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WITNESSES-PRIVILEGE AGAINST SELF-INCRIMINATION-EFFECT OF INCORRECT DECISION BY TRIAL JUDGE IN COMPELLING ANSWER WHEN PRIVILEGE ASSERTED

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WITNESSES—PRIVILEGE AGAINST SELF-INCRIMINATION—EFFECT OF INCORRECT DECISION BY TRIAL JUDGE IN COMPELLING ANSWER WHEN PRIVILEGE ASSERTED—In a judicial proceeding, a question is asked of a witness, which question he declines to answer, claiming that the answer will tend to incriminate him. The judge orders him to answer. He does so and the answer does incriminate him. What happens?

In the year 1807 Aaron Burr, charged with treason against the United States, was brought before the Circuit Court of the United States sitting at Richmond, Virginia, John Marshall, Chief Justice of the United States, presiding. There were present eminent counsel on both sides, representing the cream of the American bar. A grand jury was summoned and instructed and retired to perform its labors. Whereupon the attorney general moved that the court proceed to hear witnesses for the commitment of Colonel Burr while the grand jury was pursuing its inquiries. The motion was granted and, as counsel had to remain there on the commitment hearing, the court adopted the practice, when instructions were requested of him by the grand jury as to questions that arose in their deliberations, of throwing such questions open to the assembled bar for discussion. One such question arose when one Willie, who had been Burr's secretary, was asked to translate that part which was in cipher of a letter which was in the handwriting of Willie and was alleged to have been sent by Burr to a confederate. The witness refused the request, claiming his constitutional privilege against self-incrimination. The question involved was argued by counsel, learnedly and at length, and taken under advisement. Two days later the Chief Justice handed down his famous opinion, which has ever since been cited as the best exposition on the subject. He ordered the witness to comply with the request, stating that he could see no danger of any self-incrimination from such compliance.[1] In his opinion he stated as follows:

> "When a question is propounded, it belongs to the court to consider and to decide whether any direct answer to it can implicate the witness. *If this be decided in the negative, then he may answer it without violating the privilege which is secured to him by law.* If a direct answer to it *may* criminate himself, then he must be the sole judge what his answer would be. The court cannot participate with him in this judgment, because they cannot decide on the effect of his answer without knowing what it would be; and a disclosure of that fact to the judges would strip him of the privilege which the law allows, and which he claims. ... Many links frequently compose that chain of testimony which is necessary

[1] COOMBS, THE TRIAL OF AARON BURR 57–70 (1864).

to convict any individual of a crime. It appears to the court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible but a probable case that a witness, by disclosing a single fact, may complete the testimony against himself, and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact of itself might be unavailing, but all other facts without it would be insufficient. While that remains concealed within his own bosom he is safe; but draw it from thence, and he is exposed to a prosecution. . . .

"What testimony may be possessed, or is attainable, against any individual the court can never know. It would seem, then, that the court ought never to compel a witness to give an answer which discloses a fact that would form a necessary and essential part of a crime which is punishable by the laws."[2]

From this opinion of Chief Justice Marshall the courts of the United States have extracted and developed the three following propositions:

"1. That it is for the court to decide, 'in the first instance,' when a question is propounded, whether any '*direct*' answer to it may incriminate the witness.

"2. If the conclusion of the court under proposition number one be that the answer may incriminate the witness, it is for the witness to decide what the '*effect*' of the answer would be and to answer or refuse to answer accordingly.

"3. That if the answer may disclose a fact which forms a necessary '*link*' in a chain of evidence which would be sufficient to convict the witness of any crime, the immunity must be allowed."[3]

The one proposition which the courts have not extracted and developed from that opinion is the meaning of that sentence which the writer has italicized in making the quotation above. "*If this be decided in the negative, then he may answer it without violating the privilege which is secured to him by law.*"

What does that sentence mean? That if the witness is compelled by the court to answer the question and the answer is self-incriminating the witness is thereafter immune from prosecution for that crime? Or only that the testimony so given cannot be used against the witness in a prosecution for that crime?

[2] United States v. Burr, In re Willie, 25 F. Cas. No. 14,692e, p. 38 at 40 (1807) (italics added).

[3] Rapacz, "Rules Governing the Allowance of Privilege against Self-Incrimination," 19 MINN. L. REV. 426 at 432 (1935).

The writer has searched the digests in vain for a case in which the exact question under discussion here has arisen. But if there ever was such a case the writer has been unable to find it. He has found a number of cases where the court has ordered the witness to answer, after a claim of privilege has been asserted; but in all those cases the witness continued to refuse to answer, was committed for contempt and the case came before the appellate court in habeas corpus proceedings, by which time the original trial was long over with. In those cases the appellate court has generally agreed with the trial judge that there was nothing in the question asked that could result in a self-incriminating answer.[4] In a few cases the appellate court has disagreed with the trial judge, holding that the question asked had dangers and an answer to it should not have been ordered.[5]

There is only one case that the writer has been able to find where the witness asserted his privilege, the court ordered him to answer, he did answer, the answer tended to incriminate him and he then claimed immunity from prosecution. But that case is of no assistance in solving our problem, for it developed, on the hearing of the motion to quash the indictment, that the judge who ordered the witness to answer was only a justice of the peace, without power to so order or to punish for contempt and the motion was therefore without foundation.[6]

Nor do we obtain any light on that exact question from text writers or from contributors to law reviews.[7] They all discuss the question of the right of the witness to refuse to answer and the responsibility of the judge in ruling on such claim of privilege, but they do not either propose or solve the problem of what will happen if it turns out that the judge was wrong in concluding that an answer responsive to the question could do the witness no harm.

There being no direct authority on our question, we have to turn to other sets of problems arising under the same constitutional provision, to see if we can obtain some light on the position that the courts would be likely to take in our case. Here we are more fortunate, for we do find some very helpful authority.

After the Interstate Commerce Act was passed, government attorneys, in grand jury investigations as to violations of that act, found that

[4] Examples of these cases are Mason v. United States, 244 U.S. 362, 37 S. Ct. 621 (1917), and In re Bommarito, 270 Mich. 455, 259 N.W. 310 (1935). In each of these cases the witness had evidently been advised to claim privilege and he claimed it prematurely as to an apparently harmless question, preliminary in character.

[5] An example of these cases in Ex parte Irvine, (C.C. Ohio, 1896) 74 F. 954.

[6] Faucett v. State, 10 Okla. Crim. 111, 134 P. 839 (1913).

[7] 8 WIGMORE, EVIDENCE, 3d ed., §§ 2270, 2271 (1940); Corwin, "The Supreme Court's Construction of the Self-Incrimination Clause," 29 MICH. L. REV. 191 (1930); Rapacz, "Rules Governing the Allowance of the Privilege against Self-Incrimination," 19 MINN. L. REV. 426 (1935); 49 YALE L. J. 1059 (1940).

they were often up against a stone wall, so far as being able to obtain witnesses was concerned, for, although the prosecutions were generally against corporations, the officers and clerks of such corporations were also subject to prosecution for the same crime and when called as witnesses they invariably claimed their constitutional privilege. To obtain the desired testimony government attorneys undertook to assure the proposed witnesses of immunity, under the provisions of section 860 of the Revised Statutes, which read as follows:

> "No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture. . . ."

One Counselman, called as a witness before the grand jury on an investigation of alleged rebating by various northwestern railroads, declined to answer questions put to him, claiming the constitutional privilege, and persisted in his refusal even after having been advised of his immunity under the statute above quoted. He was therefore committed for contempt. He sued out habeas corpus and the case came before the Supreme Court in the celebrated case of *Counselman v. Hitchcock*.[8] The Court ordered the prisoner discharged. As to the effect of the so-called "immunity statute," the Court said:[9]

> ". . . This, of course, protected him against the use of his testimony against him or his property in any prosecution against him or his property, in any criminal proceeding, in a court of the United States. But it had only that effect. It could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence against him or his property, in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted.
>
> "The constitutional provision distinctly declares that a person shall not 'be compelled in any criminal case to be a witness against himself;' and the protection of § 860 is not coextensive with the

[8] 142 U.S. 547, 12 S. Ct. 195 (1892).
[9] 142 U.S. at 564.

Constitutional provision. Legislation cannot detract from the privilege afforded by the Constitution."

Shortly therafter Congress passed a new statute, applicable only to proceedings under the Interstate Commerce Act and reading as follows:[10]

"No person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements, and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the commission . . . on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding. . . ."

Again the question of the sufficiency of a statute to accomplish the result desired came before the Supreme Court in a habeas corpus proceeding following a commitment of a witness for contempt for refusing to answer questions before a grand jury.[11] The Court held that this new statute, securing to witnesses immunity from prosecution, was virtually an act of general amnesty and that the witness could be compelled to answer the question.

The same problem involved in *Counselman v. Hitchcock* came before the Court of Appeals of New York in the fairly recent case of *Doyle v. Hofstader*,[12] and, in an exhaustive opinion by Justice Cardozo, the same conclusion was reached, that to insure the witness the protection guaranteed by the Constitution, the legislature must grant to him absolute immunity from prosecution for any crime which he may be compelled to reveal.

So much for the immunity statute decisions. Now for a line of decisions in another fact situation.

A number of American courts have taken the position,[13] although there is authority to the contrary,[14] that, where a witness is called before

[10] 27 Stat. L. 443, 49 U.S.C. (1940), § 46.

[11] Brown v. Walker, 161 U.S. 591, 16 S. Ct. 644 (1896).

[12] 257 N.Y. 24, 177 N.E. 489 (1925).

[13] United States v. Edgerton, (D.C. Mont. 1897) 80 F. 374; Boone v. People, 148 Ill. 440, 36 N.E. 99 (1894); State v. Froiseth, 16 Minn. 296 (1871); State v. Gardner, 88 Minn. 130, 92 N.W. 529 (1903); People v. Haines, 6 N.Y. Crim. 100, 1 N.Y.S. 55 (1888).

[14] Spearman v. State, 34 Tex. Crim. 279, 30 S.W. 229 (1895).

a grand jury which is investigating a crime with the commission of which the witness is himself to be charged, it is a violation of his constitutional right if he is not informed, before giving his testimony, that his own conduct is the subject under investigation. The consequence of this violation of constitutional right, so say these decisions, is that any indictment rendered against him must be quashed.[15]

Adding the authority gained from a study of these grand jury cases to that gained from a study of the immunity statute cases, it becomes rather clear that the answer to the problem that we have been discussing is that when the judge wrongfully orders the witness to answer the question and the witness in so doing gives testimony that is self-incriminating, either directly or furnishing a clue or clues leading to incrimination, he thereafter is immune from prosecution for the crime so revealed.

The remaining question to be discussed is as to how and when this claim of immunity is to be raised and how far the immunity extends. Apparently, arguing by analogy to the grand jury cases, it would be by a motion to quash the indictment or information, made after the indictment is returned or information filed,[16] the motion to quash being in the nature of a plea in abatement, according to one authority,[17] or a plea in bar, according to another authority.[18]

In that hearing, on whom is the burden of proof and what showing must be made to obtain the relief desired?

According to the theory of Judge Bellinger in *United States v. Edgerton*,[19] all that should be required of the mover would be that he show (1) that he was called before a grand jury without being informed that his own conduct was the subject under investigation; and (2) that he testified before such grand jury. Apparently the subject matter of his testimony before the grand jury would be unimportant, for, as the learned judge said, in his opinion,[20] "Where a witness is compelled to testify against himself the injury inheres in the violence done to his rights. It is not susceptible of proof, nor the policy of the law to require it, and the injury done to the public in such case outweighs that suffered by the defendant."

In the other cases cited, concerning the propriety of the motion to quash, the theory of the court as to the showing that must be made is not so clear, for in all those cases it appears that the prosecution had either failed to traverse the allegations of fact made in the affidavits

[15] See cases in note 13, supra.
[16] Id.
[17] State v. Lloyd, 152 Wis. 24, 139 N.W. 514 (1913).
[18] Scribner v. State, 9 Okla. Crim. 465, 132 P. 933 (1913).
[19] (D.C. Mont. 1897) 80 F. 374.
[20] Id. at 376.

on which the motion was based or had expressly conceded the truth of such affidavits and the accused in each case had stated in his affidavit that he had testified before the grand jury as to the crime now charged against him. It is significant, however, that although in the one case where the prosecution had stipulated as to the correctness of the affidavit supporting the motion, the Supreme Court ordered the indictment quashed,[21] in the other cases there was a reversal of the conviction and a remand to the trial court for further proceedings. These proceedings, it would appear, would be a hearing by the trial court as to the truth of the facts alleged on the motion to quash, including, among the facts to be determined, the allegation that the accused did testify before the grand jury as to the crime with which he is now charged. *United States v. Edgerton* appears to be alone in its holding that what the testimony of the witness was is of no consequence in arriving at the decision on the motion.

A somewhat different statement of the procedure to be adopted in such a case was suggested by Justice Timlin, of the Wisconsin Supreme Court, in his opinion in the case of *State v. Lloyd.*[22] In that case, following a suspicious fire, one Lloyd, an insurance agent, had been called before the state fire marshal, under a writ of subpoena, issued by the latter pursuant to statutory authority, and had been interrogated regarding the issuance by Lloyd of certain fire insurance policies which it was claimed had been fraudulently issued, after the fire, to cover property already destroyed. Later an information was filed against Lloyd and the insured, charging conspiracy to defraud the insurance companies. When the case was called for trial, Lloyd moved to quash the information, on the ground that he had been compelled, in the examination before the state fire marshal, to be a witness against himself. The trial judge granted the motion and the case came before the supreme court on a writ of error, sued out by the state. The court reversed the order to quash, basing its decision on a number of grounds. (1) that the statute giving the state fire marshal authority to issue subpoenas was unconstitutional: (2) that as to no question asked him did the accused assert his constitutional privilege; (3) that there was no duty on the state fire marshal to first advise the accused as to his constitutional privilege. Remanding the case for further proceedings, the court had the following to say as to the procedure to be followed in determining the constitutional issue raised:

> "The constitutional rights of the citizen against being compelled to incriminate himself are amply protected by upholding him in his refusal to give such evidence, and by rejecting the in-

[21] State v. Froiseth, 16 Minn. 296 (1871).

[22] 152 Wis. 24, 139 N.W. 514 (1913).

criminating evidence which he is ordered or compelled to give notwithstanding his refusal, when this evidence is offered against him. Cases may arise, it is true, in which the witness claimed his privilege, the claim was denied, and he testified, and this testimony so given furnished the only means by which other testimony upon which his conviction was procured was discovered. This is rather a fanciful condition, but its occurrence is possible. In such case, in order to exclude the testimony so discovered, the accused must show that it was discovered in this way. Upon a motion to quash an information because based upon incriminating answers extorted from the accused and upon other facts discovered only through means of these incriminating answers, the burden is upon the party moving to quash the information to make this appear. It does not appear in the instant case, rather the contrary. It is not necessary to the protection of the accused in his constitutional rights that the information be quashed in this case. The accused, if guilty, may be convicted upon his own admissions voluntarily made in the examination before the state fire marshal or upon other evidence the discovery of which is not necessarily due to any self-incriminating and forced answers of the accused. All the rights of accused can be taken care of by rulings upon evidence during the trial."[23]

The suggested procedure, that the trial be proceeded with and that the question of privilege be raised by objections to evidence offered, was probably right for that particular case but it would not seem to be the most economical procedure in the ordinary case, for, if the accused is to be entitled to immunity, that issue should be decided before time is wasted on a more or less lengthy trial of other issues. Justice Timlin's suggestion, however, does add a new thought to our original problem. Ever since the decision was made in *Counselman v. Hitchcock*[24] the extreme rule of immunity there laid down has been much criticized, as not recognizing the practicalities of the situation and as freeing from prosecution criminals whose real rights have not been in any way invaded.[25] Would it not be a common-sense solution of our problem that, in a case where a witness has been compelled by a judge to answer a question and he claims that his answer was self-incriminating, he be compelled to prove, to the satisfaction of the trial judge, on a motion to quash an indictment against him, that the indictment was based either upon incriminating answers extorted from the accused or upon facts

[23] 152 Wis. at 31.

[24] 142 U.S. 547, 12 S. Ct. 195 (1892).

[25] 8 WIGMORE, EVIDENCE, 3d ed., § 2261 (1940); Corwin, "The Supreme Court's Construction of the Self-Incrimination Clause," 29 MICH. L. REV. 191 at 205 (1930).

discovered only through means of those incriminating answers? If he failed to meet that burden and the case proceeded to trial and on that trial the prosecution was able to prove its case by independent proofs, without relying on any evidence obtained or clues furnished by the witness' statements, should not the conviction be allowed to stand?

If the wrongful overruling of a witness's claim of privilege does grant him immunity from prosecution, why is it that some clever criminal, when called as a witness in any suit, has not taken advantage of this opportunity for immunity from punishment for some crime that he has committed by claiming privilege, when an apparently harmless question has been asked him and then, when the judge has overruled his claim, by giving an answer which is incriminating in nature? The reason why this apparently has never been done is probably that the judges, in ruling on these claims of privilege, have been extremely cautious in ordering an answer to a question if they consider that there might be any chance of their compelling self-incrimination. If to an apparently harmless question the witness should blurt out a confession of crime, his answer would be unresponsive to the question asked and it could never be successfully urged that such answer was one that he had been compelled to give. To carry through an elaborate scheme of obtaining immunity, by a question and ruling thereon that would permit the witness to give a responsive self-incriminating answer, would require a corrupt attorney, to ask a carefully thought-out question, a corrupt judge, to compel an answer thereto, and a witness with enough confidence in the soundness of the scheme to be willing to voluntarily confess to a crime of which there is no certainty that he could otherwise be proved guilty. Apparently such a combination of diverse factors has never been found to exist.

J. E. T.