1895

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Thesis

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 Presented for the Degree

 Bachelor of Laws

 by

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 Cornell University

 1895
PERSONAL PRIVILEGE OF THE WITNESS IN CRIMINAL PROCEEDINGS.

Introduction.

That no person should be compelled to accuse himself or give evidence which would incriminate himself was one of those principles of evidence old enough to have been crystallized into a maxim before the Law of Evidence came into existence. Not less respected for its antiquity than for its worth it has long been lauded as one of the distinguished and distinguishing features of that Anglo Saxon jurisprudence which has ever regarded the protection of the personal rights of the individual as one of its most sacred aims.

The time and manner of the introduction of this principle into English law must be purely a matter of conjecture. The earliest forms of trial, the denial by oath, the compurgation, the ordeal, the trial by jury without evidence submitted, and trial by wager of battle involved no examination of witnesses. Trials by a jury to whom evidence was submitted occurred as early as the twelfth century, but during that century the trial by compurgation was most common and it was not
until the time of Henry IV. that these jury trials with witnesses were fully established. There can scarcely be any doubt that they were inquisitorial in their methods; and that a strong prejudice against such methods soon grew up. The fact that parties in civil suits were not allowed to act as witnesses for themselves nor compelled to give evidence against themselves was, in all probability, the source of the claim that a similar plan would be pursued in criminal trials. During the century preceding the revolution of 1688 we find numerous cases boldly asserting this principle for the protection of both witnesses and accused, but nevertheless the examination of the prisoner himself formed the principal part of the trial during that same period, and the crown was constantly over-riding the law with its royal prerogative and issuing warrants under which witnesses and prisoners were tortured to obtain evidence and confessions. In this state of affairs the revolution of 1688 produced a decided change. It has been well said that the Law of Evidence dates from this point; and it is not at all surprising that a revolution whose purpose was to assert and maintain the rights of the people should result in the permanent establishment of the personal privilege of both the witness and the accused. This

(a) Leigh's Case and Wynde's Case cited in 3 Huls. 50; Collier v. Collier, 1 Croke, 201; Righton Holt's Case, 3 Croke, 388; Burrow's Case, 3 Huls. 48; Spendlov v. Smith, Hobart, 84; Cooke's Case, Suffolk, 183.
privilege, thus early established, has been ever regarded as one of the safe guards of personal freedom, and as such has been asserted, in one form or another in the Constitution of the United States and in those of nearly all the states of the Union.

The application of this general principle and the settlement of the numerous points of dispute which necessarily arose was, of course, a matter for the courts: and the purpose of this thesis is to select and classify the best results of such judicial interpretation.
SEC. L. EXTENT OF THE CONSTITUTIONAL PROVISIONS.

It is of importance in this discussion to understand the extent of these constitutional provisions so that we may determine whether the privilege of the witness rests upon common law or statutory basis, and is thus subject to change by the legislature, or whether it is more firmly fixed in the constitution of the United States and of the several states. An examination of the constitutional and statutory provisions will show a marked diversity in language. In the constitutions of Georgia, California, New York and the United States the provision is that no person shall be compelled in any criminal case to be a witness against himself. In others we find "No man can be compelled to give evidence against himself"; in prosecutions the accused "shall not be compelled to give evidence against himself"; that no person in any criminal prosecution shall be compelled to give evidence against himself; that no person shall be compelled to accuse or furnish evidence against himself. With such a provision in the state constitution of New York the earlier decisions rest this right
entirely upon common law authority. Later the common law
(a)
document was embodied in the Code, and since that time the
cases have rested their decisions upon the Code. In People
v. Kelly (24 N. Y. 74), the court said, "It is perfectly well
settled that where there is no legal provision to protect the
witness against the reading of the testimony on his own trial,
he cannot be compelled to answer. (The People v Mather, 4
Wend. 229, and cases there referred to.) This course of adju-
dication did not result from any judicial construction of the
constitution, but is a branch of the common law doctrine which
excuses a person from giving testimony which will tend to dis-
grace him, to charge him with a penalty or forfeiture, or to
convict him of a crime. It is of course competent for the
legislature to change any doctrine of the common law, but I
think they could not compel a witness to testify on the trial
of another person to facts which would prove himself guilty
of a crime without indemnifying him against the consequences,
because I think, as has been mentioned, that by a legal con-
struction the constitution would be found to forbid it". While
in New York the question is thus involved in obscurity, the
United States Courts have decided squarely that the meaning of

the constitutional provision is not merely that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself; but its object is to ensure that a person shall not be compelled, when acting as a witness in any investigation, to give testimony which may tend to show that he himself has committed a crime. In this holding the state courts have very generally concurred. A court which holds to the strict construction that the constitutional privilege applies only to the accused in a proceeding against himself would also be compelled to hold that in preliminary proceedings, the investigations of the coroner and of the Grand Jury, the constitutional protection would not apply as that would be no proceeding against any person, and therefore the legislature would be enabled to give and grant the privilege at its pleasure.

(a) State v. Quarles, 13 Ark. 307.
Higdon v. Heard, 14 Ga. 255.
Ex parte Rowe, 7 Cal. 184.
Wilkins v. Malone, 14 Ind. 153.
Emery's Case, 107 Mass. 172.
Cullen v. Comm., 24 Gratt. 624.
SEC. 2. Construction liberal. The courts have uniformly held that such constitutional and statutory provisions must be most broadly and liberally construed as an immunity or privilege. This should be clearly kept in mind throughout the entire discussion.

SEC. #. Books and papers. In accordance with this broad construction it is held that the witness is excused from producing books or papers, the contents of which may be used against him.

SEC. 4. Tendency to incriminate. The constitutional and statutory privileges give the witness his privilege not only as to those questions the answers to which might directly incriminate him but also when the answers might tend to subject him to a legal prosecution. The language of Judge Marshall in Burr's Trial has long been regarded as an accurate statement.

(a) Counselman v. Hitchcock, 142 U. S. 547.
Emery's Case, 107 Mass. 172.
Ex parte Boscowitz, 84 Ala. 463.
Minters v. People, 139 Ill. 363.
Printz v. Cheaney, 11 Iowa, 469.
People v. Mather, 4 Wend 230.
Stevens v. State, 50 Kansas, 712.
Warren v. Lucas, 10 Ohio, 337.
Fellows v. Wilson, 31 Barb. 162.
Peo. ex rel Taylor v. Forbes, 143 N. Y. 219.

(b) Byass v. Sullivan, 21 How. Pr. 50.
Wharton's Law of Evidence, Sec. 751 and cases cited.

(c) 1 Burr's Trial, 245.
the law. " Many links frequently compose that chain of testimony, which is necessary to convict an individual of a crime. It appears to the court to be the true sense of the rule, that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible but a probable case, that a witness by disclosing a single fact, may complete the testimony against himself, and to every effectual purpose, accuse himself entirely, as he would by stating every circumstance which would be required for his conviction. That fact of itself would be unavailing, but all other facts without it would be insufficient. While that remains concealed in his own bosom, he is safe; but draw it from thence and he is exposed to a prosecution. The rule which declares that no man is compellable to accuse himself would most obviously be infringed by compelling a witness to disclose a fact of this description."

This rule has been generally followed without hesitation.

(a) Best on Ev. Am. Notes.
Printz v. Cheeney, 11 Iowa, 469.
Peo. v. Mather, 4 Wen. 429.
Richman v. State, 2 Green (Iowa) 532.
Comm. v. Howell, 5 Gratt (Va.) 634.
Bank of Salina v. Henry, 1 N. Y. 83.
Stewart v. Turner, 3 Edw. Ch. 458.
SEC. 5. DISGRACE.

But farther than this the constitutions do not go, and the claim of the privilege where the answer might disgrace must rest entirely on other foundations. The discussion of this claim has resulted in this country in a great mass of confused and contradictory decisions. The subject has been complicated by the weighty reasons which may be urged both pro and con; by the uncertainty as to the rule in England, and by the statutes passed in many of the states, making it possible to prove his former criminal record by the witness. Then, many courts used loose language in decisions on the subject when the objection to the question was made by the counsel for one of the parties on the ground of irrelevancy. Added to this was the confusion of the discretionary power of the judge over cross-examination with the privilege of the witness.

Nevertheless, it is believed that the following propositions will be found to be in accord with the better line of cases, and will reconcile most justly the rights of the parties to whatever evidence the witness can give, the rights of the witness, and the demands of public policy.

(1) Where the question imputing disgrace is irrelevant to the issue and also to the credibility of the witness, counsel for the opposite party may object, the witness may claim his privilege, and the judge at his discretion may ex-
clude the question although there has been neither objection
(a) nor claim of privilege.

(2) When the question is material to the issue, the
witness should be compelled to answer, notwithstanding he
(b) bring disgrace upon himself by so doing.

(a) Peo. v. Crapo, 76 N. Y. 283.
Peo. v. Irving, 95 N. Y. 541.
Hayward v. Peo. 96 Ill. 492.

(b) Wharton I, Sec. 542.
Greenleaf I, Sec. 454.
Lohman v. Peo. 1 N. Y. 379.
Taylor v. Jennings, 7 Rob. 581.
Peo. v. Mather, 4 Wen. 250.
1 Burr's Tr. 244.
State v. Staples, 47 N. H. 113.
Guttenor v. Morse, 58 N. H. 165.
Smith v. Casster, 1 Gray, 108.
Comm v. Curtis, 97 Mass. 574.
West v. Lynch, 7 Daily, 245.
Peo. v. Irving, 95 N. Y. 541.
Howell v. Comm. 5 Gratt, 664.
State v. Patterson, 2 Ired. L. 346.
Ragland v. Wickware, 4 J. J. Marsh, 530.
Ward v. State, 2 Mo. 98.
Ex Parte Rowe, 7 Cal. 184.
Clærk v. Reese, 35 Cal. 89.
Peo. v. Furtado, 57 Cal. 345.
Brite v. Stile, 10 Tex. App. 368.
Stephens Dig. of Ev. Sec. 129, in
Chase's Ed. Note 1, P. 225.

Contra.

Vaughn v. Perrino, 2 Penn. (N.J.) 299.
Galbraith v. Eichelberger, 3 Yeates, 515.
Kirschner v. State, 9 Wis. 140.
Ingall v. State 48 Wis. 647.
(3) But when the question imputing disgrace is not material to the issue and is put only for the purpose of testing the credibility of the witness, he may decline to answer.

(a) See cases cited supra to effect that witness may refuse to answer any question which might disgrace him, and

Dodd v. Morris, 4 Camp. 519.
Friend's Case, 4 St. Tr. 225.
Lewis's Case, 4 Esp. 225.
St. v. Rollins, 77 Me. 380.
State v. Staples, 47 N. H. 113.
Smith v. Castles, 1 Gray, 108.
Peo. v. Herrick, 13 Johns. R. 82.
Lohman v. Peo. 1 Comst. 379.
In Re Lewis, 39 How. Pr. 155.
Resp v. Gibbs, 3 Yeates, 429.
State v. Bailey, 1 Penn. (N.J.) 304.
Howel v. Comm. 5 Gratt, 664.
Forsney v. Ferrell, 4 W. Va. 729.
Leach v. Peo. 53 Ill. 311.
Hayward v. Peo. 96 Ill. 492.
State v. Garrett, 1 Busbee, 357.
Campbell v. St. 23 Ala. 44.
Marx v. Bell, 48 Ala. 497.
Shepard v. Parker, 36 N. Y. 517.
Peo. v. Webster, 139 N. Y. 73.
Chase's Stephen's Dig. of Ev. Note 1, p. 225, and cases cited.
Of the situation in England, Greenleaf says, in Sec. 459, "The great question, however, whether a witness may not be bound in some cases to answer an interrogatory to his own moral degradation, where, though it is collateral to the main issue, it is relevant to his character for veracity, has not yet been brought into direct and solemn judgment, and must therefore be regarded as an open question, notwithstanding the practice of eminent judges at Nisi Prius in favor of the inquiry, under the limitations we have above stated."

Statutory changes have been numerous; mostly in the line of permitting his former criminal record to be proved by the witness himself. But mere charges or indictments may not be inquired into, since they are consistent with innocence. Some states, as Iowa and Georgia, have statutes giving to witnesses the same privilege of refusal where the answer would disgrace, as the common law gave where the answer would incriminate.


(c) Iowa Code, Sec. 3647. Georgia Code, Sec. 3814.
SEC. 6. CIVIL LIABILITY.

But a witness cannot excuse himself on the ground that his answer would expose him to civil liability.

SEC. 7. HUSBAND OR WIFE.

The privilege extends to answers which would criminate, tend to incriminate, or disgrace the wife or husband of the witness. Even in the inquisitorial procedure of Rome, witnesses were not compelled to give evidence against near relatives. For a long period of the English law this formed a part of that exclusionary rule which prohibited a husband or wife from acting as witnesses one for the other. The reform in evidence has swept aside the exclusion, but retained the privilege.

(a) Civ. Code N. Y. Sec. 837.
46 Geo. III, C. 37.
Wharton's Ev. I, Sec. 537, and numerous cases cited.

(b) Hunter's Roman Law, p. 900.

(c) State v. Welch, 26 Me. 30.
State v. Gardner, 1 Root, 485.
Comm. v. Sparks, 7 Allen, 534.
The Inhabitants of Cliviger, 2 T. R. 233.

(d) Comm. v. Reid, 8 Phil. Rep. 385.
State v. Dudley, 9 Wis. 664.
State v. Marvin, 35 N. H. 22.
Cartwright v. Green, 8 Vesey, 405.
Regina v. Halliday, Bell 257.
Regina v. All Saints, 6 M. & S. 200.
2 Taylor's Ev. 1453.
Best on Ev. p. 553.
Stephens Digest of Ev. Sec. 120.
SEC. 8. PRIVILEGE PURELY PERSONAL.

The privilege is purely a personal one, and can be claimed only by the witness himself; not by the party against whom he is called. (a) Neither is it the privilege of counsel (b) to interpose the objection. It is a question between the witness and the court with which the party has nothing to do, and with which the counsel for neither party has any right to interfere. But if the question be irrelevant, or immaterial or objectionable to either party for any other sufficient reason, the counsel may interpose his objections, and the question may be ruled out. But in cases of privilege, the question may be asked and the witness compelled to answer or rely upon (c) his privilege.


Although counsel for witnesses are not recognized in legal trials, nevertheless I see no reason why a witness who is in danger of being brought to trial for a criminal offense, who is perhaps made a witness for the express purpose of drawing from him damaging evidence, may not have counsel as to his legal right to refuse to answer any question. A keen lawyer may see the drift of an entangling question and have decision to refuse to answer where the stupid witness would suspect nothing, and the frightened fail to take advantage of the privilege. This rule will undoubtedly go the way of that one which refused counsel to prisoners accused of felony. It is considered the duty of the judge to warn the witness, but the judge is often totally unprepared for such a duty and more often neglects it entirely. Any witness who is in danger has the right to the keen, interested assistance of a legal adviser, who is perfectly familiar with the situation in all its aspects.

SEC. 9. DUTY OF JUDGE.

The position of the judge when an incriminating question is asked and before the witness has claimed his privilege has not been accurately and definitely determined, but the better authorities hold that the judge is not bound at the request of a party, or on his own motion, to notify the witness of his privilege in this relation; though he may at his discretion
give an intimation to this effect, and when the witness appears to be ignorant of his rights in this respect, it is proper that he should be advised of them. But neither of the parties to the action, nor the witness, could claim any relief for the failure of the judge to so advise the witnesses.

(a) Att'y Gen. v. Radloff, 10 Exq. R. 83.
     U. S. v. Darnand, 2 Wall Jr. 143 - 179.
     Comm. v. Shaw, 4 Cush. 594.
     Wharton on Ev. I, Sec. 535.

(b) Fisher v. Ronalds, 12 C. B. 764.
     Foster v. Pierce, 11 Cush. 437.
     Comm. v. Price, 1 Gray, 472.

(c) Friend's Case, 13 How. St. Tr. 15.
     Dixon v. Vale, 1 C. & P. 278.
     R. v. Wheater, 2 Mood C. C. 95.
     Southard v. Rexford, 6 Cow. 254.
     Rosewell's Case, 10 How. St. Tr. 168.
     R. v. De Berenger, Gurney, 194.
     Lord Cardigan's Case, Gurney, 79.
     St. v. Bilansky, 3 Minn. 246.
SEC. 10. WAIVER.

The witness may, of course, waive his privilege and answer the question. But a waiver may also be inferred from the previous conduct of the witness in relation to other questions. The question then comes, at what point in the examination can the privilege be claimed. The answer to this in England is thus stated by Best, Sec. 129: "It used to be considered that the witness who intended to claim the privilege of not answering questions of this nature was bound to claim his privilege at once; and that, if he began a criminating statement when he might have refused to make it, he was compellable to go on with it, - a rule probably established with a view of preventing witnesses from converting the privilege given by law for their own protection, into a means of serving one of the litigant parties, by setting up the privilege when their evidence began to tell against him. But in Reg. v. Garbett, 2 Car. & K. 495, a majority of the judges overruled the old notion, and held that the witness might claim his protection at any stage of the inquiry."

(a) Chamberlayn's Best on Ev. Am. notes, p. 538, and cases cited.
Whatever may be the effect of Reg. v. Garbett in England, in this country the rule is not so settled. As long as there has arisen no prejudice to either party by the testimony already given, there is no doubt that the witness may assert his right at any time, whether or not crimination has been involved in the part already stated. But when a witness voluntarily opens an account of a transaction exposing him to a criminal prosecution and gives evidence which will assist him or the party calling him, he is obliged to complete the narrative and cannot rely on his privilege on direct or cross-examination. It amounts to a waiver of his right.

(a) Wharton, Sec. 539.

(b) Peo. v. Freshour, 55 Cal. 375.
Wharton, Sec. 539.
Rapalje on Witnesses, Sec. 269.
Coburn v. Odell, 10 Foster (N.H.) 540.
Foster v. Pierce, 11 Cush. 437.
Chamberlain v. Willson, 12 Verm. 491.
1 Stark Ev. 3rd Ed. 298.
Comm. v. Price, 10 Gray, 472.
Peo. v. Carroll, 3 Park C. R. (N. Y.) 73.
Peo. v. Lohman, 2 Barb. 216.
Youngs v. Youngs, 5 Redf. (N. Y.) 505.
Alderman v. Peo. 4 Mich. 414.
Locke v. State, 63 Ala. 5.
A dictum in Coburn v. Odell, 10 Foster, 556, states the limits of this rule in a satisfactory manner. "If a witness purposely states a part of the transaction, such as will make for him or the party calling him, even though but slightly, he should not be protected; but where it is apparent that he intends to disclose nothing that may require his going farther, and what he does disclose may well enough stand without affecting the point at issue, and moreover is drawn out by questions where the full effect of the answers cannot readily be seen by him, his privilege shall not thereby be taken from him."

But it was held in Temple v. Comm. 75 Va. 892, that the fact that a witness testified before a grand jury, and on his evidence an indictment was found, will not deprive him of his privilege of declining to testify on the trial. Cullen's Case, 24 Gratt., contains a similar holding, where the preliminary examination was at a coroner's inquest.

SEC. 11. LOSS.

The privilege may be lost through the operation of a pardon, of the statute of limitations, and of the statutes granting indemnity and amnesty. But a pardon, or the Statute of Limitations, affect only the liability to incrimination and leave the witness still liable to disgrace.

(a) Wharton I Sec. 540.
Text writers and judges have laid no stress on this distinction, but it is highly probable that in a case where it is proper to grant the privilege of silence because the answer would disgrace, the courts will grant it, even when the witness is protected by a pardon or the statute of limitations. In such cases the reasons for the rule still exist in undiminished force, and no sufficient considerations can be found why the witness should be deprived of its benefits. An examination of the cases cited by text writers as authority for the general proposition that a witness will be compelled to answer when released from liability by a pardon or the statute of limitations, will show that they are all cases in which the question asked was relevant and material to the issue, and therefore the fact that the answers would disgrace the witness (a) could form no basis for a claim of privilege. Few of the English cases are of any value in this connection, but The Trial of Reading, 7 How.St.Tr. 296; Reg. v. Earl of Shaftesbury, 6 How.St.Tr. 1171; and Reg. v. Boyes, 1 B. & S., at page 321, uphold the view here advanced.

(a) Roberts v. Allat, 1 M. & Malk. 192.
Parkhurst v. Lowten, 1 Mer. 400.
Davis v. Reid, 2 Sim. 443.
Close v. Aiken, 1 Den. 319.
U. S. v. Smith, 4 Day (Conn.) 121.
Numerous statutes have been passed compelling the witness to testify, but protecting him against incrimination. In this connection the question whether the constitutional provision protects witnesses becomes important; for in those states which hold that the constitutional privilege extends only to the accused and that the privilege of the witness depends on statutory or common law, any statute upon this subject will be valid and no question of its constitutionality can arise. But where it has been held that the constitutional provision is broad enough to protect witnesses, the relation of the statutes to the constitution enters into the discussion. Without going into a close analysis of these statutes, we may divide them generally into two classes: 1st, those providing that no prosecution for the crime in question shall ever be brought against the witness; and 2nd, those providing that the evidence shall not be used against the witness on any criminal prosecution. Statutes of the first class give complete immunity, and are everywhere regarded as constitutional. As to those of the second class, the courts are divided. The Supreme Court of the United States, in the late case of Counselman v. Hitchcock (142 U. S. 547), expresses the better opinion in these words: "In view of the constitutional privilege, a statutory enactment to be valid must afford absolute immunity against future prosecution for the offense to which the question relates." Referring to the provision in question, the
Court says: "This, of course, protected him against the use
"of his testimony against him or his property in any prosecu-
"tion against him or his property in any criminal proceeding,
In a court of the United States. But it had only that effect.
"It could not and would not, prevent the use of his testimony
"to search out other testimony to be used in evidence against
"him or his property, in a criminal proceeding in such court.
"It could not prevent the obtaining and the use of witnesses
"and evidence which should be attributable directly to the tes-
"timony he might give under compulsion, and on which he might
"be convicted, when otherwise, and if he had refused to answer,
"he could not possibly have been convicted." Emery's case
(107 Mass. 112) holds to the same effect, that it is a reason-
able construction of the constitutional provision that the wit-
ness is protected from being compelled to disclose the circum-
stances of his offense; the sources from which, or the means
by which, evidence of its commission, or of his connection
with it, may be obtained, or made effectual for his conviction
(a) without using his answers as direct evidence against him.

(a) Cullen v. Comm. 24 Gratt. 624.
Contra.
Higdon v. Heard, 14 Ga. 255.
Ex Parte Rowe, 7 Cal. 184.
Wilkins v. Malone, 14 Ind. 153.
Peo. v. Kelly, 24 N. Y. 74, approved in
In Counselman v. Hitchcock (supra), Mr. Justice Blatchford says of these conflicting decisions: "It is contended on the part of the appellee that the reason why the courts in Va., Mass., and N. H. have held that the exonerating statute must be so broad as to give the witness complete amnesty, is that the constitutions of these states give to the witness a broader privilege and exemption than is granted by the constitution of the United States, in that their language is that the witness shall not be compelled to accuse himself, or furnish evidence against himself, or give evidence against himself; and it is contended that the terms of the constitution of the United States and of the constitution of Georgia, California and New York are more restricted. But we are of opinion that however this difference may have been commented on in some of the decisions, there is really in spirit and principle, no distinction arising out of such difference in language."

SEC. 12. UNDER WHAT CIRCUMSTANCES THE PRIVILEGE IS ALLOWED.

Cases and text writers have involved this point in needless confusion. The circumstances under which the right is claimed have of necessity varied widely; the considerations which are taken into account in arriving at any one decision are many: nevertheless, when a court was called upon to apply the law to one particular set of circumstances, it proceeded to settle the law of the entire subject, a labor fraught with great danger. Of course, we must expect to meet difficulty
and conflict. We have to reconcile the right of the people in criminal proceedings, and of the contesting parties in civil proceedings, to whatever evidence the witness can give, with the personal right of the witness. We must recognize that this privilege will be claimed by those honestly entitled to its protection, and also by those who are endeavoring under its cover to defeat the purpose of the law. In spite of these difficulties, the theory is of vastly greater difficulty than the practice, and the majority of those cases which have indulged in deceptive dicta have decided the questions involved in a much more satisfactory manner; so that it is believed that definite propositions can be laid down covering this subject, which can be well supported by reason and authority.

In the first place, we must get rid of one error which meets us in every text book and report; this is, the idea that any case has held, or that any case can hold, that the witness and not the judge decides the question whether or not the privilege shall be granted. This is no real error, but rather a misuse of terms. The judge always is, and always must be, the one who decides what evidence is admissible and what privileges are to be granted to witnesses. All the witness can do is to claim his privilege, and state the grounds of the claim. No case has ever gone farther than to say that such evidence, when given under oath, was conclusive of the question, and even this rule has always been qualified by the statement that it is not conclusive when the judge can clearly
see contumacy or error on the part of the witness. The judge is always the arbiter in any claim of privilege; the discussion must be of the amount and kind of evidence which it is necessary to bring before him.

One other point of more vital importance must be settled at the beginning of this discussion. Roscoe in his Criminal Evidence, at page 140, says: "Of course, the witness must always pledge his oath that he will incur risk;" and this has been called the rule in a number of decisions. Obviously, such a rule renders the privilege worthless. It compels a man upon his oath to accuse himself, in order to gain the then worthless privilege of silence. In a question, the answer to which might directly criminate, the unconstitutionality of such a method is clearly seen. The witness must swear that the truthful answer would incriminate him, testify to his own guilt, and thereupon the judge will most graciously permit him to be silent. To give any effect to the constitution, the rule must be that the witness may claim his privilege, on the ground that one of the possible answers would incriminate, without swearing that the truthful answer would do so. Where the answer might disclose a fact tending to incriminate, the oath of the witness may be useful in convincing the judge that the truthful answer would form a link in the chain of evidence, but such an oath cannot be regarded as a prerequisite to the granting of the privilege.
The witness may claim his privilege on any one of three grounds:

(1) That one of the possible answers would disgrace him.

(2) That one of the possible answers would directly incriminate him.

(3) That one of the possible answers would tend to incriminate him.

In the first of these cases there is no difficulty. The court will not grant the claim, unless it can see that one of the probable answers would directly disgrace the witness. As Judge Marshall expresses it, in Burr's Trial, "Where a witness claims to be excused from answering a question, because the answer may disgrace him, or render him infamous, the court must see that the answer may, without the intervention of other facts, fix on him moral turpitude."

No serious difficulty meets us in the second class, and it may be laid down as the correct rule that when the court can see from the circumstances of the case and the nature of the evidence, that any answer to the question in the reasonable course of events would lead directly to a criminal prosecution against the witness, the court should grant the

(a) Phillipps II, Star Page 941, C. H. & E's Note.
Greenleaf, Sec. 454.
Taylor's Ev. II, 1462.
Peo. v. Mather, 4 Wend. 250.
Parkhurst v. Lowton, 1 Mer. 400.
privilege.

In case three, the court must first determine from the circumstances of the case and the nature of the evidence, whether there is reasonable ground to apprehend that the defendant is liable to a criminal prosecution upon the ground suggested by the question. If the court decides that there is no reasonable ground to apprehend that the defendant is so liable, the witness will be compelled to answer the question. But if the judge decides that there is reasonable ground for such apprehension, then the prisoner is in danger, and the judge should permit him to refuse to answer a question, any answer to which would tend to incriminate him, even though the judge cannot see how the answer would form a link in a chain of criminating evidence.

(a) Regina v. Boyes, 9 W. R. 690.
Fisher v. Ronalds, 12 C. B. 762.
Stevens v. State, 50 Kas. 712.
Ward v. State, 2 Mo. 98.
Fellows v. Wilson, 31 Barb, 162.

(b) Burr's Trial, 245.
St. v. Lonsdale, 48 Wis. 348.
Youngs v. Youngs, 5 Redf. 505.
In Re Aston, 27 Beav. 474.

(c) Chase's Note to Stephen's Dig. of Ev. 209.
Taylor on Ev. II, Sec. 1457.
Wharton's Law of Ev. I, Sec. 535.
Peo. v. Mather, 4 Wen. 235.
State v. Edwards, II Nott & M. C. 13 (S. S.)
Short v. Mercier, 15 Jur. 93.
Lamb v. Munster, L. R. 10 Q. B. D. 110.
Let us analyze this proposition more closely. The possible circumstances may be divided into three classes.

(a) The Court sees that the witness is in danger; a question is asked, the answer to which the judge can see would tend to incriminate the witness. Of course, the privilege is allowed.

(b) The prisoner is in danger, the privilege is claimed; but the judge can see either contumacy or the impossibility of any answer incriminating, or tending to incriminate. Here, of course, the privilege will be denied.

(c) The witness in danger, a question asked; but the judge is unable to see how any answer would tend to incriminate: that is, he is unable to see just how any answer would form a link in a chain of incriminating evidence. Nevertheless, he should give the prisoner the benefit of the doubt and grant the privilege. In such a case, "reasonable grounds exist for apprehending danger to the witness from his being compelled to answer."

Those cases which are commonly cited as holding that the decision rests with the witness, hold no more than this. An examination of them will uniformly show that the witness was already in danger of a criminal prosecution in regard to the matter under consideration, and that therefore the court accepted his oath as sufficient evidence of the connection of the answer with the subject matter. For example, Poole v. Perritt (I Speers S. Q. 121), here the reporter says:
The presiding judge was of opinion, that he was not bound to answer the question, as it might, by being followed up by other questions, fix upon him the charge of gaming.

Also, Printz v. Cheeney (11 Iowa, 469), "The question asked tended to obtain from the witness certain facts which would prove that he was present and aided in the commission of the offense."

Warner v. Lucas (10 Ohio, 337), contains a dictum which goes farther than this in favor of the witness, but this can be supported by neither reason nor authority.

But all these propositions must be qualified by the rule expressed in Taylor v. Forbes (143 N. Y. 231): "The weight of authority seems to be in favor of the rule that the witness may be compelled to answer when he contumaciously refuses, or when it is perfectly clear and plain that he is mistaken, and that the answer cannot possibly injure him, or tend in any degree to subject him to the peril of prosecution."

But the courts have recognized the impossibility in most cases of anticipating the effect of the answer, where it is not so perfectly evident and manifest that the answer called for cannot incriminate, as to preclude all reasonable doubt or fair argument, the privilege must be recognized and protected."

See also Janvrin v. Scammon (29 N. H. 230).
SEC. 13. SUBSEQUENT PROCEEDINGS.

Evidence which the witness is compelled to give cannot (a) be used against him in any subsequent proceedings; nor the fact that he took advantage of his privilege and refused (b) to answer.

(a) State v. Bailey, 54 Iowa, 414.
   Conn. Rev. Stat. 1849, Title 6, Sec. 161.
   Virg. Code 1849, C. 199, Sec. 22.
   Hendrickson v. Peo. 10 N. Y., 9, 27, 31.

(b) Wharton Ev. I, Sec. 531.
    State v. Bailey, 54 Iowa, 414.
    Rapalje on Witnesses, Sec. 267.
CONCLUSION.

While many of the leading principles upon which the law of evidence is founded were known and admitted at an early period, it is nevertheless beyond doubt that the law of evidence has a history of not more than two hundred and fifty years. It has been frequently said that no law of evidence existed prior to 1688. Since that time the development has been rapid, and great reforms have been introduced in every phase of the subject. But with all the improvements of modern legislation, the system is necessarily far from perfect; the time has been too short for approximate attainment to perfection. Able men have made vigorous attacks upon the privilege of the witness, which has been the subject of this thesis, and it is entirely worth our while to look, very briefly, at the grounds upon which this privilege rests and the probability of change. This conclusion will make no attempt to summarize even the many arguments against the present system, but will be confined to a glance at the relative value and permanence of the reasons upon which the privilege must rest. It must be understood, however, that the privilege of the witness and of the accused, stand or fall together. To retain the privilege of the accused and do away with that
of the witness, would only result in the prosecuting officer's accusing the wrong man, in order that he might thus freely examine all suspects. The reasons upon which the principle in question is sustained are six in number.

1. The prevention of perjury.
2. Prevention of deception of judges and jurymen.
3. Encouragement of witnesses.
4. Difficulties in the practice of the inquisitorial system.
5. Danger of abuse of the inquisitorial system.
6. The natural protest of free men against an inquisitorial system, which would extract incriminating evidence either by the bodily torture of the rack, or the mental torture of a merciless cross-examination.

The first two of these reasons are no longer valuable. They were the reasons assigned for those exclusionary rules which the reforms have set aside. The third reason is overcome by the effectiveness of our system for the enforced attendance of witnesses. Difficulties would undoubtedly arise in the enforcement of a provision compelling answers, obstinate witnesses would be met with; but these same difficulties have been met and surmounted in the enforcement of equity degrees. Obstinate witnesses have been successfully dealt with where the motives of refusal were fully as strong as the fear of self incrimination. The tendency to non-disclosure
where the answer would lead to civil loss, is often just as great as where incrimination would result, but no complaint has been made against the operation of the rule compelling disclosure.

The last two arguments are of much greater importance. They brought about the adoption of the rule; the others are academic considerations added by the judges and text writers to bolster up weak points. The inquisitorial system has been abused whenever and wherever tried. To what extent this abuse was carried in England may be seen in the reports of the Saâte trials and the Star Chamber Proceedings. In France, at the present time, the judge browbeats the prisoner, intimidates him, seeks to entrap him, attempts in every manner to corkscrew out of him some incriminating evidence. But England, up to the Revolution of 1688, and France to the present time, had never really used any other plan. In American courts, with the history of the past as a guide, different results might at least be expected.

The last reason is certainly entitled to consideration. It is met by the statement that men object to giving testimony self incriminating, simply and only on account of the punishment which it involves; that the giving of the testimony can certainly be considered no harder than the punishment; that if his natural objection to giving self incriminating evidence is sufficient to excuse him, his natural objection to punishment
should also excuse him from that.

I think this is sufficient to show that the privilege of the witness and of the accused does not rest upon unassailable grounds. That these grounds will be vigorously attacked is beyond doubt. It is probably safe to say that some state will experiment with a return to the inquisitorial system. Such an experiment would be watched with the greatest interest, and of course, upon its success or failure would depend to a large degree the future of the principle outlined in the preceding pages.