was impolitic and that its enforcement would "destroy all that trade and commerce from which this nation reaps such great benefits". This materialistic argument was strengthened by the observation that it was very

¹ Mechem, *Public Officers* (1890) 40.

² Bracton, fol. 16; Briton, *Challenge de Jurors* c. 53 p. 135.

³ (1609) 7 Co. Rep. 17b, 77 Eng. Repr. 397.

⁴ II Corinthians 6:15.

⁵ (1744-1745) 1 Atk. 21, 26 Eng. Repr. 15 or Willes 538, 125 Eng. Repr. 1310. The argument of counsel in this case was continued from term to term during the years 1744 and 1745. The report in *Atkyns* gives the arguments of counsel at considerable length.

doubtful historically if Jews were barred as witnesses at the time in which Lord Coke lived.⁶ All the judges agreed that a person who believed in the Gentoo religion could take an oath. Unfortunately, none of them agreed upon the same test as the one by which future cases were to be decided. This situation is made worse by the fact that there are two reports of this case which differ in several material particulars. According to the contemporary report published by Atkyns, the Lord Chief Baron of the Exchequer (Parker) considered it enough if the witness believed in a God whom he regarded as the Creator of the Universe. Even more liberal views were entertained by Lee, Lord Chief Justice of the King's Bench, who intimated that perhaps in certain cases even atheists might be sworn. Lord Chancellor Hardwicke's opinion is vague. He apparently would require a belief in God and His providence, but under this view God must be thought of as a being who consciously gives rewards and punishments. The opinion of Willes, the Lord Chief Justice of the Common Bench, is the one whose language is most frequently cited. In it he declares that all persons must believe in a God and also that this God has power to give future rewards and punishments in the next world. In the other report of this case, which was not published until 1800, but was based on manuscripts given by the grandson of Willes to the reporter, only Willes' opinion is given.⁷ Besides certain merely verbal changes and changes in the paragraphing of the opinion, the meaning of the proposed test has been radically altered. This report would allow the rewards and punishments to be given either in this world or the next. The conclusions of the Court may be summarized as follows. All the judges, except the doubtful Lee, require a belief in God. Two of the four require that the God be capable of punishing wickedness. None of the judges require a

⁶ A new Biblical text was also found. "Then Peter opened his mouth and said, Of a truth I perceive that God is no respecter of persons; but in every nation he that feareth him, and worketh righteousness, is accepted with him." Acts 10:34-35.

⁷ The Supreme Court of Connecticut expressly ruled that the report of Atkyns is correct. *Atwood v. Welton* (1828) 7 Conn. 66. Most American courts in the early cases adopted the test laid down by Chief Justice Willes as reported by Atkyns. See Frank Swancara, *Non-Religious Witnesses*, 8 *Wis. Law Rev.* (Dec. 1932), p. 3.

belief in a future life, unless the Atkyns report of Willes' views is correct.

Such was the state of the common law when the American colonies successfully revolted. Although many of these colonies had been founded by persons attempting to escape religious persecution in England, nevertheless their colonial history is full of examples of religious bigotry. Under these conditions it is surprising that the earlier State constitutions contained express religious tests. In Georgia,⁸ New Jersey,⁹ North¹⁰ and South Carolina,¹¹ and Vermont¹² all office holders were required to believe in some form of the Protestant religion. In New Hampshire the governor and all members of the legislature must be Protestants.¹³ In Massachusetts¹⁴ and Maryland¹⁵ all public officials had to declare on oath their belief in the Christian religion. In Pennsylvania¹⁶ and Delaware¹⁷ the officials must subscribe to a more complicated formula which involved an acknowledgement of the divine inspiration of both the Old and the New Testaments. Only in Connecticut, New York, Rhode Island, and Virginia were there no express religious tests. Some of these religious discriminations showed astonishing vitality. The Maryland provision

⁸ Constitution of 1777, Art. VI. On historical matters relating to state constitutions and religious tests, see *Hale v. Everett* (1868) 53 N. H. 9; Clarence E. Martin, *The American Judiciary and Religious Liberty*, 62 *American Law Review* 658; Dr. Robert Baird, *Religion in America*; *Holy Trinity Church v. United States* (1892) 143 U. S. 457.

⁹ Const. 1776, art. 19.

¹⁰ Const. of 1776, art. 22.

¹¹ Const. of 1778, art. 38.

¹² Const. of 1777 ch. 1, art. 3.

¹³ Const. of 1784; James Fairbanks Colby, *Manual of the Constitution of the State of New Hampshire*.

¹⁴ Const. of 1780, ch. 6, art. 1.

¹⁵ Const. of 1776, art. 55.

¹⁶ The Pennsylvania test required "a belief in God, the Creator and Governor of the universe, the rewarder of the good and the punisher of the wicked" and an acknowledgment that the "Scriptures of the Old and New Testaments were given by divine inspiration." Const. of 1776, sec. 10.

¹⁷ In Delaware public officers were required to make and subscribe the following declaration: "I, A. B., do profess faith in God the Father, and in Jesus Christ, His only Son, and in the Holy Ghost, one God, blessed for evermore; and I do acknowledge the Holy Scriptures of the Old and New Testament to be given by divine inspiration."

Const. of 1776, art. 22.

lasted until 1851 while the more drastic New Hampshire requirement was not repealed until 1877.

The present constitutions of the various states prohibit religious tests, in the sectarian sense, but preserve one requirement which is obviously religious. Pennsylvania¹⁸ and Tennessee¹⁰ still expressly require of public officers a belief in God and a future state of rewards and punishments. Arkansas,²⁰ Maryland,²¹ Mississippi,²² North Carolina,²³ South Carolina,²⁴ and Texas²⁵ require a belief in the Supreme Being. In all states there is a constitutional provision to the effect that public officials must take an oath or affirmation. In most states there is also a provision that no person shall be denied any civil or political right because of his religious opinions.²⁶

Assuming, without conceding or discussing the point, that no violation of the Federal Constitution is involved, the courts would find no difficulty in applying provisions which require a belief in God.²⁷ It is possible, however, that different conclusions might

¹⁸ Constitution of 1874, Art. I, sec. 4.

¹⁹ Constitution of 1870, Art. IX, sec. 2. This same constitution contains a provision that "no political or religious test, other than the oath to support the constitution of the United States and of this state, shall ever be required as a qualification to any office or public trust under this state". Art. I, sec. 4. Apparently Article IX must be considered as a mere statement of what the drafters of the constitution considered Article I meant.

²⁰ Constitution of 1874, Art. XIX, sec. 1.

²¹ Constitution of 1867, Art. 37 of the Declaration of Rights.

²² Constitution of 1890, Art. XIV, sec. 265.

²³ Constitution of 1868, Art. VI, sec. 8.

²⁴ Constitution of 1895, Art. XVI, sec. 4.

²⁵ Constitution of 1876, Art. I, sec. 4.

²⁶ Such provisions exist in Alabama, Arizona, Delaware, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Minnesota, Missouri, New Jersey, New Mexico,, North Dakota, Oklahoma, Oregon, Rhode Island, Virginia, Washington, West Virginia, and Wisconsin.

²⁷ The only difficulty which is apt to arise is in determining whether the person believes in a "future state of rewards and punishments" as required by the Pennsylvania and Tennessee constitutions. Discussing a similar provision, the South Carolina Supreme Court reached the conclusion that it would bar Jews. *State v. Pitt* (1914) 166 N. C. 268, 271, 80 S. E. 1060. This is obviously erroneous no matter what the court may have considered the teachings of the Hebrew religion to be. The language in which this test is framed is a mere adoption of the language used by Willes in *Omichund v. Barker* (according to the Atkyns report). Nevertheless, Willes and all the judges used the fact that Jews could take an oath as a reason for holding Lord Coke's decision in *Calvin's case* wrong.

be reached as to the effect of other provisions. Reactionary courts might invoke the requirement of an oath or affirmation²⁸ as a basis of disqualifying one, either as a witness or as a public officer, if he does not possess the religious belief which was requisite at common law to qualify him to take an oath.

According to one line of cases, which includes most of the earlier cases dealing with the competency of witnesses, any person in order to take a valid oath must possess the minimum of religious belief required by the common law.²⁹ The legalistic reasoning upon which this view is based has been well expressed by the Supreme Court Commission of Ohio in the case of *Clinton v. State*.³⁰

Since oaths and affirmations cannot be dispensed with, . . . the recognized . . . religious qualifications of the person to take the necessary oath can no more be dispensed with than the oath itself. . . Under our constitution the character of a man's religious belief is not permitted to affect his competency as a witness; yet to render him competent to take an oath as a witness, his moral nature must be strengthened, and his conscientiousness be quickened, by a belief in a supreme being, who will certainly, either in this life or in the life to come, punish perjury.

One of the judges in a Tennessee case was even more outspoken, declaring that the reason for the constitutional requirement of a belief in God and a future state was that non-believers "cannot be trusted."³¹ If, for example, Presbyterians were excluded from office on a judicial pretense that their doctrine of predestination renders them unfit to be trusted, all would see in that practice a flagrant violation of the principle of religious liberty and of constitutional provisions which prohibit religious tests; but accord-

²⁸ Constitutional and statutory provisions relating to affirmations do not affect the question of the required religious beliefs. "The adoption of an 'affirmation' as a substitute for an oath was adopted not as a relaxation of the rule requiring a belief in a Supreme Being, but in recognition of those who believing (in the existence of God), conscientiously believe also that the divine command is to, 'Swear not at all.'" *Wright v. State*, 24 Ala. App. 378, 135 So. 636, 640 (dissenting opinion); *Commonwealth v. Smith*, 9 Mass. 107; *Clinton v. State* (1877) 33 Ohio State 27.

²⁹ Since the oath is basically the same for all purposes, obviously the same religious beliefs will be required no matter for what purpose it is taken.

³⁰ (1877) 33 Ohio State 27.

³¹ *McClure v. State* (1828) 9 Tenn. (1 Yerger) 206.

ing to the reasoning of the Tennessee jurist, if non-believers in God or Divine wrath are barred from office or the witness stand because of their nonbelief, it is assumed that this matter "has nothing to do with religious freedom."

These views, however, were quite consistent with other early cases involving the competency of witness. Thus, in Alabama in 1841, a disbeliever in divine punishments was not allowed to take the oath necessary to be a witness. No attention whatever was paid to the constitutional provision that "the civil privileges or capacities of any citizen shall in no way be diminished or enlarged on account of his religious principles".³² A like decision, under similar constitutional provisions, was given in Vermont, the court holding that it was "quite impossible" that an atheist "should be sworn".³³

The judges in the early days of our Republic believed in the then oft repeated statement that the obligation of an oath is necessary for the maintenance of peace and justice among men, and could not imagine that a constitution could be intended to grant to an unbeliever in divine judgments and punishments the right to participate in any governmental matter or in the administration of justice. Such persons were presumed to be untrustworthy and "regarded with universal horror and indignation".³⁴ This attitude of mind caused acquiescence in such statements of law as that of Chief Justice Spencer of the New York Supreme Court of Judicature in the case of *Jackson v. Gridley*:³⁵

³² *Blocker v. Burness* (1841) 2 Ala. 354.

³³ *Arnold v. Estate of Arnold* (1828) 13 Vt. 363.

³⁴ The Quarterly Christian Spectator (New Haven, Conn.) for September 1829 in a caustic review of "The Demurrer", a book by Mr. Thomas Herttell wherein the latter assailed the requirement of religious belief on the part of witnesses.

³⁵ 18 Johns. 98 (1820). As to the nature of the belief required by most courts, see Section 1818 Wigmore on Evidence (2d ed.). South Carolina follows the views of Lord Chancellor Hardwicke in *Omichund v. Barker* and only requires a belief in God and His providence. *State v. Abercrombie* (1923) 130 S. C. 358, 126 S. E. 142. Iowa follows, apparently, the view of Chief Justice Lee and Chief Baron Parker in requiring only a belief in God. *State v. Jackson* (1912), 156 Iowa 588, 137 N. W. 1034. In this connection it may be observed that prosecutions for blasphemy were once deemed justified on the ground that the offense tended to disqualify persons to be witnesses by lessening their fears of future punishments. See Fundamentalism and the Law, by Frank Swancara, in 55 United States Law Review (Nov. 1931), 593.

By the law of England, which has been adopted in this state, it is fully and clearly settled, that infidels who do not believe in a God, or *if they do*, do not think that he will either reward or punish them *in the world to come*, cannot be witnesses in any case, nor under any circumstances.³⁶

This language is a mere paraphrase of that used by Chief Justice Willes in the case of *Omichund v. Barker* as reported by Atkyns. According to that view or any other which is based on a belief in Divine punishments, not only an atheist is proscribed, but also any other person who does not believe in such retributions for misdeeds. No belief in such judgments is expressed in the pronouncements of some religious groups. Thus a spokesman for the Unitarians says that there will be "eternal good for all who have done well here" and "eternal hope for such as have done ill here."³⁷ According to the reasoning of the cases thus far cited, many of our eminent Unitarian jurists and statesmen never qualified for their respective offices, because incompetent to take a valid oath or affirmation.

Opposed to this narrowly legalistic construction, at least where there are constitutional provisions purporting to secure equal civil rights and capacities to all, regardless of their religious beliefs, is another line of decisions, nearly all of which involve the competency of non-religious witnesses. One of the most recent of these is an Alabama case, holding that an atheist may take an oath and testify, because such a right is granted him by the constitutional provision "that the civil rights, privileges, or capacities shall in no wise be diminished or enlarged on account of his religion".³⁸ Cases to the same effect may be found in Illinois,³⁹ Kansas,⁴⁰ Kentucky,⁴¹ Missouri,⁴² Virginia,⁴³ and West Virginia.⁴⁴ This principle is of course obviously applicable also to one who has to take an oath of office. Accordingly, there is a

³⁶ Italics author's.

³⁷ Reverend J. T. Sunderland, *What do Unitarians Believe* (Unitarian-Laymen's League, Boston).

³⁸ *Wright v. State* (1931) 24 Ala. App. 378, 135 So. 636.

³⁹ *Hroneck v. People* (1840) 134 Ill. 139, 24 N. E. 861.

⁴⁰ *Dickinson v. Beal* (1900) 10 Kan. App. 233, 62 Pac. 724.

⁴¹ *Bush v. Commonwealth* (1882) 80 Ky. 244.

⁴² *Londener v. Lichtenheim* (1882) 11 Mo. App. 385.

⁴³ *Perry's Case* (Va. 1846) 3 Gratt. 632.

⁴⁴ *State v. Hood* (1907) 63 W. Va. 182, 59 S. E. 971.

Georgia decision that a party described by his adversary as "an infidel of the order usually denominated Universalists" was entitled to hold the office of guardian, because the constitution provided that "no person shall be subject to any civil or political incapacity . . . in consequence of" his opinions.⁴⁵ Under this view the oath becomes a means of impressing the person with the solemnity of the occasion rather than an instrument for terrifying the taker into performing his promise from fear of supernatural punishment.⁴⁶

It can safely be assumed that the operation of the Federal Constitution is not, and cannot be, hindered by any guarantee of religious freedom contained in the constitution of any state. It is therefore necessary to consider the effect of clause 3 of Article VI of the Federal Constitution, which reads:

The Senators and Representatives before mentioned, and the members of the several State Legislatures, and *all* executive and judicial officers, both of the United States and *of the several states*, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.⁴⁷

The Supreme Court of the United States has repeatedly held that the words in the constitution are to be interpreted in the light of their meaning at common law.⁴⁸ This might be the basis of a future holding that the requirement of an oath or affirmation implies that he who is to take it must have the religious belief which at common law was necessary to qualify one for taking an oath. No court has yet been called upon to interpret this provision of the Constitution. In the absence of a precedent, any court would be free to adopt a more liberal construction which would better accord with present day liberalism and social conditions. The framers of the Federal Constitution probably

⁴⁵ *Maxey v. Bell* (1870) 41 Ga. 184.

⁴⁶ Such a view is strengthened by statutes like R. S. Mo. (1929) sec. 1718 that in administering the oath (here to witnesses) the officer shall adopt the mode which appears most binding on the conscience of the person being sworn.

⁴⁷ Italics author's.

⁴⁸ *Moore v. U. S.* (1875) 91 U. S. 270, 274; *Smith v. Alabama* (1888) 124 U. S. 465, 478; *U. S. v. Wong Kim Ark.* (1898) 169 U. S. 649. See also 12 C. J. 197, note 51.

believed that there was and always will remain a universal belief in a personal, punishing and rewarding Deity, and it never occurred to them to attempt to create and preserve equal rights for those who believe merely in the Absolute, as do some philosophers, or in the unknowable First Cause of Spencer, or those who have no form of belief in a Supreme Being. Consequently the provision for oaths and affirmations contains nothing expressly making all persons legally capable of taking them. The same situation must have existed in the formulation of several of the early State constitutions. In the constitution of Massachusetts as it existed until 1833, there was the following clause:⁴⁹

And every denomination of Christians, demeaning themselves quietly and as good subjects of the state, shall be equally under the protection of the law.

Such a provision still exists in the constitution of New Hampshire.⁵⁰ It must have been presumed that non-Christians did not exist, or that they had no rights which the believer was bound to respect, being in a condition like that of the negro slaves. Thus, it might well be urged that there was no intent to impose any religious test by the requirement of an oath. This view is strengthened by the fact that the next clause of the same sentence bans the imposition of any "religious test" as a "qualification" for any office under the United States. Finally, since the reason for the common law rule has ceased with the lessening fears of supernatural judgments felt by the average person, the maxim *Cessante ratione legis cessat lex ipsa* should be applied.

Let us suppose that a non-believer goes through all the formalities of an oath or affirmation in a jurisdiction which still imposes this religious test. He has uttered all the usual words and signed the usual form; but, if he then assumes the duties of the office to which he has been validly elected or appointed, he is a mere usurper. This situation may be illustrated by reference to the well considered English case of *Attorney General v. Bradlaugh*.⁵¹ Charles Bradlaugh, who had been elected to serve as a member of

⁴⁹ Art. III, Declaration of Rights (1780) before amendment by Art. XI which was adopted Nov. 11, 1833.

⁵⁰ James Fairbanks Colby, *Manual of the Constitution of the State of New Hampshire*.

⁵¹ (1885) 14 L. R. 667.

the British Parliament, was prosecuted for penalties for having voted in the House of Commons without first having made and subscribed the oath required of every member. He had in fact said and done all that was possible in making and subscribing the oath. Nevertheless, the court held that, simply because he had no belief in Divine punishments, it was impossible for him to make an oath, and therefore in a legal sense he had never taken the oath required.

Even more serious than the possible civil disability or criminal liability of the non-believing officer is the effect of the old rules, if applied, upon the rights of third persons. After a jury had found an accused guilty in "a case of clear and aggravated murder", a clergyman furnished an affidavit to the effect that one of the jurors was an "atheist". One of the judges of the Tennessee Supreme Court would have quashed the conviction and ordered a retrial of the case.⁵² Justice Peck said:

By our constitution such a person could not hold a civil office; he could not be a constable, nor even an administrator. The constitution is the expressed will of the community; by common consent, in article 8 section 2, no person who denies the being of a God, or a future state of rewards and punishments, shall hold any office in this government. Why? it may be asked. It is answered, because he cannot take an oath—he cannot be trusted. This question has nothing to do with religious freedom. . . . He was an evil genius, in a sacred place.

It can readily be imagined what harm to supposedly vested rights and interests would be worked if the ordinary person realized and could invoke the possibility of upsetting or preventing official action by producing such evidence concerning the theological opinions of the official.

In the early days of our Republic persons who were disqualified to take an oath and hold office belonged to an inarticulate class, and nothing was said or done in their behalf. As late as 1856, Dr. Robert Baird, the eminent Presbyterian historian, wrote:⁵³

⁵² McClure v. State (1828) 9 Tenn. (1 Yerger) 206.

⁵³ Baird, Religion in America 575.

The avowed Atheists are, happily, few in number, and are chiefly to be found among the frequenters of our remaining groggeries and rum-holes.

The godless have now largely deserted the rum-holes for the universities. In recent years Professor James H. Leuba found that the majority of historians, physical scientists, biologists, sociologists, and psychologists do not believe in a personal Deity.⁵⁴ Besides such non-believers, there are many believers whose conception of God is otherwise than as a dispenser of rewards and punishments. There is accordingly a great mass of the best educated of our fellow citizens who are disqualified from office according to the view expressed by those American courts which purport to follow the rule of *Omichund v. Barker*.

If members of some particular Christian sect were made ineligible to hold office by some express constitutional provision, most Americans would recognize and denounce this impolitic discrimination. In showing the injustice of alleged propaganda against a Presidential nominee, a religious publication said:⁵⁵

If no Catholic is allowed to be President (or governor, as the case may be), shall any Catholic be permitted the privilege of paying taxes? Allowed? Say rather compelled! . . . Shall Catholics fulfil duties, but have no rights? Shall they bear responsibilities, but enjoy no corresponding privileges? And is this good democracy? In the effort to suppress them, are the bigots willing to abrogate democratic principles and drive a coach and four through the constitution?

If we Catholics are to be debarred from political office, shall we also be forbidden to enter the army or navy? Or shall we be privileged to fight and die for America as always?

The principle invoked in the foregoing quotation is obviously as applicable in behalf of non-believers in supernatural judgments as it is in favor of members of any religious denomination.

Catholic writers who complain that in some communities Catholic teachers are refused employment are complacent about the exclusion of atheists from office in Maryland. Protestant writers who see injustice in the alleged fact that Protestants have been refused employment on a road staff in Catholic Ireland have had

⁵⁴ Leuba, *Belief in God and Immortality* (1916).

⁵⁵ *Catholic World* for October 1928, vol. 128 p. 103.

no objection, thus far, to any law which bars from public office one who does not believe in future punishments.⁵⁶ Indeed, Christian writers have exhibited smug complacency and not shame over discriminations against those who so fundamentally differed with their religious views. Thus, Dr. Robert Baird entitled one of the chapters of his work, "The Government of the United States shown to be Christian by its Acts".⁵⁷ In the text he cited the legal religious requirements for taking an oath as an example of the "spirit" which pervades our government.

If ever an effort is made to exclude the name of a candidate from the ballot, or to disqualify him if elected, on account of his inability to fear Divine wrath, the requirement of a religious qualification for taking an oath would be invoked against him, not by those who are interested in preserving a redemptive religion, but by those who design to aid their own political fortunes. An atheist would be ejected from public office, not because of his private opinions or their supposed effect upon his morality, but in order to provide a sinecure for some political ally of the accuser.⁵⁸

⁵⁶ *New Age* for February 1930 p. 99.

⁵⁷ Baird, *op. cit.* 246.

⁵⁸ The importance of this element of selfishness is strikingly illustrated by the conduct of heirs when they contest the validity of bequests for supposedly anti-religious purposes. See Frank Swancara, *A Court's Proscription of Scientific Works*, XX *Georgetown Law Journal* (March, 1932), p. 382. That discriminations based on lack of religious belief generally result only in injustice, see Frank Swancara, *Iniquity in the Name of Justice*, XVIII *Virginia Law Review* (Feb. 1932), p. 415.