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Self-Incrimination: Statute Discovered After Claim

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multaneous admission of sub-standard ability, the Court has strengthened its conviction of the dignity which should adhere to all Constitutional guarantees.

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Self-Incrimination: Statute Discovered After Claim

Defendant appeared before a special grand jury microscoping crime in the New York City garment and trucking industries. He testified extensively, stating that he paid gratuities to certain persons but refusing to state to whom and in what amounts, first upon ground that it would hurt his business and that persons paid would never admit having received any money, and later, after brief consultation with counsel, on the ground that his answers would tend to incriminate him. On appeal from a finding of contempt, held (2-1): defendant not guilty of contempt since answers to further questions would have supplied leads to possible conviction under the Internal Revenue Code. *United States v. Courtney,* 236 F.2d 921 (2d Cir. 1956).

There has not been deep controversy over the legal and historical origins of the privilege against self-incrimination. The best writings on the subject have been created to explain how the privilege arose, and how the popular judgment took root that it was better for an occasional crime to go unpunished than that the prosecution should be able to construct a criminal case, in whole or in part, with the aid of forced disclosures by the witness. See WIGMORE, EVIDENCE §§2250-2266 (3d ed. 1940); Morgan, *Privilege Against Self-Incrimination,* 34 MINN. L. REV. 1 (1949); GRISWOLD, THE FIFTH AMENDMENT TODAY (1955). Nor has there been serious disapproval over the power of the court to decide whether any direct answer to a question would implicate the witness. *United States v. Burr (In re Willie),* 25 Fed. Cas. 38, No. 14,692e (C.C.D. Va. 1807); *Ellwell v. United States,* 275 Fed. 775 (7th Cir. 1921); *cf. Ex parte Irvine,* 74 Fed. 954 (C.C. S.D. Ohio 1896).

Strong differences of opinion, in which the privilege has been treated both as a vestige and a commandment, have centered around the questions concerning the extent of the privilege, when it must be raised, and when it is waived. It has been said that its invocation in certain instances has been tantamount to an admission of guilt. See O'Connor, *The Fifth Amendment: Should A Good Friend Be Abused?,* 41 A.B.A.J. 307-10, 369-70 (1955). On the other hand, its invocation is viewed as a protection of innocence. *Maffie v. United States,* 209 F.2d 225 (1st Cir. 1954), with a penetrating analysis by Chief Judge Magruder. Courts have attempted to map out only the broad, hazy outlines in each problem area. Decisions of great importance have, unfortunately, been delivered at times when the climate

of opinion was not conducive to an adequately objective approach. See, *e.g., Rogers v. United States,* 340 U. S. 367 (1951). The *Rogers* case could be said to have marked the low-water point of the privilege against self-incrimination, with the subsequent reaction to the decision resulting in opinions more favorable toward the privilege, delivered in times less crowded with marked emotionalism. See *Emspak v. United States,* 349 U. S. 190 (1954); *Quinn v. United States,* 349 U. S. 155, 160 (1954).

The results in the instant case may very well mark the furthest extension yet encountered of the presumption in favor of the claimant, to an area not even remotely connected to the matter under inquiry, concerning an offense unknown to the claimant at the time of the invocation of the privilege, but rather unearthed after a thorough search. 231 F.2d at 925, 926 (dissent). Also, the case leaves unsolved the problems relating to the reliability and significance of the facts and circumstances placed before the judge who must determine whether the privilege is or is not available to the claimant. In *Blau v. United States,* 340 U. S. 159 (1950), the privilege was said to extend to answers that would in themselves furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime. But it has been pointed out that the protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer, not a danger of an imaginary or insubstantial character having reference to some barely possible contingency. *Mason v. United States,* 244 U. S. 362, 365 (1917); *Regina v. Boyes,* 1 B&S 311, 121 Eng. Rep. 730 (Q.B. 1861).

It was evident in a decision cited by the majority in the instant case that the implications from the questions asked, in the setting presented, and taking into consideration the public reputation of the witness, that a responsive answer to the questions asked or an explanation of why they could not be answered, would have placed the witness in a dangerous position. *Hoffman v. United States,* 341 U. S. 479 (1951). Such factors were absent in the instant case at the time the questions relating to the gratuities were asked of the witness, and upon appeal, the majority apparently found that the privilege was properly invoked, since they were presentd with a federal criminal provision by counsel for the defendant. Even assuming that the information requested could in some way furnish a link in the chain of evidence necessary for a conviction under a pertinent statute, how can it be said that the defendant in the instant case had reasonable cause to fear prosecution at the time the questions were asked, hence claim the privilege, when he did not even know of the statute, nor of its possible application to his actions? The total absence of reasonable or substantial cause to fear prosecution is all the more apparent in the instant case where the statute in question requires a *willful* attempt to evade the statutory mandate. INT. REV. CODE OF 1954 §§7203 and 6041. An honest misunderstanding would not be grounds for the imposition of any punitive sanctions. *United States v. Murdock,* 290 U. S. 389 (1933). Applying the standards

established in the *Hoffman* case, the district court determined that the witness merely seized upon the privilege as a last ditch means to avoid answering questions which would prove valuable to the special grand jury investigating the garment district in New York.

It appears obvious that if the courts excuse witnesses from testifying where their lawyers can unearth a possible stautory violation after refusal, then grand jury investigations will be severely hindered. Contempt will not then turn on whether in fact the witness believed he would be incriminated by his statements, but rather whether a higher tribunal can supply the necessary statute which could presumably be violated. No longer will the judge, faced with the witness, aware of any facts revealed during the course of his questioning, be able to give full weight to the entire surroundings in determining whether the witness in good faith believes himself in danger of self-incrimination. Such a sweeping effect reached through the approach of the majority in the instant case cannot lightly be overlooked, and the privilege itself is open to a severe question whether, on close inspection and study, it in truth serves the public interest.

Thomas T. Basil

In Rem Tax Foreclosure—Notice

Property owner was known by the town officials to be an unprotected incompetent. The town had fulfilled the requirements of section 165-b of the New York Tax Law by posting, publishing and mailing notice of an action to foreclose a tax lien on the incompetent's property. Since the taxpayer neither answered within twenty days nor paid her back taxes within seven weeks, a default judgment of foreclosure was entered and a deed was executed to the town. Held (8-1): Such notice was not sufficient to satisfy the requirements of due process. *Covey v. Town of Sommers,* 351 U. S. 141 (1956).

No person may be deprived of his property without due process of law, U. S. CONST. amend. XIV; N. Y. CONST. art. 1, §6. One of the basic requirements of this undefined concept is that notice, reasonably calculated to inform the party of a pending action, must be given. *Milliken v. Meyer,* 311 U. S. 457 (1940). The notice which is required will vary with the circumstances and conditions peculiar to the particular situation. *Walker v. City of Hutchinson,* 351 U. S. 200 (1956).

Although the Constitution does not specify any one particular method of notice, that which is given must be calculated to be actual and effective. *Milliken v. Meyer,* 311 U. S. 457 (1940). A state legislature may establish a method of