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CHIEF JUSTICE SULLIVAN

Character Sketch of the Man as Shown by the Records.
By C. J. SMYTH

Feeling that some prominent member of the legal profession in Nebraska, thoroughly acquainted with the work of the Nebraska supreme court, could, on short notice, give a better synopsis of the more important work performed by Chief Justice Sullivan than the editors could after weeks of reading the reports, The Independent called upon Former Attorney General C J. Smyth, of Omaha, and asked him for a brief statement of the prominent features of such cases as he believed to be of more than ordinary public concern.

Although a very busy man—for the law firm of Smyth & Smith, at one time attorney general and deputy attorney general of Nebraska, is counted one of the big firms of Omaha—Mr. Smyth found time to dictate to his stenographer the statement below. The Independent had decided correctly: Mr. Smyth's thorough knowledge of what is contained in the Nebraska reports enabled him to give in a half hour's dictation a succinct, clear statement which the editors could not have equaled in two weeks' digging among the records—if at all. And this is what the stenographer transcribed from Mr. Smyth's dictation:

In the case of State vs. Meserve, 58 Neb. 451-2, it was contended by the treasurer of one of the counties that he should not be required to pay the express charges upon money conveyed by him to the state, but that it should be paid by the state.

Judge Sullivan who wrote the opinion said that the law required the county treasurer to pay the expressage and in answer to the argument that the law was oppressive in that regard and required more of the county treasurer than should be required, he made this characteristic reply:

> "A person accepting a public office takes it with its burdens and whenever those become insufferably oppressive he may resort to that excellent and adequate remedy which a wise legislative foresight has provided, viz: a letter of resignation addressed to the proper authority."

Blaco vs. State, 58 Neb. 557, 561, was what is popularly known as the State Oil Inspectors case. Hilton, the inspector, had embezzled something like $6,000 of the state's money. The state sued him and his bondsmen. One of the contentions made was that the law under which Hilton had been appointed and had acted was unconstitutional. Judge Sullivan answered this contention by saying:

> "Whether it is void or valid is altogether immaterial. Under its authority Hilton accepted a commission from the governor and for nearly two years performed the duties which the law imposed and received and enjoyed the emoluments for which it provided. For the express purpose of securing to Hilton authority from the state to perform those duties and to receive those emoluments th plaintiffs in error executed to the state the bond in suit. In that bond they affirmed that Hilton ha' been duly appointed and they therein undertook to answer for any failure on his part to perform the duties imposed upon him by the act. . . . Having by their voluntary acts secured to Hilton the fruits of the law which was instructively corporated in the bond, they are now by plain principle of justice forbidden to deny that the law was constitutionally enacted."

Hilton and his bondsmen were held and the amount of the judgment against them was collected by the state.

In Cornell vs. Irvine, 56 Neb. 657, the supreme court said that Irvine could hold two offices at the same time under the state and receive two salaries. It will be remembered that he was one of the supreme court commissioners; that this commission was created because of the overcrowded condftion of the supreme court docket. It would seem, therefore, that he ought to have given all his time to the work of the commission, but no, he divided it and gave a part to the work of lecturing before the law school of the university. He, however, drew the entire salary of commissioner as well as the salary attached to his lectures.

Judge Sullivan dissented from the judgment of the court. He said:

> "I think, however, the contract which is based on the action contravenes public policy and that the position will prove to be a mischievous precedent."

In Nebraska Telephone Company vs. Cornell, 59 Neb. 733, the contention of the telephone company was that the state did not have any right to prescribe the rates which it should charge and regulate its business in other particulars. This contention was met by Judge Sullivan in the very forceful opinion in which he pointed out very clearly the principles which gave the state the right to regulate the great monopoly.

The case of the State vs. Omaha National Bank will be remembered as one of the cases which arose out of the Eartley embezzlement. The state sued the Omaha National bank for $200,000. Judge Baker tried the case in Douglas county and brushed aside all former decisions of the supreme court bearing upon the question, and decided that neither the bank nor Millard was liable. His services in that regard were subsequently rewarded by an appointment to the supreme bench of New Mexico through the influence of Senator Millard. It was, in fact, Senator Millard's first important official act.

When the case came before the supreme court Judge Sullivan wrote the opinion in which was stated with remarkable clearness the reasons why Judge Baker was wrong and why the bank should be held. Judge Norval for some reason took no part while Judge Harrison placed his vote for reversal upon a very immaterial ground. The action of Judges Harrison and Norval is generally regarded as a dodge. Judge Sullivan never dodges.

When the case went back to the district court Judge Baker, true to his friends, the Omaha National bank and Senator Millard, affected to misunderstand the order of reversal and instead of granting a new trial to the state entered up another judgment in favor of the bank. The supreme court was applied to for a writ of mandamus to compel the judge to obey its mandate. Again Judge Sullivan wrote the opinion of the court in which he showed his utter fearlessness of the great influences which stood behind the bank. Speaking of Judge Baker's action in rendering a judgment against the state, he said:

> "In rendering judgment on the verdict which had been discredited and condemned the district court failed to execute the mandate of this court, it becomes our duty to enforce obedience by mandamus. (p. 235.) . . . In disregarding our decision and dealing with the verdict as valid and binding on the parties, the lower court violated an implied command which was clear, definite, certain and intelligible, as though it had been formally expressed in precise terms. A peremptory writ will issue directing the district court of Douglas county forthwith to vacate the judgment rendered by it in favor of the defendants, the Omaha National Bank and J. H. Millard, and to forthwith award a new trial of the action." (p. 236.)

This was the language of the fearless judge who was not inquiring or caring who the losing party was. Judge Norval, of course, dissented.

This case came before the supreme court again. It is reported in the 93 N. W. 334. The court relieves Senator Millard and the bank, but in order to do it it was necessary to overrule prior decisions, disregard principles as old as the hills, and to create a new rule with respect to embezzlement of public funds. Many lawyers of different political faiths regarded this decision as one of the dark spots in the judicial history of Nebraska, but Judge Sullivan contributed nothing to it. On the contrary, he stood like an oak for what he conceived to be right. His dissenting opinion is a marvel of clearness of expression.

Speaking of the action of the bank and Millard he used this language:

> "Surely defendants cannot, with any show of reason, insist that the unauthorized payment of the warrant, the wrongful act which they themselves obeyed and participated in, operated as a practical enlargement of the treasurer's authority. As well might a parricide ground an appeal for compassion or clemency on the fact that he was an orphan. Bartley's real authority was to disburse the public funds upon valid warrants and not otherwise. He had no semblance of authority to pay an invalid warrant and yet this is precisely what he did. He not only paid out the state's money upon a warrant which proclaimed its own illegitimacy, but he paid it out directly to the defendants, the holders of the warrant. How they could be legally innocent in receiving money which they knew belonged to the state, and which was turned over to them without the actual or apparent consent of the state, is something which I have never been quite able to understand."

Neither have the people. But the state lost the money. Had the bench been composed of Sullivans the state would have won, and the taxpayers would have received their own.

In the case of State vs. C., R. I. & Pacific, 61 Neb. 545, the question was presented as to whether or not the federal court could restrain the state from suing in its own courts. Attorney General Prout thought it could and consequently asked the court to dismiss a case pending in behalf of the State vs. the R. I. road on the ground that the state was enjoined by the federal court from prosecuting the case. The supreme court refused to do

THE BIBLE CASE

Republicans Trying to Dodge the Railroad Issue.

The Independent has many times called attention to the fact that the real issue in this campaign, after all immaterial and side issues are brushed aside, is this: The People against the Railroads. But astute railroad railroad managers early in the campaign saw that it would not do to allow the real issue to be met squarely—because there are 55 farmers to every 15 or 16 railroad men, including those who are classed as "in trade."

So about a month ago one John Rush rushed into print in the Omaha Bee with a column letter of criticism and denunciation of Judge Sullivan, because the latter had written an opinion in the Freeman Bible-reading case, overruling the motion for a new trial and adhering to the former judgment. To this Hon. T. J. Mahoney made answer through the columns of the World-Herald, and an anonymous writer, "Alpha," replied to Mahoney through the Bee; and to this Mahoney rejoined in another World-Herald article. Not only are these letters much too long for reproduction in The Independent, but also it seems clear that, under the circumstances, there is no need for publishing Judge Sullivan's opinion in full. The issue in this campaign is not the question of reading the Bible in the public schools—but whether the railroad corporations now owning the republican leaders body and soul shall be permitted to continue their double game of fleecing the farmers, through exorbitant freight rates on the one hand and through expert tax-shirking on the other.

But there is some reason for calling attention to this Bible case, because, after the four letters mentioned were published, the republican managers suddenly changed their tactics and began a systematic "still hunt" among the Catholic voters, with the view of prejudicing them against Judge Sullivan, yet keeping the matter very quiet because they were afraid an open discussion of the question might align some republican Protestants on Judge Sullivan's side. In this, the republican managers have shown the same skill as they did last fall when they united the brewers and anti-saloon league in the effort to elect Mickey.

Section 11, article 8, of the constitution of Nebraska, provides that—

> "No sectarian instruction shall be allowed in any school or institution supported in whole or in part by the public funds set apart for educational purposes."

Hence, the question of whether a given act constitutes "sectarian instruction," is the one to be determined in the light of surrounding circumstances. In the case decided, the teacher had opened school with prayer, reading the Bible, and singing of hymns. In the light of her own testimony, her acts constituted "sectarian instruction," and the court could do nothing less than grant the writ prayed for. Chief Justice Sullivan, and Judges Holcomb and Sedgwick, have no power to change a plain provision of the constitution. If the provision is bad—then the burden falls upon the constitutional convention of 1875, and not upon the court.

But in refusing to grant a rehearing, Judge Sullivan said:

> "The decision does not, however, go to the extent of entirely excluding the Bible from the public schools. It goes only to the extent of denying the right to use it for the purpose of imparting sectarian instruction. The pith of the opinion is in the syllabus, which declares that 'exercises by a teacher in a public school in a school building, in school hours, and in the presence of the pupils, consisting of the reading of passages from the Bible and in the singing of songs and hymns and offering prayer to the Deity, in accordance with the doctrines, beliefs, customs or usages of sectarian churches or religious organizations, are forbidden by the constitution of this state.' Certainly the Iliad may be read in the schools without inculcating a belief in the Olympic divinities, and the Koran may be read without teaching the Moslem faith. Why may not the Bible be also read without indoctrining children in the creed or dogma of any sect? Its contents are largely historical and moral. Its language is unequaled in purity and elegance. Its style has never been surpassed. Among the classics of our literature it stands pre-eminent."

Catholics urge, however, that the King James version is a "sectarian book," and that, therefore, the mere reading of it constitutes "sectarian instruction" within the meaning of the quoted constitutional provision. This was not the vital point at issue in the case at bar, but Judge Sullivan said by way of dictum:

> "The law does not forbid the use of the Bible in either version in the public schools. It is not prescribed either by the constitution or the statutes, and the courts have no right to declare its use to be unlawful because it is possible or probable that those who are privileged to use it will misuse the privilege by attempting to propagate their own peculiar theological or ecclesiastical views and opinions. The point where the courts may rightfully intervene, and where they should intervene without hesitation, is where legitimate use has degenerated into abuse—where a teacher employed to give secular instruction has violated the constitution by becoming a sectarian propagandist."

In short, as The Independent has always held, to forbid the mere reading of the Bible in the public schools, is to tacitly admit that it is an inspired book, and, therefore, to break down the contention of atheists who would debar it. If it is not the Word of God, then there can be no more constitutional reason for debarring it than for excluding Webster's dictionary, because some patron of the school prefers Worster's or the Standard or Century. And here Judge Sullivan says:

> "The question whether its legitimate use shall be continued or discontinued is an administrative, and not a judicial question. It belongs to the school authorities, not to the courts."