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## DISCOVERY OF PENALTIES

*W. Hamilton Bryson\**

It is a well-established and fundamental principle of justice that no one may be compelled to subject himself to punishments nor to give evidence leading to that result. *Nemo tenetur prodere seipsum*<sup>1</sup> is an ancient maxim. It was written directly into the Virginia Declaration of Rights in 1776, which states that in all "criminal prosecutions" no one can "be compelled to give evidence against himself."<sup>2</sup> This idea was also incorporated into the United States Constitution in 1791 through the fifth amendment.<sup>3</sup>

The purpose of this essay is to discuss some aspects of the scope of the privilege against self-incrimination. It will consider first what can not be and then what can be discovered by the common law of England before 1776, when the first republican constitution of Virginia was promulgated.<sup>4</sup> Finally, the developments in Virginia and federal practice will be dealt with.

Not only is the privilege against self-incrimination applicable in

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1. *E.g.*, *Young v. Scott*, 25 Va. (4 Rand.) 415, 416 (1826); *United States v. McRae*, L.R. 4 Eq. 327, 337 (1867); *Harrison v. Southcote*, 1 Atk. 528, 534, 26 Eng. Rep. 333 (Ch. 1751); *Protector v. Lord Lumley*, Hardr. 22, 145 Eng. Rep. 360 (Ex. 1655); *Burrowes v. High Commission*, 3 Bulst. 48, 50, 81 Eng. Rep. 42 (K.B. 1615). The maxim is sometimes expressed as *Nemo tenetur seipsum accusare*; *e.g.*, *Rex v. Purnell*, 1 Wm. Black. 37, 39, 96 Eng. Rep. 20 (K.B. 1748); *E. WINGATE, MAXIMES* 486 (1658). See generally 1 E. R. DANIELL, *CHANCERY PRACTICE* 605-610 (8th ed. 1914); J. STORY, *EQUITY PLEADING* §§ 521-25, 553, 575-98 (1838).

2. Art. 8, 1 W. W. HENING, *STATUTES AT LARGE OF VIRGINIA* 48 (1809); 9 *id.* 110. VA. CONST. art. 1, § 8. Note also R. L. PERRY & J. C. COOPER, *SOURCES OF OUR LIBERTIES* 309, 312, 422, 428, 432 (1959).

3. "No person . . . shall be compelled in any criminal case to be a witness against himself," U.S. CONST. amend. V; the privilege against self-incrimination is part of the concept of the due process of law, and the fourteenth amendment of the U.S. Constitution applies it to the states; *Malloy v. Hogan*, 378 U.S. 1 (1964).

4. It is to be remembered that the common law of England is the common law of Virginia; VA. CODE ANN. § 1-10 (Repl. Vol. 1979); see also W. H. BRYSON, *NOTES ON VIRGINIA CIVIL PROCEDURE* 9-10 (1979).

criminal prosecutions,<sup>5</sup> but also it applies in civil litigation. A person, whether a witness in or a party to a civil proceeding, cannot be compelled to give information or to produce documents which will incriminate him in a separate, independent criminal trial. It has been further held that information is privileged even if it might only tend to incriminate<sup>6</sup> or if it might provide any link in the chain of proof in a criminal prosecution.<sup>7</sup>

Witnesses in both common law and equity cases are included in this privilege. Parties to lawsuits were not competent to testify as witnesses until the nineteenth century,<sup>8</sup> and thus they could not give testimony for or against themselves. However, in the courts of equity, although parties were incompetent as witnesses, they could be compelled to discover evidence as a part of the process of pleading. This was done by means of interrogatories, which were included in bills of discovery and in normal bills for relief.<sup>9</sup> Indeed, it has been said that every bill (and cross bill) requires discovery.<sup>10</sup> This is so because the other party has a general obligation in equity practice to respond under oath to all of the material allegations of the bill filed against him.<sup>11</sup> This sworn answer can then be used as an admission or as evidence in equity or in a related proceeding at common law.

A bill in equity which seeks an answer or discovery, directly or indirectly, of matters involving self-incrimination is improper as a matter of law. The most elegant way of asserting one's privilege against self-incrimination is by demurrer, since this is a defect in law.<sup>12</sup> If sufficient facts do not appear in the bill, the defendant

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5. *E.g.*, *Rex v. Heydon*, 1 Wm. Black. 351, 96 Eng. Rep. 195 (K.B. 1762); *Rex v. Cornelius*, 2 Stra. 1210, 93 Eng. Rep. 1133 (K.B. 1744); *Regina v. Mead*, 2 Ld. Raym. 927, 92 Eng. Rep. 119 (K.B. 1703); *Rex v. Worsenham*, 1 Ld. Raym. 705, 91 Eng. Rep. 1370 (K.B. 1701).

6. *E.g.*, *Harrison v. Southcote*, 1 Atk. 528, 539, 26 Eng. Rep. 333, 2 Ves. Sen. 389, 28 Eng. Rep. 249 (Ch. 1751); *East India Co. v. Campbell*, 1 Ves. Sen. 246, 27 Eng. Rep. 1010 (Ex. 1749).

7. *E.g.*, *Paxton v. Douglas*, 19 Ves. Jun. 225, 227, 34 Eng. Rep. 502 (Ch. 1812); *Claridge v. Hoare*, 14 Ves. Jun. 59, 33 Eng. Rep. 443 (Ch. 1807).

8. 1866-67 Va. Acts, c. 170, p. 615; VA. CODE ANN. § 8.01-396 (Repl. Vol. 1977).

9. W. H. BRYSON, *DISCOVERY IN VIRGINIA* 5-11 (1978).

10. *E.g.*, *Baker v. Morris*, 37 Va. (10 Leigh) 284, 311-12 (1839); J. STORY, *EQUITY PLEADING* § 311 (1838).

11. J. STORY, *EQUITY PLEADING* §§ 847, 852-54, 874 (1838); W. H. BRYSON, *NOTES ON VIRGINIA CIVIL PROCEDURE* 94-96 (1979).

12. J. STORY, *EQUITY PLEADING* §§ 521-24, 547, 553, 575-94 (1838).

must allege them by means of a plea.<sup>13</sup> The strength of the privilege is such, however, that it may be put forth in an answer<sup>14</sup> or simply by not responding,<sup>15</sup> but this is considered sloppy pleading. By these means, the scope of the privilege came to be defined and refined by the courts of equity, although the idea of self-incrimination is not limited to matters of equity or "conscience." In 1737 Lord Chancellor Hardwicke said that "there is no rule more established in equity, than that a person shall not be obliged to discover what will subject him to a penalty, or anything in the nature of a penalty"<sup>16</sup>; this rule is the privilege against self-incrimination. Since all suits in equity involve discovery, there can be no litigation in the courts of equity founded on penal statutes.<sup>17</sup>

The basic concept here is that of the burden of proof. According to the ancient common law theory, the prosecution must prove a defendant's guilt, if it can. It is not for the defendant to be forced to prove his own guilt.<sup>18</sup> The courts of equity may require a defendant to discover or produce evidence of his own civil wrongdoings, but this would result in his paying just compensation, not in a penalty, nor in his suffering corporal punishment. One of the major problems with the old court of star chamber was that it used equity procedures in the prosecution of crimes and thus forced defendants to discover or admit their own guilt. This fault in that court was perceived after it was abolished,<sup>19</sup> and the surviving courts of equity shunned this very bad example.

There can be no discovery of a crime which might subject a person to sanctions or punishments; the crime, an offense against the public good, might be a matter of the common law or a statute. Some of the crimes of which discovery was not allowed by the ear-

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13. *E.g.*, *Brownsword v. Edwards*, 2 Ves. Sen. 243, 245, 28 Eng. Rep. 157 (Ch. 1751); a plea is strictly construed, *see e.g.*, *Gascoyne v. Sidwell*, Gilb. Rep. 186, 25 Eng. Rep. 131, 2 Eq. Cas. Abr. 72 (pl. 19), 171 (pl. 1), 22 Eng. Rep. 63, 146 (Ch. 1726).

14. *E.g.*, *Earl of Suffolk v. Green*, 1 Atk. 450, 26 Eng. Rep. 286 (Ch. 1739).

15. *E.g.*, *Wrottesley v. Bendish*, 3 P. Wms. 235, 24 Eng. Rep. 1042 (Ch. 1733).

16. *Smith v. Read*, 1 Atk. 526, 527, 26 Eng. Rep. 332, West t. Hard. 16, 17, 25 Eng. Rep. 796 (Ch. 1737).

17. *Anon.*, 3 Leon. 204, 74 Eng. Rep. 634 (Ex. 1588).

18. *E.g.*, *Firebrass's Case*, 2 Salk. 550, 91 Eng. Rep. 465 (Dutchy Cham. 1700); *Dighton and Holt's Case*, Cro. Jac. 388, 79 Eng. Rep. 332 (K.B. 1616).

19. *Argument of counsel in Attorney General v. Mico*, Hardr. 137, 141, 145 Eng. Rep. 419 (Ex. 1658).

lier cases were murder,<sup>20</sup> piracy and larceny,<sup>21</sup> ravishment of ward (kidnapping),<sup>22</sup> bribery,<sup>23</sup> forgery,<sup>24</sup> incest,<sup>25</sup> simony,<sup>26</sup> covin and fraud,<sup>27</sup> subornation of perjury,<sup>28</sup> unmarried cohabitation and criminal conspiracy,<sup>29</sup> maintenance,<sup>30</sup> theftboot (receiving stolen property),<sup>31</sup> improperly invoking the jurisdiction of the court of admiralty,<sup>32</sup> trading against the prohibitions of a statute and exporting contraband silver,<sup>33</sup> trading contrary to the monopoly of a company,<sup>34</sup> holding simultaneously a public office and a seat in Parliament,<sup>35</sup> holding simultaneously two ecclesiastical livings,<sup>36</sup> and being an agent of the Confederate States of America.<sup>37</sup>

It is to be remembered that in the eighteenth century and earlier, many statutes encouraged criminal prosecutions by informers, private persons, who were given a part of the fine or forfeiture as a reward for their public services. This was necessary for the reason-

20. *E.g.*, Procter v. Darnbrook, Hob. 138, 80 Eng. Rep. 288 (Star Cham. 1617).

21. *E.g.*, East India Co. v. Campbell, 1 Ves. Sen. 246, 27 Eng. Rep. 1010 (Ex. 1749).

22. *E.g.*, Vice-Countess Montague v. Anon., Cary 9, 21 Eng. Rep. 5 (Ch. n.d.).

23. *E.g.*, Rex v. Heydon, 1 Wm. Black. 351, 96 Eng. Rep. 195 (K.B. 1762); Rex v. Cornelius, 2 Stra. 1210, 93 Eng. Rep. 1133 (K.B. 1744).

24. *E.g.*, Rex v. Worsenham, 1 Ld. Raym. 705, 91 Eng. Rep. 1370 (K.B. 1701).

25. *E.g.*, Brownsword v. Edwards, 2 Ves. Sen. 243, 28 Eng. Rep. 157 (Ch. 1751)(marriage with deceased wife's sister).

26. *E.g.*, Attorney General *ex rel.* Hindley v. Sudell, Prec. Ch. 214, 24 Eng. Rep. 105 (Ch. 1702).

27. *E.g.*, Spendlow v. Smith, Hob. 84, 80 Eng. Rep. 234 (temp. James I).

28. *E.g.*, Baker v. Pritchard, 2 Atk. 387, 26 Eng. Rep. 634 (Ch. 1742).

29. *E.g.*, Chetwynd v. Lindon, 2 Ves. Sen. 450, 28 Eng. Rep. 288 (Ch. 1752).

30. *E.g.*, Sharp v. Carter, 3 P. Wms. 375, 24 Eng. Rep. 1108 (Ch. 1735); Cook v. Arnold, 79 SELDEN Soc'y 461 (case 599)(Ch. 1676); Ex'rs. of Penrice v. Barker, 73 SELDEN Soc'y 63 (case 110), Repts. temp. Finch 75, 23 Eng. Rep. 40 (Ch. 1674); stat. 32 Hen. 8 (1540), c. 9, 3 STATUTES OF THE REALM 753.

31. *E.g.*, Micklethwayt v. Merrett, 79 SELDEN Soc'y 876 (case 1097)(Ch. 1681).

32. *E.g.*, Pensax v. Litten, 73 SELDEN Soc'y 23 (case 46)(Ch. 1674); stat. 2 Hen. 4 (1401), c. 11, 2 STATUTES OF THE REALM 124.

33. *E.g.*, Duncalf v. Blake, 1 Atk. 52, 26 Eng. Rep. 35 (Ch. 1737); Harrison v. Houblon, 79 SELDEN Soc'y 818 (case 1024)(Ch. 1680); stat. 10 Will. 3 (1698), c. 16, 7 STATUTES OF THE REALM 524 (wool exports from Ireland).

34. *E.g.*, Fisher v. Michel, 73 SELDEN Soc'y 245 (case 362)(Ch. 1675).

35. *E.g.*, Selwyn v. Honeywood, 9 Mod. 419, 88 Eng. Rep. 546, 2 Atk. 276, 26 Eng. Rep. 961 (Ch. 1744); stat. 12 & 13 Will. 3 (1701), c. 10, §§ 88, 89, 7 STATUTES OF THE REALM 711.

36. *E.g.*, Boteler v. Allington, 3 Atk. 453, 26 Eng. Rep. 1061 (Ch. 1746); stat. 21 Hen. 8 (1529), c. 13, § 9, 3 STATUTES OF THE REALM 293.

37. United States v. McRae, L.R. 4 Eq. 327 (1867), *aff'd.* L.R. 3 Ch. 79 (1867); U.S. Act of July 17, 1862, §§ 5-8.

able enforcement of revenue and regulatory statutes because there was no police force or governmental agency whose duties were primarily directed to this end. The various departments of the state were not designed to enforce penal statutes. Private prosecutions were conducted in the common law courts in the name of the attorney general or the king *ex relatione* the informer or else in the name of the informer *qui tam*, who was suing on behalf of the crown as well as himself. Although these prosecutions were in the hands of common informers rather than public officials, they were still criminal in nature and in effect, and the privilege against self-incrimination was available.

Not only can one not get discovery of criminal penalties, but also there can be no discovery of civil penalties. The distinction between civil penalties and civil damages is to be noted. The difference is that between the punishment of the wrongdoer and the compensation to the victim of a wrong. The most frequent examples of civil penalties in English law were treble damages for committing waste<sup>38</sup> and for failing to pay tithes<sup>39</sup> and the forfeiture of a loan for which a usurious rate of interest had been charged.<sup>40</sup> In these cases a private person, not the crown, received the penalty.

Discovery was normally needed by a plaintiff to have an accounting of the extent of the damages in the above-mentioned causes of action. Since the plaintiff must come into equity for an accounting in order to be able to make out a *prima facie* case at law (or in equity, if he chose to sue for the damages there), the equity court would require him to waive the penalty and sue for single damages, compensation, only.<sup>41</sup> Thus he would have the dis-

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38. *E.g.*, Attorney General *ex rel.* Waters v. Vincent, Bunb. 192, 145 Eng. Rep. 644 (Ex. 1724); Firebrass's Case, 2 Salk. 550, 91 Eng. Rep. 465 (Dutchy Cham. 1700); Statute of Gloucester, 1278, 6 Edw. 1, c. 5, 1 STATUTES OF THE REALM 48.

39. *E.g.*, Wools v. Walley, 1 Anstr. 100, 145 Eng. Rep. 812 (Ex. 1792); in Anon., 1 Vern. 60, 23 Eng. Rep. 310 (Ch. 1682), it was ruled that only a vicar, not his executor, could sue for the penalty; Anon., 3 Leon. 204, 74 Eng. Rep. 634 (Ex. 1588). Driver v. Man, Hardr. 190, 145 Eng. Rep. 446 (Ex. 1661), required discovery, but it was criticized by the reporter as being contrary to the normal practice. Act for the Payment of Tithes, 1548, 2 & 3 Edw. VI, c. 13, § 1, 4 STATUTES OF THE REALM 56.

40. *E.g.*, Earl of Suffolk v. Green, 1 Atk. 450, 26 Eng. Rep. 286 (Ch. 1739); Act Against Usury, 1571, 13 Eliz. I, c. 8, §§ 2, 4, 4 STATUTES OF THE REALM 542; Fenton v. Blomer, Public Record Office MS. C.33/61, f. 66 (Ch. 1580).

41. *See, e.g.*, Regina v. Newel, Parker 269, 145 Eng. Rep. 777 (Ex. 1707); Cary and Cot-

covery he needed without violating the defendant's privilege against self-incrimination. If there were no waiver, the defendant would not be required to answer nor to suffer any penalty as a result of any discovery.

A forfeiture is not just compensation for a wrong done; therefore, the occurrence of a condition subsequent is not discoverable. No discovery of a widow's remarriage was required where this would involve the forfeiture of a gift or bequest.<sup>42</sup> Likewise no discovery of the lack of consent to a marriage was enforced, if this was a condition subsequent to a forfeiture.<sup>43</sup> Also there would be no discovery which would result in the forfeiture of a leasehold or other property interest.<sup>44</sup> On the other hand, alienage, which limited the right to own land, was held to be only an "incapacity" and thus discoverable.<sup>45</sup>

If the penalty or forfeiture were waived, then discovery was freely available in order to determine the defendant's liability and the plaintiff's damages.<sup>46</sup> The practice of waiving the penalties became standard in suits for tithes,<sup>47</sup> and the courts eventually held that in tithes cases a prayer for single damages constituted an implied waiver of the statutory treble damages.<sup>48</sup> If the criminal offense had been pardoned so that there was no longer any danger of a penalty, then the crime was discoverable. Also where there had

tington v. Mildmay, Toth. 7, 21 Eng. Rep. 107 (Ch. 1590);

42. *E.g.*, Monnins v. Monnins, 2 Ch. Rep. 68, 21 Eng. Rep. 618 (Ch. 1673); *contra* Lucas v. Evans, 3 Atk. 260, 26 Eng. Rep. 951 (Ch. 1745)(the forfeiture was said to be only a "conditional limitation over").

43. *E.g.*, Chancey v. Fenhoulet, 2 Ves. Sen. 265, 28 Eng. Rep. 171 (Ch. 1751)(semble); Chauncey v. Tahourden, 2 Atk. 392, 26 Eng. Rep. 637 (Ch. 1742); Wrottesley v. Bendish, 3 P. Wms. 235, 24 Eng. Rep. 1042 (Ch. 1733); Wynn v. Wynn, 73 SELDEN Soc'y 382 (Ch. 1676).

44. *E.g.*, Lord Uxbridge v. Staveland, 1 Ves. Sen. 56, 27 Eng. Rep. 888 (Ch. 1747); *see also* Rosser v. Evans, 1 Freeman 313, 22 Eng. Rep. 1234, 73 SELDEN Soc'y 221 (Ch. 1675); Fane v. Atlee, 1 Eq. Cas. Abr. 77, 21 Eng. Rep. 890 (Ch. 1700); Price v. Evans, 73 SELDEN Soc'y 334 (Ch. 1676); Deacon v. Lucas, 73 SELDEN Soc'y 331 (Ch. 1676); Churchill v. Isaack, 73 SELDEN Soc'y 12 (Ch. 1673).

45. *E.g.*, Attorney-General v. Duplessis, Parker 144, 145 Eng. Rep. 739 (Ex. 1752), *aff'd*, 1 Brown Parl. Cas. 415, 1 Eng. Rep. 658 (H.L. 1753).

46. *E.g.*, Attorney-General v. Cresner, Parker 279, 145 Eng. Rep. 779 (Ex. 1710)(dictum); Attorney-General v. Cursell, Brit. Lib. MS. Hargr. 70, p. 102, pl. 336 (Ex. 1696); Attorney-General v. Anonymous, Hardr. 201, 145 Eng. Rep. 452 (Ex. 1661)(semble).

47. 3 R. BURN, ECCLESIASTICAL LAW 763 (9th ed. 1842).

48. *E.g.*, Wools v. Walley, 1 Anstr. 100, 145 Eng. Rep. 812 (Ex. 1792); Attorney-General *ex rel.* Waters v. Vincent, Bunb. 192, 145 Eng. Rep. 644 (Ex. 1724)(dictum).

been a trial already, the doctrine of double jeopardy would protect against any further penalty similarly to a pardon. The essence of the privilege is to protect against a penalty, not a mere conviction of a crime nor the shame of criminality exposed. The statute of limitations may protect against a forfeiture also.

A person may by contract agree to make discovery of matters which may expose him to penalties,<sup>49</sup> and he may contract to pay penalties and forfeitures. In this latter case, the payments are not penalties in the legal sense but only terms of the contract, and the courts will enforce such payments and will force the discovery that is necessary to prove them.<sup>50</sup>

In Virginia, as in England, the privilege against self-incrimination can be asserted in any court. "[N]o man should anywhere, before any tribunal, in any proceeding, be compelled to give evidence tending to criminate himself, either in that or any other proceeding."<sup>51</sup> As one Virginia court reasoned,

It is not the province of equity to do more than justice between parties litigant before it, and it leaves whatever savours of punishment or penal retribution to the rigours of the common law. It therefore not only refuses directly to enforce penalties and forfeitures, but will not for such a purpose exercise its ancillary jurisdiction in aid of a common law forum, and especially when it is called upon to compel a discovery on oath from the party sought to be subjected. In the last respect, indeed, it conforms to the spirit of the common law, which, jealous of the liberty of the citizen, protects him from being made his own accuser, or forced to give evidence against himself.<sup>52</sup>

No person is required to disclose anything which will or might "expose him to pains, penalties, or punishment, or to a criminal prosecution therefor."<sup>53</sup> The privilege includes not only criminal or

49. *E.g.*, *South Sea Co. v. Bumpstead*, Mosely 74, 25 Eng. Rep. 279 (Ch. 1728); *East India Co. v. Atkins*, 1 Stra. 168, 93 Eng. Rep. 452, 1 Comyns 347, 92 Eng. Rep. 1105 (Ch. 1719).

50. *E.g.*, *African Co. v. Parish*, 2 Vern. 244, 23 Eng. Rep. 758 (Ch. 1691); *East India Co. v. Maniston*, 73 SELDEN Soc'y 384, 2 Chan. Cas. 218, 22 Eng. Rep. 918 (Ch. 1676).

51. *Cullen v. Commonwealth*, 65 Va. (24 Gratt.) 624, 628 (1873)(Cullen refused to testify before a grand jury about a duel).

52. *Poindexter v. Davis*, 47 Va. (6 Gratt.) 481, 490 (1850)(no discovery leading to the forfeiture of property).

53. *Northwestern Bank v. Nelson*, 42 Va. (1 Gratt.) 108, 126 (1844)(receiving stolen



penal matters, but also the

discovery of waste committed by a tenant, unless the consequential penalty or forfeiture be waived, or of any matter which would subject the party to the loss of a franchise or office, or of a breach of commercial regulations exposing him to the forfeiture of a ship or cargo; and so, on the other hand, it reaches the case of the assignment of a lease by a lessee without license, or of a marriage without consent of a parent or other person designated, by which there is to be a forfeiture of a term, estate, portion or jointure.<sup>54</sup>

Thus parties have been protected from discovery involving the crimes of perpetrating a fraud,<sup>55</sup> of being an accessory to a duel,<sup>56</sup> and of receiving stolen property.<sup>57</sup> One was not compelled to answer whether he had taken property out of the state where this would result in its forfeiture to a reversioner or remainderman.<sup>58</sup> Although the Virginia usury statutes normally did not require any penalties, in those cases where they might, there could be no discovery of illegal interest.<sup>59</sup> On the other hand, one can force the discovery of the lack of good faith on the part of a purchaser<sup>60</sup> and the fact of an illegal consideration for a contract,<sup>61</sup> since neither leads to a penalty or civil forfeiture.

The privilege is pleaded in equity by demurrer, if the danger of the penalty or forfeiture appears from the plaintiff's bill. If it does not, the protection may be claimed by plea or by answer.<sup>62</sup>

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property).

54. *Poindexter v. Davis*, 47 Va. (6 Gratt.) 481, 491 (1850).

55. *E.g.*, *Dulaney v. Smith*, 97 Va. 130, 33 S.E. 533 (1899).

56. *E.g.*, *Cullen v. Commonwealth*, 65 Va. (24 Gratt.) 624 (1873).

57. *E.g.*, *Northwestern Bank v. Nelson*, 42 Va. (1 Gratt.) 108 (1844).

58. *E.g.*, *Poindexter v. Davis*, 47 Va. (6 Gratt.) 481 (1850). This forfeiture was threatened by 1 VA. REV. CODE, c. 111, § 48, p. 431 (1819).

59. *E.g.*, *Belton v. Apperson*, 67 Va. (26 Gratt.) 207, 214 (1875); *Hogshead v. Baylor*, 57 Va. (16 Gratt.) 99, 105, 106 (1860); *Young v. Scott*, 25 Va. (4 Rand.) 415, 416, 419, 420 (1826)(citing *Brownsword v. Edwards*, 2 Ves. Sen. 243, 28 Eng. Rep. 157 (Ch. 1751)); *McPherrin v. King*, 22 Va. (1 Rand.) 172, 182-184 (1822). The Virginia statutes were milder on usurers than the English ones; see VA. CODE, c. 141, §§ 7, 10 (1860), and VA. CODE, c. 141, § 11 (1849). *Cf.* *Walters v. Creger*, 4 Q. L. J. 76, 77 (Cir. Ct. Wythe Co. 1858).

60. *E.g.*, *Love v. Braxton*, Wythe 144 (Va. 1792).

61. *E.g.*, *White v. Washington*, 46 Va. (5 Gratt.) 645, 651 (1848)(a gambling debt).

62. *E.g.*, *Northwestern Bank v. Nelson*, 42 Va. (1 Gratt.) 108, 126 (1844).

In federal practice, the privilege against self-incrimination "can be claimed in any proceeding, be it criminal or civil, administrative or judicial, investigatory or adjudicatory."<sup>63</sup> This is an eloquent re-statement of the traditional rule, but it is to be remembered that the interpretation of this privilege by the United States Supreme Court is controlling in that this rule is a part of the due process of law required to be followed in state courts according to the fourteenth amendment.<sup>64</sup>

No one may be required to discover matters which might lead to his conviction of a crime.<sup>65</sup> Penalties and forfeitures may be civil in form but criminal in nature, and because of their penal aspects, they cannot be enforced by requiring a person to testify against himself.<sup>66</sup> Furthermore, the scope of this protection extends beyond strictly criminal punishments to civil forfeiture proceedings under the internal revenue laws<sup>67</sup> and under state banking laws,<sup>68</sup> to the forfeiture of contraband liquor,<sup>69</sup> to civil actions to recover statutory penalties,<sup>70</sup> and to suits for treble damages under the Emergency Price Control Act.<sup>71</sup>

The privilege against self-incrimination cannot be invoked where there is no danger of prosecution or forfeiture, where, for example, the statute of limitations has expired, where the offense has been pardoned, or immunity has been granted.<sup>72</sup> This privilege is, more-

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63. *Murphy v. Waterfront Commission*, 378 U.S. 52, 94 (1964) (White, J., concurring), quoted in *Maness v. Meyers*, 419 U.S. 449, 464 (1975).

64. U.S. Const. Amends. V and XIV; *Malloy v. Hogan*, 378 U.S. 1 (1964).

65. *E.g.*, *In re Master Key Litigation*, 507 F.2d 292 (9th Cir. 1974) (antitrust and criminal conspiracy); *Porter v. Heend*, 6 F.R.D. 588 (N.D. Ill. 1947).

66. *E.g.*, *Lees v. United States*, 150 U.S. 476, 480 (1893); *Boyd v. United States*, 116 U.S. 616, 631-634 (1886).

67. *E.g.*, *United States v. U.S. Coin & Currency*, 401 U.S. 715, 718 (1970).

68. *E.g.*, *United States v. Saline Bank of Va.*, 26 U.S. (1 Pet.) 100, 104 (1828).

69. *E.g.*, *Castro v. United States*, 23 F.2d 263, 266 (1st Cir. 1927).

70. *E.g.*, *United States v. Fishman*, 15 F.R.D. 124 (S.D.N.Y. 1952). Note that the majority and concurring opinions in *United States v. Ward*, 100 S. Ct. 2636 (1980), held that payments denoted by Congress as "civil penal[t]ies" in 33 U.S.C. § 1321 (b)(6) were in fact only civil compensatory damages, which were remedial and not penal, and were thus discoverable.

71. Emergency Price Control Act of 1942, 50 U.S.C.A. App. § 901 (1951); *E.g.*, *Bowles v. Trowbridge*, 60 F. Supp. 48 (N.D. Cal. 1945).

72. *E.g.*, *Hale v. Henkel*, 201 U.S. 43, 66-67 (1905). In our federal system of government, the question of immunity from prosecution is a particularly vexing one; see *e.g.*, *Kastigar v. United States*, 406 U.S. 441 (1972); *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964).

over, personal to the witness, and he cannot invoke it on behalf of another, his principal, or his employer.<sup>73</sup> Thus one can be compelled to testify against and to incriminate one's friends and employers. Since corporations must perform all acts through agents, it is difficult for them to keep secrets; corporations are vulnerable to full discovery by means of compulsion applied to their agents.

In summary it is to be noted that criminal punishments and civil penalties and forfeitures, as a matter of the law of evidence, must be proved by the plaintiffs; defendants cannot be made to provide proof against themselves. In civil litigation, the distinction made is that between punishment of the defendant and compensation for the plaintiff's losses. Thus single damages are compensation, but treble damages are punishment. Treble damages result in an unearned profit for the plaintiff. Statutes sometimes provide for treble damages to reward private persons for police work, but the courts should be wary of this and should refuse to allow their discovery procedures to be used to this end, if it will result in self-incrimination.

At common law, punitive damages are granted against certain tort-feasors; and the common law courts by means of modern rules of discovery will require discovery leading to punitive damages for intentional torts. The courts of equity, on the other hand, will not, as a general rule, assess exemplary or punitive damages,<sup>74</sup> and a party who sues in equity waives punitive damages.<sup>75</sup> Thus, in equity, there is no discovery of damages which go beyond compensation.

It is suggested that the modern distinctions between crime and tort and between criminal and civil procedures should prohibit the

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For one solution to the general problem, see P. J. Donnici, *The Privilege Against Self-Incrimination in Civil Pre-Trial Discovery: The Use of Protective Orders to Avoid Constitutional Issues*, 3 U.S.F. L. REV. 12 (1968).

73. *E.g.*, *Hale v. Henkel*, 201 U.S. 43, 69-70 (1905); *Village of Brookfield v. Pentis*, 101 F.2d 516, 522-23 (7th Cir. 1939).

74. K. REDDEN, PUNITIVE DAMAGES 53-54 (1980). The merger of common law and equity procedure has led some courts to question this rule. *Id.*

75. *E.g.*, *Coca-Cola v. Dixi-Cola*, 155 F.2d 59 (4th Cir. 1946); *Superior Construction Co. v. Elmo*, 204 Md. 1, 104 A.2d 581 (1954); *Bird v. Wilmington & M. R.R. Co.*, 8 Rich. Eq. Rep. 46, 57, 64 Am. Dec. 739, 746 (S.C. 1855); *Colburn v. Simms*, 2 Hare 543, 553-54, 67 Eng. Rep. 224, 229 (1843).

discovery of punitive matters in civil common law actions as well as in suits in equity. This was the position of the law for centuries before the enactment of the statutes and rules of court which allow discovery in common law litigation. However, discovery is now generally allowed in all civil cases; if the old rule requiring penalties to be waived in order to avoid self-incrimination is now enforced, punitive damages as a remedy would be destroyed. Alternatively there could be no discovery in such actions, which would make the recovery of punitive damages very difficult.

The privilege against self-incrimination is one of the foundations of civil liberty. This has been recognized for centuries. It was well stated by Chief Justice John Marshall: "The rule clearly is, that a party is not bound to make any discovery which would expose him to penalties."<sup>76</sup> We end with the observation that the courts today, through the merger of law and equity and the expansion of civil discovery devices, enforce conflicting policies. Sometimes they will require discovery leading to punitive damages; sometimes they will protect against discovery leading to self-incrimination and civil penalties.

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76. *United States v. Saline Bank of Va.*, 26 U.S. (1 Pet.) 100, 104 (1828).

