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RECENT CRIMINAL CASES

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STUART G. TIPTON, Case Editor

HOMICIDE—MURDER WITHOUT INTENT TO KILL.—[Alabama] Defendant and deceased engaged in mutual combat without weapons. They agreed to fight, and at first each drew a pocket knife but they later agreed to and did throw away their knives and "fought fair" with their fists only. Deceased died two weeks later, allegedly as a result of a blow received over his heart in the battle with defendant. Defendant was convicted of murder in the second degree. On appeal it was argued that defendant had acted in self-defense, and no *corpus delicti* had been proven by the State, and that from the facts, the crime of the defendant could at the most be manslaughter since he had no intent to kill deceased. *Held:* on appeal, affirmed. One willingly entering a fight cannot set up self-defense and the evidence in the case justified submitting the question of death to the jury, whose finding cannot be disturbed. An intent to kill is not necessary in second degree murder: *Tennant* v. *State* (Alabama, 1934) 155 So. 885.

The decision on the first two points of the appeal cannot be criticized for self-defense is not available to one willingly entering a fight, and the testimony of expert witnesses as to the cause of death of deceased is not to be controverted here. A discussion of the third defense, however, is in order. The Alabama statute distinguishes between first and second degree murder, murder in the second degree being "every other homicide committed under such circumstances as would have constituted murder at common law" except certain defined crimes, such as murder by poison, lying in wait, *etc.*, which constitute first degree murder. Murder at common law was killing a human creature in being against the peace of the King with malice aforethought, express or implied: *Beasley* v. *State* (1873) 50 Ala. 149; 1 *Wharton* "Criminal Law" (12 ed. 1932) §419. So a specific intent to kill is not necessary for murder in the second degree in Alabama, and the decision in the *Tennant* case is unimpeachable in so far as it holds that an intent to kill is not necessary to affirm the defendant's conviction. But for a homicide to be murder, it must have been committed with *malice aforethought: Roberson* v. *State* (1913) 183 Ala. 43, 62 So. 837; *Coates* v. *State* (1911) 1 Ala. App. 35, 56 So. 6; *Strickland* v. *State* (1907) 151 Ala. 31, 44 So. 90. As was held in an earlier fight case in Alabama, to justify a conviction of second degree murder, it must be shown that the defendant acted wilfully, intentionally, and maliciously: *Barnett*

v. *State* (1927) 21 Ala. App. 646, 111 So. 318.

Malice has been well defined as an "unjustifiable inexcusable man-endangering-state-of-mind" including either an intent to kill or inflict great bodily injury, a wanton and wilful disregard of human life, or, if the person is engaged in a felony, a wilful act involving a substantial element of human risk: *Perkins,* "A Re-examination of Malice Aforethought" (1934) 43 Yale L. J. 537; and see note in (1934) 25 J. of Crim. Law 454.

In the instant case defendant admittedly did not intend to kill or seriously injure deceased. Nor was defendant engaged in the commission of a felony. To find malice then, it is necessary to discover in his conduct a wanton and wilful disregard of human life. The manner in which a homicide is committed is decisive of the degree of murder: *Clarke* v. *State* (1898) 117 Ala. 1, 23 So. 671. In the instant case defendant discarded his knife voluntarily, deceased was willing for the fray, both used their fists only and fairly, and no discrepancy in size is shown to make the fight unfair. Certainly this is a case for the application of the rule that "if the blows causing death are inflicted with the fist, and there are no aggravating circumstances, the law will not raise the implication of malice aforethought, which must exist to make the crime murder": *People* v. *Munn* (1884) 65 Cal. 211, 3 Pac. 650; see further *People* v. *Mullen* (1908) 7 Cal. App. 547, 94 Pac. 867. Thus admitting that the court in the *Tennant* case was right in holding that no intent to kill is necessary to constitute murder in the second degree, the decision cannot be supported as there is no showing of any malice, express or implied, on the part of the defendant and homicide without malice cannot be murder. It was error to treat this defendant as if he had walked up behind deceased and shot him in the back. (That would be second degree murder too, not being included in the specified acts making up murder in the first degree.)

In the case of *People* v. *Crenshaw* (1921) 298 Ill. 412, 131 N. E. 576, the Illinois Supreme Court erred as badly as did the Alabama court in the *Tennant* case, but in the opposite direction. The defendant in the *Crenshaw* case accosted deceased, a much smaller man, at a country fair, inquired his name, and upon learning it said, "for two cents I'll kill you," and, after the deceased tried to avoid him, struck deceased a terrible blow on the head with his fist, killing him. A conviction of murder was reversed on the theory that no malice could be implied from the use of a bare fist. But malice may be expressed, and threats are one evidence of express malice: *McCoy* v. *People* (1898) 175 Ill. 224, 51 N. E. 777. The court relied on *People* v. *Mighell* (1912) 254 Ill. 53, 98 N. E. 236 for the reasoning that there was "no reason to suppose defendant contemplated death or serious injury" when he struck deceased with his fist, which reasoning was equally applicable to the *Tennant* case. But in the *Mighell* case, as in the *Tennant* case, there was no express malice, while there was express malice in the *Crenshaw* case.

State v. *John* (1903) 172 Mo. 220, 72 S. W. 525, is a case which properly affirmed a conviction of murder for a death resulting from a blow of the fist. The defendant in that case was a dog catcher. A crowd gathered early one morning to watch him in his efforts to catch

a dog. Defendant became irate, threatened to kill somebody if they didn't leave him alone, and then walked up to deceased, who was unoffending, struck him, and killed him. The malice necessary for murder was express in this case just as in the *Crenshaw* case, and the court's decision that it was murder seems correct. And see *People* v. *Clutuh* (1912) 18 Cal. App. 786, 124 Pac. 566, for a case where the court properly handled a "fist" case where there was no malice shown—the situation found in the *Tennant* case. While we read of manslaughter situations resulting in murder verdicts and, more often, murder situations reduced to manslaughter, most jurisdictions are pretty uniform in holding death resulting from the usaul "fist fight" situation to be manslaughter only and the instant case seems to be clearly out of line in finding malice where there seemed to be none.

HENRY L. MCINTYRE.

RAPE—AGE OF CONSENT STATUTE—REVERSIBLE ERROR.—[Tennessee] Defendant was convicted of statutory rape, the age of consent in Tennessee being set at twenty-one years. (Tennessee Code (1932) §10786.) In two important respects, the case presented an extreme application of this statute: (1) the female was within thirty days of the age of twenty-one and (2) she had been married and had separated from her husband. *Held:* on appeal, reversed and remanded: *Elkins* v. *State* (1934) 167 Tenn. 546, 72 S. W. (2d) 550.

The purpose of statutes of this type has been the subject of much discussion and today the object of such statutes is pretty well recognized and understood. In the instant case, it is held to be a "statute again and again declared to have been enacted for the purpose of protecting from seduction innocent and immature girls, protecting them from the wiles of men of greater experience in sexual affairs" The court, having determined that the prosecutrix, having been married, was not within the class of women for whose benefit and protection the statute had been enacted expressed its hesitancy to apply the statute to the defendant. All of the statutory exceptions were examined, but the court, asserting the inapplicability of those incorporated therein by the legislature, held itself unwarranted to add further exceptions through judicial holding. An alleged error in the charge to the jury upon the theory of reformation following evidence of prior illicit acts was finally seized upon as grounds for reversal. From a viewpoint of statutory interpretation, the decision is unsatisfactory and leaves the Tennessee courts no better fortified to face the next case arising under this statute.

Professor Baker, in his article *"Reversible Error in Homicide Cases"* (1932) 23 J. Crim. L. 29, discusses the numerous factors influencing courts of review when they are called upon to decide cases on appeal. It is interesting to note that although the discussion in the article is limited to homicide cases, the influencing factors there set out are applicable to almost every type of criminal proceeding. Such elements as the personality of the defendant and the prosecutrix, the circumstances involved, the punishment assessed below, the personal emotions of the judges, the conduct of counsel below, and the condition of the lower court record constitute powerful factors effecting the decision but

allow the formation of a system of criminal law in which no case will be settled until it has run the gauntlet of appellate emotions.

In the instant case, under the violated statute, only a few facts need be proven in order to obtain a conviction. These are that the female was under twenty-one years of age when the offense was committed, and that the act did not come within any of the statutory exceptions which would exonerate the accused, such as the existence of a husband and wife relationship between the defendant and female in question. Under such a procedure, the justifiable prosecution may be quickly dispatched and punishment meted to the guilty offender. However, where circumstances exist, as in the instant case, that are sufficient to deny a conviction, even though the primary, fundamental requirements are established, it would seem that methods of reversing exist which may be employed more easily and beneficially than by searching the record and selecting a minor and highly doubtful point of evidence. These methods are two-fold: (1) that the Tennessee courts follow the prior holding of *State* v. *Davidson* (1915) 134 Tenn. 482, 184 S. W. 18 (an abduction case), which held that the broad term "any female" did not include married women, and resolve that the statutory words "a female over the age of twelve and under the age of twenty-one years" does not include feme covert even though separated from their husband; (2) that the statutory exception that a conviction is unwarranted where the female is "at the time and before the carnal knowledge, a bawd, lewd, or kept female," be held satisfied where prior acts of intercourse are proven. The second method might present difficulties of determination however for it is a matter of varied opinion as to when a female becomes "a bawd, lewd or kept" woman. Once more judicial emotions would be brought to play, but such a determination is considerably more satisfactory than forcing a search of the record for technical, high doubtful, reversible error, especially where the true reason for reversal is so apparent and well founded.

CLYDE THEODORE NISSEN.

CRIMINAL LAW — GRAND JURY — LEGALITY OF DRAWING UNDER THE JURORS' ACT AND THE JURY COMMISSIONERS ACT.—[Illinois] Defendant was indicted, tried and convicted of robbery with a gun in the Criminal Court of Cook Conuty and sentenced to the penitentiary. On appeal the sole issue was whether the trial judge erred in refusing to quash the indictment, because, as argued by accused, the grand jury which found the indictment was chosen from a panel of 60 persons, summoned by order of the judge, instead of 23 as the statute specified. Last February the court reversed the conviction, but at the April term a rehearing was allowed. *Held:* on rehearing, modified and affirmed (2 judges specially concur, and 3 dissent). The language of the Jurors Act (Ill. Rev. Stat. (Smith-Hurd, 1933) c. 78 §§1-24) is clear and unambiguous, and definitely fixes the number of persons to be summoned at 23. The provisions of this act are, however, merely *directory,* and not mandatory, since the accused has not shown that the methods used have deprived him of any sbustantial legal right. Thus it was not error to refuse to quash the indictment: *People* v. *Leiber* (1934) 357 Ill. 423, 192 N. E. 331.

At common law the sheriff of

every county, at the order of the judge was bound to return to every "session of the peace, and every commission of oyer and terminer, and of general gaol delivery, 24 good and lawful men, or more, out of the entire county, out of which a grand jury of not more than 23 was chosen": 4 *Blackstone's Commentaries* (15th ed. 1809) 302; 5 *Bacon's Abridgement* (1854) 310. Though the precept specified only 24, the sheriff generally returned 48 or more; 2 *Hale's* "Pleas of the Crown" (1778) 154; *People* v. *McKay* (1820) 18 Johns. (N. Y.) 214; *United States* v. *Mitchell* (C. C. A. 9th, 1905) 136 Fed. 896. In the latter case where the court had before it the question of the validity of a grand jury which was impaneled from a summons for 30 persons, the indictment returned by a grand jury of 23 selected from such number was sustained, and the practice of calling more than the 23 to be impaneled was approved in the interest of expedition in the organization of the grand jury. From the above authorities, and there are many more, it is plain that at common law it was immaterial and did not affect the validity of the grand jury if more than 23 persons were summoned.

The Illinois Supreme Court in its opinion recognized the existence of the common law rule, but said that it was no longer of any legal significance in Illinois, as the legislature had passed the Jurors Act (*supra* at §§9, 16, and 19) and the Jury Commissioners Act (Ill. Rev. Stat. (Smith-Hurd, 1933) c. 78 §§24-35) in which the number, qualifications, and methods of selecting jurors were clearly specified. It said that the common law rule had been changed by the Jurors Act (1) by specifically limiting the number of jurors to be summoned at 23, and (2) by taking away from the judge all power over summoning the jury panel.

(1) The proposition that the number to be drawn is limited to 23 rests upon Section 16 of the Jurors Act (*supra*), which provides that a full panel of the grand jury shall consist of 23 persons, 16 of whom shall be sufficient to constitute a grand jury. The same question presented in the *Leiber* case was before a federal court in the case of *United States* v. *Breeding* (D. C. Va. 1913) 207 Fed. 645. In the latter case the defendant moved to quash the indictment on the grounds that the court had ordered 30 names to be drawn instead of 23 as provided by statute. The federal statute is quite similar to that of Illinois in that it provides for a grand jury panel of "not less than 16 nor more than 23" (U. S. Rev. Stat. (1878) c. 15 §808) while the Illinois statute provides that the panel "shall contain 23 persons." In discussing the federal statute the court recognized and approved the well-recognized principle of construction which forbids an innovation upon the common law unless the words of the statute clearly require it (*Northern Securities Co.* v. *United States* (1903) 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679), and held that the above-quoted phrase was not sufficiently strong to justify an alteration of the common law rule. It would seem to follow that if the words of the federal statute, which do show some intent on the part of the legislature to limit the selection to 23 persons, are not sufficiently strong to justify an inroad upon the common law rule, it could hardly be said that the language used in the Illinois statute is sufficiently prohibitive to show such an intention.

(2) The Illinois Supreme Court said that although the presiding judge may excuse for good cause any of the 23 which constitutes the original panel, he has no express or implied power under the Jurors Act or Jury Commissioners Act to order more than 23 persons summoned for grand jury service; and that the clerk of the court is authorized by the Jurors Act to select 23 persons by drawing their names out of a box provided for that purpose. The effect of this ruling is that whenever a grand jury is required by law the clerk may ex officio repair to the jury commissioner's office and there draw 23 names. But there seems to be no authority for the clerk's action. It cannot be found in the Jurors' Act, for the only authority there conferred upon him is to issue the summons for the 23 persons certified to him by the county board. Under the Jury Commissioners Act "one or more of the judges" is to certify to the clerk the number of petit jurors required each month; and the clerk is then to draw the number certified, and certify to the sheriff for summoning the names of the persons so drawn. Immediately following is the provision that "whenever a grand jury is required by law or by order of court, it shall be drawn and certified in like manner." The drawing is thus to be *in like manner* as in the case of petit jurors, or in other words the clerk is authorized to draw names only upon certification. Furthermore, since by another provision the judge is impowered to certify the number "required," it would seem that he should not be restricted to 23 as the court says the Jurors Act so restricts him. Here was a clear intention of the Illinois legislature, as in the case of "petit jurors," to leave the fixing of the number to "one or more of the judges" as the needs of judicial business require. It evidences a clear cut manifestation of confidence in the judiciary, and a plain reliance upon it for aid in accomplishing a clear and free-moving administration of justice. Thus to say that the judge has nothing to do with the drawing of persons which will constitute the grand jury, and that the clerk is authorized to select only 23 names from the box, seems clearly contradictory to the language and spirit of the Jury Commissioners Act.

The liberal construction contended for is further supported by the fact of its application in long continued usage under the doctrine of *contemperanea exposito.* In the present case the practice of calling more than 23 persons for grand jury duty has been followed in Cook County for over 40 years. In view of the long established construction of the statute by the public officers called upon to administer it, that construction should be followed: *Opinion of the Justices* (1885) 138 Mass. 601, 7 N. E. 35; *People* v. *Kipley* (1898) 171 Ill. 44, 49 N. E. 229; *Bunn* v. *People* (1867) 45 Ill. 397; *Nye* v. *Foreman* (1905) 215 Ill. 285, 74 N. E. 140; *Cook County* v. *Healy* (1906) 222 Ill. 310, 78 N. E. 623.

The Illinois Supreme Court escaped the administrative difficulties its decision would have occasioned by decreeing that even though the Jurors Act is construed as fixing at 23 the number of grand jurors to be summoned, the drawing of a larger number can amount to no more than a mere irregularity not affecting the validity of the indictment. It based its finding on two grounds, namely: (1) Statutory requirements intended for the guidance of officers and designed to se-

cure order and dispatch in proceedings are not usually regarded as mandatory unless followed by words of absolute prohibition; (2) the provisions of the act are merely *directory* and not mandatory since the accused had not shown that he was injured in being deprived of any of his substantial legal rights. The above rule is generally followed where the statute fixes the number of grand jurors to be summoned: *Turner* v. *State* (1886) 78 Ga. 174; *Stevenson* v. *State* (1882) 69 Ga. 68; *State* v. *Watson* (1889) 104 N. C. 735, 10 S. E. 705; *State* v. *Davis* (1841) 24 N. C. 153; *Saunders* v. *State* (1906) 148 Ala. 603, 41 So. 466; *Untreinor* v. *State* (1906) 146 Ala. 26, 41 So. 285; *Pybos* v. *State* (1842) 3 Humph. (Tenn.) 49; *Lowrance* v. *State* (1833) 12 Tenn. 145; *Commonwealth* v. *Wood* (1848) 2 Cush. (Mass.) 149; *State* v. *Clark* (1909) 141 Ia. 297, 119 N. W. 719; *Anderson* v. *State* (1843) 5 Ark. 444; *State* v. *Bachman* (1917) 41 Nev. 197, 168 Pac. 733; *People* v. *Harriott* (1856) 3 Park Crim. (N. Y.) 112. *Contra: Leathers* v. *State* (1853) 26 Miss. 73.

Likewise, with the exception of one case (*Marsh* v. *People* (1907) 226 Ill. 464, 80 N. E. 1006), the Illinois Supreme Court has followed the above rule: *Beasley* v. *People* (1878) 89 Ill. 571: *Gillespie* v. *People* (1898) 176 Ill. 238, 52 N. E. 250; *Blattner* v. *Dietz* (1924) 311 Ill. 445, 143 N. E. 92; *People* v. *Wallace* (1922) 303 Ill. 504, 135 N. E. 723; *People* v. *Birger* (1928) 329 Ill. 352, 160 N. E. 564; *People* v. *Donaldson* (1912) 255 Ill. 19, 99 N. E. 62. In the excepted decision the grand jury had been selected at a meeting of the board of supervisors not called in pursuance to the statute. The court held that the meeting was not a legal meeting, that the board had no power to act, and therefore the selection was illegal. The effect of this decision has been greatly reduced, however, by later Illinois cases, where the court has repeatedly held that the *Marsh* decision cannot be extended beyond the facts then before the court. Thus it cannot be said to be of controlling authority in the determination of this case. See *People* v. *Donaldson, supra.*

Thus in the furtherance of the purpose of the legislature for an efficient administration, it seems that the court should have interpreted the statute in such a way as to give the judge wider discretionary powers in drawing the grand jury in Cook County. The effect of the decision is to disregard the terms of the Jury Commissioners Act which was drawn with special regard for the administrative problems of the county. Further a grand jury drawn from a panel of more than 23 is illegal, and yet a premium is declared on such illegality by declaring the statute merely *directory.* Justice Stone, in his specially concurring opinion (in which the late Justice De Young concurred), pointed out the more desirable path when he said: "In a county such as Cook, with a large shifting population, it is essential to the expeditious administration of justice that the court be permitted to summon more than 23 prospective jurors, else it may well be that the grand jury cannot be impanelel on the first day of the term as required by law. Such was the intent of the General Assembly in the enactment of the Jury Commissioners Act. It is true that for reasons of public expense a judge should not order a greater number of jurors than experience shows necessary to insure the impaneling of the grand jury without

delay. The law holds no prohibition against the return of more than 23 persons from whom a grand jury is to be selected and the method followed in this case was not for that reason contrary to the statute."

FRANK J. MCCABE, JR.

[Although it has not been the practice to present discussions of trial court cases, the general interest in the Insull trial and its great importance justify a short discussion of the issues involved. Students of criminal law generally depend upon appellate reports of convictions and much is lost by ignoring trials resulting in acquittals. Therefore, from time to time the JOURNAL will present discussions of important trials along with the annotations of appellate opinions.]

THE INSULL TRIAL.—Samuel Insull and his eighteen original co-defendants were charged under the Federal mail fraud statute with having "devised a scheme and artifice to defraud and to obtain money and other property . . ." from the investing public by means of the United States mails in connection with the sale of allotment certificates of the Corporation Securities Company. The true income of Corporation Securities was said to have been misrepresented. Five major misrepresentations were alleged: (1) there was a safety of principal based upon physical properties; (2) there was an adequate yield of six per cent; (3) there was a ninety per cent holding in five of the major concerns of the Insull group; (4) there was a safe and sound investment to be found in the common stock; and (5) there were dividends that would be paid out of earnings.

The pre-trial tactics of the defendants were calculated to delay action and to lay a possible basis for appeal in case of conviction. The defendants first filed a plea in abatement (grand jury defects) which was followed shortly thereafter by a motion to quash (insufficiency, vagueness, repugnancy of the indictment, unconstitutionality of the mail fraud statute, *etc.*). These motions were denied. When Samuel Insull entered the case he pleaded to the jurisdiction (illegal arrest) to which a government demurrer was sustained. His motions for a bill of particulars and a separate trial were denied. After the case had been called for trial the court overruled the defendants' challenge to the array. A jury was impaneled without unreasonable delay and the case proceeded to trial.

In order to understand the alleged scheme to defraud, it is necessary to obtain some idea of the organization of the Insull empire. At the top of the organization were two investment companies, Insull Utility Investments organized in 1929 (hereafter referred to as IUI), and Corporation Securities Company (hereafter referred to as CS) organized in 1929. These two investment companies owned securities in the other Insull companies in order to control them. Middle West Utilities Company was a holding company which was organized in 1912 (hereafter referred to as MW). The five major Insull concerns referred to in the indictment were Commonwealth Edison Company, (hereafter referred to as CE), Public Service Company of Northern Illinois (hereafter referred to as PSCNI), Peoples Gas Light and Coke Company of which Mr. Insull first became chairman in 1913 (hereafter referred to as PGLCC), Midland

United, and Middle West Utilities Company, the holding company referred to above. Utility Securities Company (hereafter referred to as US) formed in 1922, was owned by IUI, CS, CE, PGLCC, PSCNI, and MW, and was essentially the stock selling company of the Insull group.

In the alleged scheme to defraud, the government traced the financial history of the defendants and their connections with the Insull companies in such a way as to attribute fraudulent motives to their actions. MW in the latter part of 1928 became somewhat of a white elephant due to inability to meet dividend payments. In order to effect a reorganization of MW, the market price of MW stock was forced above the 200 mark by Samuel Insull and Halsey, Stuart & Company (hereafter referred to as HS & C) through purchases to the extent of $13,000,000.00, thereby making the stock attractive to option holders. In the early part of 1929, IUI was formed to further insure control of the Insull companies and a continuation of the Insull policies. Becoming skeptical of the efficacy of IUI to continue control, due to additional stock having been sold, CS was organized in October, 1929. However, the government charged that this was not the only purpose for its formation. To insure the success of the plan to defraud, it was part of the scheme for CS to serve as a dumping place for the $13,000,000.00 of MW stock previously accumulated by Insull and HS & C. The government alleged that the reason for the roundabout way of formation of CS was not to defer income tax payments primarily, but that it was to conceal from the public the true assets of the new CS. The circular of October 19, 1929, issued to advertise the sale of CS stock, purported to say that business would commence with assets of over $80,000,000.00 when in reality all that was turned in was 304,000 shares of IUI, one-half of which was purchased from HS & C with borrowed money. Then to further confound the public, the 2,000,000 shares of CS given to SI and HS & C as part of the consideration for the 304,000 shares of IUI turned into CS, was placed in a voting trust with Insull, Stuart, and Insull, Jr. as the voting trustees. This was done to make the public think that the defendants had made a substantial investment in CS.

The next step was the listing of 700,000 allotment certificates on the Chicago Stock Exchange as the "jewels" of the Insull empire and sale to the investing public at 75. On the same day of the announcement, Stuart, president of CS and HS & C and acting for CS, began buying these units at 100. The government contended that this went beyond supporting the market as the units were already in demand. The subsequent sale of the 1,250,000 shares by US in 1930 further fortified the charges of fictitious sales. Four methods of "ring around the rosy" were introduced into evidence. The court and jury were given visual education by means of charts showing the number of times the Insull companies were on the buy and sell sides of market transactions in IUI and CS. Purchases of defendants' stock by themselves, washed sales (". . . to effect any transaction in such security which involves no change in the beneficial ownership thereof . . .;" July, 1934, Cumulative Pamphlet, U. S. C. A. §78(A)), and matched orders (an order for the purchase of a security with knowledge that it would be immediately offset by a sale or-

der entered by or for the same or different parties: July, 1934, Cumulative Pamphlet, U. S. C. A. §78(B)) were the specific devices used to rig the market in Insull securities so as to give it an appearance of activity. For instance, it was alleged that the defendants engaged in from 45 to 65 per cent of all transactions in CS common stock during the period of 1929-1931, inclusive. Further, it was charged that defendants engaged in from 65 to 95 per cent of all the transactions in CS allotment certificates. These alleged transactions consisted mainly of purchases, few sales being made.

More specific allegations of fraud, however, were made. In addition to the five major misrepresentations referred to above, the government charged that the amount of income of CS was inflated because of the methods of CS in receiving stock dividends as income at market values, in not charging organization expenses to earnings, and in deducting depreciation of approximately $34,000,000.00 (due to depreciation in securities held in other Insull companies) from capital surplus instead of from income. In the circular *re* issue of 1,250,000 shares of CS common stock dated March 21, 1930, under the paragraph heading "Earnings," it was represented: "The following is a statement of estimated net earnings for the calendar year 1930. Based upon the present income from the securities now owned and five per cent interest upon the unexpended balance of the proceeds of this financing:

Net income after deducting all expenses and taxes	$7,106,309.82
Cash dividends on preferred stock now outstanding, paid or accrued	2,237,714.50
Balance available for common stock	4,868,595.32

In the above statement of earnings, stock dividends received . . . have been taken at current market prices. On the above basis the earnings available for the 4,000,898½ shares of common stock for the average time outstanding during 1930 will be $1.42 per share." The government contended that expenditures would have exceeded income had proper accounting practices been followed and that the public was not taken into the confidence of the defendants. It was pointed out that eight drafts of this Report were made before it finally came out.

The practice of receiving stock dividends into income at market prices was alleged to be a "nefarious practice" and fraudulent in the light of the fact that all of the Insull companies knew the others were issuing stock dividends at one price and receiving such into income at inflated market prices. It was charged the defendants used this practice to effect a greater distribution of the stock, and that such was in no sense income—the equity of the stockholders not being affected. It was pointed out that such was contrary to the rulings of the N. Y. Stock Exchange. Further, such was a vicious practice inasmuch as the defendants had already deliberately misled the public by its market rigging operations in MW, IUI, and CS stock. The government attempted to reënforce its case by proof of the great discrepancy between the market value of CS and the liquidating value of the stock of the companies controlled by CS.

The effect of charging $1,000,000.00 organization expenses to capital surplus instead of first against earned surplus or against earnings was to state a profit when the de-

fendants really had a net deficit. In no case was the amount of the organization expenses disclosed to the public and the government argued that this failure of disclosure was misleading respecting the true earnings of CS.

The government charged that the depreciation of assets of CS to the extent of about $34,000,000.00 on November 15, 1929, was not shown in the balance sheet and profit and loss statement of the Report of 1929 as defendants were afraid that it would affect the marketability of their shares. The government argued that this depreciation of securities in the portfolio of CS should have been charged first to earned surplus. It was alleged that all three of the above mentioned accounting practices were knowingly consented to by the defendants since they were faced with the necessity of raising around $22,000,000.00 of funds during the year of 1930 for MW. A favorable showing of income would aid in this.

Defense counsel depended upon the character and past deeds of the defendants since, as was asserted, it was inconceivable that the defendants would turn into crooks overnight. The depression was made the scapegoat of Insull's downfall. The real thing on trial was a period in American finance and not the defendants. The whole question was one of interpretation, and the government's case was one of conjecture and surmise with no positive and direct proof of fraud sufficient to overcome the presumption of innocence that the defendants were entitled to receive. The government's case was said to be based on petty and far-flung inferences built upon inferences. Criminal intent to defraud had not been proven. There could be no temptation for the defendants to depart from a line of rectitude and truth to steal from widows and orphans inasmuch as their success depended upon the continued confidence of the investing public.

In answer to the charge of misleading the public as to the value of MW when its stock was raised from 160 to over 500 by $13,000,000.00 of purchases, the defense countered by saying that the same result could have been accomplished with $100,000.00 with the right sort of publicity. The roundabout manner of forming CS was to defer income tax payments and to continue control by Insull. The motives of the defendants were not to deceive the public for CS was not used as a dumping ground for the $13,000,000.00 acquisition of MW by Insull and HS & C. If the defendants had wanted to dump, why did they not do so on the public queried the defense? The circular of October 19, 1929 (relative to the $80,000,000.00 of assets that CS would start business with) was clear in meaning that such would be the amount when subscriptions were paid in. The voting trust set up in CS to insure control by the Insull interests was not a device to enable the defendants to further mislead the public as Insull never withdrew his contribution, nor made great personal profit.

Respecting market rigging, defense counsel asserted it had always been the practice of the Insull companies to maintain a secondary market for dissatisfied purchasers and to support the market in an orderly way. The rules of the stock exchange required stock market support both before and after the issuance of stock. It was asserted that value could only be based upon market price and that the use of market value had a place in finance which

was not of a fraudulent nature. Regarding the allegations of the use of washed sales to inflate the value of the stocks, defendants declared that such was an assumption from the books and accounts with which the government had not connected the defendants. Matched orders were admitted and justified by the defendants as a device for securing an orderly market. It was asserted that the percentage of such transactions engaged in by the Insull companies to the total transactions in Insull companies was too high by one-half and that the public had a larger share in the trading than the government would admit since the government had counted sales regardless of whether the Insull companies were on the buy or sell side of the transaction. Such wash sales were declared to be only one per cent of the total US transactions.

Concerning the five major misrepresentations, the defense attempted to meet them by counter-assertions of no fraud. Of the ninety per cent of holdings in the five major Insull concerns, it was declared that the indictment was incorrect in limiting itself to CS since the statement in the booklet referred to both the holdings of CS and IUI. There was no fraudulent misrepresentation in saying there was a safety of principal in the physical properties back of the securities held by CS or US since investment companies, as such, never own physical properties. The attractive yield of six per cent was always stated to be in stock dividends. Respecting the representation that CS was a safe and sound investment and the best buy on the market, defendants declared that the word "safe" was never used in the circular and that they thought it was a good investment, but they never said it was the best buy. Regarding the statement that dividends would be paid from earnings, the defense asserted that they were so paid.

The defense had the most difficulty in justifying its accounting practices. The government had charged that in circulars and in annual statements CS had been represented to have income when actually there was a loss. In reply to this allegation that the receipt of stock dividends at their market value misled the investing public as to its income, the defense was that the intrinsic value of the stock was at least as high as market value and the latter was the only satisfactory measure of value. Accounting was described as an inexact science and to fail to mention stock dividends as income would be to conceal more than if they were taken in as income. The federal Securities Act of 1933 allowed receipt of such dividends as income at their market value if it was stated separately. (The government argued, however, that the Act did not condone the practice but merely recognized it as a means by which the Securities Commission could be informed of the disposition of stock dividends.) This was asserted to have been done in the 1929 Report. To further throw doubt in the minds of the jury as to whether there was any fraud, the defense resorted to the expedient of showing how the $10.00 original stock dividend instead of going to $518.62 went below $10.00 to $7.55 by taking a different date when the market value was low. It was declared illogical not to treat stock dividends as income and defense counsel asserted that even if the government were correct in its accounting theory, defendants only published their ignorance.

Respecting the charging off of or-

ganization expenses to capital surplus instead of first to income or earned surplus, defense counsel argued that there was no deception as to what the income was since the 1929 Report showed (however, without the amount) that such was charged to capital surplus. Defense counsel stressed the admissions of both Messrs. Huling and Kester, expert accounting witnesses for the government, that the proper accounting practice was controversial and brought in four C. P. A.'s to justify the defendants' way of treating organization expenses.

Concerning the defendants' treatment of depreciation, the defendants declared that it was not necessary for explanations to accompany all reports subsequent to the event of depreciation. In the 1929 Report at p. 6 such was shown to be charged to paid-in surplus. Defense counsel pointed out that Mr. Huling admitted on cross-examination that appreciation should not be credited to income and queried why charging of depreciation might be necessary when an investment company's portfolio depreciated.

The frequent drafts before statements were finally issued were only customary and something in addition was necessary before fraud could be made out. The defendants only represented what in the judgment of the directors and committees was an honest statement of the condition of CS.

The enormous mass of conflicting and exceedingly complex evidence was then given the jury after what were considered by both prosecution and defense as fair instructions by Judge Wilkerson. A two-hour deliberation was sufficient for the jury to digest the evidence and reach their verdict vindicating the business practices of Insull and his associates. It has been suggested that this was a result of the emotional appeal of the defendants and the complexity of the evidence. This, however, is a matter of conjecture.

ORBA F. TRAYLOR.