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EVIDENCE - ADMISSIBILITY OF DEFENDANTS REFUSAL TO SUBMIT TO A BLOOD TEST FOR INTOXICATION

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EVIDENCE — ADMISSIBILITY OF DEFENDANT'S REFUSAL TO SUBMIT TO A BLOOD TEST FOR INTOXICATION — Defendant was convicted of operating a motor vehicle while intoxicated. This appeal was based on the contention that the testimony by a deputy sheriff of defendant's refusal to submit to a blood test to determine whether or not he was intoxicated violated his privilege against self-incrimination and was inadmissible. *Held*, the evidence was properly admitted. *State v. Benson*, (Iowa, 1941) 300 N. W. 275.

The result of this case is consistent with the trend toward limiting the protection afforded the defendant in a criminal prosecution by the privilege against self-incrimination.[1] The numerical weight of the cases seems to favor the view advocated by Professor Wigmore [2] that the privilege should be limited to testimonial utterances by the defendant, either written or oral, and should not extend to physical disclosures the defendant is forced to make or tests to which he has involuntarily submitted.[3] As to the extent to which these physical acts may go, there is considerable confusion in the cases, and some rather tenuous distinctions have been drawn.[4] The development of blood tests has reached a point of high scientific accuracy, and the results of such tests are admissible in evidence for the determination of parentage [5] and for the proof of intoxication.[6] The Iowa court,

[1] Iowa and New Jersey are the only states which do not have the privilege against self-incrimination written into their constitutions. However, State v. Height, 117 Iowa 650, 91 N. W. 935 (1902), read the privilege by implication into the due process clause of the Iowa Constitution. The case in this respect is vigorously criticized by Professor Wigmore as "futile and unhistorical" and as throwing another misplaced principle into an overflowing catch-all. 8 WIGMORE, EVIDENCE, 3d ed., § 2252, note 2 (1940).

[2] 8 WIGMORE, EVIDENCE, 3d ed., § 2263 (1940): "the object of the protection seems plain. It is the employment of legal process *to extract from the person's own lips* an admission of his guilt, which will thus take the place of other evidence."

[3] The narrow scope of the privilege would seem to be consistent with its historical background and development. 8 WIGMORE, EVIDENCE, 3d ed., § 2250 (1940).

[4] Interesting analyses of these distinctions, with exhaustive citation of authority, may be found in 5 OHIO ST. L. J. 412 (1939); 1941 WIS. L. REV. 249, note 26; 24 MINN. L. REV. 444 (1940); 19 TEX. L. REV. 463 at 472 (1941); and 8 WIGMORE, EVIDENCE, 3d ed., § 2265, note 2 (1940).

[5] See 32 MICH. L. REV. 987 (1934); 44 YALE L. J. 508 (1935); Lee, "Blood Tests for Paternity," 12 A. B. A. J. 441 (1926); and Wiener, "Determination of Non-Paternity by Means of Blood Groups," 186 AM. J. MED. SCI. 257 (1933).

[6] People v. Dennis, 132 Misc. 410, 230 N. Y. S. 510 (1928); State v. Duguid, 50 Ariz. 276, 72 P. (2d) 435 (1937); Schmidt v. District Attorney, 255 App. Div. 353, 8 N. Y. S. (2d) 787 (1938); Noe v. Monmouth County Court, 6 N. J. Misc. 1016, 143 A. 750 (1928), affd. in 106 N. J. L. 584, 150 A. 920 (1930); and State v. Gatton, 60 Ohio App. 192, 20 N. E. (2d) 265 (1938). *Contra*, Booker v. Cincinnati, 22 Ohio L. Abs. 286, 5 Ohio Op. 433 (1936), which was not mentioned in the

however, did not find it necessary to decide that the defendant could have been coerced into submission to a blood test in order to sustain the admissibility of evidence of his refusal to undergo such test voluntarily.[7] Consistent with its earlier decisions, the result was reached mainly through analogy to two similar situations. The silence of the defendant after a direct accusation of guilt may be pointed out to the jury, and while such silence does not raise a presumption of guilt, it is looked upon as one of the facts which the jury may consider in deciding the case.[8] Likewise, the prosecution is permitted to comment on the defendant's refusal to testify in his own behalf,[9] and such comment is deemed not to contravene the statutory privilege against self-incrimination.[10] Evidence of the defendant's refusal to submit to a blood test for intoxication can raise inferences no more detrimental to the defendant in the minds of the jurors than the inferences raised in either of these analogous cases. The only other case involving the same facts as here presented was decided in favor of admissibility of the evidence, but in view of the constitutional language there involved, it is of limited authority.[11] With the correctness and propriety of the Iowa court's decision there cannot be much dispute, and the only quarrel with it might be that it did not go far enough. There seems to be nothing objectionable in re-

Gatton case, supra. Ladd and Gibson, "The Medico-Legal Aspects of the Blood Test to Determine Intoxication," 24 IOWA L. REV. 191 at 267 (1939), say in conclusion: "The blood and urine test to determine intoxication has reached a stage of scientific development and reliability where it may serve a most useful purpose in assisting courts and juries to discover the truth in cases in which intoxication is an issue. Although science never stands still and there will be constant improvements in respect to the test, it has passed its experimental period and affords a safe basis of determining intoxication where the alcoholic concentration is in the higher levels. The use of the test will liberate the innocent by the same means that it will convict the guilty."

[7] To have so decided would have resulted in conflict with the Iowa cases that seem to reject the Wigmore view, note 2, supra. State v. Height, 117 Iowa 650, 91 N. W. 935 (1902); Wragg v. Griffin, 185 Iowa 243, 170 N. W. 400 (1919); State v. Weltha, 228 Iowa 519, 292 N. W. 148 (1940).

[8] 1 GREENLEAF, EVIDENCE, 16th ed., § 215 (1899); State v. Pratt, 20 Iowa 267 (1866); State v. Beckner, 197 Iowa 1252, 198 N. W. 643 (1924); State v. Johnson, 221 Iowa 8, 264 N. W. 596 (1935).

[9] State v. Ferguson, 226 Iowa 361, 283 N. W. 917 (1939), and State v. Stennett, 220 Iowa 388, 260 N. W. 732 (1936). The Iowa Code originally forbade such comment, Ann. Code (1897), § 5484, Comp. Code (1919), § 9464, providing that the accused's failure to testify "shall not have any weight against him on the trial." However, this provision was repealed by statute, Stat. 1929, c. 269, repealing Code (1927), § 13891. The current Iowa rule is definitely a minority view. 8 WIGMORE, EVIDENCE, 3d ed., § 2272 (1940). See 37 MICH. L. REV. 777 (1939), where it is suggested that the problem should be solved by statutes allowing comment.

[10] Iowa Code (1939), 13890, provides: "Defendants in all criminal proceedings shall be competent witnesses in their own behalf, but cannot be called as witnesses by the state." This statute is narrowly construed by the principal case, 300 N. W. 275 at 277.

[11] Under Ohio Const. (1851), art. I, § 10, the claim of privilege by the defendant may be commented upon. "No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be . . . the subject of comment by counsel." State v. Gatton, 60 Ohio App. 192, 20 N. E. (2d) 265 (1938).

quiring the defendant to submit a blood sample or a urine specimen even over his objection.[12] There must be limits beyond which the defendant's physical security cannot be violated, and certain acts undoubtedly exceed those limits.[13] But the harmless and painless compulsory blood test for intoxication is not vulnerable to such attack, and effective administration of justice would seem to demand its use.[14]

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[12] Inbau, "Self-Incrimination—What Can an Accused Person Be Compelled to Do?" 28 J. CRIM. L. 261 (1937).

[13] Inbau, "Self-Incrimination—What Can an Accused Person Be Compelled to Do?" 28 J. CRIM. L. 261 at 292 (1937), says, in conclusion: "In so far as the privilege against self-incrimination is concerned there seems to be no limit to the extent an accused person must tolerate an invasion of his bodily security. There may be and are, of course, other considerations which will impel a court to define certain limitations. Nevertheless, there is no justification for invoking the privilege against self-incrimination for this purpose." It is suggested that defendant could not be made to suffer pain or injury, e.g., the pain involved if defendant were forced to submit to the use of a stomach pump to obtain evidence of food he had recently consumed.

[14] Even if it be conceded that the results of a blood test should be admissible, though the defendant were forced to submit to the test, there remains the question as to what effect should be given to the test. As to whether it should be conclusive and completely supersede the observations of all witnesses, lay or expert, see 1941 WIS. L. REV. 249 at 256.