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Recent Cases

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affiliation, the most important of which were: the element of dependability, a furtherance of the objectives of the proscribed organization, a continuing course of conduct which could not be abruptly ended including reciprocal responsibilities and duties. The *Bridges* test must be applied to all instructions regarding affiliation with the Communist Party.

With reluctance, it must be admitted that the majority opinion in the *Jencks* case has overlooked this important issue. It is with great relief, however, that we are able to recognize that there is such an important problem through the insight of four members of the same court.

JOHN E. MURRAY, JR.

RECENT CASES

CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT—PUPIL ASSIGNMENT LAWS—The school law of Virginia provides for a Pupil Placement Board charged with the duty of assigning students to schools. In making such assignments, the Board was to consider "the effect of the enrollment on the welfare and best interests of the child and all other children in said school as well as the effect on the efficiency of the operation of said school; the sociological, psychological and like intangible social scientific factors as will prevent, as nearly as possible, a condition of socio-economic class consciousness among the pupils; and such other relevant matters as may be pertinent to the efficient operation of the schools or indicate a clear and present danger to the public peace and tranquility affecting the safety or welfare of the citizens of such school district." The present action was brought by Negro school children and their parents to require the defendants to cease and desist from any practices, customs, or usages in segregating school students. The United States District Court declared the above law to be unconstitutional after considering the obvious intent of the Virginia legislature to maintain segregation. *Adkins v. School Board of Newport News,* 148 F. Supp. 430 (E.D. Va. 1957), *cert. denied,* 26 U.S.L. WEEK 3128 (U.S. Oct. 22, 1957).

The Virginia Pupil Placement law is but one of many similar statutes passed by various southern states in an effort to continue unchanged the former patterns of public school attendance, the total segregation of white and Negro. Thus, as an exercise of the state's police power, these laws are enacted to provide for the public welfare by promoting the health, safety, order and efficient education of the people. ALA. LAWS REG. SESS. c. 31380 (1956) (preamble), FLA. LAWS EXTRAORDINARY SESS. c. 31380 (1956) (preamble). Prior to 1954, there was no need for such assignment laws. Under the doctrine of *Plessy v. Ferguson,* the states were able to continue the practice of segregation so long as equal facilities were provided for all races. *Plessy v. Ferguson,* 163 U.S. 537 (1896). In 1954, however, the controversial doctrine of "separate but equal" facilities was discarded by the Supreme Court, and segregation in the public schools by virtue of race was held to be unconstitutional. *Brown v. Board of Education,* 347 U.S. 483 (1954).

The *Brown* case presented a formidable obstacle to the continuation of segregation. The Virginia law sought to circumvent the decision of the Supreme Court by retaining as far as possible the status quo and by permitting a change only after a petitioner had gone through a long series of state administrative and judicial proceedings. CODE OF VA. § 22-232.7-16 (1956). Relying on the well settled proposition that before coming into a federal court, a plaintiff must have exhausted all available state administrative remedies [*Natural Gas Pipeline Co. v. Slattery*, 302 U.S. 300 (1937)], the Virginia law forced a petitioner through a series of proceedings during which 105 days might elapse between the filing of the petition and the final decision.

This provision of the Virginia law was also unavailing. Although an administrative remedy is available, it must also be adequate. *Carson v. Warlick*, 238 F.2d 724 (4th Cir. 1956). In this respect, the Virginia law put a prospective petitioner into an almost futile position. Not only did the individual face a possible adverse decision, but there was also the risk of forfeiting a full year of schooling or advancing to another grade and possibly having to bring a new and later action. Added to these difficulties was the further provision that where any system of public schools was not deemed to be "efficient" the funds appropriated for the maintenance of such schools would be withheld. To qualify this, the Virginia Assembly stated: "An efficient system of elementary public schools means and shall be only that system within each county, city or town in which no elementary school consists of a student body in which white and colored children are taught." See *Adkins v. School Board of Newport News*, 148 F. Supp. 430, 437 (1957). Thus, where a possible remedy was available under the administrative procedure, it was subsequently destroyed by the threatened closure of any school which would comply with an order to integrate. This administrative remedy, as pointed out by the court in the *Adkins* decision, led to a complete "blind alley".

Although there have been many attempts by states through legislation to perpetuate the segregated school systems now in existence, the courts are slowly cutting away at the validity of these statutes. See *Orleans Parish School Board v. Bush*, 242 F.2d 156 (5th Cir. 1957), *Brewer v. Hoxie School District No. 46*, 238 F.2d 91 (8th Cir. 1956). It is debatable whether the Supreme Court could foresee the repercussions of the *Brown* decision in 1954. *Brown v. Board of Education*, 347 U.S. 483 (1954). At that time, there seemed to be no question as to the meaning of the principles set forth. Yet, from this decision has come a succession of attempts by various states through legislation to change those principles. The theory that a state constitution stands above the rights granted by the federal constitution should have disappeared with the confederacy.

The *Brown* decision is a reality and must be faced as such. The resulting responsibilities imposed on the states are great and to effect the integration called for will no doubt give rise to many unexpected hardships in the south. The recent events in Little Rock, Arkansas, point this out only too well. It is conceivable that Pupil Assignment Laws will be adopted which can pass the test of constitutionality, and that the states may thus avert integration. But, in the last analysis, the rights granted individuals under the United States Constitution must prevail.

JAY N. PRICE

EVIDENCE—ADMISSIBILITY—ACCUSED'S REFUSAL TO TAKE INTOXICATION TEST INADMISSIBLE—In a recent case, the defendant was convicted of operating a motor vehicle while under the influence of intoxicating liquor. The state was permitted to show that the accused had refused to take a sobriety test. The Criminal Court of Appeals in reversing, held that the defendant had the right to refuse such a test and that this right would be rendered ineffective should the state be allowed to bring that fact to the jury. *Duckworth v. State,* 309 P. 2d 1103 (Okla. 1957).

The provisions of the relevant Oklahoma statute state: "No person shall be compelled to give evidence which will tend to incriminate him," with an added provision that, ". . . the person charged shall at his own request, but not otherwise, be a competent witness and his failure to make such request shall not create any presumption against him nor be mentioned in the trial." 22 OKLA. STAT. § 701 (1951). See *Shepard v. State,* 77 Okla. Crim. 131, 139 P. 2d 605 (1943), *Bell v. State,* 55 Okla. Crim. 439, 32 P. 2d 747 (1934), *Shelton v. State,* 49 Okla. Crim. 430, 295 P. 2d 240 (1931), *Zedda v. State,* 30 Okla. Crim. 348, 235 Pac. 939 (1925). Some states cover the matter by constitutional provision. The Ohio Constitution, for instance, provides, "No person shall be compelled in a criminal prosecution to be a witness against himself, but his failure to testify may be considered by the court and the jury and may be subject of comment by counsel. OHIO CONST. Art. I § 10 (1912). Other states do not have the matter covered by either constitutional provision or by statute. See *State v. Benson,* 230 Iowa 1168, 300 N.W. 275 (1941). Professor Wigmore notes that the privilege against self incrimination was established in the common law to protect the individual against "the employment of legal process to extract from the person's own lips an admission of guilt." 8 WIGMORE, EVIDENCE § 2263 (3d. ed. 1940). This rule would hold admissible all manners of real or physical evidence obtained from a forced observation. Indeed, a constitutional provision against self incrimination has been held not to afford protection against compulsory examination in the following cases: taking fingerprints under compulsion [*United States v. Kelly,* 55 F. 2d 67 (2 Cir. 1923), *McGovern v. Van Riper,* 137 N.J. Eq. 548, 45 Atl. 2d 842 (1946), *Shannon v. State,* 207 Ark. 658, 182 S.W. 2d 384 (1944), *Owensby v. Morris,*—Tex. Civ. App.—, 79 S.W. 2d 934 (1935), *People v. Jones,* 112 Cal. App. 68, 296 Pac. 317 (1931), *McGarry v. State,* 82 Tex. Crim. 597, 200 S.W. 527 (1918), *People v. Sallow,* 100 Misc. 447, 165 N.Y. Supp. 915 (1917); measuring of shoes and feet [*State v. Smith,* 133 S.C. 291, 130 S.E. 884 (1925)]; examining the defendant for identifying scars, marks or wounds [*State v. Oschoa,* 49 Nev. 194, 242 Pac. 582 (1926), *State v. Ah Chuey,* 14 Nev. 79, 33 Am. Rep. 530 (1879)]; compelling the defendant to speak for voice identification [*Commonwealth v. Valeroso,* 273 Pa. 213, 116 Atl. 828 (1922), *Johnson v. Commonwealth,* 115 Pa. 369, 9 Atl. 78 (1886)]; forcing the defendant to display clothes [*Holt v. United States,* 218 U.S. 245 (1910), *State v. Oschoa,* 49 Nev. 194, 242 Pac. 582 (1926)]; forcing him to dye his hair [*Smith v. United States,* 187 F. 2d 192 (D.C. Cir. 1930), *cert. denied,* 341 U.S. 927 (1951)]; compelling the defendant to stand during the trial for better identification [*State v. Vincent,* 222 N.C. 543, 23 S.E. 2d 832 (1943), *People v. Clark,* 18 Cal. 2d 449 (1941), *Rutherford v. State,* 135 Tex Crim. 530, 121 S.W. 2d 342 (1938)]; compelling a person to unwrap a bandaged hand alleged to be burned. *State v. Garrett,* 71

N.C. 85 (1874). As was so well stated by Justice Holmes when a prisoner was obliged to don a shirt for identification purposes: ". . . the prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material." *Holt v. United States,* 218 U.S. 245, 252, 253 (1910).

There must, of course, be a limitation to the amount of force employed in obtaining evidence. Where the zeal of the police is shocking to the conscience of the Court, there is a violation of due process. *Rochin v. California,* 342 U.S. 165 (1952). On the other hand, manual and breath tests are quite generally approved as long as the process is not so abusive as to be a denial of due process. Indeed, such a situation occurred in the *Alexander* case, wherein the accused was arrested, taken to the station, and charged with drunken driving. There she was refused permission to use a telephone to summon counsel and was not advised of her constitutional right to refuse to submit to the drunkometer tests. In affirming the conviction the Criminal Court of Appeals held that the privilege against self incrimination was not violated by these tests—walking a straight line, picking up coins, and blowing up a balloon—even though these tests were not freely entered into but were performed by reason of fear. No force or brutality was employed to bring the case under the *Rochin* doctrine, though the manual demonstrations were in effect compulsory. *Alexander v. State,* 305 P. 2d 572 (Okla. 1956). Apparently there is no problem when the accused is unconscious. The Supreme Court held that a conviction based on the result of an involuntary blood test taken while the defendant was unconscious did not deprive him of his liberty so as to violate due process. *Briethoupt v. Abram,* 352 U.S. 432 (1957). See also *State v. Cram,* 176 Ore. 577, 160 P. 2d 283 (1945). In both cases it may be assumed that the tests were performed without the consent and very possibly against the will of the accused.

In the present case, Duckworth was not timid and not unconscious. Police officers described his actions at the station as "uncooperative and cocky". He simply refused to perform any of the tests offered for determining intoxication. It appears to be an erroneous policy to make an accused's enjoyment of his constitutional rights contingent upon his ability to resist the police in their efforts to obtain evidence as these cases seem to intimate.

JOHN BURNS HAUSNER

TORTS—HUSBAND AND WIFE—HUSBAND ALLOWED TO SUE WIFE FOR DAMAGES IN NEGLIGENCE SUIT—In a personal injury action in Arkansas, a husband sued his wife for damages suffered as a consequence of her negligent operation of an automobile. Her vehicle collided with a pick-up truck driven by the plaintiff as she was proceeding at an excessive rate of speed on the wrong side of the road. In defense, it was pleaded that the Married Woman's Statute of Arkansas allowed personal injury suits between spouses only when brought by the wife. It was held in the instant case that to apply a different rule depending upon which spouse is the plaintiff would be inconsistent. The husband was intended by the legislature to enjoy the same right to sue as his wife. *Leach v. Leach,* 300 S.W. 2d 15 (Ark. 1957).

The present case followed earlier Arkansas opinions dating back to 1916, when a wife was first allowed to sue her husband for damages resulting from

personal injuries. *Fitzpatrick v. Owens,* 124 Ark. 167, 186 S.W. 832 (1916), 187 S.W. 460 (1916) (dissent). However, it marks a distinct departure in American law, since it is the first decision in favor of a husband in a personal injury action against his wife. In the fifteen states which have allowed tort actions between married parties, only two cases have been reported concerning actions instituted by the husband. The decision and result of these two cases is strikingly similar.

In Wisconsin, a husband attempted to bring suit for damages arising from negligent driving by his wife. *Fehr v. General Accident Fire and Life Assurance Corp.,* 246 Wis. 228, 16 N.W. 2d 787 (1944). It was held that the insurance company was not liable under an indemnity contract, since the husband had no right to sue his wife. The opinion stated that the Married Woman's Statute was passed to enlarge the rights of married women and did not confer any rights not specifically provided. WIS. STAT. § 246.07 (1957).

In May, 1947, the Wisconsin legislature expressly provided for such a case by allowing a husband to recover damages for personal injuries suffered by him, due to his wife's "wrongful act, neglect or default". WIS. STAT. § 246.075 (1957).

Another automobile case was decided adversely to the husband in a suit instituted in North Carolina. *Scholtman v. Scholtman,* 230 N.C. 149, 52 S.E. 2d 350 (1949). The right to sue his wife was denied the husband, despite the fact that North Carolina was the first state to allow a wife to sue her husband in an automobile negligence suit. *Roberts v. Roberts,* 185 N.C. 566, 118 S.E. 9 (1923).

In 1951, the present North Carolina statute was enacted which provides: "A husband and wife have a cause of action against each other to recover damages sustained to their person or property as if unmarried. N.C. GEN STAT. § 52-10.1 (Supp. 1953).

A similar provision exists in the state of New York, which now provides that a married woman is liable to her husband for her torts resulting in personal injury to her husband or to his property. N.Y. DOM. REL. LAW § 57 (Supp. 1957). Unique protection of insurance companies is afforded by a provision that no recovery may be allowed against an insurance company in a suit between spouses unless such liability is expressly contained in the insurance contract. N.Y. INS. LAW § 167(3) (Supp. 1957).

Although few cases have arisen on this precise issue, legal commentators strongly oppose discrimination between the sexes in tort actions between spouses. See PROSSER ON TORTS § 101 (2d ed. 1955). The fictions of a husband-wife unit and of universal domestic tranquility have been blotted out by modern experience. The rationale behind a rule which denies a husband legal remedies against his wife for damages arising from negligence, while allowing such remedies if sought by any other party, is at best questionable. The modern public policy with respect to personal injury cases seems to demand redress for such injuries. It is suggested that the issues of fraud and collusion against insurance companies can be adequately settled before a jury, as in any other negligence suit. It is hoped that the remaining forty-four states will follow the lead of these pioneers in abolishing one more antique rule of common law.

RICHARD J. ST. JOHN