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Witnesses: Privilege against Self Incrimination--Claim of Privilege after Previous Waiver

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the statement of the court in *Quinn* v. *Phipps*[7] that equity will raise a constructive trust where one, through fraud, abuse of confidence, or through some questionable means, gains an advantage for himself which in equity and good conscience he should not be permitted to retain. Professor Bogert calls the cataloguing of the types of conduct which will give rise to a constructive trust the main problem in that field and says that not all constructive trusts can be based on "fraud" unless the word is taken to include any conduct which equity would treat as "unfair, unconscionable, and unjust."[8]

Even the most liberal delineation of conduct which will give rise to a constructive trust presupposes some type of unfair or inequitable advantage taken or held by the defendant. So for the appellee in the *Woodruff* case to prevail he must show that the appellant received something which in good conscience was the property of the appellee. The appellee's contention that his bill was represented as a valid obligation of appellant does not fit within any of the foregoing definitions of the required types of conduct. There was no fraud, at least as against appellee, in using his bill to negotiate a settlement. The appellee did not plead that he had a right to obtain payment directly from the transit company and that the money was wrongfully obtained by appellant. Nor did he plead any agreement that the amount of his bill would be held in trust if recovered in a settlement.[9] Appellee's right against appellant was not contingent upon arriving at a settlement and the mere hope or expectation of receiving payment out of a particular fund will not create a trust.[10] The fact that appellant obtained and retained all the settlement is therefore not an equitable wrong to appellee. He has shown only a creditor-debtor relationship, which the appellant does not deny, except as to amount. There has long been a distinction in equity between a trust and a debt,[11] and the United States Supreme Court, in a case where the Court's sympathy lay with the petitioner for equitable relief, held that the mere non-payment of a debt is not a circumstance that will give rise to a constructive trust.[12]

Therefore, if the appellee can establish the reasonableness of his charge, he can recover the full amount in an action at law, and if it cannot so be established there is no reason for equity to aid him in an exorbitant recovery, and the Court of Appeals correctly denied him relief.

James M. Sanderson.

WITNESSES: PRIVILEGE AGAINST SELF INCRIMINATION—CLAIM OF PRIVILEGE AFTER PREVIOUS WAIVER.—In the recent case of In re *Neff*[1] a United States Court of Appeals held that a witness' waiver of her privilege against self incrimination by testifying before a grand jury is not a waiver of that privilege for purposes of the subsequent trial.

A witness, in response to a subpoena, had appeared before the federal grand jury for the District of New Jersey. There, she had answered questions put to her in connection with her acquaintance with one Valenti, then under investigation for falsely

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[7]93 Fla. 805, 113 So. 419 (1927).

[8]3 BOGERT, TRUSTS AND TRUSTEES § 471.

[9]RESTATEMENT, TRUSTS § 12, Comment j (1935).

[10]1 BOGERT, TRUSTS AND TRUSTEES § 19.

[11]1 SCOTT, TRUSTS, § 12 (1939).

[12]McKey v. Paradise, 299 U.S. 119 (1936).

[1]206 F.2d 149 (3d Cir. 1953).

filing a non-Communist affidavit in violation of the Taft-Hartley Law.[2] As a result of this testimony the witness was indicted and convicted of perjury Subsequent to her conviction she was called as a witness in Valenti's trial[3] but refused to answer on the grounds that her answers might tend to incriminate her. However, she had answered identical questions, apparently without any objection, before the grand jury For her refusal she was convicted of contempt. The Court of Appeals reversed the conviction, holding that a waiver of the privilege against self incrimination is limited to the particular proceeding in which the witness has volunteered testimony and that a trial and the grand jury hearing upon which the trial is based do not constitute a *single* proceeding.

Certainly there can be little argument but that the privilege has become firmly entrenched in American jurisprudence by constitutional provision, both Federal[4] and state.[5] Even in those states where no statutory authority for the privilege exists it is given by judicial decision.[6] It extends to civil and criminal proceedings alike.[7] In order to take advantage of the privilege, the federal courts hold that the witness must specifically claim it.[8] He may do this whether at the trial or before a grand jury [9] But the privilege may be waived either by contract or by voluntary testimony on the stand.[10]

The problem presented by In re *Neff* then is: Once the privilege not to incriminate oneself *has* been waived by giving testimony, how far will such a waiver extend? The vast majority of American courts that have been called upon to decide this question have held that the waiver of the privilege is limited to the particular proceedings in which the witness has thus volunteered testimony [11] Thus, the waiver has been held not to extend to the main trial in cases where the witness has filed schedules preceding a bankruptcy hearing,[12] has testified in a preliminary examination in a criminal case,[13] or has made statements to a judge investigating election fraud.[14] This limitation of the waiver has been applied not only to the accused, but to general witnesses as well.[15]

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[2]29 U.S.C.A. § 159(h) (1947)

[3]See United States v. Valenti, 207 F.2d 242 (3d Cir. 1953)

[4]U. S. CONST. AMEND. V.. "No person shall be compelled in any criminal case to be a witness against himself. "

[5]See, *e.g.*, CAL. CONST. Art. I, § 13, MASS. CONST. Art. 12 [§ 13], N. Y. CONST. Art. I, § 6; WASH. CONST. Art. I, § 9.

[6]Duckworth v. District Court, 220 Iowa 1350, 264 N.W 715 (1936)

[7]McCarthy v. Arndstein, 262 U.S. 355 (1922), *aff'd.* 266 U.S. 34 (1924)

[8]Rogers v. United States, 340 U.S. 367 (1950), United States v. Monia, 317 U.S. 424 (1942), United States v. Murdock, 284 U.S. 141 (1931).

[9]United States v. Monia, 317 U.S. 424 (1942), Counselman v. Hitchcock, 142 U.S. 547 (1892)

[10]8 WIGMORE, EVIDENCE § 2275 (3d ed. 1940)

[11]Arndstein v. McCarthy, 254 U.S. 71 (1920), United States v. Malone, 111 F.Supp. 37 (N.D. Cal. 1953), Overend v. Superior Court, 131 Cal. 280, 63 Pac. 372 (1900), Duckworth v. District Court, 220 Iowa 1350, 264 N.W 715 (1936), Apodaca v. Viramontes, 53 N.M. 514, 212 P.2d 425, 13 A.L.R.2d 1427 (1949), Temple v. Commonwealth, 75 Va. 892 (1881)

[12]Arndstein v. McCarthy, 254 U.S. 71 (1920)

[13]Overend v. Superior Court, 131 Cal. 280, 63 Pac. 372 (1900), *In re* Mark, 146 Mich. 714, 110 N.W 61 (1906).

[14]People v. Cassidy, 213 N.Y. 288, 107 N.E. 713 (1915)

[15]Overend v. Superior Court, 131 Cal. 280, 63 Pac. 372 (1900), Samuel v. People, 164 Ill. 379, 45 N.E. 728 (1896), Duckworth v. District Court, 220 Iowa 1350, 264 N.W 715 (1936), *In re* Mark, 164 Mich. 714, 110 N.W 61 (1906), People v. Cassidy, 213 N.Y. 288, 107 N.E. 713 (1915)

But see 8 WIGMORE, EVIDENCE § 2276(4) (3d ed. 1940) Professor Wigmore, though citing the above cases for his authority, nevertheless seems to restrict the limitation of the waiver to the *accused* only.

In re *Neff* is the first case in which a federal court of appeals has applied this rule to testimony given before a grand jury.[16] The state courts, however, have long acepted this rule.[17] The reasoning of these courts is that since the waiver of the privilege is confined to the one particular proceeding where it is made, and a grand jury hearing and subsequent trial are *not* one proceeding, then it must follow that waiver before a grand jury is not a waiver for the subsequent trial. Thus, in supporting their conclusion the state courts must rely on the premise of the dissimilarity of a grand jury and trial court.[18] But this dissimilarity is also recognized by the federal courts[19] with the justification for making such a distinction being aptly stated in the *Neff* case itself. There Mathis, C.J. said:

> "The grand jury is not a judicial tribunal but rather an *informing or accusing body.* While an appendage of the court it does not conduct its proceedings judicially and when after its secret ex parte investigation it finds and returns to the court an indictment against a defendant its function with respect to that defendant is ended."[20] (Emphasis added.)

Thus, since both federal and state courts accept the proposition that the waiver of the privilege against self incrimination is confined to the proceeding in which such waiver is made, and since they both distinguish between a grand jury hearing and the subsequent trial, the court in the *Neff* case was fully justified in reaching the same conclusions reached in the state cases upon which it relies.[21] Is there a logical justification for this conclusion? The problem posed by the question "the defendant having voluntarily testified before some official group, and having displayed a readiness to disclose criminal acts, what end of justice will be furthered by allowing silence in the future?"[22] is well worthy of consideration.

An interesting illustration of how the limitation of the waiver can frustrate prosecution[23] is provided by a California case, ex parte *Sales*.[24] There, a witness had testified before a grand jury as to a particularly heinous murder committed by several members of a secret society to which she belonged. Largely on the basis of this testimony, several persons were indicted, but at their trial the witness invoked her privilege against self incrimination and refused to testify.

An even stronger illustration of how a witness can take unfair advantage of the limitations of the waiver is *Duckworth* v. *District Court*.[25] In that case the witness who

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[16]However, just prior to the principal case, a federal district court applied the rule on similar facts. United States v. Malone, 111 F.Supp. 37 (N.D. Cal. 1953).

[17]Overend v. Superior Court, 131 Cal. 280, 63 Pac. 372 (1900); *Ex parte* Sales, 134 Cal.App. 54, 24 P.2d 916 (1933); Duckworth v. District Court, 220 Iowa 1350, 264 N.W. 715 (1936); Apodaca v. Viramontes, 53 N.M. 514, 212 P.2d 425, 13 A.L.R.2d 1427 (1949).

[18]Banks v. State, 185 Ark. 539, 48 S.W.2d 847 (1932), Adams v. State, 214 Ind. 603, 17 N.E.2d 84, 118 A.L.R. 1095 (1938); Coblentz v. State, 164 Md. 558, 166 Atl. 45 (1933); State v. Lawler, 221 Wis. 423, 267 N.W. 65 (1936).

[19]*Ex parte* Bain, 121 U.S. 1 (1887); *cf. In re* Oliver, 333 U.S. 257 (1947) (by implication)

[20]*Supra* note 1 at 152.

[21]*Ex parte* Sales, 134 Cal.App. 54, 24 P.2d 916 (1933); Duckworth v. District Court, 220 Iowa 1350, 264 N.W. 715 (1936); Apodaca v. Viramontes, 53 N.M. 514, 212 P.2d 425 (1949); Temple v. Commonwealth, 75 Va. 892 (1881).

[22]Note, 8 So. Calif. L. Rev. 51, 52 (1934).

[23]But pity not the poor prosecutor! The law still remains that a *statement* made voluntarily by a witness under oath may be used against him in any subsequent prosecution or proceeding, unless statute otherwise provides. Heller v. United States, 57 F.2d 627 (7th Cir. 1932); 58 Am. Jur., Witnesses, § 100, p. 82.

[24]134 Cal.App. 54, 24 P.2d 916 (1933).

[25]220 Iowa 1350, 264 N.W. 715 (1936).