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Constitutional Law -- Self-Incrimination -- Possibility of Subjecting Witness to Punitive Damages

Arch K. Schoch IV

Constitutional Law—Self-Incrimination—Possibility of Subjecting Witness to Punitive Damages

In *Allred v. Graves*,[1] the plaintiff, seeking compensatory and punitive damages, alleged in her complaint that the nine defendants, pursuant to a preconcerted conspiracy, came to her home where they unlawfully and maliciously assaulted her and several members of her family and shot into the automobiles and house of the plaintiff. The defendants, in their answer, denied the assault on the plaintiff or on anyone else. The plaintiff thereupon applied for an adverse examination of the defendants,[2] which the clerk ordered.[3] On the day set for the examination the defendants appeared, and through counsel moved to dismiss the order of examination on the grounds that the plaintiff was seeking punitive damages; that should punitive damages be awarded by the jury, the defendants' liberty could be affected; and that consequently the order of examination would be the equivalent of compelling the defendants to give evidence against themselves which would be violative of the federal and state constitution.[4]

In a hearing on the motion before the Judge of the Superior Court, the parties stipulated that all the defendants had already been tried for all criminal charges arising out of the occurrences. The judge held that article I, section 11 of the Constitution of North Carolina[5] applied only to criminal actions, and that the defendant would have to answer questions at the adverse examination.[6] The defendants appealed from this order.

On appeal, the North Carolina Supreme Court held that the trial judge was correct in refusing to dismiss the order for examination;[7] however, the court held that the defendants may *not* be compelled to answer questions at the examination the answers to which

[1] 261 N.C. 31, 134 S.E.2d 186 (1964).
[2] N.C. GEN. STAT. § 1-568.11(a) (1953); N.C. GEN. STAT. § 1-568.11(b) (Supp. 1963).
[3] N.C. GEN. STAT. § 1-568.11(c) (1953).
[4] 261 N.C. at 33, 134 S.E.2d at 188.
[5] N.C. CONST. art. I, § 11: "In all criminal prosecutions, every person charged with crime has the right to ... not be compelled to give self-incriminating evidence."
[6] 261 N.C. at 33, 134 S.E.2d at 189.
[7] *Id.* at 39, 134 S.E.2d at 193: The court held that a motion to dismiss the order of examination *entirely* was not proper, but that the order should be modified so that the defendants should not be compelled to answer specific questions which might tend to incriminate them.

will necessarily tend to subject them to punitive damages or body execution.[8]

The result is that North Carolina no longer applies the privilege against self-incrimination solely to criminal actions, but also applies the privilege to civil actions in which punitive damages are sought, an award of which might subject the defendant to body execution. In reaching this result, the court reasoned that it is well-accepted law that a witness should not, in any proceeding, be compelled to give testimony that will tend to incriminate him or subject him to fines, penalties, or forfeitures;[9] that this constitutional guaranty should be liberally construed;[10] that punitive damages are *penal* in nature, and not compensatory;[11] and that, therefore, the defendants should not be required to subject themselves to a penalty through self-incrimination.[12]

The Supreme Court of the United States, in *Counselman v. Hitchcock*,[13] held that the privilege against self-incrimination was not confined only to criminal cases against the one invoking the privilege. The Court held that broadly construing the Constitutional privilege, no person should be compelled *in any criminal case* to be a witness against himself, that an investigation before a grand jury was a criminal proceeding, and, therefore, the witness before such jury was entitled to invoke the privilege.[14] Further, the Court said, in dictum: "The object was to insure that a person should not be compelled, when acting as a witness *in any investigation*, to give testimony which might tend to show that he himself had committed a crime."[15]

The next major deviation from the ancient doctrine that the privilege pertained solely to criminal proceedings came in *McCarthy v. Arndstein*,[16] decided in 1924. In that case, the Supreme Court squarely held that the privilege applied in all proceedings, both civil and criminal.[17]

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[8] *Id.* at 38, 134 S.E.2d at 192.
[9] *Id.* at 34, 134 S.E.2d at 189.
[10] *Ibid.*
[11] *Id.* at 36, 134 S.E.2d at 190.
[12] *Id.* at 38, 134 S.E.2d at 192.
[13] 142 U.S. 547 (1892).
[14] 142 U.S. at 562.
[15] *Ibid.* (Emphasis added.)
[16] 266 U.S. 34 (1924).
[17] "The privilege is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought or is to be used. It applies alike to

Since *Counselman* and *Arndstein*, it has been held that the privilege against self-incrimination may be exercised by a witness in any proceeding.[18] Thus in all kinds of examinations before a court,[19] in grand jury investigations,[20] in legislative or quasi-legislative investigations,[21] in administrative investigations,[22] and other type proceedings, the privilege had been held applicable. The conclusion necessarily follows that no longer is there any problem as to the *kind* of proceedings or investigations in which the privilege may be invoked.

With this conclusion in mind, let us examine the type of facts that are protected from disclosure. Wigmore says that: "The facts protected from disclosure are distinctly facts involving a criminal liability or its *equivalent*. Hence facts involving a *civil* liability are entirely without the scope of the privilege."[23] Exactly what the "equivalent" of criminal liability is has often eluded the courts.

Facts that might tend to subject the witness to infamy and public disgrace are not protected by the privilege.[24] In *Ullmann v. United States*,[25] the Supreme Court upheld the constitutionality of the Federal Immunity Act of 1954 which authorized compelled testimony of witnesses in cases which involved the national security and granted immunity from prosecution, penalty, or forfeiture arising out of the testimony they were compelled to give. In *Ullmann*, the petitioner had claimed that disclosure would disable him im-

civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it." *Id.* at 40.

[18] See generally 8 WIGMORE, EVIDENCE §2252 (1961) [hereinafter cited as WIGMORE]; 98 C.J.S. *Witnesses* § 433 (1957).

[19] *E.g.*, Brown v. United States, 356 U.S. 148 (1958) (denaturalization proceeding in a district court); United States v. Field, 193 F.2d 92 (2d Cir. 1951) (upon forfeiture of bail; examination by district of trustees of bail fund; privilege held waived); Wood v. United States, 128 F.2d 265, 270-72 (D.C. Cir. 1942) (preliminary hearing before committing magistrate); Owen v. Fisher, 189 Misc. 69, 66 N.Y.S.2d 856 (Sup. Ct. 1947) (pretrial examination of defendant).

[20] Counselman v. Hitchcock, 142 U.S. 547 (1892).

[21] Emspak v. United States, 349 U.S. 190 (1955); Quinn v. United States, 349 U.S. 155 (1955).

[22] Smith v. United States, 337 U.S. 137 (1949) (before an OPA examiner); Graham v. United States, 99 F.2d 746 (9th Cir. 1938) (examination by immigration officers).

[23] 8 WIGMORE § 2254 at 331. (Emphasis added.) This section was cited by the North Carolina court in *Allred*. 261 N.C. at 34, 134 S.E.2d at 189.

[24] Ullmann v. United States, 350 U.S. 422 (1956); Brown v. Walker, 161 U.S. 591 (1896).

[25] 350 U.S. 422 (1956).

measurably—viz., loss of his job, expulsion from labor unions, passport eligibility, and general public disgrace.[26] However, the majority, in rejecting these contentions, reiterated the rule enunciated in *Brown v. Walker*,[27] that the immunity need only protect the witness from exposure to a *criminal* charge; if he is sufficiently protected from criminal prosecution, he may not invoke the privilege.[28]

The vigorous dissent in *Ullmann* agreed with the petitioner. The dissenting justices, Douglas and Black, contended that forfeiture of rights of citizenship should be protected to the same degree as property rights, and that the compelled testimony in question would undoubtedly deprive the petitioner of some of his valuable rights of citizenship.[29] They further concluded that "the Fifth Amendment was designed to protect the accused against infamy as well as against prosecution."[30]

Allred did not involve the claim that the facts sought to be disclosed might subject the defendants to infamy and public disgrace. The dissent in *Ullmann*, however, does serve to show a liberal departure from the old rules requiring a strict interpretation of the privilege against self-incrimination. If such a view were to prevail, it would not require that the facts tend to subject the witness to a *criminal* liability, but only that such facts would deprive the witness of his various rights of citizenship.

As previously stated, the privilege against self-incrimination is ordinarily available only where a possible criminal prosecution may result from the testimony.[31] But the concept of "criminal prosecution" has been extended to include penalties and forfeitures which are of a *penal* nature, and most jurisdictions have enacted this extension of the privilege as a statutory or constitutional provision.[32]

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[26] *Id.* at 430.

[27] 161 U.S. 591, 605-06 (1896).

[28] 350 U.S. at 430-31.

[29] 350 U.S. at 442-43.

[30] 350 U.S. at 450. Wigmore suggests that the dissenters in both *Ullmann* and *Brown* overlooked the fact that historically there is a difference in the privilege against disclosing facts involving infamy and the privilege against self-incrimination. 8 WIGMORE § 2254. See Smith v. United States, 337 U.S. 137 (1949) (pointing out the distinction). Although the privilege against disclosing infamous facts has largely dissipated, several states have preserved it by statute; see, *e.g.*, ALASKA COMP. LAWS ANN. § 58-6-12 (1948); CAL. CIV. PROC. CODE § 2065 (1955); GA. CODE § 38-1205 (1935); S.C. CODE § 9-214 (1962). See also MCCORMICK, EVIDENCE § 128 (1954).

[31] See Ullmann v. United States, 350 U.S. 422, 430-31 (1956); McCarthy v. Arndstein, 266 U.S. 34 (1924).

[32] See 8 WIGMORE §§ 2256-57.

The words "penalty" and "forfeiture" have frequently been used indiscriminately by the courts; for this reason, a shorthand definition of each might be kept in mind during the remainder of this note. A forfeiture may be said to be a loss resulting from the breach of a stipulation imposed by the parties,[33] while a penalty, on the other hand, flows from the breach of a duty imposed by law.[34]

The North Carolina court, in *Allred*, considered the possibility of having to pay punitive damages a *penalty*, and thereby extended the privilege against self-incrimination to the defendants.[35] The court said: "When the penalty lies in the payment of money, the Courts are in conflict."[36] At this point, the court quoted a footnote from Wigmore[37] which does in fact show that there has been a conflict where a statute prescribes a *fixed sum* or a multiple of actual loss for some act of the defendant. There has been no case, and surely no "conflict," holding or rejecting the contention that a possibility of punitive damages warrants the extension of the privilege against self-incrimination to the witness. In fact, the text to which the above-mentioned footnote applies expressly says that if the "penalty" is by way of punitive damages, it is still a *civil* liability and in no way a *criminal* penalty.[38]

The United States Supreme Court has extended the concept of "criminal prosecution" to include penalties and forfeitures only twice: in both cases the penalty or forfeiture was applied directly as a punishment for a crime, viz., the forfeiture of imported goods for failure to pay the applicable tariff,[39] and a civil penalty imposed for the illegal importation of aliens.[40] In both these cases, the *nature* rather than the *form* of the action was controlling. The penalty or forfeiture applied in each case was essentially punishment for the violation of the applicable law.[41]

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[33] See Chauncey v. Tahourden, 2 Atk. 392, 26 Eng. Rep. 637 (Ch. 1742).

[34] See, *e.g.*, Huntington v. Attrill, 146 U.S. 657, 668 (1892).

[35] 261 N.C. at 38, 134 S.E.2d at 192.

[36] *Id.* at 36, 134 S.E.2d at 190.

[37] 8 WIGMORE § 2257 at 337 n.3.

[38] "When the penalty lies in the *payment of money*, it seems clear that a mere unregulated increase of compensation under the name of exemplary damages is still a civil liability in essence, and therefore the same consequence ought to follow when by statute a fixed sum, or multiple based on actual loss, is prescribed." 8 WIGMORE § 2257 at 337. The cases cited by Wigmore as authority for this statement show merely a conflict as far as the type of statutes mentioned, and do not even mention exemplary damages.

[39] Boyd v. United States, 116 U.S. 616 (1886).

[40] Lees v. United States, 150 U.S. 476 (1893).

[41] Boyd v. United States, 116 U.S. 616 (1886). "If an indictment had

In all the cases that have followed the line of reasoning laid down in the two above-mentioned cases, therefore, the nature of the proceeding—that is, criminal—is the controlling factor, not the form. For example, in early actions for treble damages under the Emergency Price Control Act it was held that the privilege applied for the reason that the statutory damages were not merely remedial, but penal.[42] Later opinions of the circuit courts would impliedly overrule the earlier decisions of several district courts on this point, holding the privilege inapplicable.[43]

Following the same reasoning, the privilege has been allowed in courts of chancery under bills of discovery and under statutory interrogatories to a party.[44] *Wilson v. Union Tool Co.*[45] was an

been presented against the claimants, upon conviction the forfeiture of the goods could have been included in the judgment. If the government prosecutor elects to waive an indictment, and to file a civil information against the claimants—that is, civil in form—can he by this device take from the proceeding its criminal aspect and deprive the claimants of their immunities as citizens, and extort from them a production of their private papers, or, as an alternative, a confession of guilt? This cannot be. *The information, though technically a civil proceeding, is in substance and effect a criminal one....* As, therefore, suits for penalties and forfeitures incurred by the commission of offences against the law, are of a quasi-criminal nature, we think that they are within the reason of criminal proceedings for... that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself." *Id.* at 634. (Emphasis added.)

[42] Bowles v. Trowbridge, 60 F. Supp. 48, 50 (N.D. Cal. 1945). See also City of Philadelphia v. Cline, 158 Pa. Super. 179, 44 A.2d 610 (1945) (action under municipal ordinance to recover penalties for failure to file tax returns; privilege applies); Boyle v. Smithman, 146 Pa. 255, 23 Atl. 397 (1892) (action to recover penalties for not posting a statement of business done, under a statute declaring that the defendant "shall forfeit and pay" $1000 for each act; privilege applies). The *Trowbridge* case was also decided on another ground. The defendant had not yet been tried for the criminal aspect of his act. Therefore, he could not be required to give evidence that could be later used against him. 60 F. Supp. at 50. This was the entire basis of the decision in Porter v. Heend, 6 F.R.D. 588 (N.D. Ill. 1947). The court in *Porter* said in a suit for treble damages under the Emergency Price Control Act that it need not even consider whether the damages were remedial or penal, because the defendant would not be required to answer anyway.

[43] Crary v. Porter, 157 F.2d 410 (8th Cir. 1946). "In addition, mere increased or multiple damages, whether they be for exemplary or other public-interest purposes, whose allowance is dependent upon the recovery of actual damages, have never been regarded as constituting a criminal penalty." *Id.* at 414. See also Kessler v. Fleming, 163 F.2d 464. (9th Cir. 1947) (action under Emergency Price Control Act for treble damages; might be considered a "penalty," but it is only remedial and not a substitute for criminal prosecution); Amato v. Porter, 157 F.2d 719 (10th Cir. 1946).

[44] Speidel Co. v. N. Barstow Co., 232 Fed. 617 (D.R.I. 1916).

[45] 275 Fed. 624 (S.D. Cal. 1921).

action brought for treble damages for patent infringement; in denying discovery, a California district court followed the rule of equity which denies discovery if the answer solicited would tend to subject the party to a penalty, forfeiture or criminal process.[46] However, the same court, two years later in *Perkins Oil Well Cementing Co. v. Owen*,[47] completely reversed itself, though not expressly overruling *Union Tool*. *Perkins* held that the statute allowing treble damages was remedial; that the action was to redress a private aggrievance; that the defendant would not, by any disclosure, make himself liable to prosecution for any public offense. Therefore, no constitutional right would be invaded by compelling him to answer the interrogatories.[48] Another court in the same circuit was again faced with the question in *Schlage Lock Co. v. Pratt-Rymer Co.*[49] It acknowledged the inconsistency of the two previous cases, *Union Tool* and *Perkins*, and adopted the rule of the latter.

Another line of cases cited as authority for the *Allred* decision would not seem to be applicable at all.[50] In all four of these cases, a Mississippi immunity statute was held to protect the defendants from any prosecution, penalties, or forfeitures arising out of the illegal sale of liquor. It is submitted that the Mississippi court was not concerned with whether or not the penalties came within the concept of "criminal prosecution" for the reason that it found that the clear import of the immunity statute was to protect the witnesses from *any* penalty arising from the facts testified to, be it penal *or* remedial.[51]

Where the punishment imposed is not penal, but remedial, there was no holding prior to *Ullmann* by the Supreme Court as to whether the privilege was applicable. The Court had considered the concept of "remedial forfeiture" only once, in *United States v. Hess*,[52] and then in terms of double jeopardy, not of self-incrimination. In that case, the recovery, for the violation of a public housing act after the imposition of criminal sanctions, of double damages plus

[46] *Id.* at 629-30.
[47] 293 Fed. 759 (S.D. Cal. 1923).
[48] 293 Fed. at 761.
[49] 46 F.2d 703 (N.D. Cal. 1931).
[50] Bailey v. Muse, 227 Miss. 51, 85 So. 2d 918 (1956); Zambroni v. State, 217 Miss. 418, 64 So. 2d 335 (1953); Serio v. Gully, 189 Miss. 558, 198 So. 307 (1940); Malouf v. Gully, 187 Miss. 331, 192 So. 2 (1939).
[51] Bailey v. Muse, 227 Miss. 51, 56-57, 85 So. 2d 918, 922-23 (1956), brings this point out very clearly.
[52] 317 U.S. 537 (1943).

a penalty was held not to violate the constitutional guaranty against double jeopardy. The Court ruled that the double damages and the penalty were imposed merely to compensate the government for the damage done by the violations of the act, *i.e.*, the penalties were remedial, not penal.

From the above discussion, it may be seen that the only cases which hold the privilege against self-incrimination applicable where the witness may be subject to "penalties" by way of payment of money are those in which the courts feel that the "penalty" is not remedial, but criminally penal; ones where the damages sought are imposed as a criminal penalty or substitute therefore, and not where they are intended to compensate private aggrievances. Admittedly, punitive damages are "penal," as the court in *Allred* stresses;[53] also it is true that the defendants might become subject to body execution upon failure to pay the judgment for such damages. It is submitted, however, that the damages are not penal within the concept of "criminal prosecution," even though the defendants, in furtherance of their civil liability, might be jailed by means of body execution, and that the court erred by overlooking the distinction between merely "penal" damages which are in essence merely a further *civil* liability, and "penal" damages which come within the concept of "criminal prosecution," to which the privilege against self-incrimination extends only.

ARCH K. SCHOCH IV

Constitutional Law—Was it Intended That the Fourteenth Amendment Incorporate the Bill of Rights?

The Supreme Court in 1833 established the principle that the Bill of Rights did not apply to the states.[1] Following the Civil War the fourteenth amendment, with its "privileges or immunities" and "due process" clauses, cast doubt on this principle and raised the possibility of applying the Bill of Rights to the states by incorporating them into the amendment.[2]

[53] 261 N.C. at 35, 134 S.E.2d at 190.

[1] Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).

[2] U.S. CONST. amend. XIV, § 1, provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of