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THE CONSTITUTIONAL PROVISION REGARDING SELF-INCRIMINATION IN ITS RELATION TO EVIDENCE AND PROCEDURE

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INTRODUCTION

When the Constitutional Convention, in obedience to the sovereign mandate of the people, met to frame our now organic and fundamental law, the members of that august body, though not agreed as to various details of the constitution that they were to formulate, were all in one for a bill of rights to serve as constitutional guarantees and safeguards of individual rights. This was so, not merely because the inclusion of a bill of rights was *ordered by Congress,* but because they fully well knew that a constitution without a bill of rights is not worth the paper it is written on.

One of the rights secured to every person is freedom from compulsion of testifying against oneself. This right is of Anglo-Saxon origin. The principle originated and developed in England and from thence transplanted to America. As a part of the political traditions of the United States, the whole American Bill of Rights with the exception of the right to bear arms, and the prohibition against the quartering of soldiers in private houses was copied verbatim in the Philippine Autonomy Act, commonly known as the Jones Law. The Philippine Constitution contains substantially the same provisions in the Bill of Rights with certain modifications and additions. Article III, Sec. I, No. 18 provides: "No person shall be compelled to be a witness against himself."

In this work the writer shall endeavor to trace the history of this privilege and explain the reasons for the existence of the same. Some of the important judicial interpretations of the principle will also be given and analyzed. A careful study of the cases revealed to the writer that court interpretations of the privilege are by no means harmonious. Indeed a very no-

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ticeable divergence of opinions exist. Though it is our duty as much as possible to harmonize the cases, yet when such cases are diametrically opposed to each other, it is no longer in opposition to the above stated rule to recognize the existence of such divergence.

In the succeeding chapters, I shall try to specify the opinions of eminent jurist and authors on the subject. It is hoped by the writer that with his limited knowledge he could do justice to the subject.

CHAPTER I

RATIONAL BASIS

It is now a recognized principle, that society could demand of its members the compliance of the duty to testify, when such testimony is necessary for the proper administration of justice. If society is to protect itself from violence, unrest and disorder, if it has to preserve unity, cohesion and amicable relations among its members by settling disputes and clearing misunderstandings, then it must be possessed of the means whereby its established agency—the courts—could effectively pursue the furtherance of these ends. Hence, the general testimonial duty of every citizen.

This general testimonial duty suffers various well-defined exceptions in the nature of privileges granted witnesses in or parties to an action. Of these privileges, one is the privilege of refusing to incriminate oneself.

The courts had always been a source of fear to the many especially to the ignorant. This association in the mind, of courts and fear, is unavoidable, as the courts represent the mighty arm of the state whereby crimes are tried and punished. The natural result therefore is that ordinary witnesses are always reluctant and hesitating in presenting before the courts their evidence. They are only too willing to do anything short of contempt to avoid service in the courtroom. Even those who are used to attend court sessions either as witnesses or as mere spectators regard testimonial duty as an annoyance that at times deter them from the pursuit of their ordinary profession or vocation. To this would be added the fear of exposure from their own lips hidden and unknown crimes the commission of which they may be wholly or partially responsible. It is indeed repelling to every man to be the sole cause of his own destruction.

If the witness is not given the protection against forcible self-crimination, the law would be making the office of a witness extremely difficult to discharge.

Besides reasons of public policy, there are other reasons which explains the presence of this privilege in constitutions and statute books. The interests of humanity is also a reason for this priviledge. It is a rule of policy, "because it would place the witness under the strongest temptation to commit perjury, and of humanity, because it would be to extort a confession of truth by a kind of duress every species and degree of which the law abhors." (Jones, Commentaries on Evidence). The rule is that "Nemo tenetur seipsum accusare." Besides this privilege is for the protection of the innocent. "No doubt," says Wigmore, "a guilty person may justly be called anytime, for guilt deserves no impunity. But it is the innocent that needs protection."

CHAPTER II

HISTORY

The history of the privilege could be traced back to the early period of English constitutional development. There was a time when the English Ecclesiastical Court exercised the prerogative of administering the so-called ex-officio oath. In its form this species of oath resembles our judicial oath today," to tell the truth and nothing but the truth." But in its effects and implications ex-officio oaths covered a more elastic field, and imposed upon the affiant not only to tell nothing but *truths*, but also the obligation to truthfully tell all facts and informations asked of him; and as to the questions that could be propounded, the system allows an unlimited freedom in choice and in form.

In the hands of upright and honest prosecutors much could be gained by the use of this oath, but like all powers and privileges it is susceptible of being abused. Indeed it was so much abused that to quote Prof. Wigmore, it generated into a "merely unlawful process of poking about in the speculation of finding something chargeable" The exact origin of this oath is not very clear to present investigators; but whether its authors conceived of it in good faith, or it was at its inception invented to place in the hands of ecclesiastical prosecutors a powerful weapon to check or counteract freedom of religious thots, it is cer-

tainly a matter beyong conjecture that in the hands of unprincipled prosecutors it had been very much misused.

Under the leadership of Sir Edward Coke who became Chief Justice of the Court of Common Pleas, changes gradually began to be made. In the first few cases which he decided, he dodged the issue of the legality of the ex-officio oaths. Later on he grew bolder and laid the dictum that the ecclesiastical courts had no power to administer the oath. The issue having been settled with regards the claim of the ecclesiastical court, there yet remained to be faced the pretentions of the Star Chamber Court. This court too claimed the right to administer the oath. As an instrument to ferret and detect seditious movements and agitation for reforms, it was a potent weapon in the hands of the king. Then came the famous trial of John Lilburn. He was committed to prison and charged with the publication of seditious books. On examination he denied the charge, and asked further questions, he flatly denied the right of the prosecution to ask information from him. Lilburn did not object to answering questions on matters properly charged against him, but he refused as to matters "that do not belong unto me."

Due to the notoriety of the Lilburn and other cases, and the popular agitation that followed, Parliament in 1640 abolished the Star Chamber, and together with it, its pet child—the ex-officio oath. The rule was formulated that no man can be forced to incriminate himself on any charge nor in any court, whether in criminal or in civil cases. Later on the scope of the privilege was extended to ordinary witnesses.

The principle as thus stated found its way to the American constitution in the form of the Fifth Amendment. The various states constitutions contain the principle in substantially the same form, though in varying phraseologies.

CHAPTER III

DISTINCTIONS

In the preceeding chapter, an attempt was made to trace the historical development of the privilege. As indicated, the principle was conceived or rather developed as a result of the abuses of the early English tribunals and the ensuing vigorous agitation for reforms. Having a development peculiarly its own, and so formulated so as to afford a remedy against the ills of

ex-officio oath and a check to the further repetition of such an evil, it is not very hard to understand why the privilege in its concept and application must and should be distinguished from similar and akin legal principles or doctrines.

1. *Self-Incrimination and Confession Distinguished*

Self-incrimination and confession had been at times confused. While similar in that both have a common feature of acknowledgment of guilty facts, yet the one is distinct and different from the other both in principle and in development.

A confession is a person's free and voluntary admission or declaration of his agency or participation in a crime. A confession in order to have probative force must be voluntary; and any confession extorted by means of force or violence is excluded. While confessions can be made in or out of court, the privilege covers only statements made in court. Viewed from this angle confessions are more broad than the privilege. However the confessions rule applies only to accused persons. While on the other hand the privilege against compulsory self-incrimination applies to both an accused and an ordinary witness. As a necessary corollary, we have confessions only in criminal cases, while there may be self-incrimination in civil cases as well.

2. *Distinguished from Privilege not to Testify*

Another privilege analogous to but totally different from the privilege against self-incrimination is the privilege of an accused not to testify. While both are designed to secure a fair trial to the accused (though it must not be lose sight of that the former applies to civil cases as well) yet they must not, by virtue of such common feature, be confused, one with the other. The statutes of the Philippines seem to recognize the existence of these privileges as distinct and separate. Sec. 15 of G. O. No. 58 provides:

> SEC. 15. In all criminal prosecutions the defendant shall be entitled:
>
> 3. To testify as a witness in his own behalf; but if a defendant offers himself as a witness, he may be cross-examined as any other witness. His neglect or refusal to be a witness shall not in any manner prejudiced or be used against him.
>
> 4. To be exempt from testifying against himself.

The law thus logically puts the two provision under one section, for both provisions have to do with the rights of the accused. In pursuance however of the same logic, the codifiers of Gen. Or. No. 58 enacted two separate provisions recognizing the difference between the two privileges.

This plain and unmistakable legislative recognition is not without sanction both in origin and in logic. The prvilege not to testify is passive and negative, while the privilege against self-incrimination is declaratory and positive. The law says that the defendant in a criminal case is entitled to testify in his own behalf. It is his privilege to do so; conversely, it is his privilege also not to do so. There is no other implication from the plain statutory language that while he could not be forced to testify in his own behalf, it is his right to testify in his own favor. In other words he has the privilege not to testify—a privilege undeniably negative. A witness need not claim this privilege not to testify, and the law does not penalize him for his failure to testify in his own favor. On the other hand the other privilege presents a different aspect. When an accused is asked a criminating question its up to him to refuse and claim the privilege, or answer the question and waive the same. It is his to avail of, by positively stating to the court that the question is criminating and therefore he could not legally be forced to answer. Hence this privilege partakes of the nature of a positive right.

Another distinction bears mentioning. Since, by the settled principles of jurisprudence, an ordinary witness is covered by the self-incrimination rule, the above-mentioned privilege applies to both civil and criminal cases. On the other hand, the privilege given the accused to appear as a witness in his own behalf governs only in criminal cases. Being one of the rights secured to the accused, it follows that it is essentially a rule in criminal procedure, since we only used "accused" in criminal cases.

The preceding distinction however is lost in cases of persons accused testifying in their own favor. The waiver of the privilege not to testify, by virtue of an offer to testify, operates *ipso* facto as a waiver of the privilege of self-incrimination. Having offered himself as a witness, he subjects himself like an ordinary witness to cross-examination and according to the law, he could not refuse to answer proper and relevant ques-

tions. His guilt being the question at issue, any relevant question touching this question even if incriminating is proper and relevant.

3. *Distinguished from Unlawful Searches and Seizures*

Although the concept of compulsory self-incrimination is relatively clear, yet not infrequently it is confused with the constitutional right of freedom from unlawful or unreasonable searches and seizures. Much of this confusion is the result of the unwarranted extension of the self-incrimination rule to cases and to instances not originally thought of as applicable to by the authors of this privilege. Such extension was the result either of a zealous regard for individual rights or from a misconception of the self-incrimination privilege itself.

That these two principles are distinct and different from the other seems beyond the pale of doubt. The fact that they are contained in two separate amendments to the U. S. Constitution viz. the 4th and 5th Amendments indisputably show that the fathers of that Constitution recognize the differences. Art. III, Sec. 1, Nos. 3 and 18 provide:

> Art. III, Sec. 1.—
>
> (3) The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, to be determined by the judge after examination under oath or affirmation of the complaint and the witnesses he may produce and particularly describing the place to be searched, and the persons and things to be seized.
>
> (18) No person shall be compelled to be a witness against himself.

At the outset, the fact must be recognized, that in certain aspects of the question, the delimitation of one from the other, in cases where both operate for one purpose, is a difficult task. As was seen from the previous chapter, the privilege against self-incrimination was a manifestly vigorous protest against the unrestricted application of the pernicious ex-officio oaths. Never was the principle of the unreasonable search and seizures ever included in this mighty struggle for the abolition of the oath. Rather, the prohibition against unreasonable searches and seizures was a result from the practice of "general warrants" and "writs of assistance". It is not the scope of this

work to make a detail study of the rule. Suffice it to say that as a result of the abuses resulting therefrom (general warrants and writs of assistance). The famous Wilkes' Struggle of 1763-65 occurred resulting in the equally famous pronouncements of Lord Camden. Hence arose the rule against unreasonable searches and seizures.

It is confessedly hard to point particular and specific distinguishing marks discernible in the concept of both. In principle one is totally distinct and different from other; the fact that one covers self-incriminatory compulsion while the other covers searches and seizures sufficiently points the difference. But in their operations they could be easily distinguished. In Boyd vs. U. S. (116 U. S. 616), an order by the trial court for the production *by the defendant himself* of certain incriminating documents was properly held to be within the privilege against self-incrimination since to compel him to produce the questioned documents was tantamount to forcing him to incriminate himself. Compliance with the writ amounts to calling him as a witness, and both as a witness and the accused he is free from incriminating himself. But the court went further and propounded the obiter that the privilege also covers incriminating documents obtained by virtue of a search warrant. It needs to be repeated that the production of documents by a person whether as a witness or an accused in response to a subpoena or any writ or process *treating him as a witness* may be refused as under the protection of the privilege. But documents obtained without the use of any writ or process treating him as a witness, e.g. by search or seizure, independent of testimonial process are not within the scope of the privilege. As Prof. Wigmore puts it, "this ill-starred" opinion had exercised "unhealthy influences upon subsequent judicial opinions in many States." Continuing he says: "that opinion, thoroughly incorrect in its historical assertions and travelling outside the question at issue, advance two fallacious conclusions, viz.: first, that the Fourth Amendment (prohibiting unreasonable searches and seizures) was so related to the Fifth Amendment (prohibiting compulsory self-incrimination), that the Fifth Amendment could be invoked by an accused to withhold from surrender documents sought by even a lawful official search; and secondly, that documents obtained by unlawful official search could be excluded from evidence, as a consequence of the 4th Amendment."

Subsequent court pronouncements however, have impliedly vetoed this doctrine of Boyd v. U. S. It is now universally admitted that the illegality of the source does not affect its admissibility as evidence. If abuses occur in the use of the warrant, the persons responsible are liable for their acts, but their liability does not in any way affect the admissibility of such evidence procured, nor is the Fifth Amendment in any way involved in the illegality of the source of such evidence.

4. *Distinguished from Presumption of Fact in Certain Cases*

It has sometimes been said that the unexplained possession of stolen property creates a presumption that the possessor committed theft. It thereby casts upon him the burden of proving the innocent character of his possession in order to free himself from criminal responsibility. The rule as thus stated seem to be within the operation of the cumpulsory self-incrimination prohibition. As stated by the cases however, convictions of this kind are not sustained upon a presumption of law as to the guilt of the accused but rather upon an inference of fact as to his criminality.

The doctrine seems reasonable enough. It could never be successfully contended that the security of honest and law-abiding citizens is made insecure. "The inference of guilt", says Justice Carson, "is one of fact and rests upon the common experience of men. But the experience of men has taught them that an apparently guilty possession may be explained so as to rebut such an inference and an accused person may therefor put witnesses on the stand or go on the witness stand himself to explain his possession, and any reasonable explanation of his possession, inconsistent with his guilty connection with the crime, will rebut the inference as to his guilt which the prosecution seeks to have drawn from his guilty possession of the stolen goods." U. S. vs. Catimbang, (39 Phil. 367). This rule prevails in the United States without any dissent.

CHAPTER IV

SCOPE OF THE PRIVILEGE

The self-incriminating privilege as now applied has a scope not dreamt of by its authors. Since its recognition as a privilege appurtenant to the general right of liberty and courts had always been called to apply it now and then. To determine therefore the

justice or merits of the case as to justify or warrant the application of the privilege, the said privilege had to be examined and analyzed for the proper determination of the issues thus presented. Hence arose the inumerable decisions and doctrines revolving around this constitutional guarantee. As was stated in the previous chapters, what was originally desired to be prohibited by the rule is testimonial compulsion. But even the most hurried survey of the cases will show how far the courts had gone, perhaps impelled by a strong desire to afford the greatest protection to witness and persons accused. For the protection of innocent persons no harm will result from strained interpretations of the rule, and on this ground we could perhaps justify this traditional judicial attitude.

1. *Criminal Liability Only—Not Civil Liability*

As a preliminary discussion, it is well to remember that the privilege covers only criminating questions or facts only and not facts involving or disclosing civil liability. Hence a witness could not in a civil case involving the determination of civil liability refuse to answer questions otherwise competent and material, on the ground that the privilege protects him from disclosing facts which may subject him to criminal liability.

If however, the main issue of the civil case is criminal, i.e. if the plaintiff seeks to recover damages by virtue of acts of the defendant which if proved are criminal, then the privilege applies. It finds illustration in civil suits involving libel, slander, fraudulent insolvency—in fact all criminal acts involving civil liability.

2. *Does not Include Infamy or Disgrace*

Disclosure of facts tending to expose the witness or an accused testifying in his own behalf to disgrace and infamy is not covered by the privilege. Under Sec. 56 of Gen. Order 68 however, he could refuse to answer. Said Sec. 56 provides: "A witness must answer questions legal and pertinent to the matters at issue, though his answer may tend to establish a claim against himself; but he need not give an answer which will have a tendency to subject him to punishment for felony; nor need he give an answer which will have a direct tendency to degrade his character, unless it be to the very fact at issue or to a fact from which the fact at issue would be presumed. But a witness must answer to the fact of his previous conviction for felony." It is clear that a refusal to answer when proper, falls

under Sec. 56 of G. O. No. 58 and not under the general rule against self-incrimination. There are however courts who dissent to this rule. Justice Field, sustaining the minority view in Brown v. Walker, (161 U. S. 591) was of the belief that a person, under the protection of the privilege, should not be forced to give testimony tending to "make concessions must cover the witness with lasting shame and leave him degraded both in his own eyes and those of others" and that there is a limit whereby "even the State cannot pass in tearing open the secrets of his bosom". Justice Brown, speaking for the majority observed however that "a person who commits a criminal act is bound to contemplate the consequences of exposure to his good name and reputation, and ought not to call upon the courts to protect that which he has esteemed of such little value". "Its reducio ad absurdum", says Professor Wigmore, "is that if the privilege concerning criminality has such a scope, when criminality has been expunged, leaving only turpitude behind, then it has also that scope, when criminality never arose if turpitude was apparent; unless we avow that there is no turpitude except as involving criminality. * * *" (Wigmore, Evidence. Vol. 4, 2nd ed.)

3. *Third Persons not Included*

The privilege does not protect third persons from exposure by a witness or a person accused testifying in a criminal case. This seems clear from the personal nature of the privilege. As a constitutional right, he could claim its protection when proper, but he could not base a refusal to answer on the ground that the answer called for by the question will incriminate third persons. If, he too is involved in concurrence with others, he could refused, but not so if others' alone and not his criminality will be exposed. An attempt was made to bring corporations within the operation of the privilege. Thus in the case of Hale v. Henkel (201 U. S. 43), Hale, as Secretary-Treasurer of the MacAndrew & Forbes Co. was directed by means of a subpoena duces tecum to produce certain documents evidencing transactions between the said MacAndrew & Forbes Co. and six other firms. He refused to do as directed and was imprisoned for contempt. Hence the habeas corpus proceedings of which he was the petitioner, petitioning the court to discharge him from custody. It was insisted that while the immunity statute may protect individual witnesses, it would not protect the corporations of which he, the appellant-petitioner,

was representative and agent. The court in disposing of this contention said: "This is true. But the answer is that it was not designed to do so. The right of a person under the fifth Amendment to refuse to incriminate himself is purely personal privilege of the witness. It was never intended to permit him to plead the fact that some 3rd person be incriminated by his testimony, even though he were the agent of such person." However, the custodian of books or any one against whom the subpoena duces tecum is directed may refuse to produce them on the ground that such disclosure would incriminate him. (McAllister vs. Henkel, 201 U. S. 90).

Hence it follows that production of documents or chattels by a person in response to a subpoena duces tecum or any other form of writ or process treating him as a witness may be refused under the protection of the privilege. It follows conversely that any other process, means or methods which obtains from a person's control books or chattels is not within the scope of the privilege. Thus in State v. Flynn, (36 N. H. 64) the court refused the exclusion of evidence found by police officers secured by the latter in the exercise of a search warrant, holding that such evidence are not covered by the privilege." It seems to us an unfounded idea, that the discoveries made by the officers and their assistants, in the execution of process, whether legal or illegal, or where they intrude upon a man's privacy without any legal warrant, are of the nature of admissions made under duress, or that it is evidence furnished by the party himself upon compulsion. The information thus acquired is not the admission of the party, nor evidence given by him in any sense." Hence the liquor found on defendant's premises by the searching officers under a search warrant was admitted as evidence. The same holding was propounded in State v. Atkinson (18 S. E. 1021), where papers taken from the defendants house was admitted also as evidence against him.

4. *Public Books and Books Required by Law to be Kept*

The rule that a custodian of books may refuse to produce the books under his custody upon the issuance of a writ or process treating him as a witness, finds a qualification with regard to public books. Those books being public official books, it is the property of the State, and are always accessible to its representations and usually to the general public. An officer guilty of some misconduct, could not merely by his entries in them, insist in refusing to show those books. The judicial demand

for the production of those records are directed to him in his official capacity, and not in his capacity as a private individual. It is not his duty to commit crimes in entering records in those books. This distinction is universally accepted not merely as a matter of public policy but because the scope of the privilege does not extend that far.

The same rule obtains with regard to books which the law requires certain persons should keep. Such for instance are sales book of merchants, druggist record of sales and the like. Thus an Alabama case held that no error was committed by the lower court in compelling the counsel for the accused to deliver to the prosecution state officer a type-written translation of the evidence and testimony taken in short-hand and on a former trial of the case, said transcript having been made by the court reporter for the defendant and fees paid by him. The ruling was held as not contrary to the constitutional privilege against unreasonable searches and seizures, nor the privilege against compulsory self-incrimination. (Vaughn v. State, 24 So. 879.)

On the prosecution of a public officer for presenting a bill containing charges for services not performed by him, certain falsified, unfiled vouchers, covering the services in question, were taken from the office of the accused by his clerk, who acted in pursuance to a subpoena issued for the prosecution. The court ruled adversely against the defendant, holding that there was no violation of the privilege. (People v. Coombs, 53 N. E. 527.)

Again it was decided that the monthly statements of a pharmacist, filed in the county auditor's office, become, when so filed, public records, and as such are admissible in evidence against any and all persons affected by the records they disclose. Their introduction therefore, in a prosecution of the pharmacist for illegal sales, is not compelling the defendant to testify against himself. (State v. Smith, 38 N. W. 492). The same holding was made in a prosecution for selling liquor, where the defendant voluntarily filed a report of his sales, the court holding that the privilege was not violated by the use of the report as evidence against the defendant-druggist. A contrary ruling was however advanced in State v. Pence wherein it was held that in a prosecution under a statute requiring a druggist to keep applications made by persons desiring to buy liquor, the defendant was entitled to refuse to produce the incriminating

applications on order of the court. (State v. Pence, 89 N. E. 488). A similarly akin ruling was made in People ex. rel. Ferguson v. Reardon. A statute applicable to brokers provided that transfers of stocks should be taxed, and that each broker should keep an account book entering such transfers made by him; the statute provided further that failure to make the entries and pay the tax was an offense. Upon the prosecution of the defendant for failure to make the entries and pay the tax, an order was issued against him directing him to produce his account book. He refused, claiming the privilege, and the court sustained his contention.

5. *Facts Tending to Criminate*

The rule is that no person can be forced to testify against himself. As to what testimony a man cannot be forced to give seems purely a question of fact. The moment it is conceded that a question or a fact called for is criminating, the question of whether he will answer or not the same is purely within his own discretion. Whenever a witness claims the privilege, the court has to determine whether the privilege really applies. Most criminal acts are composed of two or more subordinate facts, each of which is essential to form the completed criminal act. For example, on the crime of conspiracy to commit treason, there must be an agreement by two or more persons to commit treason, and a decision on their part to commit it. Hence any question directed against a witness (includes the accused testifying in his own behalf) asking of him whether he had decided to commit treason, could properly be objected to, although mere intention to commit treason, not amounting to a proposal or conspiracy to commit the same, is not punishable under our statutes.

The rule, as stated by Chief Justice Marshall in Aaron Burr's Trial, is that any single fact or act of the witness, though in itself not punishable, is within the protection of the privilege if such fact, when connected with other facts constitute a crime punishable by law. "Many links frequently compose the chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself. * * * That fact of itself might be unavailing; but all other facts without it would be insufficient for his conviction. * * * It would seem, then, that the Court ought never to compel a witness to give an answer which dis-

closes a fact that would form a necessary and essential part of a crime which is punishable by the laws." To rule otherwise would be to render the privilege perfectly useless and nugatory.

CHAPTER V

FORMS OF DISCLOSURE PROTECTED

What the constitution intended to prohibit is the use of legal process to extract from a person's own lips an admission of his guilt. It is not merely any and every compulsion that is the kernel of the privilege, in history and constitutional definitions, but testimonial compulsion. If the privilege is designed to create inviolability not only for his physical control of his own vocal utterances, but also for his physical control in whatever form exercised, then it would be possible for a guilty person to shut himself up in his house, with all the tools and indicia of his crime, and defy the authority of the law to employ in evidence anything that might be obtained by forcibly overthrowing his possession and compelling the surrender of the evidencial articles—clearly a proposition no body would admit. (Wigmore, Evidence. Vol. 4, p. 864.)

1. *Bodily Exhibition*

In this phase of the question, i.e. the propriety or impropriety of admitting evidence as gathered from the bodily exhibition of the accused, there exists a sharp conflict of opinion. Some courts, impelled no doubt with a desire to afford the greatest security to defendants, uphold the minority view that the bodily exhibition of the accused is within the purview of the privilege. The majority and the better doctrine is inclined to limit the operation of the privilege within its proper boundaries and deny the claim of individuals that such evidence should be excluded as within the privilege. As was properly held the main and only purpose of the privilege is to prohibit compulsory oral examination of prisoners for the purpose of extorting unwilling confessions and declarations implicating them in crime. (People v. Gardner, 38 N. E. 1003.)

In Magee v. State (45 So. 529) the defendant was compelled to put his foot in a tract found near the place of the crime for the purpose of identifying him. The court overruled the defendant's objection, sustaining the ruling of the lower court that the Fifth Amendment was not violated. Neither is the

measurement of defendant's foot and the subsequent introduction of such measurement as evidence within the prohibition of the privilege. (U. S. v. Cross, 20 D. C. 382.) So in People v. Wormer, (175 N. Y. 188) the forcible taking of the defendant's shoes and placing them in the footmarks was held proper. The Missouri court held that the testimony of physicians as to the condition of the wounds in the head of the defendant which was shaved forcibly was admissible. The same ruling prevails in North Carolina where the Supreme Court held that the shoes of the defendant could be legally placed in the footmarks for comparison even if the shoes had to be taken from the defendant by compulsion. (State v. Graham, 74 N. C. 648). A similar ruling obtains in Louisiana. (State v. Graham, 116 La. 799.)

In the Philippines the rule seems to be the same as the prevailing doctrine in United States. In U. S. v. Salas, (25 Phil. 399) the bloody footprints and ink impressions from the accused were admitted and compared. A similar holding was made in U. S. v. Zara (42 Phil. 300) and U. S. v. Constantino (46 Phil. 745). In U. S. v. Ong Sui Hong, Justice Malcolm decided that the forcible discharge of morphine from the defendant's mouth is not error. Neither is the medical inspection of a woman to determine her pregnancy a violation of her constitutional privilege against self-incrimination. (Villaflor v. Summers, 41 Phil. 62); nor the examination of substances taken from the accused to determine whether he has venereal disease. (U. S. v. Tan Teng, 23 Phil. 145.)

The contrary view is sustained in State v. Height, (91 N. W. 935). The defendant was charged with rape. While in prison he was examined against his consent by physicians who testified from the result of such examination that he was suffering from a venereal disease. The testimony of the physician was excluded as a violation of the privilege. In People v. McCoy, in a prosecution for murder of a bastard son, the testimony of a physician as to her recent delivery was excluded. This doctrine was severely revoked in Holt v. U. S. (218 U. S. 245). In that case the accused was forced to put on a blouse alleged to be worn by the criminal. The blouse fitted him. The testimony of a witness who saw the experiment was held to be admissible and "even assuming that such evidence was improperly obtained, it is still competent." The prohibition refers to the

use of "physical or moral compulsion to extort communications"; not the exclusion of his body as evidence when it may be material.

2. *Handwriting*

Bearing in mind the court decisions as to the admissibility of evidence regarding various forms of bodily exhibition, our first impression would be that species of handwriting forcibly secured from the defendant is also admissible. However court decisions seem to be otherwise. The prosecution could not compel the defendant to write his own name or any other word as this would amount to compelling him to furnish original evidence against himself. (State v. Lurch, 12 Oregon 99; State v. Saunders, 14 Oregon 300). These two rulings were affirmed in Fitzpatrick v. U. S., though incidentally as an obiter dicta. (178 U. S. 304). In Beltran v. Samson and Jose (53 Phil. 570), the Supreme Court speaking thru Justice Romualdez held that it was error for the respondent judge to order the petitioner to appear before the fiscal and take dictation in his (petitioner's) own handwriting from the latter. An attempt was made to distinguish this case with Villaflor v. Summers (41 Phil. 62) in that in the instant case "writing is something more than moving the body, or the hand, or the fingers; writing is not a purely mechanical act, because it requires the application of intelligence and attention; and in the case at bar writing means that the petitioner herein is to furnish a means to determine whether or not he is the falsifier. * * * Besides, in the case of Villaflor v. Summers, it was sought to exhibit something already in existence, while in the case at bar, the question deals with something not yet in existence, and it is precisely sought to compel the petitioner to make, prepare, or produce by this means, evidence not yet in existence; in short, to create this evidence which may seriously incriminate him."

No matter how much attempt may be made to sustain this ruling with authorities, there still remains the challenging fact that the ruling seems to be against historical, constitutional and statutory definitions of what self-incrimination is and of what it consists. To repeat again, what the rule prohibits is testimonial or verbal compulsory evidence from one's own lips. Anatomically there seems to be a whole of difference between the hands and the mouth. Let's take a specific case. A person is accused of falsification. The prosecution calls him as a witness. Could the prosecution do so? Undoubtedly yes, since it could

not be at the outset be determined whether he will exercise the privilege. Could the defendant refuse to testify? Undoubtedly too, he could as to testify amounts to a waiver of his privilege against self-incrimination. Conversely, he could consent to testify for the prosecution, since the privilege is not a prohibition and could be waived by him. Now, could he testify in his own favor? Again the answer is in the affirmative, and we have only to cite the Constitution to support our answer. Suppose in the course of his testimony he denies having written the supposed forged signature. The prosecution could, even against his wish, compel him to sign his name in a piece of paper for the purposes of comparison; since he waives his privilege by testifying that the signature was not his and therefore the prosecution in cross-examination could compel him to write and furnish his signature—the handwriting of the defendant having been testified to by the later in his direct examination. But supposing he did not, in his direct examination touch the question of his signature. Could the prosecution in the cross-examination ask him, or in case of refusal, compel him to furnish a sample of his handwriting? If we follow the cases of Beltran v. Samson & Jose, he could not be forced to do so, as it amounts to compulsory self-information. If we follow State v. McKowen (53 So. 353; 126 La. 1075) he could be forced to do so. In the Philippines by virtue of the above cited ruling, a refusal would be proper. But supposing this same defendant were a woman, accused of adultery. Her husband's records conclusively show, is in Bilibid for the last five years preceding the present prosecution of the wife. It is alleged that the wife is pregnant. An examination of the accused by physicians to determine her pregnancy would not be a violation of the self-incrimination rule. The case of Villaflor v. Summers and many American cases is authority in this respect. Yet if it is conclusively shown that he is pregnant, what more conclusion is proper than that she had committed adultery? Other requisites of the law being proven, conviction will follow as sure as night follows day. And yet, if a forger is compelled to write his signature, there is self-incrimination. Why? Because, to quote Justice Romualdez, there is created evidence "which may seriously incriminate him." Will not the medical examination of the defendant in the other example be also incriminating? They contend that in one case "original" evidence is forced to be produced by the accused against himself. The doctrine how-

ever is at its best shadowy. It is submitted that the equities of the case does not warrant such a distinction. If it is incriminating in one, it is incriminating in the other, the doctrine of "original" evidence notwithstanding. If, in the hypothetical case given, the accused in testifying in his favor, did not make any testimony regarding the forged signature, he might perhaps legally object to any question regarding the signature or refuse to furnish a specimen of his writing on the ground that the cross-examination must be limited to those facts testified to in the direct examination. For as Professor Wigmore says, "the voluntary taking of the stand is a waiver as to all facts whatever, including even those which merely affect credibility." He knows well enough that the inquiries will be upon topics relevant to the charge—hence always incriminating. He knows too or should know that he will be subjected to cross-examination relevant to the charge against him. From what has been said, it follows that by taking the stand he waived the privilege.

CHAPTER VI

CLAIMING THE PRIVILEGE

The privilege, in order to operate must be claimed. If it were otherwise, the privilege would be converted into a prohibition. Criminating questions are allowable; it is not at once known whether the privilege would be claimed.

Let us first examine the ordinary witness. If in the course of his testimony, a criminating question is asked, he could object and refuse to answer. The privilege protects him and his secrecy. With regard to the party-defendant a different situation prevails. At least in principle he could be called by the prosecution as a witness, yet no court seemed ever to have sanctioned this procedure, since upon the general principle that he might incriminate himself, he could refuse to answer any question. Undoubtedly however, he could disclaim the privilege by talking the stand and testify. Indeed, by his mere voluntary testifying, he loses the privilege.

Where however the accused, though not taking the stand, possess documents which the prosecution desires to use, the prosecution may give notice to produce, without violating the privilege. This is because the accused's privilege as to his personal testimony does not cover his documents. While his docu-

ments and personal belongings could not be confiscated without the issuance of a proper writ, as the latter procedure is interdicted against by the Bill of Rights, yet neither is the unreasonable search and seizures rule nor the self-incrimination rule violated by a notice to produce. This is necessary in order that the prosecution, in case of a refusal, could produce or introduce secondary evidence to prove its contents.

The propriety of giving such notice to produce was never doubted until the case of McKnight v. U. S. (115 Fed. 972). This was an action charging the appellant, an officer of a bank with embezzlement, alleged to have been committed by causing money of the bank to be paid to persons for the purpose of bribery and with intent of defrauding the bank. The accused in the presence of the jury, was by direction of the court, upon motion by the prosecution, called upon to produce the document which it was alleged contained the corrupt agreement supposed to be the basis of the note unlawfully charged against the funds of the bank. In ruling the order of the trial court to produce the note erroneous, the court said: "It is true, the learned judge made no order requiring the defendant its production, but the accused by the demand made upon him before the jury after proof tending to show his possession of the document, was required either to produce it, deny or explain his want of possession of the writing or by his very silence permit inferences to be drawn against him, quite as prejudicial as positive testimony would be." It was held contrary to the Fifth Amendment which allows a person to be privileged against self-incrimination.

Of the soundness of this ruling Prof. Wigmore says: "The propriety of giving such notice was never doubted until the extraordinary ruling in McKnight v. U. S. in 1902, which seems to have exercised a baleful spell over a few other courts. Besides ignoring the fundamental principle that the privilege must be claimed the opinion also involves the fallacy that the mere necessity of making a claim of privilege for documents is improper because of the resulting inference—a fallacy which reasons in a circle, because the privilege cannot be enforced until it is claimed and the court cannot both enforce it and forbid the necessary condition precedent to enforcing it. The ruling involves the further fallacy that the accused's failure, on notice to produce the document was equivalent to a claim of privilege; but it was not because it might have been done in precisely the

same way for non-criminating document and would merely have served as a basis for the use of a copy by the prosecution."

Starting with the premise that this constitutional right is a privilege, then it can be waived. This guarantee is for the protection of all persons, and it is within him to choose availing himself of the constitutional offer or waive the same. But having waived the privilege as to a criminating fact he could not be forced to disclose other criminating facts which are independent of the criminating fact over which he waived the privilege if he claims the privilege as to the other fact. But if the second criminating fact asked to be disclosed by him is relevant to or connected with the first criminating fact disclosed voluntarily by him, his waiver of the first fact operates as a waiver of the latter fact. Where he has not actually admitted criminating facts, the witness may unquestionably stop short at any point and determine that he will go no further in that direction. The law does not endeavor to preserve any vain privilege and such a privilege as would allow a witness to answer a principal criminating question, and refuse to answer as to its incidents would be worse than vain; for, while it could help the witness, it must inevitably injure the party, who is thus deprived of the power of cross-examination to test the credibility of a person, who may, by avoiding it indulged his vindictiveness or corrupt passions with impunity. And the further consideration is also recognized, that a witness has no right, under pretense of a claim of privilege, to prejudice a party by a one sided or garbed narrative. (Foster v. People, 18 Mich. 266.)

There is a waiver when the defendant voluntarily pleads guilty. For the purposes of determining the penalty proper to be imposed upon him. Having entered a plea of guilty and voluntarily offered himself in effect as a witness, he waives the protection of the privileges. (U. S. v. Binayoh, 35 Phil. 23.)

Could a person waive the privilege by contract? In U. S. & England the general principle that a contract waiving the rules of evidence is valid and not contrary to public policy. Thus a clause in a fire insurance policy requiring the insured to submit to an examination on oath as a condition precedent to bringing an action was held valid. The insured refused to submit to the precedent examinations on oath claiming that the privilege protects him. The court dismissed the action for recovery. (Hickman v. London Ass. Co., 195 Pac. 45.) The Illi-

nois court went further and held that a contract between the insurer and the insured giving the former the right of inspection of the latter's books is a waiver of the constitutional guarantee against unreasonable searches and seizures. (Swedish-American Tel. Co. v. Fidelity & Co., 70 N. E. 768, 208 Ill. 562.) Since the privilege against self-incrimination is not a mere rule of evidence but a constitutional guarantee, it seems doubtful if the local Supreme Court will sustain a contractual waiver of the privilege as valid even on the protest of the prejudiced contracting party against the enforcement of the stipulation.

The next question is: "Who is to determine whether a question is criminating or not? If the judge is to determine it solely, then the purpose of the privilege is defeated since before he could decide on the question he must know the fact claimed to be left solely to the witness then it would enable a friendly witness, who wish to assist one of the parties, to escape examination altogether and refuse to give evidence. The correct solution seemed to be the one propounded by Chief Justice Marshall in Burr's Trial. "It is alleged that he (the witness) is and from the very nature of things must be the sole judge of the effect of his answer; that he is consequently at liberty to refuse to answer any question. * * * There may be questions no direct answer to which could in any degree affect him; and there is no case which goes so far as to say that he is not bound to answer such questions. * * * The principle which entitles the United States to the testimony of every citizen, and the principle by which every citizen, and the principle by which every citizen is privilege not to accuse himself, can neither of them be entirely disregarded. They are believed both to be preserved to a reasonable extent, and according to the true intention of the rule and of the exception to that rule, by observing that course which it is conceived courts have generally observed; it is this: When a question is propounded, it belongs to the court to consider and 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 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 judge would strip him of the privilege which the law allows—and which he claims."

CHAPTER VII

INFERENCES ON THE EXERCISE OF THE PRIVILEGES

Suppose a defendant fails or neglects to testify on his own behalf, will such failure show prima facie that he is guilty of the crime charged? The law positively decrees the negative. His failure shall not "in any way" prejudice him. The prosecution could not rely merely on the silence of the accused, but must prove each and every allegation in the complaint or information. The law which while permitting a person accused of a crime to be a witness in his own behalf should at the same time authorize a presumption of guilt from his omission to testify, would be a law adjudicating guilt without evidence, and while not obnoxious to the constitutional privilege against self-incrimination would be a law reversing the presumption of innocence, which in this country is a constitutional right.

If no inferences could be drawn from the failure of the defendant to testify, could inferences be allowed to be drawn from his exercise of the privilege? In the United States the prevailing rule seems to be that no unfavorable inferences could be drawn from the exercise of the privilege. Yet there are some courts, like those of Ohio, Maine and North Carolina, which allowed unfavorable inferences to be made. In Ohio this view is sanctioned by a constitutional proviso. Constitutional Amendment No. X, Art. 1 provides: No person shall be compelled in any criminal case to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel."

In the United States where the system of judge and jury prevails, it is possible to advance the doctrine, that no inferences could be allowed for failure of the accused to answer a criminating fact. Though it is humanly impossible to eradicate from the minds of the jurors the logical conclusion or reason as to the refusal, yet the effect of such a refusal, could to a certain extent be neutralized by requiring the judge to instruct the jury not to consider the said refusal to answer against the accused, and by prohibiting any comment by the prosecution with regards to such matters. But here in the Philippines, where the system of judge and jury does not obtain, could a refusal be the basis of an inference of guilt which could be taken into consideration as evidence for his conviction? It should be noted that our statutes are silent on this matter. It would seem to be however in conformity with logic and reason that such an inference

should not conclusively adjudicate guilt, yet must be taken as any other evidence. Laying legal considerations aside for the moment, it is undeniable, and our experience tells us, that in the ordinary run of things, the natural reaction of the mind would be to attribute an association of guilt with a refusal to answer any question which may point to his guilt. Such being the case, shall we go against a natural law, and sacrifice logic and reason to accomodate hazy and ambiguous considerations for the much prostituted phrase "rights of the accused." Professor Wigmore contemplates a situation like here when he said: "If our tribunals were not divided in function, and if the issues of fact and law came equally to the judge's mind for decision, the question would be a mere quibble, because the judge could hardly perform the impossible feat of ignoring the operations of his own mind. But since the jury, and the efforts of the counsel with the jury, are more or less within the control of the judge irrespective of his own mental operations, it remains after all a practical question whether principle and expediency requires us to prevent so far as feasible any further use of the inference than such as inevitable from the mere disclosure of the claim. * * *" In other words it is his opinion that the question of inferences is worthwhile considering in the United States because of the separate function of judge and jury; but otherwise when the judge is one both of fact and of law, any question in this regard is but a mere "quibble."

Is such an inference contrary to the letter and spirit of the privilege? It is submitted that it is not. The reason behind the privilege is because where no such privilege is allowed, every witness would be tempted to commit perjury as a result of the natural instinct of self-preservation. Will justice and equity suffer from such allowance of unfavorable inferences by the exercise of the privilege? Plainly, the answer is in the negative. The privilege was designed to protect the innocent and never for the guilty. "The defendant in a criminal case is either guilty or innocent. If innocent, he has every inducement to state the facts which would exonerate him. The truth would be his protection. There can be no alarm why he should withhold it, and every reason for his utterance." (State v. Claves, 59 Me. 298.)

CONCLUSION

It is interesting to inquire whether the prevailing conditions today warrant the continuance of the privilege as a safeguard

to personal security. As a brake against inquisitorial abuses of the ecclesiastical courts the privilege was a success. But religious prosecutions are things of the past, and if the privilege is to justify its existence in statute books, it must be in some other grounds.

Even as early as Bentham there already existed conflicting opinions as to the soundness of the rational basis of the rule. Bentham was bitter in his criticism against the privilege, and considering that nearly all reforms advocated by that great philosopher were followed, his opinions are concededly not without merit. Bentham was a confirmed lover of freedom and individual rights. Yet he believed that there is no justification for the privilege. "Nor yet is all this plea of tenderness—this doubled-distilled and trebbled-refined sentimentality anything better than a pretence. From his own mouth you will not receive the evidence of the culprit against him; * * * but from the mouth of another, you will receive it without scruple: so that at bottom, all this sentimentality resolves itself into neither more nor less than a predilection—a confirmed and most extensive predilection, for bad evidence."

There are grains of truth in this sarcastic assertion. True indeed much of this rule is silly sentimentalism, but it is also true that there are benefits inhering with the privilege. Much however of the criticism of Bentham will be avoided by confining the operation of the privilege within its proper boundaries. As was repeatedly said, the privilege as originally conceived, covers only verbal testimonial compulsion. However, as construed by the courts, the privilege was given a scope of operations, a meaning, unwarranted by historical, constitutional and statutory definitions. Some courts held that evidence gathered from bodily exhibitions of the accused or forcing the accused to furnish a species of his handwriting are inadmissible as within the prohibition of the privilege. Are these ruling warranted by the history of the privilege or its rational basis? We submit it is not. It is the policy of the law to diminish as much as possible the temptation to perjure, as would be the case if the privilege is not recognized. Hence the law prohibits the compulsion of anyone to furnish from his own mouth evidence against himself. To submit to medical examination, or measurement of a foot, or writing a phrase from dictation is not verbal testimony. True indeed the same result would be attained where he to be forced himself to tell the information de-

sired. The answer is that the fact is not altered that there was no verbal testimonial compulsion.

It would seem very radical to advocate for the abolition of the privilege. But it is not an act of indiscretion to advocate and believe that the privilege must not be extended to cover things not germane to it. Indeed such an opinion is sanctioned by history and logic.