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A BRIEF REVIEW OF CRIMINAL CASES IN THE SUPREME COURT OF ILLINOIS FOR THE PAST YEAR.<sup>1</sup>

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During the year from March 1, 1913, to March 1, 1914, the Supreme Court of Illinois handed down decisions in thirty-six criminal cases. In eighteen of these cases the judgment of the lower court was sustained; in eighteen it was reversed, and generally when reversed the case was remanded for a new trial. Among these were eight murder cases, six of which were affirmed, five robbery, of which one was affirmed, three rape, two of which were affirmed, three burglary, two of which were affirmed.

In discussing these cases I shall divide them into two groups, and consider first those cases that involve points of procedural law, and second, those cases that involve points of substantive law. Of course, in many instances, matters of both procedural and substantive law were involved in the same case.

Of the eighteen reversals, it may be said that fourteen of them were for reasons of errors in procedure, using that term in a loose sense. The most important single factor in causing reversals was error in the admission or rejection of evidence. There were six cases in which errors of this kind let the Supreme Court to give a new trial. They were *P. v. Schultz*, 260 Ill. 35, a rape case; *P. v. Newbold*, 260 Ill. 196, indictment for keeping a disorderly house; *P. v. Newman*, 261 Ill. 11, robbery; *P. v. Warfield*, 261 Ill. 293, conspiracy to defraud; *P. v. Harrison*, 261 Ill. 517, kidnapping; *P. v. Pfanschmidt*, 262 Ill. 411, murder. To draw from these cases, however, any inference that the Supreme Court is unduly enforcing merely technical requirements as to the admission of evidence, or following any rule that a presumption of prejudice arises merely from the wrongful admission of evidence would be unjustified. In the Schultz case a physician called as witness for the prosecution was allowed to testify as to the condition of the girl upon whom the rape was alleged to have been committed and further to testify that in his opinion it was a case of rape. This latter part of this testimony the Supreme Court held to be wrongly admitted. It pointed out that it is the function of the witness to state facts from which the jurors in turn will draw their own opinion as to the issues in

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the case; and that when the witness in this case was allowed to express his opinion as to whether there had been a rape he was usurping *pro tanto* the function of the jury. The error in the admission of this evidence was accentuated by the fact that subsequently another physician who had also examined the girl and was called by the defendant was not allowed by the trial court to testify as to whether or not in his opinion there had been a rape. In the Newbold case, the Newman case, and the Warfield case the trial court allowed evidence to be introduced of crimes committed either by the defendant or by third parties testifying for him other than those for which the defendant was at the time being tried.

The Pfanschmidt case involved the murder of four persons, two of them being the father and mother of the accused. Among other evidence admitted was the silence of the accused when charged with the crime; since, however, it appeared that he refused to answer because his lawyer told him not to, and also said that he would speak at the proper time, the Supreme Court held that under these circumstances no implied admission of guilt could be drawn from his silence, and the evidence was improperly admitted. The lower court also admitted evidence that a bloodhound had been put on the trail of a horse and buggy in the barnyard of the deceased and had followed the trail to a camp where the defendant had at the time been living. It appeared that the bloodhound had been carried the larger part of the way in an auto, being released only at cross-roads. The Supreme Court not only held the evidence inadmissible in this particular case, but went further and laid down the general rule that "testimony as to the trailing of either a man or an animal by a bloodhound should never be admitted in evidence in any case."

The Harrison case was another case where the lower court admitted in evidence accusations made against the accused in his presence. When the person making the charge finished it, the defendant told him profanely and emphatically that he was a liar. It seems difficult to see how such conduct could be regarded as a tacit admission of the truth of the accusation.

In all the cases just discussed, the evidence properly in the case was either slight or evenly balanced so that the wrongfully admitted evidence might well have been a considerable factor in affecting the verdict. Under such circumstances the court can do nothing but grant a new trial. But where, aside from the wrongfully admitted evidence, the guilt of the defendant is so clearly established that even without the wrongfully admitted evidence the jury would have been derelict in its duty had it not returned a verdict of guilty, the court has not

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hesitated to affirm the judgment. This principle was applied in *P. v. Burger*, 259 Ill. 284, a larceny case; in *P. v. Terrell*, 262 Ill. 138, a murder case, where the lower court erroneously rejected a small piece of evidence offered by the accused; and in *P. v. Duncan*, 261 Ill. 339, a rape case, where in addition to the wrongful admission of evidence the prosecuting attorney, just as one of the defendant's witnesses was leaving the stand, made a motion which was denied by the court, to have her arrested for perjury; and also during the course of his argument to the jury stated that the defendant had been guilty of rape on another girl besides the prosecuting witness. In some six or eight other cases the court applied the well established rule that where there is a fair conflict in the evidence, it will not disturb the verdict.

Proceeding with our analysis of the grounds upon which the various reversals were based: two of the reversals were due to failures by the lower courts to follow the very definite doctrine laid down by the Supreme Court as to the scope of the Indeterminate Sentence Act. In *P. v. Hartsig*, 249 Ill. 348, published in 1911, the Supreme Court explained in detail the relation between the general provisions of the Criminal Code and the Indeterminate Sentence Act. It there held that the latter act was not intended to change the punishment in any given crime as already covered by the Criminal Code, but was meant merely to provide that where, by the Criminal Code, the punishment for any given crime was not less than one year, then the defendant should receive an indeterminate sentence under the terms of the Indeterminate Sentence Act. Obviously, where under the Criminal Code the punishment may be less than a year, the Indeterminate Sentence Act has no application. It was the failure of the lower courts to observe this distinction that was responsible for the reversals in *P. v. Afton*, 258 Ill. 292, and *P. v. Turner*, 260 Ill. 84. The former case was an indictment for incest. The defendant was convicted and sentenced to not less than one, nor more than twenty years imprisonment in the penitentiary. Section 156 of the Criminal Code under which the defendant was convicted provides that the punishment shall be imprisonment "for not more than twenty years," *i. e.*, it may be less than one; consequently under the doctrine of the Supreme Court the case does not come within the scope of the Indeterminate Sentence Act, and the sentence was therefore erroneous. The same error was committed in *P. v. Turner*, 260 Ill. 84.

Among other questions of criminal law that have at various times been made the subject of no little discussion are these: (1) How far should a defendant in a criminal case be allowed to avail himself of procedural informalities in the trial court (a) when it does not ap-

pear that he raised the point in the court below, and (b) when it does not appear that they operated to his prejudice. (2) How far should the doctrine of *stare decisis* be regarded in criminal cases? Without attempting to formulate an answer to these questions, it is interesting to notice the answers suggested by several of the decisions of the past year. In *P. v. Gray*, 261 Ill. 140, the defendant was indicted by a special grand jury for burglary, pleaded guilty, was sentenced and then sued out a writ of error. The record in the case did not affirmatively show that any of the persons summoned as grand jurors appeared in court, that a grand jury was impaneled, that any foreman was appointed, or that the grand jury or any grand jurors were sworn. It did show that on the first day of the term the grand jury came into open court and returned an indictment against this defendant for burglary, endorsed by its foreman "a true bill." The Supreme Court held that while in the lack of evidence to the contrary it will be presumed that the proceedings in the trial court were in proper form and legal, and while certain defects actually apparent on the record may be waived by failure on the part of the defendant to object at trial, there are certain other requisites which as the common law stands must be deemed so fundamental to judicial procedure that they cannot be waived, and one of these is that the defendant must be tried upon an indictment found by a grand jury. Unless the grand jury is duly sworn as such, it is a mere informal organization having no jurisdiction in the premises and it cannot return a legal indictment. This fact not appearing in the case, it was reversed and remanded. The result reached in this case is in accord with common law principles as exemplified by numerous cases cited by the court. Whether it is in the present state of society a desirable result is a different question, and as the court says, one for the legislature to settle.

In *P. v. Annis*, 261 Ill. 157, robbery, the prosecuting attorney in his argument to the jury referred to the fact that the defendant had failed to testify in his own behalf. The trial judge instructed the jury that it were to disregard this. The Supreme Court followed several earlier cases in granting a new trial, regardless of any question of actual prejudice to the defendant.

In *P. v. Stricker*, 258 Ill. 618, an information was filed against the defendant for violation of the act entitled "An act to protect associations, unions of workmen, and persons in their labels," etc., by selling a bottle of gin to which was attached a label, which label was a counterfeit imitation of a label adopted and used by Tanqueray, Gordon and Co., a corporation. The evidence showed that Tanqueray, Gordon and Co. was not a corporation but a partnership, and the Su-

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preme Court held that for this reason the conviction could not be sustained. The purpose of the statute is not to protect the public against the sale of adulterated or inferior goods, in which case it might be argued that the allegation of whose label was being counterfeited was immaterial. Its purpose is to protect property rights in labels. A corporation is a legal person, a partnership is not; the evidence in this case showed that there was no legal entity known as Tanqueray, Gordon and Co. which owned the imitated label. There were, of course, persons composing the partnership, but who they were, whether Jones, Brown, or Robinson, no attempt was made to show, even if that were possible, so as the case ended there was no evidence as to whose property right it was that was alleged to have been violated.

With another reversal by the Supreme Court on somewhat the same question, it seems harder to agree. The case is *P. v. Smith*, 258 Ill. 502, an indictment for the crime against nature perpetrated upon a young girl. In the indictment her name was given as Rosetta May; upon the trial it appeared that her name was Rosalia May. The defendant was convicted and sentenced; upon writ of error the Supreme Court held, Justice Carter dissenting, that the variance in the names was fatal, and remanded the case. The general rule of the common law is clear that such a variance in names as the present is fatal, at least if objected to by the defendant in due course. In the present case there is nothing in the decision to indicate that any objection on this score was raised at the trial, although it is probable that there was a motion to take the case from the jury or for a new trial. The majority of the court relied upon two earlier Illinois cases, *Davis v. P.*, 19 Ill. 74, and *Penrod v. P.*, 89 Ill. 150. If these two cases are conclusive the court would undoubtedly be bound by them. They are both murder cases and raise the same point, which is this: The defendant is indicted for the murder of, say, "Robert Jones." All the evidence in the case is as to "Jones," his first name not being mentioned. The court in those two cases held that there was no evidence that Robert Jones had been killed, either by the defendant or anyone else, and this is obviously sound. In those cases there was nothing in the record to show that the Robert Jones with whose murder the defendant was charged, and the Jones about whom the witnesses were talking were the same man. It was at least theoretically possible that they were not. In the present case it appeared from the record that the prosecutrix was alive, that she was in court and identified the defendant, that he admitted that she was in his room at the time she specified, and merely denied that he had assaulted her as she asserted; and Justice Carter states in his dissenting opinion that the defendant's bill of

exceptions showed the identity of the complaining witness named in the indictment with the one who testified.

The majority of the court also held as a matter of substantive law that the act committed by the defendant did not constitute the crime against nature within the meaning of the statute, but held that the defendant might be punished under the statute punishing offenses against children under seventeen. There are no cases either way upon the exact state of facts raised by this case, but the inference from the language of the statute defining the crime against nature seems to be that the present case was not within the purview of that statute.

Other errors of procedure causing a reversal which lack of time forbids more than mentioning were: insufficiency of the indictment, *P. v. Hallberg*, 259 Ill. 502, robbery; *P. v. Tait*, 261 Ill. 197, violation of order of Board of Health; *P. v. Boer*, 262 Ill. 152, robbery; conviction for a crime not charged in the indictment, *P. v. Kroll*, 259 Ill. 592.

I have dwelt thus at some length upon the various points of procedural law involved in the decision of the past year because it is to that side of our criminal law rather than to the substantive law of crimes that attention at present seems to be directed. Turning now to some of the cases in which the chief point involved was one of substantive rather than procedural law, these decisions may be noted.

*P. v. Shaw*, 259 Ill. 544 was an indictment for bigamy upon the following facts: Helen Schneider and Edward Olsen were married in Chicago in 1888. In 1889 they separated, he acquiring a home in California and she in New York. In 1892 he got a divorce in the California courts, she being served only by publication. In 1900 she married in New York Shaw, the defendant, both parties believing that she could lawfully contract a second marriage. Shortly afterwards they moved to Chicago and lived together as man and wife until 1910, when Shaw married Lenore Smith, Helen still being alive and undivorced. Shaw was duly convicted of bigamy in the trial court. The case was taken by writ of error to the Supreme Court. There the justices were divided. They all agreed that the California divorce obtained by Edward Olsen was of no effect in New York and that consequently the New York marriage between Helen Olsen and Shaw was invalid. They were divided upon the question as to what effect the subsequent removal to and cohabitation in Chicago had upon their relations. The majority held that it had no effect at all; that Shaw, although he lived with Helen Olsen in Chicago for about nine years as her husband, was not in law such and hence was not guilty of bigamy in contracting a marriage with Lenore Smith. The minority, Justices Dunn and Far-

mer, held that since the cohabitation in Chicago was at a time when common law marriages were valid by the law of Illinois, their living together here as husband and wife was sufficient to constitute a good common law marriage. It is submitted that the opinion of the minority is both better law and better morals.

There are two earlier Illinois cases, *Manning v. Sparck*, 199 Ill. 447 and *Land v. Land*, 206 Ill. 288, referred to by the minority, where the original relation was regarded by the parties and the world at large as matrimonial as it was in this case, but was not technically legal. In both these cases the spouses continued to live together after the removal of the obstacle in precisely the same way as before, *i. e.*, as husband and wife, and they were held to be legally married thereafter by a common law marriage.

There is, of course, this difference between these two cases and the present case. They were civil; this is criminal. It has frequently been said that in civil cases the court will presume in favor of a relation that makes offspring legitimate and the conduct of the parties legal. On the other hand, in a criminal case, we encounter the well established rule that a man must be presumed to be innocent until his guilt is established beyond a reasonable doubt. Granting the force of this distinction there could be no reasonable doubt in the present case that the defendant, Shaw, and Helen Olsen, intended to have and regarded their relations both in New York and in Illinois as matrimonial and not meretricious. Indeed, the majority of the court do not deny this. They say (259 Ill. 547) "It does not appear that either of them doubted the validity of that [the New York] marriage until after their separation." The court says in support of its decision, "There is nothing which indicates that these parties contemplated or desired a common law marriage, or that they entered into such a contract. Their cohabitation was pursuant to the ceremony of marriage performed in New York." This is true, and as an original proposition it might be argued with no small force that since there was no consensual formation of the marriage relation after their arrival in Illinois no common law marriage was ever created. These observations, however, would be equally true of the two Illinois cases already referred to, in which the court unanimously agreed that after the removal of the obstacle to a marriage, the parties' relations and intentions continuing the same, a common law marriage was established. That neither party in the present case doubted the validity of the New York marriage makes it easier to establish the guilt of the defendant. Had the original relation been intentionally meretricious, it would have required much stronger evidence to justify the conclusion that they subsequently

changed that intent and attempted to establish matrimonial relations.

Several decisions deal with the liabilities of various parties to the crime. In *P. v. Barrett*, 261 Ill. 232, the facts were these: Two brothers, Henry and Edward Barrett, were in a saloon when Henry got into an altercation with a waiter and followed him into another room, motioning his brother, Edward, to accompany him. The latter did so, opening his knife as he came. Henry then urged the waiter to fight, which he refused to do because of the presence of Edward with the knife. A brother of the waiter offered to see that he had fair play, whereupon a scuffle ensued between this brother and Edward Barret, in which Edward stabbed and instantly killed his opponent. The Supreme Court held correct a verdict of manslaughter against not only Edward Barrett, who did the stabbing, but his brother Henry as well. They were both engaged in the common enterprise of an unlawful assault and each was aiding and abetting the other in the carrying out thereof.

In *P. v. Hotz*, 261 Ill. 239, an indictment for murder springing out of an abortion, it was proved that four persons entered into a conspiracy to produce the abortion. The court held that this conspiracy being established, evidence of statements and acts of one of the conspirators in pursuance of the common design was admissible against all, and that if one was guilty, they all were guilty.

With these two cases may be compared *P. v. Turner*, 260 Ill. 84. This was an indictment of a father for incest committed with his daughter. It was urged that the daughter was an accomplice. The Supreme Court held that she was not; that the statute was passed for her protection, that she was regarded as a victim, not as a criminal, and was not directly punishable under the statute; that consequently she could not be indirectly made an accomplice to an act for the commission of which she could not be punished.