VIII. EVIDENCE*

The Indiana courts decided numerous cases covering many points of evidence; however, no attempt will be made here to cover them all. Rather, the purpose of this section is to note new developments, clarifications and reaffirmations in evidence law.

A. Demonstrative Evidence

1. Exhibits in the Jury Room

In one of the more important cases, *Thomas v. State*,[1] the trial court allowed the jury to take exhibits into the jury room over the defendant's objection.[2] The exhibits consisted of statements of a State's witness which had been admitted for impeachment purposes. The Indiana Supreme Court held this to be prejudicial error and in so doing adopted the American Bar Association's standards for jury use of exhibits. While the trial court still has discretion on the matter, Indiana has now adopted the following guidelines to aid in the exercising of that discretion. The court may permit the jury to take a copy of the charges against the defendant and exhibits and writings which have been received in evidence (except depositions).[3] Among the considerations to be used in the exercising of this discretion are i) whether the material will aid

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[1]289 N.E.2d 508 (Ind. 1972).

[2]The few cases on the subject indicate it would be error to permit such statements to be taken to the jury room during deliberations. Toohy v. Sarvis, 78 Ind. 474 (1881); Nichols v. State, 65 Ind. 512 (1879); Lotz v. Briggs, 50 Ind. 346 (1875); Eden v. Lingenfelter, 39 Ind. 19 (1872); Cheek v. State, 35 Ind. 492 (1871); Smith v. West, 30 Ind. 367 (1868). These cases led to the statement:

> It is settled law in this state that it is error to permit, over the objections of the opposite party, items of documentary evidence to be taken to their consultation room by the jury . . . .

1 L. EWBANKS, INDIANA CRIMINAL LAW § 497, at 319 (Symmes ed. 1956).

In most jurisdictions depositions are not permitted in the jury room. *See* 5 F. BUSCH, LAW AND TACTICS IN JURY TRIALS § 723, at 712 (1963). The reason for this is that to allow a deposition or other similar document to go to the jury room allows the jury to examine it and give it a greater emphasis or subject it to closer criticism than other evidence. *Id.* § 723, at 713; 1 L. EWBANKS, *supra* § 497, at 319; *accord*, MODEL CODE OF EVIDENCE rule 105(m), Comment (1942). *See generally* C. MCCORMICK, LAW OF EVIDENCE § 217, at 539 (2d ed. 1972) [hereinafter cited as MCCORMICK].

[3]ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, TRIAL BY JURY § 5.1 (Approved Draft 1968).

the jury in a proper consideration of the case, ii) whether any party will be unduly prejudiced by submission of the material, and iii) whether the material may be subject to improper use by the jury.[4] The court in *Thomas* held that since the witness' statements were similar to a deposition it was improper to permit them to go to the jury as it violated all three considerations.[5] Chief Justice Arterburn, dissenting, stated that the fear that one part of the evidence may be overly emphasized is counterbalanced by the fact that the memory of the jury may not be sufficient to retain details as to the exhibits.[6]

In the case of *Martin v. State*[7] the defendant, charged with murder, argued that it was improper for the trial court to refuse to let the jury take the court's instructions with them to the jury room. The supreme court observed that established Indiana law was to the contrary, but that persuasive arguments existed on both sides. However, if the law in Indiana was to be changed, it should be done either by legislative enactment or by rule of the court. Hence, the trial court's action was not reversible error.[8]

2. *Admissibility of Gruesome Photographs*

A trio of cases reaffirmed Indiana's liberal policy of admitting photographic evidence when the exhibits are gruesome. In *Dudley Sports Co. v. Schmitt*[9] the plaintiff had been hit in the face by a defective pitching machine. During the trial, over objection as in-

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[4] *Id.*

[5] 289 N.E.2d at 509. The statements would be of little aid to the jury since they were not submitted for the truth of the matter contained therein. Also, they were subject to improper use in two ways: the jury might consider them for their truth and might give them undue weight.

[6] *Id.* at 510. Chief Justice Arterburn queried—why should the jury be required to rely upon memory which can be erroneous and corrected by actual facts. *But see* 1 L. EWBANKS, *supra* note 2:

> The juror is to register the evidence as it is given on the tablets of his memory and not otherwise.

Id. § 497, at 319.

[7] 296 N.E.2d 793 (Ind. 1973).

[8]

> It is certainly not the type of question of such vital import that a case otherwise properly tried should be reversed for the sole purpose of sending written instructions to a jury room.

Id. at 797.

[9] 279 N.E.2d 266 (Ind. Ct. App. 1972).

flammatory, the plaintiff offered color photographs of his face while on the operating table. The injuries consisted of deep cuts and lacerations on his upper lip, nose, and forehead, a partially severed nose, a crushed left sinus cavity, an exposed skull bone, and two chipped teeth. The court of appeals held the photographs to be relevant and admissible though repulsive and gruesome.[10]

Similarly, in *Blevins v. State*[11] it was held not to be error to admit photographs of the deceased's body on an autopsy table with a probe protruding from a bullet wound in the head. It was relevant in that it showed the angle at which the bullet entered.[12] Likewise, in *Ray v. State*[13] photographs of a dead body and wounds were held admissible.

In each case the courts applied the general rule that a photograph proved to be a true representation of the person, place, or thing which it purports to represent is competent evidence to visually display that which a witness may verbally describe.[14] Under this tolerant rule the courts will look at the exhibits to see the purpose for which they are offered. If they could only serve to inflame the jury or excite their feelings, rather than enlighten them as to any facts in issue, they will be excluded. Conversely, if they are in any way relevant, they will be admitted regardless of their gruesome or inflammatory nature. An extension of this rule to its current limits is questionable and a balancing of interests seems more equitable. Is it always necessary to sacrifice inflammatory prejudicial effect for relevant evidence, especially when the evidence is merely cumulative? It seems more realistic to acknowledge the fact that after the admission of a doctor's testimony and/or hospital records, the attorney's purpose in offering a photograph that is gruesome, but does corroborate his case, is to excite or upset the jury and receive larger damages. While this decision puts Indiana in line with a majority of jurisdictions, the rule may be clarified or narrowed in future cases.[15]

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[10]*Id.* at 277.

[11]291 N.E.2d 84 (Ind. 1973).

[12]Brown v. State, 252 Ind. 161, 247 N.E.2d 76 (1969), held that photographs of probes in a wound were acceptable to show the angle at which the bullet entered.

[13]291 N.E.2d 562 (Ind. Ct. App. 1973).

[14]Wahl v. State, 229 Ind. 521, 98 N.E.2d 671 (1951); Hawkins v. State, 219 Ind. 116, 37 N.E.2d 79 (1941); Midwest Oil Co. v. Storey, 134 Ind. App. 137, 178 N.E.2d 468 (1961).

[15]Examples of gruesome photographs admitted under this rule include: Schmidt v. State, 255 Ind. 443, 265 N.E.2d 219 (1970) (photograph of

3. Handwriting

In *Duncan v. Binford*[16] the court of appeals discussed the rules on authentication. A summons was delivered and a receipt signed, but the defendant claimed that it was not his signature on the receipt. The plaintiff, over objection, testified that the signature, in her opinion, was the defendant's. Defendant's objection was that plaintiff had not testified based on a comparison of handwriting samples. The court noted the familiar rule that a witness who is an expert must speak from his knowledge based on having seen the party write or from authentic papers derived in the course of business or from mere comparison.[17] But in *Duncan* the court noted that the witness was only asked to testify based upon her familiarity with the defendant's signature. Her opinion was based on her actual observation of defendant's signature and went only to the weight of the evidence.[18]

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decedent's torso and severed limbs); Brown v. State, 252 Ind. 161, 247 N.E.2d 76 (1969) (photographs of probes in wound); Wilson v. State, 247 Ind. 680, 221 N.E.2d 347 (1966) (photograph of murder victim in pool of blood); Wahl v. State, 229 Ind. 521, 98 N.E.2d 671 (1951) (photographs of deceased and her brain). *But see* Kiefer v. State, 239 Ind. 103, 153 N.E.2d 899 (1958) (admission of gruesome and shocking photos showing hands and instruments of surgeon inside chest of deceased during autopsy and additional incisions and stitches by surgeon performing the autopsy held reversible error); Evansville School Corp. v. Price, 138 Ind. App. 268, 208 N.E.2d 689 (1965) (admission of photo depicting deceased youth lying in casket held error).

Under the present law the material issue in cases involving the admission of revolting or gruesome photographs is whether or not they are relevant to the issues involved, not whether or not they are gruesome. 247 Ind. at 684, 221 N.E.2d at 349. This may be an unnecessarily harsh rule.

Dicta in *Kiefer, supra,* may indicate that the application of this rule has limits. The court stated that when necessary to prove a contested relevant fact, the probative value of such pictures is held to outweigh any possible prejudicial effect they might have. This would indicate that when the photographs are not necessary to prove the fact but are used as cumulative evidence, the probative value may not outweigh the prejudicial effect. This may provide a method of attacking inflammatory photographs. *See generally* 3 C. Scott, Photographic Evidence § 1231 (2d ed. 1969).

[16]278 N.E.2d 591 (Ind. Ct. App. 1972).

[17]*Id.* at 599. *See also* Forgey v. National Bank, 66 Ind. 123 (1879); Chance v. Indianapolis & Westfield Gravel Road Co., 32 Ind. 472 (1870).

[18]The testimony was,

> Q. Do you have an opinion based on your familiarity with Mr. Duncan's signature as to whether or not the signature that appears on Defendant's Exhibit A is or is not his signature?
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> . . .

This rule was stated more succinctly in *Smith v. State,*[19] a forged instrument case. The court of appeals there stated that when the genuineness of a signature appearing on a document is in issue, a lay witness is deemed qualified to render an opinion as to authenticity if he is acquainted or familiar with the signature of the person whose signature he is called upon to identify.[20]

While the rules stated in these cases are the accepted standards for authenticity,[21] it may be questioned whether or not stricter rules should be applied when the signature is in fact an issue, as it was in these cases. In such cases perhaps a more scientific approach should be taken by the use of handwriting experts.[22] As one authority states that if a writing is questioned, "no person not trained in the science and art of document examination is truly competent to distinguish a skilled forgery from a genuine writing."[23]

4. Failure to Introduce Objects Taken in Theft Cases

The case of *Shropshire v. State*[24] clarified the Indiana rule regarding the introduction into evidence of goods taken in a theft. In *Shropshire,* the defendant was convicted for stealing a tape

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A. I believe it's his signature.

278 N.E.2d at 599.

[19]284 N.E.2d 522 (Ind. Ct. App. 1972). *See also* Morell v. Morell, 157 Ind. 179, 60 N.E. 1092 (1901).

[20]284 N.E.2d at 525.

[21]This is the majority rule. The minimal standards demanded of the lay witness who authenticates a writing by identification of the handwriting find their justification on the basis that no more than one in one hundred writings is questioned. These permissive standards allow the admission of the general run of authentic documents with a minimum of time, trouble and expense. McCormick § 221. Professor McCormick suggests that maximum savings of these commodities could be achieved by presuming the authenticity for purposes of admissibility in the absence of proof raising a question as to genuineness. *Id.*

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> Certainly it is incredible that an unskilled layman who saw the person write once a decade before could make such a differentiation. In the event of an actual controversy over genuineness both logic and good advocacy demand a more scientific approach and resolution of the issue mainly upon the testimony of bona fide handwriting experts.

Id.

[23]*Id.* § 221, at 548.

[24]279 N.E.2d 219 (Ind. 1972).

recorder and a bayonet. The objects were recovered but not offered into evidence. On appeal the defendant contended that there was insufficient evidence to sustain the verdict because the stolen goods were not offered into evidence. Appellant relied on the case of *Keiton v. State*[25] in which the supreme court had stated that in all future cases, unless there was good reason, because of size, weight or unavailability, for not introducing such evidence as part of the case in chief to prove the *corpus delecti*, then the failure of the State to introduce such evidence as an exhibit would be sufficient reason to require the trial court, on the defendant's motion, to strike all evidence relative thereto from the record.[26] The *Shropshire* court held the *Keiton* rule inapplicable because the appellant failed to move to strike. Thus, it is now clear that mere failure of the State to introduce the stolen goods will not be sufficient to strike the testimony relating thereto. The defendant has the affirmative duty to move for such a strike.

5. *Polygraph Tests*

There has been little, if any, case law in Indiana on polygraph tests, but two cases last term indicate that Indiana is in line with the majority rule. In *Zupp v. State*,[27] during the investigation of a rape case the prosecuting witness submitted to a lie detector test. Defendant filed a motion to require the State to produce the results of the test. The motion was denied. Defendant appealed and the supreme court, finding no error, affirmed. Holding that the results were not discoverable, the court said in dictum that the results of a lie detector test are inadmissible as evidence.[28] In a later case, *Reid v. State*,[29] a robbery defendant petitioned the trial court for an order permitting him to take a polygraph. In the petition he stated a waiver of objections. The trial court admitted the testimony of a polygraph expert as a rebuttal witness for the State. Defendant claimed this to be error. The supreme court held no

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[25]250 Ind. 294, 235 N.E.2d 695 (1968).

[26]*Id.* at 301, 235 N.E.2d at 699.

[27]283 N.E.2d 540 (Ind. 1972). In Carpenter v. State, 251 Ind. 428, 241 N.E.2d 347 (1968), the court refused to pass on the admissibility of polygraph tests, but held that the trial court's consideration of test results without having a technician testify and be subject to cross-examination was prejudicial error.

[28]283 N.E.2d at 543. The court cited no Indiana authority on the matter, nor did the appellant rely on any. Rather, California authority was cited, indicating that no Indiana law on point exists.

[29]285 N.E.2d 279 (Ind. 1972).

error inasmuch as the defendant had petitioned for the test and signed an express waiver of objections, and therefore the results of the test were admissible.[30] Seemingly, the rule in Indiana is that the results of a lie detector test are inadmissible unless the party who was the subject of the test waives objection to its admissibility. However, if the reasoning behind inadmissibility of polygraph examinations is viable, the holding of *Reid* can be challenged. Courts have been reluctant to admit polygraphs because they are unconvinced of their reliability due to the numerous variables involved.[31] If inadmissibility is based upon doubt of any probative value, the fact that a person took the examination and signed a waiver should be of no moment as to admissibility. If the results are of doubtful probative value, they do not gain probative value by a mere waiver. The law in Indiana awaits further clarification on this matter.

6. Proper Foundation for the Admission of a Tape Recording

The most signficant case concerning demonstrative evidence, *Lamar v. State,*[32] created new foundation requirements for the admissibility of tape recordings. Prior law in Indiana was not well defined and held only that sound recordings were admissible upon proper identification and authentication.[33] The defendant was convicted of voluntary manslaughter. At the trial, the jury, over the defendant's objection, was permitted to hear a tape recording of his in-custody interrogation by police officers at the station. Defendant based his objection on improper foundation for admissibility and, relying on a Georgia case, requested that eight requirements be recognized.[34] The Indiana Supreme Court, relying

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[30]*Id.* at 281. *See* Comment, *Lie Detector Tests: Possible Admissibility Upon Stipulation,* 4 JOHN MAR. J. PRAC. & PRO. 244 (1971).

[31]*See generally* MCCORMICK § 207; Levitt, *Scientific Evaluation of the "Lie Detector",* 40 IOWA L. REV. 440 (1955); Skolnick, *Scientific Theory and Scientific Evidence: An Analysis of Lie Detection,* 70 YALE L.J. 694 (1961); *Symposium, The Polygraphic Truth Test,* 22 TENN. L. REV. 711 (1953).

[32]282 N.E.2d 795 (Ind. 1972).

[33]Sutton v. State, 237 Ind. 305, 145 N.E.2d 425 (1957).

[34]Solomon v. Edgar, 92 Ga. App. 207, 88 S.E.2d 167 (1955). The requirements set forth in *Solomon* were: i) it must be shown that the mechanical transcription device was capable of taking testimony; ii) it must be shown that the operator of the device was competent to operate it; iii) the authenticity and correctness of the recording must be established; iv) it must be shown that changes, additions or deletions have not been made; v) the manner of preservation of the record must be shown; vi) the

heavily on that case, set up five standards for the admissibility of sound recordings. In the future the admission of sound recordings should be preceded by a foundation disclosing that i) the recording is authentic and correct;[35] ii) the testimony elicited was freely and voluntarily made, without any kind of duress; iii) all required warnings were given and all necessary acknowledgements and waivers were knowingly and intelligently given; iv) the recording does not contain matters otherwise not admissible into evidence;[36] and v) it is of such clarity as to be intelligible and enlightening to the jury. The court stated that improved methods of obtaining and presenting competent evidence should not only be sanctioned but encouraged. In adopting these standards, the court noted that it must not lose sight of fundamental safeguards, but neither must it sacrifice scientific and technological progress to preservation of rules that have outlived their usefulness.[37]

7. Jury Views

The supreme court indicated that it would be amenable to a change in the law on jury views in *Robinson v. State.*[38] After the jury had been selected and sworn, but before the introduction of any evidence, the jury was taken to the scene of the crime. This was done on motion of the State. The defendant's objection to that

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speakers must be identified (the Indiana Supreme Court held this to be desirable but not required); vii) it must be shown that the testimony was freely and voluntarily made, without duress. *Id.* at 211-12, 88 S.E.2d at 171. The eighth requirement requested by appellant was that it be shown that the recording does not contain matters otherwise not admissible.

[35]The court felt that requirements 1, 2, 4, 5, and 6, *see* note 34 *supra*, were merely methods of assuring authenticity and so the first requirement encompasses those points in *Solomon.* The court also noted that *Solomon* requirements 4 and 5 are resolved by conforming to the Indiana chain of custody rule.

[36]This is the eighth requirement that the appellant requested. The court admitted that it was sound and that other jurisdictions recognize it. *E.g.*, Leeth v. State, 94 Okla. Crim. 61, 230 P.2d 942 (1951); Commonwealth v. Bolish, 381 Pa. 500, 113 A.2d 464 (1955); State v. Meyer, 37 Wash. 2d 759, 226 P.2d 204 (1951). It could be reasoned by analogy that this was in fact the law in Indiana. In Lee v. State, 213 Ind. 352, 12 N.E.2d 949 (1938), it was held that if a part of a paper received in evidence is competent, but the paper also contains matters incompetent, the whole may properly go to the jury if the objectionable portion is obliterated or sealed off so it cannot be read.

[37]282 N.E.2d at 797.

[38]297 N.E.2d 409 (Ind. 1973).

motion was overruled. On appeal the supreme court ruled, in accordance with statutory and prior case law, that this was reversible error.[39] In dictum the court questioned the soundness of the statute and indicated that a jury view should be a judicial prerogative.[40] However, the court was particularly reluctant to strike down the law, when the consequences would be to deny the defendant, under a life sentence, a new trial. This indication of a desire to follow the judicial prerogative, espoused by noted commentators,[41] serves as a signal to the legislature to step aside and allow the court to exercise its prerogative.

B. Impeachment

1. Pretrial Mental Examination to Determine Credibility of Rape Victims

Two cases involving pretrial psychiatric examinations of rape prosecutrixes clarified prior law in Indiana. In *Allen v. State*[42] the defendant in a rape case made a motion for a psychiatric examination of the prosecuting witness to determine her credibility. This motion was denied and defendant amended it to include examination to determine competency. This motion as to competency was granted. The defendant was convicted and on appeal claimed the trial court erred in overruling his first motion. Defendant relied

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[39] *Id.* at 412. The statute covering this point reads in part:

> Inspection of place.—Whenever, in the opinion of the court and with the consent of all the parties, it is proper for the jury to have a view of the place in which any material fact occurred . . . .

IND. CODE § 35-1-37-3 (1971). In Barber v. State, 199 Ind. 146, 155 N.E. 819 (1927), the court held that in light of this statute, sending a jury to view in a criminal case, without the defendant's consent, was reversible error.

[40] 297 N.E.2d at 412.

[41] MCCORMICK § 216, at 537; 4 J. WIGMORE, EVIDENCE § 1163, at 273 (3d ed. 1940).

> That the Court is empowered to order such a view, in consequence of its ordinary common-law function, and irrespective of statutes conferring express power, is not naturally to be inferred, but is clearly recognized in the precedents.

Id. § 1163, at 268. Wigmore also states:

> Statutes now regulate the process in almost every jurisdiction of the United States, but it may be assummed that the judicial power to order a view exists independently of any statutory phrases of limitation.

Id. § 1163, at 273.

[42] 283 N.E.2d 557 (Ind. Ct. App. 1972).

on *Burton v. State*[43] which held that a sex offense charge should not go to a jury unless a physician has examined the victim's social history and mental make-up.[44] A later case, *Wedmore v. State,*[45] modified this. In that case the defendant did not move for an examination nor did he question the competency of the witness. Agreeing with the dissent in *Burton,* the court held that there is no requirement that the examination be a condition precedent to the witness' testifying.[46] The *Allen* case raised the question of whether or not it was error to refuse a defendant's motion for such an examination; this question was not raised in *Wedmore,* as the defendant there made no such request. The court of appeals, following the indications of *Wedmore,* held that it was not error to refuse such motions.

A subsequent case in the court of appeals reaffirmed this position. The defendant in *Rickard v. State*[47] contended that a psychiatric examination of the prosecutrix in sex cases should be had to determine her credibility. He also relied on *Burton,* but the court noted that *Burton* has been superseded by *Wedmore* and found no error. Although the requested rule appears sound, indications are that if it is to be established, it must be done by the legislature.[48]

2. *Specific Acts*

The supreme court emphasized the Indiana rule on impeachment by specific acts in *Boles v. State.*[49] In *Boles* the defendant was

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[43]232 Ind. 246, 111 N.E.2d 892 (1953).

[44]*Id.* at 251, 111 N.E.2d at 894, *citing* 3 J. WIGMORE, *supra* note 41, § 924(a). Professor Wigmore advocated that such examination be conducted for the purpose of ascertaining the witness's probable credibility.

[45]237 Ind. 212, 143 N.E.2d 649 (1957).

[46]*Id.* at 223, 143 N.E.2d at 653. *See also* Bryant v. State, 271 N.E.2d 127 (Ind. 1971); Lamar v. State, 245 Ind. 104, 195 N.E.2d 98 (1964).

The dissent in *Burton* stated:

> Our legislature has not seen fit to require such as a condition precedent to the right to testify in court and I do not believe this court has any right to impose it.

232 Ind. at 260, 111 N.E.2d at 898. (Draper, J., dissenting).

[47]291 N.E.2d 916 (Ind. Ct. App. 1973).

[48]Wigmore also recognizes that a rule requiring any complaining witness in a sex offense case to undergo a psychiatric examination to determine competency and credibility should require a legislative mandate. 3a J. WIGMORE, *supra* note 41, § 924(a) (Chadbourn rev. 1970).

[49]291 N.E.2d 357 (Ind. 1973).

convicted of second degree burglary. During the trial, one Stephenson testified as a State's witness. On cross-examination he was asked if he had ever been convicted of a felony, to which he replied no. A later witness was asked on cross-examination by the defense if he knew that the witness Stephenson was a drug user. An objection was sustained. On appeal the defendant claimed that the question was relevant as bearing upon Stephenson's credibility. The supreme court ruled that the question was properly excluded because although the witness's credibility is a proper subject of inquiry, the defense's methods were improper. The court quoted the law in Indiana that a witness may not be impeached by inquiry as to specific acts of immorality.[50]

Another case involving inquiries into specific acts of misconduct was *Shropshire v. State*.[51] There the appellant was convicted of first degree burglary. He assigned as the sole error that his cross-examination violated his due process rights and that the trial court erred in requiring him to answer highly prejudicial questions. During the trial the prosecutor inquired if the defendant had ever been arrested and convicted for first degree burglary. When he answered no, he was asked if he had when he was a minor. The defendant answered a series of such questions, some under order of the judge. The supreme court agreed with the appellant and held that he was denied a fair and impartial trial. The court noted that when a defendant takes the witness stand, he may be cross-examined concerning his credibility, but that the State is not permitted to inquire into specific acts of misconduct other than prior convictions.[52] Additionally, the court stated that actual convictions in a juvenile court are inadmissible for impeachment pur-

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[50]*Id.* at 361. Woods v. State, 233 Ind. 320, 119 N.E.2d 558 (1954); Forman v. State, 203 Ind. 324, 180 N.E. 291 (1932); Davis v. State, 197 Ind. 448, 151 N.E. 329 (1926).

Professor McCormick notes that the majority of courts limit cross-examination concerning acts of misconduct as an attack on character to those acts having some relation to the witness's credibility. Other courts allow attack by a fairly wide-open cross-examination about acts of misconduct which show bad moral character and have but an attenuated relation to credibility. Finally, he notes that a substantial number of courts (among them Indiana) prohibit cross-examination altogether as to acts of misconduct for impeachment. McCormick advocates the latter as the fairest and most expedient because of the dangers of prejudice, distraction, confusion, and abuse by the asking of unfounded questions, etc. McCormick § 42.

[51]279 N.E.2d 225 (Ind. 1972).

[52]*Id.* at 227. Hensley v. State, 268 N.E.2d 90 (Ind. 1971); Woods v. State, 233 Ind. 320, 119 N.E.2d 558 (1954).

poses.[53] Therefore, the inquiry by the prosecutor about convictions while the defendant was a minor was inadmissible for impeachment purposes.

A significant case that will affect the area of impeachment is *Ashton v. Anderson*[54] in which the supreme court restricted the use of prior convictions for the purposes of impeachment. At trial, defense counsel inquired of a witness whether or not he had ever been arrested. Objection was made and properly sustained.[55] The attorney then asked whether the witness had "ever plead [*sic*] guilty or been convicted of any criminal offense." Again defendant objected and the objection was sustained. However, on appeal the court of appeals held that it was error to disallow this second question and granted a new trial. The court of appeals rested its decision on the case of *McMullen v. Cannon*,[56] which stated that the established rule in Indiana was that a witness, including a party to the action, who takes the stand as a witness in his own behalf, can be required on cross-examination, on the issue of his credibility, to answer questions as to previous convictions, whether felonies or misdemeanors.[57]

The supreme court recognized the rule set forth in *McMullen* but noted that it was a point of first impression whether a witness may be impeached by *any* prior conviction for *any* criminal offense without regard to the nature of the offense or its tendency to reflect on the credibility of the witness. Prior case law indicated that any fact that might have been shown to render a witness incompetent under statute might be shown to affect his credibility.[58]

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[53]Woodley v. State, 227 Ind. 407, 86 N.E.2d 529 (1949). The relevant Indiana statute states:

> The disposition of a child or any evidence given in the juvenile court shall not be admissible as evidence against the child in any case or proceeding in any other court . . . .

IND. CODE § 31-5-7-15 (1971).

[54]279 N.E.2d 210 (Ind. 1972).

[55]Shropshire v. State, 279 N.E.2d 219 (Ind. 1972); Hensley v. State, 268 N.E.2d 90 (Ind. 1971); Boles v. State, 291 N.E.2d 357 (Ind. Ct. App. 1973).

[56]129 Ind. App. 11, 150 N.E.2d 765 (1958).

[57]*Id.* at 12, 150 N.E.2d at 766.

[58]Niemeyer v. McCarty, 221 Ind. 688, 51 N.E.2d 365 (1943); Glenn v. Clore, 42 Ind. 60 (1873). The statute that these cases referred to is now IND. CODE § 34-1-14-14 (1971) which reads:

It also held that the extent to which such cross-examination shall be allowed is within the trial court's discretion.[59] In reaching its decision, the court stated that it could perceive no reason that a trial court should be bound to permit questions about crimes such as speeding, etc., without regard to the nature of the crime or its tendency to reflect the witness's credibility.[60] The court also held the exclusion of such evidence should not be discretionary. Either the particular conviction reflects the witness's credibility for truth and veracity or it does not. If it has a bearing, it should be admitted; if not, it should be excluded. In so holding, prior case law in Indana was overruled, and now for the purposes of impeachment under Indiana Code sections 34-1-14-13 and 35-1-31-6 only those convictions for crimes involving dishonesty or false statement shall be admissible. However, the court is also bound by Indiana Code section 34-1-14-14, which permits impeachment by a showing of prior convictions for crimes which would have ren-

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> Any fact which might be shown to render a witness incompetent, may be hereafter shown to affect his credibility.

The statute which defined what convictions would render a witness incompetent read:

> Every person, who may hereafter be duly convicted of the crimes of treason, murder, rape, arson, burglary, robbery, manstealing, forgery, or wilful and corrupt perjury, shall, ever after such conviction, be deemed infamous, and shall be incapable of . . . giving evidence in any court of justice.

IND. REV. STAT. ch. 54, § 79 (1843).

Parker v. State, 136 Ind. 284, 35 N.E. 1105 (1894), established that prior convictions could be inquired into on cross-examination to show the depraved moral character of the witness as affecting his credibility. Subsequently, in Dotterrer v. State, 172 Ind. 357, 88 N.E. 689 (1909), a witness was asked on cross-examination whether he had previously been convicted of assault and battery. The court recognized that assault and battery was not an infamous crime and held such questioning was proper. The court noted a statute which stated that in all questions affecting credibility of a witness, his general moral character may be given in evidence, and held that it applies to cross-examination of a witness.

The statute which the *Dotterrer* court referred to is IND. CODE § 35-1-31-6 (1971). The same language is also used in *id.* § 34-1-14-13, and thus the *Ashton* court noted that the ruling in *Dotterrer* would be applicable to it also.

[59]Way v. State, 224 Ind. 280, 66 N.E.2d 608 (1946); Robinson v. State, 197 Ind. 148, 149 N.E. 888 (1925); Parker v. State, 136 Ind. 284, 35 N.E. 1105 (1894).

[60]"It is illogical to assume that a conviction of *any* crime reflects, *ipso facto*, on the credibility of the witness as to truth and veracity." 279 N.E.2d at 215.

dered a witness incompetent, *i.e.*, treason, murder, rape, arson, burglary, robbery, kidnapping, forgery, and wilful and corrupt perjury.[61] These are the only prior convictions admissible to impeach.

One final case should be noted in clarifying the use of prior convictions. In *Sipes v. State*[62] it was held that it was proper for the trial judge to refuse to permit the defense counsel to impeach a witness with a prior conviction when the question failed to include the specific offense and the court and date of conviction.[63] Apparently, prior convictions will now be inadmissible unless these facts are shown.

3. Use of Admissions for Impeachment

In *Johnson v. State,*[64] the Supreme Court of Indiana decided the question of whether evidence of admissions of guilt made by defendant to a probation officer were admissible for impeachment purpose even though inadmissible as evidence of guilt of the crime charged. The appellant and a companion apparently carried cans containing combustibles into a building with the intent of setting it on fire. When confronted by three men they threatened them with weapons and then fled.[65]

The appellant first entered a plea of guilty and was assigned a probation officer who interviewed him. The appellant contended that the trial court erred in allowing the testimony of the probation

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[61]Under the proposed federal rules, evidence of prior convictions is admissible only if the crime is punishable by death or imprisonment in excess of one year or involves dishonesty or false statement. If the judge determines that the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice, he can refuse to admit it. The rules also place a time limit of ten years after which evidence of the crime is inadmissible. *Proposed Fed. R. of Evid.* rule 609, H.R. 5463, 93d Cong., 1st Sess. (1973), *reported in* 119 CONG. REC. 5452 (daily ed. June 26, 1973) [hereinafter cited as *Proposed Fed. R. of Evid.*].

[62]293 N.E.2d 224 (Ind. Ct. App. 1973).

[63]*Id.* at 227.

[64]284 N.E.2d 517 (Ind. 1972).

[65]Appellant contended at trial that the evidence that he and his companion put the cans in the building was merely circumstantial. In Vaughn v. State, 255 Ind. 678, 266 N.E.2d 219 (1971), however, it was held that a conviction may be sustained by circumstantial evidence. The fact that appellant fled is also relevant in proving his guilt. Turner v. State, 255 Ind. 427, 265 N.E.2d 11 (1970). *See also* note 14 *supra. Contra,* note 12 *supra.*

officer in rebuttal, since the testimony concerned a conversation the probation officer had with the appellant during which the appellant made admissions. The court held that such testimony was inadmissible as evidence of guilt of the crime charged, but that the testimony could be considered for impeachment purposes. In reaching its decision the court relied on *Harris v. New York*,[66] which adopted the restricted view of the privilege of self-incrimination.

It should also be noted that the appellant in *Johnson* contended that the trial judge erred because he did not determine whether the confession was voluntarily given before it was received into evidence.[67] This contention was dismissed by the court since the appellant did not raise any objection as to the voluntariness of the confession or the failure to apply the relevant statute at the trial level.[68]

4. Bias

It is a recognized principle of law in Indiana that the trial court in its discretion has wide latitude in permitting cross-examination to test the credibility of a witness by disclosing his interest in a case.[69] *Brooks v. State*[70] involved such a cross-examination and its permissible scope. The appellant was convicted of assault and battery with intent to kill. The defendant in cross-examining a prosecution witness elicited the fact that the witness had a civil law suit for damages pending against the defendant's employer.[71] Such cross-examination is proper in attempting to show the witness

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[66]401 U.S. 222 (1971). In *Harris* the Supreme Court held that evidence inadmissible against an accused in the prosecution's case is not barred for all purposes, provided that the trustworthiness of the evidence satisfies legal standards. According to the Court in *Harris* the shield provided by Miranda v. Arizona, 384 U.S. 436 (1966), is not a license to use perjury as a defense.

[67]IND. CODE § 35-5-5-1 (1971). Pursuant to this statute the trial judge must determine that the confession was given voluntarily before it is admitted into evidence. The trial judge can then permit the jury to hear relevant evidence on the issue of voluntariness.

[68]284 N.E.2d at 520, *citing* Guthrie v. State, 254 Ind. 356, 260 N.E.2d 579 (1970). *Guthrie* stands for the principle that when an argument on appeal is of a different nature than the grounds for objection at the trial, no question is raised for review.

[69]Blue v. State, 224 Ind. 394, 67 N.E.2d 377 (1946), *cert. denied*, 330 U.S. 840 (1947).

[70]291 N.E.2d 559 (Ind. 1973).

[71]*Id.* at 560.

has an interest in the case.[72] The counsel for defendant also tried to obtain information concerning the amount of damages prayed for in the civil suit. Defense counsel argued that it was highly possible that the witness would falsify his testimony to insure a conviction and use this to his advantage in the civil suit. The trial court sustained an objection to the inquiry concerning the amount of damages sought on the ground that this would not have any bearing on the bias of the witness.[73] The court determined that the appellant in his cross-examination had made it clear to the jury that the prosecution witness had a civil suit pending which could raise an inference of prejudice. The supreme court refused to substitute its judgment for that of the trial court.[74]

An additional point which should be mentioned in *Brooks* concerned an attack on the character of the prosecuting witness during appellant's cross-examination. This challenge to the character of the witness was clearly outside the scope of the direct examination. The general rule in Indiana is that the scope of the cross-examination should be limited to the subject matter of the direct examination.[75] Thus, in *Brooks* the Indiana Supreme Court reaffirmed several of the traditional principles pertaining to cross-examination.

C. Hearsay

The Supreme Court of Indiana and the Indiana Court of Appeals have recently decided three significant cases involving the question of hearsay. Hearsay evidence is testimony of an out of court statement offered for the truth of the matter asserted there-

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[72]McCORMICK § 40, at 79.

[73]Pending of civil litigation is admissible to show the bias of a witness. Hughes v. State, 212 Ind. 577, 10 N.E.2d 629 (1937). The court in *Brooks*, however, felt that because the amount of damages sought is often exaggerated and is seldom an accurate appraisal of what plaintiff really wants, it has no effect on the bias of a witness.

[74]The *Brooks* court followed the familiar rule in Indiana which states that only a clear abuse of discretion by the trial court will call for a reversal. In the court's opinion the trial court committed no abuse of discretion in *Brooks*. 291 N.E.2d at 560.

[75]The court cited Hicks v. State, 213 Ind. 277, 11 N.E.2d 171 (1937), *cert. denied*, 304 U.S. 564 (1938), for this Indiana rule. 291 N.E.2d at 562.

See McCORMICK § 27, at 54. Professor McCormick offers an excellent discussion on the scope of cross-examination and the merits of the systems of restricted cross-examination, which Indiana presently has, and wide-open cross-examination, which is included in the *Proposed Fed. R. of Evid.* rule 611(b).

in.[76] The statement's value rests upon the credibility of the out of court declarant.

1. Admission of Party-Opponent

In the case of *Moore v. Funk*[77] the Indiana Court of Appeals considered a recognized exception to the hearsay rule known as an admission of a party-opponent.[78] *Moore* involved an automobile accident in which plantiff's car was hit in the rear by defendant. The collision pushed the plantiff's car into oncoming traffic where it was hit again by another car. Defendant subsequently pleaded guilty to a charge of following too closely. Plaintiff introduced, without objection, this guilty plea to show an admission against interest. An instruction requested by defendant regarding the introduction of the guilty plea and the court's acceptance of the instruction constituted the main issue before the court.[79]

Defendant contended that the testimony concerning the conviction for following too closely could not be considered on the question of the right of plaintiff to recover but only on the question of credibility.[80] The court decided that defendant's requested instruction was an inaccurate statement of the law. Since defendant never denied pleading guilty to the charge of following too closely, she was in a position of explaining her guilty plea and rebutting the inference of negligence that it raised.[81] The only apparent reason for plaintiff to introduce the guilty plea was to establish the defendant's negligence. Defendant's instruction inferred that the only reason for introducing the guilty plea was for impeach-

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[76]McCormick § 246, at 584.

[77]293 N.E.2d 534 (Ind. Ct. App. 1973).

[78]McCormick § 262, at 628. McCormick defined an admission of a party-opponent as the words or acts of a party-opponent, or of his predecessor or representative, offered as evidence against him.

It should be noted that the court in *Moore* used the phrase "admissions against interest" in the opinion. This is a common phrase in judicial opinions, according to McCormick, but it tends to confuse two distinct exceptions to the hearsay rule. A declaration against interest and an admission of a party-opponent are the two exceptions to the hearsay rule which are often confused. When the court in *Moore* uses the phrase "admissions against interest," it is referring to admissions of a party-opponent and not declarations against interest.

[79]293 N.E.2d at 539.

[80]*Id.*

[81]*Id. See also* Richey v. Sheaks, 141 Ind. App. 423, 228 N.E.2d 429 (1967).

ment purposes. Defendant never denied making the guilty plea. Therefore, if the purpose of the introduction of the guilty plea was for impeachment purposes, the instruction was inaccurate.[82]

In another automobile accident case decided by the Indiana Court of Appeals, the issue of an admission of a party-opponent was raised once again. In *Beard v. Dodd*[83] a guest passenger testified that the defendant-driver was driving approximately seventy miles an hour when the accident occurred. The defendant offered a witness who testified that the plaintiff-passenger had previously told her that the defendant-driver was traveling thirty to thirty-five miles an hour. The plaintiff then offered rebuttal witnesses to substantiate her prior statement concerning her original estimate of seventy miles an hour. The defendant objected to these rebuttal witnesses, but the objection was overruled.[84]

The court of appeals concluded that the statement of the appellee-passenger that the appellant-driver was driving thirty to thirty-five miles an hour was an admission. Since the statement was an admission, it was direct and original evidence rather than impeaching evidence.[85] The court drew a distinction between admissions by party witnesses and admissions by nonparty witnesses. A nonparty witness has the opportunity to offer evidence of prior consistent statements to rebut evidence of inconsistent statements.[86] The exception to this rule arises in the case of admissions by a party-opponent like in *Beard*.[87] An inconsistent statement or

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[82]*See* 1 E. CONRAD, MODERN TRIAL EVIDENCE § 475, at 376 (1956). Conrad states that the undenied, unexplained, or unmodified admissions of a party have substantive weight. An admission is not binding nor conclusive upon a party if he subsequently modifies or explains it.

[83]296 N.E.2d 442 (Ind. Ct. App. 1973).

[84]*Id.* at 443.

[85]*See* note 3 *supra*. *See also* MCCORMICK §§ 39, at 78, 251, at 601. McCormick states that under the traditional hearsay rule exceptions, particular inconsistent or consistent prior statements of a witness may be admissible as substantive, relevant evidence as well as for impeachment purposes. The prior statement is admissible as substantive evidence only when it falls within one of the exceptions to the hearsay rule. Admissions of a party-opponent is one of the exceptions.

[86]296 N.E.2d at 444. *See also* MCCORMICK § 49, at 103-07.

[87]Logansport & Pleasant Grove Turnpike Co. v. Heil, 118 Ind. 135, 20 N.E. 703 (1888). This case held that when a party makes admissions they come into evidence as original evidence. This principle is based upon the idea that admissions of a party against his interest are made because they accurately represent the facts. 296 N.E.2d at 445.

an admission was shown and the appellee-passenger could not rebut this testimony by calling other witnesses to support the original statement. Thus, the court in *Beard* distinguished an admission used as substantive evidence from impeaching testimony used to discredit a witness.

2. *Spontaneous Declaration*

A third case, *Moster v. Bower*,[88] involved another exception to the hearsay rule. In *Moster* a suit was brought by a sporting goods store clerk to recover for injuries he sustained as the result of an explosion and fire. The explosion demolished the store and killed the defendant-administratrix' decedent who was a customer in the store at the time of the accident. The circuit court had directed a verdict for the administratrix.

The *Moster* case involved the spontaneous declaration exception to the hearsay rule. Closely associated with this exception is the *res gestae* exception also discussed at length in *Moster*.[89] Spontaneous declarations, *res gestae*, and excited utterances are interrelated and the *Moster* court used all of these terms. The most significant aspect of the case is the relationship between *res gestae* and the Indiana Dead Man's Statute.[90]

The proprietor of the demolished store happened to be driving to the store when the accident occurred, and upon his arrival he assisted the plaintiff from the entrance of the store.[91] The plaintiff

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[88]286 N.E.2d 418 (Ind. Ct. App. 1972).

[89]*See* 1 E. CONRAD, *supra* note 82, § 381, at 304. Conrad states that the term *res gestae* includes those exceptions to the hearsay rule which relate to declarations or acts concomitant with the fact in issue and which tend to illustrate or explain it. The term includes acts, statements, occurrences and circumstances which are substantially contemporaneous with the main fact and are so closely connected with it as to form a part of the main transaction. *See also* MCCORMICK § 297, at 704. McCormick states that the term *res gestae* has a close and significant relationship to another exception to the hearsay rule known as excited utterances.

[90]IND. CODE § 34-1-14-6 (1971) provides:

> In suits or proceedings in which an executor or administrator is a party involving matters which occurred during the lifetime of the decedent where a judgment or allowance may be made or rendered for or against the estate represented by such executor or administrator; any person who is a necessary party to the issue or record, whose interest is adverse to such estate, shall not be a competent witness as to such matters against such estate . . . .

[91]286 N.E.2d at 421.

said something to the proprietor about a man's firing a gun into a stack of shotgun shell primers in the store as they hurried across the street. At trial, plaintiff's counsel asked the proprietor what plaintiff had said at the scene of the accident. Defendant's counsel objected, and the objection was sustained.[92]

The court of appeals noted that the Dead Man's Statute was enacted to prevent fraud against a decedent when the decedent had no chance to answer and defend himself. The court, however, turned to two cases which held that even though a declarant is incompetent to testify as a witness, this will not ordinarily affect the admissibility of his statements under the *res gestae* rule.[93] The reliability of *res gestae* declarations was recognized by the *Moster* court, and it was stated that the Dead Man's Statute in Indiana has no application to a statement which is part of the *res gestae*.[94]

D. Sufficiency of the Evidence

A series of recent Indiana cases dealt with the amount of evidence necessary to sustain a conviction for possession of narcotics equipment with the intention to unlawfully administer narcotics.[95] In the case of *Bradley v. State*,[96] the Indiana Court of Appeals considered the question of whether a showing of mere possession of narcotics equipment was sufficient to sustain a conviction absent other evidence tending to prove intent to administer narcotics.

The defendant in *Bradley* had thrown to the ground a wrapped package containing an eyedropper with a needle attached when a police officer approached. The policeman searched the defendant and found a bottle cap with burns on the bottom of it. The defendant was indicted for possession of narcotic-adapted instruments with the intent to administer narcotic drugs and was

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[92]*Id.*

[93]Kenney v. Phillipy, 91 Ind. 511 (1883); Walker v. State, 162 Tex. Crim. 408, 286 S.W.2d 144, *cert. denied*, 350 U.S. 931 (1955), *cited in* 286 N.E.2d at 425-26.

[94]286 N.E.2d at 426.

[95]Von Hauger v. State, 266 N.E.2d 197 (Ind. 1971); Taylor v. State, 257 N.E.2d 383 (Ind. 1971); Eskridge v. State, 281 N.E.2d 490 (Ind. Ct. App. 1972); Dabner v. State, 279 N.E.2d 797 (Ind. Ct. App. 1972).

[96]287 N.E.2d 759 (Ind. Ct. App. 1972).

convicted.[97] The prosecution was required to prove three elements to obtain conviction.[98] It was defendant's contention that the prosecution failed to prove unlawful intent. Previous Indiana cases had found unlawful intent through evidence of flight, abandonment of a package, previous convictions, and admissions of narcotic use.[99] The question in *Bradley* was whether flight accompanied by attempted concealment constituted sufficient proof of intent.[100]

In reversing the conviction, the court of appeals stated that the evidentiary value of flight was tenuous since flight alone could not support a conviction especially when an explanation was offered.[101] The act of concealment was merely a suspicious circumstance and, according to the court, was insufficient to prove the requisite intent.[102]

In contrast to *Bradley*, the Indiana Court of Appeals in *Harms v. State*[103] held that evidence of flight while being held on a charge is admissible upon the issue of guilt. In *Harms* the court held that the subjective statements of the defendant as to his reasons for fleeing went to the weight of the evidence and not to its admissibility. This holding suggests a conflict with some of the statements in *Bradley* respecting the evidentiary value of flight.

Tomlin v. State[104] dealt with an issue concerning the sufficiency of medical testimony in a sanity case. After pleading guilty, the appellant had been convicted of robbery while armed with a deadly weapon. He requested that the guilty plea be set aside on the ground that he had a mental problem, and the request was granted. The court appointed two physicians to examine the

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[97] *Id.*

[98] Ch. 90, § 2, [1961] Ind. Acts 169 (repealed 1973). Pursuant to this statute the prosecution must prove that a person had possession of narcotic equipment, that the equipment was adapted for the use of narcotic drugs by injection into a human, and that the person who possessed the narcotic equipment had intent to unlawfully administer the drugs.

[99] *See* note 6 *supra.*

[100] 287 N.E.2d at 762.

[101] *See also* McAdams v. State, 226 Ind. 403, 81 N.E.2d 671 (1948), *cited in* 287 N.E.2d at 763.

[102] 287 N.E.2d at 763.

[103] 295 N.E.2d 156 (Ind. Ct. App. 1973).

[104] 283 N.E.2d 363 (Ind. 1972).

appellant who, upon examination, was found mentally capable of standing trial.[105] Appellant then went through the same procedure by pleading guilty and withdrawing the plea, and he was given another medical examination. The second examination found the appellant incompetent, and he was placed in an institution for five months, after which he was found competent to stand trial. Appellant's counsel contended that the testimony of the court appointed physicians was inconclusive and contradictory. In a similar case to that of *Tomlin,* the court held that a conviction need not be reversed on the ground that uncontradicted psychiatric testimony established the defendant's incompetency even though the opinions of the doctors were not absolute.[106] The court in *Tomlin* concluded, therefore, that the testimony of one of the court appointed physicians was sufficient to sustain a finding of sanity.[107]

In *Turner v. State*[108] decided by the Indiana Supreme Court, the issue involved a conviction for manslaughter based upon the uncorroborated testimony of an accomplice. The appellant and two codefendants were charged with first degree murder and murder in the commission of a felony, to wit: robbery. Separate trials were granted to appellant's codefendants. Appellant was tried and found guilty of manslaughter. His main contention was that the trial court erred in refusing to give an instruction concerning the testimony of an accomplice.[109] In Indiana accomplices are competent witnesses when they consent to testify.[110] A conviction in Indiana may be based upon and upheld on the uncorroborated testimony of an accomplice.[111] The court in *Turner* recognized the principle that the testimony of any witness who has an obvious interest in the case should be carefully examined. The jury, and

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[105]*Id.*

[106]Johnson v. State, 255 Ind. 324, 264 N.E.2d 57 (1970).

[107]283 N.E.2d at 364.

[108]280 N.E.2d 621 (Ind. 1972).

[109]*Id.* at 622. The appellant's instruction was offered to inform the jury that the testimony of an accomplice should be closely examined by the jury and weighed according to its credibility.

[110]IND. CODE § 35-1-31-3 (1971).

[111]280 N.E.2d at 624, *citing* Green v. State, 241 Ind. 96, 168 N.E.2d 345 (1960). The court in *Green* made a statement to the effect that the testimony of an accomplice must be received with caution. The instruction offered by appellant in *Turner* reiterated this point.

not the judge, however, determines the credibility of the witnesses and the weight to be given to their testimony.[112] It was the court's opinion that standard instructions given by the court in every criminal trial would provide ample opportunity to an attorney to comment about any bias of a witness.[113]

E. Relevancy

1. Circumstantial Evidence

Although *Brown v. Richards*[114] was decided on a sufficiency of the evidence basis, the crucial issue in the case was whether or not state of mind, knowledge, and mental attitude could be shown by circumstantial evidence. In *Brown,* the plaintiff-appellant's seventeen-year-old son was fatally injured while riding as a guest passenger. The host lost control of the car while piloting it through an S-curve. The plaintiff charged that the accident was the proximate result of wilful and wanton misconduct by the defendant. There were no eyewitnesses to the crash.

In finding for the appellant, the court of appeals, quoting extensively from *Brueckner v. Jones,*[115] stated that in many instances a person's actions are indicative of an indifference to their natural consequences. That is, a person's mental attitude or state of mind may be shown by circumstantial evidence—no declaration or admission is necessary. In fact, such knowledge, like premeditation in criminal prosecutions for murder, is seldom admitted by the defendant in a civil matter.[116] *Brown* agreed with the majority view espoused in both civil and criminal cases.[117] Usually, regardless of the prejudicial effect, evidence tending to show mental attitude and state of mind is admissible and relevant.[118]

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[112]*See* Taylor v. State, 278 N.E.2d 273 (Ind. 1972). The court in *Taylor* thought that it was error for the court to single out a particular witness and make suggestions indicating to the jury that the witness may be testifying falsely.

[113]280 N.E.2d at 625. With this opportunity present, the rights of the appellant are preserved, and the province of the jury is not invaded by the trial court.

[114]277 N.E.2d 910 (Ind. Ct. App. 1972).

[115]146 Ind. App. 314, 322, 255 N.E.2d 535, 540 (1970).

[116]National City Lines v. Hurst, 145 Ind. App. 278, 283, 250 N.E.2d 507, 510 (1969).

[117]*See* 8 IND. L. ENCYCLOPEDIA, *Criminal Law* § 188 (1971).

[118]Such evidence is admissible even though it occurred prior to the commission of the crime. Fausett v. State, 219 Ind. 500, 39 N.E.2d 728 (1942).

2. *Prior Similar Transactions*

Generally in Indiana evidence of prior independent crimes to show a disposition, tendency, or likelihood of the defendant to commit the offense for which he is charged is inadmissible except for the purpose of showing: 1) intent; 2) motive; 3) purpose; 4) identification; and 5) common scheme or plan.[119] A further exception is commonly recognized by this state's courts in prosecutions of crimes involving depraved sexual instinct and in cases involving assault and battery with the intent to rape.[120]

In *Gilman v. State,*[121] the defendant was charged with assault and battery with the intent to gratify sexual desires. On appeal, the defendant's assertion was that his defense was prejudiced when the State introduced evidence of a prior sodomy conviction. The defendant, in attempting to distinguish his case, argued that prior Indiana cases[122] concerned charges for the *same* act involving depraved sexual instinct. The supreme court, however, stating that all that is required is a prior *similar* act showing a depraved sexual instinct, affirmed the conviction.[123] A vigorous dissent[124] supported the defendant's contentions. It pointed out the danger that existed whenever prior acts are used to demonstrate the disposition to commit a subsequent act. All individuals on trial for

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[119]*See, e.g.*, Watts v. State, 229 Ind. 80, 95 N.E.2d 570 (1950); Hergenrother v. State, 215 Ind. 89, 18 N.E.2d 784 (1939); Gears v. State, 203 Ind. 380, 180 N.E. 585 (1932).

[120]*See* Miller v. State, 268 N.E.2d 299 (Ind. 1971); Kerlin v. State, 265 N.E.2d 22 (Ind. 1970); Woods v. State, 250 Ind. 132, 235 N.E.2d 479 (1968); Lamar v. State, 245 Ind. 104, 195 N.E.2d 98 (1964). It is of great importance in these cases that the prior acts showing depraved sexual instinct do not have to be with the same person. The general rule is that the similar acts must be with the same person. McCORMICK § 190, at 449.

[121]282 N.E.2d 816 (Ind. 1972).

[122]*E.g.*, cases cited note 32 *supra.*

[123]The rules of evidence proposed for use in federal courts do not specifically include depraved sexual instinct as one of the exceptions for the admissibility of character evidence. Rule 404(b) states:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

[124]The dissent filed by Justice Prentice, 282 N.E.2d at 817, was similar to Justice DeBruler's dissenting opinion in Kerlin v. State, 265 N.E.2d 22, 25-26 (Ind. 1970).

sexual offenses should be afforded the same evidentiary safeguards against irrelevant and prejudicial information as any other defendant.[125]

In *Lawrence v. State,*[126] the supreme court was again plagued with the problem of the State's desire to enter prior similar offenses into evidence. The defendant was charged with safe burglary and being an habitual criminal.[127] Both counts were heard at the same time, the evidence of one having been merged with evidence of the other. Again, the court recited Indiana law that evidence of prior offenses was admissible if relevant to show intent, motive, knowledge, plan, identity, credibility, or depraved sexual instinct.[128] However, in *Lawrence* no showing was made that the prior offenses were in any way relevant to the charge of safe burglary. Their sole relevance lay in giving support to the habitual criminal allegation. In adopting the holding of a Connecticut case,[129] the court ruled that the information in such cases should be divided into two parts. The jury should have first heard all of the evidence and pleas for the alleged safe burglary. After having decided that count, the jury would proceed to the habitual criminal charge and the defendant would have an opportunity to change his plea and/or offer all evidence related thereto. Since the procedure employed by the trial court constituted a denial of due process, the high court ordered a new trial.

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[125]Meeks v. State, 249 Ind. 659, 234 N.E.2d 629 (1968). It may be important to point out that the *Meeks* application of depraved sexual instinct was severely criticized in Kerlin v. State, 265 N.E.2d 22 (Ind. 1970).

[126]286 N.E.2d 830 (Ind. 1972).

[127]The Indiana habitual criminal statute, IND. CODE § 35-8-8-1 (1971), reads as follows:

> Every person who, after having been twice convicted, sentenced and imprisoned in some penal institution for felony, whether committed heretofore or hereafter, and whether committed in this state or elsewhere within the limits of the United States of America, shall be convicted in any circuit or criminal court in this state for a felony hereafter committed, shall be deemed and taken to be an habitual criminal, and he or she shall be sentenced to imprisonment in the state prison for and during his or her life.

[128]Ashton v. Anderson, 279 N.E.2d 210 (Ind. 1972); Gilman v. State, 282 N.E.2d 816 (Ind. 1972); Schnee v. State, 254 Ind. 661, 262 N.E.2d 186 (1970); Burns v. State, 255 Ind. 1, 260 N.E.2d 559 (1970); Watts v. State, 229 Ind. 80, 95 N.E.2d 570 (1950). *See also* cases cited note 31 *supra.*

[129]State v. Ferrone, 96 Conn. 160, 113 A. 452 (1921).

F. Experts

1. Expert Testimony

In *DeVaney v. State,*[130] a significant change in Indiana evidentiary law, the supreme court dealt with a litigious conundrum: the expert testifying on an ultimate issue. The defendant was charged with reckless homicide and causing the death of another while under the influence of intoxicating liquor. The court permitted an expert, called by the State, to testify on the ultimate issue in the case—in particular, the expert expressed an opinion that the point of impact was outside the defendant's traffic lane and thus indicated that the defendant crossed the center yellow line. The supreme court held that an expert could direct his testimony to the ultimate issue as long as the jury was free to reject the opinion.[131] By so ruling, the court explicitly overruled numerous Indiana cases[132] and joined a majority of state courts.[133] The reason cited for the change was that the rule forbidding opinion evidence as to ultimate issues was unduly restrictive and burdensome and incapable of uniform application. Furthermore, under the court's new directive there will be no usurpation of the adjudicating function, for an expert is still not permitted to testify as to conclusions of law.[134]

In *Robertson v. State,*[135] the prosecution charged the defendant with driving and operating a motor vehicle while under the influence of an intoxicating liquor. The defendant's primary contention of error on appeal rested on the State's asking his

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[130]288 N.E.2d 732 (Ind. 1972).

[131]Of course, this assumes that the preliminary requirements for an expert's opinions, *e.g.*, that he is qualified, that he is speaking on a subject peculiarly within his knowledge, etc., have been fulfilled. *See* McCormick § 12, at 27.

[132]*See, e.g.*, Stroud v. State, 273 N.E.2d 842 (Ind. 1971) (expert's testimony that newspaper *Screw* had socially redeeming value was inadmissible because it went to ultimate issue); Ellis v. State, 252 Ind. 472, 250 N.E.2d 364 (1969) (expert could not testify as to how a fire started); Baker v. State, 245 Ind. 129, 195 N.E.2d 91 (1964) (expert could not testify as to whether plaintiff was laboring under legal disability).

[133]McCormick § 12, at 27.

[134]This is the general rule although there is an exception when the issue concerns a question of foreign law. *See id.* at 28.

[135]291 N.E.2d 708 (Ind. Ct. App. 1973).

family physician a hypothetical question.[136] Defendant charged that such questioning violated the physician-patient privilege under Indiana Code section 34-1-14-5, which renders a doctor "incompetent"[137] to testify concerning matters communicated to him in the course of a professional service. The court, in upholding the trial court, stated that the mere fact that a doctor was the defendant's physician was immaterial when the question posed was a hypothetical based on facts in evidence. Furthermore, there was nothing in the record to indicate that the physician took into account facts other than those stated in the hypothetical when proffering his conclusion. This ruling reaffirmed prior Indiana case law.[138]

Blackburn v. State,[139] decided by the supreme court, also concerned the issue of expert testimony. The defendant, charged with first degree murder and found guilty of murder in the second degree, alleged on appeal[140] that the court erred in allowing

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[136]The prosecutor asked the doctor to assume the following facts:

> [The man] has the odor of alcoholic beverages about his breath and person, his speech is slurred, he's thick-tongued, hard to understand, he lacks control of his limbs, he's disorganized as to where he is and why, he's loud and boisterous and verbose, he displays, to some extent, a sense of power in the sense that he knows what he can do and what he can't . . . he does not follow instructions . . . he has some lacerations about the face, based on these facts, doctor, and based on your expertise, do you have an opinion as to whether such a man would be under the influence of intoxicating beverage or liquor.

Id. at 710.

[137]The word "incompetent" is probably a legislative oversight. Our legislators probably meant to use "privileged" since there is every indication the patient must claim the physician-patient relationship.

[138]*See, e.g.*, Hauch v. Fritch, 99 Ind. App. 65, 189 N.E. 639 (1934). There is no physician-patient privilege under the Proposed Federal Rules of Evidence. However, rule 504 provides for a psychotherapist-patient privilege. Under that rule a psychotherapist is:

> . . . (A) a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a mental or emotional condition, including drug addiction, or (B) a person licensed or certified as a psychologist under the laws of any state or nation, while similarly engaged.

Rule 504(a)(2).

[139]291 N.E.2d 686 (Ind. 1973).

[140]Another of the defendant's arguments on appeal was that the court erred in allowing two court-appointed psychiatrists to testify during the

the State to cross-examine an expert witness beyond the scope of the direct testimony. The court had allowed the expert to answer a hypothetical question dealing with the mental state of a man who would shoot his wife's lover, if he found the wife and lover together. The lower court reasoned that the question was admissible to determine the witness' opinion on emotional acts. The supreme court affirmed and stated that hypothetical questions may be used in cross-examination to determine the extent of the expert's knowledge and to analyze the standard or foundation for his opinions. Consequently, the cross-examination of an expert through the use of hypothetical questions beyond the scope of the direct examination was held proper and appropriate.[141] This position was an affirmation of prior Indiana case law[142] indicating the necessity for liberality and reasonable latitude when testing an expert's knowledge of the subject-matter.[143]

An expert's testimony was again a point of objection in *Smith v. State,*[144] wherein the defendant was charged with first degree murder. The issue on appeal was whether or not the testimony of two court-appointed psychiatrists was admissible. The defendant charged that the psychiatrists' opinions regarding his sanity were hearsay, since they were based in part on hospital records, the writers of which were not in court for cross-examination. The supreme court, adopting language used in *Birdsell v. United States,* [145] held that opinions based on tests performed by others are not admissible pursuant to the regularly kept records exception to the hearsay rule.[146] However, if an expert is in court and subject to cross-examination, and if that expert customarily

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State's case in chief. The court of appeals stated that court-appointed experts must be placed on the stand after *both* the State's and the defendant's cases. However, for the error to be reversible, the defendant must have shown that it prejudiced his substantive rights. Since the defendant failed to include such a statement, the court rejected this contention of reversible error. 291 N.E.2d at 698.

[141]This seems to be the general rule even in jurisdictions adopting the most restrictive view on scope of cross-examination. McCormick § 22.

[142]*See, e.g.*, McHargue v. State, 193 Ind. 204, 139 N.E. 316 (1923); Wheeler v. State, 158 Ind. 687, 63 N.E. 975 (1902).

[143]Sharp v. State, 215 Ind. 505, 506, 19 N.E.2d 942, 943 (1939).

[144]285 N.E.2d 275 (Ind. 1972).

[145]346 F.2d 775, 779-80 (5th Cir. 1965).

[146]*See* 13 Ind. L. Encyclopedia *Evidence* § 162 (1959) for a general discussion of "regularly kept records" as an exception to the hearsay rule.

relies on reports made by qualified personnel, he may state an opinion based at least in part on the report.[147] There was no reason to deprive the expert of the tools ordinarily used in making his diagnosis merely because he took the witness stand. Of great import to the court was the high reliability of reports. Additionally, with the complexity of and specialization in medicine, it would be difficult, if not impossible, to find a physician who participated in the diagnosis at all levels and phases.

The *Smith* decision appears to have changed Indiana case law.[148] In the past, Indiana courts had ruled that an expert could give an opinion based either on information already in evidence,[149] *e.g.*, testimony of others, or in response to hypothetical questions.[150] By so expanding the traditional rule in *Smith*, the court was assured of receiving not only the opinion of two experts, but also a distillation of reliable information.

2. Experts' Qualifications

The trial court, generally, has great discretion when deciding whether or not it will allow a witness to be categorized as an expert.[151] In *Chappel v. State*,[152] the defendant was convicted of breaking and entering with the intent to commit theft. The defendant's objection was that the police captain should not have been considered an expert in the use of tools for burglary. At trial, the captain testified that the defendant's crowbar could have been used to pry open a door. The supreme court, citing past Indiana authority, defined an expert as one who, either through special training or education *or through experience*, had acquired a special skill or knowledge in a particular area.[153]

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[147]285 N.E.2d at 275, 276.

[148]For a general discussion of evidence based on the testimony of others, see 13 IND. L. ENCYCLOPEDIA *Evidence* § 303 (1959).

[149]Burns v. Barenfield, 84 Ind. 43 (1882).

[150]Mounsey v. Bower, 78 Ind. App. 647, 136 N.E. 41 (1922).

[151]MCCORMICK § 13, at 30.

[152]282 N.E.2d 810 (Ind. 1972).

[153]*See, e.g.*, Patterson v. State, 262 N.E.2d 520 (Ind. 1970) (case involving illegal possession of heroin wherein court stated "extensive experience," 14½ years on the force and graduation from a federal training school, was sufficient); Spencer v. State, 237 Ind. 622, 147 N.E.2d 581 (1958) (in prosecution for forgery of a check, employees of bank were deemed experienced in reading signatures); Dougherty v. State, 206 Ind. 678, 191 N.E. 84 (1934) (in prosecution for possession of burglary tools, ten years experience on police

Here the experts had been on the police force for thirteen years and had spent five of those years as a detective. The court held that such a witness should be allowed to testify to the obvious.[154]

G. Privilege

1. Plea Bargaining

In civil cases, it is well established that communications and acts of a party in furtherance of compromise or settlement of a legal dispute are privileged and, therefore, inadmissible.[155] The rule in criminal cases in Indiana, however, has never been settled. Such communications have been treated as confessions, admissions against interest, and evidence showing a consciousness of guilt. In *Moulder v. State*,[156] the defendant appealed a conviction for involuntary manslaughter. The defendant objected to the admission of a sheriff's statement that the defendant told him that the prosecutor failed to take a plea of guilty for manslaughter. Such a statement, the defendant contended, was made in furtherance of a compromise and consequently should have been privileged. The court of appeals, hearing this case of first impression, reversed the conviction. Any communication relating to plea bargaining was privileged and therefore inadmissible unless there was a subsequent plea of guilty.[157] By so ruling, the Indiana court aligned with the majority of courts[158] and substantially adopted the rule recommended by the American Bar Association in its

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force was sufficient). Furthermore, in all of the above cited cases, the courts stated that the trial courts' rulings should stand unless there was an abuse of discretion.

[154]282 N.E.2d at 812. The supreme court may have expanded the grounds for experts' opinions with this statement. Generally, an expert may give an opinion only on some subject distinctly beyond the ken of the layman. *See* McCormick § 12, at 29. However, here the court went much further and seemingly allowed the expert to state an opinion based on facts within the layman's knowledge.

[155]*See, e.g.*, Northern Ind. Steel Supply Co., Inc. v. Chrisman, 139 Ind. App. 27, 204 N.E.2d 668 (1965).

[156]289 N.E.2d 522 (Ind. Ct. App. 1972).

[157]*See Proposed Fed. R. of Evid.*, rule 410:

> Evidence of a plea of guilty, later withdrawn, or a plea of *nolo contendere*, or of an offer to plead guilty or *nolo contendere* to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer.

[158]McCormick § 274, at 665.

Minimum Standards for Criminal Justice.[159] This new Indiana rule will promote an effective criminal court administration by allowing for the disposition of many criminal cases by compromise.

2. *Comment on Refusal to Take Stand*

In *Rowley v. State,*[160] the defendant, convicted of burglary, contended on appeal that the trial court erred when it did not promptly admonish the jury to disregard a statement by the prosecution that there was no evidence indicating that the defendant was not guilty. Indiana's highest court found that the remark violated the defendant's right to a fair trial and reversed the judgment. Indiana statutory law proscribes prosecution commentary on a defendant's refusal to take the stand.[161] Moreover, it is not sufficient for the judge merely to instruct the jury at the end of the case that they are not to consider such a comment. The judge is required to admonish the jury immediately.[162] Furthermore, it is important to note that this long-standing prohibition against commenting on the silence of the accused was constitutionalized by the United States Supreme Court in *Griffin v. California.*[163]

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[159]ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY § 3.4 (Approved Draft 1968).

> Unless the defendant subsequently enters a plea of guilty or *nolo contendere* which is not withdrawn, the fact that the defendant or his counsel and the prosecuting attorney engaged in plea discussions or made a plea agreement should not be received in evidence against or in favor of the defendant in any criminal or civil action or administrative proceedings.

[160]285 N.E.2d 646 (Ind. 1972).

[161]IND. CODE § 35-1-31-3 (1971) states that the following people are competent as witnesses:

> First. All persons who are competent to testify in civil actions.
>
> Second. The party injured by the offense committed.
>
> Third. Accomplices, when they consent to testify.
>
> Fourth. The defendant, to testify in his own behalf. But if the defendant does not testify, his failure to do so shall not be commented upon or referred to in the argument of the cause nor commented upon, referred to, or in any manner considered by the jury trying the same; and it shall be the duty of the court, in such case, in its charge, to instruct the jury as to their duty under the provisions of this section.

[162]Knopp v. State, 233 Ind. 435, 120 N.E.2d 268 (1954); Keifer v. State, 204 Ind. 454, 184 N.E. 557 (1933); Showalter v. State, 84 Ind. 562 (1882).

[163]380 U.S. 609 (1965). In *Griffin,* the highest Court said that the fifth amendment in its bearing on the states through the fourteenth amendment forbids comment by the prosecution on the accused's silence.

H. Miscellaneous

1. Confessions

The concept of treating juveniles by standards different than those applied to adults pervades our statutory scheme. It would be somewhat naive to assume that a juvenile, needing protection when deciding when to drink,[164] marry,[165] or smoking cigarettes,[166] could stand on the same footing as adults when waiving fifth and sixth amendment rights. *Lewis v. State*,[167] an appeal from a conviction of first degree murder, involved the admissibility of a juvenile's confession taken while defendant was under custodial interrogation and without the aid and support of either parents or counsel. The supreme court, in reversing the conviction, held that although a juvenile could waive his rights under the constitution, all efforts must be taken to insure the voluntariness of the confession. Therefore, a juvenile's statement could be used against him if both he and his parents understand his rights to remain silent and to an attorney. This ruling was an affirmation of prior Indiana[168] and federal case law[169] and finds support in the *Model Rules for Juvenile Courts*[170] and *Proposed Indiana*

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[164]IND. CODE § 7-2-1-9 (1971).

[165]*Id.* § 31-1-1-1.

[166]*Id.* § 35-1-105-1.

[167]288 N.E.2d 138 (Ind. 1972), *noted in* 6 IND. L. REV. 577 (1973).

[168]McClintock v. State, 253 Ind. 333, 253 N.E.2d 233 (1969); Sparks v. State, 248 Ind. 429, 229 N.E.2d 642 (1967).

[169]*See, e.g.*, Haley v. Ohio, 332 U.S. 596 (1948); *In re* Gault, 387 U.S. 1 (1967) (confessions of juveniles require special caution).

[170]NATIONAL COUNCIL ON CRIME AND DELINQUENCY, MODEL RULES FOR JUVENILE COURTS rule 25 (1968):

> Only testimony that is material and relevant to the allegations of the petition shall be admitted into evidence. No testimony that would be inadmissible in a civil proceeding shall be admitted into evidence.
> No extra-judicial statement by the child to a peace officer or court officer shall be admitted into evidence unless made in the presence of a parent or guardian of the child, or of the child's counsel. No such statement shall be admitted into evidence unless the person offering the statement demonstrates to the satisfaction of the court that, before making the statement, the child and his parents were informed and intelligently comprehended that the child need not make a statement, that any statement made might be used in a court proceeding, and that the child has a right to consult with counsel prior to or during the making of a statement.

Rules of Juvenile Procedure.[171] The rule adopted by the court does not make a juvenile's confession inadmissible per se but only emphasizes the safeguarding procedures deemed necessary to avoid all elements of coercion, duress, or inducement.

2. *Parol Evidence*

Succinctly stated, the parol evidence rule dictates that the terms and conditions of a written agreement cannot be altered, modified, or changed by statements *de hors* the instrument.[172] Or as stated in a recent Indiana decision: "The parol evidence rule states that a written agreement or contract, signed by the parties, is conclusively presumed to represent an integration or meeting of minds of the parties."[173] In *Vernon Fire & Casualty Insurance Co. v. Thatcher*,[174] the defendant appealed from a judgment for fire loss not covered in the insurance policy. The defendant argued that the lower court should have excluded evidence of misrepresentation since the parol evidence rule renders such evidence inadmissible and, therefore, limits the liability to the terms of the policy. Plaintiff-appellee, however, asserted that the complaint for damages did not attempt to change the terms of the instrument but merely alleged misrepresentation. The court upheld the verdict for the plaintiff and stated that the parol evidence rule had never operated to exclude evidence of misrepresentation.[175] A plethora of Indiana cases dating from 1856 had developed this

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> All oral testimony shall be given under oath, and may be given in narrative form.
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> (The Model Rules were proposed by the Council of Judges of the National Council on Crime and Delinquency.)

[171] REPORT OF IND. CIVIL CODE STUDY COMM'N, PROPOSED JUVENILE PROCEDURE CODE rule 9 (1970):

> Any self-incriminating admission or omission obtained by the juvenile court or its staff during the performance of juvenile court duties, including but not limited to the preliminary inquiry, the period of informal adjustment or the waiver hearing, shall not be admitted at any fact-finding hearing or at any time prior to conviction if the proceeding is transferred to a criminal court over objections thereto made at that time.

[172] Lewis v. Burke, 248 Ind. 297, 305, 226 N.E.2d 332, 337 (1967).

[173] Weaver v. American Oil, 276 N.E.2d 144, 147 (Ind. 1971).

[174] 285 N.E.2d 660 (Ind. Ct. App. 1972).

[175] *See generally* 13 IND. L. ENCYCLOPEDIA *Evidence* § 204 (1959).

proposition.[176] Whenever fraud or misrepresentation is alleged, the evidence is inadmissible to change the instrument but admissible to determine the validity of the contract or the award of damages.[177]

3. Refreshing Memory

It is an established practice that in interrogating a witness an attorney may hand the witness a writing to refresh his recollection. In the case of *LeFlore v. State*,[178] the Supreme Court of Indiana considered this evidentiary rule.

The appellant had been convicted of robbery by a jury. He contended that the trial court erred in denying his request for production of a card file which belonged to a witness for the prosecution.[179] The witness was a police officer who kept a card file at his home. The cards recorded investigations that the policeman had made, and the officer said that he had used the file to refresh his memory prior to trial. The appellant contended that the card file should have been produced at the trial to allow appellant to adequately cross-examine the policeman.

The court relied on two cases in resolving the question as to whether or not the card file should have been made available to the appellant.[180] These cases held that there is a right to have writings produced only when the witness uses the writing while he is on the stand. The policeman in *LeFlore* did not use the notes to refresh his memory while he was on the stand; therefore, the trial court did not err when it refused to order a production of the writing.[181]

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[176]McClure v. Jeffrey, 8 Ind. 79, 83 (1856); Tribune Co. v. Red Ball Transit Co., 84 Ind. App. 666, 151 N.E. 338 (1926); Paxton-Eckman Chemical Co. v. Mundell, 62 Ind. App. 45, 112 N.E. 546 (1916).

[177]In Tyler v. Anderson, 106 Ind. 185, 191, 6 N.E. 600, 603 (1886), the court said that if misrepresentation is used as a defense rather than to invalidate the contract or for damages, the parol evidence rule operates to exclude the information.

[178]281 N.E.2d 876 (Ind. 1972).

[179]*Id.* at 877.

[180]281 N.E.2d at 877-78, *citing* Northern Ind. Pub. Serv. Co. v. W.J. & M.S. Vesey, 210 Ind. 338, 200 N.E. 620 (1936); Lennon v. United States, 20 F.2d 490 (8th Cir. 1927). It is only when the witness uses the writing to refresh his memory while on the stand that there is a right to compel production.

[181]281 N.E.2d at 878.

4. Evidentiary Harpoons

An "evidentiary harpoon" is defined as evidence calculated to prejudice unfairly the minds of jurors against a defendant.[182] In *King v. State*[183] the prosecutor asked the arresting police officer whether or not he had previously known the appellant. The officer testified that he had arrested the appellant ten days previously. Appellant's counsel objected to this testimony as being an "evidentiary harpoon." The *King* court considered the thirteen factors listed in *White v. State*[184] to determine whether sufficient prejudicial harm had been done, but distinguished the case on a different ground. The appellant was tried by the court alone, and it has been held in Indiana that many errors may be practically nullified when no jury is present.[185]

In another "evidentiary harpoon" case, *Brown v. State*,[186] the appellant had been convicted of first degree burglary. During the course of the trial, a police officer was asked if the appellant had said anything when arrested. The policeman answered no, but proceeded to make a reference to the fact that the appellant was an escapee from the reformatory.[187] The defense counsel moved for a mistrial on the ground that this statement unduly prejudiced the jury. The supreme court recognized the principle that it is improper for a witness to inject statements concerning unrelated prior crimes committed by defendant. In the court's

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[182]King v. State, 292 N.E.2d 843, 846 (Ind. Ct. App. 1973).

[183]*Id.*

[184]272 N.E.2d 312 (Ind. 1971). The thirteen factors include: (1) effect of constitutional provisions, statutes, or rules relating to harmless error; (2) degree of materiality of the testimony; (3) other evidence of guilt; (4) other evidence tending to prove the same fact; (5) other evidence that may cure improper testimony; (6) evidence of waiver by injured party; (7) voluntariness of the witness' statement and deliberateness of the prosecutor to present the matter to the jury; (8) penalty assessed; (9) action by defendant or his counsel in partially eliciting the testimony; (10) existence of other errors; (11) existence of a close, clear, or compelling question of guilt; (12) standing and experience of person giving objectionable testimony; (13) repetition of objectionable testimony or misconduct.

[185]Shira v. State, 187 Ind. 441, 119 N.E. 833 (1918). The reason that many errors are nullified is that the trial judge sitting alone is presumed to know what evidence to consider and what prejudicial evidence to reject. In *King* the trial judge made no reference to the police officer's statement in deciding the case, therefore, it may be presumed that the "evidentiary harpoon" had no prejudicial effect on the outcome of the case.

[186]281 N.E.2d 801 (Ind. 1972).

[187]*Id.* at 802.

opinion, however, the statement made by the police officer constituted harmless error for two reasons: the facts given during the trial substantially connected the appellant with the crime and the trial court had sufficiently instructed the jury to disregard the testimony referring to the appellant as an escapee.[188]

5. *Dead Man's Statute*

In the case of *Jenkins v. Nachand*,[189] the court of appeals reviewed the question of whether certain testimony offered was admissible under the Dead Man's Statute. The appellant was involved in a car accident while riding with appellee's decedent. If the appellant had been allowed to testify, she would have told the trial court that appellee's decedent recklessly turned the car into oncoming traffic after appellant had repeatedly warned him not to do so.[190] Appellant's main contention was that the Dead Man's Statute did not preclude her testifying as to matters relating to the collision and occurring during the lifetime of the decedent. She based her contention on the fact that a judgment would not be adverse to the estate of appellee-decedent, but rather against the administrator only to reach an insurance policy. The decedent's heirs or estate did not have any right, title, or interest in the insurance policy and therefore, according to the appellant, a judgment would neither indirectly nor directly affect the estate.[191] The court concluded that appellant's claim would not affect the assets of the estate for two primary reasons. The first was that there was no claim filed against the estate within six months of the first publication of notice as required by statute.[192] Secondly, the estate had been fully administered, distribution made, and the estate closed before a suit was initiated. Considering the intent of the Indiana General Assembly in passing the Dead Man's

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[188]*Id. See* Capps v. State, 282 N.E.2d 833 (Ind. 1972). In *Capps* a police officer testified that the defendant was initially arrested for his suspected connection with the interstate transportation of stolen suits. Appellant contended that the testimony was prejudicial, but the testimony was not objected to at trial nor raised in a motion to correct errors and therefore, the court did not have to rule on it.

[189]290 N.E.2d 763 (Ind. Ct. App. 1972).

[190]*Id.* at 764.

[191]Appellant contended that because a judgment would not affect the decedent's estate in this case, the Dead Man's Statute would be inapplicable. A judgment must affect the estate of the decedent for the statute to operate. *See* note 15 *supra*.

[192]IND. CODE § 29-1-14-1 (1971).

Statute, the court decided that it was reversible error to refuse to allow appellant to testify in this case.[193]

IX. Probate and Trusts*

A. Executors and Administrators

During the survey period the Indiana Court of Appeals decided several cases concerning the administration of decedents' estates. In *Krick v. Farmers & Merchants Bank*[1] the appellant moved to set aside the compromise of an earlier contest of the decedent's will on the ground that he had no notice of the settlement and that the terms of the compromise were not reduced to writing.[2] After his motion was denied, the appellant waited over five years before filing an objection to the administrator's final report.

Though the administration of an estate is considered "one proceeding . . . in rem"[3] many Indiana courts treat collateral or

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[193]The *Jenkins* court felt that it was not the intent of the legislature in enacting the Dead Man's Statute to prevent testimony that could not affect a decedent's estate. 290 N.E.2d at 769.

*Bruce W. Claycombe, Mark T. McDermott, John R. Politan.

[1]279 N.E.2d 254 (Ind. Ct. App. 1972).

[2]Ind. Code § 29-1-9-1 (1971) provides that a will compromise is invalid if not reduced to writing. It should be noted that the appellant filed objections to the will compromise at three different times on the basis of this statute and his lack of actual notice. The first motion was denied by the trial court in September 1964, and no appeal was taken. The second motion was filed over three and one-half years later when the administrator filed his final report. This time the trial court realized its error in failing to comply with the statute and granted appellant partial relief. The administrator subsequently filed a supplemental final report showing that the corrections ordered by the court had been made. The appellant was not satisfied with this order of the court sustaining his objections and filed a Motion to Correct Errors in August of 1970, with substantially the same allegations of error. Denial of this third motion was the foundation for this appeal.

[3]*Id.* § 29-1-7-2 provides:

> The probate of a will and the administration of the estate shall be considered one proceeding for the purposes of jurisdiction, and said entire proceeding and the administration of a decedent's estate is a proceeding in rem.