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People v. Molineux and Other Crime Evidence: One Hundred Years and Counting

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Articles

People v. Molineux and Other Crime Evidence: One Hundred Years and Counting

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Thanks to Arminda Bepko and Martin Morris for their assistance.

I. Introduction

A one hundred year old decision that leads the New York Court of Appeals to reflect on the content of bar review courses must be an extraordinary case. *People v. Molineux*[2] has done that.

On October 25, 2001, Judge Rosenblatt writing for the Court of Appeals stated:

> *Molineux*, which this Court decided on October 15, 1901, is now 100 years old. The last century has added to *Molineux* certain refinements and procedures, but its foundation remains unchanged: a criminal case should be tried on the facts and not on the basis of a defendant's propensity to commit the crime charged. It is axiomatic that propensity evidence invites a jury to misfocus, if not base its verdict, on a defendant's prior crimes rather than on the evidence—or lack of evidence—relating to the case before it. We have repeated this theme throughout the last century.[3]

The Court noted that *Molineux* listed five general exceptions under which prior-crime evidence could be admitted (motive, intent, absence of mistake or accident, identity, and common scheme or plan) and then pronounced, "As 'known to generations of bar review students,' these five categories produced the 'MIMIC rule;. . . . "[4]

Molineux has done more than just produce a bar review mnemonic. It is one of the Court of Appeals' most influential opinions. Not only has it been cited over 800 hundred times in New York, courts throughout the country have frequently referred to it. It essentially became codified in Federal Rule of Evidence 404(b).[5]

At least in New York, judges, trial lawyers, and bar examination students all know what *Molineux* holds. The case is an icon, but I suspect that my familiarity with the precedent may be typical. I learned MIMIC in a bar review course; when I litigated I relied on *Molineux*; and I can still

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2. 61 N.E. 286 (1901).

3. People v. Rojas, 760 N.E.2d 1265, (2001).

4. *Id.* at 1268 (quoting Martin, Capra & Rossi, New York Evidence Handbook §4.8.6, at 239 n. 99 [1997]).

5. "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to prove action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. . . ." Fed. R. Evid. 404(b).

quote the *Molineux* rule. Until recently, however, I had not actually read the opinion. When a case achieves landmark status, everyone can know what it stands for even without reading it. *People v. Molineux* resulted from a fascinating trial with a fascinating history, which I relate in the first part of this article. *People v. Molineux* itself is a fascinating opinion, which I examine in the second part of this article.

II. The Trial

A. The Homicide

Sports can lead to violence—beanballs and thrown bats, dropped hockey gloves, even knee-capped figure skaters—but seldom does animosity generated at a physical fitness facility lead to murder. An 1890's craze for sport and physical activity, however, had led to athletic clubs containing not just athletic equipment but also the opportunities for social stratifications with the bitter feelings that often result. A feud at New York City's Knickerbocker Athletic Club was at the core of the murder conviction of Roland Burnham Molineux.

Harry Cornish came to that club as athletic director in January, 1896, at the age of thirty-two, from previous positions with athletic clubs in Boston and Chicago and, as he stated, after taking medical school courses "to make myself perfect in it, in regard to cultivating the human body through athletic exercises."[6] On Christmas Eve Day of 1898, he opened a package mailed to him at the club. This revealed the even-then signature pale blue box of Tiffany's, which held something that appeared to be a silver toothpick holder and a bottle of bromo seltzer that could fit in the holder. An envelope fell out, but it contained no card, and Cornish saved the addressed wrapping paper in hopes of later determining the sender.

He took the curious Christmas gift to his home at 61 West 86th Street in Manhattan, where he rented a room from Mrs. Katherine Adams and her daughter, Mrs. Florence Rodgers. Rodgers was a distant relative of Cornish: "[M]y father's aunt is Mr. Cornish's own aunt, and my own cousins are Mr. Cornish's cousins."[7] On December 28, Mrs. Adams woke with a headache and requested some of the bromo seltzer. The bottle, sealed with wax, was opened with a corkscrew, and Mrs. Adams took some

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6. MOLINEUX CASE 148 (Samuel Klaus ed., Routledge 1997) (1929) [hereinafter Klaus]. People v. Molineux was such an important case that a lightly edited transcript of the trial was published in 1929. The editor, Samuel Klaus, stated that the transcript came from the record as presented to the Court of Appeals. The transcript contains all the significant testimony, but often attorneys' questions are deleted. The transcript concentrates on the testimony, and the attorneys' opening and closing statements, their objections, the court's rulings, and jury instructions are not included. Klaus, in an entertaining introduction, presented much information about the background to the trial and the subsequent events.

7. *Id.* at 262.

of the contents. Several minutes later, Adams was violently retching. Dr. Edwin Hitchcock was summoned. Meanwhile, Cornish had tasted the bottle's contents, and now he, too, had some physical distress. Hitchcock sampled the bottle. He got a metallic taste and detected the odor of almonds, "which is the characteristic odor of the cyanogen group, of which prussic acid is the base, and then I knew I was in contact with the most deadly poison that I had ever heard of."[8]

Hitchcock, apparently having received some of the same medical education as Grandma Jonakait— "a little peppermint schnapps couldn't hurt" —administered two hypodermics of whiskey to Mrs. Adams and to be on the safe side took three drams of whiskey himself to ward off what he had tasted. The injections were of no avail; Mrs. Adams soon died.[9] A subsequent chemical analysis revealed that the bottle contained cyanide of mercury, and an autopsy concluded that she died of "hydrocyanic poisoning."[10]

Although suicide was briefly mentioned, the hunt for a murderer quickly began. Cornish faced some scrutiny because of a possible relationship with Rodgers and because of incidents in his own past,[11] but the authorities soon concluded that Cornish was the intended victim, not the killer. The New York County District Attorney, Asa Bird Gardiner, on January 1, 1899, told the press that he was searching for a yet unidentified woman and revealed his reasoning:

> History shows that it is essentially a woman's method of action. Women acted thus in ancient times and following down through the ages we find the same traits of character, the same outcropping of human nature. It is easy to surmise the reason for this trait. Woman's nature is essentially subtle. From deeds of

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8. *Id.* at 53-54.

9. The police and coroner were summoned, but only after a delay. Hitchcock was aware that he should have immediately contacted the police, but he and Cornish instead went to an undertaker on 81st Street and Columbus Avenue. Hitchcock stated, "I was not used to using the telephone. . . . I waited there, with a telephone by my side, for ten or fifteen minutes, and I did not notify the Coroner or the police." Cornish did, however, use the phone to contact a friend in the District Attorney's office. Hitchcock continued, "I had found out that Mr. Cornish knew how to use the telephone; the reason why I didn't ask him to call up the Coroner's office was because I was not well enough acquainted with him to ask him that favor." *Id.* at 65. Eventually, the District Attorney's office sent the police.

10. *Id.* at 176.

11. When Cornish went to live with Mrs. Adams, Florence Rodgers was separated from her husband. At the trial, Molineux's attorney was not allowed to ask if Cornish knew "whether you were, in any sense, the cause of the separation of Mr. And Mr. Rodgers?" The trial did develop that Cornish had gone to Chicago in 1893, and his wife divorced him in 1897. Cornish conceded knowing a Mrs. Smalls in Chicago but denied knowing her husband or her child and responded, "I was never known as Mr. Smalls when she lived at No. 426 in Thirty-Fourth Street" in Chicago. He agreed that that his previous lodgings in New York had been more convenient to his work at the Knickerbocker Athletic Club, located at Madison Avenue and 44th Street, than the room on West 86th Street with Mrs. Adams (and Mrs. Rodgers). He also testified that had been in the vicinity of the mailbox where the fatal package was mailed to him at the time it was sent. *Id.* at 165.

> blood and violence she naturally shrinks. What then follows? Her scheming brain begins to work. She turns to poison as the easiest and surest method, because if handled deftly and cleverly it insures less suspicion and less possibility of detection. In the Adams case there may be a man involved, but I think, as I have said before that a woman is at the bottom of it and the prime mover, despite the many suppositions and rumors that Mr. Cornish has an enemy in his own sex.[12]

Even so, the investigation soon focused on Roland Molineux.

B. The Motive

Molineux, born in 1866, had been a member of the Knickerbocker Athletic Club, and animosity between him and Cornish developed. Several witnesses told the jury about the feud, but Molineux readily acknowledged it, including at the coroner's inquest into Adam's death. He stated in testimony that would be later read into his murder trial that he had many arguments with Cornish. Horizontal bars were one of the chief causes. Molineux was on the Knickerbocker's athletic committee and a notable performer on the bars; "in 1885, at eighteen, he won the first national championship on the horizontal bars in the United States."[13]

In Spring 1887, the Club planned an Amateur Circus, which was to include an exhibition on the bars by Molineux. The apparatus, however, was broken, and Molineux was authorized to have it fixed. He wrote an order to have the work done, as he said, by "a man who makes the best quality."[14] Cornish, however, ordered the replacement from a different company with which he had a connection. Molineux "did not discover the substitution until the actual performance; due either to his surprise on discovery or the lesser quality of the bars, Roland fell and came close to being seriously injured."[15] This infuriated him. A witness recounted, "I remember Mr. Molineux stating that he was the man who was to perform

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12. JANE PEJSA, THE MOLINEUX AFFAIR 125-26 (1983) [hereinafter Pejsa]. This book recounts the background of the case and the legal proceedings primarily from the viewpoint of Molineux's wife Blanche. According to the author, later in her life Blanche wrote her account of the matter, which, although not published, came into the position of Irene Hauser, who had befriended Blanche and was the author's mother. As a source, *The Molineux Affair* has to be treated carefully. Jane Pejsa states:

> For all my acknowledged debt to Blanche, *The Molineux Affair* is primarily the result of several years' research into the newspaper records, the court records and every other published source of information that is extant. Where even the most intense research failed to turn up desired information, I have occasionally made obvious interpolation between the published facts. And when Blanche's account differs from a published account, I have usually opted in favor of Blanche, for the newspapers and the prosecution erred in many ways.
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> *Id.* at 240.

13. *Id.* at 22.

14. Klaus, *supra* note 6, at 346.

15. Pejsa, *supra* note 12, at 33-4.

on that horizontal bar, that his life was the one that would be endangered if the bar broke, and therefore he wanted the bar made by the people who made the best bar."[16]

The animosity deepened when Cornish wrote a letter to a prominent person on Knickerbocker stationery belittling Bartow Weeks, a member of the more prestigious New York Athletic Club and Molineux's close friend. Molineux protested to the club's management, asking them to require Cornish to apologize. They refused, concluding that the offending letter was a private matter, but Herbert Ballantine, the Knickerbocker's chief stockholder and for practical purposes its owner, responded by holding a dinner for Weeks.

The hard feelings between Molineux and Cornish went both ways. Cornish had apparently told club members that Molineux "had kept a disreputable house in Newark,"[17] and, according to another witness, "Cornish had stated that [Molineux] had made his money in the liquor business, and Cornish used some adjective that I could not recollect, but the impression it made upon me was that, having made it in that way, that it was a reproach, the same thing as a rumseller. . . ."[18] (which apparently was a much worse blast than calling him a brewer, Mr. Ballantine's profession).

The situation became so inflamed that Molineux in effect announced that either he or Cornish had to go. The club did not remove Cornish, and on March 21, 1898, Molineux resigned from the Knickerbocker Athletic Club. Molineux conceded that he had some bad feelings about Cornish after he resigned, but according to him, they soon dissipated. He joined the New York Athletic Club: "[I]t was a better club and I was a governor there, where I had only been a committeeman in the Knickerbocker Athletic Club; it was a better club, and nicer men were in it."[19]

C. The Means

A second prong of the prosecution's evidence was that Molineux had access to the poison that killed Mrs. Adams. The defendant had studied at Brooklyn Polytechnic Institute and Cooper Union and in 1898 was in charge of making dry colors for Morris Herrmann and Company, a paint manufacturer, with a factory and laboratory in Newark, New Jersey. While Mr. Herrmann said that he had no knowledge of cyanide mercury in the plant, a coworker testified that Prussian blue was available in the factory and a seller of chemicals stated that the factory had prussiate of potash, which was used for making Prussian blue as well as the basis for

16. Klaus, *supra* note 6, at 147.

17. *Id.* at 74.

18. *Id.* at 209.

19. *Id.* at 348.

producing cyanide. Although at the coroner's inquest Molineux denied ever having seen, possessed, or made cyanide of mercury, a jury could have inferred that he had the materials, ability, and facilities to make the poison.

The evidence also showed that it was physically possible for Molineux to have mailed the poison to Cornish. A postal official interpreting the postal markings on the wrapping paper stated that the package had been mailed between 4:30 and 5:30 p.m. on Friday, December 23, 1898, in a mailbox outside the General Post Office.[20] New York's General Post Office was then located just south of City Hall Park at the intersection of Park Row and Vesey Streets, a triangular piece of property whose chief functions today are simultaneously to make both pedestrian and automobile traffic more difficult. While Molineux worked in Newark, his company's main offices were on Pearl Street in Manhattan, not far from the Post Office, and he frequently went to Pearl Street on Fridays to pick up the payroll for the factory workers.

The prosecutor also presented evidence that Molineux had access to the kind of Tiffany's box that had contained the poison. A Tiffany's employee testified that the blank envelope found in the package was the sort Tiffany's provided for visiting cards and for presents, but on cross-examination the witness stated that Tiffany's records revealed that Molineux had only purchased goods in the stationery department and none of the stationery boxes were of the size that was sent. With a deft recovery, the prosecutor then asked if the sent box would have been appropriate for some sort of marriage present, and the Tiffany's man replied, "If it were a small ladle, . . . or a hair brush; a small brush might be sent in that box." The prosecutor continued, "If there was a marriage, you would be very much surprised if you found a box like that there, would you?" The witness replied, "Not at all; no, sir."[21] And other evidence had established that Molineux had been married only weeks before the package was sent. (Apparently the practice of buying items at the equivalent of the 1890's Target and re-packaging them in Tiffany's dress was even then so common that the practice drew no comment at the trial.)

The prosecutor, however, had less success in connecting Molineux to the purchase of the silver holder that was actually sent. Diligent detective work had located the manufacturer of the object and that such a silver holder had been sold on December 21, 1898, at C. Hartdegen and Co.

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20. This examination also revealed that jurors back then felt some freedom in directly addressing the witnesses, and that this practice had some advantages. The postal official had testified that fourth class mail allowed two ounces to be sent for each cent when "The Fourth Juror" interjected, "The post-office always charges a cent an ounce, so far as I am concerned, and I think that is the law." The Fifth Juror added, "And I have paid it for many years." The official responded, "I stand corrected; I was rather confused; that is correct. . . ." *Id.* at 188.

21. Klaus, *supra* note 6, at 354.

located at Broad and West Park Streets in Newark, within walking distance of Molineux's work on Jersey Street.

Emma Elizabeth Miller testified that she was the person who actually sold the holder. She described the buyer as a well-dressed man, of medium height and build, with a sandy Vandyke beard–a description that might have fit Molineux except that he was clean shaven. On cross-examination, she stated, "The defendant was not the person who bought the bottle-holder, that silver holder; I am positive of that. . . ."[22] The prosecutor's redirect examination, through sharply leading questions, tried to undermine Miller's credibility by repeatedly asking her about prior inconsistent statements. Many of those questions were about press reports, which was not surprising, for the newspapers had a significant role in this case.

D. The Press

December, 1898, was the heyday of New York City's yellow journalism, but Joseph Pulitzer and William Randolph Hearst's Spanish-American War was over. The newspapers were left with featuring stories about the San Francisco trial of a Mrs. Botkin for murdering a Mrs. Dunning by sending her an anonymous box of candy laced with arsenic. Then came the death of Katherine Adams'. The next day Hearst's *New York Journal* had blazing headlines:

> Mrs. Kate Adams Killed Like Mrs. Dunning, By Poison Sent Through the Mails.
>
> Just as Mrs. John P. Dunning was Poisoned in Delaware by the contents of an anonymously mailed package, so apparently was Mrs. Kate J. Adams brought to her death in New York yesterday morning.
>
> The accounts of the evidence adduced in the trial of Mrs. Botkin, in San Francisco, for the murder of Mrs. Dunning, her babe and her friend, paralleled in all important points the prima facie evidence upon which the story of Mrs. Adams' death must be proved.[23]

Pulitzer's *New York World*, however, went one better under its headline, "Poisoner Invades Club Circles, Causing Two Deaths."[24] It reported that Henry C. Barnet, a member of the Knickerbocker, had been killed six weeks earlier by a poison he had received through the mail and pointed out that a man had been poisoned in November, 1897, through whiskey sent him through the mail and also that Mrs. Margaret Wilkinson of Newark, New Jersey, was poisoned by arsenic-laced sugar.

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22. *Id.* at 245.

23. Quoted in *id.* at 4-5.

24. Quoted in *id.* at 5.

The *World* soon reported that, to keep their doings secret, "a coterie of degenerates were guilty of the poisoning of Henry C. Barnet and the attempted poisoning of Harry Cornish." A Club employee had taken under his care and into his home "a boyish-looking young man. . . ." They lived near the Club in an Oriental-style apartment with a Japanese butler, all "fashioned after the rooms occupied by Oscar Wilde."[25]

The *Journal*, on the other hand, quickly focused on Roland Burnham Molineux as the chief suspect. This was sensational because this suspect was the son of General Edward Leslie Molineux, a prominent citizen who resided at 117 Fort Greene Place in Brooklyn. The elder Molineux had come to New York as a young boy and entered the Civil War as a private. He showed conspicuous bravery in several battles, was wounded, and frequently promoted, ending the war as a Major General. "He had been one of the founders of the Republican Party in New York State; he was a leader among the veterans of the Grand Army of the Republic; he involved himself in the civic life of Brooklyn and the politics of New York City; and he had still found time to build a splendid fortune . . . . " through his connection with a number of enterprises, including the Brooklyn color making and paint manufacturing firm, C.T. Raynolds and Company, where his son Roland had started his career.[26]

The case had now become spectacular enough that the competitive press were soon involved in ferreting out, and sometimes creating, evidence about the case. Some were out to show Molineux guilty; others that he was falsely accused. For example, after it was reported that Emma Miller said that she sold the silver holder to a man with a sandy beard, the press searched mightily for a wigmaker who would state that he had sold a false Vandyke to Molineux. This did not lead to any evidence at the trial, but the press's efforts ended up affecting much of what was presented, including that cross-examination of Miller. The press had reported many interviews with her, and these articles provided many of the inconsistent statements that the prosecutor confronted her with.

She disputed the accuracy of some of what the press reported. The *World* had printed a purported interview with her, but she denied that she had ever talked to that reporter.[27] Miller did testify that she had given a statement to the *Newark Evening News* and to the *Journal* and that she had

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25. *Id.* at 8.

26. Pesja, *supra* note 12, at 8.

27. She may have been telling the truth, for yellow journalism was often more interested in a good story than an accurate one. It was a "sensational and unscrupulous form of journalism practiced from 1895 to the early twentieth century by two competing newspapers, Joseph Pulitzer's *New York World* and William Randolph Hearst's *New York Journal*. . . . Yellow journalism was characterized by profuse illustrations, entertainment features, and popular 'crusades,' all devices introduced by Pulitzer and soon adopted by Hearst, who also became known for his bold headlines, disregard for facts, and flamboyant Sunday magazines." ENCYCLOPEDIA OF NEW YORK 1280-81 (Kenneth T. Jackson ed., 1995) [hereinafter *Encyclopedia*].

received $125 from Hearst's paper. To that revelation the prosecutor replied, "Well, you ought to have more than that, for what you knew. I think the news was worth more, anyway." He was apparently right because other witnesses got more, sometimes a great deal more, but Emma Miller's insistence that she had received only that sum must have had an edge to it. The prosecutor responded, "Now, don't get angry about it. I think you should rather remember that with pleasure. I am quite sure that, if I had ever received anything from them, I would remember it with pleasure."[28] In spite of the prosecutorial pressure, however, she did not change her mind, and her response to the first question on re-cross-examination was, "I am positive that the defendant is not the man. . . ." [29]

At the conclusion of this questioning, however, the court interceded. The trial judge elicited from the witness that she was no longer sure whether she could identify the buyer. He then asked, "Miss Miller, since your position is that you are unable to identify the man to whom you sold that bottle, how are you enabled to swear that this defendant is not the man?" She replied, "I can tell much better who is not the man than I can tell who was." The judge apparently sought to discredit her by looking at her sales book from the date of the sale. It recorded other transactions besides the purchase of the silver holder, but she could not remember them. The court then asked her about that day, "Everything else has escaped your memory?" The witness replied, "Yes, sir. . . ." The court concluded by asking what someone trying to prove Molineux guilty might have asked, "Could you say whether that man's Van Dyke beard was false or real?" Emma Miller, the seller of the silver holder to the man who she was positive was not the defendant, replied, "No, sir; I couldn't."[30]

E. The Recorder, the Prosecutor, and the Defense Attorneys

Just as the newspapers provided a significant subtext to *People v. Molineux,* so, too, did this man who asked the last question of Emma Miller. He was not a judge or justice, but Recorder John W. Goff. New York County then had two courts that heard criminal cases. One was the Supreme Court. The other had the official title of The Court of General Sessions of the Peace of the City and County of New York, usually just called the Court of General Sessions and presided over by a Recorder, who was Goff.[31]

Various pretrial activities had occurred that resulted in Recorder Goff presiding over the trial. At the conclusion of the coroner's inquest,

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28. Klaus, *supra* note 6, at 246.

29. *Id.* at 252.

30. *Id.* at 254-55.

31. The Court of General Sessions was abolished in 1906, and Goff was transformed into a Supreme Court Justice. *Id.* at 23.

Molineux was arrested, and Cornish, who had been jailed, was discharged. A grand jury soon indicted Molineux, but an upstate justice sitting in New York City dismissed the indictment because improper evidence had been presented to that body. The case was resubmitted, but the next grand jury, which some said contained friends of General Molineux, refused to indict, and stories flew that the political establishment did not want the indictment. According to Jane Pejsa, the District Attorney, Colonel Asa Bird Gardiner was a battlefield comrade of General Molineux in the Great War.

> But the friendship between the two men ended there. Colonel Gardiner was a product of the Tammany Hall faction within the Democratic Party. There were rumors abroad that the Republican Party, of which General Molineux was one of the most influential leaders, would momentarily reveal the systematic corruption of Tammany Hall, which had infected the District Attorney's office as well as all segments of city government. The revelations were highly feared by Colonel Gardiner. It was his hope that the old wartime friendship with the general might insulate his office from the anticipated attack. To be in the position of even accusing, let alone prosecuting, the son of the general was something to be avoided if at all possible.[32]

But headlines continued to point to Roland Molineux as the murderer, and he was arrested again for assaulting Cornish. High bail was set, and when it was posted a month later, Molineux was arrested yet again for murder and held without bail. A third grand jury indicted him once more, and he was tried for murder under this indictment.

Because the Supreme Court was not in session, Molineux was arraigned on the indictment in the Court of General Sessions. District Attorney Asa Bird Gardiner sought an order from the Appellate Division of the Supreme Court to have the case removed to the Supreme Court, but the Appellate Division held that it did not have the power to do so because appeals from the Court of General Sessions went directly to the Court of Appeals. The Recorder than denied the prosecution's motion to have the case transferred to the Supreme Court, and the trial, which was to last four months, began on November 14, 1899.

District Attorney Gardiner had strong reasons to want the case taken away from Recorder Goff. Goff, an immigrant from Ireland as a boy, had come to public prominence as counsel to the Lexow Commission, led by State Senator Clarence Lexow of Rockland County, which, in 1894, investigated police corruption in New York City. "The Committee was designed to embarrass Democrats aligned with Tammany Hall."[33] Perhaps ironically operating out of the Tweed Courthouse on Chambers Street, the

32. Pejsa, *supra* note 12, at 124-25.

33. ENCYCLOPEDIA, *supra* note 27, at 667.

Committee heard from 678 witnesses and produced 10,000 pages of transcript. The investigation "made clear the price Tammany had exacted for protecting outlawed interests. Politicians and police officers had been systematically shaking down saloons, brothels, abortionists, and gambling dens."[34] Some officers freely admitted the practices, but [n]ot all were so chattily cooperative.

> One police captain, the soon-to-be-notorious William S. Devery, turned aside most questions with the insouciant assertion that "touchin' on and apprrtainin' to that matter, I disremember." Police corruption was matched by police lawlessness; investigators turned up evidence of involvement in counterfeiting and confidence scams, pervasive election frauds, voter intimidation, and the systematic brutalizing of newer immigrants. . . . The poor suffered additionally from police collaboration with landlords, strikebreaking employers, and assorted racketeers. The Lexow exposures received nationwide press coverage.[35]

Goff was a headliner in the process. His "relentless, pitiless and savage questioning of the witnesses, and the popular resentment of the Tammany corruption which the witnesses' answers uncovered" led to Tammany's defeat in the municipal elections of 1894 and got Goff elected Recorder as an anti-Tammany candidate. "Between Gardiner and Goff there was an enmity that their official relations did not temper or hide. It was common knowledge and public scandal."[36]

Gardiner, however, was making a mistake in trying to have Goff removed. Samuel Klaus explains:

> The white haired, white bearded, ruddy faced Recorder . . . was no believer in the prevailing American theory . . . that a judge should be never more than an umpire in the joust of wits between counsel on one side and counsel on the other. He was a convicting judge, a judge who made up his mind as to the guilt or innocence of the accused and if he could not comment to the jury on the evidence he used his discretion with liberality in favor of the side of justice as he saw it; counsel became trivial in their objections, persistent in their obstinacy or disrespect, if they opposed the right. . . . During his career and after his retirement and on his death, it was said that John W. Goff should never have been a judge; he did not possess a "judicial temperament."[37]

Furthermore, some felt that there was a special bond between Goff and the man Gardiner assigned to the try the case, Assistant District

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34. EDWIN G. BURROWS & MIKE WALLACE, GOTHAM: A HISTORY OF NEW YORK CITY TO 1898, 1192 (1999).

35. *Id.* at 1192-93.

36. Klaus, *supra* note 6, at 21.

37. *Id.* at 23.

Attorney James Osborne. Osborne, born in Charlotte, North Carolina, graduated from Davidson College and then New York's Columbia Law School. Forty years old, this was his first sensational case.

> He was young, a very hard worker, slow and thorough. But he was sly, and he could be ferocious. . . . He was rarely suave. His dress was careless. He crouched on his table, threw out his chin, clenched his teeth, half-closed his eyes, tiger-like, and sneered. Usually he enraged his witnesses; having become enraged, they talked. His preparation was careful, laborious, trusted no assistant. But when on his feet he showed the effective trial lawyer's resourcefulness. . . . This was the man in whom the Recorder took delight.[38]

The judge did not show the same partiality to the defense attorneys. The defense was led by Bartow Weeks, the very same man Cornish had derided in his letter that had helped fuel Molineux's animosity towards the athletic director. Weeks had been part of the District Attorney's office until he left to form a partnership a few years before the trial with George Battle, who assisted at the trial. Battle, like Osborne, was a southerner who had come north to study law at Columbia.

Certainly, Molineux's sympathizers believed that Goff thought the accused guilty, and there was little surprise when Goff elicited from Emma Miller testimony that could have only aided the prosecution. Miller's evidence, however, was only a minor part of the trial. Instead, much more time was taken on complicated and bizarre evidence about writing paper, letter boxes, and advertised medicines.

F. The Paper and the Letter Boxes

Just as Viagra can be obtained through the Internet today, men could get advertised remedies for impotency through the mail in 1898. Agnes Evans testified that she was a companion to the wife of Dr. James Burn, a medical doctor "selling an advertised remedy." Evans recorded Burns' incoming mail, and on June 1, 1898, noted a letter coming from Molineux, which stated that 25 cents were enclosed and asked that the remedy be sent to his Newark address. Asked for the name of the product, Evans replied:

> Indian Salve.
> Was it called the "Marvelous Indian Giant Salve?"–It was.
> The Court–The What?
> Mr. Osborne–"The Marvelous Indian Giant Salve."[39]
> This marvelous salve was an impotency remedy, "which contained

38. *Id.* at 15, 23-4.
39. *Id.* at 192.

secret herbs from the ancient Mohawk Tribe."[40] The requesting letter had been written on robin's egg blue paper with three interlaced crescents. At the coroner's inquest, Molineux had denied ever having seen such paper before. The prosecution established that this paper had been for sale at four stores in New York City and at two in Newark, at one of which Molineux's employer had an account. The dispute over the paper also gave the formal reason for the testimony of Mary Melando.

Newspaper readers were aware of Melando well before she testified. She and her friends maintained, as widely reported in the press, that Molineux seduced her when she was thirteen years old.[41] Melando had once been caught in a police raid on a Newark "disorderly house" and had been released at Molineux's intercession. She was not a willing witness and stayed out of New York, but two "dashing detectives" took her and a girl friend on a "spree. . . . A little giddy, the party, at the suggestion of the gentlemen, made Paterson [New Jersey,] their destination. But when they alighted, Mamie Melando to her confusion found herself in Suffern, New York."[42] She was jailed as a material witness, and thus Mary Melando was brought to court.

Melando testified that she had known Molineux for eleven years and had worked in the factory where the defendant was employed. Molineux had an apartment within that building where he lived after leaving the Knickerbocker Athletic Club, and she testified that part of her job was to maintain that sleeping place. There she saw the robin's egg blue paper with interlaced crescents and liked it so well that she took three sheets for herself. She stated that the paper she was shown in court was exactly the same as in Molineux's room.

After counsel completed their questioning, Recorder Goff took over, producing his longest interrogation of the trial. Time and again he had Melando identify the paper. She replied affirmatively to his question of whether she was in "habit" of going into his apartment. She responded, "Yes, sir," when he asked, "You have been very friendly to Mr. Molineux?" At the conclusion, Molineux's counsel Bartow Weeks objected to the question, but the objection was denied. Then, apparently because Goff had been speaking so softly with the witness, a juror stated that he had been unable to hear the testimony, and the stenographer read her testimony to the jury again.[43]

This testimony about the blue paper and Molineux's request for an impotency remedy intertwined with other evidence. Joseph J. Koch was the manager of a concern at 1620 Broadway in Manhattan. A year before

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40. Pejsa, *supra* note 12, at 72.

41. The press also reported that Molineux had been shipped out West when he was sixteen after he was named the other man (boy?) in a divorce action.

42. Klaus, *supra* note 6, at 25.

43. *Id.* at 88-106.

the murder, on January 3, 1898, he received a letter requesting a sample of paper Koch's company sold. The letter was signed "Roland B. Molineux," and the return address was the place where Molineux worked. As a result of this request, Molineux was put on a mailing list that contained information about other businesses Koch managed, including one concerning letter-boxes. This service provided an address for mail, which could be picked up by the subscriber or re-directed by the company, a common business because the Post Office did not then lease boxes.

On December 21, 1898, Koch rented a box to a person who registered as "H. Cornish." Harry Cornish stood up in the courtroom, and the witness said that this Cornish was not the renter. Neither, however, was Molineux. Koch stated, "I have never identified anybody as the man who rented . . . the letter-box."[44]

On the other hand, Koch did testify that he "most assuredly, certainly" had seen the defendant before. Molineux had come to 1620 Broadway in mid-December to inquire about renting a letter-box. "I asked him then whether he desired to make the arrangement then and there–to make the arrangement now; he said no; he said he simply called to inquire for a friend of his; that he was not prepared to make the arrangement."[45] Koch testified that one letter was put in the rented box on about January 2, 1899, and picked up, but Koch did not know by whom. "Cornish" also received some other mail, but it was placed in the wrong box, and it was not discovered until after the death of Mrs. Adams. These included a package from Cincinnati's Van Mohl and Company containing Calthos, another impotency drug, and a sample box of Kutnow powder, a patent medicine that would feature prominently in the testimony about the death of Henry Barnet. The prosecution tracked down the letters requesting that these remedies and other matters be sent to the Cornish box, and they had been written on the blue paper with the interlaced crescents.

There were reasons, however, to be suspicious about Koch's identification of Molineux. In January, 1899, as the investigation was in its first phase, he told the *Journal* about the letter box taken out by "Cornish" and that Molineux was not the renter. The paper paid him $500. Not until May did he tell anyone about the earlier visit, if it did occur, by the defendant, and in November, 1899, on the eve of the trial, he sold this story to the *World* for another $250. Exculpate Molineux and get paid from one source; inculpate him later and get paid from another.

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44. *Id.* at 289.

45. *Id.* at 288.

Many witnesses learned that there was money to be made from the competitive press, and even Cornish's shock at narrowly averting death and watching Mrs. Adams die did not stop him from considering getting paid. He testified, "I might have said [to the *Journal*] that, if I gave a story, that I ought to receive some recompense for it. . . ."[46] Money also entered into the testimony about another letter box that figured prominently into the trial.

Nicholas Heckmann rented letter boxes at 257 W. 42nd Street. He said that he knew Molineux by sight for about five years, mostly from Jim Wakely's saloon, on the corner of Sixth Avenue and 42nd Street, a place "frequented by athletic sports."[47] Heckmann testified that on May 27, 1898, Molineux rented a box under the name of "H.C. Barnet," from which he picked up mail about twenty times.

The Marston Remedy Company, pursuant to a request and a completed diagnosis form, which described Molineux and not Barnet, sent out its impotency remedy and a "marriage guide" to Barnet at that letter box.[48] In addition, Heckmann testified that Calthos had been mailed to the box. The prosecution also tracked down letters requesting other items to be sent to the Barnet box, but, as the Court of Appeals later noted, "none of these 'Barnet' letters contain any reference to any powder or substance which was used or, so far as appears, could be used, in mixing with, or in the administration of, the poison by which Barnet and Mrs. Adams are alleged to have been killed."[49]

There were reasons, however, to be suspicious of Heckmann's identification. On cross-examination he revealed that under the name of Nicholas Hackmann he had worked for the 42nd Street Road, but he maintained, "I was not discharged from that road for knocking down fares, I am sure of that. . . ." He did concede, "I was suspended and never got back [a job with the Post Office in 1884]; I do not mean discharged; simply an indefinite suspension; I believe I am still under suspension. . . ." He replied, "No, sir" to the question, "[D]id anyone ever suggest to you that if you would testify in this case an indictment pending against you would not be moved?" For reasons not given in the existing transcript, his answer was excluded to the question, "Is it not a fact that you were under an indictment for bribery, and that such indictment has not been moved?"[50]

He swore that he had not received any money in connection with this case, but after the murder he "was in the employ of the *New York World* in connection with the case at the price of fifteen dollars a day; . . . a part of my employment . . . was to keep appointments with the police

46. *Id.* at 168.

47. Klaus, *supra* note 6, at 302.

48. *Id.* at 312.

49. People v. Molineux, 61 N.E. 286, 291 (1901).

50. Klaus, *supra* note 6, at 306-08.

department, and report to the *World*. . . ." On January 31, 1899, he went to Newark with Mr. Buchignani, a *World* reporter to see Molineux at the color factory. Heckmann was told that he would receive $350 for an identification. He testified that he then recognized the defendant as the renter of the box, but he told the reporter that other papers had offered him $1,000. He would graciously accept $600 from the *World* for the identification. Heckmann testified that Buchignani responded, "Of course, Mr. Heckmann, you understand I want about $75 for myself"; "I told him to suit himself about it, to make the addition to the price. . . ."[51] The reporter, apparently not entirely trustful of his bosses, advised that it was best to get the money in advance of the identification, but in any event the *World's* editor refused to pay. Heckmann tried to no avail to sell his story elsewhere for $1,500, and thus, he said, he gave the information to the police without receiving recompense.

At the conclusion of counsel's examination of this witness, Goff took over once again. He asked if Heckmann understood the solemnity of the oath and the meaning of perjury. The witness replied that he did. The Recorder asked if Heckmann expected any money or gratuity for his testimony, and the witness replied, "Whatever reward I was to get, I was cheated out of by Mr. Hirsch [editor of the *World*.]. . . . Since then I have no promise of any reward; I don't expect any; do not want any. . . . I expect nothing."[52] Goff concluded his questions:

> Now, before you leave the stand, I will ask you this question, and I want you to probe into the depths of your conscience, and you know how vitally important it is; have you a doubt in your mind as to this defendant being the man who rented that letter-box from you under the name H.C. Barnet? – None whatever.
>
> Have you any doubt? – No, sir. . . .
>
> Before you leave the witness stand, it may be too late hereafter, and if you have any doubt, reflect–if you have any doubt whatever, you are now in the place to express that doubt now, if you have any. – I have no doubt, your Honor, at all. . . Mr. Molineux was H.C. Barnet.[53]

G. The Handwriting Evidence

Of all the evidence, the testimony that most directly implicated Molineux in Mrs. Adams' murder concerned his handwriting. Cornish had saved the wrapping paper on the package that contained the poison. Three people testified that they personally knew Molineux's handwriting, and

51. *Id.* at 306-07.

52. *Id.* at 311.

53. *Id.* at 311-12.

they all said that his hand had addressed the poison package.[54] The prosecution did not stop there; it produced fourteen handwriting experts. The bases of their expertise varied: an editor of the *Penman's Art Journal;*[55] a person "in business . . . with the Northwestern Mutual Life Insurance company as an expert penman;"[56] a Professor of Medical Jurisprudence of the College of Physicians and Surgeons of the University of Illinois who "engaged in microscopic work . . . the majority of it is investigations of ink, paper and writing, that is of forgery or anonymous or disguised letters";[57] the paying tellers of various banks;[58] a geologist and chemist who "also studied handwriting for about twenty-one years;"[59] and others. Some of these men (they were all men) had been touched by the press. The *New York Herald* had paid one the unusual sum of $37.50 for a published opinion about handwriting in the case;[60] the *New York Evening Journal* had paid another an astounding $2,000.[61] Their testimony revealed the importance handwriting expertise often had in trials and investigations of the era. One was testifying for the twelfth time that year; another said that he had appeared in more than seven hundred cases; yet another had testified 1,200 times in thirty years.

They used different methods in their determinations; one expert stated "that handwriting experts, including himself, had different modes of procedure for disguised handwriting than for simulated handwriting."[62] Even so, the experts all seemed to agree with the one who testified, "I claim that the determination of disputed handwriting is an exact science; it has been proven to be scientifically correct so often, that the cases of failure have been due, or upon investigation have been found to be due, mainly to the person making the investigation, rather than to the fact that the science is in dispute; I consider it a science."[63]

They examined writings that the defense conceded had been made by Molineux that had been entered into evidence as well as handwriting exemplars given by the defendant to one of the experts outside of court. They compared them to the letters requesting items to be sent to the Cornish and Barnet letter boxes, and they all agreed that these letters had been written by Molineux. Most damning of all, every expert said that Molineux had addressed the poison package sent to Cornish.

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54. *Molineux*, 61 N.E. at 293.
55. Klaus, *supra* note 6, at 83.
56. *Id.* at 117.
57. *Id.* at 121.
58. *Id.* at 217.
59. *Id.* at 236.
60. Klaus, *supra* note 6, at 318.
61. *Id.* at 235.
62. *Id.* at 118.
63. *Id.* at 120.

H. The Death of Henry C. Barnet–The Other Crime Evidence

Barnet had died in his room at the Knickerbocker Athletic Club on November 10, 1898, six weeks before the poison was sent to Cornish and the Cornish letter box was rented. From the onset of his symptoms on October 30, 1898, until his death, he was attended by Dr. Henry Beaman Douglas, who saw his patient two or three times a day. Douglas stated that Barnet died from cardiac asthenia or weakness of the heart caused by diphtheria as he had written on the death certificate.[64] The prosecutor, however, asked the doctor, in what was a crucial question on appeal: "Now, Barnet had told you that he received this package [of Kutnow powder] anonymously through the mail, hadn't he?" The doctor replied, "Mr. Barnet told me that he had received a box of Kutnow powder through the mail. . . "[65] and that he had taken a dose of it, which he thought was the cause of his problem. Barnet had been initially seen by a Dr. Phillips, who later attended Cornish when he became sick after taking some of the substance that had poisoned Mrs. Adams.[66] Barnet also told Dr. Phillips that he had taken a dose of 'Kutnow' powders and ascribed his trouble to that.[67] Dr. Douglas further testified that Barnet said "that he was in the habit of taking Kutnow powder to make his bowels move, and that he had taken this because he got up in the morning feeling badly, having a sore throat."[68]

Dr. Douglas sent out the sample tin of Kutnow powder in Barnet's room for analysis because he "had to account for a certain amount of mercurial stomatitis" that Barnet displayed.[69] That analysis revealed that the powder contained about fifty percent mercury cyanide, about the same

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64. *Id.* at 211.

65. Klaus, *supra* note 6, at 322.

66. The subject of Barnet's death first entered the trial during the testimony of Dr. Phillips, who had given his opinion that Cornish was suffering the effects of cyanide poisoning. The doctor was then asked whether he had attended another poisoning case at the Knickerbocker Athletic Club. When the court questioned the materiality of such evidence, the prosecution contended that it was relevant to show the basis for the doctor's conclusion that Cornish had suffered from cyanide poisoning. "It is simply that [the witness] attended another case, and, because he observed certain symptoms in that case, it enabled him to perceive the existence of similar symptoms, in the case at hand. Now, that is all." *Id.* at 133 On this basis, the court received the evidence. The doctor then testified that Cornish suffered from cyanide poisoning and said this opinion rested "very largely" on Barnet's death. *Id.* at 137.

67. Molineux, 61 N.E. at 289. Mr. Herman Kutnow, perhaps trying to get some favorable advertising out of the Molineux trial, which may have depressed the market for his product, explained to the jury that "Kutnow's powder is an evaporation of the Carlsbad mineral springs, made in a pleasant tasting form; it is a pleasant tasting effervescent salts." Klaus, *supra* note 6, at 326.

68. Klaus, *supra* note 6, at 326.

69. *Id.* at 322.

proportion that the fatal "Bromo-seltzer" that killed Mrs. Adams had. After Adams's death, Barnet's body was disinterred from its burial spot in Brooklyn's fashionable Green-Wood Cemetery, and an autopsy performed on February 28, 1899. This revealed mercuric cyanide in various of Barnet's organs. This information plus the recital of Barnet's symptoms led a number of doctors the prosecution called to conclude that Barnet had died from cyanide poisoning. These doctors all agreed that such poisoning was rare. One stated that "in the whole history of my profession, as far as I know, there are only two or three cases reported in the world. . . ."[70] Even so, Dr. Douglas maintained his position: "[M]y belief in the causation of Mr. Barnet's death remains unshaken; and I would not rather that the whole world be shaken than that my death certificate should be; I have the honor and fairness of my opinion, and that death certificate was sustained by me because it is right. . . ."[71]

No direct evidence, however, linked Molineux to that tin of Kutnow powder in Barnet's room. Besides the statement attributed to Barnet, there was no evidence on how it got there. Its wrapping paper had not been preserved. Herman Kutnow did identify the tin as one distributed after July 1, 1898, when the law began to require attached revenue stamps. He said that the samples could be obtained by visiting the office at 853 Broadway, where the name and address of the visitor was usually recorded. Samples had also been distributed in the summer of 1898 in Asbury Park, New Jersey. Most often, however, samples were mailed in response to a letter requesting a free sample. The company kept these letters, and a clerk went through all of them received from the beginning of July until the end of 1898, a number she estimated at "about a hundred thousand."[72] One of those letters was received by Kutnow Brothers on December 22, 1898, weeks after Barnet's death, and the sample tin was mailed out the next day to H. Cornish at the 1620 Broadway letter box. The handwriting experts said that Molineux had written this letter, and it was written on the robin's egg blue paper.

While the prosecution failed to link Molineux to Barnet's Kutnow power, it did present evidence about why Molineux might have wished Barnet dead. The prosecution established that Molineux and Blanche Chesebrough were married on November 29, 1998, shortly after Barnet's death. The state also presented evidence that Molineux and Chesebrough lived together from November 1897 to May 1898 at 251 W. 75th Street, where Molineux was known as Mr. Chesebrough. Molineux, then, however, seemed to be out of the picture, and another man started to call on Miss Chesebrough. As the Court of Appeals put it, this evidence about

70. *Id.* at 139.

71. *Id.* at 324.

72. *Id.* at 190.

the visitor left "no doubt in the minds of the jury that the caller . . . was in fact Barnet."[73]

When the testimony about the purported love triangle was first offered, the court and defense counsel questioned why it was material. The prosecutor testily responded:

> It shows that the defendant here was living with Mrs. Chesebrough, in 1897, and I now propose to show that he did live with her and that another man intervened, if I can.
>
> Mr. Weeks – But what motive is that for killing Cornish?
>
> Mr. Osborne – Well, didn't you hear me say that I must find a man here that didn't like Barnet and had a motive to get rid of him?[74]

This explanation satisfied the court, for the evidence was admitted.

Molineux's version of these relationships was presented through his coroner's inquest testimony. He stated that he had introduced Barnet to Miss Chesebrough at the Metropolitan Opera house in the fall of 1897– "it was the first concert given by the Banda Rossa. . . ."[75] Molineux conceded that Barnet had shown some interest in Miss Chesebrough: "He called upon her and sent her flowers; took her to dinner; took her to the theatre; just what attentions a man might pay to a lady."[76] The coroner then stated:

> Mr. Molineux, I ask you these questions, because I feel I am obliged to do so, with considerable regret. — I understand that, and answer them in the same spirit. Do you know whether or not your wife was ever in love with Mr. Barnet? — I think she admired him as friend. Did she ever have any pronounced affection for him, to your knowledge? — Not that I know of, sir. Were you in any way jealous of Barnet? — I was not. Did you ever express yourself as being hostile to Barnet at any time in your life? – Never. Did you ever speak to anyone about Barnet's attention to your wife? – I never did.[77]

Molineux went on to state that he had been engaged to Blanche Chesebrough in September 1898, that is, before Barnet's death. The engagement was not publicly announced, but it was revealed to Molineux's family. Miss Chesebrough had paid a call on the family, and General Molineux and his wife had reciprocated. Molineux knew of no calls by Barnet on Chesebrough after the spring of 1898. However, when Barnet got sick, Chesebrough sent Barnet a bouquet and a note, which read:

> I am distressed to learn of your illness. . . . Won't you let me know when you are able to be about? I want very much to see you. Is it that you do not believe me? I want very much to see

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73. *Molineux*, 61 N.E. at 290.

74. Klaus, *supra* note 6, at 279.

75. *Id.* at 349.

76. *Id.* at 349.

77. *Id.* at 350-51.

> you... Don't be cross any more, and accept, I pray you, my very best wishes. Yours, Blanche.[78]

Molineux was asked, "Would this letter indicate to your mind a degree of intimacy between Barnet and Miss Chesebrough that you were not aware of?" Molineux replied, "No sir; we all called one another by the first name; Barnet called me 'Mollie,' and I called him 'Barney,' and I think Miss Chesebrough did so, too; we were all good friends...."[79] In spite of Molineux's characterization of the relationships, the Court of Appeals delicately concluded, "This letter was couched in language from which it could be easily inferred that there existed between Miss Cheeseborough [sic] and Barnet an attachment stronger than mere platonic friendship."[80]

After the introduction of the coroner's testimony, the trial took a hiatus, when one of the jurors got sick. "Counsel for both sides came to juror number ten's home and begged him to come to court. It would not be long, they said. He would receive the most considerate care and attention."[81] Ten days later he was back in the jury box. If he did get that promised care, it was to little avail. He died a few weeks after the trial, and his widow repeatedly tried, without success, to get compensation from the state, claiming that the jury service had caused his death. The promise that it would not be long, however, was kept. Shortly after the juror returned the prosecution rested, and then, to the surprise of many, Bartow Weeks rested for the defense without presenting any evidence.

I. The Verdict

The published transcript of the trial does not include the summations, but Weeks addressed the jury for eight hours, and Assistant District Attorney Osborne followed for two long days. Jane Pejsa quotes from portions of Osborne's closing statement. About the Barnet evidence, he stated:

> It is not proved as a crime, but proved as a separate and similar transaction, tending to show that the defendant committed the Adams crime. It is introduced in evidence here... for the purpose of getting a description of the murderer; because every man of any common sense must know that the man who killed Barnet, or sent him that powder, is the same man that sent it to Cornish....
>
> And you have already conceived in your mind that the man who destroyed Barnet, and sent poison to Cornish, must have had some motive, strong or weak, adequate or inadequate, good

78. *Id.* at 351.

79. Klaus, *supra* note 6, at 352.

80. *Molineux*, 61 N.E. at 290.

81. Klaus, *supra* note 6, at 27.

> or bad, sufficient or insufficient; must have had some motive, and that this defendant is the only human being in the world who had any motive. . . .
>
> Gentlemen of the jury, we will discover–if our theory is right–that the man who hated Barnet, the man who hated Cornish, the man who had the motive, and the man who used that [blue] paper must be the same man. . . .
>
> Have you not already said, in your hearts, in your consciences, when you first heard of this cyanide of mercury being sent by the mails, sent on its deadly mission, like an arrow flying in the nighttime, to kill, not perhaps the man for whom it was intended, but some innocent child or some old woman, you know that the man was *outré*, peculiar, abnormal, in some respects; that he lacked a man's strength and a man's virility? . . . And what do you find?
>
> You find the man who hated Cornish, and the man who found Barnet to be an impediment, was the same man who used the fatal blue paper with fatal crest on it; and it turns out that man is found to be in need of a remedy for impotence.
>
> Doesn't that explain the whole thing? Is it necessary for the District Attorney to say another word in this case?[82]

The jury the attorneys addressed had taken over two weeks to select. Over 500 hundred prospective jurors were questioned.

> [T]he jury finally sworn was of such a character, it was said, never within memory of any man in the court room had a jury of such excellence ever been sworn.
>
> One juror was a retired stock broker. Another was a retired confectioner. A third was an iron manufacturer. A fourth was a chemist. A fifth was a stationer; the sixth a builder; the seventh an undertaker; the eighth a real estate dealer; the ninth a banker and broker; the tenth a millinery wholesaler; the eleventh a manufacturer of chemical thermometers. The twelfth was an executive in a book publishing company.[83]

The jury began to deliberate at three on a Saturday afternoon and returned a guilty verdict at eleven that evening. Samuel Klaus writes, "When the verdict became generally known, there was general surprise. . . . [A]ll over the city popular sympathy, already strong during the trial was with the defendant, not so much on his own account as on the account of the gallant old General," who had faithfully attended the trial, sitting at the defense table and sometimes patting the defendant's back in the presence of the jury.[84] (On the other hand, during the trial, "the defendant's attitude . . . excited most comment. From the very beginning, he showed practically no emotion or concern. On its face this was a studied attitude.

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82. Pejsa, *supra* note 12, at 210-12.

83. Klaus, *supra* note 6, at 24.

84. *Id.* at 24 and 28.

He threw back his head and laughed.... Toward the end of the prosecution's case, when the evidence was strong against him, he played 'tick-tack' ....").[85]

The *World* and the *Journal* praised the outcome. The *New York Times*, writing in a style that remains familiar, said that few expected the verdict: "Without impinging in any degree on the good faith of the jurors, it may be said that their verdict has not increased the confidence of the public that the safety of human life is promoted by the administration of the law in this case.... We are not dealing with the question of his guilt but with the manner of his trial. His guilt was not established at that trial beyond a reasonable doubt."[86] The *Evening Post* contended that the trial's length and counsel's tactics had confused the jurors and the jury was "not aided by much display of judicial firmness or discretion."[87]

At his sentencing, Molineux did speak, proclaiming his innocence of both deaths. He denied buying the bottle-holder or renting the letter boxes. He complained about "yellow journalism" and then he "raised his hands dramatically and said, 'The handwriting experts who have testified against me, Your Honor, may give their opinion, they may give their reasons, what they believe, what they think, but I know that these hands never put pen to paper to address that poison package or to write the disputed letters."[88]

Sentence was then announced. Molineux was to be executed six weeks later.

J. The Second Trial

Distinguished counsel were retained for an appeal, and in June 1901, the Court of Appeals, then sitting in Buffalo, heard the argument, which took three days. On October 15, 1901, the Court of Appeals reversed the conviction in the famous opinion discussed below.

Law partners Frank S. Black and William M.K. Olcort of Troy, New York, represented Molineux on the second trial while Assistant District Attorney Osborne labored on for the prosecution. The trial judge was now John S. Lambert from Fredonia, and he maintained a tight pace. The jury was selected in twelve hours on October 20, 1901, and with most of the evidence that had related to Barnet now inadmissible, the rest of the trial also moved quickly, being completed in three weeks.

This trial was also different because the defense did present evidence. Most notably, Roland Molineux testified. He denied the murder, of course, and he denied having rented the Cornish letter box.

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85. *Id.*, at 24-5.

86. *Id.* at 28.

87. *Id.*

88. Klaus, *supra* note 6, at 29.

Furthermore, he claimed an alibi. When the fatal package was mailed downtown on Park Row, he was visiting a Professor Vulte far uptown at Columbia University. According to Klaus, "Molineux's cross-examination was, in the opinion of those who heard it, a complete victory for him. . . . To every question, he . . . had an easy, ready answer." Thus, he was asked about the purchase of the Marvelous Indian Giant Salve. "With the same suavity with which he made it appear that Cornish was far too much below him the object of his hatred, he answered that he had used it for a sore knee. He denied that he suffered from the complaint for which the salve was advertised."[89]

Handwriting experts now also testified for the defense saying that the disputed writings were not in his hand. Mrs. Anna Stephenson, of Brooklyn–"pious, kindly, churchgoing"[90]—testified that she had seen the poison package mailed. A nervous man had bumped into her on December 23, 1898, at the General Post Office, and she just happened to be able to read the address on the package. She was positive that Molineux was not the sender. Martin Huff of Grand Rapids, Michigan, testified that he was present in Hartdegen's when the silver bottle holder was sold. Molineux was not the purchaser.A pharmacy clerk testified that Cornish and Mrs. Rodgers came into his store frequently, before Mrs. Adams died, to buy bromo-seltzer. Professor Vulte supported Molineux's alibi. The defense rebutted the contention that deadly cyanide was a rare chemical by having three law clerks testify that each had easily purchased the poison from different drug stores.

The jury deliberated less than an hour. The verdict was not guilty.

K. The Aftermath

Acquittal did not lead to unmitigated happiness for Molineux. Blanche Chesebrough Molineux, who had steadfastly attended the first trial, did not attend the second one. A few months after the acquittal, she went to Sioux Falls, South Dakota, to secure a divorce on the grounds of grievous mental cruelty. She married her divorce lawyer, Wallace Scott, and in 1905 became a vaudeville performer under the name Blanche Molineux Scott, until Molineux threatened suit to restrain her from using the Molineux name. She settled in Minneapolis, had a son who died in childhood of rheumatic fever, divorced Scott, and then reconciled with him. Scott was greatly affected by the stock market crash of 1929 and died in an automobile accident in 1930 under circumstances suggesting suicide. His wife was left destitute and scraped together a living. According to Pejsa, later in life "her appearance marked her as an eccentric. She was

89. *Id.* at 36.

90. *Id.* at 37.

often noticed in the older parts of the city–a stooped old woman with hennaed hair, a painted face and outlandish garments; however her exterior belied a beautiful speaking voice and considerable inner charm. Those who ventured to speak to her discovered a proud woman who might graciously accept the gift of friendship while rejecting any gift of material value."[91] She died in 1954 at the age of eighty.

Molineux at first went back to the color business, but he began to write, publishing sketches about life on death row, and continued on writing romantic fiction. He had a prison melodrama produced by David Belasco, and in 1913, married the play broker who had helped him with the play. His behavior, however, had become troublesome, and he suffered a nervous breakdown. He was first sent to a sanitarium in Babylon, Long Island, where he deteriorated and then to the Kings Park State Hospital for the Insane, where he died on November 2, 1917. "The records of the hospital describe the form of insanity present in the case of 'Roland B. Molineux' as 'General Paralysis, Cerebral Type, due to syphilitic infection, and characterized by progressive mental deterioration, leading to complete dementia and terminating fatally.'"[92]

While the appeal was pending, New York Governor Theodore Roosevelt removed Asa Bird Gardiner from the office of District Attorney on grounds on incompetence. James Osborne continued on for a while as a prosecutor. He ran unsuccessfully for District Attorney and then became a leading criminal defense attorney. The firm of Weeks and Battle dissolved soon after the trial. Bartow Weeks became a Justice of the New York Supreme Court. When he died, retired Justice John Goff was one of the honorary pallbearers. George Battle became a Wall Street lawyer who died in 1949.

III. The Decision

Perhaps the most surprising aspect of the Court of Appeals decision, *People v. Molineux*, is that the other crime evidence was not the determining issue on appeal. Instead, the court unanimously ruled that the improper admission of hearsay required reversal. The court discussed the other crime evidence merely to guide the trial court on what evidence would be admissible on the retrial.[93] The "Molineux Rule," the reason the

91. Pejsa, *supra* note 12, at 238.

92. Klaus, *supra* note 12, at 43.

93. On appeal, Molineux also challenged the handwriting testimony. The court noted that one method of identifying handwriting had "come to be known as comparison of hands, which could be made at common law by witnesses, or by the court or jury without the aid of witnesses, between the disputed writing *and other writings already in evidence for other purposes*. . . . No document could be introduced merely as a standard of comparison with the disputed writing." People v. Molineux, 61 N.E. at 305. (Emphasis in original.) Molineux had given exemplars of his handwriting for one of the prosecution's experts, and these writings were not admissible for any purpose other than handwriting

case is still known, was not essential to the outcome of the appeal; it was dicta.

A. The Hearsay Issue

The prosecution contended that Barnet had died because he had ingested poison mixed into Kutnow powder that he had received through the mail. The jurors could have concluded from direct evidence that Barnet died from poisoning and that Kutnow powder in his room contained a lethal dose of cyanide. Perhaps the jury could have consequently inferred that Barnet had taken the powder causing his death. But the only evidence that Barnet had received the remedy through the mail came from hearsay delivered by Dr. Douglass, who had testified that Barnet had told him "that he (Barnet) had received it through the mail, had taken a dose of it, and he thought that was the cause of his trouble."[94] The court, with almost no discussion of its conclusion, held that this testimony was inadmissible and required a reversal. The majority simply stated, "[T]here was fatal error in the admission of the statements made by Dr. Douglass with reference to receiving the box of 'Kutnow powder' by mail. This evidence was clearly incompetent. . . . There was, therefore, no competent testimony in the case that Barnett ever received 'Kutnow' powder through the mail."[95] All the judges agreed on this point. Judge Gray, who along with Judge Parker disagreed with the majority's conclusions about the other crime evidence,

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comparison. New York statutes, however, had modified the common law by permitting comparison of a writing "with any writing proved to the satisfaction of the court to be genuine. . . ." *id.* at 322, and the court ruled that the exemplars could be used for comparison purposes under New York law.

Molineux also claimed that those handwriting samples should not be used because he had not given them voluntarily. The court summarized:

> It is strongly urged upon us that, owing to the publicity of the case and the known suspicion of the police and prosecuting authorities against the defendant, he could not safely have refused [the] request to produce specimen's [sic]of his handwriting; that such refusal would have subjected him to criticism; that it would have augmented suspicion in the public mind and incited the attacks of certain newspapers which appear to have tried the case to their satisfaction without awaiting the more tedious processes of the law. But the court cannot admit the argument. The defendant had the legal right to refuse to write for Kinsley. He preferred to accede to the latter's request, and we can discover no ground upon which the writings thus produced can be excluded from the case.

Id. at 306-307. Molineux also argued that his testimony at the coroner's inquest should not have been admitted into the murder trial. The law was then that coroner's testimony could be subsequently used if a person not an accused had testified voluntarily at an inquest. The court noted that Molineux was neither under arrest nor charged when he testified and rejected his contention, as it had with the similar argument about the handwriting samples, that his testimony under the circumstances was not truly voluntary. Even though he attended the inquest under subpoena and had to choose between his privilege against self-incrimination and testifying fully, his testimony was admissible.

The court did not consider it necessary to consider other issues Molineux pressed on appeal.

94. *Id.* at 280.

95. *Id.* at 318.

gave it the most detailed consideration, and he merely stated:

> [T]he admission of the testimony of the physicians, as to what Barnet told them about the reception and the taking of the powders, was distinct error and, in view of the nature of the case made, one which cannot be overlooked. It was objectionable as being hearsay evidence and as not told for the purpose of treatment. Without that testimony there was no evidence that Barnet received any Kutnow powder containing the poisonous admixture through the mail, or that he took any of it, except as might be inferred from the autopsy performed on his body some time after Mrs. Adams' death.[96]

The majority and dissent, however, may have been differing as to how much of the hearsay testimony was inadmissible. The majority indicated that the evidence could not be used to establish that Barnet had received the powder through the mail, while Gray's dissent indicated that it could not be used for that purpose or to show that Barnet had taken the powder. New York law then, as now, recognized a hearsay exception for statements made to a treating physician. The court had enunciated the basis for the exception a decade before *Molineux* when it had stated that a person seeking medical treatment from a doctor had a "strong inducement . . . to speak truly. . ." to get the desired care.[97] The exception at the turn of the twentieth century, however, was relatively undeveloped, and whether part of Barnet's hearsay was admissible is not clear. He was talking to a treating physician, and treatment could have been affected by what substances Barnet had ingested. Thus, Barnet's statement that he had taken Kutnow powder perhaps should have been admitted under the hearsay exception. On the other hand, Barnet's treatment would not be affected by how he had obtained the powder. If he had bought the powder or had been given it by a friend or had received it through the mail, his treatment would have been the same. Consequently, Barnet's declaration that it had come through the mail did not fall within the hearsay exception for medical treatment and was inadmissible.

Whether any part of Barnet's hearsay might have been admissible became moot, however, when the court concluded that none of the evidence about Barnet's death was admissible on the retrial, including all parts of Dr. Douglass's testimony. Indeed, it is remarkable that although the hearsay ruling caused the reversal, the judges seemingly regarded that issue, perhaps because the correct ruling was apparently so obvious, as relatively insignificant beside the other crime issue. Judge O'Brien, after noting that the hearsay required a reversal, stated: "Whether any proof bearing upon the sickness and death of Barnet, or the defendant's connection with it, was admissible upon the trial of the case at bar is a

96. *Id.* at 353.

97. Davidson v. Cornell, 30 N.E. 573, 576 (N.Y. 1892).

much broader and more important question."[98] Indeed, Judge Werner, writing for the majority, produced a veritable treatise–more than twenty-seven pages–about the admissibility of the other crime evidence.[99]

B. The Other Crime Evidence

1. The Basic Rule

A basic evidentiary principle, the court stated, is that other crime evidence is not admissible. The court stressed that this was not a new doctrine, but one of ancient lineage.

> The general rule of evidence applicable to criminal trials is that the state cannot prove against a defendant any crime not alleged in the indictment, either as a foundation for a separate punishment, or as aiding the proofs that he is guilty of the crime charged. This rule, so universally recognized and so firmly established in all English-speaking lands, is rooted in that jealous regard for the liberty of the individual which has distinguished our jurisprudence from all others, at least from the birth of Magna Charta.[100]

According to the court, the rationale for this doctrine needed no elucidation: "This rule, and the reasons upon which it rests, are so familiar to every student of our law that they need be referred to for no other purposes than to point out the exceptions thereto."[101] Even so, the court went on to discuss cases that did give justifications. Thus, an earlier Court of Appeals decision indicated that admitting other crime evidence might lead to convictions without sufficient proof of the charged crime: "It would be easier to believe a person guilty of one crime if it was known that he had committed another of a similar character, or, indeed, of any character; but the injustice of such a rule in courts of justice is apparent. It would lead to convictions, upon the particular charge made, by proof of other acts in no way connected with it, and to uniting evidence of several offenses to produce a conviction for a single one."[102]

Molineux also quoted from another Court of Appeals case that maintained the prohibition on other crime evidence helped preserve the presumption of innocence. While in countries such as France the tribunal could consider the "whole past life" of the accused, "his tendencies, his

98. *Molineux*, 61 N.E. at 310.

99. ROBERT A. BARKER & VINCENT C. ALEXANDER, EVIDENCE IN NEW YORK STATE AND FEDERAL COURTS Sec.404.1 (1996) correctly label Werner's opinion "remarkably researched, instructive and entertaining . . . ."

100. *Molineux*, 61 N.E. at 293 (internal citations omitted).

101. *Id.*

102. *Id.* at 294 (quoting Coleman v. People, 55 N.Y. 81, 90 (1973) (citing State v. Lapage, 24 Am.Rep. 69 (N.H. 1876)).

nature, his associates, his practices, and, in fine, all the facts which go to make up the life of a human being. . . ." the common law had adopted a presumption of innocence that required proof beyond a reasonable doubt."[103] Under these principles "it is not permitted to show his former character, or to prove his guilt of other crimes, merely for the purpose of raising a presumption that he who would commit them would be more apt to commit the crime in question."[104]

Molineux also cited a Massachusetts case that rejected other crime evidence because "[s]uch evidence compels the defendant to meet charges of which the indictment gives him no information, confuses him in his defense, raises a variety of issues, and thus diverts the attention of the jury from the one immediately before it; and, by showing the defendant to have been a knave on other occasions, creates a prejudice which may cause injustice to be done to him."[105] Finally, the court referred to a Pennsylvania decision, which stated, "Logically, the commission of an independent offense is not proof, in itself, of the commission of another crime. Yet it cannot be said to be without influence on the mind, for certainly, if one be shown to be guilty of another crime equally heinous, it will prompt a more ready belief, that he might have committed the one with which he is charged; it therefore predisposes the mind of the juror to believe the prisoner guilty."[106]

These justifications have a common thread. When the jury hears evidence that an accused has committed other misdeeds than the one charged, the jury may too readily convict him because they perceive him to be a "knave" without concentrating on whether the presented evidence actually shows beyond a reasonable doubt that he committed the charged crime. Three decades later, Judge Cardozo in *People v. Zackowitz* [107] accepted the prohibition on other crime evidence and in notable language said, "In a very real sense a defendant starts his life afresh when he stands before a jury, a prisoner at the bar. . . . The principle back of the exclusion is one, not of logic, but of policy."[108] Judge Werner, however, did see logic behind the rule. The admission of other crime evidence would likely lead to verdicts that did not follow the law. The jury might too readily convict a defendant for the kind of person he was perceived to be without finding that the charged crime had been proved beyond a reasonable doubt. Keeping such information from the jury, then, will more likely lead to a verdict that follows the law.

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103. *Id.* at 294 (quoting People v. Shea, 41 N.E. 505, 511 (1895)).

104. *Id.* at 294 (quoting Shea at 511).

105. *Molineux*, 61 N.E. at 293 (quoting Commonwealth v. Jackson, 132 Mass. 16, 20-21 (1882)).

106. *Id.* (quoting Shaffner v. Commonwealth, 72 Pa. 60 (1882)).

107. *People v. Zackowitz* 172 N.E. 466 (1930).

108. *Id.* at 468 (citing WIGMORE, EVIDENCE, Vol 1, §§57, 192-94); *People v. Molineux*, 61 N.E. 286.

2. The Exceptions

Molineux did not become a landmark because it stated that evidence of other crimes is not generally admissible. That rule, as the court noted, was well established. *Molineux* lives because of its discussion of the exceptions to the general rule. Judge Werner's opinion collected the applicable cases, rigorously examined and categorized them, and explained the limited circumstances when other crime evidence should be admissible. More than a century later, the resulting framework still provides the basic analytic approach to other crime evidence. That structure is encapsulated in *Molineux's* most famous passage, the paragraph that continues to be extracted in cases, treatises, evidence codes, casebooks, and, of course, bar review courses:

> The exceptions to the rule cannot be stated with categorical precision. Generally speaking, evidence of other crimes is competent to prove the specific crime charged when it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; (5) the identity of the person charged with the commission of the crime on trial.[109]

The opinion went on to examine in depth the cases and commentaries that related to each of those categories and produced an invaluable primer on when each exception should apply. Those extracted principles took on a more concrete life when they were applied to the trial of Roland Burnham Molineux with the court concluding that the other crime evidence had been improperly admitted.

a. Motive

Molineux first addressed the motive exception, but it received the least attention of any of the exceptions. It clearly did not apply to the appealed trial. The court stated that other crime evidence could be admitted to establish motive only if the evidence tended to prove the motive for the charged crime. This was so "obvious" that the court said the citation of authorities for this proposition seemed "unnecessary," but still the court gave illustrations. For example, in a murder case, the prosecution was allowed to prove an "incestuous connection" between the defendant and his sister, the deceased's wife, to establish a reason why the defendant would kill the deceased. In another trial, it was admissible to admit evidence that the defendant had killed his wife and one of his children in a trial for murdering another of his offspring when that evidence tended to

109. *Molineux*, 61 N.E. at 294-95.

show that one motive existed for all the murders, that being to enable a second marriage which occurred shortly after the homicides. After discussing some similar rulings, *Molineux* concluded, "Cases of this character might be multiplied indefinitely, but enough have been cited to show that, when evidence of extraneous crimes has been competent upon the existence of motive, it has been either the specific motive which underlay the particular crime charged, or a motive common to all the crimes sought to be proved."[110]

If the evidence of another crime does not shed light on the motive for the charged crime, the motive exception does not apply. In Molineux's trial, the evidence about Barnet's death did not tend to prove anything about a reason to kill Cornish. The two killings, according to the prosecution's theory, did not result from a common or intertwined motive, but from entirely separate ones. For Cornish, it was "[h]atred, engendered by quarrels between them, in which Barnet took no part, and of which, so far as the record shows, he had no knowledge." For Barnet, it was "[j]ealousy caused by [his] intervention in [Molineux's] love affair. . . ."[111]

The court continued that the prosecution had "ingeniously" tried to fashion a common motive from the evidence that Molineux had forged both Cornish and Barnet's names to letters, but this effort failed since the evidence still only revealed separate motives. "Even if it be admitted that [this evidence] proves the commission of an independent crime, with an adequate motive behind it, it contributes nothing to the subject of the motive in the case at bar."[112] The court's conclusion was clearly correct. If Molineux had slit Barnet's throat in an act of sexual jealousy, it would have shed no light on why Molineux would have wished to murder Cornish.

b. Intent

While "motive is the moving power which impels to action for a desired result," the court noted, "[i]ntent is the purpose to use a particular means to effect such result."[113] While proof of motive may not always be essential, criminal intent always has to be established for a *mens rea* crime. Often intent can be inferred, the court continued, from the nature of the act. When it cannot be, evidence of other crimes may be used to show the purpose for an action whose criminality is inherently ambiguous. "Familiar illustrations . . . are to be found in cases of passing counterfeit money, forgery, receiving stolen property, and obtaining money under false

110. *Id.* at 296-97.

111. *Id.* at 294.

112. *Id.* at 295.

113. *Id.* at 297.

pretenses."[114] In these situations, the mere action charged does not necessarily indicate whether it was done with a criminal intent. Many people, for example, could unknowingly obtain a fake bill and then use it. Evidence that a defendant had previously passed other counterfeit money, however, tends to show that the charged act was not innocently done. Under such circumstances, evidence of other, similar crimes is admissible to establish the criminal intent for the charged crime.

The court amassed cases to illustrate the limitation of the intent exception. It only applies when the criminality of an action is inherently ambiguous. If criminal intent is readily inferred from the charged action, the other crime evidence is not necessary to prove intent and is not admissible. This fundamental limitation of the intent exception prohibited the other crime evidence in Molineux's trial. There was nothing ambiguous about the criminal intent of Molineux's alleged conduct. As the court explained, a rare and deadly poison had been mixed into a common medicine, carefully packaged to look like a gift, and then anonymously sent by mail on Christmas eve "when, according to the universal custom of this country, gifts are exchanged in this manner, and when even the most cautious and prudent person might have taken counsel of his generosity rather than his suspicions. Could such a foul and cunningly devised act have been innocently done?"[115] The court answered itself:

> If intent may not be inferred from such an act as this, then there is no such thing as inference of intent from the character of the act. . . . We have, then, two cases of poisoning as separate and distinct as two cases of shooting. Could it be successfully urged that the shooting of one person by another could be proved to show the intent with which the latter shot a third person at a different time and for a distinct cause? Certainly not. . . .[116]

c. Mistake or Accident

Molineux gave more attention to the mistake or accident exception partly because many of the relevant cases involved poisonings. One common pattern was that the deceased had died from poison, but possibly because the poison had been mistakenly taken or the ingested substance had been accidentally contaminated. Under such circumstances, evidence of other similar poisonings by the accused was admitted to rebut the possibility that the charged death was an accident or mistake. Similarly, in a time when it was not always easy to authoritatively fix the cause of a death, other poisonings were admitted to show the cause of the charged death. As an example, the court referred to the English case *Regina v.*

114. *Molineux*, 61 N.E. at 297.

115. *Id.* at 298-99.

116. *Id.* at 299-300.

Geering, "where the defendant was tried for the murder of her husband, the cause of whose death was not free from doubt. Three sons had died at about the same time, all exhibiting the same symptoms. The court held that evidence of the other three deaths was competent to show that all were due to arsenical poisoning, and the domestic history of the family was admissible to enable the jury to determine whether the poisoning was accidental or not."[117]

Molineux summarized the mistake or accident cases:

> [I]t is clear that the only two theories upon which the rulings . . . have been attempted to be or could be defended are: First, that the killing may have been accidental, or, second, that the cause of death was in doubt. In the one instance proof of the other deaths in the same family, under similar circumstances and identical symptoms, may have been the only evidence obtainable to prove a felonious killing; in the other instance the uncertainty as to the cause of death could, possibly, have been removed by evidence of previous deaths in the same family circle, under conditions which would make the cumulative evidence of all the deaths cogent proof of the cause of the particular death charged in the indictment.[118]

In contrast, the cause of the death Molineux was charged with was not in doubt. The other crime evidence added nothing to the clear proof that Mrs. Adams had been poisoned. Furthermore, while Mrs. Adams death may have been an accident, the attempted poisoning was no mistake or accident. Repeating the facts it listed when discussing the intent exception, the court stated that the deadly substance had to be deliberately mixed, was packaged to deceive its recipient, and then presented to appear as a Christmas gift. The court continued:

> Was this poison sent by mistake or accident? Are not utter depravity, venomous malignity, murderous design, fiendish cunning, indelibly stamped upon every fact and circumstance connected with the act? It would be a travesty upon our jurisprudence to hold that, in a case of such appalling and transparent criminality, it could ever be deemed necessary or proper to resort to proof of extraneous crimes to anticipate the impossible defense of accident or mistake.[119]

The other crime evidence could not be admitted to show the absence of a mistake or accident because it was already clear that the charged death was no mistake or accident.

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117. *Id.* at 302 (citing Regina v. Geering, 18 L.J. Mag. Cas. 215).

118. *Id.* at 305.

119. *Molineux,* 61 N.E. at 305.

d. Common Plan or Scheme

Molineux introduced its consideration of the common plan or scheme exception by stating:

> It sometimes happens that two or more crimes are committed by the same person in pursuance of a single design or under circumstances which render it impossible to prove one without proving all. To bring a case within this exception to the general rule which excludes proof of extraneous crimes, there must be evidence of a system between the offense on trial and the one sought to be introduced. They must be connected as parts of a general and composite plan or scheme, or they must be so related to each other as to show a common motive or intent running through both.[120]

If, for example, several houses were burglarized on a single block of Elm Street one night, evidence that the accused burglarized one of the houses would be admissible to prove the charge that he burglarized another of them. The court's review of authorities and cases led it to stress that the exception was limited to when all the crimes "are shown to have been committed in pursuance of a common design, or when they are so connected that evidence of one tends to prove the other . . . ." The highest court of Pennsylvania had correctly marked the exception's boundaries, *Molineux* concluded, when it said, "To make one criminal act evidence of another, a connection between them must have existed in the mind of the actor linking them together for some purpose he intended to accomplish; or it must be necessary to identify the person of the actor by a connection which shows that he who committed the one must have done the other."[121] Unless this connection is clear, the evidence of the other crimes should not be admitted.

The court then continued that the exception did not justify the other crime evidence in the Molineux trial because the evidence did not show that the two crimes were part of a common scheme or plan. The court stressed that the motive for the attempted killing of Cornish was clear without any reference to Barnet's death; that the killing of Barnet added nothing to the proof about the motive for trying to murder Cornish; and that the claimed motive for killing Barnet was a different one from that alleged for Cornish. Furthermore, the separation of seven weeks between the deaths undercut the notion that they were part of the same scheme. The court continued that a claim of a common scheme or plan would fail if Barnet had been shot and a bullet seven weeks later intended for Cornish killed Mrs. Adams. The Molineux trial presented the same situation: "The two deaths were caused by the same means, at different times, inspired by

120. *Id.* at 305.

121. *Id.* at 309 (quoting Shaffner v. Commonwealth, 72 Pa. St. 63).

separate motives, and charged against one person. Is there any connection between the two crimes?"[122]

Molineux did not feel it necessary to answer its question and turned its attention to the claim that the necessary connection between the incidents came from the letter box correspondence. The evidence about the "Barnet" correspondence, however, made no references to Cornish, and the "Cornish" box was rented seven months after the Barnet box and six weeks after Barnet's death. The Cornish correspondence contained no reference to the Barnet matter. As the court said, "it remains true that whatever was done in December had reference to the death of Cornish and not Barnet, the latter having died in November."[123] While the same remedies were requested to each box, this only established "that if the same person was operating through both boxes he was employing similar means for different ends or for some common purpose not disclosed by this record. The methods referred to are as identical as any two shootings, stabbings or assaults, but no more so."[124]

The prosecution also contended that the poison which caused both deaths "was one which could only be secretly and successfully produced and administered by a person who had the requisite knowledge and skill, and, therefore, it was proper to show the use of the same poison in a previous case."[125] Other evidence showed that Molinuex had the ability and means to produce the substance, and evidence of Barnet's death added nothing to this proof. "It is as plain as that two and two make four that the man who could produce it one case could do so in another."[126] At most the evidence showed the commission of two distinct crimes, not a common scheme or plan from which two crimes resulted.

e. Identity

While the court articulated analytic frameworks for the other exceptions, it had difficulty doing so for the identity exception. The court found few cases admitting other crime evidence under the identity exception with many more considering the exception and rejecting its applicability. "The reason for this is clear," the court continued. "In the nature of things there cannot be many cases where evidence of separate and distinct crimes, with no unity or connection of motive, intent or plan, will serve to legally identify the person who committed one as the same person who is guilty of the other."[127] The court did discuss a number of cases

122. *Id.* at 301.
123. *Id.*
124. *Molineux*, 61 N.E. at 301.
125. *Id.*
126. *Id.* at 302.
127. *Id.*

where the identity exception was found to apply, but it extracted no unifying principles from them.

The court then asked, "What is there in the evidence of the alleged killing of Barnet that tends to identify the defendant as the person who poisoned Mrs. Adams?"[128] The prosecution's answer stressed two aspects of the case. One, once again was the letter box evidence, and again the court rejected its significance to the murder charge.

> All that is shown by the character of this correspondence is that defendant used the names of Barnet and Cornish to carry it on and that it related generally to a common subject not connected with either of the alleged murders. As the contents of none of the letters in the one series contain any reference to or throw any light upon the matters referred to in the other series, it is difficult to understand how the letters in the Barnet series tend to identify the murderer of Mrs. Adams.[129]

The prosecution also stressed that the poison used in each was the same, and it was so rare that in all likelihood the same person must have employed it in each case. The court, after noting that each crime had a different motive, responded:

> Such an inference might be justified if it had been shown conclusively that the defendant had killed Barnet and that no other person could have killed Mrs. Adams. But no such evidence was given. The evidence tended to show that the defendant had the knowledge, skill and material to produce the poison which was sent to Cornish. But he was not shown to be the only person possessed of this knowledge, skill and material. Indeed, it is common knowledge that there are many such persons. Therefore, the naked similarity of these crimes proves nothing.[130]

3. The Dissents

Chief Judge Parker conceded that other crime evidence is generally prohibited. In determining whether such evidence might still be admissible, however, a court should not concentrate on the exceptions, as the majority had, but use a more general standard. "I think the real test in such cases is: Does the evidence of the other crime fairly aid in establishing the commission by defendant of the crime for which he is being tried? And that test, and none other, is fairly established by the authorities."[131] Although he did not expand on the crucial concept of "fairly aid in establishing," he concluded that this "broad and comprehensive test"

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128. *Id.* at 303.

129. *Molineux*, 61 N.E. at 303.

130. *Id.*

131. *Id.* at 313.

allowed admission of the other crime evidence because it tended "strongly to show that one mind conceived and one hand executed all of the details of both crimes."[132] While this might seem to be a conclusion that the identity exception applied, he continued, "[I]f we assume the contention to be sound that the People can prove facts constituting another crime only when they are within one of the exceptions enumerated, the Barnet evidence is clearly within" the identity exception.[133]

The evidence, the Chief Judge concluded, showed that one person committed both crimes. He relied on the rarity of the poison: "The fact that an attempt had been made upon the lives of two persons within so brief a period by this rare and unusual poison naturally suggested to those whose duty to the state it was to find the murderer if possible that it would quite likely appear that one person sent both packages."[134] This had to be coupled with the evidence about the letter boxes and the forged correspondence.

> [T]here is to be gleaned from the letters themselves and the circumstances surrounding and attending their writing very strong evidence that one brain conceived and carried out both schemes. In each the letter box was hired in the name of the intended victim; in each, remedies for impotency were written for in the name of the intended victim; both the Cornish and the Barnet letters were undated; both series of letters, as well as the address on the poison package, contained misspelled words; in each case a rare poison – cyanide of mercury – was employed; in both cases the mails were used to convey the poison to the intended victims; in both cases samples of Kutnow powder were written for, and were received at both boxes; Calthos, a remedy for impotency, was also received at both boxes; Barnet and Cornish were members of the same club, and the poison sent to each was contained in a simple headache remedy in ordinary use. These facts and circumstance, standing wholly uncontradicted and unexplained, as they do in this record, force the mind almost irresistibly to the conclusion that the same man desired the death of both Barnet and Cornish and plotted and worked to accomplish it. Certainly a jury are at liberty to draw that inference, and if they do the conclusion will necessarily follow that Molineux was the criminal actor in the Cornish case, because he was positively identified as the actor in the Barnet case both by the testimony of Heckman and by Molineux's description of himself in the diagnosis blank.[135]

Parker conceded that this logic depending upon establishing that Barnet had received Kutnow powder through the mail and that the hearsay

132. *Id.* at 314.

133. *Id.*

134. *Molineux*, 61 N.E. at 314.

135. *Id.* at 315.

evidence on that point had been improperly admitted, requiring a new trial. But if that fact could be proved by admissible evidence on a new trial, the evidence concerning Barnet's death should be admitted.

Judge Gray's analysis was similar to Parker's. The conviction had to be reversed because of the admission of the hearsay, but if it could be established that Barnet had received the poison through the mail, then the other crime evidence was admissible:

> The rarity of the deadly drug used, within a few weeks, in both cases; its concealment in the same kind of powders, as taken by Mrs. Adams and as found in Barnet's room after his death, and the use of the mail by the sender of the poison, in connection with the evidence showing, or tending to show, that defendant made use of the names of Barnet and of Cornish, in the hiring and use of private letter boxes, for various purposes, including the procuring of patent medicines, all of these facts would, if competently proved, have a tendency to show a unity, or similarity, of mental plan and operation, and bear upon defendant's identification, however inconclusive in themselves.[136]

4. Should the Evidence Have Been Admitted to Prove Identity?

This crucial issue separated the majority and dissent: Did the evidence show that one person committed both crimes? If so, evidence that Molineux killed Barnet should have been admissible to show that he tried to kill Cornish. One of the important facts was that the poison used in both had been rarely employed, and it might have been useful here if Judge Werner had returned to his shooting analogy. He said the two cases were no more similar than if Barnet had been shot and seven weeks later someone shot at Cornish and killed Adams. That analogy might have been more apt, however, if he had posited that Barnet had been killed by a rare gun–say a ball from a musket–and Adams was also killed by a similar ball. Would two separate homicides by musket fire have shown that both were committed by the same person? Such a conclusion would not have been warranted as long as more than one person had access to such a musket. Similarly, while the use of cyanide to poison may have been rare, since more than one person–indeed, many–had access to the poison, the mere use of the poison in separate murders did not necessarily mean that the same person did them all. In fact, this conclusion should have been clear from the presented evidence. The testimony indicated that cyanide poisoning had been rare, but at least five instances were reported, and there was no contention that Molineux had done them all. Clearly more than one person had been a cyanide poisoner.

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136. *Id.* at 317.

On the other hand, while the rarity of the poison may not have conclusively shown that one person committed both crimes, it was still relevant on the identity of the person who sent Cornish poison. Since the poison was rare, it would be logical to conclude that only a fraction of the population had access to it. Showing that Molineux poisoned Barnet would have shown that Molineux was one in that faction who did have access to cyanide and could have sent it to Cornish. But as the court pointed out, there was other, strong evidence that Molineux had such access. The other crime evidence added little, if any, probative force to the testimony that Molineux could produce cyanide. Meanwhile, it introduced the prejudicial possibility that he was a man of murderous propensities. If Cornish had been shot at by a musket, it might seem relevant to show that Molineux had killed Barnet with a musket, but if other strong evidence showed that Molineux owned such a musket, the other crime evidence would have added little legitimate probative to identifying the shooter while presenting much prejudice. The same was true for the poison.

The dissent, however, maintained that the rarity of the poison could not be viewed in isolation. It had to be coupled with the letter box evidence. But, as the court pointed out, the link between the Barnet correspondence and the attempt on Cornish was not clear. That evidence did not indicate anything about the motive to kill Cornish. It said nothing about Molineux's means and opportunity for trying to kill Cornish. It did not link Molineux to the package sent to Cornish.

Coupling the Barnet correspondence to the Cornish correspondence did not change this. If the evidence about the Cornish correspondence was believed, it could have led to the conclusion that Molineux had some sort of weird, evil fixation on Cornish, and a jury could perhaps conclude that someone with such feelings was more likely to try to kill him than another person would have been. The Barnet correspondence, however, indicated nothing about Molineux's feelings towards Cornish. All it added was that Molineux had some sort of weird, evil fixation about both Barnet and Cornish. If this indicated anything about Molineux's likelihood of committing the charged crime, it was by affirming that the defendant was some sort of weird, evil person capable of evil acts. Of course, it is precisely this sort of reasoning that the prohibition on other crime evidence is meant to prevent.

Perhaps because the court concluded that the evidence about Barnet's death should have been excluded, it did not have to consider another crucial issue. If the other crime evidence had been admissible, to what extent would it have had to have been established that Molineux killed Barnet? Looking at the Barnet evidence in isolation, it cannot be definitively concluded that Molineux killed him. The prosecution presented evidence of a motive, but it was based on sharply disputed circumstantial evidence. It was unlike the evidence for the Cornish motive

where Molineux had admitted bad feelings between Cornish and him, which was confirmed by Cornish and other witnesses. Molineux, on the other hand, expressed only friendship for Barnet, and no witness disputed that. There was evidence that Molineux might have had access to cyanide, and while opinions differed over the cause of Barnet's death, a fact-finder could have concluded that he was poisoned. A jury applying the presumption of innocence, however, could also have found an innocent explanation for the apparently suspicious Barnet correspondence. Although much advertising today suggests that this should not be case, a man suffering from impotency in Molineux's time was no doubt embarrassed by the condition and may have sought remedies confidentially. Having them delivered to a letter box under someone else's easily remembered name might be a solution occurring to many. Finally, the contention that the evidence showed that Molineux killed Barnet failed because even it had been properly established that Barnet received the poison through the mails, there was simply no proof, as there was for the Cornish package, that Molineux had sent it. Without evidence that Molineux sent the package, the proof that he killed Barnet had a gaping, unclosed hole. The evidence about Barnet alone was probably not enough to have indicted Molineux for murdering Barnet, much less sustained a conviction, and it is telling that the prosecution never sought such an indictment.

A belief that Molineux murdered Barnet sharply emerges only when it is coupled with the evidence about Cornish. The weak evidence about Barnet now appears stronger even though the Cornish evidence showed nothing directly about who sent the fatal package to Barnet. Similarly, whatever the strength of the evidence about Cornish, it too appeared stronger in light of the implications about Barnet's death even though it, too, said nothing directly about who sent the package to Cornish. Why? The answer is that suspicions have been increased that Molineux was a man of murderous instincts who could have sent both packages. And such reasoning is what is prohibited by the other crime doctrine.

Indeed, the dissent apparently concluded that the evidence supported a finding that Molineux murdered Barnet without ever analyzing the weakness of the proof that he killed Barnet. Instead, it just conflated the two cases providing an example of a reason why the prohibition on other crime evidence exists. Evidence of other crimes, as the majority noted, can too easily lead to the conclusion that a person is guilty of a crime without a careful consideration of the presented evidence. Without solid evidence that Molineux killed Barnet, evidence about Barnet's death should not have been admitted even if the identity exception applied.[137]

137. Eighty-five years later, the Court of Appeals, imposed set special burdens when the prosecution claims that the similarity of the crimes supports admitting other crime evidence to prove identity.

When it came to the identity exception, Judge O'Brien, in concurring, focused on what was truly the crucial point. "The events constituting the history of Barnet's sickness and death did not prove, or tend to prove, the fact that the defendant wrote the address upon the poison package that eventually came to the hands of Mrs. Adams, and that was the material issue at the trial."[138] The Barnet evidence might tend to establish the identity of the killer of Adams, but the logic of that proposition "is only another way of asserting the general proposition that the commission by the defendant of one crime tends to prove that he committed another crime, and no matter in what form, or how often that proposition is asserted, or how persuasive and plausible it may appear, it is erroneous, and misleading, since it violates a salutary principle of the law of evidence which should be applied in all cases without regard to the question of actual guilt or innocence."[139] O'Brien stressed that if the evidence showed that Molineux killed Barnet, he could be tried for that crime. On the other hand, "If the defendant wrote the address upon the poison package that was sent to Cornish then he is identified, but proof that at another time he sent another package to Barnet proves nothing in regard to the address. All it proves is that possibly he was capable of the wicked act charged in the indictment, and that is only another way of proving his general bad character, not even by reputation, but by a specific act, which all agree is not admissible."[140]

> To make evidence of a prior uncharged crime relevant, there must be more than a unique method involved, for, as *Molineux* long ago stated, "the naked similarity of... crimes proves nothing.."... The probative value of such evidence is, therefore, dependent upon showing not only that the method used is sufficiently unique to make it highly probable that both crimes were committed by the same individual, but also upon proof that defendant was the perpetrator of the uncharged crime. To be balanced against probative value as thus defined is the possible prejudice to defendant.
>
> Prejudice involves both the nature of the crime, for the more heinous the uncharged crime, the more likely the jurors will be swayed by it, and the difficulty faced by the defendant in seeking to rebut the inference which the uncharged crime evidence brings into play.... [T]o the extent that the evidence of defendant's identity as the perpetrator of the uncharged crime is unclear, or is called into question by defendant's rebuttal evidence, the case becomes a trial within a trial which may result in jury confusion.
>
> The foregoing analysis leads us to conclude that a Trial Judge who admits evidence of an uncharged crime on the issue of identity on less than clear and convincing evidence of both a unique *modus operandi* and of defendant's identity as the perpetrator of the crime abuses his discretion as a matter of law.

People v. Robinson, 503 N.E.2d 485, 489-90 (N.Y. 1986) (citing People v. Molineux, 61 N.E. at 303).

138. *Molineux*, 61 N.E. at 310.

139. *Id.* at 311.

140. *Id.* at 311.

IV. Conclusion

People v. Molineux is a case worth visiting again. It had a fascinating history that led to decision that not only clarified and advanced the law, but a precedent that still lives. Most important, a careful examination of it should remind us of something which is often too easy to forget. Other crime evidence should be carefully scrutinized before it is admitted.