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JUDICIAL SOLICITUDE FOR ASSASSINS OF AGNOSTICS*

By FRANK SWANCARA, of the Denver Bar

COURTS have held inadmissible the dying declarations of persons not believing in supernatural punishments.¹ Since even the Supreme Court of the United States, as if having religious "predilections," solemnly declared that such statements "may be discredited by proof" that the dying declarant "did not believe in a future state of rewards and punishments,"² it is still timely to note the actual and possible applications of the surviving mediaeval rule indicated at the outset of this paper, and also of the one last mentioned.

Two thugs were once indicted for the murder of a four-year-old girl. Shortly before dying, the child made a statement to her mother as to the manner in which she had been assaulted by the accused. The declaration was not admitted in evidence. The judicial excuse for the rejection was that the child was too young to have "had any idea of a future state."³ No other reason was suggested why the infant might not have told the truth as to the identity and conduct of her assailants. The court would have made a like ruling if the victim had been of mature years and had previously expressed a lack of belief in heaven or hell. It was, and still is, immaterial whether the skepticism results from an infant's immaturity or an adult's reasoning.

If it is possible for a distracted mother to witness a judicial farce in which the murderers of her child are freed because the procedure becomes deflected by theological considerations, it is probable that bereaved children may be compelled to see unwarranted acquittals of brutal killers of their elders.

Suppose that a citizen who disbelieves in the doctrine of divine wrath is murdered in cold blood by a fiend who professes orthodox beliefs, and that thereafter a young son of the victim is present at the trial of the assassin. Assume that it is known that the deceased while still alive and conscious of impending death named the defendant as the one who inflicted the lethal blows. The dying declaration is offered in evidence,

*Revision of article in *The Truth Seeker* (N. Y.) as reprinted in *The Lawyer* (Brooklyn, N. Y., June, 1938).

¹Swancara, *Obstruction of Justice by Religion*, 131-147 (W. H. Courtright Pub. Co., Denver, 1935).

²*Carver v. United States*, 164 U. S. 694, 697.

³*Rex v. Pike*, 3 Carr. & P. 598.

but defense counsel vociferously claims to have proof that the victim did not believe "in God and a future state of rewards and punishments."⁴

Naturally the boy's innumerable memories of his paternal companion are revived, and he recalls every incident prior to the end of the funeral. He thinks of his parent's honesty and truthfulness. He is entirely unprepared to listen to judicial and forensic expressions which assail the character, reputation, or veracity of his father.

After defense counsel shows that a dying declaration occupies the same position as a living witness with respect to admissibility and credibility, a court opinion is then adduced in support of the libel that an unbeliever in hell "is unworthy of any credit in a court of justice."⁵ The boy is compelled to hear the same shyster also read that an unbeliever in eternal damnation or in any Deity prescribing it "shows a recklessness of moral character and utter want of moral sensibility, such as very little entitles him to be believed."⁶ A church-affiliated trial judge indicates an agreement with, and approval of, such court opinions, and the grieving son concludes that the Christian on the bench is foully caluminating the dead. If the criminal trial takes place in a small and pious town, it is attended by numerous spectators. The judge's remarks are heard with great respect, and gossips proceed to repeat, with additions, such expressions, construing them in a manner tending to blacken the memory of the murderer's unoffending victim. Naturally this circumstance greatly distresses the surviving members of the latter's family.

During the trial it is possible that members of the bereaved group may hear court or counsel read from a law book these words:⁷

"I have known a witness rejected, and hissed out of court, who declared that he doubted of the existence of a God and a future state."

If the filial listener is himself, like the late Clarence Darrow, free of belief in divine vengeance, he will observe that the

⁴See *Donnelly v. State*, 26 N. J. L. 463. affirmed in *id.* 601.

⁵*Norton v. Ladd*, 4 N. H. 444.

⁶*Odell v. Koppee*, 5 Heisk. (Tenn.) 88.

⁷*Jackson v. Gridley*, 18 Johns. (N. Y.) 97, 103; *Stanbro v. Hopkins*, 28 Barb. (N. Y.) 265, 268.

hisses alluded to were directed against the summoned and disinterested witness, not against the criminal, and he may rightly conclude that if he himself attempts to testify against the killer of his father he, the witness, may be "rejected and hissed out of court," or if he is allowed to remain, hear it said that he "is unworthy of any credit in a court of justice." The judicial expressions are no messages of condolence in his hour of sorrow. Instead, these rules of evidence are more subservient to the cruelty of a Herodias or a Torquemada than to fact finding, and add insult to the injury of children who have had agnostic parents murdered.

When the dying declaration of a citizen is discredited by proof of non-belief in hell, both the declarant and his testimony are discredited in the minds of some fundamentalist jurors, and the result is as if he were shown to have been convicted of some infamous crime. It was an American (not an ancient English) court that said:⁸

"* * * It (meaning unbelief in fundamentalist Christian doctrines) can scarcely fail to deprive him of the esteem of mankind, exclude him from intercourse with men of piety and virtue, and render him odious and detestable."

A jury of fundamentalist believers in a religiously revived community, hearing the so-called impeaching evidence and thereby learning that the victim of the killing was an "infidel," might be disposed to acquit the murderer upon the old ecclesiastical tenet that the destruction of a pagan, an apostate, or an unbeliever is as laudable a service to Christian society as is the extermination of noxious insects and rodents.⁹ What jury is anxious to convict a murderer, not known to harbor any heresy, when it believes that his victim, now dead, was, in the chaste language of a Connecticut Christian judge, "Odious and detestable"?¹⁰

The juridical rule in question, in addition to causing a stigmatization of the victim's family, obviously aids a murderer to escape paying any penalty for the unjustifiable shedding of human blood. Besides affecting the credibility of the dying declaration, the practice of permitting evidence of unbe-

⁸Stow v. Converse, 3 Conn. 325, 342.

⁹"All infidels are, in law, perpetual enemies, for between them, as with the Devil, whose subjects they be, and the Christians, there is perpetual hostility, and can be no peace." Lord Coke, as quoted in *Hairn v. Bridalut*, 37 Miss. 209, 226 (1859).

¹⁰Supra note 8.

lief in theological dogmas on the part of the deceased helps the criminal to "prove" self-defense. It is a favorite trick of killers to claim that the deceased was the aggressor. If when such a defense is interposed the prosecution offers in evidence the dying declaration of the victim and the defendant submits testimony, possibly perjured, that the declarant was a non-believer in a "future state," some of the jurors who have had fundamentalist religious training in infancy may be induced to believe that the deceased victim was the aggressor and that the accused murderer did act in self-defense. The juror's reasoning would begin in accord with the following remarks of a contributor to the Scottish Rite publication, *New Age*:¹¹

"If the atheist recognizes no God and is, therefore, under no compunctions about obeying Divine law, how much less regard has he for man-made law?"

The juror might assume that because the deceased knew of no "Divine law" he had an antipathy "for man-made law," and probably assaulted the defendant, compelling the latter to act in self-defense.

Most Christian judges are willing, without abhorrence, to permit lack of belief in hell to affect either the competency or the credibility of dying declarations. Recently the highest court in Missouri not only upheld and applied the ancient rule as to the impeachment of dying declarations, without regretting the supposed necessity for so doing, but attempted to justify its ruling by the citation of precedents. So bold and emphatic was the decision that the court saw fit to use italics as follows:¹²

"Dying declarations admitted in evidence *may be discredited by showing that deceased was a disbeliever in a future state of rewards and punishment.*"

It ought not to be difficult for anyone to imagine the feelings of the family and friends of a murdered man when they see in their local newspaper the publication of an official opinion containing such a reference to the deceased. It was not the murderer who was "discredited," nor was it any perjurer or other felon, but the court meant that it was the aged and unoffending man, the victim of a brutal murder, who could be thus stigmatized.

¹¹Issue of November, 1928.

¹²State v. Rozell, 225 S. W. 931.