

SHOULD LAWYER BETRAY CLIENT TO SAVE INNOCENT MAN?

Is a lawyer justified in breaking the "seal of silence" imposed upon him regarding information given to him by his client when he becomes clearly convinced that his client is guilty of a murder for which another man is to be executed? Should the lawyer consider himself absolutely prohibited from telling the world what he has found because of the extraordinarily close and confidential relations existing between attorney and client, or should the demands of justice and the rights of the innocent third party shatter the sanctity which the law places around information passing from client to lawyer? Should he guard his client's interests, come what may, or should he turn against his client when he becomes assured beyond a reasonable doubt that this client is a guilty man?

These questions have arisen as a result of the latest development in the Frank murder case in Atlanta, Ga. The puzzle in legal ethics has been put to a number of prominent New York attorneys by *The New York Times* and answered by them.

The problem is presented by the recent announcement of Attorney William M. Smith of Atlanta, who has been acting as counsel for Jim Conley, a negro, that his man Conley is guilty of murder and not Leo M. Frank, now under sentence of death for the killing of a young girl, Mary Phagan, on April 26, 1913. The negro has already been convicted and sentenced for implication in the crime.

Mr. Smith made a public announcement in which he explained that, as a result of months of investigation and study of the case while Conley's counsel, following talks with Conley, he had come to the decision that Conley was the murderer, and that Frank was entirely innocent. In his study of the case, Mr. Smith catalogued, card-indexed, and filed for research purposes huge volumes of evidence on the Frank case.

There is a wide difference of opinion on the ethics of the situation among the lawyers interviewed. On the one hand it is held that the lawyer is justified in removing the "seal of silence" from his lips when he is convinced that his client is guilty of a grave crime and that an innocent person is to suffer for this crime. Lawyers who are of this opinion declare that the ends of justice and the welfare of society as a whole must be placed above the duty which the lawyer in the ordinary course of events owes the client.

While it is admitted that this duty is a very strict one, and that the client must be protected to the extreme by the lawyer because of the confidence vested in the attorney by the man he is defending, it is argued that the duty ceases when the attorney finds to the assurance of his own mind that his client is a criminal.

Even where the life or liberty of a third person is not at stake, it is argued that the lawyer owes the duty to society and to justice to tell of his client's guilt.

The other view, held by several of the attorneys interviewed, is that the cloak of confidence thrown around the relation of lawyer and client cannot be removed under any circumstances, and that the duty of the lawyer is always to his client, even where he is convinced that the man is guilty of a serious crime.

One of the attorneys interviewed is of the opinion that the obligation on the lawyer to protect his client is so absolute that he should even let an innocent man hang rather than invade the sacredness of the relationship existing between himself and the client. It is insisted that what the lawyer learns from the client is so highly confidential that nothing can justify the lawyer's disclosing it.

All the attorneys agree that the situation is a highly perplexing and difficult one for a lawyer where he is confronted with this choice of keeping silent and seeing injustice done or of denouncing his own client.

What J. F. McIntyre Thinks.

John F. McIntyre was emphatically of the view that Mr. Smith had acted properly.

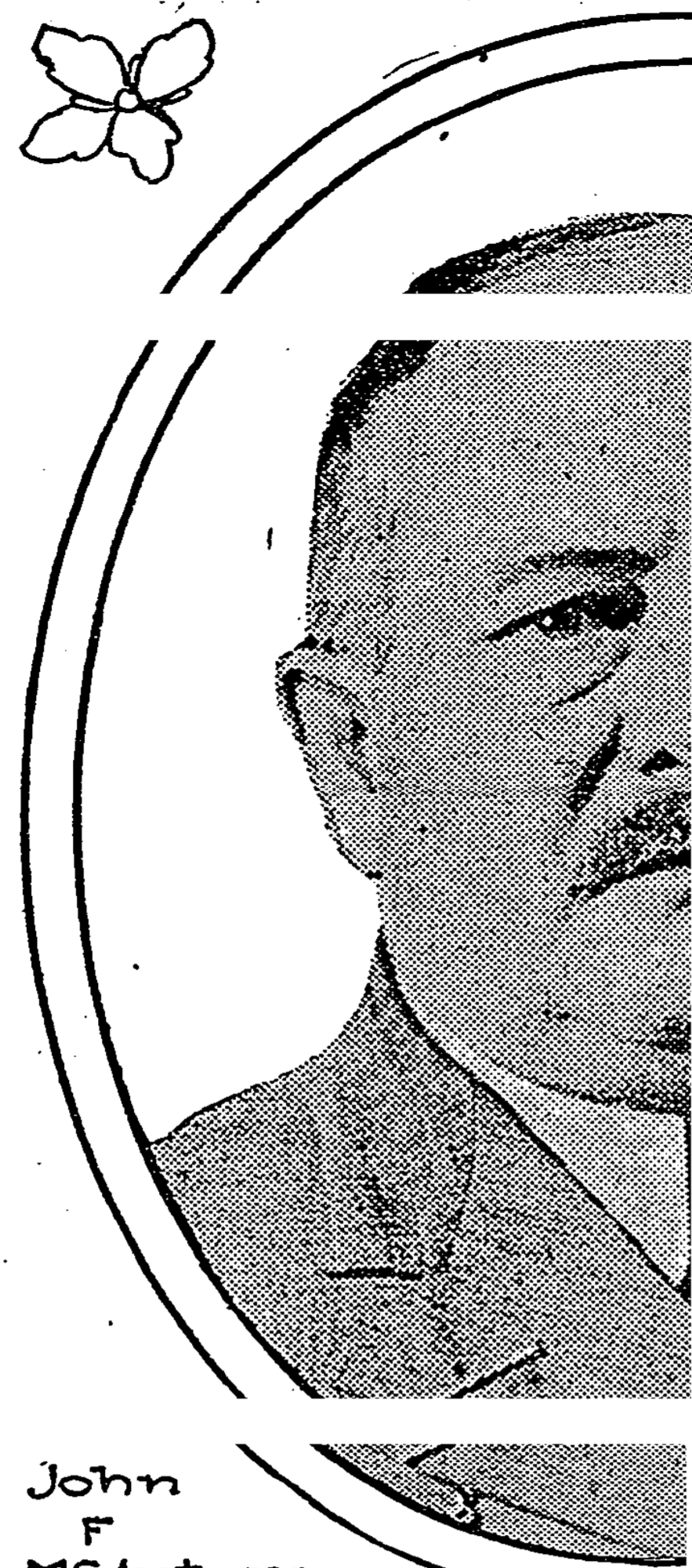
"In my opinion," said Mr. McIntyre, "it would be most reprehensible if a lawyer, knowing as the result of his client's confession to him or in consequence of facts he had found out while working up the client's case that his client was guilty, did not divulge the facts, and instead let an innocent man be punished. I think Mr. Smith acted properly in announcing to the world that he had reached the conclusion his own client was guilty. I do not see how he could keep silent and let Frank go to the chair under such conditions."

"While it is true that there is a cloak of silence and inviolability thrown around the client's statements to the lawyer, nevertheless this cloak does not extend to statements of criminality. The lawyer is an officer of the court, and as such an officer he has duties in connection with the administration of justice and the proper application of the law."

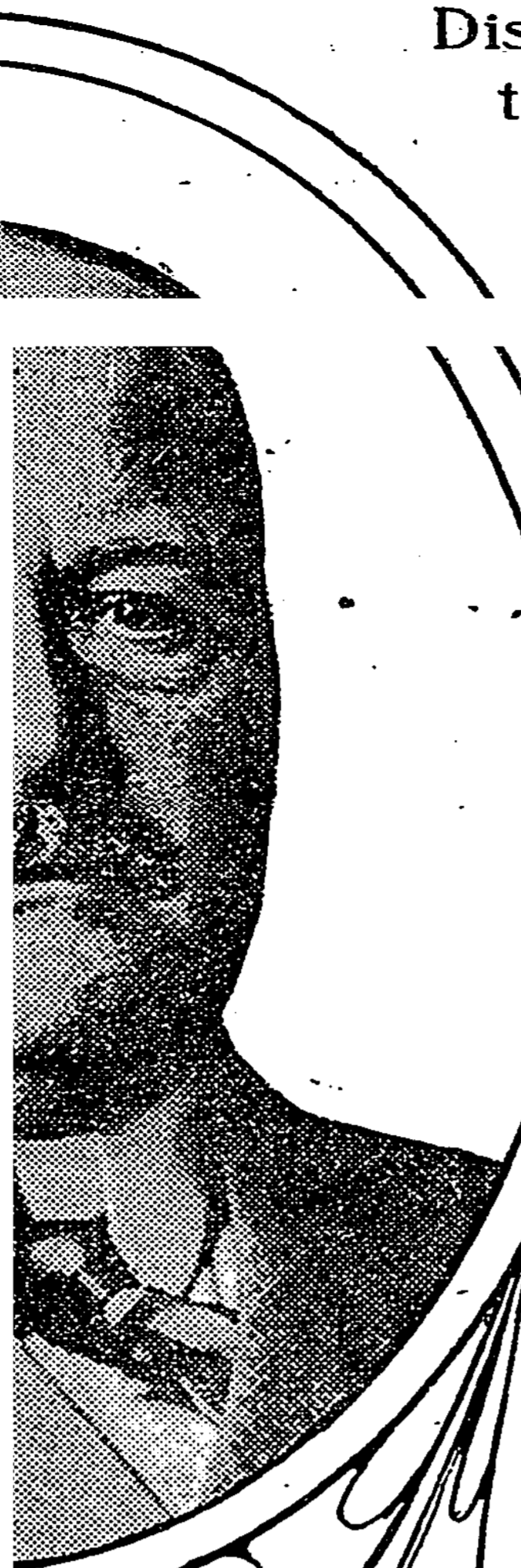
"If a lawyer is not to disclose the guilt of his client in a criminal case, when he has clearly discovered that his client is guilty, the attorney would be a betrayer at the crime and he doubtless would be punished for such an attitude."

"That the lawyer must not keep silent has been laid down in this State in a case tried within the last four or five years. If my memory serves me right, this case was that of a lawyer who was disbarred because he had kept silent in court while his client committed perjury on the witness stand, when the lawyer knew, as a result of talks with the client, that the client was then committing perjury. The court held that it was the duty of the lawyer to rise in his place in court and tell the truth. The doctrine that the client's state-

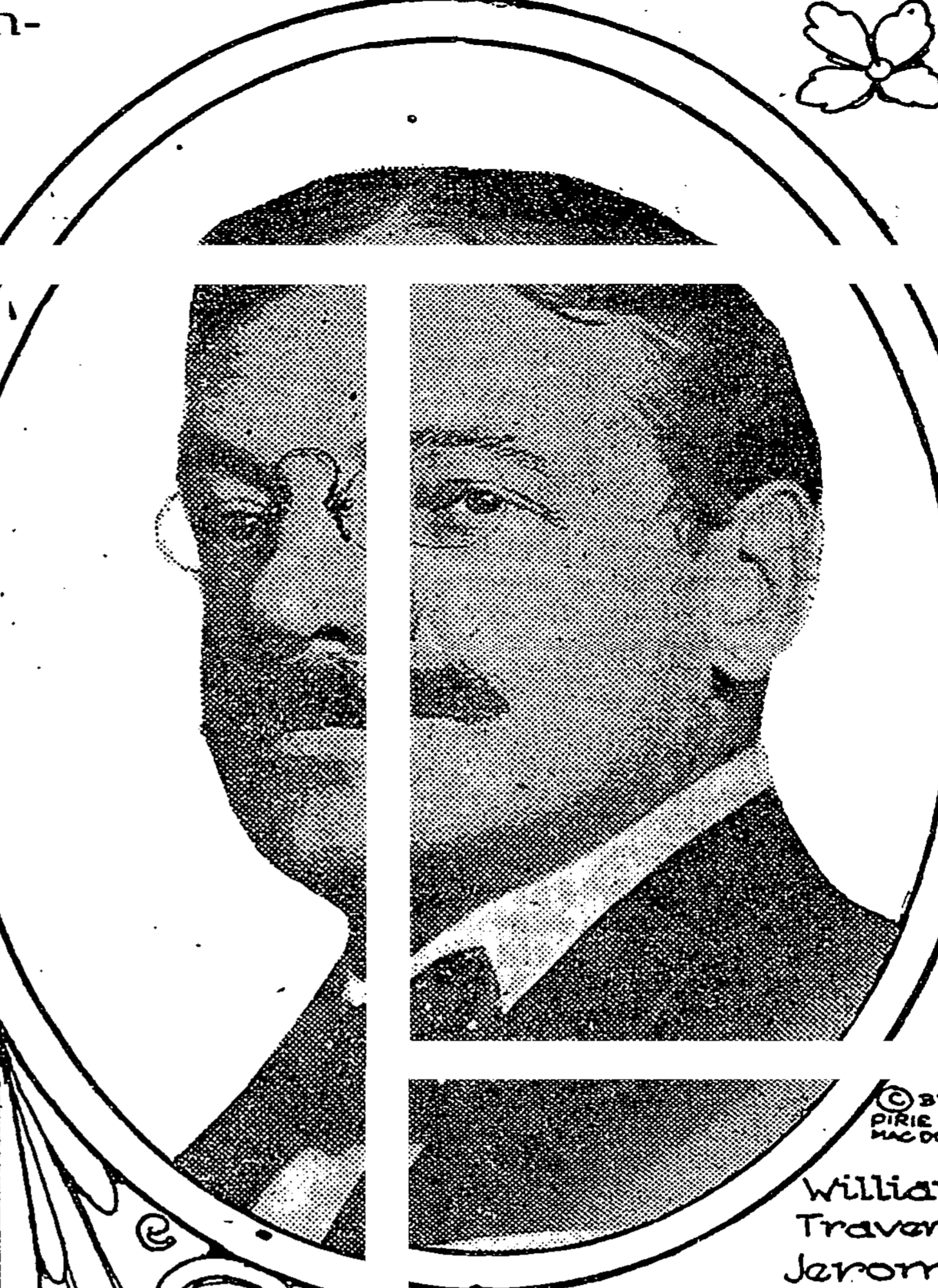
Distinguished Men of the Bar Discuss an Interesting Question Raised by the Action of Attorney Smith in the Famous Frank Murder Case.



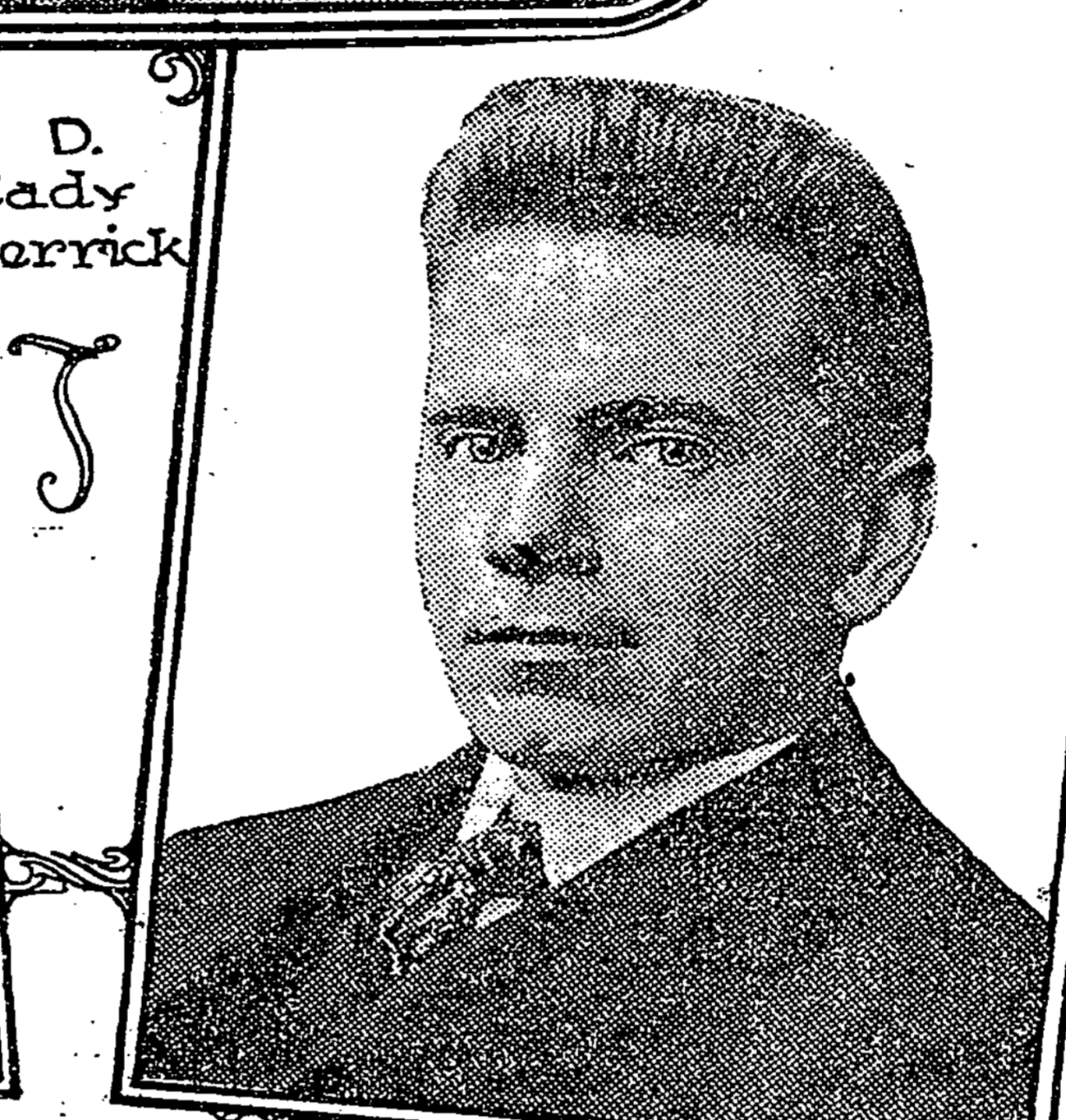
John F. McIntyre.



By Billie MacDonald.
William Travers Jerome.



Henry A. Wise.



D. Cady Herrick



Prof. Francis W. Aymar.

ments to the lawyer were sacred was found to have no application to a case of criminality like this. The line between what the lawyer should not divulge and what he should divulge is drawn by criminality."

William T. Jerome's View.

William Travers Jerome drew a distinction between what the client tells a lawyer and what the lawyer finds out for himself in working up the case. "A lawyer is certainly in a difficult position," said Mr. Jerome, "when he has to choose between allowing an innocent third person to suffer or to break the protection which the theory of privileged communications gives to his client. Yet, although a lawyer is forbidden by law to disclose what his client has told him, it is probable that in extreme cases he would be justified in telling what he knows rather than see an innocent third person unjustly punished."

"In any event, a distinction should be made between an actual confession and facts learned through his own initiative by the attorney. The seal of silence extends to the confession, but under no theory need a lawyer keep silence concerning facts which he himself finds out while working on the case and which prove to him that his client is the guilty person. In such an instance the lawyer clearly can tell what he has found out."

D. Cady Herrick's Opinion.

D. Cady Herrick, formerly Associate Justice of the Appellate Division of the Supreme Court and for some years a District Attorney, thought that Mr. Smith should not have kept silent, but that he should have chosen another form of announcement.

"In an extreme case," said Mr. Herrick, "where it is necessary to divulge facts told by a client in order to save an innocent man's life, I believe that it is the duty of the lawyer to speak, although at the same time it must be remembered that it is—in ordinary cases—for the public welfare that strict safeguards be thrown about a client's rights and his communications to his attorney."

"An instance where the lawyer finds that he must divulge his client's secrets to save an innocent man convicted of the crime he knows his client has committed makes a very hard case for a lawyer. Nevertheless, he should speak."

"In a case like the Frank case, where a lawyer ascertains that his own client is guilty of the crime for which Frank stands convicted, he owes a duty to the public, and to Frank, to make the fact known, while at the same time protecting his own client against any confessions made by that client to him."

"It seems to me that it is his duty to communicate his knowledge to the court, upon condition that his disclosures shall not be used against his own client."

"At a murder case tried in England many years ago, during the trial the defendant confessed to his counsel that he had committed the murder. The counsel informed the court, and asked to be instructed as to his duty. The court instructed him that it was his duty to remain in the case, defend his client, and see that all his legal rights were secured to him. That is, even although a man is guilty, public policy requires that he should be convicted, if convicted at all, pursuant to law, and not by its violation."

"Of course, in that case there was no innocent third party. It was only a question of the lawyer's duty under the circumstances; but it seems to me that the principle established in that case is applicable to this."

"I do not think that the disclosures should be made public or that the lawyer of the real criminal should appear as counsel for the one accused of the crime, as, according to the newspaper accounts, has been done in the case of Frank."

Former Judge Herrick did not find any distinction between facts confessed by the client and facts found out by the attorney.

"It would be impossible to draw the

line," said Mr. Herrick. "The facts found on investigation by the attorney, nevertheless, are usually based on talks with his client. The investigation would never have been made if it were not for the relation of lawyer and client and the disclosures made by the client; and I cannot see that there is any distinction as far as the seal of silence is concerned."

F. W. Aymar Dissents.

An entirely different view was taken by Francis W. Aymar, Professor of Law at New York University.

"I think that the client should have the right to come with absolute freedom to his lawyer," said Prof. Aymar, "and discuss his case with his attorney in all its phases, even to the extent of confessing guilt for a crime, and that the client should be protected in all the statements he makes. I believe it to be unjust to the client to permit the seal of silence to be removed from the lawyer's lips under any circumstances."

Henry A. Wise's Opinion.

Henry A. Wise, former United States District Attorney, drew a careful distinction between the case of crimes which had previously been committed and crimes which might be threatened or possible in giving his view of the

obligation of the lawyer to his client.

"I cannot lay too much emphasis," he said, "upon the sacredness of the relationship which springs into life when a lawyer accepts a fee from a client. Everything in that client's life and all that the lawyer may thereafter learn about him the lawyer is obligated to hold sacred, and to guard against all use to his own profit or the client's detriment."

"The relationship is one of the four great sacred relationships; all of which are age-old. It is one with the relationship of confidence and trust between the husband and his wife, the relationship between the priest and the confessor as to what is said at confessional, and between the doctor and his patient."

"You can easily argue, if you are a bit careless in your range of thought, that if a lawyer finds that a client of his has committed murder, and that an innocent man is to be hanged for the murder, he has an obligation to society in general to tell on his client, and to denounce him to the police and the courts."

"But in arguing this way, you have to overlook an item of the most vital importance. It is that if the relationship of trust and confidence between the lawyer and his client did not exist, the lawyer would have no more chance than any other person on the street to find out what his client was guilty of murder. There-

fore he has no right to the information except as he accepts it under the age-old seal as to its sacredness."

"We can best understand the situation as to the lawyer by examining a case which will be more clear—that of the priest who receives a murderer's confession. The guilty man has no doubt been taught that the priest stands for his spiritual self. And if he had not been so taught he would never think of easing his soul by going to confession."

"He goes to the priest and speaks as he would only speak to himself. He tells the priest that he is letting an innocent man die for his crime. And yet the priest is bound. If he urged the priest to aid him escaping that would be a different matter. He would be asking the priest to participate in a crime, and the privilege of the confession does not involve the asking of an immoral and illegal favor. The priest thereupon would be free to denounce him and drive him from his presence and expose him for making this improper demand."

"Or we might discuss the matter from the standpoint of any little commercial or professional business. Here I am in a law office, and I keep books on my business. I give my book-keeper each day certain items to put in the book. I trust her to do this, and I would consider it an outrageous violation of confidence and faith if she should use the information she gains outside of my office. Yet if I should ask her to put a false entry into the book, that would be asking her to commit forgery. Then she would be perfectly at liberty to go out and denounce me and make any public use she wished to of the fact that I had asked her to do a dishonorable thing."

"That is the situation. I simply cannot conceive of any moral, humanitarian, or other motive that would justify a lawyer in invading the sacredness of his relationship with a client. Charles A. Boston, Chairman of the Committee on Professional Ethics of the New York County Bar Association, was prevented by confidential considerations, he said, from discussing the point of a lawyer's duty to his client in case the client should appear to him to be guilty of a crime other than that for which the lawyer defended him. He said the confidential considerations consisted of the fact that he had pledged himself, upon taking the office he held, not to talk for publication about legal ethics until he should have the consent of the Ethics Committee. He said that under the conditions, if he should give his personal views he might be as guilty of violating ethics as any one he might seek to condemn."

What Dean Stone Says.

In the opinion of Harlan F. Stone, Dean of the Law School of Columbia University, the question of how far a lawyer should go in defending a client who is not on trial and whom he believes to be guilty resolves itself almost entirely into a matter of the betrayal of confidence.

"There are two principles that are quite clear," he said. "In the first place, a guilty man is entitled to a defense from his lawyer, even if the attorney defending him has reason himself to believe him guilty of the crime of which he is suspected or with which he is charged. That holds as a general rule, whether the client is on trial or not."

"And alongside of it is the principle, equally clear, that a lawyer is not bound to proceed with a case that he doesn't like."

"But there is a third principle to be considered, and this seems to me, in the general consideration of an abstract ethical problem, to be the most important of all. What a lawyer learns from his client is confidential. It boils down to a question of breach of confidence. There would be no possibility of defense before the law if we admitted the right of the lawyer to use against his client and in the interests of some one else the information that he has obtained during his employment as counsel. That is a very delicate personal matter, of course, but it is hard to advocate such a breach of confidence in any case."

"On the other hand, when there is no such betrayal of confidence, it seems entirely proper for a lawyer to withdraw from a case in which he believes his client to be guilty if the client is not on trial. If the client is not on trial, and if no betrayal of professional confidence is involved, I believe it to be quite proper for the lawyer to withdraw from the case and work to aid in the conviction of the guilty man and the freeing of the innocent."

"It is ethically proper for a lawyer to defend his client if guilty; but if, on the other hand, he feels that in so doing he is endangering the life or liberty of an innocent man who is on trial—while his client is not—it seems quite proper for him to withdraw entirely from his client's defense. It may be left to his careful personal consideration and his conscience to choose."

"But he should not betray the confidence of his client. He should not endanger or prejudice his client's rights."