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## CRIMINAL LAW COMMENTS AND ABSTRACTS

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### SELF-INCRIMINATION AND THE TWO SOVEREIGNTIES RULE

JIM THOMPSON

"The public has a right to every man's evidence," said Lord Chancellor Hardwicke over 200 years ago. This power of the state to obtain evidence, by compulsory process if necessary, is the very foundation of every criminal prosecution. It has, however, been subject to various limitations developed through the years by the common and statutory law which recognize certain "privileges" against the compulsion of testimony, e.g., the attorney-client and physician-patient privileges. Courts and legal scholars have long debated whether legitimate policy reasons exist to justify the handicaps they place in the way of full and fair disclosure of the truth in court.<sup>1</sup> No privilege, however, has provoked the periodic examinations, the "agonizing reappraisals" and calls for strengthening, modifying or abolishing the doctrine, especially in recent times, as has the privilege against self-incrimination.<sup>2</sup>

This power to withhold otherwise relevant and

often vital evidence has not gone unchallenged by the state. The practice of granting immunity from prosecution as a means of obtaining evidence which ordinarily would be withheld under a claim of protection against self-incrimination is nearly as old as the privilege itself.<sup>3</sup> As Wigmore has pointed out,<sup>4</sup> since it is the state which imposes a penalty as the consequence of committing a criminal act it is within the power of the state to take away the penalty by law. If the authorities decide that obtaining the testimony of a witness in a particular case is more important than prosecuting him for any offense he might have committed they may grant him immunity from prosecution and thereby obtain his testimony despite his constitutional privilege against self-incrimination.<sup>5</sup> The im-

<sup>3</sup> A good discussion of immunity statutes and their history may be found in Rogge, *Compelling The Testimony Of Political Deviants*, 55 MICH. L. REV. 163, 375 (1956-1957).

<sup>4</sup> WIGMORE *supra*, note 1 at § 2281.

<sup>5</sup> "Any evidence that he may give under such a statutory direction will not be against himself, for the reason that, by the very act of giving the evidence, he becomes exempted from any prosecution or punishment for the offense respecting which his evidence is given. In such a case he is not compelled to give evidence against himself in a criminal case, for the reason that the legislature has declared that there can be no criminal case against him which the evidence which he gives may tend to establish." *Brown v. Walker*, 161 U.S. 591, 604 (1896).

<sup>1</sup> WIGMORE, EVIDENCE § 2251 (3rd Ed. 1940), MCCORMICK, EVIDENCE (1954).

<sup>2</sup> Inbau, *Should We Abolish the Constitutional Privilege Against Self-Incrimination?*, 45 J. Crim. L., C. & P. S., 180 (1954) and GRISWOLD, THE FIFTH AMENDMENT TODAY (1955).

Griswold says the fifth amendment has come to our consciousness in the past few years and while it has troubled many members of the public, it is "one of the great landmarks in man's struggle to make himself civilized."

munity granted must, of course, be fully consonant with the protection he obtains when he refuses to testify under a claim of privilege.<sup>6</sup>

The fifth amendment protection against self-incrimination was frequently claimed by witnesses appearing in the many investigations into Communism in the United States which were conducted by Congress in the early 1950's: Congress responded to this mass use, and possible misuse, of a constitutional privilege by those who would overthrow the government which guarantees it by passing the Compulsory Testimony Act of 1954.<sup>7</sup> The Act offered immunity to persons testifying before a congressional committee, the federal courts, and grand juries in cases involving the national security or defense of the United States.

Since the language of the Act was similar to that found in an immunity statute upheld by the Supreme Court in a case some 60 years earlier it was generally assumed to be valid.<sup>8</sup> Any doubts on this score were dispelled when the Supreme Court, in the first case to arise under the Act, and concededly a test of it, held the Act constitutional. That case was *Ullmann v. United States*,<sup>9</sup> decided in 1956.

Ullmann, the petitioner, had appeared before a federal grand jury investigating wartime espionage and conspiracy to commit espionage. Asked about his and others' connections with, and membership in, the Communist Party, he refused to answer, claiming his fifth amendment privilege against self incrimination. He was offered immunity under the Compulsory Testimony Act but still declined to answer the questions and he was sentenced for contempt of court. His appeal to the Supreme Court alleged the unconstitutionality of the Act on a variety of grounds.

Most of the problems raised by the *Ullmann* case have been considered elsewhere.<sup>10</sup> One, however, presents a question having a significance beyond the immediate application of the Act. Did the Supreme Court, by its decision in the *Ullmann* case, reopen to further examination the supposedly

well-settled federal rule that a witness in a *federal* proceeding may not invoke the fifth amendment privilege against self-incrimination when the prosecution he fears is under *state* criminal law?

Ullmann contended that the immunity from prosecution given by the Act did not extend to possible incrimination under the laws of a state. If, in the course of his testimony concerning acts against federal law, the witness should be forced to mention acts which were crimes against state law he would be exposed to possible state prosecution. The fifth amendment required that he not be forced to incriminate himself under *either* federal or state law; he argued, the Act was deficient in this respect, and was, therefore unconstitutional. This contention was also raised in the District Court.<sup>11</sup> "The short answer to both questions," said that court, "is *Murdock v. United States*."

#### *Immunity From State Prosecution—A Retreat From The Rule of Murdock?*

The *Murdock*<sup>12</sup> case involved the question of whether a witness testifying in a *federal* proceeding, and with regard to a *federal* matter, could invoke his fifth amendment privilege against self-incrimination and refuse to answer a question on the ground that his answer might incriminate him under the laws of another jurisdiction. In that case the witness refused to disclose the names of persons to whom he had made payments which he subsequently deducted on his income tax return. A truthful answer would have disclosed that he had made the payments to state law enforcement officials as bribes in order that he might run his gambling businesses unhindered. The Court held that he must answer the questions because a federal investigation could not be prevented by matters depending on state law and the fifth amendment protected only against disclosures which might lead to prosecution by the federal government.

This is the "two sovereignties" rule. It embodies a conception of two separate and distinct sovereigns, the federal government and a state government, "acting separately and independently of each other, within their respective spheres."<sup>13</sup> Under this theory a witness could not invoke the fifth amendment in a Federal court sitting in Illinois, for example, because his answer to a question might incriminate him under the criminal laws of that state, and even though he would

<sup>6</sup> The Supreme Court in *Counselman v. Hitchcock*, 142 U.S. 547, 586 (1892) laid down the test for a valid immunity statute. It must be, the Court held, "a complete protection from all the perils against which the constitutional prohibition was designed to guard...."

<sup>7</sup> 68 STAT. 745 (1954), 18 U. S. C. 3486 (Supp. II 1954).

<sup>8</sup> The earlier case is *Brown v. Walker*, 161 U.S. 591 (1896).

<sup>9</sup> 350 U.S. 422 (1956).

<sup>10</sup> Rogge, *supra* note 3 and Note, *Immunity From Self-Incrimination Under The Federal Compulsory Testimony Act*, 46 J. Crim. L., C. & P. S. 673 (1956).

<sup>11</sup> 128 F. Supp. 617 (1955).

<sup>12</sup> *United States v. Murdock*, 284 U.S. 141 (1931).

<sup>13</sup> *Feldman v. United States*, 322 U.S. 487 (1943).

certainly be subject to the jurisdiction of Illinois and the danger of a subsequent state prosecution might be very real. *The amendment protects only against disclosures which might incriminate a witness under the laws of the sovereign—the federal government—on which it is binding.* One sovereign takes no notice of the operation of the criminal laws of another and is not dissuaded from action by matters depending upon them.

Since the "two sovereignties" rule of the *Murdock* case applies to the facts of the *Ullmann* case as well, the contention of Ullmann that the immunity provisions of the Act did not extend to state prosecutions was groundless, for under the *Murdock* rule the immunity *did not have to* extend that far.<sup>14</sup> There would, therefore, be no need to reach the question of whether the federal government *had the power* to bar state prosecutions for violations of state criminal law—an admittedly grave constitutional question. This was the government's contention in *Ullmann*.<sup>15</sup>

Though the issue of the applicability of the "two sovereignties" rule was squarely raised by both Ullmann and the government, and though the district court considered this the "short answer" to the whole problem, the Supreme Court did not mention the *Murdock* case, did not discuss the "two sovereignties" rule, but went instead to the second question and held that the federal government indeed had the power to bar state prosecutions for offenses against the state which were disclosed by the witness while he was under the compulsion of a federal immunity statute. This was so, the Court declared, because Congress had the power to provide for the national defense. Federal immunity was a "necessary and proper" method of carrying that object into effect and was, therefore, the "supreme law of the land" by which state courts were bound.

Sound though this holding may be, it cannot be denied that it poses something of a threat to the independence of the state judiciary in matters heretofore considered to be within their exclusive control. The federal government has supreme power in many areas other than national defense. Interstate commerce, bankruptcies, naturalization,

the postal service, foreign affairs, and regulation of U. S. currency may be mentioned. Immunity laws may now be enacted to deal with the problems arising under these powers and their prohibition of prosecution can constitutionally extend to the state courts.<sup>16</sup>

No Supreme Court Justice has been more unwilling to decide constitutional questions when not necessary to the decision of a case than Justice Frankfurter who wrote the opinion of the Court in *Ullmann*:

"In reaching out for a constitutional adjudication, especially one of such moment, when a statutory solution avoiding it lay ready at hand, the Court . . . disregard(s) its constantly professed principle for the proper approach toward congressional legislation."<sup>17</sup>

In the light of these conclusions, why did the Court ignore the *Murdock* case when that decision was clearly applicable to the facts in *Ullmann*? Why did they decide a constitutional issue of some moment when the mention of a case name would have sufficed? It is submitted that the *Murdock* case was wrongly decided and, because of the Supreme Court's avoidance of the issue in *Ullmann*, the principle which *Murdock* laid down is now open to question.<sup>18</sup> An analysis of the cases

<sup>16</sup> The problem is discussed in legislation, *The Federal Immunity Statute And Its Potential For Protecting The Witness Against State Prosecution*, 16 U. PITT. L. REV. 61 (1954).

<sup>17</sup> *Shapiro v. United States*, 335 U.S. 1, 37 (1948) (dissenting opinion). And see *Ashwander v. TVA*, 297 U.S. 288, 341 (1936) (concurring opinion).

<sup>18</sup> In *Tedesco v. United States*, 255 F.2d 35 (1958), the appellant advanced the position that "the impact of recent Supreme Court decisions has eroded the *Murdock* doctrine," citing the *Ullmann* case. He argued "the failure of the Supreme Court specifically to affirm the *Murdock* doctrine in the *Ullmann* case. He argues that the *Murdock* opinion was an easy answer to the issue before the highest tribunal and would have made it unnecessary to pass upon the constitutional power of the Congress to grant immunity from prosecution in state courts under state law."

The Sixth Circuit refused to accept this argument, concluding that Congress had a right to extend protection to the witness beyond the minimum constitutional requirements. If Congress undertook to do so, the court reasoned, the Supreme Court in *Ullmann* did not reach the question of whether it *had to* when it considered the constitutionality of the grant of immunity in state courts.

This view ignores the fact that at least one house of Congress, the Senate, was extremely uncertain as to whether it should, could, or did bar state prosecutions. See 99 CONG. REC. 4742-4743, 8340-8357 (1953).

"I think it is important . . . that we make clear that this bill, at least, in the opinion of the Judiciary Committee and of its able counsel, would not grant to a witness immunity from prosecution in a state court. . . .

<sup>14</sup> "The principle established is that full and complete immunity against prosecution by the government compelling the witness to testify is equivalent to the protection furnished by the rule against compulsory self-incrimination." *United States v. Murdock*, 284 U.S. 141, 149 (1931).

<sup>15</sup> Brief for Appellees, pp. 31-33, *Ullmann v. United States*, 350 U.S. 422 (1956).

which led to the adoption of the *Murdock* rule is in order.

At the outset it must be understood that certain general principles govern the plea of self-incrimination. The decision of whether or not an answer to a particular question will incriminate a witness is initially one for the court. If it decides that it is possible for an answer to incriminate, depending upon what the answer is, it is for the witness, and the witness alone, to then decide whether he will answer the question.<sup>19</sup> A second requirement is that the danger of self-incrimination be a "real and appreciable" one. The search for truth by the courts cannot be blocked by a remote and unsubstantial fear of incrimination.<sup>20</sup>

The first American case to raise the question of whether the fifth amendment allows a witness in a federal proceeding to refuse to answer a question which might incriminate him under the laws of another jurisdiction was *United States v. Saline Bank*.<sup>21</sup> In that case the United States sued the stockholders of the bank, which was unchartered, and hence illegal under the laws of Virginia, to recover a sum of money due the U. S. treasury. The stockholders replied that any answers they

might give in the case would incriminate them under the laws of Virginia. Chief Justice Marshall upheld this contention.<sup>22</sup>

The question was not raised again until *Brown v. Walker*.<sup>23</sup> The witness in that case, the first case to uphold a federal immunity statute and the leading case relied upon for the decision in *Ullmann*, appeared before a federal grand jury investigating violations of the Interstate Commerce Act. He refused, although under a grant of immunity similar to that in *Ullmann*, to answer any questions. One reason put forward for his refusal was that the immunity afforded him did not extend to prosecutions under state law. The Court held that the witness's immunity did extend to possible state prosecutions<sup>24</sup> and added, in *dictum*, that the witness's fears of state incrimination were groundless.<sup>25</sup>

<sup>22</sup> This case has been misinterpreted as one in which the federal court was merely administering state law and the question of incrimination under the laws of another jurisdiction was not involved. Professor Corwin, Corwin, *The Supreme Court's Construction Of The Self-Incrimination Clause*, 29 MICH. L. REV. 191, 197, n. 103 (1930) erred in this respect. And the case which is perhaps the turning point in the law on this subject, *Hale v. Henkel*, 201 U.S. 43 (1906), similarly erred. "The case of *United States v. Saline Bank*, 1 Pet. 100, is not in conflict with this. . . . It is sufficient to say that the prosecution was under a state law which imposed the penalty, and that the Federal court was simply administering the state law, and no question arose as to a prosecution under another jurisdiction."

A careful reading of the opinion in *Saline Bank* shows that this was no prosecution. It was rather, a bill in equity for discovery and relief filed by a United States District Attorney on behalf of the United States Treasury to charge the stockholders of the bank with liability for funds owed the Treasury by the bank. Under the laws of Virginia, an unchartered bank like *Saline* was illegal, and the Attorney General of Virginia could have brought suit in a state court to hold the capital stock of the bank in trust for the commonwealth. The Court in *Hale* assumed that the proceeding in the federal court was one which could have been brought under the law of Virginia outlined above. It was not, and the case must be taken as authority for the proposition that a witness in a federal proceeding is protected by the fifth amendment from incriminating himself under the laws of another jurisdiction.

<sup>23</sup> 161 U.S. 591 (1896).

<sup>24</sup> The actual holding of *Brown v. Walker* on this point has been the subject of much confusion. Compare Justice Frankfurter's statement on this point in *Ullmann*, "We have already, in the name of the Commerce Clause, upheld a similar restriction on state court jurisdiction, *Brown v. Walker* . . ." 350 U.S. at 436, with his dissent in *United States v. Kahriger*, 345 U.S. 22, 39 (1953) where he said that *Brown v. Walker* held that the fifth amendment does not protect against "the potential danger to that witness of possible prosecution in a state court. . . ."

<sup>25</sup> Counsel for the witness claimed that in allegedly granting freight rebates in violation of the Interstate

So, Mr. President, I think that should be a part of the RECORD so that anyone reading the proceedings will know exactly the legislative history of the measure and the opinion of the committee on that point." 99 CONG. REC. 4743 (1953) (remarks of Senator Kefauver).

In addition, the court in *Tedesco* conceded that the words in the immunity bill being considered in that case were identical to those of the Compulsory Testimony Act of 1954 and "that Congress, in framing the immunity portions . . . used the exact phraseology . . . with the intent that the words so used should receive the same construction." (Emphasis added.) And yet, the court in *Tedesco* construed that Act (a narcotic immunity law) as not reaching to the state courts, whereas the Supreme Court, in *Ullmann*, easily concluded that the other Act did. This is hardly the "same construction" that Congress was supposed to have intended.

The truth is that Congress made no rational choice as to whether or not immunity from state prosecution should have been granted by the Compulsory Testimony Act. The legislative history of the Act makes this clear. It is hardly any answer to say, therefore, that the *Murdock* case was not decisive of the *Ullmann* case because the Congress may undertake to give the witness more than his due.

<sup>19</sup> This is the rule laid down by Chief Justice Marshall in the leading case of *United States v. Burr*, 25 Fed. Cas. 38 (No. 14,692e) (C.C.Va. 1807). An excellent discussion of this case and others may be found in Ratner, *Consequences Of Exercising The Privilege Against Self-Incrimination*, 24 U. CHI. L. REV. 472 (1957).

<sup>20</sup> *Brown v. Walker*, 161 U.S. 591 (1896), *The Queen v. Boyes*, 1 B. & S. 311, 121 Eng. Rep. 730 (Q.B. 1861).

<sup>21</sup> 26 U.S. (1 Pet.) 100 (1828).

The lower federal courts, in a series of bankruptcy cases decided before and after the *Brown* case, applied the principle of *Saline Bank* and held that witnesses testifying in federal proceedings need not incriminate themselves under state law.<sup>26</sup>

Thus the law stood, without a dissent, when the case of *Jack v. Kansas*<sup>27</sup> was decided by the

Commerce Act the witness, who was the auditor of a railway company under investigation "might have received moneys for this purpose and not have paid them over, and thus have been guilty of embezzlement; he might have paid them by a forged check, and thus have been guilty of forgery, or he might have been guilty of murder, or burglary, or arson, and a statement by him to the effect that he paid the rebates at a certain time and a certain place would have proved him to have been present at that time and place . . . All these would be crimes against the State of Pennsylvania, and any testimony given by him might be used to convict him in the courts of that State." (Quotation from appellant's brief.) Grant, *Immunity From Compulsory Self-Incrimination In A Federal System of Government*, 9 TEMP. L. Q. 57 (1934). The fact that the Court in *Brown* quoted from the *Boyes* case in dismissing the witness's claim of possible incrimination under state law supports the view that the Court regarded this claim as groundless as a matter of fact, for *Boyes* is the leading case in the law with regard to the substantiality, as a matter of fact, of self-incrimination pleas.

<sup>26</sup> *In re Scott*, 95 F. 815 (W. D. Penn. 1899) involved the refusal of a witness to answer the questions of a federal referee in bankruptcy on the ground that his answers would incriminate him in a pending state prosecution for fraudulent insolvency. His defense was upheld.

*In re Feldstein*, 103 F. 269 (S. D. N. Y. 1900) a witness refused to tell the referee the reasons for payments made to him by the bankrupt on the grounds that his answers would incriminate him under the gambling laws of New York.

*In re Nachman*, 114 F. 995 (D. C. S. C. 1902) a similar plea was sustained.

*In re Kanter*, 117 F. 356 (S. D. N. Y. 1902) the bankrupt was allowed to refuse an order for a production of papers and records which would have incriminated him in a pending state prosecution for larceny.

*In re Hess*, 134 F. 109 (E. D. Penn. 1905) the bankrupt refused to turn over books and papers which would have incriminated him under contemplated state criminal proceedings. "Can he, then, be compelled to deliver their possession for this purpose, if, perchance, they contain evidence that may tend to incriminate him, and which might subject him to a successful criminal prosecution either in the federal or state courts? The privilege here invoked is found in the fifth amendment . . ." (Emphasis added.) The court then held that "... it is plain that whatever incriminating evidence the books may contain could be used without restriction in the state courts for the purpose of convicting him of any crime for which he might be indicted there, and, in consequence of this danger to him, the plea of his constitutional privilege must prevail." 134 F. at 111-112.

*In re Hooks Smelting Co.*, 138 F. 954 (E. D. Penn. 1905) the bankrupt's president refused to answer questions would have incriminated him in a pending embezzlement prosecution under state law.

<sup>27</sup> 199 U.S. 372 (1905).

Supreme Court in 1905. This case has been interpreted as applying an opposite rule from *Saline Bank* and the law as enforced by the lower federal courts at that time,<sup>28</sup> but the case held nothing more than that it was not a denial of due process for Kansas to compel a witness to answer questions relating to a violation of the state anti-trust laws when the immunity he was given did not, and constitutionally could not, extend to a possible prosecution for violation of the federal anti-trust laws. This was so, the Court held, because the Supreme Court of Kansas had already held that the witness could be asked no questions with regard to *interstate commerce* and there was no way, therefore, that his answer could possibly, as a matter of fact, incriminate him under federal law. "We do not believe that in such case there is any real danger of a Federal prosecution . . ." This case, the Court said, was like *Brown v. Walker* where the danger of incrimination under the laws of another jurisdiction was, in fact, only a "bare possibility" and so "improbable" that no notice would be taken of it.

The Court then added a dictum which later courts have seized upon to support their view that *Jack* adopted the "two sovereignties" rule, and indeed, the statement on its face lends some credence to that view. "We think," the Court said, "the legal immunity is in regard to a prosecution in the same jurisdiction, and when that is fully given it is enough." That this was *not* an adoption of the "two sovereignties" rule may be seen by reference to two things: (1) the Court specifically refused to qualify *Brown v. Walker*,<sup>29</sup> and (2) the Supreme Court, in *Ballmann v. Fagin*, an opinion written by Justice Holmes just one month after the *Jack* case was decided, held that a witness in a federal proceeding need not testify as to any matter which might incriminate him under the laws of another jurisdiction.<sup>30</sup> The authority cited

<sup>28</sup> *United States v. Murdock*, 284 U.S. 141 (1931); *Feldman v. United States*, 322 U.S. 487 (1943).

<sup>29</sup> "The principles underlying the provision itself have been thoroughly treated in the above cited cases (one of which was *Brown v. Walker*) and it would be out of place to here renew their discussion." 199 U.S. at 382.

<sup>30</sup> 200 U.S. 186 (1906). This has been criticized as dictum, but it was actually an alternative holding—and by far the stronger one. See 200 U.S. at 195. The witness in *Ballmann* specifically relied on *Saline Bank*. See 200 U.S. at 188. The government did not urge the adoption of any "two sovereignties" rule. It merely argued that the possibility of state incrimination was remote as a matter of fact. *Jack v. Kansas* was not relied upon by the government to support its position. See

by Justice Holmes in support of his conclusion: *United States v. Saline Bank* and *Jack v. Kansas*.

These conclusions stamp *Jack* as a "fact" case—where the court will look to see if the feared incrimination under the laws of another jurisdiction is possible, as a matter of fact—rather than a "two sovereignties" case—where the court will take no notice of possible incrimination under another jurisdiction's laws no matter how real the danger of that prosecution may be.

Then came *Hale v. Henkel*,<sup>31</sup> a case which marks the turning point in the progress of the law from *Saline Bank*, where the witness was protected, to *Murdock*, where the "two sovereignties" rule was adopted.<sup>32</sup>

Hale was called by a federal grand jury to testify concerning the affairs of a corporation, of which he was an officer, then under investigation for alleged violations of the Sherman Act. He refused to testify on the ground, among others, that his testimony would incriminate him. The Court held that the federal immunity statute which applied to the Sherman Act protected him and he could be compelled to testify. The Court noted that the immunity clause involved was the same as that under consideration in *Brown v. Walker* and that Hale's contention was foreclosed by the decision in that case.<sup>33</sup> This holding seemingly disposed of all the witness's claims of incrimination, both

state and federal,<sup>34</sup> but the Court then went on to adopt the "two sovereignties" rule. The only danger to be considered, the Court said, was that arising under the laws of one sovereign.<sup>35</sup>

<sup>34</sup> Justice Brewer, dissenting, said that he "fully agreed" with the majority's proposition that "the immunity granted by the Federal statute is sufficient protection against both the Nation and the several states. . . ."

<sup>35</sup> It may be contended that what the Court said about "two sovereignties" was only dictum, but regardless of this, it is submitted that be it dictum or holding it was bad law. The defendant's counsel was of the opinion that federal immunity would extend to the state courts under the rule of *Brown* and *Jack* but argued that such an extension was unconstitutional under the tenth amendment. See 201 U.S. at 50. The government relied on the *Brown* case and contended that the witness was immune from state prosecution. See 201 U.S. at 57 and Grant, *supra* note 24. Neither side argued "two sovereignties" and both were clearly of the opinion that there was no question of its application. The Court, however, was of the opinion that the argument of possible incrimination under the laws of the state where the federal investigatory body was sitting was unsound. "Indeed, if the argument were a sound one it might be carried still further and held to apply not only to state prosecutions within the same jurisdiction, but to prosecutions under the criminal laws of other States to which the witness might have subjected himself." This was a clear repudiation of *Ballmann v. Fagin*, where the state incrimination feared was that under the laws of Ohio—the state in which the federal grand jury in that case was sitting. Curiously enough, Justice Holmes, who wrote the opinion in *Ballmann* did not dissent in *Hale v. Henkel*.

"The question has been fully considered in England, and the conclusion reached by the courts of that country that the only danger to be considered is one arising within the same jurisdiction and under the same sovereignty. *Queen v. Boyes*, 1 B. & S. 311; *King of the Two Sicilies v. Willcox*, 7 State Trials (N.S.), 1049, 1068; *State v. March*, 1 Jones (N. Car.) 526; *State v. Thomas*, 98 N. Car. 599."

*Queen v. Boyes* is no authority for the "two sovereignties" rule. Far from it, is the leading case for the proposition that incrimination feared must be substantial in fact and under the *Saline Bank*, *Brown*, *Jack*, and *Ballmann* cases.

*Queen v. Boyes* was a bribery prosecution. The government called as a witness one of the election officials bribed by the defendant. He refused to testify on the ground of self-incrimination. The government then procured a pardon for the witness. He still declined to testify, however, on the ground that, while the pardon stayed all ordinary legal proceedings, it did not protect him against a possible impeachment proceeding in the House of Commons. This fear, said the court, was simply ridiculous.

"Now, in the present case, no one seriously supposes that the witness runs the slightest risk of an impeachment by the House of Commons. No instance of such a proceeding in the unhappily too numerous cases of bribery which have engaged the attention of the House of Commons has ever occurred, or, so far as we are aware, has ever been thought of. . . . (This prosecution) was undertaken by the Attorney General by the direction of the House itself. . . . It appears to us, therefore, that the witness in this case was not, in a

200 U.S. at 192. If the *Jack* case had indeed adopted the "two sovereignties" rule the government would surely have cited that case as it would then have had a conclusive answer to the witness's contention rather than one which depended upon a question of fact.

<sup>31</sup> 201 U.S. 43 (1906). The case is most famous for its holding that a corporation cannot plead the privilege against self-incrimination.

<sup>32</sup> "Not until this court pronounced judgment in *United States v. Murdock*, 284 U.S. 141, had it been definitely settled that one under examination in a federal tribunal could not refuse to answer on account of probable incrimination under state law." *United States v. Murdock*, 290 U.S. 389, 396 (1933).

<sup>33</sup> "Appellant also invokes the protection of the Fifth Amendment. . . . The answer to this is found in a proviso to the General Appropriation Act of February 25, 1903, 32 Stat. 854, 904, that 'no person shall be prosecuted. . . .' The court then applied the principle of the *Brown* case which, it will be remembered, extended the bar of prosecution to the state courts. "We need not state the reasons given in *Brown v. Walker*, both in the opinion of the court, and in the dissenting opinion, wherein all the prior authorities were reviewed, and a conclusion reached by a majority of that court, which fully covers the case under consideration." (Emphasis added.) It will also be remembered that the Court in the *Brown* case dismissed the witness's claim of possible state prosecution only because it was, in fact, not a substantial one.

The Supreme Court may have adopted the "two sovereignties" rule in *Hale* but the lower federal courts went right on deciding cases as if they had never heard of that decision. Pleas of possible incrimination under the laws of another jurisdiction were continually sustained on the *Saline Bank* and *Ballman* principles until the very eve of the *Murdock* decision.<sup>36</sup> Moreover, the Supreme Court

rational point of view, in any the slightest real danger from the evidence he was called upon to give when protected by the pardon from all ordinary legal proceedings; and that it was therefore the duty of the presiding Judge to compel him to answer." 121 Eng. Rep. at 738.

It is true that the King of the Two Sicilies v. Willcox, 1 Simon (n.s.) 301, 61 Eng. Rep. 116 (Ch. 1851) supports the "two sovereignties" rule. It must be noted, however, that the result was reached only because of decisive factual considerations in the case. The witness refused to testify on the ground that his answers would incriminate him under the laws of Sicily. The court held this to be no bar.

"... [I]n the absence of all authority on the point, that the rule of protection is confined to what may tend to subject a party to penalties by our own laws..." (Emphasis added.) 61 Eng. Rep. at 128.

In this case the specific laws of Sicily which the witness feared were not pointed out to the court. The witness merely alleged that he would be "subject to criminal prosecution, punishment, and penalties in Sicily." This lack of evidence as to the specific laws of the other jurisdiction involved was probably fatal, as the court pointed out in such a case "No judge can know, as a matter of law, what would or what would not be penal in a foreign country, and he cannot, therefore, form any judgment as to the force or truth of the objection of a witness when he declines to answer on such a ground." Moreover, the court said, there was no obligation on the part of the defendants to subsequently subject themselves to the jurisdiction of Sicily.

Authority on this point was not long in coming. And when it came it overruled *King of the Two Sicilies*. In *United States of America v. McRae* [1867] L.R. 3 Eq. 79, the court upheld the refusal of a witness in an English court to answer any questions when the answers might subject property belonging to the witness, and situated in the United States, to forfeiture under the laws of that country. While the court recognized that the *King* case might have been correctly decided on its peculiar facts, it specifically disapproved of any general application of the "two sovereignties" rule.

The question had indeed been "fully considered" in England but the "conclusion reached by the courts of that country" was exactly contrary to the "two sovereignties" rule laid down in *Hale v. Henkel*.

The two North Carolina cases cited by the Court may be similarly dealt with. The first, *State v. March*, 46 N.C. 526 (1854) is a "two sovereignties" case, but the later case decided by the North Carolina Supreme Court, *State v. Thomas*, 98 N.C. 599 (1887) expressly rejected the "two sovereignties" rule of the *March* case and declined to follow it. The rule had been repudiated in North Carolina, therefore, before it was cited as good authority by *Hale*.

<sup>36</sup> In *United States v. Lombardo*, 228 F. 980 (W. D. Wash. 1915) the defendant was prosecuted for failure to register the names of alien women kept for purposes

itself was apparently unsure of the correctness of the decision in *Hale* for it specifically left the question open in a case decided some twenty one years later.<sup>37</sup>

Efforts have been made to reconcile *Hale* with the earlier cases of *Saline Bank* and *Ballmann* by pointing out that the witness in *Hale* was, after all, in no real danger of state prosecution and it cannot be said that the Court in *Hale* would have decided the case the way it did if there had been a substantial danger of incrimination under state law.<sup>38</sup> This theory, even if accepted as true, is unavailing however, because the *Murdock* decision squarely applies the "two sovereignties" rule to a case where the danger of incrimination under the law of the state was very great. In fact, the answers to the questions asked would probably have been enough, standing alone, to convict him of a crime in the state courts.<sup>39</sup>

This analysis of the federal cases reveals, there-

of prostitution. Immunity from federal prosecution was offered to those complying with the regulation provisions. The court held that the defendant did not have to register because to do so would have subjected her to possible prosecution under a law of the state of Washington which forbade the maintenance of a house of prostitution. This decision was affirmed on another ground by the Supreme Court in *United States v. Lombardo*, 241 U.S. 73 (1916). It is interesting to note that four Justices who participated in the *Lombardo* decision were also members of the Court which decided *Hale v. Henkel*. The effect of this affirmation, of course, was to leave standing a lower court decision, one ground of which was contrary to *Hale*.

Pleas of possible state prosecution were also upheld. In *re Gasteiger*, 290 F. 410 (E. D. N. Y. 1923) and in *Buckeye Powder Co. v. Hazard Powder Co.*, 205 F. 827 (D. C. Conn. 1913).

In *re Doyle*, 42 F.2d 686 (S. D. N. Y. 1930), decided one year before the *Murdock* case, a similar plea was upheld. The court discussed the prior Supreme Court decisions. In *Brown v. Walker*, it said, the immunity extended to the state courts. The same was true of *Hale v. Henkel* and the apparent adoption by the Supreme Court of the "two sovereignties" rule was dictum. *Jack v. Kansas* was a "fact" case. The court would follow *Ballmann* and *Saline Bank*.

<sup>37</sup> *United States ex rel Vajtauer v. Commissioner of Immigration*, 273 U.S. 103, 113 (1927).

<sup>38</sup> See Rogge, *supra* at note 3.

<sup>39</sup> The lower court opinion in this case, *United States v. Murdock*, 51 F.2d 389, 391 (S. D. Ill. 1930) makes this clear.

"The witness admitted he had been interested in the operation of slot machines in Madison county; that he had paid money to certain persons, which he had deducted as an expense of his business in the income tax returns. The inference is quite clear that this money was paid to certain persons to procure protection from criminal prosecution by reason of defendant's illegal enterprises. The witness was asked to give the names of the persons to whom the money was given, and the purpose for which it was given."

fore, that prior to the *Murdock* decision, not one federal court, including the Supreme Court, had ever forced a witness in a federal proceeding to incriminate himself under state law when the danger of state incrimination was substantial. *Murdock* stands alone.

Legal comment was, on the whole, favorable to the *Murdock* case,<sup>40</sup> and Wigmore's wholehearted support of the "two sovereignties" rule was undoubtedly a factor here.<sup>41</sup> In the twentyone years since the decision was made, however, the "two sovereignties" rule has come under sharp attack.<sup>42</sup>

The latest decisions of the state courts construing state immunity statutes have repudiated the rule in *Murdock* and have returned to the *fact* test of *Jack v. Kansas*.<sup>43</sup> This trend is significant,

<sup>40</sup> Note, 45 HARV. L. REV. 595 (1932).

<sup>41</sup> Wigmore pointed out that "In Samoa it was tabooed to name a deceased chieftain by the title he bore when living" and in Massachusetts "to sell cigars on Sunday" was once a crime. "Are the Courts of our various Commonwealths to . . . catalogue within the rubrics of criminality every act which is anywhere, under any system of manners, morals, or policy, stigmatized by law?" he asked. 8 WIGMORE, EVIDENCE § 2258 (3rd Ed. 1940).

<sup>42</sup> Rogge, *Compelling The Testimony Of Political Deviants*, 55 MICH. L. REV. 163, (1957), and see Grant, *Immunity From Compulsory Self-Incrimination In A Federal System Of Government*, 9 TEMP. L. Q. 57 (1934), Grant, *Federalism and Self-Incrimination*, 4, 5 U. C. L. A. L. REV. 549, 1 (1957-58), by an author who has been the voice crying in the wilderness against the "two sovereignties" doctrine for twenty-three years.

<sup>43</sup> *Doran v. Doran*, 215 La. 151, 39 So.2d 894 (1949) distinguishes the federal authority on a fact basis. Adopts the *fact* test of *Jack*.

*In re Carchietta*, 124 N.Y.S.2d 402 (1953) says the *Murdock* rule is in effect in New York *except* when the defendant can "substantiate his claim by evidence that the danger of prosecution is not remote and unsubstantial, but real and substantial. He may show this by evidence of the commencement, or the actual pendency, of a criminal prosecution in a foreign jurisdiction, or by other equally cogent evidence."

*People v. Den Uyl*, 318 Mich. 645, 29 N.W.2d 284 (1947).

"We are of the opinion that the privilege against self-incrimination exonerates from disclosure whenever there is a probability of prosecution in State or federal jurisdictions. . . . It seems like a travesty on verity to say that one is not subjected to self-incrimination when compelled to give testimony in a State judicial proceeding which testimony may forthwith be used against him in a Federal criminal prosecution." 29 N.W.2d at 287.

*State ex rel Mitchell v. Kelly*, —Fla.—, 71 S.2d 887 (1954) decides the question for the first time in Florida and follows the *Den Uyl* case.

The latest state case is *Commonwealth v. Rhine*, 303 S.W.2d 301, 304 (Ky. 1957).

"We believe that to render effective the . . . Constitutional provision against self-incrimination, it is essential that it apply to prosecutions by the United States as well as those by the Commonwealth. To hold

because it was essentially for the protection of the state courts and state immunity statutes that the *Murdock* rule was intended.<sup>44</sup>

The question of the soundness of the "two sovereignties" rule is an important one today. Whatever may have been said in support of the rule in the past is open to question today when federal investigations are likely to have as one of their objects the *specific purpose* of exposing violations of state criminal law. The Kefauver Committee investigation of a few years ago is an example. The Committee's authorizing resolution gave it authority to "make a full and complete study and investigation of whether organized crime utilizes the facilities of interstate commerce . . . in furtherance of any transactions which are in violation of the law . . . of the state in which the transactions occur . . ."<sup>45</sup>

One lower federal court has sought to escape from the harsh results of an application of the *Murdock* rule in these circumstances. *United States v. DiCarlo*<sup>46</sup> was a contempt of Congress prosecution. The defendant had been a witness before the Kefauver Committee and had been asked questions concerning violations of state criminal law.<sup>47</sup> He refused to answer the questions. The government cited the *Murdock* rule in DiCarlo's contempt trial but the district court distinguished *Murdock*. The Supreme Court had specifically pointed out in that case that nothing of state concern was involved, that the questions were in relation to federal income tax matters, and that while the answers might have incriminated the witness under state law they did so only *incidentally*. This was not the case in *DiCarlo*, said the district court,

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otherwise would be to ignore the fact that our citizens are in a very real sense, as well as in a technical one, citizens of both the State of Kentucky and of the United States. The jurisdiction of both governments is coextensive."

See the favorable comments on this case: Recent Cases, 106 U. PA. L. REV. 127 (1957), Recent Cases, 11 VAND. L. REV. 199 (1957), Recent Cases, 46 KY. L. J. 281 (1958).

<sup>44</sup> The argument is that no state could enact a valid immunity law if the "two sovereignties" rule were not recognized because no state can constitutionally give immunity against federal prosecution. *Jack v. Kansas*, 200 U.S. 186 (1905). The state cases construing the state immunity statutes have held, however, that only those specific questions which may lead to federal incrimination are bad.

<sup>45</sup> S. RES. 202, 81st Cong., 2d Sess., 96 CONG. REC. 6246 (1950).

<sup>46</sup> 102 F. Supp. 597 (N. D. Ohio 1952).

<sup>47</sup> Whether or not he had engaged in the slot machine and gambling businesses in New York.

for there the questions were *specifically* directed to offenses against state law. The witness was acquitted of contempt.<sup>48</sup>

The *DiCarlo* decision has been criticized as an attempt by the district court to overrule the *Murdock* case;<sup>49</sup> it has also been praised as a just and logical exception to the *Murdock* rule.<sup>50</sup> The difference between the situation in *Murdock* and that in *DiCarlo* is more apparent than real. If the "two sovereignties" rule is sound it should make no difference in law whether the question is specifically directed at a disclosure of a violation of state law or the violation is only elicited incidentally in an answer to a question primarily concerning a federal matter.

To say that a case is founded on a misapprehension of earlier cases and finds support only in the dictum of some of them, while it may weaken the force of the case, does not destroy it or prove its incorrectness. The Supreme Court was free, in the *Murdock* case, to adopt the "two sovereignties" rule if it saw fit to do so. Any further criticism of that case must involve, therefore, an examination of the merits of the rule. These have been considered, to some extent, in the previous discussion.

The strongest argument that may be mustered in support of the *Murdock* rule is that federal investigations should not be hampered by matters depending upon the criminal laws of the forty-eight states. This is not a valid argument, however, and the proof of it may be seen in the fact that *the Murdock rule is not being enforced at the federal investigative level today*. Witnesses appearing before the McClellan Committee, a committee of the United States Congress engaged in an investigation of improper activities in the labor and management field, have refused to testify and have invoked the fifth amendment on the grounds that any answers they might give would incriminate them under various state criminal laws. Most were then under indictment in state courts. These refusals were upheld by the Committee and its counsel.<sup>51</sup>

<sup>48</sup> "In the light of its facts and the reasoning of the court, the binding effect of the *Murdock* case cannot be extended to cases, where, in the exercise of the overlapping jurisdiction of the Federal government, a Congressional committee enters upon investigations of state crimes. But in the search for the principle that ought to govern in such cases, *United States v. Saline Bank*, *supra*, may be accepted as a guide." 102 F. Supp. at 605.

<sup>49</sup> Comment, 4 STAN. L. REV. 594 (1952).

<sup>50</sup> Note, 66 HARV. L. REV. 186 (1952).

<sup>51</sup> Analytical Report, *The McClellan Committee*

It is unjust to require a witness under the jurisdiction of the federal government to incriminate himself under state law when a witness cannot be subject to federal jurisdiction without being subject, at the same time, to the jurisdiction of a state. Federal investigations nowadays are often specifically directed at violations of state criminal laws. Federal and state prosecutors work hand in hand when a criminal case presents both federal and state aspects.<sup>52</sup> Under these circumstances, it is indeed a "travesty on verity" to say that a witness has received the full protection of the fifth amendment privilege against self-incrimination when he has been granted immunity from federal prosecution alone.<sup>53</sup>

*Hearings—1957*, The Bureau of National Affairs, Inc. (1958).

At p. 5: "Maloney explained that his reason for refusing to answer questions was that he is under indictment in Washington on charges of violating state laws and conspiracy to violate them."

At p. 12: "The second alleged conspirator summoned to testify was Joseph P. McLaughlin, identified by the Committee as a Seattle gambler. . . . He invoked the Fifth and 14th Amendments when asked if the Teamster Union ever paid any of his bills, explaining that he is under indictment on 'eight or nine' counts in Portland charging gambling and conspiracy."

At p. 92: "All refused to answer questions on the ground that they are under criminal indictment in Lackawanna County on charges allegedly arising out of union activity."

Like the Kefauver investigation, specific violations of state law were apparently being sought by the Committee in some instances. The authorizing resolution provided that "there is hereby established a select committee which is authorized and directed to conduct an investigation and study of the extent to which criminal or other improper practices or activities are, or have been engaged in the field of labor-management relations . . ." S. RES. 74, 85, Cong., 1st Sess., 103 CONG. REC. 1264 (1957).

Appendix 10 at p. 449: "The Committee has thus far determined that there are at least 11 fields of major investigation that should be covered. They are: . . . (6) Extortion and robbery . . . (8) Violence . . ."

<sup>52</sup> A federal grand jury in Chicago was investigating an alleged attempt to bribe a federal official. A Chicago municipal judge was called as a witness before the grand jury and reportedly invoked the fifth amendment. When the federal grand jury returned a no bill the federal district attorney, Robert Ticken, announced that "I will turn over everything we have to the State's Attorney's office." The State's Attorney for Cook County said he would receive the evidence and documents and that "If it means what I think it does, I'll take it to the county grand jury."

The county grand jury later indicted the witness. See *Chicago Daily Tribune*, October 18, 1957, pt. 1, p. 9, and October 19, 1957 pt. 1, p. 4.

<sup>53</sup> See *Marcello v. United States*, 196 F.2d 437, 442 (5th Cir. 1952). "The doctrine (two sovereignties) is so strongly entrenched that it appears as futile to protest as it is to expect an individual to feel that his constitu-

Much confusion has resulted in these cases from attempts to apply the self-incrimination provision of the fifth amendment to state action or to bring it in the back door through the fourteenth. The first has been unavailing since *Barron v. Baltimore*,<sup>54</sup> and the second was rejected in *Twining v. New Jersey*.<sup>55</sup>

A recent case illustrates the difficulties which notions of "federalism" and "two sovereignties" have caused in this field. In *Knapp v. Schweitzer*<sup>56</sup> the petitioner was a witness before a state grand jury. He was offered immunity from state prosecution. He refused to answer questions for fear of incrimination under federal law, claiming the privilege of the fifth amendment. This same argument was put forward and rejected in *Jack v. Kansas*. This was recognized by Justice Frankfurter, speaking from the majority,<sup>57</sup> but he also seized upon the chance to add, in dictum, that

"The sole—although deeply valuable purpose of the Fifth Amendment privilege against self-incrimination is the security of the individual against the exertion of the power of the Federal government to compel incriminating testimony with a view to enabling *that same Government* to convict a man out of his own mouth." (Emphasis added.)

The first part of this statement, that the fifth amendment binds only the federal government, is undoubtedly correct;<sup>58</sup> the second part, that the government which *compels* must be the same as that which *convicts* finds no support in the language of the Constitution.<sup>59</sup>

Justice Frankfurter then re-affirms<sup>60</sup> the *Murdock* doctrine:

tional privilege has been safeguarded because the penitentiary into which his answer may land him is under the supervision of the state instead of the federal government."

<sup>54</sup> 32 U.S. (7 Pet.) 243 (1833).

<sup>55</sup> 211 U.S. 78 (1908).

<sup>56</sup> 78 Sup. Ct. 1302 (1958).

<sup>57</sup> "This cannot be denied on the claim that such state law of immunity may expose the potential witness to prosecution under federal law. See *Jack v. Kansas*, 199 U.S. 372." 78 Sup. Ct. at 1307.

<sup>58</sup> *Barron v. Baltimore*, footnote 54 *supra*.

<sup>59</sup> "Certainly there is nothing in the language nor in the history of the Constitutional provisions which dictates an answer either way upon the question whether the protection should extend to prosecution under 'foreign' law. Judges who consider that the policy behind the privilege is so salutary that the range of its application should be extended, will be inclined to accord protection when the danger of 'foreign' prosecution is clear." McCORMICK, EVIDENCE § 124 (1954).

<sup>60</sup> Though this re-affirmance is certainly dictum.

"If a person may, through immunized self-disclosure before a law-enforcing agency of the state, facilitate to some extent his amenability to federal process, or *vice versa*, this too is a price to be paid for our federalism." (Emphasis added.)

But this *vice versa* argument of federalism ignores several basic points. It is true that a state does not have to provide immunity from federal prosecution. But this is only true because a state *cannot* provide such immunity,<sup>61</sup> and because a state *does not have to provide any* privilege against self-incrimination,<sup>62</sup> and even if it does it may construe its grant not to recognize the possibility of incrimination under another jurisdiction, for a state court is, after all, the final arbiter of what its own privilege against self-incrimination encompasses. This argument does not apply in reverse, however, as those who weave the magic spell of federalism would have it do. The federal government *can* provide immunity from state prosecutions,<sup>63</sup> and the federal government *must* recognize the privilege against self-incrimination.<sup>64</sup> How far that privilege then extends becomes a policy question, not a constitutional one which the "essence of a constitutionally formulated federalism" compels.

Murdock, by his testimony before a federal agency, did not merely "facilitate to some extent his amenability to state process." He was obliged to give testimony that would, in fact, be enough to secure his conviction in a state court.<sup>65</sup> If this is the "price to be paid for our federalism," then, under our present federal and state criminal investigatory and prosecution procedures, it is submitted that the price is too high.

It is hoped that the Supreme Court will soon have occasion to examine once more the validity of the "two sovereignties" rule, a rule which finds support neither in the language of the Constitution nor in reason and justice, and that the Court will see fit to abandon once and for all a rule which ignores the realities of a twentieth century America.<sup>66</sup>

<sup>61</sup> U.S. CONST. art. 6, § 2.

<sup>62</sup> *Twining v. New Jersey*, 211 U.S. 243 (1908).

<sup>63</sup> *Brown v. Walker*, 161 U.S. 591 (1896), *Ullmann v. United States*, 350 U.S. 422 (1956).

<sup>64</sup> U.S. CONST. amend. V.

<sup>65</sup> See footnote 38, *supra* and *Feldman v. United States*, 322 U.S. 487 (1944).

<sup>66</sup> An examination of the concurring and dissenting opinions in *Knapp v. Schweitzer*, 78 Sup. Ct. 1302 (1958) indicates that at least the four votes required for certiorari will be available in any case which provides the basis for a re-appraisal of the *Murdock* doctrine.