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State of Utah v. Jean Sinclair : Brief of Respondent

Utah Supreme Court

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A. Pratt Kesler; Ronald N. Boyce; Attorneys for Respondent;

Jimi Mitsunaga; Attorney for Appellant;

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APR 16 1964

**IN THE
SUPREME COURT
OF THE
STATE OF UTAH**

OCT 14 1963
Clerk, Supreme Court, Utah

In the Matter of the Contempt of
LaRAE PETERSON.

Case No.
9948

BRIEF OF RESPONDENT

**APPEAL FROM A CONTEMPT CITATION RENDERED
AGAINST LaRAE PETERSON BY THE HONORABLE
MARCELLUS K. SNOW, JUDGE OF THE THIRD
DISTRICT COURT IN AND FOR SALT LAKE
COUNTY, STATE OF UTAH**

A. PRATT KESLER,
Attorney General,
RONALD N. BOYCE,
Chief Assistant
Attorney General,
236 State Capitol,
Salt Lake City, Utah,
Attorneys for Respondent.

JIMI MITSUNAGA,
Suite 105 Empire Building,
Salt Lake City, Utah,
Attorney for Appellant.

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

In the Matter of the Contempt of
LaRAE PETERSON.

} Case No.
9948

BRIEF OF RESPONDENT

STATEMENT OF KIND OF CASE

The appellant, LaRae Peterson, appeals from a finding of the District Court of the Third Judicial District, State of Utah, that she was in contempt of court in refusing to answer certain questions while a witness for the prosecution in the case of State of Utah vs. Jean Sinclair.

DISPOSITION IN THE LOWER COURT

After finding the appellant, LaRae Peterson, guilty of contempt for refusing to answer a question propounded by the prosecution in the case of State of Utah vs. Jean Sinclair, the court imposed a penalty sentencing her to serve five days in jail.

RELIEF SOUGHT ON APPEAL

Respondent submits the finding of contempt should be affirmed.

STATEMENT OF FACTS

The appellant, LaRae Peterson, was called as a witness by the State in the case of State of Utah vs. Jean Sinclair, in which case the latter person was charged with the first degree murder of Donald Foster.¹ The killing took place on January 4, 1962 at the Susan Kay Apartments in Salt Lake City.² LaRae Peterson, the appellant in the instant case, was in the automobile in which she and the deceased had just alighted from the automobile when he was shot and killed.³ The deceased and the appellant, LaRae Peterson, had intended to get married, although the deceased was still married at the time of his death.⁴ It was the State's contention that the motive for the killing in the instant case was one of homosexual jealousy. The State introduced into evidence a letter from Jean Sinclair to LaRae Peterson, which stated:⁵

"Dearest One: I love you with all of me. I didn't mean it for a minute (sorry that I ever met you). You know that I didn't live until you loved me. I love, want and need you and your love. Whatever I must do I will do. Please be patient and help me, Honey. Your love is all that has kept me going. I promise never to mention the men in your life

¹See Record in *State vs. Sinclair*, 9971.

²*Ibid.*

³*Ibid.*, R. 449.

⁴*Ibid.*, R. 421.

⁵*Ibid.*, R. 442.

again. All I want is to have you and Cheryl Ann happy. Please let me. All my love always. 2:45 a.m."

The evidence further disclosed that Jean Sinclair had made gifts of various items to LaRae Peterson and had allowed her to use space in Sinclair's nursing home so that Miss Peterson could operate a beauty parlor, and Jean Sinclair did so without charge.⁶ Various other close relationships between appellant and the defendant, Jean Sinclair, were admitted.⁷ During the course of the direct examination by the prosecution, the following question was put by the prosecutor:⁸

"Q. I'll ask you if you or Jean have ever committed any Lesbian acts with each other?

"MR. HATCH: Objected to as ambiguous.

"MR. MITSUNAGA: Also may the record show Counsel does invoke the privilege pursuant to 70 Utah Code in reference to Mr. Banks' question.

"MR. BANKS: I'll lay a foundation first of all for Mr. Hatch's objection.

"THE COURT: You may.

"Q. (By Mr. Banks) Do you know what 'Lesbian' is?

"A. Yes, sir.

"MR. BANKS: I'll repeat the question then at this time and allow whatever objections are going to be made.

⁶Ibid., R. 414-419.

⁷Ibid., R. 412-499.

⁸Ibid., R. 427.

"MR. HATCH: Will you hold your answer until we object.

"THE WITNESS: Yes.

"MR. BANKS: Will you re-read the last question prior to the objection.

"(Record read.)

"MR. HATCH: Permission to voir dire.

"THE COURT: You may.

"VOIR DIRE EXAMINATION

"BY MR. HATCH:

"Q. Do you know what Lesbian acts are?

"A. I imagine so.

"Q. What are they?

"A. Well, I don't know how I would explain that.

"Q. If you know what they are, you can define them, I suppose, can't you?

"A. *Well, I imagine that's when two women more less — oh, have sexual relations with one another. Is that —*

"Q. Is it possible for two women to have sexual relations with one another, to your knowledge?

"A. *I wouldn't know, sir.*

"Q. What in your way of thinking is a Lesbian?

"A. Just what I just said, sir.

"Q. In other words, a person that has homosexual acts with another woman?

"A. Yes.

"Q. But you don't know whether two women can have homosexual acts, is that correct?

"A. Well, I imagine they can. *I don't know.*

"Q. What would be a homosexual act between two women, in your mind?

"MR. MITSUNAGA: Your Honor, I'm going to object to this whole line of questioning, Mr. Hatch's testimony, if she's competent to testify this would have to come within her own personal knowledge. On that basis, we'd invoke the privilege pursuant to the Utah Code.

"THE COURT: Are you citing a statute to the Court?

"MR. MITSUNAGA: That's right. I'm citing Statute of The Code, your Honor, 78-24-9, Utah Code Annotated, 1953.

"THE COURT: You'll have to refresh the Court's memory as to that statute.

"MR. MITSUNAGA: The statute states that the witness need not answer a question that has a tendency to subject the witness to punishment for a felony nor need to give any answer which will have a tendency to degrade unless it is a very fact in issue or to a fact from which a fact in issue would be presumed."

There was additional argument by counsel in the presence of the court, after which a recess was taken until the next morning, at which time the following occurred:

"MR. BANKS: I believe at the close of the last session we had an unanswered question. Would the Reporter please read the last question.

"(Reporter reading) Well, I'll put it this way then. Have you had any homosexual acts with Jean or she with you.

"MR. HATCH: May the record in addition to my objection to ambiguity show a further objection on the basis of immateriality and the basis of irrelevancy.

"THE COURT: The record may so show. The objection will be denied.

"MR. MITSUNAGA: And I'm going to advise my client at this time to refuse to answer the questions on the grounds that it tends to incriminate and also degrade.

"MR. BANKS: We'll request the Court to compel an answer.

"THE COURT: Of course, the privilege, if it's going to be claimed, must be claimed by the defendant — or by the witness, excuse me.

"THE WITNESS: Well, I refuse to answer on the grounds that it would tend to incriminate and degrade me.

"MR. BANKS: I'd request at this time that the Court compel the witness to answer.

"THE COURT: Yes. Mrs. Peterson, the Court feels that under these circumstances the way this question is asked, and in connection with the legal ramifications involved, that this privilege is not claimable by you at this time under these circumstances. And, therefore, the Court orders you to answer the question.

"MR. HATCH: May the record note an exception on behalf of the Defendant Sinclair to the Court's ruling.

"THE COURT: The record may so show.

"MR. MITSUNAGA: May the record further show that the attorney for Miss Peterson further notes an exception to the court's ruling.

"THE COURT: The record may so show.

"The Court further advises you, Mrs. Peterson, that your refusal to answer this question upon the direct order of this Court would also place you in contempt of this Court.

"THE WITNESS: Yes, sir.

"THE COURT: You are again instructed to answer this question. Will you repeat the question, Mr. Reporter.

"(Question reread.)

"THE COURT: You are again ordered to answer, Mrs. Peterson.

"THE WITNESS: I still refuse.

"THE COURT: I didn't hear you.

"THE WITNESS: I still refuse to answer.

"THE COURT: You may proceed, Mr. Banks."

Based upon the witness's refusal to answer, the court, at a subsequent time, and out of the presence of the jury, found the appellant guilty of contempt and sentenced her to five days in jail.

ARGUMENT

POINT I.

THE APPELLANT, LARAE PETERSON WAS PROPERLY HELD IN CONTEMPT OF COURT SINCE THERE WAS NO SUBSTANTIAL AND REAL DANGER THAT HER ANSWER, TO THE QUESTION PROPOUNDED BY THE PROSECUTION, WOULD TEND TO SUBJECT HER TO PUNISHMENT FOR A CRIME.

The appellant contends in her brief that the trial court erred in punishing her for contempt for failure to answer the question of whether she had engaged in any homosexual acts with the defendant, Jean Sinclair. The appellant, in her brief, makes the contention that the answer to the question of whether or not she had engaged in any homosexual acts would tend to incriminate her by subjecting her to punishment for the crime of sodomy. An analysis of the record, it is submitted, discloses that there is little likelihood that such would in fact be the case. In response to a question from the prosecution as to how she would define a lesbian act, she stated, "Well I imagine that's when two women more or less — oh, have sexual relations with one another" (R. 427, No. 9971). She then further testified to the question of whether or not, to her knowledge, it would be possible for two women to have sexual relations, "I wouldn't know, sir" (R. Ibid.). She then testified:

"Q. What in your way of thinking is a Lesbian?

"A. Just what I just said, sir.

"Q. In other words, a person that has homosexual acts with another woman?

"A. Yes.

"Q. But you don't know whether two women can have homosexual acts, is that correct?

"A. Well, I imagine they can. *I don't know.*"

The appellant's testimony, therefore, was that she had no knowledge of whether or not sexual acts could be committed between two women. As a consequence, it appears clear that appellant could not have committed any sexual acts with the defendant, Jean Sinclair, or she would have had knowledge of the capability of the commission of such acts. Consequently, when she refused to testify on the grounds that it might tend to incriminate her to the question of whether or not she had engaged in homosexual acts, it was obvious that there was no real or substantial possibility that the answer to that question could tend to convict her of any crime since she had previously denied having any knowledge as to the possibility of whether or not such acts could be performed between women.

It is submitted that on the basis of the record, as it was then before the trial court, that there was no violation of law such as would vitiate the contempt finding. The appellant cites in her brief the Fifth Amendment to the Federal Constitution, Article I, Section 12 of the State Constitution, and 78-24-9, U. C. A. 1953, to sustain the claim that the answer requested by the prosecution was privileged. An analysis of these provisions and the law applicable to the privilege against self-incrimination clear-

ly demonstrates that the appellant may not avail herself of their protection. This, when coupled with the facts of record, which obviously indicate that the appellant had no reason to fear that the answer to the posed question would tend to incriminate her, results in a conclusion that the trial court was correct in its finding.

Federal Constitution: It is, of course, a well known fact that the Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself * * *." However, this provision is not applicable to the instant case. The Fifth Amendment, self-incrimination privilege, has been held by the United States Supreme Court not to be applicable, through the Fourteenth Amendment, against the states. Consequently, since the instant prosecution was in the state courts, the Fifth Amendment protection was not available to the appellant.

In *Twining v. New Jersey*, 211 U. S. 78 (1908), the United States Supreme Court ruled that the privilege against self-incrimination provided for in the Fifth Amendment was not applicable against the states. The court relied upon its previous decision in *Barron v. Baltimore*, 7 Peters 243, 8 L. Ed 672 (1833). The decision in the *Twining* case was also in accord with the dicta in the case of *Brown v. Walker*, 161 U. S. 591, 606 (1895), where Justice Brown stated:

"* * * It is true that the Constitution does not operate upon a witness testifying in the state

courts, since we have held that the first eight amendments are limitations only upon the powers of Congress and the Federal courts, and are not applicable to the several States, except so far as the Fourteenth Amendment may have made them applicable. *Barron v. Baltimore*, 7 Pet. 243; *Fox v. Ohio*, 5 How. 410; *Withers v. Buckley*, 20 How. 84; *Twitchell v. Commonwealth*, 7 Wall. 321; *Presser v. Illinois*, 116 U. S. 252."

Most recently the Supreme Court has continued to follow the decision of the *Twining* case, and in *Adamson v. California*, 322 U. S. 46 (1947), the Supreme Court of the United States refused to abandon the *Twining* rule, stating:

"* * * the Bill of Rights, when adopted, was for the protection of the individual against the federal government and its provisions were inapplicable to similar actions done by the states. *Barron v. Baltimore*, 7 Pet. 243; *Feldman v. United States*, 322 U. S. 487, 490. With the adoption of the Fourteenth Amendment, it was suggested that the dual citizenship recognized by its first sentence secured for citizens federal protection for their elemental privileges and immunities of state citizenship. The *Slaughter-House* Cases (16 Wall. 36) decided, contrary to the suggestion, that these rights, as privileges and immunities of state citizenship, remained under the sole protection of the state governments. This Court, without the expression of a contrary view upon that phase of the issues before the Court, has approved this determination. *Maxwell v. Bugbee*, 250 U. S. 525, 537; *Hamilton v. Regents*, 293 U. S. 245, 261. The power to free defendants in state trials from self-incrimination was

specifically determined to be beyond the scope of the privileges and immunities clause of the Fourteenth Amendment in *Twining v. New Jersey*, 211 U. S. 78, 91-98. 'The privilege against self-incrimination may be withdrawn and the accused put upon the stand as a witness for the state.' The *Twining* case likewise disposed of the contention that freedom from testimonial compulsion, being specifically granted by the Bill of Rights, is a federal privilege or immunity that is protected by the Fourteenth Amendment against state invasion. This Court held that the inclusion in the Bill of Rights of this protection against the power of the national government did not make the privilege a federal privilege or immunity secured to citizens by the Constitution against state action. *Twining v. New Jersey*, supra, at 98-99; *Palko v. Connecticut*, supra, at 328 * * *. We reaffirm the conclusion of the *Twining* and *Palko* cases that protection against self-incrimination is not a privilege or immunity of national citizenship.

"* * *

"Specifically, the due process clause does not protect, by virtue of its mere existence, the accused's freedom from giving testimony by compulsion in state trials that is secured to him against federal interference by the Fifth Amendment. *Twining v. New Jersey*, 211 U. S. 78, 99-114; *Palko v. Connecticut*, supra, p. 323. For a state to require testimony from an accused is not necessarily a breach of a state's obligation to give a fair trial.
* * *"

As a consequence, appellant may not be heard to contend that the provisions of the Fifth Amendment to the United

States Constitution afford her any relief.⁹ McCormick, Evidence, 1954, page 257.

State Constitution: Article I, Section 12 of the Constitution of Utah provides:

“The *accused* shall not be compelled to give evidence against himself * * *.”

The clear meaning of this provision would limit the right to claim a constitutional privilege against self-incrimination to an accused. This conclusion arises from the fact that only the term “accused” is employed rather than the word “person” which appears in the Federal Constitution, Amendment V, and in sixteen state constitutions, McNaughton, *The Privilege Against Self-Incrimination*, 51 Jnl. Crim. L., Crim. & Pol. Sci. 138, 139 (1960). The same conclusion follows from the fact that there is no limitation on the term evidence, restricting it to incriminating evidence, thus implying that only an “accused” is contemplated since he may refuse to even take the stand, whereas a witness normally may not refuse to be sworn. *In Re Lemon*, 15 Cal. App. 2d 82, 59 P. 2d 213 (1936); McCormick, Evidence, p. 257-8 (1954). Although the term “against himself” may imply simple incrimination, it is broader than the word incrimination is normally construed. In *In Re Sadleir*, 97 Utah 291, 85 P. 2d 810 (1938), Mr. Justice

⁹In *State v. Byington*, 114 Utah 388, 200 P. 2d 723 (1948), the court seemed to intimate that the Federal Constitution would be available to a defendant in a civil trial to refuse to answer an incriminating question. The inference arises from that opinion by virtue of the court's using the word “constitutions” rather than limiting its discussion to the Utah Constitution. To the extent that the Byington opinion would apply the Federal constitutional privilege against self-incrimination to state proceedings, it is erroneous.

Moffat inferred that the constitutional privilege under Article I, Section 12 was limited to an accused. Thus he noted, speaking of a *statutory* privilege of a witness:

“The principle behind the statute is declared in Article I, Section 12 of the Constitution of Utah, where among other things it is stated: ‘The accused shall not be compelled to give evidence against himself. This applies as well, before indictment or information filed as afterward. In the instant case the witness is not the accused. This provision of the constitution is referred to only as it tends to form a background affecting the interpretation of the statute relating to the duty of witnesses to answer or affirm under oath and the right a witness has to claim privilege under the statute.’”

Additional support for the conclusion that the constitutional privilege under Article I, Section 12, Constitution of Utah, is limited to an accused rather than a witness appears in the history of the Constitutional Convention from the remarks of the delegates during discussion on the section. See statement of Delegate Evans from Weber County, 1 Proceedings of the Constitutional Convention, p. 308, where he comments as to what Section 12 gives:

“* * * all these rights which we vouch to
the person charged with crime.”

Further, Delegate Thurman, 1 Proceedings of the Constitutional Convention, p. 312:

“We are speaking here of rights that the accused party has.”

Although several states appear to have applied the privilege against self-incrimination to witnesses as well as

an accused, Wigmore, Evidence, 3rd Ed., Sec. 2252, Vol. VIII, p. 324; (a similar statement is found in the McNaughton Rev. 1961, p. 326), it does not appear that most of the decisions covering such cases have applied constitutional provisions similar to that of Utah. In *State v. Quarles*, 13 Ark. 307 (1853), the Arkansas Supreme Court, by implication, construed a provision for the protection of an "accused" to cover a witness as well. Research has not disclosed any other cases expressly construing the term "accused" as including a witness; however, decisions from other states having similar constitutional provisions have allowed a witness to invoke a constitutional privilege against self-incrimination. *Paynter Short v. State*, 4 Harrington's Reports (Dela. 1845);¹⁰ *Cooper v. Keyes*, 246 Ky. 268, 54 S. W. 2d 933; *Young v. Knight*, 329 S. W. 2d 195 (Ky. 1959). However, these cases offer little support for the construction of the Utah Constitution in a similar manner since they did not directly construe the language of the particular constitution and the provisions of the Utah Constitution appears to have been purposely selected to restrict the constitutional claim to an accused.¹¹

Although the case of *State v. Byington*, 114 Utah 388, 200 P. 2d 723 (1948) indicated that it has been generally recognized that constitutional provisions protect a witness,

¹⁰The Delaware Supreme Court apparently relied upon a common law right of a witness to invoke privilege against self-incrimination rather than upon the Delaware Constitution, since the court relied upon English authority to sustain the witness's right to invoke the privilege and did not discuss at all the particular terms of the Delaware Constitution.

¹¹Although the Federal constitutional privilege has been construed to be applicable to witnesses, *Counselman v. Hitchcock*, 142 U. S. 547 (1892); *Batalla v. District Court*, 74 Puerto Rico 266 (1953) (construing the Organic Act of Puerto Rico), these provisions of the Federal Constitution vary substantially from those found in Article I, Section 12 of the Constitution of Utah.

the court did not thoroughly analyze the Utah Constitution, misapplied the Federal Constitution and failed to consider the fact that our Legislature has founded the right of a witness to refuse to testify on statute rather than upon the Constitution. It is submitted, therefore, that the *Byington* case should be limited to its particular facts and the court should rule that Article I, Section 12 limits the constitutional privilege to the right of an accused to refuse to give evidence against himself.

An additional reason presents itself in the instant case as to why the appellant should be foreclosed from relying upon the Utah Constitution for her claim of privilege, this being that at the time of trial, appellant relied exclusively on the statutory claim of right afforded to a witness and did not purport to invoke the privilege, if any, which might have been afforded by the State Constitution. Consequently, it is submitted that the appellant should be limited on appeal to claiming that her statutory right provided by 78-24-9, U. C. A. 1953, was violated.

Statutory Privilege — 78-24-9, U. C. A. 1953: One obvious reason why the provisions of Article I, Section 12 of the Utah Constitution were not intended to go beyond an accused is found from the fact that the Legislature saw fit to enact a statute granting to a "witness" a privilege against self-incrimination or degradation. If the Legislature had thought the Constitution granted such a privilege, they would not have enacted the statute. 78-24-9, U. C. A.

1953, was enacted in 1951 (Laws of Utah 1951, Ch. 58, Sec. 1); however, the same statute was passed, as it is now worded, at the time of statehood, R. S. 1898, Sec. 3431. Since many of the delegates to the Constitutional Convention were members of the first Legislature of the State, it would be difficult to argue anything but that R. S. 1898, Sec. 3431 (78-24-9, U. C. A. 1953) was intended to go beyond the provisions of Article I, Section 12, not merely restate part of it.

78-24-9, U. C. A. 1953, provides:

“A witness must answer questions legal and pertinent to the matter in issue, although his answer may establish a claim against himself; but he need not give an answer which will have a tendency to subject him to punishment for a felony; nor need he give an answer which will have a direct tendency to degrade his character, unless it is to the very fact in issue or to a fact from which the fact in issue would be presumed. But a witness must answer as to the fact of his previous conviction of felony.”

A clear reading of that statute would seem to limit the privilege of a witness to refuse to answer incriminating questions to those questions which would lead to the witness's conviction for a felony as that term is explained and defined by 76-1-12 and 13, U. C. A. 1953. In *In Re Sadleir*, 97 Utah 291, 85 P. 2d 810 (1938), two of the Justices felt the predecessor to the present statute covered felonies as well as misdemeanors. Thus, Justices Moffat and Larsen construed the word “felony” as including more

than the definition of that term within the Code. Justices Wolfe and Folland construed the statute as applying to felonies and misdemeanors *malum in se*, but not misdemeanors, *malum prohibitum*. Justice Ephraim Hansen, who was on the court at the time, did not sit. Subsequently the case was re-argued with Justices Folland and Hansen no longer being members of the court, and Justices McDonough and Pratt sitting. Justice Pratt concurred in a finding of reversal, but it is not clear whether he concurred in the determination that misdemeanors were included within the term "felony" as used by the privilege statute. Justice McDonough did not concur in that determination but reserved the question. Justice Wolfe filed a new dissenting opinion in which he continued to adhere to the position that the word "felony" could not be construed to apply to all misdemeanors. As a consequence, the opinion in *In Re Sadleir* cannot really be said to stand for anything by way of precedent. Supporting this conclusion is the fact that the Legislature saw fit, although some time subsequent, to completely repeal the then statute, Section 104-49-20, Revised Statutes of Utah 1933, and re-enact anew the same statute. It is inferable from this action that the Legislature felt that the interpretation of the statute should be approached from a fresh viewpoint.

It is submitted that unless the court is to do serious injustices to the principle that unambiguous legislative enactments are to be interpreted in accordance with the clear import of their terms, that 78-24-9 must be construed as being limited to felonies, and that misdemeanors are not

encompassed within that term.¹² This would construe the statute in the obvious manner which the Legislature intended. The term "felony" has been defined in 76-1-13, U. C. A. 1953, as being a separate and distinct crime and not encompassing misdemeanors. See also 76-12-12, U. C. A. 1953. Additionally, such a construction is harmonious of a common sense application of the privilege against self-incrimination. An appropriate balance must be drawn between the needs of law enforcement agencies to protect the public and the needs to protect the individual rights of an accused. See Wyman, *A Common Sense View of the Fifth Amendment*, 51 Jnl. of Crim. Law, Crim. & Pol. Sci., 155 (1960); Griswold, *The Fifth Amendment Today* (1955).

If the court is not inclined to so construe the statute, then the most obvious compromise would be to adopt the position urged by Mr. Justice Wolfe that only those misdemeanors which are *malum in se* are so protected. This

¹²Counsel contends for the first time on appeal that the answer to the question concerning homosexual acts could incriminate the appellant by proving, or by tending to subject her to punishment for violating Salt Lake City Ordinance 32-1-7 covering "indecent and immoral conduct." Since this offense would only be a misdemeanor, it would not be within the construction of 78-24-9, as urged by the State in this brief. However, an additional reason exists why 32-1-17, Revised Ordinances Salt Lake City, 1955, is not applicable. First, this is not *malum in se* but is *malum prohibitum*. See *Anderson v. Commonwealth*, 16 Am. Dec. 776 (Va. 1827); Thompson, *Common Law Crimes Against Public Morals*, 49 Jnl. Crim. L., Crim. and Pol. Sci. 350, 351 (1958). Secondly, the violation, if any, would have to have been committed within Salt Lake City, and the appellant was a resident of Salt Lake County, and nothing of record would appear to support that appellant would be within the geographical jurisdiction that would subject her to punishment, and since appellant has the burden of proof that such answer would tend to incriminate her, there would be insufficient evidence of record before this court to support the appellant's burden. Third, the ordinance is probably unconstitutional.

is also most directly in harmony with the history of the self-incrimination clause. Wigmore, Evidence, 3rd Ed., Sec. 2250.

Meaning of Tending to Incriminate: It is submitted that the court should, in the instant appeal, limit itself to the consideration of whether the requested answer would tend to incriminate as that term is used under 78-24-9. However, even were the court to consider that the constitutional question is before it, the standard to be applied as to whether or not the answer to a particular question would criminate would be the same, and as related to the facts of the instant case, the appellant would not be privileged to make a claim of self-incrimination.

It is well settled that a claim of privilege must be more than a fanciful or imaginary danger; it must be real and relate to a "probability" of prosecution. 4 Jones, Evidence, Sec. 861 (1958). McCormick, Evidence, p. 271 (1954), comments on the required showing:

"A classic statement of the test is that '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. It seems that to meet this test the court must find (1) that there is substantial probability that the witness has committed a crime under the law of the forum, and (2) that the fact called for is an essential part of the crime, or is a fact which taken with other facts already proved, or which may probably be proved, would make out a circumstantial case of guilt.'"

See also Wigmore, Evidence, 3rd Ed., Sec. 2261.

In *Mason v. United States*, 244 U. S. 362 (1917), the United States Supreme Court noted the general standard was expressed:

"The constitutional protection against self-incrimination 'is confined to real danger and does not extend to remote possibilities out of the ordinary course of law.'"

Further the court noted:

"The general rule under which the trial judge must determine each claim according to its own particular circumstances, we think, is indicated with adequate certainty in the above cited opinions. Ordinarily, he is in much better position to appreciate the essential facts than an appellate court can hold 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.

"In the present case the witnesses certainly were not relieved from answering merely because they declared that so to do might incriminate them. *The wisdom of the rule in this regard is well illustrated by the enforced answer, 'I don't know,' given by Mason to the second question, after he had refused to replay under a claim of constitutional privilege.*"

In the instant case, LaRae Peterson had previously indicated she did not know if it was possible for two women to have any form of sexual relations; obviously, after such a disclosure, there was no "real danger" of her

being subjected to criminal punishment. The danger, if any, was gone, since if she did not know if it was in fact possible to have such a relationship, she could not have had such a relationship as would subject her to punishment. She was obviously raising the objection of self-incrimination to avoid disclosing non-criminative but otherwise important evidence, or to frustrate a legitimate inquiry of the prosecution. In *The Queen v. Boyes*, 1 B. & S. 311, 121 Eng. Rep. 730 (1861), it was said as to the privilege:

“Further than this, 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, out of the ordinary course of the law and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice. The object of the law is to afford to a party, called upon to give evidence in a proceeding inter alios, protection against being brought by means of his own evidence within the penalties of the law. But it would be to convert a salutary protection into a means of abuse if it were to be held that a mere imaginary possibility of danger, however remote and improbable, was sufficient to justify the withholding of evidence essential to the ends of justice.”

The circumstances of the instant case are almost squarely within those of the *Mason* case referred to above;

under these circumstances, it can hardly be said that the trial judge, who saw the witnesses and their expressions, abused his discretion in finding that there was no real danger to appellant from answering the prosecution's question.

Counsel has urged this court to push the concept of self-incrimination beyond the rule laid down in *Mason* and beyond the rule that has been generally recognized as being the standard to be applied in appraising whether or not the answer to any question would tend to incriminate. Counsel asks this court to adopt the position which he acknowledges is the minority position¹³ espoused by the United States Supreme Court in *Hoffman v. United States*, 341 U. S. 479 (1951). This concept will allow a claim of the privilege unless it were "perfectly clear" that the answer "cannot possibly" have a tendency to incriminate. However, subsequent decisions of the United States Supreme Court have not been willing to extend the rule beyond the facts in that case, and it appears that the cases still require a showing of substantial likelihood of injury. *McNaughton*, supra, 51 Jnl. Crim. L., Crim. & Pol. Sci., p. 138 (1960). *McCormick*, Evidence, p. 272 (1954) in this regard, notes:

"* * * Fortunately, state courts which regard this change of view as unwise are free to ad-

¹³See Wigmore, Evidence, *McNaughton* Revision, Sec. 2260; *McNaughton*, The Privilege Against Self-Incrimination, its Constitutional Affection, *Raisor d'Etre* and Miscellaneous Implications, 51 Jnl. of Crim. Law, Crim. & Pol. Sci., p. 138, 152 (1960).

here to the earlier and, it is submitted, more balanced and expedient attitude."

Indeed, any other rule would do violence to the balancing test espoused by Justice Marshall in the case of *United States v. Burr*, 25 Fed. Cas., 38, 39 (1807).¹⁴ Since no reason exists to go beyond the substantiality test which appears to have been solidified by previous Utah decisions, the court should reject that position. *State v. Thorn*, 39 Utah 208, 117 Pac. 58; *State v. Hougensen*, 91 Utah 351, 64 P. 2d 229. Consequently, applying the rules previously noted that there must be a reasonable probability of substantial punitive injury to the witness, the appellant is in no position to complain, since by her testimony prior to the invocation of the privilege, she made it clear that she could not possibly have engaged in any incriminating act,

¹⁴Counsel has in his brief cited *United States v. Burr* as standing for the proposition that the self-incrimination provision really was intended to extend beyond the rule that it must appear reasonably clear that a substantial injury upon answering would occur to a witness. It should be noted that the *Burr* case was decided by Justice Marshall while acting as a Circuit Judge and not upon the Supreme Court. McCormick, Evidence p. 270 (1954) notes that reading the *Burr* case to stand for the proposition that the appellant urges is to erroneously apply the case. He states: "The classic statement on the question is that of Marshall, C. J. in *United States v. Burr*, 25 Fed. Cas. 38, 40 (1807), as follows: 'It is the province of the court to judge whether any direct answer to the question which may be proposed will furnish 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.' This is susceptible of an interpretation giving too wide a power to the witness, since almost any question 'may' conceivably in theoretical possibility call for an answer which will be part of the circumstantial proof of a crime. It must be qualified by the condition that under all the facts the judge must find a substantial probability of danger. See the later discussion in this section. And Marshall's actual holding that a question to a witness as to his present knowledge of the meaning of a letter in cipher (charged to be treasonable) was not privileged, because present knowledge is not sufficient to prove prior knowledge at the time of the plot, is consistent with that qualification."

including sodomy, as that crime is defined in 76-53-22.¹⁵ Further, the term "homosexual act" has such gigantic breadth and so many things are encompassed in the term "homosexual" that do not include criminal conduct, that there is little likelihood that the answer to the question would tend to incriminate the appellant. In Blakiston's Medical Dictionary, 2nd Ed., Homosexuality is defined as follows:

"1. The state of being sexually attracted by members of one's own sex. 2. The state of being in love with one of the same sex. 3. In psychoanalysis, a form of homoerotism in which the interest is sexual but sublimated, *not receiving genital expression*."¹⁶

Obviously, if homosexual is generally defined as not being identified with overt sensuality in women, and if the witness in the instant case declined any knowledge of the

¹⁵66-53-22 defines sodomy as the "detestable and abominable crime against nature, committed with mankind or with any animal with either the sexual organs or the mouth * * *." No case has decided in Utah whether or not an act by two females can constitute sodomy. It would indeed be impossible for two females to commit sodomy in the normal sense of that term since neither female could penetrate the other with any sexual organ which was actually a part of their body. Some form of false device might be used, but this would not constitute penetration by a sexual organ. In *State v. Petersen*, 81 Utah 340, 17 P. 2d 925 (1933), this court discussed the amended sodomy statute and ruled that an act of cunnilingus between a man and a woman would constitute sodomy. To extend the sodomy statute to an attempt at cunnilingus between two women would be most difficult since there could hardly be any penetration of the female sex organ into the mouth of the other female. Penetration is the classic definition of a sexual crime between two persons in order to constitute sodomy. It is clear, therefore, that appellant is endeavoring to unrealistically extend the criminal law.

¹⁶Recent psychoanalytical studies have indicated that overt acts seldom accompany female homosexuality. See Lorand, *Perversions, Psychodynamics Therapy*; in this regard Havelock Ellis, *Studies in the Psychology of Sex*, Vol. I, page 195, speaking of sexual inversion of women, notes: "* * * Like other anomalies, indeed, in its more pronounced forms it may be less frequently met with in women; in its less pronounced forms, almost certainly, it is more frequently found. * * *"

possibility of such actions, it can hardly be said that there is any real and substantial danger that the answer to the question as posed, on the basis of the record before the court, would tend to incriminate the appellant.

POINT II.

THE APPELLANT COULD NOT AVAIL HERSELF OF A CLAIM OF PRIVILEGE THAT THE ANSWER TO THE QUESTION MAY TEND TO DEGRADE HER SINCE THE QUESTION WAS DIRECTLY MATERIAL TO THE ISSUE OF MOTIVE IN THE CASE OF STATE VS. JEAN SINCLAIR.

Appellant, as part of her claim for reversal, contends that she is entitled to invoke the degrading provision of 78-24-9, U. C. A. 1953. No cases are cited in support of her position. The evidence of any homosexual relationship between the appellant and the defendant, Jean Sinclair, was directly relevant to the prosecution's claim of motive. As can be seen from the argument of the prosecutor in the Jean Sinclair case in summation, the love letter between the appellant and Miss Sinclair and the various other close relationships between the ladies was contended to allow an inference that Miss Sinclair killed the deceased out of jealousy because the deceased had diverted the affections of the appellant from her. The statute which allows a witness to claim a privilege against disclosing degrading testimony is subject to the exception that if the answer sought would

go to the very fact in issue, or to a fact from which the fact in issue would be presumed, the witness must answer.

In the instant case the fact of a jealous homosexual relationship between the appellant and the defendant, Jean Sinclair, would be a fact from which the ultimate fact of the murder could be presumed since it would establish the motive for the crime.

Various authorities have noted the limitations on the right of a witness to invoke the privilege against giving testimony which would tend to subject the witness to disgrace. Thus, McCormick on Evidence, page 269 (1954) notes:

"In the early 1700s a privilege was recognized against compelling answers, as to matters not material to the issues, which would disgrace or degrade, though not incriminate, the witness. This privilege has become obsolete in England and in most of our states, except where statutes have preserved the relic. *The policy behind this former privilege is now more appropriately served by rules restricting cross-examination as to collateral misconduct of a witness to impeach him, or permitting the judge in his discretion to restrict it, and the rule forbidding extrinsic proof of such misconduct.*"

Wigmore on Evidence, Sec. 2255, notes:

"The privilege against disclosing facts involving disgrace or infamy (i.e., irrespective of criminality) began to be recognized later than the privilege against self-incrimination and independently of it. Its limitations were entirely distinct, in that it did not cover facts merely 'tending' to disclose infamy, and did not apply to facts material to the

issues (but only to 'collateral' facts,—practically, to facts solely affecting credibility). * * *

See also McNaughton Revision, Sec. 2255.

The Territorial Supreme Court early recognized the limitation of materiality on the witness's right to refuse to disclose degrading information. In *Conway v. Clinton*, 1 Utah 215, 220 (1875), it was stated:

"* * * but it is well-settled that a witness is not bound to answer, nor a court to compel answer to an inquiry to disgrace a witness unless the evidence is *material* to the issue being tried.

* * *

A similar expression of the rule is found in *State v. Hougensen*, 91 Utah 351, 64 P. 2d 229 (1937). In the abortive case of *In Re Sadleir*, the court, in discussing the degradation privilege, notes that it was available to the witness in that case¹⁷ since the ultimate fact in issue was never proved. Justice Wolfe, who concurred initially as to that aspect of the court's determination, and Justice Moffat made it clear that had the ultimate fact been proved, that the witness's answer would have been material.

In the instant case the court is confronted with no such problem since the murder of Don Foster was obviously shown, and the question of identity of the defendant was the material issue. To afford a witness the right to claim a privilege against disclosing degrading information

¹⁷It should be noted that that case decided nothing as far as precedent is concerned. Indeed, Justice Moffat did what Dean Wigmore indicated the courts had been unable to do, to-wit, utterly confuse the degradation privilege with the constitutional privilege against self-incrimination.

where such information would be directly relevant to the corpus of the crime, or prove such an important aspect of the crime as the motive, would be to place reputation above the need for protection of society, something which, in this day and age, would be an absurd and ludicrous result. It is submitted that the appellant has no basis to invoke the degradation provisions of 78-24-9.

POINT III.

THE TESTIMONY OF THE APPELLANT AT THE PRELIMINARY HEARING IN THE CASE OF STATE VS. JEAN SINCLAIR DEMONSTRATES THAT THERE WAS NO BASIS FOR A CLAIM THAT THE ANSWER SHE WOULD GIVE IN RESPONSE TO THE PROSECUTION'S QUESTION, FOR WHICH REFUSAL TO ANSWER SHE WAS HELD IN CONTEMPT, WOULD TEND TO INCRIMINATE HER.

The appellant was called as a witness on behalf of the State in the preliminary hearing of the same case, State v. Sinclair, in which she was found in contempt at trial for refusing to answer a question propounded by the prosecution. The testimony of the preliminary hearing is a part of the record in the case of State v. Sinclair, No. 9971. The record of the appellant's testimony given at the preliminary hearing makes it manifest that there was no substantial fear that her testimony would tend to incrim-

inate her. In response to a question¹⁸ put by the prosecution, which was,

“Q. Did you and Jean Sinclair engage in immoral sex activities in that motel room on that date?

“A. As far as doing anything immoral, no.” Additionally,¹⁹ in response to a question as to whether or not Miss Sinclair had ever kissed the appellant on her breasts, LaRae Peterson testified that she couldn’t remember when. The question was asked,²⁰

“Q. Is it your testimony under oath at this time, Miss Peterson, that you cannot tell this Judge of any time when this Jean Sinclair caressed and kissed your breasts; is that your testimony under oath?

“A. I cannot put a date on it, that is correct.”

Additionally, the same record reflects²⁰ that LaRae Peterson denied getting in bed with Miss Sinclair and performing sexual acts. As a consequence, the only indication of homosexual acts between Jean Sinclair and the appellant is an inference from the appellant’s way of answering at the time of preliminary hearing that there may have been some fondling of the appellant’s breasts by the defendant.²¹ This, of course, does not constitute sodomy nor violate any provision of law, as the record makes it clear that any relationship that may have transpired, of this very limited nature, occurred in the privacy of Miss Peterson’s home

¹⁸R. 9971, page 306.

¹⁹Ibid., 309.

²⁰Ibid., 310.

²¹Ibid., 307-310.

or residence. Thus, there is no evidence at all before this court which would indicate anything other than that there was no reasonable fear that the answer to the question put by the prosecutor would tend to incriminate. At best, the answer could only have tended to embarrass the appellant, and this provides no basis to claim a privilege against self-incrimination, and since the testimony of the appellant was directly material to the issue of motive, the privilege against degradation was also not applicable.

The State does not contend at this point that the appellant has waived any right to claim the privilege against self-incrimination by virtue of having testified at the preliminary hearing, since the weight of authority seems to be to the contrary. *In Re Neff*, 206 F. 2d 149, 3rd Circuit (1953); 136 A. L. R. 2d 1398. However, the State does contend that the evidence offered at the preliminary hearing depreciates the contention made by the appellant that an answer given to the prosecution's question might tend to subject her to punishment for a felony or other crime.²² This evidence, when coupled with the other evidence at the time of trial, negating the real and substantial possibility that the answer to the prosecution's question would tend

²²Were the issue to be presented, the State would contend, in spite of the authority to the contrary, that once an answer has been given at a preliminary hearing, there is no further reason to allow a witness, as distinct from an accused, to invoke the privilege against self-incrimination since at that point the admission is a matter of record and may be used against the witness at any time. It would, therefore, not protect the witness to allow a later invocation of the privilege, but rather, would frustrate the prosecution in using evidence material to a particular case even though it could use the same evidence having, obtained it at the preliminary hearing, in a later prosecution against the witness. The State's position is that the purpose of the privilege against self-incrimination having vanished the privilege itself should not be allowed.

to incriminate the witness, warrants this court in affirming the finding of contempt.

CONCLUSION

The appellant in this case was at least a friend of the defendant. By her own testimony on the witness stand, there was no ignominious relationship between she and the defendant, Jean Sinclair, since had there been such a relationship, she certainly would have had knowledge as to the possibility of commission of sexual acts between women. Additionally, the appellant's testimony at preliminary hearing negatives the possibility of criminality, which leads to the conclusion that the relationship between the appellant and the defendant, Jean Sinclair, although unusual and possibly embarrassing to the appellant, was not criminal. As a consequence, it is clear that there was no "real danger" that the answer to the prosecution's question could have subjected the appellant to criminal liability.

The appellant, in her brief, has relied primarily upon decisions which constitute a minority position or which, in the cited decision, have used broad language unsupported by the result. The instant case offers a fact situation very similar to that before the United States Supreme Court in the case of *Mason v. United States*, 244 U. S. 362 (1917). In that case the Supreme Court found that there was no reasonable basis upon which the self-incrimination privilege could be invoked. The wisdom of that decision is applicable to the instant case, and the trial court, who had

full opportunity to measure the sincerity of the witness, facial expressions, and the extent to which the witness pressed the privilege rather than collateral counsel, should be sustained.

Further, the appellant's argument that somehow the answer to the question involved might subject her to punishment for the crime of sodomy is more hypothetical than real. It is obvious that the protection claimed in the instant case was not claimed in good faith. Consequently the privilege was not available.

The decision of the trial court should be affirmed.

Respectfully submitted,

A. PRATT KESLER,
Attorney General,

RONALD N. BOYCE,
Chief Assistant
Attorney General,
Attorneys for Respondent.