

CRIMINAL EVIDENCE.

compelled to do in the *Graham* case. It is immaterial whether he is compelled to do it out of court or in court. The distinction drawn by the court in the *Walker* case against the *Stokes* case, would apply just as well to the *Graham* case.

In *People v. McEvoy*, 45 How. Pr. 216, an indictment of a woman for murder of an illegitimate child at birth, the coroner had directed two physicians to go to the jail and examine her private parts to determine whether she had recently been delivered of a child. She objected to the examination, but being threatened with force, yielded, and the examination was had. Their evidence was offered on the trial, and ruled out. The court said the proceeding was in violation of the spirit and meaning of the Constitution, which declares that "no person shall be compelled in any criminal case to be a witness against himself." "They might as well have sworn the prisoner, and compelled her, by threats, to testify that she had been pregnant and had been delivered of a child, as to have compelled her, by threats, to allow them to look into her person, with the aid of a speculum, to ascertain whether she had been pregnant and been recently delivered of a child." "Has this court the right to compel the prisoner now to submit to an examination of her private parts and breasts, by physicians, and then have them testify that from such examination they are of opinion she is not a virgin, and has had a child? It is not possible that this court has that right; and it is too clear to admit of argument that evidence thus obtained would be inadmissible against the prisoner."

Leonard, J., dissenting in the tattoo case, said among other things: "I think the framers of the Constitution, and the people who adopted it, intended, that at criminal trials, the accused, if such should be his wish, should not only have the right to close his mouth, but that he might fold his arms as well, and refuse to be witness against himself in any sense or to any extent, by furnishing or giving evidence against himself, whether testimony under oath or affirmation, or confessions or admissions without either, or proofs of a physical nature." "If

witness Rhoades had testified that he knew the defendant was Ah Chuey, because he was a good English writer, and had for years kept a diary; that he wrote in it every day, and signed his name "Ah Chuey," to each entry; that he saw the book a few minutes before coming into court; that defendant then had had the book on his person, would any one say that the court, without error, could have compelled him to show the book to the jury? And yet why not, on principle, if he could be compelled to exhibit a private, harmless mark, for the same purpose? The object would have been to ascertain the truth, and the result would have verified the statement. Suppose, instead of the hand and bust of a woman, he had written upon his breast, in India ink, the words, "I am Ah Chuey," why could those words be shown with more propriety than the words in the diary, and could they not have been shown if it was proper to compel him to exhibit the mark?" "Had the identifying mark been upon some portion of the body not concealed, and had the jury seen it by reason of the defendant's presence in court, I do not say that they could not have acted upon the fact so observed. What I say is, that whether the mark is concealed or not, the court cannot compel a defendant, for the purpose of identification, or any other, the tendency of which is to criminate, to exhibit himself, or any part of himself before the jury as a link in the chain of evidence." "Had the district attorney asked the defendant whether he had on his right forearm the tattoo mark described, and had the court, against the defendant's consent, compelled him to answer that he had such a mark, there can be no doubt that such action would have been a grave error. Could the court, at the trial, in the presence of the jury, by other and forcible means, accomplish indirectly what it could not do by direct means?"

Neither Warton nor Bishop express any opinion on this question, but it seems to us that on principle a prisoner cannot be compelled to say anything, or do anything, nor submit to any act addressed to his actual person, which may tend to criminate him.—*Albany Law Journal*.