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EVIDENCE—ADMISSIBILITY OF SIMILAR PRIOR ACTS—PRIVILEGE AGAINST SELF-DEGRADATION AND SELF-INCRIMINATION.—[Utah] During a trial for statutory rape, the girl subjected to the assault was called as witness. The indictment charged the act was committed July 27th. The witness was asked by the prosecution, "Did the defendant have sexual intercourse with you at any time between July 4th and July 27th?" Defense counsel objected on grounds the evidence was immaterial, incompetent, and irrelevant, but was overruled. The witness claimed privilege against self-incrimination and self-degradation under the Utah constitution and statute. Upon denial of privilege the witness refused to answer and was imprisoned. On *habeas corpus*, the majority of the court held: (1) evidence of similar acts committed prior to the one charged are not here admissible; (2) the claim of privilege against testifying should have been allowed for such testimony is, (a) self-degrading and, (b) self-incriminating. *Sadleir* v. *Young*, 85 P. (2d) 810, (Utah, 1938).

Two judges concurred in part and dissented in part. On the first issue of 'admissibility,' the majority theory was the jury would be prejudiced against the defendant by the testimony if allowed to stand alone and that the jury would be led to convict the defendant of an offense similar in character upon a different date, but not charged. This is in contrast to the minority judges who confirmed the holding but on the theory that the testimony was not pertinent to any material issue. The general rule admits evidence of prior similar acts to show intent, knowledge, or identity. Stone, Exclusion of Similar Fact Evidence (1938) 51 Harv. L. Rev. 988; *State* v. *Hilberg*, 22 Utah 27, 61 P. 215 (1900). If the majority theory is that the evidence is inadmissible exclusively because of the resulting prejudice, it is untenable. For where the evidence of a prior similar act is pertinent and relevant to a material issue it is admissible. *State* v. *Reese*, 43 Utah 447, 135 Pac. 270 (1913); *People* v. *Patterson*, 102, Cal. 239, 36 Pac. 436 (1916); *Commonwealth* v. *Bell*, 166 Pa. 405, 31 Atl. 123 (1895). For a discussion of "admissibility" see note, (1938) 28 J. C. L. 917.

On the issue of self-degradation all judges concurred in the opin-

ion that the testimony requested would not be to a fact in issue or to a fact from which the fact in issue might be presumed and could be excluded as self-defamatory. The court's interpretation of the statute does not conflict with the general rule: a witness may be bound to answer if the evidence is relevant to a material issue being tried though it tends to defame his character. Wigmore, Evidence (2d ed. 1923) §2255; *Conway* v. *Clinton,* 1 Utah 215, 220 (1875); *Lohman* v. *People,* 1 Comstock 379 (N. Y. (1848); *Polk* v. *State,* 40 Ark. 482 (1883); *Moor* v. *Dozier,* 128 Ga. 90, 57 S. E. 110 (1907).

The minority's principal point of divergence from the majority is on the issue of privilege against self-incrimination. Involved in the problem is the jurisdictional and procedural character of a juvenile court. The court's attention is focused on the issue of whether the constitutional privilege may be extended to minor witnesses when their information would subject them to juvenile court jurisdiction exclusively.

Adhering to the negative of the proposition, the minority would deny minor misdemeanants a claim of privilege. Their theory is grounded on the premise that constitutional immunity is a protection from criminal proceedings only. In Utah all minor misdemeanants are subject exclusively to a juvenile court exercising equity jurisdiction solely. Since the crime of which the ravished witness in the instant case may be guilty, fornication, is merely a misdemeanor, her severest fate would be a juvenile court proceedings. Rev. Stat. Utah (1933) §§14-7-4, 103-51-5, 103-1-13, 14-7-25. The minority theory is substantiated by the general rule in juvenile court proceedings. Where the record is not transferrable to a criminal court the party before the court may not claim privilege. *People* v. *Lewis,* 260 N. Y. 171, 183 N. E. 353 (1932). The proceedings being civil rather than criminal the constitutional safeguards in procedural matters prescribed for criminal cases are unnecessary. *Commonwealth* v. *Fisher,* 213 Pa. 48, 62 Atl. 198 (1905); *Cinque* v. *Boyed,* 99 Conn. 70, 121 Atl. 678 (1923); *Wisenberg* v. *Bradley,* 209 Ia. 813, 229 N. W. 205 (1930).

Holding to a more literal interpretation of the constitution, the majority would grant privilege to minor witnesses. The majority viewpoint, in contrast to the minority, pictures procedures and punishments in juvenile court equally as prejudicial to the interest of a witness as those of a criminal court. Sentence to a public institution is as injurious to the interest of a witness under eighteen as it is to an informant over eighteen. Not only does this viewpoint find support in the constitution which recognizes no exception based on age but as a practical matter any such distinction is purely arbitrary. Especially is this true where the age factor simply changes the label of the actor by naming him a juvenile delinquent instead of a criminal misdemeanant. A youth seventeen should not be denied privilege when it is granted a hardened criminal testifying in regard to the same act. *People* v. *Lewis* (dissent), *supra.*

While the majority's view seems to ignore the theory of juvenile court equity proceedings, the minority doctrine, in its denial of privilege on an age basis, is also objectionable because of its arbi-

trary character. It is suggested that the two be resolved by using as a criterion the qualitative character of the offense with which the witness might be charged.

Most juvenile court legislation, as well as bringing recognized crimes within juvenile court jurisdiction, defines new offenses. For example, jurisdiction is given over children who are incorrigible, ungovernable, habitually disobedient, or beyond control of their parents. Under the qualitative theory privilege against testifying to *crimes* only is granted, while as to these new offenses it would be denied. Some legislation confusedly bases the new offenses on ordinary *malum in se* acts. Under the suggested theory privilege should be granted in such circumstances also, for a party accused of a *malum in se* act is entitled to constitutional rights regardless of age. *Ex Parte Mei*, 122 N. J. Eq. 125, 198 Atl. 8 (1937).

The historical purpose of the privilege was protection against (1) inquisitorial methods, and (2) crimination as to *malum in se* crimes. Wigmore, Evidence, §§2252, 2263; note (1937) 27 J. Crim. L. 746; *City of Mobile* v. *McCowan Oil Co.*, 226 Ala. 228, 148 So. 402 (1933). By limiting inquisitorial methods to new offenses based on acts expressly not *malum in se* the historical purpose of the constitutional privilege is preserved. Thus the qualitative theory, though it limits the juvenile court procedures, is desirable for it fulfills the constitutional intent. At the same time the new juvenile court procedures remain intact as regards those new offenses which are its principal objective. The new criterion is necessary for the spirit of constitutional privilege should be reconciled with the juvenile court procedure on a more logical basis than age if confusion is to be avoided.

J. KENNETH BAIRD.

EVIDENCE—CORROBORATION OF EXTRA-JUDICIAL CONFESSION.—[Utah] An abundance of legal learning has been devoted to two aspects of an extra-judicial confession, that is, one not made before a magistrate or in open court: (1) the question of whether such a confession independently establishes *corpus delicti*, and (2) if not, need the evidence introduced to establish it be consistent with the confession, or can the latter be corroborated by evidence distinct from that which established *corpus delicti*. These problems arose recently in a Utah infanticide case. *State* v. *Johnson*, 95 Utah 572, 83 P. (2d) 1010 (1938).

Declaring a mere extra-judicial confession insufficient to establish *corpus delicti* the majority of the court stated: "There must be evidence, independent of the confession, corroborative thereof, consistent therewith, forming a basis or foundation for the confession, . . . before the confession may be considered by the jury as evidence of guilt." Elaborating the rule, the court observed that there must be proof *aliunde* the confession that the crime has been committed, or proof of some fact or circumstance otherwise confirmatory of the confession. These requisites being present it would be proper that the jury "may consider the confession in evidence, not only in determining the question of defendant's guilty participation in the crime, but also in determining whether the crime was actually committed." This proposition permits the estab-

lishment of *corpus delicti* by the confession along with collateral evidence, each supplementing any deficiency in the other. It is the position of the dissent, however, that a confession has no place in the determination of a death by criminal agency, which must be established by evidence complete and independent thereof. As a corollary, the minority believe that, though the evidence which establishes the *corpus delicti* be inconsistent with the confession, the latter may still be accorded the jury's consideration if there is other evidence corroborative of the confession. This last observation seemingly conflicts with the rationale of the rule requiring independent proof of *corpus delicti.* The purpose of this rule is to protect persons who, for divers reasons, confess to crimes which they did not commit. It would appear that this purpose becomes frustrated if a confession, the tenor of which is inconsistent with the evidence establishing *corpus delicti,* is still accorded judicial recognition by attempting to prove it with collateral evidence.

From early common law to the present this problem has been fraught with complexity. In 1784 it was held that a conviction could be sustained on the uncorroborated confession alone. *R.* v. *Wheeling,* 1 Leach Cr. L., 4 ed., 311. During the nineteenth century the question arose frequently, and two rules were proposed: (1) the corroborative evidence might be of any sort whatever; (2) it must relate specifically to the *corpus delicti.* Of these two rules, the latter is perhaps the more general, although in England and Ireland it seems to be restricted to homicide cases. 3 Wigmore, Evidence (1st, ed., 1904) §2070.

Most jurisdictions in this country have adopted the rule requiring corroboration, and the majority of these have declared that the evidence must concern the *corpus delicti,* though in a few states *any* evidence which tends to produce confidence in the truth of the confession is considered sufficient. 3 Wigmore, Evidence (1st Ed., 1904) §2071; *Bergen* v. *People,* 17 Ill. 426 (1856).

The independent evidence of *corpus delicti* may be either direct or circumstantial. Most states do not require that the *corpus delicti* be proved by evidence which entirely excludes a consideration of the confession, but hold that the confession may be used to strengthen such evidence. There is considerable disagreement among the courts on this point, but it is generally recognized that it is sufficient if, taken together with the confession, it satisfies the jury beyond a reasonable doubt that the offense was committed, and that defendant committed it. 2 Wharton, Crim. Evidence (11 ed., 1935) 1072, §641. See *contra: Burrows* v. *State,* 38 Ariz. 99, 297 Pac. 1029 (1931) (murder; clear and convincing proof *aliunde,* of *corpus delicti* required).

Some states have adopted the rule in statutory form. For example, Arkansas: "A confession of a defendant, unless made in open court, will not warrant a conviction, unless accompanied with other proof that such offense was committed." Pope's Stat. Ark. §4081, Crim. Code §239; and New York goes even farther and extends the rule to judicial, as well as extra-judicial confessions: "A confession of a defendant, whether

in the course of judicial proceedings or to a private person, can be given in evidence against him, . . . but is not sufficient to warrant his conviction, without additional proof that the crime charged has been committed." N. Y. Crim. Code §395.

The reasons given for requiring corroboration of extra-judicial confessions are that people sometimes confess to crimes that have never been committed at all, in order to protect others, or to prevent investigation into another crime, or merely for publicity, or because of mental derangement. Blackstone, in speaking of confessions made without due caution, said: "They are the weakest and most suspicious of all testimony; ever liable to be obtained by artifice, false hopes, promise of favor or menaces; seldom rendered accurately or repeated with due precision, and incapable in their nature of being disproved by negative evidence." 4 Blackstone, Commentaries (Cooley's 3rd Ed., 1884), §355. The rule is in accord with the so-called humaneness of the criminal law.

It is hardly to be doubted that extra-judicial confessions are to be regarded most suspiciously, but there is some disagreement among the authorities as to whether corroboration should be required as a part of the law of evidence. In *R.* v. *Unkles,* Ir. R. 8 C. L. 50, 58, the rule was described as more a judicial practice than a part of the law of evidence. "A party accused of homicide *ought* not to be convicted on his own confession merely, without proof of the finding of the dead body or evidence *aliunde* that the party alleged to have been murdered is in fact dead."

The suggested distinction between a "judicial practice" and a rule of the law of evidence is apparently that one convicted merely on the basis of an uncorroborated confession in a jurisdiction where corroboration is required as a part of the law of evidence could secure a reversal in an appellate court by indicating the absence of corroboration, whereas in a jurisdiction where the "rule" was regarded merely as a "judicial practice" the defendant would have to show bias or lack of judicial attitude on the part of the judge. In other words, the "judicial practice" formula would leave much more discretion in the hands of the individual judge than the "evidence" formula.

Wigmore suggests that the supposed danger the evidence rule is intended to guard against is greatly exaggerated, and emphasizes that warning can be given the jury by counsel or by the judge, of the caution to be exercised in considering an extra-judicial confession. He condemns the rule as providing a means whereby unscrupulous counsel may trip the judge by some refinement of verbiage and thereby obtain reversals. 3 Wigmore, Evidence (1st Ed., 1904) §2073.

Why this particular rule should be singled out for condemnation as an obstruction to justice is difficult to see. There are countless other pitfalls for the unwary judge; the criminal law is full of technicalities. But the technicalities are designed to save the innocent from unjust or misguided conviction. To trust to the mercy and beneficence of a judge in a matter so vital as the requirement of corroboration seems to be exposing the defendant to an unnecessary and unjustifiable risk. Surely we may presume that our judges will know

the law and will not be caught off guard any more in the application of this rule than in the application of any of the other rules of law.

An interesting modification of the rule is that which varies the amount of corroboration required according to the severity of the crime charged. In England now, apparently one may be convicted of any crime other than a capital offense upon his own uncorroborated extra-judicial confession, 1 R. C. L. 586, n. 5, while some other jurisdictions require corroboration for all felonies and serious crimes, but not for the lesser ones. 1 R. C. L. 586, n. 4. While such procedure may expedite the business before the courts, it cannot be too strongly emphasized that extreme caution should be used in convicting, even for the lesser crimes, on the mere uncorroborated extra-judicial confession of a defendant. Theoretically, at least, a man is entitled to as careful trial where the penalty is light as where it is heavy.

W. R. BERNAYS.

EXCLUSION OF NEGROES FROM JURY—SUFFICIENCY OF EVIDENCE TO ESTABLISH DISCRIMINATION.—[Federal] In 1875 Congress enacted a statute in compliance with the 14th Amendment, providing that "no citizen . . . shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude. 8 U. S. C. A. 43 (1875). Since this enactment it has become well settled that discrimination against negroes in the selection of jurors is ground for reversal of the conviction of a negro. What constitutes discrimination within the meaning of this statute depends, of course, upon the interpretation placed thereon by the United States Supreme Court. Moreover, since the decisions of that tribunal are binding upon the state courts (*McIntosh* v. *State,* 8 Okla. Cr. 469, 128 P. 735 (1912)) and the accused can always obtain relief in the federal court (he may petition the Supreme Court for certiorari, and even if refused could probably obtain relief in the lower federal court by *habeas corpus*—28 U. S. C. A. 344 (1925); *Hale* v. *Crawford,* 65 F. (2d) 739 (C. C. A. 1st, 1933), it would seem that the degree of impartiality required by the Supreme Court would constitute the minimum to which the states must accede.

The Supreme Court has enunciated the general principle that when systematic exclusion of negroes from jury service is established, unconstitutional discrimination is shown. For a review of the decisions see *Carter* v. *Texas,* 177 U. S. 442 (1900); *Norris* v. *Alabama,* 294 U. S. 587 (1935); and comment (1934) 29 Ill. L. Rev. 498. Of course, intentional discrimination against negroes, if admitted by the jury commissioner is clearly sufficient. In *Carrick* v. *State,* 41 Okla. Cr. 336, 274 Pac. 896 (1929), the determining factor in establishing discrimination was the admission by the jury commissioner that he would never put a negro on the jury list because he had never seen a qualified negro.

But intentional discrimination, if denied, can be shown by circumstantial evidence. It is in this sphere that the difficult factual issue arises. Two main elements must be shown to establish discrimination. As a prime requisite the absence of negroes from the jury over a long period of time must be established. This element, while comparatively easy of proof,

is not sufficient of itself. *Pollard* v. *State,* 58 Tex. Cr. 299, 125 S. W. 390 (1910); *Mitchell* v. *State,* 105 Tex. Cr. 297, 288 S. W. 224 ((1926); *Ryan* v. *State,* 123 S. W. (2d) 659 (1939). Secondly, it must be proved that there were negroes qualified to serve on the jury in the particular locality. This factor alone is also insufficient, but coupled with the time element has proved sufficient. In *Lee* v. *State,* 163 Md. 56, 161 Atl. 284, the evidence that the negro population of Baltimore county, a large proportion of which were fully qualified, was about one-tenth of the total population, together with the long, unbroken absence of negroes as jurors was held to show unconstitutional exclusion of negroes from jury service. Of course, as the proportion of qualified negroes increases, the time element diminishes in importance, and *vice versa.* Thus, the tests are mutually supplementary. Just what percentage of qualified negroes in a locality must be shown has never been decided by the Supreme Court, but several states have expressed their opinion *People* v. *Hines,* 81 P. (2d) 1048 (Cal. 1938) (conviction reversed, the evidence showing seven per cent qualified negroes); *Bruster* v. *State,* 40 Okla. Cr. 25, 266 Pac. 486 (1928) (conviction affirmed, the evidence failing to show the percentage of qualified negroes); *Bonaparte* v. *State,* 65 Fla. 287, 61 So. 633 (1913) (conviction reversed, the evidence showing at least one thousand negroes qualified).

The greatest obstacle for the defendant to surmount in establishing discrimination is to prove that there are negroes properly qualified to serve as jurors in the particular locality. This task inheres with more difficulty than a mere showing of a large negro population. The qualifications necessary for a juror vary slightly in the different states, but the requirements generally found among the southern states include residence, literacy, voting, lack of a criminal record, intelligence, and good moral character. Arbitrary determinations by jury commissioners that no negroes meet the intelligence or good moral character requirements, have not been tolerated by the Supreme Court. *Neal* v. *Delaware,* 103 U. S. 370 (1880)..

In addition to the difficulties arising from the discretionary powers vested in the jury commissioners, the burden of proof is on the defendant to show discrimination. *Briscoe* v. *State,* 106 Tex. Cr. 478, 293 S. W. 573 (1927); *Mitchell* v. *State,* 105 Tex. Cr. 478, 288 S. W. 224 (1926); *Wilborn* v. *State,* 11 Tex. Cr. 299, 12 S. W. (2d) 578 (929). However, this obstacle is not as serious as might seem, because the issue of discrimination against negroes in jury service turns on the sufficiency of the evidence. Being a question of fact involving the burden of proof, the Supreme Court sees fit, in this class of cases, to review the facts and draw reasonable inferences and presumptions. So if the defendant can show sufficient evidence to make out a *prima facie* case, the burden of proof may shift to the state, thus relieving the defendant of the heavy burden which the states impose upon him. In *Neal* v. *Delaware,* 103 U. S. 370 (1880), the Supreme Court had before it a case involving the conviction of a negro on grounds of discrimination. The Supreme Court held that the allegations presented a *prima facie* case of discrimination which shifted the burden of proof to the state, and failure of the state

to rebut the presumption warranted reversal. See *Norris* v. *Alabama,* 294 U. S. 587 (1935), to the same effect. The difference between the interpretation of such a case by a state court and the Supreme Court is frequently one of burden of proof, the state court holding that the defendant has not met the burden of proof, and the Supreme Court holding that it has, and that the failure of a state to rebut warrants a reversal.

In view of the fact that the Supreme Court sets the minimum requirements, it is interesting to analyze a recent case of discrimination. In *Pierce* v. *State of Louisiana,* 9 S. Ct. 537 (1939), handed down by Justice Black, the distinction between the holding of the Louisiana Supreme Court, and the United States Supreme Court, is a difference of burden of proof. The evidence of twelve witnesses showed that for twenty years, only one negro had been called for jury service, and that the population of the Parish was composed of from one-quarter to one-half negroes, and of these negroes, only twenty-nine per cent were illiterate. The Supreme Court held that the defendant had sufficiently met the burden of proof by this evidence to shift it to the state, and the failure of the state to rebut warranted reversal. The Louisiana Supreme Court had affirmed the conviction, emphasizing the fact that there were four negroes included in the list of 300. In view of the fact that a large proportion of the negroes were disqualified because they were illiterate, the court was of the opinion that the number of negroes on the list was not disproportionate to the number of whites on the list and that the defendant had not established discrimination. Both courts seem to have determined the issue on the basis of how many negroes were on the list. Justice Black went to great pains to show that of the three negroes on the list, one was dead, and the name of another was listed incorrectly, leaving only one negro who had been called, for many years. The difference in the interpretation of these facts, was the determining factor, resulting in opposite decisions by the two courts.

The interpretation which Justice Black puts on the evidence, is supported by the trial judge's finding of discrimination in the original petit jury. The trial judge dismissed the jury, and ordered that a new impartial jury be drawn. This impartial jury convicted the defendant. But the trial judge overruled the motion to quash the indictment because of discrimination, although the indictment was returned by a grand jury drawn from the same panel as the original petit jury. The theory of the trial judge, in so doing, was that the constitutional rights of the accused were not affected by a discriminatory grand jury because the mere presentment of the indictment is not evidence of guilt, but merely brings the accused before the court. The trial judge was clearly wrong in his contention as Justice Black points out, because under the Louisiana constitution there must be an indictment to hold a man for a crime. Under the 14th Amendment and the Congressional statute of 1875, and a Louisiana statute, the indictment should have been quashed if qualified negroes were systematically excluded because of their color. The evidence, being sufficient to quash the petit jury, was sufficient to quash the indictment. *Farrow* v. *State,* 91 Miss. 509, 45 So. 619 (1908).

BETTY BOOTH.