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Constitutional Law - Applicability of the Fifth Amendment to the Federal Constitution to State Proceedings

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If under the due process clause a state would be allowed to assume jurisdiction over a foreign corporation under the facts of the instant decision, the question arises as to whether the Louisiana courts would be disposed to do so. The Louisiana legislature has not defined the term "doing business."²⁴ The criterion as imposed by the Louisiana Supreme Court was that "when a foreign corporation transacts a *substantial* part of its ordinary business in a state, it is doing, transacting, and carrying on or engaging in business therein."²⁵

However, subsequent to the *International Shoe Co.* case, the Louisiana legislature added a provision to the service of process act²⁶ providing for service on a foreign corporation not required by law to appoint an agent but that has engaged in *business activities* in Louisiana through acts performed by its employees or agents. It has been suggested that this provision would permit the Louisiana courts to entertain all suits against foreign corporations on local causes of action permissible under the *International Shoe Co.* case.²⁷ It is submitted that the Louisiana courts, if faced with the facts of the instant case, could justifiably hold that the defendant did engage in business activities within the meaning of the statute thus subjecting the corporation to service of process within Louisiana.

John M. Shaw

CONSTITUTIONAL LAW — APPLICABILITY OF THE FIFTH
AMENDMENT TO THE FEDERAL CONSTITUTION
TO STATE PROCEEDINGS

In an investigation before the Orleans Parish Grand Jury of a public bribery charge, defendant refused to answer certain questions and was convicted of contempt of court. Having served his sentence, defendant was propounded the identical questions and again refused to answer, invoking the privilege against self-incrimination provided by article 1, section 11, of the Louisiana Constitution and the fifth amendment to the United States Constitution. As the basis for invocation of the privilege against self-incrimination, defendant contended that to compel him to

24. See *Proctor Trust Co. v. Pope*, 12 So.2d 724, 727 (La. App. 1943).

25. *R. J. Brown Co. v. Grosjean*, 189 La. 778, 783, 180 So. 634, 636 (1938).

26. LA. R.S. 13:3471(5) (d) (Supp. 1954).

27. See Comment, *Amenability of Foreign Corporations to Suit in Louisiana*, 14 LOUISIANA LAW REVIEW 625, 636 (1954).

answer would force him to disclose information which could be used against him in the United States District Court where he stood indicted for violation of certain federal gambling statutes.¹ The trial court again found defendant guilty of contempt, stating that the privilege against self-incrimination provided by the Louisiana Constitution is expressly denied in public bribery cases by article 19, section 13 of the Constitution and apparently holding the fifth amendment to the United States Constitution inapplicable to state proceedings. On appeal from the second conviction, *held*, reversed.² Even though the Louisiana Constitution excepts public bribery investigations from the privilege against self-incrimination, defendant is protected under the fifth amendment to the United States Constitution, since to compel defendant to answer would make information available for use against him in the pending federal proceedings. *State v. Dominguez*, 82 So.2d 12 (La. 1955).

A privilege against self-incrimination permits a witness to refuse to answer questions propounded to him by an investigative body or court when the information sought to be obtained could serve as the basis for a subsequent prosecution of the witness. Since the pleading of the privilege hampers the investigative body or court in its attempt to ascertain information, statutes granting the privilege are usually strictly interpreted.³ For this reason, courts are inclined to disallow an extension of the privilege to include testimony which might prove incriminatory in another jurisdiction.⁴ This rule is based upon the premise that the possibility of prosecution by another jurisdiction is too remote and speculative to be within the protection of the state

1. 65 STAT. 529 (1951), 26 U.S.C. §§ 3285, 3287 (1952).

2. Justices Hamiter, Hawthorne, and McCaleb, dissenting.

3. 8 WIGMORE, EVIDENCE 318, § 2251 (2d ed. 1940).

4. *Feldman v. United States*, 322 U.S. 487 (1944), *rehearing denied*, 323 U.S. 811 (1944); *Vanse v. United States*, 53 F.2d 346 (2d Cir. 1932), *cert. denied*, 284 U.S. 661 (1931); *Hale v. Henkel*, 201 U.S. 43 (1906); *Hack v. Kansas*, 199 U.S. 372 (1905); *People v. Butler Street Foundry & Iron Co.*, 201 Ill. 236, 66 N.E. 349 (1903); *Brown v. Walker*, 161 U.S. 591 (1896). In the *Feldman* case the defendant was investigated in a state proceeding to discover assets available for judgment debtors. In such investigations, an exception was made to the applicability of the privilege against self-incrimination, much as is done in Louisiana in investigations for bribery. The defendant, relying upon the immunity which was granted by state law, gave testimony which was highly incriminatory. This testimony was subsequently taken into federal court to be used against the defendant. In upholding the conviction which was based largely upon the strength of that testimony, the United States Supreme Court said: "The state . . . could not prevent the testimony given by the party in the State proceeding from being used against the same person in a Federal court for a violation of the Federal statute . . ."

privilege.⁵ However, when the remoteness and speculativeness are removed, as when the witness is under indictment in another jurisdiction, the state-granted privilege has been extended to protect the witness.⁶ The Louisiana courts have followed this rule in interpreting the privilege against self-incrimination granted by the Louisiana Constitution.⁷ However, that document expressly denies the right to invoke the privilege in cases involving public bribery.⁸ The question of the right to plead the privilege granted by the fifth amendment to the United States Constitution where the state privilege has been withdrawn had never been presented to a Louisiana court before the instant case. Prior to the instant case, the Louisiana court had simply followed the majority rule and found that the fifth amendment had no application to state proceedings.⁹

In the instant case, since investigations for bribery are specifically excepted from Louisiana's privilege against self-incrimination, the court found that the defendant's refusal to testify was not justified by the Louisiana Constitution.¹⁰ The court decided, however, that the fifth amendment to the United States Constitution furnishes protection in the case where a witness has been indicted in a federal court for violation of a federal statute, even when the witness' right to invoke the privilege is in contest in a state court.¹¹ As authority for this conclusion, the court cited the cases of *People v. Denuyl*,¹² *Mitchell v. Kelley*,¹³ and *State ex rel. Doran v. Doran*.¹⁴ These cases, how-

5. The "practical reason" for this rule was that it would require an "encyclopedic analysis of any laws in the world, which is impracticable." WIGMORE, EVIDENCE 372 (Students' ed. 1935).

6. *People v. Denuyl*, 318 Mich. 645, 29 N.W.2d 284 (1947). This rule was adopted in Louisiana in the case of *State ex rel. Doran v. Doran*, 215 La. 151, 39 So.2d 894 (1949).

7. *State v. Rodrigues*, 219 La. 217, 52 So.2d 756 (1951); *State ex rel. Doran v. Doran*, 215 La. 151, 39 So.2d 894 (1949).

8. LA. CONST. art. XIX, § 13. But an immunity from prosecution based upon any evidence given under this rule is granted in its stead. See LA. R.S. 14:121, 15:468 (1950).

9. *State v. Rodrigues*, 219 La. 217, 52 So.2d 756 (1951). This case arose under circumstances similar to those of the instant case except that the danger of future prosecution arose not from federal courts but from the courts of this state. The court expressly rejected the proposition that the fifth amendment could protect defendant in a state proceeding and upheld the constitutionality of article XIX, § 13, although a complete immunity is not therein granted.

10. 82 So.2d 12, 16 (La. 1955).

11. *Id.* at 20.

12. 318 Mich. 645, 29 N.W.2d 284 (1947).

13. 71 So.2d 887 (Fla. 1954).

14. 219 La. 217, 52 So.2d 756 (1951).

ever, dealt not with the application of the fifth amendment to state proceedings, but rather with the extension of state-granted privileges to protect witnesses who were in imminent danger of prosecution in other jurisdictions.¹⁵ Since the Louisiana privilege admittedly could not be applied in the instant case, the cited cases have no application. The decision in the instant case, therefore, seems to be without precedent in the jurisprudence of this state. Although the court did not expressly state that the privilege afforded by the fifth amendment may be generally applicable to proceedings of the Louisiana courts, the recognition of the federal privilege where the similar privilege afforded by the Louisiana Constitution has been expressly withdrawn seems to present strong support for this conclusion. The result of the instant case is to render ineffective the exception provided in the Louisiana Constitution relating to bribery cases and to permit invocation of the fifth amendment to the United States Constitution whenever a witness stands indicted in a federal court. Although a repetition of the facts of the instant case would be fortuitous, the decision does seem to indicate that our court has taken a far more liberal attitude than has been taken by the courts of the federal and other state systems.

Robert J. Jones

CONSTITUTIONAL LAW — JUDICIAL REVIEW — LEGALIZED
GAMBLING — LOUISIANA STATE RACING COMMISSION

The Louisiana State Racing Commission granted Magnolia Park, Inc., permission to conduct harness racing in Jefferson Parish and licensed it to conduct pari-mutuel wagering as part of the operation of the track. Plaintiffs, property owners in Jefferson Parish, brought suit to force revocation of the license and to obtain temporary and permanent injunctions prohibiting the pari-mutuel wagering. They alleged that the statutes which

15. *People v. Denuyl* dealt with the application of MICH. CONST. art. 2, § 16, and expressly stated that the opinion assumed that "the Fifth Amendment to the Federal Constitution . . . does not apply to prosecution under State Laws." *Mitchell v. Kelley* applied FLA. CONST. § 12 (declaration of rights). *State ex rel. Doran v. Doran* applied only LA. CONST. art. I, § 11.