what is gained by calling a presumption "evidence" or "in the nature of evidence," and what effect the presumption should have upon the burden of coming forward with the evidence and upon the ultimate burden of proof. If the Court were to conclude that no single rule could be applied to all presumptions, a statement to that effect would be helpful. A definite commitment by the Supreme Court of Ohio would obviate much of the misunderstanding which now obtains in the field of presumptions.

ROGER H. SMITH

EVIDENCE — PRIVILEGE AGAINST SELF-INCRIMINATION

The defendant was charged with a violation of Ohio G. C. sec. 6296-30 by operating a motor vehicle while in a state of intoxication or under the influence of alcohol. He refused to submit to a blood test or urinalysis to determine the amount of alcohol in his system. The Court of Appeals for Wayne County said that since the privilege against self-incrimination as guaranteed by the Ohio Constitution applies only to disclosure by utterance, evidence of the demand and refusal was admissible and there was no error in permitting the prosecutor to urge the refusal as an inference of the guilt of the defendant. *State* v. *Gatton*, 60 Ohio App. 192, 14 Ohio O. 20 (1938).

Art. 1, sec. 10 of the Ohio Constitution as amended in 1912 provides, . . . "No person shall be compelled in any criminal case to be a witness against himself; but his failure to testify may be considered by the court and jury and may be the subject of comment by counsel. . . ." Ohio G. C. sec. 13444-3 provides that a criminal defendant ". . . may at his own request be a witness but not otherwise. . . ." The result is that the state may comment on the failure of the defendant to testify but would not be permitted to call him to the stand and force him to claim the privilege. Practically all states have constitutional provisions giving the defendant a privilege but very few authorize comment by the prosecution. (See Calif. Const. Art. 1, Sec. 13 as amended in 1934).

In the principal case the comment by the state upon the defendant's failure to submit to these tests before trial would be meaningless unless it was first shown that the defendant was asked to submit to the tests and refused to do so. Would this be similar to an attempt by the state to call the defendant to the stand in order to force him to claim his privilege? Or would there be any violation of the privilege if these tests had been made against the will of the defendant? The holding of the court here is that "the privilege against self-incrimination . . . applies only to disclosure by utterance, oral or written." This position has

the vigorous support of Mr. Wigmore. 4 WIGMORE, EVIDENCE (2d ed. 1923) sec. 2265. Historically, it is clearly sound. The privilege was created to prevent the defendant from being forced to convict himself out of his own mouth. But constitutional provisions, usually brief, "shall not be compelled to testify," "shall not be compelled to be a witness against himself," may be construed strictly or broadly and some writers have favored a construction more favorable to the defendant. 3 JONES, COMMENTARIES ON THE LAW OF EVIDENCE, sec. 1391 (1926).

A majority of the cases agree with the position taken by this court and by Mr. Wigmore. Thus it has been held no violation of the privilege:— to have defendant stand up in court for identification by a witness, *State* v. *Clark*, 156 Wash. 543, 287 Pac. 18 (1930); *Coles* v. *State*, 3 Ohio C.C. (N.S.) 420 (1901); or for observation by witnesses or jurors, *Commonwealth* v. *Di Stasio*, 1 N.E. (2d) 189 (Mass., 1936); *Lindsey* v. *State*, 4 Ohio C.C. (N.S.) 409, 14 Ohio C.D. 1, *aff'd* in 69 Ohio St. 215, 69 N.E. 126 (1903); to require defendant to write his name on cross examination, *Hall* v. *State*, 171 Ark. 787, 286 S.W. 1026 (1926); to procure defendant's signature by trick, *Lefkovitz* v. *United States Attorney, etc.*, 52 Fed. (2d) 52 (1931); to have officer place a handkerchief over accused's face in identification before trial, and to compel the growth of a beard, *Ross* v. *State*, 204 Ind. 281, 182 N.E. 865 (1932); to compel defendant to remove his coat so that jury might see scars on his body, *State* v. *Oschoa*, 49 Nev. 194, 242 Pac. 582 (1926); to admit X-ray pictures of defendant's wounded arm, *State* v. *Casey*, 108 Or. 386, 213 Pac. 771 (1923); to admit a photograph of defendant taken immediately after the arrest, to aid in identification, *Shaffer* v. *United States*, 24 App. D.C. 417 (1904); to admit evidence of scrapings taken from under the fingernails of the accused to test for human blood, *State* v. *McLaughlin*, 138 La. 958, 70 So. 925 (1926); to compel the accused to unwrap a bandaged hand claimed to have been burned, *State* v. *Garrett*, 71 N. Car. 85 (1874); to compel the defendant to put on his cap for identification before arrest, *Crenshaw* v. *State*, 255 Ala. 346, 142 So. 669 (1932); to compel the defendant to put on an overcoat found in his room to assist in identification, *Richardson* v. *State*, 168 Miss. 788, 151 So. 910 (1934); or to examine the accused against her will to determine pregnancy, *Villaflor* v. *Summers*, 41 Phil. Is. 62 (1920).

On the other hand, it has been held a violation of the privilege: to compel the defendant to stand up in court to enable a witness to testify whether his size and build correspond to the man who was involved in a burglary, *Wells* v. *State*, 20 Ala. App. 240, 101 So. 624 (1924); to

compel the defendant to take dictation in writing (even when on the stand) in falsification case, *Beltran* v. *Sampson and Jose*, 53 Phil. Is. 570 (1929); to compel the defendant to put on a coat found at the scene of the crime (when defendant had taken the stand), *Ward* v. *State*, 27 Okla. Crim. Rep. 362, 228 Pac. 498 (1924); to compel the defendant to don a cap in the presence of the jury, *Tierman* v. *State*, 50 Tex. Cr. Rep. 7, 95 S.W. 533 (1906), disapproved in *Rutherford* v. *State*, 121 S.W. (2d) 342 (Tex. Cr. App., 1939), where requiring defendant to stand and remove his glasses was held admissible; to compel defendant to display an amputated leg, *Blackwell* v. *State*, 67 Ga. 76, 44 Am. Rep. 717 (1881); to compel defendant to place his foot in a pan of mud placed before the jury so that the tracks so made could be compared with measurements of tracks found at the scene of the crime, *Stokes* v. *State*, 5 Baxt. (Tenn.) 619, 30 Am. Rep. 72 (1875); to examine defendant against her will to find out whether she recently gave birth to a child, *State* v. *Kowalewsky*, 24 Ohio L. Abs. 612 (1937); and *People* v. *McCoy*, 45 How. Prac. (N.Y.) 216 (1873), apparently regarded as overruled in *People* v. *Sallow*, 100 Misc. 447, 165 N.Y.S. 915, 36 N.Y. Crim. Rep. 27 (1917).

The same confusion exists in cases where there is a group of cases involving acts of the same kind. It has generally been held no violation of the constitutional immunity: to permit the taking of the shoes of the accused for comparison with tracks made at the scene of the crime, *Biggs* v. *State*, 201 Ind. 200, 167 N.E. 129, 64 A.L.R. 1085 (1929); *State* v. *Griffin*, 129 S. Car. 200, 124 S.E. 81, 35 A.L.R. 1227 (1927); to permit measurements of accused's shoes and feet, *State* v. *Smith*, 133 S. Car. 291, 130 S.E. 884 (1925); and to force the accused to make new tracks for comparison, *State* v. *Barela*, 23 N. Mex. 395, 168 Pac. 545 (1917). A few courts have held to the contrary. South Carolina has taken the anomalous view that an officer may take shoes from the accused for purposes of comparison but cannot force the accused to put his foot in the track. *State* v. *Smith*, *supra*. Of particular interest because of the approach made in the principal case are decisions excluding evidence of the refusal of the defendant to make tracks. *Cooper* v. *State*, 86 Ala. 610, 6 So. 110 (1888); *State* v. *Griffin*, *supra*; and *contra*, *State* v. *McKowen*, 126 La. 1075, 53 So. 353 (1910). The state that allowed the evidence itself to come in also allowed the evidence of the refusal. In *Elder* v. *State*, 143 Ga. 363, 85 S.E. 97 (1915), it was held error to forcibly take defendant's shoes from him for comparison.

In the field of fingerprinting there is more unanimity in the decisions. Many courts assume that such evidence is admissible, but some-

times the issue is contested, though usually with no finding of a violation of the immunity. *United States* v. *Kelly*, 55 Fed. (2d) 67, 83 A.L.R. 122 (1922); *Bartletta* v. *McFeeley*, 107 N. J. Eq. 141, 152 Atl. 17 (1930). A dissent was registered by *People* v. *Hevern*, 127 Misc. 141, 215 N. Y. S. 412 (1926), where the City Magistrate said that fingerprinting before conviction "involves prohibited compulsory incrimination." In 1928 a statute was passed in New York ordering police to take fingerprints in certain arrests but allowing use of the fingerprints only after defendant has been found guilty (Title X of the Code of Crim. Proc.). The weight of this county court decision is not so strong in view of *Schmidt* v. *District Attorney of Monroe County*, 8 N. Y. S. (2d) 787 (1938) expressly adopting the Wigmore approach in an intoxication case.

In cases involving venereal disease as a link connecting a defendant with a crime it is difficult to generalize on the effect of the privilege against self-incrimination because so many cases have found a waiver and so have not considered the problem of what the decision would have been if the examination had been compulsory. *Garcia* v. *State*, 35 Ariz. 35, 274 Pac. 166 (1929); *People* v. *Guiterey*, 126 Cal. App. 526, 14 Pac. (2d) 838 (1932). Numerous cases have excluded such evidence on the basis of compulsion. *State* v. *Height*, 117 Iowa 650, 91 N.W. 935, 59 L.R.A. 437, 94 Am. St. Rep. 323 (1902); *Commonwealth* v. *Valeroso*, 273 Pa. 213, 116 Atl. 828 (1922); *State* v. *Horton*, 247 Mo. 657, 153 S.W. 1051 (1913). In *People* v. *Corder*, 224 Mich. 274, 221 N.W. 309 (1928), a divided court held that it was necessary to have an affirmative expression of consent before there could be a waiver of the constitutional immunity. Ohio assumes that the examination was voluntary in the absence of a showing to the contrary. *Angeloff* v. *State*, 91 Ohio St. 361, 110 N.E. 936 (1914); *Lindsey* v. *State*, *supra*. But in *Jones* v. *State*, 20 Ohio C.C. (N.S.) 542, 31 Ohio C.D. 419 (1905), the court did say that if the examination was not voluntary, the evidence would be inadmissible.

Contrary decisions supporting the Wigmore approach may be found. *United States* v. *Tan Teng*, 23 Phil. Is. 145 (1912); *Territory of Hawaii* v. *Chung Ming (dictum)*, 21 Hawaii 214 (1912). In many cases the question is confused with the question of undue prejudice or materiality. *Bethel et al.* v. *State*, 178 Ark. 277, 10 S.W. (2d) 370, 21 S.W. (2d) 176 (1928). Sometimes emphasis is placed on modesty or possible indignities. *Anonymous*, 34 Misc. 109, 69 N.Y.S. 547, 9 N. Y. Anno. Cas. 438 (1901); *State* v. *Ah Chuey*, 14 Nev. 79, 33 Am. Rep. 530 (1879); *State* v. *Height*, *supra*.

While discussion of the problem of self-incrimination involved is rare, the substantial weight of authority favors admissibility on the issue of insanity of evidence obtained from an examination of the defendant without his consent by physicians or insanity experts. *Blocker* v. *State*, 92 Fla. 878, 110 So. 547 (1926); *Noelke* v. *State*, 15 N.E. (2d) 950 (Ind., 1938); *Commonwealth* v. *Millen*, 289 Mass. 441, 194 N.E. 463 (1935); *Jessner* v. *State*, 202 Wis. 184, 231 N.W. 634, 71 A.L.R. 1005 (1930); *State* v. *Genna*, 163 La. 701, 112 So. 655 (1927); *contra*, *People* v. *Scott*, 326 Ill. 327, 157 N.E. 247 (1927); *People* v. *Lamey*, 103 Cal. App. 66, 283 Pac. 848 (1930).

The cases involving the admissibility of compulsory blood tests or urinalyses to determine intoxication are comparatively recent and the majority of the few cases have held the evidence admissible. *People* v. *Dennis*, 132 Misc. 410, 230 N.Y.S. 510 (1928), reversing *People* v. *Dennis*, 131 Misc. 62, 226 N.Y.S. 689 (1928); *contra*, *Booker* v. *Cincinnati*, 5 Ohio O. 433, 22 Ohio L. Abs. 286 (1936), where the court said that compulsory urinalysis was inadmissible but that in view of the other evidence there was no error. In *State* v. *Duguid*, 50 Ariz. 276, 72 Pac. (2d) 435 (1937) and in *Schmidt* v. *District Attorney of Monroe County*, *supra*, the courts found a waiver but definitely indicated that the privilege was not properly involved. In *Noe* v. *Monmouth County Common Pleas Court*, 6 N. J. Misc. 1016, 143 Atl. 750, *aff'd* in 106 N.J.L. 584, 150 Atl. 920 (1928) an examination (though what kind does not appear) by a physician in an intoxication case was held admissible.

The tendency in recent years has been to construe the privilege against self-incrimination strictly. The privilege keeps out relevant evidence and there seems little justification for broadening its effect by an excess of sentimentalism. The privilege was originally intended to cover testimonial utterances only and there is ample support in principle and authority for confining it to that field. The result reached in the principal case seems clearly justifiable. Any other result would involve an unnecessary broadening of the privilege as well as an extremely technical construction of the Ohio constitutional provision.

ARTHUR N. MINDLING