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attack, but disposed of plaintiff's charges on the basis that the allegation was lacking in clarity and definiteness. It was said that the mere fact that a person has pursued his remedy as a bondholder in order to establish a standing as a judgment creditor for the purpose of effecting a redemption is not presumptive evidence of fraud.[92] The decision may, however, be but a reflection of a policy to encourage redemption[93] so that a debtor's property may go to satisfy as much of his liability as is possible.[94] It would also appear that if a court is asked to determine rights between a redeeming judgment creditor and a purchaser at foreclosure sale, it will, if at all possible, favor the former over the latter.

IV. CRIMINAL LAW AND PROCEDURE

Cases involving new developments in substantive criminal law are, as usual, limited in number for the basic principles undergo slight change during a survey period. Some expansion of substantive criminal law has, however, resulted from the application of basic principles to novel fact situations. It is, for example, a well established principle that an individual has the right to commit homicide in defense of his habitation,[1] if necessary, but that principle was, for the first time applied, in *People* v. *Eatman,*[2] to the defense of a rented apartment. It was there said that a tenant in possession had the right to use force, including homicide if necessary, if the landlord should illegally attempt to force an entrance into the premises in an effort to collect rent. But an attempt, in *People* v. *Smith,*[3] to expand the definition of habitation to include a public mine office which adjoined the defendant's living quarters failed when the court there declined to find that any defense of the habitation was involved.

92 Williams v. Williston, 315 Ill. 178, 146 N. E. 143 (1924).

93 Karnes v. Lloyd, 52 Ill. 113 (1869); Phillips v. Demoss, 14 Ill. 409 (1853).

94 Nudelman v. Carlson, 375 Ill. 577, 32 N. E. (2d) 142 (1941); Strauss v. Tuckhorn, 200 Ill. 75, 65 N. E. 683 (1902); Whitehead v. Hall, 148 Ill. 253, 35 N. E. 871 (1893).

1 People v. Osborne, 278 Ill. 104, 115 N. E. 890 (1917); Foster v. Shepherd, 258 Ill. 164, 101 N. E. 411 (1913); Hayner v. People, 213 Ill. 142, 72 N. E. 792 (1905).

2 405 Ill. 491, 91 N. E. (2d) 387 (1950).

3 404 Ill. 125, 88N. E. (2d) 444 (1949).

The use of force allegedly offered in self-defense came in for scrutiny. In the case of *People* v. *Smith*,[4] the defendant was followed to his home and an attack was made upon him as he stood on his front porch. It was held that his use of a metal crank upon his assailant, who died from the blow, was an act of self-defense and not the result of that sudden impulse of passion which is necessary to constitute manslaughter. By contrast, in another case also entitled *People* v. *Smith*,[5] manslaughter, rather than self-defense, was deemed established when it appeared that the deceased assailant, shot in the back, was unarmed. The assailant had threatened the defendant and had reached for something in his back pocket but these acts were regarded insufficient to justify a claim of self-defense when it appeared that the deceased had retreated and had been pursued by defendant. In addition to self-defense, the defendant in *People* v. *Tanthorey*[6] claimed that the shooting was accidental in character. The court pointed to the intrinsic contradiction between these defenses and ruled that the claim of accidental shooting negatived the possibility of self-defense.

The last mentioned case also raised the question as to what constitutes sufficient time between the provocation and the killing to permit the voice of reason to be heard. There have been few cases in Illinois in which the court has found that a sufficient time existed. Leaving the area of danger and then returning within a few minutes would seem to indicate a deliberate act with sufficient time for cooling, if done by a reasonable man. Upon the facts there presented, the deceased left the place of the alleged argument first and the defendant left a few minutes later, both travelling in the same direction. After having proceeded some three hundred feet, deceased and defendant met again and it was at this spot that the deceased was killed. The court felt that the time required to travel the distance was sufficient to permit the cooling of the heat of anger, hence the defendant was

[4] 404 Ill. 350, 88 N. E. (2d) 834 (1949).
[5] 404 Ill. 125, 88 N. E. (2d) 444 (1949).
[6] 404 Ill. 520, 89 N. E. (2d) 403 (1950).

not entitled to have the homicide treated as being a voluntary manslaughter.

The Illinois Criminal Code was amended, in 1921, and the punishment for larceny was changed, so that every person convicted of larceny, "if the property stolen exceeds the value of fifteen dollars, or if the property is stolen from the person of another,"[7] shall be imprisoned in the penitentiary for a term of years. It had been pointed out, in *People* v. *Sarosiek*,[8] by way of dictum, that the effect of the amendment was to make the value of the property, if stolen from the person of another, a matter of no moment. Direct application of the amended statute, however, had not occurred until, in the recent case of *People* v. *McKay*,[9] the court was asked to rule on the sufficiency of an indictment which failed to state the value of the property stolen but did charge that it had been stolen from the person of the victim. The earlier dictum was confirmed.

It cannot be said that the holding in *People* v. *Barrett*[10] has, in any way, clarified the law relating to embezzlement. A liquidating trustee was there charged with crime in that he was said to have failed to deposit funds sufficient to cover checks issued for a liquidation dividend, but instead used unclaimed sums from former dividends to cover up the deficit. Conviction was reversed because the Supreme Court failed to find, among other things, that the acts performed manifested the presence of the necessary criminal intent to convert to defendant's own use. There might be occasion to think that the failure to deposit, if true, would be a sufficient basis to raise more than a mere inference of intention to perpetrate the crime.

One of the essential elements necessary for the establishment of malicious mischief, under the Illinois statute, is that of proof of ownership of the property damaged or destroyed. Bare allegation that the property injured was a dwelling house in the lawful

7 Ill. Rev. Stat. 1949, Vol. 1, Ch. 38, § 389.

8 375 Ill. 631, 32 N. E. (2d) 311 (1941).

9 403 Ill. 417, 86 N. E. (2d) 218 (1949).

10 405 Ill. 188, 90 N. E. (2d) 94 (1950), noted in 28 CHICAGO-KENT LAW REVIEW 271-2. Daily, J., wrote a dissenting opinion.

possession and occupancy by the owner, without proof of such allegation, was held insufficient, in *People* v. *O'Brien*,[11] particularly since there was no testimony concerning the nature or extent of the occupancy of the building or whether the possession was lawful or exclusive. Proof of ownership rarely enters into decisions involving malicious mischief, and the only case at all similar to the one mentioned is an Ohio decision.[12] As the Ohio statute there concerned required that the property be owned by someone other than the defendant, it was there held that the indictment was defective for failure to charge that the vehicle was not the property of the defendant.

In *People* v. *Potts*,[13] the defendant was charged with assault with intent to commit rape by force, and also with assault with intent to rape a female under the age of sixteen. He contended that as the jury had failed to make a finding of guilt on the first charge, leading to an implied acquittal thereon, he was thereby automatically determined to be not guilty on the second. The court agreed that the defense was novel, but found no merit in it. While the case represents an initial attempt to use such a contention in a case of assault with intent to rape, it has been argued without avail in crimes of a different nature.[14]

On the procedural side, some points have been made. In *People* v. *Fry*,[15] an indictment charging that the defendant had committed "indecent and lascivious acts" in the presence of two named female children was challenged as being insufficient to fully

11 404 Ill. 236, 88 N. E. (2d) 486 (1949). In People v. Barger, 338 Ill. App. 518, 88 N. E. (2d) 109 (1949), defendant first moved to quash an information charging malicious mischief because of a failure to endorse the name of the "prosecutor" thereon. The state urged that this was necessary only where the proceedings were based on an indictment: Ill. Rev. Stat. 1949, Vol. 1, Ch. 38, § 717. The defendant then appears to have changed his motion to quash into a plea in bar, and the same was sustained. On writ of error by the state, the Appellate Court for the Fourth District could find no case in point on the major issue but concluded that it was forced to dismiss the writ of error, since no statutory right exists for the use thereof at the instance of the state, although review is available from an adverse ruling on a motion to quash: Ill. Rev. Stat. 1949, Vol. 1, Ch. 38, § 747.

12 State v. Meteff, 6 Ohio Supp. 312 (1938).

13 403 Ill. 398, 86 N. E. (2d) 345 (1949).

14 See, for example, People v. Mattei, 381 Ill. 21, 44 N. E. (2d) 576 (1942), and People v. DeYoung, 378 Ill. 256, 38 N. E. (2d) 22 (1941).

15 403 Ill. 574, 87 N. E. (2d) 780 (1949).

set forth a case of contributing to the delinquency of minors.[16] The court refused to quash the indictment, believing the words "indecent and lascivious" were sufficiently precise for they were words of common usage and conveyed a definite meaning of lustfulness and sensuality. The court also refused to require the setting forth of a more specific statement of the acts done, deeming them to be so obscene as not to require that they should be spread on the records of the court. But essential language was said to be lacking, in *People* v. *Scholl*,[17] where the information charged that the defendant "unlawfully" neglected and refused to provide for the support of her child but did not say that proper care was "knowingly and wilfully omitted," although such knowledge and wilfullness is an essential element of the offense.[18] The expression "unlawfully" was held not to be synonymous with "knowingly" on the authority of a Texas case.[19]

Stenographic errors arising in the preparation of indictments can sometimes lead to startling results, but are often cured by failure to raise objection at an appropriate time. In *People* v. *Cheney*,[20] for example, the victim's name was given as "Doris Haggard," whereas it was actually "Doris Hoggard," but the variance was not deemed to be substantial enough to require reversal of the conviction.[21] A seemingly more serious error was involved in *People* v. *Meyer*[22] where the original typewritten ninth count, which failed to charge a crime, had been crossed out by ink lines, and a substituted ninth count then followed in proper order. The verdict and judgment of guilty of murder was based on this count alone. The defendant relied on the theory that no valid indictment existed,[23] but the court refused to agree in the

16 Ill. Rev. Stat. 1949, Vol. 1, Ch. 38, §§ 103-4.

17 339 Ill. App. 7, 88 N. E. (2d) 681 (1949). See also People v. Standerfer, 339 Ill. App. 454, 90 N. E. (2d) 229 (1950), which holds that an information charging a failure to provide "proper and suitable" clothing is insufficient.

18 Ill. Rev. Stat. 1949, Vol. 1, Ch. 38, § 101.

19 Ham v. State, 118 Tex. Cr. Rep. 271, 40 S. W. (2d) 152 (1931).

20 405 Ill. 258, 90 N. E. (2d) 783 (1950).

21 The court relied on People v. Jankowski, 391 Ill. 298, 63 N. E. (2d) 362 (1945), where a charge of assault on "Catherine Valenta" was held sustained by proof of an assault on "Katherine Balenta."

22 405 Ill. 487, 91 N. E. (2d) 425 (1950).

23 See Ex parte Bain, 121 U. S. 1, 7 S. Ct. 781, 30 L. Ed. 849 (1887).

absence of proof by the defendant that the deletion and substitution had occurred after the indictment had been returned by the grand jury. It could cite no Illinois case for this view, but did rely on a presumption against fraud and forgery. The omission of words of art such as "kill and murder," in an indictment charging murder, does not amount to a fatal defect, according to *People* v. *Williams*,[24] provided there is a clear charge of wounding leading to the death of the victim.[25]

Mental incompetence of the defendant at the time of trial, especially when evident to the trial judge, should be reason to refrain from proceeding with the trial. It had been held, in *People ex rel. Wiseman* v. *Nierstheimer*,[26] for example, that an outstanding and uncancelled adjudication in another proceeding to the effect that the defendant was mentally incompetent and suffering from a permanent type of mental affliction was a matter concerning which the trial court should take notice. An exception to that doctrine was developed in *People ex rel. Miller* v. *Robinson*,[27] however, where an original petition for habeas corpus to obtain relief from a criminal conviction was dismissed, because the earlier proceeding had been one designed simply to permit emergency confinement of the accused as a person in need thereof for his own welfare[28] rather than one to procure an adjudication as to his sanity.[29] There being no record of mental incompetence, it was said to be the duty of the defendant, or his counsel, to project the issue into the case if trial was to be avoided on that ground.

Questions concerning the right to a change of venue arose when the lower court, in *People* v. *Dieckman*,[30] refused to grant to defendant permission to amend his petition based upon an alleged prejudice on the part of the trial judge. The original

24 405 Ill. 574, 92 N. E. (2d) 120 (1950).

25 The indictment was deemed aided by the doctrine of reasonable intendment laid down in Ill. Rev. Stat. 1949, Vol. 1, Ch. 38, § 716.

26 401 Ill. 260, 81 N. E. (2d) 900 (1948).

27 404 Ill. 297, 89 N. E. (2d) 32 (1949).

28 Ill. Rev. Stat. 1949, Vol. 2, Ch. 91½, § 5—1.

29 Ibid., § 6—1.

30 404 Ill. 161, 88 N. E. (2d) 433 (1949).

petition for change was defective in that it was not accompanied by the necessary supporting affidavit of the defendant's attorney, as then required by statute.[31] It is well established that, once a change of venue has been granted, the court has the right to refuse to grant a second request based upon the same allegation.[32] It was pointed out, in the instant case, however, that such doctrine does not preclude the defendant from renewing his request after an amendment to his original petition, if the original petition has been denied. There is an apparent difference between renewing a request which has been denied, on the one hand, and repeating a request already once granted, on the other. The right to obtain a change of venue before trial on account of the prejudice of the trial judge does not, however, carry over to a request for such a change on a petition in the nature of a writ of error *coram nobis* filed after conviction, according to the holding in *People* v. *Sheppard.*[33] It was there held that, because of the nature of the hearing essential thereon, the defendant is not entitled to have the matter transferred to another judge.

Two cases of interest treat with the right of a defendant to be represented by counsel. An Illinois statute has long imposed an affirmative duty on the trial court to furnish counsel for defendants charged with capital offenses,[34] but in only one case prior to the present has a decision been reversed because of a failure on the part of a court to observe that duty.[35] A second case, that of *People* v. *Butler*,[36] has now been added. Reversal was there ordered because the record failed to indicate that there had been any explanation given to the defendant as to his right to counsel or that any inquiry had been made to ascertain whether he was able to employ counsel of his own choice. The opposite

31 The statute now requires that the accompanying affidavit may be made by either the defendant or his attorney, instead of both: Ill. Rev. Stat. 1949, Vol. 2, Ch. 146, § 21.

32 Ibid., § 26.

33 405 Ill. 79, 90 N. E. (2d) 78 (1950), noted in 28 CHICAGO-KENT LAW REVIEW 374-5.

34 Ill. Rev. Stat. 1949, Vol. 1, Ch. 38, § 730.

35 People v. Williams, 399 Ill. 452, 78 N. E. (2d) 512 (1948).

36 406 Ill. 189, 92 N. E. (2d) 752 (1950).

of that situation may be seen in *People* v. *McKay*,[37] for there the defendant's complaint was that the court had appointed a public defender to represent him and had thereby, according to him, deprived him of his constitutional right to seek his own counsel. The novelty of the argument did not impress the higher court, particularly since the defendant had made no objection to the appointment nor had made any effort to secure his own counsel. Indeed, the court felt that he had been extended assistance beyond that required by law.[38]

As is usually the case, several convictions were reversed during the survey period because the evidence presented at the trial was not sufficient in amount or not of such convincing quality as to support a conviction. Thus, a finding that indecent liberties had been taken with the person of a minor had to be reversed and the cause remanded because the child's testimony was uncorroborated as well as for uncertainty as to other testimony at the trial.[39] In *People* v. *Silva*,[40] a lower court's finding of guilt in a rape case was reversed both because the testimony of the prosecutrix was not corroborated and because it was discredited by the testimony of other persons present at the time of the alleged offense. A third case, that of *People* v. *McBeth*,[41] also turned on the question of sufficiency of the evidence to establish guilt on a charge of receiving stolen goods. The novel fact situation involved a female defendant, infatuated with a penitentiary parolee, whom she allegedly thought was carrying on a legitimate "trading business" in her home but who was actually using the place as a base for the handling of stolen property. The majority of the court felt there was reasonable doubt over the point of defendant's knowledge that the goods were stolen. Numerous cases have dealt with the question of knowledge as an element in the crime of receiving stolen goods, but the instant case is rare in that it infrequently happens that a defendant is implicated solely

[37] 403 Ill. 417, 86 N. E. (2d) 218 (1949).

[38] See also People v. Montiville, 393 Ill. 590, 66 N. E. (2d) 861 (1946), for a former attempt to use the same novel argument.

[39] People v. Watkins, 405 Ill. 454, 91 N. E. (2d) 406 (1950).

[40] 405 Ill. 158, 89 N. E. (2d) 800 (1950).

[41] 405 Ill. 608, 92 N. E. (2d) 77 (1950). Crampton and Simpson, JJ, dissented.

on the basis of having permitted another to place goods upon his premises.

Comment by the prosecuting attorney on the defendant's failure to testify served as the basis for reversal in *People* v. *Cheney*,[42] for such comment is not only violative of a state statute,[43] but invades constitutional right as well. There may be occasion to reflect on whether the right is an absolute one or not, for the court took into consideration, when determining whether the nature of the comment required reversal, such things as the fact that the evidence did not eliminate all questions of doubt and that the jury had given only a light sentence. The case was distinguished from those in which the jury could not have found any other verdict than one of guilty.[44]

Establishment of the fact of imprisonment in the penitentiary on a former occasion is a prerequisite to the imposition of the aggravated punishment called for by the Illinois Habitual Criminal Act.[45] The recent case of *People* v. *Byrnes*[46] raised the question whether detention in a house of correction would meet the requirement. The defendant had been confined in the Milwaukee House of Correction under a Wisconsin conviction prior to the commission of an offense in Illinois and, on the basis thereof, he had been given the greater sentence required by the Illinois statute. The judgment was reversed and the cause remanded because the place of detention was not considered to be the equivalent of the Illinois penitentiary, even though, under the Wisconsin statute, the defendant might have received the greater sentence, for the statute of that state is satisfied by imprisonment in the state reformatory.[47] The instant case parallels earlier cases in which a former confinement in an Illinois reformatory has been held to be insufficient.[48]

42 405 Ill. 258, 90 N. E. (2d) 783 (1950).
43 Ill. Rev. Stat. 1949, Vol. 1, Ch. 38, § 734.
44 People v. Young, 316 Ill. 508, 147 N. E. 425 (1925).
45 Ill. Rev. Stat. 1949, Vol. 1, Ch. 38, § 602.
46 405 Ill. 103, 90 N. E. (2d) 217 (1950).
47 State v. Clementi, 224 Wis. 145, 272 N. W. 29 (1937).
48 People v. Perkins, 395 Ill. 553, 70 N. E. (2d) 622 (1947).

In 1949, the legislature enacted a statute providing, in brief, that any imprisoned person who asserts that there has been a substantial denial of constitutional right, either state or federal, may institute a post-conviction proceeding by petition in the court of sentence setting forth the matters relied upon for relief.[49] The statute was held not to be open to constitutional criticism in *People* v. *Dale*.[50] By reason of its existence, the United States Court of Appeals for the Seventh Circuit indicated that it would refuse to consider the merits of the claim of violation of constitutional right advanced in *United States ex rel. Peters* v. *Ragen*[51] until after an attempt had been made to obtain state relief in accordance with the new Illinois procedure. The fact that the relator's petition for a writ of habeas corpus had been denied by the federal district court prior to the passage of the Illinois statute was said to be inadequate reason for relieving the relator from the necessity of observing the requirement for exhaustion of state remedies.

The federal district court, however, was none too pleased with the type of justice that an Illinois court had dispensed in a criminal case, as was indicated by the record in the case of *United States ex rel. Montgomery* v. *Ragen*.[52] The relator there charged that the Illinois officials who had handled the prosecution for rape, of which he had been convicted, had intentionally withheld information tending to establish that the victim had never been raped from the examining physician. The relator had been confined in the penitentiary for a number of years and had pursued all state remedies without success before making application to the federal court. It expressed the view that the relator had "gone the merry go-round of Illinois justice and failed to get a

[49] Ill. Rev. Stat. 1949, Vol. 1, Ch. 38, § 826 et seq. It may be ironic that the situation reflected in the Marino case, one which would appear to have been the primary cause for the passage of the statute, ultimately resulted in providing no relief for the convicted defendant: People v. Marino, 404 Ill. 35-7, 88 N. E. (2d) 7 and 8 (1949), following the action taken in Marino v. Ragen, 332 U. S. 561, 68 S. Ct. 240, 92 L. Ed. 170 (1947).

[50] 406 Ill. 238, 92 N. E. (2d) 761 (1950).

[51] 178 F. (2d) 377 (1949), cert. den. — U. S. —, 70 S. Ct. 425, 94 L. Ed. (adv.) 294 (1950). See also United States ex rel. Hamby v. Ragen, 178 F. (2d) 379 (1950), cert. den. 339 U. S. 905, 70 S. Ct. 515, 94 L. Ed. (adv.) 431 (1950).

[52] 86 F. Supp. 382 (1949).

hearing, or even a suggestion of a hearing on the serious charge that he had made."[53] Believing that due process of law, as guaranteed by the Fourteenth Amendment, had been denied and that the conviction and sentence was void, it ordered the prisoner discharged. The court warned that to "condone the methods evidenced in this case, is to invite grave injustice. There is one way to stop a practice that has become altogether too common—and that is to bring it to a conscious level where the public can scrutinize it and take such steps as are necessary to insure a true rendition of justice to all, regardless of race, color or creed."[54] The legal profession should be especially conscious of the validity of these remarks.

V. FAMILY LAW

The usual large array of interesting cases was lacking, this year, in the field of family law, but a few decisions are worthy of attention. Among such is the case of *LaRue* v. *LaRue*,[1] for it serves to reemphasize a distinction which should be remembered. The decree for divorce there granted to the wife directed payment to the plaintiff of a sum found due her on an unpaid loan between the parties. The defendant did not pay as ordered, so the ex-wife sought a rule to show cause why he should not be punished for contempt. The ex-husband answered by admitting his failure to pay but pleaded that, by reason of a prior adjudication in bankruptcy in which proceedings he had listed the debt, the divorce court lacked jurisdiction over the matter.[2] The lower court rejected the contention and found defendant to be in contempt. On appeal, the Appellate Court for the Second District ruled the contempt order improper.

It pointed out that certain money payments called for by divorce decrees are not dischargeable in bankruptcy, but it distinguished between the payment here provided for and one calling for the payment of alimony. Obligations of the latter kind are

53 86 F. Supp. 382 at 387.
54 86 F. Supp. 382 at 387.
1 341 Ill. App. 411, 93 N. E. (2d) 823 (1950).
2 Jones v. Alton & S. R. Co., 5 F. Supp. 532 (1934).