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Constitutional Law -- Self-Incrimination -- Implied Waiver

an individual solely because *another* state agency (state-regulated primary) exists. If it is *in fact* an integral part of the state's election machinery, it is *in fact* performing a function of the state and should be governed by the provisions in the Fourteenth and Fifteenth Amendments.

CONSTITUTIONAL LAW — SELF-INCRIMINATION — IMPLIED WAIVER

Appellants, as sureties for fugitives, appealed from a contempt citation based upon their refusal to answer the court's questions concerning the whereabouts of the fugitives. *Held*, that the privilege against self-incrimination was impliedly waived by voluntary assumption of the obligations of a surety. *United States v. Field*, 193 F.2d 92 (2d Cir.), *cert. denied*, 72 Sup. Ct. 202 (1951).

The privilege against self-incrimination is recognized as a personal right. It may be waived, but only by the individual concerned.[1] Wigmore indicates that specific waiver of the privilege may be made by contract or other binding pledge, and that such waiver becomes irrevocable.[2] However, there seems to be little support for this view.[3] Several English and American courts have held such contracts against public policy and deemed the only valid waiver to be voluntary testimony in open court.

In 1930, New York investigations impelled a movement to require a specific waiver of the privilege as a prerequisite for holding certain public offices. The state constitution outlines qualifications for such offices, and the additional requirement was contested as an abridgement of the privi-

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v. Classic, 313 U.S. 299 (1941); Meyers v. Anderson, 238 U.S. 368 (1915); Yick Wo v. Hopkins, 118 U.S. 356 (1885) ("If a law fair on its face is applied with an evil eye to make illegal discrimination between persons in circumstances material to their rights, it is within the prohibition of the constitution"); Perry v. Cyphers, 186 F.2d 608 (5th Cir. 1951); Rice v. Elmore, 165 F.2d 387 (4th Cir. 1947); White v. County Democratic Executive Committee, 60 F.2d 973, 974 (5th Cir. 1932); Brown v. Baskin, 78 F. Supp. 933 (E.D.S.C. 1948); United States v. Malphurs, 46 F. Supp. 903 (S.D. Fla. 1942); James v. Marineship Corp., 25 Cal.2d 721, 155 P.2d 329 (1945) (constitutional provisions against discrimination because of color evidence a definite national policy); Buttz v. Marion Circuit Court, 225 Ind. 7, 72 N.W.2d 225 (1947); Allen v. Tobin, 155 Neb. 212, 51 N.W.2d 338 (1952); Application of Stillwell Political Club, 109 N.Y.S.2d 331 (1951); *see* County Democratic Executive Committee v. Booker, 53 S.W.2d 123, 125 (Tex. Civ. App. 1932) (dissent). But see Chapman v. King, 154 F.2d 460, 464 (5th Cir. 1946).

1. State v. Allison, 116 Mont. 352, 153 P.2d 141 (1944); McConnell v. State, 180 Okla. Crim. Rep. 688, 197 Pac. 521 (1921); Scribner v. State, 90 Okla. Crim. Rep. 465, 132 Pac. 933 (1913); 8 WIGMORE, EVIDENCE § 7a (3d ed. 1940) (waiver of rules of evidence).

2. 8 WIGMORE, EVIDENCE § 2275 (3d ed. 1940).

3. See Note, *Waiver of the Privilege Against Self-Incrimination by Public Officers*, 30 COL. L. REV. 1160 (1930).

4. State v. Rockola, 339 Ill. 474, 171 N.E. 559 (1930) (pre-trial agreement to testify, though morally binding, cannot subject defendant to contempt proceedings if he claims the privilege); *In re* Sales, 134 Cal. App. 54, 24 P.2d 916 (1933); Lee v. Read, 5 Beav. 381 (1842). *Contra:* United States v. Thomas, 42 F. Supp. 722 (D. Del. 1942).

leges and immunities of citizens.[5] The problem presented in the instant case is whether a waiver can be demanded for those public positions not described by constitution, *i.e.*, a court-appointed surety.[6]

Wigmore states that an implied contract, inferred from the relationship of the parties, is an effective waiver.[7] For example, a fiduciary principal-agent relationship sometimes requires disclosure of incriminating facts.[8] However, the majority of American decisions hold that violation of that implied duty may subject the agent to punishment, but does not force him to speak. Police officers and public officials have also been deemed *morally* bound to reveal certain self-incriminating information. If claiming the privilege is inconsistent with their assumed obligations they may forfeit their positions but remain silent.[10]

A waiver is inferred where the power to engage in an activity is a legislative grant and subject to revocation.[11] Thus, use of the highways requires compliance with accident report regulations.[12] Persons operating liquor stores, selling drugs, practicing medicine or directing corporations under state licenses must reveal records and pertinent information.[13] The legislatures can also require a waiver of the privilege when immunity from criminal prosecution is granted,[14] provided the immunity afforded is as broad

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5. U.S. CONST. Art. XIV, § 1; People v. McCormick, 261 Ill. 413, 103 N.E. 1053 (1913); People v. Williams, 145 Ill. 573, 33 N.E. 849 (1893); Evansville v. State, 118 Ind. 426, 21 N.E. 627 (1889); McCafferty v. Guyer, 59 Pa. 109 (1868); Note, *Claim of Immunity from Self-Incrimination by Public Officers*, 64 U.S.L. REV. 561 (1930); Note, *Waiver of the Privilege Against Self-Incrimination by Public Officers*, 30 COL. L. REV. 1160 (1930).

6. Obviously, the instant court would uphold such a requirement.

7. 8 WIGMORE, EVIDENCE § 2275 (3d ed. 1940).

8. Green v. Weaver, 1 Sim. 404 (1827) (implied relation of fidelity between broker and agent requires disclosure); Wilson v. United States, 221 U.S. 361 (1911), cited with approval in Davis v. United States, 328 U.S. 582, 589-590 (1946) and Shapiro v. United States, 335 U.S. 1, 17 (1947) (production of certain documents demanded on grounds that a custodian had voluntarily assumed a duty which overrode his claim of privilege); Baltimore & Ohio Ry. v. Interstate Commerce Commission, 221 U.S. 612 (1911) (officers of a corporation "by virtue of the assumption of their duties as such are bound by the corporate obligation and cannot claim a personal privilege in hostility to the requirement").

9. *Ex parte* Berman, 287 Pac. 125 (Cal. App. 1930); Hickman v. London Assur. Corp., 184 Cal. 524, 195 Pac. 45 (1920); Warren v. Holbrook, 95 Mich. 185, 54 N.W. 712 (1893); Vineland v. Maretti, 93 N.J. Eq. 513, 117 Atl. 483 (Ch. 1922).

10. Christal v. Police Comm'r of San Francisco, 33 Cal. App. 2d 564, 92 P.2d 416 (1939) (constitutional privilege may be exercised by all persons, including police officers); *In re* Lemon, 15 Cal. App.2d 82, 59 P.2d 213 (1936) (option of refusal).

11. *Ex parte* Kneedler, 243 Mo. 632, 147 S.W. 983 (1912); People v. Rosenheimer, 209 N.Y. 115, 102 N.E. 530 (1913).

12. *Ibid;* Note, *Waiver of the Privilege Against Self-Incrimination by Public Officers*, 30 COL. L. REV. 1160 (1930).

13. *Ex parte* Kneedler, 243 Mo. 632, 147 S.W. 983 (1912); Shapiro v. United States, 335 U.S. 1 (1947); United States v. Darby, 312 U.S. 100 (1941).

14. Brown v. Walker, 161 U.S. 591 (1896); *Ex parte* Cohen, 104 Cal. 524, 38 Pac. 364 (1894).

as the waiver required.[15] The courts, alone, possess no power to grant immunity in order to force discovery.[16]

The court, in the instant case, based the waiver upon an implied contractual relationship arising between appellants and the court upon the former's assumption of the obligations of sureties. It reasoned that a surety's duty to the court does not end with forfeiture of the bail fund, but continues until the defendants are delivered into the custody of the court. Upon voluntary assumption of the role, the right to claim any privilege upon relevant topics is waived. The sureties were therefore held obliged to reveal knowledge of the fugitives' whereabouts, notwithstanding that "all the precedents say that the . . . privilege . . . cannot be abolished constitutionally by advance contracts between private persons or even between a government and its crime-detecting officials."[17]

Never before have the courts so extended an implied waiver.[18] Whether the privilege itself is an archaic result of the rebellion against the tyranny of the Church and its *Oath Ex Officio*,[19] or necessary for the preservation of our American heritage of "political liberty and personal freedom,"[20] the court in the instant case has, without adequate precedent, carved another exception out of a privilege already deeply scarred.[21]

DOMESTIC RELATIONS — RIGHT OF UNEMANCIPATED MINOR TO SUE PARENT FOR PERSONAL TORT

Plaintiff, an unemancipated minor, brought an action by his next friend against a partnership of which his father was a member for injuries sustained as a result of defendants' negligence in the maintenance of their property. *Held*, that a parent in his business or vocational capacity is not immune

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15. See Apodoca v. Viramontes, 53 N.M. 513, 212 P.2d 425 (1949); People v. Lorch, 171 Misc. 469, 13 N.Y.S.2d 155 (Ct. Gen. Sess. 1939); People v. Reiss, 8 N.Y.S.2d 209, 20 N.E.2d 8 (1939).

16. Apodoca v. Viramontes, *supra* note 15.

17. *See* United States v. Field, 193 F.2d 92, 107 (2d Cir. 1951) (dissenting opinion by Frank, J.).

18. State v. Allison, 116 Mont. 352, 153 P.2d 141 (1944) (waiver of the privilege must be intelligent and informed); Powell v. Commonwealth, 167 Va. 558, 189 S.E. 433 (1937) (waiver must be made understandingly and willingly).

19. Seabury, *Address*, 18 A.B.A.J. 371 (1932) (detrimental to proper administration of justice); BENTHAM, RATIONALE OF JUDICIAL EVIDENCE, b. IX, pt. IV, c. III (Bowring's ed., vol. VII, pp. 452 ff., 1827) (He classifies reasons for the existence of the privilege into: (1) "old woman's reason" that it's "hard on a man;" (2) "fox hunter's" concept of fair sport; (3) confounding of interrogation with ancient torture; and (4) association of the privilege as against unpopular institutions such as the ecclesiastical courts.).

20. Boyd v. United States, 116 U.S. 616, 631 (1886). 8 WIGMORE, EVIDENCE § 2251 (3d ed. 1940) (though Wigmore reprints sections of Bentham's amusingly scathing criticisms, he advocates preservation of the privilege as preventive of the adverse effects of administrative reliance upon self-accusation and disclosure for conviction). See Imlay, *The Paradoxical Self-Incrimination Rule*, 6 MIAMI L.Q. 147, 148 (1952).

21. Query: Would the instant court have held the same way if the fugitives had not been alleged Communists?