

Developments in Criminal Law - 1950-1960

Charles A. Bellows

Jason E. Bellows

Sherman C. Magidson

Follow this and additional works at: <https://via.library.depaul.edu/law-review>

Recommended Citation

Charles A. Bellows, Jason E. Bellows & Sherman C. Magidson, *Developments in Criminal Law - 1950-1960*, 10 DePaul L. Rev. 339 (1961)

Available at: <https://via.library.depaul.edu/law-review/vol10/iss2/10>

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact digitalservices@depaul.edu.

CRIMINAL LAW

With ready-made opinions one cannot judge of crime. Its Philosophy is a little more complicated than people think.

—FYODOR DOSTOYEVSKY, *THE HOUSE OF THE DEAD.*

DEVELOPMENTS IN CRIMINAL LAW—1950—1960

CHARLES A. BELLOWS, JASON E. BELLOWS,
AND SHERMAN C. MAGIDSON

INTRODUCTION

ANY WRITER WHO attempts to cover all of the changes which have taken place in the area of criminal law during the space of a decade in one, limited, law review article does himself and his readers a disservice, and the field an injustice. Criminal law, as it is practiced from day to day in the trial and appellate courts in contrast to the way in which it is taught in the law schools, embodies considerations most often isolated by the labels "Constitutional Law" and "Evidence." In addition, certain aspects of the usual course in "Pleading" often crop up in the trial of a criminal case. Hence, no comprehensive-annotated type of article covering all of the changes in this vast field over the past ten years could be completed. Instead, the purpose of this article is to give a brief summary of the significant changes

MR. CHARLES BELLOWS, a member of the Illinois Bar, has also been admitted to practice before the United States Supreme Court, the United States Court of Appeals, 5th and 7th Circuits, and the United States District Court (N.D., Ill.). He received his LL.B. from the University of Chicago. Mr. Bellows, the first President of the National Association of Defense Lawyers in Criminal Cases, is a member of both the Illinois State Bar Association Committee for Revision of the Criminal Code, and the Joint Committee of the Chicago Bar Association. He has his own firm in Chicago.

MR. JASON BELLOWS, a member of the Illinois Bar, has also been admitted to practice before the United States Court of Appeals, 5th and 7th Circuits, and the United States District Court (N.D., Ill.). He received both his A.B. and J.D. from the University of Chicago, and is a partner in the firm headed by his father, Charles Bellows. He is a member of the Chicago Bar Association Committee on the Defense of Prisoners, Secretary of the Chicago Bar Association Committee on Criminal Law, and Corresponding Secretary of the Association of Defense Lawyers of Chicago.

MR. MAGIDSON, who received his B.A. from Yale University and his J.D. from Northwestern University, is a member of the Illinois Bar, and has also been admitted to practice before the United States Court of Appeals, 7th Circuit, and the United States District Court (N.D., Ill.). Mr. Magidson is a member of the Chicago Bar Association Committee on Defense of Prisoners. He, also, is associated with Mr. Charles Bellows' firm.

in Illinois criminal law which have taken place during the period 1950 to 1960. In many cases whole areas will be neglected, but, as is the case with the Post Conviction Act,* it is believed that generally they will be found elsewhere in this edition, and there treated with far more comprehensiveness than is possible in this article. Wherever possible, references to the latest articles covering a certain aspect of the criminal law will be made.

Despite the many subheadings which appear worthy of use in dealing with the criminal law, when speaking of changes only, two correctly present the subject in its proper focus: procedure and substance. One objective herein is to segregate, as well as possible, changes in procedure from changes in substance. Further, within these two categories the subject matter will be viewed from the standpoints of both statutory and case law changes.

PART I

CHANGES IN THE LAW OF CRIMINAL PROCEDURE

A. AN EXAMINATION OF DISCOVERY AND APPELLATE PROCEDURE

The two most significant changes in criminal procedure in the past decade, based upon applicability to the greatest number of cases, concern discovery and appellate practice. The Legislature of 1957 amended section 1 of division XIII of the CRIMINAL CODE,¹ to provide that prior to arraignment the State must furnish the defendant or his counsel a copy of any written confession or a list of witnesses to any oral confession. The act further provided that unless the copy of the confession or the list of witnesses was furnished in accordance therewith, the confession could not be admitted in evidence. In 1959, the Legislature modified this provision² to allow the court, upon the motion of either party, or upon its own motion, to permit the service of the copy of the confession or list of witnesses after arraignment. The Supreme Court of Illinois in *People v. Pelkola*,³ held this statute to be mandatory and ruled that where the statute was not complied with the confession could not be used either in chief or in rebuttal. However, the court further held that under the circumstances of the case, the error was harmless.

* See generally STARRS, *The Post-Conviction Hearing Act—1949-1960 and Beyond*, 10 DE PAUL L. REV. 397 (1961).

¹ Ill. Laws 1957, at 1116.

² ILL. REV. STAT. ch. 38, § 729 (1959).

³ 19 Ill.2d 156, 166 N.E.2d 54 (1960).

While in many respects a rule of evidence, the statutory provisions outlined above are in reality a form of discovery. They are meant to apprise the defendant of a very important piece of the State's evidence, his confession. While it may be argued that the defendant ought to know as well as anyone the contents of his statements made to police and prosecuting officials, the stresses of the situation might cause him to lack memory of significant details of the statement. Furthermore, as a matter of the practical disposition of a criminal case, this statute has great significance. The philosophy behind all discovery procedures, whether civil or criminal, includes the idea that the issues should be resolved as quickly as possible with the the least amount of controversy and litigation. A defendant served with a copy of his confession may readily see that his cause is hopeless and plead guilty, thus lessening his own punishment and saving the people considerable expense.

The second discovery procedure made available to defendants in Illinois criminal cases arose out of two decisions of the Illinois Supreme Court. *People v. Moses*,⁴ decided in 1957, held that a defendant in a criminal case was entitled, for purposes of impeachment, to not only the statements made by witnesses to the police and prosecuting officials, but also to the intradepartmental reports of the police department which contained material relating to the impeachment of the witness. The decision is silent as to how the information in the intradepartmental reports was impeaching, except that there is the implication that they contained evidence that a description of the person who committed the crime differing from that given at the trial was given by the complaining witnesses to the police. The court said:

. . . In this case, identification of the accused was crucial. There is no suggestion that the public interest could be prejudiced by divulging these records, and no other ground of privilege is apparent. Where it appears that there is evidence in the possession and control of the prosecution favorable to the defendant, "a right sense of justice demands that it should be available, unless there are strong reasons otherwise."⁵

Three years later, in *People v. Wolff*,⁶ the Supreme Court set forth clearer standards for the production of statements made by a witness to the police or prosecuting agency. First, the court said:

. . . All authorities examined agree that use of documents produced under the rule [of *People v. Moses*] is restricted to impeachment, thus it is held that only

⁴ 11 Ill.2d 84, 142 N.E.2d 1 (1957).

⁵ *Id.* at 89, 142 N.E.2d at 4 (quoting, in part, from *People v. Walsh*, 262 N.Y. 140, 150, 186 N.E. 422, 425 (1933)).

⁶ 19 Ill.2d 318, 167 N.E.2d 197 (1960).

statements or reports which could properly be called in the witness's own words should be made available to the defense. More specifically, as pointed out by the Supreme Court of the United States, the demand must be for "specific statements which had been written by the witness or, if orally made, as recorded by agents of the Government."⁷

The second consideration was stated as follows:

While some of the cited decisions, and others, contain language which suggests that the foundation evidence must likewise establish that the statement or report made by the witness is contradictory to his testimony at the trial, that concept has been discarded in later cases as being manifestly unfair (since contradiction can hardly be determined until the statement is produced), and the better view, to which we subscribe, is that "For production purposes, it need only appear that the evidence is relevant, competent, and outside any exclusionary rule."⁸

The last of the standards was promulgated as follows:

. . . [W]e adopt the view that where no privilege exists, and where the relevancy and competency of a statement or report has been established, the trial judge shall order the document delivered directly to the accused for his inspection and use for impeachment purposes. However, if the prosecution claims that any document ordered to be produced contains matter which does not relate to the testimony of the witness sought to be impeached, the trial judge will inspect the document and may, at his discretion, delete unrelated matters before delivery is made to the accused.⁹

One aspect of the problem is only hinted at by the court in the *Wolff* case. That is the question of whether the court may direct the documents turned over to the defendant only after the witness has testified, as is the present Federal rule,¹⁰ or whether it may be ordered given to the accused prior to the testimony of the witness. The problem is not one in which there can be a hard and fast rule, and should be committed to the discretion of the trial judge. In the average case in which there have not been any extensive statements made by witnesses, it would seem proper that the document should be turned over to the defendant only after the witness has testified. However, in the case wherein there are many prosecution witnesses and they have made several statements each to police officers, prosecuting attorneys, and other investigators of the State, the statements should very well be pro-

⁷ *Id.* at 323, 167 N.E.2d at 199 (quoting, in part, from *Palermo v. United States*, 360 U.S. 343, 345-46 (1959)).

⁸ *Id.* at 324, 167 N.E.2d at 200 (quoting, in part, from *Gordon v. United States*, 344 U.S. 414, 420, and *Jencks v. United States*, 353 U.S. 657, 667 (1956)).

⁹ *Id.* at 327, 167 N.E.2d at 201-02.

¹⁰ 18 U.S.C.A. § 3500 (Supp. 1960).

duced not only prior to the time when the witness testifies but prior to the trial. A long trial can only be made longer when the counsel for the defendant or defendants must stop the trial, inspect the documents, and only then proceed with the cross-examination of the witness. This time interval may be hours or days if there are many statements from the witness and many counsel who must inspect them. If the trial judge attempts to limit the time for inspection in order to prevent a jury from having to waste precious time, he may in effect, render the discovery rule a nullity. The seriousness of such action is seen most clearly in the light of the realization by the Supreme Court of this state that " 'the commands of the Constitution were . . . close to the surface' " of the rule.¹¹ In at least one case in the Criminal Court of Cook County,¹² the trial judge has ordered all documents containing statements of prosecution witnesses produced prior to trial, thus shortening the time of trial from a possible six to eight weeks to four weeks.

Turning aside from the developments in the law of discovery, the change in criminal procedure which affects an even greater number of defendants is that in the law of appellate procedure. Strictly speaking, the greatest change is not one of procedure but one of making the procedure available to all defendants. In this state, no point may be raised on review in a criminal case which concerns the weight of the evidence, the rulings made at the trial, or any error made at the trial of the case, unless it is properly preserved in the bill of exceptions.¹³ The bill of exceptions, while permitted to be in narrative form prepared from someone's memory (the so-called bystanders' bill of exceptions) has, since the inception of court reporting, consisted of the stenographic report of proceedings.¹⁴ This report has had to be purchased from the stenographer, except in capital cases, where by statute, in the case of an indigent defendant, the trial court could order that the county pay for all the expenses of a review.¹⁵ In the 1956 case of *Grif-*

¹¹ *People v. Wolff*, 19 Ill.2d 318, 327, 167 N.E.2d 197, 201 (1960) (quoting from concurring opinion in *Palermo v. United States*, 360 U.S. 343, 362-63 (1959)).

¹² *People v. Hansen*, No. 59-2110, Crim. Ct., Cook County, Ill. (1959). Although this case was tried prior to the decision of the *Wolff* case, there is no language in the *Wolff* case which would indicate that the procedure followed in *Hansen* was not valid.

¹³ *People v. Hamm*, 415 Ill. 224, 112 N.E.2d 485 (1953); *People v. Ball*, 412 Ill. 37, 104 N.E.2d 774 (1952); *People v. Allen*, 411 Ill. 582, 104 N.E.2d 768 (1952), *cert. denied*, 344 U.S. 843 (1952).

¹⁴ *Griffin v. Illinois*, 351 U.S. 12, 14, n. 4 (1955).

¹⁵ ILL. REV. STAT. ch. 38, § 769a (1959).

fin v. Illinois,¹⁶ the Supreme Court of the United States held that the failure to provide for the furnishing of a bill of exceptions for all indigent prisoners was a denial of equal protection. Mr. Justice Black, announcing the judgment of the Court, said:

All of the States now provide some method of appeal from criminal convictions, recognizing the importance of appellate review to a correct adjudication of guilt or innocence. . . . [T]o deny adequate review to the poor means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside. Many States have recognized this and provided aid for convicted defendants who have a right to appeal and need a transcript but are unable to pay for it. A few have not. Such a denial is a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law. There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.¹⁷

Mr. Justice Frankfurter, concurring in the judgment, stated with his characteristic pungency:

. . . [W]hen a State deems it wise and just that convictions be susceptible to review by an appellate court, it cannot by force of its exactions draw a line which precludes convicted indigent persons, forsooth erroneously convicted, from securing such a review merely by disabling them from bringing to the notice of an appellate tribunal errors of the trial court which would upset the conviction were practical opportunity for review not foreclosed.

To sanction such a ruthless consequence, inevitably resulting from a money hurdle erected by a State, would justify a latter-day Anatole France to add one more item to his ironic comments on the "majestic equality" of the law. "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."¹⁸

Upon remand, the Supreme Court of Illinois reversed the ruling of the trial court on the petition under the Illinois Post-Conviction Hearing Act,¹⁹ and ordered the trial court to order that a copy of the transcript of record be furnished to the defendant.²⁰

Concomitant with the opinion in the *Griffin* case, the Supreme Court of Illinois adopted rule 65-1.²¹ This rule codified the procedure to be followed by persons desiring transcripts of their trial furnished to them. This article will not cover these procedures and those following.

¹⁶ 351 U.S. 12 (1955).

¹⁷ *Id.* at 18.

¹⁸ *Id.* at 23.

¹⁹ ILL. REV. STAT. ch. 38, §§ 826-32 (1959).

²⁰ *People v. Griffin*, 9 Ill.2d 164, 137 N.E.2d 485 (1956).

²¹ ILL. REV. STAT. ch. 110, § 101.65-1 (1959).

However, they have been excellently treated in an article which appeared in the Illinois Bar Journal in 1959.²² Two decisions of the Supreme Court of Illinois are of importance in this area and should be discussed, if briefly. In *People v. Munroe*,²³ the court held that where a writ of error had issued prior to the expiration of the twenty-year common-law limitations upon writs of error, a transcript of trial proceedings obtained pursuant to rule 65-1 after the expiration of the twenty-year period was an additional record, reviewable by the original writ of error. However, in *People v. Berman*,²⁴ the court held that where the defendant had been convicted in 1930, had taken no action whatsoever to review his conviction until 1954—when he filed a petition under the Post Conviction Hearing Act—and had not filed a petition for writ of error under rule 65-1 until 1959, “the limitation period heretofore recognized must be construed as a proscription against the application of rule 65-1. . . .”²⁵ In *Berman*, the court also ruled that the fact that a transcript was unobtainable because no court reporter was provided to take shorthand notes of the trial proceedings, did not require a reversal as constituting a denial of due process or of equal protection.²⁶

Two further changes in appellate procedure should be noted. Rule 65-2 of the Supreme Court²⁷ abolished all distinctions between the common-law record and the bill of exceptions or report of proceedings at the trial, for the purpose of determining what is properly before the reviewing court in a criminal case. This rule eliminated the former practice, in which certain matters had to be set forth in the bill of exceptions in order to be preserved for review, such as the motion for new trial,²⁸ the motion challenging the grand jury,²⁹ the motion to suppress evidence,³⁰ and a motion for a continuance.³¹ The proceedings

²² Sullivan, *What Every Lawyer Should Know About Illinois Supreme Court Rule 65-1*, 47 ILL. B. J. 976 (1959).

²³ 15 Ill.2d 91, 154 N.E.2d 225 (1958).

²⁴ 19 Ill.2d 579, 169 N.E.2d 108 (1960).

²⁵ 19 Ill. 579, 586, 169 N.E.2d 108, 112 (1960).

²⁶ Cf. *Eskridge v. Washington State Bd. of Prison Terms & Paroles*, 357 U.S. 214 (1958).

²⁷ ILL. REV. STAT. ch. 110, § 101.65-2 (1959).

²⁸ *People v. Johns*, 388 Ill. 212, 57 N.E.2d 895 (1944); *People v. Hobbs*, 352 Ill. 224, 185 N.E. 610 (1933).

²⁹ *People v. Hobbs*, *supra* note 28.

³⁰ *People v. Reese*, 355 Ill. 562, 189 N.E. 876 (1933).

³¹ *People v. Barnes*, 405 Ill. 30, 89 N.E.2d 791 (1950), *cert. denied*, 339 U.S. 944 (1950).

and hearing upon these motions must, in most cases, be included in a properly certified bill of exceptions, for otherwise, the reviewing court would not be able to determine whether the evidence introduced supported the contentions of the motion. What the rule does rectify is the curious situation wherein the bill of exceptions contains the proceedings upon a motion, but the motion itself is contained in the common-law record. Under the old practice, the reviewing court could not consider the correctness of the ruling upon the motion, for the motion itself was not in the bill of exceptions.

The most recent change in criminal appellate procedure is the provision for review by appeal.³² Because of the greatly increased number of criminal appeals occasioned by the promulgation of rule 65-1, the Supreme Court has found it necessary to appoint for indigent prisoners many attorneys who are unfamiliar with the writ of error procedure. The court prevailed upon the Legislature to provide for appeal by notice of appeal in order that the attorneys could use a more familiar form of review. Unfortunately, the rule of the Supreme Court which implemented the legislation, while setting forth a procedure conforming to that used in civil appeals, did nothing to simplify that procedure. The procedure upon the writ of error is, by far, simpler. Under that procedure the defendant obtains his transcript of proceedings and procures its certification by the trial judge. He then requests the clerk of the trial court to prepare the so-called common-law record, which consists of the clerk's minutes, the pleadings, and other papers filed in the cause. The clerk then combines the common-law record with the certified transcript of proceedings and binds them together. The defendant sends this record to the clerk of the reviewing court, who issues a writ of error and scire facias to hear errors. The sheriff serves the scire facias.³³ In practice, the clerk of the Supreme Court procures the service of the scire facias, and when the transcript of record is filed with the clerk of the reviewing court, the writ of error is deemed returned. Thus, the only steps which the defendant must take himself are procuring the record and sending it to the clerk of the reviewing court. The practice in the Appellate Courts is slightly more complex, because in those courts the plaintiff in error must draw up the writ of error and scire facias and must also place the scire facias with the sheriff of the proper county.

³² ILL. REV. STAT. ch. 38, § 769.1 (1959); ILL. SUP. CT. R. 69-1, ILL. REV. STAT. ch. 110, § 101.69-1 (1959).

³³ ILL. SUP. CT. R. 61, 62, 6, ILL. REV. STAT. ch. 110, §§ 101.61, 101.62, 101.6 (1959).

It is hoped that eventually the court will follow the federal procedure employed in the Seventh Circuit, in which after the notice of appeal is filed with the clerk of the District Court, all the original papers and a copy of the docket entries are certified and sent to the clerk of the reviewing court.³⁴ The above concludes the summary of the significant developments in criminal appellate procedure in this state in the last decade.³⁵

B. PROCEDURAL CHANGES TRACED THROUGH THE PROGRESSION OF A CASE

The remainder of the developments in criminal procedure to be discussed herein shall be treated in the order in which the problems arise in a criminal case. In *People v. Ferguson*,³⁶ the defendant, a judge of the Municipal Court of Chicago, was indicted for conspiracy to obstruct justice, to cheat and defraud the City of Chicago and the County of Cook, and to extort money from motorists. He filed a "plea in bar" which alleged that he was immune from prosecution because a judge is so immune for acts committed by him while acting as judge, and while acting honestly and in good faith. The trial court sustained the motion. The State appealed. The court held that inasmuch as the defendant did not allege any facts in his plea, but only conclusions of law, the judge's motion was a motion to quash, from which the State

³⁴ FED. R. CRIM. P. 37, 39; FED. R. CIV. P. 75(o); 7TH CIR. R. 12 (e).

³⁵ In a recent decision of some interest, the court seemed to set at rest the problem of when a constitutional question is sufficiently present for purpose of giving the Supreme Court jurisdiction in misdemeanor cases. In *People v. Watkins*, 19 Ill.2d 11, 166 N.E.2d 433 (1960), the court held that the provisions of the Civil Practice Act, ILL. REV. STAT. ch. 110, §§ 1-4 (1959), rather than the Appellate Court Act, ILL. REV. STAT. ch. 37, § 8 (1959), or the CRIMINAL CODE, ILL. REV. STAT. ch. 38 § 780½ (1959), control the jurisdiction of the Supreme Court in misdemeanor cases in which there is involved the validity of a statute or a construction of the Constitution. The court went on to hold that in the area of searches and seizures the boundaries of the protection afforded by the Constitution cannot be determined by the declaration of one simple rule. Citing *United States v. Rabinowitz*, 339 U.S. 56 (1950), and *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1930), the court held that "the recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case." *Id.* at 17, 166 N.E.2d at 436. Thus, it would seem that whenever there is any constitutional question involved in any misdemeanor case the defendant should seek review in the Supreme Court, lest review by the Appellate Court be deemed a waiver of the constitutional question. *People v. Cosper*, 5 Ill.2d 97, 125 N.E.2d 60 (1955), *cert. denied*, 350 U.S. 844 (1955); *People ex rel. Chicago Bar Ass'n v. Barasch*, 406 Ill. 253, 94 N.E.2d 148 (1950); *People v. Richardson*, 397 Ill. 84, 72 N.E.2d 851 (1947). The determination of whether the question is debatable is one for the Supreme Court.

³⁶ 20 Ill.2d 295, 170 N.E.2d 171 (1960).

could appeal. Furthermore, the court stated that pleas in bar are properly limited to the grounds available at common law, namely, *autrefois acquit*, *autrefois convict*, and pardon. Although not mentioned by the court specifically, it would seem that the situation wherein jeopardy attaches without the case going to judgment could also be pleaded in bar.³⁷ Also, the court was silent as to the propriety of raising the immunity granted pursuant to immunity statutes.³⁸ Equating such immunity with pardon would lead one to believe that a plea in bar could be utilized in cases wherein immunity has been granted pursuant to statute.

Turning now to double jeopardy itself, the decade past has seen much activity in the field. In two cases decided in 1959, the Supreme Court of the United States affirmed the dual sovereignty theory announced in *United States v. Lanza*.³⁹ In *Bartkus v. Illinois*,⁴⁰ the Court held that the State of Illinois could prosecute for armed robbery a person previously acquitted in the United States District Court of robbery of a federally insured savings and loan association, where both the state and federal indictments were based upon the same act of bank robbery. Mr. Justice Frankfurter, speaking for the Court, after reviewing the prior cases on the subject, said:

With this body of precedent as irrefutable evidence that state and federal courts have for years refused to bar a second trial even though there had been a prior trial by another government for a similar offense, it would be disregard of a long, unbroken, unquestioned course of impressive adjudication for the Court now to rule that due process compels such a bar.⁴¹

However, he cautioned that:

. . . The greatest self-restraint is necessary when that federal system yields results with which a court is in little sympathy.⁴²

In a case argued and decided on the same days as the *Bartkus* case, the Supreme Court of the United States decided the converse situation. In *Abbate v. United States*,⁴³ the Court had before it the case of two defendants who had been convicted in the United States District Court for the Southern District of Mississippi of conspiracy to destroy a means of communication operated or controlled by the United

³⁷ See *People v. Watson*, 394 Ill. 177, 68 N.E.2d 265 (1946), *cert. denied*, 329 U.S. 769 (1946).

³⁸ ILL. REV. STAT. ch. 38, § 580a (1959).

³⁹ 260 U.S. 377 (1922).

⁴⁰ 359 U.S. 121 (1959).

⁴¹ *Id.* at 136.

⁴² *Id.* at 138.

⁴³ 359 U.S. 187 (1959).

States. Previously they had been convicted in the Criminal Court of Cook County of conspiracy to injure or destroy the property of the Southern Bell Telephone and Telegraph Company. The property of the telephone company and the means of communication operated and controlled by the United States were the same telephone facilities. The Supreme Court upheld the conviction in the face of the claim of double jeopardy, saying:

. . . [I]f the States are free to prosecute criminal acts violating their laws, and the resultant state prosecutions bar federal prosecutions based on the same acts, federal law enforcement must necessarily be hindered. . . . But no one would suggest that, in order to maintain the effectiveness of federal law enforcement, it is desirable completely to displace state power to prosecute crimes based on acts which might also violate federal law. This would bring about a marked change in the distribution of powers to administer criminal justice, for the States under our federal system have the principal responsibility for defining and prosecuting crimes. . . . Thus, unless the federal authorities could somehow insure that there would be no state prosecutions for particular acts that also constitute federal offenses, the efficiency of federal law enforcement must suffer if the Double Jeopardy Clause prevents successive state and federal prosecutions.⁴⁴

To offset the evil effects of the *Bartkus* decision, the Legislature in 1959 enacted the following statute:

Whenever on the trial of an accused person for the violation of any criminal law of this State it is shown that he has previously been tried and convicted or acquitted under the laws of the Federal government, which former trial was based on the act or omission for which he is being tried in this State, it is a sufficient defense.⁴⁵

In other decisions concerning double jeopardy and multiple prosecutions, the Supreme Court of the United States has held that a State may, without violating due process, prosecute one defendant successively for separate crimes arising out of the same transaction—such as successive prosecutions for the robbery of each person robbed in a single tavern hold-up,⁴⁶ and successive prosecutions for the murder of each member of the defendant's family whom he killed in a single course of action.⁴⁷ The latter case affirmed a decision of the Supreme Court of Illinois which held that the action of the prosecution did not violate the double jeopardy provision of the state constitution.⁴⁸

⁴⁴ *Id.* at 195.

⁴⁵ ILL. REV. STAT. ch. 38, § 601.1 (1959).

⁴⁶ *Hoag v. New Jersey*, 356 U.S. 464 (1958).

⁴⁷ *Ciucci v. Illinois*, 356 U.S. 571 (1958).

⁴⁸ *People v. Ciucci*, 8 Ill.2d 619, 137 N.E.2d 40 (1956).

Attention will now be focused on other pre-trial matters. An act of the 1957 Legislature provides a bar to the prosecution against a prisoner in the penitentiary of all indictments or informations pending in the county from which he was sentenced, unless he is brought to trial within four months of imprisonment.⁴⁹ This act also provides that the bar shall not apply if the prisoner has caused the delay, and further, that if the court is satisfied that the prosecution has exercised due diligence to procure evidence and that such evidence, though not presently available, may be procured at a later date, the cause may be continued not more than thirty days. The Illinois Supreme Court has ruled that this statute does not have a retroactive effect.⁵⁰ Presumably, although the act is silent, the motion for discharge must be made prior to conviction and in the same action as that from which the imprisoned individual seeks relief.⁵¹

The Appellate Court of Illinois for the Second District, has rendered a decision which clarifies the situation regarding the amendment of an information. In *People v. Moore*,⁵² the court held that where an information is so amended as to charge a different offense from that originally charged, it must be reverified, for the verification of the original information cannot be applied to the information as amended. The court further held that a defendant is not required to enter a plea to an unverified information, and the plea entered to the original information cannot be deemed to relate to the amended information. Further, an amendment made after the evidence has been heard which charges a different offense is material, and requires a reversal of a conviction based upon the amended information.

In *People v. Hill*,⁵³ the Supreme Court of Illinois seemingly reversed a long line of cases which have held that a trial in a case wherein there is no showing that a formal plea of not guilty has been entered is a nullity.⁵⁴ Stating that such a rule is "out of keeping with the spirit that has substituted, in criminal procedure as well as in civil, an interest in

⁴⁹ ILL. REV. STAT. ch. 38, § 633.1 (1959).

⁵⁰ *People v. Ross*, 13 Ill.2d 11, 147 N.E.2d 309 (1958).

⁵¹ See *People v. House*, 10 Ill.2d 556, 141 N.E.2d 12 (1957); *People v. Utterback*, 385 Ill. 239, 52 N.E.2d 775 (1944).

⁵² 21 Ill. App.2d 9, 157 N.E.2d 94 (1959).

⁵³ 17 Ill.2d 112, 160 N.E.2d 779 (1959).

⁵⁴ *Johnson v. People*, 22 Ill. 314 (1859); *Yundt v. People*, 65 Ill. 372 (1872); *Parkinson v. People*, 135 Ill. 401, 25 N.E. 764 (1890); *People v. Evenow*, 355 Ill. 451, 189 N.E. 368 (1934); *People v. Shoffner*, 400 Ill. 174, 79 N.E.2d 200 (1948).

the significant rights of the litigants for a ritualistic concern with empty formalities,"⁵⁵ the court went on to hold that it must "look to the record to determine whether or not the omission of a formal plea adversely affected the rights of the defendant,"⁵⁶ and if not, the conviction could not be set aside for that reason. This case overrules some of the authorities upon which the Appellate Court based its decision in the *Moore* case. Nevertheless, the *Moore* case must still stand for the proposition that an unverified information is a nullity, and that an information cannot be amended to conform to the proof in such a manner as to charge a new crime.

An amendment to the CRIMINAL CODE enacted in 1955⁵⁷ permits trial of felonies by information if the defendant, after being informed of his right to indictment by grand jury, formally waives indictment in open court. The constitutionality of this statute was passed upon in *People v. Bradley*,⁵⁸ which held that inasmuch as nothing in the statute abolishes the grand jury, it does not violate the constitution of this state.⁵⁹ Nor, according to the *Bradley* case, does the statute violate the due process provision of the Constitution of the United States in any manner.⁶⁰

The Supreme Court in *People v. Spegal*,⁶¹ decided that the right to trial by jury is one personal to the defendant and one which he can waive at his pleasure. Therefore, it was error for the trial court to have granted the prosecution a jury trial upon its request. This case specifically overruled *People v. Scornavache*⁶² and *People v. Scott*.⁶³

One further change in pre-trial criminal procedure of some note was made by a statute enacted in 1953. It was provided therein that a defendant in a criminal case could raise by a preliminary motion, questions concerning the competency of a confession taken from him.⁶⁴

⁵⁵ *People v. Hill*, 17 Ill.2d 112, 119, 160 N.E.2d 779, 783 (1959).

⁵⁶ *Id.* at 120, 160 N.E.2d at 783.

⁵⁷ ILL. REV. STAT. ch. 38, § 702 (1959).

⁵⁸ 7 Ill.2d 619, 131 N.E.2d 538 (1956), Annot., 56 A.L.R.2d 832 (1957).

⁵⁹ ILL. CONST. art. II, § 8. This section, while guaranteeing the right to indictment by grand jury, carries the provision that the Legislature may abolish the grand jury in all cases.

⁶⁰ *Hurtado v. California*, 110 U.S. 516 (1884).

⁶¹ 5 Ill.2d 211, 125 N.E.2d 468 (1955).

⁶² 347 Ill. 403, 179 N.E. 909 (1931), Annot., 79 A.L.R. 553 (1932).

⁶³ 383 Ill. 122, 48 N.E.2d 530 (1943).

⁶⁴ ILL. REV. STAT. ch. 38, § 736.1 (1959).

Although there is no intention to consider in this article the developments in the law of criminal evidence, one statute should be noted. In 1959, the Legislature enacted a statute which prohibits the court from requiring, requesting, or suggesting that the defendant submit to a lie test or to questioning under the effect of sodium pentothal or other questioning by means of any mechanical device or chemical substance.⁶⁵ This statute supplements existing case law which prohibits the admission of the results of lie detector tests in evidence,⁶⁶ and it prevents the possible forcing of admissions or confessions by judges by means of such devices.

During the last decade the Supreme Court decided two cases involving the selection of veniremen under the Jury Commissioners Act⁶⁷ and the Jurors Act⁶⁸ in criminal cases. In *People v. Siciliano*,⁶⁹ during the course of the voir dire examination of the jury, the regular panel of jurors became exhausted, and the trial court, following the provisions of section 13 of the Jurors Act,⁷⁰ ordered the sheriff to summon additional persons to serve as prospective jurors. When this was discovered by the defendant, he moved to challenge the array of the additional jurors so summoned on the grounds that their names had not been drawn in the manner provided for by the Jury Commissioners Act.⁷¹ The Supreme Court held that the Jury Commissioners Act, while it supplements the Jurors Act, is not amendatory of the earlier statute. Therefore, when it appears that the panel of jurors has become exhausted during trial, the court may order the sheriff to summon jurors without regard to the jury commissioner lists.

Approximately two years later, the court had before it a second case involving almost identical circumstances. In *People v. Bedard*,⁷² the regular panel of jurors had become exhausted prior to trial because other trials before other judges of the court had depleted the panel. One of the judges of the court issued a special venire directed to the sheriff to summon jurors. Again the defendant, when the fact became known to him, challenged the array because it had not been selected in

⁶⁵ ILL. REV. STAT. ch. 38, § 736.2 (1959).

⁶⁶ *People v. Forte*, 279 N.Y. 204, 18 N.E.2d 31 (1938).

⁶⁷ ILL. REV. STAT. ch. 78, §§ 24-35 (1959).

⁶⁸ ILL. REV. STAT. ch. 78, §§ 1-15 (1959).

⁶⁹ 4 Ill.2d 581, 123 N.E.2d 725 (1955), *cert. denied*, 349 U.S. 931 (1955).

⁷⁰ ILL. REV. STAT. ch. 78, § 13 (1959).

⁷¹ ILL. REV. STAT. ch. 78, § 32 (1959).

⁷² 11 Ill.2d 622, 145 N.E.2d 54 (1957).

accordance with the Jury Commissioners Act, which act was in force and effect in the county wherein the case was being tried. This time the Supreme Court held that the challenge to the array should have been allowed. The court held that section 13 of the Jurors Act applies only when the panel becomes exhausted *during* the trial; when the panel becomes exhausted *prior* to trial the names of the jurors must be drawn from the jury commissioners' lists in the manner provided by the Jury Commissioners Act. Moreover, the court also cautioned against the practice of summoning jurors in a criminal case in accordance with section 13 of the Jurors Act even when the panel does become exhausted *during* trial.⁷³ Further, the court held that the defendant had been entitled to have a special bailiff appointed to summon the special venire, as is provided in the Jurors Act.⁷⁴

One last change in the criminal procedure as it regards jurors resulted from the promulgation, by the Supreme Court, of rule 24-1.⁷⁵ Under this rule the trial judge exercises greater control over the voir dire examination of the prospective jurors, and the parties are barred from discussing questions of law with the jurors. Although there was some concern, especially among defense lawyers, that the new rule would hinder the parties in their attempt to obtain a fair and impartial jury, this has not proved to be the case in actual practice. However, the rule has not seemed to lessen the time needed for the selection of the jury, as it was intended to do.

Except for the discovery procedures treated above, there have been no significant changes in criminal trial practice.⁷⁶

⁷³ Among the reasons for this cautionary statement was the fact that in the *Bedard* case the jurors summoned by the sheriff were a former assistant sheriff who had served under the sheriff for three years, a woman who had known the sheriff for many years, a man who had been a former grand juror and who was intimately acquainted with the State's Attorney, a man whose son-in-law was a deputy sheriff, and a man who had known the sheriff for fifty years and had served as a juror forty or fifty times.

⁷⁴ Citing *Healey v. People*, 177 Ill. 306, 52 N.E. 426 (1898).

⁷⁵ ILL. REV. STAT. ch. 110, § 101.24-1 (1959).

⁷⁶ One minor change was effected by the amendment of § 67 of the Civil Practice Act, ILL. REV. STAT. ch. 110, § 67 (1959), concerning jury instructions, which is made applicable to criminal cases by virtue of Supreme Court rule 25, ILL. REV. STAT. ch. 110, § 101.25 (1959). Under this section of the Practice Act, as it was amended in 1955, a copy of proposed instructions must be served upon counsel for the opposing party, there must be a conference among the judge and counsel for the parties, the court must inform the parties of the instructions which he would give prior to argument, and all objections must be made at the conference which must be preserved in the bill of exceptions, in order for the reviewing court to pass upon the question of the instructions.

Post-trial procedure has seen some changes which are or might prove to be significant. In *People v. Flynn*,⁷⁷ the Supreme Court overruled prior authority⁷⁸ and held that the statutory provision that motions for new trial and in arrest of judgment must be in writing⁷⁹ are directory and not mandatory. Therefore, said the court:

It is undoubtedly a better practice to specify the grounds in writing and preserve them in the bill of exceptions. The opposite party, or the trial court on its own motion, may compel this to be done. But there seems to be no good reason why the requirement of writing may not be waived. In the case at bar there is nothing to indicate that either the prosecutor or the court called on defendants to specify in writing the points on which they based their motion, and the State must therefore be held to have waived such requirement.⁸⁰

Thus, any ground for a new trial or in arrest of judgment or for judgment notwithstanding the verdict which could have been presented is deemed presented by an oral motion not objected to by court or counsel, and may be assigned as error upon review.⁸¹

Acts of the 1953 Legislature rectified a curious situation wherein a judge without a jury hearing cases upon a plea of not guilty of misprision of treason, murder, voluntary manslaughter, rape or kidnapping could not hear evidence in aggravation or mitigation.⁸² This situation was caused by the fact that the last-mentioned crimes are punishable by definite sentences rather than indeterminate sentences, and in jury trials definite sentences must be set by the jury. The former statute, which contemplated trial by jury only, did not make any provisions for the presentation of evidence in aggravation or mitigation other than that which would be competent as proof of guilt or innocence. When trials by the court alone became permissible,⁸³ the statute was not changed to allow a hearing in aggravation and mitigation in non-jury trials. Since 1953, a court hearing one of the above types of cases upon a plea of not guilty has been given authority to hear evidence in aggravation and mitigation upon a finding of guilty.⁸⁴

In another development in the matter of sentencing, the court de-

⁷⁷ 8 Ill.2d 116, 133 N.E.2d 257 (1956).

⁷⁸ *People v. Jankowski*, 391 Ill. 298, 63 N.E.2d 362 (1945).

⁷⁹ ILL. REV. STAT. ch. 38, § 747 (1959).

⁸⁰ *People v. Flynn*, 8 Ill.2d 116, 119, 133 N.E.2d 257, 258-59 (1956).

⁸¹ *People v. Prohaska*, 8 Ill.2d 579, 134 N.E.2d 799 (1956).

⁸² *People v. Trobiani*, 412 Ill. 235, 106 N.E.2d 367 (1952).

⁸³ *People ex rel. Swanson v. Fisher*, 340 Ill. 250, 172 N.E. 722 (1930).

⁸⁴ ILL. REV. STAT. ch. 38, §§ 732, 801 (1959).

cided that a sentence, purporting to be indeterminate, of a minimum of life imprisonment and a maximum of life imprisonment was a definite sentence, and was therefore not permitted by the Sentence and Parole Act to be given for armed robbery, a crime for which the act requires an indeterminate sentence.⁸⁵

The greatest change in sentencing procedure during the period 1950–1960 was the enactment of the Illinois Habitual Criminal Act⁸⁶ in 1957. In essence, this statute has abolished the old practice wherein the second offender was indicted as a habitual criminal, his record introduced in evidence as proof of the prior offense, and upon conviction of the crime and the finding that he had been convicted of one of the prior crimes enumerated in the statute, he was mandatorily sentenced to the full term provided for by law for the second crime. Thus, after a first conviction for grand larceny and a subsequent conviction for burglary the defendant would have to be sentenced to life imprisonment, the maximum sentence for burglary. An anomaly of this situation was that if the first crime had been burglary and the second grand larceny, the defendant could have been sentenced only to ten years imprisonment, the maximum for the crime of grand larceny. Under the new practice, the defendant is merely indicted for the second offense, without any mention of the prior offense. The jury is not informed of his record and no finding by the jury is necessary. Only after conviction is the petition reciting the fact of the prior offense—which may be any felony—presented to the judge. If the judge finds that the defendant has been previously convicted of any felony, he then makes the finding that the defendant is a habitual criminal, whereupon he may sentence the defendant to such term as is provided by law for the crime of which the defendant was subsequently convicted. If the term of imprisonment for the crime is less than twenty years, the court may sentence the defendant to a term of imprisonment of twenty years or twice the maximum sentence provided by law, whichever is less. In addition, the new statute regulates the parole of prisoners sentenced as habitual criminals.⁸⁷

⁸⁵ *People v. Westbrook*, 411 Ill. 301, 103 N.E.2d 494 (1952); ILL. REV. STAT. ch. 38, § 802 (1959).

⁸⁶ ILL. REV. STAT. ch. 38, §§ 603.1–9 (1959).

⁸⁷ An excellent and comprehensive study of the Illinois Habitual Criminal Act will be found in UNIVERSITY OF CHICAGO, LAW SCHOOL, LAW REVISION RESEARCH SERIES, No. 1, DUNHAM & MERRIFIELD, LAW REVISION STUDIES, DRAFT OF A PROPOSED ILLINOIS HABITUAL CRIMINAL ACT. . . . (1955).

No further significant changes have taken place in the years under consideration in the areas of sentence, probation,⁸⁸ or parole; however, the revision of the Civil Practice Act in 1955 has presented some as yet unresolved questions concerning proceedings for relief from judgment.⁸⁹ Historically, relief from judgment in criminal cases after the expiration of term time has been by the writ of error coram nobis.⁹⁰ In 1933, the writ of error coram nobis was abolished and a motion was substituted in its place.⁹¹ Nevertheless, under this change the only grounds for relief which were available under the motion were those which were available under the writ of error coram nobis.⁹² Relief under coram nobis was available only where the conviction was obtained by duress or fraud, or where by some excusable mistake or ignorance of the accused, or without negligence on his part, he had been deprived of a defense which he could have used at his trial, and which, if known by the court, would have prevented conviction.⁹³

The 1955 amendment to section 72 of the Civil Practice Act⁹⁴ abolished not only coram nobis but also coram vobis, writs of audita querela, bills of review, and bills in the nature of bills of review. The act further provides:

. . . All relief heretofore obtainable and the grounds for said relief heretofore available, either at law or in equity, whether by any of the foregoing remedies or otherwise, shall be available in every case, by proceedings hereunder, regardless of the nature of the order, judgment or decree from which relief is sought or of the proceedings in which it was entered. There shall be no distinction among actions at law, suits in equity and other proceedings, statutory or otherwise, as to availability of relief, grounds for relief or the relief obtainable.⁹⁵

The full portent of this statute as it regards criminal cases is not yet clear. But it would seem that many new grounds for relief from

⁸⁸ For an excellent study of the rights of a probationer in a proceeding for revocation of probation see *People v. Price*, 23 Ill. App.2d 364, 164 N.E.2d 528 (1960).

⁸⁹ ILL. REV. STAT. ch. 110, § 72 (1959).

⁹⁰ See *People v. Crooks*, 326 Ill. 266, 157 N.E. 218 (1927).

⁹¹ Ill. Laws 1933, at 804-05.

⁹² *People ex rel. Courtney v. Green*, 355 Ill. 468, 189 N.E. 500 (1934). *But cf.* *Ellman v. De Ruiter*, 412 Ill. 285, 106 N.E.2d 350 (1952), wherein the court applied equitable principles in administering relief.

⁹³ *People ex rel. Courtney v. Green*, 355 Ill. 468, 189 N.E. 500 (1934).

⁹⁴ ILL. REV. STAT. ch. 110, § 72 (1959).

⁹⁵ *Ibid.*

judgment may become available in criminal cases.⁹⁶ This field is at present too problematic to even attempt to say more in an article such as this.

No article on criminal procedure would be complete without some allusion to criminal jurisdiction and venue. The clarification of the jurisdiction of the Supreme and Appellate Courts as it concerns constitutional questions has already been discussed.⁹⁷ The greatest change in criminal jurisdiction involves justices of the peace and police magistrates. By act of the Legislature in 1955 the jurisdiction of justices of the peace and police magistrates was increased to cover all crimes wherein punishment does not exceed one year imprisonment in the county jail and a fine of not more than five hundred dollars.⁹⁸ The result of this change has been to relieve the Criminal Court of Cook County and the circuit and county courts from a great load of minor cases which would have had to be tried in courts of record under the former statutes, which limited the jurisdiction of justices of the peace and police magistrates to only those crimes punishable by fine not exceeding three hundred dollars.⁹⁹

There have been no significant changes in the law as it regards the venue of the court, but the Supreme Court has restricted the proce-

⁹⁶ For example, it has been a long-stated rule that perjury—even admitted perjury—is not a basis for review under *coram nobis*. *People v. Drysch*, 311 Ill. 342, 143 N.E. 100 (1924). Nevertheless, there is authority in this state to the effect that equity will grant relief from a judgment where that judgment has been procured by means of perjury. *Seward v. Cease*, 50 Ill. 228 (1869); *Nicoloff v. Schnipper*, 233 Ill. App. 591 (1924). It has been held that relief by way of *coram nobis* will not lie based upon newly discovered evidence. *People v. Sheppard*, 405 Ill. 79, 90 N.E.2d 78 (1950); nevertheless, it has been held that a court of equity will set aside a judgment at law because of newly discovered evidence, provided that there was no lack of diligence in failing to discover the evidence sooner, and further provided that the evidence is material and would have produced a different result. *Crane Co. v. Parker*, 304 Ill. 331, 136 N.E. 733 (1922). The equitable relief mentioned above is sometimes in the form of an injunction restraining the execution of judgment, ILL. REV. STAT. ch. 69, § 4 (1959); but see *City of Chicago v. Chicago City Ry.*, 222 Ill. 560, 78 N.E. 890 (1906), or the grant of a new trial, *Crane Co. v. Parker*, *supra*, *Brown v. Luehrs*, 95 Ill. 195 (1880). In addition to the remedy to equitable relief from judgment, which should not be confused with the relief obtainable under a bill of review or a bill in the nature of a bill of review, there is the possibility that the grounds for relief and the relief obtainable under the latter two proceedings, while in some respects similar to *coram nobis*, may be sufficiently different so as to give the convicted person additional means of relief.

⁹⁷ See generally *supra* note 35.

⁹⁸ ILL. REV. STAT. ch. 79, § 165 (1959).

⁹⁹ 1 Ill. Laws 1943, at 844.

dures of taking changes of venue from the judge.¹⁰⁰ In *People v. Chambers*¹⁰¹ and *People v. Wilfong*,¹⁰² the court reaffirmed its position that a petition for change of venue from the judge because of his prejudice, is untimely when it is presented after the judge has ruled upon preliminary motions, such as motions to quash the indictment or information, or motions to suppress evidence, even when the defendant did not obtain knowledge of the prejudice until after the motions had been heard and determined. In addition, the court said in the *Chambers* case:

Although we do not believe that the circumstances herein warrant any such inference [that the defendant was endeavoring to prevent a trial before any judge], nevertheless we cannot give approbation to the apparent delaying tactics involved in the eleven continuances, extending over a period of more than a year, and in the fact that the defendant did not move to suppress the evidence until the day the case was finally set for trial and called even though that motion was predicated on facts known to him from the date of the indictment and could have been made at any time prior to the trial.¹⁰³

Thus notice was served that the court would look long and hard at petitions for changes of venue from the judge to determine whether or not they are merely subterfuges for gaining further delay of trial. Nevertheless, three cases in which changes of venue were denied in the trial courts were reversed upon review for such denial. *People v. Goss*,¹⁰⁴ was reversed when the trial court in a contempt case refused to grant a change of venue because the defendant had sought to get certain politicians to prevail upon the judge to transfer the matter to another judge for hearing, the Supreme Court saying:

From the record it appears that . . . this proceeding had bizarre aspects that made it unusually difficult for the trial judge to perform his task. But we are of the opinion that the judge's appraisal of the circumstances of this particular case should not have overridden the statutory provisions for a change of venue.¹⁰⁵

In reversing *People v. Gregory*,¹⁰⁶ the Appellate Court of Illinois for the Second District held that a petition presented on the day set

¹⁰⁰ ILL. REV. STAT. ch. 146, §§ 18-35 (1959).

¹⁰¹ 9 Ill.2d 83, 136 N.E.2d 812 (1956).

¹⁰² 17 Ill.2d 373, 162 N.E.2d 256 (1959).

¹⁰³ *People v. Chambers*, 9 Ill.2d 83, 91-92, 136 N.E.2d 812, 816 (1956).

¹⁰⁴ 10 Ill.2d 533, 141 N.E.2d 385 (1957).

¹⁰⁵ *Id.* at 548, 141 N.E.2d at 392.

¹⁰⁶ 16 Ill. App.2d 576, 149 N.E.2d 198 (1958).

for trial was timely where the act which was the basis for the information was alleged to have occurred on February 23, 1955, and the cause was first set for hearing on March 1, 1955, and then continued from time to time until June 9, 1955—the date upon which the petition for change of venue was presented. The court reiterated the law on the subject:

In a criminal case when a defendant in apt time brings himself within the terms of the statute, the trial judge has no discretion as to whether or not a change of venue will be granted. He must allow it as a matter of right. He cannot question the truthfulness or the good faith of the charge of prejudice. It is not for the judge to determine whether or not he entertains prejudice against the defendant, it is for the defendant to determine whether or not he believes that the judge is prejudiced. When the statute has been complied with the trial judge loses all power and authority over the case, except to make the necessary orders to effectuate a change of venue.¹⁰⁷

The last case on this subject is of special importance because it concerns a situation wherein there was no statutory right of the defendant for a change of venue. In *People ex rel. Przyblinski v. Scott*,¹⁰⁸ the defendants had been cited for contempt under the Election Code.¹⁰⁹ When the defendants, judges of election, first appeared before the trial judge, the county judge of Cook County, he said to them, as it is reported:

You cause criticism of our ability to run an honest election. You make me bow my head in shame. I was elected to do a job and I am doing the very best I can. I have to depend on persons I do not know to help me and you have let me down. . . . You have committed a serious offense.¹¹⁰

This, before trial had even commenced. The defendants promptly filed a petition for a change of venue; in denying it the judge said:

I am not prejudging this matter nor have I found the respondents guilty. It may be that I may find the respondents not guilty.¹¹¹

The Appellate Court of Illinois for the First District reversed the conviction, and in doing so stated:

¹⁰⁷ *Id.* at 582, 149 N.E.2d at 201.

¹⁰⁸ 23 Ill. App.2d 167, 161 N.E.2d 705 (1958), *aff'd*, 19 Ill.2d 500, 167 N.E.2d 194 (1960).

¹⁰⁹ ILL. REV. STAT. ch. 46, § 29-5 (1957).

¹¹⁰ *People ex rel. Przyblinski v. Scott*, 23 Ill. App.2d 167, 169, 161 N.E.2d 705, 706 (1958).

¹¹¹ *Ibid.*

A fair trial under due process of law requires an impartial judge free from personal conviction as to the guilt or innocence of the accused. . . . The respondents were entitled to a trial before a judge who had not formed an opinion as to their guilt. The statement of the trial judge at the time the respondents were arraigned before him indicates that he had formed an opinion as to their guilt.¹¹²

It is difficult to make any general observations about a field as broad as criminal procedure. It can be said, however, that the changes and the developments in this area have, without exception, been for the purpose of assuring the defendant and the prosecution a fair trial upon the merits of the case. The older hypertechnical rules are disappearing. In their place we find a body of law which, as was said by Mr. Chief Justice Schaefer, "has substituted . . . an interest in the significant rights of the litigants for a ritualistic concern with empty formalities."¹¹³

¹¹² *Id.* at 170, 161 N.E.2d at 706-07.

¹¹³ *People v. Hill*, 17 Ill.2d 112, 119, 160 N.E.2d 779, 783 (1959).

PART II

CHANGES IN SUBSTANTIVE CRIMINAL LAW

A. STATUTORY CHANGES

The single most important statutory change in the substantive law of crimes during the past decade should, perhaps, not even be considered a substantive change. The replacement, in 1955, of the Sexual Psychopath Act,¹ by the Sexually Dangerous Persons Act² was designed to provide "a means by which it may be determined whether a defendant's mental condition is such as to require him to plead to an indictment and be placed upon trial for the crime with which he is charged."³ Under both acts the trial on the question of mental disorder⁴ is no part of the prior criminal proceedings and is not determinative of guilt or innocence.⁵ And, under the old statute, at least,

¹ Ill. Laws 1st Spec. Sess. 1938, at 28.

² ILL. REV. STAT. ch. 38, § 820.01 (1959).

³ *People v. Capoldi*, 10 Ill.2d 261, 265, 139 N.E.2d 776, 778 (1957).

⁴ The term "mental disorder" used in the act obviously implies something other than insanity. Section 13 of division II of the CRIMINAL CODE provides for a jury trial on the merits where it appears that a person has become insane since the commission of an offense. ILL. REV. STAT. ch. 38, § 593 (1959). See text accompanying *infra* notes 169-173.

⁵ *People v. Capoldi*, 10 Ill.2d 261, 139 N.E.2d 776 (1957); *People v. Redlich*, 402 Ill. 270, 83 N.E.2d 736 (1949).

commitment as a sexual psychopath was not a bar to the trial of the defendant for the offenses charged.⁶ These features would seem to suggest that the statutes were and are substantially procedural in nature. Nevertheless, because of the fact that a petition under the act is apt to involve a denial of liberty, the practical effect of the statute is to provide new substantive law.

There are two substantial differences between the old statute and the Sexually Dangerous Persons Act. Section 1 of the new act⁷ defines as sexually dangerous those persons who suffer from a mental disorder which has existed for over a year, coupled with propensities to commit sex offenses, "and who have demonstrated propensities toward acts of sexual assault or acts of sexual molestation of children."⁸ Under the old act, it was unnecessary that the person charged have demonstrated any propensities toward sexual assault or acts of sexual molestation of children.⁹ It was merely necessary that he have criminal propensities to the commission of sex offenses. Thus it would appear, although no case has litigated the question, that under the old act a consensual sexual offense could serve as the basis for a proceeding under the act, while under the new act it would seem that a sexual crime of violence would be necessary.

Of greater importance, however, is the present provision furnishing appellate review of a determination under the act.¹⁰ Under the former

⁶ *People v. Elder*, 345 Ill. App. 607, 104 N.E.2d 120 (1952); see *People ex rel. Turnbaugh v. Bibb*, 252 F.2d 217 (7th Cir. 1958). Section 6 of the former act contained the express provision that the order discharging a person confined under the act from the custody of the Department of Public Safety shall also commit that person to the custody of the sheriff of the county from which he was committed "to stand trial for the criminal offense charged against such person." Ill. Laws 1st Spec. Sess. 1938, at 30, as amended by Ill. Laws 1941, at 551. It may be, however, that such prosecution will be barred if not brought within four months.

A conviction for the offense which forms the basis for a petition under the act voids all orders entered upon the petition. *People v. Redlich*, 402 Ill. 270, 83 N.E.2d 736 (1949).

⁷ ILL. REV. STAT. ch. 38, § 820.01 (1959).

⁸ *Ibid.*

⁹ Ill. Laws 1st Spec. Sess. 1938, at 28.

¹⁰ "The proceedings under this Act shall be civil in nature. The provisions of the Civil Practice Act including the provisions for appeal . . . shall apply to all proceedings hereunder except as otherwise provided in this Act." ILL. REV. STAT. ch. 38, § 822.01 (1959). Since the provisions of the Civil Practice Act pertaining to appeal do apply, an appeal from an order entered under this act should be taken to the Appellate Court, unless a fairly debatable constitutional question is presented by the appeal. *People v. Capoldi*, 10 Ill.2d 261, 139 N.E.2d 776 (1957).

act no appellate review was possible.¹¹ But the inclusion of a provision that proceedings under the act are to be civil in nature and that the provisions of the Civil Practice Act¹² are to apply to all such proceedings¹³ has caused some problems. In *People v. Nastasio*,¹⁴ the appellant had been indicted for a number of sex offenses. The State's Attorney filed a petition¹⁵ under the Sexually Dangerous Persons Act alleging that the defendant was a sexually dangerous person within the meaning of the act and praying for a hearing to determine the issue. The defendant demanded trial by a jury,¹⁶ which jury found that he was a sexually dangerous person. The defendant was committed to the custody of the Director of Public Safety for confinement and treatment.¹⁷

¹¹ See *People v. Ross*, 407 Ill. 199, 95 N.E.2d 61 (1950), wherein the Supreme Court held that because appellate review was not provided by the act, no appeal or writ of error would lie directly to the Supreme Court. Where the validity of a statute is in question the court can and will take jurisdiction. See *People v. Sims*, 382 Ill. 472, 47 N.E.2d 703 (1943), upholding the constitutionality of the Criminal Sexual Psychopath Act. See also *infra* note 186, discussing appellate review of sanity hearings. Following its discussion of when the court would take jurisdiction of a direct appeal in a case of this sort, the court transferred the case to the Appellate Court. *People v. Ross*, *supra*.

The Appellate Court for the Second District, *People v. Ross*, 344 Ill. App. 407, 101 N.E.2d 112 (1951), decided, however, that because of the absence of a provision in the statute providing for appellate review, it, too, lacked jurisdiction to review the case.

¹² ILL. REV. STAT. ch. 110, §§ 1-94 (1959).

¹³ ILL. REV. STAT. ch. 38, § 822.01 (1959).

¹⁴ 19 Ill.2d 524, 168 N.E.2d 728 (1960).

¹⁵ "When any person is charged with a criminal offense and it shall appear to the Attorney General or to the State's Attorney of the county wherein such person is so charged, that such person is a sexually dangerous person, within the meaning of this Act, then the Attorney General or State's Attorney of such county may file with the clerk of the court in the same proceeding wherein such person stands charged with criminal offense, a petition in writing setting forth facts tending to show that the person named is a sexually dangerous person." ILL. REV. STAT. ch. 38, § 822 (1959).

¹⁶ The new act specifically provides that "the respondent in any proceedings under this Act shall have the right to demand a trial by jury and to be represented by counsel." ILL. REV. STAT. ch. 38, § 824 (1959). The former act contained a provision entitling the respondent to a hearing before a jury to ascertain "whether or not the person charged is a criminal sexual psychopathic person." Ill. Laws 1st Spec. Sess. 1938, at 29, as amended by Ill. Laws 1941, at 551. It did not, however, specifically provide that the respondent had the right to be represented by counsel. Nevertheless, it would be hard to imagine that under the former act a respondent could be denied the right to be represented by counsel. *Cf. People v. Carpenter*, 13 Ill.2d 470, 150 N.E.2d 100 (1959).

¹⁷ The section providing that the Director of Public Safety "shall provide care and treatment for the person committed to him designed to effect recovery," is new. ILL. REV. STAT. ch. 38, § 825a (1959). The former act merely provided for commitment. Ill. Laws 1st Spec. Sess. 1938, at 28, as amended by Ill. Laws 1941, at 551.

Appealing directly to the Supreme Court,¹⁸ the defendant claimed that the admission in evidence of two depositions which had been taken in his absence violated his constitutional right "to appear and defend in person and . . . to meet the witnesses face to face. . . ."¹⁹

It was not necessary, however, for the court to reach the constitutional question.²⁰ The court reasoned that despite the fact that section 3.01 of the act²¹ provided that the provisions of the Civil Practice Act were to apply in proceedings under the act, those proceedings were essentially criminal in nature; and, in order "to interpret the statute as to promote its essential purposes and to avoid, if possible, a construction that would raise doubts as to its [constitutional] validity,"²² the court held that ". . . while the general structure of the Civil Practice Act has been adopted, the use of depositions taken out of the presence of the defendant has not been authorized."²³

The other changes in the act have not, to this date, been litigated, and do not, as yet, seem to be of as much significance as the changes discussed above. Section 4 of the old act,²⁴ providing for an examination by two psychiatrists, also provided that the psychiatrists should file with the court, in addition to their reports, their conclusions and recommendations. A section of the new act²⁵ omits the provision that the psychiatrists shall include with their reports their conclusions and recommendations, and provides that a copy of the reports shall be delivered to the respondent. This new provision is in substantial con-

¹⁸ Under the Civil Practice Act the respondent's appeal normally would have been directed to the Appellate Court of the district from which he was committed. ILL. REV. STAT. ch. 110, § 75 (1959). Because of the fact that the respondent raised a fairly debatable constitutional question, appeal lay directly to the Supreme Court. Compare *People v. Watkins*, 19 Ill.2d 11, 166 N.E.2d 433 (1960), and *supra* note 35, Part I, of this article.

¹⁹ ILL. CONST. art II, § 9.

²⁰ The fact that the court decides the issues on other than the constitutional grounds presented or argued does not defeat its jurisdiction, *City of Detroit v. Gould*, 12 Ill.2d 297, 146 N.E.2d 61 (1957); *People v. Metcoff*, 392 Ill. 418, 64 N.E.2d 867 (1946), for the court will not consider a constitutional question if the case can be decided without so doing, *People v. Chiafreddo*, 381 Ill. 214, 44 N.E.2d 888 (1942).

²¹ ILL. REV. STAT. ch. 38, § 822.01 (1959).

²² *People v. Nastasio*, 19 Ill.2d 524, 529, 168 N.E.2d 728, 731 (1960).

²³ *Ibid.* Note, however, the use of the qualifying words "out of the presence of the defendant."

²⁴ Ill. Laws 1st Spec. Sess. 1938, at 28.

²⁵ ILL. REV. STAT. ch. 38, § 823 (1959).

formity with other sections of the CRIMINAL CODE.²⁶ Of some note are the changes in release provisions. Under the former act release could only be obtained by a showing, to a jury, that the patient had *permanently* and *fully* recovered.²⁷ Under the new act provision is made for the *conditional* release, upon the petition of the Director of the Department of Public Safety, of the patient.²⁸ Also eliminated is the requirement of the old act that upon release the patient is to be committed to the custody of the sheriff of the county from which he was committed to stand trial for the offense with which he was charged prior to his commitment.²⁹

Although not technically part of the Sexually Dangerous Persons Act, a 1957 act of the Legislature is related thereto; it provides for a mandatory psychiatric examination of all persons of the age of seventeen or over who are charged with any sexual crime against a child under the age of thirteen.³⁰ The act is apparently meant to be a preli-

²⁶ See text accompanying *supra* notes 1-3, Part I, of this article.

²⁷ Both §§ 5 and 6 of the former act indicated this. Section 5 provided that the Department of Public Safety should keep a person committed "until such person shall have fully and permanently recovered from such psychopathy." Section 6 provided that the jury hearing the application for discharge shall "ascertain whether or not such person has fully recovered from such psychopathy." Ill. Laws 1st Spec. Sess. 1938, at 28, as amended by Ill. Laws 1941, at 551. (Emphasis added.) For the problems implicit in the use of these terms, see *People v. Kadens*, 399 Ill. 394, 78 N.E.2d 289 (1948), wherein the court held, in construing identical terms contained in 1 Ill. Laws 1947, at 585, that "... the words refer to the present time; that 'permanently' does not mean an absolute condition for all future time, but only that the condition to be found was full and permanent recovery at the present time, and that such condition was reasonably certain to continue. It is elementary that all law must be based on reason and to construe these words to mean absolute as to the future would be placing thereon an unreasonable construction." *Id.* at 400, 78 N.E.2d at 292.

²⁸ ILL. REV. STAT. ch. 38, §§ 825b, 825c (1959). The new act eliminates the use of the terms "fully" and "permanently" recovered, and provides that "if the patient is found to have recovered [upon the application for discharge] the Court shall order that he be discharged." ILL. REV. STAT. ch. 38, § 825b (1959).

Section 825c provides for a conditional release order permitting a patient "to go at large subject to such conditions and supervision by the Director as in the opinion of the court will adequately protect the public. In the event the person violates any of the conditions of such order, the court shall revoke such conditional release and recommit the person under the terms of the original commitment." ILL. REV. STAT. ch. 38, § 825c (1959).

²⁹ Ill. Laws 1st Spec. Sess. 1938, at 28, as amended by Ill. Laws 1941, at 551. The elimination of this provision from the present act strengthens the suspicion that commitment under the act may be a bar to the criminal proceedings which were the basis for the hearing under the act. See text accompanying *supra* note 5.

³⁰ ILL. REV. STAT. ch. 38, §§ 825f, 825g, 825h, 825i (1959).

minary step to the trial of these persons.³¹ Because of the possible conflict between this act and the constitutional proscription against self-incrimination,³² its constitutional validity is now being tested.³³

Although the foregoing statutory provisions enacted during the 1950's may be considered procedural because of the fact that they concern steps to be taken by the proper authorities prior to, or in lieu of, trial, they do represent the bulk of important substantive legislation enacted during the past decade. Very little was done in the way of enacting newer crimes as such. It must, of course, be realized that a great many crimes, or acts or omissions which are considered offenses against the People of the State of Illinois, are not found in chapter 38 of the Revised Statutes. These are most often the administrative crimes founded upon some other duty imposed by the statutes.³⁴ Changes in these provisions are not intended to fall within the scope of this review.

Prior to 1951, *simple* assault and battery in Illinois was punishable only by a fine. In 1951, however, the Legislature added a provision providing for the punishment and incarceration of persons found guilty of *aggravated* assault and battery.³⁵ Aggravated assault and battery is defined by this provision as the "unlawful and violent beating of another which results in severe personal injury." The phrase implies an injury of far more serious nature than that implied by an ordinary battery.³⁶ Punishment for aggravated assault and battery is set at one year imprisonment in the county jail, or a fine, or both.³⁷ Generally speaking the new offense may be considered to fall somewhere between simple assault, or assault and battery,³⁸ and mayhem,³⁹ or assault with intent to commit a felony.⁴⁰

³¹ Note that the act provides that trial shall be in a court of record. ILL. REV. STAT. ch. 38, § 825f (1959).

³² ILL. CONST. art. II, § 10.

³³ *People v. Ulrich*, No. 36343, Ill. Sup. Ct., May Term, 1961.

³⁴ See, e.g., ILL. REV. STAT. ch. 120, § 806 (1959).

³⁵ ILL. REV. STAT. ch. 38, §§ 562, 57 (1959).

³⁶ See *People v. Cavanaugh*, 18 Ill. App.2d 279, 152 N.E.2d 266 (1957), *aff'd*, 13 Ill.2d 491, 150 N.E.2d 592 (1958).

³⁷ ILL. REV. STAT. ch. 38, § 57 (1959).

³⁸ ILL. REV. STAT. ch. 38, §§ 55, 56 (1959).

³⁹ ILL. REV. STAT. ch. 38, § 448 (1959).

⁴⁰ ILL. REV. STAT. ch. 38, § 58 (1959). By ILL. REV. STAT. ch. 38, § 57 (1959), the law was also changed during the 1950's to increase the penalty for assault with intent to commit murder from one to fourteen years, to one to twenty years.

In 1941, the Supreme Court held that a defendant who was indicted for burglary could not be found guilty of attempted burglary⁴¹ by application of the general rule that "when an indictment for a higher crime embraces all the elements of an offense of an inferior degree the jury may discharge the accused of the higher crime and convict him of the lower if the evidence justifies it. . . ."⁴² This principle did not apply in the case referred to because the statute defining attempted burglary at that time⁴³ contained the added element, not found in the burglary statute, that the attempted burglary be committed in the nighttime. Nor did the general attempt statute⁴⁴ apply.⁴⁵ In *People v. Lebolt*,⁴⁶ however, the court decided that an indictment charging an attempt to commit burglary in the daytime could be founded upon the general attempt statute, since the specific statute provided for attempts to commit burglary at night, but it did not refer to attempts made in the daytime. In 1953, the Legislature removed the cause of this confusion by amending the statute pertaining to attempted burglary. The new statute omits any reference as to when the attempt must be made, thus bringing it into harmony with the burglary statute.⁴⁷

The entire structure of the laws relating to drugs and narcotics underwent a substantial revision in the 1950's. Sections 184 to 186g of chapter 38 were repealed in 1959 and replaced with the "Uniform

⁴¹ *People v. Glickman*, 377 Ill. 360, 36 N.E.2d 720 (1941). At that time § 85 of ch. 38 provided: "Whosoever shall attempt to break and enter *in the night time* . . . shall be imprisoned in the penitentiary not less than one nor more than five years." (Emphasis added.) Ill. Laws 1874, at 348.

⁴² *People v. Lewis*, 375 Ill. 330, 335, 31 N.E.2d 795, 798 (1940), and cases cited therein. But an attempt to commit a crime and the commission of a crime are separate and distinct offenses, *People v. Crane*, 302 Ill. 217, 134 N.E. 99 (1922), and require different elements of proof, *People v. Lardner*, 300 Ill. 264, 133 N.E. 375 (1921). It would be difficult to imagine, therefore, how an attempt could be a lesser included offense.

⁴³ Ill. Laws 1874, at 348.

⁴⁴ "Whoever attempts to commit any offense prohibited by law, and does any act towards it but fails, or is intercepted or prevented in its execution, *where no express provision is made by law for the punishment of such attempt*, shall be punished. . . ." ILL. REV. STAT. ch. 38, § 581 (1959). (Emphasis added.)

⁴⁵ Section 581 of ch. 38 is applicable only "where no express provision is made by law for the punishment of such attempt." See emphasized portion of *supra* note 44. Since § 85, at that time punished attempted burglary in the nighttime, no prosecution for attempted burglary in the nighttime could be laid under the general attempts statute. Prosecution of such an offense was strictly limited to the specific statute. ILL. REV. STAT. ch. 38, § 85 (1959).

⁴⁶ 5 Ill.2d 399, 126 N.E.2d 833 (1955).

⁴⁷ ILL. REV. STAT. ch. 38, §§ 84, 85 (1959).

Drug, Device and Cosmetic Act.”⁴⁸ The new act regulates a wider range of practices than the former act, and contains a great many changes which need not be discussed herein. In 1957, the Legislature repealed the Uniform Narcotic Drug Act,⁴⁹ and replaced it with a new uniform act,⁵⁰ which also expands greatly the area formerly covered. The definition of a “narcotic drug” is enlarged, apparently in order to keep pace with modern science.⁵¹ The act pertaining to the registration of drug addicts⁵² was repealed, and a provision included in the uniform act proscribing drug addiction.⁵³ The new act also contains provisions for the forfeiture of vehicles used in narcotics traffic or used to facilitate narcotics traffic.⁵⁴

The principal change wrought by the new act, however, is in the area of punishment. Generally speaking, possession under the prior act, if it was a first offense, was a misdemeanor.⁵⁵ The new act, with certain exceptions,⁵⁶ makes every violation a felony,⁵⁷ provides severe

⁴⁸ ILL. REV. STAT. ch. 38, §§ 186.1–.51 (1959).

⁴⁹ Ill. Laws 1955, at 1424–29.

⁵⁰ ILL. REV. STAT. ch. 38, §§ 192.1–1 to –.28–44 (1959).

⁵¹ ILL. REV. STAT. ch. 38, § 192.28–2.17 (1959).

⁵² Ill. Laws 1953, at 355.

⁵³ ILL. REV. STAT. ch. 38, § 192.28–3 (1959).

⁵⁴ ILL. REV. STAT. ch. 38, §§ 192.28–25 to –.28–32 (1959). Section 25 provides for confiscation and forfeiture to the state; § 26 for disposition until forfeiture is declared; § 27 for notice and disposition in the event of default; § 28 for a hearing on the verified answer of the claimant; § 29 for the protection, in certain cases, of the interests of mortgagees and lienholders in the event of forfeiture; § 292 for judicial review under the provisions of the Administrative Review Act; § 30 for sale after forfeiture; § 31 for disposition of proceeds after sale; and § 32 for methods of payment, security for lienholders, and use of the forfeited vehicle by the Division of Narcotic Control to enforce provisions of the act.

⁵⁵ Former § 23 (now § 192.23) provided for a fine *or* imprisonment for a term of from one to five years, or both, for a first offense of possessing. For a second offense punishment was *in the penitentiary* for any term from two years to life. Any selling offense was punishable by a term of from two years to life. Ill. Laws 1953, at 1531–32.

⁵⁶ Section 38 provides that whoever violates the act by being under the influence or addicted to any narcotic drug shall be imprisoned for a period of not less than ninety days or more than one year. It is also provided that multiple punctures from a hypodermic needle shall be *prima facie* proof of addiction. Probationary release of an addict is permitted, after service of at least ninety days sentence. ILL. REV. STAT. ch. 38, § 192.28–38 (1959). This section also contains provisions for punishment of certain persons who violate certain sections of the act pertaining to the licensed use, possession, and dispensing of narcotics. These also are misdemeanors.

⁵⁷ Soliciting, encouraging, endorsing, or initiating any person under the age of twenty-one with the intent that such person shall violate any provision of the act is punishable by from two to five years imprisonment in the penitentiary. Selling, pre-

penalties for subsequent violations,⁵⁸ and denies even a first offender charged with selling or dispensing, the right to probation.⁵⁹ Further-

scribing, administering, or dispensing in violation of the act is punishable by imprisonment in the penitentiary for any term of from ten years to life. Acquiring drugs by fraud or deceit is punishable by imprisonment in the penitentiary for a period of from one to three years for each offense, and each violation is a separate offense. Possessing, controlling, manufacturing, or compounding a narcotic drug in violation of the act is punishable by a fine and imprisonment for from two to ten years. ILL. REV. STAT. ch. 38, § 192.28-38 (1959).

⁵⁸ The second offense of selling, etc., is punishable by a life sentence. The second offense of possessing, etc., is punishable by imprisonment in the penitentiary for any term from five years to life. *Ibid.* Section 38c, in harmony with the Habitual Criminal Act, see text accompanying *supra* note 87, Part I, of this article, provides for pleading and proving prior offenses. ILL. REV. STAT. ch. 38, § 192.28-39 (1959).

In *People v. Shamery*, 415 Ill. 177, 112 N.E.2d 466 (1953), the defendant, previously convicted in 1937 of unlawful possession, and sentenced under the provisions in effect at that time to ninety days in the House of Correction, raised the issue of whether his subsequent conviction for possession was a subsequent offense under the statute calling for increased penalties. (The 1951 Act, in effect at the time of the defendant's conviction, provided for the same punishment for a first offender as the 1953 Act. Ill. Laws 1953, at 1531.) For a subsequent offense the act provided that the violator should be imprisoned in the penitentiary for any term from two years to life. The act further contained a provision that any "offense under this act shall be deemed a subsequent offense if the violator shall have been previously convicted of an offense under this Act or of a felony under any law of the United States of America, or of any State or Territory or of the District of Columbia relating to narcotic drugs." The defendant contended this his prior conviction, under the act in effect in 1937, was only for a misdemeanor. As noted above, first possession offenses even under the 1951 and 1953 Acts were misdemeanors. See ILL. REV. STAT. ch. 38, § 585 (1959). The court held that the felony provision in the proviso pertaining to increased penalties related only to convictions under the laws of the United States or any other State or Territory or the District of Columbia; any prior Illinois violation would make the increased penalty provision applicable. This was clear, the court said, because: "The first offense, if committed in Illinois, could not be a felony and the subsequent offense provision could never operate if defendant's construction were true." *Id.* at 181, 112 N.E.2d at 468. See also *People v. Tillman*, 1 Ill.2d 525, 116 N.E.2d 344 (1954).

The present Act removes this problem by providing: "An offense under this Act is a subsequent offense if the violator has been previously convicted of an offense under this Act or any previous Act of this State relating to narcotic drugs. . . ." ILL. REV. STAT. ch. 38, § 192.28-38 (1959).

It is interesting to note that the receiving-stolen-property statute follows the policy expressed by the new Uniform Narcotic Drug Act insofar as increased penalties are involved by providing that any person who receives stolen goods ". . . from any person known to be a narcotic addict, shall be imprisoned in the penitentiary for the first offense for a period of not less than five years nor more than fifteen years and for any subsequent offense shall be imprisoned in the penitentiary for a period of not less than ten years nor more than fifteen years." This is in substantial contrast to the preceding paragraph of the same section, which makes receiving goods worth over \$50 punishable by from one to ten years, and receiving goods worth less than \$50 punishable by a fine and imprisonment in the county jail for a period not exceeding one year. ILL. REV. STAT. ch. 38, § 492 (1959).

⁵⁹ ILL. REV. STAT. ch. 38, § 192.28-38 (1959). Probation is denied any violator convicted of any subsequent offense.

more, section 38 of the act proscribes the dispensing, selling, etc. of any non-narcotic substance under the guise that it is a narcotic. The act also contains provisions for the supervision and control of narcotics addicts.⁶⁰

Also enacted in 1957 was a provision forbidding electronic eavesdropping.⁶¹ The act prohibits ". . . the use of any device employing electricity to hear or record, or both, all or any part of any oral conversation . . . without consent of any party thereto, whether such conversation is conducted in person or by telephone."⁶² Evidence gained by a violation of the act is not admissible in any criminal trial, or legislative or administrative proceeding, or grand jury proceeding.⁶³ The act also prohibits the divulging of any information known to be obtained in violation of the act.⁶⁴ It will be interesting to observe the degree of enforcement of this act.⁶⁵

The Illinois Shop-Lifting Act,⁶⁶ enacted in 1957, was designed to give merchants added protection from shop-lifters and to provide a defense to any civil action arising out of the reasonable detention, by the merchant or his agent, of a suspected shop-lifter.⁶⁷

The law of bribery has been materially changed. Heretofore the rule has been, as set out in *People v. Peters*,⁶⁸ that the offense of bribery is not complete unless both parties to the transaction act from a corrupt motive. In *People v. Lyons*,⁶⁹ the court overruled the *Peters* case and held that a reasonable construction of the statutes requires that any person who corruptly engages in such a transaction is guilty of bribery regardless of the motive of the other party.

An interesting change has taken place in the area of the law regarding thefts. In 1951, the Legislature raised the dividing line between larceny and petit larceny to fifty dollars.⁷⁰ It was not until 1953 that the amount was increased to an equal figure in cases of receiving stolen goods.⁷¹ Then, in 1959, the boundary, insofar as larceny was concerned, was raised to three hundred dollars.⁷² Thus far the receiving

⁶⁰ *Ibid.* See *supra* note 56, Part II, of this article. See also ILL. REV. STAT. ch. 38, §§ 192.33-37 (1959), regulating the sale and possession of hypodermic syringes and needles.

⁶¹ ILL. REV. STAT. ch. 38, §§ 206.1-5 (1959). ⁶⁷ ILL. REV. STAT. ch. 38, § 252.2 (1959).

⁶² ILL. REV. STAT. ch. 38, § 206.1 (1959). ⁶⁸ 265 Ill. 122, 106 N.E. 513 (1914).

⁶³ ILL. REV. STAT. ch. 38, § 206.3 (1959). ⁶⁹ 4 Ill.2d 396, 122 N.E.2d 809 (1954).

⁶⁴ ILL. REV. STAT. ch. 38, § 206.4 (1959). ⁷⁰ Ill. Laws 1951, at 180.

⁶⁵ See DASH, THE EAVESDROPPERS (1960). ⁷¹ Ill. Laws 1953, at 353.

⁶⁶ ILL. REV. STAT. ch. 38, §§ 252.1-4 (1959). ⁷² ILL. REV. STAT. ch. 38, § 389 (1959).

statute has not caught up with the inflationary principles which motivated the amendment of the larceny statute.⁷³ Therefore, by reason of the differences in the respective amounts required by the larceny and stolen goods statutes for a felony, a first offender⁷⁴ who steals property worth \$299.99 is a misdemeanor; but one to whom he sells the property, and who receives it knowing that it was stolen, although also a first offender,⁷⁵ is a felon.

An act passed in 1951 providing a penalty for preventing a person in custody from consulting with an attorney or notifying his family of the fact that he is so held⁷⁶ appears to be as doomed to oblivion as the eavesdropping statute. There is some evidence that the practice of the local law enforcement agencies is still to spirit away suspects in "hot" cases from one district to another in order to avoid their communicating with their attorneys.⁷⁷ It appears that the Legislature has deemed

⁷³ ILL. REV. STAT. ch. 38, § 492 (1959).

⁷⁴ ILL. REV. STAT. ch. 38, § 393 (1959), provides increased penalties for repeated petit larcenies by persons over the age of eighteen years, and for third offenses by any person.

⁷⁵ ILL. REV. STAT. ch. 38, § 493 (1959), also provides increased penalties for subsequent offenses of receiving stolen property.

⁷⁶ ILL. REV. STAT. ch. 38, § 449.1 (1959); *cf.* ILL. REV. STAT. ch. 38, § 477 (1959).

⁷⁷ The following example, adapted from an actual case, is illustrative:

Q. . . . Did you have occasion to go to the Blank Street Police Station while acting in that capacity? [as the accused's attorney]

A. I did.

Q. And at approximately what time did you arrive at the Blank Street Police Station?

A. About 7:30 in the evening.

. . . .

A. . . .

I greeted them [members of the accused's family], immediately went to the sergeant's desk, presented my card, my professional card, stated that I was X's attorney and I wished to see him.

. . . .

Q. Will you tell us who you spoke to?

A. I spoke to a man in the uniform of the Police Department behind the sergeant's desk.

. . . .

A. I said [to him] that I'm X's attorney and I wished to see him immediately.

Q. What did he say?

A. He said—the man at the desk, that I directed my remark to and handed the card to, handed it back to me and said, "You'll have to see the Captain, counsel." I said, "Where is his office, please?" He said, "Right across the room."

. . . .

Q. Did you have a conversation with Captain Y?

A. Yes, I did.

Q. Was anyone else present when you had this conversation?

this same action to be a crime, and some effort ought to be made to comply with the dictates of the Legislature.

Substantial changes were wrought by the 1953 Legislature in the statute defining perjury. Strictly speaking the changes were made in the nature of the allegations that are necessary in an indictment for

A. There was another man in Captain *Y*'s office.

Q. Do you know the name of the other man in the office, Mr. *Z*?

A. I do not.

Q. All right. And what did you say to Captain *Y* and what did he say to you, if anything?

A. I asked him if he were Captain *Y*, the commanding officer of the district. He said that he was. I handed him my professional card and said, "I am *X*'s lawyer and I wish to see him immediately, Captain." He said, "You'll have to wait a minute, Mr. *Z*."

....

A. I stepped out of the Captain's office into the ante-room and sat at the edge of a desk about six feet from the Captain.

A. [After leaving the ante-room for a few minutes] the next thing that occurred was that I again went into Captain *Y*.

Q. Then you had another conversation with him at that time?

A. I did.

Q. Who was present at that conversation?

A. That same gentleman whose name I don't know.

Q. What did you say to Captain *Y* and what did Captain *Y* say to you, if anything?

....

A. I said, "Captain *Y*, if I'm to be of any professional use to *X*, I must see him at once." Captain *Y* said to me, "Mr. *Z*, I have a lawyer, too,—that's *A* of the State's Attorney's office—and I have put in a call for him. I can't let you see *X* without the okay of Mr. *A*."

....

Q. Then you say you went out to the *X* family. Did you then return back to the ante-room or to the office of Captain *Y*?

A. I did. I returned to the ante-room within about a minute.

Q. All right. When you got to the ante-room, what did you observe, insofar as Captain *Y* and the other gentleman with him were concerned?

A. Captain *Y* was still sitting on his desk and this other gentleman was still on the telephone.

Q. Did you have another conversation with Captain *Y* at that time?

A. I sat on the edge of the desk and called into the Captain, "Have you been able to reach *A*?"

....

He said, "Not yet counsel," and closed the door between his office and the ante-room.

Q. Did you then remain in the ante-room, Mr. *Z*, from that time on?

A. I remained there for several more minutes and smoked a cigarette.

....

A. I had stepped out of the ante-room, conversed with the *X* family and was standing in the sergeant's room when Captain *Y* emerged from his office in the ante-room and walked across the sergeant's room.

Q. And did you note where he went, when he walked across the sergeant's room?

A. He walked to the rear of the sergeant's room and through the door into some other area of the station.

Q. Did you have any conversation with Captain *Y* at that time, as he passed through?

A. I said, "What about it, Captain? Can I see him?"

Q. And then, when he disappeared beyond the door into the ante-room or, rather,

perjury,⁷⁸ and the evidence sufficient for a conviction.⁷⁹ Prior to 1953, it was necessary, in an indictment for perjury arising out of two contradictory statements, to allege in the indictment which statement was false.⁸⁰ At times this imposed a burden upon the prosecution. The rule was changed to provide

. . . that in every indictment for perjury where the falsity is based upon the giving of contradictory statements under oath . . . , it shall be sufficient to allege the making of such contradictory statements or the giving of such contradictory testimony, without alleging which statement or testimony is true, or which is false, but it shall be sufficient to allege in the alternative that one or the other was false, and given or made corruptly and wilfully.⁸¹

Prosecution under such an indictment is made effective by the further provision that “. . . falsity shall be presumptively established by proof

the squad room, how long before he emerged again?

A. He returned again after several minutes. I cannot say precisely.

Q. Did you have a conversation with him at that time?

A. Again I asked him if I could see the boy.

Q. And what response did Captain Y make?

A. He did not respond to me but continued walking through the ante-room into his office and closed the door.

Q. Did you have any other conversations on this evening with Captain Y after this last one you have just testified to?

A. Over a period of about an hour to an hour and fifteen minutes—I would say an hour and fifteen minutes—the Captain emerged from his office, walked through the sergeant's room, disappeared into the rear room and re-emerged and walked through the sergeant's room and back through the ante-room and into his office at least a dozen times. On every one of those occasions, excepting, at the most two, I asked him if I could see X now.

Q. And what was his response to your request?

A. “In just a little while.”

Q. When did you have your last conversation with Captain Y . . . at the Police Station?

A. At about a quarter to nine.

Q. And who was present at that conversation?

A. The Captain and I were alone.

Q. And where did this conversation take place?

A. It took place in the assembly room behind the sergeant's room, the Captain having come into the sergeant's room and motioned me to follow him, which I did. And inside the assembly room he informed me, he said to me, “Mr. Z, the X boy has been taken down to the State's Attorney's office. The State's Attorney told me that I was not to permit you to see him and he is gone from the station.”

⁷⁸ ILL. REV. STAT. ch. 38, § 475 (1959).

⁷⁹ ILL. REV. STAT. ch. 38, § 475a (1959).

⁸⁰ See *People v. Berry*, 309 Ill. 511, 141 N.E. 132 (1923): “. . . [A]n indictment for perjury or subornation of perjury is sufficient, if it sets forth the substance of the offense charged . . . and that the testimony charged to have been given was false.” *Id.* at 513, 141 N.E. at 133. (Emphasis added.)

⁸¹ ILL. REV. STAT. ch. 38, § 475 (1959).

that the defendant has given such testimony or made such statements under oath on occasions in which an oath is required by law, without proving which statement or testimony is true, or which is false."⁸² This section does provide, however, that if the contradictory testimony is in the same trial, a subsequent admission by the witness, in that trial, that his prior contradictory testimony was untrue, coupled with a recitation of the truth during that trial shall be a complete defense to prosecution for perjury insofar as the truthful testimony has corrected the prior contradictory testimony.

A most significant statutory enactment of the 1950's is that providing for the granting of immunity from prosecution or punishment of material witnesses called to testify before a grand jury or in a criminal prosecution.⁸³ Here again the authors may be encroaching upon the realm of procedural law, for the act is designed as an aid to prosecution and investigation. But the act also contains provisions for the protection of substantive rights, and, for the recalcitrant witness who has been provided these rights and protections, a provision for punishment.⁸⁴ Immunity acts in general have already been too thoroughly commented upon for the authors to try to do so here,⁸⁵ so also have the federal law and cases interpreting the federal law.⁸⁶ But the Illinois act, as it attempts to complement the federal act,⁸⁷ has generated important problems, and these should most certainly be considered.

The immunity statute enacted in 1953 was not essentially a novel provision in Illinois law. Generally it follows the procedure set forth by other, existing acts.⁸⁸ Wherever testimony of a material witness,

⁸² ILL. REV. STAT. ch. 38, § 475a (1959).

⁸³ ILL. REV. STAT. ch. 38, § 580a (1959).

⁸⁴ The act provides that any witness who has been granted immunity and refuses to testify or otherwise give evidence "may be punished for contempt of the court and sentenced to the county jail for not more than two years." *Ibid.* Note that normally contempt of court is punished under ILL. REV. STAT. ch. 38, § 600 (1959), which provides for a fine and a maximum jail sentence of one year. See *Beattie v. People*, 33 Ill. App. 651 (1889).

⁸⁵ Rogge, *Compelling the Testimony of Political Deviants*, 55 MICH. L. REV. 163 (1956); Comment, 26 U. CHI. L. REV. 164 (1958).

⁸⁶ Thompson, *Self-Incrimination and the Two Sovereignities Rule*, 49 J. CRIM. L., C. & P.S. 240 (1958); Comment, 46 J. CRIM. L., C. & P.S. 673 (1956).

⁸⁷ 18 U.S.C.A. § 3486 (Supp. 1960).

⁸⁸ The act granting immunity to certain witnesses in bribery prosecutions, ILL. REV. STAT. ch. 38, § 82 (1959), dates back to 1874, and the immunity section, ILL. REV. STAT. ch. 38, § 245 (1959), of the act pertaining to the obtaining of money to settle employ-

called by the prosecution either before a grand jury or in a criminal prosecution, would tend to incriminate that witness, the court may, on motion of the State's Attorney, order "... that such witness be released from all liability to be prosecuted or punished on account of any transaction, matter or thing concerning which he may be required to testify or produce evidence, documentary or otherwise. . . ." ⁸⁹ The order called for by the act operates as a bar to any prosecution of the witness for any crime shown by such testimony or evidence, except perjury arising therefrom. The act further provides that if it reasonably appears to the court that the testimony or evidence sought would subject the witness to prosecution under the laws of another state or the United States, the court shall refuse to grant the order.

The latter provision is novel to Illinois law, and is significant in that it grants protection which the Legislature need not constitutionally provide. ⁹⁰ Indeed, were the statute to grant immunity from federal prosecution in return for a witness's testimony, it would no doubt be ineffectual. ⁹¹ The interpretation of this provision, however, has caused some disagreement as to its meaning. In *People v. Burkert*, ⁹² the State's Attorney of Lake County procured an order granting a recalcitrant witness immunity in return for his testimony before a grand jury investigating vice and gambling. The court, in its order, provided that the respondent should not be required to give any testimony relating to certain matters, upon the respondent's testimony that he might be subject to federal prosecution for certain acts or omissions based upon disclosure of those matters. The respondent was taken before the grand jury and interrogated, and the interrogation was limited in conformity with the court's order. The respondent refused to answer the

ment disputes, ILL. REV. STAT. ch. 38, §§ 242-46 (1959), extends back to 1921. Outside of the CRIMINAL CODE, the immunity section, ILL. REV. STAT. ch. 120, § 453.10a (1959), of the Illinois Cigarette Tax Act, ILL. REV. STAT. ch. 120, §§ 453.1-30 (1959), has been in effect since 1945.

⁸⁹ ILL. REV. STAT. ch. 38, § 580a (1959).

⁹⁰ *Twining v. New Jersey*, 211 U.S. 78 (1908); *People v. Burkert*, 7 Ill.2d 506, 131 N.E.2d 495 (1955); *Annot.*, 38 A.L.R.2d 257, 267 (1954). The federal government can provide immunity from state prosecution. *Brown v. Walker*, 161 U.S. 591 (1896); *Ullman v. United States*, 350 U.S. 422 (1956). It must, of course, recognize the privilege against self-incrimination and provide immunity from federal prosecution if it wishes to compel testimony from a witness. U.S. CONST. amend. V. See Thompson, *supra* note 86, at 249.

⁹¹ U.S. CONST. art. VI, para. 2 (supremacy clause).

⁹² 7 Ill.2d 506, 131 N.E.2d 495 (1955).

questions and, upon petition by the State's Attorney, was held in contempt. On review, the Illinois Supreme Court held that the effect of the qualifying provision of the Illinois statute was to give a witness the protection of the fifth amendment as well as the protection of the applicable section of the Illinois Constitution.⁹³ In considering the federal cases on the subject of the type of inquiry which may be self-incriminating and the circumstances under which a witness may refuse to answer these questions, the court adopted the principle that

... to sustain the privilege it need only be evident from the implication of the question in the setting in which it is asked that a responsive answer to the question, or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result, and that consequently the privilege included answers that might furnish a link in the chain of evidence needed to prosecute the witness for a Federal crime.⁹⁴

Hence, the court concluded, the witness could refuse to answer questions unless it was "perfectly clear" that his answers could not possibly have a tendency to incriminate him under the Federal law, and the order granting immunity was not in conformity with the statute and was void.⁹⁵

B. CASE LAW CHANGES

No more fruitful source of the new case law is to be found than in those cases involving alleged unlawful searches and seizures. And, because each case involving a search and seizure invariably raises the contention that the trial court erred in denying the defendant's motion to suppress certain evidence taken from the defendant in violation of, and contrary to, sections 6 and 10 of the Constitution of the State of Illinois,⁹⁶ a great body of constitutional law has been generated by

⁹³ ILL. CONST. art. II, § 10.

⁹⁴ *People v. Burkert*, 7 Ill.2d 506, 515-16, 131 N.E.2d 495, 499-500 (1955).

⁹⁵ "We believe therefore, that he was properly entitled to the protection against self incrimination afforded by the terms of the Illinois Witness Immunity Act, and the immunity order issued was not in accordance with the statute and was therefore void. Hence defendant's refusal to answer any of the questions where there was no immunity whatever granted could not be deemed a contempt of court." *Id.* at 518, 131 N.E.2d at 501.

⁹⁶ Every practicing lawyer seems to delight in alleging violations of every one of the defendant's constitutional rights. As a result, the usual motion to suppress includes not only allegations that the search and seizure were contrary to §§ 6 and 10 of article II of the Illinois Constitution, but also allegations that the acts complained of violated the fourteenth amendment to the Constitution of the United States. One can never tell when he may have a *Rochin* case on his hands. *Rochin v. California*, 342 U.S. 165 (1952). Theoretically, however, the only proper allegation, insofar as the Illinois

each new search and seizure case. The theory encompassed by the "exclusionary rule" in Illinois is not new; it extends back into the early 1920's,⁹⁷ and only recently has again been reaffirmed by the court.⁹⁸

Perhaps the most interesting phenomenon of the past decade, insofar as the law of search and seizure is concerned, is the fact that there has been only one reported decision of any importance involving the validity or use of a search warrant.⁹⁹ In *People v. Dolgin*,¹⁰⁰ a warrant issued authorizing a state highway policeman to search for bogus cigarette tax stamps and the tools for making them. The warrant was based on a complaint which stated, in part, that the basis for believing that the stamps were contained in the place sought to be searched was that the affiant had purchased cigarettes with bogus stamps affixed at

Constitution is concerned, is that the search and seizure violated § 6 of article II of that constitution. *People v. Mayo*, 19 Ill.2d 136, 166 N.E.2d 440 (1960); *City of Chicago v. Lord*, 3 Ill. App.2d 410, 122 N.E.2d 439 (1954), *aff'd*, 7 Ill.2d 379, 130 N.E.2d 504 (1955). This conclusion served, in the *Mayo* case, as the basis of the court's rejection of an argument that a motion to suppress contraband cannot lie, even where the property is admittedly illegally seized, because (1) an accused must have an interest in property before he can petition for its suppression, *People v. Kalpak*, 10 Ill.2d 411, 140 N.E.2d 726 (1957); *People v. Perry*, 1 Ill.2d 482, 116 N.E.2d 360 (1954); (2) the admission in evidence of property cannot incriminate a person unless he owns the property; and (3) since no one can be the owner of contraband, no one can be incriminated by its admission into evidence, whether or not it was unlawfully seized. *People v. Mayo*, 19 Ill.2d 136, 166 N.E.2d 440 (1960).

Nor can an accused be forced to incriminate himself by his motion to suppress where the prosecution relies on possession of contraband, see, e.g., ILL. REV. STAT. ch. 38, § 192.28-3 (1959), as a basis for conviction. In such a case it is not necessary for the defendant to allege possession. *People v. Mayo*, 19 Ill.2d 136, 166 N.E.2d 440 (1960); *but see* *People v. Savanna Lodge No. 1095*, 344 Ill. App. 278, 100 N.E.2d 632 (1951). Thus, an effective way of avoiding incriminating statements regarding possession in a motion to suppress is illustrated in the following example:

"Your petitioner further represents that he has been informed and he believes that certain police officers of the City of Chicago will testify in the trial of the above entitled cause that on [date] they arrested your petitioner and took from his person certain purported narcotics.

"Your petitioner further represents that he is informed and he believes that the hereinafter described narcotics are now in the possession of the Police Department of the City of Chicago, and that the People of the State of Illinois intend to introduce them in evidence in the trial of the above entitled cause."

Of course, allegations of why such evidence would be inadmissible must also be included in the motion.

⁹⁷ *People v. Brocamp*, 307 Ill. 448, 138 N.E. 728 (1923); *People v. Castree*, 311 Ill. 392, 143 N.E. 112 (1924).

⁹⁸ *People v. Mayo*, 19 Ill.2d 136, 166 N.E.2d 440 (1960).

⁹⁹ The procedure for obtaining a search warrant and the matters for which a warrant may issue are set forth in ILL. REV. STAT. ch. 38, §§ 691, 692 (1959). And, see ILL. CONST. art. II, § 6.

¹⁰⁰ 415 Ill. 434, 114 N.E.2d 398 (1953).

various establishments, five of which exclusively purchased their cigarettes from the place sought to be searched, for a period of six weeks—the last time forty-nine days prior to the date the complaint for the warrant was sworn out. The court rejected the contentions of the defendant that a state highway police officer was not authorized by the statute to execute the warrant and that the period of delay between the date of the last purchase of cigarettes and the date on which the complaint was sworn out vitiated the warrant. As to the last contention, the court held that since the complaint stated that the wholesaler had made deliveries of cigarettes bearing bogus stamps over a period of six weeks, the magistrate could reasonably believe that this was a continuing offense and thus it was not unreasonable to conclude that the contraband was, at the time of the complaint, still on the premises.

There have been during the last decade, however, as many important decisions involving searches without warrants as there have been few decisions concerning the validity of warrants. And for a time it seemed as though the only limits that could or would be placed on the right to search without a warrant were the natural limits of an officer's ingenuity. It all began with a parking violation.¹⁰¹ Late one evening three police officers assigned to the gambling detail observed the defendant park his automobile on the street.¹⁰² The officers stopped the defendant and one of them measured the distance of the automobile's wheels from the curb.¹⁰³ The front wheels were found to exceed the permissible distance by nine inches and the rear ones by six inches.¹⁰⁴ The officers then saw some papers protruding about two inches from the defendant's rear pockets and asked him what they were.¹⁰⁵ When the defendant replied, "policy slips," an officer withdrew them, taking care not to place his hand inside the defendant's pocket.¹⁰⁶ The officers then searched the defendant's car and discovered other policy paraphernalia therein. The defendant was then formally charged with the possession of policy slips. The assignment of error that the defendant had been subjected to an unreasonable search and seizure in violation of the constitution was based upon the assumption that he had not been arrested until after the policy slips had been discovered in his possession. The court, in *People v. Clark*,¹⁰⁷ held, however, that a valid arrest had pre-

¹⁰¹ *People v. Clark*, 9 Ill.2d 400, 137 N.E.2d 820 (1956).

¹⁰² *Id.* at 403, 137 N.E.2d at 822.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ 9 Ill.2d 400, 137 N.E.2d 820 (1956).

ceded the search of the defendant. Starting with the statutory authority for an arrest without a warrant,¹⁰⁸ and continuing with the proposition that the authority to arrest without a warrant for a criminal offense included misdemeanors, *i.e.*, traffic offenses, as well as felonies,¹⁰⁹ the court concluded that if the defendant had violated a municipal parking ordinance in the presence of the officers they had a right to arrest him without a warrant. And then the "bomb" fell: "Where the arrest is justified, for whatever cause, the accompanying search is also justified."¹¹⁰

The technique affirmed by the *Clark* case was employed in varying ways¹¹¹ for approximately three and one-half years. Then it ceased the same way it had begun, with an arrest for a parking violation and the subsequent discovery of policy slips. In *People v. Watkins*¹¹² the court re-examined its decision in the *Clark* case. Watkins, like his predecessor, was negligent in parking his car; he parked it too close to a crosswalk. The arresting officers, observing this, waited for Watkins, whom they knew from prior arrests which they had made, to reappear from the building which he had entered. When Watkins did reappear, he saw the officers and then ran back into the building. Thereafter, the officers arrested the defendant and, upon searching him, discovered the policy slips. The court, in announcing its decision to re-examine the *Clark* decision, reaffirmed the several principles which resulted in that decision. "But," the court said, "when they are combined, transplanted, and used to govern the interpretation of the constitution, they produce an improper result."¹¹³ Hereafter, the court would examine the nature of the offense for which the defendant was arrested and the

¹⁰⁸ ILL. REV. STAT. ch. 38, § 657 (1959). An arrest without a warrant may be made by an officer for a criminal offense committed or attempted in his presence.

¹⁰⁹ In *People v. Edge*, 406 Ill. 490, 94 N.E.2d 359 (1950), the court held that an arrest for two municipal ordinance violations (obstructing an alley and not having a motor vehicle safety-inspection certificate) would sustain a subsequent search, even though the defendant was acquitted of the ordinance violation charge.

¹¹⁰ *People v. Clark*, 9 Ill.2d 400, 404, 137 N.E.2d 820, 822 (1956). See also *People v. Tabet*, 402 Ill. 93, 83 N.E.2d 329 (1948).

¹¹¹ *People v. Berry*, 17 Ill.2d 247, 161 N.E.2d 315 (1959) (Defendant's car did not have license plates or city sticker); *People v. Esposito*, 18 Ill.2d 104, 163 N.E.2d 487 (1959) (Two men driving down street in automobile with unlighted rear license; when police stopped them, passenger ran away).

¹¹² 19 Ill.2d 11, 166 N.E.2d 433 (1960).

¹¹³ *Id.* at 18, 166 N.E.2d at 436.

surrounding circumstances to determine whether the search was warranted.¹¹⁴ Applying this standard the court concluded that a

. . . minor traffic offense that ordinarily results in a "parking ticket" hung on the handle of the door of the car, telling the offender that it is not necessary to appear in court if he mails in the amount of his fine . . . does not, in itself, raise the kind of inferences which justify searches in other cases.¹¹⁵

To that extent the *Clark* case and *People v. Berry*¹¹⁶ were overruled. But the court did not hold that no traffic offense would justify a search,¹¹⁷ and to that extent *Watkins* was denied the relief for which he has already become famous. The fact that he was known to the officers, and his suspicious actions upon discovering that they were following him, led the court to conclude that in this case his arrest and subsequent search were based on reasonable grounds.¹¹⁸ James Mayo, however, benefited from *Watkins*' misfortune. He was observed parking too far away from the curb and arrested as he emerged from his car. Although policy slips were found in the glove compartment, the arresting officer admitted that at the time of the search he was merely on a "fishing expedition."¹¹⁹ Although the state conceded the invalidity of the search in the *Mayo* case the standard announced in the *Watkins* case undoubtedly would have been effective without this concession.¹²⁰ In examining "the nature of the offense [for which the defendant was arrested] and the surrounding circumstances to determine

¹¹⁴ The court indicated that in examining the surrounding circumstances to determine if the search was warranted, it will apply the following standard: "A search incident to an arrest is authorized when it is reasonably necessary to protect the arresting officer from attack, to prevent the prisoner from escaping, or to discover fruits of a crime." *Id.* at 18, 166 N.E.2d at 437. Thus in *People v. Burnett*, 20 Ill.2d 624, 170 N.E.2d 546 (1960), the court held, citing *Watkins* and the standard set forth above, that the search of a locked tin box belonging to the defendant after his arrest for participating in a lewd show was unreasonable because "there is nothing in the record to indicate that a search of the tin box . . . was reasonably necessary to protect the officers or to prevent the defendant's escape. In addition, all the evidence had been gathered which would tend to prove or to connect defendant and the two women with the offense for which they had been arrested." *Id.* at 625-26, 170 N.E.2d at 547.

¹¹⁵ *Id.* at 19, 166 N.E.2d at 437.

¹¹⁶ 17 Ill.2d 247, 161 N.E.2d 315 (1959).

¹¹⁷ Both the *Berry* and *Esposito* cases were, on their facts, upheld. *People v. Watkins*, 19 Ill.2d 11, 166 N.E.2d 433 (1960).

¹¹⁸ "With this in mind, we think that the circumstances made it reasonable for the arresting officers to assume that they were dealing with a situation more serious than a routine parking violation." *People v. Watkins*, 19 Ill.2d 11, 19, 166 N.E.2d 433, 437 (1960).

¹¹⁹ *People v. Mayo*, 19 Ill.2d 136, 166 N.E.2d 440 (1960).

¹²⁰ See *supra* note 114.

whether the search was warranted,"¹²¹ the court could not have but arrived at the following conclusions:

- 1) It did not appear from the record that a search was reasonably necessary to protect the arresting officer from attack;
- 2) Nor did it appear that the defendant was bent upon escaping;
- 3) The nature of the offense excluded the possibility that any "fruits of the crime" might have been involved.¹²²

Hence, if the *Watkins* case were to be followed, the conclusion was inescapable that although the arrest in the *Mayo* case was valid, the search was not.

Of equal importance during the 1950's was the question of when an arresting officer had reasonable grounds for making an arrest without a warrant.¹²³ In the last ten years the concept of "reasonable grounds" as a determinative of the validity of an arrest, has been considerably watered down by the court. At one point a member of the court was prompted to remark that a decision holding that reasonable grounds existed for making an arrest where the officers had been given a "lead" by an unidentified informer and upon checking this "lead" found his information to be substantially correct,¹²⁴ "makes a mockery of sec-

¹²¹ *People v. Watkins*, 19 Ill.2d 11, 18, 166 N.E.2d 433, 437 (1960).

¹²² Illinois State Bar Ass'n, Section on Criminal Law, *Noose Letter*, Nov. 1960, suggests this interpretation of the *Mayo* case. *People v. Burnett*, 20 Ill.2d 624, 170 N.E.2d 546 (1960), seems to validate the interpretation.

¹²³ An arrest by a police officer without a warrant, for a crime not committed in his presence, is lawful "when a criminal offense has in fact been committed and [the arresting officer] has reasonable grounds for believing that the person to be arrested committed it." *People v. Boozer*, 12 Ill.2d 184, 187, 145 N.E.2d 619, 621 (1957); ILL. REV. STAT. ch. 38, § 657 (1959). Whether "reasonable grounds" existed is determined by whether a reasonable man in possession of the knowledge which has come to the arresting officer, would believe that the person arrested is guilty of a criminal offense. *Husty v. United States*, 282 U.S. 694 (1931); *People v. Galloway*, 7 Ill.2d 527, 131 N.E.2d 474 (1956); *People v. McGurn*, 341 Ill. 632, 173 N.E. 754 (1930). It is not merely a suspicion, *Henry v. United States*, 361 U.S. 98 (1959), but, on the other hand, it means something less than evidence which would result in a conviction, *People v. Fiorito*, 19 Ill.2d 246, 166 N.E.2d 606 (1960); *People v. Jones*, 16 Ill.2d 569, 158 N.E.2d 773 (1959).

¹²⁴ *People v. Tillman*, 7 Ill.2d 525, 116 N.E.2d 344 (1953). The police received a call from an unidentified person telling them that a man called "Trench Coat"—and giving them a description of him—was living in a certain room in a certain hotel with a certain described woman. The informer also told the police that this man sold narcotics and that he had sold some to an addict the previous day. Shortly thereafter, the police went to the hotel, where they found the woman standing outside the door to the room where Trench Coat was alleged to be staying. The door was partly open and the police observed Trench Coat lying on a bed inside the room. The police arrested the woman, brought her into the room, searched the robe she was wearing, and found therein five capsules of narcotics. The defendant was then awakened and

tion 6 of Art. II of the Illinois constitution."¹²⁵ Nevertheless, the trend continued, to the extent, even, of permitting reasonable grounds to be shown by hearsay testimony.¹²⁶ And, where reasonable grounds could not be shown for making an arrest, the device of "consent" was resorted to.

The idea that a defendant may waive his constitutional right to inviolability of home and person is not novel.¹²⁷ The only limit to this waiver, is the qualification that it must be freely and intelligently given.¹²⁸ The latest pronouncement by the court in this area, however,

arrested. He admitted that some people called him "Trench Coat" during a conversation with the police. A search of his mattress and bed disclosed ninety-five capsules of heroin.

The contention that the search of the room without a warrant was unreasonable was disposed of on the basis of *United States v. Rabinowitz*, 339 U.S. 56 (1950); *People v. McGowan*, 415 Ill. 375, 114 N.E.2d 407 (1953); *People v. Tabet*, 402 Ill. 93, 83 N.E.2d 329 (1949); and other cited cases. The question of whether the arrest was reasonable was treated in a manner which last found expression in the *Watkins* case: "There is no formula for a determination of what is reasonable. The constantly recurring problem in this field must separately find resolution in the facts and circumstances of each case." *People v. Tillman*, 1 Ill.2d 525, 530, 116 N.E.2d 344, 347 (1954). After concluding that the officers had reasonable cause to arrest the defendant because of the extrinsic circumstances which corroborated the information given by the informant, the court stated: "Certainly, the defendant and his confederate were committing a crime in the presence of the officers, because without contradiction they were in possession of, and had under their control, narcotic drugs in violation of . . . [the Uniform Narcotic Drug Act]." *Id.* at 531, 116 N.E.2d at 348.

If the concealed possession of contraband in the presence of police officers is the commission of a crime in the presence of an officer such as would justify an arrest without a warrant, see ILL. REV. STAT. ch. 38, § 657 (1959), every arrest without a warrant and subsequent search which disclosed contraband, would be legal. *But see* *People v. McGurn*, 341 Ill. 630, 173 N.E. 754 (1931). See *supra* note 114.

¹²⁵ *People v. Tillman*, 1 Ill.2d 525, 533, 116 N.E.2d 344, 349 (1953) (dissenting opinion).

¹²⁶ *People v. LaBoestrie*, 14 Ill.2d 617, 153 N.E.2d 570 (1958); *People v. Jones*, 16 Ill.2d 569, 158 N.E.2d 773 (1959). To the same effect in the federal courts, see *Brinegar v. United States*, 338 U.S. 160 (1949); *Draper v. United States*, 358 U.S. 307 (1959).

Illinois still insists that the affidavit in support of a complaint for a search warrant be based on first hand knowledge, *People v. Elias*, 316 Ill. 376, 147 N.E. 472 (1925), but the Supreme Court of the United States has upheld a search warrant which was issued on the basis of hearsay evidence, *Jones v. United States*, 362 U.S. 257 (1960).

¹²⁷ *People v. Reid*, 336 Ill. 421, 168 N.E. 344 (1929); *People v. Akers*, 327 Ill. 137, 158 N.E. 410 (1927); *People v. McDonald*, 365 Ill. 233, 6 N.E.2d 182 (1936).

¹²⁸ See *People v. Lind*, 370 Ill. 131, 18 N.E.2d 189 (1938). And, of course, the consent must be given by someone authorized to give it. Thus, where a wife who owns an interest in the property authorizes a search of that property, a motion by the husband, also an owner of an interest, to suppress evidence discovered therein will not lie. *People v. Shambley*, 4 Ill.2d 38, 122 N.E.2d 172 (1954); *People v. Perroni*, 14 Ill.2d 581, 153 N.E.2d 578 (1958). Consent may not, however, be given by someone who has no interest in the property. *People v. Dent*, 371 Ill. 33, 19 N.E.2d 1020 (1939).

indicates the burden with which the defendant is faced when the arresting officers testify that he "consented" to their searching his person or his effects; if the trier of fact concludes that consent was given, the court will not upset this ruling unless it is patently erroneous.¹²⁹ The theory may be sound; a determination of controversial facts and the credibility of witnesses is just as much involved as in any other facet of trial practice.¹³⁰ But in practice, the theory breaks down, for often compliance by the accused with orders or directions of the police is misconstrued as "consent." Our courts would do well to study and consider some of the federal cases on the subject of consent.¹³¹

Following the decision of the United States Supreme Court in *Roviaro v. United States*,¹³² in which that Court held that the government, in a narcotics prosecution, was not warranted under the facts in the case from withholding the identity of an informer, the Illinois Court was faced with a similar problem. In *People v. Mack*,¹³³ the court upheld the privilege of the state to withhold disclosure of the identity of an informer who had signed the complaint for a search warrant. The court concluded in the *Mack* case, that since the facts sworn to by the informer took place on a different date than the charge in the indictment, the informer's testimony was only necessary to test the sufficiency of the search warrant. Because the warrant was clearly sufficient, the court did not feel that the defendant had in any way been prejudiced by the inaccessibility of the informer.¹³⁴

¹²⁹ *People v. Peterson*, 17 Ill.2d 513, 162 N.E.2d 380 (1959). See also *People v. Mathews*, 406 Ill. 35, 92 N.E.2d 147 (1950).

¹³⁰ *People v. Arnold*, 2 Ill.2d 92, 116 N.E.2d 882 (1954); *People v. Viti*, 408 Ill. 206, 96 N.E.2d 541 (1951); *People v. Weber*, 401 Ill. 584, 83 N.E.2d 297 (1949) (Question of the voluntary nature of a confession is for the trial court, and the Supreme Court will not disturb the finding unless "manifestly against the weight of the evidence." *Id.* at 598, 83 N.E.2d at 305).

¹³¹ See, e.g., *Judd v. United States*, 190 F.2d 649 (D.C. Cir. 1951) (Burden on the government to prove by "clear and convincing" evidence that the defendant had consented to search, and had not merely complied with orders of officers).

¹³² 353 U.S. 53 (1957).

¹³³ 12 Ill.2d 151, 145 N.E.2d 609 (1957).

¹³⁴ ". . . [I]t is our opinion that, regardless of what the informer's testimony might have been, it would have little relevancy in face of the independent evidence by which the crime of March 22 was proved. Under such a circumstance, together with the facts which show that the informer neither participated in the crime nor was present at the time of the raid or arrest, amplification or contradiction of the information which caused the defendant to be placed under surveillance and caught in the commission of his crime would be of no assistance to his defense." *Id.* at 166, 145 N.E.2d at 616.

Aside from the constitutional questions which have been presented to the court relative to searches and seizures, one case, *People v. Moore*,¹³⁵ has raised the interesting question of the jurisdiction of the court to hear an appeal by the state from an order suppressing evidence and ordering its return. In *Moore*, the trial court entertained, at the same hearing, both a motion to suppress and a motion for return of the property seized. The court granted both facets of the motion and the state appealed from that portion of the order directing the state to return the evidence seized—\$18,000—to the persons from whom it had been seized. The court held, *inter alia*, that the right to the return of property seized was distinct from the right to have property illegally seized suppressed in a criminal proceeding. An action claiming a right of possession of property seized under the claim that it is contraband is a proceeding *in rem*; in such a proceeding the state has the right to have the court determine whether such property is contraband, and, if an adverse decision is rendered by the trial court, the state has the right to appeal that decision, for it is not, as such, a decision in a criminal proceeding.

The court's attention during the past decade has often been directed to the problem of a defendant's right to counsel and associated problems. Most often the issue has been raised by the claim that counsel was incompetent. Generally speaking, the court has followed one general rule: If counsel was incompetent, and was *appointed*, the court will upset the conviction.¹³⁶ On the other hand, even though counsel may have been incompetent, if he was counsel of the *defendant's choice*, the court will affirm the conviction.¹³⁷ As is the case with every good general rule, however, there are exceptions. The decision in one of these, *People v. Cox*,¹³⁸ is significant more for what the court rejected as the basis for its decision than for what it finally accepted as its rationale of decision. The defendant, a fourteen-year-old boy charged with murder, was represented by a charlatan retained by the boy's

¹³⁵ 410 Ill. 241, 102 N.E.2d 146 (1951).

¹³⁶ *People v. Morris*, 3 Ill.2d 437, 121 N.E.2d 810 (1954); *People v. Blevins*, 251 Ill. 381, 96 N.E. 214 (1911); *People v. Gardiner*, 303 Ill. 204, 135 N.E. 422 (1922); *People v. Winchester*, 352 Ill. 237, 185 N.E. 580 (1933); *People v. Schulman*, 299 Ill. 125, 132 N.E. 530 (1921).

¹³⁷ *People v. Barnes*, 270 Ill. 574, 110 N.E. 881 (1915). See cases cited in *People v. Morris*, 3 Ill.2d 437, 121 N.E.2d 810, 815 (1954), and in *People v. Cox*, 12 Ill.2d 265, 146 N.E.2d 19 (1957).

¹³⁸ 12 Ill.2d 265, 146 N.E.2d 19 (1957).

mother. Although he was not a member of any bar, the charlatan was not without ability,¹³⁹ however, for the jury, upon finding the boy guilty as charged, sentenced him to serve a term of only fourteen years. Subsequent to the charlatan's discovery, the defendant petitioned the trial court, under the Illinois Post-Conviction Act,¹⁴⁰ for his release. Upon denial of this petition, he sought a writ of error from the Supreme Court. The court reversed, holding that the totality of facts in the case demonstrated that the defendant had been denied a fair trial.

Cox's assertion was not that his attorney's fraud had prejudiced his case nor that he had suffered a disadvantage because of that fraud. Rather, he contended that he was denied a fair trial and his constitutional right to be represented by counsel solely because his counsel was not licensed to practice law. The State traversed this on the basis of the admitted satisfactory conduct of Cox's trial and defense. Concededly, the due process clauses of both the state and federal constitutions were involved and, to the extent that they were involved, the meaning of the sixth amendment was important to the defendant's contentions. The court also conceded that the term "counsel" as it is employed in these constitutional provisions means a duly qualified and licensed attorney. The right to be represented by a licensed attorney does not, however, mean that an accused cannot waive that right, the same as he can waive the right to be represented by counsel at all.¹⁴¹ Furthermore,

. . . while want of counsel in a particular case may result in a conviction lacking in . . . fundamental fairness, the fourteenth amendment does not embody an inexorable command that no trial can ever be fairly conducted and justice accorded a defendant who is not represented by counsel. Thus, in the present case, the test of due process is not whether the defendant had an attorney, licensed or unlicensed, but whether, under all the circumstances of the case, his conviction was obtained in such a manner as to be offensive to the common and fundamental ideas of what is fair and what is right.¹⁴²

Essentially, then, the problem was not the fact that Cox's attorney was unlicensed,¹⁴³ nor that he was retained by Cox's mother rather than

¹³⁹ This was the basis of the State's contention in the *Cox* case.

¹⁴⁰ ILL. REV. STAT. ch. 38, §§ 826-32 (1959). See Starrs, *The Post-Conviction Hearing Act—1949-1960 and Beyond*, 10 DE PAUL L. REV. 397 (1961).

¹⁴¹ See *People v. Ephraim*, 411 Ill. 118, 103 N.E.2d 363 (1952).

¹⁴² *People v. Cox*, 12 Ill.2d 265, 271, 146 N.E.2d 19, 23 (1957).

¹⁴³ ". . . [O]therwise, an accused would be tempted to seek unlicensed and unqualified representation in the hope of gaining acquittal, but with the assurance of gaining a new trial even if convicted." *Id.* at 271, 146 N.E.2d at 23.

Cox himself,¹⁴⁴ nor that the defendant was a fourteen-year-old boy on trial for a capital offense; it was a combination of all of these factors.

In *People v. DeSimone*,¹⁴⁵ another exception to the "general rule," the defendant's counsel was an attorney licensed to practice in this state; he was also the attorney of the defendant's choice. His incompetence, however, was beyond question.¹⁴⁶ The "utter incompetency" of the defendant's counsel was such in this case as to not even require that the court discuss the general rule pertaining to counsel of the defendant's own choice. Rather, the court concluded that where the representation of an accused is of such a low caliber as to amount to no representation at all, the accused will be considered to have been denied due process of law.

The *DeSimone* case and the *Cox* case have one interesting aspect in common: both were murder cases. In *Cox*, however, the jury set the punishment at fourteen years, the shortest term possible under the statute.¹⁴⁷ In *DeSimone* the jury set the punishment for one defendant at death and for the other at forty years in the penitentiary.¹⁴⁸ Hence, despite the conclusiveness of the evidence, the court followed its well-established practice of reversing death penalty cases whenever substantial error occurs, whether the evidence is conclusive or not.¹⁴⁹ In conclusion, then, it may be stated as a corollary to the general rule holding defendants responsible for counsel of their own choice, that whenever other serious considerations enter into the problem and the accused is denied cardinal rights because of his counsel's incompetency, the court

¹⁴⁴ ". . . [E]ven though it is to be realized that the defendant's acquiescence in Simons stemmed from parental obedience rather than voluntary acceptance, we have no choice other than to hold that the right to be defended by a licensed attorney, as embodied in section 9 of article II of our constitution, was effectively waived and that such waiver was binding on the defendant. Were we to hold otherwise, every minor defendant convicted of a crime could, upon coming of age, disclaim acquiescence in his counsel, whether such counsel had been employed by his parents or appointed by the court." *Id.* at 272, 146 N.E.2d at 23-24.

¹⁴⁵ 9 Ill.2d 522, 138 N.E.2d 556 (1956).

¹⁴⁶ See examples cited by the court from the record. *Id.* at 530, 138 N.E.2d at 558-60.

¹⁴⁷ ILL. REV. STAT. ch. 38, § 360 (1959).

¹⁴⁸ Two other defendants, represented by different counsel, were acquitted.

¹⁴⁹ See also *People v. Dukes*, 12 Ill.2d 334, 339, 146 N.E.2d 14, 17 (1957): "From the evidence in this case, we conclude that the jury was justified in returning a verdict of guilty and that the death penalty may well have been warranted. But our review cannot end with that observation. We must determine whether prejudicial errors were committed during the trial which deprived the defendant of those constitutional safeguards which, under our laws, are afforded to the guilty as well as the innocent."

will consider the effect upon his constitutional rights of his counsel's incompetency.

Aside from the problems of incompetent counsel, the court has also dealt with the seemingly more simple problem of the right to counsel. In *People v. Friedrich*¹⁵⁰ it was contended that the defendant's right to counsel of his own choice had been abridged. During the initial stages of the case, counsel for Friedrich also represented a second defendant. Thereafter, the second defendant moved for a severance on the grounds that various statements made and acts done by Friedrich rendered the defenses of the two antagonistic and that if they were jointly tried the defendants' right to a fair and impartial trial would be jeopardized.¹⁵¹ The trial court refused, however, to allow counsel to represent both defendants and pursue the motion on the grounds alleged. Counsel withdraw as attorney for Friedrich and the court allowed the severance. Subsequently, Friedrich petitioned the court to allow him to be represented by his former counsel, stating that he knew of his employment by the other defendant at the time he first retained him, and that the second defendant had consented to and approved of his re-retaining counsel. Friedrich further offered to obtain the express consent of his co-defendant to the re-employment of counsel. The court denied the petition, stating that he would allow both defendants to be represented by the same counsel only if they would agree to be tried together.¹⁵²

In arriving at the conclusion that Friedrich had been denied his right to be represented by counsel of his own choice, the court held that the same grounds which authorize a severance do not necessarily preclude an attorney from representing the two parties seeking the severance. Nor did canon 6 of the CANONS OF ETHICS OF THE ILLINOIS STATE BAR

¹⁵⁰ 20 Ill.2d 240, 169 N.E.2d 752 (1960).

¹⁵¹ See also *People v. Lindsay*, 412 Ill. 472, 107 N.E.2d 614 (1952). (A severance should be granted where defenses are antagonistic or where circumstances are such as to make it unfair to require joint trial.)

¹⁵² Thereafter, the defendant obtained the services of another counsel, but prior to trial he informed the court that his retention of other counsel and the fact that he was going to trial with other counsel did not constitute a waiver of his right to be represented by his first choice.

¹⁵³ Canon 6, "Adverse Influences and Conflicting Interests," provides: "It is the duty of a lawyer at the the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

"It is unprofessional to represent conflicting interests, except by express consent of

ASSOCIATION¹⁵³ preclude the attorney from representing these defendants. In fact, the court concluded:

It does not appear that any one of the prohibitions contained in the canon was about to be violated in the event Zahler and defendant continued to be represented by the same attorney. As stated above a full disclosure of the facts was made to both parties and the express consent of each of them was offered. Nor is there any indication that in separate trials counsel could not give his undivided loyalty to each without adversely affecting the interest of the other.¹⁵⁴

And, assuming even that the interests of the two defendants were so antagonistic as to require separate counsel, the court held that

. . . the defendant had the unquestioned privilege to waive his right to separate counsel. His action in insisting that he be represented by Bellows did waive that right and . . . he now has grounds to complain that he was deprived of counsel of his own choice.¹⁵⁵

From the area of constitutional rights, we turn to an area which has always held the interest of the practitioner, the "crime" of contempt. Although criminal contempt is not precisely a crime,¹⁵⁶ it has been

all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

"The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed."

For a discussion of the developments in Legal Ethics in Illinois in the past decade see Wiles, *A Commentary on the Ethics of the Legal Profession in the '50's*, 10 DE PAUL L. REV. 480 (1961).

¹⁵⁴ *People v. Friedrich*, 20 Ill.2d 240, 252, 169 N.E.2d 752, 759 (1960).

¹⁵⁵ *Id.* at 255, 169 N.E.2d at 760.

¹⁵⁶ "Contempts are not crimes within the meaning of the statute defining misdemeanors." *People ex rel. Rusch v. Jilovsky*, 334 Ill. 536, 538, 166 N.E. 108, 109 (1929). And yet, on other occasions the court has held that a criminal contempt is a crime against the court and against the people, and is a misdemeanor. *People v. Howarth*, 415 Ill. 499, 114 N.E.2d 785 (1953). The statute of limitations applicable in misdemeanor cases, ILL. REV. STAT. ch. 38, § 631 (1959), applies in cases of criminal contempt, *Beattie v. People*, 33 Ill. App. 651 (1889). A contemnor is punishable under the statute, ILL. REV. STAT. ch. 38, § 600 (1959), providing general misdemeanor punishment. The State is precluded from seeking review of adverse decisions on the merits in cases of criminal contempts, *People ex rel. Blumle v. Neill*, 74 Ill. 68 (1874). And, until the recent innovation making appeal possible in criminal cases, a conviction for criminal contempt was reviewable only by writ of error, and appellate jurisdiction lay as in misdemeanor cases. *People v. Howarth*, 415 Ill. 499, 114 N.E.2d 785 (1953). However, a criminal contempt is not such a crime as must be prosecuted in the name of the People of the State of Illinois. ILL. CONST. art. VI, § 33; *People v. Goss*, 10 Ill.2d 533, 141 N.E.2d 385 (1957). Absent a statute, there is no right to trial by jury in any contempt proceeding. *People ex rel. Martin v. Panchire*, 311 Ill. 622, 143 N.E. 476 (1924).

more or less appropriated to the field of criminal law by the practicing attorney. The most significant change in the Illinois law of contempt occurred in 1952 when the Supreme Court abolished the common-law defense of purgation by oath. Until then, a defendant who was charged with an indirect criminal contempt¹⁵⁷ could file a verified answer denying the alleged wrongful conduct, and such denial would be conclusive on the court and a complete purge of the contempt charged.¹⁵⁸ Thereafter, if the denial under oath was false, the People's remedy lay in a prosecution for perjury.¹⁵⁹ This method of defense was unavailable in a prosecution for direct contempt.¹⁶⁰

In *People v. Gholson*,¹⁶¹ the respondents were charged with attempting to influence the trial of a criminal proceeding in which they were defendants—an indirect contempt. The respondents filed verified answers denying certain allegations contained in the petition filed by the State, and admitting others, but further denying any unlawful intent in connection with the matters admitted. Had the court applied the doctrine of purgation by oath, the defendant's answer would have been a complete defense to the charges made.¹⁶² After tracing the obscure origin and reasoning of the rule, the court concluded that the defense of purgation by oath “. . . has taken its place with ordeal and wager of law and trial by battle among the dimly remembered curios of outworn modes of trial.”¹⁶³ Hence the doctrine was discarded, and for its reasoning the court gave the following:

157 “An indirect contempt is one which occurs out of the presence of the judge and is therefore dependent for its proof upon evidence of some kind or upon facts of which the court has no judicial notice. . . . When the contempt is not an apparent one and its demonstration depends upon the proof of facts of which the court has no judicial notice, due process requires a citation in order that defendant may meet and refute the charges.” *People v. Howarth*, 415 Ill. 499, 508, 114 N.E.2d 785, 790 (1953); *People v. Harrison*, 403 Ill. 320, 86 N.E.2d 208 (1949).

158 *Crook v. People*, 16 Ill. 534 (1855); *People v. McDonald*, 314 Ill. 548, 145 N.E. 636 (1924); *People v. Whitlow*, 357 Ill. 34, 191 N.E. 222 (1934); *People v. Gholson*, 412 Ill. 294, 106 N.E.2d 333 (1952).

159 *People v. McLaughlin*, 334 Ill. 354, 166 N.E. 67 (1929); *People v. McDonald*, 314 Ill. 548, 145 N.E. 636 (1924); *People v. Gholson*, 412 Ill. 294, 106 N.E.2d 333 (1952).

160 *People v. Ryan*, 410 Ill. 486, 103 N.E.2d 116 (1951).

161 412 Ill. 294, 106 N.E.2d 333 (1952).

162 In the trial court the parties and the court itself proceeded upon the assumption that the doctrine would be effective if a proper denial were filed. The trial court held, however, that the defendants' answers were insufficient to purge them of contempt. The Supreme Court, in discussing the doctrine, held that the answers were sufficient.

163 *People v. Gholson*, 412 Ill. 294, 301, 106 N.E.2d 333, 337 (1952).

We do not believe a court can adequately, promptly and efficiently protect and preserve its judicial authority and processes, the rights of litigants, and the interest of the people in the integrity and authority of their courts, without power to inquire into and determine if contumacious acts such as alleged in the instant case have been perpetrated against the court. We believe that if the contemnor can, merely by denying the charges, deprive the court of authority to inquire into the truthfulness of his denial not only of his intentions but also as to his overt acts, that would tend to destroy rather than to uphold public confidence and respect in our courts. The alternative resort to prosecution for perjury is without reason, ineffectual and inadequate. A person could admit any ambiguous acts and merely deny evil intention. Prosecution for perjury would be impossible. . . . It seems to us . . . the court should have the same power to protect its integrity by an orderly judicial inquiry into alleged acts of indirect criminal contempt [as it has in cases of direct contempts].¹⁶⁴

Turning to the area of defenses in general, we find that the court has rendered a significant number of decisions in the past decade which, while not innovations in themselves, have cleared up prior obscurities. The defense of insanity, especially the methods for raising the defense at a particular stage of a criminal proceeding, has always concerned the trial lawyer. In *People v. Burson*,¹⁶⁵ the court illustrated the procedures to be followed when a defendant's insanity is suspected. The *Burson* case itself is a fine example of the fact that ". . . a defendant who either cannot or will not accept the responsibility of conducting his own defense, can so hinder the ordinary functioning of the judicial process as to render difficult any rational disposition of his case."¹⁶⁶ *Burson* had been indicted for a murder. Prior to, during, and

¹⁶⁴ *Id.* at 302, 106 N.E.2d at 337-38.

¹⁶⁵ 11 Ill.2d 360, 143 N.E.2d 239 (1957). A most interesting feature of this decision is the fact that the court raised the deciding issues on its own motion. The language of the court so clearly expounds the role of the Supreme Court and the realistic views which it has taken toward the administration of criminal justice, that its inclusion herein is deemed mandatory. Mr. Justice Davis, speaking for the full court, said:

"We recognize that counsel for defendant did not present or argue this point; and that the general rule is that where a question is not raised or reserved in the trial court or where, though raised in the lower court, it is not urged or argued on appeal, it will not be considered and will be deemed to have been waived. However, this is a rule of administration and not of jurisdiction or power, and it will not operate to deprive an accused of his constitutional rights of due process. The court may, as a matter of grace, in a case involving deprivation of life or liberty, take notice of errors appearing upon the record which deprived the accused of substantial means of enjoying a fair and impartial trial, although no exceptions were preserved or the question is imperfectly presented." 3 Am.Jur., sec. 248, page 33; *United Brotherhood of Carpenters v. United States*, 330 U.S. 395, 67 S.Ct. 775, 91 L.Ed. 973; *People v. Jung Hing*, 212 N.Y. 393, 106 N.E. 105; *State v. Griffin*, 129 S.C. 200, 124 S.E. 81, 35 A.L.R. 1227." *Id.* at 370, 143 N.E.2d at 245.

¹⁶⁶ *Id.* at 373, 143 N.E.2d at 246.

even after trial he exhibited an inability to aid or cooperate with appointed counsel. He insisted upon representing himself,¹⁶⁷ and his efforts in this respect no doubt precipitated much of the concern expressed by the court. Starting with the proposition that "the trial, adjudication, sentence, or execution of a person charged with a criminal offense, while insane, is a violation of due process of law,"¹⁶⁸ the court set forth the procedures to be followed when counsel, including the State's Attorney, or the trial court suspect that the defendant is possibly insane, either before trial, during trial, or after trial.

Although section 13 of division II of the CRIMINAL CODE provides for a sanity hearing to determine if an accused is competent to stand trial for a criminal offense, that statute was not intended to abrogate the common-law rule that no person shall be compelled to stand trial for any criminal offense while insane.¹⁷⁰ Thus, a formal petition for the hearing provided for by the statute is not necessary. The question of the accused's capacity to stand trial may be raised by oral motion of counsel at any time during trial, and, if made in good faith and not for the purpose of delay, it then becomes the duty of the trial court to empanel a jury to hear the issue of the accused's capacity to stand trial.¹⁷¹ The test of the accused's capacity to stand trial is his capacity to make a rational defense: "He should be capable of understanding the nature and object of the proceedings against him, his own condition in reference to such proceedings, and have sufficient mind to conduct his defense in a rational and reasonable manner, although upon other subjects his mind may be unsound or deranged."¹⁷² The ability to conduct his

¹⁶⁷ And the defendant had every right to do so, see *People v. Ephraim*, 411 Ill. 118, 103 N.E.2d 363 (1952), subject to the following conditions: "If then sane, the defendant, upon the waiver of counsel, had the right to defend himself, *subject to the constant duty of the court to protect the judicial process from deterioration occasioned by improper or inadequate conduct of the defense*. In such situation the court possesses broad discretion in relation to the appointment of counsel for advisory or other limited purposes, or to supersede the defendant in the conduct of the defense." *People v. Burson*, 11 Ill.2d 360, 373, 143 N.E.2d 239, 247 (1957). (Emphasis added.)

¹⁶⁸ *Id.* at 368, 143 N.E.2d at 244.

¹⁶⁹ ILL. REV. STAT. ch. 38, § 593 (1959).

¹⁷⁰ *People v. Burson*, 11 Ill.2d 360, 143 N.E.2d 239 (1957).

¹⁷¹ The trial court's failure to do so may result in a denial of due process. *Brown v. People*, 8 Ill.2d 540, 134 N.E.2d 760 (1956) (Trial judge may not be arbitrary in denying hearing when bona fide issue of sanity raised).

Notice that either counsel for the defendant or the State, or the trial court, on its own motion, may raise the issue of the defendant's capacity to stand trial. *Id.* at 372, 143 N.E.2d at 245.

¹⁷² *Id.* at 369, 143 N.E.2d at 244; *People v. Geary*, 298 Ill. 236, 131 N.E. 652 (1921).

defense in a rational and reasonable manner implies that the defendant is capable of cooperating with his counsel "to the end that any available defenses may be interposed."¹⁷³

Section 13 of division II also provides that no judgment shall be entered if, after a verdict of guilty, the defendant shall have become insane; and, if judgment has been entered and then the defendant becomes insane, execution of the judgment shall be stayed until recovery.¹⁷⁴ The court in *Burson* held that if the issue of insanity shall arise at either of these times, it then becomes the duty of the trial court to impanel a jury to determine the issue of sanity,¹⁷⁵ and the fact that the issue is presented in a motion for a new trial rather than in a formal petition requesting a hearing on the issue of sanity is immaterial. The test for determining insanity in such a post-sentence hearing was outlined by the court in *People v. Carpenter*:¹⁷⁶ "[1] [W]hether the prisoner has sufficient intelligence to understand the nature of the proceedings against him, [2] what he was tried for originally, [3] the purpose of his punishment, [4] the impending fate which awaits him, [5] a sufficient mind to know any facts which might exist which make his punishment unjust or unlawful, and [6] sufficient intelligence to convey such information to his attorney or the court."¹⁷⁷

Both *Carpenter* cases¹⁷⁸ provide a wealth of material for the study of the defense of insanity in Illinois. In the first case,¹⁷⁹ a writ of error challenging the validity of Carpenter's trial and sentence to death, the defendant urged the *Durham* test of insanity¹⁸⁰ upon the court. The defendant challenged the instructions given by the trial court which defined the test of criminal responsibility—that is, sanity at the time of the commission of the offense—in accord with previous expressions by the Supreme Court.¹⁸¹ He submitted that scientific reali-

¹⁷³ *Id.* at 371, 143 N.E.2d at 245.

¹⁷⁴ ILL. REV. STAT. ch. 38, § 593 (1959).

¹⁷⁵ This, of course, is in compliance with the substance of the statute.

¹⁷⁶ 13 Ill.2d 470, 150 N.E.2d 100 (1958).

¹⁷⁷ *Id.* at 475, 150 N.E.2d at 103.

¹⁷⁸ *People v. Carpenter*, 11 Ill.2d 60, 142 N.E.2d 11 (1957); *People v. Carpenter*, 13 Ill.2d 470, 150 N.E.2d 100 (1958).

¹⁷⁹ *People v. Carpenter*, 11 Ill.2d 60, 142 N.E.2d 11 (1957).

¹⁸⁰ *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954); *State v. Pike*, 49 N.H. 399 (1870).

¹⁸¹ Illinois adheres to the following tests of insanity:

"... to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a

ties prompted the adoption of the Durham type instruction.¹⁸² The court rejected this contention, observing that "the need in this area is for more clarification, and the *Durham* instruction does not supply it."¹⁸³ The old standards were reaffirmed.¹⁸⁴

The second *Carpenter* case,¹⁸⁵ an appeal from a post-sentence jury verdict finding Carpenter sane, raised two problems of trial procedure of considerable constitutional import.¹⁸⁶ During voir dire examination of the prospective jurors the State was permitted to inquire as to the

defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." *McNaghten's Case*, 10 Clark & Fennelly 200, 8 Eng. Rep. 718, 722 (1843). "The mere ability to distinguish right from wrong is not the correct test . . . the accused must also be mentally capable of choosing either to do or not to do the act, and of governing his conduct in accordance with such choice." *People v. Lowhone*, 292 Ill. 32, 48, 126 N.E. 620, 626 (1920).

The court has, within the last decade, explicitly ruled that evidence that the accused is a psychopathic personality is inadmissible as tending to show lack of criminal responsibility at the time of the commission of the offense. "A subnormal mentality is not a defense to a charge of crime unless the accused is by reason thereof unable to distinguish between right and wrong with respect to the particular act in question." *People v. Jenko*, 410 Ill. 478, 483, 102 N.E.2d 783, 785-86 (1952).

¹⁸² The defendant requested the trial judge to instruct the jury as follows:

"The Court instructs the jury that, unless you believe beyond a reasonable doubt that Richard Daniel Carpenter was not suffering from a diseased or defective mental condition, or, that if he is so afflicted, that the criminal act charged was not the product of such diseased or defective mental condition, you must find the accused not guilty by reason of insanity.

"Thus, your task would not be completed upon finding, if you did find, that Richard Daniel Carpenter suffered from a mental disease or defect. He would still be responsible for his unlawful act if there was no causal relation between such mental abnormality and the act. These questions must be determined by you from the facts which you find to be fairly deducible from the testimony and the evidence in this case, keeping in mind that the defense is not required to prove insanity beyond a reasonable doubt, but, rather, need only establish by the evidence a reasonable doubt of the sanity of Richard Daniel Carpenter." *People v. Carpenter*, 11 Ill.2d 60, 63, 142 N.E.2d 11, 12-13 (1957).

¹⁸³ The court observed that in the tendered instructions the terms "disease," "defect," and "product" were left undefined, and on the whole, the instruction then was vague and ambiguous, and suffered from a failure to define its own ambiguous terms. *Id.* at 67, 142 N.E.2d at 15.

¹⁸⁴ In fact, the court remarked, "From the substantive standpoint, there does not seem to be any significant difference, especially as the instructions would be understood by the ordinary jury. Both tests [*Durham* and the "Illinois Rule"] recognize that criminal responsibility must take account of impairment of the will, as well as impairment of the intellect. And, if anything, the given instructions are the more explicit, articulate and useful." *Ibid.*

¹⁸⁵ *People v. Carpenter*, 13 Ill.2d 470, 150 N.E.2d 100 (1958).

¹⁸⁶ As was the case with the Sexual Psychopath Act, see *supra* note 11, no provision permitting appellate review is included in the statute providing for and governing sanity hearings, ILL. REV. STAT. ch. 38, § 593 (1959). Thus, an appeal from a hearing under the act would not normally lie to either the Appellate or Supreme Courts. But,

religious or conscientious scruples of the prospective jurors concerning the death penalty. This, of course, is a permissive field of inquiry in a criminal prosecution for which the death penalty may be imposed.¹⁸⁷ The defendant argued, however, that a sanity hearing was not a trial for a criminal offense, and, as the sole purpose of the proceeding was to determine Carpenter's sanity as a prerequisite to execution of the judgment imposed, the effect of the inquiry "was to direct the jury's attention to the punishment which Carpenter was to suffer, rather than to the matter of his insanity, [and thereby] . . . deprive petitioner and Carpenter of a fair and impartial jury, thus depriving them of due process of law."¹⁸⁸ The court rejected this contention. The jury, it held, must, because of the nature of the issue before them, "have known that Carpenter had been sentenced to death and that the purpose of the hearing was to determine whether he should be executed."¹⁸⁹ Thus, in the sanity hearing, as in the original trial, the attitude of a prospective juror with respect to the imposition of the death penalty is relevant and material, for just as a juror in the original trial may hesitate to return a verdict inflicting the extreme penalty because of conscientious or religious scruples, so a juror in a sanity hearing possessing the same scruples may hesitate to return a verdict finding the prisoner sane. Since, in effect, the latter proceeding confirms the sentence in the former proceeding, the same procedures may be taken to protect the rights of the prosecution according to the statute.

The second contention in the *Carpenter* case was that it was a violation of due process for the trial court to compel Carpenter to undergo a pre-trial mental examination by three psychiatrists chosen by the State. The principal basis of this argument was that the defendant had an absolute right to the inviolability of his person and that he could

where personal liberties are involved, the court has held that a writ of error lies by force of the common law, in the absence of a statute, to determine whether the defendant had received a fair trial in accordance with "the law of the land." *People v. Scott*, 326 Ill. 327, 157 N.E. 247 (1927); *People v. Kadens*, 399 Ill. 394, 78 N.E.2d 289 (1948). The court, in the *Carpenter* case, decided, in conformity with the holdings in *Scott* and *Kadens*, that the personal liberty of the defendant was involved, and that since fairly debatable constitutional issues concerning the conduct of the trial were presented, it would take jurisdiction.

¹⁸⁷ ILL. REV. STAT. ch. 38, § 743 (1959); *People v. Winchester*, 352 Ill. 237, 185 N.E. 580 (1933).

¹⁸⁸ *People v. Carpenter*, 13 Ill.2d 470, 475, 150 N.E.2d 100, 103 (1958).

¹⁸⁹ *Id.* at 476, 150 N.E.2d at 103.

not be compelled to submit to any examination over his objections. The court pointed out, however, that *People ex rel. Noren v. Dempsey*¹⁹⁰ overruled this basis by permitting an examination to be ordered by the court "where one, by his own act, puts in issue his physical or mental condition."¹⁹¹ Since Carpenter, (or more properly his sister acting on his behalf), put his mental condition in issue by the very nature of the proceeding, it became a fact in controversy in the case and the examination was proper.

A further argument made by Carpenter in support of his second contention raises a point that has considerable merit in the light of practical experience, and, although the court rejected this argument on the grounds that a violation of due process was not involved, an eventual solution is desirable. Three psychiatrists examined Carpenter for the State. Assuming the validity of the order permitting one psychiatrist to examine him for the purpose of discovery, it was argued that the examination by the other two was unnecessary and resulted

¹⁹⁰ 10 Ill.2d 288, 139 N.E.2d 780 (1957). Although the *Noren* case involved the question of whether a judge, in a personal injury suit, could compel the plaintiff to submit to a physical examination, the court, in considering the problem, discussed *People v. Scott*, 326 Ill. 327, 157 N.E. 247 (1927), in which the court had held that it was error, in a sanity hearing, to allow the State to prove that the defendant had refused to allow doctors appointed by the court to examine him, and that the trial court was without authority to appoint alienists to examine the defendant with a view to testifying as the court's witnesses. The court, in *Noren*, expressly overruled *Scott* and the other cases which had held that the trial court was without authority to require an examination.

The *Scott* case, which was at the base of Carpenter's contention that the trial court had denied him constitutional rights in compelling him to undergo an examination, was, on its facts, stronger than both *Noren* and *Carpenter*. Both Carpenter and the plaintiff in *Noren* were the moving parties in their lawsuits, and the court specifically recognized this in the *Carpenter* case. But in *Scott*, the defendant had already been committed as an insane person. The order appointing alienists to examine the defendant resulted from the motion of the State to restore the defendant's sanity so that he could be executed in accordance with the sentence that had been imposed upon him prior to the original hearing on his sanity. While the defendant had initiated the original hearing, the State had initiated the proceeding in which the order was entered. *People v. Scott*, 326 Ill. 327, 157 N.E. 247 (1927). If *Scott* was overruled on the premise that examination is warranted where one puts his physical or mental condition in issue, the only basis for applying this premise to *Scott* must be that the petition of the State seeking the restoration of a person previously declared insane is a continuation of the original petition by the defendant seeking an adjudication of insanity. This is supported only inferentially by that part of § 593 which provides that after an adjudication of insanity, execution of sentence shall be stayed "until the recovery of said person from the insanity or lunacy." ILL. REV. STAT. ch. 38, § 593 (1959); cf. *People v. Scott*, 326 Ill. 327, 157 N.E. 247 (1927). Of course, it may also be that the original petition by the defendant under the statute waives for all further proceedings involving the same issue his right to involability of his person.

¹⁹¹ *People v. Carpenter*, 13 Ill.2d 470, 476, 150 N.E.2d 100, 104 (1958).

in the State's being allowed to overwhelm the petitioner at the hearing. Because of limited means, the petitioner was unable to secure the aid of more than one psychiatrist in Carpenter's defense. Thus Carpenter was placed, by the order of the trial court, in a position of having to aid the State in overwhelming him. The court accepted the argument that examinations by the last two psychiatrists were unnecessary for discovery and that they were for the purpose of obtaining evidence, but went on to say:

To so hold does not, however, mean that these rulings deprived Carpenter of due process of law. It must be kept in mind that on this appeal we are not concerned with the weight or sufficiency of the evidence nor with any procedural errors which may have occurred at the trial. Our concern is only that Carpenter was afforded a fair hearing and one which complied with the requirements of due process of law.¹⁹²

Hence, although it may have conceded that the appointment of three psychiatrists was improper and may have tended to overwhelm Carpenter, the court concluded that it was only concerned with whether or not the hearing was so unfair as to violate the concepts of fundamental fairness. And such violation could only be demonstrated by a showing that

. . . the psychiatrists employed by the State were biased and prejudiced and that their testimony was not an honest evaluation of their examination, for certainly it cannot offend due process of law for one who puts in issue the question of his insanity to have the benefit of all of the expert evidence obtainable.¹⁹³

It was in this respect that Carpenter's efforts failed.

CONCLUSION

As this is being written the Proposed Illinois Revised Criminal Code is being considered by the Illinois Legislature. That work, the product of over six years of effort by the Joint Committee of the Illinois State Bar Association and the Chicago Bar Association to Revise the Illinois Criminal Code, if enacted, will be the first actual "Criminal Code" in Illinois and will represent the first substantial revision of our criminal laws since 1874. The object of the Proposed Criminal Code is not to render archaic that which has gone before it; its purpose is to collect the great body of substantive criminal law now scattered throughout the 148 chapters of the statutes, discard that which is useless, revise

¹⁹² *Id.* at 478, 150 N.E.2d at 104-05. Indeed, this was the sole basis on which the court assumed jurisdiction to decide the appeal. See *supra* note 186.

¹⁹³ *Id.* at 480, 150 N.E.2d at 106.

that which needs revising, and add that which needs to be added. In this context it is hoped that what has been herein expounded will not be rendered useless, for, as is noted in the Committee Comments to the Proposed Code:

. . . [T]he supersession of all common-law definitions of particular offenses does not mean that the large mass of interpretative rules developed under the common law is superseded: these rules are a highly valuable part of our criminal law, and their effective replacement by statutory law would be exceedingly difficult.¹⁰⁴

And, it is felt that the above comments apply with equal vigor to the body of interpretative rules developed under our former criminal statutes, wherever they may be applied.

But, if the authors may be excused for their pride in the product of the Committee, and with due apologies to the editors of the DEPAUL LAW REVIEW, they would rather that their work be rendered impotent than that the Proposed Criminal Code be rejected.

¹⁰⁴ ILL. STATE AND CHICAGO BAR ASS'NS, JOINT COMMITTEE, TENTATIVE FINAL DRAFT OF THE PROPOSED ILLINOIS REVISED CRIMINAL CODE OF 1961, Comments 104 (1960).