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Refuge of a Rogue

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REFUGE OF A ROGUE

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BRUNO RICHARD HAUPTMANN staked his life and his freedom on three alibis, and lost.

The first official notice that Hauptmann was to rely on alibis for his defense came when Mr. Fisher, one of his counsel, said at the opening of the defense testimony: "We submit that in our defense we will attempt, and we believe successfully, to prove to you a complete alibi for the defendant Hauptmann on each and every occasion that he has been named as being present at a given point."

Until Hauptmann took the stand, the prosecution had no idea what those alibis would be; and until the witnesses to those alibis had testified, the attorney-general and his staff had no knowledge who would testify, nor to what. This lack of knowledge was a tremendous handicap, for the prosecution had little or no time to check the history and character of these witnesses nor to investigate the accuracy of the alibis.

One of the favorite defenses of the criminal is an alibi. It is usually introduced as the last bit of testimony in the defendant's case. It is almost impossible for a prosecutor to meet this evidence because he is totally unaware of what is coming, of what stories he must be able to refute.

In the Hauptmann case, for example, over a dozen people paraded to the witness chair in the closing days of the trial to establish the three alibis Hauptmann had set up. He swore that on the evening of the kidnapping he was in Christian Fredricksen's bakery until nine o'clock waiting for his wife, and that thereafter he went home, not to leave the house again that night. He swore that on the evening the ransom money was paid in the cemetery, he was spending a "moosical" evening at home with friends. He swore that when the ransom bills were passed in November, 1932, he was many miles from the place where the bills were circulated.

In addition to his wife's testimony attempting to establish these alibis, about a dozen other witnesses tried to build up these stories. Fortunately, David Wilentz and his staff were able to show the jury that many of the defense witnesses

were convicted criminals, dope fiends, and psychopathics, and that there was little possibility of any truth in their narratives.

The evidence that was secured concerning these witnesses had to be secured quickly, and undoubtedly much more could have been disclosed if Mr. Wilentz had had time to prepare it. But more frequently the prosecutor has neither the resources nor even a short time to check both the alibi witness and his story. He must meet this defense instantly in the middle of a trial, without any preparation whatsoever. In such a case there is frequently a gross miscarriage of justice. Another criminal is turned loose to garrote society.

Fortunately, there has been a recent tendency to protect society against the criminal instead of placing all the odds in favor of the criminal. Heretofore most all of the protection has been placed about the criminal, while society stands bare and defenseless. Before a case goes to trial, for example, the state is compelled by law to allege specifically the offense and to furnish the defendant with the names of his witnesses. The defendant simply pleads guilty or not guilty. He does not even suggest the nature of his defense nor who his witnesses may be. The defense attorneys have a good opportunity to check the state's allegations and its witnesses from every angle.

On the other hand, the state must be prepared to meet the unknown, both as to the nature of the defense and as to the antecedents, character, and reliability of its supporting witnesses. Obviously, this is an impossible task for any prosecutor. The result is that many a criminal comes to court with perjured alibi testimony and escapes the law.

To overcome this difficulty, a law was enacted in Michigan in 1927 which provided that not less than four days before the trial the defendant should serve upon the prosecuting attorney a notice of the intention to claim an alibi, setting forth specific information as to the place at which the defendant claims to have been at the time of the alleged offense. Ohio enacted a similar law in 1929, and Wisconsin followed in 1934.

The soundness of this law was recognized by the American Bar Association, which in its annual meeting in 1934 approved the principle. Since that date the Association has continually urged states to enact similar laws. Under the direction of the Association, some 150 local bar associations

are studying this measure, as well as other reforms in criminal law, and have caused its introduction into 18 legislatures in the 1935 session. At least 8 states and the federal government have recently added this act to their statutes.

The advantage of this law is apparent. State and defendant are placed upon equal footing. There is no longer a sudden popping up of witnesses to swear the defendant out of his troubles. There is a noticeable reduction in perjury.

Michigan and Ohio should by this time have been a good proving ground. How has the alibi defense law worked in practice there? In Detroit since the passage of the act alibi defenses are very few. A good percentage of those offered have been proved false and convictions have followed. Police and prosecuting officials state that the great increase in convictions where alibis have been offered since the passage of the act is due to the opportunity they have to inquire into the facts of the alleged alibi and to refute and destroy those which are false.

Ohio reports nearly the same experience. Shortly after the new law became effective, the number of alibi defenses offered decreased very noticeably; and in a short time were being used only in a minimum number of cases.

The effectiveness of the alibi defense law is thus demonstrated by actual practice. It means that wherever the law is in force, there is no longer a sudden flood of unknown witnesses to testify that the accused was not at the scene of the crime at the time of its commission and thus throw a reasonable doubt on the testimony of state witnesses. Criminals, as well as their lawyers, in these three states are impressed by the fact that an alibi defense refuted in open court is worse than no defense at all.

In those states where there is no alibi defense law, witnesses continue to appear with startling suddenness at the close of a trial. Any volume of law reports will disclose some of these interesting and ingenious alibi defenses which are without warning sprung on the prosecution.

For example, in a recent case a defendant was charged with burglarizing a freight depot at Celeste, Texas, and taking some shoes and pocket knives. Soon after the burglary the defendant was found selling these goods. On the last day

of the trial the defendant pleaded that he won the shoes and pocket knives in a game of chance in a filling station in Leonard, Texas, and had witnesses to prove it. A judge reviewing the case observed with caustic emphasis that the defendant, though he had frequent opportunities to do so, said nothing about the alibi until the last day of the trial.

The most frequent of the alibi defenses, however, is the "somewhere else" plea. To establish his innocence, a defendant will offer evidence that he was somewhere else than the scene of the crime and will offer testimony of his wife, "Moll," relatives or friends to prove it.

A typical instance of such a defense is a recent Missouri case. The teller of a bank which had been robbed identified the defendants as the hold-up men. The defendants each had an alibi. One said he had stayed at his father's home, then had visited his brother, and the day after the crime had left for New Orleans. Of course, the family all concurred in this alibi. The second defendant established his alibi by one of his relatives who testified that defendant had stayed at his home continuously a day before and until two days after the robbery, and then had departed for Cleveland. The relative brought a postal card purportedly sent by the accused several days later from Cleveland.

The postal card is a favorite trick of criminals. Gang members can easily mail cards from any desired city, thereby making possible an alibi. In fact, there is one legitimate firm that will guarantee to mail letters for one from every part of the world. It is a very simple trick, but may be effective with a jury by casting a reasonable doubt into their minds. Along with such alibis goes the forged hotel register, the faked photograph, and other similar manufactured evidence.

Manufactured alibis have offered one of the simplest and easiest avenues of escape for the criminal. Besides escape, it has encouraged perjury and thereby added a considerable item to unpunished crime.

The days when men went about the English halls of justice with straws in their sandals indicating their willingness to testify to anything for a fee, are not so far removed

from the present. Criminals may not expose the straws in their shoes, but their footwear is pretty well lined with straw.

It is estimated that perjured testimony occurs in about 75% to 90% of the criminal cases. Yet only .009 of the criminal cases in New York in one year were for perjury, and the percentage seems to follow throughout the country. The reasons why perjury is so infrequently punished are the technicalities of the law, the hesitancy on the part of judges to commit witnesses suspected of perjury, the apathy of prosecuting attorneys, the refusal of grand juries to indict and petit juries to convict, and the severe but ineffective punishment provided by law.

In the Hauptmann case, a goodly percentage of the testimony attempting to establish the alibis was undoubtedly perjured. Prosecutions of four witnesses offering perjured testimony are planned.

A recent Virginia case indicates the manner in which much alibi testimony is manufactured. A certain Mrs. Mundy had been indicted for selling liquor at a tearoom which she managed. The state claimed that two prohibition officers purchased drinks from her at eight o'clock on the evening of December 10, 1931. Her alibi was that on that night at seven-thirty she left her car to be repaired in a garage at Sulphur Springs, West Virginia, and that the repairs were not completed until nine o'clock. The garage man produced memo charges and book entries to bolster the alibi, and Mrs. Mundy was acquited.

Unfortunately for Mrs. Mundy, however, the presiding judge believed the testimony was perjured and he ordered that she be tried for offering false testimony. On the perjury trial, it developed that the supposed garage man did not own a garage and had never repaired her car. As a matter of fact, he was unemployed and had testified along the lines suggested by Mrs. Mundy, who had caused the necessary books to be prepared. Needless to say, Mrs. Mundy was convicted of perjury.

This example is not an uncommon one. The only thing uncommon about the Mundy trial was that she was convicted of perjury. Faked alibis are offered every day in court.

Judge Wilkerson of the Federal District Court in Chicago made this striking statement in the D'Andrea contempt of court case: (D'Andrea, you may remember, was Capone's bodyguard.)

"From that camp (Capone's), under what coercive influences we can only conjecture from what transpired in court, came that array of shocking perjury with which the court was confronted during the closing days of trial. We had here the spectacle of (alibi) witness after witness testifying in a way which was psychologically impossible, pretending to remember things which in the very nature of the human mind the witness could not have remembered if he had forgotten the things which he pretended to have forgotten. It was perjury on the face of it."

What took place in Judge Wilkerson's court that day occurs in practically every court of the land, especially where the defendant is permitted unlimited heights to concoct an alibi. This "array of shocking perjury" can be eliminated to a large extent by the alibi defense law which the American Bar Association and the Association of Grand Jurors of New York County are urging the various states to enact into law.

Mr. Wilentz, who is a firm believer of the advance notice of alibi law, is frequently asked why he did not invoke the recent New Jersey alibi defense law in the Hauptmann trial. In so important a case as that one he did not dare to inject constitutional questions into the case at the cost of the taxpayer. The law had never been tested in the New Jersey courts, although it has been approved in both Michigan and Ohio. Secondly, the New Jersey law does not follow the terms of the usual alibi defense law, and its usefulness has to a large measure been nullified by an unusual provision which gives the defendant a chance to offer additional rebuttal witnesses (should the alibi be perjured) to counteract any investigation the state may undertake.

The alibi defense law is not proposed as a panacea for all the ills of criminal law. It has two obvious merits: It permits the state to be as well prepared as the defense, and it tends in a large measure to eliminate perjury. It is an aid in promoting the ends of justice, and as one writer has recently said, it is "indicative of the manner in which revision

and modernization of archaic codes of criminal procedure may serve to make the criminal law what it is intended to be, 'A sword for the guilty and a shield for the innocent'." To anyone familiar with criminal procedure, there comes the realization that our past tendency has been to safeguard the criminal against society by placing all sorts of technicalities and obstructions in his hands. It is high time that we now safeguard society against the criminal, and give both society and the accused an even break.

NOTHING NEW UNDER THE SUN

By HON. FOSTER CLINE, *of S. E. C.*

Since I am no longer in general practice and very seldom file pleadings of any kind in the courts, it may be safe for me to submit for your consideration as an interesting article for DICTA the following quotations from a decision in 1568 concerning the great length of pleadings, in which the Chancellor observed:

"that the said replication (i. e., the pleading) doth amount to six score sheets of paper and yet all the matter thereof which is pertinent might have been well contrived in sixteen sheets of paper . . ."

and gave order

"that the Warden of the Fleet shall take the said Richard Mylward (the culprit pleader) alias Alexander into his custody and shall bring him into Westminster Hall on Saturday next about 10 of the clock in the forenoon and then and there shall cut a hole in the midst of the same engrossed Replication which is delivered unto him for that purpose, and put the said Richard's head through the same hole, and so let the same Replication hang about his shoulders with the written side hanging outward, and then, the same so hanging, shall lead the said Richard bareheaded and barefaced round about Westminster Hall whilst the Courts are sitting, and shall show him at the Bar of every of the three Courts within the Hall, and then shall take him back again to the Fleet, and keep him prisoner until he shall have paid £b 10 to her Majesty for a fine and 20 nobles to the defendant for his costs in respect of the aforesaid abuse."

"All we know of freedom, all we use or know
This our fathers bought for us long and long ago;
Ancient right, unnoticed as the breath we draw
Leave to live by no man's leave, underneath the law;
Lance, and torch, and tumult, steel and gray, goose wing
Wrenched them inch, and ell, and all, slowly from the King."