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## LIE DETECTORS.

## EXTRAJUDICIAL INVESTIGATIONS AND THE COURTS

THOMAS P. HARDMAN\*

THAT conscious falsification usually causes certain emotional disturbances on the part of the person falsifying and that these disturbances commonly manifest themselves in physical reaction (voice or manner) is a phenomenon that has long since been known to both the layman and the scientist. Conscious volition to repress the truth without actually substituting a false imaginative utterance ordinarily arouses similar emotive forces.<sup>1</sup> But to what extent these perturbations can be measured and recorded by so-called lie detectors in terms of change in blood pressure, respiration and galvanic reaction, and to what extent these changes can be interpreted in terms of truth or falsity is still a much-mooted question and one that challenges the courts as well as psychologists and criminologists.

In preliminary investigations as distinguished from judicial procedures, the use of the lie detector (blood-pressure method, respiration method, galvanometer method) has beyond doubt passed from the experimental to the demonstrable stage as an instrument for determining whether the accused or a suspect is consciously lying, and though it is admittedly not an infallible device for ascertaining the truth, its great usefulness is seldom questioned in this field.<sup>2</sup> Indeed its psychological value as a gadget for eliciting confessions

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<sup>1</sup> This is particularly so when a charge of some consequence has been made against the person under observation or when there is a suspicion of such a charge, so that there is present a very real fear of detection. As to the psycho-physiology of the lie, see WIGMORE, *SCIENCE OF JUDICIAL PROOF* (1937) § 269 *et seq.* See also WIGMORE, *EVIDENCE* (3d ed. 1940) § 999. That emotional disturbances recorded on lie detectors are the same or substantially the same whether the accused or a suspect actually answers the questions put by the psychometrist, see Inbau, *Scientific Evidence in Criminal Cases* (1934) 24 J. CRIM. L. 1140, 1152. See, in general, McCormick, *Deception-Tests and the Law of Evidence* (1927) 15 CALIF. L. REV. 484; LARSON, *LYING AND ITS DETECTION* (1932); Inbau, *Detection of Deception Technique Admitted as Evidence* (1935) 26 J. CRIM. L. 262; Forkoseh, *The Lie Detector and The Courts* (1939) 16 N. Y. U. L. Q. REV. 202; Trovillo, *A History of Lie Detection* (1939) 29 J. CRIM. L. 848, 30 *id.* at 104.

<sup>2</sup> See, e.g., WIGMORE, *SCIENCE OF JUDICIAL PROOF* (1937) § 314: "The practical uses of the polygraph (blood-pressure method) have been fully established by the experience at the Scientific Crime Detection Laboratory of Northwestern University—not only in police inquiries, but in commercial personnel administration." See also Inbau, *Scientific Evidence in Criminal Cases* (1934) 24 J. CRIM. L. 1140.

is now established by ample and incontestable data, and of course a confession is not inadmissible merely because so obtained.<sup>3</sup>

But how far, if at all, the recorded physical reactions may be used as evidence of innocence or guilt is quite another matter, and with respect to this problem most courts have as yet refused to sanction the lie-detector method of discovering facts.<sup>4</sup> There are, however, some rather recent lower court decisions, mostly unreported, in which this use of such scientific instruments has been sanctioned and the question therefore arises whether, in the light of the widespread present-day acceptance of the general usefulness of this psychometric method, the time has not arrived for a judicial re-examination of the admissibility of evidence based on such deception tests. If expert-opinion evidence is permissible as to analogous scientific matters, *e.g.*, as to X-ray and psychiatric examinations, in which the best of scientists not infrequently differ as to their conclusions,<sup>5</sup> why should courts be unwilling to admit this particular kind of opinion evidence, provided of course that the psychometrist is a duly qualified expert on the subject? If the acceptance of such evidence would tend in any substantial degree to increase the probabilities of arriving at the truth in a case, is there any sound objection, in view of recent advancements in lie-detector methods, to admitting the evidence for what it may be worth?

It has been suggested by some that the admission of such evidence would violate the privilege against self-incrimination unless

<sup>3</sup> See *Commonwealth v. Hipple*, 333 Pa. 33, 3 A. (2d) 353 (1939); *Commonwealth v. Jones*, 19 A. (2d) 389 (Pa. 1941). As to the kind of "compulsion" that will render a confession "involuntary" and inadmissible, see *State v. Goldizen*, 93 W. Va. 328, 116 S. E. 687 (1923); *Wan v. United States*, 266 U. S. 1, 45 S. Ct. 1, 69 L. Ed. 131 (1924). To be sure, if such invalidating compulsion is used in securing an acknowledgment of guilt while the subject is undergoing a deception test, the confession is inadmissible. See also WIGMORE, EVIDENCE (3d ed. 1940) § 822 *et seq.* Cf. Green, *Can Science Legally Get the Confession?* (1935) 21 A. B. A. J. 808.

<sup>4</sup> *Frye v. United States*, 293 Fed. 1013 (App. D. C. 1923); *State v. Bohner*, 210 Wis. 651, 246 N. W. 314, 86 A. L. R. 611 (1933). These cases are discussed, *infra*, in the body of this article.

<sup>5</sup> See, *e.g.*, *Griffith v. American Coal Co.*, 75 W. Va. 686, 84 S. E. 621 (1915) (X-ray); *Neill v. Fidelity Mutual Life Ins. Co.*, 119 W. Va. 694, 195 S. E. 860 (1938) (X-ray); *People v. Cowles*, 246 Mich. 429, 224 N. W. 387 (1929) (nymphomania); *Miller v. State*, 49 Okla. Cr. 133, 295 Pac. 403 (1930) (nymphomania); *Rice v. State*, 195 Wis. 181, 217 N. W. 697 (1928) (perverted mind). But *cf.* *State v. Driver*, 88 W. Va. 479, 107 S. E. 189 (1921). Here a qualified expert was not allowed to testify (for purposes of impeachment) as to mental abnormality causing proneness to lie. See WIGMORE, EVIDENCE (2d ed. 1923) § 934 in the footnotes as to the soundness of this case. See also WIGMORE, EVIDENCE (3d ed. 1940) § 934a.

the accused or suspect voluntarily subjects himself to the test.<sup>6</sup> Such an objection, however, seems untenable, for despite some dissent it is now generally held that the privilege applies only to compelled testimony as distinguished from nontestimonial evidence,<sup>7</sup> and it would seem that the recordings of a lie detector do not constitute a testimonial utterance within the meaning of the privilege inasmuch as the evidentiary value of the data sought to be used in court lies in the physical reaction of the person subjected to the test rather than in the words used by him. That this is so is indicated by the fact, among others, that the recordings are substantially the same whether the person taking the test answers the questions or remains silent.<sup>8</sup> The privilege against self-incrimination closes one of the doors to truth and therefore courts are inclined, and rightly, to confine the privilege within narrow limits and so to refuse to apply it to compelled nontestimonial data. For example, according to the better view the privilege does not apply to involuntary X-rays,<sup>9</sup> or involuntary finger-printing,<sup>10</sup> or to requiring one to stand up in court for purposes of identification,<sup>11</sup> or even to utter

<sup>6</sup> JONES, EVIDENCE (4th ed. 1938) § 885a, apparently supports the suggestion though the point is not specifically noted: "The . . . immunity from self-incrimination embraces within its protection the acts and conduct of a witness as well as his words."

<sup>7</sup> A leading case on the subject is *People v. Gardner*, 144 N. Y. 119, 38 N. E. 1003 (1894) (compelling accused to stand up in court for identification): "The history of the constitutional privilege . . . clearly demonstrates that it was not intended to reach a case like this. . . . The main purpose of the provision was to prohibit the compulsory oral examination of the prisoners before trial, or upon trial, for the purpose of extorting unwilling confessions or declarations implicating them in crime." See *accord* as to compulsory X-ray, *State v. Coleman*, 96 W. Va. 544, 123 S. E. 580 (1924). That most courts now follow this view, see WIGMORE, EVIDENCE (3d ed. 1940) § 2265.

<sup>8</sup> See Inbau, *Scientific Evidence in Criminal Cases* (1934) 24 J. CRIM. L. 1140, 1152. See McCormick, *supra* note 1, at 502: "since the association-word responses and even the answers to questions incident to the test are not used testimonially, *i.e.*, as statements of facts to show the truth, there would seem to be no legal obstacle to compelling by court order the submission to the test . . . on the ground of . . . privilege against self-crimination. The analogy is rather to the forced giving of finger prints, specimens of handwriting, or the like." See Note (1931) 44 HARV. L. REV. 842: "since the words spoken do not in themselves express ideas, they would not be testimony in any ordinary sense." Cf. Ladd & Gibson, *The Medico-Legal Aspects of the Blood Test to Determine Intoxication* (1939) 24 IOWA L. REV. 191.

<sup>9</sup> *State v. Coleman*, 96 W. Va. 544, 123 S. E. 580 (1924).

<sup>10</sup> *State v. Johnson*, 111 W. Va. 653, 164 S. E. 31 (1932) (making finger-prints, on demand, without objection, the reasoning of the court indicating that an objection would have made no difference). See WIGMORE, EVIDENCE (3d ed. 1940) § 2265; Kidd, *The Right to Take Fingerprints, Measurements and Photographs* (1919) 8 CALIF. L. REV. 25.

<sup>11</sup> *People v. Gardner*, 144 N. Y. 119, 38 N. E. 1003 (1894).

words for purposes of identifying the speaker,<sup>12</sup> and no reason of policy is perceived why the physical reactions evidenced by a compulsory deception test should not be placed in the same category as other nontestimonial matters.<sup>13</sup>

Another objection which may be made with considerable plausibility is the generally acknowledged fact that the lie detector has little or no efficacy in dealing with certain types of individuals. Outstanding examples are the moron who may not understand the questions and may not experience the all-essential fear of detection,<sup>14</sup> the callously indifferent (usually a "repeater"),<sup>15</sup> and the extremely corpulent person.<sup>16</sup> But these are not the normal types and the competent psychometrist, who alone may qualify as operator or witness, knows how to make allowances for these exceptional classifications. Hence this objection, too, presents no serious obstacle to the admission of such evidence.

What then are the major considerations which might be thought to justify a reconsideration of the question whether examination in open court is not only the best means of ascertaining the truth, as common-law judges have opined for centuries, but the means which must be used to the exclusion of any of the so-called lie-detector methods?

When the problem was originally presented to an appellate court in 1923, in the case of *Frye v. United States*,<sup>17</sup> the science of detecting lies by other than traditional means was still indeed in the experimental stage. There was as yet no general acceptance in the scientific world of the reliability of the particular deception test (blood-pressure method) which the judges were then asked to

<sup>12</sup> *Johnson v. Commonwealth*, 115 Pa. 369, 9 Atl. 78 (1887) (dictum). Cf. *Commonwealth v. Valeroso*, 273 Pa. 213, 116 Atl. 828 (1922). See WIGMORE, EVIDENCE (2d ed. 1923) § 2265: "Requiring him [the accused] to speak words for identification of his voice is no more than requiring the revelation of a physical mark." Such voice sounds are "real evidence", not testimonial utterances.

<sup>13</sup> See WIGMORE, EVIDENCE (3d ed. 1940) § 2265, treating the problem of "obtaining answers by questions and recording them on the polygraph or 'lie-detector'" under the heading of "Bodily Condition" (Finger Prints, Medical Examination, etc.): "The modern tendency, everywhere, is against the loose extension of the privilege." In addition to authorities cited *supra* note 8, see Inbau, *Self-Incrimination—What Can an Accused Person Be Compelled to Do?* (1937) 28 J. CRIM. L. 261.

<sup>14</sup> See Trovillo, *What the Lie-Detector Can't Do* (1941) 32 J. CRIM. L. 121.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Id.* at p. 124. Other examples of types of individuals upon whom the lie detector does not ordinarily function efficiently are, (1) the insane, (2) those under the influence of intoxicating liquor, (3) those who have recently received some serious injury. See Trovillo, *supra* note 14.

<sup>17</sup> 293 Fed. 1013 (App. D. C. 1923).

sanction. That a court should not accept a scientific device until science accepts it is a proposition that few would deny. The court was therefore on sound ground in holding in that case that the results of such a test were not (then) admissible in evidence.

Ten years elapsed before the problem was again presented to an appellate tribunal.<sup>18</sup> And again the same lie-detector method (blood-pressure test) was called in question. In the meantime, however, much experimentation had taken place. More than ten thousand extrajudicial examinations had been conducted with this kind of lie detector and when the court was asked to sanction the use at trial of the results obtained by the lie detector there was an offer of proof that seventy-five per cent of those upon whom it had been employed had confessed their guilt upon completion of a second test with this particular device. Nevertheless the court declined to sanction this method, relying with considerable conservatism on the earlier decision. The conclusion reached in the case may be justified on the ground that the blood-pressure method of valuating witnesses had not yet received the requisite general recognition in the scientific world. However, the case was decided in 1933 and not only has a vast amount of experimentation taken place since then but a much more general recognition has since been accorded to deception tests by men of science. Furthermore — and this is important — these early or comparatively early cases involved only one kind of test, namely, the blood-pressure method.

There are, however, two other kinds of detector tests that have received a wide measure of scientific sanction, *viz.*, the respiration method<sup>19</sup> and the galvanometer method.<sup>20</sup> Then too there are not a few scientists who regard any one method as more or less inadequate when used alone yet consider a combination of these methods highly reliable. This does not mean that these scientists, or all of them at least, do not consider any one of these methods as sufficiently reliable to justify a use, in preliminary investigations at

<sup>18</sup> *State v. Bohner*, 210 Wis. 651, 246 N. W. 314 (1933).

<sup>19</sup> "This method has not been developed as an independent one." See WIGMORE, *SCIENCE OF JUDICIAL PROOF* § 316. It is now usually combined with the blood-pressure method or the galvanometer method. For a description of the respiration method, see McCormick, *supra* note 1. See also Trovillo, *A History of Lie Detection* (1939) 29 J. CRIM. L. 848.

<sup>20</sup> This method "measures the variation in resistance of the skin to electric-currents administered during emotional disturbances, the variations being attributable to changes in the activity of the sweat-glands." WIGMORE, *EVIDENCE* (3d ed. 1940) § 999. See Trovillo, *A History of Lie Detection* (1939) 30 J. CRIM. L. 104; Forkosch, *supra* note 1; Winter, *A Comparison of the Cardio-Pneumo-Psychograph and Association Methods in the Detection of Lying in Cases of Theft Among College Students* (1936) 20 J. OF APPLIED SCIENCE 243.

any rate, of its results without a corroborative use of one or more of the other methods; it means rather, among other things, that since admittedly no one method is infallible with every type of individual a combination of two or, preferably, all three methods is, in general, more likely to reduce the margin of possible error — a fact that may play a major role in court in the not distant future. And it means (without making comparisons as to the respective merits of the various methods) that a decision by a court dealing with any one deception test is not necessarily a precedent when a case involving one of the other tests or any combination of tests is presented for judicial sanction. Indeed this line of differentiation may well be the turning point in the law as to the admissibility of evidence based on data obtained extrajudicially by lie-detector methods. In fact this differentiation was adopted in almost so many words in the first and apparently only reported case<sup>21</sup> in which this use of such evidence has been expressly approved.

In that case, *People v. Kenny*,<sup>22</sup> decided in 1938 by a lower New York court, the deception test sought to be sanctioned was not the blood-pressure method (which, as has already been indicated, had been disallowed by the courts in the only applicable precedents), but a quite different kind of test, namely, the galvanometer method. There expert opinion based on the results of a preliminary investigation with a lie detector was offered in evidence for the accused. It appeared that the particular kind of machine there employed (a pathometer or psychogalvanometer) had been tested upon more than 6,000 individuals and that the device when used upon persons accused of crime had proved to be efficient in an overwhelming percentage of the cases investigated.<sup>23</sup> In a liberal opinion disposing of the contention that the scientific principle involved in such a deception test had not yet reached

<sup>21</sup> *State v. Loviello and Grigano*, (1935) Circuit Court of Columbia County, Wis., is one of the first unreported cases in which a court of law permitted such evidence for the consideration of a jury. For an account of this case, see Inbau, *Detection of Deception Technique Admitted as Evidence* (1935) 26 J. CRIM. L. 262.

<sup>22</sup> 167 Misc. 51, 3 N. Y. S. (2d) 348 (1938).

<sup>23</sup> "In one laboratory test, 271 persons were examined. The results of this examination showed that 49 of the 50 guilty persons were detected by this procedure. In the accomplice group, of 102 persons 100 were detected. In the innocent group of 119 persons all were detected.

"During the preliminary examination of Father Summers by the district attorney, Father Summers testified that by reason of the realistic circumstances the emotional reactions of those who are actually accused of crime are more intense and readily ascertainable than in laboratory tests, and he expressed the firm conviction, based upon his extended investigations, that the device when thus employed is 100 per cent. efficient and accurate in the detection of deception."

the demonstrable stage and had not yet received sufficient acceptance in the scientific world, the court, per Colden, J., said:

“Objection to the use of scientific proof is not at all novel. At one time or another in their development testimony as to fingerprints, as to X-rays, as to handwriting, as to bullet markings and as to psychiatric examinations were all refused admission into evidence. . . . Their gradual admission into evidence came only after many rebuffs and rejections at the hands of various courts. Today their right to admission in evidence is firmly entrenched in our law. Yet the deductions of handwriting experts and of psychiatrists are not all uniform, and we frequently have such experts testifying in our law courts and drawing conflicting inferences from their examinations. Despite the fact that such experts frequently differ in their conclusions, their testimony is received in evidence, and it is left to a jury to determine which, if either, expert or experts they are going to believe and accept. . . . Both upon legal principle and sound reasoning, it would seem that the courts, if willing to accept and receive handwriting testimony, psychiatric testimony and other such expert opinion, should also admit in evidence testimony of the pathometer test and the results disclosed thereby when a proper foundation has been laid therefor.

“For hundreds of years our courts have deemed the examination and cross-examination of witnesses in open court to be the best method so far devised for the ascertainment of the truth and have used that method for lack of any better approach. It seems to me that this pathometer and the technique by which it is used indicate a new and more scientific approach to the ascertainment of truth in legal investigations.”<sup>24</sup>

The decision is important. Is it valid? And should courts generally accept the conclusions therein reached? In dealing with this sort of question the leading authority on evidence makes the following pertinent observation:

“Both law and practice permit the calling of any expert scientist whose method is acknowledged in his science to be a sound and trustworthy one. Whenever the Psychologist is really ready for the Courts, the Courts are ready for him.”  
“If there is ever devised a psychological test for the valuation of witnesses, the law will run to meet it.”<sup>25</sup>

But to date the law has not done a great deal of running to meet this particular psychological test — a test which is widely accepted nowadays in the nonlegal scientific world as being efficient

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<sup>24</sup> *People v. Kenny*, 167 Misc. 51, 3 N. Y. S. (2d) 348 (1938) at p. 351.

<sup>25</sup> WIGMORE, *EVIDENCE* (3d ed. 1940) § 875.



to a degree that rises, according to some eminent psychologists, as high as ninety per cent or more and seldom sinks as low as seventy per cent.<sup>26</sup> Should the courts then insist on a greater degree of accuracy than that above indicated before they accept this particular scientific device?

As to the general problem of the quantum of probative value required, the following classic statement by Cooley, J., in *Stewart v. People*,<sup>27</sup> is sufficiently representative of the general judicial attitude:

“The proper test for admissibility of evidence ought to be, we think, whether it has a tendency to effect belief in the mind of a reasonably cautious person, who should receive and weigh it with judicial fairness.”

That the law does not require a probative value greater than that indicated by Judge Cooley is reasonably clear, for certainty is rarely attainable in a trial and to require a degree of probativeness in excess of that laid down in the above statement would, as another eminent judge puts it,<sup>28</sup> “sweep away many sources of testimony to which men daily recur in the ordinary business of life, and that cannot be rejected by a judicial tribunal, without hazard of shutting out the light.” Hence even the margin of probabilities involved in the estimated minimum efficiency of the lie-detector method would seem to fall well within the general judicial requirement, and this margin of probativeness may perhaps be regarded as all the more acceptable in view of the unfortunate but undeniable fact that in a high percentage of the cases the witness on the stand not only lies but escapes detection by the traditional method of examination.<sup>29</sup>

It would seem therefore that the chief hurdle in the way of judicial acceptance of this kind of opinion evidence is lack of precedent. And as to this sort of legal obstacle, the following statement by Mr. Justice Steinbrink would seem a sufficient answer:

<sup>26</sup> See, e.g., *People v. Kenny*, 167 Misc. 51, 3 N. Y. S. (2d) 348 (1938), where an eminent psychologist of wide experience testified that the results of hundreds of examinations indicated an efficiency approaching 100 per cent. This, however, is an exceptionally high estimate. See, in general, LARSON, *LYING AND ITS DETECTION*; Inbau, *supra* note 2; Note (1938) 29 J. CRIM. L. 287. Cf. Keeler, *Debunking the Lie Detector* (1934) 25 J. CRIM. L. 153.

<sup>27</sup> 23 Mich. 63 (1871).

<sup>28</sup> Bell, J., in *Stevenson v. Stewart*, 11 Pa. 307, 309 (1849).

<sup>29</sup> Cf. McCormick, *supra* note 1, at 499-500: “Conscious perjury is too often triumphant in our courts under our present methods of ascertaining truth for us to assume too complacent a confidence in the sovereign remedy of cross-examination. It is not always the weakling who is being cross-examined, nor the soul-searching terror to evil-doers who is conducting the examination. Successful exposure of the lie from the liar’s lips requires cleverness and in-

“Law and jurisprudence, which are something more than the dry tomes of the past, can be understood by considering fundamental principles not only of government and economics but also at times by giving consideration in particular cases to sociology, medicine, or other sciences. . . . New concepts must beat down the crystallized resistance of the legally trained mind that always seeks precedent before the new is accepted into the law. Frequently we must look ahead and not backwards.”<sup>30</sup>

By thus looking ahead in the *Kenny* case, Judge Colden has taken a significant step which other courts may soon follow. In fact the highest court of the state in which the learned judge sits has not wholly refused to follow the lead, for it has since handed down a decision, *People v. Forte*,<sup>31</sup> which not only refrains from disapproving the *Kenny* case<sup>32</sup> but by implication may perhaps be construed as giving a measure of sanction to the psychometric method of ascertaining the truth. In this case the New York Court of Appeals was called upon to determine whether a lower court had erred in refusing to permit the accused to be examined by a deception test (galvanometer method) and to submit the result of such test to the jury. The request for such permission came by way of a motion to reopen the case after all the evidence had been produced for the jury's consideration. In holding that error had not been committed the court ruled that it could not take judicial notice that this scientific device was effective for the purpose of determining the truth and also gave some indication of the course that might perhaps have been pursued with success. Said the court:

“The record is devoid of evidence tending to show a general scientific recognition that the pathometer possesses efficacy. Evidence relating to handwriting, finger printing and ballistics is recognized by experts as possessing such value that reasonable certainty can follow from tests. Until such a fact, if it be a fact, is demonstrated by qualified experts in respect to the ‘lie detector’, we cannot hold as a matter of law that

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tuition in the cross-examiner which is all too often not forthcoming. If science bids fair to furnish a fairly effective technique for the exposure of deception we should not merely welcome it when it comes, but stimulate and encourage efforts to speed its coming.”

<sup>30</sup> *Beuschel v. Manowitz*, 151 Misc. 899, 271 N. Y. Supp. 277, 278 (1934).

<sup>31</sup> 279 N. Y. 204, 18 N. E. (2d) 31 (1938).

<sup>32</sup> In the *Kenny* case the court (a lower court) seems to have thought that there was sufficient proof of general scientific recognition and so admitted the evidence. In the *Forte* case the lower court thought that there was no such proof and so rejected a request of the defendant's counsel that he be permitted to take the defendant to a laboratory in an adjoining county to be examined under a “lie detector” (galvanometer method). The request came after all the evidence had been produced for the jury's consideration and as a motion

error was committed in refusing to allow defendant to experiment with it.<sup>33</sup>

This case was decided in 1938. The court was doubtless right as of that date in refusing to take judicial notice of the scientific recognition that was then accorded to the lie detector in question, for a court should require proof of a scientific fact unless there is such a general recognition of the fact in the scientific world that it can be said to be a matter of "common knowledge".<sup>34</sup> The case may have been lost because counsel did not present proper evidence as to the recognition accorded by competent scientists to this particular kind of lie detector.

The case does not hold, it should be noted, that the recordings of a lie detector may not be used at trial as the basis for expert-opinion evidence. On the contrary, the court clearly intimates that upon adequate proof that general scientific recognition is accorded a particular psychometric method the court may sanction the use of such evidence. Between the lines the case all but opens the door for the admission of evidence based on data obtained extrajudicially by a deception test, provided of course that there is a showing of a general scientific recognition of the particular device used or proposed to be used, and provided of course that the particular test is made or is proposed to be made by a competent psychometrist. At least the case may be so regarded by those who believe, as many now do, that judicial approval of the psychometric method of ascertaining facts would constitute one more step, and a soundly scientific one, in the advancement of the administration of justice, and within the limits above indicated no reason is perceived why courts generally should not soon bestow approval. For within these limits — within these safeguards — the possibility of error inherent in the present-day use of lie detectors seems materially outweighed by the opposing possibility of closing the door to truth.

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to reopen the case. The court of appeals in the Forte case therefore merely decided that it could not hold as a matter of law that error was committed in refusing to allow the defendant to reopen the case and be subjected to the deception test. Hence the Forte case did not overrule the Kenny case *sub silentio*.

<sup>33</sup> People v. Forte, 279 N. Y. 204, 18 N. E. (2d) 31 (1938).

<sup>34</sup> As to the "notoriousness" which courts require before they will take judicial notice of a fact, see, in general, Simmons v. Trumbo, 9 W. Va. 358 (1876); Lewis Hubbard & Co. v. Montgomery Supply Co., 59 W. Va. 75, 52 S. E. 1017 (1906); Martin v. Carter Coal Co., 75 W. Va. 653, 84 S. E. 574 (1915); State v. Kittle, 87 W. Va. 526, 105 S. E. 775 (1921); Brown v. Bottom Creek Coal & Coke Co., 94 W. Va. 287, 118 S. E. 284 (1923). See also WIGMORE, EVIDENCE (3d ed. 1940) § 2565 *et seq.*