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Criminal Law and Procedure - Survey of Illinois Law for the Year 1950-1951

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longer be required before a local execution may issue, for issuance thereof may be accomplished by registration of the judgment in conformity with statutory requirements. The former remedy by suit may still be utilized, if that is desired, for the new statute is not made exclusive in character. The legislature has also increased the amount of wages exempt from garnishment by raising the figure to $25 in lieu of the former exemption of $20 heretofore prevailing.\(^9\)

**IV. CRIMINAL LAW AND PROCEDURE**

Although there has been no noticeable decline in the number of criminal cases handled by the courts, very little has been done to change basic principles of substantive criminal law. The case of *People v. Liss*,\(^1\) however, is noteworthy as it establishes a limitation upon the application of the statute relating to concealed weapons.\(^2\) Upon arrest of the defendant there concerned for passing a stop light, the officer searched the automobile and discovered an automatic pistol pushed back about six inches under the front seat and lying about mid-way between the front doors. Defendant’s conviction on an information charging that he unlawfully carried concealed weapons “on or about his person” was affirmed by the Appellate Court for the First District but, on writ of error to the Supreme Court, a majority of that court agreed with defendant that the evidence was insufficient to sustain the conviction because the pistol was not readily accessible, it not being sufficiently “on or about” the person of the defendant to bring the case within the statute. The majority relied upon the decision in *People v. Niemoth*\(^3\) where a conviction of a defendant who had carried loaded revolvers on the rear seat of his car had been reversed on the theory that the revolvers were not readily available because the defendant there could not have

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\(^3\) 322 Ill. 51, 152 N. E. 537 (1926).
reached for them without moving from his position on the front seat. With the aid of that case, the court construed the statute to require that the weapon either had to be actually concealed on the person or, if not so carried, then had to be "in such close proximity that it [could] be readily used as though on the person." The dissenting judges were of the opinion that, as the amount of movement required to obtain the weapon would be negligible, the limitation placed on the statute by the majority virtually rendered the statute nugatory in cases involving weapons found "about" the person.

Inasmuch as the concealed weapons cases present an infinite variety and gradation of "ready accessibility," it cannot be said that the majority of the court is clearly wrong. Analogous reversals of convictions may be seen in cases where the weapon was in a locked glove compartment, or where it was wedged between the front seat and the door frame, with a defendant sitting about four and one-half feet away from it. On the other hand, the majority could have drawn the line so as to bring the Liss case within the "ready accessibility" test applied in another Illinois case where the gun lay on the floor of a car in front of the rear seat where the defendant sat. Moreover, other courts have upheld convictions in cases where the defendant could obtain the weapon without moving from the front seat, where the weapon was located on a shelf behind the seat of a coupe, or where it was behind a movable cushion of the rear seat. It would

4 406 Ill. 419 at 422, 94 N. E. (2d) 320 at 322. The majority noted the corroborative facts that the defendant owned neither the automobile nor the pistol and had testified that he had no knowledge of the presence of the weapon in the car.
5 The cases are collected in annotations to be found in 50 A. L. R. 1534 and 88 A. L. R. 307.
7 State v. Simon, 57 S. W. (2d) 1062 (Mo. Sup., 1933).
8 See People v. Eustice, 371 Ill. 159, 20 N. E. (2d) 83 (1939), distinguishing the holding in People v. Niemoth, 322 Ill. 51, 152 N. E. 537 (1939).
9 United States v. Waters, 73 F. Supp. 72 (1947). The opinion therein fails to disclose the exact location of the gun.
11 Commonwealth v. Miller, 297 Mass. 285, 8 N. E. (2d) 603 (1937). The prosecution was based on a statute prohibiting the carrying of guns in vehicles without a license. It was said that the trial judge could not properly have ruled, as a matter of law, that weapons hidden behind the movable arm of the rear seat cushion were not within the control of the defendant.
seem as if a borderline case of this character ought not be extended beyond its own facts. To hold otherwise would encourage would-be criminals to have weapons in their presence, but just far enough out of immediate reach, to enable them to invoke this extreme refinement of the "ready accessibility" test.

Another reversal of a conviction, this time in the case of People v. West,\(^\text{12}\) throws some light on the statutory offense of operating a confidence game. The defendant there, a businessman operating in Illinois and Ohio, made regular use of a Chicago currency exchange to cash checks totalling between $30,000 and $40,000 over a five-month period. One $900 check was returned marked "account closed" and another for $1,000, given to cover this default, was subsequently returned marked "not sufficient funds." On the basis thereof, defendant was convicted of the crime of operating a confidence game. The Supreme Court reversed, however, holding that, to support such a conviction, it was necessary to show that the confidence had been obtained fraudulently and with intent to swindle. It indicated that if the confidence be obtained through a regular course of business dealing the statute would not be violated, notwithstanding there was a subsequent abuse of that confidence. Although the fact situation was one wherein the confidence was originally built up through apparently honest means, the decision raises a question as to whether the statute is deficient in not providing protection against the acts of those who slip from honest to dishonest dealings.\(^\text{13}\)

Statutory changes have also been made in the substance of the criminal law. In the first place, public reaction to the increasing use, particularly by juveniles, of narcotic drugs may be noted via the medium of certain local changes in the Uniform Narcotic Drug Act,\(^\text{14}\) but a criticism has been raised both as to the wisdom and the constitutionality of the changes.\(^\text{15}\) New offenses have

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\(^{12}\) 406 Ill. 249, 93 N. E. (2d) 370 (1950), noted in 1951 Ill. L. Forum 175.

\(^{13}\) The prosecution was based on Ill. Rev. Stat. 1951, Vol. 1, Ch. 38, § 256. Earlier cases in point would appear to exist in the holdings in People v. Gould, 363 Ill. 348, 2 N. E. (2d) 324 (1939), and People v. Snyder, 327 Ill. 402, 158 N. E. 677 (1927).


been created (1) to cover the conduct of persons tampering with aircraft without authority or permission;\(^{16}\) (2) to punish those who, having other persons in custody, prevent the ones restrained from consulting with a lawyer or communicating with relatives within a reasonably short space of time;\(^{17}\) and (3) to penalize jail guards and the like who smuggle materials into or out of penal institutions operated by the state in violation of prison regulations.\(^{18}\) The crime of assault and battery has now been subdivided into simple assault and battery on the one hand and aggravated assault and battery on the other.\(^{19}\) The latter offense, carrying a heavier penalty, is defined as the "unlawful and violent beating of another which results in severe personal injury." It remains to be seen whether the relative term "severe" will be regarded as sufficiently definitive to meet constitutional requirements relating to a charge of crime.

Other changes have occurred in regard to the measure of punishment to be imposed for crimes already included within the code. It would seem that the petty thief, social outcast though he may be, is not to be prejudiced more than anyone else by the high cost of living, for the critical element of value, which distinguishes grand larceny from petit larceny,\(^ {20}\) has been raised from $15 to $50, thereby securing the petty thief against what would be a rather serious consequence of inflation.\(^ {21}\) His country cousin, however, who attempts to steal by altering or defacing the brand or mark upon certain named domestic animals, is not so protected. He is to be punished by a term of imprisonment in the penitentiary where the animal is valued at $15 or more\(^ {22}\) but,  

\(^{20}\) In People v. Swinson, 406 Ill. 233, 92 N. E. (2d) 758 (1950), for example, it was held to be error to sentence a defendant to a penitentiary term where the jury, without fixing the value of the property, had returned a verdict of guilty of larceny of a quantity of corn. Value is not the sole criterion for theft from the person, or theft of a horse or of an automobile, has been declared to be grand larceny: Ill. Rev. Stat. 1951, Vol. 1, Ch. 38, § 389, § 397 and § 387a, respectively. The stealing or falsifying of public records is also to be dealt with as grand larceny under Ch. 38, § 401.  
\(^{22}\) Ill. Rev. Stat. 1951, Vol. 1, Ch. 38, § 446.
if he succeeds in stealing a cow of the value, say, of $40 without tampering with the brand or mark, his punishment, at most, would be a year of imprisonment in a county jail. There being nothing to show that the inflationary process has left the value of farm animals untouched, it would seem as if the section relating to the criminal changing of marks and brands should be amended to correspond with the one relating to larceny in general.

Increase may also be noted in relation to the punishment for bribery in connection with sporting events; for the illegal employment, exhibition, or endangering the life or health of a child; and for violation of the rule relating to the secrecy of grand jury proceedings. As amended, the punishment for the latter offense by way of fine has been deleted and a purported mandatory jail sentence up to one year in duration has been substituted in lieu thereof. The presence of a typographical error, however, may have sterilized the statute in question.

Elements of criminal procedure have been considered, both by the courts and the legislature. From the judicial standpoint, the power of an officer to make an arrest without a warrant has been clarified by the recent Supreme Court decision in People v. Edge, a case which construes the term "criminal offense" as used in the statute providing for arrest without a warrant. The defendant there appealed from a conviction on a charge of possessing policy tickets. He contended, inter alia, that the origi-

23 The same thing would be true for the theft of sheep, goats and pigs, all referred to in Ch. 38, § 446, but not for horses, mules and asses. Theft of the latter would be grand larceny, without regard to value, under Ch. 38, § 397.
24 See a note in 10 La. L. Rev. 490 dealing with the effect of inflation upon the value-penalty ratio in theft cases.
28 The publishers of Ill. Rev. Stat. 1951 have printed the concluding sentence of Ch. 38, § 720, to read: "Whoever violates this section shall be imprisoned ... for not more than one year." Italic added. The text of Laws 1951, p. 1849, certified to be a true and correct copy by the Secretary of State, concludes: "Whoever violates this section shall be imprisoned ... for not more than [one] year." Italic added. If the engrossed bill reads "on year," the penalty provision would seem to be fatally defective since no such time period exists.
29 406 Ill. 490, 94 N. E. (2d) 359 (1950).
31 The prosecution was based on Ill. Rev. Stat. 1951, Vol. 1, Ch. 38, § 413.
nal arrest and the accompanying search was illegal as the arresting officer lacked a warrant. Relying upon holdings in People v. Ford and People v. Davies\(^3\) for the principle that the term "criminal offense" includes all felonies, however great, and all misdemeanors, however slight, the Supreme Court held that a violation of a municipal ordinance which would subject a defendant to a fine was to be deemed a "criminal offense" within the contemplation of the statute, justifying both the arrest and the search. Although the defendant's argument was not wholly unreasonable,\(^3\) the holding finds foundation in the Cities and Villages Act as well as in a city ordinance enacted pursuant thereto.\(^4\) There would also appear to be corroborating authority in the Municipal Court Act.\(^3\)

The holding in People v. Bobczyk\(^3\) should make the job of prosecutor easier, in drunken driving cases, for the court there held that the result of a test performed on a device known as a Harger Drunkometer was admissible in evidence to prove the alcoholic content of the subject's breath. It should be noted, however, that the question of a possible invasion of the constitutional guarantee against self-incrimination was not there considered because of technical reasons growing out of the defendant's choice of reviewing tribunals.

Two cases may also serve to throw light on proceedings based

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\(^3\) Statutory distinction is made between violations of municipal ordinances and other criminal offenses. Ill. Rev. Stat. 1951, Vol. 1, Ch. 24, §10—8, relating to municipal ordinances, for example, provides that in all actions for the violation of any municipal ordinance the first process shall be "a summons or a warrant." A warrant for arrest shall issue only "upon the affidavit of any person [who] has reasonable ground to believe that the party charged is guilty . . . ." Ch. 38, §785, relating to probation in case of certain offenses, refers to violations of municipal ordinances and other criminal offenses in the disjunctive. Section 787 of the same statute, describing conditions for release, provides that the "probationer shall not, during the term of his probation, violate any criminal law of the State of Illinois or any ordinance of any municipality of said state." Italics added.


\(^5\) Ibid., Ch. 37, §477, declares that any "police officer of the city may arrest on view any person who may be seen . . . in the act of violating, within the city, any ordinance . . . whenever such violation is, by such ordinance, made punishable by fine or otherwise."

on the so-called "criminal sexual psychopath" laws. In the first, that of People v. Ross, the issue was one as to whether or not review, by writ of error, could be obtained against a determination that the petitioner was a sexual psychopath. The Supreme Court noted the absence of any statutory provision permitting review, likened the matter to an issue arising under the Insanity Act, and transferred the cause as not being within its jurisdiction. In the other case, that of People ex rel. Elliott v. Juergens, a writ of mandamus had been sought against a county judge because he had refused to entertain sexual psychopath proceedings against a number of inmates at Menard penitentiary whose terms were expiring but who, in the judgment of the Director of Public Safety, ought not be released because of demonstrated sexual aberrations but should be transferred to an appropriate hospital for treatment. The county judge had apparently refused to act on the belief that the statute was unconstitutional. Although the Supreme Court held the statute to be both constitutional and applicable to convicted as well as unconvicted persons, it approved a decision denying the writ of mandamus because an element of judicial discretion was involved in the action of the county court. There is enough in these cases to indicate that the criminal sexual psychopath law would bear legislative re-examination to prevent a forfeiture of liberty through an erroneous determination by a nisi prius court.

A much needed amendment to the statute relating to grand juries was adopted during the year, one which permits an extension of grand jury service for up to three months in Cook County. Prior to the amendment, the statutory scheme lacked

38 407 Ill. 199, 95 N. E. (2d) 61 (1950). After transfer to the Appellate Court for the Second District, that court, not in the period of this survey, held that there was neither a statutory nor a common law basis for review and it too dismissed the proceeding without passing upon the merits of the case: 344 Ill. App. 407, 101 N. E. (2d) 112 (1951).
40 The statute was held valid, in People v. Sims, 382 Ill. 472, 47 N. E. (2d) 703 (1943), as applied to a sexual psychopath prior to any criminal conviction.
41 It possessed jurisdiction to review the trial court holding because of the constitutional question involved: Ill. Rev. Stat. 1951, Vol. 2, Ch. 110, § 199(1).
42 Habeas corpus would seem to provide an inadequate remedy against error.
uniformity in that, in other counties of the state, a court might retain the grand jury attendant upon it for a period as long as three months, while the Criminal Court of Cook County could retain its grand jury for but one month. The apparent inconsistency arose from the fact that the courts of other counties lacked a stated term of court, whereas the Criminal Court of Cook County has a term of one month in duration. The grand jury law also formerly authorized grand jurors, in courts having terms fixed by law, to serve for the term for which they were summoned but, in courts having no terms, to serve for such time as the court might direct but not to exceed three months. Despite this, it had been argued, in People v. Brautigan, that action of an extended Cook County grand jury could be upheld on the doctrine that such a jury was at least a de facto officer of the government. The court found that it was not legally possible for a de facto jury to exist concurrently with a de jure body which had been regularly constituted, so it rejected the argument.

The new law purports to authorize the two bodies to exist simultaneously but limits the extended grand jury to the investigation of only those matters which it had under consideration during its original term. By limiting the total period of service to three months, the provision should tend to prevent undue procrastination by the prosecutor as well as to avoid the criticism of a "standing grand jury" such as has been directed toward a parallel provision in the Federal Rules of Criminal Procedure.

45 Ibid., Ch. 37, § 165a.
47 310 Ill. 472, 142 N. E. 208 (1924). A grand jury of the Criminal Court of Cook County had been continued, on court order, upon a finding that it was for the best interests of public justice that the grand jury be so continued in order to complete its investigation into the conduct of members of the Chicago Board of Education as well as others connected therewith. The defendant had refused to answer questions before the extended grand jury and had been summarily punished for contempt. The conviction was held to be erroneous because the grand jury, extended without statutory authority, lacked the power to question the defendant.
48 See Stewart, Federal Rules of Criminal Procedure (U. S. Law Printing Co., Chicago, 1945), p. 46. Federal Rule 6(g) provides: "A grand jury shall serve until discharged by the court but no grand jury may serve more than eighteen months. The tenure and powers of a grand jury are not affected by the beginning of expiration of a term of court...." Although the explanatory note of the Advisory Committee, 18 U. S. C. A. § 126, would indicate that the subject matter under investigation must be limited to that already being considered, the plain meaning of the second sentence of the rule seems to be otherwise.
Provision has also been made for a special grand jury. In view of the provision in the Illinois Constitution of 1870 which permits of legislative abolition of the grand jury, the amendment could hardly be said to conflict with any constitutional right on the subject although that objection could have been raised if the right to indictment by a grand jury was not so subject.

The legislature has also aided in other aspects of procedure (1) by enacting a statute fixing venue, for purpose of prosecution, as to all offenses committed in any aircraft while the same is being navigated through the airspace within the state; (2) by nullifying any tacit time limitation on prosecutions for treason; and (3) by transferring jurisdiction over the sections relating to the manufacture of bedding to the Department of Health. It has also made other revisions in the law relating to probation and parole.

While the balance of the law in this field has gone unchanged, an interesting sidelight on the nature and effect of punishment may be observed in the federal case of *United States ex rel. McMahon v. Neely*. The federal Immigration Act provides for the deportation of any alien who, subsequent to his entry, has been sentenced to imprisonment more than once, for a term of a year or more, in connection with a crime involving moral turpitude. The petitioner there had been arrested for immediate

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49 Special grand juries may be convened by a judge of any court of record when he is of the opinion that public justice requires it: Ill. Rev. Stat. 1951, Ch. 78, § 19.


51 See Opinion to the Governor, 62 R. I. 200, 4 A. (2d) 487, 121 A. L. R. 806 (1939), to the effect that a statute purporting to authorize an additional grand jury to sit concurrently with a regular grand jury would violate the Rhode Island Bill of Rights. The court expressly distinguished the Rhode Island provision from the one in Illinois on the ground that the latter permits of legislative change on the point.


54 Laws 1951, p. 1040, H.B. 270; Ill. Rev. Stat. 1951, Vol. 1, Ch. 38, § 67 et seq. Heretofore, under Ch. 38, § 73, the prosecuting function was vested in the Department of Labor, although the matter primarily pertains to sanitation measures.


56 186 F. (2d) 846 (1951).

deportation, pursuant to a deportation order approved by the Board of Immigration Appeals, on the ground that he had twice, since his arrival in this country, pleaded guilty to charges of grand larceny and had twice been sentenced to the Illinois Reformatory, serving more than a year each time. On petition for habeas corpus, he raised the question as to whether or not a sentence to imprisonment in the reformatory was a sentence to "imprisonment" of the kind required by the Immigration Act. The District Court, on the authority of two prior federal cases on the point, held that incarceration in the reformatory was not of the type required and ordered the petitioner discharged from custody.

The Court of Appeals for the Seventh Circuit reversed the holding, pointing out that the cases relied on emphasized the correctional nature of the treatment accorded the juveniles there concerned. The petitioner, it noted, had been sentenced and imprisoned under the Illinois Sentence Commitment and Parole Act of 1917, pursuant to which youthful offenders could be sent to the reformatory. The statute then envisioned segregation of offenders in this class not only from older criminals but also from one another. Using the test suggested in the case of United States ex rel. Popoff v. Reimer, one as to whether or not the punitive element in the imprisonment was "substantial," as amplified in the case of United States ex rel. Bruno v. Reimer, where the court stressed the idea that punishment for crime had to be "clearly subordinated" in the case of juvenile offenders, the court reached the opinion that confinement

58 United States ex rel. Rizzio v. Kenney, 50 F. (2d) 418 (1931), and United States ex rel. Cerami v. Uhl, 78 F. (2d) 698 (1935). It was held, in the last mentioned case, that where the "prime object" of confinement is correctional, and the punitive element is relatively unimportant, there is no "sentence to imprisonment" of the kind required by the Immigration Act.


60 The 1917 laws classified inmates of the reformatory into two divisions, the first to include males between sixteen and twenty-one, and the second to include males between twenty-one and twenty-six.

61 79 F. (2d) 513 (1935). The court there found that the punitive element contained in a period of imprisonment in a reformatory was "clearly more substantial" than the punitive element involved in a confinement in a New York house of refuge.

62 103 F. (2d) 341 (1939).
in the reformatory under the 1917 statute was a sentence to imprisonment of the kind meant by the Immigration Act. Subsequent amendments to the Illinois statute, however, have placed emphasis on the idea of reformation, rather than on punishment, of convicts so it would seem possible, if the question should arise again, that a period of imprisonment in the reformatory under the present law might be regarded as being insufficient for this purpose. Multiple sentences of an alien youth to the Illinois reformatory, even for crimes involving moral turpitude, may not, therefore, be sufficient to subject him to deportation.

V. FAMILY LAW

Most current issues relating to family law grow from attempts to enforce the obligation to pay alimony. For example, the problem of whether or not a property settlement agreement calling for the payment of a definite sum of money by installments, when incorporated into a divorce decree, amounts to a lump sum settlement or is merely a provision for periodic alimony has again come before the courts during the survey period. The first case, that of Coleman v. Coleman, decided by the Appellate Court for the Fourth District, was one in which the ex-husband petitioned for cancellation of the agreement on the ground of the remarriage of his former wife. He relied on Section 18 of the Divorce Act as it read prior to its amendment. His petition was countered with the claim that the agreement was a lump sum settlement, hence not subject to modification, or if found to be wanting as a lump sum settlement, was not affected because the 1949 amendment applied. The court ruled for the defendant, holding that

63 Ill. Rev. Stat. 1949, Vol. 2, Ch. 118, § 13.1, establishing the Illinois State Reformatory at Sheridan, announces it to be purpose of such reformatory to provide a place for the “confinement and rehabilitation of male persons” under seventeen at the time of conviction and sentence for felonies.


3 Laws 1949, p. 729, S.B. 175; Ill. Rev. Stat. 1951, Vol. 1, Ch. 40, § 19. The amendment provided that “a party shall not be entitled to alimony and maintenance after remarriage; but, regardless of remarriage by such party or death of either party, such party shall be entitled to receive the unpaid installments of any settlement in lieu of alimony ordered to be paid or conveyed in the decree.”