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"My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution or a telephone company, yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law."—OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS (1920) 269.

Comments

THE RIGHTS OF A RIPARIAN LANDOWNER IN MISSOURI*

Introduction

The rights of a landowner in the waters of a stream flowing by or across his land are somewhat obscure in Missouri today, because there has been no direct holding by the Supreme Court as to what theory it will follow in adjudicating

*This comment is an outgrowth of the Junior Case Club final argument on Law Day, April 25, 1953, University of Missouri School of Law, in which Donald G. Stubbs and W. Bruce Saxe were co-counsel for the appellant and Donald Burrell and Donald J. Hoy were co-counsel for the respondent. The basic research for this comment was made by all four students in preparing the briefs for that argument. Messrs. Burrell and Stubbs, who have prepared this comment for publication, here acknowledge their indebtedness to Messrs. Hoy and Saxe.

such rights. At least three important theories of riparian rights have been developed in this country and England, called respectively the "natural flow," the "reasonable use," and the "prior appropriation" theories. It is the purpose of this comment to discuss the elements of these theories, with emphasis on such Missouri law as exists touching the general subject.

A brief summary of the history of riparian rights is necessary in order to provide a foundation and background for the problem. In England, prior to 1800, there was little litigation concerning water rights and hence the law was very sketchy on that subject. This was true because there were few uses to which waters could be put, and there was sufficient water available in most cases so that controversies did not arise. It is not too clear just what theory the English courts did use in deciding such cases as arose concerning water rights. The Yearbooks report only the results of the cases on this subject. The first discussion in the reports does not appear until the 16th century, and then it was limited to what should be pleaded. It was at that time held that prescription or ancient use was the proper pleading. However, it is not apparent from these cases just how such theories worked; e.g., when the cause of action arose. The first definitive theory is found expressed in cases of about 1800, and the theory of that time seems to be one of "prior appropriation" rather than either of the two set out in the earlier cases. This prior appropriation theory provided that the first one to appropriate water from a stream and put it to use was entitled to continue to use it as against any subsequent user. This theory was applied from about 1800 to 1833.

With the progress of the industrial revolution in the 1800's and the consequent increase in the demand for water and the use of watercourses, a theory began to emerge that riparian owners ought to have equal and correlative rights in ordinary watercourses, a theory contrary to the then current English rule of prior appropriation. In the United States, this theory was first manifested in the writings of Kent and Story about 1825. They imported the term "riparian" from the civil law, and proposed in essence the civil law of riparian rights, drawing particularly from the Code Napoleon. And in 1833 the English court developed from this idea a new rule of riparian law, again changing the English theory and abandoning the prior appropriation rule. The rule established in England in 1833 has been called the "natural flow" rule, and has persisted in that country up until the present time. In brief, this theory provides that each riparian owner is entitled to the flow of the stream as it existed in a natural state, subject only to diminution by other riparians for "natural" uses (e.g., drinking purposes).

Water law in the United States also began to take shape in the 1800's. But in this country at least three distinct theories have grown up and are applied today, with some states applying variations between them. In most of the states, excluding the far west, the idea that all riparian owners ought to have correlative rights provided the foundation for the law of waters, as was the case in England. But in applying this same general thought, these states developed at least two distinct theories. Some states adopted the English rule of natural flow. Other states produced a different rule, which has been called the "reasonable use" rule. This

rule provides that every riparian is entitled to make a reasonable use of the stream on his land, and has a right that other riparian owners will not make any use which would be unreasonable as to him. The incidents of the reasonable use rule vary considerably from those of the natural flow rule, as will be stated in detail *infra*.

The third general rule which grew up in this country was nothing more than the older English rule of prior appropriation, and was not based on the idea of equal rights among riparians at all, but on a first come, first served, basis. It grew up in the very arid regions of the west by somewhat of an accident, and was due to the necessities of mining during the early gold rush.¹ In all those states which adopted the prior appropriation rule as common law, the law of waters has subsequently been regulated by statute. The prior appropriation rule was found to be difficult to administer as a wholly common law rule.² It does not seem likely, therefore, that the Missouri Court would adopt this rule, and it is consequently not dealt with further in this article. Should the legislature take the initiative and provide a statutory rule as to riparian rights, there is some possibility that prior appropriation might be adopted; but it is questionable how far the legislature could go without taking property without due process of law.

In approaching the problem of a common law rule of riparian rights for Missouri, the "natural flow" and "reasonable use" theories will be taken up in order.

THE CASE FOR "NATURAL FLOW" IN MISSOURI³

While it will readily be admitted that the cases are not clear enough to allow a positive statement, it can be argued with certain reservations that Missouri probably will follow the natural flow rule. This statement can be supported by the cases on the books in Missouri and also by reasoning based on Missouri's climate and future needs of water.

Taking Missouri authority chronologically, we must start with the case of *Welton & Edwards v. Martin* decided in 1841.⁴ In this early case recognition was accorded the riparian owner's right to the natural flow of the stream. At 7 Mo. 390 the Court said:

"It is a plain principle that the proprietor of land is entitled to the use of a watercourse which flows through it, and the law gives a remedy for the violation of the right. To divert or obstruct a watercourse, is by the common law a private nuisance."

The full import of this decision cannot be grasped until one examines the authority which the court cited as correctly stating the common law rule. At page 309 of 7 Mo. the court cited the case of *Gardner v. Newburgh*.⁵ The decision in this

1. This history is presented in Wiel, *Origin and Comparative Development of the Law of Watercourses in the Common Law and in the Civil Law*, 6 CALIF. L. REV. 245 (1918) and in 4 RESTATEMENT, TORTS pp. 341-342 (1939).

2. 4 RESTATEMENT, TORTS p. 340 (1939).

3. By Donald Burrell.

4. *Welton and Edwards v. Martin*, 7 Mo. 307 (1841).

5. *Gardner v. Newburgh*, 2 Johns Chr. R. (N.Y.) 162, 7 Am. Dec. 526 (1816).

case (an injunction against the diversion of a stream) was handed down by none other than Chancellor Kent. Kent, along with Justice Story, is universally recognized as one of the first proponents of the natural flow rule.⁶ This early case, while not binding on the court, seems to go a long way in indicating that Missouri will follow the natural flow rule.

This position has been strengthened by subsequent Missouri decisions. In *McIntosh v. Rankin*,⁷ the court said at 35 S.W. 990:

"... (plaintiffs) are entitled to the uninterrupted flow of its waters in their natural channel, and the use of its power for their mill, if available for that purpose without injury to others. . . ."

In a still later case of *Greisinger v. Klinhardt*⁸ the court stated at page 982 of 9 S.W. 2d.:

"The right to the flow of a natural non-navigable stream, in its natural way, applies to upper and lower owners of land accross which the stream flows."

In 1937 in the case of *Keener v. Sharp*⁹ the court used this language, found at page 120 of 11 S.W. 2d:

"It is settled law in Missouri that a natural stream cannot be dammed up nor waters from its bottom path or bed be diverted without compensation therefor."

The preceding cases unquestionable speak in terms of natural flow. Unfortunately, a close examination of the fact situation in each case reveals that while the language was natural flow, the fact situation was equally consistent with a "reasonable use" rule. That is to say, in each case the use of the water by the defendant was causing substantial damage to the plaintiff and therefore under either the natural flow or reasonable use theory the plaintiff was entitled to relief. Looking at what the court did in each situation will not answer the problem of which rule Missouri has adopted. Looking at what the court said, there can be little doubt that Missouri follows the natural flow rule.

This brings us to the case of *Dardenne Realty Co. v. Abeken*.¹⁰ In that case an upper riparian owner diverted a natural stream, thus creating several artificial lakes, depriving the lower owner plaintiff of the natural flow. A mandatory injunction was issued, compelling the defendant to restore the stream, and forbidding him from interfering with or diminishing the natural flow of the creek and diverting any water therefrom except for domestic uses. The court did not purport to examine any vague criteria relative to the user of either party, but found without hesitation that the plaintiff was entitled to the natural flow of the stream, and allowed injunctive relief in order that it would be restored forthwith.

6. *Tyler v. Wilkinson*, 24 Fed. Cas. 472, No. 14,312 (1827); III KENT'S COMM.* 439 (13 ed. 1884).

7. *McIntosh v. Rankin*, 134 Mo. 340, 35 S.W. 995 (1896).

8. *Greisinger v. Klinhardt*, 321 Mo. 186, 9 S.W. 2d 978 (1928).

9. *Keener v. Sharp*, 341 Mo. 1192, 111 S.W. 2d 118 (1937).

10. *Dardenne Realty Co. v. Abeken*, 232 Mo. App. 945, 106 S.W. 2d 966 (1937).

In the *Dardenne* case, as was true of the earlier cases, there was actual damage to the plaintiff. But the wording of the decree in the *Dardenne* case enjoined the taking of *any* water except for domestic purposes, indicating that even if there were no damage to the plaintiff, he would still have the right to an injunction. The *Dardenne* decision seems to be as close as a court can come to adopting the natural flow rule without saying so in so many words. From the line of decisions it appears that the courts of Missouri have chosen to follow the theory of riparian rights with emphasis on the riparian owner's right to the natural flow of the stream. In view of the conditions, both climatic and industrial, which prevail in Missouri this is the more desirable rule.

Following the lead of the American Law Institute, some text writers have chosen to criticize the natural flow rule, finding it unsuitable to this utilitarian age. Such writers urge that before a riparian owner has any rights whatsoever in a stream he must make some beneficial uses of it. But even then, the riparian owner is not assured that he has any rights in the stream running across his land. The beneficial user may interfere unreasonably with the beneficial user of another riparian owner fifty miles down stream. After expensive litigation, he may or may not be assured of certain rights in the stream, and if he does secure same, such right has only been acquired against this one riparian owner. Has he yet acquired a property right? Certainly not in the usual sense that a property right is thought of, that is, as a right "in rem." He has acquired a right in personam, against this one owner fifty miles down the stream. The natural flow rule, however, assures the riparian owner that he has certain property rights in the stream, that he does not have to use the water beneficially in order to acquire this property right, and that if he does choose to exercise a beneficial user that does substantially diminish the flow of the stream he can acquire an additional incident to his property right within a period of ten years if said user is acquiesced in by lower owners. Such a rule is in accord with Anglo-American policy that property rights should be certain in their nature.

With the passing of each year more and more Missouri farmers are turning to irrigation to increase crop yields. To a farmer who must spend from 5 to 10 thousand dollars for a large scale irrigation installation, certainty is of paramount importance.¹¹ The natural flow rule, which holds the use of any perceptible amount of water for other than domestic use an infringement upon the rights of all lower owners and starts the prescriptive period running, provides that certainty. That is to say, it provides certainty after the 10 year period has run. The reasonable use rule, which is difficult of application and uncertain of result, simply will not provide the necessary assurance needed to encourage crop irrigation.

THE CASE FOR "REASONABLE USE" IN MISSOURI¹²

A strong argument can be made that no rule of riparian law is currently in

11. Reid, *Are Your Water Rights Safe?*, Country Gentleman, June, 1953.

12. By Donald G. Stubbs.

existence in Missouri, but rather that the Supreme Court must establish one in the first case to reach it presenting the problem.

In order to support this position it is necessary to examine and explain five Missouri cases in which there is language indicative of the natural flow theory.

Four of these may be dealt with together: *Welton & Edwards v. Martin*,¹³ *McIntosh v. Rankin*,¹⁴ *Greisinger v. Klinhardt*,¹⁵ and *Keener v. Sharp*.¹⁶ In each of these there are one or two sentences speaking in general terms of a right to flow similar to the natural flow rule. However, in each of these cases the decision rests on some rule of law other than any rule of riparian rights, and therefore the language referred to is entitled to no more weight than is ordinarily accorded such dictum. In any event, as has been pointed out, the words "natural flow," etc., appear in almost all the cases dealing with riparian rights, regardless of the rule being applied.¹⁷ It can hardly be said that these cases afford a foundation for a Missouri rule on riparian rights.

The fifth Missouri case, *Dardenne Realty Co. v. Abeken*,¹⁸ is of a somewhat different nature. In that case the plaintiff was a lower riparian having a considerable investment and dependent on the existence of the stream in question for his business. The defendant upper riparian diverted the whole stream to fill artificial lakes for duck hunting. Plaintiff sued for and got an injunction against this diversion in the trial court. The injunction as issued was very broad, enjoining defendant (as paraphrased by the appellate court) from "in any way diverting or interfering with the natural flow" of the stream. The case was appealed to the St. Louis Court of Appeals. In affirming the trial court, the court of appeals discussed four possible grounds for reversal which apparently had been raised by the defendant-appellant: (1) that the stream was not natural, (2) that the diversion had been made merely to protect defendant's agricultural land, (3) estoppel, and (4) prior acquiescence of the plaintiff in the change of the stream's course. The appellate court dismissed each of these contentions as applied to the case before it, and having done so, affirmed the injunction.

It may be argued that the trial court's broad injunction was an application of the natural flow rule to the facts of the case. This is principally because any diversion of the natural flow was enjoyed. However, an injunction so broad is not inconsistent with an application of the reasonable use theory to the facts at hand, if the trial

13. 7 Mo. 307 (1841).

14. 134 Mo. 340, 35 S.W. 995 (1896).

15. 321 Mo. 186, 9 S.W. 2d 978 (1928).

16. 341 Mo. 1192, 111 S.W. 2d 118 (1937).

17. Teass, *Diversion of Flood Waters for Use on Non-Riparian Lands*, 18 VA. L. REV. 223 (1932) at p. 237: "The words natural flow, normal flow, and ordinary flow appear in practically all the decisions dealing with riparian rights. The true meaning must be determined from the context of the opinion in which they occur. (Cites examples) . . . Illustrations might be multiplied, but enough has been said to demonstrate the danger in following any particular expression in an opinion rather than the decision."

18. 232 Mo. App. 945, 106 S.W. 2d 966 (1937).

court found it altogether unreasonable for the defendant to use any of the water for his duck hunting lakes. As has been noted, the courts tend to use the term "natural flow" in dealing with any riparian rights case, regardless of the theory being used.¹⁹ But regardless of the proper interpretation of the trial court's injunction, it is most noteworthy that the appellate court's opinion did not deal with the question of the proper rule of law applicable, nor with the injunction as such. The court discussed only the four grounds of reversal set out above, and finding no merit in any of them, affirmed the court below. It is a general rule of appellate practice to deal only with the grounds for reversal urged by the appellant, and inasmuch as these apparently did not include the breadth of the injunction nor the proper rule of law to be applied, the court did not deal with nor pass on these problems. It is therefore submitted that in this case, as in the other four, the question of what rule to apply was not before the court and not passed on by it. And if this is so, it is hard to see how this case can be the foundation of any rule of law in Missouri.

If there is no case law laying down a rule with regard to riparian rights, it remains yet to be determined whether there is any statutory definition of these rights. The only Missouri statute which may affect this question is section 1.010 Mo. REV. STAT. 1949 adopting the English common law as it existed in 1606. It is contended, first, that there was no definable common law rule in 1606 on the law of waters, and second, that if there was, it has only persuasive and not binding effect on Missouri courts, when faced with the problem of laying down a rule of law here. As pointed out in the historical introduction, it is very difficult to find any English rule of riparian rights prior to about 1800. Although there are a few cases, the reports never say how the results are reached. The rule was certainly not the natural flow rule, which was not established until the 1800's. Hence, it may well be said that no common law rule can be found. In any case, the Missouri Supreme Court has said a number of times that the English decisions prior to 1606 are only "persuasive" as to the common law existing in Missouri, and thus the court would not be found to follow such an early rule if it should locate one.²⁰ It would seem undesirable to attempt to apply a theory which cannot be accurately determined, and which in any case has been abandoned even by the jurisdiction once using it.

If there is neither common law nor statutory rule in Missouri as to riparian rights, then the supreme court will one day be faced with the problem of establishing a rule. There is considerable argument in favor of the reasonable use theory as the most desirable, as opposed to either of the other two in use today.²¹ The reasonable use theory is simply this: every owner is entitled to a reasonable use of the water in a stream flowing through his land; he has a right that others will not use

19. *Supra*, footnote 9.

20. *Cook v. Cook*, 232 Mo. App. 994, 124 S.W. 2d 675 (1939); *Dean v. Lee*, 227 Mo. App. 206, 52 S.W. 2d 426 (1932); *Dickey v. Volker*, 321 Mo. 235, 11 S.W. 2d 278 (1928); *Musser v. Musser*, 281 Mo. 649, 221 S.W. 46 (1920).

21. Other arguments in favor of the reasonable use rule can be found in 4 RESTATEMENT, TORTS pp. 339-345 (1939); Weil, *op. cit.* 245; Kinyon, *What Can a Riparian Proprietor Do?* 21 MINN. L. REV. 512 (1937); Note, 18 Mo. L. REV. 67 (1953).

the stream unreasonably as to him. The important incidents of this theory are that no owner has an absolute right that the stream flow on as it did in nature simply for the joy that it gives him to see the stream flow. No cause of action accrues to a riparian until another's use becomes unreasonable as to the one seeking to sue. It requires some actual damage to the one seeking to sue before any use will be unreasonable as to him.²² This rule is entirely relative. It is not really necessary to determine what constitutes "riparian lands," as the distance from the stream is only one factor to be considered in determining reasonableness. Or if a limit is put on riparian lands, (e.g., watershed) a use off riparian lands is again only a factor to consider in determining reasonableness. This rule allows maximum flexibility and application to all situations. It allows at all times the fullest beneficial use of available water.

In comparison, the natural flow theory gives each riparian owner an absolute right that the stream flow substantially undiminished (except the natural uses), and a cause of action arises immediately upon the diminution of the stream regardless of the fact that it causes no damage to the other riparians.²³ Prescription of course starts running at this time. The result of this is that a riparian owner must sue to protect his nominal right in the stream before he is damaged, or suffer his rights to be lost by prescription. And if all riparians protect the right which this rule gives them, no use can be made of streams which substantially diminishes them (except against the natural uses).

It is contended that the reasonable use theory is most desirable today because it allows for the fullest possible beneficial use of the watercourses of the state, without the rigors of an absolute rule such as prior appropriation. It would admittedly be harder to apply to specific fact situations than the natural flow rule, because the question of reasonableness would have to be determined in each case, whereas the natural flow theory, being mechanical and exact, can rather easily be applied. However, no one would contend for ease of application as an end in itself. This very ease of application has resulted in harsh results in particular cases, not found among the reasonable use decisions.²⁴ As many writers have pointed out, the reasonable use rule, being largely dependent on individual fact situations, is productive of more substantial justice in adjudicating specific water right problems.²⁵ Although the law at one time was composed largely of absolute rules, the trend has always been away from this, and today many of the important rules of law are relative rather than absolute (e.g., negligence, nuisance). Even the present law in

22. 4 RESTATEMENT, TORTS pp. 344-346 (1939).

23. 4 RESTATEMENT, TORTS pp. 342-344 (1939).

24. See for example *Whalen v. Union Bag & Paper Co.*, 208 N.Y. 1, 101 N.E. 805 (1913) where the defendant upper riparian operated a paper mill worth \$1,000,000 and employed 500 persons; discharge from the mill polluted the stream and injured the plaintiff's lower riparian land by \$100 a year. The court, applying the natural flow rule, enjoined further operation of the paper mill.

25. *Supra*, note 13.

Missouri as to percolating waters is a relative rule, being substantially the reasonable use rule proposed here.²⁶ As has been stated by Kinyon,²⁷

"One view emphasizes the right to the flow of the stream, and seeks to maintain, as nearly as possible, the status quo of nature. The other emphasizes the privilege of use, and seeks to promote the fullest beneficial use of the streams by the proprietors thereon."

The reasonable use rule is the law today in a number of states, some with rainfall like Missouri and others not. Among the states similar to Missouri are New Hampshire, Vermont, and Minnesota, which were states early establishing the reasonable use rule in this country.²⁸ There are a number of other states with somewhat different climates also following the rule.

With regard to the particular desirability of the rule for Missouri, a recent Missouri Engineering Experimental Station bulletin may be cited.²⁹ In this, there is recognized an increasing trend in Missouri to use stream water for supplemental irrigation, and the bulletin notes that this is necessary for best crop yield. The reason given is the Missouri's rainfall during the crop growing season is spasmodic, rather than being evenly distributed, with the result that many crops suffer from an actual lack of moisture, although in the aggregate there is considerable rainfall. Inasmuch as irrigation is not considered among the "natural uses" for which a stream can be diminished under the natural flow rule, if this rule were established in Missouri such essential supplementary irrigation could be effectively stopped, an obviously undesirable result.

In conclusion then it may be argued that there is no existent rule in Missouri with regard to riparian rights either by statute or common law; and that of the rules in general use, the most desirable one is the reasonable use rule.

CONCLUSION

On the basis of the present Missouri law there is considerable doubt as to what the court will do if a case arises presenting this problem. As demonstrated, some argument can be made toward two possible solutions. It is hoped that the matter may be cleared up in the near future.³⁰

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26. *Waterworks Co. v. Jenkins*, 62 Mo. App. 74 (1895).

27. Kinyon, *What Can a Riparian Proprietor Do?*, 21 MINN. L. REV. 512 at 527 (1937).

28. *Snow v. Parsons*, 28 Vt. 459 (1856); *Hayes v. Waldon*, 44 N.H. 580 (1863); *Red River Roller Mills v. Wright*, 30 Minn. 249, 15 N.W. 167 (1883).

29. Rubey, *Supplemental Irrigation for Missouri and Regions of Similar Rainfalls*, U. OF MO. ENGINEERING EXP. STA. BULL. No. 33 (Revised 1951).

30 Some consideration is being given in this state to the enactment of a comprehensive water code, purporting to cover all rights in streams. An inherent difficulty in such an undertaking is the fact that riparian owners may have "property rights" in their streams which are afforded protection by the due process clauses of the federal and state constitutions. Those interested in this phase of the problem are

WITNESS IMMUNITY AND THE MISSOURI LAW

The peeping tom and the safe cracker no longer maintain their prominence among those criminals who draw the contempt of the American public. The greater threat today is presented by the gambling syndicate, the state and nation wide dope ring, the web of subversive agents. The modern development of the use of the informer, the incriminating document, and the income tax return as basic implements of police science has paralleled the evolution of the likewise modern devices such as the patrol car and the wrist radio. Catching an ordinary bookmaker in the act of receiving bets is no longer the primary aim of the enforcement agent, but rather it is the uncovering of the make-up and operation of the larger criminal organization.

As an aid to the important accomplishment of breaking up the massive criminal hierarchy, officials more than ever recognize the value of information to be obtained through court testimony or otherwise from the "small time operator" located at the base of a pyramid of illegal activity. The barrier to the ready availability and use of such information is the state and national constitutional privilege against self incrimination. The criminal may refuse to reveal the identity of his "boss" on the ground, among others, that such evidence would tend to be self-incriminating.

It is this situation which is intended to be remedied by the granting of immunity to the witness. In short, the theory is that if a person is granted immunity from prosecution for his crime, his testimony cannot be called "incriminating", and hence, the privilege to refuse to testify is no longer applicable.

"From the earliest times it has been found necessary for the detection and punishment of crime for the state to resort to the criminals themselves for testimony with which to convict their confederates in crime. While such a course offers a premium to treachery and sometimes permits the more guilty to escape, it tends to prevent and break up combinations by making criminals suspicious of each other, and it leads to the punishment of guilty persons who would otherwise escape."¹

referred to a Note in 56 A.L.R. 277, *Constitutionality of Statutes Affecting Riparian Rights*, and the text discussion in 56 AM. JUR., *Waters*, § 295. Also in this connection, attention is directed to the following sections of the *Missouri Revised Statutes* of 1949: Section 236.280, a 1907 statute, in effect allows one owning a neck of land around which a stream flows to divert the course of the stream across the neck for power purposes, but only by condemning the rights of riparian owners below the point of diversion. There have been no decisions construing this statute; however, it seems to recognize the existence of certain "property rights" in riparian owners, which are at least required to be condemned. Sections 393.030 *et seq.* allow for the condemnation of land for a dam site by water companies; this statute does not mention riparian rights. Section 247.440 with reference to the powers of a public water supply district, allows it to condemn "private property"; the statute does not enlarge on what would be considered "property." Section 77.140 allows the city council of cities of the third class to alter and change the channel of watercourses within the city limits. Section 88.153 in setting out the duties of the board of public works of cities of the first class allows the board to supervise the construction and repairing of watercourses within the city; again no mention is made of riparian rights. These last two statutes might well be considered valid exercise of the police power, assuming the existence of riparian property rights.

1. 8 R.C.L. § 101 (1915).

United States Attorney General Herbert Brownell, Jr., in a recent speech before the Law Club of Chicago, said, "By permitting one or several criminals to escape prosecution, the larger public peril contained in a gang of criminals or in their leader may be uncovered and the guilty brought to justice."²

The Fifth Amendment to the Constitution of the United States has protected persons from being required to incriminate themselves in a federal court.³ The constitutions of all the states except two⁴ provide a similar safeguard for a witness before a state court.

There seems to be no question today that if a witness is given immunity from his crime in a proper manner, the privilege of remaining silent may not be asserted with effect.⁵ "It is generally conceded that while constitutional provisions protecting witnesses from giving self-incriminating evidence should be so construed as to give the maximum of protection, yet they should not be extended to cases outside their manifest and only purpose, the protection of the witness."⁶ All states except one⁷ have upheld statutes granting immunity.

The constitutional privilege still remains, however, and it cannot be taken away in any manner. In *Doyle v. Hofstader*,⁸ it was said:

"The privilege [against self incrimination] may not be violated because in a particular case its restraints are inconvenient or because the supposed malefactor may be a subject of public execration or because the disclosure of his wrongdoing will promote the public weal.

"It is a barrier interposed between the individual and the power of the government, a barrier interposed by the sovereign people of the state; and neither legislators nor judges are free to overleap it."

The statutes granting immunity in exchange for testimony of the witness do not destroy the privilege, but merely make its assertion unnecessary. This aspect of the

2. N.Y. Times, November 7, 1953, page 12.

3. "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

4. New Jersey and Iowa. *But cf.* *State v. Height*, 117 Iowa 650, 91 N. W. 935, 59 L.R.A. 437, 94 Am. St. Rep. 323 (1902), where it is said that the absence of explicit constitutional protection from compulsory self incrimination is not conclusive of the lack of that privilege, as by implication it is preserved in the Iowa constitutional mandate which says there may be no deprivation of life, liberty, or property without due process of law. *State v. Zadanowicz*, 69 N.J.L. 619, 55 Atl. 743 (1903), where the court said that in New Jersey the common law privilege against self incrimination exists.

5. *Brown v. Walker*, 161 U. S. 591, 16 Sup. Ct. 644 (1896); *People v. Rockola*, 346 Ill. 27, 178 N.E. 384 (1931); *Ex Parte Williams*, 127 Cal. App. 424, 16 P. 2d 172 (1932).

6. 58 AM. J., *Witnesses* § 84.

7. 8 WIGMORE, *EVIDENCE* § 2281, page 472 (3d ed. 1940). Hereinafter, this work will be cited merely as WIGMORE.

8. 257 N.Y. 244, 177 N.E. 489 (1931).

law often is misunderstood by the layman unfamiliar with the operation of such a statute.⁹

The practice of granting immunity to important witnesses has not gone unchallenged. Wigmore, while fully accepting the policy and procedure of such immunity, has pointed out several difficulties to be encountered.¹⁰ The disgrace and infamy of the offense remains even after the criminality has been abolished. The act also may be a crime in a different jurisdiction, against which the grant of immunity would have no effect. There is a practical burden for the witness in proving the amnesty which detracts from its absolute efficacy.¹¹ A further argument, largely a matter of quibbling over words, is that immunity does not arise until from and after the disclosure, and therefore the fact disclosed is at the time still a crime, and hence, the privilege should remain.¹²

Frequently, a witness may be promised protection from punishment for his crime in exchange for revealing desired testimony, such promises by the prosecuting attorney or other enforcement official perhaps being more common than immunity granted by statute. Opponents of these arrangements point out that the successor to the person promising such immunity may reinstitute proceedings, not being bound morally or otherwise by the promise of his predecessor. Likewise, a grand jury, without the advice or consent of the prosecuting attorney, might return an indictment against the witness. Others claim that the grant of immunity is a legislative function only, and cannot be assumed by a local official. Also, state statute or constitutions may subject a prosecuting attorney to removal from office for failure to prosecute offenders of laws which come to their knowledge, and such forbearance by that officer may subject him to loss of office in event of subsequent public disapproval.

Of course, the granting of immunity is not the only way of preventing the privilege against self incrimination from being asserted. Prior conviction or acquittal for the crime, abolition of the general crime exonerating prior offenders, the statute of limitations, an executive pardon, or statutory amnesty may all operate to remove the criminality of the act in such a manner as to deny to the witness his privilege to refuse to testify.¹³

The real problem to be decided in determining the propriety of statutory immunity, or immunity as promised by an enforcement official, is whether or not

9. In an address before the Speech Association of America, Mr. Bower Aly, Professor of Speech at the University of Missouri, said, "In effect, the proposal of the Attorney General (to pass such a federal statute granting immunity) would require citizens to incriminate themselves. In effect the proposal would violate not only the American tradition of civil rights; it would violate also the tradition of the common law, which is older than the Constitution, older than the nation." N.Y. Times, December 28, 1953, page 11; also in 3 SPEECH TEACHER 81, 83 (1954).

10. § 2281, page 469 ff.

11. WIGMORE answers this argument, § 2281, page 470.

12. This contention was presented in the dissent of *Hirsch v. State*, 67 Tenn. (8 Baxt.) 89 (1897). Wigmore states that this method of attack is no real argument.

13. These methods are discussed in WIGMORE § 2279.

the crime about which the witness is to be questioned is so important that he should be compelled to give his testimony and go unpunished for his particular crime.

Many statutes have been passed in this field. The most common type is that which specifies that in connection with investigations, etc., of certain types of crimes, a witness shall not be allowed to refuse to testify on the grounds that he may incriminate himself, but that he may not thereafter be prosecuted with regard to any matter to which he testified. The categories of crime most often involved are bribery and other forms of political corruption.¹⁴ Gambling offenses, illegal sales of liquor, sundry frauds, and monopolistic attempts are often included.

Likewise, many statutes have been passed according immunity to witnesses before state and federal legislative committees.¹⁵ There seems to be no doubt as to their validity.¹⁶

However, the type statute which is to receive particular attention here is what might be called a general immunity statute.¹⁷ Such a law applies to grand juries and criminal courts, rather than to legislative bodies, and applies to any and all crimes which may be under investigation or prosecution.

IMMUNITY AT COMMON LAW

In the absence of statute granting immunity, there is some common law authority upholding a power in the prosecutor, alone or with court approval, to offer immunity to one accomplice in exchange for testimony against another, or to one criminal in exchange for information concerning another which may incriminate the first. The various jurisdictions differ as to whether such an agreement is to be enforced, and even in those states which do permit the same, the practice is severely limited.¹⁸

Concerning related doctrines, the rule is almost undisputable that confessions which are made under promises of immunity are considered as made involuntarily, and therefore incompetent as evidence.¹⁹ The law varies as to the enforcement of an

14. WIGMORE § 2281, page 501.

15. 87 A.L.R. 435 (1933).

16. *People v. Sharp*, 107 N.Y. 427, 14 N.E. 319, 1 Am. St. Rep. 851 (1887); *HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS*, page 268 (1952).

17. S. D. CODE § 34.2406 (1939): "No person shall be excused from giving testimony upon the ground that such testimony might tend to convict him of a crime at any investigation or prosecution conducted by or in behalf of the state where any licensed attorney is present representing the state and conducting the investigation or prosecution for or in its behalf, and has called for such testimony on behalf of the state, with authority so to do. If in such case the person is compelled to testify over his objection that the testimony given might tend to incriminate him, such testimony shall not be used against him in any action or proceeding, civil or criminal, nor shall he thereafter be prosecuted or punished for the offense with reference to which the testimony was so given over his objection. A witness refusing to testify in any such case may be punished as for contempt of the court."

18. *Nicosia, Enforceability of Prosecutor's Agreement Not to Prosecute*, 24 J. CRIM. L. & CRIMINOLOGY 600 (1934).

19. 7 A.L.R. 419 (1920); 1 R.C.L. 564.

agreement between a defendant and the prosecutor whereby a plea of guilty is entered for one offense, in return for immunity from another.²⁰

By the weight of authority, a prosecuting attorney has no power, solely by virtue of his office, to make a binding agreement that if a defendant or witness will testify against others, he will be exempt from all criminal liability.²¹ This rule generally stands when that agreement is made without the court's advice or consent,²² and in some jurisdictions, the protection granted is equally of no avail even though the understanding with the prosecuting attorney has been approved of or known to the court.²³ In states where immunity is the subject of statute, and such power is not given expressly to the prosecuting attorney, but reserved to other officials, non-enforcement is even more certain.²⁴

In *Doyle v. Hofstede*, *supra*, it was said, "The witness is within his privilege in insisting that the basis for his immunity shall be something more substantial than the grace or favor of the prosecutor who may bring him to the bar of justice." In *People v. Groves*,²⁵ the court found, "If the district attorney made such representations, he clearly exceeded his authority in so far as binding his own office or the court was concerned. . . . [I]n determining this appeal we are not required to look into the ethics of the transaction." In other states such agreements are allowed only if made with court permission.²⁶

Missouri has followed the trend of authority. In *State v. Guild*,²⁷ the defendant was indicted for receiving and concealing stolen property. He presented a plea in abatement to the prosecution on the grounds that the state's attorney had promised to discharge him from prosecution in consideration for his giving testimony before the grand jury in connection with another case, to which agreement defendant had complied. The court said:

"This equitable understanding or implied agreement made with an accomplice is, as is also elsewhere shown, incapable of enforcement; and the accomplice cannot plead such agreement, etc., in bar, nor avail himself of it, because it is merely an equitable title to the mercy of the executive."

In speaking of "an equitable title to the mercy of the executive", the court was referring to a practice²⁸ in some jurisdictions of granting a pardon for the past crime of the witness in exchange for the testimony desired. This method would be

20. 85 A.L.R. 1177 (1933).

21. *Whiskey Cases*, 99 U.S. 594, 25 L.Ed. 399 (1879); *State v. Guild*, 149 Mo. 370, 50 S.W. 909, 73 Am. St. Rep. 393 (1899); *Allers v. State*, 144 Md. 75, 124 Atl. 399 (1923); *Apodaca v. Viramontes*, 53 N. Mex. 514, 212 P. 2d 425, 13 A.L.R. 2d 1427 (1949); *Re Werner*, 46 R.I. 1, 124 Atl. 195 (1924); *Temple v. Comm.*, 75 Va. 892 (1881).

22. *Scribner v. State*, 9 Okla. Crim. Rep. 465, 132 Pac. 933, Ann. Cas. 1915B, 381 (1913).

23. *Lowe v. State*, 111 Md. 1, 73 Atl. 637, 24 L.R.A. (N.S.) 439, 18 Ann. Cas. 744 (1909).

24. L.R.A. 1918A, 376.

25. 63 Cal. App. 709, 219 Pac. 1033 (1923).

26. *Ingram v. Prescott*, 111 Fla. 320, 149 So. 369 (1933).

27. 149 Mo. 370, 50 S.W. 909, 73 Am. St. Rep. 395 (1899).

28. 1 BISHOP, NEW CRIMINAL PROCEDURE § 1164 (1895).

unavailable in Missouri for there can be no pardon for a crime until after conviction in this state.²⁹

In *State v. Myers*, cited by the Missouri Supreme Court in 1932,³⁰ a prosecution arose out of an investigation in which defendant furnished valuable information and assistance to the state under promise of immunity by the Attorney General. Defendant's plea of abatement was overruled, the court stating that a "... promise of immunity from prosecution by the Attorney General is not binding on the state, and constitutes no bar to this prosecution." Likewise, in *State v. Lopez*,³¹ the court held, "We recognize no authority in the circuit attorney to make an agreement by which any criminal shall be discharged from the claim of justice."³²

However, even in face on such rulings, the witness may have some remedy.

"[I]t is a universal and established usage in such a case, where the witness has acted in good faith, to delay the prosecution with the understanding that he has an equitable right to recommendation for pardon, or, in the absence of legislative prohibition, for the prosecuting attorney, with the consent of the court, if that is necessary, to enter a nolle prosequi to the indictment, although, of course, it is useless to continue a case to allow for an application for pardon in those jurisdictions where there can be no pardon until after conviction."³³

A minority of states do enforce such agreements made by the prosecuting attorney. In *People v. Bogolowski*,³⁴ defendant testified against his accomplice after a promise of immunity of the prosecutor. The court held that the subsequent conviction of defendant could not stand. In *State v. Ward*,³⁵ an agreement by defendant to plead guilty to one indictment and give certain other assistance in exchange for a promise of immunity was upheld, the court finding that, "Promises of immunity from prosecution made to a witness by a prosecuting officer with the consent of the court are justified on the ground of public policy." In *Ex Parte Copeland*,³⁶ the court held "It has long been the practice to extend immunity through the action of the district attorney with the sanction of the trial judge. Immunity so extended has uniformly been held binding on the state."

In these states, the power is generally upheld on the theory that such promises involve the honor and dignity of the state, and that public policy is best served by holding out such an inducement in order that some if not all of the wrongdoers may be punished.³⁷ As to the enforceability of such an agreement, Wigmore states, "Morally, it is; legally, it ought to be."³⁸

29. Mo. CONST. Art. IV, § 7 (1945).

30. 330 Mo. 84, 49 S.W. 2d 36 (1932).

31. 19 Mo. 255 (1853).

32. Later overruled on other grounds by *State v. Adkins*, 284 Mo. 680, 225 S.W. 981 (1920).

33. 15 AM. J., *Criminal Law* § 322, p. 18. As to the nolle prosequi possibility, see L.R.A. 1918A, 377, and *Lowe v. State*, 111 Md. 1, 73 Atl. 637, 18 Ann. Cas. 744 (1909).

34. 326 Ill. 253, 157 N.E. 181 (1927).

35. 112 W. Va. 552, 165 S.E. 803 (1932).

36. 91 Tex. Cr. App. 549, 240 S.W. 314 (1922).

37. 13 A.L.R. 2d 1439 (1950).

38. § 2280b, page 464.

The problem which presents itself in the minority jurisdictions is who, other than the prosecuting attorney, may grant the immunity to a witness.³⁹ Generally, a committing magistrate, even with the assent and concurrence of the prosecuting attorney, cannot validly promise immunity from prosecution and conviction to a person under arrest, if he will testify against the others accused, especially where the proceedings for the granting of immunity to witnesses are covered by statute and no provisions are made for the granting thereof by a magistrate.⁴⁰ Neither can a justice of the peace promise immunity.⁴¹ Nor a coroner,⁴² a grand jury,⁴³ police officers,⁴⁴ nor a sheriff.⁴⁵

These minority jurisdictions hold that the state may contract with the defendant for exemption from prosecution if he shall honestly and fairly make a full disclosure of the crime at the trial of a confederate.⁴⁶ These contracts are not illegal.⁴⁷

A mere offer of immunity is not enough to require the witness to forego his privilege.⁴⁸ Of course, if the witness does not meet his side of the bargain, the immunity does not attach.⁴⁹

IMMUNITY BY STATUTE

Granting immunity to witnesses by virtue of statute, in exchange for incriminating testimony, is a common method of obtaining information which would not otherwise be available for use in criminal prosecutions. These statutes have been upheld consistently, even though the general rule is that immunity may not be granted to a witness by a prosecuting attorney with or without the approval of the court in absence of such a statute.⁵⁰

However, such a statute must meet certain requirements before it will be deemed to be sufficient protection for the witness. The statement is often made that the immunity granted must be as broad as the constitutional privilege itself.⁵¹ In the leading case of *Counselman v. Hitchcock*,⁵² decided in 1896, the court said, "It is

39. L.R.A. 1918A, 376.

40. *People v. Indian Peter*, 48 Cal. 250 (1874).

41. Dictum in *Wight v. Rindskopf*, 43 Wis. 344, 349 (1877).

42. *Faucett v. Oklahoma*, 10 Okla. Crim. Rep. 111, 134 Pac. 839 (1913).

43. *Scribner v. State*, 9 Okla. Crim. Rep. 465, 132 Pac. 933, Ann. Cas. 1915B, 381 (1913).

44. *Comm. v. St. John*, 173 Mass. 566, 54 N.E. 254, 73 Am. St. Rep. 321 (1899).

45. *Moseley v. State*, 35 Tex. Crim. Rep. 210, 32 S.W. 1042 (1895).

46. *Ex Parte Jackson*, 95 Tex. Crim. Rep. 200, 253 S.W. 287 (1923).

47. RESTATEMENT, CONTRACTS § 549 (1932). "A bargain by a prosecuting officer with a person accused of crime to recommend to the court a nolle prosequi in consideration of the accused becoming a witness for the State, is not illegal. . . ."

48. *People v. Rockola*, 339 Ill. 474, 171 N.E. 559 (1930); 69 A.L.R. 852.

49. *State v. Scarbrough*, 167 La. 484, 119 So. 523 (1929).

50. *Brown v. Walker*, 161 U.S. 591, 16 Sup. Ct. 644 (1896).

51. *People v. Boyle*, 312 Ill. 586, 144 N.E. 342 (1924); *Overman v. State*, 194 Ind. 483, 143 N.E. 694 (1924); *Comm. v. Barnett*, 196 Ky. 731, 245 S.W. 878 (1922); *People v. Buffalo Gravel Co.*, 195 N.Y. Supp. 940 (Sup. Ct. 1922).

52. 142 U.S. 547, 12 Sup. Ct. 195, 35 L.Ed. 1110 (1896).

quite clear that legislation cannot abridge a constitutional privilege, and that it cannot replace or supply one, at least unless it is so broad as to have the same extent in scope and effect."

Two types of general immunity statutes have been passed. One states that upon certain procedure having been followed, a witness will not be allowed to assert his constitutional privilege against self incrimination, but he may not thereafter be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction or matter with regard to which he was required to testify.⁵³ The second type states that the witness may not assert his privilege, but that testimony given by him may not thereafter be used in evidence in any prosecution against him.⁵⁴ It may be seen readily that the two differ radically in wording and effect.

There seems to be no question as to the validity of the first type of statute. In *Brown v. Walker*,⁵⁵ cited in 1896, such a statute was upheld. As the statute provided absolute immunity against prosecution, the witness was deprived of his constitutional right to refuse to answer.

The problem as to constitutionality of the statute arises most often with regard to the second type of law. Seemingly the better view is that the constitutional privilege, state or federal, is not satisfied by a statute requiring a person to testify or give evidence, where the only immunity offered in lieu of the privilege is that the testimony or evidence so produced shall not thereafter be used in evidence against him.⁵⁶ The objection is that the defendant or witness is still open to prosecution and may be convicted on evidence independent of, but obtained from the sources suggested by, the very information which he has been forced to give.⁵⁷

In *Counselman v. Hitchcock*, *supra*, a federal statute of the second type was in issue. The court, in a landmark decision, said:

"It could not, and would not, prevent the use of his testimony to be used in evidence against him or his property, in a criminal proceeding in such courts. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony 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."

The court was saying that a statute only preventing the use of the compelled testimony in future prosecutions against the witness, does not fully replace his constitutional privilege against self incrimination. Hence, the witness could not be required to give testimony incriminating himself, even though the immunity was granted as per the statute. The immunity must be as broad as the privilege.⁵⁸

53. VT. STAT. §§ 1746-1747 (1947).

54. U. S. REV. STAT. § 860 (1873).

55. 161 U.S. 591, 16 Sup. Ct. 644 (1896).

56. 118 A.L.R. 602 (1939).

57. This contention is disclaimed by WIGMORE, § 2283, pp. 522-523, and § 2261.

58. Note, 2 ALA. L. REV. 146 (1950); Note, 62 HARV. L. REV. 151 (1948).

However, all the cases have not followed the *Counselman* rule, and some have held constitutional a statute such as there involved.⁵⁹ These cases generally proceed on the theory that one who is given immunity from the use of his answer or testimony in any subsequent prosecution against him is so adequately protected that he may not invoke the constitutional privilege against compulsory self incrimination.

In one case, later overruled, the court said:

"If a man cannot give evidence upon the trial of another person without disclosing circumstances which will make his own guilt apparent or at least capable of proof, though his account of the transaction should never be used as evidence, it is the misfortune of his condition, and not any want of humanity in the law."⁶⁰

Missouri originally followed the minority rule, but after the *Counselman* case, turned to that point of view.

In *Ex Parte Bruskett*,⁶¹ a Missouri case decided in 1891, defendant brought a habeas corpus petition on the grounds that he had been jailed for contempt of court for refusing to answer a grand jury question as to the names of persons he knew to be gambling in the county. The prosecution claimed defendant had been granted immunity under a statute (later repealed) stating that no person should be excused from testifying concerning a gaming offense by another, but preventing the use of the testimony given in subsequent actions. The court, in remanding defendant to custody, said:

"... Will the law permit a man to keep offenses and offenders a secret, lest the offenders should in their turn give evidence against him?" We think the protection of the statute co-extensive with that intended to be afforded by the constitution."

However, in *Ex Parte Carter*,⁶² decided in 1902, the Missouri Supreme Court, although not expressly, overruled the *Bruskett* case. Defendant sought habeas corpus under facts almost identical to those in the former case, the state reiterating its previous argument. The court, expressly following the *Counselman* case, released the defendant from custody. Quoting from *In Re Emery*,⁶³ the court said:

"The principle applies equally to any compulsory disclosure of his guilt by the offender himself, whether sought directly as the object of the inquiry, or indirectly and incidentally for the purpose of establishing facts involved in an issue between other parties. If the disclosure thus made would be capable of being used against himself as a confession of a crime, or an admission of an offense by himself, in any prosecution then pending or that might be brought against him therefor, such disclosure would be an accusation of himself, within the meaning of the constitutional provision."⁶⁴

59. *State v. Quarles*, 13 Ark. 307 (1853); *Ex Parte Rowe*, 7 Cal. 184 (1857); *Kneeland v. State*, 62 Ga. 395 (1879).

60. *People ex rel. Hackley v. Kelly*, 24 N.Y. 74 (1861). Overruled *People ex rel. Lewisohn v. O'Brien*, 176 N.Y. 253, 68 N.E. 353 (1903).

61. 106 Mo. 602, 17 S.W. 753, 14 L.R.A. 407, 27 Am. St. Rep. 378 (1891).

62. 166 Mo. 604, 66 S.W. 540, 57 L.R.A. 654 (1902).

63. 107 Mass. 179, 9 Am. Rep. 72 (1871).

64. See also *State ex rel. Harley v. Standard Oil Co.*, 218 Mo., 1, 116 S.W. 902 (1909); *State ex rel. Jones v. Mallinckrodt Chemical Works*, 249 Mo. 702, 156 S.W. 967 (1913).

The general immunity statutes today contain provisions incorporating, in effect, both types of statutes. The laws usually include a provision that the evidence elicited shall not be used in any subsequent action against the witness, but in addition state that the person shall be afforded an absolute immunity against prosecution with regard to any matter or transaction about which he was required to testify.⁶⁵ In no general statute in effect today has the writer found only the provision against the use of testimony, but in each statute examined, if the evidence element was included, the absolute immunity feature also was added.

One state, Oklahoma, has incorporated in its constitution provisions similar to the general immunity statutes mentioned.⁶⁶

Missouri has no general immunity statute. However, there are several enactments granting immunity with regard to inquiries concerning special offenses.⁶⁷ With one exception,⁶⁸ each statute meets the requirements as set out by the *Counselman* case and the *Carter* case, that is, a complete immunity from prosecution granted to the testifying witness. The single statute, providing only against the use of the evidence so given in a later action, was passed in 1893, prior to the decisions in those two leading cases. The authority existent today would seem to require that it be declared unconstitutional should the instance to so hold arise.

Immunity granted on conditions other than that the required testimony be given, has been held to be improper protection for the witness.⁶⁹

It has been held that one who testifies concerning criminal offenses when required to do so, is entitled to immunity under the statutes even though he fails to claim his privilege against self incrimination before giving the testimony.⁷⁰ Such seems to be the majority rule.⁷¹ However, there have been a number of decisions to the contrary, requiring a claim of the privilege before immunity may be granted.⁷²

65. KAN. GEN. STAT. § 62-301 (1949).

66. OKLA. CONST. Art. 2, § 27 (1907).

67. MO. REV. STAT. §§ 73.840, 129.190, 136.100, 288.310 (repealed and re-enacted Mo. Laws, 1951, page 564), 386.470, 416.250, 416.330, 416.400.

68. MO. REV. STAT. § 129.190 (1949); "No person shall be excused from answering any question on trial of such action [to declare a public office vacant as per Section 129.140 on grounds of violation of election laws] relating to any of the acts claimed to have been committed by any party thereto, or any of the persons, committees or organizations mentioned in Section 129.160, on the grounds that such answer would tend to incriminate or degrade such person or witness. But no such answer or answers shall be used or be evidence against such witness in any criminal prosecution or proceeding whatever."

69. *Lamson v. Boyden*, 160 Ill. 613, 43 N.E. 781 (1896), where the court held defendant did not obtain complete immunity if his freedom from future prosecution was dependent upon repayment of the proceeds of his crime.

70. *United States v. Monia*, 317 U.S. 424, 63 Sup. Ct. 409 (1943); *State ex rel. Marshall v. Petteway*, 121 Fla. 822, 164 So. 872 (1935); *People v. Sharp*, 107 N.Y. 427, 14 N.E. 319, 1 Am. St. Rep. 851 (1887).

71. 145 A.L.R. 1416 (1943).

72. *Scribner v. State*, 9 Okla. Crim. Rep. 465, 132 Pac. 933, Ann. Cas. 1915B, 381 (1913); *Cioloconio v. State*, 198 Wis. 18, 222 N.W. 825 (1929); *People ex rel. Roach v. Carter*, 297 Mich. 577, 298 N.W. 288 (1941).

Wigmore adheres to the latter view, stating that immunity is given in exchange for the relinquishment of the privilege, and hence, if the privilege is not asserted, to grant immunity would be to give something for nothing.⁷³ This theory is based on the general rule that the constitutional privilege is waived if not claimed and asserted.⁷⁴ If the statute itself requires that the privilege be claimed, then this mandate must be followed regardless of the rule existing in the particular jurisdiction.⁷⁵

The majority view may have one serious drawback in that the prosecutor runs the risk of unintentionally affording immunity to a witness by a question the answer to which is incriminating without the knowledge of the official.

The problem often arises as to the extent of the immunity granted by a general statute, that is, to what crimes of the witness will amnesty apply.

In *Ex Parte Cohen*,⁷⁶ the court expressly interpreted statutory immunity as covering any offense to which the testimony might have reference or which it might tend to establish, and not merely the offense with which the defendant was charged in the proceeding in which the witness was required to testify. If the witness is required to answer concerning a matter or transaction, regardless of its connection or non-connection with the particular crime under investigation, the witness is thereafter immune from prosecution for that conduct.⁷⁷ "A statute which only relieves the witness from prosecution for the crime on trial is not as full a protection against self incrimination as the constitution grants him."⁷⁸

In *People v. Argo*,⁷⁹ the defendant was charged with contempt for refusing to answer a question concerning offenses, when the statute granted immunity only in connection with bribery. In releasing the defendant, the court said:

"... the rule is firmly established that if the proposed evidence has a tendency to incriminate the witness or to establish a link in a chain of evidence which may lead to his conviction, or if the proposed evidence will disclose the names of persons upon whose testimony the witness might be convicted of a criminal offense or expose him to penalties or forfeitures, he cannot be compelled to answer."

There have been cases contrary to this rule, but generally, where immunity only as to the crime under investigation was given, the revealing testimony would have been within that crime.⁸⁰

73. § 2282, page 509.

74. *State v. Erlbacher*, 270 S.W. 277 (Mo. 1925).

75. *Shaw v. United States*, 131 F. 2d 476 (9th Cir. 1942). See Mo. REV. STAT. § 288.310 (repealed and re-enacted Mo. Laws, 1951, page 564) (1949).

76. 104 Cal. 524, 38 Pac. 364, 26 L.R.A. 423, 43 Am. St. Rep. 127 (1894).

77. *Ex Parte Napoleon*, 65 Tex. Crim. Rep. 307, 144 S.W. 269 (1912); *People v. Boyle*, 312 Ill. 586, 144 N.E. 342 (1924).

78. *Overmann v. State*, 194 Ind. 483, 143 N.E. 604 (1924).

79. 237 Ill. 173, 86 N.E. 679 (1908).

80. *Frazer v. State*, 58 Ind. 8 (1877); *State v. Jack*, 69 Kan. 387, 76 Pac. 911, 1 L.R.A. (N.S.) 167, 2 Ann. Cas. 171 (1904).

In any case, however, the immunity extends only to the witness himself, and not to a third person. For example, a corporation for whom the witness is an agent or officer may not claim immunity upon the witness's testimony.⁸¹

For obvious reasons, immunity will be granted only with respect to those matters about which the witness is required to testify.⁸² If the rule were otherwise, the witness, once on the stand, might quickly expose his entire criminal career and escape punishment for all his wrongdoings.

The fact that the grant of immunity will not shield the witness from personal disgrace for having committed a crime, has been held to be no basis for his refusal to answer questions.⁸³ In *Brown v. Walker*, *supra*, it was said:

"It is entirely true that the statute does not purport, nor is it possible for any statute, to shield the witness from the personal disgrace or opprobrium attaching to the exposure of his crime; but, as we have already observed, the authorities are numerous and very nearly uniform to the effect that, if the proposed testimony is material to the issue on trial, the fact that the testimony may tend to degrade the witness in public estimation does not exempt him from the duty of disclosure. A person who commits a criminal act is bound to contemplate the consequences of exposure to his good name and reputation, and ought not to call upon the courts to protect that which he has himself esteemed to be of such little value."

Immunity attaches not only when the witness is liable criminally to prosecution and punishment, but also to instances where his answer would subject him to a penalty or forfeiture.⁸⁴ But if the penalties would be of a purely remedial nature, the witness has no privilege to refuse to answer, and hence, immunity does not attach.⁸⁵

Even though immunity may attach to the crimes of the witness, such protection does not extend to perjury.⁸⁶ Many statutes expressly provide that, ". . . no person so testifying shall be exempt from prosecution or punishment for any perjury committed by him in his testimony."⁸⁷ Several cases have indicated that this exception may exist even though not expressly stated in the statute.⁸⁸

81. *Hale v. Henkel*, 201 U.S. 43, 26 Sup. Ct. 370 (1906).

82. WIGMORE § 2282, page 505.

83. *But cf.* Mo. REV. STAT. § 129.190 (1949), where the statute reads, "No person shall be excused from answering any question . . . on the ground that such answer would tend to incriminate or degrade such person. . . ." (Emphasis added).

84. *State ex rel. Jones v. Mallinckrodt Chemical Works*, 249 Mo. 702, 156 S.W. 967 (1913). *Contra: Wilkins v. Malone*, 14 Ind. 153 (1860). See *In Re Rouse*, 221 N.Y. 81, 116 N.E. 782 (1917), where the court said, ". . . the disclosure asked of him must expose him to punishment for crime." And, "A proceeding looking to disbarment is not a criminal case."

85. 28 R.C.L. 425. However, the note writer cites no authority nor gives any explanation as to the meaning of "purely remedial nature."

86. WIGMORE § 2282, p. 504, where the rather obvious reasons for such a ruling are reviewed.

87. Mo. REV. STAT. § 73.840 (1949).

88. *Glickstein v. United States*, 222 U.S. 139 (1911); *Matter of Foster v. Hastings*, 263 N.Y. 311, 314, 189 N.E. 229 (1934).

It is generally held that the privilege against self incrimination does not extend to protect the witness as to matters that may tend to incriminate him under the laws of a foreign jurisdiction.⁸⁹ Therefore, as the witness has no privilege to refuse to answer questions concerning those crimes, no immunity can attach if he does so answer. In such a case, as the immunity statute cannot protect the witness from another state's laws, the person may prefer contempt penalties for refusal to answer in the first state.

In some cases the courts have held that the witness may refuse to answer as to matters which may subject him to the possibility of prosecution in another jurisdiction.⁹⁰ The danger of prosecution in those cases, however, seemed to be impending rather than remote, a fact which may have influenced the courts. The problem of inter-governmental immunity can be of importance only under such holdings, taking them for their face value, as there is no privilege to refuse to answer at all under the contrary rule.⁹¹

There seems to be little doubt that immunity granted in one state could have no effect in granting amnesty to the crimes of the witness under the laws of another jurisdiction. Most courts have denied the right of a witness to refuse to testify even though the immunity offered only protected him from prosecution in that particular jurisdiction.⁹² Some courts have held otherwise.⁹³ This problem seems to be one of the most valid arguments against immunity statutes as a class, considering the present day interlocking of federal and state law, especially in tax evasion matters.⁹⁴

89. *Brown v. Walker*, 161 U.S. 591, 40 L.Ed. 819, 16 Sup. Ct. 644 (1896); *Feldman v. United States*, 322 U.S. 487, 88 L.Ed. 1408, 64 Sup. Ct. 1082 (1944); *Wigmore* §2258; 59 A.L.R. 895 (1929); 82 A.L.R. 1380 (1933); Note, *Immunity from Compulsory Self-Incrimination in a Federal System of Government*, 9 TEMP. L. Q. 194 (1935).

90. *Ballman v. Fagin*, 200 U.S. 186, 50 L.Ed. 433, 26 Sup. Ct. 212 (1906); *In Re Dole*, 42 F. 2d 686 (D.C. 1930); *People ex rel. Morse v. Nussbaum*, 55 App. Div. 245, 67 N.Y. Supp. 492 (3d Dep't 1900).

91. 2 A.L.R. 2d 631 (1948).

92. *Kansas v. Jack*, 199 U.S. 372, 50 L.Ed. 234, 28 Sup. Ct. 73 (1905); *United States v. Murdock*, 284 U.S. 141, 67 L.Ed. 210, 52 Sup. Ct. 63 (1931).

93. *In Re Watson*, 293 Mich. 263, 291 N.W. 652 (1940); *In Re Ward*, 295 Mich. 742, 295 N.W. 483 (1940).

94. Although there is no federal general immunity statute, Section 3486, Title 18, U.S.C.A., does prevent the use of testimony given before House committees from being used in criminal prosecutions against the witness. See note 110, *ante*. In a very recent case, *Adams v. State of Maryland*, 98 L.Ed. 360, 362, 363 (March 8, 1954), the court said:

"Nor can we hold that the act bars use of committee testimony in United States courts but not in state courts. The act forbids use of such evidence 'in any criminal proceeding . . . in any court! Language could be no plainer. . . ."

"... And, since Congress in the legitimate exercise of its powers enacts 'the supreme Law of the Land,' state courts are bound by § 3486, even though it affects their rules of practice."

Immunity runs only in favor of a witness appearing for the prosecution.⁹⁵ In *Ex Parte Petraous*,⁹⁶ the court said:

"There is no justification in law for reading the language of the latter section apart from the other sections bearing upon the same subject matter and which are in *pari materia*, where to do so would lead to the absurd conclusion that a witness may volunteer testimony on behalf of the defense, thereby incriminating himself, clear the accused and both escape punishment."

As the court points out, if the rule be otherwise, the defense might call a witness who would confess to the crime in question; be thereby entitled to immunity; free the defendant on trial; and both go free. Some statutes expressly provide that the amnesty applies only to persons called to testify by the state.⁹⁷

Before immunity can be granted, the testimony given by the witness must, of course, be incriminating.⁹⁸ "Accordingly, if the evidence sought to be elicited can in no event tend to a conviction of the witness of an offense against the laws of the state, his privilege to remain silent does not attach, even though the effect of his testimony will be to establish a breach of the law."⁹⁹ The classic formula as to what testimony would be considered incriminating was set out by Marshall in *United States v. Burr*:¹⁰⁰

"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 accused. 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."

Some statutes expressly limit their operation. For example, Section 386.470, *Revised Statutes of Missouri*, 1949, states, "... Nothing herein contained is intended to give, or shall be construed as in any manner giving unto any corporation immunity of any kind."

The decisions generally hold that a witness cannot claim immunity unless he was required by subpoena to testify.¹⁰¹ Several cases have held that one who appears voluntarily without having been required to do so and who does not claim his privilege, is not entitled to immunity under a statute granting the same to persons who have been compelled to testify.¹⁰² The basis for these decisions is that if there

95. WIGMORE § 2282, page 516; Note, 13 So. CAL. L. REV. 160 (1939); Brady v. United States, 39 F. 2d 312 (8th Cir. 1930).

96. 2 Cal. 2d 579, 86 P. 2d 343 (1939).

97. S. D. CODE § 34.2406 (1939); VT. STAT. § 1746-1747 (1947).

98. Carchidi v. State, 187 Wis. 438, 204 N.W. 473 (1925).

99. 58 AM. J. WITNESSES § 84, page 72. WIGMORE § 2279.

100. 25 Fed. Cas. 38, 40 (C.C. Va. 1807).

101. Sherwin v. United States, 268 U.S. 369, 69 L.Ed. 1001, 45 Sup. Ct. 517 (1925); United States v. Monia, 317 U.S. 424, 87 L.Ed. 376, 63 Sup. Ct. 409 (1943); 58 AM. J., WITNESSES § 91.

102. State v. Backstrom, 117 Kan. 111, 320 Pac. 306 (1924); State v. Whalen, 108 Wash. 287, 183 Pac. 130 (1919).

is no claim of privilege, there is no "compulsion to testify" as required by the statute for immunity to attach. Most statutes today expressly provide that amnesty will not be given unless the witness is required to testify.¹⁰³

There are several ways in which a witness may effectuate his claim for immunity. In *Scribner v. State*,¹⁰⁴ the court stated:

"A claim of immunity cannot be presented by demurrer and should not be submitted to a jury under a plea of not guilty, but should be raised alone by a plea in bar, in support of a motion addressed to the court, which plea and motion should be decided by the court without the intervention of a jury."

The plea in bar appears to be the more commonly accepted method of claiming the immunity,¹⁰⁵ but in other cases a motion to quash the indictment has been used.¹⁰⁶ In England and Canada a procedure has been developed by statute wherein the witness is given a certificate attesting to his immunity.¹⁰⁷

The failure of a witness to answer a question, after having been granted immunity, will generally result in a citation for contempt of court, in the same manner as if he had refused to answer a question on the grounds that to do so would be to incriminate himself, where the court feels that the reply would not be damaging. Immunity statutes generally make no express provision for failure to testify. However, in *Illinois Revised Statutes*, Chapter 38, Section 580(a), it is said, "... Any witness, who, having been granted immunity as aforesaid, refuses to testify or produce evidence, documentary or otherwise, may be punished for contempt of court and sentenced to the county jail for not more than two years."

Protection of a statute, granting immunity if incriminating testimony is required to be given, may not end the troubles of the particular witness. Some states provide certain penalties to be imposed if a public official will not waive his right to immunity upon appearing to testify to matters concerning his office. The New York Constitution, Article I, Section 6, provides that if a public officer refuses to sign a waiver of immunity, he will be deemed removed from office and prohibited from holding public office within the state thereafter for a period of five years. The purpose of these provisions, it is said, is not to compel public officials to incriminate themselves, but to purge the public service of dishonest and unfaithful officials.¹⁰⁸ In 1953, Executive Order No. 10450 of the President of the United States, concerning security regulations for government employees, was amended so as to include as one of the several grounds for dismissal of employees, "Refusal by the individual, upon

103. See MO. REV. STAT. §§ 136.100, 73.840, 288.310 (repealed and re-enacted Mo. Laws, 1951, page 564), 286.470 (1949).

104. 9 Okla. Crim. Rep. 465, 132 Pac. 933, Ann. Cas. 1915B, 381 (1913).

105. *Heike v. United States*, 217 U.S. 423, 51 L.Ed. 821, 30 Sup. Ct. 539 (1910).

106. *Sandwich v. State*, 137 Ala. 85, 34 So. 620 (1903).

107. See WIGMORE § 2281, notes appearing on pages 472-473.

108. *Canteline v. McClellan*, 258 App. Div. 314, 316, 16 N.Y.S. 2d. 792 (4th Dep't. 1939).

the ground of constitutional privilege against self incrimination, to testify before a congressional committee regarding charges of his alleged disloyalty or other misconduct."

PARTICULAR IMMUNITY STATUTES

A number of states have passed general immunity statutes, mostly within recent years.¹⁰⁹ The Missouri statutes are applicable only to particular types of investigations. Section 73.840 applies to investigations or inquiries by public utilities commissions in cities of the first class; Section 129.190 to an action to declare a public office vacant on account of violation of election laws; Section 136.100 to testimony given before the state collector of revenue; Section 288.310 (repealed and reenacted substantially in the same form under a different section number, in Laws of Missouri, 1951, page 564) to tribunals established under the Employment Security Law; Section 386.470 to appearances before the Public Service Commission; Section 416.230 to affidavits demanded by the Secretary of State as to the conduct of a corporation in monopoly investigations; Section 416.330 as to court appearances concerning the existence of monopolies; and Section 416.400 in any proceeding to enforce Chapter 416 concerning monopolistic practices.

The federal statutes contain no general immunity law.¹¹⁰ However, on January 21, 1953, Senate Bill 565 was introduced, and, if passed, would place such a statute on the books.¹¹¹ At the time of this writing, however, no action has been taken upon the bill, other than a hearing before a subcommittee of the Committee of the Judiciary of the Senate on April 17, 1953, where several objections were made to certain provisions of the bill.

109. ILL. STAT., Chap. 38 § 580(a) (1949); IND. STAT. § 9-1605 (Burns, 1933); KAN. GEN. STAT. § 62-301 (1949); OKLA. CONST. Art. 2 § 27 (1907); McKinney's 1953 Session Laws of New York, Chapter 891, § 2447; S. D. CODE § 34.2406 (1939); TENN. CODE § 11592-11593 (Michie, 1932); VT. STAT. § 1746 (1947); W. VA. CODE § 5742 (1943); WIS. STAT. § 325.34 (1951).

110. But see U.S.C.A., Title 18, § 3486. "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." See note 94, *supra*. Note that this statute does not meet the requirements of the *Counselman* case for an immunity statute. See also MANUEL FOR COURTS-MARTIAL, UNITED STATES, 1951, paragraph 148e, "The fact that an accomplice testifies for the prosecution does not make him afterwards immune to trial except to the extent that immunity may have been promised him by an authority competent to order his trial by general court-martial."

111. "Section 3486. . . (b) Whenever in the judgment of the Attorney General the testimony of any witness, or the production of books, papers, or other records or documents by any witness, in any case or proceeding before any grand jury or court of the United States is necessary to the public interest, such witness shall not be excused from testifying or from producing books, papers, and other records and documents on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to penalty or forfeiture; but such witness shall not be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled,

In 1952, the National Conference of Commissioners on Uniform State Laws presented a "Model State Witness Immunity Act,"¹¹² a very comprehensive general immunity statute. This act has not as yet been adopted by any state, although one state did pass it as written except for provisions added to make it apply only to certain specified offenses.¹¹³ The proposed Act states:

"In any criminal proceeding before a court or grand jury, (or examining Magistrate,) if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and if the prosecuting attorney, in writing (and with the approval of the Attorney General), requests the court to order that person to answer the question or produce the evidence, the court, after notice to the witness and hearing, shall so order (, unless it finds that to do so would be clearly contrary to the public interest,) and that person shall comply with the order. After complying, and if, but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, that person shall not be prosecuted or subjected to penalty or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order, he gave answer or produced evidence. But he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury, false swearing or contempt committed in answering, or failing to answer, or in producing, or failing to produce, evidence in accordance with the order."

The Model Act has very effectively eliminated many of the problems existing with regard to the present general immunity statutes, such as to whether or not the privilege against self incrimination must be claimed.

Although the Act does not expressly exclude defense witnesses, the prosecuting attorney may thwart any such attempt to so apply it by merely refusing to request the immunity be granted. The Act requires the witness to claim the privilege against self incrimination before immunity attaches, the theory being that immunity should be used only when necessary to get evidence not otherwise available, and to give the prosecutor notice of matters the witness regards as incriminating and hence a better basis for weighing the advisability of the grant of immunity.

The Model Act contains two stages of decision on the granting of immunity. A request by the prosecuting attorney is first necessary. This official is or should be well informed as to the witness's expected evidence, the importance of the testimony and the proceeding, and the effect of granting immunity. Hence, the act grants him

after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such witness so testifying shall not be exempt from prosecution and punishment for perjury or contempt committed in so testifying. (c) The judgment of the Attorney General that any testimony, or the production of any books, papers, or other records or documents, is necessary to the public interest shall be confirmed in a written communication over the signature of the Attorney General addressed to the grand jury or court of the United States concerned, and shall be made a part of the record of the case or proceeding in which such testimony or evidence is given."

112. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, page 251 (1952).

113. CALIF. PENAL CODE § 1324 (1953).

the first discretion. This request is required to be in writing to prevent its being made too casually.

Secondly, the act provides for one of two alternatives, which must be obtained in addition to the request of the prosecutor. One alternative would require the approval of the Attorney General. This state official should be acquainted with the importance of the witness to other investigations and proceedings in the state, and with the importance of the particular proceeding. "Co-ordination of enforcement efforts on an ever-widening basis—ultimately to include nation-state co-operation—seems essential in dealing with organized crime."¹¹⁴ The Attorney General need not approve the request if he feels the particular case does not merit the granting of immunity. In the alternative, the act provides, in place of review by the Attorney General, for a limited discretion in the court to refuse to issue the requested order if it finds that such would be "clearly contrary to the public interest."

Neither the Attorney General nor the court has any power to initiate the grant of immunity. The second step is provided to prevent possible overzealousness, lack of wisdom, or corruption of the local prosecutor.

Requiring the approval of the Attorney General has the disadvantage of a delay before the immunity can be granted. Under such a requirement, unless the question and claim of immunity had been anticipated and the written request and approval prepared in advance, it would be necessary to stop the trial, obtain the approval of that officer which may not be readily available, make such approval part of the record, and then proceed with the questioning. Probably most such situations could be anticipated. Since the Missouri Attorney General has no supervisory powers over local prosecutors at the present time, perhaps to give him authority to control the county official's attempts to grant immunity would be an unwise step towards initiating that type of relation. On the other hand, the provision permitting the court to reject the request if to grant the order would be "clearly contrary" to the public interest, is rather undesirable in that there is no definition of what is to be taken into consideration in finding "the public interest."

CONCLUSION

In view of the trends of criminal activity toward the large, intricate, and widespread organization, and the difficulty presently encountered in obtaining information concerning these groups for purposes of investigation and prosecution by the ordinary police methods, it is believed that Missouri should adopt a general immunity statute. The Model State Witness Immunity Act stands as a very desirable and well designed guide.

STEPHEN E. STROM

114. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, page 266 (1952).

SUCCESSFUL DEFENSES TO THE CHARGE OF INCOME TAX FRAUD

THE TAXPAYER'S PROBLEM

At first blush the attorney for the taxpayer, in a fraud case, has a relatively simple problem. Not only must the Commissioner of Internal Revenue prove that the taxpayer has failed to report his correct income but the commissioner must also prove that the failure was with intent to evade the tax. It is not enough for the commissioner to prove the omission was merely a matter of sloppy record keeping. Even worse, from the government's standpoint, once the government alleges fraud, the commissioner takes on himself the burden of proof. In non-fraud cases, the taxpayer must overcome the presumption that the commissioner's determination is correct but once fraud is alleged the tables are turned. The moment the commissioner alleges fraud he takes on the onus of making out a better than prima facie case.

Other advantages seem to lie in the taxpayer's favor. The commissioner starts from "scratch" without knowing the full extent of the taxpayer's activities while the taxpayer's attorney in preparing his defense starts out with all the evidence available to him. To marshal that evidence in convincing form for presentation to a sophisticated bench like the United States Tax Court or to a "blue ribbon" jury is the problem that faces the defense attorney. In no field of law is it more important for the lawyer to understand accounting problems, the techniques of auditing and of internal bookkeeping control in the modern business world. Without this understanding the taxpayer's attorney flounders in cross-examining government experts and gets lost in the morass of worksheets in his conferences with the taxpayer's accountant. Taxpayer's counsel faces another problem in his dealings with the accountant; if the accountant prepared the tax returns on which fraud is now charged counsel must face the possibility that the accountant may be subpoenaed as a government witness, and even worse, that the accountant may turn out to be a hostile co-defendant.

But let us move from the theoretical to the practical. Let us examine some of the techniques used by the government in these cases; let us scrutinize the defense techniques which have been successfully tested by tax counsel in defending their clients.

THE BANK DEPOSIT METHOD

Since bank deposits, brokerage accounts, real estate escrows and safety deposit records are readily accessible to tax examiners, these prove a fertile field for allegations of fraud. The mere fact that taxpayer had a deposit in a bank or a brokerage house in a fictitious name does not in itself prove that the deposit is income. Secondly, even if it is income, the government must prove that it is income for the year being examined. It may develop to income of prior years shown in prior returns, returns on capital, gifts and accommodation transactions, or other non-taxable items.¹

1. Roy E. Ellegard, 7 T.C.M. 590, 598 (1948); Rose Rusman, 3 T.C.M. 922 (1944); T. M. Stanton, 6 T.C.M. 977, 979 (1947); A. W. Minyard, 6 T.C.M. 1137, 1148 (1947).

Bear in mind, however, that the mere finding of the account in the year in question permits the commissioner to sit back and ask the taxpayer to pay a tax on it or account for the source. *Prima facie* the commissioner relies on the presumption he is correct. But although the deposit may give rise to a tax, the commissioner needs more to prove "fraud."

Where it is shown that taxpayer's deposits or other assets were obtained over a number of years and where the sum of them exceeds the taxpayer's deposited income, we have an inference that the source of these assets is unreported income. The taxpayer must then explain its source. A failure to explain leads to findings against him both as to the source of the deposits and the taxpayer's intent in failing to report them. A mere claim that the monies are trust funds, or loans, capital receipts and exchanges are not enough. A detailed analysis of the sources must be given. Taxpayers have been able to show in some instances that the deposits constituted a return of capital or consisted of a constantly revolving fund used to cash checks for customers, or were received from a corporation to be spent or loaned for it. Once the receipt is shown to consist of unreported gross income, the commissioner is not obliged to prove the deductions to which taxpayer may be entitled. Typical defense raised by taxpayers include:

- a) No real interest in the account by the taxpayer.²
- b) The account consists of non-taxable items such as:
 - 1. Borrowed money;
 - 2. Repayment of loans;
 - 3. Interbank transfer of funds by the taxpayer from one account to another;
 - 4. Proceeds from sale of assets;
 - 5. Redeposits of withdrawn cash;
 - 6. Trust funds held for a third party.

Let us look at a typical case, the case of *Hyman Wagman*.³ The facts were these:

Wagman reported his income on a calendar year basis for 1941 to 1946. He contested the deficiencies assessed for 1942, 1943 and 1946 by the commissioner. The commissioner had included in his income for those years various bank deposits. The deposits had been made by Wagman in large sums in certain bank accounts which he opened in his name, the names of his family and in the name of his family and in the name of his store.

Although the deposits were revealed by the records of the bank, they had not been shown on the books of the store. The commissioner's examiners investigated his bankbooks, those of certain debtors of his, and his own books and records, to find the source of these deposits. Tax examiners questioned the taxpayer, his accountant and others familiar with his affairs. No satisfactory explanation was given as to the source of these funds. The commissioner treated the receipts as unreported sales for the first two years, and for the last year as "other income."

2. E. C. Humphreys, 9 B.T.A. 656 (1927).

3. 10 T.C.M. 836 (1951).

The store's bookkeeper testified that all sales were properly recorded and the proceeds deposited in the bank and that any monies withheld were put through petty cash. The bookkeeper swore that ultimately all monies received from sales were deposited in the bank as per the books. The commissioner claimed that taxpayer made sales above ceiling prices and that these sales were not recorded properly, but no proof was offered of this charge. On the basis of the bookkeeper's testimony, the court decided that the commissioner sustained his burden of proving taxpayer's basic tax deficiency but that the fraud charge had not been proven and the extra 50 per cent fraud penalty would not be assessed.

THE NET WORTH METHOD

Another technique used by the Bureau of Internal Revenue in reconstructing the tax payer's income is "The Net Worth Method". The technique is a simple one. The Bureau adds up all the taxpayer's personal assets at the beginning of the year, subtracts all of his liabilities and computes what he was worth. To his worth at the beginning of the year is added the income he reports in his tax return. The sum of his net worth at the beginning of the year plus his income according to his tax return for the year should give the amount he is worth at the end of the year, assuming the taxpayer spends nothing during the year. However, the Bureau deducts from that figure the amount the taxpayer spent during the year on his personal living expenses. This is his hypothetical net worth at the end of the year. The Bureau then compiles the taxpayer's net worth at the end of the year by listing all of his assets and subtracting all of his liabilities. If this compilation is higher than the taxpayer's hypothetical net worth as computed above, the Bureau says that the difference can only be accounted for by assuming that the taxpayer has a source of unreported income.

Simply stated, then, the Bureau contends that the taxpayer's increase in net worth between two periods is larger than can be accounted for by his tax returns. Accordingly, the taxpayer must have unreported income. Now, at first blush, one need not be a tax lawyer or an accounting genius to see that such a contention is vulnerable to attack on several points. One, if the Bureau of Internal Revenue's opening net worth statement is too little, that is, if the taxpayer's net worth at the beginning of the year is understated, the whole computation falls like a house of cards. Point two, if the taxpayer's living expenses have been inaccurately computed, the hypothetical net worth figure to be reached for the end of the year will be inaccurately computed. Point three, if the taxpayer's assets at the end of the year have been overlisted or his liabilities underlisted the closing net worth will be incorrectly computed and the commissioner's contention that there is a duty on the taxpayer to account for this apparent increase will be incorrect.

In many instances, however, the taxpayer destroys for himself the possibilities of using the points of attack listed above. Generally speaking, the Revenue Agent when he makes an examination of the taxpayer and begins to suspect that the taxpayer may have unreported income, requests the taxpayer to supply him with net worth statements as of the beginning and end of the year and to supply him with an estimate of the taxpayer's living expenses.

The taxpayer who voluntarily supplies this information to the Bureau of Internal Revenue is eliminating any possibility that he may attack these figures later. What is worse, many taxpayers, not realizing the significance of the statements they are giving, are sloppy in their preparation with the result that the taxpayers themselves put together a number of sets of figures that on their face are irreconcilable and seem to prove that there is unreported income. The unknowing taxpayer often starts out by understating his net worth at the beginning of the year, understating his living expenses during the year, and understating his net worth at the end of the year. The Revenue Agent is generally able to check only the net worth at the end of the year because that is nearest to his audit date in point of time. The Agent is generally able to increase the net worth at the end of the year with the disastrous result that the taxpayer is unable to explain the discrepancies of the other figures given to the Bureau of Internal Revenue.

It should be borne in mind that the key figure in the net worth case is the opening net worth of the taxpayer. In many instances, by the time an attorney has been retained to represent the taxpayer, he must begin by attaching those opening figures.

One last word before leaving the subject of net worth. Although the technique seems to have many frailties, it has been approved by the court many, many times. A good statement on the subject may be found in the case of *Manasse Karger*⁴ where the court stated "This method (the net worth method) may not reflect income effectively, but it seems to do so with sufficient accuracy to warrant its use here, since no records were kept from which income could be more exactly determined."⁵ The *Karger* case also points to another major line of attack. If the taxpayer can show that he keeps accurate books and records, they will very often sustain his position even though the net worth statements apparently show that there is something "fishy". The courts realize the frailties of the net worth method, but if one's books and records are not accurate he must be prepared to stand or fall on his ability to attack the net worth computations.

THE EARLIER YEAR DEFENSE

This is a variation of the technique of attacking the opening net worth method. Actually, it is available to the taxpayer who cannot account for the deposit of a large amount of cash in a single year. The basic defense consists of a contention by the taxpayer that his bank deposits represent funds earned in prior years or taken from a mattress or withdrawn from a savings bank box.

The use of this defense without detailed corroborative evidence is generally unwise. The Tax Court is a sophisticated bench. It is true that occasionally the court has accepted this explanation after detailed cross examination has failed to break down the taxpayer and where the taxpayer has introduced third party evidence and other corroborative material to sustain his contention.

4. 38 B.T.A. 209 (1939).

5. *Id.* at 214.

A good example of an instance where a taxpayer was successful in using his technique was the case of *Alfred Hollander*.⁶ The rejection of such a defense may be found in the case of *Grover G. Goe*.⁷ If a client relies on such a defense, his attorney should dig, search and hunt for every bit of corroborative evidence he can find and be prepared for a rigorous cross examination.

THE MARK-UP METHOD

Any accountant will tell you that if he is given accurate records of the purchases of a particular individual and if he has enough clients of his own in that individual's business, he will be able to reconstruct sales for you by marking up the purchases based on the average mark-up experienced by his other clients. Now, we all know that the Commissioner of Internal Revenue has available at his disposal the largest compilation of tax statistics in the world. As a result, the Bureau of Internal Revenue very often will attempt to reconstruct a taxpayer's income by corresponding with his vendors, marking up his purchases, and computing his sales. From that hypothetical figure, the Bureau of Internal Revenue will deduct the expenses actually proved by the taxpayer and thus compute his net income. Indeed, rumor hath it that the Bureau of Internal Revenue uses the gross mark-up test as an internal check when deciding which returns to audit and which returns to let by.

Obviously, the mark-up method is vulnerable to attack at several points.

One, the taxpayer may be able to prove that the purchases shown by the commissioner are inaccurate. Two, the taxpayer may be able to prove that he does not experience the so-called average mark-up. Three, if the taxpayer is able to prove that his books and records are accurately kept, the Tax Court will not generally accept any hypothetical method of reconstructing the taxpayer's income.

The best example we can think of in this respect is the actual experience of a client of ours in the Bar and Grill business. His records were sad. The Bureau of Internal Revenue reconstructed his income by taking a list of his purchases of liquor, marking them up a certain percentage based on their experience with bar and grills, and deducting the actual expenses he had proven. A substantial deficiency in tax resulted. The taxpayer took the stand and testified under oath that regardless of the fact that his books and records may have been inaccurate, he followed the practice of depositing every day in the bank his total cash receipts directly from the register. Corroborative testimony was obtained from employees of the taxpayer. Adding machine tapes of the taxpayer's bank deposits for the years in question were introduced in the evidence, backed by copies of the taxpayer's bank statements. They tallied within a few percentage points of the income reported on the taxpayer's return. The taxpayer explained that the reason he had not sustained the so-called "average mark-up" was that it was the practice engaged in his bar of giving a number of free drinks to steady customers. So, although this taxpayer's books were

6. 10 T.C.M. 617 (1951).

7. 10 T.C.M. 307 (1951).

among the worst we have ever seen, he was able to prevail. The Tax Court preferred to take his concrete evidence over and above the hypothetical technique used by the commissioner.

PROVING FRAUD BY THE ISSUE OF INDIRECT TECHNIQUES

As stated above, the burden of proof is on the Commissioner of Internal Revenue is proving "intent to defraud". It is a difficult burden for him to sustain when he uses indirect techniques such as the net worth method or the bank deposit method. But unless the taxpayer is able to come up with some kind of satisfactory defense, the commissioner's contentions will be sustained.

Bear in mind, also, that the commissioner is not held to as high a degree of proof in proving a mere deficiency. So, although the Tax Court may not feel that the commissioner has carried his burden well enough to permit him to collect the 50% fraud penalty, they may agree that the taxpayer's records are so inaccurate that the commissioner has sustained an increase in taxable income. The increase in taxable income does not require the commissioner to prove very much—it is up to the taxpayer to overcome the basic presumption that a determination by the commissioner is the correct one.

Surprisingly enough, one of the criteria unofficially used by the Tax Court depends on "the type" of taxpayer. For example, the court is more willing to accept the explanation of "money in the mattress" among uneducated, foreign people, than in the case of professional or business men.

The Tax Court is more willing to assess the fraud penalty in cases of persons engaged in illegal or semi-legal businesses. Examples of cases in the first group include *Russell C. Mauch*⁸ and *Frank Hendrick*,⁹ while instances involving illegality may be found in the case of *Cohen v. The Commissioner*,¹⁰ *M. T. Manton*¹¹ and *Harry Wyman*.¹²

TESTS

There does not seem to be a single test which permits the judiciary to decide whether or not a taxpayer has been guilty of fraud. However, in the experience of many tax practitioners and after examining many cases, it would seem that the kind of evidence most likely to convince the court of the necessity of a fraud penalty may be found among the following:

- (a) Hidden bank accounts in the names of dummies or other relatives.
- (b) Income from illegal transactions not reported on the tax return.
- (c) Refusal to keep books and records when taken into consideration with the educational and business experience of the taxpayer.

8. 35 B.T.A. 617 (1937).

9. 7 T.C.M. 364 (1948).

10. 176 F. 2d 394 (10th Cir. 1949).

11. 7 T.C.M. 937 (1949).

12. 9 T.C.M. 566 (1951).

(d) Fraudulent explanations or entries either made in the taxpayer's books and records or furnished to Revenue Agents.

(e) Substantial amounts of unreported income or substantial amounts of overstated expenses, particularly when the technique is repeated year after year.

SUMMARY

The successful defense of an income tax fraud case, whether it be a criminal case or one involving an attempt by the Bureau to assess the 50% civil fraud penalty, depends more than anything else upon the ability of the taxpayer's attorney to dig among the taxpayer's books and records. As a result, the job requires extreme coordination between the attorney, the taxpayer and the taxpayer's accountant. Since it is the taxpayer's books and records that have furnished the commissioner with the basis of the fraud charge, it is those very same books and records which can be counted on mainly to help prepare the taxpayer's defense. To overlook the vast volume of helpful material to be found in those records, is a foolhardy thing. Even though the records must be conceded to be inaccurate, they furnish a gold mine of helpful information and they should not be discarded. They should be studied carefully, entry by entry, and used to refresh the taxpayer's memory about possible defenses he has long forgotten and which he has failed to reveal to the Bureau of Internal Revenue.

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