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CRIMINAL LAW CASE NOTES AND COMMENTS

Prepared by students of Northwestern University School of Law, under the direction of student members of the Law School's Legal Publications Board

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Legislation Concerning Alibis, Perjury, Self-Incrimination Immunity, Official Conduct, and Grand Juries

The Chicago Crime Commission, an independent citizen's committee, which has long been a vital force in combatting criminal activity in Chicago and Illinois, has recently sponsored five bills designed to improve the administration of criminal justice in Illinois. Concerned almost entirely with problems of criminal investigation and prosecution, the bills deal with alibis, providing for advance notice of intention to use alibi defenses; perjury, obviating the necessity of proving which of two contradictory statements is true; self-incrimination immunity, giving the court power to grant immunity from prosecution to material witnesses; official conduct, penalizing a public officer who refuses to waive his immunity when being investigated; and grand juries, providing in effect for extending the life of grand juries in Cook County.

None of these proposed statutes contain any startling innovations—most are similar to legislation which has already been adopted in other jurisdictions, tested, and proved satisfactory. As is obvious from a glance, they are mainly aimed at strengthening the hand of the prosecution in criminal cases. Despite the fact that some of these bills will receive opposition from those members of the bar who make a practice of taking defendants' cases in criminal prosecutions, it must be noted that none place undue advantages in the hands of the prosecution. All are drawn with the fundamental aim of improving the chances of ultimate justice in criminal cases—certainly a laudable objective. This will become more apparent as the bills themselves are studied. Each of the five proposed statutes is analyzed and discussed in this paper with full treatment of both the policy arguments and the legal problems which may arise.

The Alibi Bill

In many criminal cases, an otherwise air-tight prosecution is defeated when the defendant produces at the close of his case alibi testimony, purporting to establish his presence at a place other than that where the crime was committed. Often the prosecution is unable to effectively rebut this evidence, and the alibi defense results in a verdict of acquittal for the defendant. Obviously, in the final minutes of trial, the prosecution will not have an opportunity to verify the alibi testimony or to produce direct rebutting testimony. In most instances trial strategy would dictate against a request for continuance by the prosecution even assuming that such a request would be granted. To prevent this surprise, an alibi statute is proposed which would require the defendant, whenever he proposes to offer in his defense testimony to establish an alibi, to provide the prosecuting attorney before the trial with a written notice of his intention to assert such alibi. The notice must include specific infor-

mation as to the place where the accused maintains he was at the time of the offense. If the defendant fails to file such notice, then the court is empowered to exclude alibi evidence offered by the defendant if it appears to the court that such evidence takes the state by surprise.¹ The proposed bill reads as follows:

“Whenever a defendant in a criminal cause shall propose to offer in his defense, testimony to establish an alibi, such defendant shall, not less than eight days before the trial of such cause, file and serve upon the prosecuting attorney a notice in writing of his intention to assert such alibi, which notice shall include specific information as to the place where the accused maintains he was at the time of the alleged offense. The defendant shall not be permitted to introduce evidence inconsistent with such notice unless the court for good cause permits the notice to be amended. In the event of the failure of a defendant to file the written notice in this section prescribed, the court may exclude evidence offered by the defendant for the purpose of proving an alibi, if it appears to the court that such evidence takes the state by surprise.

“Provided, however, that in the event the time and place of the offense are not specifically stated in the complaint, indictment or information, on application of the defendant not less than eight days before the trial of such cause that the time and place be definitely stated in order to enable him to offer evidence to establish an alibi, the court shall direct the prosecuting attorney to serve a written notice upon the defendant not less than five days before the trial of such cause so stating the time and place of the offense, and thereafter the defendant shall give the notice above provided not less than two days before the trial of such cause if he proposes to offer evidence to establish an alibi. In the event the time or place of the offense has not been specifically stated in the complaint, indictment or information, and the court directs that written notice be given by the prosecuting attorney, as above provided, and the prosecuting attorney advises the court that he cannot safely do so on the facts as he has been informed concerning them, or if in the progress of the trial the evidence discloses a time or place of the offense other than alleged, the defendant may, without having given the notice above mentioned, offer evidence for the purpose of establishing an alibi.”

There can be no argument against this bill on the basis of improving criminal justice and effective law enforcement. Its provisions can have no harmful effect on a valid alibi defense, and it will provide substantial protection against “manufactured” alibis. In other jurisdictions where this type of statute has been enacted, law enforcement officers have reported gratifying results.² There are, however, some interesting legal problems which arise from a consideration of the bill.

¹ A similar bill was introduced in the House of Representatives of the Illinois State Legislature during the 1947 session. It was referred to the House Judiciary Committee, and defeated therein.

² Attorney General of New York Urges Criminal Law Reform (1931) 9 *The Panel* 45, 46: “In fact, the experience of Ohio and Michigan has been that the alibi is seldom used now as a defense. In those states, since the enactment of their alibi laws, there has been an increase in convictions, and a corresponding decrease in perjured testimony.” See Esch, Ohio’s New “Alibi Defense” Law (1931) 9 *The Panel* 42; Toy, Michigan Law on Alibi and Insanity Defenses Reduces Perjury (1931) 9

From a constitutional basis, an alibi statute would be clearly valid. It merely imposes a condition upon the defendant's taking advantage of his right to testify in his own behalf.³ If the defendant provides the notice, he will offer evidence which will tend to clear him. If he does not give notice or use an alibi, then he does not thereby confess his presence at the place where the crime was committed—this latter fact must still be proved by the prosecution. The bill can be viewed as imposing a "pleading" requirement, making the defendant lay a pre-trial foundation in order to prove an alibi.⁴ In this view, the requirement is analogous to the common law requirement of a special plea in order to show former conviction, former acquittal, or pardon.⁵ In no instance is the defendant required to testify—he is only required to give advance notice of his intention to testify.⁶

The scope of the requirement was limited under a similar New York statute, when the court held that the statute would not be applicable if the defendant himself desired to testify concerning an alibi defense.⁷ The court arrived at this result by noting that the language of the act was not expressly clear on this point, and to construe it so as to require notice when the defendant himself testifies would be to deprive the defendant of a fair trial by denying his privilege of testifying in his own behalf in a criminal prosecution. It is difficult to read the statute as exempting the defendant from the requirement, and it is more difficult to accept the court's reasoning for so doing. As has been pointed out above, the statute merely imposes a condition on the defendant's testifying.⁸ Furthermore, the right to testify in his own behalf is accorded to the defendant in both New York and Illinois by statute.⁹ The right was not recognized at common law. Certainly it is valid to reason that what the legislature has in its power to confer by statute, it can limit by

The Panel 52; Dean, *Advance Specifications of Defense in Criminal Cases* (1934) 20 A.B.A.J. 435. This type of statute has been enacted by fourteen states. Arizona Code Ann. (1939) §44-1031; Indiana, Burns Stat. Ann. (1933) §9-1631, 2, 3; Iowa Code (1946) §777.18; Kansas Gen. Stat. (Corrick 1935) §62-1341; Michigan Stat. Ann. (1935) §28.1043 (amended, 1947 supp.); Minnesota Stat. (Mason 1945) §630.14; New Jersey Stat. Ann. (1939) §2:190-7, 8; New York Code Crim. Proc. §295-L; Ohio Code Ann. (Page 1939) §13444-20; Oklahoma Stat. (1941) t. 22, §585; South Dakota Code (1939) §34.2801; Utah Code Ann. (1942) §105-22-17; Vermont, Acts 1939, No. 53; Wisconsin, Supreme Court Order, Stat. 1941, §355.085.

³ See Note (1941) 15 St. John's L. Rev. 304; Note (1941) 10 Fordham L. Rev. 305.

⁴ Millar, *The Statutory Notice of Alibi* (1934) 24 J. Crim. L. & Criminology 849.

⁵ *Ibid.*

⁶ These arguments based on constitutional grounds have been advanced in other jurisdictions when alibi statutes were questioned in the courts. In no instance, however, have the statutes been held unconstitutional. *People v. Schade*, 292 N. Y. S. 612 (1936) (alibi statute held constitutional in face of objection that it forced the defendant to testify against himself); *State v. Thayer*, 124 Ohio 1, 176 N. E. 656 (1931) (Ohio alibi statute held constitutional). The statutes have, in other cases, been impliedly held constitutional by being accepted by the Supreme Court of the state without objection. *State v. Carter*, 149 Kan. 295, 87 P. (2d) 818 (1939); *State v. Waid*, 92 Utah 297, 67 P. (2d) 647 (1937); *People v. Wudarski*, 253 Mich. 83, 234 N. W. 157 (1931). The invalidity of the constitutional argument is ably presented in Millar, *The Statutory Notice of Alibi* (1934) 24 J. Crim. L. & Criminology 849; Burdick, *Criminal Justice in America* (1925) 11 A.B.A.J. 510, 512; Willoughby, *Principles of Judicial Administration* (1929) 450-451.

⁷ *State v. Rakiec*, 23 N. Y. S. (2d) 607 (1940).

⁸ The fallaciousness of the arguments presented by the court in the *Rakiec* case is shown in Note (1941) 10 Fordham L. Rev. 305.

⁹ Illinois, Smith-Hurd Ann. Stat. (1935) c. 38, §734. This statute is in derogation of the common law. See Note (1941) 10 Fordham L. Rev. 305.

statute. The defendant is in no way deprived of his right to a fair trial. There are other instances in criminal law where if the defendant does not make a pre-trial assertion of a right or defense he is thereafter precluded from taking advantage of it.¹⁰ In view of these considerations, it is to be hoped that the Illinois court will not so construe the present act.

The second section of the statute makes allowance for the situations which may arise when either the indictment does not state a definite time and place for the commission of the offense, or where there is variance, non-fatal, between the proof of time and place and that alleged in the indictment. In the former situation, the prosecution can be required to serve on the defendant a notice specifying the time and place with particularity. If he does not do so, or if the proof varies from the indictment, then the defendant is not required to give prior notice of an alibi defense.¹¹ Similar provisions exist in other jurisdictions which have adopted an alibi statute.¹² This makes the bill fairer to the defendant, and is a decided improvement over the original form of the bill, introduced at the last session of the Illinois legislature, which made no allowance for such a situation.

The statute now proposed is less exacting than the bill proposed by the Crime Commission and submitted to the legislature in 1947.¹³ Originally, the defendant was required to furnish the prosecution in his notice of alibi defense a list of the names and addresses of witnesses by whom he proposed to prove his alibi. Such a provision gives the prosecution a much better chance to disprove fabricated alibis. The desirability of such a provision has been questioned on the ground that it would enable the police and prosecution officials to intimidate the defendant's witnesses in advance of trial. Such an argument is certain to be made by those members of the bar who specialize in defense work. It is thought, however, that the danger of such intimidation is over-emphasized, and that the advantages to be gained from a more stringent statute would outweigh the possibilities of abuse by prosecution officials. Of the fourteen jurisdictions which now have the alibi statute, six require the list of names and addresses to be furnished by the defendant.¹⁴

One further problem which may arise in the use of this statute would be the right of the prosecution to comment to the jury when the defendant gives notice of intention to produce an alibi but does not do so at the trial. To allow the prosecution to make use of this fact in his argument to the jury would obviously be prejudicial to the defendant. Such comment may well be prohibited by the ban on any comment by the prosecution on the failure of the defendant to testify in his own

¹⁰ *E.g.*, Motion to suppress illegally seized evidence (see *United States v. Seguro*, 275 U. S. 106 (1927)); motion to produce involuntary confession (see Note (1947) 38 *J. of Crim. Law & Criminology* 249).

¹¹ See text at note 1 *supra*.

¹² Indiana (Burns Supp. 1942, §9-1631) requires a counter notice by the prosecution if the time alleged by the state becomes different than that stated in the indictment; Kansas Gen. Stat. (Corrick, 1935) §62-1341 provides that if the prosecution does not supply the time proven at the trial, then no alibi notice will be required. See *State v. Thayer*, 124 Ohio 1, 176 N. E. 656 (1931).

¹³ See note 1 *supra*.

¹⁴ Arizona, Iowa, Kansas, Michigan, New Jersey, New York. For statutory citations, see note 2 *supra*.

behalf,¹⁵ a view which was taken in an Ohio case arising out of a similar statute.¹⁶

The bill as it now exists will be a valuable addition to Illinois criminal procedure. Imposing no unfair burden on the defendant, it will lessen the chances of a guilty defendant making use of a perjured alibi to evade conviction. On the other hand, it cannot harm the defendant who has a legitimate alibi defense. The bill will aid in the movement to make criminal prosecutions less an arena for the "jousting of advocates" and more an impartial and searching inquiry into the guilt or innocence of the accused.

The Perjury Bill

"Hundreds of persons perjure themselves in the courts every day except Sunday . . . there is an agreement that perjury is rampant, and that, as a general rule what happens to perjurers is nothing . . ." ¹⁷ To remedy this situation, so often decried by legal writers on the subject,¹⁸ a bill has been proposed which will make it much easier to obtain a perjury conviction in Illinois.¹⁹ The bill leaves unchanged the previously existing definition of perjury, which is to swear or affirm wilfully, corruptly, and falsely, under oath, in a matter material to the issue in point or in question.²⁰ However, the proposed Bill provides that:

"In every indictment for perjury or subornation of perjury, it shall be sufficient to set forth the substance of the offense charged upon the defendant, and before what court or authority the oath or affirmation was taken, averring such court or authority to have had full power to administer the same, together with the proper averments, except as hereinafter otherwise provided, to falsify the matter wherein the perjury is assigned, without setting forth any part of the records or proceedings, either in law or equity, other than as aforesaid, and without setting forth the commission or authority of the court or other authority before whom the perjury was committed, or the form of the oath or affirmation, or the manner of administering the same; *provided, that in every indictment for perjury based upon the giving of contradictory testimony or the making of contradictory statements under oath on occasions in which an oath is required by law, it shall be sufficient to allege the making of such contradictory statements or the giving of such contradictory testimony, without alleging which statement is true, or which is false.*

In any prosecution for perjury based upon an indictment alleging the making of contradictory statements or the giving of contradictory testimony, falsity shall be presumptively established by proof that the defendant has given such testimony or made such statements under oath on occasions in which an oath is required by law, without proving which statement or testimony is true, or

¹⁵ This is prohibited in Illinois by statute. Smith-Hurd Ann. Stat. (1935) c., 38 §758.

¹⁶ State v. Cocco, 73 Ohio App. 182, 55 N. E. (2d) 430 (1943) (prejudicial error to comment on failure to prove alibi when notice was given). For a discussion of this problem, see Note (1935) 26 J. Crim. L. & Criminology 454.

¹⁷ McClintock, What Happens to Perjurers (1940) 24 Minn. L. Rev. 727, 728.

¹⁸ See Note (1934) 24 J. Crim. L. & Criminology 901; Boston, Drastic Changes in Law Necessary to Curb Perjury in Our Courts (1935) 13 The Panel 6.

¹⁹ This bill in modified form was introduced in the 1947 session of the legislature, but was defeated in the House Judiciary Committee.

²⁰ Ill. Rev. Stat. (1947) c. 38, §473.

which is false; provided, however, that where such contradictory testimony is in the same trial and is the result of the breaking down of the direct testimony by cross-examination, there shall be no such presumption.'²¹ (New matter italicized.)

The effect of the bill is to make it possible to convict for perjury by alleging and proving contradictory statements under oath, eliminating the necessity of proving which statement is false. There can be no doubt that the now existing requirement that the truth be alleged and proved has caused a paucity of perjury convictions.²² That a statute such as the proposed one would be a material aid in stopping the prevalent practice of court-room perjury cannot be doubted.²³

The practical argument made against this proposed change in the law governing perjury is that an individual would be very reluctant to change his testimony if he had testified falsely or in error on one occasion and wanted to testify to the truth at a later time. It is reasonable to suppose that no one will be indicted because of an honest change in testimony; furthermore the usual situation is where a witness recants previously given truthful testimony. The bill merely raises a presumption in favor of the prosecution, and allows the defendant to explain in whatever manner he can his change in testimony. Certainly if the defendant has in fact wilfully testified falsely, there is no valid reason why he should not be prosecuted. It must be noted that the prosecution even under this proposed statute would still have the burden of proving the defendant guilty beyond a reasonable doubt. The presumption aids in establishing this burden, but does not force the defendant to prove his innocence beyond doubt.

This bill in similar form was introduced and defeated in the legislature during the 1947 session, and has been changed in the interim. As originally written, the bill provided that proof of contradictory statements would raise a presumption of perjury, rather than a presumption of falsity. This previous wording would have made it possible to avoid proving the other elements of the crime of perjury—i.e., wilfulness, corruptness, and materiality. The change from presumption of perjury to presumption of falsity removes the constitutional objection that the presumption might be invalid as violating due process of law.²⁴ Similar

²¹ The proposed bill is, in form, an amendment to Ill. Rev. Stat. (1937) c. 38, §484. One change proposed to the bill when it was introduced in the legislature in 1947 would limit the contradictory statements provisions to the trial of any civil or criminal case in a court of record or in any grand jury proceeding. This would needlessly limit the scope of the statute; perjury by contradictory statements should be as broad in its application as ordinary perjury.

²² Illinois, along with the majority of jurisdictions, now requires that the falsity of the testimony must be established by two credible witnesses, or by one witness if corroborated by other independent circumstances. *People v. Alkire*, 321 Ill. 28, 151 N. E. 518 (1926). No jurisdictions have held in the absence of statute that proof of contradictory statements is sufficient to establish perjury, although some have stated that such proof is sufficient if it is corroborated by some circumstantial evidence. *Horn v. State*, 186 Miss. 455, 191 So. 282 (1939). For a discussion of these views, see 7 Wigmore, *Evidence* (3rd ed. 1940) §2041; Note (1941) 28 Va. L. Rev. 102.

²³ See Boston, *Drastic Change in Law Necessary to Curb Perjury in Our Courts* (1935) 13 The Panel 6. Similar statutes now exist in New York, New Jersey, and Utah. See note 24 *infra*.

²⁴ In order for a presumption established by statute to be considered constitutional and not violate the requirements of "due process" there must be a rational connection between the fact proved and the ultimate fact presumed. *Casey v. United States*, 276 U. S. 413 (1928); *People v. McBride*, 234 Ill. 146, 84 N. E. 865 (1908) (issuance

statutes existing in other states have not gone beyond the point of allowing proof of contradictory statements to establish the requirement of falsity.²⁵

A constitutional argument made against the bill as it now stands is that, since the indictment would allege two contradictory statements without stating which is true or which is false, the allegation would be in the disjunctive or alternative and would thus not sufficiently inform the accused of the charge against him.²⁶ It is true that an allegation in the disjunctive or alternative was invalid at common law,²⁷ and it might be argued that the same invalidity attached to the requirement that in all criminal prosecutions the accused should be sufficiently informed of the charge against him. However, this bill does not provide for disjunctive or alternative statements in the sense used at common law. The accused is not charged with one crime or another crime. He is accurately informed of precisely what he is to meet at the trial. This view was upheld by a New Jersey court which held constitutional a statute providing that in any perjury indictment, contradictory statements may be alleged, and their proof at the trial would raise a presumption of falsity.²⁸ The court also stated that the statute did not impose an unconstitutional burden on the defendant by making contradictory statements when proved a prima facie case for the prosecution.²⁹ The jury must still be satisfied beyond a reasonable doubt of the falsity and wilfulness of the statements, and the burden of proof is not shifted.

The arguments for the proposed statute on a policy level are compelling reasons for its adoption. The opposing view has been well stated: "The obligation of protecting witnesses from oppression, or annoyance, by charges, or threats of charges of having borne false testimony, is far paramount to that of giving even perjury its desserts."³⁰ Or, as stated

of internal revenue stamp statutory prima facie evidence of the sale of intoxicating liquors; held constitutional); *People v. Beck*, 305 Ill. 593, 137 N. E. 454 (1922) (presumption of Illinois act that possession of intoxicating liquors means that such liquor is presumed to be kept for sale or other disposal in violation of the Act held constitutional). If proof of contradictory statements raised a presumption of perjury, it could not logically be said that such proof reasonably tends to raise an inference of wilfulness, corruptness, or materiality. The established fact does not tend to raise an inference of the main fact.

²⁵ The New York Statute (New York Penal Code, §1627) provides that in prosecutions for first degree perjury, the falsity of the statements shall be presumptively established by proof of contradictory statements. It is only for second degree perjury that the crime is presumptively established by proof of the contradictory statements. However, second degree perjury as a crime does not include the requirement of materiality, and wilfulness still need be proved even with the presumption. Utah has a statute exactly the same as New York. Utah Code Ann. §103-43-14. The New Jersey Statute (N. J. Stat. Ann. (1939) §§2:157-4 to 2:157-8) provides only that in prosecutions for "false swearing" the falsity of the statement shall be prima facie established by proof of contradictory statements.

²⁶ On the basis of this argument, the Illinois Bar Association disapproved the perjury bill proposed in the 1947 session of the Legislature.

²⁷ *Cohn v. Graber*, 194 N. Y. S. 233 (1922). See Hankin, *Alternative and Hypothetical Pleadings* (1924) 33 Yale L. J. 365.

²⁸ *State v. Ellenstein*, 121 N. J. L. 304, 2 A. (2d) 454 (1938). The New York statute has been held constitutional. *People v. Glass*, 181 N. Y. S. 547 (1920); *People v. Caifa*, 299 N. Y. S. 838 (1937).

²⁹ *State v. Ellenstein*, 121 N. J. L. 304, 2 A. (2d) 454 (1938). See *State v. Harris*, 132 N. J. L. 54, 38 A. (2d) 686 (1944).

³⁰ Best, *Evidence* (12th ed. 1922) 522. Greenleaf states that proof of contradictory statements is not and should not be perjury. 1 Greenleaf, *Evidence* (1st ed. 1842) §259. However, Wigmore appears to favor such a statute. 7 Wigmore, *Evidence* (3rd ed. 1940) §2041.

by one court: "This inducement (to tell the truth) would be destroyed if a witness could not correct a false statement, except by running the risk of being indicted and convicted for perjury."³¹ It is submitted that these fears are somewhat exaggerated. On the other side is the alarming situation that perjury is estimated to be present in 50% of contested civil cases, 75% of criminal cases, and 90% of divorce cases.³² Perjury remains one of the most difficult crimes to establish within the law and to the satisfaction of juries. It is believed that the proposed change in the Illinois law would be an invaluable asset to lessening the prevalence of perjury in the courts, and would not substantially endanger the honest witness. For a dishonest witness, there need be no concern.

The Official Conduct Bill

This bill, probably the most controversial, is designed to remove the impediment to investigation which is imposed by the constitutional privilege against self-incrimination.³³ At present, a public official when called before a grand jury which is investigating his conduct or his office, can refuse to testify on the ground that his answer might tend to incriminate him, and still hold his office. To overcome this handicap to efficient public investigation, a statute is proposed which provides that any person holding public office, trust, or employment who refuses to testify upon matters relating to his office on the ground that such answer might tend to incriminate him shall forfeit his office and shall be disqualified thereafter from holding any public office, trust, or employment, for a period of five years.³⁴ The statutory proposal is as follows:

"Any person holding or who has held any elective or appointive public office, trust or employment (whether state, county or municipal) who refuses to testify upon matters relating to said office, trust or employment in any proceeding wherein such person is a defendant or is called as a witness on behalf of the prosecution (whether such proceeding is criminal, quasi criminal or before a trial board), upon the ground that to answer might tend to incriminate him or compel him to be a witness against himself, or who refuses to waive immunity when called by a grand jury to testify upon such matters, shall be removed from office by the appropriate authority or shall forfeit his office at the suit of the attorney general if he is then holding the same, and be disqualified from holding any public office, trust or employment, for a period of five years; provided that if at the time of any such refusal, said person is no longer holding such office, trust or employment, he shall be disqualified from holding any public office, trust or employment for a period of five years. Provided, however, that nothing in this section shall apply to persons holding state offices for which the State Constitution provides exclusive causes and methods for removal from office."

There can be no doubt that the refusal of a public officer to testify concerning his office cannot be justified on moral grounds. Privilege permits

³¹ *People v. Gillette*, 111 N. Y. S. 133, 139 (1908).

³² Note (1934) 24 J. Crim. L. & Criminology 901.

³³ Ill. Const. Art. II, §10: "No person shall be compelled in any criminal case to give evidence against himself. . . ."

³⁴ A similar bill was introduced in the Illinois legislature at the last session, but was defeated.

the refusal, but to exercise the privilege is wholly inconsistent with the official's public duty. A refusal to testify is a breach of the public trust and on this ground should subject the official to dismissal.³⁵ These arguments have been upheld in several cases involving the dismissal of police officers for refusal to waive their immunity, although it must be recognized that in the case of policemen, whose direct duty is to detect and suppress crime, there is more reason for calling a refusal to testify a dereliction of duty.³⁶ For officers other than policemen, the problem appears in a somewhat different light, and few cases have arisen concerning them.³⁷

This type of statute has been adopted by no other states. New York has included a similar provision in its constitution, probably to dispel any possible doubts as to the constitutionality of the measure.³⁸ In order to avoid the most valid constitutional objection, the bill as presently proposed would not extend to include those offices for which the constitution specifies exclusive causes and methods of removal.³⁹ Although the precedents, judicial or otherwise, on this question are few,⁴⁰ the better view seems to be that the legislature has power only to change the provi-

35 See 8 Wigmore, Evidence (3rd ed. 1940) §2275(a); Note (1930) 30 Col. L. Rev. 1160 (discussing a statute similar to the one here considered).

36 *Christal v. Police Commissioner of San Francisco*, 33 Cal. App. (2d) 564, 92 P. (2d) 416 (1939); *Souder v. City of Philadelphia*, 305 Pa. 1, 156 Atl. 245 (1931).

37 *In re Holland*, 377 Ill. 346, 36 N. E. (2d) 543 (1941) involved a judge of the municipal court of Chicago who refused to sign an immunity waiver when called before the grand jury. In subsequent disbarment proceedings, the court held that "unless the circumstances surrounding him or duties placed upon him are of such character as to require, in honesty and good conscience, that he waive the right," a person is not guilty of wrong should he claim it. 377 Ill. at 357, 36 N. E. (2d) at 548. Recently, two police officers in Chicago were discharged by the Civil Service Commission for invoking their constitutional privilege of immunity from self-incrimination by refusing to sign an immunity waiver when called upon to testify before a grand jury. On appeal, the Superior Court of Cook County quashed the record returned by the Commission, and the two cases are now pending on appeal before the Appellate Court. The Superior Court did not specifically reject the Commission's reasoning that a refusal to testify would be grounds for discharge, but distinguished between a refusal to testify and a refusal to sign a waiver, holding that the latter did not constitute grounds for discharge. *Drury v. Hurley*, case No. 47-S17720 (1948); *Connelly v. Hurley*, case No. 47-S17721 (1948). If a ruling is obtained by the Appellate or Supreme Court that a refusal to testify is grounds for discharge under the Civil Service Act, then there would be no need for this proposed statute as applied to police officers and other civil service officers. For a discussion of these cases, see Note (1948) J. Crim. L. & Criminology 613.

38 New York Const. Art. 1, §6. A similar provision has been included in the New York City Charter, §903. The removal power has been exercised in at least two New York cases. *People v. Harris*, 294 N. Y. 424, 63 N. E. (2d) 17 (1945); *Canteline v. McClellan*, 282 N. Y. 166, 25 N. E. (2d) 972 (1940).

39 The Constitutional provisions for removal are as follows: Art. VI, §30, applies to removal of judicial officers. The General Assembly may for cause remove from office any judge by a 3/4 vote of each house. Other judicial officers shall be removed from office on prosecution and final conviction for misdemeanor in office. Art. VI, §28 provides that justices of the peace in Chicago are removable by summary proceeding in circuit or superior court for extortion or other malfeasance.

40 *McCafferty v. Guyer*, 59 Pa. 109 (1868); *State ex rel. Gibson v. Friedley*, 135 Ind. 119, 34 N. E. 872 (1893); *Commonwealth v. Williams*, 79 Ky. 42 (1880). In *Louthan v. Commonwealth*, 79 Va. 196 (1884), a statute was held unconstitutional which allowed the Superintendent of Schools to be removed from office for participating in a political meeting. The court stated that a constitutional officer cannot be removed from office for exercising any right guaranteed under the constitution. In *People v. Dreher*, 302 Ill. 50, 56, 134 N. E. 22 (1922), the court stated: "There is no prohibition, or limitation in the Constitution of this State on the power of the legislature to prescribe the means by which officers, other than judicial officers, below the grade of state officers may be removed from office."

sions for removal for those offices over which it has some measure of control.⁴¹ It must be noted that the exception provided in the bill covers only those offices for which the constitution provides both causes and methods for removal which are exclusive, and does not, by its terms, extend to those state civil officers for which the constitution may provide only a method for removal.

It has also been argued that the bill in effect nullifies the constitutional protection against self-incrimination for the public officials involved. They may exercise their privilege, but to do so involves the loss of their primary livelihood. It can be said, however, that the bill will not deprive any person of his constitutional right to refuse to testify, but does provide that no person serving the public can hide his criminality behind that privilege and still hold public office. An official may assert his constitutional right, but he has no constitutional right to hold his office.⁴²

As originally worded in the version of this bill introduced in the 1947 session of the legislature, permanent disqualification from office was the penalty for a refusal to testify. This disqualification has been reduced to a period of five years to mitigate the harshness of the penalty. It is necessary to have some such provision in the bill, since if there is not, the purpose of the bill may be avoided by merely appointing the discharged official to another position, or changing the name of his office.⁴³ It is possible to argue that a disqualification from future office is, in effect, establishing qualifications for holding public office. An objection can then be raised that the qualifications for office as specified in the constitution are exclusive,⁴⁴ but it would seem that such holdings have been in situations involving non-moral qualifications, as where the period of residency established by the constitution is changed by statute for a particular office. Statutes prescribing the holding of public office by convicted felons

41 Mechem, *The Law of Public Offices and Officers* (1890) §457: "... where the constitution provides that officers may be removed for a given cause, defining it in terms which have a definite and well understood legal meaning, it is not competent for the legislature to extend its scope by adding or incorporating offenses which do not fall within that meaning. The statement of one cause is an implied prohibition to the legislature's adding to it or extending it to other causes . . ." See Comment, *Claim of Immunity from Self-Incrimination by Public Officers* (1930) 64 U. S. Law Rev. 561; 8 Wigmore *Evidence* (3rd ed. 1940) §2275a.

42 *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 29 N. E. 517 (1892) (police officer discharged for taking active part in politics). It has been definitely established that an official does not have a property right in his office. *Preston v. Chicago*, 246 Ill. 26, 92 N. E. 591 (1910); *People ex rel. Gersch v. Chicago*, 242 Ill. 561, 90 N. E. 259 (1909). See Note (1930) 30 Col. L. Rev. 1160.

43 This was done in New York after the constitutional amendment was adopted. In *People v. Harris*, 294 N. Y. 424, 63 N. E. (2d) 17 (1945), Cassidy, the Commissioner of Water Supply of Albany was removed for refusal to sign an immunity waiver. The city officials thereupon created the office of Water Rent Delinquencies and appointed Cassidy to that office at the same salary. As a result of this avoidance of the constitutional amendment, a statute has been proposed in New York which would disqualify the removed officer from all public offices for a specified period of time.

44 *People v. McCormick*, 261 Ill. 413, 103 N. E. 1053 (1913) (statute held unconstitutional which required five years residence in the county for county commissioners); *State v. Bateman*, 162 N. C. 588, 77 S. E. 768 (1913) (statute requiring recorder to be licensed attorney at law held unconstitutional). See Mechem, *Public Officers* (1890) §96; 1 Story on the Constitution, 625. It is, of course, within the power of the legislature to provide its own qualifications for offices whose qualifications are not set forth in the constitution or for offices created by the legislature. *People v. Olson*, 245 Ill. 288, 291, 92 N. E. 157, 158 (1910).

have never been attacked on this ground.⁴⁵ If the disqualification be viewed as a moral or character requirement for holding office, it would not seem to contravene the exclusiveness of constitutional qualifications for office.

From the standpoint of engendering in all public officials a higher standard of public duty, as well as making investigations of malfeasance in office much easier, such a statute would be clearly desirable. It would have no application to the private affairs of public officials. It is difficult to see how such a statute could be misused, and the only opposition to it could come from a personal fear of investigation. It is within the legislative power to regulate against acts incompatible with a proper discharge of the public official's duty,⁴⁶ and this is a clear case where such power should be exercised.

The Immunity Bill

Of all the bills here discussed the immunity bill is undoubtedly the least controversial in nature. Its constitutional validity is beyond serious challenge. Its effectiveness in the investigation of modern large-scale criminal activities has been widely recognized.⁴⁷ The legal principle upon which it operates is embodied in many provisions scattered throughout Illinois statute law, both in the Criminal Code and in various regulatory measures.⁴⁸ The proposed bill would empower the court on motion of the state's attorney to grant general immunity to a material witness in any grand jury investigation or at the trial of any offense, either felony or misdemeanor, when the witness withholds evidence by asserting his constitutional privilege against self-incrimination.⁴⁹ After grant of immunity, persistence in his refusal to testify or produce evidence would subject the recalcitrant witness to imprisonment for contempt for as long as two years.⁵⁰ At present the only criminal laws on the books which are implemented in their enforcement by immunity clauses are the bribery and labor extortion laws.⁵¹ Obviously there are many other crimes, such as conspiracies generally, gambling, and election frauds, requiring the participation of two or more persons, where a comprehensive immunity statute would be of immense assistance in obtaining convictions otherwise impossible. Although there exists in the absence of legislative authorization some common-law support for a power in the prosecutor, either alone or with the approval of the court, to offer immunity to one accom-

⁴⁵ Ill. Rev. Stat. (1947) c. 38, §616.

⁴⁶ *People v. Loeffler*, 175 Ill. 585, 51 N. E. 785 (1898): "When offices are created by statute, those offices are wholly within the control of the legislature which created them." See *People v. Dreher*, 302 Ill. 50, 134 N. E. 22 (1922), *supra* note 39.

⁴⁷ 4 Wigmore, *Evidence* (3rd ed. 1940) §2284; Note (1920) 5 Iowa L. Bull. 175; Note (1922) 12 J. Crim. L. & Criminology 381; Dession, *Criminal Law Administration and Public Order* (1948) 381.

⁴⁸ Ill. Rev. Stat. (1947) c. 38, §82 (Bribery and attempted bribery); Ill. Rev. Stat. (1947) c. 38, §245 (labor extortion); *cf.* Ill. Rev. Stat. (1947) c. 38, §335 (disgorging illegal funds from gaming); Ill. Rev. Stat. (1947) c. 63, §6 (testimony before the General Assembly or a committee thereof); and statutes treating the following subject matters: Anti-trust and corporate officers; prostitution nuisance (injunctive relief); insurance regulation; trucking; liquor control; cigarette tax; messages tax.

⁴⁹ See note 32 *supra*.

⁵⁰ A substantially similar bill was introduced at the 1947 session of the General Assembly and was killed by the House Judiciary Committee, modified and presented to the Senate, and there killed after being referred out of the Judiciary Committee without recommendation.

⁵¹ Cited *supra* note 46.

police for testimony against another, the practice has apparently never prevailed in Illinois and is elsewhere severely limited in its scope.⁵² Instead of the present crazy-quilt of special enactments affecting only particular crimes and employing varied phraseology, the proposed immunity law, as set forth below, would make available to law enforcement officials in all cases the authority to compel the production of incriminating matter from relatively minor offenders in the interest of obtaining sufficient evidence to convict the major defendant. The bill provides as follows:

“Whenever, in any investigation before a grand jury, or trial in a court of record, of any person charged with a criminal offense (either felony or misdemeanor) it shall appear to the court that any person called as a witness in behalf of the prosecution is a material witness and that his testimony or any evidence he may produce, documentary or otherwise, would tend to incriminate him, on motion of the State’s Attorney the court may cause an order to be entered of record that such witness be released from all liability to be prosecuted or punished on account of any transaction, matter, or thing concerning which he may be required to testify or produce evidence, documentary or otherwise, the order shall forever after be a bar to any indictment, information or prosecution against the witness for any felony or misdemeanor shown in whole or in part by such matter except for perjury committed in the giving of such testimony. Any witness, who, having been granted immunity as aforesaid, refuses to testify or produce evidence, documentary or otherwise, may be punished for contempt of the court and sentenced to the county jail for not more than two years.”

The general principle upon which all immunity provisions are based is that the constitutional privilege against being compelled to testify to facts which tend to incriminate the witness may be effectively annulled if the penalty for the offense disclosed thereby is eliminated. If the sting of criminality attaching to certain conduct is withdrawn as to a particular individual, it is as though the statute prescribing the punishment for the offense in question had never been enacted. Thus the witness may be compelled as in all other cases to testify to facts which to him are no longer personally incriminating. On theory, the validity of such an exchange of privilege for immunity cannot be questioned.⁵³ The practical difficulty in drafting such a statute lies in making the immunity precisely co-extensive with the constitutional privilege which is to be abrogated. An amnesty broader than is absolutely necessary confers an unwarranted “gratuity to crime.”⁵⁴ On the other hand, a grant of

⁵² Cf. *People v. Bogolowski*, 326 Ill. 253, 157 N. E. 181 (1927) (defendant testified against his accomplice after promise of immunity by prosecutor alone; held, subsequent conviction of defendant could not stand). Usually the offer of immunity by the prosecutor does not affect the privilege if the approval of the court is not obtained. *Ex parte Napoleon*, 144 S. W. 269 (Tex. Crim. App. 1912); *People v. Groves*, 63 Cal. App. 709, 219 Pac. 1033 (1923) (such private agreements are against public policy). If the court does give its sanction, the promises are upheld. *Ex Parte Copeland*, 240 S. W. 314 (Tex. Crim. App. 1922); *State v. Ward*, 112 W. Va. 552, 165 S. E. 803 (1932).

⁵³ *Brown v. Walker*, 161 U. S. 591 (1896); *People v. Rockola*, 346 Ill. 27, 178 N. E. 384 (1931); *Ex Parte Williams*, 127 Cal. App. 424, 16 P. (2d) 172 (1932); 4 Wigmore, *Evidence* (3rd ed. 1940) §2281 (traces principle as far back as 1725).

⁵⁴ See *Holmes, J.*, in *Heike v. United States*, 227 U. S. 131 (1913).

immunity which leaves the witness exposed to subsequent prosecution based in whole or in part on revelations made during his forced disclosures would be constitutionally objectionable. If the witness were not offered sufficient protection from the legal consequences of offenses which he might bring to light, he could refuse, as before, to testify, and the purpose of the statute would be frustrated.⁵⁵

There are two distinct types of immunity provisions in effect in Illinois at this time. One type of statute merely confers protection against the use of the evidence given under testimonial compulsion as the basis for any subsequent prosecution.⁵⁶ This means only that the record of the testimony given at the earlier hearing will not later be offered in evidence against the witness. It does not shield him against evidence which is unearthed as a result of clues furnished by the testimony at the first hearing. Though the question of whether one may be compelled under such a statute to reveal incriminating facts has not been answered in Illinois, it has been answered in the negative elsewhere under similar constitutional limitations.⁵⁷ The second type of statute removes liability for punishment "on account of any transaction, matter, or thing" testified to by the witness. It accords immunity in the most sweeping fashion possible, not only for the crime actually inquired about but also for those crimes incidentally revealed during the course of the testimony.⁵⁸ Such scope is clearly necessary to provide an adequate substitute for the privilege which is to be taken away.⁵⁹ This latter type of statute is the model after which the proposed immunity bill is drawn. In order to prevent the witness from pouring out all his past derelictions, whether relevant to the matter at issue or not, and thus securing in effect a pardon for each past offense, the instant bill would authorize extension of immunity only as to those offenses "concerning which he may be required to testify."

⁵⁵ The question of the extent of immunity conferred by the statute can arise in one of two ways: (a) the accused has made disclosure of a separate offense, and is later charged with it, and then pleads an immunity gained by his disclosure, or, (b) accused refuses disclosure of the other offense alleging it to be a separate one, therefore not covered by the immunity and therefore still privileged. The decision should be the same whichever way the question arises. *Cf. People v. Argo*, 237 Ill. 173, 86 N. E. 679 (1908); *Re Doyle*, 257 N. Y. 244, 177 N. E. 489 (1931).

⁵⁶ Ill. Rev. Stat. (1947) c. 63, §6. *Cf. People v. Kelly*, 24 N. Y. 74 (1861).

⁵⁷ *Counselman v. Hitchcock*, 142 U. S. 547 (1892); *Ex Parte Carter*, 166 Mo. 604, 66 S. W. 540 (1902); *Commonwealth v. Frank*, — Pa. Super. —, 48 A. (2d) 10 (1946).

⁵⁸ Ill. Rev. Stat. (1947) c. 38, §82 (bribery). It was held originally that this immunity only extended to subsequent prosecutions for bribery based on derivative evidence. *People v. Argo*, 237 Ill. 173, 86 N. E. 679 (1908). This holding was later overruled *sub silencio* in *People v. Boyle*, 312 Ill. 586, 144 N. E. 342 (1924), extending the immunity granted in §82 to offenses revealed which "relate to the charge of bribery." The pertinent language of the proposed bill is ". . . shall be a bar to prosecution . . . for any felony or misdemeanor shown in whole or in part by such matter." For constitutional purposes this scope of protection is said to be essential. *People v. Rockola*, 342 Ill. 27, 178 N. E. 384 (1931). *But cf. People v. Sharp*, 107 N. Y. 427, 14 N. E. 319 (1887) (valid if only a bar against subsequent bribery prosecutions).

⁵⁹ See *People v. Spain*, 307 Ill. 283, 284, 138 N. E. 614 (1923) ("the rule is firmly established that if the proposed evidence has a tendency to incriminate the witness or to establish a link in the chain of evidence which may lead to his conviction or if the proposed evidence will disclose the names of persons upon whose testimony the witness might be convicted of any criminal offense, he cannot be compelled to answer").

The bill does not cover voluntary admissions not demanded by the interrogator.⁶⁰

To attain the ideal of co-extensiveness with constitutional privilege, the statutory grant of immunity should be used solely to overcome an obstacle, i.e., a meritorious refusal to answer to a particular line of inquiry.⁶¹ It should not be used where the desired information can be had voluntarily or where the witness' evidence is not truly privileged.⁶² A common example of the wasteful use of the immunity power is presented by the typical clause in acts setting up legislative investigating committees and some administrative agencies.⁶³ Once the witness or his private records are subpoenaed he is automatically insulated from prosecution for anything he might divulge at the hearing.⁶⁴ He need not make a specific claim of privilege once on the stand. Under this type of statute the prosecutor is at a disadvantage since he does not know whether, or to what extent, a witness may have participated in a crime; and so runs the risk of unintentionally affording immunity. The proposed immunity bill does, however, take advantage of the requirement of timely assertion of privilege. It provides that the court may order that the witness be rendered immune from future prosecution if it appears that evidence that the witness can produce will tend to incriminate him. Thus it is reasonable to assume that this extraordinary power which would be vested in the court would be used sparingly and only to obtain evidence which would not be available under ordinary process.⁶⁵

⁶⁰ This assumes that the witness has already claimed his privilege and that the court has ordered that the immunity be granted. The witness' answers would have to be responsive to the question or they could be stricken; the prosecutor's questions would presumably be relevant to the facts in issue, the result being that only those utterances of the witness which are essential to the particular trial or investigation will be protected. Even though there were no express provision to that effect, the immunity would not logically extend to perjury. *People v. Kramer*, 14 N. Y. S. (2d) 161 (1939). Also, if after grant of immunity the witness in fact said nothing that tended to convict him of crime the immunity might be held not to have attached. *See Carchidi v. State*, 187 Wis. 438, 204 N. W. 473 (1925).

⁶¹ The privilege may be waived if not seasonably asserted. Comment (1940) 49 *Yale L. J.* 1059; Annotation, *Privilege Against Self-Incrimination Before Grand Jury* (1923) 27 *A. L. R.* 139. The trial judge has the last word on whether the evidence the witness desires to withhold is actually damaging. For the classic formula as expressed by Marshall, C. J., see *In re Willie*, 25 Fed. Cas. 38, 40 (C. C. Va. 1807).

⁶² *E.g.*, Corporate records, *Wilson v. United States*, 221 U. S. 361 (1911).

⁶³ For example, in 56 Stat. 23 (1942), as amended, 50 USCA Appendix, §901 *et seq.*; Ill. Rev. Stat. (1947) c. 38, §245 ("No person shall be excused from attending, testifying and producing any books, papers, documents or other evidence in obedience to a subpoena served at the instance of the Attorney General or of the State's attorney before any court, magistrate, or grand jury, upon any investigation, proceeding or trial for a violation of the provisions of this act, upon the ground, or for the reason that the testimony or evidence . . . required of him, may tend to criminate him or subject him to a penalty or forfeiture, etc.'").

⁶⁴ *United States v. Monia*, 317 U. S. 424 (1943); Note (1943) 41 *Mich. L. Rev.* 1199; *In re Grand Jury*, 135 N. Y. Supp. 103 (1912) (immunity waiver ineffective). *Contra: People ex rel. Roach v. Carter*, 297 *Mich.* 577, 298 N. W. 288 (1941); cases collected in Note (1937) 10 *So. Calif. L. Rev.* 344.

⁶⁵ For instance, documentary evidence which is incriminating to the person producing it may be compelled under the proposed statute. If the papers are records required to be kept by law, they may well not be privileged at all, and thus may be compelled under ordinary process. *See Shapiro v. United States*, 335 U. S. 1 (1948). The immunity provision of the act under which the General Assembly and its committees conduct investigations has a proviso relating to non-privileged records so as to prevent the extension of immunity thereto. Ill. Rev. Stat. (1947) c. 63, §6. For an example of an imprudent conference of immunity where it was not demanded, see *People v. Finklestein*, 299 Ill. App. 363, 20 N. E. (2d) 290 (1939) (corporate books).

The most serious objection taken to immunity statutes as a class is based on defects in our complex and interlocking federal system. It is that no one sovereign can immunize a witness against prosecution at the hands of another sovereign, violation of whose law may also be revealed by the evidence given under grant of immunity. This objection may be more fully appreciated when it is remembered how inextricably the federal tax laws are bound up with normal business activity. Tax evasion and criminality under state laws often go hand in hand. Yet conceding the weight of such an argument, few courts have accepted it,⁶⁶ and the United States Supreme Court has recently held that it is not a violation of the Fifth Amendment privilege to base a federal conviction on evidence obtained from a defendant in a state court under grant of immunity.⁶⁷

That the statute would be an efficient tool in the investigation of crimes where chief reliance must be placed on the testimony of persons actually implicated can be little doubted. That the present distribution of immunity clauses throughout the statute books is illogical is apparent. No reason is seen why this device should not be utilized in the enforcement of all the criminal laws. The exercise of the power to grant immunity from future prosecution is amply restricted by giving it primarily to the trial judge, and by the requirement that the witness' testimony be material to the cause being tried or investigated. Further, only witnesses on behalf of the prosecution can be clothed with immunity. It would thus be impossible for a witness, aided by the defense attorney, to give testimony on behalf of the defense which would incriminate him and yet which would clear the accused—with the result that both would escape punishment.⁶⁸ The late Dean Wigmore recommended a similar bill almost twenty-five years ago, calling it a "valuable and satisfactory aid to investigation and prosecution of crime."⁶⁹ It is high time this salutary measure was enacted into law.

The Grand Jury Bill

"At common law the grand jury expired with the term, and no statute has changed this rule or authorized any court to continue a grand jury beyond the adjournment of the term."⁷⁰ So spoke the Illinois Supreme Court in 1923 and its words still accurately describe the situation that exists today. Moreover, the Criminal Court of Cook County, where the case arose which provoked the Court's observation, still has a term of court which expires at the end of a month, in contrast with other counties in the state whose terms range from three to six months.⁷¹ Thus Cook

⁶⁶ *Jack v. Kansas*, 199 U. S. 372 (1905) (testimony compelled under grant of immunity with federal prosecution probable; no violation of any federal constitutional right); *United States v. Murdock*, 284 U. S. 141 (1931) ("The principle is well established that full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the rule against self-incrimination"). *But cf. In re Watson*, 293 Mich. 263, 291 N. W. 652 (1940) ("To overcome the privilege, the extent of the immunity would have to be of such a nature that it would protect not only against state prosecution but also against any reasonably probable federal prosecution"); *In re Ward*, 295 Mich. 742, 295 N. W. 483 (1940).

⁶⁷ *Feldman v. United States*, 322 U. S. 487 (1944).

⁶⁸ Note (1939) 13 So. Calif. L. Rev. 160.

⁶⁹ 4 Wigmore, Evidence (3rd ed. 1940) §2284.

⁷⁰ *People v. Brautigan*, 310 Ill. 472, 142 N. E. 208 (1923).

⁷¹ Ill. Rev. Stat. (1947) c. 37, §724 *et. seq.*

County, the most heavily populated and highly urbanized county in all the state, has a grand jury which because of its abnormally short life is unable to maintain the vigorous and prolonged investigation which is requisite to cope with modern organized crime.

A statutory change is certainly indicated, and the following bill has been proposed:

“ . . . provided, further that in counties having a population of more than two hundred fifty thousand inhabitants, the names of the persons to constitute the regular and supplemental panels shall be drawn in the manner provided for the drawing of names of persons to serve as petit jurors in such counties; the twenty-three names to provide the regular panel shall be first drawn, and thereupon twenty names for the supplemental panel shall be drawn and listed on that panel in the order in which they are drawn; *provided that in counties having a population of more than five hundred thousand inhabitants, the court on petition of the State's Attorney or upon its own motion may extend the term of any grand jury for a period of thirty days; provided that no grand jury shall serve in excess of six months; and, provided that the existence of an extended grand jury shall not affect the impanelling, existence or power of the regular grand jury; and, provided further that there shall be no more than one such extended grand jury and one regular grand jury in existence in any one of said counties at the same time.*”⁷² (New matter italicized.)

The foregoing grand jury bill would seem to meet the Cook County problem admirably.⁷³ It would empower the court in counties having a population of over 500,000 to extend the term of any grand jury thirty days, for a total permissible life of six months. Only one such extended grand jury could be in existence in one county at the same time, although the proposed enactment expressly allows the impaneling of the regular grand jury to proceed as heretofore. Presumably the power to call a statutory special grand jury would likewise not be impaired.

Legislative action pertaining to grand juries presents the only solution to this constantly recurring problem. Attempts in the past by court order alone to hold over a grand jury past its prescribed term so that it could conclude important business have not been legally satisfactory. If no regular grand jury is impaneled at the beginning of the new term and the preceding grand jury is held over to continue its deliberations, the Supreme Court has held that it has at least a *de facto* existence and may initiate contempt proceedings against a witness that refuses to testify before it.⁷⁴ It is very doubtful, however, whether such a body could return indictments which could withstand a timely motion to quash or a challenge to the array.⁷⁵ But if a regular grand jury is summoned to

⁷² In form, an amendment to the Juror's Act, Ill. Rev. Stat. (1947) c. 73, §9.

⁷³ The bill as originally introduced in 1947 passed the Senate but was defeated in the House Executive Committee, and read as follows: “. . . provided that in the Criminal Court of Cook County, the Court shall order one or more grand juries to be summoned at such times as the public interest may require to serve until discharged by the Court, but not to exceed six months.”

⁷⁴ *People v. Cochrane*, 307 Ill. 126, 138 N. E. 291 (1923).

⁷⁵ The defendant in the *Cochrane* case, cited *supra* note 73, raised the question of illegality of the grand jury proceedings too late and thus was barred procedurally. No opinion was expressed on the effect of a timely assertion of illegality. *But cf.*

sit contemporaneously to handle the routine business of returning indictments, the continued grand jury has not even the power to compel testimony.⁷⁶ There is thus no common-law power in the court to prolong the life of a particular grand jury.⁷⁷ True, there is statutory authority for the calling of special grand juries when the court "is of the opinion that public justice requires it."⁷⁸ Contrary to the holdings by the appellate courts of some other states,⁷⁹ the Illinois Supreme Court has held that there is no constitutional barrier to legislative creation of any number of grand juries to function in the same county simultaneously.⁸⁰ Nevertheless, insofar as the special statutory grand jury is still a constituent part of the court which impanels and charges it,⁸¹ it has been said that it suffers from the same infirmity of abbreviated existence as the regular body. Therefore in Cook County it could probably function no longer than a month.⁸²

It should be noted, however, that were the reform proposed by this bill enacted the Criminal Court of Cook County would still possess far less power with respect to the number and tenure of outstanding grand juries than was vested in the federal district courts by the Rules of Criminal Procedure in 1938.⁸³ It may be objected that the bill by in effect singling out Cook County runs afoul of the State Constitutional provision against "local or special" laws affecting the summoning and impaneling of grand juries.⁸⁴ There is small merit in this contention, however. In the first place, the bill does not purport to affect the procedure of selecting and calling grand juries as such.⁸⁵ It only permits the regularly constituted grand jury to serve as long as the maximum term of court allowable under the Illinois Constitution.⁸⁶ Secondly, a law is not considered "special" because it classifies counties on the basis of population, if the number of inhabitants creates substantial difference in the needs concerning the subject of the legislation.⁸⁷ There would seem to be an obvious relationship between the number and life of grand juries and the population of the district wherein they function.⁸⁸ Certainly no legiti-

State v. Noyes, 87 Wis. 340, 58 N. W. 386 (1894); People v. Morgan, 133 Mich. 550, 95 N. W. 542 (1903).

⁷⁶ People v. Brautigan, 310 Ill. 472, 142 N. E. 208 (1924).

⁷⁷ *Accord*, Riley v. State, 209 Ala. 505, 96 So. 599 (1923); 38 C. J. S. Grand Juries, §32 p. 1022; Orfield, Criminal Procedure From Arrest to Appeal (1947), c. IV, p. 155.

⁷⁸ Ill. Rev. Stat. (1947) c. 78, §19. See Steiner, *Impaneling a Grand Jury in Illinois* (1936) 2 J. M. L. Q. 63.

⁷⁹ See Opinion to the Governor, 62 R. I. 200, 4 A. (2d) 487 (1939).

⁸⁰ People *ex rel.* Ferrill v. Graydon, 333 Ill. 429, 164 N. E. 832 (1929).

⁸¹ People v. McCauley, 256 Ill. 504, 100 N. E. 182 (1912).

⁸² See Peterson, *The Grand Jury—Voice of Democracy*, Criminal Justice, January 1944. *But cf.* Chamberlin, *Special Grand Juries in Illinois* (1930) 22 J. of Crim. L. & Criminology 163, 169. Although there are three courts of the same "grade" in Cook County, only the Criminal Court may summon a grand jury. People *ex rel.* Chicago Bar Ass'n v. Feinberg, 348 Ill. 549, 181 N. E. 437 (1932).

⁸³ Federal Rules of Criminal Procedure (1946) Rule 6 (eighteen months maximum life; no limit on number outstanding).

⁸⁴ Ill. Const. Art. 4, §22. See also, Art. 6, §29.

⁸⁵ *Cf.* People *ex rel.* Henderson v. Onahan, 170 Ill. 449, 48 N. E. 1003 (1897); People v. Traeger, 374 Ill. 355, 29 N. E. (2d) 519 (1940) (jury commissioner scheme in counties of 250,000 or more upheld).

⁸⁶ Ill. Const. Art. 6, §12 (at least two terms a year for circuit courts).

⁸⁷ Krause v. Peoria Housing Authority, 370 Ill. 356, 19 N. E. (2d) 193 (1939); People *ex rel.* Bd. of Education v. Reed, 344 Ill. 397, 176 N. E. 234 (1939). *Cf.* Hunt v. Rosenbaum Grain Corp., 355 Ill. 504, 189 N. E. 907 (1934).

⁸⁸ See 28 USCA §421 (1928), 36 Stat. 267 (1910) (two grand juries may be con-