

Heike Vs. United States

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Appeal No. : 227 U.S. 131

Appellant : Heike

Respondent : United States

Judgement :

Heike v. United States - 227 U.S. 131 (1913)

U.S. Supreme Court Heike v. United States, 227 U.S. 131 (1913)

Heike v. United States

No. 520

Argued January 9, 1913

Decided January 27, 1913

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CERTIORARI TO THE CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

SYLLABUS

There is a clear distinction between an amnesty for crime committed and the constitutional protection under the Fifth Amendment from being compelled to be a witness against oneself.

The obvious purpose of the Act of February 25, 1903, c. 755, 32 Stat. 854, 904, granting to witnesses in investigations of violations of the Sherman Act immunity against prosecution for matters testified to, was to obtain evidence that otherwise could not be obtained; the act was not intended as a gratuity to crime, and is to be construed, as far as possible, as coterminous with the privilege of the person concerned.

Evidence given in an investigation under the Sherman Act does not make a basis under the Act of February 25, 1903, for immunity of the witness against prosecutions for crimes with which the matters testified about were only remotely connected.

Granting a separate trial to one of several jointly indicted for conspiracy is within the discretion of the trial judge, reviewable only in case of abuse.

Even if there may have been an abuse in some instances of indicting under 5440 for conspiracy instead of for the substantive crime itself, liability for conspiracy is not taken away by its success, and in a case such as this, there does not appear to be any abuse.

Evidence showing that a conspiracy had continued before and after the periods specified in the indictment *held* in this case not inadmissible against a defendant present at the various times testified to.

192 F. 83 affirmed.

The facts, which involve the extent of immunity granted under the Act of February 25, 1903, c. 755, 32

Stat. 854, 904, are stated in the opinion.

MR. JUSTICE HOLMES delivered the opinion of the Court.

The petitioner was indicted for frauds on the revenue; and, in the sixth count, under Rev.Stat. 5440, for a conspiracy to commit such frauds by effecting entries of raw sugars at less than their true weights by means of false written statements as to the same. Rev.Stat. 5445. Act of June 10, 1890, c. 407, 9, 26 Stat. 131, 135. He pleaded in bar that, in 1909 and 1910, answering the government's subpoena, he had testified and produced documentary evidence before a federal grand jury investigating alleged breaches of the Sherman Anti-Trust Act that the testimony and documents concerned the subject

matter of the present indictment, and that therefore he was exempted from liability by the Act of February 25, 1903, c. 755, 32 Stat. 854, 904, as amended June 30, 1906, c. 3920, 34 Stat. 798. There was a replication; issue was joined; a trial was had upon the plea, in which the court directed a verdict for the government, 175 F. 852; leave was given to plead over; a premature attempt was made to bring the case before this Court, [217 U. S. 423](#) , and then there was a trial on the merits in which the petitioner was found guilty on the sixth count. The circuit court of appeals affirmed the judgment, 192 F. 83. Whereupon a writ of certiorari was granted by this Court.

The investigation in which the petitioner testified concerned transactions of the American Sugar Refining Company. See *Pennsylvania Sugar Refining Co. v. American Sugar Refining Co.*, 166 F. 254. The petitioner was summoned to produce records of the American Sugar Refining Company and to testify. He appeared, produced the records, and testified that he was the person to whom the subpoenas were addressed, secretary of the New York corporation, and secretary and treasurer of the New Jersey corporation of the same name. He summed up what the books produced showed as to the formation of the New York company. He identified his signature to four checks of the company in a transaction not in

question here -- the Kissel-Segal loan mentioned in *United States v. Kissel*, [218 U. S. 601](#) , [218 U. S. 608](#) . These checks were not used in the present case. He testified as to the ownership of the Havemeyer and Elder Refinery in Brooklyn. Finally, he produced a table showing how many pounds of sugar were melted each year, from 1887 to 1907, in each refinery, this table, of course, not purporting to represent the petitioner's personal knowledge, but being a summary of reports furnished by the company's different employees, and, the government contends, volunteered by him.

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The Act of February 25, 1903, c. 755, 32 Stat. 904, appropriates \$500,000 for the enforcement of the Interstate Commerce and Anti-Trust Acts,

"Provided, that no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said acts; Provided further, that no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying."

(This last proviso was added only from superfluous caution, and throws no light on the construction. *Glickstein v. United States*, [222 U. S. 139](#) , [222 U. S. 143](#) - 144.) By the amendment of June 30, 1906, c. 3920, 34 Stat. 798, immunity under the foregoing and other provisions

"shall extend only to a natural person who, in obedience to a subpoena, gives testimony under oath, or produces evidence, documentary or otherwise, under oath."

The petitioner contended that, as soon as he had testified upon a matter under the Sherman Act, he had an amnesty by the statute from liability for any and every offense that was connected with that matter in any degree, or at least every offense towards the discovery of which his testimony led up, even if it had no

actual effect in bringing the discovery about. At times, the argument seemed to suggest that any testimony, although not incriminating, if relevant to the later charge, brought the amnesty into play. In favor of the broadest construction of the immunity act, it is argued that, when it was passed, there was an imperious popular demand that the inside working of the trusts should be investigated, and that the people and Congress cared so much to secure the necessary evidence that they were willing that some guilty persons should escape, as that reward was necessary to the end. The government, on the other hand, maintains that the statute should be limited as nearly as may

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be by the boundaries of the constitutional privilege of which it takes the place.

Of course, there is a clear distinction between an amnesty and the constitutional protection of a party from being compelled in a criminal case to be a witness against himself. Amendment V. But the obvious purpose of the statute is to make evidence available and compulsory that otherwise could not be got. We see no reason for supposing that the act offered a gratuity to crime. It should be construed, so far as its words fairly allow the construction, as coterminous with what otherwise would have been the privilege of the person concerned. We believe its policy to be the same as that of the earlier Act of February 11, 1893, c. 83, 27 Stat. 443, which read: "No person shall be excused from attending and testifying," etc. "But no person shall be prosecuted," etc., as now, thus showing the correlation between constitutional right and immunity by the form. That statute was passed because an earlier one, in the language of a late case, "was not coextensive with the constitutional privilege." *American Lithographic Co. v. Werckmeister*, [221 U. S. 603](#) , [221 U. S. 611](#) . Compare Act of February 19, 1903, c. 708, 3. To illustrate, we think it plain that merely testifying to his own name, although the fact is relevant to the present indictment as well as to the previous investigation, was not enough to give the petitioner the benefit of the act. See 3 Wigmore, Evidence 2261.

There is no need to consider exactly how far the parallelism should be carried. It is to be noticed that the testimony most relied upon was the summary made from the books of the company by its servants at the petitioner's direction, and simply handed over by him; that, apart from the statute, the petitioner could not have prevented the production of the books or papers of the company, such as the summary was when made, or refused it if

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he had the custody of them, and that the decisions that established the duty to produce go upon the absence of constitutional privilege, not upon the ground of statutory immunity in such a case. *Wilson v. United States*, [221 U. S. 361](#) , [221 U. S. 377](#) *et seq.*; *Dreier v. United States*, [221 U. S. 394](#) , [221 U. S. 400](#) ; *Baltimore & Ohio R. Co. v. Interstate Commerce Commission*, [221 U. S. 612](#) , [221 U. S. 623](#) ; *Wheeler v. United States*, [226 U. S. 478](#) ; *Grant v. United States*, *ante*, p. [227 U. S. 74](#) . But this consideration does not stand alone, for the evidence given in the former proceeding did not concern the present one, and had no such tendency to incriminate the petitioner as to have afforded a ground for refusing to give it, even apart from the statute and the fact that it came from the corporation books. Taking all these considerations together, we think it plain that the petitioner could take nothing by his plea.

The evidence did not concern any matter of the present charge. Not only was the general subject of the former investigation wholly different, but the specific things testified to had no connection with the facts now in proof much closer than that all were dealings of the same sugar company. The frauds on the revenue were accomplished by a secret introduction of springs into some of the scales in such a way as to diminish the apparent weight of some sugar imported from abroad. The table of meltings by the year had no bearing on the frauds, as it was not confined to the sugar fraudulently weighed, and it does not appear how the number of pounds was made up. The mere fact that a part of the sugar embraced in the table was the sugar falsely weighed did not make the table evidence concerning the frauds. The same consideration shows that it did not tend to incriminate the witness. It neither led nor could have led to a discovery of his crime. So the

admission of his signature to certain checks, although it furnished a possible standard of the petitioner's handwriting if there had

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been any dispute about it, which there was not, in the circumstances of this case at least, had neither connection nor criminating effect. When the statute speaks of testimony concerning a matter, it means concerning it in a substantial way, just as the constitutional protection is confined to real danger, and does not extend to remote possibilities out of the ordinary course of law. *Brown v. Walker*, [161 U. S. 591](#) , [161 U. S. 599](#) . See 5 Wigmore, Evidence 2281, p. 238. Other questions would have to be dealt with before the petitioner could prevail upon his plea; but, as we consider what we have said sufficient, we shall discuss it at no greater length. There was no dispute as to the facts, and a verdict upon it for the government properly was directed by the court.

The other matters complained of would not have warranted the issue of the writ of certiorari, and may be dealt with in few words. The petitioner was denied a separate trial, and this is alleged as error. But it does not appear that the discretion confided to the trial judge was abused. *United States v. Ball*, [163 U. S. 662](#) , [163 U. S. 672](#) . Again, it is said that, if the evidence proved the petitioner guilty of a conspiracy, it proved him guilty of the substantive offense. It may be that there has been an abuse of indictment for conspiracy, as suggested by Judge Holt in *United States v. Kissel*, 173 F. 823, 828, but it hardly is made clear to us that this is an instance. At all events, the liability for conspiracy is not taken away by its success -- that is, by the accomplishment of the substantive offense at which the conspiracy aims. *Brown v. Elliott*, [225 U. S. 392](#) ; *Reg. v. Button*, 11 Q.B. 929; *Rex v. Spragg*, 2 Burr. 993, 999.

An objection is urged to the admission of certain books, called the pink books, in evidence, they being the books in which were entered weights given by one set of weighers -- the city weighers, the weighers not having been called. These weights were the higher ones, and were introduced as evidence of the discrepancy. They appear

to have been accepted by the company, were checked by the company's tallyman, who testified, and if other evidence than that of the men who made the entries was necessary, it was produced. See 2 Wigmore, Evidence 1521, 1530. Another objection to evidence concerned the admission of testimony that the same course of conduct was going on long before the date in the indictment when it is alleged that the defendants conspired. The indictment, of course, charged a conspiracy not barred by the statute of limitations, but it was permissible to prove that the course of fraud was entered on long before and kept up. [*Wood v. United States*, 16 Pet. 342, 41 U. S. 360](#) ; *Standard Oil Co. v. United States*, [221 U. S. 176](#) . The acts and directions of earlier date tended to show that the same conspiracy was on foot. The petitioner was there. The time of his becoming a party to it was uncertain. The longer it had lasted, the greater the probability that he knew of it, and that his acts that helped it were done with knowledge of their effect. We think it unnecessary to discuss the suggestion that the evidence did not warrant leaving the case to the jury, or to add further to the discussion that the case received below.

Judgment affirmed.