

JUDGE OVERRULES MOTION TO STOP TRIAL

Defense Charges Prejudicial Remarks Made by Sparks to Jury.

Prosecutor Remy began to work around to introduce the written "death statement" which Smith prepared from memory after Madge had told him the history of the trip in different conversations. The witness' testimony was interrupted by frequent objections.

Defense Alert

The defense objected, fearing the prosecutor was about to submit Smith's war record, and the fact that he was wounded as a marine at the battle of Belleau Woods, and since that time has suffered from shell-shock. Remy evidently was afraid that Smith, who is easily excited, would become confused on cross-examination and create a bad impression. Remy wanted to get the fact to the jury it seemed that Smith was shell-shocked.

Secretary to New

Smith then said that he was private secretary to Senator Harry S. New at Washington, D. C., for a year. He has practiced law since 1917, he said.

Went With Two

"Yes," replied the attorney. "Miss Ermina Moore, and Mrs. Oberholzer went with me."

Stephenson Busy

The later busied himself with a pencil.

Mother Present

"Mrs. Oberholzer took me up, and she was present all the time, Oh, she may have gone out of the room a few minutes once or twice, or something like that."

Three Witnesses

Remy, at this point, procured the dying statement and carefully unfolded it.

Lying in Bed

"She was lying in bed, and I was near the head."

State Held Up

Following a protracted cross-examination by Inman, Smith was excused by the State without the dying de-

"We object, Your Honor," he said, and, turning to the witness, asked:

"Were these remarks afterward reduced to writing, Mr. Smith?"

"The substance was," replied Smith.

"We object," said Christian. "The writing should be the best evidence."

"The substance was," replied Smith.

"Anyone who hears a statement, later reduced to writing can testify about it," the Judge reminded Christian.

"I wrote down the substance myself, from memory, of her entire story as she told it to me at different times," said Smith.

For the first time since the trial opened, Attorney John Kiplinger of Rushville, a defense lawyer, took a hand in the proceedings. "We further object because it is not part of the res gestae," he said.

The "res gestae" is a legal term meaning the gist of the affair.

"That's overruled too," said the Judge.

Christian took a hand.

"We further object, because the defendants were not present. It calls for hearsay. It has not been shown she was in extremis."

"Objections sustained on those theories," said Judge Sparks.

Prosecutor Remy attacked from another angle, laying the legal groundwork for a dying declaration, which can be admitted as evidence in murder trials, as an exception to the rule against hearsay evidence, on the theory that a person about to meet death, will tell the truth.

"What was her condition?" asked Remy.

"We object," wearily interposed the defense attorneys. They were promptly overruled.

"She was apparently in great distress, physically and mentally said Smith.

"After that, from time to time, did you have any conversation with her as to the manner of her death?"

"Yes, the first time was Tuesday. I took Miss Moore with me."

Miss Moore Fainted

Smith said that he particularly remembered taking Miss Moore, because when the latter walked into Madge's bedroom, and caught the first glimpse she had had of her friend in her bruised and battered condition, she fainted over on the floor in a dead faint.

This episode was ruled out of the evidence when it developed that Smith was downstairs when he heard Miss Moore fall and did actually see her faint. Defense attorneys appeared elated.

Judge Sparks said that the affair was "frankly material."

Then proceeded laying the foundation for introduction of the death statement, every step a battle.

"When was the next time she mentioned her condition?"

"About a week after this Tuesday. It was about 6 o'clock in the evening. I think her mother was in the room. She was in great agony," said "Goody" and she said "Goody" to me, seemingly in great anguish. The next day she said to me "When I said goodbye to you last night, I thought it was good-bye. She always said she would not get well."

Remy then interrogated Smith regarding the preparation of the statement in manuscript form.

Tells of Writing

"At my office I reduced the statements she gave to me in writing. On Thursday, March 26, at about 9:30 or 10 o'clock in the morning, I called Miss Ermina Moore to my office and she brought her own notes. I took my draft and Miss Moore's notes and read them out loud, using Miss Moore's notes and those I had written in consecutive order relating Miss Oberholzer's experience. I corrected any grammatical errors that might have existed, called a stenographer, and dictated the entire statement. Two days later, I called Miss Moore and we corrected the typed matter."

"Was the statement as prepared by you substantially the same as she had related to you?"

"Yes."

"And then you went to the Oberholzer home?"

"Yes."

"Who was present in Miss Oberholzer's room besides yourself?"

"Dr. John K. Kingsbury, Miss Moore, and Griffith D. Dean. Dean is Smith's law partner."

Remy, at this point, procured the dying statement and carefully unfolded it.

"Did you show her the statement?"

"Yes."

"Did you read it to her?"

"Yes."

"What was her position?"

"Lying in bed."

"She was lying in bed, and I was near the head."

"Did you read it as you wrote it?"

"Yes, I read it very slowly and distinctly. Every word, every sentence, every paragraph, and every page, slowly and distinctly. Every sentence I stopped and asked her if it was true. She interrupted me several times in the midst of sentences to say, 'Yes, that's right.'"

"Did she request any corrections?"

"Yes, three or four times, she interrupted me."

"After reading her the statement, did she sign it?"

"Yes."

"Where was she when she signed it?"

"Still in bed. L. Kingsbury propped her up, and I think possibly, that Miss Moore, assisted him. We took a magazine, and laid it on a pillow, held it before her and I placed the pen in her hand. She signed it, and I did not guide her hand."

Remy, with the manuscript in his hand, stepped forward and said: "I hand you State's exhibit number one, and ask you to say whether or not, this is the statement."

Smith examined it thoroughly. Page by page, and paragraph by paragraph, and arriving at the last page, he glanced at its foot, observed the signature, and answered, "Yes, sir."

Statement Held Up

Following a protracted cross-examination by Inman, Smith was excused by the State without the dying de-

claration having been introduced. Smith refused to be shaken in his testimony by the veteran attorney, who poured question after question at him, on the preparation of the document, and the validity of Madge's signature.

Smith took the stand after Judge Sparks had overruled the motion of the defense to stop the trial and discharge the jury. The jury was excluded from the room while defense and State attorneys argued.

The motion was made on the ground that Judge Sparks had made prejudicial remarks before the jury, Thursday afternoon.

The remarks to which the defense took exception were made by Judge Sparks while George Oberholzer, father of Madge, was on the stand, and were relative to the defense theories that Madge committed suicide instead of being murdered.

Judge's Remarks

Part of the remarks the judge made were as follows:

"Whether a virtuous woman holds her virtue dearer than her life or her life dearer than her virtue if attacked by superior forces, and whether those superior forces were bound to take that into consideration, is a matter for the jury to decide, and therefore he may testify," ruled Judge Sparks.

The judge also indicated in his talk, according to defense contention, that the theory of suicide can not be made in the trial.

"Such remarks are more damaging to the defendants than any testimony that could be introduced," said Floyd Christian, defense attorney presenting the motion.

"This is a case of suicide, not homicide," Christian shouted.

"We ask that the submission of evidence be stopped and the jury be discharged," said Christian.

"So we can start all over in this case with clean hands. This is a very clear case, and the defendants are entitled to a fair trial."

Christian told the judge that the motion and the defense argument were not made in a spirit of animosity, but only to "guarantee the defendants a trial under due process of law."

That the defendants are reaching a point of honest concern over the seriousness of the case resulting from the testimony introduced by Prosecutor Remy Thursday, was written on their faces, Stephenson sat at the defense table with his chubby fists poked into his face and a trace of worry visible on his countenance. Klincek and Gentry also followed the argument with much interest.

"Here we have a statement made by the court in all good faith, but we think the court has committed a very grievous error," said Christian.

"What the court states to a jury bears great weight."

Christian said that all the crimes in Indiana are defined by statute.

No Statute

"There is no statute in this case covering this murder charge as outlined in this indictment," he shouted.

Appeal Certain

Defense attorneys will appeal the case if a conviction is obtained, they stated.

"We have enough errors in the record now, to reverse this case on appeal," said Ira M. Holmes, one of the defense staff, who is noted for his success in appealing criminal cases in Supreme Court.

Judge Begins

Adjusting himself easily in his chair, Judge Sparks began:

"Gentlemen, the situation as I see it is just this. Of course, I wouldn't say anything to the jury that would jeopardize the defendants. That I have not done."

"This is one court, I think, that has done less to influence the jury than any I know. To say they (the jury) would follow my instructions, instead of yours, is in conflict with my experience. Of course, you are all in earnest in the case, but I think you're taking yourselves a little too seriously."

"All yesterday, you had the privilege of asking the jury to step outside and make your remarks. It's not my duty to suggest those things to you," Judge Sparks shot at the defense. It was easily understood.

"You didn't ask the court to discuss that matter Thursday. You asked for a ruling."

Natural Consequence

"It seems to me Gentlemen, that the fundamental conditions in this case are well established. The law provides that if a man commits a felony, he is bound to anticipate the natural and reasonable consequences of that act. I did not tell the jury it was the natural consequence of the act, but that if they find the suicide the natural and reasonable consequence of the act, it's up to them to do a certain thing."

"I don't agree with the defense counsel when they say a blow is necessary. Floyd Christian, defense attorney previously had used the word 'blow' in a general sense, as being necessary to the commission of murder."

I think a murder can be committed indirectly, and so the decisions say.

Cites Case

"Here's a case: Three men took an old man from his home and loaded him in a carriage. They carried ropes and clubs, not with the purpose in mind of killing him, but to beat and frighten him. He jumps from the carriage, falls into the river, and is drowned. The three are convicted of murder."

"But suppose he shot himself instead—would that be murder?"

Asked John H. Kiplinger of Rushville one of the squad of defense attorneys.

"No. You're misquoting me," Sparks retorted.

"This jury is bound to understand here from your remarks Your Honor, that this woman took her life to save her virtue," Christian said. "There is no issue here like that. At least I don't think so."

Judge Differs

"Well, I do, and that's where we differ," said Judge Sparks. "The motion is overruled, with thirty days in which to file a bill of ex-

ception. Call the jury in and the next witness."

The fourteenth day of the trial—thirteen were taken to get a jury—was opened Thursday morning by the opening statement of the State's case, made by Charles E. Cox, former Supreme Court judge, hired by the Oberholzer family to assist the prosecution. Cox drew a picture of Stephenson's palatial home in Irvington as a place of double character, like its master, to which the defense objected. Judge Sparks said: "It may explain why Miss Oberholzer went there," in reference to statements that good people on occasion gathered at the house.

Mother on Stand

Mrs. George Oberholzer, Madge's mother, dressed in mourning, was the first witness. Her voice broke frequently, and she appeared on the verge of a breakdown several times as she related how Madge left the home Sunday evening with a large man who called for her, following four telephone calls from Stephenson's house and how she was carried into the house two days later, broken and poisoned, while the family was down town looking for her.

Mrs. Eunice Shultz, who rooms with her son, a Butler University instructor, at the Oberholzer home, was next. She told of seeing a man who said his name was Johnson, carry Madge into the house Tuesday, March 17, and lay her on her bed. One of the high points of the trial came when Mrs. Shultz, a motherly little woman, rose from the witness chair and pointed at the huge Klincek, sitting behind Stephenson and exclaimed:

"That's the man."

Doctor Heard

Dr. John K. Kingsbury, family physician, who was called by Mrs. Shultz, gave the jury the history of the case, as related to him that morning by Madge. He told it as Madge told him, he said, from the time she left home. He told how she was forced to drink something at the Stephenson house, taken to the Union Station, put in a Stateroom with Stephenson, who attacked her, hitting why she didn't cry for aid while being taken to the depot:

"It was awful, Daddy. We stopped at the Washington Hotel, and Mr. Stephenson and Gentry sat on each side of me with a revolver at my side, while Stephenson had someone else with Claude Worley, to arrange about some protection during the trip."

George Oberholzer, the father, was next. He told how Madge said to him on her death bed, when he asked why she didn't cry for aid while being taken to the depot:

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