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Evidence--Does the Privilege Against Self-Incrimination Extend to Incrimination Under the Laws of Another Jurisdiction?

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for realty brokers' commissions to be written is the hardship visited on a broker in obtaining such agreements from a vendor. A landowner may well feel that it is a slur on his integrity for a broker to insist on a written agreement and therefore he may take his business to another broker who is willing to chance the honesty of the landowner in order to obtain business. The vendor then has the protection of the statute of frauds if he chooses not to pay the broker his commission.[12]

The Court of Appeals in the principal case has recognized section 8 of the Kentucky statute of frauds as applicable to the contract in question but nevertheless allowed recovery on quantum meruit. While the decision of the Court may have circumvented the statute of frauds, it is difficult to find this result alarming. Not only does quantum meruit have support as a basis for recovery where a contract, either for broker's commission or for labor and services, has been held unenforceable because within the statute of frauds, but there also seems to be no valid policy reasons in favor of denying recovery.

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EVIDENCE—DOES THE PRIVILEGE AGAINST SELF-INCRIMINATION EXTEND TO INCRIMINATION UNDER THE LAWS OF ANOTHER JURISDICTION?—The witness, Rhine, was summoned before the Jefferson County, Kentucky, grand jury and questioned concerning his relations with the Communist Party and Carl Braden. Braden had been convicted for violating the Kentucky sedition laws, but that conviction had been reversed earlier by the Court of Appeals of Kentucky on the ground that Congress had pre-empted the field of sedition.[1] Rhine refused to answer certain questions[2] propounded by the Commonwealth's Attorney on the ground that his answers might tend to incriminate him. The trial court ruled that Rhine was privileged to refuse to answer the questions, and the Commonwealth appealed to the Court of Appeals for the purpose of a certification of law under Section 337 of the Kentucky

[12] Id. at 412.

[1] Braden v. Commonwealth, 291 S.W. 2d 843 (Ky. 1956).

[2] The following questions were asked Rhine:

> "56 Q. Mr. Rhine, regardless of whether or not you are a Communist —I am not interested in that—but do you know whether or not Carl Braden is a Communist?
>
> "57 Q. Did you ever attend a Communist Party meeting in Carl Braden's house—without asking or wanting to know what effect such attendance might have had on you, if any effect, but in view of that, did you ever attend any meeting in Carl Braden's house relative to Communism or where a cell meeting was being held?"

Commonwealth v. Rhine, 303 S.W. 2d 301, 302 (Ky. 1957).

Criminal Code. Since there was no danger of state prosecution of Rhine for sedition, the Court considered two questions: 1) whether the answers would tend to incriminate Rhine under federal law, and 2) whether the privilege against self-incrimination guaranteed by Section 11 of the Kentucky Constitution extended to the disclosure of facts which would tend to incriminate under federal law. *Held:* Affirmed, the witness was privileged to refuse to answer the questions. *Commonwealth* v. *Rhine,* 303 S.W. 2d 301 (Ky. 1957).

Despite earlier decisions to the contrary,[3] the Supreme Court established in *United States* v. *Murdock* that the privilege against self-incrimination guaranteed by the fifth amendment of the federal constitution does not protect a witness from being compelled to incriminate himself under the laws of another jurisdiction.[4] Furthermore, a majority of state courts have refused to permit a witness to invoke the state privilege against self-incrimination in such cases.[5] One basis behind *United States* v. *Murdock* and similar state decisions[6] is the concept of the federal and state governments as separate and distinct sovereignties acting independently of each other within their own respective spheres.[7] Such a concept must obviously view the privilege against self-incrimination as intended only to prevent the forum jurisdiction from convicting a person on the basis of evidence it has compelled him to give.[8] The rule in *United States* v. *Murdock* has been highly criticized by some writers,[9] and even some federal judges have expressed dissatisfaction with the doctrine.[10] This view of the relationship between federal and state governments is too unrealistic. As the Court of Appeals of Kentucky pointed out in *Commonwealth* v. *Rhine:*

> We believe that to render effective the quoted [Kentucky] Constitutional provision against self-incrimination, it is essential that it apply

[3] United States v. Saline Bank of Virginia, 26 U.S. (1 Pet.) 100, 104 (1828); Ballmann v. Fagin, 200 U.S. 186 (1906); but see, Brown v. Walker,161 U.S. 591, 608 (1896).

[4] 284 U.S. 141, 149 (1931).

[5] See 8 Wigmore, Evidence sec. 2258 (3d ed. 1940); McCormick, Evidence sec. 124 (1954); annotations 59 A.L.R. 895 (1929) and 82 A.L.R. 1380 (1933).

[6] E.g., State v. Morgan, 164 Ohio St. 529, 133 N.E. 2d 104 (1956).

[7] Feldman v. United States, 322 U.S. 487, 490-92 (1944).

[8] But cf. Counselman v. Hitchcock, 142 U.S. 547, 562 (1892); Brown v. Walker, 161 U.S. 591, 622-27 (1896) (dissent); Ullmann v. United States, 350 U.S. 422, 445-46 (1956) (dissent).

[9] Grant, "Immunity from Compulsory Self-Incrimination in a Federal System of Government," 9 Temp. L.Q. 57 and 194 (1934-35); Grant, "Federalism and Self-Incrimination," 4 U.C.L.A. L. Rev. 549 (1957); Parsons, "State-Federal Crossfire in Search and Seizure and Self-Incrimination," 42 Cornell L. Q. 346, 368 (1957); but see, 8 Wigmore, Evidence sec. 2258 (3d ed. 1940).

[10] Black, J., dissenting in Feldman v. United States, 322 U.S. 487, 498-99 (1944) and Irvine v. California, 347 U.S. 128, 140 (1954); Marcello v. United States, 196 F. 2d 437 (5th Cir. 1952); United States v. DiCarlo, 102 F. Supp. 597 (N.D. Ohio 1952).

> to prosecutions by the United States as well as to those by the Commonwealth. To hold otherwise would be to ignore the fact that our citizens are in a very real sense, as well as in a technical one, citizens of both the State of Kentucky and of the United States. The jurisdiction of both governments is co-extensive.[11]

The narrow concept of separate sovereignties does not alone justify denying a witness the privilege of silence when his answer would incriminate him in another jurisdiction.

A second argument in behalf of the majority view is that the interest of the forum jurisdiction in securing the evidence outweighs the interest of the witness in remaining silent. Particular concern has been shown when a witness has attempted to invoke the privilege as to matters which would incriminate in another jurisdiction in the face of an immunity statute of the forum state. Representative of this attitude is the statement of the Supreme Court of Massachusetts in a recent decision:

> A conclusion that the Constitution of this Commonwealth confers upon a witness a privilege against self-incrimination with respect to Federal crimes would lead to serious practical difficulties. No immunity statute can be enacted by a State that will protect against a Federal prosecution. [citations omitted] There are today many Federal crimes which deal with ordinary violations of State criminal law wherever in connection with such violation there has been interstate transportation or communication or use of the mails. Many crimes and particularly 'organized' crime . . . are likely to have ramifications which would bring them within the purview of some Federal statute. If the State Constitution grants a privilege against self-incrimination with respect to Federal crime, it would seem that there can be no effective investigation of even State aspects of such crimes, since evidence of the commission of a crime within the State would constitute one element of proof of commission of the Federal crime. And since the State cannot grant immunity as to the Federal crime it will remain helpless.[12]

Kentucky has a number of witness immunity statutes, and a good illustration of the effect of *Commonwealth* v. *Rhine* would be in regard to the statute granting immunity from prosecution to any witness compelled to testify in a prosecution or investigation of gambling.[13] Since a witness may now refuse to testify on the ground that he might incriminate himself under the federal Gambling Occupation Tax Act,[14]

[11] 303 S.W. 2d 301, 304 (1957).

[12] Cabot v. Corcoran, 332 Mass. 44, 123 N.E. 2d 221, 225 (1954).

[13] Ky. Rev. Stat., sec. 436.510. Other Kentucky immunity statutes which might be affected are: Ky. Rev. Stat., sec. 341.210 (unemployment compensation investigations); Ky. Rev. Stat., sec. 242.420 (violations of local option liquor laws); Ky. Rev. Stat., sec. 278.350 (Public Service Commission hearings); Ky. Rev. Stat., sec. 124.330 (election law violations); Ky. Rev. Stat., sec. 435.250 (sending threatening letter); and Ky. Rev. Stat., sec. 432.520 (failure to come to the protection of a prisoner).

[14] 65 Stat. 529 (1951), 26 U.S.C., secs. 4401-23 (Supp. IV 1957).

it is apparent that the effectiveness of the immunity statute as a means for uncovering violations of Kentucky's anti-gambling statutes has been greatly impaired if not wholly destroyed.

It is also argued that extending the privilege against self-incrimination to include incrimination under the laws of another jurisdiction would interfere with the orderly conduct of many civil actions.[15] For example, in a Kentucky divorce suit, a male witness might refuse to answer questions concerning an illicit affair with the defendant wife in Ohio on the ground that he might incriminate himself under the federal Mann Act. A great number of commercial transactions could involve criminal violations of federal statutes as well as those of other states, and it is entirely possible that conduct acceptable in one jurisdiction could constitute a crime in a second jurisdiction. It is, therefore, quite probable that the privilege against self-incrimination will be invoked on the basis of *Commonwealth* v. *Rhine* in a variety of situations.

Finally, it is argued that, when a witness seeks to invoke the privilege against self-incrimination on the ground of incrimination under the laws of another jurisdiction, the actual danger of prosecution in the other jurisdiction is too remote and speculative to justify allowing the witness to remain silent.[16] However, this view is not justifiable in light of the law regarding the admission of evidence compelled by one jurisdiction in a prosecution by another jurisdiction. In *Feldman* v. *United States*, the Supreme Court held that incriminatory evidence might not only be lawfully compelled by a state court, but that it was admissible in a federal prosecution of the witness.[17] Since a state is powerless to grant a witness immunity from federal prosecution,[18] It is clear that a federal conviction may result from a state's refusal to allow a witness to remain silent whenever his testimony would tend to incriminate under federal law. Similarly, prosecution and conviction

[15] King of the Two Sicilies v. Willcox, 1 Sim. (N.S.) 301, 61 Eng. Rep. 116, 128 (Chan. 1851). It is also said that a judge cannot be expected to know the laws of another jurisdiction. Ibid.; 8 Wigmore, Evidence sec. 2258 (3d ed., 1940). However, this argument is met sufficiently if the witness is required to prove the incriminating statute. United States v. McRae, L. R. 3 Ch. App. 79, 84-86 (1867).

[16] Brown v. Walker, 161 U.S. 591, 608 (1896); People v. Butler Street Foundry & Iron Co., 201 Ill. 236, 66 N.E. 349, 354-55 (1903); State v. Jack, 69 Kan. 387, 76 Pac. 911, 916 (1904), aff. Jack v. Kansas, 199 U.S. 372, 381-82 (1905).

[17] 322 U.S. 487 (1944). Even before it became well established that the fourteenth amendment of the federal constitution does not protect a person from compulsory self-incrimination in state courts, Twining v. New Jersey, 211 U.S. 78 (1908) and Adamson v. California, 332 U.S. 46 (1947), the Supreme Court held that a state might compel testimony which would tend to incriminate the witness under federal law. Jack v. Kansas, 199 U.S. 372 (1905).

[18] Jack v. Kansas, 199 U.S. 372 (1905).

in another state could follow if a witness is compelled to testify as to matters which are incriminatory under the laws of the sister state, although one state court has refused to admit incriminatory evidence which was compelled in federal courts.[19]

Prior to the decision of the Court of Appeals of Kentucky in *Commonwealth* v. *Rhine*, only Michigan, Louisiana, and Florida had recognized that incrimination under the laws of another jurisdiction *might* justify silence by a witness. However, an analysis of the cases leads to the conclusion that the Kentucky decision gives an even wider scope to the privilege against self-incrimination than is recognized in the jurisdictions supporting the minority view. The present minority view was first formulated in 1940 by the Supreme Court of Michigan in the case of *In re Watson*.[20] The court stated:

> The claim of privilege in the face of a State immunity statute cannot be used as a subterfuge or pretense to refuse to answer in proceedings to detect or suppress crime. But neither can the grant of immunity be used to compel answers that will lead straight to federal prosecution. Whenever the danger of prosecution for a federal offense is *substantial* and *imminent* as a result of disclosures to be made under a grant of immunity by the State, such immunity is insufficient to overcome the privilege against self-incrimination.[21] (emphasis added)

As the privilege has been extended by the courts supporting the Michigan rule only in those cases in which there was in fact a criminal proceeding against the witness in another jurisdiction at the time the questions were asked,[22] it is apparent that the concept of "substantial and imminent" danger of prosecution in another jurisdiction is an essential part of the Michigan rule. As expressed by the Louisiana court:

> [T]he important question to be resolved in granting the immunity [from self-incrimination] is the danger of prosecution in the other jurisdictions. Where it appears that the danger is *remote* or *unlikely*,

[19] Clark v. State, 68 Fla. 433, 67 So. 135 (1914); State ex rel. Mitchell v. Kelly, 71 So. 2d 887 (Fla. 1954) (dictum); see also Boynton v. State, 75 So. 2d 211 (Fla. 1954). In a number of cases, the state court has felt obligated to honor a federal immunity statute. Annotation 154 A.L.R. 994, 997 (1945); State v. Verecker, 124 Me. 178, 126 Atl. 827, 828 (1924) (dictum). A federal immunity statute may preclude any state prosecution. Adams v. Maryland, 347 U.S. 179 (1954); Ullmann v. United States, 350 U.S. 422 (1956), Comment, 45 Ky. L.J. 350 (1956-57).

[20] 293 Mich. 263, 291 N.W. 652 (1940).

[21] Id., 291 N.W. at 661.

[22] State ex rel. Doran v. Doran, 215 La. 151, 39 So. 2d 894 (1949) (witness under California indictment); State v. Dominguez, 228 La. 284, 82 So. 2d 12 (1955) (witness under federal indictment); People v. Den Uyl, 318 Mich. 645, 29 N.W. 2d 284 (1947) (witness appealing to the Supreme Court from federal conviction); People v. Hoffa, 318 Mich. 656, 29 N.W. 2d 292 (1947) (witness under federal indictment). See also, United States v. McRae, L. R. 3 Ch. App. 79, 84-7 (1867) (witness in English Court under United States indictment).

> the privilege against self-incrimination should not be extended. Nevertheless, where the danger is imminent, such as in cases which involve then pending charges awaiting prosecution, the privilege of immunity should be extended to a witness.[23] (emphasis added)

The courts adhering to the Michigan rule have refused to find a "substantial and imminent" danger of prosecution unless the witness was then under actual indictment in a federal or sister state court,[24] but the rule now established in Kentucky does not seem to have such limited application.

In *Commonwealth* v. *Rhine,* the Court of Appeals of Kentucky used only two steps to reach its decision. First, by applying the same standards as would have been applied had the questions been asked in federal court, the Court found that "the information desired by the Commonwealth's Attorney could have provided some evidence for a Federal prosecution. . . ."[25] Then, having answered affirmatively the question "whether Section 11 of the Constitution of Kentucky provides a privilege to a witness to refuse to answer where the answer might tend to incriminate him of an offense against the United States."[26] the Court had no difficulty in holding that the witness was privileged to remain silent. Although the Court of Appeals relied on the cases supporting the Michigan view, the facts and opinion in the case negative the assumption that Kentucky intends to adopt the qualifications of the Michigan rule.[27] The Court of Appeals did not concern itself with whether the witness would be in "substantial and imminent" danger of federal prosecution if he answered the questions in the affirmative, and there was no evidence that Rhine had been or would be indicted in federal court for violation of the Smith Act.[28]

However, if an answer will tend to incriminate, how is a court to determine whether or not the witness is in real danger of having his answer used against him in a prosecution in another jurisdiction? The distinction between cases in which there is or is not a "substantial and

[23] State v. Dominguez, 228 La. 284, 82 So. 2d 12, 20 (1955).

[24] State ex rel. Mitchell v. Kelly, 71 So. 2d 887 (Fla. 1954); Lorenzo v. Blackburn, 74 So. 2d 289 (Fla. 1954); In re Watson, 293 Mich. 263, 291 N.W. 652 (1940); In re Schnitzer, 295 Mich. 736, 295 N.W. 478 (1940); In re Cohen, 295 Mich. 748, 295 N.W. 481 (1940); In re Ward, 295 Mich. 742, 295 N.W. 483 (1940).

[25] Commonwealth v. Rhine, 303 S.W. 2d 301, 303 (Ky. 1957).

[26] Ibid.

[27] Using language similar to that of the Supreme Court of Michigan, In re Watson, 293 Mich. 263, 291 N.W. 652, 661 (1940), the Court of Appeals of Kentucky spoke of the "probability of prosecution" in federal court, Commonwealth v. Rhine, 303 S.W. 2d 301, 304 (Ky. 1957), but this apparently means no more than that the questions asked Rhine would tend to incriminate him under federal law. Cf. Ex parte January, 295 Mo. 653, 246 S.W. 241, 244 (1922) (dictum).

[28] 54 Stat. 670, 671 (1940), 18 U.S.C., sec. 2385 (1952).

imminent" danger of prosecution in another jurisdiction is, at best, illusory.[29] If the scope of the privilege is to be extended at all, the most workable rule is that used by the Kentucky Court of Appeals in *Commonwealth* v. *Rhine,* i.e., if an answer would tend to incriminate the witness under the laws of any jurisdiction, the witness is privileged to decline to answer the question.

In conclusion, *Commonwealth* v. *Rhine* deserves favorable criticism, both as to its narrow holding and the broad doctrine underlying that holding. As no possible violation of state laws was concerned, the sole purpose of the questions asked Rhine was to uncover violations of federal law. Clearly, this was sufficient justification for allowing Rhine to remain silent since no interest of the state could be served by requiring him to answer.[30] As the powers of the federal courts extend within the state and as persons are subject to extradition to a sister state for a variety of crimes, the principle that no man should be compelled to convict himself out of his own mouth cannot be upheld unless a witness may refuse to answer when the answer would tend to incriminate him under the laws of another jurisdiction. As the Supreme Court of Michigan stated:

> It seems like a travesty on verity to say that one is not subjected to self-incrimination when compelled to give testimony in a State judicial proceeding which testimony may forthwith be used against him in a Federal criminal prosecution.[31]

The Court of Appeals of Kentucky has remained true to the spirit as well as the text of the constitutional guaranty against self-incrimination.

James Park, Jr.

[29] Professor Wigmore attacks as futile and illusory the distinction of the Michigan view between cases in which there was or was not an imminent danger of prosecution in another jurisdiction, but it must be observed that Wigmore is opposed to *any* extension of the privilege to cover incrimination under the laws of another jurisdiction, 8 Wigmore, Evidence sec. 2258 (3d ed. 1940).

[30] During the course of the famed Kefauver Committee investigations, one federal district court upheld the right of a witness to refuse to answer questions which would incriminate him under state law. United States v. DiCarlo, 102 F. Supp. 597 (N.D. Ohio 1952). The court attempted to distinguish United States v. Murdock on the ground that the congressional committee was seeking evidence only of violations of state law which were the primary concern of the state. The distinction would seem to have some merit, but the case constitutes the only authority for such an argument. Cf. comment, 4 Stan. L. Rev. 594 (1952).

[31] People v. Den Uyl, 318 Mich. 645, 29 N.W. 2d 284, 287 (1947). The passage was quoted, Commonwealth v. Rhine, 303 S.W. 2d 301, 304 (Ky. 1957).