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THE RIGHT OF THE ACCUSED IN A CRIMINAL CASE NOT TO BE COMPelled TO BE A WITNESS AGAINST HIMSELF.*

MOSE E. BOIARSKY**

The early common law knew nothing of the maxim nemo tenetur prodere seipsum.1 Its procedural methods had to do with ex officio oath, with an interrogatory oath, and with an inquisitorial procedure. Today, however, the accused may sit "serenely watching the contest, wrapped in a mantle of presumption of innocence."2

The procedure of investigation, or inquisitorial procedure, seems to have originated in the Roman Law3 and was later adopted by the Catholic Church. Innocent III, whose influence early in the 1200s, caused the abolition of the trial by battle by the Church, introduced and developed the interrogatory oath which pledged the accused to "swear that you shall make true answers to all things that shall be asked of you."4 One writer has said that the inquisitional cast to the oath probably had its origin in a combination of circumstances following the War of the Roses; that the nobility had in large part been destroyed, thus removing a check upon the Crown.5 Particularly was this true when applied to criminals.

Much light has been thrown on the practice of questioning the accused of crime by Sir James Fitzjames Stephen.6

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* The James F. Brown Prize Thesis, 1927-28. In 1919 the late James F. Brown, of the class of 1873, gave $5,000.00 to the University to be invested by it and the income used as a prize for the best essay each year on the subject of the individual liberties of the citizen as guaranteed by our constitutions. Any senior or any graduate of any college of the University, within one year after receiving his bachelor's degree, may compete for this prize.

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1 "No person shall be compelled in any criminal case to give evidence against himself."


3 MAURICE PARMELEE, CRIMINOLOGY, 275.

4 For a complete history of the privilege against self-incrimination in all its various phases, applicable both to the accused and to witnesses, see WIGMORE, EVIDENCE, §§2250.

5 Albert J. Harno, "Recent Criminal Cases in Illinois," 6 ILL. LAW QUAR. 114.

6 STEPHEN, HIST. CRIM. LAW, I., 325.
Considering a group of trials which occurred between 1554 and 1637, he says:

"The prisoner, in nearly every instance asked, as a favor that he might not be overpowered by the eloquence of a counsel denouncing him in a set speech, but, in consideration of the weakness of his memory, might be allowed to answer separately to the different matters which might be alleged against him. This was usually granted, and the result was that the trial became a series of excited altercations between the prisoner and the different counsel opposed to him. Every statement of counsel operated as a question to the prisoner, and indeed they were constantly thrown into the form of questions, the prisoner either admitting or denying or explaining what was alleged against him. The result was, that, during the period in question, the examination of the prisoner at was the very essence of the trial, and his answers regulated the production of the evidence; * * *"

Under this method of procedure, the safeguards of innocence were disregarded, and frequently torture was used.

"The judge proceeds ex officio either of his own mere motion, or on the suggestion of a promoter (inquisitio cum promovente); * * *"

"The accused was arrested, kept in confinement, more or less close, and examined * * * the examination being sometimes carried on by means of torture. He had no counsel, apparently no right to summon witnesses, and was not allowed to know the evidence against him * * * The result was that he was or might be given no opportunity to cross-examine them * * *"

Certainly such a practice was void of prejudice against self-incrimination and sentiment as to examining a defendant of his own defense. The Millenary Petition (1603), asking for relief, contained, "That the oath ex-officio,

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RIGHT OF THE ACCUSED IN A CRIMINAL CASE

whereby men are forced to accuse themselves, be more sparingly used.\(^9\)

The seventeenth century in English legal history gave to us many of our existent institutions, and it is not strange, therefore, that we should seek in that period some light on the development of a maxim which today has become well-rooted in our federal and state constitutions and one which many courts are prone to apply liberally.

John Lilburn, an obstreperous and forward opponent of the Stuarts and "popularly known as 'Freeborn John'" has been accredited with having brought to a culmination the use of the \textit{ex officio} oath. The Star Chamber had charged him with the printing or importing of heretical and seditious books. He denied these charges, and he refused to make any answer to other like charges, saying:

"... If you will not ask me about the things laid to my charge, I shall answer no more; * * * And of any other matter that you have to accuse me of, I know it is warrantable by the law of God, and I think by the law of the land, that I may stand upon my just defense and not answer to your interrogatories."

For this, he was condemned to be whipped, and the sentence was executed. Lilburn carried his complaint to Parliament and "in 1648 the Lords ordered the sentence to be totally vacated * * * as illegal and most unjust against the liberty of the subject of law of the land and Magna Carta."\(^10\) It is well to note, however, that nothing concerning the privilege is mentioned in the Magna Carta.\(^11\)

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See Shakespeare, Hamlet, Act III, Sc. 3, first published in 1603, where-in the King soliloquizes (as cited by Wigmore):

"In the corrupted currents of this world
Offence's gilded hand mayavo by justice;
And oft 'tis seen the wicked prize itself
Buys out the law. But 'tis not so above;
There is no shuffling; there the action lies
In his true nature, and, we ourselves compelled,
Even to the teeth and forehead of our faults,
to give in evidence."

\(^10\) See Wigmore, supra, n. 4.

\(^11\) "Compulsory self-incrimination existed for four hundred years after Magna Carta * * *" Thomas James Nottin, The Constitution of the United States, p. 213.
Meanwhile, Parliament had passed a statute in which was inserted a clause which forever forbade any ecclesiastical court to administer ex officio any oath requiring answer as to matters penal and this clause was substantially re-enacted after the restoration of the Stuarts.

What has been said applied to the ecclesiastical courts. It was totally lacking, at least until 1600, in the common law courts. In 1533, a statute provided that:

"Every person presented or indicted of any heresy, or duly accused by two lawful witnesses may be committed to the ordinary (of the church) to answer in open court."

In 1590, Udall appeared before a common law jury with witnesses charging him with seditious libel, and he pleaded not guilty. He did not, however, claim any privilege against self-accusation, though but a few months before, he had claimed the privilege before the High Commission Court.

In the Jesuit Garnet's trial for the Gunpowder Plot, the accused, before the Council, said:

"When one is asked a question before a magistrate, he is not bound to answer before some witnesses be produced against him, 'quia nemo tentur prodere seipsum!'

He made no such plea before the common law judges.

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12 No person "exercising * * * ecclesiastical power * * * shall 'ex officio' or at the instance or promotion of any whatsoever, urge, enforce, tender, give or minister" to any person "any corporal oath whereby he or they shall or may be charged * * * to make any presentment of any crime or offense * * * or to accuse himself or herself of any crime * * * or by reason whereof he or she shall or may be liable or exposed to any * * * punishment whatsoever." STAT. 16. I, 4 (1641).

13 STAT. 13 Car. II. 12 (1661).

14 ST. 25 HENRY VIII, Ch. 14.


16 1 How. St. Tr. 1271, 1274.

17 Coke cites two cases contra to Garnet's case, 12 Rep. 27; 3 Bulst. 49. Wigmore says that "neither of these indicate the existence of any common law rule * * *. The only source of doubt that can be found arises from certain scantily reported chancery rulings of the late 1500s," citing, among others, Cromer v. Penston, Cary 13 (1587); Wolgrave v. Coe, Troth. 18, (1595).
But in 1660, it was definitely given judicial recognition in Scroop's Trial\(^{18}\) where the court says to the accused:

"Did you sit upon the sentence day, that is the evidence, which was the 27th day of January? You are not bound to answer me, but if you will not we must prove it. Do you confess that?"\(^{19}\)

Lilburn had never claimed the right to refuse absolutely to answer a criminating question: he had merely claimed a proper proceeding of accusation or presentment;\(^{20}\) but, once the ex officio oath was abrogated, the maxim *nemo tenetur prodere seipsum* was prominently urged. Accordingly the practice of questioning the accused died out soon after the Revolution of 1688.\(^{21}\) However, committing magistrates were authorized to take the examination of persons suspected, which if not under oath, was admissible against him on his trial, until, by statute,\(^{22}\) the prisoner had the option to speak if he desired and he was warned that what he said might be used against him.\(^{23}\) The change in the English criminal procedure in this particular seems to be founded upon no particular statute and no judicial decision, but upon a general and silent acquiescence of the courts to a popular demand. One writer finds a casual connection between the privilege and the period in English history which deposed a tyrannical king and "changed the succession to the crown; which restored to the British Constitution its democratic element, at the same time defining and enlarging it; which curbed the royal prerogative and emancipated the judiciary from that slavish subserviency to the crown which had disgraced it under the Stuarts, * * **\(^{24}\) The change effected was but a natural sequence of the change from tyranny to liberty, from a cruel and truckling judiciary to a judiciary made independent, that it might stand indifferent between the

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\(^{18}\) 5 How. St. Tr. 947.  
\(^{19}\) Cited and quoted in Note 5, 6 Ill. Law Q.J. 76. The privilege was extended, by 1685, to include an ordinary witness, and not merely the party charged. See Reading's Trial, 7 How. St. Tr. 259, 296.  
\(^{20}\) Wigmore, cit. supra, n. 4.  
\(^{21}\) Stephen, I, 263.  
\(^{22}\) 11 and 12 Vict., Ch. 2.  
\(^{23}\) Twining v. New Jersey, 211 U. S. 78, 102 (1908).  
\(^{24}\) Wm. A. Maury, n. 165.
crown and the prisoner. The principle became a popular one principally because it was opposed to the use of torture then prevailing on the continent and Scotland.\textsuperscript{26} It is interesting to note that the privilege is totally lacking in the English Bill of Rights (1688).

While this English doctrine was developing, the precisely contemporary struggle across the Channel is in marked contrast with its opposite results. The Council of Louis XVI, in drafting the great Criminal Ordonnance of 1670, fixed, for a century to come, the French rule of compulsory self-crimination.\textsuperscript{27} During this same period, the rule was evidently unknown in America. It remained an unknown doctrine during a whole generation in the Colony of Massachusetts,\textsuperscript{27} where, as late as 1685, the interrogatory oath was permitted.\textsuperscript{28}

Despite the fact that their English forefathers had not registered the privilege against self-accusation among the fundamentals of jury procedure, the American constitution makers of 1789, "who had themselves suffered nothing \* \* \* and could aim merely to copy the lessons which our forefathers of a century ago had handed down from their own experiences," incorporated the principle.\textsuperscript{29} This, however, was not the first declaration of the privilege in the col-

\begin{itemize}
  \item \textsuperscript{26} For an excellent account of a French trial, see 5 \textit{Amer. L. Rev.} 38.
  \item \textsuperscript{27} \textit{Hunt, American History Told by Contemporaries}, Vol. 1, p. 382: The Trial of a Woman Antinomian. See also, C. F. Adams, \textit{Three Episodes of Massachusetts History}, I, 363-609.
  \item \textsuperscript{28} \textit{Bradford's History of a Plymouth Plantation}, 465 (1642): \textquotedblleft Quest. How farr a majestrate may extracte a confession from a delinquente to accuse himselfe of a capitall crime, seeing 'nemo tenetur prodre seipsum?' \textquoteleft Ans. A majestrate cannot without sin neglecte deligente inquisition into the cause brought before him. If it be manifeste that a capitall crime is committed, and that common report, or probabilitie, suspicion or some complains (or the life) be of this or that person, a majestrate ought to require and by all due means to procure from the person (so farr already betrayed) a naked confession of the fact \* \* \* ; for though 'nemo tenetur prodre seipsum,' yet by that which may be known to the majestrate by the forenamed means, he is bound thus to die; or else he may betray his countrie and people to the heavie displeasure of God.\textquoteright\textquotedblright
  \item \textsuperscript{29} \textit{Wigmore, cit. supra.} n. 4 n. 112.
\end{itemize}
RIGHT OF THE ACCUSED IN A CRIMINAL CASE

Virginia, in its first constitution, adopted at Williamsburg, in 1776, provided that a person accused of crime entitled to certain rights and privileges for his protection among them, that he could not be "compelled to give evidence against himself". Massachusetts's first constitution, adopted in 1780, provided that no person held to answer "for any crime or offence" could be "compelled to accuse or furnish evidence against himself." In the first constitution of Maryland, adopted on November 11, 1776, it was provided that "no man ought to be compelled to give evidence against himself in a common court of law, or any other court". Similar provisions were made in the first constitutions of New Hampshire, Pennsylvania, and North Carolina. This illustrates the great importance that was attached to this privilege by the inhabitants of the colonies when the original states first attempted to set up their own form of government, so that the doctrine became a part of the fundamental law, and in the Fifth Amendment to the Constitution of the United States, it was provided that no person "shall be compelled in any criminal case to be a witness against himself." Since that time, the language of the Fifth Amendment is repeated without substantial change in the constitution of every state admitted.

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30 John D. Carroll, "The Extent of the Cross-Examination to Which an Accused May be Subjected When He Offers Himself as a Witness in His Own Behalf," 11 VA. L. Rev. 248 (1925).
31 VA. Const. §8 (1776).
33 Md. Const. §20 (1776).
34 N. H. Const. §15 (1785).
35 Pa. Const. §9 (1776).
36 N. C. Const. §7 (1776).
37 Constitution of United States, Fifth Amend.
into the Union, 38 excepting New Jersey 39 and Iowa; 40 but the courts of those states have held that the immunity from self-incrimination is a part of the fundamental law. Explanation of the Colonial Conventions' insistence for the privilege differs. One writer says "it would seem to be found in the agitation then going on in France against the inquisitional feature of the Ordonnance of 1670." 41 Another writer gives as the reason the inquisitional method. 42 These constitutional provisions are not considered as creating a new privilege or enlarging the one existing at common law. They are, in reality, declaratory of the common law rule.

How far then shall we apply the privilege? Shall we

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39 N. J. Comp. St. 1910, Evidence, §5, §2 quoted ante, §488, 1003, State v. Zdanowicz, 69 N. J. L. 629, 65 Atl. 743 (1905), ("Although we have not deemed it necessary to insert in our Constitution this prohibitive provision; the Common-law doctrine, unaltered by legislation or by law practice, is by us deemed to have its full force.") State v. Miller, 71 N. J. L. 627, 60 Atl. 202 (State v. Zdanowicz, approved). 1916, Canover v. West Jersey Mortgage Co., 87 N. J. Eq. 16, 90 Atl. 604 (Receiver).

40 Iowa Const. I, 10.

41 WIGMORE, supra, n. 4, n. 112.

42 JOHN D. CARROLL, supra, n. 30.
extend it to all criminating possibilities? It is well settled, for instance, that the privilege does not apply to protect one against pecuniary loss and that it applies only to criminal liability or the equivalent thereto.

It is generally stated that the privilege against self-accusation exists, not only when the accused is liable criminally to prosecution, but extends also to cases where his answer would tend to expose him to a penalty or a forfeiture. This raises the questions, what is a penalty and what is a forfeiture? For the purposes of this discussion, a penalty is a liability to pay money or yield up a public privilege. Such a penalty is not necessarily a criminal liability as distinguished from a civil liability, for when a penalty lies in the payment of money, a mere unregulated increase in compensation under the name of exemplary damages is really a civil liability. In Lees v. United States, where an action, civil in form, was brought to recover a penalty for importing an alien under a contract to perform labor, in violation of a Congressional enactment, it was held that, while the action was civil in form, it was undoubtedly criminal in its nature, and the defendant could not be compelled to be a witness against himself. However, in the case of Levy v. Superior Court, it was held that the privilege is not applicable to penalties of a purely remedial character.

The distinction between a penalty and a forfeiture is a shadowy one. The latter, however, is really a criminal liability. "When a right of property is devised, or a liability to pay money to another person is created, by way of a retribution for misconduct done, or of a deterrent from misconduct apprehended, the effect is in spirit penal; and the disclosure of such facts should therefore be protected by privilege."
The privilege against self-incrimination has sometimes been confused with the privilege to refuse answers which tend merely to disgrace witnesses. The early trend of judicial authority, especially in England, was to allow a refusal of an answer that tended to degrade one’s moral reputation. The two privileges were never confused in England. The privileges against disgracing answers clearly existed there in the early part of the 18th century, before the limits of the other privilege were clearly fixed. The rulings on the privilege were conflicting. The privilege has two limitations: (1) It applied only to collateral facts—facts affecting character, bias, corruption; (2) it applied only to facts directly involving disgrace and not to facts merely tending to disgrace indirectly. This was brought out pointedly in the case of People v. Mather. However, in United States v. James, Grosscup, J., said:

“...The privilege which the framers of the amendment secured was silence against the accusation of the federal government. Did they take no thought of the pains of practical outlawry? * * * If the immunity was only against the law-inflicted pains and penalties, the government could probe the secrets of every conversation, or society, by extending compulsory pardon to one of its participants, and thus turn him into an involuntary informer. Exposure, self-confessed exposure, would lose him his place in society, his good name in the world, and like a bill of attainder, taint his blood and that of all who inherit it.”

This same view was expressed in the dissenting opinion

53 Pleasant v. State, 15 Ark. 624, 648 (1854): “Such an examination * * * is inquisitorial, and tends to compel her to criminate and disgrace herself * * *”
54 Cook’s Trial, 13 How. St. Tr. 334 (1696).
55 In Rex v. Lewis, 4 Esp. 225 (1803), the question asked was whether he had not been in the House of Correction, and Lord Ellenborough held this to be privileged. See contra Cundell v. Pratt, Moo. & M. 108.
56 State v. Hill, 52 W. Va. 296, 43 S. E. 160 (1892).
59 By Field, J.
RIGHT OF THE ACCUSED IN A CRIMINAL CASE

in *Brown v. Walker*. But the majority view was expressed thus:

"The fact that the testimony may tend to degrade the witness in public estimation does not exempt him from the duty of disclosure. A person who commits a criminal act is bound to contemplate the consequence of exposure to his good name and reputation, and ought not to call upon the courts to protect that which he has himself esteemed to be of such little value. * * * The design of the constitutional privilege is not to aid the witness in vindicating his character. * * *"

Other cases clearly show that the infamy or disgrace which may result from disclosures made by a defendant are not matters which the constitution shields, but if the answer has no effect upon the case except to impair his credibility, it has been held that the constitutional privilege might be invoked.

In some of the states, a prisoner, charged with a crime and brought before an examining magistrate, may, after witnesses in support of the charge have been heard, make a statement concerning the charge. This may be used against him on trial if it has a tendency to establish his guilt, provided the accused has first been cautioned that he need not answer and if he does, whatever he says is entirely voluntary. This was first brought about by statute in England and the provisions thereof have been adopted in several of the states. Wigmore points out "the rule excluding untrustworthy confessions and the rule giving a privilege against compulsory testimonial self-incrimination are sometimes not kept plainly apart * * * for not only have they the common feature of an acknowledgment of guilty facts, but also, by the test frequently employed, the test of voluntariness for confessions becomes al-

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61 Hill v. State, 4 Ind. 112. (1853); Clementine v. State, 14 Mo. 112 (1851); Starks v. Evid. I. 193; Leach v. Commonwealth, 129 Ky. 497, 112 S. E. 505 (1908); State v. Angel, 93 S. C. 149, 76 S. E. 190 (1912); but see In re Klinzer's Will, 130 N. Y. S. 1050, 71 Miss. Rep. 620 (1911).
62 Ex parte Hedden, 29 Nev. 352, 90 Pac. 737, 13 Ann. Cas. 1173 (1907).
63 Cooley's Const. LIMITATIONS, 8th ed., 651.
64 1 and 2 Phil. and M., c. 13.
most identical with the idea of compulsion as forbidden by the privilege. * * * If the privilege, fully established by 1680, has sufficed for both classes of cases, there would have been no need in 1780 for creating the distinct rule about confessions. 68 As expressed by one jurist:

"I hold it to be clear that when the law rejects a disclosure made under oath by a person charged with a crime, it does so, not because any right or privilege of the prisoner has been violated but because it is deemed unsafe to rely upon it as evidence of guilt. * * 69 70"

Courts, however, have given judicial expressions which blend the two into one principle. For example the Colorado court 68 held that "a constitutional provision that no person shall be compelled to testify against himself in any criminal case applies not alone to confessions of guilt, (made before a coroner's jury) 69 but to any admission which may furnish a single link in a chain of evidence by which his conviction of a criminal offense may be secured." Courts have said that to make a confession admissible, it must be shown that it is voluntary. 70 But what is voluntary has given courts some trouble. Selden, J., in a dissenting opinion 71 said:

"The criterion given in most of the cases by which to determine whether a declaration or confession of a person charged with a crime is competent evidence against him upon his trial, is, to ascertain whether it was voluntarily made. * * * Now it is obvious that this is not a strictly accurate test. * * * A confession * * * made upon the heel of promises of favor, may be perfectly voluntary, yet it is rejected. * * * If by voluntary is meant uninfluenced by the disturbing fear of punishment, or by flattering hopes of favor, the expression may be accurate."

This same expression was later given in a majority opinion of the New York Court. 72

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68 See Wigmore, §2266 for a discussion of the differences between the rule on confessions and the privilege as applied to all witnesses.

69 Selden, J., see n. 71.

70 Tuttle v. The People, 33 Colo. 243, 70 L. R. A. 33 (1905).

69 Insertions are those of the writer.


71 Hendrickson v. The People, 10 N. Y. 13 (1854).

72 People v. McMahon, 15 N. Y. 384 (1857); see also Eyre, C. B., in Warickshall's Case, 1 Leach Cr. Cas. 299.
The prisoner is not to be sworn, for, as it has been said where the accused takes an oath "any confession he may make is deprived of its voluntary character," though there is a contrariety of opinion on this point." While "it may, at first view, appear unreasonable to refuse evidence of a confession, merely because it was made under oath, thus having in favor of its truth, one of the highest sanctions known in the law," as one writer expressed: "it is to be observed that none but voluntary confessions are admissible; and that if to the perplexities and embarrassments of the prisoner's situation are added the danger of perjury * * * the confession can scarcely be regarded as voluntary; but on the contrary, it seems to be made under the very influences, which the law is solicitous to avoid." Decisions put it thus: "The reason is that in the agitation of mind in which the party charged is supposed to be, he is liable to be influenced by the hope of advantage, or fear of injury to state things which are not true." Generally, in all cases, except treason, the confession of the accused may be received in evidence to establish his guilt; but the confession is said not to be sufficient evidence of the crime, and should only be allowed for the purpose of connecting the defendant with the offense. While a confession is not admissible if the accused's hopes or fears are operated upon to induce him to make it, statements made before the confession which were likely to do away with the effect of the inducements have been admitted in evidence. In Commonwealth v. Curtis, the prisoner had asked the officer who made the arrest, whether he had better plead guilty, and the officer replied that "as a general thing, it was better for a man who was guilty to plead guilty, for he got a lighter sentence." After that he made statements which were relied upon to prove his guilt. The

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74 State v. Gilman, 61 Me. 215 (1863).
76 GREENLEAF, supra, §225.
78 People v. McMahon, supra, n. 72.
78 Stringfellow v. State, 20 Miss. 157 (1853).
79 Thompson v. Commonwealth, 20 Gratt. 724 (1870); State v. Welch, 36 W. Va. 690, 15 S. E. 419 (1892).
80 97 Mass. 574 (1887).
court held the confession inadmissible, "although the officer's remarks related to pleading guilty on trial and not to making a confession in pais, and although the prisoner began the conversation and solicited the advice of the officer, who first told him that 'he did not wish to advise him one way or another.'" But, "saying to the prisoner that it will be the worse for him if he does not confess, or that it will be better for him if he does, is sufficient to exclude the confession." A voluntary confession obtained by artifice is admissible and a confession has been admitted where there is a mere exhortation or adjuration to speak the truth. Properly, a confession made by a defendant on a legal examination should be given in evidence against him unless made by him under the influence of a threat or a promise, or other coercion calculated to produce an untrue confession. Each case, however, should, and does, depend largely on its own special circumstances.

While the privilege protects the accused from testimonial compulsions, courts have not limited the applicability thereof to oral testimony. Documents and chattels have been held to be within the privileges, "though the accused should hold it (them) in his hands in the court." The immunity has been held to be violated even where there is no more than a demand on a defendant in a criminal case, in the presence of a jury, to produce a paper referred to, which contains incriminating evidence against him; but merely asking the accused whether he had the original of an incriminating document has been held not to be an infringement upon the privilege against self-accusation. The privilege applies only to private papers, and not to public or official documents which are kept as a public trust and which are subject to permissible inspection by the public.

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81 2 Hale, C. P. 659.
82 State v. Brooks, 92 Mo. 542, 5 S. W. 257 (1887).
83 Ann. Cas. 1913 B 302.
84 Tuttle v. People, supra, n. 68.
85 Wigmore, §2263 quotes Earl, J., in People v. Gardner, 144 N. Y. 119, 38 N. E. 1003 (1894): "The main purpose of the privilege was to prohibit the compulsory examination of prisoners * * * for the purpose of ex-torting unwilling confessions or declarations implicating them in crime.
86 Roe v. Hervey, 4 Burr. 2484, 2489.
87 Gillispie v. State, 5 Okla. Cr. 546, 115 Pac. 620 (1911); COOLEY, CONSTITUTIONAL LIMITATIONS, I, 650.
88 State v. Morden, 87 Wash. 465, 151 Pac. 832 (1915).
RIGHT OF THE ACCUSED IN A CRIMINAL CASE

at any time. Where the legislature, acting within the police power, requires a record of one engaged in the pursuit of a particular vocation, as for example, a druggist, the records are in no sense private papers, and no constitutional privilege is violated by requiring their production, but in such cases, there must be a provision in the enactment making them public documents.

What the first Congress thought of the idea of compelling a man to produce evidence against himself may be inferred from a section of the Judiciary Act of 1789:

“All of the said courts of the United States shall have power in the trial of actions at law or in equity and in admiralty, and upon such motions being given, to require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of chancery.”

And so, the United States Supreme Court in the Boyd Case said that “any compulsory discovery compelling the production of his private books and papers, to convict him of a crime is contrary to the principles of a free government and it cannot abide the pure atmosphere of political liberty and personal freedom.”

This same case, by way of obiter, declared the “privilege applicable to documents obtained by officers’ search or seizure, legal or illegal, irrespective of testimonial pro-

80 State v. Donovan, 10 N. D. 203, 86 N. W. 709 (1901); but see Taylor, Law of Evidence, §1361: 81 State v. Smith, 74 Iowa 580, 40 N. W. 492 (1888).
92 Ibid; also n. 25 L. R. A. N. S. 518.
94 Pollock, Production of Documents, 27.
95 Boyd v. U. S., supra, n. 93, holding that an Act of Congress which authorizes a court of the United States in revenue cases, on motion of the government attorney, to require the defendant to produce in court his private papers, books, and invoices, was unconstitutional, as being repugnant to the Fourth and Fifth Amendment of the Federal Constitution.
cess.\textsuperscript{96} Previous holdings\textsuperscript{97} had admitted documents and chattels obtained from the accused's possession without use of process.\textsuperscript{98} Since the Boyd Case, state courts have divided on the question. In the case of Gindrat \textit{v. People},\textsuperscript{99} the court refused the pronouncement of the United States Supreme Court. But the two cases may be distinguished. In the Boyd Case, the erroneous order compelled the accused to produce evidence against himself, while in the Gindrat Case, the question of illegality was raised collaterally, and the court simply admitted evidence which was offered—not by the accused—and did not inquire whether possession of it had been obtained lawfully or unlawfully.

In the case of \textit{State v. Griswold},\textsuperscript{100} the use of an envelope containing pictures, as evidence against a person accused of crime, was held not a violation of a constitutional guarantee against self-incrimination, even though the envelope and enclosures were taken from his premises by a trespasser. This case has been distinguished from the Boyd Case upon the ground that in the Griswold Case "the thing used in evidence was a simple piece of personal property, having of its own no voice or meaning so far as guilt or innocence was concerned, and giving no evidence, the evidence in the case arising from the conduct of the defendant with reference to it."\textsuperscript{101} Other courts\textsuperscript{102} have followed the Boyd Case and exclude the evidence.

But, in a later case,\textsuperscript{103} the United States Supreme Court held that the fact that papers, pertinent to the issue, may have been illegally taken from the possession of the party against whom they are offered is not a valid objection to their admissibility. In the Weeks Case\textsuperscript{104} the same court reached a contrary result. "The Federal courts cannot, as against a seasonable application for their return, in a crimi-

\textsuperscript{96} Wigmore, \textsection 2263.
\textsuperscript{97} Commonwealth \textit{v. Dana}, 2 Metc. 329.
\textsuperscript{98} Francia's Trial, 15 How. St. Tr. 897, 906 (1717).
\textsuperscript{99} 138 Ill. 103, 27 N. E. 1085 (1891).
\textsuperscript{100} 67 Conn. 290, 34 Atl. 1046 (1896).
\textsuperscript{101} Note, 59 L. R. A. 465, 469 (1903).
\textsuperscript{103} Adams \textit{v. N. Y.}, 192 U. S. 586, 24 S. Ct. 372 (1904).
nal case, retain for the purposes of evidence against the accused his letters and correspondence seized in his house in his absence and without his authority by a United States Marshal holding no warrant for his arrest or for the seizure of his premises. In this case, the court distinguished the Adams Case, stating that the decision in the earlier cases rested upon incidental seizure made in the execution of a legal warrant.

What may be said for the doctrine expressed in the Weeks Case? "The arguments in favor of this new doctrine are, that the officer making such search is an agent of the state and to permit the use of evidence taken by him without authority is to validate an unreasonable search and seizure; and that such use is compelling the accused to testify against himself." On the other hand it is said to look behind the evidence raises the trial of outside issues and that the exclusion of such evidence is an indirect penalty on the law enforcers.

To the contention that instruments, devices, or tokens used in the commission of a crime and illegally seized should not be used in evidence, the West Virginia court said:

"One complete answer to this is that, if it was an illegal seizure, that is no objection to the use of the papers as evidence for the court can take no notice how they were obtained."

The court distinguishes the Edwards Case from the Boyd Case on the ground that in the latter case the seizure was of private papers belonging to the defendant. Yet the same court later permitted a letter, written by the accused to his mother and intercepted by the jail keeper, to be introduced in evidence.

May a corporation refuse to produce its books on the ground that it may, by the production thereof, incriminate itself? It has been held that a corporation is not a "per-

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105 Silverthorne Lumber Co. v. U. S., 251 U. S. 385 (1920); State v. Wills, 91 W. Va. 359, 111 S. E. 261 (1922).
106 30 W. VA. LAW QUAR. 203.
108 State v. Booker, 68 W. Va. 8, 60 S. E. 295 (1910).
son" within the meaning of the fifth amendment of the Federal Constitution, because the privilege does not apply to non-personal entities;\(^{110}\) and, therefore, a corporation cannot resist, upon the ground of the constitutional protection against self-crimination, the compulsory production of its books and papers before the grand jury under a subpoena duces tecum.\(^{111}\) Neither may a corporation officer refuse to produce the records in his possession because their contents may tend to incriminate him,\(^{112}\) because ordinarily the officer does not hold such documents in his private capacity. In a work of authority it is stated: "It would seem reasonable, however, that when books or papers are only nominally the work and property of the corporation and are essentially the product and private act of an individual, to hold that he may refuse to produce them when they would have a tendency to incriminate him, if they are in his custody. In such a case they are as much his private papers as if they had no connection whatever with corporation business.\(^{113}\)

Since the purpose of the privilege is protection, if the evidence sought to be elicited could in no event tend to a conviction of an offense, his privilege to remain silent does not attach. This is true, if at the time the testimony is given, the acts are no longer punishable by virtue of the repeal of the statute creating the offense, or by reason of conviction and satisfaction of the sentence,\(^{114}\) or the barrier to punishment raised by lapse of time.\(^{115}\)

Frequently statutes have been enacted compelling a party to appear and to give testimony, and indemnifying such party against future penal conviction. The question arises, why does this not do away with the constitutional privilege?

An early New York case\(^ {116}\) held that a statute which compelled the giving of testimony, but which provided that

\(^{110}\) In re Bornn Hat Co., 223 U. S. 713, 56 L. ed. 626, 32 S. Ct. 521 (1912).


\(^{113}\) 28 R. C. L. 449, citing Notes, 30 L. R. A. N. S. 726, and Ann. Cas. 1912 D 569.

\(^{114}\) Ex parte Cohen, 104 Cal. 524, 38 Pac. 384 (1894).

\(^{115}\) Ibid.

\(^{116}\) People v. Kelley, 24 N. Y. 74 (1861).
the testimony so given should not be used in any prosecution or proceeding, civil or criminal, against the one giving such testimony, was sufficient protection. This, however, was overruled in a later case.\textsuperscript{117} The United States Supreme Court has held that nothing short of absolute immunity from prosecution could satisfy the constitutional guaranty, and that a statute declaring that no evidence obtained from a witness should be given in evidence, or in any manner used, against him or his property, in any criminal proceeding, did not supply a complete immunity because it did not prevent the use of his testimony to search out other testimony to be used against him.\textsuperscript{118} A later United States court decision\textsuperscript{119} compelled testimony to be given, even though it brought one’s former acts within the definition of crime, and the case of \textit{Interstate Commerce Commission v. Baird}\textsuperscript{120} declared that the immunity extended by the interstate commerce act, from prosecution or from forfeiture of estate because testimony given in pursuance of the requirements of the law, satisfies the Fifth Amendment.

\textit{(Continued in next issue.)}

\begin{footnotes}
\item[118] \textit{Counselman v. Hitchcock}, 142 U. S. 547, 35 L. ed. 1110 (1892); \textit{Cullen v. Commonwealth}, 24 Gratt. 624 (1873). See \textit{W. Va. Code Ch. 152, §18}. It is doubtful if the W. Va. statute provides an immunity which is co-extensive with the privilege.
\item[120] 194 U. S. 25, 48 L. ed. 860 (1903).
\end{footnotes}