LUCK AND WITLESS VIRTUE *vs.* GUILE

IN WHICH AN ENGLISH CLERGYMAN PROVES
THE NEMESIS OF JOHN ("JAKE THE BARBER")
FACTOR, *alias* J. WISE, *alias* H. GUEST

By
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FOREWORD

JOHN JACOB FACTOR is now serving a ten-year sentence in a federal penitentiary for a crime which fell far below the standard of performance he set for himself in England. The only point of similarity to the subject matter of this paper is that the complaining witness in the recent federal prosecution, which terminated Factor's career, was a clergyman.

In England, Factor acquired an enormous reputation as a financial swindler, ranking along with Hatry and Jabez Balfour in the amount of public interest his exploits aroused. His English victims were not little people but members of the aristocracy and leaders in the professions, and many of the letters found in his companies' files bore the crest of nobility. As one instance, I recall a letter from a man now high in the counsels of the British government referring to a basket of trout caught on that day and forwarded to "Jake" in gratitude for valued advice.

Factor's picture is probably familiar to most of you. He is small in stature, not over five feet four inches in height, and at the time I knew him he weighed around one hundred and fifty pounds and was quite unprepossessing in his general appearance. He had a dark, swarthy complexion and Semitic features and possessed the ability to light up his countenance with a friendly and disarming smile and to become most ingratiating when about to sever you from all your worldly goods. He could also, when it served his purpose, switch off the charm and assume an expression which revealed him as an evil-tempered and thoroughly vicious man. Generally, however,

he practiced the adage that to betray confidence you must first obtain it.

While he used many employees and associates, he was essentially a lone operator and went to great lengths to disassociate himself personally from his various enterprises. He trusted his associates with tremendous sums of money and shared very little of it with them. Apparently there is honor of a sort among thieves, because, with the possible exception noted in this paper, there is no evidence that any of his associates ever held out anything or levied any tribute.

One of the chief reasons that Factor used associates was that he was illiterate and had difficulty in even writing his name. He could not write checks or instructions, and I doubt if he could read much more than his name. However, he had an intimate knowledge of human psychology and the affairs of the stock market. There is not the slightest question of his innate ability, which, if put to use to better ends, would have brought him legitimate success.

He had not the slightest compunction for his victims and was without a trace of loyalty toward those who assisted him in his ventures, abandoning them to their respective fates when he fled England taking all the profits with him.

He was described in a recent editorial in the *Chicago Tribune* as "the only impresario who ever managed to work lend lease in reverse." I here attempt to show exactly how he did it without adopting the customary procedure of deleting amounts, names, dates, places, etc.

I do not claim, nor do I wish to create the impression of claiming, professional credit for the success of the

Faber suit. As an English lawyer would put it, I was "led" throughout that litigation by a well-known Chicago lawyer by the name of John H. S. Lee. It is as an observer on the scene that I seek to write a story never fully told before, and the use of the personal pronoun is adopted to avoid awkwardness in the telling.

No attempt is made to describe the personal experiences of the writer through a glorious summer in an England living in a happier day. The English lawyers with whom I lived and worked gradually grew to accept me as among those present and made possible many opportunities to observe matters of interest in the law courts and to watch the best of the English barristers in action. For that chance to gain some slight familiarity with the system of jurisprudence upon which our own is based, I give grateful acknowledgment to the little clergyman whose stubborn British virtues made the following narrative possible.

LUCK AND WITLESS VIRTUE *vs.* GUILE*

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by Thomas C. McConnell

IN THE fall of the year 1928 the Reverend Arthur Travis Faber, a clergyman of the Church of England, then enjoying the living of a parish in Leeds, came into a small inheritance of some three thousand pounds. At that time he had been negotiating over the matter of a dowry for his daughter, whose intended marriage was one of love plus certain customary marital arrangements. Even with the inheritance, he was still far short of his prospective son-in-law's demands. It was a good match, and Faber did not want to lose it. He was on the lookout for some means of increasing his inheritance. In the vernacular, he was "on the make" and "ripe for a taking." At about this time one Jacob Factorovitz, later shortened to Factor, popularly known as "Jake the Barber" because of his former connection as a chore boy with his brother Max's cut-rate shop on Halsted Street, was embarking on the promotion of a brighter future for a half-dead but respected publication, known as the *Financial Recorder*. This, however, was not to be a purely altruistic endeavor.

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Factor had plans in which his own personal fortunes were also to be refurbished. But I am ahead of my story.

Some months previously at Toronto, Canada, while awaiting the dying-down of an investigation of a little promotion in oil-shale lands, Factor had struck up an acquaintance with one Captain Alexander Clarence Bowles. This gentleman had an extraordinary military record in the last war and came from a good family, but at the moment was down on his luck. He was preoccupied with the problem of where to find the wherewithal for a return to his home in England. Factor was impressed by his soldierly appearance, his rank, and by the fact that he wore the ribbon of the Victoria Cross, but chiefly because he could write initials after his name which would look good on a letterhead. In short, Bowles had all the requisites of a "front" behind which Factor could operate.

Bowles left Toronto with one hundred and fifty pounds of what I suppose to have been oil-shale money. Upon his arrival in London he purchased a respectable weekly financial paper founded in 1862, known as the *Financial Recorder*, and its subscription lists. The purchase price was one thousand pounds, one hundred pounds down and the balance in instalments. Bowles later testified that all he agreed to do was to permit the use of his name on the masthead and publish what Factor told him to. Incidentally, on the list of subscribers to this paper was the name of Arthur Travis Faber.

No immediate change in the character of the paper was evident. Bowles drew a weekly stipend of ten pounds and apparently conducted the paper under the guidance of writers who had been in the paper's employ for years.

Some weeks later, a Mr. J. Wise appeared in London and took up residence at the Mayfair Hotel. He opened an account of one thousand pounds in the Midland Bank. In order to open this account, he had to sign his name. Later comparison showed that the signatures of J. Wise and J. Factor were undoubtedly written by the same hand.

The next issues of the *Financial Recorder* carried a slight innovation, in that in a box on the front page was shown the paper's recommendation to invest in the shares of "Swears and Wells," which were due to have a substantial rise on the London Exchange and might be purchased through Tyler, Wilson, and Company, with whom the paper had made satisfactory arrangements. From a gentle recommendation in the earlier issues, this advice became more urgent. "Buy Swears and Wells Now" became the caption in this customary box. In the next few issues the paper was able to announce substantial profits for its clients in these shares, due to the fact that most of the subscribers were buying them.

The shares had advanced several points, and outside buyers were beginning to take an interest. Faber, reading his issue of the paper, saw the answer to his personal problem. He bought "Swears and Wells," and, sure enough, the stock continued to advance. A few days later he received a telegram from the paper advising him to sell and cash his profit. He followed this recommendation, and, strangely enough, he received a check for his principal plus his profit.

So far, Factor was engaged in an activity known in England as "share pushing." His chance for profit was limited to the rise in the value of the shares which he

himself had purchased for his own account. This profit was much too small to hold his interest. It is not surprising, therefore, that the next issue announced that the paper had acquired an option on all the shares of Hecla Consolidated Gold Mines Ltd., and that while these shares were not yet registered on the Exchange, their immediate listing was contemplated, and that then their rise would be even more emphatic than that of "Swears and Wells." Faber saw the recommendation of the paper and was in on the ground floor.

Succeeding issues carried advices to buy, but there was no expected telegram to sell Hecla Consolidateds. In fact, there was no place where they could be sold. Subscribers of the *Financial Recorder* had by that time invested over two hundred thousand pounds in these shares.

There were inquiries in the City about the company. Since no such company existed, except in the realm of fantasy, it was a little difficult to find out anything about it. Then like an avalanche the investors descended upon Bowles. Writ followed writ. He consulted with Factor and was told to try and settle with the subscribers by offering them no more than ten shillings to the pound.

Bowles was quite successful in the adjustments with the clients, and with something less than one hundred thousand pounds was able to settle the claims—that is, all but one, the claim of Arthur Travis Faber. After a number of calls on Bowles, Faber had listened with growing impatience to his story of misfortune with the Hecla shares and to the various explanations as to why the company had never been registered. He immediately realized that his stock was worthless, but nevertheless was shrewd enough to see that there was money in the till

sufficient to pay all his investment plus the customary profit, and so threatened that if he did not get it, he would make a horrible example out of Bowles.

Factor, in the meantime, had decided that it might be prudent and the better part of valor to remove himself from the reach of the process of the British courts, and he was then living at the Hotel Carlton in Paris. Bowles, worried and distracted, made a hurried trip across the Channel to see him and to try and prevail upon him to pay Faber in full. Factor, of course, appreciated the practical turn of Faber's mind. He saw no humor in it and assumed an attitude of righteous indignation. Bowles was instructed to tell Faber that he, Factor, "would see him in hell before he would pay him a cent."

After receiving this message, Faber sued Bowles and Factor in a civil suit, but he was never able to obtain service on Factor. After months of delay and a lengthy litigation, he obtained a judgment against Bowles for two thousand three hundred and seventy pounds and costs. On supplementary proceedings he was able to determine that a balance of something over one hundred and seven thousand pounds in cash had been withdrawn by Bowles from the bank accounts of the *Financial Recorder*. However, by that time the whereabouts of Bowles was unknown.

While all this was going on, an outside brokerage house by the name of the Broad Street Press Ltd., run in conjunction with an old established financial weekly called *Finance*, was creating quite a stir in the City. It was organized with a capital of five thousand pounds divided into one thousand ordinary shares of one pound each. It was registered by Mr. Barnett Leon Elman, a

solicitor, who later served three years in Dartmoor Prison for his part in the affair. The shareholders were clerks in Elman's office, and the original capital was paid into the company bank account at Barclay's Bank from the account of Mr. H. Guest in the North of Scotland Bank.

The company procured through Frederick Newberry a large block of shares in a company known as Asbestos and Holdings Trust Ltd. It then invited its clients to participate in the same sort of "jingle" which had fooled Faber. They first purchased shares in Triplex Safety Glass, which were listed on the London Exchange, and were very shortly afterward informed to their great delight that the shares had advanced in price. As a variation to the *Financial Recorder* scheme, the clients were not urged to sell and cash their profit, and in fact very few transactions for their accounts were actually concluded. Factor had by now enough money to push these shares up marketwise through his own operations, and the clients whose confidence had thus been completely gained were then advised to put their money in the shares of the Asbestos Company. To a very large extent this recommendation was followed.

By April of the year 1930 the complete success of the plan was evidenced by the fact that the Asbestos shares had been completely exhausted, and, to supply the demand, it was necessary to acquire shares in some other company. Accordingly, Newberry was again consulted, and on April 28 a company known as Vulcan Copper Mines Ltd. was registered and 1,660,400 of its shares unloaded on the British public. By July, 1930, all the Vulcan shares had been sold, and the Broad Street Press in its enthusiasm had sold 66,400 more shares than were

registered. Again through Newberry, on July 22, the Rhodesia Border Mining Corporation was registered, and 1,242,200 of its shares sold to the public. Since only 1,000,000 of these shares were actually registered, the company had sold almost a quarter of a million shares above the authorized capital. However, this sale of unregistered stock was not a matter of any great moment because, as might be anticipated, none of these companies had assets of any greater value than the paper on which their shares were printed.

In October, 1930, a Miss Edith Oerum, who had paid in six thousand pounds to the Broad Street Press in the manner indicated, consulted a London firm of solicitors named Wordsworth, Marr, Johnson, and Shaw. This firm, although it had a most lucrative practice, including the representation of the Amsterdam diamond cartel, might have stepped right out of a Dickens novel. When I first met them, I discovered that, except for Wordsworth, the grandson of the founder of the firm, any resemblance between the firm name and any living solicitor was purely coincidental. The firm had been in existence for more than one hundred years and had just renewed its lease at 39 Lombard Street in the City of London for a further period of sixty-five years.

Its method of conducting business was unique, if not refreshing. The clerks and stenographic force appeared on the scene at ten in the morning—the partners a half to three-quarters of an hour later. The work of the partners was done between that time and two in the afternoon. At half-past two all the partners went to lunch in the back room of an oyster shop around the corner from Lloyd's. The lunch usually consisted of oysters or shell

fish and chips. The shop was not licensed so they provided their own wine. The lunch lasted most of the afternoon. At around five o'clock they all returned to chambers. Then the letters would be signed and a conference held with the managing clerks, who were doing all the work, following which their rubbers and umbrellas would be brought in and they would all depart for homes where they could not be reached by that abomination known as a telephone.

The furniture of the Wordsworth chambers apparently had originated with the firm—it defied description. The carpet in the reception room had come untacked so that it caught the door every time anyone attempted to enter —no one could ever be bothered to take the five minutes necessary to tack it down again. The contraption they called a water closet never worked. When I called this feature to the attention of the managing clerk, he told me not to be disturbed about it—that it never had really worked well. The offices of the partners were heated by coal grates. Along the walls the floors were stacked with old parchment briefs, rolled and tied with faded ribbons and incrusted with accumulated dust.

At four in the afternoon, while the partners were still at lunch, all work in the office stopped for tea, brought in to the clerks by the stenographers. This routine had evidently gone on for years and I am sure it still does, in spite of war, bombs, hell, or high water.

On November 10, 1930, this firm, proceeding in a leisurely manner, procured an order to permit it in due course to institute proceedings to wind up the affairs of the Broad Street Press and later the Vulcan and the Rhodesia companies. By the middle of February of the fol-

lowing year they had discovered that Jacob Factor, operating under the alias of H. Guest, had withdrawn from the company between June 13 and October 27, 1930, the sum of seven hundred and nine thousand one hundred and eight pounds sterling. As against this amount, he was credited with one hundred and four thousand two hundred and twenty-eight pounds, leaving a net amount of monies paid to his account of six hundred and four thousand eight hundred and eighty pounds. By this time the Wordsworth firm was finally convinced that it was dealing with an affair which presented financial irregularity.

Scotland Yard was then called in. On that day, their City inspector committed suicide. The accounts of the Broad Street Press showed that he had had phenomenal success in gauging the interim movements of the London Stock Exchange. He had no losses, and his cashed profits exceeded ten thousand pounds. The resulting investigation by Scotland Yard furnished the basis for the issuance of an extradition warrant calling on the United States government to surrender Jacob Factor for trial in England on the charge of violating the British Larceny Act.

Prior to the service of this writ, a law firm in Chicago headed by the late Senator Charles S. Deneen, with which I was associated, received a letter from Faber's solicitors. It described the proceedings against Bowles and stated: "Though we are not in a position at the moment to give you any definite evidence on the point, we entertain no doubt that the cash withdrawn by Bowles was received by Jacob Factor. He has been known over here for some years as a notorious share pusher." This letter then stated: "If you advise that there is a reasonable prospect

of success in any proceedings which you might think fit to take against Jacob Factor, the necessary funds to prosecute the claim can be obtained in one way or another, perhaps by raising a fund from the defrauded persons. At this juncture, however, no steps have been taken in this direction, and we should be gratified therefore if you will bear in mind that we are directed to limit your costs to one hundred pounds." Since the word "costs" in the English sense means fees, this letter aroused no enthusiasm among the senior members of the firm. There were no clues offered as to the location of any funds or as to where Factor might be found.

One evening I arrived home to find that I was to spend an evening at contract bridge. At the conclusion of the first table's play a desultory conversation, to which I was paying very little attention, suddenly became of extraordinary interest. The other gentleman at the table, who was an employee of a Chicago bank, started to describe a little fellow by the name of John Factor who that very afternoon had been in the trust department of the bank to deposit a million dollars' worth of British War Loan Bonds for investment in a trust. He went on to say that when he expressed some surprise at the amount involved, Factor had told him that he had just finished establishing another million dollar trust at the First National Bank. Being somewhat suspicious of the transaction, he had checked this information at the First National and had been advised that Factor's statement was entirely true.

Forty-eight hours later the Reverend Faber was advised by cable that he had instituted suit in the federal court on behalf of himself and all those similarly situated to impress a trust on a fund of two million dollars in

the hands of two of the largest banks in the city of Chicago. A few days later, Factor surrendered for arrest under the extradition warrant and was then served with process in the Faber suit.

To understand what follows, it is necessary for me to explain the essential features of the legal theory upon which this suit was predicated. The letter of Faber's counsel had been very sketchy as to facts. No information was given as to the activities of the Broad Street Press. However, it took no mental genius to grasp the obvious fact that these two trust funds must represent the fruits of Factor's activity in England. So in the Faber suit it was alleged that the money in the trusts was the identical money, or its proceeds, received by Factor from Faber and other British subjects similarly situated.

After the suit was started, an explanatory letter was written to Faber advising him to start to work on the raising of the promised fund to pay expenses. He sought the aid of a Mr. Pepys, the senior official receiver under the British Companies' Act, and after lengthy conversations persuaded him to authorize the Wordsworth firm to forward the claims of Edith Oerum and other clients of the Broad Street Press with directions authorizing their intervention as co-plaintiffs in his suit. He also obtained the promise of the receiver to circularize the clients of the Broad Street Press in order to raise a fund to pay the costs.

After Edith Oerum joined the suit, the following situation was presented. Faber sued on behalf of all persons similarly situated, but the other clients of the *Financial Recorder* had all released their claims, and he was not similarly situated with the clients of the Broad Street Press, unless his specific money could be traced into the

trust funds in Chicago and could be described as commingled with Broad Street Press money. If this could not be established, then Miss Oerum had no standing in his suit, and Faber's suit, in turn, could establish no claim on the trust funds, so that the net result of it all would be that both claims would fail. If they did fail, the funds would be released by the banks, and once in Factor's hands, the chance of rediscovering their location could by no process of thinking be considered bright.

In addition to this difficulty, Factor's counsel had immediately presented another. They filed a motion to dismiss the suit on the ground that Factor was a citizen of the United Kingdom of Great Britain and Ireland, as were the plaintiffs, and therefore the requisite diversity of citizenship for jurisdiction in the federal court was lacking.

This issue was called up for early disposition, and Factor, together with a galaxy of counsel, appeared at a hearing before Judge Wilkerson armed with a British passport reciting that he was born at Hull, England. He also had the affidavit of a rabbi to the effect that said affiant had attended the circumcision of a child named Jacob at Hull, being the son of an itinerant rabbi named Factor. This evidence having been ruled insufficient, Factor himself took the stand to testify as a witness at the event of his own birth. He finally was permitted to testify that he had seen his name inscribed in the family Bible as having been born in 1892 at Hull.

Both he and his counsel had overlooked the fact that in the marriage license bureau in New York City he had filed an application to marry one Rella Cohen, and in this document he had recited under oath that his place of birth was Chicago, Illinois. With the appearance of a

certified copy of this document, properly authenticated with a gold seal and bright red ribbon, the defense of no diversity of citizenship died a-borning.

An interesting sidelight on the disposition of this issue was that actually Factor was the son of an itinerant rabbi named Factorovitz and was born in a little village in a part of Russia near the city now known as Warsaw. He had been admitted as an immigrant at the port of Philadelphia along with father, mother, and two brothers in the year 1902. He had taken out his first citizenship papers but not his second and was still a citizen of Russia. We had discovered these facts from the records of the Immigration Department in our search for counterproof to his affidavit. If he had told the truth, the case would have been dismissed because he could have corroborated his testimony by government records. Later his counsel told me that they knew these facts, but that Factor was obsessed with the fear of a British prosecution for a passport fraud and refused to permit them to use this evidence. He was therefore "hoist by his own petard" when his false marriage application destroyed the probative value of his false testimony.

With this issue behind us, we stood face to face with the real problem in the case—to prove that Faber's money was in the trust funds. As I have already pointed out, Faber had paid his money to the *Financial Recorder;* Miss Oerum had paid hers to the Broad Street Press. The question was, "What was the source of the monies in the trust funds?" The answer could only be found in England. No one could foretell the answer until by subpoena the records of the banks which had dealt with this money could be examined. It was a chain of proof in which ev-

ery link had to be sustained by a preponderance of the evidence, in which failure at any step of the effort must result in complete failure of the suit.

The latter part of May, 1932, saw Mr. Lee of the Deneen firm and myself on the old "Mauretania" bound for London. This was no pleasure trip. The time on board was spent in earnest communion with depositions taken in the extradition hearings held in London. These depositions referred to gambling at Le Touquet and stock-market operations at Paris. It therefore seemed reasonable to suppose that some of the money might have been routed through France. Our plans were therefore changed. When our boat stopped outside the harbor of Cherbourg, I returned with the tender, bound for Paris, while Lee continued on to Plymouth and thence to London.

On arrival at Paris, I thought from what I knew of Factor that he would select a good hotel, so I put up at his former residence, the Hotel Carlton. It was a happy choice, being located near the Port Maillot on the Champs Elysées and only a few blocks distant from a residence in Neuilly in which I had always stayed when *en repos* during the last war. The neighborhood had many nostalgic associations for me, and, while I had no time to renew them, this recollection gave the feeling that I was in friendly and familiar surroundings and contributed to making the Paris visit a never-to-be-forgotten delight.

On registering in a Paris hotel, one must fill out a slip for the Prefecture de Police, giving the place of the registrant's birth. This information appears upon the registry book of the hotel. Just as a matter of curiosity, I asked to see the entry made by Factor when he had stayed at the

hotel. This record showed that here in Paris, although traveling on a British passport showing his birthplace as Hull, England, Factor had registered as having been born at Chicago, Illinois, U.S.A.

Upon taking up the investigation of Factor's accounts in France, a serious difficulty was immediately presented. Under the laws of France, a broker, banker, or other person acting in a confidential relationship to clients or customers, who divulges any information with regard to such accounts, is guilty of an offense, the penalty for which is two years' penal servitude. Without the aid of French officials, it was obviously impossible to get anywhere at all in the face of such a law.

Through the aid of a British solicitor doing business in Paris, an introduction was obtained to the Director of Criminal Prosecutions in the Prefecture. To my surprise, this gentleman was not French, but English. His name was Roberts, and, after twenty years of effort, he had accomplished the almost impossible feat of heading a department under French Civil Service. It would seem that he is entitled to a slight digression.

He had an office in that part of the Prefecture which dates back to the year 800. This part of the building had stood since Paris was merely an island on a mud flat on a bend in the Seine. The windows to his office were grated slits in a wall at least six feet thick. The window over his desk gave view to the approach to the Prefecture and a part of the Seine. During his tenure of the office, Roberts had occupied his spare time in making sketches of the scenes he viewed through this window. The office walls were covered with these drawings and proved him a talented artist, and a few minutes' conversation proved him

a highly cultured and extremely intelligent man. I have since wondered whether or not his position as head of the law-enforcement division of the Civil Service might not have been explained by some connection with the British Secret Service.

To him was submitted the problem of how to obtain evidence in a land where to divulge it was a crime. He advised that there was an exception to this law in that the Director of Criminal Prosecutions could compel the production of any documents or records he might require in making an investigation. However, there was a limitation to this exception. While the witness who produced the information was protected from prosecution by the Prosecutor's request, he could refuse to divulge it, and upon such refusal the maximum penalty was a fine of twenty francs, at that time eighty cents in our money. The French court had no power to cite such refusal as a contempt, as is the common practice here. However, the witnesses were perfectly willing to give the information, when assured of their own immunity. This procedure thus procured the records necessary to prove the transactions which had taken place in France.

On arrival in London, the really serious part of the business began. We had previously determined that the source of the trust funds in Chicago was twofold—first, the cable of one million dollars from Brown, Shipley, and Company in London to Brown Bros., Harriman, and Company in New York by Arthur J. Klein to Rella Factor, and, second, a registered package containing a million-dollar market value of British War Loan Bonds sent by a broker in London to the Union Bank of Chicago as receiving agent for a Mrs. Cohen, who was Factor's

mother-in-law. We had obtained the serial numbers of these bonds and also the name of the English broker who had forwarded them. This, then, was the obvious starting point for further investigation.

Depositions were started before the United States consul in London. The broker's records showed he had been put in funds for the purchase of these bonds by cash withdrawn from the North of Scotland Bank on the order of Arthur J. Klein. The records of that bank disclosed that these funds had been paid out of the account of H. Guest. The memorandum in the possession of the bank justifying this charge was what was termed a "paying-out slip." This document showed the charge to the account, the delivery of the money to a bank messenger, and the receipt signed by the broker. The account of H. Guest was shown to be the account of Factor by the bank manager, who, by pointing out a photograph of Factor, identified him as the bank's customer. The bank had in its possession a power of attorney executed by H. Guest making Arthur J. Klein his attorney in fact to check against the account. The signature on this document was identified as that of Jacob Factor. In a similar manner, the million dollars in currency sent by Brown, Shipley, and Company to New York was traced back to a withdrawal by Klein from the H. Guest account in the North of Scotland Bank.

It was now necessary to trace the source of the monies which had been paid into the account of H. Guest at the North of Scotland Bank. They totaled in all some nine hundred thousand pounds sterling. A large part of these sums came from Barclay's Bank and the Midland Bank, but among the deposits was a cash item of something

over one hundred and seven thousand pounds which was made at a date corresponding to the closing of the account of the *Financial Recorder* in the Midland Bank.

To understand the difficulties involved, some explanation is necessary of the nature and character of the English banking system. There are five great branch banking systems. The banks named above are two of these and have branches all over the City of London, throughout England, the colonies, and on the Continent, so that a payment made to the North of Scotland Bank designated on its records as originating from Barclay's Bank might have come from any bank belonging to the chain. It was necessary to work down through the records of the head offices of these banks to find and locate the particular branch involved. It is sufficient here to note that, as a result of a lot of examination of books and records, it was ultimately disclosed that the deposits in the H. Guest account originated in withdrawals from branches of Barclay's and the Midland with which the Broad Street Press did business.

At the time these transactions took place, the British banks were using a depositor's book called a "paying-in book." It was somewhat similar to the passbook used by our own banks, but with a difference, in that the original paying-in book belonged to the bank and remained in its possession. The entries in the book were made by the customers and showed the number of the check deposited, the name of the drawer, the drawee bank, and the amount. Cash deposits showed the numbers appearing on the bank notes. When a deposit was made, the customer called for his paying-in book, made the entry, and turned the book back to the bank. It thus

constituted a statement of account made out in the handwriting of the depositor and was thus an admission of the receipt of any items handled and gave complete evidence of their source.

At the time the depositions were taken the paying-in books had been superseded by deposit slips similar to our own, but the old paying-in books of the Broad Street Press still remained in the hands of the bank, and these furnished us the evidence, not only of payments into the account of the Broad Street Press, but also of the source of the payments and the state of the accounts of the company with its various clients. As these customers were as a class the persons upon whose behalf the suit was brought, and as it was their money we were seeking to trace, these records proved a commingling of their money in a bank account in the name of the Broad Street Press.

The mere statement of this proof can give no adequate picture of the many technical difficulties with the evidence which counsel had to meet and overcome. For example, British banks do not voluntarily produce their books so that proof can be made in American courts. In fact, to produce the sort of proof of these transactions our courts require would have disrupted the entire banking system of England, because the customers' accounts are not kept in a loose-leaf ledger, as is the practice in this country, but are entered in longhand in a voluminous and bulky customers' ledger. This ledger is in constant use in an English bank to show the state of its accounts with its clients, and is the only permanent record which they have. To subpoena in the books themselves would mean that the English bank would be giving its permanent

records into the jurisdiction of an American court, which in turn might order them returned to America and thus deprive the bank of the only source of information as to the state of its accounts.

To protect the banks from the loss of their records, the British Parliament had passed a Banker's Act which provided that, upon a subpoena being served, the requirements of evidence could be satisfied by certification by the bank manager of the entries in the ledger. Under that act it was not necessary in England to prove the making of the entries in the books or any of the foundation proof so necessary in our courts, as the records so certified proved themselves and were admissible without more.

As any lawyer knows, such proof would not prove anything in our courts, and it was necessary for us in some way to devise a method of getting a record proof which would satisfy our rules of evidence. This was done by arranging to have the bankers photostat the entries, and then produce the books under a stipulation permitting their withdrawal from evidence after opposing counsel were given the opportunity to use them on their cross-examination. The photostats were then proved to be the same as the original records and the foundation proof as to the making of the entries was put in by the testimony of the ledger clerks. Since the British bankers were unfamiliar with what seemed to them a very queer proceeding, they would invariably refuse to answer any question until it was arranged to have their own counsel present. The result was that at practically every session of the taking of the depositions, a bank manager would appear accompanied by a barrister and a solicitor, all dressed in cutaway coats and striped trousers, prepared for a very

formal and dignified noting of their objections in the record. Whenever a question was asked, they would go into a huddle and decide whether or not they should advise the witness to answer.

To get these bank witnesses in the first place, it was necessary to petition the English High Court of Justice for a subpoena calling for oral testimony and records. Counsel, of course, had no standing in the English courts, but did have a very important looking document designated as "Letters Rogatory" under the seal of the United States District Court, with large red ribbons attached. "Letters Rogatory" at that time were only honored under the treaties with England in a case where the nation itself was a party to the suit. However, the English High Court of Justice was not familiar with this technicality, and since counsel for the banks did not point it out and counsel for the plaintiffs were content to rest their plea on the document itself, the subpoenas issued without difficulty.

The taking of these depositions was a day and night task, and we made the American Club our office and headquarters. Never before or since has the staid, austere, and thoroughly reputable American Club seen such a succession of questionable characters pass through its portals. Examining witnesses out of court in the evening and in court by day, and with two lawyers working continuously at the task fifteen hours a day, months were spent. As Westbrook Pegler would say, the English lawyers "went off the sled at the first turn."

By the end of the month of August, 1932, most of the technical proof had been introduced in evidence, but all that had been done so far had only given emphasis to the most difficult problem in the entire case, which, if not

solved, threatened to defeat and negative all that had gone before.

After a tiresome succession of ledger clerks and bank witnesses and the offering into evidence of hundreds of documents and records, and after taking the testimony of more than two hundred witnesses, it was apparent that exactly no progress had been made in connecting up the Faber claim with the funds of the Broad Street Press.

Faber's money had been paid into the Midland Bank. His canceled check showed the indorsement of Captain Bowles to the account of the *Financial Recorder*. The record of this account showed deposits of around two hundred thousand pounds sterling. It showed numerous withdrawals from time to time, but from the time of the Faber deposit until the closing of the account there were always sufficient funds on hand to cover Faber's payment.

The applicable theory of tracing is that, as between a person wronged and the wrongdoer, money paid out of a commingled fund is presumed to belong to the wrongdoer until the fund is exhausted. Under this theory Faber could trace down to the date of the closing of the account, but there the trail ended in a blind alley. Bowles had closed the account by withdrawing the balance in cash.

As pointed out above, a clue had been given by the records in the North of Scotland Bank, which showed a credit to the H. Guest account of cash in a similar, but not identical, amount to that of the Bowles withdrawal. The dates of the withdrawal and the deposit were only two days apart. It was therefore a moral certainty that the entry in the H. Guest account represented a payment

from Bowles to Factor of monies drawn from the *Financial Recorder* account. If this could be proved, then Faber's money was commingled with the Broad Street Press money in the account of H. Guest.

It was obvious that the missing link of proof could only be supplied by Bowles, but where to find Bowles? Scotland Yard was consulted, but all they could tell us was that he had not left the country, at least not under his own name. Since the affair of the *Financial Recorder* some two years before, he had dropped completely out of sight.

A young lawyer named Perry, associated with the Wordsworth firm, had met him at the time of an investigation by the senior official receiver of the affairs of the *Financial Recorder*. He had talked with him and he could recognize him. Perry was assigned the task of locating him to the exclusion of all else. He ran down all available clues, traveling to Hull, Liverpool, and various places in Scotland. All during the time the depositions were being taken he could report no progress. We were nearing the end of our task, and the constant subject of discussion was when and where and if ever we might count on finding Bowles. We had finally reached the stage of considering amendments or other ways and means of getting out from under the legal objections to our suit which a failure to make this proof would immediately raise. We knew that our opponents were enjoying our discomfiture. They kept asking us whether or when we intended to put Bowles on the stand. From this we could only infer that Bowles was enjoying himself on the Continent or in the colonies on a Factor expense account.

One evening I invited Perry to the American Club for dinner. We took the underground and got off at Piccadilly Circus, intending to walk the remaining distance to the Club. Now Perry had a profound and enduring regard for an English drink named "gin and ginger." The sight of the Piccadilly Bar caught his eye as we emerged from the underground. In the next two hours that establishment did quite a business in Perry's favorite drink. Comfortably installed in an eighteenth-century atmosphere, the thought of dinner at the Club had long since lost any attraction for either of us.

By this time Perry had shed his customary English reserve and was well launched on a lengthy discourse, the topic of which, if ever remembered, has long since been forgotten, when suddenly he stopped talking and began to listen.

There was a telephone stall directly behind the booth in which we were sitting, and someone was having difficulty with a number. Perry quietly disengaged himself from the table and walked behind the booth. A few seconds later he was back introducing me to Captain Alexander Clarence Bowles, V.C. Much later in the evening, at a restaurant in Soho, he told us all about his association with Factor.

Needless to say, by that time we had developed quite an attachment for the Captain, and we had no desire or intention of losing his company. He had no guest card, but nevertheless he spent the night at the American Club with a doorman hired by the Club to keep his like out, now hired by us to keep him in. Next morning Bowles, Perry, and I left the Club, bound for a deposition hearing at the United States consul's office on Harley Street.

Bowles made an excellent witness. He testified he had withdrawn all the funds of the *Financial Recorder* under directions from Factor and had met him two days later at his rooms in the Mayfair Hotel. There he had received instructions to deposit the money in cash to the account of H. Guest at the North of Scotland Bank. He further testified that Factor had told him to keep for himself the sum of five hundred pounds with which to take up residence on the Continent. He said he had made the deduction and deposited the balance, but not wishing to spend the five hundred pounds in Continental travel he had sedulously avoided any further meeting with Factor.

On cross-examination some considerable doubt was cast on whether Factor had actually authorized the five hundred pound deduction, but this line of questioning only strengthened the proof of the actual deposit of *Financial Recorder* funds in Factor's account. When Bowles left the stand, no one present had the slightest doubt but that Faber's case stood complete and beyond refutation.

Settlement talks immediately ensued. So far as Factor's counsel and ourselves were concerned we had practically reached an agreement two days after the conclusion of the Bowles testimony, but we had not reckoned with Mr. Pepys. This old fuddy-duddy had all of the vices and none of the virtues of the original Pepys, who wrote the diary. He was incensed at the thought that American lawyers were undertaking to agree about matters within his prerogatives, so he sent around a note by messenger that the settlement conversations were to be continued at the office of the Senior Official Receiver.

Since all of Factor's companies were in liquidation and Pepys was the liquidator, we had no alternative but to adjourn our meetings to this place of assignation. There Mr. Pepys held court from his desk on a little raised dais, and we sat before him at desks, feeling like little schoolboys, while he called on us one by one for our views. He then called in scriveners to put the suggestions in draft form. The sessions would start at eleven in the morning and continue until two-thirty in the afternoon, at which time Pepys would ring a bell, and his clerk would bring him his hat, coat, rubbers, and umbrella, and we were through for the day. One Friday we had reached a point in the discussion vital to Mr. Lee and myself, in fact one might say that, from our point of view, it was the crux of the matter, and that was the size of our fee. At this juncture Mr. Pepys rang his bell and his clerk appeared with the customary accouterments. Since it was only one o'clock, we asked him where he was going, to which he replied that his weekly holiday had started and that he would be back on the following Tuesday.

As Charley McCarthy would say, "That did it." Lee wrathfully announced that he was sailing on the next boat. Factor's lawyers announced that they had made the only proposal they were ever going to make, and he could take it or go on with the suit; that since holidays seemed to be in season they were taking one too, and were leaving immediately for three weeks on the Continent. Pepys never turned a hair. He calmly put on his rubbers, his coat, and his bowler hat, picked up his umbrella, said "Good day, gentlemen," and walked out of our respective lives forever.

Lee took the next boat, leaving to Wordsworth and myself the task of obtaining approval of the settlement. We circularized all the victims and obtained the consent of 94 per cent of them, and then appeared before a British court to get the approval. After the hearing the court took under advisement a petition to approve, without prejudice to the extradition proceedings, a net payment of some three hundred and seventy-four thousand pounds in release of the claims of those who dealt with Factor's companies. This amount was the approximate equivalent of the then value of the trusts established in the Chicago banks.

Faber, however, had not completed his mission. He insisted that out of the settlement funds he be paid the amount he had invested plus what he termed his customary profit plus all his costs, including those incurred in the Bowles suit, plus interest at bank rates. This, in gratitude, the other claimants were willing to concede—after they found out Faber intended to block the settlement unless they did.

Since the court had indicated that the settlement would be approved in due course, I felt free to sail for home. I had passage on the "Europa" and went aboard at Plymouth without awaiting the actual entry of the order. Again I had reckoned without Pepys. When I checked in with the purser he handed me a telegram from Wordsworth requesting me to return to London immediately to defend a petition by Pepys to modify the settlement to permit the fixing of the attorneys' fees by the English court. The purser had also handed me a cable from my wife stating that she was meeting the boat in New York. I went to my stateroom to consider the position.

It was apparent that Pepys could do no real damage, as Judge Wilkerson, with jurisdiction over the fund, would have the final word regardless of what the English court might say. It was also fairly clear that Wordsworth's hand was strengthened, on any further hearing, by my absence. The amenities of the situation, however, still needed careful consideration.

Thereupon I had an inspiration. Everyone in the case had been addicted to holidays except myself. To an Englishman the word "holiday" connotes something sacrosanct, a natural, inalienable, and fundamental right. Why not call this boat trip my holiday? I then wired Wordsworth to tell Pepys that I was taking a holiday, and that if the judge indicated an intention to amend the order of approval, to withdraw our petition, cable me in New York, and I would return on the next boat and renew the application. On my arrival in New York I found a cable from Wordsworth saying that the judge, in spite of Pepys' objection, had approved the settlement without amendment or modification.

Probably a more apt title for this paper would have been "Luck and Stubborn or Shrewd Virtue vs. Guile," because it is quite apparent that Faber's actions in the course of this suit were far from witless. There can, however, be no doubt about his luck.

Factor prided himself on his amazing success at games of chance. The records at Le Touquet showed that he had won almost a million francs in competition with the best of Continental gamblers. There is a well-authenticated story that as banker in a game of *chemin de fer* he had once left a future king of England living for a time on the in-

terest of his debts. Be that as it may, Factor couldn't win a trick from Faber.

The chances against the disclosure of the hiding place of Faber's money four thousand miles away, by casual conversation in the presence of a person in a city of three million souls, who had his claim in hand, far exceed any possible combinations of odds at Monte Carlo, and any editor worth his salt would reject outright the story of Perry's meeting with Bowles as far beyond the range of credibility.

A moralist of the High Church school would conclude that the very Fates themselves were set in angry and retributive motion when Factor instructed Bowles to tell a clergyman of the State Church of England to go to hell. However, no moralist could survive the advantage, enjoyed by the writer, of studying proximate causation under the late Joseph H. Beale. Applying Beale's theory of the latest intervening factor upon a set stage or fixed frame of reference, there can be not the slightest scintilla of a doubt but that the success of the Reverend Faber should be ascribed to Mr. Perry's well-developed taste for "gin and ginger."

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