CHAPTER II.

SECOND DAY'S PROCEEDINGS—MONDAY, JULY 13, 1925.

Court opened with prayer by the Rev. Moffett. Oh, God, our Father, Thou Who are the creator of the heaven and the earth and the sea and all that is in them. Thou Who are the preserver and controller of all things, Thou who wilt bring out all things to Thy glory in the end, we thank Thee this morning that Thou doest not only fill the heavens, but Thou doest also fill the earth. We pray Thy blessings upon this Court this morning. We pray that Thy blessings might guide the presiding judge, that he may give wise decisions in his conduct of this case. We pray that Thou would bless the jury, each member of it, as they shall hear and receive testimony, that they may be able to receive it and make a decision according to the law and the evidence in the case. We pray Thee, our Father, that Thou would bless the lawyers on each side of this case, that each one of them singly and individually shall have nothing before their minds, but each one shall do his duty that justice may be done. We pray Thee that Thou wouldst bless the principles in this case, that Thou wouldst bless those in the court and those on the outside to the ends of the earth. Bless these newspaper men as they take reports and interpret the facts throughout the world. Our Father, we pray Thee that Thy blessings may so overshadow and that Thy spirit may so direct and that Thy spirit may so guide and that the highest ideals of justice and righteousness and truth may prevail in this court in its decision for the good of men and for Thy glory, we ask in the name of our Lord and Saviour, Jesus Christ. Amen.

Jurors Called.

The Court—Open court, Mr. Sheriff.

Mr. Sheriff—We will have to have order in the courtroom. Call the jury Mr. Clerk. Answer to your name, gentlemen. (List of jurors was thereupon called.)

The following corrections were made by the jurors as to their several initials.

W. G. Day, R. F. West, J. W. Riley.

The Court—The jury is all present. Are you ready to proceed Mr. Attorney-General?

Gen. Stewart—Is the defendent present?

Mr. Neal—Yes, sir.

Mr. Neal—Before the jury is sworn we want to call attention to our motion to dismiss and quash the indictment which has been filed.

The Court—I think, Dr. Neal, that the indictent should be read first and then when I call on you to plead you may present your motion. Are you ready to read the indictment General?

Gen. Stewart—Your honor, we want to interrogate one of the jurors.

The Court—Very well, which one?

Gen. Stewart—Mr. Gentry, Prof. Gentry.

The Court—You want the rest of the jury to retire?

Gen. Stewart—Yes, sir.

The Court—Mr. Sheriff, take the jury please sir, for the present, except Mr. Gentry. Let's have order in the courtroom. Where is my policeman that had the gavel here the other day?

Spectator—Right over there.

Judge Demands Order.

The Court—Come over here, Mr. Rice, I wish you would keep order

please and if they don't do what you say I will put them out. Gentlemen, we cannot proceed in the courtroom, as many people as there are without absolute order, so if any person persists in being disorderly in the courtroom they will be removed from the courtroom by the officers. I give you warning and I hope you will take this warning and heed it and that no person has to be removed from the courtroom. You want to ask Mr. Gentry some questions?

Mr. Darrow—Just a minute. We want to object. The juror has been passed and accepted and we want to object to any further interrogation.

The Court—The juror has not been sworn and I think either side has a right to interrogate any juror they see proper.

Mr. Darrow—We want to save our exception.

Gen. Stewart—This interrogation, of course, is no reflection on Prof. Gentry.

The Court—You might state why you make this inquiry.

Gen. Stewart—The reason we make it—we make this inquiry to definitely determine as to Mr. Gentry's expression of opinion. It has come to our ears that he had perhaps expressed an opinion and I just wanted to interrogate him about that.

The Court—An opinion as to the guilt or innocence of the defendant?

Gen. Stewart—Yes, sir.

Mr. Darrow—We want to save our objection anyway.

The Court—Yes, sir, that will be overruled.

Stewart Questions Juror.

Gen. Stewart—Have you made any expression of opinion as to the guilt or innocence of Scopes?

Mr. Gentry—I don't know anything about it only what I have read in the papers, not a thing.

Gen. Stewart—Did you make the statement at any time that Mr. Scopes ought not to be convicted?

Mr. Gentry—No, I don't know that I did. I don't remember a thing about it.

Gen. Stewart—You have nothing in mind now?

Mr. Gentry—No, sir, not a thing in the world.

Gen. Stewart—There is no reason why you would not be willing and could not hear the evidence in this case and return your verdict on the evidence alone?

Mr. Gentry—Not a thing.

Gen. Stewart—That is all we care to ask. We just wanted to verify the report we heard.

The Court—Do you want to interrogate the juror, colonel?

Mr. Darrow—No, sir.

Gen. Stewart—There is no reflection on him at all.

The Court—Mr. Gentry, you have an absolutely open mind, no prejudice or leaning or bias either way?

Mr. Gentry—I haven't any.

The Court—None at all.

Mr. Gentry—No, sir.

The Court—And can try the case wholly upon the law and the evidence?

Mr. Gentry—Yes, sir.

The Court—Let the jury be brought back please.

The Court—Let the jury come in. I don't like for the jury to come in under the ropes, Mr. Sheriff, but come over the ropes.

Mr. Attorney-General, are you ready to proceed?

Gen. Stewart—Yes, your honor.

The Court—Very well, sir. Prepare the indictment.

Gen. Stewart—Mr. Clerk, give me the indictment, please, sir. One of the jurors is not in.

A Voice—He will be in in just a minute.

The Court—One of the jurors is not in.

A Voice—He will be in in just a minute.

The Court—You may read the indictment, gentlemen.

Gen. Stewart—State of Tennessee, County of—

The Court—Wait a minute. Is the other juror in?

Gen. Stewart—No, sir.

The Court—Who is the other juror?

A Voice—Riley. He will be in in just a minute.

Mr. Darrow—The jury has not been sworn either?

The Court—No. We make out the issues before we swear the jury.

Mr. Darrow—Will your honor explain the procedure of this court? I am not familiar with it.

The Court—We make up the issues and then swear the jury to try the issues as joined, as joined.

Mr. Darrow—You don't mean by a statement on both sides?

The Court—No, sir. I mean by the reading of the indictment, and your plea.

Mr. Darrow—I understood it was a little different the other day.

The Court—Yes.

Gen. Stewart—Your honor, the defense has notified us of the filing of a motion to quash. Before reading the indictment we want to say that we want that properly disposed of.

The Court—Wouldn't that come when I call upon them to plead, Mr. Stewart, or not? I can proceed either way.

Gen. Stewart—The practice has been to dispose of that even before the jury is sworn.

The Court—I mean to dispose of that before the jury is sworn.

Gen. Stewart—Our practice has been to dispose of that even before the jury was empaneled.

The Court—Suppose you read the indictment first?

Indictment Read.

Gen. Stewart (Reading)—

State of Tennessee,
County of Rhea.

Circuit Court.
July Special Term, 1925.

The grand jurors for the state aforesaid, being duly summoned, elected, empaneled, sworn, and charged to inquire for the body of the county aforesaid, upon their oaths present:

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 and 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 Court—What is your plea, gentlemen?

Mr. Neal—May it please your honor. We make a motion to quash the indictment, and we would like simply to present the motion, possibly read it, and then with a very brief explanation, if any, ask your honor to reserve judgment on that until later in the trial.

Gen. Stewart—That would not be the practice at all. We would insist on the disposition of the motion before we proceed at all.

The Court—Under the practice, if they insist upon it, I would have to pass upon your motion before I go further.

Mr. Neal—We want to get it in the record, with the reading and a brief statement.

The Court—I will hear your motion.

Mr. Neal—Where is your motion? Have you it, general, over there?

Gen. Stewart (Handing document to counsel)—

Defendant Moves to Quash.

The defendant moves the court to quash the indictment in this case for the following reasons:

First—(a) Because the act which is the basis of the indictment, and which the defendant is charged with violating is unconstitutional and void in that it violates Sec. 17, Article II of the constitution of Tennessee.

Sec. 17. Origin and frame of bills. Bills may originate in either house, but may be amended, altered or re-

jected 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.

(b) In that it violates Sec. 12, Article XI of the constitution of Tennessee:

Sec. 12. Education to be cherished; common school fund, poll tax, whites and negroes, colleges, etc., rights of—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 the government to cherish literature and science. And the funds called the common school fund and all the lands and proceeds thereof, dividends, stocks and other property of every description whatever, heretofore by law appropriated by the general assembly of this state for the use of common schools. and all such as shall hereafter be appropriated shall remain a perpetual fund, the principal of which shall never be diminished by legislative appropriations; and the interest thereof shall be inviolably appropriated to the support and encouragement of common schools throughout the state, and for the equal benefit of all the people thereof; and no law shall be made authorizing said fund or any part thereof to be diverted to any other use than the support and encouragement of common schools. The state taxes derived hereafter from polls shall be appropriated to educational purposes, in such manner as the general assembly shall from time to time direct by law. No school established or aided under this section shall allow white and negro children to be received as scholars together in the same school. The above provisions shall not prevent the legislature from carrying into effect any laws that have been passed in favor of the colleges, universities or academies, or from authorizing heirs or distributees to receive and enjoy escheated property under such laws as may be passed from time to time.

(c) In that it violates Sec. 18, Article II of the constitution of the state of Tennessee:

Sec. 18. Of the passage of bills. Every bill shall be read once on three different days, and be passed each time in the house where it originated, before transmission to the other. No bill shall become a law until it shall have been read and passed, on three different days in each house, and shall have received, on its final passage, in each house, the assent of a majority of all the members to which that house shall be entitled under this constitution; and shall have been signed by the respective speakers in open session, the fact of such signing to be noted on the journal; and shall have received the approval of the governor, or shall have been otherwise passed under the provisions of this constitution.

(d) In that it violates Sec. 3, Article I of the constitution of Tennessee:

Sec. 3. Right of Worship Free—That all men have a natural and indefeasible right to worship Almighty God according to the dictates of his 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 of worship.

(e) In that it violates Section 19, Article I of the constitution of Tennessee:

Sec. 19. Printing presses free; freedom of speech, etc., secured. That the printing presses shall be free to every person to examine the proceedings of the legislature, or of

any branch or officer of the government, and no law shall ever be made to restrain the right thereof.

The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty. But in the prosecutions for the publications of papers investigating the official conduct of officers, or men in public capacity, and the truth thereof, may be given in evidence; and in all indictments for libel the jury shall have the right to determine the law and the facts under the direction of the court, as in other crimnal cases.

(f) In that it violates Section 8, Article I of the constitution of Tennessee:

Sec. 8. No man can be disturbed but by law. That no man shall be taken or imprisoned, or 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.

(g) In that the act and the indictment and the proceedings herein are violative of Section 9, Article I of the constitution of Tennessee:

Sec. 9. Rights of the accused in criminal prosecutions. That in all criminal prosecutions, the accused hath the right to be heard by himself and his counsel; to demand the nature and cause of the accusation against him, and have a copy thereof, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favor, and in prosecutions by indictment or presentment, a speedy public rial, by an impartial jury of the county in which the crime shall have been committed, and shall not be compelled to give evidence against himself.

(h) In that the act, prosecution and proceedings herein violate Section 14, Article I of the constitution of Tennessee:

Sec. 14. Crimes punished by presentment, etc. That no person shall be put to answer any crimnal charge but by presentment, indictment or impeachment.

(i) In that the act violates Section 8, Article II of the constitution of Tennessee:

Sec. 8. General laws only to be passed; corporations only to be provided for by general laws. The legislature shall have no power to suspend any general law for the benefit of any particular individual, nor 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. No corporation shall be created, or its powers increased or diminished by special laws; but the general assembly shall provide general laws, for the organization of all corporations hereafter created, which laws may, at any time, be altered or repealed; and no such alteration or repeal shall interfere with or divest rights which have become vested.

(j) In that the act violates Section 2, Article II of the constitution of Tennessee:

Sec. 2. No person to exercise powers of more than one department. No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted.

Second—(a) That the indictment is so vague as not to inform the defendant of the nature and cause of the accusation against him.

(b) That the statute upon which the indictment is based is void for indefiniteness and lack of certainty.

Third—(a) In that the act and the indictment violate Section 1 of the Fourteenth amendment of the constitution of the United States:

Mentions Fourteenth Amendment of U. S. Constitution.

Sec. 1. Art. XIV. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. 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 the jurisdiction the equal protection of the laws.

Mr. Neal—Now, may it please your honor, we would prefer to have you reserve judgment, if the state will permit and the argument in connection with this question until the whole case, the evidence will be of enlightening character both to your honor and the jury and our intention, unless the state insists, was simply to read the indicment and then allow it to remain—

Mr. Darrow—Read the motion.

Mr. Neal—I mean read the motion and allow your honor to pass upon it later we think the whole evidence in the whole case will be enlightening, and I say particularly perhaps to your honor, and your honor will be in much better position to decide these issues after our whole case rather than hearing an argument this morning, no matter how elaborate.

The Court—What course do you want to pursue, Mr. Attorney-General?

Gen. Stewart—We want the matter disposed of at this time, yes, sir.

Mr. Neal—As I understand, we would have the right to make an explanatory statement and then the Attorney-General make his argument. and we to make the final argument?

Gen. Stewart—Yes, that is right.

The Court—Yes, you would have the right to open and close, take the affirmative of the argument and state your position.

Mr. Neal—The only thing we want to understand is we have the right to close the argument.

Mr. McKenzie—To open and close.

Mr. Neal—May it please your honor, I am simply going to run through and explain our attitude or view. One of my associate counsel will make the final argument.

The Court—Yes.

Mr. Neal—May it please your honor, it is useless for us to stress right at the beginning hour, that your honor has the power, not only power but the duty, to pass on the constitutional matters. A great deal of misunderstanding exists in regard to that matter. A great many people, I think a great many lawyers, seem to unconsciously have the understanding that the appelate courts have that power alone, to pass on the unconstitutionality of statutes; but I am sure your honor is not deceived in the matter. As was said in the great case of Meador vs. Madison, it is the very essence of judicial functions to determine what the law is, and to determine what the law is, necessarily requires the determination of it constitutionality. I am sure it is not necessary for us to pause to explain to your honor, that it is not only your power but your sworn duty to support the constitution of the United States and of the state of Tennessee.

The Court—It is not necessary to argue that point.

Mr. Neal—So, while I do not expect to read all the motion, it is a very brief explanation of our idea, appealing to that particular section of the constitution, naturally and logically the first objection we make to this statute, is to call attention to that well known provision of our constitution, at least well known to Tennessee lawyers, in regard to the caption and the substance of the bill.

I do not think I exaggerate, may it please your honor, when I say probably four-fifths of the law which the Tennessee supreme court has ultimately held unconstitutional, the constitutionality has been based upon this particular provision. They have praised it highly. They have not looked upon it as purely a technicality, but looked upon it as a matter which is very important, to hold the

legislature's hands, within the provisions of this particular law. Now, we will not take your honor's time in explaining why this provision, and why our courts have praised it so highly, but it is there, and I am sure your honor is familiar with it.

Now, coming to the application of this particular law. We will just mention our contention in this respect and not elaborate. The act commences, "An act inhibiting the teaching of the evolution theory in our universities, normals and all other schools of Tennessee which are supported in whole or in part by public school funds." There is the caption speaking of evolution. When we get to the body of the act: "Be it enacted by the general assembly of the state of Tennessee that it will be unlawful for any teacher in any university, normal or other school in Tennessee supported in whole or in part by public school funds, to teach any theory" any theory—not the theory, not the one contemplated by the legislative mind in the caption, but when we get to the body of the act, which must be responsive in every way to the caption, there is adversity of the act which the act is attempting to make a misdemeanor.

Passing from the first objection, the second objection, in that it violates Section 13, Article II of the constitution of Tennessee. I will not read the part which is rather lengthy, but only the particular provision we have in mind, when we say this particular provision conflicts with the statute:

"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 conductive 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."

That is, in this very part of the constiuion is carried with its grant of power, the mandatory duty to cherish science.

Now, may it please your honor, we will have evidence, and now we think simply by appealing to your judicial knowledge, we can show that not only can the legislature not cherish science, but in no possible way can science be taught or science be studied without bringing in the doctrine of evolution, which this particular act attempts to make a crime. Whether it is true or not true, all the important matters of science are expressed in the evolution nomenclature. It would be impossible, if Tennessee wanted to, to strip from modern expressions of science, or announcements of science the evolutionary theory, and therefore, we think this act attempts to cut out of the very provision of the constitution upon which our common school system is based the very purpose for which this power was given.

Now, that will be elaborated a little later.

In that it violates Section 18, Article III of the constitution of Tennessee, in regard to the passage of bills. We will not stress that. We thought possibly some defect might be found, but some other speaker will explain in regard to that, that is with regard to the regularity of the procedure of the legislature at the time this particular bill was passed.

Now, may it please your honor, we come to the most sacred provision of the constitution of Tennessee, and with your honor's permission, I would like to read that.

The Court—Yes.

Mr. Neal—(Reading) "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 of worship."

Now, may it please your honor, we do not for one moment in this case

question the right of the state of Tennessee, through proper legislative enactment or through administrative authority, to supervise and control its schools. We think, of course, the curriculum in that school must be fixed by some authority, that authority may be a local authority, municipal authority, it may be a country authority or may be a state authority. It may, as I say, fix that through administrative councils, tribunals and committees, or it may be by legislative enactment. But, may it please your honor, we insist, that in exercising this power, it is limited by the express provisions of the constitution, itself.

And, therefore, we contend, and in my humble judgment this is the most important contention of the defence, that in exercising this power, it cannot exercise it so as to violate this great provision of the constitution in regard to religious liberty, in regard to the prevention of any establishment of any particular religion or of any particular church. Our contention, to be very brief, is that in this act there is made mandatory the teaching of a particular doctrine that comes from a particular religious book, and to that extent, it places the public schools of our state in such a situation, in regard to particular church establishments, that they contravene the provisions of our constitution. Now, may it please your honor, that will be elaborated on later by some of my associates.

In that it violates Section 19, Article I of the constitution of Tennessee in regard to printing presses and expression of opinion. I will not read that.

Stewart Asks Retirement of Jury.

Gen. Stuart—It has occurred to me, perhaps, that if we are going to elaborate this argument don't you think you would, perhaps, ask the jury to retire?

Mr. Darrow—I object to the jury retiring.

Gen. Stewart—You don't object?

Mr. Darrow—We do object.

Gen. Stewart—It don't make any difference whether you do or not. It is a matter that addresses itself to the court. I ask your honor to let the jury to retire.

Mr. Neal—State why? The jury has got to be the judge of the law and the facts in this case, and this is up to this jury.

Gen. Stewart—You are not here under a plea of not guilty, and the case is not before the jury.

Mr. Neal—We are here with our motions before the jury, and we have got a right to state our motion, since the jury will be the judge of the law and the facts. We will have to go over it again anyway, and it is the same matter that we will present in the opening statement.

Gen. Stewart—There is no issue before the jury. There is nothing for the jury to consider. There is no issue before the jury.

Mr. Neal—Then what is the harm in having them here? It is the same jury that will try the case.

Gen. Stewart—That is the harm in having them here. I ask your honor to let the jury be discharged. I don't want to invade their province. I don't want anything said here that might handicap them in rendering a verdict on the evidence that will be presented to them. I think right now we are getting on dangerous territory, and I think we might invade some of the jury's rights in this case.

Mr. Neal—The jury is the judge of the law and the facts.

Gen. Stewart—Oh, that is all foolishness.

Mr. Neal—They ought to hear anything that the court has a right to listen to.

The Court—This matter that is being presented now, is purely a matter for the court to pass on. The jury has no jurisdiction to pass on this question. The jury in the final analysis are the judges of the law and the facts when the case is presented to them properly. And I think if you gentlemen are going to discuss matters that are vital to the issues in this case, before the court, it is in the discretion of the court to have the jury retire?

Mr. Thompson—Before you make a statement on that, may I make a suggestion? Of course this question of whether or not the jury retires is discretionary with the court.

The Court—Absolutely so.

Mr. Thompson—That makes first, then the inquiry in what way it can possibly prejudice the jury to hear a discussion of it if the attorney-general cannot state in what way the jury can be prejudiced, why should the court exercise its discretion by having the jury retire?

Gen. Stewart—I understand your honor had already decided the proposition?

Judge Retires Jury.

The Court—Mr. Officer, you may let the jury go. I know we are safe to let the jury be excluded. If they stay, there might be some discussion that might invade their province.

Mr. Darrow—Your honor, we will go right over it on the opening statement again, in a few minutes?

Mr. Neal—The same statement, in the same way, to the same jury.

The Court—It may become necessary for the court to make inquiries from you gentlemen, during the arguments from which the jury might infer that the court had certain opinions as to the facts and so the court will be more at ease with the jury not present.

Mr. Darrow—We will be less at ease.

The Court—Let the jury retire.

(Whereupon the jury retired from the courtroom.)

Mr. Neal—May it please your honor?

The Court—You may proceed, Judge Neal.

Mr. Neal—The last clause was the clause in regard to freedom of communication, thought and opinion. One of the fundamental rights of men. Every citizen may freely speak and write on any subject, being responsible for the abuse of that liberty. We think that particularly refers to libel.

The Court—To which?

Mr. Neal—The abuse of that liberty granted by the latter clause evidently applies to libel, and we think that then there is the freedom of expression of opinion regardless of the site, whether the site of it is in a schoolhouse, or store, or street, or building, or any place—the freedom of expression of a man's ideas and a man's thoughts, limited only by his responsibility under libel law.

In that it violates Section 8 of Article I of the constitution of the state of Tennessee—which is Section 8—which is the great section in our constitution which corresponds to the section of the great section in the fourteenth amendment—the first section of the fourteenth—that no man shall be taken or imprisoned or disseized of his freehold and 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. We will refer to that later when we come to the final section which has to do with the federal constitution. By numerous decisions the law of the land, as your honor knows, is the same thing as due process of law.

The Court—Yes, sir.

Mr. Neal—In that the act and the indictment and the proceedings herein are violated Section 9, Article I of the constitution of Tennessee and that is that in all crimnal prosecutions the accused shall have the right to be heard by himself and his counsel. Now this is the vital part—to demand the nature and cause of the accusation against him and have a copy thereof, to meet the witnesses face to face, etc. Now our contention, may it please your honor, is that this crime which they have attempted to define—the crime in this act—the definition is so indefinite that it is absolutely impossible for the defense to know exactly the nature of its charge—of the charge. Now if there is one thing that is fundamental to crimnal law, it is that the crime must be defined with sufficient particularity, not only in the indictment, but in the statute, so that the court, the individual, everyone, may know whether this

particular individual has violated that particular command of the state or not. Now we think that the act in many particulars, especially in attempting to make a crime of teaching of certain doctrines in the Bible, which we think you now can take due judicial knowledge of, and which we hope later to present evidence in regard to, a doctrine in the Bible is so indefinite that every man that reads the Bible will have a different interpretation as to exactly what that theory of creation is and how it is possible, may it please your honor, for the state of Tennessee to make a crime that which every individual—and the individuals are millions—would arrive at a different idea as to exactly what the offense is.

Next that the proceedings herein violates Section 16 of Article I of the constitution. We contend that this act is so indefinite that there cannot possibly be trained an indictment based upon the law, therefore this piece of paper which the distinguished attorney-general has filed here as an indictment does not come within the meaning of such, on account of its indefiniteness and the statute on which it is based, and therefore violates this particular provision of the constitution in that the act violates Section 8, Article 11 of the constitution. The legisature shall have no power to suspend any general law for the benefit of an individual, inconsistent with the general laws of the state, contemplating such laws, nor to pass any law carrying to an individual or individuals any grants, immunities or privileges other than such as may be by the same law extended to any member of the community.

Now, we contend, may it please the court, and this is one of the most serious and one of the many serious contentions of the defense that this particular law lacks uniformity, that it must be, if you can defend it at all, an exercise of the police power of the state, and the crimnal jurisdiction of the state which most writers classify under the head of police power. Here is a mandatory provision of our constitution, that these laws must be general and uniform.

Now this law tends to say that which is an offense if committed in the high schools would be no offense if committed up here on the streets and highways or in public halls of our state.

Suppose, may it please the court, the legislature of Tennessee should attempt to say that it is murder in one part of your town and not murder the other part of town. We do not think that would violate any more the spirit or provision of this law than does this act, in that the act violates Section III of the constitution of Tennessee, no person or persons belonging to one of these departments shall exercise any of the powers particularly belonging to the either of the other, except in the case herein directed, or permitted.

Now, may it please your honor, under that particular objection this statute is so indefinite, it fixes no definite time, as we noticed a moment ago, just one aspect of it, one particular aspect as we understand it, what parts of the act must be committed under this law. The act violating the story of the Divine creation set out in the Bible or the other that man is descended from lower animals. You have just as many interpretations of the particular offense there as individuals who read the Bible.

Now the act being so indefinite, if it is made definite and specific, it would force that upon the court. Your honor would have to assume legislative powers and attempt to make specific what the legislature left indefinite, and that is the reason.

Now, may it please your honor, that is the first section of our objection. The other two sections are very brief. The second section is that the indictment is vague as not to inform the defendant of the nature and cause of the accusation against him. We have been speaking about the law; we have said that the indictment is too vague, that these gentlemen have simply said Mr. Scopes taught evolution, simply followed the statute, or attempted to follow this, if it can be followed, which I doubt very seriously, but I think the learned attorney-general has made a very strenuous effort to follow the statute with all its indefiniteness, but we do not think that is sufficient; we think that the indictment should set out just exactly what our defendant was supposed to have taught. My associate will emphasize, that particular part of our motion. Secondly, that the statute upon which the indictment depends is void for indefiniteness and lack of certainty, which we have stressed all through this hurried statement of ours, which will also be stressed by my associate.

Now, if your honor pleases, we come to the third and last section of our motion to dismiss; that the act and the indictment violates Section 1 of the Fourteenth Amendment of the constitution of the United States. Now, will your honor bear with me and let me read that?

The Court—Yes, sir. Take your course.

Religion Not Proper Subject for Legislation.

Mr. Neal: (Reading) I want to say that our main contention after all, may it please your honor, is that this is not a proper thing for any legislature, the legislature of Tennessee or the legislature of the United States to attempt to make and assign a rule in regard to. In this law there is an attempt to pronounce a judgment and conclusion in the realm of science and in the realm of religion. We contend, may it please your honor, that was not the purpose for which legislatures were created; under our system they were created for very definite, limited purposes, to lay down rules of conduct, rules of conduct that the framers of our constitution made a very definite, very precise and a very narrow line within which these rules of conduct should be drawn. But the great domain of opinion, the great realm of religion, the framers of our constitution, not that they regarded it unimportant, but that they regarded it so important that no power, legislative or court, would attempt to lay down and assign a rule to bind conscience and the minds of the people.

Now, may it please your honor, we have been met constantly and this is my concluding word, we have been met constantly by the assertion if you don't like this law, have it repealed. The bitter tragedy and humor of such a remark to us, we know, of course, that we cannot have this law repealed; we grant you that the legislature spoke for the majority of the people of Tennessee, but we represent the minority, the minority that is protected by this great provision of our constitution, that that man that hollers out to us the assertion that we should have his law repealed is either ignorant or has only contempt for this great provision of the constitution that was made to protect one sole individual or a dozen or a thousand.

Mr. Hays—If your honor please.

Gen. Stewart—Your honor, we have the right to speak.

The Court—Gentlemen, who of you will argue? We want all of you if you want to be heard.

Mr. Neal—Just Mr. Hays and Mr. Darrow will follow.

The Court—Mr. Hays, I will hear you now.

Hays Argues.

Mr. Hays—There are only a few phases of the argument of Judge Neal to which I wish to address myself. I should like to direct the court's attention to the indefiniteness of the indictment as drawn. Mr. Scopes is charged in the caption of the act with one thing and in the body of the indictment it is put in another way. It is a good deal like charging a man with murder and trying him for another offense. I believe this act is indefinite in many respects. I will pay my respects to the phase of it which I consider most indefinite. A man could not tell whether he is commiting a crime. It is not clear what is meant by the word "teach." Suppose during my next half hour I expound the theory of the divine

creation. Have I violated the law? I presume our teachers should be prepared to teach every theory on every subject. Not necessarily to teach a thing as a fact. There are many hypotheses about which the world is talking. And we desire to know the facts. I can conceive a law as bad that would provide that we could not repeat the story of divine creation as taught in the Bible. It should not be wrong to teach evolution, or certain phases of evolution, but not as a fact. That is quite a different proposition. Even with all the discussion about this law, which has been talked about all over the United States, if I were a teacher in the schools of Tennessee I would not be able to tell whether I, in explaining to my children the facts concerning the theory of evolution, and the facts concerned in teaching the theory of divine creation in the Bible, whether I would know when I was violating this law.

I direct your honor's attention to the fact that a law cannot stand unless it is definite enough for a man to know when he is committing crime. And if we are to teach this or not to teach that. We must know whether or not the making of a particular statement is a crime. If it means that we cannot teach certain things, it should be definitely stated. If it means that you cannot explain a certain theory that should be stated plainly, or whether either or both of them can be expounded.

And the last point to which I wish to address myself, is to consider this act under the police powers of the state. The only limitation on the liberty of the individual is in the police power of the state. The preservation of public safety and public morals falls under this head. The determination of what is a proper exercise of the police power is under the jurisdiction and supervision of the court.

Now, as to whether a law is reasonable or unreasonable under the police power of the state, I have taken the liberty of drafting a law, which it seems to me would be constitutional if this law is constitutional. I have entitled this, "An act prohibiting the teaching of the heliocentric 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 violation thereof.

Hays Drafts a Law With Death Penalty as a Comparison.

Sec. 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 in the state which are supported in whole or in part by the public school fund of the state 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 and planets move around the sun.

Sec. 2—Be it further enacted that any teacher found guilty of a violation of this act shall be guilty of a felony, and upon conviction shall be put to death.

Sec. 3—Be it further enacted that this act take effect from and after its passage, the public welfare requiring it.

Now, my contention is that an act of that sort is clearly unconstitutional in that it is a restriction upon the liberties of the individual, and the only reason Your Honor would draw a distinction between the proposed act and the one before us is that it is so well fixed scientifically that the earth and planets move around the sun. The Copernican theory is so well established that it is a matter of common knowledge. I might say that when the Copernican theory was first promulgated, he was under censure of the state. The book was published in Hamburg and Copernicus was banished from the state. And Georgiana later fell under the displeasure of the inquisition, and was put to death, and because of that theory Galileo, too, incurred the displeasure of the inquisition. The only distinction you can draw between this

statute and the one we are discussing is that evolution is as much a scientific fact as the Copernican theory, but the Copernican theory has been fully accepted, as this must be accepted.

Law Under Police Power Must Be Reasonable.

My contention is that no law can be constitutional unless it is within the right of the state under the police power, and it would only be within the right of the state to pass it if it were reasonable, and it would only be reasonable if it tended in some way to promote public morals. And, Your Honor, and you, gentlemen of the jury, would have to know what evolution is in order to pass upon it. And I feel that it would be in the interest of justice for your honor to reserve a decision on this motion until after the case is in; then you can determine more definitely whether this comes within the police power of the state. If it is unreasonable, if it is not necessary, or does not conserve the public morals, it is not within the police power. To my mind, the chief point against the constitutionality of this law is that it extends the police powers of the state unreasonably and is a restriction upon the liberty of the individual.

The Court—Have you a brief, Mr. Hays?

Mr. Hays—I shall have it.

The Court—I should like to see it.

Mr. Hays—The reason I suggested that Your Honor reserve your decision on this, is that it is in the interest of justice that you do so until the case is in.

The Court—I cannot proceed until I have a plea of not guilty.

Mr. Hays—We are asking that you proceed, and ask that you reserve your decision until the case is developed. We are ready to proceed.

The Court—I will hear you, General.

Gen. Stewart—We will only have two arguments. Gen. McKenzie will make the first argument.

Gen. McKenzie—May it please Your Honor, I have been very much interested in the remarks of distinguished adversary counsel and by the remarks from the entire array in the case. Upon the first proposition, may it please your honor, that the indictment is not sufficient; it has been passed on by the supreme court of our state too often, and this indictment is in the language of the statute. Under the laws of the land, the constitution of Tennessee, no particular religion can be taught in the schools. We cannot teach any religion in the schools, therefore you cannot teach any evolution, or any doctrine that conflicts with the Bible. That sets them up exactly equal. No part of the constitution has been infringed by this act. Under the law we have the right to regulate these matters. Col. Neal in his argument has admitted this. Now, the distinguished gentleman, Mr. Hays, got up some indictment by which he was to hang somebody. That was not at all a similar case to this act; it has no connection with it; no such act as that has ever passed through the fertile brain of a Tennessean. I don't know what they do up in his country. It has been held by the supreme court that the Tennessee legislature has the right to arbitrate and to judge as to how they shall proceed in the operation of the schools. They have provided school funds and say that they shall not be diminished in any way, shape, form or fashion, and the Tennessee legislature is the proprietor of the schools and directs the handling of the school funds.

The Court—General, there was some insistence that the caption did not conform with the requirements of the law.

Gen. McKenzie—Your Honor, that is their caption.

The Court—That is their objection to it. What is their obligation?

Gen. McKenzie—I could not say as to that.

Mr. Neal—The caption sets forth a bill touching the theory of evolution and the body of the bill says any theory of evolution.

General McKenzie Charges Interference by Foreign Lawyers.

Gen. McKenzie—The object of the restriction is to give notice to the legislature that they should prevent surprise and fraud in the enactment of laws. However, they are to be construed liberally. In Railroad vs. Tennessee this is fully explained. Another thing, you do not construe these statutes according to their technical sense, unless it is a technical statute; you construe them in common ordinary language, and give them an interpretation like the common people of this state can understand. You do not need experts to explain a statute that explains itself. Under the law you cannot teach in the common schools the Bible. Why should it be improper to provide that you cannot teach this other theory? This indictment says that this is what he did; and that he was a school teacher, employed by a school supported wholly or in part by the public school funds of the state of Tennessee. Now, if the court please, in the construction of a statute, it has to be construed in common ordinary language. In the construction of a statute we don't have to send out and get some fellow to construe it for us.

Mr. Neal—Is the general discussing our motion, or the admissibility of evidence?

Gen. McKenzie—I am replying to the extensive speech of the gentleman over there on evolution, and, incidentally, to your argument. The rule of construction in these matters is in favor of the statute and every doubt must be solved so as to sustain it where that can be done and its constitutionality maintained. You do have to look to the interpretation of the titles as well as to the acts. The questions have all been settled in Tennessee, and favorable to our contention. If these gentlemen have any laws in the great metropolitan city of New York that conflict with it, or in the great white city of the northwest that will throw any light on it, we will be glad to hear about it. They have many great lawyers and courts up there.

Says Sixteen-Year-Old Boy Could Understand Law.

The United States supreme court has also sustained our contention in this matter. As to the scientific proposition, the words employed in the constitution or a statute are to be taken in their natural and popular sense, unless they are technical legal terms, in which event they are to be taken in their technical sense. But this is not such a statute. This is not a statute that requires outside assistance to define. The smallest boy in our Rhea county schools, 16 years of age, knows as much about it as they would after reading it once or twice.

Mr. Malone—We object to this argument. The motion before the court does not involve the discussion of the admissibility of evidence. We are discussing the constitutionality of this indictment on a motion to quash. And I would like to say here, though I do not mean to interrupt the gentleman, that I do not consider further allusion to geographical parts of the country as particularly necessary, such as reference to New Yorkers and to citizens of Illinois. We are here, rightfully, as American citizens.

The Court—Col. Malone, you do not know Gen. McKenzie as well as the court does. Everything he says is in a good humor.

Mr. Malone—I know there are lots of ways of saying—

The Court—I want you gentlemen from New York or any other foreign state, to always remember that you are our guests, and that we accord you the same privileges and rights and courtesies that we do any other lawyer.

Mr. Malone—Your Honor, we want to have it understood we deeply appreciate the hospitality of the court and the people of Tennessee, and the courtesies that are being extended to us at this time, but we want it understood that while we are in this courtroom we are here as lawyers, not as guests.

Gen. McKenzie—Your Honor, we have the very highest regard for these distinguished lawyers. I will admit that I have no respect for their opinions that have been advanced as to the law, and do not believe it to be the law—that I have the right to say in the legal form. But, so far as wanting to insult or hurt the feelings of either one of these various gentlemen, that is not my intention. I have been reading from our supreme court opinion. I do not know whether they have any respect for that or not.

Now, then, the distinguished gentleman remarked in regard to the police power of the state. Our supreme court said that this can be classified as either the exercise of power under the power of the legislature or under the police power, either one they want, against the state. And our supreme court said that the police power of the state and of the government has never been defined. The United States supreme court in 128 U. S. said the same thing. So, it don't seem to be so very restricted.

Police Power Never Defined.

In determining whether the statute enacted under the police power and discriminating between particular classes of persons, is reasonable, the courts have no power to pass upon the statute with a view to determining whether it will ultimately redound to he public good, or counteract to natural justice or equity, because these expressions are solely for the legislature. But the function of the courts is merely to decide whether it has any real tendency to carry into effect the purpose designed in the act, ultimately the protection of the public safety, the public health or the public morals. There can be no question, as we view it, as to the constitutionality of the act, or the validity of the indictment.

It serves notice on the defendant of what? That you were employed to teach in the public schools of Rhea county, that you taught a theory that is contrary to the record given by the Holy Writ as to the creation of man, and I insist it defines its own self. It does not need any construction. Instead, you taught that a man descended from a lower order of animals, just in the language of the statute. There can be no question on that ground.

Sue Hicks—I do not want to take up much time of Your Honor, because I think the most of their exceptions, I think that all of their exceptions are not valid, and I think the most of them are not worth considering, but I would like to say a word or two on one or two of the assignments made, that my colleagues have overlooked.

Now, further on the question of education and science, literature and science, I would like to say this—that the constitutional convention had in mind when they made that clause that the great public school fund should be preserved and not directed to any other purpose, and that is the main intention of the constitutional convention.

I will go on and read right here in part, I want to read from the case of Leeper vs. State, a particular excerpt from it, which has not been quoted, that Your Honor has not seen:

"We are of the opinion that the legislature under the constitutional provsion may as well establish a uniform system of schools and a uniform administration of them, as it may establish a uniform system of criminal laws and of courts to execute them."

Then, it goes on and says under the police powers that they have the right to do that, and then further it says: The court not only upholds the right of the legislature to pass this new police power, and also under the inherent right of the state to control its schools. They have two grounds on which to pass the act, if they think the teaching of evolution is harmful to the children of the state, to the future citizens of the state, upon the ground of police power, they may pass the act. They do not have to consider whether it is harmful, if, in their own judgment, they want to pass the act regulating the schools, be-

cause they are the supreme head of the schools, and they can regulate the schools as any other part of the regulations might be had. They can pass the law under the inherent powers vested in them, and that has nothing to do with the police powers.

Taking up another exception or two, the right of religious worship, "that all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience," that seems to me as perfectly ridiculous to say when a state employs a teacher, and he is employed under men appointed by the legislature by their acts, it is perfectly ridiculous to me to think that when they employ that teacher that he can go in and teach any kind of doctrine he wants to teach, and yet be violating that act of free speech, but they say they cannot do that, it would be violating it, if they did. Suppose a teacher wanted to teach architecture in a school when he has been employed to teach mathematics. Suppose he is employed to teach arithmetic to the class which the uniform textbook commission has adopted, and by the way, the uniform textbook commission, as Your Honor knows, has been established by the legislature. Suppose that instead of teaching arithmetic this teacher wants to teach architecture. Under their argument they say that they cannot control him and make him teach that arithmetic in that school. They go on and say that his religious worship is hindered thereby. The teaching in the schools has nothing whatever to do with religious worship, and as Mr. McKenzie brought out, he can preach as he wants to on the streets—his religious rights—but cannot preach them in school. I think that about covers all their exceptions that are worth while to mention.

The Court—Have you a copy of that brief for the state?

Mr. Hicks—Yes, sir, we can get it for you, Your Honor.

Court—Well, I will see it later. Any other counsel? Mr. Haggard? Gen. Stewart?

Gen. Stewart—Yes, sir.

Court—If you gentlemen would prefer the court will now adjourn for dinner in about twenty-five minutes.

Gen. Stewart—It is ten minutes after eleven according to my time.

Court—The court will adjourn at 11:30 and I wouldn't want to break into your argument.

Gen. Stewart—Well, I couldn't finish in twenty minutes. It will take thirty or forty minutes, I think. Of course, I want to read some authorities.

The Court—Well, I want to say to both sides, gentlemen, these issues are too profound for the court to guess at. I want briefs from both sides. If you have briefs I want you to file them with me. If you haven't any briefs, I will ask that you prepare them hurriedly.

Mr. Neal—May it please Your Honor, we had contemplated that possibility — especially Mr. Hays more than myself—we had contemplated that these proceedings would be more or less informal.

Mr. Hays—We will promise Your Honor to furnish the brief.

Mr. Neal—We contemplated the brief will come later. We contemplated your decision coming later, but if your decision is coming now we will very quickly have in your hands the brief.

Court—Any one else for the state besides Gen. Stewart? Anyone else to argue besides you?

Gen. Stewart—No, sir; that is all we will have. I want to make a few—

Court—Except you?

Gen. Stewart—I wanted to argue a little.

Court—I say, except you.

Gen. Stewart—That is all except I wanted to make an argument on the proposition.

Court—I said any other lawyer except you. The defense seems possibly to have misconstrued the procedure and I wouldn't want to break into your argument, so having

these things in view I think the court will adjourn until 1 o'clock and then I want any authorities you have.

Mr. Hicks—I want all the witnesses that are in the courtroom to answer to their names and meet me right outside just as we go out—I want to see if you are here—in Judge McKenzie's office over there.

Read list of witnesses as follows:

Frazier Hutchison, James Benson, Howard Morgan, Richard Gill, Rose Cunningham, Mara Stout, Harry Shelton, Orville Gannoway, Charles Stokeley, Gregg Kyle, Elsie Farrar.

Court—Court will adjourn until 1 o'clock.

MONDAY AFTERNOON SESSION.

The Court—Call the court to order.

The Court—I will hear you, Gen. Stewart.

Gen. Stewart—Your Honor, may it—

The Court—Proceed without your coat.

Gen. Stewart—Yes, sir.

The Court—I wish you would this afternoon take up these different rounds as they are stated in the motion.

Gen. Stewart—Yes, sir, that is my purpose, Your Honor. Now if the court please, in this motion to quash as Your Honor has requested I will take up each—undertaking to state our position or theory on each assignment of each section of the constitution upon which they base this motion.

Stewart Answer Defense on Motion to Quash.

The first assignment is with reference to the origin and frame of the bill and cites Section 17, Article 11 of the constitution of Tennessee, which has been read, but the part underscored I take it is the part that is most material, Dr. Neal, so I will leave the other alone and address what remarks I shall make solely to that part that is indicated from the citation that they insist more seriously upon. This they underscore. "No bill shall become a law which embraces more than one subject, that subject to be expressed in the title." Now if Your Honor please, the constitution of the—as I understand their position, they say the caption doesn't correspond with the body of the act.

The Court—Yes, sir.

Gen. Stewart—The constitution of the state of Tennessee I have here, Your Honor. I have also most of these matters briefed, which brief I will present to Your Honor. I cannot read from the book. I have here the annotated constitution of Tennessee, Shannon's annotation, and under this, reading from the annotations under this section, among other things I want to call the court's attention to this. "A general title to an act is one which is full and comprehensive and covers all legislation germaine to the general subject stated. A title may cover more than the body, but it must not cover less. It need not index the details of the act, nor give a synopsis thereof." Citing Railroad Company vs. Burns, 11 Cates, and Green vs. State, 13 Cates. In this case if the court please—where is the copy of that act?

Mr. McKenzie—The law?

Gen. Stewart—Yes, sir.

Mr. Darrow—I will lend you my copy.

Gen. Stewart—We have one here, I thank you.

The copy of the acts says this: "An act prohibiting the teaching of the evolution theory in all the universities, normals and schools of this state which are supported in whole or in part by the public school funds of the state, and provides the penalties for violation thereof. Section 1, Be it enacted by, the general assembly of the state of Tennessee, that it shall be unlawful for any person 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 teach instead that man has descended from a

lower order of animals." If anything, your honor, the caption to this act is broader than the title. The caption of the act states the legislature's conception of the evolution theory, that is, that it states in words —in so many words—that this act shall prohibit the teaching of the evolution theory and the body of the act —I mean to say states the legislature's conception of the theory of evolution—that is the particular part they undertake to prohibit teaching. Now if anything, your honor, the caption of this act is broader than the title—broader than the body. It covers the evolution theory. It may be said that there are many theories of evolution but it refers in the body of the act to one particular theory of evolution which the legislature certainly had in mind when they passed the law. It has been repeatedly held by our courts that it does not invalidate the act if the caption is broader, or shall be broader than the body of the act—that doesn't invalidate it at all. All that is necessary under our law, is that the caption of the act and the body of the act shall be germaine one to the other. The caption of the act shall simply state enough to put the legislature on notice when the caption is read as to what they are passing—what they, the legislature, are passing upon. This, if your honor please, undertakes to deal with only one thing, and that is to prohibit the teaching in the public schools of Tennessee the evolution theory, that is the particular evolution theory that man descended from a lower order of animal. I don't think, your honor, that that can be seriously considered. I have several cases here—a number of citations I can read to your honor, but I know, of course, that your honor has had a number—or some questions presented to you a number of times and are familiar with the general principles.

The Court—You are insisting that if the caption is broader than the body of the act that it doesn't invalidate the act?

Says Caption is Broader Than the Act.

Gen. Stewart—Our insistence is that the only objection that could be made is that the caption is broader than the act and it is well settled in Tennessee that that would not invalidate it.

Mr. Darrow—There is no question but the caption is broader than the act, but the act can be broader than the caption. I think that is something different.

Gen. Stewart—The caption cannot be broader than the act and then the act in turn broader than the caption. I don't understand that.

Mr. Darrow—We understand that the caption may be broader than the act.

The Court—Without affecting the validity of the act?

Mr. Darrow—Yes, but the act cannot be broader than the caption, or cannot include something that is not in the caption and two subjects cannot be included.

Gen. Stewart—No, that is true, there cannot be, and certainly if the caption of the act is broader than the body of the act, then the body of the act could not be broader than the caption. That could not be true both ways. If the caption is broader than the body, then there couldn't be two subjects within the body of the act, but there are not two subjects in the body of the act. I understand their insistence, your Honor, to be that in order to violate this act it must be necessary first to teach, by specific reference to the story of divine creation in the Bible, that that is untrue—that the story of divine creation is untrue, and to say at the same time that instead of that the story of man's creation by evolutionary process is true. I understand that to be their insistence and about all I would care to remark—to say in remarking to that, would be this, that we have a rule of construction in Tennessee which prohibits the court from placing an absurd construction on the act and that certainly would be an absurd construction. Now the next assignment if the court pleases is that

Section 12, Article 11 of the constitution of Tennessee, and they point to that part of the constitution which makes it the duty of the legislature to cherish literature and science. Now, your honor, there is a case of Green vs. State of Tennessee, which to my mind settles that proposition thoroughly. This brief was prepared in accordance with another motion that was filled and I will have to lose some time in looking through it, because the chronological order in this is different than from the other.

The Court—Have you the books here?

Gen. Stewart—The books? I have some of the cases here. Most of them are just quoted from, your Honor. This case Green vs. State of Tennessee, says this: It is cited a number of times in various reports and decisions and they quote from Judge White in a dissenting opinion, In dissenting on the particular point In question—dictum you might call it—that is what they do call it, but, nevertheless, it is an authority in which he states—

The Court—Judge White, of the Supreme Court of the United States?

Gen. Stewart—No, sir, of the Supreme Court of Tennessee.

Mr. Malone—General, can you give us the citation?

Gen. Stewart—I lost it in my brief case. Here it is. Here is the footnote of the annotation here in the volume of the constitution. (Read ing the constitutional provision making it the duty of the legislature to cherish literature and science.) That is merely a direction to the legislature, but, nevertheless, it indicates the popular feeling on this question. That was the comment Judge White made in his dissenting opinion in 5 Humpheys, 215.

"Cherish Literature and Science" Merely Directory.

To cherish literature and science. The constitution maks it the duty of the legislature to cherish literature and science, but this is our position in following that reasoning that is merely directory to the last legislature and constituting as to that, and is stated in the opinion of Judge White, that indicates the popular feeling of the people, that they realize the importance of education, they realize the importance of literature, they realize the importance of scientific investigation, and they say to the legislature through the constitution, that they should cherish literature and science.

Now, that, if your honor pleases, is merely directory to the legislature. Being so, the legislature has a right to exercise its discretion in placing its discretion on that when they speak to us through the statute.

And that, your Honor, disposes of the matter.

The Court—Was that case disposed of by Judge White rendering a dissenting opinion?

Gen. Stewart—The case in which he rendered a dissenting opinion, if the court pleases, this particular construction of this particular part of the constitution was invoked and this section of the constitution was invoked. But in this particular part it was a taxation question, a question of taxation.

Mr. Neal—May I ask the General does he know the date of this decision?

Gen. Stewart—Yes, sir. It is 1874, I believe.

The Court—Have you got the opinions here? Let us see it.

Gen. Stewart—No, sir. I have not that book. Only the annotation I have here.

Mr. Neal—Did you cite Humphreys?

Gen. Stewart—Green vs. Allen, 5 Humphreys, 215.

I find that opinion dissented from in a number of other cases. They can be found running through this brief.

The Court—You say the majority didn't pass upon that question?

Gen. Stewart—No. It was mere dictum. It is cited and recognized in several cases and annotated under this section of the constitution, and I read from the annotation, to cherish literature and science, which means to recognize, to protect, to

aid, to comfort. Cherish means to protect, comfort, aid and so forth. So that it could not be any more than directory. It shall be the duty of the legislature to cherish literature and also to cherish science.

The Court—That would be a question of policy addressing itself to the legislature?

Gen. Stewart—If your Honor pleases, just as in the question where the question has been raised that the spirit of the constitution has been violated by a certain act they hold that this is a matter which addresses itself purely to the legislature. They have a right to say in their acts what is the spirit and what is not the spirit of the constitution. The question cannot be raised that the legislature violates the spirit of the constitution in any act. The spirit of the unwritten law or the unwritten part of he constitution.

As has been said only the express words of the constitution can be violated; but in determining that question the supreme court has said what the spirit of the constitution is, and in that addresses itself to the legislature. But, likewise this as Judge White says is merely a direction to the legislature. They are not bound by it, and it is left for them to interpret, and there is nothing binding about it at all.

Supposing then there should come within the minds of the people a conflict between literature and science? Then what would the legislature do? Wouldn't they have to interpret? It would go to the act, speaking to us through the statute book. Wouldn't they have to interpret their construction of this conflict which one should be recognized as higher or more in the public schools? Where there would be a conflict between literature and science? It is merely directory. And as he states, eloquently to me, that it merely expresses the policy or the feeling of the people at the time.

The Court—You say they cited Judge White approvingly in some other cases?

Gen. Stewart—Not stating it to be approved, your honor, but it is cited, and the presumption would be where it is cited in some of these cases that I can cite to your honor, in this brief, it would, of course, approve it. Now on that same proposition of cherishing science and literature, the case reported in 103 Tennessee, Page 209, which is to my mind the controling case, on the proposition, and we reach the last question—and the greatest question we might discuss on this, the case of Leeper versus the State of Tennessee, where the uniform textbook law was attacked and numerous questions raised, and in a very lengthy opinion by the supreme court they placed within the legislature the absolute power to control the public school system.

In this case, if your honor please, I want to read from it. In construeing Article 11, Section 12, the same article we are reading from here, cherishing literature and science they say: "We are of the opinion that the legislature under the constitutional provisions, may as well establish a uniform system of schools and taxation and a uniform system of criminal law and, of course, to execute them."

Now, I think this dictum announced in this dissenting opinion is to cherish literature and science. What else could it mean? What else could the constitution mean, if they had meant for the legislature to recognize literature and science, for instance, over and above the Bible in so many words? If they had intended that the legislature recognize science over literature, they would have said so. If they had intended that the legislature should pass laws recognizing science they would have said so affirmatively. They merely say it shall be the duty of the legislature to cherish literature and science. And who, who in the last analysis, if the court pleases, has the right to say whether they have or not? It is merely directory to the legislature.

The Court—Do you think that would be a question of public policy, addressing itself to the legislature?

Gen. Stewart—It might be.

The Court—Addressing itself to the legislature?

Gen. Stewart—It might be a question of public policy. But the point, the principal point I intend to make is that it is a matter that addresses itself to the legislature and its discretion.

Mr. Neal—May I ask a question?

Gen. Stewart—Go ahead.

Mr. Neal—I gather he admits it would be impossible to cherish science under this law?

Gen. Stewart—No, sir, I do not make any such admission; claiming that I do not come from a monkey, I cannot do it.

Mr. Malone—We do not think you did either, General.

Mr. Malone—Section 18, Article 2, of the constitution is the next, the question of the passage of bills, and since that relates to the house journal, the journal is not here, they did that—

The Court—I understood Judge Neal said that they threw that in, thinking they might find some irregularity.

Mr. Neal—Not exactly that, your honor; if any irregularity existed, we might take advantage of it.

The Court—You do not insist on that?

Mr. Neal—

Mr. Darrow—We have no contention on that.

The Court—Yes.

Gen. Stewart—The next one, and the one which Dr. Neal referred to as one of the most important ones, Section 3, Article 17, still of the constitution, the right of free worship:

Says Law Does Not Interfere With Worship.

"That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their conscience, that no man can of right be compelled to attend, erect, or support any place of worship, that no human authority in no case whatever can control or interfere with the rights of conscience, that no preference shall ever be given by law to any religious establishment or mode of worship."

If your honor please, this law is as far removed from that interference with the provision in the constitution as it is from any other that is not even cited. This does not interfere with the religious worship—it does not even approach interference with religious worship. This addresses itself directly to the public school system of the state. This does not prevent any man from worshiping God as his conscience directs and dictates. A man can belong to the Baptist, the Methodist, the Lutheran, the Christian or any other church, but still this act would not interfere with any worship by any construction you might place on it. It is not a religious worship to every man who lives within the bounds of this sovereign jurisdiction, and this cannot interfere with it. How could it? How could it interfere in any particular with religious worship? You can attend the public schools of this state and go to any church you please. This does not require you to harbor within the four walls of your home any minister of any denomination, even. Or, what is there in this act that says you shall contribute to the maintenance of any particular religious sect or cult? There is nothing in the question, if your honor please, there is not an abridgement of the rights of religious freedom or worship.

Darrow Says Law Gives Preference to Bible.

Mr. Darrow—I suggest you eliminate that part you are on so far. The part we claim is that last clause, "no preference shall ever be given, by law, to any religious establishment or mode of worship."

Gen. Stewart—Yes, that "no preference shall ever be given, by law, to any religious establishment or mode of worship." Then, how could that interfere, Mr. Darrow?

Mr. Darrow—That is the part we claim is affected.

Gen. Stewart—In what wise?

Mr. Darrow—Giving preference to the Bible.

Gen. Stewart—To the Bible?

Mr. Darrow—Yes. Why not the Koran.

Gen. Stewart—Might as well give it to any other book?

Mr. Darrow—Certainly.

Gen. Stewart—And no preference shall ever be given by law to any religious establishment or mode of worship?

Mr. Darrow—Certainly.

Gen. Stewart—What is there in this that requires you to worship in any particular way?

Mr. Darrow—That is the part we claim.

Stewart Claims St. James Version Standard in Tennessee.

Gen. Stewart—I think so, too. There is as little in that as in any of the rest. If your honor please, the St. James Version of the Bible is the 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—Mr. Attorney-General, may I ask a question?

Gen. Stewart—Certainly.

Mr. Malone—Does the law of the land or the law of the state of Tennessee recognize the Bible as a part of a course, in biology or science?

Gen. Stewart—I do not think the law of the land recognizes them as confusing one another in any particular.

Mr. Malone—Why does not 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 does not 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?

Gen. Stewart—It is not a religious question.

Mr. Malone—I am asking why.

Gen. Stewart—You are getting right back to the proposition of the police power, where the legislature, through the exercise of police power, passes a law directing a particular curriculum in the schools.

Mr. Malone—I do not want to interrupt.

Gen. Stewart—All right, go ahead.

Mr. Malone—Not only do we maintain not only is the police power of the states not the power to direct any particular line of study, but it is not the law—

Gen. 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 does not mention the Bible?

Gen. Stewart—Yes, it mentions the Bible. The legislature, according to our laws, in my opinion, would have the right to preclude the teaching of geography. That is—

State Not Heathen.

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

Gen. Stewart—It does not mention the Koran.

Mr. Malone—Does not it prefer the Bible to the Koran?

Gen. Stewart—We are not living in a heathen country.

Mr. Malone—Will you answer my question? Does not it prefer the Bible to the Koran?

Gen. Stewart—We are not living in a heathen country, so how could it prefer the Bible to the Koran? You forced me then, in advance of the matter I am arguing now, to get down to the absolute basis of the proposition that it is the exercise of the police power; that is the question that is involved. That is what it must turn on.

Mr. Malone—The improper exercise—

Gen. Stewart—The improper exercise of the police power and dictation of what should be taught in the public schools?

Mr. Malone—Yes, sir.

Gen. Stewart—Do you say teaching the Bible in the public school is a religious matter?

Mr. Malone—No. I would say to base a theory set forth in any version of the Bible to be taught in the public school is an invasion of the rights of the citizen, whether exercised by the police power or by the legislature.

Gen. Stewart—Because it imposes a religious opinion?

Mr. Malone—Because it imposes a religious opinion, yes. What I mean is this: If there be in the state of Tennessee a single child or young man or young woman in your school who is a Jew, to impose any course of science a particular view of creation from the Bible is interfering, from our point of view, with his civil rights under our theory of the case. That is our contention.

Gen. Stewart—Mr. Malone, could not he go to school on Friday and study what is given him by the public school; then on Sunday study his Bible?

Mr. Malone—No, he should be given the same right in his views and his rights should not be interfered with by any other doctrine.

Gen. Stewart—It is not an invasion of a man's religious rights. He can go to church on Sunday or any other day that there might be a meeting, and worship according to the dictates of his conscience. It is not an invasion of a man's religious liberty or an invasion of a man's religious rights. That question cannot determine this act. It is a question of the exercise of the police power. That is what it is, and nothing else, and if they undertake to pass an act to state you shall not teach a certain Bible or theory of anything in your churches, an invasion of a private or civil act, 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. It is an effort on the part of the legislature to control and direct the expenditure of state funds, which they have the right to do. It is an effort on the part of the legislature to control the public school system, which they have the right to do.

Insists it is Question of Police Power.

Gen. Stewart—That question cannot determine this act. It is a question of the exercise of the police powers of the state; that is what it is and nothing else, and if they undertake to pass an act saying you cannot teach the Bible or any certain book in any of your Bibles, that is an invasion of civil rights and that would interfere with their rights under the constitution. But this is a statement on the part of the legislature of the state of Tennessee, which directs the expenditure of the school funds of the state, and this is an act requiring that their money shall not be expended in teaching theories that contradict the Bible. It is an effort on the part of the legislature to control the expenditure of state funds, which it has the right to do. It is within the province of the legislature to control the public schools of the state. This is not an invasion of individual rights, nor of the right of worship in the different churches. If they taught there anything that conflicts with this act it would not prohibit attendance at such a church. That is not what it restricts, nor does it undertake to control one's conscience. I have gotten ahead of their assignment, however. Another question is as to the violation of Section 19, Article 1, of the constitution of Tennessee, as to the freedom of speech, the printing press, etc. From the formation of this Union, one of the inalienable rights of a citizen has been the right to speak freely on any subject. Being responsible, however, for the abuse of that privilege, or to prosecution, for the publication in papers investigating men in a public capacity, and by indictment for libel, where a jury shall have the right to determine under the law and the facts, under the direction of the court, as in any other criminal case. Now this assignment under freedom of speech, Dr. Neal insists upon. Under that question, I say, Mr. Scopes might have taken his stand on the street corners and expounded until he became

hoarse, as a result of his effort and we could not interfere with him; but he cannot go into the public schools, or a school house, which is controlled by the legislature and supported by the public funds of the state and teach this theory. Under the exercise or the police power, we should have a right to object to it. The legislature has a right to control that. Now if your honor please, Mr. Hays said this morning, by way of injecting a little fun into this matter, I presume, what he conceived to be an act, the equal in viscious qualities to this, and prescribing the death penalty upon any man who might undertake to teach a certain theory or system—as to the earth being round I believe he said; I forget which it was.

Mr. Hays—Round. Round in our city.

Gen. Stewart—How is that? Round in your city? You must live on a hillside. Is it round in New York?

Mr. Hays—All round.

Gen. Stewart—The inference was that this act was absurd to him as an act carrying the death penalty for teaching a theory in contravention of what modern science claimed as a natural and well-known proposition. I presume that under this right to regulate liberty and freedom of thought and freedom of speech, that Mr. Hays would insist that the court should construe the act at bar in this manner—without reflecting, if Your Honor please, on Your Honor, or anybody—that the court in ruling on this would say. (Reading.)

Law of the Land.

"Law of the land and due process of law have been defined to mean one and the same thing. The law of the land as Daniel Webster has said, is the general law, which hears before it condemns, and proceeds upon inquiry before it renders judgment, and after hearing. The law of the land applies to all amendments, with certain restrictions." No property right is involved in the right of a man to teach in a public school. We come again to the proposition of the exercise of the police power of the state. A man has no vested right, he has no civil right, he has no inherent right, and no right that he can claim as a property right, as a teacher in a public school, except those which are subject to the control of the legislature. So there can be no serious contention there, if Your Honor please; that is a right that is subject to the constitution and subject to the acts of the legislature in the exercise of the police powers.

Darrow Says Statute is Void.

Mr. Darrow—No person shall be put to answer a criminal charge but by presentment or by indictment.

Gen. Stewart—What particular section do you mean there? Section 14, Article 1 of the constitution is as follows:

"Crimes punished by presentment, etc. That no person shall be put to answer any criminal charge, except—

Mr. Darrow—We mean indictment.

Gen. Stewart—Except by presentment, indictment or impeachment. The two things are void. The whole indictment?

Mr. Darrow—Yes, sir. It doesn't state any crime.

Gen. Stewart—It would void the statute, would it?

Mr. Darrow—We claim the statute is void; and that it is based on those two grounds.

The Court—That the statute is too meager, they claim, General. I think, and therefore, that the indictment is too meager.

Mr. Neal—That under this law it is not possible to draw an indictment, and therefore this defendant was being tried without indictment.

Gen. Stewart—The wording of the indictment complies with the wording of the statute. In such a case it is generally held to be good.

The Court—As I understand, general, after disposing of the statute they say there is no indictment.

Mr. Darrow—On both grounds, Your Honor.

Gen. Stewart—There is no way of discussing them without discussing them together.

The Court—Of course the indictment could not be more comprehensive than the statute, and if the statute is too meager therefore, the indictment would be too meager.

Gen. Stewart—And if the statute is good the indictment is good.

Mr. Darrow—We claim that the indictment should set out what the offense was—what the doctrine was—what his version of the doctrine was.

Gen. Stewart—Undertake to set out the full and complete doctrine?

Mr. Darrow—Yes.

Gen. Stewart—I do not understand that to be the law. It would be impossible to frame an indictment properly under that, and no indictment can be presented. An indictment must state facts, and not conclusions of law. Of course there is no conclusions of law stated here. An indictment must charge the crime with certainty and show such facts and circumstances as constitute the crime; a mere statement of conclusion on the law, is sufficient. The law says it shall be a violation of the law for a man in our public schools to teach a theory that denies the divine theory of creation and that man descends from a lower order of animals. The indictment complies with the wording of the statute in toto. If the statute is good, then the indictment must be good. Now, if Your Honor please, they say it is too vague; he does not know what he is charged with. We must set out in our indictment that he taught Little Johnnie Jones that a man is descended from a monkey, a gorilla, or what not, and told him this in the following words, to-wit: It is not necessary that we state all that; it is sufficient under our law that he may know what he is charged to answer. This indictment says that John Scopes, on such and such a date, taught a theory denying the divinity of Christ and that man is descended from a lower order of animals. He is notified sufficiently under this what he is here to defend. That is all that is necessary and all that is required under our law.

In Harris vs. State, in 71 Tennessee, Page 326—

Mr. Darrow—71 Tennessee?

Gen. Stewart—At page 326. In that case it is held that the words of the statute must be followed, or otherwise the defendant might be charged with one offense and convicted of another.

By our code, Section 5117, only such a degree of certainty is required as will enable the court who sits on it, to form judgment, and they comment, less strictness. As has always been held in this state—it has always been held in this state, that less strictness is required in indictments for misdeameanors than in felonies. That is from Section 5117, that is where they require that only such degree of certainty is required as will enable the court to pronounce judgment upon conviction. That the section is based upon that same section of the constitution.

All that is necessary under both of them is that the defendant may know what he is charged with and that the court may intelligently pronounce judgment upon conviction. That is all that is required, and that, in my opinion, makes it entirely sufficient. I see no reason why this indictment is too vague. If we had charged John Scopes with unlawfully teaching in the public schools of Rhea county and said no more, then, certainly, he would not be upon notice with what he has was charged to come here and defend. But we say that he has unlawfully taught a theory that denies the story of divine creation and has taught instead that man descended from a lower order of animals, and what could be plainer? What is there vague and indefinite and uncertain about that? You did not prepare a brief here to defend him on a charge of arson, did you? He is not here for transporting liquor, and he knows it. He is here for teaching a theory that denies the

story of divine creation and that, if Your Honor please, is sufficient. The act is sufficient to notify him what he is charged with, and therefore the indictment is sufficient, and it complies with the requirements of the law. And when it meets that requirement, and the further requirement that it is sufficient for the court to know to be able to render judgment upon conviction. The next is Article 8, Section 11, general laws, only to be passed. "The legislature shall have no power to suspend any general law for the benefit of any particular individual inconsistent with the general laws of the land, nor to pass any law granting to any individual or individuals right, 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 provision of such law. No corporation shall be created or its general powers increased or diminished by special law; but the general assembly shall provide by general law, for the organization of all corporations hereafter created which laws may, at any time, be altered or repealed; and no such alterations or repeal shall interfere with or divest rights which have become vested."

I don't see that there is anything in that assignment to discuss. One observation, however, I have discussed in discussing this sufficiency of the indictment—it was suggested in conversation between Mr. Darrow and myself that if a man is indicted for murder, he cannot simply be indicted for the unlawful murder of another—as Mr. Darrow says he must be told or he must be accused of murdering some particular man who must be named in the indictment. That is true as a matter of common sense. That is true as a matter of construction of our murder statute. It is true our murder statute says it shall be unlawful for any person to kill any reasonable creature in being. And, of course, you have to name who is killed.

(Reading) In that the act violates Section 2, Article 2 of the constitution of Tennessee. "No person to exercise power of more than one department."

Judge Chases Photographers.

The Court—Gentlemen, the jury will not be sworn this afternoon, and you photographers will have to move out.

Gen. Stewart—You might let the officers dismiss them for the day?

The Court—Yes. Let the jury go home, Mr. Officer?

Gen. Stewart—The next assignment, if the court please, is that no person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted.

Mr. Darrow—We are not going to argue that.

Gen. Stewart—We will just strike that then. They say they do not reply on the next assignment—Section 2, Article 2 of the constitution.

Mr. Neal—We do not insist on it.

Mr. Darrow—Oh, we don't care.

Mr. Stewart—Let's strike it then?

Mr. Neal—All right.

Gen. Stewart—They are willing that that be stricken. The next is, the indictment—

Mr. Darrow—Will you tell me what that is, to be sure?

Gen. Stewart—Under (j) Section 2, Article 2. The next is that the indictment is so vague as not to inform the defendant of the nature and cause of the accusation against him. I have already argued that. The next is that the statute is void. I have already argued that. And void for indefiniteness and uncertainly. And the next assignment is the only one, if Your Honor please—is the principal one, I think on which this case rests. It is the Fourteenth Amendment to the United States constitution, and that and the other—that and the constitution of Tennessee—raising the same questions are the ones that I think the case must terminate on. (Reading).

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, as citizens of the United States and of the state wherein they reside. 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."

One Serious Contention.

Now, on that assignment, if the court please, comes the discussion of the exercise of police powers, and that assignment, I think, is the only one your honor which might be seriously considered. In the consideration of this assignment, I have made careful search of authorities, and while I have found much law in favor of the state's position, there are particularly two or three cases from which we shall quote, and largely, these are derterminative of the issues here. The case of Meyer vs. The State of Nebraska, which is reported in the supreme court reports, lawyers' edition, is a case recently decided by the supreme court of the United States, and in that we have an act of that state—Nebraska—which prohibited the teaching in any of the schools of that state—not just the public schools, but all schools—any language other than the English language to any pupil under the eighth grade. The supreme court held that act unconstitutional. They said that it contravened that it was an abridgement of the right—that it invaded the right of property, that it was unconstitutional on account of the Fourteenth Amendment. They hold in substance that the school teacher was deprived of the right to pursue his lawful occupation to teach German in the private and parochial schools of that state. And here is in part what they said.

The Court—Have you a copy of the opinion?

Gen. Stewart—Yes, sir; I have the book at the office. Further in deciding the case the court said, in part:

"The problem for our determination is whether the statute is construed to apply and unreasonably infringes the liberty granted by the Fourteenth Amendment." They pass directly upon this question. "While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration, and some of the included things has 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. Plaintiff in error taught this language in school as a part of his occupation—his right to thus teach and the right of parents to engage him, we think are within the liberty of the amendment."

Thus the line is drawn and in deciding the case, the supreme court held that this law was unconstitutional, but we call the court's especial attention that the court held it was unconstitutional because it affected all the schools—not only the public schools, but the private schools and in this connection we call the court's special attention to the comment of the supreme court in this opinion at the conclusion of the same, and just before decision. "The power of the state to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instruction in English is not questioned. Nor has challenge been made of the state's power to prescribe a curriculum for institutions which it supports. Those matters are not within the present controversy."

That is the very crux of this lawsuit. That is absolutely the question involved here, if Your Honor please. And the case of Leeper against the state of Tennessee—on this case, and the case of Leeper against the state of Tennessee we are willing to risk our rights.

The Court—That is the Nebraska case?

Nebraska Case Cited.

Gen. Stewart—Yes, sir.

The opinion in the Nebraska case says, "nor has challenge been made of the state's power to prescribe a curriculum for institutions which it supports." Here in Rhea county is a high school erected, supported and maintained by the public treasury, by the school fund that is taken from that treasury—by the money that is paid into the court from the pockets of the taxpapers of Rhea county and of the state of Tennessee. Isn't that a school that is supported by the state? And the supreme court of the United States says, "Nor has challenge been made of the state's power to prescribe a curriculum for institutions which it supports."

How much stronger could they make the language? How much more, Your Honor, would we have them say than to recognize the right of the state of Tennessee to direct and control the curriculum in the Rhea County High School. That is the question. I think that is settled; that is the highest tribunal of our nation speaking.

I want to cite 7 Mellory, 240, the Indiana case which holds, in substance, that the regulation of public schools is a set matter exclusively within the dominion of the legislature.

There are a great many authorities along this line shedding light over different angles. But, your honor, I think it is sufficient here for the state, insofar as anything else I might have to say here is concerned, to rightly, wholly and entirely in accord with what I have already said upon the case of the state of Tennessee vs. Leeper, that one from Blount county.

The Court—Have you the book?

Gen. Stewart—Yes, Your Honor. Your Honor, the case in Oregon, recently decided, in which Justice McReynolds also rendered the opinion, is at one with the Nebraska case.

The Court—Have you the opinion?

Gen. Stewart—Yes, sir.

The Court—I wish you would preserve that.

Gen. Stewart—It holds the same as the Indiana case which I just referred to, Your Honor.

Now, if Your Honor please, I prefere to read this Leeper case to the court.

The Court—I wish you would read the entire case if it is not too long.

Mr. Darrow—I guess he can state it in a minute. Take as long as you want, though.

Mr. Stewart—This is 103 Tennessee, 504. The defendant was convicted of violating the uniform text book law and sentenced to pay a cost of $10. I will not read the indictment.

Mr. Darrow—Is that what you want to go into?

Gen. Stewart—You may read it if you care to. On this same question. (Reading from the State of Tennessee, 103, 504, Edward Leeper vs. State of Tennessee, the defendant, a public school teacher, beginning with the words, "did unlawfully use and permit to be used," etc., to "prescribed the terms upon which it may be done in the interest of the citizen.")

Gen. Stewart—Then they discuss the question of monopoly, and whether they have a right to make this restriction upon the publishers of these books. Then, going further into the question, the question of police power, they say: (Reading beginning with "It is said that the schools do not belong to the state," and ending with words "best interest of the citizens will be conserved.")

They come back upon that question, I thought I had gotten beyond that question.

(Reading beginning with words "We are of the opinion" and ending with words "prevent benefit from book dealers.")

Now, if Your Honor please, they wind up here with further remarks along that line, but they adopt the opinion there, as I just finished reading, and they say in State vs. Hawer, that the control of the public school system must be lodged

somewhere, and where is a better place to lodge it than in the general assembly, composed of men from the different counties of the state, men who represent a certain standard in their legislative and senatorial district; men who are responsible to their constituency, to the citizens of Tennessee for the acts that they commit.

Here is a uniform system of public schools in the state of Tennessee. Who has the right to control it? If the legislature should not have the right to control them, then who ought to have the right to control them. Who may say what books shall be taught or what books shall not be taught; who has that right? The legislature has that right. If they don't have it, who could have it? Where could the power be lodged? Where in the state of Tennessee could you lodge a central power to control the uniform system, if the court please? I think the case of Leeper vs. State settled that question beyond peradventure of a doubt, and that it settles it definitely. I think it says that case construed with the case of the U. S.—I have forgotten the style of it—

The Court—Nebraska?

Gen. Stewart—Nebraska case. construed with that case, Your Honor. I think it is as plain as it can be possibly made that in the exercise of its police power the state legislature has the right to execute a uniform law regarding the uniform system of public schools. Who then has a right to control, who then has the right to control the management of these public schools, and they have a right to name the curriculum for each and every one of these public schools, because they have a right to control the system.

They do it in the exercise of their police power and the court will not refute this except as to where it is shown that there is an abuse of this power. It must be a reasonable use, and the reason is the one test, the only test that can be applied to it. And reason is the test we would want to apply to it, and we are willing that the test of reason be applied to it.

This, if the court please, the constitutionality of this act—the question is important that they have no right, that it is an abridgement of rights.

Your Honor, just a few more words.

The Police Officer—No, no talking in the courtroom.

Gen. Stewart—Your Honor, just a few more words and I am through.

Charges Attack on Legislature.

Attack is made upon the right of the legislature to pass such an act. The question has been made that it abridges the right of religious liberty; that it is an intervention of that section of the constitution. Much more might be said about it. I could make, in a very short time, a speech about it, but that is unnecessary and perhaps foolish; it would be sufficient to say that I believe, Your Honor, that this is important upon a construction of the constitution as to whether or not the state was, in the exercise of its police power, as to the right to control the curriculum in the public schools. The question on the invasion of religious liberty is not even raised in the case of the State vs. Marbury, the Nebraska case, where they passed a law you could not teach except in the English language. There is no question there in the violation of that part of the constitution. No question was made in that case. No question was made in the Leeper case it is an invasion if the court please, of any religious liberty, and they inject it into this case only because the Bible is mentioned.

Now, what is the difference? If the state has a right in the exercise of its police power to say you cannot teach Wentworth's arithmetic or Fry's geography, it has the same right to say you cannot teach any theory that denies the divine creation of man. This is true because the legislature is the judge of what shall be taught in the public schools and that is the reason it is true. Police power, the exercise of po-

lice power, the phrase which no man under God's shining sun has ever undertaken to define, what does it mean.

You might talk from now until doomsday and you could not define it; it passes down to the sound discretion of the legislature. They have a right to say and no one else has a right to say, and I say, Your Honor, that in the passage of this act the legislature abused no discretion, but used only the reasonable means at hand; they exercised a lawful and legal right that was given them by the constitution, the police power of the state, and I say that they were within their right, and I say that any effort to place any other construction upon this, or to invalidate any other part of the constitution, is an effort to becloud the true issues in the case.

Mr. Hayes—May I ask you a question?

Gen. Stewart—Yes, sir.

Hays Asks How Scopes Got Book.

Mr. Hayes—Did the state, under the power you have referred to, prescribe the book which Mr. Scopes taught in the schools?

Gen. Stewart—Did they do what?

Mr. Hays—Did the state, under the power you have referred to, prescribe the book which Mr. Scopes taught from, the manual that he was teaching from?

Gen. Stewart—There is no act on that, as I understand it.

Mr. Hayes—I thought you just stated that the state prescribed the school books; did they prescribe the school book that Mr. Scopes was using?

Gen. Stewart—I said they had a right to.

Mr. Hayes—Did they exercise that right?

Mr. Malone—How did he get the book we mean, was it given to him by the state.

Gen. Stewart—That is a matter of proof; we are prepared to show that; do you want to put me on the witness stand?

Mr. Malone—No. I would like to—

(Laughter in the courtroom.)

The Court—We will take a few minutes recess.

(Thereupon a short recess was taken.)

Mr. Darrow—Shall I proceed?

The Court—I will hear you, Colonel.

Mr. Darrow—If the court please.

The Court—Have order in the courtroom. Get seats.

Mr. Darrow—I know my friend, McKenzie, whom I have learned not only to admire, but to love in our short acquaintance, didn't mean anything in referring to us lawyers who come from out of town. For myself, I have been treated with the greatest courtesy by the attorneys and the community.

The Court—No talking, please, in the courtroom.

Darrow Given Title.

Mr. Darrow—And I shall always remember that this court is the first one that ever gave me a great title of "Colonel" and I hope it will stick to me when I get back north.

The Court—I want you to take it back to your home with you, colonel.

Darrow's Speech—Holds Bryan Responsible.

Mr. Darrow—That is what I am trying to do.

But, so far as coming from other cities is concerned, why, Your Honor, it is easy here. I came from Chicago, and my friend, Malone, and friend Hays, came from New York, and on the other side we have a distinguished and very pleasant gentleman who came from California and another who is prosecuting this case, and who is responsible for this foolish mischievous and wicked act, who comes from Florida.

This case we have to argue is a case at law, and hard as it is for me to bring my mind to conceive it, almost impossible as it is to put my mind back into the sixteenth century, I am going to argue it as if it was serious, and as if it was a death struggle between two civilizations.

Let us see, now what there is about it. We have been informed that the legislature has the right to prescribe the course of study in the public schools. Within reason, they no doubt have, no doubt. They could not prescribe it, I am inclined to think, under your constitution, if it omitted arithmetic and geography and writing, neither under the rest of the constitution if it shall remain in force in the state, could they prescribe it if the course of study was only to teach religion, because several hundred years ago, when our people believed in freedom, and when no men felt so sure of their own sophistry that they were willing to send a man to jail who did not believe them. The people of Tennessee adopted a constitution, and they made it broad and plain, and said that the people of Tennessee should always enjoy religious freedom in its broadest terms, so I assume, that no legislature could fix a course of study which violated that. For instance, suppose the legislature should say, we think the religious privileges and duties of the citizens of Tennessee are much more important than education, we agree with the distinguished governor of the state, if religion must go, or learning must go, why, let learning go. I do not know how much it would have to go, but let it go, and therefore we will establish a course in the public schools of teaching that the Christian religion as unfolded in the Bible, is true, and that every other religion, or mode or system of ethics is false and to carry that out, no person in the public schools shall be permitted to read or hear anything except Genesis, Pilgrims Progress, Baxter's Saint Rest, and In His Image. Would that be constitutional? If it is, the constitution is a lie and a snare and the people have forgot what liberty means.

I remember, long ago, Mr. Bancroft wrote this sentence, which is true: "That it is all right to preserve freedom in constitutions, but when the spirit of freedom has fled, from the hearts of the people, then its matter is easily sacrificed under law." And so it is, unless there is left enough of the spirit of freedom in the state of Tennessee, and in the United States, there is not a single line of any constitution that can withstand bigotry and ignorance when it seeks to destroy the rights of the individual; and bigotry and ignorance are ever active. Here, we find today as brazen and as bold an attempt to destroy learning as was ever made in the middle ages, and the only difference is we have not provided that they shall be burned at the stake, but there is time for that, Your Honor, we have to approach these things gradually.

If This Law Holds—Reverts to Wicked Ancient Laws.

Now, let us see what we claim with reference to this law. If this proceeding both in form and substance, can prevail in this court, then Your Honor, no law—no matter how foolish, wicked, ambiguous, or ancient, but can come back to Tennessee. All the guarantees go for nothing. All of the past has gone, will be forgotten, if this can succeed.

I am going to begin with some of the simpler reasons why it is absolutely absurd to think that this statute, indictment, or any part of the proceedings in this case are legal, and I think the sooner we get rid of it in Tennessee the better for the peace of Tennessee, and the better for the pursuit of knowledge in the world, so let me begin at the beginning.

Let us take this statute as it is, the first point we made in this suit is that it is unconstitutional on account of the divergence and the difference between the statute and the caption, and because it contains more than one subject. Now, my distinguished friend was quite right, every constitution with which I am familiar has substantially this same provision, that the caption and the law must correspond. He is right in his reason. Why? Lots of things are put through in the night-time. Everybody does not read all of the statutes, even members of the legislature—I have been a member of the legislature myself,

and I know how it is—they may vote for them without reading them, but the substance of the act is put in the caption, so it may be seen and read, and nothing can be in the act that is not contained in the caption. There is not any question about it, and only one subject shall be legislated on at once. Of course the caption may be broader than the act. My friend is entirely right about it. They may make a caption and the act may fall far short of it, but the substance of the act must be in the caption, and there can be no variance. Now, Your Honor, that is elementary, nobody need to brief on that, it is a sufficient brief to read the constitution, that one section, it is very short.

Now, let us see what they have done, there is not much dispute about the English language, I take it, here is the caption, "Public act, Chapter 37, 1925. An act prohibiting the teaching of the evolution theory in all the universities, normals and all the public schools of Tennessee which are supported in whole or in part by the public school funds of the state, and to prescribe penalties for the violation thereof."

Now what is it, an act to prohibit the teaching of the evolution theory in Tennessee? Well, is that the act? Is this statute to prevent the teaching of the evolution theory? There is not a word said in the statute about evolution, there is not a word said in the statute about preventing the teaching of the theory of evolution—not a word. This statute contains nothing whatever in reference to teaching the theory of evolution in the public schools of Tennessee. And, Your Honor, the caption contains nothing else—nothing else. Does the caption say anything about the Bible? Oh! no, does it say anything about the divine account contained in the Bible? Oh! no. If a man was interested in the peace and harmony and welfare of the citizens of Tennessee, if he was interested in intellectual freedom and religious freedom, if he was interested in the right to worship God as he saw fit, but he found out that chaos and disorder and riot could follow in the wake of this caption, and he found out that every religious prejudice inherent in the breast of man could be appealed to, by the law, the legislature was about to pass—there is not a single word in it. This caption says what follows is an act forbiding the teaching of evolution, and the Catholic could have gone home without any thought that his faith was about to be attacked, the Protestant could have gone home without any thought that his religion could be attacked, the intelligent scholarly Christian, who by the millions in the United States, find no inconsistency between evolution and religion, could have gone home without any fear that a narrow, ignorant, bigoted shrew of religion could have destroyed their religious freedom and their right to think and act and speak, and the nation and the state could have laid down peacefully to sleep that night without the slightest fear that religious hatred and bigotry was to be turned loose in a great state. Any question about it? Anything in this caption whatever about religion, or anything about measuring science and knowledge and learning by the book of Genesis, written when everybody thought the world was flat? Nothing. They went to bed in peace, probably, and they woke up to find this, which has not the slightest reference to it, which does not refer to evolution in any way, which is as claimed a religious statute, the growth of as plain religious ignorance and bigotry as any that justified the Spanish inquisition or the hanging of the witches in New England, or the countless iniquities under the name of what some people called religion, and persued the human race down to the last hundred years. That is what they found, and here is what it is: "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 in the state, which are supported in whole or in part by the public school funds of the state, to teach" —what, teach evolution? Oh! no—"to teach the 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." That is what was foisted on the people of this state, under a caption which never meant it, and could give no hint of it, that it should be a crime in the state of Tennessee to teach any theory of the origin of man, except that contained in the divine account as recorded in the Bible. But the state of Tennessee under an honest and fair interpretation of the constitution has no more right to teach the Bible as the divine book than that the Koran is one, or the book of Mormons, or the book of Confucius, or the Budda, or the Essays of Emerson, or any one of the 10,000 books to which human souls have gone for consolation and aid in their troubles. Are they going to cut them out? They would have to pick the right caption at least, and they could not pick it out without violating the constitution, which is as old and as wise as Jefferson.

Certainly Violates Constitution.

Your Honor, there can be no sort of question, I submit, as a lawyer, I may be wrong, I have been wrong before—there is no more question that this violates the constitution in its provisions. The caption must state the substance and meaning of the act, and the act can contain nothing excepting the substance of the caption; and there be no more question about it than that two and two make four. They will have to arrange their cohorts and come back for another fight if the courts of Tennessee stand by their own constitution, and I presume they will.

It is binding on all the courts of Tennessee and on this court among the rest, and it would be a travesty that a caption such as this and a body such as this is woud be declared valid law in the state of Tennessee. So much for that. Now, as to the statute itself. It is full of weird, strange, impossible and imaginary provisions. Driven by bigotry and narrowness they come together and make this statute and bring this litigation. I cannot conceive anything greater.

What is this law? What does it mean? Help out the caption and read the law. "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 the public schools in the state which are supported in whole or in part by public school funds of the state, to teach any theory that denies the conception of the divine creation of man as put in the Bible and teach in its stead that man is descended from a lower order of animal."

The statute should be comprehensible. It should not be written in Chinese anyway. It should be in passing English. As you say, so that common, human beings would understand what it meant, and so a man would know whether he is liable to go to jail when he is teaching not so ambiguous as to be a snare or a trap to get someone who does not agree with you. It should be plain, simple and easy. Does this statute state what you shall teach and what you shall not? Oh, no! Oh, no! Not at all. Does it say you cannot teach the earth is round? Because Genesis says it is flat? No. Does it say you cannot teach that the earth is millions of ages old, because the account in Genesis makes it less than six thousand years old? Oh, no. It doesn't state that. If it did you could understand it. It says you shan't teach any theory of the origin of man that is contrary to the divine theory contained in the Bible.

No Legislature Can Say What is Divine—Discusses Bible.

Now let us pass up the word "divine!" No legislature is strong enough in any state in the Union to characterize and pick any book as being divine. Let us take it as it is. What is the Bible? Your Honor,

I have read it myself. I might read it more or more wisely. Others may understand it better. Others may think they understand it better when they do not. But in a general way I know what it is. I know there are millions of people in the world who look on it as being a divine book, and I have not the slightest objection to it. I know there are millions of people in he world who derive consolation in their times of trouble and solace in times of distress from the Bible. I would be pretty near the last one in the world to do anything or take any action to take it away. I feel just exactly the same toward the religious creed of every human being who lives. If anybody finds anything in this life that brings them consolation and health and happiness I think they ought to have it whatever they get. I haven' any fault to find with them at all. But what is it? The Bible is not one book. The Bible is made up of sixty-six books written over a period of about one thousand years, some of them very early and some of them comparatively late. It is a book primarily of religion and morals. It is not a book of science. Never was and was never meant to be. Under it there is nothing prescribed that would tell you how to build a railroad or a steamboat or to make anything that would advance civilization. It is not a textbook or a text on chemistry. It is not big enough to be. It is not a book on geology; they knew nothing about geology. It is not a book on biology; they knew nothing about it. It is not a work on evolution; that is a mystery. It is not a work on astronomy. The man who looked out at the universe and studied the heavens had no thought but that the earth was the center of the universe. But we know better than that. We know that the sun is the center of the solar system. And that there are an infinity of other systems around about us. They thought the sun went around the earth and gave us light and gave us night. We know better. We know the earth turns on its axis to produce days and nights. They thought the earth was created 4,004 years before the Christian Era. We know better. I doubt if there is a person in Tennessee who does not know better. They told it the best they knew. And while suns may change all you may learn of chemistry, geometry and mathematics, there are no doubt certain primitive, elemental instincts in the organs of man that remain the same, he finds out what he can and yearns to know more and supplements his knowledge with hope and faith.

Bible is in Province of Religion—Accounts of Creation Conflict.

That is the province of religion and I haven't the slightest fault to find with it. Not the slightest in the world. One has one thought and one another, and instead of fighting each other as in the past, they should support and help each other. Let's see now. Can your Honor tell what is given as the origin of man as shown in the Bible? Is there any human being who can tell us? There are two conflicting accounts in the first two chapters. There are scattered all through it various acts and ideas, but to pass that up for the sake of argument no teacher in any school in the state of Tennessee can know that he is violating a law, but must test every one of its doctrines by the Bible, must he not? You cannot say two times two equals four or a man an educated man if evolution is forbidden. It does not specify what you cannot teach, but says you cannot teach anything that conflicts with the Bible. Then just imagine making it a criminal code that is so uncertain and impossible that every man must be sure that he has read everything in the Bible and not only read it but understands it, or he might violate the criminal code. Who is the chief mogul that can tell us what the Bible means? He or they should write a book and make it plain and distinct, so we would know. Let us look at it. There are in America at least five hundred different sects or churches, all of which quarrel with each other and

the importance and nonimportance of certain things or the construction of certain passages. All along the line they do not agree among themselves and cannot agree among themselves. They never have and probably never will. There is a great division between the Catholics and the Protestants. There is such a disagreement that my client, who is a school-teacher, not only must know the subject he is teaching, but he must know everything about the Bible in reference to evolution. And he must be sure that he expresses his right or else some fellow will come along here, more ignorant perhaps than he and say, "You made a bad guess and I think you have committed a crime." No criminal statute can rest that way. There is not a chance for it, for this criminal statute and every criminal statute must be plain and simple. If Mr. Scopes is to be indicted and prosecuted because he taught a wrong theory of the origin of life why not tell him what he must teach. Why not say that you must teach that man was made of the dust; and still stranger not directly from the dust, without taking any chances on it, whatever, that Eve was made out of Adam's rib. You will know what I am talking about.

No Man Could Obey Law—No Court Could Enforce It

Now my client must be familiar with the whole book, and must know all about all of these warring sects of Christians and know which of them is right and which wrong, in order that he will not commit crime. Nothing was heard of all that until the fundamentalists got into Tennessee. I trust that when they prosecute their wildly made charge upon the intelligence of some other sect they may modify this mistake and state in simple language what was the account contained in the Bible that could not be taught. So, unless other sects have something to do with it, we must know just what we are charged with doing. This statute, I say, your Honor, is indefinite and uncertain. No man could obey it, no court could enforce it and it is bad for in-definiteness and uncertainty. Look at that indictment up there. If that is a good indictment I never saw a bad one. Now, I do not expect, your honor, my opinion to go because it is my opinion, because I am like all lawyers who practice law; I have made mistakes in my judgment of law. I will probably make more of them. I insist that you might just as well hand my client a piece of blank paper and then send the sheriff after him to jail him. Let me read this indictment.

Reads from Newspaper

I am reading from a newspaper. I forget what newspaper it was, but am sure it was right: "That John Thomas Scopes on April, 1925, did unlawfully and willfully teach in the public schools of Rhea County, Tennessee, which public schools are supported in part and in whole —" I don't know how that is possible, but we will pass that up—"In part or in whole by the public school funds 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 is descended from a lower order of animals." Now, then there is something that is very elementary. That is one of them and very elementary, because the constitutions of Tennessee provides and the constitution of pretty near every other state in the United States provide that an indictment must state in sufficient terms so that a man may be appraised of what is going to be the character of charge against him. Tennessee said that my friend the attorney-general says that John Scopes knows what he is here for. Yes, I know what he is here for, because the fundalmentalists are after everybody that thinks. I know why he is here. I know he is here because ignorance and bigotry are rampant, and it is a mighty strong combination, your Honor, it makes him fearful. But the state is bringing him here by indictment, and several things must be stated in the indictment; indictments must state facts, not law nor conclusions

of law. It is all well enough to show that the indictment is good if it charges the offense in the language of the statute. In our state of Illinois, if one man kills another with malice aforethought, he would be guilty of murder, but an indictment would not be good that said John Jones killed another. It would not be good. It must tell more about it and how. It is not enough in this indictment to say that John Scopes taught something contrary to the divine account written by Moses—maybe—that is not enough. There are several reasons for it. First, it is good and right to know. Secondly, after the shooting is all over here and Scopes has paid his fine if he can raise his money, or has gone to jail if he cannot, somebody else will come along and indict him over again. But there is one thing I cannot account for, that is the hatred and the venom and feeling and the very strong religious combination. That I never could account for. There are a lot of things I cannot account for. Somebody may come along next week and indict him again, on the first indictment. It must be so plain that a second case will never occur. He can say to him, "I have cleared that off."

No Other Indictment Like This One

He can file a plea that he has already been put in jeopardy and convicted and paid the fine, so you cannot do it over again. There is no quesion about that, your Honor, in the slightest and the books are full of them. I have examined, I think all the criminal cases in Tennessee on this point. I don't like to speak with too much assurance, because sometimes you get held up on such a thing, but I assume that if they have got anything on the other side I would have heard from them, and I have, with the aid of my assistants and helpers, they doing most of the work, I have examined most all of them, and if there is another indictment in Tennessee like it I haven't found it, and plenty of indictments have been declared void in Tennessee because they did not tell us anything—plenty of them. I do not think there ever was another one like it in Tennessee, and I am not referring to the subject matter now because I know there never was, as far as the subject matter goes, but I am speaking of the form of it. Now, Mr. Scopes, on April 24 did unlawfully and wilfully teach in a public school of Rhea county, Tennessee, which public school is supported in whole or in part by the public school fund of the state, certain theories that deny the story of the divine creation of man. What did he teach? What did he teach? Who is it that can tell us that John Scopes taught certain theories that denied the story of the divine—the divine story of creation as recorded in the Bible. How did he know what textbooks did he teach from? Who did he teach? Why did he teach? Not a word—all is silent. He taught, oh yes, the place mentioned is Rhea county. Well, that is some county—Maybe all over it, I don't know where he taught, he might have taught in a half a dozen schools in Rhea county on the one day and if he is indicted next year after this trial is over, if it is, for teaching in District No. 1, in Rhea county, he cannot plead that he has already been convicted, because this was over here in another district and at another place. What did he teach? What was the horrible thing he taught that was in conflict with Moses and what is it that is not in conflict with Moses? What shouldn't he have taught? What is the account contained in the Bible which he ignored, when he taught the doctrine of evolution which is taught by every—believed by every scientific man on earth. Joshua made the sun stand still. The fundamentalists will make the ages roll back. He should have been informed by the indictment what was the doctrine he should have taught and he should have been informed what he did teach so that he could prepare, without reading a whole book through, and without waiting for witnesses to testify—we should have been prepared to find out whether the thing he taught was in

conflict with the Bible or what the Bible said about it. Let me call attention, your Honor, to one case they have heralded here—I don't know why. I will refer to it later. Let me show you a real indictment, gentlemen, in case you ever need to draw another one. You don't mind a little pleasantry, do you? Here is the case we have heard so much about.

Leeper Case Again

Leeper vs. State. My fellow is a leper, too, because he taught evolution. I am going to discuss this case a moment later to show that it has nothing to do with the subject. This man was indicted because under the school book law of this state the commission had decided certain books should be taught, and amongst the rest they decided that Frye's geography should be taught. That any teacher that did not follow the law and taught something else should be fined $25. Of course, it wasn't so bad as to teach evolution, although the statute doesn't say anything about evolution. Now they indicted him and this is what they said in the indictment. This is their leading case. "The grand jury for the State of Tennessee, upon their oaths present that Edward Leeper, heretofore, to-wit: On the 5th day of October, 1899, in the state and county aforesaid, being then and there a public schoolteacher and teaching the public school known as school No. 5, Sixth district, Blount county"—they pick that out all right—"did unlawfully use and permit to be used in said public school, after the state textbook commission had adopted and prescribed for use in the public schools of the state Frye's introductory geography as a uniform textbook another and different textbook on that branch than the one so adopted aforesaid, to-wit: Butler's geography and the new Eclectic elementary geography against the peace and dignity of the state. Now, your honor, would that have been a good indictment, if they had left all that out and said he taught some book not authorized by the board? He has got a right to know what he taught and where he taught it and all the necessary things to convict him of crime. Your Honor, he cannot be convicted in this case unless they prove what he taught and where he taught it, and we have got a right to know all that before we go into court—every word of it. The indictment isn't any more than so much blank paper. I insist, your Honor, that no such indictment was ever returned before on land or sea. Some men may pull one on me, but I don't think so—I don't think so. You might just as well indict a man for being no good—and we could find a lot of them down here probably and if we couldn't I could bring them down from Chicago—but only a man is held to answer for a specific thing and he must be told what that specific thing is before he gets into court. The statute is absolutely void, because they have violated the constitution in its caption and it is absolutely uncertain—the indictment is void because it is uncertain, and gives no fact or information and it seems to me the main thing they did in bringing this case was to try to violate as many provisions of the constitution as they could, to say nothing about all the spirit of freedom and independence that has cost the best blood in the world for ages, and it looks like it will cost some more. Let's see what else we have got. This legislation—this legislation and all simliar legislation that human ingenuity and malice can concoct, is void because it violates Section 13, Section 12 and Section 3. I want to call attention to that, your Honor, Section 12 is the section providing that the state should cherish science, literature and learning. Now, your Honor, I make it a rule to try not to argue anything that I do not believe in, unless I am caught in a pretty close corner and I want to say that the construction of the attorney-general given to that, I think, is correct and the court added a little to it, which I think makes your interpretation correct for

what it is good for. It shows the policy of the state. It shows what the state is committed to. I do not believe that a statute could be set aside as unconstitutional simply because the legislature did not see fit to pass proper acts to enlighten and educate the yeomen of Tennessee.

Violates Right of Worship—Does Not Understand Religious Hatred

The state by constituion is committed to the doctrine of education, committed to schools. It is committed to teaching and I assume when it is committed to teaching it is committed to teaching the truth —ought to be anyhow—plenty of people to do the other. It is committed to teaching literaure and science. My friend has suggested that literature and science might conflict. I cannot quite see how, but that is another question. But that indicates the policy of the state of Tennessee and wherever it is used in construing the unconstitutionality of this act it can only be used as an indication of what the state meant and you could not pronounce a statute void on it, but we insist that this statute is absolutely void because it contravenes Section 3, which is headed "the right of worship free." Now, let's see, your Honor, there isn't any court in the world that can uphold the spirit of the law by simply upholding its letters. I read somewhere—I don't know where—that the letter killeth, but the spirit giveth life. I think I read it out of "The Prince of Peace." I don't know where I did, but I read it. If this section of the constitution which guarantees religious liberty in Tennessee cannot be sustained in the spirit it cannot be sustained in the letter. What does it mean? What does it mean? I know two intelligent people can agree only for a little distance, like a company walking along in a road. They may go together a few blocks and then one branches off. The remainder go together a few more blocks and another branches off and still further some one else branches off and the human minds are just that way, provided they are free, of course, the fundamentalists may be put in a trap so they cannot think differently if at all, probably not at all, but leave two free minds and they may go together a certain distance, but not all the way together. There are no two human machines alike and no two human beings have the same experiences and their ideas of life and philosophy grow out of their construction of the experiences that we meet on our journey through life. It is impossible, if you leave freedom in the world, to mold the opinions of one man upon the opinions of another—only tyranny can do it—and your constitutional provision, providing a freedom of religion, was meant to meet that emergency. I will go further—there is nothing else—since man—I don't know whether I dare say evolved—still, this isn't a school—since man was created out of the dust of the earth —out of hand—there is nothing else your Honor that has caused the difference of opinion, of bitterness, of hatred, of war, of cruelty, that religion has caused. With that, of course, it has given consolation to millions.

But it is one of those particular things that should be left solely between the individual and his Maker, or his God, or whatever takes expression with him, and it is no one else's concern.

500 Different Christian Creeds—Darrow Pseudo-Scientist

How many creeds and cults are there this whole world over? No man could enumerate them? At least as I have said, 500 different Christian creeds, all made up of differences, your honor, every one of them, and these subdivided into small differences, until they reach every member of every congregation. Because to think is to differ, and then there are any number of creeds older and any number of creeds younger, than the Christian creed, any number of them, the world has had them forever. They have come and they have gone, they have abided their time and have passed away, some of them are here still, some may be here forever, but there has been a multitude, due to the multitude and manifold differences in human beings, and it was meant by the constitutional convention of Tennessee to leave these questions of religion between man and whatever he worshiped, to leave him free. Has the Mohammedan any right to stay here and cherish his creed? Has the Buddist a right to live here and cherish his creed? Can the Chinaman who comes here to wash our clothes, can he bring his joss and worship it? Is there any man that holds a religious creed, no matter where he came from, or how old it is or how false it is, is there any man that can be prohibited by any act of the legislature of Tennessee? Impossible? The constitution of Tennessee, as I understand, was copied from the one that Jefferson wrote, so clear, simple, direct, to encourage the freedom of religious opinion, said in substance, that no act shall ever be passed to interfere with complete religious liberty. Now is this it or is not this it? What do you say? What does it do? We will say I am a scientist, no, I will take that back, I am a pseudo-scientist, because I believe in evolution, pseudo-scientist named by somebody, who neither knows or cares what science is, except to grab it by the throat and throttle it to death. I am a pseudo-scientist, and I believe in evolution. Can a legislative body say, "You cannot read a book or take a lesson, or make a talk on science until you first find out whether you are saying against Genesis. It can unless that constitutional provision protects me. It can. Can it say to the astronomer, you cannot turn your telescope upon the infinite planets and suns and stars that fill space, lest you find that the earth is not the center of the universe and there is not any firmament between us and the heaven. Can it? It could—except for the work of Thomas Jefferson, which has been woven into every state constitution of the Union, and has stayed there like the flaming sword to protect the rights of man against ignorance and bigotry, and when it is permitted to overwhelm them, then we are taken in a sea of blood and ruin that all the miseries and tortures and carion of the middle ages would be as nothing. They would need to call back these men once more. But are the provisions of the constitutions that they left, are they enough to protect you and me, and every one else in a land which we thought was free? Now, let us see what it says: "All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience."

That takes care, even of the despised modernist, who dares to be intelligent. "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 in any case whatever"—that does not mean whatever, that means, "barring fundamentalist propaganda. It does not mean whatever at all times, sometimes may be—and that "no preference shall be given by law to any religious establishment or mode of worship." Does it? Could you get any more preference, your honor, by law? Let us see. Here is the state of Tennessee, living peacefully, surrounded by its beautiful mountains, each one of which contains evidence that the earth is millions of years old,—people quiet, not all agreeing upon any one subject, and not necessary. If I could not live in peace with people I did not agree with, why, what? I could not live. Here is the state of Tennessee going along in its own business, teaching evolution for years, state boards handing out books on evolution, professors in colleges, teachers in schools, lawyers at the bar, physicians, ministers, a great percentage of the intelligent citizens of the state of Tennessee evolutionists, have not even

thought it was necessary to leave their church. They believed that they could appreciate and understand and make their own simple and human doctrine of the Nazarine, to love their neighbor, be kindly with them, not to place a fine on and not try to send to jail some man who did not believe as they believed, and got along all right with it, too, until something happened. They have not thought it necessary to give up their church, because they believed that all that was here was not made on the first six days of creation, or that it had come by a slow process of developments extending over the ages, that one thing grew out of another. There are people who believed that organic life and the plants and the animals and man and the mind of man, and the religion of man are the subjects of evolution, and they have not got through, and that the God in which they believed did not finish creation on the first day, but that he is still working to make something better and higher still out of human beings, who are next to God, and that evolution has been working forever and will work forever—they believe it.

A Crime in the State to Get Learning

And along comes somebody who says we have got to believe it as I believe it. It is a crime to know more than I know. And they publish a law to inhibit learning. Now, what is in the way of it? First, what does the law say? This law says that it shall be a criminal offense to teach in the public schools any account of the origin of man that is in conflict with the divine account in the Bible. It makes the Bible the yard stick to measure every man's intellect, to measure every man's intelligence and to measure every man's learning. Are your mathematics good? Turn to I Elijah ii, is your philosophy good? See II Samuel iii, is your astronomy good? See Genesis, Chapter 2, Verse 7, is your chemistry good? See—well, chemistry, see Deuteronomy iii-6, or anything that tells about brimstone. Every bit of knowledge that the mind has, must be submitted to a religious test. Now, let us see, it is a travesty upon language, it is a travesty upon justice, it is a travesty upon the constitution to say that any citizen of Tennessee can be deprived of his rights by a legislative body in the face of the constitution. Tell me, your honor, if this is not good, then what? Then, where are we coming out? I want to argue that in connection with another question here which is equally plain. Of course, I used to hear when I was a boy you could lead a horse to water, but you could not make him drink—water. I could lead a man to water, but I could not make him drink, either. And you can close your eyes and you won't see, cannot see, refuse to open your eyes—stick your fingers in your ears and you cannot hear—if you want to. But your life and my life and the life of every American citizen depends after all upon the tolerance and forebearance of his fellowman. If men are not tolerant, if men cannot respect each other's opinions, if men cannot live and let live, then no man's life is safe, no man's life is safe.

Here is a country made up of Englishmen, Irishmen, Scotch, German, Europeans, Asiatics, Africans, men of every sort and men of every creed and men of every scientific belief; who is going to begin this sorting out and say, "I shall measure you; I know you are a fool, or worse; I know and I have read a creed telling what I know and I will make people go to Heaven even if they don't want to go with me, I will make them do it." Where is the man that is wise enough to do it?

Statute Under Police Power

This statute is passed under the police power of this state. Is there any kind of question about that? Counsel have argued that the legislature has the right to say what shall be taught in the public school. Yes, within limits, they have. We do not doubt it, but they probably cannot say writing and arithmetic could not be taught, and certainly they cannot say nothing can be taught unless it is first ascertained that it agrees with the Scriptures; certainly they cannot say that.

But this is passed under the police power. Let me call your honor's attention to this. This is a criminal statute, nothing else. It is not any amendment to the school law of the state. It makes it a crime in the caption to teach evolution and in the body of the act to teach something else, purely and simply a criminal statute.

There is no doubt about the law in this state. Show me that Barber's case will you? (Taking book from counsel.)

There isn't the slightest doubt about it, or in any other state. Your honor, I have got a case there, but I have not got my glasses.

Associate Counsel—Here they are.

Mr. Darrow—Thank you.

There isn't the slightest doubt about it. Can you pass a law under the police powers of the state; that a thing cannot be done in Dayton, but they can do it down in Chattanooga? Oh, no. What is good for Chattanooga is good for Dayton; I would not be sure that what is good for Dayton is good for Chattanooga, but I will put it the other way.

Any law passed under the police power must be uniform in its application; must be uniform. What do you mean by a police law? Well, your honor, that calls up visions of policemen and grand juries and jails and penitentiaries and electrocutionary establishments, and all that, and wickedness of heart; that is police power. True, it may extend to public health and public morals, and a few other things. I do not imagine evolution hurts the health of anyone, and probably not the morals, excepting as all enlightment may and the ignorant think, of course, that it does, but it is not passed for them, your honor, oh, no. It is not passed because it is best for the public morals, that they shall not know anything about evolution, but because it is contrary to the divine account contained in Genesis, that is all, that is the basis of it.

Now let me see about that. Any police statute must rest directly upon crime, or what is analagous to it; it has that smack, anyhow. Talk about the police power and the policemen and all the rest of them with their clubs and so on, you shudder and wonder what you have been doing, and that is the police power.

Now, any such law must be uniform in its application, there cannot be any doubt about that, not the slightest. Here, for instance, the good people of—well, I guess these are good people, Nashville, wasn't it? Whether the common people down there—

Mr. Neal—That is a Tennessee case.

Is Bath on Sunday Wicked?

Mr. Darrow—Anyhow, it is a Tennessee case. Good people stirred up the community, by somebody, I don't know who, passed a law which said it was a misdemeanor to carry on barbering on Sunday, and that it should be a misdemeanor for anyone engaged in the business of barbering to shave, shampoo and cut hair or to keep open the bath rooms on Sunday.

(Laughter in courtroom.)

Mr. Darrow—Well, of course, I suppose it would be wicked to take a bath on Sunday, I don't know, but that was not the trouble with this statute. It would have been all right to forbid the good people of Tennessee from taking a bath on Sunday, but that was not the trouble. A barber could not give a bath on Sunday, anybody else could. No barber shall be permitted to give a bath on Sunday, and the supreme court seemed to take judicial notice of the fact that people take a bath on Sunday just the same as any other day. Foreigners come in there in the habit of bathing on Sundays just as any other time, and they could keep shops open, but a barber shop, no. The supreme court said that would not do, you could not let a hotel get away with what a barber shop can't. (Laughter.)

And so they held that this law was unconstitutional, under the pro-

vision of the constitution which says laws must be uniform. There is no question about the theory of it. If there were not, why, they would be passing laws against—the fundamentalists would be passing laws against the Congregationalists and Unitarians—I cannot remember all the names—Universalists—they might graduate the law according to how orthodox or unorthodox the church was. You cannot do it; they have to be general. The supreme court of this state has decided it and it does not admit of a doubt.

Now, I will just read one section of the opinion: The act is for the benefit of all individuals, barbers excepted; we know that all of the best hotels have bathrooms for the use of guests, that they accept pay for baths and permit them on Sunday.

Charges Class Legislation

(Reading from Barbers case, 2 Pickle, beginning with "that in many cases the barber has bathroom" to "for this and other things the act is held void.")

That in the case in 2 Pickle that I read from. Why they named this Pickle I have not found out yet.

But there is another in 16 Cates, page 12. This is a case, your honor, where they passed a law:

(Reading from above book beginning with words "that it shall be unlawful for any jobbing," to "It shall be unlawful.")

If it is unlawful for these corporations to discharge an individual because they didn't vote a certain ticket, this must have been passed against the wicked democrats up here. Up in our state it is the republicans who do all that, but still, it shall be unlawful to discharge any man if he don't vote a certain way or buy at a certain place if he did buy at a certain place, that only applied to corporations; if John Smith had a little ranch upon the mountain or had hired a man he could discharge him all right if he didn't vote the right ticket or go to the right church or any old reason. And the supreme court of the state said, "Oh, no, you cannot pass that sort of a law." What is sauce for the goose must be sauce for the gander. You cannot pass a law making it a crime for a corporation to discharge a man because he voted differently and leave private individuals to do it. And they passed this law.

Let us look at this act, your honor. Here is a law which makes it a crime to teach evolution in the caption. I don't know whether we have discussed that or not, but it makes it a crime in the body of the act to teach any theory of the origin of man excepting that contained in the divine account, which we find in the Bible. All right. Now that act applies to what? Teachers in the public schools. Now I have seen somewhere a statement of Mr. Bryan's that the fellow that made the pay check had a right to regulate the teachers. All right, let us see. I do not question the right of the legislature to fix the courses of study, but the state of Tennessee has no right under the police power of the state to carve out a law which applies to schoolteachers, a law which is a crimnal statute and nothing else; which makes no effort to prescribe the school law or course of study. It says that John Smith who teaches evolution is a crimnal if he teaches it in the public schools. There is no question about this act; there is no question where it belongs; there is no question of its origin. Nobody would claim that the act could be passed for a minute excepting that teaching evolution was in the nature of a criminal act; that it smacked of policemen and criminals and jails and grand juries; that it was in the nature of something that was criminal and, therefore, the state should forbid it.

It cannot stand a minute in this court on any theory than that it is a criminal act, simply because they say it contravenes the teaching of Moses without telling us what those teachings are. Now, if this is the subject of a criminal act, then it cannot make a criminal out of a teacher in the public schools and leave a man free to teach it in a private school. It cannot make it criminal for a teacher in the public schools to teach evolution, and for the same man to stand among the hustings and teach it. It cannot make it a criminal act for this teacher to teach evolution and permit books upon evolution to be sold in every store in the state of Tennessee and to permit the newspapers from foreign cities to bring into your peaceful community the horrible utterances of evolution. Oh, no, nothing like that. If the state of Tennessee has any force in this day of fundamentalism, in this day when religious bigotry and hatred is being kindled all over our land, see what can be done?

Now, your honor, there is an old saying that nits make lice. I don't know whether you know what it makes possible down here in Tennessee? I know, I was raised in Ohio. It is a good idea to clear the nits, safer and easier.

To Strangle Puppies Is Good When They Grow Into Mad Dogs, Maybe

To strangle puppies is good when they grow up into mad dogs, maybe. I will tell you what is going to happen, and I do not pretend to be a prophet, but I do not need to be a prophet to know. Your honor knows the fires that have been lighted in America to kindle religious bigotry and hate. You can take judicial notice of them if you cannot of anything else. You know that there is no suspicion which possesses the minds of men like bigotry and ignorance and hatred.

If today—

The Court—Sorry to interrupt your argument, but it is adjourning time.

Mr. Darrow—If I may I can close in five minutes. I can close in five minutes in the morning, only a few.

If today, your honor—give me five minutes more, I will not talk five minutes.

The Court—Proceed tomorrow.

Mr. Darrow—I shall not talk long, your honor, I will tell you that.

If today you can take a thing like evolution and make it a crime to teach it in the public school, tomorrow you can make it a crime to teach it in the private schools, and the next year you can make it a a crime to teach it to the hustings or in the church. At the next session you may ban books and the newspapers. Soon you may set Catholic against Protestant and Protestant against Protestant, and try to foist your own religion upon the minds of men. If you can do one you can do the other. Ignorance and fanaticism is ever busy and needs feeding. Always it is feeding and gloating for more. Today it is the public school teachers, tomorrow the private. The next day the preachers and the lecturers, the magazines, the books, the newspapers. After while, your honor, it is the setting of man against man and creed against creed until with flying banners and beating drums we are marching backward to the glorious ages of the sixteenth century when bigots lighted fagots to burn the men who dared to bring any intelligence and enlightment and culture to the human mind.

Tomorrow I will say a few words.

The Court—You gentlemen send down your authorities to my room at the hotel, on both sides, and your briefs, if you have such.

Court is adjourned to 9:00 o'clock tomorrow morning.