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The Right to Practice Law As Dependent On Fear of Hell

BY FRANK SWANCARA*

Colorado Rule 222 provides that "every applicant [for admission to the bar] shall, before receiving a certificate of admission, * * * take the following oath * * *." Since we have by statute adopted the common law as of 1607, a person is incompetent to take an oath of this kind unless, according to some cases, he believes in supernatural punishments "in the world *to come*."[1] Of course. if the oath maker is a Gentoo or a Mohammedan he is, *ipso facto*, competent. The presumption is that his hell is fearful enough to make his oath terrifying and effective. So important, in jurisprudence, is hell that the Tennessee Constitution of 1870 provides that "no person who denies * * * a *future* state of rewards and punishments, shall hold any office * * *."

Since any person may take an oath as a witness, why not also an oath of office or of admission? The answer is that the term "witnesses" in Section 1, Ch. 177, C. S. A., providing that all persons may be witnesses, refers only to persons who testify to matters other than those stated in an oath. One taking an oath of admission to the bar is not acting as a "witness." If that is true, then he is not a witness who, under Section 7, Ch. 177, C. S. A., may go through the formalities of an oath or affirmation without being "questioned in regard to his or her" opinions on the subject of punishments "in the world to come."[2]

The court itself recognizes that the applicant may "affirm" under Section 2, Ch. 115, C. S. A., and so he may, but that statute was copied after like statutes intended to accommodate only "Quakers, Nicolites, Tunkers and Mennonists."[3] Only in Florida does the statute permit affirmations by "all persons who do not believe in the doctrine of future rewards and punishments."[4] Rule 43 (d) permits "a solemn affirmation" in lieu of an oath. Judges say, however, that one incompetent to take an oath is also incompetent to make "a solemn affirmation."[5]

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[1]Jackson v. Gridley. 18 Johns (N. Y.) 98, 103 (1820), where the court said: "By the law of England * * * 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."

[2]Ibid.

[3]See Ch. 71, §3, COMP. STAT. D. C. 1894.

[4]REV. STAT. 1919, §2703, as quoted in 3 WIGMORE ON EVIDENCE (2d ed.), 877.

[5]Samford, J., in Wright v. State, 24 Ala. App. 378, 135 So. 636, 640 (1931).

To deny admission to, or to disbar, solely on the ground that the applicant or lawyer does not believe in punishments "in the world to come" and is on that account incompetent to take any oath, under the common law and where that common law has not been abrogated, would seem a violation of our Bill of Rights. Section 4, Art. II of the state Constitution provides that "no person shall be denied any civil or political right, privilege or capacity, on account of his opinions concerning religion," but the operative effect of that clause is modified by the further provision that "oaths or affirmations" shall not be dispensed with, which implies a retention of the common law requirements as to competency to take oath.[6] Be that as it may, the right to practice law is not a "civil or political right" within the meaning of the Constitution, but is only a favor granted or withheld at the pleasure of the Supreme Court. That tribunal has inherited the power which the inns of court had, in England, to "refuse to give to one of its members a call to the bar, * * * without reasons."[7] It follows that the Supreme Court could refuse to admit not only one disqualified at common law to take an oath or affirmation, but also "without reasons" anyone else. If a policy of non-admission were enforced long enough, it might not only abolish the bar but also leave no young man qualified to become judge if to be "learned in the law" means to be an admitted attorney.

Judge Jeffreys would have no troubles under our Rules regarding oaths, for he had all the beliefs required, judging by the fact that he warned a witness thus:[8]

> "* * * and that God of Heaven may justly strike thee into eternal flames and make thee drop into the bottomless lake of fire and brimstone."

No one has ever questioned the competency of any applicant to take an oath, but one himself might inform the admitting court of his incompetency at common law, to conform to an ethical precept involved in these words of Chief Justice Shaw:[9]

> "* * * where a man is called as a witness, * * * he is not only permitted, *but bound*, by every consideration of moral honesty, to avow his unbelief, if it exists."

Chief Justice Taft would, accordingly, have had to avow his unbelief[10] in a doctrine required for the competency of witnesses at common law, and the late Charles S. Thomas would have had to admit that he rejected the doctrine that "man seems to suffer in death the added affliction of an eternity of post mortem agonies."[11]

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[6]Clinton v. State, 33 Ohio St. 27 (1877).
[7]O'Brien's Petition, 79 Conn. 46, 63 Atl. 777 (1906).
[8]Quoted in WIGMORE ON EVIDENCE (2d ed.) §1816.
[9]Commonwealth v. Kneeland, 20 Pick. (Mass.) 206, 220 (1838).
[10]Publications of American Unitarian Association duly examined.
[11]Charles S. Thomas, *Morituri Te Salutamus.*

Edwin M. Abbott in *The Law and Religion* is "convinced," says Prof. Yarros, in the American Bar Association Journal, "that many lawyers do good in the world and lead worthy and useful lives without any belief in a personal God."[12] Such lawyers could be, theoretically, disbarred on the ground that the alleged oath of admission each took was not an oath at all. The same may be said of lawyers who do have a "belief in a personal God" but do not believe in the doctrine of divine punishments. *Attorney General v. Bradlaugh*[13] is authority for these conclusions. Charles Bradlaugh was prosecuted, criminally, for penalties for having, as a duly elected member of the House of Commons, voted without first having made and subscribed the oath required of a member. He had in fact said and physically performed all that was possible in the making and subscribing of an oath, and what was done was binding on his conscience. Yet because he had no belief in divine punishments, it was held that it was legally impossible for him to take an oath, and therefore no oath was taken. If that case is fully followed, not only could there be disbarments, but no applicant for admission to the bar could be admitted if he avowed a non-belief in the doctrine of punishments.

Chief Justice Willes, justifying oaths, cited Lactantius on the point that oaths frighten or influence men "so very wicked as not to be afraid even of committing murder."[14] But oaths are not necessary to preserve the integrity of honest men. Much less is any creed on "post mortem agonies." One judge took judicial notice of the fact that Clarence Darrow had no belief even in a Deity capable of inflicting punishments.[15] Hence Darrow was incapable of taking an oath, as the courts held Bradlaugh to be. To have barred Darrow from the bar on that account would have been a penalty on opinion, yet some judges are willing to impose such penalties, for one of them, in New Jersey, was ready to exclude a New York attorney in the event that the latter would not give a satisfactory answer to a question relating to religious belief.[16]

For many reasons, and in every state, the court rule or statute that requires an "oath" of an attorney might well be amended so as to permit an oath without regard to common law qualifications, or an affirmation without regard to the theological or other opinions of the applicant.

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[12](1939) 25 A.B.A.J. 1044.

[13]14 L.R. (Q.B. Div.) 667, 698 (1885). "* * * the question before the court was whether the person, although he went through the form of it, could take an oath." *Id.* 697.

[14]Willes Rep. 538.

[15]Brown, J., in State v. Weedman, 55 S.D. 343, 226 N.W. 348, 369 (1929).

[16]Letter of Paul Blanchard concerning proceedings of June 3, 1940, in a case wherein Herman Matson was suing the city of Hoboken and Blanchard appeared as one of counsel for plaintiff.