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Evidence: Criminal Prosecution: Self Crimination

William Edward Taay

Two questions are provoked by this case: (1) should a state court stay proceedings in an action *in personam* pending determination of a prior action brought in a federal court between the same parties on substantially the same cause of action? (2) should a federal court stay proceedings in such an action, pending determination of a prior action brought in a state court? There is a conflict in the holdings. The federal view, as expressed in several cases which deny a stay of proceedings in the federal court pending determination of a prior action in a state court, is that the matter is discretionary with the federal district court. *City of Ironton, Ohio,* v. *Harrison Construction Co.,* 212 Fed. 353 (C.C.A. 6th, 1914); *Southern Pacific Co.* v. *Klinge,* 65 (2d) 85 (C.C.A. 10th, 1935). But in the case of *Great North Woods Club* v. *Raymond,* 54 F. (2d) 1017, 1018 (C.C.A. 6th, 1931), in which the federal district court stayed proceedings pending determination of a prior suit in a state court, the Circuit Court of Appeals held that the stay order must be vacated. The court state: "Where a federal court has jurisdiction of parties and of subject matter, it is usually true that plaintiff in that court has an absolute right to have his case in that jurisdiction proceed to trial, and there is no discretion to stay that action, pending the results of an earlier one in the state court." See also *Checker Cab Mfg. Co.* v. *Checker Taxi Co.,* 26 F. (2d) 752 (N.D. Ill. 1928). These decisions indicate that a defendant has little opportunity to stay an action begun in federal court pending the determination of a prior suit in a state court. However, the majority of state courts hold that the granting or refusal of a stay of proceedings begun in the state court, pending the results of a prior action in federal court, is discretionary with the state court. *Curlette* v. *Olds,* 110 App. Div. 596, 97 N.Y. Supp. 144 (1906); *Western Union Telegraph Co.* v. *Howington,* 198 Ala. 311, 73 So. 550 (1916); *State* ex rel *Milwaukee Lumber Co.* v. *Superior Court,* 147 Wash. 615, 266 Pac. 1054 (1928). In the *Western Union* case, the appellate court would not set aside the lower court's determination to stay proceedings; in both the *Milwaukee Lumber Co.* case, and the *Curlette* case the appellate court would not disturb the lower tribunal's refusal to stay proceedings. The Wisconsin Supreme Court, in the principal case, does not follow this rule of discretion. In Wisconsin, a stay of proceedings where a prior action is set down for early trial in a federal court, is not discretionary but mandatory on the trial court, unless such action in the state court "is reasonably necessary for the protection of some substantial right of a party." The principal case is the first definite holding of our supreme court in this manner. The court discards the dicta of the early case of *Wood* v. *Lake,* 13 Wis. 94 (1860), which stated that the Wisconsin courts need not abate proceedings pending the results of a suit between the same parties on the same cause of action in a federal court. It is interesting to trace the development of the Wisconsin doctrine from *Wood* v. *Lake,* through *Ashland* v. *Whitcomb,* 120 Wis. 549, 98 N.W. 531 (1904), and *Ashland* v *Wis. Central Railway Co.,* 121 Wis. 646, 98 N.W. 532, 99 N.W. 431 (1904), to the principal case.

PAUL G. NOELKE.

EVIDENCE—CRIMINAL PROSECUTION—SELF-CRIMINATION—The defendant was prosecuted for driving an automobile on the public highways while under the influence of intoxicating liquor. A physician testified in the case concerning the results of a chemical analysis of the defendant's urine for ethyl alcohol content, a sample of which had been voluntarily furnished by the defendant. The urinalysis interpreted according to a scientific standard disclosed the defend-

ant to have been "distinctly drunk." The defendant objected to the admission of the testimony on the ground that he was compelled to give evidence against himself in violation of the constitution of the state of Arizona which provides: "No person shall be compelled in any criminal case to give evidence against himself." On an appeal by the State of Arizona from an order granting the defendant a new trial, *held,* order vacated. Although the defendant may not have known at the time why he was asked for a sample of urine, the defendant's constitutional privilge against self-crimination was not violated and the physician's analysis was admissible. *State* v. *Duguid,* (Ariz. 1937) 72 P. (2d) 435.

The legal principle which protects a person from self-crimination is guaranteed by the federal Constitution, by forty-six state constitutions and by statute in New Jersey and Iowa. However, it is agreed by the authorities that to violate the privilege necessitates testimonial compulsion. Thus, the tendency of the modern cases is to open the door to the reception of all kinds of real evidence or proof of physical facts which speak for themselves like the urinalysis in the principal case. Generally, the accepted practice has been to admit in evidence testimony as to the defendant's personal appearance, personal attire, and physical characteristics as hair, eyes, complexion, marks, scars, height, weight, footprints, fingerprints, stains and similar facts which are open to common observation. The question is how far these opportunities for observation may be coerced and there are extreme cases in both directions. Thus in *State* v. *Ah Chuey,* 14 Nev. 79, 33 Am. Rep. 530 (1879), where the identity of the defendant was disputed, he was compelled to expose his arm to the jury to disclose tattoo marks. A compulsory showing of footprints was approved in *State* v. *Graham,* 74 N.C. 646, 21 Am. Rep. 493 (1876); *Walker* v. *State,* 7 Tex. App. 245, 32 Am. Rep. 595 (1879); *People* v. *Van Wormer,* 175 N.Y. 188, 67 N.E. 299 (1903). The contrary rule is found in *Day* v. *State,* 63 Ga. 668 (1879) and *Stokes* v. *State,* 5 Baxt. (Tenn.) 619, 30 Am. Rep. 72 (1875). A compulsory fingerprint test was approved in *People* v. *Sallow,* 100 Misc. Rep. 447, 165 N.Y. Supp. 915 (1917). In *Holt* v. *United States,* 218 U.S. 245, 54 L.ed. 1021 (1910), where the defendant was compelled to put on a blouse for identification, the court stated that the prohibition against compelling a man in a criminal court to be a witness against himself refers to the use of physical or moral compulsion to extort communications from him and not to the exclusion of his body as evidence when it may be material. Obviously, if the contrary were true, we would have the ridiculous situation of a jury being forbidden to look at the accused and compare his features with a photograph or proof. The court further stated that when the defendant is exhibited, whether voluntarily or by order, even though the order goes too far, the evidence, if material is competent.

That the modern cases in fact are strictly confining the constitutional privilege to testimonial compulsion and opening the door wide as to evidence outside the limitation may be seen from the following judicially approved cases regarded beyond the pale of the constitutional prohibition: compelling the defendant accused of murder to exhibit scars and to don a shirt found at the scene of the crime and submit to inspection by the jury, *State* v. *Oschoa,* 49 Nev. 194, 242 Pac. 582 (1926); officers compelling the suspect to put on his cap before the arrest, *Crinshaw* v. *State,* 225 Ala. 346, 142 So. 669 (1932); identifying accused by placing a handkerchief over his face and compelling him to grow a beard, *Ross* v. *State,* 204 Ind. 281, 182 N.E. 865 (1932); admitting evidence of reenactment of crime, *People* v. *Fischer,* 340 Ill. 216, 172 N.E. 743 (1930); compelling the defendant to put on an overcoat for purposes of identification, *Richardson* v. *State,* 168 Miss. 788, 151 So. 910 (1934); introduction of photo-

graphs of fingerprints of defendant, *State* v. *Johnson,* 111 W. Va. 653, 164 S.E. 31 (1932); compelling defendant against her will to submit to a medical examination in prosecution for driving while intoxicated, *Noe* v. *Monmouth County Common Pleas Court,* 6 N.J. Misc. 1016, 143 Atl. 750 (1928); forcibly taking shoes from defendant for purpose of comparing footprints, *Biggs* v. *State,* 210 Ind. 200, 167 N.E. 129 (1929) and *State* v. *Romero,* 34 N.M. 494, 285 Pac. 497 (1930); admitting sound motion picture of defendant charged with manslaughter making a voluntary confession to the police officials, *People* v. *Hayes,* (Cal. 1937) 71 P. (2d) 321. Compulsory reports under the hit and run driving laws have been held constitutional as outside the privilege of self-crimination. *State* v. *Razey,* 129 Kan. 328, 282 Pac. 755 (1930); *People* v. *Thompson,* 259 Mich. 109, 242 N.W. 857 (1932); *Ule* v. *State,* 208 Ind. 255, 194 N.E. 140 (1935). Contra: *Rembrandt* v. *City of Cleveland,* 28 Ohio. App. 4, 161 N.E. 364 (1928); *James* v. *City of Cleveland,* 28 Ohio App. 178, 162 N.E. 617 (1928).

The leading case in Wisconsin, *Thornton* v. *State,* 117 Wis. 338, 93 N.W. 1107 (1903), lays down the rule that those portions of the person or attire which are customarily open to observation are legitimate sources for testimony and that it is not compelling a defendant to be a witness against himself by requiring him to give witnesses, in court or out of court, an opportunity to make such observation. Thus, the case holds that it was not error to compel the defendant to deliver to witnesses his shoes for the purpose of comparing with them footprints found in the snow near the scene of the crime, and that testimony of such comparison was admissible at the trial. Following the leading case, *Rogers* v. *State,* 180 Wis. 568, 193 N.W. 612 (1923), held there was no error in receiving testimony of a witness who positively identified the defendant after he had put on certain clothes and a cap and sat in an automobile. *Pollack* v. *State,* 215 Wis. 200, 253 N.W. 560 (1934), held admissible photographs taken of defendants with their knowledge in positions they indicated they occupied at the time of the crime. *Jessner* v. *State,* 202 Wis. 184, 231 N.W. 634 (1930), upholds the appointment of expert witnesses to examine a defendant pleading insanity as not violating the defendant's constitutional rights against self-crimination. The necessity of testimonial compulsion to violate the constitutional privilege is brought out clearly in *Ware* v. *State,* 201 Wis. 425, 230 N.W. 80 (1930), which holds that a diary surreptitiously obtained by the husband and proving the guilt of the wife of adultery was admissible and did not compel the wife to testify against herself. Relative to the attitude in the Wisconsin jurisdiction on the matter of the urinalysis test mentioned in the principal case, the Wisconsin Supreme Court in *State* v. *Bohner,* 210 Wis. 651, 246 N.W. 314 (1933), holding there was no error in excluding the testimony of an expert concerning the results of a lie detector test, declared that the courts will go a long way in admitting expert testimony providing the scientific principle or discovery upon which the testimony is based has been sufficiently established to have gained general acceptance in the particular field in which it belongs. The general trend appears to be that scientific tests once accepted by the courts do not violate *per se* the fundamental constitutional privilege against self-crimination and that the testimoney founded thereon, if material, is competent.

WILLIAM EDWARD TAAY.