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REVERSIBLE ERROR IN HOMICIDE CASES

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Introduction.

In the case of *People* v. *Cardinelli*[1] the Supreme Court of Illinois affirmed the conviction of Sam Cardinelli who had been indicted for murder, found guilty, and sentenced to death. The defendant had a bad reputation, probably was an undesirable citizen, and may have been an accessory in the homicide in question, but a number of errors had been committed during the trial and defense counsel had a variety of points to urge for reversal. Police officers had been allowed to give the details of several conferences held with the defendant and improper testimony was admitted; there was much "uncalled for" and "unfair" cross-examination; and the State's Attorney was guilty of unprofessional conduct. The Supreme Court admitted that these errors had been committed but nevertheless affirmed the conviction. It said:[2]

"We have considered all the errors assigned and find the record free from reversible error. An examination of the evidence so clearly and conclusively establishes the guilt of the accused that the jury could not reasonably have arrived at any other verdict than one of guilty. As we have said, this record is not free from error. The purpose of the reviewing Court, however, is to determine whether defendant has had a fair trial under the law and whether his conviction is based on evidence establishing his guilt beyond all reasonable doubt. Where it can be said from the record that an error complained of could not reasonably have affected the result of the trial the judgment of the trial court should be affirmed."

The defendant offered no evidence to show that he was a peaceable and law-abiding citizen and there was considerable testimony that he conducted a "headquarters" for highway men and that he kept guns on the place. Moreover, deceased was robbed and murdered in his place of business and several crimes of the same kind recently had been committed. So the conviction was affirmed although defendant at most was merely an accessory and there was error in the trial below. Had the defendant shown that he was a civic leader and a pillar in the community would those same errors become revers-

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[1](1921) 297 Ill. 116, 130 N. E. 355.

[2]297 Ill. at p. 129.

ible errors? They might. Herein lies the difficulty in evaluating the decisions in criminal cases. The judges seek to ascertain whether or not defendant received a "fair trial" and in determining that a variety of factors may influence their judgment.

In *Sanchez* v. *State*[3] we find the following statement in a decision reversing the conviction of the defendant of murder in the first degree:[4]

"The defendant was confined to jail, was only eighteen years old, was a foreigner, had no knowledge of his legal rights, had to rely upon his attorney to secure material existing evidence, which the attorney, being wholly incompetent as hereinafter shown, failed to do. In such a case, where the defendant has been sentenced to death, a new trial will not be denied for lack of diligence, where the newly discovered evidence will probably change the result. The granting of a new trial upon the ground of newly-discovered evidence is in the legal discretion of the court. In the instant case, it appears that the court's discretion was clearly abused. The motion for new trial should have been sustained."

Here an appellate court finds that the judge of the trial court erred in the discretion shown. And why? Note that the defendant was young and a foreigner, poorly defended and sentenced to death. And it was found that the new evidence probably would change the result if another jury examined the evidence. In reversing the conviction below the court shows its human qualities in every line of the above extract and for that matter, may we not find between the lines of almost every decision influencing factors which show that judges are men who eat, drink, and live as do the sheriffs, bailiffs, clerks, attorneys, jurors, and defendants. Appellate courts, presumably deciding cases appealed on points of law, may exhibit mortal prejudices and sympathy.[5] The case of *People* v. *Goldman*[6] affirmed the conviction of the defendant below and such was the display of human qualities that Judge Thompson in his dissent felt called upon to say:[7]

"While the conduct of Goldman does not comport with innocence, this court should not, upon the consideration of incompetent evidence, conclude

[3](1927) 199 Ind. 235, 157 N. E. 1.

[4]199 Ind. at p. 242.

[5]In *People* v. *Dear*, (1918) 286 Ill. 142, 121 N. E. 615 this is illustrated by the court in affirming the conviction of defendant. It said (281 Ill. at 151), "It is not claimed . . . that the judge who tried the case was prejudiced against plaintiff in error. It is only suggested that the judicial ermine cannot obliterate human impulses, and that the tried judge well knew that any continuance granted would be construed by the public press at that time as a wrongful delay of justice and result in criticism of any judge who might wish to stand between the majesty of the law and the cry of the mob." By its protest the court displays very human qualities.

[6](1925) 318 Ill. 77, 148 N. E. 873, 41 A. L. R. 461.

[7]318 Ill. at p. 92.

that he is guilty and then hold that the errors committed by admitting the incompetent evidence do not justify a reversal. This is a court of review and not a court of first instance. The question for us to determine is not whether Goldman is guilty of wrongdoing but whether he has been tried according to law. . . . The law does not provide one method for trying innocent persons and another for trying guilty persons."

Is the last sentence borne out by the cases? Is there a different standard applied, in determining whether or not the errors claimed were prejudicial and therefore reversible, when the court, reading the record, determines that the defendant actually was guilty or not guilty? Can we take an instruction held erroneous in case A, where the court thought it doubtful whether or not defendant was guilty, and rely upon it for reversal in case B, where the court, reading the record as a jury examines the evidence, finds that the evidence shows guilt "without question"? Of course there are many cases where the majesty of the law seems to give to the Appellate Court no option but to reverse as in *State* v. *Snider,*[8] where the case was reversed because of error in proceeding in the absence of the accused, *People* v. *Heffernan,*[9] where the admission of evidence of other independent crimes had been permitted, or *People* v. *Sobieskoda,*[10] where an instruction was so improper that it simply could not be ignored. On the other hand there are many cases where the appellate courts feel that they must affirm. For instance, where the Appellate Court thinks it is murder but the defendant has been found guilty only of manslaughter.[11] But there are a great many cases where the appellate court can affirm if it cares to or reverse if that seems desirable. Particularly where error is claimed as a result of some ruling by the trial judge who has discretionary powers, where the State's attorneys have misconducted themselves, or where the instructions are confusing, the appellate court can justify its decision no matter which way it decides. The result is that a large percentage of the criminal cases are retried by the appellate court *as a court of first instance.* The court may examine the record, becoming a *second* jury, making up its mind first as to *guilt* or *innocence.* Then, having decided that, it disposes of the writ of error upon that basis but giving *"legal reasons"* therefor. And if the evidence as it appeals to the judges shows no guilt

[8](1918) 81 W. Va. 522, 94 S. E. 981.

[9](1924) 312 Ill. 66, 143 N. E. 411.

[10](1923) 235 N. Y. 411, 139 N. E. 558.

[11]*State* v. *Russo,* (1922) 193 Iowa 992, 188 N. W. 660; *Burchett* v. *State,* (Oklahoma, 1922) 209 Pac. 970; *State* v. *Ball,* (1922) 110 Kan. 428, 204 Pac. 701; *Harrison* v. *State,* (1921) 18 Okla. Crim. 403, 195 Pac. 511; *Collins* v. *State,* (1925) 88 Fla. 578, 102 So. 880.

beyond a reasonable doubt and the court *wants to reverse,* it is very easy to find some instructions (out of ten or twenty pages of them) repetitious, inaccurate, unnecessary, misleading, inapplicable, argumentative or disjointed. Here is a useful made-to-order peg upon which to hang reversal and still preserve the "majesty of the law."

The study of legal doctrines in criminal law is a most dull and useless study. Continually we are meeting up with conflicting statements such as these—"We do not understand the law to be that the use of violent epithets or threats, directed by deceased against a defendant, by reason of which defendant draws his gun and shoots deceased, will mitigate a homicide,"[12] and ". . . be it noted that the authorities are practically agreed in this state that words may reduce the crime from murder in the first degree to murder in the second degree."[13] The confusion in doctrinal study may be further illustrated by the cases on "proximate cause of the death,"[14] and the cases wherein defendant shoots at A but misses him and kills B.[15] The reliance upon doctrine occasionally proves not only confusing but actually results in a miscarriage of justice. For example, in *People* v. *Crenshaw,*[16] the defendant threatened deceased, a smaller man, cursed him, and when deceased tried to walk away caught him, turned him around and said "for two cents he would kill him right there." He immediately struck deceased a blow in the face which caused his death. The appellate court discussed the doctrine of implied "malice," attempted to define it and, upon finding that death was "not reasonably to be expected from a blow with the bare first," reversed the conviction of murder. The court declared that it followed *People* v. *Mighell*[17] and in that case there was a homicide from a blow by the fist. But in the *Mighell* case there was also passion aroused by an insult to a female relative and the case properly was no case of murder. But the "doctrine" of the *Mighell* case was carried over to the *Crenshaw* case with weird results.

In selecting cases for the study of criminal law two distinctly different approaches may be taken. The effort may be made to arrange cases according to the doctrinal treatment in the opinions and then to attempt to harmonize and perfect the doctrines. On the other hand the student of criminal law may arrange his cases to fit a clas-

[12] *Harrison* v. *State,* (1921) 18 Okla. Crim. 403, 195 Pac. 511.
[13] *State* v. *Liolios,* (1920) 285 Mo. 1, 225 S. W. 941.
[14] See *State* v. *Snider,* (1918) 81 W. Va. 522, 94 S. E. 981.
[15] Cf. *Carpio* v. *State,* (1921) 27 N. M. 265, 199 Pac. 1012, 18 A. L. R. 914; *Jones* v. *State,* (1923) 159 Ark. 215, 251 S. W. 690.
[16] (1921) 298 Ill. 412, 131 N. E. 576, 15 A. L. R. 671.
[17] (1912) 254 Ill. 53, 98 N. E. 236.

sification based upon the fact situation and then by comparison he may find out how the courts actually handle such cases. In pursuing the latter method certain generalizations may be made by reading between the lines of the opinion, or better still, by reading the record and briefs of counsel. Certain factors seem to be present which influence decisions one way or the other. It appears that much might be gained by spending the minimum of time upon doctrine and the maximum of time in finding out as best we can why the court decided as it did. Of course, it is impossible to make *accurate* statements as to the motivating factors present but in a general way it may be said that when certain conditions are present, certain decisions may be expected. To be sure, almost any thesis may be "proved" by cases if selections are made from a large number examined. But conclusions drawn from *selected* cases generally are inaccurate for the simple reason that careful search nearly always will reveal similar cases holding another way. During the past year the writer has had the opportunity to study some three hundred comparatively recent homicide cases which were selected before any generalizations were formulated and were chosen not on the basis of doctrinal classification but because of the fact situations. Certain observations made during the study of these cases, the entire opinion invariably being used, and in many instances the records being examined, are herein stated. Naturally, the conclusions formed may be considered less convincing, when drawn from cases chosen for a different purpose, than conclusions which are backed up by cases searched for and selected for that particular purpose. It is submitted, however, that more accuracy in judgment comes from conclusions formed *after selection.* From these generalities there may be worked out a new approach to the study of the criminal law.

Personality of Defendant or Deceased.

Age, sex, and position in life have an influence upon the outcome of a criminal prosecution. In the recent case of *Sexson* v. *Commonwealth*[18] we find a reversal of the conviction of defendant below who had been sentenced to death. He was "only nineteen years of age." The appellate court reversed because it was thought that the circuit court erred in overruling the motion for the exhumation of the victim's body. The dissent shows that such exhumation would have uncertain value and no showing was made that it was necessary. But, the defendant was nineteen years old. Of course, the very young

[18] (Kentucky, 1931) 39 S. W. (2d) 229.

have always been favored in criminal cases,[19] but in finding "reversible error" it is surprising to see with what ease error is found in case of the youthful offender.

The process of criminal justice is nicely illustrated by *State* v. *Russo*,[20] where the facts show that the defendant was insulted at certain words of deceased. The defendant left him, entered the house, secured two guns, and fired two shots at deceased who ran. The defendant followed deceased down the street, overtook him and deliberately fired eight shots into his body. This seems to be a simple case of murder but the defendant was a young Italian girl of sixteen years of age and was convicted of manslaughter and sentenced to the Women's Reformatory for a term not to exceed eight years. See also *State* v. *Benham*[21] where a sixteen-year old boy shot a large and strong man. *White* v. *State*[22] is a case illustrating a reversal of a conviction of murder where the defendant "was an ignorant negro boy, arrested and taken from his work in the field, and brought to the scene of horrible murder" where he confessed. In the case of *Sanchez* v. *State*[23] the defendant was a Mexican boy of eighteen years of age unable to speak English and, as might be expected, there was a reversal. Appellate courts often are charitable to foreigners who have difficulty in defending themselves.[24]

The character and position in life of the defendant often influences the decisions of criminal cases. A conviction of manslaughter was reversed in *Davis* v. *Commonwealth*,[25] where the defendant, who had shot deceased, "was a hard-working boy and bore an excellent reputation in the community," had immediately raised the alarm and

[19]See *Holmes* v. *State*, (1923) 133 Miss. 610, 98 So. 104. It might be added that appellate courts often adopt strained and technical views in order to give favored defendants new trials. Hard cases often make bad law. See *People ex rel. Marcley* v. *Lawes, Warden et al.*, (1930) 254 N. Y. 249, 172 N. E. 487. This case involved the application of the harsh "Baumes Law" and the court said: "If the sentence under review stands, the relator who is twenty-five years of age, because he had previously stolen chickens, certain automobile parts, and a motorcycle, must spend the remainder of his days in a state prison." On April 23, 1932, the Supreme Court of Illinois saved Russell McWilliams, a 17 year old killer, from the electric chair. The reversal was based upon the refusal of the trial judge to permit testimony to be brought in to show the youth's "habits of industry and frugality and the fact that he turned his money over to his mother." To reverse because of this "error" indicates that the case must have been unusually well conducted below.

[20](1922) 193 Iowa 992, 188 N. W. 660.

[21](1867) 23 Iowa 154.

[22](1922) 129 Miss. 182, 91 So. 903, 24 A. L. R. 699.

[23]*Supra*, note 3.

[24]*People* v. *Nitti*, (1924) 312 Ill. 73, 143 N. E. 448; *Bielich* v. *State*, (1920) 189 Ind. 127, 126 N. E. 220.

[25](1924) 204 Ky. 809, 265 S. W. 316.

had notified the parents of deceased. But, where the defendant is a gangster as in *Commonwealth* v. *Micuso,*[26] an affirmance, if at all possible, may be expected. Where the village marshal took the life of one of a group of disorderly toughs in an attempted arrest the court showed a favorable attitude toward defendant's cause.[27] But in another case where a blow was struck during an attempted arrest, the defendant, "a young man of bad moral character, [who] was drunk and disorderly on the streets of the town," received no sympathy and his conviction was affirmed.[28] That drunken drivers of automobiles find few condolences in their appeals is shown by *People* v. *Townsend.*[29] Where the defendant has associated with evil companions,[30] has conspired to rob during which a murder occurs,[31] or has engaged in saloon brawls,[32] it is the usual thing to find the conviction affirmed.

Often the character and status of the deceased influences the decision of criminal cases. The decision of *Hayner* v. *People*[33] reversed a conviction of manslaughter where the defendant was a law abiding man in his own home and deceased was quarrelsome and intoxicated. In *People* v. *Peranio*[34] the conviction was affirmed where the deceased was the local storekeeper. In *State* v. *Carlino*[35] the victim was an innocent man riding by on his way to work and in *State* v. *Olander*[36] "the deceased, Halfpap, an honorable citizen, while engaged with his duties as a merchant, was killed by a shot from a revolver held in the hands of this defendant." Convictions in these cases were affirmed.

It is not to be inferred that whenever the defendant, an honorable and upright man, kills a person considered to be somewhat undesirable that the appellate courts invariably find "reversible error," or that there will always be an affirmance when the defendant, a loafer, drunkard, or gangster, kills one of the leading citizens of the community. But it is surprising how often one can begin the reading of the facts of a criminal case and then predict the result, not on ques-

[26] (1922) 273 Pa. 474, 117 Atl. 211.
[27] *People* v. *Jarvis,* (1923) 306 Ill. 611, 138 N. E. 102.
[28] *Caperton* v. *Commonwealth,* (1920) 89 Ky. 652, 225 S. W. 481; see *People* v. *Osborne,* (1917) 278 Ill. 104, 115 N. E. 890.
[29] (1921) 214 Mich. 267, 183 N. W. 177, 16 A. L. R. 902.
[30] *Romero* v. *State,* (1917) 101 Neb. 650, 164 N. W. 554, L. R. A. 1918 B, 70.
[31] *State* v. *Carlino,* (1922) 98 N. J. L. 48, 118 Atl. 784.
[32] *People* v. *Bashic,* (1923) 306 Ill. 341, 137 N. E. 809.
[33] (1904) 213 Ill. 142, 72 N. E. 793.
[34] (1923) 225 Mich. 125, 195 N. W. 670.
[35] *Supra,* note 31.
[36] (1922) 193 Iowa 1379, 186 N. W. 53, 29 A. L. R. 306.

tions of "law" but by weighing the facts. The appellate courts decide primarily whether or not the defendant has received a fair trial, i. e., they may administer justice as they see it. When the case is presented to them, they may either "affirm" or "reverse and remand," and it is undeniable that in close cases where the factual situations are doubtful, in making up their minds what to do the judges react as human beings although they may camouflage their real reasons in their "legal" opinions.

The Type of Crime and the Way It was Handled Below.

It is hardly necessary to state that the type of crime is an important factor to consider in predicting decisions in criminal cases. Where there are mitigating circumstances we expect to find the discovery of reversible error but where there is a cold-blooded killing such error may not be considered prejudicial. In *Romero* v. *State*[37] a watchman was shot and killed as he was attempting to arrest robbers discovered in the act of breaking and entering a railway car. The majority of the Supreme Court judges desired that the case should be affirmed declaring that the defendant knew his companions had a gun and might use it if apprehended. They said,[38] "It is common experience that persons engaged in committing a felony may kill those who interfere." The lower court had ignored defendant's requests for instructions, and gave several that were *admittedly erroneous* but nevertheless the conviction was affirmed.

Where the appellate courts carefully examine the evidence it generally goes hard with the defendant who has been "criminally" careless or mean. To illustrate—this statement was taken from *People* v. *Camberis:*[39]

"The evidence shows clearly in this record that plaintiff in error was driving his automobile, being practically inexperienced in its management and control, so recklessly, wantonly, and in so criminal a manner and in such utter disregard of the safety of others, that no other conclusion could be reached by the jury than he was responsible for Bock's death. We do not think that the errors complained of by counsel on the trial of this case were prejudicial. . . . Judgment affirmed."

In the case of *State* v. *Olander*[40] we find that the conviction of the defendant below was affirmed, the court saying:

[37] (1917) 101 Neb. 650, 164 N. W. 554, L. R. A. 1918 B, 70.
[38] 101 Neb. at p. 652.
[39] (1921) 297 Ill. 455, 464, 130 N. E. 712.
[40] (1922) 193 Iowa 1379, 1381, 186 N. W. 53, 29 A. L. R. 306.

"We are asked by appellant to be merciful, where he showed no mercy to his victim and his victim's family. We are asked to give greater consideration to the defendant's family than he himself gave them."

The amount of punishment assessed below has a potent influence upon the appellate courts and should be noticed here.

(A) When the death sentence has been pronounced below the appellate courts generally are very strict and the record must be practically free from error. As was stated in *Howington* v. *State*[41] the granting of defendant's motions "should be exercised liberally in favor of life or liberty." It is common in capital cases to find a reversal where a confession was introduced over defendant's objections,[42] where the instructions did not completely cover all angles of defendant's case,[43] or where testimony concerning other separate offenses is admitted.[44] We do not mean to infer that all death sentence cases are reversed but it will be found that the defendant in such cases has a better chance for reversal than if he has received only the normal penalty. In *Bryant* v. *Commonwealth*[45] the punishment of the defendant had been fixed at death and the case was affirmed but the court said:[46]

"The jury could not possibly have avoided finding the defendant guilty of murder upon the evidence in this case, as it impresses us. . . . There is no complaint of the indictment or the instructions. . . . The record is peculiarly free of errors in the admission and rejection of evidence, and nothing occurred upon the trial that in our judgment would afford legal justification for a reversal of the judgment. It is therefore affirmed."

(B) The same thing is true in a somewhat lesser degree in the cases where the defendants received the *maximum* terms of imprison-

[41](Oklahoma, 1925) 235 Pac. 931. See *People* v. *Blevins,* (1911) 251 Ill. 381, 393, 96 N. E. 214, where the court stated: "Counsel for the State insist that even if the court did err in the respects pointed out, the evidence so conclusively shows the guilt of the plaintiff in error that the judgment should not be reversed. It is true, error will not always reverse in criminal cases where the guilt of the accused is conclusively shown (*People* v. *Cleminson,* 250 Ill. 135), but to this rule there are some exceptions. . . . In this case the death penalty was fixed by the jury, and it may be that the weak manner in which plaintiff in error was defended, the vigorous manner in which he was prosecuted by four able and experienced lawyers, and the admission in evidence, on the trial, of incompetent testimony calculated to prejudice and degrade plaintiff in error in the minds of the jury, influenced the jury in determining the punishment that should be inflicted."

[42]*Lee* v. *State,* (Georgia, 1929) 148 S. E. 400.

[43]*People* v. *Pursley,* (1922) 302 Ill. 62, 134 N. E. 128.

[44]*People* v. *Heffernan,* (1924) 312 Ill. 66, 143 N. E. 411.

[45](1924) 202 Ky. 427, 259 S. W. 1038.

[46]202 Ky. at p. 432.

ment. The Supreme Court of Missouri in deciding the case of *State* v. *Liolios*[47] thought there were some mitigating circumstances in the conduct of the defendant who in a moment of jealous rage had shot down his wife. After trial he had been sentenced to life imprisonment. The court declared that if the case were affirmed the defendant would be punished as much as "if he had killed by poison or stealth."[48]

"To say that, under the facts in this case, the law places appellant on a par with the coldest-blooded murderers in history, is to shock the sense of justice. Neither will it satisfy the conscience to say that executive mercy must be invoked to right so great a wrong. The law ought not to be, and is not, so inflexible that it must rely upon the pardoning power to render justice where the law has failed."

"Fortunately" the court found a suitable error in the instructions given, and was able to remand the case for another trial.[49]

(C) But on the other hand we find a different attitude toward errors where the convicted defendant got off with a light sentence below. In *Harrison* v. *State*[50] the defendant had been convicted of manslaughter under circumstances which indicated murder to the appellate court, so, while admitting that certain instructions were incomplete, the court declared that the change as a whole did not deprive the defendant of any right or result in a "miscarriage of justice." A case of great similarity is *Collins* v. *State*[51] where the appellate court affirmed a manslaughter verdict under circumstances which indicated that the offense might well have been treated as murder. The attitude of the court seemed to infer that the defendant, receiving the lowest possible sentence, should be satisfied and could not possibly show any prejudice. A quotation from *State* v. *Ball*[52] will add weight to the above comment:

"It is only because this case is one of homicide that we allow it so much space. There is no doubt of defendant's guilt. The record shows a case of what was virtually murder after arming, preparation, and lying in wait; it was almost confessedly so; yet the defendant has escaped with the meager penalty attached to manslaughter in the third degree. Affirmed."

In another case[53] the defendant was indicted for murder in the

[47](1920) 285 Mo. 1, 225 S. W. 941.
[48]285 Mo. at p. 23.
[49]See *McHargue* v. *Commonwealth,* (1929) 231 Ky. 82, 21 S. W. (2d) 115.
[50](1921) Okla. Crim. 403, 195 Pac. 511.
[51](1925) 88 Fla. 578, 102 So. 880.
[52](1922) 110 Kan. 428, 429, 204 Pac. 701.
[53]*Pendergrass* v. *State,* (1923) 157 Ark. 364, 248 S. W. 914.

first degree, was found guilty of murder in the second degree and received a seven-year sentence. On appeal there was no "prejudicial" error found although the defendant in his brief pointed out a number of errors committed during the trial. There had been a court room demonstration, a juror had misconducted himself, the court refused a new trial despite newly discovered evidence, and there was error in many of the instructions given.

Sometimes the finding of prejudicial error is influenced by peculiar statutes in force in the particular State as in the case of *State* v. *Kester,*[54] where the facts were found to fit a statute other than the one which served as the basis of the charge. The defendant in *Bielich* v. *State*[55] was merely an accessory *after* the fact but in Indiana we find that there is a statute which declares that such an accessory may be punished as a principal. This statute is unusually harsh and makes possible a miscarriage of justice. Prejudicial error was found probably because the court did not think the defendant should receive such a severe penalty when he was only an accessory after the fact. In all these cases the appellate courts are not so much deciding points of law as administering justice as they see it. Such an attitude on the part of courts of review has much to commend it but it does violence to the orderly concepts of criminal law. What is reversible or prejudicial error? That depends upon many things not the least of which is the way the case was treated below. What then may we rely upon in attempting to formulate the "rules" of criminal procedure? Are there rules which may be lifted from one type of case and applied to cases involving different situations? As stated above there may be principles of procedure which are generally followed, but in the close case it is dangerous to rely entirely upon rules in anticipating appellate decisions. Strange as it may seem, a decision that a claim of error is made out upon appeal in case A may not be followed when an identical claim of error is made in the appeal of case B, if the defendant in case A had been sentenced to the maximum term and the defendant in case B in the eyes of the appellate court had been pretty lucky to get off as easily as he did.

The Judges—The Personal Equation.

A group of men have before them upon appeal the abstract of the record and briefs and arguments of counsel. These men decide the appeal ostensibly upon the basis of the briefs of counsel present-

[54] (Missouri, 1919), 201 S. W. 62.

[55] *Supra,* note 24.

ing the points of law involved. But throughout the reported decisions one invariably can find cases where the judges have preconceived notions of the guilt or innocence of the defendants, and these notions consciously or unconsciously influence the "legal" opinions. Examples are too numerous to mention but the following are illustrative:

"We hold, therefore, that where the guilt of the appellant is clearly established, and there is no good reason to believe that upon a second trial an intelligent and honest jury could or would with reason and propriety arrive at any other verdict than that of guilt, a new trial will not be granted except for fundamental error . . . affirmed."[56]

We are minded to ask what is "fundamental" error?

"We are of the opinion that when defendant mixed the paris green with water and placed it within reach of his wife to enable her to put an end to her suffering by putting an end to her life, he was guilty of murder by means of poison within the meaning of the statute even though she requested him to do so . . . (affirmed)."[57]

"It seems hard to believe that a man in full control of his mental faculties would ruthlessly, without any provocation, shoot his friend to death and then simulate such passion after the act . . . (Reversed and remanded)."[58]

"Can it be said, under all the circumstances of this case, that from the time that the fight started between Finley and the plaintiff in error, the plaintiff in error had at any time prior to the killing, as a reasonable man, any opportunity for deliberation. . . . (Reversed and remanded.)"[59]

"Douglas and appellant had pistols identical in make and caliber and the wounds found on Gatlin's body threw us light on who fired the shots that struck him. The evidence leads more strongly to the belief that Douglas actually fired the fatal shot. . . . (Reversed.)"[60]

"We do not think the evidence in this record sufficient to sustain a conviction for the crime of assault to commit murder. No instruction was given that the jury might, if the evidence warranted it, find the defendants guilty of a lesser crime under the indictment. . . . Reversed and remanded.)"[61]

"Upon a consideration of the entire record, it appears to us that the jury could have arrived at no other verdict than that of the guilt of the defendant, and, while there are some irregularities and errors in the record,

[56]*Allen* v. *State,* (1917) 13 Okla. Crim. 395, 396, 164 Pac. 1002.

[57]*People* v. *Roberts,* (1920) 211 Mich. 187, 198, 178 N. W. 690, 13 A. L. R. 1253. See comment on this case, 30 Y. L. J. 408.

[58]*People* v. *Lowhone,* (1920) 292 Ill. 32, 46, 126 N. E. 620.

[59][Defendant was convicted below of murder.] *People* v. *Bartley,* (1914) 263 Ill. 69, 76, 104 N. E. 1057.

[60]*Shine* v. *State,* (1924) 99 Tex. Crim. 418, 423, 269 S. W. 804.

[61]*People* v. *Brown,* (1919) 288 Ill. 489, 493, 123 N. E. 515.

none of them are fundamental nor so materially prejudicial as to require a reversal. The case is affirmed."[62]

"The conduct of the prosecuting attorney was improper, and if it appeared from an examination of the whole record that it might have influenced the verdict of the jury such misconduct would be reversible error. In this case, however, the guilt of plaintiff in error is established by two eye-witnesses to the assault and by convincing corroborative evidence. . . . (Affirmed.)"[63]

In these cases we find evidence to substantiate the observation that appellate courts often serve as second juries. If that be true they may be open to influences which would affect any official in public life. The presence or absence of reform movements in the jurisdiction, political influences brought to bear, public policy and opinion (as may be seen in certain liquor cases) all affect judicial decisions. We are interested, however, in the more personal factors.

The members of the Supreme Courts, being wearers of the ermine, often with experience as trial judges, seem to favor rulings of the judges below. As was said in affirming the case of *Sneed* v. *State:*[64]

"It would not do to set aside the verdicts of juries on account of the alleged misconduct of trial judges upon the mere affidavits of on-lookers, especially when such affidavits are controverted in all essential particulars, as they are here."

In *People* v. *Mendez*[65] the defendants complained of the conduct of the trial judge and charged that the court assisted in the prosecution of the case but the conviction was affirmed, the court taking a very lenient position regarding the activities of the brother judge below. This type of holding is quite common but sometimes the appellate courts take a different attitude and there may be found in some of the cases reversed a desire on the part of the appellate judges to "lecture" the trial judges through the opinion.[66]

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[62]*McCurdy* v. *State,* (Oklahoma, 1928) 264 Pac. 925, 929.

[63]*People* v. *Pilewski,* (1920) 295 Ill. 58, 61, 128 N. E. 801; see also *Romero* v. *State, supra,* note 37; *People* v. *Davis,* (1921) 300 Ill. 226, 133 N. E. 320; *Hayner* v. *People,* (1904) 213 Ill. 142, 72 N. E. 793; *People* v. *Camberis, supra,* note 39.

[64](1923) 159 Ark 65, 77, 255 S. W. 895.

[65](1924) 193 Cal. 39, 223 Pac. 65.

[66]In *People* v. *Carrico,* (1924) 310 Ill. 543, 549, 142 N. E. 164 the trial judge expressed an opinion concerning the veracity of a witness. The court said, "It was for the jury and not the judge to determine whether the witness was a partisan or was interested or prejudiced and the judge should not have expressed any opinion on that question. Under other circumstances it might have required a reversal of the judgment, but in view of the character of the testi-

Where actual errors appear to have been committed below, the promptness or delay of the trial judge in handling such errors is carefully noted upon appeal. As was said in *People* v. *Reilly*,[67] where objection was made to the remarks of the district attorney:

". . . to the last sentence objection was properly made. The objection was sustained, and the court instructed the jury to disregard the remark. Under the circumstances, the error would not warrant a reversal of the judgment. In the light of the entire record, it is clear that this remark did not influence the action of the jury."

In the *Pendergrass* case, which was discussed above, the court said:[68]

"However, we are convinced that the instructions of the presiding judge to the jury not to allow the applause in any way to influence them in their verdict, and telling them that if they did so, it would show them unworthy to sit as jurors in any case, were adequate to eliminate from the mind of any sensible and honest juror whatever prejudice might, for the moment, have been lodged in his mind."[69]

Sometimes the decisions of appellate courts indicate a desire to end a long drawn out piece of litigation. When an opinion begins as in *State* v. *Burris*,[70] "This is the second appeal of this case," and declares that there is little variation in the evidence,we may wager safely, that there will be an affirmance. In the decision affirming the second appeal of *Egbert* v. *State*, the court said:[71]

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mony given by the witness we do not think that plaintiff in error was prejudiced by the statements of the judge . . . Judgment affirmed."

But the opposite result was reached in *People* v. *Rongetti*, (1928) 331 Ill. 581, 596, 163 N. E. 373 where the court participated in the cross-examination of a witness. The court said, "This cross-examination was highly prejudicial. . . . The attitude of the trial court in examining witnesses, in refusing to give an opportunity to counsel for plaintiff in error to state his objections, the manner in which rulings adverse to counsel for plaintiff in error were given, together with numerous errors in the admission of testimony force this court to the conviction that plaintiff in error has not had a fair trial."

The only test is the character of the evidence given and each case must stand upon its own circumstances. See *Dodd* and *Edmunds* "Illinois Appellate Practice" (1929) sec. 706, pp. 478-480.

[67](Oklahoma, 1929) 281 Pac. 606, 607. See *Allen* v. *State, supra,* note 56.

[68]157 Ark. at p. 371.

[69]But see the case of *People* v. *Saylor,* (1925) 319 Ill. 205, 149 N. E. 767 [mayhem], where the conviction was reversed, the court saying (319 Ill. at 213), "While counsel for the People were offenders, counsel for the plaintiffs in error kept equal pace with them, and the failure of the presiding judge effectively to assert his authority resulted in a quarrelsome, brawling contention before the jury inconsistent with the serious deliberation which should characterize the proceedings of a judicial trial. . . . The Appellate Court [Illinois Court of Appeals] stated that many improper remarks were made by the State's Attorney and his assistant which could not be approved, 'and if this misconduct had been confined to that side alone, we would deem it our duty to reverse the judgment.' We do not agree with this view of the record, and we are not willing to affirm a judgment based upon such an irregular, disorderly and turbulent proceeding as the record shows this trial to have been."

[70](1924) 198 Iowa 1156, 198 N. W. 82.

[71](1925) 113 Neb. 790, 800, 205 N. W. 252.

"In a long trial it is almost inevitable that things occur which a reviewing court might desire had not happened. This is true in this case, but on the whole we regard them as of not sufficient importance to amount to prejudicial error. . . . Upon an examination of the entire record and the fair inferences based thereon, we are clearly of the opinion that the evidence is sufficient to support the verdict and judgment. No prejudicial error appearing in the record, the judgment of the district court is affirmed."

In *People* v. *Rongetti*[72] the court positively seems irritated by the continued appearance of the case, saying,[73]

"This case has been successively tried before three different juries, and in each trial they have returned verdicts of guilty. Three judgments have been pronounced upon such verdicts by three different trial judges. In the first trial, the defendant was convicted of murder, and in the last two trials he was found guilty of manslaughter. This court said under similar circumstances, in *Rafferty* v. *People,* 72 Ill. 37: 'This was the third trial of the case, with the same result each time. Neither the prisoner nor his counsel can have any just cause of complaint, that this cause has not received, at the hands of this court, all the patient attention and careful consideration demanded by the great and solemn issues involved. . . . Under the circumstances, we do not feel it our duty to set the verdict aside for the irregularity indicated, and must affirm the judgment.' "

Not only may an appellate court look unfavorably upon repeated appeals but it may be irritated by discovering bad faith or fraud on the part of the defendant. In *People* v. *Schmidt*[74] the court in an opinion written by Judge Cardozo stated:[75]

". . . He now says that he did not murder Anna Aumuller and that his confession of guilt was false. . . . He tells us why he chose to charge himself with the graver offense. He believed that he could feign insanity successfully, and that after a brief term in an asylum he would again be set at large. . . . The defendant now tells us he was sane. . . . He asks that he be given another opportunity to put before a jury the true narrative of the crime. . . . A criminal may not experiment with one defense, and then when it fails him, invoke the aid of the law which he has flouted, to experiment with another defense, held in reserve for that emergency."

After holding that there was grave error in an instruction given below, the court refused to reverse but affirmed the conviction declaring that "the defendant has forfeited the right to avail himself of the errror in the charge." In *Commonwealth* v. *Micuso*[76] the court affirmed the conviction of the defendant, distinctly inferring that de-

[72] (Illinois, 1931) 176 N. E. 298.
[73] 176 N. E. at p. 302.
[74] (1915) 216 N. Y. 324, 110 N. E. 945, L. R. A. 1916 D.
[75] 216 N. Y. at p. 327.
[76] (1922) 273 Pa. 474, 117 Atl. 211.

fendant's story was untrue. In *People* v. *Pilewski*[77] the defendant agreed not to take advantage of an error in naming the deceased in the indictment and then after conviction be appealed. The conviction was affirmed. Again, in *Smith* v. *State*[78] the court in affirming displays considerable irritation at defense counsel's excuse for delay in filing his plea in abatement.

On the other hand, it is not uncommon to find appellate courts influenced by the desire to see that "justice is done" where a defendant has been harshly treated before trial or after trial, and sometimes we find considerable stretching of doctrine and rule to accomplish this salutary result. This is particularly true in the cases involving extorted confessions such as *People* v. *Vinci*[79] and *White* v. *State*.[80] Also, we find this attitude in the cases where "the entire atmosphere during the trial, from start to finish, was permeated with excitement, feeling, and a general determination to condemn and punish this defendant, regardless of his mental responsibility at the time of the unfortunate homicide."[81] This "justice factor" is always present where the defendant did not have the benefit of an explanation of his constitutional rights,[82] where the defendant has language difficulties,[83] where the defendant has an incompetent attorney,[84] or where immunity promises have been made to the defendant and not kept.[85] Of course, if the appellate court is not impressed with a claim of injustice done to defendant, appellate courts ordinarily affirm rulings of the trial judge "who occupies a much better position than we do to judge" whether or not defendant received a fair trial.[86]

Conduct of Counsel.

The personal equation in appellate decisions further is influenced by the way the case was conducted by counsel below. Being human, appellate judges may be affected by the conduct of the lawyers who had charge of the prosecution and the defense, although finding concrete examples of this is somewhat difficult due to the fact that the judges, being lawyers themselves, prefer, if possible, to find errors in instructions or ruling on law if they care to reverse, rather than in the conduct of counsel. And there are many cases where there

[77](1920) 295 Ill. 58, 128 N. E. 801.
[78](1919) 188 Ind. 501, 124 N. E. 698, 3 A. L. R. 999.
[79](1929) 295 Ill. 419, 129 N. E. 193.
[80](1922) 129 Miss. 182, 91 So. 903, 24 A. L. R. 699.
[81]*Seay* v. *State,* (1922) 207 Ala. 453, 93 So. 403.
[82]*People* v. *Kurant,* (1928) 331 Ill. 470, 163 N. E. 411.
[83]*Bielich* v. *State, supra,* note 24.
[84]*Sanchez* v. *State,* (1927) 199 Ind. 235, 157 N. E. 1.
[85]*People* v. *Bogolowski,* (1925) 317 Ill. 460, 148 N. E. 260.
[86]*Bryant* v. *Commonwealth,* (1924) 202 Ky. 427, 259 S. W. 1038.

has been some misconduct by counsel, but the case, nevertheless, is decided by the preconceived notion of guilt or innocence. Where the guilt seems clear the prosecuting attorney may make almost any kind of inflammatory remarks without fear of reversal.

"He denounced the defendants as murderers because they were so proved by the evidence and the witness as a perjurer because his testimony was shown to be untrue. It is within the scope of a proper and fair argument to denounce a defendant as guilty of the crime charged and a witness guilty of perjury where an inference of such guilt may be fairly inferred from the facts and circumstances shown by the evidence. . . . (Affirmed.)"[87]

In *Rider* v. *State*[88] we find that the following remark had been made by the prosecutor, "If you should render a verdict of manslaughter in this case, Judge McCaleb and Sam Casey would go out over this town and say that they had won the greatest victory they had ever won." Nevertheless, the conviction was affirmed, the court admitting that the remark was irrelevant and "it was improper for the prosecuting attorney to make use of it, but we cannot see how it could possibly have resulted in any prejudice to appellant's cause."[89] However, where the evidence showing guilt is meagre, abusive remarks, appeals to passion and prejudice, or other misconduct may be held reversible error.[90] Such errors seem to depend more upon the state of the evidence than upon rules of law. Nevertheless, there are many cases where conduct of counsel is the main factor in reaching a decision.

One of the chief difficulties of appellate judges is the mass of work which faces them at every term and they display considerable irritation when many errors are claimed and the majority prove to be groundless although some legitmate complaints are included. It is easy to guess that the Supreme Court of Michigan affirmed the con-

[87] *People* v. *Dear*, (1918) 286 Ill. 142, 154, 121 N. E. 615. In *People* v. *Durkin*, (1928) 330 Ill. 394, 407, 161 N. E. 739 the court said, "During the arguments to the jury numerous objections were made, both by counsel for plaintiff in error and for the People, to statements made by the other side. It is unnecessary to set them out in detail. Some of them were erroneous, and were this a case close on the facts, errors of the assistant State's attorney complained of would justify a reversal of the judgment. It is evident, however, from the verdict of the jury, that they were not prejudiced by them." (In view of the last sentence it is interesting to note that the jury fixed defendant's punishment at thirty-five years in the penitentiary.)

[88] (1919) 140 Ark. 1, 215 S. W. 1.

[89] See *People* v. *Dabney*, (1924) 315 Ill. 320, 146 N. E. 166; *People* v. *Cummings*, (1930) 338 Ill. 636, 170 N. E. 750; *Lane* v. *U. S.*, (1929) 34 F. (2d) 413.

[90] See *People* v. *McGeoghegan*, (1927) 325 Ill. 337, 156 N. E. 378; *Reich* v. *State*, (1929) 111 Tex. Crim. 642, 13 S. W. (2d) 697 [rape]; *People* v. *Gardiner*, (1922) 303 Ill. 204, 135 N. E. 422; *People* v. *Schulman*, (1921) 299 Ill. 125, 132 N. E. 530, 24 A. L. R. 1022.

viction in *People* v. *Greeson,*[91] for the first paragraph in the opinion reads:

"Steere, J. Defendant was tried and convicted in the recorder's court of the city of Detroit, of first degree murder of his wife, Lillian Greeson, at their apartment in said city on the 19th day of July, 1920, and sentenced to life imprisonment in the State prison at Marquette. The case was removed to this court by writ of error. The voluminous record of over 1,000 pages shows a protracted and exhaustive trial with active effort on the part of defendant's counsel to make and save all possible objections known to the technique of criminal defense, there being in the record 97 requests and 210 assignments of error, filling some 79 pages of the record."

In examining long opinions it is not uncommon to find instances where the court can find no prejudicial error in several claimed and then passes over another admitted to be error.[92]

Often a court, desiring to affirm but finding error, will declare that exceptions were not taken at the proper time. In a case[93] where it appeared that the trial judge vacated the bench during arguments in the course of which improper remarks were made by the prosecutor, the appellate court affirmed the conviction, saying, "It does not appear that any motion for a mistrial was made, or any complaint urged against the argument of the solicitor-general, or that any ruling by the court was made."[94]

There are many cases where the errors in conduct of court or counsel are not considered to be reversible, the appellate court finding that the errors were "invited" by the conduct of the complaining counsel; e. g., "If the trial judge was indiscreet in this respect, counsel for the defendants were equally so."[95] In *Crowell* v. *State*[96] the court considered the conduct of court and counsel and said:[97]

". . . and when the court would sustain the objection of the county attorney, counsel for the defendant would make some remarks to the court which would occasionally bring forth a reply from the trial judge. . . . In the case at bar the remarks of the trial judge were provoked by the counsel for defendant and are not of such a nature as would warrant a reversal under the circumstances revealed in this case."

The prosecutor at the trial of *People* v. *Reilly*[98] committed a grave

[91](1925) 230 Mich. 124, 203 N. W. 141.
[92]See *Bryant* v. *Commonwealth, supra,* note 45.
[93]*Sheppard* v. *State,* (1928) 167 Ga. 326, 145 S. E. 654.
[94]See *Pendergrass* v. *State, supra,* note 53; *Sneed* v. *State,* (1923) 159 Ark. 65, 255 S. W. 895.
[95]*People* v. *Mendez* (1924) 193 Cal. 39, 223 Pac. 65. See the *Saylor* case, *supra,* note 69.
[96](Oklahoma, 1929) 276 Pac. 518.
[97]276 Pac. at p. 519. See also *People* v. *Campbell,* (1926) 323 Ill. 129, 132, 153 N. E. 596 [robbery].
[98](Oklahoma, 1929) 281 Pac. 606.

error when he was addressing the jury, but the court found that defendant's counsel likewise had erred, and had not properly objected to the prosecutor's conduct. Therefore, the judgment was affirmed. When it is objected that the jury has been formed illegally it is not uncommon to find that the claim of error will not be allowed where the defense had some peremptory challenges still unused.[99] These cases which involve the "balancing" of error are most interesting but they certainly are confusing when the attempt is made to formulate rules drawn from the decisions.

The skill of the attorney for appellant is, of course, vital in all criminal appeals. It is not necessary to give illustrations of the necessity for pleasing appellate courts in briefs of counsel but when case after case is affirmed "where the errors are not clearly pointed out, but merely claimed," or where rules of court are disregarded, where the brief is too long or too short, where no citations are given, or perhaps incorrect ones, or where previous holdings are gallantly (or carelessly) disregarded, it behooves the counsel for defendant to regard the "wearers of the ermine" as human beings capable of displaying traits of irritability toward careless and slipshod methods which may at times overwhelm their desire to see that the defendant had a "fair trial."

The State of the Record.

As may be inferred from the foregoing discussion the closeness of the case as disclosed by the record is of utmost importance. The court in *People* v. *Cochran*[100] said:

"We have not attempted to set forth the evidence fully upon the point but only sufficiently to show the evidence was sharply conflicting and that there was substantial evidence in the case upon which to base a defense as against the charge of murder. In this conflicting state of the evidence, it is essential that the jury be accurately instructed as to the law and that the record be free from prejudicial error."

Similar statements appear regularly in criminal cases.

"There was serious conflict in the testimony. . . . In such a condition it is essential, in order to sustain the verdict, that the jury should have been properly instructed and that no substantial error should have occurred at the trial."[101]

[99] *People* v. *Estes*, (1922) 303 Ill. 602, 136 N. E. 459.
[100] (1924) 313 Ill. 508, 523, 145 N. E. 207.
[101] *People* v. *Duncan*, (1924) 315 Ill. 106, 110, 145 N. W. 810. See *People* v. *Jarvis*, (1923) 306 Ill. 611, 138 N. E. 102; *People* v. *Hamilton*, (1915) 268 Ill. 390, 109 N. E. 329 [rape].

On the other hand, where the case is not "close," what ordinarily may be expected to be "prejudicial," error is found to be harmless. For example:

"The statement was clearly error and in a case close on the facts would be sufficient to reverse the judgment. . . . The testimony presented in the case shows the guilt of the plaintiff in error, and this error is not sufficient to cause a reversal of the judgment."[102]

This element of the "closeness of the case" as shown by the record does violence with rules in a way that bewilders the scholar who attempts to use the reported decisions of criminal cases to build up an orderly scheme of criminal procedure based upon unvarying rules. The following statement from *People* v. *Gardiner*[103] shows how treacherous rules, principles, and generalities may be in this field. The court said:[104]

"The fact that a person charged with crime is poorly defended will not justify a reversal of the judgment where it is reasonably supported by the evidence . . . but where the evidence is close, as it is in this case, and it is clear that the prosecuting attorney has taken advantage of the accused because he was poorly represented and the trial court has permitted such advantage to be taken, then we will consider the errors *nothwithstanding the failure to properly preserve the questions for review.*" (Italics ours.)

But in another case[105] the same court said:

"Plaintiff in error makes a serious complaint of the action of the trial court in asking numerous questions of the witnesses, both upon their direct and cross examination. A careful examination of the abstract will disclose that this complaint is not wholly unfounded, but upon examination of the record we find that *no objection was made and no ruling required at the trial. Without such objections and exceptions the question is not properly preserved for review.*" (Italics ours.)

In reading criminal cases it is not unusual to find the court examining the various errors claimed in this way:

> Error A is not sufficient to justify reversal.
> Error B is not sufficient to justify reversal.
> Errors C, D, E, etc., are not sufficient.
>
> But, adding them all together, we conclude that there was not a fair trial below, so we will find A, or B, or C, or D, or E to be "prejudicial" error.

[102] *People* v. *Dabney*, (1924) 315 Ill. 320, 327, 146 N. E. 166. See *People* v. *Shrader*, (1927) 326 Ill. 145, 157 N. E. 225.

[103] (1922) 303 Ill. 204, 135 N. E. 422.

[104] 303 Ill. at p. 206.

[105] In *People* v. *Lee*, (1910) 248 Ill. 64, 71, 93 N. E. 321 [poison case].

And then, again, we may find another case in the same court where the error condemned above reappears, but this time it is "cured" by the fact that the other instructions or rulings, as it may be, display the utmost generosity toward defendant. Many bad instructions are held to be cured by the usual "presumption of innocence," and "burden of proof upon the state" instructions.[106] How often we read, "Standing alone this charge might be open to criticism, but in the general charge the court instructed the jury that . . . . In view of the entire charge of the court we are of the opinion that the charge complained of is not subject to the criticism made."[107]

The value of an appellate opinion in a criminal case is difficult to gauge. We may have a long opinion which works out in this order: the chief claim of error, A, urged by the defendant, is examined and the court decides it is prejudicial, or reversible error, but there are present, also, the doubtful claims B, C, D, etc. Now, having decided to reverse on error A, the opinion also treats as reversible errors claims B, C, and D, which, of course, is easy and tempting to do.[108] On the other hand, the record may show a number of errors claimed with the chief reliance placed upon the so-called error A. After examining A, the court may find it non-reversible and then it passes on to B, C, and D. It is easy and tempting to hold them all non-reversible, and often that is done. This may be seen in the case of *Alderson* v. *State* [109] where the defense pressed its attack upon the indictment which was held good. Thereafter, the opinion discusses and finds not erroneous a large number of separate instructions. This process is easy to understand when the entire opinions are studied with care but when the lawyer appeals a case on claims B, or C, or D, only, it difficult to say how the court will hold on B, or C, or D as *primary* issues and not merely additional claims of error. The state of the record—that is, the presence or absence of other issues, how convincing the evidence is, the point in the administrative process where the so-called error occurred, the aggravation of the error or its cure by other safeguarding instructions, the number of errors claimed, the form and style of the record, the skill in presentation, all may influence the decision. In fact, often it is impossible to state just what a decision "decides" unless the record and briefs of counsel be studied

[106]See *Alderson* v. *State,* (1924) 196 Ind. 22, 145 N. E. 572.

[107]*Sheppard* v. *State,* (1928) 167 Ga. 326, 145 S. E. 654.

[108]See *People* v. *Cochran, supra,* note 100; *People* v. *Duncan, supra,* note 101; *People* v. *Davis,* (1921) 300 Ill. 226, 133 N. E. 320; *People* v. *Jarvis,* (1923) 306 Ill. 611, 138 N. E. 102.

[109]*Supra,* note 107.

through the eyes of the court. In many criminal cases there is no one "point." The case to be understood must be completely analyzed, all possible factors considered, all issues compared, and the history of the case in its local setting studied before we can safely say we understand the case.

Conclusion.

The reports of appellate decisions, which form the bulk of the materials used in the study of the criminal law, are presumed to contain the rules which govern the practice in any jurisdiction. Decisions are compared and doctrines are formulated in a quest for certainty. But in studying the written opinions, if we look only for legal principles, we ignore the vital elements in the judicial process. Most of the collections of "cases" for the use of law students are not cases but extracts and are cut to fit a doctrinaire classification prepared in advance. Without a study of the entire administrative process these extracts are employed to support a top-heavy structure of dogma which hides the real meaning of the cases. The trouble lies in the difficulty of evaluating the part of a decision which considers only one of the errors claimed for, as we have seen, the criminal appeal may be taken on a variety of claims. In fact, the defense at the trial generally arranges its tactics to "make up a record," and takes advantage of all possible irregularities. If the legal scholar feels competent to judge what is sound and what is unsound decision of isolated points, he may make a very satisfactory arrangement of the appellate opinions to suit himself but the practical value of his labors is very small. In some degree this may explain why a useful text book on criminal law has yet to make its appearance.

What is law? In his stimulating book "Law and the Modern Mind,"[110] Mr. Jerome Frank quotes from Salmond:[111]

"The law presents itself primarily and essentially as a system of rigid rules. . . . The law is impartial. It has no respect of persons. Just or unjust, wise or foolish, it is the same for all, and for this reason men readily submit to its arbitrament. Though the rule of law may work injustice to the individual case, it is nevertheless recognized that it was not made for the individual case and that it is alike for all."

Mr. Frank tersely says:[112]

[110]Brentano, 1930.
[111]*Op. Cit.*, p. 119.
[112]*Op. Cit.*, p. 120.

"This is very pretty, but is it not mostly rhetoric? The law is not a machine and the judges not machine-tenders. There never was and there never will be a body of fixed and predetermined rules alike for all."

We have been attempting to point out, by reading between the lines, certain factors which influence the decisions of appellate judges in homicide cases. But appellate judges are reading a "cold record" and are removed from the actual trial of criminal cases. How many more factors of influence may be found at the trial! The administration of criminal justice is a process in government and the process works not upon formulae, but through countless individuals. The desire to see justice done, which motivates a judge in bending a principle to fit his fact situation, is as much law as the principle itself. The leniency usually shown to the youthful offender of good family is as much law as the pompous pronouncement that an instruction is erroneous because it is argumentative. The study of the background of a case and the characteristics of the deciding judges is as much the law as the grave conclusion that two names are "idem sonans and, therefore, the indictment is a proper indictment." The study of a discharge at a preliminary hearing, removal to the juvenile court, the "striking off with leave to reinstate," the acceptance of a plea to a lesser offense, or the securing of a parole are as much law as criminal intent, attempt, solicitation, joinder of counts or aider by verdict. When we recognize the "criminal law" as a subject of administration rather than doctrine, then the lawyer may be of assistance in securing needed legislative reforms which are advocated and in part secured by the social scientist and welfare worker.

The best guides to the study of criminal law are found in the statutes, not only those dealing with crimes, but those dealing with courts, juries, insanity, bail, probation and parole machinery, and the like. The opinions of the appellate courts interpreting those statutes should be studied in their entirety, keeping in mind the fact that the judges are deciding the particular fact situation primarily and that generalities or rules often can be accepted only as tools for the opportunist and not as uniform formulae for action. In studying these opinions all possible attention should be given to the circumstances of the trial itself and, as well, to the abstracts, briefs and arguments, and conditions of the appeal. If we study how the system works we shall be nearer to "the law" than if we study how it "should work" with the guide of outgrown precedent and metaphysical "legal" reasoning.