Day 5

Hays argues that expert testimony should be admitted

First, our opponents object to the jury hearing the law; now, they are objecting to the jury hearing the facts. The jury is to pass on questions that are agitated not only in this country, but I dare say, in the whole world.... The learned attorney general started his argument this morning by saying; we admit Mr. Scopes taught something contrary to the law. While we admit that Mr. Scopes taught what the witnesses said that he did, but as to whether that is contrary to the theory of the Bible should be a matter of evidence. Possibly the prosecution are without evidence.... Certainly no court has ever held it to be dangerous to admit the opinions of scientific men in testimony. Jurors cannot pass upon debatable scientific questions without hearing the facts from men who know. Is there anything in Anglo-Saxon law that insists that the determination of either court or jury must be made in ignorance? Somebody once said that God has bountifully provided expert witness on both sides of every case. But, in this case, I believe all our expert witnesses, all the scientists in the country are only on one side of the question; and they are not here, your honor, to give opinions; they are here to state facts....

Their theory seemed to be at the beginning that Prof. Scopes taught and that evolution teaches that man descended from a monkey. If Prof. Scopes taught that, he would not be violating this law.... To prove that man was descended from a monkey would not prove that man was descended from a lower order of animals, because they are all in the same order of animals-the first order-and that is the use of the term "order of animals" by zoologists and I suppose we have got to interpret this term according to its usual use and so even if Prof. Scopes taught what the prosecution thinks, even then according to our theory, they would not prove that Scopes taught that man descended from a lower order of animals. They might say that man came from a different genus but not a lower order of animals. Perhaps that is new to you, gentlemen, and I confess it was new to me and yet these men had the audacity to come into court and ask the court to pass upon these questions without offering any evidence...

When these gentlemen tell your honor what their theory of the case is, and then say, "the defense should put in no evidence because this is our theory" they immediately suggest to your honor that you should hear one side of the case only. Your honor may know of the occasion some time ago when a man argued a question for the plaintiff before a judge who had a very Irish wit and after he had finished the judge turned to the defendant and said, "I don't care to hear anything from the defendant, to hear both sides has a tendency to confuse the court" (Laughter in the courtroom)....

What are the questions of fact? A man is guilty of a violation of the law if he teaches any theory different from the theory taught in the Bible. Has the judge a right to know what the Bible is? Does that law say that anything is contrary to

If they want to make a school down here in Tennessee to educate our poor ignorant people, let them establish a school out here; let them bring down their experts. The people of Tennessee do not object to that, but we do object to them making a schoolhouse or a teachers' institute out of this court. Such procedure in Tennessee is unknown.

Malone argues for admission of expert testimony

There is never a duel with the truth. The truth always wins and we are not afraid of it. The truth is no coward. The truth does not need the law. The truth does not need the force of government. The truth does not need Mr. Bryan. The truth is imperishable, eternal and immortal and needs no human agency to support it. We are ready to tell the truth as we understand it and we do not fear all the truth that they can present as facts. We are ready. We are ready. We feel we stand with progress. We feel we stand with science. We feel we stand with intelligence. We feel we stand with fundamental freedom in America. We are not afraid. Where is the fear? We meet it, where is the fear? We defy it, we ask your honor to admit the evidence as a matter of correct law, as a matter of sound procedure and as a matter of justice to the defense in this case. (Profound and continued applause).

Argument over whether the defense is using the trial for publicity reasons

Gen. Stewart--It is a known fact that the defense consider this a campaign of education to get before the people their ideas of evolution and scientific principles. This case has the aspect of novelty, and therefore has been sensationalized by the newspapers, and of course these gentlemen want to take advantage of the opportunity. I don't want to make any accusations that they are improperly taking advantage of it.[15] They are lawyers and they have these ideas, and it is an opportunity to begin a campaign of education for their ideas and theories of evolution and of scientific principles, and I take it that will not be disputed and all I ask, if the court please, is that we not go beyond the pale of the law in making this investigation.

Malone--I just want to make this statement for the purposes of the record, that the defense is not engaged in a campaign of education, although the way the defense has handled the case has probably been of educational value. We represent no organization or organizations for the purpose of education.[16] Your honor knows that everything the court says not only goes out to the world through the newspapers, but through the radio and it is difficult for a court these days to exclude a jury from what is going on in the courtroom, because it would be difficult for a juror to go anywhere in the utmost privacy and not hear what's going on, so the rules would have to be changed to meet the advance of science. If the defense is representing anything it is merely representing the attempt to

meet the campaign of propaganda, which has been begun by a distinguished member of the prosecution.

Judge Raulston excludes expert testimony

This case is now before the court upon a motion by the attorney general to exclude from the consideration of the jury certain expert testimony offered by the defendant, the import of such testimony being an effort to explain the origin of man and life. The state insists that such evidence is wholly irrelevant, incompetent and impertinent to the issues pending, and that it should be excluded.

Upon the other hand, the defendant insists that this evidence is highly competent and relevant to the issues[17] involved, and should be admitted....

Now upon these issues as brought up, it becomes the duty of the court to determine the question of the admissibility of this expert testimony offered by the defendant.

It is not within the province of the court[18] under these issues to decide and determine which is true, the story of divine creation as taught in the Bible, or the story of the creation of man as taught by evolution....

Let us now inquire what is the true interpretation of this statute. Did the legislature mean that before an accused could be convicted, the state must prove two things:

First--That the accused taught a theory denying the story of divine creation as taught in the Bible;
Second--That man descended from a lower order of animals.

If the first must be specially proven, then we must have proof as to what the story of divine creation is, and that a theory was taught denying that story. But if the second clause is explanatory of the first, and speaks into the act the intention of the legislature and the meaning of the first clause, it would be otherwise....

In the act involved in the case at bar, if it is found consistent to interpret the latter clause as explanatory of the legislative intent as to the offense against, then why call experts? The ordinary, non-expert mind can comprehend the simple language, "descended from a lower order of animals."

These are not ambiguous words or complex terms. But while discussing these words by way of parenthesis, I desire to suggest that I believe evolutionists should at least show man the consideration to substitute the world "ascend" for the word "descend."

In the final analysis this court, after a most earnest and careful consideration, has reached the conclusions that under the provisions of the act involved in this case, it is made unlawful thereby to teach in the public schools of the state of Tennessee the theory that man descended from a lower order of

Fig. 6 *A view of Robinson's Drug Store from the outside; when the Scopes Trials began, the owner hung a banner advertisement, saying "Where it Started."*

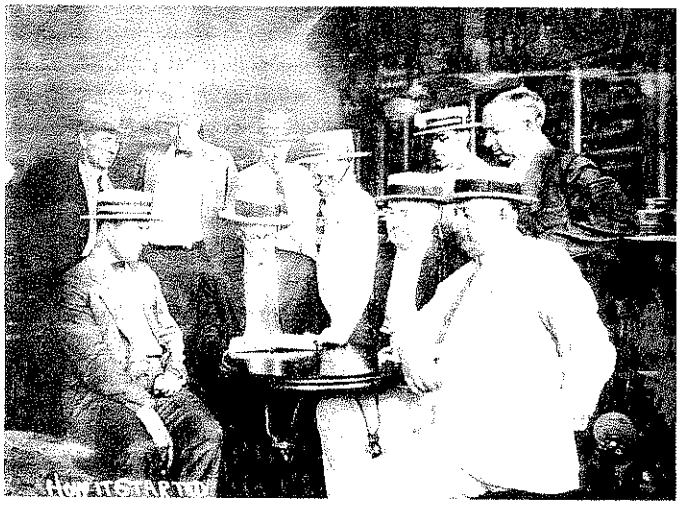

Fig. 7 *From left: Herbert Hicks, John Scopes, Walter White, and Gordon McKenzie; standing are Burt Wilbur, Wallace Haggard, W.E. Morgan, George Rappleyea, Sue Hicks, and F.E. Robinson reenacting their original meeting at Robinson's drugstore.*

14. **Expert Testimony:** To bring in scientific support, Scopes brought in the help of America's three most well-known evolutionists: the paleontologist Henry Fairfield Osborn, eugenicist Charles B. Davenport and psychologist J. McKeen Cattell. Scopes had been working with these people in public prior to the trials in hopes of setting the stage in the mind of the public in his favor. Osborn personally had been head to head with Bryan over the evolution issue for years; he also argued that evolution and Christian morals were indeed compatible. Cattell helped by meeting Scopes in New York to confirm the AAAS's

commitment to the defense, who then promised that "The American Civil Liberties Union can count on the association providing scientific expert advisors in defense of Professor Scopes." Davenport's involvement included writing an article entitled "Evidences for Evolution," which educated the public on Darwin's theories and capitalized the popular interest caused by the case. During the actual trials, the defense was denied the chance to bring these experts before the court because the judge ruled that it was irrelevant to the case at hand (Larson 113, 115). (K)

Fig. 8 *A group of scientists called by the defense as expert testimony.*

15. **"His case has the aspect of novelty..."** As the first trial date approached, people from all over the United States gathered in Dayton, Tennessee. Located on the banks of the Tennessee River, Dayton was once a mining town with a population of five thousand people in the early 1900s. By 1925, however, the mines went dry and the coal companies went bankrupt; Dayton's population diminished to eighteen hundred. George Rappleyea, an engineer of the Cumberland Coal and Iron Company, was often accused of instigating the court case as a means to stimulate the local economy; but whatever his true motives may have been, it worked. People came by train from Chattanooga, or by the airstrip in Rhea County, which had been especially set up for this event.

Seemingly overnight, Dayton became much like a circus. On Main Street, preachers held prayer meetings, Fundamentalists set up a tabernacle, and signs saying "Read Your Bible" and "Prepare to Meet the Maker" sprung up over town. Vendors sold hot dogs, ice cream, and lemonade; tourists could buy stuffed monkeys, which had become Dayton's mascot. A live chimpanzee was even been brought in to perform.

Additionally, more than two hundred reporters came in from all over the country, including those from Britain, France and Germany. From Chicago, WGN Radio setup to make the first ever live radio broadcast in history; Western Union telegraph operators also set up behind the grocery store to tap out what would be over two million words over the phone lines.

In John Scopes' autobiography, he described the flock of people and reporters in Dayton as "one of the rarest collections of screwballs" he had ever seen in his life (Olson 24-26). (K)

16. **"We represent no organization or organizations for the purpose of education"** This statement is just not true. When the Butler Act appeared in March of 1925, the ACLU announced it would defend any teacher who stood up to the law. The American Civil Liberties Union, who describe themselves as "our nation's guardian of liberty," frequently defend education and free speech. It was the ACLU who caused George A. Rappleyea to seek out Frank Robinson and other school board members, who later nominated John Scopes. So in fact, the whole trial was set in motion by such an organization, as well as local education representatives. The ACLU did not want Darrow on the case, because they had hoped to hire Bainbridge Colby. The organization even stated "We actually had Darrow and Malone right here in our office in an effort to persuade them they did not belong." The Scopes Trial was hoped to go to the Supreme Court, however it did not. So the ACLU got its chance with *Epperson v. Arkansas* in which evolution was once again defended, and won (ACLU; Johnson 23; Larson 101-103). (C)

17. **"Issues":** In the minds of Darrow and those on the defense, the question of the trial was not whether John T. Scopes had violated the law, but whether the law was constitutional to begin with. What complicated the trial was the conflicting views over evolution and creationism, the separation of church and state, and the government's power over taxpayer's rights. All of these issues "were gathering like a storm" in Dayton, Tennessee, and as it became broadcasted around the country, the event became known as the Trial of the Century (Olson 17).

Congressman Foster V. Brown of Chattanooga, Tennessee, complained that the trials were "not a fight for evolution or against evolution, but a fight against obscurity," suggesting how others viewed the trial purely as a publicity stunt for Dayton (Larson 93). These mixed views seem to muddle the overall "purpose" of the trial, but the conflict that stands out the most is ultimately creationism versus evolution. (K)

18. **"Province" of the Court:** Here, the "province" of the court can be defined as "The range of one's proper duties and functions; scope or jurisdiction" (The American Heritage® Dictionary). Though seen as a battle of evolution versus