

1955

## Abstracts of Recent Cases

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A majority of state statutes either directly or by implication condition the use of chemical tests upon consent. In a few of the jurisdictions where there are no statutes on the subject, the courts indicate that the defendant cannot be compelled to take the tests.<sup>56</sup> Perhaps these opinions can be best explained on policy considerations rather than on orthodox legal theory. It has been an American tradition to

<sup>56</sup> *State v. Benson*, 230 Iowa 1168, 300 N.W. 275 (1941) (dicta); *Hinkenfeut v. State*, 267 P.2d 617 (Okla. 1954) (dicta); *Apodaca v. State*, 140 Tex.Cr.R. 593 (1940). *But See People v. Kiss*, 125 Calif. App. 138 at 142, 269 P.2d 924 at 927 (1954) where the court admitted breath test evidence voluntarily submitted saying, "But conceding that violence was applied to appellant to induce his cooperation in taking the test, its results are none the less lawful and admissible . . . It will be excluded only where the accused is by threats and punishment so terrorized into submission that to admit it would be a mockery and a pretense of a trial."

abhor police states, and to resent the notion that physical force can be used to obtain a specimen from a person's body by men in uniform. However it would be better to have a statute granting such rights to citizens than to enlarge legal concepts in order to prevent reasonable physical compulsion. Therefore it is incumbent upon the legislatures of the various states to offer aid to the police through legislation enabling consent to be obtained without resort to physical force.<sup>57</sup> Thus far, only the New York statute has accomplished this result. Moreover, the results of this survey indicate the need in most states for the legislature to consider and resolve the many other technical and procedural problems which still exist. Perhaps it would also be advisable to expand the Uniform Vehicle Code to include provisions regulating these matters.

<sup>57</sup> See Mamet, *Constitutionality of Compulsory Chemical Tests to Determine Alcoholic Intoxication*, 35 J. CRM. L. & CRIMINOLOGY, 132 (1945).

## ABSTRACTS OF RECENT CASES

**State May Use Evidence Suppressed by Federal Court**—An indictment was filed in the United States District Court charging appellant with unlawful possession of marijuana. The evidence upon which the prosecution was predicated had been obtained by a federal narcotics agent as the result of an illegal search pursuant to a void search warrant. The trial court granted a motion to suppress the evidence and the action was dismissed. Thereupon the narcotics agent instituted an action based on the same evidence in the state court. The United States Court of Appeals for the Tenth Circuit refused to enjoin the use of this evidence. *Rea v. United States*, 218 F.2d 237 (10th Cir. 1954). The court declared that neither the Constitution nor any federal law prohibits the use of illegally seized evidence, but that exclusion of such evidence is founded solely upon a federal judicial policy. This policy applies only in the federal courts, and then only when the unlawful evidence is obtained by a federal officer. Thus, the court held that the admissibility of such evidence is

governed by state law and that the order sought would constitute an interference with state judicial process. The Supreme Court has granted certiorari.

**New Federal Immunity Act Upheld**—In a proceeding involving the first order compelling testimony under the Compulsory Testimony Act, a New York District Court held the act does not violate the Fifth Amendment or separation of powers doctrine. In *re Ullmann*, 23 U.S.L. Week 2393 (Feb. 15, 1955). Although noting that the Fifth Amendment only requires that immunity be given from federal prosecution in order to compel testimony in a federal court, the court interpreted the act as granting immunity from state prosecution as well. The court relied on a Supreme Court decision, to the effect that Congress can prohibit state courts from using evidence gathered by a Congressional committee, to reject the contention that Congress has no power to interfere with state criminal proceedings. The defendant, a grand

jury witness, also contended that the act was unconstitutional in that it requires the court to perform the nonjudicial function of approving the application for a grant of immunity—which was said to amount to a veto power over the Department of Justice. However, the court held the required approval to be merely formal to assure compliance with the statute and not discretionary in cases involving court or grand jury witnesses. The provision dealing with witnesses before a congressional committee, however, seems to involve discretionary approval, and thus a question of its constitutionality may still exist.

**Negligence or Incompetency of Defense Counsel Not Grounds for New Trial**—Defendant appealed from a conviction of rape and kidnapping on the ground that he was not adequately represented by counsel. On appeal, held affirmed. *Hendrickson v. State*, 118 N.E. 2d 493 (Ind. 1954). Defendant cited examples of counsel's failure to object to certain testimony and instructions, but the Supreme Court of Indiana held that they at most constituted honest errors in judgment. "When a defendant employs an attorney he places the conduct and management of his defense in that attorney's hands. Frequently even the best of attorneys make decisions during the course of a trial which may later appear to have been errors in judgment. This is a natural result of the imperfection of man. . . ."

**Inquiry into Violation of Constitutional Rights Not Allowed in Extradition Proceeding**—Petitioner, a negro, was arrested in Pennsylvania on a charge of illegal flight from a Georgia prison. The hearing judge found that after being sentenced to life imprisonment, petitioner had been subjected to cruel and unusual punishment in a Georgia work camp and, that if returned to the custody of Georgia, he was likely again to be subjected to such punishments as the "sweat box" and "Georgia Rack". The Supreme Court of Pennsylvania dismissed petitioner's writ of habeas corpus holding that any inquiry into constitutional

rights would conflict with provisions of the United States Constitution providing for extradition, and that the courts of Georgia can be relied upon to afford redress. *Commonwealth ex rel. Brown v. Baldi*, 378 Pa. 504, 106 A.2d 777 (1954). The dissent argued that evidence as to cruel and unusual punishment is ordinarily excluded in extradition proceedings because of a presumption of regularity, but that in this case the presumption had been overcome. The dissent also attacked the majority's assertion that petitioner will have access to Georgia courts.

**Availability of Bail Pending Appeal**—After conviction of income tax evasion, defendant's application for bail pending determination of appeal was denied by both the District and Appellate Court. Mr. Justice Douglas, sitting as circuit justice, reversed these determinations under a rule which provides, "Bail may be allowed pending appeal or certiorari only if it appears that the case involves a substantial question which should be determined by the appellate court. . . ." In interpreting the phrase "substantial question", Justice Douglas declared that the first fact to be considered is the soundness of the errors alleged. The fact that one appellate judge would be likely to see merit in the contention is enough, and even if this is not true, a question may nevertheless be "substantial" if it presents a novel question or one that needs clarification. He concluded that as bail is basic to our system of law, doubts whether it should be granted or denied should always be resolved in favor of the defendant. *Herzog v. United States*, 75 Sup. Ct. 349 (1955).

**Failure to Provide Medical Care for Newborn Child Does Not Constitute Criminal Negligence**—Defendant, an unwed mother, was convicted of killing her newborn child. One of the State's theories was that the failure to provide medical care for the newborn child, who died shortly after birth, constituted criminal negligence. The Supreme Court of Wyoming, in reversing the conviction, held that the mere failure on the part of a woman to make proper

provision for her expected confinement is not sufficient to warrant a conviction. "While the fact that medical care has not been provided might be a circumstance, along with others, that there existed an intent to kill . . . no case has been found going the length of the contention of the State. . . . Children are born of unattended mothers on trains, in taxis, and in other out of the way places, and we fear to open up a field for unjust prosecution of actually innocent women." *State v. Osmus*, 276 P.2d 469 (Wyo. 1954).

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**Blood Tests Not Admissible to Show Possible Paternity**—Defendant was convicted of being the father of the complaining witness' child. Blood tests which had been taken at his request and which had failed to exclude the possibility that he was the father were admitted into evidence over his objection. On appeal, the highest court in Michigan reversed. *People v. Nichols*, 67 N.W.2d 230 (Mich. 1954). The court stated that while medical authorities agree to the accuracy of the test to establish nonpaternity, it has no probative value whatsoever to establish paternity. (This is because a dissimilarity of blood types can show that a specific person could not be the father, while a similarity means only that the person tested is one of a large class any of whom could be the father.) Thus the court concluded that the evidence should have been excluded on the ground of irrelevancy.

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**Short Course for Prosecuting Attorneys**—The Tenth Annual Short Course for Prosecuting Attorneys, conducted by Northwestern University School of Law, will be held during

the five day period from August 1 to August 6, 1955. The course has a three-fold objective:

To offer instruction regarding the preparation and trial of criminal cases.

To acquaint prosecutors with the possibilities of scientific methods in criminal investigations and prosecutions.

To provide a forum for the mutual exchange of information by the attending prosecutors.

Well qualified authorities will discuss such subjects as the selection of jurors, opening statements, the examination and cross examination of witnesses, closing arguments, preparation for trial, the effective use of medical evidence, the prosecution of drunk driving cases, extradition and habeas corpus problems, the law on confessions, homicide investigation, handwriting and typewriting identification, alcoholic intoxication tests, common sense techniques for the interrogation of criminal suspects, the lie-detector technique, the taking and signing of written confessions, the self-incrimination privilege and other matters of importance to prosecuting attorneys.

The attendance fee is \$75.00, payable on August 1st. Attendance is restricted to attorneys holding federal, state or municipal office as prosecutor or assistant prosecutor. The complete expenses of most of the previous course attendants were defrayed by the counties or states they represented.

A copy of the complete program for the course will be available on June 1st. However, prosecutors who wish to register now, or who desire any further information at this time should write to: Professor Fred E. Inbau, Northwestern University School of Law, Lake Shore Drive and Chicago Avenue, Chicago 11, Illinois.