

"NO ONE SHALL BE COMPELLED IN ANY CRIMINAL CASE TO BE A WITNESS AGAINST HIMSELF,"

CONSIDERED WITH SPECIAL REFERENCE TO THE UNCONSTITUTIONALITY OF STATUTES OF IMMUNITY OR INDEMNITY.

Throughout the centuries of civilization there has been a great problem confronting the most distinguished writers and jurists of all nations. The foremost thought of the times has endeavored to solve this problem either by the principles of logic or by the instinctive feelings of humanity. The diverse views on this problem have all been predicated on the ultimate principle of elevating humanity to a higher and nobler plane. Reasons *pro* and *con* almost innumerable have been advanced on either side and, to the minds of the reasoners, the conclusion reached has been proved beyond a question. This great problem has been, and is nothing more nor less than, how shall the truth be best established in a suit at law with the least harm to the individual and the greatest good to society? This problem embodies the whole law of evidence, not only as we of the common law understand it, but those as well of the civil law and of the canon law.

The law of evidence involves as many and perhaps more intricate points in all systems of jurisprudence than any other branch, unless it be that of pleading. Many of these questions were settled years ago, and have remained ever since unchanged. Others have not been and are not yet settled. They remain still a bone of contention among lawyers and philosophers, and frequently are a matter which leads the populace (who are told that "ignorance of the law excuses no one") to believe that these abstruse discussions are more for the purpose of bewildering their minds than of arriving at any real and substantial conclusion. About the question we have selected such conditions exist. Old principles long considered estab-

lished have been broken in upon by legislation until we are all at sea, lawyers as well as laymen. A return to fundamental principles will be necessary to get our bearings.

It was the custom and law of Rome, that no one except a slave should be compelled to give testimony against himself. One of Cicero's most noted invectives is the one against Verras, who attempted by torture to compel a Roman citizen to testify. Aulus Gellius, Tully and Ulpian characterize the methods practiced upon slaves not only as cruel and inhuman, but as producing falsehood rather than truth.

These Roman writers and speakers tell us that men in their extremity will not hesitate to testify to an untruth; that to compel pain of body and mind in order to secure the truth is against the very law of nature. The law writers and causuists of the Middle Ages endeavored to show that such was not the case, and though some admit the rule was harsh, justice demanded its strict application to all persons. It was reasoned that, for very tenderness, the law could not endure that any man should die upon the evidence of false or even a single witness, and that, therefore, this method was contrived whereby innocence should manifest itself by stout denial or guilt by plain confession. There were those who had the courage to make a protest, even at a time in which to invent some new engine of torture was to receive the plaudits of the populace and the rewards of the government. Beccaria, Ch. 16, with the satire of mathematical precision, thus characterizes the methods then in vogue: "The force of the muscles and sensibilities of the nerves of an innocent person being given, it is required to find the degree of pain necessary to make him confess guilt of a given crime." Disregarding all protests under the Roman law, to comparatively modern times under the civil law men have been compelled by the most awful tortures to give testimony in "any criminal case."

In the trial of Prince Pierre Bonaparte¹ we have an example of the inquisitorial proceedings of the continent. Indeed, within a year the civilized world has been shocked and its sense of justice outraged by the proceedings in the trial of

¹ AM. LAW REV., Vol. V, p. 14.

M. Zola at Paris, and especially has this been so with the people of the United States, on account of the *incommunicando* to which men were subjected who ran afoul of Spanish justice.

It is an ancient principle of the law of evidence, as it was administered by our ancestors, that a witness shall not be compelled, in any proceeding, to make disclosures or to give testimony which will tend to incriminate him or make him subject to fines, penalties or forfeitures. Neither Fleta, Glanville nor Bracton make any mention of the right inherent, in every man born under the common law, to demand that he shall not be compelled, in any proceeding, to give testimony which may incriminate him. This does not argue that the right did not exist. So great has always been the respect paid to individual freedom among the Anglo-Saxon people, that from the very earliest times this right has been fundamental in their system of legal procedure and almost axiomatic.

The Norman had not set his foot on English soil many years before the moderation of the common law became an intolerable check to his rapacity. By the statute of 3 Edw. I, c. 12, the dreadful punishment of *peine forte et dure* was introduced. This was contrived to compel an accused person to testify, when, rather than plead, he would stand mute. Previous to this time, in such a case, the accused was tried by two juries; and, if found guilty by both, it was decreed he should be punished according to the charge. Blackstone tells us¹ that "if the corruption of blood and consequent escheat in felony had been removed, the judgment of *peine forte et dure* might, perhaps, have innocently remained as a monument to the savage rapacity with which the lordly tyrants of feudalism hunted after escheats and forfeitures."

That Blackstone was mistaken, we have ample proof. In America, where escheats never prevailed, there was a case—poor Giles Corey, when accused of witchcraft, was pressed to death for refusing to plead.² In England the punishment of *peine forte et dure* was abolished by 12 George III, c. 20, and

¹ Bk. 4, 328.

² 3 Bancroft His. 93.

the same punishment allowed for refusing to plead as in case of conviction on the charge. Under this statute, in 1777 at the old Baily, and in 1792 at Wells, men were hung for refusing to plead on arraignment.

It is a fact of history, too clearly evidenced to be doubted, that the rack was commonly used as an engine of state during the reigns of the Plantagenets and the Tudors. Woe to the man who fell under the displeasure of the Richards, John, or the later Henrys. Men were ruthlessly thrown into dungeons to die in awful agony, or were put upon the rack to force from them a confession which would implicate fellow-conspirators; but this was never the law of England. It was an usurpation of the law in the hands of a sovereign who overrode the law and trampled solemn charters under foot. The rack was never even proposed as an instrument of the law but once. This was in the trial of Felton, during the reign of Elizabeth, when Bishop Laud, of London, proposed the use of the rack upon the accused to discover his accomplices in the assassination of the Duke of Buckingham. The matter being referred to the judges, it was unanimously agreed that, "to the honor of the law and to the honor of the judges, the rack could not be legally used."¹

There is a great deal of evidence to show that the common law principle always was that no one should be compelled to incriminate himself. Coke says of Leigh's case, in 10 Eliz. : "As to Leigh's case remembered this mere recited, for it was 10 Eliz., Dyer, but not in the printed book, but in his other book, a manuscript written with his own hand, which book I have, in which are many cases not in the printed book . . . This Leigh was an attorney of the C. B. (He loved masses as well as he did his life.) Thither he went, and would go to hear this. And touching this matter the Ecclesiastical Judges would have examined him on oath. He refused to answer them. Upon this they committed him to the Fleet. The judges did then presently send for their attorney by *habeas corpus*, and upon return they did, in this case, examine the matter and said *quod nemo tenetur seipsum prodere*; and so for this cause

¹ Trial of Felton, 3 State Tr. 368-371.

they delivered him. (The sheriff would be always ready to take him by the back if he once consents the matter against himself.)" A similar decision is recorded in Hinde's case for usury,¹ also Burrows and other plaintiffs, for not taking an oath.² It will be seen that these cases record the most ancient decisions of which there is any record, and some of which were merely remembered. Though not actually going back to the time when "the memory of man runneth not to the contrary"—the beginning of the reign of Richard, 1189—still they do reach back to a time when the contrary was neither known nor remembered. The most important among many modern English cases affirming this ancient rule are the following: *Sir John Friend*;³ *Earl of Macclesfield*;⁴ *Rex v. Slaney*;⁵ *Cates v. Hardacre*.⁶ Such we find the common law to be as administered by the judges of the English courts.

The English Government had not learned that Englishmen were entitled to all the rights accorded them by the common law, wherever they might be under the jurisdiction of the crown, until it was too late, and the King had lost his most valuable colony. The pioneer settlers had seen the rights and privileges they held most dear to personal freedom and liberty entirely disregarded as to themselves. They also remembered how they or their immediate ancestors had been compelled to leave their fatherland because of prosecutions never recognized by the laws of England. Many of these people were from Continental Europe, and knew by bitter experience the unlimited rapacity and savagery of the ruling classes. They had fled from the ruling classes, that they might have civil and religious liberty. When the minute men fought at Lexington, suffered at Valley Forge, and finally stood in line of attack at Yorktown, it was for the maintenance of the ancient and inalienable rights of Englishmen. For eight years the colonists, irrespective of nationality,

¹ 18 Eliz.

² 13 Jac. 1, 3 Bulstrode, 50.

³ 13 How. St. Tr. 16.

⁴ 16 How. St. Tr. 767.

⁵ 5 Car. P. 213.

⁶ 3 Taunt. 424.

stoutly maintained their rights against a tyrannical government. It is little wondered, then, that we find the colonists, irrespective of previous nationality, firmly united in defence of the ancient principles of common law.

The freedom of the colonies once secure, the people set about also to secure the liberty which had been the ultimate object of the Revolution. A constitution was drawn, defining the powers of the states and general government, and providing for the administration of the new state of affairs. No mention was made in it of the particular liberties contended for. It contained no bill of rights on which the people could confidently rely. This was one of the strongest arguments against the Constitution.¹ Finally the Constitution was adopted, with the express understanding that a bill of rights would also be proposed for adoption.² This was done at the very first session of Congress, and ten of the proposed amendments received the ratification of the states in a short time and became incorporated into the Constitution. We find that four of these had to do with the rights of the people when a criminal accusation was brought against a man, or any of his acts were brought to light upon which a criminal case could be founded.³ The third clause of the fifth amendment declares that "No person . . . shall be compelled, in any criminal case, to be a witness against himself." The scope and effect of this clause will be the subject of the subsequent discussion.

That no person shall be compelled to give evidence against himself in any criminal case is but an affirmance of a common law privilege of inestimable value.⁴ This is a fact of common knowledge, and is affirmed, without exception, in the constitutions of all the states as well as of the United States. It is stated in somewhat different words in the various places. Being an affirmance of a broad privilege accorded by the common law, the rule of construction must be co-extensive

¹ Federalist, 83, 84; Vol. 2 and 3, Elliot's Debates.

² Choate, Lec. on Jefferson, Burr and Hamilton, 1858.

³ Story, Const. Sec. 301 and note; Const. Amend. 4, 5, 6, 8.

⁴ Story, Const. Sec. 1788.

with the manifest purpose, and, as far as possible, all given the same interpretation.¹

The question naturally arises, what is the interpretation to be given this clause, or, in other words, what is the common law on this subject?

For a long period it was undetermined whether or not the common law privileges extended to protect the witness against the disclosure of facts, which would subject him to a mere civil action. Cases were to be found in the *nisi prius* courts on either side of the controversy, varying as the equities of the case seemed best to suggest. In 1806 the question arose upon the impeachment of Lord Melville, and, upon being referred to the Law Lords, it was ruled that the witness must answer, though it did subject him to civil action. The question was, however, left in some doubt by a strong dissenting opinion from four of the judges, including Lord Mansfield. It was later settled in conformity with the opinion of the majority of the judges by 46 Geo. III, c. 37. In the United States the great weight of authority is now in conformity with the rule as settled by statute in England.²

Whether a witness will be compelled to answer a question which will disgrace him, has been decided in the negative in two very early cases in the history of American Law, and one late case in the District Court of the United States for the Northern District of Illinois.³ It may be said of these rulings, with all due respect to the eminent and honorable judge who decided the late case, that the true rule, as supported by the great weight of authority, and, to our mind, the sound reason of justice and public policy, is: "That where the transaction to which the witness is interrogated *forms any part of the issue* to be tried, the witness will be obliged to give evidence, how-

¹ Counselman *v.* Hitchcock, 142 U. S. 547.

² Robinson *v.* Neal, 3 T. B. Mon. (Ky.) 213; Stoddert *v.* Manning, 2 Har. & G. (Md.) 147; Alexander *v.* Knox, 7 Ala. 503; Noss *v.* Van-swearingen, 7 S. & R. (Pa.) 192; Steward *v.* Turner, 3 Edw. Ch. (N. Y.) 458; Planter's Bank *v.* George, 6 Mar. (La.) 670, overruling Orleans Nav. Co. *v.* New Orleans, 1 Mar. (La.) 23.

³ Com. *v.* Gibbes, 3 Yeates (Pa.), 429 (1802); Galbreath *v.* Eichelberger, 3 Id. 515 (1803); U. S. *v.* James, 60 Fed. 257.

ever strongly it may reflect on his character."¹ A different rule might deprive parties of the most necessary and urgent testimony for defence against a criminal accusation, penalty or forfeiture, and thus subject an accused to the very same disgrace, which it was designed to ward off from the witness called to give testimony. The good accomplished in *such a case* would be co-extensive with the harm it was designed to obviate. But if the party called as a witness cannot be made to suffer pains and penalties in regard to anything to which he may testify by reason of the Statute of Limitations, a pardon, an acquittal or conviction, then the rule as announced in *The United States v. James, supra*, does not accomplish good co-extensive with the harm. Pains and penalties and the consequent disgrace attached must always, *in foro conscientiæ*, be regarded as a greater evil than mere disgrace. Judge Grosscup himself says, in the *James* case, *supra*: "Happily the day when this immunity (from disgrace) is needed seems to be over. It is difficult for us, who live in a time when there are few, if any, definitions of crime that do not meet with the approval of universal intelligence and conscience, to appreciate these conceptions of our fathers." We can see no reason, therefore, for applying the rule now, which, it has been shown, is against the great weight of authority. If the reason for a rule never general has become obsolete by the changes in the composition of society—as Judge Grosscup admits society has changed—then the old maxim will apply: "*Cessante ratione, cessat lex.*"

But when the evidence asked for goes further than to subject the witness to a civil action or tends to disgrace him, and opens the way for prosecution in a criminal case, the authorities are unanimous in holding that, under the common law and also under the constitutional declaration of the common law, the witness cannot be compelled to testify. The authori-

¹ *Greenleaf Ev.*, Sec. 454; *Phil. & Am. Ev.*, 917; *Jennings v. Prentice*, 39 Mich. 421; *Moline Wagon Co. v. Preston*, 35 Ill. App. 358; *Weldon v. Burtch*, 12 Ill. 374; *Clementine v. State*, 14 Mo. 112; *People v. Mather*, 4 Wend. 250; *Hill v. State*, 4 Ind. 112; *King v. Edwards*, 4 T. R. 440; *Lohman v. People*, 1 Comstock, 385; *Roberts v. Allpratt*, 22 Eng. Com. L. 288.

ties are so numerous and general on this point that it is considered unnecessary to refer to them here. A collection of a large number of cases will be found in 29 Am. & Eng. Ency. of L. 835.

To what extent does this rule go? How may a witness know when he can claim his privilege? This can be answered in no better way than in the words of Chief Justice Marshall, at the trial of Aaron Burr.¹

This case has been followed in the United States in all its branches except, perhaps, where the Chief Justice says: "And if he say on oath he cannot answer without accusing himself, he cannot be compelled to answer." Some courts have held that they are not bound by the witness' sworn statement unless reasonable grounds be made to appear that the testimony asked for would tend to incriminate him.² This we believe to be the true rule, as gathered from the whole of Chief Justice Marshall's argument in the Burr case. If the witness should be able to escape testifying by a sworn statement that what he would say would tend to incriminate him, an obdurate witness would have it within his power to refuse testimony on a mere pretence. But yet the court ought and will allow the witness great latitude in judging for himself;³ for if he pointed out the direct reason, the privilege would be worthless.⁴ The relation of the witness to the subject of inquiry and character and scope of the question must all be considered.⁵ In this case it was held a student need not explain in what department of a university he was studying when the subject of inquiry was the death of a waiter at

¹ 1 Burr's Trial, 244.

² *Regina v. Garbett*, 1 Den. Cir. Ct. 236; *Reg. v. Boyes*, 1 Best and Smith, 311; *Com. v. Braynard*, Thach. Cir. Ct. (Mass.) 146; *Mahauke v. Cleland*, 76 Ia. 401; *State v. Lonsdale*, 48 Wis. 348; *State v. Thaden*, 43 Minn. 253.

³ *Stevens v. State*, 50 Kan. 712; *People v. Forbes*, 143 N. Y. 219; *Jarvin v. Scammon*, 29 N. H. 280; *Chamberlain v. Wilson*, 12 Vt. 491; *Taylor Ev.*, Sec. 1548.

⁴ *People v. Mather*, 4 Wend. 229; *Murluzzi v. Gleason*, 59 Md. 214; *Southard v. Rexford*, 6 Com. 254; *Fisher v. Ronalds*, 16 Eng. L. & Eq. 418; *Burr's Trial*, *supra*.

⁵ *Taylor v. Forbes*, Justice, 143 N. Y. 119.

a class banquet from the effect of poisonous gases introduced into the banquet hall by a tube from a room below.

It will be seen that the protection thrown around the witness is complete in every particular. He may not be compelled even to furnish a single link upon which a criminal prosecution can be grounded; and it has been held that this protection is extended to other cases than those where a person is called as a witness in a case being tried in court.

In *Counselman v. Hitchcock*¹ it was held that the witness could not be compelled to incriminate himself when called as a witness before a grand jury investigation. It has also been held that the same rule applies to an investigation by a legislative committee.² Both these cases have been decided since the New York cases,³ in which we have the narrow construction, and we conceive that they lay down the true rule. In *Taylor v. Forbes, Justice*,⁴ decided since the *Counselman* case, *supra*, the rule as laid down in the *Counselman* case is approved as authority. It may be inferred that, since the rule applies to the above cases, the protection afforded a witness extends to any kind of an investigation wherein the party called to give testimony may be compelled to do so, if he does not thereby incriminate himself.

The delivery of Blackstone's Commentaries on the laws of England, as lectures at Oxford University, was listened to by a young man, who was afterwards to become famous as his early instructor's chief opponent. This was Jeremy Bentham, the soul of whose life was reform. Reform in law and legal procedure, such as penal laws, laws of property, prison management, all came under his comprehensive sway. Blackstone was attacked by him in scathing terms. He did not believe with the great commentator that the laws of England were perfect as they stood. A large majority of the reforms accomplished during the present century along the lines just mentioned, have been the direct result of the plan laid down

¹ 142 U. S., 547.

² *Emery's Case*, 107 Mass. 172.

³ *People v. Kelly*, 24 N. Y. 74; *People v. Sharp*, 107 N. Y. 427.

⁴ 143 N. Y. 219.

by this great student. His best known and most elaborate work is on evidence. In it he inveighed against the many artificial restrictions put upon witnesses by the common law, such as the rules of exclusion disqualifying a wife or husband as a witness against the other, the requirements of religious belief in a witness, the rule prohibiting a person from testifying for himself, the rule granting the privilege to a witness not to incriminate himself, and many others of a similar nature.¹ To his influence may be attributed the abolishment of the rule which "protects any witness from answers which would tend to incriminate him" in India, though still retained in England.²

The rule we are discussing has been changed in some respects in England by taking away the privilege in some cases, and giving indemnity in others.³ The United States, as well as many of the states, has endeavored to give indemnity to witnesses who shall testify to facts which will tend to incriminate them. We believe none of the states have ever passed a general statute in this particular, they having confined the scope of their legislation to particular cases. The United States, however, endeavored to pass a general statute giving indemnity in all cases where a witness was called in its courts or had been called in any foreign court. Indemnity statutes are necessary in this country because of our general constitutional provisions granting the privilege to a witness of refusing to testify against himself. A statute compelling a witness to testify would clearly be unconstitutional.

In England, where the legislative power is supreme, there are no restrictions. Parliament with the Queen is sovereign. It may take away the privilege under discussion in particular cases, or in all cases, or grant immunity or indemnity in some or all, as it is deemed best for the enforcement of law, preservation of order and upbuilding of society. Chief Justice Coke says⁴ that "It [parliament] has sovereign and uncontrolled authority in the making, conferring, enlarging, restraining,

¹ Wilson, *Modern English Law*, 254, *et seq.*

² Wilson, *Modern English Law*, 256.

³ See 2 Taylor *Ev.*, par. 1455, for a list of such statutes.

⁴ 3 *Inst.* 36.

abrogating, repealing, reviving and expounding of laws concerning matter of all possible denominations, ecclesiastical or temporal, civil, maritime or criminal." Sir Matthew Hale says of it in his work, "Of Parliament," page 79: "This being the highest and greatest court over which none other can have jurisdiction in the kingdom, if by any means a misgovernment should fall upon them, the subjects of this government are left without all manner of remedy."

In some of the states where the statutes of indemnity have been called in question, and also in the United States, the courts of last resort have held them unconstitutional, because they were not broad enough to guarantee to the accused party the full and complete immunity which was necessary under the constitution; in other words, that "in view of the constitutional provision a statutory enactment (of this character) to be valid must afford absolute immunity against future prosecution for the offence to which the question relates."¹ In other states the same principle has been enunciated, but it has been there held that the statute was constitutional, because it granted "absolute immunity."² Without stating the above principle there have been a great many cases holding such statutes constitutional, because the statutes were as broad as the evil they were intended to remedy.³ The reason advanced in some of the decisions holding such statutes constitutional is that the provision of the state constitution in question is not so broad as that of other states in which a like statute has been held unconstitutional. No mention of this reason is made, however, in the New York cases in which "any criminal case" is construed so narrowly. Since the Counselman case, *supra*, holding that the intent of all the con-

¹ Counselman *v.* Hitchcock, 142 U. S. 547; Emery's Case, 107 Mass. 172; Cullen *v.* Commonwealth, 24 Grat. 624; Temple *v.* Commonwealth, 75 Va. 892. See, also, Boyd *v.* U. S., 116 U. S. 616.

² State *v.* Nowell, 58 N. H. 314; La Fontaine *v.* Southern Underwriters' Ass'n, 83 N. C. 132.

³ Quarles *v.* State, 13 Ark. 307; Higdon *v.* Head, 14 Geo. 255; Wilkins *v.* Malone, 14 Ind. 153; People *v.* Kelly, 24 N. Y. 74; People *v.* Sharp, 107 N. Y. 427; *Ex parte* Buskett, 106 Mo. 602; Bedgood *v.* State, 115 Ind. 275; Kain *v.* State, 16 Tex. App. 282; Hirsch *v.* State, 8 Baxt. (Tenn.) 89.

stitutions is practically the same, that contention is hardly tenable.

Immediately after the decision in the Counselman case, Congress passed a statute believed to satisfy all the requirements of that case. After the statute states that no one shall be excused from testifying or producing books and papers before the Interstate Commerce Commission, on the ground that such evidence would tend to incriminate the witness, it says: "But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify, produce evidence, documentary or otherwise, before said commission or in obedience to its subpoena or the subpoena of either of them or in any such case or proceeding."¹ Undoubtedly, the author of the statute believed he had removed the last obstacle in the way of the Interstate Commerce Commission in securing evidence of the illegal practices of the railroads, on which to found an indictment against the officials. This statute was, however, declared unconstitutional by Judge Grosscup,² but was upheld by a later case.³ Although we believe the James case was rightly decided, we cannot concur in the reasons advanced therefor, except, perhaps, the first one, that a right given by the constitution cannot be taken away by statute. The second ground that to answer the question asked would tend to disgrace the witness has previously been shown by the great weight of authority to be erroneous; the further reason that the statute amounts to a pardon and that an accused need not plead a pardon unless he desires so to do, is untenable on the authority of the case cited to support the contention, *United States v. Wilson*.⁴ In that case Chief Justice Marshall does hold an accused need not plead a pardon from the President unless he sees fit. Of such a pardon the *court could not take judicial notice*, but if it had been such a pardon that the court must notice it, then it would have been effective

¹ 27 Stat. L. 443, ch. 83.

² *James v. U. S.*, 60 Fed. 257.

³ *Brown v. Walker*, 161 U. S. 591, four judges dissenting.

⁴ 7 Peters, 150.

without being pleaded.¹ In the James case, *supra*, the statute relied on was a Federal statute, one of which the court must take judicial notice. The accused was not compelled to plead it. As to the first reason advanced in the James case, I said "perhaps" it was meritorious. In *Kendrick v. Commonwealth*² there is a strong opinion by Lacey and Richardson, J.J., dissenting on the same ground advanced by Judge Grosscup in the James case, *supra*. They hold it is not competent for the legislature to take away a right granted by the constitution through an act of immunity because thereby the constitution is annulled by the legislative power. This opinion has more force when coupled with the dissent of Nicholson, C. J. and Turner, J., in *Hirsch v. State*.³ It states that "We hold the law does not abrogate the offence until the witness has testified, but that after the witness has testified the law then virtually operates to abrogate it and shield him from prosecution. The act of testifying constitutes the abrogation of the offence under the law. This only occurs after the witness has voluntarily waived his constitutional right to refuse to testify. If he does not voluntarily waive his right he cannot be deprived of it by compulsory law." This is a logical and just conclusion. It does not infringe the personal privilege of the accused as given him by the constitution. He may testify or not as he sees fit, but once having voluntarily given testimony, which would tend to incriminate him, the statute acts as a pardon and he may not thereafter be prosecuted for anything upon which he may give evidence. It is a statutory way of making effective a prosecuting attorney's promise to refrain from prosecution in return for state's evidence. Otherwise the agreement so frequently made by states' attorneys to secure this kind of evidence has no force whatever. Neither the court nor prosecuting attorney can offer a witness such indemnity. It must be guaranteed to him positively by statute.⁴

¹ See, also, 4 Black Com. 402.

² 78 Va. 490.

³ 8 Baxt. (Tenn.) 89.

⁴ *Temple v. Commonwealth*, 78 Va. 819.

We rest our conclusions on a different basis and one which we believe has never, except in one case, been advanced by any of the courts as a reason for their decisions concerning the constitutionality of these statutes. Perhaps this is for the reason that, except in *Brown v. Walker, supra*, the exact point has never arisen in any of the cases in the states, and other sufficient grounds have always been found in the Supreme Court of the United States. We believe the true rule is, that a statute of the kind in question must give "absolute immunity" to the unwilling witness, as shown heretofore, and that the dissenting judges in *Brown v. Walker, supra*, took the right position in their dissenting opinion.

There are offences which are not only a transgression of the laws of one jurisdiction, but also of another jurisdiction, and so far as *that act* is concerned, these jurisdictions may be entirely independent. Or a person may be called to testify in a case, not necessarily criminal in its nature, which will involve facts tending to incriminate the witness in another jurisdiction over which the court or legislature in which the witness is called has no authority.

We do not propose to enter into an extended discussion of the police powers of the states nor of the extent of the power granted by the states to the Federal Government. It is only necessary to show that a state of facts may arise which would lead to the conditions just mentioned and we have substantiated our contention.

Whether the states emerged from the control of the crown, and stood out after the troublesome times of the revolution as independent sovereignties, has been a question involving almost every manner of speculative discussion. It is true that they have never been recognized as such except, possibly, when, for a short time, Rhode Island and North Carolina had the liberty to assume complete powers of sovereignty. They undoubtedly had this power, and though it was never assumed, the first remained outside the Union for over a year, and the latter about six months.¹ It is said by Chief Justice Jay: "From the crown of Great Britain the sovereignty of their country

¹ Cooley, Con. Limit., pp. 8, 9; Story, Sec. 271-280.

passed to the people of it; and it was not then an uncommon opinion that the unappropriated lands, which belonged to the crown, passed not to the state within whose limits it was situated, but to the whole people. On whatever principle this opinion rested, it did not give way to the other, and thirteen sovereignties were considered as emerged from the principles of the Revolution, combined with local convenience and consideration."¹ Before the adoption of the Constitution, the states had all the attributes of sovereignties.² But emerging from the principles of the Revolution, which were very ill defined, the states at once in the "warmth of mutual affection" looked to each other for a continuation of the support given in a time of great need, and the moral obligation bound them together in a new compact.³ This compact is said by Van Buren⁴ to have been an heroic though, perhaps, a lawless act. Yet it is declared by Chief Justice Chase, in *Texas v. White*,⁵ when discussing the status of the states which seceded during the Civil War, that he can conceive of nothing more nearly a unity than a "perpetual union" made "more perfect." Notwithstanding these divergent opinions they will help us to understand more clearly the respective powers of the state and Federal Government.

It is declared by the tenth amendment to the Constitution that, "The powers not delegated to the United States by the Constitution nor prohibited by it to the states are reserved to the states respectively or to the people." Although "the people" are in some parts of the Constitution interpreted to mean the whole people of the United States, collectively represented, as "We, the people," in the preamble of the Constitution, in this amendment it was never so intended. Citizenship of a state and citizenship of the United States are entirely separate and distinct.⁶ "The Government of the United States can claim no powers which are not granted to it by the Con-

¹ *Chisholm v. Georgia*, 2 Dal. 470.

² *License Cases*, 5 Howard, 587.

³ *Federalist*, No. 53, by Madison.

⁴ *Pol. Par.* 50.

⁵ 7 Wal. 724.

⁶ *Slaughter House Cases*, 16 Wall. 36.

stitution; and the powers actually granted must be such as are expressly given or given by necessary implications."¹ "It has never been questioned, so far as I know, that the American legislatures have the same unlimited power in regard to legislation which resides in the British Parliament except where they are restrained by a written constitution. This must be conceded, I think, to be a fundamental principle in the political organization of the American states. We cannot comprehend how upon principle it should be otherwise. The people must, of course, possess all legislative power originally. They have committed this in the most general and unlimited manner to the several state legislatures, saving only such restrictions as are imposed by the Constitution of the United States or of the particular state in question."² The principle upon which the judges have gone is aptly stated by Chief Justice Marshall in *Gibbons v. Ogden, supra*: "The genius and character of the whole government seems to be that its action is to be applied to all the external concerns of the nation, and to those internal concerns which effect the states generally; but not to those which are completely within a particular state which do not effect other states, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government." Thus there grows out of the theory of our government a complicated system of sovereignties, each exercising exclusive jurisdiction within its own sphere, but both over the same territory.³

If the general government is supreme in its sphere, it follows that any statute passed by it in conformity with its powers must be given precedence over any state law or constitution which conflicts with it.⁴ The last case cited is authority on

¹ *Martin v. Hunter's Lessee*, 1 Wheat. 326; *Gibbons v. Ogden*, 9 Id. 187; *Calder v. Bull*, 3 Dal. 386; *Gilman v. Philadelphia*, 3 Wal. 713; *Weister v. Hade*, 52 Pa. 477; *Briscoe v. Bank of Kentucky*, 11 Peters, 316.

² *Thorpe v. Rut. & Bur. R. R. Co.* 27 Vt. 142; *Mason v. Waite*, 4 Scam. (Ill.) 134; *Sears v. Cottrell*, 5 Mich. 251; *Legget v. Hunter*, 19 N. Y. 445.

³ *Cooley*, Const. Lmt. p. 2.

⁴ *Marbury v. Madison*, 1 Cranch, 137; *Sturges v. Crowninshield*, 4 Wheaton, 122; *Ex parte Eames*, 2 Story, C. C. 332.

the exclusive jurisdiction of the Federal courts within their sphere. Perhaps, however, the strongest case on that subject is that of *Abelman v. Booth*.¹ In that case Booth was held by United States Marshal Abelman for violating the fugitive slave law. The State Court of Wisconsin issued a writ of *habeas corpus*, and the Supreme Court of the state held that the writ would lie on the ground that the Federal statute under which the prisoner was arrested was unconstitutional. The State Court even went so far as to order the clerk to make no return on the writ of error or to enter any order upon the journals or records of the court concerning the same. This power was expressly declared on appeal to the Supreme Court of the United States not to be within the sphere of the State Court. It was said by Chief Justice Taney: "When a court, so elevated in its position, has pronounced a judgment which, if it could be maintained, would subvert the very foundation of our government, it seemed to be the duty of this court . . . to show plainly the grave error into which the State Court has fallen."²

The general government is supreme, however, in its sphere only. Its power is circumscribed by the Constitution, and any act, legislative or judicial, outside this sphere, is void. There the states are supreme. In the forty-fifth number of the *Federalist* it is said: "The powers of the states would extend to all objects, which, in the ordinary course of affairs, concerns the lives, liberties and properties of the people, and internal order, improvement and prosperity of the state."³ The states exercise full and complete power over everything connected with the social and internal condition, which relates to moral and political welfare.⁴ Every law for the restraint or punishment of crime, or the preservation of public peace, must come within the power of the states.⁵ A writ of *habeas corpus* was taken out for a man drafted into the military service of the

¹ 21 How. 506.

² See, also, *Tarbel's Case*, 13 Wal. 397; *In re Spangler*, 11 Mich. 299.

³ *Mayor of New York v. Milne*, 11 Peters, 132; *Calder v. Bull*, 3 Dallas, 386.

⁴ *License Cases*, 5 How. 588.

⁵ *License Cases*, 5 How. 631.

United States in Michigan. The judge said in deciding the case adversely to the writ: "The Federal Government and state government exist as independently as the government of the several states; each acting within its sphere is foreign to the other and independent, and this principle extends to the courts of each. . . . We have two governments, a state government and a Federal government; each of these is supreme within its sphere. . . . Neither is supreme in the sense that it has power to dictate or control the other when acting within its appropriate sphere. Each is supreme in its own sphere. Neither is supreme within the sphere of the other."¹ "The powers of the general government and of the state, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties acting separately and independently of each other, within their respective spheres, and the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a state judge or state court as if the line of division was traced by land marks and monuments visible to the eye. The Federal and state governments are supreme in their respective sphere; first, in delegated powers; second, those not delegated, and any act beyond of either is null and void."²

Perhaps at this point, if not before, the reader has come, as we have, to believe with the judges of the Supreme Court of Indiana: "First, the states are to exist with independent powers within their sphere. Second, the Federal Government is to exist with independent powers within its sphere." This doctrine, which has pervaded our whole system of government, seems, however, to be fast losing ground, and in a late decision of the Supreme Court of the United States³ to have been entirely overthrown. Were it not that the opinion of itself, by a bare majority of the court, states that the ground taken was hardly necessary to the proper decision of the case, and also that four judges make a vigorous dissent, the conception

¹ *In re Spangler*, 11 Mich. 299.

² *License Cases*, 5 How. 588.

³ *Brown v. Walker*, *supra*.

of "State Sovereignty and National Unity" would be a thing only to be remembered.

In respect to some transgressions, it sometimes occurs that not only the provisions of the law of the United States are violated, but also the same act is a violation of the statute of the state. One fact or series of facts may constitute two crimes, each of which is an offence against separate and independent jurisdictions, so far as these facts are concerned, and a prosecution in one will be no bar in the other. Thus, nearly all the states provide a penalty for the offence of counterfeiting. This is also punishable by an act of Congress. Likewise with the offence of assaulting a United States marshal or hindering him in the execution of a process. So, also, where larceny is committed in one state and the goods taken into another. The person may commit two crimes punishable in two jurisdictions, which, if both were within one jurisdiction, and prosecution were attempted for both in different places or in the same place at different times, a conviction for one can be pleaded in bar to the other.¹

Since the control of railroads in the matter of unjust discriminations has come to be a common subject of legislative action, both state and national, providing penalties for non-performance of certain duties relative thereto, it will no doubt be a subject soon coming before the courts for adjudication, in both state and Federal jurisdiction. As interstate and intrastate commerce are so closely related, an investigation in either jurisdiction is not only liable but most likely to involve facts tending to incriminate a witness in the other.

Section No. 860 of Revised Statutes of the United States was a general statute of immunity, or proposed such. It was declared unconstitutional in *Counselman v. Hitchcock*, *supra*, as not broad enough to give absolute immunity even in the Federal courts. This statute proposes to give immunity

¹ *Fox v. Ohio*, 5 How. 410; *Prigg v. Pa.*, 16 Peters, 540; *City of N. Y. v. Milne*, 11 Peters, 142; *Barron v. Baltimore*, 7 Peters, 243; *Houston v. Moore*, 5 Wheaton, 1; *White v. Commonwealth*, 4 Bin. 418; *Stearns v. United States*, 2 Paine C. C. 300; *U. S. v. Holloday*, 3 Wal. 407; *Moore v. State of Ill.*, 14 How, 13.

for any "pleading, discovery or evidence obtained from a party or witness by means of any judicial proceeding in this or any foreign country." It was the intention of the legislators that evidence might be demanded, when necessary, of a character tending to incriminate in any proceeding, civil or criminal, giving the party producing the same immunity for anything to which he might testify. Properly stated, to give "absolute immunity" in the Federal courts, what would be the effect of such a statute? A witness might be called on in any kind of judicial proceeding and asked for evidence tending to incriminate himself. He demands his constitutional privilege and is shown the statute purporting to give him absolute immunity. Thereupon he "makes it reasonably clear" that the evidence called for will be a link in the chain of facts which will lead to his conviction in a court entirely independent, so far as the jurisdiction of Congress is concerned. Has he absolute immunity? The same reasoning will apply to a general statute of immunity in any of the state courts.

In *Brown v. Walker*¹ the Supreme Court holds the statute, 27 Stat. L. 443, Chap. 83, constitutional. The opinion holds that the prisoner who refused to testify before the Interstate Commerce Commission, on the ground that he would incriminate himself by so doing, was not technically within its terms, but says that even though he was, the statute last mentioned gave him absolute immunity for anything to which he might testify. This not only in the Federal courts, but also, since a Federal statute is the supreme law of the land, in the state courts, and hence he must testify.

A large part of the argument in *Brown v. Walker, supra*, is given to the citing of cases and extracts from state courts; notably *State v. Nowell*² and *Kendrick v. Commonwealth*.³ These cases argue at length that a particular state statute in question gives absolute immunity from prosecution to anything to which the witness might testify. If the reasoning in *Brown v. Walker* is sound, and the Federal power is supreme,

¹ 161 U. S. 591.

² 58 N. H. 314.

³ 78 Va. 490.

how shall a state grant absolute immunity? Suppose the state statute of immunity applied to a prosecution generally, and a witness was called in a state court concerning an inquiry, as to a railroad not complying with a statute in regard to weighing.¹ He claims his privilege on the ground of a possible prosecution under the Interstate Commerce Law. The Federal power is supreme; the state power subject to it; the state grant absolute immunity? Is not this "*reductio ad absurdum*?" In this far reaching decision, *Brown v. Walker*, we have *Queen v. Boyes*² cited as showing a mere possibility of prosecution is insufficient and that the danger must be real and appreciable; also that we having adopted certain principles of natural justice from the mother country, a certain construction there should be ours; citing *Cathcart v. Robinson*,³ *McDonald v. Hovey*.⁴ We stand ready to admit both propositions in that case, and wish to carry the last rule over to another case from the mother country, where the danger *was appreciable* when made "reasonably clear." This case was decided a little later than *Queen v. Boyes*, *supra*, but for our purpose at the same time. The United States Government, just after the Civil War, brought proceedings in an English court to get possession of a fund held by one McRea in England as an agent of the Confederate States. When called as a witness McRea stood on his privilege granted by the common law and pleaded a United States statute which might subject him, as a promoter of the Confederate cause, to forfeiture of goods. The case went off on other grounds, but it was distinctly argued at length that McRea, having pleaded the statute, could not be compelled to testify concerning anything tending to subject him to forfeiture.⁵ We conceive that such a case might arise in America and certainly there is no power in such independent sovereignties to grant immunity from the laws of the other. Even the Federal Government

¹ Starr & Curtis An. Statutes, III. Chap. 114, pp. 139, 140.

² 1 B. & S., 311, 321, decided May 27, 1861.

³ 5 Peters, 264.

⁴ 110 U. S. 619.

⁵ *U. S. v. McRea*, L. R. 3 Ch. Appeal, 79, by Lord Chelmsford.

cannot say "No person shall be prosecuted or subjected to any forfeiture, etc., for or on account of any transgression, etc., the aforesaid commission, etc." if that person's testimony will make him liable, criminally, under the laws of a foreign nation, as in the case of *McRea*.

The chief argument, as we understand the case of *Brown v. Walker*, for the position of the majority of the court, is, that by Article 6 of the Constitution, the Federal law-making power is made supreme.¹ These cases are all on the power of Congress to suspend the running of a state statute of limitations during the continuance of hostilities and when local courts are closed. The statutes were generally upheld on the principle of the war power granted to Congress. It will be found, however, on reading *Hanger v. Abbot*,² that the same court declared that state statutes of limitations do not run at such a time, regardless of any Federal statutes on the subject. The Federal statute was, therefore, merely declaratory of what had previously been the law. The cases above referred to do not, therefore, support the position taken in *Brown v. Walker*.

It is admitted that treaties made by the Federal Government are the supreme law of the land. They are made so by the Second Clause of Article 6 of the Constitution, when "they shall be made under authority of the United States." We are not ready to admit, however, that treaties receive their supreme power from this clause alone. The "authority of the United States" is found elsewhere in the Constitution. By the First Clause of Section 10 of Article 1 the states are prohibited from "entering into any treaty alliance or confederation, grant letters of marque and reprisal," and by the Second Clause of Section 2 of Article 2 the President and Senate are vested with the power to make treaties. Treaties always relate to the "external affairs" referred to by Justice Marshall in *Gibbons v. Ogden*, *supra*, concerning which affairs the states have nothing to do. Thus it becomes necessary

¹ *Stewart v. Kahn*, 11 Wal. 493; *U. S. v. Willey*, 11 Wal. 508; *Mayfield v. Richards*, 115 U. S. 137.

² 6 Wal. 532.

oftentimes, as the political exigencies of the nation require, that agreements in the form of treaties shall be made with a foreign nation inimical to the interests of this or that state. The framers of our fundamental rules of government were wise enough to see this, and amply provided for it by making treaties the supreme law of the land.

Can it anywhere be shown in the Constitution that the states are prohibited from exercising the legislative function except in special cases? In Article 6 "The Constitution and laws made in pursuance thereof" are made the supreme law of the land. By virtue of what power granted by the states can it be said that, in pursuance of which, Federal statutes shall be supreme over the states in all things, as the decision in *Brown v. Walker* would indicate they are? or, to be more specific, if that decision is not meant to be carried so far, that Congress can control state courts so far as the prosecution of crime is concerned, or so far as the admission of certain kinds of evidence is concerned? There are a large number of cases in the state courts along this line, but we know of none except *Brown v. Walker*, in the Supreme Court of the United States. Most if not all of the cases in the state courts are on the power of the Federal Government to tax the processes of a state court, and they are uniformly against this proposition except one—*Liederkrantz v. Schlemann*¹—and this case does not refer to *Walton v. Bryenth*,² decided a short time previously in exactly the opposite way. Neither of these cases have a full or practically any discussion. All or nearly all the others of these cases referred to cite at length *McCulloch v. Maryland*,³ where Chief Justice Marshall says "the power to tax is the power to destroy," and hence decides that the states cannot tax the agencies of the Federal Government. He also says that it makes no difference that the tax is low and may not be a burden. It is the *power to destroy* at which he aims. Such being the case, these state decisions go on the principle that states, their courts and the

¹ 25 How. Prac. N. Y. 388.

² 24 How. Prac. N. Y. 35.

³ 4 Wheaton, 316.

means of exercising governmental functions have the constitutional right to exist, and they hold that the Federal Government has no power to use a means which may in the end destroy what the state has a right to enjoy.¹ In the last case cited we have a unanimous opinion from the Supreme Court of Michigan, when that court had some of the most illustrious judges of any court of America on its bench—Campbell, Cooley, Christiancy and Martin. We append here a part of Justice Campbell's opinion :

“And the question we are called upon to decide is, therefore, whether Congress has power to put an end to the exercise of the judicial power of the states.”

“Presented in this form, the inquiry involves little short of an absurdity. It is one of the cardinal principles of political science that no government can exist without a judicial system . . . A state without courts to enforce its own laws is an impossibility, and if Congress can destroy or control the state judiciary it can utterly abrogate the state itself.”

“No one would contend that the system of government established by the Constitution of the United States can possibly permit of any diminution by the general government of any of the functions which are left under state control. The judicial powers, like other powers of the Union, are enumerated. They do not cover any considerable number of these subjects which concern the ordinary interests of the people. They punish no ordinary local crimes against the peace and good order of society committed within the states, and they can entertain jurisdiction in no ordinary litigation between members of the same community. . . . Our whole system is based upon the principle that local affairs must be administered by state authority, unless where peculiar circumstances have led to the establishment of definite exceptions resting on special reasons of public policy. The same power which established the departments of the general government determined that the local governments should also exist for their

¹ *Smith v. Short*, 40 Ala. 385; *Warren v. Paul*, 22 Ind. 281; *Jones et al. v. Estate of Keep*, 19 Wis. 369; *Sayles v. Davis*, 22 Wis. 225; *Fifield v. Close*, 15 Mich. 505.

own purposes, and made it impossible to protect the people in their common interests without them. . . . There is nothing in the Constitution which can be made to admit of any interference by Congress with the secure existence of any state authority within its lawful bounds."

If the Federal Government may not destroy state courts or control their evidence by taxation, which must necessarily be by statute, then we can see no way in which it would be possible for them to control the states or their courts directly by legislation, as is attempted by 27 Stat. L. 443, Chap. 83, if the decision in *Brown v. Walker* is right.

We are not informed of an attempt by any of the states to pass a general statute of immunity. It may be argued that, where these statutes relate only to transgressions of a particular kind, that the foregoing reasoning may not apply. This objection seems to have merit. The statute may relate only to bribery, as in Illinois,¹ or the state police, as formerly in Massachusetts,² or the violation of the Interstate Commerce Law, as in the Federal jurisdiction.³ These are offences against the particular jurisdiction alone, where no testimony relative to the issue would tend to criminate, it would seem, in any other jurisdiction. But who can say where such testimony would lead? Suppose, in order to investigate a question of unjust discrimination under the Interstate Commerce Law, a railroad official were asked for certain weights of grain shipped by different parties. He refuses to answer, on the ground that it would tend to incriminate him; and he makes it reasonably clear that the answer would tend to incriminate him, or subject him to a penalty in Illinois⁴ or some other one of the states. A charge of bribery in the State of Illinois might, in the investigation of it, lead to a demand for testimony which, considering "the relation of the witness to the subject-matter of inquiry and character and scope of the question," would tend to disclose a link in the chain of evidence

¹ Chap. 69, Criminal Code.

² *Emery's Case*, *supra*.

³ 27 Stat. L. 443, Chap. 83.

⁴ Starr & Curtis An. Sta., Chap. 114, pp. 139, 140.

upon which the witness might be prosecuted outside of the state jurisdiction. Of course, the witness must make it reasonably clear that such is the case.

As a corollary of the principle which has been mentioned, viz., that the witness must make it reasonably clear that the testimony asked for would tend to incriminate him, the party called as a witness must, in order to secure his constitutional privilege, plead the law of a foreign nation if the penalty of such law is the one from which he demands immunity.¹ The rule would be the same if the law of another of the states of the Union was relied on, and such law in any way was different from or in any way changed the common law. If, however, the law of the other state was a common law principle, it would not be necessary to plead it to secure immunity from it, because the common law will be presumed to be the law of the sister state.² The rule would be otherwise if a witness in a state court relied on a Federal statute. State courts take judicial notice of the acts of Congress.³ A witness demanding his privilege on a statute of which the trial court does not take judicial notice need only bring such a statute to the notice of the court in order to demand his privilege. This was decided by Lord Chelmsford in *The United States v. McRea, supra*.

The reader will have noticed that pardons, acquittals, convictions and statutes of limitations have been mentioned as protecting a witness against any prosecution to which any matter he might testify to would subject him. The question as to whether an accused can be prosecuted on the same charge after an acquittal or conviction was settled early in the history of our law, and is made doubly sure by the very general constitutional provision, that an accused shall not be twice put in jeopardy of life or limb on the same charge. A large

¹ *King of Two Sicilies v. Wilcox*, 1 Sim. (N. S.) 301, by Lord Cranworth.

² Storey, *Conflict of Laws*, Sec. 316; *Williams v. Wade*, 1 Metc. 82; *Abell v. Douglass*, 4 Denio, 305; *Kernot v. Ayer*, 11 Mich. 181; *Schurman v. Marley*, 29 Ind. 458; *Mendenhall v. Gately*, 18 Ind. 149.

³ *Murry v. City of Butte*, 7 Mont. 61.

number of courts have also decided that a pardon or a statute of limitation is a bar to future prosecution.¹

Thus a party called upon to give testimony tending to incriminate himself cannot claim his privilege when a pardon, acquittal, conviction or the statutes of limitation intervene to protect him. Where the statutes of limitation are relied on, however, to compel a party to testify, it is not enough to show that the time necessary to the operation of the statute has elapsed without conviction, but it must be affirmatively shown that no prosecution is then pending.² If the offence sought to be brought to light is such a one as we have discussed in this article, one which might bring to light a criminal infraction of law in a different and independent jurisdiction, it would be necessary to show that the reason relied on to compel the witness to testify was as broad as the privilege of which he was deprived.

It has been suggested that the kind of statute in question might be made effective by both the United States and all the states uniting in passing a similar statute which would be broad enough to cover "any pleading and discovery or evidence obtained from a party or witness by means of any judicial proceeding in this or any foreign state or country shall be given in evidence, etc." Granting that if such a visionary thing were possible, the real difficulty arises in the matter of compelling a witness to plead a pardon, acquittal, conviction or statutes of limitation or of immunity which may effect him in another jurisdiction. So long as the court must take judicial notice of a statute as a Federal statute in both Federal and state courts then this difficulty will not arise. But no sooner does the opposite rule come into effect, that a court does not take judicial notice of the various statutes and judicial acts, then the witness who does not wish to give testimony against himself may plead the statute of the state

¹ *Reg. v. Boyes*, 101 E. C. L. 327; *Weldon v. Burch*, 12 Ill. 374; *Williams v. Farrington*, 2 Cox Chan. 202; *Roberts v. Allat*, 22 E. C. L. 288; *People v. Mather*, 4 Wend. 252; *State v. Wharton*, 3 S. W. (Tenn.) 490; *Manchester R. R. Co. v. Concord R. R. Co.*, 20 Atl. (N. H.) 383; *Child v. Merrill*, 66 Vt. 302.

² *Salina Bank v. Henry*, 3 Denio, 593; *Southern R. R. News Co. v. Russell*, 91 Ga. 808.

where he may be convicted of some crime as to which he is asked to testify, and though it may be possible he cannot be prosecuted in that state, for that crime, in any court in that state, the court cannot take judicial notice of the fact nor can the accused be compelled to plead it.¹ With such a state of facts a state statute of the kind in question would be unconstitutional, and the whole fabric so carefully woven would fall to pieces. We believe we have shown that, except for the case of *Brown v. Walker*, it is impossible for either the state or Federal Government to grant "absolute immunity," and this case, it seems to us, upon another hearing of the same proposition, could not be decided in the same way. It is not necessary, therefore, in order to show that statutes of immunity or indemnity are unconstitutional, to refer to the doubtful and speculative arguments, as to whether a witness will be compelled to testify to such matters as will disgrace him in the eyes of his neighbors; nor is it necessary to determine whether the framers of the Constitution intended that the declaration that "No man shall be compelled in any criminal case to be a witness against himself," might be annulled by granting immunity.

Since the Counselman case, *supra*, has thrown the weight of its authority on the side of the right of the witness called to testify to matters which will tend to incriminate him, the true rule undoubtedly is, that a statute of indemnity must furnish absolute immunity. This means that a person cannot be compelled to testify if there is any possible way in which his answers may tend to incriminate him in the jurisdiction in which he is called, or in any other jurisdiction, provided he brings it to the knowledge of the court that he is opening the way for a prosecution in such other jurisdiction. This immunity the courts have declared to be the measure of the ancient common law rule as it is declared in the Constitution of the United States.

Although the legislatures of the various states or, Congress, may change or abrogate a common law privilege, they cannot change a constitutional provision, at least, without granting an equivalent. This, we believe, we have shown they cannot do.

Chicago, December, 1898.

Charles E. Lahman.

¹ *Wilson v. United States*, 7 Peters, 150.