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Criminal Law and Procedure - Survey of Illinois Law for the Year 1948-1949

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The much litigated case of Roth v. Kaptowsky has finally resulted in a determination that Section 19 of the Garnishment Act is broad enough to permit a court to enter a judgment in favor of a creditor against a garnishee under which monthly installments payable out of the proceeds of a life insurance option settlement may be appropriated, as the same mature, toward the payment of a judgment against the life insurance beneficiary. As a result of that decision, one said to be completely novel in the law of this state, new suits to reach the successive monthly payments as they become due are rendered unnecessary. The case affords a striking parallel to the doctrine of Levinson v. Home Bank & Trust Company wherein the garnishee was permitted, under Section 13 of the Garnishment Act, to set off all demands against the debtor whether the same were due at the time of garnishment or not. Logical extension of the instant case could carry the creditor's right over so as to reach the proceeds of other installment contracts.

One slight change has been made to the Attachment Act by the addition thereto of a section setting forth a preferred form of affidavit for attachment. The section is permissive in character.

IV. CRIMINAL LAW AND PROCEDURE

There has been a scarcity of cases of any serious import in the field of substantive criminal law since the last issue of this survey, but a few new points have been made. In People v. Wheeler, for example, the indictment contained two counts, one charging a fraudulent and felonious embezzlement and conversion of certain personal property which had been loaned to defendant, the other charging embezzlement of property which

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15 337 Ill. 241, 169 N. E. 183 (1929).
18 403 Ill. 78, 84 N. E. (2d) 832 (1949).
had been entrusted to defendant as bailee. A general finding and sentence of guilty of the crime of larceny was appealed from on the theory that the judgment was erroneous because based on a finding of larceny whereas the indictment charged embezzlement, or else because the indictment forced the defendant to meet charges of three separate crimes, to-wit: embezzlement, larceny by bailee, and grand larceny. The conviction was affirmed when the Supreme Court pointed out that the Illinois statute defining the offense of larceny by bailee declares that one who commits such an offense shall be deemed guilty of larceny. A general finding of guilty of larceny was, therefore, deemed proper provided the evidence warranted a conviction.

An ingenious but ineffectual defense was proposed in *People v. Raddatz*, wherein the defendant had been convicted on a count charging the taking of indecent liberties with a seven-year old girl tending to render her guilty of indecent and lascivious conduct. It was argued that, the victim being below the statutory age at which a child could be found guilty of a crime or misdemeanor, there was nothing the defendant could do which would give rise to a chargeable offense against himself. Both the Appellate Court and the Supreme Court affirmed the conviction on the ground the statute did not require that the child be or become delinquent before a conviction could be had.

The holding in *City of Chicago v. Terminiello*, noted in the two prior issues of this survey, failed to stand up when the case reached the United States Supreme Court. The defendant had been convicted of violating a city ordinance through the medium of a speech which he had made leading to a breach of the peace. The defendant had contended throughout that his constitutional

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3 403 Ill. 48, 85 N. E. (2d) 32 (1949), affirming 335 Ill. App. 575, 82 N. E. (2d) 508 (1948).
4 Ibid., Ch. 38, § 591.
5 Ibid., Ch. 38, §§ 103-4.
right to free speech had been denied to him. The highest court, by a five-to-four vote, reversed because of an error in an instruction, one which had not been excepted to at the trial and upon which no error had been assigned either in the Illinois Appellate or Supreme Court or in the petition for certiorari or brief filed before the United States Supreme Court. The majority indicated that the construction placed on the language of the ordinance by the instruction was as binding as if the precise words had been written into the ordinance itself. Conceiving that one function of free speech was to "invite dispute," the majority decided that free speech would best serve its high purpose when it did induce a condition of unrest, did create dissatisfaction with conditions as they were, or even when it stirred people to anger. The principal criticism voiced by the dissenters was against the action of the court in dealing with a point not raised or urged by the defendant.

Addition to substantive criminal law has been made by the passage of two new statutes. One of them creates the offense of "reckless homicide" so as to warrant the imposition of a penalty upon any person who drives a vehicle with reckless disregard for the safety of others and thereby causes death. The other makes the crime of child abandonment into a felony by providing for a sentence of from one to three years in the penitentiary.

No cases were reported during the survey period which were of interest concerning such matters as arrest, preliminary examination or grand jury proceedings, but two cases dealing

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8 The trial court had charged that a breach of the peace could consist of any "misbehavior which violates the public peace and decorum" and that such misbehavior might "constitute a breach of the peace if it stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, or if it molests the inhabitants in the enjoyment of peace and quiet by arousing alarm."

9 Laws 1949, p. 716, S. B. 185; Ill. Rev. Stat. 1949, Vol. 1, Ch. 38, § 364(a). The penalty may be by fine up to $1000, by imprisonment in the county jail up to six months, or both, or by imprisonment in the penitentiary from one to five years. The requirement that death occur within a year and a day has been made applicable to this offense: Ill. Rev. Stat. 1949, Vol. 1, Ch. 38, § 365. As to the basis for such a requirement, see Zacharias, "Homicide: Why Death in a Year and a Day?" in 19 CHICAGO-KENT LAW REVIEW 181.

10 Laws 1949, p. 714, H. B. 156; Ill. Rev. Stat. 1949, Vol. 1, Ch. 38, § 99. A change has also been made in the statute regulating change of venue in criminal cases, where the cause assigned is the prejudice of the judge against the defendant or his attorney, in that the accompanying affidavit need be made by either the defendant or his attorney, instead of both as heretofore required: Laws 1949, p. 1630, H. B. 91; Ill. Rev. Stat. 1949, Vol. 2, Ch. 146, § 21.
with the sufficiency of informations or indictments invoke interest. The information filed in People v. Ostrowski,\textsuperscript{11} signed and sworn to by the complaining witness, was prepared on a standard form issued by the court. The body thereof appropriately charged the offense of contributing to the delinquency of a child but it failed to state the name of the person bringing the prosecution or that such person was a resident of the city. No motion was made before trial to correct the document but, for that matter, the defendant likewise failed to address any criticism thereto. The conviction was affirmed, and re-affirmed by the state Supreme Court, on the ground that the information was sufficient as the failure to name the complaining witness and to describe her as a resident did not render the information invalid in the absence of objection prior to trial.

Much the same treatment was accorded to the problem raised in People v. Gray,\textsuperscript{12} where the indictment charged a felony, burglary, in one count and the misdemeanor of malicious mischief in another. Having been found guilty on both counts and sentenced to a term of from three to twenty years, defendant contended on appeal that the judgment was void because the indictment covered separate and distinct offenses carrying different penalties. Any duplicity, the court said, went to the form of the indictment and, in the absence of a motion to quash, was not open for consideration. The presence of language in the judgment indicating a sentence for malicious mischief was treated as surplusage.

The right of an accused person to be represented by counsel was involved in three very similar cases,\textsuperscript{13} wherein sentence had been entered on pleas of guilty. The defendants complained that they had not been advised of their right to have the benefit of counsel, but the court reiterated the previously existing rule that a trial court had no affirmative duty to advise the defendants of the right to counsel in non-capital cases. It should be noted,

\textsuperscript{11} 402 Ill. 106, 83 N. E. (2d) 276 (1948), affirming 334 Ill. App. 494, 80 N. E. (2d) 89 (1948).

\textsuperscript{12} 402 Ill. 590, 85 N. E. (2d) 2 (1949).

\textsuperscript{13} People v. Barrigar, 401 Ill. 471, 82 N. E. (2d) 433 (1948); People v. Cox, 401 Ill. 432, 82 N. E. (2d) 463 (1948); People v. Bennett, 401 Ill. 403, 82 N. E. (2d) 405 (1948).
however, that the defendants had been indicted prior to the promulgation of present Rule 27A, which should clarify the issue in this respect. In *People v. Cohen*, by contrast, the trial judge had, *sua sponte*, appointed the public defender to serve as counsel for the defendant and, when he was permitted to withdraw, had appointed still another counsel. After several continuances, the defendant moved to substitute counsel of his own choice but his motion was overruled. Reversal of the ensuing conviction was sought because the motion had been denied. It was said that no error had occurred in the action leading to the appointment of counsel to defend, even in the absence of such a request, but that such appointment could not operate to deprive the defendant of his right to have counsel of his own choice when he elected to assert that right.

The defendant's refusal to submit to the examination intended by the "sexual psychopath" statute led to defendant's imprisonment, in *People v. Redlich*, for contempt of court until he complied with the order for examination. While the contempt order remained in force, the defendant was tried under an indictment charging a crime against nature, was found guilty, and was sentenced to the penitentiary. The Supreme Court declared that his status as a sexual psychopath was made moot by the conviction but it reversed the contempt order. As the obvious purpose of the statutory examination was to prevent a person who was afflicted with a mental disorder from being tried for a criminal offense until he had recovered from his psychopathic condition, the whole object of the statute was said to be destroyed by the conviction. For that reason, proceedings under the statute designed to secure a determination of mental condition, including all orders entered in connection therewith, were rendered void by the determination that the defendant was sane and guilty.

A judicially permitted separation of the jury empanelled in

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14 The rule is set out in 400 Ill. 22 and in Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 259.27A. It is now the mandatory duty of the trial judge to advise the defendant as to his right to counsel.
15 402 Ill. 574, 85 N. E. (2d) 19 (1949).
17 402 Ill. 270, 83 N. E. (2d) 736 (1949).
a non-capital case, where much publicity was given to the trial, became the bone of contention in *People v. Wilson*,\(^{18}\) The defendant had been accused of placing explosives in the automobile of his divorced wife. He sought an order, before the jury had been selected, designed to require that the jurors be kept together during the trial, but his motion was denied. Prior to verdict, he made another motion to declare a mistrial because of the unfavorable publicity received but failed to succeed and he was found guilty. The Supreme Court, when reversing and remanding, agreed that a verdict would not be set aside on the bare assumption that the defendant might have been prejudiced by adverse publicity but it did declare that, where other errors intervene, the misconduct in allowing the jurors to separate over defendant’s protest would have weight on the issue of whether or not to grant a new trial.

Questions concerning the sufficiency of the judgment and sentence which follow upon a finding of guilty were posed in several cases for it would appear that the trial courts are still experiencing difficulty in making the judgment and sentence as specific and as precise as possible. Much of the misunderstanding seems to arise in connection with sentences imposed under the 1943 amendment to the Parole Act,\(^{19}\) which amendment permits the judge to fix minimum and maximum limits within those limits provided by law for the offense. In *People v. Rogers*,\(^{20}\) for example, the defendants had been indicted for burglary and, on a plea of guilty, had been ordered confined until discharged by the parole board, provided the term should not exceed the maximum, nor be less than the minimum, provided by law for that offense. The trial judge subsequently entered an order “recommending” that the minimum duration of the sentence should be five years and the maximum ten years. A reversal was ordered on the ground that the defendant was entitled to have the judgment made specific and certain so he might know the limits of its duration.\(^{21}\)

\(^{18}\) [400 Ill. 603, 81 N. E. (2d) 445 (1948)].

\(^{19}\) [Ill. Rev. Stat. 1949, Vol. 1, Ch. 38, § 801 et seq.]

\(^{20}\) [401 Ill. 53, 81 N. E. (2d) 420 (1948)].

\(^{21}\) See also *People v. Crump*, 402 Ill. 204, 83 N. E. (2d) 687 (1949), and *People v. Small*, 401 Ill. 20, 81 N. E. (2d) 424 (1948).
Wholesome contrast is provided, however, by the decision in *People v. Ashley*,²² wherein the defendant, adjudged guilty of larceny of a motor vehicle, had been sentenced to a term of from one to twenty years but which sentence also stated that the court, after hearing evidence, had “fixed the minimum duration of imprisonment to be five years, and the maximum to be ten years.” The same contention was raised on appeal as had been argued in the Rogers case, but the judgment was affirmed because the court had “fixed” the sentence and had not merely “recommended” the same. The provision, by rule or statute, of a standardized judgment order might obviate much of the confusion.

Problems growing out of appellate procedure in criminal cases still recur, but the case of *People v. Kidd*,²³ one of first impression in Illinois, dealt with the question as to whether or not a bill of exceptions, signed *nunc pro tunc* after the time for filing prescribed by Rule 70A²⁴ had run, could be deemed part of the record on appeal. The defendants, after conviction, had been granted a period of one hundred days within which to file a bill of exceptions. On the 98th day, the trial judge not being present, defendants presented the bill of exceptions to another judge of the district who ordered the same filed without signature. Three months later, the bill was presented to the trial judge, who signed but added the qualification that he was, at all times, within the jurisdiction and not ill or disabled. In answer to the state’s contention that the trial judge had lost jurisdiction on the expiration of the one-hundredth day, defendants advanced the argument that the order for filing constituted an extension of the period within which the bill could be signed. The Supreme Court, construing the rule in question, declared that the express provision therein requiring a certificate of correctness by the trial judge before the bill is to be filed precluded any other judge of the district from allowing the bill to be filed without signature. Presentation to such other judge, therefore, could not operate to prevent the running of time

²² 403 Ill. 395, 86 N. E. (2d) 212 (1949).
²³ 401 Ill. 230, 81 N. E. (2d) 892 (1948). Gunn, J., agreed with the judgment but disagreed over the construction of Rule 70A. He was of the opinion that the bill of exceptions was properly before the court.
²⁴ Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 259.70A.
for filing nor could a *nunc pro tunc* order supply the deficiency in the record.

Claims concerning alleged infringement of the right to due process under the Fourteenth Amendment have been made many times and in a variety of ways, but no where is the difficulty of obtaining review thereof more acute than where the defendant seeks relief solely on the common-law record. Some clarification may have been provided by the case of *People v. Loftus*. After affirmance of his conviction for armed robbery by the state supreme court, the defendant there concerned applied for, and was granted, certiorari by the United States Supreme Court. That court made an announcement which amounted to an inquiry as to the nature of the appropriate method to follow, under correct Illinois procedure, on behalf of a defendant claiming a violation of due process in the state court. The Illinois Supreme Court answered the interrogatory by enumerating the three methods, and by discussing the applicability thereof to the case in chief. It declared that a writ of error was inappropriate as the matter complained of did not appear in the common-law record. For that matter, a petition or motion in the nature of a writ of error coram nobis was inapplicable as that writ should appropriately be addressed to the trial, not a reviewing, court. By implication, therefore, the proper procedure seemed to call for use of the writ of habeas corpus.

But if it be thought that the Loftus "announcement" served as a clarifying agency, the decision in *Young v. Ragen* would seem to indicate the converse is true for the state circuit court there concerned had dismissed a similar petition for habeas corpus. When reversing that order, the federal supreme court remanded the case to permit a reconsideration in the light of the earlier Illinois expression. It took the occasion to point out that

25 400 Ill. 432, 81 N. E. (2d) 495 (1948).
26 See *People v. Loftus*, 395 Ill. 479, 70 N. E. (2d) 573 (1947).
28 Those methods are (1) by writ of error, based on the common law record, which may be supplemented by a proper bill of exceptions; (2) by petition for writ of habeas corpus, where the judgment of conviction is void; and (3) by motion in the nature of a writ of error coram nobis, pursuant to Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 196.
if the writ of habeas corpus was not available then there was no post-trial remedy. Accepting the fact that there might be difficulty in adapting available state remedies to meet the requirement that prisoners be given some clearly defined method by which to raise their claims, the court nevertheless insisted that the requirement be met.

The legislature appears to have come to the aid of the courts by enacting a new statutory proceeding designed to cover the point. It provides, in brief, that any imprisoned person who asserts that there has been a substantial denial of constitutional right, either federal or state, may institute a proceeding by petition in the court in which the conviction took place setting forth the matters relied upon. The trial court is authorized to enter such orders as may be appropriate, with opportunity for review by the state supreme court on writ of error, if taken within six months from the date of the judgment.

Application and construction of the Parole Act became necessary in two quite similar cases filed before the Illinois Supreme Court as original petitions for habeas corpus. In each instance the defendant had been “paroled” to another jurisdiction so that he could be tried for an offense committed therein although, in neither case, had there been even colorable compliance with the requirement that the parolee should secure useful employment and a home free from criminal influence. The relators virtually conceded that the paroles were invalid but did claim that the time spent in the foreign jurisdiction should be credited on the Illinois sentence. The relators were remanded to the custody of the warden when the court declared the acts of the parole board were void and, being void, could create no right in favor of the relators.

33 Brief note may be made of the fact that the Probation Act has been amended to allow wider latitude in probation matters to the nisi prius court: Laws 1949, p. 719, H. B. 341; Ill. Rev. Stat. 1949, Vol. 1, Ch. 38, § 785. There have also been some technical changes in the law relating to the sentence and parole of felons: Laws 1949, pp. 727-8, S. B. 664 and 556; Ill. Rev. Stat. 1949, Vol. 1, Ch. 38, §§ 801 and 803.
Family law provides a never-ending series of interesting questions. True to norm, the greater portion of the problems presented during the current period concerned issues arising out of divorce suits. Many of the resulting decisions were little more than reiterations of familiar rules; others struck at bold steps which had been taken by the trial courts; but some brought new horizons into view.

Illustrative of the first group is the case of *Gleiser v. Gleiser*¹ wherein a default decree, granting plaintiff a divorce as well as the custody of a minor child, also provided for child support and attorney’s fees although personal service on the non-resident defendant was lacking. Shortly after entry of the decree, the defendant, upon special appearance and leave granted, filed his petition seeking to vacate those portions of the decree calling for support money and attorney’s fees because of the want of jurisdiction over his person. The petition was denied by the trial court after a hearing had been had thereon. That order was reversed, as might be expected, on direct appeal to the Illinois Supreme Court,² because the court noted that it had "long been the established rule of this State that a decree requiring the payment of alimony, child support or attorney’s fees is a decree in personam."³ Such provisions being void for lack of personal jurisdiction, they may properly be vacated even though more than thirty days may have passed since the entry of the decree,⁴ and the petition to vacate does not, of itself, constitute a general appearance.⁵ The court was careful to point out, however, that the father’s obligation to support his child had not ceased, either by the decree or by reason of the present ruling, provided jurisdiction to enforce the same could be obtained.

One viewing the holdings of Illinois courts, when dealing with the effect which remarriage has upon lump-sum alimony provi-

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¹ 402 Ill. 343, 83 N. E. (2d) 693 (1949).
² Direct appeal was proper, under Ill. Rev. Stat. 1949, Vol. 2, Ch. 110, § 199, because the alleged denial of due process presented a constitutional issue.
³ 402 Ill. 343 at 345, 83 N. E. (2d) 693 at 694.