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Mechanically Produced Evidence

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and soybean oil, now widely used in the preparation of margarine, are extracted, and the interests of the manufacturer in having a wide distribution of his product, have been gaining extensive support throughout the United States. By retreating from the fiscal bulwark to that of commercial prohibition as to coloring oleomargarine yellow in imitation of butter, a willingness to work toward a fair compromise could be demonstrated, and coupled with a stress on a showing of concern for consumer interests, the industry could hope to divert the clamor for lifting all restrictions on oleomargarine into the channel of tax repeal, saving the fortress of color prohibition, and thus the butter market and the dairy industry.

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MECHANICALLY PRODUCED EVIDENCE

The practice of preserving evidence and bringing it before the courts through the medium of recording machines is not in itself new and has been recognized by the courts for some time. The thing that prompts the writer to review the subject is the improvement made in recent years in the quality of recording devices. The two devices that are foremost in the writer's mind as being adaptable to the field of law are the "wire" and "tape" recorder. Without going into the relative merits of each, suffice it to say at this time that each will economically record and reproduce oral testimony. With most "wire" recorders now in use it is possible to record up to one hour of continuous recording. "Tape" recorders are said to be more efficient and have a greater recording capacity; up to six hours on some models. Both of these machines are reasonably priced and it is thought that with the passing of time they will be more extensively used by lawyers and courts. A few of the many uses that can be made of this type of device is sought to be presented in this article.

The case of *Commonwealth v. Clark*,[1] involved a prosecution for attempted extortion and bribery. The court permitted the introduction of "speak-o-phone" records secretly made of conversations with the defendant, and playing of the records in the presence of the jury. The court reasoned that "the phonograph, the dictaphone, the talking motion picture machine, and similar recording devices with reproducing apparatus, are now in such common use that the verity of their recording and reproducing sounds, including those made by the human voice in conversations, is well established; and as advances in such matters of scientific research and discovery are made and generally adopted, the courts will be permitted to make use of them by way of presenting evidentiary facts to the jury".

The admissibility of recordings involves essentially the same problems and is

1. 123 Pa. Super. 277, 187 Atl. 237 (1936); accord, ". . . the mere fact that certain portions of the mechanically recorded conversations were less audible than others did not call for exclusion of what the jurors personally heard from the "playing" of the records. There would be no more valid reason for exclusion of the mechanically recorded conversations than there would be for the excluding competent conversations, overheard in part, by human witnesses." United States v. Schanerman, 150 F. (2d) 941 (C. C. A. 3rd 1945); State v. Perkins, 355 Mo. 851, 198 S. W. (2d) 704 (1946).

based on the same principles found in the admission of motion pictures in evidence.[2] In *People v. Hayes*,[3] the court permitted a sound motion picture of defendant making a confession to be reproduced before the jury and received as evidence. The defendant relied for reversal of the judgment on the proposition that it was prejudicially erroneous for the trial court to receive such evidence. In upholding the conviction, the court said that "such reproduction stands on the same basis as any orthodox mechanical medium, that is, there is a preliminary question to be determined by the trial judge as to whether or not the sound moving picture is an accurate reproduction of that which it is alleged occurred. If after a preliminary examination, the trial judge is satisfied that the sound moving picture reproduces accurately that which has been said and done, the other requirements relative to the admissibility of a confession are present, i. e., it was freely and voluntarily made without hope of immunity or promise of reward, then, not only should the preliminary foundation and the sound moving picture go to the jury, but, in keeping with the policy of the courts to avail themselves of each and every aid or truth, such practice is to be commended as of inestimable value to triers of fact in reaching accurate conclusions." It would seem that the same approval would be applicable to recordings which are sought to be used in evidence. The reliability of a recorder, as a basis for testimony, would require merely some testimony to the type of machine and its dependability in experience, so far as the recorded words alone are concerned.[4]

In *Boyne City B. & A. R. Co. v. Anderson*,[5] the Supreme court of Michigan approved the use of a phonographic recording of sounds claimed to have been made by a train. The court likened their use to communication conducted through the medium of the telephone. "Here, as with the telephone, the apparatus itself does not identify the speaker; and to that fact there must be further evidence, analogous to that required for telephone audition".[6] Establishing the identity of the speaker can be accomplished in the manner it was facilitated in the *Clark Case*. There the Attorney General was present during the whole interview and was familiar with the defendant's voice and could tell who was speaking over the recorder. He was called to identify the voices and tell the jury who was speaking at the time. However, in the case of *People v. Miller*,[7] the proof was insufficient to identify the speakers and the phonographic record was found not to be competent.

The objection is frequently heard in criminal trials that the defendant's confession has not been freely and voluntarily made, he testifying that it was induced either by threats or force. It would appear to the writer that if the defendant's confession is recorded, the trial court could more accurately determine whether the confession has been obtained by means which do not violate the defendant's constitutional rights. This argument has been convincing in cases in which a

2. State v. Perkins, supra.
3. 21 Cal. App. (2d) 320, 71 P. (2d) 321 (1937).
4. Wigmore, The Science of Judicial Proof, 489, Sec. 228 (3d ed. 1937).
5. 146 Mich. 328, 109 N. W. 429 (1906).
6. Wigmore, The Science of Judicial Proof, 489, Sec. 228 (3d ed. 1937).
7. 58 N. Y. Supp. (2d) 525 (3d Dep't 1945).

confession was presented by means of a movietone and it would seem that the same argument is tenable where the confession is introduced through the medium of a recording device. While a recorder is probably not as utopian as a movietone in this matter, many of the same advantages are afforded. All the spoken words and sounds made at the time of the confession would be recorded including the statements of the officer taking the confession whereby the accused is informed as to his constitutional rights. Certainly, the trial court could learn more about the conditions under which the confession was obtained by listening to an accurate recording of the defendant's words than from a written confession signed by the accused. Any acts of violence or threats by the officers in charge could not go unnoticed in the trial court.

It is submitted that recorders could be used advantageously for the purpose of impeaching a witness for making prior inconsistent statements. *State v. Simon*,[8] is the only case discovered in which the point was considered. This court held that dictagraph records were clearly incompetent for impeachment of a witness's testimony. The court reasoned, "It is elementary that prior inconsistent statements by a witness cannot be proved until the witness has been asked on cross, and has failed to admit, that he made them. Then the counter proof must be by leading question, and answer, as to whether the witness, on the specified occasion, said what he had refused to admit saying. No machine could comply with that rule." The writer questions the wisdom of this reasoning; could a written statement signed by the witness do more? It is submitted that a recording and a written statement signed by the witness could both perform the same functions. The court suggests a further reason for not admitting a phonograph record as being that it cannot be cross-examined as to whether the whole conversation was reproduced. Could a written statement made by the witness be any more readily cross-examined? It would seem that the person introducing the recording for purposes of impeachment could be cross-examined as to whether the recording contained all of the conversation.

The taking of depositions is another instance in which the use of recording devices would prove to be highly beneficial. An amendment of Wyo. Comp. Stat. 1945 sec. 3-2915[9] would be required, but in the event such an amendment were forthcoming, the taking of depositions would not only be simplified but would also be less expensive. Instead of employing someone to take the testimony in shorthand to be later transcribed, a recording would be made of the entire proceedings. When the deposition is sought to be introduced in evidence, the proper foundation would have to be laid by proof with respect to the dependability of the machine in reproducing voices and there would also need be an identification of the persons speaking.[10] Wyo. Comp. Stat. sec. 3-2916 provides that the deposition so taken shall be sealed in an envelope endorsed with the title of the cause, and the name of the officer before whom it was taken, and such officer shall address

8. 113 N. J. L. 521, 174 Atl. 867 (Sup. Ct. 1934).
9. "The deposition shall be written in the presence of the officer before whom it is taken, either by the officer, the witness, or some disinterested person, and subscribed by the witness."
10. Wigmore, The Science of Judicial Proof, 489, Sec. 228 (3d ed. 1937).

and transmit the same to the clerk of the court where the action or proceeding is pending. . . . Couldn't a spool of wire or tape be transmitted to the court just as easily as a bundle of papers?

Recording devices could also be utilized in the recording of testimony during the trial.[11] In a recent Wyoming trial a wire recorder was installed in the courtroom and the proceedings had therein were recorded. According to the court reporter it not only assisted him in preparing an accurate transcript but also enabled him to complete it in far less time than would have been required using conventional shorthand transcription. Conceivably, the cost of obtaining a written transcript could be greatly reduced by the application of modern, scientific methods such as these. It doesn't appear, nor is it the contention of the writer, that a recorder will ever replace the written transcript so that we could just send a spool of wire or tape to the appellate court. The reasons for this would seem too obvious to need mention. An argument against the use of a recording device to record the happenings at a trial is that the recorder doesn't identify the person speaking. Suffice it to say at this time that this is no obstacle and that there are means of identifying the voice of the speaker that have proven satisfactory. There is, however, the possibility that these machines would become defective during the trial so that they would not record. Granting this, the objection is still not disastrous for the court reporter would be taking the testimony in shorthand from which a transcript could be prepared.

Another example of a situation in which a recording of the testimony taken at a trial would be invalauble is where there is an appeal made under Wyo. Comp. Stat. 1945 sec. 3-3801[12] some five years after the trial took place. Under Wyo. Comp. Stat. 1945 sec. 1-624 the court reporter preserves the full stenographic notes taken at the trial. The transcript of the testimony would not be prepared until five years after the trial at which time there is a request for the same.[13] Conceivably, the court reporter who originally took the stenographic notes may be unavailable at the time a request is made for the transcript. Under this fact situation, the writer has been informed by experts that the preparation of an accurate transcript would border on the impossible since most court reporters use different shorthand techniques. An audible recording preserved along with the court reporter's shorthand notes would be most helpful in interpreting these notes.

It is submitted that the various types of recordings should be admitted in evidence even though there is the possibility of imposture. Without going into the technical aspects, certainly it is possible to "erase" a portion of the recording and since the recording leaves no physical impression on the tape the erasure could not be detected. Possibly, attempts will be made to introduce evidence so obtained; and to guard against this happening appropriate safeguards can and should be taken. It is not within the realm of this paper to devise the means, but it is felt that a seal placed on the spool containing the recording immediately after making

11. 3 Wigmore, Evidence, Sec. 809 (3d ed. 1940).
12. "A district court may vacate or modify its own judgment or order, after the term at which the same was made: (8) For errors in a judgment, shown by an infant in twelve (12) months after arriving at full age. . . ."
13. Wyo. Comp. Stat. 1945, sec. 1-624.

it along with a statement by the person making the statements acknowledging said recording would work satisfactorily. At any rate, the court has before it the persons authenticating the recording and it would seem that their testimony is as reliable as that relating to any other matter sought o be inroduced. To preclude recordings because of the possibility of alterations would seem as logical as saying that nobody should be permitted to testify for fear that they may tell an untruth.

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WHO IS A GUEST WITHIN MEANING OF AUTOMOBILE GUEST STATUTES

A large percent of the litigation resulting from motor vehicle accidents involves a class of legislation commonly called "guest statutes". Generally, such a statute provides that an owner or operator of an automobile is absolved from liability to a guest unless he is guilty of some degree of conduct greater than ordinary negligence.[1] Of the 26[2] states that have enacted such statutes, 17[3] of them have attempted to define a "guest". Most of these statutary definitions are similar in nature but contain slight variations of terms. Thus, one who rides gratuitously in some states is a guest,[4] while others who are carried without compensation,[5] or free of charge,[6] or without payment therefor,[7] are guests under the statutes of other jurisdictions. The remaining states simply use the word guest.[8]

1. See 2 Wyo. L. J. 182 (1947) for discussion on degrees of care required under the various statutes. For general discussion on liability to a guest see 94 A. L. R. 1221; 20 Va. L. Rev. 326 (1934).
2. Ala. Code 1940 tit. 36 sec. 95; Pope's Digest of Ark. Stat. 1937 sec. 1302-04; Vehicle Code of Cal. 1935 sec. 403; Colo. Stat. Ann. 1935 c. 16, sec. 371; Del. Rev. Code 1935 sec. 5713; Fla. Stat. 1941 sec. 320.59; Idaho Code Ann. 1932 sec. 48-901; Ill. Rev. Stat. 1947 c. 95½ Par. 58a; Burn's Ind. Stat. Ann. 1938 sec. 47-1021; Gen. Stat. of Kan. 1935 sec. 8-122b; Mich. Comp. Laws 1929 sec. 4648; Mont. Rev. Code 1935 sec. 1748.1; Rev. Stat. Neb. 1935 sec. 39174; Nev. Comp. Laws 1929 Supp. 1941 sec. 4439; N. M. Stat. Ann. 1941 sec. 68-1001; N. D. Rev. Code 1943 sec. 39-1501; Throckmorton's Ohio Code Ann. 1936 sec. 6308-6; Ore. Comp. Laws Ann. 1940 sec. 115-1001; S. C. Code 1932 sec. 5908; S. D. Code 1939 sec. 44.0362; Vernon's Tex. Stat. 1948 sec. 6701b; Utah Code Ann. 1943 Tit. 57, c. 11, sec. 7; Vt. Public Laws 1933 sec. 5113; Michie's Code Va. 1942 sec. 2154-232; Wyo. Comp. Stat. 1945 sec. 60-1201; Rem. Rev. Stat. of Wash. sec. 6360-121.
3. N. D. Rev. Code 1943 sec. 39-1501; S. D. Code 1939 sec. 44.0362; Ill. Rev. Stat. 1947 c. 95½ par. 58a; Gen. Stat. of Kan. 1935 sec. 8-122b; Nev. Comp. Laws 1929 Supp. 1941, sec. 4439; Vt. Public Laws 1933 sec. 5113; S. C. Code 1932 sec. 5908; Idaho Code Ann. 1932 sec. 48-901; Burn's Ind. Stat. Ann. 1938 sec. 47-1021; Ala. Code 1940 Tit. 36 sec. 95; Vernon's Tex. Stat. 1948 sec. 6701b; Throckmorton's Code of Ohio Ann. 1936 sec. 6308-6; Ore. Comp. Laws Ann. 1940 sec. 115-1001; Utah Code Ann. 1943 Tit. 57, c. 11, sec. 7; N. M. Stat. Ann. 1941 sec. 68-1001; Del. Rev. Code 1935 sec. 5713; Wyo. Comp. Stat. 1945 sec. 60-1201.
4. Burn's Ind. Stat. Ann. 1938 sec. 47-1021; Ala. Code 1940 Tit. 36 sec. 95; Vernon's Tex. Stat. 1948 sec. 6708-6; Ore. Comp. Laws Ann. 1940 sec. 115-1001.
5. Utah Code Ann. 1943 Tit. 57, c. 11, sec. 7.
6. N. M. Stat. Ann. 1941 sec. 68-1001.
7. N. D. Rev. Code 1943 sec. 39-1501; S. D. Code 1939 sec. 44.0362; Vt. Public Laws 1933 sec. 5113; Ill. Rev. Stat. 1947 c. 95½ par. 58a; Del. Rev. Code 1935 sec. 5713; Gen. Stat. of Kan. 1935 sec. 8-122b; Nev. Comp. Laws 1929 Supp. 1941, sec. 4439; Wyo. Comp. Stat. 1945 sec. 60-1201; S. C. Code 1932 sec. 5908; Idaho Code Ann. 1932 sec. 48-901.
8. Fla. Stat. 1931 Supp. 1947, sec. 320.59; Pope's Digest of Ark. Stat. 1937 sec. 1302-04; Vehicle Code of Cal. 1935 sec. 403; Colo. Stat. Ann. 1935 vol. 2, c. 16, sec. 371. Michie's Code Va. 1942 sec. 2154-232; Mich. Comp. Laws 1929 sec. 4648; Mont. Rev. Code 1935 sec. 1748.1; Rev. Stat. Neb. 1935 sec. 39174.