

April 1958

Constitutional Law--Witnesses--Privilege Against Self-Incrimination

C. R. S.

West Virginia University College of Law

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Constitutional Law Commons](#), and the [Evidence Commons](#)

Recommended Citation

C. R. S., *Constitutional Law--Witnesses--Privilege Against Self-Incrimination*, 60 W. Va. L. Rev. (1958).
Available at: <https://researchrepository.wvu.edu/wvlr/vol60/iss3/10>

This Case Comment is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

From a practical standpoint, taxation of the loop deviation in the *Central Greyhound* case, covering over forty percent of the entire route, would understandably burden interstate commerce to an unreasonable degree, whereas the degree of burden imposed in the instant case through taxation of the loop would appear to be so insignificant as to invoke the *de minimis* rule. See Brown, *State Taxation of Interstate Commerce--What Now?*, 48 MICH. L. REV. 899 (1950).

In any case, the past decisions of the courts would bear out a conclusion that in a situation involving an inconsequential loop deviation, caused by geographical conditions, and closely related to the intrastate traffic, the deviation itself becomes constitutionally insignificant for taxing purposes. Therefore the taxing state need not apportion its tax in consideration of a minor detour, but may consider it as business carried on entirely within the state. See *e. g.*, *Central Greyhound Lines v. Mealey*, *supra*; *Lehigh Valley Ry. v. Pennsylvania*, *supra*; *American Barge Lines v. Koontz*, 136 W. Va. 747, 68 S.E.2d 56 (1951).

D. L. McC.

CONSTITUTIONAL LAW — WITNESSES — PRIVILEGE AGAINST SELF-INCRIMINATION.—A, secretary-treasurer of a labor union, was issued a personal subpoena *ad testificandum* and a subpoena *duces tecum* addressed to him in his official capacity as a union officer, for appearance before a federal grand jury investigation. He failed to produce the demanded books and records, and refused, on the ground of self-incrimination, to answer questions pertaining to their whereabouts; he was adjudged guilty of criminal contempt upon his repeated refusal to answer. This conviction was upheld by the United States Circuit Court of Appeals for the Second Circuit. *Held*, on certiorari, that despite the fact that a custodian of records voluntarily assumes a duty which overrides his claim of privilege as to the records themselves, he does not thereby waive the fifth amendment privilege against self-incrimination as to oral testimony concerning his failure to produce the records. *Curcio v. United States*, 354 U.S. 118 (1957).

The much discussed and often maligned portion of the Constitution of the United States which gives rise to the principal case

guarantees that "no person . . . shall be compelled in any criminal case to be a witness against himself . . .". U.S. CONST. amend. V, cl. 3. The privilege is not peculiar to the United States; it was, in fact, embodied in English law centuries ago as the maxim, *nemo tenetur prodere se ipsum*. GRISWOLD, *THE 5TH AMENDMENT TODAY* 2 (1955). There is a record showing the use of such privilege as far back as the sixteenth century. *Cullier and Cullier*, Cro. Eliz. 201 (1589). It was regarded as fundamental enough to warrant inclusion in the Bill of Rights, although no similar provision appears in earlier basic documents such as the Magna Charta or Declaration of Independence. HOOK, *COMMON SENSE AND THE FIFTH AMENDMENT* 24 (1957). In recent years, its use is regarded, particularly by the layman, as more a plaything for idle Communists and others of their ilk than as a basic safeguard. Historically speaking, there are three basic reasons normally given for inclusion of the privilege: (1) it would be cruel to require one to give evidence of his own guilt; (2) protection of the innocent; and (3) protection against the state (particularly, from torture or other form of coercion).

The privilege is not—and has never been—considered as all-inclusive. The places wherein it may be used include things other than formal trial, such as appearance before a federal grand jury, 8 WIGMORE, *EVIDENCE* 2252 (3d ed. 1940), but the use is limited. Even confining the realm of support for this statement to cases akin to the one under discussion, it has been held that the custodian of corporate records may not invoke the privilege on the ground that production might tend to incriminate the producer, personally. *Essgee Co. v. United States*, 262 U.S. 151 (1923); *Wilson v. United States*, 221 U.S. 361 (1911). The same principle is applied to custodians of noncorporate organization records. *United States v. White*, 322 U.S. 694 (1944) (labor union).

The principal case presents a novel twist to an old situation. It would seem, on first inspection, to set a dangerous precedent in that record custodians might deliberately destroy or otherwise put beyond use the demanded records, and be immune from prosecution. This is not true; custodians in such instances are subject to prosecution for failure to produce records demanded by subpoena *duces tecum*. See *Nilva v. United States*, 352 U.S. 385 (1957); *United States v. Fleischman*, 339 U.S. 349 (1950); *United States v. White, supra*; *Wilson v. United States, supra*. In the principal case, the citation for contempt was not for *failure to produce the records*, but was for *refusal to answer questions concerning this failure*.

In view of this, the problem is basically resolved into one issue: Is this the type act which the self-incrimination provision is designed to encompass?

In the United States, this has not been a provision calling for strict interpretation. *Blau v. United States*, 340 U.S. 159 (1951); *Boyd v. United States*, 116 U.S. 616 (1886). The Supreme Court has stated, moreover, that "this constitutional protection must not be interpreted in a hostile or niggardly spirit", in referring to the privilege. *Ullmann v. United States*, 350 U.S. 422, 426 (1955). This construction has not been without criticism, but appears to be that which will be maintained in light of past decisions as well as those more recent ones shown above. Cf. *United States v. Murdock*, 284 U.S. 141 (1932); 8 WIGMORE, EVIDENCE 2251 (3d ed. 1940).

In recent years, only one case has been considered by the Supreme Court which has a remotely parallel situation—the much-cited *Rogers* case. *Rogers v. United States*, 340 U.S. 367 (1951). In that case, the privilege was invoked as a basis for excusing refusal to name the person who had custody of certain records when one under subpoena failed to produce the records; the Supreme Court refused to allow this. Thus, an opposite result was reached to that in the principal case. However, the bases of decision in the two cases were just as opposite as were the decisions themselves. The *Rogers* decision was based on (1) a waiver of the privilege through lack of timely invocation, and (2) an assumption that the harm, *i.e.*, self-incrimination, had already occurred. Parenthetically, it might be stated that although the bases of decision are correct, there is room for doubt as to their applicability to the fact pattern in the *Rogers* case. *United States v. Moma*, 317 U.S. 424, 427 (1943) (waiver); *Brown v. Walker*, 161 U.S. 591, 597 (1896) (harm already done). The *Rogers* case points out the difference, rather than similarity, in the situations presented. In the principal case, the invocation of the privilege was timely; in the *Rogers* case, it was not. In the *Rogers* case, incrimination by self-testimony was already present; in the principal case, it was not. Thus, the aspects treated in the cases are truly dissimilar, even though they appear much the same on the surface.

Prior to forming conclusions based on the preceding materials, there is one further argument often used in this and similar cases: Prosecution for such offenses might be hampered if the decision were allowed to stand unchallenged. This may be rather sum-

marily disposed of, having never been considered as a *valid* argument. Cf. *United States v. Nesmith*, 121 F. Supp. 758 (D.C.D.C. 1954).

In the foregoing presentation, it has appeared that (1) historically speaking, the privilege against self-incrimination has been present for not less than four hundred years; (2) despite criticism, the privilege has not been subjected to narrow interpretation in the United States; (3) cases similar on the surface which have been decided in what would appear to be a *contra* fashion have not been decided on the same rationale, but rely on waiver of the privilege; and (4) even the strictest interpretation in favor of those invoking the privilege in such instances as are presented in the principal case will not preclude prosecution for failure to produce the records, but merely removes the additional penalty for the witness's refusal to convict himself from his own mouth.

In view of the above comments, it would appear that the case as presented is novel only as to facts; the basic problem present is still conviction of a person through his own statements. This is precisely the situation obviously intended to be prevented, by the very language of the self-incrimination clause of the fifth amendment. When regarded as such, it further appears that the provision is not broadened by this decision, but is only affirmed as to effect. It may be true that some guilty party may escape conviction, but this was considered by the founders of the United States to be preferable to a system wherein the likelihood of the guilty *and* innocent being convicted was greater. *Ullmann v. United States*, *supra* at 428. The decision of the principal case, although admittedly allowing a freedom of action—or inaction—which may render conviction more difficult, seems consistent when seen as a part of a legal system wherein the scales are deliberately weighted in favor of the defendant in any criminal action.

C. R. S.

CRIMINAL LAW—DOUBLE JEOPARDY—WAIVER THEORY DISAPPROVED.—*D* was tried under an indictment charging arson in the first count and first degree murder in the second count. As to the second count, the trial judge instructed the jury as to both first and second degree murder. The jury returned a verdict finding *D* guilty of arson under the first count and second degree murder under the