1929

A Critical Comment on the Privilege Against Self-Crimination

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A CRITICAL COMMENT ON THE PRIVILEGE AGAINST SELF-CRIMINATION

The periodically recurrent agitation for bigger and better reforms was ushered in last year by the five to four decision of the United States Supreme Court in the Olmstead Case. The pronouncement by the majority of the court that wire tapping was not a search and seizure within the purview of the Fourth Amendment of the Federal Constitution and therefore the use of any information so acquired was not compulsory self-crimination, as prohibited by the Fifth Amendment, met with nationwide publicity, thousands of letters were addressed to the Supreme Court, some horrified at the violation of the "privilege," others mildly reproving, still others indulging in scathing denunciations of those jurists who had the effrontery to abridge somewhat or somehow the inviolable privileges enumerated in the Constitution.

The haziness, the uncertainty, the doubts exhibited in the minds of the decriers of the Supreme Court, as to the actual meaning, scope, the limitations and modifications of the privilege prompt this epitome of the privilege. We will endeavor to set forth the privilege in a critical manner, stating as briefly as is feasible, its history and its construction.

The exemption from testimonial compulsion arose, in American law, shortly before the formation of the union. Today it is firmly imbedded in the concrete of judicial determinations; but it has not been so always. From 1215 to about 1625, compulsion as a means of extracting self-criminatory responses was

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2 The right of the people, to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated. . . .
3 No person . . . shall be compelled in any criminal case to be witness against himself.
4 The Law Reviewers have seized this opportunity to launch into metaphysical discussions of the Olmstead case. Dean Wigmore approves of the case, in XXIII Ill. Law. Rev. at 377; see also Search and Seizure, 27 Mich. L. Rev. 78; The Supreme Court and Unreasonable Searches, 38 Yale L. J. 77, and a case note in 77 Pa. L. R. 139, and 6 N. Y. U. L. Rev. 75.
5 For excellent Histories of the privilege, see Wigmore, sec. 2550 (references to Wigmore in this article are to the first edition); 15 Harv. L. R. 610; Twining v. New Jersey, 211 U. S. 78, 29 Sup. Ct. 14.
a common feature of the courts of England; it was not till late in the 17th century that this practice was seriously questioned, and in the early eighteenth that the compulsion was removed and the privilege began to take a definite form and substance. It became entrenched in the Common Law, and before the adoption of the federal constitution, five states had bulwarked the privilege by providing in their constitutions that no man shall be compelled to give evidence against himself in criminal cases. Since then all the states, except New Jersey and Iowa, have included such a provision, and the Fifth Amendment of the Federal Constitution likewise bestows the right of silence. New Jersey and Iowa, despite their lack of constitutional privilege, nevertheless grant it by virtue of the common law. See State v. Zdanowicz for the New Jersey Rule; and State v. Height for the Iowa version.

The constitutional phraseology neither enlarges nor narrows the scope of the privilege as understood, developed and accepted in the common law. This leads to several important consequences:

1. A clause protecting a person from being a “witness against himself” protects a witness as well as an accused—that is, a party defendant.
2. A clause exempting from “self-criminating testimony in criminal cases” protects equally in a civil case, where the fact probed for will advise of a criminal act done.
3. The privilege is applicable to all courts, grand juries, preliminary inquiries, etc.
4. The converse of proposition No. 2 supra, if by a dexterous manipulation of the wording we could educe one, does not

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The common law is the only system of jurisprudence that recognizes the privilege. Wigmore, sec. 2251.

North Carolina, 1776; Pennsylvania 1776; Virginia 1776; Mass. 1780; N. Hamp. 1784. It is well known, of course, that the first ten amendments bind only the Fed. Govt. Barron v. Baltimore, 7 Peters 243.

69 N. J. L. 619, 55 Atl. 743. See also In re Haines, 67 N. J. L. 442, 51 Atl. 929.

117 Iowa 650, 91 N. W. 935.

Wigmore, sec. 2253.


Wigmore, sec. 2253.
obtain. Facts tending to expose one to a civil liability are not within the scope of the privilege.\textsuperscript{14}

5. In the United States, if the natural or logical result of the testimony tends to expose the infamy of the witness, or react to his disgrace, it is not, and should not, be privileged, unless the question asked concerns an immaterial fact.

Social ignominy with its resultant ostracism was not within the contemplation of the creators of the privilege, so in this country, this slim pretext for the utilization of the privilege has long been abandoned. It is replaced by judicial restriction of cross-examination as to character.\textsuperscript{15} Thus character itself is not a subject that may be probed into, merely reputation, and the right to inquire with respect to reputation is limited by the rules of relevancy.

A digression is here perhaps permissible. We have stated supra that impending disclosure of civil liability is not sufficient to invoke the privilege. In equity that is not precisely so. Where a right of property will be divested or money will be paid to another for a wrong or misconduct\textsuperscript{16} by way of penalty equity will not decree discovery. So also where a forfeiture is involved, chancery will not require the interrogatories to be answered. The rule is succinctly stated in the Boyd case\textsuperscript{17} as follows: "Now it is elementary knowledge that one cardinal rule of the Court of Chancery is never to decree a discovery which might tend to convict the party of a crime, or to forfeit his property." This is no doubt explained, in part, by equity’s well known abhorrence of forfeitures.

We are now confronted with the problem: Does the privilege exist when it would reveal a crime under a foreign sovereign? Thus if A is testifying in New York in a civil action, can he refuse to answer on the ground that his reply would fur-

\textsuperscript{14}Id. 2254; and Boston & Maine R. R. v. State, 75 N. H. 513, 77 Atl. 996; State v. Heffernan, 28 R. I. 20, 65 Atl. 284.

\textsuperscript{15}Compare the dissenting opinion of Justice Field in Brown v. Walker, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 513, and the old New Jersey cases. Vaughn v. Perrine, 3 N. J. L. 299; Fries v. Burgler, 12 N. J. L. 79. See also Lohman v. People, 1 N. Y. 378, 49 Amer. Dec. 340, holding that a witness is privileged not to answer questions tending to disgrace himself only where they are immaterial to the issue except so far as they affect his credibility.


nish evidence of a crime for which he might be punished in Illinois? No. The privilege does not extend to testimony revelatory of a crime under a foreign sovereign.\textsuperscript{18} The reason is self-evident. There is no double jeopardy and by the abstruse reasoning which deduces that lack, the analogy is apt, and Lo! the mirage of the privilege dissolves and through the dissipating haze we see that the privilege is not omnipresent.\textsuperscript{19}

There is no vestige of the privilege which permits even the pretense of excluding answers which would incriminate third persons only. The favored use of this subterfuge and the one to which is had most frequent resort is illustrated in the case of the corporate employee or officer and the corporation.

In \textit{Hale v. Henkel}\textsuperscript{20} the defendant pleaded privilege on the ground that it would incriminate the corporation. Held, not so. The privilege is personal and a shield only to the person testifying. It has been held, also, that the Fifth Amendment does not apply to corporations. They, being creatures of the state, can possess no secrets, as to the sovereign who created them.\textsuperscript{21}

The facts “tending to criminate” which are protected are not only those facts which directly criminate the witness, but also responses which lead up to self-crimination, as for example the showing of the letter, in Aaron Burr’s Trial.\textsuperscript{22} This doctrine does not apply however to any fact which merely, under some conceivable expectation, might form a part of a crime.

It does apply:

1. To a fact which is relevant to an inquiry whose sole or essential object is to charge or fasten a crime on a witness: e. g. an accused in a criminal case.

2. To a witness, not a party, against whom it is desired to prove a crime by way of impeachment.\textsuperscript{23} If the question

\textsuperscript{18} \textit{Hale v. Henkel}, 201 U. S. 43; \textit{Cf. United States v. Lombardo}, 241 U. S. 73, 36 Sup. Ct. 508, refusing to pass on the question which the lower court had decided contra to the weight of authority, 228 Fed. 986; \textit{United States v. McKae}, L. R. 3 Ch. 79, and further compare \textit{King of the Two Sicilies v. Wilcox}, 1 Sim. N. S. 301.


\textsuperscript{20} 201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652.

\textsuperscript{21} \textit{Id}; also \textit{Silverthorne Lumber Co. v. U. S.}, 251 U. S. 385. Curiously enough the Fourth Amendment does apply to corporations. 40 Sup. Ct. 182, 64 L. Ed. 319.

\textsuperscript{22} \textit{Robertson's Rep.}, 1, 208 (at 244) Fed. Cases, No. 14692E.

\textsuperscript{23} \textit{Wigmore, sec. 2260}. 
asked, divulges by the required answer a clue to the commission of a crime, which involves others, but does not necessarily implicate the testifier, it is privileged.\textsuperscript{24}

The privilege protects a person from any testimonial disclosure sought by legal process against him as a witness.\textsuperscript{25} It follows, therefore, that documents or chattels produced by order of a subpoena or other legal process, are also privileged, but documents or chattels obtained from the person's control without the use of process against him as a witness, are not privileged and may be used against him, evidently.\textsuperscript{26} The Federal Courts are contra, following the leadership of the Week's case,\textsuperscript{27} holding that if federal agents violate the Fourth Amendment in securing evidence, they cannot use it because of the Fifth Amendment. \textit{Boyd v. U. S.}\textsuperscript{28} was the forerunner of the current federal trend that distinguishes violations of the Fourth Amendment by also stigmatizing them as infractions of the fifth. The overwhelming majority of the states refuse to follow the Supreme Court and do admit illegally seized evidence provided no legal process is required to secure it.\textsuperscript{29} If, however, federal agents are not involved, the United States Courts will avail themselves of illegally seized evidence.\textsuperscript{30}

When a document is "official" it is not privileged, as it is made by an official holding a public trust, and liable therefore, at any time, to inspection as a memorial open to the public. These documents may be secured by legal process.\textsuperscript{31}

Where a document is withheld because it is privileged, no inference of its contents may be made. However, psychiatrists, alienists, and other mental specialists, have uncovered nothing which will prevent the jury from thinking that if the defendant

\textsuperscript{24}It should not be privileged, but it apparently is. See \textit{Ward v. State}, 2 Mo. 120, at 122.
\textsuperscript{25}Wigmore, sec. 2263.
\textsuperscript{28}116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746.
\textsuperscript{29}See opinions of Taft and Brandeis in \textit{Olmstead v. U. S.}, 48 Sup. Ct. 564, 277 U. S. 438, 72 L. Ed. 944, thoroughly discussing this phase. See Wigmore, sec. 2264, wherein the noted author deplees the confusion of the Fourth and fifth amendments.
\textsuperscript{31}Wigmore, sec. 2264.
were innocent he would present the document to exonerate himself. No anaesthetic has been produced which will cause a cessation of the jury's cerebral processes.

The privilege encompasses testimonial evidence only. An inspection of the bodily features of the witness is not a violation of the privilege. Unless an attempt is made to secure an oral or written communication from the witness, the demand made is not a testimonial one, and, therefore, not privileged. Hence a request that a defendant roll up his sleeves, or expose his chest or stand up to be identified is not privileged, and the witness must comply. However there are two exceptions to this:

1. The defendant cannot be required to speak for identification purposes.
2. The defendant cannot be compelled to furnish specimens of his handwriting for purposes of comparison. The spirit governing the exceptions is obvious: They are testimonial in nature and hence privileged.

We now avail ourselves of another digression. This time we compare the privilege with confessions. This can be effected very simply by dividing the similarities or contrasts into three sections:

1. The privilege extends only to court room statements made under process as a witness, whereas the inadmissible confession comprises statements made in or out of court, but secured by compulsion.
2. Where the privilege is waived, a wrongfully obtained confession may be excluded.
3. The privilege embraces witnesses testifying in civil and criminal cases, whereas confessions may issue only from accused persons in criminal cases.

The privilege merely grants the right of refusal to answer and does not prohibit the addressing of the question to the witness. Peruse any constitutional provision appertaining to the privilege and it is at once apparent that the answer alone is protected. It follows, then, that a witness cannot object to the

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23 Wigmore, sec. 2265.
24 For a comprehensive development of the subject see Wigmore, sec. 2266.
25 U. S. Const. Amend. V is typical: "No person shall be compelled to be a witness against himself."
question, but he may decline to reply. It is a non sequitur, however, to maintain that a defendant can be called as witness in a criminal case for the express (or perhaps sole) purpose of interposing queries which the prosecution knows, or believes, that the defendant need not answer because privileged. In civil cases though, the defendant can be called and questioned, although he need not answer.

The old English practice, 1725 et circa, was to have the presiding judge warn the witness that the question was one he need not answer. This has grown obsolescent in the United States, and today in the majority of the states, the trial judge is under no duty to caution the witness as to the existence of his privilege, although his right to do so still of course persists.

The witness on the stand, whether he be a defendant or a witness, is the only person who can avail himself of the privilege. Counsel may not resort to an objection in order to apprise the witness that the question carries with it the option of refusing to answer. As the privilege is peculiarly personal, the logic and reasonableness of this limitation is self-evident.

The witnesses may not arbitrarily refuse to answer. They must state the reason for their non-disclosure. The danger must be real and appreciable, for the constitutional protection does not extend to remote possibilities out of the ordinary course of the law. If the question clearly calls for an incriminating answer, the witness need only plead the privilege, and not reveal his testimony to the court. However, the statement by the witness that his answer would incriminate him is not conclusive; the solution is to be determined primarily by the trial court.

Chief Justice Marshall, with his customary clarity, laid down the rule, in Aaron Burr's case, as follows:

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21 Board, etc. v. Marettï, 93 N. J. E. 513, 117 Atl. 433.
22 Wigmore, sec. 2268, and cases there cited.
24 See Rapeljes' Law of Witnesses, sec. 265; Wrottesley's Examination of Witnesses, p. 20.
26 Mason v. United States, 244 U. S. 362, 37 Sup. Ct. 621, 61 L. Ed. 1198.
"When a question is propounded, it belongs to the court to consider and to 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 which is 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 judges would strip him of the privilege which the law allows."

It is to be observed that the Mason case, note 42 supra, was decided in 1917, whereas Aaron Burr's case was disposed of in 1807, a lapse of one hundred and ten years. To this we add: Where the answer is clearly inculpatory the privilege applies. Otherwise not.44

The general rule in the United States is that a witness' silence shall not and cannot be referred to or commented upon. The Supreme Court, in a most illuminating opinion, decided contra to this, under the particular facts of the case in Twining v. State of New Jersey.45 The trial judge in New Jersey had commented on the failure of the defendant to take the stand in his own behalf. Conviction had resulted and defendant had subsequently appealed. New Jersey, as has been shown above, has no constitutional privilege provision. The Supreme Court held that the suspension of the privilege, if there is no state constitutional privilege, is not a violation of the due process clause46 and also that the right to non-compulsory testimony is not a privilege and immunity of citizens of the United States. The Twining case was no doubt affected by the settled law in New Jersey empowering the trial judge to comment upon the witness' speech, or failure thereof. The General rules are as follows:

1. Comment by counsel on failure of accused to testify is forbidden. This is reversible error in Oklahoma and Iowa.47

2. This applies to the ordinary witness also.

3. This prohibition against drawing inferences applies to defendant's silence at prior or preliminary examinations.48

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44 See State v. Thaden, 43 Minn. 253, 46 N. W. 447.
45 211 U. S. 73, 29 Sup. Ct. 14, 53 L. Ed. 97.
46 United States Constitution, Amendment XIV.
47 See Chap. 68, Sec. 11 of Revised Statutes of Oklahoma; see also State v. Baldeser, 88 Iowa 55, 55 N. W. 97.
48 Wigmore, Sec. 2272.
4. No inference is to be drawn from nonproduction of privileged documents. (See above) (Page 6.)

A most compelling argument in favor of the ban against inferences is found in Wigmore. To paraphrase him.

One of the real purposes of the privilege is to have the prosecution information leading to defendant's conviction, and not to rely on his confession. Therefore, to permit an inference of guilt to be drawn from his silence, is to vitiate the full force of the privilege.

Failure to produce evidence other than one's own testimony is open to an unfavorable inference. For example: The defendant was indicted for the larceny of a horse, and he refused (or failed) to call the alleged vendor of the horse to aid him. Held: The failure to so call was open to the inference. Thus once again we see that it is defendant's testimonial answer that is the object of the privilege's protection.

We have progressed to the problem of waiver of the privilege. The testimonial privilege is the subject of waiver as fully as other constitutional privileges. A defendant may waive his privilege by contract, as where an employee covenants to answer any bill of discovery. Where an ordinary witness, (that is, one not a defendant) waives his privilege, he must reveal all the facts, i.e., when the witness once answers to relevant incriminating questions he cannot stop short, so long as the question is "proper cross-examination." If the defendant take the stand of his own volition, he also has waived the privilege. The general rule is and should be, that the waiver extends to all matters relevant to the issue, but does not go to defendant's credibility. However, there are various modifications and restrictions dependent on the various jurisdictions.

Thus a defendant testifying in his own behalf is subject to cross-examination, in some states as to matters brought out in

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49 For the sake of brevity only.
50 Wigmore 2272.
51 People v. Cline, 83 Cal. 374; See Wigmore, 2273, for exhaustive treatment of when inference may be noticed.
52 East India Co. v. Atkins, 1 Stra. 168.
54 Camminetti v. U. S., 242 U. S. 430, 37 Sup. Ct. 141, 61 L. Ed. 409,
direct examination,64 and in others to all relevant matters.55 The waiver is limited to the particular proceeding in which the defendant volunteers the testimony. Thus, testimony contributed at a preliminary trial (as a grand jury or coroner’s inquest) is no waiver at the main trial, later.56 Where the privilege is claimed so as to prevent cross-examination, all the direct testimony, relevant thereto may be stricken out.57

When the accused takes the stand as a witness, he is open to impeachment like any other witness, and evidence of his bad character for veracity is admissible even though as a mere accused he would first have to introduce evidence of his good behavior. So to put character in issue also as a witness his veracity can be impeached and he cannot rebut it with evidence of good character till the impeachment. The accused as a witness may be impeached by proof of conviction of another crime (preferably by producing the record thereof); and the accused, as a witness, is in a few states amenable, on cross-examination, to explain specific acts of misconduct impeaching his character for veracity.58

The general rule is that a witness can be cross-examined only as to those matters brought out on direct,59 but this rule does not embrace inquiries merely impeaching character (and not requiring an incriminating response.)

Legal criminality consists of a liability to punishment by law. When the liability is no longer existent there is a discontinuance of the taint of criminality, and with that departs the privilege. The various modes in which the liability may be terminated, thus effecting a dissolution of the privilege will be discussed at some length. To simplify the classification, the various modes of dissolution will be lettered:

A. Acquittal
B. Conviction
C. Statute of Limitations

64 State v. Zdanowicz, 69 N. J. L. 619, 55 A. T. L. 743; People v. Tice, 131 N. Y. 651, 30 N. E. 494, where the authorities are collated. In same states, such as New Jersey, the courts have held both ways at different times. Thus compare, State v. Sprague, 64 L. 419, 45 A. 783, with State v. Grover, 139 A. 417.
65 See note 54 supra.
66 Overend v. Superior Ct., 131 Cal. 280.
67 Wigmore, 1321.
68 Id., Sec. 2277.
69 Compare the so-called Penn. and Mass. Rules.
D. Abolition of the Crime
E. An Executive Pardon
F. Legislative Amnesty
G. Statutes Forbidding the Use of Testimony

A. An acquittal conclusively negatives crime. Therefore no privilege can be claimed on a charge of the crime for which an acquittal was the verdict.

B. Conviction and punishment therefor is another bar to the privilege. The reason being self-explanatory, we pass on.

C. The bar of the statute of limitations removes the privilege as the liability to punishment ceases with the falling of the bar. A few states, notably New Jersey, hold that with the falling of the bar, the perpetrator has a vested right not to be persecuted or prosecuted. Thus it is seen that there is one justification for the criminal limitations statutes. They may lead to the divulging of information which will be of material assistance in the apprehension of the unbarred fellow reprobates.

D. When we deliberate over the dissipation of the privilege by reason of the abolition of the crime by an act passed subsequent to its commission, we have one observation to make. The statute must contain a provision exculpating all prior offenders. This section and C, above, are strongly similar.

E. An executive pardon, if accepted, bars the privilege, even though there still remains possible liability of the pardoned one for infraction of the laws of another sovereign. This is explained supra. The prevalent notion among the laity and not a few of the profession is that a pardon must be accepted. It has early been decided, from United States v. Wilson to the recent Burdick case, that a pardon is ineffective till accepted, and that no executive coercion may be exercised to insure acceptance. The Burdick case reiterated the doctrine that despite the fact that the witness has immunity at hand, his privilege of self-crimination remains until he avails himself of the pardon.

The Burdick case has been greatly weakened by the Supreme Court's later potent and portentous decision in Biddle

Supra, note 18. The prosecuting officer's promise of immunity is not technically a pardon, and therefore the privilege should not cease. But see the Whisky Cases, 99 U. S. 594, 25 L. Ed. 399.
7 Peters 150, 3 L. Ed. 646.
v. Perovich\textsuperscript{34} ruling that commutation of sentence must be accepted. A pardon removes all legal liability, but does not obviate the disgrace. (Query: Does it blot out guilt?) This is one reason for allowing the accused the option of accepting or rejecting; but as there is no constitutional privilege\textsuperscript{35} protecting the right to refuse to answer because subjecting to disgrace, this affects the weight of the pardon very slightly. In the old case of Reading's Trial, 7 How St. Tr. 259, the question which we will leave unanswered was settled: Can you ask a witness about a crime for which he has been pardoned?

F. A legislative privilege offering amnesty for the individual offender who shall disclose the facts of the offence upon inquiry disintegrates the criminality and puts "finis" on the privilege, providing, of course, that the legislature's offer is accepted. The practical purpose of the amnesty statutes is compensation enough for the dissolution of the privilege. For exhaustive statutory citations see Wigmore.\textsuperscript{69} The theory of these statutes is that by expurgating the crime the privilege ceases; this is the uniform rule.

G. This causes us to ponder. Statutes forbidding the use of testimony do not forbid prosecution or punishment but merely enunciate that the testimony given shall not be used elsewhere. The early cases\textsuperscript{67} seemed to favor these statutes, but in Counselman v. Hitchcock\textsuperscript{68} the Supreme Court rendered the opinion that nothing less than complete absolution will suffice, and therefore statutes merely prohibiting the use of testimony are totally inadequate. These statutes do not prevent the prosecution from indicting the witness for offenses revealed by clues furnished by his testimony. So the federal courts, followed by the states, are today in accord on their insistence that the liability be absolutely exterminated.\textsuperscript{69}

We have thus followed the privilege from its history to those circumstances when it is nonexistent. We have seen that

\textsuperscript{34} 47 Sup. Ct. 664, 274 U. S. 480, 71 L. Ed. 1161.
\textsuperscript{35} Locate supra.
\textsuperscript{36} Wigmore, Sec. 2281, note 5.
\textsuperscript{65} People v. Kelly, 24 N. Y. 74.
\textsuperscript{67} 142 U. S. 547, 15 Sup. Ct. 195, 35 L. Ed. 110.
\textsuperscript{68} ing, 211 U. S. 78.
as a privilege it is within the control of the states and not that of the United States, that the Olmstead Case, supra, is a decision binding the Federal government; and lastly that our Constitution is not fixed and immutable, but plastic and capable of being interpreted liberally. So as we reflect on the privilege, let us view it in the spirit which prompted Chief Justice Marshall to say "We must never forget it is a constitution we are expounding."

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71 McCulloch v. Maryland, 4 Wheaton 316, 4 L. Ed. 579.