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Constitutional Law—Compulsion to Testify After Immunity Has Geen Granted

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from raising it on appeal. Had the defendant so alerted the trial court, the trial judge, under Section 450 of the Code of Criminal Procedure,[40] could have removed any doubt by polling the jury. The Court expressed some doubt whether Section 433 even applied to Courts of Special Sessions—but assuming that it did, the defendant was not allowed to raise the objection for the first time on appeal. There is long standing support that a poll of the jury is not a matter of absolute right.[41] The right to poll the jury may be waived either expressly, or by acts or failure to act. Section 450 of the Code of Criminal Procedure provides that, upon the rendition of the verdict, the jury may be polled at the instance of either party, but the application of the statute has come to require that, in order for there to be a valid poll the request must be timely or the defendant will be assumed to have waived the right.[42] Reliance by the defendant on the Fifth and Fourteenth Amendments to The United States Constitution would not change the result because the Fifth Amendment operates exclusively on federal courts and any right to poll a jury is not an element of due process which could be said to be guaranteed by the Fourteenth Amendment. The failure of a trial court to poll the jury is not a denial of any fundamental, constitutional right owed to a defendant; and the right to poll may be waived by a failure to request it before the recording of the verdict.[43]

Proceedings in Courts of General Sessions outside the metropolitan area of New York City are governed by Part 5 of the Code of Criminal Procedure, Sections 699-740C inclusive and Section 714 which states in substance that when a jury have reached a verdict, they must deliver it publicly to the court which must enter it in its minutes. These sections make no provision requiring that the names of jurors be called.[44] The decisions of the Court of Appeals point out the necessity of the defendant to make his objection in the lower court upon the jury's return or else he will preclude himself from raising this issue upon appeal.

Compulsion to Testify After Immunity Has Been Granted

The New York Constitution provides that "no person . . . shall be compelled in any criminal case to be a witness against himself."[45] Because of this constitutional privilege, a prospective defendant, or one who was a potential target of an investigation, could not be constitutionally subpoenaed and sworn before a grand jury, and if he was subpoenaed he could not be held in contempt

40. Code of Crim. Proc. § 450:
When a verdict is rendered and before it is recorded the jury may be polled, on the requirement of either party; in which case they must be severally asked whether it is their verdict. . . .
41. Reed v. Cook, — Misc. —, 103 N.Y.S.2d 539 (Sup. Ct. 1951).
42. People v. Schneider, 154 App. Div. 203, 139 N.Y. Supp. 104 (2nd Dep't 1912).
43. Warner v. New York Central Railroad, 52 N.Y. 437, 11 Am. R. 724 (1873).
44. People v. Albro, 8 Misc. 2d 670, 172 N.Y.S.2d 175 (County Ct. 1957).
45. N.Y. Const. Art. 1, § 6.

for claiming his constitutional privilege and refusing to testify. If he did testify, and an indictment based on his testimony resulted, the indictment had to be dismissed because he had been forced to bear witness against himself. This was true even though he failed to claim his constitutional privilege. But a witness in a proceeding directed against others, might be constitutionally subpoenaed, and if he gave any incriminating testimony without claiming his privilege, the testimony could later form the basis for an indictment.[46]

However with the passage of immunity statutes, the law changed so that a prospective defendant could be constitutionally subpoenaed and forced to testify under pain of criminal contempt. As before, a potential defendant obtained automatic immunity from indictment based on any incriminating testimony he might give, even though he did not claim his constitutional privilege. Some courts held that a mere witness also obtained automatic immunity, and that if he refused to testify he might be held in contempt.[47]

In 1953, Section 2447 of the penal law was passed which proposed to change the procedure by requiring a person to claim his privilege, be directed to answer, and then testify in order to obtain immunity. The import of this section is to eliminate automatic immunity by requiring the witness to first claim his constitutional privilege in order to obtain immunity. In *People v. De Feo*[48] the Court of Appeals implied that Section 2447 could not constitutionally be applied to prospective defendants and this implication was transformed into a holding in *People v. Steuding*,[49] where the Court said that the right against self-incrimination is automatically conferred by the Constitution and cannot be curtailed by statute.. Implicit in the *Steuding* case is the decision that if a witness fails to claim his privilege, he is deemed to have waived it. However, a prospective defendant may never be held to have waived his privilege by failing to invoke it. Thus the law of the State as to prospective defendants is the same as it was before the enactment of Section 2447 of the Penal Law.

The decision in *In re Second Additional Grand Jury (Cioffi)*,[50] that a witness who has been granted immunity may not refuse to testify, and if he does so refuse, he is guilty of criminal contempt, renders the law the same on this point as it was before the enactment of Section 2447. In this case the Grand Jury, investigating alleged unlawful solicitation of legal business, informed the defendants that they were being called as witnesses only and were not prospective targets of the investigation. The defendants claimed their constitutional privilege, were granted immunity according to Section 2447, continued

46. People v. Ferola, 215 N.Y. 285, 109 N.E. 500 (1915); People v. Gillette, 126 App. Div. 665, 111 N.Y. Supp. 133 (1st Dep't 1908); People v. Bermel, 71 Misc. 356, 128 N.Y. Supp. 524 (Sup. Ct. 1911).

47. People v. Breslin, 306 N.Y. 294, 118 N.E.2d 108 (1954); Coyle v. Truesdell, 259 App. Div. 282, 18 N.Y.S.2d 947 (2d Dep't 1940).

48. 308 N.Y. 595, 127 N.E.2d 592 (1955).

49. 6 N.Y.2d 214, 189 N.Y.S.2d 166 (1959).

50. 8 N.Y.2d 220, 203 N.Y.S.2d 841 (1960).

to claim their privilege and were adjudged guilty of criminal contempt. The Court of Appeals held that the defendants were guilty of criminal contempt and that had they answered the questions of the Grand Jury they would have obtained total immunity against any prosecution as to matters disclosed by the testimony, except for perjury or contempt.

The *Cioffi* decision is based on the assumption that the defendants were summoned as witnesses only, but even if the defendants could be considered potential targets of the investigation, the decision in the instant case would probably have been the same. The *Steuding*[51] case holds that a potential defendant does not have to claim his privilege in order to get immunity from indictment based on incriminating testimony he might give; but the case does not refer to contempt proceedings for failure to testify when he has obtained immunity. Since the defendant is accorded automatic immunity, there is no reason for him to refuse to testify since he would not be bearing witness against himself, and a contempt proceeding for refusal to testify is proper.

It has been consistently said that the immunity granted must be as broad as the privilege of silence which is destroyed.[52] In *People v. De Feo*[53] the Court of Appeals decided that the immunity conferred under Section 2447 was not co-extensive with the constitutional protection against self-incrimination because the grand jury limited the immunity to specific crimes, and as a result the conviction of criminal contempt could not stand. However, when, as in *In re Cioffi*,[54] Section 2447 is properly used it grants complete immunity, and is sufficiently broad to protect against prosecution of all violations of the laws of New York State.

ATTORNEY'S REFUSAL TO TESTIFY AT INQUIRY INTO UNETHICAL PRACTICES GROUND FOR DISBARMENT

After ordering a "Judicial Inquiry and Investigation" into the unethical practices of certain attorneys,[55] the Appellate Division disbarred the appellant when he failed to answer relevant questions at the inquiry.[56] The appellant maintained that the disbarment order violated his privilege against self-incrimination under Article 1 Section 6 of the New York Constitution. The issue presented to the Court of Appeals in the case of *In re Cohen*[57] was whether the constitutional privilege against self-incrimination, which protects one against criminal prosecution, also protects one from disciplinary action as a member of the bar for failing to answer questions at a judicial inquiry. The Court of Appeals[58] affirmed the disbarment of the Appellate Division.

51. Supra note 49.
52. Matter of Doyle, 257 N.Y. 244, 177 N.E. 489 (1931).
53. Supra note 48.
54. Supra note 50.
55. N.Y. Judiciary Law § 90.
56. 9 A.D.2d 436, 195 N.Y.S.2d 990 (2d Dep't 1959).
57. 7 N.Y.2d 488, 199 N.Y.S.2d 658 (1960).
58. Ibid.