tural Adjustment Act, but for a conspiracy to violate the statute protecting the United States against frauds. *United States v. Kapp.*[1]

The current popularity of the plea of unconstitutionality in the federal courts has not been confined to civil suits. In criminal cases where the statute, under which defendants acted, has either been declared unconstitutional before the indictment,[2] or has not been before the United States Supreme Court at the time of the trial,[3] the plea has been overruled. The gist of the offense is said to be a conspiracy to defraud the government and any attack on the statute which gave the defendant an opportunity to perpetrate the fraud is collateral to the issue.[4] The false claims statute,[5] under which these indictments are brought, aims to protect the government against those who have the intention to defraud it, regardless of the constitutional authority of the government to participate in activity which gives the defendant his opportunity to attempt the fraud.

A different problem arises, however, if the defendants in these cases are indicted under an act which either had been declared, or is alleged to be, unconstitutional. The intent to defraud, coupled with the unsuccessful attempt to defeat the operations of an apparently valid statute, would seem to be sufficient to impose criminal liability.[6] On the other hand, the doctrine that an act must be a crime at the time of its occurrence *and* at the time of trial in order to be punishable,[7] would seem to negative liability in the cases where the statute has been declared unconstitutional prior to the trial.

Evidence—Self-Incrimination—Searches and Seizures—[Federal].—Defendants, under the authority of the Securities Act of 1933,[1] sought by subpoenas *duces tecum* to obtain copies of all telegrams sent or received by the plaintiffs and others between certain dates relating to specified transactions. Suits were brought to restrain the defendants from enforcing the subpoenas. On appeals from orders granting interlocutory injunctions, *held*, reversed. The subpoenas were not a violation of the privilege against self-incrimination,[2] nor did they constitute an unreasonable search and seizure.[3] *Newfield v. Ryan et al.* (two cases) and *Ballentine v. Florida Tex Oil Co. et al.*[4]

[1] 58 S. Ct. 182 (1937).

[2] United States v. Harding *et al.*, 81 F. (2d) 563 (App. D.C. 1936) (National Industrial Recovery Act).

[3] Ranger v. United States, 76 F. (2d) 817, 824 (C.C.A. 8th 1935)(Reconstruction Finance Corp. Act); Madden v. United States, 80 F. (2d) 672, 674 (C.C.A. 8th 1935) (Public Works Administration); United States v. Soeder *et al.*, 10 F. Supp. 944 (Mo. 1935) (Agricultural Adjustment Act); United States v. MacDonald *et al.*, 10 F. Supp. 948 (Mo. 1935) (Agricultural Adjustment Act).

[4] Ranger v. United States, 76 F. (2d) 817 (C.C.A. 8th 1935).

[5] 40 Stat. 1015 (1918), 18 U.S.C.A. § 80 (1927).

[6] See People v. Moran, 123 N.Y. 254, 25 N.E. 412 (1890).

[7] Commonwealth v. Marshall, 28 Mass. 350 (1831).

[1] 48 Stat. 74 *et seq.* (1933), 15 U.S.C.A. § 77a *et seq.* (1937).

[2] U.S. Const. 5th Amend., ". . . . nor shall (any person) be compelled in any criminal case to be a witness against himself. . . . ."

[3] U.S. Const. 4th. Amend., "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . . ."

[4] 91 F. (2d) 700 (C.C.A. 5th 1937), *cert. denied*, 58 S. Ct. 54 (1937), petition for rehearing denied, 58 S. Ct. 137 (1937).

Making available copies of telegrams to the Securities Exchange Commission will aid in the effective administration of the Securities Exchange Act. Neither the history of, nor the present justifications for the privilege against self-incrimination should dictate a contrary result. The historical basis of the privilege—a desire to limit the jurisdictional encroachment of the English ecclesiastical courts and to eliminate the inquisitional oath of the Star Chamber[5]—cannot be its justification today.[6] Two *ex post facto* rationalizations are recited in defense of the privilege, "fairness,"[7] and the notion that "any system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby."[8] To the first objection Bentham's classical Old Woman's[9] and Fox Hunter's[10] reasons are eloquent answers. As for the second, it is understandable only in the sense that the absence of the privilege might give the prosecution a power complex at the expense of the accused's legal rights.[11] Notwithstanding the existence in the United States of the privilege, there exist a legion of instances of brutal police methods.[12] Its prevalance is in part due to the existence of the privilege, since it immunizes from legal process other wise available evidence, and hence puts a premium on extra-legal methods of getting the same evidence.[13]

Not only are the arguments advanced in favor of the privilege unconvincing, but there are affirmative reasons for removing it. It deters the investigation and ultimate punishment of anti-social behavior, since the only incriminating evidence may be un-

[5] 4 Wigmore, Evidence § 2250 (2d ed. 1923); 13 Encyc. Soc. Sci. 651 (1937); Wigmore, *Nemo Tenetur Seipsum Prodere*, 5 Harv. L. Rev. 71 (1891).

[6] See Limburg, The Privilege of the Accused to Refuse to Testify, 52 Annals of Am. Acad. of Pol. & Soc. Sci. 124, 129 (1914).

[7] Boyd v. U.S., 116 U.S. 616, 631 (1886).

[8] 4 Wigmore, *op. cit. supra* note 5, at § 2251.

[9] "The essence of this reason is contained in the word 'hard'; 'tis 'hard' upon a man to be obliged to criminate himself. Hard it is upon a man, it must be confessed, to be obliged to do anything that he does not like. That he should not much like to do what is meant by his criminating himself, is natural enough; for what it leads to is his being punished. What is no less hard upon him is that he should be punished: but did it ever yet occur to a man to propose a general abolition of all punishment with this hardship for a reason for it." 5 Bentham, Rationale of Judicial Evidence 230 (1827).

[10] "This consists in introducing upon the carpet of legal procedure the idea of *fairness*, in the sense in which the word is used by sportsmen. The fox is to have a fair chance for his life: he must have (so close is the analogy) what is called *law:* leave to run a certain length of way, for the express purpose of giving him a chance for escape. While under pursuit, he must not be shot: it would be as *unfair* as convicting him of burglary on a hen-roost, in five minute's time in a court of conscience. . . . ." *Id.*, at 238; but see 4 Wigmore, *op. cit. supra* note 3, at 822.

[11] 4 Wigmore, *op. cit. supra* note 5, at 826, citing Stephen, History of the Criminal Law I, 342, 441, 535, 542, 565 (1883).

[12] National Commission on Law Observance and Enforcement, Report on Lawlessness in Law Enforcement (1931); Villard, Official Lawlessness, The Third Degree and the Crime Wave, 155 Harper's Magazine 605 (1927); Murphy, The Third Degree: Another Side of our Crime Problems (1929). For an exhaustive citation of appellate cases evidencing third degree methods during the nineteen twenties, 43 Harv. L. Rev. 617 (1930).

[13] Waite, Criminal Law in Action 143, 144 (1934); Stevens, Archaic Constitutional Provisions Protecting the Accused, 5 Jour. Cr. L. and Cr. 18, 19 (1914).

available as a result of the assertion of the privilege.[14] The vogue of immunity statutes,[15] granting suspected individuals freedom from prosecution if they give evidence which otherwise would be incriminating, but would aid in the prosecution of others, is legislative recognition that the privilege may be a bar to the proper prosecution of those suspected of crime.

Historically the privilege protected a witness from "testimonial compulsion."[16] This has been interpreted to include documents owned by the accused and taken from his possession,[17] since he is at any time subject to authenticate the documents as a witness.[18] Such an extension of the privilege ignores the fact that other persons are qualified to authenticate the documents, in the event that the person from whose possession the documents were taken claims his privilege.[19] Since under statutes such as the Securities Exchange Act most proof must be made by the use of documentary evidence, such a broadening of the privilege, as a practical matter, would partially nullify the Act.[20] But there is usually no privilege when documents are taken from the possession of a third person.[21] The claim of privilege in the instant case was probably based on the notion of property[22] interest by the plaintiffs in the telegrams and a confidential relationship between the plaintiffs and the telegraph companies. It is difficult to see why a combination of the concepts "property" and "confidential relationship" should result in an extension of the privilege.

It has been suggested, contrary to the cases, that it is never correct, historically at least, to speak of a subpoena *duces tecum* as an unreasonable search and seizure and therefore violative of the Fourth Amendment.[23] But it is now well settled that a subpoena general in its scope is a violation of that constitutional guarantee.[24] Since the subpoenas in the instant case were confined to telegrams sent between definite dates, dealing with specific subject matter, and sent or received by certain individuals, and

[14] Taft, The Administration of Criminal Law, 15 Yale L. J. 1 (1905); Limburg, *op. cit. supra* note 6, 124 *et seq.*

[15] For an exhaustive citation of such statutes see 4 Wigmore, *op. cit. supra* note 5, § 2281, n. 10.

[16] 4 Wigmore, *op. cit. supra* note 5, § 2263.

[17] Boyd v. U.S., 116 U.S. 616 (1885); Hale v. Henkel, 201 U.S. 43 (1906); Internal Revenue Agent v. Sullivan, 287 Fed. 138 (D.C. N.Y. 1923).

[18] 4 Wigmore, *op. cit. supra* note 5, § 2264.

[19] Chamberlayne, Trial Evidence § 1027 (2d ed. 1926).

[20] However, corporations may not claim the privilege, 4 Wigmore, *op. cit. supra* note 5, § 2259(a).

[21] 4 Wigmore, *op. cit. supra* note 5, § 2259; Wilson v. U.S., 221 U.S. 361, 376 (1910); McMann v. Engel, 16 F. Supp. 446 (1936).

[22] See Hitchcock, The Inviolability of Telegrams, 5 So. L. Rev. 32 (1879). *Cf.* property rights equity recognizes in letters, Boker v. Tibbie, 210 Mass. 599, 97 N.E. 109 (1912).

[23] Handler, Constitutionality of Investigations by the Federal Trade Commission: II, 28 Col. L. Rev. 905, 909 *et seq.* (1928).

[24] Hale v. Henkel, 201 U.S. 43 (1901); Federal Trade Commission v. American Tobacco Co., 264 U.S. 298 (1924); Interstate Commerce Commission v. Brimson, 154 U.S. 447 (1894); see also McMann v. Securities and Exchange Commission, 87 F. (2d) 377 (C.C.A. 2d 1937); see also note 25 *infra.*

were to be used in connection with a particular investigation, they would seem not to be a "fishing expedition," but a reasonable demand and therefore within the Fourth Amendment.[25]

Evidence—Wrongful Death—Admissibility of Plaintiff's Evidence on Deceased's Careful Habits—[Illinois].—In an action for the death of the plaintiff's intestate, struck by the defendant's automobile, the plaintiff called the defendant who testified fully on the accident. There were no other eyewitnesses. Later the plaintiff introduced evidence on the careful habits of his intestate to prove freedom from contributory negligence. On appeal from a judgment for the plaintiff, *held*, reversed. The habit evidence should have been excluded as the defendant, called by the plaintiff, was an eyewitness. *Scally v. Flannery*.[1]

The instant decision might well have been expected, for logical conclusions to be drawn from the Illinois cases practically preclude the effective use of habit evidence to show freedom from contributory negligence in any case in which the defendant has seen the accident. In the recent case of *Nordman v. Carlson*,[2] where the plaintiff had declined to call the defendant as an eyewitness, evidence of the careful habits of the deceased was admitted. The decision was based on the ground that such evidence is rendered inadmissible only by the availability of a competent eyewitness and that the defendant was rendered incompetent by the Illinois "dead man" statute.[3] There is Illinois authority, however, to the effect that if the plaintiff or another person interested in the estate testifies to the careful habits of the deceased on the issue of freedom from contributory negligence, such testimony is evidence of a "transaction"[4] between the defendant and the deceased and removes the defendant's incompetency.[5] If this authority were followed the defendant could testify, and then logically the habit evidence originally admitted would have to be stricken.[6] Upon this analysis, the defendant's testimony, since rendered admissible only by that of the plaintiff, should also be stricken. This peculiar result might best be avoided by deeming the defendant's objection to the plaintiff's habit evidence waived by the introduction of direct evidence based on its admission.

The general rule that habit evidence is inadmissible if testimony of credible eyewitnesses[7] is available[8] seems perfectly sound. The probative value of a general habit

[25] *Cf.* Hearst v. Black, 87 F. (2d) 68 (App. D.C. 1936), noted 35 Mich. L. Rev. 1383 (1937); see also Federal Trade Commission v. American Tobacco Co., 264 U.S. 298, 306 (1924); 36 Col. L. Rev. 84 (1936).

[1] 292 Ill. App. 349, 11 N.E. (2d) 123 (1937).

[2] 291 Ill. App. 438, 10 N.E. (2d) 53 (1937).

[3] Ill. Rev. Stat. 1937, c. 51, § 2.

[4] An accident is a "transaction" within the meaning of the statute. Van Meter v. Goldf arb, 217 Ill. 620, 148 N.E. 391 (1925).

[5] Rouse v. Tomasek, 279 Ill. App. 557 (1935).

[6] Moore v. Bloomington D. & C. R. Co., 295 Ill. 63, 128 N.E. 721 (1920); Soucie v. Payne, 299 Ill. 552, 132 N.E. 779 (1921).

[7] The problem of whether a person is an eyewitness has raised some difficulty: One who saw the deceased shortly before or after the accident has been held to be an eyewitness. Cox v. Chicago & N.W.R.Co., 9 Ill. App. 15 (1900); Anderson v. Metropolitan W.S.E. Co.,