Confessions of a CRIMINAL LAWYER

ALLEN LUMPKIN HENSON

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DEDICATED TO:

The late Judge George G. Glenn and to Judge Malcom C. Traver, both of Dalton, Georgia, my mentors in the law;

AND TO:

The splendid lawyers who practice in the Court over which I preside.

FRONTISPIECE

To fashion a trial lawyer the great Personality Designer must rise to the acme of his art. He may not use the pattern for any other type, but he must borrow from all. He will need a bit of the actor for dramatic flair. The propensities of the humorist he must use to lighten situations, and those of the satirist to punish with ridicule. And there must be a part of the mathematician for exactness, and some of the logician for reasoning. There must be a bit of the vocalist for gracious voice. A dash of the Pied Piper must go in, to lead and to charm. This personality creation must shift back and forth from the tenderness of the shepherd to the ferocity of the mandarin. The stern bearing of the deacon and the levity of the clown are needed too. And the story-teller—since he must convince, and to convince the more easily he must entertain. All of these and more, for persons and situations are as unlike as finger prints, and the trial lawyer must, at every trial, direct a new unrehearsed show. He may choose neither the theme nor the actors. His players, be they parties or witnesses, range from rogues to saints.

CONTENTS

Chapter 1

LAW SUPPLANTS TOMAHAWK AND RIFLE

On a bleak Monday morning in February 1832, Judge John W. Hooper packed his saddlebags with a supply of goose quill pens and foolscap paper, Cobb's *Georgia Digest,* and Chitty's *Blackstone,* the working law library of the day, and tossed his saddle across the back of a sorrel pony to follow Indian trails in a swing around the newly created Cherokee Judicial Circuit, on the northernmost end of the Georgia map. He was accompanied by a cavalcade of lawyers. They drew rein at the plantation residence of Jasper Harnage, near the present town of Tate, in Cherokee County, and there in the old pioneer's manor house constructed of hewn logs, organized and held the first session of a court of general jurisdiction to be held in the Cherokee country.

On the preceding December 3, Governor Wilson Lumpkin had approved legislation extending the jurisdiction of the state over this territory, one and one-half times the size of the State of Rhode Island—beautiful mountain country of delightful climate, broken by fertile valleys of virgin forests and abundantly watered by clear, cool creeks and rivers.

The domain of the Cherokee lay to the north. An imaginary line began about fifty miles north of Charleston, ran along the Kanawha River to the Ohio; thence along the Ohio to the Tennessee; thence southward to the northern boundary of the present State of Alabama, a distance of about a hundred miles; thence eastward to the starting point, passing slightly north of the present city of Atlanta.

Hostile pressure caused a gradual movement of the tribes to their more peaceful lands in Georgia.

At the turn of the eighteenth century, after the Georgia government had succeeded the trustees of the colony and the colony had become a sovereign state, those in authority began to take notice of this vast territory over which, according to maps made in England, they had sovereignty. Under the royal charter of January 1732, the grant included "all the lands lying between the Savannah and the Altamaha rivers and lines drawn from their headwaters to the South Seas, including all of the islands not more than twenty leagues from the eastern shores." The limits set would today include Little Rock, Phoenix, Los Angeles and the northern part of Mexico.

The Federal government was interested in settling this territory. Georgia was interested in developing that portion of her domains closer home. An agreement was made in 1802 with the expansion-minded Jefferson administration in Washington, under which Georgia ceded all lands outside its then borders in consideration of a promise that the Government would extinguish Indian titles in the Cherokee County and move the several tribes to reservations in the West.

The first Europeans to venture into the Cherokee country were a group of Moravians who had come over with John and Charles Wesley in 1735. They established a Christian mission at a point in the present County of Gordon, which, with good luck, was a thirty-day journey from Savannah. They later established another at Spring Place (now Murray County). The superior intelligence and the fine characteristics which later made the Cherokees stand out above other Indians on the continent may be attributable to the influence of the Moravians.

No effort had been made to carry out the agreement of 1802, and the Cherokees had been little disturbed in their ancestral hunting grounds until General Andrew Jackson finished his campaign against the Seminoles in Florida, then Spanish territory, in 1818.

Jackson was the idol of Tennesseeans before his victory over the British at New Orleans. That glamorous exploit made him a national hero. Chasing that remnant of redskins back into the Okefenokee swamp was an anticlimax, certainly not an achievement fit to spark a campaign for the Presidency of the United States. He had set his heart on winding up his colorful career in that office. A sorry show is often saved by an encore; so the General took a detour deep into Spanish territory, seized two Spanish forts and with them the Spanish governor, planted the United States flag over Pensacola, and hanged two British subjects. While official Washington was seething with anger and threatening to court-martial the General for this assault upon two friendly powers, he was marching his army back to the Cherokee country where it had been largely recruited. A granite shaft a few miles south of Gainesville, Georgia, in Hall County, marks the camp site where he discharged volunteers and the militia companies furnished by Georgia and Tennessee. Among those discharged were my grandfather, Presley Henson (Chastain's Co., Nelson's Bn., Ga. Mounted Volunteers), and two young Indians, John and Horne, the sons of Chief Black Hawk, whose tribe occupied the western part of the Cherokee country.

The General went back to Tennessee to finish building his mansion, the Hermitage, set his farms in order, and launch his campaign for the Presidency. Discharged officers and men joined the white settlers now beginning to infiltrate the Cherokee country.

My grandfather had soldiered with John and Horne; so, with nothing more inviting in sight, he settled in Black Hawk's territory. He built his "big house" and kitchen of hewn logs, in a cove at the head of the valley. The valley had such topography and setting as that which encouraged the imagination of the ancients to fashion stories of gods and goddesses ruling lands and seas and elements, long before the days of Homer. Some say there was the magic of a good-luck charm governing the valley's formation, since

its clear streams and fertile ground are ringed about by mountains which form a giant horseshoe. Starting at a prong of this horseshoe and tracing the ridge northward, we go along a crest for some thirty miles. Curving leftward along the toe of the horseshoe and continuing along the highest ground, we turn toward the south, and the same distance in that direction brings us to a point where the hills merge into the plains. Now we find ourselves at the other prong of the horseshoe. To reach our starting point we must travel eastward some fifteen miles and cross a stream which bisects the valley and flows past a village, the early history of which can be gleaned only from Indian lore. The first settlers of one valley called it Littleroe.

The earliest site of the Cherokee government, other than that of scattered tribal councils, was located at Echota on the Little Tennessee River, thirty miles south of the present city of Knoxville. In 1819 they transferred the capital to a point in Georgia near the present town of Calhoun, in Gordon County. In the forks of the Connasauga and Coosawatee rivers, where these streams flow together to form the Oostanaula, they built the last Indian village to be erected upon their native soil. They called it New Echota. A council house was about as dear to an Indian's heart as his wigwam. It was the first building at New Echota; a round structure, following the style of Indian architecture. Fronting streets, all of which led to the council house, were other public buildings, and a print shop—the first and only one to be erected by Indians. Nearby were mission chapels and a tavern. A dozen or more houses of conventional architecture made up the village. These were occupied by officers of the government, missionaries, and Indian families wealthy enough to afford them. Half a mile from the village was the home of the grandparents of Will Rogers, world-famous humorist and philosopher.

It is doubtful whether men of higher caliber were ever produced anywhere than in New Echota. John Ross, Chief Pathkiller, and Major Ridge compare favorably with the

greatest statesmen on the continent. In the Hall of Fame in our national capital is a bronze likeness of one of New Echota's "home town boys," Sequoia, whose syllabic alphabet is regarded as the second greatest literary achievement in history. Wholly unlettered and without knowledge of any language except that of the Cherokees, he made of the Indian tongue a written language. S. A. Worcester, a Boston clergyman, had the characters of this alphabet cast into type. He interested Elias Boudinot, a young clergyman newly out of a seminary at Boston, in the new Indian government and they came to New Echota and established *The Cherokee Phoenix,* the only newspaper ever to be printed in this Indian tongue.* The first edition appeared February 1, 1828, and was delivered without cost to citizens of the Cherokee nation until it was suppressed by Georgia authorities six years later. From this print shop came numerous Bible translations, religious tracts, school books, and even a hymn book. The laws and statutes of the government were printed and circulated to the citizens. Dr. W. L. R. Smith, in his *Story of the Cherokees* said, "Sequoia's invention was an unspeakable boon, spreading intelligence among all of the people."

In that interim between the coming of the Moravians and the establishment of the government at New Echota, few squatters had ventured into the territory. The establishment of a formal government, and the great number of white families which the territory had drawn from Jackson's army, made life among the Indians less hazardous. These

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* Sequoia's syllabic alphabet consisted of eighty characters which represented the sounds in Indian spoken words. These characters were entirely original. No use was made of the Latin alphabet. In fact new letters (different letters, maybe) were necessary since those of the Latin alphabet were not designed to capture the sound peculiar to Indian words.

The type for these symbols of sound was cast in Boston and used to print this paper. My neighbors in Gordon County are now reconstructing this ancient village and in the excavations have found one or more of each of these symbols where the old print shop stood.

factors caused an influx of venturesome whites, missionaries, tradesmen, and landless planters, which resembled a gold rush.

Disputed land titles were about as numerous as squatters' cabins. Indians, who had once lived from the abundant game in the forests and the fish in the streams, were forced, against ingrained nature, to plant patches of corn and vegetables, or starve. Imagine forcing such menial work upon an Indian brave of the early nineteenth century! Without courts and with no one certain which of the two governments was best able to afford protection or deserved allegiance, all too many disputes were settled by flintlock rifles and tomahawks.

The European arrival on this continent gave rise to conflicts and problems of adjustment. Was it possible for peoples of such widely differing culture, history, and tradition to live off the same soil? Every device, from the most cautious diplomacy to the severest military force, had been employed upon the Indians in America in an attempt to adjust the questions of living space and trade relations, as well as social and political relations. But the problem posed by placing the seat of the Cherokee government within the boundaries of a sovereign state was without parallel. The fact that no social order had advanced so much in culture and statesmanship within a comparable length of time only served to accentuate the problem. Men in authority in Georgia came to the realization that unless they acted with firmness and persistence the new nation which had the blessing of the Federal government would soon have its protection.

By 1832 the territory was a cauldron of uncertainty. Even those acting in good faith knew not where sovereignty lay. One thing was certain in the minds of legislators who convened at the Georgia Capital in 1832: Georgia must move in with her courts and her military forces and take over or recognize the Cherokee government as a *fait ac-*

compli and forget about her agreement with the Federal government.

To implement the legislative policy extending the sovereignty of Georgia into the disputed area, Governor Lumpkin organized several companies of militia and sent them into the territory. President Adams based Federal troops in Tennessee to oppose them. The Federal troops never moved in, probably because the militia did nothing more than quiet the disorder. Then, too, since the Cherokee country had been recognized by the Federal government as foreign territory and, therefore, out of the jurisdiction of both the Federal government and Georgia, one had as much right as the other to quiet the disorder. The militiamen, on orders from the Governor, suppressed *The Cherokee Phoenix,* and that publication was to appear no more. A number of people were imprisoned, charged with having incited the Indians to oppose Georgia authority. Among them was John Howard Payne, author of the world famous ballad, *Home, Sweet Home.* Tradition has it that while he was imprisoned at the old Van House at Spring Place, he heard Georgia militiamen humming this top number on the then hit parade as they walked post.

General Jackson failed in his bid for the Presidency in 1824. President Adams succeeded himself, and the hands-off policy which had characterized his first administration continued. Time was of the essence, and time was favoring the Indians. They were digging in, and doing well. The tide of public sympathy was running high in their favor. General Jackson was successful in his bid for the Presidency in 1828, and promptly after his inauguration commenced the negotiation of treaties under which the Cherokee relinquished their holdings for new locations in the Oklahoma Territory.

John and Horne, whose wigwams were not far from my grandfather's cabins, were in the unhappy caravan which left the valley under compulsion of the changed Federal

policy. Their tribes had ranged the western prong of the horseshoe and into the plains beyond. The mountain bears the name of Horne to this day, and a creek which flows down toward Armuchee to join the Oostanaula at Rome, leaping in wild torrents over the cliffs at the Pocket Falls, has been known as John's Creek since my grandfather's day. John and Horne set out a grove of black locust at the foot of this waterfall, forming a pretty park about that enchanted cascade of water, as pure and sparkling as can be found on this continent. These locust trees were designed to furnish their tribesmen with hard, seasoned timber for bows and arrows. By the time the locust trees had matured, the descendants of John and Horne were squeezing the triggers of Vickers and Browning machine guns along the Somme and in the Argonne in defense of a country common to both Indians and whites.

Black Hawk's tribe was concentrated on my grandfather's lands at the extreme head of the valley, preparatory to the long trek to reservations in the West. About twenty acres of the Pine Camp, as it has since been known, are hemmed in by the mountains. The land had been cultivated and the furrows appear regular now. The saplings which gave the place its name still stand among the dim furrows, but they have grown to be huge trees. I played about these pines when a small boy. I always felt the silence which held the place—a silence charged with something I could not understand.

Many years ago, my native Georgia adopted the Cherokee Rose as her state flower. It is a beautiful wild rose; five petals of the most delicate pink, the borrowed tints of the last sunset which the Indians saw as they prepared to strike their tepees with the dawn. The petals are delicate and fragrant. They grow among the sentinel pines unattended, for the Pine Camp has not known human habitation since those tepees were struck. I know Georgia, and I love every foot of her soil. I know the riotous verdure of her mountains in the springtime, and in the fall. I know the Marshes

of Glynn down by the sea, immortalized by Sidney Lanier. I know her broad plateaus, and all of her forests and glens. I have never seen the Cherokee Rose grow wild in any place in her vast domain save in this little twenty-acre plot where the Cherokees last rested on their native soil. There it grows in profusion.

Henry II, in 1176 A.D., created the courts of the assizes to "preserve the King's peace." Under the firm but diplomatic hand of Judge Hooper, the new courts had accomplished that purpose in the Cherokee country. The last of the treaties, ratified by the Senate on May 23, 1836 (with only a one-vote margin), provided for the removal of eight thousand nine hundred and forty-six men, women, and children from the Cherokee country. Squatters' rights were extinguished along with Indian titles, and the land escheated to the state. A commission was created to survey the lands and divide them into lots of one hundred sixty acres each. Each lot number was inserted in a capsule, and all were placed in a hogshead which was arranged on a frame in such manner as to rotate and thoroughly mix the capsules. For two weeks, those who were entitled lined up to draw from this huge barrel a lot of land in the Cherokee country.

One old chap from the coastal plains (he had never seen a mountain) drew his lot, got his "beeswax title" from the state, and rushed to look over his holdings. To his consternation, it lay upon the mountainside. He rushed back to the commissioner's office and stormed in without ceremony. "I've been gypped!" he said. "A mountain goat couldn't walk across that pile of rocks!" But there was nothing he could do about it. So he went back home denouncing the whole scheme of things. He traded his lot to a neighbor named Tate for a heifer calf. Since that time, a hundred million dollars' worth of marble has been quarried from that mountainside.

New Echota had been the site of much activity during the fourteen years which preceded Judge Hooper's ses-

sion of the court at Harnage. Not less than a dozen treaties had been concluded with the Washington government. Among those sitting in council almost continuously were: Chief Pathkiller, Chief Corn Tassel, John Ross, Major Ridge and Chief Elijah Hicks. There were others, some of whom acted in an advisory capacity. A Constitutional Convention held at New Echota in July of 1827, presided over by John Ross, elected Charles R. Hicks, a Moravian convert of mixed blood, Chief of the nation. John Ross was elected Assistant Chief. It is quite evident that the missionaries had influence in the councils, since four of them were arrested, along with a printer who worked for the *Cherokee Phoenix,* because of their activities in connection with the convention and their refusal to take the oath of allegiance to the State of Georgia. The Moravians and Methodists recalled their missionaries, but Worcester of the Congregationalists stood firm. He was tried by the state courts and sentenced to four years at hard labor. This is the case in which the Supreme Court of the United States held that Georgia statutes which extended the laws of Georgia over the Cherokee country were unconstitutional. Concerning this, President Jackson made his historic retort, "John Marshall has made his decision, now let him enforce it!" Chief Corn Tassel was waylaid and killed by a tribesman named Sanders. Sanders was tried in the Georgia courts for murder, and sentenced to be hanged. The case was carried to the Supreme Court of the United States which ordered the state court to certify and send up the record for review. In derision, the Georgia court sent up only a certified copy of the return of the sheriff, showing that the sentence of death had been carried out. Such was the atmosphere in which the first Georgia courts functioned.

There was not a lawyer in the Cherokee country; but neither individuals involved in criminal or civil litigation, nor the Cherokee government itself, went unrepresented. The ablest men of the Georgia bar appeared for them and fought without reservation for their rights under treaties

made with the government of the United States. William Wirt, Attorney General in President Monroe's cabinet and biographer of Patrick Henry, represented them before the Supreme Court in Washington.

As for Judge Hooper and his coterie of lawyers:

It was uncertain on that February morning in 1832 whether the Georgia courts would be accepted by the people or recognized by Federal authority. But things went well enough, probably because of the sponsorship of Jasper Harnage. At Spring Place, in Murray County, deep in the heart of a territory somewhat untamed compared to other sections, the sailing was not so smooth. A man named Bishop was indicted for murder. Bishop was the leader of a powerful faction in that area. An opposing faction sensed the advantage of his downfall and commenced pushing the case. Soon every family in the county became embroiled. A feud was imminent. So marked was the fear of violence that Colonel Lindsey, who commanded Federal troops based nearby in Tennessee (probably sent there initially to keep an eye on Governor Lumpkin's militia), sent a detachment to Spring Place, the scene of the trial. When the judge rode into town, he found this detachment bivouacked conveniently nearby. Not sure that their mission was a friendly one, he ordered the officer in command to get his "foreign troops" off Georgia soil. He thought it the part of prudence not to open court until they were gone. The sheriff was more afraid of the Bishop faction than of the Indians or the soldiers. Insisting that trouble was certain if a court were organized to interfere with the way things were being run, he was reluctant to attempt it at that time. The Judge took him by the arm and walked with him to the entrance of the borrowed church building where the court was to be held, and stood beside him while he falteringly intoned "O-yez—O-yez, the honorable Superior Court of the County of Murray, the State of Georgia, is now in session! Press forward all ye who have grievances and ye shall be heard!"

The court was organized and the Bishop case com-

pleted, without incident. The sovereignty of Georgia has never again been challenged in the Cherokee country.

Following the Cherokee land lottery, the population grew rapidly. Farms and trading centers were opened up; schools and churches dotted the hillsides. And the real greatness of our country began to be evidenced in the industrious pioneers who had drawn lots in the lottery and settled the new counties, now undisputed subdivisions of the sovereign State of Georgia.

There was a great deal of rowdyism, as is invariably true in frontier settlements. Controversies over squatters' rights provide fertile fields of litigation. Trading posts became business houses having diverse commercial connections. Banks sprang up to supplant the barter system with bills of exchange and currency.

The method of settling disputes which that ungodly and unusual mixture of people in the Cherokee country had employed prior to Judge Hooper's swing around the new circuit, had not attracted lawyers. But the caravan with which he rode lost a hardy disciple of Blackstone to practically every new county government. The law office of one of them, Warren Akin, has had continuous succession since this pioneer hung out his shingle at Cassville, in Cass County, on March 15, 1836. Its location has been moved only once, and that was made necessary when the name of the county was changed to Bartow and the county site moved to Cartersville in 1872. Warren Akin, grandson of the founder and present head of that office, has succeeded three generations of his family in the practice originally established. The first clients stacked flintlock rifles in the corner and hung powder horns on the wall while they talked matters over with their lawyer. The Akin who founded this office drafted legal documents with goose-quill pens dipped in pokeberry juice. Some of the original equipment is still in use.

I graduated from the Berry Schools in the spring of 1911 and got all set to go to Georgia University in the fall.

Hacks and surreys had replaced the horse and saddle, but there were a few old-timers still in the active practice who had ridden the circuit when it was new. "Big Court" had held a charm for me since the first time my father had carried me along with him to attend the sessions, when I was a small boy. Big names attract students, so I found my way to the court in session in my home town when I got home from school.

One of the most colorful men I saw in action was the late Judge George G. Glenn of Dalton, a magnificent trial lawyer. I ventured down to the little hotel when court was over, to see more of that distinguished group. They wer accustomed to sit on the broad piazza after the evening meal and spin yarns, talk politics, and talk over memorable cases. At times, half of the town would gather to hear them. I got acquainted with all of them, the Judge, the State's Attorney and particularly Judge Glenn. He had a sensational murder case to try during the week, and before the evening was over he asked me to sit in with him. I wouldn't have been happier if someone had made me a present of the British Navy. I handed him books, interviewed witnesses all that week, and made myself generally useful.

"We'll make a good team," he said when the court was over. "Why don't you come up to Dalton and work with me this summer?"

I had no difficulty in making up my mind. Before the summer had passed I was pretty well courthouse-broke, and I found a new and interesting adventure in every case we handled. In the meantime I toyed with law books. If the Georgia Code had been tossed away, I could almost have reproduced it from memory.

A bar examination was coming up in December, and I decided to take it. James J. Copeland was "readin' law" that summer. We crammed together for that exam, alternating as quiz master. When the big day arrived and we got set for the ordeal, the Circuit Judge, Augustus W. Fite, handed each of us a quiz sheet containing a hundred and

two of the toughest questions the examining board could conjure up. We sweated through the all-day grind. On Christmas Eve, 1913, we got a two-word telegram which has decorated the walls of every office I have ever had: "Both passed." I went down to my home town at Calhoun, hung up my shingle, and waded in.

This chance visit to "Big Court," my acquaintance with Judge Glenn, and subsequent events, sidetracked my plans to go to the University and, the premises considered, I am pleased at the change of plans. Otherwise I would have been delayed several years in getting into the practice. World War I was to intervene. It set a peg in the landscape of history definitely separating two eras. Judges and lawyers rode the circuit no more. Automobiles took the place of the hacks and surreys which had earlier replaced the horse and saddle. I would not have gotten in on the fringe of the circuit-riding period which grouped together a great array of trial lawyers. I would have missed the stories which they told at the country hotels after court was over. I would not have heard the magnificent arguments which they made in tight cases. I doubt if I would have stumbled upon the trial techniques which they taught me—"tricks of the trade" not to be learned in the law schools or found in the books.

Many of these men were born during or soon after the War Between the States and brought up during the Reconstruction. The scorched-earth policy of invading armies had impoverished their families and robbed many of them of formal education. Many of them practiced law "by ear." I have often heard them referred to as "old field lawyers." Thomas E. Watson had occasion to write his impression of a jury argument which he heard one of them make when he was a youngster. "You never heard anything like it!" he said. "A torrent bursting through a mountain gorge, a windstorm of thunder and lightning, a volcano in eruption—these are the things that speech reminded you of. And when you heard men like this in an impassioned, persuasive effort before a jury, with a courtroom filled with

anxious spectators, you could speak of it in the same tone as that used when one said 'I saw Jeb Stewart lead a cavalry charge,' or 'I saw Pickett charge at Gettysburg!' It was a thing you could never forget!"

Not all of the lawyers I knew were spellbinders, or circuit-riders. It was not an easy matter to crash the latter group. A big speech in a bad case with a good verdict, repeated a few times while the courtroom was crowded, got some of them started. An alpaca coat, a streaming black tie, patent leather shoes, and a gold-headed cane, placed others in the charmed circle. Not a few depended mainly upon a foghorn voice, mixed with a bit of the art of the actor. The base of this noble structure was to be found in the several county bar groups. Some of the practitioners whom I have known were destined to "waste their sweetness on the desert air," in mimic battles in isolated bailiwicks where Justice Courts held forth on Saturdays.

They were important personages in their "deestricts." Don't forget that. And they were usually the first to be consulted on legal matters. But if they got into deep water they called in some one of the circuit-riders. They dominated the practice so far as petty criminal cases were concerned. Many of them kept a Georgia Code in the rear of a grocery store, the base of their operations, and talked with clients on the courthouse square, at all-day singings, picnics, and wherever the people gathered. Some of them tilled the soil as a principal occupation, but, come Saturday, they emerged from this prosaic role and made for the "law grounds" where they would contend in forensic battle the livelong day. And woe to one unacquainted with the technique of Justice Court practice who tangled with one of them in that forum.

The advent of railroads and corporations encouraged specialization and soon we had the counterpart of Trebatius who, unable to compete with the great trial lawyers of the Roman Forum, distinguished himself as an "office lawyer." When Caesar came to power he selected Trebatius as his

"attorney general." The first written laws and orders in the British Isles were probably drafted by him. Lawyers in England are licensed as solicitors or as counsellors or as barristers. The profession in this country drifted into these classifications, but here a lawyer may roam the range if he has the desire and ability to do so. Here they give us the package—we are licensed as solicitors, counsellors, and barristers. Men in the early days of the circuit knew no such divisions. When I was about to order my first letterheads, I was considering whether to use the term "Attorney and Counsellor-at-Law," or "Attorney-at-Law." My old mentor of the old school said, "Hell, no! Put it 'Lawyer.' That means everything!" I have never had a letterhead or card with any other designation.

Cicero once said, "Forensic oratory was the first and jurisprudence the second art in Rome." The first art was the stock in trade of the "old field" lawyers in the Cherokee country, but opinions appearing in the Appellate Court reports of Georgia are proof they knew the second art as well. I have observed every crop of lawyers to come to the Bar in the Cherokee country since the days of the circuit riders. In making for the second art to which Cicero referred, all but a negligible few have missed the first.

Now let me start you around the circuit, first at the exact place where a fearless judge got the courts of the Cherokee Judicial Circuit off on the right foot.

Chapter 2

A SWING ABOUT THE CIRCUIT

It was an all-day trip from county site to county site in 1914. We would start on a Sunday in time to get to the county site town by mid-afternoon. The innkeeper would be waiting for us. His was the honor and the profit to entertain the judge and visiting lawyers. Stable boys would be waiting, vying with one another to care for the horses.

Most innkeepers constructed an ell running from the main building, of sufficient length to hold half a dozen beds arranged after the fashion of a hospital ward. The judge drew the first bed, and state's attorney the next, and lawyers according to rank on down the line. Sometimes the host found it necessary to crowd three (of whom I was often one) into the far-end beds. Each meal was a gourmet's delight but they put the big pot in the little one during court week. For breakfast they loaded the long table with platters filled with great rashers of country ham swimming in red gravy, fried chicken, country-fried steak, eggs fried and eggs scrambled. They never had less than three kinds of jam and jelly and always a canister of wild honey. The light, fluffy biscuits were as large as saucers. The delightful aroma which steamed up from the coffee served in mammoth cups has not been equalled.

The whirring sound of the coffee mill as it ground the dried coffee beans, the frying of bacon as it danced in the pan, were signals and incentives to get out of bed. Breakfast usually beat the sun.

Practically every dish served at breakfast reappeared for the noonday meal (we called it dinner in those days) but

there were also platters of roast beef, roast pork, and six or seven kinds of vegetables, as well as pies, "open, criss-crossed, and kivered."

How did we eat all that? We didn't. Everything was on the table when the dinner bell sounded. It was a question of "help yourself and pass it." The prudent diner simply made a quick estimate of his capacity, surveyed what was on the table, and took his pick. The innkeeper's wife usually came in at about the time everyone had finished, probably to receive the plaudits of the courthouse crowd. They were always forthcoming.

I recall one occasion when the judge led off. "Miz Foster," he said, "this is the best gravy I ever drawed a biscuit through!"

"Ah, Miz Foster," said another, "the best vittles I ever drawed up a chair to!"

Contrary to present-day practice, supper was the light meal. Buttermilk was the beverage, and usually some patronizing fellow out in the county brought in wild game: venison, quail, or wild turkey.

The innkeeper at old Spring Place kept such an inn and served such meals as I have described. On a Sunday afternoon almost half a century ago, I drove with circuit judge, Judge Glenn, and other lawyers into that little town to open court on Monday. The boys took our horses and we got placed in the ell reserved for us. Soon the judge, state's attorney, graybeards and all, were off their dignity. There was always a little "cuttin' up" in our end of the house—anything to pass the time—and invariably, after a long ride like that, the little brown jug started around. A man who used a cocktail glass to take a drink in those days would have lost caste. It was grown-man stuff to grasp the neck of the jug where the handle makes junction, lay the body of the jug along the forearm, and imbibe a mule's earful at a single draught.

As the jug was about to start the round, beginning, of

course, with the judge, the grim and dignified state's attorney—the real pillar of the law—raised his hand in caution and in subdued tones said, "Careful, boys. Not so much noise. Don't you see those church people walkin' by out there? Pull down them shades! If they look through the windows and see us turnin' up this jug, they're shore to go off and tell a lie on us!"

After supper a poker game got started. There is no rank and little dignity in a poker game; the judge didn't fare so well. I recall the punch line in his charge to the Grand Jury next morning: "—and gentlemen," when he had gotten second wind (charges to the Grand Jury had to be good in those days—second only to a rip-roaring, fire-and-brimstone sermon), "I will charge you on this damnable crime of gaming—they use some kind of cards—particularly a game I think they call poker, about which the Court knows practically nothing!" As he got to that point in the charge, he glanced over at a couple of his compatriots of the bar who had jarred his bankroll pretty heavily in the game, and went on to give expert poker players hell.

The men and the boys got in the act next morning. (Country women avoided the town when court was in session and town women remained indoors.) The rising sun found them on the roads leading to old Spring Place, traveling in all manner of rigs, with not a few on horseback and some walking. The men liked to rub elbows with their neighbors from over the county. But most of all, they wanted their boys to see what happens in court. After stopping their teams to drink at the watering troughs scattered about town, they massed them around the courthouse square until every hitching post had been taken.

Late-comers found such places as they could and left their teams to munch hay from the wagon beds. As each group secured its horses, they were out on the town, teenage boys half a pace to the rear and wide-eyed with excitement. Things like buying a few yards of calico or a sack

of flour, or having a wagon tire shrunk, had been put off until court week. If the old clock stopped, they waited until the big court week to bring it in.

It was a fine time, too, to peddle out a load of garden truck—watermelons, peaches, and maybe a crate of frying chickens—and a favorite time for the country folks to visit sons and daughters, cousins and what-nots, who had moved to town. The town folks braced for the occasion, particularly the merchants, blacksmiths, watchmakers, cobblers and the like. Early morning found every storehouse floor sprinkled and swept, and a tub of free ice water handy, and all the goods and merchandise cleaned and displayed.

Town kids rigged up soda pop stands. Some of them fried hamburgers, hot dogs, baloney—anything to coax a dime out of somebody's pocket. Anyone who has ever mixed with that crowd will remember the odors: hamburgers smoking in grease poured their peculiar smell into the atmosphere, while soda jerks loaded the air with the sweet-smelling aroma peculiar to their bellywash. All of it floated out to mix with that not-too-bad sniff of parching peanuts and popcorn stirred briskly by fruit vendors.

It was not only a field day for the old itinerant preacher, holding forth at one corner of the square, but also for the medicine man, in competition on the opposite corner. I imagine the medicine show has been a part of big court since the days of Patrick Henry and Andrew Jackson. It was a great show in the old days, as curbstone performances go. The "doctor" rigged up an improvised stand at a convenient point and backed his rig up against it so his paraphernalia and wares would be readily at hand. His dress was between a zoot suit and a Prince Albert, always with a flowing black tie and a beaver hat, to tip the garb in favor of the formal. It was enough to excite attention. And by the time he had unpacked his supply of herbs, nostrums, ointments, liniment, et cetera, he had a crowd. He started his patter with the first cluster of likely customers, and as more people came up, his voice took on such volume as to cover the bailiwick.

He was a ventriloquist too, and when he seated the dummy on his knee, the fun started—a big argument featuring jokes and skits.

When the crowd looked promising, he gave the dummy a rest, and with a bottle of medicine in one hand and a jar of ointment in the other, launched into a lecture on the ailments of the flesh and the perfect remedy he had for each. A single nostrum, flourished in his outstretched hand during the lecture, was guaranteed to cure anything from threatened dandruff to leprosy, while aches and pains would disappear, according to his patter, like the proverbial snowball, with a single smear of his wonderful ointment.

At the hour fixed by law, the sheriff appeared on the balcony, and with his voice reverberating through the whole town, opened court. The medicine man and the preacher were winded by this time and they didn't mind watching the crowd flow into the courthouse. They busied themselves with getting ready to repeat their performances at the noon recess. The judge brought the crowd to perfect order by a single rap of the gavel—our people have ever had respect for their courts—and proceeded to empanel the Grand Jury. While they elected a foreman and a clerk, the judge empaneled the traverse jury, dividing it into panels, and swore in bailiffs, one for the judge, another for the Grand Jury, and a few "riding bailiffs" for the sheriff.

The big event was now in order—the judge's charge to the Grand Jury. In the old days this usually represented a great literary effort—a thesis on good government plus a summary of our criminal laws. He put all of the eloquence at his command into this, and all the logic he could muster, not forgetting in his peroration to touch on some stirring episodes of our history.

Men of the county who amounted to anything at all saw to it that their boys heard this charge. Many youngsters got a lasting impression from a term of court. They observed the men in the custody of the sheriff—the renegades of the county. The men whom their parents respected were

jurors, court officers, and men in charge. From the judge's charge and from the legal arguments of the lawyers, they got some knowledge of the laws. When they grew up, they served on juries. They tried every character of civil and criminal case under the guidance of the judge and the lawyers. By the time they had served a few terms they had the equivalent of a course of lectures in a law school.

Preliminaries over, the judge sounded the docket: "State against So and So," he intoned. Now and then the sheriff would announce "No arrest!" This meant another young blade, sensing trouble with the Grand Jury, had fled the realm. Back in the audience some chap sometimes yelled, "Gone to Texas." If verified by any responsible person, that ended the case. The Panhandle got a newcomer or two every time a Grand Jury met in the Cherokee country, until fingerprinting and easy extradition came into existence. A surprising number of oil millionaires in the Lone Star State may trace their good fortune, at least in part, to these Grand Juries up in the Cherokee country, which years ago moved their fathers and grandfathers to seek greener pastures in the West.

When the business of the Court had been finished in one county, the judge, State's attorney and such of the lawyers as enjoyed a circuit-wide practice, moved on to the next. The schedule followed was fixed by law, so that each of the counties had its big court. And the closing of each session closed the book on disputes, which have been ever present in communities, since time began. "The King's Peace" reigned for a while, until time's accumulation of a new set of misunderstandings, mistakes and disputes made necessary another term of the court.

CHAPTER 3

JUSTICE COURTS

Big Court was not the sole luminary in the judicial firmament of the thirteen original states. Stow, the great historian, says that justice courts were instituted in England in 1076 A.D. by William I. Leo Page, a more recent historian, says that these courts as we knew them in the colonies and in the original states, were instituted in 1195 A.D. when Archbishop Hubert appointed knights, whom he designated *Custodes Pacis,* to assist the sheriffs in keeping the king's peace. They functioned long before fixed rules of procedure governed trials in English courts. Trial by ordeal and trial by combat required few rules of procedure. No legislative authority at any time prescribed any rules for the trial of cases in these courts except a summons to be served upon the person complained against. When the colonies became independent states, they took over these courts. Many have since enlarged their jurisdiction and prescribed rules of procedure. But Georgia has retained them exactly as they were when created by the good Archbishop, almost a millennium ago. The magistrates who preside over them are seldom lawyers. *Custodes Pacis* became Justices of the Peace in legal terminology about five hundred years ago, but they are referred to in Georgia as Esquires or, more commonly, "Squires."

Each Georgia county was divided into numbered districts, designated militia districts. Later they took on various unofficial names. Shakerag, Lickskillet, Bloody Eighth are typical. There was seldom an entire incorporated town included in these, the smallest subdivisions of the State. The

Justice of the Peace was the ranking officer. A collection agency's letter of some years ago, together with the reply, will give a good idea of his importance.

> "Our client shipped the goods you ordered. If you don't take it out of the railroad depot and pay for it we will notify the depot agent that you are a deadbeat, and we will ask the Postmaster to put up a notice that you shirk your debts. Then we will write your pastor about you. If that don't bring you to taw we will send the account to the Justice of the Peace and get a lawyer in your town to work you over."

The reply nonplussed the ingenuous collector.

> "When I had opened up the railroad office where I am depot agent, I went to the Post Office where I am Postmaster, and got your letter. Since I am the only man in this district that knows any law I guess I'm the only lawyer here. I do all the preachin' at the church here and am the Justice of the Peace and there ain't no other merchant. So I consulted myself in the above capacities and we decided to tell you to go to hell!"

The General Assembly has added much to the duties of the Justice of the Peace, but nothing to those of the court. He is election manager in his district, registrar of births and deaths, and is qualified to act as coroner.

My first impression of the functions of a Justice of the Peace lingers. When I was a small boy, my father (my mother dissenting) carried me to the law ground in the old Oostananala District where 'Squire John L. Camp was in charge of an election. Some twenty-five or thirty men, and twice that many dogs, were gathered around when we drove up. One of the neighbors had set up his cider barrel near the polling place, and the crowd had begun to mix his potent apple juice with the moonshine from the neighbor-

ing hills. Although the polls had been open for two hours or more, few votes had been cast, and these by the preacher and the school teacher and a few who wished to get away before the place got rough.

By midday the cider barrel and that well-known Georgia institution, moonshine, had begun to take their accustomed place in this democracy of ours. The arguments had become boisterous, and now and then the constables who attended the Justice of the Peace went to calm them down. The good Justice eventually lost fifty percent of his effective provost strength; one of the constables went down to "keep order" too often. His last official act for that day was an SOS for the assistance of his mate. "Come down here!" he yelled, "and help me keep down peace!" He was the only man at the moment kicking up a disturbance. To appease the majesty of the law they sent him home, and the Justice deputized my Uncle Jim Keys to serve in his stead.

After a somewhat drab morning up around the ballot box, one of the celebrants decided to cast his vote. When he had marked the ballot he began to yell out the names of candidates for whom he was voting. That challenged the spirit of contest. Another man announced quite as loudly that he was going to kill every vote his compatriot had cast. He revised his previously marked ballot accordingly. That caused a bigger fuss than ever. But Uncle Jim, the badgeless limb of the law, and his fellow officer got the men away.

From that time most of the men who voted shouted aloud the names of their favorites only to have some other sovereign elector kill the vote. The fortunes of the candidates seesawed in that manner, the crowd getting more fun out of killing votes than electing officers. Many who, as they explained, could not read to do much good, asked 'Squire Camp to mark their ballots, specifying in most instances one or two candidates for whom they wished to vote. The others did not matter. Thus the good Justice decided the fate of more than one candidate at the polls that day.

At three o'clock in the afternoon, Uncle Jim formally

closed the polls by order of the Justice. The cider barrel man had loaded his empty casks and moved away in the excitement of the voting. Uncle Jim had been so busy he had forgotten to vote.

Mr. Justice Blanton thought it not improper to spice an opinion (Blondheim Bros. vs. Baldwin, 73 Ga. 549) with a bit of humor at their expense:

> "A Justice of the Peace is generally a man of consequence in his neighborhood; he writes the wills, draws the deeds, and pulls the teeth of the people; also he performs divers surgical operations on the animals of his neighbors. The Justice has played his part on the busy stage of life from Mr. Justice Shallow to Mr. Justice Wiggins. Who has not seen the gasping, listening crowds assembled around His Honor, the Justice, on tip-toe to catch the words of wisdom as they fell from his venerated lips?
>
> 'And still they gazed,
> And still the wonder grew
> That one small head
> Could carry all he knew.' "

Evidently Mr. Justice Wiggins, whose ruling was under review, failed to appreciate the humor. Nor did his fellow justices, scattered about the State. At the very next election they gave him a resounding defeat.

Big Court convened once or twice a year, depending upon the grist from the Grand Jury and the volume of civil business. One or more Justice courts met in Gordon County every Saturday. We had thirteen of them in as many militia districts. Saturdays found most of the local bar down at the "law ground," each with a law book under his arm, ready to take all comers. I have seen them fight all days in relays, for stakes that rarely topped fifteen dollars.

One Saturday in November, I went with a client named

Jim Gillespie to a law ground on top of a mountain, just over in Pickens County. It was as cold as blue blazes. There wasn't a building within ten miles. About twenty-five men and seventy-five dogs made up the group of parties, witnesses and spectators. The Justice and his bailiffs had felled three or four huge trees so that their trunks lay parallel with a space in between. They had cleared out this space and had a big pine-knot fire blazing.

The good Justice was reticent about commencing the trial. "You've appealed from me to this jury," he told my client. "Now you and your lawyer go ahead."

The other side was unrepresented, but we finally got the five-man jury lined up on one of those logs.

With the Justice back with the spectators, I presented my evidence in the best way I could. The most awkward situation a lawyer can find is trying a case without a lawyer on the opposite side. Our opposition had no witnesses. Testifying for himself, he denied every statement which my client had made. As soon as he had finished, and without waiting for me to ask him any questions, he rose from his seat on the log and walked over before the jury. Looking each juror square in the face, he said: "If you give this case to Jim Gillespie, my brother Bill will bodaciously beat hell out o' the last cornsarn one o' ye—by God!" The jurors knew Bill. I lost the case.

I represented one of the local young blades in 'Squire Hill's court in old Resaca District. He was charged with having seduced a female of previously chaste character. She was a healthy specimen of no mean proportions. Colonel Tom Skelly represented her, but she did most of the talking. She made out a perfect case, embellishing her testimony with some rather positive language. Colonel Skelly rested his case, and we came to bat.

My client was not bashful either. He promptly and vigorously challenged her precious chaste character—a perfect defense under the law. Up she bounced, like a rubber ball, at the mention of such a thing. Shaking her finger under

the Justice's nose, she yelled, "I know I am a pure woman! I can prove it by my lawyer settin' over there!" Leveling a finger in the Colonel's direction, she asked, for all to hear, "Colonel Skelly, didn't you proposition me over at Tilton the other day 'n' didn't I turn you flat down?"

The shift of onus was not too pleasing to her dignified counsel. But he came through. "Yes," he said rather dryly, "and I've been mad at you ever since."

'Squire C. L. Burns, as fine a character as I ever knew, held his court in Lilly Pond District. I tried a case in his court which had sharp conflicts in the evidence. My opponent was a loquacious old chap and he had employed the skill for which he was noted in confusing the issues. He was a great speech maker, so far as length and volume went. In his argument to the jury, he abused my client unmercifully, picturing him as a pinch-penny skinflint of the lowest order.

Rising to his full length to put over a peroration with hands outstretched, he said, "Why, gentlemen, this plaintiff is like that unregenerate of Holy Writ who demanded a pound of flesh cut from nearest the heart of a poor creditor like my humble client—"

I interrupted to remind him, as well as the Justice, that the story of Shylock did not come from Holy Writ at all, but from profane literature—a play written by William Shakespeare.

That started a hot argument. "I know it did!" my adversary insisted. "It didn't!" I rejoined.

After a few such rejoinders, the good Justice whammed the table with a small hammer which did good service as a gavel. "Shut up! Both of ye!" he ordered. "You're both dead wrong. It didn't come from the Bible, nor it didn't come from no Shakespeare. It come from McGuffey's Fifth Reader. I read it there myself!"

That was that. We went on with the case.

It was a long time between sessions of the Superior Courts, and to those of us who did not ride the circuit and had to rely upon the sometimes sparse pickin' in our home

counties, Justice Courts were lifesavers. A five-dollar fee two or three times a week, with a small fee now and then for divers legal services, got us by. Besides, they were great training grounds. Lawyers of my day are indebted to these noble though lowly pillars in the judicial structure.

CHAPTER 4

FIRST MURDER CASE

A new lawyer, particularly a fledgling, was an object of interest in the old Cherokee Circuit. What did he have on the ball? What kind of speech could he make? Was he a fighter?

These were queries that ran through every mind. The courthouse crowd lost no time putting him through his paces. If a pauper case was handy, the Judge was sure to try him out on that. If not, the State's Attorney would take him in on a case and bid him spread his oratorical pinions. In that swing around the circuit they gave me the works. The late Sam P. Maddox, a magnificent trial lawyer, was State's Attorney. He asked me to sit in on the trial and make one of the arguments in a hard-fought murder case.

"Talk at least thirty minutes," he said, "and talk—say something—anything. The chances are there won't be much sense to what you say, but nobody in the courtroom can tell the difference except the Judge and a few of the lawyers. In time, you'll begin to make sense."

I had prepared some notes to glance at during my speech. He made me tear them up.

"Don't begin with crutches," he said. "Stand up on your hind legs and talk to that jury."

I did.

When I got back from my first swing around the circuit I found the whole county in a furore over the homicide of the Sheriff's son. An old Confederate veteran named Turner had been thrown in jail, charged with the murder.

The trouble started at a county hoe-down at the old

man's house, a few days before Christmas. The country swains gathered for the occasion and all too many of them brought mountain dew. By the time the callers and fiddlers had gotten them through a few sets, the rowdies were pretty well liquored up, and so was the host. A little past midnight the party broke up in a row. The girls managed to unscramble their dates and get them started back home.

The Sheriff's son had hit the jug pretty heavy. He had no date and had been paying amorous attention to the old man's granddaughter throughout the evening. He was among the last to leave.

When he was about fifty feet from the door, the old man reached for an ancient Civil War musket that rested on racks just above the door, pulled back the enormous hammer which those weapons carried, and blazed away. Next morning, the young man's horse was found tethered to the well shelter in the front yard. The young man's body, riddled by buckshot, was lying face down on the frozen ground.

The Sheriff was probably the most influential figure in local politics and the family had been widely and favorably known since the county was created. Turner was a sharecropper with a limited circle of friends, even in his isolated bailiwick. He was poor as a church mouse, which probably accounted for my employment in the case.

Every other member of the local bar was obligated one way or another to the affable Sheriff. I had so newly come to the bar that I had formed no deeply set connections, politically or otherwise, and my acquaintance with the Sheriff was casual.

When the case was called for trial, the courtroom was packed with spectators. I sat alone at the defense counsel's table with my aged client, facing my fellows of the local bar. They were grouped around the State's Attorney and the Sheriff, who were actively prosecuting the case and were bent on slipping the noose around the old man's neck. (Hanging was the mode of execution at that time.)

This was my first case to try alone. I felt a keen sense

of responsibility. (I had never tried a capital felony case without a deep feeling of humility and fear that I might make a mistake likely to cost my client his life.) I was faced with an element of a criminal trial that was new to me and alarming—a hostile, jam-packed courthouse crowd. I knew I had to win them over if I was to have a chance with the jury.

There was haste in getting the trial under way, as if to make quick work of the old man. The State paraded witness after witness before the jury and we could get nothing favorable from them at all. I was not adept at cross-examination in the first place, and a new Judge, who had assumed the bench only that morning, sensed the temper of the courthouse crowd and rode my neck with vigor. He overruled every motion I made before I could get the last word out of my mouth, but I made a lot of noise and more motions. It was a three-cornered cat fight, and I was on the focal point of the triangle.

The little granddaughter was a buxom young thing, about eighteen years old. Her development frontwise was such that a first glance would not suffice at all. Her limbs were firm and shapely. Her neck was classical, and her face not bad to look at. It was apparent that that cosmic urge which attends emergence from adolescence had so recently begun to stir within her that she didn't understand it, but was pleased at the stirring.

The State made its first mistake by calling her as a witness, and I dug my defense, what little I had, out of her on cross-examination. The boy, she said, had bothered her all night. She didn't volunteer any evidence at all, and had just that coyness and reticence in talking about the horrible affair to make her testimony impressive.

The old man, in his unsworn statement to the jury, gave his version of the incident. He told about the old musket which he had smuggled away when his depleted regiment stacked arms at the surrender—he'd carried it a thousand miles, he said, when he was barefoot, cold and

hungry, and had never parted with it since. His little, motherless granddaughter, he said, had come running to him, and she was crying. She told him the boy had tried to overpower her and was running away. Then the old man's mind went blank, he said, and he must have grabbed the old musket and shot it, without knowing what he was doing.

The State prosecuted without mercy, and those selected to address the jury followed a like pattern. They referred to the old man's story with derision.

Since I had introduced only the defendant's statement, I had the concluding argument. I had another advantage: the old man had a wealth of white beard such as Confederate officers wore. To jurors and spectators he looked quite like portraits of their fathers and grandfathers looking down from living room walls. I wove into that argument parts of every Decoration Day and Fourth of July speech I had ever heard. I marched that old musket in the heroic hands of a Confederate soldier, footsore and hungry, over the hills of Northern Virginia, faithful and unwilling to quit until that noblest of all soldiers bade farewell to his army at Appomattox. I hailed it as a badge of honor that there were yet fires of memory in the gallant old soldier to call upon his comrade of a hundred battles and a thousand marches —the musket—to speak again in the defense of Southern womanhood. The blast of that martial old weapon I made its last, but not its least, honor.

There were few men in the courthouse who had not sat under the spell of Memorial Day oratory with Confederate fathers and grandfathers. My borrowed phrases they had heard before, many times. As I went along I could feel the tenseness back of the bar subside. The Judge felt it too. The tone of his voice when he charged the jury was less unfriendly. The jury was out but a short while. They brought back the sweetest verdict I have ever known. My foot was in the door.

This case gave me a deep respect for the temper of the crowd back of the bar. One who is able to gauge it and

conform strategy to it, will usually be able to control a case. I learned, too, that a line of argument which awakens impressions fixed in the minds of jurors will find ready acceptance. Mark Antony, if Shakespeare be an accurate historian, captured the mob when at Caesar's funeral he reminded them, "I tell you that which you yourselves do know." I stocked my library with school readers, from McGuffey on down, and familiarized myself with every story in them, that I might carry jurors along in my theories and illustrations over paths they had known since childhood. It is far easier to remind than to inform. This jury, quite unconsciously, became sympathetic because we were greatly outgunned, so far as counsel was concerned, and because the Judge kicked us around. Factors which move a jury to acquit are many and varied, and chief among them are devices (and these are many and varied) which take their minds off the evidence.

Chapter 5

A BATTLE OF WITS

The high office of Judge is too often enmeshed in politics. That means political races, promises and platforms. Such circumstances almost compel a judge to forget that he is the impartial arbitrator between the state and the accused, and to assume the role properly belonging to the State's Attorney. If too many criminals go free, people are inclined to hold the judge responsible. This is particularly true in rural sections. Such a state of affairs moved a circuit judge in the Blue Ridge Circuit to put his elbows on the bench, look down at a prisoner whose case was called and ask, "Mr. Prosecuting Attorney, are *we* ready?"

Jurors, as a rule, are quite independent out in rural counties where no judge would dare don a judicial robe to add a show of austerity. They like an open field and a fair fight for even the worst offenders. If a trial lawyer can make it appear that the judge is crawling off the bench to aid the state's counsel, they will resent it.

Practitioners of criminal law who find themselves before judges like the politics-disturbed fellow who presided in the Blue Ridge circuit, are sometimes driven to develop devices which some have been unkind enough to refer to as tricks.

The cases of Charlie Clements and Carse Stephens illustrate the extent to which they must go if, to paraphrase the bard of Stratford-on-Avon, they are to turn the sword of the judiciary into its own proper entrails.

Charlie was a happy-go-lucky, good-natured countryman whose only offense was a few too many drinks during Christmas season and the illegal possession of intoxicants at a

church service out in the country. At the behest of some good church people, the Grand Jury pounced upon him.

When Charlie's case was called he had not a single witness and no excuse for imbibing too freely. The Judge was in bad humor that day—a great asset to me, I figured, provided I did not lose my temper too. When the case was called, I made a motion for continuance, taking care not to include a single legal ground.

"I move to continue this case, Your Honor," I said. "This boy's witness hasn't gotten here yet."

"Has he been subpoenaed?" the Judge inquired.

"No sir, but we thought surely he would be here."

"You know better than to make any such motion as that —go to trial! Call the jury, Mr. Clerk."

The roomful of jurors felt sorry for Charlie. We struck a panel and the State called the County Commissioner as its first witness, then three or four parishioners of the little church. They testified that they had attended the Christmas tree ceremonies at Fairmount Methodist Church on Christmas Eve; that Charlie stalked down the aisle, red-faced and glassy-eyed; that when he attempted to unscramble himself from his topcoat, a half-killed quart of liquor fell out and rolled down the aisle; that Charlie made a dive for it and, in his frantic effort to recover the precious liquid, struck the bottle against a bench, breaking it to pieces. They had to open a couple of windows, they said, to clear the liquor-laden atmosphere before the program could proceed. In the meantime, Charlie quit-claimed the premises in full flight.

That was the whole story. Of course, Charlie had not a witness in the world. I took a chance when I asked the Judge to continue the case because of an absent witness, but I got away with it. I then took another gamble. After the State had finished its evidence, I said: "Judge, our witness has come in. He is the only eyewitness Charlie's got. He's been in the courtroom and heard the testimony, but I hope

the Solicitor will not object to his telling the jury what he knows."

"You asked for the segregation of the witnesses yourself," the Judge shot back heatedly. "I'm not going to permit your witness to sit here and hear all the State's testimony and then take the stand!"

"This is the only witness I've got, Judge. If he can't testify, we'll just have to let the case go to the jury."

"Very well—go to the jury!"

I waived the first speech, and the case was so plain the Solicitor didn't say anything except that old stock argument about protecting society. While he was mumbling along, I was thinking. The Judge was becoming more fretful every minute, and that, I think, was why he did not ask me to produce my witness. If he had, it would have been the hoosegow for one honest lawyer. We had no witness.

My short argument ended with a sentence which would not reveal my punch line until the last word was spoken. I knew the Judge would stop the particular kind of plea I was about to make.

"You'd take a different view of this case, gentlemen," I said in opening, "if you could just hear our eyewitness—but the Prosecuting Attorney won't let you. [It is never nice to charge the Judge with anything bordering on being wrong.] If he had just let this boy's witness tell you—"

"Wham!" went the Judge's gavel. "That argument is entirely improper," came from the grave and heated Judge.

"I'm sorry, Judge—that is all I can say," and I took my seat.

The jury filed out. I could tell by the way they were chewing their tobacco that Charlie was safe. Sure enough, they came back with a verdict of "Not guilty."

One of the jurors said to me a few days later, "Colonel," he said, "None of us doubted for a minute that Charlie was guilty, but damned if we aimed to stand for the Judge not allowing his witness to go on the stand."

Carse's case was like walking the proverbial tight rope. It was a liquor case, during the prohibition era when enforcement officers were operating under shoot-to-kill orders. The Judge had staked his reputation on drying up the six North Georgia counties over whose courts he presided. He employed ingenious methods, and a constant battle of wits raged between him and the moonshiners and bootleggers up in the hills. The Judge usually won. When a culprit was convicted in his Court on such a charge, he could make peace with the Judge only by telling where and from whom he had obtained the liquor. Not that such a culprit got any less than the maximum sentence by furnishing the information. If he did not come clean to the Judge's satisfaction, he simply stayed in jail during such time as he held out. And this time would be added to the maximum sentence. To claim that the "venom" was obtained from a man already in the chain gang, or dead, or moved out of the State, was wholly unacceptable. Only such information as would afford the Court another customer was acceptable.

The Judge was the greatest sleuth those parts had known. I never knew any man to outwit him, except Carse. Carse had sold enough corn liquor to float the Pacific Fleet, and the Judge knew it. But catch Carse—he could not.

One day an old Negro woman was convicted in Bartow, an adjoining county, of selling whiskey at Adairsville. The Judge had a peculiar mannerism by which we could tell when he was on the rampage. He would cock an eye, scratch the back of his left wrist with the little finger of his right hand, and gore with gimlet-like words.

He stood the old Negro woman before the bar. "Now, tell me," he said as he appeased that itching wrist, "where you got this liquor."

The culprit melted under his first words. "Yassar, jedge," she said, "I got dat licker from Mistah Carse Stephens."

"Wham!" went the gavel, and officers rushed before the bench. "Bring me Carse Stephens, boys," said the Judge.

In a little while the officers were leaving Carse's cabin with the lord of that manor. But his wife was heating the motor of a strip-down Ford, in a run to my office. By the time Carse's wife and I had reached the courthouse, some thirty miles away, the old woman had been brought before the Grand Jury and an indictment had been returned. (The Judge gave quick service in such cases.)

As we walked down the aisle the clerk was calling Carse's case. Carse was sitting disconsolate at a table reserved for the defense, flanked by two officers. I took my place beside him just as the first juror was called. Pretty soon a jury had been qualified and the trial began.

The courthouse was an enormous room. The Judge, seated upon the imposing bench, faced the audience. Immediately in front of him was the court stenographer's table, with the witness chair on his right and another on his left. The jurors were seated with their backs to the audience, facing the Judge and the witness. Flanking the jury box on one side was a table assigned to the defense; on the opposite side was another table assigned to the Prosecuting Attorney.

The old woman was brought in and seated in the witness chair on the Judge's right. "Aunt Mary," the Prosecuting Attorney began, "do you know that gentleman sitting over at that table?" He pointed in our direction.

The old Negro said she was ninety years old—she looked a hundred and ten. Adjusting her glasses, she looked carefully and said: "Nawsur. I don't believe I does."

"What? You don't know Carse Stephens?"

"I knows a gent'man what dey calls Mistah Carse Stephens—but dat ain't de gent'man."

"Didn't you swear before the Grand Jury that you bought liquor from Carse Stephens?"

"Yassar, I bought licker from a gent'man dey called Mistah Carse Stephens, but dat ain't de gent'man."

The Judge took a hand here. He grilled the old woman

for half an hour—she swearing by all the gods, "I knows de gent'man dey called Mistah Carse Stephens, but dat ain't de gent'man."

There was nothing the Judge could do but direct a verdict of not guilty. There was no other witness.

The trial was half over before I realized that I was in the direct line of vision from the witness chair which the old Negro occupied, with Carse seated behind me, plainly visible to everyone in the courthouse except this old witness. She could not see him at all, but kept looking directly at me, swearing, "Dat ain't de gent'man." Carse and I walked out of the courtroom as innocent as a couple of lambs.

Chapter 6

I WAS A DELEGATE

I was going pretty well in 1915, although I was just twenty-two. I had been through a few terms of the local court, and older men at the bar had ceased to give me the breaks usually enjoyed by young lawyers. In fact, they had commenced to give me merry hell. Young lawyers really catch it: businessmen and those with serious lawsuits are slow to risk the advice of young lawyers. Judges are cautious of their inexperience. At best, they are feeling their way along, and everyone knows it. I was vain enough to think I was pulling over that hump. *Lex concubina invidia est** was still in my mind. But public speaking is essential to a trial lawyer's training. Politics and law have ever been bedfellows in Georgia, as elsewhere. Judge Glenn had gotten me started in both, up in Whitfield.

Most of my heroes at the bar took to the hustings for their friends who were running for public office, and it brought them a lot of good publicity. Governor John M. Slaton was in a hard campaign for the United States Senate. So I prepared a few speeches and soon I was shelling the woods for him all through the Cherokee country. I saw to it that he got a letter or two from someone every time I made a campaign speech for him. The newspapers mentioned one or two of these speeches. Soon campaign headquarters was making engagements for me.

I was at home one night between speaking engagements, smug in the comforting thought that I was making the grade

* The law is a jealous mistress.

in my two loves, law and politics, and taking in enough fees to pay my bills and dress up my young wife a bit. She had broken into the clubs and social circles, and the people of the county were having me out to make speeches. Important men, even bankers, began dropping by my office to chat. This gave me the idea that I had arrived.

One day while all this was running through my mind, the telephone rang. I was a bit excited; it was long distance. Back in those days a long distance call meant exceptionally good news, or bad. The call was from the Attorney General in Atlanta. He offered me an appointment as Assistant Attorney General, and asked that I make up my mind about it in a few days. I didn't sleep any that night, nor did my wife. Accepting would mean pulling up stakes. I caught the early morning train to the Capitol and looked the place over. I had been to the big building only once or twice.

Few young lawyers are able to turn down political appointments, so the following month found me behind the big desk in the Attorney General's suite, with more fast balls coming over the plate than my imagination had pictured. The Attorney General, Warren Grice, was a great lawyer and he typified, to as great an extent as any man I have ever known, the Southern Gentleman—that noble product of the old South, portrayed by the story books. The office was swamped with litigations of every character, most of them different from any of the cases I had been handling. I waded in. Except for the Ducktown Copper case in the U. S. Supreme Court, and the Leo M. Frank case, our litigation was seldom in the headlines. There were no jury trials, and I settled down to a prosaic grind.

There were a number of great men in the Capitol, all good friends of Mr. Grice. These nabobs, together with many eminent lawyers who practiced law in Atlanta, visited the office frequently. It became something of a literary club. The discussions of events of the day—politics, outstanding cases—were learned and witty, and of course they rehashed the yarns of the circuits of the old days. Those

discussions all but shaped the policies of the office. My contacts with these men channeled my thinking and, in a manner, fixed my philosophy. Among them were: Judge John C. Hart; Judge Richard B. Russell, Sr., of the Court of Appeals; Spencer R. Atkinson, once Justice of the Supreme Court of Georgia; Judge Arthur G. Powell, one of the initial members of the Court of Appeals, then in private practice; Justice Marcus Beck of the Supreme Court; Reuben R. Arnold, probably the greatest trial lawyer of his day; John M. Slaton, then Governor; and occasionally, top-ranking lawyers from out in the State. Colonel William J. Speer, the State Treasurer, and General William A. Wright, who served in their respective ranks in the Confederate Army, and who had been in office since the overthrow of the carpet-baggers, belonged to this group. And there was Dr. M. L. Brittain, State School Superintendent and later President of Georgia School of Technology and its real builder. The three last named were not lawyers but were such men as would add greatly to any gentle company. In reflecting over the pleasant association I had with these men, and what wisdom it profited me, I have often decided I would not trade this for all the college degrees in Christendom.

Politics were rife in the summer of 1915. Mr. Grice, the poorest politician I ever knew, had opposition. Thomas B. Felder, of somewhat colorless background and accomplishment, resigned as Attorney General in the spring, to make the race for United States Senator. (Grice had succeeded him as an appointee of the Governor). Governor Slaton was in the race, and about the time the campaign got hot, Thomas W. Hardwick, who had had a spectacular career in Congress, entered the list to provide the always dangerous and unpredictable three-cornered contest. This race overshadowed all others. It proved to be one of the bitterest contests in Georgia history, winding up in a convention fight still memorable in the minds of older politicians.

Governor Slaton had the support of the Hoke Smith faction, long dominant in Georgia politics but somewhat reactivated by the furore of the race. The Frank case had not militated against Slaton's popularity, and he was widely regarded as one of the most able and courageous men in public life. Mr. Felder offered no cogent reason why he should be preferred over Slaton. He was just running, careful not to foreclose any chance of a trade with Hardwick.

Hardwick was known to be a skillful political manipulator. His vote, while he was a member of Congress, against authorizing the handling of parcel post by the Postal Service, had identified him in the minds of many with corporate interests and gained him the support of big business. Six years before, Hardwick had unseated Thomas E. Watson (father of rural free delivery and one-time candidate for the Presidency, on the Populist ticket) as congressman from the Tenth District, in a campaign which reeked of fraud; it was generally accepted that he won that race by trickery. That race provides an interesting chapter in Georgia politics in that it gave birth to the Cracker Party, the party-within-the-party which, until recently, wielded absolute control in Richmond County. The local politicians wisely kept it confined to Augusta and Richmond County. Some years ago I talked with an old Negro at McRae, Georgia, who told me that he happened to be visiting his daughter in Augusta on the day of that election and the Hardwick supporters voted him seventeen times, once at each precinct. I have no doubt that the old Negro was telling the truth. But for the fact that no one could tell just what trick "Tom," as Hardwick was known, would pull out of the bag, his chances of election would have been all but disregarded.

Political cards and canards were the implements of political warfare in those days, and elections turned on the skill, or lack thereof, of political writers attached to campaign headquarters. Governor Slaton had probably the most imposing campaign staff in the history of Georgia politics. But the publicity writers mentioned the campaign manager's

name quite as often as they did the candidate's. (Only the candidate's name should be used in news stories and campaign literature. In "postmorteming" races since that time, I have traced many defeats to that one error).

I do not recall any major national issues. A good party man in the Democratic South did not need such issues. Slaton's publicity man did not overlook Hardwick's anti-parcel post vote or his leanings toward vested interests. Hardwick and Felder, skillful campaign managers but without elaborate staffs, just ran. In the absence of sharp issues, *"I am a candidate"* is the best campaign slogan. A long and involved platform encouraged Slaton's over-play and whittled down his majority. When the ballots were in, Hardwick and Felder had each received a surprising vote, and Slaton was just short of a majority of all the county unit votes, necessary for nomination under the rules.

The nominating convention, traditional in Georgia, followed (on October third) on the heels of the individual balloting in the more than eighteen hundred precincts scattered about the State. This grand political jamboree is the Mecca of adherents to all brands of politics, bandwagon jumpers, state employees and, of course, delegates and candidates with their campaign staffs.

The members of county delegations were indebted to that candidate for Governor who received the plurality of votes in the county whose unit vote they were to control. These delegations range in number from two to sixteen, depending upon county population. Every shade of political persuasion was represented in the formation of the party platform and in the selection of officers of the state organization of the party.

I was selected as a delegate from my county of Gordon, along with F. A. Cantrell, my old mentor of the Bar at Calhoun, who taught me something about selecting jurors in the Bowen Lumber case.

I was not in any of the guarded conclaves which preceded the convention, but everyone knew something was

going on which only a fight on the convention floor would bring to light. It was common knowledge that Hardwick and Felder were jockeying to combine their pledged convention support, but no one knew which of these men would get the combined support.

This was the tense atmosphere which prevailed when I walked into the lobby of the Dempsey Hotel, already crowded with delegates, friends of the candidates, and spectators, on the afternoon before the convention. I did not know it at the time, but the king-makers were in the proverbial smoke-filled rooms, busy with the strategy which they were to employ to rob Slaton of the nomination. One thing I noticed about the crowd milling around that afternoon was that everybody was as much at sea as I was. The atmosphere was charged with more uncertainty than at any time during the campaign, but I was armed with the spirit; I was all dressed up and didn't know where to go.

The crowds in the hotel lobby began to thin out late in the evening, and I went down to spend the night with Mrs. Anna Pinson, my mother's sister. I was back early the next morning, and the milling around was under way with even more people, many of whom had almost lost a bout to old Barleycorn. While I was drinking up the rumors and comforting myself, along with other Slaton men, in the thought that we were keeping up our side of the melee, someone called my name. I looked around to see a uniformed colored fellow with a small tray in his hand. Standing behind this porter was a magnificent-looking fellow, six foot four and straight as an Indian chief. I was sure he was from the political holy of holies upstairs. I swelled up a bit upon realizing that one so highly placed had noticed me. He shook my hand cordially and introduced himself as Santy Crawford of Rome, in the Seventh Congressional District. I recognized the name, for he and Judge Newt Morris were Hardwick's major domos in that district.

"Missed you at the caucus last night," he said with the

skilled politician's way of enveloping one with warm, unadulterated friendship and camaraderie.

"What the hell is a caucus?" went through my mind.

"Every county in the Seventh District was represented except Gordon," he continued. "I've been looking everywhere for you."

After he had elevated me to a feeling of considerable importance, he went on to tell me how we boys in the Seventh District ought to stick together; about how young talent, such as I possessed, could climb to dizzy political heights; and that he and his friends were just the people to start me on that spiral. I was noncommittal. I didn't wish to offend such an important man, yet I was ready to give my good right arm for Jack Slaton. Santy got away in a little while, without shaking my two votes, which his faction desperately needed.

Just as the crowd was thinning out to go over to the convention hall, Santy came rushing back. He held a bunch of important-looking papers in his hand. "We are looking for a good, levelheaded man to head one of the committees," he said, "and I have recommended you."

I thought the boys upstairs were about to recognize a real talent after all. I saw my name in the headlines, showing the boys back home a thing or two. I was a great deal more in accord with that suggestion than I had been with the district caucus plans in which I had not figured. In no time at all Santy had my acceptance, and made sure to see that I looked on while he inserted my name at the top of a list. Almost as an afterthought, he said, "Now, of course, every chairman must go along with the caucus," ending it up with a facial gesture and expression that warbled it into a question. That didn't shake my two votes, but Santy didn't withdraw the offer of a chairmanship, so I was on the inside, I thought.

"Now," he said, "you'd better hurry on over to the convention hall. Go right to the stage where they'll read out

the committee announcements—and you ought to be right there to accept, so the crowd can see you."

Over I went, and fought my way to the stage. Some fellows, who must have been Santy's friends, led me to a seat back on the left rear, and told me to wait. Pretty soon the old machine was rollin'. I got a little impatient and evidently one of Santy's friends noticed it, for he came over and said they'd begin to introduce committee chairmen right away. Everybody on stage except Santy's man looked at me as though they wondered what the hell I was doing up there. By that time the place was a madhouse.

Routine nominations were rushed through by early afternoon, while the rival factions interested in candidates for the United States Senate observed an armed truce. Finally one fellow got the floor to nominate John M. Slaton. About half the crowd cheered madly. It all lasted for an hour—wild demonstrations by shirt-sleeved delegates, mixed with spectators who vastly outnumbered them. All had dishevelled hair, and were waving banners and shouting. When things calmed down a little, some chap nominated Hardwick. And there was another demonstration, which included both the Hardwick and Felder camps. Then came the nomination of Felder, and the same crowd which had demonstrated for Hardwick took second wind for still another march around the hall.

In the meantime, I hadn't found my committee—hadn't been noticed except by Santy's friend, whose duty (as I now know) was to keep me on the cooling board and happy.

Then the balloting began. It was a tense moment. Slaton had a plurality, as everyone expected, but not a majority over the other two candidates. Another ballot, and Slaton got four more votes, to place him within two votes of the number he needed. Hardwick and Felder hung on grimly, the Slaton crowd laboring for the controlling votes. Newt Morris was recognized for a privileged motion. (The chair erroneously ruled it such, but it was no time to appeal the ruling). He moved for an adjournment until ten o'clock

the next morning. A *viva voce* vote was taken after a flood of parliamentary pyrotechnics from the Slaton side, and the chair gave the old ruling: "The noes seem to have it, the noes have it, but the ayes prevail!" Before the Slaton crowd could get a record vote on the motion, the crowd was streaming through the half dozen doorways, and Newt Morris and Santy Crawford were on a beeline to the Hardwick command post at the hotel.

I moved around to my district delegation the next morning, but it was too late. During the night the Tom Hardwick crowd had pulled the proverbial rabbit out of the hat. Felder men joined them, along with a few traded-with county delegations, whose excuse was that when the deadlock occurred they were released to cast the vote of their counties for whom they pleased. It required but a single ballot to nominate Hardwick.

I later learned that, on either of the last three ballots taken during the closing hours of the first session, my two votes would have elected my friend and benefactor to membership in the United States Senate. While Santy had me on the stage, looking for my committee, Newt Morris was back with the Seventh District delegation with my two votes in his pocket—voting against us.

That was my first lesson in power politics—an encore to the terrible drubbing which I, along with most of the Governor's friends, had to suffer at the polls that summer. I was to be introduced to the worst that politics has to offer—completing a term of office after defeat at the polls. Such hapless public servants are called "lame ducks." Mr. Grice and I had six months of it, and more work during that six months than we had had during the previous eighteen. The General Assembly had enacted a Child Labor Law, a Workman's Compensation Law, a complete revision of the tax structure, and new banking and insurance codes. And there were drastic revisions in the Public School System. Every department head was on our necks for opinions and interpretations of those statutes and advice as to how they

should be implemented. We were called upon to assist in the organization of half a dozen boards and bureaus. Law firms in Atlanta and New York filed suits contesting the constitutionality of almost every new statute, and it was our responsibility to defend the suits. It was "double drill and no canteen."

The sensational Leo M. Frank murder case had been tried in Atlanta about a year before the convention met. Frank had been convicted and sentenced to die in the electric chair. An appeal had been pending in the Supreme Court of Georgia for months. Although the highlights of the trial and the mob-stirring evidence of the State's witnesses had brought international repercussions, rivaling the famous Dreyfus Case tried in the sleepy little town of Rennes, France in 1894, the Frank case was yet to make the tremendous impact on politics which, when it did come, blasted political dynasties to bits in Georgia.

Repercussions of the political contest of that summer, and of the hectic convention, had scarcely died away when this sleeping dog—the Frank case—bounded fully alert into the quietude of the State Capital; the Supreme Court announced its decision affirming the conviction. That set the press in motion, rehashing the weird stories carried during the trial. And the witches' cauldron of passion commenced to boil and bubble all over again. An application to the Prison Commission for a reduction of Frank's sentence to life imprisonment brought more editorials, calculated to reopen old sores. That application was denied and Frank's family, his lawyers, and his friends appealed to the Governor, who had power under the Constitution to modify the sentence. That was Frank's last resort.

But the Frank case demands a chapter all its own.

Chapter 7

THE LEO M. FRANK CASE

It was not for the sizzling campaign of the summer of 1915 to determine the fortunes of the men who at that time strode giant-like across a political stage so charged with drama nor yet was it the nominating convention of the Party, which followed in September, that decided their fate. The tragic events which attended the Leo M. Frank case moved in to govern these fortunes, and to change the political complexion of the State. These events were to drive Governor John M. Slaton from public life, place Frank's prosecutor at the helm of State, transfer the fiery Thomas E. Watson from limbo to the United States Senate, and, for good measure, cause me to commit treason.

On April twenty-six, 1913, Confederate Memorial Day, Mary Phagan, a teen-age girl who worked at a pencil factory in Atlanta, was brutally murdered. The plant was closed because of the holiday but she had come to the office for the pay she had earned during the previous week. Her body was found in the basement at the foot of the elevator shaft, the victim of a sex maniac. Leo M. Frank, a young Jew who was manager of the plant and who, with a Negro watchman, was in the plant that day, was charged with the crime.

Public sentiment against Frank ran high. Judge Leonard S. Roan, who was to preside in the trial of the case, moved slowly in calling it for trial, in the hope that the excitement would abate. But delay served only to fan the fury. Events which followed Frank's arrest, and the sensational evidence given at the trial, were dramatized by feature writers and

were colored to such an extent that race prejudice and religious intolerance rocked the State and loosed forces which revived the Klu Klux Klan of the Reconstruction era.

Frank had been convicted in the trial court and sentenced to death before I came to the Attorney General's Office. A motion for a new trial had been denied and the case was before the Supreme Court of Georgia on appeal. It was the duty of the Attorney General to represent the State as leading counsel in criminal cases when they had reached the Appellate Courts. That duty was assigned to me. The Frank case was unusual. I joined the Prosecuting Attorney and his staff in the preparation of briefs for the trials in the U. S. District Court and in the Supreme Court of the United States. This involved reading and analyzing every line of testimony given at the trial. But I had not been a member of the Bar of my State long enough to be eligible for enrollment as a member of the Bar of that court, and my name, therefore, does not appear with counsel in the official reports of the case.

The circumstances which were to set the stage for me to learn who killed Mary Phagan, and the motive and the manner of the killing, began to take shape in March of 1864 amid the smoke of Joseph E. Johnston's little parrot guns at Resaca as he opposed Sherman's march on Atlanta.

My grandfather was seventy when that battle took place. He crossed the mountain from his cabin in Rock Creek Valley, leading a blind horse upon which my grandmother rode. They reached the scene of this fight as the Federal troops moved on toward Calhoun. My grandmother had with her such cloth for bandages and such medicines as she could find, and it was their purpose to do what they could for the wounded. This kindly old couple carried a casualty of that fight back to their home across the mountain and there nursed him back to life. He later joined his command and surrendered at Milledgeville, Georgia, following Appomattox. This young soldier in gray was Frederick C. Foster, an

inseparable companion of Leonard S. Roan (who had presided at the trial).

Roan and Foster had been reared on adjoining farms in middle Georgia and had studied under the same private tutor before the days of common schools. After the war they were roommates at the University of Georgia, and after graduation they practiced law together until Roan moved to Atlanta, where he became Judge of the Superior Court of Fulton County.

I had many delightful visits with Judge Foster during the last years of his life. He told me, of course, about the weeks he had spent with my grandparents on the mountain farm where I was reared; and how they nursed him through his illness, hidden a great deal of the time in the loft of their cabin to keep from capture by marauders of Federal cavalry. I paid my last visit to him soon after I moved to Atlanta. His death occurred within the following week.

Knowing that I had become connected with the State's legal department, Judge Foster had told me what he knew of the Frank case. Together with what I had learned from others, from the record, and from my own observations, this enabled me to piece together the facts of that tragic happening in their entirety.

This is the story, substantially as Judge Foster told it to me: A few days before the motion for a new trial was to be heard, Judge Foster received a penciled note from Judge Roan, addressed to him at Madison, asking him to come to Atlanta. The note gave no details, and its brevity was unusual, judging by the letters they had exchanged over the years; the unsteady penmanship lent a color of urgency. When Judge Foster came to Atlanta next morning, he found his friend in the state of mind the note had indicated.

The interview took place in Judge Roan's chambers. "It's this Frank case, Fred," Judge Roan said, and proceeded to tell Judge Foster that he was not at all satisfied with the verdict. The atmosphere surrounding the trial, and the

prejudicial publicity which had preceded it, had unduly influenced the jury.

"I did not read the news stories because I wished to be guided only by the evidence," the Judge continued.

"Yes," Judge Foster observed, "the Judge, under our practice, is the thirteenth juror."

"I had made up my mind to grant a new trial," Judge Roan continued. "Yesterday, just before I wrote you, William Smith came to see me. Smith has represented Jim Conley in connection with this matter. Conley was the first man arrested as a suspect. He sullenly refused to talk to the officers about it, and so far as I know, Smith is the only man he has talked to."

"Did you get any help from Smith?"

"You know, Smith is an ethical lawyer and a fine lawyer. He is as much troubled about Frank's conviction as I am. Smith is in a ticklish position. His first duty is to his client, but the turn of events makes it impossible for the State to further implicate Conley. He is convinced that Conley, not Leo Frank, is the murderer of Mary Phagan."

"Did he get that impression from statements made to him by Conley?"

"Yes, he did."

"About the firmest rule in criminal procedure is that no court in the land may receive confidential communications between attorney and client, even if the attorney is willing to divulge them."

"That's what is troubling Smith. But he told me he had observed the threatening crowds milling about during the trial, the inflammatory news stories and wild rumors which had incited people all over the state, the disorder in the presence of the jury, the threats communicated by menacing gestures within the courtroom during the trial, the show of hostility to Frank's lawyers outside the courtroom, and the ovation for the State's Attorney wherever he appeared.

" 'Judge, that verdict was only the echo of an angry

mob!' Smith told me. 'I can't reveal my client's secrets, yet I can't live with them!"

"Did he tell *you?*"

"Yes, he did. He left with me Conley's story as he had pieced it together, and told me he would be guided by my conception of the ethics involved and what ought to be done under the unusual circumstances.

"Conley's story as related to me by Smith was substantially this:

"Conley got to the pencil factory on the morning of April twenty-sixth just after Mr. Frank. At least Mr. Frank was in his office, but not at his desk. Conley was to watch that day until Newt Lee came on duty as watchman along about six o'clock. By the time Conley had gotten to the basement, he heard two men, maybe three, come in and go up to the top floor. Then he heard noise up there which sounded like sawing and hammering. He didn't think it necessary to go up there where they were working. Later on, he heard some people go into Mr. Frank's office, and heard them talking.

"Conley expected to be in the building alone that day—certainly the greater part of it—and arranged for a man to bring him some corn whiskey. He was afraid the man would come before Mr. Frank left—which he did. He knocked on the door to the alley, and Conley took the whiskey and gave the man three dollars. He did not drink any of it, for fear that Mr. Frank would call him and learn that he was drinking. He walked around ever so long—he couldn't tell just how long—and he heard the people in Mr. Frank's office walking around. He came up the steps just far enough to see, and saw them leave. One of them was Mr. Frank, and one was a woman.

"Then Conley took a big drink from his bottle of corn whiskey. After a while he heard another man leave, but the men working on the upper floors were still there. He commenced to feel his whiskey, took two or three more drinks, and never heard the workmen when they left. He drained his bottle and walked over to the elevator shaft, where he

could toss it into the debris in the basement. Then he sat in a chair near the elevator shaft.

"In a little while he saw a girl come in and walk toward the door to Frank's office. His mind was clouded by that time, he said, but he went in the office behind her. She had something in her hand that looked like a letter (envelope). When he approached her she commenced to scream and to fight him. He stated he didn't know how long the struggle lasted but that he remembered fighting back. Then, he said, his mind went blank, and he didn't remember anything until he came to himself down in the basement, slumped in a sitting position and leaning against the bottom of the elevator shaft.

"He looked around and there was the girl, lying still, with a cord around her neck. He looked at her a long time, and decided she was dead. He was scared. He didn't wait for Newt Lee, the night watchman, but hid the body the best he could, and left by the alley entrance.*

"Conley's testimony at the trial was, of course, in sharp contrast to the story he had told Smith before Frank had

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* Frank, in his unsworn statement to the jury, said: "Miss Hall [a secretary] left my office on her way home at this time. There were then in the building: Arthur White, Harry Denham, and Mrs. White. It must have been from ten to fifteen minutes after that that this little girl, whom I afterwards found to be Mary Phagan, came in. She asked for her pay. I got my cash box, referred to the number, and gave her the envelope. As she went out, she stopped near my outer office door and said, 'Has the metal come?'

"The safe door was open and I could not see her, but I answered 'No.' The last I heard was the sound of her footsteps going down the hall.

"The little girl had hardly left the office when Limmie Quinn came in. A few minutes before one o'clock, I called my wife and told her I was coming to lunch at one-fifteen. I asked Mr. White if his wife was going to stay with him. She said, 'No'—and I got my hat and left, locking the outer door."

If Frank's counsel permitted him to take the stand for his statement to the jury without knowing what he would say, they took a dangerous risk. To have permitted him to say that the girl left the pencil factory before he did, without evidence in reserve to show that she returned later in the day, was a grave tactical error.

been charged and while he (Conley) was a suspect, groping for a defense for himself. When Frank was charged, Conley pinned his hopes on the Prosecuting Attorney, and would be expected to support the case against Frank. Conley had been in the Criminal Courts most of his adult life. He knew better than to talk to anyone except his lawyer when the heat was on him, and was wise enough to go to any length to unload on someone else.

"Smith and I evaluated Conley's statement in the light of these circumstances and in the light of the whole factual situation as it appeared in the trial of Frank.

"We concluded that Conley had told Smith the truth.

"That," concluded Judge Roan, "has confirmed my determination to grant this motion for a new trial. But when I do, the Governor does not have enough troops to control the mob which is certain to gather as my decision becomes known. They've been literally maddened by the news stories and the wild rumors which such stories start."

The two men began to analyze the situation from that angle.

"Roan," Judge Foster said, "if you grant this motion, you may save Frank's life, but the chances are that you would not. You would preserve the integrity of the courts, but at awful cost—not that any price is too high. Exactly what happened at the pencil factory that day is known only to Conley. Smith was his lawyer. He was talking to Smith as such. No court in the land would permit Smith to divulge confidential communications made to him by his client, even if Smith were willing to do so. So a new trial would serve only to postpone the danger and to augment it. The apostle Paul recognized the law of expediency. There is a forum in our judicial structure presided over by the Governor which may receive the facts from Smith, if he is willing to divulge them. That forum is the Court of Pardons. The pardoning power is the equity of criminal law, and the Governor alone may exercise it."

"What do you mean?" inquired Roan.

"Simply this: deny the motion and let the case run its course through the courts. That will give time for this excitement to subside, if it is to subside at all. The case will finally wind up in the Governor's lap. If Smith is unwilling to give the Governor the facts, you can do it."

"But I got the facts from Smith under such confidential relationship that I could not speak of them, even to the Governor. It would literally ruin Smith if people thought he had violated his client's trust."

"Smith trusted you, and I believe he will trust the Governor."

In the course of this conversation the name of Judge Arthur Powell had been mentioned many times. During the trial, Judge Roan had relied upon him in tough spots. In fact, Judge Powell had sat on the Bench with him while he charged the jury. Now Roan and Foster called Judge Powell, and he joined them. The three went over to the Kimball House for a late lunch, and there talked over the plan Judge Foster had suggested, until it was time for his train to leave the old Union Station for Madison. All three saw no other way out. Only Judge Roan ever spoke to Smith about it. Whether Smith ever talked to the Governor about it, I do not know. I presume he did.

In the spring of 1936, Judge Powell and I spent most of the night on a Pullman car between Augusta and Atlanta, rehashing the famous case. He confirmed Judge Foster's story as I have related it here. I never mentioned it to anyone else and would not have discussed it with him had I not known from Judge Foster that he already had the facts from sources more direct than my own.

While the case was pending in the Appellate courts, Jim Conley had been convicted of robbery and was serving time in prison. Before the motion for a new trial was heard, other witnesses had repudiated the testimony which they had given at the trial. Judge Roan overruled the motion and left for Rochester, Minnesota, where he entered Mayo Clinic as a patient. The case had affected his health considerably.

While convalescing from nervous strain, he made an affidavit in which he expressed the opinion that Leo M. Frank was perfectly innocent of the murder of Mary Phagan, and that an awful miscarriage of justice would result unless a pardon be granted. An unfriendly press, particularly a newspaper called the *Columbia Sentinel,* published by Thomas E. Watson, declared that the Judge had been overreached; that the statement had been obtained from him at a moment when he was without mental capacity to make any statement; and that his signature to the affidavit had been secured by fraud.

On November fourteenth, 1914, the Supreme Court of Georgia, two justices dissenting, sustained the overruling of the motion for a new trial. Nationwide effort to influence the Governor's action on an application for pardon followed. Letters and petitions came from every section of the country, and some from foreign countries, in such numbers that it was quite impossible for the Governor's clerical staff to read them, not to speak of acknowledging them. I read dozens of them. They were piled high in the huge reception room, like windrows in a haymow. Most of them were appealing, but some were demanding and others threatening. Most of them were typewritten, but handwriting experts would have been charmed by the ones penned in variegated styles, which expressed a wide gamut of moods and passions. Societies and groups expressed themselves in petitions, some of which carried more than a thousand signatures. The envelopes bore the postmarks of hundreds of small towns and every large city in the United States.

Some really vicious messages were found on the grounds of the Governor's private residence at suburban Buckhead. Servants found them sticking under the doors, in the mailbox, and in various other places, voicing dire threats to the Governor and his wife if he should interfere with the verdict of the jury.

The Governor well knew the political implications: to deny the application for pardon would raise him to the

crest of public favor; to grant it, or even to commute the sentence to life imprisonment, would remove him from public life forever.

The time came for him to make a decision. Many years after the terrible affair was over Governor Slaton told Judge Arthur G. Powell about the moment when he finally reached that decision. It was on Friday, June eighteenth, 1915. "When I had the commutation of Frank's sentence under consideration," Judge Powell quoted him as saying, "I received thousands, and my wife hundreds, of letters saying that one or both of us would be killed and our home destroyed if I commuted the sentence. I worked downstairs in my library until two o'clock in the morning, preparing a statement and drawing the order. When I went upstairs, Sallie was waiting for me. She asked me, 'Have you reached a decision?' 'Yes,' I said, 'it may mean my death, or worse, but I have ordered the sentence commuted.' She kissed me and said, 'I would rather be the widow of a brave and honorable man than the wife of a coward!' "

Late in the afternoon of the following day, Saturday, a half-holiday, the Governor handed the order to Jesse Perry, his executive secretary. The Capitol was empty of employees; there was no one in the executive suite except the Governor, Mr. Perry, and myself. Perry had probably anticipated the order, as had other close friends of the Governor. They had arranged to take him out of the State on the excuse that he needed a respite from the arduous work of the past several weeks. But the Governor would have none of it. In their effort to persuade him to make the trip, they hinted of demonstrations—possibly violence. That settled the question; Jack Slaton was not a man to run from a mob.

When the Governor handed the order to Perry, he telephoned to Sheriff C. Wheeler Mangum. The Sheriff came quickly. He knew the importance of getting Frank out of the city before the press should discover what had happened.

He knew what the excited voices of newsboys shouting that announcement would mean.

Perry and the Sheriff were determined to get Frank out of Atlanta on the Central of Georgia, leaving at ten o'clock that night, to the State Farm and safety. Their first concern was to by-pass Brit Craig, energetic reporter for the *Atlanta Constitution,* who had made a wide reputation covering the Frank case. The Sheriff deputized three men who had never been connected with the Sheriff's office, to carry the prisoner to the State prison farm.

But Brit's sixth sense was operating. When the special deputies reached the forbidding old Fulton Tower, there was Brit, flanked by reporters from other news agencies.

The jailer knew Brit's weakness for a series of "short snorts" and a good yarn. Officers in charge of the jail lured the news hawks and a few others back to the consultation room, where they began to imbibe and to swap yarns. The Sheriff's deputies grasped this opportunity to leave with Frank, unnoticed by the newsmen.

The train conductor evidently recognized Frank from the photos which had been published so often in the newspapers. At any rate, when the officers got off the train at Macon with their famous prisoner, they found themselves surrounded by the newspaper fraternity of that town. There were George S. Griffin, news editor of the *Associated Press,* the late George M. Sparks,* reporter for the *Macon Telegraph,* and half a dozen others. One of the trainmen had telegraphed Macon papers from a wayside station en route, and the cat was out of the bag. The story had only to be verified.

Before the deputies and their prisoner had covered the remaining thirty-odd miles to the State Farm by high-powered automobile, Sparks had extras flying throughout

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* Dr. Sparks founded the Georgia University Evening School, Atlanta, and was President Emeritus at the time of his death.

the city, and Griffin had plastered the story about the commutation of the death sentence and Frank's removal on the front pages of the nation. It was past midnight then. Brit and his friends had finally emerged from the consultation room at the tower and were on their way across town, when they heard the newsboys shouting and saw the "scoop" under a Macon dateline, snatched from under their very noses.

I read the stories next morning. They were written in such manner as to deliberately invite intervention on the part of the mob. Frank was pictured as well fed and housed, doing light work until a future Governor should pardon him. The sensational testimony at the trial was rehashed. I was tired and did not leave my apartment during the day. I was depressed, too. But for the pleasure of my association with Mr. Grice and the Governor and others who were my friends at the Capitol, I might have been tempted to rue the day I left my country law practice only to plunge into a maelstrom which had tossed lives, reputations, and fortunes about upon an ungovernable, unpredictable wheel.

I planned to get to my office early the next morning. The Attorney General and I were soon to be succeeded, and I wished to finish some work I had started. On my way, I heard the newsboys yelling "Frank practically free!" I read the news stories that were printed under streamer headlines, as the street car made its way through the traffic.

As we approached the downtown area, the streets and sidewalks were crowded—unusually so for early Monday morning. The nearer we got to the State Capitol building, the denser became the crowd. More than a block from the plaza, where stands Georgia's monument to her immortal Gordon, the progress of the car was impeded by the throng of men and boys. They had ceased to notice the clanging of the gong as the motorman stomped upon it frantically. I left the car to make my way to the Capitol building

through the huge crowd which surrounded it and overflowed into the square.

I finally worked my way through the frenzied people crowded about the Hunter Street entrance. State officials and employees evidently took a look at that sea of angry faces, and left. I did not see any of them among the crowds milling about the corridors. We had spent so much time after office hours working on the case that the Governor's executive secretary furnished me with a key to a side door of the executive suite. In the excitement I managed to slip this key into the lock and enter unnoticed. I thought I would find Jesse Perry, but no one was there. I sat down and looked at my watch. It was twenty minutes of ten. I glanced outside the window, and there was a sea of humanity milling about, crowding around this exhorter and that. I could hear their high-pitched voices whetting the ugly temper of the crowd. Some were holding forth in the corridors. I heard the speakers demand a full pardon for Creen, and each time they hurled epithets at the Governor, they received the applause of the crowd. (Creen was a degenerate life-termer housed at the prison farm with Frank, who, a few days before, had slashed Frank's throat with a butcher knife.)

As I watched the wild emotion of this crowd, I thought of a mob under the same sort of frenzy demanding the release of Barabbas. I watched them but a few moments before the full import of the ugly situation dawned upon me.

The last order the Governor had given was under no circumstances to employ the State Militia. He alone, as its Commander-in-Chief, was authorized to set the militia in motion. Notwithstanding, I picked up the telephone from Perry's desk, but there was no response from the switchboard. It occurred to me that the operator would not have been able to reach her post even if she had been bold enough to try. The Governor's order kept running through

my mind as plans as to what I ought to do blurred in my thinking like events in a troubled dream.

The crowd seemed to be thinning. I feared that it would reassemble near the suburban Buckhead mansion where the Governor lived. Without stopping to argue further with myself, I picked up a telephone with a direct line from the uptown exchange and called Major John Grice, commanding officer of the Governor's Horse Guard, and transmitted to him what purported to be an Executive Order calling the squadron to riot duty about the Governor's house.

That was treason and I knew it!

I had levied arms against the constituted authority of my State, illegally assumed command of troops, and violated the orders of the Commander-in-Chief. But I was not hanged, as the law dictates in such cases, since I did avert a tragedy too awful to contemplate.

Other friends of the Governor had become alarmed. Late in the afternoon of the preceding day (Sunday), a rumor had spread that a mob was being organized to lynch the Governor and burn his home. Logan Bleckley, Clerk of the Supreme Court, and Judge Arthur G. Powell, constituted themselves a counter force. Armed with a Springfield rifle and a shotgun, they had set out for the Governor's house. They arrived after dark and, unannounced, took up their position on the broad piazza facing the entrance to the grounds. Soon after they had arrived, Justice Beck of the Supreme Court came puffing down the walk to join them, armed with a sawed-off shotgun and pockets full of shells loaded with buckshot. The Governor was astounded the next morning to find them standing ground, weary from excitement and loss of sleep.

The cavalrymen whom I had activated by my false order swept in. By a swift encircling movement, they entrapped twenty-five or thirty men who had hidden themselves about the buildings on the Governor's property. Some were armed with firearms, some with black-jacks and some

with dynamite. They were disarmed and corralled into a carriage house at the rear of the premises. The guardsmen beat the main body of that heavily armed mob by minutes.

Whether the Governor ever knew how the troops got there, I am yet to learn. I knew the Governor well until his death in 1955, tried many lawsuits with him as opposing counsel. The Frank case was never again mentioned at any time during the pleasant associations I had with him.

Events proved the wisdom of my caution. On August sixteenth following, a motorized mob, presumably led by the men who had precipitated the ugly demonstration at the Capitol, assailed the hospital ward at the prisoners' barracks at the State Farm at Milledgeville and seized Leo M. Frank. The movement was planned and executed with the skill of a commando raid. Telephone and telegraph lines leading from Milledgeville were severed. The mob divided, one section moving in the direction of Sparta, arousing the countryside with the noise of their firearms. They riddled a telephone pole near Sparta with rifle and pistol fire to divert attention from the group which moved silently with the prisoner in the direction of Atlanta. They brought the hapless Frank to a cemetery near Marietta, where Mary Phagan had lived, and the gray dawn of the morning saw his lifeless body swinging from a tree near the grave of the little girl who they fancied or chose to fancy had been his victim.

Mine was a minor role in the tragic affair. I was many years junior to the principals involved. Everyone seemed anxious to get it relegated to the limbo of history with the least damage to those who survived. They awaited an opportune time. It was not for me to jump the gun.

But the case and its tragic outcome was packed with politics for more than two decades. Mr. Dorsey was a candidate for Governor in the summer of 1916. While he did not himself exploit the animosities engendered by the Frank case for political purposes, Thomas E. Watson did. It was

Watson's vitriolic editorials in the *Columbia Sentinel* in support of Dorsey's candidacy that kept alive the storms of passion.

Dorsey was elected, and served two terms. In 1920 he tried for a seat in the United States Senate. One of his opponents was his erstwhile political mentor, Thomas E. Watson. Another was the incumbent, Senator Hoke Smith. Watson's overwhelming victory made it clear that the prejudice and passion of the Frank case, like Banquo's ghost, would not down.

Twelve years later, Slaton's friends, probably to test the then political potency of the Frank case, entered him as a candidate for the United States Senate against William G. Harris, the incumbent. In this two-man race, Slaton's vote was negligible.

Judge Powell, in his book *I Can Go Home Again,* published in 1942, says he was one of the few people who knew that Leo M. Frank was innocent of the crime for which he was convicted and lynched. "I know who killed Mary Phagan," the Judge said, "but I know it in such a way that I can never make the information public so long as certain people are living.

"I expect to write down what I know and why I know it," he continued, "and seal it up and put it away with instructions that it not be opened until certain people are dead. I owe this much to Jack Slaton and to the memory of an innocent man who died an awful death."

The Judge's death occurred August 5, 1951. If he left any such statement it has not come to light.

I was one of the few people to whom Judge Powell referred. I have reason to believe that the others were ex-governor John M. Slaton, who reduced Frank's sentence from death to life imprisonment, and William Smith, who had represented Conley. (Judge Roan and Judge Foster died long before the political tumult of the case had subsided, and many years before Judge Powell's book was published).

At the time Judge Powell's book was issued, Dorsey

was serving as Judge of the Superior Court of Fulton County, a post which he held at the time of his death in 1948. Smith, after a few years' residence in New York, where he made a fortune in real estate, was living in the little mountain town of Dahlonega, Georgia, famed as the site of the nation's first gold rush, as well as the first mint to be established by the United States Government. His death occurred in 1956. Slaton was engaged in the active practice of law in Atlanta. His death occurred in 1954.

Judge Dorsey's duties on the bench were exacting. The spring of 1947 found him on the brink of nervous exhaustion. He planned a vacation in Florida to rest. The day before he left, I went to his office in the courthouse in response to his telephone call. For the first time since he, Warren Grice, Basil Stockbridge, and I had worked together in the State Library at the Capitol, on the briefs for the U. S. Supreme Court, he mentioned the Frank case to me. He told me he had just finished reading *Red Galluses* (a story of Georgia politics), a book which I had written and which had been published a short while before.

"I have been looking for someone to write a story of this case," he said. "*Red Galluses* is a splendid portrayal of the colorful personalities which have figured in our stormy politics, and I would sooner risk your doing justice to the Frank case than anyone else I know.

"Magazines all over the country keep on distorting the facts. Not a single year has passed but that some publisher has sent people down here to write about it. None of them has been fair to me or to the State.

"It is high time someone with knowledge of the facts write objectively about the case from authentic records."

He rose from his desk and showed me a large cabinet in the corner, concealed by a screen. It was packed with documents of every character, ranging from scribbled notes made at the counsel table during the progress of the trial, to bound volumes containing the official reports of decisions of the courts of last resort.

"There," he said, "is every scratch of the pen, including my notes and memoranda, made during the trial, as well as the substance of every conference I had with officers and witnesses before or since the trial. I want you to take all this, and put in a story what the others have left out. I will see that it is published."

The Judge was stirred with emotion. I talked with him for more than an hour. I did not once mention what I had learned from Judge Foster or anyone else. In fact, I said nothing about the case at all. I just listened to him.

We agreed to go into the matter more fully when he got back, and we left the matter in that indecisive shape.

I was convinced that he was unaware of the talk and planning of Judge Foster, Judge Roan, and Judge Powell when it was decided to overrule the motion for a new trial and head the case toward the Governor, sitting as a Court of Pardon. I was confirmed in the belief, in which Judge Powell shared, that Hugh Dorsey had conscientiously followed his duty as he saw it. Because of factors too often present in such cases, he never knew the truth about the Frank case.

He left the next day, but he never recovered from the nervous exhaustion we had hoped would be relieved by his stay in Florida. He never again resumed his duties on the bench.

I am the sole survivor of the "few people" to whom Judge Powell referred. Every reason which he had for not including this story in his book has disappeared. My conscience has impelled me to pay the debt which he felt that society owed to Jack Slaton and "to the memory of an innocent man who died an awful death."

Chapter 8

HOME AGAIN

My neighbors in Gordon County were busy on their farms in August 1916, when the state government changed and I came back to my law office over Uncle Pike Chastain's drug store. I had never seen the town so quiet. War had broken out in Europe a little more than two years before; the South was facing the depression out of which grew the "buy a bale" movement to save cotton farmers from disaster. It was a dull summer, particularly for the legal profession. The most energetic lawyer in an honest search for a fee could scarcely raise a dollar with a pocket full of rocks. I was yet to learn, among other things, that a country law practice was seasonal.

Across the street from my office was a little park. I had plenty of time to enjoy the flowers and shrubs in that park and to sit under the spreading oaks during that drab summer. I think the goldfish in the fountain came to know me, and I often imagined that they rated me along with themselves as to importance in the scheme of things, and I was in no position to disagree with them.

On the other side of the park was a street paralleling some railroad tracks, and beyond the tracks was Tom House's cotton gin.

September came, and there was crispness in the air, which was exhilarating. Across the park came the noise of workmen as they hammered and sawed and tossed timbers about, getting the gin ready for operation. The dullness lifted a bit as more people came to town and an occasional client drifted in.

In a little while, wagons began to appear with their tall frames piled high with snowy fleece from the cotton fields, and the old gin started up. Across the park came the pleasing hum of machinery. The bellows fairly sang as they drew the sunbleached locks from the wagons and poured them in unending streams upon the spinning saws, and the great press laughed in its own way to mould the staples into bales—cotton bales. Leading the medley in easy cadence, and blending with it, was the staccato from the exhaust of the steam turbines.

Hitching posts in the public square which had not known all summer long the caress of a gentle nag rubbing his nose and pawing the ground with impatience, now held teams of mules and horses as farmers and their sons rollicked about to look the town over. Wagons rattled along every street, and stood outside the stores to load supplies. Lines formed at the windows down at the bank, as clerks pounded their machines to compute figures on cotton tickets and shoved greenbacks under the wicket.

Springtime brings life to the trees and flowers and the fields, and nature revives a drab world with smiles. But it takes the cool, sweet days of autumn and harvest time to awaken the spirit and breathe vibrant life into a farming town down South.

Clients came to my office with the first real money I had seen since I linked up at the wicket gate in the treasurer's office at the State Capitol to sign the payroll. As I worked with their writs and petitions, the grand oratorio of that old cotton gin, like "perfume from an unseen censer," filled the air about me.

Who knows but that some kindly dispensation might be made to permit country lawyers to live in that land of fadeless beauty, when the days of their writs and briefs and courts are done? If Providence deals thus gently with men of the ancient and time-honored profession, and I find myself in that heavenly environment, I shall not ask to hear the living strings of Israfel's lute, or the music of the

spheres as they sing together. I will forego the celestial choir if I may hear again the "put-put-put" of that old steam engine, which long ago turned the wheels of the machinery in Tom House's gin at harvest time.

That fall season brought more Justice Court lawsuits than old Gordon County had ever seen before. I commenced to cut my teeth in the rough and tumble practice of the law. Scarcely a Saturday passed without my appearance in one of these courts, espousing the cause of a client. And always, on the opposing side of the case, there appeared one or more of my fellows of the bar, equally concerned about the even flow of justice. We fought as though the course of history hinged upon a single case.

Few of the thirteen Militia Districts afforded courthouses. In some of the districts, sessions were held in blacksmith shops, crossroads stores, or out under the trees. Two of the justices, 'Squire John L. Camp, of the Costanaula District, and 'Squire C. L. Burns, of the Lilly Pond District, built courthouses at their own expense.

Cases in these courts, small though they were from a monetary standpoint, often involved intricate points of law. I have tried cases before these unlettered men as they presided from nail kegs, cracker boxes, tree stumps, and sundry unconventional perches. Sometimes they were barefoot. I have known them to be as stubborn as a Missouri mule, and with a kink in their thinking that a Daniel Webster could not dislodge.

One of my friends told a story which illustrates the moods of Justice Court lawyers in such situations. My friend was making an earnest argument, he said, trying to sell the Justice on a legal theory which controlled the case. The Justice listened in silence, his poker face never indicating that the argument was having any effect at all. My friend rode to court on an old plow mule which bore the respectable name, Noah. Somehow the mule got the hitch rein loose and was browsing about the law ground. Probably impatient at the drawn-out proceedings, the old mule

slipped up now and then to nudge his master in the ribs with his nose, as if to say, "Cut it out—you're gettin' nowhere—let's go home."

Finally my friend paused in his argument to address the mule. "Noah," he said, "I see the point in this lawsuit. Everybody else around here sees it—with one exception—and you see it, stubborn as you are. But I be damned if I can get this ignoramus settin' on this case to see it, so we might as well go on home."

Sometimes I have felt as did my friend and his mule about the Justice settin' on the case. But I have not found one of them to be downright dishonest. I think the absence of fixed rules, which judges too often automatically substitute for their own good judgment, enables the justices to come nearer substantial justice than some of their compatriots presiding in paneled chambers and delivering their opinions from benches flanked by leaders of the Bar. Their guesses at the law compare favorably.

"There are three things which the Lord knoweth not," the writer of the Proverbs said, "a serpent on a rock, a ship in the midst of the sea or the way of a man with a maid." If this ancient writer had glanced into the future to witness a session of the Justice Court for the 849th District, G.M., sitting at Sugar Valley, in Gordon County, in the good year 1916 A.D., he would probably have added, "—or what a panel of jurors will do."

John Garlington had sued old man Boss Seritt on a promissory note which represented the purchase price of a mule. Seritt filed his answer in defense, setting up that the mule was absolutely worthless—wouldn't pull the lightest plow and didn't know "Gee" from "Haw." He asked to be relieved of payment.

After the planting season was over and before the suit was filed, the mule and a locomotive accustomed to run through the bailiwick on the tracks of the Southern Railway Company concurrently violated one of Newton's laws, namely: that two objects may not occupy the same space

at the same time. As a result the locomotive picked the mule from a railroad crossing and draped him around a telegraph pole twenty yards away. Seritt sued the Southern for the "mulicide," contending that the animal was worth one hundred dollars, or other large sums.

The mule dealer's case against Seritt and Seritt's case against the Southern came on for trial at the same term of court, and on the same day. The case against Seritt was tried first and the jury went out to deliberate on the verdict. In the meantime, Seritt locked horns with the railroad people before another panel of jurors.

After a time both juries came into court with their verdicts. The first jury found that the mule was worthless, and assessed costs against Garlington who, they found, had defrauded the old man by selling him such a mule.

The second jury stuck the Southern Railway Company for a full hundred dollars and costs in Seritt's favor, for killin' the best darn mule in Sugar Valley District.

I was present in 'Squire C. L. Burns's court in Lilly Pond District when a jury got out of character to act as peacemaker.

One of the local farmers had sued another. Twenty bushels of corn was the subject matter of the suit. The jury listened to them patiently all morning, as they bickered back and forth. Each had a teen-age son. These boys, each taking the side of his father, all but came to blows during the trial. Constable Salmon, a crippled old chap and almost blind, had to deputize bystanders to keep order in the court.

The court recessed for lunch and the jurors disappeared down the road in a pick-up truck. In about an hour they returned with the truck loaded with corn. With the help of men standing about the court grounds, they stacked the corn in the little courtroom.

When 'Squire Burns reconvened the court, everyone looked at the jurors seated in the jury box, and wondered what the business of bringing corn into court meant. One juror broke the silence. "'Squire," he said, "druther than

hear these two neighbors fussin' over a little tad o' corn, we fetched 'em the whole twenty bushels."

"We went around to our own barns," another said, "and we put in four bushels apiece 'n' that make twenty bushels —what they're fightin' over."

The grizzled old Justice, who had spent four years in Wheeler's Cavalry, Confederate States Army, looked the embarrassed litigants in the face and said, "I reckon that winds up yer lawsuit. Now get yer corn 'n' go home and try to be neighbors."

The erstwhile battlers went out, and their boys went with them. But they did not take the corn. In a little while they all came back. They appeared as chummy as kittens in the spring sunshine. Conversation in the room and outside ceased. "What now?" was written on every face.

The fellow who had started the suit pointed to the old constable. " 'Squire," he said, "we decided to haul this corn over to Constable Salmon's barn. He's been constable here a long time 'n' he ain't as pert as he used to be—all crippled up and can't see good. He didn't make much corn this year—not enough to run him 'n' his folks 'til spring."

No one spoke for a moment. The good justice switched his cud of tobacco from one side of his mouth to the other.

"Boys," he said, "if you are a-mind to do that, I'm gonna strike this case from the docket and let my constable here collect all the cost."

Old Resaca District, in the upper edge of Gordon County, was always good for a show on Justice Court Day. That county furnished a number of infantrymen in the Mexican War in 1847, among them General Nelson A. Miles. Memories of service in that exotic country evidently lingered, since men who returned renamed two of the villages from which they had enlisted, with Mexican names. Resaca was one. Sonora was the other.

The martial spirit lingered, too. Without a war to test

their mettle, the men contented themselves with mimic battles in the Justice Court. A fight by proxy was not to their liking, so they seldom brought in lawyers.

The Justice who presided before the First World War was a colorful old chap named Gordon Fite. He was in his sixties then, weighing about two hundred, and was about five feet six. When the issue was joined in a case and things got interesting, he moved his spectacles well down to the tip of his nose and, not without dignity, encouraged the hassel. Gordon Fite kept the village store, where his court held sessions, but he was more concerned about a slack season in his court than with his business. In fact, none of the villagers liked to draw a blank on court day. If they couldn't get up a lawsuit any other way, they managed to prod some merchant or tradesman at the county site into suing somebody.

Dr. W. A. Richards, a physician at Calhoun, accommodated them on one occasion. He sued a man named Henderson on account of medical services, taking me along to try the case. It was in 1914, when I was still a fledgeling at the Bar.

Henderson, unwilling to divide the fun with a lawyer, represented himself.

The Doctor took the witness stand and swore good and hard as to the correctness of the account—two visits to treat Henderson's wife, and a vial of medicine, amounting to seven dollars and a half in all.

"What you got to say, Henderson?" the good Justice inquired as he shifted position back of the cracker box.

"Plenty," said Henderson, exhibiting a small bottle filled with a cherry-colored fluid before the court. "This here medicine Doc Richards give my wife is rank pizen!" he declared. With that he planted the bottle on the improvised bench before the Justice.

"Naw!" he exclaimed, "I ain't payin' for no pizen doctor medicine!"

"Just a minute, Henderson," I cautioned as I took him for some questions. "How do you know this medicine is poison—your wife didn't take a drop of it, did she?"

"Naw—'n' she ain't goin' to."

"But you said it was poison. How do you know?"

"Look at it. You can tell it is. Bill Gleason's wife took some just like it 'n' she didn't git over it for a month."

While I was having this hassel with Henderson, the Doctor stepped forward. uncorked the bottle, and drank the entire contents.

"Now, 'Squire," he said, "let's see how 'pizen' this medicine is."

The Doctor resumed his seat. There was silence for a moment, born of astonishment. Then the people who had crowded around burst out laughing.

The Justice resumed his place behind the counter, waiting upon his customers while the erstwhile courthouse crowd busied themselves with their favorite cut-plug tobacco and the fine art of whittling, as they "ribbed" Henderson about the "licking" Doc Richards had given him.

"I didn't mind Doc winnin' the case," he said in that droll manner of a Georgia countryman, "but I be damned if I liked the bodacious underhanded way he done it."

The Justice Courts have been the subject of more jokes and good-natured satire than any other institution in our history, unless it be the first Model T Fords to bounce over the dirt roads of that era. As with the lowly "Tin Lizzie," the Justice Court was the last thing in its category which our people, jokesters in particular, would be willing to part with. Nothing which would serve its purpose nearly so well has been found.

We must imagine that the first serious disagreement to disturb pre-Saxon men, banded together in clans as they roved about the forests and glens which once characterized the home island of the English, brought about some character of judicial forum.

The first pip in the shell of that egg from which emerged

the first element of the English Judicial system was the establishment of the Coroner's Court, in 1075 A.D. The next vestige of formal government on the island appeared in 1076, when William I appointed in each subdivision of the realm, later known as shires or counties, *Custodes Pacis,* keepers of the King's peace. They were empowered to impress into the King's service "men good and true" to assist them. This officer, with men summonsed to help him when that need arose, was charged with the responsibility to hold for the King's officers those who threatened or committed any character of breach of the peace, to adjudicate differences between the subjects of the King, and to act generally for the Sovereign until officers of higher rank could take over.

Later these officers were known as Justices of the Peace. It was the function of the "men good and true" to attend the justices at court, hear the testimony of disputants and their witnesses, and determine what was truth in their controversies. They became known as jurors.

Maybe the Greeks had a word for it—certainly the English had a court for it.

As the social order on the island developed, each new contingency created a court with jurisdiction and procedures to meet it. Tin workers established that industry early in English history; and to deal with new problems peculiar to that craft and the men who dealt with it, the Court of Stannaries was established. When tradesmen commenced to travel through the realm to peddle their wares, disputes with the residents arose. It was necessary to settle these disputes promptly so that the tradesmen might move on from fair to fair and market to market. The King, therefore, established courts which would act wherever controversies arose. They called it the Court of Dirty Feet.*

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* These tradesmen could be readily distinguished by their dirty feet, caused by walking over the dusty roads. Hence the name of the court.

The justification for such courts appeared in the Doomsday Book of Ipswich in 1291 A.D., as follows:

> *The plees betwixe strangue folk that men clepeth pypoudrous shouldene ben pleted from day to day. The plees in tyme of feyre betwixe straunge and passant shuldene bene pleted from hour to hour.***

When custom had fixed the rules of the Law Merchant,*** the King established the Courts of Pie Powder to deal with litigation incident to the expanding commerce.

When Elizabeth I came to the throne in 1558 A.D., there were seventy separate and distinct courts struggling with legal entanglements throughout the realm. Most of these have faded into history since the great chancellors and jurists erected that magnificent structure of the judicial system, which the original thirteen colonies in America inherited when they became sovereign states.

We still have the Coroner's Court, but our English forebears of the Elizabethan Era would not recognize it, so drastic have been the changes in its functions. But English barristers of 1076 A.D., would be perfectly at home in the Justice Courts of the American states, which have retained them without change. Should one take from the ancient archives in England a form of writ employed in the reign of William I, to start an action in the Justice Court, it would not differ from the forms now in use in the more than nine hundred Militia Districts in Georgia.

Such of the states as have assumed—and it is a violent assumption—that they would be able to improve on the handiwork of our ancient English ancestors who called this court into being, have found themselves without a Small

** In modern English: "The pleadings between non-citizens and local residents are many and should be heard from day to day. The pleas of transients who are strangers should be heard from hour to hour while fairs (markets where wares are displayed for sale) are being held."

*** The law governing bills, notes, bills of exchange, checks, et cetera.

Claims Court. They have floundered about, trying to provide courts to replace these Justice Courts. Jurisdiction and procedures have differed with each metropolitan community. In their quest for procedureless procedure, these states have arrived at costly, time-consuming, complicated judicatures, whose judgments are derived largely from guesswork.

Over at the clubs, or at bull sessions when Bar associations meet, great men of the profession who tell stories of epic battles in court often build these stories around trials in Justice Courts. They never forget that great training ground.

If Patrick Henry could return from that Valhalla where the spirits of great lawyers assemble, to attend such a session, his story would no doubt be about the case of Venable versus Hook, tried in a Justice Court in Virginia soon after the British surrendered at Yorktown. We have this story from his best biographer, William Wirt, Attorney General in President Monroe's Cabinet. In 1781, as a consequence of the invasion of Cornwallis and Phillips, the Colonial Army was in great distress. Wirt says a Mr. Venable, an army commissary, took two steers from the herd of a man named Hook, to feed a detachment of Virginia troops.

When the war was over, Hook sued Venable, demanding a judgment for the value of the beef. Old Patrick, exulting in the victory, as was all Virginia with the possible exception of Hook, appeared to defend the case. His speech to the jury was among the greatest of his career.

"He painted the distress of the Colonial Army," Mr. Wirt says, "exposed almost naked to the rigors of a winter sky, and marking the frozen ground over which they marched with the blood of their unshod feet. 'Where was the man who had an American heart in his bosom,' Henry asked, 'who would not have thrown open his fields, his barn, his cellars, the doors of his house, the portals of his breast to receive with open arms the meanest soldier in that little band of patriots? Where is the man? There he stands!'

"The great orator then carried the jury, by the powers

of his imagination, to the plains around York, the surrender of which had occurred shortly after Hook had been relieved of his beef. He pictured the surrender in the most glowing and noble colors of his eloquence. The audience saw before their eyes the humiliation and dejection of the British as they marched out of the trenches—they saw the triumph which lighted up every patriotic face, and heard the shouts of victory and the cry of Washington and liberty as it echoed from the hills and shores of the neighboring river.

" 'But, hark!' thundered the impassioned Henry as he pointed to Hook, white as cotton and trembling like an aspen leaf. 'What notes of discord are these which disturb the general joy and silence the acclamations of victory—they are the notes of *John Hook,* hoarsely bawling through the American camp *beef, beef, beef.*' "

You who read this will expect me to march the jury in with a verdict for the defendant. The jury went out—but they haven't returned. The case is still on the docket with only the verdict missing from the record. The jury leaped from the box when the avalanche of wit and ridicule had finished its sweep, and joined the crowds in hot chase after Hook as he spurred his thoroughbred out of town in search of safer environs.

George Washington, after he had retired from the Presidency to live at Mount Vernon, thought it no loss of dignity to take the oath of office as Justice of the Peace, to which station his neighbors had elected him. Until his last illness intervened, he docketed their cases, patiently heard their evidence, and rendered judgment with that consecration to public duty which characterized his service as Chief Magistrate of the United States of America.

CHAPTER 9

HUMOR HAS ITS PLACE

Abraham Lincoln's skillful use of humor stood him out as a great trial lawyer. Senator Thomas E. Watson, equally invincible before a jury, was a master of satire as well as humor. But humor or satire was not injected merely to amuse. Unless a humorous story or cutting epigram served to aid reasoning and logic, they left it out. Cases pop up now and then which can be won only by clowning. Quite as often, there are cases which the slightest levity would ruin. I had two such cases, the Bill Smith case and the Sam Borders case.

The law in English-speaking countries is based largely upon the ancient customs of the people living on the British home island. It is universally known as the Common Law. One of Georgia's first legislative acts was to adopt the laws in force in England in 1776. Each of the original States adopted the Common Law, either by legislative enactment or simply by applying it.

Under the Common Law, a wife was a chattel. Upon marriage, her legal existence was merged in that of her husband's. Not being a person in the sight of the law, she could not own property. Neither could she sue nor be sued in the courts.

Should any of the gentle sex of Eve shudder at the horror of this ancient rule, a part of which is in force now, let them blame a comely socialite, Lady Hatton, who flourished in London during the reign of Elizabeth I.

Lord Coke and Lord Bacon, among the great architects of the English judicial system, were rivals at the London

Bar. They were also rivals for political preferment by the Queen. But of more importance to this story, they were rivals for the hand of Lady Hatton, a widow, and the wealthiest peeress in the realm. Evidently Lord Coke was a more skillful pleader in Cupid's court, as well as before his Sovereign. He married the widow and soon thereafter succeeded to the highest judicial position in the realm.

Like many young widows burdened with wealth and social position, Lady Hatton was not at all easy to manage. Keeping her in line taxed the ingenuity of the great Chancellor quite as much as did the business of erecting the noble structure of English law.

England's unbossed sovereigns have been women. The sceptered sway of monarchs must rest upon the loyalty of their subjects. The loyalty which Elizabeth I inspired in England's sturdy yeomanry flamed anew in the hearts of Englishmen three hundred and fifty years later, to make the coronation of Elizabeth II a carnival of joy throughout the realm.

Elizabeth's occupancy of the throne in the days of Lord Coke and Lady Hatton was a circumstances which might have been reasonably expected to complicate the good Chancellor's plan to put wives in their proper places, according to his views. Such was not the case. These noble ladies themselves provided both the reason and the excuse for the rigorous laws which have plagued the sex of Eve unto this good day.

Elizabeth, of course, moved about on the summit of society. The realm knew none worthy to hold the proverbial candle to Her Majesty in this regard, unless it was Lady Hatton, the richest peeress in the realm, and creditor of the Crown. The group with which they whiled away their social hours was so limited in number that they were compelled to be quite chummy. Any other relationship would have blown the exclusive club to bits—and marched someone off to the Tower of London. Besides, even kings and queens may not snub their creditors.

William Shakespeare was in London at the time. But he was unnoticed. The socialite par excellence was Sir Walter Raleigh. As aforesaid, Elizabeth was a young woman. Sir Walter was a handsome young nobleman, famed for his gallantry. If historians may be believed, he thought less of that cloak of royal scarlet than of the tips of his sovereign's tiny shoes, which were about to be besmirched by the dirt in the footpath over which she was walking.

Sir Walter found much business with his Queen which could best be toyed with outside the royal castle. Lady Hatton understood. She owned country places surrounded by gardens and hunting preserves. To be near the social whirl in London, she also maintained a town house set amidst formal gardens. And she built a cottage in an obscure corner of the grounds surrounding her town house, a cottage fit for a Queen. Before the contractor had delivered the job, Sir Walter had found the path which led to the side door of this royal love-nest. For a time, Lady Hatton in particular and married women in general were safe from the edicts under the seal of the Chancellor.

The cares of a kingdom sorely taxed the leisure of Elizabeth, but not that of Lady Hatton. Nor was Sir Walter burdened with work. And the cottage hidden in the garden was a lovely place. Let us skip the details. It will suffice to say that tongues wagged in those days quite as they do now, and queens are not immune from jealousy.

Kings and queens have measured jealousy by sterner measures than Elizabeth employed. After all, she owed this high-born subject a lot of money. We must imagine that she took the advice of the Chancellor. This one time they had a common grief. Scriveners worked late to turn out edicts, and Lady Hatton awoke to find that by fiat of law she had become a mere chattel of her husband: he was now her lord and master. Worse still, the title to her castles and lands—even the mischievous love-nest—had been transferred to his absolute ownership.

Since a public law applies to all alike, the sovereign

excepted, married women from that day to this have smarted under rules which crept into the law for no other purpose than to assuage the anger of a queen. And, incidentally, to keep an amorous young widow in line.

It was not until 1861 that Georgia made any attempt to modify these rules. But careless legislation failed to wipe the slate clean, and for certain purposes a married woman remains the chattel of her husband. Both husband and wife may sue for injuries to the wife. But should someone as much as plant an amorous kiss upon the willing or unwilling lips of a wife, the husband may sue and recover damages, on the perfectly sound legal theory that the wrongdoer has committed trespass upon his property. Such an act constitutes criminal tort.

John Holcomb, styling himself an aggrieved husband, filed a perfect example of this old Common Law action against Bill Smith.

That character of case is difficult to defend, particularly in Gordon County, a rural community where up to that time few dents had been made in the Victorian code of morals. Our defense was merely an appearance in the hope that we could whittle the verdict down. Only the sheriff and the injured husband took the witness stand. The sheriff told the horrible details. I asked him no questions. One question, directed to the husband, brought out the fact that he and his wife had gone back together since the suit was filed.

Bill kept a commissary at a cotton mill village. He began paying attention to this pretty little customer, and to the extent that the husband became suspicious. He missed Bill down at the store one Saturday afternoon, the very time he should have been there to serve his week-end rush of customers. He recalled that his wife said she was going to the movies. At any rate, Bill and the wife were absent at the same time, and the green-eyed monster set the young husband in motion. To the sheriff's office he went. They drove

to a woodland grove near town (used, some thought, for amorous rendezvous) looking for the couple. As luck would have it, they found the pair and their worst fears were confirmed. Back at the courthouse, Bill made bond for the two. The husband separated from his faithless spouse and filed this suit.

I had the last speech in the case, not having offered any evidence. I had to keep an eye on the judge. I knew he would not let me get far with the line of argument I had in mind. I approached the matter in this fashion:

"Gentlemen, I am going to ask you to find a verdict against my client in this case."

The jurors looked up in surprise.

"Yes," I continued, "the law gives the plaintiff a right to a verdict, and the judge will charge you that law. That is what is known in the law as a case actionable per se, which means that the plaintiff is entitled to a verdict because of the nature of the offense. And the measure of damage is the enlightened conscience of an honest jury. It is what the law terms punitive damages—damages which will deter the defendant from repeating the offense."

I knew the judge would charge that.

Looking over at the victim—and she was a beautiful young lady—I continued: "While the law says you must give the plaintiff damages, it leaves to your own good judgment as to just how much. Now, the evidence is undisputed that Bill had one indulgence. It is also undisputed that the husband has the object of this trespass back, and it will last him for and during his natural life. I think it is common knowledge that such an indulgence goes, in these parts, for two dollars."

Still looking at the comely cause of the trouble, I continued: "Bill ought to be made to pay. I ask you to bring a verdict of two dollars."

The judge whammed down the gavel and reprimanded me. I thought surely I would go to jail—the courthouse

crowd roared with laughter. The jury came back in a few minutes with this verdict: "We the jury find for the plaintiff two dollars."

The case against Sam Borders required totally different tactics. The Grand Jury had indicted Sam for disturbing divine worship at old Hill City Baptist Church.

A lawyer can often get a man under the wire in a rural county when he is charged with murder or arson and sometimes even with rape, but whoever stands indicted for disturbing divine worship at a little country church might as well get his habiliments together for the maximum stay in the chain gang, if there be any evidence at all to sustain the charge. Precious little is required. Sam was Justice of the Peace in Hill City Militia District. But he had fallen from his high estate in the estimation of his neighbors because of two (to them) unpardonable sins: he got drunk occasionally, and he had "quit" his wife. Everybody in the District was howling for his scalp, and I think the judge had assured them that if they would bring a little evidence over to Big Court, they would be in no way disappointed.

Sam had put his farm at my disposal. "Take every dollar it will bring, Colonel," he said, "if you can get them to take it as a fine and let me off." The prosecuting attorney would not even talk about a fine. "Sam must walk the plank," he said.

When Big Court met, half of Hill City was in attendance.

Sam and I sat at the defense table, dejected and alone. I had not the least idea of any theory on which I could win that case. The first witness called by the State was Rev. Arthur Smith, pastor of the church, and one of the most popular and venerable ministers in the county. He testified that on the first Sunday in May, he went to Hill City Church to deliver his message. "I read the Scripture lesson," he said, "then began my sermon. In about five minutes I heard a disturbing noise back in the audience. I paused until quiet was restored and then started again. I recognized the defendant back there making the trouble. I paused until

he got quiet, then started again. I did this two or three times, and finally gave up and dismissed the congregation."

Ed Rooney, a deacon in the church and song leader, corroborated Mr. Smith and said that the sermon usually lasted about an hour, but this one lasted less than half an hour.

The next witness was one of the noblest men I have ever known, B. J. Bandy. He had been Worshipful Master of his Masonic Lodge for years, and was a man of unimpeachable character. He testified that he sat within arm's length of Sam that day and that every time the preacher made a statement, Sam would dispute it loudly enough to be heard all over the house. Mr. Bandy was a deacon also. Milton Fuguae was called next and he testified that he sat beside Sam that day, that he detected whiskey strongly on Sam's breath, and that he had some trouble getting him away when the services were over. He corroborated all that Mr. Bandy had said about the disturbances. I asked neither of these witnesses a question. The State then brought a chap named Wright. I knew that he was not a member of any church and that he had lost some cases in Sam's J. P. Court. I had a suspicion that he had reported the matter to the Grand Jury. I dug him hard. He confirmed all that I had suspicioned. I kept Sam off the witness stand. I had formulated a theory on which to go to the jury, and I did not want to take chances on his upsetting it.

Since I had offered no evidence, I had the first speech and the last. In the first speech I talked about everything but the case, never hinting to the prosecuting attorney what my theory would be. The case was so plain that there was little he could say, and, try as he might, he was not able to anticipate me.

In my final speech I "periorated" about the little country churches: how juries must protect them; how they had made possible a Christian social order; how the faith of our mothers had been entwined about their altars. Then I paid the most glowing tribute to the country preachers

going about in their labor of love, and I placed the Reverend Mr. Smith on the very highest pedestal of Christian service, not forgetting the good deacons.

"It was a most regrettable thing that occurred on that glorious first Sunday in May," I said, "as the fine folks over at Hill City gathered to worship. And it happened exactly as Brother Smith and all of these good deacons have said it happened. It is the divine province of old Hill City Church to save craven souls, such as poor old Sam, sitting over there. That is why Brother Smith preaches over there, and that is why Brother Rooney sings—to save the lost. Why, my friends, once old Stephen was disturbed in Jerusalem—he was stoned. And as those cruel stones tore his flesh he lost not his purpose. He prayed for his disturbers—that their souls might be saved. That is how Brother Smith and his deacons intended to handle this matter—on their knees around that altar in old Hill City Church. That is the only way it could have been handled to save poor old Sam's soul.

"But Brother Smith and the other consecrated Christians let the matter get out of their hands and brought it over here—where it cannot be handled according to the Scriptures. And by whom? By this unregenerated sinner, Wright, and to feed his grudge against Sam. He brought this case here, and when he did it, he pushed that holy edifice aside and denied to it the divine functions which it alone may serve. I ask you to send it back over there—back to Brother Smith and his Christian people of old Hill City Church. Otherwise you might have upon your hands the terrible responsibility of insulating a precious soul from the Kingdom. I ask you to back up old Hill City Church in its divine mission in that splendid community."

In ten minutes the jury returned with a verdict: "Not guilty!"

The ordeal must have operated favorably on Sam. The next time church met over at Hill City, there was Sam. He made acknowledgments and humbly asked for baptism and full fellowship in the Church. Brother Smith and his dea-

cons received him with open arms. Then he convinced his wife that he was a "changed man" and they got back together. Sam has been an exemplary citizen from that day to this. I might have been right after all.

The slightest levity in that case would have ruined it. The defense had to be sad and solemn to win—something to cast the other side in the role of the wrongdoer.

Grim judges ofttimes succumb to humor. One who is able to flavor a seemingly impossible situation with the ridiculous can sometimes take out the sting. Gid Turner's case will illustrate this.

Gid was a taxicab driver at Buckhead, a suburb of Atlanta. He had been indicted on a morals charge in Henry County, some forty miles south of Atlanta. Such a charge is not too difficult ordinarily, even in a rural county such as Henry. But this case was charged with difficulty in the extreme, since Gid's partner in crime was a coal-black Negro woman. White men have been given the "tar and feather" treatment for that offense in rural sections of the South, without the dignity of a trial in court.

Gid was probably ashamed to tell me the details, and I did not press him. I went down to Hampton, where the case was to be tried, to get the story from the officers and to take a poll of public sentiment.

Turner had been to the Negro's shack on the outskirts of Hampton, the sheriff told me, always after dark. Social contacts between the white and Negro races were simply unthinkable in the minds of people in that rural county, so the sheriff and his deputies busied themselves to discover the purpose of these nocturnal visits.

"Colonel," the sheriff said to me, "I don't blame you for representing this fellow. I guess the lowest-down man in the country is entitled to a lawyer. But folks kept seeing this fellow goin' down to that shack after dark. He done it several times. I thought it was time to investigate, so me and my men went down in that section and hid ourselves until we saw him go in the door. We waited awhile, but

couldn't hear what they were sayin'. When the light went out we busted in. There he was, piled up in the bed with this nigger—'n' him a white man.

"Colonel," he continued, "you ought to see that nigger: blackest nigger in Henry County, and will weigh two hundred pounds if she weighs an ounce. She looked like a walrus layin' in that bed that night."

I was certain that if I let that case go to the jury in Henry County, they would throw the whole criminal code at him. I set about to contrive some other way out.

Next day I called him to come to my office and I insisted that he tell me his story. I was interested to see just how it checked with the sheriff's. I imagine he knew that I had talked with the sheriff, so, as clients often do, he labored to keep as close as possible to the officer's recital of the facts and at the same time leave room for explanation. Here was his story:

"Colonel," he said, as he appeared resigned to the worst if the slim hope he held to failed to work, "I am a innocent man." Most clients start off with that sentence. "But," he continued, "the darndest thing happened that ever happened to a innocent man, or a guilty one either. I went down to Hampton to bring this nigger to Atlanta in my taxicab. When I got to her house it was pitch dark. There warn't no light burnin', so I hollered pretty loud to see if she was home. She answered back in there somewhere—sounded like she was half asleep. I was in a hurry so I pushed the door open to go in there and rouse her up so we could get goin'.

"And, Colonel, I'll be durned if I didn't catch my foot on something scattered over the floor, and I tripped and fell. I made a lot of noise when I fell 'cause I fell into a chair settin' by the bed, and it yanked me right over in the bed with this dam nigger.

"I reckon the noise was what made the sheriff come in. I was sort of stunned for a minute 'n' the next thing I knowed they were jerkin' me out o' one side o' that bed and the nigger woman out the other."

I didn't feel that I possessed the skill to sell that story to a jury of white men. I concluded that I had best have the client enter a plea of guilty and take chances of whittling the penalty down a bit. I went to the judge's chambers before the court convened, and told him and the prosecuting attorney the story just as my hapless client had told it to me, and with a perfectly straight face. Just as the sheriff, the clerk of the court, and other officials were about to throw me out, I commenced laughing. Those who had gathered around saw the humor, and they all but burst their sides with laughter, in which the judge got off his dignity to join. I got the story accepted as a joke.

The warden had made reservations for Gid out at the work camp, but the judge rewarded the ingenuity of this modern Baron Munchausen by letting him off with a moderate fine. Incidentally, this fine was paid by a daughter then playing in one of the Broadway theaters in New York. So happy was she that her father would not have to pick rocks on the road gang, she doubled the fee which I had charged. I think I earned it.

Speaking of segregation and of humor, here is Uncle Wash's idea of segregation. ("Uncle Wash" is a symbol of the good dependable old Negro, the kind that is worth his weight in gold.)

The traffic judge was on Uncle Wash's neck hard, about running through a red light. Since Uncle Wash was a good old colored man, the judge had no idea of dealing harshly with him. In fact, a good colored man or woman, old enough to be called "Uncle" or "Aunt" and merit that warm-hearted recognition, usually gets by with no penalty at all down South.

"What'n the world do you mean, Wash, running over that red light? Don't you know you're liable to kill yourself or somebody else?"

"Yassah, jedge," Uncle Wash explained, "I thought dat green light was fo' de white folks 'n' dat red light was fo' us cullud folks."

CHAPTER 10

DRAMA IN A TRIAL

A flair for the dramatic is inherent in every human being—particularly in every trial lawyer. The clergy is not immune. One who is able, by marshaling the dramatics of any situation, to lift an audience to the highlands of emotion will be able to control, for the moment at least, its thought and actions.

The trial lawyer must be trained in two ways: to produce dramatic build-ups when they serve his purpose, then to burst the bubble and conduct the static of emotion back to earth when his adversary is about to land the jury on the mountain top.

Jim Mullinax's case afforded a perfect setting for dramatics.

The Grand Jury indicted Jim on a string of charges which grew out of his hilarious appearance, on a Sunday afternoon, at the railroad depot at Sugar Valley. Most of the villagers came down on Sunday afternoons when the weather was pleasant, to see the local passenger go by. It was sort of a social occasion, another chance for the village gossip to get around. Jim happened up, on the occasion in question, "drunk as a lord," the witnesses said; he used opprobrious language in the presence of the women and children, and "cut up" generally. He topped it all off by getting into a row with the depot agent, and a bystander or two testified positively to the several charges contained in the indictment. When the State finished with its last witness, it had a perfect case.

I knew that Jim was the unpolished stone among dra-

matic actors. I had represented him before. He could do more with a defendant's statement than any client I ever had. I decided I ought to try some dramatics.

I put Jim on the stand for the "prisoner's statement."

"Gentlemen," he began, after he had looked each juror squarely in the face, "these are all good men that have swore against me. I was raised over there at Sugar Valley and I've knowed 'em nearly all of my lfe. But they are mistaken—honestly mistaken. I remember the Sunday they're talkin' about—least I reckon it was the Sunday because it was the only Sunday I've been back there since I moved to Rome. Me and my daughter come up that Sunday on the mornin' train and went over to the Methodist buryin' ground. You know, we buried my wife over there about a month before, and that's why we moved to Rome. We took along a little somethin' to eat, because we had to walk over there and it is about four miles from the depot. Miz Griffin let us have some flowers to put on Minnie's grave—that's my wife's name—and we picked up some wild flowers as we passed the foot of Baugh Mountain. We stayed over there, just me and my daughter, until just time to walk back to get on the train goin' back to Rome. We had our roun' trip tickets and they are mistaken about us gettin' tickets from the agent. Gentlemen, I know I drink some—or used to—'n' I'm ashamed of it. But I didn't drink none that day."

Old Edwin Booth couldn't have packed more feeling in that narrative than did Jim. Of course I didn't spoil his effort with an argument, nor did the Solicitor General feel like an argument. I was fearful that the judge might upset things with his charge, but he didn't. It was a recital of rules, given in all cases, such as jurors and spectators had heard time after time, and it did not divert the channel of thought. It didn't take long for the jury to come back with a pardon for old Jim.

It is easier to get away with these tactics when a woman, an old person, or a youth is involved. When lawyers have clients in this category, they usually look about for some

character of emotional appeal. There was a backfire in the case of an awkward country lad whom the Grand Jury had indicted for simple larceny, the charge being that he had pilfered corn from the field of a neighboring farmer. When ears of corn are tender and in the stage to provide that delectable dish, corn-on-the-cob, people in the Cherokee country call them "roasneers." Although the evidence was largely circumstantial, it was pretty clear that the boy had been getting his pin money from the sale of the prosecutor's "roasneers." We started the build-up with the very first witness the State introduced. All along, we stressed the defendant's immaturity, his social background, the likelihood that his first experience at the Bar of Justice would get him straight, et cetera.

It went well with the jury, and with the spectators. Even the prosecutor, old man Spivey, seemed to melt under the admonition of the good Apostle Paul: "Should you overtake a brother in a fault, recover him with meekness." The attention of the jury relaxed, as though the verdict were already written in their minds. Even the judge lost interest. An acquittal was assured. But it was one of those cases in which a statement from the accused is a must. So we put the boy up. He followed the briefing pretty well for a time—that "I'm-goin'-to-be-a-better-boy-from-now-on" line. In fact, he did it too well. He oversold himself. Looking around at the judge, he said: "And another thing, Judge, I'm goin' to stay out of old man Spivey's roasneer patch from now on."

Everyone looked at me. I looked at the floor.

Even more devastating to a case is a surprise tossed in at a propitious moment. When the evidence of an unsavory situation hits suddenly, it takes all else out of the minds of jurors. "Somebody has been suckin' eggs and hidin' the shells" is the thought that is almost sure to follow. It is hard to free their minds again, and the luckless practitioner suffering surprise is looked on with suspicion thereafter. If

there be skeletons in the closet, it is best to drag them out before the other side gets a chance. Confession is not only good for the soul, it purchases compassion. This was illustrated in the case of the injured wife.

This young woman was in a heated contest with her husband over the custody of their four-year-old daughter. With long black hair, worn after the fashion of Theda Bara of silent-movie fame, her appearance was striking. Her figure was one which would rate a second glance in any place, and her eyes were inviting. Her husband had charged infidelity as unfitness for the guardianship of the child. She had retaliated in kind. Our trouble was that he had proof and we did not. I knew, or thought I knew, that opposing counsel had a letter in his file upon which he depended to blast us out of the water. The wife had written this letter to a man a short while before the case was filed, and in it she had recounted, with no little pleasure, a delightful weekend which they had had together at an out-of-town hotel. She wrote much as she must have felt on this amorous occasion, and invited plans for more of the same. I thought it good tactics to shake the skeletons in the closet myself, not only to rob the situation of the element of surprise, but to get the first chance to explain things. Just before I turned her over to opposing counsel for cross-examination, I called upon him for this letter. I knew that if he denied having such a letter he could not thereafter introduce it, and that in the absence of such denial, the Court would require him to hand it over. After a wrangle, the Court required him to produce it. I read it to the jury, placing the emphasis where I wanted it. Missteps like this were much harder to explain thirty years ago, but we had the chance while the witness was under my control. We did our very best, and she was adept at the business. She developed, very skillfully, our theory that the poor little wife, in the bloom of young womanhood, suffering from neglect and loss of consortium while the debonair young husband grazed on other pastures, was forced by the law of nature and his neglect to violate

conventionalities. Now she was being bruised for his transgressions, "more sinned against than sinning." That was the burden of my argument. Of course, the question of custody was for the court, but we tried all the issues together and the jury found for us. So did the trial judge. Even the young husband saw the logic, and the wife became sold on it, too. Within a week they went back together, withdrew the case, and, so far as I know, lived happily ever after.

"Not my brudder but me, O Lawd" is the best attitude when one is looking for mercy instead of justice. Then too, we fed this unsavory story to the jury so they could take it like the cat ate the grindstone.

Emotional build-ups are fragile things, and as easy to destroy as a big soap bubble. The surest way to destroy one is to mention it in the argument. If the jury gets the idea that it is lawyer-made, it will backfire every time. Mrs. Anderson's case is a perfect illustration.

Mrs. Anderson was in her forties, tall as a bean pole and as slender. She had a wealth of black hair, with eyebrows rivaling John Lewis', and they were jet black. Her complexion was sallow and colorless. Her husband had executed a deed conveying to her a valuable farm, and a few months thereafter filed his petition in bankruptcy. The local bank, acting through the trustee in bankruptcy, filed suit to set aside the conveyance as fraudulent. The burden was on us to prove the *bona fides* of the transaction, and to do so we had to show where the old woman got some six thousand dollars with which to pay the purchase price. Her only source of income was the sale of butter and eggs and dried apples off the farm. Of course, it would take half a century for a housewife in those circumstances to accumulate that much money. But we got enough in the record to sustain a verdict if by sheer luck we could coax one from the jury.

Both sides closed, but the bank's counsel asked that the old woman be recalled for further cross-examination. They

grilled her for an hour. She fought them the best she could. Finally, counsel announced: "That is all." The old woman collapsed—she fell sprawling from the witness chair. We grabbed her up, carried her into the Grand Jury room, and spread her out on a table, and closed the door. Then we started the jury argument. Nobody knew what was happening behind that closed door, or whether the old woman was dead or alive.

I made not the slightest reference to the old woman's fainting. I did not try to appeal to pity. I knew that if I had, the effect would have been destroyed. The jury did not stay out very long. They hurried to get back to see if the old woman had survived. And they brought along the very medicine for her convalescence.

And the strangest thing! When court was over and the matter had been discussed a bit, nearly everybody accused me of staging the show.

If I had, it would not have been the perfect performance that it was. To feign the surprise and deep concern which possessed me at the moment, and which by perfectly natural reaction I transmitted to those about me, would have taxed the skill of the greatest of actors. A dramatic display such as this is most effective when the important participants are wholly ignorant of what is to take place, when the lawyer involved is as much surprised as the jury—when, in short, it just happens.

Chapter 11

KNOW YOUR JURY

There is a world of anxiety bundled up in the business of pacing back and forth just outside the maternity ward, first-time fathers say, while wrapped in frightened expectancy, biting finger nails, chewing cigars, and otherwise trying to hold on to reality. Save your sympathy. The hard pressed lawyer, pacing about the courtroom while the jury is hatching a verdict, hath greater need of it.

His troubles begin with the selection of "twelve men, good and true," and to get a panel safe for the case at hand, he needs a sixth sense and a perfectly zeroed crystal ball. Then when they get in the box and begin to look over both counsel and client, inviting the capture of their interest while daring the capture of their will, another phase of the trial taxes the lawyer's ingenuity. One who has toyed with mountain trout, as they dart about in the rapids of a cool, swift-moving stream, tossing in this lure and that, trying everything in the tackle box likely to tempt the big fellows to strike, will understand the problems of the trial lawyer as the case moves along. These fellows in the jury box are as skittish and suspicious as the denizens of the mountain stream. Be the angler fisherman or lawyer, the lure must be right.

Two cases up in the Cherokee Country years ago impressed upon me the care with which jurors must be selected to start with, then the meat upon which they must be fed, metaphorically speaking, throughout the trial. And the ration need not be made up entirely of evidence. In one of these cases, we rescued old man Bowen from an impos-

sible civil case; in the other we spared a teen-age colored girl named Rosie Lee from the toils of the rockpile.

A lumber company in Atlanta sued old man Bowen. The suit involved nearly a million feet of lumber, delivered by the wagon load at old Resaca. The plaintiff's experts had measured this lumber with precision instruments. Their books had been kept by certified public accountants. They had memoranda, receipts, invoices, bills of lading, ledgers, et cetera, which documented every transaction. These records told a perfect story.

Old man Bowen was not adept at keeping records. He had a large calendar marked off in squares, with numerals designating the days printed in these squares. Every evening the boys and the old man posted the number of feet of timber hauled that day in the appropriate square. It looked as if he had kept this calendar hanging in the kitchen, since it was greasy in spots, and smoke from the fireplace had probably been responsible for discoloring the once white paper. But the figures, in pencil, could be read. He had a sheaf of papers, too. We didn't try to classify them. We didn't know just what they were. When the arguments were over, we simply dumped them into the laps of the jurors, along with the plaintiff's beautifully kept records, and trusted to luck.

The late Judge Frank A. Hooper, Sr., of Atlanta, represented the plaintiff. Associated with him was a member of the local bar. I had been associated by the late F. A. Cantrell. We were out-gunned, so far as counsel was concerned, and I thought our chances were nil. Mr. Cantrell did not. I had reckoned without his uncanny skill in selecting a jury. He knew every man, woman, and child in the county. He could recount all the family feuds since the War Between the States, knew all the relationships, what church each family belonged to, what their politics were. He could look at a countryman from across the square and tell what humor he was in. The jury lists at that time were made up of men who had come up during Reconstruction days, when

there were few schools. About one out of four was able to read or write. A still smaller percentage were able to add and subtract in simple arithmetic.

Mr. Cantrell knew who could write, or sign his name, and who could not, and who could add and subtract figures. He was wholly undisturbed about the case. He had stricken from the jury the name of each man who could cipher, or even read a single piece of the plaintiff's documentary evidence. Even if they had known an invoice from the label off a tomato can, they couldn't make the computations necessary to find for the plaintiff. Besides, we had a bigger bundle of papers than they did, and every juror on the panel knew what a calendar was. It required no mental gymnastics at all to find for the defendant—not a figure was involved in a verdict like that—and that is what they did.

"You can't go agin' a calendar," one of the jurors remarked, in justification of the verdict.

Rosie Lee's case not only posed a problem in jury selection, but it called for ways and means to provide a repast palatable and satisfying to the intellectual appetites of a panel of jurors not calculated to relish her behavior. She flourished in my home town years ago, when there was a very marked difference between the appearance of people who lived in the rural sections and those who lived in the cities and towns. She was a "town girl," the social rage over in the Flatwoods when she visited there one summer during "big meetin' " time. The country Negroes considered themselves somewhat promoted socially to have her around. But while Rosie Lee was reveling in all this notice, she managed to rifle just about every trunk and closet her hosts had. She lifted dresses, scarf pins, shoes, ribbons and diverse kinds of bric-a-brac. But each one who missed an article here and there kept mum about it, considering it a part of the price for the social whirl and the uplifting effect of the glamorous belle from town.

Rosie Lee made home base with her gleanings. In the

meantime, the folks compared notes and came to the conclusion that this little Mairzy Doats from the bright lights had exacted too high a price for embellishment of Flatwoods society. A delegation waited upon the Grand Jury, and the subject of their story was, as my old friend George Glenn used to say, "in liminee."

Rosie Lee's father was a good man and was pretty well embarrassed at the antics of the girl. "Do what ye kin fo' de chile," were his parting words when he had arranged for me to appear for her. We had agreed that Rosie Lee would have to "walk the plank," but I promised to make it as light as I possibly could.

The Flatwoods is unlike any other community. Roland Hayes, famous tenor, was born there and lived there until near teen-age. It is a Negro settlement about ten square miles in area; once a part of the large holdings of Dr. William Mann, at the commencement of the War Between the States. It was noised about that if the Confederacy lost the war, slave owners would be required to give each of their slaves forty acres of land and a mule. Whether the Doctor thought this a requirement or not, I do not know. At any rate, when General Lee surrendered at Appomattox, the Doctor parceled out this tract of land among his slaves, giving each forty acres and a mule. And these Negroes have occupied the land ever since. The Doctor's family name predominates until this day. (It became known as the Flatwoods because of the character of the land.) They are industrious people, and the settlement has been practically free from crime since the community was established, following the surrender.

Roland and I played up and down the creek which ran through the Flatwoods when we were small boys, spearing frogs and fishing for trout. My grandfather's farm, where I was reared, was nearby, and we knew and respected the Negro families who lived there. When Roland returned from his first concert tour abroad, where he appeared in command performances before the royal families at Lon-

don and at St. Petersburg, he was acclaimed by critics as the greatest concert artist of his day.

He was the highest-paid singer in the world in 1928 when he came to Calhoun to compliment his "home folk" with a concert. I walked with him over the once familiar grounds in the Flatwoods, and carried him to visit with a son of Doctor Mann.

Much water had run under the bridge of time since they had played together in the Flatwoods. The son of the slave was famous on two continents, while the son of the master lived unnoticed in a rented cottage.

I have never seen men greet one another more cordially. When Roland left, he slipped a fifty-dollar bill in the old man's hand for the sake of "auld lang syne."

Negroes from the Flatwoods have an air about them that is not to be found in other communities of their race. They are independent and self-reliant and, while friendly they appear to white people who do not know them to be "uppity," bordering on the arrogant. When a parade of these husky black women alternated on the witness stand, to give the lowdown on Rosie Lee's depredations, I dug them a bit —just enough to make them spark now and then with anger. When they got their dander up, they got saucy. I irked them into as much of that as possible. I knew the jury would not like these husky black women who were talking saucy to white folks. One got rough—to my delight—and the judge cautioned her to calm down.

I do not recall whether we had arguments in the case. If we did, the jury paid no attention to us. They were thinking about those Negro women tossing their saucy talk back to white folks. When the last juror in line filed into the jury room, he met the first one coming out with a verdict turning Rosie Lee loose. And I had learned the technique for examining "uppity" witnesses.

On one of my swings around the circuit in old Murray County, the court was having its unending trouble with the Bishops and the Lockridges (feuding families) which

set the criminal court in motion when Judge Hooper convened it in 1833 for its first session. William Bishop, scarcely out of his teens, was charged with the murder of Wash Lockridge.

Judge Newt Morris and J. M. Neel, Jr., both top-ranking trial lawyers, and I, represented Bishop.

Ony two persons, Tom Bishop and William Bishop, survived the altercation. According to their story, two or three Lockridge boys and as many Bishops were taking pot-shots at one another with their squirrel rifles, over on the side of the mountain above Eaton. While Wash Lockridge was aligning the sights of his rifle on Tom Bishop, Tom's younger brother, William, drilled him through.

The aisle down the center of the courtroom divided the kinsfolk and partisans of the two belligerent families. The eldest of the Lockridge clan was seated with State's counsel, aiding the prosecution. Across the room with defense counsel was the head of the Bishop clan. Both men were old and broken. Their bald pates stuck up through a fringe of snowy white hair. For thirty years or more they had alternated at these positions in the courtroom, first prosecuting, then defending, as the ancient feud took first a member of one of the families, then one from the other.

Both families had considerable following in the county and it was difficult to get a jury. State and defense counsel had been see-sawing back and forth all morning, squabbling about whether this juror or that was qualified to sit on the case, the two old men lending what help they could to their respective groups of lawyers as to the desirability of men to compose the jury.

Late in the day we had managed to agree upon ten jurors. We needed two more. The situation became tense, and each side considered the individuals called for these remaining places very carefully. Finally one man was accepted by the State's counsel, and the Solicitor general yelled out the formal indication, "Juror, look upon the prisoner! Prisoner, look upon the juror!"

That passed the ball to us to reject or accept. We went into a huddle on this man. Our old client, excitedly sticking his head right into the middle of the huddle, said, "Take 'm!"

"Now, you want to be mighty careful," Judge Morris said. "There's some good men down the line."

"Take 'm!" the old man responded.

"We're not goin' to take a man on this jury on a hunch," Morris fretted, "unless you've got a mighty good reason! Tell us exactly why you want 'm on this jury, and let's see if the reason is worth a whoop!"

"Take 'm, dammit," the old man said as he stuck his head over to the middle of the huddle, "I slep' with 'm last night!"

The jury was out twenty-four hours. All the while, the old man's bedfellow was fighting for a verdict of acquittal. He won the others over, proving that the old client had good ideas about selecting a jury.

CHAPTER 12

THE WESS MORGAN CASE

In the spring of 1923 (as I recall, it was April), S. C. Goss, Gordon County policeman, and Lee Cates, a federal officer, went to the backwoods home of Wess Morgan to serve a search warrant. Morgan, an illiterate farmer, was known to be dealing in bootleg whiskey, and the officers' object was to confiscate a supply thought to be hidden in the farm shack in which he lived with his wife, mother, and eight children. Goss's nickname, Shorty, was description in reverse; he was a tall, handsome fellow.

When the officers drove up, Morgan was tinkering with some repair work at a blacksmith shop located near his house. Goss approached him in friendly fashion to apprise him of the warrant and the right to search.

"Hello, Shorty," said Morgan, dropping the work he was doing and greeting the officer with the same show of friendliness.

Meanwhile, Cates had entered the house and started the search. Goss and Morgan walked toward the house. As they stepped on the piazza, they glanced into the room leading from the entrance hall, and Morgan saw Cates for the first time. He had emptied a drawer which he had pulled from a dresser containing the children's playthings. In his impatience to find the object of his search, he had broken a china doll. It was lying in a corner of the room. Other toys such as backwoods children had only at Christmastime were scattered here and there, and he had tramped on some of them as if to work spite on Morgan's children. He had not spared the family album. It had been tossed on the floor with other

family keepsakes and some of the pictures had come loose and were scattered about.

Morgan's face flushed. He held back for Goss to enter, then followed him through the door into the hall. As he did so, he reached for a twenty-two caliber target pistol hanging upon the door facing, and fired a bullet into Goss's brain, causing instant death. Then he turned on Cates, who was so shocked at what had happened that he dodged into an adjoining room before returning the fire. They exchanged nearly a dozen shots amid a medley of crashing furniture, slamming doors, and screaming women and children, without injury to more than the house furnishings.

When the belligerents had fired their last shots, neither risked the chance that he would be able to reload first. Cates ran for his automobile parked in front of the house, and Morgan made for the mountainside.

The Ku Klux Klan was riding its highest crest at the time, powerful throughout the nation. A majority of the male citizens of the county were members of the local Klan, and Goss was one of its moving spirits. He was a splendid police officer and very popular. News of his tragic death spread quickly, and in less than an hour a heavily armed posse, led by the sheriff, was combing the hills for Morgan. The hunt lasted several days, and at times the posse numbered into the hundreds. Crops went unattended, merchants closed their stores, and normal activities throughout the county were all but suspended while the search was on. Time went by and tempers went up, as searchers, hunting in relays around the clock, came back from the hills empty-handed.

About a week had gone by when Harry A. Wise, who had succeeded the slain policeman, went to the Morgan home to reason with his wife and mother. "If you'll tell me where to find Wess," he said, "I guarantee no harm will come to him. He'll get a fair and impartial trial, I promise you."

While this talk was going on, the hunted man pushed up a slab in the puncheon floor, and surrendered. Wise

made good his promise. He slipped his prisoner into Calhoun by side roads, and there engaged a high-powered automobile and set out for Atlanta to lodge the weary fugitive in Fulton Tower for safekeeping.

News of the capture spread as quickly as had news of the crime. By noon, Calhoun had such a crowd as would have delighted Barnum and Bailey, many bleary-eyed and weary from searching. The Circuit Judge rushed down from Dalton. He called a special session of the Grand Jury, to meet the following Monday. Then he personally filled out an affidavit and bond for attachment, had Goss's widow sign it, and tied up a thousand-dollar savings account which Morgan had at a local bank.

Morgan's friends employed me on the day he was apprehended. I began to study the situation carefully. I talked to many people that day, looking for evidence in support of a motion for a change of venue. I had never seen Gordon County people so worked up. Nor was this emotion-charged, sadistic frenzy confined to the vicious few, although there were some level-headed men who made every effort to calm the passions of their less thoughtful neighbors. Ben Watts, a fine citizen of mature years, was among them. But Morgan was behind bars, so no trouble resulted from the angry crowd.

The Grand Jury met and promptly returned an indictment charging murder. The officers, in anticipation of the indictment, had left to get the prisoner early that morning, timing their return to follow immediately such preparations for the trial as could be done *in absentia.* I had not conferred with my client, but I had been busily trying to figure out strategy to gain delay—a great defensive weapon in a criminal case.

The courtroom atmosphere that morning seemed dimensional and tangible, such as might hang on Lucifer's pitchfork. I tried to do all the talking I could, but only on matters unlikely to provoke controversy, taking care to say nothing that the crowd back of the bar would not agree

with. I had Morgan's wife, his mother, his eight shabbily dressed kids, with a couple more kids borrowed from his brother, all crowded around counsel table, arranged so they could see the jurors and the jurors could see them. The judge looked down through a perplexed frown. He suggested it would not be well to wear out those women and children by keeping them in that hot, crowded courtroom during the trial. "Your Honor," I said, "this poor woman is Wess Morgan's wife. The older one is his mother, and these are his children. He is about to go through a great ordeal, a trial for his life. They wish to be with him through it all, and he wants them with him so long as he may have them."

"I think you ought to find some place outside this courtroom," said the judge.

"That is your Honor's responsibility," I declared tossing the ball to him. He dropped the matter. I could sense that the people in the courtroom were in agreement. I had won the first tilt; small indeed, but however small, I had inched a bit into their tolerance.

The judge called the case for trial, rushing jury lists to counsel. Before looking at the jury list, I moved for a change of venue. I knew this would be overruled, but I knew, also, that a writ of error would stay the trial until the Supreme Court had reviewed the judge's ruling on the motion; that if he refused to certify the writ, subsequent procedure would be nugatory and the effect would be a long postponement of the trial. It is discretionary with a judge whether he will receive evidence in support of such a motion by affidavit or from witnesses testifying in person. This judge said he would require affidavits. I reached in my brief case and took out a number of typewritten papers. The judge evidently took these to be the supporting affidavits. He then decided he would prefer that witnesses testify in person. I called Ben Watts to the stand, then a few others who had expressed concern at the temper of the crowd when they rushed in at the news of Morgan's capture. They

were not nearly so fearful about Morgan's getting a fair and impartial trial as they had been about that crowd milling around the courthouse the Thursday before. The judge promptly overruled the motion and ordered the clerk to begin the call of the jury. I had anticipated just this, so when the court officers began to stir about and shift position back of the bar (which always happens when there is a go from one step in a trial to the next), I tendered an appeal to the Supreme Court which I had prepared in advance, complaining of error on the overruling of my motion for a change of venue. The judge was not prepared for this. He knew that there could be no legal trial with that appeal pending. I was about to lose such sympathy back of the bar as I had earned, but the judge saved me.

"Mr. Henson," he said, "do you realize that if you insist on this motion, it will cost Gordon County an extra thousand dollars to try this case?"

Now it was my moment. I pulled myself up and pointed a finger at this embodiment of the law. I thought of old Roscius, an actor who had trained in the Roman Forum when Cicero tried cases there, and I said, in somewhat modulated accents, "Your Honor, if there be a single thing I can do, and lawfully do, which will save Wess Morgan one additional breath of the life which God has given him, I will do it if it bankrupts this county from border to border."

Back of the bar, frowns warred with smiles. The tension faded with the faintness of the fringe of an echo. They agreed with me on that one, and it was not so inconsequential.

My motion for a continuance was overruled promptly, and I gave notice of an appeal. Then we struck a jury, and the State commenced with its evidence. The prosecuting attorney was vicious in the extreme, playing to the crowds back of the bar.

My mentors in the law had taught me never to refer to the poor devil I was representing as "the defendant." I was

in there slugging for Wess Morgan and I pronounced that name when I referred to him. I avoided asking Cates any question that would call for his disagreement. I kept mainly to those little trinkets scattered over the floor while the little kids who loved them looked on with broken hearts at the disarray of a little head of doll hair, or a dent in a cherished toy. I thought of that poem of such sweet sentiment:

The little toy dog is covered with dust,
But sturdy and staunch he stands;
The little toy soldier is red with rust,
And his musket moulds in his hands.

I tried to point up these little objects in the same sentiment. Who doesn't have such keepsakes, and would not be crushed to see them desecrated? I made little reference to Morgan, directing my remarks principally to the federal officers stepping on the rights of the little, ragged children—while these same children looked about the courtroom with frightened and puzzled eyes.

After the lawyers had spoken and the judge had charged the jury, I was all but spent. The judge and the prosecuting attorney had been on my neck all day long. It was late in the afternoon, so I thought I would slip out the back way and wait at home to be called for the verdict. As I walked down the back steps, half a dozen spectators at the trial, some of them my friends, detained me. Soon a crowd gathered. To my surprise, they were making a hero out of me. I felt better. In fact, I felt puffed up, and had renewed hope that the verdict would not carry the extreme penalty.

The jury deliberated for three days. They could not agree upon a verdict and we drew a mistrial. Meanwhile the officers had gotten into a squabble over the reward that had been offered for Morgan's arrest. They were not in such a great hurry for the hanging after the mistrial, and the case was tried without such haste at the succeeding regular term

of court when the courtroom atmosphere was not nearly so bad.

We got a verdict with a recommendation this time, and Morgan was sentenced to a life term. He was at the State Prison Farm for about five years, and was then paroled. Today he is a prosperous farmer in Fayette County, well respected by his neighbors. If anyone has anything bad to say about me, I would advise them not to say it down in Wess Morgan's bailiwick.

Chapter 13

FIRST TRYOUT IN THE BIG LEAGUE

In the late Twenties, I had the urge to try out in the big league. So in January of 1929, I moved down to Atlanta. I figured that it would take a few months to get acquainted —to learn my way to the Court House, get acquainted with the big wheels and see how they operated in the big city. Every courthouse crowd has its peculiar way of doing things, and one has to know them, else remain an outsider. By the time the April term rolled 'round, I had accumulated a few cases. Three of them were on the calendar in Judge Virlyn B. Moore's division. No one ever had a better judge to get started with. One of my clients, a colored man, was charged with an assault with intent to murder; another, a Negro who taught at one of the Negro colleges, was charged with issuing fictitious checks, five in all, and a separate indictment had been returned for each check; a third, a white man, was charged with forging a note on Frank Matthews, whom I had known in Cartersville.

About six or eight months previously, the Baptist people were aroused by the theft of more than a million dollars by a financial advisor named Carnes. He had been put in charge of trust funds, and had really taken the good Baptists to the cleaner. He vanished, and the best detectives were put on his trail. He turned up in Canada, posing as a retired business man. Arrested there, he waived extradition. His was one of the cases scheduled for trial at the April term. There were several others, including a young chap who had recently moved to Atlanta from Canton. He was charged with stealing eleven dollars and some few cents.

The Carnes affair was a headline case. The newspapers had been tossing it back and forth from the day the theft was discovered. When the officers arrived with the infamous prisoner, nothing short of extra editions and feature stories would suffice to tell the story of his life in Canada and the fine work of the detectives in locating him to bring him to justice.

It is the practice of courts to dispose of cases in which pleas of guilty are to be entered before calling contested cases. The form and character of the jury's verdict in these cases are agreed upon by counsel for the State and defense counsel, and express the agreement as to the length and conditions of the penal sentence. If the trial judge approves the agreement of counsel, he directs the foreman of the jury to sign it. The record of the case shows this prepared verdict to be the responsibility of the jury without the slightest indication that it represents a trade between the lawyers.

When the counsel moved the court to approve an agreement as to a verdict in the Carnes case, everyone knew there had been a trade. News cameras flashed, reporters scurried for telephones, and excitement spread among the unusually large crowds of spectators. The judge called a jury in the box and directed them to sign a consent verdict with a maximum term of five years.

Another consent verdict, in the case of the teen-ager from Canton, followed immediately. The judge instructed the same jury to sign a verdict in that case, with a maximum punishment of fifteen years. Every juror drawn for service witnessed the proceedings and heard the two verdicts published. Then the court got down to jury business and the first case called was that of my old Negro professor.

We had no defense. It was merely a question of begging what little mercy we could from the jury. The State was represented by Ed Stephens, the most relentless man on the prosecuting attorney's staff. He spread all five of those fictitious checks out on the railing, and demanded the

limit. It was a short case and the hardest to argue I have ever had. The jury went out and the court took up the assault case. My client had ripped a Negro from ear to ear with one of those ugly knives with a spring to flash it open. The surgeon had done a bad repair job and the Negro had a ridge of scar tissue ranging down from one ear and under his chin almost to the other ear. He looked as if he had slipped the rope at an unsuccessful hanging.

While we were drumming along with the trial, the sheriff announced that the jury in my old professor's case had reached a verdict. "Bring them in, Mr. Sheriff," the judge directed. "We will suspend the case on trial for a moment while Mr. Stephens receives and publishes the verdicts."

Stephens stepped over to receive the documents from the foreman of the jury. He looked at the entry which the jury had made on the first indictment long enough to read it half a dozen times. His face flushed noticeably. Then he fingered through the others. Finally he read the verdict in the first case: "We, the jury, find the defendant not guilty." Then on down the line until five verdicts of not guilty had been pronounced, all in the hearing of the jury in the case on trial.

I could scarcely believe my ears.

Judge Moore never let anything worry him. He just grinned. But not Mr. Stephens. He came to life in every nerve when we resumed the trial of the assault case a moment later. He handled his witnesses with more caution. There were five of them who testified to an unprovoked assault with a deadly weapon upon an unoffending fellow by my client.

Stephens made a determined argument in the case—he all but challenged the integrity of any juror willing to agree to a verdict of acquittal. It is difficult to "sum up" in any case where there is nothing to "sum." I was relegated to tactics which Judge Glenn often used: when the law is against you, argue the facts; when the facts are against you,

argue the law; when both the facts and the law are against you, talk to the jury about such things as mother, home, and heaven. I tried to outdo the fair Portia in the business of dressing up a sordid background by calling the gentle dew of mercy from any heaven that might have some to spare.

Argument of counsel over, the judge sent that jury out to deliberate. Then he called the forgery case.

The offender in that case had been a trusted agent of an insurance agency operated by Frank Matthews, one of my boyhood friends. The evidence was perfectly clear that he had signed Frank's name to a promissory note, obtained a thousand dollars on that forged signature, and spent the money. He was unable to replace a dollar of it.

Before time for the argument in this case, the sheriff announced that the jury in the assault case was ready to bring in a verdict. Court attachés were astounded to hear it—an unqualified acquittal!

We finished the forgery case. It was late in the afternoon when that jury filed into the jury room. But they were back with a verdict in ten minutes. You guessed correctly. That jury put the lamb skin on as neat a case of forgery as ever went to trial.

When the first jury gave us an unexpected victory, I felt slightly inflated. The second made me feel like a new edition of old Dan Webster. When the third one plastered the vigorous prosecuting attorney in the eye with a "not guilty" verdict, I began to think I was just too heavy for the boys at the Atlanta Bar. I made it convenient to talk with some of the jurors.

"We set in that court room this mornin'," one of them said, "and the judge made us sign a verdict giving that damn fellow Carnes five years for stealing over a million dollars—he ought to have life. Then he made us sign a verdict giving that ignorant country boy fifteen years for stealing eleven dollars—he ought to have been turned loose!"

"Yes," another broke in, "and we all got out there in that

hall sworn and be damned that we would turn everybody loose that came before us, criminals and all, no matter what they done."

If lawyers didn't run into luck like this once in a while, the practice would be "double drill and no canteen."

Luck dogged at my heels at that term of court. Another impossible case was that of a teen-age boy charged with the theft of an automobile.

A locomotive engineer named Miller, whom I had known at Calhoun, sent the boy's mother to me.

"Colonel," she said, "I've been worried to death until I saw Mr. Miller. He said you could clear my boy—said just get you and there would be nothin' to the case."

I explained to her that my good friend had overestimated me; that any criminal case was dangerous. When I attempted to get at the facts, she seemed to think that unimportant. "No matter how bad the case," she quoted Miller as saying, "Henson will carry the boy right out the front door." I could not dissuade her from that fool notion. But no. I could win the case, hands down, she insisted. Mr. Miller had told her so.

I was behind the eight-ball in more ways than one. It is never good practice to let a client think his case is an easy one. Most any one can win an easy case. But if the client is made to think his is the worst case in the books, the lawyer will not be blamed for losing it. If he happens to win—well, he's simply a wizard.

I made careful investigation—examined the police reports and the evidence taken at the committal trial. I was convinced that, barring a miracle, the boy was in for a four-year stretch.

When we went down to court, the old lady had half the neighborhood with us. They were all laughing as though they were going to a picnic—not a worry in the world. Miller was along, too—just as confident as were the others. I was the only troubled soul in the case.

The trial got under way and the State made out a per-

fect case until they put up the man whose automobile had been stolen.

"Mr. Brown, did you own a Chevrolet automobile on or about June 10th, 1928?" the State's Attorney asked.

"Yes," the witness replied.

"Have you got the bill of sale with you?"

Taking a paper from his pocket he answered, "Yes, sir. Here it is."

"Was that the autmobile the officers pulled this defendant out of over on Formwalt Street?"

"Yes. The very automobile," he answered.

"Your witness," State's counsel said as he handed the bill of sale to me.

I looked at it—then I looked at it some more. It was made out to Ronald R. Brown and Luther R. Brown. Then I looked at the indictment. It alleged that the automobile was the property of Ronald R. Brown.

"Who is Luther R. Brown?" I asked.

"He's my brother."

"You boys went in together and bought this car?" I asked.

"Yes," he replied.

"How much did you put in it, and how much did Luther put in it?" was my next question.

"We went fifty-fifty," the witness replied.

"Then," I asked, "the automobile belonged to Ronald R. Brown and Luther R. Brown at the time it was stolen."

"Yes, that's the way it was," he said.

I moved for a verdict of acquittal on the grounds that the *probata* failed to support the *allegata*—the charge being that the automobile alleged to have been stolen was the property of Ronald R. Brown, whereas the proof showed it to be the property of Ronald R. Brown and Luther R. Brown.

Judge John D. Humphries, wiry and quick-thinking, was presiding. "Stand up, young man!" he snapped. "You almost got into trouble. If it had not been for a technicality, this

jury would have sent you to the prison farm." He proceeded to give the boy a good lecture, and told him he could go.

Out in the hall, Miller said to the old woman and her friends who had gathered around, "I told you that man never lets a case get to the jury!"

I thanked whatever gods there be for the miracle.

I tried two colored boys at the fall term, charged with armed robbery. They had been thrown in jail early in the summer. Unable to make bond, they sweated it out in the big rock.

The evidence at the trial developed that the boys were part and parcel of a crap game. They had lost their shirts. They got suspicious, they said, that the chap who wound up with all the money had loaded dice. One of them scrambled out down the alley somewhere to get some more money so they could watch the sharpster more closely. Pretty soon he had what money the boys had scraped up to continue the game. Here such a row broke out that a couple of policemen were attracted, and they came upon the scene just as the loser was extracting the money from the winner at the point of a switch-blade knife. They booked the boys for armed robbery.

"I must concede," I told the jury, "that these boys are guilty of a crime—a misdemeanor. They were shootin' craps. That's against the law. Down South we concede to colored boys the ancient right to shoot a few craps. Maybe we shouldn't. It is against the law. At any rate, viewed from background and history, 'tis but a soft impeachment. They were certainly not guilty of robbery. The law gives them, and everyone, the right to recover winnings—even if they had lost under the fair rules of the game.

"I submit, gentlemen, that these boys have suffered enough for the offense of shootin' craps. When they were put in jail, watermelon vines all over Georgia were coaxing into being the succulent sweets to be found nowhere in this world save inside the rind of that delectable melon. And

while they languished there, their fellows down in the alley, and out in the country where our colored folks picnic and frolic, were relishing the fruits of the colored folks' own vine. And the frosts came, and the watermelon went—and these boys languished. Big slices passed in their dreams and in their fantasies. But no watermelon. And if missing out for a whole season on watermelon is not punishment enough for a couple of colored boys for shootin' a few craps, I fear for the safety of the Republic!"

The boys went free.

Judge Virlyn B. Moore called me into his chambers. It was the first time any of the judges had done so.

"If the jury hadn't turned these boys loose, I would have," he said.

From then on, I had more than a passing acquaintance with one of the finest men ever to don the robes.

This case illustrated the leeway which a jury has in criminal cases to do simple justice notwithstanding the law and the evidence. There are offenders now and then who are guilty as charged but who should have a medal instead of duty on the rock pile. To preserve the jury's rights of discretion, the law will not permit the judge to direct a verdict of guilty in criminal cases. Nor will a verdict of guilty stand if disapproved by the judge. Both judge and jury must go haywire at the same time for a wrongful conviction to result.

Chapter 14

MISCARRIAGES OF JUSTICE

In the early afternoon of a day in May, 1920, Jeff Holt, a tenant farmer, came rushing into Calhoun. The plow-mule upon which he rode was all but spent when he loped up to a hitching post on the courthouse square. Holt dismounted in such haste that he neglected to tether the mule to the hitching post. That mattered little since the animal was so winded from the pace which the rider had forced upon him that he was content to droop his head and stand without any compulsion from a hitch rein.

Holt rushed up the courthouse steps and into the Sheriff's office in a state of great excitement. Grabbing the Sheriff by the arm, he shouted, "Sheriff, a nigger has raped my girl!"

"What?" the Sheriff gasped.

"One shore did! It happened a little while ago over at Beamer's bridge!"

The excited exchange of words brought the men in the Sheriff's office to their feet, and before the fellow could mumble out the details of his story a dozen or more idlers, loitering about the courthouse, also crowded in.

In a matter of minutes, the Sheriff, Elias Medders, two of his deputies, and a man named Frank Bearden were headed out of town to get such details as they could from the girl and, most important, to get a description of the attacker.

News of that character gets around fast. Whoever heard it dropped whatever he was doing and converged on the courthouse. When the Sheriff and his party returned an

hour later, the crowd on the courthouse grounds numbered more than a hundred. They were waiting to hear what the girl's story was.

Already some talk of lynching had started, and the Sheriff correctly reasoned it would never do to give the crowd any of the details of such a trouble-provoking matter. To keep down trouble he knew he must seize the planning initiative, so he organized the most reasonable and clear-thinking men present into a posse.

When his posse was organized, he said to them, "Men, the first thing to do is to find the guilty man. My deputies have a good description of him and they are combing the woods and the back alleys looking for him. I am deputizing every one of you who is willing to take an oath to uphold the law, to join them in hunting up the guilty man before he gets away."

The men indicated their willingness to take the oath. After the Sheriff had administered it with solemnity, he said, "Now go about it quietly—see if you can find the Negro who fits this description." He gave them the best description he had of the wanted man and returned to the courthouse steps where he had a commanding view of the ever-increasing crowd.

"Men," he addressed the crowd, "if reports be true, we have already had enough lawlessness. We're not going to have any more. You know Bill Shirley and Jim Owens. They are my deputies. And you know every man on this posse. They have all taken the same oath to enforce the law that I have, no matter who it hits. This thing is going to be handled. You can depend on that. And it's going to be handled accordin' to law."

The prudent manner in which the Sheriff had handled the tense situation had its effect. The crowd began to thin out. But Bearden, resentful at not being included in the posse, kept stirring up trouble and doing a lot of talking.

Every rural county has a small group of men who hang around the county courthouse, busy with everyone's affairs

to the neglect of their own. At a wedding they are discontented at not being the center of festivities. At a funeral they are jealous of the corpse. They manage to get on the jury at every term of court. They maneuver so they can get to shake the judge's hand as he walks into open court while the populace looks on. When they are not busy meddling with the County Commissioner's business, they are instructing the sheriff, or some other county officer in his duties. Gordon County had a group like this too, and Bearden was its shining light. This violent disturbance of the even tenor of that little county site town was cut to fit their idiosyncrasies.

Bearden went back that afternoon to see the girl. And the next morning another of his type went over, then another. As each came back, he regaled such people as were in town with the details of the tragic happening, purporting to give the "lowdown." Each had a different version and a different description of the Negro culprit.

Good cotton-planting weather is about the only thing which will keep a Georgia countryman away from the county site longer than two or three days at a stretch. But, come Saturday, they will be in town—cotton-planting or no cotton-planting.

It was Wednesday when this frantic fellow, Bearden, blew the top from the quietude of the town, and it was the best weather of the season for planting cotton. Thursday and Friday following, things were rather quiet about the courthouse.

In the meantime, the energetic posse, as well as the Sheriff and his deputies, were busy. By sundown on Friday, they had locked in the jail every colored boy for miles around who came anywhere near fitting the varied descriptions offered. The Sheriff correctly reasoned that the culling process should be done before the Saturday crowd hit the town. He sent for the girl. Her whole family came with her. Up in the corridors of the jail, with as much secrecy as possible, the officers paraded that woebegone bunch of

Negroes before her. After they had been around a time or two, she pointed out a light colored man about twenty-five years old, named Wylie Byrd. He seemed to fit the description she had given the Sheriff least of all. But this was before Bearden and his fellow pseudo-Hawkshaws had confused her with their fool questions. Byrd was waiter and general handyman at a local boarding house called Happy Top.

The other suspects were released to a more keen appreciation than ever before in their lives of the clear air and the bright sunshine outside that crowded jail.

The first callers at the Sheriff's office next morning were told that the man had been found, that he was safe in jail, and that the Judge had called a special term of the Court to put him on trial. This had a quieting effect.

Calling a special term of court to try a single individual, particularly before he has been indicted, is grossly unfair. A poor devil, under such circumstances, doesn't have a Chinaman's chance. He must be hauled in for trial while public clamor and passion are at their height. But there are times when it is the prudent thing to do, and this was such a time. So long as the officers and the courts are doing something—anything—in situations likely to incite mob spirit, busybodies are less apt to make trouble.

Due to the skillful handling of this precarious situation by Sheriff Medders, the cotton and corn fields kept the bulk of the populace busy during the next two weeks. Things quieted down, awaiting a session of Big Court.

The people who lived at Happy Top made up a fund for Byrd's defense and asked me to represent him. Local politics were warming up at the time and I had friends running for every county office. I was among them, running for a seat in the General Assembly. My opposition was weak, and I was sure of election. I hesitated to accept employment, knowing full well that if I represented that Negro my chances to sit as a member of the General Assembly would go the way of the proverbial snowball.

When I took the oath required for admission to the Bar at a session of the Court held in old Whitfield County on the first Monday in January 1914, Judge Augustus W. Fite, who administered that oath, handed me a placard on which was printed: *Lex Concubina Invidia Est.*

"That means," he said, " 'The law is a jealous mistress.' Her favors go to those who worship only at her shrine, to those whose devotion is to the law."

I looked at the placard, and felt that the shades of great lawyers of the past were watching to see on which side would fall the tally in this ancient contest between our exacting Mistress and the impish siren of politics. It has since decorated the walls of every office I have occupied.

Here was a fellow almost friendless, about to be placed on trial for his life, and under circumstances which made a fair and impartial trial out of the question. Public sentiment, which all too often governs sensational criminal trials, ran before justice to vent its wrath for the crime, in disregard of the individual. Even the vaunted right to be tried by a jury of one's peers was beyond the reach of this man who had sought my assistance. No Negro had held public office or served on a jury since carpetbag days. Laws rooted in that unhappy era forbade it.

I put away political ambitions to lose myself in preparation for trial. I have since made some of the most determined fights of my career for helpless and friendless people of every race, who I thought were being mistreated. And I seldom received any pay at all for my services. But there is a thrill, coupled with a great sense of pride, in getting down with a poor devil to help him in his direst distress. The real pay-off has been when life flows back into the wan face of a wife, or mother—sometimes when children look up, not fully understanding the ordeal but sensing that it has ended, and that there are good things to look forward to.

When I undertook the defense, I supposed the man to be guilty. Professional ethics require a lawyer to obtain for his client every right to which he is entitled under the law. I have never hesitated to free an accused person on a tech-

nicality, no matter how heinous the crime or how mean the person. If the law allows a technicality to free such a person, it is his right under the law. The lawyer is free, therefore, from any necessity of passing upon guilt or innocence. After all, a case hinges not on whether the accused be guilty or innocent, but upon what the witnesses say. I never represented anyone I knew to be guilty (except in connection with entering a plea of guilty). In fact, I never asked about that. It is the least important thing I need to know.

It was not a rosy dawn for Wylie Byrd on the May morning which brought a record crowd of people to Calhoun for a special term of Court. Nor was it rosy for me. Ordinarily that crowd would have been a candidate's delight—voters from every district and a fine chance to get in some back-slapping and hand-shaking. Candidates were stirring among them like bees. I was watching from my office window. I knew they wanted none of me. Every window framed a part of the overflow crowd in the courthouse. I could see their back-ends packed along the window casings.

A few minutes before the big clock was to signal the opening of the Court, I slipped in the back way. Byrd was already seated at counsel table. I joined him as the Judge called the Court to order.

I had determined that my first effort to find some chord of sympathy in that crowd back of the bar, upon which I might play—even faintly—would begin with the selection of a jury. I was unable to create any situation which presented the slightest opening for this. Almost every man called qualified under the questioning of the State's Attorney. The situation was entirely too tense for me to question either the individuals called or the panel. These men seemed too anxious to get on that jury—a circumstance which always portends danger. The State's Attorney appeared as fearful of questions as I was. He asked only the questions required by law, so we had a jury in the box in less than an hour.

Holt and his wife were seated at counsel table reserved for the State, before the Court was formally opened. The

first appearance of the girl alleged to have been attacked was when officers escorted her into the courtroom to place her in the witness chair.

She appeared to be about seventeen years old. Bennett Cerf would have described her as curvaceous. Her dress was what Bobby Burns would have called "hodden grey."*

An ugly hum circulated through the auditorium which was filled to capacity. But this was not the usual courthouse crowd. Not a single boy or a woman was in the courtroom. A couple of dozen of the Sheriff's special deputies, wearing their hats, were circling about the room and in the halls and corridors. From the start, the crowd was menacing. Now, when the young girl made her appearance, the mutterings grew so raucous that the Judge had to caution the crowds against any character of demonstration. It was at this moment that I addressed the Court for the first time. The crowd inside the bar was such that I could not move about freely. I requested the Judge to clear the area around the defense counsel's table. Before I had finished, a deep, resounding voice issued from the crowd. "We'll git ye both!" I knew the voice. It was Mose Keys, my cousin.

I have never before or since heard a direct threat from a courthouse audience. It alerted the deputies but was otherwise ignored. Not that it didn't unnerve me, but I tried not to show it.

The girl was the first witness to be called.

"You are Ethel Holt, are you not?" the State's Attorney asked.

"Now, Ethel," he continued, "I want you to tell this jury in your own words what occurred the last time you were in Calhoun—when you were going home."

"I was goin' back all by myself," she said, "and all of a sudden this nigger over there run up behind me and caught me."

"Whereabouts were you when he caught you?"

"I was just on yonder side of Beamer's Bridge."

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* The attire of poor folk in Scotland.

"Well, what did he do?"

"He throwed me down and pulled up my dress."

"Did he do that right there in the road?"

"Naw, sir. Not there. He drug me over in the brush on the side of the road."

"What did you do?"

"I kicked and screamed."

"What time of day was it?"

"Just as I was walking across that bridge I heard the town clock strike twelve."

That was the first break I'd had. The old town clock could be heard for miles on a clear day and the people at Happy Top and most business houses of the town depended on it for their time. Many at Happy Top had told me that Byrd had been serving the noonday meal as the clock was striking twelve. The girl's statement about the time impressed the State's Attorney also. He knew she had fixed the time by this clock when she talked to the Sheriff. I had been fearful she might change it but this put it on the record squarely.

"It takes two or three minutes for the town clock to strike twelve strokes, doesn't it?" the State's Attorney continued. "Was it the first stroke or the last stroke which you heard as you crossed the bridge?"

"It was the first un—he had me before the last un."

"How long were you on the ground?"

"I don't know how long it was."

"Was it long enough for you to walk from the bridge to your house?"

"Yes, I guess it was."

"You finally got up and walked on home?"

"Yes, 'n' he run through that brush toward town."

"Now, while he had you down on the ground, as you say, was he on top of you?"

"I don't want to answer no more questions."

"Yes, but you must. Now tell this jury whether he penetrated your private parts with his private parts?"

She didn't want to sit up there any longer, she said.

The Judge very kindly explained that she must answer the questions. The State's Attorney repeated the last question slowly.

"Now," said he, "do you know what I mean?"

"Yes, sir. But I don't know."

She wound up with evasions, barely making out a case of rape. But that crowd was just as mean as though she had proved the ugly crime charges. I was disappointed to observe that the reticence of the girl to testify clearly had not had the effect, on the crowd back of the bar or on the jury, which one would expect.

The witness was a perfect target for cross-examination. Ordinarily I could have torn her story to shreds. But it was so easy to give that crowd and the jurors the wrong impression. And I had been in practice long enough to know that a vigorous cross-examination of a child, an old person, or a woman, is risky. My witness from Happy Top, I knew, would make her story impossible. So I got her off the stand as quickly as possible, contenting myself with pegging the time on the strokes of the old town clock definitely.

In Georgia there is a rule of law that a man may not be convicted of rape on the uncorroborated testimony of the supposed victim. But to invoke that rule might have caused trouble. Besides, I could take advantage of this rule later to get the verdict set aside by the Appellate Court. For that reason I did not ask the Judge to direct a verdict of not guilty. I was eager to pour oil on the troubled waters with my witnesses from Happy Top.

A recess for lunch enabled me to check with these witnesses, locked up in the Grand Jury room. Not one of them wavered. The temper of the crowd made them even more determined to testify for the defense.

But my best witness was the old town clock in the bell tower. For more than a century it had hovered over every session of the Court in Gordon County which sat to redress grievances and right wrongs. It was a witness now in a drama of human life long to be remembered in the Cherokee Circuit. It beat a single resounding tone to call the Court to

convene for the afternoon session. The Sheriff's deputies led that jury of poker-faced men to their seats in the box, through the throng which had crowded inside the Bar.

The State announced that it would rest the case on this girl's testimony. The Judge directed me to proceed with the defense. Hushed expectancy followed this announcement. The crowd had heard about the Happy Top witnesses but had not seen any of them since the start of the trial.

I called Mrs. Jasper Dorsey as the first defense witness. Whispers circulated as the officer escorted her to the witness stand. She was a dependable person with a good reputation. More important, she was a woman of good appearance. I preferred that that crowd look into the face of such a witness.

"Mrs. Dorsey," I commenced, "tell this Jury who you are and what your business is."

"Well, Colonel—I think all these men know I am Jasper Dorsey's wife. We have both lived in Gordon County all our lives. For the last five or six years we have a boardin' house up on the hill—between here and Echota Mills."

"Do they call your place Happy Top?"

"That's what the boys named it 'n' that's what everybody calls it now."

"How far is Happy Top from here?"

"I reckon it's a little better 'n a quarter."

"Can you hear the town clock when you're inside the house at Happy Top?"

"Colonel, we run things by that clock. When it strikes four in the mornin' me 'n' my husband get up to start breakfast for some of the boarders who have to go to work early. We set the breakfast table by this clock. When it strikes twelve in the middle of the day, everybody makes a break for the dining room. We don't need no dinner bell. When it strikes six in the afternoon, you can see those folks settin' out on the porch movin'—'n' in two minutes every chair on the porch is empty."

"Do you know Wylie Byrd, Mrs. Dorsey?"

"I've been seein' him around for several years. He's been workin' for us for the last two years."

"What does he do for you?"

"Most everything around the place—helps cook—cleans up—sets the table and waits on the table."

"Was that the kind of work he was doin' for you this past month—May?"

"That's what he's been doin' ever since he come there two years ago."

"Mrs. Dorsey, do you remember that a girl was said to have been attacked back on the 12th of last month?"

"Yes. There was so much excitement. I don't think I'll forget it."

"Where was Wylie Byrd that day?"

"He got up there about five o'clock in the mornin', like he always does, and helped get breakfast. Then he waited on the breakfast table. When he had finished cleanin' up, we started dinner. Then he set the dinner table about eleven-thirty and waited on the tables from twelve o'clock until about two."

"How many folks did you have at dinner that day?"

"It was the usual crowd—about twenty."

"Do they all eat at the same time?"

"Most of 'em. But some get in afterwards—all the way from one to two."

"Was Wylie there all that time on the 12th of May?"

"He shore was. I was with 'em myself 'n' so was my husband."

"What time did he leave, that day?"

"It was around three—the same time he always does."

"Do you know what kind of a reputation Wylie has?"

"He has got a good reputation. He won't steal a thing, 'n' he won't drink. That's why we like 'em. We can leave everything with him, keys to everything. I never heard anything against him in my life. If I had, I wouldn't have hired him. And another thing—that boy will tell you the truth. Never caught him in a lie in the two years he's been there."

The crowd was silent while Mrs. Dorsey was testifying. The Jury paid close attention. There was still no indication we had broken through that hard crust of presumptive guilt.

"You would hate mighty bad to lose a fellow like Byrd, wouldn't you, Mrs. Dorsey?" State's Attorney began.

"Yes, I would."

"And that's why you are helping him out?"

"No! That's not it. Byrd was within ten feet of me all that mornin', from nine o'clock 'til about three, 'n' if he had bothered any girl that day while the town clock was striking twelve, or anywhere close to it, he would have had to do it in my kitchen or dining room."

The effect of this testimony on the crowd back of the bar was resentment—as if they had been cheated. The jurors seemed unimpressed, and sat like images carved from marble. I did not recall the girl for further questions.

The case needed a William Evarts or a Senator Vest for the jury argument. It had only myself; my only weapon, logic. The girl testified she had heard the same clock strike the same hour that the Happy Top witnesses heard. Therefore, both the girl and those witnesses fixed time by the very same timepiece. If this would not convince the twelve men in the jury box, nothing would. I sold that logic as best I could.

But something sinister insulated those men against reason. They stayed in the jury room long enough to write a verdict sending the young Negro to his doom. The Judge pronounced the death sentence, and the crowds went silently away. And there was a look of shame on every face.

Mass hysteria will play tricks with individual minds. Psychiatrists say that the channeling of common thought on a single object of hate insulates the mind of each individual in the group against reason or logic. Caught in such a sinister spell, individuals are unable to free themselves from mass thought and sometimes mass action, until the spell is broken. When hate has accomplished its purpose and the common object is no more, individual minds regain balance.

The mob no longer reacts. It has ceased to exist. But the individuals lately composing it do exist. That is why the public will clamor for the conviction of some poor devil, then when conviction is obtained, sign a petition to set him free.

Of course I filed a motion for a new trial. It is still pending, undisposed of. When the import of the fiasco had fully dawned upon those people—particularly the jurors—they swamped the Judge with letters, most of them unsigned, asking him to correct the injustice. One came from the foreman of the jury. The Judge sent it to me.

"We knew the Negro was innocent," he wrote, "but it won't do to turn loose a Negro charged with raping a white girl."

A day or two after the Court was over, I went to the jail to see my client. "You know," the Sheriff said to me, "that damn nigger escaped."

I never made a serious attempt to find out what happened, but I gathered it was substantially this: A week before the motion for a new trial was to be heard, the Judge and the Sheriff got together with some of the men who had served on the jury. The foreman who had written to the Judge about the case was with them. When night came, the Sheriff went up to the jail, took the fellow out, and drove over to the railroad depot in Rome. He gave him enough money to last a few weeks, and told him to buy a ticket to parts unknown. As the train pulled out, the Negro waved to the Sheriff. He had a ticket—only he knew to where.

I got licked in the political race, but I never regretted my decision.

That case was never again mentioned in Gordon County.

If it were possible to publish in the newspapers of each county in these United States the persons and the situations involved in wrongful convictions, it would be appalling. Poor devils doing time, hopes blasted and families ruined, who are as innocent of wrongdoing as the Apostle Paul.

Finite human beings operate the courts. Every member of the judicial team, from the lowliest constable to the presiding judge, has the foibles, the shortcomings, the prejudices and passions "that flesh is heir to." And the weakest strut in the structure is the witness. Tragic mistakes will occur so long as people are human, and men and women will pay for these mistakes with their lives, their reputations, and their fortunes.

Too many such mistakes may be traced to insensitive investigating officers and prosecuting attorneys, more interested in statistics—the closing of a file—than in justice to an individual. I recall vividly the case of Paul Jackowic, the only son of an old immigrant couple. When I first saw him, he was beginning a twenty-five-year stretch in the Federal Penitentiary in Atlanta.

That year I had several prisoners from the prison in Atlanta freed on habeas corpus. News like this gets around among prisoners. This young man had written his father to get me to file a writ of habeas corpus for him. The family called me by long distance telephone, from their home in Princeton, New Jersey, the moment they read the son's letter. The old man spoke in such broken English that I could scarcely discover the cause of his grief. I did understand that he wished to consult me at my office. I told him to come; I would do my best to help him. Three days later, he and his old wife made their appearance and with them was the son's wife, a beautiful young woman, advanced in pregnancy. The old couple looked as if they had but recently walked down the gangplank from the old country, and their speech indicated as much. The young wife appeared to be a first-generation immigrant. All three were travel-weary and thoroughly broken in their distress.

This is the story they told: The old man and his wife were originally from Poland. They married there in their early twenties and came to America. After bouncing around a bit, they located at Princeton. By hard work and frugal

living, characteristic of good immigrants, they made a modest living, acquired a plot of land in the suburbs and built a cottage.

"Da poy, he was goodt—" the old man said with lowered voice. Here the old lady interrupted: "He been a goodt poy alvas." And she wiped away the tears. The young wife did not speak at all. Her spirit was broken. But she looked at me as though I were a last but forlorn hope.

The plot of land they had bought was big enough for two cottages. He built one with high hopes that some day there would be need for another. That time came. The boy grew up and married the young woman who had come with them, and with their savings the other cottage went up. Promise of a blessed event brought joy to the four.

One morning in January 1930, the young man kissed his wife good-bye, as was his custom, waved to his old mother, and started across town to Princeton University, where he was employed to fire the boilers at the heating plant.

Two strangers asked him for a ride to town. He let them out at their destination and drove on, parking his car in the usual place and going to work. The hitch-hikers, meanwhile, took a detour and robbed the registry division of the Post Office at gunpoint—in broad, open daylight. Postal inspectors and G-men stationed in the building picked up the hoodlums before they could leave town. Someone had seen them get out of this young man's automobile. The officers were so close to the scene of the crime that they were immediately on the heels of the supposed getaway car. Within a couple of hours, the hapless young man was in jail with his recent passengers.

That evening the old mother and father and the young wife were frantic at Paul's failure to come home from work. For them it was a dismal night. They watched the sun come up—waiting for some word from the missing son and husband.

The Grand Jury was in session, so the officers carried the matter to them promptly. Before the day was over, in-

dictments had been returned charging the three with armed robbery of a United States Post Office. They were held incommunicado—sixteenth century Spanish style. All the young fellow could do was sit it out in jail and ponder.

The old father searched all day for him, and there was another night of sleepless anguish. The next day he continued the search, checking in jails and hospitals.

In the meantime, the officers told the boy that if he would just plead guilty they would recommend that the judge put him on probation. They posed as his friends. When they unfolded a sheath of legal-looking papers, he signed what proved to be a plea of guilty. That was the thing to do, they said. But the judge didn't follow the recomendation of the officers—if, indeed, they made such.

The old man, after being shunted about, finally checked the jail where Federal prisoners were kept. He was told the boy had been brought there the day before and was in court that very morning for arraignment. The old man, unable to imagine why all this should be, found his way to the courthouse. Managing to get into the courtroom, he was just in time to see the officers leading his son to the prisoner's stock under a twenty-five-year sentence.

Habeas corpus will reach only jurisdictional defects appearing on the face of the record. So I consoled them as best I could and advised them to secure counsel in the jurisdiction where the case originated and put the matter up to the Department of Justice and the Federal Parole Board. After months of anguish and suspense, the boy was released. He had aged a dozen years in those months of terror.

This case caused the Department of Justice to institute a rule under which judges in the trial court will not receive a plea of guilty of an accused person unrepresented by counsel. If the accused has no counsel, the judge designates one and affords ample opportunity for consultation. Only when the lawyer concurs that the plea of guilty ought to be entered, will the judge permit it. That rule would have saved these four people months of grief and frustration.

Chapter 15

"KIVVER" EVERYTHING AND TOUCH NOTHING

McElwaney, a handsome, well proportioned young man of about twenty-two, lay in ambush for a farmer named Rakestraw, an elderly man and a good man. He had been pulling fodder on a hot August day, the most disagreeable job on any farm, and was on his way home late in the afternoon. As he walked across a little bridge over a branch, McElwaney let him have a blast from a double-barrelled shotgun. Other farm hands answered his cries, but before they could reach him, McElwaney stepped a few paces forward, and with more deliberate aim, fired the other charge, which ended the old man's life. A jury promptly convicted him, voting the death sentence.

It was at this point I was employed in the case.

The trial judge construed McElwaney's statement to the sheriff to be a confession of guilt to the offense charged, and instructed the jury that the confession alone would authorize conviction of murder. I appealed on the ground that the statement was at most a damaging admission but did not amount to a confession of the guilt of murder since it would have been possible for the accused to have killed Rakestraw under justifiable circumstances. Murder is the unlawful killing of a human being, in the peace of the State, by a person of sound memory and discretion, with malice aforethought, either expressed or implied. The killing is but one element of the crime, and to admit to that one element only, does not constitute a confession of all the elements. My contentions were sustained and a new trial was ordered.

This deepened the resentment abroad in the county, and

the judge called a special term of court to dispose of the case. The second trial started on a cold, blustery day in mid-winter. The crowds overflowed the old courthouse, packed in the corridors and halls like sardines in a tin. The occasion resembled a Roman holiday, and muttered threats and grimaces brought up the ugly temper of that crowd like flak searching for its target. Save for his lawyer, McElwaney sat alone. Not a single friend, not even a member of his family, came to lend a show of comfort.

My first effort was to get a little sympathy—to get some of those people sorry for the lone, miserable boy. I addressed the Court in the presence of the panels from which jurors would be drawn, and asked for a continuance of the case.

"What grounds?" the judge inquired in a harsh voice—exactly what I wanted. I had no grounds and would have been more disappointed than surprised had he granted the motion. It was a beautiful chance to do a selling job on the courthouse crowd.

"The boy's mother is ill," I began, "and cannot possibly get here through this cold, rainy weather. She couldn't even be brought here on a stretcher." We painted the pitiful plight of the boy, friendless and alone, facing the darkest moment to come to any human being. I embellished the circumstances with all of the pathos at my command, being careful to keep the thoughts of that crowd on an old mother in the evening of life, bowed down with grief. The trial judge denied the motion, but I noticed that some of the harshness and drive had left his voice, and I could sense a trace of pity and feel the pent-up tension of the crowd subside. The courtroom atmosphere had its first slip toward a recommendation of mercy and a life sentence. To avoid the electric chair was in itself a victory.

I had taken the precaution to make sure the boy had a mother—and nobody had said she wasn't sick.

Foster was an eccentric bachelor who worked as a mechanic at Marietta, Georgia. He avoided social contacts,

lived to himself, and spent little money. He owned a valuable farm in Douglas County, where he was raised, but worked as a mechanic at Marietta, in an adjoining county. He owned other property, an apartment house in Atlanta, and had a sizeable bank account. He was past middle age when he got into trouble. All of a sudden he took a tumble for a blonde about half his age, who worked in a print shop in Atlanta. Since he was reputed to be pretty well fixed financially, the path to this young woman's heart should have been smooth, yet it wasn't. This was his first disturbance of that character, and he scarcely knew how to handle it. It became fixed in his not-too-well-ordered mind that the loss of this newly found treasure would mean the end of his world.

The young woman had had more experience in the game of hearts, yet she misjudged the situation. She played the game anciently ingrained in the sex of Eve: hard-to-get. He supposed (and she was probably at the bottom of it) that the foreman at her shop was the obstacle in his path. He contrived to remove that obstacle.

A tenant farmer living on Foster's farm in Douglas County had a married daughter who lived in a cotton mill village in Atlanta. She had a son about six years old, the pride and joy of the old grandfather and grandmother, and two worthless sons who had drifted to Atlanta a couple of years before and fallen in with a tough gang that was making easy money bootlegging whiskey. Foster knew these boys and they fitted into his plans admirably.

Foster constructed a crude bomb, fashioned in such manner that when attached to the underside of an automobile and wired to the ignition system, the turning of the ignition switch would set it off. He paid these boys three hundred dollars on their promise to rig this bomb under the supposed rival's automobile just before he left work in the afternoon. Plans made, Foster went back to Marietta to await the late edition of Atlanta daily papers and the headlines announcing that his rival had been blown to kingdom come.

But the headlines did not appear. Next morning he went to the cheap hotel in Atlanta where the boys usually hung out. He found them asleep, since the darkness of the night best suited their meanderings. He aroused the older one and demanded an explanation.

"It got too hot for us," the fellow explained. "Somebody got to follerin' us. Everywhere we drove, he drove. There wuz two of 'em 'n' they looked like the law."

"What did you do with the bomb?" Foster asked.

"Well, they kept follerin' us and we turned off on Bankhead Highway where we could lose 'em—'n' you know where the road bends just as you get on the river bridge? Well, we rounded that curve and when we got on the bridge, Rollie over there . . ." (Rollie was still asleep) "throwed it in the Chattahoochee River."

"The hell he did! With all that work I done!"

"We didn't want to git caught with that darn thing in the car."

"Well, dig up the money I paid ye."

"To tell you the truth, Ranse, we've spent it."

"You fellers ain't goin' to make no fool out o' me. If you don't git me my money, I'll take it out in hide 'n' hair."

"Now just wait," the nervous boy pleaded. "You just make another one and we'll do it right next time. Maybe we kin slip in that lot next time when nobody's around."

Foster wanted that rival disposed of. He was willing to take another chance.

"All right," he said, "here's two hundred more. Now I can make a better one. If you crawfish on me this time, it's goin' to be just too bad. You and Rollie go over to the old man's house over on my place Saturday night. I'll drive down the Douglasville road right after dark. You be where my farm road turns off. I'll bring one this time with two sticks of dynamite in it 'n' if somethin' don't happen Monday when that jerk gets off from work, somethin' goin' to happen to you—get that?"

Late Saturday afternoon, the boys drove up to the tenant house where their old father and mother lived alone. To

make the visit look right they carried their sister and the little grandson along.

After dark, the boys went up to the road junction where they found Foster waiting for them. There they received the infernal machine. They carried it back to the old man's house and stashed it under the floor near the chimney, where they thought it would be safe from view.

The old mother and father lingered beyond their usual bedtime to enjoy the visit from their children. But before very late they blew out the kerosene lamp and all went to bed. They slept well: the little grandson despite the excitement of a weekend in the country, the recreant, insensitive sons despite the foul purpose of their visit.

The grandson was first to get out of bed the next morning. While the grandmother was brewing the coffee and preparing breakfast, he was galloping about the place, at play. He saw the strange-looking contraption underneath the floor and dragged it out. While he was tinkering with it, the crude detonating device set off two sticks of dynamite. The explosion tore out one end of the house, toppling the chimney and wrecking the place generally. No one was hurt but the little boy. He was killed instantly.

A Douglas County Grand Jury indicted Foster for murder, specifically charging that he had set in motion a dangerous and criminal agency likely to produce death, and which did produce the death of the boy.

A local lawyer whom he knew associated me and I was employed in the case. I went over to Douglasville to talk to the fellow and to reconnoiter a bit. I had never heard of a case like it and my perplexity was how to figure out a defense. I found that our client had a kinswoman living in the county, whom the people I had talked to described as "the o'neriest wench in these parts." She was just that, one of those individuals who are not as bad a part of the time as they are most of the time. She owned some property, and was avaricious and grasping no end.

Now, we didn't start any rumors. But rumors went

around that in the event Foster went to the chair, as most everyone expected, this woman would get his property. She had already taken over the management of his affairs. She heard the rumors and took well to the idea. She hung around the jail until she got him to sign a will leaving all of his property to her. That confirmed the rumor (I didn't keep the fact of the will a secret) and when people heard about it, they were prepared to believe most anything. Then someone started a rumor that she wouldn't object to cashing in on this will—fearful that, somehow, Foster might not be electrocuted.

I went over to try the case. The whole county, it seemed, was there, crowding the corridors and halls of the courthouse to hear every word that was said. And the courtroom atmosphere was such as to delight any criminal lawyer. The State made out a terrible case. But the whole sordid mess in all its horrible details failed to get the minds of that crowd off this woman and the will. I had her planted up at the counsel table, painted up and dressed fit to kill.

The State's Attorney made a brilliant and determined effort to pull his case uphill. But after a three-day battle, that jury went out and brought back a verdict fixing the penalty at not more than four and not less than two years at the State farm. He stayed about a year and a half, and died soon after he was released, in the midst of a lawsuit trying to get his property back from this kinswoman.

I learned in the Army that if you can get the enemy to firing on a diversionary target you are less likely to get hit. The rule works in the trial of criminal cases, as I suppose in many other of life's departments.

In the early evening of August 11, 1949, Margaret Mitchell, world famous author, was fatally injured in an automobile accident as she crossed Peachtree Street, accompanied by her husband. They had parked their automobile some twenty feet from the end of the block and were walking across to a neighborhood theater. It was on a Sunday

and the traffic was light. They did not take the steps necessary to carry them to the cross-walk. The danger would not have been less, since the cross-walk was unmarked and was not protected by signal lights. Slightly before they had reached the center of the street, Gravitt bore down upon them, traveling, as witnesses said, at an excessive rate of speed. On seeing the automobile approach, Mr. Marsh, out of a split-second decision, carried his wife forward out of the path of the machine. She lunged in the opposite direction, causing her husband to almost lose his hold upon her arm. Being retarded by him, she failed to make it across the path of the oncoming vehicle. She was struck with such violence that she was torn from his grasp.

Gravitt was arrested, of course, and carried to the police station. The officers made all the tests to determine whether he was under the influence of intoxicants. The tests were negative. He was foolish enough to tell the officers that he had had one bottle of beer some five hours before. The officers clung to that, never mentioning the tests.

Margaret Mitchell, as she was universally known, was revered throughout the nation because of her superb story, *Gone With the Wind*—not only a best seller for a couple of years, but the subject of one of the greatest films of all time. She was particularly loved in the South where her unusual qualities were best known. Only Henry Grady had earned a place in the hearts of people of the South comparable to that she held.

I was employed immediately. From the moment of the accident until this noble lady breathed her last, the press of the nation voiced the grief of our people at such a loss, and the horror of it. I came to the conclusion at the outset that this case would be tried by the newspapers. My strategy was to get what I could out of the publicity. The problem was how to do it. The press started off mean. Just as they were putting Gravitt behind bars, either a news photographer or an officer who was present said something which caused the hapless and crestfallen prisoner to smile, and at

that instant the camera clicked. The picture was syndicated all over the nation. Of all times, this was not a time for him to be smiling. They referred to him as a taxi driver, although he was off duty at the time and en route to a drug store to have a prescription filled for a sick child. And of course they played up the beer, making no mention of the fact that it was consumed five hours before the accident. These items provided the theme for news stories.

My client said not a word, nor did I. We did nothing. There was nothing to say, nor anything we could do. But they overshot the publicity to such an extent that people on the streets, in the clubs, at sewing circles, and wherever congregated, began to say: "If it had been an ordinary person, they'd have put a little piece in the paper and that would have been the last of it."

News reporters mingle with people. Their stories began to take on this flavor and the tide started in our direction. It permeated the prosecuting attorney's organization. By the time Grand Jury action came around, every official concerned seemed determined to demonstrate that the homicide of a great person should be treated no differently from that of a lowly person. The indictment was for involuntary homicide, reducible to a misdemeanor.

I was not "scared" any more, but we had to employ extreme caution to get a verdict recommending misdemeanor punishment. With that "short beer" in the case, we could not hope for acquittal.

The State never once during the trial of the case used the name, Margaret Mitchell. It was always "Mrs. Marsh." I took my cue from that, and the case proceeded as though Mrs. Joe Doaks had been the victim of that unhappy occurrence.

This attitude on the part of the State was not because of any lack of love for Margaret Mitchell. It was a case of being "scared" to trigger with something undefinable in the atmosphere of the case. I dreaded the business of cross-examining Mr. Marsh. The slightest error here would bring

down upon us all of the wrath the courtroom crowd and the jurors could muster. I had learned from sad experience something about cross-examining children, women, and old persons. Woe to the chap who overreaches or embarrasses one of these. But here was John Marsh, the husband of Margaret Mitchell. Anything which could have been taken as an affront to him or anything which would have in the slightest reflected upon her, would have wrecked any chance for less than the maximum. It was evident that Mr. Marsh was wholly unacquainted with court procedure. He could not understand why he shouldn't go along and tell the story in his own way. He was the only eyewitness, and it was entirely necessary that I limit him to the essentials and bring out the facts as stated in the opening paragraph. He evidently attached little importance to that. It was up to me to get it out of him without offense. I loaded that job off on Judge Virlyn B. Moore, who presided. In fact, I maneuvered the Judge into explaining the rules to Mr. Marsh, and, incidentally, to the jury and the courthouse crowd, outlining what information the jury had to have. If I had had a minor hassel with that witness, it would have blown the case to kingdom come. I had learned long before (and I didn't learn it in the law school) that if some cross-talk must be had with an opposition witness, it is best, if it can be done, to get the judge to tangle with him. It worked fine in this case, and I got a verdict reducing the offense to a misdemeanor—and a very light sentence.

On a cold, bleak night in January, 1948, Paul Stubblefield, a husky young Negro, toughened by combat service in World War II, emerged from a hiding place on the grounds of a drive-in theater on Piedmont Road, in Atlanta, and with an iron pipe, shattered the skull of the night watchman, a white man just past his sixty-fifth birthday. The old man was found a few minutes afterwards by police officers, his life ended by a single blow. Other officers cruising in a patrol car on a street back of the theater lot saw the

Negro as he left the back part of the property, and picked him up on suspicion. They found the old man's watch, the keys to the office of the theater, his wallet, and his fountain pen, on the Negro's person. The wallet contained thirteen dollars in bills and some small change and the old man's social security identification. Seeing an ambulance drive up to the entrance of the theater grounds (called by officers who had found the body), the arresting officers carried the boy there, and found their fellow officers and the ambulance. The young Negro readily confessed to the crime. The officers carried him to Police Headquarters where he signed a confession.

This boy was from a respectable family. He had graduated from high school, enlisted in World War II, and had been honorably discharged about a month before. He had no criminal record. His victim was a venerable old man, entirely too feeble to cope with such an assailant.

My law partner, William E. Spence, didn't want the case at all. "We've never had one electrocuted," he argued, "and I dread this business of having a client go to the chair."

I had never refused a case for that reason. Besides, the fee was attractive. The boy's father made it plain that if we could keep the boy out of the chair, he would be thankful and perfectly satisfied.

The facts were as I have given them. We hadn't the slightest defense. Here we had a young Negro, with a body as lithe and powerful as a tiger's, committing a brutal, predatory murder—the worst of all crimes. His victim had been an inoffensive old fellow, doing a painful and rigorous job to support himself and an aged wife.

William A. Boyd, of the State Attorney's staff, tried the case for the State. He fully exploited the dramatics attendant upon the circumstances and the evidence. He put the old wife up as his very last witness—broken, of course, and grieved. She identified the watch as one which she had given her husband on his last birthday. A cheap watch it was, and purchased by her meager savings. She identified the

other articles. Her grief was genuine and her manner was such as to gain all of the sympathy hearts could hold. She was not vindictive—just the kind of witness who hurts badly, and whom the kind lawyers had best never cross-examine. When she came off the stand, Bill Spence was low. I wasn't much better.

We let the boy get on the stand to explain his presence at the theater after midnight. He said he was picking up coins scattered about by movie-goers and popcorn vendors making change. He had just gotten out of the army, he said, and had no job, and was trying to find all the coins he could.

Ordinarily cross-examination of the State's witnesses in a case such as this had best be avoided. It should be attempted only where there is a chance to scare up a little sympathy for the prisoner. I tried it on the officers. They were handsome fellows, all about six feet four, and the smallest would tip the scales at two hundred and fifty. Out of them I coaxed a picture of that little "nigger" down at the chief's office at three o'clock in the morning making that confession.

All around the wall were pictures of chiefs since Fulton County Police Department was started. These grim officers looked down from those walls on this cowering little chap, their badges dominating the picture. Each officer's chest sported an enormous badge, glaring down at him. The prisoner was right in the middle of this circle of giants, friendless, alone, and frightened within an inch of his life. Those eight-pound badges loomed up in his mind, terrible as an army with banners. I matched his misery with that of the poor old lady, and put it in the balance which that jury was to read—grief against grief, in equal proportion.

A trial lawyer must have some reasonable theory to sell the jury. Ofttimes the last word of the last witness characterizes the case and shoots into a cocked hat the most carefully worked out theory. Sometimes one must wait until the last witness is through before attempting to dig up a

theory. In these cases, the lawyer has this much time to think out his theory: from the time he arises from his seat at counsel table until he walks six or eight feet to stand before the jury. If he can't figure out a reasonable theory in that time, he is a lost ball. The Stubblefield case put me in just that dilemma.

In such extremes, a Bible story will sometimes work. Jurors resent quotations from the Bible, but will listen with interest to a story about any of the old Bible characters. During that six-foot walk over to the jury box, I thought of the first case ever to be recorded. It was tried in a Jewish court. The procedure was essentially the same as our own. In that court the offender was charged with the specific acts which constituted the crime. He was confronted with witnesses against him. He was privileged to put up his witnesses, and to tell his side of the matter. When all of the evidence was in, including the statement of the accused, the court made a finding of fact—determined whether the defendant was guilty. And upon such finding a judgment was pronounced.

Juries were unknown to Jewish courts. The magistrate made both the findings of fact and law and fixed the punishment. The case is a familiar one. It is that of Cain, accused of the murder of his brother, Abel. Jehovah presided at the trial. When I reached that point in the story, the jurors evidenced a deep interest. Each had been sold in Sunday school and church on the idea that Cain was guilty, without extenuating circumstances.

The story shifts to the punishment. "Thou shalt be banished from friends and kindred," reads the sentence. We cannot banish offenders, but we have the exact counterpart—life imprisonment. Then, the story goes, Jehovah pronounced an even greater sentence upon those who would add more severe punishment than life imprisonment. Most jurors have heard prosecuting attorneys urge that old quotation, "Whosoever sheddeth man's blood, by man shall his blood be shed." At any rate, it will click in their minds that

capital punishment was meted out somewhat lavishly even when Daniel was head of the judiciary in Israel. But that was while the children of Israel were in open rebellion, in the wilderness, during that forty years they spent getting out of Egypt and back to Canaan. They were permitted a golden calf to worship, like their pagan neighbors, "because of the hardness of their hearts." And it was at such a time that they adopted the eye-for-an-eye and a tooth-for-a-tooth doctrine.

But when Jesus came, he prepared a divine discourse on this very subject—the eye-for-an-eye and tooth-for-a-tooth doctrine, which included capital punishment. That was the Sermon on the Mount. He started it off by saying, "You have heard it said, an eye for an eye and a tooth for a tooth." Then he proceeded to repeal that old doctrine, specifically and directly. Capital punishment has, therefore, never had divine sanction. Then, too, it has been unmistakably disapproved by the Third Member of the Holy Trinity, which respectable authority teaches us is the inner conscience of man.

I embellished that story the best I could. Talking about the case would have been fatal. The jury was out a short while. In the meantime the prosecuting attorney had prepared that awful sentence ending with "—and may the Lord have mercy on your soul." The judge spread the parchment before him as the jury filed in. He didn't need it. The jury followed the precedent set in the case against Cain.

When Christmas came, that Negro's family remembered me with a substantial gift. No Christmas since has passed without a gift from them, and whenever the young man gets his hand on any kind of a greeting card commemorating a special day or occasion, he sends it to me. Some day I will persuade the parole board to release him.

In 1943 Atlanta had its first widely publicized juvenile crime wave. Teen-agers living in the city and in most of the suburban communities were involved. They came from

across the railroad track and from the brownstone fronts. Every stratum of society was represented. The offenses ranged from snatching small objects from shop windows to breaking into residences to wreck the furnishings.

Among them was a seventeen-year-old boy whose parents were my good friends. They had lived for many years at Buckhead, and they enjoyed an enviable reputation. This boy was out in the early evening with a group of boys who lived nearby and who attended the same school. They were bent on no particular mischief—just rollicking about Buckhead, stopping at this drug store and that, to while away the time and to talk to such of their friends as they chanced to see.

At this age, excitement is the spice of a boy's life. Excitement is born of daring—anything to upset his elders and get them in motion. That is always good fun for a group of wide-awake boys. The best excitement they could think of at the time was to snatch some article displayed at or near the entrance to Wender and Roberts' drug store, in the brightly lighted center of the business section, and make off with it.

While the matter was under discussion, the spirit of banter ran high. And there was, of course, a dare. So this young fellow, to prove beyond doubt that he was not "chicken" and to impress his fellows with his dash and daring, darted inside the door and made off with a casting rod such as fishermen use. It was a toy rod, in fact worth about two dollars.

The clerk up front recognized him (the others were waiting outside) and ran after him. A police officer saw the commotion and joined the chase. It was easy, of course, to round up the boys. Then it was that their escapade ceased to be fun.

The newspapers had chided the police so much about disorder among the youngsters that the officers determined to make an example of these boys. The owners of the drug store had known them since infancy, and they did not wish

to prosecute. But juvenile crime had become the hot potato down at police headquarters, and the Chief wanted some favorable headlines.

The boy's mother came to me, embarrassed beyond words and in tears. Cases had not been made against the others since they had not entered the store. But the facts, under the cold letter of the law, made this boy a felon.

I immediately went to the chambers of Judge John S. McClelland, of the Criminal Court of Fulton County, in whose court the charges were made, and told him the whole story. The judge had never failed during his long tenure on the bench to help a youthful offender.

"It would not be best for the boy, to let this go unnoticed," he said, "and we must work it out in such manner as to shock him into a realization that he is headed in a dangerous direction."

We came to the conclusion that two months' probation would accomplish that. So the mother, the father, the boy, and I went to the Judge's chambers, where the Judge charmed the young fellow with his interest in young people generally and in those who have made the first mistake, particularly.

I signed a plea of guilty for the boy, and the Judge placed him on probation, responsible to his father.

The boy responded splendidly to the corrective measures. The unhappy experience was forgotten. He finished within the top ten percent of his class at Fulton High School, and was chosen student Commandant of the cadet corps.

Time came for him to do his turn in the armed services. He chose the army; and because of his handsome, soldierly appearance and qualities of leadership, he was selected to train for a commission at the Officers' Training School.

A routine check, always made of men about to be commissioned in the army, disclosed his record in the criminal court. When this personnel report reached his commanding officer, he was pulled out of line and ordered to report to the personnel officer of his regiment. There, he was pre-

sented with orders reducing him to the ranks and transferring him to duty as a private.

Of course his spirit was broken. He suffered an inferiority complex, from which he will never be free. Worst of all, employment which requires a fidelity bond will, in all probability, be beyond his reach. So, for that childish mishap he will be "bound in shallows and in miseries" all of his life.

For more than two decades, some of the best minds in the nation have studied juvenile delinquency. Professional men of the several sciences involved have approached this baffling study from viewpoints of men learned in their respective fields of study and education. None has come to conclusions which even hint at a solution, though their suggested corrective measures have been many and varied.

If the men and women concerned with the problem could put away the slide rules of science, and in a natural way observe human relations, they would find that the pattern of juvenile delinquency follows closely that of adult delinquency. The tragic thing is: we have given little thought to procedures designed to deal with youthful offenders following conviction. Probation and parole systems set free the body but leave the spirit imprisoned. To be a whole man, or boy, there must be a spirit as well as a body. Otherwise there is lack of morale and absence of initiative.

But this story is about my young client. Let us call him John. If it had been possible under the law for Judge McClelland to have entered an order in the case probating John for any given length of time and providing that if the terms of the probation sentence be violated, then, and not until then, a final judgment of conviction be entered, the boy would have an opportunity to clear his name. But present laws require that the proverbial millstone be tied around the necks of probationers before they have a chance to make good on probation.

It would be simple indeed to enact a law which pro-

vides that the case remain open and undisposed of until the offender has had his chance. If he fails, then would be the time to enter a judgment of conviction; if he makes good, then enter a judgment of acquittal.

Such a revision of present laws would every year save thousands of youthful offenders throughout the country from that life punishment which now follows misdeeds occurring before the full age of accountability.

Chapter 16

ANSWERS NOT IN LAW SCHOOLS OR BOOKS

Nearly eighty percent of the crimes coming before the courts stem from psychic trauma of varying character—factors wholly beyond the control of the offender. Instead of relegating the handling of such offenders to men of the intricate science involved, we stand them before a panel of men ignorant of that science, wholly incompetent to evaluate clinical diagnosis, much less make it. But the law supposes the findings of such a panel to be safer. Some such absurdity in the law moved Dickens to put in the mouth of Mr. Bumble, "If the law supposes that, the law is a ass, a idiot."

This absurdity extends to civil procedures, in fact to every case in which a finding as to mental capacity is involved. It is the proper function of the courts to pass upon the question of guilt or innocence, but they may not with any degree of safety invade the science of the sociologist, the criminologist, and the medical doctor.

They tell us in the books and in the law schools that to sustain a plea of insanity we must bring before the jury the testimony of medical experts. Assuredly, that is the conventional way to do it. But it does not work. Jurors will not believe a thing they say, as a rule. Unless there be tangible evidence of insanity which they can see with their own eyes, even expert witnesses will seldom convince them. So far as the moral and ethical aspects of persons and situations involved in either civil or criminal trials are concerned, laymen jurors may be relied upon to make the safest determinations to be expected. But they are no more

qualified to judge the mental responsibility of the warped personalities which come before the courts than they are to navigate the *Queen Mary*.

The state must, of course, isolate, either by imprisonment or quarantine, persons who because of criminal conduct or infection by a communicable disease, become dangerous to their fellows. Commitments are based either upon conviction of crime or upon a finding that the disease and the necessity for quarantine exists. We ignore the fact that the group routed to penal institutions must be subdivided, one division constituting those who are innately mean and whose violations result from calculated risk and the other constituting those whose offenses stem from mental disturbances and other factors beyond their control. The formal law takes no notice of the latter group; and whether individuals who compose it are committed to chain gangs or mental hospitals depends on whether their abnormality is brought to the attention of the sheriff or the health officers. While the state is justified in suspending the right to liberty of such persons throughout that period during which their abnormality portends a danger to others, to restrain them after the necessity therefor has ceased to exist is morally and constitutionally wrong. The sixty-four dollar question is: what manner of man or woman should make the classification, in the first place, and then determine when the necessity to restrain them has ceased to exit?

When a person breaks out with smallpox, there never is any disagreement. We, of course, relegate that determination to experts of the medical profession. But the poor devil suffering some character of psychic trauma, often equally, if not more, dangerous to the sufferer and to society, must have his diagnosis made by laymen who never had a single day of schooling or experience in the diagnosis or treatment of mental illness.

Should a person having smallpox fall into the hands of the health officers, a doctor would make a careful diagnosis of his condition and prescribe treatment on that basis.

Every effort would be made to bring him back to normal health as quickly as possible, and when clinical findings justified it, he would be released. But if the health officer followed the logic of the lawyer, the "offender" would be sentenced to a fixed number of days in quarantine, with a fixed number of doses of medicine, based upon the broad classification of the disease (not any diagnosis of the patient), and the patient would be fitted to the treatment. Should the patient regain robust health halfway down the stretch of the sentence, he would be required to serve every day, regardless of the current state of his health, and to take every dose of the medicine whether or not he needed it. If, however, complications should arise, and should the last day of the sentence find the patient worse than he was at the outset, he would be dumped out, nevertheless, sound and well *by presumption of law.* Then the lawyer would tear his hair and wonder why smallpox continued to spread.

So long as the law tosses such curves over the plate, it is reasonable to expect trial lawers themselves to unloose a few curves in a pinch. And if an ass be in the picture, is it the law or the lawyer?

I tried three cases which will illustrate the limits to which lawyers must go, at times, to bypass the law's absurdity. The tactics employed will appear to take on the complexion of trickery. Conceding this to be true, they were necessary and justified, to prevent the trickery embodied in our present legal procedure.

A young fellow named Brock, a special officer of DeKalb County Police Department, assigned to duty on the campus at Emory University, drove up to a sentry post at the entrance of the Naval Air Station with his friend, Joe Veal, with whom he had never had the slightest disagreement. When Veal opened the glove compartment of the automobile, Brock took a pistol kept there and, in the presence of this armed guard, deliberately shot his friend. There was neither motive nor reason for the killing. Brock had the appear-

ance of a bright young man, yet clinical records in the files of the Veterans Administration indicated a psychopathic condition of undetermined character. Knowing that jurors pay little attention to clinical records, we were not willing to risk the boy's neck on conventional methods; we tried a slightly unconventional one.

I placed a cross mark on the wall. No one in the courtroom knew it was there except Brock and his counsel. I told Brock to glue his eyes to that cross mark—come what may—and never relax his gaze for an instant. He was so co-operative that had a cyclone wrecked the building at any time during the four days of the trial, Brock's eyes would have followed that cross mark into its vortex. People swarmed into the courtroom and out; jurors moved into the box and out; the judge, now and then, whammed the bench with his gavel. But Brock saw nothing but that cross mark. The reaction of a normal person, of course, would have been to glance in the direction of any commotion, and everyone, judge, jurors, spectators, and all, reacted in that manner—except Brock.

The jury came in with the finding we wanted. It is well to get juror reaction, which we did. One of the jurors summed it all up when he said: "Did you notice that boy staring into space during this whole trial? Crazy as hell!"

A brilliant young lawyer named Irwin was indicted for the murder of a taxicab driver. He had completed a short trip, gotten out of the cab at his destination, paid the cab fare, and without provocation or reason, drilled the driver through with a blast from a rifle, causing instant death. Some years previous to this incident, he had been a patient at the State Hospital for the Insane, at Milledgeville. He resented the idea of a plea of insanity—said it would hurt his law practice. In fact, he wanted to act as leading counsel in his own case. His movements, appearance, and conduct were such as to convince the jury that he was perfectly sane—in fact, far above the average in in-

telligence. I knew his hospital record, of course, but I knew also that his conduct during the trial would outweigh that record. I had to find something the jurors could see and hear.

I finally convinced Irwin that he was in imminent danger of the death sentence. Then he became reconciled to doing whatever I told him to do. I instructed him to sit with apparent disinterest—just sit. Then when the time came for his statement, I told him to talk for an hour and a half, carefully watching the clock to make sure he talked that long, and not to refer to the case at any time, or mention any circumstance connected with it, but to confine his narrative to things he had witnessed while at the mental hospital.

When the time came, he rehearsed a sordid and gruesome story. He put it over with embellishments. For an hour and a half he told of atrocities so terrible that they were sickening: how guards and orderlies, at the direction of the doctors, strung old men and women by the heels and disemboweled them; how recreant patients were stripped of clothing and flayed alive. He took on such an appearance of sincerity that one would be inclined to believe that he thought he was telling the truth. The jury, fully convinced that the man was crazy as a loon, brought back the verdict we wanted.

Were these tricks bordering on the unethical? The "trick" was in the law which relegates to non-professional people, the jurors, the duty to make determinations of sanity, with only such information concerning the mental stamina of the prisoner as can be had by a mere glance. Yet highly trained medical experts would venture to make such judgments only after following careful diagnosis over a period of weeks. Besides, I was hired to keep my clients out of the electric chair—a thing more atrocious on the part of the state than is this simple expedient of counsel. Sam Jones, famous evangelist, once said: "If the devil is going your way, go with him."

And there was the case of Mrs. Ina Mae Smith, a daughter of an aristocratic Georgia family of the old South. She and a sister, whom I never heard referred to except as Miss Lucy, were educated in music and the liberal arts. They were typical Southern belles at the turn of the century.

I first saw Mrs. Smith soon after I had offices at the Capitol in 1933. She was sitting in the Governor's office, a woman of striking appearance. She was of medium height and her figure was classic. Her hairdo and clothes were neat, and more "different" than old-fashioned. Her face would have been beautiful but for lines etched by cynical distrust. The way she held her head, the way she moved, her aloofness and general demeanor, marked her as an unusual person. I saw her at the Capitol half a dozen times during the four years I was there, always with the higher officials. I got the impression that what she might have to say was not for ordinary people. Some years later, when I was back in the private practice, I saw her every time I was at the courthouse. Time, and her cynical viewpoint, had taken their toll. Her dress was shabby. She talked incessantly, always on the defensive because of imaginary wrongs. She made the rounds of the judges' offices almost daily, constantly raisin' hell about something. But despite her dilapidated appearance, she retained traces of that regal bearing. Age, instead of mellowing the poor old woman, had accentuated her cynicism.

I was in the courtroom one day when a case which she had instituted was called for trial. She had no lawyer, and her case was about to be dismissed for irregularity in procedure. She was present, condemning without stint the whole judicial structure, paying her respects to the judge who happened to be occupying the bench at the time. Out of pure charity, I examined the procedure and found that a simple amendment would correct it. I went to the old lady and offered to represent her in connection with the case without charge. She was in the right and we won the case.

From that time, I could scarcely get about without her

dogging at my heels. I learned that she owned two apartment houses on Formwalt Street, once a desirable residential section. Time had dealt unkindly with that part of town, too. Her property had almost gone to wreck. Her buildings were empty—she never could get along with a tenant. She would not spend a dime for repairs. If a window pane was reduced to fragments under the impact of a small boy's slingshot, the hole remained. She would not have it repaired. When the steps broke down, she put up a plank from the ground on which to mount the porch. Two beautiful pianos, and gorgeous paintings collected in better days, were ruined by rain coming through a leaky roof. Thousands of dollars' worth of family furniture and heirlooms, gotten together by her family before the War Between the States, suffered the same fate. When her house became untenantable, she visited neighbors, never in a friendly mood but always demanding, and stayed until they forced her away. Small boys ganged up to taunt her when she appeared in the streets.

One day the police department picked her up. She was wandering about, robbing garbage cans, and out of kindness they carried her to the police station and sued out a lunacy warrant. Down at the police station the matron got her calmed down by offering her some new clothing, and while they were making the change, they found that what they supposed to be falsies turned out to be two wads of currency totaling ten thousand dollars. It is easy to imagine the headlines—this old town character caught robbing garbage cans, and hoarding all that money.

Of course she hit the corridors of the police station yelling for me. With ten thousand dollars stashed away in the sheriff's safe, one might well imagine that indignation swelled at full tide in my bosom at the way the old lady had been treated. I could hardly get to her through the newspaper folk who crowded around.

A lunacy commission was organized in the ordinary's office: two physicians and a lawyer. The courtroom could

not hold the spectators at that trial. The best feature writers were there, and for a couple of days I dominated the headlines. I was entirely unable to keep the old woman seated. Every neighbor she had was there and each outlined some character of peculiarity. And at every statement, the old woman shouted the wrath of her ancestors down upon the witness. The commission, of course, found her insane—incapable of managing her property or caring for herself. The matter would probably have ended there if the ordinary had appointed the guardian we wanted. He declined our suggestion, so we entered an appeal to a jury in the Superior Court.

In the meantime my fan mail came in floods, letters from all over the country. I was a hero. "Don't let the poor old lady down!" was the general import of these letters. I had long distance calls from all over Georgia offering help.

The ordinary appointed the president of the local Bar Association to represent somebody—I never found out who. At any rate, he fought with might and main to sustain the commission. The trial came on before Judge Virlyn B. Moore, the best judge in the world for a case like this.

Just before the case started, I had a serious talk with Mrs. Smith.

"Now, Mrs. Smith," I reasoned, "this jury is going to decide whether you are crazy and ought to be sent down to the insane asylum. I don't know whether you are crazy or not. But I'm going to find out."

"Of course I'm not crazy!" she protested.

"Well, we'll see," I continued. "And this is the way I am going to find out. If you get up and scream at these witnesses, like you did in the ordinary's court, I'll know you are crazy. And the jury will, too. But if you sit back with me and do exactly what I tell you to do, you won't have to go where they send crazy people."

She promised. And she sat throughout the trial as calm as a chancellor. The neighbors whom she had terrorized

for several years had a field day. One of them said the old lady wouldn't use electric lights, but clung to candles and wouldn't have any other kind of light on the place. They drew a ghastly picture of the poor old woman—allowing her houses to go to ruin for lack of simple repair, grabbing in garbage cans, et cetera. Two psychiatrists had conducted extensive examinations, with my client's full co-operation. They found just about all of the symptoms and indications of insanity in the books, giving it as their opinion that she had had a total break with reality and had become dangerous to herself and to others.

It was with some misgivings that I put her on the stand. She did pretty well until they began to ask her about her property. She swore up and down that she had graduated at Shorter College at the age of five; that she had purchased the Formwalt Street property at the age of six; that she was a concert pianist at the age of four.

My adversaries argued to the jury that the old soul was as crazy as a loon; that she ought to be sent to the sanitarium for her own comfort.

"Let her live with her tallow candles in the mellow glow of a past which was glorious to her," I argued.

I followed old Cicero's essay on that phase of life which Browning described as "the last for which the first was made," and did a pretty nice oration. That was an easy subject.

The jury came out and announced a verdict which restored the old lady to her pristine glory down in the alley, with her God-given right to pester the neighbors to her heart's content. The folks on Formwalt Street gave her a pretty wide berth thereafter.

For a couple of years afterwards, I scarcely made an appearance in the courts out in the State or at other public occasions but that some old person didn't grab me by the hands with a "God bless you, Colonel, for that fight you made for poor old Mrs. Smith."

Her mental condition grew rapidly worse. A few months

after the jury found her to be competent, another trial was held and a guardian appointed who had her property put in good condition and took over the management of her affairs. She went to the State Hospital for mental patients, where she lived happy in the knowledge that her board and keep cost her nothing, and she didn't have to hunt all over town for people to quarrel with. She bossed her hospital ward until her death a few years later.

The purpose of every judicial investigation is to ascertain the truth. But establishing the truth in a controversy in which one group of witnesses testifies in irreconcilable conflict with another of apparently equal credibility is quite different from establishing a scientific fact. Should A testify that B was at his home at a given hour on a certain day, while X testifies that B was present at the scene of a crime fifty miles distant from A's home at that precise time, we are presented with the questions of whether A is more worthy of belief than X, and whether their evidence relates to the same person—(the troublesome question of identity). It is quite impossible to establish the certainty of B's whereabouts; and therein lies what is often a source of injustice in criminal trials.

But "yes" or "no" answers as to whether the accused committed the criminal act charged may not with justice constitute the whole finding. There is often the question as to whether the man on trial possessed the mental capacity to comprehend the nature and consequences of his act; whether the act was caused by factors entirely beyond his control. There are involved, therefore, certain scientific truths, which must be applied if substantial justice is to be reached. Unlike the "yes" or "no" answers which we may expect from a layman jury, these truths are demonstrable. They have been established long before the trial commences, and are to be applied along with the finding that the accused did commit the act charged. But a layman fact-finding authority cannot know them, much less apply them.

So long as the fact-finding authority is dealing with the question of B's whereabouts, we will get the safer guess from the collective minds and viewpoints of laymen. But when we come to the question of the personality patterns of the accused, his mental capacity to comprehend the nature and consequences of his act, his motivations sparked by factors beyond his control, we must look to the scientists educated in that field. There are many phases of law enforcement which require the findings of schooled experts. Such findings are needed when the accused is brought before the bar to be sentenced, in order that the character of sentence best calculated to salvage the offender, and at the same time protect society, may be determined. They are also important when an application for probation or parole is to be passed upon; when it is necessary to determine the character of treatment best calculated to restore the prisoner to normalcy; when it is necessary to determine whether punishment which may act as a deterrent to crimes of the type involved is advisable.

Justice Irvin Ben Cooper of New York says in effect that we must have "the everlastin' teamwork of every bloomin' soul" to reach reasonably correct solutions in cases coming before criminal courts.

In the last analysis, the function of judicial systems dealing with offenders against the law is to separate the sheep from the goats, making as certain as can be that no woolly ward of the shepherd is forced to browse with his less useful and less attractive cousin.

A simple rearrangement of our rules of procedure would, I believe, make available in every criminal trial both the "horse sense" of the layman and the skill and learning of the scientist, from the time of the arrest of the offender until his final discharge.

Here is what we need:

a) An Advisory Staff as a division of Pardon and Parole Boards, to consist of professional people capable of advising

such Boards with respect to the mental and moral competency of applicants for probation and parole to re-enter society, and generally as to their fitness for release.

b) A provision in the law making sex criminals and third-time felons ineligible for parole unless their applications be supported by a finding of the Advisory Staff, following careful diagnosis, that such applicants are free from latent mental disorder such as would render release inadvisable.

c) A provision that thirty days prior to the expiration date of penal sentences of sex offenders and third-time felons, a diagnosis and report on each be mandatory; and if the diagnosis and report be such that it would not support an application for parole, the same be forwarded to the prosecuting attorney in the jurisdiction wherein the trial was had; make it his duty, on receipt of such report, to proceed to sue out a writ of lunacy and proceed, as in other cases of insane persons, to have the offender committed as an incompetent, subject, of course, to existing laws which govern treatment and restoration to competency.

d) Make it the duty of the trial judge to fix penal sentences, but make available to him the Advisory Staff, to provide a pre-sentence investigation of all factors which would aid in fixing the length and character of the sentence.

Some day our people will dispense with the archaic doctrine of atonement, and commence to classify offenders rather than crimes, in their effort to separate the sheep from the goats—and to keep them separated.

Some such rules as are here suggested will carry us a long way in that direction.

Chapter 17

THE GLENN ROBINSON CASE

On the morning of June 25, 1947, young and attractive Mrs. Jeannette Reyman left Bogart for Atlanta, some fifty miles distant. She was alone, driving a pick-up truck. She and her husband had newly come to Georgia and were busy erecting guest cabins and buildings, and landscaping grounds suitable for a motel and restaurant business which they were about to commence. The day was clear and bright, with not a cloud in the sky. The time element, clearly established, made it highly improbable that Mrs. Reyman was at any time outside the downtown business section before three o'clock in the afternoon when she made her last purchase at a Whitehall Street address. At five minutes past five o'clock, a man drove that truck to a shopping center on Moreland Avenue, about three miles from the Whitehall Street address but within the city, parked it on the street, and walked unconcernedly away.

At eight o'clock the following morning, Mrs. Reyman's body was found inside the truck, among the articles which she had purchased. She had been ravished by sex maniacs, then beaten to death, sometime between three and five in the afternoon in broad-open daylight, in the heart of Atlanta.

Mrs. Reyman's purpose was to purchase equipment. At eleven-thirty in the forenoon she drove the truck, on which was lettered the name of her business, to a West Peachtree Street address and there made certain purchases. A few days after the story of the homicide had broken in the papers, a sales clerk named Carden, at the Ponce de Leon

Avenue store of Sears Roebuck & Company, some three miles from the West Peachtree Street address, telephoned police officers that a woman whom he described as a "strawberry blonde" appeared at his counter on the day of the murder at about twenty minutes past twelve, and purchased certain hardware; that she was accompanied by a man about six feet tall, with black hair and eyes. They left together, according to his story, about forty-five minutes later. (Some two weeks later, he identified Glenn Robinson as the man who was with her.) Mrs. Reyman was next seen at a hardware store on Whitehall Street when she drove up in the truck, identified by its lettering as the one which she was driving when she stopped at the West Peachtree Street address. She was alone. There she made other purchases, and left at about three o'clock.

When the shopkeepers came to work the next morning, the truck was standing where it had been parked the previous late afternoon. Passers-by noticed drops of blood on the pavement beneath and removed a canvas which covered the cargo space, to find the body of Mrs. Reyman among the articles which she had purchased at the West Peachtree and Whitehall Street addresses. The articles claimed to have been sold to her by Carden were nowhere to be found. Wounds made by some kind of blunt instrument, sufficient to produce death, marred the upper part of her body. An autopsy revealed that she had been ravished by sex maniacs. The amount of semen found in the uterus and upon the exterior parts of her body indicated that more than one man had participated in the monstrous outrage.

Skillful men of the homicide squad were on the scene a few minutes after the horrible discovery. They interviewed every person in the vicinity, particularly those regularly employed in the business places. Among them was a Mrs. Owens. Three men had seen the driver park the truck, and they alone were able to give the slightest clue. Mrs. Owens was carefully examined by the officers within a few minutes after the discovery was made. She

assured the officers that no one had come to her place (a combination service station and refreshment bar); that she had seen no strange person at all, or anyone whose actions had attracted her attention.

A couple of weeks went by, with lurid stories in the newspapers and stepped-up efforts on the part of the police, joined by men of the crime laboratory. A stream of suspects flowed through police station line-ups. Each of the three men who had seen the driver park and walk away from the truck identified a different suspect. One of them changed his mind three times; he backed away from his identification of one suspect to put it on another, then said none in any of the line-ups was the man. A coroner's investigation and inquest failed to throw any light on the matter and found that the hapless victim had come to her death at the hands of persons unknown. The officers were at their wit's end.

The Chief of Police ignored his tables of organization to pick two men from the vice squad, and turned the investigation over to them. Police line-ups blossomed all over again and among the new suspects was a taxicab driver named Glenn Robinson, who had recently come to Atlanta from employment by the Reymans as a carpenter in the construction of the motel which they had expected to operate. Here it was that William E. Spence, my law partner, and I got into the picture.

The newly assigned officers, eager to rate, started the trial in the newspapers. Pretty soon, all and singular were spoiling for a hanging, and they had nominated Robinson to furnish the neck. Searching Robinson's house (he had moved his family down from Bogart a few days after the homicide), they found a pair of bloody trousers, they said—and streaming headlines heralded the find. Up to this time, Robinson had not been formally accused, but was being held on suspicion of murder. The officers were skilled in getting publicity, and public sentiment was running against us like an ungovernable tide.

We thought it time to force their hand, so we filed a petition for the writ of habeas corpus, returnable instanter. This forced an indictment, but we gained no information. The newspapers were now in dead earnest to convict in the great court of public opinion before Robinson could have his day in court. Our only chance was to meet them in that forum.

Bill Spence was nosing around Bogart and Athens to see what he could learn. He found an old lady, Mrs. P. A. Gunter, who thought she knew about the trousers. She had patched a pair for Robinson, she said, and they were at her house until a few days after Mrs. Reyman was killed. When the Robinsons had broken up housekeeping at Bogart, she kept their scant household goods at her house until they could find a house in Atlanta. And these were not carried to Atlanta until a few days after the homicide. Mrs. Gunter said the trousers which she had patched were moved along with the other belongings. Bloody trousers dangled before us in our dreams. Did the officers find the trousers which the old woman had mended? We didn't know.

We knew, of course, that there is no procedure in our law which will permit depositions in criminal cases. But we had to capture the headlines, and we had to see those trousers, though they were guarded by the officers like the gold at Fort Knox. We prepared a motion to perpetuate the testimony of this old woman by depositions, and we dressed it up with every recital we thought would make a good news story. "The old lady might die any minute," we said. "She is too old to come to Atlanta. Those trousers were in her house until after the homicide had occurred." We figured out what we hoped she would swear, and put that in. We didn't expect to get anywhere with the motion as such, but we hoped it would get us a news story. So we presented it to Judge Virlyn B. Moore, as fair a man as ever graced the Bench, and prayed that the State show cause why the depositions of the old lady should not be taken

at her home near Athens. The Judge granted the rule and, to our surprise and perfect delight, required the trousers to be produced at the hearing. The Solicitor-General's staff blew their tops, but they had to answer and bring the trousers along.

Every news-gathering agency was represented at the hearing. And the trousers! Down at the tip end of the inside watch pocket, and about five inches below the waist-band, was a tiny brown spot which could be covered by the head of a pin. It could have been the teardrop of a fly. That was the "bloody trousers." Lawyers can do a lot of talking on any character of a motion, and we heaped such ridicule upon the farcical byplay of the vice squad men and their find that the newspaper men became convinced that they had been taken for a ride. We got the headlines from that day on, and public sentiment began to slide our way.

Bill Spence was as fussy as Stonewall Jackson about what the enemy was doing, and what he was likely to do. He insisted upon knowing, and we developed our case accordingly. We knew almost as much about their files as they did. By planting a clue here and there and observing their reaction, we knew, at least, what they didn't have. We had them spending their time at the harmless business of chasing red herrings. We had a completely bomb-proof alibi throughout the time involved, with margin to spare, except for a two-hour period at the most dangerous spot for us on the face of the clock.

A sullen, silent, unpredictable man was the one witness who could clear this uncertainty. This man was a tailor. Robinson declared that this tailor had delivered a taxi driver's uniform to him about four-thirty on the afternoon of the homicide, making it impossible, from the standpoint of distance and time, for him to have parked the truck on Moreland Avenue. The tailor declared to Spence that he did not recall delivering the uniform at all. We knew that men from the Solicitor-General's office had been talking to this chap, but we did not know what he was telling them. You

can't chase all the coons up one tree, we figured. So we had to trust to luck that we could take care of him when he got on the stand.

In the meantime the vice squad men had furnished Mrs. Owens with a photograph of Robinson and, we must imagine, plenty of tutelage as to what to say. Then they rigged up some line-ups down at the police station, so with that photograph etched on her memory she could spot Robinson. We did not know it until she took the stand, but it turned out that she remembered much: Robinson had come into her place about five minutes after the truck had been parked. He had bought a package of cigarettes, had torn off the top and crammed one in his mouth. He had been highly nervous, and scooted out in a half-trot.

By the time the case reached the trial calendar we had all the holes plugged that we could. But we knew we had to discredit Carden, Mrs. Owens, and in all probability, this tailor.

To digress a bit: I shall relate a happening here which, at the moment, called to my mind this observation of an old colored preacher: "De Lawd is gwina take keer o' his chillun." The Lord was right then and there about this very business. (Assuming that we *were* His chillun.) As the twelve men accepted as jurors filed into the jury box, John Echols, one of my friends at the local bar, motioned me aside. "See that fellow on the back row next to the railing?" he said.

I was afraid I had made a mistake in accepting him. "What about 'm?" I asked.

"He's an old client of mine," John said. "He busted into my office to employ me to defend him in this very case a day or two before the coroner's inquest over the body of Mrs. Reyman. He was white as a sheet and scared to death. The police had picked him up as a suspect in this very case, kept him overnight in jail and put him in the line-up to see if the people in the Moreland Avenue area would identify him as the man who parked that truck and walked away."

"Did Paul Webb's . . ." (the prosecuting attorney) "crowd know of this when they accepted him as a juror?" I asked, wondering which of us had blundered.

"I don't know about that," he said, "but I do know the man didn't sleep a wink from the time of that line-up until the coroner's inquest was over—stayed in my office most of the time, fidgety as a dog with fleas. He calmed down some when the inquest was over without his name being mentioned, but didn't get back to normal until Robinson was indicted."

The man's name had been drawn by lot, along with forty-eight others, from a jury box containing nearly twenty thousand names. It was by a trick of chance that he occupied a seat in the jury box instead of warming the chair in the prisoners' dock which held Robinson.

I played to that Irishman, and when I made my argument, I had carefully prepared a paragraph about how awful it would be if one of those people, highly charged with emotion, should identify the wrong man in one of these line-ups. I was looking right at this fellow as I made that peroration. He squirmed in his seat. I was sure no hanging would follow this trial.

But for a chance to point out the misuse, or rather the over-use, of the right of cross-examination common to trial lawyers, I would simply say we got two mistrials and an acquittal on the third trial. Thus ends the story of the Robinson case. It is usually necessary to drag a criminal case uphill: it was particularly true of this case. To do so, we realized keenly that we would definitely and unmistakably have to blow these witnesses out of the water to the satisfaction of each of the twelve jurors. I was not able to do it by cross-examination.

Theoretically, an accused person is presumed to be innocent until his guilt has been established by competent evidence. But in many sensational cases, newspaper stories serve to remove the presumption, and the defense lawyer goes into the trial with the odds against him. I had had enough

favorable publicity in this case to even the odds, but I realized and feared the trend which the news stories published during the progress of the trial might take. My tactics were to blow the State's key witness out of the water to the satisfaction of twelve jurors.

On the first trial, four of the jurors—among them the red-faced Irishman—refused to agree to a verdict of guilty. The judge declared a mistrial. On a subsequent trial a month later, five jurors held out for acquittal. The State's attorney was determined to convict Robinson, so a third trial was ordered.

I check my tactics carefully.

Lawyers may not ask leading questions of witnesses whom they call to the witness stand. Such questions must be couched in language which does not suggest the answer desired. Lawyers know this as direct examination. But the bars are down when questioning witnesses called to the stand by the opposite party. Lawyers may grill such witnesses with any character of questions, even to demanding the answer they want. More cases have been lost than won by belaboring witnesses on cross-examination. Lawyers are constantly publishing works on the art of cross-examination. When I read them I muse in reflection: "Brother, you might write a classic on this art, but if you are to win your tough cases you had best toss your book out the window and learn the art of direct examination."

On two occasions, I had labored with Mrs. Owens for hours, trying all of the tricks of cross-examination to be found in the books. When I lashed out at her, "Didn't you tell those officers so and so?" she hedged and dodged and ad-libbed, and explained, and jumped from limb to limb, never directly answering any question. When every effort had been exhausted, the sum total was an hour of diatribe and evasion, with the result that there was not a clear statement in the record—nothing a juror could put his finger on.

On the last trial, I forgot about my right of sifting cross-examination. The questions went like this:

Q. "Mrs. Owens, did you talk to two city detectives on the morning Mrs. Reyman's body was found in that truck?"

There was nothing to explain. No chance to hedge. Nothing possible but a simple answer in one word: "Yes."

Q. "Now, tell the jury what they said to you."

A bit flustered, she started her rehearsed lines. With the aid of the trial judge, I stopped her—held her to the question. Every time she got set to jump the fence, I hauled her back again. To aid her memory, I had one of the officers presented before the bar for her to see. She recognized him as one of the officers who had talked to her. He went out, and his partner was brought in (they invariably work in teams of two).

"You can't fool me!" she screamed. "That's the one who was here a minute ago!" The courthouse crowd raised the roof in merriment and the judge pounded for order.

In a tremulous voice she repeated for the jury the questions which the officers had asked her.

Q. "Now, tell the jury what you said to them."

She was pretty well licked by that time, and under a bit of goading, stated what her answers had been. I looked her straight in the eyes, with uplifted hand to arrest her attention and prevent a flow of ad-libbing, and went to some harmless question for a gentle taper-off. I got her off the stand as quickly as possible, since the jury could not fail to see the glaring difference in the story she had told in response to the prosecuting attorney's questions and the one she had told the officer when first interviewed. In ten minutes of direct examination I had torn her rehearsed story to shreds—a thing I was not able to do with cross-examination.

I put Carden through the same routine, with the same result, coaxing out of him the fact that he had been dickering for a job on the police force since the day he volun-

teered as a witness in the case. I think they had promised him one if he came through all right. (Mrs. Owens went to work as a jail matron promptly after the case was over.)

The tailor fared even worse. On direct examination by the State's counsel, he knocked our alibi into a cocked hat, left as we were with a couple of hours during which we could not account for Robinson. Backed in a corner, the good tailor gave his reason for telling Spence that he knew nothing at all about delivering a uniform to Robinson that day. It was his fixed policy, he said, never to testify for a defendant—only for the State.

Facial expressions in the jury box showed the disgust with which they viewed such a man. I made but casual reference to the tailor in my argument. I have found that when the minds of jurors have seized upon such a point, nothing counsel may say in an argument will add anything. Such situations are easy to over-argue.

Our strategy paid off: when the police chose the newspapers to try the case, we jumped in too. And with the "mostest." We made the witnesses do the talking, and on questions of our choosing.

It has been said that there is no perfect crime. Apparently this one was. I am thoroughly convinced that Robinson was perfectly innocent.

Chapter 18

THE WALLACE CASE

On the morning of April 20, 1948, the village of Greenville, in Meriwether County, presented nothing unusual for a county site town in a rural section of Georgia. Few people were on the streets, since April is the busiest month on the farms, and merchants had such customers as came in hurriedly for sundry items needed to keep the tenants and farm hands busy preparing the land for early planting.

A Ford sedan ground its brakes at the entrance to the town's only restaurant. At the wheel was John Wallace. With him were Herring Sivell, Tom Strickland and Henry Mobley, all livestock raisers and farmers. A package of cigarettes was all they wanted in the restaurant. Wallace paid for them, and the four men left without conversation or the pleasantries usual when county folk of long acquaintance come together.

The group stepped briskly across the highway and walked down the path to the entrance of the county courthouse. They were looking for Wilson Turner.

"There's his truck," Wallace was heard to say, pointing to a Ford pick-up truck parked in the jail yard.

The men were met on the courthouse steps by Tom Collier, the Sheriff of Meriwether County. Wallace and the Sheriff did all of the talking.

"I got back from Carrollton last night, John," the Sheriff said, "and I brought Turner with me—'n' I brought his truck too."

"Did you find out anything about my cows?" Wallace asked.

"Turner told us all about one of them, me and the sheriff at Carrollton. He never got into Carroll County with any of 'em, and the sheriff said he couldn't hold Turner any longer without evidence. So I brought 'im back and he's in the jail now.

"On the way back he told me that he had tied that cow you bought at the auction to a tree in your woodland pasture a day or two ago 'n' she's over there yet."

Wallace's face flushed in anger. Turning to leave, he said, "Hold Turner 'til we get back, Tom. We ought to be back before twelve."

"You'll have to get a warrant today—I can't hold him on suspicion no longer."

Wallace and his friends drove to the woodland pasture back of his farm to search for the cow. In a secluded spot on the banks of a little stream which ran through the place, they found the pride of Wallace's herd, a registered animal which had cost Wallace more than fifteen hundred dollars. Turner, if his confession is to be believed, had tied her to a tree, thinking he would dispose of her later. But other farmers who had been missing cattle were on Turner's trail, so he had returned and slashed the cow's throat with a crude knife. She had been dead about two days when they found her.

The men returned to the Sheriff's office and told him of their discovery. It was then about midday, when country people have their dinner. At Wallace's insistence, Turner was released. Collier, in common with country people down South, did not want anyone to come to his house angry or leave hungry. So Wallace and his friends, along with Turner, ate a hearty meal together as guests of the Sheriff. Turner left about one o'clock, driving his truck up the highway in the direction of Newnan, in Coweta County. When he was out of sight, Wallace and his friends followed in a Ford sedan.

Evidently Turner drove rapidly, since Wallace and his party did not overtake him. They examined the byroads

which led from the highway for tire tracks in the dirt, thinking that Turner might have taken one of these. They found no tracks, so they continued up the highway in the direction of Newnan.

As they approached Sunset Tourist Court, beside the highway on the Coweta side of the county line, Wallace cried out, "Look! There's his truck!"

Swerving without slackening speed, Wallace turned the automobile onto the grounds of the tourist court and brought it to a stop eight or ten feet from the entrance of a snack bar in a small structure near the road. The men got out. Wallace had a double-barreled shotgun in his hands. They examined the truck to make sure it was Turner's, then entered the snack bar. Turner had about half finished a soft drink. There were probably a half dozen others in the room who had stopped for refreshments.

Wallace called to Turner to come out, but Turner, somewhat fearful, hesitated.

One of the members of Wallace's party forced him out and half led and half dragged him to their automobile. In the process of forcing Turner into the automobile, Wallace struck him over the head with his gun.

A number of people present in and about the snack bar saw Wallace strike Turner, and some of them remonstrated with the four men as they forced him into the rear seat of their car.

"Don't treat that boy so rough," one man said.

"He's a dangerous fellow," said Wallace, "and we're arresting him for murder."

"Well, put some handcuffs on him and stop beating him," another cautioned.

Mobley and Sivell got in on either side of Turner, with Wallace driving and Strickland on the seat beside him. They headed across the county line into Meriwether County. Only the three men now living who were in the automobile when it left the tourist court knew what happened during the next few days.

Turner's truck remained at the tourist court, but he did not come home that night.

Turner was well known in Meriwether County, but not favorably. He had an older brother who had registered for the draft and reported for service in the Second World War, only to be rejected because of physical defects and given a certificate exempting him from further consideration by the Draft Board. Wilson Turner, the brother, subsequently died. The Turner in question, whose name was William, got possession of his deceased brother's certificate of exemption and took his name. He contracted marriage under that name and had been bobbing about, sharecropping for a different landowner each year. He had been on Wallace's farm only three months when he bought his new Ford truck for cash. The deduction was that the money had come from his activities as a cattle thief. Several farmers, including Wallace, had hired men to watch their herds at night in an effort to catch him.

Turner's wife was a woman who came from a respectable family. People sympathized with her in her anxiety about Turner's whereabouts and commenced to search for him. He could not be found.

In the meantime, the incident at the tourist court had been heralded in the headlines and news stories. Larger groups were organized and joined in the search. A week went by and all that the most careful search could bring to light were the already-known facts about the parked truck at Sunset Tourist Court, the seizure of Turner by Wallace and his friends, and the whack on the head at the hands of Wallace.

Meanwhile the news services had moved in reporters and feature writers to join the search parties and to mull over strategy with the officers. Sheriff Collier of Meriwether County had shown little interest in the matter and Sheriff Lamar Potts of Coweta took over the investigation.

Since this sparse information failed to support a charge of murder against Wallace and his accomplices (the *corpus*

delicti was lacking), Potts secured warrants charging them with kidnapping, and lodged them in jail at Newnan.

Then it was that news reporters and feature writers pulled out the stops for a crescendo that covered Dixie like the dew. And editorial writers joined them to produce a medley which all but caused to remain unheard the calm and unruffled chords which come from living strings touched by the hand of justice.

A headline in connection with a homicide, with the word "blood" in it, is a news writer's delight. Sheriff Potts gave them plenty of delight. He found blood on Wallace's clothes and in his house, he declared, and on Sivell's clothes and in his house. This was the case with Strickland and Mobley too. And all of this was as if by design to proclaim their guilt.

Under those ugly headlines was a front page spread calling upon all who had witnessed the affair at the tourist court to contact Sheriff Potts. A dozen or more people responded—one a housewife who said she had been standing in her front yard about 100 yards away. The good Sheriff culled them down to three (retaining the housewife), according to whether the testimony suited his purpose. The next story heralded the magnanimity of Sheriff Potts for kicking in a five hundred dollar contribution which started a fund to develop evidence against Wallace and to pay the expenses of his prosecution. The publishers' management in Atlanta sent other writers and publicity specialists. They moved into the courthouse at Newnan and began to flood the State and the wire services with lurid stories of the atrocity.

Although the liquidation of Wallace's holdings showed him to be insolvent, they portrayed him as a wealthy farmer, arrogant and mean, who treated his army of sharecroppers quite as a feudal lord of the Middle Ages had treated his serfs. Turner was always the unoffending tenant farmer. Potts, of course, they portrayed as the Sir Galahad of the law. They built him up to fair proportions, devoting a

story to him in the magazine section of the Atlanta *Journal's* Sunday edition which would have charmed the vanity of Sherlock Holmes had he been the subject. The sum total of their effort was to protect the public mind against anything which might put Turner in a bad light or point up a single faint virtue which Wallace might at some time have possessed. Thus the great court of public opinion took jurisdiction, and this one news source was the sole witness. Before any formal court opened, before any judicial body sat in judgment, this witness heralded the prosecution's prejudiced story into the living rooms in the evenings, in the market-places, on the street corners, and out on the farms throughout the day. Wallace had not a chance to be heard.

I was associated in the case two weeks before it was to be tried. I used all of that time—far too short to make preparations—to sound out local sentiment and examine into the circumstances, and to learn what evidence could be had for Wallace and (of greater importance) what the State's witnesses would say. Among the disconcerting developments was this: Potts had gone to Wallace's farm and carried away two tenants, Robert Lee Gates and Albert Brooks. They were Negroes, wholly illiterate, and we were informed that they would be submissive to any direction Sheriff Potts might give them. They had been indicted as accessories after the fact (knowing of the crime but failing to report it), and Potts held them incommunicado. There was no way to discover what they would say, but it was certain that they were completely under the Sheriff's domination. Listed on the indictment were the names of Mrs. Merle Hannah, who lived across the highway from the tourist court; Steve Smith, owner of the tourist court; Dr. J. D. Tribble, and Dr. L. L. Elliot.

Knowing the temper of the Sheriff, and having observed that with the newspaper buildup he had had he would direct the case, I did not go near any of the witnesses listed on the indictment. I used what little time I had to examine

into the circumstances—the technique of obtaining the indictment, drawing and summonsing the jury, et cetera. I became convinced that neither the Grand Jury which had returned the indictment nor the panel of jurors drawn to try the case, was legally constituted, since they had not been summonsed at all.

I prepared a challenge to the array directed to both the Grand and Traverse juries on the ground that no summons had been issued to any of them as provided by law, or served in the manner provided by law; they had learned of their selection by a postal card addressed to them by the Sheriff. In addition, I prepared a plea in abatement in a move to have the indictments dismissed, setting up that since the Sheriff had contributed to a fund raised to aid the prosecution he was a party-at-interest and was disqualified to summon the Grand Jury or to act as Sheriff while they had the indictment under consideration. And in addition I moved to disqualify the Sheriff as a member of the Court, since, having made himself a party-at-interest, he was disqualified to have custody of the jury trying the case, and that that disqualification applied also to each of his deputies.

The case was coming up for trial on a hot July day in 1948. When I arrived at Newnan that morning I had to drive around the crowds which were milling about the courthouse grounds, and park on the outskirts of the town. The paved streets and sidewalks had already absorbed enough heat from the sun to be oppressive. Little concession stands were on every corner, serving the crowds with soft drinks and hot dogs.

It was more like court week at old Spring Place during the horse and buggy days than any I had seen in years.

When the judge called the case, I presented my preliminary motions, the challenge to the juries, and the plea in abatement. The Sheriff blinked his eyes as if annoyed, and the crowd back of the bar was quiet. The judge adjourned to his chambers to hear the arguments, but overruled them

all, and we went back to the courtroom and commenced the selection of the twelve jurors who were to decide Wallace's fate.

Jurors who are conscientiously opposed to capital punishment are disqualified by law from sitting on cases involving the death punishment. It is the practice of the court to question each juror about this, and those who declare they are opposed to capital punishment are excused for "cause." The clerk called sixty-eight men in this case, but not one of them was excused for cause. Never before had I witnessed a call of jurors in a capital felony case where at least ten per cent were not disqualified for cause, and I have seen it go as high as fifty per cent. I sensed that each man called in this case was eager to put the proverbial rope around John Wallace's neck.

Wallace alone was put on trial.

I knew perfectly well that to reverse the conviction already obtained in the court of public opinion was beyond the skill of the advocate. But I felt certain that the rulings of the judge, denying my challenge to the qualification of the jury as well as my challenge to the competency of the sheriff to act as a member of the court, would nullify any verdict of guilty the jury might render. So my plan was to make such witnesses and such circumstances as I could to stand out as ridiculous. These tactics I planned in contemplation of a new trial about a year later, so that the impossible testimony and unbelievable circumstances would in time be revealed for what they were and induce a change in the trend of thought. I contented myself, therefore, with efforts to lead the witnesses into the wilderness and the judge into error whenever possible. Oddities of any kind, especially in testimony, make lasting impressions—if there is sufficient time to think them over. Recounted by talkative people who are ever ready to show off their wit, oddities grow more ridiculous with each telling. I have known cases to change character entirely in this way.

Mrs. Hannah, the first witness called for the State, pro-

vided enough extravagant testimony for the entire case. "I was standing in my yard," she said, "when the Wallace car drove up. I was about a hundred yards away. I saw Wallace hit the little man over the head with the gun. The blow killed him dead. They throwed him in the back of the car and raced off toward Greenville."

"You were a hundred yards away?" I asked her.

"Yes. But I could see everything that happened and I could hear the lick."

"Did you ever see a human being killed like that before?"

"Naw. But I saw it then."

"Did you ever before examine a person who had been injured, to determine whether he was dead?"

"Naw. But I shore saw that 'n killed."

"You don't know much about medicine, do you—never went to any medical schools?"

"Naw. But I've been around sickness. My children have had the measles 'n' things like that."

Her evidence that the blow killed Turner then and there got by as "expert testimony."

Smith was much closer to the struggle. He testified to approximately the same details. The two doctors revealed in their opinions hypotheses established by the testimony of Mrs. Hannah and Smith. Principally for window-dressing, I interrogated the doctors as to the type of examination men of their profession commonly use and think necessary to determine the precise moment when life becomes extinct. Both testified on oath that Mrs. Hannah, a housewife who had never cracked a book on medicine or surgery or any related subject, was competent to testify that the blow which Wallace struck caused Turner's death.

The prosecuting attorney started his parade of surprise witnesses with Robert Lee Gates. No one friendly to Wallace had been permitted to see Gates, or Albert Brooks, since the Sheriff had spirited them away from Wallace's farm.

Gates was led into court by a deputy sheriff and placed

on the witness stand. Sheriff Potts posted himself in such a position that his gimlet-like eyes of steel gray caught the cloudy, subdued eyes of the witness. Not once was the poor Negro free from this gaze.

I broke the silence by addressing the Court. "I earnestly request that Your Honor advise this witness that he has been indicted as an accessory after the fact in this case; that any testimony which he might give might tend to incriminate him; and that he has the right to refuse to answer any question concerning the case; and that his refusal to give testimony will not be prejudicial against him in any manner."

The trial Judge, Samuel J. Boykin, apprised Gates fully of his right to refuse to testify. "Now that I have explained to you that you are not required to answer any question about this case," the Judge said, "tell me whether you wish to be a witness in the case."

Still under the gaze of the Sheriff, he said, "I wants to be a witness fo' Mistah Leemah."

"A witness for whom?" the Judge inquired.

"A witness fo' Mistah Leemah," he answered, pointing to the Sheriff.

Since the colored people in the County pronounced the Sheriff's first name, Lamar, as "Leemah," the Judge construed the statement as waiving immunity from testifying, and handed him over to the prosecuting attorney for questioning.

"Robert," the prosecuting attorney asked, "do you know John Wallace?"

"Yassah."

"You live on his place, don't you?"

"I uster live over there."

"Where do you live now?"

"I doan know whar I lives now. Mistah Leemah he done moved me."

This routine brought answers which the prosecuting attorney did not want. After a whispered exchange of words

with the Sheriff, he led the witness into the main story. When it appeared in the transcript, reduced from question and answer form to narrative, this was the story:

The day after Turner was reported missing, Wallace came to the cornfield where Gates and Brooks were at work. He was driving a pick-up truck. He told them to get in, and drove them over to the stock barn.

"Boys, get out," he directed, "and get the grabs* and a long rope and put them in the truck."

Then Wallace drove to the toolhouse where he loaded two axes and a twenty-gallon drum of gasoline. From there he drove the truck with the Negroes aboard to an old house site in the midst of a heavily wooded pasture through which flowed a little stream. He directed them to dig a pit near the stream, and then to gather dry wood and brush and fill the pit with it.

"What did you do next?" counsel asked.

Still under the gaze of the Sheriff, the witness detailed the rest of the story.

While the Negroes were digging the pit and filling it with wood, Wallace sat on a log nearby. He had brought his shotgun along and it was leaning against the log within his reach. He had tied the rope to the grabs.

Wallace handed the grabs to Gates when the pit had been filled, and pointed out an old well nearby which had once furnished water to the residence but had long since fallen into decay.

"Mistah Wallace, he say, 'See dat ole well?' " Gates continued. "He had to show us whar it was. It was all growed up with weeds and brush. 'Take dese grabs 'n' let 'em down 'n' ketch a package down dere—'n' hook it good—it's heavy!'

"We done lack he tol' us 'n' we hooked sump'n 'n' it was hard to pull up."

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* An anchor-like instrument attached to a rope, used to remove objects from wells.

"Well, go on," the prosecuting attorney said. "Did you pull up the package?"

"It wuz tied up in guano sacks."

"Did you untie it?"

"Yassah, 'n' den we run."

"Where did you run to?"

"Mistah Wallace, he fotch us back."

"What made you run?"

"Dere wuz a daid man in dem sacks."

"Who was that dead man?"

"It were Mistah Turner."

Then, the story went, Wallace made them put the package on the pile of dry wood with which they had filled the pit. They then heaved the drum of gasoline to the pit and saturated the wood and the package with its contents. Then all stepped back fifteen or twenty steps, and Wallace tied some dry straw around a rock, lit it with a match, tossed it into the pit and ignited the gasoline. They all sat around stoking the fire until the package was consumed.

"Did you ever see this before?" the prosecuting attorney asked as he exhibited a tin containing the familiar Prince Albert tobacco label, slightly scorched.

"Yassah. Dat was in de ashes when we cleaned out de pit."

"So you cleaned out the pit?"

"Yassuh. Mistah Wallace, he say 'Boys, clean out dis pit with dese shovels so nobody can see dat dere was a fire nowhar 'round here.' "

"Where did you put the ashes?"

"We shoveled 'em all in de creek."

The auditorium was a huge one. It had been packed and jammed since early morning. The crowd had been unusually silent while Gates was testifying, but when the prosecuting attorney indicated that he had no further questions there was a hum of whispered conversation as tenseness subsided. Just as I rose to commence my cross-examination of the witness, the clock in the courthouse tower started strik-

ing the hour of twelve. The Judge recessed the court for lunch but only those assured of a seat for the afternoon session made a move. Many sent youngsters out to fetch sandwiches. But the interest in the trial was such that the spectators would sooner have starved than miss any part of it.

"Robert, where have you been since Sheriff Potts picked you and Albert up that day?" I asked when the court resumed the trial.

"I doan know," he answered, still under the gaze of Sheriff Potts.

"Did you know that you boys have been charged with a crime punishable by death in the electric chair?"

"Nawsah."

"Sheriff Potts put you in jail, didn't he?"

"Yassah."

"Have you talked to a lawyer since you were carried off?"

"Nawsah."

"Have you talked to anyone except Sheriff Potts since he took you off?"

"Nawsah."

"He told you what to do and say?"

"Yassah."

"And that's what you are doing and saying?"

"Yassah."

Brooks had been rehearsed with the same script. He followed it closely, as Gates had done, answering my questions with "Yassah" and "Nawsah."

The State introduced in evidence a few partially burned leaves and branches which Gates said came from saplings nearby, scorched by the flames of the gasoline, and the Prince Albert tobacco tin which they claimed was in Turner's pocket when his body was reduced to ashes. The Sheriff produced a white handkerchief containing about ten ounces of a substance which resembled ashes and testified that they were the ashes which he had found in the creek about a hundred yards downstream from the pit. He had collected

them, he testified, about a week after the body was burned, where they had been washed up on the bank. Doctor Herman Jones, head of the crime laboratory, testified that he had examined the ashes and that they were the ashes of a human body.

It would have been easy, of course, to have developed by cross-examination of this crime laboratory expert (he qualified as a medical expert) that temperature a little in excess of 3300 degrees Fahrenheit would be required to disintegrate a human body, whereas it would not be possible to develop in excess of 1150 degrees from a wood fire in an open pit. I could have made him go through mental gymnastics to explain how it was possible for those ashes to have gotten together again several days after being thrown into flowing water to show up a hundred yards down the creek, and how that tobacco tin could have emerged with slight scorch from a fire purported to have consumed Turner's body. Then, too, there was a spendid chance to show by this witness, a medical doctor, that lay witnesses viewing the incident from a distance could not give an opinion as to whether the blow which Turner had received at the tourist court was sufficient to produce death. The skillful handling of this witness would have riddled the State's contention that the crime was committed in Coweta County, a contention which they had to sustain in order to make a conviction possible.

A local lawyer associated in the case persuaded the leading counsel to allow him to cross-examine Doctor Jones, since he had not been permitted to say anything at all up to that time. But the fellow had a hard time keeping within the rules as the trial Judge viewed them. He had labored with the witness about ten minutes when the Judge stopped him, and we lost the only evidence that could have saved us.

I am certain that no character of cross-examination of Doctor Jones could have made a dent in that jury, but I could have placed a hurdle in the appellate record that

would have been hard for the grim justices of the Supreme Court to vault.

Here the prosecution added a curious tinge to the case; one I have not seen reported in any case since the fifteenth century. This was the evidence of a Miss Mahaley Lancaster, a woman apparently in her sixties. Had they allowed her to bring her broomstick to the stand, she would have appeared entirely in character.

"You are a fortuneteller, are you not?" the prosecuting attorney asked.

"No, sir, I ain't," she snapped. "I'm a clairvoyant—borned one."

"What's the difference?"

"A fortuneteller dreams things 'n' a clairvoyant sees 'em."

"Did you talk to Sheriff Potts about this case?"

"He come to me fust thing—they all do."

Here she flew off on her own, needing no questions, and said:

"I seed that man over there," pointing to Wallace, "and three other men throw Turner in that old well, plain as day. I told Sheriff Potts they had burnt 'im, 'n' I told Sheriff Potts he'd find them ashes down that creek if he'd look. And ain't that where he found 'em?"

The trial Judge was eminently fair, considering the tense atmosphere, and would have stricken out this testimony had I objected. But I encouraged them to make the case as ridiculous as possible.

I had questioned, I thought, every character of witness. But here was something novel to contend with.

"Miss Lancaster," I began, "are you—"

"It ain't Miss Lancaster," she interrupted, "it's Miss Mahaley. Clairvoyants don't use their last names."

"Well, Miss Mahaley, then. Did the Deity equip you with these supernatural powers before you were born or did it leak in afterwards?"

"Look-a-here," she almost screamed, leaning forward to drill me with crazed eyes, "if you go to tryin' any of these here tricks and lawyer smartness on me, they'll find you in a well, 'n' it might be the same well they throwed Turner in!"

That was not an event which I wished to contemplate—much less court. Besides, the old hag seemed to be a pet over in her part of the county. So I took my seat while she glowed with the satisfaction of victory and notoriety.

Miss Mahaley was an oddity after the news reporter's own heart. She dominated the news headlines that day.

Whether she had fitted her story to the prosecutor's or whether the Sheriff-prosecutor had conformed the testimony of the State's witnesses to her weird divinations, I do not know. I do know that the notoriety from the trial enhanced her prestige to such an extent that for months after the affair was over, an array of automobiles, from strip-down Fords to Cadillacs, brought troubled persons of high and low degree to her tumbledown cabin in a remote section of Coweta County.

The only defense witnesses available to Wallace were the men jointly indicted with him. Only these men had knowledge of what had occurred after they had left the tourist court with Turner. We called each of them to the witness stand. Unlike Gates and Brooks, they refused to testify, confirming our fears that the Sheriff had an agreement with them, as well as with Gates and Brooks.

The maneuver was as simple as it was unconscionable. "If you boys will waive your right to refuse to testify *against* Wallace," they told Gates and Brooks, "we will let you go free." But they told Strickland, Sivell and Mobley, "If you fellows will stand on your right to refuse to testify *for* Wallace, we will see that you do not go to the electric chair." Thus they were able to exploit testimony which would damn Wallace and suppress testimony which would save him.

Wallace insisted on making a statement to the jury in

his defense. I strongly advised against it. My associates, however, agreed with Wallace. They helped him hatch up a statement which required seven hours to deliver. They were naive enough to suppose that Wallace would charm that jury.

It is the practice for leading counsel to make the main argument, since that is the concluding argument and it affords an opportunity to clear any hurdles which opposing counsel might set. It is the "last word"—the opportunity for that sweep of oratory and emotional appeal which ofttimes carries jurors along to favorable verdicts. This was one time when I was in thorough accord with such practice. I knew that Daniel Webster and William Evarts combined could not have dented that jury. I made a mother-home-and-heaven speech, putting serious effort on the issue of whether Turner was killed within the jurisdiction of the court in which he was on trial. The leading counsel argued the merits.

The jury went out about three o'clock in the afternoon. I thought I would go to my hotel, half a block away, and pack my bag so I could leave promptly when the verdict was in. As I walked into the lobby, the hotel clerk and the few people standing about were congratulating the county on the verdict—the electric chair. The verdict had been returned and the Judge had entered sentence before I could walk half a block to the hotel.

I was confident we would be able to reverse the case. I prepared exceptions *pendente lite,** excepting to the Judge's order overruling my challenge to the array, and to the order dismissing my plea in abatement, and sent them down to local counsel, asking them to get the Judge's certificate and file them. When I went down to present the amended motion for a new trial, I learned that associate counsel had tossed my *pendente lite* exceptions into the waste basket.

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* The appeal in questions of law.

The case went to the Supreme Court and, without the points which I had sought to preserve by exceptions *pendente lite,* was affirmed.

Our next move was an application for a commutation of sentence. The Atlanta *Constitution* timed an inflammatory editorial to appear on the day previous to the date on which the Board of Pardons and Paroles scheduled the hearing. The good editor all but threatened the members of the board with political ostracism if they gave Wallace any consideration. That editorial and the news stories which had been showering down for more than a week brought such a great number of people to the hearing that the board moved down to the Senate Chamber. We presented the affidavit of a merchant living near Newnan, in which he stated that a few days before the trial of the case, he heard a man who had served on the jury declare that if he could get on that jury he would sit until hell froze over or send Wallace to the chair. We presented another from a traveling salesman who lived in Atlanta and who testified that he witnessed the affair at the tourist court; that he told the Sheriff, when interviewed by him, exactly what he saw and heard; that he was not summoned as a witness; that when he learned from news stories of the trial date, he telephoned the State's Attorney and gave him the information which he had previously given the Sheriff; that that officer told him not to attend the trial. He further stated that he had not at any time prior to the trial informed Wallace's attorneys that he had witnessed the happenings at the tourist court, and that if he had been called upon to testify, he would have testified that the blow did Turner no great injury.

Newspapers reporting the hearing said not a word about these affidavits, reserving all of their space for those who opposed the application. The public never knew about the prejudiced juror, nor the shunned witness.

With Wallace's conviction salted down by a decision of the Supreme Court, the State allowed the triumvirate who

rode with Wallace on that fateful day to enter pleas for life sentences. The cases against the star witnesses, Gates and Brooks, were dismissed.

Strickland, Mobley and Sivell were serving their terms when Wallace was again sentenced to the chair. They could now testify without fear of immediate reprisal, and for the first time it was possible to make of record the only eyewitness testimony about what happened immediately following the incident at the tourist court. They made affidavits outlining substantially this story: Turner's injury at the tourist court was slight. After they had carried him back to Meriwether County, they came to a second automobile parked on the side of a road leading from the main highway to Wallace's farm. Turner was transferred to this automobile and walked unaided some twenty-five or thirty feet to get in it. He had no injury which was noticeably disabling. He was fully alive in Meriwether County when the second automobile was driven in the direction of Wallace's farm.

That testimony would have been controlling, since it went to a substantive fact and was uncontradicted by any witness. (Opinion evidence would, as a matter of law, have to fall before evidence of a substantive fact, unless the witness were impeached.) This evidence would have destroyed the State's contention that the mortal blow was struck in Coweta County. It would have ruined the State's case.

We filed extraordinary motion for a new trial, setting up that the evidence of these men was not available to us on the trial of the case, since the witnesses refused at that time to give the testimony; that the witnesses were able and willing to testify on a subsequent trial. The trial Judge denied this motion and back to the Supreme Court we went, without avail. The Pardon and Parole Board again rejected an application for commutation and, so far as any State authority was concerned, we were at our row's end. We heard the sentence of death pronounced the third time.

Sheriff Potts made the mistake of bringing his prisoner to Atlanta to await the execution date. We filed a petition

for the writ of habeas corpus in Fulton Superior Court, raising every Federal question we could find in the books, but based mainly on the ground that the newspapers had inflamed public opinion throughout the State, particularly in Coweta County, by persistently coloring the facts prejudicially to the extent that Wallace had been robbed of the unbiased judgment of the jurors; that the threats to, and coercion of, members of the Pardon and Parole Board, expressed editorially, had robbed him of the uninfluenced consideration of his case by that tribunal.

The Senior Judge, Virlyn B. Moore, gave us every consideration, requiring such witnesses to testify as we desired to be brought from over the State. He heard us fully, but declined to release Wallace. The Judge, over the vehement objection of the State's counsel, held up the execution until we could get a review of this ruling in the Georgia Supreme Court. We again failed to get relief in that Court, and went by *certiorari* to the Supreme Court of the United States. That Court declined to take jurisdiction. (Shortly thereafter, the same justices took jurisdiction of an almost identical case appealed from the Supreme Court of Florida, nullified a conviction in the State courts, and ordered a new trial.)

For the fourth time I suffered the ordeal of hearing my client sentenced to receive the death penalty, and on November 3, 1950—two years, six months, and twenty-five days after the tragic affair at Sunset Court—John Wallace walked unaided, calmly and complacently, to the electric chair. The great state of Georgia had exacted what her archaic laws declare to be her due.

But the newspaper fraternity were not content to allow old John's spirit to rest. On the evening of November 5, 1954, a television show, THE BIG STORY, purported to re-enact the tragic events of the Wallace case. Unbelievably, not a single representation bore the semblance of truth. The announcement was made of an award by the sponsors

of five hundred dollars to the newspaperman for "objective reporting" of the Wallace case.

Wallace was portrayed as a handsome but sinister-looking man, six feet two, never without a bullwhip in his hands. Cowering outside a richly appointed office were a haggard group of bedraggled tenant farmers, begging for bread. Cut-ins and side views flashed on the screen now and then showed emaciated children groping about the knees of timid, brow-beaten mothers, poorly dressed—all with starvation written upon their faces.

As the serfs were admitted, the actor playing the part of Wallace turned from a mahogany desk in a leather-trimmed revolving chair to spurn their poor petitions, toying all the while with the menacing bullwhip.

The pick-up truck shown outside under a magnolia tree belonged to Wallace—not to Turner (who, in reality, had purchased it from the proceeds of the theft of cattle for which Wallace owed mortgage notes)—and the Wallace of their story emphasized his order to Turner to get going to work with the truck, by a lash on the back with the bullwhip.

With a to-hell-with-the-facts attitude all too common to news gathering agencies, the sponsors of THE BIG STORY bought the script and awarded the feature writer five hundred dollars for "objective reporting" of the John Wallace case.

One of the editors involved said to me, in justification of the character of news stories and editorials, "Oh, well—Wallace was guilty, wasn't he?"

Maybe so. I never asked a client in all my life whether or not he was guilty. But this I do know: An innocent man can be convicted in this manner quite as easily as a guilty one.

The Wallace case points up what Judge Simon H. Rifkind in the *Journal of the American Judicature Society,* August, 1950, referred to as a clash between two great constitutional principles.

But Her Majesty's Government in England, or any predecessor government of England, has not found it to be such. Before Fuchs's conviction for betraying state secrets to the Soviets, no newspaper in England had commented on the case beyond the bare facts that a charge had been made. In England the law forbids any newspaper discussion of charges, pending the trial. But from the moment of the investigation of Alger Hiss, later convicted in the United States of a similar offense, the press of this country heralded every detail their news reporters could gather.

The extent to which newspapers may influence the result of trials in our courts has been left largely to men who fix the policies of the press. Notwithstanding the duty and the authority to guarantee trials under established rules of law, our courts have backed away from it. The press, in spite of pious platitudes about freedom of speech, has treated inflammatory incidents and sensational testimony as a commodity which they sell. The Wallace case illustrates how they too often build up their inventories.

The process of erosion in this case commenced on the day of the incident at the tourist court. The territory from which the jurors must be drawn was drenched with all kinds of information—some true, some false—all unchecked by any process of the law, all uncleaned of the dross which it is the object of the laws of evidence to exclude. By the time the jurors who were to try Wallace had been seated in the jury box, they had been living for weeks in a climate surcharged with unbridled emotion. To have excluded from the jury all who had been drilled (either by radio or television) with information about Wallace's mistakes since his childhood, none of which could have formed any part of the evidence in the case, would have reduced the jury to the blind, the deaf, and the illiterate. Even these would have picked up rumors.

Suppose a friend of Wallace had accosted a prospective juror and slipped him a piece of notepaper on which was written: "John Wallace is one of the best men in the com-

munity. He is an exemplary citizen. Turner was a deadbeat, a draft-dodger, and a thief." The court would not have had the least hesitancy in sending so bold a friend to jail for contempt.

But the newspaper publishers handed each of them a paper saying, in effect: "The murder of Turner, an innocent young man with a wife and baby, was the blackest crime in the history of Coweta County. John Wallace ran him down and killed him, and threw his body in a well." That got by as objective reporting.

Then, suppose another of Wallace's friends (the first one could not have—he would have been in jail) had slipped over to the chambers of the Justices of the Supreme Court and handed them a writing to the effect that the law was on trial in the Wallace case, and if Wallace went free we might as well abolish all penal institutions and allow crime to go unnoticed. The grim Justices, we must imagine, would have blown their judicial tops, and the hapless informant would have landed in jail. But the newspaper publishers handed them papers containing just such. Not an eyebrow was raised.

Of such practice Judge Rifkind says:

> If that kind of practice obtained in surgery, the situation would be somewhat as follows: The poor victim is on the operating table. He has been prepared by the latest methods of science so that he is as pure, as clean, as sterile as science can make him. He is wheeled into the operating room, which has been as thoroughly prepared for his reception. No germ would dare to penetrate the devices employed for its extermination. The Doctor wears a sterile gown. He has cleansed his hands, turned off the faucets with his elbows, and donned rubber gloves. The nurses have masks over their mouths to prevent contamination. Elaborate precautions are taken to insure against infection. Precisely when the incision is made, the windows are thrown wide open, and the dust,

dirt and pollution of the Sanitation Department's trucks are allowed to enter.

If that were the practice of surgery we would think the surgeons were mad. And of course they would be. There would doubtless be many medical miscarriages. And when we use a comparable method in the courts we have miscarriages of justice.

Thomas Jefferson did not dare say to the press of his day, "Thus far shalt thou go and no farther." Mr. Justice Black, in Bridges vs. California, 314 U.S. p. 270, quotes him as saying:

> I deplore . . . the putrid state into which our newspapers have passed, and the malignity, the vulgarity, and mendacious spirit of those who write them . . . These ordures are rapidly depraving the public taste.
>
> It is however an evil for which there is no remedy, for our liberty depends on the freedom of the press, and that cannot be limited without being lost.

To hear a death sentence pronounced is a most disquieting experience. I went through this doleful ritual on four separate occasions with one young fellow who was later acquitted. I have stood before with many others to hear the dread sentence. Only in the Wallace case, out of a total of a hundred and six capital felony cases, have I failed to work around it. It distressed me greatly to have the record in that case closed in this manner.

If I were to try the case over again, I would not change the tactics which I employed. I knew that we could no more stem the prejudice, whipped up by the press to set the case in the minds of prospective jurors, than we could roll back the tide. I played for time and laid a perfect foundation for a reversal of the conviction which I knew was inevitable under the circumstances surrounding the first trial. Pity, a

more gracious trait, lies at that point on the arc whence the pendulum starts to swing back again.

Divided command at counsel table is as dangerous in the trial of a case in court as it is in a military operation. Demnage, in the second trial of the Dreyfus case at Rennes, in Brittany, departed in his argument from the theory developed by Labori, his associate counsel, in the presentation of the evidence, with disastrous results. Longstreet presumed to change what he supposed to be a minor part of Lee's tactics at Gettysburg, to turn certain victory to stunning defeat.

Similar disunity between defense counsel lost the Wallace case.

Chapter 19

THE C.I.O. CASES

In the foothills of the Appalachian mountains, some forty miles southwest of Chattanooga, is the splendid Georgia county of Chattooga. Summerville is its county site. Many of the pioneer families of that country are still represented by the farmers, merchants, professional men and tradesmen who make up this rural population. Farmers predominate, which means that the average citizen of the county is a hard-headed chap of brash independence. Among the industries of the county is Berryton Mills, manufacturer of textiles. Practically every employee of the mills comes from the farms in that area, and they are able to go back again when they become dissatisfied with life in the mill village. Unlike most cotton mill people, none of them is wedded to his job.

Berryton Mills and the village are located a few miles from Summerville. The village consists of half a hundred cottages, a country store, a park, a couple of churches, and a school. All of the cottages have plenty of ground for gardens, and some have ground for part-time farming. Workers in the mill have never worried greatly about wage scales since they are able to gather most of the fruits and vegetables which they need from their gardens and patches. Not a few raise pigs for slaughter when cold weather comes, and all keep a flock of chickens. Until the advent of labor organizers, all they knew about labor troubles was what they read in the papers.

In 1949 the C.I.O. people came to Berryton and persuaded a majority of the employees to form a local union.

The fight with the management commenced with the first efforts to organize. Before any collective bargaining could get under way there was either a strike or a lock-out, no one was able to determine which. At any rate, labor troubles hit the peaceful village with terrible impact. Labor leaders moved in to direct the striking group. The management refused even to speak to them. Instead, they let it be known out in the county that good jobs in the mill were open. Picket lines were thrown about the property, first to dissuade people living outside the village from taking the vacant jobs and later to prevent them from doing so. A great majority of the people in Chattooga were self-employed and were ignorant of the factors involved in the strike. They figured that if the mill offered a man a job and the rate of pay was agreeable, all around, it was not the business of anyone else to interfere. Union members had been sold on different ideas. They ganged about the entrances to the mill property before each workshift started, to keep the strike-breaking employees out. Law enforcement officers were hard put at times to prevent bloodshed. Arrests were made every time workshifts changed, and local justices of the peace held committing courts every day to try the cases. As fast as the persons accused were bound over to the Grand Jury, union officials bailed them out. Back they went to the picket lines, madder and more determined than ever. Weeks of such antics brought bitterness. The union members followed doggedly their professional leadership.

One morning a car-pool from out in the county attempted to cross a picket line. Twenty or thirty men and women and a number of teen-agers, maddened at this maneuver, surged about the automobile to stop it. In the melee the automobile was overturned and the young woman driving was crushed. She died on the spot.

That night someone, thought to have been a striking employee, tossed a stick of dynamite under a dwelling house occupied by a non-striking family and blew it to bits.

Union officials and Berryton management got set for a

finish fight, passing the ball for the moment to their respective legal staffs. It was at this point that I was employed in the cases.

The Magistrate ordered the suspect held in jail without bond, along with four men and three women charged with overturning the automobile.

Counsel for Berryton Mills appeared as prosecutor in the Magistrate's Court the day following the homicide, to whet the temper of the populace into ugly frenzy. Circumstances could not have afforded the Berryton management a more effective strike-breaking weapon. Bobby Lee Cook, a splendid young lawyer at the local bar, with whom I was to be associated in the trial court, appeared for the accused.

"One wanders into the enemy's camp to get information, not to give it," is an adage of the military. Cook thought well of it, so he forced the prosecution to parade its witnesses in the Magistrate's Court to tell all they knew, without using a single witness of his own. That tied the prosecution down to a definite theory which they could not change on afterthought, while we were able to shift about and pinpoint our evidence on the fixed target which they had set.

The Magistrate held the four men and three women on charges of murder, and one man on a charge of dynamiting an inhabited dwelling. These offenses are punishable by death in the electric chair.

I drove up to Summerville a week before the trial was set, to go over the case with Mr. Cook and have a look at the locations of buildings, street intersections, and grounds at Berryton Village where the homicide occurred. I stayed an extra day to sound out public reaction to the strike generally, particularly as it was affected by the homicide of the young woman. Strikers were lying low—keeping in and around their shacks—while strike-breakers were operating the mill. Berryton management had been championing the cause of non-union employees. Now they flavored their platitudes with righteous pleas for law and order as they

prosecuted eviction warrants against strikers whose families occupied the shacks in the village.

Mr. Cook dragged these "tenants by sufferance" up to the little town and contested every eviction case. He had them bring their untidy wives along, and all their kids. The courthouse was filled with them in their dirty clothes, and they themselves hadn't been scrubbed for a week. They contrasted sharply with the well-dressed officials of Berryton Mills and the fashion-plate lawyer prosecuting them.

With organized labor and the National Surety Corporation behind us, we could have made bond for Al Capone. So Cook posted bonds and appealed each case. People from Summerville and throughout the county saw this sordid show—the ruthlessness with which Berryton Mills ground families who had worked at the mills for years eking out an existence on substandard wages. Public sentiment began to flow our way.

Every trial lawyer's objective and problem is to get the static out of bad courtroom atmosphere, turning it in reverse if possible. Then to dominate the case. This rather delicate undertaking must commence when the lawyer drives up to the courthouse grounds and, briefcase in hand, begins to walk up the courthouse steps—particularly in jurisdictions unfamiliar to him and where he is not known.

Everything he does, everything he says from that moment is noted by anxious and curious eyes and ears. The first factor to consider is the judge. No two can be handled alike. He must of necessity be a politician, else he would not be on the bench. Then, there is the crowd back of the bar. They elected the judge. He is their *alter ego*. They do not like local lawyers to push him around, much less an outsider. The first thing to flit into the judge's mind when a lawyer from a big town appears in a case is "I be damned if this city slicker is goin' to put anything over me!"

The chaps back of the bar have the same attitude. There are always two strikes against the newcomer, and they wait to see if the judge is going to have to put the screws to him.

Friendly hasslers are bound to come up, and where there are no controlling decisions involved, the prudent lawyer will let the judge come out best. The judge will love that, and so will the courthouse crowd.

And the prudent lawyer will get up some character of law point just before the trial commences, always an inconsequential one, since the solution is to be left to the judge. The purpose of this is to lead him, and his constituents back of the bar, to think that he is in charge of the situation. It would be a mistake to contend in a this-is-it fashion —"Judge, is this not the safer rule?" The lawyer must be more tactful, and pretty soon the good judge will be convinced that the visiting lawyer is playing his game, and he will, as a rule, bend over backwards to be fair. And the boys back of the bar will be so pleased to have the "city feller" conform to their way of doing things that they will be ready to give him their shirts.

It is perfectly proper to slug it out with the prosecuting attorney. The sounder licking you can give him, the better. Just by being prosecuting attorney, he is asking for it. But be careful with the judge. There is one thing worse than trying to run roughshod over him, and that is to do too much bowing and scraping—to be too servile. People (and that goes for judges and jurors) like a lawyer who puts up a fight. And when circumstances require it, he must take on the judge.

These problems were present along with others, when the first of the cases, that of Roy McGraw, was called for trial. There was the problem of handling the press. Every news agency was represented. Two young women were on their first assignment. The Atlanta dailies, the Chattanooga *Times,* and the Rome *Tribune-Herald* had their best feature writers on the job. Feature writers like to deal with oddities. The late Robert Ripley received more money per word for his brand of literature than any man in history. He dealt exclusively in oddities.

The lawyer must give newspapermen something unusual

—tactics out of the ordinary; color. They go for "quotable quotes"; and a few attractive phrases scattered about during the trial will enable them to point up the lawyer. If the lawyer can get them slanting their stories in his direction, the newspapers can create favorable courtroom atmosphere.

In every press report of a case, someone is going to be the hero. Bobby Lee and I managed to capture that role in these cases. I have observed, time after time, brilliant lawyers muffing the chance of a lifetime to get into the big-time groups, all because they did not know how to handle the press.

The judge had had little experience as a trial lawyer and less as a judge. He was new on the bench and these were his first capital felony cases. They not only involved complicated questions of law but were charged with politics. Visiting lawyers added some novelty, as did the presence of so many newspaper people. Withal, it was an anxious time, and the crowd back of the bar was waiting to see how the new judge would handle the situation.

On the first Monday in July, 1951, people from two neighboring states had joined the people of Chattooga County, and the augmented crowd was milling about the courthouse square in Summerville, waiting for the curtain to go up on the C.I.O. trials. By the time the judge had arrived, every seat in the courtroom was filled. Standing room, and perches along the window sills, were at a premium. Huddled with State's counsel around their table was the mother of the slain girl. The floor space back of the bar reserved for lawyers and court officials had been invaded by the press; feature writers representing four newspapers and two press services were grouped around a long table. Every chair inside the bar was taken, many by law students, who often cut their classes for a day in court with me when I had a big fight going.

The judge took his place on the bench and looked that crowd over. Evidently he expected trouble from me. When he gave me the once-over his face had the look of a drawn

tomahawk. "Old boy," I figured, "you'll have to be handled with silk gloves."

I said not a word when the case was called—it is never good tactics to grab the ball too quickly. Counsel employed by Berryton Mills was not so prudent. He promptly started a hassel which diverted the attention of the judge and the courthouse crowd from me. When I was drawn into the melee, I managed to stir an exchange of words in such manner as to give the judge a fine opening for repartee so he could come out wittiest and wisest.

First in order was, of course, the selection of the jury—a fine chance for by-play. If done skillfully, it can, in a measure, set the trend of interest back of the bar. Privately employed counsel, prosecuting for the State, quizzed each juror rigorously as to his acquaintance with the defendant, his lawyers, his place of residence, employment, and so on. He did a good job, he thought. Turning to me, he asked: "Have you any questions?"

I ignored the remark. When the judge made the same inquiry I said to him: "The State has not yet accepted this juror, your Honor."

"We'll do that after the defendant's counsel has finished his questions," State's counsel rejoined.

"What about that, Mr. Henson?" the judge asked.

"We stand mute, sir, until this juror is put upon us," I said.

That started an argument. I knew that if the judge ruled with State's counsel it would be such an error as would nullify the verdict if there was a conviction.

He did rule with State's counsel. "Go ahead and ask questions, Mr. Henson," he said.

I repeated my statement: "We will stand mute until the juror is put upon us." So I asked no questions. The second juror was called, questioned by the State's counsel, and turned over to me. I kept on "standing mute." The judge got worried about the ruling and changed it to rule in our favor.

That pleased the gallery rooting for me. And it put State's counsel in not too good a light.

Then I got a perfect chance for by-play. After jurors had taken the stiff questioning of State's counsel and had been accepted and turned over to me, I asked only one question: "Even if you did know me, or Bobby Lee Cook or Roy McGraw, or all of us, you'd still be an honest man and render an honest verdict, wouldn't you?"

Each replied with emphasis. I could feel the crowd back of the bar agreeing with me and with the embarrassed jurors. About halfway down the list State's counsel left off the questioning. That was a retreat which put us in a good light.

Before the day was done, Bobby Lee and I were running the show. The kindly disposition of the judge, won by courtesy, had fully cleared the atmosphere back of the bar. We fought it out with the State's counsel for five days, tooth and nail. Throughout the trial we pointed up Berryton Mills as the real prosecutor. We kept the labor leaders out of town, but we were careful to put every official of Berryton Mills under subpoena, and we paraded them across the witness stand so that their patrician-like appearance might contrast with that of the shabbily clad cotton mill folk whom we represented.

In our argument neither of us mentioned the labor dispute, which stood out like a sore thumb throughout the trial. We stood Berryton Mills out as the real party-at-interest in the case—not the great state of Georgia.

Bobby Lee, by means of that rapier of wit, sarcasm, and satire, which he wielded so skillfully, chided Berryton's prosecutor for calling into question the integrity of jurors. "He is not satisfied with the type of men whose names were placed in the jury box on a basis of uprightness in this community," he said. "Maybe he is to be excused. He don't know our people here in Chattooga. So vehement was he when he challenged your honesty, I expected him to ask that each of you be required to post a performance bond

to qualify you in this case." When that noise which comes when crowds shift in the seats had subsided, he continued. "But we know you, and we were content. Honest verdicts come from honest men. And an honest verdict is all we want in this case."

He ended with a beautiful peroration. "If you accede to Berryton's demand and cause Roy McGraw's friends to open that six feet of earth to deposit there his pain-wracked body for the rest he was denied in life, this blue-stocking crowd at Berryton Mills who have so long divided much of his earnings among them, will look up to laugh—but not to smile. And Sovereign Justice, a stranger in their councils, will pause to moisten that mound with tears."

I like to carry a jury along with the philosophy ingrained in them at Sunday school. I had a perfect chance. There sat the mother, prominent with prosecution counsel, lending her silent demand for Roy McGraw's death.

"All the world mourns for the loss of this unfortunate victim of this labor dispute," I said. "She was entering that bloom of young womanhood, a joy to her mother who sits with Berryton at the counsel table. Who is so lacking in human kindness that they do not sympathize with her very deeply? Who would not, if they could, lighten the burden of her grief?

"If you could write a verdict in this case which would restore in her that peace of mind which she had before her bereavement, I would accede to that verdict. Roy McGraw would accede to it with all his heart. But you cannot. That is beyond human agency.

"You know, gentlemen, that poor woman who supposes, and mistakenly so, that she has the kindly interest of Berryton Mills, is the tragic figure in this tragic affair. Our tears may be more properly shed for her. Berryton Mills, by bringing her here, has held out to her that her comfort of heart and mind lies in the doctrine of atonement—one person has been killed, therefore another person must die. And

all of her cries echo from a mountain of falsehood and error. And her grief becomes ever more poignant.

"Berryton's philosophy comes hot from hell. In it you can hear those discordant notes from that ever-running, grinding machinery from which they have grown rich. They brought her here to exploit her grief—not to assuage it.

"A poet once asked, 'Is there balm in Gilead?' And every pronouncement from the man who walked in Galilee answered, 'yes.' This good old lady will not find it, so long as she trots under Berryton's wages.

"The good apostle Matthew knew how to find it. 'Pray for those who despitefully use you,' he said. Berryton would substitute prosecution for prayer. The way was pointed out when a cross stood out on Golgotha in stark relief against a troubled sky at the most awful moment in all history. Old Stephen had found the way long before. It was when he was carried just outside Jerusalem, there to be stoned to death. And as those stones tore his quivering flesh, he called upon that Power which governs all things to show compassion toward his tormentors—not vengeance. And when the old man went out, his heart was charged with peace and contentment.

"If old Stephen had had the benign counsel of Berryton Mills, his inclination would have been to rush out and holler for warrants against each of his persecutors, yelling for their death. But if he had, instead of being the immortal example for all mankind that he is, he would have passed from the scene to be forgotten, unhonored and unsung, as Berryton Mills will do."

Pointing to Berryton's counsel, I concluded, "There sits Berryton Mills, gentlemen. But the might of its mailed fists cannot avail unless sparked by your verdict. Thank God for that."

Lawyers in England avoid the last argument, but in this country, lawyers often sacrifice much to have the last say. Studying the effect of the technique of trial lawyers at the

British bar, I found that by skillful planning the first argument brought out in the trial will incline the last speaker to spend his time answering them and thus divert attention from basic issues. To toss in some philosophy with which there can be no disagreement will evoke foolish attempts to answer or concede the point. Skillful use of the first speech will, as a rule, serve to jar the prepared speech out of an adversary's mind, interrupt his line of thought, and set him off blazing away at targets set for him.

Berryton's counsel belabored himself to place the State of Georgia into the chair in which I had planted Berryton Mills.

The old woman didn't hear the counsel's speech. She left when I finished, and I did not see her at the courthouse again.

By the time the case went to the jury on Friday night, the people out in the county arranged a barbecue for us at a pretty spring some miles from Summerville. Old Brother Arthur Smith, who figured in the Sam Borders case, was there and treated me like a long-lost brother.

There is nothing like a barbecue down South to break up pet peeves and factional differences. A truce reigns with respect to these when people shuffle side by side along an improvised table while barbecue and Brunswick stew, such as we prepare it down South, are ladled into picnic plates, piled high with the sauces and spices and pickles which go with it. It is hard at times for a chap to sit in a church pew beside one who failed to invite his women folk to a party, or beside one who has crossed him in politics. But he will mingle with such an opponent at the old barbecue grounds without a thought of their differences.

The crowd that night was not mad at anybody—not even union organizers. The indications were unmistakable that the week-long trial had reinstated our clients in the good graces of the community. I wondered, at the time, how much of this had leaked into the jury box.

The merriment ended when, at about half past eleven,

a runner from the Sheriff's office brought word that the jury was ready with a verdict. Everyone adjourned to the courthouse to find the crowd little diminished. All of Berryton was there. Members of the press had not left the courthouse. Tenseness back of the bar gave way to hilarious demonstration when the foreman read the verdict—involuntary manslaughter. On the basis of that verdict, the judge permitted all except the man accused of tossing the dynamite to make bond. We had bondsmen present, and the Berryton folk carried the men who had been on trial back to the village for a real celebration, lasting until the wee hours of the morning.

The alleged dynamiter's case was called a few weeks later. Private counsel, stung by the turn of events, redoubled his efforts in that case. He fought hard and bitterly. But we had broken the back of the prosecution. We got an acquittal in that case. Dismissal of all pending cases ended the tragic and regrettable affair.

Chapter 20

TRADITION AND INFORMAL LAW

When my practice began to take in circuits in the State, distant from my own, among the things I learned was that to sustain a verdict, correct pleading and careful compliance with the rules of practice and of evidence were necessary. But to win, I found, it was also necessary to invoke intangible things like local customs and traditions, which never find their way into law books.

The pleadings and the record of a case instituted at Hiwassee, in the fastness of the Georgia mountains, would not be different from those in a case tried at Brunswick on the sea coast, at the opposite end of Georgia. Identical rules of law would govern. In the conduct of a case, the lawyer from the mountains must conform to local practices and call upon traditions revered by jurors from the coastal plains, if he is to coax a verdict from them. Conversely, a lawyer from the Geechee country had best acquire some of the manners and speech of the hillbilly if he is to win cases in the mountain circuits.

In 1945 I tried a case at Brunswick for Felix Johnson, in which I needed more of the art of the actor than that of the lawyer.

Felix was a cherubic-looking young fellow who did a thriving wholesale liquor business in Atlanta. To my mind, he was a wizard in that business, mainly because he looked and acted more like a choirboy than a business man—particularly one capable of dealing with men in that business.

When Felix started his business he employed Johnnie Ryals as his accountant. Johnnie married a young woman who lived on the coast. She didn't like Atlanta, and Johnnie

became weary of the exacting work of keeping books, so he persuaded Felix to finance a night club on Saint Simon's Island, across the causeway from Brunswick.

Acting on my advice, it was left to Johnnie to make all of the arrangements. He leased from Henry Coffer a building fronting on the boardwalk, for a term of five years, promising to pay a thousand dollars per month as rent. He then registered a trade name, The Five O'Clock Club, dressed the place up with appropriate furniture and fixtures, and hung up a neon sign arrangement which lit up half of the island. Felix stocked the place with fifty thousand dollars' worth of the distillers' art.

Johnnie did well for a time—until he got to be one of his own best customers (probably "consumers" would be a better word).

Felix grew a little uneasy about the venture. He took me down to the island to see what was going on. We spent a couple of days going over the books and observing operations generally. A hamper full of unpaid bills, Coffer's claim for a thousand dollars on the first day of each month, and the approaching end of the summer season, convinced us that the prudent thing to do was to get out of the venture as quickly as possible.

The big headache was Coffer's claim. The lease had four years to run and somebody was chargeable with a thousand dollars for each month of the unexpired term. That added up to nearly thirty-six thousand dollars. The stock and fixtures were worth about that sum.

I knew that if we got into court in a battle of liens, Coffer's position was impregnable—a landlord's lien for rent takes precedence over every other claim except taxes. A thirty-six-odd thousand dollar bite out of the estate meant that Felix would get the "noneth."* The property could not

* When I was a small boy I heard Aunt Sallie Culpepper grumbling about a division of profit in connection with a venture in which her son, John, was involved with neighborhood boys. "When all the money John has put into this thing is taken into account," she said, "John will get the *noneth!*" I have laughed at the crude expression many times since.

be expected to bring at forced sale what it had cost him.

Our first move was to buy time on the local radio and advertise a big Saturday night show. We filled the house until the "wee sma' hours" to convert "liquid assets," as we knew them, to liquid assets which bankers would recognize.

While the helpers were leaving behind the last of the revelers, Felix and I commenced to check the cash registers. The sun was sending its golden shafts up over the Atlantic as we finished. Felix mopped his Irish face and remarked, "Well, we've clipped old Coffer for a little to the rise of a thousand dollars—enough to get us back home."

Very early next morning, we backed a couple of trucks up to the service entrance and commenced to load everything in the place. Coffer got wind of our operations, and at about the time we had finished loading, a squad of deputy sheriffs flew down upon us, armed with a distress warrant commanding them to seize every item of the property, trucks and all.

Luckily for us the suit was against Ryals, and the officers found the property in Johnson's possession.

Possession at the time of the seizure was all that Johnson had to show in order to defeat Coffer's lien, and the sheriff's entry of levy showed that. That put Coffer behind the proverbial eight-ball. The burden of proof was upon him to show by clear and convincing evidence that the property did not belong to Johnson. It is easier to hold the fort than it is to take it, so we filed with the court Johnson's claim to title, which was, of course, superior to a landlord's lien. Thanks to Coffer, we avoided the battle of liens and sat by while he and his lawyers made frantic search for evidence which would disprove our title.

Coffer was represented by John Gilbert, a member of the firm of Judge Millard Reece, one of the best groups of lawyers in the coastal region. It is easy to anticipate the tactics of an expert trial lawyer. The best bet is that he will develop the strongest offense, or defense, and base his case upon the soundest theory available. I therefore antici-

pated that Gilbert would stand on the theory that Johnson was a silent partner in the business and bound equally with Ryals by the terms of the lease.

In the two weeks which intervened between the date of the sheriff's seizure and the trial of the case, I read every story about coastal Georgia on which I could get my hands. I stocked up with Geechee talk and pronunciation peculiar to the common folk who lived in that circuit. I learned the stories of their men of local renown, not forgetting legends of pirates who once roamed the Gold Coast. A lot of money hinged on the verdict to be written in that case, and I knew that if Gilbert could find enough evidence to get to the jury on the issue of whether a partnership existed between Johnson and Ryals, I would have to move the hearts of those jurors with persuasive argument to win. Shakespeare treated just such a situation in these lines, "What plea in law so tainted and corrupt but being seasoned by gracious voice obscures the show of evil?"

While stocking up on Geechee lore, I found that Ryals had been flirting with the opposition. He had avoided Felix and me—had somehow gotten the idea that we were responsible for all his troubles. I knew my skillful adversary would not be able to involve Johnson in a partnership with Ryals by any writing such as a tax return, or an invoice, and that if he did it at all it must be by Ryals' evidence. So I got ready for battle on the theory that Johnson would deny that any partnership had at any time existed, while Ryals would testify that the business was in fact Johnson's, and that he (Ryals) was merely a front for Johnson.

The courthouse at Brunswick rises above a vibrant growth of live oaks and semi-tropical shrubs in a superbly landscaped park. Each tier of windows in the building opens on a splendid flower arrangement, each blossom contributing to the faint but pervasive fragrance which permeates the place.

In that beautiful setting, Judge W. C. Little called the case. Johnson and I faced Coffer and his counsel. They were

smiling and confident. Our only hope was that we were the underdogs in the fight.

Then came that tricky business of selecting a jury. The clerk commenced to call names from a list of twenty-four, copies of which had been furnished counsel. As each name was called, a juror stood and gave his name, occupation, and place of residence. Gilbert and I had half a minute to look each man over before the next name was called. It was up to me to hazard two guesses with respect to each of them: first, whether Gilbert wanted him on the trial panel, and second, whether I did not want him. The first consideration weighed the heavier.

One of the men was a sea captain who had retired with the old windjammer he had sailed from the Port of Brunswick. Six of the men manned shrimp boats. There were a number of turpentine distillers from the woodlands, and a tobacco farmer or two. The urban population was represented by a real estate dealer and two or three merchants, the only occupations I had ever previously dealt with in the precarious business of selecting a jury.

The rule was to announce our objections alternately. Gilbert started off. He struck a shrimp fisherman, which gave me a clue as to the character of jurors he did not want. We each had six strikes. I employed my strikes to free the list of every juror who knew anything about business—such as leases and invoices. The sea captain and the turpentine man from the piney woods survived our strikes, along with one shrimp boat man.

The evidence took the trend which I had expected, Ryals swearing up and down that Johnson had agreed to share the gains and losses incident to the business, while Johnson swore by all the gods that he had let Ryals have the bottle goods on consignment to be paid for as sold, and that the fixtures were there on loan to Ryals. He went down, he said, to carry his property back to his warehouse.

The only comfort I could get out of Ryals' testimony was that it was couched in distinctly legal language—unusual

for laymen. The term "gains and losses" is a part of the definition of a partnership agreement. It was clear that he had been coached. A partnership agreement may be proven by the conduct of the parties. Ryals had been schooled on that point, and he fitted in Johnson's conduct with that of his own, all tending to show that they acted as though they were partners.

The issues were clear-cut. If Johnson was to be believed, there was no partnership and his claim of title would be superior to Coffer's lien. If Ryals was to be believed, Johnson was a silent partner, bound by each stipulation in the lease contract.

Gilbert made the opening argument. He was superb. He was on his home grounds, representing a favorably well known local man. Coffer's case was too good to inspire a really earnest jury speech. That character of case is always difficult to discuss before a jury, but Gilbert handled it masterfully.

I reveled in the folk lore of the Golden Isles—people in that country are boastful of these legends and stories. I spun yarns which only those steeped in life in the Geechee country are supposed to know. I drew upon Dana (*Two Years Before the Mast*) to get Felix out of the storm—double-reefed the topsails, furled the reefsails, climbed down the hatches and hove to on the starboard tack. I knew the old sea captain would understand, and if the shrimp man didn't, the captain would revel in the chance to explain.

I matched every tutored statement which Ryals had made with a motive, and wound up with an eloquent and convincing discourse on "The Prejudiced Witness," by the great Justice Lamar, who came from that section and who was a member of the Supreme Court of Georgia early in its history. Meanwhile Felix sat by. He looked as if a halo belonged around his bushy blond head.

Late in the afternoon the jury came back with a straight verdict in favor of Felix. Coffer and Gilbert were astounded, and it was easy to see that the judge was surprised.

I will never know whether it was my speech or Johnson's looks that won that case.

When I got back to my office in Atlanta, my associate, the late H. A. Allen, remarked, "Well, I imagine your father and your grandfather were born and brought up in old Glynn County?"

"And what do you mean?" I asked.

"The boys tell me," he explained, "that you have at least two immediate ancestors born and bred in every county in which you try a case, and in a pinch ring in a great-great-grandfather."

Once the practitioner has hurdled all of the objections, the motions, the demurrers, and has gotten his pleadings in proper form, he is in a position to pull out all of the stops and play in all of the keys. To do so he must invoke also those laws which live only in tradition, ancient practices, old wives' tales, fairy stories, and in old discarded grammar school readers.

After all, people are governed by these. No *basic* law has ever come from any parliament, legislature, tribal council, or other character of law-making agency. Floods of legislative enactments come each year from legislative bodies all over the world but they are seldom more than regulatory measures.

Rules of action came about when organized groups, and individuals within organized groups, began adjusting their behavior to patterns which would enable them to survive with the least amount of friction. Ruth Benedict says that custom is our paramount social problem now because custom is the law, notwithstanding conflicting rules of conduct prescribed by statutes.

Laws follow custom as closely as they may. When English chancellors and judges found that a rule or custom had existed since "time whereof the mind of man runneth not to the contrary," they embodied it in their decrees, to become the law of the land.

Our own Federal Constitution is an example. It is true

that a convention met at Philadelphia and committed it to parchment. But long before a word of it had been written, the people had fixed in their minds every item which it contained. In fact, the men of the convention failed to include all of its provisions. The Constitution would never have been adopted by the people, in fact, had not the Constitution-makers promised to complete it by amendment. Ten such amendments were required, and to make it full and complete certain unwritten provisions have been recognized.

The people of England did not take the trouble to reduce any provision of their constitution to writing, so universally accepted were the customs which involved the whole domain of their religious, cultural, and economic life.

But government in America was not derived from family, tribal or clan practices. Government here was more an initial creation than an evolvement stretching over centuries, as was England's. People of many cultures and many lands were concerned in its creation. Settlers at Inverness, on the Georgia coast, brought with them the customs and practices of the Highlands of Scotland—even the name of the village from whence they came. The name "New Amsterdam" would indicate that Hollanders who settled the place wished to transplant to their new environment some part of their homeland. Germans in Wisconsin reveled in the folklore of their native land, while the Swedes to the northwest clung to everything which reminded them of their ancestral home. The English along the Atlantic coast differed widely in ideology and culture from the French in Louisiana, and each took pride in the difference. Wanting in means of communication and contact, these divergent groups could have no common tradition and little common interest.

The Boston Tea Party and Bunker Hill were the first incidents to provide these self-contained settlements with common pride in the New World. The War of the Revolution, the Continental Congress, and the frontier legislative

assemblies, produced statesmen and military heroes who overshadowed great men in the countries from which they had derived. When an element of the Continental Army dashed to victory in the field, or made skillful retreat to more favorable ground, a hero was made and a legend was born.

The Declaration of Independence moved in the direction of complete separation from the political institutions of Europe. The adoption of a national Constitution completed that move, and the colonists found themselves abruptly cut off from systems of law and government which had developed so slowly that rules of conduct took on the efficacy of law by reason of court decree rather than by legislation. Centuries were required to raise such a structure. The colonists had not even a decade in which to build. It was necessary, therefore, to gather together the basic concepts of government and put them in writing—to create the Constitution.

To make certain that no interpretation of the Constitution would upset the public policy of any state rooted in such ancient practices, the men who drafted it, and those who urged its adoption over much opposition, recognized the right of interposition on the part of the several states—an aspect of the Constitution not in writing. James Madison defined the doctrine of interposition in these words: "The powers of the Federal Government as resulting from the compact to which the States are parties, as limited by the plain sense and intention of the instrument constituting that compact: as no further valid than they are authorized by the grants enumerated in that compact: and that, in case of a deliberate palpable and dangerous exercise of other powers, not granted by the said compact, the States, who are parties thereto, have the right and are in duty bound to interpose for arresting the progress of the evil, and for maintaining within their respective limits, the authorities, rights and liberties appertaining to them."

Thomas Jefferson supported that doctrine heartily. He

said: "To give the General Government the final and exclusive right to judge its powers, is to make its discretion, and not the Constitution, the measure of its power: and that, in all cases of compact between parties having no common judge, each party has an equal right to judge for itself, as well of the infraction as of the mode and measures of redress."

Georgia successfully urged that doctrine and ignored a decree of the Supreme Court of the United States in two instances: Chisholm vs. Georgia; and the cases involving the homicide of Chief Pathkiller, referred to in the first chapter. Subsequently, the states of Massachusetts, Virginia, Kentucky, Pennsylvania, Rhode Island, Vermont, Wisconsin, and South Carolina successfully defied decrees of that Court to preserve public policy hallowed by tradition. This doctrine was last asserted in connection with the Dred Scott case in 1857, when many of the northern states made it a criminal offense for any officer of the state to recognize or apply the judgment of the Federal Supreme Court in that case.

The result is a dual system of laws and government, made up of the *Formal Law* and the *Informal Law.*

Samuel H. Sibley, Judge Emeritus of the United States Circuit Court of Appeals (Fifth Circuit), in a treatise on *The Informal Law,* said: "There is no crime against this State or these United States, except in the transgression of a written statute. But after all, the constitutions and codes are but a roof over our heads. We live under them but not in them. Though our daily conduct is regulated in every detail by laws of the most exacting sort, it is not the formal law. The criminal law, for instance, cuts little figure in the life of a good citizen. No one knows or cares much about it except criminals and lawyers—decent folk, by their very decency, are kept from its slime. The part of formal law in life is the part that the banks and bottoms play to the fish that inhabit it. The banks and bottoms preserve its (the water's) shape and keep it from dissipation, but the better

class of fish avoid them and live their joyous life in a clearer element. The mudcats, the frogs and terrapins make their homes in the mud. Or to use another figure, constitutions and codes are the turtle's shell—at once a burden and protection to him—but his life lies in the more loosely organized materials of his flesh and blood, and on these at last the growth and permanency of the shell itself depend. Such is the relation of the Formal Government to the others."

The learned Judge says further: "Formal government was born of the informal, leans upon it, and where democratic in form, is almost powerless without it. In the public opinion of the country is the womb of all important legislation. Many laws are enacted by society before they reach the legislature. Those that are first formally enacted must be re-enacted by society before they can be successfully enforced."

Our ancient customs and practices are not enforceable in the formal courts until they "spill over" into constitutions and statutes. We must, therefore, have informal courts. And we do. The decrees of these courts are as inflexible and binding as were those of the Medes and Persians in the days of old Darius.

Any person, be he citizen, alien, or denizen, may be a member of these courts. There are no terms and no fixed time for them to meet. They come into being at any time and at any place where two or more people gather. Any individual may become a member of as many of them as he can get around to. They meet at crossroads, stores, clubs, sewing circles, picnics, and even at churches before and after the sermon. A favorite place is at backyard fences, where neighboring clotheslines come into such close proximity as to make conversation convenient.

Procedures in these courts differ widely from those of the formal courts. If the person on trial happens to come into the presence of the court, his case is immediately suspended. In fact, he is often needed to sit in judgment on someone else who happens to be absent.

Then, too, direct evidence has no place in a trial in

these courts. If the witness had firsthand knowledge of the facts in the case, he or she couldn't be dragged into court. Hearsay evidence is the basis of all judgments. "Somebody said so and so," "Oh, have you heard—" and "It's goin' around that—" and "So and so was seen—" are fair examples of the factual structure of a case.

A typical case is that of *The Universe* vs. *Mr. and Mrs. Brown.*

Mr. and Mrs. Smith invited the Browns, among others, to a formal dinner. The engraved invitations designated it as such. Mr. Brown, over the protest of his wife, attended in a business suit. Not only that, he anchored his napkin inside the collar band of his shirt for the very practical purpose of protecting that newly-laundered piece from stray bits of food which might fall from his knife while in the process of traveling to his mouth.

One might search constitutions and criminal statutes until doomsday without finding a single provision under which the formal courts might inflict the slightest penalty on Mr. Brown. So far as the formal law goes, he is a man without guile, wholly acceptable. But just watch those informal courts go into action! Down at the bank they would meet, and at every club in town. Even on the street corners. The whole Brown family would be relegated to the lowest place in the social circles of the town—a decree which would follow them to their graves. Mrs. Brown might have been dressed in the height of fashion and her bearing might have been that of a queen. But the informal courts work "corruption of blood" and Mrs. Brown would share the penalty, as would the Brown children.

A single session of the court will seldom serve to fix a sentence. There must be several regroupings of the personnel of the court, scattered about in various places and on various occasions. But finally the status of the accused becomes so firmly fixed in the community that nothing can shake it except a pardon. And the informal system is not without its pardon courts.

A new trial is always in order. Any person at any time

may open the case for another trial. And should it be found on a series of new trials that the condemned person has "lived down" his offense, it is not unusual to see him bounced back to a round of the ladder of good grace higher than he originally occupied.

At times there is sharp conflict in the mandate of the formal and the informal law. Among the archaic laws in Georgia is a statute to prohibit tipping. "Thou shalt not tip a waiter," the informal law says, "else you will be known as a cad." Tipping irked a legislator years ago, so he "passed a law agin it." But the informal legislature did not re-enact it, so tipping goes merrily on.

In 1954 the Supreme Court decreed that segregation of the Caucasian and Negro races in public school systems violated a provision of the Constitution of the United States. That decree ran counter to ancient practices and traditions in Georgia, and other states of the South. The governments of these states, following their own historic precedent and that of sister states of the North, will invoke the doctrine of interposition.

At times, informal courts have been sinister things. Mobs have substituted them for the formal courts, to uphold tradition. But I have never heard of a mob, as distinguished from killers with criminal intent, raising its terrible hand to enforce a formal law.

I was always more hopeful of a favorable verdict when I was able to tie in some incident or point of argument in my cases with a flow of thought present in the locale, traceable always to concepts of tradition.

A family without tradition to spark pride in its individual members is rare indeed. Each community, whether it be village or hamlet, town or city, has its traditions. There is not one state in the Union which is not distinguishable from all of the others by its peculiar traditions. But all of us, cod fishermen of Gloucester in Massachusetts, lumberjacks in Oregon, melon growers in California, planters down South, and financiers on Wall Street, along with strata of

society betwixt and between, respond alike to the traditions of our common country. Usually one or more of them can be harnessed to help win jury verdicts.

Fearful that I may have lowered the men of my profession in the estimation of those who have had the patience to read through this story, I shall conclude with a tale which could very well have happened. It is a tale which has been told and passed along from mouth to ear for a long, long time.

Once a man died. He went straight to Hell, surveying the place from the shores of that Lake of Fire and Brimstone. It was terrible. As far as he could see, condemned souls burned and sizzled in flames seven times hotter than any fire on this mundane sphere we call earth.

Just as the Devil's helpers were about to catapult the man into that cauldron of pain and terror, a long shout was heard—"Hold ever'thing!" The ugly Imps looked about to see one of the old Prophets digging his shepherd's crook into the ground to aid him in his haste as he approached. With him was a group of men dressed in purest white.

"You've got the wrong man!" the Prophet cried. "His name got on the wrong list through error. He shouldn't be here at all!"

The Devil's crew verified the old Prophet's claims. They sent runners everywhere to find someone to draft legal papers to get the man out. But they could find no one in Hell who had had any experience with legal papers.

But "all's well that ends well"—they sent across Jordan and got the man a lawyer.

INDEX