Dear Sam — Many corrections have been made on this — the last proof. AGH

IN THE

Supreme Court of Tennessee

AT NASHVILLE BY TRANSFER FROM KNOXVILLE.

JOHN THOMAS SCOPES,
Plaintiff-in-Error,

vs.

STATE OF TENNESSEE,
Defendant-in-Error.

No. 2 Rhea County, Criminal Docket, September Term, 1925.

STATEMENT OF FACTS, ASSIGNMENT OF ERRORS, BRIEF AND ARGUMENT IN BEHALF OF JOHN THOMAS SCOPES, PLAINTIFF IN ERROR.

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Supreme Court of Tennessee,

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JOHN THOMAS SCOPES, Plaintiff-in-Error, vs. STATE OF TENNESSEE, Defendant-in-Error.	**No. 2 Rhea County, Criminal Docket, September Term, 1925.**

STATEMENT OF FACTS.

This is an appeal in the nature of a writ of error from a judgment of the Circuit Court of Rhea County, the defendant having been found guilty and fined $100.00 for the violation of what is generally known as the Anti-Evolution Act, being Chapter 27 of the Public Acts of 1925, which became effective on March 21, 1925. Said Act reads as follows:

> "AN ACT prohibiting the teaching of the Evolution Theory in all the Universities, Normals, and all other Public schools of Tennessee, which are supported in whole or in part by the public school funds of the State, and to provide penalties for the violations thereof.
>
> SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE, That it shall be unlawful for any teacher in any of the Universities, Normals, and all other Public schools of the State which are supported in whole or in part by the public school funds of the State, to teach any theory that denies the story of the Divine Creation of man as taught in the Bible, and to teach instead that man has descended from a lower order of animals.

SECTION 2. BE IT FURTHER ENACTED, That any teacher found guilty of the violation of this Act, shall be guilty of a misdemeanor, and upon conviction, shall be fined not less than One Hundred ($100.00) Dollars nor more than Five Hundred ($500.00) Dollars for each offense.

SECTION 3. BE IT FURTHER ENACTED, That this Act take effect from and after its passage, the public welfare requiring it."

The indictment under which Scopes was found guilty reads as follows (Tr., Vol. I), p. 47):

"That John Thomas Scopes heretofore on the 24th day of April, 1925, in the county aforesaid, then and there unlawfully did wilfully teach in the Public schools of Rhea County, Tennessee, which said Public schools are supported in part or in whole by the public school fund of the State, a certain theory and theories that deny the story of the Divine Creation of man, as taught in the Bible, and did teach instead thereof that man has descended from a lower order of animals, he, the said John Thomas Scopes, being at the time or prior thereto a teacher in the Public schools of Rhea County, Tennessee, aforesaid, against the peace and dignity of the State.

A. T. STEWART,
Attorney General."

The trial began on July 10, 1925, and continued until July 21, 1925.

The defendant Scopes filed an elaborate motion to quash the indictment, and also demurred to the indictment on numerous grounds (Tr., Vol. I, pp. 3, 48, 54). The motion to quash was denied on all grounds, and the demurrer was likewise overruled (Ib., p. 15). During the progress of the trial the defendant offered the testimony of various scien-

tific and expert witnesses for the purpose of explaining the theory of evolution, the facts upon which that theory is based and the scientific accuracy and authority therefor. The defense also offered to prove by Biblical scholars what the Bible was, its history, its acceptation and intepretation. The defendants further offered to show that there was nothing necessarily inconsistent between the Bible as interpreted by many Biblical scholars and evolution and certainly nothing inconsistent between the theory of evolution and Christianity. The Court, on motion of the State, excluded all this testimony. The Court's action in so doing is preserved in the technical record (T. R., Volume 1, pp. 36-41).

At the conclusion of the trial, and after the judgment of the Court had been pronounced, the defendant filed a motion for a new trial in which he assigned as error the action of the Court in overruling the motion to quash and the demurrer, and likewise the action of the Court in regard to certain rulings of the Court during the trial of the cause (Ib., p. 43).

Unfortunately the bill of exceptions was not certified and filed within the time limited by the trial court; and upon a preliminary motion of the State filed herein on October 5, 1925, the bill of exceptions was stricken out as a part of this record. However, as will hereafter appear, Volumes II, III, IV of this transcript, while technically not a part of the present record, contain a vast amount of scientific knowledge of which the Court must take judicial notice, but which the Court could probably find nowhere else in so convenient a compass. Before the bill of exceptions was stricken out, a large part of the plaintiff in error's brief had already been printed; and the Court will find

in the course of this brief references to and quotations from the bill of exceptions. In view of the action of the Court in striking out this bill of exceptions, we do not present these references and quotations as part of the record but we have retained them because we feel they are valuable in illustrating the argument. We ask the Court to take judicial notice of the statements of scientists referred to in the brief in the same way that it would take judicial notice of such statements if they appeared in encyclopedias. Where the quotations are from statements made by the Judge or attorneys, we ask the Court to consider them hypothetically, that is, as representing a position that might be taken in a trial of any case under the statute.

Necessarily, the plaintiff in error must confine his assignments of error to such errors as appear in the technical record; and for error in the action of the Court below, he assigns the followings:

ASSIGNMENT OF ERRORS.

I.

THE TRIAL COURT ERRED IN OVERRULING THE DEFENDANT'S MOTION TO QUASH THE INDICTMENT AND HIS DEMURRER THERETO ON THE GROUND THAT SAID INDICTMENT IS VOID AS THE FACTS CONSTITUTING THE CRIME WERE NOT ALLEGED WITH SUFFICIENT PARTICULARITY, AND AS THE DEFENDANT WAS NOT PROPERLY INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION AGAINST HIM. LIKEWISE, THE TRIAL COURT ERRED IN OVERRULING THE DEFENDANT'S MOTION FOR A NEW TRIAL ON THE SAME GROUND.

Authorities relied upon:

Rumely v. *U. S.*, 293 Fed. 532, 547;
Goldberg v. *U. S.*, 277 Fed. 211, 215;
Fontana v. *U. S.*, 262 Fed. 283, 286;
Miller v. *U. S.*, 133 Fed. 337, 341;
U. S. v. *Hess*, 124 U. S. 483;
Evans v. *U. S.*, 153 U. S. 584, 587.

Also see argument hereinafter.

II.

THE TRIAL COURT ERRED IN OVERRULING THE DEFENDANT'S MOTION TO QUASH THE INDICTMENT AND HIS DEMURRER THERETO ON THE GROUND THAT SAID ACT IS UNCONSTITUTIONAL, IN THAT THE CAPTION DOES NOT EXPRESS THE SUBJECT OF THE LAW AS REQUIRED BY ARTICLE II., SECTION 17 OF THE CONSTITUTION OF TENNESSEE. THE TRIAL COURT LIKEWISE ERRED IN OVERRULING THE DEFENDANT'S MOTION FOR A NEW TRIAL ON THE SAME GROUND.

Authorities relied upon:

Cannon v. *Mathes*, 8 Heisk. 515, 518;
State v. *Hayes*, 8 Cates 42, 43;
Samuelson v. *State*, 8 Cates 477, 478;
State v. *McCann*, 4 Lea 8, 12;
Knoxville v. *Lewis*, 12 Lea 182;
Hyman v. *State*, 3 Pickle 113;
Ledgewood v. *Pitts*, 14 Cates 570, 608.

Also numerous other authorities cited in the argument hereinafter.

III.

THE TRIAL COURT ERRED IN OVERRULING THE DEFENDANT'S MOTION TO QUASH THE INDICTMENT, AND HIS DEMURRER THERETO, ON THE GROUND THAT SAID ACT IS UNCONSTITUTIONAL AS VIOLATING THE DEFENDANT'S CONSTITUTIONAL GUARANTY OF RELIGIOUS FREEDOM AS ESTABLISHED BY ARTICLE I., SECTION 3, OF THE CONSTITUTION OF TENNESSEE. THE TRIAL COURT LIKEWISE ERRED IN OVERRULING THE DEFENDANT'S MOTION FOR A NEW TRIAL ON THE SAME GROUND.

Authorities relied upon:

Constitutional Law, 12 C. J., Sec. 451;
Schools and School Districts, 35 Cyc., pp. 1126-27;
Schools, 34 R. C. L., Secs. 115-116;
State v. *School Dist.,* 76 Wis. 177;
People v. *Board of Education,* 245 Ill. 335;
Herold v. *School Directors,* 135 La. 1034.

Also numerous other authorities cited in the argument hereinafter.

IV.

THE TRIAL COURT ERRED IN OVERRULING THE DEFENDANT'S MOTION TO QUASH THE INDICTMENT AND HIS DEMURRER THERETO ON THE GROUND THAT SAID ACT IS UNCONSTITUTIONAL AS GIVING A PREFERENCE TO A RELIGIOUS ESTABLISHMENT IN VIOLATION OF ARTICLE I, SECTION 3, AND ARTICLE XI, SECTION 8 OF THE CONSTITUTION OF TENNESSEE. THE TRIAL COURT ERRED IN OVERRULING THE DEFENDANT'S MOTION FOR A NEW TRIAL ON THE SAME GROUND.

Authorities relied upon:

Watson v. *Jones,* 80 U. S. 679;
Davis v. *Beacon,* 133 U. S. 333;
Mormon Church v. *United States,* 136 U. S. 1;
Reynolds v. *United States,* 98 U. S. 145;
Campbell v. *State of Georgia,* 11 Ga. 353;
Commonwealth v. *Herr,* 229 Pa. St. 132;
James Madison's Memorial Address to General Assembly of Virginia in 1785;
Statute of Religious Freedom of Virginia of Thomas Jefferson;
Evans v. *School District of California,* 222 Pac. 801;
People v. *Board of Education,* 245 Ill. 334;
Wilkerson v. *City of Rome,* 152 Ga. 762;
Herald v. *Parish Board of School Directors,* 136 La. 1034;

State v. *Board School District No. 8,* 76 Wisc. 177;

Constitutional Law, 12 C. J., Sec. 451;

Schools and School Districts, 35 Cyc., pp. 1126-27;

Schools, 34 R. C. L., Sections 115-116.

See authorities referred to under Assignment III.

V.

THE TRIAL COURT ERRED IN OVERRULING THE DEFENDANT'S MOTION TO QUASH THE INDICTMENT AND HIS DEMURRER THERETO ON THE GROUND THAT SAID ACT IS UNCONSTITUTIONAL IN THAT IT VIOLATES ARTICLE XI, SECTION 12 OF THE CONSTITUTION OF TENNESSEE, WHICH PROVIDES THAT "IT SHALL BE THE DUTY OF THE GENERAL ASSEMBLY TO CHERISH LITERATURE AND SCIENCE." THE TRIAL COURT LIKEWISE ERRED IN OVERRULING THE DEFENDANT'S MOTION FOR A NEW TRIAL ON THE SAME GROUND.

Authorities relied upon:

> "Science is accumulated and accepted knowledge which has been systematized and formulated with reference to the discovery of general truths or the operation of general laws." —Webster's New International Dictionary 1924 ed.).

Neither the story of creation in the first chapter of Genesis, nor the conflicting story of creation in the second chapter of Genesis is accredited by science, but the doctrine of organic evolution, including the ascent of man "from a lower order of animals", is universally accepted by scientists at the present time.

> Encyclopedia Britannica (11th ed.), on Evolution;
> New International Encyclopedia (1923 ed.) on Evolution.
> The Americana (last ed.) on Evolution.

See also statements of distinguished scientists in the excluded bill of exceptions (Tr., Vol. III and IV, pp. 568-723); the facts set forth therein being facts of which the Court must take judicial notice, being the universal voice of science.

> Judicial Notice, 15 R. C. L., Sec. 55;
> Evidence, 23 C. J., Secs. 1964, *et seq.*

See also numerous other authorities cited in the argument hereinafter.

VI.

THE TRIAL COURT ERRED IN OVERRULING THE DEFENDANT'S MOTION TO QUASH THE INDICTMENT AND HIS DEMURRER THERETO ON THE GROUND THAT SAID ACT IS UNCONSTITUTIONAL IN THAT IT VIOLATES ARTICLE I, SECTION 8 OF THE CONSTITUTION OF TENNESSEE, PROVIDING THAT "NO MAN SHALL BE TAKEN OR IMPRISONED, DISSEIZED OF HIS FREEHOLD, LIBERTIES, OR PRIVILEGES, OR OUTLAWED, OR EXILED, OR IN ANY MANNER DESTROYED OR DEPRIVED OF HIS LIFE, LIBERTY OR PROPERTY, BUT BY THE JUDGMENT OF HIS PEERS OR THE LAW OF THE LAND", AND ALSO IN THAT IT VIOLATES OTHER PROVISIONS OF THE STATE CONSTITUTION HERETOFORE REFERRED TO AND DISCUSSED UNDER ARGUMENT OF ASSIGNMENTS VI AND VII. THE TRIAL COURT LIKEWISE ERRED IN OVERRULING THE DEFENDANT'S MOTION FOR A NEW TRIAL ON THE SAME GROUNDS.

Authorities relied upon:

The authorities and argument under this Assignment are consolidated with Assignment VII.

VII.

THE TRIAL COURT ERRED IN OVERRULING THE DEFENDANT'S MOTION TO QUASH THE INDICTMENT AND HIS DEMURRER THERETO ON THE GROUND THAT SAID ACT IS UNCONSTITUTIONAL AS VIOLATING SECTION I OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, WHICH PROVIDES THAT "NO STATE SHALL MAKE OR ENFORCE ANY LAW WHICH SHALL ABRIDGE THE PRIVILEGES OR IMMUNITIES OF CITIZENS OF THE UNITED STATES, NOR SHALL ANY STATE DEPRIVE ANY PERSON OF LIFE, LIBERTY, OR PROPERTY WITHOUT DUE PROCESS OF LAW, NOR DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS." THE TRIAL COURT LIKEWISE ERRED IN OVERRULING THE DEFENDANT'S MOTION FOR A NEW TRIAL ON THE SAME GROUND.

Authorities relied upon:

Const. Law, 12 C. J., Secs. 441, 443;
Gitlow v. *New York,* 45 Sup. Ct. Rep. 17;
Meyer v. *Nebraska,* 262 U. S. 390;
Pierce v. *Society of Sisters,* U. S. Sup. Court, June 1, 192 ;
Truax v. *Raich,* 239 U. S. 33;

Slaughter House Case, 16 Wallace 36;
Smith v. *Texas,* 233 U. S. 630, 636;
Lawton v. *Steel,* 152 U. S. 133, 137;
Yick Wo v. *Hopkins,* 118 U. S. 356, 369;
Rogio v. *State,* 2 Pickle 272;
State v. *N. C. & St. L. Ry. Co.,* 16 Cates 1;
Stratton v. *Morris,* 89 Tenn. 397, 534.

Also numerous other authorities cited in the argument hereinafter.

VIII.

THE TRIAL COURT ERRED IN FAILING AND REFUSING TO QUASH SAID INDICTMENT ON THE GROUND THAT SAID ACT IS UNCONSTITUTIONAL AS VIOLATING ARTICLE I, SECTION 10 OF THE CONSTITUTION OF THE UNITED STATES, WHICH PROVIDES THAT "NO STATE SHALL PASS ANY LAW IMPAIRING THE OBLIGATION OF CONTRACTS".

This particular ground of the invalidity of the anti-Evolution Act was not raised by the motion to quash or the demurrer in the trial court. But this fact is ammaterial.

State v. *Nichol,* 8 Lea, 659, 660;
Pleading, 21 R. C. L., Sec. 161;
Craigie v. *Lovell,* 109 U. S. 194.

This Act, by attempting to prohibit the teaching of evolution in the University of Tennessee, is in violation of numerous contracts between the State of Tennessee and the United States whereby the

State accepted financial aid from the Federal Government upon the condition that the teaching of the sciences should be promoted and encouraged and in no wise restricted in said institution. The particular acts whereunder this obligation was assumed are set out in the argument hereafter.

IX.

THE TRIAL COURT ERRED IN EXCLUDING THE TESTIMONY OF THE SCIENTIFIC WITNESSES OFFERED BY THE DEFENDANT.

These witnesses would have shown that the doctrine of evolution, and particularly the descent of man from a lower order of animals, is based on sound, multitudinous and irrefutable facts; that said doctrine is not immoral or unchristian; that it is thoroughly compatible with sound religion and morality.

This testimony having been excluded, this Honorable Court must therefore consider it as an admitted or established fact that the evolution of man from a lower order of animals is an established scientific fact, and that the teaching of such fact does not tend toward immorality or irreligion.

The exclusion of this testimony was error.

Authorities relied upon—

22 C. J. 164;
Fitch v. *Martin*, 84 Neb. 745;
22 C. J., 165;
23 C. J., 169;
Carter Machine Co. v. *Haynes*, 70 Fed. 859;

Jones Commentaries on Evidence, Vol. 1, pp. 626, 640, 650;
Dumphry v. *St. Joseph Stockyards Co.*, 118 Mo. App. 506;
4 Wigmore on Evidence, Sec. 2567;
State v. *Norcross*, 132 Wisc. 534;
Hoyt v. *Russell*, 117 U. S. 401;
Cyc. on Evidence, Vol. 7, pp. 84, 861.

X.

THE TRIAL COURT ERRED, IN VIEW OF THE INVALIDITY OF SAID INDICTMENT AND THE UNCONSTITUTIONALITY OF SAID ACT, AND THE EXCLUSION OF SAID EXPERT TESTIMONY, IN PRONOUNCING THE DEFENDANT GUILTY OF ANY OFFENSE AND IN ASSESSING A FINE AGAINST HIM.

It follows without argument that if the indictment is invalid or if the Act is invalid, the sentence pronounced upon the defendant Scopes is likewise invalid.

ARGUMENT.

In addition to the authorities cited following the several assignments of error hereinabove set out, the plaintiff in error desires now to make a more detailed and elaborate argument of the momentous issues involved, taking up in numerical order the propositions of law advanced in said assignments of error.

ASSIGNMENT I.

THE INDICTMENT IS VOID, AS THE FACTS CONSTITUTING THE CRIME ARE NOT ALLEGED WITH SUFFICIENT PARTICULARITY, AND AS IT DOES NOT PROPERLY INFORM THE DEFENDANT OF THE NATURE AND CAUSE OF THE ACCUSATION AGAINST HIM.

We shall hereafter discuss the questions arising from the indefiniteness and vagueness of the law itself. Here we are concerned only with the form of the indictment. If the indictment is not properly drawn so as to show the nature and cause of the accusation and so as definitely to describe the crime, it is no indictment, and a trial thereunder would violate sections 9 and 14, of Article I of the Constitution of the State of Tennessee.

The indictment itself says that on the 24th day of April, 1925, in the County of Rhea, Scopes wilfully taught certain theories contrary to the statute (setting forth the words of the statute), in the public schools of the State, the said Scopes being a teacher of such public schools, all against the peace and dignity of the State.

There is not a word said as to where he taught, that is, in what school, or to whom he taught, nor does the indictment itself say what he taught.

A first requisite of an indictment is that it be drawn in such manner that, if a defendant is afterwards charged with the same offense, he can set up in plea that he had theretofore been in jeopardy. As said in *Rumely* v. *U. S.*, 293 Fed. 532, 547:

> "It is a rule of criminal pleading that the indictment must be free from all ambiguity and leave no doubt in the mind of the accused and in that of the court as to the exact offense intended to be charged. This is required so that the accused may know what he is called upon to meet and also that upon a plea of former acquittal or conviction it may appear *with accuracy* what the exact offense was to which the plea relates."

To the same effect *Goldberg* v. *U. S.,* 277 Fed. 211, 215; *Fontana* v. *U. S.,* 262 Fed. 283, 286; *Miller* v. *U. S.,* 133 Fed. 337, 341; *U. S.* v. *Hess,* 124 U. S. 483; *Evans* v. *U. S.,* 153 U. S. 584, 587.

The case of *Fontana* v. *United States,* 262 Fed. 283 arose under the Espionage Act. It is exactly in point. The indictment charged that the defendant made a public address (violating the law) in the presence of members of the military and naval forces of the United States. That indictment was better than the indictment here because in alleging the crime it stated what was said. But the indictment was held void, the court saying, page 286:

> "The basic principle of English and American jurisprudence is that no man shall be deprived of life, liberty, or property without due process of law; and notice of the charge or claim against him, not only sufficient to inform him that there is a charge or claim, but so distinct and specific as clearly to advise him what he has to meet, and to give him a fair and reasonable opportunity to prepare his defense, is an indispensable element of that process. When one is indicted for a serious offense, the presumption is that he is innocent thereof, and consequently, that he is ignorant of the facts, on which the pleader founds his charges, and it is a fundamental rule that the sufficiency of an indictment must be tested on the presumption that the defendant is innocent

of it and has no knowledge of the facts charged against him in the pleading. Miller v. United States, 133 Fed. 337, 341, 66 C. C. A. 399, 403; Naftzger v. United States, 200 Fed. 494, 502, 118 C. C. A. 598, 604."

* * * * * * *

"Nor were the charges in this indictment so certain and specific that upon conviction or acquittal thereon it or the judgment upon it constitute a complete offense to a second prosecution of the defendant for the same offense. In determining this question the evidence on the trial may not be, and the indictment and the judgment alone can be, considered, because the evidence does not become a part of the judgment, and as the indictment states no facts from which the time, places, or occasions on which the respective statements therein were alleged to have been made can be identified, the indictment and judgment fail to identify the charges so that another prosecution therefor would be barred thereby. Florence v. United States, 186 Fed. 961, 962, 964, 108 C. C. A. 577, 578, 580, and cases there cited; Winters v. United States, 201 Fed. 845, 848, 120 C. C. A. 175, 178."

* * * * * * *

"If the pleader had set forth in this indictment *any fact or facts, such as the time, place, occasion, circumstances, persons present, or any other distinctive earmark* whereby the defendant could have found out or identified the occasion or occasions when the government intended to attempt to prove that the defendant uttered any of the nine sayings charged he might have been able to investigate the basis of the charges, to learn who were or were not present on the occasions referred to, hence who were possible witnesses, and to prepare his defense; but there is nothing of that kind in the indictment. As it reads, he might have been called to meet on each of the nine charges testimony that at any time of day or night, at any place in New Salem, on any occasion, public

> or private, before the indictment was filed, and after the Espionage Act was passed on June 15, 1917, he had uttered to any one whomsoever any one of the statements charged in the indictment. These considerations compel the conclusion that this pleading signally fails to state the facts which the government claimed constituted the alleged offense in this case, so distinctly as to give the defendant a fair opportunity to prepare his defense to meet any of them, and that he could not and did not have that notice of them required to give him a fair trial."

The indictment here states the names of no persons, nor what was said, nor has it any other distinctive earmark which would identify the occasion. In other words, the indictment is substantially this:

> "Some time, somewhere, to some one, Scopes, a teacher in the public schools of Rhea County, Tennessee, *taught that man was descended from a lower order of animals,* against the peace and dignity of the State."

Is this indictment free from ambiguity? Does it describe the exact offense intended to be charged? If the defendant were again charged with teaching this doctrine in the public schools on the 24th day of April or on any other date, would he be able to set up a plea of former conviction? To whom did he teach? Who were the pupils? What did he say? What was the school Where was the school, assuming that there is more than one in Rhea County? It is not sufficient to say that the evidence in this case would show whether or not the same crime was charged. The indictment must show this and, in the absence of such showing, it is fatally defective.

There are reasons for the provisions of the Constitution which require an indictment. The de-

fendant must be apprised by a statement of facts of what the charge is, not a statement of law or conclusions of law, but a statement of facts! For instance, if one man kills another with malice aforethought, that is murder. An indictment would not be sufficient if it stated that John Jones killed another with malice aforethought. The indicment must state how, when, where and who the man was. Then, if a defendant is acquitted or convicted and is again charged, he can take advantage of the plea of double jeopardy.

Scopes taught in Rhea County. This is a large county and presumably has more than one school. If the indictment charged that Scopes taught in a certain school, by number and district, he would have an answer if he was again charged with having done the same thing. And the same would apply if the indictment stated to whom he taught, or if it stated specifically what was taught.

Scopes is charged with having taught theories of creation contrary to the Bible but the Bible is a large book. What are the theories to which the indictment refers? What are the theories in the Bible? There are conflicting accounts in the Bible. Did he say something contrary to one and not contrary to the other? The indictment should have shown what it was that he taught that is claimed to have been unlawful, and this without compelling him to read through a book of hundreds of pages on the chance of skipping the most important passage. He should have had an opportunity of checking up the passages complained of in order to determine whether or not those passages meant what the prosecution said they meant.

For illustration, take the case of *Leeper* v. *Tennessee*, 103 Tenn. 500. There the indictment charged that the defendant "on the 5th day of October, 1899,

in the State and county aforesaid, being then and there a public school teacher and teaching in the public school known as School No. 5, Sixth District, Blount County, did unlawfully use and permit to be used in said public school, after the State Text Book Commission had adopted and prescribed for use in the public schools of the State, Frye's Introductory Geography as a uniform text book, another and different text book on that branch than the one so adopted as aforesaid, to-wit, Butler's Geography and the New Eclectic Elementary Geography against the peace and dignity of the State."

Suppose that indictment had merely said that the defendant taught from some book not authorized by the board in a school in Blount County and on a certain day? Would that have charged a crime? Yet the indictment here is not one whit more definite. If, after this trial, Scopes is charged with exactly the same offense and in the same words, under an indictment worded exactly the same way, the judgment of conviction in this action would not for a moment answer the new charge.

It is, therefore, contended that the indictment is void for indefiniteness.

ASSIGNMENT II.

THE ACT IS UNCONSTITUTIONAL BECAUSE THE TITLE DOES NOT EXPRESS THE SUBJECT OF THE LAW AS REQUIRED BY ARTICLE II, SEC. 17 OF THE TENNESSEE CONSTITUTION.

Article II, Sec. 17, of the Tennessee Constitution, provides:

> "Bills may originate in either house; but may be amended, altered or rejected by the other. No bill shall become a law which embraces more than one subject, that subject to be expressed in the title. All acts which repeal, revive or amend former laws, shall recite in their caption or otherwise the title or substance of the law repealed, revived or amended."

By this provision in the Constitution of 1870, it was evidently intended to do away with the evil practice of giving to acts titles which conveyed no real information as to the objects embraced in their provisions.

> *Cannon* v. *Mathes,* 8 Heiskell 518;
> *State* v. *Hayes,* 8 Cates 42, 43;
> *Samuelson* v. *State,* 8 Cates 477, 478.

This requirement that the subject of a legislative bill shall be expressed in the title is mandatory.

> *Cannon* v. *Mathes,* 8 Heiskell 515, 518;
> *State ex rel* v. *McCann,* 4 Lea, 8, 12;
> *Knoxville* v. *Lewis,* 12 Lea 182;
> *Hyman* v. *State,* 3 Pickle 113;
> *Mfg. Co.* v. *Falls,* 6 Pickle 482;

State v. *Yardley,* 11 Pickle 552;
State v. *Bradt,* 19 Pickle 584, 590-592;
State v. *Brewing Co.,* 20 Pickle 726, 741;
Saunders v. *Savage,* 24 Pickle 345, 346;
R. R. v. *State,* 2 Cates 608;
Goodbar v. *Memphis,* 5 Cates 25;
Dixon v. *State,* 9 Cates 79;
Malone v. *Williams,* 10 Cates 390, 466, 467;
R. R. v. *Byone,* 11 Cates 278, 286, 287;
State v. *Burrow,* 11 Cates 376, 384-388;
Kirk v. *State,* 18 Cates 7, 12;
Ledgewood v. *Pitts,* 14 Cates, 570, 608, 609.

The title of the Act reads as follows:

> "An Act prohibiting the teaching of the Evolution Theory in all of the Universities, Normals and all other Public Schools of Tennessee, which are supported in whole or in part by the public school funds of the State, and to provide penalties for the violation thereof."

The Act reads in part:

> "Section 1. Be it enacted by the general assembly of the State of Tennessee that it should be unlawful for any teacher in any of the universities, normals and other public schools of the state, which are supported in whole or in part by the public school funds of the State to teach any theory that denies the story of the divine creation of man as taught in the Bible, and to teach instead that man has descended from a lower order of animals."

It is not contended that this statute is unconstitutional because the caption is broader than the act, which is an obvious fact. But it is essential that the caption of the Act and the body shall be germane one to the other. It is

necessary that the caption of the Act state enough to put the legislature on notice as to what the law is. The body of the Act refers to a particular theory, *i. e.*, that man is descended from a lower order of animals—not to the evolution theory. But more than this, an Act cannot include something that is not in the caption. The Bible is referred to in the Act. Two subjects cannot be included where the caption refers to one.

The constitutional provision is based upon general knowledge of the habits of legislators. They must be given by the caption a general idea of the subject upon which they are to vote, and only one subject is to be legislated on at once. Even members of the legislature do not read all the statutes.

The title refers to the evolution theory. There is not a word said in the statute about the theory of evolution—not a word said about preventing the teaching of the theory of evolution; and the caption contains nothing else. Nor does the caption say anything about the Bible or about the divine act of creation in the Bible. If a legislator was interested in intellectual and religious freedom, if he believed that chaos and disorder would follow any limitation of it, if he believed that it was an insult to education to make the Bible the yardstick of learning, would he know by a reading of the caption that he was to vote upon any such subject? The Catholic legislator could have gone home without any thought that his faith was attacked. Likewise the Protestant and the Jew. The intelligent, scholarly Christian, who knew no inconsistency between evolution and religion, could have returned to his home without the slightest idea that he had voted or that the legislature was about to vote on an act which concerned the Bible and his interpretation thereof. There is not a thing in the caption about measuring science and knowledge and

learning by the Book of Genesis—nothing about the literal interpretation of the Bible. Then, after the act is passed, these men find that they have apparently voted upon a statute which prevents the teaching of any theory contrary to that contained in the Bible, in the King James version, and in the King James version literally accepted. Is it made unlawful to teach the theory of evolution? Oh, no. It is made unlawful to teach any theory that denies the story of the Divine Creation of man in the Bible and to teach instead that man has descended from a lower order of animals. This law was passed under a caption which gave no hint that it should be a crime in the State of Tennessee to teach any theory of the origin of man other than that contained in the Bible.

From the title, one might assume that the legislature was merely passing a regulation concerning the curriculum of schools. But the Act seeks to impose upon the schools a religious doctrine held only by a certain group of the Christian church and denied by all other groups. Under the color of the title many may have been misled into supporting the bill, who, because of political considerations, would as vehemently have opposed the bill.

The evils which this constitutional provision was intended to avoid are shown in the present law.

The caption must contain the subject of the Act. There cannot be two subjects embraced in the Act. The Act can contain nothing that is not included in the caption. This law violates these provisions.

ASSIGNMENTS III AND IV.

THE ACT VIOLATES ARTICLE I, SECTION 3, AND ARTICLE XI, SECTION 8, OF THE CONSTITUTION OF THE STATE OF TENNESSEE, IN THAT IT VIOLATES THE DEFENDANT'S GUARANTY OF RELIGIOUS FREEDOM, AND GIVES A PREFERENCE TO A RELIGIOUS ESTABLISHMENT.

Article I, Section 3, of the State Constitution provides, in part, as follows:

> "Sec. 3. *Right of Worship Free.*—That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience; that no man can, of right, be compelled to attend, erect, or support any place of worship, or to maintain any minister, against his consent; that no human authority can, in any case whatever, control or interfere with the rights of conscience; and *that no preference shall ever be given, by law, to any religious establishment* or mode ("modes" in Constitution of 1796) of worship."

Religious equality is one of the fundamentals of American institutions. In the early debates at the Constitutional conventions, it was agreed that the principle would not be observed by provisions for religious toleration, but only through declarations insuring absolute religious equality. The broadest possible words were used to achieve the purpose. We believe that the words of the Tennessee Constitution will not be interpreted in any sense that will fail to guarantee absolute religious equality

before the law. This end is accomplished by the guarantee that *"no preference shall ever be given by law, to any religious establishment."*

1. ARGUMENT ON QUESTION OF PREFERENCE.

Does this statute give a preference, by law, to a religious establishment? The question is not one, as seemed to have been assumed by the arguments of the Attorney General and the court below, of any interference with the right of worship or with the choice of place of worship or the maintenance of any ministry. It is not one, on this phase of the case, of interference with the rights of conscience. It is wholly one of a statute giving a preference to the religious establishment or establishments that believe in the inerrancy of the Bible literally interpreted, a doctrine which is not accepted by a great many of the Christian churches. Those who believe in it are ordinarily called "fundamentalists," though "literalists" would be a more correct name, for not all fundamentalists accept the Old Testament literally. A Baptist or a Methodist church, with doctrine based upon the inerrancy of the scriptures, and even upon an acceptance of the Book of Genesis on questions of science, is a religious establishment. The doctrine of that establishment or mode of worship is preferred by this law not only to the doctrines of any other Church establishment, but likewise to the teachings of science. If a law provided, for instance, that no one should teach anything contrary to the theory that the Pope was infallible, no one would question that this would, by law, give a preference to the religious establishment known as the Catholic Church. Did a law, for instance, provide that no one should teach anything contrary to the theory

set forth in the Mormon Bible, would any one for a moment claim that such a statute would not, *by law,* give preference to the religious establishment known as the Mormon Church?

The Federal Constitution is not directly involved in this point although it has been said that the amendments therof are

> "declaratory of the great principles of civil liberty, which neither the national nor the State Government can infringe" (Campbell v. State of Georgia, 11 Ga. 353).

In an eloquent opinion, Chief Justice Joseph Henry Tumpkin said, page 373:

> "Any attempt in this country today to establish religion * * * would shock not only the common sense but sense of justice of the teeming millions in this free and happy country! Shame! Shame upon such legislation would be indignantly uttered by ten thousand tongues. * * *
>
> Should the legislature through haste or inadvertance pass an act at war with the *spirit,* object and design of our social systems, as manifested in this charter, it would become the imperative duty of the Courts, however delicate the task, to vindicate the rights of the citizen, by pronouncing such a Statute invalid."
>
> *Campbell* v. *State of Georgia,* 11 Ga. 353, 373.

2. POSITION OF COURT AND PROSECUTION.

Referring to this point, Judge Raulston said, in denying the motion to quash the indictment:

> "It should be observed that the first provision in this section of our Constitution provides that all men shall have the natural and indefeasible right to worship Almighty God

according to the dictates of their own conscience. I fail to see how this Act in anywise interferes or in the least restrains any person from worshipping God in the manner that best pleaseth him. It gives no preference to any particular religion or mode of worship. Our public schools are not maintained as places of worship but on the contrary were designed, instituted and are maintained for the purpose of mental and moral development and discipline. This section quoted provides that 'No man can of right be compelled to attend, erect or support any place of worship or to maintain any minister against his consent; that no human authority can in any case whatever control or interfere with the right of conscience, that no preference shall be given, by law, to any religion or established mode of worship.' I cannot conceive how the teachers' rights under this provision of the Constitution would be violated by the Act in issue. There is no law in the State of Tennessee that undertakes to compel this defendant or any other citizen to accept employment in the public schools. The relations between the teacher and his employer are purely contractual and if his conscience constrained him to teach the evolution theory he can find opportunities elsewhere in other schools in the State to follow the dictates of his conscience and give full expression to his beliefs and convictions upon this and other subjects without any interference from the State of Tennessee or its authorities, so far as this Act is concerned. Neither do I see how the Act lays any restraint on his right to worship according to the dictates of his conscience. Under the provisions of this Act this defendant or any other person can entertain any religious belief which most appeals to their conscience. He can attend any Church or connect himself with any denomination or contribute to the erection of buildings to be used for public worship as he sees fit. The court is pleased to overrule on these grounds" (Tr., Vol. I, pp. 21-22).

There is not a word here to indicate that the court understood the real ground of objection, to wit, that a preference was given to a religious establishment, *by law,* in that nothing contrary to a certain definite, fixed religious tenet based on a liberal Biblical text should be taught in the public schools of Tennessee.

Nor did the State apparently realize the point of the objection. After the learned Attorney General, Mr. Stewart, argued that the Act did not interfere with the right of worship, the following colloquy took place (Tr., Vol. II, p. 165 *et seq.*):

> "Mr. Darrow: I suggest you eliminate that part you are on so far. The part we claim is the last clause. 'No preference shall ever be given, *by law,* to any religious establishment or mode of worship.'
>
> General Stewart: * * * Then, how could that interfere, Mr. Darrow?
>
> Mr. Darrow: That is the part we claim is effective.
>
> General Stewart: In what wise?
>
> Mr. Darrow: Giving preference to the Bible (and he might have added 'The King James version of the Bible.')
>
> General Stewart: To the Bible?
>
> Mr. Darrow: Yes, why not the Koran?
>
> General Stewart: Might as well give it to any other book.
>
> Mr. Darrow: Certainly.
>
> General Stewart: And no preference shall ever be given, by law, to any religious establishment or mode of worship?
>
> (Discussion.)
>
> General Stewart: There is as little in that as in any of the rest. If your Honor please, the King James version of the Bible is a recognized one in this section of the country, the laws of the land recognize the Bible, the laws of the land recognize the law of God and Christianity as a part of the common law.

Mr. Malone: Why doesn't this statute impose the duty of teaching the theory of creation as taught in the Bible and exclude, under penalty of the law, any other theory of creation? Why doesn't that impose upon the course of science, or specifically the course of biology, in this State, a particular religious opinion from a particular religious book * * *?

General Stewart: This Act could not turn his religious point of view or his religious purpose. The question involved here is, to my mind, the question of the exercise of the police power.

Mr. Neal: It doesn't mention the Bible?

General Stewart: Yes, it mentions the Bible. The Legislature, according to our laws and my opinion, would have the right to preclude the teaching of geography.

Mr. Neal: Does not it prefer the Bible to the Koran?

General Stewart: It doesn't mention the Koran. * * * We are not living in a heathen country, so, how could it prefer the Bible to the Koran?"

Then General Stewart continued:

"If they undertake to pass an Act stating that you shall not teach a certain Bible or theory of anything in your Churches * * * then, according to my conception of this, it might interfere with this provision of the Constitution, but this is the authority on the part of the Legislature of the State of Tennessee to direct the expenditure of the school funds of the State and, through this Act, *to require that the money shall not be spent in the teaching of the theories that conflict or contravene the Bible story of man's creation* * * *" (Ib., pp. 168-9).

3. POSITION OF DEFENSE.

Of course, the statute prefers the Bible to the Koran or the Book of Mormon; not only this, it furthermore gives a preference to the religious es-

tablishments of those particular Protestant sects which believe in the literal acceptation of the story of creation in the Bible, as against the sects which do not. It gives a preference to these particular sects over any other Church establishment, be it Protestant, Catholic, Jewish, Buddhist or Mohammedan, in forbidding the teaching of a doctrine in the public schools contrary to the particular doctrine which is the foundation of the literalist religious establishments. If this law does not give a preference in Tennessee, neither then would a law in Hawaii, where we have many Buddhist fellow citizens, which would give a preference to the tenets of their religion in denying the right to teach anything contrary thereto. If this law does not give a preference, then a law in Utah providing that nothing contrary to the Book of Mormon should be taught in the public schools would not give a preference to that religious establishment and, likewise, in every state of the Union where a majority sect was in control, laws might be passed forbidding the teaching of anything contrary to the particular doctrine that the majority espoused. By parallel reasoning, it might be said that such laws would not give a preference to such establishments. Gradually, through the elimination of the teaching of anything contrary to the views of particular sects, as learning in science becomes subject to the test of Church doctrine, our public education would become a fraud. Not truth but varying orthodoxies will be the end of public education, and, instead of a land where absolute religious liberty is a Constitutional guaranty, where differences between men and differences between states and differences between sections of the country are nowhere concerned with religion, we shall have a country where the dominant sect holding a temporary majority in each state or in each section will demand that noth-

ing contrary to its doctrines be taught in the public schools. Thus we would, by elimination, color or void education on other subjects. The curriculum would be dictated by religious opinion. Religious freedom and toleration would disappear. The rights of the people are encroached upon gradually by laws, the character and object of which are not at first appreciated. But the sinister purpose is there. At first the new law seems strange. Then we become accustomed to it. At first penalties are mild, then they become severe. At first they relate to slight differences. Then the intolerance, bigotries and bitternesses become acrid, until we come to the tragic end where bigots light fagots, and with flaming banners and beating drums we march back to the "glorious" ages of Mediaevalism.

We do not challenge the right of the Legislature of Tennessee to control the public schools, to fix the curriculum, to forbid the teaching of biology or anything else. We do contend, of course, that if biology is to be taught, no Legislature has the right to compel the teaching of false biology, or of any one theory of biology, particularly when the statutory insistence upon that theory is a cover for promulgating a certain literal religious tenet held by some religious establishments and not by others. We challenge the right of any legislative body in America to recognize, by law, the dogma of any religious sect as the measurement of what shall be tought the children of our country. As was said in *Watson* v. *Jones*, 80 U. S. 679, 728:

> "The law knows no heresy and is committed to the support of no dogma, the establishment of no sect."

To permit this, to make the Literalist interpretation of the Bible the yardstick of learning, is a violation of religious liberty and gives a preference to certain religious establishments.

The Memorial address to the Great Assembly of the Commonwealth of Virginia in 1785 by James Madison protesting against the attempt to secure recognition of the Christian religion by the Legislature of Virginia, points out various reasons why the slightest preference for any religious establishment must be avoided. Among other objections, he claimed that the bill would

> "destroy that moderation and harmony which the forbearance of our laws to intermeddle with religion has produced among its (Christianity's) several sects. * * * If with the salutary effects of this system under our own eyes we begin to contract the bounds of religious freedom we know no name which will too severely reproach our folly. At least, let warning be taken at the first appearance of the threatened invasion. The very appearance of the bill has transformed that Christian forbearance, love and charity, which of late mutually prevailed, into animosities and jealousies which may not soon be appeased. What mischiefs may not be dreaded should this enemy to the public quiet be armed with the force of law."

4. RELIGIOUS QUESTION AT BASIS OF LAW.

"There is no religious question here," says the prosecution, and yet, from the very beginning of the trial, it was quite evident that an issue of sectarian ascendency was involved. In public discussion, practically no other question has been raised. The newspapers of the country, whether Literalist or otherwise, state this as the main issue and, even in the court of law, the very discussion of the Act, quoting from Madison "transformed that Christian forbearance love and charity * * * into animosities and jealousies * * *"

The author of the Anti-Evolution law, John Washington Butler, explained his reasons for its introduction. He says:

> "In the first place, the Bible is the foundation upon which our American Government is built * * *
>
> "The evolutionist who denies the Bible story of creation, as well as other biblical accounts, cannot be a Christian * * *. I regard evolution to be the greatest menace to civilization in the world today. It goes hand in hand with Modernism, makes Jesus Christ a fakir, robs the Christian of his hope and undermines the foundation of our Government of the people, for the people and by the people."

Governor Peay, in his message of approval, said:

> "Nobody will deny that the whole Bible teaches that man was created by God in his own image. This bill is founded in the idea and belief that the very integrity of the Bible in its statement of man's Divine Creation is denied by any theory that man has ascended or descended from any lower order of animals; that such theory is not at utter variance with the Bible story of man's creation is incapable of successful contradiction. * * * The regulation which is now being written into the statutory law involves a vital subject and policy. It is faith in man's divine creation and the soul's immortality" (Tr., Vol. III, pp. 540, 543).

Judge John T. Roulston, in his charge to the Grand Jury, read the First Book of Genesis from the Kings James version of the Bible.

Thus, apparently to him, the bill intended to prohibit the teaching of the theory contrary to the Literalist interpretation of the Protestant Bible.

Arguing in support of the constitutionality of the bill, Attorney General Stewart pleaded for the law, as follows:

> "Tell me that I would believe I was once a worm and would writhe in the dust? Will they take from me my hope for the Hereafter? * * * Why, if the Court please, have we not the right to interpret our Bible as we see fit? Why have we not the right to bar the door to science when it comes within the four walls of God's Church upon this earth?"

A part of Mr. McKenzie's plea was as follows:

> "They want to put words into God's mouth and have him say that he issued some sort of protoplasm or soft dish rag and put it in the ocean and said 'Old boy, if you wait about six million years, I will make something out of you'" (Tr., Vol. III, p. 425).

Mr. Bryan, from his first appearance in court, to his last statement, issued after his death, insisted that the only real question involved was a religious one. He took the position that there is only one true religion; that all others are false; that that religion is based upon the Bible literally accepted; that any teaching contrary to that, destroys faith and should be prohibited by law. In spite of his technical statement that the question in the case was whether or not the Legislature had a right to control the public school system, his arguments favored the law as supporting a Literalist interpretation of the theory of creation as taught in the Bible. This is the theory of a particular religious establishment.

5. UNAMERICAN DOCTRINE.

We conceive that it might be possible to make an argument for the teaching of religion in schools. This would not be American doctrine. It would be contrary to all our institutions. But we cannot conceive how it is possible to make the claim that

no religious issue is here involved, or that the law does not give preference to a religious establishment, without shutting one's eyes to the basis of, the understanding of, and the reason for the law.

In the Memorial address of James Madison, to which we have referred above, he objected to the bill which would establish a state religion because,

> "it is proper to take alarm at the first experiment upon our liberties. We hold this prudent jealousy to be the first duty of citizens and one of the noblest characteristics of the late Revolution. The freemen of America did not wait until usurped power had strengthened itself by exercise and entangled the question in precedents. They saw all the consequences in the principle and they avoided the consequences by denying the principle. We revere this lesson too much, soon to forget it."

This Court may feel that there could be no great harm in prohibiting the teaching of the theory that man is descended from a lower order of animals instead of teaching the Bible theory. If, however, the principle be once admitted that any particular religious theory has a place in the schools and that doctrines in contradiction thereto must be avoided, the consequences will be far-reaching. The majority today may be the minority tomorrow. The new majority may go a step further, and religious liberties, and peace in religious matters and the sanctity of conscience for which men have fought and died for centuries, may be destroyed.

In *Commonwealth* v. *Herr* (1910), 229 Pa. St. 132, Anno. Cas. (1912) page 422, a statute was held valid which prohibited a teacher from wearing any dress, mark, emblem or insignia indicating that he was a member or adherent of any religious order, sect or denomination, and the basis of the law was to prevent any preference to any religious estab-

lishment. In *Connell* v. *Gray,* 33 Okla. 591, 600, it was held that a student of a state college could not be required to contribute to a Young Men's Christian Association.

Under this Anti-Evolution law in Tennessee, funds appropriated for public school purposes must be used indirectly for the support of a certain religious establishment. School teachers are forbidden, by law, to contradict the teaching of a passage of Scripture which exemplifies the religious doctrine of the Literalist wing of certain evangelical sects. "But," say our opponents, "there is nothing in the law which compels the teaching of this particular doctrine. It merely denies the right to teach anything in conflict with the doctrine." Where is the difference in logic or in fact? Either view gives a preference to the establishments maintaining the Literalist interpretation of the Bible. That religious point of view is to be taught by the elimination of anything contrary, while all other religious doctrines must meet the test of whatever science or history may teach. Is not this a preference? The school board specifies that biology shall be taught; the statute says only Genesis biology can be taught.

It will no doubt be admitted that a law providing affirmatively for the teaching of the religious doctrine of any sect, would violate the Constitution. It would no doubt be admitted, that a law providing affirmatively for the teaching of any part of the religious doctrine of any sect would be a preference. Is not a law prohibiting the teaching of any theory contrary to a religious doctrine of a particular sect quite as much a preference?

"But," say our opponents, "this law merely prevents the negativing of a religious theory. It prevents the teaching that man is descended from a lower order of animals, which is contrary to re-

ligion." "This theory itself," say they, "is one of irreligion and, if religion should not be taught, neither should it be negatived." In fact, they go so far as to say that, to some, evolution is a religion. It has been held that a doctrine is not a religious one merely because people call it so. (*Davis* v. *Beacon,* 133 U. S. 333; *Mormon Church* v. *U. S.,* 136 U. S. 1, 49, 50; *Reynolds* v. *U. S.,* 98 U. S. 145, 162.) "But," say our opponents "to force a child to accept a doctrine subversive of his religious belief is to violate his religious freedom." This may be true, and naturally to force him to accept evolution would be just as intolerant as to force him to accept Literalism. But to make him acquainted with the theory of evolution—basic in the study of biology—is a different matter. The teacher should be free to acquaint his class with all important theories and hypotheses. Acceptance or rejection is for the student.

The argument though plausible is fallacious in ignoring the constitutional provision which, by forbidding a preference, practically prohibits the teaching of any religious creed. There is no such prohibition against the teaching of science. On the contrary, science is to be encouraged—and this is so whether or not certain facts of science seem consistent with certain religious tenets. Were this not so, the teaching of any branch of science might be objectionable if this encroached on any belief, even an absurd one, to which a few subscribed.

6. EARLY AMERICAN ATTITUDE ON RELIGIOUS FREEDOM.

Our Constitutions were generally established before the public school system was known. Therefore, the inhibitions against religious preference in schools must be taken from general language. Such

general language forbidding a preference, by law, to any religious establishment, is certainly sufficient to cover the schools. That the words "preference to a religious establishment" refer to the doctrines of any church or religion cannot seriously be questioned. The words are broad and all inclusive.

In Webster's New International Dictionary, the following example is given to show the meaning of the words "religious establishment:"

> "By the establishment of religion is meant the erection and *recognition* of a State Church *or the concession of special favors,* titles and *advantages to one Church* which are *denied to others.*"

In the Madison Memorial above referred, to appears the following:

> "* * * The same authority which can force a citizen to contribute three pence only of his property for the support of any one *establishment* may force him to conform to any other establishment in all cases whatsoever."

Again:

> "* * * The establishment proposed by the bill is not requisite for the support of the Christian Religion. To say that is a contradiction to the Christian Religion itself, for every page of it disavows a dependence on the purity of this world. It is a contradiction of fact, for it is known that this religion both existed and flourished not only without the support of human laws but in spite of every opposition from them * * *."

> "* * * Experience witnesseth that ecclesiastical *establishments,* instead of maintaining the purity and efficacy of religion, have had a contrary operation."

"* * * The proposed *establishment* is a departure from that generous policy which, offering an asylum to the persecuted and oppressed of every nation and religion, promised a luster to our country and an acquisition to the number of its citizens."

The religious establishment referred to by Madison and all the founders of the Republic was the establishment known as the Christian Religion, or sects thereof. None should have any preference.

The statute for religious freedom in Virginia, written by Thomas Jefferson, says:

* * * our civil rights have no dependence on our religious opinions any more than our opinions in physics or geometry."

Again:

"Truth is great and will prevail if left to herself, that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict, unless by human interposition disarmed of her natural weapons, free argument and debate, errors ceasing to be dangerous when it is permitted freely to contradict them."

No one familiar with the history of religious freedom in the United States can question but that this Act is contrary to the fundamental principles of our Government and its bills of rights. The framers of our Federal Constitution and our early statesmen sought to prevent forever every pretense of alliance between Church and State. In the Virginia Convention in 1776, Madison objected to the use of the words "the fullest toleration" to express the principle of religious liberty. He showed the distinction between the recognition of a right and the toleration of its exercise. Toleration implies the power of jurisdiction. He proposed, therefore,

instead of providing "that all men should enjoy the fullest toleration in the exercise of religion, to declare that all men are equally entitled to the full and free exercise of it, according to the dictates of conscience and this declaration was adopted." (Gray's James Madison.)

The words incorporated into the Tennessee Constitution of 1796 providing that "all men have a natural and indefeasible right to worship God" and the words "No human authority can in any case control or interfere with the rights of conscience" came from the Virginia Declaration of Rights.

Judge Cooley, in Constitutional Limitations, 5th Ed., Chap. 14, page 13, paragraph 1, declares that the American Constitutions

> "have not established religious toleration but religious equality."

In the Memorial of James Madison of 1785, referred to above, appears the following:

> "Still less can it (religion) be subject to the legislative body."

Mr. Bryan refers to Jefferson and clinches the American policy (Introduction to Jefferson's Manual):

> "That God himself was not willing to use coercion to force man to accept certain religious views. Man, uninspired and liable to error, ought not to use the means that Jehovah would not employ. Jefferson realized that our religion is a religion of love and not a religion of force."

The history of religious freedom of the United States is summarized in *Reynolds* v. *United States*, 98 U. S. 145, 162, by Mr. Chief Justice Waite:

> "The word 'religion' is not defined in the Constitution. We must go elsewhere, there-

> fore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted. The precise point of the inquiry is, what is the religious freedom which has been guaranteed.
>
> Before the adoption of the Constitution, attempts were made in some of the colonies and States to legislate not only in respect to the establishment of religion, but in *respect to its doctrines and precepts* as well."

It is to be noted that the legislation referred to had to do with the doctrines and precepts of religious sects as well as with the church itself. The court went on to say that

> "The people were taxed against their wills for the support of religion and sometimes for the support of particular sects to whose tenets they could not and did not subscribe."

The controversy culminated in the State of Virginia, at which time Mr. Madison prepared the "Memorial and Remonstrance," referred to above, Madison demonstrated:

> " 'that religion, or the duty we owe the Creator', was not within the cognizance of civil government."

The Court points out that the constitutional convention met more than a year after the passage of the Jefferson statute. Several of the states, among them Virginia and North Carolina, declined to ratify the constitution without amendments, whereupon Mr. Madison proposed the federal amendment providing for religious freedom.

7. HISTORICAL CONFLICT BETWEEN SCIENCE AND THEOLOGY.

History must be recalled in order to comprehend the early agitation in America involving religious freedom.

For many centuries any difference with the established church or the tenets thereof involved both political and economic consequences. Under these circumstances not only were preferences understandable, but were necessary in order to maintain the economic and political structure of the time. Compulsory support of the Church or its doctrines was enforced. For the maintenance of this economic structure, it was necessary that heresy be punished. Likewise, politically, any differences by individuals with the Church threatened the State.

Every minority sect in times past had demanded complete separation and that no preference be given. It is significant to note that among those who in history have been most insistent upon complete religious equality or freedom were John Wesley, the founder of the Methodist Church, and Roger Williams, the Rhode Island protagonist among the Baptists.

In the conflict between science and theology the Church throughout history has taken a consistent position. First it attacked any scientific discovery conflicting with the literal interpretation of the Bible as rank heresy; secondly, as the truth of any scientific doctrine became established, the Church tried to compromise between the Bible and the doctrine; finally, the Church in its retreat would take the position that science on the particular subject had not to do with religion. Thus with geography, astronomy, geology, anthropology, medicine, philology and kindred subjects. Thus, comets, meteors and eclipses, storms, thunder and lightning, once

regarded as signs of the wrath of the Almighty, later were understood as a part of natural law.

Bury, in his "History of Freedom of Thought," pages 63, 64 and 65, said:

> "While this principle, with the associated doctrines of sin, hell, and the last judgment, led to such consequences, there were other doctrines and implications in Christianity which, forming a solid rampart against the advance of knowledge, blocked the paths of science in the Middle Ages, and obstructed its progress till the latter half of the nineteenth century. In every important field of scientific research, the ground was occupied by false views which the Church declared to be true on the infallible authority of the Bible. The Jewish account of Creation and the Fall of Man, inextricably bound up with the Christian theory of Redemption excluded from free inquiry geology, zoology and anthropology. The literal interpretation of the Bible involved the truth that the sun revolves around the earth. The Church condemned the theory of the antipodes. One of the charges against Servetus (who was burned in the sixteenth century) was that he believed the statement of a Greek geographer that Judea is a wretched barren country in spite of the fact that the Bible describes it as a land flowing with milk and honey. The Greek physician Hippocrates had based the study of medicine and disease on experience and methodical research. In the Middle Ages men relapsed to the primitive notions of a barbarous age. Bodily ailments were ascribed to occult agencies—the malice of the Devil or the wrath of God. St. Augustine said that the diseases of Christians were caused by demons, and Luther in the same way attributed them to Satan. It was only logical that supernatural remedies should be sought to counteract the effects of supernatural causes. * * * Physicians were often exposed to suspicions of sorcery and unbelief. Anatomy was

> forbidden, partly perhaps on account of the doctrine of the resurrection of the body. The opposition of ecclesiastics to inoculation in the eighteenth century was a survival of the medieval view of disease. Chemistry (alchemy) was considered a diabolical art and in 1317 was condemned by the Pope. The long imprisonment of Roger Bacon (thirteenth century) who, while he professed zeal for orthodoxy, had an inconvenient instinct for scientific research, illustrates the medieval distrust of science."

But the Christian religion was not bound up with those doctrines, whatever may have been the view of narrow theologians. William North Rice, professor of geology at Wesleyan University, in an address in 1899 before the Connecticut Academy of Arts and Sciences, said:

> "When conceptions of the cosmos with which religious beliefs had been associated were rudely shattered, it was inevitable that those religious beliefs themselves should seem to be imperiled. And so in the early years of the century it was said 'If the world is more than six thousand years old, the Bible is a fraud and Christian religion a dream.' And later it was said 'If physical and vital forces are correlated with each other, there is no soul, no distinction of right and wrong and no immortality.' And again it was said, 'If species have originated by evolution, and not by special creation, there is no God.' So it had been said centuries before, 'If the earth revolves around the sun, Christian faith must be abandoned as superstition.' But in the nineteenth century, as in the sixteenth, the scientific conclusions won their way to universal acceptance and Christian faith survived. It showed a plasticity which enabled it to adapt itself to a changing environment. The magically inerrant Bible may be abandoned and leave intact the faith of the Church in a divine revelation.

> The Church has learned wisdom. The persecution of Galileo is not likely to be repeated, nor even the milder forms of persecution which assailed the geologists at the beginning and the evolutionists in the middle of the century."

The Court, mindful of religious history, will recognize the background that induced the founders of this country and the framers of our Bills of Rights to provide that no preference be given to any religious establishment.

What wonder that in the trial of an American for teaching the theory of evolution, one feels that he has gone back to the Middle Ages! Some one has said that

> "Science is based upon a disinterested love of facts, without any regard to the bearing which those facts may have on one's hopes or fears or destiny."

In 1662 the Press Licensing Act in England prevented the publication of heterodox works. In 1695 the Act was allowed to drop; but at that time there were three legal weapons for coercing those who were unorthodox: First, the ecclesiastical courts had the power of imprisonment for a maximum term of six months in cases of atheism, blasphemy, heresy and damnable opinions; second, the Common Law was interpreted to make blasphemy a crime, as blasphemous words were held an offense against the state, since Christianity, in the words of Lord Chief Justice Hale, was "parcel of the laws of England." Third, by a statute of 1698, persons who were educated in the Christian religion were guilty of crime if they, among other things,

> "shall deny the Christian religion to be true, or shall deny the Holy Scriptures of the Old and New Testaments to be of Divine authority."

The motive of this statute was expressed in the Act that

> "Many persons have, of late years, openly avowed and published many blasphemous and impious opinions contrary to the doctrine and principles of the Christian religion."

It is interesting to note that the violation here was against those who should deny that the Scriptures were of *Divine authority*—quite a different proposition from this law, which is more drastic, in that apparently one cannot teach anything about creation contrary to the *truth* of the Scriptures.

The founders of our Government believed that civic virtues could be found in Christian, Jew and Infidel alike, irrespective of differences of creed. They intended to strengthen the future of the country by definitely separating Church and State and denying to each the slightest encroachment upon the other's domains. The entire Roman Empire succumbed to the teachings of Christianity, weak and persecuted as it was. In its turn, the Roman Catholic Church was unable to stem the growth of Protestantism or of science, notwithstanding all the terrors of the Inquisition. Freedom of conscience, freedom of the mind, equality of all religious establishments before the law, constitute the very foundations of liberty.

8. THE BIBLE IN THE TENNESSEE SCHOOLS.

A statute of the State of Tennessee provides:

> "At least ten verses from the Bible shall be read or caused to be read, without comment, at the opening of each and every public school upon each and every school day by the teacher in charge, provided the teacher does not read

the same chapter more than twice during the same session * * *." (*Acts of 1915*, Chapter 102.)

Authorities are in conflict as to the constitutionality of laws providing for the reading of the Bible in the public schools.

> *Evans* v. *School District of Cal.,* 222 Pac. 801;
> *People* v. *Board of Education,* 245 Ill. 334, 350;
> *Wilkerson* v. *City of Rome,* 152 Ga. 762;
> *Herold* v. *Parish Board of School Directors,* 136 La. 1034;
> *State* v. *Board School, District No. 8,* 76 Wis. 177.

None of them presents so strong a case as this one, making a story of the Bible the basis of learning.

Yet, in Tennessee, we have a statute providing for the reading of the Bible in public schools and, another law which denies the right to teach a theory of man's creation which some only claim is contrary to the Bible.

Thus, a child in school hears the Bible read and learns the theory of creation in the Bible. But the teacher is denied the right to impart knowledge as to another theory. Yet it is claimed that no preference is given to the religious establishment which is based upon the inerrancy of the Bible, the inerrancy of the Bible from cover to cover, every word literally accepted and on all subjects, religious, geographical, medical, biologic and astronomical.

9. THE BIBLE AS THE YARDSTICK OF LEARNING.

If this statute is valid, then little by little the Bible and a literal interpretation thereof can be made the standard of knowledge and accuracy for every work of science. Is my geography correct? Look to the Bible, because we cannot teach anything contrary thereto. And yet, when the Bible was written, very little of the world was discovered. Is my astronomy correct? Look to the Bible. And yet, the Bible was written before the invention of the telescope. Is my geology correct? Is my biology correct? Am I right on this, that or the other scientific fact? Look to the Bible. By the elimination of learning on any subject from any source other than the Bible, any religious establishment which happens to be in the majority can gain control of the minds of the children in the public schools. If perchance the majority somewhere should not be a Christian majority, the Koran or the Book of Mormon, or any other, might equally well be set up as a standard of truth, knowledge and scientific learning.

As was said by William Newton Clark, formerly Professor of Theology in a leading Baptist University, Colgate, in his "Outline of Christian Theology" (page 222):

> "The time has come when Theology should remand the investigation of the time and manner of the origin of man to the science of anthropology, with its kindred sciences, just as now it remands the time and manner of the origin of the earth to astronomy and geology, and should accept and use their results, content with knowing that the origin of mankind, as of all else, is in God."

Not only must science be squared with the Bible, but with the particular interpretation of the Bible

held by the powers in control. And all this is done in face of the Constitution of Tennessee (Art. II., Sec. 12, referred to hereafter) which makes it the duty of the State to cherish *"Science"*.

10. EFFECT OF THIS STATUTE.

The Tennessee statute gives preference to those particular religious establishments maintained by the so-called Literalists over the views not only of scientists of all creeds, but even over the views of the so-called Liberal and Modernist representatives of the Christian and Jewish faiths, as well as over the views of other creeds which do not accept the Bible in all respects as the literal word of God. To give a bounty to a church, to give special favors in taxes on church buildings of one denomination, to give advantage to any industry or to prefer in any way the tenets of any faith—all are illustrative of preferences to religious establishments—and the last no less than the others.

"I believe in the story of creation, as set forth in the Bible," says the Literalist. "We control the Legislature," says the Literalist. "We will prevent the teaching of anything, however well established in science, however generally accepted by other Christians, that contravenes the Bible as we interpret it. We will compel acceptance in the public schools by providing that the Bible shall be read and by eliminating the teaching or even the exposition of any theory contrary to our interpretation of it. In this way, our views shall prevail."

And the lawyers for the Prosecution, assuring the Court and the public that their opponents are Infidels and Agnostics who do not believe in the Bible, calmly stated that their clients had not asked for a preference for their particular religious establishment. On the street corners and in the

Churches, at business and in prayer, their real clients, the Literalists, deny them. They feel that this religious preference must be had in order to save their children. They make no secret of the fact that the law gives them this preference. They have forgotten the history of religious warfare, the terrors of the Inquisition. The advance of science is disregarded. American traditions are disdained. The broad principles of religious liberty seem unimportant to people who assume that they alone possess the word of God. It is vastly more important to them that their peculiar views of the Bible should be enforced by law, and that anything contrary should be prohibited, than that religious freedom, undefiled, should prevail. They never stop to think that some day they may find themselves in the minority.

The stanchions of liberty remain in the Tennessee Constitution. The Literalists cannot, whatever their motives, have this preference, for the Constitution of Tennessee says that there shall be religious equality "and that no preference shall ever be given by law to any religious establishment."

ASSIGNMENT V.

THE ACT IS UNCONSTITUTIONAL IN THAT IT VIOLATES ARTICLE XI, SECTION 12 OF THE CONSTITUTION OF THE STATE OF TENNESSEE, WHICH PROVIDES THAT "IT SHALL BE THE DUTY OF THE GENERAL ASSEMBLY TO CHERISH LITERATURE AND SCIENCE".

Article XI, Section 12 of the Constitution of Tennessee provides:

> "Knowledge, learning and virtue, being essential to the preservation of republican institutions, and the diffusion of the opportunities and advantages of education throughout the different portions of the state being highly conducive to the promotion of this end, it shall be the duty of the General Assembly in all future periods of this Government to cherish literature and science."

1. Does this act violate the duty of the legislature 'to cherish science?" What is science? Webster's New International Dictionary (1924 Edition) defines it as

> "Accumulated and accepted knowledge which has been systematized and formulated with reference to the discovery of general truths or the operation of general laws."

Granted that the legislature may refuse to established schools "to cherish science." Granted that there is no over-shadowing power to compel it. Still, if the legislature does establish schools for the teaching of science, does it not become mandatory upon the legislature to cherish science and not heresy?

Who is to determine whether this act tends to cherish science? Manifestly the courts must determine whether the act is patently an obstruction to the progress of science or whether it tends to cherish it.

By this act the legislature has set up the Genesis story of creation as scientifically true with respect to the origin of man. How are we to know what is accredited by science except by a study of the treatises and teachings of the accepted masters of science?

Is the Genesis story of creation accredited by science? Which story? For there are two distinct and hopeless conflicting accounts of creation in the first and second chapters of Genesis. We must assume that the legislature intended to set up the story in the first chapter of Genesis as scientic fact. It may be confidently asserted that there is not in the world today even one great scientist who believes in the accuracy of the Genesis story of creation. Science considers the light of this world as dependent upon the sun, moon and stars. In the Genesis story there were three days with morning and evening, light and darkness, before the sun, moon and stars were created. Science considers that life upon this planet is dependent upon the sun. In the Genesis story life appeared upon the third day, while the sun was not created until the fourth day. In Genesis vegetation is complete two days before animal life appears. Geology shows that they appeared simultaneously, even if animal life did not appear first. In Genesis birds appear together with aquatic creatures and precede all land animals; according to the evidence of geology, birds were unknown until a period much later than that at which aquatic creatures abound, and they were preceded by numerous species of land ani-

mals, particularly by insects and other creeping things. According to Genesis, the earth, sun, moon and stars and all forms of animal and vegetable life were created in six days. Science says that life upon this earth began some twenty five or thirty millions of years ago; while the earth itself is believed to be at least a hundred millions of years old. According to Genesis, the first man, Adam, was a perfect man who walked and talked with God in the Garden of Eden. According to science, man had his origin with the lower forms of life and has been ascending through the ages in his physical, mental and moral attributes. According to science, the Genesis story of creation was not original with the Jews.

> "The great discoveries by Botta and Layard in Assyria were supplemented by the researches of Rawlinson, George Smith, Oppert, Sayce, Sarzec, Pinches and others, and thus it was revealed more clearly than ever before that as far back as the time assigned in Genesis to the creation a great civilization was flourishing in Mesopotamia; that long ages, probably two thousand years, before the scriptural date assigned to the migration of Abraham from Ur of the Chaldees, this Chaldean civilization had bloomed forth in art, science and literature; that the ancient inscriptions recovered from the sites of this and kindred civilizations presented the Hebrew sacred myths and legends in earlier forms—forms long antedating those given in the Hebrew Scriptures; and that the accounts of the Creation, the Tree of Life in Eden, the institution and even the name of the Sabbath, the Deluge, the Tower of Babel and much else in the Pentateuch, were simply an evolution out of earlier Chaldean myths and legends. So perfect was the proof of this that the most eminent scholars in the foremost seats of Christian learning were obliged to acknowledge it."

> White's "History of the Warfare of Science with Theology," Vol. II, pp. 370-371.

Dr. Arthur Stanley, dean of Westminster Abbey, who probably did more than any other clergyman of his time to save what is essential in Christianity, said in his memorial sermon at the funeral of Sir Charles Lyell, the great geologist:

> "It is now clear to diligent students of the Bible that the first and second chapters of Genesis contain two narratives of the creation side by side, differing from each other in almost every particular of time and place and order. It is well known that, when the science of geology first arose, it was involved in endless schemes of attempted reconciliation with the letter of Scripture. There were, there are perhaps still, two modes of reconciliation of Scripture and science, which have been each in their day attempted, and each has totally and deservedly failed."

On the other hand, is there any agreement among the scientists of today on the subject of evolution? Does science believe in evolution? The general acceptance of this doctrine is so pronounced that the evolution of man "from a lower order of animals" is no longer regarded as a theory but as a fact. Scientists differ as to the contributing factors which entered into this progressive evolution of life, but not as to the fact itself. The theory is so universally accepted that in the 1924 edition of *Webster's New International Dictionary*, the word "Evolution" is defined as follows:

> "The development, not of an individual organism, but of a race, species, or other group; phylogeny; in general, the history of the steps by which any living organism or group of or-

ganisms has acquired the mortphological and physiological characters which distinguish it. Hence the theory that the various types of animals and plants have developed by descent with modification from the pre-existing types, as opposed to the old theory of the separate creation of each species. *This theory, which involves also the descent of man from the lower animals, is based on facts abundantly disclosed in every branch of biological study,* especially by paleontology, embryology, comparative anatomy, experiments in hybridization, etc. * * * The indications are that all animals and plants are the descendants of a very few simple organisms (or perhaps of but one) not very unlike some of the simplest protozoans. The various living and existing types do not form a single series but a genealogical tree whose branches exhibit very different degrees of divergence from the parent stock. Many branches have died out completely, and are known only by fossils. Close resemblance between two forms, as between man and the anthropoid apes, does not necessarily, therefore, indicate descent one from the other, though it does furnish good evidence of origin from common ancestors at a comparatively recent date. Lamarck was the first prominent modern zoologist to adopt and formulate it. Its general acceptance, however, was largely brought about by its clear exposition and demonstration by Darwin. Modern theories of evolution differ only in regard to the various factors influencing it, their relative importance, and the ways in which they act."

The *Encyclopedia Britannica,* 11th Edition, in treatment of Evolution, says:

"Since Huxley and Sully wrote their masterly essays in the 9th edition of this Encyclopedia, *the doctrine of Evolution has outgrown the trammels of controversy and has been accepted as a fundamental principle.* Writers

on biological subjects no longer have to waste space in weighing evolution against this or that philosophical theory or religious tradition; philosophical writers have frankly accepted it, and the supporters of religious tradition have made broad their phylacteries to write on them the new words."

The *New International Encyclopedia* (1923 Edition) says:

> "*The proof of man's origin from some other primate is now past dispute.* In fact, no scientist now doubts man's descent, less directly from all lower forms of life, and more immediately from a common ancestor with the anthropoid apes."

The *Americana* says:

> "*The evolution conception is no longer a debated question.* The particular methods, and, above all, the so-called factors, or initiating and guiding causes of evolution are still open to debate, and indeed are continuously and vigorously debated. When one reads of disagreements among biologists concerning the merits of Darwinism, it is not a disagreement concerning the 'fact of evolution,' for which the term 'Darwinism' is too often synonymously used in popular writing and speaking, but it is a disagreement concerning the value of Charles Darwin's explanation of the causes of evolution, namely, his theories of natural and sexual selection."

Henry Drummond, co-worker with Dwight L. Moody, and one of the greatest religious forces of the last generation, said:

> "Science for centuries devoted itself to the cataloging of facts and the discovery of laws. Each worker toiled in his own little place—the geologist in his quarry, the botanist in his garden, the biologist in his laboratory, the astron-

omer in his observatory, the historian in his librarian, the archaeologist in his museum. Suddenly these workers looked up; they spoke to one another; they had each discovered a law; they whispered its name. It was Evolution. Henceforth their work was one, science was one, the world was one, and mind, which discovered the oneness, was one."

> Drummond's "Ascent of Man" (James Pott & Co., Publishers, 1894), pp. 8-9.

After reciting in detail the evidences from comparative anatomy and paleontology of the evolution of man, Mr. Drummond says:

> "Take away the theory that man has evolved from a lower animal condition, and there is no explanation whatever of any of these phenomena. With such facts before us it is mocking human intelligence to assure us that man has not some connection with the rest of the animal creation, or that the processes of his development stand unrelated to the other ways of Nature. That Providence, in making a new being, should deliberately have inserted these eccentricities, without their having any real connection with the things they so well imitate, or any working relation to the rest of his body is, with our present knowledge, simply irreverence." Ib. p. 97.

The legislature may undoubtedly, within reasonable bounds, prescribe what sciences shall be taught in the public schools; but under the constitution, with the solemn duty resting upon it to foster science, the legislature cannot prescribe for the public school courses in history, geology, botany or any other science, and then deliberately set aside the fundamental principles of these sciences and set up theories of its own.

This act purports to apply not only to the public schools but also to the normal schools and State

University. In the institutions of higher learning, all scientific subjects should be taught, and the ultimate recesses of human knowledge should be explored, if science is to continue its earnest and ceaseless quest after truth. No avenue should be blocked. No inquiry of the human mind should be foreclosed. That the legislature should attempt to do so is a gratuitous affront to that body of earnest men who are seeking to guide aright the inquiring minds of our youth; and it is a deliberate violation by the legislature of its fundamental duty to cherish science.

Can the legislature by its own fiat create a new heaven and a new earth? Can it reverse the natural law, change the tides and seasons, formulate new rules of mathematics and new postulates of science? If it purports to fosten science, must it not foster science according to scientists and not according to its own pronouncements? If the legislature can by fiat establish the Genesis story of creation as scientific fact, it can by fiat stop the rivers in their courses, turn back the tides, make the moon a phantom, the sun a dragon, change the colors of the flowers, and make this world as different from that which science beholds as Stygian darkness from the Elysian fields.

If Article XI, Section 12 of the Constitution means anything, it means that science must be free to pursue its painstaking researches; nay, more, that the legislature instead of retarding and making a mockery and caricature of science, must sustain and nourish it.

2. A second phase in which Article II, Section 12, of the State Constitution is important concerns the question of its effect upon the proprietary control over public institutions by the State. As was

said by William Waller, Yale Law Review, Volume 35, No. 2, December, 1925, page 193:

> It is unquestionably true that a state government in its capacity of paymaster has a degree of control over public employees and institutions which it does not possess over private persons. But to the doctrine that the majority through the state government may control the disposition of public funds, there is the well-established exception that these funds shall not be diverted to other than 'public purposes'. Ferrell v. Doak, 1925, 152 Tenn. , 275 S. W. 29; Loan Association v. Topeka (1875 U. S.) 20 Wall, 255. Such a diversion would constitute a taking of the property of the minority or dissenting taxpayers without 'due process of law' and necessarily the majority are not the sole judges of what is a public purpose. In the courts must rest the ultimate decision."

Taxation is lawful for a public purpose. Taxation is undoubtedly lawful for the purpose of encouraging literature and science, but are funds used for a public purpose when there is a limitation that science must be taught according to any theological creed? If so, then the establishment of a state theological seminary for the promulgation of that creed must likewise be regarded as the use of public funds for a public purpose.

ASSIGNMENTS VI AND VII.

THE ACT IS UNCONSTITUTIONAL IN THAT IT VIOLATES AMENDMENT XIV, SECTION 1, OF THE CONSTITUTION OF THE UNITED STATES, AND LIKEWISE ARTICLE I, SECTION 8 OF THE CONSTITUTION OF TENNESSEE.

AMENDMENT XIV OF THE UNITED STATES CONSTITUTION PROVIDES, IN PART, AS FOLLOWS:

> "NO STATE SHALL MAKE OR ENFORCE ANY LAW WHICH SHALL ABRIDGE THE PRIVILEGES OR IMMUNITIES OF CITIZENS OF THE UNITED STATES, NOR SHALL ANY STATE DEPRIVE ANY PERSON OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW; NOR DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS."

The arguments on this Point apply as well to various provisions of the Constitution of the State of Tennessee, so that we refer to them here, showing that the Act is likewise unconstitutional as violative of the State Constitution.

The act is violative of Article I, Section 8, of the Constitution of the State of Tennessee. (See Sections A, 1, 2, 3 and 4 of this Point.)

> "Section 8. *No Free Man to be Disturbed But by Law.*—That no man shall be taken or imprisoned or seized of his freehold, liberties or privileges or outlawed or exiled or in any manner destroyed or deprived of his life, liberty or property but by the judgment of his peers or the law of the land."

In connection with this we shall consider the public policy of the State and the extent of the police power, which will bring up for consideration Article XI, Section 12, of the Constitution of the State, part of which reads as follows:

> "Knowledge, learning and virtue being essential to the preservation of republican institutions * * * it shall be the duty of the General Assembly in all future periods of this Government to cherish literature and science."

The act is also violative of Article I, Section 9, of the Constitution of the State of Tennessee. (See Section B of this Point.)

> "Section 9. *Rights of the Accused in Criminal Proceedings.* That in all criminal prosecutions the accused has the right * * * to demand the nature and cause of the accusation against him * * *."

The act is also violative of Article XI, Section 8, of the Constitution of Tennessee. (See Section C of this Point.)

> "Section 8. *General Laws only to be Passed.* The legislature shall have no power * * * to pass any law for the benefit of individuals inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals, rights, privileges, immunities or exemptions other than such as may be, by the same law, extended to any member of the community who may be able to bring himself within the provisions of such law."

SECTION A.

1. *The extent of the police power and authorities thereon:*

We wish to make clear at the very beginning that the defense makes no contention that the Legisla-

ture has not a right to control the public school system of the State. Were there any doubt on this question, it is settled by *Leeper* v. *The State*, 103 Tenn. 500. The Legislature has this right, but obviously, the right must be subject to certain limitations. Under the Tennessee School Law certain subjects are to be taught, certain books are prescribed. It is conceivable that it would be quite proper for the Legislature to say that certain subjects should not be taught or that certain books should not be used but it does not follow from this that the legislative power is wholly unrestricted and that, if a subject is to be taught, the Legislature could, under any circumstances, pass a law that it was to be taught incorrectly, inaccurately, or falsely. The Legislature might provide that biology should not be taught in the high schools of the state, but, if biology is to be taught, we contend that the Legislature could not insist upon a teacher instructing his pupils in incorrect, inaccurate, or false biology. It is conceivable that the Legislature might say that geography should not be taught in the primary schools, yet, if geography is to be taught, the Legislature could not compel instruction, for instance, that the earth is flat. It is conceivable that the Legislature might say that chemistry should not be taught, but, if chemistry is to be taught, the Legislature could not make it a crime to teach that H_2O makes water, or that the measure of learning in chemistry should be based upon the Bible. The Legislature might eliminate astronomy, but, if astronomy was to be taught, it could not pass a law providing that no teacher should teach contrary to the Bible, that the earth moved around the sun. In other words, there is obviously some limitation upon the power of the Legislature. No argument that the Legislature controls the public school system of the state

can support an act which, in its terms, is unreasonable or is not within the police power of the state or is violative of another constitutional provision such as that relating to religious establishments. The Legislature cannot lay down rules and conclusions in the realms of science and religion. Legislatures have limited purposes. They were created to formulate rules of conduct. The framers of the Constitution had a very narrow line within which these rules of conduct should be drawn. That line has never been drawn to include the right to assign a rule to bind the consciences or the minds of the people.

The only limitation upon the liberty of the individual which a state can exercise is found in its police power but

> "in order that a statute or ordinance may be sustained as an exercise of the police power, the courts must be able to see that the enactment has for its object the prevention of some offense or manifest evil or the preservation of the public health, safety, morals or general welfare. * * * The mere restriction of liberty or property rights cannot of itself be denominated public welfare and treated as a legitimate object of police power." (Constitutional Law, 12 C. J., Sec. 441.)

Again:

> "The Legislature is the sole judge as to all matters pertaining to the policy, wisdom and expediency of statutes enacted under the police power but, on the other hand, whether legislation purporting to be enacted in the exercise of the police power is really such and whether regulations prescribed by the Legislature are unreasonable or are otherwise unconstitutional are questions for the judiciary." (Constitutional Law, 12 C. J., Sec. 443.)

The Act, by making it criminal for Scopes to teach evolution, is depriving him of his liberty, and the right properly to practice his profession. It may be said that Scopes was not obliged to teach in the public schools, that if he did not like the laws affecting them, he might teach in private schools; but the teacher has a legal right to teach in all schools, so long as he observes *proper* laws and regulations. The Act deprives parents and pupils, as well as teachers, of their liberty. While the Supreme Court of the United States has refrained from defining the term "liberty", yet it has been held that freedom of speech and of the press, the right of parents to bring up their children and to worship God according to the dictates of their own conscience, the right of parents to have children properly educated in public schools, are among the fundamental personal rights included under the term "liberty", which are protected by the Constitution from impairment by the State.

> *Gitlow* v. *People State of New York,* Vol. 45, Sup. Ct. Rep., 17; page 625;
> *Meyer* v. *Nebraska* (infra);
> *Pierce* v. *Society of Sisters,* etc. (infra);

The rights of all, to-wit, teacher, pupil and parents, are concerned in a case involving the teacher, since all those rights are interlocked.

> *Truax* v. *Raich,* 239 U. S. 33.

Unless, therefore, the legislation can be justified as necessary to promote the health, safety or morals of the community, it is in violation of the above Articles of the state and federal Constitutions. The legislation cannot be arbitrary. It must have a reasonable relation to the competency of the state to effect.

Meyer v. *Nebraska,* 262 U. S. 390;
Pierce Governor of Oreg. v. *Society of the Sisters, etc.,* U. S. Supreme Court June 1, 1925;
Same v. *Society of the Sisters, etc.;*
Same v. *Hill Military Academy,* Vol. 45, Sup. Ct. Rep. No. 16, page 575;
Slaughter House Case, 16 Wallace 36;
Butchers Union v. *Crescent,* 111 U. S. 746;
Yick Wo v. *Hopkins,* 118 U. S. 356;
Mugler v. *Kansas,* 123 N. S. 623;
Lawton v. *Steel,* 152 U. S. 133, 137;
Allgeyer v. *Louisiana,* 165 U. S. 578, 579;
Collins v. *New Hampshire,* 171 U. S. 31;
Taylor v. *Beckham,* 178 U. S. 548-602-603;
Connolly v. *Union Sewer Pipe,* 184 U. S. 541;
Dobbins v. *Los Angeles,* 195 U. S. 223;
Smith v. *State of Texas,* 233 U. S. 630;
Mehlos v. *Milwaukee,* 146 N. W. (Wis.) 882, 884;
N. Y. ex rel. Selz v. *Hesterberg,* 211 U. S. 31;
Adams v. *Tanner,* 244 U. S. 590;
Hammer v. *Dagenhart,* 247 U. S. 251;
Truax v. *Corrigan,* 257 U. S. 313;
Child Labor Tax Case, 259 U. S. 21;
Adkins v. *Children's Hospital,* 261 U. S. 525.

In his address before the American Bar Association at Detroit on September 2, 1925, Charles E. Hughes said:

> "And while I shall not attempt to discuss the constitutional questions which will come under the appropriate judicial review, the constitutional criterion is sufficiently apparent, and that is whether legislation with regard to

> courses of instruction, as to what may and may not be taught, has relation to a legitimate object within the State power and is not to be condemned as arbitrary and capricious."

Whether we agree with the theory of evolution or not, it cannot be reasonably claimed that there is anything inherently vicious or immoral in such teaching. It is a well recognized scientific theory accepted by the great mass of scientists of all creeds and essentially a part of the general subject called science. It is impossible to teach almost any scientific subject without referring in some way to this theory. (See statements of various scientists in record.) While such statements are not part of the evidence in the case, yet since the question is one of science, the Court may take judicial notice from any source it chooses. It may go to encyclopedias and books, and may acquire information direct from scientists; or it may take statements presented in a court of law, giving, of course, the weight to each of these to which it is entitled. These statements show that whether the subject is geography, geology, comparative anatomy, comparative embryology, paleontology, astronomy, physiology, chemistry, zoology, breeding, study of plants, or almost any other scientific subject, the facts of evolution and the theory deduced from those facts are a necessary study.

William North Rice, Professor of Geology at Wesleyan University, said in an address delivered October 11th, 1899, before the Connecticut Academy of Art and Sciences:

> "To exclude the idea of evolution from any class of phenomena is to exclude that class of phenomena from the realm of science."

The following letter from Woodrow Wilson, written to Prof. Winterton C. Curtis of the Uni-

versity of Missouri, sufficiently sums up the situation:

"Washington, D. C.,
August 29, 1922.

My dear Professor Curtis:
May it not suffice for me to say in reply to your letter of August twenty-fifth that of course, like every other man of intelligence and education, I do believe in organic evolution. It surprises me that at this late date such questions should be raised.

Sincerely yours,

WOODROW WILSON.

Leaving out of consideration for a moment the primary schools and devoting ourselves to the State University, where medicine is taught, is it conceivable that medical students can become properly versed in the various sciences necessary to the learning of medicine without some knowledge of this scientific theory? In the human body there are many vestigial members which today have no use but which had a function at some time in the course of human development. How is one to explain these vestigial members?

As was said by Prof. Horatio Hackett Newman, zoologist of the Universtiy of Chicago:

"There are, according to Wiedersheim, no less than eighty vestigial structures in the human body, sufficient to make of a man a veritable walking museum of antiquities. Among these are the vermiform appendix, the abbreviated tail, with its set of caudal muscles, a complicated set of muscles homologous with those employed by other animals for moving their ears but practically functionless in all but a very few men; a complete equipment of scalp muscles used by other animals for erecting the hair but of very doubtful utility of mo-

tion, even in the rare instances when they function voluntarily; gill slits in the embryo, the homologous of which are used in aquatic respiration; miniature third eyelids (nictitating membranes), functional in all reptiles and birds, being vestigials in all mammals; lanugo, a complete coating of embryonic down or hair, which disappears long before birth and can hardly serve any useful function while it lasts. These and numerous other structures of the same sort can be reasonably interpeted as evidence that man has descended from ancestors in which these organs were functional. Man has never completely lost these characteristics. He continues to inherit them, though he has no longer any use for them. Heredity is stubborn and tenacious, clinging persistently to vestiges of all that the race has once possessed, though chiefly concerned in bringing to perfection the more recently adapted features of the race."

As was said by Charles Hubbard Judd, Director of the School of Education, University of Chicago (Tr., Vol. IV, pp. 675-676):

"Every psychologist recognizes the fact that the human organs of sense, such as the eye and the ear, are similar in structure and action to the organs of sense of the animals. The fundamental pattern of the human brain is the same as that of the higher animals. The laws of learning which they have studied in psychology and educational laboratories are shown to be in many respects identical and almost similar for animals and man. It is quite impossible to make any adequate study of the mental development of children without taking into account the facts that have been learned from the study of animal psychology. It would be impossible, in my judgment, in the State University, as well as in the Normal Schools, to teach adequately psychology or the science of education without making constant

> reference to all the facts of mental developments which are included in the general doctrine of evolution. The only dispute in the field of psychology that has ever arisen among psychologists, so far as I know, has to do with the methods of evolution. There is a general agreement that evolution, in some form or other, must be accepted as the explanation of human mental life."

How is it possible to teach medicine without at least teaching the theory of evolution, for it is to be noted that the Act refers to theory and not necessarily fact. (Note the title of the Act.) Other state statutes (for instance, the Florida statute) on the same subject make it unlawful to teach evolution as a fact, but this law goes so far as to prohibit the teaching of the theory. Nor is such teaching of the fact of evolution a crime in Florida.

Or is it to be said that, in the State of Tennessee, the students in medical schools may merely be taught the facts above stated? To teach that man has these vestigial members, which have no use today but which functioned during the progress of the race, might lead a student to believe that there is some evidence that man was descended from a lower order of animals. Has a teacher, under such circumstances, merely by teaching the facts, violated the statute? Is it reasonable to inhibit a teacher from stating to the students the theories which scientists deduce from the facts? It is safe to say that, in the event that these scientific facts cannot be taught in a medical school in Tennessee, either the students of Tennessee must go elsewhere for their medical education or the doctors of Tennessee must be had from other states. If it be claimed that this particular Act is too limited to have those consequences, we should answer that the principle involved in this Act would lead to the in-

hibition of the teaching of various phases of medical science, if such phases are contrary to the Bible. Time was when the science of medicine was regarded as the practice of magic, when people were treated by herbs, which were supposed to be referred to in the Bible; blood root on account of its red juice, was held good for the blood; liver-wart, having a leaf like the liver, was used to cure diseases of the liver; eyebright for the eyes, etc., etc. This was called the doctrine of "Signatures." All this was done in the name of theology, of the Bible, and of the ruling Church. Roger Bacon, who first tried the experimental method in connection with medicine, was kept in a dungeon for some fourteen years, because his activities and thought were held to be contrary to the word of God. We are informed that, even in Tennessee today, there are religious sects which reject medicine, claiming it is the invention of the Devil. The underlying thought is no different from that involved in this or any other law which would prevent the teaching in the medical school of the State of all theories concerning the development of man.

Under the Fourteenth Amendment and under Section 8, Article I, of the Tennessee Constitution, the question is whether the Act promotes public health, safety or morals, or, tersely stated, whether the Act is reasonable.

The Supreme Court of the United States, in *Smith* v. *Texas,* 233 U. S. 630, page 636, said:

> "Life, liberty, property and the equal protection of the law in the Constitution are so related that the deprivation of any one of those separate and independent rights may lessen or extinguish the value of the other three. In so far as a man is deprived of the right to labor, his liberty is restricted, his capacity to earn wages and acquire property is lessened and he is denied the protection which the law affords

> those who are permitted to work. Liberty means more than freedom from servitude and the constitutional guarantee is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling."

This law limits the liberty of the citizen to have his children properly taught in the schools, it limits the liberty of Scopes, the teacher, properly to teach biology, it deprives the public schools of the State of their opportunity and right to turn out learned men and women for the benefit and advancement of the State.

Two recent cases referring to the limitation of the right of the Legislature to pass laws concerning education have recently come to the Supreme Court of the United States.

In *Meyer* v. *Nebraska*, 262 U. S. 390, a state law forbade, under penalty, the teaching in any private, denominational, parochial or public school of any modern language other than the English language to any child who had not attended and successfully passed the eighth grade. The statute was held to invade the liberty guaranteed by the Fourteenth Amendment and to exceed the power of the State.

Mr. Justice McReynolds, speaking for the Court, said, at page 399:

> "While this court is not attempting to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry and establish a home and bring up children, to worship God according to the dictates of his own

conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

Again; on page 400, the Court said:

"The American people have always regarded education and the acquisition of knowledge as matters of supreme importance, which should be diligently promoted. The ordinance of 1787 declares 'Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.' Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life, and nearly all the states, including Nebraska, enforce this obligation by compulsory laws.

"Practical education of the young is only possible in schools conducted by especially qualified persons who devote themselves thereto. The calling always has been regarded as useful and honorable, essential indeed to the public welfare.

"Evidently the Legislature has attempted materially to interfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge and with the power of the parents to control the education of their own * * *.

"That the State may do much, go very far indeed in order to improve the quality of its citizens, physically, mentally and morally, is clear but the individual has certain fundamental rights which must be respected. * * * Perhaps it would be highly advantageous if all had already understanding of our ordinary speech but this cannot be coerced by methods which conflict with the Constitution—*a desirable end cannot be promoted by prohibited means.*"

See also

Bartels v. *Iowa*, 262 U. S. 404.

Again, in *Pierce* v. *The Society of Sisters of the Holy Name,* U. S. Sup. Ct. (June 1, 1925), the law of Oregon which would have compelled all children to be sent to public schools was held to be unconstitutional. The Court said:

> "No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils, to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition; that certain studies plainly essential to good citizenship must be taught but that nothing be taught which is manifestly inimical to the public welfare."

But, said the Court,

> " * * * Rights guaranteed by the Constitution may not be abridged by a legislation which has no reasonable relation to some purpose within the competency of the State."

Neither of these cases concerns the question of the regulation of the state over only the schools which it supports. Referring to all schools, questions were naturally raised which do not concern us here. But the above quotations and the principles evolved from the opinions are applicable in the case at bar. These cases hold that, while the Legislature has a right to supervise schools and to lay down regulations, rights which, of course, would be more extensive in connection with public schools than with private schools, (see *Waugh* v. *Mississippi University,* 237 U. S., 589; *Heim* v. *McCall,* 239 U. S., 175; *Crane* v. *New York,* 239 U. S., 195), yet the Legislature has not an unlimited right in the control of education. However desirable it might have been that children should learn only the English language, yet in *Meyer* v. *Nebraska* (*supra*), the

court said that this could not be "coerced by methods which conflict with the Constitution—a desirable end cannot be promoted by prohibited means," and, in the *Pierce* case (*supra*), "Rights guaranteed by the Constitution may not be abridged by a legislation which has no reasonable relation to some purpose within the competency of the state."

See also

Hardwick v. *Board of School Trustees,* 205 Pac. (Cal.) 49;
Commonwealth v. *Roberts,* 159 Mass. 372;
Denton v. *James,* 107 Kan. 729;
Trustees of School v. *People,* 87 Ill. 304.

In *California Trust Company* v. *Lincoln Institute, of Kentucky,* 130 Ky. 804, the Court said, at page 813:

> "Education strengthens the mind, purifies the heart and widens the horizon of thought. It magnifies the domain of hope, multiplies the chances of success in life and opens wide the door of opportunity to the poor as well as to the rich. It makes men better husbands, better fathers and better citizens. It is not doubted that the Legislature under the police power may regulate education in many respects. * * * Perhaps it may be within the police power to prohibit coeducation of the sexes or to in any other reasonable way regulate the mere *manner* of educating the youth of the state, but to arbitrarily prohibit education is in direct violation of the bill of rights above quoted."

In *Lawton* v. *Steel,* 152 U. S. 133, 137, it is said:

> "To justify the state in thus interposing its authority on behalf of the public, it must appear first that the interests of the public generally and as distinguished from those of a particular class require such interference and

> second, that the means are reasonably necessary for the accomplishment of the purpose and not unnecessarily oppressive upon individuals. The Legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."

And again in *Mehlos* v. *Milwaukee,* 146 N. W. (Wis.) 882, 884, the court said:

> "Too much significance cannot be given to the word 'reasonable' in considering the scope of the police power in a constitutional sense. It took much time, notwithstanding the clear declarations over and over again on the subject here and by the Federal, Supreme and other courts, * * * for courts and text writers in general to appreciate that the final evidentiary test of the legitimacy of a police regulation is whether it is reasonable under all the circumstances."

Apparently the prosecution claims that the power to prohibit implies the power to limit. In other words, that if the state in its control of education could prohibit the teaching of biology, it can limit the teaching of certain branches of the subject; if it could prohibit the teaching of medicine, it can limit the branches to be taught; that if it could prohibit the teaching of any subject, it can determine in what way, false or true, that subject is to be taught. Of course, this does not follow:

The state may prohibit entirely foreign corporations from doing intrastate business, yet it cannot prevent them from doing it on condition that they shall agree not to remove the cases to the Federal courts, where they are entitled to do so, on the

ground of diversity of citizenship. (Citing *Donald* v. *Philadelphia,* 241 U. S. 329; *Barron* v. *Burnside,* 120 U. S. 186.)

The position of the prosecution was best presented in the words of Mr. Bryan:

> "Mr. Scopes has the right to say anything he wants except in the school-room where he is an employee of the State. He can speak on the corners or hire a hall. The law deals with him as a representative of the State, and the real question involved in the case is whether he can misrepresent his employer and demand pay for saying what his employer does not wish said. He also demands that his employer furnish him an audience to listen while he says what his employer does not wish said."

But this assumes that the Legislature has absolute autocratic and proprietary rights over our public schools; that it is limited only by its own caprice; that it has a right to command that the flat world system of geography be taught, that it can outlaw the multiplication table or proscribe the rules of syntax!

The argument is fallacious upon its face, for we come back to the essential limits of the police power of the state, to-wit, that its exercise must be by laws which are reasonable. Any law which would attempt to impose false teaching or to limit learning to a particular branch of any subject, eliminating other essential branches, must necessarily be unreasonable.

And the argument goes too far, for if the legislature were in such complete control, it could negative the teaching of anything no matter how sound, and compel the teaching of anything no matter how absurd.

Public education has come to be regarded as a fundamental requisite of our Government. The

greater majority of the children cannot hope to receive education beyond that imparted in public schools or universities.

In a speech before Congress in 1876, Henry William Blair said:

> "Sirs, the one indefeasible thing is the power to think, and whatever people has that power, and most of it, will be most free. Virtue results from it, because virtue is the child of conscience, and a safe conscience must be instructed by intelligence. The common school then is the basis of freedom; and the system is an absolute condition precedent to the spread and perpetuity of Republican institutions throughout the country and the world. Ignorance is slavery. No matter what the existing forms of the government, ignorance will reduce them to the one form of despotism as surely as gravity will bring the stone to the earth. Knowledge is liberty; and no matter what the forms of government, knowledge generally diffused will carry liberty, life and power to all men and establish universal freedom so long, and only as long, as people are universally made capable of its exercise by universal intelligence."

2. *Public Policy as Expressed in Provisions for Religious Liberty.*

In connection with the unreasonableness of the law, we beg to refer the Court to Point III, where we have considered the provisions of the Constitution guaranteeing religious liberty, for a large part of the argument there tends to support the view that the Anti-Evolution law not only does not tend to preserve public morals but is directly contrary to the public policy of the United States and of this State. The sovereign State of Tennessee in its insistence that the Church should have no hand in the affairs of State has been peculiarly zealous to

protect the people, for it even goes so far as to prohibit ministers of the gospel and priests of any denomination from holding office in the Legislature. (Art. IX, Sec. 1, Constitution.)

Every step in science which has been opposed in the name of faith and religion, has found its obstacle in the same line of reasoning, and on occasion, with a far sounder basis than the opposition to the theory of evolution. Prior to the discovery of the Copernican theory, it was thought that the earth was the center of the universe. The new idea was opposed to all religion, for if this earth was merely one of a number of planets—and a small planet at that—it made more difficult the faith that the individual man, out of hundreds of millions, was the center of God's attention. When new astronomical facts developed, when it was learned that the sun was over 90,000,000 miles from the earth; that some stars were 500,000 times as far from the earth as the sun; that the universe was infinite in extent, the natural result was that the individual man seemed so infinitely small that it was difficult to believe that his activities were of great importance to God. And so with evolution, somehow man's importance becomes minimized if, in some way—and even physically—he is related to a lower order of animals. The acceptance of scientific facts has not destroyed religious faith. The Christian religion is based, not so much upon the old, as upon the new Testament. The acceptance of scientific facts has, for many people, magnified the conception of God's power.

The police power must be founded upon a sound public policy. Where, therefore, we find in the provisions for religious liberty, direct constitutional provisions which show that this exercise of power on the part of the Legislature is contrary to our traditions and institutions, it would seem to follow that the Legislature has transcended its powers.

3. *Public Policy from Point of View of Effect of the Anti-Evolution Law on Teachers.*

Another point of view which bears upon the unreasonableness of the law concerns the effect of such a law upon a teacher. It involves, indirectly, a question which might have been raised under Article I, Section 4, of the State Constitution, providing that no political or religious test other than an oath to support the Constitution of the United States and of the State should be required as a qualification to any office or public trust in the State. The consideration also bears on the question of the rights of conscience.

The teacher is obliged to teach certain subjects. Under this law if he teaches contrary to a certain passage in the Bible, he commits a crime. Suppose he conscientiously believes in the theory of evolution. Either he must teach what he believes to be false or suppress what he believes to be true. It is not questioned that a limitation may be placed upon the teacher's conscience when required by the necessities of public safety, public health or justice. For instance, a Jew would have no right to work on Sunday or to refuse to testify in court on Saturday. A Quaker teacher would have no right to teach certain forms of pacifism in the public schools. But to teach a certain specific religious doctrine or teach the contrary, is not a matter of public safety. The teacher is in a position of public trust. He is an employee of the Government, charged with the duty of instructing the young. To require him to teach nothing contrary to a certain religious doctrine, adds, in substance, a new test to the qualifications of teaching. Sooner or later no educated or honorable man could take the position of teacher at all, and the profession would be limited to those who believed doc-

trines supported by the majority of a state legislature. (See Section C of this Point.) Irrespective of the question of discrimination there discussed, these considerations must be borne in mind, in connection with a pronouncement of a public policy which would put the teaching profession in such an unfortunate position.

4. *Public Policy in view of Article XI, Section 12, of The State Constitution.*

Whether or not Article XI, Section 12, of the Constitution of the State of Tennessee is directory or mandatory it still proclaims the policy of the State:

> "Knowledge, learning and virtue being essential to the preservation of Republican institutions and the division of the opportunities and advantages of education throughout the different portions of the state being highly conducive to the promotion of this end, it shall be the duty of the General Assembly in all future periods of this Government to cherish literature and science."

Here is the public policy of the State laid down in its Constitution, formulated by men who were not afraid of the spirit of liberty and who realized the necessity of cherishing science. Not science so long as it conforms to the Bible, not science so long as it conforms to the King James version of the Bible; certainly, not science so long as it conforms to the King James version of the Bible literally accepted. The public policy of the State is to cherish science—science, science!

As Freund says, in his work on "Police Power," page 513:

> "Freedom in the pursuit of literature and science is as a matter of history bound up

with the freedom of religion and of speech and press, for it has practically never been opposed for other than religious or political motives."

The only limitation upon the liberty of the individual must be found in the police power of the state; the police power of the state can only act in matters which tend to subserve public health, morals or welfare; this law does not so treat it; is unreasonable and contrary to the public policy of the state. The law therefore, cannot be sustained under the police power.

SECTION B.

THE FOURTEENTH AMENDMENT AND ARTICLE I, SECTION 9 OF THE STATE CONSTITUTION.

The Act deprives the defendant of his liberty without due process of law and is in violation of the Fourteenth Amendment, as well as of Article I, Section 9, of the State Constitution, in that it fails to prescribe with reasonable certainty the elements of the offense.

We have already dealt with the form of the indictment. We have referred there to the case of Fontana against the United States, 262 Fed. 283, where it was held that the "due process" clause is violated unless the indictment itself is so distinct and specific as to advise the defendant of the crime, and to enable him, if there be a second prosecution, to show that he has already been put in jeopardy. The argument on Point I. should likewise be considered in this Section, for it is contended that the trial on that indictment was violative not only of the State Constitution, but of this clause of the Federal Constitution as well.

We shall, however, deal here with the indefiniteness of the law, irrespective of the indictment.

This is a penal statute. It must be construed strictly. It must define the nature of the offense with reasonable certainty so as to apprise all persons of what constitutes the offense.

The Tennessee statute makes it criminal

> "to teach any theory that denies the story of the Divine Creation of Man as taught in the Bible and to teach instead that Man has descended from a lower order of animals."

1. There is no agreement as to which story of the Divine Creation of man as taught in the Bible is intended.

a. In the first place, the Bible itself contains two versions, even in the Book of Genesis, (1) that God created man and woman out of the dust at the same time, and (2) that He first created Adam and thereafter created Woman out of Adam's rib. Other versions of creation can be found in other parts of the Bible. Even the theory of evolution finds some support.

> "My substance was not hid from Thee when I was made in secret and curiously wrought in the lowest parts of the earth. Thine eyes did see my substance yet being *imperfect;* and in Thy book all my members were written, which in continuance were fashioned when as yet there was none of them." (Psalms 139:15, 16; see also Romans VIII, 22.)

In Numbers XXV, 11, 16, we are told that God is "the father of spirits and not the father of flesh." Also *John IV, 23, 24, Hebrews XII; 9.*

b. Does this law refer to a literal interpretation of the Bible or is one entitled to make his own interpretation?

There are Christians who state that the teaching of the Bible is divinely inspired in matters of religion and morals, but, just as God is said to have used history and parable to enunciate his teachings, so he used myth and cosmography to bring to the masses of mankind the lessons of religion and morals.

(c) There are Christians who believe in the Divine origin of the Bible but affirm that the Bible, in stating that God created man and woman out of dust, did not set forth the process of creation. On their interpretation, evolution is not inconsistent with the theory of creation, as set forth in the Bible. Great religious thinkers and scientists, Presbyterians, Roman Catholics, Baptists, Methodists and others have affirmed that the theory of evolution is not opposed to biblical teaching. Some have asserted that the story of creation set forth in the Bible applies only to the creation of the soul. What theory of creation, as set forth in the Bible, must the teacher avoid contradicting?

Or, what theory of creation is the standard to show what he must not teach? Shall it be the theory that the Bible applies only to the soul and not to the body? Shall it be that set forth in the earlier or the later part of the Bible? Shall it be the view held by the Modernists or the Literalists? Or, shall it be the view of some particular individual? The message of the Governor of the State, in approving this bill, said that a literal interpretation of the Bible was not intended (fol.). The court, in construing the Act, eliminated the clause referring to the Bible entirely. A teacher, under penalty of committing a crime, is obliged to make his own construction, where courts, governors, lawyers, scientists and Bible students differ. Differences of opinion, a determination as to what is false doc-

trinal interpretation is left to the court, or perhaps a jury.

d. What Bible is intended? If one takes the Hebrew Bible and makes a translation (see statement of Dr. Rosenwasser), he will find, for instance, that the original word translated "create" is in Hebrew "bara"; that this word actually means "to set in motion", not necessarily "to create" all at one time. If the Act refers to the Bible as frequently translated, there is nothing inconsistent between evolution and the Bible. We have, we hope, progressed beyond the thought of the Fifteenth Century when it was a crime in England to read the Bible in the original tongue. For violating such a law, thirty-nine men were put to death.

The court, in this case, apparently regarded a literal interpretation of the King James version of the Bible as the only one that should be held by a pious man. The statute does not say so. The statute leaves the matter in indefinite shape.

2. The word "teach" is likewise indefinite. This is illustrated by the words in other so-called anti-evolution laws, where it is forbidden to teach *as a fact* that man was descended from a "lower order of animals" (Florida statute).

Mr. Justice Holmes, of the United States Supreme Court, once said:

> "A word is not a crystal, transparent and unchanged; it is the skin of a living thought, and may vary greatly in color and in content, according to the circumstances and time in which it is used."

But chameleon-like words which may mean one thing and may mean another, cannot be used in a criminal statute. What is meant by the word "teach"? The word is defined in Funk & Wagnalls New Standard Dictionary "to impart knowledge or

information; (2) by means of lessons given; instruction; to communicate the knowledge of; make known or understood." In Webster's New International Dictionary as "To instruct; to impart the knowledge of; to make aware by information, experience or the like." In other words, does the Act refer to teaching "as a fact" or as "true", or, does it forbid the expounding of information? It might not be objectionable or unreasonable for an act to provide that a teacher must not teach things as true, about which people differ, whereas it would be unreasonable to provide that he could not expound information as to different theories. It would be one thing to have forbidden the teaching of the evolutionary theory as the only theory in the mind of the teacher which had any basis in truth. It is quite another to forbid as does the Tennessee Statute, the mere explaining, expounding or elucidating the evolutionary theory as one of several theories including the Biblical theory. Suppose Scopes taught, in the sense of expounding information, the theory of evolution. Suppose, half an hour later, he taught, in the same sense and to the same class, the theory of Divine Creation in the literal sense of the Biblical statement. Suppose, on another occasion, he taught the theory of the Buddhist or the Mohammedans. In other words, if he expounded information in all theories, has he violated this law? If not, how could he have been found guilty of crime for telling Howard Morgan the evolutionary theory that man was evolved from protoplasm in the sea? We assume that there would be no violation of law unless he expounded the theory of evolution to the exclusion of the theory or theories of creation stated in the Bible. Where a word having two distinct meanings is used, without definition, one cannot determine what would constitute a crime.

3. Or even take the term "lower order of animals." This is an artificial term, much as "mammals" is an artificial term. The term has a definite meaning in zoology. It was first used by Linnaeus about two hundred years ago. The first order was called primates. In this first "order of animals" were included man, apes, monkeys and lemurs. If evolution taught that man was descended from, say a monkey, which it does not, this would not be a teaching that man was descended from a "lower order of animals," because man and monkeys are primates and are in the same "order."

In other words, the Act itself is indefinite and unclear. No one could tell what would constitute a crime thereunder. Is it a crime to teach the theory of evolution alone, or is it merely a crime if it is taught as a denial of the story of creation in the Bible? What is meant by the word "taught"? Is it a crime merely to expound information on all theories, or, does it only become a crime when one theory is taught as true to the exclusion of another? What is intended by "Bible"? Does this refer only to the King James version and not the Bible as differently translated? Unless an act is definite enough to advise and specify as to what constitutes the crime, it is unconstitutional. A person is not obliged to determine the meaning of an act at his peril. This is a criminal statute. It should be definite and certain. The legislature might easily have stated just what could be taught as to man's creation and just what could not be taught.

There are over five hundred different Christian creeds in the world, all derived from differences, and in these creeds, almost every individual has his own interpretation. They are all based on the Bible, yet here is an act which makes the Bible the

sword of Damocles over the poor teacher. He must know all the interpretations. He must avoid any interpretation which some individual judge would claim as unlawful. He must not only know some part of the Bible; he must know all of the Bible and all versions of the Bible.

4. And finally, the teacher must guess what construction a court or different courts would place upon the Act. (The Court's construction in the Court below is used by way of illustration.) No one can tell by a mere reading of this statute just what is prohibited. Under the construction of the court below, the first clause was entirely excluded, the court's view being that the only thing prohibited was to teach that a man was descended from a lower order of animals and that the first part of the statute, referring to the Bible, was explained by the second. On what theory of law can a criminal statute be sustained that merely provides that it is a misdemeanor to teach that man is descended from a lower order? Is there anything in such teaching that is criminal in its nature? As well might it be made unlawful to teach that the present man is in some respects different from the first man, or that he was created out of clay or sand. On the other hand, on the face of it, the law would appear to read that one would be guilty of no crime unless he taught both, to-wit, a theory denying a story of Divine Creation *and* to teach instead that man descended from a lower order of animals. It might be possible to take the position that *the theory of creation as set forth in the Bible is not necessarily inconsistent with the theory that man descended from a lower order of animals.* Millions of Christians do take that position. Certainly the act is, on its face, open to these two constructions, and not only laymen but lawyers and judges might differ as to which is correct.

Laws of this character have been considered by the United States Supreme Court in many cases. The leading case is *Harvester Co.* v. *Commonwealth of Kentucky,* 234 U. S. 216, where a statute attempted to create and define a crime. Various statutes had been so construed that they would make combinations for the purpose of controlling prices lawful *unless for the purpose or with the effect of fixing the price that was greater or less than the real value of the article* (234 U. S., page 221).

It was contended that "real value" fixed an uncertain standard. The court said, at page 223:

> "To compel them (business men) to guess on peril of indictment * * * to define prophetically what the reaction of only partially determinate facts would be * * * is to exact gifts that mankind does not possess."

Again, in *Collins* v. *Commonwealth of Kentucky,* 234 U. S. 634, 638, the court said:

> "It was found that the statute in its reference to 'real value' prescribed no standard of conduct that it was possible to know; that it violated the fundamental principles of justice embraced in the conception of due process of law in compelling men on peril of indictment to guess what their goods would have brought under other conditions not ascertainable."

See also

> *American Seeding Machine Co.* v. *Commonwealth of Kentucy,* 236 U. S.660.

United States v. *Brewer,* 139 U. S. 278, concerned a Tennessee statute, in reference to which the court said:

> "Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid."
>
> *U. S.* v. *Sharp,* 1 Pet. C. C. 118.

> "Before a man can be punished his case must be plainly and unmistakably within the statute."
>
> *U. S.* v. *Lacher,* 134 U. S. 624, 628.

See also

> *U. S.* v. *Pennsylvania R. R. Co.,* 242 U. S. 248.

In *Chicago, Milwaukee & St. Paul* v. *Polt,* 232 U. S. 165, the court said:

> "No doubt the states have a large latitude in the policy that they will pursue and enforce, but the rudiments of fair-play required by the Fourteenth Amendment are wanting when a defendant is required to guess rightly what a jury will find. * * * "

In *U. S.* v. *Armstrong,* 265 Fed. 683, the syllabus states:

> "In general, the criminal statute to be valid must be so clearly and definitely expressed that an ordinary man can determine in advance whether his contemplated act is within or without the law, and if deviation from a standard is prohibited, the standard must be definitely fixed."

In *Chicago and N. W. Ry. Co.* v. *Railroad and W. Commission,* 280 Fed. 387, 399, a statute provided that buildings should be so constructed that employees should be protected from "heat, rain, cold, snow or other inclement weather" while working, and further provided that it should be unlawful to require men to work outside of such buildings in "rain, heat, cold, snow or other inclement weather." In reference to this, the Court said:

> "Applying these principles to the case at bar, the questions at once arise: What is the standard of guilt? When is it fixed, and by whom?

> The words 'rain and snow' are hardly definite enough in a criminal statute. The words 'heat and cold' are so elastic in their meaning as to cover the whole range of temperature. The words 'inclement weather' are equally indefinite. What is meant by 'inclement weather'? Will a fog or mist come within the language? Will wind be included? It is surely necessary that limitations shall be placed upon all of these terms. But who is to supply the limitations, the employer or the employee? or the court? or the jury? The Legislature is the only proper authority to define a statutory crime against the state. This power cannot be delegated to individuals, courts, or juries. The uncertainty and indefiniteness in the present statute is in my judgment as great as was found to exist in the statutes considered in the cases above cited."

Are the words "rain, heat, cold, snow, or other inclement weather" more indefinite than the word "Bible", where there are various Bibles, various translations and innumerable interpretations? Are the words more indefinite than the word "teach"? Are the words more indefinite than "theory of evolution", a scientific subject about which even scientists differ? Are the words more indefinite than "lower order of animals"?

The statute quoted above is direct, fixed and definite compared with the law in question here.

In view of the above, can it be said that one would know what acts constitute a violation of this law?

SECTION C.

It is submitted that the law in question is not a general law and thus contravenes Article XI, Section 8, of the Tennessee Constitution, likewise violating the provision of the Fourteenth Amendment

that no State shall deny to any person within its jurisdiction the equal protection of the law."

In reference to this Section, the Supreme Court said in *Yick Wo* v. *Hopkins,* 118 U. S. 356, 369:

> "These provisions are universal in their application to all persons within the territorial jurisdiction without regard to any differences of race, of color, or of nationality, and the *equal protection of the laws is a pledge of the protection of equal laws.* * * *
>
> "The fundamental rights of life, liberty and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to man the blessings of civilization under the reign of just and equal laws."

This law makes it criminal for teachers in public schools to do what teachers in private and other schools can do quite lawfully. It is contended that there is a distinction between the classes because the State supports the public schools and the teachers in the State. This argument might be applicable had it to do with school regulations and did the law not make those acts a crime. If an act is criminal, it is criminal everywhere within the State and it is criminal when performed by any person. If the public morals or safety require the passage of a criminal statute, such public morals or safety concerns one school as well as another. If the morals of children would be impaired by a certain teaching, such morals would be impaired wherever such teaching is adopted. The only basis on which the act can be supported is that it is necessitated by public morals and safety. Why is not the child in a private school quite as much entitled to the State's protection against impairment of morals as is a child in the public school? If it

be contended that, if this were a general law, it would be clearly unconstitutional as coming within *Meyer's* v. *Nebraska* (*supra*) and *Pierce* v. *Society of the Holy Name* (*supra*), the answer is that that is because such legislation is not required in order to promote the public welfare.

In *Rogio* v. *The State,* 2 Pickle 272, a law provided that barber shops should not keep open bathrooms on Sunday. The prohibition did not apply to hotels or to any concern but barber shops. It was held to be unconstitutional as not general.

Again, in *State* v. *Nashville, Chattanooga & St. Louis Ry. Co.,* 16 Cates 1, a law made it a crime for a corporation to do certain things which individuals were permitted to do. The law was held unconstitutional.

The assumption of the prosecution is that the one who pays has a right to regulate. But that is quite a different proposition from saying that the one who pays can make it a crime for its employees to behave in a certain way, whereas, it is no crime for others to behave in that same way. There is no attempt here to prescribe the school law or course of study. A violator is a criminal if he teaches the theory of evolution in the public schools. Therefore, teaching the theory of evolution must be a criminal act. If it is a criminal act, it is because such teaching is contrary to public morals. If so, it must apply generally, not only to some teachers, but to all teachers, and possibly not only to teachers, but to writers as well. It must apply to books as well as to the spoken word, and possibly not only to books and teaching but to any utterance on the subject anywhere, any place, in private schools and public schools, on the platform, in conversation, to oral, written or printed statements, in newspapers, magazines or books, to statements, direct and indirect. Things that are so bad as to

necessitate prohibition by criminal law must be prohibited all over the state and wherever the law has jurisdiction. The criminal law cannot apply to a particular class, the criminal law cannot apply only to the teachers *in the public schools* of Tennessee. Discrimination always renders a law unconstitutional, but it is particularly obnoxious to the equality-of-laws provision "in the administration of criminal justice." (Compare *Pace* v. *Alabama,* 106 U. S. 583-4.) (See also *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540; *Truax* v. *Covington,* 257 U. S. 312, 335; *State* v. *Railroad,* 124 Tenn. 4.)

But there is a more subtle yet perhaps more far-reaching discrimination in the Statute. The principle underlying it carried to its logical conclusion would compel the employment of Literalists as teachers or prevent the employment of non-literalists. This statute makes the Bible the standard of teaching to some extent. Suppose the Legislature thought it wise to limit the employment of public teachers to men who believed literally in the Bible. What simpler method could be devised than to pass laws preventing the teaching in any subject of anything contrary to any statement in the Bible? However general a law may seem to be, yet if the effect is to discriminate, however slightly, in favor of any class, there is a denial of the equal protection of the laws under the Fourteenth Amendment. It will not answer to say that all may become Literalists. They are not obliged to do so in order to become teachers. It will not answer to say the discrimination in the statute is slight. The law forbids any discrimination. There is only one educational test in biology that applies equally—that is knowledge of biology—only one educational test in geography—only one in astronomy. And any law which tends to make the Bible the test of the

truth of any branch of science discriminates in favor of teachers who literally accept the Bible.

The statute is further discriminatory in that it permits the Literalist to teach his theory, but denies that right to the evolutionist. A biologist who is a literalist may teach that God created the earth in six days and man in one. A biologist who is an evolutionist may not teach his theory. It is the business of teachers to teach their subject, but if it be a crime to state anti-literalist theories, it ought to be a crime to state literalist theories. A conscientious teacher refrains from injecting his own private convictions—religious or others—into his subject. He says in effect, "Here is a body of data and inferences, conceivably erroneous, but widely prevalent, with which an educated person in this generation should be familiar. Make what you will of it." The statute discriminates against trained professional teachers of biology. A statute would be analogous which provided that no plasterer who had served an apprenticeship and learned his trade should plaster on public work. Presumably some theory or theories of creation or evolution of man must be taught if science is to be taught. Why is the theory of a certain class preferred? And are not all theories to be presented? Certainly men do not have the equal protection of the laws if some are free to present their views and others are denied the right to present theirs. Such discrimination can be justified only if certain views are criminal or immoral. There is no warrant for any discrimination upon religious grounds.

In *Stratton* v. *Morris*, 89 Tenn. 497, 534, the Court said:

> "Whether a statute be public or private, general or special in form, if it attempts to create distinctions and classifications between the

> citizens of this State, the basis of such classification must be natural and not arbitrary."
>
> *State* v. *Railroad,* 124 Tenn. 4, 10.

The "reach and influence" of the equality-of-laws provision are "immense" (*Ex Parte Va.,* 100 U. S. 339, 367). The provision insures "equality of protection not only for all, but against all similarly situated" (*Truax* v. *Corrigan,* 257 U. S. 312, 331, 333). "* * * No greater burdens should be laid upon one than are laid upon others in the same calling or condition." "No impediment should be interposed to the pursuit of anyone except as applied to the same pursuits by others under like circumstances." (*Barbier* v. *Connolly,* 113 U. S. 27, 31, quoted in *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540, 558, 559. "It is the individual who is entitled to the equal protection" (*McCabe* v. *Atchison R. R. Co.,* 235 U. S. 151, 161). It is immaterial how small is the group affected, the denial of equal protection to a single person, natural or artificial, is a violation of constitutional right.

However general a statute may appear to be in its terms, yet if its effect is to strike at, or discriminate against, a class, it is unconstitutional.

In *Ah Kow* v. *Nunan,* 5 Sawy 552, the defendant was convicted of crime and imprisoned in the county jail. An ordinance of San Francisco provided that every male person so confined should have the hair of his head "cut or clipped to an uniform length of one inch from the scalp thereof" (p. 556). Pursuant to this ordinance, Ah Kow's queue was cut off. He brought suit for damages, and the issue was as to the validity of the enactment. He alleged that he wore the queue pursuant to the "religious faith of the Chinese" (p. 555). Mr. Justice Field held the ordinance invalid and sustained the plaintiff's claim. His statement of the

purpose and effect of the equality-of-law provision and its relation to the due-process principle is so convincing as to merit extended quotation:

> "Many illustrations might be given where ordinances, general in their terms, would operate only upon a special class, or upon a class, with exceptional severity, and thus incur the odium and be subject to the legal objection of intended hostile legislation against them. We have, for instance, in our community a large number of Jews. They are a highly intellectual race, and are generally obedient to the laws of the country. But, as is well known, they have peculiar opinions with respect to the use of certain articles of food, which they cannot be forced to disregard without extreme pain and suffering. They look, for example, upon the eating of pork with loathing. It is an offense against their religion, and is associated in their minds with uncleanness and impurity. Now, if they should in some quarter of the city overcrowd their dwellings and thus become amenable, like the Chinese, to the act concerning lodging-houses and sleeping apartments, an ordinance of the supervisors requiring that all prisoners confined in the county jail should be fed on pork would be seen by every one to be levelled at them; and, notwithstanding its general terms, would be regarded as a special law in its purpose and operation.
>
> During various periods of English history, legislation, general in its character, has often been enacted with the avowed purpose of imposing special burdens and restrictions upon Catholics; but that legislation has since been regarded as not less odious and obnoxious to animadversion than if the persons at whom it was aimed had been particularly designated.
>
> *But in our country hostile and discriminating legislation by a state against persons of any class, sect, creed or nation, in whatever form it may be expressed, is forbidden by the*

> *fourteenth amendment of the constitution.* That amendment in its first section declares who are citizens of the United States, and then enacts that no state shall make or enforce any law which shall abridge their privileges and immunities. It further declares that no state shall deprive any persons (dropping the distinctive term citizen) of life, liberty or property, without due process of the laws. This inhibition upon the state applies to all the instrumentalities and agencies employed in the administration of its government, to its executive, legislative and judicial departments, and to the subordinate legislative bodies of counties and cities. And the equality of protection thus assured to every one whilst within the United States, from whatever country he may have come, or of whatever race or color he may be, implies not only that the courts of the country shall be open to him on the same terms as to all others for the security of his person or property, the prevention or redress of wrongs and the enforcement of contracts, *but that no charges or burdens shall be laid upon him which are not equally borne by others, and that in the administration of criminal justice he shall suffer for his offenses no greater or different punishment"* (italics ours).

Justice Field's decision has been the subject of approving comment by the highest critical authorities.

> Zollman *Religious Liberty in American Law,* 17 Mich. Law Review, 355, 359.

It is to be noted that the statute was general, just as this statute is general. It applied to all classes but the vice was that it struck at a particular class, to wit, the Chinese, just as this statute applies to a particular class, that is, those who do not accept the Bible literally.

Imagine two men trained for the teaching of biology, their livelihood depending upon it. Each has a position. One believes in evolution. The other does not. Can the legislature enact a law, the effect of which is to prevent the teaching of evolution, if it conflicts with the Bible? The non-believer in evolution would not mind. The belief of the other in evolution is not taken away by this law, but he must stand by and refrain from teaching a theory that he has always believed and must also not teach anything contrary to a theory which he does not believe. This might easily prove so intolerable to this man that he could not continue to teach. The law is, therefore, plainly to "lay a greater burden upon him than is" laid upon his fundamentalist brother and is, therefore, taking from him the equal protection of the law. See *Barbier* v. *Connelly,* 113 U. S. 31, supra.

The question—as the phrases "good", "reasonable", "just", "proper", suggest—is a question of policy. It is not a question, of course, whether the courts themselves consider the legislation desirable or undesirable, but a question whether the statute's inclusions and exclusions rest upon some "reason" which—having regard to the general policy in favor of "equality of treatment" (*Truax* v. *Corrigan, supra,* 257 U. S. 333)—can be accepted as "good and valid" (*Stratton* v. *Morris; State* v. *Railroad, supra*).

Some distinctions, it may safely be stated, can never have a foundation in "good and valid reason."

A statute which says that a certain act is a crime if done by "white men" but not by "black men" (compare *Gulf Railroad Co.* v. *Ellis,* 165 U. S. 150 at p. 155)—or if done by "men possessed of a certain wealth" but not by the poor (*ibid*)—or if done by native-born citizens but not by foreign-born (compare *Fraser* v. *McConway,* 82 Fed. 258), or if

done by citizens and not by aliens (*Truax* v. *Reich,* 239 U. S. 33, 41)—or if done by artificial persons, but not by natural ones (*State* v. *Railroad,* 124 Tenn. 4)—is necessarily void.*

How with respect to a statute that declares that candid evolutionists are guilty of crime if they state in the schools the doctrine they believe, while fundamentalists can proclaim their opinions without fear of punishment?

That the law does discriminate—that it "interposes" an "impediment" to the teaching "pursuits" of the one class and not of the other—is undeniable and, we believe, undenied.

The question then, is simply: Is the distinction one which, consistently with a general theory of equality of laws, can be accepted as reasonable?

The character of the distinction is in no manner of doubt. "The purpose of an act" said Mr. Justice Hughes, and it was of the equality provision that he wrote,—"must be found in its natural operation and effect (citing cases), and the purpose of this act is not only plainly shown by its provisions but it is frankly revealed in its title" (*Truax* v. *Raich,* 239 U. S. 33 at p. 40). The Bible is named in the statute. The purpose of the enactment *is on its face* to give a preference to one set of religious opinions over another. And if the purpose were not thus disclosed by the very terms of the enactment, the situation would be no different. For courts, in determining whether a statute does or does not work a forbidden inequality, "are not struck with blindness and forbiden to know as judges" what they "see as men" (Field, J., in *Ah*

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* In the cases cited the illustrations were of discriminations in respect to private, civil relations: Discrimination in respect to the criminal law is even more objectionable, supra, page .

Kow v. *Nunan,* 5 Sawyer 552, 560); they may not "shut their eyes" to basic facts (*Pruitt* v. *Commissioners,* 94 N. C. 709, 716).

The only theory on which the statute can possibly be sustained is the theory that in some sense of which the law may take cognizance, the biblical doctrine concerning the creation is to be preferred to the evolutionary. It may safely be stated that this theory, or any theory which discriminates between religious *opinions,* is a theory that, at least since the adoption of the Fourteenth Amendment, no American court, either as matter of common or of constitutional law, has accepted. (See Points II and IV, A.)

Is the case for the statute in some mysterious way strengthened by the fact that the discrimination is a discrimination with respect to teaching in the public schools? Is discrimination more defensible between evolutionists and fundamentalists with respect to public employment than with respect to private occupation?

To these questions the decision of this court in *Mashall & Bruce Co.* v. *Nashville* (109 Tenn. 495), supplies the answer. The City of Nashville adopted an ordinance requiring that

> "all city printing shall bear the union label of the Nashville Allied Trades Council or the label enacted by the International Typographical Union".

Plaintiff was the lowest bidder for certain blank books and stationery and was awarded the contract. The city however notified complainant that it would refuse to receive the goods upon the sole ground "that they did not bear the union label prescribed by the ordinance" (p. 498). This court held the ordinance void as in excess of the city's powers under the charter. In a full opinion this court went

on to decide that the ordinance was as well a violation of the constitution of the State and of the United States. At pages 504, 505 appear the following clear statements:

> "This ordinance in question violates section one of the Fourteenth Amendment to the Constitution of the United States, which declares that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."
>
> "And it violates the Constitution of the State of Tennessee.
>
> *   *   *   *   *   *   *
>
> "In *Adams* v. *Brenan* (177 Ill. 194), referred to above, the [Illinois] Supreme Court said: 'There is no more reason or justification for such a contract as this than there would be for a provision that no one should be employed except members of some particular party or church. In any such case it might be said that the board entertained a bona fide opinion that the members of some political party were more intelligent and better capable of performing the work, so that better results would be obtained, or that the members of a church, on account of their higher standard of morality would more faithfully and conscientiously carry the contract. The fact that the board may have been of the opinion that its action was for the benefit of the public can not afford a justification for limiting competition in bidders, and requiring them to abandon the right to contract with whomsoever they may choose for the performance of the work.'"

This court in the *Marshall* case found the discrimination there concerned not less, but more objectionable because it was a discrimination with re-

spect to *"public work"* (109 Tenn., at page 507). Schools and teaching are as plainly within the equality-of-laws principle as any of the other institutions and activities of man. So it has been held with respect to scholars: A statute is void under the equality-of-laws principle which excludes colored children from the schools (*State* v. *Duffy,* 7 Nev. 342), or which denies the colored schools a share of one of the state's educational funds (*Dawson* v. *Lee,* 83 Ky. 49. And it has been repeatedly decided in North Carolina that where one race is much richer than another a statute which both imposes and distributes taxes along race lines works a forbidden discrimination. (*Pruitt* v. *Gaston County Commissioners,* 94 N. C. 709; *Riggabee* v. *Durham,* 94 N. C. 800; *Markham* v. *Manning,* 96 N. C. 132.*

The case with respect to discrimination between teachers is no different. For the right to teach is a right protected by the Constitution of the United States (*Meyer* v. *Nebraska,* 262 U. S. 390; and no discrimination is more plainly obnoxious to the equality-of-laws principle than discrimination in legislation which affects the "opportunity of earning a livelihood." (*Truax* v. *Raich,* 239 U. S. 533/39).

We have treated the statute hitherto as being in effect, what is is in intention, a statute designed to favor literalists as teachers in the public schools of the State. It is, of course, no answer to this that the prohibition is not absolute. An evolutionist may, indeed, still teach if he suppresses his convictions. The equality-of-laws provision, however, condemns not only legislation that works a complete exclusion: that provision requires, as we have already seen, that "no impediment should be interposed to the pursuits of anyone except as

applied to the same pursuits by others under like circumstances."

> *Barbier* v. *Connolly,* 113 U. S. 31;
> *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540, 59.

The suggestion that an evolutionist may escape the penalties of the statute by ceasing, in fact or in form, to be an evolutionist—the *Marshall* case refutes in language curiously apt (109 Tenn., at page 507):

> "The answer is made that the nonunion citizen is not deprived by the right to contract for this work by this ordinance, except by his own act in refusing to join the union. So any man could become a Democrat, a Presbyterian, or a Catholic. And should a law limit public work to any one of these classes, the individual could bring himself within the privileged class by joining it. *But he is not compelled to do this.*" (Italics ours.)

The question as we have already said is in a broad sense one of policy,—of "justice" of "propriety", of "soundness", of "validity", of "reasonableness". This standard no statute can satisfy which offends against the constitutionally declared policy of the State. Least of all can a statute whose clear purpose is the exclusion of candid evolutionists from public employment be sustained in a jurisdiction whose fundamental law provides:

> "That no political or religious test, other than an 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. 1, Sec. 4, see also Art. 1, Sec. 3, and compare Point III this brief and cases there cited.

(On this point see A 3, page 62.)

In determining whether a statute works a forbidden inequality the courts as we have seen are not to be "blind". They must not "shut their eyes" to what all men see. It is known of all men that the present is a time of sincere and far-reaching controversy between supporters and opponents of the evolution theory. Controversy exists, is acute, and is perhaps growing more acute. It is precisely as between aligned and opposed contestants in any controversial field,—economic, political, scientific or religious,—we submit, that the need of "equal protection" is greatest. (Compare *Atchison, &c. Ry. Co.* v. *Vosburgh,* 238 U. S. 56, 60, 62.

At all times and in any American jurisdiction a statute which imposes burdens upon those who hold one creed or opinion and leaves their opponents unfettered must be constitutionally condemned. Most plainly must the statute fail in this state and at this time. In language that the Supreme Court of the United States applied to another penal statute (*Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540, 560), language that this court in turn has again in relation to a penal statute quoted and approved (*State* v. *Railroad,* 124 Tenn. 4, 12):

> "No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure the equality of rights which is the foundation of free government."

SECTION D.

The statute is likewise violative of "due process" in that it indirectly provides for the use of public funds for other than a public purpose. (See Assignment V, 2, page).

CONCLUSION.

From the above, we maintain that the Act in question is unconstitutional, is a violation of Section 1 of Article XIV of the Constitution of the United States, as well as of Article I, Section 8; Article I, Section 9, and Article XI, Section 8, of the Constitution of the State of Tennessee. It does abridge the liberties of citizens of the United States without due process of law, and it denies to persons within the jurisdiction, the equal protection of the laws. It is not within the police power of the state, for it does not tend to conserve public health, welfare and morals. In, and of itself, it is an unreasonable law; it is contrary to public policy, as expressed in the provisions of the state constitution in reference to religious liberty; it is contrary to public policy because of the effect the law would have on teachers, and the teaching profession; and it is contrary to public policy in view of Article XI, Section 12 of the State Constitution, which, whether mandatory or directory, holds that the State shall cherish literature and science. It is in violation of the State and Federal Constitutions in that it fails to prescribe with reasonable certainty the elements of the offense, and in that it is not a general but a discriminatory law.

ASSIGNMENT VIII.

THE ACT IS UNCONSTITUTIONAL, BECAUSE IT IMPAIRS THE OBLIGATION OF A CONTRACT OR CONTRACTS IN VIOLATION OF SECTION 10, ARTICLE I, OF THE FEDERAL CONSTITUTION.

Blount College, established in 1794, sustained by land grants from the United States Government, became known in 1879 as the "University of Tennessee." In 1862 Congress donated public lands to various states, under the Morrill Act, with the stipulation that the proceeds should be "inviolably appropriated to the endowment, support and maintenance of at least one college where the leading object shall be, without excluding other scientific and classical studies, and including military tactics, to teach such branches of learning as are related to agriculture and the mechanical arts in such manner as the Legislature of the states may, respectively, prescribe in order to permit the liberal and practical education of the industrial classes in the several pursuits and professions of life." In 1869 the State Legislature appropriated this fund to the State University (Acts of 1868; 1869, Chap. 12).

In 1897 (Acts of 1887, Chap. 222) the Legislature of Tennessee authorized the acceptance of assistance from the Government to the University of Tennessee, pursuant to the provisions of the Hatch Act, under which Congress had appropriated certain moneys from the sale of public lands to each state and territory for the establishment of agricultural experimental stations "in order to and in

acquiring and diffusing among the people of the United States useful and practical information on subjects connected with agriculture and to permit scientific investigation and experiment respecting the principles and applications of agricultural science."

Again, by act of Congress of August 30, 1890, Congress appropriated more money to "be applied only to instruction in agriculture and mechanical arts, the English language and the various branches of mathematical, physical, natural and economic science, with special reference to their applications in the industries of life and to the facilities for such instruction." Pursuant to this Act, the Legislature of Tennessee empowered the University of Tennessee to accept the money (Acts of 1891, Chap. 36).

Again, under the Adams Act of March 16, 1906, further money was appropriated for researches or experiments bearing upon the agricultural industry, and this money was accepted by the State Legislature.

The acceptance of this money, pursuant to the stipulation imposed by Congress, amounted to a solemn covenant with the Federal Government that the State University should be a college dedicated to the pursuit of science. These grants, with their acceptance, constituted a contract. The Legislature cannot lawfully evict science from the State University. It cannot provide that science be measured by the Bible, or any other doctrinal book. Science is based on fact, not on religious authority.

Any contention that the theory of evolution is not a part of scientific instruction along agricultural lines is answered by the statement of Jacob Lipman, Dean of the College of Agriculture and Director of the New Jersey Agricultural Experimental Station, State University of New Jersey,

New Brunswick, New Jersey. He is Editor in Chief of various agricultural journals, Associate Editor of the "Pennsylvania Farmer", President of the International Society of Soil Science and is one of the leading agricultural experts in this country. He refers to evidences of organic evolution, as gathered from mineral deposits, the soil, and a study of plants and animals (Tr., Vol. IV, pp. 668-670):

> "The phosphate deposits of central Tennessee are derived from lime stone rock fifty million years old at the very least estimate. The extensive deposits of coal represent the remains of ancient vegetation. We are now burning coal derived from plants that grew at least twenty million years ago."

This is contrary to the Bible. He says further:

> "The primitive forms of plant life gradually developed into more perfect organisms until the mosses, ferns and cycads gave way to flowering plants perhaps ten million years ago at a very conservative estimate. * * * These plants, together with the bacteria, are the important factors in our agriculture as regards the maintenance of a supply of nitrogen in our 'soils'."

Further:

> "In the same way genetics has made it possible for us to improve the types of animals of economic importance in our farming industry."

His statement ends:

> "With these facts and interpretations of organic evolution left out the agricultural colleges and experimental stations could not render effective service to our great agricultural industries."

Matter of the same kind will be found in various of the statements filed. Even though these are

not in evidence, yet the court will take judicial notice of the facts stated therein, since they are matters of science.

Under these circumstances, it is apparent that this law against teaching the theory of evolution conflicts with the contracts with the United States Government under which money was appropriated and accepted for the purpose of promoting scientific investigation and experiment respecting the principles and applications of agricultural science.

As heretofore stated, the court will find the scientific testimony in the excluded bill of exceptions exceedingly helpful in passing upon the scientific and moral bearings of this question; of which perforce the court must take judicial notice, but which it would be ill qualified to pass upon without consulting the recognized treatises and authorities on the subject.

ASSIGNMENT IX.

THE TRIAL COURT SHOULD HAVE ADMITTED IN EVIDENCE THE EXPERT TESTIMONY OFFERED BY THE DEFENDANT.

The exclusion of this expert testimony logically means that the State has conceded victory to the defendant by default. The State was unwilling to meet the issue as to whether the evolution of man is scientifically established, and whether such fact is compatible with sound religion and morality. By moving to exclude this testimony tendered by the defendant, the State admitted that such facts could be established, or that such facts are immaterial. But these facts go to the very essence of the controversy. If man is descended from a lower

order of animals, then the Act is invalid as patently obstructing the teaching of science and as patently preferring the religious or theological views of those who believe in the literal inerrancy of the first chapter of Genesis. If the doctrine of evolution is not immoral nor irreligious, then the Act is a capricious and oppressive measure, and is not a valid exercise of the police power of the state.

This Honorable Court must therefore consider these facts to have been conclusively shown; and this Court must therefore find that the Anti-Evolution Act is capricious, unconstitutional and void.

It would seem that either this must be admitted, or that at any rate the Court erred in excluding the testimony.

This case involved the question of the Bible and what it means, various stories of creation in the Bible, and the correct translation, understanding and interpretation thereof. There was likewise involved the question of the theory of evolution (as stated in the title) and the descent of man from a lower order of animals, as stated in the Act. All these questions have been the subject of study by students for generations. Yet the court held that expert evidence on these subjects was not admissible. Any such ruling as to the Bible is explained by the court's construction of the Act, which eliminated that clause entirely, but still expert evidence should have been received to determine in the light of the facts whether the law was reasonable and if for no other purpose than to determine whether the body of the Act was germane to the title on questions concerning evolution and as to what was meant by "lower order of animals."

The exclusion of this evidence resulted in various inconsistent rulings, all of which cannot be correct. The court admitted in evidence on behalf of the

State the King James version of the Bible. Why, if this question was not involved? The court admitted in evidence, on behalf of the defendant, a Hebrew Bible, written in the original language, but eliminated from evidence the translation of the Hebrew words, which was given in the statement of what the defense would have proved by Rabbi Herman Rosenwasser. The same inconsistency appeared when the court accepted in evidence the Catholic Bible, for, of course, this was improper evidence if no question of the Bible was involved.

(a) The defense would have proved that the King James version of the Bible was only one translation and that a different translation would show that there was nothing inconsistent between the Bible and the theory of evolution (see statement of Herman Rosenwasser). A curious situation arose as to this evidence. The Court had admitted in evidence, the Hebrew Bible, written in Hebrew. The Court excluded the evidence of the witness who would have translated the pertinent parts. One ruling or the other must have been erroneous.

The defense would further have proved that parts of the Bible actually support the theory of evolution (see statement by the defense counsel, fol.). We would further have proved from learned biblical scholars that the Bible is both literal and figurative; that God speaks by parables, allegories, sometimes figuratively and sometimes literally.

(b) The defense would have proved by scientific witnesses what evolution was; what were the facts supporting it. The defense would not have called such witnesses to state their opinion as deduced from the facts. The witness would have testified to the facts in order that the jury might come

to its conclusion. It would not have been opinion evidence but evidence of facts. And these scientific witnesses, most of them likewise religious men and believers in the Bible, as interpreted by them, and some of them, for instance, Kirtley Mather, a student of the Bible, would have shown that there was no inconsistency between the Bible and the theory of evolution.

The Act does not read that it shall be unlawful to teach any theory which denies a literalistic interpretation of every word of the story of creation, as set forth in the King James version of the Bible. It merely uses the word "Bible". So that, under a proper construction of the Act, such evidence should have been admitted.

Disregarding for a moment whether the question involves law for the court or of fact for the jury, let us suppose the Legislature passed an Act providing that "it shall be unlawful to teach any theory that denies the story that the earth is the center of the Universe, as taught in the Bible, and to teach instead that the earth revolves around the sun," or, "that it shall be unlawful to teach any theory that denies that the earth is flat, as taught in the Bible, and to teach instead thereof that the earth is round."

The contention of the prosecution that the State can pass any law to control education would, of course, support such laws. The only difference between these acts and the Act in question is that we have learned certain truths in the course of time, the evidence has now become conclusive. Our opponents would find a distinction by saying that it has been proved mathematically that the earth is round and moves around the sun, but it may be pointed out that had such an act been passed in the Middle Ages, it would have found for its support exactly the same arguments as are made in support

of the Tennessee Act today. The question is wholly one of evidence.

In the Sixteenth Century the work of Copernicus was banned. At the end of the century Giordiano Bruno was burned to death. Later, Galileo was forced to recant by the Inquisition because he taught such theories. Galileo's recantation, in part, was as follows:

> "I, Galileo, being in my seventieth year, being a prisoner and on my knees and before your Eminence, having before my eyes the Holy Gospel, which I touch with my hands, abjure, curse and detest the error and the heresy of the movement of the earth."

So, Scopes, before the school board or the judge, with his eyes on the Holy Gospel, might be heard to say, "I, Scopes, being a prisoner, in the presence of this court, having before my eyes the Holy Gospel, which I touch with my hands, abjure, curse and detest the error and the heresy of the theory of evolution."

Galileo had defended on the ground that he had merely said that he was teaching a theory; that the conclusion was undecided, that the theory was merely probable, but the judges of the Inquisition retorted that in no way did that excuse him, saying "Although in the same you labor with many circumlocutions to induce the belief that it is left by you undecided and merely probable, which is equally a grave error, since an opinion can in no way be probable which has been already declared and finally determined contrary to the Divine Scripture."

So, in this case, a teacher has no defense by stating that he merely has taught a theory, because the Legislature finds it criminal even to suggest the probabilities of something which has been "finally determined contrary to the Divine Scripture."

In 1885 Henry Ward Beecher said, in an address called the "Two Revelations", which referred to the Bible and evolution:

> "That in another generation evolution will be regarded as uncontradictable, as the Copernican system of astronomy or the Newtonian doctrine of gravitation can scarcely be doubted. Each of these passed through the same contradiction by theologians. They were charged by the Church, as is evolution now, with fostering materialism, infidelity and atheism."

In the *Oregon School Law* case (*supra*), the well-known constitutional lawyer, Louis Marshall, in a brief against the constitutionality of the law, said:

> "Fundamentally, therefore, the questions in this case are, may liberty to teach and to learn be restricted? Shall such liberty be dependent on the will of the majority? * * * If such power can be asserted, then it will inevitably lead to the stifling of thought. If the law of a temporary majority may thus control, then it is conceivable that it may prohibit the teaching of sciences, of the classics, of modern languages and literature and art and of nature study. A majority may reach the conclusion that the teaching of the *Darwinian theory* or of the philosophy of Kant or Spinoza or the ideas of Montesquie, of Jeremy Bentham or of John Stewart Mill or of Emerson shall be prohibited * * *."

Mr. Marshall, renowned scholar, student and constitutional lawyer as he is, thought to reduce to absurdity arguments for such laws, by pointing out that, by parallel reasoning, a law might be declared constitutional which would prohibit the teaching of the Darwinian theory.

Can the questions involved here be determined without evidence? Is it true, as the prosecution

stated, that any sixteen-year-old schoolboy in Tennessee understands the Bible and knows what evolution is? Whether or not these are questions of fact for the jury or whether or not the court erred in refusing to receive this information for the purposes of acquiring information to determine whether or not the law was reasonable, in either case, the evidence should have been received. Even where a court takes judicial notice, it may (and in some cases, we submit it should) take evidence for its own information.

Facts for the Jury.

But there were definite questions of fact for the jury. The State proved that Scopes expounded a theory that man was descended from a single cell. Does this make out a case? It would do so, under a proper construction of the statute, only if evolution were necessarily contrary to the story or stories in the Bible. As to whether it is necessarily contradictory, is a question of fact, and not a question of law. The court cannot charge that the two things are necessarily inconsistent where men differ so widely. The question of fact bears, first, upon what the biblical story is, as to whether that story is generally accepted, as to the different versions of the Bible, as to the translations of the Bible, and as to the interpretations of leading biblical scholars on the subject. For instance, suppose the jury came to the conclusion that Rosenwasser's translation of the Bible was an accurate one, in other words, that the word "create" means "to set in motion" and that the other words were to be translated in like fashion, or, suppose the jury came to the conclusion, as would have been stated by some biblical scholars, that the Bible interprets itself, that the words in one part of the Bible are to be construed according to the light thrown on them

when the same words are used in other parts of the Bible, would not the verdict be affected?

The testimony of William Jennings Bryan was admissible. He was a student of the Bible. He knew what the Bible meant. "A day might be a long period. The earth may be millions of years old." He would have admitted that nowhere in the Bible is the process of creation stated. He would no doubt have conceded that there are passages in the Bible which speak for evolution. That testimony tended to show, and we contend that a continuation would have shown, that there was no conflict between the biblical theory and evolution. Nor is there any warrant in law for the Court to have expunged this testimony from the record and to have refused to permit further examination. The defense had a legal right to make its offer of proof so that a higher court might determine whether the testimony was admissible.

On these questions concerning the Bible, evidence should have been admitted.

This is not a case involving a narrow question of fact. It is not a case merely of what Scopes said and what a book says. A jury must determine the meaning of what Scopes said and the meaning of what the book says, and they cannot do this without evidence—evidence as to what the book is, as to what book is intended, and as to the doctrine about which Scopes was talking.

Further than this, matters in elucidation are not necessarily irrelevant to a case. The question of conflict between evolution and the Bible is a relevant issue here—an issue for the jury and, if that is so, evidence on these subjects is likewise admissible. As is said in Corpus Juris 22, page 161:

> "The law furnishes no precise and universal test of relevancy. The question must be determined in each case according to the teachings of reasoning judicial experience."

In 22 Corpus Juris, page 164, appears the following:

> "A relevant fact will not be rejected because not sufficient in itself to establish the whole or any portion of a party's contention but all that is required is that the fact must legitimately tend to prove some matter in issue or to make a proposition in issue more or less probable. Indeed, it is sufficient if the fact may be expected to become relevant in connection with other facts."

In *Fitch* v. *Martin,* 84 Neb. 745, the court said:

> "The relevancy of a collateral fact to be used as the basis of legitimate argument is not to be determined by the conclusiveness of the inference it may afford with reference to the legitimate fact. If it tends, in a reasonable degree to elucidate the inquiry, it is relevant."

Of course, this evidence may not be relevant on the theory of the State but, as was said in 22 C. J., page 165:

> "It is no objection to admissibility of a party's testimony that it is competent only on his theory of the case. He has a right to have the case submitted to the jury on his theory, if there is any testimony to support it."

Another sound rule is that facts are relevant which are necessarily primary to the reception of evidence. This has been applied time and again to the question of the accuracy of a photograph or to a set of books. The prosecution introduced the King James version of the Bible in evidence. The defense wished to show the unreliability of the particular version that the prosecution is using, for the statute refers not to any particular version but to the "Bible".

FACTS FOR THE COURT.

It is the contention of the defense that evidence would be required even though the only question involved was one of the constitutionality of the law, and even if that left no question for the jury. A court may take judicial notice of facts of science but, when it takes judicial notice, it should be particularly careful to avoid error. Where the facts are difficult or complicated or within the knowledge of experts, the better practice requires that the court shall call such experts. The argument of the prosecution apparently is that the court can take judicial notice only of facts, even in science, that are commonly known and accepted, on the theory that it would be a waste of time to prove such facts. Then they say that no other facts can be proved, because the court will not take judicial notice of them and because they are not questions of fact for the jury. Therefore, if the question is an involved one, no evidence should be permitted. But, if supported at all, this law must be upheld on the theory that it is contrary to public morals to teach the theory of evolution and to teach theories contrary to the stories of creation in the Bible. How can the court determine this question without some knowledge of the facts of science and religion? Unless descent from a lower order of animals is the theory of evolution, the act is in conflict with the caption. How authoritative is the theory of evolution? Is it entirely a lie? Is it in part a lie? Who are the sponsors for it? On what ground do they base their theory? What is the evidence? Let us assume that the Legislature passed a law, the validity of which depended wholly upon scientific questions and that the court was called upon to determine whether the law reasonably tended to promote public safety. Could it be said that evi-

dence should not be received because the final question would be one of law instead of fact. Exactly the same principle applies when the question is one of public morals. It might be said that, if a law prohibited the teaching of a false doctrine in the public schools, it would still be constitutional. But then the question arises as to what is false doctrine.

If the question involved the matter of astronomy, would that be passed on by any court without the testimony of an astronomer? The court may take judicial notice, for instance, of the time of the rising of the moon, taking its information from an almanac, but does this mean that it would not be competent for an attorney to introduce the almanac in evidence? The court may take judicial notice of the facts of human anatomy. Does this mean that it would not be competent for an attorney to produce expert evidence on these facts? After all, when the court does take judicial notice, knowledge or cognizance, while it is entitled to gather its information from any source it chooses yet, ordinarily, it is supposed to inform itself from the most appropriate source. Could anything be more appropriate than the sworn testimony of scientists on this question in a court of law?

As was said in 23 *Corpus Juris*, 169:

> "Judicial cognizance may extend to matters beyond the actual knowledge of the Judge, but it is just as much an error for the Court to mistake a fact of which it has general cognizance as to mistake a principle of law. When the matter is a proper subject of judicial knowledge, the judge in order to obtain mental certainty may require the assistance of the party who invoked his judicial knowledge; he may investigate the matter for himself or he may pursue both courses. The scope, direction and details of such investigation are entirely with-

in the discretion and under the direction of the judge uncontrolled by the rules of evidence or the wishes or suggestion of the parties. The judge can resort to or obtain information from any source of knowledge which he feels would be helpful to him, *always seeking that which is most appropriate.*"

In *Carter Machine Company* v. *Haynes*, 70 Fed. 859, 864, the court said:

> "I am fully aware of the value of the testimony of expert witnesses in matters of science and art, and a judge may well consider and be governed by such evidence in matters of complexity, obscurity and doubt."

The feature to be emphasized is the difference between judicial cognizance and the assumption of knowledge.

As was said in *Jones' Commentaries on Evidence*, Volume One, page 626:

> "Courts should observe the utmost caution to avoid assuming knowledge of natural facts and laws that are beyond the scope of common, positive knowledge."

And, in *Dunphry* v. *St. Joseph Stockyards Company*, 118 Mo. App. 506, the Court said:

> "The mysteries of nature are so manifold, deep and subtle, that the finite mind cannot indulge in dogmatic conclusions affecting them without falling into error."

In *Jones' Commentaries on Evidence*, p. 640, appears the following:

> "It goes without saying that every judge upon the bench would disclaim such an encyclopedic knowledge, added to a phenomenal memory, as would serve him on every application that the Court should take judicial cog-

> nizance of a given fact. However wide his reading, the suggestion of some matter for the court's knowledge and notice must frequently make a demand upon him, to which, without some means of reference or refreshing his knowledge, he might not be able to respond."

The real question involved on this phase of the discussion is whether it is necessary for a party to produce evidence where the Court takes judicial notice, not as to whether a party *can* produce evidence. Ordinarily the taking of judicial notice is a favor to a party litigant. He should not be prevented from waiving the favor. Sometimes the Court will refuse to take judicial cognizance unless the party does produce the witnesses.

The rule, as stated in IV. Wigmore Evidence, Section 2567, is as follows:

> "That a matter is judicially noticed, means merely that it is taken as true without the offering of evidence by the party who should ordinarily have done so. But the opponent is not prevented from disputing the matter by evidence, if he believes it disputable."

Yet here the Court refused to permit evidence on the part of the defense.

It is said in *Jones' Commentaries*, on page 650:

> "If there is a doubt as to the propriety of taking judicial notice, the proper method is for the court to disclaim it and allow it to be proved in the ordinary way."

In *State* v. *Norcross*, 132 Wis. 534, the question arose as to whether a certain river was navigable. The court took judicial notice of the fact that it was not. It was held error to deprive a suitor of trial or hearing and foreclose him on such inquiry by setting the Court's own knowledge or judicial

notice in opposition to the averments of his complaint.

The Court said (page 544):

> "That a river is not navigable may sometimes be the subject of judicial notice; but considering the various degrees of navigability, and the various kinds of navigation, and the various appliances for the purposes of navigation, and the different conditions along different portions of the same river, there must still remain a large class of cases in which to determine this question by a judicial notice would deprive the party averring navigability or non-navigability as the foundation of his right, *of the opportunity of trial and hearing.*"

Where facts are those of ordinary knowledge, it may be said that the Court must take judicial knowledge; where they are matters of science, not matters of ordinary knowledge, the Court may take judicial notice of facts but there is no compulsion. "The nature of the subject, the issue, the apparent justice of the case, the Court's own information and the means of information at hand, are facts in determining the judicial cognizance."

Porter v. *Waring*, 2 Abbott, N. C., 230.

In *Hoyt* v. *Russell*, 117 U. S. 401, Mr. Justice Field said:

> "It may be that the judge's information on the subject was at fault and calculations and inquiries on the subject may have been necessary. Such is the case with reference to a great variety of subjects of general concern of which courts are required to take judicial notice. Information to guide their judgment may be obtained by resort to original documents in the public archives or to books of history or science or to any other proper sources."

It is submitted that the only basis on which the Court could eliminate this evidence was to assume to itself an extraordinary knowledge, and it has been said that:

> "There are occasions on which the knowledge of the judge is greater than that which the Court should possess, but the judge has no right to act upon his own special notice of facts as distinct from that general knowledge which might properly be important to other persons of intelligence."
>
> *Supra, Jones on Evidence,* p. 644.

In *Cyc. of Evidence,* Vol. 7, p. 861, a distinction is drawn between what may and what must be noticed. It is said:

> "It is impossible to draw any distinct lines separating these two fields. Generally speaking, however, courts are bound to take notice only of the public laws, and the facts established thereby, and the official capacity and seals of some officers. They are not ordinarily compelled to take cognizance of matters of fact. Whether or not they will do so depends upon the nature of the subject, the issue involved and the apparent justice of the case.

In *Cyc. of Evidence,* p. 84, Vol. 7, appears the following:

> "Proof may be required of facts of which the court entertains doubt even though they are proper subjects for judicial notice. Especially may this be so when to the court's doubt is added denial of such facts."

But it will be said that whether or not the Court takes judicial notice, and the source of its information if it does, are wholly matters of discretion. For instance, on this appeal, even though the statements of scientists are not in evidence, we have

asked the Court to take notice of the facts stated therein. But for the Appellate Court, that would be an "appropriate source" under the circumstances. For the court below, the statement of these men in the witness stand, under cross-examination, would have been the most "appropriate source." It is submitted that there was an abuse of discretion on the part of the Court in refusing to hear testimony in a case involving questions of such doubt and complexity.

We have dealt with the questions of judicial knowledge as though the matter concerned only the court but the elimination of such evidence makes a farce of the constitutional provision of the State of Tennessee that the jury are the ultimate judges of both fact and law in a criminal case (Article I, Section 19). We are aware that the jury must accept the law from the court and apply the law, as thus taken, to the facts, but if the jury are the ultimate judges, it can hardly be said that they should be left in ignorance as to the fundamental questions which evidence would elucidate.

Thus, on the ground that there were questions of fact for the jury, some of the evidence should have been accepted, first, because evidence is relevant which tends to elucidate the main issues, secondly, because the jury were entitled to information as to the Bible, its translation and its meaning, in order to determine whether or not there was a conflict between the Bible so translated and interpreted and the theory of evolution. But all the evidence should have been admitted to enable the court to determine whether the statute was properly passed under the police power of the State. This is so whether or not the court takes judicial notice of the facts of science, for in such event it should have taken its information from the most appropriate source.

ASSIGNMENT X.

THE JUDGMENT OF THE LOWER COURT SHOULD BE REVERSED.

It follows that if the foregoing assignments of error or any of them is valid, the trial court erred in finding the defendant Scopes guilty.

It is earnestly insisted that not only one but all of said assignments are valid, and that said judgment should be now reversed and this prosecution dismissed at the cost of the State.

CONCLUSION.

There is probably no better evidence of the vice of legislation of this kind than the public controversy that has arisen over the Tennessee statute. Tennessee has been known for its freedom, liberality and devotion to truth. Evolution has been taught in the State for generations and apparently without affecting devotion to religious faith. The great men who founded the State and wrote her constitution, realizing the danger of injecting religious controversy into the political life of the State, sought to avoid such consequences by inserting in the constitution broad provisions which would make all faiths equal before the law; that would deny a preference of any kind, no matter how slight, to those who have espoused particular faiths. For the founders even religious toleration, for which men had given their lives for centuries, was too low an ideal. Religious equality was the end. And in order to assure the people that there was, and could be no conflict between religion and science, the con-

stitution provides that science should be cherished. The constitution was the foundation stone. One might well enquire in view of this legislation in the words of Judge Haywood when he said in 1826:

> "Will the Tennesseans of tomorrow be able to look forward and say with gratification and pride that the pioneer fathers and mothers of the Grand Old State have not failed to transmit their shining virtue to posterity." (Preface, Haywood History of Tennessee.)

There was an attempt in 1796 to place in the constitution a clause as follows:

> "No person who publicly denies the Being of God or a future state of rewards and punishments *or the divine authority of the old and new testaments* shall hold any office in the civil departments of this State."

The words "or the divine authority of the old and new testaments" were stricken out by a decisive vote. Representative Rhea, for whom, presumably, Rhea County was named, voted in the negative. Representative Lewis said:

> "On this question we enter our dissent as we conceive the law to be an inferior species of persecution. * * *"

And yet this provision merely required that one should not deny the *divine authority* of the old and new testaments. Here, at the beginning, was repudiated the idea that any part of the public policy of the State of Tennessee required belief even in the divine authority of the Bible, much less the belief in the truth of every statement of scientific fact in the Bible literally accepted.

But, say our opponents, religion cannot be taught; therefore, the negation of religion cannot be taught. It is forgotten that religion cannot be

taught because the constitution forbids it, whereas the constitution, far from forbidding the teaching of science, demands it. However irreligious it may be to some, the teaching of the facts of science is encouraged, not prohibited, by the constitution.

On October 4, 1836, the Hon. E. J. Shields, a resident of Nashville, whose memory is still ripe in the minds of Tennesseans, delivered an address before the Alumni Society of Nashville University on the subject "The Progress of Popular Science, Literature and Knowledge in the United States and of Present Condition and Prospects in Tennessee." He said, in part:

> "How exhilarating soever may have been the progress of other nations in all those pursuits which elevate and ennoble the human character, we may (at least) boast of our superiority to many of those illiberal prejudices and misdeeds in Government which tend so much in other governments to cramp the genius, sour the mind and disturb the social relations of life. * * * This wide-spread diffusion of light and knowledge is and must be one of the results of the happy constitution which was won and secured to us by our sires. * * *"

Of the two political leaders, both members of the same political party, whom Tennessee in the last generation has most gladly heard and followed, Mr. Bryan was a Literalist. Mr. Wilson stated that "like every other man of intelligence and education, I do believe in organic evolution".

Division on these questions enters through all parties and all classes in the state and nation. Wisdom should dictate that the state take no part in the controversy.

The latest pronouncement on religious liberty by a leading American statesman, Charles Evans

Hughes, appeared in his address to the American Bar Association at Detroit, Michigan, on September 2, 1925. (See *supra*, p. 49). He stated, in part:

> "One little statute, in a few words, may carry a thrust at a vital spot, or inflict a serious wound and give us far more trouble than a thousand prolix measures which may do no one any serious injury and of which most persons are happily ignorant.
>
> "The most ominous sign of our time, as it seems to me, is the indication of the growth of an intolerant spirit. It is the more dangerous when armed, as it usually is, with sincere conviction. * * * It can be exorcised only by invoking the Genius which watched over our infancy and has guided our development—a good genius, still potent, let us believe—the American spirit of civil and religious liberty. Our institutions were not devised to bring about uniformity of opinion: if they had been, we might well abandon hope. * * * Democracy has its own capacity for tyranny. Some of the most menacing encroachments upon liberty invoke the democratic principal and asserts the right of a majority rule. * * * The interests of liberty are peculiarly those of individuals, and hence, of minorities, and freedom is in danger of being slain at her own altars if the passion for uniformity and control of opinion gathers head.
>
> "If progress has taught us anything, it is the vital need of the freedom of learning. * * * Reliance upon education will be in vain if we do not maintain the freedom of learning. Perhaps that is the most precious privilege of liberty, the privilege of knowing, of pursuing untrammeled the paths of discovery, of inquiry, of invention."

After referring to the attempts of legislatures to impair liberty, he says:

> "Yet we observe persistent attempts in our legislatures * * * to hamper scientific investigations.

"* * * While with a different purpose we observe the manifestations of the same spirit in the efforts to interfere with instruction in our schools, not to promote the acquisition of knowledge, but to obstruct it.

"The question is now presented as to the control of education in the public schools. * * * It is a plausible statement that if the State provides institutions of learning, it is entitled to determine what shall be taught in them. * * * And, while I shall not attempt, as I have said, to discuss the constitutional questions raised by particular legislation * * * the constitutional criterion is sufficiently apparent and that is whether legislation with regard to courses of instruction, as to what may and may not be taught, has relation to a legitimate object within the State power and is not to be condemned as arbitrary and capricious.

"Believing, as I do, that the freedom of learning is the vital breath of democracy and progress, I trust that a recognition of its supreme importance will direct the hand of power, and that our public schools,—for the mass of our young people can know no other,—and our State universities, the crown of our educational system, may enjoy the priceless advantages of courses of instruction designed to promote the acquisition of all knowledge and may not be placed under restrictions to prevent it, and that our teachers and professors may be encouraged, not to regard themselves as the pliant tools of power, but to dedicate their lives to the highest of all purposes, to know and to teach the truth, the whole truth and nothing but the truth. This is the path of salvation of men and democracy.

"It would be serious enough if interference with education found its motive in the desire to control intellectual activity in the interest of formal intellectual concepts, but it is far more serious when these endeavors are for the purpose of controlling the pursuit of knowledge in what is supposed to be the interest of religion by aiming at the protection of creed

> or dogma. To control curricula in our public schools and State universities in the interest of a reasonable arrangement of courses of study in order to aid the acquisition of knowledge, is one thing; to attempt to control public instruction in the interest of any religious creed or dogma is quite another. If we are true to the ideal of religious liberty the power of government is not to be used to propagate religious doctrines or to interfere with the liberty of the citizen in order to maintain religious doctrines.
>
> "* * * What could be a nobler exercise of governmental power than to destroy religious error and save the souls of men from perdition? That plausible pretext has given us the saddest pages of history. That is the road that leads back to the perversion of authority and the abhorrent practices of the dark days of political disqualifications on grounds of religion, of persecution, of religious wars, of tortures, of martyrdom. * ** If we are to be saved a recrudescence of interference with religious liberty, mistaken real must be checked as soon as it appears. * * * To learn, to know, is the way of life; and faith only serves to honor the quest. * * *
>
> "The highest interests of the soul demand freedom, not fetters, and the immunity of the domain of conscience from the control of government is the assurance of the richest fruitage of the spiritual life."

There can be no doubt that pronouncements like this by leading American statesmen were inspired by this statute. On October 6th, 1925, in his speech before the American Legion Convention, President Coolidge said, after referring to intolerance as regards religion:

> "It is the ferment of ideas, the clash of disagreeing judgments, the privilege of the individual to develop his own thought and shape his own character, which makes progress pos-

> sible. It is not possible to learn much from those who uniformly agree with us."

The Legislature of today is not in harmony with those who wrote the constitution of the State of Tennessee. We can well ask ourselves whether the spirit of freedom, equality and liberty which then prevailed still inspires those who control the destiny of this State and, if it does, whether that spirit was existent when this statute was unfortunately passed. The men of today have seemingly forgotten the rivers of blood that flowed through the ages because of religious controversy and difference of religious opinion. They have seemingly forgotten that a majority of today may be a minority of tomorrow and that a slight step taken by them to promote some religious doctrine by preventing the teaching of a scientific theory may tomorrow be used against them, by those who shall wish to promulgate an entirely different and more overwhelming faith. The literalists who would give a preference to their tenets may be laying the foundation for a structure that will crash over their heads.

We can imagine looking down at the Legislature of Tennessee of today the galaxy of great men whom Tennessee has given to the Nation, men of the Wautauga settlements winning the wilds from the Indians; Isaac Shelby and John Sevier, leaders in Indian warfare, who led the attack on the British at King Mountain and founded the State of Franklin; Andrew Jackson, James K. Polk and Andrew Johnson, whom Tennessee gave to the presidency of the Nation—all of the fighters, statesmen, educators and scientists who have played a noble part in the development not only of their native state, but of the Nation as well. Were these men living today, what would they say of a law that would bring religious doctrines into the realm of politics,

public controversy and social contention, that would support as part of the public policy of the State of Tennessee a law giving any preference, however slight, to any religious establishment?

Respectfully submitted,

JOHN NEAL,
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ARTHUR GARFIELD HAYS.
FRANK SPURLOCK,
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