THE REVIEW OF HOMICIDE CASES IN PENNSYLVANIA.

Important legal changes are frequently the result of efforts to influence the determination in particular cases. No more striking example is to be found in Pennsylvania than the modification of appellate procedure to secure the release of Paul Schoeppe, convicted of murder in the first degree. The consequence was the imposition of duties upon the Supreme Court in homicide cases differing from the requirements of review where other matters are involved. A consideration of the law as it existed in 1870, and the effect of the legislation passed during that year may not be without interest.

In Pennsylvania, provision was early made for review of minor criminal proceedings by the Provincial Court, but in case of murder the trial was had before the judges of this tribunal specially presiding in the various circuits.[1] General jurisdiction of appeals by any party aggrieved was granted in 1722,[2] by an act which gave authority to affirm, or reverse, the judgment entered in the court below. To this was subsequently added the power to modify.[3] Following, however, the common law, consideration was alone given to errors appearing upon the record, since the statute of Westminster,[4] conferring the right to bills of exceptions, had application to civil causes, and not to criminal proceedings.[5] Neither the testimony of witnesses, the rulings upon evidence, the answers to the points, nor the charge of the court could be brought upon the record for review,[6] either directly, or indirectly, by referring to the same in the motion for a new trial, or in arrest of judgment.[7] The record alone was examined, and bills of exceptions being without the sanction of a statute, had no place in the administration of the criminal law.

[1] Act 1693, Provincial Laws, 223; re-enacted in 1700, Bioren's Laws, Vol. 1, p. 32, Chaps. 100, 101.

[2] Act March 22, 1722, Sec. 9, and Smith's Laws, 138.

[3] Act June 16, 1836.

[4] Statute Westminster 2d, 13 Edward I, C. 31.

[5] Haines v. Com., 99 Pa. 410.

[6] Middleton v. Com., 2 Watts, 285.

[7] Sampson v. Com., 5 W. & S. 385.

That this limitation upon the defendant's right of review was not considered a hardship, prior to 1856, is evidenced by the declaration of Chief Justice Gibson, which well explains the then point of view, when he said:

"Nor is this a defect in our system; at least, whatever it may seem in theory, it is not a defect in practice; for the recollection of no lawyer can point to an instance of injustice suffered or conviction procured by straining the law against the accused. . . . As to a severity of administration, the tendency to err is in the opposite direction; and the prisoner has an additional and an all sufficient safeguard in the sympathies of the jury. But though convictions of the innocent are unknown, acquittals of the guilty are abundant; and if it were an object to increase their number, it could not be denied that it would be promoted by the delay incident to a writ of error; for when the public has become indifferent to the event, and the anger of the injured party, which lent a temporary activity to the prosecution, has subsided, above all, when the principal witnesses are dead or dispersed, an acquittal on a second trial is pretty much a matter of course. . . . Besides, it is proved by all experience, that the efficacy of punishment depends on its promptness and certainty, and that the more we multiply the chances of eventual escape, the more we take from its influence. . . . We are unwilling to introduce into the administration of the criminal justice, disorders so prejudicial to the general weal, by departing from a construction which has prevailed without interruption for near two centuries."[8]

Notwithstanding this expression of judicial thought, the legislature in 1856 [9] provided for more extended review in homicide cases, and permitted exceptions to "any decision of the court upon any point of evidence or law," which shall have been "noted by the court and filed of record, as in civil cases." Written opinions on points submitted were required of the court below, but only such matters of substance as were formally excepted to, were made the subject of review.[10] The seventh section provided for objections to the charge, but it is to be noted that this portion of the act was omitted when the general revision of the law of criminal procedure was made and adopted.[11] The manner of securing leave to appeal was likewise fixed by the act of 1856, and

[8] Middleton v. Com., 2 Watts, 285.
[9] Act Nov. 6, 1856, Sec. 7, in P. L. of 1857, App., p. 795.
[10] Fife v. Com., 29 Pa. 429, 435.
[11] Act March 31, 1860, P. L. 440, Secs. 57 and 58.

a similar regulation is found in section 59 of the procedure act. The latter contains, however, an additional method of obtaining an *allocatur,* in that the attorney general is given power to allow the writ.[12]

This was the state of the law in 1869 when Paul Schoeppe was indicted for the murder of Maria Steinnecke. The defendant, a young physician of pleasing personality, educated in Germany, was accused of having killed his patient by the administration of poison; and, after a hearing, at which much expert testimony was introduced, a conviction of murder in the first degree was had. A motion for a new trial was overruled by the court below, and the defendant was sentenced to be executed.[13]

An agitation on behalf of the prisoner was immediately begun, and many of the important medical associations throughout the country passed resolutions denouncing his conviction as based on unworthy expert opinion. Within thirty days after the sentence an application for an *allocatur* was duly made to Chief Justice Thompson of the Supreme Court, which—Justices Read and Sharswood concurring—was refused. Request was then presented to Governor Geary for a pardon, but the decision of the executive was adverse, and a warrant for the execution of Schoeppe was issued.

Honorable F. Carroll Brewster, attorney general of the state, was then applied to, and in his official capacity granted leave to appeal, a power possessed by virtue of section 33 of the Criminal Procedure Act, as already noted, but rarely exercised. The writ of error so allowed was returned to the Supreme Court, and the legislation governing the right of review was again discussed by Justice Read.[14] On February 14, 1870, the judgment was affirmed and the record was remitted.

In the meantime, the friends of the defendant had secured the passage by the legislature of an act which gave to defendants in murder cases the right to appeal without leave, and required

[12] Section 33; a re-enactment of the Act of April 13, 1791. and Sec. 9 of the Act of June 16, 1836.

[13] For charge of the court and opinion overruling motion for new trial, see Schoeppe v. Com., 2 Leg. Gaz. 15; 1 Leg. Gaz. 78.

[14] 65 Pa. 51, 52.

that all records so removed to the Supreme Court should be reviewed by the judges, both as to law and evidence, to determine whether the ingredients necessary to constitute murder in the first degree were proved to exist. The legislation was made applicable to writs of error then pending. It was anticipated that this law would be in force before the disposition of the writ granted with leave of the attorney general, but a veto by the governor caused delay, so that it did not become effective until February 15, a day after the decision was rendered by Justice Read.[15] Notwithstanding this fact, a second writ of error was immediately sued out, and the record was returned with the charge of the court, the prisoner's points and answers, and the bills of exceptions to decisions on the evidence, and to the charge. The Commonwealth entered a plea of former judgment, and, after argument, its contention was sustained,[16] and the record was remitted for the purpose of execution.

Subseqently, another act of assembly was passed by which the Court of Oyer and Terminer of Cumberland County was given power to open and set aside the judgment of conviction. An application was made to the trial judge, Hon. James H. Graham, who, after hearing, refused to interfere. Later, in the same year, he was defeated for re-election in a contest in which the Schoeppe case played an important part, and his successor, Hon. B. F. Junkin, upon application, granted a new trial, which resulted in an acquittal.

Thus the act of February 15, 1870, came to be the law regulating appeals in homicide cases. Of it the Supreme Court said:[17]

"It is not improper, before closing, to say a few words in reference to the Act of 1870, to draw attention to some of its defects, and to the radical change in our criminal jurisprudence it will produce. It was passed for this case, but owing to the governor's veto it came too late. It is another evidence that laws which are the offspring of feeling are seldom wisely framed. It commands this court to review the evidence, and to determine whether the ingredients to constitute murder in the first degree were proved to exist, and yet, in forgetfulness of the former law, it provides no means to take, preserve and

[15] Act February 15, 1870, P. L. 15.

[16] 65 Pa. 55.

[17] Schoeppe v. Com., 65 Pa. 58.

bring up the evidence. This, the first attempt to act under it, proves its inefficiency, the judge below returning to our *certiorari* that he was not able to make the return of the evidence."

The permission to appeal without special leave, granted by this legislation, was deemed of sufficient importance to be incorporated into the Constitution of 1874, which directs that:

"In all cases of felonious homicide, and in such other criminal cases as may be provided for by law, the accused after conviction and sentence may remove the indictment, record and all proceedings to the Supreme Court for review."[18]

Though the privilege is thus protected against interference by the legislature, yet it does not prevent the enactment of reasonable regulations as to procedure, such as limiting the time during which the writ must be sued out;[19] or, be taken to constitute it a *supersedeas*.[20]

The so-called Schoeppe act met with scant approval from the appellate court, when first considered, and the result was an interpretation of its provisions without liberality, notwithstanding the broad terms used. Justice Dean, in speaking of this, said:[21]

"I am aware that this court has given a very narrow construction to these comprehensive words, and has decided that they do not empower the court to review the question of the guilt or innocence of the prisoner."

Chief Justice Thompson expressed the views of the court upon its scope soon after its passage.[22] It was remarked:

"We have listened to the able and zealous argument of the prisoner's counsel as if on a motion for a new trial; we could find no fault with that, for it in fact was a method of showing that the ingredients of murder in the first degree had not been proved. But our duty under the act is widely different. A court on hearing a motion for a new trial, judges of the action of the jury on the testimony

[18] Art. V, Sec. 24. The Act of May 19, 1874, P. L. 219, Sec. 1, re-affirms this right and provides for exceptions to any decision of the court, and the sealing of a bill in the same manner as is practiced in civil cases.

[19] Sayres v. Com., 88 Pa. 291.

[20] Act May 19, 1897, P. L. 67, Sec. 4; Com. v. Hill, 185 Pa. 585.

[21] Dissenting opinion, Com. v. Danz, 211 Pa. 507.

[22] Grant v. Com., 71 Pa. 495, 505 (1872).

on both sides, and considers whether too much or too little weight has been given to features for the whole of the testimony in view of its intrinsic character; the manner in which it has been given by the witnesses, their apparent bias, intelligence or want of it, and character. All this has been before and under the eye of the court, and they can say on a calm reconsideration of it all, whether justice does, or does not, require a new trial. This court cannot do this, and the act of assembly does not contemplate any such thing. Our duty is to see whether there was evidence given in the case, which, if believed by the jury, would furnish the elements, or 'ingredients,' as the act says, of murder in the first degree, under our statutes on the subject, *viz.*: the *corpus delicti*, either 'killing by poison, lying in wait, or by any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempted perpetration of any arson, rape, robbery or burglary.' To this extent is the duty devolved on this court, of reviewing the facts in cases of convictions for murder in the first degree, by the act of 1870. It goes no further towards enabling it to grant new trials. If there have appeared in the testimony the ingredients to constitute murder in the first degree, our power ceases. Whether the jury should or should not have believed and relied on it, is what this court cannot examine into. That must be inquired of on a motion for a new trial in the court below, as formerly."

That the act should not be treated as a substitute for a motion for a new trial, where the weight of the testimony is to be considered, has been frequently declared in subsequent cases.[23] It is, however, the duty of the court to determine whether competent evidence appeared, which would justify a finding that the ingredients necessary to constitute murder in the first degree are present;[24] but if there is any such testimony it must be accepted as true, for it is not for the appellate court to pass upon its credibility;[25] nor to determine whether the jury believed or relied upon the facts proved.[26] Though the entire record is to be examined to determine the presence or absence of evidence establishing the essential elements, this does not mean that it gives to the de-

[23] Staup v. Com., 74 Pa. 458; McGinnis v. Com., 102 Pa. 66; Com. v. Danz, *supra;* Com. v. Garrito, 222 Pa. 304; Com. v. Wendt, 258 Pa. 325; McCue v. Com., 78 Pa. 185, 189.

[24] Com. v. Harris, 237 Pa. 597; Com. v. DeMasi, 234 Pa. 570; Com. v. Garrito, *supra.*

[25] Com. v. Diaco, 268 Pa. 305; Com. v. DeMasi, *supra.*

[26] Com. v. Morrison, 103 Pa. 613.

fendant a right to a review of alleged errors occurring during the course of the trial, or in answers to the points and charge of the court where he has failed to take exceptions which are still required, as in other cases, to bring such matters to the attention of the appellate tribunal.[27]

Formerly, the final disposition of the case by the Supreme Court ended the proceedings, and certainly after the term no additional steps could be taken, except as ordered in the judgment entered by the appellate court.[28] Thereafter, relief was to be secured through the medium of the pardon board. This rule has been, however, modified by the act of 1903, passed, as was the act of 1870, to meet a particular case.

Samuel Greason was convicted of murder in Berks County, and, upon appeal, judgment of the court below was affirmed on November 3, 1902.[29] On April 22, 1903,[30] an act was passed giving jurisdiction to the Supreme Court, notwithstanding the expiration of the term in which the prisoner was convicted and sentenced, to entertain a petition supported by after-discovered evidence, averring ground for substantial doubt as to the guilt of the defendant. By virtue of this legislation, it may permit the Court of Oyer and Terminer in which the prisoner was tried to grant a rule for a new trial *nunc pro tunc;* which tribunal, after hearing, can discharge the rule; or, if sufficient grounds appear to lead to the opinion that right and justice require a rehearing of the case, to certify this fact to the Supreme Court, where the action taken is subject to approval or disapproval. On May 4, advantage of the provisions of this legislation was taken on behalf of Greason, and his petition was presented, with the result that the record was remitted, with leave to the court below to grant a rule for a new trial *nunc pro tunc.*[31] After hearing, the rule was discharged, and the appeal which followed was dismissed.[32] In but one other reported case

[27] Com. v. Ware, 137 Pa. 465.
[28] Schoeppe v. Com., 65 Pa. 51, 57, following Com. v. Mayloy, 57 Pa. 291.
[29] Com. v. Greason, 204 Pa. 64.
[30] P. L. 245.
[31] Greason's Petition, 205 Pa. 630.
[32] Com. v. Greason, 208 Pa. 126.

has the attempt been made to secure relief under the act of 1903, the application being refused.[33]

This brief sketch of the development of the practice upon appeal in homicide cases would lead to the conclusion that hard cases do not always make bad law, as has been so frequently said, for the modifications resulting from the attempts to lend aid to Schoeppe, though, as subsequent events showed, he was entirely unworthy of sympathy, are generally recognized as wise and beneficent provisions, and have seen endorsement, in part at least, by subsequent legislative enactments.

Sylvester B. Sadler,
Justice of the Supreme Court of Pennsylvania.

[33] Com. v. Hine, 213 Pa. 97.