27/73

SUPREME COURT OF VICTORIA

THOMSON v COTTON

Murphy J

8 October 1973

MOTOR TRAFFIC – DRINK/DRIVING – CHARGES LAID – WHETHER DRIVER OF MOTOR CAR WHO IS UNDER ARREST OBLIGED TO COMPLY WITH A POLICE OFFICER'S REQUEST TO FURNISH A SAMPLE OF BREATH: *MOTOR CAR ACT* 1958, SS80F(6), (8).

[Ed note: In MC45/74 the decision of *King v McLellan*; *Kerley v Farrell* by the Full Court of the Supreme Court of Victoria (Gowans, Nelson and Anderson JJ) 23, 24, 28 May, 24 June 1974 — [1974] VicRp 92; [1974] VR 773 over-ruled the decision of Murphy J in *Thomson v Cotton*. Below is what was held in the case of *King v McLellan*.]

HELD:

1. In *Thomson v Cotton*, unrep, VSC, 8 October 1973, Murphy J ruled that, notwithstanding the provisions of s80F(6) of the *Motor Car Act* 1958 ('Act') which authorized a member of the police force to require a person who had become a suspect by answering to one or other of the descriptions therein set out to furnish a sample of his breath, and s80F(8) which obliged the "suspect" to do so, and s80F(11) which made it an offence for him to refuse or fail to do so, such provisions did not apply to a person who when so required was already under arrest on a charge of driving a motor car while under the influence of intoxicating liquor under s80B and that a refusal to furnish the sample was therefore not an offence under s80F(11) of the Act. The basis of his Honour's reasoning was that there was applicable to the case of a person under arrest a common law rule that protected him from being obliged to incriminate himself in any form. He held that in the absence of clear words in the relevant legislation, indicating that the legislature had intended to abrogate the common law rule, the legislation should not be construed so as to require a person under arrest to furnish a sample of his breath, the analysis of which might incriminate him, and further that on its proper construction s80F(11)(a) of the Act did not evince an intention to make it apply to a person under arrest.

2. The Court of Appeal did not share these views. Section 80F(11)(a) was not to be read down in the way suggested but applied to all persons in respect of whom the requirements of s80F(6) and s80F(8) had been fulfilled. The contrary conclusion appeared to depend in part upon attributing to a maxim of the common law a breadth of operation which it did not have and in part upon finding in the relevant statutory provisions indications of intention which were not there and downgrading the clarity of the meaning of the provisions themselves.

***Thomson v Cotton*, unrep, VSC, 8 October 1973, Murphy J, overruled.**

3. That there is a fundamental principle that no man can be compelled to incriminate himself cannot be gainsaid. The maxim is one expression of the principle which has been quoted and applied countless times. But as an examination of the history of this principle shows, the protection afforded by it has always been accorded, and has only been accorded, in respect of a right to refuse to answer incriminating questions and not to incriminate himself, when being interrogated in some form of judicial inquiry. Even in the United States where the common law maxim has been transmuted into constitutional safeguards or statutory protections the principle has not been extended beyond incriminating answers to questions.

4. Accordingly, the common law principle regarding self-incrimination did not apply to the taking of a breath sample pursuant to s80F of the Act.
