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RULES GOVERNING THE ALLOWANCE OF THE PRIVILEGE AGAINST SELF-INCrimINATION

By Max P. Rapacz*

It is stated in a legal encyclopedia1 in general use that there are several English authorities which hold that a witness is the sole judge of whether answering a certain question would tend to incriminate him and that there are also several American authorities which lean that way. In an Indiana case, which is being frequently cited, the court said:

"Some courts hold that the witness is the sole judge as to whether an answer will incriminate him. Others say, without limiting the statement, that it is for the court to say."2

Although there seems to be a conflict, especially between the earlier cases and the more recent decisions, it will be pointed out that the conflict is more apparent than real.

THE ENGLISH AUTHORITIES

In England there clearly was a difference of opinion among the judges who participated in the earlier decisions, and there was considerable hesitancy in arriving at any absolute rules. The discussions revolve about the dicta of Maule, J., in Fisher v. Ronalds3 that the judge was bound by the statement of the witness, made under oath, that the answer would incriminate. However, the court did not decide whether the statement of the witness is to be taken as conclusive, although Maule, J., thought so after an observation that it was not necessary to decide the point. The privilege was recognized in the case because the danger was apparent.

The English decisions both before4 and after5 the decision in

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128 R. C. L. 428; see also 24 L. R. A. (N.S.) 165 that there are perhaps a few decisions which hold the witness to be the sole judge.
3(1852) 12 C. B. 762, 766, 22 L. J. C. P. 62.
4In Regina v. Garbett, (1847) 2 Car. & Kir. 474, 1 Den. 236, where we have the first extensive discussion of the question of whether the court or the witness is the judge, a majority of the judges, after stating that it was not necessary to decide the point, stated that the privilege should be allowed when the witness claims it and there appears to be "reasonable ground" to believe that it would do so. The judges were cautious not to lay down
Fisher v. Ronalds show that the extreme view of Maule, J., never received much support and that the courts were veering away from it and qualifying the right of the witness to decide. Finally, in Regina v. Boyes and Ex parte Reynolds the English courts settled it that the witness is not the sole judge and that it is for the court to determine, under all the circumstances of the case and the nature of the evidence which the witness is called to give, that there is "reasonable ground" to apprehend danger. In the latter of the two cases the court pointed out that there were differences of opinion on the subject before Regina v. Boyes and that the cases before it are regarded as dicta, while Regina v. Boyes is an express decision on the point. any absolute rule in the matter. In Mercier v. Short, (1851) Macnag. & G. 205, 217, the court said that it will satisfy the rule if the witness will state "circumstances consistent on the face of them with the existence of the peril alleged and which also renders it extremely probable" that incrimination would result from requiring an answer. The court found that enough had been disclosed to allow the privilege in the case. In Sidebottom v. Adkins, (1857) 29 L. T. (O.S.) 310, 3 Jur. (N.S.) 631 the court refused to follow the extreme view of Maule J., in Fisher v. Ronalds, (1852) 12 C. B. 762, 22 L. J. C. P. 62. Although admitting that there may be cases in which the witness ought to be allowed to be the sole judge, it was of the opinion that the court was the judge upon the circumstances of the case and reversed the lower court which had left the decision to the witness who had refused to answer. But see Pollock, C. B., in Adams v. Lloyd, (1858) 3 H. & N. 351, 27 L. J. Ex. 499, where a year later he said that he had always been of the opinion that the law on the subject had been correctly stated in Maule, J., in Fisher v. Ronalds. In Youngs v. Youngs, (1882) 5 Redf. (N.Y.) 518 for an excellent discussion of the English authorities. Also Ex parte Irvine, (C.C. Ohio 1896) 74 Fed. 954, 962 wherein Justice Taft regarded Ex parte Reynolds as settling the English rule. It is very difficult to determine from the language in many of the cases whether we have a decision or merely dicta. Also, quite frequently, the courts fail to give any clue as to whether the particular decision was for the witness on the ground that the judging is to be done by the witness or because the witness was entitled to the privilege as a matter of right under the particular circumstances regardless of who is the final judge of the plea. Even Justice Marshall was puzzled by this problem when counsel for the witness in United States v. Burr, (C.C. Va. 1807) Fed. Cas. No. 14,692e, Coombs' Trial of Aaron Burr 67, strongly urged the case of United States v. Goosely, (C.C. Va. 1807) Fed. Cas. No. 15,230, 1 Burr's Trial 222, in support of a rule that the witness was the sole judge. After some consideration Justice Marshall concluded that the general doctrine of the judge in that case must have referred to the circumstances which showed that the answer might incriminate. The same problem appears in the next group of cases about to be discussed, and it is believed that some apparent conflicts are explainable on the basis of Justice Marshall's view of United States v. Goosely which without the explanation would have to be regarded as a very strong case in favor of the witness.
THE STATE OF THE AUTHORITIES IN THE UNITED STATES

As in the English decisions so in the early American cases there are statements and opinions to the effect that the witness is the judge without any apparent limitations other than that the claim be made under oath. It was the conclusion of one writer that in the earlier American cases the witness's oath was generally conceded to be determinative of the validity of his claim unless the court could say that by no possibility could an answer to the challenged question produce the forbidden result. Dean Wigmore also states that a few of the earlier rulings in the United States inclined towards the extreme view of Justice Maule in Fisher v. Ronalds.

Although some of the early cases both in England and America come very close to supporting a rule that the witness is the sole judge, later developments have shown that no such absolute rule in favor of the witness ever existed. The statements in the early English cases, as was pointed out in the first part of this article, were mostly dicta. Likewise, it may be said for the early American cases that they are either dicta or the language of the opinions was inaptly chosen, thus giving the impression that the decisions supported a rule making the witness the sole judge. This conclusion is substantiated by the subsequent history of Warner v. Lucas, one of the early American cases frequently cited to the effect that it is for the witness to determine the question. That case contains some strong statements in favor of the witness, but they are explained in the recent Ohio case of McGorray v. Sutter in such a manner as to give a clue to interpreting other cases with similar statements, and it shows that they are not to be taken at face value.

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10 In State v. Edwards, (1819) 2 Nott & McC. (S.C.) 13, 10 Am. Dec. 557 it was contended in behalf of the State that the particular question would not tend to incriminate and that the court should be the judge. Held, that the witness was the judge, with an observation that the answer might tend to incriminate. State v. Edwards was followed in Poole v. Perritt, (1842) 1 Speers (S.C.) 121, the court stating that the witness, with instructions from the court when necessary, must decide whether the answer will tend to incriminate him. In Ward v. Sykes, (1884) 61 Miss. 649 it was held on appeal that the trial court was right in allowing the witness to be the judge. See also Warner v. Lucas, (1840) 10 Ohio 336, 339 where the court stated that before Burr's Trial (1807) it had been laid down in general terms that the witness himself is the judge and that "it is difficult to perceive how the court can be the judge".


13 (1840) 10 Ohio 336.

14 (1909) 80 Ohio St. 400, 89 N. E. 10.
In the McGorray Case it was again strongly contended that the witness was the sole judge. The trial court, having concluded that the answer would not incriminate, compelled the witness to answer. On appeal the court held that the witness was not the final judge and explained the Lucas Case. It was of the opinion that the Lucas Case only decided that the claim of the witness was conclusive with respect to the incriminating evidence sought to be elicited and cannot be said to decide that the claim of the witness will be conclusive in any case in which it appears to be ill founded, or made in bad faith for the purposes of defeating the administration of justice in the case in which the witness is called. That explanation of the Lucas Case has generally been accepted, and it is believed that when the courts seemingly hold that the witness is the judge, they have reference only to the particular question under consideration as Chief Justice Marshall pointed out in explanation of United States v. Goosely, and do not intend to hold that it would be left for the witness to decide if it were clear that incrimination would not result.

The unqualified statements that the witness is the judge usually appear in respect to questions that are of an incriminating nature where the witness is entitled to the privilege in any event. For example, in the much discussed case of Fisher v. Ronalds Williams, J., in approving a statement of Maule, J., that the judge is bound by the witness's oath also saw that the answer would have a direct tendency to place the witness in danger of proving a crime. In a quite recent American case the trial judge left it to the witness to decide whether an answer to a particular question would tend to incriminate him. The defendant on trial objected to the ruling, and the judge used rather decisive language that the witness was the judge of the matter. On appeal the court held that the ruling of the trial judge was not erroneous, but again it was quite evident to the court that the questions were of an incriminating nature. Since the witness is entitled to the privilege in any event in the type of case just considered, no one is harmed when the court

15The English Court likewise pointed out, in Ex parte Reynolds, (1882) 20 Ch. Div. 294, 51 L. J. Ch. 756, when it settled the rule for the English courts, that any rule of allowing the witness to refuse to answer the question merely on his own statement would not be feasible. It would enable a witness friendly to one of the parties to aid that party by refusing to give evidence, a serious question of public policy.

16See note 9 supra for Justice Marshall's explanation.

states that the witness is the sole judge without qualification, but it does lead to some misunderstanding of the cases and opinions.

It is believed that most of the apparent decisions and other statements that the witness is the judge can be explained on the above reasoning and are not to be taken too literally. On the other hand, there are occasional opinions and statements to the effect that the court determines whether the privilege shall be allowed without any apparent limitation upon the judge. To accept such statements literally would be straying just as far from the true rule as would be the acceptance of the statements that the witness is the sole judge. The fact is that the witness and the judge each play a part in making the determination in accordance with certain principles first clearly enunciated by Chief Justice Marshall in United States v. Burr.

**The Manner of Determining the Claim**

It was Chief Justice Marshall who gave us the first clear exposition of the manner of determining the claim even long before there was any lucid understanding of that particular phase of the subject in the English courts. Although the language of the courts today may differ somewhat from that used by Chief Justice Marshall in the Burr Case, the controlling principles pronounced in that case have been consistently and substantially followed or approved in a long line of cases practically without dissent.

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18See In re Moser, (1904) 138 Mich. 302, 306, 101 N. W. 588 wherein the position of the witness was that he was the "sole" judge. The court denied his claim and stated: "The constitution vests in the witness no such arbitrary power, and we are cited to no decisions which go to that extent." See also, Ex parte Senior, (1896) 37 Fla. 1, 19, 19 So. 652 wherein the court declared: "It has never been recognized that he [the witness] alone has the right in all cases to decide whether his answer will tend to criminate him. Such a rule would be mischievous and enable unscrupulous witnesses to defeat the ends of justice." It seems that Adams v. Lloyd, (1858) 3 H. & N. 351, 27 L. J. Ex. 499 and Taylor v. Forbes, (1894) 143 N. Y. 219, 38 N. E. 303 probably extend protection to the witness as far as any case, and yet they do not leave it entirely to the witness.

19See Lockett v. State, (1920) 145 Ark. 415, 224 S. W. 952 for just a bare statement that the court is the judge. See also Sterrett, J., in Commonwealth v. Bell, (1891) 145 Pa. St. 374, 388, 22 Atl. 641, 642 which tends to leave an impression that it is a matter entirely for the court to decide.


Since the case has been followed so universally, it remains only to ascertain what principles Chief Justice Marshall laid down in that case, their meaning, and the manner of their application by the courts.

The facts of the *Burr Case* were simple. The United States government was investigating the charge of treason against Mr. Burr and had preferred an indictment against him. A witness (Burr's secretary) was asked if he knew what a certain cipher in a letter, probably written by Mr. Burr, meant. The witness refused to answer on the ground that an answer might tend to criminate him. It was contended in behalf of the witness that he alone must be the judge of the effect of the answer and that he could refuse to answer any question if he would but say on his oath that it would criminate him. Had the court sustained the contention of the witness, it would have remained for the witness to be the *sole* judge of answering or refusing to answer practically any question. However, Chief Justice Marshall pointed out that there may be questions to which no "direct" answer could in any degree affect him and that there was no case which went so far as to say that the witness is not bound to answer such questions. He was of the opinion that no "direct" answer to the question propounded could criminate the witness and compelled an answer and in his opinion set out the principles about which the problem is resolved in the courts today.

The pertinent parts of the opinion in the *Burr Case* are quoted below, and the remainder of this thesis will be concerned largely with the meaning and development, in subsequent decisions, of the principles set out therein. Chief Justice Marshall said:

"When two principles come in conflict with each other, the court must give them both a reasonable construction, so as to preserve them both to a reasonable extent. The principle which entitles the United States to the testimony of every citizen, and the principle by which every witness is privileged not to accuse himself, can neither of them be entirely disregarded. . . . When a ques-

tion is propounded, it belongs to the court to consider and to decide whether any direct answer to it can implicate the witness. If this be decided in the negative, then he may answer it without violating the privilege which is secured to him by law. If a direct answer to it may criminate himself, then he must be the sole judge what his answer would be. 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 privilege which the law allows, and which he claims. It follows necessarily then, from this statement of things, that if the question be of such a description that an answer to it may or may not criminate the witness, according to the purport of that answer, it must rest with himself, who alone can tell what it would be, to answer the question or not. If, in such a case, he say upon his oath that his answer would criminate himself, the court can demand no other testimony of fact.

"The gentlemen of the bar will understand the rule laid down by the court to be this: It is the province of the court to judge whether any direct answer to the question which may be proposed will furnish evidence against the witness. If such answer may disclose a fact which forms a necessary and essential link in the chain of testimony, which would be sufficient to convict him of any crime, he is not bound to answer it so as to furnish matter for that conviction. In such a case the witness must himself judge what his answer will be; and if he say on oath that he cannot answer without accusing himself, he cannot be compelled to answer."22

From the opinion of Chief Justice Marshall the courts have extracted and developed the three following propositions:

1. That it is for the court to decide, "in the first instance," when a question is propounded, whether any "direct" answer to it may incriminate the witness.

2. If the conclusion of the court under proposition number one be that the answer may incriminate the witness, it is for the witness to decide what the "effect" of the answer would be and to answer or refuse to answer accordingly.

3. That if the answer may disclose a fact which forms a necessary "link" in a chain of evidence which would be sufficient to convict the witness of any crime, the immunity must be allowed.

The net result of propositions number one and two is that both the court and the witness judge the question, each within his own province. If the court decides that an answer may incriminate, the witness is still the sole judge of what the answer

would be; but if the court decides that it can have no incriminating
tendency, it will compel an answer. So any statement that one or
the other is the judge must be considered in reference to which of
the two propositions the court had in mind. That distinction,
while not always discernible in some cases, has been clearly pointed
out in others. In Livingston v. Indianapolis Insurance Company,
which purports to follow the Burr Case, the court said:

"It is the province of the court, in the first instance, to judge
whether the answer may incriminate him; and if it be of that
character, it is the right of the witness, who alone knows what his
answer will be to judge what will be the consequence of answer-
ing and if he declare on oath, that the answer will incriminate
him, or have that tendency, he may refuse to testify."23

Since Chief Justice Marshall first announced the principle that
it is the province of the court to consider and decide, "in the first
instance," whether a direct answer to the question may incriminate
the witness, the courts have interpreted and expanded it to mean
that the court shall determine whether there is reasonable ground
to apprehend danger upon all the circumstances of the case in-
cluding the evidence sought to be adduced in the particular case.24
This rule is now well settled although the courts use different
language in stating it. Some state that there must be a "real
danger."25 Others add that there must be reasonable ground to
apprehend danger "under the ordinary course" of things.26 Still
others say that there must be a "direct" tendency to incriminate.27

The constitutional protection is said to be confined to "real
danger" and does not extend to remote possibilities out of the

23(1842) 6 Blackf. (Ind.) 133, 135. Accord: People v. Mather, (1830)
4 Wend. (N.Y.) 229; Richman v. State, (1850) 2 Greene (Iowa) 532; Ex
parte Gauss, (1909) 223 Mo. 277, 122 S. W. 741; Abrams v. United States,
(C.C.A. 2nd Cir. 1933) 64 F. (2d) 22; 28 R. C. L. 429.
24State v. Thaden, (1890) 43 Minn. 253, 45 N. W. 447; Overund v.
Superior Court of San Francisco, (1920) 131 Cal. 280, 63 Pac. 372; People
584, 90 N. E. 238; Elwell v. United States, (C.C.A. 7th Cir. 1921) 275
Fed. 775; Wallace v. State, (1899) 41 Fla. 547, 26 So. 713; Comm. v.
Phoenix Hotel Co., (1914) 157 Ky. 180, 162 S. W. 823; United States v.
712, 32 Pac. 350; Foot v. Buchanan, (C.C. Miss. 1902) 113 Fed. 156;
People v. Priori, (1900) 164 N. Y. 459, 58 N. E. 668; Taylor, Evidence,
25Lindquist v. Hayes, (1926) 22 Ohio App. 141, 153 N. E. 297; People
v. Boyle, (1924) 312 Ill. 586, 144 N. E. 342.
26Mason v. United States, (1917) 244 U. S. 362, 37 Sup. Ct. 621, 61
L. Ed. 1198; Regina v. Boyes, (1861) 1 B. & S. 311, 30 L. J. Q. B. 301.
27Abrams v. United States, (C.C.A. 2nd Cir. 1933) 64 F. (2d) 22.
ordinary course of law. So our next problem is: What will constitute "real danger" or a "reasonable apprehension" of danger? It must appear to the court from the character of the question and other facts adduced in the case that there is some "tangible and substantial" probability that the answer of the witness may help to convict him of some crime. That may require careful delving into the facts before a court can say that reasonable ground exists.

This delving into facts has in turn given rise to the question of how far the witness can be compelled to show or explain how an answer would incriminate him. Here it is necessary to distinguish between a showing that the question may incriminate and a showing of how it may do so. The court cannot require the witness to show how an answer might incriminate him, but it may require a showing to its satisfaction that the question, if answered, may tend to incriminate. The mere assertion of the witness that an answer may incriminate will not suffice. A bankrupt was required to submit, for the inspection of the court, matter which he refused to file in his schedule on the ground that it might incriminate him. An officer of a corporation who was indicted

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28 Mason v. United States, (1917) 244 U. S. 362, 37 Sup. Ct. 621, 61 L. Ed. 1198; State v. Wood, (1926) 99 Vt. 490, 134 Atl. 697; Regina v. Boyes, (1861) 1 B. & S. 311, 30 L. J. Q. B. 301. In Regina v. Boyes the witness still refused to testify, after being presented with a pardon from the Crown, on the ground that the pardon would not prevent impeachment by Parliament. The court held that the trial judge should have compelled an answer considering the possibility of impeachment too remote though possible. On the point of the danger to be apprehended the court said: "We are of opinion that the danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things—not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. We think that a merely remote and naked possibility should not be suffered to obstruct the administration of justice"—(p. 330). American courts frequently adopt this phraseology.

29 Ex parte Wagner, (C.C. Ohio 1896) 74 Fed. 954.

30 People v. Mather, (1830) 4 Wend. (N.Y.) 229; Wallace v. State, (1899) 41 Fla. 547, 26 So. 713; Comm. v. Phoenix Hotel Co., (1914) 157 Ky. 180, 162 S. W. 823.


33 In re Naletsky, (D.C. Conn. 1921) 280 Fed. 437; In re Hess, (D.C. Pa. 1904) 134 Fed. 169; see also Brown v. United States, (1927) 276 U. S. 134, 48 Sup. Ct. 288, 72 L. Ed. 500, where an officer of an unincorporated association, charged with violation of the anti-trust laws, was required to produce the books in court.
and who refused to surrender the books of the corporation to a receiver on the plea that they might incriminate him was required to place the matter in such shape that the court could intelligently determine the question from an examination of the averments of the answer or, if necessary, from an inspection of the books and documents whether they would have that tendency. 84

In most instances the question propounded to a witness will, upon its face, disclose whether or not it has a tendency to incriminate. But if it does not appear from the question itself, as when the question seems innocent in form but with a possibility that it might incriminate, then it is the "duty" of the witness to make it appear to the court that his answer might at least have that tendency. 85 And it is not for the witness to surmise that another question is going to follow which will tend to convict him of a felony, and therefore refuse to answer the first question. 86 Where the court should stop in its demand for an explanation is a troublesome question which must be left largely to the sound discretion of the judge in each particular case. The following quotation may well serve as a guide for any judge.

"In respect to this claim of privilege there are two extremes, which ought to be avoided: First, that of requiring from a witness who has honestly claimed the privilege, any explanation whatever of his reason for refusing to answer if the court can see how such answer may fairly and reasonably tend to incriminate him; and, second, that of permitting a witness to interpose the shield of apprehended peril as a protection against every question which he is disinclined to answer, although there be nothing in the circumstances of the case which in the least suggests the danger." 87

It has been suggested that the disclosures might be made without the hearing of the jury, just as questions involving the admissibility of evidence are usually presented by counsel, but that none the less this would amount to compulsion and has never been favored by the courts. 88

85 In re Rogers, (1900) 129 Cal. 468, 62 Pac. 47.
86 Overund v. Superior Court of San Francisco, (1920) 131 Cal. 280, 63 Pac. 372.
88 4 Wigmore, Evidence, 2nd ed., sec. 2271.
THE WITNESS IS THE JUDGE OF THE EFFECT OF THE ANSWER

Although there are many cases repeating the second proposition of the Burr Case that the witness is the judge of the effect of the answer, only a few of them indicate what is meant by it. When the counsel in the Burr Case argued that the witness was the sole judge of the effect of the answer, he had in mind the broad general proposition that the witness had the right to determine in the first instance whether the question was incriminating. As was previously observed, that contention was not sustained, and Chief Justice Marshall must have intended that the witness shall be the judge of the effect of the answer only when the question is such that an answer may incriminate. That is the interpretation generally given to the phrase in subsequent decisions. Occasionally, however, the courts have used the expression in reference to the right of the court to decide, in the first instance, whether the particular question is incriminating at all.

If the question propounded be such that an answer to it might incriminate the witness, it is well settled that it must be left to the witness to decide whether the answer, if given, would incriminate him. This is said to be on the ground that the courts cannot decide upon the effect of the answer without knowing what it is, and a disclosure of the fact would strip the witness of his privilege. The courts recognize the impossibility of anticipating the answer in most cases, and so leave it mainly to the witness, who understands his peril and the direction in which the questions and answers may lead, whether it were better not to answer such questions at all.

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89 See 2 Elliot, Evidence, (1904) 1008 where the writer apparently uses the phrase in this more general sense.

40 See Overman v. State, (1924) 194 Ind. 483, 143 N. E. 604 where it is pointed out clearly that the court determines whether an answer might incriminate the witness, but that in its determination it is bound by the statements of the witness as to its "effect" and that if the question be of such a nature that the answer may or may not incriminate him then the witness’s determination is final. See also Kirschner v. State, (1859) 9 Wis. 133, 136 for a similar interpretation of the phrase.


42 People v. Mather, (1830) 4 Wend. (N.Y.) 229 is the leading case on this point and is frequently cited without any further discussion of the matter.


Privilege Against Self-Incrimination

The Witness Is Entitled to the Privilege If an Answer Would Furnish One “Link” in a Chain of Evidence

It is this third proposition of the Burr Case which causes the courts the most trouble. The position of the prosecuting attorney in the Burr Case was that a witness can never refuse to answer any question unless that answer, unconnected with other testimony, would be sufficient to convict him of a crime. Chief Justice Marshall thought that to be too narrow a view of the privilege and pointed out that such a rule would practically render the privilege useless. He stated the rule to be that the witness may not be compelled to answer, “if such answer may disclose a fact which forms a necessary and essential link in the chain of testimony, which would be sufficient to convict him of any crime. . . .”

The courts are uniformly adhering to this rule laid down by Chief Justice Marshall, and if an answer may disclose a single material fact in the “chain” the privilege must be allowed. The difficulty comes in applying the rule and lies chiefly in determining whether the facts of any particular case bring the party within the rule. On what facts will constitute a “link” within the meaning of the rule there is a considerable divergence of views. The difficulties of the problem and the divergence in views are well illustrated by a couple of quotations.

In Fisher v. Ronalds, Maule, J., in arguing that it is the witness who is to use his discretion and not the judge, put the problem thus:

“The witness might be asked, Were you in London on such a day? and, though apparently a very simple question, he might have good reason to object to answer it, knowing that, if he admitted that he was in London that day, his admission might complete a chain of evidence against him which would lead to his conviction.”

That represents a liberal view which would permit a witness to refuse an answer to almost any question which might be asked. On the other hand, in Ex parte Irvine, Chief Justice Taft said:

“It is impossible to conceive of a question which might not elicit a fact useful as a link in proving some supposable crime against a witness. The mere statement of his name or of his place

47 (1853) 12 C. B. 762, 765, 22 L. J. C. P. 62.
of residence might identify him as a felon, but it is not enough that the answer to the question may furnish evidence out of the witness' mouth of a fact which, upon some imaginary hypothesis, would be the one link wanting in the chain of proof against him of a crime. It must appear to the court, from the character of the question, and the other facts adduced in the case, that there is some tangible and substantial probability that the answer of the witness may help to convict him of a crime."

This quotation is more representative of the approach to the problem than the opinion of Maule, J., but the question is not one susceptible of settlement by any rule of thumb as is well illustrated by the more recent case of *In re Moser*, where the judges of the same court disagreed as to whether the witness had brought himself within the privilege on the facts of the particular case.

It is believed that the courts generally have strayed far from Chief Justice Marshall's view on what facts tend to criminate. In *Counselman v. Hitchcock*, one of the leading cases on the entire subject of self-incrimination, it was contended in behalf of the government that the fact that an answer may uncover clews and furnish the names of witnesses which may assist the government to convict the witness does not of itself entitle him to the privilege. The court did not agree with that view and practically laid down a rule which classifies as incriminating evidence which is not incriminating in itself but likely to lead to the discovery of such evidence. That would seem to be a considerable departure from Justice Marshall's view in the *Burr Case* that the witness is excused only if a "direct" answer would tend to incriminate. An answer which would merely lead to further questioning which might prove incriminating was not regarded by Chief Justice Marshall as sufficient to excuse an answer to the first question not directly incriminating. According to Chief Justice Marshall the fact had to be a "necessary and essential" link in a chain of evidence which would convict the witness.

Having departed from Chief Justice Marshall's conservative view of what facts constitute a forbidden link, the courts nevertheless had to draw the line somewhere, and it is but natural that

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50 (1892) 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110.  
51 The Supreme Court has been severely criticized for its liberal views in the Counselman Case. See Corwin, E. S., The Supreme Court's Construction of the Self-Incrimination Clause, (1930) 29 Mich. L. Rev. 191, 205; 4 Wigmore, Evidence, 2nd ed., sec. 2261, p. 862.
opinions should differ as to where that line ought to be drawn. It has been pointed out that this proposition of not giving any evidence which may form a link cannot be maintained to its full extent, since there is no answer which a witness could give that might not become part of a "supposable concatenation of incidents" from which criminality of some kind may be inferred.\textsuperscript{52} The rule that one link of incriminating evidence excuses the witness must be regarded as limited by the corollary rule that there must be reasonable ground to apprehend danger.

The question of what constitutes a link arises most frequently in two types of situations which also serve to illustrate the difficulties involved. The first involves the disclosure of whether the witness was present at a certain place at a given time; and the second involves the naming of persons who might disclose other evidence towards the conviction of the witness. The issue involved in the first question was raised at an early date in \textit{United States v. Miller}\.\textsuperscript{53} The witness was asked by the prosecution if he saw the defendant, on trial for duelling, shoot at X. It was pointed out, in behalf of the witness, that in any prosecution of himself in connection with the same offense the government would have to prove his presence and therefore to require him to admit his presence tended to incriminate him. The court ruled that he must answer on the ground that no "direct" answer could furnish evidence against him. Chief Judge Cranch, however, was of the opinion that the privilege ought to be allowed, and the courts seem to be following his view of the matter.\textsuperscript{54}

As to whether a witness should be required to disclose the names of persons who might later testify against him, there is some difference of opinion. The question appears to have been first raised in the early case of \textit{Ward v. State}\.\textsuperscript{55} where the witness was asked who, not naming himself, bet at faro. The court ruled that he must answer, pointing out that the offense was not in being present but in betting and that the law will not permit a man to keep offenses and offenders a secret just because the offenders may in their turn give evidence against him. Again, recently in

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\item \textsuperscript{52} Wharton's Criminal Evidence, 10th ed., sec. 466.
\item \textsuperscript{53} (C.C. D.C. 1821) 2 Cranch 247, Fed. Cas. No. 772.
\item \textsuperscript{54} Ex parte Hughes, (1909) 57 Tex. Cr. R. 82, 121 S. W. 1118; Ex parte Werner, (1924) 46 R. I. 1, 124 Atl. 195; Ex parte Crow, (1932) 126 Cal. App. 617, 14 P. (2d) 918, 920.
\item \textsuperscript{55} Ward v. State, (1829) 2 Mo. 120, 22 Am. Dec. 449.
\end{itemize}
In re Doyle, a federal court held that the disclosure of a list of names of persons with whom it was alleged the witness had split fees would not tend to incriminate, the court saying: "The question is, not whether by his answer the prosecutor would perhaps be able to get leads to other witnesses, but whether an answer to the particular question would put the witness in danger." Although the two cases perhaps represent the general rule, there are some authorities which take a more liberal view towards the withholding of names of persons who might serve to convict the witness of a crime. They regard it as furnishing a link in a chain and hold that the witness need not disclose such names.

One other illustration will serve to show the care which must be used in determining when there is that connection which the courts call a "link." In Ex parte January the witness was asked if he had purchased any liquor within twelve months, and he refused to answer on the ground that the answer would tend to incriminate him. The purchase of liquor was not a crime, and the trial court committed him for contempt. On appeal the witness was ordered discharged because possession of liquor was a crime and if he admitted buying it, he might later be indicted for possession and thus have furnished a "link" in the chain.

**Summary and Conclusions**

The matter of determining whether the privilege shall be allowed in any particular case does not rest entirely with either the judge or the witness, but both participate in the determination in accordance with certain established rules.

The rules governing the privilege are now pretty well settled. Any differences which still exist are in the language in which the rules are stated, in the manner of applying the rules, and in what Justice Mitchell of the Minnesota supreme court has called the "burden of proof." Justice Mitchell, in *State v. Thaden*, has given us what is perhaps the best exposition and summary of the problems involved and the manner of applying existing rules since

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56 (D.C. N.Y. 1930) 42 F. (2d) 686.
57 40 Cyc. 2540.
60 (1890) 43 Minn. 253, 45 N. W. 447.
Chief Justice Marshall first analyzed the problem so clearly and reached a solution now universally regarded as correct. In view of the excellence of Justice Mitchell's opinion and its general approval by courts as a correct statement of the law, it seems appropriate to quote a considerable part thereof in concluding this article. Justice Mitchell summarized as follows:

"While no principle of the common law is more firmly established than that which affords a witness the privilege of refusing to answer any question which will criminate himself, yet its application is attended with practical difficulties. To hold that the witness himself is the sole and absolute judge whether the answer will criminate him would be to place it in his power to withhold evidence whenever he saw fit. Such a rule could not be tolerated for a moment. On the other hand, to require him to state what answer he would have to give, or to explain fully how his answer would tend to criminate, would deprive him of the very protection which the law designs to afford. Moreover, the reason of the rule forbids that it should be limited to confessions of guilt or statements which may be proved in subsequent prosecutions as admissions of facts sought to be established therein; but it should be extended to the disclosure of any fact which might constitute an essential link in a chain of evidence by which guilt might be established, although the fact alone would not indicate any crime. Hence the problem is how to administer the rule so as to afford full protection to the witness, and at the same time prevent simulated excuses. All the authorities agree to the general proposition that the statement of the witness that the answer will tend to criminate himself is not necessarily conclusive, but that this is a question which the court will determine from all the circumstances of the particular case, and the nature of the evidence which the witness is called upon to give. But the question on which the cases seem to differ is as to what we may call the burden of proof; some holding that the statement of the witness must be accepted as true, unless it affirmatively appears from the circumstances of the particular case that he is mistaken, or acts in bad faith, while other cases hold that, to entitle a witness to the privilege of silence, the court must be able to see, from the circumstances of the case and the nature of the evidence called for, that there is reasonable ground to apprehend danger to the witness, if he is compelled to answer. . . . The difference is theoretical, rather than practical; for it would be difficult to conceive of an instance where the circumstances of the case, and the nature of the evidence called for, would be entirely neutral in their probative force upon the question whether or not there was reasonable ground to apprehend that the answer might tend to criminate the witness. After consideration of the question, and an examination of the authorities, our conclusion is that the best practical rule is that laid down in some
of the English cases, and adopted and followed by Chief Justice Cockburn, in *Reg. v. Boyes*, that, to entitle a party called as a witness to the privilege of silence, the court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. To this we would add that, when such reasonable apprehension of danger appears, then, inasmuch as the witness alone knows the nature of the answer he would give, he alone must decide whether it would criminate him. This, we think, is substantially what Chief Justice Marshall meant by his statement of the rule in the Burr trial.

Dean Wigmore has said that Justice Mitchell's summing-up of the rule leaves nothing to be added, and that it ought to remain the last word in the development of the rule. Dean Wigmore's statement, however, should not be taken to mean that no further progress is possible. The latest development is a recent tendency on the part of the courts to exercise more completely the discretion which they possess in applying the rule. Whereas some of the earlier cases readily awarded the privilege, the recent cases, especially in the federal courts, show a more inquiring attitude on the part of the judges for the purpose of keeping the privilege within bounds. This is particularly true of the income tax cases where there has been a closer scrutiny of the questions and possible answers with a view of protecting the public interest. In a recent case we find a federal judge saying that the court is not without a "duty and a power" in respect to the problem because of the need of protecting society.

It would seem to be apparent from what Justice Mitchell has said and from other parts of this article that the correct solution of any individual case must depend as much upon the proper exercise of discretion by the presiding judge as upon any established rules. To that end the trial judge is permitted a wide discretion in deciding whether the privilege should be allowed, and if he interprets the situation correctly and acts fairly, he will not be reversed unless there be manifest error. On this point the

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61(1861) 1 B. & S. 311, 30 L. J. Q. B. 301.
62State v. Thaden, (1890) 43 Minn. 253, 45 N. W. 447.
65Justice Chase in Abrams v. United States, (C.C.A. 2nd Cir. 1933) 64 F. (2d) 22.
66Russell v. United States, (C.C.A. 6th Cir. 1926) 12 F. (2d) 683, writ
United States Supreme Court, in affirming an order punishing a witness for refusing to answer, said:

"The trial judge must determine each claim according to its own peculiar circumstances. . . . Ordinarily, he is in a much better position to appreciate the essential facts than an Appellate Court . . . and he must be permitted to exercise some discretion, fructified by common sense, when dealing with this necessarily difficult subject. Unless there has been a distinct denial of a right guaranteed, we ought not to interfere." 

Trial judges have not always exercised this wide discretion which they possess in the matter, and it is submitted that all courts should follow the example recently set by the federal courts in scrutinizing the questions and possible answers more carefully with the view of allowing the privilege less readily in the interests of society. Although the constitutional rights of the witness should be protected, the constitutional and statutory rights of the other parties to the suit or under prosecution as well as the right of the state to testimony should not be overlooked. The problem of allowing or disallowing the privilege would seem to call for some balancing of those interests.

of certiorari denied, 273 U. S. 708, 47 Sup. Ct. 100, 71 L. Ed. 851; State v. Medley, (1919) 178 N. C. 710, 100 S. E. 591.