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CRIMINAL LAW—Compelling Defendant in Criminal Case to speak as Means of Identification—Held, Unconstitutional and Inadmissible as Evidence.—In the recent case of *State v. Taylor*,[1] the South Carolina Supreme Court was again confronted with the question of the admissibility of testimony under *Article 1, Section 17 of the South Carolina State Constitution of 1895.* The pertinent part of aforesaid section reads as follows: . . . "nor shall any person be subject for the same offense to be twice put in jeopardy of life or liberty, nor shall be compelled in any criminal case to be a witness against himself . . . ".

Defendant in the recent case of *State v. Taylor*, while being held as a suspect on a charge of rape, was compelled, along with four other prisoners, to stand with his back to the prosecuting witness and repeat certain words said by assailant to the prosecuting witness at the time of the crime. Prosecuting witness then identified defendant by his voice as her assailant. At the trial, a deputy sheriff who had witnessed the procedure was allowed to testify as to the above transactions. HELD—This was a violation of *Article 1, Section 17, Constitution of 1895.*

In South Carolina, the law is settled that under no circumstances can a defendant be compelled to testify against himself.[2] This applies not only to courts of law but also to examinations before any tribunal or other body that has power to subpoena and compel attendance of witnesses, including hearings before a legislative investigating committee that has been given plenary powers to compel testimony.[3] However, it is not always clear as to what evidence falls within that privilege. While the precise point raised in the principal case is one of first impression in this state, the Supreme Court of South Carolina has held that many other forms of evidence come

1. ..... S. C. ....., 49 S. E. 2d 289 (1948).
2. State v. Griffin, 129 S. C. 200, 124 S. E. 81, 82, 35 A. L. R. 1227 (1923).
3. In Re Hearing Before Joint Legislative Committee, 187 S. C. 1, 196 S. E. 164 (1938).
4. State v. Griffin *supra*, note 2.

within the privilege. In the leading case[4] in this state on the question of self-crimination, it was held that it was permissible for a sheriff to take a defendant's shoe and place it in a track in order to prove that defendant had been near the scene of the crime. Testimony as to the similarity of the tracks and the shoes was admitted. It was held, however, that the defendant could not be compelled to walk in the tracks in order to establish the similarity nor was it admissible to show that defendant refused to properly place her foot in the tracks. In this case the Court laid down the rule which is followed in South Carolina when it HELD, *inter alia:* A defendant in a criminal case cannot be compelled to testify against himself under any circumstances; the line of cleavage being whether the proposed evidence is defendant's testimony, or evidence in itself, unaided by any statement of defendant. Again in *State v. Green*[5] evidence of the similarity of defendant's shoes and tracks outside a window was not admitted when it was shown that defendant had been compelled to place his feet in the tracks for the purpose of comparison. It has also been held that evidence obtained by compelling a defendant to run or walk in a certain manner for the purpose of identification is inadmissible.[6] However, in a recent case it was held that compelling a defendant to stand up in the court room for the purpose of identification is not in violation of *Article 1, Section 17 of the South Carolina Constitution of 1895.*[7]

In the United States there are only two other cases which decide the precise point presented in the principal case. In *Johnson v. Commonwealth,*[8] the exception relating to this point was dismissed upon the ground that the request to introduce this evidence was acceded to by both defendant and his counsel and therefore was never passed upon by the Pennsylvania Court. The other case,[9] a Texas decision, held on identical facts with the principal case that the testimony could not be admitted.

The privilege which is embodied in *Article 1, Section 17 of the South Carolina Constitution* is likewise embodied in the

5. 121 S. C. 230, 113 S. E. 317 (1922).
6. State v. Atkinson, 40 S. C. 363, 18 S. E. 1021 (1893).
7. State v. O'Neal *et al,* 210 S. C. 305, 42 S. E. 2d 523 (1947).
8. 115 Pa.St. 369, 9 A. 78, 81 (1887).
9. Beachem v. State, 144 Tex. Crim. R. 272, 162 S. W. 2d 706, 709 (1942).

Federal Constitution and the constitutions of forty-five other states. However, the decisions of the courts as to its scope and purpose are widely divergent and often conflicting. The theories on the privilege seem to range from those few courts which hold ". . . that the privilege as to self-crimination relates only to oral or written testimonial utterances, and not to any other physical acts or exhibitions even though such acts or exhibitions, required of a defendant on his trial, constitute or disclose evidence tending to incriminate him (see particularly *State v. Ah Chuey,* (1879), 14 Nev. 79, 33 Am. Rep. 530), to the apparent position that the privilege protects the defendant from being required to perform any affirmative act whatever during his trial (aside from being present in court) which would serve as evidence against him. See *Smith v. State,* (1946), 247 Ala. 354, 24 So. 2d 546. These represent the extreme views taken, and most of the cases have not gone so far in either direction . . . ".[10]

The author of the annotation in 171 A. L. R. 1144 divides the privilege into three categories, to wit: (1) where the defendant has not become a witness against himself; (2) on the cross examination of a defendant who has testified in his own behalf; and (3) where the defendant is making a common-law or statutory statement to the jury. The author discusses a possible fourth class in the notes which is where the defendant before the trial is required to perform certain acts which are witnessed by some one and then testified to by this party on the trial. In a general summary of the law in each classification the author states that under classification number (1) the courts generally hold that the defendant must come to court, except in some misdemeanors, sit in view of the jury, and this requires the defendant to be in view of the witness. The courts usually will allow the defendant to perform such acts as will enable witnesses and jury to have a clear view of such portions of his person or attire as are customarily open to public view. Under heading number (2) it is generally held that when a defendant takes the witness stand in his own behalf, he thereby subjects himself to the same rules which govern other witnesses. Since the practice classified under number (3) is employed in only a few jurisdictions and there are only a few cases in point, it is sufficient to say that there is a diversity of

10. 171 A. L. R. 1152.

opinion as to what is admissible under the privilege. While these classifications may be helpful in justifying many of the decisions, no judicial authority has been found for it. South Carolina and the majority of the jurisdictions weigh the merits of each individual case in determining the admissibility of the evidence under this privilege.

The Federal Courts, in accord with Mr. Wigmore, hold that the privilege extends only to testimonial utterances and writings and does not include acts by defendant.[11]

In the principal case, the South Carolina Supreme Court went a long way in extending the privilege granted by *Article 1, Section 17*. However, the decision seems to be sound and in accord with the rule laid down in *State v. Griffin, supra.*

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DIVORCE—Full Faith and Credit Clause of U. S. Constitution—Validity of a Foreign Divorce Decree.—On August 4, 1944, respondent filed a bill of complaint for divorce in the Circuit Court of the Second Judicial Circuit of the State of Florida. The complaint alleged extreme cruelty as grounds for divorce, and also alleged that the respondent was a *bona fide* resident of the State of Florida. In this divorce proceeding, appellant retained Florida counsel, who entered a general appearance, and on September 4, 1944, filed an answer denying the allegations of respondent's complaint, including the allegation as to respondent's Florida domicile, and demanding strict proof thereof. Throughout the entire proceedings, and at all of the hearings, the appellant was present and was represented by counsel, and contested the case. Respondent introduced evidence to substantiate the allegations of his complaint, based upon cruelty, and to establish his Florida domicile. Counsel for appellant had full opportunity to cross examine respondent and his witnesses, and to introduce evidence in rebuttal. The circuit court of Florida, on March 12, 1945, entered a final decree of divorce after specifically finding ". . . that it has jurisdiction of the subject matter and the parties to this cause." More than two years later, on July 15,

11. Holt v. United States, 218 U. S. 245, 252, 31 S. Ct. 2 (1910), Wigmore on Evidence Sec. 2263, pp. 863, 864.

1947, appellant instituted the present action against respondent in the circuit court of Richland County. In this action she asks the court to declare the Florida divorce decree invalid for lack of jurisdiction. The respondent filed a demurrer to the complaint, which was sustained. *HELD,* on appeal, that the divorce proceeding in Florida was valid, and was not the subject of collateral attack because the divorce decree was rendered in a case in which appellant appeared in person and by counsel, and not only contested the case but demanded and received in that Court affirmative relief. Under such circumstances, the Florida Court's jurisdiction was held to be unassailable. *Kahn v. Kahn,* ____ S. C. ____, 49 S. E. 2d 570 (1948).

The question of whether or not a divorce decree granted by the courts of one state can be collaterally attacked in the courts of a sister state has been the subject of considerable comment and prolific litigation. Many of the discordant decisions regarding this matter can be traced to the diversity of facts which have been the basis for the original suits. The present question is of particular concern to the courts of South Carolina, because of its peculiar position as the one remaining State which has not yet provided for legalized divorces.[1]

Any attempt to impeach a divorce decree in a proceeding, the purpose of which is not to annul or cancel the decree, is considered as a collateral attack thereon. *In re Hurter,* 181 N. Y. S. 75, 111 Misc. 85 (1920). Generally, a judgment which is conclusive in the state where rendered must be given full credit in the courts of another state in a suit between the same parties or their privies, with regard to an issue which was determined in the former proceeding. *Scheper v. Scheper,* 125 S. C. 89, 118 S. E. 178 (1923). A decree, however, which is void for lack of jurisdiction may be collaterally attacked. *State v. Westmoreland,* 76 S. C. 145, 56 S. E. 673 (1906). When the collateral attack is allowed, all reasonable intendments and presumptions are taken in favor of the decree sought to be impeached. *Schulze v. Schulze,* 149 Ga. 532, 101 S. E. 183 (1919).

1. Art. 17, Sec. 3, South Carolina Constitution of 1895: "Divorces from the bonds of matrimony shall not be allowed in this State."

Art. 4, sec. 1, of the Federal Constitution[2] requires that judicial proceedings in every state shall be given full faith and credit in the courts of sister states. The Act of May 26, 1790, 1 Stat. at L. 122, chap. 11, as amended, Rev. Stat., sec. 905, 28 U. S. C. A. sec. 697, declares that the judicial proceedings, properly authenticated, shall be given such faith and credit in every ". . . court within the United States as they have by law or usage in the courts of the state from which they are taken." Hence Congress interpreted this portion of the Constitution to mean not partial credit but full credit. *Haddock v. Haddock,* 201 U. S. 567, 50 L. Ed. 868, 26 S. Ct. 525, 5 Ann. Cas. 1 (1905). It is one thing to allow a court to re-examine a finding of jurisdiction when the question was previously determined in ex-parte proceedings as in *Williams v. North Carolina,* 325 U. S. 226, 89 L. Ed. 1577, 157 A. L. R. 1366 (1944). It is quite another thing to permit the same court to cast aside the findings of a court in a sister state where both parties appeared, the question of domicile was contested, and the highest requirements of due process were fully complied with. *Davis v. Davis,* 305 U. S. 32, 83 L. Ed. 26, 118 A. L. R. 1518 (1938).

An examination of the case of *Andrews v. Andrews,* 188 U. S. 14, 47 L. Ed. 366, 23 S. Ct. 237 (1902), will reveal a decision which appears to be *contra* to the holding in the *Kahn* case, *supra.* However, that decision was rendered prior to the modern development of the law with respect to finality of judicial proceedings. *Sherrer v. Sherrer,* 92 Law Ed., Adv. Ops., 1055, 68 S. Ct. 1087, (decided June 7, 1948).

The principle issue decided in the *Kahn* case is not one which has been dealt with by South Carolina courts previously. The well known divorce cases in South Carolina, (*McCreery v. Davis,* 44 S. C. 195, 22 S. E. 178 (1894); *Scheper v. Scheper,* 125 S. C. 89, 117 S. E. 178 (1923); *State v. Westmoreland,* 76 S. C. 145, 56 S. E. 673 (1906); *State v. Duncan,* 110 S. C. 253, 96 S. E. 294 (1918), and the very recent case of *Nimmer's Estate v. Nimmer,* 212 S. C. 311, 47 S. E. 2d 715 (1948) were all concerned with actions in which only one party appeared and in which the question of domicile was not contested.

2. "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof."

The most difficult question presented by this decision is, will an interested third party be precluded from attacking the holding of the foreign jurisdiction to the same extent as the litigating parties? The problem was not dealt with squarely, nevertheless, by implication, it seems that the court went further than to merely decide the rights of the individuals. This is not a situation in which a State and its power to control its domiciliaries are the sole factors. This is, rather, a case in which two States of the Federal Union must construe their respective powers in the light of the Federal Constitution. Chief Justice Vinson concluded his opinion in the *Sherrer* case, *supra,* by saying:

"And where a decree of divorce is rendered by a competent court under the circumstances of this case, the obligation of full faith and credit requires that such litigation should end in the courts of the State in which the judgment was rendered." However this decision might be interpreted in the future, the conflict of authority bearing upon it illustrates the necessity for enactment of uniform divorce laws in each of the forty-eight states.

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