

# CONVICTING THE INNOCENT

*Herbert T. Andrews*

MASSACHUSETTS

IN the summer and fall of 1913 there was a flood of forged and bad checks in Boston, Massachusetts. These were turned over to the Police Department, and particularly to Inspector Conboy, but the efforts to apprehend the forger were unsuccessful.

Sometime in October, 1913, Inspector Conboy received from a Boston merchant a check for \$30 which had been given him for a purchase by one Herbert T. Andrews. The check was signed in Andrews' own name. The merchant had received this check some weeks before but had not cashed it. When he did deposit it for payment, it was returned by his bank stamped "no account." The merchant thereupon turned the check over to the police. Inspector Conboy located Andrews on November 1, 1913.

Herbert T. Andrews was cashier for a large Boston store. He was well thought of by his employers as well as by his neighbors and many friends. He lived happily with his wife and baby on Hemenway Street, Boston. Just after he had returned home from his work on the first of November and was sitting down to his supper, there came a knock at the front door. It was Inspector Conboy and Special Officer Lyons with the message that Andrews was wanted at headquarters. Without permitting him to finish supper, the officers took Andrews to the Back Bay Station where Captain Good, after asking a few questions, sent him to police headquarters. Andrews' fingerprints and photograph were taken. The arrest of Andrews seemed like a lucky stroke, for this gave the police a genuine check irregularity to be compared with the numerous bad checks lately passed in the city. Andrews was officially charged with forging and uttering over forty checks. He was held for a hearing in the lower court, and was placed in the Tombs. The court decided that there was probable cause to hold him for indictment by the Grand Jury. The charge based upon the returned \$30 check marked "no account," because of

which he was arrested, was dismissed by the court for the reason that it was shown that Andrews had \$36 in the bank at the time the check was drawn and for some time thereafter, but had later drawn three small checks which had closed out his balance.

In the short time between his arrest and his appearance in the lower court the Police Department had, however, obtained identifications of Andrews' photograph from the victims of a number of the forged and bad checks which had been turned over to them.

Following the session in the lower court, Inspector Conboy spoke to Andrews and asked him why he had not pleaded guilty to the charges of forging and uttering checks. Andrews replied that he was innocent, whereupon the inspector told him that witnesses had been found to prove his guilt. Later when Andrews' father was endeavoring to plead for his son, the inspector stated that he was absolutely sure of his man and that he had never made a mistake in forty years. Many of the victims absolutely identified Andrews' photograph as that of the person who had passed the checks, others thought that possibly he might be the man, and still others could not identify him at all. The Police Department then arranged for a "show up." They took Andrews to police headquarters and after standing him at one end of a room brought in a number of his alleged victims. Andrews later said that the police officers took down the testimony of those who identified him and disregarded that of those who said he was not the man. After this experience, Andrews was taken to the Charles Street Jail where arrangements were made by his father and wife for his release on bail.

The Grand Jury considered the evidence against Andrews and returned an indictment against him covering forty-three counts of forging and uttering bad checks. The trial was set for February 10, 1914. During the time Andrews was out on bail awaiting trial, further checks were passed in and around Boston of exactly the same character as those attributed to Andrews. When Andrews appeared for trial on February 10, 1914, two additional charges were brought against him and his bail was raised from \$1,200 to \$4,000. Andrews, unable

to raise this additional amount, had to return to jail and await trial, which was postponed from day to day until finally on February 23, 1914, he was tried for three days before Judge Chase of the Superior Court of Suffolk County. The state was represented by Thomas D. Lavelle, Assistant District Attorney of Suffolk County, and the prisoner, by Frank M. Zottoli, attorney at law of Boston, Massachusetts.

The defendant's family and his attorney had made strenuous efforts to prove that the alleged forgeries and utterances of checks had not been committed by Andrews. In the effort Andrews' resources and those of his father were exhausted, and they went into debt to friends. They hired the Burns Detective Agency with no success. Mr. Zottoli endeavored to enlist the services of an eminent handwriting expert, who proved unable to help, in view of his opinion that Andrews' admitted handwriting and that on the forged checks was very similar, and in view of the further fact, as later discovered, that a police inspector had informed the expert that he had witnesses who had seen Andrews write the very checks for which he was being tried.

Seventeen witnesses, men and women, took the stand and identified Andrews as the man who had passed the checks upon them. Many of them were positive in their identifications and there was little that the defendant could do but deny all knowledge of or connection with the checks, and deny that he had ever seen any of the witnesses who testified against him. Andrews' attorney did his best to break down the various identifications but was unable to do so in the eyes of the jury, for they returned a verdict of guilty of uttering bad checks on seventeen counts. He was acquitted on all of the other counts, including all counts based on charges of forgery, because the state did not have sufficient evidence to establish that the checks had been written by Andrews. Andrews was found guilty on February 26, 1914, and on May 18, 1914, was sentenced to fourteen months in the House of Correction at Deer Island.

When Judge Chase sentenced Andrews in open court, Andrews again asserted his innocence, as he had done consistently since the day of his arrest. Attorney Zottoli asked

for a new trial, on the ground that a mistake in identity was apparent. He stated to the judge that a friend of his had seen one of the disputed checks and remarked that it was in handwriting similar to that of a forged check which had been passed on him at Salt Lake City. It was well known that Andrews had not been in Salt Lake City. Mr. Zottoli pointed out further that, while Andrews was awaiting trial and sentence, additional bad checks, similar to those upon which Andrews had been convicted, continued to be passed in Boston and the immediate vicinity. Judge Chase did not feel that he could disturb the verdict of the jury merely upon these statements by Andrews' attorney, but he indicated that if evidence were produced to substantiate these assertions he would gladly grant a new trial.

Bad checks, similar to those upon which Andrews had been convicted, continued to appear after his sentence and commitment to Deer Island. When these came to the attention of the Police Department it became quite evident that someone else was passing bad checks. Information obtained by the Detective Agency led to the belief that possibly these checks were passed by one Earle Barnes, formerly of Denver, Colorado. Captain Armstrong detailed Inspector Linton of the Boston Police Department to find Barnes. Through a careful search of hotel registers, Linton traced Barnes to Nantasket Beach. There he found that Barnes was posing as the son of a wealthy man and that he was spending money freely. He paid for purchases with checks, and several of them came back marked "no account." After careful investigation, Inspector Linton arrested Barnes and took him to headquarters, where he admitted that he had under a fictitious name drawn the several checks they held against him. When faced with additional bad checks going back over a period of months he admitted having passed them. The police officials seemed greatly surprised when he admitted his authorship of a number of the checks on which Andrews had been convicted. By comparing Barnes's handwriting with these checks it became apparent that he had been their author. Barnes's confession given on the day of his arrest, June 12, 1914, was reported to Captain Armstrong of the

Police Department, who immediately proceeded to the Superior Court to interview Judge Chase. Although Judge Chase was in the midst of a murder trial he took time to hear Captain Armstrong's statement and ordered the production of Andrews in court as soon as possible. Assistant District Attorney Lavelle, who happened to be prosecuting the murder case, was advised of the facts. Defense Attorney Zottoli was called to court at once so that when Andrews arrived the principal parties to the trial were present. Barnes, by a coincidence, happened just then to be brought into court. Judge Chase heard the parties. Upon motion of Mr. Zottoli, a new trial was granted immediately. Prosecutor Lavelle promptly nol-prossed the indictment and Andrews was a free man. He was cleared entirely of having had any connection with any of the forged or bad checks upon which he had been indicted and tried.

On June 14, 1914, Earle Barnes was arraigned before the Superior Court and pleaded guilty to a number of charges involving the forging and uttering of checks. He requested a short sentence, on the ground that he had freely confessed to passing the checks on which Andrews had been convicted and had thus aided in righting the wrong done Andrews. Judge Chase admitted this, and sentenced Barnes to eighteen months in the House of Correction at Deer Island.

WRITING about this case some ten years later, Prosecutor Lavelle observed, concerning the appearance of the two men in Judge Chase's court on June 12, 1914:

As the two men stood at the bar I wondered how so many persons could have sworn that the innocent man was the one that had cashed the bad checks. The two men were as dissimilar in appearance as could be. There was several inches difference in height and there wasn't a similarity about them. To this day I can't understand the positiveness of those witnesses. I know that they felt they were swearing to the truth. I know that the police felt that the man was guilty. So this was a case where "seeing was not believing," as the reverse of the old adage goes.

THIS is a clear case of mistaken identity. It would seem,

however, that a little care on the part of the police could have avoided the tragic error committed. An identification by photographs is rarely conclusive. It seems not unsafe to infer that the police were instrumental in persuading the seventeen witnesses to identify Andrews. When bogus checks began to appear after his arrest and during his detention for trial and sentence, it must have been apparent that another check passer was at large. It is not usually too difficult for the police to find a congenital passer of checks, especially when he operates in the same neighborhood for a time. He leaves visible traces. The record discloses no serious effort to unravel the problem created by the new checks until after Andrews' conviction, and not until then does the appearance of the new checks seem to have weakened the confidence of the police in the guilt of Andrews. Under the circumstances this appears like gross negligence. The case exemplifies the zealotry of the police for convictions. Though it was apparent that Andrews was not of criminal type and had never been arrested before, he was treated on the theory that he must be guilty. Andrews later described vividly the horrors of the several jails in which he was lodged and the awful criminals and degenerates with whom he was herded. From the first, he, like other accused persons, was treated like a guilty man. For the suffering to which he and his family were exposed, not to speak of the expense incurred in trying to prove himself innocent, no attempt was ever made to compensate him. It must be recorded that when it became patently obvious that the police had gotten the wrong man, Captain Armstrong and the prosecution moved quickly to undo their error. The case of Andrews resembles that of Greenwald (p. 80). Whereas in the Greenwald case six victims identified the wrong man, in the Andrews case, there were seventeen—quite a commentary upon the reliability of identifications, especially in a case where the resemblance proved to be most remote, if not indeed nonexistent. Andrews paid a heavy price for the petty oversight of over-drawing his bank balance. Perhaps this is the moral of the case, if there is any.

*BIBLIOGRAPHY*

1. Articles in the *Boston Globe* of June 13, 14, and 19, 1914, and an editorial on June 15, 1914.
2. "When Seeing Is Not Believing," by Thomas D. Lavelle, former Assistant District Attorney of Suffolk County, Massachusetts (*Boston Post*, July 24, 1923).
3. Acknowledgments: Mr. Frank M. Zottoli, attorney at law, Boston, Mass.; Mr. Bert Wentworth, Dover, N.H.