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## MAX AN ATHEIST TESTIFY BY VIRTUE OF SECTIONS 605-606, OF THE CIVIL CODE OF PRACTICE OF KENTUCKY.

By BASIL DUKE SARTIN.

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The Court of Appeals of Kentucky, in the cases of *Bush vs. Com.* 80 Ky. 244; *L. & N. R. R. vs. Mayes* 26 R. 197; *Bright vs. Com.* 86 S. W. 527; *White vs. Com.* 96 Ky. 180, held that an atheist could testify by virtue of sections 605-606 of the Civil Code of Practice of Kentucky, which reads: "Subject to the exceptions and modifications contained in section 606, every person is competent to testify for himself or another, unless he be found by the court incapable of understanding the facts concerning which his testimony is offered." The court construed the statute to permit an atheist to testify because of the failure of the common law requirement of religious belief to be mentioned in the exceptions of section 606.

The purpose of this article will be to investigate the position of the court on the above question and to show whether the court erred in its decision.

It will be taken for granted in this investigation that the above section should be construed in the light of the common law, as well as in view of the evil it was intended to remedy. Therefore, in order to know the true application and interpretation of section 605-6 of the Civil Code of Practice of Kentucky, it is essential that we know the history of that section, learn the evil it was to eradicate, as well as get the intention of the Legislature when it was enacted. This involves the old and complex problem of the negro. Therefore, let us for a short time study the history of the negro race in the United States, likewise the growth of slavery, together with its abolition in the state of Kentucky.

Permit me to say in the beginning of our investigation that it is

not the purpose of this article to worry the reader with a detailed account of the slavery problem in the United States, but it shall only be mentioned where it is necessary for a thorough understanding and for a proper construction of sections 605-6 of the Civil Code of Kentucky.

It will be remembered that after the invention of the cotton gin, the South saw its great future in the raising of cotton, and the effort to realize her dream, was the beginning of the history of the statute we have now for construction. Laborers were needed in the cotton fields of the South, and hence the demand for slaves grew ten folds. Inter state slave trade flourished. But as eager as the South was for an extension of slave territory, the North was as firm in defiance of its northern advance. Laws were passed in every state concerning the rights of negro slaves. The following extract from Smith's Political History of Slavery will give an idea of the kind of laws which were passed regulating the competency of negro witnesses in the state of Ohio.

"Under the territorial government the free blacks voted for delegates to the convention to form a state constitution for Ohio, but in the convention they were deprived of this privilege in the new state by the casting vote of the presiding officer, who was a Virginian and who became the first executive. Under this influence the government was purely a white man's government. After the reduction of suffrage in the Ohio constitutional convention by the casting vote of the president, an attempt was made to exclude colored persons from giving testimony in courts of justice against white persons, which was defeated by a vote of 16 to 17. Yet in the face of this, in spite of the obligation of the Ordinance of 1787, which secured the benefit of habeas corpus and trial by jury and which was not changed or modified by the constitution, but confirmed and continued; in spite of other guaranties of personal liberties, the Legislature in 1804 and 1807 enacted rigorous black laws which provided:

1. That no black or mulatto should be permitted to settle or reside in the state, unless he should first procure a certificate of his freedom under a seal of a court of record.

2. That no black or mulatto person should be sworn or give evidence in any court or elsewhere in the state, in any case where a white person was a party or in any prosecution in behalf of the state against a white person.

3. That no black or mulatto person should be entitled to trial by jury even in cases involving his personal liberty, etc."

The state of Virginia did not always favor the slave trade. Virginia at one time enacted laws for the purpose of checking the importation of slaves into her territory and fixed heavy duties on every slave imported. The following extract from Collin's History: "The Domestic Slave Trade of the Southern States" will show Virginia's early stand on slavery. "The General Assembly of Virginia in 1778 enacted that 'No slave or slaves shall hereafter be imported into this Commonwealth by

sea or land nor shall any slave or slaves so imported be sold or bought by any person whatever under penalty of one thousand pounds for every slave imported and five hundred pounds for every one sold or bought, and the slave himself to be free. In 1785 a law was passed declaring free the slaves who should afterward be imported and kept in the state a year, whether at one time or at several times. 1806 a law was passed totally prohibiting the introduction of slaves into Virginia. It was amended, however, in 1811; in favor of the residents of the state as it restored to them the same privileges concerning the importation of slaves which they had under the law of 1778. An act of Jan. 9, 1813 further amended and extended to the immigrants the right of bringing in slaves." See Henning Stat. at Large, vol. 9, p. 471. Ibid. vol. 12, p. 182.

The above extracts from the laws of Ohio and Virginia are only mentioned for the purpose of introducing the statutory regulations of slavery in the state of Kentucky, for public sentiment is not always confined by territorial limits of the states; nor were state laws regulating the rights of slaves always different in other states. So we find that the laws of Virginia regulating the importation of slaves were in force in the state of Kentucky till the year 1798, when An Act to reduce into one the several acts respecting slaves, free negroes, mulattoes, and Indians was approved Feb. 8, 1798. See 2 Littel, or title 68—Emancipation of Slaves—Statute law of Kentucky pp. 608-9.

Again in 1823, we find An Act to amend the law respecting the Emancipation of Slaves was approved November 13th, 1823. See Session Acts pp. 260 or Statute law of Kentucky pp. 610.

The following extract from The Domestic Slave Trade of the Southern States, by Collins will also give light on the early stand of Kentucky on slavery, "An act was approved February 18th, 1815, no one was allowed to bring slaves into Kentucky except those intending to settle in the state, and they were required to take the following oath:—I, AB, do swear (or affirm) that my removal to the State of Kentucky was with an intention to become a citizen thereof and that I have brought with me no slave or slaves and will bring no slaves or slave to this state with the intention of selling them." See Acts of Legislature 1814-15, pp. 435-6.

In 1833 it was enacted that each and every person who shall hereafter import into this State any slave or slaves or who shall buy any slave or slaves or contract for sale or purchase for a longer term than one year, of the service of any such slave or slaves, knowing the same to have been imported as aforesaid, he, she, or they, so offending, shall forfeit six hundred dollars for each slave so imported, sold or bought, or whose services has been so contracted for. Ibid 1832-3, pp. 258.

It was not to apply to immigrants provided they took the required oath; nor to citizens of Kentucky who derived their title by descent, will, distribution, marriage, gift or in consideration of marriage, nor to travelers who could prove to the satisfaction of a jury that the slaves were for necessary attendance. See Laws of Kentucky 1832-33, pp. 258.

The above acts indicate the position of Kentucky towards slavery up to the year 1833. No decided change was made, however, in the law of Kentucky regulating slaves till 1851. It will be remembered that near the middle of the 19th Century was the beginning of bitter feeling between the North and the South. Kentucky in this controversy decided to remain neutral, yet in sympathy and on the question of slavery she was a Southern State. In 1854 a Code of Practice was prepared by Commissioners M. C. Johnson, James Harlan, and J. W. Stephenson and was adopted by the General Assembly. In Section 669-70 of this Civil Code, we find these provisions relative to the competency of witnesses: "All persons, except those enumerated in the next section, shall be competent to testify in a civil action. The following persons shall be incompetent to testify:

1. Persons convicted of a capital offense, or of perjury, subordination of perjury, burglary, robbery, larceny, receiving stolen goods, forgery, or counterfeiting.
2. Infants under the age of ten years, and over that age if incapable of understanding the obligation of an oath.
3. Persons who are of unsound mind at the time of being produced as witnesses.
4. Husband and wife for or against each other or concerning any communication made by one to the other during the marriage, whether called as a witness while that relation subsisted or afterwards.
5. An attorney concerning any communication made to him by his client to him in that relation, or his advice thereon without the client's consent.
6. Persons interested in the issue in behalf of themselves and parties to an issue in behalf of themselves, or those united with them in the issue.
7. NEGROES, MULATTOES, OR INDIANS, in any action or proceeding where a white person in his own right or as representative of a white person is a party except an action brought to recover a penalty or forfeiture for a violation of law, against a negro, mulatto or indian."

Note in sub-section 7 of the above extract that negroes were denied the right to testify in any court of justice. This is the first statute denying them the right of giving testimony because of color. This incompetency of negroes as witnesses existed in all the Southern States. We also learn that many such laws were in force in some of the Western States against the Chinese.

Again in 1866 we find in Kentucky Code of Civil Practice by Harvey Meyers these provisions, which slightly changed sections 669-70 of the Code of 1854, "All persons except those enumerated in the next sec-

tion shall be competent to testify in a civil action." The next section declares, "The following persons shall be incompetent to testify: Persons convicted of a capital offense, etc.; infants, etc.; persons of unsound mind; Husband and Wife; an attorney, etc.; persons interested in an issue." In sub-section 7 of the above provisions we find again this condition, "NEGROES, MULATTOES, INDIANS shall be incompetent to testify in any action or proceeding where a white person, in his own right or as a representative of a white person is a party, except in actions brought to recover a penalty or forfeiture for violation of law, against a negro, mulatto or indian." This section was amended March 14th, 1866, so as to read, "NEGROES, and MULATTOES, shall be competent witnesses in all civil proceedings in which negroes and mulattoes are the only parties interested in the issue, and in all criminal proceedings where a negro or mulatto is a defendant."

This closes the statutes of Kentucky which expressly regulate the competency of the negro as a witness and leads us to the statute, Section 605-6, of the Civil Code of Practice of Kentucky, which passed near the year of 1872. The object of the acts regulating his competency as a witness have been set forth to show the nature of the facts and conditions which underlie sections 605-6 of the Civil Code of Practice. It is necessary for one to have a knowledge of the history of slavery previous to the enactment of the above section, 605, in order to get the legislative intent and to know the evil that the Legislature was endeavoring to remedy when the above statute was enacted.

It will be remembered that between 1866 and the passage of Sections 605-6 of the Civil Code of Practice of Kentucky was the period of Reconstruction. The South had been crushed by the military powers of the North. The slaves had been freed. Yet, the Southern States refused to grant any privileges of citizenship to the negro by virtue of the 13th Amendment to the Constitution of the United States. In 1866, April 9, Congress passed what is known as the "Civil Rights Bill" which permitted a negro to testify against a white person in the State Courts. But Kentucky in the case of *Bowlin vs. Commonwealth*, 65 Ky. 5, held that the "Civil Rights Bill" was unconstitutional and void. Justice Robertson in delivering the opinion of the Court said: "Each state, so far as not prohibited by her own Constitution or that of the United States, has the unquestionable right to regulate her own domestic concerns and prescribe remedies, including rules of evidence in her own courts. Congress had no Constitutional authority to repeal or essentially modify the law of Kentucky on the subject of negro testimony. A negro is incompetent to testify against a white man under the laws of the courts of Kentucky. The utmost legal effect of the emancipating section was to declare the colored as free as the white race in the United States. It

certainly gave the colored race nothing more than freedom. It did not elevate them to social or political equality with the white race. It neither gave nor aimed to give them in defiance of state laws all the rights of the white race, but left them equally free in all the States, and equally subject to State jurisdiction and State laws."

It is evident that Mr. Robertson was correct in his decision. Congress could claim no power by virtue of the thirteenth amendment. The North saw that further amendment would be necessary so we find that the fourteenth amendment was made to the constitution of the United States. Yet after the passage of the fourteenth amendment we find the courts of the State of Kentucky differing widely on the result of the amendment. The following extract from the Lexington Reporter and Observer, a newspaper published in Lexington, Ky., July 8, 1871: "Does the first section of the fourteenth amendment to the constitution operate as a repeal of Kentucky Statutes excluding negro testimony in actions in which whites are parties? Judge Cofer of the Hardin Circuit Court in a very able opinion, answered yes, and admitted negro testimony. He had been followed by Judge Randall, Judge Wickliffe, and perhaps other circuit judges. Judge Pryor of Carroll Circuit Court answered, no, and refused to permit negro testimony as provided by Kentucky Statutes. Judge Pryor has been and is very warmly in favor of the repeal of all laws making a discrimination of the races on the question giving testimony. But in an eloquent and able charge to his grand jury, held that the fourteenth amendment had no application to the question. The Court of Appeals has not as yet acted, and until it does, we shall have presented the strange spectacle of two systems of law administered in joining circuits. The same question arose in California regarding Chinese testimony. In the lower court a person was convicted on Chinese testimony, the court holding with Judge Cofer that the fourteenth amendment repealed the statutes excluding such testimony. But the Supreme Court of the state on appeal reversed the judgment, holding with Pryor that the late amendment does not and can not affect the state law regulating practice in the state courts. But from his decision Judge Rhodes, a democrat, dissented. This case (People vs. Brady 6 Am. Rep. 604) is, we believe, the only one affecting this question which has been decided by the Supreme Court of a state."

So far as I can find the Court of Appeals of Kentucky never passed on this question—Did the fourteenth amendment repeal all laws excluding negro testimony? But ever since the passage of the fourteenth amendment and even before that time, we learn that negro testimony became a political issue between the Northerners or Radicals, and the Southerners. The following extract is an editorial from the Lexington Reporter and Observer, June 8, 1869: "A Radical convention in this

city, put forth one of the dogmas of its party—negro testimony. We are unquestionably opposed to an extension to the negro race of any privileges now possessed by those of our race and color and we can conceive of no contingency in which we would advocate the conferring upon the negro the right to testify in causes to which white persons are parties. We hold this to be a government established for the benefit of our own race and all the privileges to be enjoyed by virtue of its authority are intended for that race alone. The rights of the negro are those which his common humanity demands and which our own moral sense of right and justice may impel us to concede. The ballot box, the jury, the witness stand are privileges which are of right belong exclusively to the Caucasian race. And we are unalterably opposed to any innovation breaking down the barrier between the two races.”

But on the other side of the issue of negro testimony we hear such vindictives hurled against the position of the South as these by Sumner, “It is vain to say that this is the country of the white man. It is the country of man. Whoever disowns any member of the human family as brother, disowns God as father, and thus becomes impious as well as inhuman. It is the glory of republicans institutions that they give practical form to this irresistible impulse.”

The following extract from Shaler’s “Kentucky” p. 368, gives some light on the problem of negro testimony in this state, and likewise corroborates the thought that section 605-6 of the Civil Code of Kentucky was enacted to permit negro testimony.

“The last important problem left by the war was the question of negro testimony in the courts. The old slavery laws in Kentucky limited the testimony of the negro in many ways; white men could not be convicted of grave crime by their evidence. These laws should have been repealed at once, and it is clearly to the discredit of the State that they remained upon the statute books until 1872, though negro testimony was admitted in 1871. There is however, some excuse for this delay. The Freedmen’s Bureau had constituted itself the keeper of the whole negro population, and had in an unfortunate way removed them from the control of the ordinary civil law of the State. To the appeal for the abrogation of the statute the people answered, do away with this interference with negroes and we will give them equal protection before the law. When in 1872 the end of this system of supervision of the negro population by the Freedman’s Bureau was abandoned, the resistance to the complete assimilation of the negro with the whites in all matters of the law came about. The negro has been found a very trustworthy witness, and none regret his full admission to the courts.”

It will be unnecessary to note further the contention that existed between the radicals and democrats upon the question of negro testimony. It will suffice to say that the contest was waged with all the

bitterness and stubbornness which had marked the late contest of arms between the North and the South, the North winning again by force of numbers as on the battle field. Thus in order to end the controversy of the courts over the effect of the fourteenth amendment to the Federal Constitution we find the following bill introduced in the Legislature of Kentucky with the following comment upon it by the Lexington Observer and Reporter. The paper in publishing the proposed bill made this criticism of the proposed law: "The following is an act to amend the laws of evidence in this Commonwealth. A wider or more complete revolution in legal practice was never made by Jacobin or Communist, and if the people do not have cause to rue it, then we are vastly mistaken in our apprehensions. It only required this act of humiliation to complete the abjectness of the people of Kentucky to the dictation of their radical task-masters. The next step will be negroes in the jury box, and wherever else our masters shall appoint them to come.

"An act to amend the laws of evidence in this Commonwealth.

Section 1. *Be it enacted by the General Assembly of the Commonwealth of Kentucky.* No person shall be disqualified as a witness in any civil action or special proceeding, by reason of his interest in the event of the same, as a party or as otherwise; but such interest may be shown for the purpose of affecting his credibility.

Section 2. Nothing in the preceeding section contained shall, in any manner, affect the laws now existing relating to the settlement of estates of deceased persons, infants, idiots, or lunatics, or the attestation of the execution of wills, or of conveyances of real estate, or of any other instrument required by the law to be attested.

Section 3. Neither husband or wife shall be competent to testify for or against each other, etc.

Section 4. No party shall be allowed to testify, by virtue of section 1, in any action or special proceeding where the adverse party is deaf and dumb, etc., etc.

Section 5. No person who would, if a party, be incompetent to testify under the provisions of section 4 of this act, shall become competent by reason of the assignment of his claim.

Section 6. No person shall be deemed competent to testify in behalf of his own interest, etc.

Section 7. **NO ONE SHALL BE INCOMPETENT AS A WITNESS BECAUSE OF HIS OR HER RACE OR COLOR.**

Section 8. This act shall be in effect from its passage."

It will be noticed that section 7 of the above proposed act contained an express provision to the effect that no one shall be incompetent to testify by reason of his race or color. No one would contend for a moment that this section was not for the purpose of giving the negro the right to testify in our courts. It is true that the above bill was not passed verbatim as proposed, but in substance it is the same as the bill

which was enacted—sections 605-6 of the Civil Code of Kentucky. The amended bill, section 605 of the Civil Code, expresses the same thought as was embodied in the original bill in sections 1 and 7. Note the exact wording of the amended bill which was adopted in preference to the original bill. “Subject to the exceptions and modifications contained in section 606, EVERY PERSON is competent to testify for himself or another unless he be found by the court incapable of understanding the facts concerning which his testimony is offered.”

The meaning which was intended to be conveyed by “every person” was that Negroes, Mulattoes, and Indians should be competent witnesses in civil actions, not that atheists, infidels, etc., should be permitted to testify. It would be recklessness to put such application to section 605 of the Civil Code; for it is evident that the above statute, 605 of the Civil Code was intended to eradicate one thing—discrimination between whites and blacks in giving testimony. There was no contention between the atheist and the fideist, no intention on part of the Legislature to permit the atheist to testimony, nor no desire on part of the masses. Then how could the Court of Appeals come to the conclusion that Sections 605-6 of the Civil Code of Practice gave the atheist the right to testify?

I maintain that Sections 605-6 of the Civil Code of Kentucky had one main object in view to accomplish, namely, to give the negro the right to testify in our courts. No one ever thought of abolishing the common law rule of religious belief prior to testifying in courts of justice, when the above section was enacted. It was enacted as has been shown, to meet a change brought about by the Reconstruction in the South. The original bill, newspaper editorials, public comment and statutory regulations prior to its enactment, show clearly the evil which was to be remedied—in equality between the whites and the blacks in giving testimony. Hence giving the statute its proper construction, the common law rule of religious belief is now in force in the State of Kentucky. Later statutory enactments show that this idea is true. Section 680 of the Civil Code expressly recognizes the obligation of the oath and expressly required that it shall be administered. Therefore, as the common law rule of competency is now in force in this state, when the proper construction is given to Sections 605-6 of the Civil Code, I contend that an atheist is incompetent to testify in the courts of Kentucky.