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Evidence—Privilege Against Self-Incrimination—Admissibility of Results of Intoxication Tests

disregarded this holding.[12] It was not until the instant case that the Missouri courts extended the doctrine of the earlier case. In this case the fact that the call testified to was received shortly after the letter was mailed by the witness seems practically irrefutable circumstantial evidence of the identity of the caller, since he stated that he wished to talk about the letter and did not deny the conversation when opportunity offered. Thus, the principal case seems to be an advance along the same lines as the other liberal decisions on the matter, rather than a departure from the general rule requiring identification. H. G.

EVIDENCE—PRIVILEGE AGAINST SELF-INCRIMINATION—ADMISSIBILITY OF RESULTS OF INTOXICATION TESTS—[Texas].—Defendant was prosecuted for "murder without malice" for striking a pedestrian while driving an automobile. The prosecution attempted to introduce as evidence the results of certain tests performed on defendant while under arrest to prove that defendant was intoxicated at the time of the accident. These tests required defendant to answer questions, walk, make sudden turns, touch his nose, and submit a urine specimen for analysis. Defendant objected that the results were inadmissible as violative of the provision of the Texas constitution against self-incrimination.[1] *Held*, that the evidence was inadmissible. *Apodaca v. State*.[2]

The common law privilege against compulsory self-incrimination included two aspects: (a) testimonial utterances (b) obtained under compulsion. Originally the privilege was designed to prevent law enforcement agencies from relying on forced testimony, which would quite possibly be false.[3] All but two American jurisdictions have adopted this privilege in their constitutions.[4] But the American courts began at an early time to emphasize the compulsion factor of the rule to the exclusion of the requirement that the evidence be testimonial. Under this extension of the rule, the courts in effect prohibited examinations of the body of the accused and enforced conduct.[5]

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12. Meyer Milling Co. v. Strohfeld (1929) 224 Mo. App. 508, 20 S. W. (2d) 963, cert. quashed in State ex rel. Strohfeld v. Cox (1930) 325 Mo. 901, 30 S. W. (2d) 462.

1. Tex. Const. art. 1, sec. 10. "In all criminal prosecutions the accused * * * shall not be compelled to give evidence against himself."

2. (Tex. Cr. 1940) 146 S. W. (2d) 381.

3. 8 Wigmore, *Evidence* (3d ed. 1940) 276, 362, secs. 2250, 2263. See Ex parte Frenkel (1920) 17 Ala. 563, 85 So. 878, a homicide case, where it was held that questioning the accused concerning the number of intoxicating drinks consumed violated the rule.

4. Iowa and New Jersey have adopted the privilege by statute. The wording of the privilege varies among the jurisdictions. The usual phrasing is either that in criminal cases no person shall be compelled to be a witness against himself or that no person shall be compelled to give evidence against himself. "This variety of phrasing * * * neither enlarges nor narrows the scope of the privilege as already accepted, understood, and judicially developed in the common law." 8 Wigmore, op. cit. supra, note 3, at 321, sec. 2252.

5. Cooper v. State (1889) 86 Ala. 610, 6 So. 110; Blackwell v. State

In order to prevent the privilege against self-incrimination from becoming a tool for the guilty instead of a protection for the innocent, it was soon necessary to make certain limitations on the growing extension. Evidence of enforced conduct was admitted for the purpose of identifying the accused. Requiring the accused to stand in court[6] or to don particular wearing apparel[7] has been held not to be within the privilege. Fingerprinting, photographing, and measuring an arrested person is constitutionally permissible.[8] Generally an examination for identifying scars, marks, or wounds has also been acceptable.[9] There has been some conflict on the question whether an accused person could be required to make a footprint for identification purposes, but the modern tendency is to permit this type of enforced conduct.[10] Another limitation on the extension of the rule against self-incrimination was established by permitting compulsory psychiatric examinations in criminal cases in which defendant pleaded insanity.[11] Even though such an examination involves questioning the accused, the courts have placed their decision on grounds of fairness and practicality without directly meeting the question of self-incrimination.[12]

(1881) 67 Ga. 76, 30 Am. St. Rep. 72; Jordan v. State (1856) 32 Miss. 382; People v. McCoy (N. Y. 1873) 45 How. Pr. 216; Stokes v. State (1875) 64 Tenn. 619; State v. Slammon (1901) 73 Vt. 212, 50 Atl. 1097, 87 Am. St. Rep. 711; State v. Nordstrom (1893) 7 Wash. 506, 35 Pac. 382.

6. People v. Oliveria (1899) 127 Cal. 376, 59 Pac. 772; State v. Reasby (1896) 100 Iowa 231, 69 N. W. 451; State v. Ruck (1906) 194 Mo. 416, 92 S. W. 706; People v. Gardner (1894) 144 N. Y. 119, 38 N. E. 1003; Benson v. State (Tex. Cr. 1902) 69 S. W. 165. Cf. Turman v. State (1906) 50 Tex. Cr. 7, 95 S. W. 533 (*Benson* case completely ignored).

7. Holt v. United States (1910) 218 U. S. 245; Canty v. State (Ala. 1939) 191 So. 260; Ross v. State (1932) 204 Ind. 281, 182 N. E. 865; Rutherford v. State (Tex. Cr. 1938) 121 S. W. (2d) 342.

8. United States v. Kelly (C. C. A. 2, 1932) 55 F. (2d) 67; State v. Clausmeier (1900) 154 Ind. 599, 57 N. E. 541, 50 L. R. A. 73; Downs v. Swann (1909) 111 Md. 53, 73 Atl. 653; People v. Les (1934) 267 Mich. 648, 255 N. W. 407; Bartletta v. McFeeley (1930) 107 N. J. Eq. 141, 152 Atl. 17; People v. Sallow (County Ct. 1917) 100 Misc. 447; Conners v. State (Tex. Cr. 1938) 115 S. W. (2d) 681.

9. O'Brien v. State (1890) 125 Ind. 38, 25 N. E. 137, 9 L. R. A. 323; State v. Tettaton (1900) 159 Mo. 354, 60 S. W. 743; State v. Ah Chuey (1879) 14 Nev. 79; State v. Oschoa (1926) 49 Nev. 194, 242 Pac. 582; State v. Garrett (1874) 71 N. C. 85, 17 Am. Rep. 11; Hooks v. State (1924) 97 Tex. Cr. 480, 261 S. W. 1053.

10. Admitting such evidence: Magee v. State (1908) 98 Miss. 865, 46 So. 529; State v. Barela (1917) 23 N. M. 395, 168 Pac. 545; State v. Graham (1876) 74 N. C. 646, 21 Am. Rep. 493; Johnson v. State (1922) 91 Tex. Cr. 291, 238 S. W. 933. Excluding this evidence: Cooper v. State (1889) 86 Ala. 610, 6 So. 110; Penton v. State (Ark. 1937) 109 S. W. (2d) 131; Day v. State (1879) 63 Ga. 667; State v. Griffin (1924) 129 S. C. 200, 124 S. E. 81.

11. Ingles v. People (1933) 92 Colo. 518, 22 P. (2d) 1109; People v. Krauser (1925) 315 Ill. 485, 146 N. E. 593; State v. Genna (1927) 163 La. 702, 112 So. 655; People v. Truck (1902) 170 N. Y. 203, 63 N. E. 281; State v. Cerar (1922) 60 Utah 208, 207 Pac. 597; State v. Eastwood (1901) 73 Vt. 205, 50 Atl. 1077. Contra: Noelke v. State (Ind. 1938) 150 N. E. (2d) 950.

12. Inbau, Self-Incrimination—What Can an Accused Be Compelled to Do? (1937) 28 Jour. Cr. L. 261, 282.

The modern limitations on the extension of the rule seem to be returning the majority of American jurisdictions to a use of the privilege in its original meaning—the excluding of testimonial utterances made under compulsion. But a more precise interpretation of "testimonial" is being obtained. Whereas any speaking or writing was originally considered *ipso facto* testimonial, the courts now seem to distinguish between questioning for the purposes of identification or observation and questioning for the purpose of obtaining information.[13] In the instant case there was compulsory questioning, but the court did not consider its nature. It merely ruled that compulsory "demonstrations" violated the privilege against self-incrimination. Thus, the court seems to have followed the older American view of the rule against self-incrimination by basing its decision on the factor of compulsion alone.[14] D. A.

FEDERAL COURTS—APPEAL IN DIVERSITY OF CITIZENSHIP CASES—RETROSPECTIVE APPLICATION OF CHANGE IN STATE LAW UNDER *Erie R. R. v. Tompkins*—[United States].—An employee sued his employer in the federal district court in Ohio, alleging negligence resulting in occupational disease. Under the then existing state law, plaintiff had no cause of action and the trial court dismissed the petition. Pending hearing on appeal from the order of dismissal, the state supreme court overruled its previous decisions so as to allow actions of the sort plaintiff sought to bring. The circuit court of appeals held that the state law obtaining at the time of the trial was the law of the case. On certiorari, the Supreme Court of the United States *held:* The state law as changed by the highest state court must be given effect on appeal, so that the order of dismissal, though correct when made, must be reversed and plaintiff's action reinstated. *Vandenbark v. Owens-Illinois Glass Co.*[1]

When there is a change in the law between trial and appeal, there are two possible courses. Either the law and facts existing at the time of trial must be considered as a unit, so that a change in the law will not change the law of the case, or the intervening change in the law must be given retrospective effect and so control the outcome. The general rule in the

13. United States v. Mullaney (C. C. 1887) 32 Fed. 370; Bradford v. People (1896) 22 Colo. 157, 43 Pac. 1013; State v. McKowen (1910) 126 La. 1075, 53 So. 353. See 8 Wigmore, op. cit. supra, note 3, at 375, sec. 2265: "Unless some attempt is made to secure a communication, written or oral, upon which reliance is to be placed as involving his consciousness of the facts and the operations of his mind in expressing it, the demand made upon him is not a testimonial one."

14. Several jurisdictions approve of compulsory examinations to determine intoxication. State v. Gatton (1938) 60 Ohio App. 192, 20 N. E. (2d) 265. See: State v. Duguid (1937) 50 Ariz. 276, 72 P. (2d) 435; Noe v. Monmouth County Court (C. P. 1928) 6 N. J. Misc. 1016; Schmidt v. District Atty. (1938) 8 N. Y. S. (2d) 787, 255 App. Div. 353. Cf. People v. Henry (1937) 23 Cal. App. (2d) 155, 72 P. (2d) 915. For a thorough study of the problem, see Ladd and Gibson, The Medico-Legal Aspects of Blood Tests to Determine Intoxication (1939) 24 Iowa L. Rev. 191.

1. (1941) 61 S. Ct. 347.