Journal of Criminal Law and Criminology

Volume 31
Issue 1 *May-June*

Article 7

Summer 1940

Vignettes of the Criminal Court

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VIGNETTES OF THE CRIMINAL COURT[1]

FOR THE HONOR OF HIS DAUGHTER

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The victim of this homicide was the brother of a sergeant in the police department. The first trial was warmly contested. The jury had returned a verdict of guilty and fixed the defendant's punishment at imprisonment in the penitentiary for twenty years. The Supreme Court reversed this judgment and ordered a new trial. This is an account of the second trial.

The defendant's daughter was a telephone operator at the time of the homicide. She would ordinarily return home at ten o'clock. On the evening in question it was 11:30 and she had not yet made her apeparance. The father became worried and left with his son, Carmen, to find her. They went to an intersecting point where the father knew that she would have to make a transfer to reach her home. He was surprised to see her in a car parked about 100 feet from the northwest corner of this intersection. He reported the matter to Officer Carroll, standing on the corner chatting with a Catholic Priest who was waiting for a car. The officer walked over to the auto, observed nothing wrong, and refused to make an arrest. The father then told Carmen to call up his mother and tell her to "come and get the daughter." Carmen went to the drug store on the corner but was unable to obtain the number. The father then went to the phone. Successful in his mission, in about fifteen minutes the wife stepped from the street car. Up to this point the state and defense agreed upon the facts. But the state contended that the defendant called his wife for armed re-enforcements. The prosecution was unable to trace ownership of the gun to the family, however, and was therefore precluded from making an argument that the defendant called his wife for a revolver. They contended, nevertheless, that soon after the arrival of the wife, the defendant approached the car and fired two shots at the young man who had been with his daughter. The defense version of the homicide was that the wife walked to the car and cried, "You beast." The young man answered, "Get away from here, you ———." He grabbed her by the hair and was pulling her into the car. The father advanced to the machine, whereupon the boy reached for a gun that was lying on the floor of the car. The father grabbed his hand and in the scuffle that ensued two shots were fired which resulted in death. Carmen, his wife, and the daughter

[1] The last contribution under this title, and by the same author, was published in the preceding number of this Journal, XXX, 6.

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were eye-witnesses of the tragedy. The wife was called as a witness but was not permitted to testify on account of her marital incompetency. The daughter was not in the city during the trial. She had left home on the eve of the hearing.

The deceased's brother testified as a necessary witness to prove the corpus delicti of the offense. Officer Carroll then told what he knew about the transaction. He testified that as soon as he heard the shots he ran in the direction of the machine. The accused ran west to an alley, then south, and then east again to Farragut Avenue. It was at this spot that Carroll reached him and made his arrest. The father dropped the gun as soon as the officer approached. Other witnesses testified in reference to the defendant's presence at the scene immediately after the shooting, but were not in position to inform the jury as to the nature of the difficulty between the men. The state then offered into evidence a statement by the young man made in the presence of the accused. It was to the effect that he had taken the daughter home from work and the accused had shot him while he was in his car. In the former trial, there was an extensive dying declaration submitted in evidence, in which the declarant described the shooting so as to negative the element of necessary self-defense upon the part of the accused. A doctor had testified upon the hearing of the motion for a new trial that he had been present with the boy from the time he was brought into the hospital; that the patient never made the statements contained in the purported declaration; and that some of the officers who had signed this statement had not even been present at the hospital. It was largely on account of this improper evidence that the Supreme Court reversed the decision of the lower court. This declaration was not introduced in the second trial. The lack of it seriously weakened the state's case since all the other eye-witnesses testified for the defense.

It was shown that the deceased was a large man, weighing over 200 pounds. The defendant was short, weighing only 150 pounds. He was very dark, a native of Lombardy, and unable to speak the English language. He was neatly dressed, in a new blue serge suit. Not understanding what was being said during the trial, he was not able to help his cause much by his demeanor. There was grim determination in his countenance. He never smiled throughout the proceedings, although there were many occasions when the court fans responded to the judge's clever antics. He made a fairly good witness in his own behalf. The judge ordered that the questions be asked as though directed to the average witness, insisting that the interpreter use the first person in quoting the answer of the witness. The prosecutor wisely closed his cross-examination by inquiring as to the whereabouts of the daughter. No character witnesses testified that the defendant was known as a peaceable and law-abiding citizen. This was a close case and such testimony would have been of material aid. There was evidently good and sufficient

reason for the defense not taking up this subject.

The defense admitted that the accused had fired the shots that killed the boy, although if the shooting occurred in the manner described by the defendant it was possible that the boy pulled the trigger in the scuffle. Defense counsel stated that the prosecutor's demand for the death penalty at the beginning of the trial was "pure bunk." The prosecutor's aim was to ask for something big with the hope of obtaining a mite. He argued further that Officer Carroll's failure to make the arrest was really the cause of the tragedy. He properly pointed out that it was the duty of the jury to place themselves in the position of the father. If they felt that the defendant, as a parent, had a right to believe that something of an untoward nature had happened to his daughter he was authorized to act upon it even though it had not actually occurred. The defendant had testified that the girl's hair was dishevelled and her clothing in a wrinkled, crumpled condition. Counsel explained the daughter's absence by intimating she was too modest to appear at the trial to explain her unseemly conduct. He argued that the state had not shown that it had made any endeavor to obtain her presence by serving a subpoena upon her. He called the jury's attention to the fact that the gun had not been traced to the defendant. In reply to the sisters' testimony that their deceased brother never had a gun, as far as they knew, although they had access to his room, and that they had been in his car on the day previous to the homicide and had not seen a gun, the defending attorney maintained that these girls had not testified at the first trial and would say anything to help the cause of the state. He was glad that such nice-appearing young ladies had come to court so that the jury might better visualize the defendant's daughter and know how the father felt when he thought that something had happened to her.

In final argument, the prosecutor gripped his hearers' attention on two or three occasions while emphasizing some of the most striking features of his case. Those points were delivered with such force that they must have been driven into the consciousness of the jury. He did not inform them that it was a logical inference to conclude that the wife had been told by her husband to bring him the weapon which caused the death. Neither did he argue the point that the daughter failed to make her appearance in the case because of the fear of the defense that the jury would learn the whole truth. If she appeared and were unable to satisfy the jury that something wrong had happened between the boy and herself, it would have deeply impressed the jury that the shooting by the accused was violent, unnecessary, and cruel.

The jury was out seven hours when they informed the judge that they were hopelessly deadlocked, unable to reach a verdict. A report was to the effect that they were nine to three for acquittal. The judge finally dismissed them.

Additional sidelights on the trial follow:

Just before final arguments, the judge informed defense counsel that it would be necessary for him to submit the citations which he desired to use in his address to the jury. The judge would then read these authorities and decide whether or not quoting from them would be proper. In some instances he refused the attorney the right to read from these citations. In regard to a Missouri case he told the defending attorney, "Unless you show me that some principle enunciated in that case is on a novel question of law with no Illinois decisions bearing upon it, I will not permit you to read it to this jury. You must confine yourself to Illinois law." On another occasion he told him, "Unless there is evidence in this case authorizing the applicability of that principle of law I will not let you read that case to the jury. Let the record show that the court refuses counsel permission to read from the 12th to the 17th line, of Page .... of the 322nd Illinois report."

To assist the theory of self-defense the accused had testified that upon the occasion when the boy pulled the defendant's wife's hair, she shouted in Italian, "Help, Help."

It is the duty of the state to call all eye-witnesses of a homicide. Where the wife of the defendant has been an eye-witness the state simply calls her to the stand, asks questions to bring out her relationship with the defendant, and then asks the court to explain to the jury the rule of law which requires the prosecution to call all eye-witnesses of the homicide; and further, that rule of law which states that a wife shall not be competent to testify for or against her husband in a criminal case. The prosecutor commented upon the size and apparent physical strength of the wife, in his final argument. His adversary objected to any remark upon this matter but the court ruled, "The jury saw her. They may draw any conclusion which they desire from her appearance." This was an illustration of the extent to which alert state's attorneys present inferences in favor of their theories.

Defense counsel cited the well-known Filippo Case, Illinois Reports. He also attempted to read from the 147th Missouri, 152 but as heretofore intimated, the court warned him that he would only permit him to read from it, if the decision were in reference to a novel point of law not covered by an Illinois decision.

He appealed to the jury again and again to take themselves back to the scene of the homicide and look at the circumstances as they surrounded Jim. He asked, "What would you do if you found your daughter in a car, with its lights out, parked a hundred feet from the corner on the wrong side of the street? You might think it was as serious a matter as Jim did. But, it is not what you would have thought or what you would have done. You are concerned with what Jim thought, under those circumstances."

He pleaded, "When Jim left his home, did he have any intention to commit murder? If he were looking for trouble, would he have taken his boy,

twelve years of age with him? All the facts in this case indicate that the difficulty arose suddenly and the homicide was the result of an unexepected quarrel. These facts strike at the very foundation of the state's claim that the homicide was committed with malice aforethought."

The prosecutor might have answered, "I agree. The defendant did not intend to commit murder at the time that he left his home with the little boy. From the evidence, though, I infer that he did have murder in his heart at the time that he called up his wife. The law does not require that a defendant meditate over a homicide in order for him to be guilty of murder. If the slightest time intervenes for him to consider his acts he may be held accountable to the charge of murder."

The prosecutor might also have argued, "The defendant presents a double-barrelled defense. He wants you to excuse him for the homicide because of something that the young man is alleged to have done to his daughter. From the evidence in this case you have reason to believe that nothing of an improper nature happened between them. The defendant does not stop here, however. He introduces the theory of self-defense by claiming that the deceased reached for a gun that was in his car. Do not the facts indicate that the defendant was not only the aggressor, but the 'sole mover' in the transaction? In a subtle manner, defense counsel asks you to give the accused a clean bill of health because the unwritten law justifies his action. In the same breath he asks you to spare his client because of the necessity to kill in self-defense. The latter defense, if it creates a reasonable doubt of the defendant's guilt, warrants an acquittal. The other affords the defendant no adequate excuse for his actions. The only reason evidence was permitted to be heard on the question of the boy's alleged relations with the daughter was to throw what light it could upon the defendant's conduct; not as an excuse, but as an explanation of it. It was part of the res gestae, and did shed some light on the transaction so that you might better understand it."

The prosecutor failed to picture the boy in his youth, his life snuffed out, in the manner that some state's attorneys might have done. This argument always appeals to the heart.

The defending attorney's strongest legal argument lay in the fact that the state had not traced the ownership of the gun to the defendant. His argument was, "With all the investigators of the state's attorney's office at hand, and with the brother of a police sergeant the victim of the homicide, I have reason to infer that if Jim had been the owner of the gun they would have been able to show it to your complete satisfaction. In this case they have made no effort to prove that the accused owned a gun.

"The defendant's denial of ownership is uncontradicted. The testimony of Carmen and his father stands unimpeached. There are authorities which state that where there has been uncontradicted testimony advanced upon the part of the defendant the jury have a duty to believe it." Here, he attempted

to read a decision but the judge refused to allow him to do so.

In this case, the defendant's conduct, demeanor, and past history entitled him to be looked upon as a decent, respectable member of the community. If a jury becomes satisfied as to the good character of an accused on trial for murder they will hesitate long before returning a verdict which will consign him to a penitentiary for a term not less than fourteen years.

The prosecutor overlooked the stock argument, "The defendant judged the alleged wrong done to his daughter and fixed the penalty for it. After fixing the penalty he acted in the capacity of the executioner." This is always effective.

The defendant must bear the expense of a third trial. It has cost him a huge sum to be defended in these two trials. It seems unfortunate that he should have to defend himself three times in order to satisfy society. If the homicide occurred in the manner related by him and his witnesses it was grossly unfair for him to suffer the ordeal of three trials for a vindication. On the other hand, if it occurred in the manner described by the state's witnesses, he was fortunate to escape a conviction of murder.

From the facts in this case it was a reasonable inference that the defendant's wife brought him the gun which fired the fatal shots. But with all the trained investigators at the disposal of the state's attorney he was not able to trace the ownership of that gun to the family. It is very likely that the detectives worked upon every possible clew to find out whence it came. In all likelihood they interviewed every neighbor of the family in order to trace it. If the fact were that the wife went to one of her neighbors to obtain the gun, in compliance with the request of her husband, that person from whom she obtained it was an indirect cause of the homicide. That person, if discovered by the police, could be charged as an accessory before the fact, of murder. He, therefore, held the fate of the defendant in his hands. If the words, "I let her take the revolver on the night in question," ever fell from his lips, the defendant's doom was sealed. Such testimony would not only be consistent with the state's theory of a premeditated murder but would destroy nearly all the defense theories. It would make of the defendant not only a premeditated killer but would brand him an unmitigated perjurer. The jury, learning that the defendant had baldly lied to them, would feel disposed to inflict a severe penalty upon him. If this assumed fact were the truth, the defendant and his family must have lived under a terrible suspense, fearing that these fateful words might issue from the lips of their confidant. If it were true, they owed him a debt of everlasting gratitude for remaining mute.

Summary

This closely tried murder case embraced the theory of self-defense. We also see the rules of law that apply in connection with the admissibility of a dying declaration. What is needed in the way of evidence to permit the introduction of such a statement is indicated. We are also introduced to the

homicide resulting from heat of passion —where it leads a father to wreak personal vengeance upon one whom he believes to have violated the moral code against his daughter. The unwritten law is relied upon by the defense. The reader sees how this theory is projected into a trial regardless of the laws designed to keep it from influencing the minds of the jury.

THE MOB SPIRIT ASSERTS ITSELF

Counsel were selecting the jury. The defense viewpoint in forcible rape was not being developed extensively. A native of Norway was selected, although an assistant state's attorney by the name of Olson was participating in the prosecution. Matters looked unfavorable to the defense at this early period, although counsel did not appear fretful. The defendant was jaunty and defiant, assisting his counsel to select the men to try him. He was a bright boy, athletic, aggressive, a born fighter.

Charged, too, with a carnal attack upon the complaining witness, a young man who had been with the defendant at the time did not appear at the trial. This was a harmful circumstance for the accused because it would appear to the jury that if there were extenuating circumstances, his pal would be on hand to disclose them.

The two boys started out to attend a K. C. dance. Nearing the entrance, they discovered that the affair had been postponed. It was on the sidewalk in front of this dance hall that they met the alleged victim of the attack, Dora, and her friend. The boys introduced themselves and shortly thereafter hailed a taxi. They invited the girls to an apartment occupied by the defendant's sister. The accused maintained that he had been drinking before he met the girls, that he invited them to the apartment for the purpose of having a good time, and that while in the cab, the girls drank liquor with him. The victim's girl friend admitted that the accused drank wine from a bottle while still in the cab. Arriving at their destination, the boys' next move was to borrow a phonograph from the neighbor below them.

The girl friend of the complaining witness appeared to be under the influence of a drug, while testifying. She could hardly speak, pausing at every other word to gulp and choke. She seemed in a daze, on the verge of fainting. At one period, asked by the state's attorney to illustrate how the victim acted after the alleged offense, she closed her eyes and fell forward. The prosecutor rushed to her side, believing she was in a state of collapse.

She testified that the defendant went into the bathroom with the complaining witness and locked the door. When Dora came out she told of being attacked. Her bruised face confirmed it. Later in the evening when the couple again emerged from the bathroom, she was in a stupor. The witness asked the defendant, "Have you been at her again?" She continued, "I wanted to

take Dora out of that house. The defendant said, "Why not stay here all night?" Finally the four of us walked downstairs. I was supporting Dora as we walked. A cab was hailed and we entered it. It was two o'clock in the morning. We stopped at two drug stores but they were closed. We finally came to a policeman and reported the attack."

Policemen hurried to the apartment, finding the defendant in pajamas, with a girl in his room. This girl testified in the defendant's behalf and supported his story to the effect that the complaining witness' bruises were caused by her being in an intoxicated state and falling upon the floor of the bathroom. This girl had been in the apartment during the latter part of the evening.

Counsel argued the medical point that blood trickling down the canals on either side of the bridge of the nose would cause the skin about the eyes to discolor.

Now the defendant takes the stand. Far from polite in his replies to the state's attorney, on one occasion he stated, "You heard me, didn't you?" At another time, he replied, "I answered that question once before." Later he said, "Why should I have done that?" On still another occasion, he said, "Where was I going? I don't care to answer that." The words and the tone of voice indicated defiance. He was anything but a beaten man. No force or set of circumstances could down a man of this character. Here was a courtroom jammed day after day throughout the trial with a morbid following whose main interest was to hear startling sex revelations. The average observer was shocked at the alleged brutality of the defendant's attack. The circumstances of it were such that this crowd might have been converted into a mob to do bodily violence to the man charged with the atrocious deeds related upon the witness stand. The accused had been sitting within a few feet of the father, mother, and family of the victim, any one of whom might have committed a slaying in the courtroom and there would not have been a jury in Christendom which would have done anything but return a verdict of "not guilty" under the unwritten law. Here was the accused with his back to the wall, fighting against these overwhelming odds. Yet they were incapable of squelching his spirit. By his conduct and demeanor he seemed to say, "I have just begun to fight." Such qualities are those of the hero who readily risks his life to perform a physical act of manly courage. As it developed in the trial he had served as a life-guard for several years at one of the Muncipal bathing beaches. The qualities of this life-guard were the same as those which led the soldier in France to assume any risk in going over the top, to face the enemy's bayonets with a smile. Here was the reckless courage that brooks no opposition and knows no fear. What an unfortunate event in his life that he had not been in front-line trenches when a display of those qualities might have won him undying renown. It were far better for him and his family that he had met death on the field of battle

than that he should be committed to a penitentiary, disgraced as a rapist.

It was this dare-deviltry which led him into drinking carousals. When he drank, his sense of judgment and control failed. The physical instincts in his nature assumed control. His will directed him to commit acts of violence, to attack a girl, to commit a bold, brazen holdup, perhaps, to go out in the street and knock down the first ten negroes who crossed his path. Whatever the urge, he would have been led to undertake it. "Running wild" is probably the best phrase to explain the nature of such a boy when his sense of judgment is removed by liquor. Inhibitions had never been developed in his nature. He knew neither reserve nor restraint upon those occasions. In his normal moments he was "raring to go." Under the influence of liquor, he was "raving mad."

The affair in question was indeed a tragedy. It was deplorable that this unfortunate girl should have crossed the defendant's path when he was on a "rampage." But whether he should be held morally responsible for the atrocious crime, assuming that he was guilty, is difficult to say. The wild, unrestrained instincts in his nature were probably born with him. He was in all likelihood beyond control during his youth. The wild orgy experienced on this day was merely an expression of his nature. Yet, he was now facing the prospect of entering a penitentiary, a rapist, to think of nothing but that one wild night filled with the reckless abandon of youth.

The jury was composed of young men and women in modest walks of life. They were simple, plain, everyday folks. They were a law-abiding type, likely to deal sternly with crime. None was stylishly dressed. They followed every movement of the trial closely, as though they wanted to learn all they possibly could from the testimony. They observed the crowded courtroom. They could see that the judge felt the extreme seriousness of the charge by keeping them together for two weeks. They probably knew that this was the custom only in a murder case where a possible penalty was death. They probably reached their verdict and fixed the penalty long before the end of the trial. They eagerly watched the girl friend of the complaining witness on the stand to determine whether she was telling the truth. They were anxious to return a verdict which would carry out the apparent wishes of the public at large.

They were anxious, nevertheless, to hear the defendant's explanation of the affair. They probably wondered how he would meet the various charges made against him. They were perhaps stunned to see him present a bold front on direct examination. His manner of testifying may have impressed them with the fact that his character and disposition fitted the type of man described by the testimony of the girls. The jury probably concluded that the defendant was really capable of doing the foul acts charged by the state, because of his conduct on the witness stand. Yet it may have been just as well that he talked and acted in his

natural manner. Perhaps he would have made a complete failure had he acted the part of a reserved, undemonstrative, soft-speaking youth. The fact remained, however, that the jury was shocked by this brazen audacity. These judges of his fate presented the picture of determination, prepared to meet force with force. It appeared that each of them was ready to challenge the accused to physical combat because of his brutal attack. One juror, the second from the right, in the front row, had a scowl on his features which was so noticeable that it indicated that a calm, deliberate judgment of the boy's fate by this man was an utter impossibility. He felt so antagonistic toward the accused that he did not hesitate to reveal his detestation of him.

This trial revealed the mob spirit as one seldom observes it in a criminal trial. The public had been aroused by the newspaper accounts of the offense. It was embittered against the man on trial. It had made up its mind as to its guilt, without any extenuating factors, before the conclusion of the state's case. Here was an instance where the public was not sufficiently patient to wait for the other side of the story. There was only one side of it in their minds, and that damned the defendant. That spirit spelled destruction for the boy. His doom was sealed as soon as the girl's companion recounted the details of the tragic affair. A public so aroused does not reason. They want to inflict punishment. They want to impose the extreme penalty exacted by the law. Were the boy thrown in the midst of this mob they would have torn him asunder. A jury impressed with the mob spirit will not administer justice. The administration of justice is hopeless under these circumstances. Rules of procedure and evidence, specially designed to curb this mob spirit, give way to a superior force. The law is not carried out in its intended manner under this pressure. A jury cowed by this mob spirit merely responds to a surging demand. The men who have the power of inflicting punishment under these circumstances use their power to punish the offender in order to meet the insistent demand of the crowd. A jury so influenced by the mob is actually fearful of its own safety in returning any other verdict than that which imposes the extreme penalty of the law. The wail of the mob tells the jurors that any penalty within the province of the law is not harsh, severe or painful enough to meet requirements.

When the mob thus asserts itself and the jury feels its influence, the defending attorney does all in his power to calm the seas, to quell the rising tide, to relieve the strain, to bring reason into play, to keep prosecution in the forefront and persecution in the background, to create an atmosphere of forebearance, to convince the multitude there are two sides of the dispute, that the law will take its course, that all the accused wants is that to which he is entitled, a fair, legal hearing, according to the law of the land; that charity and mercy, the noblest impulses of the human heart, should cause a fair-minded person to

see that the accused receives an impartial, dispassionate trial, unimpaired by the multitude seeking to pass judgment before hearing the evidence. The jurors are urged not to bow to the demand of a public whose only access to information is the press which necessarily dispenses second-hand reports to its readers. Such material is written primarily for the purpose of entertaining readers and not with an abiding interest in the administration of justice. The mind which the newspaper reporters seek to satisfy is the mind bent on entertainment. It appeals to the man who rejoices in the sight of his fellow-man suffering the attack of the populace. One seldom reads in the newspaper of the man who never does an act to taint his name. If he pays his bills, keeps out of trouble, minds his own business, manages to agree pretty well with his fellowmen, lives an honest, simple life, you never hear of him. It isn't news until he does the extraordinary act, until he is in difficulty. Then he becomes a topic of interest. The exaggeration of a fact or circumstance in his account, an omission of a vital factor, an insertion of a slight untruth which changes the entire complexion of the matter, is what the reader peruses in order to have gratified the pleasure and curiosity of mob instincts.

To one who had observed the conduct of this trial, with its attending atmosphere, it was apparent why Darrow felt the necessity of submitting the Leopold-Loeb defense to a judge rather than a jury. The judge, by appreciation of his solemn oath, by his experience, training, and learning, is more likely to resist the demand of the mob and follow the course of the law. He is constitutionally better fitted to do justice as he sees it instead of being a pliant tool. If the Leopold-Loeb Case had been presented before a jury it would have been necessary for Darrow to have convinced the public as well as the jury of the inappropriateness of the extreme penalty. The jury feels the pulse of the surrounding multitude more keenly than the judge whose career sets him somewhat apart from every-day contact with his fellowmen. The jury desires to do what the majority of their fellowmen would do under similar circumstances, not of necessity what they individually, would do or like to do. They are inclined to bow to the will of the majority. Their thoughts and actions may be compared to the reed, bent forward and backward by the wind. The judge, on the other hand, in a case of this character, is more likely to be firm, to do abstract justice, to satisfy his own conscience uninfluenced by motives of prejudice or revenge.

There is always grave danger of the accused receiving an unfair trial where reporters supply inflammatory material to a gullible public desiring entertainment and sensation. It is an influence that constantly hinders the due administration of criminal justice. Of course the defendant would be in an even worse predicament without the law. A mob would inflict punishment with far less ado than a legal tribunal, and would do so in barbaric fashion. However this may be, a trial influenced

by the spirit of the mob, approaches barbaric action and is but a short step in advance of it.

In his final argument defense counsel could make no headway. His words were like drops of rain falling on the proverbial duck swimming merrily along as though nothing unusual were happening. The jurors had heeded the command of the mob. Their minds were made up. They presented a stone wall. There was no communication with them. In this condition, they could be neither convinced nor persuaded. They returned a verdict fixing the penalty at the extreme limit permitted them by the law.

The upper court, removed from the influence of the mob, reversed the judgment and granted the accused a new trial. It found that the trial judge erred in his ruling against the competency of a doctor prepared to testify as to the impotency of the accused. Two objectionable instructions also had been given by the lower court.

To refute the contention of impotency the girl friend of the complaining witness testified again at the second trial that the couple left her presence for about half an hour; and when she again saw Dora, the latter immediately told about the attack that Gene had made upon her. The complaining witness corroborated this story and added that later in the evening the defendant cornered her in the bathroom and struck her again and again in her struggle to resist him.

The defendant's companion, also indicted, again remained away from the trial. He left the accused to fight it out alone. The newspapers again described the details with such vividness that the defendant was placed in the position of a fiend incarnate. Not much time was spent in the selection of the jury, but the defendant again took an active part in assisting his attorney at this stage of the trial. Both seemed confident that they could satisfy the jury that there had been a drunken debauch in which the girl was as much to blame as the defendant. The prosecutor used every means at his disposal to engender prejudice against the accused. To say that it was a vigorous prosecution is to put it mildly. When the girl's friend gave her account of the brutal attack made by the athletic young man before them, the jury became tense. This tenseness became more acute every succeeding moment. When finally the complaining witness was escorted to the witness chair, paralytic for life, the prejudice developed into a frenzy. The drop of a pin could have been heard as she stuttered and groped through her incoherent account. She seemed still in a daze from the blows received at the hands of the accused. She cried hysterically when asked to point her finger at the man who made the attack. Upon one occasion she swooned. The court ordered the jury withdrawn. Her forehead was bathed with cold water. The jury was recalled and she tried again to complete her story. The defendant showed no trace of remorse. He was busily engaged making notes and whispering advice to his lawyer. He was seeking means by which he could break down her story. The trial was a battle of

wits, in his mind. The element of sympathy was totally out of order.

The prosecutor left no stone uncovered in presenting the facts. In final argument he bore down upon the accused with every ounce of energy in his body. His high-pitched voice denounced the accused as few men have been verbally attacked in this community. The defense attorney based his argument strictly upon law. He maintained that there were several inconsistencies in the testimony of the two girls. He continued to say that the accused took the stand and testified like a man with an innocent conscience.

In the second trial, a different defending attorney had used different tactics. He made an opening statement in order to allay prejudice. He touched upon the high spots in his defense so that the jury would learn there were two sides of the case. The defendant was not the prize-fighter, raring to go, in his trial. He was as mild-mannered during the trial as it was possible for a youth of his nature to be. When he took the stand his voice was barely audible to the jury. The only time he raised it was to emphasize his denial of certain charges contained in his attorney's questions. When he was taken over on cross-examination he answered the question as a gentleman. It was always, "Yes, Sir," "No, Sir." He was an impressive witness. The defending attorney discarded the element of impotency. He presented his theory along these lines: The jury could use their own common sense as to what happened. He would rely upon their good sense in concluding that the girl was as much responsible for what happened as the boy. It was a natural outcome of circumstances over which the girl had as much control as the boy. He was not a model young man on this day. But was she a model young lady? Why not look upon it as an unfortunate result of the folly of youth? With the testimony substantially the same, but with different theories and generals directing the battle, the jury found the defendant guilty, but fixed his penalty at only ten years. Such is an example of the inequality of justice, showing how much depends upon the trial attorney and jury that happen to be assigned to a criminal trial.

Summary

The defense was confronted with the prospect of having a girl eighteen years of age appear on the witness stand in a semi-paralyzed condition due to an alleged brutal attack upon her in the process of forceful rape. In addition was her girl friend, practically an eye-witness to the scene. It required the utmost skill to present the defense in such a way that the jury would impose less than the maximum penalty. The penalty provided for this offense in Illinois ranged from one year to life imprisonment. A second set of jurors, with different strategy to bring about a less severe penalty under the highly provocative circumstances surrounding the commission of the offense, returned a different verdict. The importance of the personal appearance of the accused in such cases as he tells his story, is dwelt upon at length. The background of such a case, showing how the girl in

a measure contributes to her predicament, is also touched upon. The failure of the defendant's pal to appear at the trial and support the defense theories was a fatal blow to the accused. It became necessary to rely upon his almost uncorroborated account of the contributory acts for which the complaining witness was responsible. While no one saw the act complained of in the indictment, the evidence does not need to extend to this degree. The medical testimony goes far to supply this necessary proof. Coupled with the circumstances recounted by the complaining witness and her girl friend, it was proven to the satisfaction of the jury that the defendant attacked her. The defense contended that some of her physical injuries were brought about by her falling upon sharp corners of furniture in the apartment while under the influence of intoxicating liquor. Although this was a possible explanation, the difficulty in substantiating such a theory must have been made plain to the reader. It was a case in which the odds were hopelessly against the defense. Its aim was to bring about a sentence calling for less than the maximum punishment possible under the statute. How the defense sought to bring about such a verdict is the primary message conveyed.