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Bishop Rice's Last Battle for Civil Rights

A Memorandum for the State Historical Society

BY FRANK SWANCARA*

There appeared in the *Rocky Mountain News* shortly before Sunday, February 18, 1945, an advertisement stating, in substance, that on that day the Bishop would, in the name of the Liberal Church, protest against the witch-hunting clause of House Bill No. 325.

The assailed clause consisted of the words, "although *in every case* the credibility of the witness may be drawn in question." Separated from its context, the clause seems innocent enough, but it immediately followed a clause providing that persons shall not be "excluded" as witnesses "on account of their opinions on matters of religious belief." Therefore the bill, if passed, would have invited lawyers to pry into private and secret "opinions" on the pretext of testing "credibility."

It happens that these clauses were copied from an existing Colorado statute,[1] first enacted in 1883. What it meant in 1883 is clear from the following statement of a New York court in 1858:

"And when the people declared, in their constitution, that 'no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief,' they did not intend to say that some persons may not have such *awful* religious opinions as to render them less credible as witnesses than others."[2]

So the courts, in 1858, held that even without such statutory permission as given by the Colorado statute, credibility could be tested by questions on the "opinions" of the witness. The Colorado statute of 1883 simply adopted the New York case law of the time.

The Colorado statute of 1883 is cited in Wigmore on Evidence in connection with the following text:

> "Much less, in these days, should evidence be admitted, not of cacotheism, but of mere disbelief in a personal Deity, i. e., atheism, —a belief quite consistent with the strictest sense of moral obligation to speak the truth. Some statutes, however, preserve a permission to use such evidence,—a sop of mediaevalism left to satisfy those who would otherwise have not consented to abolish theological qualifications for the oath."[3]

If the Colorado legislature of 1883 could not avoid the "sop of mediaevalism," surely the sponsors of the House Bill in 1945 could have done

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[1]Sec. 1, Ch. 177, C. S. A.

[2]Stanbro v. Hopkins, 28 Barb. 265, 270.

[3]Sec. 936 Wigmore on Ev. (2d Ed.).

so, for Dean Wigmore's text goes on to show that "in these days" some courts "justly reject" that sop.

During the formation of the New York case law, as existing in 1883, opinions regarding theism, monotheism, and hell were "awful" to persons holding contrary opinions. However, if a witness belonged to a politically or socially powerful sect or denomination, then no matter how "awful" his creed might seem to some, no lawyer dared to impeach him.[4] Judicial notice was then taken of the liberty of conscience. But if the witness was thought not accepting theism or monotheism, the New York courts, as late as 1891, would not protect him. He could not prove his "credibility" by showing that he had endured the pains of poverty for the sake of avoiding debt.

When John Most became a witness he was victimized by the practice sanctioned by case law in New York and by such clause as was placed in House Bill No. 325. He was unpopular because of a speech on behalf of the Chicago "anarchists," and spoke of "how they were strangled to death, not properly hanged."[5] He was convicted under the "Unlawful Assemblage Act," and on appeal the highest court dismissed as "frivolous," without discussion, his exception to a question affecting his opinion on a theological subject.[6]

In 1903 the same reviewing court considered a case where the impeached witness was a respectable business man. One judge said, in effect, that in obedience to *stare decisis* what was sauce, or poison, to the goose John Most must also be fed to Mr. Cory. However, two judges thought it both unconstitutional and unreasonable to permit lawyers to pretend that they are drawing in question the "credibility" of a witness by inquiring as to his presumably unpopular opinions on the fundamentals of predominant creeds.[7]

The purpose of pretending to test "credibility" by questions on religious, or anti-religious opinions, is to arouse hostility against the witness on the part of jurors having contrary opinions. How a juror may act or react is illustrated by the effect of the following question once propounded to Upton Sinclair:

> "Did you not say 'the Eddy Bible is unadulterated moonshine,' and that the organization is the 'church of the full pocketbook'?"[8]

Referring to a juror who had heard that question, and who was "a Christian Scientist," Col. Van Cise said:

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[4]Com. v. Buzzell, 16 Pick. (Mass.) 153 (1834).
[5]People v. Most, 8 N. Y. Supp. 625 (1890).
[6]People v. Most, 27 N. E. 970 (1891).
[7]Brink v. Stratton, 68 N. E. 148, 63 L. R. A. 182 (1903).
[8]36-37 Colo. Bar Assn. Rep. (1934), p. 123.

"Up came the juror like a huge trout from the depths, gone was his lethargy, and he sat glowering in his chair."[9]

While Bishop Frank H. Rice was practically alone in placing himself on record as opposing the witch-hunting clause in House Bill No. 325, his protest accorded with both the letter and spirit of the state's Bill of Rights. Section 4 provides that "no person shall be denied any civil * * * right, privilege or capacity, on account of his opinions concerning religion," which provision is substantially the same as that which caused the Court of Appeals of Kentucky to say:

> "We think that this provision of the constitution not only permits persons to testify without regard to religious belief or disbelief, but that it was intended to prevent any inquiry into that belief for the purpose of affecting credibility."[10]

That decision had the approval of Dean Wigmore.[11]

Of course, if House Bill No. 325 had passed, the clause in question would have been a nullity, as it is in the existing statute.[12] But the presence of that clause amounts, in effect, to an insult against individuals having no fear of supernatural punishments, because of implications against their veracity.[13] As witnesses, they are placed in a list with convicted felons.[14]

Personals

Lt. Col. John C. Street will serve on the staff of Supreme Court Justice Robert H. Jackson, chief of counsel for the United States in prosecuting war criminals in Europe. Col. Street was an attorney for the Burlington Railroad prior to entering the army. Mrs. Street is the former Helen M. Thorp of the Denver bar and former instructor at the University of Denver School of Law.

Fred N. Holland has been promoted to the rank of major. Maj. Holland is officer in charge of the fraud section of the field investigations branch of the office of dependency benefits. This branch in its three years of activity has saved more than eight million dollars to the government in the prevention of payments of family allowances to those not entitled to them.

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[9]Supra note 8 at p. 124.

[10]Bush v. Com., 80 Ky. 244 (1882).

[11]Supra note 3.

[12]The modern cases cited in note, 95 A. L. R. 723 and supplements.

[13]Direct aspersions are found in Odell v. Koppee, 5 Heisk. (Tenn.) 88; Norton v. Ladd, 4 N. H. 444; and in Stanbro v. Hopkins, cited supra note 2.

[14]Note the position of the clause, "nor those who have been convicted of crime," as it appears in Sec. 1, Ch. 177, C. S. A.