A LAWYER'S STORY

(1869)

Under an ancient common law rule of evidence, a party to a civil lawsuit or a defendant in a criminal prosecution could not testify under oath in his own trial. The rationale for this prohibition was the conviction that because a party had an "interest" in the case he might give false testimony to prevail. A defendant in a criminal case could not testify in a co-defendant's trial for fear that he would perjure himself, persuade the jury to acquit the co-defendant, who would then reciprocate the favor, and both guilty parties would go free. If, however, charges against a defendant were dismissed or he was found guilty and sentenced, he could testify in another criminal case because he had no "interest" in it. Over time, the exclusionary rule was abandoned in civil cases but was retained in criminal cases far into the Nineteenth Century. In Minnesota the common law prohibition in criminal cases was abolished by legislation effective March 6, 1868, and it thereby became the ninth state to permit a defendant in a criminal case to testify in his own defense. *

In October of the following year, the *Blue Earth City Press* republished a colorful story from the *Philadelphia Times* about a criminal case in Pennsylvania that almost ended in tragedy because the common law bar was in force. It illustrates why Minnesota and other states acted to liberalize witness competency laws. The editor of the *Post* was likely aware of the recent Minnesota law but does not mention it. It was common practice for small town newspapers at this time to republish stories from other papers to inform and entertain their readers and fill space. "A Lawyer's Story" satisfies these goals. It follows.

*** See generally Douglas A. Hedin, "The Emergence of a Criminal Defendant's Right to Testify at Trial in Minnesota" (MLHP, 2011-2015).**

Blue Earth City Post

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A LAWYER'S STORY

Philadelphia Times

"I never would convict a man on circumstantial evidence if I were a juror – never! Never!"

The speaker was a distinguished criminal lawyer of nearly forty years active practice and his fame extended far beyond the limits of his own state.

We had been discussing the recent *cause celebre* in which, upon purely circumstantial evidence, a man had been convicted of an atrocious murder, although many of those most familiar with the circumstances of the case entertained the gravest doubts about the justice of his conviction, and had been swung off into eternity, protesting his absent innocence with his latest breath and calling upon God to send his soul straightaway to hell if he was not telling the truth.

As most of our party were lawyers, the conversation, naturally enough, drifted into a discussion of the dangers arising from convicting accused persons whose own mouths were closed, upon purely circumstantial evidence in the absence of any direct and positive proof of guilt, and case after case was cited in which, after conviction and execution, the entire innocence

of the supposed culprits had been clearly demonstrated. Most of the laymen present agreed with the distinguished lawyer whose very positive expression of opinion had been quoted, while the majority of the lawyers contended, with that earnestness for which lawyers are noted when advocating their own side of any question, that justice could never miscarry when careful judges guard against the possibility of unsafe verdicts by refusing to permit a conviction except when every link in the chain of circumstantial evidence has been established beyond a doubt and the whole chain had been made so perfect and complete as to leave no room for any consistent hypothesis of innocence.

"The first murder case I ever tried," said one of them, "was stronger than fiction, as you will admit, and is quite as remarkable as any of the cases you have referred to where innocent men have been wrongfully convicted upon circumstantial evidence. It ought to have been reported, as an example of unreliability of the direct and positive testimony of eye-witnesses, who tell what they believed to be the truth."

He then related the main points of what certainly was a most remarkable and dramatic trial and which constitutes a fair offset to some of the memorable cases to be found in every work on circumstantial evidence. The narrative produced so strong an impression upon my own mind, that subsequently with his consent, I put it in to the following shape, having first carefully compared it with his notes of testimony taken upon the trial of the case. It can be relied upon as absolutely correct, with the exception that I have used fictitious names, for reasons

which will readily be appreciated when it is known that most of the actors in the drama are still living.

One winter evening about 8 o'clock, in the early days of the war, in the quiet little town of _____, while patrolling the streets to pick up stragglers from the camp on the outskirts of the town, Corporal Julius Fry was shot and killed by one of three men of bad character, who were in company and upon terms of open enmity with the soldiers. The men were arrested, committed to prison and brought to trial at the next term of the court. Two of them were gamblers and desperados, and supposed to have more than once had their hands stained with human blood. The third, whom I shall call Short, though bearing an unenviable reputation, was regarded as one unlikely to slay a fellow–man, except under compulsion of circum-stances. On account of the character of the man and the trouble they had already brought upon the quiet, law-abiding citizens, the sentiment of the whole community was strongly against them.

In order to clearly understand the force of the testimony given upon the trial and the subsequent result, it is important to bear in mind the physical peculiarities, dress and general appearances of each of the three prisoners.

Short was a small man of not more than five feet six inches in height, slender, weighing scarcely 130 pounds, with bright, fury-red hair and side-whiskers, and, at the time of the murder, wore a white felt hat and an old light-blue army overcoat.

Ryan was fully six feet in height, of robust frame, with black hair and mustache, dressed in dark clothes and wore a black Derby hat.

Grey was a heavy, broad-shouldered man of medium height, weighing fully 200 pounds, with a full black beard reaching nearly to his waist. But as the evidence subsequently showed that he had not fired the shot, it is unnecessary described his appearance more minutely.

Certainly it is difficult to imagine two men more unlike than Short and Ryan, or less liable to be mistaken for each other, even by strangers, much less by acquaintances. There was no possibility for a case of mistaken identity.

Short and Ryan were tried together with their consent – Grey having asked for and obtained a separate trial – and each was defended by separate counsel. After the preliminary hearing relating to the post–mortem examination, the cause of death and the identification of the body of the deceased as the person named in the indictment, the Commonwealth called as its first witness a woman, Mary Bowen. She bore a bad reputation for chastity, but nobody questioned her integrity or her purpose to tell, reluctantly, it is true, the whole truth. The prisoners were all her friends and were constant visitors to the drinking saloon of which she was proprietress. She was a woman of powerful physique, almost masculine frame, great force of character and more than ordinary intelligence.

From her testimony it appeared that a colored woman with whom she had some dispute had hit her on the head with a stone and ran, and the three prisoners, coming up at the moment started with her up the street in pursuit of the fugitive. Although the night was dark and there was snow on the ground, and a gas lamp near by gave sufficient light to enable one to recognize a person with ease some feet away. After running about 100 yards the pursuers came to the corner of an alley and stopped under the gas lamp, being challenged by the deceased, who was in uniform, in company with his squad. She swore that when the corporal called "halt," Short, whom she had known intimately for years, replied, "Go to h---l," and, while standing at her side, so that their elbows are touching both being immediately under the gas light he pulled out a pistol, pointed it at the deceased, was four or five feet from him, and fired and then ran down the alley, the deceased returned, wounded, and Short disappeared. While the shots were being fired she saw both Ryan and Grey standing at the corner some feet away from her and after that they separated and she went home. It was also proved that this alley was bounded on either side by high fences, difficult to climb, and led down to stream of water about fifty feet wide and three or four feet deep. No trace of footsteps were found in the snow except those of one man leading down into this stream, and it was evident that the person who had fired had not climbed either fence, but had waded through the stream and had disappeared on the other side.

The next witness was the soldier who stood close by the deceased when the first shot was fired, and who, not knowing

either of the prisoners, described the person who had fired and ran down the alley as the man with red hair and side-whiskers, dressed in a light–blue army overcoat and white soft hat, and upon being directed to look at the three prisoners identified Short as the man whom he had seen do the shooting

The testimony of these witnesses was in no way shaken upon cross examination.

Then the sworn ante-mortem statement of the deceased, taken by a magistrate, was read to the jury. He said that he had known Short personally for some time, but had never had any difficulty with him. He fully identified him as the man had fired the first shot and then ran down the alley, fired one shot after another until he fired the last and fatal shot almost in the face of the deceased. He also fully described the clothing worn by Short as it had been described by the other witnesses.

These were all the witnesses to the occurrence, except the prisoners themselves, and of course, they could not be heard. The case against Short seemed to be as conclusively made out as though a score witnesses had sworn that they had seen him do the shooting. Neither the judge, the jury, nor the spectators entertained the slightest doubt of his guilt, and when the Commonwealth at this point closed its case, it seemed as though the fatal rope is only around his neck and his escape impossible.

Ryan heaved a sigh of relief which was audible throughout the whole courtroom, for he was safe; there was not one word of

testimony against him, or any circumstance tending to show any previous arrangement or concert of action between him and Short.

After a whispered consultation between the counsel for the defense, one of them rose and moved the court to direct the jury to forthwith return a verdict of "not guilty" as to Ryan, in order that he might be called as a witness for the other prisoner. This was resisted by the district attorney, and, after lengthy and elaborate arguments, the court decided that was bound to grant the motion, and accordingly Ryan was declared "not guilty," and the verdict recorded.

Then came a scene as dramatic to those present as anything ever witnessed on the stage. Without any opening speech by Short's counsel, Ryan, in obedience to a nod from his attorney, stepped out of the prisoners' dock and into the witness box, looked around the court-room, took up the Bible and was sworn to tell "the truth, the whole truth, and nothing but the truth." Every head was bent forward, every ear was on the alert, every eye fixed on the witness – something startling was expected. Would he attempt to show that Short had done the shooting in self-defense? That seemed the only thing possible. But how could he be believed in the face of positive testimony of three witnesses, two of them living in the court-room, one of them dead – murdered?

Ryan stood for a moment looking down and then slowly lifting his eyes to the bench, and a silence in which the falling of a feather might have been heard, he said:

“May I ask the Court a question?”

The venerable Judge, evidently surprised at being interrogated, looked at him and said: “Certainly, sir.”

“I understand that I am acquitted,” said Ryan, pausing a moment and then continuing: “I want to know whether anything I may say now can ever be used against me in any way?”

What did he mean? What need for that question? Everybody looked at his neighbor inquiringly.

The flushed face of the Judge showed that he, at least understood that it meant an attempt to swear his guilty companion out of the hangman’s grasp. Then, in a tone of unmistakable indignation, came the answer quote

“I am sorry to say, sir, that nothing you may say now can be used against you; that is, on trial for murder. You have been acquitted.”

Ryan’s face grew pale and then red, and he said, slowly and distinctly:

“It was I who fired all the shots – not Short.”

Most of the faces in the court in the court-room wore looks of incredulity; some of indignation at the heartened wickedness of the man who just been declared innocent, and who, by his

own statement, was guilty of murder, if he was not guilty of perjury.

But quietly and calmly, without a tremor, as coolly as he was describing some trivial occurrence which he had casually witness, Ryan went on, step by step, detailing all that had occurred, and when he had finished his story there was probably not a person present was not fully convinced that not only that Ryan had told the simple truth, but also that he himself fired the fatal shot in self-defense, or at least under the such circumstances as would have led any jury to acquit him.

He detailed how he had fired the first shot from a small, single-barreled pistol in the air without any purpose except to give his challenger a scare, and then ran down the alley; and, upon been closely pursued by the deceased with saber drawn and raised to strike, he was compelled to pull out a revolver, and fire several shots toward his pursuer, who was rapidly gaining on him, to keep him back; and that, when he had but one shot left, he stumbled over a large stone and fell on his knees, and at this point the deceased struck him with the saber cutting him slightly on the cheek, and, being thus pressed, he aimed and fired the last shot, which subsequently proved fatal. He further told how, upon recovering his feet, he ran, waded through the stream, and finding that he lost his hat when he fell, retraced his steps, recrossed the stream, found his hat and then went to a hotel, where he was seen by several witnesses to dry his clothing. His manner, his bearing, and the story itself convinced his hearers that he was telling the truth.

But, so that nothing might be wanting, if any doubt remained in the minds of the judge or the jury, witnesses of undoubted veracity were called who corroborated him as to the condition of his clothing and the cut on his cheek within fifteen minutes after the occurrence. Besides it was shown that, although the man who had fired and waded through the stream, Short's clothing was perfectly dry.

It is unnecessary to say that Short was promptly acquitted, and warmly congratulated on one of the narrowest escapes ever made by any man in a court-room. Nothing could have saved him had the court refused to direct acquittal of Ryan and allowed him to testify.

The deceased corporal, the soldier and Mary Bowen were – mistaken. That was all there was about it.

So much for the occasional unreliability of the direct testimony of honest eye-witnesses.

And so much, also, for giving the accused an opportunity to be heard on the witness-stand, the denial of which by law is one of the relics of barbarism which still disgraces its administration in some states at this late date.

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