DRUNKOMETER: Tests for intoxication. Evidence admissible in court. Police may use reasonable force to compel submission to test.

October 5, 1940.

Mr. Don F. Stiver,
Superintendent, Indiana State Police,
State House,
Indianapolis, Indiana.

Dear Mr. Stiver:

This will acknowledge your request of October 1, 1940 for an official opinion concerning the use by your Department of the device known as the drunkometer. Without setting out the burden of your letter, it is only necessary to point out that your request really embodies only two specific questions, namely:

> "1. Is evidence obtained by the use of the drunkometer admissible in court?
>
> "2. To what extent may the State Police use force in compelling arrested persons to submit to the drunkometer test?"

We understand that the drunkometer is a machine for calculating the degree of intoxication by a chemical test employing the breath. In recent years there have been several methods evolved for making tests of intoxication. These tests have been based variously upon examining the content of the blood, the urine, the breath, the saliva and the cerebro-spinal fluid. We have been fortunate in Indiana in having in Dr. Harger of Indiana University, a leading expert and experimenter in this field, and more especially in the field of breath tests for alcoholic content. Dr. Harger, in collaboration with other scholars, has proved the almost exact correlation which exists between the alcoholic content in the blood stream and that to be found in the breath. (See a recent chemical test for intoxication employing breath (1938), 110 Journal of the American Medical Assoc. 779). Other distinguished physiologists, among them Dr. Haggard of Yale University, have determined that it is possible to make a very accurate estimate of blood alcohol from the alcoholic content of the breath.

(See Quantative differences in the affects of alcoholic beverages (1938), 219 New England Medical Journal 466). It might be added further that the drunkometer has been given a practical test not only in Indiana but the same kind of procedure was given a practical trial under the auspices of traffic officials in Evanston, Illinois. (See Blood Test to Determine Intoxication, 24 Iowa Law Review, page 200.) We can therefore, I believe, safely accept the scientific *bona fides* of the drunkometer as a device for calculating the extent of intoxication. It is hardly necessary to point out to you that Section 54, Article 5, Chapter 48, Acts of 1939, that is, the Indiana State Highway Traffic Act, has set up by statute a guide for the determination of intoxication by percentage of alcohol in the blood.

The usual objections advanced against the use of such devices, or rather against the admissibility of evidence obtained by the use of such devices, have been that to permit the introduction in evidence of such proof, would deny the privilege against self-incrimination and that the procurement of such evidence would constitute an unlawful search and seizure. I shall discuss the objection of an unlawful search or seizure first.

The Fourth Amendment to the Federal Constitution names four objects of search and seizure: persons, houses, papers and effects. And, fortunately, the Supreme Court of the United States has given a very strict and narrow interpretation to these words. We are concerned here with a search of the person and it has always been considered that such a search was proper where the person has validly been arrested either under a warrant or while committing a misdemeanor in the presence of a peace officer or where the peace officer had proper cause to think that a felony had been committed. (5 C. J. 389; Agnello v. United States, 269 U. S. 20; Wallace v. State, 157 N. E. (2d) 657). Mr. Hugh Willis in an article in the Indiana Law Journal (4 Ind. Law Journal 311, Unreasonable Searches and Seizures), has shown that the Fourth and Fifth Amendments to the Federal Constitution do not flow from the same historical sources. He points out that Dean Wigmore (Wigmore on Evidence, Vol. 4, Sec. 2183 *et seq.;* and 36 Yale Law Journal 988) is of the opinion that evidence obtained illegally and by methods of unreasonable search, should still be admissible because the evidence *per se*

would be admissible within the well established rules of evidence. Dean Wigmore reaches this conclusion, of course, for the reason that the immunity against unreasonable searches and seizures under the Bill of Rights, is for the purpose of protecting the right of privacy and has nothing to do with abrogating the use of certain kinds of evidence. It is true that the Supreme Court of Iowa, in the case of State v. Haight, 117 Ia. 650, 91 N. W. 935, has held that a physical examination of the accused to determine the presence of venereal disease, constituted an unlawful search and seizure as well as a denial of the privilege against self-incrimination, but I agree with the comment and analysis of Professor Ladd in the Iowa Law Journal article earlier referred to, that this case represents an unwarranted extension of the search and seizure provision in the Constitution. In a day which permits the taking of fingerprints and the photographing of accused persons as necessary and practical details of criminal arrest and prosecution, I think that to hold that requiring an accused person to blow in a rubber balloon is a violation of the right of privacy, is not good constitutional law and is not well supported by prevailing decisions in the better jurisdictions.

I proceed to the more important question, that is, the argument that the use of the drunkometer is a violation of the Fifth Amendment to the Federal Constitution and a denial of the privilege against self-incrimination. There are no Indiana decisions on the precise point but there is, of course, a body of law in this state upon the general power of courts to compel defendants in criminal cases to submit to physical examination. Chapter 102, Acts of 1927, provides for the appointment of two or three competent, disinterested physicians to examine the defendant in cases where the defense of insanity is interposed. The validity of this section of our code has never been passed upon by the Supreme Court, perhaps, for the reason that although attacks have been made by some attorneys on constitutional grounds, no one has ever taken such attacks very seriously. Other states have upheld the validity of similar laws. (See State v. Petty (Nev.), 108 Pac. 934; People v. Glover, (Mich.) 38 N. W. 874; and People v. Furlong, 187 N. Y. 198, 79 N. E. 978). On the same general subject, the Supreme Court of West Virginia (State v. Coleman (W. Va.), 123 S. E. 580), has upheld the admissibility of testimony given by a doctor who made an x-ray

examination of the defendant's skull without notice to his attorneys and without his consent. In both New York and New Jersey, it has also been held that physicians may testify as to the physical condition of accused persons against their will even to the extent of the forcible removal of bandages and that such evidence cannot be rejected on the theory that such evidence was produced by compelling the person to be a witness against himself. In Indiana, in the case of O'Brien v. State, 125 Ind. 38, witnesses were permitted to make an examination of the body of the accused in order to find certain marks or scars and upon a request being refused, the prisoner was handcuffed and the proposed examination made forcibly and against his will. The Supreme Court of Indiana came to the conclusion that such compulsory physical examination had nothing to do with testimonial utterance and was, therefore, beyond the constitutional prohibition. (For a discussion of this case and others, see 4 Ind. Law Journal 456, Power of Courts to Compel Defendant in a Criminal Case to Submit to a Physical Examination, by Sumner Kenner.)

The Supreme Court of the United States, in the case of Twining v. New Jersey, 211 U. S. 78, has held that self-incrimination is not within the prohibition of the due process clause under the Fourteenth Amendment to the Federal Constitution and it is only necessary to decide as definitely as possible the application of the self-incrimination provision to the drunkometer. I am of the opinion that this provision of the Constitution applies to testimonial utterances only and I am fortified in this conclusion not noly by the opinion of Dean Wigmore but by the expression of the Attorney General of Pennsylvania (Opinion No. 225, February 29, 1940, Claude T. Reno, Attorney General), as well as a small but pertinent group of modern decisions.

In the case of State v. Dugduid (Ariz.) (1937), 72 Pac. 435, the Arizona Supreme Court upheld the admissibility of evidence taken by urinalysis but somewhat dodged the question of the privilege by simply remarking that consent of the accused was established by a failure to resist. In the case of State v. Gatton, Ohio Court of Appeals for the Ninth Judicial District (1938), 57 Ohio App. Reports —, the court held that there was no reversible error in the trial court's action in permitting the State to introduce testimony showing the request and refusal of the defendant to give a sample on

request, thus permitting the District Attorney to argue the defendant's refusal to the jury. The court used the following language:

> "It will be observed in the instant case that the evidence offered was not required to be given by the defendant himself, but was given by the deputy sheriff and the doctor called by the deputy to make the examination of the defendant. We are unable to observe any merit in the defendant's claim that the introduction of such evidence violated his constitutional rights, and we believe and hold, that the constitutional inhibition against self-incrimination relates only, as stated by Greenleaf, to disclosure by utterance. No such disclosure was required of defendant in this case."

The privilege against self-incrimination was for many years in this country, extended beyond its historical bases to the extent that it became a shield for the defense of criminals but the practical requirements of crime detection and criminal prosecution have tended to narrow the provision to its true historic limits. It is well established today in this country that accused persons must submit to fingerprinting (People v. Sallow, 165 N. Y. Supp. 915), to photographing (Shaeffer v. U. S., 24 App. D. C. 417), to physical examination of injuries or wounds and in the field of demonstrative evidence, wide discretion has been allowed, for example, the use of prints made by shoes. The modern scope of the self-incrimination provision is well summed up by the Supreme Court of Louisiana in State v. Graham, 160 La. 779, 41 So. 90:

> "The tendency of the more modern cases is to restrict the constitutional privilege against compulsory self-incrimination to confessions and admissions proceeding from the accused, and to open the door to all kinds of real evidence or proof of physical facts which speak for themselves."

(For further citations of authority affecting power to make paternity blood tests and the true meaning of the self-incrimination provisions today, see Wigmore on Evidence, Vol. 4, Sec. 2263; People v. McCoy, 45 How. Prac. 216; State v.

Dann, 64 S. Dak. 309, 264 N. W. 667; State v. Wright, 17 N. E. (2d) 428; — Iowa Law Review 57; Villafor v. Summers, 41 Phil. Is. 62; and especially the exhaustive article on "Blood Tests to Determine Intoxication", 24 Iowa Law Review 191.)

I should point out that in the introduction of evidence procured by the drunkometer, it is necessary to lay a foundation in the trial court in introducing such expert evidence of your technicians more or less in the same way as it is necessary to qualify an expert such as a doctor. Being of the opinion that evidence obtained by the use of the drunkometer is admissible in Indiana courts for the reason that it does not amount to testimonial utterance, there is but one more question to be decided and that is to what extent the State Police may use compulsion in requiring accused persons to take the tests. The constitutional provision against self-incrimination is directed largely against a certain kind of evidence, the character of which we have commented on before as relating only to testimonial utterances. There is no legal impediment which would prevent the use by the State Police of any reasonable force or compulsion in making an accused person take such a test. I think the use of force or compulsion to require the taking of the drunkometer test, falls into the same category as the slight and reasonable physical force which is used sometimes in taking fingerprints or in making physical examinations of accused persons. I think it is my duty, however, to point out to you that although there is no legal impediment which would prevent the use by the State Police of force in giving drunkometer tests, yet it is obvious that the conduct of your Police Force and the gathering of such evidence, is not only a legal but an administrative problem, so public policy demands in your case that your Force be instructed to use only the most reasonable means in the compulsory use of the drunkometer as a test for intoxication. To elaborate this point, I think it is necessary to draw a clear distinction between the force that a peace officer may use in making an arrest or in restraining a person in custody and the force that may be used in compelling an arrested person to take the drunkometer test. In the first situation, a peace officer may use all the reasonable force necessary even to the point of killing a person if he rebels against arrest. This rule, of course, cannot be used in compelling an accused person to take the drunkometer test. In compelling a person to take

the drunkometer test, only a reasonable amount of force, such as might be employed in fingerprinting or photographing or making a physical examination, can be used.

Summarizing, it is my opinion that the drunkometer is a scientific device of value and that the tests made by its use may provide evidence which is admissible in court and that the State Police may use all reasonable force in subjecting accused persons to this test.

INSURANCE: State, or political sub-divisions thereof, not authorized by any existing statute to insure against negligent operation of motor vehicles by their agents in governmental capacity.

October 8, 1940.

Honorable Frank J. Viehmann,
Commissioner, Department of Insurance,
State House,
Indianapolis, Indiana.

Dear Sir:

I have before me your letter of August 21st which reads as follows:

> "A question has been referred to the Insurance Department relative to an interpretation of certain Acts of the Legislature in connection with the placing of isurance by political sub-divisions of the State.
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> "We attach hereto a statement of fact with accompanying correspondence placed before the Department and respectfully request an opinion as to whether or not the carrying of public liability and property damage insurance by political subdivisions of the State of Indiana is permissible and whether the payment of premiums on such insurance by the said political subdivisions is legal."

The claim that political sub-divisions of the state may, at their option, carry public liability and property damage insurance is based upon the two sections of Chapter 245, page 1254, of the Acts of 1935 (Sections 39-1816 and 39-1817