6-1-1953

Witnesses -- Privilege Against Self-Incrimination

Sheldon J. Schlesinger

case of premature payments by the obligee to the surety's principal, if such payments are substantial, these courts hold that the contract has been materially altered, and they grant the surety a full release.[12]

The Florida Supreme Court, in this case of first impression, has committed itself to the view espoused by the weight of authority — that a corporate surety will be discharged only by a deviation from the contract which results in injury to the surety, and then only to the extent of such injury. However, by its dicta and the cases cited therein,[13] it is apparent that the court does not take cognizance of the inherently prejudicial nature of premature payments, *i.e.*, constituting a release of security.[14]

In this writer's opinion, the most cogent reasoning supports the proposition that premature payments constitute a release of security. Taking this view, it is unnecessary to inquire, as this court did, into the question of *actual* damage. For corporate sureties, though not deserving of the favoritism accorded their "simon-pure" predecessors, are nonetheless entitled to the benefit of the express provisions in their contracts. If the obligee disposes of security which, under the contract, he is bound to hold for the benefit of the surety, he has certainly damaged that surety — at least, to the extent of the unauthorized payments.

Michael H. Kramer

WITNESSES — PRIVILEGE AGAINST SELF-INCRIMINATION

Appellee sought an injunction against proceedings by the Florida State Board of Architects to revoke his architect's certificate. He claimed immunity from such a proceeding under a statute prohibiting prosecution, penalty or forfeiture against any person who testifies before any court in a case involving violation of the statutes against bribery.[1] *Held*, a proceeding to revoke appellee's certificate amounts to a prosecution to effect a penalty or forfeiture as contemplated by the statute. *Florida State Board of Architecture v. Seymour*, 62 So.2d 1 (Fla. 1952).

The privilege against self-incrimination arose in American law shortly before the formation of the Union[2] and is firmly established today by judicial determination.[3] Before the adoption of the Constitution five

ex rel Union Indemnity Co. v. Shain, 334 Mo. 153, 66 S.W.2d 102 (1933); Barton v. Title Guaranty & Surety Co., 192 Mo. 561, 183 S.W. 694 (1916); Crouse v. Stanley, 199 N.C. 186, 154 S.E. 40 (1930); St. John's College v. Aetna Indemnity Co., 201 N.Y. 335, 94 N.E. 994 (1911).

12. Globe Indemnity Co. v. United Ry., 272 Fed. 607 (3d Cir. 1921); First National Bank v. Fidelity & Deposit Co., 145 Ala. 335, 40 So. 415 (1906); Meyer v. Standard Accident and Ins. Co., 114 N.J.L. 483, 177 Atl. 255 (1935); Lyons v. Kitchell, 18 N.M. 82, 134 Pac. 213 (1913).

13. See note 9 *supra*.

14. See note 10 *supra*.

1. FLA. STAT. § 932.29 (1951).

2. See 8 WIGMORE, EVIDENCE § 2250 (3d ed. 1940).

3. People v. Newmark, 312 Ill. 625, 144 N.E. 338 (1924); People v. Spain, 307

states had provided for this in their constitutions.[4] Since then, all the states, except New Jersey and Iowa, have adopted the privilege; and these two states have it in their common law.[5] This privilege applies to civil and criminal cases alike whenever the testimony might tend to subject the witness to criminal prosecution.[6]

The privilege applies, not only where the witness's testimony may tend to subject him to criminal prosecution but, where he may be exposed to a "penalty or forfeiture."[7] The distinction between a remedial statute and a penal statute is that the penalty imposed by the former is not to punish a public wrong but to redress a private grievance.[8] Thus, the latter penalty may be defined as a liability to pay money or yield up a public privilege by way of a punishment imposed by law.[9]

In cases of disbarment proceedings against an attorney the courts have held that such proceedings do not constitute a penalty or forfeiture which would be protected by immunity statutes.[10] The reasoning behind such decisions is that the purpose of a disbarment proceeding is not to punish but to determine, in the public interest, whether one should be permitted to practice law.[11] Thus, along similar lines of reasoning, the privilege to practice medicine could be withdrawn when it became necessary to preserve public health, morals, comfort, safety, and the good order of society.[12]

Architects are required to possess educational and moral qualifications similar to those of a doctor and lawyer.[13] It has been reasoned that such positions are not held by inherent right, but are subject to prescribed educational and moral qualifications which must be continued after one has been afforded the privilege to practice.[14]

In the instant case, the court reasons that the right to earn a living is protected by the immunity statute. The reasoning in the disbarment

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Ill. 283, 138 N.E. 614 (1923); People v. Danziger, 238 Mich. 39, 213 N.W. 448 (1927).

4. N. C., 1776; Pa., 1776; Va., 1776; Mass., 1778; N. H., 1784.

5. State v. Height, 117 Iowa 650, 91 N.W. 935 (1902); State v. Zdanowicz, 69 N.J.L. 619, 55 Atl. 743 (Ct. Err. & App. 1903).

6. Counselman v. Hitchcock, 142 U. S. 547 (1892); *Ex parte* Frenkel, 17 Ala. 563, 85 So. 878 (1920); Goytan v. Deasy, 85 Cal. 454, 259 Pac. 488 (1927); Overman v. State, 194 Ind. 483, 143 N.E. 604 (1924); Dendy v. Wilson, 142 Tex. 460, 179 S.W.2d 269 (1944).

7. Lees v. United States, 150 U. S. 476 (1893).

8. Schlage Lock Co. v. Pratt-Rymer Co., 46 F.2d 703 (D.C. N.D. Calif. 1931); Standard Oil Co. v. Roxana Petroleum Corp., 9 F.2d 453 (D.C. S.D. Ill. 1925); Perkins Oil Well Cementing Co. v. Owen, 293 Fed. 759 (D.C. S.D. Calif. 1923).

9. WIGMORE, EVIDENCE § 2257 p. 333 (3d ed. 1940).

10. Fish v. State Bar, 214 Cal. 182, 4 P.2d 937 (1931); Matter of Gluck, 229 App. Div. 490, 243 N.Y. Supp. 334 (1st Dept. 1930); *Re* Rouss, 221 N. Y. 81, 116 N.E. 782 (1917); *Re* Randell, 158 N Y. 216, 52 N.E. 1106 (1899).

11. *In re* MacDonald, 56 Ariz. 120, 105 P.2d 1114 (1940); Light v. State Bar of Cal., 14 Cal.2d 328, 94 P.2d 35 (1939); *In re* Carter, 59 Idaho 547, 86 P.2d 162 (1938); *In re* Smith, 220 Minn. 197, 19 N.W.2d. 324 (1945).

12. State *ex rel* Munch v. Davis, 143 Fla. 236, 196 So. 491 (1940).

13. FLA. STAT. § 467.08 (1951).

14. Commonwealth *ex rel* Ward v. Harington, 266 Ky. 41, 98 S.W.2d 53 (1936).

cases and the standards to which professional people in general are held would seem to belie this construction.

It would seem that the immunity afforded by the statute in the instant case has been extended too far. The privilege (including the usual immunity statutes) traditionally only protect answers which injure in a *penal* sense. The effect of the decision has extended the statutory words "penalty or forfeiture" to an area more civil in nature. "The privilege against self-incrimination is a rule of necessity beyond which it should not be extended; its use should not be considered as affording the witness a certificate of good character."[15] Thus, in the words of Professor Wigmore, "The privilege cannot be enforced without enforcing crime, but that is a necessary evil inseparable from it and not a reason for its existence. We should regret the evil and not magnify it by approval."[16]

Sheldon J. Schlesinger

WORKMEN'S COMPENSATION — PENDENCY OF APPEAL AS TOLLING STATUTE OF LIMITATIONS

Petitioner was awarded a workmen's compensation claim, but it was reversed by the full Industrial Commission. The Circuit Court and the Florida Supreme Court[1] affirmed the Commission's order. Thereupon, the petitioner attempted to have the Commission review the cause. *Held*, the Commission had no jurisdiction because of petition for review was filed over one year after entry of the Commission's original reversal.[2] The pendency of the petitioner's appeal from such order did not toll the running of the limitation statute. *Davis v. Combination Awning & Shutter Co.*, 62 So.2d 742 (Fla. 1953).

Since modification and review statutes are based upon statutory rights rather than constitutional rights,[3] the courts generally have interpreted them very strictly.[4] There are two ways in which the courts treat the time limits in the review statutes—as a jurisdictional question[5] or as

15. Scholl v. Bell, 125 Ky. 750, 102 S.W. 248, 261 (1907).
16. WIGMORE, EVIDENCE § 2251 p. 317 (3d ed. 1940).

1. Davis v. Combination Awning & Shutter Co., 487 So.2d 436 (Fla. 1950).
2. FLA. STAT. §§ 440.27, 440.28 (1951).
3. City of Miami v. Saco, 156 Fla. 634, 24 So.2d 115 (1945). See FLA. STAT. §440.27 for the statutory conditions that must be complied with in Florida for review of a compensation award.
4. Winrod v. McFadden Publications, 187 F.2d 180 (7th Cir. 1951); Mitchel v. Town of Niagee, 51 So.2d 198 (Miss. 1951); Thomsen v. Null, 248 S.W.2d 6 (Mo. 1952); Wills v. Stineman Coal & Coke Co., 170 Pa. Super. 446, 87 A.2d 104 (1952); Bucker v. Kapp Bros., 110 Pa. Super. 65, 167 Atl. 652 (1933); *cf.* Mallory v. Pittsburgh Coal Co., 162 Pa. Super. 541, 58 A.2d 804 (1948). See Young v. McKenzie, 46 So.2d 184 (Fla. 1950).
5. Manrose v. Miami Shipbuilding Corp., 156 Fla. 402, 23 So.2d 733 (1945); See Concord Realty Corp. v. Romano, 30 So.2d 485 (Fla. 1947).