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Constitutional Law - Privilege from Self-Incrimination - Application in State Courts Under Fourteenth Amendment. Malloy v. Hogan, 84 S. Ct. 1489 (1964)

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in nature.[13] While such a decision is ideologically sound, to note its practical difficulties would seem equally sound; and if the Supreme Court takes the same position as to retroactivity in *Mallory v. Hogan*[14] the reaction from the various states will indeed make the welkin ring.

Jeffery Graham

Constitutional Law—PRIVILEGE FROM SELF-INCRIMINATION—APPLICATION IN STATE COURTS UNDER THE FOURTEENTH AMENDMENT.—The petitioner, ordered to testify before a referee appointed by the Superior Court of Hartford County, refused to answer questions concerning his earlier arrest and conviction for pool-selling on the grounds that his answers might tend to incriminate him. He was adjudged in contempt by the Superior Court and imprisoned until he was willing to answer the questions.

The Superior Court denied an application for a writ of habeas corpus; and that decision was upheld by the Connecticut Supreme Court of Errors, which ruled: (1) that the privilege against self-incrimination as stated in the Fifth Amendment is not available to a witness in a state proceeding; (2) that the Fourteenth Amendment did not extend the privilege to him; (3) that the privilege under the Connecticut Constitution had not been properly invoked.[1]

On appeal to the United States Supreme Court, it was held that the Fourteenth Amendment guaranteed the petitioner the privilege stated in the Fifth Amendment against self-incrimination and that the Connecticut Supreme Court of Errors incorrectly ruled that the privilege was not properly invoked.[2]

Justice Field's 1891 dissent in *O'Niel v. Vermont*[3] is the first indication by the Supreme Court that the Fourteenth Amendment might be considered to incorporate the Bill of Rights. In 1904 *Adams v.*

13. Per curiam opinions: 372 U.S. 766-770, 773-780 (1963). See also, U.S. ex rel Craig v. Meyers, 220 F. Supp. 762 (E.D. Pa. 1963), where state courts holding that Gideon was prospective is overruled.

14. Mallory v. Hogan, 64 S.Ct. 1489 (1964), Court brought the Fifth Amendment privilege against self-incrimination within the 14th Amendment's due process clause and thereby expressly overruled Twining v. New Jersey, 211 U.S. 78 (1908).

1. Malloy v. Hogan, 150 Conn. 220, 187 A.2d 744 (1963).

2. Malloy v. Hogan, 84 S. Ct. 1489 (1964).

3. 144 U.S. at 363 (1891) "These rights, as those of citizens of the United States find their recognition and guaranty against Federal action in the Constitution of the United States and against State action in the Fourteenth Amendment." See also, Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights?, The Judicial*

New York,[4] according to some writers,[5] tentatively held that the Fifth Amendment comes under the Due Process Clause of the Fourteenth Amendment. After avoiding resolution of that issue in a number of cases[6] the Supreme Court squarely faced the question as one of first impression in *Twining v. New Jersey*[7] and ruled, under assumed facts,[8] that the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment is not made obligatory on the states by the Due Process or Privilege and Immunities Clauses of the Fourteenth Amendment but is merely a rule of evidence. Despite some feelings to the contrary,[9] the rule stated in *Twining* stood, although objected to by some jurists,[10] until the present case. The United States Supreme Court, repudiating the *Twining* view, ruled that the freedom from compulsory self-incrimination is fundamental to our accusatorial system of justice and as such is within the established standard for the application of the Fourteenth Amendment.[11] The Court then directed

Interpretation 2 STAN. L. REV. 151 (1948).

4. 192 U.S. 585 (1904).

5. Corwin: *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 MICH. L. REV. 1:1, at 202 (1930).

6. *Supra*, note 4; Consolidated Rendering Co. v. Vermont, 207 U.S. 541 (1908).

7. 211 U.S. 78 (1908).

8. *Id.* at 114. "We have assumed only for the purpose of discussion that what was done in the case at the bar, was an infringement of the privilege against self-incrimination. We do not intend, however, to lend any countenance to the truth of that assumption."

9. *Supra*, note 5 at 201. "In view of this language [Professor Corwin is referring to the words of the Twining opinion] the point should unquestionably be regarded as still an open one under the United States Constitution."

10. In Irvine v. California, 347 U.S. 128, 141, 142 (1953), Justice Black wrote in a dissenting opinion: "I think the Fourteenth Amendment makes the Fifth Amendment applicable to the States and state courts like federal courts are therefore barred from convicting a person for a crime on testimony which either federal or state officers have compelled him to give against himself. The construction I give to the Fifth and Fourteenth Amendments makes it possible for me to adhere to what we said in Ashcraft v. Tennessee, 322 U.S. 143, 155, that 'The Constitution of the United States stands as a bar against the conviction of any individual in an American court by means of a coerced confession.'"

In Rochin v. California, 342 U.S. 165, 179 (1952), Justice Douglas concurring, wrote of the freedom from compulsory self-incrimination, "If it is a requirement of Due Process for a trial in a federal courthouse it is impossible for me to say it is not a requirement of Due Process in the State courthouse."

11. Monroe v. Pope, 365 U.S. 167, 208 (1961); Synder v. Massachusetts, 291 U.S. 97, 105 (1934); Bute v. Illinois, 333 U.S. 640, 659 (1947). The standard of application of Due Process used by the Supreme Court is "a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

the trial judges "not to be skeptical" when determining whether the witness apprehends sufficient danger in answering as to warrant invoking the privilege; thereby returning to the witness the discretion he once had.[12]

This case reflects the Court's willingness to review past decisions in the light of more recent applications of the Fourteenth Amendment to sections of the Bill of Rights.[13] The seeds of the present decision are rooted in the earlier rulings of this Court condemning coerced confessions in state criminal prosecutions,[14] confessions forced by falsely aroused sympathy[15] and the use of torture to compel testimony.[16]

As a result of this case a witness in a state proceeding may act as he would in a similar federal proceeding with regard to invoking the Fifth Amendment privilege against compulsory self-incrimination. No particular formula of words must be used, all that is required is a statement of reliance on that section of the Fifth Amendment.[17] In the past all States have recognized such a privilege,[18] however, they have not all had the same standard to invoke its use; the establishment of such a standard is the fundamental change made by this decision.

The uniformity achieved by this case causes some to foresee the

12. The adopted guideline stated in U.S. v. Coffey, 198 F.2d 438, 440-441 (1952) is as follows: "In determining whether the witness really apprehends danger in answering a question, the judge cannot permit himself to be skeptical; rather he must be acutely aware that in the deviousness of crime and its detection, incrimination may be approached and achieved by obscure and unlikely lines of inquiry."

This is the subject of a dissent by Justice White, joined by Justice Stewart. They believe the rule permitting the judge rather than the witness to determine when an answer sought is incriminating must not change if the general rule to testify when subpoenaed is to remain. There is substance to a contrary view, similar to that held by the Court, Chief Justice Marshall once wrote: "The Court cannot participate with him in this judgment, because they cannot decide on the effect of his answer without knowing what it would be; and a disclosure of that fact to the judges would strip him of the privileges which the law allows, and which he claims . . . it must rest with himself who alone can tell what it would be, to answer the question or not." 1 Burr's Trials 244, 245.

13. Mapp v. Ohio, 367 U.S. 643 (1961); Gideon v. Wainwright, 372 U.S. 335 (1962).

14. Brown v. Mississippi, 297 U.S. 278 (1935); Bram v. U.S., 168 U.S. 532 (1897).

15. Spano v. New York, 360 U.S. 315, 323 (1959).

16. Haynes v. Washington, 373 U.S. 503 (1963).

17. Quinn v. U.S., 349 U.S. 155 (1955).

18. The Iowa and New Jersey Constitutions do not contain self-incrimination provisions. In Iowa, the Due Process provision has been held to include the exemption from compulsory self-incrimination. Koonck v. Cooney, 244 Iowa 153, 55 N.W.2d 269 (1952). A common law privilege had been recognized by New Jersey decisions, State v. Zdanowicz, 69 N.J.L. 619, 55 A.2d 743 (1903).

passing of our federal system,[19] yet for others it represents another step implementing the true intent of the Fourteenth Amendment.[20]

Alan MacDonald

Torts—Doctrine of Attractive Nuisance—Damages Recoverable by Trespassing Child in Absence of Enticement or Allurement.—On April 8, 1964 the Supreme Court of Alaska[1] reversed a superior court decision and held that the element of enticement or allurement need not exist before there can be liability to a child trespasser under the Doctrine of Attractive Nuisance.[2]

Five-year-old Gerald Vaska boarded the defendant's barge by way of a plank which extended to shore and was killed on deck when a heavy wooden cargo pallet fell on him. His administrator brought suit to recover damages for the death of the child. The case was tried by the Superior Court of the Fourth Judicial District and at the end of the plaintiff's case, the defendant moved for dismissal. The motion was granted on the ground that under the evidence and the law, the child's death was not a result of any negligence on the part of the defendant. The court further stated that the Attractive Nuisance Doctrine would not be applicable in this case because there was nothing about the barge and the cargo pallet that was particularly attractive or inherently dangerous to young children.

The Doctrine of Attractive Nuisance, as originally formulated, was in a state of confusion. The Supreme Court of the United States, in a much criticized opinion by Mr. Justice Holmes,[3] held that an occupier or possessor of land was liable for conditions which were highly dangerous to a trespassing child, only where there was something about the land or some object on it that enticed or allured the child into exposing himself to the dangerous condition.[4]

19. *Supra*, note 2, a dissent by Justice Harlan, joined by Justice Clark.

20. Adamson v. California, 332 U.S. 46, 68 (1946).

1. Taylor v. Alaska Rivers Nav. Corp., 391 P.2d 15 (Alaska 1964).

2. The Doctrine of Attractive Nuisance was developed by courts making the occupier or possessor of land liable for conditions which are highly dangerous to trespassing children. It was considered that because of a child's immaturity and lack of judgment, he was incapable of understanding and appreciating all of the possible dangers which he may encounter in trespassing.

3. United Zinc and Chemical Co. v. Butt, 258 U.S. 268, 275 (1921). "A child was not allowed to recover when he was not induced to trespass by the presence of a pool of poisoned water that killed him, but discovered it after he had come upon the land."

4. Keefe v. Milwaukee and St. Paul R.R., 21 Minn., 207, 18 Am. Rep. 393 (1875);