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EVIDENCE

Nothing is opened so frequently by mistake as the human mouth.—ANONYMOUS.

DEVELOPMENTS IN EVIDENCE— 1950–1960

EDWARD W. CLEARY

AN ATTEMPT TO cover significant developments of a decade of extensive judicial and legislative activity in the field of evidence within the allotted space poses at the outset a hard choice: whether to survey in breadth or to dig in some depth. The author has chosen the latter. Consequently, much has been omitted which may well be considered of more importance than what is included. Many of the decisions are arbitrary.

The reader has been left to his own industry to explore such important developments as the advent of common sense to the opinion rule,¹ and some withering of the rule against impeaching one's own witness.² The role of the presumption is left untouched for those who gain relaxation from solving puzzles.³ Important legislation, including that which provides for blood tests in paternity cases,⁴ and the Uniform Act to secure the attendance of witnesses from within or without a state in criminal cases, receives no mention.⁵

The effort has been to explore critically some of the important things which have been done and a few of those which have not been done.

¹ *Clifford-Jacobs Forging Co. v. Industrial Comm'n*, 19 Ill.2d 236, 166 N.E.2d 582 (1960); noted in 1960 U. ILL. L.F. 457.

² *People v. Wesley*, 18 Ill.2d 138, 163 N.E.2d 500 (1959); ILL. REV. STAT. ch. 110, § 60 (1959).

³ *Kettlewell v. Prudential Ins. Co.*, 4 Ill.2d 383, 122 N.E.2d 817 (1954). Cf. Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5 (1959); ILLINOIS PATTERN JURY INSTRUCTIONS, Nos. 22.01, 50.07, 50.08 (1961).

⁴ ILL. REV. STAT. ch. 106½, §§ 1-7, 55 (1959).

⁵ ILL. REV. STAT. ch. 38, §§ 690.1-6 (1959).

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SEARCH AND SEIZURE

THE CONSTITUTIONAL PROTECTION

Illinois was one of the early members of the constantly increasing group of states giving realistic effect to the constitutional inhibition against unreasonable searches and seizures by excluding from evidence the results thereof.⁶ The propriety of a particular search and seizure is thus translated into a question of admission or exclusion of evidence. Developments of significance have occurred in the past ten years, and it seems likely that the stage has been set for additional changes in this area.

Years ago the Supreme Court of the United States, in formulating the rule of exclusion in federal prosecutions of evidence obtained in violation of the constitutional protection against unreasonable searches and seizures, excepted from its operation evidence seized by independently acting state officers: the Constitution protected only against action by federal officers.⁷ Under this "silver platter" doctrine, evidence unlawfully seized by state officers was admissible in federal cases. Illinois adhered to the silver platter doctrine, refusing to exclude evidence unlawfully seized by Wisconsin officers.⁸ The consequence of the doctrine was to countenance activities which would have resulted in exclusion if carried on by enforcing officers of the prosecuting jurisdiction. Only recently the Supreme Court of the United States jettisoned the silver platter doctrine as encouraging violations of fundamental rights, involving a logic beyond the dictates of reason, striking at the roots of a healthy federalism, and undermining the integrity of the judicial process itself.⁹ These are powerful reasons, which might well induce the Supreme Court of Illinois to abandon the silver platter doctrine, particularly in view of the fact that original adherence was in a case involving unlawful seizure in another state, rather than by federal officers acting in Illinois.¹⁰

Another aspect of the rule excluding unlawfully seized evidence is the extent of the "parasitic" right of search, incidental to a lawful ar-

⁶ *People v. Brocamp*, 307 Ill. 448, 138 N.E. 728 (1923).

⁷ *Weeks v. United States*, 232 U.S. 383 (1914). See MCGUIRE, EVIDENCE OF GUILT 209-17 (1959).

⁸ *People v. Touhy*, 361 Ill. 332, 197 N.E. 849 (1935).

⁹ *Elkins v. United States*, 364 U.S. 206 (1960).

¹⁰ *People v. Touhy*, 361 Ill. 332, 197 N.E. 849 (1935).

rest. Illinois has adhered to the view that evidence is not to be excluded because seized in connection with an arrest for another crime.¹¹ As a general proposition, this view seems to be sound. However, when it was extended to include arrests for minor traffic violations,¹² the possibilities of circumventing basic constitutional guarantees became apparent. Officers without sufficient cause to arrest a suspect on a particular charge merely had to follow him until he committed the inevitable parking or other minor violation; then he could be arrested and searched. Recently the Supreme Court withdrew its approval of this practice.¹³ Traditionally, the parasitic right of search has been justified basically *because* of the necessity of searching the prisoner for weapons which might be used to injure the officer or to effect an escape. If evidence of the crime was found during the search, the realities of everyday life rebutted any contention that it had to be restored. In changing its position, the Supreme Court also worked a change in the basic justifying formula, substituting *when* for *because*.¹⁴ As suggested with vigor in the specially concurring opinion, it may be unrealistic to "establish by judicial fiat that all minor traffic offenders must be accepted by arresting officers as persons who pose no threat to their personal safety."¹⁵ The dilemma thus posed between constitutional abuses and the safety of law enforcement officers is troublesome. Perhaps a more direct approach, involving inquiry into the motivation of the arresting officers, would have avoided this particular difficulty. While exploring motivation is in itself a matter of difficulty, that fact has never deterred the law from embarking upon it.

A third problem in connection with the rule excluding unlawfully seized evidence involves the "standing" required to support a motion to suppress or an objection to admission. Must the accused assert a property right, *e.g.*, ownership, in the item seized in order to entitle

¹¹ *People v. Brown*, 354 Ill. 480, 188 N.E. 529 (1933). Accused was arrested for one bank robbery. Search disclosed evidence of another bank robbery, of which he was convicted.

¹² *People v. Edge*, 406 Ill. 490, 94 N.E.2d 359 (1950). Accused, arrested for parking violation and failure to have safety sticker, was convicted of policy violation on the basis of evidence found. *People v. Clark*, 9 Ill.2d 400, 137 N.E.2d 820 (1956) (*semble*). See also *People v. Berry*, 17 Ill.2d 247, 161 N.E.2d 315 (1959).

¹³ *People v. Watkins*, 19 Ill.2d 11, 166 N.E.2d 433 (1960); *People v. Mayo*, 19 Ill.2d 136, 166 N.E.2d 440 (1960).

¹⁴ *People v. Watkins*, *supra* note 13, at 18, 166 N.E.2d at 437.

¹⁵ *Id.* at 23, 166 N.E.2d at 439.

him to complain of the manner in which it was seized? In the first two cases announcing the rule of exclusion of unlawfully seized evidence, the defendants unabashedly asserted ownership¹⁶ or possession.¹⁷ Thereafter, however, the possibility seems to have occurred to defense counsel that such statements might be allowed in evidence as admissions,¹⁸ and petitions to suppress which omit any reference to ownership appear repeatedly in the cases. The Supreme Court of Illinois then held time after time that an accused could not raise the question of unlawful seizure unless he claimed ownership of the property and asked for its return.¹⁹ True, on one occasion in a burglary case involving unlawful seizure of the stolen registered bonds, the court scented some inconsistency in its position:

If, in order to have them suppressed he must allege that he owned them, then he has in effect been compelled to admit the possession of stolen property recently following a crime, which is sufficient in itself, unless explained, to authorize conviction.²⁰

The difficulty was resolved by ruling that the petition to suppress need not allege ownership when the unlawful seizure occurred at the home of the accused. The distinction is unwarranted: unlawful seizure is unlawful seizure. While the locus may be a factor properly to be considered in determining the legality of the seizure, it should not affect the consequences of a seizure once determined to be unlawful. The distinction might be tenable if "home" is equated to possession, but this the court has not done.

The dilemma of the accused who could not claim ownership or right of possession without confessing guilt or at least making a very damaging admission was again considered in *People v. Perry*,²¹ in which the accused was convicted of unlawfully possessing slot machines owned by a club of which he was manager. The court saw no paradox in the position of an accused who could have possession sufficient to

¹⁶ *People v. Brocamp*, 307 Ill. 448, 138 N.E. 728 (1923) (prosecution for receiving stolen property).

¹⁷ *People v. Castree*, 311 Ill. 392, 143 N.E. 112 (1924) (prosecution for unlawful possession and sale of liquor).

¹⁸ This fear finds support in *State v. Dersiy*, 121 Wash. 455, 209 Pac. 837 (1922).

¹⁹ *People v. Exum*, 382 Ill. 204, 47 N.E.2d 56 (1943); *People v. Edge*, 406 Ill. 490, 94 N.E.2d 359 (1950); *People v. Perry*, 1 Ill.2d 482, 116 N.E.2d 360 (1953); *People v. Gambino*, 12 Ill.2d 29, 145 N.E.2d 42 (1957); *People v. Perroni*, 14 Ill.2d 581, 153 N.E.2d 578 (1958).

²⁰ *People v. Grod*, 385 Ill. 584, 591, 53 N.E.2d 591, 595 (1944).

²¹ 1 Ill.2d 482, 116 N.E.2d 360 (1953).

support a charge of illegal possession but not sufficient to support a claim of unlawful seizure.²²

From the number and overall consistency of the decisions, it might be concluded that so far as Illinois is concerned law-enforcing officers may proceed freely to effect unlawful seizures as long as their efforts are confined to items of which possession is in itself a crime or tantamount to proof of crime, *e.g.*, narcotics and stolen property. However, the Supreme Court of the United States recently considered the question of standing to complain of unlawful seizure and came up with a different answer. In a narcotics case, the District Court denied a motion to suppress the narcotics because the accused claimed neither ownership of the articles seized nor a possessory interest in the locus. Conceding the general principle that only the victim of an invasion of privacy could complain, the Court perceived a difference in the cases in which possession equalled or tended to equal guilt. The Court fitted the dilemma shoe on the other foot: The government sought to base a conviction on a possession which was not sufficient to support a claim of unlawful seizure. Consequently, the government should be required ordinarily to choose between opposing a motion to suppress made before trial and basing the case on possession.²³ And even more recently the Supreme Court of Illinois, in rejecting a contention by the State that unlawfully seized evidence would be suppressed only when self-incriminating, gave a clear indication of its willingness to re-examine the entire matter of standing.²⁴

WIRETAPPING—ELECTRONIC EAVESDROPPING

The Federal Communications Act,²⁵ once the initial shock of construing "any person" as including a federal officer²⁶ is surmounted, has on the whole received a narrow construction. None of the following has been held to violate the statute: wiring a stool pigeon for sound so as secretly to broadcast a conversation with a suspect for the benefit of tuned-in government agents;²⁷ applying the detectaphone

²² *Id.* at 488, 116 N.E.2d at 364.

²³ *Jones v. United States*, 362 U.S. 257 (1960).

²⁴ *People v. Mayo*, 19 Ill.2d 136, 166 N.E.2d 440 (1960) (citing *Jones v. United States*, *supra* note 23).

²⁵ 47 U.S.C.A. § 605 (Supp. 1960).

²⁶ *Nardone v. United States*, 302 U.S. 379 (1937).

²⁷ *On Lee v. United States*, 343 U.S. 747 (1952).

to the wall so as to pick up directly the voice of a person talking on the telephone;²⁸ listening on an extension telephone without the knowledge of the person at the other end of the line.²⁹

In Illinois, the Electronic Eavesdropping Act of 1957³⁰ requires a contrary result in each of these situations. Electronic eavesdropping is defined as:

the use of any device employing electricity to hear or record, or both, all or any part of any oral conversation . . . without consent of any party thereto, whether such conversation is conducted in person or by telephone. . . .³¹

So stringent is the definition that specific exceptions were required in order to legalize the use of hearing aids by the deaf and the enjoyment of radio and television broadcasts. The statute purports to extend its prohibitions to all persons, including both state and federal officers. The validity of its application to federal officers is, of course, open to serious doubt.³² Violation of the act is a misdemeanor.³³ Further eavesdropping may be enjoined, and both actual and punitive damages may be recovered.³⁴ The act further provides that evidence obtained in violation of its provisions is inadmissible in evidence.³⁵

Two further situations which have been passed upon in connection with the Federal Communications Act³⁶ may deserve comment. (a) In the second *Nardone* case,³⁷ evidence derived from illicit wiretapping was held to be inadmissible, as being, in Mr. Justice Frankfurter's famed phrase, "a fruit of the poisonous tree." The extent to which violation of the Illinois act will taint other evidence is not spelled out specifically in the statute. However, under the provision that evidence "obtained in violation of this Act is not admissible,"³⁸ reinforced by the provision making a person guilty of a misdemeanor who "uses . . . information"

²⁸ *Goldman v. United States*, 316 U.S. 129 (1942).

²⁹ *Rathbun v. United States*, 355 U.S. 107 (1957).

³⁰ ILL. REV. STAT. ch. 38, §§ 206.1-5 (1959).

³¹ ILL. REV. STAT. ch. 38, § 206.1 (1959).

³² *Ullman v. United States*, 350 U.S. 422 (1956) (upholding the power of Congress to grant a witness immunity against prosecution by a state).

³³ ILL. REV. STAT. ch. 38, § 206.2 (1959).

³⁴ ILL. REV. STAT. ch. 38, § 206.3 (a)-(e) (1959).

³⁵ ILL. REV. STAT. ch. 38, § 206.3 (f) (1959).

³⁶ 47 U.S.C.A. § 605 (Supp. 1960).

³⁷ *Nardone v. United States*, 308 U.S. 338 (1939).

³⁸ ILL. REV. STAT. ch. 38, § 206.3 (f) (1959).

obtained in violation of the act,³⁹ plus case law suppressing evidence discovered through information contained in evidence obtained through unlawful search and seizure,⁴⁰ the fruit of the poisonous tree rule seems to be indicated. Nevertheless, this result reasonably would seem to be limited to instances in which the information was obtained by engaging in electronic eavesdropping, and no tainting would follow in a situation in which a face to face conversation was illicitly recorded. Some analogy to the best evidence rule may be apparent. (b) The Supreme Court of the United States has held that a person who was not a party to the illicitly intercepted communication does not have standing to object to its use.⁴¹ The Illinois act provides:

Any or all parties to any conversation upon which electronic eavesdropping is practiced . . . shall have the following rights:

(f) Any evidence obtained in violation . . . is not admissible. . . .⁴²

The language in subsection (f) taken alone is sufficiently broad to confer standing to object upon one who was not a party to the intercepted conversation, yet the introductory language of the section limits standing to a party to the conversation. The intervening subsections seem clearly to make the remedies of injunction and damages available only to parties to the conversation.⁴³ Moreover, the "use" of information obtained by illegal electronic eavesdropping is made a misdemeanor.⁴⁴ Thus, competing rules of *expressio unius* and *eiusdem generis* result in a considerable problem of statutory construction. *People v. Mayo*,⁴⁵ involving unlawful search and seizure, may well indicate a disposition on the part of the Supreme Court of Illinois to recognize standing on the part of a person not a party to the conversation, when and if the question arises. This construction would seem to conform to the overall purpose and policy of the legislation, in the absence of clear indication from the language itself.

³⁹ ILL. REV. STAT. ch. 38, § 206.4 (1959).

⁴⁰ *People v. Martin*, 382 Ill. 192, 46 N.E.2d 997 (1942).

⁴¹ *Goldstein v. United States*, 316 U.S. 114 (1942). Government witnesses who confessed and turned state's evidence when confronted with the intercepted telephone conversations were held properly permitted to testify.

⁴² ILL. REV. STAT. ch. 38, § 206.3 (1959).

⁴³ ILL. REV. STAT. ch. 38, § 206.3 (a)-(e) (1959).

⁴⁴ ILL. REV. STAT. ch. 38, § 206.4 (1959).

⁴⁵ 19 Ill.2d 136, 166 N.E.2d 440 (1960).

BLOOD TESTS FOR ALCOHOL

In 1957, the Legislature provided for the admission in evidence of chemical analyses of breath, blood, urine, saliva, or other bodily substance, in cases of driving under the influence of liquor, with attendant presumptions that the person was or was not under the influence, or no presumption at all, variously depending upon the results of the analysis.⁴⁶ The great weight of scientific authority supports the accuracy and reliability of tests of this nature, and no serious contention against admissibility can be made on the ground of invalidity of the scientific method, provided there is compliance with usual requirements for admitting chemical analyses.⁴⁷

Constitutional problems which have been raised in many jurisdictions have not been passed upon in Illinois.⁴⁸ In *Breithaupt v. Abram*,⁴⁹ the Supreme Court of the United States reviewed a New Mexico conviction in a case in which a physician had, at the instance of police, removed a blood specimen while the accused was unconscious. The conviction was sustained against attack on the grounds of self-incrimination, unlawful search and seizure, and violation of due process. The rather limited effect of this decision must be noted. The fourteenth amendment does not require the states to recognize the privilege against self-incrimination⁵⁰ or to exclude unlawfully seized evidence.⁵¹ Hence, the only available ground was brutal and offensive police tactics within the purview of *Rochin v. California*,⁵² which the three dissenters thought applicable.

⁴⁶ ILL. REV. STAT. ch. 95½, § 144(b) (1959). For a recent comprehensive survey, see Slough & Wilson, *Alcohol and the Motorist: Practical and Legal Problems of Chemical Testing*, 44 MINN. L. REV. 673 (1960).

⁴⁷ The admissibility of breath tests was sustained in *People v. Bobczyk*, 343 Ill. App. 504, 99 N.E.2d 567 (1951), and in *People v. Garnier*, 20 Ill. App.2d 492, 156 N.E.2d 613 (1959). In *Woolley v. Hafner's Wagon Wheel, Inc.*, 27 Ill. App.2d 1, 169 N.E.2d 119 (1960), the scientific validity of blood tests was recognized, but the persnickety persistence on a detailed accounting for the specimen which characterizes many analysis cases resulted in exclusion. None of these cases mentions the statute.

⁴⁸ In *People v. Bobczyk*, *supra* note 47, constitutional questions were waived by appealing to the Appellate Court. In the other cases cited in *supra* note 47, no effort seems to have been made to raise constitutional questions, and in any event they would have been waived by appealing to the Appellate Court.

⁴⁹ 352 U.S. 432 (1957).

⁵⁰ *Adamson v. California*, 332 U.S. 46 (1947).

⁵¹ *Wolf v. Colorado*, 338 U.S. 25 (1949).

⁵² 342 U.S. 165 (1952).

Serious constitutional objection seems to lie only in regard to the taking of blood samples without consent. Obtaining specimens of breath, urine, or saliva in the natural course of nature seems to involve no problem of self-incrimination or unlawful seizure, even though some invasion of privacy may be inevitable. The taking of blood, however, which is by far the most satisfactory method of testing, does require a substantial infringement upon bodily integrity, which quite conceivably could result in coercive tactics of modestly Star Chamber proportions. While most courts have sustained the validity of taking blood specimens without consent, a serious doubt may well be raised. The Illinois statute makes no provisions as to the manner in which the specimen is to be obtained. Nor does the statute spell out the application or effect of the presumptions for which it provides. Presumably, they will be put before the jury in the form of appropriate instructions, with the larceny cases which depend on proof of possession perhaps suggesting a pattern.⁵³ Certainly any thought of applying the "bursting bubble" theory to such a presumption is inappropriate. In view of the recognized scientific basis for these presumptions, they seem immune against any claim of unconstitutionality on the ground of absence of rational connection between the basic facts and the presumed fact.⁵⁴

PRIVILEGE

PHYSICIAN AND PATIENT

The purpose of the whole process of trial is to get at the truth. Since a privilege is designed to suppress the truth, the relationship to be protected or the policy to be promoted should indeed be compelling in order to justify the suppression of the truth which any privilege engenders. The courts, in the common-law process of making law through decision, have been sparing in their recognition of privileges. The legislatures over the country have bowed more freely to the pressures of professional and other groups to create privileges in considerable variety, most of them of dubious merit.

In 1959, Illinois lost an engagement in the war of unsound privileges by joining the large group of states with statutes recognizing a physician-patient privilege. The loss, however, appears to have been exceedingly minor. The statute adds a new section, 5.1, to the Evidence Act, reading as follows:

⁵³ *People v. Stone*, 349 Ill. 52, 181 N.E. 648 (1932).

⁵⁴ *Cf. Tot v. United States*, 319 U.S. 463 (1943).

No physician or surgeon shall be permitted to disclose any information he may have acquired in attending any patient in a professional character, necessary to enable him professionally to serve such patient, except only (1) in trials for homicide when the disclosure relates directly to the fact or immediate circumstances of the homicide, (2) in all mental illness inquiries, (3) in actions, civil or criminal, against the physician for malpractice, (4) with the expressed consent of the patient, or in case of his death or disability, of his personal representative or other person authorized to sue for personal injury or of the beneficiary of an insurance policy on his life, health, or physical condition, (5) in all civil suits brought by or against the patient, his personal representative, a beneficiary under a policy of insurance, or the executor or administrator of his estate wherein the patient's physical or mental condition is an issue, (6) upon an issue as to the validity of a document as a will of the patient, or (7) in any criminal action where the charge is either murder by abortion, attempted abortion or abortion.⁵⁵

Except for the exceptions, the statute is a paraphrase of the New York statute of 1828,⁵⁶ which has been the inspiration of legislation in many states.⁵⁷ Though the commentators almost to a man have agreed on the unsoundness of privilege in this area,⁵⁸ except in regard to the psychiatrist,⁵⁹ the steady "me too" insistence of the doctors has been effective. However, the only real harm accomplished by the Illinois statute seems to lie in its recognition of the principle.

Several comments on the Illinois enactment are called for. In the first place, while the section purportedly applies to criminal proceedings, it seems to be wholly ineffective in this respect on constitutional grounds. The act amends "An Act in regard to evidence and depositions in civil cases." To include in an amendment to an act so entitled, a change in the rules of evidence in criminal cases is about as obvious a violation of the requirement that the subject be expressed in the title⁶⁰ as can be imagined.⁶¹ It seems clear that the act can have no application whatever in criminal cases.

⁵⁵ ILL. REV. STAT. ch. 51, § 5.1 (1959).

⁵⁶ 2 N.Y. REV. STAT. Part III, ch. 7, tit. 3, art. 8, § 73 (1829).

⁵⁷ WIGMORE, EVIDENCE § 2380 (3d ed. 1940).

⁵⁸ McCORMICK, EVIDENCE 211-24 (1954), contains a comprehensive discussion, with full references to the literature.

⁵⁹ Note, 47 NW. U. L. REV. 384 (1952); ASSOCIATION OF AMERICAN LAW SCHOOLS, SELECTED ARTICLES ON EVIDENCE AND TRIAL 254 (Fryer ed. 1957); GROUP FOR ADVANCEMENT OF PSYCHIATRY, CONFIDENTIALITY AND PRIVILEGED COMMUNICATION IN THE PRACTICE OF PSYCHIATRY (1960).

⁶⁰ ILL. CONST. art. 4, § 3.

⁶¹ Bradley v. Casey, 415 Ill. 576, 114 N.E.2d 681 (1953); Johnson v. Daley, 403 Ill. 338, 86 N.E.2d 350 (1949).

Secondly, the exceptions enumerated in the act by their terms render the act inapplicable in most types of litigation which are likely to occur. In view of the elimination of mental illness inquiries by exception (2), of malpractice cases by exception (3), of suits in which the patient's physical or mental condition is an issue by exception (5), and of will contests by exception (6), no small mental agility is required to imagine a situation in which either the application of the statute is not expressly negated or the consent of the patient or his representative will not be forthcoming under exception (4). The only one coming readily to mind is an action by a physician to recover fees for services rendered, a twist not without irony in a statute enacted in response to the demands of the profession.

Thirdly, if we are seriously concerned with maintaining the secrecy of professional confidences rather than merely with keeping the truth from coming out in court, serious thought ought to be given to following the pattern set by the French, making the disclosure of professional secrets a crime.⁶²

The practical nonexistence of areas for applying the Illinois statute renders unnecessary any discussion of problems which have arisen elsewhere as to when the physician-patient relationship exists,⁶³ the extent of matters included within the privilege, and when and how the privilege is waived.

SELF-INCRIMINATION

GRANTS OF IMMUNITY

Granting immunity from prosecution as a means of requiring a witness to give testimony which otherwise would be self-incriminating has had an interesting history in Illinois. In *People v. Bogolowski*,⁶⁴ the court held that the giving of testimony in reliance upon a promise of immunity by the prosecutor was a complete defense to prosecution for an offense disclosed in the testimony. Logically, this of course

⁶² CODE PÉNAL FRANÇAIS art. 378 (France 1934). See Purrington, *An Abused Privilege*, 6 COLUM. L. REV. 388, 394 (1906). An exhaustive discussion of art. 378 is found in 6 GARRAUD, *TRAITÉ DU DROIT PÉNAL FRANÇAIS* 63-89 (1935).

⁶³ Thus the Illinois courts need not decide whether the privilege includes veterinarians. See *Hendershott v. Western Union Telegraph Co.*, 106 Iowa 529, 76 N.W. 828 (1898), in which the symptoms of Bravo, a sick horse, were held inviolate by the trial judge, whose view, however, found no adherent on appeal. *Sed quaere* as to what would constitute consent.

⁶⁴ 326 Ill. 253, 157 N.E. 181 (1927).

suggested the possibility of compelling any witness to testify in return for a promise of immunity by the prosecutor, since the promise would remove any incriminating aspect of the testimony given. However, in *People v. Rockola*,⁶⁵ the court refused to accept the logic of the situation and held that an unwilling witness could not be compelled to testify over a claim of self-incrimination by the prosecutor's promise of immunity. Although it was well concealed, there was in fact much wisdom in this decision in its effect of curtailing what otherwise would have amounted to an uncontrolled power of pardon in prosecutors as to all kinds of offenses.

The initial approach of the Legislature to compelling testimony in return for a grant of immunity was limited to crimes involving difficulties of proof without a witness who would turn state's evidence, e.g., bribery⁶⁶ and extortion.⁶⁷ Provisions for immunity were included in the Cigarette Tax Act of 1945⁶⁸ in connection with investigations thereunder. The legislative approach to the problem which lay in the background of *Rockola*⁶⁹ lacked consistency: Action by the court was required in bribery cases, while in the extortion and cigarette cases the immunity arose simply by virtue of giving testimony in response to a subpoena at the instance of the State's Attorney or Department of Revenue.

In 1953, a statute was adopted⁷⁰ which applies to grand jury investigations and trials of all criminal offenses. The grant of immunity is by the court, upon motion by the State's Attorney and a showing that the person is a material witness for the prosecution and that his testimony would tend to incriminate him. In these respects the Illinois statute substantially conforms to the Model State Witness Immunity Act.⁷¹ The Model Act, however, affords no protection against prosecution under the laws of another jurisdiction, and no such protection is afforded under the Illinois bribery, extortion, and cigarette tax statutes mentioned previously. Constitutionally, this protection is not

⁶⁵ 339 Ill. 474, 171 N.E. 559 (1930).

⁶⁶ ILL. REV. STAT. ch. 38, § 82 (1959).

⁶⁷ ILL. REV. STAT. ch. 38, § 245 (1959).

⁶⁸ ILL. REV. STAT. ch. 120, § 453.10a (1959).

⁶⁹ *People v. Rockola*, 339 Ill. 474, 171 N.E. 559 (1930).

⁷⁰ ILL. REV. STAT. ch. 38, § 580a (1959).

⁷¹ 9C UNIFORM LAWS ANN. 186.

required.⁷² Nevertheless, the general Illinois statute⁷³ provides against the entry of an order if it reasonably appears that the giving of the testimony would subject the witness to prosecution under the laws of another state or of the United States. Thus the Legislature has made the privilege against self-incrimination truly effective, attaining a more palatable result than that reached by the courts.⁷⁴

CONFESSIONS

Involuntary confessions are inadmissible, whether on grounds of unreliability⁷⁵ or violation of due process.⁷⁶ Illinois has been particularly plagued by uncertainty concerning the kind of statement by an accused to which this rule of exclusion should apply. One line of cases has held that the rule applies only to statements which constitute comprehensive admissions of guilt.⁷⁷ Another line of cases has held that the principle of exclusion is to be applied to all admissions by an accused, whether technically "confessions" or not.⁷⁸ The situation is a poor one in which to engage in finespun distinctions as to whether the extorted statement is a "confession" or merely an "admission." Nor should the fact that the statement is "exculpatory" in nature, as emphasized in some of the cases,⁷⁹ be significant. The extortion of a statement by coercion or promises is equally a violation of fundamental rights of an accused and repugnant to ideas of due process, regardless of the nature of the statement. One would have thought the distinction had been laid at rest once and for all in *People v. Hiller*,⁸⁰ had the court

⁷² *Knapp v. Schweitzer*, 357 U.S. 371 (1958); *People v. Butler St. Foundry*, 201 Ill. 236, 66 N.E. 349 (1903).

⁷³ ILL. REV. STAT. ch. 38, § 580a (1959).

⁷⁴ See Black, J., dissenting in *Knapp v. Schweitzer*, 357 U.S. 371, 382 (1958). *People v. Burkert*, 7 Ill.2d 506, 131 N.E.2d 495 (1955), gave this provision of the statute a construction very favorable to the reluctant witness.

⁷⁵ *People v. Fox*, 319 Ill. 606, 150 N.E. 347 (1926).

⁷⁶ *Brown v. Mississippi*, 297 U.S. 278 (1936); *People v. Rogers*, 413 Ill. 554, 110 N.E.2d 201 (1953).

⁷⁷ *People v. Kircher*, 309 Ill. 500, 141 N.E. 151 (1923); *People v. Okopske*, 321 Ill. 32, 151 N.E. 507 (1926); *People v. Wynkoop*, 359 Ill. 124, 194 N.E. 276 (1934); *People v. Mowry*, 6 Ill.2d 132, 126 N.E.2d 683 (1955); *People v. Stanton*, 16 Ill.2d 459, 158 N.E.2d 47 (1959).

⁷⁸ *People v. Santucci*, 374 Ill. 395, 29 N.E.2d 508 (1940); *People v. Hiller*, 2 Ill.2d 323, 118 N.E.2d 11 (1954).

⁷⁹ *People v. Okopske*, 321 Ill. 32, 151 N.E. 507 (1926); *People v. Wynkoop*, 359 Ill. 124, 194 N.E. 276 (1934); *People v. Mowry*, 6 Ill.2d 132, 126 N.E.2d 683 (1955).

⁸⁰ 2 Ill.2d 323, 118 N.E.2d 11 (1954).

not resumed its old ways in subsequent cases.⁸¹ This is an area in which state concepts of due process have been reviewed without hesitation by the Supreme Court of the United States, which has rejected the distinction.⁸²

Another troublesome problem in the area of confessions is the use of failure to deny as an admission. The adage, "Silence gives consent," is nullified by its contrary, "Silence is golden." The inference of acquiescence is a weak one at best. The notion that "whatever you say can be used against you" is pretty well imbedded in the lore of ordinary people. Advice of counsel may intervene. Particularly when coupled with a supposed distinction between confessions and mere admissions, discussed in the preceding paragraph, both the temptation and the opportunity to manufacture some evidence are present in a high degree. Perhaps some of the objectionable aspects would be removed by drawing a line between cases in which the accused is in the custody of the police and those in which he is not. The decisions, however, have shown no inclination to make the distinction, and the practice continues.⁸³

In line with decisions of state courts generally, Illinois has refused to follow the *McNabb-Mallory* rule⁸⁴ that a confession obtained during illegal detention ipso facto is inadmissible, and has held that illegal detention is merely a circumstance to be taken into consideration in reaching a determination whether the confession is voluntary.⁸⁵

Considerable sensitivity has been demonstrated by the Legislature in regard to confessions. Legislation has been enacted to afford an accused the opportunity to move in advance of trial to suppress a confession, as well as to object to its admission at the trial.⁸⁶ The judge is not to "require, request or suggest," during the trial, that an accused submit to a lie detector or truth serum test.⁸⁷

More important is legislation which requires that the accused be

⁸¹ *People v. Mowry*, 6 Ill.2d 132, 126 N.E.2d 683 (1955); *People v. Stanton*, 16 Ill.2d 459, 158 N.E.2d 47 (1959).

⁸² *Ashcraft v. Tennessee*, 327 U.S. 274 (1946).

⁸³ *People v. Homer*, 8 Ill.2d 268, 133 N.E.2d 284 (1956); *People v. Torres*, 19 Ill.2d 497, 167 N.E.2d 412 (1960).

⁸⁴ *McNabb v. United States*, 318 U.S. 332 (1943); *Mallory v. United States*, 354 U.S. 449 (1957).

⁸⁵ *People v. Hall*, 413 Ill. 615, 110 N.E.2d 249 (1953).

⁸⁶ ILL. REV. STAT. ch. 38, § 736.1 (1959).

⁸⁷ ILL. REV. STAT. ch. 38, § 736.2 (1959).

furnished a copy of his confession, if written, and with a list of the persons present, whether oral or written. The statute applies only to confessions "made before any law enforcement officer or agency in this State." In the absence of compliance with the statute, the confession is inadmissible.⁸⁸ Thus Illinois has made his confession available to the accused in advance of trial, a result which has been reached elsewhere by means of judicially constructed discovery procedures.⁸⁹ The Illinois statute has been before the Supreme Court several times. As would be expected, the term "confession" has been construed as including only comprehensive admissions of guilt,⁹⁰ a construction which appears to be wholly reasonable bearing in mind that a statute, not a constitution, is being expounded. The Legislature could have avoided this result, had it chosen to do so, by using instead the word "statement." In *People v. Pelkola*,⁹¹ however, in which the statute concededly was not complied with, the presence of other competent evidence in the record to establish guilt beyond reasonable doubt was held to render the error in permitting the confession to be used non-prejudicial. This is an approach with which the Supreme Court of the United States once toyed in cases involving involuntary confessions as a violation of due process,⁹² but later disclaimed.⁹³ It may well be that the difference between a basic constitutional right and a statutory right, in effect, to discovery justifies the attitude of the Illinois court.⁹⁴

The more one wanders through the maze of attempts to guard against the abuse of confessions the more one wonders whether the ultimate wisdom may not have been reached by the great Sir James Fitzjames Stephen in section 26 of the Indian Evidence Act of 1872:

No confession made by any person whilst he is in the custody of a police-officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.⁹⁵

⁸⁸ ILL. REV. STAT. ch. 38, § 729 (1959).

⁸⁹ *People v. Cartier*, 51 Cal.2d 590, 335 P.2d 114 (1959).

⁹⁰ *People v. Stanton*, 16 Ill.2d 459, 158 N.E.2d 47 (1959); *People v. Nelson*, 18 Ill.2d 313, 164 N.E.2d 16 (1960).

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

⁹² *Stein v. New York*, 346 U.S. 156 (1953).

⁹³ *Spano v. New York*, 360 U.S. 315 (1959).

⁹⁴ Cf. *People ex rel. Noren v. Dempsey*, 10 Ill.2d 288, 139 N.E.2d 780 (1957). It may be significant that the noncompliance in *Pelkola*, was failure to disclose the name of a person who was present, rather than failure to furnish a copy of the confession, it being oral.

⁹⁵ 3 ENCYCLOPAEDIA OF GENERAL ACTS AND CODES OF INDIA 618 (Sapru ed. 1936). Out-

HUSBAND AND WIFE

Important clarification of the competency of and communications between husband and wife has been effected in *People v. Palumbo*.⁹⁶ At common law husband and wife were incompetent to testify for or against the other, and a privilege existed as to confidential communications between them during the marriage. In addition, the Illinois cases established a rule against admitting testimony of a spouse as to any conversation or admission or any knowledge gained through the marriage relation, it being unclear whether this was based on incompetency or privilege.⁹⁷ In criminal cases these principles prevailed until 1937, unchanged by statute.⁹⁸ In civil cases, the Act of 1867 and later acts⁹⁹ effected some minor exceptions, but here, too, the common-law principles in general prevailed until 1935. In 1934, because the Supreme Court of the United States had recently refused longer to follow the common-law rule which disqualified the wife from testifying for the husband,¹⁰⁰ the Supreme Court of Illinois was urged to do likewise but declined, saying that the matter should be left to the Legislature.¹⁰¹ The Legislature responded the next year by amending section 5 of the Evidence Act to read as follows:

In all civil actions husband and wife may testify for or against each other, provided that neither may testify as to any communication or admission made by either of them to the other or as to any conversation between them during coverture, except in actions between such husband and wife, and in actions where the custody or support of their children is directly in issue, and as to matters in which either has acted as agent for the other.¹⁰²

cries from the police would no doubt be forthcoming, but such was the case when the Illinois court rejected involuntary confessions. See *People v. Rogers*, 303 Ill. 578, 136 N.E. 470 (1922). Similar cries rent the sunny skies of California when the admissibility of unlawfully seized evidence was repudiated in *People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905 (1955).

⁹⁶ 5 Ill.2d 409, 125 N.E.2d 518 (1955).

⁹⁷ *Reeves v. Herr*, 59 Ill. 81 (1871); *Schreffler v. Chase*, 245 Ill. 395, 92 N.E. 272 (1910).

⁹⁸ The opinion in *People v. Palumbo*, 5 Ill.2d 409, 125 N.E.2d 518 (1955), erroneously intimates that the Evidence Act governs husband-wife testimony in criminal cases: The act in fact applies only to civil cases. See cases cited *supra* note 61.

⁹⁹ Ill. Laws 1867, at 185; Ill. Laws 1874, at 98.

¹⁰⁰ *Funk v. United States*, 290 U.S. 371 (1933).

¹⁰¹ *People v. Kendall*, 357 Ill. 448, 192 N.E. 378 (1934).

¹⁰² ILL. REV. STAT. ch. 51, § 5 (1959).

Substantially the same language was added to the CRIMINAL CODE in 1937.¹⁰³

So strong at times, however, is the preference of courts for judicial as opposed to legislative wisdom that the old principles for a while continued to prevail, despite the legislative enactments. It was held that the wife could not, over objection by the opposite party, testify to a conversation with her husband,¹⁰⁴ and that the incompetency still extended to knowledge gained through the marriage relationship.¹⁰⁵ These holdings were clearly contrary to the purpose of the legislation: to remove the rule of incompetency entirely and to preserve only a privilege as to confidential communications between the spouses. While the word "confidential" was not used by the Legislature, it seems ineluctably to be contemplated, and such has been the usual construction of statutes of this kind.¹⁰⁶ Finally, in 1955, the Supreme Court carefully reviewed the entire matter and ruled that the effect of the statutory changes was to eliminate the common-law disqualification of husband and wife and to leave only a privilege as to confidential communications between them.¹⁰⁷ And a communication in the presence of a third person does not meet the requirement of confidentiality.¹⁰⁸

A further question, not yet answered in Illinois, concerns the ownership of the privilege. May either spouse claim it, or may it be claimed only by the communicating spouse? Since the matter is, in most jurisdictions, governed by statute, and the statutes vary widely, decisions holding that either spouse may claim the privilege on the basis of the local statute are not persuasive.¹⁰⁹ If, as seems to be the case, the purpose of the privilege is to encourage freedom of communication, Wigmore's conclusion that the privilege should belong only to the communicating spouse, seems, as Professor McCormick suggests, to be convincing.¹¹⁰

¹⁰³ ILL. REV. STAT. ch. 38, § 734 (1959).

¹⁰⁴ *Dunn v. Heasley*, 375 Ill. 43, 30 N.E.2d 628 (1940).

¹⁰⁵ *Heineman v. Hermann*, 385 Ill. 191, 52 N.E.2d 263 (1943).

¹⁰⁶ MCCORMICK, EVIDENCE 172 (1954).

¹⁰⁷ *People v. Palumbo*, 5 Ill.2d 409, 125 N.E.2d 518 (1955).

¹⁰⁸ *Ibid.*

¹⁰⁹ The CAL. CIVIL CODE § 1881(1), for example, clearly contemplates permitting either spouse to claim the privilege.

¹¹⁰ MCCORMICK, *op. cit. supra* note 106, at 176; WIGMORE, EVIDENCE § 2340 (3d ed. 1940).

MATTERS IN PREPARATION OF TRIAL

The advent of liberal discovery has brought with it problems of privilege intimately associated with the everyday work of the lawyers. Two recent decisions, one suggesting¹¹¹ and the other holding¹¹² that matter which is privileged against discovery as the "work product" of the lawyer is not privileged against compulsory production at the trial, call for some re-examination of basic considerations.

The purpose of discovery was well described in *People ex rel. Noren v. Dempsey*:

Excessive emphasis upon the adversary aspects of our system, and hence upon the sporting chances of a trial, has yielded to universal recognition of the role of a trial as a search for truth. Limited discovery, available only in equity, has been replaced by comprehensive discovery available in all actions.¹¹³

That case sustained the authority of trial judges to require personal injury plaintiffs to submit to physical examination at the instance of the defendant and was shortly followed by the adoption of Supreme Court rule 17-1, setting forth a comprehensive scheme for physical and mental examinations.

The new rules which the Supreme Court announced on September 19, 1955, to become effective January 1, 1956, concurrently with the revision of the Civil Practice Act, contain extensive provisions for discovery, substantially along the lines of the Federal Rules. Unlike the Federal Rules, the Illinois Rules anticipated a measure of conflict between liberal discovery and the effective functioning of the lawyer. Rule 19-5 includes the following provision:

(1) Matters Privileged Against Discovery.

All matters which are privileged against disclosure upon the trial are privileged against disclosure through any discovery procedure. Disclosure of memoranda, reports or documents made by or for a party in preparation for trial or any privileged communications between any party or his agent and the attorney for the party shall not be required through any discovery procedure.¹¹⁴

In terms, the foregoing language creates an exemption only from discovery. Under the familiar principle of *expressio unius*, the construction would appear to be that memoranda, reports, or documents

¹¹¹ *Kemeny v. Skorch*, 22 Ill. App.2d 160, 159 N.E.2d 489 (1st Dist. 1959).

¹¹² *Haskell v. Siegmund*, 28 Ill. App.2d 1, 170 N.E.2d 393 (3d Dist. 1960).

¹¹³ 10 Ill.2d 288, 293, 139 N.E.2d 780, 783 (1957).

¹¹⁴ ILL. SUP. CT. R. 19-5.

made in preparation for trial would not be exempt from compulsory production at the trial. However, the matter is not so simple.

In the great case of *Hickman v. Taylor*,¹¹⁵ the Supreme Court of the United States in effect wrote a love letter to the lawyers, who had begun to doubt their place in the affections of the Court. The case arose as a result of efforts to discover statements taken by an attorney from witnesses. Some of the statements were written, some oral. No communication between attorney and client was, of course, involved. The Court voted unanimously against allowing the discovery. Mr. Justice Murphy, writing for the majority, phrased the problem in terms of whether discovery could be used "to inquire into materials collected by an adverse party's counsel in the course of preparation for possible litigation."¹¹⁶ In concluding that the attempt fell outside the arena of discovery, he stressed the public interest in the proper functioning of the legal profession and pointed out that the profession could not function properly unless the lawyer were permitted to "work with a certain degree of privacy," "without undue and needless interference." If such materials were thrown open, much would not be written. "Inefficiency, unfairness and sharp practice" would result, with a demoralizing effect on the profession.¹¹⁷ Having thus laid out the general controlling interests, the opinion then approaches the written and the oral statements by somewhat different routes. If production of the written statements is sought by order to produce, Federal rule 34 requires a showing of good cause; if sought in connection with the taking of a deposition, then Federal rule 30(b) gives the trial judge, for good cause, discretion to limit the inquiry: the fact that the materials are in preparation for trial precludes the good cause in the one instance and furnishes it in the other. As to the oral statement, to require the attorney to testify concerning it would reduce the attorney to the status of ordinary witness, rather than officer of the court, and the standards of the profession would suffer. However, as regards either kind of statement, it would be recognized that rare situations involving hardship may justify departures.¹¹⁸

In a concurring opinion, Mr. Justice Jackson stressed not only the

¹¹⁵ 329 U.S. 495 (1947).

¹¹⁶ *Id.* at 505.

¹¹⁷ *Id.* at 510-11.

¹¹⁸ *Id.* at 512-13. It should be noted that the Illinois rule in terms does not apply to oral statements at all.

importance to society of the legal profession,¹¹⁹ but also of the adversary system. Discovery is not intended to enable the profession to function "without wits or on wits borrowed from the adversary."¹²⁰ Requiring a lawyer to tell what a witness has told him, inexact at best, could well result in forcing the lawyer to take the stand to defend his own credibility, in the event his version were used to impeach the witness.¹²¹ Thus we find faint overtones of a property right, as well as concern for the functioning of the profession.

The essential basis for exempting preparations for trial from discovery, then, is the insuring of effective working conditions for the profession. In this respect, the underlying policy is very closely allied to that which gives rise to the privilege for communications between attorney and client: affording conditions under which adequate legal advice and representation are fostered. The subsidiary notion that a party has a property right in the fruits of his own counsel's endeavor, as a further support for exempting preparatory materials, is less impressive and yields more readily to the overall public interest in promoting access to facts.

Thus approached, the problem of requiring disclosure at the trial of materials exempt from discovery may require a different general answer from that reached in the two cases mentioned at the outset.¹²² It may be that the knowledge that his preparatory materials are subject to invasion only at the trial stage would have a somewhat less disturbing effect upon the lawyer's preparation, and that the usefulness to the opponent of such invasion would be slighter, with a correspondingly diminished disposition to embark upon it. Yet the difference is only one of degree and involves an inquiry upon which we do not embark when the attorney-client privilege is invoked.

The fact is that in each of the two cases the court was confronted with particular aspects. *Kemeny v. Skorch*¹²³ concerned the report of a physician who conducts an examination to enable him to testify, a type of witness which the court was more than prepared to place in

¹¹⁹ *Id.* at 515.

¹²⁰ *Id.* at 516.

¹²¹ *Id.* at 517.

¹²² *Kemeny v. Skorch*, 22 Ill. App.2d 160, 159 N.E.2d 489 (1st Dist. 1959); *Haskell v. Siegmund*, 28 Ill. App.2d 1, 170 N.E.2d 393 (3d Dist. 1960). Cf. *Walker v. Struthers*, 273 Ill. 387, 112 N.E. 961 (1916); *Chicago v. Harrison-Halsted Bldg. Corp.*, 11 Ill.2d 431, 143 N.E.2d 40 (1957).

¹²³ 22 Ill. App.2d 160, 159 N.E.2d 489 (1st Dist. 1959).

a category for special treatment.¹²⁴ *Haskell v. Siegmund*¹²⁵ involved a true hardship situation: the insured owner of the car, since deceased, had given a statement that the car was being driven with his permission, evidence which otherwise was obtainable only with difficulty and uncertainty and from a doubtful source since the driver was at the time of trial in the penitentiary. Regardless of how one may feel about putting the medical expert in a class for special treatment, the result in *Haskell* would better have been reached under a hardship exception, as recognized in *Hickman v. Taylor*.¹²⁶ When SUPREME COURT RULE 19-5 was drafted, the Joint Committee debated at length the wisdom of including a hardship exception in subsection (1). None was included, a decision which might well be considered open to review at this time. Creating a hardship exception in the civil cases would fit into the pattern of the criminal cases which recognize a hardship situation resulting from the built-in inequality of the adversaries, and afford the accused access to statements obtained by the prosecution from its witnesses.¹²⁷

HEARSAY

BUSINESS RECORDS

The admissibility of business records in evidence continues to be a source of confusion and uncertainty. Much of the difficulty arises from misapprehension of the purpose and effect of section 3 of the Evidence Act.¹²⁸ The original purpose of section 3 is clear: it dealt

¹²⁴ In this connection, consider the proposal for court-appointed experts.

¹²⁵ 28 Ill. App.2d 1, 170 N.E.2d 393 (3d Dist. 1960). Other questions may be raised in connection with *Haskell*: Was the statement truly against interest, since the granting of permission also brought the policy into operation, thus protecting the declarant with coverage and obligating the insurer to finance the defense if he were sued? Was the decision correct in excluding the statement from the attorney-client privilege on the basis that the statement was obtained by a claim agent rather than by an attorney? Was the decision correct in denying the statement of the insured the protection of the attorney-client privilege because it was obtained in preparation for trial of a case against the driver, although the factor of ownership would have helped make a case against the insured?

¹²⁶ 329 U.S. 495 (1947).

¹²⁷ *People v. Moses*, 11 Ill.2d 84, 142 N.E.2d 1 (1957); *People v. Wolff*, 19 Ill.2d 318, 167 N.E.2d 197 (1960). *Moses* preceded, *Wolff* followed and adopted the procedure outlined in *Jencks v. United States*, 353 U.S. 657 (1957), and subsequent congressional enactment. The statements are not available prior to trial but only after the witness has testified on direct.

¹²⁸ ILL. REV. STAT. ch. 51, § 3 (1959).

primarily with the competency of witnesses. In fact, the title of the act in which it first appeared was "An Act relating to the competency of witnesses in civil cases."¹²⁹ Most of the provisions of this act remain unchanged in the present Evidence Act; though some deletions and changes have been made, they are not of basic importance in connection with business records. The fundamental design of the statute has not been altered. Section 1 removes generally the incompetency of parties and interested persons to testify which had existed at common law. Section 2 (the Dead Man's Act) constitutes an exception to section 1, preserving the common-law incompetency in the Dead Man situations, with certain exceptions. Section 3 is a further exception to section 2, permitting a party to testify to his books despite the fact that he is otherwise incompetent under section 2. Only incidentally, and in the Dead Man situation, does section 3 purport to set forth the foundation requirements for the admission of book accounts; otherwise, the common law has continued to govern.¹³⁰

Nevertheless, the impression has persisted that in some fashion section 3 controls the admissibility of business records generally. The Supreme Court on occasion has so stated,¹³¹ counsel continue so to argue,¹³² and the Legislature has so assumed in amending the section by adding "other record or document," together with provisions for microfilming.¹³³

Section 3 does not apply in criminal cases.¹³⁴ It is limited to the books, records, or documents of a party who would otherwise be incompetent under section 2, and it applies then only if the claim or defense is founded thereon. It has no application to books or records of a third person. It does not deal with the source of the information which has been recorded.

These manifest deficiencies, plus the uncertain and unsatisfactory

¹²⁹ Ill. Laws 1867, at 183.

¹³⁰ *Stettauer v. White*, 98 Ill. 72 (1881); *House v. Beak*, 141 Ill. 290, 30 N.E. 1065 (1892).

¹³¹ *Trainor v. German-American Sav. Ass'n*, 204 Ill. 616, 68 N.E. 650 (1903) (involving the admissibility of the books of plaintiff, which was a corporation, hence raising no question of competency of witnesses).

¹³² *National Malleable Castings Co. v. Iroquois Steel Co.*, 333 Ill. 588, 165 N.E. 199 (1929); *Secco v. Chicago Transit Authority*, 6 Ill. App.2d 266, 127 N.E.2d 266 (1955).

¹³³ Ill. Laws 1949, at 919; Ill. Laws 1951, at 1331; ILL. REV. STAT. ch. 51, § 3 (1959).

¹³⁴ *Johnson v. Daley*, 403 Ill. 338, 86 N.E.2d 350 (1949); *Bradley v. Casey*, 415 Ill. 574, 114 N.E.2d 618 (1953).

state of the case law, call for the adoption of a comprehensive statute on the subject. Section 3 should be amended to make it clearly deal only with the subject of competency of witnesses, otherwise incompetent under section 2, to testify to business records, leaving the question of the requirements for the records themselves to be dealt with in a general section on that subject. A new section should then be added to the effect that a memorandum or record is admissible if: (a) it was made in the regular course of business; (b) it was the regular course for a person with personal knowledge to make the record or to transmit the information for the record; and (c) it was made at or near the time. Provision should be made for establishing the accuracy of the record by testimony of a witness familiar with the routine of its preparation, thus dispensing with questions as to the necessity of calling all participants. Absence of an item ordinarily recorded should be admissible to prove its nonoccurrence. Microfilming should be covered broadly. "Business" should be defined to include all regularly organized activities. Regularly recorded matters which in themselves constitute exceptions to the hearsay rule should be admissible.

Only a certain predisposition on the part of lawyers to look under the bed for things which are not there has prevented constructive action in this area.