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Notes

James E. Murray

Edmund L. White

Peter H. Lousberg

NOTES

Attorneys

NEGLIGENCE OR INCOMPETENCE OF AN ATTORNEY AS GROUNDS FOR DISBARMENT OR SUSPENSION.

Introduction

An attorney at law is licensed by the state principally by reason of his unique character as a representative of parties litigant in courts of justice.[1] He has been variously described as one who is "reasonably well acquainted with the law"[2] and an "officer of the court."[3] By provision made as early as the act of 4 HENRY IV., c. 18, a system was provided for the appointment of barristers and counselors at law. Under the modern practice in the United States, the licensing of attorneys is not regarded as a mere ministerial power, but as a judicial function, and is therefore entrusted to the courts, rather than to the legislature.[4] In the absence of constitutional or statutory restrictions, a court of superior or general jurisdiction has the authority to suspend an attorney from practice, or to disbar or strike from the rolls an attorney of such court upon proper grounds,[5] due to the character of attorneys as officers of the court in which they are admitted to practice. The ultimate purpose of all regulations of the admission of attorneys has been stated as the assurance to the courts of the assistance of advocates of ability, learning and sound character and the protection of the public from incompetent and dishonest practitioners.[6]

Broadly, an attorney may be suspended or disbarred for such misconduct as shows him to be an unfit or unsafe person to enjoy the privileges and to manage the business of others in the capacity of a counselor.[7] The attorney is a man of three fundamental, though not necessarily divided, allegiances. He owes a duty toward the court of maintaining a "respectful attitude, . . .

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1 Brewer v. Watson, 71 Ala. 299, 304 (1882).

2 Savings Bank v. Ward, 100 U.S. 195, 199 (1879).

3 Danforth v. Egan, 23 S.D. 43, 119 N.W. 1021, 1024 (1909).

4 *In re* Day, 181 Ill. 73, 54 N.E. 646 (1899).

5 State *ex rel.* Wolfe v. Kirke, 12 Fla. 278 (1868).

6 *Ex parte* Wall, 107 U.S. 265 (1882).

7 Wernimont v. State, 101 Ark. 210, 142 S.W. 194 (1911); *In re* Durant, 80 Conn. 140, 67 Atl. 497 (1907).

Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamor."[8] Toward his brethren at the bar, the attorney must "strive at all times to uphold the honor and to maintain the dignity of the profession."[9] Lastly, and most importantly, the attorney is responsible to his client in particular and society in general — the very *raisons d'etre* of this unique representative in the courts of law. To this latter group, a fundamental rule has been generally accepted as to the width and breadth of this responsibility, *i.e.,* that an obligation is owed of exercising that knowledge, skill and ability ordinarily possessed and exercised by members of his profession[10] and of possessing such reasonable knowledge of well-settled rules of law as will enable him to perform those necessary duties which he may undertake.[11] The primary purpose of this discussion is to shed some light upon the application of this principle by the judiciary in disciplinary actions brought against negligent and incompetent attorneys.

The Disbarment Proceeding

Behind the institution of the disbarment action are the many local and state bar associations who have become, in effect, the "keepers" of the legal profession's conscience. Accordingly, numerous state statutes have explicitly provided that the errant counselor shall first be brought before a grievance committee of the state bar association, which hears testimony and evidence upon the charges made.[12] If the committee is satisfied that the lawyer has committed acts which warrant discipline, an action is then brought before a court having the requisite jurisdiction. Several statutes have gone so far as to stipulate that the state bar association has complete jurisdiction over the discipline of its members, though review is readily available to the judiciary.[13]

Whatever the actual statutory mechanics of the various jur-

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8 CANONS OF PROFESSIONAL ETHICS OF THE AMERICAN BAR ASSOCIATION, CANON No. 1 (1954).

9 *Id.,* CANON No. 29 (1954).

10 Hampel-Lawson Mercantile Co. v. Poe, 169 Ark. 840, 277 S.W. 29, 34 (1925).

11 *In re* Woods, 158 Tenn. 383, 13 S.W.2d 800, 803 (1929).

12 ARIZ. CODE ANN. § 32-337 (1939); DEL. CODE ANN., Supreme Court Rules, 32 (1953); S.C. CODE § 56-153-155 (1952); TEX. STAT. REV. CIV. art. 320a-1, State Bar Act art. 12 B § 16 (1948); WIS. STAT. § 256.28 (1951). Typical statutory provisions wherein the local and state bar associations are designated as the moving forces behind disbarment proceedings.

13 NEV. COMP. LAWS § 565 (1929); N.C. CODE § 84-23 (1950).

isdictions may be, the American Bar Association, through the CODE OF LEGAL ETHICS, has had a vital influence upon their formulation. In several jurisdictions, they have been given the effect of legislative enactments.[14] Canon No. 29,[15] pertaining to the maintenance of the honor of the profession, has been repeatedly used by the courts as a basis for disbarments for reasons of incompetence or gross negligence.

Despite the fact that certain state statutes have specifically enumerated the various grounds for disbarment, the courts have generally used them merely as minimum standards and have gone beyond and relied upon common law rules in determining whether an accused has failed to live up to the requirements of the bar.[16] The problem of ridding the bar and courts of law of inadequate practitoners has been with the legal profession for some time. Long ago, it was suggested that trial courts should be invested with the authority to suspend incompetent attorneys who had been repeatedly guilty of "sloppy" pleading or other incompetent practices.[17] Though this possible solution would seem particularly drastic and harsh to most, it does point up the fact that for many years the legal profession in general and the judiciary in particular have been acutely aware of the havoc worked upon the integrity and effectiveness of the legal profession by incompetent attorneys.

Gross Negligence

A fundamental concept which has become enmeshed in nearly all jurisprudence upon professional disciplinary actions has been the supposed requisite of "fraud" or some sort of "moral turpitude" on the part of the attorney involved. If the charge of deliberate or wilful misconduct could not be substantiated, the cause necessarily failed.[18] As was stated in In re *Smith:*[19] "To justify disbarment, proof of carelessness or mistaken judgment is

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14 DEL. CODE ANN., Supreme Court Rules, Rule 33 (1953); N.C. GEN. STAT. appendix 6, art. 10 (1943).

15 See Note 9, *supra.*

16 State v. Mosher, 128 Ia. 82, 103 N.W. 105, 111 (1905).

17 Winch, *The Recall of Lawyers,* 24 Green Bag 135, 136 (1912). "I am in favor of the recall of incompetent lawyers. . . . I certainly favor lodging in our trial courts authority to suspend a lawyer from practice upon its appearing by the pleadings he files or his conduct at the trial table, that he is incompetent."

18 People *ex rel.* Chicago Bar Ass'n. v. Lotterman, 353 Ill. 399, 187 N.E. 424, 428 (1933).

19 365 Ill. 11, 5 N.E.2d 227, 229 (1936).

not sufficient." This theory of moral guilt has predominated, almost universally, in past disciplinary actions and has retained its great significance down to the present time. It would appear, however, that the trend of recent decisions, while far from disregarding the degree of moral guilt involved, has displayed a marked lessening of the rigid adherence to this formerly unquestioned doctrine.

An example of judicial development in this regard can be obtained from the opinions expressed by the California courts. In earlier decisions, the requisite of moral turpitude was thought indispensable.[20] Subsequently, the court formulated the theory that if the oath of office was violated, *i.e.*, "faithfully to discharge the duties of an attorney . . . to the best of his knowledge and ability,"[21] then disciplinary action could and should be imposed upon the lawyer accused, even though there had been no wilful misconduct.[22] Where an attorney was such a careless and indifferent practitioner, the California court held that he had, in effect, violated his oath of office.[23] While fraud was mentioned as a common law requirement, it did not appear that the acts complained of had been in any way intentional.

After the judicial door had been left ajar, a natural consequence was the holding that moral turpitude was not an essential ingredient in the proceeding but that "gross negligence" which bordered upon fraud was acceptable in its stead. By interpreting inadequacy and incompetence as elements of fraud, the courts have been able to satisfy the statutory as well as common law requirements. Another convenient evasion has been the finding of wrong intention from the totality of the attorney's dealings, even though the acts primarily complained of arose from negligent practices only.[24] While it has been ruled that even inadvertence may be deemed sufficient to justify a suspension,[25] the decisions

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20 *In re* Morganstern, 61 Cal. App. 702, 215 Pac. 721 (1923); *In re* Collins, 147 Cal. 8, 81 Pac. 220 (1905).

21 CAL. BUS. AND PROF. CODE § 6067 (1951).

22 Marsh v. State Bar, 210 Cal. 303, 291 Pac. 583, 585 (1930).

23 Cheleden v. State Bar, 20 Cal.2d 133, 124 P.2d 1 (1942).

24 *In re* Boyer, 231 Ia. 597, 1 N.W.2d 707 (1942) — attorney's continued negligence not in itself sufficient to warrant disbarment, but taken with evidence of fraud, it is indicative of his attitude and lack of character; Disbarred. *In re* Modr, 268 App. Div. 641, 52 N.Y.S.2d 560 (1st Dep't 1945) — grossly neglected interests of clients and misled them; Disbarred.

25 *In re* McKenna, 16 Cal.2d 610, 107 P.2d 258 (1940). Attorney prepared answer to complaint but through inadvertance failed to file it. Plaintiff took default judgment; Six months suspension.

appear to vary greatly with individual circumstances. Gross negligence, in and of itself, has been held sufficient as a basis for disbarment[26] while other actions have been dismissed if fraudulent intent could not be proved.[27]

A professional malpractice which has caused considerable discussion both as to the amount of fraudulent intent involved and its validity as a basis for disbarment has been the "stringing" of a client. Under this device, the counselor invariably accepts his fee in advance, and, while assuring the client that a judgment is forthcoming, he permits the case to hang in abeyance for months and even years.[28] It is difficult to compare this malpractice with others involving negligence, basically due to the implied fraud committed in the acceptance of the fee without the performance of services in return.[29]

In a large number of these "stringing" cases, it would seem that the original intent, upon the acceptance of the fee, was the carrying out of the wishes of the client. During the course of the litigation, however, the human frailty of dilatoriness inevitably arose to plague the attorney, and lengthy and costly delays in the prosecution of the client's interests resulted. In the majority of these cases, a suspension has been considered sufficient, largely due to the extreme reluctance on the part of the courts to deprive the errant attorney of his complete professional standing if he has subsequently made an attempt to repair the injury done.[30] Nevertheless there have been instances of complete disbarment under similar circumstances.[31]

Incompetence

It has been stated, *obiter*, that an attorney may be stricken

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26 *In re* Gilbert, 274 Ky. 187, 118 S.W.2d 535 (1938). Lawyer neglected client's cause, accepted fees without rendering services; Disbarred.

27 *In re* Smith, 365 Ill. 11, 5 N.E.2d 227 (1936); *In re* Janover, 178 App. Div. 882, 165 N.Y. Supp. 645 (1st Dep't 1917). Negligence, but no fraud or deceit proved; No disciplinary action.

28 Trusty v. State Bar, 16 Cal.2d 550, 107 P.2d 10 (1940).

29 *In re* Smith, 84 N.J. Eq. 252, 94 Atl. 39 (Ch. 1915).

30 Trusty v. State Bar, 16 Cal. 2d 550, 107 P.2d 10 (1940); *In re* Chernow, 266 App. Div. 502, 42 N.Y.S.2d 500 (1st Dep't 1943). Attorney neglected the interests of his client and misled him concerning the status of his case; Six months suspension.

31 *In re* Sparer, 265 App. Div. 717, 40 N.Y.S.2d 679 (1st Dep't 1943). Lawyer failed to prosecute suit, misled client and kept fee; Disbarred; *In re* Robinson, 163 App. Div. 844, 147 N.Y. Supp. 103 (1st Dep't 1914). Fees were accepted over a period of many years of practice for which no services were ever performed; Disbarred.

from the rolls of the court at any time by his failure to continue to meet those requirements that were originally necessary for admittance to the bar.[32] In following this apparent rule, an interesting question of statutory construction arose where the issue of ignorance of the law was squarely presented as a basis for disbarment, and the court said: [33]

> The result of the authorities is, that for a mere mistake the court will not punish an attorney, as for that he may be made answerable in damages upon an action; but for fraudulent and corrupt practice he may be removed from office.
> . . . ignorance of the law in an attorney does not authorize the court to suspend or remove him from office, as a contrary doctrine would render it necessary that an attorney should possess some knowledge of the law — a condition which the statute does not require.

While outwardly approving this "rule of thumb", subsequent decisions have not in any way sustained its validity. Undoubtedly, a sudden decline in the moral fibre of the attorney or a complete loss of character will bring dismissal from the bar,[34] but what of a subsequent loss of knowledge in the all-important fundamentals of legal theory and practice?

Incompetence on the part of an attorney in the conduct of his professional activities has, by statute, been considered grounds for disbarment in several jurisdictions.[35] Though these provisions would appear to require a certain rigid standard of professional skill, in practice they necessitate little more than the ordinary qualification of moral fitness. A number of other jurisdictions require attorneys to take an oath that they will discharge their duties to the best of their ability, and authorize proportionate disciplinary measures for gross neglect in legal practices.[36]

Although unhesitatingly recognizing their common law power to take disciplinary action for negligent and incompetent practices, the courts have seldom actually exercised this jurisdiction and the penalties imposed have been relatively light.[37] The re-

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32 Smith v. State, 1 Yerg. 228 (Tenn. 1829).

33 Bryant's Case, 24 N.H. (4 Fost.) 149, 155, 158 (1851).

34 Cheleden v. State Bar, 20 Cal.2d 133, 124 P.2d 1 (1942).

35 ALASKA COMP. LAWS ANN. § 35-2-71 (10) (1949); WASH. REV. CODE § 2.48.220 (10) (1951).

36 ARIZ. CODE ANN. § 32-101 (1939); CAL. BUS. AND PROF. CODE § 6067 (1951); KAN. GEN. STAT. § 7-105 (1949); MINN. STAT. § 358.07 (9) (1950); OKLA. STAT. tit. 5, § 2 (1951).

37 *In re* Melin, 410 Ill. 332, 102 N.E.2d 119 (1951). Attorney was "grossly negligent" in handling estate funds; Three months suspension; *In re* Miller, 55 Nev. 444, 38 P.2d 972 (1934). Lawyer negligent and careless in not closing estate for 20 years; Six months suspension.

luctance to take away the attorney's professional standing where there has been no intentional misconduct has been a very significant factor. The difficulty of the situation was well-expressed in Ex parte *Burr*. [38]

> On one hand, the profession of an attorney is of great importance to an individual, and the prosperity of his whole life may depend on its exercise. The right to exercise it ought not to be lightly or capriciously taken from him. On the other, it is extremely desirable that the respectability of the bar should be preserved. For these objects, some controlling power, some discretion, ought to reside in the court. This discretion ought to be exercised with great moderation and judgment; but it must be exercised; . . . .

The element of moral guilt again appears as the prime consideration in the underlying theory of the many decisions which hold that the severe consequences of disciplinary action should not be imposed upon those who are morally innocent. Characteristic of this thinking was *Friday* v. *State Bar*,[39] where it was ruled that in the absence of negligence constituting a violation of his oath, the attorney's "mere ignorance of the law," in "good faith" is not cause for disbarment nor could the act committed because of ignorance constitute moral turpitude. How ignorance can truly be in "good faith" would appear to be a problem of no little consequence. Perhaps the court based its decision on the time-honored "ignorance is bliss" adage.

If the client is protected against the fraud, deceit and gross negligence of the attorney, it would seem logical that he should be also sheltered from the complete ignorance or incompetence of his counselor. Accordingly, it has been stated: "The client is just as much entitled to protection against carelessness or incompetence as he is to protection against dishonesty."[40] However, for all practical purposes, it has been impossible to disbar simply upon the grounds of fundamental ignorance. Though there have been decisions implying that these grounds should be sufficient,[41] other courts have explicitly stated that ignorance of the law cannot be considered as a possible basis for disbarment.[42] Ignorance of simple statutory provisions which has resulted in a violation of the law by an attorney has been regarded as so gross as to

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38 9 Wheat. 529, 530 (U.S. 1824).

39 23 Cal.2d 501, 144 P.2d 564 (1943).

40 State v. Soderberg, 215 Wis. 571, 255 N.W. 906, 907 (1934). Attorney consistently neglected clients, accepted fees for work undone; Two years probation.

41 Smith v. State, 1 Yerg. 228 (Tenn. 1829).

42 Friday v. State Bar, 23 Cal.2d 501, 144 P.2d 564 (1943).

involve moral turpitude. "The unprofessional conduct of respondent, which not even the alchemy of extreme charity can transmute into anything less than gross negligence and sheer incompetence, . . . reveals a total unfitness to practice law."[43]

Dilatoriness in the prosecution of a client's cause is another element of incompetence which is often found, express or implied, in the stated disbarment rulings. Many perplexing problems caused by the human frailty of procrastination have arisen in the efforts of the bar associations and courts in maintaining professional standards. How punctual, persistent, and persevering must the lawyer be in the conduct of his client's affairs? Here again we find that the courts are extremely charitable if the ingredients of fraud or some kind of moral turpitude cannot be found.[44] Where a dilatory habit has been formed and has become so fixed and so much a part of the counselor's character as to be past remedy, disbarment has been ordered. In the case of In re *Gennow*,[45] the court ruled that a lawyer who persisted in neglecting his client's affairs for long periods brought the entire bar into disrepute and displayed an utter "lack of capacity" to properly serve his clients. It is interesting to note that ineptitude, coupled with gross negligence formed the basis for the decision, fraululent intent being all but forgotten. This is characteristic of a number of decisions in which moral deviation as a necessary requisite is overshadowed by the fundamental principle in professional disciplinary theory that the public is entitled to some protection from practitioners who are grossly inadequate.

"Unethical" and "unprofessional" conduct has been the description applied to acts of negligence and carelessness, as where a client's foreclosure record was permitted to lapse and become void by the Statute of Limitations, the court ordering a three year probation.[46] In many cases involving dilatory conduct, the courts are quick to utilize such phrases as "unfit" and "unprofessional," yet the subjective intent of the attorney is the most important consideration and often is the deciding factor

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43 *In re* Williams, 221 Minn. 554, 23 N.W.2d 4, 9 (1946). Counselor advised and participated in scheme to evade inheritance taxes; Disbarred.

44 *In re* Halpern, 265 App. Div. 340, 38 N.Y.S.2d 630 (1st Dep't 1942). Client's case was neglected and forgotten, finally dismissed; Six months suspension.

45 206 Minn. 389, 289 N.W. 887 (1939).

46 *In re* Larson, 210 Minn. 414, 298 N.W. 707 (1941).

47 *In re* Marfeo, 274 App. Div. 21, 79 N.Y.S.2d 804 (1st Dep't 1948). Attorney failed to act upon client's tort claim for several years, suit was subsequently dismissed for failure to prosecute; Censure.

between disbarment and suspension or probation for a relatively short period of time.[47] Nevertheless it has been held that an attorney is liable in a disciplinary action for the gross negligence of his secretary which should have been corrected.[48]

Failure to appear in court to defend the client's case has also received the harsh condemnation of the courts and has been considered sufficient to justify dismissal from the bar.[49] Inattention to duty, though insufficient in itself,[50] has resulted in disbarment when considered together with the acceptance of a fee and a complete lack of services therefor.[51]

Since the attorney is required to render the best possible service to his client, it would follow logically that a physical impairment of his mental facilities would warrant disbarment not only for the welfare of the particular attorney but for the general public as well. As was stated *supra,* earlier cases have suggested that mental faculties as well as character traits must be maintained throughout the legal career.[52] Though cases of disciplinary action brought for reasons of insanity or mental disease of some kind are extremely rare, (due in large measure to the generally-accepted belief that there must be a degree of guilt) several holdings have stated that mental or emotional disturbances must not be allowed to endanger innocent clients.[53] That disbarment is erroneously regarded by some as a criminal proceeding, requiring a positive proof of moral guilt, is evidenced by the fact that insanity has been pleaded as a defense.[54] Only one statutory pro-

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[48] *In re* Hendrick, 229 App. Div. 100, 241 N.Y. Supp. 50 (1st Dep't 1930). Lawyer instructed secretary to secure release from client on an insurance claim. Anxious to leave on a weekend, the secretary forged the signature. Though client was subsequently paid, the attorney was held responsible for not verifying the release; One year suspension.

[49] *In re* Fellows, 57 Ariz. 224, 112 P.2d 864 (1941). Failure to appear at trial of client on charge of perjury; Disbarred; *In re* Shelley, 56 Ariz. 303, 107 P.2d 508 (1940). Acceptance of fee for divorce case although nothing was done to prosecute the action; Disbarred.

[50] People *ex rel.* Chicago Bar Ass'n v. Wing, 284 Ill. 647, 120 N.E. 451 (1918). Acceptance of client's case with knowledge that it could not be handled for some time; Insufficient grounds for disbarment.

[51] *In re* Gilbert, 274 Ky. 187, 118 S.W.2d 535 (1938).

[52] Smith v. State, 1 Yerg. 228 (Tenn. 1829).

[53] *In re* Manahan, 186 Minn. 98, 242 N.W. 548 (1932). Attorney committed frauds upon clients while subject to hereditary fits; Disbarred. *In re* Fitz Gibbons, 182 Minn. 373, 234 N.W. 637 (1931). Lawyer embezzled funds which he held as guardian while suffering from periodic epileptiform attacks; Disbarred.

[54] *In re* Patlak, 368 Ill. 547, 15 N.E.2d 309 (1938). Insanity pleaded as a defense to frauds committed upon clients; Disbarred.

vision has included "want of a sound mind" as a mandatory basis for removal from the bar.[55]

Poverty has figured indirectly in several disbarments through the resultant negligent and unscrupulous practices which lack of finances had engendered.[56] Youth, inexperience and mental anguish have not, in themselves, been considered as grounds for expulsion from the profession but they have been suggested as mitigating circumstances in determining the severity of disciplinary actions in which moral or ethical malpractices were involved.[57] Advanced years and senility, insofar as they have affected the mental capacity of the attorney and his ability to serve the best interests of his client have resulted in merely short suspensions, censure or probation.[58] In the main, old age, youth and insanity though affecting the ability of the attorney to perform his professional duties adequately, have been considered predominately in mitigating the effect or the severity of the disciplinary proceeding rather than forming basis for complete disbarment. Generally, severe reprimands are held sufficient in cases where old age has resulted in incompetency prejudicial to the best interests of the client.[59]

Though inexperience caused by youth or lack of legal practice has not been taken to justify disbarment, it has also been denied as a defense to charges of gross negligence in the handling of a client's funds.[60] In other circumstances, however, lack of experience has been accepted as a mitigating factor.[61]

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55 GA. CODE ANN. § 9-501 (4) (1935).

56 Cheleden v. State Bar, 20 Cal. 2d 133, 124 P.2d 1 (1942). People *ex rel.* Chicago Bar Ass'n. v. Grusd, 318 Ill. 44, 148 N.E. 860 (1925).

57 People *ex rel.* Chicago Bar Ass'n. v. Charone, 288 Ill. 220, 123 N.E. 291 (1919). Attorney's inexperience, want of diligence and lack of good judgment were not considered sufficient grounds for disbarment; No disciplinary action.

58 *In re* O'Brian, 197 App. Div. 50, 188 N.Y. Supp. 506 (1st Dep't 1921). Advanced years and long service considered in mitigation for negligent practices; One year suspension. *In re* Tracy, 150 App. Div. 913, 135 N.Y. Supp. 29 (1912). 71 year old lawyer negligently handled client's funds; Severe reprimand.

59 *In re* Tracy, *supra,* note 58.

60 People *ex rel.* Colorado Bar Ass'n. v. Waldron, 28 Colo. 249, 64 Pac. 186 (1901).

61 Champagne v. Benoit, 78 Atl. 1009 (R.I. 1911). Lawyer failed to relinquish money collected for his client due to an exaggerated idea of the value of his services. His inexperience and want of appreciation of responsibility as an attorney were considered in mitigation of disciplinary measures; Suspension for several months.

62 JESSUP, THE PROFESSIONAL IDEALS OF THE LAWYER, A STUDY OF LEGAL ETHICS 1 (1925).

Conclusion

"A profession is a calling in life based on special training and ability contemplating public service, and differentiated from ordinary business vocations by its subordination of pecuniary returns to efficient service."[62] The terms "special training and ability" and "efficient service" have a vital significance in any intelligent understanding of the problems involved in the maintenance at a high level of the standards of the legal profession. As has been often emphasized,[63] and recently reiterated in the 1953 *Annual Reports of the American Bar Association*,[64] the underlying purpose behind the disbarment of an attorney is not the punishment of the individual, nor is it intended purely to maintain the social prestige of the profession; rather, it is basically meant to afford some degree of protection to society and the particular interests of the client.

If this fundamental premise be established, it appears extremely difficult to reconcile much of the past and present judicial thinking in regard to the disciplining of negligent and incompetent lawyers. Even the word "discipline" is misleading and a source of continued difficulty since it clearly carries the connotation of malicious and intentional wrongful acts which require some sort of retribution. How can the courts regard moral turpitude, fraud or some sort of intentional misconduct as the only grounds for disbarment if the fundamental purpose of the proceeding is the protection of the client? There is little in fact or logic to back the contention that the careless, disorganized and ill-trained practitioner is not potentially as harmful as those few unscrupulous members of the legal profession. Yet with a very few exceptions, judicial opinion has steadfastly demanded criminal requisites for an admittedly non-criminal action.

There is no doubt that the danger exists that undue sanctions for purely negligent and incompetent practices might result in the undue harrassment of honest and competent practitioners. This would appear to be a hazard which has been ever-present under existing standards and which could be adequately coped with by the wise exercise of judicial discretion. The courts have long recognized this danger and have taken cognizance of it.[65]

One of the principal goals of professional discipline has been largely undermined by this past and prevailing attitude of a large number of jurisdictions. In order to adequately serve the public, the legal profession must afford more effective measures to combat the grossly negligent and incompetent attorney who un-

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63 State v. Soderberg, 215 Wis. 571, 255 N.W. 906 (1934).

64 78 ANNUAL REPORTS OF THE AMERICAN BAR ASSOCIATION 298 (1953).

fortunately can be quite as costly and destructive as his most unethical brethren. More stringent enforcement of existing statutory and common law professional standards is at present the most acceptable solution.

James E. Murray

Constitutional Law

Refusal to Give Incriminating Evidence before Grand Jury as Grounds for Contempt

Introduction

A fundamental principle incident to the rights of man, which the framers of our Constitution incorporated therein, is the privilege against self-incrimination contained in the Fifth Amendment.[1] This privilege has come under particular scrutiny in our time due to the prevalence of grand jury investigations. In considering the problem of the refusal to give criminatory evidence before a grand jury and the possibility of this being contempt, the nature and scope of the privilege itself must be examined together with its applicability to grand jury proceedings.

Since the privilege has its basis in the common law maxim, *nemo tenetur seipsum accusare*,[2] it is evident that such a proposition may be the subject of many varied interpretations. As a result, refusal to testify before a grand jury by claiming the privilege may quite unexpectedly result in contempt. The federal and state courts have recognized this difficulty and have attempted to remedy it by reaching some degree of certainty.

The basic problem we are concerned with is when and how this privilege can be legally utilized. Decisions in the state and federal courts concerning witness immunity before grand juries will be examined in addition to the presentation of current federal legislation as it affects such testimony. The purpose of this writing, then, is to examine the decisions and principles as they affect the privilege and to consider the effect of current legislation on the matter.

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65 *Ex parte* Burr, 9 Wheat. 529 (U.S. 1824).

1 U.S. Const. Amend. V which provides ". . . nor shall be compelled in any criminal case to be a witness against himself, ..."

2 (No one is bound to accuse himself.) Brown v. Walker, 161 U.S. 591, 596 (1896).

State Interpretation

All jurisdictions within the United States recognize the privilege; most states specifically providing for it in their constitutions.[3] However, a distinction does exist between the federal and state constitutions in that the Fifth Amendment to the Federal Constitution applies only to the federal courts and in no way involves the states.[4] The similarity in the nature and purpose of the two may well serve as an aid in determining the construction of either. The precedent inherent in one may also serve as precedent for the other, thus solidifying their effect to some extent. The duty to answer will then be fairly uniform since the constitutional right to assert this privilege against self-incrimination also measures the duty to answer.[5] This applies to the grand jury as well as to other instrumentalities of our judicial system.[6]

When a witness appears before a grand jury and answers questions that may be criminatory in nature, it is necessary, in order to afford adequate protection against express as well as implied self-accusation, that the provision in the state constitution be broadly and liberally construed. The language is brief but comprehensive, and so likewise should be its application.[7] However, this should not be carried to extremes since no general immunity will be granted by a statute or constitution merely because one is testifying before a grand jury.[8] The refusal is a personal one, incapable of being assigned, and is the subject of judicial scrutiny. The court must realize from the circumstances presented before the jury, that there is at least an apprehension of the danger of self-incrimination. In determining the presence of such danger, the court will give added weight to the oath of the witness as to its criminatory nature and point out his mistakes before denying his privilege.[9]

It may appear at first impression that a witness could appear before a grand jury, confess all, thereby receiving absolution and escape contempt. But this is not so, since the "rule is well established that confessions and declarations voluntarily made by a witness before a grand jury may be introduced in evidence in a subsequent criminal prosecution in which the witness is the de-

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3 8 WIGMORE, EVIDENCE § 2252 (3d ed. 1940).

4 Davison v. Guthrie, 186 Iowa 211, 172 N.W. 292 (1919).

5 Gendron v. Burnham, 146 Me. 387, 82 A.2d 773, 780 (1951).

6 Commonwealth v. McNary, 246 Mass. 46, 140 N.E. 255, 256 (1923).

7 People v. Newmark, 312 Ill. 625, 144 N.E. 338, 340 (1924).

8 *Ex parte* Montgomery, 244 Ala. 91, 12 So.2d 314, 317 (1943).

9 *In re* Jennings, 154 Ore. 482, 59 P.2d 702, 718 (1936).

fendant."[10] The grand jury witness need not be informed of his constitutional privilege and if he testifies without objection, then he will be regarded as having done so voluntarily and hence waived his privilege to refuse.[11] In reaching this conclusion, it is presumed that the witness knew the law to the effect that he could not be compelled to give such testimony, since everyone is presumed to know the law. But once he does begin to testify, and then subsequently claims his privilege, the problem arises as to how far the courts may go in determining whether the claim is made in good faith.[12] If the court does recognize it as a bona fide claim, then the privilege applies, not only to the cause under consideration, but to any and all facts the jury may discover or develop therefrom. Hence, if the answer to a series of questions would tend to incriminate, while an answer to one would not, the witness may not be compelled to answer.[13] And once the immunity has been unjustly claimed, the witness will not be held in contempt each time he refuses to testify on the same or closely related matters, but he will be deemed guilty of only one contempt and punished accordingly.[14]

The privilege, as can readily be seen, applies to testimony before a grand jury,[15] and in fact an unjustifiable refusal to answer a proper question proposed by a grand jury is grounds for contempt. It is the unjustifiable refusal that provides the grounds, thus eliminating mistake as furnishing such grounds, and implying that the court must first determine the adequacy of the privilege claimed.[16] In the case of *Gendron v. Burnham*,[17] the court was concerned with the power to punish for contempt and the problem of maintaining an equitable balance between the right of the court to require answers and the right of the witness to refuse. Here, there was no evidence that the witness was obstructive, and as such, he was entitled to specific rulings by the court as to whether or not the privilege was validly claimed for the questions he had refused to answer. This power to punish for contempt is inherent in the court and it can utilize such power to prevent the

10 2 WHARTON'S CRIMINAL EVIDENCE 971 (11th ed. 1935).

11 State v. Comer, 157 Ind. 611, 62 N.E. 452, 453 (1902); *cf.* People v. Larue, 28 Cal. App.2d 748, 83 P.2d 725, 728 (1938).

12 People v. Richter, 182 Misc. 96, 43 N.Y.S.2d 114, 124 (1943).

13 People v. Newmark, 312 Ill. 625, 144 N.E. 338, 341-342 (1924).

14 People *ex rel.* Amarante v. McDonnell, 100 N.Y.S.2d 463, 467 (Sup. Ct. 1950).

15 People v. McPhail, 118 Colo. 478, 197 P.2d 315, 317 (1948); State v. Kemp, 126 Conn. 60, 9 A.2d 63, 69 (1939).

16 Gendron v. Burnham, 146 Me. 387, 82 A.2d 773, 781 (1951).

17 *Id.*, 82 A.2d at 773.

hindrance or obstruction of the administration of justice.[18] The grand jury, being a judicial body, is a constituent part of the court [19] and contempt of it is contempt of the court.[20] In *Commonwealth v. McNary,* [21] the court reiterated this fundamental proposition and expounded further on the matter when it stated that: [22]

> . . . the court has the power and is charged with the duty of punishing for contempt any one whose conduct interferes with or has a tendency to obstruct the grand jury. Such conduct is as much contempt, and punishable as such, as that which interferes with or has a tendency to obstruct the administration of justice in the courts in another form or manner.

Before a grand jury, as before a court, the command must be clear and the disobedience willful for the authority of the court to have been abused.[23] If, however, a witness answers a question on a promise of immunity, he will not be considered as abusing the court if he refuses, provided he has grounds for asserting the privilege. Nor will his testimony criminate him if he testified in reliance on the promise.[24]

This is the view in the state courts concerning the privilege against self-incrimination, its application to grand jury proceedings and the abuse of it amounting to contempt. We have considered this privilege as it applies to a refusal to testify before a grand jury, and have found that an unjust and unfounded refusal may draw from that jury a contempt citation. These decisions present a point of departure from which the statutes governing particular situations must necessarily proceed in their construction and interpretation.

Federal Interpretation

Having discussed somewhat at length the nature and theory of the state courts concerning the privilege before a grand jury, attention is now turned to its counterpart, the federal courts and grand juries. In *Twining v. New Jersey,*[25] the Supreme Court was called upon to consider the question of whether the Fourteenth Amendment prevented the states from encroaching on the privi-

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18 Winfree v. State, 175 Tenn. 427, 135 S.W.2d 454, 455 (1940).

19 People v. Pisanti, 179 Misc. 308, 38 N.Y.S.2d 850, 852 (County Ct. 1943).

20 *Ex parte* Shuler, 210 Cal. 377, 292 Pac. 481, 493 (1930).

21 246 Mass. 46, 140 N.E. 255 (1923).

22 *Id.,* 140 N.E. at 256.

23 Spector v. Allen, 281 N.Y. 251, 22 N.E.2d 360, 365 (1939).

24 People v. Conzo, 301 Ill. App. 524, 23 N.E.2d 210, 213 (1939).

25 211 U.S. 78 (1908).

lege against self-incrimination. After analyzing this concept in the light of both the "privileges and immunities" clause and the due process clause, the Court concluded that "exemption from compulsory self-incrimination in the courts of the States is not secured by any part of the Federal Constitution." [26] The Court further stated that even if it be assumed that the right is one fundamental to the nature of man under a free government, it is, so far as the states are concerned, one which must be safeguarded by the states themselves. [27] The Fifth Amendment may then be said to operate exclusively in the restriction of federal power and has no application, as such, to the states.[28] For these reasons, immunity against state prosecution is not essential to the validity of a federal statute which provides that testimony of the witness will not be used against him, nor is it essential to the validity of a state statute where immunity is not guaranteed against federal prosecution. In this way, investigations for federal and state purposes will not be hampered because the privilege guaranteed by one of their respective statutes is not co-extensive with that of the other.[29]

The Fifth Amendment is susceptible of two main interpretations when considering testimony given before federal grand juries. It may be construed liberally, allowing the witness to decide for himself what he is to answer. Under this approach, no one could be compelled to testify unless he so chose, which choice in itself defeats the purpose of the privilege, or unless he evidenced bad faith in refusing. Or, if his testimony is to be a complete pardon for all he has testified to, then he has secured absolute immunity. This indeed satisfies the purpose of the Amendment, since he will not be a witness against himself although compelled to testify. In addition to this, the Supreme Court in *Brown v. Walker*[30] reiterates the principle that if the witness elects to waive the privilege before a grand jury, then he must continue making full disclosures, for then he is not allowed to stop. In so doing, a tendency to disgrace or embarrass the witness himself or others, before the grand jury or elsewhere, is not grounds for refusal.[31]

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[26] *Id.*, at 114.

[27] *Id.*, at 91-97. But only five of the thirteen colonies (North Carolina, 1776; Pennsylvania, 1776; Virginia, 1776; Massachusetts, 1780; New Hampshire,. 1784) insisted on safeguarding this privilege which is evidence that it was not originally considered among the inalienable rights of our "founding fathers."

[28] Barron v. Baltimore, 7 Pet. 243 (U.S. 1833).

[29] United States v. Murdock, 284 U.S. 141, 149 (1931).

[30] 161 U.S. 591 (1896); *accord,* Rogers v. United States, 340 U.S. 367 (1951).

These are grounds only when it exposes the witness himself to prosecution, and even there, when that possibility is removed, the Amendment ceases to apply.[32]

In the case, *United States v. Burr,* [33] Chief Justice Marshall, in recognizing the maxim that no man is bound to criminate himself, sets forth the well known "link test" for determining the courts' power to ask questions and the rights of the witness to refuse to answer. In upholding this right of refusal before a grand jury, he said that:[34]

> It is the province of the court to judge whether any direct answer to the question which may be proposed will furnish evidence against the witness. If such answer may disclose a fact which forms a necessary and essential link in the chain of testimony, which would be sufficient to convict him of any crime, he is not bound to answer it so as to furnish matter for that conviction.

The opinion of the witness himself, in claiming the immunity before the jury, does not of itself "establish the hazard of the incrimination."[35] Of course it is to be understood that the witness need not prove that the answer would actually be criminatory since in doing this he would be losing the privilege while trying to establish it. It is enough if the danger is real and not merely fanciful.[36] The court will recognize the danger and release the witness from the obligation to answer where it appears that it is absolutely necessary. In this way, abuse of the privilege will be kept at a minimum.

It is a settled principle that the protection of the Fifth Amendment extends to federal grand juries.[37] Since they are a part of the court, contempt of the grand jury in its presence, is contempt in the presence of the court and will be punished accordingly.[38] A witness cannot challenge the authority of the grand jury nor is he entitled to set limits on the scope of its investigation. Since a

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31 Brown v. Walker, 161 U.S. 591, 595 (1896).

32 Hale v. Henkel, 201 U.S. 43, 67 (1906).

33 25 Fed. Cas. 38, No. 14,692e (D.Va. 1807).

34 *Id.,* at 40; Blau v. United States, 340 U.S. 159, 161 (1950).

35 Hoffman v. United States, 341 U.S. 479, 486 (1951).

36 United States v. Greenberg, 187 F.2d 35, 38 (3d Cir. 1951); *Aff'd,* 192 F.2d 201 (3d Cir. 1951); *cert. granted* 342 U.S. 917 (1952); *rev'd per curiam* 343 U.S. 918 (1952). This case was reversed by the Supreme Court on the basis of the Hoffman case, *supra.* Reversal was decided on the basis of the similarity in the application of the privilege and not on a material point of law.

37 8 WIGMORE, EVIDENCE § 2252 (3d ed. 1940).

38 Camarota v. United States, 111 F.2d 243, 246 (3d Cir. 1940); *Cert. denied sub nom* Camarato v. United States, 311 U.S. 651 (1940).

grand jury is a part of the court, contempt of it can be punished the same as that before a court. It is specifically provided by statute that:[39]

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as— (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice; . . . (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Thus a grand jury being a part of the court has power to punish for contempt of its order or command. Whether or not the refusal to answer on grounds of self-incrimination is contempt of the grand jury, depends on the surrounding circumstances. Since the privilege controls the duty to answer, an abuse of the privilege is an abuse of the duty to answer. Such abuse may result in contempt. Thus it appears that any unjust claim of the privilege which appears so in the eyes of the court, may be contempt, while a refusal to answer when under a command to do so by the court would be an outright contempt.

The inquisitorial functions of the grand jury and the compulsion of witnesses to answer are indirectly recognized as inherent parts of our judicial process.[40] In *Counselman v. Hitchcock*,[41] the Supreme Court, seeing a similarity of principle and spirit between the state and federal constitutions, advocates a liberal construction in order to effect, as far as possible, the same interpretation. However, the Court stated that:[42]

> We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States.

In the *Counselman* case, the witness refused to answer before the jury; he was then taken into the court and instructed to answer, but on his return he refused again. The Supreme Court upheld his refusal because the act under which the inquiry was being made was declared unconstitutional. The Court did prevent the use of the evidence against the witness but did not preclude prosecution. Nothing short of absolute immunity would justify compelling the witness to testify if he claimed his privilege.

There is a clear distinction between amnesty and the constitu-

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39 62 STAT. 701 (1948), 18 U.S.C. § 401 (1952).

40 Blair v. United States, 250 U.S. 273, 280 (1919).

41 142 U.S. 547 (1892).

42 *Id.*, at 586.

tional protection against self-incrimination,[43] for if there was none, then the Fifth Amendment would bathe all in immunity. A witness before a grand jury can claim the privilege for a valid reason. The necessity of a valid reason is the distinction. However, a statute may grant absolute immunity in order to obtain information not otherwise available. As far as the applicability of the Amendment where the nature of the proceeding is concerned, Justice Brandeis in *McCarthy v. Arndstein*,[44] states that: "It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it." Included in this is the grand jury and the witnesses who may appear before it.

In determining the nature and scope of the constitutional privilege against self-incrimination, the Supreme Court, in *United States v. White*,[45] said that the difficulties that may be experienced in the detection and prosecution of crime, as a result of acknowledging the privilege, would be far outweighed by the potential evils of self-incrimination. Even complete immunity may be granted by Congress in the pursuit of the constitutional powers when the public interest will be better served by the information obtained, than by the punishment of the witness for the crime revealed.[46] This indeed would greatly increase the effectiveness of the grand jury. However, legislation which is plain in its terms, and appears on its face, to the layman, to grant complete immunity, will be upheld in order to give effect to the intent of the legislature, as evidenced by the words of the act.[47]

It is plain to see from these decisions that the federal courts are more liberal in the granting of witness immunity than the state courts. However, this may be due to the closer cooperation between legislative and judicial departments in the federal government, and their reluctance to infringe on one another. Since the grand jury is usually effectuating the desires of the legislature indirectly, it provides the link between the information desired and the privilege granted by the legislature. Thus the judiciary breaches the gap between punishment and privilege.

Federal Legislation

In addition to the immunity granted by the Fifth Amendment

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43 Heike v. United States, 227 U.S. 131 (1913).

44 266 U.S. 34, 40 (1924).

45 322 U.S. 694, 698 (1944).

46 United States v. Jaffe, 98 F. Supp. 191, 197 (D.C. Cir. 1951).

47 United States v. Monia, 317 U.S. 424, 430 (1943).

to a witness before a federal grand jury, Congress has it within its power to compel testimony in any proceeding and, at the same time, remove the criminatory nature of it, if there is any. In other words, Congress may confer a blanket immunity in congressional proceedings as well as before a grand jury. This power to make all laws necessary to its functioning is explicitly conferred on Congress by the Constitution.[48] Further enforcing this power, the Constitution, in the Fourteenth Amendment,[49] also prevents the states from interfering with this exclusive power of the legislature. In considering federal legislation on the matter, it can be seen that the power to grant immunity is a tremendous responsibility and one that is not easily handled. It was first specifically granted in 1857, and since then, it has been changed many times in an attempt to avoid abuse while at the same time furthering the investigative capabilities of Congress.[50] Initially, under these statutes, the federal grand jury was not mentioned, and as such, it may be assumed that the intent was merely to advance congressional investigations. In 1948, Congress attempted to clarify all ambiguity by passing a statute conferring immunity from prosecution for testimony given before Congress. This statute reads:[51]

> No testimony given by a witness before either House, or before any committee of either House, or before any joint committee established by a joint or concurrent resolution of the two Houses of Congress, shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege.

The grand jury proceedings are not afforded this opportunity since the statute only pertains to Congressional investigations. As stated in *United States v. Bryan*,[52] the purpose of this "bargain" statute was to give a complete immunity in subsequent criminal proceedings in return for which the Committee could compel testimony of a criminatory nature. The only way Congress can compel such testimony and still not abrogate the rights guaranteed by the Fifth Amendment is to remove its self-incriminatory nature. This is exactly what Congress did by this statute.

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48 U.S. CONST. Art. I, §8: "The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . ."

49 U.S. CONST. AMEND. XIV, § 1: ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . ."

50 United States v. Bryan, 339 U.S. 323, 335 (1950).

51 62 STAT. 833 (1948), 18 U.S.C. § 3486 (1952).

52 339 U.S. 323, 337-339 (1950).

The Supreme Court, in *Adams v. Maryland,* [53] said the act was a bar to self-incrimination in state courts and under state statutes as well. Thus on the federal level, the immunity was made co-extensive, giving protection in both federal and state courts.

Because of the continued use of the privilege as a protective shield by criminals and subversives, [54] Congress decided to extend this immunity to grand juries and other proceedings, while at the same time establishing certain conditions precedent to its availability. These conditions narrowed the scope of the statute to the most important areas. This recent amendment of the "bargain" statute, entitled "Compelled testimony tending to incriminate witnesses; immunity",[55] provides that in *any* investigation concerning national security, by following the proper procedure a witness can be compelled to testify but he cannot be prosecuted as a result of such testimony. As a safeguard against possible abuse, immunity will not be granted unless the Attorney General has been informed and a petition has been filed with the United States district court, requesting that such immunity be granted. Here, the court will make the direct order to compel testimony by nullifying the refusal, and will enter such command as a matter of record. Before Congress or Committees thereof, a majority of those present must consent to the compulsion of the testimony. Once the witness has been compelled to answer, and then refuses, he will be punished for contempt because then the basis for the refusal to testify is gone.

Complete immunity, although restricted to items concerning national security, is now available to witnesses before federal grand juries. There is no question as to the nature of his answer since there is no prosecution to fear on the federal or state level. He must answer all questions when ordered to do so since a refusal now amounts to open contempt.

Conclusion

It is evident from our consideration of this matter that what is or is not contempt for a refusal to testify, depends a great deal on the surrounding circumstances in each case. This survey has only considered cases dealing with the privilege before a grand jury, and the abuse that results in contempt. It has been found that a just refusal to testify, on the part of the witness because of possible self-incrimination, will always be recognized by the courts,

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53 347 U.S. 179, 181-182 (1954).

54 H.R. REP. No. 2606, 83d Cong., 2d Sess. (1954).

55 Pub. L. No. 600, 83d Cong., 2d Sess., Chap. 769 (Aug. 20, 1954).

and this privilege to refuse, without contempt, will be allowed if actually needed. In presenting the privilege and attempting to define its limits as it applies before a grand jury, this article has merely shown the many facets of the privilege. An abuse of any one may result in a contempt citation. Such contempt is punishable both by the federal and state courts, but greater liberality will be found under the federal system, since here the federal judiciary is guarding a very fundamental guarantee of the Constitution.

Many statutes have been enacted in the various states, confirming the common law right to refuse to testify while at the same time enlarging it to cover general areas or confining it to particular fields for particular purposes. In any event, the basic purpose of these enactments has been to remove the refusal and the criminatory nature while at the same time compelling testimony under the threat of contempt. Such statutes afford maximum security for the witness, while at the same time outlining his duty to answer so as to let him make the choice between complying with the order or being held in contempt for the refusal. Here, there is no chance of infringing on the rights of the witness because there can be no self-incrimination and the possibility of contempt is not hidden behind the vague generalities used by the courts when they attempt to clarify exactly what is an abuse of the privilege to refuse to testify. The main purpose of these statutes has been to aid in the functioning of the grand jury and to facilitate the attainment of its goal as an inquisitorial instrumentality of the judiciary.

From the practical point of view, the principles set forth in this writing form the foundation for the right of a witness before a grand jury to refuse to answer on the grounds of self-incrimination. Any abuse of that right constitutes contempt. These principles may be used in deciding whether a particular answer may be refused because of possible self-incrimination. As can be seen from this writing, there is no definite answer to the problem, with the possible exception of a generalization that contempt depends on the reasonableness of the refusal. In granting immunity, statutory enactments are of necessity quite comprehensive in their effect. The Supreme Court quite clearly stated this necessity in holding that:[56] "In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution . . . ." This is exactly the effect of the latest federal statute in certain situations, where absolute immunity is granted thereby assuring validity. No longer will the privilege against self-incrimination be used as a shield when the protection of this statute is invoked. But nevertheless the statute should be

56 Counselman v. Hitchcock, 142 U.S. 547, 586 (1892).

closely guarded to prevent it from becoming an immunity bath for all the subversives and undesireables in the nation. It is hoped that with this blanket immunity, grand jury and congressional investigations will be better able to obtain the information desired and, at the same time, add to the equitable administration of justice.

Edmund L. White

Torts

Statutory Imposition of Vicarious Liability upon Parents for Child's Torts

Traditionally common law jurisprudence has embraced two basic principles. First of these is the maxim that one wrongfully injured has a remedy. Second, there is the familiar principle of no liability without fault. The field of tort law occasionally brings these maxims into conflict as where a minor is guilty of a tort and the plaintiff seeks to hold the parent liable. A wronged plaintiff has his action against the child for damages but there is little chance of satisfaction. Hence, it is common practice to attempt to hold the parent vicariously liable. But courts are notoriously reluctant to impose liability upon a parent where there is no fault, and the mere fact of a parent-child relationship has never been, at common law, a basis for parental liability.

In recent years, this problem has received the attention of the state legislatures. Finding that common law inroads upon parental immunity do not satisfy modern needs, there have been several types of statutes enacted to impose liability upon the parent. Before considering these statutes, however, a cursory glance at the nature of common law liability is advisable.

Common Law Liability

Parental liability for a child's tort at common law was imposed in two situations, *i. e.*, where there was an agency relationship, or where the parent was himself guilty in the commission of the tort in some way. A New York decision[1] divided the liability possibilities into five specific situations. First, where the doctrine of respondeat superior was applicable; second, where the parent

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[1] Steinberg v. Cauchois, 249 App. Div. 518, 293 N.Y. Supp. 147 (2d Dep't 1937).

entrusted a dangerous instrumentality to the care of a child; third, where the parent entrusted an instrumentality to the care of a child knowing the child capable of inflicting injury with it; fourth, where the parent had knowledge of the child's dangerous propensities but failed to take corrective steps; and fifth, where the parent participated with the child by consenting to, or ratifying the tortious act. The last four categories are merely particularizations of the general proposition that a parent will be liable for his child's tort when the parent is himself in some way guilty, the second, third and fourth being predicated on the negligence of the parent.

Under the agency theory, the parent has been liable for intentional torts when the act was at the direction of the parent, either expressed or implied.[2] This agency theory is modified by application of the rule that a principal is not liable for an agent's tort committed when the agent "strays" from the principal's business.[3] The "family purpose" or the "family car" doctrine is an off-spring of this agency theory. This doctrine equates the family car with the father's business and the child to the father's agent.[4]

When the parent is held liable for his child's tort on the theory that the parent was himself negligent, liability lies for the parent's negligence and not for the act of the child.[5] In this connection it should be noted that there is a narrow line between a parent's liability for entrusting a dangerous instrument to a child, and the liability bottomed upon a parent's knowledge of his child's vicious habits. One case held that an air gun was not a dangerous instrument and the father's liability, if any, had to rest on his knowledge of his son's vicious nature.[6] Another case held that plaintiff's failure to allege that an air rifle was a dangerous instrument, or that use of it when given to a child would result in harm to others, was demurrable.[7] That the courts are reluctant to impose vicarious liability on parents is evident in *Skelton v. Gambrell*,[8] where the child shot and killed plaintiff's spouse with a gun given to him by his parents. The parents had notice that the son had on several occasions pointed the gun at other people, but this was held not sufficient to establish notice that the child would

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2 Trahan v. Smith, 239 S.W. 345 (Tex. App. 1922).

3 Kirkpatrick v. McCarty, 112 Colo. 588, 152 P.2d 994 (1944).

4 Grier v. Woodside, 200 N.C. 759, 158 S.E. 491 (1931); *acord,* Gosset v. Van Egmond, 176 Ore. 134, 155 P.2d 304 (1945).

5 Norton v. Payne, 154 Wash. 241, 281 Pac. 991 (1929).

6 Capps v. Carpenter, 129 Kan. 462, 283 Pac. 655 (1930).

7 Mazzocchi v. Seay, 126 W.Va. 490, 29 S.E.2d 12 (1944).

8 80 Ga. App. 880, 57 S.E.2d 694 (1950).

commit manslaughter.

It becomes obvious that these two theories imposing vicarious liability upon parents do not comprehend all possible torts. Therefore, the legislatures in a number of jurisdictions have felt the necessity of covering certain aspects of the parent-child relationship with statutes making the parent liable for the child's tort.

Statutory Liability

The liability of parents for the torts of their children has been imposed in various types of statutes, some declaratory of the common law and others in derogation of the common law. The former type, because they declare common law principles, do not impose liability on a parent-child relationship *per se*. That the parent is made liable is merely incidental to the operation of the statute. Illustrative of this class is a Montana statute making children liable for their civil wrongs;[9] a North Carolina statute imposing liability as a misdemeanor for giving a child under twelve years of age firearms;[10] and statutes of several states that apply the agency theory in the form of the "family purpose" doctrine or requiring, simply, proof of an agency relationship.[11]

Probably the most interesting statute announcing common law doctrine in this field is the Georgia statute that reads:

> Every person shall be liable for torts committed by . . . his child . . . by his [the parent's] command or in the prosecution and within the scope of his business, whether the same shall be by negligence or voluntary.[12]

This act incorporates the agency theory upon which the common law imposed a child's liability upon his parents.[13] The underlying principle is agency, however, not the parent-child relationship.

Statutes imposing liability on parents for the torts of their children move closer to the imposition of liability grounded upon the parental status. Of these, the most frequently found concern the negligence of a minor in driving an automobile. In fourteen states, the person who signs the minor's application for a driver's license is made liable for the negligence of the minor while driving.[14] The most comprehensive of these statutes provides that

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9 MONT. REV. CODES ANN. §64-113 (1947); see also, OKLA. STAT. tit. 10, §20 (1951).

10 N.C. GEN. STAT. §14-316 (Recomp. 1953).

11 CONN. GEN. STAT. §§7904, 7905 (1949); MINN. STAT. ANNOTATIONS §170.54 (1949); N.C. GEN. STAT. §20-71.1 (Recomp. 1953).

12 GA. CODE ANN. §105-108 (1937).

13 *Supra*, page 296.

the parent, guardian, or anyone signing the application will have the minor's negligence, ordinary or "wilful", imputed to him and will be jointly and severally liable with the minor.[15] The signer can extinguish his liability by requesting cancellation of the minor's license or by having the minor file and maintain proof of financial responsibility. Death of the signer will also cause cancellation of the license.[16]

In practical effect, this type of statute results in liability being placed most often upon parents, who are the most frequent signers for the minor.[17] But the traditional reluctance of the common law to impose liability upon a parent because of the status as a parent is evident from the attitude of the courts to the statutes. In *Bispham v. Mahoney*,[18] an action under the Delaware act, the court said:[19]

> The legislative intention as disclosed by the language of the statute is not to impose liability by reason of parenthood, of itself. Custody of the minor is the foundation of liability. The legislative purpose was to protect the public, and the statutes were drawn to effect the purpose in the most practical way.

The court went on to stress the voluntary assumption of liability by the parent so that liability was imposed because of the consent of the signer.

It is evident, then, that while the law has not yet imposed liability upon a parent for his child's tort, the practical effect of these statutes is that the parent signer is held liable for the minor's negligence. When compared to the common law approach of the "family purpose" doctrine,[20] however, these statutes are one step closer to imputing the negligence of the child to the parent on the sole basis of the relationship. Under the statute, no agency need be proven to hold the signer liable. All that is necessary is to show a prior signing by the parent coupled with negligence on the part of the child.[21]

In a limited number of jurisdictions, there are statutes which do impose liability upon parents for the torts of their children, the parental status being the sole bases for imposing this

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14 Arizona, Arkansas, California, Colorado, Delaware, Florida, Idaho, Indiana, Kentucky, Maryland, Montana, Ohio, Rhode Island, and Utah.

15 CAL. VEH. CODE ANN. §350 *et seq.* (1948).

16 ARK. STAT. ANN. §75-317 (1947); IDAHO CODE ANN. §§49-313, 49-315 (1949).

17 See annotation of these cases in 26 A.L.R.2d 1320.

18 7 Harr. 285, 183 Atl. 315 (Del. Sup. Ct. 1936).

19 *Id.* at 315.

20 *Supra*, page 296.

21 Pascoe v. Payne, 124 Cal. App. 528, 12 P.2d 1091 (1932).

liability. All of these statutes are concerned, in varying degree, with property destruction caused by the child. The earliest statute of this kind was enacted in Arkansas in 1849.[22] This act makes a parent liable for a fine imposed by the act when the child destroys property of another. The succeeding section of the law provides that the imposition of the fine shall not acquit anyone from civil liability.[23] Unfortunately, there are no reported decisions construing this act and it is not clear whether or not the parent would be civilly liable.[24] Under a strict construction approach, the parent would probably escape liability in a civil action.

In Arizona,[25] Maine,[26] New Jersey,[27] and Oregon,[28] there are statutes which impose liability upon a parent where the child harms or injures school property. Missouri imposes a ten dollar fine when a child defaces the state house, to be collected in a civil action from the parent.[29] There are no reported decisions construing these statutes, probably because of their limited application.[30]

By far the most important statutes of this character have been only recently enacted, in Nebraska in 1951,[31] and in Michigan in 1953.[32] The Nebraska law reads:

> The parents shall be jointly and severally liable for the wilfull and intentional destruction of real and personal property occasioned by their minor or unemancipated children residing with them, or placed by them under the care of other persons.

The Michigan statute is essentially the same except that liability is limited to three hundred dollars.

These two enactments, along with those concerning school

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22 ARK. STAT. ANN. §41-4233 (1947).

23 *Id.* §41-4234.

24 All of the states having statutes imposing liability upon parents of a child destroying property of another show an absence of decisions construing those statutes. Some of the more important have been so recently enacted that there has been scarcely enough time for a decision. Those which have been in existence longer are so limited in scope, that it is probable that no appeal has been taken on them.

25 ARIZ. CODE ANN. §54-504 (1939).

26 ME. REV. STAT., c. 37, §193 (1944).

27 N.J. STAT. ANN. §18:14-51 (1940).

28 ORE. REV. STAT. §336.170 (1953).

29 MO. ANN. STAT. §§10279, 10280 (Vernon 1939).

30 *Supra,* note 24.

31 NEB. REV. STAT. §43-801 (Supp. 1952).

32 MICH. STAT. ANN. §27.1408(1) (Cum. Supp. 1953).

property, impose liability upon the parent-child relationship in the true sense of the concept. No agency is required to be shown, nor does an aggrieved plaintiff have to show that the parent was in some way negligent or responsible for failing to prevent the destruction of property as at common law. It might be said that liability lies on the parent for his failure to enlighten his charge on the unlawful nature of destroying property, but this basis of liability goes to the core of the domestic training of children and is far different from the common law theories. The object of the statutes is the protection of a third party's property. To grant this protection, the legislatures have incidentally at least looked to the parent's duty to train and discipline his child. It is clearly evident that the statutes in question have added an element to our legal system which the common law has steadily refused to recognize.

A parallel doctrine of parental liability is well entrenched in the civil law prevailing in Louisiana.[33] The civil law liability upon the parent covers all tortious acts of the child, intentional or negligent, and is predicated on the parent-child relationship.[34] Though the Nebraska and Michigan laws apply only to the wilful destruction of another's property and are relegated to a much narrower scope, the basic theory behind the statutes, *i.e.*, liability because of parental status, is the same basis on which the civil law has imposed liability upon a parent for the child's tort. Once the prohibited act has been established as having been perpetrated by the child, the parent is liable regardless of whether or not he has taken any part in its commission.

Those statutes imposing liability upon a parent when the child has destroyed property take the final step in imposing absolute parental liability and are the logical end result of the trend found in the liability of a signer of the minor's application for a driver's license.[35] In the license statutes, the parent's liability is voluntarily assumed by signing the license. Also, the scope of the license acts is not limited to parents but extends to anyone

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33 The father, or after his decease, the mother, are responsible for the damage occasioned by their minor or unemancipated children, residing with them, or placed by them under the care of other persons, reserving to them recourse against those persons. LA. CIV. CODE, art. 2318 (1952); history, Projet du Gouvernement (1800), Bk. III, Title III, Art. 20, par.2.

34 Honeycutt v. Cower, 25 So.2d 99, 101 (La. 1946): "A father is liable for the act of a minor son residing with him. . . . This liability is based on the acts of the minor which constitute fault or negligence. . . . It is not necessary to show that the minor son was on a mission for his parent, as the liability is not based on the relationship of master and servant."

35 *Supra*, page 298.