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# VIGNETTES OF THE CRIMINAL COURT[1]

CHARLES C. ARADO[2]

*An Insanity Hearing*

A woman was charged with contributing to the delinquency of her own child. The prosecutor informed the presiding judge that the defendant was a victim of alcoholism. He had an alienist in court to establish her insanity. The judge called twelve men into the box, two of whom were colored. The prosecutor's opening statement was to this effect, "In regard to this indictment, the evidence will show that neighbors of this woman complained of her conduct. The State's attorney's office made an investigation. The evidence will explain to you what was discovered.

"An alienist will testify that in his opinion the woman had been insane at least a year. You will probably be advised by the court, at the close of the evidence, to find that the defendant committed the act mentioned in the indictment, but that she was insane at the time. As a consequence, she will be sent to Elgin."

When the 13-year-old daughter took the stand and was asked, "Did your mother become drunk around the house?" she immediately answered, "No." Although understanding the nature of the proceedings, it was impossible for her to speak disgracefully about mother.

The next step in this informal hearing brought about the appearance of an officer who had arrested the defendant several times.

When the alienist took the stand, the prosecutor asked, "Precisely what did you find from your examination?" He answered, "She had no idea why she was in jail. She kept looking at the ceiling instead of directing her eyes at me. She said that Christ had talked to her about her departed children. I found that she drank about from a half to a pint of whiskey daily. Her blood pressure was 160. I found that she had already been committed to the psychopathic hospital. She was basically feeble-minded, alcoholic, and subject to hallucinations."

[1] Member of the Chicago Bar.

[2] The last installment in this series was published in number 5 of the present volume of this Journal.

He then described the various tests applied to the accused which indicated insanity. His summary was, "She is suffering from a mental disturbance in which are present alcoholism, feeble-mindedness, and hallucinations."

At the conclusion of the testimony the prosecutor said to the jury, "I haven't the power to tell you what you should do. It will be necessary for the judge to give you six possible verdicts that you can return. You are advised that under the verdict finding her guilty of the offense but insone now, she can be committed to Elgin."

The jury brought in the requested verdict within ten minutes.

*Unwritten Law and Self-Defense*

It is midnight. The scene is on the south side, in front of the home of the accused, a girl twenty-three years of age. Two shots are fired. Neighbors find the victim of the shooting mortally wounded and notify the police. They identify the body as that of Jesse Gore. His folks are notified. They tell of the boy's association with the defendant. She surrenders to the police the following day with this account of the tragedy: "Jesse and I had been to a theatre. When we returned, instead of going into the apartment we remained in the hallway for some time. I asked him, 'Does this mean anything to you?' He replied, 'Forget it.' When I cried, he said sneeringly, 'You're over three times seven.' I said, 'I'm going east.' When I started to walk toward the lake he handed me a revolver and said, 'Take this, it will be easier for you.' I seized the gun and in the scuffle that followed I must have shot him."

An unusually intelligent jury was selected to try the case, two men being high executives in nationally known corporations. While it is dangerous for the defense to rely upon the unwritten law and an emotional appeal to overcome reason and authoritative law with such a jury, counsel must have felt that the girl's grievance was of such an aggravated nature that even these intelligent men would reason that she was justified in acting as she had done.

The victim had been a gas company inspector, unmarried. His mother took the stand to supply the necessary evidence of the corpus delicti of the offense. The coroner's doctor was then called. Asked by the state to tell the jury what he found upon his investigation, he testified that two shots were fired into the back of the deceased's head, taking a downward course. For emphasis the prosecutor asked him to indicate on his (the attorney's head) where the bullets entered. The first policeman who arrived at the scene

testified that he found two 32-caliber empty shells within a few feet of the body. The sergeant in charge of the police investigation of the case then testified that upon a visit to the home of the defend- and he found a box of 32-caliber bullets and pencilled notes on the "care and use" of revolvers. In addition, he told of the conversation with the defendant after her arrest. Her written statement was produced and the officer testified that she had signed it voluntarily, in his presence. An objection was made to this statement but the court ruled it was admissible. Whereupon the prosecutor read it to the jury. The statement was full and complete as to the alleged misconduct of the victim.

Defense counsel cross-examined the coroner's doctor with reference to the inventory of the deceased's personal belongings, among which was a ring with the stone so cut that it revealed a suggestive picture. Also was found a bottle of medicine, labeled to indicate the defendant was suffering from a venereal disease. These bits of evidence were important to the defense in claiming that the deceased's character was reflected by the very articles he was carrying on the fateful night.

The girl was called to the stand. She was very frail. It seemed to require much effort for her to talk, her words being barely audible to the jury. Counsel stood at the end of the jury rail as he sketched the life of his client by appropriate questions. She had become an orphan at an early age, thereafter living with a Mrs. Smith whose name she adopted. She recounted her introduction to Gore at a public dance hall and her relations with him, mentioning the different occasions when they met, where, and what they did. She stated further that he was the only man with whom she had been on intimate terms and that he gave her every assurance he intended to marry her. On an occasion when she informed him of a physical ailment, he admitted having contracted a venereal disease some years before meeting her. He advised her to attend to the trouble by seeing his doctor. She told the jury that she had been treated by this physician. There was no contradictory testimony on this point.

She testified that she had never owned a gun, that the revolver used in the homicide had been in the possession of the deceased on the night of the shooting. When asked about the cartridges found at her home she testified that Gore had given her the gun and cartridges at one of their meetings in his home. She returned the revolver but kept the cartridges. She then related the incidents leading up to the shooting. She adhered to her former statements,

except that the self-defense element was now strongly injected into her story. The account of the verbal quarrel was the same as she had related to the police. She continued, "When he handed me the gun I grappled with him. He held his arm around my neck and covered my mouth so that I couldn't scream. I bit his fingers to force him to release his grip. I was choking. As he swung me around I noticed the gun laying on the ground. I picked it up. I don't remember what happened after that."

During the course of her direct examination, counsel asked about bruises suffered on the date of the homicide. She stated that the marks therefrom were still on her forehead. He asked her to show them to the jury. This was the first time she had taken off her close-fitting hat to reveal a crop of curly blond hair. She walked before the jury holding back her hair so that all the jurors might see the scar. It was an impressive demonstration, although the jurors might have doubted this story that Jesse had beaten her head against the stone steps.

The prosecutor retraced her life on cross-examination to show that she was a wayward character. He was successful in having her admit that the reason she left the home of her foster mother, who was amply providing for her, was due to the fact that she wanted to return home any hour she pleased. The prosecutor, not content with a favorable inference that might be drawn from admissions obtained on his cross-examination, believed that he must secure a complete confession. No witness wants to admit a lie on cross-examination. He will do almost anything to keep from doing so. When an examiner asks him point blank, "Isn't it a fact that such is true?" the witness will invariably answer in the negative.

When the prosecutor was cross-examining the defendant so minutely upon instances of her waywardness, the defending attorney frequently remarked, "She is not being tried for that."

During her cross-examination in connection with the empty cartridges found in her home, she was asked, "Wasn't it strange that Gore should be giving you a gun and cartridges without saying anything about their possible use? How did it happen that you gave him back the gun but not the cartridges? Where did you receive the information that you wrote in regard to the care and use of a revolver?" He then had her repeat the story of the slaying. As she recounted details, he asked her questions which he felt she could not answer; or if she did answer, would damage her story. Probably the most effective question asked was, "Why did you kill

Gore?" Although she had woven the story of self-defense into her testimony on direct-examination she now faltered. There was a pause. The seconds seemed minutes. Any answer that she might make after this hesitation would not be given much credence by the jury. She finally stammered, "I don't know."

It is in little things that the truth will be revealed and upon which verdicts in the most important cases will be decided. Had she answered this question in a straight-forward manner, "I killed him because he was choking me," she would have impressed the jury with the truthfulness of her story. Had the attorneys for the defense anticipated that question they would in all likelihood have instructed her as to the answer to be made to it. This incident became the "high spot" of the trial. On account of it the state could hope to shatter the theory of self-defense. The defense, on the other hand, was practically forced to rely upon the unwritten law for an acquittal. Of course, it is much safer to rest one's case upon legal grounds. When an attorney must rely upon the unwritten law it is necessary to use extraordinary effort to win the cause. He is not winning it according to the dictates of law, but on account of his ability to show the inherent justice of his cause.

Defense counsel called a policeman in rebuttal. The officer was asked the condition of the front of the deceased's clothing when he first saw the body. Upon answering in a manner that met with the attorney's approval, the prosecutor brought out in cross-examination that this condition was not observed at the place where the body laid, before it was removed to the morgue.

Defense counsel then called another officer to testify that the cartridges found near the body, although 32-caliber, were not manufactured by the same corporation which made those found in the home of the defendant. This enabled the defense to maintain that they were an entirely different lot of cartridges, in substantiation of the probable truth of her story that those used in the fatal shooting were not taken from her box, but had been the property of Gore who also carried the gun.

The first speaker for the prosecution indulged in a visualization of the famous play within a play in Hamlet, giving a striking exhibition of dramatic talent as he said: "Hamlet suspected that his uncle had been responsible for the murder of his father. He hesitated, however, to accuse him of the horrible crime. He decided upon a plan, arranging for a play to involve the brother of a monarch aspiring to the throne. The characters in the playlet resembled

the characters in real life. His uncle was invited to the play. When he observes the scenes which are taking place, as Hamlet figured they actually occurred, at the moment when the brother murders the king, Hamlet's uncle, no longer able to restrain himself, shouts, 'Lies! Lies! Lies!' When Hamlet heard this utterance he knew that this uncle had killed his father."

Insisting upon the spirit of Jesse Gore pervading the atmosphere of the courtroom, on one occasion he utters, "Oh would that I could ask leave of this Honorable Court to call into this room the spirit of Jesse Gore. Oh that I could see him walk through those big doors, take the witness stand, and tell *his* side of the story.

"She was older than Jesse. She had been to dance halls and cafes upon many occasions. She knew the world. If their relations were not the highest, morally, she was as much to blame as he. There is no evidence that he pursued her. From the evidence, that she sought him, even while still on duty, we may safely conclude that she was the pursuer.

"She met him at a dance hall. Without being formally introduced, she danced with him. That was a fateful dance for Jesse Gore. Before she was through with him she was to make him dance the 'Dance of Death.'

"At seven-thirty on this evening, the evidence indicates that the fate of Jesse Gore was sealed. If he had done any wrong, she was to judge it. She had assumed the role of judge and jury. There were no court attaches. There was no solemn courtroom. She heard the evidence, she found him guilty. For his wrong, she decreed DEATH. She was the executioner. If, for Jesse's wrong, he should forfeit his life, what punishment are you to mete out to her who not only joined in the wrong alleged to have been committed by him, but who in addition took a human life, a possible penalty for which is death on the gallows in this state?"

Directing the attention of the jury to the judge, he remarked, "You gentlemen are fortunate to sit in a case presided over by this eminent jurist. He is so fair, so dignified, his qualities are of such a nature, that all members of the bar concerned with the administration of justice in his courtroom look upon him as an inspiration."

He quoted a verse of Poe's, "The Raven," the last lines to the effect that a Raven, perched on a transom, reflected its shadow on the floor of the room of the musing poet. After repeating the words of the poem with electrical effect, he stated, "That was a poem. For the mistake in stating that an object reflects a shadow in a

downward direction when we know this is a physical impossibility, we forgive the author. It was permissible for him to violate one of the rules of physics in order to complete the verse of one of the most beautiful poems ever penned. There is no excuse, however, for this defendant when she relates that she shot the deceased in a struggle. If her story is true, then the course of the bullets would have been in an upward direction. It was impossible for her to have shot the deceased in this manner. A gun held in the position she described could not possibly have shot a bullet in a downward direction.

"I am deputized by the mother of "blue-eyed Jesse Gore" not to ask you to take the life of this defendant. At the same time, recall that this little woman has suffered an irreparable loss. No more will she see her boy come home from work. This defendant not only wrecked Jesse's life. She desolated his mother's. February 12th is Lincoln's Birthday. You and I look upon it, rejoicing. She too had looked upon it with pleasure up to this year. We all join in doing honor to one of our dearest heroes. But from this date, February 12th will be a day of horror for this little mother. On this day she will wend her weary way to a cemetery to place a few more flowers upon the grave of her loved one. This defendant snuffed out that life like you would snuff out the light of a candle."

In demonstrating the course of the bullet, he used the head of the court reporter as a model. It was a vivid, dramatic exhibition.

"If Jesse gave her the gun and cartridges, why did he take back the gun and leave the cartridges with her? Let the defense answer that question, if they can.

"Where is the gun? She remembered every detail of the crime, every step she took after the shooting. But she doesn't remember what she did with the gun. Why, that was the most important thing connected with the homicide. Of all things, she would certainly remember what she did with the gun. I will tell you why she does not remember this. I will tell why that gun is not before you. If that gun were here and we traced its ownership, we would find it the property of this defendant. We could satisfy you gentlemen beyond a reasonable doubt that this gun did not belong to Jesse Gore and had not been in his possession on the fateful night. Who is throwing dust in your eyes? Who is befogging the issue? Who is seeking to make this murder case a mystery? Guilt thrives in mystery. Consider the motive that the defendant has in not producing it here in court. I ask the defense, "Where is the gun?"

Toward the end of his speech he said, "Rise up in your manhood. Stop the murderous hand of the woman about to pull the trigger to discharge its deadly contents into another victim, even now, doomed for manslaughter."

"There is no question that she killed the defendant. She admits it. Her only legal answer is self-defense. Her explanation, however, of the struggle and tussle is a myth. That feature of her story cropped out after she had talked with her lawyer. It is not included in her original version of the affair."

"Why did you kill him? The witness had not been coached on the answer she was to make to this question. The accused fell into a trap because not previously warned as to the possibility of the state's attorney asking it. If she had come back with, "It was either his life or mine,' even though a fabrication, such answer to this vital question would not only have been consistent with the legal contention of self-defense but would have completely non-plussed my colleague. When she answered, 'I don't know,' we could then argue that such an answer indicated that the theory of self-defense was purely a myth. If it had been an actual case of shooting to save her life, the accused would have re-lived the scenes. Visualizing, again, her precarious position at the time that she reached for the gun, she would have told a story that anyone in that position would have told. In answer to my colleague's question, she would have immediately replied, 'I shot him because I felt it necessary to save my life.' When she finally answered, 'I don't know,' the defense shifted from self-defense to a purely emotional defense, unaided by a single circumstance calling for self-preservation. How can the defense argue self-defense when the accused, herself, did not claim that she had to kill the defendant in order to protect her life?"

Such power of speech in a state's attorney is indeed dangerous. If his mind is made up as to the guilt of an innocent man, and he uses this skill to bring about a conviction, it will require exceptional talent and ingenuity in his opponent to create a reasonable doubt to withstand this persuasive power.

An associate defense counsel who had not taken an active part in the trial of the case, arose to say that he would not recite poetry or drama, but would try to inform the jury as to the law which applied to the facts in the case. He read from a number of Illinois cases upon the subject of self-defense. By thus singling it out, he hoped to impress its importance upon the jury. The testimony in the case had in fact seriously damaged this theory.

Chief counsel for the defense began his address as follows: "There are three types of mentality on this jury. One has made up his mind that the defendant is guilty. The second has made up his mind that she is innocent. The third, the ideal type, has not made up his mind, and will listen attentively to the final arguments and instructions of the court. Not until he has analyzed the evidence with his fellow-jurors will this juror conclude the guilt or innocence of the accused. You have heard a lot of quotations from Shakespeare and the Bible. My opponent made a beautiful speech. Where it was convenient, though, he misinterpreted the evidence. He painted the defendant black and the deceased 'lily white.' You gentlemen recall the uncontradicted testimony in this case and know whether the deceased was as spotless as my adversary portrayed him. I do not have any intention, however, to besmirch him. I will refer to his character only when necessary to explain the evidence, so that you gentlemen will know and appreciate the position of my client at the time she is charged with shooting him."

The defense was not resting on the firmest ground. It had become a difficult matter to argue legal extenuation for the defendant's conduct. Counsel had to leave the realm of law and maintain that the dictates of decency and manhood required the jury to condemn the deceased and sympathize with the defendant. It was necessary to appeal to the hearts of the jurors rather than their intellects. It was necessary to prove that "good conscience and common justice" entitled the defendant to do what she did because the deceased had robbed her of her most priceless possession, virtue, and had marred her life forever.

He analyzed the evidence thoroughly, always pointing out the evidence which conformed to his views of the transaction. He developed elements of weakness in the state's case, showing where his opponent has misconstrued the evidence. His handling of the case, from the standpoint of a technician, was masterful.

The final speaker for the state struck at the roots of the issue, taking a bold stand on one or two decisive points, willing to rest his case on the jury's answer in regard to them. Although the jury was thoroughly instructed on the principles of law favoring the defense, after the case had been in their hands for an hour, it was rumored by court attaches that they were voting nine to three for conviction of murder carrying a minimum of fourteen years imprisonment. They finally agreed upon a verdict of manslaughter, calling for an indeterminate sentence of from one year to life.

SUMMARY

This is the thread-worn story of the girl who has loved not wisely, but too well. We see her sweetheart trying to break away. Flirting with fire, he met the consequences that not infrequently come to one in that position. A clever approach by the defense in an effort to arouse the jury against the deceased, by insinuating that he had spread a loathesome disease to the girl, affords an example of sizing-up psychological factors in order to win a verdict. The desperate effort made by the prosecutor to stem the tide by having the jury consider the bereaved mother of the victim is deemed worthy of note. Here was reliance upon oratory to offset physical facts. That he succeeded in gaining a verdit of conviction under the circumstances presented to the jury is indeed a tribute to oratory.

*Manslaughter by an Automobile*

The state's theory of the accident held that the defendant, making a right turn, drove a Ford Sedan around the corner so fast that the car ran over the left curb of the intersecting street and on a plot of ground reserved by the park system as a playground for children. Evidence of tracks upon this plot was not strong. The defense argued that a car does not ordinarily leave a track or imprint upon an asphalt paving.

Evidence brought out by the defense disclosed that the family of the deceased three-year old boy had engaged attorneys to effect a recovery in a civil suit based upon the death claim. When the defending attorney asked the members of the family on cross-examination whether they had ever spoken to anybody about the case, or anyone had ever spoken to them, some of them were guileless enough to answer both questions in the negative. It developed that the defendant or her husband had offered a cash settlement of $800.00 to induce the boy's parents to drop the civil suit as well as this criminal prosecution. The defense attorney correctly maintained that this action did not indicate guilt. It might just as well have indicated a mind and heart bent on duty and compassion for injuries unfortunately sustained by the victim of an accident.

He argued further that the testimony of the boys who had appeared in behalf of the prosecution was incredible; not that they deliberately lied, but they were at an age when they were too susceptible to suggestion. He had asked them leading questions to

which they answered as his voice and manner suggested, making many irreconcilable contradictions and gross exaggerations.

He brought out the fact that at the time of the accident, the child must have darted in front of the car. The defendant did not see him until struck. She stopped in about four feet. She became so excited that she was unable to drive her car away. She walked to the child's side and asked a man to pick him up and drive to a hospital. She went home, telling her husband to go back and find the car. The attorney argued that these circumstances did not constitute flight from the scene.

He asked the defendant if she had done everything she could to avoid the accident. She was his only witness. He conducted the examination snappily. When the prosecutor had finished her cross-examination, defense counsel said quickly and cocksurely, as though there was absolutely nothing to the case, "Let's waive argument." The prosecutor declined.

The assistant state's attorney used flowery language in final argument, faultless in pronunciation and grammatical construction, but far too refined to establish man-to-man contact. That they did not follow him with their closest attention, was plainly visible.

The defending attorney now had his inning. He referred to the speech that had just been made, the prosecutor's mention of daggers and dirks in an automobile manslaughter case. The jury smiled. It was evident that they were catching his point. He briefly reviewed the evidence as though he were hurrying in a case which did not need profound or lengthy argument. He anticipated the prosecutor's succeeding speech when he told them that they could expect to hear that, "A life was snuffed out; a body and soul that had a right to grow and develop into manhood, was abortively cut down. No more would the little boy be cherished at his mother's bosom." Hidden smiles could be observed upon the jurors' faces.

He continued, "A verdict of guilty will not bring the boy back. Hasn't the defendant suffered enough; and won't she continue to suffer, to know and realize that she has been the cause, however innocent, of taking the life of a little boy? She's a mother. Hasn't she suffered enough ignominy and disgrace to be charged with a crime; to be heralded as a criminal? Her nights have been sleepless ever since this unfortunate accident. Are you to send her to the penitentiary because of an accident which might have befallen your sister or wife while driving your car?

Among the points of law covered in the instructions were:

Remarks by the court in making rulings, and expressions of his opinions as to facts, are to be disregarded by the jury, as they are the sole judges of the facts and are to give what credence and weight to the testimony they deem fit, uninfluenced by the judgment or opinion of the court.

The jurors are not to feel prejudiced against the defendant merely because a human life was taken.

The means of perceiving, the knowledge and experience of the witnesses, and their demeanor while on the witness stand, are competent subjects for the consideration of the jury.

If a defendant testifies, the jury have no right to disregard his testimony merely because he is the defendant; but they are to judge his testimony and consider it along with the other evidence in the case, taking into consideration, of course, that he is the defendant and interested in the outcome.

If the jury finds that a witness has sworn falsely to a fact material to the issue, they may disregard his entire testimony except where it is corroborated by other competent, credible testimony.

There is a legal duty to manage a car with reasonable care.

If the defendant were driving in such a manner that it can be said that she knew or should have known the danger to the deceased or that the probable consequences of that reckless driving would be the injury or destruction of life of another, and, after observing the danger, did not use ordinary means available to prevent the loss of life, she is culpably responsible and penally liable for the crime of manslaughter. (This instruction was verbatim from a previous Illinois opinion on manslaughter by an automobile.

The following points of criminal law were discussed during the presentation of the evidence:

The prosecutor sought to have witnesses who heard a person, now missing, testify as to what that witness had said before the coroner's jury. The judge sustained the objection, stating that the rule as to hearsay applies to inquests.

The prosecutor asked a lieutenant of police if he did not give him (the officer) a subpoena to serve, and whether the latter discovered that the aforesaid witness then lived in Elgin.

The defending attorney maintained that the prosecutor couldn't now complain about the absence of this witness. The state's attorney could have mentioned these facts to the judge at the start of the trial and asked for a continuance, asserting that he had been

diligent in trying to have the said witness present; and upon giving reasonable assurance that the witness would be present at a future date, the motion for a continuance would undoubtedly have been granted.

The jury returned an acquittal verdict after a few minutes of deliberation.

SUMMARY

Here is a manslaughter case with the human element predominant because the defendant was a woman and the deceased a child. The jury might have returned a verdict of conviction upon the same set of circumstances had the accused been a man. A fundamental rule of law frequently arising in criminal cases is called to our attention in this account, namely, that the testimony at a coroner's inquest is to be considered hearsay evidence at the subsequent trial and if the witness has disappeared from the jurisdiction of the state, his evidence regardless of its importance, is incompetent.

*Incidents in a Confidence Game Trial*

Although the accused was sixty-five years of age he did not look nearly that old. He had been practicing law with a young man now assisting in the presentation of his defense. He was neatly dressed in a blue serge suit. He appeared clean-cut, eager and ready for the fray. It was a most unusual sight to see this former assistant state's attorney being on the receiving end of a criminal prosecution.

He had been editor-in-chief of a weekly newspaper with quite a large circulation. It was especially active during political campaigns when various candidates subscribed for thousands of issues containing favorable comments about them. It was rumored that a wealthy candidate subscribed for Two Hundred and Fifty Thousand copies during his recent campaign. The paper acted as a spokesman for the regular Republican party of Chicago. It appeared to be very close to the City Hall clique in control. Telephone calls would be made asking for a subscription to this paper because the subscriber would derive much benefit, politically, from the fact that he was indicating his loyalty to the Republican party. The accused was charged specifically with obtaining $25.00 for an "ad" from a proprietor of a soft-drink parlor by making false representations as to his paper being the official organ of the Republican

party; also, because of the representation that the subscription price was going into the campaign fund for the head of the ticket. The state introduced other activities of the accused and his authorized agents along the same line. An instance of this consisted of press cards given to subscribers, which were supposed to entitle the holders to extra right such as choice seats at theatres and other places of amusement. Evidence of these matters were admissible for the purpose of proving the intent of the accused to obtain money from Kelly (the complaining witness) by misrepresentations and betrayal of confidence.

The state was compelled to call an employee of the accused to prove its case. This young man proved loyal to his employer and did what he could to balk the state in proving fraud. While the defendant was on the stand he was so wrought-up emotionally that he could hardly contain himself. His private office had been raided by the state's attorney during the investigation. Under cross-examination he frequently endeavored to volunteer information to the court and jury. He answered every aspersion cast by the prosecutors. This indication of personal indignation toward the state's attorney was compatible with an innocent conscience, deeply aroused by the unfair, prejudiced attacks being made against him. He presented the appearance of a man intended to be the personal victim of a state's attorney primarily interested in politics, who wanted to ruin his victim. According to his version, the prosecutor was using the power of his office to satisfy a personal grudge. His counsel urged him to be calm and not to engage in this repartee with the state's attorneys. Yet, his conduct was so consistent with an outraged conscience that the demonstration probably did him more good than harm.

Defense counsel's manner of directing the examination was to bring out various incidents and circumstances which negatived the presumption that the defendant either misrepresented facts, gained confidence for the purpose of defrauding and betraying this confidence, or obtained money illegally or criminally. The direct examination proved that the defense attorney had studied the requirements of proof in a confidence game case well, because the examination, with the answers of the defendant, struck at the very elements of the charge. Some of the points brought out were as follows: The accused denied that he had stated to anyone that his paper was the official organ of the regular Republican party; 2—He denied making statements on the date indicated by the state's evidence,

or upon any other occasions, to the effect that the funds received for subscriptions for advertising were to be applied to the local campaign fund; 3—He fully described the transaction in which he obtained the $25.00 in question, wherein it was revealed that it was purely a business deal in which Kelly bargained for space which he felt would help him in his business; 4—He identified the ad in the paper for which Kelly had paid the $25.00, thereby indicating that he, the accused, had fulfilled his promise in connection with the deal. The conclusion reached from the entire testimony was that Kelly had paid a reasonable price for an ad, that he had received what he bargained for, that the defendant had not misrepresented any facts, had not obtained Kelly's confidence or betrayed it, and had not obtained money illegally or criminally. This was an excellent example of a direct examination of an accused wherein the defense laid a basis for the creation of a substantial doubt as to guilt and at the same time introduced points which might be argued forcefully in proving the defendant completely innocent. Where the facts developed in such an examination can be corroborated by other disinterested witnesses the defendant is reasonably certain of the verdict. Such a direct examination can only be made when the defending attorney has made a thorough study of the elements of the charge and of the facts of the particular case.

The examination was conducted so well that it appeared to have non-plussed the state's attorney. The jury must have been amazed when no cross-examination was undertaken of the defendant. In a close case, where the state's attorney waives cross-examination of the accused, he practically seals his doom. It was surprising that defense counsel did not mention this point in his closing argument.

The prosecutor was soft-spoken in his final address. It was impossible for anyone except those jurors directly in front of him to hear his first words. Of a refined nature, he was anything but demonstrative in his approach. Exceedingly calm and collected, he aims to win cases upon his reasoning prowess and gentlemanliness. The points that he made were these: "The accused falsely claimed that his paper was the organ of the regular Republican party. He fraudulently maintained that the funds given for advertising were to be turned over to the local campaign fund. Kelly had no desire to advertise. His only purpose was to give money to the current administration for possible favors. The accused secured his confidence by using the above devices. It was a shake-

down, get-rich-quick scheme. The defendant had been artful enough to have one of his employees do the soliciting over the phone." The prosecutor made his most impressive point when he waved Kelly's check in front of the jury and stated that the payee on it was the Chicago Republican Party, not the Chicago Republican Party Inc., which name the accused maintained he had always used. The prosecutor contended that the evidence indicated that the defendant was obtaining money on the pretense of being able to do favors for those who subscribed to his paper. The press cards indicated the extent to which he had gone on his pretext of being able to do favors for his constituents. He claimed that the evidence revealed sundry schemes, tricks and devices designed to defraud innocent prey.

Defense counsel wisely started his final argument by referring to the state's attorney's apologetic remark, "I regret very much to be forced to prosecute this case. But I have no choice in the matter. The front office has commanded me to prosecute it and I must comply with its order!" He used the above expression to argue that the prosecutor was ashamed of his actions in the case but was receiving orders from headquarters, which had an ulterior aim to prosecute the defendant to further its political ends.

He then submitted the following arguments: "The defendant is on trial only for obtaining $25.00 from Kelly by means of the confidence game. I wish you to understand thoroughly that this is the only issue in this case. The evidence of any other transaction was admissible only for its effect on the question of the intent of the defendant to obtain money from Kelly by the use of the confidence game. You are not to convict the accused because of anything that he might have done unless you believe that the evidence in this case proves beyond a reasonable doubt that he obtained $25.00 from Kelly by use of the confidence game. If you believe there is a reasonable doubt that Kelly was victimized, then you are to return a verdict of not guilty. Only as the other transactions cast light on the Kelly deal are you to consider them. Unless the Kelly transaction proves the defendant's use of the confidence game, these other matters in evidence are of no consequence and entirely beside the issue.

"It is apparent there is something unusual about this prosecution. The state's attorney senses it when he apologizes for his appearance in the case, and when he says that the front office demands the prosecution. Here we have the spectacle of a state's

attorney using his office to destroy a man sixty-five years of age. There is something about this case which can be read between the lines. This message does not come to us directly from the lips of witnesses on the stand. Nevertheless, from that evidence, we can detect something behind this law-suit, something which the state's attorney does not wish to appear of record.

"In this case we find that the state's attorney raided the defendant's office and seized all his belongings. Whenever the prosecuting force of the community takes upon itself the right to violate a man's constitutional rights it seems to me that its representative is in poor grace to come before a jury and urge law enforcement." (A court reporter had corroborated the defendant's testimony that he had been arrested and kept ex communicado three or four hours, an additional act of outlawry by the authorities.)

"What respect can the state's attorney expect the citizens of this community to have for law-enforcement when he goes into a man's place of business without process, seizes his books, papers, and everything in sight; and then caps this exhibition of outlawry by holding a prisoner in custody without giving him an opportunity to communicate with his lawyer?"

"If the business transaction with Kelly were free from fraud, then the state's case is completely destroyed. In this case we find that Kelly never made a protest against the transaction until the defendant had been indicted. Then, for the first time, we find him as the complaining witness, in a confidence game case. Don't you think that if this transaction were tainted with fraud, that Kelly would have lodged a protest against the defendant long before the time he did? Doesn't it appear to you that he is merely an instrument of oppression in the state's attorney's effort to send this elderly man to the penitentiary? Don't you think that if the defendant had obtained his confidence falsely and had betrayed it, with the result that Kelly was swindled, that he, Kelly, would have been 'howling' about the transaction soon after it was alleged to have taken place? Not a word of complaint was heard from him until the state's attorney seizes the defendant's belongings. Doesn't it appear reasonable to draw the inference that it is the state's attorney who is the prosecuting witness in this case rather than Kelly?"

"When I was walking to the courthouse today I thought how fortunate it is that we have a legal system which places twelve

jurors between the state's attorney and the citizens of this community."

"We have shown that the defendant's reputation for honesty and integrity is good. Two well-known judges have vouchsafed it. He has lived amongst his fellowmen for sixty-five years and there is apparently not a blemish against his good name. This is extremely important in a case of this kind."

"I believe that when you stop to consider the manner in which this indictment was brought about, you will see the invisible, underlying forces at work."

"As an officer of this court I have a duty to inform you of the law applicable to this case. In order to enable you to determine whether the Kelly transaction was an instance of the perpetration of a confidence game I will submit some late decisions which declare what the elements of this charge are and what evidence must be produced to make out such a case. In the 324th Illinois, we find that the state must prove the defendant's intent to obtain the confidence of his victim in order to betray him and obtain moneys by criminal means."

"Kelly's eye-teeth are cut. He is in a business which demands alertness. He knew what he was doing. You know that it isn't the easiest task to obtain the confidence of a tavern operator. You know that he will not repose confidence in you easily. Of course, the converse of the proposition exists; namely, you don't repose much confidence in him." (It is of exceeding importance in the defense of a confidence game case to show that the alleged victim was of age, mentally sound, and as able to handle himself as the person alleged to have swindled him. In case the victim is an infant, weak-minded, weak-willed, or of advanced age, then an unfavorable inference can be reasonably drawn. Where this is not the case, the Supreme Court uses this expression: "The parties appeared to be on an equal footing. They were dealing at arms' length."

"Where is the trick or device? Since when has it become a swindle to secure an ad for a newspaper? When the Wacker Drive was opened we found that the contractors had subscribed for space in a special Wacker edition of one of our large daily newspapers. Solicitors called upon these contractors and asked them to take space in this issue, for which they were to pay a certain price. Are you to prosecute the newspaper owners for operating a confidence game in obtaining these ads? Every Christmas and

New Year we are approached by various publications and asked to pay for space in special editions of the paper, in which we are to wish the readers, "A Merry Xmas." Now it isn't that we become so sentimental that we must broadcast our Good Wishes. It is because we feel that we will derive some benefit from obliging these newspapers. We at least feel that they will not condemn us as readily as they otherwise might. We may say that we are indirectly forced to subscribe to such advertisements. Yet we would not think of prosecuting the editors and operators of the newspapers for obtaining money by means of the confidence game. Other instances where we subscribe for space in a magazine or community paper is in publications which are issued in the name of politics and religion. We are frequently called upon to donate to the cause of ward politics. A raffle is conducted and we are asked to take tickets to make it a success. Are those in charge of politics and churches subject to criminal prosecution because they obtain money in this manner?"

"If the state's attorney is to condemn the defendant for using press cards to aid him in gaining business, I will ask him what he thinks about the numerous stars given to individuals by our President of the County Board, our Mayor, and other public officials which aim to entitle the owners of them to the right of way and immunity from violations of the traffic laws. Don't you think that more harm comes from the use of these tokens of authority than will come from the use of the defendant's press cards?"

"He had a right to publish articles in behalf of the mayor and to quote the mayor in conversations. He has testified and it is uncontradicted that he spoke with the mayor on frequent occasions, so that it was logical and reasonable for him to talk about his association with this public official. It was permissible for him to refer to this acquaintanceship in soliciting ads. It s a long way from mentioning association with the Mayor to stating that the funds received were to be given to this executive in his pending campaign."

"It seems farcical that the state's attorney should be pleading for law-enforcement at the same time that he relies upon the testimony of a tavern-keeper in proving his case against an attorney with an unblemished reputation.

"In the 319th Illinois, the Supreme Court states that the gist of this offense is obtaining the confidence of the victim. Unless this

element is present the crime is not confidence game, even admitting that money was obtained under false pretenses."

"Kelly didn't state that he was victimized when he was on the stand. He said in effect that he subscribed for space and that he received it. Where is the fraud in a case where the state must prove an intent to swindle beyond a reasonable doubt?"

"Forgetting that you are jurors, and the formalities surrounding this case, if some friends of yours approached you and you consented to take space in a newspaper for which you agreed to pay $25.00, would you later claim that the solicitor of such an ad intended to operate a confidence game against you? The evidence in this case not only fails to show the elements of confidence game but proves clearly, on the other hand, that there was no intent on the part of the defendant to defraud Kelly."

"In the Sears Case, decided in April, 1923, the Supreme Court sets forth the elements of confidence game and states that obtaining money by false pretenses does not constitute proof of this charge."

"Don't you think that Kelly felt he was to obtain some benefit by paying for this ad? And don't you think that he was likely to receive his money's worth when you stop to consider his business and what it means for him to be favored by public officials? Isn't it natural to expect that Kelly wanted friendship with the groups supporting this political newspaper?"

"From the evidence in this case it does not appear that what the defendant did was reprehensible. He is to be condemned only because it was *he* who did it. Another newspaper doing the same thing would receive the hearty support of the state's attorney instead of condemnation. So that it appears to depend on the political complexion of the newspaper whether or not a crime has been committed."

"In the Kratz Case, a decision dated February, 1924, the court speaks of the two parties in the transaction being on an equal footing."

"The state's attorney knows that there were countless transactions in which ads had been solicited and published in this paper. Yet he parades one instance (not the Kelly case) where money was paid for an ad which was not in fact placed in the paper. Don't you think that if there were other instances of a similar nature, that the state's attorney would have brought them to your attention? Hasn't the defendant satisfied you when he

states that in the case of the failure of an insertion the newspaper is willing to place such ad in the next issue or refund the money? How often do you see an insertion of a statement of a mistake made in quoting the price mentioned for a certain article? Are these owners of our newspapers guilty of obtaining money by means of the confidence game when they make these mistakes?"

"Upon one occasion when the accused was alleged to have held a damaging conversation with one of the state's witnesses, he testified that he was at Fox Lake on that date." That testimony has not been contradicted.

Counsel used rare judgment in admitting that the defendant was at fault in not inserting the ad heretofore mentioned in one of the succeeding paragraphs in his paper, even if out of place. It is always advisable to make an admission, as long as the attorney does not admit the commission of the alleged crime or facts which bear strongly upon this main issue. When counsel stated that the ad subscriber had a grievance against the defendant it appeared that he was honest and candid in his argument. This is always a decided advantage in the presentation of a cause.

"Do you think that Kelly thought he was giving the $25.00 to the Mayor's fund, when as a matter of fact he bargained for and obtained advertising space in the defendant's paper?"

The prosecutor opened his closing argument with a reference to defense counsel's contention that the first speaker for the state was apologetic for his prosecution because of the unfairness of it. He maintained that his colleague was only sorry because of the necessity of prosecuting a brother lawyer. The cleverness of these remarks lay in the fact that defense counsel had opened his argument on the same subject. The prosecutor proceeded to do the best he could with a case in which the facts appeared overwhelmingly against him. The oratorical feature of his argument was so pronounced that in his flights some of the adherents of the accused openly sneered at him. Of course, this was a case in which it was difficult for an orator to find adequate means of expressing himself. The subject matter was not of such a character that it could be used as a basis for oratory, unless extreme tact and delicacy were applied. The openings which he seized were these: (1) He elaborated upon the high place in history which our political parties have played in the history of this country; (2) he maintained, in eloquent flourishes, that the accused had betrayed his party and that in this betrayal he struck at the foundation of our

government; (3) he pictured the lawyer in communication with a client who feels free to bare his soul to him, knowing that what is said in such communications will never be repeated or divulged by a lawyer worthy of the name. In this trusted relationship, the attorney must be honest, because, if he violate his trust he pollutes the administration of justice of which he is an officer. He also argued dramatically that a lawyer, by his knowledge of the law and the procedure therein, is able to conduct his efforts so that their criminality will not be disclosed. He concluded that the evidence showed the defendant had handled the affairs of his business with a view of mulcting everyone with whom he could come in contact.

The jury was out less than an hour before returning a verdict of not guilty.

## Summary

The charge of obtaining money by use of the confidence game consists of a number of elements, each of which must be established beyond a reasonable doubt in order for a conviction to withstand the careful probing of the Supreme Court. It is difficult for the state to secure an affirmance of the judgment because the prosecuting attorney in charge of the trial fails to grasp the full significance of this technical offense. One of the keenest examples of analysis afforded a student of Criminal Law is the reasoning of the higher court in these cases in which it constantly draws a distinction between this crime and that of obtaining money by false pretenses. In the account of this trial we see the defending attorney carrying on an aggressive defense in which he not only seeks to create a reasonable doubt but to prove his client's innocence as to any criminal intent. It is doubtful whether a jury would have found the defendant guilty in a civil case on the evidence presented here. The aid to the defense that is possible where the accused himself is an attorney and knows how to conduct himself on the witness stand, is also made plain. In every confidence game charge, the same elements arise and it becomes the duty of the defending attorney to know them so that he will be prepared to show where the state has fallen down in its task of making out a case which will stand up when reviewed by the higher court. In a case where the accused does not have a good reputation in the community, the jury is likely to convict him on general principles merely because someone has lost money. A jury

does not analyze the situation in the manner of the Supreme Court, not having had the legal training to enable them to appreciate the technical points involved in this charge.

*Facing Death in Three Trials*

Husband and wife had been found murdered in their apartment. The defendant was god-father of one of their children. According to the state's theory, there had been a quarrel because the deceased parents had returned a gift sent to the child on his last birthday by the accused. Upon a showing of deliberate murder of two people on slight provocation, the jury returned a verdict of death. The judge granted a motion for a new trial. On a second hearing the jury again returned a death verdict. An appeal was taken to the Supreme Court, resulting in another reversal.

The following account deals with the third trial. The accused called a number of witnesses to support an alibi as he had done unsuccessfully twice before.

A court reporter was on the stand for the state in rebuttal. In answer to the prosecutor's question, the witness testified that she did not find anywhere in her notes the defendant's testimony in the previous trials that he had carried his gun for the purpose of protecting a large amount of money on his person.

The prosecutor then inquired, "Were these questions asked and did the accused make these answers before Judge Jackson?" (Referring to the second trial). An objection was made because the answers were not contradictory of the testimony of the accused in this trial, amounting merely to cumulative evidence. The court acknowledged the correctness of this principle but stated that it did not apply here since the accused had in fact testified in a contrary manner. This rule of criminal evidence is frequently interposed to keep out testimony of the police, particularly that pertaining to alleged oral and written statements made by a prisoner prior to the trial.

Defense counsel objected to the exclusion of the jury during argument on points of law. This position was deemed untenable as the court retains the exclusive function of passing upon the propriety of objections made during the course of the trial, without the aid of interference of the jury.

The state had introduced evidence to show that shortly before the tragedy the defendant was observed carrying a gun at a wake.

The prosecutor asked for the death penalty as he had in the two previous trials. He had good reason to expect it if the jury were satisfied that the defendant was the guilty party. Most of his time was spent in depicting the horror of the crime and little, if any, upon proving that the defendant was guilty of it.

One of the state's witnesses had admitted that she couldn't identify the accused. She could merely say that the man who rushed down the stairs wore a grey cap. She had heard one shot, there was a pause, and then two more.

A third victim of the shooting was the witness relied upon by the state to clinch its case. As she impressed the jury, it would return its verdict. If they did not believe her, the defense had a chance.

The prosecutor argued, "What was the motive for this witness to lie as to her identification in a case where her testimony, if believed, meant virtually the taking of a human life?"

A strong defense argument was, "What was the motive for the defendant to slay these people?" The state's case was weak in this regard. In none of the trials did the state offer any other motive than anger resulting from the parents' return of a birthday gift.

A pin had been stuck into the body of one of the victims. It was now in court as an exhibit. It was this evidence which had driven two juries into a frenzy against the accused.

The bullets found in the bodies of the two victims were of the same calibre, indicating that one man had killed both persons. The defense had naturally argued against the likelihood of such a theory.

For nearly three years the accused had been confined in the County Jail. Yet, in this third trial, he was composed and confident, smiling at his friends as though he were certain to win this time.

At the beginning of his argument, defense counsel said in substance, "I was born and reared in a mining community. Everyone who was able, relied upon Mother Earth to give him work. It was a land where men were men.

"My father was a lawyer. I am in practice with my brother, also a lawyer. I have been admitted to practice before the United States Supreme Court. By inheritance and personal experience I naturally have a high regard for the sanctity of the law. I know something about criminal trials, courts, juries, and men accused of crime."

He scathingly denounced the policemen who had worked up the case against his client. He contrasted them with the policeman whom he had called as a defense witness.

He picked up the pen dramatically and exclaimed, "Here is evidence of the working of the Mafia. This pen is the symbol of death."

He compared the credibility of his witnesses with those of the state.

"Let me submit the Steinbuch case in the 306 Illinois on the subject of identification. In connection with the defense of alibi the Supreme Court held that the evidence on the subject of identity must be clear and convincing. I challenge the state's attorney to read that opinion to you.

"The defendant bore a sterling reputation. He was an engineer at the time of the shooting. He found out that he was accused of murder. He surrendered. He had nothing to fear. He said, 'Here I am. Do with me what you will. I am innocent.'

"It was physically impossible for him to have framed his alibi between the hour of the offense and his arrest. There were too many details demanding attention.

"Mrs. Porto, the state's star witness, didn't describe him correctly to the police. She had said that the man who ran downstairs was six feet in height. The defendant is only five."

"Why would the defendant want to kill two people over a quarrel which had occurred two and one-half months before the shooting?

"The brother of the man who was killed had an appearance that didn't commend itself, to say the least. There is testimony that he had said shortly before the slaying, 'I could shoot the eyes out of him.' You heard him deny this shooting, mildly, on cross examination."

After the said denial, the attorney had asked the brother this single question, "Are you the same witness who testified in the second trial?" Answer: Yes." Then he said triumphantly, "That's all."

"The accused has shown that he owned a green hat at the time of this offense. He never owned a grey hat.

"I wish to make one point clear as crystal to you. We want no compromise verdict. If you believe that the defendant killed these two people, give him death. If you have a reasonable doubt of it,

don't return an imprisonment verdict. That wouldn't be fair to him or yourselves.

"On the one side of these criminal cases is the strength and power of the state. On the other side, as a rule, are the weak, the poor, and the oppressed.

"Render a verdict that betokens the Yuletide spirit that is enveloping us at this hour."

One juror not appearing to give his attention, the attorney looked at him and pleaded, "Please listen to me. These are the only words that will be said in behalf of a man in the darkest hour of his life. Hear me, for his sake."

At this moment, tears streamed down his cheeks.

"This defendant has encountered a living death for three years with an indictment of murder hanging over his head. How many times has he awakened in the middle of the night to see an electric chair? Only he knows. Talk of punishment! Are you alarmed because he hasn't suffered enough? Facing death, visualizing it, is far more terrible than actually experiencing it."

"I am tender-hearted, usually opposed to punishment. But I say that hanging is too good for the man or men who committed this murder. I believe in burning them at the stake."

"The livid fire of vengeance was in his eyes." (Referring to the brother of the deceased husband.)

"These state's attorneys think that they can "yes and no" a man to the penitentiary. Things happen during trials which are as helpful to the jury as the questions and answers that they hear. These are the things which are not planned. They arise spontaneously. Providence seems to interpose His benign influence. He will continue to exercise an influence leading to just verdicts as long as there are human beings to try these cases."

At another period of his final argument, the defending attorney said, "A jury is always right, in my opinion. I will abide by your verdict. I know that it will be right. Only in one instance in my career have I seen a jury return an erroneous verdict. The defense lawyer was largely responsible for their mistake upon that occasion. In the cases where juries have convicted my clients, they did right. They were also right when they acquitted them."

That there had been two previous trials was an important element here. The jury is not in a position to analyze the reason for reversals. They are normally led to believe that some-

thing must have been intrinsically wrong with the state's case or the judgment would not have been set aside.

Aside from their star witness, the state's case depended upon circumstantial evidence. If the jury believed her, however, as against the alibi witnesses, they would convict.

The defendant's easy and confident manner while on the stand must have made a decided impression upon the jury.

During the trial the judge had frequently ordered the jury withdrawn for the purpose of hearing arguments, or criticizing defense counsel. Both judge and lawyer talked so loudly upon these occasions that the jury must have heard them. The fact that the attorney stood up for the rights of his client seemed to impress the jury favorably.

The jury returned a verdict of acquittal. After the trial, the defendant frequented the criminal court building as a spectator. He seemed to enjoy the spectacle of jury trials. He probably learned much technique in appearing as the central figure in three of them in each of which the prosecutor had asked the jurors for his death.

## Summary

Here the defendant was twice sentenced to death and yet lived to see the day when he was acquitted of the charge. One is impressed with the nonchalance of this defendant. The reader observes the increased prejudice felt against a man who has slain two people, rather than one. The defense was an alibi. Two juries felt that it had not been established. The third jury, with the same evidence before it, acquitted him. This shows that justice depends in a large measure upon the twelve men who happen to be sitting in the particular case.