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SEARCH AND SEIZURE: UNDESIRABILITY OF ILLINOIS EXCLUSIONARY RULE

LAWRENCE X. PUSATERI

RECENTLY, the Illinois Supreme Court was called upon to abolish a rule of procedure adopted in Illinois some thirty-four years ago which permits a defendant in a criminal action to make a pre-trial motion to suppress evidence obtained in violation of the constitutional prohibition against illegal search and seizure.[1] The assertion was made that in view of the recent decision of the United States Supreme Court in *Wolf v. Colorado*[2] the fourteenth amendment to the United States Constitution does not require states to exclude evidence obtained by an unreasonable search and seizure, the constitutional grounds which led to the adoption of the rule of exclusion have disappeared, and the rule itself should be abolished.

The Illinois Supreme Court reasoned that the *Wolf* decision, although holding that the states were not required to exclude such evidence, nevertheless did not compel the introduction of such evidence; the court ruled that the Illinois exclusionary rule would be retained. In its decision the court, although acknowledging the Illinois position as being in the minority,[3] rejected the adoption of the majority view[4] that permits the introduction of illegally obtained evidence

[1] City of Chicago v. Lord, 7 Ill. 2d 379, 130 N.E. 2d 504 (1955).

[2] Wolf v. Colorado, 338 U.S. 25 (1949).

[3] The exclusionary rule has been adopted by the federal courts and in twenty-one states, namely; California, Delaware, Florida, Idaho, Illinois, Indiana, Kentucky, Michigan, Mississippi, Missouri, Montana, North Carolina, Oklahoma, Oregon, South Dakota, Tennessee, Texas, Washington, West Virginia, Wisconsin and Wyoming. Many of the decisions in support of the above enumeration are to be found in the appendix to Wolf v. Colorado, 338 U.S. 25, 33 (1949).

[4] The common law rule of admissibility is followed without qualification in twenty-five states, namely; Arizona, Arkansas, Colorado, Connecticut, Georgia, Iowa, Kansas, Louisiana, Maine, Massachusetts, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, Utah, Vermont and Virginia. In Alabama and Maryland the admissibility rule applies except in specific situations where the exclusionary rule is enacted by statute. Many of the decisions in support of the above enumeration are to be found in the appendix to Wolf v. Colorado, 338 U.S. 25, 33 (1949).

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and leaves the aggrieved party to find his remedy by way of civil damages and criminal prosecution of the offender who conducted the search.

It is significant to note that up to the time of the decision in *People v. Brocamp*,[5] the Illinois courts had consistently held that relevant evidence obtained in violation of the constitutional provisions against unreasonable search and seizure was admissible in evidence.[6] It is not the purpose of this discussion to enumerate and evaluate each of the arguments for and against the exclusionary rule found in the Illinois decisions and the decisions of other jurisdictions, but rather to discuss and attempt to interpret some of the Illinois decisions in the light of the present Illinois exclusionary rule.

The arguments for and against the rule were discussed extensively in a learned opinion by Justice Cardozo wherein the New York Court of Appeals unanimously decided against its adoption.[7] Dean Wigmore also enumerates these arguments in much detail, and concludes by stating that the exclusion of such evidence is based upon "misguided sentimentality."[8] He illustrates the result of the rule in the following mythical narration:

> Titus, you have been guilty of conducting a lottery; Flavius you have confessedly violated the constitution. Titus ought to suffer imprisonment for crime and Flavius for contempt. But no! We shall let you both go *free*. We shall not punish Flavius directly but shall do so by reversing Titus' conviction. This is our way of teaching people like Flavius to behave and of teaching people like Titus to behave, and incidentally of securing respect for the constitution. Our way of upholding the constitution is not to strike at the man who breaks it, but to let off somebody who broke something else.[9]

It is submitted that a study of the Illinois decisions will reveal that the present Illinois law of search and seizure is in an undesirable, uncertain state. The exclusionary rule has been arbitrary in its application and has introduced needless confusion into criminal law and procedure. The many exceptions, refinements and distinctions that have been granted the judicial blessings of the courts have largely destroyed any value that the "rule" might otherwise have had. In addition it appears that the decisions are neglecting to distinguish be-

[5] 307 Ill. 448, 138 N.E. 728 (1923).

[6] People v. Paisley, 288 Ill. 310, 123 N.E. 573 (1919); Trask v. People, 151 Ill. 523, 38 N.E. 248 (1894); Siebert v. People, 143 Ill. 571, 32 N.E. 431 (1892); Gindrat v. People, 138 Ill. 103, 27 N.E. 1085 (1891).

[7] People v. De Fore, 242 N.Y. 13, 150 N.E. 585 (1926).

[8] Wigmore, Evidence, Vol. VIII, § 2184 (3d ed., 1940).

[9] Ibid.

tween constitutional protections and the totally distinct subject of a procedural rule dealing with the admissibility of evidence.

PRELIMINARY RULES

It is the intention here to treat the decisions under specific subject headings in so far as it is possible to so categorize them. However, by way of leading into a study of the decisions, it is deemed necessary to state a few introductory rules concerning search and seizure and the motion to suppress. As to what constitutes a search, it has been held that if the articles seized are in plain sight it is not an unlawful search, for a search implies a "prying into hidden places for that which is concealed, or an invasion and quest with some sort of force, either actual or constructive, and it is not a search to observe that which is open to view."[10] The latter view is held true whether the observation be in sunlight or by artificial light, such as a flashlight.[11]

In regard to rules applying specifically to the motion to suppress, it is first required that the motion be made in writing.[12] In addition, an accused person who wishes to avail himself of the exclusionary rule must make a "timely" motion to suppress, and to be "timely" the motion to suppress must be made before trial.[13] Failure to make the motion before the commencement of the trial is held to waive the right, and once the waiver has occurred, evidence obtained by an unlawful search is admissible not only in the proceeding in which the constitutional guaranty is waived, but in any and all subsequent proceedings.[14]

Thus a defendant's constitutional right to be protected against unlawful search and seizure is made to depend upon his raising the question in a particular way at a specified time. The protection of a citizen's constitutional rights becomes dependent upon a mere rule of practice. As a matter of actual experience, what is happening in the Illinois criminal courts today is that the clever criminal, or the one able to afford skilled counsel is the one who can take advantage

[10] People v. Marvin, 358 Ill. 426, 193 N.E. 202 (1934); People v. Patterson, 354 Ill. 313, 188 N.E. 417 (1933).

[11] People v. Exum, 382 Ill. 204, 47 N.E. 2d 56 (1943).

[12] People v. Mirbelle, 276 Ill. App. 533 (1934).

[13] People v. Brocamp, 307 Ill. 448, 138 N.E. 728 (1923).

[14] People v. Sovetsky, 343 Ill. 583, 175 N.E. 844 (1931); In People v. Kissane, 347 Ill. 385, 179 N.E. 850 (1932), it was held that although the motion to suppress must be made before trial, the court in its discretion may defer the hearing on the motion until the evidence is offered on the trial.

of this rule. The destitute lawbreaker or the innocent victim unfamiliar with court procedure loses his rights under the constitution because he did not proceed thus and so.

As to what property may be suppressed, the rule in Illinois is that not only the physical evidence itself is excluded, but in addition no derivative use can be made of evidence illegally seized. Thus if incriminating documents are illegally seized, not only is the use of the documents outlawed, but also outlawed are any leads or information that may have been derived from the documents such as the names of witnesses.[15] Likewise it is held that a witness discovered as the result of an illegal search of the defendant's home is not a competent witness, and the fact that this witness testified to things that were antecedent to the arrival of the police who made the illegal search does not establish her competency as a witness.[16] The latter decision is an obstacle to law enforcement and successful criminal prosecution, for it is submitted that the competency and the inherent probative value of the testimony of a witness are in no way effected by the circumstances of her discovery.[17]

As a final preliminary consideration, it is to be noted that although for the most part this discussion will be concerned with Illinois law, frequent reference will be made to federal decisions which are pertinent. This is in accordance with the view of the Illinois Supreme Court[18] that federal decisions definitely fixing a rule applying to the introduction of evidence obtained by illegal seizure are very applicable, inasmuch as the guaranties of immunity from unreasonable search and seizure contained in the federal Constitution[19] and the Illinois Constitution[20] are practically the same.

[15] People v. Marvin, 382 Ill. 192, 46 N.E. 2d 997 (1943).

[16] People v. Albea, 2 Ill. 2d 317, 118 N.E. 2d 277 (1954).

[17] See also U.S. v. Arrington, 215 F. 2d 630 (C.A. 7th, 1954), where it was held that a confession made during an illegal search cannot be relied upon in support of the legality of the search.

[18] People v. Exum, 382 Ill. 204, 47 N.E. 2d 56 (1943).

[19] U.S. Const. Amend. 5:
"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

[20] Ill. Const. Art. II, § 6 (1848):
"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue without probable cause, supported by affidavit, particularly describing the place to be searched, and the persons or things to be seized."

DEFENDANT MUST CLAIM AS HIS OWN THE PROPERTY SOUGHT TO BE SUPPRESSED

In a number of Illinois decisions, exceedingly broad language is to be found asserting an exception to the exclusionary rule to the effect that a defendant in his motion to suppress must claim as his own the property sought to be suppressed. Thus in *People v. Pankey*,[21] the court in affirming the trial court's denial of the motion to suppress stated:

> In view of the fact that plaintiff in error did not claim ownership of the property seized, he is precluded from asserting that the seizure was unlawful, or to complain of its use in evidence as being in violation of his constitutional rights. The Supreme court of this state has repeatedly held that where a defendant disclaims ownership of property seized and does not seek its return to him, he cannot complain of its seizure or of its use in evidence against him, for he is not then in a position of giving evidence against himself.[22]

The above requirement of assertion of ownership is a logical limitation imposed by the courts on the use of the preliminary motion to suppress. However, upon analysis of the decisions discussing this requirement, we find that the requirement of an allegation of ownership in the motion to suppress is not one of general application, but in fact is made to depend in great part upon ancillary considerations and seemingly inconsequential distinctions.

The decisions are in agreement that where the property seized was found as a result of a search of the automobile of the accused after he has been lawfully arrested in his automobile, a motion to suppress the evidence must contain a claim by the defendant that the property sought to be suppressed is his own.[23] An assertion of ownership is also required for property found in a search of the defendant's automobile, even though the defendant was not in the automobile at the time of the arrest. Thus in *People v. Tabet*,[24] where the defendants were arrested in front of a store where a theft occurred, on suspicion of stealing clothing, and information was found on them which led to the discovery of their automobile where the stolen property was found, the court affirmed the ruling that the motion to suppress would not lie in that the defendants disclaimed ownership of the property found.

[21] 349 Ill. App. 303, 110 N.E. 2d 683 (1953). [22] Ibid., at 306 and 684.

[23] People v. De Marios, 401 Ill. 146, 81 N.E. 2d 464 (1948); People v. Exum, 382 Ill. 204, 47 N.E. 2d 56 (1943); People v. Patterson, 354 Ill. 313, 188 N.E. 417 (1933).

[24] 402 Ill. 93, 83 N.E. 2d 329 (1949), cert. denied 336 U.S. 970 (1949).

Allied with the above decisions, and yet not directly concerned with the search of an automobile, is the decision of *People v. Edge*,[25] in which the defendant had been arrested for violating a municipal ordinance by obstructing an alley with his automobile and by failure to have a safety inspection sticker. As he stepped out of his automobile, the arresting officer asked him about a bulge in one of his rear pockets, at which time the defendant took out a package of policy slips. The court ruled that since the defendant neither claimed ownership nor demanded the return of the policy slips, he was in no position to complain of their seizure or their use in evidence against him.

An allegation of ownership in the motion to suppress is required in those instances where the search and seizure takes place in a lodge or club.[26] Where, however, the property sought to be suppressed is found in the home of the defendant, the Illinois courts apply a different rule. Thus in *People v. Grod*, where the defendant was arrested on a charge of burglary, and the following day the police went to his home and searched it without a warrant and found bonds taken in the burglary, the court ruled that the motion to suppress was properly sustained in spite of the fact that it did not allege that the property seized belonged to the defendant. The court stated:

> [t]here is a distinction between the search of a dwelling house without a warrant, and search of the person of the defendant or of the vehicle in which he is riding, in that the first is unreasonable as a matter of law, [and may be suppressed upon proof of illegal search without regard to the ownership of the property] whereas the latter may depend on the particular circumstances of the case.[27]

The *Grod* case has been cited as being in support of the proposition that the search of a dwelling house without a warrant is unreasonable as a matter of law.[28] This is clearly no longer a correct statement of the law, at least where the defendant is home at the time of both the arrest and incidental search of his home. Thus in *People v. Clark*,[29]

[25] 406 Ill. 490, 94 N.E. 2d 359 (1950).

[26] People v. Pankey, 349 Ill. App. 303, 110 N.E. 2d 683 (1953).

[27] 385 Ill. 584, 592, 53 N.E. 2d 591, 595 (1944). But see People v. Gambino, 12 Ill. 2d 29 (Sept., 1957), where the defendant was arrested on the charge of robbery in front of an apartment. The defendant stated he lived "right there" and the police went into the apartment and there seized property identified as having been taken in the robbery. The court therein stated: "Furthermore since the defendant neither claimed ownership of the property alleged to have been illegally seized nor requested its return, he cannot complain of its seizure or use in evidence against him."

[28] People v. Kalpak, 10 Ill. 2d 411, 140 N.E. 2d 726 (1957).

[29] 7 Ill. 2d 163, 130 N.E. 2d 195 (1955).

a police informer made an unlawful purchase of narcotics in the defendant's apartment. The police officers who were waiting for the informer outside of the apartment house, immediately went up to the defendant's room, broke into it, and arrested the defendant without an arrest warrant, and searched his person and his room without a search warrant.

The court in this case upheld the arrest and the search, made no mention of the requirement of any warrant, and in fact appeared to liberalize the requirements of a valid arrest by stating that it is only necessary that the belief in the mind of the officer making the arrest be such as to influence the conduct of a "reasonable and prudent man under similar circumstances" and not that of a "prudent and cautious" man as was formerly asserted by the decisions.[30]

However, in *People v. Kalpak*,[31] the defendant was lawfully arrested in his home while preparing to perform an illegal act upon a disguised policewoman, but he was not at home at the time that the actual search was conducted, for the officers immediately took him to the police station. One hour and fifteen minutes later, while the defendant was still in custody, an officer returned and the room was searched. The room had been guarded by a police officer from the time of the arrest to the time of the search. The court ruled the search to be illegal and ordered a new trial.

This ruling is an unfortunate one, for it penalizes the administration of justice merely because police officers took necessary precautions to secure the immediate safe custody of a criminal. It is clear that an incidental search conducted at the time of the arrest would have been lawful. Similarly if the officers had returned with a search warrant, the search would have been lawful. But the law does not require such a useless act. The officers had personal knowledge of the offense committed in their presence a short time prior.

The United States Supreme Court has expressly held that merely because the officers had time to procure a search warrant does not mean that they are compelled to do so. Thus in *United States v. Rabinowitz*,[32] the police did not have a search warrant at the time of

[30] People v. McGowan, 415 Ill. 375, 114 N.E. 2d 407 (1953); People v. Barg, 384 Ill. 172, 51 N.E. 2d 168 (1943); People v. Exum, 382 Ill. 204, 47 N.E. 2d 56 (1943). "Prudent and cautious man" was reasserted as the test by the Illinois Supreme Court in a recent decision. People v. Boozer, Docket No. 34372 (May, 1957).

[31] 10 Ill. 2d 411, 140 N.E. 2d 726 (1957).

[32] 339 U.S. 56 (1950).

the valid arrest of the defendant in his home. The court in sustaining the search of the home stated:

> To the extent that Trupiano v. United States, 334 U.S. 699, requires a search warrant solely upon the basis of the practicability of procuring it rather than upon the reasonableness of the search after a lawful arrest, that case is overruled. The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable. That criterion in turn depends upon the facts and circumstances—the total atmosphere of the case. It is a sufficient precaution that law officers must justify their conduct before courts which have always been, and must be, jealous of the individual's right of privacy within the broad sweep of the Fourth Amendment.[33]

The search conducted in the *Kalpak* case was a reasonable one under all of the facts and circumstances, as stated above.

In *People v. Duchant*,[34] the court ruled that an allegation of ownership was not required even though the defendant was present in his home at the time of the search. However, in *People v. Reid*,[35] where the defendant was arrested in his home on suspicion of robbery, and the gun used in the robbery was found at this time, the court affirmed a denial of the motion to suppress on the basis that it failed to allege ownership and did not seek a return of the property. As its basis of distinction the court stated that the defendant Reid at the time of the search persisted in a disclaimer of ownership of the premises, and insisted that he was merely a roomer.

It would appear that if the courts are to insist on applying greater protections where the home is concerned, their willingness to do so should not be made to depend on whether or not the defendant denies the premises as his home at the time of the search. Such a denial would seem to be a natural reaction of a guilty person to the questions of arresting police officers, and if it is proved on the trial the home is in fact that of the defendant, there is not a sufficient basis to penalize the latter defendant.

In addition it may be asked on what basis such a preferential distinction is made in favor of the home of a defendant. A man's home has been referred to as his castle, but experience has taught us that in many instances it is a thieves' lair, a robber's den, or a dope peddler's storeroom. A man's home surely is no more sacred than his person.

A further example of the uncertainty created in this facet of the law by the application of the motion to suppress is found in the de-

[33] Ibid., at 66.

[34] 370 Ill. 650, 19 N.E. 2d 590 (1939).

[35] 336 Ill. 421, 168 N.E. 344 (1929).

cision in *People v. Mirbelle*.[36] The defendant was charged with the offense of carrying a concealed weapon, which weapon was taken from his person. He was allowed to make a motion to suppress in spite of the fact that he testified that he had no gun and that the gun was not taken from his person. The court stated:

"A defendant is entitled to the benefit of any defense shown by the entire evidence, even if the facts on which such defense is based are inconsistent with the defendant's own testimony." This is but a statement of the general law bearing upon the subject.[37]

A closely related problem is concerned with the question of which persons the courts will consider to have a sufficient interest so as to be able to allege ownership in those instances where such an allegation in the motion to suppress is required. An extraordinary decision in this regard is found in the case of *People v. Perry*.[38] The defendant was the manager and president of a social club incorporated under the laws of the state of Illinois as a nonprofit enterprise. He was charged with the offense of illegal possession of slot machines, and he sought to have suppressed these machines taken from the club. In a seeming paradox the court ruled that the defendant Perry did have sufficient custody and control of the machines to warrant conviction for their unlawful possession, but did not have sufficient interest therein to enable him to raise the issue of unlawful search and seizure.

The decision in *City of Chicago v. Lord*[39] presents an analogous factual situation. An owner of an arcade had just left the premises when the police officers entered and seized obscene films. The defendant Chertkoff remained on the premises; he was employed as a "change man," making change for customers and reimbursing them when a machine failed to work. The court held that the defendant Chertkoff did have a sufficient interest to make the motion to suppress. It was reasoned that he was in charge of the premises after Lord, the owner, had departed, and that he had the right of possession of the premises and of the films as against everyone other than Lord, and that he must be permitted to assert that right of possession in an action against him based upon evidence procured by the search.

Similarly, in *People v. Martin*,[40] the defendant Kuder, an employee of the defendant Martin, had made certain entries in books and rec-

[36] 276 Ill. App. 533 (1934). [37] Ibid., at 546.

[38] 1 Ill. 2d 482, 116 N.E. 2d 360 (1953).

[39] 3 Ill. App. 2d 410, 122 N.E. 2d 439 (1954), aff'd 7 Ill. 2d 379, 130 N.E. 2d 504 (1955).

[40] 382 Ill. 192, 46 N.E. 2d 997 (1942).

ords of Martin unlawfully seized by the police. The court held on a motion by Kuder to suppress the evidence, that there was no merit in the contention "that she was not interested in the papers because she did not own them."

It would appear that the defendant Perry, as an employee as well as an officer, had as much interest in the property of his employer as did the employees Chertkoff and Kuder. The fact that the employer in the *Perry* case was a corporation does not deprive Perry of his position as an employee in possession within the meaning of the *Lord* decision, and yet the motion to suppress was not made available to him.

In all of the above instances, whether the evidence be found in the automobile of the defendant, or upon his person, or in his home, whether or not he disclaims it as his home or not, whether he is an employee of a corporation or of a natural person, it cannot detract from the probative value of the evidence on the main issue of proving the guilt or innocence of the defendant. The rules of evidence are designed to enable courts to reach the truth and in criminal cases, to secure a fair trial to those accused of crime. Evidence obtained by an illegal search and seizure is just as true and reliable as evidence lawfully obtained. The court needs all reliable evidence material to the issues before it to determine the guilt or innocence of the accused, and how such evidence is obtained is not material to the primary issue of innocence or guilt. The motion to suppress serves no purpose under such circumstances other than to add confusion and uncertainty to the law.

CONSTITUTIONAL RIGHT AGAINST ILLEGAL SEARCH AND SEIZURE IS WAIVED IF DEFENDANT CONSENTS TO THE SEARCH

Another group of factual situations in which the Illinois courts applying a liberal interpretation have reduced the number of instances in which a motion to suppress will lie, is comprised of cases in which a defendant is deemed to have consented to the search. It is a well settled rule that one who consents to a search of his property waives his constitutional right to complain that the search and seizure were unlawful.[41] The general rule applies, not only to a search of the defendant's person and car, but in addition, if the defendant consents to a search of his home, it is a lawful search even if he is

[41] People v. Mathews, 406 Ill. 35, 92 N.E. 2d 147 (1950); People v. Schmoll, 383 Ill. 280, 48 N.E. 2d 933 (1943); People v. Mizzano, 360 Ill. 446, 196 N.E. 439 (1935).

not home at the time of the search.[42] In those instances, where the evidence is in direct conflict as to whether or not there was in fact a consent to search, it is for the trial court to determine which witnesses are telling the truth.[43]

Although, generally, the defendant's consent is held to arise by his language and conduct, exercised at the time of the search,[44] or by a written consent signed by the defendant,[45] it has also been held that the defendant's consent may arise through a statutory enactment governing his occupation. Thus in *People v. Allen*,[46] where the defendant was in the auto sales business and was licensed by the state of Illinois to deal in used cars, it was held that under the Uniform Motor Vehicle Anti-Theft Act,[47] as a condition of his license, he was deemed to have granted authority to any peace officer to examine his records, motor vehicles, or parts and accessories at his place of business at any reasonable time during the day or night.[48]

In regard to the limit of the search, once the consent is given, the rule is the same as in those situations where search warrants are employed; it is thus held that there is no right to search beyond the limit prescribed in the consent to search.[49] Also, if the search warrant is void, a person is not bound to know that the warrant is illegal and need not object to it and resist its execution at the risk of being held to have consented to the search.[50]

Generally, a subterfuge and deceit employed by the arresting officers in obtaining the consent to search vitiates the consent.[51] Hence, where the police officers obtained entrance into the premises by falsely pretending that they were housemen employed by the hotel in which the defendant lived, the resulting search was ruled illegal, as

[42] People v. Polenik, 407 Ill. 337, 95 N.E. 2d 414 (1950).

[43] People v. Levy, 370 Ill. 82, 17 N.E. 2d 967 (1938); People v. McDonald, 365 Ill. 233, 6 N.E. 2d 182 (1936); People v. Reid, 336 Ill. 421, 168 N.E. 344 (1929).

[44] People v. Mathews, 406 Ill. 35, 92 N.E. 2d 147 (1950); People v. Wetherington, 348 Ill. 310, 180 N.E. 843 (1932).

[45] People v. Rogers, 8 Ill. 2d 279, 133 N.E. 2d 16 (1956).

[46] 407 Ill. 596, 96 N.E. 2d 446 (1950), cert. denied 341 U.S. 922 (1951).

[47] Ill. Rev. Stat. (1949) c. 95½, § 85.

[48] In People v. Levy, 370 Ill. 82, 17 N.E. 2d 967 (1938), the court had this same statute to construe. It held that the evidence itself was sufficient to show consent.

[49] People v. Schmoll, 383 Ill. 280, 48 N.E. 2d 933 (1943).

[50] People v. Reid, 315 Ill. 597, 146 N.E. 504 (1925).

[51] People v. Dalpe, 371 Ill. 607, 21 N.E. 2d 756 (1939); People v. Chatman, 322 Ill. App. 519, 54 N.E. 2d 631 (1944).

being obtained without consent.[52] However, a slightly different view as to trickery and ruse was adopted by a federal decision wherein the court said:

> The fact that the police officers obtained the keys to Keating's truck from him by means of a ruse does not make the use of said keys illegal. As the district court observed at the trial, police officers are not required to be too polite. They may match wits with alleged criminals, and in the absence of coercive, abusive tactics, obtain evidence for use in the prosecution.[53]

Where the search is obtained by the officer without force, fraud, or trickery, the consent is generally held to constitute a waiver of the defendant's constitutional rights.[54] In *People v. Dent*,[55] officers went to the home of the defendant suspecting her, at that time, of running a policy game. They rang the bell at her home, and someone in the house said, "Come in," whereupon the officers entered and found the defendant and a woman companion seated at a table upon which there was policy material. The defendant denied giving the invitation to enter, but admitted that her companion did so. The court ruled that this constituted an illegal search and seizure, stating that even though the invitation to enter was made in the presence of the defendant, the evidence does not establish that the invitation was extended with the permission of the defendant, and the gist of the act of invitation is that it must be extended upon specific authorization.

It is difficult to see how the court sustained the motion to suppress under the above circumstances. It is submitted that the facts of the case show clearly that there was not a search within the meaning of the prior decisions of the court, holding that a search implies a probing into hidden places for that which is concealed.[56] In this instance, the policy matter was lying open to view upon the table. Concerning the possibility of illegal entrance, Justice Stone, in his dissent, reasons logically that since the householder has a right to inquire who is seeking admission to his home, the holding of the majority opinion that permission to enter, given in ignorance of the identity and purpose of those seeking admission, renders such entrance illegal, not

[52] People v. Dalpe, 371 Ill. 607, 21 N.E. 2d 756 (1939).

[53] U.S. v. O'Brien, 174 F. 2d 341, 345 (C.A. 7th, 1949).

[54] In United States v. Mitchell, 322 U.S. 65 (1944), the Supreme Court approved on disputed evidence a finding of consent to search in a case where the consent was obtained while the defendant was in the custody of police officers.

[55] 371 Ill. 33, 19 N.E. 2d 1020 (1939).

[56] Authorities cited note 10 supra.

only is an unreasonable restriction upon officers of the law, unnecessary to preserve the constitutional safeguards of the citizen, but puts a premium upon such a plea of ignorance since, no matter how false the plea, it is impossible of refutation.[57]

In a recent decision by the Illinois Supreme Court,[57a] the facts disclosed that a police informer made a purchase of narcotics in the defendant's apartment. Police officers were waiting for the informer, and after determining that the substance he had was a narcotic, they accompanied the informer back to the apartment. They rapped for admittance, whereupon a lady's voice inside the apartment asked who it was. The informer answered that it was he, whereupon the woman, a companion of the defendant, opened the door, admitting the informer and the police officers. The defendant was sitting on the apartment couch, and the informer identified him to the police as the man from whom the narcotics had been purchased.

The defendant was then placed under arrest and upon his person was found money which had been given to the informer by the police officers earlier in the evening, the serial numbers having been recorded. The defendant contended that the money found upon his person at the time of the arrest was taken by an illegal seizure since no search warrant had been procured. The court, making no reference to the *Dent* decision, sustained the search.

A related problem occurs where the accused is alleged to have been coerced to consent to the search. In *People v. McGurn*,[58] the police jumped upon the defendant who was sitting in a taxicab and told him to keep his hands away from his pockets. They then commenced to feel his side and his stomach whereupon the defendant stated, "You will find it on the right side." The statement was held not to constitute a waiver of the defendant's constitutional right, but was rather a submission to the officers supposed authority for the purpose of prevention of further violence.

The above reasoning was not applied, however, in *People v. Preston*,[59] wherein the defendant was lawfully arrested on grounds of murder. In the presence of the police, the sheriff, and an assistant state's attorney, he was told to let down his trousers and expose his

[57] People v. Dent, 371 Ill. 33, 35, 19 N.E. 2d 1020, 1021 (1939).

[57a] People v. Faulkner, Docket No. 34367, 10 May 1957.

[58] 341 Ill. 632, 173 N.E. 754 (1930).

[59] 341 Ill. 407, 173 N.E. 383 (1930).

underwear, which he did, disclosing a blood stained shirt and underclothes, which were later introduced as evidence against him at the trial. The court held the above constituted a valid search. It would appear that a person in police custody, surrounded by law enforcement officers has as equally submitted to authority as one who discloses where a weapon is to a police officer who is searching his person. In both instances an implied official coercion is present.

An interesting set of facts was presented in a very recent Illinois Supreme Court decision.[59a] The defendant was arrested by an officer with an arrest warrant while the defendant was standing in his apartment house on the stairs leading from the first-floor vestibule to the second floor. When the arresting officer started to read the warrant to the defendant at her apartment door, which was standing open, the defendant said: "Come on inside; the neighbors upstairs will hear you." The court held that the entry into the apartment was lawful, and as to all articles that were in plain view ". . . . there was no unlawful search since the officers were in the apartment at the invitation of the defendant."[59b]

The problem of implied coercion also arises in those instances where it is necessary to determine whether the consent of a third person is binding on the defendant so as to waive the latter's constitutional privileges. Thus in *People v. Lind*,[60] the court asserted the general proposition that the constitutional barrier to unreasonable search and seizure can be waived by the person whose rights are invaded or by someone specifically authorized to act for him in the matter. However, in this case, the court held that even if the defendant's wife possessed the authority to waive his constitutional rights, she was in a highly nervous state because of the recent arrest of her husband, and the request to search the premises by the officer was thus so tinged with coercion that it could not be said to have been freely given, and thus she cannot be said to have waived her husband's constitutional rights.

In *People v. Mizzano*,[61] in a similar factual situation, the wife of one of the defendants answered the door. The officers told her that

[59a] People v. Heidman, 11 Ill. 2d 501, 144 N.E. 2d 580 (May, 1957).

[59b] Ibid., at 585.

[60] 370 Ill. 131, 18 N.E. 2d 189 (1938).

[61] 360 Ill. 446, 196 N.E. 439 (1935).

they were police officers and that they had information that stolen goods were in her home. The court held:

> There was no evidence of an unlawful search. While the officers did not have a search warrant, they had been informed that stolen property was to be found in that building and searched the premises with the consent of Mrs. Scallati.[62]

This decision does not appear to be in agreement with the *Lind* ruling. As a possible basis of distinction, the court stated that the property seized was not offered in evidence. However, the company's inventory of the property was offered and received in evidence and the officers were allowed to testify as to what they found, all of which evidence should have been held inadmissible if the search and seizure were declared unlawful.

A recent Illinois decision[63] presented an interesting set of facts. A husband and wife had a family quarrel in which the husband assaulted the wife with a weapon. The wife invited the officers to search for the weapon on the premises jointly owned and occupied by her and her husband. The husband sought to suppress the introduction of the weapon in evidence, alleging that the consent of the wife to search the premises could not act as a waiver of his constitutional privileges. The court denied the motion to suppress, stating that where two persons have equal rights to the use or occupancy of the premises, either may consent to a search and the evidence thus disclosed can be used against either. It was pointed out that in this instance the wife was not acting as an agent for her husband, but acting in her own right as an occupant of the premises.

Similarly, it has been held that a woman can consent to a search of premises against a man she is living with where the house is under joint ownership and control.[64] Also, the consent of one counterfeiter waives the constitutional right of the other partner where they have equal rights to the use and possession of the premises.[65] It has, an addition, been held that the rights of an employee roomer can be waived by the employer who is the owner of the house.[66] These latter decisions are in conformity with the judicial trend which tends to carve out new exceptions to the exclusionary rule and thus to avoid the application of the rule in favor of an unworthy defendant.

[62] Ibid., at 449 and 440.

[63] People v. Shambley, 4 Ill. 2d 38, 122 N.E. 2d 172 (1954).

[64] Stein v. U.S., 166 F. 2d 851 (C.A. 7th, 1948).

[65] U.S. v. Sferas, 210 F. 2d 69 (C.A. 7th, 1954); cert. denied 347 U.S. 933 (1954).

[66] Milyoncio v. U.S., 53 F. 2d 937 (C.A. 7th, 1931); cert. denied 286 U.S. 551 (1931).

CONCEALED WEAPONS CASES

The impropriety and incongruity resulting from the application of the Illinois exclusionary rule become most apparent when applied to the specific criminal offense of carrying a concealed weapon. The pertinent provision of the Illinois statute relating to concealed weapons states:

> No person shall carry concealed on or about his person a pistol, revolver or other firearm. . . .[67]

It has been held in this regard that before there can be a conviction under this statute there must be proof that the firearm is covered in such a manner as to give no notice of its presence,[68] or that it at least be concealed from ordinary observation.[69] Moreover, the general rule has been asserted by the Illinois courts that discovery of the weapon after the arrest of the defendant cannot relate back to and operate as a justification of the arrest, and therefore a motion to suppress will lie to prevent the introduction of the weapon in evidence.[70]

The practical effect of the application of the above rules by the Illinois courts is to make a criminal practically immune from arrest for the offense of carrying a concealed weapon upon his person. The only instance in which an accused can be convicted for the latter offense is when he has been lawfully arrested on reasonable grounds for believing he is guilty of a different offense and the incidental lawful search of his person reveals a concealed weapon.[71]

The facts in *People v. Ford*[72] clearly illustrate the above situation. In this case a deputy sheriff saw the defendant, a reputed member of a known criminal gang sitting in an automobile in front of a roadhouse on the outskirts of the city of Chicago. The deputy was under the instructions of his superior officer to apprehend any member of this gang for questioning with respect to the abduction of one Jake Factor. He arrested the defendant without a warrant and after making the arrest, searched him, and discovered an automatic pistol on his

[67] Ill. Rev. Stat. (1955) c. 38, § 155.

[68] People v. Niemoth, 322 Ill. 51, 152 N.E. 537 (1926).

[69] People v. Euctice, 371 Ill. 159, 20 N.E. 2d 83 (1939).

[70] People v. Ford, 356 Ill. 572, 191 N.E. 315 (1934); People v. Humphreys, 353 Ill. 340, 187 N.E. 446 (1933); People v. Macklin, 353 Ill. 64, 186 N.E. 531 (1933); People v. McGurn, 341 Ill. 632, 173 N.E. 754 (1930).

[71] People v. Euctice, 371 Ill. 159, 20 N.E. 2d 83 (1939); People v. Kissane, 347 Ill. 385, 179 N.E. 850 (1931).

[72] 356 Ill. 572, 191 N.E. 315 (1934).

person. The court admitted that it was manifest from the evidence that the defendant was committing the offense of carrying a concealed weapon at the time he was arrested. Nevertheless, a motion to suppress the weapon as evidence was sustained and the defendant discharged.

Similarly, in *People v. Henneman*,[73] the defendant was arrested as he was walking into a tavern, under what the police officer believed to be suspicious circumstances. The officer followed him into the tavern and arrested him, brought him out on the sidewalk, searched him and found a .32 caliber pistol in his possession. He was convicted of the offense of carrying a concealed weapon. The Illinois Supreme Court ruled that the trial court erred in denying the motion to suppress the weapon as evidence. The court stated:

> This court has repeatedly held that the fact that it develops after an invalid arrest, that the person arrested is carrying concealed weapons, does not justify the arrest, and an officer making such arrest without a warrant must, as ground for his belief that the person arrested is guilty of a crime or implicated therein, have information of some facts which would indicate and influence a prudent, cautious man under the circumstances.[74]

The above decisions appear to be diametrically opposed to the Illinois Supreme Court declaration that the constitutional limitation on searches and seizures was primarily intended as a shield to the innocent rather than a refuge for the guilty.[75] This, then, is an instance where the constitutional provision is distorted by extending the meaning so as to defeat the ends of justice.

The reasoning applied in the above decisions was to the effect that the officer had neither knowledge nor information that the defendant had committed any criminal offense and the discovery of the weapon cannot relate back to and operate as a justification for the arrest. The court's statement to the effect that the officer had neither knowledge nor information that the defendant had committed any ciriminal offense was made to refute any contention that the arrest was valid under the first section of paragraph 657 of the Illinois Criminal Code[76] as an arrest made by an officer for a criminal offense committed in his *presence*.

[73] 373 Ill. 603, 27 N.E. 2d 448 (1940).

[74] Ibid., at 606 and 449.

[75] People v. Exum, 382 Ill. 204, 47 N.E. 2d 56 (1943); People v. Marvin, 358 Ill. 426, 193 N.E. 202 (1934).

[76] Ill. Rev. Stat. (1955) c. 38 § 657.

A closer examination of the statute reveals that it only requires that the offense be committed in the *presence* of the officer and not in his sight or view. Thus, what the Illinois courts are doing in these instances is formulating a new process of reading into the Illinois statute the requirement that the officer have knowledge of the commission of the offense communicated to him through his sense of sight, for surely under a literal interpretation of the statute the defendants in both the *Ford* and *Henneman* cases were committing the offense of carrying a concealed weapon in the *presence* of the officers.

Sight will be the only one of the senses applicable in these instances, for normally a weapon cannot be tasted or heard or smelt, and touching is eliminated in that a touching for the purpose of ascertaining the presence of a concealed weapon is itself an unlawful search. To proceed to a ridiculous end, we see that we must place a further limitation on the sense of sight. Presumably sight must be confined to those instances where a bulge occurs in the clothing and that bulge is seen by the officer, using his sense of sight as a prudent and cautious man under the circumstances, and he recognizes that bulge to be in the shape of a weapon, for the gravaman of the offense is concealment and if the weapon is visible to eyesight or ordinary observation it is not concealed.[77]

The Illinois Supreme Court has stated that the enactment of a law against carrying concealed weapons is aimed at persons of criminal instincts and for the prevention of crime.[78] This same court has stated that the object of the legislature in the passage of the Concealed Weapons Act was to protect the public against the occurrence of assaults, affrays and crimes of violence, which are encouraged by the general and promiscuous carrying of concealed weapons.[79] It is hard to reconcile the above statements of the court with the Illinois decisions concerning the carrying of concealed weapons. The effect of such decisions is to render the statute nugatory in those instances where the weapon is concealed on the person of the defendant.

How much more consistent was the attitude expressed by the Illi-

[77] Authorities cited notes 68 and 69 supra.

[78] People v. Liss, 406 Ill. 419, 94 N.E. 2d 320 (1950).

[79] People v. Saltis, 328 Ill. 494, 160 N.E. 86 (1927), appeal dismissed 277 U.S. 575 (1928). In this case the admission into evidence of the revolver found on the person of the defendant after the arrest was held not to have deprived the defendant of his constitutional rights where the testimony of the witness to the effect that the defendant had a concealed revolver on his person was received without objection.

nois Supreme Court in *People v. Garwood*,[80] where the defendant had been convicted of carrying a concealed weapon. The court held that the defendant by taking the case to the appellate court had waived the constitutional question of illegal search and seizure. The court used some strong but consistently fitting language in stating:

> They are clearly guilty of the offense charged and they should consider themselves fortunate that the penalty imposed was not much heavier.[81]

ARREST AND INCIDENTAL SEARCH AND SEIZURE WITHOUT BENEFIT OF WARRANT

The situation here presented is that in which an arrest is made by an officer without an arrest warrant, and he proceeds to conduct an incidental search without benefit of a search warrant. Where the arrest is justified, the accompanying search without a search warrant is also justified, and evidence taken as a result of such incidental search is admissible.[82] Conversely, if the arrest is unlawful, the property taken as a result of the search incident thereto is not admissible in evidence upon a motion to suppress it.[83] Thus the primary consideration becomes that of determining what is a valid arrest. Paragraph 657 of the Illinois Criminal Code provides:

> An arrest may be made by an officer or by a private person without warrant, for a criminal offense committed or attempted in his presence, and by an officer, when a criminal offense has in fact been committed, and he has reasonable grounds for believing that the person to be arrested has committed it.[84]

As to what physical acts of the arresting individual are necessary to actually effect an arrest, it may be stated generally that arrest imports an actual restraint or detention. Manual touching is not necessary where the subject submits to the arrest or is otherwise actually subjected to restraint.[85] In addition to the authority of the arresting person as prescribed by the above statute, and his intention to arrest, which intention is understood by the one arrested, there must be an actual restraint of the person, a restriction of his right of locomotion.[86]

[80] 317 Ill. 578, 148 N.E. 259 (1925).

[81] Ibid., at 580 and 259.

[82] People v. Clark, 9 Ill. 2d 400, 137 N.E. 2d 820 (1956); People v. Roberta, 352 Ill. 189, 185 N.E. 253 (1933).

[83] People v. Galloway, 7 Ill. 2d 527, 131 N.E. 2d 474 (1956); People v. Ford, 356 Ill. 572, 191 N.E. 315 (1934).

[84] Ill. Rev. Stat. (1957) c. 38, § 657.

[85] People v. Mirbelle, 276 Ill. App. 533 (1934).

[86] Ibid., at 540.

The case of *People v. Scalisi*[87] provides an excellent example of the importance of the distinction between an arrest for questioning which is clearly unlawful, and the action of an officer in stopping a person for the purpose of questioning him, which is clearly permissible. Police officers saw the defendants riding in a Cadillac car at 9:00 A.M., became suspicious, and followed the car. When the car stopped, the police approached it, gun play ensued, and an officer was killed. The defendants were convicted of murder. The Supreme Court of Illinois, in reversing the conviction of the defendants, placed much emphasis on what they termed the illegality of the attempted arrest.

If the court had determined from the evidence that the officers, as they approached the car, had not intended to arrest the defendants for questioning but had merely intended to question them without putting them under arrest, unless their questioning of the defendants should reveal some crime, the aspect of illegal arrest might well have been removed from consideration. Of course other considerations enter into the question of whether or not the conviction would have been sustained. But the right of the officers to so stop and question the defendants was set out in *People v. Henneman*,[88] where the court stated:

> That the officers had a right to stop and question plaintiff in error and his companion cannot be doubted, and if there were disclosed by such questioning, facts which would tend to establish suspicion that plaintiff in error was engaged in or had been guilty of a crime, his arrest, made as a result of such belief on the part of the officers, would be a legal arrest and a search following such an arrest would not be an unreasonable search.[89]

Thus in the *Scalisi* decision, of paramount importance was the determination of the intent of the officers. The court stated that the testimony of Conway, the leader of the squad, showed conclusively the officers intent to arrest. Excerpts from the decision reveal that Conway testified in part as follows:

> . . . That when his squad was pulling up to where the cars finally came to a stop, and as he was getting out of the car and started to approach the Cadillac, it was his purpose and intention to interrogate the men in the Cadillac car and at that time to detain them for a length of time until satisfied as to who they were; that at the time he turned around and followed the Cadillac car it was his intention to stop them and find out who they were, and detain them long enough to question them. . . .[90]

[87] 324 Ill. 131, 154 N.E. 715 (1926).

[88] 367 Ill. 151, 10 N.E. 2d 649 (1937).

[89] Ibid., at 154 and 650.

[90] People v. Scalisi, 324 Ill. 131, 138; 154 N.E. 715, 718 (1926).

The above evidence is not inconsistent with an intent to stop and question. In any event, the testimony of Conway does not appear to show *conclusively* the intent to arrest for questioning. The question of restraint of physical locomotion and other acts necessary to constitute an arrest would also be pertinent to this inquiry.

There is a fine line as to when a stopping by an officer of an individual will in and of itself constitute an arrest. Police officers have the right to stop and question persons where their duty calls for them to do so. In the absence of evidence of a flagrant abuse by the officers, this right to stop and question should be construed liberally to the advantage of the representative of the people who in many instances is risking his life in so acting. This is especially true where the officer is merely approaching the defendants at the time he is fired upon.

As to an arrest by a private person, the rules are clear and the statute is construed literally. He may arrest only when an offense is committed or attempted in his presence, and he may not arrest another private person on probable cause or because he has reasonable grounds to believe such person to be guilty of a crime which has been committed.[91] If a private person does so arrest, he will be guilty of trespass if no criminal offense was committed or attempted in his presence, whether or not he had probable cause to believe the arrested person guilty.[92]

Regarding the situation where an officer arrests pursuant to the statutory provision that a criminal offense has in fact been committed, and he has reasonable grounds for believing that the person to be arrested has committed the offense, the problems become more complex. The term "criminal offense" within the meaning of the Illinois Arrest Act includes not only felonies, but misdeameanors as well. Thus in *People v. Clark*[93] and *People v. Edge*,[94] it was held that a search incident to an arrest for a parking violation or violation of a municipal traffic ordinance would be justified, and that it was immaterial whether or not the charge was sustained, or even whether the defendant was ever charged with the minor violation. The above holdings deal directly with an offense committed in the presence of the officer and represent a liberal view of the court in sustaining an

[91] Enright v. Gibson, 219 Ill. 550, 76 N.E. 689 (1906).

[92] Schramko v. Boston Store of Chicago, 243 Ill. App. 251 (1927); Sundmacher v. Block, 39 Ill. App. 553 (1890).

[93] 9 Ill. 2d 400, 137 N.E. 2d 820 (1956).

[94] 406 Ill. 490, 94 N.E. 2d 359 (1950).

arrest on a minor charge, when there is a strong indication that the arresting officer suspected the defendant of a more serious offense at the time he made the arrest for the traffic violation. In both instances, the incidental search disclosed evidence of the more serious offenses, and the defendants were convicted of said offenses with the aid of such evidence, while the minor offenses that were used to sustain the arrest, were completely ignored after such use.[95]

The most serious problems arise in this area, where the offense is not committed in the presence of the officer, but he nevertheless arrests a person for that offense without an arrest warrant. The decisions do not present us with a general rule as to what is or is not reasonable grounds for such an arrest within the meaning of the statute. It is generally stated that reasonable grounds for making the arrest is always a mixed question of law and fact, and that each case must be considered and decided upon its own set of facts.[96]

By way of preliminary consideration, we may observe that statements of opposite extremes frequently appear in the decisions. On the one hand it has been stated that an arrest by an officer on bare suspicion is not a valid arrest.[97] On the other, the statement appears that what is in fact required by the statute is that the officer's ground for belief that the person to be arrested is guilty of a crime must be such as would influence the conduct of a prudent and cautious man under the circumstances.[98]

A study of the decisions concerned with Illinois law reveals that the interpretation by the courts of similar as well as contrasting factual situations has been seemingly inconsistent to the extent that even if the officer were a trained attorney familiar with each of the decisions, he would not be able to determine with reasonable certainty whether or not the facts surrounding the arrest which he is contemplating are sufficient to sustain it legally. The problem becomes even more difficult for the ordinary officer, totally unfamiliar with judicial requirements.

[95] See U.S. v. Lefkowitz, 285 U.S. 452 (1932) in support of the proposition that an arrest may not be used as a pretext to search for evidence.

[96] Carroll v. United States, 267 U.S. 132 (1925); People v. Kissane, 347 Ill. 385, 179 N.E. 850 (1932).

[97] People v. Gallaway, 7 Ill. 2d 527, 131 N.E. 2d 474 (1957); People v. De Luca, 343 Ill. 269, 175 N.E. 370 (1939); People v. Chatman, 322 Ill. App. 519, 54 N.E. 2d 631 (1944).

[98] People v. Derrico, 409 Ill. 453, 100 N.E. 2d 607 (1951); People v. Euctice, 371 Ill. 159, 20 N.E. 2d 83 (1939); People v. Brown, 354 Ill. 480, 188 N.E. 529 (1933); People v. Marklin, 353 Ill. 64, 186 N.E. 531 (1933); People v. Kissane, 347 Ill. 385, 179 N.E. 850 (1932).

It has been stated that the bad reputation of the defendant, or his reputation for being a hoodlum, standing alone, is not sufficient to justify an arrest, and is in fact an arrest based on mere suspicion. Thus in *People v. Ford*,[99] the defendant was arrested while seated in an automobile which was parked in front of a roadhouse on the outskirts of Chicago. The officer testified that he was acting under the instructions of his superior officer to apprehend any member of the Touhy gang in connection with the abduction of one Jake Factor. The defendant was arrested and searched, and an automatic pistol was found on him. The court in reversing the conviction for carrying a concealed weapon stated:

> The officer however had neither knowledge nor information that the plaintiff in error had committed any criminal offense. The evidence discloses that he was arrested solely because he was reputed to be a member of a certain body of men suspected of being implicated in the kidnaping of Factor.[100]

In *People v. Kissane*,[101] police officer William Drury arrested the defendant Anthony Kissane, otherwise known as Red Kissane, a person of no little reputation, whom this same officer had arrested before. Drury said that his reason for arresting the defendant was that he had received a description of a man at a roll call who had held up a bank two days before. He testified that he came to the conclusion that Kissane answered the description, and he arrested him on the street, searched him, and found a weapon in his jacket. Kissane was not the perpetrator of the robbery, was never formally charged with the bank robbery and was released from jail about five hours after his arrest. The court sustained the above arrest, and the defendant was convicted of the offense of carrying a concealed weapon.

The above decisions are not without their similarities. It is submitted, however, that the conclusions reached in the above cases do not add certainty to the law of arrest, especially in the mind of the ordinary police officer.

Seeming uncertainty is to be found in the Illinois decisions dealing with the arrest of one who is found in the presence of another person who is lawfully arrested. The question becomes one of determining whether mere physical presence of the former person with the one lawfully arrested is sufficient to show that the former is also implicated in a criminal offense. If independent acts are being performed

[99] 356 Ill. 572, 191 N.E. 315 (1934).

[100] Ibid., at 576 and 317.

[101] 347 Ill. 385, 179 N.E. 850 (1932).

by the person who is present with the one lawfully arrested, such acts may be sufficient to implicate the former in the offense. Thus in *People v. McGowan*,[102] the police officers observed one Dawkins carry a bag that was open in such a manner that the policy slips could be seen. The defendant McGowan was seen to emerge from the building carrying a bag of similar type and appearance. The court in sustaining the arrest stated:

> . . . We believe such facts were sufficient to justify the belief of a prudent and cautious man that McGowan was likewise implicated in the offense and that the bag carried by him also contained policy slips. Under such circumstances we must conclude that the arrest of Thomas McGowan and the search made incident thereto were justified under the law.[103]

In *People v. Galloway*,[104] a police informer named Gladden made a purchase of narcotics from one Galloway; the purchase was made a few blocks away from the point where the police officers were waiting for the informer to return. The defendant Jones was with the defendant Galloway at the time of the sale to Gladden, and Jones actually supplied the narcotics to Galloway in the presence of Gladden. However, when Gladden returned to the police, he neglected to mention Jones, and he gave the police a description of Galloway only. The police proceeded to the place of the sale and arrested Galloway and Jones, who was still present with Galloway at the time of the arrest. The court sustained the arrest of Galloway. In holding the arrest of Jones illegal, it stated:

> From Gladden's testimony it appears that he did not know or describe Jones, nor did he tell officers Smith and Wright how many men he had dealt with. Galloway was arrested because Gladden described him to Officer Smith following the alleged purchase. The officer, therefore, must have had a reasonable belief that Galloway had committed an offense, but he could not have had a reasonable and well founded belief as to Jones's participation in the alleged crime. Jones was arrested merely because he was found in the presence of Galloway, and this could not make the Jones arrest lawful.[105]

This reasoning was not applied by the Illinois Supreme Court in *People v. Euctice*.[106] In this case Illinois police had received a radio call from Indiana police that a robbery and murder had been committed in Indiana and the killers were proceeding on Route 66 to Illinois. The officers had stopped the car of the defendants because one

[102] 415 Ill. 375, 114 N.E. 2d 407 (1953).

[103] Ibid., at 382 and 410.

[104] 7 Ill. 2d 527, 131 N.E. 2d 474 (1956).

[105] Ibid., at 535 and 478.

[106] 371 Ill. 159, 20 N.E. 2d 83 (1939).

of them was said to answer the description of the men given in the radio call. The court in sustaining the arrest and search and seizure of all of the defendants in the car stated:

> Euctice was said to have answered the description of one of the men given in the radio call. Under such circumstances, the arrest was lawful, and the officers had a right to search defendants without a search warrant, for in such case the right of search and seizure is incidental to the right to arrest. . . .[107]

It becomes even more difficult to rationalize the above holdings when it is considered that in the *Galloway* case, Jones was in fact guilty of the offense he was arrested for, while in the *Euctice* case, it was later shown that the defendants had no connection with the Indiana offenses, and they were convicted only for the offense of carrying concealed weapons in the automobile that was stopped by the police.

In *People v. Derrico*,[108] the court sustained the arrest of the defendant who was in a car with one Hrabina at the time that the latter was lawfully arrested for burglary. The court, in holding that the facts were sufficient to engender in the mind of the officer "as a prudent and cautious man, a belief that the defendant was implicated in the robbery" placed much emphasis on the presence of the defendant in the car with Hrabina and the fact that a safe moved in the burglary could not have been moved by one man. It is submitted that the above facts are not considered sufficient for a lawful arrest of the defendant Derrico, when it is considered that the burglary had occurred over two months prior to the date of the arrest and at a distance from the scene of the arrest.

In *People v. Henneman*,[109] a filling station had been held up by two men in a black car. On the very next day and at a distance of only two miles away, the defendant was arrested, searched, and found to be carrying a concealed weapon. On the trial for the latter offense, the officers testified that they thought that the man who was in the black car with the defendant immediately prior to the defendant's arrest, answered the description of the man who actually committed the robbery. The court held that the above facts did not justify a reasonable belief that the defendant Henneman was in any way implicated in the crime.

[107] Ibid., at 162 and 85.

[108] 409 Ill. 453, 100 N.E. 2d 607 (1951).

[109] 373 Ill. 603, 27 N.E. 2d 448 (1940).

Finally, the much discussed case of *People v. Tillman*,[110] presents a very interesting set of facts. In this case, the source of information initially given to the police officers was not by way of roll call, radio call, police informer, or the order of a commanding officer. The officers received an anonymous phone call telling them that in a specific room at the Grand Hotel there was a man called "Trench Coat" who was peddling narcotics, and on a previous evening he had sold drugs to an addict. "Trench Coat" and his woman companion were specifically described by the caller.

The officers proceeded to the specific room in the Grand Hotel, and in the hallway outside the door of the room, they found a heavy set woman meeting the description given to them on the phone. The door was slightly ajar, so that the officers could see a man lying asleep upon a bed, and his description also matched the one given in the phone conversation. The officers arrested the woman, brought her into the room, and searched her, finding heroin in her robe. They then awakened the defendant "Trench Coat" on the bed, arrested him, and found ninety-five capsules of heroin under the mattress. The Illinois Supreme Court in affirming the conviction in the lower court where the arrest was sustained and the motion to suppress denied, stated:

> Finding narcotics on defendant's confederate gave much support to the officers' belief that Trench Coat was trafficking in narcotics. Certainly, the defendant and his confederate were committing a crime in the presence of the officers, because without contradiction, they were in possession of, and had under their control, narcotic drugs in violation of the above section.[111]

As to the first sentence in the above quotation, under the holding of the *Galloway* decision, the mere fact that the officers found narcotics on the woman who was in the hall, by itself would not have been sufficient to justify the arrest and search of the defendant in the room. The court did in fact place much reliance on the information received in the anonymous phone call; it was essential for it to do so to sustain the arrest of the defendant. The decision, in so far as it allows a determination of the reasonable belief of the officers at the time of the arrest to be based upon an anonymous phone call, reaches a new high in liberality in sustaining an arrest. It is far removed from the requirements of a warrant that must be supported by a signed, sworn affidavit

[110] 1 Ill. 2d 525, 116 N.E. 2d 344 (1954) cert. denied 348 U.S. 814 (1954); cert. denied 350 U.S. 1009 (1956).

[111] Ibid., at 531 and 348.

based upon personal knowledge.[112] Justice Klingbiel in one of the dissents in the case, describes the majority opinion as making a mockery of the constitutional provision against illegal search and seizure.[113]

As to the second sentence, in the above quotation from the opinion of the court, to the effect that the defendant and his confederate were committing a crime in the presence of the officers, it appears to be in direct derogation of the well-established Illinois rule that the discovery of evidence after an arrest cannot relate back to and operate as a justification of the arrest. Here, then, there was no evidence that the narcotics in the robe and under the mattress were seen by the officers until after the arrest.[114] If the court here means that "presence" does not require sight or view before arrest, it is saying so for the first time and it is opening up a new field of arrest, especially in those concealed weapons cases where the weapon is not discovered until after an invalid arrest. Law enforcement and justice would benefit from such an interpretation.

SEARCH CONDUCTED BY OTHER THAN STATE OFFICERS ACTING UNDER COLOR OR AUTHORITY FROM THE STATE

Proponents of the exclusionary rule have asserted that its retention is necessary to preserve the inviolability of an individual's constitutional right against illegal search and seizure. It is submitted that the decisions do not support the above contention, especially where the application of the motion to suppress is made to depend upon the mere fortuitousness of the duty and occupational status of the individual conducting the search. Thus in Illinois, on a given set of facts, if two separate individuals, one a state officer and the other a person not acting under color or authority from the state, conduct separate searches in the identical unlawful manner using the exact unlawful means, the evidence obtained by the latter person will be held not to be subject to a motion to suppress.

The foregoing is well illustrated by the decision in *People v. Touhy*,[115] where an unlawful search based upon mere suspicion was conducted by officers of the state of Wisconsin. The Illinois Supreme Court here stated:

[112] Authorities cited, notes 19 and 20 supra.

[113] People v. Tillman, 1 Ill. 2d 525, 116 N.E. 2d 344 (1954).

[114] Authorities cited, note 70 supra.

[115] 361 Ill. 332, 197 N.E. 849 (1935).

. . . The rule in this state is, that where officers of the state charged with the prosecution of a crime, conduct, by virtue of their office, an unlawful search and seizure, the evidence there obtained is not admissible against the defendant. The rule is not applied to evidence unlawfully obtained by others than state officers acting under color of authority from the state. Likewise the provision of the Federal Constitution against unlawful search and seizures is not intended as a limitation upon other governmental agencies. The seizure was not made or authorized by an officer of this state or any agency. The court did not err in denying the motion to suppress.[116]

Similarly, it has been held that where the person who obtained the evidence was only a private detective acting under a private employment having no official authority, the evidence was not rendered inadmissible because of an unlawful search and seizure. Thus the court in *Gindrat v. People*[117] held that the Illinois constitutional prohibition against unreasonable search and seizure is a limitation on the powers of the state government and has nothing to do with the unauthorized rights of the private individual, having no authority or color of authority from the state.

It appears improper to hold that the people of the state are to be penalized in their efforts on behalf of law enforcement because the act was committed by an employee of the people, while no such penalty is exacted where the search is conducted by one of their own group. Justice Cardozo summed up the inconsistency of the above situation very simply:

The criminal is to go free because the constable has blundered.[118]

In the federal courts it is held that the evidence obtained by an illegal search and seizure is nevertheless admissible where the search is made for the purpose of enforcing state law, by state officers without federal participation. Thus in *United States v. Haywood*,[119] where Chicago police illegally arrested the defendant for a violation of the Illinois Uniform Narcotics Drug Act, the court stated:

Generally speaking in the federal courts state officers are considered as strangers as far as the use of evidence procured by search and seizure is concerned; and although search and seizure by state officers may be illegal, if made entirely independent of any cooperation with federal officers, the evidence seized is usually admissible in prosecutions in the federal courts.[120]

So also where a federal officer is involved, the prevailing view is that evidence obtained by an unlawful search and seizure by federal

[116] Ibid., at 347 and 857.

[117] 138 Ill. 103, 27 N.E. 1085 (1891).

[118] People v. De Fore, 242 N.Y. 13, 21, 150 N.E. 585, 587, (1926).

[119] 208 F. 2d 156 (C.A. 7th, 1953).

[120] Ibid., at 158.

officers without participation of state and local officers is admissible in a prosecution in a state court.[121] The Illinois courts have not had occasion to rule on precisely this factual situation, although in *People v. Dalpe*,[122] the evidence was held to be inadmissible where a federal officer was not only working in conjunction with state police officers at the time of the search, but in addition led the search and seizure.

The admissibility of evidence and the protection of a citizen's fundamental constitutional right should not be made to depend upon the antecedent and wholly unrelated fact that the unreasonable search by which it was unlawfully obtained was made by a federal officer instead of a city or state policeman. This is not founded in reason or in law. The city or state policeman takes substantially the same oath to uphold the law of the land that the federal police officer takes. Concerning this situation, Justice Thompson stated:

> ... If it is the purpose of the rule to protect the outraged citizen, he is entitled to the protection under one situation as under the other. The unsoundness of the rule rests in the erroneous assumption that the people are bound by the wrongful acts of public police officials employed by their government and that the people are to be punished for those acts by the courts refusing to receive evidence illegally obtained.[123]

The above examples of distinctions and technical exceptions reveal the confusion that has arisen in the law because of the presence of the motion to suppress, which in turn is being rendered valueless by these same exceptions and distinctions.

CONCLUSION

The spectacle of an obviously guilty defendant obtaining a favorable ruling by a court upon a motion to suppress and thereby in effect obtaining immunity from any successful prosecution of the charge against him, is a picture which has been too often seen in Illinois practice. The due administration of criminal law is seriously hampered and in many cases entirely subverted by a strict adherence to the exclusionary rule. The rule has too often appeared as a tool in the hands of the criminal element.

If a defendant is innocent or if there is ample evidence to convict

[121] See Annotation at 50 A.L.R. 2d 571 (1956). But see also Rea v. United States, 350 U.S. 214 (1956) where in a five to four decision the court held that a federal agent may be enjoined from testifying in a state court on the basis of evidence obtained by him under an improper search warrant.

[122] 371 Ill. 607, 21 N.E. 2d 756 (1939).

[123] Dissent in People v. Castree, 311 Ill. 392, 413, 143 N.E. 112, 120 (1924).

him without the illegally obtained evidence, exclusion of the evidence gives him no remedy at all. Thus the only defendants who benefit by the exclusionary rule are those criminals who could not be convicted without the illegally obtained evidence. Allowing such criminals to escape punishment is not appropriate recompense for the invasion of their constitutional rights; it does not punish the officers who violated the constitutional provisions; it fails to protect society from known criminals who should not be left at large.

The offending officer should be punished for his violation of the constitution. As the exclusionary rule operates however, the defendant's crime and the officer's flouting of constitutional guarantees both go unpunished. Justice Jackson in speaking of the above situation stated:

> Society is deprived of its remedy against one lawbreaker because he has been pursued by another. The disciplinary or educational effect of the court's releasing the defendant for police misbehavior is so indirect as to be no more than a mild deterrent at best.[124]

As a matter of practical experience, this writer has had occasion to listen to instructional lectures given to Chicago police officers wherein the officers are told that their primary concern and consideration is not whether or not a conviction in court is obtained, but more important is that the narcotics, policy matter, gambling equipment and other contraband and stolen property are taken from the criminal element. The above instruction stems from the many technicalities that have arisen as a consequence of the application of the motion to suppress which makes it so difficult to obtain a conviction, and thus the law enforcement officers must concentrate on confiscating the contraband, so as to protect the interests of the People of the State in this worthwhile respect. In many instances it becomes mandatory for the officers to seize the contraband property immediately, for if they were to delay to procure a search warrant, or to wait for the defendant to commit some ancillary technical violation, they would not only lose the criminal, but the contraband property as well, which property then remains in the hands of the criminal element and is continued to be employed for a mephistophelian purpose.

The cost of retaining the exclusionary rule is manifestly too great. It would be far better for this state to adhere to the non-exclusionary rule, and if the judiciary does not deem it fit to do so, it is time for the

[124] Irvine v. California, 347 U.S. 128 (1954).

legislature to act. The plain implication of the United States Supreme Court in *Wolf v. Colorado*[125] is that the federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate. So also in Illinois, the legislature may and should negate.

In addition the legislature may re-examine the laws concerning the sanctions to be placed upon illegal searches and seizures. If the present Illinois law[126] is deemed inadequate to discourage illegal practices by enforcement officers, the legislature might well consider the apportionment of damages for such conduct between the governmental unit employing the officer and the individual officer.[127] It might also consider fixing a minimum amount to be received as damages in the same manner that a minimum has been fixed for the invasion of other civil rights. Strong criminal penalties might also be imposed upon officers and their superiors for violation of the constitutional prohibition against unlawful search and seizure.

These methods would be far more effective in discouraging illegal activities on the part of enforcement officers, and at the same time the abolition of the motion to suppress would discontinue its unjustifiable obstruction of the process of law enforcement and render inconsequential its failure to make proper accommodation for the social interest in effective repression of the criminal elements within the community.

[125] 338 U.S. 25 (1949).

[126] A common-law action for damages is available against officers who conduct an unlawful search. See Bucher v. Krause, 200 F. 2d 576 (1953), cert. denied 345 U.S. 997.

[127] See Karas v. Snell, 11 Ill. 2d 233, N.E. 2d (1957), in which the court discussed the fact that under the Revised Cities and Villages Act (Ill. Rev. Stat. [1955], c. 24, §§ 1–15), the city has indemnifying liability for the acts of its police officers when the injury caused by the police officer occurs while he is engaged in the performance of his duties and the injury does not result from the wilful misconduct of the officer.