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EVIDENCE—ADMISSIBILITY OF EVIDENCE OBTAINED BY "LIE-DETECTOR." [Wisconsin] The defendant, on trial for robbery, offered "lie-detector" testimony as to the truthfulness of his alibi, and as to his innocence of the crime itself. The trial court refused to admit the evidence, and the defendant appealed. *Held:* that the evidence was inadmissible; conviction affirmed: *State* v. *Bohner* (Wis. 1933) 246 N. W. 314.

The opinion of the court in this case contains a quotation from defense counsel's brief to the effect that the defendant offered to prove "by Prof. Leonarde Keeler, of the Northwestern University Crime Detection Laboratory, of Chicago, Illinois, by a test upon the defendant with his instrument known as the 'lie-detector' that the defendant was not in the city of Tomah on the date of the robbery and was not guilty." This language has conveyed the impression that Mr. Keeler actually conducted the tests referred to, and that he participated in the trial of the case. As a matter of fact, however, he never did test the defendant or anyone else suspected of this particular robbery. The extent of his participation consisted of correspondence with the defense counsel, in which Mr. Keeler consented merely to examine the defendant and render a report to defendant's counsel. Moreover, Mr. Keeler advised and requested that no attempt be made to introduce evidence either as to his willingness to conduct the test or as to any report he might render upon the result of his examination—it being thought advisable to await a more favorable opportunity to seek judicial recognition of such evidence, and at a time when more complete data and information could be presented for a court's consideration. Nevertheless, the present decision represents a refusal to admit "lie-detector" evidence in a criminal proceeding.

Long before psychologists ever attempted to develop a scientific technique for detecting deception, persons of average intelligence must have observed the fact that conscious lying ordinarily produces certain emotional disturbances such as blushing, squinting of eyes, squirming, peculiar monotone of the voice, throat pulsation, cold sweat, and a host of other manifestations. These phenomena were not merely observed and then set apart for psychological theorizing. They actually played, and still play, an important part in practical affairs — especially so in our judicial system. Every judge and every jury, perhaps unknowingly, gives considerable weight to physical reactions when an accused or a witness is giving testimony in

the trial of a case. And this has received judicial sanction. A court may even go so far as to instruct the jury that in determining the credibility of a defendant in a criminal case they may take into consideration his demeanor and conduct, both upon the witness stand and during the trial. *Boykin* v. *People* (1896) 22 Colo. 496, 45 Pac. 419. *Contra: Purdy* v. *People* (1892) 140 Ill. 50, 29 N. E. 700. Moreover, it is very generally held that the conduct, demeanor, and words of one charged with crime, about the time of its commission or of its discovery, or upon his arrest for or upon his accusation of it, are admissible as evidence against him. *McAdory* v. *State* (1878) 62 Ala. 154, 159. See 1 *Wigmore* "Evidence" (2d ed. 1923) § 273. It is apparent, therefore, that the notion of detecting deception by utilizing certain psycho-physiological principles is not entirely new.

The most reliable "lie-detector" perfected up to the present time is the Keeler Polygraph: *Larson* "Lying and Its Detection" (1932) xv. It consists of two units, one recording continuously and quantitatively the blood pressure, or rather the deviations from a known pressure and volume flow of blood; the other recording respiration. A third unit is to be added shortly—one recording the psycho-galvanic reflex, an indicator of the change in skin resistance to an imperceptible electrical current administered during the period of questioning, the variation being attributable to supposed changes in the activity of sweat glands. While this third unit is not new, heretofore some difficulty has been encountered in recording graphically its extremely sensitive reactions. For detailed discussion of the mechanical features of the instrument, see *Keeler* "A Method for Detecting Deception" (1930) 1 Am. J. Police Sci. 38, which article is quoted at length in *Wigmore* "Principles of Judicial Proof" (2d ed. 1931) 615.

Physiological irregularities, such as high blood pressure, etc., or emotional instability caused by worry or psychological strain, do not interfere with the deception test, because these factors are ascertained in the "control" part of the record. In other words, that part of the record made by the subject while being asked the few customary irrelevant questions (e. g., Have you had breakfast this morning?—requiring an answer of "yes" or "no," without explanatory remarks) will indicate the physiological and psychological peculiarities of the particular individual. Significance is attached only to the deviations from the "norm" at the points where the subject is being interrogated as to his participation in the crime under investigation.

Within the past eleven years (the last three with the assistance of Charles M. Wilson), Keeler who is now forensic psychologist at the Scientific Crime Detection Laboratory of Northwestern University School of Law, has conducted approximately fourteen thousand deception tests. And in the numerous criminal cases full confessions have been secured in some seventy-five per cent of those in which the record indicated deception regarding the pertinent questions propounded of the suspect.

Although no claim is asserted as to the infallibility of this deception technique, the results obtained over a period of years have indicated a remarkable degree of accuracy. But is perfection a prerequisite to

judicial recognition? Professor Wigmore, in his discussion of scientific evidence in general, has stated that it is only necessary for something of a scientific nature to have "a reasonable measure of precision in its indications." See 2 *Wigmore* "Evidence" (2d ed. 1923) §990. The admissibility of blood hound evidence: *State* v. *King* (1919) 144 La. 430, 80 So. 615; 8 R. C. L. §177, of evidence of similarity of foot-marks: *State* v. *McLeod* (1930) 198 N. C. 649, and of conduct to show insanity: 1 *Wigmore, supra* §228 *et seq.*—all "are striking examples of the fact that the conclusiveness in the inference called for by the evidence is not a requirement for admissibility." See *McCormick* "Deception Tests and the Law of Evidence" (1927) 15 Cal. L. Rev. 484, 500.

The instant case is the second in which an appellate court passed upon the admissibility of "lie-detector" evidence. The first was *Frye* v. *United States* (D. C. 1923) 293 Fed. 1013, 34 A. L. R. 145, in which a federal court rejected the testimony of W. M. Marston, one of the early experimenters with "lie-detectors."

Under the present procedure of conducting "lie - detector" tests, members of the Scientific Crime Detection Laboratory staff always obtain the consent of a suspected individual. No one is ever compelled to subject himself to an examination. All are apprised of the nature and significance of the tests. Therefore, under the rule admitting evidence voluntarily given by the accused, there is no doubt as to the propriety, as far as its constitutionality is concerned, of admitting the polygraph record thus obtained or expert opinion testimony concerning its interpretation. This would clearly constitute a waiver, and such evidence might be used against an accused for the purpose of proving that he lied in answering certain questions pertaining to his participation in a given crime.

Where the suspected individual refuses to submit to the test, his constitutional guaranty against self-incrimination may seem to afford him protection against a compulsory examination. And yet, upon the analogy of several other types of cases there should be no valid objection on this ground. For instance, an accused person may be compelled to stand up in court for the purpose of identification: *People* v. *Gardner* (1894) 144 N. Y. 119, 38 N. E. 1003, 28 L. R. A. 699; to place his feet in a suitable position for view by the jury: *State* v. *Prudhomme* (1873) 25 La. Ann. 522; to make foot-marks for comparison with those found at the scene of the crime: *Biggs* v. *State* (1929) 201 Ind. 200, 167 N. E. 129, 64 A. L. R. 1085; to make finger-prints for the same purpose: *People* v. *Sallow* (1917) 100 Misc. 447, 165 N. Y. Supp. 915; to submit to a physical examination for scars or wounds: *O'Brien* v. *State* (1890) 125 Ind. 38, 25 N. E. 137, 9 L. R. A. 323; to exhibit certain tatoo marks to the jury: *State* v. *Ah Chuey* (1879) 14 Nev. 79, 33 Am. Rep. 530.

"Lie-detector" evidence is of a nature similar to that used in the foregoing cases. The instrument merely records the reactions in a subject's blood pressure and respiration when asked questions pertinent to the crime under investigation. (*The record is precisely the same even though the subject remains silent instead of replying by the usual "yes" or "no."*) Therefore, in view of the fact (1) that

lay testimony is admissible concerning the physiological and psychological reactions of a person when accused or when being tried for a criminal offense (*Boykin* v. *People, McAdory* v. *State, supra*), and (2) that compulsory submission to a "lie-detector" test does not provoke "compulsory testimony" (if the analogy to the decisions cited in the previous paragraph is valid), it would seem that an accused individual may be forced to submit to the examination. The evidence thus obtained could be presented to a court by either (or both) of two methods. A qualified expert might testify as to the recorded reactions and his interpretation thereof, or else the polygraph record could be presented to the court with merely an explanation by the expert as to what physiological changes, if any, occurred during the interrogation.

The Wisconsin court in the *Bolner* case placed considerable emphasis upon the fact that if a defendant in a criminal case is permitted to have tests taken outside of court and then to introduce the results when favorable, without the necessity of his taking the witness stand, the way would be open to abuses that would not promote the cause of justice. But this objection is easily met by the suggestion that whenever a defendant seeks to introduce testimony of this nature he will be considered as having waived his privilege of refraining from taking the witness stand. Of course, the Wisconsin court also intimated that an accused could not be compelled to submit to the examination. But, upon the analogy of the cases previously discussed in this note, and after taking into consideration the nature of the test, it is here suggested that "lie-detector" evidence is admissible even though obtained from an unwilling individual.

The foregoing discussion concerning the constitutionality of "lie-detector" evidence assumes, for this purpose, judicial recognition of the science as such. That, of course, is the first step. And eventually data and information concerning the high degree of accuracy of the most advanced methods for detecting deception will be presented to the courts for their consideration in determining its judicial status as evidence of guilt or innocence. For that reason consideration was here given to the possible methods by which a court could admit the evidence without violating the constitutional safeguard against self-incrimination, and also without prejudicing the cause of the prosecution.

FRED E. INBAU.

JURY TRIAL—CONSTITUTIONALITY OF STATUTE PROVIDING FOR WOMEN JURORS.—[Illinois] The defendant was indicted and tried for robbery with a dangerous weapon. A challenge to the array was made by the accused on the ground that the jurors were selected in accordance with the provisions of the Act of June 17, 1929, providing for women jurors, which act had previously been held unconstitutional. The jury tendered contained the names of ten women. The trial court overruled the challenge. The defendant was convicted and sentenced for an indefinite term. *Held:* on appeal, reversed and remanded. The denial of a challenge to the array of jurors where the panel had been selected under an unconstitutional statute is reversible error: *People* v. *Patterson* (1932) 350 Ill. 519, 183 N. E. 584.

The case in which the court had declared the women juror statute unconstitutional was that of *People ex rel. Thomson* v. *Barnett* (1931) 344 Ill. 62, 176 N. E. 108, 76 A. L. R. 1044. That part of the act amending the law applicable to jury commissioners read as follows: "the said commissioners . . . shall prepare a list of all electors of both sexes between the ages of twenty-one and sixty years, possessing the necessary qualifications for jury duty, to be known as the jury list . . ." It was further provided that "this act shall not be in force unless the question of its adoption has been submitted to the legal voters of the state and approved by a majority of all votes cast upon the proposition . . . if a majority of the legal voters of this state voting upon said proposition vote in favor of this act it shall thereby and thereupon be in force and effect in this state": Illinois Session Laws (1929) sec. 1 (2) and sec. 2 (2) pp. 538-539. The *Barnett* case arose on a petition brought by a taxpayer of Cook County praying for a writ of mandamus commanding the jury commissioners of said county to prepare the jury list and to place the names of male citizens only upon such list. The writ was issued upon the ground that, under the Illinois Constitution, the General Assembly, except where it is so provided by the constitution, has no authority to refer a general act of legislation to a vote of the people of the state for their decision as to whether such act shall have effect as a law: Comment (1932) 26 Ill. L. Rev. 582. This decision is in accord with the majority view: *People* v. *Kennedy* (1913) 207 N. Y. 533, 101 N. E. 442; *Opinion of the Justices* (1894) 160 Mass. 586, 36 N. E. 488; *Brawner* v. *Curran* (1922) 141 Md. 586, 119 Atl. 250. But *cf. Santo* v. *State* (1855) 2 Iowa 165. The precise question involved in the instant case was considered in *People* v. *Schraeberg* (1932) 347 Ill. 392, 179 N. E. 829, the array having been challenged because drawn under the law declared unconstitutional in the *Barnett* case. In sustaining the challenge it was held that the law, prior to the attempted change, remained in force, and that trial before a jury selected without regard to such law was a denial of the right to trial by jury according to the law of the land. The Illinois Court, however, has not determined that women may not become liable to jury service, but only that the legislature chose an unconstitutional method of making them liable.

In general, the courts have held that a constitutional provision limited in its scope to suffrage does not automatically extend to women the right or duty to serve upon juries "since the statute for the appointment of jury commissioners and requiring them to make up a jury list of 'all electors'" (in the case of Illinois) "does not apply to and was not intended to include women, as the word 'electors' when the statute was enacted meant male persons only": *People ex rel. Fyfe* v. *Barnett* (1926) 319 Ill. 403, 150 N. E. 309; *In re Grilli* (1920) 110 Misc. 45, 179 N. Y. S. 795; *Opinions of the Justices* (1921) 237 Mass. 591, 130 N. E. 685; *State* v. *James* (1921) 96 N. J. L. 132, 114 Atl. 553; *McKinney* v. *State* (1892) 3 Wyo. 719, 30 Pac. 293; *State* v. *Bray* (1923) 153 La. 103, 95 So. 417; *State* v. *Mittle* (1922) 120 S. C. 526, 113 S. E. 335; Comment (1926) 21 Ill. L. Rev. 292; (1930) Ill. St. B. A. 278; Comment (1925) 11 A. B. A. J. 792. However, in the

case of *People* v. *Barltz* (1920) 212 Mich. 580, 190 N. W. 423, 12 A. L. R. 520, the court decided that when the Nineteenth Amendment granting suffrage to women was passed, women *ipso facto* became entitled to perform jury duty. This decision was grounded upon the theory that the discharge of jury duty is the privilege of every elector. From the pragmatic view the decision in the *Barltz* case apparently turned upon the fact that the Michigan Constitution, coupled with a statute, required jurors to be drawn from the electors and provided that every citizen of the state was an elector. Other courts also have decided, as did the Michigan Court, that no new legislation was necessary to qualify women for jury service after the passing of the Nineteenth Amendment, but that pre-existing statutes, wherein the qualifications of jurors were phrased in terms of "qualified voters," "qualified electors," or "electors and householders," were broad enough to include the newly enfranchised voters: *State* v. *Walker* (1921) 196 Iowa 823, 185 N. W. 619; *Palmer* v. *State* (1926) 197 Ind. 625, 150 N. E. 917; *Commonwealth* v. *Maxwell* (1921) 271 Pa. St. 378, 114 Atl. 825; *State* v. *Rosenberg* (1923) 155 Minn. 37, 192 N. W. 194; *Parus* v. *State* (1918) 42 Nev. 229, 174 Pac. 706, 4 A. L. R. 140 (as applicable to women grand jurors); Comment (1928) 23 Ill. L. Rev. 398. It thus becomes evident that the courts have in all cases, including those above, either directly or by way of dicta, held that legislative provision is necessary to qualify women for jury service: *People* v. *Lensen* (1917) 35 Cal. App. 336, 167 Pac. 406; *Ex parte Mana* (1918) 178 Cal. 213, 172 Pac. 986, L. R. A. 1918E 771; *State* v. *James*, *supra;* Comment (1922) 2 Ore. L. Rev. 30. *Cf. Strauder* v. *West Virginia* (1879) 100 U. S. 303, 310.

The reason for this rule may be found in the fundamental nature of jury trial as it has been developed with the common law. The right to vote is recognized as a constitutional right, while jury service is regarded as a liability, or a duty, imposed by the law making power, and therefore may be abridged denied or enlarged by the legislature: *People* v. *Holmes* (1930) 341 Ill. 23, 173 N. E. 145, 71 A. L. R. 1327; Comment (1921) 6 Va. L. Reg. (N. S.) 780. The Illinois Constitutional provision and jury statute have direct relation to jury service under the common law, wherein the very idea of a jury was of a body of men composed of peers or equals of the person whose rights it was selected to determine, since man alone served his realm as a peer. Thus, although the common law conception of a jury as a body consisting of twelve men had its origin at a time when women were denied political rights, a disqualification which has been removed by the Nineteenth Amendment, and even though, under the rule in the *Holmes* case, it admittedly has always been within the sole province of the legislature to determine who was a competent "peer," and in what manner jurors should be selected, and despite the fact that in the *Barltz* case the word "men" was held to have been employed in its generic sense, nevertheless, the courts have of necessity held that further legislative action is necessary to make women equally liable with men for jury service: Comment (1927) 12 St. Louis L. Rev. 138. It cannot properly be said, however, that additional legislation will of itself solve the problem of the woman

juror, inasmuch as the Illinois Constitution provides for a trial by jury as that institution was known at the time of the adoption of the Constitution, which was a jury of twelve men: *Stephens* "The Growth of Trial by Jury in England" (1896) 10 Harv. L. Rev. 150; *Thayer* "The Jury and Its Development" (1892) 5 Harv. L. Rev. 249, 295, 357. Thus an Illinois statute making women voters liable for jury duty will raise a question requiring close reasoning on the part of the court if it is to be upheld under the present constitution. It would not seem impertinent, however, to offer the prediction that a legislative enactment providing substantially that all male and female electors shall be liable to serve as jurors, will, in the light of modern tendencies, be upheld by the court.

ROBERT T. WRIGHT.

CONTEMPT — JUROR'S INTENT TO OBSTRUCT JUSTICE — ADMISSIBILITY OF EVIDENCE OF CONDUCT IN THE JURY ROOM.—[Federal] The petitioner, Genevieve Clark, was convicted of criminal contempt in that, with intent to obstruct justice, she gave answers knowingly false and others knowingly misleading in response to questions affecting her qualifications as a juror for the trial of one Foshay and others in Minneapolis, who were charged with the use of the mails in furtherance of a scheme to defraud: *United States* v. *Clark* (D. C. Minn. 1931) 1 F. Supp. 747. The petitioner, discovering the trial for which she was called was to be that of Foshay, realizing that she might be disqualified, and desiring to serve as a juror for "special reasons," concealed her former employment by the Foshay Company, and further concealed her interest in the case and friendship for those indicted. The evidence also showed that she argued with and explained transactions of the case to the other jurors upon personal information while the trial was in process. Finally, evidence of her conduct in the jury room was admitted showing that the petitioner would not listen to the arguments of the other jurors and told them that a witness for the government had previously perjured himself to convict an innocent man in the South, which information came to her personally through her husband during the trial. She hung the jury and admitted in her answer that she voted for acquittal. The Circuit Court upheld her conviction for contempt: *Clark* v. *United States* (C. C. A. 8th 1932) 61 F. (2d) 695. *Held:* on certiorari, affirmed. The privilege that protects from exposure the arguments and ballots of a juror does not obtain if his place on the jury was fraudulently begun or fradulently continued: *Clark* v. *United States* (1933) 53 Sup. Ct. 314.

Dean Pound has said that in one way or another almost all the vexed questions of the science of law prove to be phases of the problem of adjustment between rule and discretion: *Pound,* Interpretations of Legal History (1923) p. 1. It is of necessity then that we study the discretion as well as the rule: *Havighurst,* Services in the Home—A Study of Contract Concepts in Domestic Relations (1932) 41 Yale L. Rev. 388. The rule in the instant case is that a juror has a privilege which protects from exposure his arguments and ballots while considering his verdict: *R.* v. *Kahalewai* (1873) 3 How. 465, 470; *State* v. *Powell* (1824) 7 N. J. L. 244, 248.

See *Woodward* v. *Leavitt* (1871) 107 Mass. 453, 460. *Cf. Matter of Cochran* (1924) 237 N. Y. 336, 340, 143 N. E. 212; *People ex rel. Nunns* v. *County Court* (1919) 188 App. Div. 424, 430, 176 N. Y. S. 858. The origin of the privilege seems to be ancient usage which is now assumed and conceded; its reason is stated to be the public policy that desires independence of thought and will not permit stifling of debate in the jury room which might result from fear of exposure: 4 *Wigmore* "Evidence" (2d ed. 1923) §2346. This social policy conflicts in the present case with another social consideration, that of preventing fraud in trial by jury. Mr. Justice Cardozo, though recognizing the privilege in general outline, considered the integrity of the jury in the instant case of greater social need than keeping inviolate the privilege. He therefore exercised the discretion and drew an exception to the privilege rule, or rather limited its scope, by holding it not applicable where the relation out of which it arose had been fraudulently begun or fraudulently continued. To accomplish this, the court set up the postulate of the privilege as arising from an honestly created relationship, and by the aid of distinctions and analogies it achieved the result which recognized the paramount social policy.

The analogy of the attorney and client privilege, applied here by the court, provides a workable technique, i. e., the privilege survives until the relation is abused and vanishes when abuse is shown to the satisfaction of the judge. (See cases collected in the instant case.) This keeps the privilege inviolate from impertinence and malice, and permits its violation, not upon a mere charge of illegality, but only after a *prima facie* case has been made out by other evidence showing that the privilege ought not to be allowed. Thus the evidence made available by invasion of the jury room is only allowed by way of corroboration of a case already made out. By this construction the crime does not depend upon conduct in the jury room but is completed by the perjury with intent to obstruct justice. The facts in the instant case fit this, for the petitioner was not charged with perjury, nor with the obstruction of the processes of justice, but that by means of perjury she attempted to put herself in a position where she could so obstruct justice. Accepting this theory of the crime it would seem that whether the petitioner actually obstructed justice or not was immaterial and that there would still be contempt although she actually voted according to her conscience and justice was not obstructed. The rationale of this possibly unjust result, which is the logical result of the court's reasoning, is that if justice was not in fact obstructed by the fraud of the talesman, the contempt proceedings probably would not be brought, although all the necessary elements would be present.

The decision as it is limited, however, is sound, and disturbs no other authority or rule. As the court pointed out, the authority of *Bushell's* case that jurors shall have the privilege of returning a verdict according to their conscience is not impaired, for the petitioner was not held to answer for any verdict, but for the deceit whereby she put herself in the position to vote at all: *Bushell's Case* (1670) Vaughan 135. Moreover, if there had been a verdict, the rule that the testimony of a juror is not admissible for the impeachment of his verdict would

be maintained with whatever integrity it otherwise has: *McDonald* v. *Pless* (1915) 238 U. S. 264, 35 Sup. Ct. 783. In any event the rule is wholly unrelated to the problem of the proper limits of the inviolate privilege itself. See *Mattox* v. *United States* (1892) 146 U. S. 140, 13 Sup. Ct. 50. *Cf. 5 Wigmore* "Evidence" (2d ed. 1923) §§ 2353, 2354. The decision also renounced whatever was left of the rule that the oath of the contemnor is a bar to prosecution for contempt. Even the privileged communications rule, forbidding the use of the juror's testimony for any purpose whatever, is maintained, for if the juror has honestly created his relationship, he can claim the full vigor of his privilege: 4 *Wigmore* "Evidence" (2d ed. 1923) § 2346.

STANLEY THOMAS.

ARREST WITHOUT WARRANT — SEARCH AND SEIZURE — CONCEALED WEAPONS.—[Illinois] Police officers entered a building at about 10:30 o'clock at night and arrested two girls, who admitted that they were practicing prostitution. Upon inquiry made by the officers, the girls said that there were two "sluggers" in the storeroom on the ground floor who were their men. This room, fitted up as a gymnasium, apparently was operated in connection with the house of ill fame. Upon entering the room the officers asked three men, seated around a table to stand up. The men remained seated and were told by the officers, "We are police officers, stand up." The men did not stand as requested and two of the officers seized and searched each of them finding pistols on defendant and one other. These men were taken into custody, and the officers proceeded to search the entire building. Prior to his trial on an indictment for carrying concealed weapons, the defendant filed a motion to suppress the evidence. This motion was denied. *Held:* on appeal, affirmed. The seizing and arrest of the men was justified, and the introduction of the guns in evidence was proper: *People* v. *Roberta* (Ill. 1933) 185 N. E. 370.

The instant case appears to sustain an arrest without warrant as lawful where there is scant evidence supporting a reasonable belief that defendant had committed a criminal offense. The police had no warrant to search the building nor to arrest any person therein. There was no disturbance of any kind and defendant had committed no criminal offense in the presence of the officers. The decision is based on two statutes one making it a misdemeanor to have any connection with a house of ill fame, whether in the capacity of owner, keeper, patron, or inmate: Ill. Rev. Stat. (Smith-Hurd 1929) Ch. 38 secs. 162, 163, and the other authorizing an officer to arrest if he has reasonable grounds for believing that the person to be arrested has committed a criminal offense: Ill. Rev. Stat. (Smith-Hurd 1929) Ch. 38, sec. 657. "Criminal offense," as used in the latter statute embraces both felonies and misdemeanors: *People* v. *Scalisi* (1926) 324 Ill. 131, 154 N. E. 715. It is contended that the officers had reasonable grounds for believing that the defendant was in some way connected with the disorderly house, and it is on the acceptance of this contention by the court that the decision rests.

Another recent decision sustains an arrest without warrant on evidence no more weighty in character

than that in the instant case: *People* v. *Kissane* (1932) 347 Ill. 385, 179 N. E. 850. Here the court held a revolver admissible in evidence where the person carrying it was arrested by officers, according to their testimony, on the grounds that they suspected him of a bank robbery committed two days before. Defendant was a known gangster and in spite of a very reasonable contention by counsel that the testimony of the officers was obviously a false story, neither the Appellate nor the Supreme Court would reverse the case.

Two earlier decisions involving similar questions had proved extremely unpopular from the layman's viewpoint: *People* v. *Scalisi* (1926) 324 Ill. 131, 154 N. E. 715; *People* v. *McGurn* (1931) 341 Ill. 632, 173 N. E. 754; see Note, 22 J. of Cr. L. 589. Each of these cases involved notorious gunmen and each was reversed, the former partially, the latter entirely on the ground that the arresting officers had no reasonable grounds for making the arrest. Judging from the four cases mentioned it might appear that the court now requires less by way of evidence to support reasonable belief than at the time of the *Scalisi* and *McGurn* cases. That this is not so may be readily ascertained from an examination of the testimony of the arresting officers in each case. In the *Scalisi* case, where a detective squad car followed and stopped a car full of gangsters not knowing them to be such, the testimony given by the officers was in effect as follows: "that at the time of the pursuit, the men in the other car were unknown to the officers; that the latter knew of no felony or misdemeanor the others might have committed; that the officers had no warrant or process of law for their arrest, and had no knowledge that any of them was a fugitive from justice; that it was the purpose of the officers to interrogate the men, to stop them and find out who they were." In the *McGurn* case the testimony was essentially this: "there was no felony or misdemeanor which had in fact been committed, for the commission of which there was any reasonable grounds to suspect the defendant. There was nothing about the attending circumstances which would lead a reasonable and prudent man to believe that defendant was in fact committing any criminal offense or which would justify the officer in making the arrest." The only attempt to justify the arrest was a statement by one of the officers that he was acting under orders of his superior to arrest defendant on sight. In both cases the officers' testimony precluded affirmance. In the layman's eyes such testimony plays no part. He knows only the bare facts; that defendants were known gangsters, that they had broken the law and been arrested, that they were convicted by a jury, and that the supreme court reversed the case.

The court must trouble itself with a further problem not entering into the layman's reasoning. "The question is whether protection for the individual would not be gained at a disproportionate loss of protection for society": Cardozo, J., *People* v. *Defore* (1926) 242 N. Y. 13, p. 24, 150 N. E. 585. Involved in the problem is the constitutional guaranty that citizens shall be free from unreasonable search and seizure. On the other hand is the feeling, fast increasing in strength, that gunmen, especially in our larger cities, should not be released after arrest upon what appears to the layman

an absurd technicality. The layman's viewpoint must not be too summarily cast aside, for although the judge and lawyer may, through greater knowledge, become impatient with his criticism, it may well be true that this constitutional guaranty needs tempering to better adapt it to the present day of organized crime. It must appear an inadequacy in the law to allow well known criminals to walk the streets carrying concealed weapons unmolested by police. It must appear a greater deficiency that such a gangster, brought before a court on a charge of carrying a concealed weapon is released upon the ground that the arresting officer had no reasonable grounds for believing that the gangster had committed a criminal offense. It is the layman's viewpoint, shared to some extent by the judge, which has dictated affirmances in concealed weapon cases involving gangsters on evidence which in other types of cases would in all likelihood result in reversals: *People* v. *DeLuca* (1931) 343 Ill. 269, 175 N. E. 370.

The *Scalisi* and *McGurn* cases have accomplished a purpose, for by them the police were initiated into some of the vagaries of the law. The *Kissane* and *Roberta* cases show no change in the application of the law by the court, but show more intelligent testimony by the arresting officers, which is at least adequate, if believed by a jury, on which to hang an affirmance. There is in each of these later cases, in legal conception, "evidence to support the verdict."

HARDY KING MACLAY.