CHAPTER II

THE SUPREME COURT, IN FELONY CASES

By

ALBERT J. HARNO

CONTENTS OF CHAPTER II

CHAPTER II

THE SUPREME COURT, IN FELONY CASES

1. Scope of the Chapter. The purpose of this study is to form an estimate and an appreciation of the place and influence of the Supreme Court in the scheme of the administration of the criminal law of the state. The task is delicate and subtle. To find the number of cases affirmed or reversed during a certain period, involves but a mechanical calculation, but to form an estimate of the bearing of the Supreme Court's decisions on the problem of crime calls for penetrating discriminations and keen evaluations. The task is approached with much diffidence and some trepidation. The observations that follow contain analyses of the decisions. In no sense are they offered as the final word on this subject. They are submitted with a thorough appreciation of the fact that others, with the same data, might reach different and more acceptable conclusions.

The problem, beyond certain easily made calculations, is one involving judgment—a careful balancing of values. When the Supreme Court reverses the judgment of the trial court, the action may signify that the trial court was in error, or that the prosecuting attorney blundered, or the fault may have been, principally, that of the jury, or, not unlikely, the three, or two of them, may have shared in responsibility for the error. But our study cannot end there, for thus far, it involves but the searching out and the classification of the errors assigned by the Supreme Court. The reasons expressed by the court for reversing a case are important. The next task, therefore, involves analyses of reasons, and the careful weighing of one expression of the court with others made on similar issues. Having found the rule, it becomes important to study its underlying principle and policy. Finally, a study of the effect of a decision often is of utmost consequence. The immediate bearing of a decision is upon the issues in the particular case, but its influence, frequently, does not end there, but continues to bear on the course of law administration for years, for generations, and even for centuries to come.

2. Function of the Supreme Court in Criminal Cases. In studying the decisions in criminal cases we shall be dealing, principally, with felony charges. But as a considerable number of misdemeanor cases ultimately go to that court by way of the Appellate Courts, or directly, because in them a constitutional question is involved, and as decisions in such cases affect the rights of defendants in felony, as well as misdemeanor cases, no study would be complete without considering them. The influence of the Supreme Court in criminal cases, it will be observed, is particularly dominating. By statute, writs of error in all felony cases, and in misdemeanor cases in which the construction of the Constitution is involved, are taken directly to the Supreme Court. Writs of error in other misdemeanor cases are taken to the Appellate Court. But,

even as to them, a writ of error from the Supreme Court to the Appellate Court to obtain a review of the latter court's decision, is a constitutional writ of right and must be allowed when claimed.[1]

The criminal cases heard by the Supreme Court form only a portion of its work. From a study of its opinions during the course of one year (October term 1926 through June term 1927) it was found that approximately thirty per cent of the court's decisions were devoted to the criminal law, and seventy per cent to other fields. Out of 321 cases decided that year, 98 were criminal, and 223 dealt with other subjects in the law.[2]

A substantial number of criminal cases reach the Supreme Court, but even so, that number is relatively small compared with the great number of such cases that come before the trial courts. We must not conclude from this, however, that the Supreme Court's place in law administration is correspondingly unimportant. That is not to be measured by the number of cases it passes on directly. For, as has already been observed, the influence of a particular decision transcends its particular significance. The Supreme Court speaks with authority, and trial courts, prosecuting officers and the lawyers throughout the state, must and do heed its opinions.

When a particular opinion but follows precedent, the trail having been blazed before, then the procreative powers of the court are little in evidence, but when precedents fail, then they are most conspicuous. In commenting on the serious problem that then confronts the judge, Mr. Justice Cardozo has said:[3]

> "He must then fashion law for the litigants before him. In fashioning it for them, he will be fashioning it for others. The classic statement is Bacon's: 'For many times, the things deduced to judgment may be meum and tuum, when the reason and consequence thereof may trench to point of estate.' The sentence of today will make the right and wrong of tomorrow . . . Every judgment has a generative power. It begets in its own image. Every precedent, in the words of Redlich, has a 'directive force for future cases of the same or similar nature.' Until the sentence was pronounced, it was as yet in equilibrium. Its form and content were uncertain. Any one of many principles might lay hold of it and shape it. Once declared, it is a new stock of descent. It is charged with vital power. It is the source from which new principles or norms may spring to shape sentences thereafter."

Occasionally, the authoritative influence of the court comes into relief with sudden effect through an announcement of a change of view on a question. Such *coup de main* was accomplished when the Supreme Court reversed its position on illegal searches and seizures. For many years the court had adhered to the opinion that, in the administration of the criminal law, courts "are not accustomed to be over-sensitive in regard to the sources from which evidence comes."[4] Then came the decision in *People* v. *Brocamp*,[5] with the holding that an unlawful search and seizure violated

[1] See sections 2 and 11 of Article VI of the Constitution and section 118 of the Practice Act.
[2] See Table 2 *infra*.
[3] *The Nature of the Judicial Process* (1922) 21-22.
[4] (1891) 138 Ill. 103, 111, 27 N. E. 1085.
[5] (1923) 307 Ill. 448, 138 N. E. 728.

the provision of the state constitution, and that it constituted reversible error to admit in evidence the ill-begotten articles. With that decision, the old line of descent was broken and a new one established. The descendants generated through the latter have already passed through so many generations that some of them bear but little resemblance to the common ancestor.

3. Statistical Summaries of Rulings, Classified as to Quantity, Grounds of Reversal, Etc.

During the ten years under consideration, approximately 700 criminal cases have been before the Supreme Court. In Table 1, that follows, we show, year by year, the number of criminal cases considered by the court, the number reversed, reversed and remanded, affirmed and the percentage affirmed. In totals, during the ten year period, 410 cases were affirmed, 217 reversed and remanded and 72 reversed. The affirmances constituted 59% of the total number of cases considered. Thus, approximately three-fifths of the cases were affirmed, and two-fifths either reversed or reversed and remanded.[1]

TABLE 1. *Criminal Cases* AFFIRMED, REVERSED AND REMANDED, OR REVERSED BY THE SUPREME COURT OF ILLINOIS, *October Term 1917 Through June Term 1927*

Year	Affirmed	Reversed and Remanded	Reversed	Total	Per Cent Affirmed
1917-1918	30	9	6	45	64
1918-1919	27	12	1	40	68
1919-1920	37	17	7	61	61
1920-1921	43	21	3	67	64
1921-1922	47	32	4	83	57
1922-1923	52	21	3	76	68
1923-1924	36	21	13	70	51
1924-1925	40	32	7	79	51
1925-1926	45	19	16	80	56
1926-1927	53	33	12	98	54
Totals	410	217	72	699	59

In Table 2, we show a comparison of criminal and civil cases during a period of one year. For the year studied (that of 1926-1927), the percentage of affirmances was slightly lower than the average for the ten year period. Of the civil cases for that period, 61% were affirmed, which is slightly higher than the percentage affirmed in the criminal cases for that year and slightly higher than the average affirmed in criminal cases for the ten year period.

TABLE 2. COMPARISON OF *Criminal and Civil Cases* DECIDED BY THE SUPREME COURT, *October Term 1926 Through June Term 1927*[2]

Class of Cases	Cases	Affirmed	Reversed and Remanded and Reversed	Per Cent Affirmed
Criminal	98	53	45	54
Civil	223	136	87	61

The criticism, frequently urged, that the Supreme Court is over-tech-

[1] In Missouri it was found that during a ten-year period the affirmances by the Supreme Court of Missouri showed 56.37 per cent. *The Missouri Crime Survey* (1926) 221.

[2] The above table is approximate only as a number of cases could not be arbitrarily included.

nical in criminal cases would seem not to be borne out by the figures, unless it also is contended that the court likewise is too technical in civil cases.[1]

In Table 3, we have classified the cases according to offenses. A study of that table shows that the percentage of cases affirmed or reversed varies greatly with the crime. To compare some of the more serious crimes, we find that only 38% of the confidence game judgments were sustained in the Supreme Court, and but 42% of those involving the receiving of stolen property. On the other hand, 79% of the robbery cases have withstood the scrutiny of the court. Thus, the percentage of affirmances, in cases involving the taking of property by violence, was approximately double that where they involved the wrongful dealing with property through stealth. The percentage in the murder cases was about average. Less than half of the liquor cases were affirmed, and less than one-third of those in which contempt of court was involved.

TABLE 3. *Cases* BEFORE THE SUPREME COURT, OCTOBER TERM 1917 THROUGH JUNE TERM 1927, *Classified According to Offenses*

Offenses Charged	Total Cases	Affirmed	Reversed and Remanded	Reversed	Per Cent Affirmed
Murder	103	58	42	3	56
Manslaughter	43	25	18	0	58
Felonious assaults	27	18	8	1	67
Rape and incest	41*	27	13	2	64
Crime against children	15	9	6	0	60
Burglary	48*	28	20	3	55
Robbery	87	69	14	4	79
Larceny	56*	33	21	3	58
Embezzlement	12	7	4	1	58
Receiving stolen property	26	11	13	2	42
Confidence game	33*	13	11	10	38
Forgery	8	4	4	0	50
Perjury	8	5	2	1	63
Contempt of court	18	6	3	9	33
Conspiracy	19	15	3	1	79
Violation of liquor laws	60*	22	16	14	42
Miscellaneous	99*	60	19	18	62
Totals	703*	410	217	72	59

*Apparent discrepancies in number of cases are due (1) to the fact that some cases have different dispositions as to different joint defendants, and (2) to transference to Appellate Court for jurisdictional reasons.

In the above table, it will be observed that a heavy percentage of reversals was found in connection with the confidence game crime. The Supreme Court affirmed but 13 cases where that crime was involved, and reversed 21. Obtaining property by means of the confidence game is a purely statutory crime which appears to be spreading over the fields once occupied by other crimes. Having no exact boundaries, it has become a source of much grief to prosecutors.

In Table 4, which follows, we have made a comparison of the number of cases that have been taken to the Supreme Court, the number affirmed, reversed, or reversed and remanded, between Cook County and the rest of

[1] It should be observed that in criminal cases writs of error to the Supreme Court lie only on behalf of the defendant. The state cannot take up a case. In civil cases, either the plaintiff or the defendant may carry his case up to a higher court. As to whether this makes any difference in the percentage of cases affirmed or reversed is problematical.

the state. The two have made their offerings in nearly equal numbers. Cook County has contributed 354, and "down-state" 340. Cook County exceeds the rest of the state in the percentage of cases affirmed.

TABLE 4. *Criminal Cases Affirmed,* REVERSED AND REMANDED, OR REVERSED BY THE SUPREME COURT, OCTOBER TERM 1917 THROUGH JUNE TERM 1927, *in Cook County Compared with Rest of State*

	Cases*	Affirmed	Reversed and Remanded	Reversed	Per Cent Affirmed
Cook County	354	222	100	33	62.5
Rest of State	340	182	117	36	54.4

*Apparent discrepancy due to (1) causes transferred to Appellate Court, (2) original suits in Supreme Court.

The principal grounds assigned by the Supreme Court for the reversal of criminal cases, with the number for each separately tabulated under specific crimes, are shown in Table 5. It will be our problem to study these in detail. For the present, we may point out that *errors in the giving or refusing of instructions,* with 81 cases in which that was assigned as a ground for reversal, heads the list. A doughty coadjutor, in this tragedy of errors, is the ground, *errors in the admission or exclusion of evidence,* with 80 separate occasions in which it was assigned. Next in line, come *evidence insufficient to sustain the verdict,* with 68, *misconduct of the court,* with 35, *misconduct of counsel for the state,* with 24, and so on down the list.

TABLE 5. PRINCIPAL GROUNDS FOR REVERSAL OF CASES BY THE SUPREME COURT, 1917-1927

	Violation of Constitutional Provision	Defective Indictment or Information	Instructions: Errors in Giving or Refusing	Evidence: Errors in Admission or Exclusion	Errors in Cross-Examination	Variance	Conduct: Conduct of Prosecuting Attorney	Conduct of Court	Error in Form of Verdict	Evidence Insufficient to Sustain Verdict	Miscellaneous	
Murder	0	0	23	22	5	1	6	7	0	3	4	
Manslaughter	0	0	13	7	2	0	3	2	0	2	1	
Assault with intent to commit felony	0	1	3	2	0	0	0	2	0	2	1	
Crime against children.	0	0	1	3	1	0	1	1	0	1	2	
Rape and incest	0	0	5	6	1	0	0	1	0	3	3	
Burglary	0	1	8	5	4	0	3	3	0	7	1	
Robbery	0	1	1	5	1	2	2	5	0	5	0	
Embezzlement	0	0	2	0	0	0	0	0	1	3	1	
Larceny	0	0	8	6	3	2	2	3	1	10	2	
Receiving stolen property	0	0	4	4	1	2	2	2	0	3	2	
Confidence game, etc.	0	0	4	6	1	4	2	1	0	10	1	
Forgery	0	0	0	3	1	0	0	1	0	0	0	
Perjury	0	0	1	0	0	0	0	0	0	1	1	
Contempt of court	4	0	0	0	0	0	0	1	0	0	7	
Conspiracy	0	0	1	1	0	1	0	0	0	1	1	
Violation of liquor laws	0	12	3	4	0	1	0	2	2	7	6	
Miscellaneous	7	3	4	6	0	3	3	4	0	10	4	
Total	11	18	81	80	20	16	24	35	4	68	37	394
Per Cent	2.8	4.6	20.6	20.3	5.1	4.1	6.1	8.8	1.0	17.2	9.4	100.

(I) Constitutional Provisions, as Ground for Reversal

Constitutional questions in criminal cases have arisen in comparatively few cases.[1] But their paucity is in no way a fair appraisal of their importance. Frequently, they have been of great moment and interest. The principal constitutional questions involved, during the period studied, have been those dealing with due process, unreasonable searches and seizures and self-incrimination.

4. Due Process. The concept, firmly rooted in the common law, that all crimes necessarily involve the criminal intent, is giving way to a surge of legislation which is making various acts criminal regardless of the knowledge or intent of the offender. The state, in the maintenance of public policy, may provide, as to certain deeds, "that he who shall do them shall do them at his peril and will not be heard to plead in defense, good faith or ignorance." The policy involved has been well stated by Mr. Chief Justice Taft:[2]

> "Many instances of this are to be found in regulatory measures in the exercise of what is called the police power where the emphasis of the statute is evidently upon achievement of some social betterment, rather than the punishment of the crimes as in cases of *mala in se*."

The Supreme Court of Illinois, recently, has had this question before it in the case of *People* v. *Billardello*.[3] The defendant was charged with and convicted of violating section 35 of the Motor Vehicle Act which made it unlawful to have in one's possession a motor vehicle, the original engine number of which had been destroyed, removed, altered or defaced. The defendant contended that section 35 was unconstitutional; that it was arbitrary and unreasonable to subject a citizen to a "deprivation of his property and his liberty by imposing a fine and imprisonment on him for an act done without any criminal intent and in ignorance of any violation of law." In affirming the judgment of the Circuit Court, the Supreme Court said:[4]

> "The principle had been established by many previous decisions referred to in the opinions in those cases, that in the exercise of the police power for the protection of the public the performance of a specific act may be declared to be a crime regardless of either knowledge or intent, both of which are immaterial on the question of guilt."

A broad view of public policy is at the basis of the decision in the *Billardello* case. It is refreshing to read such an opinion. The law may bear heavily upon an individual occasionally, but if the greater interests of the public are thus served, the principle is easily justified that the individual should act at his peril.[5]

5. Searches and Seizures. Reference to the use of evidence obtained by unreasonable search and seizure, and to the decision in *People* v. *Brocamp*[6] has been made previously. Two

---

[1] Violations of constitutional provisions have been assigned as error by the Supreme Court during the period studied in but eleven cases, see Table 5.

[2] *United States* v. *Balint* (1922) 258 U. S. 250, 252, 42 Sup. Ct. 301, 66 L. Ed. 604.

[3] (1925) 319 Ill. 124, 149 N. E. 781.

[4] Page 126 official report.

[5] To the same effect see *People* v. *Oberby* (1926) 323 Ill. 364, taken to the Supreme Court on writ of error to the Appellate Court.

[6] (1923) 307 Ill. 448, 138 N. E. 728.

questions, in the case, were involved in tantalizing confusion—one of constitutional law and the other of evidence. The defendant's home had been searched by officers without a search warrant, and articles were found which appeared to have been the very fruits of a crime. After his indictment, the defendant made a motion asking that the articles be returned to him on the ground that they had been taken from him through unreasonable search and seizure in violation of Article 2, Section 6 of the Constitution. This section reads as follows:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue without probable cause, supported by affidavit, particularly describing the place to be searched, and the persons or things to be seized."

The trial judge denied the defendant's motion, and the case proceeded; the articles unlawfully taken were admitted in evidence against him over his objection, and he was convicted. The Supreme Court held that reversible error had been committed. We quote from the opinion:[1]

> "It is very clear that the defendant's constitutional rights were ruthlessly and unlawfully violated. . . . Such action of the officers in forcibly or unlawfully and without a warrant entering the plaintiff in error's home and searching it and seizing the articles aforesaid has in unmistakable terms been condemned by the courts of this country. If an American's constitutional rights cannot be protected against ruthless and unlawful acts of the character disclosed in this record, then the constitution guaranteeing such rights is a mere nullity and our boasted rights of liberty are vain boastings . . . Our holding is that the unlawful search and seizure aforesaid violate the provisions of our State constitution."

That the seizure in the *Brocamp* case was *unreasonable,* and that it violated the Constitution there is no doubt. But does it follow that the effects seized, which apparently were the very articles with the theft of which the defendant was charged, were not admissible in evidence against him? When the articles were unlawfully seized, the wrongful act of the persons participating constituted a trespass, and the fact they purported to be acting on behalf of the state, made them no less so. The Constitution is plain thus far. But does it follow that the effects seized had lost their potentiality as evidence against the accused? On this great issue the courts, as well as others, are divided in opinion. The Illinois view has the respectable support of the Supreme Court of the United States.[2]

---

[1] Pages 453, 456 official report.

[2] See *Boyd* v. *U. S.* (1885) 116 U. S. 616, 6 Sup. Ct. 524; *Weeks* v. *U. S.* (1914) 232 U. S. 383, 34 Sup. Ct. 341; *Silverthorne* v. *U. S.* (1920) 251 U. S. 385, 40 Sup. Ct. 182; *Gouled* v. *U. S.* (1921) 255 U. S. 298, 41 Sup. Ct. 261; *Amos* v. *U. S.* (1921) 255 U. S. 313, 41 Sup. Ct. 266. Various state courts take the same view. See also Atkinson *Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures* (1925) 25 Colum. L. R. 11.

Probably the majority of state courts hold that the evidence is admissible. See 4 Wigmore *Evidence* (1923, 2nd ed.), sec. 2184. Harno *Evidence Obtained by Illegal Search and Seizure* (1925) 19 Ill. L. R. 303. For a discussion of the sufficiency of a

The *Brocamp* decision has generated other cases. In *People* v. *Castree*[1] a warrant had been issued to search a store building belonging to the defendant at a certain address. The entrance at that address was the defendant's dwelling. The defendant actually conducted a small store in a room of his house, but that room fronted on another street. The officers searched both the store and the residence part of his building. In the latter they found intoxicating liquor. The Supreme Court held that an unreasonable search and seizure was involved.

In *People* v. *Elias*[2] a judgment of conviction was reversed because a search warrant had been issued on the sworn complaint of the state's attorney, based on his information and belief. But, in *People* v. *Swift*,[3] a search and seizure without a warrant from the person of the defendant, who had been arrested on suspicion, was held not to have been unreasonable.

Further citations to decisions by the Supreme Court of Illinois, and to others holding to this view, could be multiplied showing the elusive and fitful status of the law on this subject. Our interest in the question bears not so much on the principle or the philosophical theory involved, intensely interesting though it is, but upon the fact that convictions are being reversed whenever such evidence is used, that because of this view of the Supreme Court the hazards appertaining to securing convictions have been increased, and that seemingly guilty persons have found this contention a convenient way out of their difficulties. The search and seizure guaranty was a bulwark raised by a people harassed by a tyrannical government. Wilkes fought for it in England, and the eloquence of Otis was "a flame of fire" on its behalf in the colonies. But that was a century and a half ago; since then the pendulum has made a complete sweep. Today some of the very bulwarks of liberty have become safe-guards for criminals. Once the cry was against governmental aggression; today it is against the very impotency of the agencies of government. After the Supreme Court's action, reversing Brocamp's conviction, the case against him was dropped. Similarly, Castree and Elias were never retried.[4]

6. Self-Incrimination. The maxim *nemo tenetur prodere seipsum*, or, as it now is expressed in constitutional phraseology, "No person shall be compelled in any criminal case to give evidence against himself,"[5] is today one of the great impediments to securing the conviction of the guilty. The maxim had its inception in the opposition to the procedure of the Star Chamber and of the ecclesiastical courts, with which it probably originated. The opposition was to "what was known

search warrant based on information and belief see Harno *Recent Illinois Criminal Cases* (1926) 20 Ill. L. R. 643. As to seizure incident to an arrest see *People* v. *Chaigles* (1923) 237 N. Y. 193, 142 N. E. 583, 32 A. L. R. 676. An extensive note on the subject may be found in 32 A. L. R. 680.

[1] (1924) 311 Ill. 392, 143 N. E. 112.

[2] (1925) 316 Ill. 376, 147 N. E. 472.

[3] (1925) 319 Ill. 359, 150 N. E. 263.

[4] The state's attorney, who succeeded the one who prosecuted the *Castree* case, commented on its further disposition as follows: "Nothing further could be done on the possession act under the holdings of the upper court. The investigator who made the buy was a free-lance investigator and he had long since moved to other parts when the case finally got back from the Supreme Court."

[5] Constitution of Illinois, Article II, section 10.

as the *ex officio* oath, . . . but in the old ecclesiastical courts and in the Star Chamber it was understood to be, and was, used as an oath to speak the truth on the matters objected against the defendant—an oath, in short to accuse oneself. It was vehemently contended by those who found themselves pressed by this oath that it was against the law of God, and the law of nature, and that the maxim *nemo tenetur prodere seipsum* was agreeable to the law of God, and part of the law of nature." [1]

The inquisitorial cast of the oath probably had its origin in a combination of circumstances in England following the Wars of the Roses. The nobility, in a large part, had been destroyed, thus removing a check upon the crown. The Tudor monarchs introduced a procedure similar to that obtaining in France. This manifested itself particularly in the treatment of persons accused of crime.

> "The accused was arrested, kept in confinement more or less close, and examined, . . . the examination being sometimes carried on . . .by means of torture. He had no counsel, apparently no right to summon witnesses, and was not allowed to know the evidence against him. This might be given at the trial in the form of depositions, for the government was not required to produce its witnesses in court. The result was that he was, or might be, given no opportunity to cross-examine them, while, on the other hand, he was himself elaborately questioned before the jury, and, in fact, his examination was the very essence of the trial." [2]

The use of the *ex officio* oath was finally brought to a culmination with the trial of one John Lilburn[3] in 1637. Subsequently the Court of Star Chamber and the Court of High Commission for Ecclesiastical Causes were both abolished by statute in 1641. "In the latter statute was inserted a clause which forever forbade, for any Ecclesiastical Court, the administration *ex officio* of an oath requiring answer as to matters penal." [4] With the abrogation of the *ex officio* oath the maxim *nemo tenetur prodere seipsum* was even more imperatively urged. In 1660 it definitely was given judicial recognition in *Scroop's Trial*,[5] where we find the court saying to Scroop in the course of the trial of the Regicides: "Did you sit upon the sentence day, that is the evidence, which was the 27th day of January? *You are not bound to answer me, but if you will not we must prove it.* Do you confess that?"

This, in short, is the historical background of the privilege against self-incrimination. It arose out of the struggles against the acts of an oppressive and tyrannical government. The great contest was in full swing when the American Colonies were being settled, and its stirring events were still fresh in mind when our first constitutions were being written. In them it found firm lodgment, presumably, as another bulwark against autocratic and high-handed governmental acts. But, as the situation was noted in our remarks concerning searches and seizures, we here again are at the far sweep of the pendulum. As said by one noted observer: [6]

---

[1] I Stephen *History of the Criminal Law of England* (1883) 342.
[2] Lowell. The Judicial Use of Torture (1897) 11 Harv. L. Rev. 290, 294.
[3] (1637) 3 How. St. Tr. 1315.
[4] 4 Wigmore *op. cit.* sec. 2250.
[5] (1660) 5 How. St. Tr. 947.
[6] William H. Taft (then Secretary of War), *The Administration of Criminal Law* (1905) 15 Yale L. J. 1, 12.

"We find that these constitutional limitations adopted centuries ago in tenderness to the defendant and which have to some extent outlived their usefulness, because the reasons for their adoption have ceased to be, have been elaborated in their scope and operation, not only by the court, but also by the legislatures, because thought to be in the interest of liberty. And this has made them greater obstacles in the conviction of the guilty."

An instance of an elaboration of this constitutional provision is found in *People* v. *Spain*,[1] where the Supreme Court held:

"When a proper case arises, the constitutional provisions quoted should be applied in a broad and liberal spirit in order to secure to the citizen that immunity from every species of self-accusation implied in the brief but comprehensive language in which they are expressed . . . The security which they afford to all citizens against the zeal of the public prosecutor or public clamor for the punishment of crime should not be impaired by any narrow or technical views in their application to such a state of facts as appears from the record before us."

These words, if spoken in 1640, or, even in 1789, well would have proclaimed the cause of liberty against governmental oppression. With the criminal class as powerful and as audacious as it is today, they do not have the eloquent appeal they once had. "The danger now is, not that innocent men will be convicted, but that guilty men will go unwhipped of justice." [2]

A great impetus would be given to law enforcement if the privilege against self-incrimination could be removed from our constitutions. "I cannot see," said a noted federal judge,[3] "why a man in a public court to which all may resort, in the presence of a judge presumably bent upon justice, with a jury who certainly in ordinary cases do not lean against him, himself represented by a person employed to defend him—I cannot see why a man so situated should not be compelled to tell what he knows. The possibilities of abuse seem to me quite unreal. There are cases where they would not be, of course, e. g., in times of great public excitement, such as during war, but in normal times, I cannot agree that such a man is in danger of injustice."

The time is far distant, in all probability, when a total abrogation of the privilege can be accomplished. It is rooted too deeply for sudden upheaval. But the case of interpretation is otherwise. "So much of it lies in the interpretation that its scope will be greatly affected by the spirit in which that interpretation is approached. Much can be settled by a consideration of its historic scope, before the constitutions were made. But, after all this, the decision will constantly depend upon whether the privilege is approached with favor or with disfavor, with fatuous adulation or with

[1] (1923) 307 Ill. 283, 289, 138 N. E. 614.

[2] Storey, *The Reform of Legal Procedure* (1911), 217. Mr. Storey, at page 220, quotes the following pertinent remarks from one of Demosthenes' orations: "What is it that has ruined Greece? Envy, when a man gets a bribe; laughter if he confesses it; mercy to the convicted; hatred of those who denounce the crime—all the usual accompaniments of corruption."

[3] Judge Learned Hand in course of remarks on the *Improvement of the Technical Rules of Evidence* (July, 1923), 10 Proceed. of Acad. of Pol. Science 407, 411. See also Herbert S. Hadley, *The Reform of Criminal Procedure*, ibid, 396, 402, and Reynolds, *The Betterment of Criminal Justice*, ibid, 377, 383.

judicious appreciation." [1] The highest court of a sister state, recently, has expressed a view in accordance with these remarks, and at variance with that taken by our Supreme Court.[2] In the absence of a clear expression of other legislative intent, it said, "The field of operation of a statute which safeguards the privilege against self-incrimination should not be extended beyond the historic limits fixed by the purpose and spirit of the privilege itself."

(II) Defective Pleadings, as Ground for Reversal

When questions relative to defective indictments or informations have been raised in the Supreme Court, it frequently has expressed liberal views in affirming convictions. But in this, as it appears frequently in other connections, the court has not pursued a uniform policy.

7. Liberal Views. Section 6 of division 11 of the Criminal Code provides that "every indictment . . . shall be deemed sufficiently technical and correct which states the offense in the terms and language of the statute creating the offense, or so plainly that the nature of the offense may be easily understood by the jury." This is a liberal statute, in which the legislature, obviously, has made an effort to turn its back upon technical indictments. Consonant with the statute the court held in *People* v. *Connors:* [3]

> "An indictment for a statutory offense is sufficient if it sets forth the offense in the terms and language of the statute creating the same or so plainly that its nature may be easily understood by the jury. This court has so held in numerous cases, . . . and has more than once said that where a statute creates an offense, while indictments thereunder should contain proper and sufficient averments to show a violation of the law, 'great niceties and strictness in pleading should only be countenanced and supported when it is apparent that the defendant may be surprised on the trial or unable to meet the charge or make preparation for his defense for want of greater certainty or particularity in the charge. Beyond this, it tends more to the evasion than the investigation of the charge, and becomes rather a means of escaping punishment for crime than of defense against the accusation.'"

The court held in the *Connors* case that it was sufficient, under the statute above quoted, "to describe the offense of burglary in the language of the statute, without including the word 'feloniously.'" [4]

In another case,[5] the plaintiff in error, Joe Kargula, contended that the indictment which read, "that one Joe Clark, *alias* Joseph Swintowsky and Joe Kargula," etc., was bad because it was returned against Joe Clark under two *aliases,* and not against plaintiff in error. The court held that there was no objection to the indictment as worded. Joe Clark was not described, it thought, as having two *aliases,* and if a comma had been placed after the name Joseph Swintowsky, there could have been no objection at all. It then made the following pertinent remarks: [6]

---

[1] 4 Wigmore, *op cit.,* sec. 2251.
[2] *People* v. *Ales* (1928), 247 N. Y. 351, 160 N. E. 395.
[3] (1922) 301 Ill. 249, 250, 251.
[4] See to the same effect, *People* v. *Connors* (1922), 301 Ill. 112.
[5] *People* v. *Kargula* (1918), 285 Ill. 478.
[6] Ibid, page 480.

"The meaning of the indictment is plain and unequivocal and the court did not err in overruling the motion to quash. Where the meaning of an indictment is plain and unequivocal, false grammar, wrong spelling, defective rhetoric or an error in punctuation will not render the indictment insufficient."

In *People* v. *Reed*[1] the defendant was charged with the crime of pandering. In the Supreme Court he raised a technical objection as to the use of the disjunctive *or* in the information. The court held that if there was any force in the objection it was waived by going to trial. It then continued as follows:[2]

"Section 9 of division 11 of the Criminal Code provides: 'All exceptions which go merely to the form of an indictment shall be made before trial and no motion in arrest of judgment or writ of error shall be sustained for any matter not affecting the real merits of the offense charged in the indictment.' All objections to the information were waived by going to trial."[3]

8. Technical Views.. The liberal trend of the decisions, above instanced, has had jarring interruptions, so cataclysmic, at times, that one may well wonder which way the stream flows. Such, we believe, was the effect of the decision in *People* v. *Stoyan*.[4] The defendant had *pleaded guilty* on an information filed in the Municipal Court of Chicago and had received his sentence, when he discovered that the information had in it some peculiar language. It charged that *John Stoyan,* on April 27, 1917, in the county of Cook, "did then and there with a certain instrument commonly called a revolver, . . . unlawfully, willfully and maliciously make an assault in and upon one *John Stoyan,* with intent then and there to inflict upon the person of said Thomas Korshak a bodily injury, contrary to the statute," etc.

The defendant was sentenced for an assault with a deadly weapon. The Supreme Court reversed the judgment (Mr. Chief Justice Carter dissenting) stating its views, in part, as follows:[5]

"The information in this case charges that plaintiff in error made an assault upon John Stoyan with intent to inflict bodily injury upon the person of Thomas Korshak. It cannot be presumed that the insertion of the name of John Stoyan was a clerical error, but it must be assumed that he was another and different person than the plaintiff in error although bearing the same name."

Why must it be assumed that a different person, other than the defend-

[1] (1919) 287 Ill. 606.
[2] Ibid, 609.
[3] In *People* v. *Folignos* (1926), 322 Ill. 304, 306-307, the Court said: "It is not alleged in either count that Valentino Parise or Gene Parise could read and understand the Italian language, and it is contended by plaintiff in error that this was an essential averment. We do not agree with this contention. The indictment is in the language of the statute, and it sets out in both Italian and English the contents of the letters which it is charged the accused sent to the persons threatened. He was fully informed of the charge against him and had a full opportunity to prepare his defense. The indictment is sufficient."
[4] (1917), 280 Ill. 300, 117 N. E. 474.
[5] Page 302 official report.

ant, was denoted? Why is it not plain that this was a clerical error? Is it of no point that the defendant had pleaded guilty, and that this question was for the first time raised on error? Had it been raised on demurrer or a motion to quash, there might have been some justification for the view expressed. But this man had pleaded guilty to the charge and had been sentenced, when the diligence of counsel was rewarded by finding that the prosecutor's pen had slipped in drawing the information.[1] In this study we are interested in finding how the decisions of the Supreme Court affect the administration of the criminal law. The *Stoyan* case is an example of how, by a decision, the Supreme Court may make that administration difficult. The average man, on reading this information, would have observed in it a slip, and without knitting his brows would have seen through the mistake. Exactness and clearness are desirable and at times essential in the law. But if a proposition is clear, we believe want of exactness should not be considered ground for reversal.

In *People* v. *Goldberg*[2] the court was even more meticulous in finding grounds for error in the indictment. There were fifty counts in the indictment, and the defendant was convicted under all of them. On error the Supreme Court approved of forty-nine. In the fiftieth the prosecutor had written *Holdberg* instead of *Goldberg*. Because of that, the case was reversed and remanded. The following statement taken from the opinion presents the court's views:[3]

> "It is contended by the state that as many of the witnesses pointed out plaintiff in error during the trial and said he was the man they bought intoxicating liquor from, the judgment should not be reversed because of the one count against Holdberg; that plaintiff in error was clearly proven guilty of the fifty charges, and that if the judgment is reversed on that account, under the decision in *People* v. *Gaul*, 233 Ill. 630, the entire judgment must be reversed and that injustice would be done the state, as it contended none of the other errors assigned would require a reversal of the judgment. We think this is probably true. One instruction given for the people was palpably erroneous but possibly was not of such prejudicial effect as to require a reversal. This court is desirous that justice may be done to both parties in all cases,

---

[1] "Manifestly, the fault should be taken for what it really is, a clerical error, pure and simple. And the inquiry should be whether the objectionable words cannot be discarded, under the rule that 'whenever a description or averment can be stricken out, without affecting the charge against the prisoner, and without vitiating the indictment, it may on the trial be treated as surplusage and rejected.' *Durham* v. *People* (1843), 5 Ill. (4 Scam.) 172. Applying this principle, we would reject the words 'one John Stoyan' where that name is inadvertently used, and the word 'said' before the name 'Thomas Korshak,' leaving the charge phrased thus: that 'John Stoyan on etc., at etc., did then and there, with a certain instrument, commonly called a revolver, . . . unlawfully, wilfully, and maliciously make an assault *in and upon, with intent then and there to inflict upon the person of Thomas Korshak a bodily injury,*' etc. The result is by no means in the highest form of the pleader's art, but its meaning is unmistakable. In the words of *Durham* v. *People*, *supra*, the information, after this pruning, 'contains a charge of a substantive offense, specified in terms certain to a common intent.'" Comment on Recent Cases, 12 Ill. L. Rev. (1917) 555, 556.

[2] (1919) 287 Ill. 238.

[3] Page 245 official report. See also *People* v. *Berman* (1925), 316 Ill. 547 for a discussion of the sufficiency of indictments and informations.

but the forms and requirements of law must be regarded in the administration of justice, and if the officers charged with the duty of protecting the interests of the People in the enforcement of the criminal law choose to name two different parties defendant in different counts of the same indictment and ask and secure a verdict of guilty against one defendant named under all the counts in the indictment, contrary to good pleading and the law, this court cannot sustain the judgment on the ground that the defendant convicted was proved guilty of all the charges in all the counts of the indictment and would have been found guilty if he had been named as defendant in all of them. It would have been a simple matter for the state to have *nollied* the count against Holdberg and the situation then would have been relieved of the difficulty. In the condition the record is in we cannot, without disregarding the law, affirm this judgment but are compelled to reverse it."

There remains another feature in the *Goldberg* case for our attention. The People insisted that the question as to the "count against *Philip Holdberg* should have been pleaded in abatement or in some manner raised in the court below." To this the Supreme Court answered that the defendant had made a motion in arrest of judgment, and further that he had made a motion that the state be required to elect under what counts a conviction would be asked. The motion to arrest the judgment, said the court, reached every defect in the record, and the motion to elect afforded the state an opportunity to dispense with the count against *Holdberg*. "True, in making the motion," the court admitted,[1] "it was not specifically pointed out that the defendant named in one of the counts was not plaintiff in error, but counsel for the state had prepared the indictment and must be conclusively presumed to have known that plaintiff in error was named as defendant in only forty-nine of the counts."

Here again, what is apparent as a typographical error to any one but the court, to it, meant that the prosecuting officer could only have intended some one other than the defendant. Further, the procedure followed by the defendant gave him, first, an opportunity to gamble for a favorable jury verdict, and, that not having been forthcoming, then to raise a question as to the error in the indictment.

By way of comparison attention is directed to the case of *People* v. *Kuhn*.[2] The defendant, after the verdict, had objected that he had been convicted by a jury different from the one shown by the record. Specifically, one juror had been excused and another substituted in his place, but through an oversight the record omitted to enter the change. The Supreme Court held the contention did not constitute grounds for reversing the judgment. The concluding words of the opinion were as follows:[3]

"If a jury returning into court to deliver a verdict is not the same jury impaneled and sworn, it is the plain duty of any party to object to the return of the verdict by such a jury; and if he does not but chooses to speculate on the chance of a favorable verdict he should

[1] Page 244 official report.
[2] (1919) 291 Ill. 154.
[3] Ibid, 164.

not be heard afterward to make the objection that a juror acted without being sworn."

9. Negative Averments. Reference to Table 5 will show that among the principal grounds upon which the Supreme Court reverses cases, defective indictments or informations account for but 4.6%. But if this table is scrutinized carefully it will be found that twelve out of thirty-seven (32.4%) of the liquor cases were reversed on account of errors in indictments or informations. Our attention now is directed to some of those cases and particularly to certain holdings bearing on the necessity for and the sufficiency of negative averments in indictments and informations. Among the decisions to be considered are those in *People* v. *Martin*[1] and *People* v. *Barnes*.[2] In those cases it was held (Mr. Chief Justice Duncan and Justices Stone and Farmer dissenting) that in charging a violation of the Illinois Prohibition Act, it is not sufficient to aver merely that the defendant unlawfully had violated the act, but the indictment or information must also contain negative averments that the defendant did not come within any of the exceptions or provisos of the act; this notwithstanding the fact that the act itself provides that it shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented, and that it further provides in section 39 that *"it shall not be necessary in any affidavit, information or indictment . . . to include any defensive negative averments,* but it shall be sufficient to state that the act complained of was then and there prohibited and unlawful."

Section 3 of the Prohibition Act provides:

> "No person shall on or after the date when this act goes into effect, manufacture, sell, barter, transport, deliver, furnish or possess any intoxicating liquor except as authorized in this act, and all the provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.
>
> "Liquor for non-beverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, delivered, furnished and possessed, but only as herein provided, and the attorney general may, upon application, issue permits therefor, but in case the office of commissioner of prohibition shall be created then such commissioner shall issue said permits: Provided, that nothing in this act shall prohibit the purchase and sale of warehouse receipts covering distilled spirits on deposit in government bonded warehouses."

Mr. Justice Heard, in the *Martin* case, after quoting this section, and other sections of the act including Section 39, disposes of this question as follows:

> "Where a statute defining an offense contains an exception or proviso in its enacting clause which is so incorporated with the language describing and defining the offense that the ingredients of the offense cannot be accurately and clearly described if the exception is omitted, it must be shown that the accused is not within the exception . . . If an act is prohibited except under certain conditions, the indictment

[1] (1924) 314 Ill. 110.
[2] (1924) 314 Ill. 140.

must allege the circumstances for the purpose of showing that the prohibited act constituting the crime has been done."

Mr. Justice DeYoung in the *Barnes* case, after quoting section 39 of the act, goes on to say:

> "It is not sufficient to charge an offense in the language of the statute, alone, where by its generality it may embrace acts which it was not the intent of the statute to punish. Such facts must be alleged that, if proved, defendant cannot be innocent. . . . The pleader must either charge the offense in the language of the statute or specifically set forth the facts constituting it. But where the statute creating a new offense does not describe the act or acts which compose it, the pleader is required to state them specifically. . . . Section 9 of the bill of rights provides that in all criminal prosecutions the accused shall have the right to demand the nature and cause of the accusation against him. The purpose of this guaranty is to secure to the accused person such specific designation of the offense laid to his charge as will enable him to prepare fully for his defense and to plead the judgment in bar of a subsequent prosecution for the same offense."

It is respectfully submitted that this is not a satisfactory disposal of this section of the statute. It, further, is respectfully submitted that these two decisions thwart the expressed intention of the legislature. What is the effect of the statement in section 39 of the act that it shall not be necessary to include any defensive negative averment? After reading the majority opinions we can only conjecture. Surely the court does not mean to hold that the legislature cannot alter a rule of pleading. But if not, it would seem that the court would at least have to hold that part of section 39, dealing with negative averments, unconstitutional. But again, it has not done that. What then is the effect of section 39? The situation is paradoxical!

We turn to Mr. Justice Stone's dissenting opinion rendered in the *Barnes* case. After quoting section 39 of the act, he continues:

> "It is obvious that it was the intention of the legislature to change the rule above referred to, and if that body has the power to do so this court is bound by such change. We are referred to no section of the constitution depriving the legislature of that power. The constitutional right of one charged with crime, under section 9 of the bill of rights, to know the nature of the offense charged against him is not violated, for the reason that the indictment charges that he illegally possessed the liquor. Section 39 entitles him to a bill of particulars in a proper case. The opinion in this case does not hold section 39 unconstitutional and the meaning of its language cannot be mistaken. This court, as I view it, cannot disregard the plain legislative enactment. . . . When a defendant is charged with the unlawful sale of intoxicating liquor or the unlawful possession of the same or of such instruments, it cannot be doubted that he is informed of the nature of the charge against him. This is all that is required under section 9 of the bill of rights. An indictment meets the constitutional requirements when it, by statutory description or by other apt averments, identifies the offense."

This, it is submitted, is the correct view. Further, it is sustained by

numerous cases interpreting identical or similar statutes in various parts of the United States.[1]

The second count in the indictment in the *Martin* case alleged "that William H. Martin . . . did then and there *unlawfully have and possess intoxicating liquor, contrary to the form of the statute,*" etc. This count was insufficient said the Supreme Court. To continue in its words:[2]

> "It neither charges that plaintiff in error possessed intoxicating liquor *without being authorized by law* to possess the same, nor that he possessed intoxicating liquor with intent to violate the provisions of the Prohibition Act, but simply alleged that he possessed the same, which, of itself, is not a violation of the law. . . . *The use of the word 'unlawfully' . . . . does not have any effect inasmuch as the use of this word represents merely the conclusion of the pleader and does not state any fact from which the inference of unlawfulness would arise.*"

It would seem from this language that had the charge alleged possession of intoxicating liquor *without being authorized by law,* it would have been sufficient. But since the charge was that he possessed it *unlawfully,* that was bad.

The form and contents essential in an indictment for rape have been made uncertain in view of some recent decisions of our Supreme Court. Particularly, the uncertainty arises as to when it is necessary through a negative averment to allege that the person raped is not the wife of the person charged. An indictment for rape under the common law need contain no such allegation. Further, the view was taken in *People* v. *Dravilles*[3] that it was not made necessary, under the Illinois Statutes, so to aver in cases involving forcible rape or assault with intent to commit rape. The material parts of the Criminal Code defining rape read as follows:

> "Rape is the carnal knowledge of a female, forcibly and against her will. Every male person of the age of seventeen years and upwards, who shall have carnal knowledge of any female person under the age of sixteen years and not his wife, either with or without her consent, shall be adjudged to be guilty of the crime of rape; . . . provided, that every male person of the age of sixteen years and upwards who shall have carnal knowledge of a female forcibly and against her will shall be guilty of the crime of rape."

In *People* v. *Stowers*[4] it was said that, although it was unnecessary to have the indictment aver that the person raped is not the wife of the defendant in cases involving forcible rape, yet, since the second sentence of the

---

[1] *Leonard* v. *U. S.* (1927), 18 F. (2d), 208; *U. S.* v. *Dwyer* (1926), 13 F. (2d), 427; *Keen* v. *U. S.* (1926), 11 F. (2d), 260; *Massey* v. *U. S.* (1922), 281 F. 293; *Davis* v. *U. S.* (1921), 274 F. 928; *Ex Parte Baldwin* (1927), 259 Pac. (Cal. App.), 119; *People* v. *Cencevich* (1923), 220 Pac. (Cal. App.), 448; *Bass* v. *Doolittle* (1927), 112 So. (Fla.), 892; *Carroll* v. *Merritt* (1926), 109 So. (Fla.), 630; *Bird* v. *State* (1927), 257 Pac. (Wyo.), 2 Cf.; *U. S.* v. *Boasberg* (1922), 283 F. 305.

That it is sufficient to allege that the defendant's acts were "unlawful," see *Adamson* v. *U. S.* (1924), 296 F. 110; *Ritter* v. *U. S.* (1923), 293 F. 187; *U. S.* v. *Illig* (1920), 288 F. 939; *Rulovitch* v. *U. S.* (1923), 286 F. 315.

[2] Pages 114-115 official report.

[3] (1926) 321 Ill. 390, 152 N. E. 212.

[4] (1912) 254 Ill. 588, 98 N. E. 986.

statute contains the words *and not his wife,* the indictment must contain a negative averment if the charge is under that portion of the statute. There is no defensible reason for this distinction excepting the worn-out old rule of criminal pleading that an indictment or information must cover every element included in the statutory definition of the crime, and all exceptions in the statute must be negatived so the indictment may correspond in all respects with the statute.[1]

The *Stowers* case, however, went on to hold that a count charging the accused *with having made an assault upon Eva Crane with intent to commit upon her the crime of rape,* was sufficient under the proviso of the statute "that every male of the age of sixteen years and upwards who shall have carnal knowledge of a female forcibly and against her will shall be guilty of the crime of rape."

The reader should compare the holding in the *Stowers* case with that in the recent case of *People* v. *Fathers.*[2] In the latter case the defendant was indicted as having *unlawfully, willfully and feloniously made an assault upon Ilea Slade, a female person under the age of sixteen years, with the intent to ravish and carnally know her.* The defendant was convicted under this indictment. On error it was held that the indictment was fatally defective. The court assumed that the accused had been indicted for an assault with intent to commit rape without force, and that the indictment was, therefore, defective because it did not contain the negative averment *and not his wife.*

The construction of the statute, requiring a negative averment in the non-force cases, and not in others, might well be doubted. From the standpoint of precedent, it can be sustained because of the wording of the statute. But was the court right in assuming that the *Fathers* indictment was one for rape without force? In the *Stowers* case a similar indictment was held sufficient under the last proviso of the statute. Is not the *Fathers* indictment likewise sufficient under that proviso? It alleged an *assault with intent to ravish.* Every assault involves an attempt to commit *violent* injury on the person of another. And the word *ravish* means to *"commit a rape upon. To carry off* (a woman) *by force. To seize and carry off by force."* [3] It is submitted, that both on authority and reasoning, the indictment in the *Fathers* case was sufficient.

10. *In General.* What, then, it may well be asked, is the test of the sufficiency of an indictment or information? Section 6 of division 11 of the Criminal Code, to which reference has previously been made, states that an indictment shall be sufficiently technical and correct which states the offense in the terms and language of the statutes creating the offense, *or so plainly that the nature of the offense may be easily understood by the jury.* It is respectfully asked, does not the court at times ignore either or both of these provisions and particularly the latter? Surely no jury could have misunderstood the nature of the offense set out in the *Fathers* case. The trend is away from the technical and legalistic pleading of the common law. Wherever statutes are being drawn or codes formulated

[1] 2 Wharton *Criminal Procedure* (1918, 10th ed.), sec. 1138.
[2] (1926) 322 Ill. 424, 153 N. E. 704.
[3] Funk and Wagnall's Dictionary.

dealing with this question, statements, similar to those in section 6, are to be found. If, notwithstanding, the ends of justice were to be better served by minute particularity in pleading, there would yet be sufficient reason for the rigid rulings. But that, it is submitted, was not the case in the decisions considered. A certain amount of particularity is desirable, but rigid exactness frequently must result in decisions barren of utility and justice.

(III) Erroneous Instructions, as Ground for Reversal

11. In General. Errors in giving or refusing instructions have accounted for over one-fifth of the reversals in the Supreme Court during the ten year period studied.[1] In approximately thirty-six per cent of the homicide cases reversed, this type of error was a material factor.

The object of the instructions is to direct the jury on the law involved in the case, but it is a well known fact that if they are numerous and involved, there is great danger they will create confusion and not enlightenment. In *People* v. *Heard*[2] the court observed:

> "Counsel presented to the court eighty-eight instructions to enlighten the jury regarding the law to be applied to the facts, the prosecutor offering forty-eight, thirty-nine of which were given, and the plaintiff in error offering forty, seventeen of which were given as tendered and nineteen of which were modified and given as modified. This was a gross abuse of the privilege of tendering instructions. Many of the instructions were stock instructions not applicable to the case; others were substantially duplicates; some did not state the law correctly, and still others were carelessly-drawn, argumentative instructions, which tended rather to confuse the jury than to enlighten them. This court has repeatedly condemned the practice of burdening the trial court with the labor of weeding out a lot of miscellaneous stock instructions in the short time available for this part of the trial. . . . The fact that the prosecutor tendered to the court these erroneous and duplicate instructions, so often and recently condemned in the opinions of this court, shows a lack of familiarity with the court's decisions and with the law applicable to the case at hand."

In *People* v. *Munday*[3] the court refused to consider alleged errors in the instructions where the defendant had offered two hundred and seventy-two instructions of which over two hundred had been refused by the trial court.

The court, frequently, has expressed its disapproval of the fact that instructions, it previously has condemned, are given over and over. In *People* v. *Clark*,[4] it said:

> "This instruction has been repeatedly condemned by this court, . . . and it seems strange that the practice of giving the instruction should not be discontinued in the Criminal Court of Cook County, where the same error has been repeatedly committed."

[1] See Table 5.
[2] (1922) 305 Ill. 319, 323.
[3] (1917) 280 Ill. 32.
[4] (1922) 301 Ill. 428, 435.

In *People* v. *Duncan*[1] the instructions alone covered twenty-eight pages of the abstract.

The grievance against bad instructions has still another side to it, and one that is frequently lost from sight. If instructions are so bad that the court feels compelled to reverse the case because of them, that, at least, labels on them the sign, *beware!* But what is the situation as to instructions which are bad, and yet not bad enough to occasion reversals? Such instructions, defective as they are, immediately become model ones and are used again and again. For has not the Supreme Court approved them? An assistant in the state's attorney's office in Cook County for years has industriously culled from the Supreme Court decisions in criminal cases *approved* instructions. The situation is disheartening. It represents an *impasse* in the law, at the blind end of which we are groping in vain for exit.

The court has recognized the principle that a conviction will not be reversed, because of errors in the instructions, if the jury could not have reached any other conclusion had the instructions been correct. This view is stated in *People* v. *Scimeni:*[2]

> "It is not necessary in order to affirm a conviction to find that the instructions are free from error. To require absolute and technical accuracy in instructions would, as a general rule, defeat the ends of justice and bring the administration of the criminal law into disrepute and contempt. It is sufficient when the instructions, considered as a whole, substantially and fairly present the law of the case to the jury."

The court has given expression to various other rules governing instructions, some of which are, that instructions must be considered as a series and not alone;[3] that bad instructions are not cured by correct ones[4] (as there is no way of telling whether the jury followed the erroneous or the correct ones); that error in favor of the defendant will not be balanced by error against him;[5] and that a defendant cannot complain of erroneous instructions he himself has offered. It follows that a bill of exceptions must contain all instructions and also state by whom they were offered.

12. Instructions as to an Alibi. One of the common defenses to a crime is that of the alibi. The court has had occasion frequently to condemn instructions involving that defense. One which informed the jury, "to render the defense of an alibi available the evidence must cover the whole of the time of the commission of the alleged crime," was held erroneous, since an accused is entitled to the benefit of alibi evidence, notwithstanding, it does not cover the whole of the time occupied by the commission of the crime.[6] In *People* v. *Braidman,*[7] a case in which accused's alibi covered the whole period, the court held an instruction erroneous which informed the jury that it was incumbent upon the defendant to so prove his alibi as to render the commission of the crime

[1] (1924) 315 Ill. 106.
[2] (1925) 316 Ill. 591, 597.
[3] *People* v. *Heard* (1923) 305 Ill. 319.
[4] *People* v. *True* (1924), 314 Ill. 89.
[5] *People* v. *Jones* (1924), 313 Ill. 335.
[6] *People* v. *Johnson* (1924), 314 Ill. 486.
[7] (1926) 323 Ill. 37.

by him impossible or highly improbable, and that unless such proof was made the defense of alibi was not available to the defendant.

A number of cases have been reversed because of instructions that the burden of proving the alibi was on the defendant. In *People* v. *Stoneking*[1] the trial court had given an instruction implying that the defense of alibi tended merely to cast a doubt on the case made by the People. Since this instruction had been disapproved of several times[2] previously, the court's language, on this occasion, condemning it is of interest:

> "This is the identical instruction discussed and criticised in *Ackerson* v. *People,* 124 Ill. 563. We there held that it is not true, as a general or a legal proposition, that the defense of *alibi* tends merely to cast a reasonable doubt upon the case made by the People. That may, and will in many cases, be the only effect of the evidence produced to sustain the *alibi.* But the defense of *alibi* controverts the guilt of the defendant, and if certainly and satisfactorily established would be conclusive of the defendant's innocence. While in theory it does not deny that the crime has been committed, it asserts that the defendant, during the whole of the time in which the crime is shown to have been committed, was so far removed from the place of its commission that he could not have participated in its perpetration. . . . Such has been the holding of this court for more than fifty years."

13. Instructions as to Self-Defense. In a homicide case, where self-defense is pleaded, to sustain that defense, must the accused have acted under a *well grounded* apprehension of danger, or is it sufficient if he was reasonably led to believe, from the facts apparent to him, that he was in danger? In *People* v. *Davis*[3] the accused sought to reverse a judgment against him for manslaughter. He had killed a man in a street fight. The defense was self-defense. Various instructions of the trial court were attacked. From among them we direct attention to the one following:

> "You are further instructed, that before a person will be justified, under the law of self-defense, in shooting and killing another, it is not enough that he is under a reasonable apprehension of danger; he must at the time have not only a reasonable, but a well grounded belief, from the surrounding circumstances, that he is in danger, real or apparent, of losing his life, or receiving great bodily harm."

The Supreme Court held this language erroneous, and properly so, since it required more than a reasonable apprehension of danger before the accused could strike in self-defense.

The trial court, no doubt, was influenced to give this instruction by the language which had been used by the Supreme Court in former cases of this nature, particularly the following taken from *Campbell* v. *People:*[4]

> "If the defendant was pursued or assaulted by the deceased in such a way as to induce in him a *reasonable and well-grounded belief*

[1] (1919) 289 Ill. 308, 313.

[2] *Miller* v. *People* (1866), 39 Ill. 457; *Ackerson* v. *People,* 124 Ill. 563; *Sheehan* v. *People* (1890), 131 Ill. 22; *People* v. *Lukoszus* (1909), 242 Ill. 101; *People* v. *Blair* (1914), 266 Ill. 70; all cited by the Court.

[3] (1921) 300 Ill. 226.

[4] (1854) 16 Ill. 17.

that he was actually in danger of losing his life, or suffering great bodily harm, when acting under the influence of such reasonable apprehension, he was justified in defending himself, whether the danger was real or only apparent." (Italics ours.)

It is quite evident that this case was brought to the attention of the Supreme Court in the *Davis* case for it answers:

"It is true that in the *Campbell* case, and in many of those which have followed, the statement is made, substantially, that if the defendant was assaulted in such a way as to induce in him a reasonable and well grounded belief that he was in danger he would be justified, but in no case has it been held that an instruction has been proper which required more than a reasonable belief in the danger. In cases in which the expression 'reasonable and well grounded' has been used, the language is that of the writer of the opinion in discussing the general principles of the law of self-defense and is not that of any instruction being considered. It means no more than a belief, reasonable in view of the facts apparent to the accused."

In cases of self-defense, the Supreme Court held, men are obliged to judge from appearances, and if they act from real and honest convictions induced by reasonable evidence they cannot be held responsible. "To require in addition to this, a well grounded belief is to require actual danger. 'Well grounded' is intended to mean more than 'reasonable.'"

The position taken by the Supreme Court is correct and accords with settled principles. The language of the opinion is clear. But habit is strong. In *People* v. *Stapleton*,[1] where a similar point was involved, the court said:

"Actual and positive danger is not indispensable to justify self-defense, but if the circumstances are such as to induce in the accused *a reasonable and well-grounded belief* that he is actually in present danger of losing his life or receiving great bodily harm he will be justified in defending himself, whether the danger is real or only apparent." (Italics ours.)

The language in the *Stapleton* case appears to have reverted back (at least partially) to that used in the *Campbell* case, but the language in the *Campbell* case had been condemned by the Court in *People* v. *Davis*. If a *well-grounded* belief requires actual danger and is more than a *reasonable apprehension*, this hyphenated word should have no place either in the court's language or in the instructions. Its use in the *Stapleton* case will only mislead prosecuting officers and trial courts in the future.

In *People* v. *Duncan*[2] the accused had been convicted of murder. The trial court had instructed, among other things, as follows:

"It must appear from the evidence that at the time of said killing the defendant was in such apparent danger that a reasonable person under the same circumstances would have been induced to believe that it was necessary or apparently necessary to kill John Grant Powell in order to save his own life or to prevent his receiving great bodily harm."

[1] (1921) 300 Ill. 471, 133 N. E. 224.
[2] (1924) 315 Ill. 106, 145 N. E. 810.

The Supreme Court found error in this instruction in that it left doubt as to the burden of proof. It is said, "The burden is on the prosecution to prove the guilt of the defendant and the defendant is not required to prove anything. It is sufficient if the evidence as to self-defense leaves a reasonable doubt as to the defendant's guilt." After disposing of this feature the court continued:[1]

> "The instruction is in error also in stating that it must appear that the danger to the defendant was such that a reasonable person, under the same circumstances, would have been induced to believe, etc. The jury are not to determine what a reasonable man would have been induced to believe, but, What did the defendant at the time and under the circumstances, acting as a reasonable man, believe? What any reasonable man may do under given circumstances is not always possible to determine. Man's reason does not always operate to produce the same result under the same circumstances. The question in cases of this character concerns the particular man, and the circumstances must be viewed from the standpoint of the defendant alone, particularly under circumstances of great excitement. In order to avail himself of the right of self-defense it is not necessary that the defendant should have acted as a man of ordinary judgment and courage or as an ordinarily courageous man. . . . It is sufficient if the circumstances were sufficient to excite the fears of a reasonable person and the defendant really acted under the influence of those fears."

It is difficult to follow the above language of the court and to find in it a distinction. It would appear the court is laying down the subjective test for self-defense as distinguished from the objective one. However that may be the discriminations made are not clear. *The jury are not to determine what a reasonable man would have been induced to believe,* but they should determine *what the defendant at the time and under the circumstances acting as a reasonable man believed.* What difference can there be between what a reasonable man under the circumstances believed, and what the defendant under the circumstances acting as a reasonable man believed? The trial court had told the jury that before self-defense could be of avail to the defendant he must have been in such apparent danger that a *reasonable man under the circumstances would have been induced to believe it was necessary to kill.* The Supreme Court held that this statement was erroneous. It then went on to say that the privilege of self-defense arises if the *circumstances are sufficient to excite the fears of a reasonable person and the defendant acted under the influence of those fears.* It is respectfully submitted that the court has made a distinction which it will have the greatest difficulty to defend in future cases.[2]

The question as to the correct rule governing self-defense cases has become even more complicated through a later statement of the court. In *People* v. *Bradley*[3] it said:

---

[1] Page 112 official report.

[2] Some of the language in the comment on the *Duncan* case was adapted from a comment on that case by the writer in (1926) 20 Ill. Law Rev. 648-649.

For a note showing the confusion on the case in Illinois as to whether the objective or subjective test should be applied, see (1925) 19 Ill. L. R. 692. See also on this question the case of *People* v. *Scimeni* (1925), 316 Ill. 591, 147 N. E. 484.

[3] (1927) 324 Ill. 294.

> "In this case the killing was proved and not denied. The defense was that the homicide was committed in self-defense. If the circumstances and appearances at the time of the killing are such as to justify a reasonable man in the belief that he was in imminent danger of losing his life or receiving great bodily harm, acting under the influence of such belief from the appearances, if he kills a person so threatening him the homicide would neither be murder nor manslaughter but would be justifiable."

The language quoted is in intent and meaning that which the court expressly condemned in the *Duncan* case. We believe the Supreme Court has shown an unsteadiness in views and a lack of clarity on this important question. And if our surmise is correct, can there be any doubt that criminal trials, wherever this issue has been raised, have been disturbed throughout the state?

14. Instructions as to the Defense of Insanity.

Instructions involving insanity, frequently have been before the Supreme Court. From the standpoint of *principle* there is no phase of the criminal law more puzzling, nor one that is more unsatisfactory. The case of *People* v. *Krauser*[1] takes up this question. The defendant had been convicted of murder. In reversing the judgment of the court below,[2] several interesting questions were raised; among them that relating to the test to be applied when the defense of insanity is advanced.

The trial court had instructed that "unsoundness of mind, or affection of insanity must be of such a degree as to create an uncontrollable impulse to do the act charged, by overriding the reason and judgment, and obliterating the sense of right or wrong as to the particular act done and depriving the accused of power of choosing between them." This instruction followed the case of *Hopps* v. *People*.[3] Basing its opinion on the later case of *People* v. *Lowhone*,[4] the Supreme Court found the instruction erroneous. It said that since the *Hopps* case advances have been made in knowledge on the subject of insanity, its various types and characteristics, "and that it is now recognized that there are cases of partial insanity which may render a person incapable of knowing a particular act to be wrong, or if he can distinguish right from wrong as to a particular act he may be incapable of exercising the power to choose between the right and the wrong."

The court was of the opinion that, under the instruction given, to justify an acquittal, there was required of the defendant not only the ability to distinguish between right and wrong, but the power to choose between them and to act according to his choice. The court's language follows:[5]

> "In the *Lowhone* case the ability to judge and the power to choose are held equally necessary to criminal responsibility, and therefore the lack of either will justify a verdict of not guilty. The instruction in question states that both the knowledge of right and wrong and the

[1] (1925) 315 Ill. 485, 146 N. E. 593. Some of the language that follows was adapted from a comment by the writer in (1926) 20 Ill. L. R. 659.
[2] Farmer and Thompson, JJ., dissenting.
[3] (1863) 31 Ill. 385.
[4] (1920) 292 Ill. 32, 126 N. E. 620.
[5] Page 514 official report.

ability to choose between them are necessary to such a verdict, and it was therefore erroneous to give it."

Two separate views are stressed in the *Lowhone* and *Krauser* cases. One, the traditional conception of right and wrong evolved in 1843 in *M'Naghten's* case,[1] and the other, the comparatively new one called the *irresistible impulse.* We cannot, within the scope of this study, discuss adequately and critically the various tests that have been and that now are applied in insanity cases, but we should be missing our purpose if we did not call attention to the fact that at this point our law is quite out of keeping with scientific thought on the subject. This observation does not bear peculiarly upon the law of Illinois, but upon the law generally in English speaking countries.[2]

The question as to what is right and what is wrong is an ethical one. Conceptions as to it vary with individuals and with peoples.[3] "In the majestic roll-call of centuries and ages the eternal question of Pilatus: *'What is truth?'*—is echoed and re-echoed without the remotest hope for its universal solution. Every society has a moral code of its own, embodying rules and precepts that are *not* permanent. Things which today are considered *wrong,* tomorrow will be found on the list of customs considered *right.* Acts and deeds which yesterday were regarded as right,—today are attacked and prosecuted by the state, while its judicial machinery is engaged in the destruction of their very reminiscence." [4] Ethical principles, ever changing and chameleon hued, cannot furnish exact criteria for criminal responsibility.

Insanity is a disorder of the mind—it is "always the expression of derangement in the mode of the working of the supreme regions of the brain." To quote Mercier: [5]

---

[1] (1843) 10 Clark & F. 199, 8 Eng. Reprint 718.

[2] "If I were called upon today to testify as an expert in a criminal case involving the mental state of the defendant I would undoubtedly be asked questions that were formulated more than a century ago. I would be asked, among other things, whether the defendant knew the difference between right and wrong; and I would probably be asked by means of a hypothetical question whether I thought the defendant responsible. To the psychiatrist such questions as these have the effect of making him feel almost hopeless in any attempt that he may make to be of assistance to the court and the jury. Such questions, particularly the former, the right and wrong test as it is known, represent antiquated and outworn medical and ethical concepts, which have become crystallized, in the course of time, into rules of law; whereas the question of responsibility carries with it a metaphysical implication and the more one thinks of it the more one feels quite incapable of answering it." White, *The Need for Co-operation Between the Legal Profession and the Psychiatrist in Dealing with the Crime Problem.* (1927) 52 Report of American Bar Association 497, 498.

[3] See Garofalo *Criminology* (1914), Chap. I.

[4] Brasol, *The Elements of Crime* (1927), 299.

[5] *Criminal Responsibility* (1926), 103.

"What is needed in the law (in addition to procedural reform) is a proper conception of the unified personality. Disease of the mind is disease of a unity, of the personality make-up. And so long as it interferes with a person's power to conform his conduct to the demands of the criminal law, it is immaterial whether it manifests itself *primarily,* and to the casual eye, in a crumbling of the cognitive processes of the mind, or in an abnormal functioning of the emotional processes, in impaired power of inhibition or lack of will, in all of these or in combinations of these; the diseased personality is the fact. If legal tests must needs be provided (and with the system of trial by jury the use of some tests is better than to leave the matter entirely open), they should be applied only after the general mental condition of the defendant, as manifested by his mental and environmental history, physical and mental examination, psychological-psychiatric study,—in

"Insanity is a disease or disorder—I prefer the latter term—not of this or that organ, or tissue, or part of the body, as are the diseases, which come under the purview of the general physician or surgeon, but of the whole individual who is the subject of the disorder. And it is so because the original seat of the disorder is in that central and supreme organ in which the whole individual and every part of him is summed up and represented. A man may lose his hand or his foot, his arm or his leg, and still remain the same man—the same personality. He may suffer disease of his heart or lung, of his liver or kidney, and yet his individuality—the characters which make him the man he is, not only different from other people, but recognizable as himself—remains unchanged. But when the highest regions—the governing functions—of his brain are disordered, the whole man is a changed being. If we knew him before, and now have experience of him, we are irresistibly compelled to realize that he is not the man he was. His personality is altered. We feel that we no longer know him as we did. It is useless to appeal to him in the same way. He is no longer moved by the same motives. His conduct cannot be predicted by the same rules. He has undergone a profound, a radical change of nature. He is different from his former self in much the same way as we, in our dreams, differ from our waking selves. We then find ourselves thinking, judging, feeling, acting, in ways foreign to those of our waking nature, invested with capabilities and disabilities which our waking selves know not; and the madman passes his time in a waking dream."

If then in insanity we have the disintegration of the individual and an altering of the personality, is it to be supposed that criminal responsibility can be determined by so naive a rigmarole as the right and wrong test! The irresistible impulse conception gives but little, if any, additional aid. What is needed, when the issue of insanity is raised, is a scientifically trained diagnostician instead of the present partisan conflict between experts hired by the state and the accused. The situation would be much improved if the study were made by neutral experts who have no connection with the conflict between the prosecution and the defense.[1] The findings of the experts should be reported to the court. If it is found that the accused's mind was deranged at the time he committed the deed, the extent to which the disease has progressed, and an opinion on how materially that has altered his normal reactions, should be included in the report. A still better suggestion, if it

---

brief, the whole series of past social reactions of the accused as well as his conduct in the particular case under consideration,—have first been placed before the jury in an intelligent, clear, unbiased report."

Glueck, *Mental Disorder and the Criminal Law* (1925), 265-266.

[1] Attention is called to the Massachusetts compulsory examination law reading: "Whenever a person is indicted by a grand jury for a capital offense or whenever a person, who is known to have been indicted for any other offense more than once or to have been previously convicted of a felony, is indicted by a grand jury or bound over for trial in the superior court, the clerk of the court in which the indictment is returned, or the clerk of the district court or the trial justice, as the case may be, shall give notice to the department of mental diseases, and the department shall cause such person to be examined with a view to determine his mental condition and the existence of any mental disease or defect which would affect his criminal responsibility. The department shall file a report of its investigation with the clerk of the court in which the trial is to be held, and the report shall be accessible to the court, the district attorney and to the attorney for the accused, and shall be admissible as evidence of the mental condition of the accused." Massachusetts Acts and Resolves, 1921, Chap. 415.

were not for constitutional impediments, would be to instruct the jury to determine only whether or not the act was committed by the defendant, and if they answer that the deed was his, then to turn him over to a scientific group, including one or more persons legally trained, to determine what to do with him. The sane criminal is a menace to society. The law seems not to contemplate that the insane criminal is even a greater menace.

15. Reasonable Doubt. The Supreme Court repeatedly has condemned the practice of giving long instructions on reasonable doubt, holding that the words *beyond a reasonable doubt* are as clear as any defining language. But on those occasions when it has criticized the definitions, it generally has held that the error was harmless. It has had some difficulty in determining whether a reasonable doubt instruction should apply to each separate point or to all the evidence taken as a whole. Or, stating the problem otherwise, must the jury be convinced beyond a reasonable doubt as to each *separate* material fact, or is it sufficient if it is convinced on the *whole of the evidence?* This question was raised in *People* v. *Johnson.*[1] The defendant had been convicted of the crime of "receiving for his own gain a Ford sedan knowing it to have been stolen."[2] Among other things, the trial court had instructed:

> ". . . the law does not require that the jury shall believe that every fact in a criminal case has been proved beyond a reasonable doubt before they can find accused guilty. The reasonable doubt the jury is permitted to entertain must be as to the guilt of the accused on the whole of the evidence and not as to any particular fact in the case."

This instruction, said the Supreme Court, was wrong. We quote:[3]

> "While the law does not require proof of every fact in the case beyond a reasonable doubt, and the doubt to justify an acquittal must be as to the guilt of the accused on the whole evidence and not as to any particular fact, yet a reasonable doubt as to the existence of any particular fact necessary to constitute the crime requires a verdict of not guilty, and it is necessary to a conviction that the people should prove, beyond a reasonable doubt, every fact necessary to constitute the crime. If one such fact is not proved by the measure of proof required by law, then the crime itself is not proved so as to authorize a conviction. It is not correct to say that a reasonable doubt as to any particular fact in a case is not sufficient to justify an acquittal, without distinguishing between facts which are material and constitute a necessary element of the crime and those which are not so material and necessary."

We wonder if the Supreme Court is sound in this view. Is it not feasible that the jury might have a reasonable doubt as to one material fact standing alone, but when the light of all the surrounding facts is shed on the case, that they might well come to the conclusion that no reasonable doubt remains

---

[1] (1925) 317 Ill. 430, 148 N. E. 255. See also *People* v. *Mooney* (1922), 303 Ill. 469. In *People* v. *Steinkraus* (1920), 291 Ill. 283, the Court said that if the word *incriminating* were substituted for the word *material* so that the instruction would read "It is not necessary for the state to establish each incriminating fact beyond a reasonable doubt," then it would not be in error.

[2] Some of the language that follows has been adapted from a comment on *People* v. *Johnson* found in (1926) 20 Ill. L. R. 660.

[3] Pages 435-436 official report.

as to the guilt of the accused? Dean Wigmore has summed up the situation as follows:[1]

> "It is generally and properly said that this measure of reasonable doubt need not be applied to the specific detailed facts, but only to the *whole issue;* and herein is given opportunity for much vain argument whether the strands of a cable or the links of a chain furnish the better simile for testing the measure of persuasion. The truth is that no one has yet invented or discovered a mode of measurement for the intensity of human belief. Hence there can be yet no successful method of communicating intelligibly to a jury a sound method of self-analysis for one's belief. If this truth be appreciated, courts will cease to treat any particular form of words as necessary or decisive in the law for that purpose; for the law cannot expect to do what Logic and Psychology have not yet done."

16. Miscellaneous Errors in Giving and Refusing Instructions.

The Supreme Court has held that the singling out of the testimony of one witness for comment in an instruction is error. In *People* v. *Andrenos*[2] it reversed the conviction (two justices dissenting) because the trial court had given the following instruction:

> "The court instructs the jury that the defendant may be convicted of the crime of rape upon the uncorroborated testimony of the complaining witness . . ."

The danger, said the court, is that the impression of credibility of such testimony is likely to be magnified in the minds of the jury. The court, further, has expressed the view that an instruction singling out the defendant and telling the jury that they might take into consideration his interest in the result was erroneous. The instructions, it held, should be impersonal.[3]

It is error for the trial court to state abstract principles of law not based upon evidence. Instructions of that sort, the Supreme Court has held, confuse the jury, as it cannot be expected that they will comprehend the meaning of a legal dissertation on a point not before them. Therefore, even if the statement is correct as a principle of law, it is error to give it.[4]

In the case of *People* v. *Wong*[5] the trial court had instructed the jury as follows:

> "You are not bound to take the testimony of any witness as true merely because such witness swears to certain facts, and you should not take the testimony of any witness as true, if, for any reason, his or her testimony appears to you to be untrue or untrustworthy."

The Supreme Court held that this instruction was improper and that the giving of it constituted reversible error.[6] In the words of the court:[7]

---

[1] 5 Wigmore, *Evidence* (1923, 2d ed.), sec. 2497.
[2] (1926) 323 Ill. 34.
[3] *People* v. *Schuele* (1927), 326 Ill. 366.
[4] *People* v. *Bradley* (1927), 324 Ill. 294, 309.
[5] (1926) 321 Ill. 181, 151 N. E. 485. The comment that follows on the *Wong* case was adapted from a comment by the writer on that case found in (1927) 22 Ill. L. R. 16-18.
[6] See similarly *People* v. *Kranser* (1926), 315 Ill. 485, 146 N. E. 593; Cf. *People* v. *Costello* (1926), 320 Ill. 79, 150 N. E. 712; *People* v. *Considine* (1926), 321 Ill. 590, 152 N. E. 564.
[7] Page 185 official report.

"By the first clause of the instruction the jurors were informed that they were not bound to take the testimony of any witness as true merely because he swore to certain facts, and by the second the jurors were told that they should not take the testimony of any witness as true if for any reason it appeared to them to be untrue or untrustworthy. The proposition that jurors by mere caprice, or for any reason which they deem sufficient, may disbelieve a witness is not the law. They are not at liberty to determine the credibility of witnesses according to their own judgment, without regard to those considerations which are proper or necessary in making that determination. . . . The instruction given permitted the jury arbitrarily to disregard the testimony of the witnesses who appeared in behalf of plaintiff in error, and since the evidence was conflicting, the giving of the instruction constitutes reversible error."

The proposition may be taken for granted that the jurors should not decide a question upon mere caprice. But did the instruction give them that latitude? The judge said they should not take the testimony of any witness as true if for *any reason* it appeared to them to be untrue or untrustworthy. While the words *any reason* might mean caprice in a colloquial sense, the word *reason* in its correct sense means "a rational ground or motive."

It is stated in the opinion that the jury is not at liberty to determine the credibility of witnesses according to their own judgment, without regard to those considerations which are proper or necessary in making that determination. What are those considerations, and wherein do they conflict with the trial court's instructions? "The jury are the part of the tribunal charged with forming a conclusion as to the truth of the testimony offered. They are absolutely free to believe or not to believe a given witness. Once the witness is determined by the judge to be qualified to speak, the belief of the jury in his utterances rests solely with themselves. Hence the judge cannot legally require them to believe or to disbelieve any portion of the testimony."[1] When the judge declares a witness competent, it becomes the duty of the jury to consider and to weigh his testimony. They cannot arbitrarily reject it.[2] But the weight to be given the testimony and the credit to be given a witness are questions wholly for the jury.[3] As stated by the court in *Hauser* v. *People:*[4]

"The jury, in determining as to the credibility of witnesses and the value of their statements, may consider the appearance and conduct of the witnesses while on the stand. One witness may, by his frank and open manner and prepossessing appearance, convince the jury that he is truthful, unbiased, intelligent and worthy of confidence. The appearance and manner of another may indicate that he is crafty, cunning, unfair and unreliable, or lacking in judgment or discretion. That when nothing appears to the contrary the presumption is to be fairly indulged that an unimpeached witness has testified truly may be laid down as a principle derived from the experience and knowledge of mankind, but

[1] 2 Wigmore, *Evidence* (1923, 2d ed.), 1010. And see 5 Jones, *Blue Book of Evidence* (1914), sec. 901, and 6 Jones, *Commentaries on Evidence* (1926, 2d ed.), secs. 2462-2466, and see *People* v. *Thompson* (1926), 321 Ill. 594, 152 N. E. 516; *People* v. *Kilbane* (1926), 322 Ill. 190, 152 N. E. 566.

[2] *R. R. I. & St. L. R. R. Co.* v. *Coultas* (1873), 67 Ill. 398.

[3] *People* v. *Delucc* (1909), 237 Ill. 541.

[4] (1904) 210 Ill. 253, 269.

the law has no such rule which the court may lay down in the instructions to the jury."

It was well said by the court of a sister state:[1]

> "When the credit of a witness is to be passed on, each juror is called upon to say whether he believes him or not; this belief is personal, individual, and depends upon an infinite variety of circumstances; any attempt to regulate or control it by a fixed rule is impracticable, worse than useless, inconsistent and repugnant to the nature of a trial by jury."

It is difficult to see wherein the trial court committed error in the instruction quoted from the *Wong* case. Even if it were to be taken that the instruction gave the jury too much latitude, would it follow that reversible error was committed? Was the instruction so wrong that the jury was misled by it? The jury is not a body so constituted to comprehend precise distinctions. The paramount inquiry, we take it, should be whether possible injustice was done the accused. If not, what is to be achieved by reversing a case because an instruction was not legally exact?

The Supreme Court takes the position in cases where a section of the criminal code makes unlawful the attempt to do a certain act, as well as the doing of the act, that separate offenses are defined, and this is true, even though the penalty for the attempt and the consummated act be the same. Moreover, a trial court must be on guard, in giving its instruction, not to use language that will include both.

It is, therefore, error, in an instruction, to follow verbatim the language of the statute. This was the error in *People* v. *Crane*.[2] The accused had been indicted for taking indecent liberties with a child of the age of thirteen years. The trial court had instructed the jury in the language of the statute,[3] which reads in part:

> "That any person of the age of seventeen years and upwards who shall take, or attempt to take . . . . indecent liberties with a child . . . . shall be imprisoned in the penitentiary not less than one year or more than twenty years."

A verdict of guilty was returned.

---

[1] *State* v. *Williams* (1855), 2 Jones L. (N. C.) 259; quoted by Wigmore ibid. See also *United States* v. *Lee Huen* (1902), 118 Fed 442.

[2] (1922) 302 Ill. 217, 134 N. E. 99.

[3] Sec. 109, Ch. 38, Smith's Illinois Revised Statutes (1921) reads as follows:

"Be it enacted by the People of the State of Illinois, represented in the General Assembly: That any person of the age of seventeen years and upwards who shall take, or attempt to take, any immoral, improper or indecent liberties with any child of either sex, under the age of fifteen years, with the intent of arousing, appealing to or gratifying the lust or passions or sexual desires, either of such person or of such child, or of both such person and such child, or who shall commit, or attempt to commit, any lewd or lascivious act upon or with the body, or any part or member thereof, of such child, with the intent of arousing, appealing to or gratifying the lust or passions or sexual desires, either of such person or of such child, or of both such person and such child, or any such person who shall take any such child or shall entice, allure or persuade any such child, to any place whatever for the purpose either of taking any such immoral, improper or indecent liberties with such child, with said intent, or of committing any such lewd, or lascivious act upon or with the body, or any part or member thereof, of such child with said intent, shall be imprisoned in the penitentiary not less than one year nor more than twenty years: Provided, that this act shall not apply to offenses constituting the crime of sodomy or other infamous crimes against nature, incest, rape or seduction."

The Supreme Court found error in the instruction (two justices dissenting), because, it held, two separate offenses were covered within the language used, namely the taking of indecent liberties with a child, and the attempt to commit that crime. In the language of the court:

> "It is the rule in this state that the commission of a crime, and the attempt to commit the same, are separate and distinct offenses. . . . The statute under which this prosecution was brought defines more than one crime. It provides that one who shall take any immoral, improper or indecent liberties with any child of either sex under the age of fifteen years with the intent there specified shall be imprisoned in the penitentiary not less than one nor more than twenty years, and also provides that if such person shall attempt to take such indecent liberties with such child he shall be imprisoned in the penitentiary for not less than one nor more than twenty years. Under the instruction given, if the jury thought that the evidence showed an attempt to take indecent liberties but that it did not show the accomplishment of the crime, they might nevertheless have felt justified, under such instruction, in returning a verdict of guilty under a charge of taking indecent liberties though the proof showed an attempt, only."

We respectfully submit that the above is an unnecessary refinement of reasoning which tends to lose sight of the inherent merits of the case. Could not the court easily have determined whether any injustice was done the particular defendant through the conviction?

In *People* v. *Kubulis*[1] the court said:

> *"The venue must be proved beyond reasonable doubt equally with any other fact in the case,* but the instruction improperly assumes that the crime, if proved to have been committed, was committed in Kankakee County." (Italics ours.)

The defendant had been convicted of burglary and larceny.

In *People* v. *Adams,*[2] a forgery case, the court said:

> "It is next contended that the People failed to prove the venue as laid in the indictment. *The venue was a jurisdictional fact but it was not an element of the crime to be proved beyond a reasonable doubt.* If there was evidence from which it could reasonably be inferred that the forgery was committed in DuPage County that was sufficient."[3] (Italics ours.)

In *People* v. *Niles,*[4] a perjury case, it appears from the facts stated that the accused and two others, Jackson and Haskell, had been jointly indicted for larceny in March, 1919. Jackson and Haskell pleaded guilty, but the defendant, Niles, pleaded not guilty and was acquitted. In September, 1919, Niles was indicted for perjury committed in the larceny trial, and was convicted. But that conviction was set aside by the Supreme Court for errors in the instructions. The eighth one, and the court's language relative to it, has drawn our attention. It told the jury that the question for it to try was whether the defendant had testified falsely "to any matter *material*

[1] (1921) 298 Ill. 523, 528.
[2] (1921) 300 Ill. 20, 24.
[3] To the same effect see *People* v. *McIntosh* (1909) 242 Ill. 602.
[4] (1920) 295 Ill. 525, 129 N. E. 97.

in that case, as charged in some count of the indictment." In this language the Supreme Court found error. To support its decision it quoted with approval from an earlier Illinois case[1] where it was said:

> "In the first instruction the jury were directed to find the defendant guilty if he willfully testified falsely in a material matter on the trial of a cause in court, while the statute requires the false testimony, to make out perjury, to be 'in a matter material to the issue or point in question.' The defendant may have sworn falsely in a material matter and at the same time not sworn falsely in a *matter material to the issue.*"

This, we submit, presents too subtle a distinction. A *material matter in the case,* according to the view taken, is so different from a *matter material to the issue* or *point in question,* that the jury might have been misled by the instruction. The defendant, it was said, may have sworn falsely in a *material matter,* and at the same time not sworn falsely in a *matter material to the issue.* We believe the distinction is unsound. We believe the wording approved by the court could have meant nothing different to the jury than the one given. No case, we submit, should be reversed on so delicate a point.[2]

(IV) Errors in the Admission of Evidence

17. In General. In a hotly contested trial lasting over several weeks it would be surprising, indeed, if no errors were made in the admission or exclusion of evidence. The court has expressed the view, where such error is harmless and there is sufficient other competent evidence to support the verdict, and the guilt of the accused seems clear, that it will not reverse the conviction. Reference to Table 5 will show that errors in the admision or exclusion of evidence have accounted for approximately one-fifth of the reversals.

18. Confessions. In three recent instances,[3] the Supreme Court was called upon to consider the trustworthiness of confessions and the principles governing their admission. In *People* v. *Fox,*[4] Mr. Justice Thompson, after a penetrating examination of the question, stated that involuntary confessions are rejected "not because of the illegal or deceitful methods employed in securing them but because of their unreliability." Testimonial untrustworthiness being the foundation of exclusion, "it follows that the exclusion is not rested upon the privilege against self-incrimination." The aim of the confession rule is to "exclude self-criminating statements which are false, while the privilege rule excludes all statements coming within it, whether true or false." [5]

---

[1] *Young* v. *People* (1890), 134 Ill. 37, 42.

[2] See comment on this case in (1921), 15 Ill. L. R. 620. And see the further case of *People* v. *Niles* (1922), 300 Ill. 458, where this accused was "tried again on the same indictment" and where "the same evidence was introduced," resulting again in his conviction. The judgment was affirmed by the Supreme Court.

[3] *People* v. *Fox* (1926), 319 Ill. 606, 150 N. E. 347; *People* v. *Costello* (1926), 320 Ill. 79, 150 N. E. 712; *People* v. *Guido* (1926), 321 Ill. 397, 152 N. E. 149.

[4] *Ibid.* Mr. Justice Duncan dissented from the opinion in this case.

[5] *People* v. *Fox, supra,* pages 615-616 official report; *People* v. *Costello, supra,* page 104 official report; *People* v. *Guido, supra,* page 411 official report. In the last case Justices Duncan and Heard dissented.

Whether or not a confession is voluntary, is a preliminary question for the court to decide "from evidence heard out of the presence of the jury." In reaching his conclusion, "it is not necessary that he should be convinced, beyond a reasonable doubt."

There is no disagreement among the authorities that the admissibility of a confession depends upon the voluntariness. But the question as to when it is voluntary is more difficult. Mr. Justice Thompson in the *Fox* case stated that the criterion to be applied is as follows:[1]

> "Generally speaking, a confession is regarded as voluntary when it is made of the free will and accord of the accused, without fear or any threat of harm or without promise or inducement by hope of reward. . . . The real question presented to the court is not whether there is evidence of threats or promises, but whether there has been any threat or promise of such a nature that a prisoner would be likely to tell an untruth from fear of the threat or hope of profit from the promise."

Similar views are expressed in *People* v. *Costello*[2] and *People* v. *Guido*.[3] The statement quoted, without doubt, represents the prevailing view. Attention is called, however, to an opinion by the Supreme Court of the United States which held that this is not a sufficient test.[4] In the words of Mr. Justice Brandeis, who wrote the opinion:[5]

> "The Court of Appeals appears to have held the prisoner's statements admissible on the ground that a confession made by one competent to act is to be deemed voluntary, as a matter of law, if it was not induced by a promise or a threat; and that here there was evidence sufficient to justify a finding of fact that these statements were not so induced. In the federal courts, the requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or a threat. A confession is voluntary in law, if, and only if, it was, in fact, voluntarily made. A confession may have been given voluntarily, although it was made to police officers, while in custody, and in answer to an examination conducted by them. But a confession obtained by compulsion must be excluded whatever may have been the character of the compulsion, and whether the compulsion was applied in a judicial proceeding or otherwise. . . . None of the five statements introduced by the Government as admissions or confessions was made until after Wan had been subjected for seven days to the interrogation. The testimony given by the superintendent of police, the three detectives and the chief medical officer left no room for a contention that the statements of the defendant were, in fact, voluntary."

In *People* v. *Rogers*[6] the Supreme Court took occasion to express its views on the "sweating process" at times resorted to by the police to obtain confessions. The defendant had complained that he was prejudiced by the following article which had appeared in one of the Chicago daily papers during the course of the trial:

---

[1] Pages 615, 616 official report.
[2] (1926) 320 Ill. 79, 150 N. E. 712.
[3] (1926) 321 Ill. 397, 152 N. E. 149.
[4] *Wan* v. *United States* (1924), 266 U. S. 1, 45 Sup. Ct. Rep. 1.
[5] Pages 14-15 official report.
[6] (1922), 303 Ill. 578.

"Cops Protest Court Ban on Confessions

"When a Chicago police official yesterday heard Judge Fitch of the criminal court had ruled he would not allow confessions of prisoners to be introduced as evidence in trials, he said 95 per cent of the work of the department will be nullified if the policy is permitted to prevail. The judge explained he was acting in accordance with a Supreme Court ruling given in the case of Nick Viano, hanged recently for murder. The court held that a confession obtained after long mental and physical fatigue should be construed as having been forced. It was pointed out by the police official that few, if any, prisoners confess except after lengthy examination. 'We are permitted to do less every day,' continued another official. 'Pretty soon there won't be a police department.'"

The Supreme Court found that no sufficient showing had been made for setting aside the verdict, since it did not appear in the record that any of the jurors had seen the article before the trial was concluded or afterwards. But in view of what was said in the item quoted the court deemed "it proper to give it further notice, although not necessary to a decision of this case." We continue in the language of the court:[1]

"The sentiment so expressed confirms a preconceived opinion of this court, or at least of several members thereof, that it has been the practice of the Chicago police in a number of cases to extort confessions from suspects arrested by them by means of what is called 'the sweating process.' . . . This sweating process has no doubt been accompanied in some cases by violence or beating of the suspect into making a confession. It is not the right of a policeman or sheriff or any officer who has the custody of a prisoner to resort to such tactics to secure a confession. . . . A confession that is forced by such tactics is under the law absolutely inadmissible against the prisoner on the trial, and in this court it is not possible for the people to sustain a judgment in any criminal case where the record shows that it was had on a confession so obtained. The practice of punishing a suspect by blows or other violence when he otherwise refuses to confess is a violation of the criminal law itself and renders a policeman subject to criminal prosecution for such conduct. . . . The legitimate way is to get out in the field where the crimes are committed and hunt up legitimate evidence against the parties who commit the crimes, and at the same time respect the constitutional and legal rights of suspects arrested for crime. . . . We can conceive of no more beastly and criminal practice than the securing of convictions in the manner indicated. No self-respecting citizen, and certainly no law-abiding citizen, can stand for such a practice after he has well studied the question. It is the most dangerous and the most uncivilized practice imaginable to allow the police to go out and arrest a man or boy upon mere suspicion that he has committed a crime and for days subject him to the sweating process and to violence until he finally gives up and confesses in order to escape the torture to which he is being subjected."[2]

---

[1] *Ibid* 588-590.

[2] "During the discussions which took place on the Indian Code of Criminal Procedure in 1872 some observations were made on the reasons which occasionally lead native police officers to apply torture to prisoners. An experienced civil officer observed, 'There is a great deal of laziness in it. It is far pleasanter to sit comfortably in the

19. *Admissions of Evidence of Other Crimes.*

The admission of evidence of other crimes has been not an infrequent source of error. In the case of *People* v. *Spaulding*[1] the court states a rule when such evidence is relevant. The defendant was tried and convicted for the murder of a policeman. Evidence was introduced tending to show the disappearance of the defendant's confederate, the only eye-witness to the crime. Evidence was further admitted detailing the subsequent finding of a skeleton in a shallow grave near the isolated cottage where the defendant was hiding; also the burning of the cottage and other connected facts. On error, it was objected that this evidence was improperly received. In a searching opinion, the Supreme Court held this evidence was admissible to show that the confederate was killed to prevent his testifying against the defendant. There follows the language of the court:

> "The question is, Is the evidence relevant? Does it tend to prove any fact material to the issue involved? . . . Evidence of other offenses wholly disconnected with the offense charged is not admissible, for the reason that it does not tend to establish the fact in controversy. Guilt cannot be shown by showing that the defendant has committed other offenses, but where relevant evidence is offered it is admissible notwithstanding it may disclose another indictable offense. . . . There are many cases which hold that where the motive for the crime charged is the concealment of some other crime, either by destroying the evidence of such other crime or by killing a witness who could testify relative to it, the evidence of such motive is admissible even if it does show the commission of an extraneous crime."

The relevancy of evidence of other crimes has not always been so clear, as will be observed from a four to three decision in *People* v. *Rogers*.[2] The defendant had been convicted of taking indecent liberties with a female child. The statute[3] makes it an offense to take or attempt to take indecent liberties with a child under the age of fifteen with intent of arousing sexual desires either of such person or of such child, or both. The prosecution called twelve other girls, all under fifteen, who testified concerning improper liberties taken with them at different times and places. The admission of this evidence was held reversible error by the majority of the court. To quote from the opinion:[4]

> "Proof of separate and distinct acts of indecent liberties with other children at other times and places would not tend to show guilty knowledge or intent in the act charged. Such was shown by the act itself. It was not necessary, therefore, to prove similar offenses with other children to show guilty knowledge or intent or to show that the act charged was not an accident or mistake."

---

shade rubbing red pepper into a poor devil's eyes than to go about in the sun hunting up evidence.' This was a new view to me, but I have no doubt of its truth." 1 Stephen, *History of the Criminal Law of England* (1883), 442 n.

[1] (1923) 309 Ill. 292, 141 N. E. 196.

[2] (1927) 324 Ill. 224.

[3] Smith-Hurd Revised Statutes (1927), Chap 38, sec. 109.

[4] *Supra* 233.

It appears to us that the majority of the court laid down too narrow a rule of evidence in this case,[1] and that the opinion of the dissenting justices not only is more liberal, but it permits, because it holds that evidence of other offenses can be admitted, of a truer insight into accused's guilty intent, and of the crime committed. We quote from the dissenting opinion:[2]

> "Before plaintiff in error could be legally convicted of the charge against him it was necessary for the prosecution to prove not only that he took immoral, improper and indecent liberties with the child, but also that these liberties were taken with the specific intent of arousing, appealing to or gratifying the lust or passion or sexual desires of either himself or of such child, or of both. It is well established by the decisions of this court and the courts of other jurisdictions, that where a specific intent is an essential element of a crime and the prosecution must prove this specific intent in order to secure a legal conviction, evidence of similar acts committed by the accused happening at or about the same time is relevant and competent to show such intent."

In *People* v. *Hobbs*[3] the defendant was convicted of murder by abortion. The conviction was reversed on the grounds that the trial court committed error in permitting evidence to be introduced which tended to show that the defendant had committed an abortion on another subsequent to the act charged. The Supreme Court was of the opinion, while evidence of former similar acts are admissible to show intent, a subsequent abortion, without proof of former ones, has no such tendency and the trial court was in error in admitting this evidence.

The *Hobbs* case was followed by *People* v. *Moshiek*[4] in which the defendant had been convicted of forgery. At the trial a witness had been permitted to testify to other acts of forgery committed by him and the accused, subsequent to the one charged. The Supreme Court held that the admission of that evidence was error. To quote from the opinion:[5]

> "This court in the case of *People* v. *Hobbs*, 297 Ill. 399, has definitely and finally settled the question that the evidence of the commission of subsequent crimes is not admissible for the purpose of proving guilty knowledge or intent in the absence of proof that the defendant has formerly committed a similar offense, and that his first offense must be held to be the beginning of his criminal career, and that his intent in the commission of his first offense may not be presumed from his commission of subsequent similar and distinct offenses."

We believe that the court's view on the admission of evidence in both the *Moshiek* and the *Hobbs* cases, as well as that expressed in the *Rogers* case, tends to retard effective administration of the criminal law. By proving other similar instances the endeavor is to "negative inadvertence and any other innocent explanation. It argues that the oftener a like act has been done, the less probable it is that it could have been done innocently."[6] To

---

[1] See discussion, 1 Wigmore, *Evidence* (1923, 2nd ed.), secs. 216, 357.
[2] Ibid 236.
[3] (1921) 297 Ill. 399, 130 N. E. 779.
[4] (1926) 323 Ill. 11.
[5] Ibid 22.
[6] 1 Wigmore, *op. cit.* sec. 312.

this end "it is immaterial whether the instances are found occurring before or after the act charged."[1]

20. *Error in the Admission of Complaints of Children in Crimes Against Children.*

In *People* v. *Romano*[2] the defendant had been convicted of the charge of taking immoral and indecent liberties with a female child of the age of six years. The child's mother and a nine year old girl were permitted by the trial court to testify that the child had complained of the defendant's conduct. The Supreme Court reversed the judgment of the trial court on the ground that the complaint of the child was not a part of the *res gestae,* and although the court found that such statements were admitted under similar circumstances in rape cases, it held that the rule did "not extend to the crime of taking indecent liberties with a child."

We believe there is no substantial basis for a distinction in the admission of such evidence between rape and indecent liberties cases. We believe, further, that the Supreme Court might well have held these statements admissible without doing violence to our rules of evidence. Nor would the admission of this evidence have jeopardized the interests of justice. "The phrase *res gestae* is, in the present state of the law, not only entirely useless, but even positively harmful. It is useless, because every rule of Evidence to which it has ever been applied exists as a part of some other well established principle and can be explained in the terms of that principle. It is harmful, because by its ambiguity it invites the confusion of one rule with another and thus creates uncertainty as to the limitations of both."[3]

The utterances of this child, if admissible, were so on the theory of spontaneous exclamations. Such exclamations are admissible as an exception to the hearsay rule because experience has taught us that "under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock."[4] The objection that the evidence is untrustworthy, which is fundamental ordinarily with hearsay testimony, is not present in such a case. This child's utterances were spontaneous and therefore trustworthy. "It is to be observed that the statements *need not be strictly contemporaneous* with the exciting cause; they may be subsequent to it, provided that there has not been time for the exciting influence to lose its sway and to be dissipated."[5]

21. *Curing Error by Direction to Disregard.*

Occasionally, a witness will volunteer a prejudicial remark. At other times, evidence competent as to one, but incompetent as to a joint defendant, is admitted. In all such cases the attorney for the defendant should promptly object. The trial court should then immediately sustain the objection, order the remarks stricken and tell the jury to disregard

[1] 1 Wigmore *op. cit.* secs. 359, 316, and see Wharton *Criminal Evidence* (1912, 10 ed.), sec. 887.
[2] (1923) 306 Ill. 502, 138 N. E. 169. Mr. Justice Carter dissented.
[3] 3 Wigmore *op. cit.* sec. 1767. See also article by Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae* (1922), 31 Yale L. J. 229.
[4] 3 Wigmore ibid sec. 1747.
[5] 3 Wigmore ibid sec. 1750.

the testimony. But is the error thereby cured? Obviously it may be so serious that it cannot be cured by the instruction to disregard. The Supreme Court had been liberal in protecting the rights of the defendant in such cases.

The case of *People* v. *Sweetin*[1] involves this question. The defendant, Elsie Sweetin, and her co-defendant, Hight, had been jointly tried for the murder of the defendant's husband. Hight confessed and implicated Mrs. Sweetin. On the trial, the confession of Hight was introduced and the jury were told to disregard it so far as it referred to Mrs. Sweetin. In holding that error had been committed, the Supreme Court said:[2]

> "While the court instructed the jury that Hight's confessions were not admissible as against plaintiff in error, such instruction could by no possibility eradicate the testimony from the minds of the jury. While theoretically the instruction withdrew the evidence from the consideration of the jury, practically the human mind is so constructed that inevitably the prejudicial effect remained therein."[3]

22. Husband or Wife Testifying for or Against Each Other.

In *People* v. *Ernst*[4] the defendant was charged with forging his wife's signature to a note. The case had an interesting history:

> "Testimony was offered by the state to the effect that plaintiff in error's wife came to the bank after the auditor had taken charge and was shown the note in question and asked whether or not the signature was hers, and that she said it was not and that she had not authorized her husband to sign it. Defendant objected to this testimony and the objection was overruled, but later, during the presentation of the state's case, the court struck out this evidence. Plaintiff in error sought to testify that he had authority from his wife to sign her name to this note, but the court refused to permit him to do so. The state also offered plaintiff in error's wife as a witness, but the court ruled that she was incompetent and that a statement made by her could not be used against him."[5]

The case came up for two hearings before the Supreme Court. After the first, Mr. Justice Stone, speaking for a unanimous court,[6] held that the judgment should be reversed and the cause remanded, among other reasons, for error committed in admitting evidence of the wife's statement to the auditor of the bank. He held further, in a well considered opinion, that both husband and wife were competent to testify in the case. The opinion concluded:

> "We are of the opinion that in this case the common law should be relaxed in so far as necessary to obtain the truth concerning defendant's authority from his wife to sign her name to the note in question. So limited, the court should have permitted the defendant and his wife to testify."

---

[1] (1927) 325 Ill. 245.
[2] Ibid 252.
[3] In *People* v. *Swift* (1925), 319 Ill. 359 the situation was much the same, but as the defendant had neglected to ask for separate trial the Supreme Court refused to reverse his case.
[4] (1923) 306 Ill. 452, 138 N. E. 116.
[5] Ibid 454.
[6] *People* v. *Ernst*, docket No. 14612, agenda 43, April, 1922.

The accused not being satisfied with the court's ruling as to the admissibility of the evidence of the wife, filed a petition for a rehearing which was granted. The unexpected then happened. In the second opinion the Supreme Court held that the common law could not be relaxed and that, consequently, neither the husband nor the wife was a competent witness. In the language of the court:

> "We are confronted with a legislative enactment that 'the rules of evidence of the common law shall also be binding upon all courts and juries in criminal cases except as otherwise provided by law,' and the legislature has not otherwise made any provisions changing the rule in cases of this character. . . . If it is now thought the statute is unwise and does not rest on a sound basis of reason, we think the legislature must be appealed to, to change it. This court cannot do so."[1]

Is the court's second thought an improvement? We think not. The statute in question has no inhibition against husband and wife testifying for or against each other. It merely provides that the rules of evidence of the common law shall govern. This fairly raises the question: Was it the intention by this statute to crystallize the rules of the common law? And if not, what are the rules of evidence of the common law governing this question?

It is not questioned that the common law rule was that husband and wife were disqualified by the marital relationship as witnesses for or against each other. But the common law rule also was that a wife on her marriage submerged her legal identity. She could not make a binding contract. She was legally incapacitated to deal with property. She had few interests, if any, to protect from her husband. The law made him the over-lord. Had he forged her name, it would have been a mere idle act, and of no criminal consequences, since she could not create an obligation.[2]

Since that time statutes have quite generally conferred on the wife many, if not all, of the rights, privileges, etc., of a single woman. Our court has proudly pointed to woman's status in Illinois: "Few, if any, state legislatures in this country have gone further to secure to a wife all of her separate rights without interference on the part of the husband than has the legislature of this state."[3]

The wife now has interests in property with which not only a stranger may interfere, but her husband as well. If she now signs a note, she creates an obligation. She has become a legally responsible person with interests to protect. She is permitted to speak in court in protection of those interests, and to expose a violator of her rights. If that violator happens to be her husband, he is as to those interests much the same as a stranger. The law has endowed a married woman with legal capacity to hold property independent of her husband. This marks a decided change in the legal status of woman and presents a new problem for the common law to contemplate. Her present status has been wrought largely through statutory enactment,

[1] *People* v. *Ernst* (1923), 306 Ill. 452, 456, 138 N. E. 116.
[2] See *McLean* v. *Griswold* (1859), 22 Ill. 218; *Carpenter* v. *Mitchell* (1869), 50 Ill. 470; *Schmidt* v. *Postel* (1872), 63 Ill. 58.
[3] *Betser* v. *Betser* (1900), 186 Ill. 537, 538, 58 N. E. 249.

but this presents added reason, not less, for the common law to unbend and adapt itself to present conditions in the matter of qualifying both parties to the marital relationship as witnesses.[1]

23. Errors in Cross Examination.

Reference to Table 5 will show that 5.1 per cent of the reversals during the period studied were for errors in cross examination. It will be noted, too, that improper cross examination was urged successfully most frequently, as was the case with most of the other principal grounds for error, in homicide cases. The Supreme Court has steadfastly adhered to the policy of allowing ample cross examination and yet it has carefully kept that "legal engine" for discovering truth in its proper place. The fact that relatively few cases have been reversed for improper cross examination is most gratifying.

A few illustrations of the improper use of cross examination will suffice. In *People* v. *Sorrells*[2] the state's attorney cross examined the defendant as follows:

> "Q. 'You remember a woman named Rose Mason testifying at the inquest?' A. 'Sure.' Q. 'Rose is dead now, isn't she?' A. 'Yes, sir.' Q. 'You remember her saying she saw you going in that house that morning?' "

Although objection to the last question was properly sustained, it still, in the opinion of the court, constituted prejudicial error. To quote:[3]

> "This last question was objected to and the objection sustained, but the question was clearly prejudicial error. There was no attempt to use the testimony of Rose Mason before the coroner's inquest, but the inference was gotten before the jury that there had been a witness, now dead, who had seen the plaintiff in error go into his house, where the deceased was later found dead, during the morning of the day of the crime. There was no evidence in the record tending to show that he was in his house during that morning after first leaving it. While the court sustained the objection the damage from such question had been done. This question supplied by inference in the minds of the jury a link in the chain of circumstances not supplied by any portion of the evidence. This was reversible error."

Judgment was reversed in *People* v. *Lewis*[4] because the prosecuting officer, in cross examining the defendants, repeatedly asked of them questions regarding other indictments against them and also concerning matters tending merely to disgrace and prejudice them with the jury. In *People* v. *Moshiek*[5] the court said:

> "The state's attorney, instead of offering this rebuttal testimony if it was forthcoming, sought to discredit the testimony of Wilson by unfair and unlawful means, by asking the witness if he was not charged with forgery and if he was not guilty of forgery. There is no claim whatever, so far as this record shows, that Wilson was ever convicted of the crime of forgery or of any other felony or infamous crime."

---

[1] See *Boyer* v. *Sweet* (1900), 184 Ill. 120.
[2] (1920) 293 Ill. 591.
[3] Ibid 595.
[4] (1924) 313 Ill. 312.
[5] (1926) 323 Ill. 11, 21.

In *People* v. *Johnson*[1] error was committed because the prosecuting officer had attempted to impeach his own witness. "There is no rule of evidence more firmly established," said the court, "than that a party cannot impeach a witness called by him by proving that the witness has on some other occasion made a statement different from the one he makes in court."

(V) Variance, as Ground for Reversal

24. In General. A variance occurs when the proof does not sustain the criminal charge but tends to establish something different. It is not always possible to know in advance just what the proof will show. To meet the possibility of varying evidence, different counts are allowed, and if the proof corresponds to any one of the counts (assuming, of course, that a count states a criminal offense), the case has been properly supported. At times, the proof fails to correspond to any valid count. Then the state fails because of a variance of the proof from the charge. No one would contend that a person charged with murder might be found guilty of larceny, but we shall find cases involving subtleties and where the distinctions are not so apparent. In *People* v. *Jennings*[2] the court said, "A variance to vitiate a trial must be material." But when is it material? As to that question there may be differences of opinion.

In *People* v. *Zangain*[3] the accused had been convicted of burglary. The indictment charged him with breaking and entering the "store building of James A. Hendricks and the estate of H. H. Morgan, deceased, operating under the firm name of Morgan and Hendricks." This, the Supreme Court held (three justices dissenting) was a sufficient description of the premises.

Can the estate of a deceased partner be a member of a partnership and carry on business after his death? To this question the majority of the court answer:

> "It is settled by all authority that the business of a partnership may be continued after the death of a partner, either by the original articles of co-partnership, or by parol agreement between the partners, or by the will of a partner with the assent of the other partners, or even by agreement of the surviving partners and the representatives of the estate of the deceased partner."

This being so, was it sufficient to name the estate of the deceased partner without giving the name of the legal representative heirs or devisees? On this question the majority were of the opinion that with respect to property, a partnership is "recognized as a legal entity distinct from and independent of the persons composing it." The majority conclude:

> "Inasmuch as the funds and property of a deceased partner may be continued in the business and the representatives of the estate sustain the relation of partners, and in common acceptation the estate is a partner, we do not regard it as essential that the names of those who would be entitled on the settlement of the partnership affairs should be named. The ownership of the property was sufficiently alleged."

---

[1] (1924) 314 Ill. 486.
[2] (1921) 298 Ill. 286.
[3] (1922) 301 Ill. 299, 133 N. E. 783.

In the opinion of the minority, however, after the death of a partner, and before settlement of the partnership business, ownership should be laid, for purposes of indictment, in the surviving partner as the personal representative of the partnership. After the partnership business is settled,

> "the interest of the deceased partner passes to his personal representative, heir, devisee or legatee, as the case may be, and ownership should then be laid in all the individuals comprising the partnership, naming them. . . . For aught that appears on the face of this indictment the accused may have been the owner, in whole or in part, of the store building as heir or devisee of H. H. Morgan and may have had the possession of the building and the lawful right of entry."

The notion that a partnership is an entity is interesting. Both on this point and on that relating to the allegation as to the ownership of the premises the opinion of the minority is in legal strictness more nearly correct. Nevertheless the position taken by the majority should be commended. "It would have been less confusing, naturally, if the court had avowedly adopted the view that a description in popular language, even though not wholly an accurate one, would satisfy the requirements of allegation. But even as it is, the case is bound to exercise a salutary influence toward the elimination of an inviting species of unmeritorious objection." [1]

In *People* v. *Emmel*[2] the court held it was sufficient in an indictment for obtaining property by means of the confidence game to allege that the property obtained was either that of the general owner *or* of the agent in possession, and that it was sufficient to prove that the confidence game was practiced either on the owner *or* the agent.

25. The Doctrine of Idem Sonans. When a material name or word in an indictment has been wrongly written or spelled, the doctrine of *idem sonans* (having the same sound) is raised. If it is found *idem sonans* with that proved, there is no error. If the name alleged is one by which the party is usually known, even if his true name is proved to be different, there is no variance.[3] If the name alleged is of the same sound as the name proved or so near it that no one could possibly have been prejudiced, there is no error. In *People* v. *Callahan*[4] the property stolen was alleged to be that of Claude and *Elza* Mills, whereas the proof showed it to be that of Claude and *Elga* Mills. The court held that this did not constitute fatal variance. In *People* v. *Weisman*[5] the property taken was alleged to be that of the First National Bank of Marissa, *Illinois*. The proof showed the correct description to be First National Bank of Marissa. Again, the court held that the defendant was not prejudiced by the variance. In *People* v. *Estes*,[6] Charles R. Carlyle, Sr., was sworn in as foreman of the jury but the bill was signed by Charles Robert Carlyle. The court saw in that no sufficient reason for quashing

[1] Millar (1922), 17 Ill. L. R. 233, 234.
[2] (1920) 292 Ill. 477.
[3] *People* v. *Decina* (1923), 306 Ill. 260; *People* v. *Marek* (1927), 326 Ill. 11.
[4] (1926) 324 Ill. 101.
[5] (1921) 296 Ill. 156.
[6] (1922) 303 Ill. 602.

the indictment. In *People* v. *Goldberg*[1] a count making a charge against *Philup Goldberg* was held good though the defendant's true name was Philip Goldberg, but one calling him Philip *Holdberg* was fatal.[2]

In *People* v. *Belle*[3] the allegation was that the burglarized store was the property of S. Arthur Board, and the proof showed his name to be S. A. Board. In *People* v. *Jennings*[4] the building burglarized was alleged to have been a storehouse, while some of the witnesses testified that it was a meat market. In both of the above cases the variance was held to be not material.

The case of *People* v. *Novotny*[5] involved a prosecution under the confidence game statute. It was charged that the defendant had obtained money by use and means of the confidence game from Rapan *Manian,* but the evidence showed that the name was Rapan *Mananianian.* This was held to be fatal. Mananianian is no more like Manian than Browning is like Brown, said the court. Two principal reasons were given for the decision, viz., (1) a material averment (that is the name of the person defrauded) was not proved, and (2) an acquittal or conviction of wrongly obtaining money from Rapan Manian would be no bar to a subsequent trial for defrauding Rapan Mananianian. To quote from the opinion:[6]

> "While the offense of obtaining money by means of the confidence game is punished as a public crime, the particular offense charged is always the obtaining of the property of some individual, whose name therefore becomes material to the description of the offense as stated in the cases cited. Being a material averment it is necessary to be proved, and a failure to prove it is not a mere variance but a fatal lack of evidence to prove the crime charged. There is here no question of *idem sonans* . . . . Would the production of the record showing an acquittal on this indictment for obtaining the property of Rapan Manian constitute a defense to another indictment for obtaining the property of Rapan Mananianian? If it would, then an acquittal upon an indictment against Robert Brown would constitute a defense to a subsequent indictment of Robert Browning, and an acquittal of Thomas Buchan a defense to a subsequent indictment of Thomas Buchanan, or *vice versa.*"

All the circumstances in the *Novotny* case clearly indicate that no injustice was done the defendant through the conviction. He was at the trial and strenuously defended himself. He understood the nature of the charge against him. There is nothing to indicate that he was misled or confused by the charge in any way. What magic is there in a name? Is it not but one means of identification? Surely the court does not mean to intimate that an acquittal of Jones for assault on John Smith would be a bar to a prosecution against Jones for assaults he has made on *other* John Smiths. If in a second prosecution for an assault on *another* John Smith, Jones were to raise *res adjudicata,* is there any doubt that it could be shown that in the second action a different individual was involved? Equally,

[1] (1919) 287 Ill. 238.
[2] See comment on this case supra.
[3] (1923) 308 Ill. 593.
[4] (1921) 298 Ill. 286.
[5] (1922) 305 Ill. 549.
[6] *Ibid.,* 557-558.

can there be any doubt, if the defendant Novotny, after his conviction for obtaining the property from *Rapan Manian* by means of the confidence game, were to be similarly charged for obtaining the property of *Rapan Mananianian,* that he could show that he had already been convicted of that offense? We believe that, here again, the administration of the criminal law would have been promoted more effectively if the court had first inquired into the fact whether any injustice had been done the defendant through the conviction.

26. Joint Indictments. The sufficiency of an indictment against an accessory under the Illinois Criminal Code has been considered frequently by the Supreme Court.[1] The case of *People* v. *Bogue* [2] raises this question relative to an indictment for rape. Five persons were jointly indicted as principals for the rape of one woman. After their conviction, on writ of error, it was argued that this was neither legally nor physically possible, as the crime is in its nature several in its perpetration. There follows the language of the court: [3]

> "It is conceded several persons may be jointly indicted and convicted for the commission of one crime, but it is contended that when several are jointly indicted for rape of one woman, the presumption must be indulged that all but one of the parties encouraged and aided the perpetrator in committing the crime, and the indictment must so allege . . . . By our criminal code an accessory who encourages, aids and abets in the commission of a crime shall be considered as principal and punished accordingly . . . . It is necessary that the indictment charge all of the defendants with the crime, as they must all be tried together. This court has often said it is necessary that an accessory before the fact be indicted and punished as a principal, and that the usual practice is to indict as principal an accessory before the fact."

The *Bogue* case should be read in connection with the case of *People* v. *Richie,*[4] which also involved a joint indictment for rape. In that case it was said, "Apart from the statute making accessories punishable as principals, two persons cannot be jointly guilty of a crime such as rape, where by the very nature of the act individual action is essential." It is permissible "to join two or more defendants in the same indictment where they commit the same offense as principals or where they act as principal and accessory." But since, in the *Richie* case, distinct acts of rape were involved by two persons upon the same woman, it was held the indictment was bad for "an indictment charging two or more persons with the commission of a joint offense will not be sustained by proof that each committed a distinct offense."

27. Content of the Indictment. The content of a homicide indictment, which has ever been a matter of much concern to the state's attorney, can be made relatively simple if the

---

[1] The Illinois Criminal Code provides: "An accessory is he who stands by, and aids, abets or assists, or who not being present, aiding, abetting or assisting, hath advised, encouraged, aided or abetted the perpetration of the crime. He who thus aids, abets, assists, advises, or encourages, shall be considered as principal, and punished accordingly." (1925) Smith-Hurd, Ill. Rev. Stats., chap. 38, sec. 582.

[2] (1925) 319 Ill. 294, 149 N. E. 750. The language relative to this case is adapted from a comment by the writer in (1927) 22 Ill. L. Rev. 18-19.

[3] Page 296 official report.

[4] (1925) 317 Ill. 551, 148 N. E. 265.

Supreme Court's suggestions in the case of *People* v. *Corder*[1] is followed. The indictment was unusually wordy. It was contended that it was uncertain because it did not specifically aver that the mortal wound from which the deceased died was the mortal wound inflicted by the defendant, and, further, that the date was not alleged in a positive averment. The language of the Supreme Court in reply is noteworthy:

> "Omitting the formal parts of the indictment, all that was necessary to make it sufficiently technical and correct was to say that on a certain day in a certain county John F. Corder 'did unlawfully, with malice aforethought, by shooting, kill Jane Hardy.'"

In an earlier case,[2] an information had been brought against the defendant for murder committed *by shooting with powder and shot from a gun.* The defendant was acquitted on that charge. Later another indictment for killing the same individual was brought against the defendant alleging that he had killed the deceased *by beating him upon the head with a gun.* On that charge the accused was convicted. The Supreme Court held that the two indictments stated different offenses, and that the acquittal on the first was no bar to the second, the prisoner never having been in legal jeopardy.

To expedite the administration of the criminal law we stand in great need of the simplification of criminal pleadings. The tendency is in that direction. The state of Michigan[3] recently has prescribed a form for an indictment for murder reading "AB murdered CD." Various other forms prescribed by the recent Michigan statute are correspondingly short. We believe, in the absence of legislation in Illinois, our Supreme Court, through its influence, could do much toward simplifying criminal pleadings. In its decisions, it might extend the excellent suggestions contained in the *Corder* case by indicating that shorter indictments in other offenses would be desirable. A suggestion from the court carries tremendous weight. Much, therefore, depends upon its leadership. The position it takes on a question can easily change the trend, not only of criminal pleadings, but of the whole law of the state.

28. Proof of Offense Differing from the One Alleged.

It is but a travesty on justice when, under the law, a guilty defendant is permitted to escape conviction because the crime he was charged with was, by a slight shade of difference, not the crime of which the evidence showed him guilty. The difference between an attempted and a consummated crime, frequently, is not measurable. So, too, it is difficult, at times, to distinguish larceny from embezzlement, larceny from false pretenses, or false pretenses from that new horror found in the Illinois criminal code, *the confidence game.* What a boon these close distinctions must be to the criminal! It is he who thrives by our serene devotion to the letter of the law and by our strict adherence to syllogistic reasoning. The close approximation of the definition of one crime to others is a patent cause for the miscarriage of justice in many cases. A few illustrations from recent cases, we believe, will bear out these remarks.

---

[1] (1923) 306 Ill. 264, 137 N. E. 845.
[2] *Guedel* v. *People* (1867), 43 Ill. 226.
[3] *Michigan Public Acts* (1927), Chap. 7, Sec. 44.

In *People* v. *Gore*[1] the defendant was convicted of larceny as bailee. In the Supreme Court the conviction was set aside because the evidence tended to show him guilty of *obtaining money by the use of a false and fraudulent deed rather than larceny as a bailee.* The defendant, acting under an oral authority from others, signed the name of his principals to a written contract of sale for real property, and received, upon delivery of the deed, a check made out to him for the purchase price. The principals testified that they had not signed the deed or ratified the transaction. The defendant converted the proceeds of the check he had received to his own use. The result was that the purchasers did not get legal title to the land and the defendant had their money, which, apparently, he refused to return. On those facts a larceny as bailee charge was brought against him. To quote from the opinion:[2]

> "While the evidence establishes that plaintiff in error had an oral contract with the Bucketts to sell the property in question, there was no evidence that he was authorized to sign their name to a contract. An oral contract of agency to sell real estate does not authorize the agent to sign the name of his principal to a written contract of sale . . . . Nor was he authorized by the contract of agency to receive a check for the payment of the lots, made out in his name. The question involved in this case is whether or not plaintiff in error was bailee of a check belonging to the Bucketts. Unless he was proven so beyond a reasonable doubt, conviction of larceny as such bailee cannot stand. The fact that he may have used a false and fraudulent deed to procure money from Gost does not aid in the solution of the question. The conviction must be of the crime charged and not of some other crime. The Bucketts were not entitled to this money until they had given the warranty deed to the property in question, which they at no time did."

In *People* v. *Ingravallo*[3] the defendant falsely represented the death of the insured and demanded payment on the policy. His conviction was reversed because "the obtaining of money from an insurance company by a false representation of the facts . . . does not constitute obtaining money by means of the confidence game." In *People* v. *O'Connor*[4] a purse was taken from a drunken man. As this was not robbery, but only larceny, the case was reversed. In *People* v. *Peers*[5] the defendant was indicted for attempting to obtain money by means of the confidence game. He had insured his car after it had been wrecked and then had sent in a claim for damages post-dating the accident. He was convicted and sentenced, but on error judgment was reversed because the proof showed, not a confidence game attempt, but an attempt to obtain money by false pretenses.

The case of *People* v. *Heisler*[6] raises the distinction between the crime of abortion and that of an attempted abortion. The accused had been charged with, and convicted of the crime of murder by abortion. On a post mortem examination, the proof showed that the fœtus had decomposed within the

[1] (1926) 322 Ill. 67.
[2] Ibid 68-69.
[3] (1923) 309 Ill. 498.
[4] (1923) 310 Ill. 403.
[5] (1923) 307 Ill. 539.
[6] (1921) 300 Ill. 98.

body of the woman. The defendant's wrongful act had brought on the condition which caused the death of the woman; but, since the fœtus had decayed within the body, it was murder by attempted abortion. Had it been expelled the crime would have been murder by abortion. Because of this variance, the case was reversed. The following quotation is from the opinion:

> "In medical parlance a distinction is often made between the terms 'abortion' and 'miscarriage,' but in law, and as used in our statute, there is no ground for any distinction. The terms are synonymous. Abortion is the expulsion of the fœtus at a period of utero-gestation so early that it has not acquired the power of sustaining an independent life. . . . To cause a woman to abort or miscarry and to attempt to procure or produce an abortion or miscarriage are separate and distinct offenses. . . . This conviction of the plaintiff in error for murder by abortion would not be a bar to the prosecution of her for murder by an attempt to produce an abortion. She is charged in the indictment with murder by abortion, and the proof shows clearly that no abortion was produced. The variance between the charge and the proof is fatal."

It should be observed that the language of section three of the criminal code covers both of these offenses. It reads in part as follows:

> "Whoever . . . causes any woman . . . to abort or miscarry, or attempts to procure or produce an abortion or miscarriage, . . . shall be imprisoned in the penitentiary . . . ; or if the death of the mother results therefrom, the person procuring or causing the abortion or miscarriage shall be guilty of murder."

But there is yet another phase of this problem, viz., can a conviction for an attempt stand where the evidence establishes that the act was consummated? That it cannot is the decision in *People* v. *Lardner*.[1] The accused had been indicted for the larceny of five beaded hand bags. He had taken the bags from a show case and had placed them in the pocket of his overcoat. After some altercation he left the store, leaving this overcoat lying on another show case about six feet from the one from which the bags were taken. The bags were there discovered. The accused was found guilty of an attempt to commit larceny under section 581 of the criminal code. This section covering attempts not otherwise expressly dealt with, provides for the punishment of "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."

The evidence established the fact that the defendant had taken physical control of the bags. "There was a complete severance from the possession of the owners from whom the bags were taken." The Supreme Court reversed the judgment of the trial court on the ground that the defendant was guilty of larceny and not an attempt to commit larceny. It held, further, that even though a lesser offense is included in an indictment for a higher one, and a defendant though acquitted of the higher might still be convicted of the lesser, this rule did not here apply since an essential element of an attempt is a failure to consummate the crime. There was no failure here; the crime of larceny was complete. In the language of the court:

[1] (1921) 300 Ill. 264, 133 N. E. 375, 19 A. L. R. 721 (annotated at page 724).

"The essential elements of larceny are a felonious taking by which the owner is deprived of possession and the thief acquires such possession for an appreciable period of time, although it may be only for a moment. An attempt to commit larceny is the unfinished crime. The essentials of the attempt are the intent to commit the crime, the performance of some overt act towards its commission, and a failure to consummate the crime. Whenever one intending to commit the crime of larceny does an act toward it but is intercepted, or some accident intervenes so that he fails to accomplish what he intended, it is an attempt within the statute. If there is such intent and an endeavor to accomplish the crime by some act falling short of the execution of the ultimate design it constitutes the attempt. . . . A failure to consummate the crime is as much an essential element of an attempt as the intent and the performance of an overt act toward its commission. Evidence that a crime has been committed will not sustain a verdict for an attempt to commit it, because the essential element of interception or prevention of execution is lacking. . . . When an indictment charges an offense which includes within it a lesser offense, the defendant, though acquitted of the higher offense, may be convicted of the lesser; but that rule cannot be applied to an attempt defined by the statute, because an essential element of the attempt is a failure to consummate the crime. The statute only includes a case where there is a direct, ineffectual act toward the commission of crime. If the evidence for the people proved the defendant guilty of the crime of larceny he could not be convicted for an attempt which failed."

While this is the rule relating to attempts and consummated acts, the situation must be distinguished sharply from one where the conviction is for an assault with intent to commit a crime, and the evidence establishes the act was consummated. Here, notwithstanding, the conviction stands. *People* v. *Mason*[1] presents that issue. The accused had been convicted of an assault with intent to commit rape. There was evidence tending to show that rape had been committed. In affirming the judgment of the trial court, the Supreme Court held that the crime of rape involves assault with intent to commit rape, and that the charge had been sustained, notwithstanding rape had actually been committed. The following is the language of the court:

"Counsel further contend that conviction in this case of assault with intent to commit rape cannot be sustained, for the reason that the facts show, if taken to be true, that the crime of rape, and not of assault with intent to commit rape, was proven. The test in this class of cases is whether or not the evidence shows plaintiff in error to be guilty of the crime charged, and the fact that the evidence proving him so guilty may also prove an offense of greater magnitude is not a variance between the proof and the indictment upon which the verdict is based. Proof of the crime of rape also involves proof of an assault with intent to commit rape, and though it be conceded that in this case the proof does show the crime of rape, such does not make void the conviction of the crime charged."

Although somewhat startling when placed in juxtaposition, these cases represent settled principles of law. The distinction lies between attempt and

[1] (1922) 301 Ill. 370, 133 N. E. 767.

consummated act, representing distinct offenses, and an assault with intent to commit a certain crime and the actual commission of the crime, one including the other. To be sure, it is difficult to see why an attempt to commit larceny is any less an element of the crime of larceny than an assault with intent to commit rape is an element of the consummated crime of rape. On this question Professor Millar has commented:[1]

> "An attempt, as known to the criminal law, is in no sense a constituent element of the crime itself, for there can be no punishable attempt without a failure to accomplish the object intended. . . . It is not enough to constitute a criminal attempt that there shall be a certain degree of progression along the 'iter criminis:' it must appear, in addition, that the progression had come to a full stop. Quite otherwise is the case of assault with intent to commit a crime. In offenses involving force, such as rape, the assault with intent is *per se* an element of the completed crime. The allegation of the completed crime, therefore, includes the charge of assault. In this case, it suffices to show a certain degree of progression along the 'iter criminis,' viz., to the extent of the assault, accompanied by the intent in question, without regard to success or failure of the criminal purpose: the conception of assault with intent is complete irrespective of the carrying out of the intent."

Professor Millar continued:

> "Here there is room for legislation. If the evidence fails to show the completed crime as charged, but shows a punishable attempt, the only thing, under present conditions, preventing conviction is the absence of an allegation stating the fact of failure. It is very difficult to see how this absence can work any real prejudice to the defendant. The attempt should be made a lesser included offense by statute. This was done in England by the statute of 1851, already mentioned. The provision[2] is to the effect that, if it shall appear to the jury, on the trial of any offense, that the crime charged was not completed, they may find the prisoner not guilty of the crime but guilty of an attempt to commit it . . . . Similar statutes exist in many American jurisdictions."

There is need, too, for the revision of the criminal code covering the crimes relating to property. The subtle distinctions between the various crimes there involved have become so firmly rooted in the criminal law that nothing short of legislation can adequately remedy and liberalize the situation. Kenny tells us:[3]

> "Some of these limitations would seem to us unaccountable if we did not know that they had been inspired by motives of humanity. The desire of avoiding capital punishment—and in later times that of restricting the number of offenses in which, by the old procedure in trials for felony, the accused person was denied the support of counsel and witnesses—led our mediæval judges to invent ingenious reasons for depriving many acts, that seemed naturally to fall within the definition of larceny, of all larcenous character. So extreme was the severity of the law of larceny that it exacted death as the penalty for stealing, except when the thing stolen did not exceed the value of twelve pence.

[1] Comment (1922), 17 Ill. L. Rev. 42, 43.
[2] 14 and 15 Vic. c. 100, sec. 9.
[3] *Outlines of Criminal Law* (1926, 12 ed.), 182.

> This severity was ultimately tempered by two active forces. One was what Blackstone leniently terms 'a kind of pious perjury' on the part of juries; who assessed the value of stolen articles in a humanely depreciatory manner. Thus in 1808, to avoid convicting a woman for the capital offence of 'stealing in a dwelling-house to the value of forty shillings,' a jury went so far as to find on their oaths that a 10 pound Bank of England note was worth only 39s. The other force which similarly opposed putting men to death for thefts was that ingenious judicial legislation which we have already mentioned."

In the criminal code of Canada the situation has been remedied by a broad comprehensive statutory provision[1] under the heading *theft,* that covers not only common law larceny but all other matters involving the fraudulent conversion or misappropriation of another's personal property. The provision reads as follows:[2]

> "1. Theft defined.—Theft or stealing is the act of fraudulently and without color of right taking, or fraudulently and without color of right converting to the use of any person, anything capable of being stolen, with intent,—(a) to deprive the owner, or any person having any special property or interest therein, temporarily, or absolutely, of such thing, or of such property or interest; or (b) to pledge the same or deposit it as security; or (c) to part with it under a condition as to its return which the person parting with it may be unable to perform; or (d) to deal with it in such a manner that it cannot be restored in the condition in which it was at the time of such taking and conversion.
>
> "2. Theft is committed when the offender moves the thing or causes it to move or to be moved, or begins to cause it to become movable, with intent to steal it.
>
> "3. The taking or conversion may be fraudulent, although effected without secrecy or attempt at concealment.
>
> "4. It is immaterial whether the thing converted was taken for the purpose of conversion, or whether it was, at the time of the conversion, in the lawful possession of the person converting."

Such legislation, if adopted in Illinois, we believe, would have a noticeable salutary effect on the enforcement of the criminal law.

(VI) Conduct of Prosecuting Attorney, as Ground for Reversal

29. In General. The prosecuting attorney is an officer of the state, "required not merely to execute justice, but to preserve intact all the great sanctions of public law and liberty. No matter how guilty a defendant may in his opinion be, he is bound to see that no conviction shall take place except in strict conformity to the law. It is the duty, indeed,

---

[1] The Criminal Code of Canada is based on the English Draft Code formulated by the English Royal Commissioners but never adopted in England.

[2] Crankshaw's *Criminal Code of Canada* (1924, 5th ed.), sec. 347.

A report of the Crime Survey Committee of the Philadelphia Law Association has recommended a revision of the Criminal Code of Pennsylvania so that "a bill for unlawfully taking the goods of another should charge that A. B. on the ..... day of ....., 192...., stole from C. D., property of the value of $..... in the County of Philadelphia. Under such a bill the jury should be allowed to convict of larceny, larceny as bailee, embezzlement or receiving stolen goods knowing them to be stolen." *Report of Crime Survey Committee* (1926), 473.

of all counsel to repudiate all chicanery and all appeal to unworthy prejudice in the discharge of their high office; but eminently is this the case with public officers, elected as representing the people at large, and invested with the power which belongs to official rank. . . . Such officers are bound to . . . . scrupulously avoid all unfairness in the presentation of the law."[1] This language, we might remark, describes the habiliments of the state's attorney when he appears for legal inspection. They are, so to speak, his formal clothes, to be worn only on special occasions. The ordinary state's attorney in action is nothing of the kind. He is a partisan as much as the counsel for the defense,[2] who, by the way, is also an officer of the court. At times the prosecuting officer is viciously combative, and, occasionally, it is feared, he presses a case unduly for conviction.

30. Improper Remarks. Frequently the Supreme Court has been obliged to criticize the conduct of the state's attorney. Usually, while condemning his improper deeds, it has affirmed the conviction if the evidence of the guilt of the defendant otherwise was clear. But, occasionally, the acts of misconduct have been regarded by the court as so prejudicial that it has deemed a reversal was warranted. In *People* v. *Bimbo*,[3] where the misdeeds of the assistant state's attorney were particularly flagrant, the court took occasion to remark:

> "The state's attorney is a sworn officer of the court, and it is his official duty to see that the defendant has such fair and impartial trial. While errors are sometimes committed by counsel through eagerness to win a lawsuit, yet there is nothing in the duty of a state's attorney which requires him to prejudice the right of a defendant to a fair trial in an eagerness to secure a conviction. . . . Argument of counsel is for the purpose of assisting the jury fairly, deliberately and impartially to arrive at the truth of the facts submitted to them for their decision, and it is highly improper for the prosecutor to do or say anything in argument, the only effect of which will be to inflame the passions or arouse the prejudices of the jury against the accused without throwing any light upon the question for decision. . . . On account of the misconduct of the assistant state's attorney the judgment of the criminal court will be reversed and the cause remanded."

In the case of *People* v. *Dabney*[4] the Supreme Court expressed a governing principle for cases of this nature. The defendant had been convicted for assault with intent to murder. Among the grounds urged for reversal, it was contended that the state's attorney had made improper remarks during the course of his argument. The following language [5] of the Supreme Court, in disposing of the question, commends itself to us:

> "The statement was clearly error and in a case close on the facts would be sufficient to reverse the judgment. The jury were required to try the case according to the law and the evidence, and what the people of the community might want in the matter had nothing to do with their duty in the case . . . . We are of the opinion, however, that in

[1] 3 Wharton *Criminal Procedure* (1918, 10th edi.), sec. 1490.
[2] See *People* v. *Russell* (1926), 322 Ill. 295.
[3] (1924) 314 Ill. 449, 454.
[4] (1925) 315 Ill. 320, 146 N. E. 166.
[5] Page 327 official report.

this case it cannot be said that but for such statement the verdict might have been otherwise. The testimony presented in the case shows the guilt of plaintiff in error, and this error is not sufficient to cause a reversal of the judgment."

Subsequently, in *People* v. *Milewski*[1] where it appears the defendant had been convicted of murder, the contention was raised, on writ of error, that the state's attorney had used improper language in his argument. In disposing of this point the Supreme Court, speaking through Mr. Justice Farmer, said:[2]

"It is possible the language used by the state's attorney might have been misconstrued by the jury, but not probable. We have repeatedly cautioned the state's attorneys against using language not justified by the record, but in this case the proof of guilt was so conclusive that the language of the state's attorney could not have prejudiced the defendant, and this is shown, we think, conclusively by the punishment inflicted."

31. Misconduct in Offering Evidence and in Cross-Examination.

The rule in Illinois is a bit confusing as to how to prove the conviction of a crime in the impeachment of a witness. In criminal cases the proof must be by the record or a duly authenticated copy of the record. This question arose in the case of *People* v. *Decker*.[3] The defendant had been indicted for the larceny and burglary of a hen roost. On cross-examination the state's attorney asked one of the defendants: "You have been in trouble of this kind before, haven't you?" and "You have had criminal charges preferred against you before?" Although objections to these questions were sustained, the Supreme Court found their damaging effect such that they constituted grounds for reversal.

The method of questioning followed in the *Decker* case has justly caused Dean Wigmore to exclaim:[4]

"Cannot state's attorneys be expected to know and to remember the elementary rules of evidence obtaining in the forum where they practice? So long as prosecuting attorneys act with unrestrained aggressiveness and untrained ignorance, it is difficult for the legislators to contemplate a reform of those excessive safeguards which now license the guilty as well as protect the innocent."

There was further error in the *Decker* case. The decision, therefore, does not depart from the established principle of the court that it will not reverse for misconduct if the evidence clearly and conclusively shows that the defendant was guilty.[5]

---

[1] (1925) 316 Ill. 288, 147 N. E. 246.

[2] Page 291 official report. To the same effect see *People* v. *Young* (1925), 316 Ill. 508, 147 N. E. 425, where the Supreme Court said, page 512, official report:

"If the case made against defendants were not so overwhelmingly clear and conclusive we might be disposed to reverse the judgment for that error, but the evidence makes it conclusive that the jury could not reasonably have found any other verdict than one of guilty if the assistant state's attorney had made no reference to the defendants' failure to testify."

[3] (1923) 310 Ill. 234.

[4] Comment (1924), 18 Ill. L. R. 571. See also *People* v. *Lewis* (1924), 313 Ill. 312.

[5] See *People* v. *Beil* (1922), 322 Ill. 434, where the court said: "While the objectionable questions should not have been asked, yet upon this record it cannot be said that they were prejudicial to the plaintiff in error." See also *People* v. *Garippo* (1926), 321 Ill. 157.

But in *People* v. *Green*,[1] where evidence of conviction of an assault to commit robbery was admitted to impeach the testimony of one of the defendants, the court without mentioning its principle not to reverse where the evidence for guilt was clear, reversed the instant conviction upon the ground that a conviction for an assault with intent to rob was not admissible, since that crime was not designated as an infamous crime under the statute. We quote from the opinion:[2]

> "It is conceded by counsel for the state that under paragraph 279 of the Criminal Code . . . . the crime of assault with intent to rob is not specifically named as in the list of infamous crimes, but they contend that an assault with intent to commit a robbery is as depraved as an actual robbery, and that as the infamy of a crime depends largely on the state of mind, the crime of assault with intent to commit a robbery should be held infamous as well as the crime of robbery. We cannot so hold. Whether the crime is infamous depends not upon the common law or the court's view of its moral aspects but upon the statute, ... and as the crime of assault with intent to commit robbery is not included in the statute as an infamous crime, therefore, under the statute, evidence of Rizzo being convicted of an assault with intent to commit robbery was erroneously admitted."

It was technical error to admit evidence of the conviction of assault with intent to rob, since the statute did not name this among the infamous crimes, but was it reversible error? Had the witness succeeded in the robbery, the impeaching evidence would have been good and the instant conviction upheld, but since he failed, the evidence was bad, and its admission constituted reversible error. This, it appears to us, is standing on the bare letter of the law.

32. Some Discriminations on Propriety of Conduct of State's Attorney.

The opinion in the case of *People* v. *Heywood*[3] defines a situation where the prosecuting attorney may comment on the defendant's failure to produce witnesses. Further, it places a limitation upon proper argument of counsel. The defendant had been convicted of murder. During the course of the argument, his counsel had referred to the failure of the prosecution to bring in certain witnesses. Following this the prosecuting attorney asked the defendant's counsel why he did not bring in the same witnesses. Under those circumstances, the Supreme Court held that the retort of the prosecuting attorney was proper. It held, also, that while the scope of the argument is defined by the scope of the evidence, the prosecuting officer may draw all legitimate inferences he can from evidence. There follows the language of the court:[4]

> "It has been held that it is error to comment upon the fact that the accused has not produced witnesses who are equally accessible to the prosecution, ... but the situation in that case[5] was materially

[1] (1920) 292 Ill. 351.
[2] Ibid, 356.
[3] (1926) 321 Ill. 380, 152 N. E. 215. Comment on the *Heywood* case is adapted from a comment by writer found in (1927) 22 Ill. L. R. 7.
[4] Page 383 official report.
[5] *People* v. *Munday* (1917), 280 Ill. 32, 117 N. E. 286.

different from that presented to the court by the objection made in this case. Here the prosecutor was simply replying to a question which had been propounded by the attorney for the accused, and this he had a right to do. The court properly limited the argument to a reply to the argument of opposing counsel . . . . The prosecuting attorney has the right to draw all the legitimate inferences he can from the facts that are proven, and the accused has no right to complain that such deductions place him in a bad light before the jury."

There has ever been a vexed problem relative to the inferences to be drawn in case an accused fails to rebut evidence introduced against him. Particularly is this so where he is in an advantageous position through a superior source of information or grasp of the facts. The case of *People* v. *Sicks*[1] presents this point. The accused had been convicted of robbery. On writ of error, he contended, among other things, that the state's attorney had commented on his failure to testify. The state's attorney, it appears, had made the following statement during the course of his argument:

"Let us check up on the state's case. Mr. Rose had quite a long conversation with Sicks, and Mr. Rose testified that Sicks had a peculiar accent to his speech. He could not tell just what nationality the accent would indicate and the defense does not appear to enlighten us on this subject."

On this the court comments:

"This was legitimate argument. The state's attorney had a right to comment upon the failure of the defense to produce testimony to show the nationality of Sicks and to show that he did not speak with a peculiar accent, if such was the fact. This was one of the details of identification by the complaining witness, and we see no reason, supported by law or justice, why the state should not be permitted to comment on the fact that this piece of evidence stands in the record undenied and unexplained."

It has been held by some courts that since the prosecution has the burden of proof, no inference can be drawn from a defendant's failure to produce evidence.[2] Mr. Wigmore's answer to this contention is sufficient.[3] It is true, he states, "The burden is on the prosecution and the accused is not required by any rule of law to produce evidence; but nevertheless he runs the risk of an inference from non-production."

(VII) Conduct of the Trial Judge, as Ground for Reversal

33. Respective Functions of Court and Jury.

Trial by jury, said the Supreme Court of the United States, "in the primary and usual sense of the term at the common law and in the American constitutions . . . is a trial by a jury of twelve men, *in the presence and under the superintendence of a judge empowered*

[1] (1921) 299 Ill. 282, 132 N. E. 573.
[2] *People* v. *Streuber* (1898), 121 Cal. 431, 53 Pac. 918; *State* v. *Carr* (1873), 25 La.; An. 407; *State* v. *Hull* (1893), 18 R. I. 207, 26 Atl. 191.
[3] 4 Wigmore, *Evidence* (1923 ed.), sec. 2273.

to instruct them on the law and to advise them on the facts."[1] (Italics ours.)

In the state of Illinois, we not only have that anomaly of the law that jurors in criminal cases *shall be the judges of the law and the fact,* but the restriction on the authority of the trial court that he must not comment on the evidence or indicate to the jury what his views are. We have developed great concern that the judge must not *invade the province of the jury!* It is reversible error for the trial court to advise the jury on the facts or to comment on the evidence. In the words of our Supreme Court taken from the case of *People* v. *Filipak:*[2]

> "In all criminal prosecutions the accused persons, guilty or innocent, are entitled to a fair and impartial trial by jury. . . . The jury is charged with the duty of determining the facts, and it is not the province of the judge, in a criminal case, to express by word or indicate by conduct in the jury's hearing any opinion upon the facts. . . . The trial judge has the right to ask questions of witnesses or call other witnesses to the stand in order to ascertain the facts and elicit the truth concerning the questions at issue, but he must do it in a fair and impartial manner, without showing any bias for or prejudice against either party. . . . Jurors are ever watchful of the attitude of the judge, and any disclosure of a hostile attitude on his part toward the accused person is very apt to influence them in arriving at their verdict."

The trial court's privilege to ask questions even has been tagged with a *caveat* by the supreme court. In *People* v. *Schultz,* it said:[3]

> "The examination of witnesses is the function of counsel, and the instances are rare and the conditions exceptional which will justify the presiding judge in conducting an extensive examination. In conducting an examination of any length it is almost impossible for the judge to preserve a judicial attitude. Jurors watch the trial judge closely and generally place great reliance on what he says or does. They are quick to perceive any leaning of the court. . . . It is the duty of the judge to see that all the truth is brought out so that the jury can arrive at a true verdict, and sometimes it is necessary for him to ask a question or two to clear up the situation. It is generally better for the court to suggest to counsel the additional information he would like to have brought out and let counsel further examine the witness. When the court asks a question and secures an answer, it, of course, renders unusual prominence to that question and answer and may unduly influence the jury in their verdict. While we do not approve of the trial judge examining the witnesses, we do not find that plaintiff in error was prejudiced by the judge in this trial."

We believe that criminal law administration would be improved measurably if the provision making the jurors the judges of the law and the fact were repealed, and that it would be improved further if the trial judge were given the power to advise the jury on the facts, and to comment on the weight of the evidence. In making certain specific proposals for the reform of the law

---

[1] *Capital Traction Company* v. *Hof* (1898), 174 U. S. 1, 14. Quoted in *The Law of Evidence* by Morgan and others (1927), 10.

[2] (1926) 322 Ill. 546, 554.

[3] (1921) 300 Ill. 601, 606-607.

of evidence, a distinguished committee[1] has summed up the advantages to be gained through permitting comment by the judge as follows:[2]

> "From these statements the conclusion seems justified that in actual practice the privilege of proper comment has the following beneficial effects: (1) It saves time and expense by bringing quicker verdicts, reducing the number of disagreements, and diminishing the number of new trials and applications for new trials. (2) It has an appreciable effect upon a substantial percentage of attorneys in making them spend less time in examining prospective jurors. In this connection, it is interesting to note that in England there is practically no expenditure of time in selecting a jury, and to ponder whether the privilege of comment, so vigorously used there, is not a contributing cause to this desirable end. (3) It operates to a considerable degree to induce the trial judge to pay close attention to the conduct of the trial. It is true that many judges who do not comment have a proper appreciation of the judicial function and do not neglect the performance of their duties to litigants and to the jury. But certainly the privilege of comment is an added incentive to good work."

34. Comments by the Judge.

In *People* v. *Garines*[3] counsel for the state remarked, during the course of the examination of a witness: "It is just a lot of cooked-up stuff here," and shortly after this the trial court said: "We all know what it is; we are not blind; go on, Mr. Nash." These remarks were held to be so prejudicial as to constitute one of the grounds for reversing the case. In the language of Mr. Justice Thompson:[4]

> "This remark of the court was highly prejudicial . . . . Although there may be enough evidence in a record to justify a conviction, a defendant has a right to a trial by jury and not by this court. He has a right to be tried in accordance with the law of the land, and a conviction secured in total disregard of that law cannot be sustained."

During the course of the trial in the case of *People* v. *Haas*,[5] a prosecution for taking indecent liberties with a child, the trial judge remarked in the presence of the jury, and upon the examination of the complaining witness (a child of six) as to her competency to testify: "Of course she is a child; I realize that; but I have a notion that she will come pretty near to telling the truth as some other parties." In holding that this was error the supreme court said:[6]

> "While the meaning intended to be conveyed may have been that

[1] Professor Edmund M. Morgan, Chairman, of Harvard University (then of Yale), Professor Zechariah Charee, Jr., of Harvard, Professor Ralph W. Gifford, of Columbia, Professor Edward W. Hinton, of the University of Chicago, Hon. Charles M. Hough, Judge of the United States Circuit Court of Appeals, Hon. William A. Johnston, Chief Justice of the Supreme Court of Kansas, Professor Edson R. Sunderland, of the University of Michigan, and Dean John H. Wigmore, of Northwestern University.

[2] *The Law of Evidence* (1927), 20-21.

[3] (1924) 314 Ill. 413, 145 N. E. 699.

[4] Pages 422-423 official report. For a case flagrant with improper remarks see *People* v. *Bimbo* (1924), 314 Ill. 449, 145 N. E. 651, and see *People* v. *Black* (1925), 317 Ill. 603, 148 N. E. 281.

[5] (1920) 293 Ill. 274.

[6] Ibid 277.

the witness was competent to testify, yet the ordinary meaning to be attributed to such language is that the judge who tried the case considered her a truthful witness. The question to be decided by the trial judge was whether or not the witness was competent to testify, but the law does not give him the right to express an opinion as to whether or not such witness would testify truthfully. The effect on the minds of the jury could have been none other than that the judge considered the witness to be not only a competent witness but a truthful one. This was an invasion of the province of the jury and constituted prejudicial error."

Without doubt statements by and the attitude of the court during the course of a trial can and at times do have a bearing in influencing the verdict of the jury. But even so, must it be assumed that the court's influence was inimical to the ends of justice? We already have expressed the opinion that the trial judge should be given wider latitude in expressing his views. But even under the rule as it prevails in Illinois, should not the first inquiry of the supreme court, when this problem is raised, be directed to the question of the guilt or innocence of the accused as disclosed by the whole record? What purpose can be served in reversing a case because an occasional objectionable remark by counsel or by the trial court creeps in? If the record indicates doubt as to the guilt of the accused, improper remarks might well be considered. But when there is no doubt, or the objectionable features of the remarks are slight, the interests of justice would seem best served by an affirmance of the judgment of the trial court.

35. *Limiting the Argument of Counsel.*

In *People* v. *McMullen*[1] the judgment of the trial court was reversed because, in the opinion of the supreme court, an unreasonable limitation had been placed on counsel's time for argument. The trial court had limited counsel for the accused to thirty-five minutes for argument to the jury. Quoting from the opinion:

"Any limitation of the constitutional right which deprives a defendant of an opportunity to have his counsel argue the law and the facts has always been regarded as error requiring a new trial. . . . From the nature and importance of this case, the condition of the evidence and the time necessarily required to make a fair presentation to the jury, the limit imposed was unreasonable."

Doubtless the supreme court was correct in reversing the case on this ground. It should be observed, however, that notwithstanding an accused's constitutional right to be heard by counsel, the limitation of time for argument generally is considered to rest in the sound discretion of the trial court, and a higher court, on error, should reverse only in case there has been a clear abuse of this discretion to the prejudice of the defendant.[2]

36. *Absence from the Court Room.*

In *People* v. *Chrfrikas*[3] the judge temporarily left the court room, remaining, however, within hearing distance. During this period counsel for

[1] (1921) 300 Ill. 383, 133 N. E. 328.
[2] *Samuels* v. *United States* (1916), 232 Fed. 536, 146 C. C. A. 494, Ann. Cas., 1917, A-711. See also 16 C. J. 88, where numerous cases are collected.
[3] (1920) 295 Ill. 222, 129 N. E. 73.

the state, in the course of his argument to the jury, made an improper reference to another case of a similar nature to the one in issue. The trial court immediately ordered this reference stricken. The defendant was convicted, but on error, the case was reversed and remanded (Thompson, Farmer and Stone, JJ., dissenting). Quoting from the dissenting opinion:[1]

> "This judgment is reversed solely on the grounds that the state's attorney made improper reference to the horrible killing of little Janet Wilkinson and that the trial judge left the court room during the course of the argument of counsel to the jury. We agree fully with the court in holding both acts serious error, and if the jury had anything to do with fixing the punishment and the punishment had been unusually severe, then the errors would have demanded a reversal of the judgment. As it is, we think the record shows plaintiff in error so clearly and conclusively guilty that the jury could not reasonably have returned any verdict other than one of guilty. A verdict of guilty carried with it imprisonment in the penitentiary for an indeterminate period, and the errors, therefore, ought not to be held reversible in this particular case."

With great deference, we emphasize our approval of the dissenting opinion. It more nearly complies with the insistent demands of our time to rid the law of its "red tape," and, particularly, to secure the conviction of criminals with less observance of the technicalities and niceties of the law.

(VIII) Form of Verdict, as Ground for Reversal

37. In General. Reference to Table 5 shows that defective verdicts account for the reversal of but few criminal cases. The opinion in the case of *People* v. *Quesse*[2] presents certain liberal views on this question. The defendants had contended that the verdict was too uncertain to sustain the verdict since it found them guilty as charged *in the seventh count or counts of the indictment.* The people contended that the words *or counts* were allowed to remain in the form given to the jury through inadvertence. The supreme court applied "the rule that a verdict should be sustained where the intention of the jury can be ascertained with reasonable certainty," and held that there was no basis for the contention "that it may have been the intention of the jury to return a verdict of guilty on any other count than the seventh." We continue in the language of the court:[3]

> "We are unable to see the force of the argument of counsel for plaintiffs in error concerning the insufficiency of the verdict. The test as to the sufficiency of a verdict is whether or not the intention of the jury can be ascertained with reasonable certainty. If it can be, the verdict will be sustained. . . . In applying this test a verdict is not to be construed with the same strictness as pleadings in criminal cases but all reasonable intendments will be indulged in to sustain it."

In *People* v. *Shupe*[4] the verdict found that the value of the property received by the defendants was *over $15.* This was held sufficient to sustain

[1] Ibid 230.
[2] (1924) 310 Ill. 467.
[3] Ibid 471.
[4] (1922) 306 Ill. 31.

a judgment and sentence of imprisonment in the penitentiary, as the word *over* meant *more than, in excess of*. The verdict satisfied the statute, it was held, which requires for such cases that the property "exceed the value of $15."

But in *People* v. *Valanchauskas,*[1] where the verdict read, "We, the jury, find the defendant, Stanley V. Valanchauskas, guilty of embezzlement in manner and form as charged in the indictment," and the indictment had charged him with the embezzlement of $1,000, the supreme court held that the verdict was fatally defective. Without a finding, the court held, "of the sum of money stolen the court could not determine whether the plaintiff in error had been found guilty of a felony or a misdemeanor." Can such a ruling be justified? Even the generally accepted legal view is that "a general verdict of guilty is an affirmation of the value stated in the indictment, and is, therefore, for this purpose, sufficient."[2]

The general verdict—where a jury brings in a general finding to the effect that it doth find the defendant guilty as charged—frequently causes trouble in other ways. Ordinarily it is well enough if there was but one count to the indictment, but should it contain two or more there is trouble in the offing. Such a problem was presented in *People* v. *Lawrence.*[3] The defendant had been indicted in the criminal court of Cook County in two counts. The first count charged that he kept, owned, operated, etc., a slot machine in violation of section 137f of the criminal code. The second count was similar, but charged in addition a previous conviction of the same offense. The record of the finding and judgment of the court showed merely that the court found, in general terms, that the defendant was guilty, without specifying upon which count. The judgment affixed the penalty for the second offense. This judgment was first reviewed in the appellate court for the first district and was there affirmed.[4] To review the latter judgment, writ of error was prosecuted in the supreme court. This court sustained the judgment (Duncan, C.J.; Stone and DeYoung, JJ., dissenting).

The problem presented is not free from difficulty. There are authorities to the effect that "in order to justify a sentence as for a second offense, it must appear by the verdict that the jury have found the party guilty of such offense."[5] However, a more liberal view finds support to the effect that where an indictment charges more than one crime, or different degrees of the same crime, in separate counts, a general verdict of guilty is understood to find the highest offense if there is testimony to support it.[6] In the *Lawrence* case the trial court gave a sentence which was authorized only by the second count. Since, however, the defendant's guilt was proved under that count, there was little room for uncertainty as to the nature or purpose of the penalty.

---

[1] (1927) 324 Ill. 187.
[2] 3 Wharton *Criminal Procedure* (1918, 10th ed.), sec. 1686.
[3] (1924) 314 Ill. 292, 145 N. E. 384. Comment on the *Lawrence* case is adapted from a comment by the writer in (1926) 20 Ill. L. R. 648.
[4] *People* v. *Lawrence* (1924), 232 Ill. App. 341.
[5] *Maguire* v. *State* (1877), 47 Md. 485, 498. See also *Kenny* v. *State* (1913), 121 Md. 120, 87 Atl. 1109, and *Thomas* v. *Commonwealth* (1872), 22 Grat. 912 (Va.).
[6] *State* v. *Core* (1879), 70 Mo. 491; *State* v. *Nelson* (1867), 14 Rich. L. (S. C.) 169.

(IX) Evidence Insufficient to Sustain Verdict

38. In General. The supreme court frequently has expressed its reluctancy to reverse a case on the ground that the evidence was insufficient to sustain the verdict. In *People* v. *Kilbane*[1] it said:

> "Where the testimony regarding the material facts in issue is directly in conflict and irreconcilable, and its conclusion in such case of necessity depends largely upon the credit to be given the opposing witnesses, it is the peculiar province of the jury to determine on which side of the controversy the truth lies. In such case this court has no right to interpose by substituting its own opinion when the jury have honestly and according to their best light performed this duty, unless this court is satisfied, from a consideration of all testimony, that there is a reasonable doubt of the guilt of the accused."

A similar view was expressed in the earlier case of *People* v. *LaMorte*[2] in the following language:

> "Courts are reluctant to substitute their opinion for that of the jury upon controverted questions of fact, and it is only when this court is able to say, from a careful consideration of the whole of the testimony, that there is clearly a reasonable and well founded doubt of the guilt of the accused, that it will interfere on the ground that the evidence does not support the verdict."

While the foregoing statements are representative of the views of the court, it has also emphasized the view that "a verdict of guilty must be supported by evidence, and where it is apparent that the verdict is not based upon evidence proving the guilt of the accused it is the duty of the court to set aside the judgment based upon it."[3]

In the case of *People* v. *Lardner*[4] the decision was by a divided court, with the majority reversing the conviction (Thompson, Farmer and Duncan, JJ., dissenting). The conviction was for receiving stolen property—certain rugs. The majority and minority differed principally in inferences drawn from the evidence. For example, the trial court had instructed that the possession of stolen property after it had been stolen is *prima facie* evidence of guilt. This instruction, said the majority, was wrong because possession was not shown to have been conclusively and exclusively in the defendant. On the other hand, the evidence, to the minds of the dissenting judges, "clearly shows that plaintiff in error and Cæsar were acting together in all that they did and that the possession of the stolen property was joint."[5] The majority found that there was not sufficient evidence to sustain a charge that the rugs were stolen. But, said the minority, "it is our opinion that the evidence shows the rugs to have been stolen, and that the jury was clearly justified in concluding that plaintiff in error received the stolen rugs and converted them to his own use with the knowledge that they

[1] (1926) 322 Ill. 190, 194.
[2] (1919) 289 Ill. 11, 24.
[3] *People* v. *Wieland* (1924), 313 Ill. 594, 601.
[4] (1921) 296 Ill. 190, 129 N. E. 697.
[5] Ibid 195.

were stolen."[1] We wonder if the majority clearly had in mind the guiding principles announced in the *Kilbane* and *La Morte* cases.[2]

39. Evidence to Sustain an Alibi.

The probative weight of the evidence of alibi was involved in *People* v. *Stephens*.[3] The accused had been convicted for an assault with intent to murder, committed on October 29, 1918, in Aurora, Illinois. As a defense the accused introduced evidence tending to show that in July, 1918, he had been shot in the leg in Chicago by a policeman, this causing a fracture of the bone; that the plaster cast into which his leg had been placed was not removed until November 8, 1918, and that an X-ray picture of this leg was taken November 13, 1918, which photograph was introduced into evidence. Several witnesses testified that they had seen the accused in bed at different times during the months of August, September, October and November, 1918. A reputable doctor testified that he had visited the accused several times during September and October, 1918, and that he had visited him in Chicago on October, 28, 1918, just previous to the shooting, which occurred shortly after midnight October 29. These facts, in the main, were supported by the unimpeached testimony of reputable witnesses. On the other hand, several witnesses testified positively that they had seen the accused on the streets of Aurora at the time of the crime. The jury convicted the defendant and the Supreme Court affirmed the conviction (Cartwright, C.J., and Farmer and Stone, JJ., dissenting).

The dissenting opinion, after detailing the facts of this case drew this conclusion:[4]

> "Whatever justification there may have been for discrediting testimony offered by the defendant concerning the failure to recognize him when he was in Aurora after the commission of the crime, there was none as to the evidence of the alibi, and to say that upon such proof the jury could disregard the evidence would be to eliminate that defense entirely from the law."

Mr. Justice Carter, speaking for the majority, frankly admitted there was a serious conflict in the evidence and if some of the witnesses testified truly the accused was not in Aurora at the time of the commission of the crime. He found, however, that "several police officers and several disinterested persons testified positively that he was in Aurora at the time of the crime, and they identified him not only by his personal appearance but by a peculiar tone in his voice when they heard him talking in a room in

[1] Ibid 195.

[2] After the reversal in the *Lardner* case, the charge against the defendant, Lardner, was stricken with leave to reinstate, by the state's attorney. The defendant, it would appear, was not discouraged by his experiences, for we have found him appearing before the Supreme Court again on a distinct conviction in the case of *People* v. *Lardner* (1921), 300 Ill. 264. In that case he had been convicted of an attempted larceny, but the Supreme Court reversed the case because the facts showed a consummated larceny. We have commented on that case previously in this study. Again, after that reversal the charge against him was stricken. But this was not yet enough for him, for we have found him appearing once more before the Supreme Court on writ of error in *People* v. *Lardner* (1923), 306 Ill. 231. On the last occasion he had been convicted of larceny, the offense charged being distinct from any of the other charges of which he previously had been convicted. In the last case the Supreme Court affirmed his conviction.

[3] (1921) 297 Ill. 91, 130 N. E. 459.

[4] Ibid 106, 107.

the county jail. . . . On this state of the record," the court concluded, "it was peculiarly a question for the jury to decide whether or not plaintiff in error was at the scene of the crime at the time it was committed."[1]

Although the point involved was a close one, we commend the conclusion reached by the majority of the court. The alibi theoretically is a perfect defense. Yet in practice it must be scrutinized most carefully by the courts. The ease with which it is manufactured makes it ever a matter of suspicion, barely short of a complete discredit as a defense.[2] What is more, even though the witnesses for the accused were not impeached, there was here a conflict in the evidence. The credibility of witnesses and the weight of evidence, properly, was a question for the jury.

While the alibi was insufficient to justify a reversal in the *Stephens* case, it came to its own in *People* v. *Madia*.[3] Here again, the accused had been convicted for an assault with intent to murder. At the trial he had based his defense on an alibi, which was corroborated by the unimpeached testimony of his employer. Several witnesses had testified for the state. Some of the testimony tended to identify the accused as the person who had committed the crime. The court, however, found the evidence uncertain and of a general nature. In considering all the testimony of the people in its most favorable light, the court was of the opinion that the best that could be said for it was that it equally balanced that for the defense; that it did not show the defendant guilty beyond all reasonable doubt, and that, therefore, safety and justice required that the cause be tried again.

40. The Corpus Delicti. Problems relating to the *corpus delicti* commonly arise in connection with homicides, but occasionally they are to be found in other branches of the criminal law. In *People* v. *Maruda*[4] we have a case of this nature. The defendant was indicted for larceny. He had been employed as a night porter by Marshall Field & Company of Chicago at twenty-two dollars a week. The case is not clear how he first came under suspicion; at any rate he was arrested and his premises searched. There was evidence that between fifty and sixty dresses, each worth about forty dollars, were found at his home. There was further evidence that goods had been missed by Marshall Field & Company, and some of the dresses found on the defendant's premises were definitely identified as having come from that Company. Further, proof of an extra-judicial confession of the alleged theft by the accused was admitted in evidence. On those facts he was convicted.

On writ of error, the Supreme Court reversed and remanded the case on the ground that the *corpus delicti* had not been proved. In the language of the court:[5]

> "In this case it is not shown that the plaintiff in error was in possession of the property of Marshall Field & Co., or that the property of which he was in possession had been stolen from Marshall Field &

[1] Ibid 104.
[2] See Wharton *Criminal Law* (1912, 11th ed.), sec. 380.
[3] (1920) 294 Ill. 575, 128 N. E. 579.
[4] (1924) 314 Ill. 536, 145 N. E. 696. Comment on the *Maruda* case is adapted from a comment by the writer in (1926) 20 Ill. L. R. 651-654.
[5] Page 542 official report.

> Co., by evidence other than his own statement. The law is well settled that the *corpus delicti* cannot be proved by extra-judicial confessions, alone. . . . It may, however, be proved by circumstantial evidence; . . . . and an extra-judicial confession may be considered, in connection with the other evidence, to establish the *corpus delicti*, and if the evidence of other facts and circumstances so fully corroborates the confession as to show the commission of the crime beyond a reasonable doubt, may be sufficient. . . . It is not sufficient, however, in this case, because of the failure to identify the property found in Maruda's possession as that of Marshall Field & Co., and the failure to identify the property testified about on the trial as that which was found in Maruda's possession."

Originally the rule appears to have been that a conviction could be supported on the uncorroborated confession of an accused.[1] Sir Matthew Hale, however, changed this sound rule by one of his utterances. He said,[2] "I would never convict any person of murder or manslaughter unless the fact were proved to be done, or at least the body found dead." And, thus, there was introduced into the law this trouble maker to which, to make matters worse, was assigned a high-sounding Latin name—the *corpus delicti.* The doctrine is with us; no one seems to know just what it means, but it, nevertheless, clings to us like Sinbad's Old Man of the Sea, not to be shaken off, and the worst of it is, it has opened the way of escape for numerous criminals who might otherwise have paid the penalty for their crimes in the penitentiary or on the gallows.

Without the defendant's confession, very probably there was not sufficient evidence of the *corpus delicti*—that a larceny had been committed. But in the court's own language, "an extra-judicial confession may be considered, in connection with other evidence, to establish the *corpus delicti.*" But was there not other evidence? When it was shown that goods were missing from Marshall Field & Co., and fifty to sixty dresses were found in the possession of a night porter, part of which were identified as coming from Marshall Field & Co., was this not other evidence which might be considered along with the defendant's confession? The effect of the court's decision would appear to be that the confession has no probative value at all—that the crime must be established entirely by proof *aliunde.*

Dean Wigmore, in his work on Evidence,[3] questions the policy of the corroboration rule. He says:

> "No one doubts that the warning which it conveys is a proper one; but it is a warning which can be given with equal efficacy by counsel or (in a jurisdiction preserving the orthodox function of judges) by the judge in his charge on the acts. Common intelligence and caution, in the jurors' minds, will sufficiently appreciate it, without a laying on of the rod in the shape of a rule of law. Moreover, the danger which it is supposed to guard against is greatly exaggerated in common thought. The danger lies wholly in a false confession of guilt. Such confessions, however, so far as handed down to us in the annals of our courts, have been exceedingly rare. Such a rule might ordinarily, if not really

[1] 4 Wigmore *Evidence* (1923, 2nd ed.), sec. 2070.
[2] *Pleas of the Crown* (1778 ed.), 290.
[3] (1923, 2nd ed.) Vol. IV, sec. 2070.

needed, at least be merely superfluous. But this rule, and all such rules, are today constantly resorted to by unscrupulous counsel as mere verbal formulas with which to entrap the trial judge into an error of words in his charge to the jury. These capabilities of abuse make it a positive obstruction to the course of justice.[1]

(X) Sundry Grounds for Reversal

41. Remarks by Bystanders in Hearing of the Jury.

Errors in criminal cases creep in through various ways and sources, and at times, it seems, without the fault of the trial court, or the state's attorney or even the jury. In *People* v. *Kawoleski,*[2] a deputy sheriff in charge of the jury, during a recess in the trial, made the remark in the hearing of the jury, "it should not take more than two or three minutes to convict that bird." The supreme court justly denounced this conduct of the officer. It went further; it found in it ground for reversing the judgment of conviction. The following is the language of the court:

> "The error here complained of was committed by an officer of the court, was so flagrant and so manifestly intended to influence the jury against defendant, we are convinced that in fairness to a defendant tried for a criminal offense, and for the *public good,* it should be made known that this court will not approve verdicts where such means are resorted to by officers of the law to procure verdicts. Such conduct is unjustifiable in any case, and no distinction can be made between guilty and innocent parties. All defendants in criminal cases are entitled to a fair trial. We have held the law does not permit one method for the trial of guilty men and another method for the trial of innocent men."[3] (Italics ours.)

This decision illustrates how difficult, at times, it is to secure and sustain convictions. But must a case necessarily be reversed because of such an occurrence? Assuming one in which the evidence is quite conclusive, must it be reversed because of an ill-chosen remark made within the hearing of the jury? We commend the court in its position that all are entitled to a fair trial. But does a fair trial mean that the case must have been free from all error or blemish? A prisoner is entitled to a fair trial, but whether or not he has had one should well be gathered from the whole case, and not from isolated occurrences. As to whether the Supreme Court followed the principle in the foregoing cases not to reverse, even though error occurred, where the whole record discloses guilt, is not clear.

42. Intoxication of the Accused.

In *People* v. *Cochran*[4] the defendant had been convicted of murdering his wife. Among the defenses raised during the trial was the matter of the defendant's intoxication. In reversing and remanding the case, the Supreme Court said as to intoxication:

---

[1] See also on the *corpus delicti, People* v. *Wulff* (1924), 313 Ill. 286; *People* v. *Hein* (1924), 315 Ill. 76. For an extended analysis of this question see the case of *State* v. *Dixson* (1927), 260 P. (Mont.) 138.

[2] (1924) 313 Ill. 257.

[3] See generally on remarks to jurors, 3 Wharton *Criminal Procedure* (1918, 10th ed.), secs. 1664, 1665, 1771, 1776.

[4] (1924) 313 Ill. 509.

"From an examination of the authorities in this and other states we are of the opinion that the true rule is, that where intoxication is so extreme as to suspend entirely the power of reason and the accused is incapable of any mental action he cannot be convicted of any crime which involves intent or malice, but that he can be convicted for committing, while in such state of intoxication, a crime which consists only of the doing of acts which are prohibited by law and in which intent, deliberation or malice is not an element."

It is true, in those jurisdictions where murder has been divided into degrees, and where to constitute murder in the first degree, a specific intent must be shown, that intoxication, even though voluntary, will negative the specific intent. But the state of Illinois has not divided murder into degrees. We follow the common law classification, and common law principles generally as to the crime of murder appertain. In the *Cochran* case the Supreme Court appears to have gone off the common law preserves, and one is just a bit alarmed as to how to confine its doctrines. The following quotation from Bishop states the common law position correctly:[1]

"The common law divides indictable homicides into murder and manslaughter; but the specific intent to kill is not necessary in either. A man may be guilty of murder without intending to take life, or of manslaughter without so intending, or he may purposely take life without committing any crime. The intention to drink may fully supply the place of malice aforethought; so that if one voluntarily becomes too drunk to know what he is about, and then with a deadly weapon kills another, he commits murder the same as if he were sober. In other words, the mere fact of drunkenness will not reduce to manslaughter a homicide which would otherwise be murder, much less extract from it altogether its indictable quality."

43. Ineligibility of State's Attorney to Practice Law.

The case of *People* v. *Munson*[2] raises the question as to whether a state's attorney not licensed to practice law is eligible to prosecute a criminal case. The defendant, Munson, had been indicted for robbery. At the trial a motion was made to quash the indictment on the ground that the state's attorney, who was prosecuting the case, was not a licensed attorney, and that, therefore, the indictment returned by the grand jury, before which body he had appeared and examined witnesses, was void. On writ of error the Supreme Court sustained the defendant's contention and reversed the case.[3] Since this decision is likely to have a far reaching effect and, since the rule it announces may become, at times, a serious impediment to law administration, we shall comment on it somewhat at length.

No contention was raised in the case as to the election of the state's attorney. The emphasis of the opinion is on the fact that he had not been licensed to practice law. Relative to the election of state's attorneys, the Illinois State Constitution provides:[4]

[1] 1 Bishop *Criminal Law* (1923, 9th ed.), 296, sec. 401.
[2] (1926) 319 Ill. 596, 150 N. E. 280.
[3] Justices Thompson, Farmer and Duncan dissented on the ground that there was no showing that the state's attorney did anything prejudicial while in the grand jury room.
[4] Sec. 22, Art. 6.

"At the election for members of the general assembly in the year of our Lord one thousand eight hundred and seventy-two, and every four years thereafter, there shall be elected a state's attorney in and for each county in lieu of the state's attorneys now provided by law, whose term of office shall be four years."

The Illinois statutes specify, among other duties of the state's attorney, the following:[1]

"To commence and prosecute all actions, suits, indictments and prosecutions, civil and criminal, in any court of record in his county, in which the people of the state or county may be concerned."

The statutes also provide, but under another heading:[2]

"No person shall be permitted to practice as an attorney or counsellor at law, or to commence, conduct or defend any action, suit or plaint, in which he is not a party concerned, in any county or probate court, or in any court of record, within this state, . . . without having previously obtained a license for the purpose. . . "

From these provisions, the opinion reasons, it follows that a state's attorney must be licensed to practice law. But this is a *non sequitur*. The decision places a limitation upon the powers of the electors to choose whom they will to act for them. This is done by a chain of indirect reasoning which is ever an unsafe process. The constitution does not require that the state's attorney be licensed to practice law; nor does the statute relative to state's attorneys require it. Since, however, there appears among his other duties (and it should be noted that he has duties that do not require any appearance in court) that of appearing for the People in court, he is made ineligible to perform this duty if not licensed, because another and distinct statute designates certain qualifications for attorneys and counsellors generally. It is to be noted that the latter statute bears upon a different question; it deals generally with attorneys as members of a profession and not with the qualifications of specific officers. Neither by constitutional provision nor by statute is it provided that prosecuting officers must be recruited from the ranks of those who have been admitted to practice law.

To read into the qualifications of state's attorneys, statements from the statute applying to attorneys and counsellors generally, is also to forget the common law background relative to public prosecutors. At common law, the rule was that any individual might appear before the grand jury and conduct the evidence on the part of the crown. To quote Stephens:[3]

"Indictments, as I have already shown, are, properly speaking, accusations made by the grand jury, who are called together to acquaint the court before which they are assembled with the crimes committed in their district. Anyone, however, may appear before them with a bill or draft indictment and witnesses to prove its truth. Theoretically, or at

[1] (1925) Smith-Hurd, Ill. Rev. Stat., ch. 14, sec. 5.
[2] Smith-Hurd, *op. cit.*, ch. 13, sec. 1.
[3] 1. *History of the Criminal Law of England* (1883), 293. See *In Re Day* (1899), 181 Ill. 73, 50 L. R. A. 519, on history of the power to prescribe qualifications for attorneys. And see article by Prof. Bruce, *The Judicial Prerogative and Admission to the Bar* (1924), 19 Ill. L. R. 1.

least according to the earliest theory upon the subject, the court does not look beyond the grand jury. The result is that in this country anyone and everyone may accuse anyone else, behind his back and without giving him notice of his intention to do so, of almost any crime whatever."

In the United States, while there is some difference in practice, the view is generally adhered to that the presence and participation in proceedings before the grand jury of a private prosecutor, in any other capacity than a witness, is improper. The privilege of attendance is limited to prosecuting officers.[1] It does not follow, however, that the prosecuting officer must be a licensed attorney. If, under the common law, anyone, whether an attorney or not, might appear as a prosecutor before the grand jury, on what principle can this privilege now be limited to prosecutors alone who are licensed attorneys? The American cases take the view that the privilege be restricted to prosecuting officers. But this is because of the nature of their office, and not because they are licensed attorneys. The historical background relative to the public prosecutor is distinct from that of the lawyer as a member of a profession. To say that a section of a statute, appertaining to attorneys and counsellors generally, applies to prosecuting officers is to ignore this important feature.

But assuming that the state's attorney was so ineligible that he could not have withstood a direct attack questioning his right to this office, does it follow that his part in *Munson* case was subject to be questioned by the accused? If the state's attorney was not a *de jure* officer, might not his acts still have been free from collateral attack because he was one *de facto?* The defendant was convicted of robbery. We believe this judgment was not subject to attack, because of the ineligibility of the state's attorney, unless it should appear that he was not an officer either *de jure* or *de facto.*

As to what constitutes one an officer *de facto,* there have been various definitions.[2] One by John F. Dillon, in an opinion rendered while he was a justice of the Supreme Court of Iowa, is here set out:[3]

"An officer *de facto* is one who comes in by the forms of an election or appointment, and who thus acts under claim and color of right, but who, in consequence of some informality, omission or want of qualification, could not hold his office, if his right was tried in a direct proceeding by an information in the nature of a quo warranto."

The state's attorney in the *Munson* case testified as follows:[4]

"I am A. A. Brown, and have been acting as state's attorney since November 11, 1924. I have been waiting upon the grand jury for the

---

[1] 2 Wharton *Criminal Procedure* (1918, 10th ed.), sec. 1294.

[2] "An officer de facto is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law:" Lord Ellenborough in *King* v. *Corp. of Bedford Level* (1805), 6 East. 369.

"Acts done by an officer de facto, and not de jure, are good; as if one being created Bishop, the former Bishop not being deprived or removed, admits one to a benefice upon a presentation, or collates by lapse, these are good, and not avoidable . . . . For the law favours acts of one in a reputed authority, and the inferior shall never inquire if his authority be lawful." 16 *Viner's Abridgment* (1793), 114.

[3] *Ex Parte Strahl* (1864), 16 Iowa 369, 378. See also: Wallach *De Facto* Office (1907), 22 Pol. Sci. Quar. 460.

[4] Abstract of record, page 7.

March term, 1925, of this court in the capacity of state's attorney."

It would appear from the foregoing that if Brown was not an officer *de jure,* he was at least one *de facto.* On the theory that he was an officer *de facto,* there remains for consideration the validity of his acts.

The acts of a mere intruder are void. But in the interests of order and regularity, "and to prevent confusion in the conduct of public business and insecurity of private rights, the acts of officers *de facto* are not suffered to be questioned because of the want of legal authority except by some direct proceeding instituted for the purpose by the state or by some one claiming the office *de jure,* or except when the person himself attempts to build up some right, or claim some privilege or emolument, by reason of being the officer which he claims to be."[1] Outside of these cases the acts of a *de facto* officer are as valid as those of one *de jure.* This principle has given rise to the rule that the deeds of *de facto* officers cannot be questioned collaterally. To hold otherwise would frequently leave a community without law enforcing officers. So long as the public accepts an individual as an officer and acquiesces in his deeds, it is a salutary rule that others should not be heard to question him.[2] It appears that this feature was not urged for the consideration of the Supreme Court. If merit there is in it, it is unfortunate that it was not advanced to the end that the conviction might have been upheld.[3]

(XI) Subsequent Disposition of Cases Reversed and Remanded

44. In General. When a judgment has been given an outright *reversal* by the Supreme Court, the legal career of the case is at an end. But when a case has been *reversed and remanded,* that is, when it has been sent back to the trial court, it becomes material for further investigation. We have made a study of the subsequent disposition of a number of such cases in the belief that the facts obtained might shed some light on the administration of the criminal law. The results of our study are set out in the following Table 6.

It will be observed that out of 136 cases from Cook County reversed and remanded, but nine defendants were reconvicted. One pleaded guilty to the offense charged and four pleaded guilty to lesser offenses. Thirteen were retried and acquitted. The charges against the others were dropped for one cause or another as shown in the table. The net result was that but fourteen defendants, or 10.2 per cent, of the 136 from Cook County, received new sentences. For the rest of the state the record is somewhat better. And still, the number again sentenced after the reversals is small—thirty-two out of one hundred fifty-five, or 20.6 per cent.

The reasons advanced by the state's attorneys for so low a percentage of

[1] Cooley *Constitutional Limitations* (1903, 7th ed.), 898.

[2] *Campbell* v. *Commonwealth* (1880), 96 Pa. St. 344. The defendant had been convicted of arson. The eligibility of two of the judges who sat in the trial was questioned. The court said (page 347): "They are judges *de facto,* and as against all parties but the Commonwealth, they are judges *de jure.* Having at least a colorable title to these offices, their rights thereto cannot be questioned in any other form than by quo warranto at the suit of the Commonwealth." See also *State* v. *Gonzales* (1862), 26 Tex. 197.

[3] For a more extensive comment on this case by the writer see (1926), 21 Ill. L. Rev. 273.

TABLE 6. DISPOSITION OF CASES REVERSED AND REMANDED BY SUPREME COURT

	Cook County	Down State	Total
Retried—convicted	9	20	29
Pleaded guilty	1	8	9
Pleaded guilty to lesser offense	4	4	8
Retried—acquitted	13	10	23
Nolled by state's attorney	26	33	59
Stricken with leave to reinstate	63	24	87
Discharged by court	3	1	4
Dismissed for want of prosecution	4	13	17
Dead	—	7	7
Not apprehended	6	—	6
Bond forfeited—not apprehended	1	1	2
Escaped jail—not apprehended	—	1	1
No retrial had, prosecution abandoned	2	24	26
Pending retrial	2	9	11
No record	2	—	2
Totals	136	155	291
Summary: Convicted or pleaded guilty	14	32	46
Per cent. of total; Convicted or pleaded guilty	10.2	20.6	15.8

convictions after reversals by the Supreme Court are various. In the main they tell a convincing story of the great difficulties encountered in securing second convictions. It should be remembered that a considerable period of time necessarily must elapse between the time of the first conviction and the second trial. It is a slow process to take a case to the Supreme Court, there to wait its turn for consideration, and after the decision to make its way back to the trial court, there further to encounter the delays incident to a new trial. In the meanwhile witnesses may have died, or left the jurisdiction. The evidence, too, has grown cold. The expense involved in the first trial is a material deterrent to setting the wheels in motion for another prosecution. If the evidence originally was obtained by a defective search warrant, a new trial is very nearly impossible, for the very evidence that was material in the first conviction cannot be used in the second. One state's attorney wrote that it was difficult to secure a second conviction "for a jury gives much weight to the reversal." The chances, thus, are greatly in favor of the defendant. According to Table 6, after a reversal of conviction by the Supreme Court a defendant has six and one-half chances to one never to be penalized to any extent for the crime with which he originally was charged. Out of 291 cases studied, there were only 46 (15.8 per cent) in which the defendants were re-sentenced. In totals, out of the 291 cases, 29 were retried and convicted, 9 pleaded guilty, 8 pleaded guilty to lesser offenses, 23 were retried and convicted, and 222 escaped further prosecution.

(XII) CONCLUSION

45. Progress and Growth in the Criminal Law.

The minute analysis of cases in this study might well cause the reader to sum up its net result as a display of pedantry, rather than to find in it anything helpful to the better administration of our criminal law. Our only apology for the method followed lies in the fact that, to us, it appeared, as the study was undertaken, that but two means of

approach were possible. One shorter and perhaps more readable, through summaries and generalizations; the other, through the detailed examination of the decisions. We chose the latter because it seemed to us it responded more nearly to the purpose of the study.

All reasoning is from premises and the problem before us has been to find the premises from which the court has operated. Individuals tend to vary one from the other in their processes of ratiocination—some more, some less. The extent of the variation depends upon a variety of conditions and circumstances. The premises, and hence the conclusions, of the logician differ from those of the sociologist. The mathematician conceives his data unlike the economist and, hence, reasons not like him. Within a profession the tendency is for uniformity, but even there, a fact takes unto itself changing hues and colors, as, in turn, it is presented to the scrutiny of various individuals. Our problem, thus, has involved the finding of the starting points—the premises of the court. Naturally we have found some changing policy depending upon which member of the court wrote the opinion, and also upon which side of a particular case was most noticeably displayed to the members of the court.

Occasionally, the court has expressed liberal views and at others, it has seemed oblivious to the fact, that "the law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal,"[1] and then it has decided cases upon ancient precepts and with a deaf ear to the voice of utility and justice.

In *People* v. *Cohen*[2] the information alleged the larceny of "one dollar ($1) good and legal money of the United States of the value of one dollar." The defendant contended that this was insufficient since it was difficult to understand the nature of the offense charged. In affirming the conviction, the court said the defendant was quite justified in presenting the case to the Supreme Court in view of "earlier decisions of this and other courts when the strict rules of pleading of the common law were controlling the decisions of the courts." Today, it held, such an allegation is a "definite and certain description of a piece of money of fixed value." We continue in the language of the court:[3]

> "Great niceties and strictness of pleading should only be countenanced and supported when it is apparent that the defendant may be surprised on the trial, or unable to meet the charge or make preparations for his defense for want of greater certainty or particularity. . . . The criminal law is fast outgrowing those technicalities which grew up when the punishment for crime was inhuman and when it was necessary for the courts to resort to technicalities to prevent injustice from being done. Those times have passed, for criminal law is no longer harsh or inhuman, and it is fortunate for the safety of life and property that technicalities to a great extent have lost their hold."

Again in *People* v. *Michael*,[4] a bigamy case in which the point was raised

[1] *Wood* v. *Duff-Gordon* (1917), 222 N. Y. 88, quoted by Cardozo, *The Nature of the Judicial Process* (1922), 100.
[2] (1922) 303 Ill. 523.
[3] Ibid 525.
[4] (1917) 280 Ill. 11.

that the trial court had erroneously refused an instruction that the defendant's failure to testify should not raise a presumption against him, the court held that the refused instruction stated the law correctly and should have been given, but that this did not necessarily require a reversal of the case. It continued in the following language:[1]

> "Courts no longer adhere to the technical rule that a judgment must be reversed where the record shows that error was committed on the trial. It is, we believe, universally agreed by courts now that only error prejudicial to the complaining party requires a reversal of the judgment. Courts are not agreed, however, that if there is error apparent upon the face of the record it must be presumed to have been prejudicial unless the whole record affirmatively discloses the contrary. That appears to be the prevailing view in most jurisdictions, but there are a considerable number of respectable courts which hold that the record must not only show error but that it must also show that the complaining party was prejudiced thereby. . . . This court has held in numerous decisions that error in the admission of evidence or in the giving and refusing of instructions will afford no ground for reversal in a criminal case where the guilt of the accused was so clearly and conclusively established by competent evidence that the jury could not reasonably have arrived at any other verdict than one of guilty. . . . Where it can be seen from the record that an error complained of could not reasonably have affected the result of the trial it has been said to be harmless and not ground for reversal."

The error assigned in *People* v. *Petrie*,[2] for which the case was reversed and remanded, was that the record did not show properly that the trial court had explained to the accused, the consequences of the plea of guilty. The record, it appears, did not show this fact, but was amended to incorporate it. This amendment was based upon the affidavit of the court reporter, together with a transcript of his notes taken at the time the accused was sentenced. The Supreme Court (Carter and Thompson, JJ., dissenting) was of the opinion that this was insufficient since an amendment to the record in a criminal case is only permissible when based upon some "official or *quasi* official note, memorandum or memorial paper remaining in the files of the case or upon the records of the court and not upon the recollection of the judge or other person or upon *ex parte* affidavits or testimony after the event has occurred."[3]

To this Mr. Justice Carter, in his dissenting opinion, makes this reply:[4]

> "The adoption of modern methods has evidently supplanted the old practice of judge-made notes. They rarely are fully kept by any trial judge. Why, therefore, should the court insist upon such notes when they are often no longer made? Why should the court not give the same effect to that which has taken their place as it does to the notes of the judge, when, as everyone knows, they are as reliable, if not more so, than the judge's notes, because more complete and in greater detail?

[1] Ibid 13-14.
[2] (1920) 294 Ill. 366, 128 N. E. 569.
[3] Ibid 368.
[4] Ibid 373.

> The oath of the official reporter, as well as the recollection of the judge at the time of entering the amending order, offers a sufficient degree of accuracy and reliability in the subject matter of the amendment. I do not think it is doing violence to the language of the statute to say that the reporter's notes taken in obedience thereto is a *'quasi* official note or memoral paper,' and therefore satisfies the rule already laid down repeatedly by the courts with reference to the memorandum upon which an amendment of the record may be based."

In *People* v. *Picard,*[1] a burglary case, the indictment alleged that the accused with intent to steal broke and entered a certain "railroad freight car then and there being used by and in the possession of the Illinois Central Railroad Company, a corporation, said railroad freight car then and there being a Cudahy Milwaukee Refrigerator Line car numbered two thousand thirty-five," etc. This indictment was held fatally defective because it did not allege the ownership of the car sufficiently. If, said the court, "the Cudahy Milwaukee Refrigerator Line is a corporation it should have been so alleged, and if it was merely an association the individuals comprising the same should have been named."

Mr. Justice Carter dissented from the decision in the *Picard* case. We take occasion again to quote him, stating as we do so that we believe his opinion should have borne the approval of the whole court. He said:[2]

> "Notwithstanding the former decisions of this court on this question cited in the opinion, if the sole responsibility of deciding this question, even in the light of the former decisions, rested upon me, I should be disposed to overrule the former decisions on the ground of public policy. I agree fully with the reasoning that is frequently laid down by the courts that stability and uniformity of decisions in judicial tribunals conduce so much to the welfare and happiness of the people that when a question has once been settled and no positive rule of law has been violated or contravened and no serious detriment is likely to arise prejudicial to the public interest such adjudication ought to stand and be followed, . . . but it seems to me that it is so manifest that serious detriment to the public has arisen, and will arise in the future, by following the line of authorities holding that the omission to allege that the owner of the property burglarized was incorporated when the name of the company is set out in full, that if in rare cases the doctrine of *stare decisis* should be departed from this is one of those cases. Such a holding would in no way be injurious to those whose cases have heretofore been passed on involving this question, and I cannot see how it would in any way prejudice, in the future, the proper administration of the criminal law. On the contrary, it seems to me it might well be argued that to now change the rule and construe the statute as contended for by counsel for the state would tend strongly to uphold the proper administration of justice in our criminal courts."

The following observations by Mr. Justice Holmes not only are apropos on this subject but they should furnish guidance to both judges and lawyers.[3]

> "The training of lawyers is a training in logic. The processes of

[1] (1918) 284 Ill. 588.
[2] Ibid 593.
[3] Collected Legal Papers (1920), 181, 184.

analogy, discrimination, and deduction are those in which they are most at home. The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. . . . We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind. . . .I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious, as I have said. . . . I cannot but believe that if the training of lawyers led them habitually to consider more definitely and explicitly the social advantage on which the rule they lay down must be justified, they sometimes would hesitate where now they are confident, and see that really they were taking sides upon debatable and often burning questions."

As we near the end of this study, we draw the reader's attention to the fact that though we have not hesitated to commend the court on various occasions, our observations have been largely critical. This has been but proper and natural as our object has been to point out what have seemed to us to be defects and faults in the administration of the criminal law and thus to counsel improvement. It should be observed, however, that this has been a study of the decisions for but a term of ten years. Were comparisons to be made between the period studied and one of equal duration of a half-century ago, the outstanding feature for comment, we believe, would be the noting of the progress our court has made in ridding the law of many of the legalistic restrictions and barriers common in earlier times. Let the reader observe this fact and be heartened and cheered by it. The trend of judicial decisions manifestly is toward more liberality and freedom. Our impatience is registered against the tediousness of the movement; its direction is unmistakable.

Evidence is not wanting that our judges realize the opportunity that lies within their grasp; sometimes, to be sure, but dimly, and sometimes giving expression to it only through dissenting opinions, but it persists. There is no compelling reason of logic which forces the judge to apply any one of competing rules urged upon him.[1] As the horizon widens and the perspective becomes more inclusive he realizes, as did Judge Carter, that while stability and uniformity of decisions frequently (perhaps generally) are conducive to the public welfare, cases do arise when such welfare is better promoted by departing from the doctrine of *stare decisis*. Our law is a living growing phenomenon. It moves and changes so as to comprehend new situations. This marks its vitality.[2] The Supreme Court of Illinois has never been without judges who have perceived the workings and the methods of the law. Some, indeed, have given expression and comprehensiveness to it with great clarity and force, and thus they have given luster and distinction to the court.

[1] See Cook, *Scientific Method and the Law* (1927), 13 Am. Bar. Assoc. J. 303, 308.
[2] See Cardozo, *The Growth of the Law* (1924), 66, and see another book by Judge Cardozo, *The Paradoxes of Legal Science* (1928).

46. Summary. 1. The Supreme Court passes upon but few criminal cases as compared to the total number which arise in the trial courts of the state. But the Supreme Court's place and influence in the administration of the criminal law is not to be measured by the number of cases it passes upon. The immediate bearing of a decision is upon the issues in a particular case, but the influence of a decision transcends its local significance. It becomes an authority which may shape new sentences thereafter.

2. Out of 699 criminal cases which appeared before the Supreme Court during a ten year period, 410 were affirmed, 217 reversed and remanded, and 72 reversed. Thus, 59 per cent of the cases were affirmed. The most common ground for error was in the giving or refusing of instructions by the trial court. The next principal ground, with very nearly an equal number of cases, related to the admission and exclusion of evidence. Other principal grounds upon which cases were reversed were, violation of constitutional provisions, defective indictments or informations, errors in cross-examination, variance, improper conduct of the state's attorney, misconduct of the trial court, error in the form of the verdict, and evidence insufficient to sustain the verdict.

3. *Constitutional questions* in criminal cases have arisen in relatively few cases, but in some instances they have involved questions of great import. In 1923 the Supreme Court, in *People* v. *Brocamp,*[1] abandoned its previous position on the admission of evidence secured through illegal searches and seizures, and held that the admission of evidence so secured constituted reversible error. The holding in the *Brocamp* case (and in others that followed) has made the administration of the criminal law more difficult since it has placed in the hands of the criminal an added obstructive weapon. It should be observed, however, that the view adopted has considerable public approval, and that it is supported by the decisions of the Supreme Court of the United States.

4. Where the constitutionality of a statute was attacked, under the due process clause, which made criminal certain acts regardless of the intent or guilty knowledge of those accused, the Supreme Court has upheld the statute, expressing the view that this, and similar statutes, were valid when passed in the general interests of the public welfare. We commend the court on the position it has taken.

5. The constitutional provision relating to *self-incrimination* has received from the Supreme Court a broad interpretation. The self-incrimination privilege, we believe, is an obstacle to the conviction of the guilty, and should not be extended beyond its historic scope.

6. Of the total number of cases reversed during the period studied, 4.6 per cent were for errors in *indictments or informations.* A number of opinions by the Supreme Court were found in which the court expressed itself opposed to technical pleadings. The effect of these liberal views has been considerably offset by other decisions, which appear to us to have been extremely technical. For example, in an indictment with fifty counts against Philip *Goldberg,* forty-nine were approved by the court, but since the fiftieth

[1] (1923) 307 Ill. 448.

read *Holdberg* instead of Goldberg, the case was reversed. The court, it is believed, also has taken too strict a view in holding that negative averments are necessary (notwithstanding a statute expressly states that they shall not be) in liquor indictments.

8. The court has made several very close discriminations as to *instructions* relating to *self-defense* in homicide cases. Not only are these discriminations difficult to follow, but the court has shown unsteadiness in its views. We believe that the expressions on this important question are confusing, and that they tend, when this issue arises, to make the administration of the law uncertain.

9. The law relative to the proper *instructions* to be issued to the jury on the tests of *criminal responsibility* when the issue of insanity is raised, is not in keeping with modern scientific thought and is in great need of revision.

10. The Supreme Court has reversed several convictions because of the admission of *evidence of other crimes.* We believe that the court has laid down too narrow a rule in some of the cases for the effective administration of the criminal law. The court has not sufficiently recognized the principle that proof of other similar crimes tends to negative inadvertence and innocence in the particular case in issue, and that for that purpose it is immaterial whether the instances were found occurring before or after the act charged.

11. The rule of evidence that a *husband or wife* cannot testify for or against each other is entirely out of keeping with present ideas as to the marital relation, and is not in accord with the status the law is now giving the wife. The problem calls for legislation, but in the absence of that, we believe the Supreme Court has the power to liberalize the rules of evidence through the decisions and that it would be in the interests of the public welfare for it to do so.

12. The Supreme Court has taken an emphatic stand against "third degree" methods in obtaining *confessions* from persons suspected of crime. No officer, it has said, having custody of a prisoner, has the privilege to resort to such tactics, and if a confession is so obtained, it is not admissible in evidence, and it is not possible to sustain a conviction in the Supreme Court if it appears that such improper methods were used. There is little doubt that statements often are obtained from suspects through brutal methods. The Supreme Court's position on this question is commendable.

13. When an indictment contains a material name or word which the proof shows to have been misspelled, there occurs what is known in the law as a *variance.* In determining whether it is a fatal variance the doctrine of *idem sonans* (having the same sound) is applied. If it is found *idem sonans* with the name or word proved, there is no error. Otherwise the mistake is likely to constitute ground for reversing the case. We believe that the doctrine of *idem sonans* is too technical and subtle for guidance in cases of this nature. It does not offer an adequate test upon which to predicate a judicial decision. The administration of the law would be promoted if it were abandoned.

14. The Supreme Court, in the case of *People* v. *Corder,*[1] in which the

[1] (1923) 306 Ill. 264.

indictment was unusually verbose, made the suggestion that it would have been sufficient to have alleged that on a certain day in a certain county John F. Corder "did unlawfully, with malice aforethought, by shooting, kill Jane Hardy." We believe, by that statement, the Supreme Court took a forward step toward the simplification of *criminal pleadings*. Any suggestion from the court carries tremendous weight; much, therefore, depends upon its leadership. The position it takes can well change the trend, not only of criminal pleadings, but of the whole law of the state.

15. Technical distinctions are to be found in the law between *attempted and consummated crimes*. Thus, a case was reversed in the Supreme Court because a jury found a man guilty of attempt to commit larceny, when the evidence was to the effect that the crime of larceny had been consummated. Many cases have been reversed, too, because of the technical distinctions which exist among the various crimes relating to personal property. There is great need for legislation removing the subtle distinctions between crimes. A statute which will group all the crimes as to personal property under a common heading and which will make it possible under a simplified charge to convict for all crimes involving the fraudulent conversion or the misappropriation of another's personal property, is needed particularly.

16. There exists in Illinois that anomaly in the law that the *jurors* in criminal cases shall be the *judges of the law and the fact*. There, also, is the restriction on authority of the trial court, that he must not comment on the evidence or indicate to the jury his views. We believe that criminal law administration would be improved if the provision, making the jurors the judges of the law and the fact, were repealed, and that it would be improved further if the trial judge were given the power to advise the jurors on facts, and to comment on the weight of the evidence.

17. When question has been raised as to the *form of the verdict*, the Supreme Court frequently has announced the liberal view that the "test as to the sufficiency of the verdict is whether or not the intention of the jury can be ascertained with reasonable certainty." However, in *People* v. *Valanchauskas*,[1] where the verdict read "We the jury, find the defendant, Stanley V. Valanchauskas, guilty of embezzlement in manner and form as charged in the indictment," and the indictment had charged him with the embezzlement of $1,000, the Supreme Court held the verdict fatally defective. Without a finding, the court held, "of the sum of money stolen, the court could not determine whether the plaintiff in error had been found guilty of a felony or a misdemeanor."

18. The Supreme Court has stated that it will reverse a criminal conviction for *insufficiency of evidence* only when it is able to say "from a careful consideration of the whole of the testimony, that there is clearly a reasonable and well founded doubt of the guilt of the accused."[2] This, we believe, is a sound principle to which the court should continue to adhere.

19. The court has strictly adhered to the rule that the *corpus delicti*—the fact that a crime has been committed—cannot be established by extra-

[1] (1927) 324 Ill. 187.
[2] But see *People* v. *Lardner* (1921), 296 Ill. 190.

judicial confessions, alone. In *People* v. *Maruda*[1] this question was considered at some length. The court expressed views that are open to the interpretation that a crime must be established entirely by proof other than the confession of the defendant. This would appear too narrow a construction. In fact, the rule that a defendant's confession, alone, does not suffice, is a questionable doctrine. We submit that the ends of justice would be better served by a return to the rule as it was originally in the law, viz., that an uncorroborated confession of an accused is sufficient to support a conviction.

20. In a study of the *subsequent disposition* of 291 cases reversed and remanded by the Supreme Court, it was found that but 46 defendants were punished after their cases had been reversed and remanded. Out of the 291 cases, 29 were retried and convicted, 9 pleaded guilty, 8 pleaded guilty to lesser offenses, 23 were retried and acquitted, and 222 escaped further prosecution. After a case is reversed and sent back to the trial court, a defendant has six and one-half chances to one never to be penalized to any extent for the crime with which he originally was charged.

21. We believe that the administration of criminal justice would be improved substantially if the courts would give less effort to obtaining logical certainty, and less heed to the doctrine of *stare decisis*. It is not in uprightness, but in the comprehensiveness of views, that judges fail to measure up to their responsibilities. The opinions we have reviewed bear evidence to the fact that, at times, our court has responded watchfully to the "call of other voices," but at others, it has slipped back and listened despairingly and alone to the call of logic. The court has made progress in ridding the criminal law of legal scholasticism. While this report is critical of that which still persists, the fact is noteworthy that the doctrine of *stare decisis* is being employed less frequently. More and more the tendency is to disregard technical reasoning, to overlook slight errors, and to proceed to the ultimate question—the guilt or innocence of the accused.

[1] (1924) 314 Ill. 536.