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Self Incrimination and the Waiver Thereof

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Comment and Casenotes

SELF INCRIMINATION AND THE WAIVER THEREOF

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WAIVER BY ORDINARY WITNESS

The overwhelming weight of the decisions relating to waiver by an ordinary witness of his privilege against incriminating himself is that once he discloses a fact or transaction without invoking his privilege he waives that privilege with respect to the details and particulars of such fact or transaction.

The mere mention by a witness of any act or happening while on the stand waives the privilege as to all the elements and items which are involved. He may be required to enlighten the court as to all the factors of the affair as well as the *minutiae* of the incident.

The usual rule is that ". . . If two are related facts, part of a whole fact forming a single relevant topic, then his waiver as to a part is a waiver as to remaining parts; because the privilege exists for the sake of the criminating fact as a whole."[1]

Typical of the statements setting out the majority rule is that of the Supreme Court of the State of Washington; a witness who voluntarily answers an incriminating question on direct examination without claiming his privilege cannot refuse to answer on cross-examination questions germane to his direct examination.[2] The majority's attitude is that the waiver is complete and total.

The Maryland law on the point is confused because of the early case of *Roddy v. Finnegan.*[3] This was a suit in trespass *vi et armis* for assault and battery. One Curran sold a load of hay to Finnegan which was delivered to the street in front of Finnegan's stable. Finnegan, in the presence of Curran, gave directions to the driver to put the hay in a window opening into the stable. Following orders, Curran's driver drove the team on the pavement. Roddy, a police officer of Baltimore, came on the scene and made inquiry as to why the wagon and team were on the pavement in violation of the city ordinance. Finnegan was then

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[1] 8 WIGMORE ON EVIDENCE (3rd Ed. 1940) Sec. 2276 (b) (1).

[2] State v. Morgan, 151 Wash. 300, 275 P. 717 (1929).

[3] 43 Md. 490 (1876).

arrested for the violation. This action was subsequently brought for illegal arrest.

Finnegan appeared as a witness for himself and gave his version of the occurrence. On cross-examination he was asked: "When you pointed out to the witness Curran the window through which you wished the hay put into the stable, and told him to put it in at that window, did you or did you not intend that the wagon and horses should be driven on the pavement, for the purpose of putting in the hay?"[4] Upon proper objection the lower court ruled the question inadmissible.

In reversing the lower court, the Court of Appeals said, "The witness ordinarily has the privilege of declining to answer a question that might subject him to criminal prosecution; but this he can waive. . . . Where he is both party, and witness for himself, he must be held on his cross-examination as waiving the privilege, as to any matter which he has given testimony-in-chief. Having testified to a part of the transaction in which he was concerned, he is bound to state the whole."[5]

This case is a further example of the majority doctrine of complete waiver. But nine years later the Court of Appeals completely ignored the principles enunciated in *Roddy v. Finnegan*,[6] when it decided the case of *Chesapeake Club v. State*.[7]

The defendant *Club* was indicted and found guilty of violating the Local Option Law of Anne Arundel County by unlawfully having in its possession and selling spirituous liquors. Witness Taylor, a member of the Club, stated without objection that he had got whiskey and beer at the Club. The State asked if he had ever seen any liquor there. The witness objected to answering, claiming his answer might incriminate him, but the trial Court required him to answer.

Chief Judge Alvey speaking for a divided court said the witness was entitled to insist upon his privilege of being exempt from making any disclosure that might be used for his crimination. "Formerly it was thought that if a witness chose to reply in part he might be compelled to answer everything relating to the transaction. But that doctrine has been solemnly overruled, and it is now finally settled in the English courts that after a witness has been sworn, he may claim his protection at any stage of the

[4] *Ibid.*, 500.
[5] *Ibid.*, 502.
[6] *Supra*, n. 3.
[7] 63 Md. 446 (1885).

inquiry, and upon his so doing he cannot be compelled to answer any additional question that would tend to criminate him."[8] For this proposition the Court cited *Regina v. Garbett.*[9] No mention was made of *Roddy v. Finnegan.* No other authority than this lone English case was put forth to bolster the view that the majority doctrine "has been solemnly overruled". By this slight reference to the above mentioned case, Maryland has joined England to form the only two jurisdictions which allow the claiming of the privilege at any stage of the inquiry at the complete whim of the witness.

Regina v. Garbett involved the appearance of Garbett as a witness in a civil action between Bragdon and Booth to which Garbett was not a party. He gave evidence favorable to Booth, the defendant. In the course of his testimony, he disclosed facts which tended to show that he was involved in a forgery. The court then compelled him over his objection, on cross-examination by counsel for the plaintiff, to answer the direct question whether he had committed the forgery. Later, he was put on trial for that crime and in that criminal trial the question arose as to the admissibility against him of his compelled answer in the earlier civil suit. The Court said, "It made no difference in the right of the witness to protection that he had chosen to answer in part. He was entitled to it at whatever stage of the inquiry he chose to claim it, and that no answer forced from him by the presiding judge (after such claim) could be given in evidence against him."[10]

The English rule as laid down in the *Garbett* case has not been changed. The present law, there, is that if the witness "chooses to answer part of an inquiry, it does not waive his right to object to answer subsequent questions."[11]

Although the *Roddy* case was a civil action where the witness in question was a party to the suit and the *Chesapeake Club* case was a criminal prosecution involving an ordinary witness, it is not possible to distinguish the two cases on either basis. The Court made itself much too clear in the latter case to permit any hairline distinctions to be drawn. The fact remains that Maryland is the only American jurisdiction which allows a witness after he has started to testify about the subject matter to claim protection of self-incrimination at any stage of the inquiry.

[8] *Ibid.*, 457.
[9] 2 C. & K. 474, 175 Eng. Repr. 196 (1847).
[10] *Ibid.*, 175 Eng. Repr. 205.
[11] HALSBURY, LAWS OF ENGLAND (2nd Ed. 1934) 804.

Dean Wigmore when he compiled his model code of evidence suggested the following to cover waiver by ordinary witnesses of the privilege of self-incrimination. "An ordinary witness, by testifying, does not waive the privilege; except that if he testifies to any part of a matter known to him to be criminating, he may not afterwards during that trial claim the privilege for any other part of the same matter."[12]

Reasons for Complete Waiver Doctrine

The aim of the various rules of evidence promulgated through the years is to promote justice through the finding of the truth. In the interest of justice it would be manifestly unfair to allow a witness who has volunteered certain information to the court which he was not forced to reveal to withhold the particulars of the transaction. The witness was under no compulsion to disclose facts which tend to incriminate him. Once he does divulge such information, his privilege is waived and all details must be given.

If the complete waiver doctrine were not applied, it would be possible by collusion between the witness and the party for whom he was testifying to be certain that only such evidence which favored their side of the case would be revealed. By the strategic claiming of the privilege by the witness, under the guise of invoking constitutional rights, the opposing party would not be allowed the full cross-examination to which he is entitled.

Common sense insists that once a witness discloses a part of a doubtful transaction with the inherent possibilities of incrimination, it is reasonable to believe that he realizes that a full revelation of all of the facts will more probably lead to a full incrimination. The courts must assume that the witness has waived his privilege in its entirety.

How Waiver Is Exercised

When a witness answers a question which is put to him by counsel without suggesting to the court that he might be incriminating himself, the privilege is waived in its entirety. The recital of one fact which suggests incrimination will waive the privilege concerning all other facts revolving about the same set of circumstances.

When a witness voluntarily offers to testify fully about the matter at issue after he has been informed of his consti-

[12] Wigmore, Code of Evidence (3rd Ed. 1942) 2375.

tutional rights and where he is acting under advice of counsel, he has waived the privilege.

The privilege is waived by the answering of questions without objection and without attempts being made to invoke any constitutional right.[13]

WHO DECIDES IF PRIVILEGE CAN BE EXERCISED

Final decision as to whether the privilege can be exercised lies with the trial judge. It is not sufficient that the witness in his own mind think his answer might incriminate him. The court must be able to perceive that there is a reasonable ground for refusal. If it appears to the trial judge that the answer would not have the tendency claimed by the witness, he can be compelled to answer.

"The mere statement of the witness on oath that he believes that the answer to the question asked will tend to criminate him will not suffice to protect him from answering, if from all the circumstances surrounding the case the court is satisfied that the answer will have no such effect as that claimed by the witness. It is for the court to decide whether the privilege is well and bona fide claimed or not. . . ."[14]

As Mr. Chief Justice Marshall framed the proposition, "When a question is propounded it belongs to the court to consider and to decide whether any direct answer to it can implicate the witness."[15]

The statement by the witness that the answer to be made is incriminating is not conclusive since it is within the province of the trial judge to make the final decision.

WHO CAN CLAIM PRIVILEGE

"This is a personal privilege of the witness, and must be claimed by him upon oath . . . and consequently neither the party to the cause nor the counsel engaged will be permitted to make the objection."[16]

WAIVER BY ACCUSED

In the case of *State v. Allen*,[17] Allen was convicted of assault with intent to rape. The accused was required while on the witness stand in his own behalf and under cross-examination to try on a hat which had been found

[13] WHARTON, CRIMINAL EVIDENCE (11th Ed. 1935) 1981 *et seq.*
[14] *Supra*, n. 7, 456.
[15] U. S. v. Burr, Fed. Case No. 14, 692e (1807), 25 Fed. Cas. 38.
[16] *Supra*, n. 7, 456.
[17] 183 Md. 603, 39 A. 2d 820 (1944).

at the scene of the crime and which, concededly, had been worn by the culprit.

The Court, in reversing the lower court agreed that when the accused voluntarily takes the stand in his own behalf he waives the privilege of self-incrimination concerning any matter pertinent to the issue on trial regardless of the extent of the direct examination, and cited *Guy v. State*.[18] It then said that:

> "The one limitation is that he, himself, may not be compelled to furnish or produce evidence which would tend to connect him with the crime."[19]

No authorities were referred to.

It is the last quotation which will now be examined in the light of prior Maryland and foreign decisions.

Weight of Authority

Almost all jurisdictions have changed the common law rule which forbade the accused to testify in his own behalf. The applicable Maryland code section states that, "In the trial of all indictments . . . against persons charged with the commission of crimes and offenses . . . in any court in this State . . . the person so charged shall at his own request, but not otherwise, be deemed a competent witness; but the neglect or refusal of any such person to testify shall not create any presumption against him."[20]

In allowing the accused to take the stand under authority of such Code sections as above, there has developed through a long line of decisions the effect of such action by the traverser. It waives completely his constitutional privilege against giving self-incriminating evidence.

"When the accused voluntarily offers himself as a witness, the waiver of the witness's constitutional privilege is complete, and when he takes the stand, his privilege is waived in its entirety. He may accordingly, be asked questions on cross-examination which tend to incriminate him, so long as they are material and relevant to the issues . . ."[21]

There was never any doubt that Maryland was firmly entrenched behind the majority doctrine until the case of *State v. Allen. Guy v. State*[22] has been cited as majority authority since its initial delivery.

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[18] 90 Md. 29, 44 A. 997 (1899).
[19] *Supra*, n. 17, 612.
[20] Md. Code (1939) Art. 35, Sec. 4.
[21] Wharton, Criminal Evidence (11th Ed. 1935) 1984.
[22] *Supra*, n. 18.

In the latter case the defendant was indicted for unlawfully selling intoxicating liquors contrary to the Local Option law of Harford County. The accused took the stand, of his own motion, and testified in his own behalf. Upon cross-examination by the State, he was asked if he had a United States license to sell liquors. The defendant objected, claiming he might incriminate himself. The lower court overruled the objection and required the answer. In affirming the court below, the Court of Appeals said, "And it would seem but right that if a person so charged voluntarily becomes a witness in his own behalf, he should be held to have waived the privilege and protection which would otherwise have been afforded him . . ."[23] The Court cited with approval *Commonwealth v. Nichols*,[24] to the effect that when the accused takes the stand he can be "cross-examined upon all facts relevant and material to that issue, and cannot refuse to testify to any facts which would be competent evidence in the case if proved by other witnesses."[25] The accused may be cross-examined concerning any matter pertinent to the issue on trial, regardless of the extent of the direct examination.[25]

These are unequivocal words, the plain meaning of which force a complete and total waiver instantly the accused takes the stand. There is no room in the *Guy* case to allow for any such partial waiver as was allowed in the *Allen* case.

Under similar factual circumstances, the *Guy* case has been approved on two separate occasions by the Court of Appeals.[26] Neither case sought to narrow the majority doctrine in any way.

A situation factually similar to the *Allen* case was that of *Smith v. Commonwealth*.[27] The defendant was convicted of malicious cutting with intent to kill. While she was testifying as a witness in her own behalf, and after she had stated she cut the prosecuting witness, the State's Attorney presented a knife and asked her to identify it. She did so and the knife was introduced in evidence.

On appeal the Court rejected the contention that the lower court had erred in permitting the introduction of the knife into evidence. "Besides having voluntarily testified that she cut Mary Braxton with a knife to protect

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[23] *Ibid.*, 33.
[24] 114 Mass. 285, 19 Am. Rep. 346 (1873).
[25] *Ibid.*, 287.
[26] Lawrence v. The State, 103 Md. 17, 30, 63 A. 96 (1906); Lansman v. State, 142 Md. 398, 402, 121 A. 159 (1923).
[27] 136 Va. 773, 118 S. E. 107 (1923).

herself, she waived her right to object to questions concerning the identity of the knife or its introduction in evidence."[28]

The sound rule accepted in most states is that "an accused in a criminal case, by testifying at all, waives the privilege . . . as to all matters relevant to any part of the issues, but not as to facts merely affecting his credibility as a witness."[29]

There was no problem as to the credibility of the accused in the *Allen* case. The forcible trying on of the hat was a matter relevant to the issue. The moment the defendant, of his own motion, was sworn as a witness, there was no possibility of refusal to answer any question or do any reasonable act which had a direct bearing upon the trial. He had waived completely his privilege of self-incrimination.

As Mr. Justice Stone, later Chief Justice of the Supreme Court said, "The safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf and not for those who do. There is a sound policy in requiring the accused who offers himself as a witness to do so without reservation, as does any other witness."[30]

Reason for Complete Waiver Doctrine

There is ample logic in the majority doctrine which requires that when the accused takes the stand his waiver of the privilege must be complete. The defendant has been advised of the privilege by either his counsel or by the court and knows that he can not be forced to testify against his will. He is cognizant of the fact that the privilege has protected him from answering embarrassing questions. Any question which he answers relating to the issue may be incriminating. Therefore, when he does testify as to an incriminating fact, his voluntary offer to do so must be assumed to be a waiver as to all other relevant facts relating to the issue.

There is a definite distinction between the position of a witness when he initially takes the stand and that of the accused when he is first sworn. The ordinary witness does not know what connection there is between the first question asked him and any subsequent question that might be incriminating. So that when such a question is

[28] *Ibid.*, 778, 118 S. E. 109.
[29] Wigmore, Code of Evidence (3rd Ed. 1942) Sec. 2376.
[30] Raffel v. U. S., 271 U. S. 494 (1926).

asked he will be excused from answering it if it tends to subject him to criminal prosecution. But the traverser, when he takes the stand, knows that there must always be a connection between the first question and subsequent ones, all of which may incriminate him.

Therefore, when the accused testifies, he has signified his waiver as to all facts relating to the issue by his initial act of taking the stand.[31]

MINORITY VIEW

There is an extreme view exemplified by one or two decisions which allow the privilege to be claimed by the accused at any time after examination has commenced. This conception virtually concedes no possibility of waiver even though it is the defendant who voluntarily takes the stand.

This opinion originated with Judge Cooley of Michigan, distinguished author of many legal treatises. Speaking of the accused taking the stand in his own behalf, he says, "and if he does testify, he is at liberty to stop at any point he chooses, and it must be left to the jury to give a statement which he declines to make a full one, such weight as, under the circumstances, they think it entitled to. . . ."[32] This novel approach was called to that author's attention while he was in the process of revising the first edition of the work in question, but he refused to make any change in the phraseology in spite of the fact that there were no authorities upon which the section was based.[33]

Judge Cooley in a *dictum* applied his rule in *People v. Mead*,[34] and it was this case upon which the Court in the *Allen* case relied in part.

In spite of the position of leadership in which Judge Cooley was held by the courts of his own state, it was necessary for the Supreme Court of Michigan to hold conversely to him. "Contrary to the views of that eminent author and judge, Mr. Justice Cooley, it seems to have been universally held that the defendant, by taking the stand in his own behalf, thereby waives, to a certain extent at least, his constitutional right to refuse to testify."[35] The court allowed full cross-examination of the defendant on the same basis as other witnesses.

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[31] 8 WIGMORE, EVIDENCE (3rd Ed. 1942) 2296 (b) (2).
[32] COOLEY, CONSTITUTIONAL LIMITATIONS (8th Ed. 1927) 660.
[33] 8 WIGMORE, EVIDENCE (3rd Ed. 1942) 2296 (b) (2) (f).
[34] 50 Mich. 228, 15 N. W. 95 (1883).
[35] People v. Dupounce, 133 Mich. 1, 94 N. W. 388 (1903).

By *dictum* the Georgia Supreme Court in an early case[36] was aligned with the minority view. Speaking of self-incrimination after the defendant has taken the stand in his own behalf that court said, "The defendant cannot even waive this protection; for the law is, in this regard, his guardian."[37] But a later Georgia decision in discussing the above said, "This case does not require us to go to the extreme length laid down by that last cited, and it is proper to say that, without qualification, we cannot give our sanction to the doctrine there announced. . . ."[38]

Dean Wigmore refers to Georgia as the only jurisdiction which adheres to the minority view, citing *Higdon v. Heard*,[39] but apparently the later Georgia decision has now placed her with the majority on this point.[40]

The *Allen* case placed much credence in the decision of *Ward v. State*[41] which was considered "a well reasoned case directly on point". In a trial for illegal manufacture of intoxicating liquor, one of the defendants became a witness in his own behalf. The State's Attorney, on cross-examination, handed the witness a coat found by police officers near where the alleged crime was committed and asked him to put it on. Counsel for the defendant objected, but the court required the defendant to put on the coat in the presence of the jury.

In holding that the lower court's action was prejudicial to the defendant, the court said, "The protection offered by the constitutional provision against self-incrimination is peculiarly a protection to witnesses. In this case the defendant at the time of being required to put on the coat was a witness, and the demonstration of the fit of the coat on the body of the defendant was required to be made in the presence of the jury during the progress of the trial . . . we think a clear distinction should be made between the defendant as such and between the defendant as a witness. The prohibition was intended for the protection of witnesess, and as such should receive a more liberal construction in favor of witnesses."[42]

The Oklahoma court made no mention of the ordinary rule that the accused waives the privilege when he testifies for himself. The basis of the court's reasoning rests on

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[36] Higdon v. Heard, 14 Ga. 255 (1853).
[37] *Ibid.*, 258.
[38] Gravett v. The State of Georgia, 74 Ga. 191, 200 (1884).
[39] *Supra*, n. 36.
[40] 8 WIGMORE, EVIDENCE (3rd Ed. 1940) 2275.
[41] 27 Okla. Cr. 362, 228 P. 498 (1924).
[42] *Ibid.*, 499.

the obvious fallacy that when the defendant takes the stand he is in every respect to be treated as an ordinary witness. It is well recognized that such a distinction must be made when applying the principles of waiver to the privilege of self-incrimination. When the defendant takes the stand, he is sworn not only as a witness but also as the accused. All that this oath implies immediately follows. He is in no respect to be treated merely as an ordinary witness.

Although *Ward v. State* has not been specifically overruled in Oklahoma, late decisions from that jurisdiction place it with the majority.[43] Speaking of the cross-examination of the defendant on the stand, the Oklahoma court says, "His cross-examination is not confined to a mere categorical review of the matters stated in the direct examination. He may be asked questions irrelevant and collateral to the issue for the purpose of testing his memory, affecting his credibility and the weight of his testimony."[44] This statement places the court in line with the decisions on the point and extends a considerable shadow over the value of the *Ward* case.

CONCLUSION

When the traverser takes the stand to testify in his own behalf, the overwhelming weight of authority holds that after he is sworn the privilege against self-incrimination has been waived in its entirety. Historically the Maryland decisions have agreed with the majority doctrine.

There is a very slight body of opinion which allows the accused to claim his privilege even after he has begun to testify. These few cases are almost completely *dictum.* They have been thoroughly discredited in the jurisdictions of their origin. It is upon these weak decisions which the Court of Appeals chose to base the *Allen* case.

Once a defendant in a criminal action voluntarily testifies upon the merits before the trier of fact, he has no privilege to refuse to disclose any matter relevant to any issue in this action.[45]

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[43] Murphy v. State, 112 P. 2d 438 (Okla. Cr. App. 1941); Williamson v. State, 77 P. (2d) 1193 (Okla. Cr. App. 1938).

[44] Murphy v. State, *supra*, n. 43.

[45] AMERICAN LAW INSTITUTE, MODEL CODE OF EVIDENCE (1942) Rule 208.