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## Assault and Battery-Police Officer-Third Degree

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## RECENT CASE NOTES

ASSAULT AND BATTERY—POLICE OFFICER—THIRD DEGREE—Each of the appellants was charged with assault and battery, and the cases were consolidated and tried together and each was found guilty. The evidence showed that a man was arrested and taken to the police station; that appellants were plain clothes detectives, and took the man to the "detectives' room," where they gave him the "third degree" at a time when there was no charge filed against him; accused him of theft, called him vile names, and tried to make him confess, threatening him with bodily injury. One of the appellants struck him with his fist, and both beat him with a rubber hose. Appellants swore that they committed these acts in self-defense; one of appellants weighed 180 pounds and the other 230 pounds. Appellants were tried in the Allen County Circuit Court, and moved for an instructed verdict for the defendants on the ground that they were prosecuted under the wrong statute, there being a special statute against using force to obtain a confession. *Held*, the evidence was sufficient to support the charge of assault and battery, there being many acts that offend against more than one statute.<sup>1</sup>

The first question to be asked is: *What protection have the courts afforded against third degree methods?* A review of the cases reveals three methods which the courts have used to combat "third degree" methods:

(1) Any evidence obtained by such methods will be excluded by a trial court, or the judgment will be reversed if such evidence is admitted in the lower court.<sup>2</sup>

(2) Police officers using unnecessary force on prisoners, including attempts to extort confessions, will be prosecuted criminally.<sup>3</sup>

(3) The individual subjected to such methods will be given civil redress.<sup>4</sup>

It will be noted that all these are indirect remedies assuaging the wrong after it is committed, and in no way empowering the judiciary to exert any prior control to prevent the wrong. Is there any method whereby the courts can exert direct control? Could the courts exert direct control by acknowledging "third degree" methods to be under the protection of the self-incrimination clauses of the various constitutions? The Federal Constitution and those of all the states except Iowa and New Jersey have

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<sup>1</sup> *Bonahoon v. State*, 178 N. E. 570, Sup. Ct. of Ind., Dec. 10, 1931.

<sup>2</sup> *Wan v. United States*, 266 U. S. 1; *Tramp v. State*, 104 Neb. 222, 176 N. W. 543; *Cooper v. State*, 237 Pac. 865; *Cross v. State*, 142 Tenn. 510, 221 S. W. 489; *Mangum v. United States*, 289 Fed. 213; *Roman v. State*, 23 Ariz. 67, 201 Pac. 551; *People v. Rogers*, 303 Ill. 578, 136 N. E. 470; *Franklin v. Commonwealth*, 201 Ky. 324, 256 S. W. 714; *Dickson v. Commonwealth*, 210 Ky. 350, 275 S. W. 805; *King v. State*, 108 Neb. 428, 187 N. W. 934; *White v. State*, 248 S. W. 690; *Thurman v. State*, 169 Ind. 240, 82 N. E. 64 (admitted on facts); *Edmondson v. State*, 72 Ark. 585, 82 S. W. 203; *State v. Young*, 27 So. 50; *State v. Dildy*, 72 N. C. 327; *Warren v. State*, 29 Tex. 360; *Beckham v. State*, 14 So. 859; *United States v. Balayut*, 1 Phil. 451.

<sup>3</sup> *United States v. Pabalan*, 37 Phil. 352; *United States v. Frank*, 6 Phil. 433; *Durham v. State*, 199 Ind. 567; *People v. Rogers*, 303 Ill. 578, 136 N. E. 470.

<sup>4</sup> *State ex rel. Burns v. Clausmeier*, 154 Ind. 599; *Firestone v. Rice*, 38 N. W. 855 (Mich.); *Atwood v. Atwater*, 61 N. W. 574 (Neb.).

incorporated the rule of the privilege against self-incrimination. The problem is: When does the protection of the privilege arise? To determine this it is necessary to examine the cases and the wording of the provisions under which they arise, and in connection with which they are interpreted.

A clause exempting from self-criminating testimony "in criminal cases" protects equally in civil cases when the fact asked for is a criminal one.<sup>5</sup> The protection under all clauses extends to all manner of proceedings in which testimony is to be taken, whether litigious or not, and whether "ex parte" or otherwise. It therefore applies in all kinds of courts, including juvenile courts when constituted as criminal courts and in all methods of interrogations before a court.<sup>7</sup> It will be noted that thus far there is definitely a "case," before the court, and these principles are so well settled, that they are unquestioned by any except ignorant or over-skilled counsel, raising a dust in an effort to confuse the court. But the protection extends farther; it has been held to extend to investigations before a grand jury. This will be discussed from the aspects of our double sovereignty.

*Under the Federal Constitutional Provisions:*

(a) The fifth Amendment of the Federal Constitution provides: "No person \* \* \* shall be compelled in any criminal case to be a witness against himself." How far back does this protection extend? The Fifth Amendment extends its protection to a witness called to testify before a grand jury which is investigating alleged violations of the interstate commerce law; it is not limited to cases of criminal prosecution against the witness himself.<sup>8</sup> When a witness called before a grand jury is granted by statute an absolute immunity from prosecution, penalty or forfeiture, he cannot claim the protection of the Fifth Amendment,<sup>9</sup> the inference being that he could claim constitutional protection were he not so protected.

*Under State Constitutional Provisions:*

(a) *New York.* The constitution provides that "No person shall \* \* \* be compelled in any criminal case to be a witness against himself."<sup>10</sup> It was held unconstitutional to deny a witness his privilege and immunity, when he was called before a grand jury investigating charges against himself.<sup>11</sup>

(b) *Kentucky.* The constitution provides that "In all criminal prosecutions the accused \* \* \* cannot be compelled to give evidence against himself."<sup>11a</sup> Under this, one cannot be compelled to give evidence before a grand jury of facts disclosed by the witness' own testimony in a prior prosecution against another.<sup>12</sup>

(c) *Missouri.* The constitution provides that "No person shall be compelled to testify against himself in a criminal cause." One compelled to testify before a grand jury concerning an investigation involving others is entitled to the protection of the constitutional provision.<sup>13</sup>

<sup>5</sup> *Ex parte Senior*, 37 Fla. 1, 19 So. 652; *Wilkins v. Malone*, 14 Ind. 153.

<sup>6</sup> *Ex parte Tahbel*, 189 Pac. 804.

<sup>7</sup> *Pye v. Butterfield*, 5 B. & S. 829 (statutory interrogatories).

<sup>8</sup> *Counselman v. Hitchcock*, 142 U. S. 547, 12 Sup. Ct. 195.

<sup>9</sup> *Hale v. Henkel*, 201 U. S. 43, 26 Sup. Ct. 371.

<sup>10</sup> Art. 1, Sec. 6.

<sup>11</sup> *People ex rel. Hacklet v. Kelly*, 24 N. Y. 74, 78.

<sup>11a</sup> Sec. 11, Bill of Rights.

<sup>12</sup> *Bentler v. Com.*, 136 S. W. 396.

<sup>13</sup> *State v. Naughton*, 120 S. W. 53.

(d) Under similar provisions, like decisions were given in Minnesota, Ohio and Oklahoma.<sup>14</sup>

Does a "case" within the meaning of the constitutional provision extend to investigations by a legislature, or a body having legislative functions? The constitutional provision against self-incrimination (Decl. of R., Art. 12, Mass.) applies to investigations ordered and conducted by the legislature or either of its branches; is regulated therein by the same rules as in judicial and other inquiries.<sup>15</sup>

There is authority, then, that the privilege extends both to judicial and legislative functions, and it does not seem to be stretching the truth to say that a "case" includes an investigation by judicial or legislative officials to determine whether or not there are grounds for a formal action in a court of law. This would seem to cover, as far as it extends, investigations by police officers. *But does the protection extend to executive and administrative inquiries?* To partly meet this: *What is a grand jury?* In *State v. Cox, supra*, the protection was held to extend to grand jury investigations. In the same jurisdiction, Ohio, it was held that "the grand jury does not exercise a judicial function, but only acts as the constitutional accuser of crime."<sup>16</sup> The grand jury is certainly not exercising a legislative function. If neither judicial nor legislative, then, under our theory of the division of powers the inference must be that the protection is afforded to investigations by an administrative body. If the protection against self-incrimination is afforded to investigations by administrative officers in one situation, why should it not be afforded to investigations by other administrative officers, viz., the police? Although the distinction that a grand jury is not a judicial body is not so flatly stated in other jurisdictions, it is recognized as being different from a judicial body, and in these jurisdictions the protection has been extended to grand jury investigations.<sup>17</sup> As a matter of fact the grand jury is probably a body with overlapping functions, analogous to the several commissions, boards, etc., the constitutionality of which has been declared recently. The federal rule, however, is that a grand jury is a judicial body.<sup>18</sup> In some of the states not defining the nature of the grand jury, it has not been considered so inherently a part of the judiciary that it was unconstitutional for the legislature to take away from the judiciary the power to summon the grand jury.<sup>19</sup>

In the principal case, the court twice asserted that although there had been no formal arrest, the detectives could have been prosecuted under Sec. 2420 Burns 1926, which defines the offense of using force to obtain a confession from a *prisoner*. If this is true, the court tacitly admits that there is a "case." If there is a "case" the "prisoner" comes within the consti-

<sup>14</sup> *State v. Froiseth*, 16 Minn. 296; *State v. Cox*, 101 N. E. 135 (Ohio); *Scribner v. State*, 9 Okla. Cr. 465, 132 Pac. 933.

<sup>15</sup> *Henry Emery's Case*, 107 Mass. 172. See Wigmore on Evidence, Vol. IV, ch. 28, Sec. 2252, pp. 853 ff.

<sup>16</sup> *State v. Price*, 101 Ohio St. 50, 128 N. E. 173.

<sup>17</sup> *Klaus v. Bolster*, 146 N. E. 733, 251 Mass. 292; *Ward Baking Co. v. Western Union Telegraph Co.*, 200 N. Y. S. 865, 205 App. Div. 723; *In re Both*, 192 N. Y. S. 822.

<sup>18</sup> *In re National Window Glass Workers*, 287 Fed. 219.

<sup>19</sup> *Jasonowski v. Connolly*, 197 Mich. 257, 163 N. W. 910.

tutional protection. The court does bring the situation under the protection of Sec. 15, Art. 1, Indiana Constitution, that "no person arrested or confined in jail shall be treated with unnecessary rigor." What is necessary rigor? May necessary rigor be used to gain a confession? If not, then why not give the prisoner the specific protection of the next sentence, next section in the Indiana Constitution, the protection against self-incrimination? If necessary rigor may be used, then the two sections have the same linguistic implications, and the prisoner is entitled to the protection of both or neither.

It may be contended that the writ of *habeas corpus* would furnish equal protection under such circumstances. It is asserted here that it would not. The object of the writ of *habeas corpus* is to secure a speedy release by judicial decree of persons illegally restrained or their liberty.<sup>20</sup> It is to summarily protect the liberty of the citizens from unlawful detention.<sup>21</sup> But it should never be issued unless the petition therefor shows upon its face that the prisoner is entitled to be discharged.<sup>22</sup> Nor does it have any purpose to punish the respondent.<sup>23</sup> The distinction between being entitled to freedom and being protected from "third degree" methods seems obvious enough.

But how would allowing the constitutional protection against self-incrimination help the prisoner until after he had already been subjected to the third degree? In the all too frequent cases where the third degree is a matter not only for hours, but of days,<sup>24</sup> the court would have the opportunity of properly enjoining any further conduct of this sort, and if the order were disobeyed, of citing the police officers for contempt. Apparently under the Indiana theory, the same court that issued the order could punish for the indirect contempt, without a jury, which jury might be prejudiced in favor of the derelict representatives of law and order.

It may be contended that in jurisdictions with more democratic rules of contempt, the officer, guilty of an indirect contempt, is entitled to a trial by a jury for the contempt. Then what would be the advantage? The answer is this: The question at issue would not be the violation by a police officer of the privilege and immunities of an individual branded as a criminal suspect, but would be the violation by a police officer of the power of a court of a sovereign state. It is submitted that the latter would be more impressive to a jury.

It seems reasonable to assert, then, that a court could grant the protection of the quite general constitutional immunities given against self-incrimination, or there is sufficient authority upon which to base such a decision reasonably enough. This writer was unable to find any authority that had expressly denied the privilege, despite the unsupported opinions of text writers to the contrary. Such a decision would restrict the undesirable activities of police officers and, in the absence of laws removing the entire matter of investigating criminals from the hands of police officers, such a decision would seem a highly desirable result. L. H. W.

<sup>20</sup> *Ex parte Craig*, 282 Fed. 138.

<sup>21</sup> *Bens v. United States*, 266 Fed. 152.

<sup>22</sup> *Superior Court v. State*, 197 Pac. 537.

<sup>23</sup> *People ex rel. Klee v. Klee*, 195 N. Y. S. 778.

<sup>24</sup> *Wan v. United States*, *supra*, note 2.