ARTHUR CHENEY TRAIN

COURTS AND CRIMINALS

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Содержание

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CHAPTER I. The Pleasant Fiction of the Presumption of Innocence

There was a great to-do some years ago in the city of New York over an ill-omened young person, Duffy by name, who, falling into the bad graces of the police, was most incontinently dragged to headquarters and "mugged" without so much as "By your leave, sir," on the part of the authorities. Having been photographed and measured (in most humiliating fashion) he was turned loose with a gratuitous warning to behave himself in the future and see to it that he did nothing which might gain him even more invidious treatment.

Now, although many thousands of equally harmless persons had been similarly treated, this particular outrage was made the occasion of a vehement protest to the mayor of the city by a certain member of the judiciary, who pointed out that such things in a civilized community were shocking beyond measure, and called upon the mayor to remove the commissioner of police and all his staff of deputy commissioners for openly violating the law which they were sworn to uphold. But, the commissioner of

police, who had sometimes enforced the penal statutes in a way to make him unpopular with machine politicians, saw nothing wrong in what he had done, and, what was more, said so most outspokenly. The judge said, "You did," and the commissioner said, "I didn't." Specifically, the judge was complaining of what had been done to Duffy, but more generally he was charging the police with despotism and oppression and with systematically disregarding the sacred liberties of the citizens which it was their duty to protect.

Accordingly the mayor decided to look into the matter for himself, and after a lengthy investigation came to the alleged conclusion that the "mugging" of Duffy was a most reprehensible thing and that all those who were guilty of having any part therein should be instantly removed from office. He, therefore, issued a pronunciamento to the commissioner demanding the official heads of several of his subordinates, which order the commissioner politely declined to obey. The mayor thereupon removed him and appointed a successor, ostensibly for the purpose of having in the office a man who should conduct the police business of the city with more regard for the liberties of the inhabitants thereof. The judge who had started the rumpus expressed himself as very much pleased and declared that now at last a new era had dawned wherein the government was to be administered with a due regard for law.

Now, curiously enough, although the judge had demanded the removal of the commissioner on the ground that he had

violated the law and been guilty of tyrannous and despotic conduct, the mayor had ousted him not for pursuing an illegal course in arresting and "mugging" a presumptively innocent man (for illegal it most undoubtedly was), but for inefficiency and maladministration in his department.

Said the mayor in his written opinion:

"After thinking over this matter with the greatest care, I am led to the conclusion that as mayor of the city of New York I should not order the police to stop taking photographs of people arrested and accused of crime or who have been indicted by grand juries. That grave injustice may occur the Duffy case has demonstrated, but I feel that it is not the taking of the photograph that has given cause to the injustice, but the inefficiency and maladministration of the police department, etc."

In other words, the mayor set the seal of his official approval upon the very practice which caused the injustice to Duffy. "Mugging" was all right, so long as you "mugged" the right persons.

The situation thus outlined was one of more than passing interest. A sensitive point in our governmental nervous system had been touched and a condition uncovered that sooner or later must be diagnosed and cured.

For the police have no right to arrest and photograph a citizen unconvicted of crime, since it is contrary to law. And it is ridiculous to assert that the very guardians of the law may violate it so long as they do so judiciously and do not molest the Duffys.

The trouble goes deeper than that. The truth is that we are up against that most delicate of situations, the concrete adjustment of a theoretical individual right to a practical necessity. The same difficulty has always existed and will always continue to exist whenever emergencies requiring prompt and decisive action arise or conditions obtain that must be handled effectively without too much discussion. It is easy while sitting on the piazza with your cigar to recognize the rights of your fellow-men, you may assert most vigorously the right of the citizen to immunity from arrest without legal cause, but if you saw a seedy character sneaking down a side street at three o'clock in the morning, his pockets bulging with jewelry and silver! Would you have the policeman on post insist on the fact that a burglary had been committed being established beyond peradventure before arresting the suspect, who in the meantime would undoubtedly escape? Of course, the worthy officer sometimes does this, but his conduct in that case becomes the subject of an investigation on the part of his superiors. In fact, the rules of the New York police department require him to arrest all persons carrying bags in the small hours who cannot give a satisfactory account of themselves. Yet there is no such thing under the laws of the State as a right "to arrest on suspicion." No citizen may be arrested under the statutes unless a crime has actually been committed. Thus, the police regulations deliberately compel every officer either to violate the law or to be made the subject of charges for dereliction of duty. A confusing state of things, truly, to a man

who wants to do his duty by himself and by his fellow-citizens!

The present author once wrote a book dealing with the practical administration of criminal justice, in which the unlawfulness of arrest on mere "suspicion" was discussed at length and given a prominent place. But when the time came for publication that portion of it was omitted at the earnest solicitation of certain of the authorities on the ground that as such arrests were absolutely necessary for the enforcement of the criminal law a public exposition of their illegality would do infinite harm. Now, as it seems, the time has come when the facts, for one reason or another, should be faced. The difficulty does not end, however, with "arrest on suspicion," "the third degree," "mugging," or their allied abuses. It really goes to the root of our whole theory of the administration of the criminal law. Is it possible that on final analysis we may find that our enthusiastic insistence upon certain of the supposedly fundamental liberties of the individual has led us into a condition of legal hypocrisy vastly less desirable than the frank attitude of our continental neighbors toward such subjects?

The Massachusetts Constitution of 1785 concludes with the now famous words: "To the end that this may be a government of laws and not of men." That is the essence of the spirit of American government. Our forefathers had arisen and thrown off the yoke of England and her intolerable system of penal government, in which an accused had no right to testify in his own behalf and under which he could be hung for stealing a

sheep. "Liberty!" "Liberty or death!" That was the note ringing in the minds and mouths of the signers of the Declaration and framers of the Constitution. That is the popular note to-day of the Fourth of July orator and of the Memorial Day address. This liberty was to be guaranteed by laws in such a way that it was never to be curtailed or violated. No mere man was to be given an opportunity to tamper with it. The individual was to be protected at all costs. No king, or sheriff, or judge, or officer was to lay his finger on a free man save at his peril. If he did, the free man might immediately have his "law"—"have the law on him," as the good old expression was—for no king or sheriff was above the law. In fact, we were so energetic in providing safeguards for the individual, even when a wrong-doer, that we paid very little attention to the effectiveness of kings or sheriffs or what we had substituted for them. And so it is to-day. What candidate for office, what silver-tongued orator or senator, what demagogue or preacher could hold his audience or capture a vote if, when it came to a question of liberty, he should lift up his voice in behalf of the rights of the majority as against the individual?

Accordingly in devising our laws We have provided in every possible way for the freedom of the citizen from all interference on the part of the authorities. No one may be stopped, interrogated, examined, or arrested unless a crime has been committed. Every one is presumed to be innocent until shown to be guilty by the verdict of a jury. No one's premises may be entered or searched without a warrant which the law renders

it difficult to obtain. Every accused has the right to testify in his own behalf, like any other witness. The fact that he has been held for a crime by a magistrate and indicted by a grand jury places him at not the slightest disadvantage so far as defending himself against the charge is concerned, for he must be proven guilty beyond any reasonable doubt. These illustrations of the jealousy of the law for the rights of citizens might be multiplied to no inconsiderable extent. Further, our law allows a defendant convicted of crime to appeal to the highest courts, whereas if he be acquitted the people or State of New York have no right of appeal at all.

Without dwelling further on the matter it is enough to say that in general the State constitutions, their general laws, or penal statutes provide that a person who is accused or suspected of crime must be presumed innocent and treated accordingly until his guilt has been affirmatively established in a jury trial; that meantime he must not be confined or detained unless a crime has in fact been committed and there is at least reasonable cause to believe that he has committed it; and, further, that if arrested he must be given an immediate opportunity to secure bail, to have the advice of counsel, and must in no way be compelled to give any evidence against himself. So much for the law. It is as plain as a pikestaff. It is printed in the books in words of one syllable. So far as the law is concerned we have done our best to perpetuate the theories of those who, fearing that they might be arrested without a hearing, transported for trial, and convicted in

a king's court before a king's judge for a crime they knew nothing of, insisted on "liberty or death." They had had enough of kings and their ways. Hereafter they were to have "a government of laws and not of men."

But the unfortunate fact remains that all laws, however perfect, must in the end be administered by imperfect men. There is, alas! no such thing as a government of laws and not of men. You may have a government more of laws and less of men, or vice versa, but you cannot have an auto-administration of the Golden Rule. Sooner or later you come to a man—in the White House, or on a wool sack, or at a desk in an office, or in a blue coat and brass buttons—and then, to a very considerable extent, the question of how far ours is to be a government of laws or of men depends upon him. Generally, so far as he is concerned, it is going to be of man, for every official finds that the letter of the law works an injustice many times out of a hundred. If he is worth his salary he will try to temper justice with mercy. If he is human he will endeavor to accomplish justice as he sees it so long as the law can be stretched to accommodate the case. Thus, inevitably there is a conflict between the law and its application. It is the human element in the administration of the law that enables lawyers to get a living. It is usually not difficult to tell what the law is; the puzzle is how it is going to be applied in any individual case. How it is going to be applied depends very largely upon the practical side of the matter and the exigencies of existing conditions.

It is pretty hard to apply inflexibly laws over a hundred years

old. It is equally hard to police a city of a million or so polyglot inhabitants with a due regard to their theoretic constitutional rights. But suppose in addition that these theoretic rights are entirely theoretic and fly in the face of the laws of nature, experience, and common sense? What then? What is a police commissioner to do who has either got to make an illegal arrest or let a crook get away, who must violate the rights of men illegally detained by outrageously "mugging" them or egregiously fail to have a record of the professional criminals in his bailiwick? He does just what all of us do under similar conditions—he "takes a chance." But in the case of the police the thing is so necessary that there ceases practically to be any "chance" about it. They have got to prevent crime and arrest criminals. If they fail they are out of a job, and others more capable or less scrupulous take their places. The fundamental law qualifying all systems is that of necessity. You can't let professional crooks carry off a voter's silverware simply because the voter, being asleep, is unable instantly to demonstrate beyond a reasonable doubt that his silver has been stolen. You can't permit burglars to drag sacks of loot through the streets of the city at 4 A.M. simply because they are presumed to be innocent until proven guilty. And if "arrest on suspicion" were not permitted, demanded by the public, and required by the police ordinances, away would go the crooks and off would go the silverware, the town would be full of "leather snatchers" and "strong-arm men," respectable citizens would be afraid to go out o' nights, and liberty would degenerate

into license. That is the point. We Americans, or at least some of the newer ones of us, have an idea that "liberty" means the right to steal apples from our neighbor's orchard without interference. Now, somewhere or other, there has got to be a switch and a strong arm to keep us in order, and the switch and arm must not wait until the apples are stolen and eaten before getting busy. If we come climbing over the fence sweating apples at every pore, is Farmer Jones to go and count his apples before grabbing us?

The most presumptuous of all presumptions is this "presumption of innocence." It really doesn't exist, save in the mouths of judges and in the pages of the law books. Yet as much to-do is made about it as if it were a living legal principle. Every judge in a criminal case is required to charge the jury in form or substance somewhat as follows: "The defendant is presumed to be innocent until that presumption is removed by competent evidence"… "This presumption is his property, remaining with him throughout the trial and until rebutted by the verdict of the jury."… "The jury has no right to consider the fact that the defendant stands at the bar accused of a crime by an indictment found by the grand jury." Shades of Sir Henry Hawkins! Does the judge expect that they are actually to swallow that? Here is a jury sworn "to a true verdict find" in the case of an ugly looking customer at the bar who is charged with knocking down an old man and stealing his watch. The old man—an apostolic looking octogenarian—is sitting right over there where the jury can see him. One look at the plaintiff and one at the accused and the jury

may be heard to mutter, "He's guilty,—all right!"

"Presumed to be innocent?" Why, may I ask? Do not the jury and everybody else know that this good old man would never, save by mistake, accuse anybody falsely of crime? Innocence! Why, the natural and inevitable presumption is that the defendant is guilty! The human mind works intuitively by comparison and experience. We assume or presume with considerable confidence that parents love their children, that all college presidents are great and good men, and that wild bulls are dangerous animals. We may be wrong. But it is up to the other fellow to show us the contrary.

Now, if out of a clear sky Jones accuses Robinson of being a thief we know by experience that the chances are largely in favor of Jones's accusation being well founded. People as a rule don't go rushing around charging each other with being crooks unless they have some reason for it. Thus, at the very beginning the law flies in the face of probabilities when it tells us that a man accused of crime must be presumed to be innocent. In point of fact, whatever presumption there is (and this varies with the circumstances) is all the other way, greater or less depending upon the particular attitude of mind and experience of the individual.

This natural presumption of guilt from the mere fact of the charge is rendered all the more likely by reason of the uncharitable readiness with which we believe evil of our fellows. How unctuously we repeat some hearsay bit of scandal. "I

suppose you have heard the report that Deacon Smith has stolen the church funds?" we say to our friends with a sententious sigh—the outward sign of an invisible satisfaction. Deacon Smith after the money-bag? Ha! ha! Of course, he's guilty! These deacons are always guilty! And in a few minutes Deacon Smith is ruined forever, although the fact of the matter may well have been that he was but counting the money in the collection-plate. This willingness to believe the worst of others is a matter of common knowledge and of historical and literary record. "The evil that men do lives after them—" It might well have been put, "The evil men are said to have done lives forever." However unfair, this is a psychologic condition which plays an important part in rendering the presumption of innocence a gross absurdity.

But let us press the history of Jones and Robinson a step further. The next event in the latter's criminal history is his appearance in court before a magistrate. Jones produces his evidence and calls his witnesses. Robinson, through his learned counsel, cross-examines them and then summons his own witnesses to prove his innocence. The proceeding may take several days or perhaps weeks. Briefs are submitted. The magistrate considers the testimony and finally decides that he believes Robinson guilty and must hold him for the action of the grand jury. You might now, it would perhaps seem, have some reason for suspecting that Robinson was not all that he should be. But no! He is still presumed in the eyes of the law, and theoretically in the eyes of his fellows, to be as innocent

as a babe unborn. And now the grand jury take up and sift the evidence that has already been gone over by the police judge. They, too, call witnesses and take additional testimony. They likewise are convinced of Robinson's guilt and straightway hand down an indictment accusing him of the crime. A bench warrant issues. The defendant is run to earth and ignominiously haled to court. But he is still presumed to be innocent! Does not the law say so? And is not this a "government of laws"? Finally, the district attorney, who is not looking for any more work than is absolutely necessary, investigates the case, decides that it must be tried and begins to prepare it for trial. As the facts develop themselves Robinson's guilt becomes more and more clear. The unfortunate defendant is given any opportunity he may desire to explain away the charge, but to no purpose.

The district attorney knows Robinson is guilty, and so does everybody else, including Robinson. At last this presumably innocent man is brought to the bar for trial. The jury scan his hang-dog countenance upon which guilt is plainly written. They contrast his appearance with that of the honest Jones. They know he has been accused, held by a magistrate, indicted by a grand jury, and that his case, after careful scrutiny, has been pressed for trial by the public prosecutor. Do they really presume him innocent? Of course not. They presume him guilty. "So soon as I see him come through dot leetle door in the back of the room, then I know he's guilty!" as the foreman said in the old story. What good does the presumption of innocence, so called,

do for the miserable Robinson? None whatever—save perhaps to console him in the long days pending his trial. But such a legal hypocrisy could never have deceived anybody. How much better it would be to cast aside all such cant and frankly admit that the attitude of the continental law toward the man under arrest is founded upon common sense and the experience of mankind. If he is the wrong man it should not be difficult for him to demonstrate the fact. At any rate circumstances are against him, and he should be anxious to explain them away if he can.

The fact of the matter is, that in dealing with practical conditions, police methods differ very little in different countries. The authorities may perhaps keep considerably more detailed "tabs" on people in Europe than in the United States, but if they are once caught in a compromising position they experience about the same treatment wherever they happen to be. In France (and how the apostles of liberty condemn the iniquity of the administration of criminal justice in that country!) the suspect or undesirable receives a polite official call or note, in which he is invited to leave the locality as soon as convenient. In New York he is arrested by a plainclothes man, yanked down to Mulberry Street for the night, and next afternoon is thrust down the gangplank of a just departing Fall River liner. Many an inspector has earned unstinted praise (even from the New York Evening Post) by "clearing New York of crooks" or having a sort of "round-up" of suspicious characters whom, after proper identification, he has ejected from the city by the shortest and

quickest possible route. Yet in the case of every person thus arrested and driven out of the town he has undoubtedly violated constitutional rights and taken the law into his own hands.

What redress can a penniless tramp secure against a stout inspector of police able and willing to spend a considerable sum of money in his own defence, and with the entire force ready and eager to get at the tramp and put him out of business? He swallows his pride, if he has any, and ruefully slinks out of town for a period of enforced abstinence from the joys of metropolitan existence. Yet who shall say that, in spite of the fact that it is a theoretic outrage upon liberty, this cleaning out of the city is not highly desirable? One or two comparatively innocent men may be caught in the ruck, but they generally manage to intimate to the police that the latter have "got them wrong" and duly make their escape. The others resume their tramp from city to city, clothed in the presumption of their innocence.

Since the days of the Doges or of the Spanish Inquisition there has never been anything like the morning inspection or "line up" of arrested suspects at the New York police head-quarters.* (*Now abolished.) One by one the unfortunate persons arrested during the previous night (although not charged with any crime) are pointed out to the assembled detective force, who scan them from beneath black velvet masks in order that they themselves may not be recognized when they meet again on Broadway or the darker side streets of the city. Each prisoner is described and his character and past performances are rehearsed by the

inspector or head of the bureau. He is then measured, "mugged," and, if lucky, turned loose. What does his liberty amount to or his much-vaunted legal rights if the city is to be made safe? Yet why does not some apostle of liberty raise his voice and cry aloud concerning the wrong that has been done? Are not the rights of a beggar as sacred as those of a bishop?

One of the most sacred rights guaranteed under the law is that of not being compelled to give evidence against ourselves or to testify to anything which might degrade or incriminate us. Now, this is all very fine for the chap who has his lawyer at his elbow or has had some similar previous experience. He may wisely shut up like a clam and set at defiance the tortures of the third degree. But how about the poor fellow arrested on suspicion of having committed a murder, who has never heard of the legal provision in question, or, if he has, is cajoled or threatened into "answering one or two questions"? Few police officers take the trouble to warn those whom they arrest that what they say may be used against them. What is the use? Of course, when they testify later at the trial they inevitably begin their testimony with the stereotyped phrase, "I first warned the defendant that anything which he said might be used against him." If they did warn him they probably whispered it or mumbled it so that he didn't hear what they said, or, in any event, whether they said it or not, half a dozen of them probably took him into a back room and, having set him with his back against the wall, threatened and swore at him until he told them what he knew, or thought he knew, and

perhaps confessed his crime. When the case comes to trial the police give the impression that the accused quietly summoned them to his cell to make a voluntary statement. The defendant denies this, of course, but the evidence goes in and the harm has been done. No doubt the methods of the inquisition are in vogue the world over under similar conditions. Everybody knows that a statement by the accused immediately upon his arrest is usually the most important evidence that can be secured in any case. It is a police officer's duty to secure one if he can do so by legitimate means. It is his custom to secure one by any means in his power. As his oath, that such a statement was voluntary, makes it ipso facto admissible as evidence, the statutes providing that a defendant cannot be compelled to give evidence against himself are practically nullified.

In the more important cases the accused is usually put through some sort of an inquisitorial process by the captain at the station-house. If he is not very successful at getting anything out of the prisoner the latter is turned over to the sergeant and a couple of officers who can use methods of a more urgent character. If the prisoner is arrested by headquarters detectives, various efficient devices to compel him to "give up what he knows" may be used —such as depriving him of food and sleep, placing him in a cell with a "stool pigeon" who will try to worm a confession out of him, and the usual moral suasion of a heart-to-heart talk in the back room with the inspector.

This is the darker side of the picture of practical government.

It is needless to say that the police do not always suggest the various safeguards and privileges which the law accords to defendants thus arrested, but the writer is free to confess that, save in exceptional cases, he believes the rigors of the so-called third degree to be greatly exaggerated. Frequently in dealing with rough men rough methods are used, but considering the multitude of offenders, and the thousands of police officers, none of whom have been trained in a school of gentleness, it is surprising that severer treatment is not generally met with on the part of those who run afoul of the criminal law. The ordinary "cop" tries to do his duty as effectively as he can. With the average citizen gruffness and roughness go a long way in the assertion of authority. In the task of policing a big city, the rights of the individual must indubitably suffer to a certain extent if the rights of the multitude are to be properly protected. We can make too much of small injustices and petty incivilities. Police business is not gentle business. The officers are trying to prevent you and me from being knocked on the head some dark night or from being chloroformed in our beds. Ten thousand men are trying to do a thirty-thousand-man job. The struggle to keep the peace and put down crime is a hard one anywhere. It requires a strong arm that cannot show too punctilious a regard for theoretical rights when prompt decisions have to be made and equally prompt action taken. The thieves and gun men have got to be driven out. Suspicious characters have got to be locked up. Somehow or other a record must be kept of professional

criminals and persons likely to be active in law-breaking. These are necessities in every civilized country. They are necessities here. Society employs the same methods of self-protection the world over. No one presumes a person charged with crime to be innocent, either in Delhi, Pekin, Moscow, or New York. Under proper circumstances we believe him guilty. When he comes to be tried the jury consider the evidence, and if they are reasonably sure he is guilty they convict him. The doctrine of reasonable doubt is almost as much of a fiction as that of the presumption of innocence. From the time a man is arrested until arraignment he is quizzed with a view to inducing him to admit his offence or give some evidence that may help convict him. Logically, why should not a person charged with a crime be obliged to give what explanation he can of the affair? Why should he have the privilege of silence? Doesn't he owe a duty to the public the same as any other witness? If he is innocent he has nothing to fear; if he is guilty—away with him! The French have no false ideas about such things and at the same time they have a high regard for liberty. We merely cheat ourselves into thinking that our liberty is something different from French liberty because we have a lot of laws upon our statute books that are there only to be disregarded and would have to be repealed instantly if enforced.

Take, for instance, the celebrated provision of the penal laws that the failure of an accused to testify in his own behalf shall not be taken against him. Such a doctrine flies in the face of human nature. If a man sits silent when witnesses under oath accuse

him of a crime it is an inevitable inference that he has nothing to say—that no explanation of his would explain. The records show that the vast majority of accused persons who do not avail themselves of the opportunity to testify are convicted. Thus, the law which permits a defendant to testify in reality compels him to testify, and a much-invoked safeguard of liberty turns out to be a privilege in name only. In France or America alike a man accused of crime sooner or later has to tell what he knows—or take his medicine. It makes little difference whether he does so under the legalized interrogation of a "juge d'instruction" in Paris or under the quasi-voluntary examination of an assistant district attorney or police inspector in New York. It is six of one and half a dozen of the other if at his trial in France he remains mute under examination or in America refrains from availing himself of the privilege of testifying in his own behalf.

Thus, we are reluctantly forced to the conclusion that all human institutions have their limitations, and that, however theoretically perfect a government of laws may be, it must be administered by men whose chief regard will not be the idealization of a theory of liberty so much as an immediate solution of some concrete problem.

Not that the matter, after all, is particularly important to most of us, but laws which exist only to be broken create a disrespect and disregard for law which may ultimately be dangerous. It would be perfectly simple for the legislature to say that a citizen might be arrested under circumstances tending to create

a reasonable suspicion, even if he had not committed a crime, and it would be quite easy to pass a statute providing that the commissioner of police might "mug" and measure all criminals immediately after conviction. As it is, the prison authorities won't let him, so he has to do it while he has the opportunity.

It must be admitted that this is rather hard on the innocent, but they now have to suffer with the guilty for the sins of an indolent and uninterested legislature. Moreover, if such a right of arrest were proposed, some wiseacre or politician would probably rise up and denounce the suggestion as the first step in the direction of a military dictatorship. Thus, we shall undoubtedly fare happily on in the blissful belief that our personal liberties are the subject of the most solicitous and zealous care on the part of the authorities, guaranteed to us under a government which is not of men but of laws, until one of us happens to be arrested (by mistake, of course) and learns by sad experience the practical methods of the police in dealing with criminals and the agreeable but deceptive character of the pleasant fiction of the presumption of innocence.

CHAPTER II. Preparing a Criminal Case for Trial

When the prosecuting attorney in a great criminal trial arises to open the case to the impanelled jury, very few, if any, of them have the slightest conception of the enormous expenditure of time, thought and labor which has gone into the preparation of the case and made possible his brief and easily delivered speech. For in this opening address of his there must be no flaw, since a single misstated or overstated fact may prejudice the jury against him and result in his defeat. Upon it also depends the jury's first impression of the case and of the prosecutor himself—no inconsiderable factor in the result. In a trial of importance its careful construction with due regard to what facts shall be omitted (in order to enhance their dramatic effect when ultimately proven) may well occupy the district attorney every evening for a week. But if the speech itself has involved study and travail, it is as nothing compared with the amount required by that most important feature of every criminal case—the selection of the jury.

For a month before the trial, or whenever it may be that the jury has been drawn, every member upon the panel has been subjected to an unseen scrutiny. The prosecutor, through his own or through hired sleuths, has examined into the family history,

the business standing and methods, the financial responsibility, the political and social affiliations, and the personal habits and "past performances" of each and every talesman. When at the beginning of the trial they, one by one, take the witness-chair (on what is called the voir dire) to subject themselves to an examination by both sides as to their fitness to serve as jurors in the case, the district attorney probably has close fit hand a rather detailed account of each, and perchance has great difficulty in restraining a smile. When some prospective juror, in his eagerness either to serve or to escape, deliberately equivocates in answer to an important question as to his personal history.

"Are you acquainted with the accused or his family?" mildly inquires the assistant prosecutor. "No—not at all," the talesman may blandly reply.

The answer, perhaps, is literally true, and yet the prosecutor may be pardoned for murmuring.

"Liar!" to himself as he sees that his memorandum concerning the juror's qualifications states that he belongs to the same "lodge" with the prisoner's uncle by marriage and carries an open account on his books with the defendant's father.

"I think we will excuse Mr. Ananias," politely remarks the prosecutor; then in an undertone he turns to his chief and mutters: "The old rascal! He would have knifed us if we'd given him the chance!" And all this time the disgruntled Mr. Ananias is wondering why, if he didn't "know the defendant or his family," he was not accepted as a juror.

Of course, every district attorney has, or should have, information as to each talesman's actual capabilities as a juror and something of a record as to how he has acted under fire. If he is a member of the "special" panel, it is easy to find out whether he has ever acquitted or convicted in any cause celebre, and if he has acquitted any plainly guilty defendant in the past it is not likely that his services will be required. If, however, he has convicted in such a case the district attorney may try to lure the other side into accepting him by making it appear that he himself is doubtful as to the juror's desirability. Sometimes persons accused of crime themselves, and actually under indictment, find their way onto the panels, and more than one ex-convict has appeared there in some inexplicable fashion. But to find them out may well require a double shift of men working day and night for a month before the case is called, and what may appear to be the most trivial fact thus discovered may in the end prove the decisive argument for or against accepting the juror.

Panel after panel may be exhausted before a jury in a great murder trial has been selected, for each side in addition to its challenges for "cause" or "bias" has thirty[1] peremptory ones which it may exercise arbitrarily. If the writer's recollection is not at fault, the large original panel drawn in the first Molineux trial was used up and several others had to be drawn until eight hundred talesmen had been interrogated before the jury was

[1] In the State of New York.

finally selected. It is usual to examine at least fifty in the ordinary murder case before a jury is secured.

It may seem to the reader that this scrutiny of talesmen is not strictly preparation for the trial, but, in fact, it is fully as important as getting ready the facts themselves; for a poor jury, either from ignorance or prejudice, will acquit on the same facts which will lead a sound jury to convict. A famous prosecutor used to say, "Get your jury—the case will take care of itself."

But as the examination of the panel and the opening address come last in point of chronology it will be well to begin at the beginning and see what the labors of the prosecutor are in the initial stages of preparation. Let us take, for example, some notorious case, where an unfortunate victim has died from the effects of a poisoned pill or draught of medicine, or has been found dead in his room with a revolver bullet in his heart. Some time before the matter has come into the hands of the prosecutor, the press and the police have generally been doing more or less (usually less) effective work upon the case. The yellow journals have evolved some theory of who is the culprit and have loosed their respective reporters and "special criminologists" upon him. Each has its own idea and its own methods—often unscrupulous. And each has its own particular victim upon whom it intends to fasten the blame. Heaven save his reputation! Many an innocent man has been ruined for life through the efforts of a newspaper "to make a case," and, of course, the same thing, though happily in a lesser degree, is true of the police and of some prosecutors

as well.

In every great criminal case there are always four different and frequently antagonistic elements engaged in the work of detection and prosecution—first, the police; second, the district attorney; third, the press; and, lastly, the personal friends and family of the deceased or injured party. Each for its own ends —be it professional pride, personal glorification, hard cash, or revenge—is equally anxious to find the evidence and establish a case. Of course, the police are the first ones notified of the commission of a crime, but as it is now almost universally their duty to inform at once the coroner and also the district attorney thereof, a tripartite race for glory frequently results which adds nothing to the dignity of the administration of criminal justice.

The coroner is at best no more than an appendix to the legal anatomy, and frequently he is a disease. The spectacle of a medical man of small learning and less English trying to preside over a court of first instance is enough to make the accused himself chuckle for joy.

Not long ago the coroners of New York discovered that, owing to the fact that the district attorney or his representatives generally arrived first at the scene of any crime, there was nothing left for the "medicos" to do, for the district attorney would thereupon submit the matter at once to the grand jury instead of going through the formality of a hearing in the coroner's court. The legal medicine men felt aggrieved, and determined to be such early birds that no worm should escape

them. Accordingly, the next time one of them was notified of a homicide he raced his horse down Madison Avenue at such speed that he collided with a trolley car and broke his leg.

Another complained to the district attorney that the assistants of the latter, who had arrived at the scene of an asphyxiation before him, had bungled everything.

"Ach, dose young men!" he exclaimed, wringing his hands —"Dose young men, dey come here and dey opened der vindow and let out der gas and all mine evidence esgaped."

It is said that this interesting personage once instructed his jury to find that "the diseased came to his death from an ulster on the stomach."

These anecdotes are, perhaps, what judges would call obiter dicta, yet the coroner's court has more than once been utilized as a field in the actual preparation of a criminal case. When Roland B. Molineux was first suspected of having caused the death of Mrs. Adams by sending the famous poisoned package of patent medicine to Harry Cornish through the mails, the assistant district attorney summoned him as a witness to the coroner's court and attempted to get from him in this way a statement which Molineux would otherwise have refused to make.

When all the first hullabaloo is over and the accused is under arrest and safely locked up, it is usually found that the police have merely run down the obvious witnesses and made a prima facie case. All the finer work remains to be done either by the district attorney himself or by the detective bureau working under his

immediate direction or in harmony with him. Little order has been observed in the securing of evidence. Every one is a fish who runs into the net of the police, and all is grist that comes to their mill. The district attorney sends for the officers who have worked upon the case and for the captain or inspector who has directed their efforts, takes all the papers and tabulates all their information. His practiced eye shows him at once that a large part is valueless, much is contradictory, and all needs careful elaboration. A winnowing process occurs then and there; and the officers probably receive a "special detail" from headquarters and thereafter take their orders from the prosecutor himself. The detective bureau is called in and arrangements made for the running down of particular clues. Then he will take off his coat, clear his desk, and get down to work.

Of course, his first step is to get all the information he can as to the actual facts surrounding the crime itself. He immediately subpoenas all the witnesses, whether previously interrogated by the police or not, who know anything about the matter, and subjects them to a rigorous cross-examination. Then he sends for the police themselves and cross-examines them. If it appears that any witnesses have disappeared he instructs his detectives how and where to look for them. Often this becomes in the end the most important element in the preparation for the trial. Thus in the Nan Patterson case the search for and ultimate discovery of Mr. and Mrs. Morgan Smith (the sister and brother-in-law of the accused) was one of its most dramatic features. After they

had been found it was necessary to indict and then to extradite them in order to secure their presence within the jurisdiction, and when all this had been accomplished it proved practically valueless.

It frequently happens that an entire case will rest upon the testimony of a single witness whose absence from the jurisdiction would prevent the trial. An instance of such a case was that of Albert T. Patrick, for without the testimony of his alleged accomplice—the valet, Jones—he could not have been convicted of murder. The preservation of such a witness and his testimony thus becomes of paramount importance, and rascally witnesses sometimes enjoy considerable ease, if not luxury, at the expense of the public while waiting to testify. Often, too, a case of great interest will arise where the question of the guilt of the accused turns upon the evidence of some one person who, either from mercenary motives or because of "blood and affection," is unwilling to come to the fore and tell the truth. A striking case of this sort occurred some ten years ago. The "black sheep" of a prominent New York family forged the name of his sister to a draft for thirty thousand dollars. This sister, who was an elderly woman of the highest character and refinement, did not care to pocket the loss herself and declined to have the draft debited to her account at the bank. A lawsuit followed, in which the sister swore that the name signed to the draft was not in her handwriting. She won her case, but some officious person laid the matter before the district attorney. The forger was arrested

and his sister was summoned before the grand jury. Here was a pleasant predicament. If she testified for the State her brother would undoubtedly go to prison for many years, to say nothing of the notoriety for the entire family which so sensational a case would occasion. She, therefore, slipped out of the city and sailed for Europe the night before she was to appear before the grand jury. Her brother was in due course indicted and held for trial in large bail, but there was and is no prospect of convicting him for his crime so long as his sister remains in the voluntary exile to which she has subjected herself. She can never return to New York to live unless something happens either to the indictment or her brother, neither of which events seems likely in the immediate future.

Perhaps, if the case is one of shooting, the weapon has vanished. Its discovery may lead to the finding of the murderer. In one instance where a body was found in the woods with a bullet through the heart, there was nothing to indicate who had committed the crime. The only scintilla of evidence was an exploded cartridge—a small thing on which to build a case. But the district attorney had the hammer marks upon the cap magnified several hundred times and then set out to find the rifle which bore the hammer which had made them. Thousands of rifles all over the State were examined. At last in a remote lumber camp was found the weapon which had fired the fatal bullet. The owner was arrested, accused of the murder, and confessed his crime. In like manner, if it becomes necessary to determine

where a typewritten document was prepared the letters may be magnified, and by examining the ribbons of suspected machines the desired fact may be ascertained. The magnifying glass still plays an important part in detecting crime, although usually in ways little suspected by the general public.

On the other hand, where the weapon has not been spirited away the detectives may spend weeks in discovering when and where it was purchased. Every pawnshop, every store where a pistol could be bought, is investigated, and under proper circumstances the requisite evidence to show deliberation and premeditation may be secured.

These investigations are naturally conducted at the very outset of the preparation of the case.

The weapon, in seven trials out of ten, is the most important thing in it. By its means it can generally be demonstrated whether the shooting was accidental or intentional—and whether or not the killing was in self-defence.

Where this last plea is interposed it is usually made at once upon the arrest, the accused explaining to the police that he fired only to save his own life. In such a situation, where the killing is admitted, practically the entire preparation will centre upon the most minute tests to determine whether or not the shot was fired as the accused claims that it was. The writer can recall at least a dozen cases in his own experience where the story of the defendant, that the revolver was discharged in a hand-to-hand struggle, was conclusively disproved by experimenting with the

weapon before the trial. There was one homicide in which a bullet perforated a felt cap and penetrated the forehead of the deceased. The defendant asserted that he was within three feet of his victim when he fired, and that the other was about to strike him with a bludgeon. A quantity of felt, of weight similar to that of the cap, was procured and the revolver discharged at it from varying distances. A microscopic examination showed that certain discolorations around the bullet-hole (claimed by the defence to be burns made by the powder) were, in fact, grease marks, and that the shot must have been fired from a distance of about fifteen feet. The defendant was convicted on his own story, supplemented by the evidence of the witness who made the tests.

The most obvious and first requirement is, as has been said, to find the direct witnesses to the facts surrounding the crime, commit their statements under oath to writing, so that they cannot later be denied or evaded, and make sure that these witnesses will not only hold no intercourse with the other side, but will be on hand when wanted. This last is not always an easy task, and various expedients often have to be resorted to, such as placing hostile witnesses under police surveillance, or in some cases in "houses of detention," and hiding others in out-of-the-way places, or supplying them with a bodyguard if violence is to be anticipated. When the proper time comes the favorable witnesses must be duly drilled or coached, which does not imply anything improper, but means merely that they must be instructed how to deliver their testimony, what answers are

expected to certain questions, and what facts it is intended to elicit from them. Witnesses are often offended and run amuck because they are not given a chance upon the stand to tell the story of their lives. This must be guarded against and steps taken to have their statements given in such a way that they are audible and intelligible. A few lessons in elementary elocution are generally vitally necessary. The man with the bassoon voice must be tamed, and the birdlike old lady made to chirp more loudly. But all this is the self-evident preparation which must take place in every case, and while highly important is of far less interest than the development of the circumstantial evidence which is the next consideration of the district attorney.

The discovery and proper proof of minute facts which tend to demonstrate the guilt of an accused are the joy of the natural prosecutor, and he may in his enthusiasm spend many thousands of dollars on what seems, and often is, an immaterial matter. Youthful officials intrusted with the preparation of important cases often become unduly excited and forget that the taxpayers are paying the bills. The writer remembers sitting beside one of these enthusiasts during a celebrated trial. A certain woman witness had incidentally testified to a remote meeting with the deceased at which a certain other woman was alleged to have been present. The matter did not seem of much interest or importance, but the youth in question seized a yellow pad and excitedly wrote in blue pencil, "Find Birdie" (the other lady) "at any cost!" This he handed to a detective, who hastened

importantly away. It is to be hoped that "Birdie" was found speedily and in an inexpensive manner.

When the case against Albert T. Patrick, later convicted of the murder of the aged William M. Rice, was in course of preparation, it was found desirable to show that Patrick had called up his accomplice on the telephone upon the night of the murder. Accordingly, the telephone company was compelled to examine several hundred thousand telephone slips to determine whether or not this had actually occurred. While the fact was established in the affirmative, the company now destroys its slips in order not to have to repeat the performance a second time.

Likewise, in the preparation of the Molineux case it became important to demonstrate that the accused had sent a letter under an assumed name ordering certain remedies. As a result, one of the employees of the patent-medicine company spent several months going over their old mail orders and comparing them with a certain sample, until at last the letter was unearthed. Of course, the district attorney had to pay for it, and it was probably worth what it cost to the prosecution, although Molineux's conviction was reversed by the Court of Appeals and he was acquitted upon his second trial.

The danger is, however, that a prosecutor who has an unlimited amount of money at his disposal may be led into expenditures which are hardly justified simply because he thinks they may help to secure a conviction. Nothing is easier than to waste money in this fashion, and public officials sometimes

spend the county's money with considerably more freedom than they would their own under similar circumstances.

The legitimate expenses connected with the preparation of every important case are naturally large. For example, diagrams must be prepared, photographs taken of the place of the crime, witnesses compensated for their time and their expenses paid, and, most important of all, competent experts must be engaged. This leads us to an interesting aspect of the modern jury trial.

When no other defence to homicide is possible the claim of insanity is frequently interposed. Nothing is more confusing to the ordinary juryman than trying to determine the probative value of evidence touching unsoundness of mind, and the application thereto of the legal test of criminal responsibility. In point of fact, juries are hardly to be blamed for this, since the law itself is antiquated and the subject one abounding in difficulty. Unfortunately the opportunity for vague yet damaging testimony on the part of experts, the ease with which any desired opinion can be defended by a slight alteration in the hypothetical facts, and the practical impossibility of exposure, have been seized upon with avidity by a score or more of unscrupulous alienists who are prepared to sell their services to the highest bidder. These men are all the more dangerous because, clever students of mental disease and thorough masters of their subject as they are, they are able by adroit qualifications and skilful evasions to make half-truths seem as convincing as whole ones. They ask and receive large sums for their services, and their dishonest

testimony must be met and refuted by the evidence of honest physicians, who, by virtue of their attainments, have a right to demand substantial fees. Even so, newspaper reports of the expense to the State of notorious trials are grossly exaggerated. The entire cost of the first Thaw trial to the County of New York was considerably less than twenty thousand dollars, and the second trial not more than half that amount. To the defence, however, it was a costly matter, as the recent schedules in bankruptcy of the defendant show. Therein it appears that one of his half-dozen counsel still claims as owing to him for his services on the first trial the modest sum of thirty-five thousand dollars. The cost of the whole defence was probably ten times that sum. Most of the money goes to the lawyers, and the experts take the remainder.

It goes without saying that both prosecutor and attorney for the defence must be masters of the subject involved. A trial for poisoning means an exhaustive study not only of analytic chemistry, but of practical medicine on the part of all the lawyers in the case, while a plea of insanity requires that, for the time being, the district attorney shall become an alienist, familiar with every aspect of paranoia, dementia praecox, and all other forms of mania. He must also reduce his knowledge to concrete, workable form, and be able to defeat opposing experts on their own ground. But such knowledge comes only by prayer and fasting—or, perhaps, rather by months of hard and remorseless grind.

The writer once prosecuted a druggist who had, by mistake, filled a prescription for a one-fourth-grain pill of calomel with a one-fourth-grain pill of morphine. The baby for whom the pill was intended died in consequence. The defence was that the prescription had been properly filled, but that the child was the victim of various diseases, from acute gastritis to cerebro-spinal meningitis. In preparation the writer was compelled to spend four hours every evening for a week with three specialists, and became temporarily a minor expert on children's diseases. To-day he is forced to admit that he would not know a case of acute gastritis from one of mumps. But the druggist was convicted.

Yet it is not enough to prepare for the defence you believe the accused is going to interpose. A conscientious preparation means getting ready for any defence he may endeavor to put in. Just as the prudent general has an eye to every possible turn of the battle and has, if he can, re-enforcements on the march, so the prosecutor must be ready for anything, and readiest of all for the unexpected. He must not rest upon the belief that the other side will concede any fact, however clear it may seem. Some cases are lost simply because it never occurs to the district attorney that the accused will deny something which the State has twenty witnesses to prove. The twenty witnesses are, therefore, not summoned on the day of trial, the defendant does deny it, and as it is a case of word against word the accused gets the benefit of the doubt and, perhaps, is acquitted.

No case is properly prepared unless there is in the court-room

every witness who knows anything about any aspect of the case. No one can foretell when the unimportant will become the vital. Most cases turn on an unconsidered point. A prosecutor once lost what seemed to him the clearest sort of a case. When it was all over, and the defendant had passed out of the courtroom rejoicing, he turned to the foreman and asked the reason for the verdict.

"Did you hear your chief witness say he was a carpenter?" inquired the foreman.

"Why, certainly," answered the district attorney,—

"Did you hear me ask him what he paid for that ready-made pine door he claimed to be working on when he saw the assault?"

The prosecutor recalled the incident and nodded.

"Well, he said ten dollars—and I knew he was a liar. A door like that don't cost but four-fifty!"

It is, perhaps, too much to require a knowledge of carpentry on the part of a lawyer trying an assault case. Yet the juror was undoubtedly right in his deduction.

In a case where insanity is the defence, the State must dig up and have at hand every person it can find who knew the accused at any period of his career. He will probably claim that in his youth he was kicked in a game of foot-ball and fractured his skull, that later he fell into an elevator shaft and had concussion of the brain, or that he was hit on the head by a burglar. It is usually difficult, if not impossible, to disprove such assertions, but the prosecutor must be ready, if he can, to show that foot-ball

was not invented until after the defendant had attained maturity, that it was some other man who fell down the elevator shaft, and to produce the burglar to deny that the assault occurred. Naturally, complete preparation for an important trial demands the presence of many witnesses who ultimately are not needed and who are never called. Probably in most such cases about half the witnesses do not testify at all. Most of what has been said relates to the preparation for trial of cases where the accused is already under arrest when the district attorney is called into the case. If this stage has not been reached the prosecutor may well be called upon to exercise some of the functions of a detective in the first instance.

A few years ago it was brought to the attention of the New York authorities that many blackmailing letters were being received bearing the name of "Lewis Jarvis." These were of a character to render the apprehension of the writer of them a matter of much importance. The letters directed that the replies be sent to a certain box in the New York post-office, but as the boxes are numerous and close together it seemed doubtful if "Lewis Jarvis" could be detected when he called for his mail. The district attorney, the police, and the post-office officials finally evolved the scheme of plugging the lock of "Lewis Jarvis's" box with a match. The scheme worked, for "Jarvis," finding that he could not use his key, went to the delivery window and asked for his mail. The very instant the letters reached his hand the gyves were upon the wrists of one of the best-known attorneys in the

city.

When the district attorney has been apprised that a crime has been committed, and that a certain person is the guilty party, he not infrequently allows the suspect to go his way under the careful watch of detectives, and thus often secures much new evidence against him. In this way it is sometimes established that the accused has endeavored to bribe the witnesses and to induce them to leave the State, while the whereabouts of stolen loot is often discovered. In most instances, however, the district attorney begins where the police leave off, and he merely supplements their labors and prepares for the actual trial itself. But the press he has always with him, and from the first moment after the crime up to the execution of the sentence or the liberation of the accused, the reporters dog his footsteps, sit on his doorstep, and deluge him with advice and information.

Now a curious feature about the evidence "worked up" by reporters for their papers is that little of it materializes when the prosecutor wishes to make use of it. Of course, some reporters do excellent detective work, and there are one or two veterans attached to the criminal courts in New York City who, in addition to their literary capacities, are natural-born sleuths, and combine with a knowledge of criminal law, almost as extensive as that of a regular prosecutor, a resourcefulness and nerve that often win the case for whichever side they espouse. I have frequently found that these men knew more about the cases which I was prosecuting than I did myself, and a tip from them has more

than once turned defeat into victory. But newspaper men, for one reason or another, are loath to testify, and usually make but poor witnesses. They feel that their motives will be questioned, and are naturally unwilling to put themselves in an equivocal position. The writer well remembers that in the Mabel Parker case, where the defendant, a young and pretty woman, had boasted of her forgeries before a roomful of reporters, it was impossible, when her trial was called, to find more than one of them who would testify—and he had practically to be dragged to the witness chair. In point of fact, if reporters made a practice of being witnesses it would probably hurt their business. But, however much "faked" news may be published, a prosecutor who did not listen to all the hints the press boys had to give would make a great mistake; and as allies and advisers they are often invaluable, for they can tell him where and how to get evidence of which otherwise he would never hear.

The week before a great case is called is a busy one for the prosecutor in charge. He is at his office early to interview his main witnesses and go over their testimony with them so that their regular daily work may not be interrupted more than shall be actually necessary. Some he cautions against being overenthusiastic and others he encourages to greater emphasis. The bashful "cop" is badgered until at last he ceases to begin his testimony in the cut-and-dried police fashion.

"On the morning of the twenty-second of July, about 3.30 A.M., while on post at the corner of Desbrosses Street—," he

starts.

"Oh, quit that!" shouts the district attorney. "Tell me what you saw in your own words."

The "cop" blushes and stammers:

"Aw, well, on the morning of the twenty-second of July, about 3.30 A.M."

"Look here!" yells the prosecutor, jumping to his feet and shaking his fist at him, "do you want to be taken for a d—n liar? 'Morning of the twenty-second of July, about 3.30 A.M., while on post I' You never talked like that in your life."

By this time the "cop" is "mad clear through."

"I'm no liar!" he retorts. "I saw the – pull his gun and shoot!"

"Well, why didn't you say so?" laughs the prosecutor, and the officer mollified with a cigar, dimly perceives the objectionable feature of his testimony.

About this time one of the sleuths comes in to report that certain much-desired witnesses have been "located" and are in custody downstairs. The assistant makes immediate preparation for taking their statements. Then one of the experts comes in for a chat about a new phase of the case occasioned by the discovery that the defendant actually did have spasms when an infant. The assistant wisely makes an appointment for the evening. A telegram arrives saying that a witness for the defence has just started for New York from Philadelphia and should be duly watched on arrival. The district attorney sends for the assistant to inquire if he has looked up the law on similar cases in Texas and

Alabama—which he probably has not done; and a friend on the telephone informs him that Tomkins, who has been drawn on the jury, is a boon companion of the prisoner and was accustomed to play bridge with him every Sunday night before the murder.

Coincidently, some private detectives enter with a long report on the various members of the panel, including the aforesaid Tomkins, whom they pronounce to be "all right," and as never having, to their knowledge, laid eyes on the accused. Finally, in despair, the prosecutor locks himself in his library with a copy of the Bible, "Bartlett's Familiar Quotations," and a volume of celebrated speeches, to prepare his summing up, for no careful trial lawyer opens a case without first having prepared, to some extent, at least, his closing address to the jury. He has thought about this for weeks and perhaps for months. In his dreams he has formulated syllogisms and delivered them to imaginary yet obstinate talesman. He has glanced through many volumes for similes and quotations of pertinency. He has tried various arguments on his friends until he knows just how, if he succeeds in proving certain facts and the defence expected is interposed, he is going to convince the twelve jurors that the defendant is guilty and, perhaps, win an everlasting reputation as an orator himself.

This superficial sketch of how an important criminal case is got ready for trial would be incomplete without some further reference to something which has been briefly hinted at before—preparation upon its purely legal aspect. This may well

demand almost as much labor as that required in amassing the evidence. Yet a careful and painstaking investigation of the law governing every aspect of the case is indispensable to success. The prosecutor with a perfectly clear case may see the defendant walk out of court a free man, simply because he has neglected to acquaint himself with the various points of law which may arise in the course of the trial, and the lawyer for an accused may find his client convicted upon a charge to which he has a perfectly good legal defence, for the same reason.

Looking at it from the point of view of the prisoner's counsel, it is obvious that it is quite as efficacious to free your client on a point of law, without having the case go to the jury at all, as to secure an acquittal at their hands.

At the conclusion of the evidence introduced in behalf of the State there is always a motion made to dismiss the case on the ground of alleged insufficiency in the proof. This has usually been made the subject of the most exhaustive study by the lawyers for the defence, and requires equal preparation on the part of the prosecutor. The writer recalls trying a bankrupt, charged with fraud, where the lawyer for the defendant had written a brief of some three hundred pages upon the points of law which he proposed to argue to the court upon his motion to acquit. But, unfortunately, his client pleaded guilty and the volume was never brought into play.

But a mastery of the law, a thorough knowledge and control of the evidence, a careful preparation for the opening and closing

addresses, and an intimate acquaintance with the panel from which the jury is to be drawn are by no means the only elements in the preparation for a great legal battle. One thing still remains, quite as important as the rest—the selection of the best time and the best court for the trial. "A good beginning" in a criminal case means a beginning before the right judge, the proper jury, and at a time when that vague but important influence known as public opinion augurs success. A clever criminal lawyer, be he prosecutor or lawyer for the defendant, knows that all the preparation in the world is of no account provided his case is to come before a stupid or biased judge, or a prejudiced or obstinate jury. Therefore, each side, in a legal battle of importance, studies, as well as it can, the character, connections, and cast of mind of the different judges who may be called upon to hear the case, and, like a jockey at the flag, tries to hurry or delay, as the case may be, until the judicial auspices appear most favorable. A lawyer who has a weak defence seeks to bring the case before a weak judge, or, if public clamor is loud against his client, makes use of every technical artifice to secure delay, by claiming that there are flaws in the indictment, or by moving for commissions to take testimony in distant points of the country. The opportunities for legal procrastination are so numerous that in a complicated case the defence may often delay matters for over a year. This may be an important factor in the final result.

Yet even this is not enough, for, ultimately, it is the judge's charge to the jury which is going to guide their deliberations and,

in large measure, determine their verdict. The lawyers for the defence, therefore, prepare long statements of what they either believe or pretend to believe to be the law. These statements embrace all the legal propositions, good or bad, favorable to their side of the case. If they can induce the judge to follow these so much the better for their client, for even if they are not law it makes no difference, since the State has no appeal from an acquittal in a criminal case, no matter how much the judge has erred. In the same way, but not in quite the same fashion, the district attorney prepares "requests to charge," but his desire for favorable instructions should be, and generally is, curbed by the consideration that if the judge makes any mistake in the law and the defendant is convicted he can appeal and upset the case. Of course, some prosecutors are so anxious to convict that they will wheedle or deceive a judge into giving charges which are not only most inimical to the prisoner, but so utterly unsound that a reversal is sure to follow; but when one of these professional bloodhounds is baying upon the trail all he thinks of is a conviction—that is all he wants, all the public will remember; to him will be the glory; and when the case is finally reversed he will probably be out of office. These "requests" cover pages, and touch upon every phase of law applicable or inapplicable to the case. Frequently they number as many as fifty, sometimes many more. It is "up to" the judge to decide "off the bat" which are right and which are wrong. If he guesses that the right one is wrong or the wrong one right the defendant gets a new trial.

CHAPTER III. Sensationalism and Jury Trials

For the past twenty-five years we have heard the cry upon all sides that the jury system is a failure, and to this general indictment is frequently added the specification that the trials in our higher courts of criminal justice are the scenes of grotesque buffoonery and merriment, where cynical juries recklessly disregard their oaths and where morbid crowds flock to satisfy the cravings of their imaginations for details of blood and sexuality.

It is unnecessary to question the honesty of those who thus picture the administration of criminal justice in America. Indeed, thus it probably appears to them. But before such an arraignment of present conditions in a highly civilized and progressive nation is accepted as final, it is well to examine into its inherent probabilities and test it by what we know of the actual facts.

In the first place, it should be remembered that the jury was instituted and designed to protect the English freeman from tyranny upon the part of the crown. Judges were, and sometimes still are, the creatures of a ruler or unduly subject to his influence. And that ruler neither was, nor is, always the head of the nation; but just as in the days of the Normans he might have been a

powerful earl whose influence could make or unmake a judge, so to-day he may be none the less a ruler if he exists in the person of a political boss who has created the judge before whom his political enemy is to be tried. The writer has seen more than one judge openly striving to influence a jury to convict or to acquit a prisoner at the dictation of such a boss, who, not content to issue his commands from behind the arras, came to the courtroom and ascended the bench to see that they were obeyed. Usually the jury indignantly resented such interference and administered a well-merited rebuke by acting directly contrary to the clearly indicated wishes of the judge.

But while admitting its theoretic value as a bulwark of liberty, the modern assailant of the jury brushes the consideration aside by asserting that the system has "broken down" and "degenerated into a farce."

Let us now see how much of a farce it is. If four times out of five a judge rendered decisions that met with general approval, he would probably be accounted a highly satisfactory judge. Now, out of every one hundred indicted prisoners brought to the bar for trial, probably fifteen ought to be acquitted if prosecuted impartially and in accordance with the strict rules of evidence. In the year 1910 the juries of New York County convicted in sixty-six per cent of the cases before them. If we are to test fairly the efficiency of the system, we must deduct from the thirty-four acquittals remaining the fifteen acquittals which were justifiable. By so doing we shall find that in the year 1910 the New York

County juries did the correct thing in about eighty-one cases out of every hundred. This is a high percentage of efficiency.[2] Is it likely that any judge would have done much better?

After a rather long experience as a prosecutor, in which he conducted many hundreds of criminal cases, the writer believes that the ordinary New York City jury finds a correct general verdict four times out of five. As to talesmen in other localities he has no knowledge or reliable information. It seems hardly possible, however, that juries in other parts of the United States could be more heterogeneous or less intelligent than those before which he formed his conclusions. Of course, jury judgments are sometimes flagrantly wrong. But there are many verdicts popularly regarded as examples of lawlessness which, if examined calmly and solely from the point of view of the evidence, would be found to be the reasonable acts of honest and intelligent juries.

For example, the acquittal of Thaw upon the ground of insanity is usually spoken of as an illustration of sentimentality on the part of jurymen, and of their willingness to be swayed by their emotions where a woman is involved. But few clearer cases of insanity have been established in a court of justice. The district attorney's own experts had pronounced the defendant a hopeless paranoiac; the prosecutor had, at a previous trial, openly declared the same to be his own opinion; and the evidence was

[2] The following table gives the yearly percentages of convictions and acquittals by verdict in New York County since 1901:

convincing. At the time it was rendered, the verdict was accepted as a foregone conclusion. To-day the case is commonly cited as proof of the gullibility of juries and of the impossibility of convicting a rich man of a crime.

There will always be some persons who think that every defendant should be convicted and feel aggrieved if he is turned out by the jury. Yet they entirely forget, in their displeasure at the acquittal of a man whom they instinctively "know" to be guilty, that the jury probably had exactly the same impression, but were obliged under their oaths to acquit because of an insufficiency of evidence.

An excellent illustration of such a case is that of Nan Patterson. She is commonly supposed to have attended, upon the night of her acquittal, a banquet at which one of her lawyers toasted her as "the guilty girl who beat the case." Whether she was guilty or not, there is a general impression that she murdered Caesar Young. Yet the writer, who was present throughout the trial, felt at the conclusion of the case that there was a fairly reasonable doubt of her guilt. Even so, the jury disagreed, although the case is usually referred to as an acquittal and a monument to the sentimentality of juries.

The acquittal of Roland B. Molineux is also recalled as a case where a man, previously proved guilty, managed to escape. The writer, who was then an assistant district attorney, made a careful study of the evidence at the time, and feels confident that the great majority of the legal profession would agree with him

in the opinion that the Court of Appeals had no choice but to reverse the defendant's first conviction on account of the most prejudicial error committed at the trial, and that the jury who acquitted him upon the second occasion had equally no choice when the case was presented with a proper regard to the rules of evidence and procedure. Indeed, on the second trial the evidence pointed almost as convincingly toward another person as toward the defendant.

I have mentioned the Patterson, Thaw, and Molineux trials because they are cases commonly referred to in support of the general contention that the jury system is a failure. But I am inclined to believe that any single judge, bench of judges, or board of commissioners would have reached the same result as the juries did in these instances.

It is quite true that juries, for rather obvious reasons, are more apt to acquit in murder cases than in others. In the first place, save where the defendant obviously belongs to the vicious criminal class, a jury finds it somewhat difficult to believe, unless overwhelming motive be shown, that he could have deliberately taken another's life. Thus, with sound reason, they give great weight to the plea of self-defence which the accused urges upon them. He is generally the only witness. His story has to be disproved by circumstantial evidence, if indeed there be any. Frequently it stands alone as the only account of the homicide. Thus murder cases are almost always weaker than others, since the chief witness has been removed by death;

while at the same time the nature of the punishment leads the jury unconsciously to require a higher degree of proof than in cases where the consequences are less abhorrent. All this is quite natural and inevitable. Moreover, homicide cases as a rule are better defended than others, a fact which undoubtedly affects the result. These considerations apply to all trials for homicide, notorious or otherwise, the results of which in New York County for ten years are set forth in the following table:

YEAR	CONVICTIONS	ACQUITTALS	CONVICTIONS PER CENT	ACQUITTALS PER CENT
1901	25	17	60	40
1902	31	11	74	26
1903	42	8	84	16
1904	37	14	72	28
1905	32	13	71	29
1906	53	22	70	30
1907	39	10	78	22
1908	35	17	67	33
1909	43	11	80	20
1910	45	15	75	25
TOTAL	382	138	Av. 74	Av. 27

A popular impression exists at the present time that a man convicted of murder has but to appeal his case on some technical ground in order to secure a reversal, and thus escape the consequences of his crime. How wide of the mark such a belief may be, at least so far as one locality is concerned, is shown by the fact that in New York State, from 1887 to 1907, there were 169 decisions by the Court of Appeals on appeals from

convictions of murder in the first degree, out of which there were only twenty-nine reversals. Seven of these defendants were again immediately tried and convicted, and a second time appealed, upon which occasion only two were successful, while five had their convictions promptly affirmed. Thus, so far as the ultimate triumph of justice is concerned, out of 169 cases in that period the appellants finally succeeded in twenty-two only.

Since 1902 there have been twenty-seven decisions rendered in first-degree murder cases by the Court of Appeals, with only three reversals.[3] The more important convictions throughout the State are affirmed with great regularity.

As to the conduct of such cases, the writer's own experience is that a murder trial is the most solemn proceeding known to the law. He has prosecuted at least fifty men for murder, and convicted more than he cares to remember. Such trials are invariably dignified and deliberate so far as the conduct of the legal side of the case is concerned. No judge, however unqualified for the bench; no prosecutor, however light-minded; no lawyer however callous, fails to feel the serious nature of the transaction or to be affected strongly by the fact that he is dealing with life, and death. A prosecutor who openly laughed or sneered at a prisoner charged with murder would severely injure his cause. The jury, naturally, are overwhelmed with the gravity of the occasion and the responsibility resting upon them.

In the Patterson, Thaw, and Molineux cases the evidence,

[3] Written in 1909.

unfortunately, dealt with unpleasant subjects and at times was revolting, but there was a quiet propriety in the way in which the witnesses were examined that rendered it as inoffensive as it could possibly be. Outside the court-room the vulgar crowd may have spat and sworn; and inside no doubt there were degenerate men and women who eagerly strained their ears to catch every item of depravity. But the throngs that filled the courtroom were quiet and well ordered, and the justified interested outnumbered the morbid.

The writer deprecates the impulse which leads judges, from a feeling that justice should be publicly administered, to throw wide the doors of every courtroom, irrespective of the subject-matter of the trial. We need have no fear of Star Chamber proceedings in America, and no harm would be done by excluding from the courtroom all persons who have no business there.

It is, of course, not unnatural that in the course of a trial occupying weeks or months the tension should occasionally be relieved by a gleam of humor. After one has been busy trying a case for a couple of weeks one goes to court and sets to work in much the same frame of mind in which one would attack any other business. But the fact that a small boy sometimes sees something funny at a funeral, or a bevy of giggling shop-girls may be sitting in the gallery at a fashionable wedding, argues little in respect to the solemnity or beauty of the service itself.

What are the celebrated cases—the trials that attract the

attention and interest of the public? In the first place, they are the very cases which contain those elements most likely to arouse the sympathy and prejudices of a jury—where a girl has taken the life of her supposed seducer, or a husband has avenged his wife's alleged dishonor. Such cases arouse the public imagination for the very reason that every man realizes that there are two sides to every genuine tragedy of this character—the legal and the natural. Thus, aside from any other consideration, they are the obvious instances where justice is most likely to go astray.

In the next place, the defence is usually in the hands of counsel of adroitness and ability; for even if the prisoner has no money to pay his lawyer, the latter is willing to take the case for the advertising he will get out of it.

Third, a trial which lasts for a long time naturally results in creating in the jury's mind an exaggerated idea of the prisoner's rights, namely, the presumption of innocence and the benefit of the reasonable doubt. For every time that the jury will hear these phrases once in a petty larceny or forgery case, they will hear them in a lengthy murder trial a hundred times. They see the defendant day after day, and the relation becomes more personal. Their responsibility seems greater toward him than toward the defendant in petty cases.

Last, as previously suggested, murder cases are apt to be inherently weaker than others, and more often depend upon circumstantial evidence.

The results of such cases are therefore an inadequate test of

the efficiency of a jury system. They are, in fact, the precise cases where, if at all, the jury might be expected to go wrong.

But juries would go astray far less frequently even in such trials were it not for that most vicious factor in the administration of criminal justice—the "yellow" journal. For the impression that public trials are the scenes of buffoonery and brutality is due to the manner in which these trials are exploited by the sensational papers.

The instant that a sensational homicide occurs, the aim of the editors of these papers is—not to see that a swift and sure retribution is visited upon the guilty, or that a prompt and unqualified vindication is accorded to the innocent, but, on the contrary, so to handle the matter that as many highly colored "stories" as possible can be run about it.

Thus, where the case is perfectly clear against the prisoner, the "yellow" press seeks to bolster up the defence and really to justify the killing by a thinly disguised appeal to the readers' passions. Not infrequently, while the editorial page is mourning the prevalence of homicide, the front columns are bristling with sensational accounts of the home-coming of the injured husband, the heartbreaking confession of the weak and erring wife, and the sneering nonchalance of the seducer, until a public sentiment is created which, if it outwardly deprecates the invocation of the unwritten law, secretly avows that it would have done the same thing in the prisoner's place.

This antecedent public sentiment is fostered from day to

day until it has unconsciously permeated every corner of the community. The juryman will swear that he is unaffected by what he has read, but unknown to himself there are already tiny furrows in his brain along which the appeal of the defence will run.

In view of this deliberate perversion of truth and morals, the euphemisms of a hard-put defendant's counsel when he pictures a chorus girl as an angel and a coarse bounder as a St. George seem innocent indeed. It is not within the rail of the courtroom but within the pages of these sensational journals that justice is made a farce. The phrase "contempt of court" has ceased practically to have any significance whatever. The front pages teem with caricatures of the judge upon the bench, of the individual jurors with exaggerated heads upon impossible bodies, of the lawyers ranting and bellowing, juxtaposed with sketches of the defendant praying beside his prison cot or firing the fatal shot in obedience to a message borne by an angel from on high.

How long would the "unwritten law" play any part in the administration of criminal justice if every paper in the land united in demanding, not only in its editorials, but upon its front pages, that private vengeance must cease? Let the "yellow" newspapers confine themselves simply to an accurate report of the evidence at the trial, with a reiterated insistence that the law must take its course. Let them stop pandering to those morbid tastes which they have themselves created. Let the "Sympathy Sisters," the photographer, and the special artist be excluded

from the court-room. When these things are done, we shall have the same high standard of efficiency upon the part of the jury in great murder trials that we have in other cases.

CHAPTER IV. Why Do Men Kill?

When a shrewd but genial editor called me up on the telephone and asked me how I should like to write an article on the above lurid title, I laughed in his—I mean the telephone's face.

"My dear fellow!" I said (I should only have the nerve to call him that over a wire). "It would ruin me! How could I keep my self-respect and write that kind of sensational stuff—Why do men kill? Why do men eat? Why do men drink? Why do men love? Why do men—"

"Look here!" he interrupted. "I want to know why one man kills another man. If we knew why, maybe we could stop it, couldn't we? We could try to, anyhow. And you know something about it. You've prosecuted nearly a hundred men for murder. Get the facts—that's what I want. Cut the adjectives and morality, and get down to the reasons. Anything particularly undignified about that?" And he rang off.

I arose and walked over to the bookcase on which reposed several shelves of "minutes" of criminal trials. They were dusty and depressing. Practically every one of them was a memento of some poor devil gone to prison or to the chair. Where were they now—and why did they kill—yes, why DID they?

I glanced along the red-labeled backs.

"People versus Candido." Now why did HE kill? I remembered the Italian perfectly. He killed his friend because

the latter had been too attentive to his wife. "People versus Higgins." Why did he? That was a drunken row on a New Year's Eve within the sound of Trinity chimes. "People versus Sterling Greene." Yes, he was a colored man—I recalled the evidence—drink and a "yellow gal." "People versus Mock Duck"-a Chinese feud between the On Leong Tong and the Hip Sing Tong—a vendetta, first one Chink shot and then another, turn and turn about, running back through Mott Street, New York, Boston, San Francisco, until the origin of the quarrel was lost in the dim Celestial mists across the sea. Out of the first four cases the following motives: Jealousy—1. Drink—1. Drink and jealousy —1. Scattering (how can you term a "Tong" row?)—1.

I began to get interested. Supposing I dug out all the homicide cases I had ever tried, what would the result show as to motive for the killing? Would drink and women account for seventy-five per cent? Mentally I ran my eye back over nearly ten years. What OTHER motives had the defendants at the bar had? There was Laudiero—an Italian "Camorrista"—he had killed simply for the distinction it gave him among his countrymen and the satisfaction he felt at being known as a "bad" man—a "capo maestra." There was Joseph Ferrone—pure jealousy again. Hendry—animal hate intensified by drink. Yoscow—a deliberate murder, planned in advance by several of a gang, to get rid of a young bully who had made himself generally unpleasant. There was Childs, who had killed, as he claimed, in self-defence because he was set upon and assaulted by rival runners from another seaman's boarding

house. Really it began to look as if men killed for a lot of reasons.

One consideration at once suggested itself. How about the killings where the murderer is never caught? The prisoners tried for murder are only a mere fraction of those who commit murder. True, and the more deliberate the murder, the greater, unfortunately, the chance of the villain getting away. Still, in cases merely of suspected murder, or in cases where no evidence is taken, it would be manifestly unfair arbitrarily to assign motives for the deed, if deed it was. No, one must start with the assumption, sufficiently accurate under all the circumstances, that the killings in which the killer is caught are fairly representative of killings as a whole.

All crimes naturally tend to divide themselves into two classes —crimes against property and crimes against the person, each class having an entirely different assortment of reasons for their commission.

There can be practically but one motive for theft, burglary, or robbery. It is, of course, conceivable that such crimes might be perpetrated for revenge—to deprive the victim of some highly prized possession. But in the main there is only one object—unlawful gain. So, too, blackmail, extortion, and kidnapping are all the products of the desire for "easy money." But, unquestionably, this is the reason for murder in comparatively few cases.

The usual motive for crimes against the person—assault, manslaughter, mayhem, murder, etc.—is the desire to punish, or

be avenged upon another by inflicting personal pain upon him or by depriving him of his most valuable asset—life. And this desire for retaliation or revenge generally grows out of a recent humiliation received at the hands of the other person, a real or fancied wrong to oneself, a member of one's family, or one's property. But this was too easy an answer to my friend's question. He wanted and deserved more than that, and I set out to give it to him.

My first inquiry was in the direction of original sources. I sought out the man in the district attorney's office who had had the widest general experience and put the question to him. This was Mr. Charles C. Nott, Jr., (now judge of the General Sessions) who had been trying murder cases for nearly ten years. It so happened that he had kept a complete record of all of them and this he courteously placed at my disposal. The list contains sixty-two cases, and the defendants were of divers races. These homicides included seventeen committed in cold blood (about twenty-five per cent, an extraordinary percentage) from varying motives, as follows: One defendant (white) murdered his colored mistress simply to get rid of her; another killed out of revenge because the deceased had "licked" him several times before; another, having quarrelled with his friend over a glass of soda water, later on returned and precipitated a quarrel by striking him, in the course of which he killed him; another because the deceased had induced his wife to desert him; another lay in wait for his victim and killed him without the motive ever

being ascertained; one man killed his brother to get a sum of money, and another because his brother would not give him money; another because he believed the deceased had betrayed the Armenian cause to the Turks; another because he wished to get the deceased out of the way in order to marry his wife; and another because deceased had knocked him down the day before. One man had killed a girl who had ridiculed him; and one a girl who had refused to marry him; another had killed his daughter because she could no longer live in the house with him; one, an informer, had been the victim of a Black Hand vendetta; and the last had poisoned his wife for the insurance money in order to go off with another woman. There were two cases of infanticide, one in which a woman threw her baby into the lake in Central Park, and another in which she gave her baby poison. Besides these murders, five homicides had been committed in the course of perpetrating other crimes, including burglary and robbery.

Passing over three cases of culpable negligence resulting in death, we come to thirty-seven homicides during quarrels, some of which might have been technically classified as murders, but which being committed "in the heat of passion," in practically every instance resulted in a verdict of manslaughter. The quarrels often arose over the most trifling matters. One was a dispute over a broom, another over a horse blanket, another over food, another over a twenty-five cent bet in a pool game, another over a loan of fifty cents, another over ten cents in a crap game, and still another over one dollar and thirty cents in a crap game. Five men were

killed in drunken rows which had no immediate cause except the desire to "start something." One man killed another because he had not prevented the theft of some lumber, one (a policeman) because the deceased would not "move on" when ordered, one because a bartender refused to serve him with any more drinks, and one (a bartender) because the deceased insisted that he should serve more drinks. One man was killed in a quarrel over politics, one in a fuss over some beer, one in a card game, one trying to rob a fruit-stand, one in a dispute with a ship's officer, one in a dance hall row. One man killed another whom he found with his wife, and one wife killed her husband for a similar cause; another wife killed her husband simply because she "could not stand him," and one because he was fighting with their son. One man was killed by another who was trying to collect from him a debt of six hundred dollars. One quarrel resulting in homicide arose because the defendant had pointed out deceased to the police, another because the participants called each other names, and another arose out of an alleged seduction. Three homicides grew out of street rows originating in various ways. One man killed another who was fighting with a friend of the first, a janitor was killed in a "continuous row" which had been going on for a long time, and one homicide was committed for "nothing in particular."

Конец ознакомительного фрагмента.