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Criminal Law and Procedure - Survey of Illinois Law for the Year 1951-1952

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action, it was of the opinion that the facts warranted equitable relief against the constructively fraudulent transfer of the debtor’s property into the hands of the former shareholders, so an equitable lien was impressed thereon for plaintiff’s benefit. That decision accords both with the general rule and some earlier Illinois cases on the subject of creditors’ rights. The novelty of the case, if there is any, lies in the use of the modern declaratory judgment procedure as a substitute for the old-fashioned creditor’s bill with its attendant formalities.

IV. CRIMINAL LAW AND PROCEDURE

Significant cases in the field of criminal law divide about equally into those dealing with substantive issues and those concerning procedural points. In the first of these categories, mention might be made of the fact that the 1874 statute, which prohibits the unlawful possession of burglar’s tools, was construed for the first time this year by the Supreme Court through the medium of the case of People v. Taylor. The defendant, an unemployed handyman, was arrested by police on suspicion while walking through a neighborhood where burglaries had been frequent. In his pocket at the time were a pair of pliers, a screwdriver, and a pencil flashlight. He was convicted for a violation of the statute in the trial court and the Supreme Court, on writ of error, had little difficulty in reaching the conclusion that the tools possessed by the defendant came within the statutory prohibition. The conviction was reversed, however, on the ground the circumstantial evidence presented was insufficient to support an inference regarding the presence of the necessary felonious intention. The holding in People v. Beacham was distinguished

8 See 10 C. J. S., Bills and Notes, § 529.
10 Bouton v. Smith, 113 Ill. 481 (1885); Dunphy v. Gorman, 29 Ill. App. 132 (1888).
2 410 Ill. 469, 102 N. E. (2d) 529 (1951), noted in 30 CHICAGO-KENT LAW REVIEW 278.
3 358 Ill. 373, 193 N. E. 205 (1934).
as the case there lacked the elements of plausible explanation, consistent testimony, and witness corroboration which characterized the instant case.

The common-law rule that a husband and wife, being one person, cannot alone be convicted of conspiracy, was offered for reconsideration by the Appellate Court for the First District in People v. Estep. The defendant and his wife had been convicted with two others and, on writ of error transferred, the common-law rule was argued inter alia in their behalf. Although the question had not been decided in any prior Illinois criminal case, two civil cases purport to follow the common-law rule. The prosecution argued that the common-law rule had ceased to operate as it could no longer be said that a wife lacks separate legal existence. The reviewing court declined to decide the question so argued by both parties, and quite properly affirmed the conviction, on the ground of a common-law exception which permitted the husband and wife to be convicted when they conspired with others.

One judicial decision effected a salutary change in the law relating to the manner of determining guilt under a charge of indirect contempt. A direct contempt may be punished summarily without issuance of a rule to show cause and without the hearing of evidence, but a proceeding to punish for an indirect contempt requires information, notice, citation or rule to show cause, and a hearing, since the alleged contemptuous conduct occurs out of the judge's presence and extrinsic evidence of the fact would be necessary. In such cases, the Illinois courts have consistently followed the rule that the defendant's sworn answer, denying the wrongful acts charged, is conclusive, and evidence may not be received to impeach the same. On such an answer, the defendant heretofore would be entitled to be discharged and

6 Worthy v. Birk, 224 Ill. App. 574 (1922); Merrill v. Marshall, 113 Ill. App. 447 (1904). In the last mentioned case, an action for slander, the court held that a statement that a husband and wife had conspired to cheat and defraud was not per se slanderous as a charge of crime, since a husband and wife could not be indicted for conspiracy.
the only remedy against him would be a prosecution for perjury for having made a false answer.\(^7\)

The rule that a sworn answer purges the defendant of an indirect contempt was argued in favor of defendants in several cases during the year, being avoided by the court in one case,\(^8\) applied in another,\(^9\) but was finally renounced in the case of *People v. Gholson*,\(^10\) so as to bring about an overruling of all previous decisions on the point. In that case, Judge Maxwell, for the Supreme Court, emphasized the point that the guilt of the contemnor and the violation of the court's dignity were the same in cases of direct and indirect contempt, hence the court should have, within limits of due process, the same power to secure an orderly conduct of its affairs in both cases. The contempt power having proved ineffectual in every case of indirect contempt where the contemnor was willing to take the "usually slight risk" of conviction for perjury, it was thought best to abolish the doctrine of purgation by oath as an impediment to the orderly and impartial administration of justice. Referring to Mr. Justice Holmes' condemnation of the rule as a "fragment of a system of proof which does not prevail in theory or as a whole,"\(^11\) the Illinois Supreme Court concluded that the time had come "to renounce the doctrine altogether and stamp out its dying embers."\(^12\)

Two criminal statutes were challenged on constitutional grounds. The validity of the "reckless homicide" act,\(^13\) adopted in 1949, was sustained by the Supreme Court in *People v. Gar-
man. It was there argued, on behalf of the defendant, that the statute was so vague, indefinite and uncertain as to violate his right to due process of law. The court, adhering to the rule that the legislature describes a new crime with sufficient clarity when it uses words having an established common law meaning, and on finding that the statutory phrase "reckless disregard of the rights and safety of others" possessed a definite common law meaning, achieved the conclusion there had been no violation of constitutional requirements. In People v. Levin, however, the Supreme Court declared Section 19 of the Illinois version of the Uniform Trust Receipts Act, one which declares it to be a felony for the "trustee" to fail to pay over the money received, to be unconstitutional on the ground the subject matter thereof, that is the criminal penalty, was not revealed in the title of the act.

Most disconcerting, from the procedural standpoint, was the action taken by the Supreme Court in the case of People ex rel. Jones v. Robinson. In that case, the court declared that an original habeas corpus petition which presented a fact question would not be considered notwithstanding a constitutional provision which allocates, to that very court, original jurisdiction over writs of habeas corpus. The court said that it was foreclosed from determining the issues of fact presented, thereby denying to the prisoner a right accorded to him by the constitution to choose the tribunal in which to file his petition, but it advanced no cogent reasons for dismissing the proceeding. Persons engaged in seeking constitutional reforms could well take note of this holding.

14 411 Ill. 279, 103 N. E. (2d) 636 (1952).
15 Ill. Const. 1870, Art. II, § 2, provides: "No person shall be deprived of life, liberty, or property, without due process of law."
16 People v. Green, 368 Ill. 242, 13 N. E. (2d) 278, 115 A. L. R. 348 (1938).
17 412 Ill. 11, 104 N. E. (2d) 514 (1952), noted in 30 CHICAGO-KENT LAW REVIEW 387.
19 The statute was said to violate Ill. Const. 1870, Art. IV, § 13.
20 409 Ill. 553, 101 N. E. (2d) 100 (1951), criticized in 30 CHICAGO-KENT LAW REVIEW 282.
21 Ill. Const. 1870, Art. VI, § 2.
It is common practice, in return for aid furnished, to strike an indictment with leave to reinstate, but that fact, according to the decision in People v. Bryant, does not serve to discharge the other of two alleged conspirators so jointly indicted. The defendant there argued that an order striking the indictment as to a co-defendant, even with leave to reinstate, had operated as a discharge of such defendant, thereby necessitating the discharge of the defendant himself under a well-established rule that a single person cannot be held for a conspiracy. The argument was based on a rule followed in some states to the effect that a nolle prosequi as to one conspirator requires the discharge of the other since it renders the indictment inoperative. The Illinois Supreme Court, however, had no difficulty in distinguishing the defendant’s authorities on the basis that, while an unconditional nolle prosequi may terminate the proceedings, an order striking the indictment with leave to reinstate possesses no such operative effect. The decision might well have been expected inasmuch as the court had already decided that a granting of immunity to one alleged co-conspirator was not an acquittal, hence afforded no reason for the discharge of the other.

A defendant’s right to be present at the trial of his case may be prejudiced by a judge’s communication with the jury after it has retired and in the absence of the defendant. Whether that fact will warrant reversal of a conviction, in the absence of a showing that such communication was prejudicial to the defendant, came up for consideration in the case of People v. Tilley. The jury there deliberated all night when the judge inquired

22 409 Ill. 467, 100 N. E. (2d) 598 (1951), affirming 342 Ill. App. 90, 95 N. E. (2d) 620 (1950).
23 People v. LaBow, 282 Ill. 227, 118 N. E. 395 (1917).
24 The cases have been collected in annotations appearing in 72 A. L. R. 1180 and 97 A. L. R. 1312.
25 No Illinois court, apparently, had ever decided whether one alleged conspirator must be discharged when the charge against the other has been modified either by an unconditional nolle prosequi or by an order unconditionally striking the indictment as to him.
26 People v. Kidd, 357 Ill. 133, 191 N. E. 244 (1934).
27 People v. Cohn, 358 Ill. 326, 193 N. E. 150 (1934).
28 411 Ill. 473, 104 N. E. (2d) 499 (1952). Bristow, J., wrote a dissenting opinion, concurred in by Maxwell, J.
whether there was any hope that a verdict might be reached. Upon the jurors’ request for further information, the judge stated he could give no new instructions except in the presence of the attorneys and the defendant but, in response to a question by one juror, he replied that the defendant had specifically denied committing the crime. Upon review, a majority of the Supreme Court found no prejudice had occurred and, following the holding in *People v. Brothers*,29 rejected an argument offered in the defendant’s behalf to the effect that any communication whatsoever between judge and jury, in the absence of the defendant, would entitle the latter to a new trial.30 A dissenting opinion, after a careful review of all Illinois cases, pointed out that, in all cases prior to the Brothers decision, on which the majority had relied, the court had adhered to a strict rule against secret judge-jury communications; that the Brothers case was based on a misunderstanding of the extent to which the earlier cases had safeguarded the defendant’s right to be present at his trial; and that attempted distinctions which the court had made were insubstantial.31 In view of this vigorous challenge, serious doubts may be entertained as to the durability of the rule laid down in the Brothers case and in the instant case. With due regard for the finality of a Supreme Court decision, it would seem that clarification would be helpful.

The holding in *People v. Ferguson*32 may be said to overrule

29 347 Ill. 530, 180 N. E. 442 (1932).
30 At 411 Ill. 473 at 478-9, 104 N. E. (2d) 499 at 502, the court approved a statement made in the opinion in the Brothers case to the effect that privacy “of jury deliberations should be zealously protected against invasion, but the cardinal test on a motion to set aside a verdict on that ground is whether or not the invasion was calculated to influence the verdict of a jury. If it was not so calculated, it would be idle to disturb a verdict. Often it is practically impossible to prevent a juror from communicating with a judge, as when he approaches the judge and asks permission to telephone his family or to say that he is sick. Surely such harmless communications of themselves are an insufficient excuse for setting aside a verdict or reversing a judgment.”

31 By way of emphasis, the dissenters urged that no inquiry should be permitted into the question whether the defendant had been injured by the interview for if “the court is permitted to talk with the jury in the jury room in the absence of the defendant, then the defendant has no knowledge of what was said or done and would be at a disadvantage in proving that something improper took place... It surely is against the policy of law in this State to impose upon a defendant in a criminal proceeding such a burden.” See 411 Ill. 473 at 486-7, 104 N. E. 499 at 506.

32 410 Ill. 87, 101 N. E. (2d) 522 (1951), noted in 40 Ill. B. J. 417.
the former case law concerning consecutive sentences, as set forth in *People v. Nicholson*, at least insofar as that case could be said to be inconsistent with the instant decision. The defendant there was convicted for burglary and sentenced on May 2, 1935. He was subsequently convicted on another charge of burglary and sentenced thereon on May 27, 1935. The judgment order in the second case commanded, *inter alia*, that the Department of Public Welfare should confine the defendant "from and after" delivery but added that "the said imprisonment shall begin at the expiration of the sentence of imprisonment of the said Sterling Ferguson entered the second day of May, A. D. 1935, in cause No. 75757." Under the former rule, if a judgment order was inconsistent or repugnant within itself on the point as to whether the sentence should be concurrent or consecutive, it was held that the sentence, as a matter of law, had to run concurrently with other sentences. Despite some admitted conflict in the language of the judgment order, the Supreme Court decided that the quoted words adequately expressed an intention that the sentences should run consecutively, hence the order was not defectively ambiguous. Dealing with the case on its own merits and refusing to interpret the language of the judgment order under an ironclad rule of law, the court recognized a conflict between its holding and the rule announced in the Nicholson case so it expressly declared that case overruled.

Another sentencing problem was generated in the case of *People v. Westbrook* where, after verdict and judgment of guilty on an indictment for armed robbery, a crime calling for an indeterminate sentence, the defendant was given a maximum and minimum sentence of life imprisonment. Notwithstanding an argument by the prosecution that such a sentence was literally correct, the court held the punishment to be, in effect, a definite

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33 404 Ill. 122, 87 N. E. (2d) 15 (1949).
34 411 Ill. 301, 103 N. E. (2d) 494 (1952), noted in 32 Bost. L. Rev. 349.
35 Ill. Rev. Stat. 1951, Vol. 1, Ch. 38, § 802, provides in part: "The minimum limit fixed by the court may be greater but shall not be less than the minimum term provided by law for the offense and the maximum limit fixed by the court may be less but shall not be greater than the maximum term provided by law therefor."
one and invalid as opposed to the legislative purpose to require an indefinite and flexible sentence within prescribed limits.

Some cases also dealt with aspects of the right to secure review of trial court determinations in criminal cases. The Appellate Court for the First District, for example, in People v. Collis, held that a defendant who had requested, and had been granted, probation was thereby deemed to have waived his right to a review of his conviction. Numerous cases in other jurisdictions, as well as an analogous Illinois decision in People v. Andrae dealing with the effect to be given a petition for release on probation, support the decision affirming the conviction.

Limitations exist upon the State's right to sue out a writ of error in criminal cases but, according to People v. Moore, such limitations will not be permitted to inhibit state powers to secure law enforcement through civil proceedings. Gaming apparatus and money of the defendant had there been seized under a search warrant, but a county court order had suppressed the search warrant and had directed the return of the property so taken. Upon direct appeal by the state, the defendant argued that the right of the state to sue out a writ of error did not extend to permit review of an order such as the one there involved. The Supreme Court agreed with the defendant but it added that the order of the county court had a double aspect. Insofar as the order holding the search warrant to be void was an incident to a criminal proceeding, the state had no right to a writ of error. But the order was also effective in determining property rights, i.e. whether the property seized was contraband, so the action was held to be a proceeding in rem, civil in nature and attended

37 295 Ill. 445, 129 N. E. 178 (1920). It was there held that, under the act providing for a system of probation by which a convicted person could be admitted to probation when "nothing remains to be done by the court except to pronounce sentence," a prisoner's filing of a petition for release on probation was evidence that he accepted the plea or verdict of guilty as final, hence had no right to move in arrest of judgment.
39 410 Ill. 241, 102 N. E. (2d) 146 (1951).
by the right of appeal. Review was, therefore, limited to that aspect of the case.  

Reviewability of a commitment order under the "criminal sexual psychopath" law was considered in People v. Ross. The plaintiff in error sought review before the Supreme Court but that tribunal, finding it had no jurisdiction, transferred the case to the Appellate Court for the Second District. By analogy to People v. Cornelius, decided under one of the sections dealing with insane persons, the Appellate Court found that the order of commitment was interlocutory, hence not reviewable. It was also there suggested that, inasmuch as the statute made no provision for review, a reviewing court would have no jurisdiction in such a case and could only dismiss the writ of error. If the alleged sexual psychopath is to be denied bail pending a hearing and may not have review of a commitment order, there is evident reason why the legislature should re-examine the statute to prevent a forfeiture of liberty.

A decision of utmost significance in the law of Illinois criminal procedure came from the hands of the Illinois Supreme Court in People v. Jennings, a case explaining the operation of the 1949 Post Conviction Act and avoiding a construction thereof which would have resulted in making the statute into just another blind alley in the Illinois "merry-go-round" concerning review in criminal cases. Petitioners, imprisoned in the penitentiary for

40 The court there refused to pass on the question whether some $18,000 in currency, seized during the raid, could be considered as contraband as the issue of whether or not it had formed a functional integral part of a gambling operation had not been passed on by the trial court. On that point, see the later holding of the Appellate Court for the Fourth District in People v. Wrest, 345 Ill. App. 186, 103 N. E. (2d) 171 (1952).


43 407 Ill. 199, 95 N. E. (2d) 61 (1950).


47 411 Ill. 21, 102 N. E. (2d) 824 (1952), noted in 40 Ill. B. J. 413 and 46 Ill. L. Rev. 900.

individual offenses, had sought hearings under the statute alleging that they had suffered a denial of federal constitutional rights in that confessions had been improperly obtained from them. The state’s attorney moved to dismiss the petition in each case on the ground the claims were barred by the doctrine of *res judicata* and the petitions had not alleged facts sufficient to state a cause of action. The motions were sustained and the several petitions were dismissed without further hearing. The Illinois Supreme Court also dismissed review without hearing or opinion, but the United States Supreme Court granted certiorari.

In that forum, the Illinois Attorney General argued that the Post Conviction Hearing Act did not provide an appropriate remedy for the consideration of those claims which were or could have been adjudicated at the trial of the case. Refusing to accept this view, the United States Supreme Court said: “We do not lightly assume that a state has failed to provide any post-conviction remedy if a defendant is imprisoned in violation of constitutional rights. Accordingly we consider it appropriate that the Illinois Supreme Court be permitted to provide definite answers to the questions of state law raised by these cases. . . . If Illinois does not provide an appropriate remedy for such a determination, petitioners may proceed without more in the United States District Court.”

The Illinois Supreme Court then wrote its explanatory opinion, holding that the Post Conviction Hearing Act does provide an appropriate remedy for assertion of claims by indigent defendants that their constitutional rights have been denied them. It also indicated that the doctrine of *res judicata* is not to be applied mechanically to foreclose inquiry into the merits of such claims but rather the inquiry “must be made even though it involves a collateral attack upon a judgment which the court had jurisdiction and authority to enter.”

By so holding, the court avoided a return to the hopeless legal situation which confronted a prisoner before enactment of the

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50 411 Ill. 21 at 25, 102 N. E. (2d) 824 at 826.
statute, when the only state remedies seemed to be the three blind alleys of habeas corpus,\textsuperscript{51} writ of error,\textsuperscript{52} and writ of error \textit{coram nobis}.\textsuperscript{53} The opinion, however, discloses two possible limitations upon the prisoner's right to review. In the first place, the court does not foreclose consideration of a former adjudication as evidence on the question as to whether defendant's constitutional rights have been infringed; it merely holds that the former adjudication shall not be conclusive. Secondly, the defendant may have "waived" his constitutional rights, either by failure to assert them at the trial, where opportunity was had, or by failing to seek review of a decision adverse to his claim, as where the prisoner is financially unable to obtain the transcript necessary for an effective review on writ of error. Legislation providing for a prompt, inexpensive, full and adequate review of every felony conviction might yet be the only real solution.

V. FAMILY LAW

Although there is little new in the law concerning marriage,\textsuperscript{1} some matters regarding divorce call for attention. In \textit{Elston v. Elston},\textsuperscript{2} for example, the well-established doctrine of recrimination was applied by the court, acting as representative of the state's interest in the preservation of the marriage relation, despite the

\textsuperscript{51} That remedy, in Illinois, is appropriate only to test the jurisdiction of the court in which petitioner was tried: People v. Bradley, 391 Ill. 169, 62 N. E. (2d) 788 (1945). There is no right to an appeal and the Illinois Supreme Court will not entertain original proceedings which present a fact question: People ex rel. Jones v. Robinson, 409 Ill. 553, 101 N. E. (2d) 100 (1951), noted in \textit{30 CHICAGO-KENT LAW REVIEW} 282.

\textsuperscript{52} As an indigent defendant cannot afford to pay for a stenographic transcript of the trial proceedings, review by way of writ of error is, to all practical effect, confined to the common law record, that is to the indictment, the arraignment, the entry of the plea, the fact of a trial, and the verdict and judgment thereon. The writ of error, under such circumstance, is ineffective to review alleged violations of constitutional rights, except those which may be revealed on the face of the common law record.

\textsuperscript{53} The statutory writ of error \textit{coram nobis}, based on Ill. Rev. Stat. 1951, Vol. 2, Ch. 110, §196, permits the presentation only of those questions of fact unknown at the time of trial. It is clearly unsuitable to fit the typical situation.

\textsuperscript{1} The case of Whelan v. Whelan, 346 Ill. App. 445, 105 N. E. (2d) 314 (1952), might be mentioned as it represents the first clear-cut application of the Uniform Marriage Evasion Act, Ill. Rev. Stat. 1951, Vol. 2, Ch. 89, § 19 et seq., to a marriage performed elsewhere, but which would have been void if performed in Illinois, between first cousins.

\textsuperscript{2} 344 Ill. App. 233, 100 N. E. (2d) 635 (1951), noted in \textit{15 U. of Det. L. J. 156}. 